

## Mother Nature & Leases: Drafting Issues to Protect Against Storm & Other Damage – SAMPLE CLAUSES

### FORCE MAJEURE EXAMPLES

#### [Definition]

“**Force Majeure**” shall refer to any strikes, labor disputes, lockouts, inability to obtain labor, materials, equipment, or reasonable substitutes therefor, acts of God, governmental restrictions, regulations, or controls, judicial orders, enemy or hostile government actions, civil commotion, war, terrorism (foreign or domestic), fire, accident, explosion, falling objects or other casualty, or other causes beyond the reasonable control of the party obligated to perform hereunder.

#### [MUTUAL EXCUSE]

**24.1 Force Majeure.** Whenever a period of time is provided in this Lease for either party to do or perform any act or thing, except for the payment of monies by Tenant, the computation of such period of time shall exclude any delays due to strikes, riots, acts of God, shortages of labor or any cause or causes, whether or not similar to those enumerated, beyond the parties’ reasonable control or the reasonable control of their agents, servants, employees and any contractor engaged by them to perform work in connection with this Lease.

-or-

#### [LANDLORD ONLY]

**33. Force Majeure.** Landlord shall not be responsible for and damages incurred by Tenant, or for any delays in Landlord’s performance of its obligations hereunder, if any, when such damages or delays are caused by strikes, lockouts, labor disputes, acts of God, inclement weather conditions which delay or preclude construction, inability to obtain labor or materials or reasonable substitutes therefor, the actions or inactions of governmental or quasi-governmental authorities affecting the Premises, or for any other cause that is unforeseen or beyond the reasonable control of Landlord.

### CASUALTY EXAMPLES

#### [I. FROM IRC FORM LEASE]

**9.1 FIRE OR OTHER CASUALTY.** Tenant shall give to Landlord prompt written notice of any accident, fire or damage occurring on or to the Premises. Thereupon, Landlord’s obligation concerning the repair or reconstruction of the Building (hereinafter defined) will be as follows:

**A. PARTIAL DESTRUCTION OF PREMISES.** If the Building shall be damaged by the elements or other casualty or by fire, not due to Tenant’s intentional acts or negligence, which do not thereby render the Premises untenable in whole or in part, then Landlord shall promptly after receipt of insurance proceeds cause such damage to be repaired, and the Rent shall not be

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abated. If by reason of any such occurrence, the Premises shall be rendered untenable only in part, due to damage to the Building structure, Landlord shall promptly after receipt of insurance proceeds cause the damage to be repaired and the Rent meanwhile shall be abated proportionately as to the portion of the Premises and only for the time such Premises are rendered untenable due to damage to the Building structure. Notwithstanding the foregoing, in the event Landlord proceeds to have any damage restored as aforesaid, Tenant agrees that promptly after completion of such repairs by Landlord, it will proceed with reasonable diligence and at its sole cost and expense to rebuild, repair and restore its signs, fixtures, equipment and to construct and install leasehold improvements of the same type and character as in existence prior to such casualty and to promptly reopen for business in the same manner as required at the commencement of the Term. In no event shall Landlord be obligated to repair or restore any special equipment or improvements installed by Tenant, it being understood that Landlord's restoration obligations shall be limited to restoration of the Building.

**B. SUBSTANTIAL DESTRUCTION OF PREMISES.** If the Building shall be rendered wholly untenable by reason of such occurrence (i.e., destruction of twenty-five percent (25%) or more) not due to Tenant's intentional acts or negligence, and Tenant actually shall not be operating in any portion of the Premises, then Landlord shall promptly after receipt of insurance proceeds cause such damage to be repaired, and the Rent shall meanwhile be abated in whole, provided, however, that Landlord shall have the right, to be exercised by notice in writing delivered to Tenant within sixty (60) days from and after said occurrence, to elect not to reconstruct the destroyed Premises, and in such event this Lease and the tenancy hereby created shall cease as of the date of the said occurrence, the Rent to be adjusted as of such date. If Landlord shall not have completed such repairs within one (1) year after the occurrence of such fire or other casualty, then Tenant shall have the right to terminate this Lease by delivering notice thereof to Landlord prior to such completion. Notwithstanding the foregoing, in the event Landlord proceeds to have any damage restored as aforesaid, Tenant agrees that promptly after completion of such repairs by Landlord, it will proceed with reasonable diligence and at its sole cost and expense to rebuild, repair and restore its signs, fixtures, equipment and to construct and install leasehold improvements of the same type and character as in existence prior to such casualty and to promptly reopen for business in the same manner as required at the commencement of the Term. In no event shall Landlord be obligated to repair or restore any special equipment or improvements installed by Tenant, it being understood that Landlord's restoration obligations shall be limited to restoration of the Building.

