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Advanced Commercial Real Estate
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**Financing Considerations for
Lease Negotiations**

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FINANCING CONSIDERATIONS FOR LEASE NEGOTIATIONS

I. SNDA'S And Landlord Financing Issues

A. What is a Subordination, Non-Disturbance and Attornment Agreement ("SNDA")?

1. A contractual agreement between Tenant and Landlord's Mortgagee ("Lender") which covers numerous issues of concern to these parties with respect to commercial Leases involving property which is encumbered by Mortgage financing.
2. Basic issues covered in an SNDA include priorities between Lease and Mortgage, Lender liability after foreclosure, preservation of rights of Tenant, maintaining property's rental income after foreclosure, protection of Lender from Landlord-Tenant "conspiracy".
3. Creates direct contractual relationship between Tenant and Lender, who otherwise would each only be in privity of contract with the Landlord.
4. Landlord often is a party to SNDA to provide consent to issues negotiated between Tenant and Lender.

B. Rights of Tenant and Lender in Absence of SNDA.

1. If Lease is prior in time to Mortgage, upon foreclosure Lender acquires property subject to all terms of the Lease.
2. If Mortgage recorded prior to execution of Lease, the Lease is automatically subordinated to Mortgage unless Lender chooses to subordinate the Mortgage to the Lease.
 - "Majority Rule" requires Tenant to be made a party to foreclosure suit
 - "Minority Rule" provides for automatic termination of Lease upon foreclosure
3. Effect of Modifications of prior instrument
 - If prior Lease is amended after Mortgage recorded, the amendments could be voided upon foreclosure
 - Amendments to prior Mortgage more likely to be upheld.

C. Lender Concerns Regarding SNDA's.

1. Ensure priority of Mortgage over claims of Tenants under future Leases (including with respect to casualty/condemnation proceeds) (Subordination).
2. Ensure continuation of rental stream after foreclosure (Attornment).
3. Preclude modifications or termination of Leases without Lender consent.
4. Control certain key approval rights of Landlord under Lease (assignment/sublet, Tenant alterations, permitted uses) to protect Lender's collateral.
5. Limit liability of Lender (or new owner) as Successor Landlord after foreclosure or deed-in-lieu of foreclosure.
6. Limit Tenant rights to offset or rent abatement.
7. Protect ability (pursuant to Assignment of Rents) to have rent paid directly to Lender upon default by Landlord under Mortgage.
8. Protect ability to receive any termination or contraction fees paid by Tenant.
9. Clarify inconsistencies in Lease to benefit of Lender as Successor Landlord.
10. Permit Lender to "cure" defaults of Landlord under Lease.

D. Tenant Concerns Regarding SNDA's.

1. Ensure continued use and possession of Leased premises upon foreclosure of prior Mortgage (Non-Disturbance).
2. Retain rights and protections negotiated in original Lease after foreclosure, including rent offsets and abatements, completion of Landlord construction obligations and continued funding of Tenant improvement allowance.
3. Create direct privity of contract with Lender.
4. Limit Lender's rights to control Landlord's approval rights under the Lease.
5. Require Lender to permit Landlord to use insurance proceeds to restore property upon casualty and protect Tenant's rights to share of such proceeds attributable to Leasehold improvements.
6. Obtain Landlord's consent to direct payment of rent to Lender upon default under Mortgage.

E. Landlord Concerns.

1. Pre-Negotiate “balanced” form of SNDA and attach to Lease.
2. Address SNDA requirements of future Lenders and/or Purchasers.

F. Ground Lease Issues.

1. If Property is subject to Ground Lease, space Leases are Subleases.
2. Sublessees and Ground Lessors need Non-Disturbance Agreements to cover same issues as Tenants and Lenders under a SNDA.

G. Alternatives/Supplements to SNDA’s.

1. Language in body of Lease
 - Landlord First Draft Provision (See Attachment A)
 - Negotiated Provision (See Attachment B)
2. Estoppel Certificate may include SNDA provisions, but usually better to have two separate instruments.

H. Why are SNDA’s Difficult to Negotiate?

1. Three party agreements with all parties having different interests to protect and varying positions of negotiating strength.
2. SNDA often negotiated between Tenant and Lender after completion of separate lengthy bi-party negotiations by each of Tenant and Lender with Landlord regarding Lease and Mortgage.

I. Form SNDA’s.

1. Lender first draft (Attachment C)
2. Negotiated Tenant oriented form used by anchor Tenant (Attachment D)
3. Key negotiated issues

II. Landlord Waivers and Consents with Regard to Tenant Financing

A. Tenant proposes to finance cost of tenant improvements and/or needs to pledge Leasehold Improvements as collateral.

B. Lease normally contains provisions which directly or indirectly limit Tenant's ability to use Leasehold Improvements as collateral.

