

LETTERS OF CREDIT AS LEASE SECURITY – IN A NUTSHELL

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I. Some background.

Lease security can be in the form of cash deposit, certificate of deposit, joint signature bank accounts, securities. In some jurisdictions cash and equivalents must be held in a separately identified account, as trust funds, the property of the tenant, in a manner so that it is not treated as landlord's property in case of bankruptcy of or lien against landlord.

At some point tenants found that they could borrow more cheaply from their banks if they delivered only a Letter of Credit (hereinafter called a "Credit"), since there was no actual payment by the bank until the beneficiary asked for the proceeds, although of course this was a function of the financial credit of the tenant and the bank might require substantial collateral..

But Credits started to become more common. Using the terminology of UCC Article 5, the "applicant," the tenant, asks its bank as "issuer" to issue a Credit running to the benefit of the landlord "beneficiary."

II. Law and practice.

In the USA, Uniform Commercial Code Article 5 governs Credits. Article 5 permits (5-103(c)) most of the provisions of the Article to be varied by agreement including incorporation by reference. Many Credits state that they are governed by UCP600 or ISP98, which refer to (a) UCP600 is Uniform Customs and Practice for Documentary Credits published by the International Chamber of Commerce, 2007 revision, ICC Publication No. 600, or (b) ISP98 is International Standby Practices (endorsed by the ICC which designates it ICC Publication No.590) governing **standby letters of credit** which are those used in lease security deposit transactions.

For an ordinary lease security Credit, if the bank issuer insists on subjecting it to one of UCP600 or ISP98, there are not many especially notable provisions that will affect your handling of the Credit, and none that will have any effect 98% of the times you accept one. One interesting provision of UCP600 is that if the Credit expiration date (the last day to submit it to the bank for payment, a "presentation") occurs when the issuer is closed due to some force majeure event the expiration date is not (!) extended; if you are the beneficiary you are out of luck. Since it is not an invariable provision it can be changed by landlord requiring that the Credit provide otherwise. ISP98 does provide for an automatic 30 day extension in that situation.

The other main provision affecting all Credits is the longest time which the issuer can use before it accepts ("honors") or rejects the presentation, which is: UCC--most states are 7 business days; UCP600--5 banking days; and ISP98--7 business days; this time frame may be changed by the parties in the body of the Credit, either reduced or increased [see the Freddie Mac form attached hereto as exhibit 2] . If a presentation is dishonored (that is, refused) by the bank issuer, it must at once upon the determination return the documents or inform beneficiary that it is holding them for further instructions

from beneficiary, so you will find out quickly and receive your submitted documents back.

Two standard rules: if a Credit does not specify otherwise it is not revocable and it is not transferable. You must specify transferable or revocable in your Credit if you want them to apply, although why anyone would want the Credits revocable is difficult to imagine. Just one more note, there is no formal form of Credit, it could be literally a letter, on letterhead of the bank, it need not be on special paper difficult to alter.

III. Some drafting thoughts.

Usual rule number one, KISS. Keep it simple. Recall the name of UCP600, Customs and Practice for Documentary Credits. Credits that call for documents. As you can see from the sample forms attached, the typical Credit says the issuer bank will pay upon receipt of certain documents. In classical Credits, a seller overseas would deliver some shipping or bonded warehouse documentary receipt showing that it had delivered a product and based on that it was entitled to be paid. In lease security standby Credits the usual format was that upon delivery of specified documents the bank would pay the landlord, the documents usually being something like a statement by landlord that tenant defaulted and notice was given and a certain number of days had elapsed and therefore landlord wanted the security converted to cash so it could pay itself back as if it had been holding cash security.

The danger to landlord is in making those documentary requirements too complex. The result would be that, for one example, when the time came it was often troubling to have a requirement (remember, these requirements are totally in the discretion of the parties when they prepare the Credit, or at least when they agree to the lease

provision describing the form of the Credit) of an affidavit in which landlord was required to swear that tenant was in default when tenant denied the default. Many defaults are in the gray area, which is why so many attorneys spend a lot of their practice in litigation involving these disputes. Also note that under UCC 5-110, presentation by the beneficiary is its warranty that the drawing does not violate any agreement between beneficiary and applicant – which would be the Lease, which is probably quite close to the same result as a landlord's affidavit regardless of the Credit language itself.

