

**RIGHTS OF FIRST REFUSAL AND RIGHTS OF FIRST OFFER**

**ICSC Law Conference - Workshop  
(October, 2002)**

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## **RIGHTS OF FIRST REFUSAL AND RIGHTS OF FIRST OFFER**

### **I. General Matters**

#### **A. Options v. Preemptive Rights**

An option creates in its holder the power to compel the sale or transfer of a property interest. A preemptive right, on the other hand, creates in its holder only the right to acquire the property interest before the owner conveys it to a third party.

Rights of first refusal (“ROFR”) and rights of first offer (“ROFO”) are preemptive rights. (See Exhibit A, Section I, attached hereto)

Nevertheless, ROFR and ROFO are sometimes generically referred to as types of options since the holder has an elective right which it may exercise or not exercise, in its discretion. Accordingly, it is oftentimes difficult to determine whether case law relating to options can be applied to preemptive rights such as ROFR and ROFO. (See Exhibit A, Section II)

#### **B. ROFR and ROFO - Personal or Real Property Interests?**

This issue is undoubtedly a matter of state law. Accordingly, the result may differ from jurisdiction to jurisdiction. Nevertheless, there appears little, if any, law to suggest that the ROFO is a real property interest.

As to ROFR, cases seem to go in a variety of directions. See Exhibit A, Section III for a discussion of illustrative decisions.

#### **C. Are ROFR and ROFO subject to the rules against perpetuities?**

Since there seems little to suggest that the ROFO is an interest in land, there is little reason to believe the ROFO be subject to the Rule against Perpetuities. Nevertheless, it would be prudent to include a time limitation on the ROFO even if tied to a life in being.

With respect to the ROFR, logically the issue should turn upon whether the ROFR is determined to be an interest in land or not. If not, the Rule against Perpetuities would seemingly not apply. Nevertheless, case law seems to suggest that courts may look at a variety of different matters in this determination. See Exhibit A, Section IV for a discussion.

See Exhibit B for a discussion of how one state, Georgia, has treated rights of first refusal through case law. See also “Pre-emptive Rights to Realty as Violation of Rule Against Perpetuities or Rule Concerning Restraints on Alienation,” 40 A.L.R. 3d 920.

## II. Special Issues

### A. When to disclose?

Legal professionalism requires treating opposing parties and their counsel with fairness, civility, respect, candor, and courtesy. Unfortunately this provides little guidance as to when a grantor of a ROFR should disclose to a third party offeree the existence of a ROFR affecting the real property at issue. Should disclosure occur (i) at the outset of negotiations with the third party offeree, (ii) only after material terms have been agreed to which the grantor of the ROFR is willing to accept, (iii) prior to, or after, exercise of letter of intent, (iv) only after negotiations have proceeded to a point that it is clear that a deal can or will be made, or (v) after all negotiations have been finalized but immediately prior to written or oral acceptance of the third party offer? If the ROFR has been recorded, does this relieve the grantor of the ROFR, or its counsel, of the burden of disclosure to the third party offeree, since this is a matter of public record and the third party offeree has constructive notice? Is it reasonable to assume that a third party offeree would search the public records during the negotiation process, prior to the offer being accepted by the property owner?

What if the property owner does not want the ROFR disclosed to the third party offeree or its counsel prior to finalizing all terms because he believes this will “scare off” the offeree or make the negotiations more difficult, and such property owner makes his wishes known to his counsel? How does the ethical obligation to the client affect grantors’ counsel ability to disclose the existing ROFR?

### B. Taxation

In a jurisdiction where the ROFR is determined to be a real property right, will the granting of such right create any transfer, conveyance or documentary stamp tax? Must the holder of the ROFR file any real property ad valorem tax return or pay any such tax?

If the answer to either of the foregoing questions is yes, how is such real property interest to be valued for these taxing purposes?

### C. Excluded Transactions

It is commonly believed that a number of transactions should not trigger the ROFR. It is wise to specifically provide for these exempt transactions in the terms of the ROFR rather than leave the matter to case law where the unexpressed intention of the parties may be at issue.

Only a bona fide offer from a third party, as distinguished from related parties to the property owner, should trigger a ROFR. Additionally, only those offers which the property owner is willing to accept should trigger the ROFR. Offers that the property owner rejects, whether solicited or unsolicited, should not trigger the ROFR. The drafting must so provide.

For a variety of other exempt transactions, see Section 2 of the Right of First Refusal Agreement form attached as Exhibit C hereto. These exempt transactions may also be applicable to a ROFO. See Section 2 of the Right of First Offer Agreement form attached as Exhibit D hereto.

See also (a) “Landlord and Tenant: What Amounts to ‘Sale’ of Property for Purposes of Provision Giving Tenant Right of First Refusal if Landlord Desires to Sell,” 70 A.L.R. 3d 203, and (b) “Rights of Holder of First Refusal Option on Real Property in Event of Sale at Foreclosure or Other Voluntary Sale,” 17 A.L.R. 3d 962.

#### D. **Title Insurance**

Since a ROFO is generally not considered a real estate interest, title insurance, which insures only real property interests, is generally not available. In those jurisdictions where a ROFR is not a real property interest, title insurance would also be difficult to procure. Title insurance may be available in those states where a ROFR is deemed a real property interest, however, one should check with the local title insurance underwriters regarding this matter.

One underwriter in a state in which ROFR is a real property interest, has indicated that they would not insure a “naked” or freestanding ROFR (i.e., one that is not part of a insured lease or regarding property adjacent to an insured fee simple interest).

The form of the title insurance for a ROFR is also likely to vary from state to state. In some states a ROFR may be included as an insured appurtenance as part of the insured property. The title insurance company will normally take exception to the terms and conditions of the ROFR and will not insure performance by the grantor of the ROFR. In some jurisdictions it may be possible to use a fairly standard form option to purchase endorsement with respects to a ROFR to purchase real property. See Exhibit E for a sample.

#### E. **Terms and Conditions of Third Party Offer**

A ROFR customarily provides, if exercised, the purchase or lease (as applicable) must be on the same terms and conditions as the third party offer triggering the ROFR. In other instances, the ROFR may provide that it must be on the exact terms and conditions. It may be more favorable to the ROFR holder if the exercise must only be on the same or equivalent economic terms.

Some courts have held that certain terms of the third party offer may not need to be included in the terms of a ROFR acceptance if they are inconsequential or unique. For a further discussion of the cases in this area, see Exhibit F attached.

If the ROFR acceptance is to be on the same terms and conditions as the third party offer, this places a burden on the grantor of the ROFR to determine whether the acceptance of the ROFR complies (i.e. is the acceptance on the same terms and conditions). If the grantor determines that it is, the third party offeree may challenge and file suit. If the grantor determines that the ROFR acceptance is not on the same terms and conditions and elects to sell to the third party offeree, the ROFR holder may challenge and initiate suit. Perhaps the grantor of the ROFR should be indemnified by the ROFR holder for any alleged improper exercise of the ROFR (absent gross negligence or willful misconduct of the grantor).

With respect to a lease, note how a third party offer may include various terms the ROFR holder would not accept:

1. The tenant finish build-out is particularized to suit only the third party offeree.
2. The permitted signage is only for third party offeree's prototypical signage.
3. The lease includes a guaranty and the guarantor is required to have, and maintain throughout the term of the lease, a net worth of not less than \$X. Perhaps the ROFR holder is not in a position to offer a similar creditworthy guaranty.
4. Permitted assignments of the lease are only to a specific parent, subsidiary or affiliate of the third party offeree.
5. The end of the proposed lease term of the ROFR space does not coincide with the end of the lease term of the remainder of the ROFR holder's leased space.
6. A large security deposit (or a letter of credit in lieu thereof) is required which the ROFR holder cannot match.
7. The permitted use is limited to third party offeree's permitted use and not the ROFR holder's required use.

With respect to a ROFR involving a purchase of land, various terms and conditions can be included in the third party offer which may prove difficult for a ROFR holder to match:

1. Significant earnest money (perhaps even non-refundable if the offeree has undertaken its due diligence during the negotiation process).
2. Installment sale.
3. A property exchange.
4. A very short inspection period or time to close (the third party offeree may commence his inspection during the negotiation of the third party offer, long before the offer is finalized such that a very short inspection period or closing period is included in the actual contract which is offered to the ROFR holder to match).

Must the grantor of a ROFR provide a complete copy of the third party offer or only the material terms (e.g. a term sheet or letter of intent)? Letters of intent are especially problematic. Does it constitute a contract? Is it even an offer? What if it provides there is no binding agreement until a purchase agreement is executed? Does the letter of intent have to be provided to ROFR holder or does it even trigger a ROFR?

## F. Broker Commissions

The ROFR should provide whether any brokerage commission will be paid in connection with the ROFR. Obviously, if a broker was not the procuring cause, the ROFR holder and the grantor prefer that no brokerage is to be paid. Where the ROFR agreement is silent on this matter, trouble lurks. Note some of the cases in this area:

- (i) David Meyers, Inc. v. Anderson, 48 Wash. App. 381, 739 P.2d 102 (1987). The ROFR provided that it must be accepted on the same terms and conditions as the third party offer. The third party offer included a payment of a five percent (5%) brokerage commission. The ROFR holder exercised his right to purchase the property when provided a copy of the third party offer, however, the ROFR, when exercised, did not contain a provision to pay the five percent (5%) brokerage commission. The court held that the ROFR was improperly exercised because it did not contain the same terms and conditions of the triggering offer.
- (ii) Reef v. Bernstein, 23 Mass. App. 599, 504 N.E.2d 374 (987). The triggering third party offer contained a broker's fee. The ROFR was to be exercised on the "same terms and conditions" as the third party offer. The ROFR provided for the same purchase price, but the ROFR holder was to receive a credit in the amount of the broker's fee against the purchase price. The amount of the credit equal to the broker's fee was put in an escrow fund to pay for any liability to the broker. The court held that this was an exercise on the same terms and conditions.
- (iii) Coldwell Banker Phyllis Reuben Real Estate v. Romano, 619 A.2d 376 (Pa. Super. 1993). A broker had an exclusive right to sell a particular property which was subject to a ROFR. A sale pursuant to the ROFR exercise was an exception to the broker's exclusive right to sell. The broker procured a ready, willing and able purchaser which triggered the ROFR. The ROFR holder exercised and the sale was closed to the ROFR holder. The court held that no brokerage commission was due to the broker in connection with the sale to the ROFR holder because the broker was not the procuring cause for the ROFR purchaser.

