

**MODEL AGREEMENT FOR
LETTER OF CREDIT IN PLACE OF SECURITY DEPOSIT
(LENDER-CONTROLLED)¹**

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Description. A commercial tenant (the “Tenant”) sometimes delivers a letter of credit (an “L/C”) to its landlord (the “Landlord”) instead of delivering a security deposit, especially a large security deposit. During the dotcom bubble (and landlords’ leasing market) of 1999 and early 2000, a Tenant would often give a Landlord an L/C for a year’s rent or more. The technique is, however, not limited to high-tech tenants or landlords’ markets.

Whenever Tenant delivers a substantial L/C, Landlord’s mortgage lender (the “Lender”) will often want to control that L/C, because otherwise Lender will probably: (a) not want to be responsible for Tenant’s security deposit after foreclosure (a major Tenant concern when negotiating an SNDA); (b) regard the lease as being too risky; (c) more heavily discount Tenant’s rent for underwriting purposes; (d) not be able to get the benefit of the L/C; and (e) fear that any funds drawn under the L/C may end up in the wrong pockets.

The fifth concern just listed is particularly compelling when Lender requires a “hard lockbox” to collect rent. The logic of any “hard lockbox” dictates that Lender control the L/C. Otherwise, the “hard lockbox” has a gaping hole in it. Even without a “hard lockbox,” i.e., even if Lender will otherwise allow Landlord to collect the monthly rents, Lender may nevertheless want to control the L/C just because the amount at risk (the amount of potentially diverted funds) as a result of any misuse of the L/C is so much greater than a month or two of rent.

This Model Document (the “Letter Agreement”) establishes a structure so that when Landlord and Tenant have agreed to use an L/C instead of a security deposit, Lender can hold

¹ Experience suggests the need, unfortunately, to remind the user that this model document, outline, or checklist comes with no guarantee or warranty; may contain errors or omissions; does not define a minimum standard of practice; has not been approved by, and is not the official position of, any organization; does not estop any person in any negotiation or transaction or otherwise; should be used only where correct in context; does not replace thought, analysis, and use of a range of appropriate precedents; has not been tailored for use in any particular state (except perhaps New York); and is just a model document, outline, or checklist – nothing more. The author disclaims responsibility for any use or misuse of this model document, outline, or checklist. Consent is granted for any attorney to use and adapt for specific transactions, subject to the preceding qualifications.

and control the L/C. As an alternative, Landlord could “pledge” the L/C and its proceeds to Lender. Such a pledge may, however, raise concerns regarding perfection and practical control of the L/C and its proceeds. As another alternative, Lender could hold the L/C and obtain a power of attorney to draw upon it. Unless Issuer is willing to confirm that it will honor such a drawing, though, a power of attorney structure still leaves some residual uncertainty about whether Lender would actually be able to draw the L/C. Lender may therefore want a more direct role regarding the L/C, as contemplated here.

The approach to L/C’s implemented in this document tracks suggestions in a recent article in the *California Real Property Journal*. The author of that article discusses Lender’s risks and a variety of mechanisms to mitigate them, but identifies the arrangement suggested here as a desirable mechanism, if practical under the circumstances.²

This Letter Agreement was prepared primarily from Lender’s perspective. It also reflects extensive careful negotiations by landlords and tenants in a number of transactions. As a result, this Letter Agreement is intended to and should be “comment-proof,” except as described in these cover notes. To the extent that a Landlord or Tenant comments on this Letter Agreement, those comments would in most cases either: (a) reflect changes in the business deal; (b) represent an effort to weaken Landlord’s and Lender’s position or strengthen Tenant’s position in a substantive way, inconsistent with the concept that the L/C should be the functional equivalent of a cash security deposit; (c) imply that the Lease does not adequately cover the routine two-party mechanics of the L/C; or (d) merely prove that someone can always find some way to comment on anything.

Brackets indicate options, blanks, and points to consider.

Substantive Comments. Please note these substantive issues when using this Letter Agreement.

- ***Two-Party L/C Agreement.*** This Letter Agreement assumes that the Lease itself already adequately addresses the issues that arise between Landlord and Tenant relating to the L/C.³ This Letter Agreement focuses purely on new issues that arise when Lender enters the picture. Therefore this Letter Agreement is not an appropriate starting point for Lease provisions regarding an L/C. Other precedents should be used instead, and are available from the author. (Where an L/C is delivered for a two-party relationship of this type, the underlying “deal documents” often address the L/C minimally or not at all, which is not necessarily right either.)

² See Janet C. Norris, “Letters of Credit Posted by Dot-com Tenants -- How Lenders Can Avoid Becoming a Victim of Tulipmania,” 18 *California Real Property Journal*, No. 2, Spring 2000, Page 3.

³ Lender’s counsel will, of course, want to confirm that proposition as part of its due diligence review of the Lease.

- *Lender's Obligations.* By holding the L/C, Lender assumes the obligations to draw or return the L/C when appropriate. Lender must be willing to bear those obligations -- fundamentally the obligations not to lose the L/C and to draw with reasonable diligence and dispatch when necessary -- and whatever exposure and risk they may entail. Lender should probably not wade in these waters unless it knows where the underwater monsters lie in wait. And there are plenty of underwater monsters here. Although Lender may want to be released and indemnified regarding any liability arising from losing or failing to draw the L/C when required to do so, this model does not give Lender any such protection. It may be inappropriate. If Lender agrees to hold the L/C, it should agree to handle the L/C correctly, just as it would if it insisted on holding a cash deposit or Tenant's first-born. If Lender is unwilling to take responsibility for the L/C but also unwilling to allow Landlord to hold it, then the solution may be to find a third party (a servicer?) willing to assume responsibility for the L/C. Failing that, the parties may need to establish some other security arrangements (although if Lender wants to control that other security, similar issues will arise there as well).
- *Tenant's Remedy.* Although this Letter Agreement allows Tenant to offset rent if the L/C is not returned when it should be, that remedy will not help at or near the end of the lease term, when little or no rent remains for offsetting. Realistically, Tenant may stop paying rent a few months before the end of the term -- just as Tenant might when Tenant has posted a large security deposit -- or the L/C may have "burnt down" to a lower level at that point. Still, Tenant should consider this risk and perhaps negotiate a faster burn-down in the last year of the term.
- *L/C Fees.* This Letter Agreement requires Tenant to pay all L/C reissuance and transfer fees whenever Lender or Landlord transfers the L/C, under the theories that: (a) such fees would never have arisen with a cash security deposit; and (b) Borrower and Lender should not be worse off with an L/C. At some point (e.g., after the 17th transfer in four months) these fees should perhaps become Landlord's or Lender's responsibility.
- *Business Terms of L/C.* This Letter Agreement tries to prevent any Lender involvement in the underlying issues regarding reduction of the L/C, terms for drawing the L/C, and the like. All these mechanics belong in the Lease rather than this Letter Agreement. But Lender and Lender's counsel will want to review and understand these terms as part of due diligence.
- *Landlord Bankruptcy.* If Landlord files bankruptcy, the automatic stay may limit Lender's ability to draw the L/C, particularly if Lender will keep the proceeds. It should be possible to negotiate an appropriate arrangement at the time. As a superior but unrealistic alternative, the expiry date of the L/C could automatically extend until 30 days after the bankruptcy court lifts the automatic stay.
- *Lender Credit Issues.* Tenant may want to require that any assignee of Lender's position meet some credit standards, or at least be an institutional lender as broadly defined. But would any Landlord agree to such a limitation for a future

owner of the property? Why should Landlord agree to a similar limitation for a Lender? If Landlord and Lender successfully reject the concept, then Tenant bears the risk that an uncreditworthy party might control the L/C.