1. Upon expiration or earlier termination of Lease, Leasehold Improvements become property of Landlord.
2. Tenant may remove most Leasehold Improvements before expiration or earlier termination of Lease if it repairs any damage related to such removal.
3. Tenant is required to remove "Special Alterations" (such as internal stairways, vaults) which are not typically found in office space or require extraordinary demolition costs for the removal thereof.
4. Tenant may not create any lien against any property of the Landlord.

C. Provisions of Waiver.

1. Confirmation that the Tenant (Borrower) (a) owns Lender's Collateral (the Leasehold Improvements) prior to the expiration or earlier termination of the Lease and (b) may remove the Leasehold Improvements and (c) the Leasehold Improvements become the property of the Landlord only if not so removed.
2. Landlord recognizes the Lender's security interest in the Leasehold Improvements.
3. If the Tenant defaults under its loan with Lender, the Lender may either (a) abandon the Leasehold Improvements in place or (b) prior to the expiration or earlier termination of the Lease, remove the Leasehold Improvements in accordance with the terms of the Lease.
4. Landlord may require Lender to pay rent for the period of time Lender remains on the Premises to remove the Leasehold Improvements.
5. A detailed description of the Leasehold Improvements should be attached to the Landlord's Waiver and Consent.

ATTACHMENT A

Landlord Form First Draft Lease Language

1. Rights of Mortgagees and Ground Lessors.

A. Landlord has heretofore encumbered the Land and the Building with a Mortgage and may hereafter encumber the Land and the Building, or any interest therein with additional mortgages, may sell and lease back the Land, or any part of the Land, and may encumber the leasehold estate under such a sale and leaseback arrangement with one or more mortgages. (Any such mortgage is herein called a “Mortgage” and the holder of any such mortgage is herein called a “Mortgagee”. Any such lease of the land is herein called a “Ground Lease” and the lessor under any such lease is herein called a “Ground Lessor”.) This Lease and the rights of Tenant hereunder shall be and are hereby expressly made subject to and subordinate at all times to each Mortgage and to any Ground Lease (it being agreed by Tenant that in the case of a Ground Lease Tenant’s right to possession shall be as a subtenant) now or hereafter existing, and to all amendments, modifications, renewals, extensions, consolidations and replacements of each of the foregoing, and to all advances made or hereafter to be made upon the security thereof. The subordination expressed in the preceding sentence shall be automatic and shall require no further action by Landlord or Tenant for its effectiveness. However, Tenant agrees to execute and deliver to Landlord such further instruments consenting to or confirming the subordination of this Lease to any Mortgage referred to and to any Ground Lease and containing such other provisions which may be requested in writing by Landlord within ten (10) days after Tenant’s receipt of such written request.

B. If any Mortgage is foreclosed, or Landlord’s interest under this Lease is conveyed or transferred in lieu of foreclosure, or if any Ground Lease is terminated:

(i) No person or entity which as the result of any of the foregoing has succeeded to the interest of Landlord in this Lease (any such person or entity being hereafter called a “Successor”) shall be liable for any default by Landlord or any other matter which occurred prior to the date such Successor succeeded to Landlord’s interest in this Lease nor shall such Successor be bound by or subject to any offsets or defenses which Tenant may have against Landlord or any other predecessor in interest to such Successor;

(ii) Upon request of any Successor, Tenant will attorn, as Tenant under this Lease subject to the provisions of this Paragraph 19.B. and Paragraph 19.D. below, to such Successor and will execute and deliver such instruments as may be necessary or appropriate to evidence such attornment within ten (10) days after receipt of a written request to do so; and

(iii) No Successor shall be bound to recognize any prepayment by more than thirty (30) days of Net Rent or Additional Charges.

C. Notwithstanding anything to the contrary contained herein, any Mortgagee or Ground Lessor may subordinate, in whole or in part, its Mortgage or Ground Lease (as the case may be) to this Lease by sending Tenant notice in writing subordinating such Mortgage or Ground Lease to this Lease, and Tenant agrees to execute and deliver to such Mortgagee or Ground Lessor such further instruments consenting to or confirming the subordination of such

Mortgage or Ground Lease to this Lease and containing such other provisions which may be requested in writing by such Mortgagee or Ground Lessor within ten (10) days after notice to Tenant of such request.