## G. Larger Tract or Multi-Units

A lease or conveyance including a ROFR may also state what effect the ROFR will have if the property subject thereto is ever offered as part of a larger tract. As illustrated by the cases cited below, state courts vary widely in the recognition and enforcement of ROFRs when the tract subject thereto is included in a the sale of a larger tract.

- (i) Chapman v. Mutual Life Ins. Co. of New York, 800 P.2d 1147 (Wyo. 1990). This case exemplifies the majority rule that when the owner of a tract subject to an ROFR attempts to sell that tract as part of a larger tract, the owner must offer the tract subject to the ROFR to the holder of the

ROFR, independent of the larger tract at a price that reflects the tract's value. If the owner attempting to sell the larger tract fails to make such an offer, the courts will return the parties to the status quo ante, invalidating any sale of the tract subject to the ROFR until a bona fide offer is made for that tract. In reaching its decision the Court recognized alternate courses taken in other jurisdictions. See Brenner v. Duncan, 27 N.W.2d 320 (Mich. 1947) (granting specific performance to a holder of a ROFR); See also Anderson v. Armour & Co., 473 P.2d 84 (Kan. 1970) (granting monetary damages to the holder of an ROFR).

- (ii) Crow-Spieker v. Helms, 731 P.2d 348 (Nev. 1987). This case illustrates the most extreme minority view. The owner of a tract subject to an ROFR solicited and received an offer on a larger tract including the tract subject to the ROFR. The Court held that an offer for the larger tract did not implicate or trigger the ROFR because the owner of the larger tract acted in good faith and without any wrongful intent. The Court held that the holder of the ROFR was not entitled to a remedy.

See also "Option to Purchase Real Property as Affected by Optioner's Receipt of Offer for, or Sale of, Larger Tract Which Includes the Optioned Parcel," 34 A.L.R. 4<sup>th</sup> 1217.

#### H. **Bankruptcy**

The law concerning the status of an ROFR when the grantor files for bankruptcy is evolving. The old rule held that such ROFRs were executory contracts that could be rejected by the debtor subject to 11 U.S.C. § 365. The case below illustrates the emerging rule and provides an excellent analysis of the law and alternative arguments.

In re Bergt, 241 B.R. 17 (Bankr. D. Ala. 1999). Debtor that owned property subject to an ROFR moved to reject the ROFR as an executory contract and, implicitly, to avoid the obligation to the holder of the ROFR. Debtor argued that the rejection would benefit the estate by making the property more marketable. The Court held that a ROFR possessed was not an executory contract that could be rejected by the Debtor and that even if the Debtor could reject the ROFR, this rejection would not result in avoidance of the obligation to the holder of the ROFR.

ROFR, as executory contracts, are not specifically addressed in the bankruptcy bill working its way through Congress as of August 15, 2002.

#### I. **ROFO – Duty to Negotiate in Good Faith**

Does a ROFO imply a duty on behalf of the offeror to negotiate terms of sale or lease in good faith or does this require the offeror to offer terms to the ROFR holder closely approximating market terms? Other than the general contractual obligation which implies a duty of good faith and fair dealing, we have not found any case law dealing specifically with ROFO. May the parties express an intention in the document not to create any duty of good faith and fair dealing upon the offeror, to the extent permitted by applicable law?

To some extent, flexibility can be drafted into the ROFR offer which allows the offeror to vary some of the terms of the offer when negotiating with third parties after the ROFR or ROFO holder has elected not to meet the terms proposed by the offeror (e.g. a certain percentage of price reduction can be offered to third parties, such as 10-15%, without going back to the ROFR holder).

J. **Practice Tips**

1. With respect to a ROFR, if the exercise must be on the “same terms and conditions” (or equivalent language) provide for whether a copy of the entire offer is provided to the ROFR holder (so that no material terms are omitted) or whether merely the material terms are to be provided.
2. If a ROFR exists, make certain that the third party offer does not include a confidentiality provision so that the grantor of the ROFR is not precluded from providing the terms of the offer to the ROFR holder. At a minimum, the confidentiality provision must exclude disclosure of the terms to the ROFR holder.
3. Provide a termination date for the ROFR or the ROFO (whether it be a particular time or tied to a life in being) to avoid running afoul of the Rule against Perpetuities or any restraint on alienation argument unless there is sufficient case law in the applicable jurisdiction indicating that these rules will not be applied.
4. Be sure to provide as to whether the ROFR or the ROFO is personal to a particular party or tenant or whether it will inure to the benefit of their successors, assigns or assignees.
5. In connection with the lease, these pre-emptive rights should only be capable of being exercised if the lease is not in default.
6. With respect to a lease,
  - (a) Minimum credit standards of the ROFR holder may be imposed with respect to a ROFR holder or ROFO holder to make certain that the holder has sufficient creditworthiness for the additional financial obligation of the additional space subject to the ROFR.
  - (b) As to a ROFR, a lease guaranty requirement should be included if the space subject to the original lease in which the ROFR exists also has a lease guaranty.
7. A ROFR should provide that once triggered, if the ROFR holder does not exercise within a certain time, terminates. One exception to this may be that if the sale/lease falls through, the right can be revived.
8. In connection with both the ROFR and ROFO, there should be some flexibility in terms for the grantee to negotiate with a third party so that they do not need to re-

offer to the ROFR holder or the ROFO holder upon every change in terms. Examples: in connection with the ROFR, extension of the inspection period to the third party offeree, an extension of the closing date by less than 30 days should not require re-offering to the ROFR holder. Perhaps some de minimus reduction in the sales price which is negotiated during the inspection period should be permitted without having to re-offer to the ROFR holder.

9. With respect to a ROFO, the grantor must have some ability to negotiate a price and closing time period with any prospective third party without having to make a new offer to the ROFR holder each time these terms vary. Parameters can be prescribed.
10. For arguments for and against granting a ROFR, see Exhibit G attached.
11. For additional sample ROFR provisions see Exhibit H attached.

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## EXHIBIT A

### **Rights of First Offer and Rights of First Refusal – Selected Issues**

#### **I. Introduction**

Rights of first offer and rights of first refusal, commonly referred to as preemptive rights, often provide dramatic repercussions for landowners seeking to sell property. *See* Sheldon A. Halpern, *Rights of First Refusal and First Offer: Avoid Them If You Can*, SHOPPING CENTER BUSINESS, Apr. 2001, at 78. Under a right of first offer, a landowner is required to offer the specified real property interest to the holder of the right before offering the property to a third party. *Id.* This differs from a right of first refusal in that under a right of first refusal, the landowner is required to notify the holder of the right that a third party has made an offer to purchase the real property interest. *Id.* The property interest at issue must then be presented to the holder of the right, who may purchase the interest under the same terms offered by the third party. *Id.*

While potentially appearing harmless, rights of first offer and rights of first refusal can affect one's ability to market land, leading to frequent disputes. *Id.* As a result, a diverse body of case law surrounds the subject of preemptive rights with jurisdictions conflicting over the manner by which to scrutinize these interests. Courts vary with respect to their relation to options, their status as personal or real property, and their treatment by the Rule Against Perpetuities.

This discussion will provide an overview of how some jurisdictions treat preemptive rights in the aforementioned situations. While it will analyze some courts' reasoning in specific situations, it cannot provide a comprehensive summary of the law in each jurisdiction. Instead, this discussion will provide a glimpse of the law surrounding preemptive rights with respect to (1) their relation to options, (2) their status as personal or real property, and (3) their treatment with respect to the Rule Against Perpetuities.

Before beginning, it is important to note that even though a significant distinction exists between rights of first offer and rights of first refusal, the treatment of the two by courts does not vary. Few cases even mention the term "right of first offer" explicitly. In fact, only a limited number of courts have discussed these rights in a real estate setting. Those that have done so seemingly group rights of first offer into an overarching category of rights of first refusal or preemptive rights. As such, this article will not focus on rights of first offer, but will instead examine the expansive legal framework surrounding rights of first refusal.

#### **II. Distinction Between a Preemptive Right and an Option**

Preemptive rights are distinguishable from options. *Smith v. Mitchell*, 269 S.E.2d 608, 610-11 (N.C. 1980). Courts recognize the distinction between rights of first refusal and options to varying degrees. *See, e.g., Ferrero Constr. Co. v. Dennis Rourke Corp.*, 536 A.2d 1137, 1140 (Md. 1988); *Smith*, 269 S.E.2d at 610. While most courts note the distinction, some appear to draw more of a parallel to the jurisprudence surrounding options than others. *Smith*, 269 S.E.2d

at 610-11. The North Carolina Supreme Court, for example, provided a clear analysis of the divergence between preemptive rights and options. In *Smith v. Mitchell*, the court clarified that “preemptive provisions, while analogous to options, are technically distinguishable.” *Id.* at 610. The court further articulated that “[a]n option creates in its holder the power to compel sale of land. A preemptive provision, on the other hand, creates in its holder only the right to buy land before other parties *if the seller decides to convey.*” *Id.* at 610-11 (emphasis added). Consequently, this distinction creates significant legal impacts, especially when addressing unlawful restraints on alienation. See *Shiver v. Benton*, 304 S.E.2d 903, 905 (Ga. 1983).

