

**David J. Siegel**

## **REMEDIES AND ENFORCEMENT**

### **Introduction**

Whether they like it or not, all experienced attorneys, business people and brokers involved in the leasing of commercial real estate are forced, at some point, to deal with the issues that arise when one or the other party to a lease does not live up to its obligations under the lease. The prospect of enforcing one's rights and remedies under a lease in the event of a breach or default by the other side, while not always pleasant to contemplate, is in many ways central to the process of commercial leasing; after all, one of the primary reasons that parties enter into formal lease agreements in the first place (as opposed to living under informal, "handshake" arrangements) is to ensure they have the ability to enforce their rights and remedies in the event of a failure by the other party to comply with its duties under the lease. Every duty or obligation of a party contained in a lease must, to be meaningful, be associated with a right or remedy in favor of the other party if it is breached, and, in that sense, the remedies available to the parties to a lease underlie virtually every provision included in the lease. An understanding of those remedies, and the manner in which they are enforced, is therefore essential for any real estate professional; for taking part in commercial leasing without understanding the issues associated with remedies and enforcement is comparable to driving a car without knowing the rules of the road.

At the most basic level, there are two categories of rights and remedies which are applicable to commercial leases (as well as any other contract): (1) Rights and remedies that are spelled out in the lease document itself, and (2) rights and remedies that exist under applicable law (whether statutory or common law). Those two categories are, however, not rigidly separated; i.e., certain rights and remedies which are set forth in a lease may not be enforceable under applicable law. Since most commercial leases entered into nowadays contain very thorough provisions that address the significant rights and remedies of the parties (particularly the landlord), there is a tendency to focus on the first category of lease rights and remedies (and, in fact, this presentation will comport with that tendency), but it is important to understand the second category as well, if for no other reason than to ensure that the rights and remedies that are actually provided for in a lease are enforceable under applicable law.

This presentation discusses some of the most significant issues and concerns associated with defaults and remedies under commercial leases and the enforcement of those remedies, focusing on both categories of rights and remedies discussed above. In particular, the following topics will be addressed:

1. Tenant defaults and landlord remedies
2. Landlord defaults and tenant defenses

3. Holdover
4. Security deposits
5. Other enforcement/enforceability issues

Sample lease provisions providing some examples of the matters discussed in this presentation are also included in the Exhibits attached to these materials.

## **Presentation Outline**

### **I. Tenant Defaults; Landlord Remedies**

- A. Tenant Defaults: See sample provisions attached as Exhibit I.A
  1. Payment Defaults
    - a. Cure right or no cure right or hybrid (e.g., notice and cure rights only required x times per year, then automatic Default)
    - b. Scheduled rent/payments vs. non-scheduled rent/payments
  2. Other Defaults which may be subject to no or short time frames for cure
    - a. Insolvency/Bankruptcy Defaults (enforceability issues) (voluntary vs. involuntary for cure right)
    - b. Assignment and Subletting
    - c. Mechanics' Liens
    - d. Insurance
    - e. Estoppels/SNDA's
    - f. Permitted Use
    - g. Compliance with laws
    - h. Environmental covenants
    - i. Surrender of Premises obligations
    - j. Alterations without LL consent
    - k. Vacancy or Abandonment
  3. Catch-all Default (usually fairly substantial cure right, with possible extensions if cure is being diligently pursued)
  4. Other common Default issues
    - a. Whether vacancy/abandonment of Premises constitutes a default (retail vs. other contexts)
    - b. Cap on tenant's time limit to cure non-monetary defaults if tenant is diligently pursuing a cure
    - c. Whether force majeure is an excuse for Tenant non-performance
    - d. Cross-defaults with other leases / documents affecting tenant's tenancy / tenant's loan/credit facilities
    - e. Guarantor defaults / insolvency / net worth / change of control

- f. Whether Tenant can exercise rights/options if in default (beyond or not beyond cure periods) or material or monetary default

B. Landlord Remedies: See sample provision attached as Exhibit I.B

- 1. Forcible Entry and Detainer summary (*735 ILCS 5/9-101, et. seq.*)
  - a. No self help to remove tenant / no changing locks, etc. – judicial process / eviction procedure is required in IL
  - b. Summary procedure (only matters germane to possession are to be addressed), but still can be subject to procedural delays
  - c. Notice requirements (may be contracted out of, but usually safest to comply in any case)
    - i. 5-day notice (non-payment of rent) – See Exhibit I.B.1.c.i (735 ILCS 5/9-209)
    - ii. 10-day notice to quit - See Exhibit I.B.1.c.ii (735 ILCS 5/9-210) Note: Currently proposed legislation would change the 10-day period to 7 days. (S.B. 636)
    - iii. Sample notice of default – See Exhibit I.B.1.c.iii
  - d. Actions for rent by a landlord can (but are not required to) be joined with a forcible entry and detainer complaint
  - e. By statute, if the plaintiff to a forcible entry and detainer action voluntarily dismisses the action, or fails to prove the plaintiff’s right to possession, judgment for costs shall be entered in favor of the defendant. (*735 ILCS 5/9-114*)
- 2. Landlord duty to mitigate damages
  - a. Legal basis / explanation (*735 ILCS 5/9-213.1*)
  - b. What constitutes “reasonable efforts to mitigate”
    - i. Question of fact under IL law
    - ii. Extent of efforts to find new tenant / reletting costs / alterations / alternative uses
  - c. Burden of proof is on landlord to demonstrate mitigation
  - d. There is a split in authority in IL as to whether a landlord’s failure to demonstrate mitigation is a bar to recovery of damages, or whether it merely reduces the damages that are recoverable. The trend is in favor of reduction rather than a bar.
- 3. Standard Lease remedies (termination of lease or possession):
  - a. Termination of possession without terminating lease (can collect rent and, if necessary, sue for rent, as it comes due)
  - b. Terminate lease and collect diff. btwn. remaining rental (discounted to present value) and fair market rental value of premises (contract damages)
  - c. Under IL case law, forfeiture of leases is disfavored, and generally, only a material breach by the tenant will justify termination of lease or possession