D. Should any prospective Mortgagee or Ground Lessor require a modification or modifications of this Lease, which modification or modifications will not cause an increased cost or expense to Tenant or in any other way materially and adversely change the rights and obligations of Tenant hereunder, then and in such event, Tenant agrees that this Lease may be so modified and agrees to execute whatever documents are required therefor and deliver the same to Landlord within fifteen (15) days following the written request therefor. Should any prospective Mortgagee or Ground Lessor require execution of a short form of lease for recording (containing, among other customary provisions, the names of the parties, a description of the Premises and the term of this Lease), Tenant agrees to execute such short form of Lease and deliver the same to Landlord within fifteen (15) days following the written request therefor.

E. If Tenant fails within five (5) days after a further additional written demand therefor to execute and deliver any instruments as may be necessary or proper to effectuate any of the covenants of Tenant set forth above in this Paragraph and in Paragraph 18 above captioned "Estoppel Certificates", Tenant hereby makes, constitute and irrevocably appoints Landlord as Tenant's attorney in fact (such power of attorney being coupled with an interest) to execute and deliver any such instruments for and in the name of Tenant.

F. Tenant agrees that the provisions of this Paragraph shall remain in full force and effect, notwithstanding that any Mortgagee or Ground Lessor may directly or indirectly own or have an interest in Landlord, or in the Land or the Building in addition to its interest as Mortgagee or Ground Lessor.

**ATTACHMENT B
NEGOTIATED FORM LEASE LANGUAGE**

1. SUBORDINATION;LANDLORD DEFAULTS.

A. Subordination. Within ten (10) business days after request by Landlord, Tenant shall execute, from time to time, a subordination, non-disturbance and attornment agreement in substantially the form attached hereto as Exhibit N (the "SNDA") or such other form as is reasonably acceptable to Tenant. **In the event a future mortgagee, beneficiary or ground lessor shall be unwilling to enter into a SNDA as aforesaid, this Lease shall remain in full force and effect and the obligations of Tenant shall not in any manner be affected except that, notwithstanding anything to the contrary in this Lease, this Lease shall not be subject and subordinate to such mortgagee's beneficiary's' or ground lessor's (as applicable) interest in the Premises.** Notwithstanding the foregoing to the contrary, any such mortgagee, beneficiary or ground lessor may elect to give the rights and interests of Tenant under this Lease priority over the lien of its mortgage, deed of trust or estate of its lease as the case may be. In the event of such election and upon the mortgagee, beneficiary or ground lessor notifying Tenant of such election, the rights and interests of Tenant shall be deemed superior to and to have priority over the lien of said mortgage or deed of trust or estate of its lease as the case may be, whether this Lease is dated prior to or subsequent to the date of such mortgage, deed of trust or lease. In such event, Tenant shall execute and deliver whatever instruments may be reasonably required by such mortgagee, or beneficiary to confirm such superiority on the form customarily used by such party. Landlord hereby agrees to obtain from the mortgage holder under any current mortgage or ground lessor under any current ground lease a fully executed SNDA within ten (10) business days after the date the SNDA is executed by Tenant. Tenant shall execute the SNDA simultaneously with this Lease. **This Lease and the Work Letter shall be terminable by Tenant for Landlord's failure to deliver the executed SNDA to Tenant within such 10-business day period. Landlord represents and warrants that, as of the date hereof, there is no mortgage encumbering the Building, except for a mortgage securing debt in the maximum amount of \$ _____ to _____, and there are no ground leases affecting the Building.**

B. Notice to Landlord and Mortgagee. In the event of any act or omission by Landlord (other than the failure to timely obtain the SNDA) which would give Tenant right to damages from Landlord or the right to terminate this Lease, Tenant will not sue for such damages nor exercise any such right to terminate until (i) it shall have given written notice of the act or omission to Landlord and to the holder(s) of the indebtedness or other obligations secured by any mortgage or deed of trust affecting the Premises or of any ground or underlying lease, if the name and address of such holder(s) have been furnished to Tenant, and (ii) **a reasonable period of time, in light both of the time required to effect a remedy and of the impact of the act or omission on Tenant's business operations at the Premises, for remedying the act or omission has elapsed following the giving of the notice (which shall in no event be deemed any less than thirty (30) days or greater than ninety (90) days),** during which time Landlord and such holder(s), or either of them, and their agents or employees, will be entitled to Landlord's rights to enter upon the Premises upon reasonable notice to Tenant and do therein whatever may be reasonably necessary to remedy the act or omission, subject to the terms of this Lease.

ATTACHMENT C
LENDER FORM/FIRST DRAFT
SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT

This SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT dated as of _____, 200__ (the “Agreement”), is executed by and among _____, a[n] _____ [corporation/ limited partnership / limited liability company] (the “Tenant”), _____, a national banking association (the “Lender”), AND _____, a _____ (“Landlord”).