Because the holder of a preemptive right cannot compel the sale of the property, courts like the one in *Smith* are less likely to find that a preemptive right is a restraint on alienation than other restrictions, like options. *Smith*, 269 S.E.2d at 610. In *Smith*, the court examined a right of first refusal found in a restrictive covenant on a plat of real property. *Id.* at 610. Under similar circumstances, addressing unlawful restraints on alienation and the Rule Against Perpetuities, the Supreme Court of Georgia addressed this issue in *Shiver v. Benton*. 304 S.E.2d at 905. The court there also made a clear distinction between rights of first refusal and options, elaborating that “[a] right of first refusal may have many similarities to an option but is more adequately defined by the term preemptive right.” *Id.*

In *Shiver*, twelve individuals each owned a fractional share of a fee as tenants in common. *Id.* The cotenants entered into a collateral right of first refusal agreement. *Id.* If one of the cotenants entered negotiations to sell her interest in the fee, the agreement granted a right of first refusal to the others, whereby they could obtain the interest by offering the same price and terms as the third party. *Id.* In *Shiver*, the distinction between preemptive rights and options was determinative in the Court’s assessment of the unlawful restraint on alienation issue. *Id.* Citing the Restatement of Property, the Court held that when one conditions the preemptive right on meeting the terms of a third party, it is not an unlawful restraint on alienation. *Id.*

Other courts do not create such a harsh distinction between rights of first refusal and options. See *Ferrero*, 536 A.2d at 1137. In contrast to the clear distinction established in cases like *Smith* and *Shiver*, some jurisdictions analyze preemptive rights within the legal framework of options from which they emerged. See, e.g., *id.* For instance, the Maryland Court of Appeals articulated that “[a] right of first refusal is a type of option.” *Id.* at 1140. While the Court later emphasized the distinction between an option and a preemptive right, it nevertheless presented its analysis through the development of the law on options. *Id.* at 1140-42.

### **III. Personal Property Versus Real Property**

A majority of courts find that preemptive rights are real property interests, rather than mere contract rights. *Id.* at 1139. However, unlike the distinction between preemptive rights and options, jurisdictions differ and holdings vary within jurisdictions depending on the terms of the rights of first refusal. The reasoning underlying the majority view stems from the fact that the “performance or nonperformance [of the preemptive right]...affect[s] the nature, quality, value, or mode of enjoyment of the demised premises....” *In re Jenkins*, 74 B.R. 440 (Bankr. N.D. Ga. 1987). Moreover, a preemptive right provides an equitable interest that springs forth, allowing for specific performance, should the property owner attempt to sell to someone else. *Kingston v.*

*Robinson*, 596 A.2d 1378, 1384 (Sup. Ct. Del. 1991). Because of the holder's ability to enforce the right in equity, courts will usually treat this interest as a real property interest. *Id.*

The Maryland Court of Appeals, in *Ferrero*, held that the real property interest created by a right of first refusal was analogous to a springing executory interest because it vests only when an owner decides to sell her property. *Ferrero*, 536 A.2d at 1139. In *Ferrero*, the plaintiff and defendant entered into a contract for the purchase of two lots, with the contract containing a right of first refusal on seven other lots that named the plaintiff as the holder of the right. *Id.* at 1138. The defendant never recorded the contract, but the closing occurred. *Id.* The Court commented that its holding regarding rights of first refusal and real property interests comported with the findings of "the vast majority of courts and commentators," and similarly the Court found that a right of first refusal located in an unrecorded contract for purchase created a real property interest.

Nevertheless, the Maryland case failed to discuss rights of first refusal in situations that could more easily render them personal property interests, such as preemptive rights in collateral agreements or ones that are expressly personal. Therefore, while the majority position appears to render a right of first refusal found within a conveyance of a property interest a real property interest, it is not clear whether courts will extend this reasoning to all situations. *See, e.g., Fallschase Dev. Corp. v. Blakey*, 696 So. 2d 833 (Fl. Dist. Ct. App. 1997) (holding that when an agreement provides a right of first refusal to a named individual, the right is personal to that individual).

Numerous courts have held that a right of first refusal could be a personal or real property interest. *See, e.g., Ricketson v. Bankers First Sav. Bank, FSB*, 503 S.E.2d 297 (Ga. 1998); *Fallschase*, 696 So. 2d at 833; *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378 (Del. 1991). In *Stuart Kingston*, the Supreme Court of Delaware established that rights of first refusal may be personal or real property interests. *Stuart Kingston*, 596 A.2d at 1384. In that case, the dispute involved a right of first refusal that was silent as to duration and transferability of the right. *Id.* at 1380. While the Court found that the silence led the right to be one in real property, it nevertheless examined the contract to discern whether it created a personal or real property interest. *Id.* at 1384. As such, the Court noted that "[a]n agreement between two parties which confers a right of first refusal and further provides for the termination of that right upon the death of either party is deemed to have created a personal right...." *Id.*

Other courts, however, will not make a presumption that the right of first refusal conveys an interest in real property. The Supreme Court of Georgia discussed this issue in *Ricketson v. Bankers First Savings Bank, FSB*. 503 S.E.2d at 299-300. As in other cases, the preemptive right in *Ricketson* involved a clause granting the plaintiffs "first refusal on the remaining property belonging to [the defendant]." *Id.* at 297-98. In holding that the obligation did not encumber the land, the Court looked to the intentions of the parties and their manifestation of that intent. *Id.* at 300. The Court first stated that subsequent purchasers "will not be bound unless it was intended that they should be." *Id.* In ruling that the covenant was personal, the Court looked for manifestations of the parties' intent to have it run with the land and found none. Instead, the Court turned to the fact that the parties did not record the covenant and expressed no intent for it to run with the land. *Id.*

Therefore, even though the majority view holds that preemptive rights are interests in real property, courts do not uniformly find as such. Instead, many courts look to the facts surrounding the right of the first refusal, with some making the presumption of a real property interest and others presuming personal covenants.

#### **IV. Preemptive Rights and the Rule Against Perpetuities**

Courts generally reach fairly uniform results with respect to distinctions involving preemptive rights; however, this is not the case regarding preemptive rights and the applicability of the Rule Against Perpetuities. The applicability of the Rule Against Perpetuities varies greatly depending upon the facts of the case and the law of the jurisdiction. Logically, one may think that courts would first determine whether or not the preemptive right is personal or real property. Then, based upon that information, they would determine the applicability of the Rule Against Perpetuities – the Rule applies to real property and not to personal property. This is not necessarily the case, however. Even in situations where courts determine that a preemptive right is a real property interest, some courts hold that the Rule Against Perpetuities does not apply for other reasons. *See Ferrero*, 536 A.2d at 1137; *Shiver*, 304 S.E.2d at 903. Thus, one cannot establish a necessary correlation between a court’s findings regarding the nature of the interest, real property or personal property, and the applicability of the Rule Against Perpetuities. *Id.*

In traditional common law jurisdictions, which appear to comprise a majority of jurisdictions, a right of first refusal that fails to establish a termination date within a life in being plus twenty-one years violates the Rule Against Perpetuities. Jonathan F. Mitchell, *Can a Right of First Refusal Be Assigned?*, 68 U. CHI. L. REV. 985 (2001); *Ferrero*, 536 A.2d at 1139-40. The Maryland Court of Appeals in *Ferrero* provides an example of this position in holding that because preemptive rights are interests in real property, the Rule Against Perpetuities applies to such rights. 536 A.2d at 1139. In *Ferrero*, the Court looked to the Restatement of Property and more than twenty other jurisdictions to fashion its conclusion. *Id.* at 1140. The Court also examined the implications of shifting away from the majority view that a right of first refusal may violate the Rule Against Perpetuities. The Court reasoned that in “property law, vested rights and settled expectations are at stake. A departure from settled law may introduce doubt as to the value of vested rights.” *Id.* As a result, the Court prioritized stability in this area of the law. *Id.*

Numerous courts depart from this rule for varying reasons. Nevertheless, there is an established minority view that points to the distinction between options and preemptive rights to conclude that preemptive rights should not be subject to the Rule Against Perpetuities. *Id.* at 1142. Those jurisdictions look at the effect that the preemptive right at issue renders upon the alienability of the property interest. *Shiver*, 304 S.E.2d at 907. Those courts examine the purposes underlying the Rule Against Perpetuities, one of which is to “facilitate the alienability of property.” *Ferrero*, 536 A.2d at 1142-43. As certain preemptive rights do not pose a restraint on alienation, those courts find that the Rule Against Perpetuities is inapplicable because the rights do not fall within the purpose of the Rule. *Shiver*, 304 S.E.2d at 907.

Georgia case law provides a well-developed analysis of a jurisdiction that holds preemptive rights to be real property, but will not apply the Rule Against Perpetuities to certain preemptive rights that do not restrain alienation. *See Shiver*, 304 S.E.2d at 903; *Hinson v.*

*Roberts*, 349 S.E.2d 454 (Ga. 1986); *Hornsby v. Holt*, 359 S.E.2d 646 (Ga. 1987). Georgia courts consistently hold that the Rule Against Perpetuities is not applicable to rights of first refusal that are based on meeting the terms of offers by a third party because such restraints do not fall within the purpose of the Rule Against Perpetuities. *Id.*

In 1983, the Supreme Court of Georgia in *Shiver v. Benton* first held that preemptive rights, when they are conditioned on meeting the terms of the offer of a third party, do not fall within the purview of the Rule Against Perpetuities. *Shiver*, 304 S.E.2d at 907. The Court noted that even though the Restatement of Property and a majority of courts find that preemptive rights may be void as per the Rule Against Perpetuities, the agreement at issue was compatible with the “policies of commerce and utilization of land.” *Id.* at 906-07. In *Shiver*, the right of first refusal agreement failed to set a termination date within twenty-one years after some life in being. *Id.* at 905. Instead, the agreement bound all “heirs, executors, and legal representatives” for the “maximum extent and time permitted by law.” *Id.* However, the court found the determinative fact to be that the parties conditioned the agreement on meeting the terms of a third party, as opposed to meeting a fixed price. *Id.* at 905.