- *Loan Bifurcation.* If the Loan may be bifurcated under particular circumstances, establish a similar mechanism for Lender to bifurcate the L/C and this Letter Agreement, including the allocation of any transaction costs.
- *Interest.* This Letter Agreement says Tenant can never recover interest on sums wrongfully drawn under the L/C, or any other sums on account of any damage that Tenant (or its credit enhancer) might suffer because of a wrongful draw. Tenant might reasonably insist on recovering interest (and, less reasonably, other costs and expenses) if Lender wrongfully draws and then fails to hand over the proceeds promptly. Lender will probably reject the concept, which is why it's not in the model. If Lender is willing to agree to pay interest or any other amounts under these circumstances, should Lender be allowed to offset any L/C fees that Tenant avoided paying while the L/C was not in effect? If Lender makes a wrongful draw, Tenant might also ask that Tenant have the right to require Lender to confirm in writing that such draw was wrongful, if Tenant believes such a confirmation would help Tenant explain the situation to the L/C issuer (the "Issuer"). Such writings are, however, more common in elementary school ("notes from home") than in business transactions.
- *Interaction with SNDA.* In this Letter Agreement, Lender acknowledges that, for purposes of an SNDA, Lender has received Tenant's security deposit. If the parties want to call the L/C something other than a security deposit, this language should be edited, as must the related language in the SNDA.
- *Complexity.* This Letter Agreement and its cover notes are rather long and complicated, covering a wide range of circumstances and issues. In the author's humble opinion, this Letter Agreement and its cover notes address everything they need to, and address it correctly. But is this structure just too complicated? Does it create too much of a risk of problems, of something falling between the cracks, of some unexpected risk that no one considered, of moving pieces that don't quite mesh correctly under some weird, unpredictable, but also perhaps inevitable confluence of circumstances? Attorneys, including the author, certainly can and do say they have thought of everything, but isn't that overly optimistic hubris? (Of course, attorneys make this claim every day of the week, usually with documents much longer and more complex than this one.) Maybe Lender should reject this entire arrangement on grounds of pure complexity. On the other hand, sometimes such an arrangement will be the only way to get the deal done,⁴ or may be what the marketplace expects at the time.

⁴ "Getting the deal done" may be great at the moment of closing. But then the parties must live with their deal, potentially for a very long time. If some complex imperfection in the

- *Personal Guaranty Option.* As an alternative, Lender might simply require that a “deep pocket” personally guarantee that Landlord will draw the L/C when necessary and properly apply any proceeds of such a draw. (“All roads lead to recourse.”) Such a structure may, however, introduce credit issues of a type that nonrecourse mortgage lenders and the rating agencies don’t like.

Tenant Bankruptcy Issues. If Tenant files bankruptcy, consider the impact of statutory limitations on the amount of Landlord’s claim against Tenant’s bankruptcy estate if Tenant rejects the Lease. If a cash security deposit is \$4X, but bankruptcy law says Landlord’s claim after Lease rejection can never exceed \$2X (the “Claim Cap”), what happens? If the security deposit were cash, then Tenant’s bankruptcy estate could force Landlord to disgorge the excess security deposit above the Claim Cap. Can Tenant’s bankruptcy estate require the same result if Tenant delivers an L/C instead of a security deposit? What if Landlord never converts the L/C into cash? If Landlord does convert the L/C into cash, does the cash then become a security deposit subject to the Claim Cap? Could Tenant’s estate recover the excess proceeds (or undrawn face amount of the L/C) beyond the Claim Cap?⁵

These issues go beyond L/C’s and this Letter Agreement. They affect the more general structuring of any Lease with a large security deposit. They actually affect the Lease more than they do this Letter Agreement, although this Letter Agreement can be written in a way that is sensitive to these issues. As long as the L/C amount is less than the Claim Cap -- for example, whenever the L/C is less than one year’s rent -- the problem does not arise at all.

The following are some possible techniques to respond to these issues arising from the Claim Cap. None of these techniques is guaranteed to solve the Claim Cap problem. This Letter Agreement reflects only a few of them. When appropriate, Lender’s or Landlord’s counsel may want to invest some additional time and effort in dealing with this problem.

- *No Cash Security.* Landlord could plan to draw the L/C only to the extent necessary to cure defaults, never converting it into a cash deposit to back the lease. This approach requires no verbiage other than language that clearly allows partial draws on the L/C. Landlord would then plan to try to persuade the

deal comes back to bite the parties, they will forget about how glad they were to “get the deal done” and instead simply blame their lawyers for the imperfection. This risk is particularly troublesome in leases. They often have a very long life. During that long life, many circumstances can change and one party or the other will almost certainly become dissatisfied with the economics of the transaction or for other reasons want to find a way to damage the other party. As a result, lawyers need to look beyond “getting the deal done” and think about all the (bad) ways the transaction might play out. In the euphoria and urgency of the closing, lawyers need to be the gloomy, slow, and careful voices of the future.

⁵ See 11 U.S.C. § 502(b)(6); see also Anthony N. Natsis, Joseph M. Davidson, and Michael S. Greger, “Structuring Deals with High-Tech Tenants--’The Good, The Bad and The Ugly,’” 18 California Real Property Journal, No. 3, page 4 (Summer 2000) (further discussion of these structuring issues).

bankruptcy court that the undrawn L/C is something very different from a security deposit and should not be subject to disgorgement.