4. Other Lease Remedies
  - a. Landlord right to cure Tenant default (self-help)
    - i. Landlord may want to permit tenant a shorter time frame for cure than for “Defaults” // Landlord may want immediate right in event of emergency
    - ii. Provide for recovery of costs
  - b. Distraint for rent (*735 ILCS 5/9-301*) (Landlord right to obtain and sell Tenant’s personal property) // distinguished from landlord lien (in IL there is no statutory or common law landlord lien in non-farm leases)
    - i. Only available for rent defaults by a tenant
    - ii. Property subject to distraint (must be personalty, must be property of the tenant (not third party) and in the county in which the premises are located)
    - iii. Procedure (somewhat analogous to self-help) / constitutionality has been affirmed
  - c. Default interest on overdue payments
  - d. Attorneys’ fees
  - e. Catch-all remedy (“all other rights and remedies available at law or in equity”)
  - f. Enforceability issues (rent acceleration / liquidated damages / penalty issues)

**II. Landlord Defaults / Tenant Defenses to Defaults:**

A. Landlord Defaults / Tenant Remedies: See sample provision attached as Exhibit II.A.

1. Most leases do not contain Landlord default provisions; those that do usually provide for short notice and cure rights for monetary defaults and long periods for non-monetary defaults
2. Tenant remedies
  - i. Generally any rights at law or in equity
  - ii. Landlord may require waiver of termination of lease barring certain highly material defaults (e.g., equivalent of constructive eviction)
  - iii. Self-help rights lease provision (landlords usually very reluctant to give, particularly in multi-tenant buildings)
  - iv. Offset rights lease provision (landlords very reluctant to give – may only cover a specified % of rent in any month, or require a judicial determination) // interference with rent stream // lenders may object

B. Tenant Defenses / Excuses for non-payment of rent:

1. Withholding Rent:
  - a. Basic precept: Payment of Rent as independent covenant // tenant must overcome this precept (either by provision in lease or operation of law) to justifiably withhold rent
  - b. Constructive eviction
    - i. Tenant must actually vacate the Premises
    - ii. High standard of interference (“requires that the landlord have done something of a grave and permanent character with the intention of depriving the tenant of enjoyment of the premises”; or “where premises leased are rendered useless to the tenant or the tenant is deprived in whole or in part of the possession and enjoyment thereof as the result of the wrongful act of the landlord”)
    - iii. Landlord gets reasonable opportunity to cure
  - c. Lease provisions (landlords will be reluctant to permit)
    - i. Untenantability / interruption in services provision (arguably analogous to casualty/condemnation)
      - w. Duration of untenantability
      - x. Within vs. not within control of Landlord
      - y. Fault vs. no-fault
      - z. Insurance considerations
    - ii. Offset rights provision
2. Defenses on the merits (substantive challenge of default)
3. Waiver of default by Landlord (acceptance of rent, etc.)
4. Tenant defenses to forcible entry actions (i.e., for possession of premises) must be germane to the issue of possession

C. Limitations on Landlord’s Liability: See sample provision attached as Exhibit II.C.

1. Usually leases will provide that Landlord’s liability is limited to its interest in the building and land
  - i. Tenant may seek to include proceeds (e.g., insurance and sale)
  - ii. Tenant may seek exceptions for fraud, intentional defaults, breaches of title-related covenants
2. Usually limited to period during which Landlord owns the building
  - i. Tenants will want to ensure that successor Landlord assumes obligations

3. Tenants will request carve-outs for pre-completion obligations in new construction buildings

**III. Holdover:** See sample provisions attached as Exhibit III.

A. Basic Precepts (if no language in Lease to contrary) (established by case law):

1. Landlord may treat as tenant at sufferance subject to immediate eviction
2. Landlord may treat as “holdover tenant” (year-to-year in the case of a lease with a term for over 1 year) on the same terms as the prior lease (other than those that are not “appropriate” – e.g., an option to purchase has been held not to remain in effect during a holdover tenancy). Generally, if rent is paid on a monthly basis during a holdover, a month-to-month tenancy is deemed to have been created.
3. Under Illinois law, only landlord’s (and not tenant’s) intent to treat as holdover vs. tenant at sufferance matters. Landlord must be careful, however, not to engage in conduct that is contrary to the position it wishes to take (e.g., collecting rent from a tenant for a period that is after expiration of lease term may undercut a landlord’s argument that the tenant is merely a tenant at sufferance).

B. Typical Lease Provisions / Issues:

1. Landlord remedies
  - a. Increased Rent (usually x% above last rent)
    - i. Can be Base Rent or all Rent
    - ii. Often different rates depending on duration of holdover (e.g., 125% for first 30 days, 150% thereafter)
    - iii. Penalty vs. Liquidated Damages issues
    - iv. Statutory 200% of rent for “willful” holdover (**735 ILCS 5/9-202**)
  - b. Indemnification for damages
    - i. Consequential damages included or excluded (e.g., loss of new tenant for Landlord)
2. Other Issues
  - a. Deemed length of Tenant’s rent obligation in event of a holdover (e.g., if holdover for portion of 1 month, is tenant responsible for entire month of rent, or just # of days of holdover?)
  - b. If Tenant holds over for only a portion of the Premises, is Tenant deemed to be in holdover of the entire Premises or just the portion which is occupied or a hybrid (e.g., if a portion of a floor for a multi-floor tenant, Tenant may be deemed to holdover on whole floor but not whole premises)?