**C. DESTRUCTION OF SHOPPING CENTER.** If the Shopping Center shall be damaged by the elements or other casualty or by fire, not due to Tenant's intentional acts or negligence and which damage does not render the Premises untenable in whole or in part, Landlord shall promptly after receipt of insurance proceeds cause such damage to be repaired and the Rent shall not be abated. If the Shopping Center or any premises (other than the Premises) located thereon suffers damage or destruction of a substantial nature (i.e., destruction of ten percent (10%) or more of the Shopping Center), which damage or destruction does not render the Premises untenable in whole or in part, Landlord shall after receipt of insurance proceeds cause such damage to be repaired and the Rent shall not be abated; provided, however, that Landlord shall have the right to be exercised by notice in writing to be delivered to Tenant within sixty (60) days from and after such occurrence to elect not to reconstruct the destroyed portion of the

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Shopping Center, and in such event this Lease and the tenancy hereby created shall cease as of the date of the occurrence, the Rent to be adjusted as of such date.

**D. APPLICATION OF INSURANCE PROCEEDS:** Notwithstanding the foregoing provisions of this Section 9.1, provided Landlord terminates the leases of all other similarly situated tenants in the Shopping Center, Landlord may terminate this Lease with no further liability to Tenant whatsoever in the event that following any fire or other casualty of any part of the Shopping Center, any party holding a mortgage, trust deed or similar lien on Landlord's interest in the Shopping Center elects to require the application of the insurance proceeds to reduce the indebtedness secured by such mortgage, trust deed or similar lien.

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### **[II. SHORTER EXAMPLE]**

**12.1 Casualty and Repairs.** Except to the extent caused by the negligent or willful actions and omissions of Tenant, including Tenant's contractors, employees, agents and invitees, in the event the Premises are damaged by fire or other casualty, rendering the damaged portion of the Premises unfit for use and occupancy by Tenant (each occurrence a "**Casualty**"), Landlord shall give Tenant a certification made by a competent architect, licensed in the state in which the Premises is located, as to the number of days from the occurrence of such Casualty that, with the exercise of reasonable diligence, the Premises can be made fit for Tenant's occupancy (the "**Repair Period**"), and the election, if any, which Landlord has made according to this Section 12. Such notice will be given within sixty (60) days from the date Tenant notifies Landlord of the Casualty, with the date of such Landlord's notice referred to as the "**Notice Date**" for the purposes of this Section 12. Except as expressly set forth in this Section 12, this Lease shall not terminate as a result of any Casualty, and shall remain in full force and effect thereafter, with the Parties hereby waiving any provision of law or equity to the contrary.

**12.2 Minor Casualty.** To the extent that the Repair Period is expected to conclude within sixty (60) days of the Notice Date, Landlord will diligently pursue the repair of the Premises (excluding any Tenant's Work). In that event, this Lease shall continue in full force and effect, except that Minimum Rent shall be abated, on a per diem and pro rata basis, based on the portion of the Premises that Tenant cannot use during the Repair Period.

**12.3 Major Casualty.** If (a) the Premises is damaged by Casualty, to the extent that the Repair Period exceeds sixty (60) days from the Notice Date; or (b) more than fifty percent (50%) of the Premises are damaged by Casualty, and on the Notice Date, the remainder of the Term is less than six (6) months (and if applicable, Tenant fails to exercise, within fifteen (15) days following the Notice Date, any remaining Extension Option); then Landlord may, at Landlord's sole option, elect to either (i) diligently pursue the repair of the Premises (excluding any Tenant's Work) and this Lease shall continue in full force and effect, except that Minimum Rent shall be abated, on a per diem and pro rata basis, based on the portion of the Premises that Tenant cannot use during the Repair Period, or (ii) not to repair such damage during the Repair Period, in which case this Lease shall terminate effective on the date of termination set forth in Landlord's notice, and Minimum Rent shall be abated, on a per diem and pro rata basis, based on the portion of the

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Premises the use of which Tenant is deprived during the period from the date of the Casualty to the date of Landlord's termination of the Lease.