R E C I T A L S:

A. The Lender is the mortgagee under that certain Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing dated _____, 200__, to be recorded concurrently herewith (the “Mortgage”), which Mortgage encumbers the Real Estate (as hereinafter defined) and secures a principal indebtedness in the amount of _____ and 00/100 Dollars (\$_____).

B. The Tenant has entered into that certain lease agreement dated _____, 200__ with the Landlord (or the Landlord’s predecessor-in-interest) (the “Lease Agreement”, the Lease Agreement, together with all amendments and modifications thereof, being collectively referred to herein as the “Lease”), pursuant to which the Tenant has leased certain premises (the “Leased Premises”) [consisting of approximately _____ rentable square feet of space in the building (“Building”)] on the parcel of land (the “Land”; the Land and Building being collectively referred to herein as the “Real Estate”) legally described on Exhibit “A” attached hereto and made a part hereof.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby covenant and agree as follows:

A G R E E M E N T S:

1. The Tenant represents and warrants to the Lender that the Lease constitutes the entire agreement between the Tenant and the Landlord with respect to the Leased Premises and there are no other agreements, written or verbal, governing the tenancy of the Tenant with respect to the Leased Premises.

2. The Tenant has executed and delivered to the Lender that certain Tenant Estoppel Certificate dated on or about the date hereof (the “Estoppel Certificate”). The provisions of the Estoppel Certificate are hereby incorporated into this Agreement as if fully set forth in this Agreement in their entirety, and the Tenant acknowledges that the Lender will be relying on the statements made in the Estoppel Certificate in determining whether to disburse the proceeds of the loan secured by the Mortgage and whether to enter into this Agreement.

3. The Tenant covenants with the Lender that the Lease shall be subject and subordinate to the lien and all other provisions of the Mortgage and to all modifications and extensions thereof, to the full extent of all principal, interest and all other amounts now or hereafter secured thereby and with the same force and effect as if the Mortgage had been executed and delivered prior to the execution and delivery of the Lease. Without limiting the generality of the foregoing subordination provision, the Tenant hereby agrees that any of its right, title and interest in and to insurance proceeds and condemnation awards (or other similar awards arising from eminent domain proceedings) with respect to damage to or the condemnation (or similar taking) of any of the Real Estate, shall be subject and subordinate to the Lender's right, title and interest in and to such proceeds and awards.

4. The Tenant acknowledges that the Landlord has collaterally assigned to the Lender any and all leases affecting the Real Estate, including the Lease, and the rents and other amounts, including, without limitation, lease termination fees, if any, due and payable under such leases. In connection therewith, the Tenant agrees that, upon receipt of a notice of a default by the Landlord under such assignment and a demand by the Lender for direct payment to the Lender of the rents due under the Lease, the Tenant will honor such demand and make all subsequent rent payments directly to the Lender. The Tenant further agrees that any Lease termination fees payable under the Lease shall be paid jointly to the Landlord and the Lender.

5. The Lender agrees that so long as the Tenant is not in default under the Lease:

(a) The Tenant shall not be named or joined as a party in any suit, action or proceeding for the foreclosure of the Mortgage or the enforcement of any rights under the Mortgage (unless the Tenant is a necessary party under applicable law); and

(b) The possession by the Tenant of the Leased Premises and the Tenant's rights thereto shall not be disturbed, affected or impaired by, nor will the Lease or the term thereof be terminated or otherwise materially adversely affected by (i) any suit, action or proceeding for the foreclosure of the Mortgage or the enforcement of any rights under the Mortgage, or by any judicial sale or execution or other sale of the Leased Premises, or any deed given in lieu of foreclosure, or (ii) any default under the Mortgage.

6. Prior to pursuing any remedy available to the Tenant under the Lease, at law or in equity as a result of any failure of the Landlord to perform or observe any covenant, condition, provision or obligation to be performed or observed by the Landlord under the Lease (any such failure being hereinafter referred to as a "Landlord's Default"), the Tenant shall: (a) provide the Lender with a notice of the Landlord's Default, specifying the nature thereof, the section of the Lease under which such Landlord's Default arose, and the remedy which the Tenant will elect under the terms of the Lease or otherwise, and (b) allow the Lender not less than thirty (30) days following receipt of notice of the Landlord's Default to cure the same; provided, however, that, if such Landlord's Default is not readily curable within such thirty (30) day period, the Tenant shall give the Lender such additional time as the Lender may reasonably need to obtain possession and control of the Real Estate and to cure such Landlord's Default so long as the Lender is diligently pursuing a cure. The Tenant shall not pursue any remedy available to it as a result of any Landlord's Default unless the Lender fails to cure same within the time period specified above. For purposes of this Section 6, a Landlord's Default shall not be deemed to have occurred until

all grace and/or cure periods applicable thereto under the Lease have lapsed without the Landlord having effectuated a cure thereof.

