

# **Options, Rights of First Refusal and Rights of First Offer in Purchase and Leasing Transactions – A Practical Guide**

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*OPTIONS, RIGHTS OF FIRST REFUSAL, AND RIGHTS OF FIRST OFFER IN PURCHASE  
AND LEASING TRANSACTIONS*

**A. Introduction**

1. Options

- (a) An option is a standing, irrevocable offer by Seller to sell (or lease) on the terms specified in the option, which the Buyer (or Tenant) may accept by exercise
- (b) Holder of option controls whether and when to exercise
- (c) Price can be fixed or established by procedure or formula
  - ☐ appraisal
  - ☐ formula (e.g. based on operating performance)

2. Right of First Refusal (ROFR)

- (a) Right to acquire (or lease) property – “pre-emptive” right, *triggered by third-party action*
- (b) Holder of ROFR does not control timing
  - ☐ ROFR triggered by proposed transaction between the owner of the real estate interest that is the subject of the ROFR (owner; Landlord) and third party
- (c) Holder of ROFR usually does not control price
  - ☐ Price typically established by proposed third party transaction

3. Right of First Offer (ROFO)

- (a) Right to acquire (or lease) property – another “pre-emptive” right, *triggered by Seller (or Landlord)*
- (b) Holder of ROFO does not control timing
  - ☐ ROFO triggered when owner of the interest that is subject to the ROFO expresses a desire to sell/lease
  - ☐ ROFO may be triggered before third-party buyer/tenant has been identified
- (c) Holder of ROFO typically does not control price

- ☐ Price typically established by notice from owner to holder of ROFO; minimum price could be established by ROFO holder
- ☐ If holder of ROFO declines to exercise, owner is free to sell/lease to third party at or above price (or \_\_\_\_% of price) offered to holder of ROFO

4. Beware of Mexed Missages

(a) St. Martin v. Leuthner, 2005 WL 625889 (Minn. App.)

- ☐ Seller sells portion of lakeshore property to buyer, retains balance of property to build retirement home
- ☐ Purchase agreement states “Seller agrees to give buyer **first option to buy** adjoining lot or lot to south at price of \$1,000 foot.” (emph. added)
- ☐ Attorney for Seller discusses with Seller difference between option to buy and right of first refusal; drafts option
- ☐ Seller believes Buyer has ROFO/ROFR, with no right to buy if Seller doesn’t plan to sell; commences construction of home
- ☐ Buyer gives notice of option exercise; trouble ensues

(b) Stuart v. D’Ascenz, 2000 Colo. App. LEXIS 1694 (Sept. 28, 2000)

- ☐ Plaintiff sells bar to defendant for \$125,000;
- ☐ Defendant leases bar back to plaintiff; lease gives plaintiff “the **1st right of refusal on the property** for a period of two (2) calendar year term from the start of this lease. The **purchase price shall be \$160,000.**” (emph. added)
- ☐ Plaintiff exercises at \$160,000; defendant refuses to sell
- ☐ Trial court allows plaintiff to enforce purchase; appellate court reverses, holding that lease granted plaintiff a right of first refusal, not an option

(c) Olympik Village Apartments Limited Partnership v. Rochester Lodge No. 13, 2000 WL782012 (Minn. App.) (unpublished)

- ☐ Agreement requires Seller to notify adjoining landowner prior to unconditionally agreeing to sell property, “to allow [adjoining landowner] 10 business days to offer to purchase [the Seller’s property]”

- ☐ Seller enters into purchase agreement to sell; gives notice (and copy of purchase agreement) to adjoining landowner
- ☐ Adjoining landowner submits offer; Seller rejects and sells to third party
- ☐ Adjoining landowner's claim for damages/specific performance dismissed; court holds that agreement gave adjoining landowner right to make an offer, but did not require Seller to accept the offer.