- IV. **Security Deposits:** See sample provisions attached as Exhibit IV.
- A. General Purpose.
  - B. Letter of Credit vs. Cash.
  - C. Landlord Personal Liability for Return (absent a contrary provision in the lease)

V. **Other Enforceability Issues:**

- A. Indemnification or Exculpation of Landlord or Agents for Negligence. Not Enforceable (*765 ILCS 705/1*)
  - 1. Application to general indemnities (indemnification for “any and all” damages constitutes an indemnity against damages resulting from negligence)
  - 2. Recent (2005) exception for property damage
  - 3. Does not apply to Tenant’s negligence
  - 4. “To the maximum extent permitted by law” qualifier
- B. Landlord Self-Help for Eviction. Not Enforceable.
- C. Rent Acceleration. Likely not enforceable if not reasonably tailored to Landlord’s actual damages. Liquidated damages / penalty issues.

**Exhibit I.A**  
**Sample Tenant Default Provisions**

**I. Typical / Neutral-to-Landlord-favorable**

Each of the following events shall be an "Event of Default" hereunder:

(a) Tenant fails to pay when due any installment of Rent and such default shall continue for five (5) days after notice of such default is given to Tenant (which notice may be in the form of an Illinois Statutory 5-day notice utilized in Forcible Entry and Detainer Proceedings), except that if Landlord shall have given two such notices of default in the payment of any Rent in any 12-month period, Tenant shall not be entitled to any further notice of its delinquency in the payment of any Rent or an extended period in which to make payment until such time as 12 consecutive months shall have elapsed without Tenant having failed to make any such payment when due, and the occurrence of any default in the payment of any Rent within such 12-month period after the giving of 2 such notices shall constitute an Event of Default; or

(b) Tenant fails to observe or perform any other term, covenant or condition of this Lease and such failure continues for more than 30 days (10 days with respect to a default under Section \_\_\_\_ (Use; Compliance With Laws)) after notice by Landlord to Tenant of such default, or if such default (other than a default under Section \_\_\_\_ (Use; Compliance With Laws)) is of a nature that it cannot be completely remedied within 30 days, failure by Tenant to commence to remedy such failure within said 30 days, and thereafter diligently prosecute to completion all steps necessary to remedy such default, provided in all events the same is completed within 90 days; or

(c) if Landlord applies or retains any part of the security held by it hereunder, and Tenant fails to deposit with Landlord the amount so applied or retained by Landlord, or to provide Landlord with a replacement Letter of Credit, if applicable, within 5 days after notice by Landlord to Tenant stating the amount applied or retained; or

(d) Tenant files a voluntary petition in bankruptcy or insolvency, or is adjudicated a bankrupt or insolvent, or files any petition or answer seeking any reorganization, liquidation, dissolution or similar relief under any present or future federal bankruptcy act or any other present or future applicable federal, state or other statute or law, or makes an assignment for the benefit of creditors or seeks or consents to or acquiesces in the appointment of any trustee, receiver, liquidator or other similar official for Tenant or for all or any part of Tenant's property; or

(e) A court of competent jurisdiction shall enter an order, judgment or decree adjudicating Tenant bankrupt, or appointing a trustee, receiver or liquidator of Tenant, or of the whole or any substantial part of its property, without the consent of Tenant, or approving a petition filed against Tenant seeking reorganization or arrangement of Tenant under the bankruptcy laws of the United States, as now in effect or hereafter amended, or any state thereof, and such order, judgment or decree shall not be vacated or set aside or stayed within 60 days from the date of entry thereof;

[(f) Guarantor generally does not, or is unable to, or admits in writing its inability to, pay its debts as they become due or is subject to the filing of a petition, case or proceeding in bankruptcy.]

## **II. Landlord favorable**

Each of the following events shall be an "Event of Default" hereunder:

(a) Tenant shall at any time fail to make any payment of Rent (or any portion thereof) or any other payments required of Tenant hereunder when required; or

(b) Tenant shall breach or violate any of its duties or obligations set forth in Section \_\_\_ (Surrender of Leased Premises; Restoration), Section \_\_\_ (Insurance), Section \_\_\_ (Covenants Against Liens), Section \_\_\_ (Assignment and Subletting), Section \_\_\_ (Use; Compliance With Laws), Section \_\_\_ (Environmental), or Section \_\_\_ (Subordination; Estoppel) of this Lease; or

(c) Tenant shall at any time be in default in any other covenants and conditions of this Lease to be kept, observed and performed by Tenant, which and such default continues for more than twenty (20) days (or such shorter time period as may specifically be set forth in this Lease) after notice from Landlord; or

(d) this Lease or Tenant's interest therein, or any interest in Tenant, shall be assigned, transferred, mortgaged or pledged, levied on or attempted to be taken by execution, attachment or other process of law, or if any execution or attachment shall be issued against Tenant, or any of Tenant's property in the Leased Premises shall be taken or occupied or attempted to be taken or occupied by someone other than Tenant; or

(e) a receiver, assignee or trustee shall be appointed for Tenant or Tenant's property or if the Tenant shall file bankruptcy, or if involuntary bankruptcy proceedings shall be filed against Tenant, or Tenant generally does not, or is unable to, or admits in writing its inability to, pay its debts as they become due; or

(f) Landlord shall receive notice of any alleged violation of any Legal Requirements resulting from or in any way connected with Tenant's use of the Leased Premises and such violation is not cured (and all liabilities connected therewith fully satisfied) by Tenant prior to the earlier of (a) five (5) Business Days before the last day of the period permitted by law for curing such violation or (b) five (5) Business Days before the first date Landlord becomes subject to any fine, penalty, lien, judgment, order or other liability due to the continued existence of such violation; or

(g) Tenant shall abandon the Leased Premises or vacate same for a period in excess of ten (10) consecutive days.

## **III. Tenant favorable**

Each of the following events shall be an "Event of Default" hereunder:

(a) Tenant shall fail to pay any Rent within fifteen (15) Business Days following receipt of notice from Landlord that the same is past due; or

(b) Tenant shall fail to keep, observe or perform any of the other covenants or agreements herein contained to be kept, observed and performed by Tenant, and such failure shall continue for sixty (60) days after notice thereof in writing to Tenant from Landlord (or such longer time as may be reasonably necessary in the event the failure cannot reasonably be cured within sixty (60) days provided Tenant commences the cure within such sixty (60) day period and thereafter diligently pursues such cure to completion).

