OPTIONS AND RIGHTS OF REFUSAL

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CHAPTER 11
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OPTIONS AND RIGHTS OF REFUSAL

I. INTRODUCTION

Options, rights of refusal, rights of offer, rights of negotiation—they all preferential or "pre-emptive" rights, each of a distinctive nature, but with perhaps more in common than not. The rights range along a continuum, with options unattached to a lease or other right on one end, and loose rights of offer on the other. Owners fight hard to avoid options and other rights which hamper the owners' flexibility; tenants and prospective purchasers see such rights as an important way to protect their ability to grow efficiently. And brokers/tenant representatives often see such rights as part of a bundle of rights that will add transactional value to their clients.

This paper will address both purchase and lease pre-emptive rights. It will look at some interesting legal questions, and offer some drafting ideas, but it is not an exhaustive review of the law or the drafting choices. There is a wide range of analysis available. Among recent articles, you might want to look at Michael Saks' article on Rights of First Refusal, presented at this advanced drafting seminar in 2003. There is also an admirable review of the law and drafting principles in Mark Senn's "Commercial Real Estate Leases: Preparation, Negotiation, and Forms" (2006, Aspen Publishers), and a scholarly exegesis on options in Gregory Gosfield's "A Primer on Real Estate Options," Real Property, Probate and Trust Journal, Spring 2000. And if you like to follow the thinking of real estate professionals around the country, you will often find worthwhile discussions of pre-emptive rights on the list-serve known as DIRT, presented by the ABA and moderated by Prof. Patrick Randolph (DIRT@LISTSERV.UMKC.EDU; http://dirt.umkc.edu/).

I'll refer generally to options and other pre-emptive rights as "rights"; options as options, rights of first refusal as "ROFRs", rights of first offer as "ROFOs". Grantor is called "owner" and the grantee is the "holder."

II. TYPES OF PRE-EMPTIVE RIGHTS

Courts use many labels. "Preferential right," "pre-emptive right," "right of first refusal." All mean approximately the same thing, "a generally well-understood meaning within the business world that the rightholder must be given an opportunity to purchase the property from the property owner [on the terms offered by any third party]." Abraham Investment Company v. Payne Ranch, Inc., 968 S.W.2d 518 (Tex.App. — Amarillo 1998, no writ), citing Gochman v. Draper, 389 S.W.2d 571, 578 (Tex.Civ.App. — Austin 1965), rev'd on other grounds, 400 S.W.2d 545 (Tex. 1966). But actual language varies substantially, and is often unclear. Drafters tend to use labels that don't always match the language of the clauses—frequently see letters of intent that promise a right of first refusal in the header, but offer something much closer to a right of first offer, or right of negotiation, in the text. And practitioners distinguish rights of first refusal from rights of first offer in many different ways. One attorney characterizes a right of first offer as a right that requires the owner of the property to let the holder make an offer to purchase the subject property; another characterizes it as a right that requires the owner to tell the holder on what terms the owner will sell the property. Is the latter significantly different from a right, styled a "right of first refusal" that requires the owner to allow the holder to purchase if owner has merely entered into negotiations with a prospect, upon the terms that the owner is prepared to offer to the third party? You can see the continuum at work here.

A. Option

What is it? An option to purchase real estate is a contract in which an owner grants the holder the right to buy the property at a specified price within a specified time. It is a unilateral contract, without obligation on the holder's part until the option is exercised, at which time it becomes a binding bilateral contract for sale, losing its character as an option. An offer is a binding option contract if it is in writing, signed, recites purported consideration, and proposes an exchange on fair terms within a reasonable time. Restatement (Second) Contracts, §87(1)(a). An option is a significant benefit to the holder, because she can compel the owner to sell/lease, etc., so long as the option is enforceable. And it is a significant burden to the owner, because it so hampers the owner's leasing program. Many options permit the holder to exercise at any time before a specified expiration date, and hence to control the timing. See Riley v. Campeau Homes (Texas), Inc., 808 S.W. 2d 184 (Tex.App. — Hous. [14th Dist.] 1991, writ dism'd). The Owner must keep space vacant, or rent it out only for short time periods; each decreases value. On the other hand, an option to be exercised at a fixed date (or dates) can permit an owner to lease the space until that date, and still afford the holder the knowledge that the space will be available on a date certain. And an option to purchase can afford the owner a substantial up front, non-refundable fee, unlike a "free look" purchase and sale agreement.

What's the primary difference between an option and a ROFR? "[A]n option to purchase gives the holder the right to compel" the sale, while a right of first refusal simply "requires the owner, when and if he or she decides to sell, to offer the property first to the holder." Stuart v. D'Ascenz, 22 P.3d 540 (Colo. Ct.
B. Right of First Refusal

Unlike an option, the owner has more control over the timing of a ROFR. If and when the owner wants to sell or lease the asset, it must first offer the asset to the holder. The holder can't force the timing (see Draper, supra), but the right is still a substantial encumbrance: owner must make the decision to sell/lease; receive an expression of interest; negotiate acceptable terms; and then — hit the "pause" button until the ROFR holder has the chance to exercise or waive. A ROFR ripens into an option once the owner decides to offer the asset; the holder is not obligated to buy/lease, but the owner is obligated to hold open to the holder the opportunity to accept an offer to sell/lease. Campeau, supra, Henderson v. Nitschke, 470 S.W.2d 410, (Tex. Civ. App. –– Eastland, 1971, reh'g denied).

C. Right of First Offer

When the owner "intends" to sell or lease the asset, it must notify the holder before offering the asset to any third party (except to another party with a superseding right), and the holder has the first right to make an offer, which owner must accept or reject in a specified period of time. The ROFO may specify the terms in advance, or leave them to the holder's offer. This is the least advantageous right to the holder, since it requires holder to make an offer without knowing how owner values the asset. A common permutation is to provide that the owner's notice to the holder will specify the price and terms owner is willing to accept. Although ROFOs and rights of first negotiation (ROFNs) still encumber the property, they are a logical expression of good market practice and good tenant relations: if an owner has available property, it makes sense to give its tenant/neighbor first shot at acquiring the property.

D. Right of First Negotiation

Not as common in this market (at least by that title) as a ROFO, but from an owner's viewpoint, perhaps better. When the owner "intends" to sell or lease the asset, owner must notify the holder, and the parties have a specified period of time in which to negotiate exclusively, after which the owner may offer the asset to third parties free of the right.

E. Miscellaneous

All such rights may be "first" rights, or may be subordinate to existing rights. In addition, there are, of course, rights to contract the holder's space, rights to terminate, rights to renew, rights to extend, none of which are directly addressed in this paper.

III. A FEW LEGAL QUESTIONS AND COMMENTS

A. What makes a right enforceable?

At its most basic, an enforceable right must specify the asset, price and terms, and times of closing. One court held that a ROFR need not provide a price term if it provided a mechanism to determine price—but it must have one or the other. Crestview Builders, Inc. v. The Noggle Family Limited Partnership, 816 N.E.2d 1132 (Ill. App. 2004), citing Universal Scrap Metals, Inc. V. J. Sandman & Sons, Inc., 786 N.E.2d 574 (2003). Black's Law Dictionary (7th ed. 1999), at 1121, says the dates need not be specified, but must be within a reasonable time in the future. Troublesome drafting details may arise with each of the requirements, as discussed below.

B. Is consideration necessary? Must it actually be paid?

Texas has long held that consideration is necessary to create a binding agreement, see Baldwin v. New, 736 S.W.2d 148 (Tex.App. — Dallas, 1987, writ denied). A recent Texas Supreme Court case adopted §87(1)(a) of the Restatement (Second) of Contracts to hold that an option contract in which consideration is recited, but not paid (emphasis added), is enforceable, so long as the underlying exchange is fair and the offer is to be accepted within a reasonable time. 1464 — Eight, Ltd. v. Joppich, 154 S.W.3d 101, 48 Tex. Sup. Ct. J. 275 (2004). Note that the Court commented that its new position was in the minority, but found that the Restatement's arguments were persuasive. The Court did not go so far as to hold that an option contract did not require consideration to be enforceable.

C. What is a "bona fide offer"?

Is it a fully executed contract, subject only to the ROFR, or an offer which, upon acceptance, creates a binding contract, or something less? The Baldwin court cited Jones v. Riley, 471 S.W. 2d 659, 659 (Tex.Civ.App. — Ft. Worth 1971, writ ref'd n.r.e.) for the proposition that "[A] bona fide offer is one that is made in good faith, and on acceptance, becomes a valid and binding contract enforceable by any party to it." At the least, in Texas a bona fide offer must be more than merely a letter of intent or proposal. At worst, Baldwin seems to require a further drilling down — that is, even a fully executed contract, if it is a "free look" contract, unsupported by consideration, may be subject to question by an aggressive option holder. So, regardless of the recent Supreme Court holding in Joppich about nominal consideration, because Texas requires binding consideration to make an offer bona fide, drafters should continue to recite at least nominal consideration in their contracts. They should try to avoid both a true "free look" and retention...
of earnest money as sole remedy. In the context of a lease, a fully executed lease without contingencies might be necessary to constitute a "bona fide" offer — not a happy prospect for an owner or its broker. See the further discussion in Section IV below. Of course, neither of these cautions accords with market dictates, so a better answer is for drafters to avoid requiring "bona fide offers."

D. Options and the Rule Against Perpetuities; Restraints on Alienation

The Rule Against Perpetuities ("Rule") is more often encountered by trusts and estates lawyers and oil and gas practitioners than by real estate lawyers. But it comes up from time to time, especially, though not exclusively, in the context of options to purchase. To refresh your memories: An interest in real property is void unless it must vest within 21 years after a life or lives in being at the time the interest is created; if the interest is created without mention of any life in being, then the period is just 21 years from the time of its creation. Texas courts are directed to "liberally construe and apply the provision to validate an interest to the fullest extent consistent with the creator's intent." Tex.Prop.Code §5.043, "Reformation of Interests to the fullest extent consistent with the creator's intent."