Some argue, with some validity we believe, that the Credit is in lieu of cash, so landlord should not be any worse off than if it was holding cash, in this context. Accordingly, why should there be any documentary requirements. Just an instruction to the bank, or a sight draft (a draft payable at sight, see exhibit 3 hereto), is all landlord need submit. Then it holds the proceeds as a cash security deposit and if there was a default that triggered the drawing it takes the portion it would be entitled to under the Lease if the security deposit had originally been cash.

If landlord cannot get agreement to a nondocumentary presentation, keep the certificates simple. Even though it is just a proof reading job, if the wording is different on your document from what the Credit requires you may not get paid. For this reason, when using words describing what the document must say, you can use modifiers such as substantially as follows, or to the effect that. Then if you can correctly copy you will be paid, but failing that (a sadly commonplace failing) you may nonetheless be paid if close enough to satisfy the bank. Of course if you have sufficient time you can try again to correct your failure; under UCC 5-108 the issuer

must advise of deficiencies by specifying them within the time available for review or else it waives its objections.

Be careful of the identity of the person designated as required to sign a document. If you require a document signed by an LLC manager, and then convert to a corporation, how do you comply; if you require signing by a named person and she is in some desolate wilderness for 2 weeks, how do you comply; require signing by the managing agent and you no longer have a managing agent, what then? You must keep things such as titles and identities very general. If you require signing by a named person who has died you probably cannot draw on that Credit under any circumstance without consent of the tenant applicant, who is probably not in an accommodating frame of mind when you are trying to grab the proceeds of its Credit.

Allow partial drawings. This permits a draw while the balance remains in Credit form, so that if there are bankruptcy benefits to having a Credit over cash they are preserved for the balance instead of converting all to cash. Look into the right to make presentation by fax or email without ever needing to deliver originals, but be sure you understand the bank's procedures. Credits are not negotiable instruments and the issues involved with a lost note do not really confront the bank, therefore why should it refuse to permit the named beneficiary to request draws without delivering the original Credit, or by faxed request to pay by wire to a specified account in beneficiary's name or by check to its order? If the Credit is large enough in amount try to get a convenient location for presentation, so that someone can make a presentation of the original Credit in person without risk of loss by mail or delivery service (yes, the overnight deliverers loses a few packages, or certainly misdelivers them which is unfortunate if your expiration date is fast approaching).

Make sure the Credit is transferable, it must so state since the default format is non-transferability, so that landlord can transfer to a purchaser of the property, or lender, and that any charges are specified as being a manageable amount (which your Lease might require tenant to reimburse) or are payable in the first instance by Applicant/tenant.

So called evergreen Credits are very typical. These provide that they automatically renew (like an evergreen tree) every year until issuer advises that they are being terminated; the lease and Credit should provide that non-replacement within a certain period prior to the newly established expiration date is grounds immediately to draw the full amount of the Credit. The notice is usually 30 days but that may be snug, by the time your client focuses on it, you get out the presentation documents, send them, find 7 days later there's a problem and need to resolve it, you could be bumping up against the end of the 30 days; 60 days is better and often possible to get.

And provide in your Lease that if the Credit expires by slipping through the cracks, tenant must replace it within a short time period or is considered in default.

Finally, there is an issue recently arisen, the credit of the issuer bank. Some suggest a provision in your lease that if the rating agencies, Moody's, S&P, Fitch, reduce the bank issuer's rating below some floor then landlord can require a new bank or else it can draw the proceeds. One tenant issue is whether it is realistic to believe a tenant can go to a totally strange bank and obtain approval of a letter of credit application in a short time frame; another is to whether any bank today is sound, plus the unavoidable time lag between deterioration of actual soundness and when the raters re-rate the bank down. But, the question is definitely out there lately.

