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Seminar 3

LEASING LOIs – Love ‘em or Leave ‘em

Presented to

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by:

Amanda T. Links, Esq.
Senior Leasing Counsel
Unibail-Rodamco-Westfield
One World Trade Center
Suite 46E
New York, New York 10007
amanda.links@urw.com

Karim A. Ali, Esq.
Partner
Porter Wright Morris & Arthur LLP
41 South High Street
Suite 3100
Columbus, OH 43215
kali@porterwright.com

Seminar Description: This seminar will focus on the fundamentals of negotiating a retail leasing letter of intent (also known as an “LOI”). The presenters will discuss the advantages of negotiating letters of intent prior to negotiating and executing retail leases, as well as the disadvantages of negotiating leasing letters of intent and the pitfalls of relying on them. They will also survey the legal issues regarding use of a letter of intent.

Summary

A letter of intent is typically a non-binding agreement or understanding summarizing key terms that will serve as the basis for negotiating a full lease agreement between landlord and tenant parties. The prime purpose of the letter of intent is to reach general agreement on certain key terms. Although most commercial terms of a letter of intent are not usually legally binding in most U.S. jurisdictions, they should be drafted with due care and attention. As explained below, a letter of intent can be used as parol evidence in the event a dispute arises regarding the terms of a lease agreement.

There are many advantages and disadvantages to using a letter of intent. The advantages and disadvantages may vary based upon the bargaining power of the parties, anticipated time lines, number of competing deals, and internal procedures or lease approval process. Figure 1 (below) shows some of the common advantages and disadvantages of negotiating letters of intent. A letter of intent is often drafted by the tenant’s broker or leasing representative, but there are no hard and fast rules regarding who should prepare the initial letter of intent.

- If a landlord is seeking to develop a new retail development or redevelop an existing one, a landlord might propose initial letters of intent for all tenants as a means of simplifying the negotiation process. A landlord generated letter of intent might include all of the material terms that the landlord is willing to consider, but it generally includes only key terms with the expectation of leaving flexibility to negotiate a lease agreement. A landlord generated letter of intent ensures all of the lease negotiations with respect to a new development (or a redevelopment) start in the same place. Of course, depending upon the bargaining power of the potential tenants, the letter of intent generated letter of intent may vary from tenant to tenant. A national or regional tenant may have the bargaining power to dictate the terms of the letter of intent and potentially the lease form. On the other hand, a landlord with a high value retail development will likely drive the letter of intent terms
- A savvy national or regional retail tenant will prefer to draft the initial letter of intent. By controlling the initial letter of intent draft, a retail tenant establishes early the items that are important to its business. Retailers may have varying key business points and a well-drafted letter of intent allows the retailer to an opportunity to exert a degree of control that it might not otherwise have during the lease negotiation. While a landlord might prefer a letter of intent with limited details, retailers often prefer a letter of intent with as much detail as possible, especially if the lease will be negotiated on the landlord’s standard form. A detailed letter of intent is a retail tenant’s first opportunity to share those key material terms that the retail tenant must have to obtain internal deal approval.
- Although most letters of intent are generally meant to be non-binding, there are some circumstances where a letter of intent may be used to impose binding obligations on the parties to the letter of intent. Moreover, courts have used the negotiated terms of a letter of intent as a guide to understand the intent of the parties regarding ambiguous or conflicting lease terms. As a result, letters of intent should be drafted with due attention to the purpose for providing for one and the potential for its future and potential unintended use.

Figure 1

Advantages	Disadvantages
<ul style="list-style-type: none"> • Restrict the other party’s ability to negotiate • Prevent the other party from negotiating with other potential parties • Provide a firm show of interest between parties and are often the first step in proceeding with a full lease negotiation 	<ul style="list-style-type: none"> • Possibility of being interpreted as a final, binding contract. • Restrict your own ability to negotiate • Unintentionally place obligations and liability outside of the four corners of a binding lease agreement

<ul style="list-style-type: none"> • Secure a space for a lease in a competitive leasing market while obtaining financing, negotiating terms • Simplifies some of the negotiations during document drafting phase • Summarizes the key business points agreed to by the parties, which are to be included in the lease • Simplifies negotiations during document drafting phase • Potentially reduce cost and expenses to negotiating a retail lease • Identify “deal breakers” early 	<ul style="list-style-type: none"> • Can be a source of ambiguity if the terms are not clear • Silence as to a particular issue can be negotiated to the advantage of either party • Can provide for terms that are contrary to a negotiated lease form between parties • An additional agreement to be negotiated might add additional time and cost to the process • Could serve as the basis for expectation damages if a deal is not ultimately consummated • Requires the parties to negotiate in good faith to reach a deal even when one or both parties are actively pursuing other deals
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I. Why use a letter of intent

“The shoals that wrecked this deal are common hazards in business negotiations. Letters of intent and agreements in principle often . . . do no more than set the stage for negotiations on details. Sometimes the details can be ironed out; sometimes they can’t . . . Approaching agreement by stages is a valuable method of doing business.”¹ As summarized by the court in *Empro Mfg. Co. v. Ball-Co Mfg., Inc.*, letters of intent can be used to set the stage for lease negotiations by resolving certain key issues up front. **Exhibit A** reflects a standard letter of intent and the material terms that should be included within a letter of intent. The goal of negotiating a letter of intent is not to negotiate a second “shorter” lease agreement, the goal is to negotiate the key terms that can later serve as a basis of obtaining mutual agreement on the key terms between landlord and tenant as well as allow for internal approval if the deals by management of landlord or tenant. It is not uncommon for a typical letter of intent to reflect extensive redlines, marked changes, strike-outs, or hand-written comments as reflected on **Exhibit B**. Lease negotiators have the responsibility of interpreting the final letter of intent into a final lease agreement. That said, a final letter of intent may not always lead to a final acceptable lease agreement. Sometimes, a final lease may be elusive as a result of (i) a change in economic conditions, (ii) introduction of a more attractive deal, (iii) a failure to resolve outstanding economic terms, (iv) a failure to obtain internal approval; or (v) any number of other factors.

A. Landlord’s Perspective

Often times, landlords take one of the following positions with regard to letters of intent in leasing transactions. First, they may elect to not have one at all. Second, if there is a letter of intent, it is often kept short and to the point, to memorialize key business terms and is almost always non-binding. Third, although a letter of intent has been entered into with a tenant, only a separate and internal deal sheet, which is approved by landlord’s real estate committee, is relied upon in drafting and negotiating the lease. In the third case, the deal sheet may or may not include all of the terms in the letter of intent, which may render all or part of the letter of intent useless, depending on the landlord and the circumstances.

From a landlord perspective, many of the fine details are preferably worked out in the lease, and left up to the attorneys negotiating the lease (as opposed to being included in a letter of intent, which may be negotiated without the assistance of attorneys). However, letters of intent are not entirely without utility. It is often helpful to set the stage and expectations of a new tenant working with a letter of intent for the first time. Including provisions such as recurrent charges to be billed as additional rent, operational covenants, and the scope of tenant’s and landlord’s construction obligations, can be quite useful in the shopping center context. Additionally, uncommon and deal specific terms which impact the business deal, such as exclusives, competing use and kiosk restrictions, extended hours of operation and radius clauses should be negotiated at the letter of intent stage, in order to ensure that the parties are on the same page and to avoid protracted negotiations of the lease itself.

¹ *Empro Mfg. Co. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 426 (7th Cir. 1989).

It may also be useful to denote which party will be drafting the lease and on which party's form. Many letter of intent's prefer to use their own lease form and if a tenant is insistent on using its own lease form, it is better to be discussed upfront to avoid battling forms being exchanged after the letter of intent has been agreed upon.