The Court reasoned that when examining the effects of the agreement and the policies underlying the Rule together, it is not persuasive to apply the Rule to rights of first refusal. *Id.* at 906. Therefore, it did not void the agreement as a violation of the Rule Against Perpetuities. *Id.* at 907. However, the Court contrasted the preemptive right at issue with the one found in *Lufburrow v. Williams*, which violated the Rule Against Perpetuities. *Id.* at 906 (discussing *Lufburrow v. Williams*, 263 S.E.2d 535 (Ga. Ct. App. 1979)). Instead of conditioning the right of first refusal on the offer of a third party, the parties in *Lufburrow* did not tie the price to the open market, but to the ad valorem tax value. *Id.* at 906-07.

The Supreme Court of Georgia revisited the issue of rights of first refusal and the Rule Against Perpetuities in 1986 in *Hinson v. Roberts*. 349 S.E.2d at 454. In that case, the plaintiff conveyed property to one of the defendants by deed that contained a right of first refusal granting the plaintiff the right to repurchase the property from the defendant by matching the terms and conditions of any future prospective purchaser. *Id.* at 455. However, the right of first refusal failed to state a terminating date. *Id.* Turning to its precedent in *Shiver*, the Court held that a right of first refusal does not violate the Rule Against Perpetuities when based on matching the offer of a third party because it is “compatible with the policies of commerce and utilization of land.” *Id.* at 456. The court further elaborated that “[t]he clause does not then run contrary to the purposes of the Rule Against Perpetuities, such as preventing the tying up of land for an unreasonable length of time, prohibiting restraints on alienation, and assuring the utilization of...land...” *Id.*

Shortly thereafter, the Supreme Court of Georgia again visited the issue in *Hornsby v. Holt*, rendering a similar holding. 359 S.E.2d at 646. In *Hornsby*, two brothers exchanged warranty deeds containing a right of first refusal based on matching the best offer from a third party in the event one decided to sell. *Id.* at 647-48. However, the security deed to the lender did not contain the language regarding the preemptive right of the brother. *Id.* at 648. One brother defaulted on his payment, and the lender foreclosed on and obtained the property, having bid the highest amount at sale. *Id.* The other brother was not granted an offer to purchase and brought suit. *Id.* Reiterating its previous two holdings, the court found that the right of first

refusal lies outside the Rule Against Perpetuities because it does not amount to a restraint on alienation. *Id.* at 649. This examination of Georgia law provides one example of how a jurisdiction resolves issues involving preemptive rights and the Rule Against Perpetuities without following the traditional common law approach.

Jurisdictions vary regarding the reasoning underlying holdings that remove preemptive rights from the scope of the Rule Against Perpetuities. *See id.*; *Gartley v. Ricketts*, 760 P.2d 143 (N.M. 1988); *Adler v. Simpson*, 610 N.Y.S.2d 351 (N.Y. App. Div. 1994). In *Adler v. Simpson*, the Supreme Court of New York construed the right of first refusal between private individuals as personal, as to avoid application of the Rule Against Perpetuities. 610 N.Y.S.2d at 693. In that decision, the Court stated that “the right of first refusal could not be deemed to have run with the land because it would have been violative of the Rule Against Perpetuities and the only reasonable construction...must be that the parties intended it to be a personal agreement....” *Id.* Therefore, it appears that some courts will even construe the agreements themselves as to avoid the Rule Against Perpetuities.

Constructions like those issued by the Georgia and New York courts appear to reflect a trend shifting away from the traditional common law approach. Jonathan F. Mitchell, *Can a Right of First Refusal Be Assigned?*, 68 U. CHI. L. REV. 985, 996 (2001). The Restatement (Third) of Servitudes exempts rights of first refusal from the Rule Against Perpetuities altogether. *Id.* Moreover, the Restatement (Third) of Property acknowledges a growing trend away from applying the Rule Against Perpetuities to Preemptive Rights. *Id.* Therefore, it is difficult to predict the direction in which courts will move with respect to preemptive rights and the Rule Against Perpetuities.

## EXHIBIT B

### Georgia Courts' Interpretations of Preemptive Rights – Selected Cases

#### *Shiver v. Benton*, 304 S.E.2d 903 (Ga. 1983)

- The Supreme Court of Georgia held that a preemptive right is not an unlawful restraint on alienation or violative of the Rule Against Perpetuities when it is conditioned on meeting the terms of the offer of a third party.

#### *Hinson v. Roberts*, 349 S.E.2d 454 (Ga. 1986)

- The Supreme Court of Georgia held that a right of first refusal may not be defeated by offering the land as part of a package transaction, even if the owner allocates the purchase price among the several tracts. Additionally, the Court held that a right of first refusal does not violate the Rule Against Perpetuities when based on matching the offer of a third party because it is “compatible with the policies of commerce and utilization of land” and does not run contrary to the Rule Against Perpetuities’ purpose.

#### *Hornsby v. Holt*, 359 S.E.2d 646 (Ga. 1987)

- The Supreme Court of Georgia held that a security deed is subject to a right of first refusal contained in a contemporaneously executed document and that foreclosure constitutes a “sale,” triggering the right of first refusal. The Court also held that a right of first refusal, when conditioned on meeting the terms of an offer by a third party, does not violate the Rule Against Perpetuities because it does not amount to a restraint on alienation.

#### *Ricketson v. Bankers First Savings Bank, FSB*, 503 S.E.2d 297 (Ga. Ct. App. 1998)

- The Court of Appeals of Georgia held that a right of first refusal is a personal property interest, unless the parties possess and manifest an intent that the right of first refusal run with the land. In the absence of a recording of the document containing the right of first refusal and an expression of an intent for the right of first refusal to run with the land, a preemptive right does not bind subsequent holders of the property.

#### *Hasty v. Health Services Centers, Inc.*, 373 S.E.2d 356 (Ga. 1988)

- A lessor granted a lessee a right of first refusal on the leased property. The right of first refusal stated that the right was triggered when specific terms for conveyance were obtained by “an offer to purchase...or otherwise.” The lessor granted an option to purchase to a third party.
- The Supreme Court of Georgia held that an option triggers a right of first refusal when the right of first refusal is not conditioned specifically on an offer to sell by a third party. The Court looked to the specific language of the right of first refusal, which stated that the terms for conveyance could result from an offer for sale or “otherwise.” The Court reasoned that because the language provided other means for obtaining the terms of the prospective sale, the option triggered the right of first refusal at issue.

#### *Hewatt v. Leppert*, 376 S.E.2d 883 (Ga. 1989)

- A lessor granted a lessee a right of first refusal, providing the right to purchase the leased property in the event that the lessor received an “acceptable offer” for sale. The lessor

listed the property for \$450,000, and the lessee refused to purchase at that price. The lessor then contracted with a third party, granting an option to buy the property at \$450,000.

- The Supreme Court of Georgia held that the granting of the option did not trigger the right of first refusal because the right was conditioned on an acceptable offer of sale, which did not occur. However, the Court found that the lessor nevertheless breached the agreement because the option diminished the value of the right of first refusal by reducing the possibility that third party would present an “acceptable offer.”

::ODMA\PCDOCS\ATL\603644\1

**EXHIBIT C**

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[SPACE ABOVE THIS LINE RESERVED FOR RECORDING DATA]

After recording, return to:

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

**RIGHT OF FIRST REFUSAL AGREEMENT**

THIS AGREEMENT, made as of this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between \_\_\_\_\_ a \_\_\_\_\_ (hereinafter referred to as "Grantor"), and \_\_\_\_\_, a \_\_\_\_\_ (hereinafter referred to as "Grantee");

WITNESSETH THAT:

IN CONSIDERATION of the sum of TEN AND NO/100 DOLLARS (\$10.00) and other good and valuable consideration, Grantor and Grantee hereby covenant and agree as follows:

1.

**Right of First Refusal**

Grantor does hereby grant unto Grantee, a right of first refusal (hereinafter referred to as the "First Refusal Right") to purchase all of Grantor's right, title and interest in and to the real property described in Exhibit "A" attached hereto and by this reference made a part hereof, and together with all personal property located on or used in connection with said real property which is owned by Grantor (said real property and said personal property, hereinafter collectively referred to as the "Property"), subject to and upon the terms and conditions hereinafter set forth.

During the term of this Agreement, in the event Grantor receives a bona fide written offer from any third party to purchase the Property, or any portion thereof which is subject to this First Refusal Right, which Grantor desires to accept, Grantee may elect to purchase the Property, or the applicable portion thereof, at the price and on the terms and conditions (except for the time within which to close the transaction) as are contained in the written offer. Grantor shall give notice to Grantee, including delivery to Grantee of a true and exact copy of the written offer, and allow Grantee thirty (30) calendar days subsequent to Grantee's receipt of such notice within which Grantee may elect to purchase the Property, or the applicable portion thereof, from Grantor; and in the event Grantee so elects to purchase the Property, or the applicable portion thereof, by giving notice of such election to Grantor within the thirty (30) day period, Grantor shall sell the Property, or the applicable portion thereof, to Grantee at the price and on the same terms and conditions as are contained in the written offer, except that Grantee shall not be required to close the transaction prior to sixty (60) calendar days following the expiration of the aforesaid 30-day period. To the extent any portion of the price in the third party bona fide offer is to be paid by non-cash consideration, such consideration shall be valued at the fair market value thereof as certified by \_\_\_\_\_.