- *Immediate Use of L/C Proceeds.* If any default occurred under the Lease, Landlord would have the right to draw the entire L/C, using the proceeds first to cure Tenant's default and then only to prepay rent at the back end of the Lease and for no other purpose. Tenant would have no interest in such proceeds. (But wouldn't Tenant insist on having the right to require Landlord to return the undrawn L/C or prepaid rent under some circumstances, such as a landlord default or a casualty or condemnation? Would Tenant then have a sufficient interest in the L/C for the bankruptcy court to say it's just like a cash security deposit?) After such prepayment of rent, Landlord and Lender might go a step further and require Tenant to restore the L/C to restore the security as originally intended, but this may be excessive.
- *No Interest in L/C Proceeds.* The lease could include language in which Tenant purportedly disclaims any interest in the L/C proceeds.
- *Prohibit Cash Security.* The lease could affirmatively forbid Tenant from converting an L/C into a cash security deposit, making any such conversion an Event of Default in and of itself. This would be premised on the logic (very likely correct) that because of the Claim Cap, Landlord is better off with an L/C than a cash security deposit.
- *Tenant Improvements Loan.* The parties might reduce the security deposit (or L/C security arrangements) and add to the transaction an independent tenant improvements loan from Landlord to Tenant, backed by a leasehold mortgage and/or an L/C, collaterally assigned to Lender.⁶
- *Unsecured Loan.* The L/C might simply back a separate unsecured payment stream from Tenant to Landlord (and assigned to Lender) -- a promissory note requiring certain payments fully secured by the L/C -- having no relation at all to the Lease. The parties would expressly agree that the payment stream is

⁶ Any such structure creates enough new issues to fill a rabbit's hole. Does such a loan create usury problems? Can this loan and the Lease safely be cross-defaulted? If so, will a bankruptcy court pay any attention to the cross-default? Does such a loan create regulatory or reporting issues for publicly traded REIT's? Under income tax regulations, what interest rate must Landlord charge? Does such a loan work, more generally, as a tax and accounting matter? Should Landlord use a separate entity as lender, with completely separate documentation? Will a court look beyond the "loan" and treat the entire relationship as a "lease"? How does Lender perfect its position? What if the Lease terminates other than because of a Tenant default (e.g., as the result of casualty or condemnation, the two hypothetical events that in the aggregate cost parties to real estate transactions several times as much in legal fees as they would lose overall if they ignored these issues completely)? These questions probably just scratch the surface.

something other than “rent.” (The Claim Cap applies to claims for “rent.”) In this case, though, the Lease and the “note” might need to be cross-defaulted, or other issues regarding the interaction of rights and remedies (see the discussion above regarding Tenant’s right to a refund of prepaid rent) might ultimately force the parties to tie the two documents together.

- *Key Money and Back-End Free Rent.* Tenant might deliver key money and be entitled to equivalent free rent at the end of the term -- but only in the form of a refund for the last few months of rent at the end of the term, and only if Tenant has not defaulted.
- *Deferred Key Money.* Instead of paying key money at the outset of the Lease, Tenant could agree to pay Landlord’s retenuing costs if at any time the Lease went into default. That obligation would be backed by the L/C and would be characterized as something very different from -- totally independent of -- the rent or any security deposit under the Lease. For example, if Tenant failed to pay the retenuing costs, Landlord would have no rights or remedies under the Lease, merely a right to draw the L/C.
- *Other Recharacterization.* One could try in other ways to recharacterize the L/C and its proceeds as something other than a security deposit. As noted above, though, a careful Tenant will want protections that may end up defeating the recharacterization. If Landlord has enough negotiating strength, Landlord may be able to require Tenant to drop these concerns -- and bear the related risks -- as the price of getting the Lease signed.
- *Guaranty Backed by L/C.* One might create another degree of separation between the L/C and the Lease by having the L/C relate not to the Lease at all, but instead to a totally independent third-party guaranty of the Lease, issued by a third party guarantor (the “Guarantor”). Guarantor’s general credit would not back the Lease, but would simply serve the purpose (Landlord hopes) of protecting the L/C from the Claim Cap. If Guarantor itself were to file, then the cases indicate that the Claim Cap would limit Landlord’s claim against Guarantor. But if only Tenant filed, it is generally believed that the Claim Cap would not protect the nonbankrupt Guarantor.⁷ Landlord could then draw the L/C based on the nonbankrupt Guarantor’s failure to pay, rather than because of anything related to Tenant or the Lease. Landlord would say, with some justification, that the Claim

⁷ In other words, if Tenant is in bankruptcy but guarantor is not, then as a matter of state-law guaranty enforcement, the state court should not give the nonbankrupt guarantor the benefit of the Claim Cap. This result seems logical, at least from a creditor’s perspective. The author has, however, been advised of occasional state-law cases that hold otherwise, and apply the Claim Cap to Landlord’s claim against the nonbankrupt guarantor. Notwithstanding diligent research, the author has not been able to locate any such cases. If any reader is aware of them, a reward of one dollar will be paid for the correct citation(s). No security of any kind is being offered for the making of this payment.

Cap is completely irrelevant to Landlord's rights under the L/C. Under this structure, Guarantor would be either: (a) creditworthy enough that bankruptcy is unlikely; or (b) a bankruptcy-remote entity. In either case, Tenant and its principals need not have any interest in or control of Guarantor. Perhaps it is best if they do not. Guarantor might even be a third-party bonding company.⁸ To avoid dragging Tenant's bankruptcy back into the picture, one could even require Guarantor to waive any right of reimbursement from Tenant if Landlord draws the L/C. In some permutations, this structure amounts to a miniaturized version of structured financing. It may represent a very attractive and workable way to solve the entire Claim Cap problem.

- *Personal Guaranty.* Obtain a personal guaranty against any risk arising from the Claim Cap. Assign that personal guaranty to Lender.
- *Reimbursement Structure.* The application of the Claim Cap may vary depending on whether (and to what degree) Tenant must reimburse Issuer for any draw under the L/C. Could Landlord mitigate the problem by requiring Issuer to agree not to look to Tenant for any such reimbursement, and look instead to a third party principal or investor in Tenant? Does the answer depend on the extent and nature of any security Issuer holds (e.g., a fully cash collateralized L/C)?
- *Limit L/C to One Year's Rent.* As long the L/C does not exceed one year's rent, the Claim Cap should not apply. Landlord can therefore solve the Claim Cap problem simply by not structuring a transaction that requires an L/C exceeding the Claim Cap. An L/C for one year's rent should always be safe. Or, to the extent that the L/C would exceed the Claim Cap, one could substitute any of the mechanism(s) suggested above -- a "mix and match" solution to the problem but a solution nevertheless. The author would submit that the hybrid nature of such a solution creates unnecessary issues, complexity, concerns, and drafting. Landlord and Lender should take one road or another but not more than one. It all depends on context and circumstances, though.
- *Take the Risk.* Another possibility is for Landlord and Lender not to worry about the Claim Cap and simply take the risk and either (a) hope that the L/C serves its purpose and Tenant stays out of bankruptcy or (b) recognize that in bankruptcy the L/C will give Landlord and Lender substantial comfort but not quite as much comfort as they really wanted. That approach ignores a substantial risk inherent in the structure of the transaction. It requires Tenant to bear the full cost and burden of obtaining an L/C without giving Landlord and Lender the full corresponding benefit of having a reliable L/C. In other words, it creates an economic absurdity. It implies that some alternative and superior solution to the problem should be available. Such a solution should give Landlord/Lender an

⁸ The bonding company would bring to the transaction solely the fact that it is highly unlikely to go bankrupt. The L/C itself would not be backed by the bonding company's credit but perhaps by cash collateral instead.

incremental benefit at no incremental cost to Tenant and should therefore be preferred. The concept of “ignoring the problem” is, however, by no means uncommon, and might be viewed as Landlord’s “taking a business risk” on the Lease -- a decision that Lender might hesitate to second-guess. As a matter of risk management, Lender’s or Landlord’s counsel should recognize that “business decisions” like this one often correlate with short memories, and later on, when the risk actually hits, all fingers point to counsel. Therefore, counsel may want to memorialize in writing that counsel identified the bankruptcy risks of such a structure and suggested that the parties not ignore them.