**12.4 Limitation.** Notwithstanding any other provision of this Lease, if the proceeds of Landlord's insurance are insufficient to pay for the repair of any Casualty to the Premises, or if the Casualty is of such a nature so as to not be insured under Landlord's insurance, then Landlord will have the option to either repair such damage or terminate this Lease as of the date of such Casualty, by written notice to Tenant. If a Casualty, or any other damage by fire or casualty to the Premises, is the result of the negligent or willful action omission of Tenant, including Tenant's contractors, employees, agents and invitees (i) there will be no abatement of any Rent; (ii) this Lease shall remain in full force and effect; (iii) Tenant, at Tenant's sole cost and expense, shall be responsible for reimbursing Landlord for the costs of repairing such damage to the Premises and Shopping Center (to the extent such costs are not covered by Tenant's insurance on the Premises); and (iv) Landlord shall not be liable to for any of Tenant's damages or losses occasioned by such damage to or destruction of the Premises, or by the repair or restoration of the Premises.

**12.5 Tenant's Repair.** If Landlord is obligated or elects to repair any damage to the Premises, Tenant shall promptly replace or fully repair all inventory, goods, exterior signs, trade fixtures, equipment, display cases and Tenant's Work. Tenant shall continue the operation of its business in the Premises during the Repair Period to the extent reasonably practical from the standpoint of good business.

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### **[III. SHORTEST EXAMPLE]**

**30. Casualty/Restoration.** In the event the Leased Premises are damaged by fire, explosion or any other casualty to the extent which is less than twenty-five percent (25%) of the full replacement cost of the Leased Premises (as conclusively determined by Landlord's architect and specifically exclusive of the replacement cost of all of the improvements performed by Tenant pursuant to Exhibit E) and none of the events described in the next succeeding sentence of this Paragraph shall have occurred, the damage shall be repaired by Landlord within a reasonable time period thereafter, provided that Landlord shall not be obligated to expend for such repair an amount in excess of the insurance proceeds recovered as a result of such damage and that in no event shall Landlord be required to repair or replace Tenant's stock in trade, fixtures, furniture, furnishings, floor coverings and equipment and any work performed by Tenant pursuant to Exhibit E. In the event of any such damage by fire, explosion or any other casualty, and (a) Landlord is not required to repair as hereinabove provided, or (b) the Leased Premises are damaged to the extent of twenty-five percent (25%) or more of the full replacement cost of the Leased Premises (as determined in the manner contemplated above in this Paragraph 30), or (c) the building which the Leased Premises are a part is damaged to the extent of twenty-five percent (25%) or more of the full replacement cost of said building (as conclusively determined by Landlord's architect and specifically exclusive of any and all improvements of any nature whatsoever, performed by any tenant in the Shopping Center pursuant to the terms of its respective lease), or (d) the buildings (taken in the aggregate) in the Shopping Center shall be damaged to the extent of more than twenty-five percent (25%) of the aggregate full replacement

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cost (as conclusively determined by Landlord's architect and specifically exclusive of any and all improvements of any nature whatsoever, performed by any tenant in the Shopping Center pursuant to the terms of its respective lease), Landlord may elect either to (i) repair or rebuild the Leased Premises or the building or buildings respectively, or (ii) terminate this Lease. Landlord shall make such election by giving notice of such election in writing to Tenant within one hundred twenty (120) days after the date of the event causing the damage. If Landlord is required or elects to repair the Leased Premises as herein provided, Tenant shall promptly commence and diligently complete at Tenant's expense, the repair and restoration of all work set forth in Exhibit E; repair or replace its stock in trade, fixtures, furniture, furnishings, floor coverings and equipment; and if Tenant has closed, Tenant shall promptly reopen for business. Notwithstanding anything to the contrary contained in this section, Landlord shall not have any obligation whatsoever to repair, reconstruct or restore the Leased Premises when the damage resulting from any casualty covered under this Paragraph 30 occurs during the last twenty-four (24) months of the Lease Term or any extension thereof.