5. Do Options, ROFRs, and ROFOs Create an Interest in Real Property?

Consider:

- ☐ Statute of Frauds
  - See Minn. Stat. § 513.05:
 

Every contract for the leasing for a longer period than one year or for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing and subscribed by the party by whom the lease or sale is to be made, or by the party's lawful agent thereunto authorized in writing; and no such contract, when made by an agent, shall be entitled to record unless the authority of such agent be also recorded.
  - An option contract is generally *outside* the statute of frauds because it conveys no interest in land. Malevich v. Hakola, 278 N.W.2d 541 (Minn. 1979); Shaughnessy v. Eidsmo, 23 N.W.2d 362 (1946).
  - In Bero Motors v. General Motors, 2006 WL 2312182 (Mich. App. 2006), plaintiff recovered damages (including lost profits) of \$3,126,934, when General Motors failed to honor an oral commitment to assign a right of first refusal to plaintiff.
  - But see Olympik Village Apartments Limited Partnership vs. Rochester Lodge No. 13, 2000 WL 782012 (Minn. App.) (oral statements cannot be relied on to establish the written contract of sale).
- ☐ Rule against Perpetuities
  - Results vary by state

- Minnesota has adopted the Uniform Statutory Rule Against Perpetuities:

“A nonvested property interest is invalid unless:

(1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or

(2) the interest either vests or terminates within 90 years after its creation.”

Minn. Stat. § 501A.01(a).

#### □ Recording Acts/Intervening Interests

- “Relation back” doctrine
- In Startex v. Aelina Enterprises, 206 WL 952390 (Tex. App. 2006), the Court was presented with the following order of events:

1970: Lease entered into between then Owner and [a predecessor to] Startex, as Tenant; Tenant has ROFR to purchase the property. Lease is recorded.

1996: Lease/Purchase Contract between then-Owner and Aelina; Lease/Purchase Contract gives Aelina an option to purchase the property.

May, 2003: Owner and Aelina enter into purchase agreement; Owner notifies Startex.

June, 2003: Startex gives notice exercising its right to purchase on same terms as Aelina deal.

July 29, 2003: Startex purchases property.

July 31, 2003: Aelina notifies Startex that Aelina has elected to purchase property under its option.

The trial court granted summary judgment in favor of Aelina, but the appellate court reversed, holding that Aelina acquired its interest with notice of the Startex ROFO, and that Startex’s right was superior to Aelina’s option.



Although Court holds that Startex acquires the property free of Aelina option, decision does not address whether Startex takes free of Aelina Lease.

☐ Availability of Title Insurance?

- See limited protection provided by sample endorsement attached as ***Exhibit A***

**B. Purchase Transactions**

1. Options to Purchase.

(a) Background.

- ☐ May be granted by free-standing agreement or to a Tenant under a lease.
- ☐ Often used for land assembly deals; developer doesn't want to purchase some property until all property is under control/option. May also be useful where confidentiality is critical.
  - A Buyer may achieve much of the same flexibility under a purchase agreement with contingencies.
- ☐ Sometimes, Seller will prefer an option because of the ease in eliminating Buyer; unlike a non-performed purchase agreement, an unexercised option agreement may not need to be cancelled.
  - Advantage is lost if Buyer's exercise of option creates binding agreement of purchase and sale.
  - On the Buyer side, options leave little margin for error (as compared to purchase agreement, where non-performance is followed by the statutory cancellation period).

(b) Options – Drafting Topics.