- *Fundamental Problem.* The fundamental problem and issue affecting this entire area is simply the following. How can Borrower, Lender, and Tenant treat the L/C as the functional equivalent of a security deposit without actually calling it a security deposit or otherwise giving Tenant an interest in the L/C proceeds? The answer is not necessarily easy or straightforward, but similar questions and issues arise (and are solved) throughout secured lending as a result of the need to consider bankruptcy law. If the L/C proceeds are intended to be a security deposit that isn’t a security deposit, what does state law say about those proceeds? For example, if state law imposes certain requirements about how a landlord holds a security deposit, must Borrower/Lender comply with them? What happens if they don’t?

Third-Party Credit Enhancers. This Model Document addresses a three-party relationship: Lender, Borrower, and Tenant. In many transactions of the type that motivates this Letter Agreement, a fourth player casts its shadow over the negotiations: the credit enhancer that has backed Tenant’s business and has actually obtained the L/C on Tenant’s behalf, because Tenant lacks the credit to do so. The credit enhancer serves as “applicant” under the L/C reimbursement agreement with Issuer. The credit enhancer’s interests are similar to those of Tenant. Both would like to delay, defer, and frustrate any draw on the L/C, and perhaps even prevent Beneficiary from transferring the L/C to an unknown new party who may have a different and less cooperative agenda. They would also like to try to leverage the parties to try to “work out” a solution to Tenant’s lease, instead of merely having Landlord draw the L/C. From a credit enhancer’s perspective, that solution would ideally include giving the credit enhancer the benefit of any value that exists in the Lease when Landlord (or Lender) draws the L/C.⁹ This Letter Agreement does not consider the credit enhancer’s interests at all, except to the extent that they overlap Tenant’s interests considered in this Letter Agreement.

Prenegotiated Terms. Consider whether to remove or edit the following provisions in this Letter Agreement, which were “prenegotiated” to reflect the likely agenda(s) of other party(ies).

- *Tenant Offset Rights.* This Letter Agreement lets Tenant offset rent if certain “bad things” happen regarding the L/C. These offset rights seem appropriate and

⁹ As with many issues in this transaction structure, that issue belongs largely in the Lease rather than in this Letter Agreement.

tolerable under the circumstances, but they are still offset rights. Lender must be comfortable with them. But would Tenant have such rights if a security deposit were misused or lost? Should an offset right arise only if a court issues a judgment that the L/C should have been returned but was not? As long as Lender is creditworthy, might Lender reasonably say that Tenant should be limited to a general claim against Lender rather than a right of offset? Does the entire arrangement violate the “no-offset” theory of the Lease? Does it potentially impair the security value and reliability of the rental stream and the L/C? In place of an offset right, should Tenant merely have the right to deposit rent with its counsel, in escrow, until it has accumulated enough money to make up for the lost L/C? Under that structure, the money would stay in escrow until the dust cleared regarding the missing L/C. In the meantime, Tenant would lose the use of its funds and Landlord and Lender might lose the extra security the L/C was intended to create.

- *Duty to Draw.* Lender agrees to draw the L/C if Landlord directs Lender to do so. Lender may fear liability for somehow mismanaging the process. But Lender should probably either confirm and know that it is competent to manage this process (which is not that complicated) or not insist on holding the L/C.
- *Loan Transfers.* Although this Letter Agreement builds in the possibility of a transfer of the L/C from Lender to a Successor Lessor or to a loan transferee, neither transferee is exculpated from any liability of the transferor. One might wish to provide for such exculpation (similar to the carveouts in an SNDA), although it may be overkill.
- *Loan Event of Default.* Lender’s rights and remedies vary depending on whether a Loan Event of Default “has occurred and is continuing” (or equivalent language). Lender may prefer to refer instead to whether an Event of Default has occurred, under the theory that once an Event of Default has occurred, Lender should remain able to exercise rights and remedies (“do bad things to Borrower”) at any time thereafter -- whether or not Borrower has subsequently cured the Event of Default. The reference to “has occurred and is continuing” effectively allows Borrower a wide-open right to cure an Event of Default at any time -- a perpetual cure period beyond whatever cure period the parties negotiated in the documents. While this is an excellent position for Lender to take, Borrowers routinely insist on referring to a Loan Event of Default that “has occurred and is continuing,” and Lenders typically accept that language. In using this model, Lender may prefer to cut it back to refer simply to whether an Event of Default has occurred.

Other Documentation. This Model Document may need the following exhibits, related documents, additional information, and so on:

- *Separate L/C Agreement.* As between Landlord and Tenant, the L/C may be governed by some separate agreement rather than the Lease itself. This is somewhat undesirable, as the laws of entropy dictate that the separate agreement

is more likely than a Lease to get lost. This risk can be mitigated by attaching a copy of the separate agreement as an exhibit to this Letter Agreement. That assumes, of course, that the parties will not also lose this Letter Agreement. If Landlord and tenant use a separate agreement for the L/C, the SNDA and this Letter Agreement should define that separate agreement as part of the Lease, to protect Lender against, for example, bad faith modifications.