**Exhibit I.B**  
**Sample Landlord Remedy Provision**

\_\_\_01 Landlord shall use commercially reasonable efforts to mitigate its damages in the event of a Default by Tenant hereunder. No such mitigation of damages by Landlord shall constitute a waiver of any Default by Tenant hereunder, nor shall anything in this Section adversely affect Landlord's right, as in this Lease elsewhere provided, to indemnification against liability for injury or damages to persons or property occurring prior to a termination of this Lease.

\_\_\_02 All cure periods provided herein shall run concurrently with any periods provided at Law (but nothing contained in the foregoing shall be deemed to limit the notice and cure rights to which Tenant is entitled under this Lease).

\_\_\_03 During the continuance of a Default, as designated herein above, in addition to any other rights or remedies provided for herein or at law or in equity, Landlord, at its sole option, shall have the following rights:

A. The right to declare the Lease Term ended and reenter the Premises and take possession thereof (with process of law), and to terminate all of the rights of Tenant in and to the Premises.

B. The right, without declaring the Lease Term ended, to reenter the Premises and to occupy the same (with process of law), or any portion thereof, for and on account of the Tenant as hereinafter provided, and Tenant shall be liable for and pay to Landlord on demand all such reasonable expenses as Landlord may have paid, assumed or incurred in recovering possession of the Premises, including reasonable costs, expenses, attorney's fees and expenditures placing the same in good order, and all other reasonable expenses, commissions and charges paid by the Landlord in connection with reletting the Premises (other than costs and expenses relating to the construction or installation of alterations and/or improvements to the Premises). Any such reletting may be for the remainder of the term of this Lease or for a longer or shorter period. Such reletting shall be for such rent and on such other terms and conditions as Landlord, in its sole discretion, deems appropriate. Landlord may assume Tenant's interest in any existing subleases to any tenant of the Premises, as Landlord may see fit, and Tenant shall have no right or authority whatsoever to collect any rent from such subtenants of the Premises. In any case, and whether or not the Premises or any part thereof is relet, Tenant, until the end of the Lease term shall be liable to Landlord for an amount equal to the amount due as Rent hereunder, less net proceeds, if any of any reletting effected for the account of Tenant. Landlord reserves the right to bring such actions for the recovery of any deficits remaining unpaid by the Tenant to the Landlord hereunder as Landlord may deem advisable from time to time without being obligated to await the end of the term of the Lease. Commencement of maintenance of one or more actions by the Landlord in this connection shall not bar the Landlord from bringing any subsequent actions for further accruals. In no event shall Tenant be entitled to any excess rent received by Landlord over and above that which Tenant is obligated to pay hereunder; or

C. The right, even though it may have relet all or any portion of the Premises in accordance with the provisions of subsection B above, to thereafter at any time elect to terminate this Lease for such Default on the part of the Tenant, and to terminate all the rights of Tenant in and to the Premises.

\_\_\_04 Pursuant to the rights of re-entry provided above, Landlord may, in each case with process of law, remove all persons from the Premises and may, but shall not be obligated to, remove all property therefrom, and may, but shall not be obligated to, enforce any rights Landlord may have against said property or store the same in any public or private warehouse or any other reasonably secure location at the cost and for the account of Tenant or the owner or owners thereof. Tenant agrees to hold Landlord free and harmless from any liability whatsoever for the removal and/or storage of any such

property, whether of Tenant or any third party whomsoever. Such action by the Landlord shall not be deemed to have terminated this Lease.

\_\_\_05 In the event of a termination of this Lease by reason of a Default by Tenant, Landlord may recover from Tenant, in addition to any other remedies permitted at law or in equity (but subject to any limitations on such other remedies expressly set forth herein):

A. The worth, at the time of the award, of the unpaid Base Rents and Additional Rents which had been earned at the time this Lease is terminated.

B. The worth, at the time of the award, of the amount by which the unpaid Base Rents and Additional Rents which would have been earned after the date of termination of this Lease until the time of award exceeds the amount of the loss of rents that Tenant proves could be reasonably avoided;

C. The present value of any unpaid Rent which would have accrued after the time of award during the balance of the Lease Term, less the present value of the then current market rental value of the Premises for such period, after deduction from the said current market rental value of the Premises. Present value shall be computed on the basis of a discount rate equal to \_\_\_%; and

D. Any other amount, and court costs, necessary to compensate Landlord for all reasonable costs incurred as a result of such Default (including any reasonable costs and expenses relating to the construction or installation of alterations and/or improvements to the Premises in connection with any reletting of the Premises for the same purposes as permitted under this Lease (but not any materially different purposes)). Such costs may include, without limitation (subject to the parenthetical at the end of the immediately preceding sentence), (i) reasonable expenses for cleaning, repairing or restoring the Premises, (ii) reasonable brokers' fees and commissions, advertising costs and other reasonable expenses of reletting the Premises, (iii) reasonable costs of carrying the Premises such as taxes, insurance premiums, utilities and security precautions, (iv) reasonable expenses of retaking possession of the Premises, and (v) reasonable attorneys' fees and court costs.

\_\_\_06 In any action brought by the Landlord to enforce any of its rights under or arising from this Lease during the continuance of a Default by Tenant, Landlord shall be entitled to receive its reasonable costs and legal expenses including reasonable attorneys' fees.

\_\_\_07 The waiver by Landlord of any Default of Tenant hereunder shall not be a waiver of any preceding or subsequent breach of the same or any other term. Acceptance of any Rent payment shall not be construed to be a waiver of the Landlord of any preceding breach of the Tenant.

\_\_\_08 Any amounts owed by Tenant under the terms of this Lease which are not paid when due shall bear interest at the Default Rate from the date that the same were due until paid.

