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**COMMERCIAL LEASE NEWSLETTER**

**“SHORT LEASING”**  
**MITIGATION OF LOSS RENTALS DURING INCREASE IN**  
**VACANCIES - SUBLEASING AT A DISCOUNT (PART II)**

There are currently significant issues facing commercial property owners and managers as a result of dropping commercial property values and increasing vacancy rates. Due to our troubled economic times Commercial Tenants are faced with the choice of minimizing their business operations at one or multiple lease locations.

The Landlord in a lease default situation also has (at least arguably) a duty to attempt to minimize damages, if it can, by re-letting the premises. The Landlord does not have to use extraordinary efforts to re-let the premises especially in the event the Landlord has other available units for lease in addition to the space that would be in default and Landlord employs its normal procedures to relet the vacated premises as used for other space in the overall property. Any prospective rentals subsequently received by the Landlord would need to be offset against the judgment obtained by the Landlord. The below are the identified steps which need to be addressed in a “Short Leasing” approach:

1. **Summary of Options as to the Tenant’s right to sublet or assign lease and opportunity to minimize and mitigate damages (“Short Leasing”)**: The Tenant has more options than simply to defend a lawsuit for lease damages. In fact, the Tenant can take a number of proactive steps to minimize and mitigate damages under a scenario when the Tenant has to vacate the premises and the Tenant nonetheless still has ongoing obligation for rent. In the above captioned scenario, there are a number of Tenant options, some far superior choices than others:
  - a. **Exposure to Judgment**: Face a prospective judgment in this example of in excess of \$300,000.00 and hope that the Landlord might rent the Tenant’s premises to reduce damages. A passive and poor plan of action;
  - b. **Retain Commercial Leasing Agent**: Alternatively the Tenant can take a proactive step as follows. The Tenant can immediately retain a commercial leasing agent to offer the premises for lease assignment or sublease;

- c. **Prospective Tenant Inducement under Short Leasing Scenario:** The Tenant can authorize the commercial leasing agent to provide the prospective Tenants (“New Tenant”) an inducement whereby the original Tenant offers to pay a percentage of the ongoing rent on a monthly basis to entice a New Tenant to promptly take over the existing lease. By way of example and assuming the above captioned scenario, existing Tenant could offer to pay 40% of the overall lease payments for the New Tenant or subsidize the monthly payments by paying the amount of \$3,750.00 per month (this number of course is negotiable and is subject to discussions between Tenant, New Tenant, Commercial Leasing Agent and Landlord to arrive at a mutually acceptable figure). New Tenant could immediately take occupancy and pay the remaining 60% in the sum of \$5,625.00 thereby reducing the Tenants exposure by not only 60% of the current rentals due at the premises, but also eliminating the Tenant’s exposure to accelerated rentals, court costs, attorney fees, late charges as well as Tenant improvement lease up fees. Assuming the original Tenant was able to hire a commercial leasing agent for the payment of 5%, the original Tenant could save approximately 55% of the lease payments and the existing Tenant would have also avoided attorney fees, court costs as well as lease up fees. Using our example and assuming New Tenant would be promptly located, this could result in a saving of upwards of \$180,000.00 of damage exposure, a substantial significant amount.
- d.  **(“Short Payoff”) Lease Buyout:** Another alternative is for the Tenant to employ a “Short Payoff” approach. In this scenario the existing Tenant approaches the Landlord and agrees to pay the Landlord a buy out of the lease and a structured payment providing the Landlord with a cash payment, promissory note, or a promissory note with some sort of collateral (again these are negotiable items to be addressed by the Tenant). Any of these efforts are superior to taking no action and having the original Tenant exposed to substantial and significant damages resulting from vacating the premises and allowing for monthly lease payments and damages to accrue.

By taking a proactive approach, identifying the issues and taking a short leasing approach, a Tenant could minimize and mitigate its damages. In fact, utilizing the short leasing approach, it actually has a Win, Win, Win benefit since:

- a. The Tenant reduces its potential lease exposure;
- b. The Landlord avoids losses and a lawsuit costs and expenses in hopes of recapturing damages from the vacated premises;
- c. The New Tenant acquired commercial lease premises at a significant subsidized lower lease payment and;
- d. Our court system is relieved of further burden of commercial leasing litigation with results in a benefit to Landlord, Tenant, our judicial system as well as our economy.