Should Grantee, by written notice to Grantor, elect not to exercise the right to purchase, or should Grantee fail to notify Grantor of its election to purchase within the aforesaid 30-day period, then, in either of such events, Grantor shall be free to consummate the sale of the Property, or the applicable portion thereof, to the third party submitting the written offer, provided that the sale is closed and on the same material terms and conditions as are contained in the written offer, without any substantive modification thereto, except that the closing thereof may occur on or before the thirtieth day subsequent to the closing deadline set forth in the written offer, but provided that the closing must occur within one (1) year after the date of the written offer. Should any such sale be consummated, this First Refusal Right shall thereafter be of no further force and effect with respect to the Property, or applicable portion thereof, subject to the sale. Should any such sale not be consummated as aforesaid, Grantor shall, in the event Grantor subsequently receives any modified or new bona fide written offer from any third party to purchase the Property, or any portion thereof, again follow the provisions of this paragraph requiring notice to Grantee and opportunity for Grantee to purchase the Property. Grantor shall not be obligated to offer to sell or to sell the Property, or any portion thereof, and Grantor shall not be obligated to disclose to Grantee any offer to purchase the Property or any portion thereof, which Grantor may receive which Grantor, in its sole discretion, does not accept or intend to accept.

## 2.

### Limitations and Exclusions on First Refusal Right

Notwithstanding anything herein to the contrary, under no circumstances shall “a bona fide written offer from a third party” be deemed to include or shall this First Refusal Right be triggered by any of the following:

- (i) a gift of the Purchaser’s Tract, or any portion thereof, by Purchaser,
- (ii) a devise of the Purchaser’s Tract, or any portion thereof, or any other transfer upon the death of Purchaser,

- (iii) transfers to any parent, subsidiary or affiliate of Purchaser or transfers to any entity controlled by or under common control with Purchaser or transfers of co-ownership interests in the Purchaser's Tract,
- (iv) transfers of stock of Purchaser or transfers to any entity into which or with which Purchaser is merged or consolidated,
- (v) transfers by Purchaser which are deemed or considered transfers by operation of law, liquidation or consolidation, including, without limitation, mergers, consolidations, reorganizations or dissolutions,
- (vi) grants of easements, leases, usufructs, licenses, concession agreements or transfers not in fee,
- (vii) involuntary transfers, including, without limitation, transfers in foreclosure, transfers in lieu of foreclosure, condemnation or deeds in lieu of condemnation, bankruptcy or court-ordered estate liquidation,
- (viii) sale and leaseback financings, synthetic leases, or any other off balance sheet financing,
- (ix) other financing transactions of any nature no matter the structure, including financing arrangements which include lender acquisition rights, and
- (x) package sales transactions in which Purchaser offers or markets the Purchaser's Tract and one or more other parcels or tracts together as one package.

3.

Term of First Refusal Right

The First Refusal Right shall commence as of the date hereof and shall remain in effect until \_\_\_\_\_.

4.

Exercise of First Refusal Right

To exercise the First Refusal Right herein granted, Grantee must deliver written notice of its election to exercise the First Refusal Right to Grantor as provided in Section 1 herein. Upon such notice being given, this Agreement shall become a contract of purchase and sale subject to the terms contained in this Agreement. In the event the First Refusal Right has expired and terminated, any attempt to exercise the First Refusal Right shall be ineffective.

5.

Broker and Broker's Commission

Grantor and Grantee warrant and represent to the other that such party has not employed any broker or agent in connection with this Agreement. Grantee acknowledges that Grantee

shall be entitled to no commission in the event Grantee elects to purchase the Property or the applicable portion thereof, pursuant to the First Refusal Right. Grantee and Grantor covenant and agree, each to the other, to indemnify the other against any loss, liability, costs, claims, demands, damages, actions, causes of action, or suits based upon or arising out of the alleged employment or use by the indemnifying party of any real estate broker or agent.

6.  
Closing

The closing (hereinafter referred to as the "Closing") of the exercise of the First Refusal Right shall be held as provided in Section 1 of this Agreement, in the offices of \_\_\_\_\_  
\_\_\_\_\_. The exact time and date of Closing shall be selected by Grantee by delivering written notice thereof to Grantor at least ten (10) business days prior to Closing. In the event Grantee has exercised the First Refusal Right but does not notify Grantor of the exact time and date of Closing, Closing shall be held at 10:00 a.m. on the last day for closing as described in said Paragraph 1 in the aforesaid office.

7.  
Survey and Inspection of Property

From and after the date on which Grantee has notified Grantor of its election to purchase the Property, or the applicable portion thereof, pursuant to this First Refusal Right and until the date of Closing, Grantee and Grantee's agents, employees and independent contractors shall have the right and privilege to enter upon the Property to survey and inspect the Property, all at Grantee's sole cost and expense; provided, however, Grantee shall provide Grantor with reasonable prior written notice of any inspection or survey and Grantee, and Grantee's agents, employees and independent contractors, shall not disrupt or interfere with Grantor's activities on the Property. Grantee hereby covenants and agrees to indemnify and hold harmless Grantor and their partners from any and all loss, liability, costs, claims, demands, damages, actions, causes of action, or suits arising out of or in any manner related to the exercise by Grantee of Grantee's rights under this paragraph.

8.  
Notice

a. Any notice, election, exercise of the First Refusal Right, or other communication required or permitted hereunder shall be delivered by hand (or by professional overnight courier service) or by certified United States mail, return receipt requested, postage and charges prepaid, to the following addresses:

To Grantor:

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

To Grantee:

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

with a copy to:

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

b. Any notice, election, exercise of the First Refusal Right, or other communication delivered or mailed as aforesaid shall be effective upon receipt or refusal to accept delivery.

c. Each party hereto may change its address for notice, elections, exercising the First Refusal Right, and other communications from time to time by notifying the other party of the new address in the manner provided for giving notice herein.

9.

Time of Essence

Time is of the essence of this Agreement.

10.

Entire Agreement

This Agreement constitutes the entire agreement of the parties and may not be amended except by written instrument executed by all the parties hereto. If all or any portion of this Agreement shall be declared invalid or unenforceable under applicable law, then the performance of such portion shall be excused to the extent of such invalidity or unenforceability, but the remainder of this Agreement shall remain in full force and effect; provided, however, that if the excused performance of such unenforceable provision shall materially adversely affect the interest of either party, the party so affected shall have the right to terminate this Agreement by written notice thereof to the other party, whereupon this Agreement shall become null and void, except for those indemnities set forth in Sections 6 and 8 of this Agreement and the provisions of Section 16 of this Agreement.

11.

Headings

The section headings are inserted for convenience only and are in no way intended to describe, interpret, define, or limit the scope or content of this Agreement or any provision hereof.

12.

Surviving Clauses after Closings

Sections 6, 8 and 16 of this Agreement shall survive the Closing regardless of whether expressly incorporated into the closing documents. All other paragraphs of this Agreement shall be merged into the delivery of the closing documents and shall not survive Closing.

13.

Applicable Law

This Agreement shall be construed and interpreted in accordance with the laws of the State of Georgia.

14.

Assignability

Grantee may not assign Grantee's rights under this First Refusal Right Agreement without the prior written consent of Grantor, which may or may not be given in Grantor's sole discretion.

15.

Successors and Assigns

This Agreement shall be binding upon and inure to the benefit of Grantor, Grantee and their respective successors and assigns, if any.

16.

Cancellation of Record of Grantee's Rights

In the event the First Refusal Right expires and is terminated or if the First Refusal Right is exercised and the resulting contract is not consummated due to the default of Grantee, Grantee's rights and interests in and to the Property shall automatically be rendered void without action by Grantor or Grantee. In furtherance of the foregoing, Grantee shall, upon the request of Grantor, execute and deliver to Grantor a quitclaim deed releasing the Property from any right or claim of Grantee, and Grantee hereby appoints Grantor Grantee's attorney-in-fact for the sole purpose of executing and delivering on behalf of Grantee a quitclaim deed as aforesaid. The power of attorney herein granted is coupled with an interest and is irrevocable by death, insolvency or otherwise. Notwithstanding the above, Grantor will not exercise the power of attorney herein granted until five (5) days after Grantor has given to Grantee written notice of Grantor's intention to exercise the power of attorney and Grantee has failed to execute and deliver a quitclaim deed as aforesaid within said five-day period. All third parties may rely, without further documentation, upon Grantor's filing of a document evidencing termination of the First Refusal Right signed solely by Grantor filed in the Deed Records of Forsyth County, Georgia.

IN WITNESS WHEREOF, Grantor and Grantee have set their hands and seals hereto as of the day and year first above written.

GRANTOR:

\_\_\_\_\_

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

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Attest: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

[BANK SEAL]

[INSERT APPLICABLE ACKNOWLEDGEMENT FORM]

GRANTEE:

\_\_\_\_\_, a  
\_\_\_\_\_

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

By: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Attest: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: \_\_\_\_\_

[CORPORATE SEAL]

[INSERT APPLICABLE ACKNOWLEDGEMENT FORM]

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**EXHIBIT D**

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[SPACE ABOVE THIS LINE RESERVED FOR RECORDING DATA]

After recording, return to:

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

**RIGHT OF FIRST OFFER TO PURCHASE AGREEMENT**

THIS AGREEMENT made as of the \_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between \_\_\_\_\_, a \_\_\_\_\_ (“Purchaser”), and \_\_\_\_\_, a \_\_\_\_\_ (“Developer”);

**WITNESSETH:**

WHEREAS, on the date hereof Purchaser has purchased and acquired from Developer that certain parcel of land described in Exhibit A attached hereto and made a part hereof (the “Purchaser’s Tract”);

WHEREAS, Developer owns that certain parcel of land described in Exhibit B attached hereto and made a part hereof (the “Developer’s Tract”) which is contiguous with the Purchaser’s Tract); and

WHEREAS, Developer has requested that it be granted a right of first offer to purchase the Purchaser’s Tract in certain events if Purchaser decides to sell the Purchaser’s Tract; and

WHEREAS, Purchaser is willing to grant such right of first offer to Developer subject to and in accordance with the terms, covenants and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the foregoing, Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Purchaser and Developer hereby covenant and agree as follows:

IV. **Section 1. Right of First Offer**

A. In the event Purchaser elects to sell the Purchaser's Tract, Purchaser shall give Developer notice of such election to sell which shall include the offering price and other basic terms for any such sale. Developer shall have a period of twenty (20) days from the receipt of any such notice within which to decide whether or not to purchase the Purchaser's Tract at such stated offering price and upon such other basic terms and shall give notice of such decision to Purchaser within said twenty (20) day period. If Purchaser either receives a notice from Developer that Developer does not desire to purchase the Purchaser's Tract or Purchaser fails to receive any notice from Developer within said twenty (20) day period, then Purchaser shall have the right (subject to the provisions of Section 1.C. hereof) to proceed to sell the Purchaser's Tract to any third party and upon any such conveyance this Agreement shall cease and terminate and be of no further force or effect. If for any reason Purchaser fails to sell the Purchaser's Tract within eighteen (18) months of the date Purchaser first gives notice to Developer pursuant to this Section 1.A., then Purchaser must reoffer the Purchaser's Tract to Developer a second time before Purchaser may sell same to a third party. Developer shall have a twenty (20) day period from said second offering to elect to purchase the Purchaser's Tract and shall give notice of its decision to Purchaser within said twenty (20) day period. If Purchaser either receives a notice from Developer that Developer does not desire to purchase the Purchaser's Tract or Purchaser fails to receive any notice from Developer within said twenty (20) day period, then Purchaser shall have the right to proceed to sell the Purchaser's Tract to any third party and shall have no further obligation to reoffer the Purchaser's Tract to Developer whether or not Purchaser ever consummates a sale to such third party buyer.

B. If Purchaser receives a notice from Developer within said twenty (20) day period which indicates that Developer desires to purchase the Purchaser's Tract, then the parties shall cooperate and coordinate in good faith to arrange a closing at the earliest reasonably convenient closing date (but in no event more than ninety (90) days after Purchaser's receipt of Developer's notice of its desire to purchase the Purchaser's Tract) and shall consummate such closing in accordance with local custom and practice regarding the closing prorations and adjustments and responsibility for closing costs and recording fees. Within five (5) business days of Purchaser's receipt of Developer's notice to purchase, Developer shall place into escrow, with an escrow agent satisfactory to Purchaser and Developer, earnest money in the amount of five percent (5%) of the purchase price. Developer shall accept title to the Purchaser's Tract subject to real estate taxes, installments of special assessments, and any and all covenants, easements and restrictions of record, except that delinquent real property taxes or installments of special assessments and any mortgages or liens then outstanding on the Purchaser's Tract shall be discharged from the purchase price proceeds payable by Developer hereunder. Developer shall accept the improvements on the Purchaser's Tract in their then "AS IS," "WHERE IS," "WITH ALL FAULTS," condition with no warranty or representation of any nature whatsoever. The purchase price shall be payable in cash or other method acceptable to Purchaser. Title to the Purchaser's Tract shall be conveyed by limited warranty deed, subject as to those title matters described above.

C. Under any of the circumstances described in this Section 1., Purchaser shall have the right to sell the Purchaser's Tract to any third party at a price equal to or greater than the stated

offering price or for an amount not less than eighty-five percent (85%) of such stated offering price. If such selling price is less than eighty-five percent (85%) of the stated offering price, then Purchaser shall reoffer the Purchaser's Tract to Developer for such lower price in the manner described in this Section 1. and Developer shall have the right to elect to purchase the Purchaser's Tract as set forth in this Section 1.

V. **Section 2. Limitations and Exclusions on Right of First Offer.**

Notwithstanding anything herein to the contrary, under no circumstances shall Purchaser have any obligation to provide the notice referred to in Section 1. hereof nor shall Developer have the right to purchase the Purchaser's Tract if Purchaser is selling or transferring the Purchaser's Tract in connection with any of the following transactions:

- (xi) a gift of the Purchaser's Tract, or any portion thereof, by Purchaser,
- (xii) a devise of the Purchaser's Tract, or any portion thereof, or any other transfer upon the death of Purchaser,
- (xiii) transfers to any parent, subsidiary or affiliate of Purchaser or transfers to any entity controlled by or under common control with Purchaser or transfers of co-ownership interests in the Purchaser's Tract,
- (xiv) transfers of stock of Purchaser or transfers to any entity into which or with which Purchaser is merged or consolidated,
- (xv) transfers by Purchaser which are deemed or considered transfers by operation of law, liquidation or consolidation, including, without limitation, mergers, consolidations, reorganizations or dissolutions,
- (xvi) easements, leases, usufructs, licenses, concession agreements or transfers not in fee,
- (xvii) involuntary transfers including, without limitation, transfers in foreclosure, transfers in lieu of foreclosure, condemnation or deeds in lieu of condemnation bankruptcy or court-ordered estate liquidation,
- (xviii) sale and leaseback financings, synthetic leases, or any other off balance sheet financing,
- (xix) other financing transactions of any nature no matter the structure, including financing arrangements which include lender acquisition rights, and
- (xx) package sales transactions in which Purchaser offers or markets the Purchaser's Tract and one or more other parcels or tracts together as one package.

VI. **Section 3. Miscellaneous**

A. Assignment. The rights arising under this Agreement may be assigned by Developer only to the party or parties acquiring the Developer's Tract or any portion thereof, and provided that (i) the assignee at the time of such assignment agrees in writing (in Georgia recordable form) to be bound by all terms and conditions contained herein which are applicable to Developer, (ii) a copy of such instrument is given to Purchaser within ten (10) days of such assignment (and Purchaser shall be entitled to rely thereon without further inquiry), and (iii) such rights may be assigned to and exercised by only one assignee at any one time, but such assignee may be comprised of multiple parties acting in concert. Developer may also assign its rights under this Agreement to its first mortgagee or first security deed holder with respect to the Developer's Tract.

B. Binding Effect. Subject to the provisions hereof regarding assignment, this Agreement shall be binding upon and inure to the benefit of the owners of the Purchaser's Tract and the Developer's Tract and their respective successors and permitted assigns.

C. Amendment and/or Modification. Neither this Agreement nor any term or provision hereof may be changed, waived, discharged, amended or modified orally, or in any manner other than by an instrument in writing signed by all of the parties hereto.

D. Costs and Attorneys' Fees. If any party hereto shall bring any suit or other action against another for relief, declaratory or otherwise, arising out of this Agreement, the losing party shall pay the prevailing party's reasonable costs and expenses, including such sum as the Court may determine to be a reasonable attorney's fee actually incurred.

E. Notice. All notices, demands, statements, and requests (collectively the "notice") required or permitted to be given under this Agreement must be in writing and shall be deemed to have been properly given or served as of the date hereinafter specified: (i) on the date of personal service upon the person to whom the notice is addressed, or if such person is not available, the date such notice is left at the address of the person to whom it is directed, or (ii) on the date the notice is postmarked by the United States Post Office, provided it is sent prepaid, registered or certified mail, return receipt requested, or (iii) on the date the notice is delivered by a courier service (including Federal Express, Express Mail, Emery or similar operation) to the address of the person to whom it is directed, provided it is sent prepaid, with confirmation of receipt requested. The initial notice address of each signatory to this Agreement is set forth below.

Purchaser: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Developer: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Each party shall have the right from time to time and at any time, upon at least ten (10) days' prior written notice thereof in accordance with the provisions hereof, to change its respective address and to specify any other address within the United States of America; provided, however, notwithstanding anything herein contained to the contrary, in order for the notice of address change to be effective it must actually be delivered. Refusal to accept delivery of a notice or the inability to deliver a notice because of an address change which was not properly communicated shall not defeat or delay the giving of a notice.

F. Time. Time is of the essence with respect to this Agreement. If the time period by which any right, option or election provided under this Agreement must be exercised, or by which any act required hereunder must be performed, or by which the closing must be held, expires on a Saturday, Sunday or holiday, then such time period shall be automatically extended through the close of business on the next regularly scheduled business day.

G. Governing Law. This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of \_\_\_\_\_, without giving effect to principles and provisions thereof relating to conflict or choice of laws and irrespective of the fact that any one of the parties is now or may become a resident of a different state. Venue for any action under this Agreement shall lie in \_\_\_\_\_ County, \_\_\_\_\_.

H. Documents. Each party to this Agreement shall perform any and all acts and execute and deliver any and all documents as may be necessary and proper under the circumstances in order to accomplish the intents and purposes of this Agreement and to carry out its provisions.

I. Entire Agreement. This Agreement (and any attached exhibits) contains the entire agreement and understanding of the parties with respect to the entire subject matter hereof, and there are no representations, inducements, promises or agreements, oral or otherwise, not embodied herein. Any and all prior discussions, negotiations, commitments and understandings relating thereto are merged herein. There are no conditions precedent to the effectiveness of this Agreement other than as stated herein, and there are no related collateral agreements existing between the parties that are not referenced herein.

J. Counterparts. This Agreement may be signed in counterparts, any one of which shall be deemed to be an original.

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IN WITNESS WHEREOF, Purchaser and Developer have caused this Agreement to be executed and sealed effective as of the day and year above referenced.