\_\_\_09 If Tenant defaults in the performance of its obligations under this Lease, Landlord, without waiving such default, may perform such obligations at Tenant's expense: (a) immediately, and without notice, in the case of emergency or if the default (i) materially interferes with the use by any other tenant of the Building, (ii) materially interferes with the efficient operation of the Building, (iii) results in a violation of any Requirement, or (iv) results or will result in a cancellation of any insurance policy maintained by Landlord, and (b) in any other case if such default continues after 10 days from the date Landlord gives notice of Landlord's intention to perform the defaulted obligation. All costs and expenses incurred by Landlord in connection with any such performance by it and all costs and expenses, including reasonable counsel fees and disbursements, incurred by Landlord in any action or proceeding (including any unlawful detainer proceeding) brought by Landlord or in which Landlord is a party to enforce any obligation of Tenant under this Lease and/or right of Landlord in or to the Premises, shall be paid by Tenant to Landlord on demand, with interest thereon at the Default Rate from the date incurred by Landlord. Except as expressly provided to the contrary in this Lease, all costs and expenses which, pursuant to this Lease are incurred by Landlord and payable to Landlord by Tenant, and all charges,

amounts and sums payable to Landlord by Tenant for any property, material, labor, utility or other services which, pursuant to this Lease or at the request and for the account of Tenant, are provided, furnished or rendered by Landlord, shall become due and payable by Tenant to Landlord within 10 Business Days after receipt of Landlord's invoice for such amount.

**Exhibit I.B.1.c.i**  
**Sample 5-day Notice**

\_\_\_\_\_, 20\_\_

**LANDLORD'S FIVE DAYS' NOTICE**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Re: Lease of Space Located at \_\_\_\_\_, Chicago, Illinois to  
("Tenant") by \_\_\_\_\_ ("Landlord").

Dear \_\_\_\_\_:

Reference is made to that certain [Lease] dated \_\_\_\_\_ by and between the above referenced Landlord, as landlord, and the above referenced Tenant, as tenant (the "Lease"), pursuant to which the Landlord has leased to Tenant, and Tenant has leased from Landlord, certain premises (the "Leased Premises") consisting of approximately \_\_\_\_\_ square feet of rentable area commonly known as Suite \_\_\_\_ in the building commonly known as \_\_\_\_\_, Chicago, Illinois, upon the terms and conditions set forth in said Lease.

This letter will serve to notify the Tenant that there is now due to the Landlord the sum of \_\_\_\_\_ and \_\_/100 Dollars (\$ \_\_\_\_\_), (the "Rental Amount") said Rental Amount representing rent for the Leased Premises which is past due pursuant to the Lease.

The Tenant is hereby further notified that payment of said Rental Amount is hereby demanded of the Tenant, and that unless payment thereof is made on or before the expiration of five (5) days after service of this notice, the Landlord shall have the right to terminate the Lease or Tenant's right of possession of the Leased Premises thereunder in addition to enforcing any other remedy available to Landlord under the Lease at law or in equity. Only FULL PAYMENT of the Rental Amount demanded in this notice will waive the Landlord's right to terminate the Lease and/or Tenant's rights of possession thereunder pursuant to this notice, unless the Landlord agrees in writing, in its sole and absolute discretion, to continue the Lease and Tenant's rights of possession in exchange for receiving partial payment thereof.

Nothing contained in this letter shall be deemed or construed to waive, limit or otherwise adversely affect any rights or remedies to which the Landlord is entitled under the Lease, at law or in equity, all such rights and remedies being hereby expressly reserved.

Sincerely,

\_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_

STATE OF ILLINOIS            )  
  ) ss.  
COUNTY OF COOK            )

**AFFIDAVIT OF SERVICE**

The undersigned, \_\_\_\_\_, being duly sworn, on oath deposes and says that on the \_\_\_ day of \_\_\_\_\_, 20\_\_\_, he/she served the within notice on the within named tenant, \_\_\_\_\_, by (check appropriate):

- (1) delivering a copy thereof to the tenant;
- (2) leaving a copy thereof with \_\_\_\_\_, a person above the age of thirteen (13) years, residing on or being in charge of the premises; or
- (3) posting a copy thereof on the premises, there being no one in actual possession of the premises

Subscribed to and sworn to before me  
this \_\_\_ day of \_\_\_\_\_, 20\_\_

\_\_\_\_\_  
Notary Public

**Exhibit I.B.1.c.ii**  
**Sample 10-day Notice to Quit**

\_\_\_\_\_, 20\_\_

**NOTICE TO QUIT**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Re: Lease of Space Located at \_\_\_\_\_, Chicago, Illinois to \_\_\_\_\_  
("Tenant") by \_\_\_\_\_ ("Landlord").

Dear \_\_\_\_\_:

Reference is made to that certain [Lease] dated \_\_\_\_\_ by and between the above referenced Landlord, as landlord, and the above referenced Tenant, as tenant (the "Lease"), pursuant to which the Landlord has leased to Tenant, and Tenant has leased from Landlord, certain premises (the "Leased Premises") consisting of approximately \_\_\_\_\_ square feet of rentable area commonly known as Suite \_\_\_\_ in the building commonly known as \_\_\_\_\_, Chicago, Illinois, upon the terms and conditions set forth in said Lease.

This letter will serve to notify the Tenant that in consequence of the Tenant's default under the Lease in [DESCRIBE NATURE OF DEFAULT], the Landlord has elected to terminate the Lease and the Tenant is hereby notified to quit and deliver up possession of the Leased Premises to the Landlord within \*ten (10) days after the date of service of this letter.

Nothing contained in this letter shall be deemed or construed to waive, limit or otherwise adversely affect any rights or remedies to which the Landlord is entitled under the Lease, at law or in equity, all such rights and remedies being hereby expressly reserved.