B. Tenant's Perspective

It is not uncommon for a retail tenant (especially a national or regional retail tenant) to provide a 10-20 page very detailed letter of intent that includes most of their key negotiating points beyond your typical rent, co-tenancy, permitted use, exclusive use, CAM, kickout, and other common terms. The letter of intent prepared by a retailer may also include the following items:

- detailed remedies for any potential violation of any rights to be offered to the tenant under the lease (parking ratio, signage, kiosk placement/access to the premises, prohibited uses)
- deletion of common landlord add on expenses (charge backs, construction deposits, plan review or architectural fees)
- deletion of unacceptable clauses (relocation, refund of unamortized allowance upon early termination, radius restriction, required remodel/refresh)

While **Exhibit C** is a depiction of a fairly straight-forward and concise letter of intent, some retailers take the additional step of including their preferred lease language as part of the letter of intent. It is common for the parties to agree to use Landlord's lease form (subject to the bargaining power of the parties). As a result, a retail tenant will seek to use its preferred letter of intent to ensure all of its key terms are properly addressed.

C. When to use a letter of intent

A letter of intent can be extremely helpful for almost any retail leasing deal, but it is typically used when the negotiating parties do not have a conforming deal term sheet or when a confirming e-mail might not be appropriate (such as a one-year renewal lease on the same terms and conditions of the existing lease). The more complex the deal terms or leasing requirements, the more likely the parties should use a negotiated letter of intent to confirm the parties do in fact have a meeting of the minds. In certain cases, however, parties with existing relationships and established lease forms and negotiation processes may use deal confirmations, which can effectively serve as a less formal letter of intent.

D. Key Terms to include in a letter of intent

There are no firm rules regarding which terms should always be included in a letter of intent. **Exhibit A** reflects the common items that you might typically find in a commercial leading letter of intent. But the parties are free to negotiate more or less based upon the circumstances of the deal. Most letters of intent will include some or all of the following material business terms:

- Rent
- Additional Rent
- CAM [Fixed / Annual Increases / NNN]
- Term
- Delivery Date
- Construction Allowance
- Percentage Rent
- Radius Restriction [Remedies]
- Co-Tenancy [Remedies]
- Renewal Options
- First Right of Refusal
- Kickout
- Landlord Work [scope of work]
- Tenant Work [scope of buildout]

If a business has specific leasing requirements (such as operating hours, patio seating, franchisor approval, or parking requirements or limitations), the letter of intent should include a reference to those deal specific requirements. In addition, if either landlord or tenant has specific "deal breakers" they should be included or discussed during the letter of intent phase of the lease negotiation. While the parties may not resolve all open

items with respect to a deal breaker, the parties are establishing up front the items that must be resolved before moving forward to final lease execution. It may also be an ideal time to assess whether going forward with a deal is feasible given the open deal breakers.

E. Pitfalls to using a letter of intent

One of the most important key points regarding a letter of intent is that it is merely a “letter” of “intent.” For the most part, it is generally not a binding contract between the parties (although, as discussed below, a letter of intent LOI can be binding or have some binding elements). The letter of intent is typically the last of the preliminary steps before proceeding to agreeing to open lease negotiations. Depending upon the level of detail and specificity that the parties elect to include within a letter of intent, negotiating a letter of intent could take almost as much time as it will take to negotiate the terms of a full retail lease.

Another common pitfall to negotiating a letter of intent is not fully engaging the entire commercial leasing and business team when making decisions that will impact the business team. If the terms of a commercial lease will involve resource allocation, merchandising, store design and construction, legal, and store operations, these stakeholders should have an opportunity to provide guidance in connection with the negotiation of potential commercial lease terms. When the parties negotiating the letter of intent (e.g. outside brokers, outside counsel, or real estate deal makers) are not familiar with the key terms that are acceptable to the business or if the business requirements change, the signed LOI can be used as leverage against the other party. Similarly, tenant and landlord parties should consider running the terms of a letter of intent by legal counsel. Legal counsel typically has a working knowledge of the key business and legal points that is acceptable to the business.

II. Interpreting a letter of intent

A letter of intent can be written and/or interpreted one of three ways: (1) creating a binding and enforceable contract; (2) creating a duty to negotiate in good faith towards a definitive agreement; or (3) creating a non-binding term sheet.² A court will look to the intent of the parties to determine which document, and its corresponding obligations, the parties intended to create. Often, the intent of the parties can be interpreted by the language contained in the letter of intent and/or by the actions of the parties in reliance on the letter of intent. When preparing a letter of intent, the preparer should use express, unambiguous language to demonstrate the intent of the parties to place the letter of intent into one of these three categories. Additionally, the parties should avoid acting in reliance on a letter of intent.³

1. Creating a binding and enforceable contract

A court may interpret the parties intended to create a binding and enforceable contract. Courts will weigh a variety of factors to determine whether the letter of intent was intended to be a binding contract. These factors include:

- Whether a party expressly reserved the right to be bound only when a written agreement is signed;
- Whether there was any partial performance by one party that the party disclaiming the contract accepted;
- Whether all essential terms of the alleged contract had been agreed upon;
- Whether the complexity or magnitude of the transaction was such that a formal, executed writing would normally be expected;
- Whether the contract is one usually put in writing;
- Whether the price involved is large or small;
- Whether the explicit language used by the parties indicates their intent; and

² 37 Real Prop. Prob. & Tr. J. 509.

³ See *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 785 (Tex. App. 1987).

- Whether there was anything left to negotiate.

In *Knight v. Sharif*, the Fifth Circuit upheld the lower court's decision to grant summary judgment in favor of a buyer on the grounds that no enforceable contract was entered when "[n]umerous material issues were left open by the parties for future negotiation," and further when the parties continually redrafted the letter of intent and contemplated a definitive agreement.⁴ The Fifth Circuit reasoned that, "[c]onditions of final approval, satisfaction of the parties or approval of counsel, as required in the letter of intent, are also strongly persuasive that the parties are not to be bound by the initial letter of intent."⁵

A court may determine that the parties intended to create a binding contract even in the event that certain terms are missing from the agreement. A court may consider a letter of intent to be sufficiently definite when it includes a description of the property/premises, the price to be paid, and time of performance.⁶ If a court determines that the terms of sufficiently definite and the parties intended the letter of intent to be a binding contract, but the letter of intent is missing certain terms of the deals, the court may fill the missing terms with "gap-fillers" by a court.

2. Creating a duty to negotiate in good faith towards a definitive agreement

Some courts may find that a letter of intent creates no more than a duty to negotiate in good faith. In *Feldman v. Allegheny Int'l Inc.*, the Seventh Circuit stated that a letter of intent is "an agreement to negotiate, not a promise that those negotiations would be fruitful."⁷ The duration of time the parties spend negotiating terms and the level of conformity with the terms of the letter of intent are helpful to assess whether the parties have fulfilled this obligation. In *Feldman*, the parties negotiated the terms of the definitive agreement for several months. After those months, the Seventh Circuit believed "[b]oth parties were free to end the arrangement and move on if they felt that discussions were progressing too slowly or they had reached a stalemate and believed they had better prospects elsewhere."⁸ An obligation to negotiate in good faith towards a definitive contract can be created or avoided, as the parties see fit, by express or unambiguous language.

Similarly, in *Teachers Ins. & Annuity Asso. v. Tribune Co.*, the Southern District of New York found that a binding agreement to negotiate in good faith existed when the district court held that the parties intended to create a binding obligation to negotiate towards a definitive agreement when a lender sent a borrower a basic term sheet of a proposed loan, offered the borrower the opportunity to accept, and the borrower accepted.⁹ The court reasoned that the basic term sheet created a binding preliminary commitment that imposed "the obligation to negotiate the open issues in good faith in an attempt to reach the alternate objective within the agreed framework."¹⁰

3. Creating a non-binding term sheet

In order to create a non-binding term sheet, parties should use express unambiguous language to establish that the letter of intent (i) is not a definitive agreement; and (ii) creates no obligation on either party to enter into a definitive agreement or negotiate in good faith towards a definitive agreement. The drafting tips included in Section III will help drafters of letters of intent land their letter of intent into this non-binding term sheet category.