IV. Bankruptcy.

Just a few comments. The "independence principle" (expressed in UCC 5-103) is that a Credit is a direct agreement between issuer bank and beneficiary landlord and independent of the underlying contract of beneficiary with applicant (the Lease), and so the bankruptcy of tenant should not intrude. For this reason many have suggested that Credits are the preferred form of security, despite the administrative burden versus a simple cash deposit, such as keeping physical custody of the letter of credit itself, keeping track of the expiration date, issuer creditworthiness, failed document presentation.

The two main benefits of Credits are (i) avoiding the automatic stay of the Bankruptcy Code which forbids landlord's drawing of cash security after tenant files for bankruptcy without bankruptcy court approval, which can often take a long time, and (ii) perhaps avoiding (or at least seeking to avoid) the cap on damages for lease defaults. The "cap" limits the amount of damages allowed to a landlord in bankruptcy to one year's rent or 15% of the remaining rent up to 3 years' rent. But there was an instance in which the bankruptcy estate obtained an injunction against beneficiary making a draw and when this was violated the beneficiary was ordered to repay the money to the estate (In re Texas Commercial Energy LLC, 2007 U.S. Dist LEXIS 49678 (S.D. Tex. 7/10/07), though the Credit had been issued after the bankruptcy and efforts to enjoin drawing on Credits are almost unique and are harshly criticized by observers when granted. There are, however, several cases which hold that a Credit is subject to the cap on damages (e.g. In re Mayan Networks Corp. 306 B.R. 295 (BAP 9th Cir. 2004)). And one case decided the cap question based on whether the tenant posted collateral with the bank-issuer to secure issuance of the credit, so that landlord's drawing and resulting bank seizure of the collateral it was holding which was property of the bankrupt being taken by the bank and

thereby reducing the estate, but most other cases do not focus on this issue despite similar facts. And in one case, landlord drew on its Credit, never filed a proof of claim in the bankruptcy proceeding since the draw covered its claims, and the court found that it had no jurisdiction to apply the cap on damages without the landlord filing a proof of loss (in some situations under the Bankruptcy Code parties other than landlord can file a proof of loss claim on behalf of landlord, so even this non-filing may not always be a total solution).

Currently the ideal method seems to be a third party guaranty of the lease backed by a Credit from guarantor (never tenant) in the amount landlord seeks as security deposit, with the any excess Credit proceeds being returnable only to guarantor, not tenant, if and when they are to be returned (for example, drawing the full amount but lease damages being a lesser amount). This should have the ideal results of avoiding the cap on damages entirely and avoiding all bankruptcy proceeding involvement.

As with most bankruptcy discussions, the bottom line may be that the law is ever moving, with circuit splits, many bankruptcy court level decisions, and little coherence. One must be very cautious handling a letter of credit security deposit once notice of commencement of a bankruptcy case is received. But as long as the security is less than one year's rent, which is the vast majority of deposits, the cap on damages limiting the Credit does not arise, and there is not really serious dispute at this time about being able to make presentation and draw the proceeds without court approval.

The biggest danger remaining is bank solvency. This issue will no doubt (hopefully, in any event) ultimately pass, as it did during Resolution Trust and other times of banking stress, but the advantage of some kind of early warning trigger requiring

tenant to replace the Credit before the bank has actually failed will allow landlord to draw on the Credit while the bank is still in business.

V. The Lease

Remember, your lease must be in good form when it is signed. Afterthoughts are too late.

You must review the letter of credit language as well as the security deposit language, default damages language and rights to apply security. The security clause needs to allow drawing on the security swiftly after default in rent in order to try to accomplish it before a tenant slipping into bankruptcy can file and the automatic stay turns the arrears into a pre-filing claim; try to avoid limiting the withdrawal until after notice and expiration of grace periods, or worse, until a judgment in landlord-tenant court is entered.

You must review your letter of credit provision for the kinds of things discussed above, and re-review it often for your new leases.

You must review your damages after default and bankruptcy proceeding damages provisions.

