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OFFER TO LEASE

[\$1.5]

9.1 The Landlord will finish the Premises in accordance with and only to the extent of the Landlord's Work described in Schedule D to this Offer.

Section 9.1 should be deleted if the landlord is not doing work to the premises, and Section 9.2 should be amended accordingly.

9.2 Unless otherwise agreed in writing by the parties, the Tenant agrees that by taking possession of the Premises the Tenant thereby acknowledges that the Premises are in a good and satisfactory condition as of the date of such possession and the Landlord has fulfilled its obligations to complete the Landlord's Work.

A tenant would want to amend Section 9.2 to expressly exclude any latent defects and to provide that the tenant has a certain amount of time to provide a deficiency list.

10. POSSESSION OF PREMISES FOR COMPLETION OF TENANT'S WORK

Note that this offer does not provide for a tenant improvement allowance. It could do so if a special provision were added in Schedule G. In such a case, the allowance would also likely be mentioned in Article 10. See chapter 11 (Special Tenant Rights) for a sample tenant improvement allowance provision.

10.1 The Tenant will prepare and submit to the Landlord, within [number] days of the acceptance of this Offer by the Landlord, for the Landlord's written approval, plans and specifications of the proposed Tenant's Work in order to make the Premises ready for occupancy.

[OR

10.1 *The Tenant will finish the Premises in accordance with the Tenant's Work as described in Schedule E to this Offer.*]

The landlord may wish to amend Section 10.1 (alternate) to provide that the tenant is required to use the landlord's mechanical, electrical, and other contractors in conducting the tenant's work that affects the structure of the building or the building operating systems. Additionally, the landlord may insist on carrying out the tenant's work on behalf of the tenant at the tenant's sole cost and expense.

Whether or not the foregoing amendments are made, the alternate section is preferable from the landlord's point of view because the nature of the tenant's work does not have to be negotiated and is certain at the time of execution of the offer. If the alternate section is used, amendments must be made to Sections 10.2, 10.4, and 13.3(b) to remove the references to the landlord's approval.

10.2 The Landlord will give the Tenant not less than [number] days' written notice of the date that the Landlord's Work, as described in Schedule D, will be finished and the Premises will be ready for the commencement of the Tenant's Work all in accordance with the Landlord's prior written approval as described in Section 10.1.

| See commentary to Section 10.1 (alternate).

10.3 The Tenant will complete the Tenant's Work and stock the Premises within *[number]* days (the "Fixturing Period") after the date the Premises are ready for commencement of the Tenant's Work as indicated in the Landlord's notice to the Tenant described in Section 10.2. The Tenant will not open for business to the public until the Tenant's Work is completed to the reasonable satisfaction of the Landlord. During the Fixturing Period, the Tenant will not be required to pay Minimum Rent, Percentage Rent, or Additional Rent, but will otherwise comply with the terms and conditions of this Offer.

| This Section 10.3 will need to be consistent with Section 7.1.

10.4 If the Tenant fails to submit to the Landlord the Tenant's plans and specifications of the proposed Tenant's Work or of any revisions or additions to the same required by the Landlord within the time described in Section 10.1, *[if Section 10.1 (alternate) is used, amend this section to reflect that alternate provision]* or fails to perform or complete the Tenant's Work within the time described in Section 10.3, or in any manner delays or interferes with the approval by the Landlord of the plans and specifications or the performance or completion of the Tenant's Work or the Landlord's Work, the Landlord may, if the Tenant's failure, delay, or interference is not corrected within the time stated in a written notice to the Tenant, either:

- (a) correct the Tenant's failure, delay, or interference at the sole expense of the Tenant, whether by completion of the plans and specifications or construction of the Tenant's Work or otherwise, in which case the other provisions of this Offer will continue to apply; or
- (b) cancel this Offer and the agreement of the parties resulting from this Offer, without prejudice to any of the Landlord's other rights and remedies including, without limitation, the right to retain for its own use the Tenant's Work or the right to demolish the Tenant's Work, without compensation to the Tenant.

| See the annotation to Article 11 of the constructed centre offer regarding *force majeure*.

[Optional:

10.5 The Tenant acknowledges that if the Landlord is providing financial assistance to it in connection with the Tenant's Work, the Tenant will execute the Landlord's standard tenant fixturing loan agreement in the form set out in Schedule I.]

| This Section 10.5 is optional. For a discussion of tenant allowances and tenant fixturing loan agreements, see chapter 11 (Special Tenant Rights).