III. Drafting a letter of intent

Whether a letter of intent is enforceable depends on whether the parties to the letter of intent intended to be bound by the terms contained therein. An intent to be bound can be demonstrated by the language of the letter of intent and/or by the actions of the parties in reliance on the letter of intent. Jurisdictions vary on whether intent to be bound should be considered objectively or subjectively. Jurisdictions that adopt the objective approach, such as Ohio and Illinois, will determine the parties' intent as a question of law. Jurisdictions that adopt the subjective approach, such as Michigan, New York, and Texas, will frequently have the question of intent answered by a jury as a question of fact. In order to avoid costly litigation to determine intent, all parties, but particularly parties in subjective jurisdictions,

⁴ 875 F.2d 516, 524 (5th Cir. 1989).

⁵ Id.

⁶ See *Coe v. Chesapeake Expl., L.L.C.*, 695 F.3d 311, 321 (5th Cir. 2012) (holding an agreement to be sufficiently definite when it identified the property to be conveyed, its price, the closing and delivery dates, and the purchaser's interest in the property).

⁷ *Feldman v. Allegheny Int'l, Inc.*, 850 F.2d 1217, 1223 (7th Cir. 1988).

⁸ *Feldman v. Allegheny Int'l, Inc.*, 850 F.2d 1217, 1223 (7th Cir. 1988).

⁹ 670 F. Supp. 491 (S.D.N.Y. 1987).

¹⁰ Id. at 498.

should use express and unambiguous language that sets forth the terms and obligations of the parties to the letter of intent.

1. **Use express language.** Express language that prevents ambiguities about whether the parties intended for the letter of intent to be a binding contract. Express, unambiguous language allows courts to determine the intent of the parties as a matter of law. Further, express, unambiguous language will prevent courts from weighing extrinsic (parol) evidence to determine whether the letter of intent is to create an enforceable, binding contract.

A. *Include an express non-binding clause in your letter of intent to prevent courts from imposing rights and obligations on the parties. For example:*

- "The parties agree that this letter of intent is not intended to create a definitive agreement."
- "Landlord and Tenant hereby acknowledge and agree that this non-binding letter of intent does not address all essential terms and conditions of the transaction and that a binding agreement shall not exist between the parties unless a mutually acceptable lease agreement (the 'Lease') has been executed and delivered to both parties.
- "No Contract. This is not binding and no party shall be entitled to any recourse in the form of damages . . . in the event that there is a failure, for any reason, of the parties to agree on a term or terms and provisions of a Purchase Agreement."¹¹
- "Nothing in this Agreement shall impose any obligation upon the [Parties] to consummate any business transaction with the other or to enter into any discussions or negotiations with respect thereto."

B. *Consider using express disclaimers throughout the letter of intent. For example:*

- "The rights and obligations of each party contained herein is contingent upon the execution of a definitive agreement."
- "This offer is also contingent on the following: . . ."

C. *Include an automatic termination date for the letter of intent.*

- "Expiration. This Letter of Intent, if not accepted, shall expire at 5:00 p.m., []."

2. **Clearly indicate which provisions are binding and which are non-binding.** Generally, letters of intent contain both binding and non-binding provisions.¹² The binding provisions are typically "procedural issues such as confidentiality, exclusivity and terminating the letter of intent."¹³ When drafting a letter of intent, consider whether the following items should be binding or non-binding:

- access rights to the property for the purposes of conducting preliminary due diligence prior to execution of the final agreement;
- confidentiality and non-disclosure;
- exclusive dealing;
- promise of the seller not to make any substantial changes to the property;

¹¹ King's Daughters & Sons Circle No. Two of Greenville v. Delta Reg'l Med. Ctr., 856 So. 2d 600, 607 (Miss. Ct. App. 2003).

¹² Cabot Corp. v. AVX Corp., 863 N.E.2d 503, 513 (Mass. 2007) (determining that an "intention to purchase" was not binding in a letter of intent, but the phrase "agrees to take or pay for a minimum" quantity was a binding obligation).

¹³ 2016-4 RMMLF PROC 4B.

- acknowledgement by both parties that the non-binding provisions are not enforceable; and
- that the binding provisions shall continue to be enforceable until a certain date, if applicable, regardless of whether a final agreement is reached.

“The bottom line is this: If a letter of intent does not lead to a consummated transaction, it is important for the parties to understand and agree in advance on which provisions are binding and which ones are not.”¹⁴ This can be done, or at the very least proven, by using express drafting techniques.

A. *Separate binding provisions from non-binding provisions in sections of your letter of intent. For example:*

- Begin the binding section with language such as, “The parties agree that this provisions of this Section [] shall be binding.” Begin the non-binding section with language such as, “The parties agree that this provisions of this Section [] are non-binding. Prior to the execution of a definitive agreement, the parties may propose different terms than those summarized in this Section [].”

B. *Create a clause that expressly states which sections of your letter of intent are binding. For example:*

- “Except as provided in sections [] through [], both inclusive, this letter shall represent a non-binding letter of intent between the parties.”

C. *Have each party initial each binding provision. For example:*

- “Confidentiality. The material contained herein is confidential. It is intended for the sole use of the Landlord in its decision to lease to Tenant and is not to be copied nor disclosed to any other person.

Landlord Initial _____ Tenant Initial _____”

3. **Expressly create or disclaim a duty to negotiate in good faith.** Depending on the nature of the deal, one or both of the parties may want to obligate the other to negotiate in good faith towards a definitive agreement. A duty to negotiate in good faith should be expressly included or disclaimed. The duty or disclaimer should be included in the binding section of the letter of intent.

IV. **Avoid consideration of extrinsic evidence**

If a letter of intent is unambiguous, “the factfinder must consider all evidence—including all written and oral statements made by anyone involved in the negotiations—in order to ascertain whether or not a binding contract had been formed.”¹⁵ This extrinsic, or parol, evidence can be in the form of oral communications, emails, press releases, and all other communications evidencing intent outside the four corners of the letter of intent. In *Quake Constr., Inc. v. Am. Airlines, Inc.*, the Supreme Court of Illinois affirmed the appellate court’s decision to admit parol evidence to determine the intent of the parties when a letter of intent contained both detailed terms of the agreement, but also referred several times to the execution of a formal agreement.¹⁶ The Court reasoned that the letter of intent was ambiguous, and therefore, parol evidence should be allowed in order to determine the parties’ intent to be bound.

¹⁴ 2016-4 RMMLF PROC 4B.

¹⁵ J. Andrew Holten, Letters of Intent in Corporate Negotiations: Using Hostage Exchanges and Legal Uncertainty to Promote Compliance, Vol. 162, 1237(citing *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 796 (Tex. App. 1987)).

¹⁶ 141 Ill. 2d 281, 284, 152 Ill. Dec. 308, 310, 565 N.E.2d 990, 992 (1990).