7. If the Lender or any future holder of the Mortgage shall become the owner of the Real Estate by reason of foreclosure of the Mortgage or otherwise, or if the Real Estate shall be sold as a result of any action or proceeding to foreclose the Mortgage or transfer of ownership by deed given in lieu of foreclosure, the Lease shall continue in full force and effect, without necessity for executing any new lease, as a direct lease between the Tenant and the new owner of the Real Estate as “landlord” upon all the same terms, covenants and provisions contained in the Lease (subject to the exclusions set forth in subsection (b) below), and in such event:

(a) The Tenant shall be bound to such new owner under all of the terms, covenants and provisions of the Lease for the remainder of the term thereof (including the extension periods, if the Tenant elects or has elected to exercise its options to extend the term), and the Tenant hereby agrees to attorn to such new owner and to recognize such new owner as “landlord” under the Lease without any additional documentation to effect such attornment (provided, however, if applicable law shall require additional documentation at the time the Lender exercises its remedies then the Tenant shall execute such additional documents evidencing such attornment as may be required by applicable law);

(b) Such new owner shall be bound to the Tenant under all of the terms, covenants and provisions of the Lease for the remainder of the term thereof (including the extension periods, if the Tenant elects or has elected to exercise its options to extend the term); provided, however, that such new owner shall not be:

(i) liable for any act or omission of any prior landlord (including the Landlord) [that is not then continuing under the Lease; provided, however, that the Tenant’s sole remedy against the Lender with respect to any act or omission of any prior landlord (including the Landlord) that is then continuing under the Lease shall be to assert against the Lender any offsets of rent or other defenses which the Tenant has against any landlord under the Lease (including the Landlord) (subject to the limitation set forth in clause (ii) below)];

(ii) subject to any offsets or defenses which the Tenant has against any prior landlord (including the Landlord) unless the Tenant shall have provided the Lender with (A) notice of the Landlord’s Default that gave rise to such offset or defense, and (B) the opportunity to cure the same, all in accordance with the terms of Section 6 above;

(iii) bound by any base rent, percentage rent, additional rent or any other amounts payable under the Lease which the Tenant might have paid in advance for more than the current month to any prior landlord (including the Landlord);

(iv) liable to refund or otherwise account to the Tenant for any security or other deposits not actually paid over to such new owner by the Landlord;

(v) bound by any amendment or modification of the Lease made without the Lender's consent;

(vi) bound by, or liable for any breach of, any representation or warranty or indemnity agreement contained in the Lease or otherwise made by any prior landlord (including the Landlord); or

(vii) personally liable or obligated to perform any such term, covenant or provision, such new owner's liability being limited in all cases to its interest in the Real Estate.

8. Any notices, communications and waivers under this Agreement shall be in writing and shall be (a) delivered in person, (b) mailed, postage prepaid, either by registered or certified mail, return receipt requested, or (c) by overnight express carrier, addressed in each case as follows:

To the Lender: _____

Attention: _____

With a copy to: _____

Attention: _____, Esq.

To the Landlord: _____

Attention: _____

[OR]
To the Landlord: _____

Attention: _____

With a copy to: _____

Attention: _____, Esq.

To the Tenant: _____

Attention: _____

With a copy to:

Attention: _____, Esq,

or to any other address as to any of the parties hereto, as such party shall designate in a written notice to the other party hereto. All notices sent pursuant to the terms of this section shall be deemed received (i) if personally delivered, then on the date of delivery, (ii) if sent by overnight, express carrier, then on the next federal banking day immediately following the day sent, or (iii) if sent by registered or certified mail, then on the earlier of the third federal banking day following the day sent or when actually received.

9. The Tenant acknowledges and agrees that the Lender will be relying on the representations, warranties, covenants and agreements of the Tenant contained herein and that any default by the Tenant hereunder shall permit the Lender, at its option, to exercise any and all of its rights and remedies at law and in equity against the Tenant and to join the Tenant in a foreclosure action thereby terminating the Tenant's right, title and interest in and to the Leased Premises.

10. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto, their respective successors and assigns and any nominees of the Lender, all of whom are entitled to rely upon the provisions hereof. This Agreement shall be governed by the laws of the State of Illinois.

11. This Agreement may be executed in multiple counterparts and all of such counterparts together shall constitute one and the same Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Subordination, Non-Disturbance and Attornment Agreement the day and year first above written.

LANDLORD:

_____, a[n] _____
[corporation / limited partnership /
limited liability company]

By: _____
Name: _____
Title: _____

TENANT:

[TENANT], a[n] _____
[corporation / limited partnership /
limited liability company]

By: _____
Name: _____
Title: _____

LENDER:

_____,
a national banking association

By: _____
Name: _____
Title: _____

[Notary Pages and Legal Description Deleted]

ATTACHMENT D

NEGOTIATED FORM SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT

This SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT dated as of _____ (the “**Agreement**”), is executed by and among _____, an _____ (the “**Tenant**”), and _____, a national banking association (the “**Lender**”), and _____, a _____ (the “**Landlord**”).

RECITALS:

A. The Lender is the mortgagee under that certain Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing dated _____, _____, to be recorded concurrently herewith (the “**Mortgage**”), which Mortgage encumbers the Real Estate (as hereinafter defined) and secures a principal indebtedness in the amount of _____ and 00/100 Dollars (\$ _____).

B. The Tenant has entered into that certain lease agreement dated _____, _____ with the Landlord (or the Landlord’s predecessor-in-interest) (the “**Lease Agreement**”, the Lease Agreement, together with all amendments and modifications thereof, being collectively referred to herein as the “**Lease**”), pursuant to which the Tenant has leased certain premises (the “**Leased Premises**”) consisting of approximately _____ rentable square feet of space in the building (“**Building**”) on the parcel of land (the “**Land**”; the Land and Building being collectively referred to herein as the “**Real Estate**”) legally described on Exhibit A attached hereto and made a part hereof.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby covenant and agree as follows:

AGREEMENTS:

The Tenant covenants with the Lender that the Lease shall be subject and subordinate to the lien and all other provisions of the Mortgage and to all modifications and extensions thereof, to the full extent of all principal, interest and all other amounts now or hereafter secured thereby and with the same force and effect as if the Mortgage had been executed and delivered prior to the execution and delivery of the Lease. Without limiting the generality of the foregoing subordination provision, the Tenant hereby agrees, subject to the terms and conditions of Sections 12 and 13 of the Lease [**NOTE: THESE ARE THE CASUALTY AND CONDEMNATION PROVISIONS**], that any of its right, title and interest in and to insurance proceeds and condemnation awards (or other similar awards arising from eminent domain proceedings) with respect to damage to or the condemnation (or similar taking) of any of the Real Estate, shall be subject and subordinate to the Lender’s right, title and interest in and to such proceeds and awards.

The Tenant acknowledges that the Landlord has collaterally assigned to the Lender any and all leases affecting the Real Estate, including the Lease, and the rents and other amounts, including, without limitation, lease termination fees, if any, due and payable under such leases. In connection therewith, the Tenant agrees that, upon receipt of a notice of a default by the Landlord under such assignment and a demand by the Lender for direct payment to the Lender of the rents due under the Lease, the Tenant will honor such demand and make all subsequent rent payments directly to the Lender. The Landlord hereby consents to the Tenant following any such direction from the Lender.

The Lender agrees that so long as the Tenant is not in default (after the expiration of all applicable notice and cure periods) under the Lease:

The Tenant shall not be named or joined as a party in any suit, action or proceeding for the foreclosure of the Mortgage or the enforcement of any rights under the Mortgage (unless the Tenant is a necessary party under applicable law); and

The possession by the Tenant of the Leased Premises and the Tenant's rights thereto shall not be disturbed, affected or impaired by, nor will the Lease or the term thereof be terminated or otherwise materially adversely affected by (i) any suit, action or proceeding for the foreclosure of the Mortgage or the enforcement of any rights under the Mortgage, or by any judicial sale or execution or other sale of the Leased Premises, or any deed given in lieu of foreclosure, or (ii) any default under the Mortgage.

Prior to seeking damages from Landlord or exercising a right to terminate the Lease (collectively, the "Remedies") as a result of any failure of the Landlord to perform or observe any covenant, condition, provision or obligation to be performed or observed by the Landlord under the Lease (any such failure being hereinafter referred to as a "Landlord's Default"), the Tenant shall: (a) provide the Lender with a notice of the Landlord's Default, specifying the nature thereof, and (b) allow the Lender not less than thirty (30) days following receipt of notice of the Landlord's Default to cure the same; provided, however, that, if such Landlord's Default is not reasonably curable within such thirty (30) day period, the Tenant shall give the Lender such additional time as the Lender may reasonably need to obtain possession and control of the Real Estate and to cure such Landlord's Default so long as the Lender is diligently pursuing a cure (which additional time shall not exceed ninety (90) days). The Tenant shall not pursue any of the Remedies as a result of any Landlord's Default unless the Lender fails to cure the same to Tenant's reasonable satisfaction within the time period specified above.

If the Lender or any future holder of the Mortgage shall become the owner of the Real Estate by reason of foreclosure of the Mortgage or otherwise, or if the Real Estate shall be sold as a result of any action or proceeding to foreclose the Mortgage or transfer of ownership by deed or other conveyance given in lieu of foreclosure, the Lease shall continue in full force and effect, without necessity for executing any new lease, as a direct lease between the Tenant and the new owner of the Real Estate as "landlord" upon all the same terms, covenants and provisions contained in the Lease (subject to the exclusions set forth in Subsection (b) below), and in such event:

The Tenant shall be bound to such new owner under all of the terms, covenants and provisions of the Lease for the remainder of the term thereof (including the extension periods, if the Tenant elects or has elected to exercise its options to extend the term), and the Tenant hereby agrees to attorn to such new owner and to recognize such new owner as “landlord” under the Lease without any additional documentation to effect such attornment (provided, however, if applicable law shall require additional documentation at the time the Lender exercises its remedies then the Tenant shall execute such additional documents evidencing such attornment as may be required by applicable law);

Such new owner shall be bound to the Tenant under all of the terms, covenants and provisions of the Lease for the remainder of the term thereof (including the extension periods, if the Tenant elects or has elected to exercise its options to extend the term), but subject to the limitations in Section 27 [**NOTE: SECTION 27 LIMITS LANDLORD’S LIABILITY TO ITS INTEREST IN THE REAL ESTATE**] of the Lease; provided, however, that such new owner shall not be:

liable for any act or omission of any prior landlord (including the Landlord) that is not then continuing under the Lease; provided, however, that nothing in this Agreement shall limit Tenant’s ability to assert against the Lender any offsets of rent or other defenses which the Tenant has against any landlord under the Lease (including the Landlord), including pursuant to the terms of Section 17B of the Lease [**NOTE: SECTION 17B DESCRIBES TENANT’S OFFSET RIGHTS**]. This Section 5(b)(1) shall in no way be deemed to permit the repetition or continuation of any such act or omission (or the continuation of a condition resulting from a past act or omission) not otherwise permitted by the Lease;

bound by any base rent, additional rent or any other amounts payable under the Lease which the Tenant might have paid in advance for more than the current month to any prior landlord (including the Landlord);

bound by any amendment or modification of the Lease made without the Lender’s consent; or

bound by, or liable for any breach of, any representation or warranty or covenant of any prior landlord contained in Section 26C(i) of the Lease. [**NOTE: THIS SECTION REFERS TO LANDLORD’S ENVIRONMENTAL REPRESENTATIONS.**]

Nothing in this Agreement shall in any way affect Tenant’s rights under the Landlord Guaranty (as defined in the Lease). [To be included while Landlord Guaranty is in effect.]

Any notices, communications and waivers under this Agreement shall be in writing and shall be (a) delivered in person, (b) mailed, postage prepaid, either by registered or certified mail, return receipt requested, or (c) by overnight express carrier, addressed in each case as follows:

To the Lender _____

Attention: _____

With a copy to: _____

Attention: _____

To the Landlord (prior to the Commencement Date): _____

Attention: _____

With a copy to: _____

Attention: _____

Attention: _____

To Landlord (after the Commencement Date): As instructed by Landlord

To the Tenant (prior to the Commencement Date): _____

Attention: _____

With a copy to: _____

Attention: _____

To the Tenant (after the Commencement Date): _____

Attention: _____

With a copy to:

Attention: _____

or to any other address as to any of the parties hereto, as such party shall designate in a written notice to the other party hereto. All notices sent pursuant to the terms of this section shall be deemed received (i) if personally delivered, then on the date of delivery, (ii) if sent by overnight, express carrier, then on the next federal banking day immediately following the day sent, or (iii) if sent by registered or certified mail, then on the earlier of the third federal banking day following the day sent or when actually received.

The Tenant acknowledges and agrees that the Lender will be relying on the representations, warranties, covenants and agreements of the Tenant contained herein and that any default by the Tenant hereunder shall permit the Lender, at its option, to exercise any and all of its rights and remedies at law and in equity against the Tenant.

This Agreement shall be binding upon and shall inure to the benefit of the parties hereto, their respective successors and assigns and any nominees of the Lender, all of whom are entitled to rely upon the provisions hereof. This Agreement shall be governed by the laws of the State of Illinois.