- ☐ As noted above, an option is an irrevocable offer by Seller to sell on the terms specified in the option, which Buyer may accept by exercise. All provision typical to a purchase agreement should be included in the option, including:
  - property description
  - price
  - closing schedule, mechanics

- title assurances/coverages
- prorations
- due diligence; inspections
- Seller representations/warranties
- treatment existing tenants (estoppels?), service contracts
- contingencies
- casualty/condemnation

□ In addition to typical purchase agreement topics, in drafting an option, the parties will also need to consider:

- notice protocol for exercise
- what the option consideration should be and its timing
- how time requirements are defined (calendar day vs. business day, e.g.)
- how much time, if any, should there be between notice and closing?
- whether an earnest money deposit is required
- when/whether background materials must be shared (past environmental reports, e.g.)
- whether the option period can be extended and for what consideration
- if the option is contained in a lease, whether rent should continue during the time after exercise by notice and before purchase
- if the option is contained in a purchase agreement, whether the option survives the closing under the purchase agreement. See Bruggeman v. Jerry's Enterprises, Inc., 591 NW2d 705 (Minn. 1999) (merger doctrine did not apply to extinguish option of Seller to re-purchase contained in purchase agreement)
- whether the option can be assigned
- whether the option will be recorded

- whether the option holder will be required to subordinate to future mortgage financing
- whether there are tax deferral objectives (1031 exchange, e.g.); tax timing objectives or reported earnings objectives that are important to the parties

2. Rights of First Offer and First Refusal.

(a) A Seller will generally prefer to grant a Right of First Offer instead of a Right of First Refusal.

- ☐ The ROFO provides the Seller with more control, as the Seller decides when and on what terms the Seller would be willing to accept.
- ☐ Finding a third party willing to negotiate a purchase agreement for a property that is subject to a ROFR is very difficult.

(b) ROFR/ROFO – Drafting Topics

- ☐ Limiting the time frame for exercise.
  - time required to obtain financing
  - Effect of delay caused by Seller. In Electric Fetus Company, Inc. v. Gonyea, 2000 WL 1778906 (Minn. App.) (unpublished), the holder of ROFR exercised, matching third party offer but not closing date; ROFR holder given additional time for performance because Seller's actions made performance on the schedule specified in third party offer impossible.
- ☐ Allowing adequate time to find third party purchaser, if holder of ROFO passes on exercise of right.
- ☐ Allowing flexibility in business terms to avoid having to come back re-offer the property.
- ☐ Whether ROFO is one-time right (expires on sale to third party).
  - Compare with lease transactions – continuing obligation on Landlord to re-offer same space; third-party purchaser will expect to take free and clear of ROFR/ROFO at time of next sale.
  - Is ROFO revived if initially declined, Seller accepts offer from third party, but that transaction fails to close?

- ☐ Owner will need limited right to transfer property without triggering ROFR/ROFO:
  - Related party transactions – See, e.g., Creque v. Texaco Antilles Ltd, 409 F.3d 150 (3<sup>rd</sup> Cir. 2005), where holder of ROFR sought to force sale of property upon learning that one wholly-owned Texaco subsidiary had transferred property to another wholly-owned subsidiary for \$5,000 (Court held ROFR not triggered, but also held “for the sake of equity” that the ROFR could still be enforced against the transferee).
  - Foreclosure/deeds in lieu
  - Gifts
  - Bulk/portfolio sales
- ☐ Effect of Seller’s willingness to offer credit terms.
- ☐ Effect of Seller’s decision to sell property at auction.
- ☐ Putting third parties on notice; recording
  - Buyer who purchases with knowledge of ROFR takes subject to claim of specific performance; Buyer may not have BFP status. Williston on Contracts § 67:85, p. 505
- ☐ Require holder to subordinate to mortgage financing?
- ☐ Interaction between option and ROFO/ROFR, if transaction includes both

(f) **Sample Provisions.**

See ***Exhibit B*** for Right of First Offer to Purchase.

See ***Exhibit C*** for Right of First Refusal to Purchase.

3. **Bankruptcy Considerations**

- (a) Options and ROFR/ROFO are likely to be treated executory contracts, rejectable in bankruptcy
- (b) Bankruptcy Code Section 365(i) may protect the holder of an option in possession of the property
- (c) When option is contained in a lease, Tenant/holder of option rights may be able to protect itself by declining Landlord’s rejection

## C. Lease Transactions.

### 1. Options to Extend or Renew.

- (a) Background. The simplest and most common option contained in a lease is the option to extend or renew.