Finally, you must keep your perspective. Most small tenants do not vanish via bankruptcy, they just vanish. They leave the week after Christmas, or whenever their current season ends, and are seen no more. The security is retained and the issues discussed above do not come up. You send in your Credit and the bank sends back the check, so the basic Credit considerations outside of bankruptcy are the most important. Even when they do commence a bankruptcy proceeding, very few tenants deposit more than a year's rent as security so the cap on damages from security is not then an issue, and

cash security is treated as if landlord was a secured creditor as to it and so recovery is pretty much a foregone conclusion – but could be very slow in being concluded since the automatic stay bars the withdrawal without court approval but does not itself impair the ultimate recovery. Accordingly the difference between cash and Credit is often not a fatal difference, more like a convenience one, unless it is a major tenant of your property.

A footnote. An excellent article on Credits in leasing generally can be found on the RPTE website under Probate & Property archived articles, July-August 2002 and November-December 2002 [2 part article], **Letters of Credit in Lease Transactions**, By Susan Fowler McNally, Carter Klein, and Michael Abrams. It is a bit dated as to bankruptcy – for a recent discussion one could refer to Letters of Credit as Landlord's Protection Against a Tenant's Bankruptcy, by Alan N. Resnick in The American Bankruptcy Law Journal, Vol. 82, Issue 3, 2008, a nice long exposition of a very few of the later cases.

Richard M. Frome

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EXHIBITS

1. Sample clause for a lease concerning letter of credit as security.
2. Freddie Mac form of letter of credit they require.
3. Freddie Mac sight draft form.
4. Another sample letter of credit.
5. Sample of notice from bank cancelling evergreen letter of credit and supplemental notice withdrawing the cancellation.

1. Sample clause for a lease

(B) Simultaneously with the execution of this Lease, in lieu of the cash deposit described in the preceding paragraph (A), Tenant may deliver to Landlord an unconditional, irrevocable, transferable letter of credit ("Credit") in the amount of the Deposit required thereunder as security, subject to the following terms and conditions. Such Credit shall (a) be in form and substance reasonably satisfactory to Landlord; (b) at all times in the amount of the Deposit, and if at any time and for any reason the amount able to be drawn by Landlord under the Credit is less than the amount of the Deposit, Tenant shall, within 20 business days thereafter, cause the amount able to be drawn by Landlord to be increased to the amount of the Deposit; (c) be issued by a commercial bank reasonably acceptable to Landlord and located in, or able to be drawn by delivery to an office in _____; (d) be transferable at no charge by Landlord to any successor to Landlord's interest under the Lease, or its mortgagee, or agent of either;; (e) be payable at sight upon presentment to the issuer of Landlord's sight draft; (f) not expire sooner than one year from issuance; and (g) at least thirty (30) days prior to the then

current expiration date of such letter of credit, shall be replaced, renewed, or automatically extended from time to time through the 120th day after the expiration of the term. If beneficiary of the Credit transfers the Credit, transferor shall be released from all liability for the return thereof. If the Credit is not replaced or renewed within the time period specified above, then Landlord shall have the right to immediately draw upon the entire amount of the Credit. Any amounts drawn under the Credit shall be held by Landlord as cash security pursuant to the preceding Section [until the Credit is replaced, or perhaps no right to replace once it fails to maintain it as required?]. The Credit shall provide that upon issuer's receipt of an affidavit of a representative of Borrower as to the loss, theft, destruction or mutilation of the Credit and an agreement of indemnity from Beneficiary all in form and substance reasonably satisfactory to issuer, issuer will issue a replacement Credit in the same face amount thereof and otherwise of like tenor.

Each Credit shall be issued by a commercial bank that has a long term credit rating of at least A (or equivalent) by Moody's Investor Service, Inc., or Standard & Poor's Corporation or Fitch Inc. (a "Satisfactory Credit Rating"), and shall be otherwise acceptable to Landlord in its reasonable discretion. If the issuer's credit rating is or subsequently falls below a Satisfactory Credit Rating, then Landlord shall have the right to require that Tenant obtain from a different issuer a substitute letter of credit that complies in all respects with the requirements of this Section, and Tenant's failure to obtain such substitute letter of credit within 90 business days following Landlord's written demand therefor shall entitle Landlord to immediately draw upon the then existing Credit and hold such proceeds as provided above. In the event the issuer of any Credit is placed into receivership or conservatorship by the Federal Deposit Insurance Corporation, or any successor or similar entity, then, effective as of the date such receivership or conservatorship occurs, said letter of credit shall be deemed to not meet the requirements of this Section, and, within ten (10) business days thereafter, Tenant shall replace such letter of credit with cash equal to the deposit or other collateral acceptable to Landlord in its reasonable discretion. Except as otherwise expressly set forth in this Lease, Landlord may draw upon the Credit upon default by Tenant in