What about rights coupled with other interests, as in a lease? The Rule traditionally has not been applied in America to purchase options, including first refusal rights, in commercial leases where such rights are part of the lease and last only as long as the lease. Simes, Law of Future Interests, Sec. 132 (2nd Ed. West 1966), cited by Patrick Randolph, writing in DIRT, October 6, 2001 (http://DIRT.umkc.edu).

This makes sense, since the right (unless otherwise stated) expires on lease expiration. And even in states, like Texas, that find rights in gross and options to be subject to the Rule, such rights contained in a lease are held not to restrain alienation, and hence either not subject to the Rule, Forderhause v. Cherokee Water Co., 623 S.W.2d 435 (Tex. 1982), or exceptions to the Rule. There are three generally recognized exceptions to the Rule with respect to real estate transactions: a lessee's option to renew a lease; a lessee's option to purchase all or part of the leased premises; and — you'll be glad to know — a usufructuary's option to extend the scope of an easement or profit, Ferrero Constr. Co. v. Dennis Rourke Corp., 311 Md. 560, 572 (Md. 1988). If you felt impelled to include a savings clause for a right granted in a lease, an appropriate clause might be: "the Option shall expire upon the expiration or earlier termination of this Lease, and in any event within 21 years after the death of the last survivor of the present managing member of Landlord's general partner."

As you may have noticed, the analyses seem often to merge and confuse the Rule with common law rules against restraints on alienation. The Court in Forderhause identified two views in the U.S. concerning applicability of the Rule. "One view is that such a right, if unlimited as to time, is violative of the rule and will not be enforced" (cites omitted). The other view is that the rule against perpetuities is only a means of preventing unreasonable restraints on alienation, and if a preferential right to purchase does not operate to restrain alienation, but only dictates who shall have the first right to acquire property when and if the owner desires to sell it, then the agreement is not within the prohibition. (cites omitted). The latter view appears to be the rule in Texas." Forderhause, supra, at 439. Texas cases have held that options [and rights of first refusal] can operate as indirect restraints on alienation of property. Williams v. Williams, 73 S.W.3d 376 (Tex.Civ.App. — Houston [1st Dist] 2002, no pet.); in the analysis, they often refer to both alienation restraints and perpetuities as against public policy favoring free transferability of property. One
commentator notes that the two rules are distinct: one prevents property interests from vesting remotely, the other prevents grantors from unreasonably depriving grantees of the power to alienate their estates, and further notes that the public policies underlying the two rules are also not identical: while both serve to facilitate transferability, the rule against perpetuities is also concerned with restrictions that render title uncertain. John C. Murray, Jack Murray on ROFR and RAP, writing in DIRT, October 13, 2005 (DIRT@listserv.umkc.edu).

E. Interest in realty or personality?

Traditionally, most courts treat options and other rights as general intangibles (like agreements to agree) before exercise, and an equitable interest in realty after exercise and before closing. If that's the case, the statute of frauds may not apply (not an interest in land), and so oral options may be enforceable. The holder may not be able to rely on a recorded option to protect it against third party claims, or to get title insurance covering the option. And the holder may not have an insurable interest in the property, and so property insurers may deny coverage or recovery. Texas treats options as interests in real estate. See Hitchcock Properties, Inc. v. Levering, 776 S.W.2d 236 (Tex.App. Hous. [1st Dist.], 1989, reh denied). The Hitchcock court referred to Tex.Rev.Civ.Stat.Ann. art 6573a, §20, which defines real estate to include "a leasehold, as well as any other interest or estate in land..." "Given the nature of an option's relation to and limitation over the land optioned, it is no less logically included in the definition of an "interest" in land, than is, for example, an easement, or royalty interest, or a contingent future interest." Hitchcock, 238, id.

Characterization also is relevant in bankruptcy, where the answer is not entirely clear. However, at least one bankruptcy court has held that an option to purchase contained in a lease agreement is an interest in real estate and is not subject to the UCC. First National Bank of Chicago v. Valley Liquors, Inc. (In re Valley Liquors), 103 B.R. 961 (Bankr. N.D. Ill. 1989), which found that a lender that thought it had perfected its security interest in the holder's option by filing a UCC-1 had failed to perfect — it should have filed in the real property records. 8

F. Effect of Bankruptcy?

Is an option or ROFR enforceable by the holder under §365(f)(1) of the Bankruptcy Code? There is a split in the circuits, and the cases are very fact specific. Some courts hold that ROFRs are (or may be) an impermissible restraint on assignability. But most courts hold that a ROFR in a lease, while executory in nature, is a part of the larger executory contract or lease, and hence if the Trustee chooses to assume the lease, the ROFR is included. In re E-Z Serve Convenience Stores, Inc., 289 B.R. 45, 53 (Bankr. M.D. N. Carolina 2003). By the same token, the majority of cases construing options in gross seem to hold that an option to purchase in gross, like a ROFR, is executory, and therefore is subject to rejection under §365. This appears to be the law in the Fifth Circuit. See, Rivercity v. Herpel (In re Jackson Brewing Co.), 567 F.2d 618, (5th Cir. 1978).

G. Is the right insurable?

It depends, since it is largely a matter of risk analysis. As indicated above in the discussion on the rule against perpetuities, within a lease, a right is a part of the lease, and hence should be insurable, whether or not the title company will give a separate endorsement for the option itself. Standing alone, it is less likely to be insurable, as it is frequently interpreted as an intangible property right, to be secured under the UCC, instead of a real property right. In my experience, Texas title companies will give coverage for options to purchase contained in a lease, by insuring the "option estate" along with the leasehold estate, but damages are those covered by the leasehold endorsement. In ALTA jurisdictions, an Option Endorsement is available. Even if insurable, the title company will not insure against bankruptcy or effect of subsequent tax liens.

H. Is the right assignable?

Is an option or other right contained in a lease assignable apart from the lease? Assume that the granting language is silent, and that the lease does not provide that an assignment of the lease (or an assignment without consent) will terminate options. If it is an interest in real property, it should be assignable separately. Gosfield says that the traditional common law is that, absent an express prohibition, an option in a lease is assignable separate from the lease. See Owners Ill., Inc. v. Lake Shore Land Co., 457 F. Supp. 896 (W.D. Pa. 1978). The drafting lesson is to avoid silence: specify whether or not (usually "not") preemptive rights may be assigned.

IV. DRAFTING TIPS

It is easy to see why owners do not favor preemptive rights. A broker may be reluctant to list an asset subject to a ROFR, unless she is promised a commission if the holder exercises. Prospects may be reluctant to engage in serious negotiations, knowing that their offers must first be taken to the holder, with the result that the deal will, at the least, be delayed, and at the worst, lost to the prospect. The holder may well want the offer to contain more information than the owner really wishes to disclose. And, if the holder declines to exercise, the asset may remain encumbered, if the owner's deal with the prospect changes during subsequent negotiations from that described in the offer.
Of course, the effects can be mitigated. Response periods can be very short. Owner can refuse the "bona fide offer" standard and instead bargain for the trigger to be receipt of a letter of intent or proposal to lease/buy, or even the giving by owner of a proposal to lease/buy, on economic terms generally acceptable to owner. And of course, an owner will presumably not grant an option or ROFR except to a buyer/tenant with substantial bargaining power.

Any clarifying and mitigating factors must be clearly reflected in the documentation. Look for the following:

A. State the Conditions
The Lease must be in effect, without [current] default. Superseding rights must have been waived. The Lease or other instrument containing the right must not have been assigned. Financial condition must be acceptable. Specify what constitutes acceptable financial condition, based on then-current financial criteria, or no decline in liquid net worth, or review of certified financials.

B. Describe the Property
Recall that defining the asset is necessary for enforceability. Be sure to specifically describe the property. If it is a portion of a larger parcel, does it include easements? Does it include a right for the holder to compel specific performance if subdivision is required prior to sale?

If it is an option to expand a leasehold, avoid such terms as "contiguous space", or "remaining space on Floor 15", and avoid describing the space only by reference to an exhibit. Give the square footage, state whether it is contiguous or not, identify by exhibit through labeling and crosshatching (not color-coding). And, if it is an option to purchase, specify whether it includes real property and personal property.

If it is a right other than an option, you must also specify what effect if the owner's proposal is for more or less property than that covered by the right. A North Dakota case in 1999 held that an owner may not eliminate the ROFR by selling more than the property subject to the right. Stuart v. Stammen, 590 N.W. 2d 224 (N.D. 1999). But the reverse may also be true: where an owner received an offer to buy only one parcel of a larger tract subject to a ROFR, the owner couldn't be forced to sell the land piecemeal, in order to accommodate the ROFR. Unreported decision in Rottier v. Walsh, 1999 Wis. App. LEXIS 1053 (9/23/99).

C. State the Price and Other Terms
1. What if a Ground Tenant Has Option to Buy the "Premises"?
That means the land and the building, but if tenant erected the building and paid for it, must tenant pay a second time? Not a problem if the option is a fixed price. But if it is at "market", the language should be specific as to what is being valued, and at what time, by what methodology, and by whom. Remember that a below-market lease affects the value on the market, and from a tenant's point of view, that depressed value should be reflected in the purchase price, even though, once exercised and closed, the lease will terminate. The majority of states hold, on various grounds, that "a landlord can sell only what he or she owns, that is, "a leased fee estate," and that if tenant pays for more that this tenant is paying for something he or she already owns, and that there is no reason why a tenant should pay more for the property than an outsider." Friedman, Milton, Rights of Refusal and Their Not-So-Hidden Problems, Lawyer's Supplement to the Guarantor, Nov/Dec 1991, Chicago Title Insurance Company, citing TCC Enters v. Estate of Erny, 149 Ariz. 257, 717 P.2d 936 (Ariz. App. 1986).