11. COMMENCEMENT DATE OF THE TERM AND RENT

Subject to the Terms of this Offer, the obligations of the Tenant under the Lease, including without limitation the obligation of the Tenant to pay Minimum Rent and Percentage Rent and Additional Rent, will commence on the earlier of:

- (a) the day following the expiration of the Fixturing Period, as described in Section 10.3; or
- (b) the date the Tenant actually opens for business to the public, having first obtained the Landlord's written consent to such opening,

(the "Commencement Date").

| Article 11 provides that the tenant will commence payment of minimum, additional, and percentage rent on the commencement date. A tenant may wish to insert an estimated commencement date. This Article needs to align with Sections 7.1 and 10.3 to ensure consistency regarding what the tenant is required to pay during the fixturing period, and what the tenant is required to pay as of the commencement date.

Note that this precedent does not contemplate events of unavoidable delay, which might prevent the tenant from opening (or from completing tenant's work). It is relatively unusual for an offer to lease to contain a *force majeure* clause which relieves either party from performance due to events beyond their control; however, given the COVID-19 pandemic, parties may wish to consider including such a clause and to expressly refer to pandemics (see "Force Majeure Terms" in chapter 11). This would be particularly relevant if there are no conditions precedent in the offer or the conditions are controlled by a third party (for example, regulatory approvals) and there is a material period between signing of the offer and execution

of the lease—or where the offer remains operative during a fixturing period or conditional period. In an extreme case, parties may also wish to consider having a termination right if the *force majeure* event extends beyond a certain period.

12. INDEMNITY

In consideration of the Landlord's acceptance of this Offer, the Indemnifier will indemnify the Landlord with respect to the Tenant's observance and performance of all terms, covenants, and conditions contained in this Offer and in the Lease pursuant to this Offer in the same manner and to the same extent as the Tenant, and will, together with the Tenant, execute and deliver the Lease of the Premises as described in Article 13 [and, or as an alternative, a separate indemnity agreement in the form set out in Schedule H].

The indemnity provisions may be set out in the lease or in a separate agreement. See chapter 19 (Guarantees and Indemnities in Commercial Leasing). If the offer provides that it could operate as the lease pending execution of the formal lease, the indemnifier must be made a party to the offer to lease.

13. FORM OF LEASE

13.1 The Lease of the Premises will be the form of lease set out in Schedule C and amended only in the manner described in Schedule F.

Section 13.1 has been drafted so that the landlord's lease form is to be attached to the offer. The offer does not refer to the landlord's "standard" form lease, because one may not exist or there may be more than one standard form lease, depending on the nature of the tenant.

Attaching the form of lease to the offer provides at least two benefits that are very important to the leasing practitioner:

- (a) it assists in avoiding uncertainty and the argument that the offer is an "agreement to agree" and is therefore not binding on the parties; and
- (b) the offer can easily specify the amendments, if any, that the parties agree are to be made to the lease.

One of the most problematic aspects of the offer to lease is the question of whether the offer, once accepted, is a legally binding agreement between the parties or is merely an agreement to agree. In order to be legally binding, it must contain the essential elements of a lease (see commentary to Article 22) and it must not be interpreted as contemplating a further document.

It is a matter of construction whether the contemplation of the execution of a further contract:

is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. [Von Hatzfeldt-Wildenburg v. Alexander, [1912] 1 Ch. 284 at 288-289]

See *Caberwall v. Bammotra*, 2016 BCSC 631 at para. 39.

It is helpful if the offer clearly provides which lease form is to be used; what amendments, if any, are to be agreed to between the parties; when the lease is to be executed; and what happens if the lease is not executed. The offer in this precedent provides that the amendments will be negotiated at the time the offer is negotiated, thereby ensuring that there is no further negotiation or agreement contemplated, following final acceptance of the offer. This offer also provides, in Section 13.3(a), that the tenant is not permitted to open for business in the premises until the lease is settled and signed.

Another way of ensuring certainty is to attach the required form of lease to the offer and to provide that any changes to it must be negotiated within a specified time following execution by both parties; otherwise, the agreement is null and void. This approach may be preferable if the lease negotiations are protracted

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