



**Wednesday, October 23, 2019  
3:30 PM – 4:45 PM**

**Seminar 3**

**Leasing Letters of Intent:  
Love 'Em or Leave 'Em**

**Amanda T. Links**  
Unibail-Rodamco-Westfield  
New York, NY

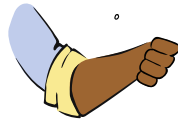
**Karim A. Ali**  
Porter Wright Morris & Arthur LLP  
Columbus, OH

- Advantages and Disadvantages to Using an LOI
- Key Terms to Include in an LOI
- Pitfalls to Using an LOI
- Interpreting an LOI
- Use of an LOI as Extrinsic Evidence
- LOI and Final Lease

- **Letter of Intent:** A non-binding agreement or understanding summarizing key terms that will serve as the basis of negotiating a full lease agreement between landlord and tenant parties.



# Dealmaker's Perspective



[Your Company Logo]

Month Day, Year

[Recipient First Name] [Recipient Last Name]  
[RECIPIENT COMPANY NAME]  
[Recipient Street Address] [Recipient Suite Number]  
[City], [State] [Zip Code]

RE: [PROPERTY STREET ADDRESS] [PROPERTY SUITE NUMBER]  
[PROPERTY CITY] [PROPERTY STATE]

Dear [Recipient First Name]:

We are pleased to present the following proposal to lease the above referenced property on behalf of [Tenant or Person's Name] ("Tenant").

**LOCATION AND SIZE OF PREMISES:** [Street Address], [Suite Number], [City], [State], consisting of approximately [Square Feet Size of Space or Property] square feet.

**TENANT:** [Tenant or Person's Name]

**LEASE TERM:** [Number of Months] months, commencing [Month] [Day], [Year]

**RENT PROVISIONS:** [Dollar Amount] per month on a [Rent Type. For example: Full Service Gross (FSG), Modified Gross (MG), Triple Net (NNN)] basis

**OPERATING EXPENSES:** [Amount of Operating Expenses if Applicable]

**EARLY OCCUPANCY:** [Example: Tenant shall receive immediate occupancy upon signing the lease.]

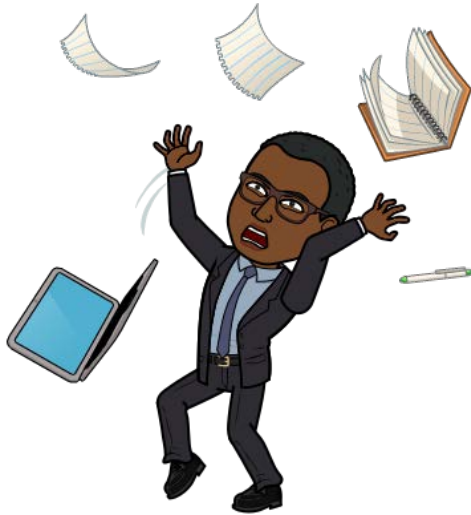
**TENANT IMPROVEMENTS:** Landlord, at Landlord's sole cost and expense shall perform the following tenant improvements: *(List the tenant improvements you'd like below)*

- Example: Clean-up the suite, walls, floors, bathrooms
- Example: Replace ceiling tiles
- Example: Replace any damaged, stained or mismatched electrical/data outlets
- Example: Replace carpet throughout the suite
- Example: Touch-up & repaint any damaged or scuffed walls

**PARKING:** Landlord shall provide Tenant with parking throughout the term of the lease at the cost of [Example \$0.00] per stall.

**ABATED/FREE RENT:** Landlord shall provide Tenant with [Number of Months] months of

# Attorney's Perspective



[Your Company Logo]

Month Day, Year

[Recipient First Name] [Recipient Last Name]  
**[RECIPIENT COMPANY NAME]**  
 [Recipient Street Address] [Recipient Suite Number]  
 [City], [State] [Zip Code]

RE: [PROPERTY STREET ADDRESS] [PROPERTY SUITE NUMBER]  
 [PROPERTY CITY] [PROPERTY STATE]

Dear [Recipient First Name]:

We are pleased to present the following proposal to lease the above referenced property on behalf of [Tenant or Person's Name] ("Tenant").