2. What About Agreements to Agree, or Agreements to Appraise? Or Fixed Price/Rent Far Below Market?
Below-market rates are arguably a restraint on alienation, or unenforceable in equity. But those arguments fail more often than not. Agreements to agree are generally unenforceable, but an agreement to lease "at the greater of market rent or the rent adjustment of 3% over the rent currently being paid at the time of exercise" is enforceable at "market" and, in jurisdictions which impose a duty of good faith, an agreement to "negotiate the amount of rent at the option of either party" is not void as an agreement to agree, but rather imposes on the owner an obligation to negotiate in good faith. Note that there's a difference between agreeing to set rent at market and agreement set at a "reasonable" rent.

Agreements to set rate by appraisal are enforceable, although problems inhere in drafting appropriate language, where the appraisal method chosen can significantly affect the result. For example, should the appraiser calculate the value with or without considering the tenancy of the option holder? And in the case of a sale, should value be tied to highest and best use, existing use taking into account the condition of the improvements, or without improvements? See 2 Friedman on Leases, §15.101 n. 11 (4th ed. 1990).

D. Identify What Triggers the Right
1. Option. Holder's Notice
That seems simple enough, but misinterpretations occur. Look at this language: "Leasee [sic] has the 1st right of refusal on the property for a period of (2) calendar year [sic] term from the start of this lease. The purchase price shall be $160,000." Because it stated a fixed price, the holder interpreted it as an option, offered to purchase, and then sued for specific
performance. The court (D'Ascenz, supra) said nothing in the language indicated that the holder had the right to compel a sale, despite the purchase price language, and found it to be a ROFR.

2. ROFR. Receipt of an Offer

This brings us back to the issue of a "bona fide" offer. The Latin phrase literally means "good faith." I think that is how it is commonly meant in ROFRs — that owner has received a good faith proposal. But we have seen that that interpretation is fraught with danger. I used to employ the term, which exists in a lot of older forms. Now, I avoid it, or use it only when I've defined it. That definition will vary depending on the deal: sometimes it is receipt of a proposal or letter of intent which owner intends to pursue. It might also be owner's first entering into negotiations with a third party with respect to the space, or owner's intent/desire to market the space. Owner wants it as far away from a fully negotiated deal as possible.

If dealing with an interest in leasing or selling property subject to an existing ROFR with "bona fide offer" language, counsel to an owner should consider including all of the following in the contract that will represent the bona fide offer: (a) independent non-refundable consideration; (b) additional consideration, such as an obligation to perform a phase I, accept/reject title, etc. during due diligence; (c) limited contingencies permitting termination during due diligence, instead of "in buyer's sole discretion". The goal is to present to the holder evidence of an offer that is not simply a free look, but one which will become binding upon acceptance by the owner.

3. ROFO. Leased Space: Notice from Owner of "Availability"

Many clauses are unclear about what constitutes availability. One approach is: "Space shall be deemed available when the current lease expires or is otherwise terminated, and not leased to another tenant." But that may leave premises unleased for a period of time. Consider, instead:

Space shall be deemed available when the current lease expires or is otherwise terminated and not leased to another tenant, or — months prior to the scheduled expiration date, unless the current tenant has agreed with landlord to extend the term.

Or:

Space shall be deemed available when landlord decides to market the space for lease/sale.

Landlords will not want to be bound only to existing rights to renew/expand, but will want the space to be "unavailable" if an existing tenant takes it, whether or not that tenant had a preexisting contractual right.

Be sure to specify what does not constitute availability: if space is assigned or subleased by the existing tenant; extended or expanded by the existing tenant; subject to an existing expansion right of another tenant. From a tenant's point of view, the definition of availability should exclude space that is currently not leased (so the landlord can't offer it immediately and get rid of the right), but that is subsequently leased and then available.

When should availability not matter? Landlord may not want to be encumbered during the first or last portion of the holder's term, especially if the term of the expansion is coterminous with the original term, because there is not enough time to amortize improvements and commissions, unless the tenant must extend the term.

Once space is available, how soon may owner give notice? An owner will prefer to give notice when it first conceives the intent to market the space, even if the right is denominated a ROFR. Mark Senn, in "Commercial Real Estate Leases: Preparation, Negotiation and Forms", 3d Ed., Aspen Publishers, notes that if the owner can notify its holder of the first offer the owner proposes to make, the offer will probably be high, to permit owner to negotiate. If the notice is of the first offer the owner receives, it will probably be low, to permit the offeror to negotiate. If it is the last offer agreed upon, it probably will reflect what owner really will accept, but will come so late in the deal that owner may lose the deal if it must notify and wait for the holder to accept or waive. Senn, 4-57.

E. Identify What Does Not Trigger the Right

1. Many owners will want to carve out certain types of transfers: transfers of stock or other ownership interests; transfers for estate-planning purposes; transfers by devise or gift; transfers to subsidiaries or affiliates; transfers by foreclosure or deed in lieu; and portfolio sales of multiple properties in a single transaction. John C. Murray, "Option or Right of First Refusal: Which Is It?" p. 5. See Boyd & Mahoney v. Chevron, USA, 419 Pa. Super. 24, 29-30 (1992). Also exclude financing devices, such as sale/leasebacks.

2. Does a transfer of one co-tenant's right to another co-tenant trigger it? No, according to Texas Co. v. Graf, 221 S.W.2d 865 (Tex.Civ.App. — Ft. Worth, 1949; rev' denied), where the court construed the agreement to be made to grant to each co-owner an option to purchase the property of any other co-owner before such property could be sold to a third party. Graf, 866. Accord, in
California, Pelladini v. Valadao, 7 Cal. Rptr. 3d 413 (Cal. App. 2003), where a transfer of a co-tenancy didn’t transfer the full property, which was what was covered by the ROFR.

3. What about condemnation? No, with respect to ROFRs, etc., since it is not a voluntary sale, and ROFRs are triggered when an owner wants to sell, intends to sell, receives an offer to sell, etc. In addition, enforcing a ROFR when a public agency seeks to condemn would violate public policy. See Draper v. Gochman, 400 S.W.2d 545, 548 (Tex. 1966). An unexercised ROFR gives the tenant no interest in the real estate which is compensable in a condemnation proceeding. City of Ashland v. Kittle, 347 S.W. 2d 522 (Ky. 1961), cited in Draper. But with an option, a drafter should be careful to provide that the option to purchase automatically expires on the day before any proceedings in condemnation, else the holder "may receive a windfall in condemnation proceeds, since it is entitled to the amount by which the award exceeds the option price; in effect the tenant is considered the owner of the premises." Senn, supra, 4-49.

F. What Belongs in the Notice? How Much Disclosure Must be Made?

1. All terms, or only economic terms like term, rent, concessions? Hahalyak v. A. Frost, Inc., 444 Pa. Super. 494, 502-503 (2005), held that terms not related to the space in question (for example, agreement to pay moving costs or to cover rent in building being vacated) need not be disclosed. Specify whether the offer includes a commission, and, if it does, whether the existing tenant/holder can adjust the consideration to exclude a commission (or whether the existing tenant/holder must pay a commission). Specify whether the owner must provide a copy of the contract, or only a summary of the terms. And, if a summary will suffice, specify what terms must be provided. If the clause is silent, must the owner tell all, or does the holder have a duty to ask questions? The court in Comeaux v. Suderman, 93 S.W.3d 215 (Tex.App. — Houston [14th Dist] 2002) upheld an owner who gave notice of an offer at $X for the subject property and additional property. The holder erroneously assumed the offer was for the ROFR property, but didn't ask, and declined because it couldn't afford to buy at $X. The terms of the right didn't require owner to specify what additional property was at issue, nor to allocate the price. It just required the "complete terms and conditions", and a sale to the holder of the leased premises on the same terms and conditions.

2. Consider whether the terms to be met must be the terms of the offer, or the current lease terms. Be specific. Landlord may well prefer market terms and conditions to those of the existing lease, especially those of a below-market or long-term lease. In a lease right, be clear as to whether the holder must meet the offer terms. If not, then tenant improvement allowances must be addressed, and usually prorated over the number of months remaining in the term. And think through the standard "upon the terms set forth in the Offer Notice, and the other terms and conditions of this Lease." Some terms may not logically apply. And remember, if the third-party proposal or offer contains confidentiality language, you must address the need of the owner to provide the offer terms to the holder.