- ☐ Old cases discuss the distinction between a “renewal” (which required a new lease) and an “extension” (where extended term is treated as part of original demise). See Casner, American Law of Property (1974), § 3.85.
- ☐ Most courts now seem to pay little attention to the distinction. See Friedman on Leases (Fifth Edition) §§ 14:3.1; 14:3.2.

- (b) Sample provision: See *Exhibit D*

- (c) Exercise; Notice

- ☐ Space known (size; condition)
- ☐ Term known
- ☐ Rate – fixed vs. to be determined (“market”)
- ☐ Landlord requirement for lease amendment
- ☐ Effect of lender – Subordination, Non-Disturbance and Attornment Agreement (“Tenant agrees not to amend . . .” or “No lease amendment shall be binding upon lender . . .”)
- ☐ Timing of notice
  - 30 days vs. 6 months vs. 12 months vs. 24 months prior to end of term?
  - How much notice is appropriate will depend on many factors, including size of space, Landlord’s need to market space, Tenant’s business planning, and time required for Tenant to secure and build out new space.
  - Notice required “within 30 days from expiration” held to permit exercise within 30 days following end of term. Friedman on Leases (Fifth Edition) § 14.2, n. 183.

- (d) Late Notice

- ☐ Consequence of late exercise by Tenant

- Missing key deadlines can lead to unfortunate outcomes. See Chesapeake Bark v. Monro Muffler, 891 A.2d 384 (Md. App. 2006), where Tenant under 20-year lease was 17 days late in delivering extension notice; Court holds that extension was ineffective.
- ☐ Requiring pre-exercise notice from Landlord
- (e) Rent Determinations. Where the rental rate for the renewal term is not fixed or established by formula – “market” rent
- ☐ Defined process for determination – not an agreement to agree
- See cases collected at Friedman on Leases (Fifth Edition) § 14.1.1.
  - Compare King v. Dalton Motors Inc., 109 NW2d 51 (1961), where Landlord granted Tenant “a first option to extend this lease for an additional five (5) years, the terms and conditions *to be agreed upon at the time of the option renewal*”; Court holds provision (and similar “first option to purchase”) to be unenforceable.
  - See also Camelot LLC v. AMC Showplace Theaters, 665 F.3d 1008 (8<sup>th</sup> Cir. 2012), where Lease provided that any extension would be on same terms as existing Lease, except that “no Rent concessions, . . . lease buyouts. . . or limitations on tax or expense pass-throughs . . . shall be applicable”; provisions for these items had been “intentionally omitted” from the original Lease; the Court held that the terms of the option period are not “readily ascertainable” and that the option to renew “requires new, negotiated terms”.
- ☐ Key variables need to be considered in describing the process for determining a market rent adjustment:
- Who will make the determination? Battle of the appraisers: averaging multiple appraisals *vs.* averaging two of three *vs.* “baseball” arbitration
  - Length of renewal term
  - Market area; building type
  - What value, if any, should be given to existing Tenant improvements?

- What value implications, if any, should be reflected for the Landlord's cost of re-tenanting the space and the Landlord's lost rental stream during the re-tenanting period?
- What assumption should be made about Tenant inducements and transaction expenses?
- How far in advance of lease maturity should the process be commenced?
- Must the Tenant's exercise of a renewal option be absolute even before the renewal rate is known? Or, might Tenant have the right to rescind exercise if Landlord's determination of renewal rate or terms is unacceptable?
- Should the non-economic aspects of the Tenant's lease be ignored for purposes of determining fair rental value?

(f) Other drafting topics to consider.

- ☐ Should the option be personal or transferable?
- ☐ Effect, if any, of Tenant defaults – prior to exercise; at time of exercise; at time of commencement of renewal term.
- ☐ Require full occupancy – by original Tenant?
- ☐ Timely exercise – time is of the essence.
- ☐ Will Landlord be precluded from showing the space prior to deadline for Tenant's exercise of the right?