payment of basic rent but only to the extent of the unpaid basic rent at a time when Landlord, based on information in the public domain or credit report or news article, believes there is a possibility that Tenant may become debtor in a proceeding under the Bankruptcy Code within the following 12 months.

[note, not all banks, much less all tenants, will agree to all elements of this provision].

2. Freddie Mac form of Credit they require

FREDDIE MAC FORM OF LETTER OF CREDIT

(REVISION DATE 01-30-08)

[ISSUER'S LETTERHEAD]

IRREVOCABLE, UNCONDITIONAL STANDBY LETTER OF CREDIT

NO. _____

_____, 2 _____

Freddie Mac Loan No. _____

Federal Home Loan Mortgage Corporation

Attention: _____

Regional Managing Director [*for Early Rate Lock Application*]

Director, Portfolio Services [*for Rental Achievement Agreement or
Escrow Agreement*]

Director, Affordable Housing [*for Forward Commitment*]

Dear Sir or Madam:

For the account of _____ [*insert name of account
party/customer*] ("Account Party"), we ("Bank") hereby establish in favor of the Federal
Home Loan Mortgage Corporation ("Freddie Mac") our Irrevocable Standby Letter of
Credit No. _____ ("Credit") in an aggregate stated amount of
\$ _____ ("Stated Amount").

The Bank has been requested by the Account Party to issue this Credit in connection with
that certain [*insert reason for issuance of letter of credit*]

[loan to be made by _____ (*insert name of Seller/Servicer*)
to the Account Party and intended to be purchased by Freddie Mac pursuant to the terms
and conditions of that certain early rate-lock application dated as of _____
from _____ (*insert name of Seller/Servicer*).]

OR

[Rental Achievement Agreement] **or** [Escrow Agreement] dated as of

_____ by and between _____ [*insert name of Borrower*]

and _____ [*insert name of Seller/Servicer*] and assigned to Freddie Mac.]

OR

[Forward Commitment issued by Freddie Mac.]

The Stated Amount must be available for drawing by Freddie Mac as set forth below. This Credit must expire at ___ p.m. local time in _____, _____ ***[insert name of city in which the Bank is located]***, on _____, _____ ("Expiration Date"). Demands for payment under this Credit may be made by Freddie Mac from time to time on or before the Expiration Date by presentation of your draft in the form of Exhibit A drawn on us and completed by Freddie Mac [or _____.] ***[insert name of Seller/Service for all letters of credit except those issued in connection with a Forward Commitment. The Seller/Service's name should not be included for letters of credit issued in connection with a Forward Commitment.]***

[Unless we notify you in writing at least thirty (30) days prior to the Expiration Date, the Expiration Date of this Credit must be extended automatically for successive one-[month/year] periods.]

[We may, at our own option, extend the Expiration Date for successive one-[month/year] periods by so notifying you in writing at least thirty (30) days prior to the Expiration Date.]

Each draft presented for payment against this Credit must be dated the date of presentation and must be presented to us at _____ (or at such other address in _____, _____ as we may designate in written notice delivered to you). In each case where we have received a draft as described above prior to _____ m. _____ time, on a Business Day, we will make payment by _____ m. _____ time on the following Business Day. As used herein, "Business Day" means any day other than (i) a Saturday or Sunday, or (ii) a legal holiday on which banking institutions in the state of _____ are closed.

Payment against this Credit may be made by wire transfer of immediately available funds to the account specified by you, or by deposit of same day funds in a designated account you maintain with us.

Partial drawings are permitted under this Credit. All documents presented to us in connection with any drawing under this Credit and all other communications and notices to us with respect to this Credit must be in writing or facsimile (and confirmed in writing), dated the date of the presentation, and delivered to us at the address set forth above and must specifically refer to us by name and to this Credit by the Irrevocable Standby Letter of Credit Number set forth on the first page of this Credit.