**LOCATION AND SIZE OF PREMISES:** [Street Address], [Suite Number], [City], [State], consisting of approximately [Square Foot Size of Space or Property] square feet.

**TENANT:** [Tenant or Person's Name]

**LEASE TERM:** [Number of Months] months, commencing [Month] 1, 20[Year].

**RENT PROVISIONS:** [Dollar Amount] per month on a [Rent Type. For example: Full Service Gross (FSG), Modified Gross (MG), Triple Net (NNN)] basis.

**OPERATING EXPENSES:** [Amount of Operating Expenses if Applicable]

**EARLY OCCUPANCY:** [Example: Tenant shall receive immediate occupancy of the premises on [Date] of the lease.]

**TENANT IMPROVEMENTS:** Landlord, at Landlord's sole cost and expense shall provide the following tenant improvements: (List the tenant improvements like below)

- Example: Clean-up the suite, walls, floors
- Example: Replace ceiling tiles
- Example: Replace any damaged, stained or discolored carpet, electrical outlets
- Example: Replace carpet throughout the suite
- Example: Touch-up & repaint any damaged or scuffed walls

**PARKING:** Landlord shall provide Tenant with parking throughout the term of the lease at the cost of [Example \$0.00] per stall.

**ABATED/FREE RENT:** Landlord shall provide Tenant with [Number of Months] months of



- **Hypothetical #1:**
  - ABC Cinemas owns and operates a prominent movie theater chain in the Midwest. Green Development Group that specializes in the development of commercial properties in the Midwest.

- **Hypothetical #1:**
  - In April of 2002, ABC contacted Green about a proposal to build and lease a theater complex at Town Center Pointe. In September of 2002, Green agreed to add a theater complex to its existing plans for the Town Center Pointe Project and at ABC's request, Green amended its site plan filed with the city to include a theater complex. Green also purchased an additional fifteen acres of land to incorporate the theater into the Town Center Pointe Project. In November of 2002, Green and ABC entered into an LOI detailing the construction and lease of the theater at Town Center Pointe.

- **Hypothetical #1:**
  - “The purpose of this letter is to express the intent of Lessor to earnestly investigate and work in good faith toward an agreement whereby the Lessor would lease to Lessee the property described herein upon the terms detailed below. Although this letter is binding on the parties as to terms herein detailed, should the transaction contemplated not occur, this shall not be construed as either a lease agreement or an option to lease. As soon as this Letter of Intent is fully executed by both parties, we will proceed to draw up the Lease in accordance with the Letter of Intent.”



- **Hypothetical #1:**

- In cover email accompanying the LOI, ABC's CEO noted that the parties were in agreement to conform the lease at Town Center Pointe to the recent agreement at Thomas Pointe and that subject to approval by ABC's board, they wanted to get this deal signed quickly.

- **Hypothetical #1:**
  - By January of 2003, no lease between the parties had been executed and Green reached out to ABC stressing the urgency to get the lease executed. The parties continued negotiations in February and March, during which time Green started looking for replacement companies to lease the theater at Town Center Point.

- **Hypothetical #1:**
  - At the end of March, ABC informed Green that it no longer intended to lease the theater at Town Center Point because its Board of Directors had rejected the lease. In August of 2003, Green signed an agreement with XYZ Theaters for the construction and lease of the theater complex at Town Center Point. Shortly after signing the lease with XYZ, Green filed suit against ABC alleging breach of contract.

- **Hypothetical #1:**

- Do you think the court would consider the LOI to be a binding contract?



- **Hypothetical #1:**
  - In 168th & Dodge, Ltd. Partnership v. Rave Reviews Cinemas, Ltd. Liab. Co., the 8<sup>th</sup> Circuit Court of Appeals held that the LOI could not be considered a binding contract because it expressly stated that it was not to be interpreted to be a binding agreement.

- **Hypothetical #1 Take Away:**
  - Always include non-binding language in your LOIs to avoid the agreement from being deemed a contract, especially if the LOI is executed by one or both of the parties.

