

## MODEL CLAUSE

### Protect Yourself When Giving Right of First Refusal

The following clause was drafted by Syracuse attorney Stuart J. Frank. It sets out the limits and requirements for the tenant's right of first refusal.

Paragraph a says that the tenant has a right of first refusal for a designated space if it meets certain conditions. Paragraph b sets out your notice requirements. Paragraph c discusses the way that the tenant will exercise its right of first refusal. Paragraph d says that if the tenant doesn't properly exercise its right, it will be for-

feited. Paragraph e says that only the tenant can exercise the right of first refusal. Paragraph f says that you're not obligated to rent the additional space to anyone if it becomes available. Paragraph g lists certain events that won't trigger the right of first refusal. Use paragraph h only if a new lease will be signed for the additional space. It says that a default under the original lease or new lease will be a default under the other lease. Show this clause to your attorney before using it. [CLL10050](#)

#### RIGHT OF FIRST REFUSAL FOR ADDITIONAL SPACE

- a. Right of First Refusal.** During the first [insert #, e.g., 6] months of this Lease, Tenant shall have a one-time right of first refusal ("Right of First Refusal") to lease space located at

[For a shopping center:] space [insert #] on floor [insert #],  
[For an office building:] suite [insert #] of the Building,  
as more particularly shown on Exhibit [insert #] attached hereto (the "Additional Space), so long as the use for the Additional Space includes

[For a shopping center:] the sale of [insert merchandise];  
provided that:

[For an office building:] the use specified in Section [insert # of use clause] of this Lease, provided that:

- (i) this Lease is in full force and effect and Tenant is open and operating in all of the Premises;
- (ii) Tenant has not been in default under the terms and conditions of this Lease at the time it exercises the Right of First Refusal and shall not be in default when it is supposed to take possession of the Additional Space;
- (iii) Tenant, during the term of this Lease, has not been in default of the terms of this Lease [insert #, e.g., 3] or more times (whether cured or uncured);
- (iv) Tenant's then current financial condition, as revealed by its most recent financial statements (which shall include quarterly and annual financial statements, including income statements, balance sheets, and cash flow statements) must demonstrate, in Landlord's sole discretion, either:
  - (A) Tenant's net worth is at least equal to its net worth at the time this Lease was signed; or
  - (B) Tenant meets the financial criteria acceptable to Landlord.

- b. Landlord's Notice.** Landlord shall give Tenant notice, in writing (the "Landlord's Notice"), of a prospective lease for the use, as described in Paragraph a above, at the Additional Space. The Landlord's Notice shall include the terms and conditions of such prospective lease.

- c. Tenant's Exercise of Right.** To exercise this Right of First Refusal, Tenant shall:

- (i) Accept the terms and conditions of the prospective lease as proposed by Landlord by notifying Landlord, in writing, sent by registered or certified mail,

return receipt requested, of its intent to so accept, postmarked within [insert #, e.g., 2] business days after receipt of Landlord's Notice. Tenant's notice of acceptance shall include the financial statements required by Paragraph a(iv) above and such other financial information required by Landlord to make its decision;

- (ii) Execute

[For a new lease:] a new lease for the Additional Space (which lease shall be identical to such prospective lease mentioned hereinabove) or

[For amendment to current lease:] an amendment to this Lease, subjecting the Additional Space to this Lease (at the rent and for the terms and conditions set forth in the prospective lease mentioned hereinabove)

within [insert #, e.g., 3] business days after receipt of same from Landlord; and

- (iii) [insert name(s) of guarantor(s) if original lease has guarantor(s)] deliver to Landlord, concurrently with the [lease/amendment], an original, signed, and notarized guaranty of the [new lease/amended lease] in a form which is identical to the guaranty form applicable to this Lease.

- d. Lapse of Right.** Tenant acknowledges that time is of the essence with regard to this Right of First Refusal. If Tenant does not timely satisfy the conditions of Paragraph c above, then (i) Landlord will have the right to accept the prospective lease free of the rights of Tenant under this Paragraph, and (ii) Landlord's obligation under this Clause shall be null and void and without further force and effect throughout the remainder of the term of this Lease and any renewals or extensions thereof.

- e. Personal to Tenant.** This Right of First Refusal for the Additional Space is personal to the named tenant herein and is not transferable.

- f. No Obligation.** In the event the Additional Space becomes available but no third party offer for the Additional Space exists, Landlord is under no obligation to offer for lease all or any portion of the Additional Space to Tenant.

- g. Events Not Triggering Right.** Anything contained herein to the contrary notwithstanding, the Right of First

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Refusal shall be deemed not to have arisen and to be of no force and effect if any of the following events occur:

- (i) The sale or transfer of stock or other ownership interests in Landlord;
- (ii) Landlord's shares become, or continue to be, traded on the New York, American, or Over-The-Counter stock exchange or market or any similar exchange or market;
- (iii) Landlord enters into a management agreement or any similar agreement which transfers control of the Premises;
- (iv) Landlord enters into a ground lease, mortgage, or trust deed respecting all or any portion of the

Premises, makes any advances thereunder, or enters into any renewals, modifications, consolidations, replacements, extensions, and refinancings thereof; or

- (v) Landlord enters into a contract for the sale of the [Building/Center] containing the Premises.

**h. Cross Default.** *[Insert if new lease is signed]* Tenant agrees that any default by it under this Lease shall be deemed to constitute a like default under the lease for the Additional Space. Tenant further agrees that the lease for the Additional Space shall stipulate that any default by Tenant thereunder shall be deemed a like default under this Lease.