2. Options to Expand.

- (a) Background. A Tenant may occupy its initial space with the hope that, as its business grows, it can expand into larger premises. The Landlord will (to a degree . . .) want to accommodate Tenant, but will want to narrowly define expansion rights in terms of location and timing of the exercise, retaining as much flexibility as possible to lease the expansion space to third parties.
- (b) Defining the Expansion Space and its Condition.
- ☐ Is the expansion space presently available, with the Tenant having an immediate right to exercise the option and take over the space? Or is the space presently occupied by a third party, with the Tenant having an option to expand at some future date?

- Merely identifying the space on an Exhibit is not enough. Both the Landlord and Tenant need to know the condition in which the space will be delivered.
  - Does the space have all required access (including to emergency stairwells, etc.)?
  - Will the Landlord improve the space? Provide fit planning? Provide an allowance? Dictate the contractor? Charge an oversight fee related to work contracted by Tenant? Remove existing improvements? Construct demising walls?
  - Can Tenant or Tenant's contractors work in the space while Landlord's work is in process?
  - Will there be a need to create multi-tenant corridors?

(c) Rent Determination.

- The lease rate for the option space could be fixed, indexed, or based on a market rent adjustment.
  - See discussion of market rate determinations in the case of Extension/Renewal Options, above
  - The only additional variable now is defining the space the value of which is to be determined
  - When does base rent commence for the expansion space? When do operating expense, utility and property tax pass-throughs commence?

(d) Other Lease Terms.

- Upon exercise, the expansion space becomes part of the original lease, subject to the terms and conditions set forth in the lease.
- If some existing lease terms do not apply to the expansion space, say so.

3. Rights of First Offer and Refusal to Expand.

- Under a right of first refusal, the Tenant is given the right to match the terms of another, fully-negotiated lease obtained by the Landlord.



- A right of first refusal is very undesirable to a Landlord, because it puts a chill on Landlord's ability to lease the space. Brokers may also be unenthusiastic.
  - Landlord must first find a third party to lease the expansion space and then offer the same space and deal to the Tenant.
  - Many potential tenants will not be willing to put in the effort to negotiate a lease only to have an existing Tenant exercise a right of first refusal and accept the presented lease.
  - A practical resolution might involve treating the ROFR as triggered by the Landlord's acceptance of a bona-fide, third-party lease proposal/LOI (that Tenant can accept or decline), rather than deferring that trigger until a lease is fully documented.
- Under a right of first offer, the Landlord must offer space to Tenant before offering the space to a third party.
- Because Landlord controls the timing of the offer and the terms of the offer, this alternative is much preferred by landlords.
  - Tenant may simply want to be the "first to know" that a space will be available and a simple ROFO can accomplish that with minimal administrative burden on Landlord.
  - Landlord needs to build in flexibility to deal with third parties in case Tenant does not accept the initial offer. Tenant will feel abused if Landlord offers the space to Tenant at one rate, only to offer the space to a third party at a better rate if Tenant passes on the offer. Tenant will expect to have the space re-offered to Tenant if Landlord improves the terms. On the other hand, Landlord will not want to return to Tenant with a new offer for every little adjustment to its deal with a third party.
  - Tenant may wish to require that Landlord identify any existing superior rights of other tenants.
  - Non-economic terms of lease
  - Credit issues
  - Sample provision: See Exhibit E

(e) Drafting Topics.