Sincerely,

\_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_

\* -- Note: See reference in presentation outline for possible change to 10 day period

STATE OF ILLINOIS            )  
  ) ss.  
COUNTY OF COOK            )

**AFFIDAVIT OF SERVICE**

The undersigned, \_\_\_\_\_, being duly sworn, on oath deposes and says that on the \_\_\_ day of \_\_\_\_\_, 20\_\_\_, he/she served the within notice on the within named tenant, \_\_\_\_\_, by (check appropriate):

- (1) delivering a copy thereof to the tenant;
- (2) leaving a copy thereof with \_\_\_\_\_, a person above the age of thirteen (13) years, residing on or being in charge of the premises; or
- (3) posting a copy thereof on the premises, there being no one in actual possession of the premises

Subscribed to and sworn to before me  
this \_\_\_ day of \_\_\_\_\_, 20\_\_

\_\_\_\_\_  
Notary Public

**Exhibit I.B.1.c.iii**  
**Sample Default Notice**

\_\_\_\_\_, 20\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Re: Lease of Space Located at \_\_\_\_\_, Chicago, Illinois to  
("Tenant") by \_\_\_\_\_ ("Landlord").

Dear \_\_\_\_\_:

Reference is made to that certain [Lease] dated \_\_\_\_\_ by and between the above referenced Landlord, as landlord, and the above referenced Tenant, as tenant (the "Lease"), pursuant to which the Landlord has leased to Tenant, and Tenant has leased from Landlord, certain premises (the "Leased Premises") consisting of approximately \_\_\_\_ square feet of rentable area commonly known as Suite \_\_\_\_ in the building commonly known as \_\_\_\_\_, Chicago, Illinois, upon the terms and conditions set forth in said Lease. All initially capitalized terms used in this letter and not otherwise defined in this letter shall have the meanings ascribed to such terms as set forth in the Lease.

Further reference is made to Section \_\_\_\_ of the Lease, which provides as follows:  
" \_\_\_\_\_".

Tenant has failed to comply with the foregoing terms of Section \_\_\_\_ of the Lease by \_\_\_\_\_.

This letter will therefore serve to notify the Tenant that Tenant's failure to comply with the terms of said Section \_\_\_\_ of the Lease, as described above, constitutes a breach of the Lease on the part of the Tenant, and Landlord reserves each and all of its rights and remedies under the Lease with respect thereto. This letter will further serve to notify the Tenant that if this breach of the Lease on the part of Tenant is not cured within \_\_\_\_ days after the date of this notice, then an "Event of Default" will have occurred under the Lease, as provided in Section \_\_\_\_ of the Lease, and Landlord will have each and all of the rights and remedies provided in the Lease with respect thereto [including, without limitation, the right to terminate the Lease or Tenant's rights of possession thereunder.]

Nothing contained in this letter shall be deemed or construed to waive, limit or otherwise adversely affect any rights or remedies to which the Landlord is entitled under the Lease, at law or in equity, all such rights and remedies being hereby expressly reserved.

Sincerely,

\_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_

**Exhibit III.A**  
**Sample Landlord Default / Tenant Remedy Provision**

\_\_\_01 Generally. In the event of any default by Landlord hereunder, Tenant agrees to give notice of such default to Landlord at Landlord's Notice Address as stated in Section \_\_\_ and to provide Landlord: (i) ten (10) Business Days to cure such default, in the case of a monetary default by Landlord, or (ii) thirty (30) days to cure such default, in the case of a non-monetary default by Landlord; provided, however, that if the nature of such non-monetary default is such that more than thirty (30) days are required to cure the same, then Landlord will not be in default if Landlord commences performance within such thirty (30) day period and thereafter diligently prosecutes the same to completion. In the event of any actual or alleged failure, breach or default hereunder by Landlord, Tenant's sole and exclusive remedy will be against Landlord's interest in the Property [and the rents, issues, profits and proceeds thereof], and no directors, officers, employees and any partner of Landlord will be sued, be subject to service or process, or have a judgment obtained against him in connection with any alleged breach or default, and no writ of execution will be levied against the assets of any partner, shareholder or officer of Landlord.

\_\_\_02 Set Off Rights. Any amounts payable by Landlord to Tenant under this Lease which are not paid within ten (10) days after the same are due shall accrue interest at the Default Rate from the tenth (10<sup>th</sup>) day after the same were due until payment is received by Tenant. Landlord and Tenant further agree that in the event that Landlord fails to pay any amount required to be paid by Landlord to Tenant pursuant to this Lease within ten (10) Business Days after the date the same is due, then Tenant shall have the right to give Landlord a second written notice (an "Offset Exercise Notice") requesting payment of such costs, and, in the event that Landlord fails to fully pay such costs within five (5) Business Days after such Offset Exercise Notice is provided to Landlord, any such unpaid amounts, together with all accrued and unpaid interest thereon, may be offset against the next installment of Rent and other amounts then due Landlord hereunder (in order of payment) until all such unpaid amounts and interest thereon have been either fully offset or paid by Landlord in full. The terms of this Section \_\_\_02 shall be binding upon any purchaser or transferee of Landlord's interest in this Lease, regardless of whether the same relate to matters occurring prior to such purchase or transfer, and upon any mortgagee, trustee and beneficiary under a deed of trust or ground lessor of Landlord, regardless of whether the same relate to matters occurring prior to the date of the mortgage, deed of trust or ground lease (as applicable) thereof, or prior to the date of the exercise or enforcement of any rights or remedies thereunder or in any way relating thereto (including any foreclosure or deed in lieu of foreclosure).

\_\_\_03 No Waiver. The waiver by Tenant of any breach or default by Landlord hereunder shall not be a waiver of any preceding or subsequent breach or default of the same or any other term. Acceptance of any payment by Tenant from Landlord shall not be construed to be a waiver of the Tenant of any preceding breach or default of the Landlord.

**Exhibit II.C**  
**Sample Limitation on Landlord's Liability Provision**

It is expressly understood and agreed by Tenant that none of Landlord's covenants, undertakings or agreements continued in this Lease are made or intended as personal covenants, undertakings or agreements by Landlord or any entity which is affiliated with Landlord its parent or subsidiaries. The liability of Landlord for Landlord's obligations under this Lease shall be limited to Landlord's interest in the Real Property and Tenant shall not look to any other property or assets of Landlord or the property or assets of any direct or indirect partner, member, manager, shareholder, director, officer, principal, employee or agent of Landlord (collectively, the "Parties") in seeking either to enforce Landlord's obligations under this Lease or to satisfy a judgment for Landlord's failure to perform such obligations; and none of the Parties shall be personally liable for the performance of Landlord's obligations under this Lease.