G. What Will Constitute an Enforceable Acceptance of the Offer?

Must the acceptance be timely? Yes. Duce Realty Co. v. Cox, 356 S.W.2d 807 (Tex.Civ.App. — Waco, 1962 no writ). Therefore, specify how long the holder has to respond, and what a failure to respond means. Must the acceptance be a mirror image of the offer, or can the holder accept and at the same time vary the terms? What if the varied terms are terms which, by their nature, can't be matched? "Unqualified, unambiguous and strictly in accordance with the terms of the agreement" is how the court characterized the requirement in Comeaux, supra, citing Crown Construction Company, Inc. v. Huddleston, 961 S.W.2d 552, 558 (Tex.App. San Antonio 1997, no writ). The exercise of an option, like the acceptance of any other offer, must be positive and unequivocal, and must not change or qualify the terms of an offer; if it does, the offer is rejected. See Texas State Optical, Inc. v. Wiggins, O.D., 882 S.W.2d 8 (Tex.App. — Houston [1st Dist.] 1994, citing Scott v. Vandor, 71 S.W.2d 79, (Tex.App. — Houston [1st Dist.] 1984, writ ref'd n.r.e.; Chapman v. Mitsui Eng'g & Shipbuilding Co., 781 S.W.2d 312 (Tex.App. — Houston [1st Dist.] 1989, writ den'd.). However, while Texas doesn't generally impose on contract parties a duty of good faith and fair dealing, the 5th Circuit has interpreted Texas law on rights of first refusal to permit a rightholder to vary its acceptance from the terms of the notice if a seller imposes a term in bad faith, or contains conditions that are not commercially reasonable to defeat an option [or right of first refusal]. The option holder may validly exercise the option while at the same time rejecting the bad faith term. West Texas Transmission, L.P. v. Enron Corp., 907 F.2d 1554, 1566 (5th Cir. 1990), cert. den'd.13
H. When Must an Offer be Re-Made?
There are numerous choices here: (a) if the holder rejects the offer but the deal then doesn't close on "same" or "substantially similar" terms; (b) if offer is rejected and deal doesn't close within X months; (c) if offer is rejected and owner then negotiates a substantially different deal with the prospect; (d) if offer is accepted and subsequently the space again becomes available; (e) never. Owners and agents must often make judgment calls if a ROFO (or a ROFR with appropriate language permitting owner to make the offer before a deal is set in stone) is waived and then the deal with the prospect changes substantially, as deals often do. The cases are fact specific. To avoid this problem I often start with the following language:

If [holder] does not accept the offer and execute [an amendment to lease] [a purchase and sale agreement in the form attached] within the time allowed, or otherwise rejects [owner's] offer, [owner] may negotiate with the intended third party and execute a [lease] [contract] with such third party on any terms negotiated, whether similar or dissimilar to those originally communicated to [holder], so long as [owner's] notice of the Proposed Terms was made in good faith.

A negotiated variation then may be:

… with such third party on terms that are, in landlord's good faith opinion, similar to those in the offer.

I. Multiple Rights
The majority viewpoint appears to be that if a contract has both a ROFR and an option, the option right fails if the holder is first presented with its ROFR and refuses to exercise. Since the law is fact-specific, the option and ROFR language should address the expectations of the parties. Note that while this appears to be the majority viewpoint, there are many courts that have held to the contrary. Gosfield: In general, if the holder of the ROFR also holds a fixed option, then upon the trigger of the ROFR, the holder may select which power it chooses to exercise, but the unexercised right will terminate. If neither is exercised, both will terminate. To protect the holder and avoid ambiguity, a clause should provide for survival of one or both rights, even after a sale to a third party. Commentator John Murray notes that perhaps most of all, language like that in the right at issue in Shepherd (a ROFR clause that said if the sale wasn't consummated, the ROFR remained in effect, coupled with an option that was silent on the point) illustrates the difficulties we as contract drafters can create for our clients, by using broad short-cuts such as "notwithstanding anything to the contrary in this Agreement", or survival language, in one place but not consistently. "Option or Right of First Refusal: Which is It?", John C. Murray, First American Reference Library, 2005.

V. PROTECTING THE OWNER AND THE THIRD-PARTY PROSPECT
A. Make Time of the Essence
Be extremely clear as to when tender of any consideration must be made (on exercise? On commencement/closing?) Include the essential terms of the purchase contract or renewal/expansion lease. An owner doesn't have a duty to warn a holder about the imminence of a deadline, or the effect of a failure to timely tender. But in states that impose a duty of good faith and fair dealing on landlords, it is not unknown for a court to require that the owner/holder act equitably.

B. Address Performance Obligations
Be sure that holder is obligated to perform if it exercises.

If Tenant timely exercises the Right, then Tenant shall have the obligation to [purchase the Property] [lease the Expansion Space] [extend the Term] upon the terms set forth in the Offer Notice [and the Additional Terms set forth below] [and the terms and conditions of the Lease not inconsistent with the terms of the Offer Notice], and Landlord may enforce specific performance.

C. Estoppel
How does a third party know if a right has been rejected? A well-drafted right might require a rejecting holder to give an estoppel at any time in the future if requested, stating that it has rejected. That may work for a tenant, but it would be harder to enforce the obligation on a holder of a bare right to purchase. A ROFR or ROFO in gross should, perhaps, require that the notice be sent certified mail, return receipt requested; that the response be given within ___ days by certified mail, return receipt requested, and that, if no response is received, the right is deemed waived, and a third party may rely on owner's affidavit to that effect.

D. What Happens if Holder Rejects the Right?
The language must address the issue:

If Holder either rejects the Right or does not timely exercise the Right, then Owner [shall be free to offer the Property to a third party] [negotiate with the intended third party] and execute a [lease] [contract] with such third...
party or other party on any terms negotiated for a period of ____ months.

See other iterations in the attached Forms.

VI. CONCLUSION

As you can see, there are many permutations to consider in drafting a clear and enforceable clause granting an option or other pre-emptive right. I've attached some forms, and excerpts from forms. They are forms that I think are worth keeping on hand. I've highlighted particularly interesting clauses and phrases by bolding and italicizing them. The *Wall Street Journal* recently had an article on the changing nature of business models — moving from competitive to collaborative. Our Section's contribution to the knowledge base of all its members is a fine example of the benefits of collaboration. My thanks to the attorneys who made their superior knowledge and forms available.
APPENDIX A

END NOTES

1 Facts here were an option to repurchase by a developer, for $10 Option Fee, at a fixed price equal to the original purchase price. Case of first impression in Texas. The Court noted that the "real consideration" was the obligation to pay the $10, and payment was of no consequence, since the grantor could enforce the obligation. But the Court went on to agree with the Restatement, which views that analysis as a "mere fiction", and says that fairness does not require any further consideration when the option price itself is fair. The recital is a mere formalism. See email analysis and string on DIRT@LISTSERV.UMKC.EDU, beginning March 3, 2005, see also Weatherbie, David. Case Law Update, St. Bar Advanced Real Estate Law Course, 2004.


3 Because a free look is essentially an option, in which holder is not bound until it waives inspection contingencies. The Baldwin court held that a fully executed contract that gave the buyer 60 days to examine the property and withdraw in buyer's sole discretion did not constitute a bona fide offer. Even more, it was also not a bona fide offer because once the offer was "firm", buyer still had an out - it could default and lose only its earnest money, as the seller's sole remedy.


5 More formally, an "option in gross".

6 In the event Owner receives a bona fide offer which is acceptable to Owner for the purchase of any or all the real property more particularly described in Exhibit A attached (the "Property"), Owner shall give written notice of such offer to [Holder] in the manner and at the address set forth in this Agreement. The notice must set forth the name of the proposed purchaser, the amount of such purchase price and all other terms and conditions for the proposed sale of the Property.

7 One seldom sees Rule savings clauses in leases, but they are not unknown. I recently came across the following in a Dallas office lease: "If any right granted in this Lease or other provisions of this Lease is subject to the rule against perpetuities and the same shall not occur or shall not have vested on the date that is 21 years after the death of the last to die of all now living descendants of Ronald W. Reagan, George H.W. Bush and Gerald R. Ford, all of whom are former Presidents of the United States of America, then such right or provisions shall terminate as of such date." At least one Texas court found that an option to purchase contained within a lease without a savings clause that could be exercised over 30 years violated the Rule, based on the fact that the lease expressly bound heirs and assigns. Garza v. Sun Oil Co., 727 S.W.2d 115 (Tex.App. –– San Antonio, 1986, reh. denied).

8 There is a thorough analysis of the rights of secured parties in options and other pre-emptive rights, and whether or not such rights are realty or personalty, in Perfecting and Enforcing a Security Interest in an Option to Purchase Real Estate by John C. Murray, John C. Murray Reference Library, available at http://www.firstam.com/faf/reference/main.html. See also Gosfield, Gregory, "A Primer on Real Estate Options," Real Property, Probate and Trust Journal, Spring 2000.

9 See Powertest Corp. v. Evans, 665 F. Supp. 134 (D. Conn. 1986), concluding that an option price of $50,000 was enforceable, despite a third party offer of $400,000; case cited in Gosfield, Gregory, op cit., fn. 26, p. 142.

10 Miner v. Tustin Ave. Investors, 10 Cal Rptr. 3d 178 (Cal. App. 2004)

11 Lloyd Noland Foundation v. City of Fairfield, 837 So. 2d 253 (Ala. 2002).

12 Crim Truck & Tractor Co. v. Navistar International Transportation Corporation, 823 S.W.2d 591 (Tex. 1991); English v. Fischer, 660 S.W.2d 521 (Tex. 1983).
The case has been frequently cited by Texas courts; see, for example, Texas State Optical, Inc. v. Wiggins, O.D., 882 S.W.2d 8 (Tex.App. - Houston [1st Dist.] 1994, reh. overruled 1994). The dissent in Texas State Optical argues that the 5th Circuit case "did not follow Texas law; rather, it created new law." Texas State Optical, supra, at 12. And other courts note that the good faith/commercially reasonable/no frustration of purpose exceptions to the general rule that an acceptance must mirror an offer are "not unanimously embraced". McMillan v. Dooley, 144 S.W.3d 159 (Tex.App. — Eastland 2004).

Shepherd v. Davis, 574 S.E.2d 514 (VA. 2003). The Court in Shepherd noted that the specific language creating the two parallel rights is always critical.

Gosfield, supra, citing to Stenke, 392 N.W.2d at 418; Wanda E. Wakefield, Annotation, Construction and Effect of Options to Purchase at Specified Price and at Price Offered by Third Person, Included in Same Instrument, 22 A.L.R.4TH 1293 (1983). See, also, Markert v. Williams, 874 S.W.2d 353 (Tex.App. - Hous. 1 Dist. 1994), where unclear drafting left a tenant without a surviving option to buy when the tenant failed to exercise its ROFR and the property was subsequently sold.
Options and Rights of Refusal

Chapter 11

APPENDIX B

FORMS

Options

Expansion Options: Unusual negotiated limitation: "Landlord agrees to restrict the lease term of any third party lease covering all or any portion of the Expansion Space to a maximum of thirty six (36) months for which rentals are due and payable."