This Credit is subject to the Uniform Customs and Practices for Documentary Credits, 2007 revision, International Chamber of Commerce Publication No. 600 ("UCP"). As to

matters not governed by the UCP, this Credit must be governed by the internal laws of the State of New York (without regard to conflicts of law provisions).

Very truly yours,

[Name of Issuer]

By: _____

Name: _____

Title: _____

3. Freddie Mac sight draft form [can be generally used when Credit requires a sight draft]

Sight Draft

[FREDDIE MAC OR SELLER/SERVICER LETTERHEAD*]

Re: _____ *[name of Issuer]* Irrevocable Standby
Letter of Credit No. _____.

_____, _____
[Date]

Freddie Mac Loan No.: _____

[Name & address of Issuer]

Pay to the order of _____ in the amount
of \$_____ drawn on _____, as
issuer of its Irrevocable Standby Letter of Credit No. _____ dated
_____, 2_____.

(Freddie Mac or Seller/Service*)

By:

Name:

Title:

4. Another Credit form

		LETTER OF CREDIT DEPARTMENT 101 BARCLAY ST. 8TH FLOOR, EAST NEW YORK, N.Y. 10286-1238	
OUR REF. NO.		DATE	
BENEFICIARY	LLC	APPLICANT	CORPORATION
ATTENTION: PRESIDENT		NEW YORK, NY	
GENTLEMEN/LADIES:			
WE HEREBY ISSUE OUR IRREVOCABLE STANDBY LETTER OF CREDIT IN YOUR FAVOR, EFFECTIVE IMMEDIATELY, OUR REFERENCE NO.			
ACCOUNT OF:			
CORPORATION			
NEW YORK, NY 10			
AVAILABLE WITH:	OURSELVES	BY PAYMENT	
DRAFTS AT SIGHT			
DRAWN ON THE BANK OF NEW YORK, NEW YORK, NEW YORK, AS INDICATED BELOW			
TO THE EXTENT OF:	***USD	.00***	
EXPIRY DATE:			
PLACE OF EXPIRY:	OUR COUNTERS		
ADDITIONAL DETAILS:			
FUNDS UNDER THIS LETTER OF CREDIT ARE AVAILABLE TO YOU AGAINST YOUR SIGHT DRAFT(S) DRAWN ON US. NO OTHER DOCUMENTATION IS REQUIRED.			
THIS LETTER OF CREDIT MAY BE TRANSFERRED IN ITS ENTIRETY ONLY, BUT NOT IN PART, WITHOUT ANY CHARGE TO THE BENEFICIARY. SAID TRANSFER IS TO BE EFFECTED AT THE COUNTERS OF THE BANK OF NEW YORK, NEW YORK AND IS CONTINGENT UPON:			
(A) THE SATISFACTORY COMPLETION OF OUR TRANSFER FORM, ATTACHED HERETO, WITH THE SPECIMEN SIGNATURE OF THE BENEFICIARY'S AUTHORIZED REPRESENTATIVE PROPERLY VERIFIED BY AN OFFICER OF THE BENEFICIARY'S BANK; AND			
(B) RETURN OF THE ORIGINAL OF THIS LETTER OF CREDIT FOR ENDORSEMENT THEREON BY US TO THE TRANSFEREE.			
ALL TRANSFER FEES ARE FOR THE ACCOUNT OF THE APPLICANT.			
CONTINUED ON NEXT PAGE			



LETTER OF CREDIT DEPARTMENT
101 BARCLAY ST. 8th FLOOR EAST
NEW YORK, N.Y. 10286-1238

- 2 -

OUR LETTER OF CREDIT

IN THE EVENT THIS LETTER OF CREDIT IS TRANSFERRED AS STATED ABOVE, THE SIGHT DRAFT(S) REQUIRED HEREIN IS(ARE) TO BE EXECUTED BY THE TRANSFEREE AS BENEFICIARY.