**Exhibit III**  
**Sample Holdover Provisions**

**I. Typical**

Landlord and Tenant recognize that Landlord's damages resulting from Tenant's failure to timely surrender possession of the Premises may be substantial, may exceed the amount of the Rent payable hereunder, and will be impossible to accurately measure. Accordingly, if possession of the Premises is not surrendered to Landlord on the Expiration Date or sooner termination of this Lease, in addition to any other rights or remedies Landlord may have hereunder or at law, Tenant shall (a) pay to Landlord for each month (or any portion thereof) during which Tenant holds over in the Premises after the Expiration Date or sooner termination of this Lease, a sum equal to 150% of the Rent payable under this Lease for the last full calendar month of the Term, (b) be liable to Landlord for (i) any payment or rent concession which Landlord may be required to make to any tenant obtained by Landlord for all or any part of the Premises (a "New Tenant") in order to induce such New Tenant not to terminate its lease by reason of the holding-over by Tenant, and (ii) the loss of the benefit of the bargain if any New Tenant shall terminate its lease by reason of the holding-over by Tenant, and (c) indemnify Landlord against all claims for damages by any New Tenant. No holding-over by Tenant, nor the payment to Landlord of the amounts specified above, shall operate to extend the Term hereof. Nothing herein contained shall be deemed to permit Tenant to retain possession of the Premises after the Expiration Date or sooner termination of this Lease, and no acceptance by Landlord of payments from Tenant after the Expiration Date or sooner termination of this Lease shall be deemed to be other than on account of the amount to be paid by Tenant in accordance with the provisions of this Section \_\_\_\_.

**II. Complex**

Unless Landlord expressly agrees otherwise in writing, if Tenant shall remain in possession of all or any portion of the Premises beyond the Term, Tenant shall pay Landlord:

- (i) for the first one hundred twenty (120) days of any such holdover, an amount of Net Rent equal to 125% of the Net Rent applicable immediately preceding Tenant's holdover of possession of the Premises beyond the Term, plus 100% of all Additional Rent, and
- (ii) thereafter during any such holdover, an amount of Net Rent equal to 150% of the Net Rent applicable immediately preceding Tenant's holdover of possession of the Premises beyond the Term, plus 100% of all Additional Rent,

in all events on a monthly basis, and only with respect to the portion of the Premises as to which Tenant has retained possession from time to time after the expiration or earlier termination of this Lease (but with respect to the entire portion of the Premises on any partial floor of which Tenant has so retained possession, as provided in the next succeeding sentence), and prorated on a per diem basis for each day Tenant shall retain possession of the Premises or any part thereof after expiration or earlier termination of this Lease during such period. For purposes of calculating the amount of Net Rent and Additional Rent payable by Tenant as provided above, in the event that Tenant remains in possession of any portion of any floor of the Building included (in whole or in part) within the Premises, Tenant shall be deemed to have held over with respect to all of the space on such floor (or the entire portion of such floor which is included in the Premises immediately prior to the Expiration Date). The foregoing provisions shall not be deemed to limit or constitute a waiver by Landlord of any rights of re-entry or other rights or remedies of Landlord provided herein or at law and shall not serve as permission for Tenant to hold over, nor serve to extend the Term (although after commencement of said holdover Tenant shall remain bound to comply with all provisions of this Lease until Tenant vacates the Premises, and such vacation shall be subject to the provisions of this Lease). Landlord and Tenant further agree that, in the event that any such holdover by Tenant shall extend for greater than one hundred twenty (120) days beyond the Term, then Tenant shall also indemnify and defend Landlord from and against all actual, direct claims and damages

sustained or incurred by Landlord by reason of Tenant's holding over beyond (but not within) such one hundred twenty (120) day period, including, without limitation, all Holdover Damages (but in all events, without duplication of any amounts payable by Tenant pursuant to the other provisions of this Lease), which Holdover Damages shall be limited as set forth below in this Section \_\_\_\_\_. For purposes of the foregoing, the term "Holdover Damages" shall mean (without duplication of any other amounts payable by Tenant pursuant to this Lease) any and all actual holdover costs, penalties, rentals and damages incurred by a prospective tenant of all or any portion of the portion of the Premises with respect to which Tenant shall have held over beyond the foregoing one hundred twenty (120) day period under such tenant's then existing lease for space at another building, to the extent that Landlord is obligated to pay such holdover costs, penalties, rentals and/or damages under a binding agreement entered into between Landlord and such prospective tenant (it being agreed that Landlord shall use reasonable efforts to mitigate the amount of any such costs, penalties, rentals and/or damages payable by Landlord. At Tenant's request made at any time during the last six (6) months of the Term, Landlord shall notify Tenant of any leasing of the Premises (or any portion thereof) for a term commencing following the expiration of the Term (or of Tenant's right of possession hereunder) which may give rise to any indemnification obligations of Tenant pursuant to this Section \_\_\_\_\_. Notwithstanding the foregoing, Landlord and Tenant acknowledge that the rental amounts and indemnification obligations set forth in this Section \_\_\_\_\_ have been specifically negotiated by Landlord and Tenant to be, and the same shall be, Landlord's sole monetary remedy on account of Tenant's holding over in or retaining possession of the Premises or any part thereof, and in no event shall Landlord be entitled to recover any other monetary damages or award, whether direct, indirect, special or consequential.