1. **Avoid calling a letter of intent a “contract” or “agreement,” instead use terms such as “proposal” and “letter of intent.”** Although courts have found that terms such as “proposal” and “letter of intent” do not preclude the formation of a legally-binding contract, these terms are less likely to be interpreted as such. In *Stand Energy Corp. v. Cinergy Servs.*, the Court of Appeals of Ohio held that a letter of intent was not binding because it included express language that the letter of intent was a “proposed agreement” with a “proposed date” of execution rather than a definitive intent to be bound by the terms contained therein.¹⁷ However, while labels such as “proposal” and “letter of intent” are persuasive evidence that the parties do not intend to be bound by the terms contained therein, these labels are not controlling. In *Teachers Ins. & Annuity Asso. v. Tribune Co.*, the Southern District of New York held that a letter of intent created a binding obligation to negotiate in good faith, in part reasoning that “[l]abels such as ‘letter of intent’ or ‘commitment letter’ are not necessarily controlling although they may be helpful indicators of the parties’ intentions.”¹⁸

2. **Do not issue a press release until a final, definitive agreement is reached.** The intent of the parties can be determined by both the terms of the letter of intent and the actions of the parties. Prior to a final, definitive agreement being reached, parties should avoid outward discussions about the terms of the agreement. In *Texaco, Inc. v. Pennzoil Co.*, while the parties were preparing a final, definitive agreement, each party announced terms of a memorandum of agreement.¹⁹ Thereafter, the board of Texaco withdrew its proposal and Pennzoil demanded the agreement be honored. Based on the parties’ conduct and the language of the press releases, which “as a whole is worded in indicative terms, not in subjunctive or hypothetical ones”²⁰, the Court of Appeals of Texas found that there was sufficient evidence for a jury to find that the parties intended to be bound by the terms of the preliminary agreement.

V. A letter of intent may be introduced as parol evidence after a final, definitive agreement is reached.

There are no parol evidence rules specific to letters of intent, but considering the elements of a parol evidence inquiry is helpful to determine whether courts will admit letters of intent as parol evidence once a final contract is executed. There are a myriad of ways courts apply the parol evidence rule, and so any initial inquiry about the admissibility of letters of intent should start with an analysis of that specific jurisdiction’s formulation of the rule. Some states, like Arizona²¹ and Washington,²² will generally admit letters of intent as evidence to help interpret the final agreement, while other states, like Connecticut,²³ Georgia,²⁴ and New York,²⁵ are generally hostile to admitting such evidence.

Courts all use the same basic rule, that parol evidence is barred when used to alter, vary, or change the terms of a written contract, but admissible when used for interpretation.²⁶ The other commonality is that all courts will try to apply this rule in a way that effectuates the intent of the contracting parties.²⁷ However, there are vast and sometimes contradictory applications of the rule, which can lead to disparate and sometimes incongruous outcomes. Admitting, or barring, parol evidence can depend on whether the parties intended the final agreement to be integrated, whether there is ambiguity in the terms of the contract or the intent of the parties, and whether additional terms are consistent with the final, written contract.

1. The decision to admit letters of intent as parol evidence.

A. Impact of Integration Clauses

Courts agree that in contract disputes, the ultimate goal is to effectuate the intent of the parties.²⁸ This basic contract principle applies to integration. If parties intend for a contract to be fully integrated, parol

¹⁷144 Ohio App. 3d 410, 760 N.E.2d 453 (2001) .

¹⁸ 670 F. Supp. 491, 497 (S.D.N.Y. 1987).

¹⁹ 729 S.W.2d 768 (Tex. App. 1987).

²⁰ *Id.* at 790.

²¹ See *Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 1138 (Ariz. 1993).

²² See *Lopez v. Reynoso*, 118 P.3d 398, 400 (Wash. Ct. App. 2005).

²³ See *Tallmadge Bros. v. Iroquois Gas Transmission Sys., L.P.*, 746 A.2d 1277, 1288 (Conn. 2000).

²⁴ See *First Data Pos. v. Willis*, 546 S.E.2d 781, 794-95 (Ga. 2001).

²⁵ See *W.W.W. Assocs. v. Giancontieri*, 566 N.E.2d 639, 640 (N.Y. 1990).

²⁶ See, e.g., *Masterson v. Sine*, 436 P.2d 561, 226-27 (Cal. 1968); Restatement (Second) of Contracts § 214(c) (Am. Law Inst. 1977).

²⁷ *Masterson v. Sine*, 436 P.2d at 225.

²⁸ *Id.*

evidence will not be allowed.²⁹ But if parties intend for the final contract to be only partially integrated, courts are more likely to admit parol evidence, like a letter of intent, to supplement the terms of the contract.³⁰ While most courts will examine integration as a threshold issue, some will admit parol evidence regardless of integration.³¹

I. Dual Approach to Intent to Integrate the Final contract.

There are two approaches courts take to determine the parties' intent about integration. More conservative courts will only look to the four corners of the final contract,³² while more liberal courts will look to extrinsic evidence to determine whether the parties intended the final contract to be fully integrated.³³

For example, in *Rumsfeld v. Freedom NY, Inc.*,³⁴ the court did not allow parol evidence of an alleged oral side agreement because the terms of the final contract in question were completely integrated. The court relied exclusively on the integration clause in the contract, stating: "[a]lthough our cases recognize that extrinsic evidence may be considered on the issue of integration, we think that such circumstances are extremely limited where there is an integration clause."³⁵ The only exceptions, according to the court, are when a document is obviously incomplete, or the integration clause was included by fraud or mistake.³⁶

Alternatively, the court in *Sylvania Electric Products, Inc. v. United States*³⁷ considered all of the circumstances surrounding the negotiation of a government contract for the installation of long-distance cable communications systems. The plaintiff wanted to include evidence of a conference after the final contract was signed, where it alleged the defendant clarified certain terms in the contract.³⁸ In order to determine if the parties intended the final contract to be fully integrated, the court looked to extrinsic evidence like the nature of the conference, the sophistication of the parties, industry practice, and the parties' subsequent actions after the oral promises at the conference.³⁹ The court found the contract was not fully integrated based on this extrinsic evidence, and thus allowed the oral agreement to be considered in interpreting the final contract.⁴⁰

II. Integration clauses are not always dispositive.

Most modern contracts have standard integration clauses, but courts are split on whether they are dispositive of the integration issue. Most courts recognize that an integration clause creates a strong presumption of full integration, but some are hesitant to give effect to integration clauses when there is contradictory parol evidence, especially when the integration clause is included as a boilerplate provision.⁴¹

Competing examples can be found in *Lopez v. Reynoso*⁴² and *Tallmadge Bros. v. Iroquois Gas Transmission Sys., L.P.*⁴³ In *Lopez*, the court allowed parol evidence of an oral agreement despite an integration clause, finding that the boilerplate language betrayed the true intent of the parties to have additional oral provisions included in the final contract.⁴⁴ The court considered one party's testimony that the contract was incomplete, plus the subsequent conduct of the parties and industry practice, in concluding that the parties did not intend the final contract to be fully integrated.⁴⁵ However, in *Tallmadge*, the court did not consider any parol evidence of prior negotiations, concluding that the boilerplate integration clause in the final contract was the only expression of intent that mattered.⁴⁶

²⁹ See *id.* at 226-27.

³⁰ *Id.*

³¹ See *Zhou v. Ruess*, No. C073405, 2016 LEXIS 6767, at *20-21 (Ct. App. Cal. 2016).

³² See, e.g., *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1328 (Fed. Cir. 2003).

³³ See, e.g., *Sylvania Electric Products, Inc. v. United States*, 458 F.2d 994, 1106 (Ct. Cl. 1972).

³⁴ 329 F.3d 1320 (Fed. Cir. 2003).

³⁵ *Id.* at 1328.

³⁶ *Id.*

³⁷ 458 F.2d 994, 1106 (Ct. Cl. 1972).

³⁸ *Id.* at 1306.

³⁹ *Id.* at 1107-08.

⁴⁰ *Id.* at 1108.

⁴¹ See *Lopez v. Reynoso*, 118 P.3d 398, 403 (Wash. Ct. App. 2005).

⁴² *Id.*

⁴³ *Tallmadge Bros. v. Iroquois Gas Transmission Sys., L.P.*, 746 A.2d 1277, 1288 (Conn. 2000).