- ☐ Same topics as lease renewal/extension option, above (personal to Tenant, effect of Tenant default, etc.). One issue that may require delicate balancing is the time limit between notice to the Tenant and Tenant's deadline to exercise . . . Tenant may want or need time to review/design/price the expansion space before concluding whether to exercise.
- ☐ Availability of space – existing Tenant has vacated and has no further rights and there are no options of other parties, or such options have been waived.
  - Disclaim liability for non-delivery of space due to holdover
  - For ROFO – when is space “available for lease”. See Exhibit E.
  - Landlord right to re-lease to existing Tenant even if that Tenant has no right to renew?
- ☐ Recalculate Tenant's prorata share.
- ☐ Description of space delivery condition warranties vs. “AS IS”.
- ☐ Is ROFR or ROFO intended to be a one-time right – waived if not timely exercised – or a continuing right?
  - Landlord does not want to re-offer the space to Tenant if terms change, or if space comes up again.
  - Tenant will want a look at the space each time it becomes available; Tenant appetite for space will vary over time.
- ☐ Dealing with conflicting rights of other (existing) tenants – “Superior Rights”.
- ☐ Result when ROFR/ROFO deal has term that extends beyond term of main lease
  - Require extension of main lease?
  - Tenant to have option to elect reduced term on ROFR/ROFO space?
- ☐ Interaction between ROFR/ROFO and option when Tenant holds both rights on same space.

- Some cases hold that passing on ROFR also waives option rights.
  - If ROFR/ROFO rights are independent of option rights, so state.
- Effect on ROFR/ROFO when Landlord offers large blocks of space to a third party, including space not subject to ROFR/ROFO.

US.108700823.01

## **EXHIBIT A**

### **OPTION ENDORSEMENT**

Company insures against loss or damage which the insured may sustain resulting from an adverse determination of a court of competent jurisdiction based upon the invalidity, unenforceability or failure of superiority of the Option described in Schedule A hereof, as against any lienholder, encumbrancer or party having an interest or estate in the land created or arising between Date of Policy and date of acquisition of the estate to which the Option relates provided that:

1. The Option is properly exercised in accordance with its terms;
2. The superiority of the Option is asserted by the insured, at its own expense in a timely manner and by appropriate action or proceeding against any such lienholder, encumbrancer or party having said interest or estate including, without limitation, any action or proceeding brought by any such lienholder, encumbrancer or party, or any proceeding necessary to have any such lien, encumbrance, interest or estate removed from its effect upon the land and relegated to the fund produced as a result of the exercise of the option; and
3. The coverage offered by this endorsement shall not be applicable to:
  - (a) any loss arising from bankruptcy or insolvency proceedings or the exercise of the rights of any trustee, receiver or creditor in connection therewith;
  - (b) any loss based upon the contention or determination that the Option transaction is part of a security arrangement or financing devise; or
  - (c) any loss based upon taxes or assessments levied by any governmental agency or authority subsequent to the Date of Policy.

## **EXHIBIT B**

### *Sample Right of First Offer For Tenant to Purchase*

#### ***[Short fuse; Offering Notice may prove challenging]***

Landlord hereby grants to Tenant a continuing Right of First Offer to purchase the Leased Premises during the “Right of First Offer Period,” which shall commence on the date of this Amendment and shall terminate upon expiration of this Lease.

(a) If, during the Right of First Offer Period, Landlord decides to sell the Leased Premises, Landlord shall provide to Tenant a letter of intent specifying the general terms upon which Landlord wishes to sell the Leased Premises (the “**Offering Notice**”). If Tenant desires to purchase the Leased Premises, Tenant shall, within seven (7) days after receipt of the Offering Notice, notify Landlord, in writing, either (i) that Tenant intends to exercise its Right of First Offer on the terms stated in the Offering Notice, or (ii) that Tenant declines to exercise its Right of First Offer. If Tenant fails to give such notice within such seven (7) business day period, Tenant will be deemed to have declined to exercise its Right of First Offer.