“Purchaser”

\_\_\_\_\_

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

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

[SIGNATURES CONTINUED ON FOLLOWING PAGE]

[INSERT PROPER ACKNOWLEDGEMENT FORM FOR APPLICABLE STATE]

[SIGNATURES CONTINUED FROM PRECEDING PAGE]

“Developer”

\_\_\_\_\_

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

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

[SEAL]

[INSERT PROPER ACKNOWLEDGEMENT FORM FOR APPLICABLE STATE]

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## TABLE OF EXHIBITS

- A — Legal Description of Purchaser's Tract
- B — Legal Description of Developer's Tract

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## EXHIBIT E

### ENDORSEMENT

ATTACHED TO AND FORMING A PART OF  
POLICY NUMBER

ISSUED BY

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#### OPTION TO PURCHASE ENDORSEMENT

A. With respect to the option to purchase contained in the lease described in Schedule A, the option to purchase is hereby incorporated into Schedule A of the policy as an interest insured thereby, and the Company further insures against loss or damage sustained or incurred by the insured by reason of:

1. The unenforceability of the right to exercise the option to purchase except to the extent that such unenforceability or claim thereof is based on the failure of the insured to have fulfilled the terms and conditions of the option;
2. The priority over the option to purchase of any conveyance made of the fee simple estate in the land or any liens or encumbrances created thereon after the date of policy, excepting any such liens and encumbrances that would affect the insured had the insured been the owner of the fee simple title instead of an optionee as of the date of policy, including without limitation, real estate taxes, special assessments, demolition liens, drainage liens and water tax liens, or any right, title or interest in the land derived thereunder;
3. The entry of any court order or judgment which constitutes a final determination and requires the insured, as a condition to receiving specific performance of the option, to pay a sum in excess of the option price, other than attorney's fees and all costs of litigation.

B. Nothing contained in this endorsement shall be construed as insuring the insured against loss or damage sustained or incurred by reason of:

1. Disaffirmance of the option under the provisions of the bankruptcy code;
2. The failure of the optionee to receive all or part of an award entered in a condemnation proceeding unless failure to share in said award stems solely from a court order or judgment which constitutes a final determination and adjudges the option invalid or incapable of specific performance;
3. The failure of the insured at the time of payment of the option price either to have obtained proper conveyances and releases from all persons then having an interest in said land or a lien or encumbrance thereon (the determination as to the identity of such persons and the nature of the interest, lien or encumbrance owned or claimed, to be at the expense of the insured) or to have obtained a court order or judgment which constitutes a final determination and determines those persons and interests, entitled to receive the option price, but this shall not limit the coverage pursuant to A. #2 herein.
4. Attorney's fees and costs in connection with the proceedings mentioned in subparagraph 3 immediately above, or in connection with an action to enforce the option, excluding attorney's fees incurred to defend an attack on the validity of enforceability of said option;
5. Any lien, or right to a lien, for services, labor or material, heretofore or hereafter furnished, imposed by law.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

## EXHIBIT F

### SELECTED CASES REGARDING “SAME TERMS AND CONDITIONS”

1. Third party offered to purchase property for a sum of money, plus two specific automobiles. A portion of the sum of money was to be paid in the form of a note from the third party to the owner, which was to be secured by a mortgage on the property and a pledge by the third party of unencumbered bonds. The ROFR holder accepted the terms of the offer, with the exception that it would provide a larger initial payment, it would substitute two comparable automobiles and it would not provide security for the note other than the mortgage. The court held that the ROFR holder offered a “financing package substantially and materially different than that offered” by the third party purchaser. The court held that such offer “lacks the required identity” and the ROFR holder would have no right to purchase the property. Castrucci v. Young, 515 N.E.2d 658 (Ohio Misc. 1986)
  
2. ROFR granted the ROFR holder 30 days to exercise its right to purchase. Following notice from seller of a bona fide third party offer, the ROFR holder made an offer to seller contingent upon the ROFR holder entering into a separate agreement with a third party. Within said 30-day period, however, the ROFR holder satisfied the contingency and notified seller that the exercise of the ROFR was unconditional. Court held that “if the person offering to perform is acting in good faith, and makes the mistake of demanding something to which he is not entitled, he ought to be given the same opportunity to recede from such demand.” Since the ROFR holder properly exercised the ROFR by the end of the 30-day period, the ROFR was deemed satisfied. In addition, the ROFR holder’s offer, which deducted the amount of a broker commission which was included in the third party purchaser’s offer price, was held to be “on the same terms and conditions” as the third party purchaser’s offer, as the return to the owner was identical to the offer by the third party. The court found that “the probable expectations of both the lessor and the lessee were that if the lessee made a proposal to exercise the right of first refusal which was exactly the same in net effect to the lessor as the triggering offer, the right of first refusal would be deemed exercised. If the literal matching of terms were required, a triggering offer could by offering some unique consideration such as existing trust deed notes, a bag of diamonds or a herd of Arabian horses, effectively defeat the lessee’s right of first refusal.” C. Robert Nattress & Associates v. CIDCO, 184 Ca.App.3d 55 (1986)
  
3. The ROFR holder matched the offer of a third party, which included an amount for a brokerage commission, with the following exception: the ROFR holder and owner agreed, in a separate document, that an amount equal to the brokerage commission payable in the third party agreement would be paid into an escrow account, to enable the ROFR holder to assume the liabilities of the owner to any brokers involved in the third party contract. The ROFR holder was to retain any excess which remained in the account following such claims, if any. The third party challenged the agreement, claiming it was not an identical offer, and therefore not a proper exercise of the ROFR. The court found that “the expectation of the parties to the instrument giving rise to the right of first refusal is that the services of a broker will not be

needed and that no broker's commission will be payable ... what the seller views as his price is the amount to be received after the deduction of any commission." Accordingly, the court held that a ROFR is properly exercised even if the purchase price deducts the amount of a brokerage commission. Reef v. Bernstein, 504 N.E.2d 374 (Mass.App.Ct. 1987).

4. The ROFR holder matched the offer of the third party with the exception that the ROFR holder excluded the amount of the broker commission. In this case, the court explicitly disagreed with the ruling in Reef v. Bernstein. The court summarized Milton Friedman on Leases: "Does a tenant meet an outside offer and agree to purchase 'on the same terms' if he offers to pay the same price, less the amount of a brokerage commission that would have been payable by the landlord on the sale to the third party? Generally, tenant's deduction of the amount of a broker's commission precludes his offer from constituting a proper exercise of his first refusal." The court found the possible result of the brokers receiving no commission as "unfair" and held that the exclusion of the broker commission was a materially different term in the ROFR holder's acceptance. Interestingly, despite this holding, the court found that, had the ROFR holder matched the purchase price in the third party agreement – including the amount for the brokerage commission – "that would have been the end of the matter and the brokers who procured the [third party] offer would not have been entitled to any commission." David Meyers, Inc. v. Anderson, 739 P.2d 102 (Wash.App. 1987).
5. The ROFR holder matched most of the terms of the third party lessee's offer, with the exception of the following terms: the third party lessee agreed to acquire additional land next to the subject site, construct a new building on the entire site and enter into a buy-sell agreement with landlord for the additional parcel. The offer came at the end of a twenty-year lease. The court held that the ROFR holder did not adequately exercise the ROFR by excluding the additional provisions. The court did note, however, that a lessor could not "select an alternate use for his property which is inconsistent with the [the ROFR holder]'s existing use yet holds no economic advantage for the lessor. Arguably, the exercise of such provision which serves only to oust a lessee could constitute a breach of the covenant of good faith and fair dealing." Richard Ellis v. Chevron, U.S.A., Inc., 201 Cal.App.3d 132 (1988)
6. Third party purchaser offered three parcels of land plus cash for owner's property. The ROFR holder offered the owner all cash equal to the total value of the third party's offer. The court held that "exact identity of offers is not required." However, the court "implied a duty of reasonableness and good faith in exchange offers" and held that, "absent findings of bad faith or unreasonableness, the property owner should retain primary control over disposition of the property." In this case, the owner was justified in rejecting the ROFR holder's offer. Matson v. Emory, 676 P.2d 1029 (Wash.App. 1984)
7. Third party offered owner cash plus the conveyance of a particular house to owner. The ROFR holder offered cash plus "any piece of real property selected by" the owner, up to a certain value. The court held that the ROFR holder's offer was not identical to the offer of the third party, as it did not include the particular house. Weber Meadow-View Corporation v. Wilde, 575 P.2d 1053 (Utah 1978).

8. Owner transferred property to a partnership owned by owner and a third party without offering the property to the ROFR holder. Owner claimed the ROFR holder could not match the offer from the third party, citing numerous characteristics of the third party that were “material inducements” for owner to enter into the deal and which were not able to “be duplicated as a matter of law”: the third party’s “reputation, expertise and experience in developing office buildings, success in development real estate, integrity, business history, business contacts, financial strength, effective organization and personal compatibility” with the owner. The court disagreed with the argument that the offer could not be matched. The court found that unique factors “may be a sufficient basis to distinguish one offer from another, but only where the seller supplies a reasonable justification for the distinction. Whether a justification is reasonable must be determined in light of the circumstances of the particular case.” The court found that, in fact “competing offers of this nature are commercial proposals and can be evaluated against ascertainable commercial standards. The fact that this evaluation might force the seller either to enter into a partnership relationship with the promisee rather than the third party or to refrain from selling altogether is a foreseeable consequence of the seller’s agreement to a right of first refusal.” Prince v. Elm Investment Co, Inc., 649 P.2d 820 (Utah 1982)
9. The ROFR holder agreed to all terms of an offer by a third party except conditioning the sale on the approval of a governmental body. The court found that, when construing the requirement that an obligee match the ‘terms and conditions’ offered by a third party, “most courts have insisted that purchaser replicate a myriad of non-price conditions, including terms requiring adequate credit and special payment terms, ... the assumption of real estate commissions, ... additional partnership and land development obligations, ... the exchange of land parcels rather than a cash transaction, ... and the purchase of a larger quantity of land.” A “purported acceptance which leaves the property owner ‘as well off’ as a third party offer, but which modifies, adds to or otherwise qualifies the terms of the offer, generally constitutes a rejection of the option and a counter-offer.” The court found that “no hard and fast rules” determine when a minor or insubstantial variation from the original offer is acceptable, but that “courts invoke [such] exception only when two conditions exist ... first, the third party offer may contain terms which are peculiar to the relationship between the third party and the property owner and which the preemptive rightholder could never satisfy ... [and] second, the unique conditions do not provide a reasonable basis for distinguishing between the two offers, raising the inference that the seller imposed those terms in bad faith to defeat the option.” Here, the court found neither exception existed and ruled that the option was not properly exercised. West Texas Transmission, L.P. v. Enron Corporation, 907 F.2d 1554 (5<sup>th</sup> Cir. 1990)
10. Owner claimed the ROFR holder could not match the portion of the third party offer which included a personal guaranty of the owner-financed purchase price by the third party, as the third party had a substantially greater net worth than the ROFR holder. The court rejected this argument. The court found that “under the [owner’s] theory, a party having the contractual right of first refusal would ordinarily be unable to exercise it were a Trump or Rockefeller was the third party offeror. Would a time-payment offer, as in this case, which has been made by a 50-year-old person be met by the same offer made by a 70-year-old, who might not survive the period? If, as in this case, a lessor who has given his lessee the right of

first refusal expects to require the lessee personally match the net worth of a future offeror, that should be made a condition of the lease. We have not seen a case in Illinois, or any other jurisdiction, which has considered a similar assertion.” Vincent v. Doebert, 539 N.E.2d 856 (Ill.App. 1989)