UNDER NO CIRCUMSTANCES SHALL THIS LETTER OF CREDIT BE TRANSFERRED TO ANY PERSON OR ENTITY WITH WHICH U.S. PERSONS OR ENTITIES ARE PROHIBITED FROM CONDUCTING BUSINESS UNDER U.S. FOREIGN ASSET CONTROL REGULATIONS AND ANY OTHER APPLICABLE U.S. LAWS AND REGULATIONS.

THIS LETTER OF CREDIT SHALL INITIALLY EXPIRE AT OUR COUNTERS ON . . . HOWEVER, IT IS A CONDITION OF THIS LETTER OF CREDIT THAT IT SHALL BE DEEMED AUTOMATICALLY EXTENDED WITHOUT AMENDMENT FOR ADDITIONAL PERIODS OF ONE (1) YEAR FROM THE PRESENT OR EACH FUTURE EXPIRATION DATE HEREOF, UNLESS AT LEAST THIRTY (30) DAYS PRIOR TO ANY SUCH EXPIRATION DATE WE NOTIFY YOU AT THE ABOVE ADDRESS BY REGISTERED OR EXPRESS MAIL, RETURN RECEIPT REQUESTED OR BY RECEIPTED OVERNIGHT COURIER OF OUR ELECTION NOT TO SO RENEW THIS LETTER OF CREDIT FOR ANY SUCH ADDITIONAL PERIOD. AFTER YOUR RECEIPT OF SUCH NOTICE OF NON-RENEWAL FROM US BUT ON OR BEFORE THE THEN CURRENT EXPIRATION DATE HEREOF, YOU MAY DRAW UP TO THE THEN FULL REMAINING AMOUNT OF THIS LETTER OF CREDIT BY MEANS OF YOUR SIGHT DRAFT DRAWN ON US. IN ANY EVENT, THIS LETTER OF CREDIT SHALL NOT BE AUTOMATICALLY EXTENDED BEYOND ITS FINAL EXPIRATION DATE OF

PROVIDED THAT WE HAVE NOT BEEN NOTIFIED BY THE BENEFICIARY THAT A DEFAULT HAS OCCURRED UNDER THE UNDERLYING LEASE AGREEMENT BETWEEN THE APPLICANT AND THE BENEFICIARY, AND FURTHER PROVIDED THAT THIS LETTER OF CREDIT HAS BEEN AUTOMATICALLY EXTENDED AS HEREINBEFORE SET FORTH, THE AGGREGATE AMOUNT OF THIS LETTER OF CREDIT SHALL BE AUTOMATICALLY REDUCED, WITHOUT AMENDMENT, BY U.S. \$: ON AUGUST 1ST OF EACH YEAR COMMENCING ON AUGUST 1, AND ON EACH AUGUST 1ST THEREAFTER FOR AS LONG AS THIS LETTER OF CREDIT IS IN EXISTENCE.

ALL DRAFTS MUST BEAR ON THEIR FACE THE CLAUSE: "DRAWN UNDER THE BANK OF NEW YORK IRREVOCABLE LETTER OF CREDIT NO. . . ."

WE HEREBY ENGAGE WITH THE DRAWERS OF DRAFTS DRAWN UNDER AND IN COMPLIANCE WITH THE TERMS OF THIS LETTER OF CREDIT, THAT THE SAME SHALL BE DULY HONORED UPON PRESENTATION AND DELIVERY OF DOCUMENTS AS SPECIFIED TO THE BANK OF NEW YORK, 101 BARCLAY STREET, NEW YORK, NY 10286, ATTENTION: THE MANAGER, STANDBY LETTER OF CREDIT DEPARTMENT, FLOOR 8 EAST, ON OR BEFORE AUGUST 28, OR ANY AUTOMATICALLY EXTENDED DATE THROUGH AUGUST 28, AS PROVIDED FOR HEREIN.

EXCEPT SO FAR AS OTHERWISE EXPRESSLY STATED HEREIN, THIS

CONTINUED ON NEXT PAGE

FORM 606-610922-2584577

BMEI

FORM 18413 8502PNCA

To: The Bank of New York
Standby/GFT Letter of Credit Department
101 Barclay Street, Floor 8 East
New York, NY 10286

TRANSFER WITH NO SUBSTITUTION OF INVOICES

This form is to be completed and returned to The Bank of New York if transfer with no substitution of invoices is desired. If we can be of further assistance, please contact our Standby Letter of Credit Department at 212-815-3490.