Option to Buy contained in a Lease:

1. Option to Buy. Landlord, in consideration of the premises and promises set forth in this Lease, and in further consideration of Tenant paying $[100.00] (the "Buyer's Option Deposit") to Landlord on or about the Effective Date, grants to Tenant the exclusive option (the "Option") to buy the Premises at the Purchase Price and otherwise in accordance with the terms and conditions of the Purchase Agreement attached hereto as Exhibit __. The Buyer's Option Deposit shall be non-refundable. If Tenant exercises the Option, the Buyer's Option Deposit shall be applied to the Purchase Price.

2. Timing. The Option may be exercised at any time after [], and will expire upon the scheduled expiration or earlier termination of this Lease in accordance with a right granted under this Lease. Upon expiration or earlier termination the parties will be released from any obligation to buy or sell the Premises (unless the Option has been exercised prior to the expiration date, in which event the obligations shall survive until Closing), and this Lease shall continue in full force and effect until the scheduled expiration. Tenant may not exercise the Option if, on the date of exercise, there is an uncured Event of Default under this Lease of which Tenant has received written notice from Landlord.

4. Exercise. The Option shall be exercised by delivery of written notice to Landlord (the "Option Notice"), accompanied by a signed counterpart original of the Purchase Agreement. The date that Landlord receives the Option Notice shall be the "Option Effective Date". Landlord shall execute and deliver a signed counterpart original of the Purchase Agreement to Tenant, with a copy to the Title Company identified in the Purchase Agreement, within two (2) business days after the Option Effective Date. Time is of the essence. If the Option is exercised, Landlord agrees to sell, and Tenant agrees to buy, the Premises in accordance with the terms of the Purchase Agreement. This Lease shall terminate upon the Closing of the purchase and sale of the Premises in accordance with the Purchase Agreement.

5. Certain Definitions. Capitalized terms used in this Article and not otherwise defined in this Lease have the meanings given them in the Purchase Agreement.

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Offer to Purchase: defining "bona fide offer":

If during the Term or any extended Term Landlord receives a bona fide offer from an unaffiliated party to purchase property that includes Landlord's interest in all or part of the Premises (the subject of such offer being referred to as the "Property") and that Landlord desires to accept, Landlord shall first notify Tenant of its intention to accept such offer and in such notice shall state Landlord's offer to sell the Property to Tenant on the same terms and conditions as are set forth in the third party offer. For purposes of the preceding sentence, an offer that does not require the purchaser to deposit, either with Landlord or with an escrow agent, earnest money equal to at least 5% of the purchase price shall not be deemed a bona fide offer.
Offer to Purchase: Conversion of Non-Cash Offer.

If the third-party offer provides that all or part of the consideration to landlord is to consist of real or personal property that cannot readily be acquired by Tenant, then Tenant may substitute for such property cash in the amount determined in accordance with the following procedures:

(1) Landlord and Tenant shall attempt to agree on the value, provided that if Tenant notifies Landlord that Tenant elects not to exercise Tenant's rights under this ROFR, then the parties need not attempt to agree on such value and all proceedings under this ROFR shall terminate.

(2) If either party concludes that agreement as to the value is impossible, the party shall notify the other party of that conclusion ("Notice to Appraise") and the value shall be determined by appraisal in accordance with the following provisions...

.Closing. At the closing provided for in subparagraph ____, Landlord shall convey the Property to Tenant in the manner required, and subject to any exceptions or encumbrances permitted, by the terms of the third-party offer, if and to the extent required by the terms of the third-party offer, Landlord shall provide owner's title insurance coverage to Tenant and Tenant shall provide mortgagee's title insurance coverage to Landlord.

Expansion Right of First Refusal: different term

If the term for the Space set forth in Landlord's notice is less than the Term of the Lease, then Landlord will negotiate in good faith with Tenant to extend the Term with respect to the Space to be coterminous with the term of the Lease. However, if Landlord and Tenant are not able, within 3 business days after Landlord's receipt of Tenant's acceptance notice, to agree on those modifications, if any, to the terms and conditions set forth in Landlord's notice which Landlord reasonably determines should be made in order to reflect such an extension of the Term of the Lease with respect to the Space, then the term with respect to the Space shall remain as set forth in Tenant's acceptance notice.

--Mark Senn, Commercial Real Estate Leases: Preparation, Negotiation and Forms, Third Edition, at 4-38.3, form 4-10.

Traditional Right triggered by (undefined) bona fide offer:

A. So long as there exists no uncured default under the Lease on the date of exercise or on the effective date of any expansion, Tenant shall have an on-going right of first refusal to lease space on the third (3rd ) floor of the Building (the "Additional Space"), subject to existing renewal and expansion rights. If Landlord receives a bona fide offer for any portion of the Building which includes the Additional Space, Tenant's right of first refusal shall be for no less than the portion of the Building included in such offer. Landlord shall notify Tenant in writing, and the following will apply:

B. Landlord shall provide notice to Tenant that it has received a bona fide offer from a prospective tenant to lease all or any part of the Additional Space (the "Offer Notice"). The Offer Notice shall set forth in reasonable detail the Base Rent for the Additional Space, abatements and other concessions, and other economic terms to which Landlord has agreed. As to any such offer, Tenant may elect either (i) to lease the entire offered space, or (ii) to refuse to exercise its right of first refusal. Tenant acknowledges that the Offer Notice may vary from the terms of this Lease. For example, (i) a third party may be willing to lease the Additional Space for a term which is longer than the unexpired balance of the original Term, or (ii) a third party may desire to lease more than, or only a portion of the Additional Space. Therefore, it is acknowledged that the Offer Notice may require Tenant to accept the Additional Space on terms which require Tenant (a) to extend the balance of the term of this Lease (but only with respect to the Additional Space) to the term set forth in the Offer Notice, and (b) to otherwise match the Offer Notice. Tenant shall
have ten (10) business days from the receipt of the Offer Notice in which to make its election, on the terms and conditions described in the Offer Notice to Tenant, subject to B. and C. below. A failure to respond within such ten (10) business day period shall be deemed a refusal to lease.

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Right of First Refusal that is triggered by "entry into negotiations":

If Landlord enters into negotiations with a prospective tenant to lease the Expansion Space, Landlord shall notify Tenant of such fact and shall include in its notice the rent, term and other terms (including, but not limited to, finish out, moving allowances and design fees) at which Landlord is prepared to offer such Expansion Space to such prospective tenant.

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Another version triggered by proposal:

A. Expansion Space and Proposal. If (i) Landlord receives a proposal outlining the rent and general business terms upon which another prospective tenant desires to lease the vacant space on the ____ floor (_______ RSF in Suite ___ of the Building (the "Expansion Space"), as outlined and identified on Exhibit ______ hereto, or (ii) Landlord expects to make a proposal to a prospective tenant outlining the rent and other general business terms upon which Landlord is willing to lease the Expansion Space to the prospective tenant, and (iii) on the basis of either such proposal (the "Proposal") Landlord intends to enter into further negotiations for a lease agreement with the prospective tenant for the Expansion Space, then Landlord shall, prior to entering into negotiations for a lease agreement, submit the Proposal to Tenant with an offer to lease the Expansion Space to Tenant (the "Offer Notice").

B. Offer During First 12 Months of Term. The Base Rent, Tenant Alterations, and other economic terms for the Expansion Space which becomes a part of the Premises between the Commencement Date and the end of the 12th full month of the Term shall be as provided in the Lease with respect to the Premises; provided further that the Tenant Allowance for the Expansion Space shall be the same as for the Premises on a square foot basis. The Tenant Allowance shall be reduced in proportion to the number of months remaining in the Term at the date the Expansion Space is expected to become a part of the Premises.

C. Offer after the First 12 Months of the Term. The Offer Notice shall set forth the business terms and conditions contained in the Proposal (the "Proposed Terms"), and shall offer to lease the Expansion Space to Tenant on the Proposed Terms. Tenant acknowledges that the Proposed Terms may vary from the terms of the Lease.

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Holder-oriented; addressing offer made by landlord or offer received by landlord. Tenant shall have the right of first refusal to purchase the premises as hereinafter set forth. If at any time during the term, Landlord receives a bona fide offer, other than at public auction from a third person (which does not have the power of eminent domain) for the purchase of the premises, which offer Landlord desires to accept, Landlord shall promptly deliver to Tenant a [copy of such offer] [a notice setting forth the economic terms of such offer], and Tenant may, within --- days thereafter, elect to purchase the premises on the same terms as those set forth in such [offer] [notice of offer]. If Tenant does not accept such offer within the time specified, the right of refusal shall cease, but this lease shall continue otherwise on all the other terms and conditions hereof. This right of refusal shall be inapplicable to a transfer by gift or devise, including a trust, to or for a party related to Landlord, or to any transfer, in whole or in part, from one such related party to another, but shall apply to any subsequent transfer to a third person. An offer made by Landlord for the sale or other transfer of the premises to a third person, other than in lieu of condemnation, shall
give Tenant the same rights under this Article as if such offer were an acceptable offer made to Landlord by a third person. Friedman, Milton, Rights of Refusal and Their Not-So-Hidden Problems, Lawyer's Supplement to the Guarantor, Nov/Dec 1991, CTIC.

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Holder oriented: specifying how much space must be taken.