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### **[IV. NON-SHOPPING CENTER VERSION]**

**15.1 Landlord Termination Rights.** If the Premises or any portion of the Building or the Project is damaged by fire, earthquake, terrorism, act of war, act of God, the elements or other casualty, then Landlord may terminate this Lease upon notice given to Tenant within sixty (60) days after the date of such casualty, effective as of the date of the casualty if (a) in Landlord's opinion, repairs to the Premises cannot be completed within ninety (90) days; (b) any other portion of the Building or the Project is damaged to the extent that, in Landlord's opinion, repair thereof cannot be completed within ninety (90) days; (c) the Premises or any portion of the Building or the Project necessary for Tenant's occupancy is damaged during the final twelve (12) months of the Term, unless Tenant shall exercise its next available extension option (if any) within ten (10) days following receipt of Landlord's termination notice and Landlord does not elect to terminate this Lease pursuant to one of the other subsections herein within ten (10) days of such exercise; (d) the insurance proceeds available to Landlord are not sufficient to complete repair or restoration; (e) Landlord's lender does not elect to make insurance proceeds available to Landlord for repair and restoration; or (f) Tenant has vacated the Premises or is in Default under this Lease.

**15.2 Repairs.** If this Lease is not terminated as provided above, it shall continue in full force and effect, and Landlord shall promptly and diligently, subject to reasonable delays for insurance adjustment, and subject to all other terms of this Article, restore the Premises, the Common Areas and the portions of the Project serving the Premises and Tenant shall assign to Landlord all insurance proceeds payable to Tenant as to the Tenant Improvements and any Alterations; provided that if the cost of the restoration of the Tenant Improvements and any Alterations by Landlord exceeds the amount of Tenant's insurance proceeds therefor, as assigned by Tenant to Landlord, such excess shall be paid by Tenant to Landlord prior to Landlord's restoration thereof. Further, if any Landlord Work included any above-Building standard improvements and the restoration of such above-Building standard improvements is not covered by the insurance proceeds received by Landlord, the cost of the restoration of such above-Building standard

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improvements shall be paid by Tenant to Landlord prior to Landlord's restoration thereof. Such restoration shall be to substantially the same condition of such items as prior to the casualty, except for modifications (a) required by Law; (b) required by the holder of a mortgage on the Building, or the lessor of a ground or underlying lease with respect to the Property; or (c) to the Common Areas reasonably deemed desirable by Landlord, and which are consistent with the character of the Project. No such modifications shall materially impair access to the Premises and any Common Areas serving the Premises. Tenant shall be responsible, at its sole cost and expense, for the repair, restoration, and replacement of Tenant's Property. Landlord shall not be liable for any loss of business, inconvenience, or annoyance arising from any casualty or any repair or restoration of any portion of the Premises, the Building, or the Project as a result of any damage from any casualty. All work by Tenant shall be subject to the terms and conditions of Article 11.

**15.3 Tenant's Termination Rights.** If Landlord does not elect to terminate this Lease pursuant to Landlord's termination right as provided above, and the repairs cannot be completed within three hundred sixty five (365) days after being commenced (the "Repair Period") as determined by an architect or contractor designated by Landlord, Tenant may elect, no earlier than sixty (60) days after the date of the casualty and not later than ninety (90) days after the date of such casualty, to terminate this Lease by notice to Landlord, effective as of the date specified in the notice, which date shall not be less than thirty (30) days nor more than sixty (60) days after such notice. In addition, in the event that the Premises or the Building is destroyed or damaged to any substantial extent during the last twelve (12) months of the Term, then Tenant shall have the option to terminate this Lease by giving notice to Landlord within thirty (30) days after such casualty, in which event this Lease shall cease and terminate as of the date of such notice. Tenant shall also have the right to terminate this Lease if Landlord does not complete repairs within the Repair Period by thirty (30) days' notice to Landlord after the expiration of the Repair Period; provided however, if Landlord completes repair within such thirty (30) day period, such termination shall be nullified and this Lease shall continue in full force and effect.

**15.4 Apportionment of Rent.** Upon any termination of this Lease pursuant to this Article, Tenant shall pay the Rent, properly apportioned up to such date of termination, and both parties hereto shall thereafter be freed and discharged of all further obligations hereunder, except as provided for in provisions of this Lease that by their terms survive the expiration or earlier termination of this Lease.

**15.5 Abatement.** The Rent shall abate on an equitable basis to the extent Tenant's use of the Premises is impaired, commencing with the date of the casualty and continuing until completion of the repairs required of Landlord; provided that if the damage is due to the negligence or willful misconduct of any Tenant Related Party, Rent shall only abate to the extent the same is covered by rent loss insurance, if any, carried by Landlord.

**15.6 Express Agreement.** This Lease shall be considered an express agreement governing any case of damage to or destruction of the Premises, the Building, or the Project by fire or other casualty; and any present or future Law that purports to govern the rights of Landlord and Tenant in such circumstances in the absence of express agreement is hereby waived by the parties and shall have no application.