- *Form of L/C.* Lender's counsel must review and approve the L/C, and the original must be delivered for the closing. The very important topic of what an L/C should say is outside the scope of these cover notes and this Letter Agreement, but must be considered. For example, Tenant (or Issuer, with Tenant cheering from the sidelines) will often try to require Lender or Landlord to give notice before drawing the L/C, which is undesirable. Mechanically, the process of reviewing and approving an L/C often causes problems and delays. It should therefore be started early. Landlord and Tenant should show Lender's counsel a draft of the L/C before having it issued. Ideally, they should start with a draft form of L/C provided by Lender's counsel.
- *Delivery of L/C.* Tenant will sometimes hesitate to deliver the original L/C in advance of the closing for fear that the transaction might not close. This fear can be mitigated if Lender's counsel confirms in writing (e.g., as part of the cover memo distributing this Letter Agreement) that the L/C will be returned if the deal does not close. This Letter Agreement does not contemplate attaching a copy of the L/C to the agreement as an exhibit, but that would not be a bad idea.
- *Form of SNDA.* This L/C agreement assumes the parties use the New York State Bar Association form of SNDA prepared in the early 1990's by a subcommittee that Joshua Stein chaired. Some terms used in this L/C agreement (such as Successor Lessor) are defined in that form of SNDA, which this L/C Agreement cross-references for such purpose. Any other form of SNDA will work just as well. All defined terms must be cross-checked in any event. The parties may wish to incorporate this Letter Agreement directly into the SNDA, and make Landlord a party. This eliminates one document and the related risk of not being able to find that document later. The elimination of that risk will be particularly effective if the parties record the SNDA.
- *Lender's Approval of Issuer.* Regardless of the form of the L/C, Lender must review and consider whether Issuer is acceptable as a credit matter. Often this will not be a problem, but it is Lender's call, not the attorney's. Lender will not necessarily be able to make the decision instantly. The approval process may require some lead time. Tenant should be advised to plan ahead for this process and delay.
- *Nonrecourse Clause.* This Letter Agreement incorporates by reference the "Nonrecourse Clause," as defined in the Loan Agreement. Confirm the Loan Agreement defines such term. But should the Nonrecourse Clause really apply to all of Borrower's obligations under this Letter Agreement or otherwise relating to

the L/C? Aren't some of those obligations (e.g., indemnities, use of L/C proceeds, noninterference with L/C draws, possible adverse effect of Landlord bankruptcy) appropriate for carveout treatment? If so, that issue should be addressed in the loan agreement rather than here, so that when someone else later reads the loan documents to understand the Borrower-Lender relationship, the nonrecourse carveouts will all be in the one place where the reader will expect to find them.

- *Coordination with Loan Documents.* Confirm that this Letter Agreement uses defined terms consistent with the Loan Documents (e.g., the "Collateral"). Conform this Letter Agreement as necessary.
- *UCC-1 Financing Statement.* Consider whether, where, and how to file UCC-1 financing statements for Lender's security interest under this Letter Agreement.
- *Claim Cap Measures.* To the extent that Landlord and Lender adopt any measures suggested above to respond to the Claim Cap, those will require additional documentation, much of which will need to be tailored and then negotiated with third parties and hence a likely cause of delay and problems.

Points Not Covered. A document of this type could cover the following points, but this one does not, for the following reasons:

- *Waiver of Injunction.* One might ask Tenant to waive any right to enjoin an L/C draw. But this may be overkill and it belongs in the Lease, anyway.

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[LETTERHEAD OF LENDER]

New York, New York 100__ (the "Lender")

_____, 200__
(the "Effective Date")

("Borrower" or "Landlord")

("Tenant")

Agreement Regarding Letter of Credit (the "Letter Agreement")

To Whom It May Concern:

Please refer to the following agreements and documents, each as amended or supplemented from time to time but only with Lender's express written agreement or consent:

- *Loan Documents.* The Loan Agreement between Borrower and Lender dated _____ (the "Loan Agreement") and the Loan Documents as defined in the Loan Agreement (the "Loan Documents");
- *Lease.* The _____ Lease between Borrower (as landlord) and Tenant dated _____, including the _____ Agreement as defined therein (the "Lease");
- *L/C.* The _____ Letter of Credit, as defined in the Lease (together with any L/C Modifications that this Letter Agreement permits or requires, the "L/C"), issued by _____ (the "Original Issuer"); and
- *SNDA.* The Subordination, Nondisturbance, and Attornment Agreement entered into between Lender and Tenant[, with Borrower's consent,] dated _____ (the "SNDA"). All definitions in the SNDA apply in this Letter Agreement, except where this Letter Agreement provides some other definition for a term.

Lender, Borrower, and Tenant agree, and the Lease is modified, as set forth in this Letter Agreement. Lender approves that modification. If this Letter Agreement and the Lease differ, or if the Loan Documents and this Letter Agreement differ, then in either case this Letter Agreement governs.

1. *Certain Definitions.* The following terms shall be defined as follows:

- *Acceptable Issuer.* An “Acceptable Issuer” means a commercial bank: (a) that has an office with a physical street address in New York, New York, or in _____, at which physical street address Lender may present the L/C for payment; (b) whose commercial paper is rated P-1 or better by Moody’s (or the equivalent in Lender’s judgment); (c) whose Moody’s bank rating is Aa2 or better (or the equivalent in Lender’s judgment); and (d) that Lender and Borrower have otherwise approved. As of the Effective Date, Original Issuer is an Acceptable Issuer. To the extent that as of the Effective Date any rating of Original Issuer does not satisfy the express requirements of this definition, Borrower and Lender waive such noncompliance but any future downgrade of Original Issuer shall constitute an Issuer Downgrade.
- *Acceptable L/C.* An “Acceptable L/C” means a letter of credit that at all times: (a) may be drawn upon by Lender at the physical street address described in the definition of “Acceptable Issuer”; (b) states that Lender (and/or its successors and assigns) may from time to time assign it to any assignee of the Loan, and Issuer will reissue it to the assignee, all without requiring the assignor or the assignee to pay any L/C Fees; (c) is issued by an Acceptable Issuer (except for 30 days after an Issuer Downgrade); (d) fully complies with all Lease requirements regarding the L/C, including required face amount, terms, and expiry date; and (e) Lender has otherwise approved in all respects, in both form and substance. As of the Effective Date, the L/C is an Acceptable L/C.
- *Beneficiary Confirmation.* A “Beneficiary Confirmation” means confirmation, consent, or approval by the beneficiary of the L/C.
- *Delivery Failure.* A “Delivery Failure” means a failure, by Borrower and/or Lender as applicable, to return to Tenant, if, when, and as this Letter Agreement requires: (a) any Unused L/C Proceeds; and (b) the L/C, except to the extent that Issuer has released the L/C account party from any and all liability or obligations (contingent or otherwise) relating to the L/C.
- *Issuer.* The “Issuer” means the issuer of the L/C.
- *Issuer Downgrade.* An “Issuer Downgrade” means the occurrence of any circumstance or event that causes Issuer to cease to be an Acceptable Issuer.
- *L/C Fees.* The “L/C Fees” means any fees the Issuer imposes to issue, transfer, or reissue the L/C or any L/C Modification.
- *L/C Modification.* An “L/C Modification” means any of the following, in form and substance reasonably satisfactory to Lender, and without otherwise modifying the L/C except as this Letter Agreement permits: (a) any replacement (in the same form), extension, or amendment for the L/C; (b) an L/C Restoration; or (c) any document that reduces the face amount of the L/C.
- *L/C Restoration.* An “L/C Restoration” means an L/C Modification that: (a) Tenant delivers to Lender simultaneously with Lender’s release to Tenant of the proceeds

(without interest) of a Protective Draw or wrongful draw on the L/C; and (b) restores and increases the face amount of the L/C by an amount equal to such proceeds released to Tenant.