⁴⁴ *Lopez v. Reynoso*, 118 P.3d at 403.

⁴⁵ *Id.* at 402.

⁴⁶ *Tallmadge Bros. v. Iroquois Gas Transmission Sys., L.P.*, 746 A.2d at 1291 (relying on a provision that stated: "This Agreement contains the entire and only agreement between the parties and no oral statements or representations or prior written

B. The Role of Ambiguity.

Some courts require contract language to be ambiguous before admitting parol evidence. Parol evidence is only admissible to interpret a contract, and thus, some courts require a showing of ambiguity before they will admit parol evidence.⁴⁷ If the terms of the contract are ambiguous with respect to specific provisions or integration, the court will consider parol evidence. But the definition and application of ambiguity is different in each court. There are generally three ways in which courts view the question of ambiguity: (1) they do not consider ambiguity a threshold issue at all, (2) ambiguity is a threshold issue to be determined by the plain meaning of the contract's terms, and (3) ambiguity is a threshold issue to be determined by whether the terms of the contract are reasonably susceptible to other interpretations.

I. Approach to Ambiguity.

Some courts do not require a showing of ambiguity. These courts subscribe to the notion that language is fallible and thus anything can be ambiguous, and therefore an inquiry into ambiguity is a waste of time. This view was clearly expressed in *Masterson v. Sine*,⁴⁸ a seminal case that liberalized the use of parol evidence. Courts that subscribe to this view skip the ambiguity requirement and focus on other elements of the parol evidence test, like integration and consistency.

On the opposite end of the parol evidence spectrum, courts emphasize the need for ambiguity, looking only to the plain meaning of the terms of the contract.⁴⁹ While "plain meaning" means something different in every court, the underlying principle of fidelity to the written word as the memorial of the parties' intent is the same. In *Tallmadge*, the court uses the plain meaning test to determine ambiguity, as it did to determine the question of integration. However, in this inquiry, they look at the provision at issue in the final contract, which concerned the scope of a general release provision and whether it applied to the construction site as a whole, or only certain parts of the construction site.⁵⁰ Despite evidence that the parties only intended the contract to only cover a specific area, the court turned solely to the words in the contract, which unambiguously covered the entire construction area.⁵¹ Instead of relying on evidence to the contrary, the court held that "language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract."⁵²

Finally, occupying the middle ground are courts that require a showing of ambiguity, but will look outside the contract to determine if the intent or content is ambiguous. This view emphasizes that the ultimate issue is the intent of the parties, and sometimes their intentions can be affected by the circumstances surrounding the formation of the contract. Unlike in *Tallmadge*, the court in *Seiden Assocs. v. ANC Holdings, Inc.*,⁵³ looked at evidence outside the contract, including the interpretations offered by the parties.⁵⁴ The litigation centered on an earned compensation provision and a final fee provision in an employment contract. The two provisions conflicted, and both parties offered differing interpretations. The court determined that both parties' interpretations were reasonable,⁵⁵ and thus allowed extrinsic evidence of a discretionary bonus.

C. The Role of Consistency with the Final Contract.

Another factor courts will consider when weighing the admissibility of parol evidence is consistency. If the terms in a letter of intent contradict the terms of the final contract, a court is less likely to admit it. However, the terms in a letter of intent can be read as consistent with the final contract, the court is more likely to admit it as interpretive evidence, or even as evidence of additional obligations. For example, in *Sylvania Electric Products, Inc. v. United States*,⁵⁶ the court allowed extrinsic evidence after finding that an oral agreement to the terms of the

matter not contained in this instrument shall have any force and effect. This Agreement may only be changed, modified or discharged by an agreement in writing executed by the parties hereto."").

⁴⁷ See, e.g., *id.* 1288; *Seiden Assocs. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992).

⁴⁸ 436 P.2d 561, 226-27 (Cal. 1968).

⁴⁹ See *Tallmadge Bros. v. Iroquois Gas Transmission Sys., L.P.*, 746 A.2d at 1291.

⁵⁰ *Id.* at 1288-89.

⁵¹ *Id.*

⁵² *Id.* at 1289.

⁵³ 959 F.2d 425 (2d Cir. 1992).

⁵⁴ *Id.* at 428.

⁵⁵ *Id.* at 428.

⁵⁶ 458 F.2d 994, 1106 (Ct. Cl. 1972).

contract made after the contract was concluded because the oral agreement was not in conflict with the final contract. Instead, the oral agreement helped define an ambiguous term in the contract.⁵⁷

2. Application – Letters of Intent and Final Contracts

When a final contract is executed, a letter of intent becomes parol evidence for purposes of interpreting the final contract. Courts will apply their version of the parol evidence test to determine the admissibility of the letter of intent, but there are several practical considerations that will make admissibility more or less likely, like clarity of drafting, the presence of an integration clause, and the circumstances of the agreement. Both the drafting of the letter of intent and the drafting of the final agreement can affect the admissibility of the letter of intent.

A recent case out of Delaware, *Ev3, Inc. v. Lesh*,⁵⁸ underscores the importance of drafting in both the letter of intent and the final contract. In *Ev3*, the court applies the parol evidence rule directly to a letter of intent that the defendant wanted to admit to interpret certain provisions in an executed merger agreement. The court ultimately excluded the letter of intent as parol evidence. The final agreement did contain an integration clause that included the letter of intent, but because the letter of intent provision at issue was non-binding, the court ruled it could not come in as parol evidence despite the language in the final agreement's integration clause.⁵⁹ It also focused on the relationship between the letter of intent provision and the final contract, finding that the provision in the letter of intent was inconsistent with the final contract, which had its own integration clause.⁶⁰

Ultimately, the issues in *Ev3* came down to drafting. Clear language, specific integration clauses, and other considerations will help avoid costly litigation about the admissibility of letters of intent as parol evidence.

A. Drafting the Letter of Intent

I. **Clarity is key:** Whether or not they are admissible, courts will often consider letters of intent when trying to interpret the final contract. It is imperative that the letter of intent is clear about how the parties intend it to relate to the final contract. The more express the intentions in the letter of intent, the less likely the court is to substitute its own interpretation of the final contract, or worse, accept the opposing party's interpretation. This clarity is especially important in designing binding and non-binding provisions and in the integration clause.

II. **Integration clauses must be clear and specific:** The letter of intent should include clear language about how the parties intend for it to relate to the final agreement. This can be done by designating binding and non-binding provisions, discussed below, but it can also take the form of an integration clause. The more specific the integration clause is, the more limited it will be to interpreting the provisions in the final agreement.

III. **Binding and non-binding provisions should be clearly delineated:** Being clear about which provisions in the letter of intent are binding and which are non-binding can be determinative of the admissibility of the letter of intent in subsequent litigation and how the letter of intent will be used. This is especially true of provisions that directly relate to or contradict the final agreement.

B. Drafting the Final Contract

I. **Clarity is key:** Clear drafting in the final contract can be the key to avoiding costly litigation about parol evidence, especially when it comes to letters of intent. If the final contract specifically addresses the letter of intent's relationship to the final contract, courts will often defer to that language.

II. **Integration clauses should reference the letter of intent:** Although integration clauses are not guarantees that a letter of intent will be barred as evidence to help interpret a final contract,⁶¹ they can clarify the parties' intent about what the final agreement is meant to include and preclude. Most modern contracts contain boilerplate integration clauses, but the key to successful drafting is to be specific and clear in each

⁵⁷ Id. at 1108.

⁵⁸ 103 A.3d 179 (Del. 2014).

⁵⁹ Id. at 181-82.

⁶⁰ Id. at 189.