Landlord is not permitted to give the notice more than - months and not less than - months before the space will become available. Tenant must take [the entire available space] [not less than square feet of the available space]

Calculating Allowance. Landlord shall provide an Allowance equal to $- per square foot of rentable area for improvements to the Premises such as carpeting, lighting, walls, etc., and not so-called 'soft costs'; computed by the following formula: ($- X # rsf in the Expansion Space) X a fraction in which the numerator is the number of full months remaining in the original lease term and the denominator is the number of full months remaining in the lease term, but in no event shall the allowance exceed the actual costs of the improvements.

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Right of First Refusal:

(a) Tenant shall, during the Term of this Lease, have a right of refusal (as hereinafter described) on certain space adjacent to the Premises containing approximately _______ square feet, as shown on Exhibit _______ attached (the "Expansion Space"), for a term ending contemporaneously with the expiration or earlier termination of the Term of this Lease.

(b) Provided that no Event of Default under the Lease has occurred on the date Landlord enters into negotiations to lease all or any portion of the Expansion Space to a prospective Tenant, Landlord shall deliver notice to Tenant of such fact and of the terms and conditions on which Landlord would lease the Expansion Space to Tenant, which terms and conditions may be substantially different than those provided to any other prospective tenant. Landlord shall have no such obligation to notify Tenant if Landlord enters into negotiations with a tenant then occupying all or any portion of the Expansion Space to renew and/or extend its lease of the Expansion Space or with any other existing tenant in the Building to which Landlord has previously granted a right or option to lease the Expansion Space.

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additional language for prospective tenant taking space in addition to Refusal Space:

Landlord shall have no such obligation to notify Tenant if (i) Landlord enters into negotiations with any other existing tenant in the Property (or any successor in interest thereto) to which Landlord has previously granted a right or option to lease the Refusal Space, or (ii) if Landlord enters into negotiations with a prospective tenant desiring to lease other space in the Building in addition to the Refusal Space.

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Right of First Refusal (but note that it more resembles a right of first offer):

A. Provided Tenant is not in Default of the Lease, if Landlord receives a proposal outlining the rent and general business terms upon which another prospective Tenant desires to lease all or any portion of the space adjacent to the Premises (the "Expansion Space"), or if Landlord expects to make a proposal to a prospective Tenant outlining the rent and other general business terms upon which Landlord is willing to lease such space to the prospective Tenant, and if on the basis of either such proposal (the "Proposal") Landlord intends to enter into further negotiations for a more definitive lease agreement with the prospective Tenant, then Landlord shall, prior to entering into negotiations for a more definitive lease agreement, submit the Proposal to Tenant with an offer to lease the Expansion Space to Tenant on the Proposed Terms (as defined below).

B. Landlord shall give Tenant written notice of the business terms and conditions contained in the Proposal (the "Proposed Terms"), and shall offer to lease the identified portion of the Expansion Space to Tenant on the Proposed Terms. Tenant acknowledges that the Proposed Terms may vary from the terms of this Lease. For example, (i) a third party may be willing to lease the Expansion Space for a term which is longer than the unexpired balance of the original Lease Term, or (ii) a third party may desire to lease only a portion of the Expansion Space. Therefore, it is acknowledged that the Proposed Terms may require Tenant to accept the Expansion Space on terms which require Tenant (a) to extend the balance of the term of this Lease (but only with respect to the Expansion Space) to the term set forth in the Proposed Terms, and (b) to otherwise match the Proposed Terms.

C. Tenant shall have seven (7) days following receipt of the Proposed Terms to accept or reject in writing Landlord's offer. If Tenant accepts the offer, then within fifteen (15) days after acceptance, Tenant shall execute and deliver an amendment to this Lease, in the form attached hereto as Exhibit __, with respect to the Expansion Space, on the Proposed Terms. If Tenant does not execute such an amendment within the time allowed, or otherwise rejects Landlord's offer, Landlord may negotiate with the intended third party and execute a lease with such third party on any terms negotiated, whether similar or dissimilar to those originally communicated to Tenant, so long as Landlord's notice of the Proposed Terms was made in good faith. If a lease with the third party is signed, Tenant's rights hereunder to the Expansion Space shall terminate. If a lease with the third party is not signed, Landlord shall notify Tenant in writing (the "Termination Notice") that the third party period is terminated, and the Expansion Space shall again be subject to Tenant's right of first refusal and Expansion Option.

D. The rights of Tenant under this Paragraph are not assignable separately from the Lease, and shall terminate upon (a) any assignment, sublease or other Transfer, (b) any Default hereunder by Tenant, and/or (c) any termination of this Lease or of Tenant's right of possession hereunder.

###. RIGHT OF FIRST OPPORTUNITY (specifying the required information)

(a) Grant of Right. The "Additional Space" is the rentable area of the Building which is outlined on Exhibit attached hereto. At such time, if any, during the initial Lease Term that Landlord proposes or intends to propose to a third party prospective tenant (other than an existing tenant who is renewing or extending its lease, whether or not pursuant to a granted right to do so), the term and the financial consideration for which Landlord would be willing to lease all or a portion of the Additional Space, and provided there is no Tenant Default (or event which, with the giving of notice or passage of time or both, would become a Tenant Default), Landlord shall communicate the same information to Tenant and allow Tenant the opportunity set forth in this Paragraph ("Landlord's Notice").
(b) **Terms of Opportunity.** Landlord's Notice shall set forth, in addition to rent and term information, the condition in which the Additional Space is offered, the amount of any tenant improvement allowance, the amount of any security deposit or additional security deposit required with respect to the offered Additional Space, and such other matters as Landlord may desire. Tenant acknowledges that the terms of the leasing opportunity may vary, in the discretion of Landlord, depending upon future circumstances. For example, (i) a third party may be willing to lease the Additional Space for a term which is longer than the unexpired balance of the initial Lease Term or as part of a larger space; or (ii) a third party may desire to lease only a portion of the Additional Space but the remainder would be, in Landlord's judgment, less marketable or may become subject to a first opportunity or other right in favor of the third party. Therefore, it is agreed Landlord may offer the Additional Space or the applicable portion thereof to Tenant on terms which require Tenant (a) to extend the balance of the term of this Lease (at a rent acceptable to Landlord) to coincide with the length of the term being considered with respect to the third party, (b) to lease the entirety of the larger space being considered by the third party, (c) to lease the entire Additional Space and not just the portion being considered by the third party, and/or (d) to agree to other conditions designed to protect Landlord's interest.

(c) **Response to Offer.** Tenant shall have until 5:00 p.m. on the fifth (5th) business day following receipt of Landlord's Notice to execute an amendment to this Lease or, at Landlord's option, a separate lease for the space offered by Landlord's Notice, on terms set forth in this Lease and in Landlord's Notice. Any separate lease shall contain a provision to the effect that a Default by Tenant thereunder shall also be a Default under this Lease; this lease shall be simultaneously amended to provide that any Default by Tenant under the new lease shall also be a Default hereunder. Should Tenant fail to execute such a separate lease or amendment within the time allowed, or otherwise indicate rejection of the offer contained in Landlord's Notice, Landlord may negotiate with the intended third party and execute a lease with such third party on any terms negotiated, whether similar or dissimilar to those originally communicated to Tenant, so long as Landlord's Notice to Tenant was made in good faith. If a lease with the third party is signed, all of Tenant's rights hereunder to the Additional Space shall terminate. If a lease with the third party is not signed, the Additional Space shall again be subject to this right of first opportunity.

(d) **Financial Statements.** As a condition to Tenant executing a lease or amendment under this Paragraph, Tenant shall deliver to Landlord complete current financial statements of Tenant and any guarantors. Landlord shall have the right to review such financial statements. If Landlord is not satisfied, in its discretion, with the financial condition of Tenant or any guarantor, as demonstrated by such financial statements, then Landlord shall so inform Tenant and may then proceed to negotiate with the third party on the same terms as if Tenant had rejected Landlord's communication.

(e) **Personal Nature of Right.** The rights of Tenant under this Paragraph are not assignable separately from this Lease. Such rights of Tenant shall terminate upon (a) any assignment, sublease or other Transfer, (b) any Default hereunder by Tenant, and/or (c) any termination of this Lease or of Tenant's right of possession hereunder; provided, however, in the event Tenant shall have executed an amendment or a separate lease leasing space pursuant to this Paragraph and Landlord subsequently terminates this Lease or Tenant's right of possession hereunder for Default, the damages to which Landlord shall be entitled shall include damages under such amendment or separate lease.

(f) **Certificate.** At such time as Tenant rejects a communication by Landlord or otherwise has no rights (or less rights) with respect to the Additional Space or any portion thereof, Tenant, upon request by Landlord, shall execute and deliver to Landlord a certificate setting forth the status of the remaining rights, if any, which Tenant enjoys with respect to the Additional Space, the compliance of Landlord with the process set forth in this Paragraph, and such other matters as Landlord may reasonably request.

(g) **No Landlord Liability.** Landlord has not promised that all or any portion of the Additional Space shall be or become available to Tenant or that such an event shall occur on or before any particular date. Landlord shall have no liability for the failure of all or any portion of the Additional Space to become available. Landlord shall have no obligation to remove any other tenant from the Additional Space and may allow any such tenant to renew or extend its lease and/or to holdover. The rights granted to Tenant hereunder are subject and subordinate to any rights previously granted to any other tenant regarding the leasing of all or
any part of the Additional Space. In no event shall any actual or alleged failure by Landlord under this Paragraph allow Tenant to terminate this Lease.