- **Hypothetical #2:**

- Goodbrews is an international coffee chain. Harry Hopeful is a developer and owner of several regional strip malls. Goodbrews and Hopeful were in talks to bring a Goodbrews in as an anchor tenant at Hopeful's newest development.
- As part of the deal, Hopeful would build a new building, at his cost, specifically designed for a Goodbrews location and in accordance with Goodbrews' specifications.

- **Hypothetical #2:**
  - Shortly thereafter, Goodbrews and Hopeful entered into a LOI, which included the following provision:
    - “This Letter of Intent will be superseded by, and the parties will only be bound by, the terms of a written lease agreement, in form and substance satisfactory to both parties, which has been fully executed and delivered by the parties.”

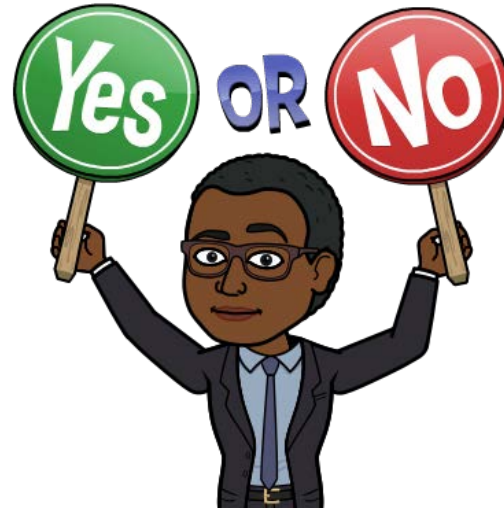


- **Hypothetical #2:**
  - Hopeful started construction of the building without a signed lease at the insistence of Goodbrews, who represented that it was not in their business model to back out of a deal.
  - Goodbrews oversaw the construction of the building, including giving input on the design of the building.

- **Hypothetical #2:**
  - After the building was completed, in accordance with Goodbrews' specifications, Goodbrews informed Hopeful that it would not sign a lease and would not be moving into the center. Hopeful was unable to lease the building to any other tenant and sued Goodbrews for breach of contract.

- **Hypothetical #2:**

- Do you think the court would consider the LOI to be a binding contract?



- **Hypothetical #2:**

- In *McCarthy Gilroy. Ltd. Liab. Co. v. Starbucks Corp.* a California District court held that the LOI was not a binding contract. The court found determinative the LOI's language stating the parties would not be bound. The court however left open the Landlord's promissory estoppel claim.

- **Hypothetical #2 Take Away:**
  - Always include non-binding language in the LOI. Because the LOI often times satisfies the Statute of Frauds requirements, without non-binding language, you may fall into the trap of the LOI being construed as a valid binding contract. More importantly, don't start construction without a signed lease.

- **Hypothetical #3:**

- Luxury Home is a high-end luxury retailer with stores throughout the globe. Smithtown is a real estate developer and owns malls throughout the Northeast. In November, Smithtown reached out to Luxury Home regarding leasing a space at its new mall at Pinebrook Place.

- **Hypothetical #3:**

- In December, Smithtown sent Luxury Home a signed LOI, which set forth the lease terms and included the following provision:
  - “To induce the Luxury Home to proceed with the leasing of the store, Smithtown will withdraw the store from the rental market, and only negotiate the above described leasing transaction to completion. Please acknowledge your intent to proceed with the leasing of the store under the above terms, conditions and understanding by signing the enclosed copy of the letter and returning it to the undersigned within ten (10) days from the date hereof.”

- **Hypothetical #3:**
  - At the request of Smithtown, so it could secure financing from its lender, Luxury Home returned a fully executed LOI to Smithtown. A draft lease was sent by Smithtown to Luxury Home one week later, and shortly thereafter, Smithtown and Luxury Home had a call to discuss comments to the lease.



- **Hypothetical #3:**
  - During this time, Smithtown also began discussions with Smartbuys, a competitor of Luxury Home, to lease the same store. The next week, Smithtown notified Luxury Home that all negotiations between Smithtown and Luxury Home were terminated and the next day, Smithtown signed a lease with Smartbuys for the store. Luxury Home brought action against Smithtown for breach of contract.

- **Hypothetical #3:**
  - Do you think the court would consider the LOI to be a binding contract?