⁶¹ See, e.g., *Black v. Evergreen Land Developers*, 450 P.2d 470 (Wash. 1969); *Froines v. Valdez Fisheries Dev. Ass'n*, 75 P.3d 83, 88 (Alaska 2003).

individual contract and sometimes in individual sub-parts of the contract. The more specific and clear each integration clause is, the less likely a letter of intent will be used as evidence.

III. **Be wary of promises made during negotiations:** In weighing whether to allow parol evidence, some courts will look at the circumstances surrounding the final contract to determine intent. The letter of intent can be part of this calculation, for example, to prove the sophistication of the parties or that there was discussion of a particular issue that did not make it into the final contract. To avoid this issue, make sure all provisions in the letter of intent correspond to provisions in the final agreement, making it clear how the parties intend the two documents to work together, or whether one precludes the other.

EXHIBIT A
Form Letter of Intent

LETTER OF INTENT

[Date]

[Tenant Name and Address]

This letter is intended to serve as a Letter of Intent confirming the terms between _____, a(n) _____ ("Landlord") and _____, a(n) _____ ("Tenant") under which Landlord shall lease space to Tenant located in Landlord's building located at _____.

Section I: Non-Binding Provisions

Landlord and Tenant agree ☐

1. **Landlord:**
2. **Tenant:**
3. **Building:**
4. **Premises:** approximately _____ rentable square feet of _____ space, commonly known as Suite _____.
5. **Security Deposit:**
6. **Term:** _____ [months/years]
7. **Delivery Date:** _____, 20__
8. **Commencement Date:** _____, 20__
9. **Base Rent:** \$_____ per rentable square foot

Base Rent shall be as follows, based on the leased space together with ratable share of common area:

Months <input type="checkbox"/> :	_____ per square foot;
Months <input type="checkbox"/> :	_____ per square foot;
Months <input type="checkbox"/> :	_____ per square foot;
Months <input type="checkbox"/> :	_____ per square foot;

10. **Additional Rent:**
 - a. **Utilities:**
 - b. **Taxes:**
 - c. **Insurance:**
11. **Tenant Improvements:**
12. **Landlord Work:**
13. **Right of First Refusal:**
14. **Option to Renew:**

Section II: Binding Provisions

Except as provided in this Section II, this letter shall represent a non-binding letter of intent between the parties.

1. Definitive Agreement. As soon as reasonably possible, Landlord and Tenant shall proceed to negotiate and execute a definitive lease [amendment/agreement] containing the terms and conditions set forth herein and such other terms and conditions, not inconsistent herewith, as are typically included in leases of commercial real estate. Upon execution by the parties hereto that lease shall supersede the obligations set forth in this Letter of Intent.

Non-Binding Obligation:

THIS LETTER OF INTENT DOES NOT CONSTITUTE OR CREATE, AND SHALL NOT BE DEEMED TO CONSTITUTE OR CREATE, ANY LEGALLY BINDING OR ENFORCEABLE OBLIGATION ON THE PART OF EITHER PARTY TO THIS LETTER OF INTENT. NO SUCH OBLIGATION SHALL BE CREATED, EXCEPT BY THE EXECUTION OF A SEPARATE WRITTEN AGREEMENT BETWEEN THE PARTIES REGARDING THE PROPOSED TRANSACTION, AND THEN ONLY IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF SUCH SEPARATE AGREEMENT. NOTWITHSTANDING THE FOREGOING THE CONFIDENTIALITY PROVISIONS SHALL SURVIVE THE TERMINATION OF THIS LETTER.

Landlord Initial _

Tenant Initial _____

2. Expiration. This Letter of Intent, if not accepted, shall expire at 5:00 p.m., [____].

Landlord Initial _

Tenant Initial _____

3. Confidentiality. The material contained herein is confidential. It is intended for the sole use of the Landlord in its decision to lease to Tenant and is not to be copied nor disclosed to any other person.

Landlord Initial _

Tenant Initial _____

4. Exclusive Dealing.

Landlord Initial _

Tenant Initial _____

5. Entire Agreement. This Letter of Intent embodies the entire agreement of the parties and there are no agreements among the parties oral or written affecting the subject matter hereof.

Landlord Initial _

Tenant Initial _____

6. Brokers.

[Signature Page to Follow]

[Landlord]

By: _____

Name: _____

Title: _____

ACCEPTANCE

The undersigned, being the duly authorized representative of Tenant, signs below to evidence the agreement of Tenant to the terms set forth above.

[Tenant]

By: _____

Name: _____

Title: _____

EXHIBIT B

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Re: [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

This letter shall set forth the terms and conditions pursuant to which [REDACTED] will open a store in the above-referenced location. This proposal is subject to the final approval of our real estate committee.

PREMISES: Space #: [REDACTED]
Size: ~~4,686-1,253~~sf
Frontage: ~~No less than 28' 5"~~ Approximately 20 feet, subject to re measurement.

TENANT: [REDACTED] Please provide entity and financials.

LANDLORD: [REDACTED]

USE: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

TERM: Ten (10) years plus a partial year expiring on the January 31 next following the tenth (10th) anniversary of the Commencement Date.

LEASE YEAR: "Lease Year" shall mean the twelve (12) month period beginning on the first day of the month of February first following the Commencement Date and ending on the last day of January, and each subsequent twelve (12) month period. The period from the Commencement Date through the date immediately prior to the first day of the initial Lease Year shall be deemed a "Partial Lease Year."

DELIVERY OF POSSESSION:

~~Delivery of possession of the Premises will not be deemed to have occurred until all of the following conditions have been met:~~

- ~~• Physical possession has actually been delivered with landlord's work completed and ADA compliant~~
- ~~• Landlord and all governmental authorities have approved all of Tenant's plans and construction, including the signs and storefront, with all required permits and approvals issued to Tenant~~
 - ~~• Landlord has removed all asbestos and hazardous materials from the Premises and support systems and received an air quality "closure certificate" from an independent environmental engineer NA as this is new construction.~~

~~The anticipated possession date is [REDACTED] to discuss dates before which Tenant shall have no obligations to accept. The Rental Commencement Date set forth in the Lease shall be extended one (1) day for each day of delay caused by Landlord.~~

~~3. If, subject to Force Majeure and Tenant delay, or Landlord fails to deliver [REDACTED] months after the Anticipated Delivery Date, the Tenant may terminate the Lease upon notice to Landlord, and Landlord shall then promptly reimburse tenant for the preparation of its plans, specifications, and sign drawings, capped at [REDACTED] Fee.~~

LEASE/RENT COMMENCEMENT DATE:

The Commencement Date shall be the earlier of (a) the date Tenant opens for business or (b) [REDACTED] (b) after the last to occur of (i) ~~delivery of the premises from Landlord on a date acceptable to Tenant~~ (ii) the date Landlord approves Tenant's plans, or (iii) the date Tenant receives its building permits, provided the Tenant submits plans to the city by [REDACTED] and to the Landlord by [REDACTED] [REDACTED] Date needs adjusting... No penalties/fees for late opening. In no event shall Tenant be required to open for business between December 26th and February 1st and in the event the Commencement Date would otherwise occur during such period, Tenant shall have the right to either delay the Commencement Date until the first Saturday in February or to open for business during such period and alternative rent.

LANDLORD WORK:

As-is delivery ~~Landlord must demise the location, provide HVAC, stub all utilities, water, sewer, to the back of the space, space must have sprinklers in the space, ceiling height must be confirmed to be 13' or higher, space has sprinklers and a store façade. Space must have a level concrete floor. Landlord has also confirmed that the ceiling height is 13'. All restaurant hoods, walk in freezers and refrigerator's and safes must be removed including jewelry store safes.~~ LANDLORD MUST REPRESENT THAT THE HVAC IS IN SPACE, ALL UTILITIES WATER, SEWER MUST BE STUBBED TO BACK OF SPACE.