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**Right of First Offer:**

(b) Provided that no uncured Event of Default (or event which with notice and/or lapse of time could become an Event of Default) under this Lease has occurred, Landlord shall, upon the vacating or intended vacating of the Offer Space by any tenant, deliver notice to Tenant of such fact and shall include in such notice those terms and conditions on which Landlord would lease such Offer Space to Tenant, which terms and conditions may be substantially different than those provided to any other prospective tenant. Within 10 days after the delivery of such notice, Tenant shall notify Landlord in writing of its election to exercise its right of first offer. Landlord shall have no obligation to notify Tenant until any and all other existing tenants in the Building (or any successors in interest thereto) to which Landlord has previously granted a right or option to lease the Offer Space have declined such space, and Tenant's right of first offer shall remain subject to any right of first refusal or similar right or option which has previously been granted to any other party. **Further, Landlord shall have no obligation to offer the Offer Space to Tenant prior to or in connection with its initial leasing subsequent to the date hereof.**

…(e) Possession of the Offer Space shall be delivered to Tenant on the Expansion Date and in the condition specified by Landlord pursuant to subparagraph (b) above. Landlord will use reasonable diligence to make the Offer Space available to Tenant on the Expansion Date. Landlord shall not be liable for the failure to give possession of the Offer Space to Tenant on the Expansion Date by reason of the holding over or retention of possession of any tenant, tenants, or occupants, or for any other reason, and such failure shall not impair the validity of this Lease, or extend the Term, but the rent for such Right of First Offer Space shall be abated until possession is delivered to Tenant and such abatement shall constitute full settlement of all claims that Tenant might otherwise have against Landlord by reason of such failure to give possession of the Offer Space to Tenant on the Expansion Date.

--courtesy of Cheryl Engelmann

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**Multiple Rights (negotiated):**

1. **Right of Refusal.** During the Renewal Term, and subject to any then-existing rights to renew or expand granted under existing leases of space in the Building, Tenant (or its Affiliate Assignee only) shall have the following right of refusal to lease additional space in the Building:

   A. **Expansion Space and Proposal.** Provided there is no Event of Default (or event which, with the giving of notice or passing of time or both, would become an Event of Default) under this Lease, then, **if (i) Landlord receives a proposal outlining the rent and general business terms upon which another prospective tenant desires to lease all or any portion of the remainder of floor ____ (the "Expansion Space"), as outlined by cross-hatching and identified on Exhibit A hereto, or (ii) Landlord expects to make a proposal to a prospective tenant outlining the rent and other general business terms upon which Landlord is willing to lease all or any portion of the Expansion Space to the prospective tenant, and (iii) on the basis of either such proposal (the "Proposal") Landlord intends to enter into further negotiations for a lease agreement with the prospective tenant for such portion of the Expansion Space (the "Refusal Space"),** then Landlord shall, prior to entering into negotiations for a lease agreement, submit the Proposal to Tenant with an offer to lease the Refusal Space to Tenant.
B. Offer Notice. Landlord shall give Tenant written notice (the "Offer Notice") of the business terms and conditions contained in the Proposal (the "Proposed Terms"), and shall offer to lease the Refusal Space to Tenant on the Proposed Terms. Tenant acknowledges that the Proposed Terms may vary from the terms of the Lease.

C. Amendment. Tenant shall have five (5) days following receipt of the Offer Notice to accept or reject in writing Landlord’s offer. If Tenant accepts the offer, then Tenant must execute and deliver an amendment to the Lease within five (5) days after receipt of an amendment from Landlord with respect to the Refusal Space on the Proposed Terms, and, to the extent inconsistent with the Proposed Terms, the terms of the Lease; however, Tenant shall accept the Refusal Space in an "AS-IS" condition and Landlord shall not provide to Tenant any allowances or other tenant inducements except as specifically provided in the Offer Notice. If Tenant does not execute such an amendment, or otherwise rejects Landlord's offer, Landlord may negotiate with the prospective tenant and execute a lease with such prospect on any terms negotiated therewith, provided such terms are, in Landlord's good faith opinion, similar to those contained in the Offer Notice. If a lease with the third party is not signed (or, if signed, thereafter expires), the Expansion Space shall again be subject to Tenant's right of first refusal. Time is of the essence.

2. Preferential Right to Lease. Subject to any then-existing renewal or expansion rights of other tenants of the Building, then, during the first twenty-four (24) months of the Renewal Term, Landlord shall first offer to lease to Tenant any available space on floor - of the Building ("Preference Space") before leasing such space to any party not already the tenant of such space; such offer shall be in writing and specify the lease terms for the Preference Space, including the rent to be paid, the term thereof, and the date on which the Preference Space shall be included in the Premises (the "Preferential Offer Notice"). Tenant shall notify Landlord in writing whether Tenant elects to lease the entire portion of the Preference Space identified in the Offer Notice, on the terms set forth in the Lease, including this Amendment, within ten (10) days after Landlord delivers the Offer Notice. If Tenant timely elects to lease the Preference Space, then Tenant shall execute an amendment to the Lease within five (5) days after receipt thereof from Landlord, on the terms of the Lease, including this Amendment, except that: (a) Base Rent for the Preference Space shall be $____ per square foot of Net Rentable Area; and (b) the $____ Tenant Allowance shall be reduced in proportion to the number of months remaining in the Renewal Term at the date the Preference Space is expected to become a part of the Premises. The Tenant Allowance shall be used for the actual cost of tenant improvements to be constructed pursuant to plans agreed upon by the parties and otherwise in accordance with the Lease. Tenant's rights with respect to the Preference Space shall expire at the end of the twenty-fourth (24th) month of the Renewal Term except with respect to Preference Space offered to Tenant during such time period but not yet a part of the Premises. If any Preference Space is also Refusal Space, the terms of Paragraph 8 shall take precedence. Notwithstanding anything to the contrary contained herein, except as subject to any existing rights of other tenants in the Building, Landlord shall not enter into lease negotiations for the Preference Space within sixty (60) days of the Effective Date of this Amendment.

3. General Conditions to Expansion Rights. The rights granted Tenant in Paragraphs 1 and 2 (collectively, "Expansion Rights") above are subject to the following:

A. Time of Essence. If Tenant fails or is unable to timely exercise any of its Expansion Rights hereunder, then such right shall cease with respect to the space so offered, time being of the essence with respect to exercise, and Landlord may lease all or any portion of the Expansion Space or the Preference Space to third parties on such terms as Landlord may elect, whether similar or dissimilar to those originally communicated to Tenant, so long as Landlord's Offer Notice or Preferential Offer Notice was made in good faith. Any counter-proposal or conditional acceptance on the part of Tenant shall be deemed a refusal on Tenant's part to exercise.

B. Not Assignable. Tenant's Expansion Rights are not assignable separately from the Lease, and shall terminate upon (a) any assignment, sublease or other transfer (except to an Affiliate Assignee), (b) any uncured default under this Lease by Tenant, and/or (c) any termination of the Lease or of Tenant's right of possession hereunder.
C. **Financial Statements.** As a condition to Tenant executing a lease or amendment with respect to Tenant's Expansion Rights, Tenant shall deliver to Landlord complete current financial statements of Tenant. Landlord shall have the right to review such financial statements. If Landlord is not satisfied, in its discretion, with the financial condition of Tenant, as demonstrated by such financial statements, then Landlord shall so inform Tenant and may then proceed to negotiate with the third party as if Tenant had rejected Landlord's Offer Notice or Preferential Offer Notice.

D. **No Default.** Tenant's rights shall not be exercisable if any Default exists on the date of exercise or has existed within six months of the date of exercise.

D. **No Landlord Liability.** Landlord has not promised that all or any portion of the Expansion Space or Preference Space shall be or become available to Tenant or that such an event shall occur on or before any particular date. Landlord shall have no liability for the failure of all or any portion of the Expansion Space or Preference Space to become available. Landlord shall have no obligation to remove any other tenant from the Expansion Space or Preference Space and may allow any such tenant to renew or extend its lease and/or to holdover. The rights granted to Tenant hereunder are subject and subordinate to any rights previously granted to any other tenant regarding the leasing of all or any part of the Expansion Space or Preference Space. In no event shall any actual or alleged failure by Landlord with respect to Tenant's Expansion Rights allow Tenant to terminate the Lease.

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Option to Extend Term (with CPI adjuster and rate determination by Qualified Broker if negotiations fail)

Option to Extend Term

This Exhibit sets forth the terms under which Tenant shall have the right to extend the Term of the Office Lease Agreement (the "Lease") to which this exhibit is attached. Capitalized terms that are used but not defined in this exhibit have the meaning given such terms in the body of the Office Lease Agreement.

1. Tenant shall have the right and option to extend the Term for a period of five years (the "First Renewal Term"), provided that (a) Tenant notifies Landlord at least nine but not more than 12 months before the end of the Initial Term of Tenant's election to exercise the renewal option, and (b) no Event of Default has occurred and is continuing, either at the time Tenant gives such notice or at the time the First Renewal Term would begin. If Tenant exercises the option provided for in the preceding sentence, Tenant shall have the similar right and option to extend the Term for an additional period of five years (the "Second Renewal Term" and, with the First Renewal Term, a "Renewal Term"), provided that (c) Tenant notifies Landlord at least nine but not more than 12 months before the end of the First Renewal Term of Tenant's election to exercise the renewal option, and (d) no Event of Default has occurred and is continuing, either at the time Tenant gives such notice or at the time the Second Renewal Term would begin. The First Renewal Term, if any, shall commence on the expiration of the Initial Term, and the Second Renewal Term, if any, shall commence on the expiration of the First Renewal Term. All terms and provisions of the Lease shall remain in effect during any Renewal Term, except that (i) Minimum Rent for each month of any Renewal Term shall be adjusted as provided below, (ii) no extension option granted by this paragraph may be exercised so as to extend the Term of the Lease beyond the end of the Second Renewal Term, and (iii) Landlord shall not be obligated to make any alterations or repairs to the Premises other than those routinely required of Landlord by the terms of the Lease.