_____, 20____

Gentlemen/Ladies:

With reference to your Letter of Credit No. _____ issued in (my) favor (of us) or transferees, (I) we hereby transfer all rights therein to the extent of \$ _____ to _____ subject to the terms and conditions of said credit.

- Please notify the transferee of the transfer and of the terms and conditions thereof.
- Enclosed is the original Letter of Credit so that you may endorse the transfer thereon.

Yours very truly,

Beneficiary
Name: _____

By: _____
(Authorized Signature)
Print Name: _____
Title: _____

The above signature of an officer or other authorized representative conforms to that on file with us. Said officer or representative is authorized to sign for said party.

Bank Name: _____

By: _____
(Authorized Signature)
Print Name: _____
Title: _____

Please Note: You must check off one of the following regarding any amendments to this letter of credit

- Advise to the transferee directly.
- Advise to the transferee only after you have obtained my approval.

Beneficiary:
Name: _____

By: _____
(Authorized Signature)

5. Notice cancelling evergreen and notice withdrawing cancellation

JOB FRI 08:43 AM

FAX NO.



KEYBANK NATIONAL ASSOCIATION
STANDBY LETTER OF CREDIT SERVICES
MAIL CODE: OH-01-51-0435
4910 TIEDEMAN ROAD
CLEVELAND, OHIO 44144-2338
TEL NO: 216-813-3696, -3698, -3702,
-3714 OR -3715
FAX NO: 216-813-3719

OCTOBER 27, 2008

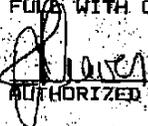
**** NOTICE OF NON-RENEWAL ****

OUR PRE CONVERSION STANDBY LETTER OF CREDIT NO:

RE: OUR STANDBY LETTER OF CREDIT NUMBER : DATED DECEMBER
22,
ACCOUNT PARTY:

THE ABOVE REFERENCED LETTER OF CREDIT WAS ISSUED WITH THE
CONDITION THAT IT BE AUTOMATICALLY EXTENDED WITHOUT AMENDMENT
FROM THE PRESENT OR ANY FUTURE EXPIRATION DATE UNLESS WE NOTIFY
YOU IN ACCORDANCE WITH THE LETTER OF CREDIT TERMS.

WE HEREBY NOTIFY YOU THAT WE ELECT NOT TO EXTEND THIS CREDIT FOR
ANY ADDITIONAL PERIOD AND THEREFORE, THIS CREDIT WILL EXPIRE IN
FULL WITH OUR CLOSE OF BUSINESS ON DECEMBER 20, 2008.


AUTHORIZED SIGNATURE

A KeyCorp Bank

KEYBANK NATIONAL ASSOCIATION
STANDBY LETTER OF CREDIT SERVICES

MAIL CODE OH 01-51-0435

4910 TIEDEMAN ROAD

CLEVELAND, OHIO 44144-2338

TEL NO: 216-843-3696, #3698, 3702, 3714 or
3715

FAX NO: 216-813-3719

DATE: NOVEMBER 4, 2008

BENEFICIARY

APPLICANT

WE HEREBY AMEND OUR IRREVOCABLE TRANSFERABLE LETTER OF CREDIT NUMBER XXXX AS
FOLLOWS:

AMENDMENT SEQUENCE NUMBER 001

PLEASE DISREGARD OUR NOTICE OF NON-RENEWAL DATED OCTOBER 27, 2008.

EXPIRATION DATE IS EXTENDED TO DECEMBER 20, 2009.

ALL OTHER TERMS AND CONDITIONS INCLUDING THE AUTO EXTENSION CLAUSE REMAIN
UNCHANGED. THIS AMENDMENT IS TO BE CONSIDERED AN INTEGRAL PART OF THE LETTER OF
CREDIT AND MUST BE ATTACHED THERETO.

KEYBANK NATIONAL ASSOCIATION

AUTHORIZED SIGNATURE

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