Landlord will represent that the Landlord is responsible for hold harmless and indemnification of that and handling obligations for all pre-existing hazardous materials. [REDACTED] will be

responsible only for hazardous materials that we actually introduce to the Premises. Landlord to provide sufficient documentation on hazardous materials to allow us to obtain our permits (any environmental surveys will be at Landlord's expense). [REDACTED] takes the property without responsibility for latent defects.

No other payments, security deposit, architecture or other review fees whether billed by Landlord or its contractors will be paid by [REDACTED]. Security deposit may be required pending review of Tenant's financials. [REDACTED] month security deposit to be held for term of lease. Security deposit will be calculated using Year 1 Min Rent, CAM, and Promo.

Landlord will represent that the Landlord is responsible for hold harmless and indemnification of that and handling obligations for all pre-existing hazardous materials. [REDACTED] will be responsible only for hazardous materials that we actually introduce to the Premises. Landlord to provide sufficient documentation on hazardous materials to allow us to obtain our permits (any environmental surveys will be at Landlord's expense). [REDACTED] takes the property without responsibility for latent defects.

No other payments, security deposit, architecture or other review fees whether billed by Landlord or its contractors will be paid by [REDACTED].

INITIAL PROMOTIONAL CHARGE

(GRAND OPENING ASSESSMENT): \$[REDACTED]/s.f. [REDACTED] psf – One time charge

LEASE TERM: Ten (10) years.

MINIMUM RENT: Year 1: [REDACTED] psf with [REDACTED]% annual increases.

OTHER CHARGES: During the Lease term, Tenant will reimburse Landlord for Tenant's proportionate share (based on total GLA) of the actual cost of the following items [REDACTED]

[REDACTED]:

- Common Area Maintenance/Insurance, not to exceed \$[REDACTED]/s.f. per annum, including insurance, based on X calendar year. On the first day of each January following the expiration of the **second** calendar year Tenant's annual CAM Charge shall be increased by [REDACTED] percent ([REDACTED]%)
- First Year Real Estate Taxes estimated to be \$[REDACTED]/s.f. per annum.
- Marketing Charge, \$[REDACTED]/s.f. per annum with [REDACTED]% increases
- Initial Assessment - None
- Insurance, in CAM
- Fire Detection, \$[REDACTED]/Annually
- Sewer, \$[REDACTED]/Annually
- Central Plant/Tenant HVAC \$[REDACTED] psf

Tenant will not be responsible for any charges other than those set forth herein.

Landlord represents that there are no occupancy charges, other than utilities, payable by Tenant other than those listed above.

~~There shall be no management or administrative fees included in common area maintenance costs.~~

PERCENTAGE RENT: ~~████ (████%) percent of Natural Break Point over \$████ with a █████ (████%) pay rate, per previously negotiated in █████ (████%) of Natural Break point with a █████% pay rate. █████ (████%) percent over a █████ break point.~~

~~GRAND OPENING CHARGE: None See above~~

UTILITIES: Premises shall be separately metered or sub metered by Tenant. Tenant shall pay for its consumption of all utilities direct to the utility company including, but not limited to, electricity, water, sewer, gas and trash.

RELOCATION: Limited to one time during the term to a mutually acceptable location within a relocation zone. All costs to be covered by Landlord. No down time for the tenant. Landlord responsible for the build-out and any associated costs with a temp location. █████ to send █████ a cross hatch area for review.

**MINIMUM SALES/
TERMINATION:**

GROSS SALES KICK-OUT: If Tenant's gross sales are less than \$████ in the third (3rd) lease year of the term (months 25-36), then Tenant shall have the right to terminate the lease upon ~~████ days~~ ████ days written notice of the end of the third lease year. In the event Tenant exercises the right, Tenant shall pay back ~~████ percent~~ ████% percent ~~████%~~ ████% of the unamortized Tenant allowance and ~~No~~ No brokerage commission. (previously negotiated in █████) If Tenant's gross sales are less than \$████ in the third (3rd) lease year of the term, then the Landlord shall have the right to terminate the lease upon █████ days written notice. Such notice shall be given within █████ days of the end of the third lease year. In the event the Landlord exercises the right, Landlord shall pay back █████ percent ~~████%~~ ████% ~~of the unamortized tenant improvements less the TA provided by landlord.~~

SECURITY DEPOSIT: ~~None TBD, subject to a review of financial statements~~ None.

GUARANTOR: TBD
If Landlord wants to review Tenant's financial statements, it will need to execute an NDA.

**ADDITIONAL ANCHOR
STORE CHARGE:**

None

RADIUS RESTRICTION:

~~None~~ ~~_____ miles~~ ~~None~~ ~~_____~~ ~~NONE~~ ~~_____ miles~~
~~through kick out measuring period, _____ mile thereafter.~~

KIOSK:

Landlord will restrict its right to erect kiosks and other structures within _____ (_____) _____ feet of the line parallel to the end wall on the storefront lease line. No Kiosk with competitive product for _____' of lease line. ~~No kiosk with competitive product for _____' of the lease line.~~ The above shall not apply to any kiosk or installation currently existing at the date of this lease. ~~Tenant shall understand that the center court is the seasonal and partnership marketing activation area for activities such as _____ and the _____, etc.~~

TENANT ALLOWANCE:

\$ _____ \$1 _____ f _____ psf (due to adding store front)

**LEASING/CONSULTING
AGREEMENT:**

_____ to provide separate agreement. Years 1-5 _____ % of rent; Years 6-10 _____ % of rent.
To be further discussed. NEEDS ADDRESSING ON CALL.

LOD/AS-BUILTS:

Landlord to provide LOD.

SIGNAGE/STOREFRONT:

Tenant shall have the right to design the premises in accordance with Tenant's unique architectural design in keeping with its then current design program and Landlord's Design Criteria.

ASSIGNMENT:

Tenant shall have the right to assign the lease and/or sublet the Premises.

Landlord will not unreasonably withhold, delay or condition its consent to any assignment of the lease and/or sublease or part or all of the Premises. In addition, Tenant will have the right, without Landlord's consent to (a) a parent, subsidiary, affiliate, division or corporation controlling, controlled by or under common control with Tenant; (b) a successor corporation related to Tenant by merger, consolidation, reorganization or government action; or (c) a purchaser of substantially all of Tenant's tangible property in the Premises, provided that, as of the date of such transfer, the purchaser reasonably has the financial ability to perform the obligation of Tenant under the lease. Any sale or transfer of Tenant's capital stock redemption or issuance of additional stock of any class shall not be deemed an assignment, subletting or any other transfer of the lease or the Premises.

ONGOING CO-TENANCY:

Landlord shall, upon request of Tenant, verify in writing the names and square foot areas of the Anchor Stores, Named Tenants and all other tenants open and operating in the Shopping Center. Tenant shall not be required to operate in the Premises unless (a) tenants occupying [REDACTED] or more of the GLA of the Shopping Center (excluding the Anchor Stores) are open and operating (the "Ongoing Co tenancy Requirement") **OR** (b) less than [REDACTED] [REDACTED] are open and operating. If either (a) or (b) fail then Tenants remedy takes effect. If at any time during the term of the lease the Ongoing Co tenancy Requirement is unsatisfied for a period of at least thirty (30) days, Tenant shall pay as "Substitute Rent" the lesser of (i) Minimum Rent, Percentage Rent and Other Charges, or (ii) in lieu thereof, [REDACTED] percent [REDACTED] (%) of Tenant's gross sales until such date that the Ongoing Co tenancy Requirement has been satisfied ~~for 3 calendar months~~. With respect to the Ongoing Co tenancy Requirement, Landlord may substitute Anchor Stores with "Like Replacements". In the event the Ongoing Co tenancy Requirement remains unsatisfied for a period of [REDACTED] ~~as to a non Anchor Store and [REDACTED] [REDACTED] ([REDACTED]) days as to an Anchor Store~~, Tenant shall have the right to (1) terminate the lease upon [REDACTED] ([REDACTED]) days written notice to the Landlord or (2) revert to full rent and charges. "Like Replacement" shall mean a national, ~~high end~~ specialty or apparel tenant with similar customer demographics and customer profile, selling merchandise of the same type and category, of the same or better quality and at the same price points as that of the tenant it is replacing as operated as of the date of the lease In the event Tenant cancels the lease, Tenant shall not be obligated to reimburse Landlord for any portion of the Tenant Allowance or free rent.