2. **Base Rent for each Renewal Term shall be the greater of:**

(a) The product of the CPI Factor (as hereinafter defined) and the Base Rent in effect on the day preceding the commencement of such Renewal Term (without giving effect to any abatements, set-offs or concessions then in effect); or
(b) The Market Rate (as hereinafter defined) for the Premises determined as of the commencement of such Renewal Term, as designated by Landlord by Notice to Tenant (Landlord's Notice) but subject to Tenant's right to dispute as hereinafter provided.

As used in this paragraph, the term "CPI" refers to the Consumer Price Index for All Urban Consumers, U.S. City Average, All Items (1982-84 = 100), as published by the United States Bureau of Labor Statistics, and the term "CPI Factor" means a fraction, the numerator of which is the CPI published for the month that preceded by three months the beginning of such Renewal Term and the denominator of which is the CPI published for the month that preceded by three months the beginning of (i) the Initial Term, for purposes of determining the CPI Factor for the First Renewal Term, or (ii) the First Renewal Term, for purposes of determining the CPI Factor for the Second Renewal Term; provided, that the CPI Factor shall never be less than one. (By way of illustration, if the Initial Term began on January 1, 2006, then the CPI Factor for the First Renewal Term would be determined by the ratio (not less than one) of the CPI for October 2010 with the CPI for October 2005). If the Consumer Price Index ceases to be published, then "CPI" shall refer to such other generally accepted measure of monetary inflation as Landlord may in good faith select.

As used in this paragraph, the term "Market Rate" means, with respect to any Renewal Term, the market annual rental rate applicable to the Premises as Base Rent for such Renewal Term, given the continued applicability of all previously-applicable terms of the Lease other than amount of Base Rent specified in the Lease. The Market Rate for any Renewal Term shall be determined as provided in paragraph 3 of this exhibit, but shall in no event be less than the Base Rent in effect for the last month of the immediately preceding term (i.e., the Initial Term or the first Renewal Term, as the case may be) of the Lease.

3. Subject to the foregoing criteria, the Market Rate applicable to any Renewal Term shall be determined as follows:

(a) Not less than three months before the beginning of such Renewal Term, Landlord shall notify Tenant of Landlord's good faith estimate of the applicable Market Rate, taking into account rents then being asked and paid under new leases for comparable office space in the Project, if any such leases exist, and in other office buildings facilities in the general vicinity of the Project, with appropriate adjustments for (i) terms that are included in or omitted from the Lease but are omitted from or included in otherwise comparable leases, and (ii) leasing commissions that Landlord could reasonably expect to avoid by renewing the Lease instead of procuring a new tenant for the Premises.

(b) If Tenant disagrees with Landlord's estimate of the applicable Market Rate, Tenant must notify Landlord of such disagreement within 15 days after the date of Landlord's estimate. If Tenant does not notify Landlord of such disagreement within the specified period, the Market Rate for the upcoming Renewal Term shall be the amount specified in Landlord's notice and shall not be subject to challenge.

(c) If Tenant gives timely notice to Landlord that Tenant disagrees with Landlord's estimate of the Market Rate, each party shall provide the other promptly with full information as to the office spaces that such party deems comparable to the Premises, rental rates being asked and paid for such spaces and the basis for any adjustments that such party contends should be made in such other rental rates in arriving at the Market Rate. Senior representatives of the parties shall meet and attempt to resolve the issue within 15 days after the date of Tenant's notice of disagreement.

(d) If the parties have not agreed on a Market Rate within 30 days after the date of Landlord's estimate, then Landlord shall appoint a Qualified Broker (as hereinafter defined) to determine the Market Rate. The Qualified Broker shall be given a complete copy of the Lease and shall be instructed to assume (i) that the Premises are available in the rental market, (ii) that the Landlord has had a reasonable time to locate a tenant, (iii) that neither Landlord nor any prospective tenant is under a compulsion to rent, (iv) that Landlord and any prospective tenant are typically motivated, well-informed and well-advised and each is acting in what it considers its own best interest, (v) the Premises are fit for immediate occupancy and use "as is", require no additional work by Landlord or any prospective tenant, are appropriate and desired for immediate occupancy by any prospective tenant and contain no work that has been carried out thereon Tenant or anyone claiming under Tenant during any prior portion of the Term of the Lease which has diminished the rental value of the Premises, and (vi) that in the event the Premises are or have
been destroyed or damaged by fire or other casualty prior to the commencement of the applicable Renewal Term, they will have been fully restored prior to such commencement. The Qualified Broker shall take into consideration, among other things, the adjustment factors described in subparagraph 3(a) above, and any increases or possible increases in rent then being included in leases for comparable space in the Project or in comparable projects based on changes in price indices or periodic market rental adjustments. Within 30 days after his or her appointment, the Qualified Broker shall notify each party as to his or her determination of the Market Rate, and the amount so determined shall be final and binding on each party for purposes of determining the new Base Rent.

(e) As used in this paragraph, "Qualified Broker" means a commercial real estate broker, licensed as such in the state in which the Project is located, with at least ten years commercial leasing experience in the metropolitan area in which the Project is located, including significant experience in negotiating office leases in that area, who is not related by blood, marriage or business affiliation to either Landlord or Tenant or to any principal of either Landlord or Tenant.

(f) The parties shall contribute equally to the fees and expenses of the Qualified Broker, if any.

(g) If for any reason the Market Rate has not been finally determined before the commencement of Tenant's obligation to pay Base Rent based upon a determination of such Market Rate, then the amount stated in Landlord's estimate of Market Rate shall be in force as the Market Rate on an interim basis until the Market Rate is finally determined, and Tenant shall pay Base Rent under the Lease based on such interim Market Rate. Within ten days after the Market Rate has been finally determined, Tenant shall pay any underpayment of Base Rent to Landlord or Landlord shall refund any overpayment of Base Rent to Tenant, as the case may be.

4. Tenant acknowledges and agrees that time is of the essence with respect to the exercise of any renewal option and that notice of exercise of any such option given before the earliest date on which such notice is permitted to be given will, at the Landlord's sole option, be void and ineffective. Tenant also acknowledges that if Tenant's notice of exercise of any renewal option is given after the last date on which such notice was permitted, the renewal option will not have been exercised and cannot thereafter be revived or reinstated except with the written consent of Landlord, which Landlord may withhold in Landlord's sole and absolute discretion.

--Courtesy of Chuck Calvin, Faegre & Bensen, Denver, CO.

Language addressing result of rejection of the offer.

If Holder either rejects the Right or does not timely exercise the Right, then Owner [shall be free to offer the Property to a third party] [negotiate with the intended third party] and execute a [lease] [contract] with such third party on any terms negotiated, whether similar or dissimilar to those originally communicated to Holder, so long as Owner's Offer Notice was made in good faith.

Alternate: Owner shall be free to offer the Property on terms that are less favorable to Owner than the terms of the Offer Notice, but if the [purchase price] [base rent] is more than 5% less than the [purchase price] [base rent] stated in the Offer Notice, then Owner must first give Holder new notice in accordance with the procedures set forth above.

Alternate: Owner shall be free to offer the Property to a third party on any terms negotiated for a period of - months, and if the [lease] [sale] is not consummated within such month period, then Owner must first re-offer the Property to Holder in accordance with the above procedures.
All or Nothing ROFR:

Provided that this Lease continues in full force and effect without any uncured default by Tenant, Tenant shall have a right of first refusal to lease any vacant space in the - square foot area abutting the Premises on the - [e.g., "east"], which option space is cross-hatched on Exhibit A to this Lease (such space being hereinafter referred to as the "Designated Area"), which Landlord intends to market for lease to a party or parties other than the current tenants thereof. The right granted by this provision, however, is subject to the following terms and conditions: [...]

If a proposed tenant, i.e., other than the current tenant in the space, gives Landlord an expression of interest in leasing then-vacant space within the Designated Area (either as a separate leased premises or together with space outside the Designated Area), and if Landlord intends to enter into a lease with the proposed tenant for such space, Landlord shall deliver to Tenant a written notice which (i) specifies the portion or portions of the Designated Area an, if applicable, any other space in the Building which the proposed tenant wishes to lease and Landlord intends to allow to be leased along with the portion or portions of the Designated Area (all such space being referred to collectively as the "Refusal Space"), (ii) identifies the proposed tenant, (iii) summarizes what Landlord considers to be the most significant business terms of the proposed lease, and (iv) offers to lease the Refusal Space to Tenant on the same terms and conditions as Landlord intends to offer to the proposed tenant. Tenant shall then have a period of five days from the delivery of such notice (the "Delivery Date") to accept the lease offered by Landlord. If within the 5-day period Tenant does not give Landlord written notice of its acceptance of the lease offered by Landlord (time being of the essence), then Landlord shall be entitled to execute with the proposed tenant identified in Landlord’s notice to Tenant (or with an "affiliated entity," i.e., an entity affiliated to such identified proposed tenant by common ownership), a lease of the Refusal Space for the same or better (for Landlord) terms as stated in the notice to Tenant. If within 180 days after the Delivery Date Landlord does so execute a lease of the Refusal Space, this right of first refusal shall terminate (i.e., as to the entirety of the Designated Area), and this Rider shall have no further force or effect. If Landlord does not execute a lease of the Refusal Space with the proposed tenant or an affiliated entity within 180 days after the Delivery Date, then Landlord shall again comply with the terms of this Rider in marketing the portion of the Refusal Space which is in the Designated Area.

"Breakpoint" ROFR:

. . . . . . The option granted in this paragraph shall not apply to any proposed lease involving more than - square feet, even though all or a portion of the option space is included. For leases involving less than - square feet, the option shall apply only to the option space, and the parties shall prorate all lease terms in the proposed lease to determine the terms available to Tenant for the option space.

--courtesy of Jim Wallenstein, Jenkens & Gilchrist.