- *L/C Transition.* An “L/C Transition” means, upon a sale, Foreclosure, or refinancing of the Mortgaged Property, or assignment of the Loan, the occurrence of the following events: (1) delivery of the L/C and any Unused L/C Proceeds to the purchaser (or other transferee) or new mortgagee of the Mortgaged Property; (2) such purchaser’s (or other transferee’s) or new mortgagee’s assumption of all obligations of Lender or Borrower (as applicable) under this Letter Agreement; and (3) delivery to Tenant of reasonable evidence of “1” and “2.”
- *Protective Draw.* A “Protective Draw” means a draw under the L/C made solely because: (a) an Issuer Downgrade occurred; or (b) Tenant did not deliver an L/C Modification when required to do so.
- *Tenant Default Draw.* A “Tenant Default Draw” means any draw made under the L/C (by Borrower or Lender) in compliance with and to the extent the Lease permits, if, under the Lease: (1) such draw is on account of Tenant’s default or breach or to cure Tenant’s nonperformance or nonpayment; or (2) Borrower is otherwise permitted to retain the proceeds of such draw free of any obligations to Tenant.
- *Unused L/C Proceeds.* The “Unused L/C Proceeds” means any proceeds of any draw under the L/C, which proceeds have not yet been applied in accordance with this Letter Agreement to cure Tenant’s default or breach under the Lease or released to Borrower, Lender, or Tenant. The Unused L/C Proceeds shall not include interest except as this Letter Agreement expressly provides. The Unused L/C Proceeds may not be applied against, and do not secure, Borrower’s obligations to Lender except when and as this Letter Agreement expressly states.

2. *Delivery of L/C to Lender.* Borrower and Tenant are, simultaneously with the execution and delivery of this Letter Agreement, causing the L/C to be issued and delivered to Lender, for Lender to hold in accordance with this Letter Agreement. Upon receipt of the L/C in compliance with this Letter Agreement, Lender acknowledges that Lender shall be deemed to have received [Tenant’s security deposit] [the L/C] for purposes of the SNDA. All parties acknowledge that the L/C is not a security deposit and Tenant has no interest in the L/C or any Unused L/C Proceeds except as this Letter Agreement permits. The L/C does not secure the Loan. The proceeds of a draw under the L/C shall not be applied against the Loan except as this Letter Agreement expressly permits. Tenant shall cause the L/C to be an Acceptable L/C at all times.

3. *L/C Modifications.* To the extent that the Lease permits or requires Tenant to deliver to Borrower any L/C Modification, Tenant shall instead deliver the original of such L/C Modification to Lender (and simultaneously give Borrower a copy), when and as the Lease requires Tenant to deliver such L/C Modification to Borrower. Delivery of an L/C Modification to Borrower shall not suffice. If Lender has not received any L/C Modification when and as the Lease requires Tenant to deliver it to Borrower, then Lender may draw the entire L/C on

Borrower's behalf, as a Protective Draw. Lender shall not be bound by any L/C Modification that reduces the amount of the L/C except for any such reduction that either (1) Lender expressly approves in writing; or (2) the Lease expressly permits by its terms (provided that such terms do not require any Beneficiary Approval). To the extent that the Lease requires Beneficiary Approval for any L/C Modification, such requirement shall be replaced by a requirement for Beneficiary Approval issued in writing by Lender.

4. *Issuer Downgrade.* Lender may draw upon the L/C in full, as a Protective Draw, 30 days after any Issuer Downgrade, unless within that time Tenant has delivered to Lender a replacement Acceptable L/C. If Tenant delivers a replacement Acceptable L/C, then Lender shall simultaneously return to Tenant the L/C whose issuer was subject to the Issuer Downgrade. Lender shall notify Tenant promptly of any Issuer Downgrade, but the giving of such notice is not a condition to any Protective Draw.

5. *Proceeds of Protective Draws.* If Lender makes any Protective Draw, then Lender shall hold the proceeds of such Protective Draw in an interest-bearing account at a bank Lender designates. Lender shall promptly notify Borrower and Tenant of such bank. Except as set forth in this Letter Agreement, Lender shall hold such proceeds in accordance with the Lease. Interest shall be released periodically to Tenant and reported as Tenant's income. Tenant certifies that the taxpayer identification number below Tenant's signature is Tenant's correct taxpayer identification number, and the Internal Revenue Service has not notified Tenant that Tenant is subject to backup withholding. Upon request, Tenant shall deliver a "W-9" form for any interest earned on proceeds of a Protective Draw. If Tenant does not, then the funds shall be held in a non-interest-bearing account. If Lender thereafter receives an Acceptable L/C, then Lender shall return to Tenant the proceeds of the original L/C and all remaining interest accrued thereon. [Within ___ days after any Protective Draw, the parties shall consummate an L/C Restoration for all Unused L/C Proceeds. If Tenant has not timely performed its obligations under the preceding sentence, then at Borrower's or Lender's option, any Unused L/C Proceeds shall immediately be applied solely to prepay rent under the Lease, starting with the installments furthest in the future within the term of the Lease (other than any extension or renewals terms for which Tenant has not yet exercised extension or renewal options) and continuing in reverse chronological order until such Unused L/C Proceeds have been exhausted. Such prepaid rent shall not be refundable to Tenant under any circumstance.] [Tenant shall then promptly deliver to Lender a replacement Acceptable L/C in the full amount the Lease otherwise requires.]

6. *Tenant Default Draws.* In addition to any right for Lender to otherwise draw upon the L/C under this Letter Agreement, to the extent, and only to the extent, that the Lease permits Borrower from time to time to make a Tenant Default Draw, Lender may at Lender's option make any such draw(s) in place of Borrower, but only if an Event of Default has occurred under the Loan and Lender, or a receiver acting on Lender's behalf, has activated Lender's assignment of rents or otherwise commenced to collect rents from the Mortgaged Property. If Borrower determines that Borrower is entitled to make a Tenant Default Draw, then Borrower may direct Lender to draw the L/C. Within 20 days after receiving such direction, Lender shall draw the L/C as Borrower directs, provided that such direction sets forth such 20-day period and reminds Lender that Lender must draw the L/C within such period. Any such notice shall be delivered to Lender in accordance with the notice requirements of the Loan Agreement, and in addition (as a

further condition for such notice to be effective, notwithstanding anything to the contrary in the Loan Agreement) Borrower shall deliver additional copies of such notice, at the same time and by the same means, to: _____ and _____, Esq., _____, _____.