11. Offer from a third party, which included a deposit “upon the signing” of the purchase contract, was accepted by owner. Owner provided notice to the ROFR holder of the third party offer, which notice included a copy of the executed purchase contract. The ROFR holder accepted the terms of the contract within the required time period, but did not make the deposit, because no new contract was provided to the ROFR holder to sign. Owner accepted exercise of ROFR by the ROFR holder, and third party sued for title to the property. The court was “unpersuaded” by the ROFR holder’s argument that, since the contract clause required the tender of a contract as a condition to the requirement for a deposit, the ROFR holder was “entitled to postpone its payment of a deposit until it received a contract of sale from [owner].” The court found that the ROFR holder “misperceive[d] the legal significance of the written document in the [owner-third party] relationship on the one hand and the [owner-ROFR holder] relationship on the other hand.” The owner-third party relationship required a written contract “both to spell out the terms of their mutual undertakings and to satisfy the statute of frauds.” Conversely, the court found that the combination of the lease, the notice from owner and the copy of the purchase contract “were sufficient to spell out the terms of the offer and to satisfy the statute of frauds” in the owner-the ROFR holder relationship. “This combination of writings was for [the ROFR holder] the legal equivalent of the single document signed by” the third party. The court ruled that the ROFR holder did not accept the offer. Smith v. Hevro Realty Corporation, 507 A.2d 980 (Conn. 1986)

## **EXHIBIT G**

### **Negotiating Rights of First Refusal**

#### A. Arguments to get a ROFR:

1. We need to protect our investment in the property and leasehold improvements.
2. It is our corporate policy.
3. We are just matching your best deal so it won't cost you anything.
4. We don't want to be stuck with a Landlord who we don't know or who doesn't have your integrity and reputation for reasonableness.
5. We really want to own the real estate now but don't have the necessary cash at this time.
6. We really want an option to purchase at a set price, but we are willing to settle for a right of first refusal.
7. We are willing to pay a little extra money for it.
8. We need to insure compatibility with the adjoining business.
9. We need to have some control over adjacent land for expansion (would prefer an option).
10. We really want to own the land at this time, but landlord will only lease, so we at least want our chance to purchase in the future.

B. Arguments to avoid a ROFR:

1. It puts a damper on any potential sale and artificially drives down the price.
2. It is against our corporate policy.
3. We don't want to pay an additional agent commission on the sale/lease extension.
4. No contract ever closes exactly as presented so lawyers will end up getting involved which increases our costs and stress levels.
5. Our lender will only allow a very limited right of first refusal.
6. It causes burdensome time delays and increases paperwork.
7. It takes one of the most likely prospects (you) out of the bidding competition. You can meet your need by out bidding other prospects.
8. It can inhibit our internal corporate reorganizations or restructurings involving sale of property.
9. It forces seller to disclose transactions the buyer and seller may want to keep confidential (for example, if part of a larger transaction).
10. It may give rise to sharing condemnation awards or having to deal with claims for condemnation proceeds.
11. Brokers won't take a listing if ready, willing and able purchasers are preempted by holder of right of first refusal (unless a commission arrangement is agreed to).
12. If the holder of a right of first refusal exercises, the property owner must assess whether acceptance is on same terms and conditions or a counteroffer.

An incorrect assessment may result in a lawsuit from the right of first refusal holder or the bona fide third party offeree.

13. In a lease situation, the terms and conditions (such as tenant improvement allowance and signage) will be too tenant specific to be practicably enforceable.

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## EXHIBIT H

### Right of First Refusal for Adjoining Lease Space (Lease)

Subject to the rights of existing tenants in the Building, Landlord grants to Tenant the right (the "First Refusal Right") to lease the First Refusal Space, as hereinafter defined, at any time during the first \_\_\_\_ (\_\_\_\_) years of the Term, on and subject to the following terms and conditions. The First Refusal Right is not effective or exercisable by Tenant during the existence of a default by Tenant under this Lease past any applicable notice and cure period.

a. The "First Refusal Space" shall mean \_\_\_\_\_ rentable square feet of space as shown on Exhibit \_\_\_\_ attached hereto.

b. Should Landlord receive from a prospective third-party tenant an offer to lease the First Refusal Space or any premises within the Building containing all or a portion of the First Refusal Space which Landlord intends to accept (the "Third-Party Offer"), Landlord agrees promptly to so notify Tenant in writing of the Third-Party Offer. Tenant shall have a period of \_\_\_\_ (\_\_\_\_) business days after the date of the notice to Tenant within which to exercise the First Refusal Right (the "Acceptance Period") by delivery to Landlord to written notice of its exercise on or before the last day of the Acceptance Period. If Tenant fails to duly and timely exercise the First Refusal Right, or elects not to exercise the First Refusal Right, the same shall lapse, and be of no further force and effect, and Landlord shall be free to lease the First Refusal Space.

c. Within ten (10) days after the effective date of Tenant's exercise of the First Refusal Right, Landlord and Tenant shall enter into an amendment to this Lease adding the First Refusal Space to the Premises which amendment shall subject the First Refusal Space or any premises within the Building containing all or a portion of the First Refusal Space, which is contained in the Third Party Offer, to the terms and provisions of this Lease except that all of the economic terms of the Third Party Offer, including the Base Rent and [Expense Stop or Base Year] relating to the First Refusal Space shall be as set forth in the Third Party Offer. The term with respect to such First Refusal Space shall be coterminous with this Lease and Tenant's allowance for improvement shall be an amount equal to the product of multiplying Tenant's allowance under the Third party Offer times a fraction, the numerator of which is the number of full calendar months remaining in the Term and the denominator of which is the number of months in the initial Term of this Lease.

d. Tenant's improvements to the First Refusal Space or any premises within the Building containing all or a portion of the First Refusal Space which is contained in the Third Party Offer shall be designed and installed in accordance with the procedures and conditions set forth in Exhibit \_\_\_\_ attached hereto.

e. If Tenant fails to or elects not to exercise the First Refusal Right and the third party submitting the Third-Party Offer does not lease the First Refusal Space, the First Refusal Space shall again become subject to the First Refusal Right herein contained as to any subsequent Third-Party Offer submitted to Landlord.

f. Should Tenant exercise its First Refusal Right and subsequently fail to enter into the amendment within the ten (10) day period as set forth in clause (c) above, Landlord may at its option treat such failure as a default by Tenant under this Lease.

g. This First Refusal Right is personal to \_\_\_\_\_ and shall become null and void upon any permitted transfer or assignment of this Lease.

h. As to the Lease Guaranty dated \_\_\_\_\_ executed by \_\_\_\_\_ (“Guarantor”) with respect to this Lease (the “Guaranty”), in the event Tenant exercises the First Refusal Right and the First Refusal Space becomes subject to this Lease, the Guaranty shall be amended to provide that the Lease, as modified to include the First Refusal Space, is guaranteed as to payment and performance by the Guarantor. The foregoing is required regardless of whether the Third-Party Offer included any guaranty with respect to the First Refusal Space.

### **Right of First Refusal (to Purchase or Lease)**

In the event that, during the term of this Lease, Lessor receives, from a prospective third-party, a bona fide offer to purchase or lease any portion of Lessor's property that includes the property that is the subject of this Lease (the "Premises") which Landlord desires to accept (the "Third-Party Offer"), Lessor hereby grants to Lessee a right of first refusal (the "First Refusal Right") to purchase or lease, as applicable, all of the Lessor's right, title and interest to the Premises. Lessor agrees to promptly notify Lessee in writing of the Third-Party Offer (with a copy of the Third-Party Offer). Lessee shall have thirty (30) days after the receipt of the notice by Lessee to exercise the First Refusal Right (the "Acceptance Period"). Lessee may exercise by delivery on or before the last day of the Acceptance Period to Lessor of a written notice of its desire to purchase or lease, as applicable, the Premises upon the same terms and conditions contained in the Third-Party Offer as allocable to the Premises. In the event the First Refusal Right is exercised by Lessee, Lessor shall also grant to Lessee an easement for ingress and egress to the Premises as well as any access easements necessary for utility service for the operation of the Lessee's improvements located on the Premises.

If Lessee does not timely exercise the First Refusal Right, the same shall lapse and Lessor shall, subject to the terms of this Lease, be free to sell or lease the Premises to the third party submitting the Third-Party Offer provided that the sale or lease is closed within ninety (90) days after the last day of the Acceptance Period on the same material terms and conditions as are contained in the Third-Party Offer. In the event the material terms and conditions of the Third-Party Offer are changed or modified Lessor shall promptly provide Lessee with written notification of such changes or modifications. If Lessee fails to or elects not to exercise the First Refusal Right and the third party submitting the Third-Party Offer does not purchase or lease the Premises, as applicable, the Property shall remain subject to the First Refusal Right herein contained as to any subsequent Third-Party Offer submitted to Lessor.

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