This Agreement may be executed in multiple counterparts and all of such counterparts together shall constitute one and the same Agreement.

[Signature Page follows]

[Signature Page, Notaries and Legal Description Deleted]

JENNER & BLOCK



Partner

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E-mail: dresnick@jenner.com

Donald I. Resnick is a partner in Jenner & Block's Chicago office. He is Chair of the Firm's Real Estate Practice, Co-Chair of the Firm's Real Estate Securities Practice, and a member of the Firm's Management Committee. He also is Chair of the Firm's Business Services and Transaction Executive Committee. Mr. Resnick is AV Peer Review Rated, Martindale-Hubbell's highest peer recognition for ethical standards and legal ability.

Since 1975, Mr. Resnick has focused his practice in the area of commercial real estate, on both a national and local basis, having significant experience in real estate transactions, financing, development and construction and corporate real estate services. Mr. Resnick's practice also encompasses real estate-related loan and equity restructuring and workouts and the hospitality, gaming and entertainment industry.

Mr. Resnick represents clients in connection with all types of real estate transactions, including acquisitions and dispositions, capital markets transactions, leasing, joint ventures and like-kind exchanges involving office buildings, multi-family apartment projects, retail projects, hotels and industrial facilities. Mr. Resnick counsels clients with respect to all facets of real estate transactions, including contract and financing issues, due diligence, lease negotiations (including ground leases), operational and management issues, ownership and equity structures, and tax issues.

Mr. Resnick represents one of the largest national pension fund advisors in connection with its real estate equity investments in the Midwest. Mr. Resnick also represents national banks, REITS and other institutions in connection with all aspects of real estate financing, including both secured and unsecured credit facilities and construction and permanent financing. Mr. Resnick also has significant experience in Tax Increment Financing (TIF) and in advising clients with respect to tax exempt bond financing. Mr. Resnick counsels both lenders and borrowers in connection with all aspects and types of real estate and commercial credit facilities, including mezzanine loans, participating and other "joint venture" structured facilities, credit enhancement, revolving lines of credit, loans collateralized by TIF proceeds, securitized lending facilities and multi-lender credit facilities.

Mr. Resnick represents developers in connection with all aspects of newly developed and constructed and rehabilitated real estate projects, providing counsel regarding land acquisition, land use and planning, financing (both public and private), architectural and design contracts, construction contracts, build-to-suit projects, development agreements and ownership structure and related joint venture issues. Mr. Resnick recently represented General Electric Asset Management in connection with its acquisition, financing and development transactions involving a Class A downtown Chicago office building, a high-rise luxury condominium project and two large multi-family apartment projects. Mr. Resnick represented the developer of Citadel Center, a 1.5 million square foot mixed-use office complex built in downtown Chicago and the developer of the new world headquarters' complex developed in downtown Detroit for Compuware. Mr. Resnick also counsels Millennium Park Inc., the not-for-profit foundation providing development funding for the city of Chicago's Millennium Park Project.

Mr. Resnick counsels numerous corporate clients, including Fortune 500 companies, in connection with all of their corporate real estate needs. These include, on a national basis, development and/or leasing of office, manufacturing and distribution facilities, build-to-suit transactions, office and industrial space leases, ground leases, facility management and facility operations issues, and the development, sale, leasing, or other utilization of non-core real estate assets.

Mr. Resnick draws upon his experience in representing real estate developers and other professionals in the commercial real estate industry in counseling corporate clients regarding their numerous real estate needs.

Mr. Resnick is a member of the American Bar Association and its real property section. He is also a member and director of the Illinois chapter of REIA (Real Estate Investment Association). Mr. Resnick has given seminars and written articles regarding various real estate issues including complex like-kind exchanges, real estate workouts and loan restructures, dual agency for brokers and real estate contract negotiations. He is a guest lecturer for Northwestern University Kellogg School of Management's Real Estate program. Mr. Resnick also serves (since 1980) as general counsel for Hubbard Street Dance Co., an internationally renowned dance company based in Chicago.

Chambers & Partners USA has named Mr. Resnick one of the country's leading lawyers in real estate law. He also was listed in *Best Lawyers in America* for real estate law, was elected by his peers as an Illinois Super Lawyer in real estate transactions and was named a leading lawyer in the areas of the real estate finance law and commercial real estate law in the Leading Lawyers Network survey of over 52,000 Illinois lawyers.

Mr. Resnick graduated from the University of Illinois in 1972 with high honors (*Phi Beta Kappa*) and obtained his J.D. from Harvard Law School in 1975. Mr. Resnick is a member of the bar of the state of Illinois.