- **Hypothetical #3:**
  - In Channel Home Ctrs., Div. of Grace Retail Corp. v. Grossman, the 3<sup>rd</sup> Circuit Court of Appeals held that LOI was in fact a binding contract and that manifested a mutual intent for the parties to negotiate in good faith. The court also found that Landlord's promise to withdraw the space from the rental market and to negotiate solely with Tenant was sufficiently definite as to be enforceable. Consideration existed because the LOI enabled Landlord to secure funding from third parties and helped Tenant solidify its bargaining position.

- **Hypothetical #3 Take Away:**
  - LOIs may be construed as an agreement to negotiate in good faith, even in the absence of monetary consideration. To avoid falling into this pitfall, make sure that your LOI contains non-binding language.

- Advantages to Using an LOI
  - Restrict a party's ability to negotiate key terms during the lease negotiation process
  - Limit a party's ability to negotiate with other parties
  - Demonstrate interest in making deal
  - Summarize key business terms

- Advantages to Using an LOI
  - Streamline lease negotiation process
  - Potentially reduce cost and expenses in connection with negotiating a retail lease
  - Identify “deal breakers” early
  - Allows parties to negotiate in phases
  - Allows parties to demonstrate the intent of a specific negotiated term in a final lease agreement

- Disadvantages to Using an LOI
  - Inadvertently creating binding obligations between parties
  - Restrict ability to negotiate terms
  - If the deal maker and the lease negotiating team (or business priorities) are not aligned, an LOI could lead to internal business conflicts

- Disadvantages to Using an LOI
  - Allows a party to use the absence of a term (or the existence of a strike out) to demonstrate the intent of a specific negotiated term that may not have been contemplated during the LOI stage
  - Can be used to provide evidence that is contrary to the final lease agreement



- Disadvantages to Using an LOI
  - Can potentially add significant costs to a lease negotiation
  - Could serve as the basis for a claim for expectation damages
  - Could require the parties to negotiate in good faith to pursue a final lease deal even though either party might be actively pursuing other options



- Leasing LOIs
  - Landlord's Perspective
  - Tenant Perspective

- Key Terms to Include in an LOI
  - Rent
  - Additional Rent
  - CAM [Fixed/NNN]
  - Term
  - Delivery Date

- Key Terms to Include in an LOI
  - Co-Tenancy
  - Renewal Options
  - Exclusive
  - Kickout
  - Landlord's Work [Scope of Work]
  - Tenant Work

- Interpreting a Letter of Intent
  - Creating a binding and enforceable contract
  - Creating a duty to negotiate in good faith towards a definitive agreement
  - Creating a non-binding term sheet

- Factors a court will consider to determine whether an LOI is a binding and enforceable contract
  - Express language of the LOI
  - Essential Terms
  - Partial Performance

- Creating an Enforceable Duty to Negotiate
  - Feldman v. Allegheny Int’l Inc.
  - Teachers Ins. & Annuity Assoc. v. Tribune

- **Creating a Non-Binding Term Sheet**
  - Use express and unambiguous language to establish there is no definitive agreement and no obligation to negotiate in good faith towards an definitive agreement.



- **Creating a Non-Binding Term Sheet**
  - Clearly indicate which provisions are binding and nonbinding
    - Separate binding and non-binding provisions
    - Expressly state which provisions are binding
    - Have each party initial each binding section
    - Expressly disclaim or create any duty to negotiate in good faith

- Extrinsic Evidence
  - An LOI may be introduced as parol evidence after a final lease agreement is executed
    - Resolve ambiguity
    - Reach intent of the parties
  - Integration clauses are not a silver bullet

- Lease drafting notes when using LOIs
  - Use clarity
  - Integration clauses should expressly incorporate the LOI
  - Expressly disclaim all prior LOIs, lease negotiations, promises, and correspondence

# Many Thanks!



# Many Thanks!





**Make Your Voice Heard,  
Complete the Session-Specific Surveys!  
[survey.icsc.com/2019LCW?session=76597](https://survey.icsc.com/2019LCW?session=76597)**

**WiFi**

**Network: ICSC Law Conference**

**Password: 2019ICSC**