(b) If Tenant declines to exercise, or is deemed to have declined to exercise, its Right of First Offer, Landlord will be entitled to sell the Leased Premises ***[for a period of nine (9) months]*** after the date of such declining or deemed declining. Such sale by Landlord must be on substantially the same terms as in the Offering Notice. A sale on “substantially the same terms” as in the Offering Notice would mean (i) the net purchase price (i.e., taking into account commissions and other costs if same would be incurred in a sale to a third party but would not be incurred in a sale to Tenant) paid by a third party is at least 95% of the price presented in the Offering Notice, and (ii) the remaining terms are not materially more favorable to the purchaser than those in the Offering Notice. If the Landlord desires to complete a sale of the Leased Premises on terms substantially different than those included in the Offering Notice, Landlord must provide Tenant with an opportunity to buy the Leased Premises on such different terms and conditions, with another seven (7)-day notice and response period. ***[If at the end of nine (9) months Landlord has not completed a sale of the Leased Premises but still wishes to sell the Leased Premises, Landlord must again provide Tenant with an Offering Notice and start the process anew.]***

(c) If the Leased Premises are sold to a third party after compliance with the terms of this Exhibit, Tenant’s Right of First Offer thereafter shall be null and void and shall not be binding on such purchaser nor applicable to any subsequent sale of the Leased Premises.

(d) If the Tenant decides to purchase the Leased Premises under the terms of the Offering Notice, the Tenant shall within the seven (7)-day period execute the letter of intent presented by the Landlord and make a non-refundable deposit per the terms of the letter of intent, and close the transaction within 60 days.

(e) Notwithstanding anything in the foregoing to the contrary, Tenant’s Right of First Offer shall not apply to, and Tenant shall have no right to purchase the Leased Premises in connection with, (i) the sale or transfer of the Leased Premises to an affiliate of Landlord, which shall include any entity which control, is controlled by or is under common control with Landlord, or any entity in which Landlord has a substantial economic interest or (ii) the sale or proposed sale of the Leased Premises where the Leased Premises is a portion of a package or portfolio sale including one or more additional properties.

## **EXHIBIT C**

### *Sample Right of First Refusal For Tenant to Purchase*

#### 1. Right of First Refusal.

(a) Landlord hereby grants to Tenant a continuing Right of First Refusal to purchase the Building during the Right of First Refusal Period, which shall commence on the date of this Lease and shall terminate upon expiration of the original Term of this Lease.

(b) In the event Landlord receives a bona fide offer from an unaffiliated third party for the purchase of the Building (the "Prior Offer") during the Right of First Refusal Period that Landlord is willing to accept, it may do so but only subject to the Right of First Refusal hereby granted. Promptly following execution of the Prior Offer, Landlord shall provide a true, correct and complete copy thereof to Tenant. Tenant shall then have a period of seven (7) days within which to exercise its right to buy the Building from Landlord on the same terms and conditions as set forth in the Prior Offer by so notifying Landlord in writing. If Tenant timely submits such written notice, Tenant shall purchase and Landlord shall sell the Building pursuant to all of the terms, conditions, covenants and agreements of the Prior Offer.

(c) In the event Tenant fails to timely deliver such written notice (time being of the essence), then, subject to the terms of the next sentence, Tenant's Right of First Refusal granted hereunder shall lapse and be of no further force and effect. If Tenant fails to timely deliver an exercise notice as aforesaid, Landlord shall be free to consummate the sale of the Building pursuant to the Prior Offer. If the sale of the Building pursuant to the terms of the Prior Offer should fail to close, Tenant shall again have a Right of First Refusal for the Building for the remainder of the Right of First Refusal Period on the terms and conditions set forth in this paragraph.

(d) Notwithstanding anything in the foregoing to the contrary, Tenant's Right of First Refusal shall not apply to, and Tenant shall have no right to purchase the Leased Premises in connection with, (i) the sale or transfer of the Leased Premises to an affiliate of Landlord, which shall include any entity which control, is controlled by or is under common control with Landlord, or any entity in which Landlord has a substantial economic interest or (ii) the sale or proposed sale of the Leased Premises where the Leased Premises is a portion of a package or portfolio sale including one or more additional properties.

## **EXHIBIT D**

### *Sample Renewal Clause*

#### ***[Informal]***

Landlord grants Tenant the right and option to renew the Term for \_\_\_\_ periods of \_\_\_\_ years (each a “Renewal Term”).