Borrower shall indemnify, defend, and hold harmless Lender from and against any and all loss, cost, liability, and expense, including the payment of reasonable attorneys' fees, as the result of any claim Borrower makes against Lender as a result of Lender's drawing the L/C when and as this paragraph permits or requires. Such indemnity shall not be deemed to limit the provisions of this Letter Agreement by which Borrower acknowledges Lender has no liability to Borrower whatsoever for any such draws.

7. *Use of Tenant Default Draw Proceeds Under Lease.* To the extent that Lender makes a Tenant Default Draw, Lender shall (as between Lender and Borrower) be entitled to retain the proceeds of such draw. Tenant shall be entitled to full credit for any sums Lender retains, as if Borrower retained such sums. The proceeds of a Tenant Default Draw do not constitute a security deposit under the Lease. Such proceeds shall instead immediately become the property of Borrower and/or Lender (as described in this Letter Agreement and the Loan Documents), free of any claim by Tenant, other than Tenant's right to be credited for such proceeds under the Lease. Notwithstanding the foregoing, if the Lease requires the proceeds of a Tenant Default Draw be used for a specified purpose, then Borrower and Lender shall cause such proceeds to be used in such manner.

8. *Use of Tenant Default Draw Proceeds Under Loan.* If an uncured Event of Default occurs under the Loan, then Lender may apply, against Borrower's obligations under the Loan Documents, any proceeds of a Tenant Default Draw that Lender retains and is not required to use for a particular purpose under the Lease. Provided that and only so long as no Event of Default has occurred and is continuing under the Loan: (a) to the extent that the Lease allows (but does not require) Borrower as landlord to apply the proceeds of a Tenant Default Draw to cure Tenant's default under the Lease, Lender shall release such proceeds only for such purpose upon such terms as Lender shall reasonably require; and (b) otherwise, Lender shall retain such proceeds as cash collateral for Borrower's obligations to Lender under the Loan Documents (the "Cash Collateral").

9. *Treatment of Cash Collateral.* The Cash Collateral shall be part of the Collateral under the Loan Documents. Lender shall release the Cash Collateral to Borrower if and when Borrower is entitled to obtain a release of all security for the Loan. Lender shall be entitled to exercise any or all rights and remedies under the Loan Documents and applicable law regarding the Cash Collateral, including (to the extent Lender so desires) all rights and remedies that the Loan Documents would allow Lender to exercise against any other Collateral. Lender shall hold the Cash Collateral under such additional documents as Lender shall require. Such documents shall allow Borrower to apply the Cash Collateral to pay for Borrower's costs of replacing Tenant (if and when Borrower has located a replacement tenant), provided that, notwithstanding anything to the contrary in any other Loan Document: (1) Lender has approved such replacement tenant and all terms of its lease; (2) no uncured Event of Default exists under the Loan Documents; and (3) Borrower satisfies such other conditions (including approval and disbursement procedures) as Lender shall establish. If, 60 days after a Tenant Default Draw, Borrower has not executed and delivered cash collateral documents satisfactory to Lender, then

Lender may at Lender's option (with Lender having no obligation to do so) apply the proceeds of such Tenant Default Draw to prepay the Loan. Any conditions to such prepayment that the Loan Documents would otherwise establish shall be deemed waived, except that Borrower shall pay such prepayment premium, yield maintenance premium, liquidated damages, or other fee or payment as the Loan Documents would require for a voluntary prepayment in like amount.

10. *Security Interest.* Borrower hereby grants to Lender a security interest in all of Borrower's rights in, to, and under the L/C, any Unused L/C Proceeds, this Letter Agreement, and all Cash Collateral, to secure all of Borrower's obligations under the Loan and the Loan Documents. Such security interest shall be governed by all the terms and conditions of the Loan Documents that relate to security for the Loan. Lender may exercise all rights and remedies under the Loan Documents or applicable law regarding such security interest. Borrower shall execute such further documentation to evidence, implement, or perfect such security interest as Lender shall require.

11. *Use of L/C Proceeds, Generally.* Unless and until the Lease allows Borrower to make (or this Letter Agreement allows Lender to make on behalf of Borrower) any Tenant Default Draw, any proceeds of the L/C or any draw under the L/C shall not secure, or be applied against, Borrower's obligations to Lender. If Borrower or anyone acting for Borrower receives any proceeds of any L/C draw, then Borrower shall immediately remit such proceeds to Lender to be applied in accordance with this Letter Agreement.

12. *Wrongful Draws by Lender.* Under any circumstances not otherwise expressly provided for in this Letter Agreement, Lender shall not draw upon the L/C unless Borrower directs Lender to do so. If it is finally determined that Lender wrongfully drew the L/C, whether on Lender's initiative or when Borrower directed Lender to draw, then: (a) Lender shall thereupon promptly release to Tenant the proceeds of such draw without interest (except as this Letter Agreement requires for proceeds of a Protective Draw); (b) Tenant shall simultaneously with, and as a condition to, such release, deliver to Lender an L/C Restoration; and (c) provided that Lender with reasonable promptness performs its obligations under "a" when obligated to do so, neither Borrower nor Lender shall have any other liability or obligation to Tenant, and Lender shall have no other liability or obligation to Borrower or Tenant, on account of a wrongful draw of the L/C, including a draw of the L/C that violates this Letter Agreement.

13. *Drawing Procedures.* If Borrower or Lender draws upon the L/C for any reason, then the party drawing upon the L/C shall automatically be deemed to have represented, warranted, and certified that such draw complies with the Lease (as modified by this Letter Agreement) and with this Letter Agreement. Tenant's rights and remedies for a wrongful draw shall, however, be limited to those set forth in this Letter Agreement. Promptly after Lender or Borrower draws upon the L/C for any reason, Borrower shall notify Tenant of such draw and the basis for it. Neither Lender nor Borrower is obligated to notify Tenant before drawing upon the L/C. Tenant expressly waives any such notice, to the extent (if any) that Tenant might otherwise be entitled to such notice.

14. *Dispute Resolution.* If Tenant claims that Lender wrongfully drew upon the L/C, then Tenant and Borrower shall promptly resolve such dispute through appropriate litigation or as they shall otherwise agree. Tenant and Borrower shall each give Lender simultaneous copies of

all notices, documents, and pleadings delivered or served in connection with the foregoing. Lender may participate in such dispute resolution to the extent, if any, that Lender determines appropriate. Pending resolution of such dispute, Tenant shall not be entitled to offset rent or exercise any other remedies on account of such draw of the L/C and all of Tenant's obligations under the Lease shall continue in full force and effect. During the pendency of any dispute, Lender and Borrower may apply the proceeds of any draw under the L/C in a manner consistent with their determination regarding Tenant's default under the Lease, but without prejudice to Tenant's rights if it is later determined that Tenant was not in default or Tenant Default Draw was otherwise wrongful. At Lender's option, Lender may hold the Unused L/C Proceeds pending determination of the dispute. If and when such dispute has been resolved, Borrower and Lender shall return to Tenant any amounts wrongfully drawn, without interest, provided that at the same time Tenant shall deliver to Lender an L/C Restoration in like amount. Notwithstanding anything to the contrary in this Letter Agreement, Lender may at any time fully discharge all its obligations under this Letter Agreement by depositing the L/C and any Unused L/C Proceeds in any court of competent jurisdiction and commencing an action in the nature of interpleader.