TRADEMARKS:

Landlord shall not use the name or logo of Tenant without Tenant's written approval.

CONFIDENTIALITY:

Both Landlord and Tenant agree to keep the terms of this Letter of Intent confidential.

CHARGEBACKS:

~~Sprinkler shutdown. Tenant shall have the right to install their own barricade and graphics. If not, Tenant shall be billed back at a rate of [REDACTED] per lineal foot. [REDACTED] /sf which shall include, but not limited to construction barricade and graphics (if applicable), temporary electricity, temporary trash, mall tile, sprinkler shutdown fee.~~

NON-BINDING:

The foregoing is intended to be a non-binding outline of proposed Lease terms and conditions and, until such time as the parties execute a formal Lease, is subject to the execution of a formal Lease which is unconditionally delivered by each of the parties. Until such time, neither party shall have any obligations hereunder.

SUBMISSION OF DOCUMENTS:

In order to insure the timely completion of Tenant's plans and specifications and the execution of the leases by the parties, it is imperative that the following documents be provided to Tenant

no later than three (3) weeks following receipt of this Letter of Intent. A delay in the submission of these documents may result in a delay in the opening of Tenant's store.

CONSTRUCTION DOCUMENTS: **Tenant to Provide**

LEGAL DOCUMENTS Address: ~~Tenant~~ ~~Landlord~~ Tenant Landlord to Provide

The foregoing contains a summary of the basic business terms and conditions which will form a part of the lease. Accordingly, this letter is not intended, nor may it be relied upon, to create any legal rights in, obligations upon or binding agreements by either Landlord or Tenant. Except as expressly set forth in the immediately preceding sentence, no rights or obligations of either party hereto to the other shall exist unless and until a lease is fully executed and delivered by the parties hereto.

Please acknowledge that the foregoing represents your understanding of the business agreement for the above-referenced store by executing this letter in duplicate and returning one (1) copy to the undersigned at the address set forth above.

Leases are negotiated in store opening date sequence; however, the Tenant's lease review process will not commence until receipt of an executed copy of this letter.

In the event that a lease is not executed and delivered by the parties hereto as aforesaid within six (6) months from the date hereof, it will be conclusively presumed that the parties hereto have no further intent to negotiate a lease for this location.

We look forward to working with you on this project. If you have any questions, please contact me immediately.

Respectfully yours,

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

cc:

[REDACTED]
[REDACTED]

EXHIBIT C

RE: [REDACTED]

Dear [REDACTED]

Please find below our economic Letter of Intent summarizing [REDACTED]'s basic business terms and conditions for Tenant to lease premises at the above referenced location and which we are prepared to present to [REDACTED] for approval.

- **TENANT TRADE NAME:** [REDACTED]
- **TENANT ENTITY:** [REDACTED]
- **SPACE NUMBER:** [REDACTED]
- **SQUARE FOOTAGE:** Approximately [REDACTED] square feet.
Landlord reserves the right to move the Premises in either direction within forty feet (40') of the location proposed in this Letter of Intent

USE CLAUSE: To be provided by Tenant.

- **TERM OF LEASE:** Approximately 10 years.
- **DELIVERY DATE:** Approximately [REDACTED]
- **FIXED RENTAL COMMENCEMENT DATE:** The earlier of grand opening or [REDACTED]
- **MINIMUM ANNUAL RENTAL:** \$ [REDACTED] per year commencing on the above Lease Commencement Date with [REDACTED] % annual increases.
- **PERCENTAGE RENTAL:** [REDACTED] percent ([REDACTED] %) of Tenant's Gross Sales in excess of the initial breakpoint of \$ [REDACTED] which shall increase each Lease Year during the Term proportionately with the annual increases of the Minimum Rent steps.
- **RENT STABILIZATION:** For any lease year in which Percentage Rental is payable, on the February 1st next following, the Minimum Annual Rental shall be increased by the amount of Percentage Rental payable for the immediately preceding year.
- **OPERATING EXPENSE (CAM):** \$ [REDACTED] /sf initial annual rate, payable monthly, with [REDACTED] % fixed annual increases beginning on the January 1st immediately following the RCD.
- **PROMOTIONAL (MARKETING) CHARGE:** \$ [REDACTED] PSF initial annual rate, payable monthly, with [REDACTED] % fixed annual increases beginning on the January 1st immediately following the RCD.
- **INITIAL PROMOTIONAL CHARGE (GRAND OPENING ASSESSMENT):** \$ [REDACTED] /sf – One time charge
- **TAXES:** \$ [REDACTED] /sf estimated initial annual rate, payable monthly, with Pro-rata annual adjustments beginning on the January 1st immediately following the RCD.

- **FINANCIAL INFORMATION:** Tenant shall provide financial statements for the Tenant Entity and Guarantor (if any) for review by Landlord as a condition to entering into a Lease for the Premises
- **SECURITY:** Cash deposit/Letter of Credit equivalent to [REDACTED] months' Rental, payable with Tenant's executed Lease to be held for Term
- **RADIUS RESTRICTION:** [REDACTED] miles
- **DESIGN MILESTONE DATES:** The following represents milestone dates which Tenant shall use commercially reasonable efforts to maintain based upon expected time frames and are all subject to Landlord and force majeure delays:

SPACE LAYOUT PLAN DUE DATE: A date will be arranged mutually between both parties by the end of [REDACTED]

CONCEPTUAL/SCHEMATIC DESIGN DUE DATE: A date will be arranged mutually between both parties by the end of [REDACTED]
Tenant's plans shall be completed by an experienced retail designer.

- **CONDITION OF PREMISES:** New shell delivery.
- **CONSTRUCTION CHARGES:** \$ [REDACTED] per square foot, including but not limited to, construction barricade and graphics, plan review fee, temporary electricity, temporary trash, mail tile, sprinkler shutdown fee.

CONFIDENTIALITY: THE MATERIAL CONTAINED HEREIN IS CONFIDENTIAL. SUCH MATERIAL IS INTENDED FOR THE SOLE AND EXCLUSIVE USE OF BOTH PARTIES AND IN NO INSTANCE SHALL BE REPRODUCED OR DISCLOSED TO ANY OTHER PERSON AT ANY TIME.

This letter is for discussion purposes only and shall not be binding upon the parties. The only document that will constitute a binding agreement is a lease executed and delivered by the authorized representatives of both parties, which both parties endeavor to execute a mutually agreeable document within 90 days of the mutual signing of this letter. The parties acknowledge that this non-binding letter may not address all essential terms of the lease contemplated by this letter, and that certain terms will be subject to further negotiation. Until a lease has been executed and delivered, this location may be offered to other interested parties. In any event, if not executed by both parties, the terms of this Letter of Intent become null-and-void after 30 days from the date of this letter.

Sincerely,

[REDACTED]

By: _____
 Signed: _____
 Title: _____
 Date: _____
 Phone: _____
 Email: _____

AGREED AND ACCEPTED:

By: [REDACTED]
 Signed: [REDACTED]
 Title: [REDACTED]
 Date: [REDACTED]
 Phone: [REDACTED]
 Email: [REDACTED]

Upon acceptance and execution, please scan and email this document to the email address listed above.