Tenant shall notify Landlord in writing of its election to renew this Lease for each Renewal Term not less than six (6) months nor more than twelve (12) months prior to the expiration date of the then existing Term. Tenant’s failure to timely exercise any option hereunder shall cause the automatic extinguishment thereof, time being of the essence.

Each Renewal Term shall be upon all of the terms, covenants, and conditions of this Lease except that the Annual Rent payable during the Renewal Term shall be [\$ \_\_\_\_\_/year] or ***[determined in accordance with Section \_\_\_\_].***

Notwithstanding the above, Tenant shall have no right to extend or renew this Lease if (i) it is in default at the time of giving its notice of renewal; (ii) Tenant is in default as of the first day of the extended Term which was the subject of such notice; or (iii) Tenant is not occupying the entire Premises.

## **EXHIBIT E**

### *Sample Right of First Offer – Expansion of Leased Premises*

#### ***[Landlord friendly]***

#### **1. Right of First Offer.**

- (a) Provided Tenant is not then in default under the terms, covenants and conditions of the Lease, but subject to the superior rights in effect as of the date hereof, if any, of any other tenants, Tenant shall have the right to lease, as and when it becomes available (as defined below), any available space on the \_\_\_\_\_ floor of the Building (any such space, as and when becoming available and subject to this Article, referred to as the “Expansion Premises”).
- (b) Space is “available” for purposes of this Article when (i) it is vacated by the prior tenant, such tenant’s lease having expired or been terminated by Landlord, (ii) any tenants having superior rights to such space have declined or failed to exercise such rights, and (iii) Landlord intends to market such space for lease.
- (c) Nothing herein shall be construed so as to limit Landlord’s absolute right to renew or extend the lease of any existing or future tenant.
- (d) In the event that Expansion Space becomes available, Landlord shall give written notice to Tenant of the availability of the Expansion Space and the terms and conditions on which Landlord intends to offer it to the public and Tenant shall have a period of seven (7) days in which to exercise Tenant’s right to lease the Expansion Premises pursuant to the terms and conditions contained in Landlord’s notice, failing which Landlord may lease the Expansion Premises to any third party on whatever basis Landlord desires, and Tenant shall have no further rights with respect to that Expansion Premises. Without limiting the generality of the foregoing, if Landlord leases a particular Expansion Space to a third party pursuant to the preceding sentence and such Expansion Space is subsequently vacated again during the Term of this Lease or any renewal hereof, Tenant shall not have a new right of first offer to lease such space.
- (e) If Tenant exercises an expansion option hereunder, effective as of the date Landlord delivers the Expansion Premises (the “Delivery Date”), the Expansion Premises shall automatically be included within the Premises and subject to all the terms and conditions of the Lease, except as set forth in Landlord’s notice and as follows:
  - (i) Tenant’s Proportionate Share shall be recalculated, using the total square footage of the Premises, as increased by the Expansion Premises.
  - (ii) The Expansion Premises shall be leased on an “as is” basis and Landlord shall have no obligation to improve the Expansion Premises or grant Tenant any improvement allowance thereon.



- (iii) If requested by Landlord, Tenant shall, prior to the beginning of the term for the Expansion Premises, execute a written memorandum confirming the inclusion of the Expansion Premises and the Annual Rent for the Expansion Premises.
- (f) Notwithstanding the foregoing, Tenant shall have no right to lease Expansion Premises if the Termination Date under this Lease is prior to the date on which the term of the lease of the Expansion Premises would expire under the terms under which Landlord intends to offer the Expansion Premises to the public (“Expansion Termination Date”). However, if Tenant has a remaining renewal option which, if properly exercised, would extend the Termination Date of this Lease to or beyond the Expansion Termination Date, Tenant shall have the right to lease the Expansion Premises if, concurrently with its exercise of that right, it also exercises such renewal option.