15. *Return of L/C and Unused L/C Proceeds.* If, when, as, and to the extent that the Lease requires Borrower to return the L/C or any Unused L/C Proceeds to Tenant, Lender shall return them to Tenant, provided that if Tenant is entitled to such return because Tenant has delivered an L/C Modification or (to the extent the Lease permits) cash in substitution for such L/C Modification, then Lender shall not be obligated to return the L/C or any Unused L/C Proceeds to Tenant unless and until Lender has received such L/C Modification or cash and it complies with all then requirements of the Lease. If Tenant believes Tenant is entitled to the return of the L/C or the Unused L/C proceeds, but Borrower disagrees and directs Lender not to return them to Tenant, then Lender shall not return them unless and until the dispute has been resolved. During such dispute resolution, Lender shall have no liability to Tenant. Tenant shall resolve such dispute solely with Borrower. So long as no Event of Default shall have occurred under the Loan, Lender shall not release the L/C or any Unused L/C Proceeds to Tenant unless authorized to do by Borrower, other than in exchange for cash (to the extent the Lease permits) or a replacement Acceptable L/C.

16. *Assignment of Loan.* If Lender assigns the Loan as it relates to the Mortgaged Property, or if any Foreclosure occurs, then Lender shall cause a L/C Transition to occur. If a Successor Lessor fails or refuses to cooperate with an L/C Transition, then Lender shall either (at Lender's election) continue to hold the L/C and Unused L/C Proceeds under this Letter Agreement, or return them to Tenant. If an L/C Transition occurs (or Lender returns the L/C and Unused L/C Proceeds) as this paragraph contemplates, then all rights and obligations of Lender, including those relating to the L/C and any Unused L/C Proceeds, shall terminate.

17. *Transfer of L/C.* If from time to time Lender transfers or assigns the L/C, in whole or in part, including pursuant to a L/C Transition, then Tenant shall pay all related L/C Fees, notwithstanding anything to the contrary in the L/C or any form of transfer documentation annexed to the L/C. Tenant shall pay such L/C Fees directly to Issuer at the time of transfer or assignment. If Tenant fails or refuses to do so, then the parties shall have the same rights and remedies as if Tenant had failed to timely deliver an L/C Modification the Lease requires.

18. *Repayment of Loan.* If Borrower has repaid the Loan in full in cash (including all sums secured by the Mortgage), so that Borrower is entitled to require Lender to release all of Lender's security for the Loan, then Lender shall assign (at Tenant's expense) and deliver the L/C and Unused L/C Proceeds to Borrower or as Borrower shall direct. Upon such assignment and delivery: (a) Borrower shall be responsible for the L/C and Unused L/C Proceeds; (b) all liability of Lender for the L/C and Unused L/C Proceeds shall terminate; and (c) Lender shall have no responsibility for Borrower's (mis)application of or failure to return them.

19. *Sale or Refinancing.* If Borrower refinances the Mortgaged Property, then Borrower shall within 30 days thereafter cause a L/C Transition to occur. If Borrower fails to do so within such period, then so long as such failure shall continue, notwithstanding anything to the contrary in the Lease Tenant may (in place of paying rent to Borrower on a current basis) deposit Tenant's rent in escrow, in an interest-bearing account, with counsel to _____, under escrow documentation satisfactory to _____, until such time as Borrower has caused a L/C Transition to occur. When Borrower has accomplished a L/C Transition, Tenant shall promptly remit to Borrower's new mortgagee (or as Borrower's new mortgagee shall direct) all rent previously deposited in escrow, together with interest earned thereon. Failure to do so shall constitute a monetary default under the Lease.

20. *Delivery Failure.* If any Delivery Failure occurs and Borrower or Lender (as applicable) has failed to cure such Delivery Failure within 30 days after Tenant has given written notice of such Delivery Failure to both Lender and Borrower, then notwithstanding anything to the contrary in the Lease Tenant may offset rent under the Lease until such time as Tenant has thereby offset an amount equal to the L/C and Unused L/C Proceeds affected by such Delivery Failure. If and when Borrower or Lender has cured the Delivery Failure, Tenant shall remit to Borrower (or Borrower's new lender) the amount previously offset. This paragraph shall survive termination of this Letter Agreement.

21. *Offsets.* Except to the extent that this Letter Agreement expressly permits Tenant to offset rent or pay rent into escrow under specified circumstances, Tenant shall under no circumstances be entitled to offset rent, or otherwise withhold performance under the Lease, on account of the L/C or any dispute relating to the L/C or any draw under the L/C.

22. *Miscellaneous.* Lender may exercise any of its rights, and perform any of its obligations, under this Letter Agreement through any servicer or other agent Lender designates from time to time. As between Borrower and Lender, this Letter Agreement constitutes a Loan Document. The Nonrecourse Clause, as defined in the Loan Agreement, is incorporated by reference in this Letter Agreement. **IF ANY DISPUTE OR PROCEEDING ARISES OUT OF THIS LETTER AGREEMENT OR THE INTERPRETATION OR ENFORCEMENT OF THIS LETTER AGREEMENT THEN: (A) ALL PARTIES WAIVE TRIAL BY JURY; (B) NEW YORK LAW SHALL GOVERN; AND (C) EACH PARTY CONSENTS TO THE JURISDICTION OF ANY STATE OR FEDERAL COURT IN THE BOROUGH OF MANHATTAN, STATE OF NEW YORK.** Any notices under this Letter Agreement shall be given, and shall become effective, as provided for in the Lease or in the Loan Agreement. If any party gives any notice under this Letter Agreement, then such party shall simultaneously deliver copies of such notice to all other parties to this Letter Agreement, except where prohibited by

law. As between Borrower and Tenant, this Letter Agreement amends and constitutes part of the Lease.

If the foregoing accurately reflects your understanding, please sign and return a copy of this Letter Agreement to us. It shall then bind the parties and their successors and assigns. This Letter Agreement may be executed in counterparts.

Thank you.

Very truly yours,

LENDER

By: _____
Name:
Title:

Borrower and Tenant confirm and agree to the foregoing Letter Agreement.

BORROWER

By: _____
Name:
Title:

TENANT

By: _____
Name:
Title:

Taxpayer Identification Number:
