

FINANCING CONSIDERATIONS FOR LEASE NEGOTIATIONS

by Robert S. Bornhoff, Esq.
Quarles & Brady LLP

I. LANDLORD FINANCING

A. Subordination, Non-disturbance and Attornment Agreements ("SNDAs")

1. Historical Considerations.

The SNDA evolved historically as a mechanism through which lenders and tenants could obtain more certainty with respect to their respective rights and obligations in the event of a default and foreclosure with respect to the landlord's interest in the property. Common law principles with respect to a number of the issues traditionally addressed in SNDAs vary significantly from state to state. For instance, in some states, a foreclosure by a lender may automatically terminate the lease. In other states, the lender may have the right to "pick and choose" those leases that the lender wants to retain in the event of a foreclosure. The SNDA allows the parties to eliminate uncertainties and avoid undesirable outcomes in the common law application of various concepts that could impact their interests.

2. Objectives of the Parties

a. Lender's Objectives.

The lender want its liens to have a first priority position, ahead of all interests of tenants under leases.

The lender wants a mechanism to ensure that it can retain credit tenants and cash flow from existing leases in the event of a foreclosure.

The lender generally wants to address certain unacceptable or problematic lease provisions to make them acceptable from the lender's standpoint.

The lender may require specific terms and agreements to ensure that its loans meet the underwriting requirements necessary for securitization.

The lenders wants greater certainty with respect to legal outcomes.

b. Tenant's Objectives.

The tenant wants to ensure that it has the right to retain possession, use and occupancy of the premises, notwithstanding any foreclosure that may occur.

The tenant wants to avoid "renegotiating" the lease through the SNDA.

The tenant wants to ensure that the landlord's obligations under the lease are performed, even if the landlord's interest is held by another party.

The tenant wants greater certainty with respect to legal outcomes.

c. Landlord's/Borrower's Objectives.

The landlord's primary goal is to GET THE DEAL DONE! The landlord may be a party to the SNDA, but to a large degree, the landlord typically is a third party to this negotiation.

3. What Does the Lease Require?

In the majority of cases, the nature of a tenant's obligation to subordinate will be established by language in the underlying lease. Therefore, it is prudent to check the requirements of the lease at the beginning of any SNDA negotiations.

Most lease forms typically contain subordination clauses that automatically subordinate the lease to the landlord's lien. Some provisions go even farther and obligate the tenant to provide specifically enumerated representations and agreements to the lender, upon the lender's request. Tenants need to be aware of such provisions when negotiating their leases and any SNDAs.

In some cases, particularly with larger retail tenants, it is not uncommon to negotiate a form of SNDA concurrently with the negotiation of the lease and to attach the SNDA form as an exhibit to the lease.

It is not uncommon for tenants to negotiate "automatic" non-disturbance provisions into their leases in those cases where the lease already provides for an automatic subordination by the tenant.

4. The Basic Provisions

a. Subordination

The tenant's agreement that its lease will be in a subordinate position to the lender's lien.

While the loan is outstanding, in the event of any conflict between the terms of the loan and the terms of the lease, the terms of the loan will control, subject to the other express agreements of the parties in the SNDA.

Note that if the landlord's lien instrument is recorded prior to the consummation of the lease, the lease already will be subordinate to the landlord's lien when the lease is consummated, but the parties may still enter into an SNDA under such circumstances (e.g., most credit tenants will still require an SNDA to

confirm their non-disturbance rights (and possibly other rights) if there is a senior lien).

b. Non-disturbance.

The agreement of the lender that if the lender forecloses, the lender will not disturb the tenant's ongoing possession of the premises.

Most sophisticated tenants will always require non-disturbance rights in exchange for an agreement to subordinate the lease.

Most lenders are willing to agree to non-disturbance rights for subordinate tenants. One common exception, however, applies to related party tenants. Lenders often are not willing to provide non-disturbance rights to tenants that are related to the landlord/borrower.

c. Attornment.

The agreement of the tenant to recognize the purchaser at a foreclosure sale as the landlord under the lease and to pay rent under the lease to said purchaser.

5. Other Commonly Negotiated Provisions.

a. Limitations on Lender's Liability for Certain Defaults.

Although some limitation of this nature is common in virtually every SNDA, the scope and specific terms for such limitations can be extremely contentious. The tenant may be able to negotiate carve outs to the limitations on lender's liability in certain cases, such as, e.g., with respect to continuing defaults (e.g., a leaky roof). A common approach to resolving contested liability issues in this type of provision is to provide for liability to the lender only after the giving of notice and an opportunity to cure.

b. Offsets for defenses.

The lender typically requires a waiver of any offsets or defenses that a tenant may have against the landlord. Tenants that have negotiated offset rights directly into the lease will strongly resist such a waiver. A common compromise is for the tenant to retain certain offset rights, but to agree to provide additional notice and cure rights to the lender before such offset rights can be implemented. Another common compromise is to place a cap on the amount that can be offset in any given period so that the overall impact of the offset on cash flow is minimized.

c. Prepaid rent.

Generally, the SNDA provides that the lender is not obligated for pre-paid rent or is only obligated for a minimal amount of pre-paid rent. A provision obligating the lender with respect to rent paid up to thirty (30) days in advance is quite typical.

d. Amendments and modifications.

The SNDA typically restricts or limits the types of future amendments and modifications that can be made to the lease without the lender's consent. The tenant may be able to negotiate a carve out to allow for certain types of amendments and modifications (e.g., amendments already expressly allowed by the lease; amendments that do not affect the term, reduce the rent, or that otherwise materially impact any of the economic terms of the lease).

e. Security Deposits.

The lender typically seeks to limit its liability with respect to the return of any security deposit that is not actually paid over to lender by the landlord. A tenant, on the other hand, does not want to be left holding the bag if the landlord misappropriates the deposit and it is not turned over to the lender upon foreclosure.

f. Construction Obligations.

Lenders often try to limit any obligation to commence or complete any construction required under the lease from an after a foreclosure. Obviously, such limitations are often unacceptable to tenants that have expressly negotiated for specific construction obligations.

g. Purchase Options.

Lender's typically try to eliminate the tenant's right to exercise any purchase options. A compromise in some cases is to allow the option to continue but to require that the minimum purchase price must be at least equal to the entire amount owing on the loan.

h. General Limitations of Liability.

Lenders often seek to insulate themselves from certain types of liabilities that landlords often are more willing to assume (e.g., liability for environmental representations and warranties).

Lenders also often seek to limit their liability to the interest in the property. This typically will not be a problem if the lease already limits the landlord's liability in such a manner (as many leases do). If, however, a tenant

has negotiated for a broader scope of landlord liability, the tenant will not willingly allow the lender to obtain a greater limitation of liability. One compromise in such cases is to limit liability to the lender's interest in the property, but only so long as the lender maintains a minimum equity stake in the property (typically 10% or 20%).

i. Insurance and Condemnation Proceeds.

This is often one of the most problematic areas of SNDA negotiations. The tenant typically will want insurance and condemnation proceeds made available for restoration of the premises. The lender, on the other hand, will want the flexibility either to allow use of proceeds for construction or to apply the proceeds to reduce the balance of the loan.

j. Self-help rights.

Many lender's will try to eliminate or reduce self help rights available to a tenant, especially in cases where the tenant can obtain an offset against rent upon exercise of the self help right. Again, a typical compromise here is the providing of notice and an opportunity for the lender to cure before any self help (and possibly offset) right is triggered.

k. Notice and/or Cure Rights.

Most lenders will require that tenants agree to provide additional notice and cure rights to the lender before exercising any rights and remedies under the lease. Tenants typically are willing to provide notice, but may object to lengthening time periods.

l. Limitation of Termination Rights.

Lenders often seek the elimination of tenant termination rights in SNDAs. Tenants generally may be willing to provide additional notice before exercising a termination right, but further restrictions on the ability to exercise termination rights are often hotly contested by tenants.

m. Compliance with Certain Retail Lease Provisions.

Many lenders seek to avoid any obligation to comply with certain typical retail lease provisions, such as radius restrictions, exclusive rights, "go dark" provisions, etc. Again, if a tenant has negotiated specifically for such rights in the lease, the tenant likely will strongly oppose any such accommodations to the lender.

6. Bargaining Power.

The bargaining power of the parties will have a huge impact on the negotiation of virtually all provisions in the SNDA.

One major factor in determining the relative bargaining power of the parties is whether the SNDA is being entered into before or after the landlord's loan. If the tenant is entering into the lease after the landlord's lien instrument has been recorded, the tenant typically will have little bargaining power to extract any concessions with respect to the SNDA from the landlord. If, on the other hand, the lease was entered into prior to the loan and the SNDA, the tenant's bargaining power is significantly enhanced

Another major factor impacting bargaining power is the credit nature of the tenant. For example, a large national retail tenant will have a significantly greater ability to negotiate favorable SNDA terms than will a small "mom and pop" tenant.

[A sample SNDA form is attached at the end of this outline as Exhibit A.]

B. Tenant Estoppel Certificates

1. In General.

A tenant estoppel certificate is a written acknowledgement from a tenant with respect to certain factual matters relating to the tenant's lease.

In some cases, lenders may be willing to proceed with tenant estoppel certificates rather than SNDAs.

It also is quite common for the SNDA to be expanded to include estoppel provisions.

2. Customary provisions.

Estoppel certificates can cover a variety of factual matter relating to a particular lease. Some of the most common items typically covered in estoppel certificates are the following:

- a. Identification of the documents that constitute the entire lease (e.g., the original lease along with any amendments and related documents).
- b. The lease commencement and expiration dates.
- c. Whether any renewal options or termination options are present.
- d. Tenant's possession of the premises.

- e. Date through which rent has been paid.
- f. The existence of any defaults by tenant and/or landlord.
- g. Whether any litigation relating to the property has been commenced or threatened.
- h. Any security that has been provided for the lease.
- i. Whether any construction obligations remain with respect to the lease.

3. What Does the Lease Require?

As with SNDAs, a good starting point in negotiating any estoppel certificate is to look at the lease and see what it requires. Leases will typically contain provisions obligating a tenant to provide an estoppel certificate, if requested, within a stated period of time. The specific terms for the estoppel certificate also may be outlined in the lease.

[A sample Estoppel Certificate form is attached at the end of this outline as Exhibit B.]

II. TENANT FINANCING

A. Landlord Lien Rights & Waivers

1. Statutory Landlord's Liens.

In most states (including Arizona), landlords are entitled to a statutory lien on a tenant's personal property if a tenant fails to pay rent. More specifically in Arizona, A.R.S. §33-362 provides for a lien in favor of the landlord on all non-exempt property of the tenant upon the leased premises for the payment of rent.

2. Consensual Security Interests.

Landlord's also can obtain consensual security interests from tenant's to secure obligations under the lease. Such security interests can secure not only payment of rent, but also the payment and performance of other obligations under the lease.

Such security interest provisions are common in many landlord form leases and tenants need to be careful to avoid the inadvertent grant of a security interest through such a provision.

3. Waivers.

Landlord's liens and security interests can be a significant impediments to a tenant's ability to obtain financing, especially if the tenant's prospective lender desires to secure financing with a security interest in personalty that potentially could be subject to the landlord's lien (or security interests). This is often the case when a tenant seeks equipment financing or other purchase money financing or working capital financing secured by a "blanket" lien in the tenant's assets.

Lenders that provide such financing to tenants customarily require that their liens have priority. Consequently, any liens and security interests in favor of the landlord must, therefore, be waived or subordinated.

Landlords typically (but not always) are willing to grant such waivers or subordinations, so long as the waiver does not impair any of the landlord's rights in the real property and fixture.

4. Customary Lien Waiver Provisions.

- a. Subordination or waiver of both the landlord's lien and any landlord's security interest to the liens and security interests of the tenant's lender.
- b. Consent to the liens and security interests of the tenant's lender (with such consent intended to ensure that the granting of the liens and security interests in favor of tenant's lender do not trigger a default under the lease).
- c. A right of entry in favor of tenant's lender to remove its collateral (often with indemnification and repair agreements provided by tenant's lender with respect to such entry). Tenant's lender also may want the right to sell the collateral from the premises. Such a provision is not uncommon, but can be difficult to obtain.
- d. Notice of defaults and an opportunity to cure in favor of tenant's lender.
- e. Landlords sometimes require that the tenant's lender agree to pay rent in exchange for occupying the premises in connection with the recovery or sale of collateral.

5. Bargaining Power.

Again, bargaining power is a key in determining what agreements the tenant and its lender ultimately can negotiate with the landlord. For this reason, it is strongly advisable for tenants to negotiate this item up front, at the same time that the lease is negotiated, as the tenant's bargaining power will be greatest at that time.

[A sample Landlord Lien Waiver form is attached at the end of this outline as Exhibit C.]

B. Leasehold Encumbrances; Elements of a Financeable Lease1. In General.

Land owners and developers often use ground leases essentially as financing devices to facilitate development. Lenders presented with the opportunity to finance such ground leased real property will often obtain a leasehold mortgage on the tenant's interest in the ground lease.

Similarly, many tenants seek to negotiate in their leases provisions that allow for the providing of leasehold mortgages to facilitate any future financing plans that they may have. For example, such provisions are quite common for chain tenants.

Tenants typically need to negotiate up front for provisions that allow for such encumbrances.

2. Customary Provisions for a Financeable Lease.

- a. A lease term extending beyond the maturity of the loan. Some rating agencies require even more, specifying that the term of the lease must extend for a significant period (e.g., 10 or 20 years) beyond the maturity date of the loan.
- b. Rights to notice and cure in favor of the lender.
- c. Right of the lender to obtain a new lease (on substantially the same terms) if the old lease is terminated for any reason.
- d. The right to assign and mortgage the leasehold estate without restriction.
- e. Provisions insuring that the loan controls over the lease with respect to the application of casualty insurance and condemnation proceeds.
- f. No right of the parties to cancel the lease.
- g. Fixed rent or variable rent tied to the income from the property.
- h. Landlord estoppel provisions.

3. Encumbering the Fee.

In some cases, the landlord/owner may agree to subject its fee interest to the lien of the tenant's lender to facilitate the contemplated financing. In such a case, the transaction really ends up in many respects being the same as a more typical fee mortgage transaction.

If the landlord has separately encumbered the fee apart from the leasehold encumbrance, for the lease to be financeable, the fee mortgage will need to be subordinated to the lease.

EXHIBIT A

[SNDA FORM]

When recorded, return to:

**SUBORDINATION, NON-DISTURBANCE,
ATTORNMEN and ESTOPPEL AGREEMENT**

THIS AGREEMENT is made and entered into this ____ day of _____, 20____, by and among _____, a(n) _____ (the "Beneficiary"), whose address is _____, a(n) _____ (the "Lessee"), whose address is _____, and _____, a(n) _____ (the "Lessor"), whose address is _____.

RECITALS

A. Beneficiary is the owner and holder of that Promissory Note dated _____, in the principal sum of _____ DOLLARS (\$ _____), secured by a Deed of Trust, Assignment of Rents, Security Agreement and Fixture Filing (the "Deed of Trust") recorded prior to or contemporaneously with the recording hereof **[in Docket _____, page ____], **[at Recorder's No. _____], in the records of _____ County, Arizona, which Deed of Trust constitutes a lien or encumbrance on that real property more particularly described on Exhibit "A" attached hereto and by this reference incorporated herein. Lessor and Lessee hereby authorize Beneficiary, or any title company recording this Agreement at the direction of Beneficiary, to insert the recording information for the Deed of Trust in the space provided above in this paragraph.

B. Lessee is the holder of a leasehold estate (the "Leased Premises") included in the real property described on Exhibit "A" attached hereto and by this reference incorporated herein, pursuant to the terms of that **[unrecorded] lease (the "Lease") dated _____, **[a memorandum of which was recorded on _____, **[in Docket _____.

_____, page _____,] **[at Recorder's No. _____,] in the records of _____ County, Arizona] and executed by Lessee and Lessor.

C. Lessee and Beneficiary desire to confirm their understanding with respect to the Lease and the Deed of Trust.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, the parties hereto agree and covenant as follows:

1. The Lease is now, and shall at all times continue to be, subject and subordinate in each and every respect to the Deed of Trust and to all extensions, modifications, renewals, replacements, substitutions and/or consolidations thereof. Nothing contained herein shall be deemed or construed as limiting or restricting the enforcement by Beneficiary of any of the covenants, conditions, provisions or remedies of the Deed of Trust, whether or not consistent with the Lease.

2. So long as Lessee is not in default (beyond any period given Lessee to cure such default) in the payment of rent or in the performance of any of the terms, covenants or conditions of the Lease to be performed by Lessee, Beneficiary shall not disturb or interfere with Lessee's possession and occupancy of the Leased Premises during the term of the Lease or any extension thereof duly exercised by Lessee.

3. If the interests of Lessor shall be transferred to and owned by Beneficiary by judicial foreclosure, private trustee sale or any other manner, and Beneficiary succeeds to the interest of Lessor under the Lease, Lessee shall be bound to Beneficiary under all of the covenants, conditions and provisions of the Lease for the remaining term thereof, and any extension thereof duly exercised by Lessee, with the same force and effect as if Beneficiary were the lessor under the Lease. Lessee hereby attorns to Beneficiary as its lessor effective immediately upon Beneficiary's succeeding to the interest of Lessor under the Lease. The Lessee's attornment shall be self-operative and shall be effective immediately upon Beneficiary's succeeding to the interest of Lessor under the Lease without the execution of any further instruments by any of the parties hereto.

4. If the interests of Lessor shall be transferred to and owned by Beneficiary by judicial foreclosure, private trustee sale or any other manner, and Beneficiary succeeds to the interest of Lessor under the Lease, Beneficiary shall be bound to Lessee under all of the terms, covenants and conditions of the Lease with the same force and effect as if Beneficiary were the Lessor under the Lease, except that Beneficiary shall not be:

(a) Liable for any act or omission of any prior lessor (including Lessor) [**, except that Beneficiary shall be obligated to cure any continuing default that commences prior to the transfer event and continues thereafter (e.g., a roof leak that is the responsibility of Lessor prior to the transfer event shall remain the responsibility of Beneficiary or such other transferee after the transfer event)];

(b) Subject to any offsets or defenses that Lessee might have against any prior lessor (including Lessor);

(c) Bound by any rent or additional rent or advance rent that Lessee might have paid for more than the current month to any prior lessor (including Lessor) and all such rent shall remain due and owing notwithstanding such advance payment;

(d) Bound by any amendment or modification of the Lease made without its consent and written approval;

(e) **Bound to commence or complete any construction or to make any contribution toward construction or installation of any improvements upon the Leased Premises required under the Lease or any expansion or rehabilitation of existing improvements thereon, or for restoration of improvements following any casualty not required to be insured under the Lease or for the costs of any restoration in excess of any proceeds recovered under any insurance required to be carried under the Lease;

(f) **Bound by any restriction on competition beyond the Leased Premises;

(g) **Personally liable under the Lease. Beneficiary's liability under the Lease shall be limited to the ownership interest of Beneficiary in the Leased Premises; or

(h) **Liable for any conflict between the provisions of the Lease and the provisions of any other lease affecting the Premises (including, but not limited to, any provisions relating to renewal options and options to expand).

In addition, Beneficiary shall not have any liability or responsibility under or pursuant to the terms of the Lease or this Agreement after it ceases to own an interest in or to the property described on Exhibit "A".

5. Lessor certifies to Beneficiary that a true and correct copy of the Lease has been delivered to Beneficiary. Lessor and Lessee certify to Beneficiary and agree as follows:

(a) The Lease has been executed and delivered by the parties, is in full force and effect, and has not been modified or amended;

(b) No default exists under the Lease, and no event has occurred and no condition exists that with notice or lapse of time, or both, would constitute a default under the Lease;

(c) The term shall commence or did commence on _____, and full rental will then accrue or is now accruing thereunder;

(d) No rent under the Lease has been paid more than one month in advance of its due date;

(e) Beneficiary shall have no liability or responsibility for the application or return of any security deposit of Lessee unless actually received by Beneficiary;

(f) Lessee, as of the date hereof, has no charge, lien or claim of offset under the Lease or otherwise, against rents or other charges due or to become due thereunder;

(g) Lessee has not received notice of any assignment, mortgage or pledge of Lessor's interest in the Lease or any rents or other amounts payable thereunder;

(h) The only persons or entities in possession of the Leased Premises or having any right to the possession or use of the Leased Premises (other than the record owner or holders of recorded easements) are those holding under the Lease;

(i) Lessee has no option or right of first refusal under the Lease to acquire the Leased Premises and no other right or interest in or under any contract, option or agreement involving the sale or transfer of the Leased Premises; and

(j) Except for this Agreement, the Lease constitutes the entire agreement between the parties with respect to the Leases Premises.

6. Lessee shall give written notice to Beneficiary of any failure by Lessor to perform or observe any of the covenants, conditions or provisions of the Lease, and Beneficiary shall have the right, but not the obligation, to cure such failure. In the event of any such failure by Lessor, Lessee shall not take any action with respect to such failure, including without limitation any action to terminate, rescind or avoid the Lease or to withhold any rent thereunder, for a period of thirty (30) days after notice thereof to Beneficiary; provided, however, that if such failure cannot reasonably be remedied within that thirty (30) day period, Lessee shall not take any action with respect to such failure, including without limitation any action to terminate, rescind or avoid the Lease or to withhold any rent thereunder, so long as Beneficiary shall commence to remedy the failure within the thirty (30) day period and thereafter shall diligently prosecute the remedy to completion.

7. In the event that Lessee receives any notice from Beneficiary to pay rent or other sums or render any other performance under the Lease to Beneficiary, Lessee may render performance in accordance with such notice without any duty of inquiry and despite any knowledge or notice to the contrary with the same force and effect as if such payment or performance were rendered to Lessor, and Lessor hereby releases and discharges Lessee of and from any liability to Lessor resulting from Lessee's payment of such rent to Beneficiary in accordance with this Agreement and/or with any separate written notice or instructions from Beneficiary.

8. All notices required or permitted to be given hereunder shall be in writing and may be given in person or by United States mail, by commercial delivery service or by electronic transmission with verified receipt. Any notice directed to a party to this Agreement shall become effective upon the earliest of the following: (i) actual receipt by that party; (ii) delivery to the designated address of that party, addressed to that party; or (iii) if given by certified or registered United States mail, twenty-four (24) hours after deposit with the United States Postal Service, postage prepaid, addressed to that party at its designated address. The designated address of a party shall be the address of that party shown at the beginning of this Agreement or such other address as that party, from time to time, may specify by notice to the other parties.

9. The term "Beneficiary" shall be deemed to include _____ and its successors and assigns, including anyone who shall have succeeded to Lessor's interest by or through judicial foreclosure, private trustee's sale, or other proceedings brought pursuant to the Deed of Trust or deed in lieu of such foreclosure or proceedings.

10. Each covenant, condition and provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law but if any covenant, condition or provision of this Agreement shall be held to be void or invalid, the same shall not affect the remainder hereof which shall be effective as though the void or invalid covenant, condition or provision had not been contained herein.

11. This Agreement may not be modified orally or in any other manner than by an agreement in writing signed by the parties hereto or their respective successors in interest. This Agreement shall inure to the benefit of and be binding upon the parties hereto, their successors and assigns.

12. This Agreement shall be governed by and construed according to the laws of the State of Arizona.

13. This Agreement may be executed in any number of counterparts, and each counterpart executed by any of the undersigned, together with all other counterparts so executed, shall constitute a single instrument and agreement of the parties.

IN WITNESS WHEREOF, these presents are executed as of the date indicated above.

By: _____

Name: _____

Title: _____

BENEFICIARY

By: _____

Name: _____

Title: _____

LESSEE

By: _____

Name: _____

Title: _____

LESSOR

[ADD ACKNOWLEDGMENTS AND EXHIBITS]

EXHIBIT B

[ESTOPPEL CERTIFICATE FORM]

**[When recorded, return to:

Attention: _____, Esq.]

LESSEE'S ESTOPPEL CERTIFICATE AND AGREEMENT

The undersigned, _____, a(n) _____, whose address is _____ (hereinafter called "Lessee"), hereby certifies to _____, a(n) _____, whose address is _____ (hereinafter called "Lender"), and agrees as follows:

AGREEMENT

1. Lessee is the holder of a leasehold estate (hereinafter called the "Leased Premises") included in the real property described on Exhibit "A" attached hereto and by this reference incorporated herein, pursuant to the terms of that **[unrecorded] lease (hereinafter called the "Lease") dated _____, **[a memorandum of which was recorded on _____, **[in Docket _____, page _____,] **[at Recorder's No. _____,] in the records of _____ County, Arizona,] between _____, a(n) _____, whose address is _____ (hereinafter called "Lessor"), and Lessee.

2. A true and correct copy of the Lease is attached hereto. The Lease represents the entire agreement between the parties thereto as to the Leased Premises. The Lease is presently in full force and effect and unmodified or unchanged.

3. Possession of the Premises has been turned over to Lessee, and Lessee is entitled to continuing, undisturbed possession, subject to the terms of the Lease.

4. Minimum monthly rent has been paid through _____. No rent under the Lease has been paid more than thirty (30) days in advance of its due date.

5. A security deposit in the amount of \$ _____ has been paid by Tenant and is being held by Landlord under the terms of the Lease.

6. The Lease expires on _____. Lessee has _____ options of _____ years each to extend the term of the Lease.

7. No default exists under the Lease.

8. Lessee, as of the date hereof, has no charge, lien or claim of offset under the Lease or otherwise, against rents or other charges due or to become due thereunder.

9. Lessee has not received notice of any assignment, mortgage or pledge of Lessor's interest in the Lease or any rents or other amounts payable thereunder.

10. Lessee has no right or interest in or under any contract, option or agreement involving the sale or transfer of the Leased Premises.

11. Lessee shall give written notice to Lender of any failure by Lessor to perform or observe any of the covenants, conditions or provisions of the Lease, and Lender shall have the right, but not the obligation, to cure such failure. In the event of any such failure by Lessor, Lessee shall not take any action with respect to such failure, including without limitation any action to terminate, rescind or avoid the Lease or to withhold any rent thereunder, for a period of thirty (30) days after notice thereof to Lender; provided, however, that if such failure cannot reasonably be remedied within that thirty (30) day period, Lessee shall not take any action with respect to such failure, including without limitation any action to terminate, rescind or avoid the Lease or to withhold any rent thereunder, so long as Lender shall commence to remedy the failure within the thirty (30) day period and thereafter shall diligently prosecute the remedy to completion.

12. All notices required or permitted to be given hereunder shall be in writing and may be given in person or by United States mail, by delivery service or by electronic transmission. Any notice directed to a party to this Agreement shall become effective upon the earliest of the following: (i) actual receipt by that party; (ii) delivery to the designated address of the party, addressed to that party; or (iii) if given by certified or registered United States mail, twenty-four (24) hours after deposit with the United States Postal Service, postage prepaid, addressed to that party at its designated address. The designated address of a party shall be the address of that party shown at the beginning of this Agreement or such other address as that party, from time to time, may specify by notice to the other party.

13. This Agreement is executed and delivered to Lender at the request of Lessor for the purpose of inducing Lender to provide or continue loan accommodations to Lessor, and with the understanding that Lender is relying upon the certifications, representations and agreements contained herein.

IN WITNESS WHEREOF, these presents are executed as of the _____ day of _____, 200__.

LESSEE

[ADD ACKNOWLEDGEMENTS (OPTIONAL) AND EXHIBITS]

EXHIBIT C

[LIEN WAIVER FORM]

LANDLORD WAIVER

To induce _____, whose address is _____ (hereinafter called "Lender"), to grant and/or continue financial accommodations to _____, a(n) _____ corporation, whose address is _____ (hereinafter called "Debtor"), the undersigned covenants and agrees as follows:

1. Debtor has executed a Security Agreement dated as of _____, 20____, (hereinafter called the "Security Agreement"), granting to Lender a security interest in that property of Debtor described in the Security Agreement and on Schedule "A" attached hereto and made a part hereof (hereinafter called the "Collateral"). The Collateral is located on the real property described on Schedule "B" attached hereto (hereinafter called the "Real Property"), which is owned by the undersigned or in which the undersigned has or claims a lien or interest.

2. The undersigned hereby consents to the Security Agreement and to all liens, security interests and rights of Lender in the Collateral arising from the Security Agreement and waives and releases all rights of levy for rent and all liens, security interests, claims, rights and demands of every kind against the Collateral.

3. The undersigned hereby grants permission to Lender, its officers, agents and employees, to enter, at any time, the Real Property or any other premises where the Collateral may be found for the purpose of removing the Collateral from the Real Property or conducting one or more sales of the Collateral on the Real Property. The rights granted to Lender in this Agreement will continue until a reasonable time (but not less than fifteen (15) days) after Lender receives notice in writing from the undersigned that Debtor is no longer in lawful possession of the Real Property. If Lender enters onto the Real Property and removes the Collateral, Lender agrees with the undersigned not to remove any Collateral in such a way that the Real Property is damaged, without either repairing any such damage or promptly reimbursing Landlord for the cost of repair.

4. The Collateral shall at all times be personal property, shall not constitute fixtures or be part of the Real Property and shall not be subject to distraint or execution by the undersigned or to any claim of the undersigned.

5. The undersigned shall notify any purchaser of the Real Property, and any subsequent mortgagee or other encumbrance holder or claimant, of the existence of this Waiver/Release Agreement, which shall be binding upon the executors, administrators, successors, assigns and transferees of the undersigned and shall inure to the benefit of the successors and assigns of Lender.

6. In the event of any default under its lease or agreement with Debtor, then prior to: (i) terminating its lease or agreement with Debtor, (ii) incurring any attorneys' fees, or (iii) incurring any other expenses which it would, but for this provision, charge Debtor, the undersigned shall notify Lender in writing at the above address of such default and allow Lender 30 days after receipt of such notice to remedy any such default on behalf of Debtor; provided, however, that if the default cannot reasonably be remedied within that 30-day period, the undersigned shall not terminate its lease or agreement with Debtor or incur any attorneys' fees or other expenses so long as Lender shall commence to remedy the default within that 30-day period and thereafter diligently prosecute the remedy to completion.

IN WITNESS WHEREOF, the undersigned has executed this Agreement this _____ day of _____, 20__.

Address:

[ADD ACKNOWLEDGEMENTS (OPTIONAL) AND EXHIBITS]