**Exhibit IV**  
**Sample Security Deposit Provision**

**I. Letter of Credit**

\_\_\_01 Tenant shall deliver to Landlord, upon Tenant's execution of this Lease, a Letter of Credit (as hereinafter defined) in the amount of \$\_\_\_\_\_, as security for the faithful performance and observance by Tenant of the terms, covenants and conditions of this Lease. The Letter of Credit shall be in the form of a clean, irrevocable, non-documentary and unconditional letter of credit (the "Letter of Credit") issued by and drawable upon any commercial bank which is a member of the New York Clearing House Association or other bank satisfactory to Landlord, trust company, national banking association or savings and loan association with offices for banking purposes in the City of Chicago (the "Issuing Bank"), which has outstanding unsecured, uninsured and unguaranteed indebtedness, or shall have issued a letter of credit or other credit facility that constitutes the primary security for any outstanding indebtedness (which is otherwise uninsured and unguaranteed), that is then rated, without regard to qualification of such rating by symbols such as "+" or "-" or numerical notation, "Aa" or better by Moody's Investors Service and "AA" or better by Standard & Poor's Rating Service, and has combined capital, surplus and undivided profits of not less than \$2,000,000,000. Such Letter of Credit shall (a) name Landlord as beneficiary, (b) have a term of not less than one year, (c) permit multiple drawings, (d) be fully transferable by Landlord without the payment of any fees or charges by Landlord, and (e) otherwise be in form and content satisfactory to Landlord. If upon any transfer of the Letter of Credit, any fees or charges shall be so imposed, then such fees or charges shall be payable solely by Tenant and the Letter of Credit shall so specify. The Letter of Credit shall provide that it shall be deemed automatically renewed, without amendment, for consecutive periods of one year each thereafter during the Term (and in no event shall the Letter of Credit expire prior to the 45th day following the Expiration Date) unless the Issuing Bank sends a notice (the "Non-Renewal Notice") to Landlord by certified mail, return receipt requested, not less than 45 days next preceding the then expiration date of the Letter of Credit stating that the Issuing Bank has elected not to renew the Letter of Credit. The Issuing Bank shall agree with all drawers, endorsers and bona fide holders that drafts drawn under and in compliance with the terms of the Letter of Credit will be duly honored upon presentation to the Issuing Bank at an office location in Chicago, Illinois.

\_\_\_02 If (a) an Event of Default by Tenant occurs in the payment or performance of any of the terms, covenants or conditions of this Lease, including the payment of Rent, or (b) Tenant fails to make any installment of Rent as and when due, or (c) Landlord receives a Non-Renewal Notice, Landlord shall have the right by sight draft to draw, at its election, all or a portion of the proceeds of the Letter of Credit and thereafter hold, use, apply, or retain the whole or any part of such proceeds, as the case may be, (x) to the extent required for the payment of any Fixed Rent or any other sum as to which Tenant is in default including (i) any sum which Landlord may expend or may be required to expend by reason of Tenant's default, and/or (ii) any damages to which Landlord is entitled pursuant to this Lease, whether such damages accrue before or after summary proceedings or other reentry by Landlord, and/or (y) as a cash security deposit, unless and until, in the case of clause (c) above, Tenant delivers to Landlord a substitute Letter of Credit which meets the requirements of this Article \_\_\_. If Landlord applies or retains any part of the proceeds of the Letter of Credit, or cash security, Tenant, upon demand, shall amend the Letter of Credit to increase the amount thereof by the amount so applied or retained or provide Landlord with an additional Letter of Credit in the amount so applied or retained so that Landlord shall have the full amount thereof on hand at all times during the Term. If Tenant shall comply with all of the terms, covenants and conditions of this Lease, the Letter of Credit or cash security, as the case may be, shall be returned to Tenant after the Expiration Date and after delivery of possession of the Premises to Landlord in the manner required by this Lease.

\_\_\_03 Upon a sale or other transfer of the Real Property or the Building, or any financing of Landlord's interest therein, Landlord shall have the right to transfer the Letter of Credit to its transferee or lender. With respect to the Letter of Credit, within 5 days after notice of such transfer or financing, Tenant, at its sole cost, shall arrange for the transfer of the Letter of Credit to the new landlord or the lender, as designated by Landlord in the foregoing notice or have the Letter of Credit reissued in the name of the

new landlord or the lender. Upon such transfer, Tenant shall look solely to the new landlord or lender for the return of such Letter of Credit (or any unused cash proceeds of the Letter of Credit), and the provisions hereof shall apply to every transfer or assignment made of the Letter of Credit (or such cash security) to a new landlord. Tenant shall not assign or encumber or attempt to assign or encumber the Letter of Credit or such cash security, and neither Landlord nor its successors or assigns shall be bound by any such action or attempted assignment, or encumbrance.

## **II. Cash**

A. Tenant shall, upon execution of this Lease, deposit with Landlord a security deposit of \$\_\_\_\_\_ (the "Security Deposit") as security for the faithful performance and observance by Tenant of the terms, provisions and conditions of this Lease. If Tenant defaults with respect to any of the terms, provisions and conditions of this Lease including, but not limited to, the payment of Rent, Landlord may use, apply or retain the whole or any part of the Security Deposit to the extent required for the payment of any Rent or for any sum which Landlord may expend or may be required to expend by reason of Tenant's default in respect to any terms, covenants and conditions of this Lease including, but not limited to, any damages or deficiency in reletting of the Leased Premises whether such damages or deficiency accrued before or after summary proceedings or other re-entry by Landlord. If Landlord elects to apply all or a portion of the Security Deposit as herein provided, Tenant shall within ten (10) days after written demand therefor pay Landlord an amount equal to the portion of the Security Deposit so applied. Landlord shall not be obligated to pay any interest on the Security Deposit. In addition, Landlord may commingle the Security Deposit with its other funds. In the event that Landlord transfers title to the Leased Premises, Tenant agrees to look solely to the transferee thereof for the return of the Security Deposit.

B. In the event that Tenant fully and faithfully complies with all the terms, provisions, covenants and conditions of this Lease, the Security Deposit shall be returned to Tenant after the termination of this Lease and after delivery of entire possession of the Leased Premises to Landlord in the condition set forth herein.