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Ancillary Agreements in Real Estate Transactions

Andrew R. Berman, Barry A. Hines, and Everett S. Ward¹

A. Introduction

This article discusses certain ancillary but important documents in the context of two common real estate transactions: mortgage loan financings and acquisitions of income-producing real estate.

Mortgage Loan Financings/Lending

In a typical mortgage loan financing, a lender makes a non-recourse loan secured by a mortgage or deed of trust on the borrower's property. For the lender, the loan to value ratio (LTV) of the transaction is a crucial underwriting component, and the lender's assessment of the "value" of the real estate collateral derives largely from the aggregate rent paid by the tenants under existing leases with the borrower/landlord. In addition, a prudent mortgage lender typically prefers that its mortgage lien is senior to the tenant space leases (even if the lease was entered into prior to the financing) and that the tenants will "attorn" and continue to pay amounts due under the lease to the lender if it becomes the owner of the property either because of a mortgage foreclosure or deed-in-lieu.

A lender making a non-recourse loan secured by a lien on income-producing property depends on the income from tenant leases as (i) its primary (if not sole) source of payment of debt service, and (ii) a critical component of the lender's planned exit from the loan (i.e., strong rental income increases the likelihood of a refinancing of the lender's loan or the sale of the property, and repayment of the lender's loan). Integral components of the lender's loan underwriting, due diligence, and loan documentation processes include (i) an assessment of each tenant's financial strength, (ii) a careful review and analysis of the key provisions of each lease and the respective obligations of the borrower (as landlord) and the tenant under each lease, (iii) obtaining key information from the borrower and each tenant through estoppels and certified rent rolls, (iv) obtaining estoppel certificates from other key parties (such as parties to reciprocal easement agreements and other agreements that may affect the property, and (v) preparing and negotiating subordination, non-disturbance and attornment agreements ("SNDAs")² to document each key space tenant's or ground lessor's (where the lender is the holder of a leasehold mortgage) respective obligations to the lender with respect to the particular space lease or ground lease, as the case may be.

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Mr. Ward expresses his appreciation to Quarles & Brady LLP associate Katie McMahan for her assistance in the preparation of this article. In addition, Mr. Berman expresses his appreciation to Orrick associate Leni Kirschenbaum for her assistance in the preparation of this article.

² SNDAs also are referred to sometimes as recognition agreements or non-disturbance agreements.

Acquisitions of Income-Producing Real Estate

In a real estate acquisition, the purchase price paid by the buyer for income producing real estate is frequently determined by reference to the property's cap rate -- the ratio of the property's net operating income (NOI) to the asset value (i.e., the purchase price). In order to determine the NOI of the property, a prudent buyer confirms the property's operating income and related expenses (operating expenses, insurance, taxes, etc.).

The gross income of the asset will vary depending on the rent roll -- the sum of the various amounts paid by the tenants under their related leases (i.e., minimum rent, escalations, pass-throughs, electricity and HVAC charges, and other additional rent paid by tenants). And, the expenses for the property will include real estate taxes and other operating expenses (e.g., labor costs for the building's personnel, utility charges, and ordinary maintenance and repair, etc.). Oftentimes, expenses also include amounts required to be paid by landlord as a result of specific provisions in the leases. Consequently, a prudent purchaser will review the leases and determine if there are any obligations required to be performed and/or paid by the landlord after the closing.

* * *

In both mortgage loan financings and real estate acquisitions, it is essential for lenders and buyers to perform certain due diligence and to require certain ancillary documents. This article discusses in great detail the necessary due diligence and required ancillary documents to successfully close commercial mortgage loan financings and acquisitions of real property (i.e., single or multi-tenant, non-multifamily property) (the "**Project**"). In particular, this article focuses on the following: lease due diligence; rent rolls; estoppel certificates; and SNDAs (including SNDAs for ground lease transactions).

B. Lease Due Diligence

Mortgage Loan Financings/Lending

As a key part of its due diligence process in a mortgage loan financing, the lender (or its counsel) should review all Project leases; in particular, the lender should identify and pay particular attention to key tenant leases.³ Specifically, lease reviews should identify and describe the following (in no particular order):

- a. overall Project and tenant construction schedules (including milestone dates and tenant space delivery dates) where the lender is making a construction loan for the property (including disbursements of loan proceeds for tenant improvements under the lease) and/or where the borrower and/or the tenant have significant construction obligations under the lease;
- b. financial penalties payable by the borrower for failure to meet tenant space delivery dates or other milestone dates, and the source of the borrower's funds to pay those penalties (or other security given by the borrower in favor of tenants to secure the

³ "Key" leases are those leases that (i) provide the most net cash flow to the Project, and/or (ii) on the date of the lease review have significant unsatisfied landlord financial and/or operational obligations.

borrower's space delivery obligations), to the extent that such funds or other security are not included in the uses of loan proceeds;

c. sources and uses of funds for tenant construction and tenant improvement obligations, as well as any requirement that the tenant escrow those funds (or provide other security to the borrower to guaranty the tenant's ability to pay such obligations);⁴

d. tenant approval rights and timetables regarding plans and specifications for the Project and/or tenant's space, as applicable;

e. tenant estoppel letters and SNDA provisions (including any applicable forms of those documents that are attached as lease exhibits);

f. provisions relating to the tenant's obligations to obtain and maintain insurance for its leased space. If the lease permits the tenant to satisfy its insurance requirements pursuant to self-insurance, then the lender should understand and be comfortable with the parameters of the tenant's self-insurance program;

g. provisions for the use and application of insurance and/or condemnation proceeds;

h. lease provisions relating to the allocation of, and timing for, reimbursement of taxes, insurance, and operating expenses, as well as any landlord right to reimbursements for capital expenditures and any exclusions from operating expense reimbursements;

i. with respect to any retail leases, tenant operating covenants, tenant opening requirements (including any co-tenancy requirements), and Project amenity requirements (e.g., operation of a fitness center, concierge service, and/or restaurant);

j. rental payment schedules and security deposits;

k. provisions permitting early lease termination or granting a tenant lease termination rights for construction delays or failures to meet specified milestone dates;

l. right of first refusal (ROFR) and right of first offer (ROFO) provisions;

m. tenant purchase options;

n. lease assignment provisions and lease amendment rights; and

o. landlord defaults and tenant remedies (including any rent offset rights and/or lease termination rights).

⁴ If the tenant is in fact required to provide any "other security" as collateral, then the lender should make sure that the borrower has the right to, and does, collaterally assign its rights to such security to the lender as additional collateral for the loan.

Acquisitions of Income-Producing Real Estate

As discussed above, in connection with any acquisition of income producing real estate, the buyer (or its counsel) should perform due diligence, including a close review of all Project leases. As with mortgage loan financings, the buyer should also identify and pay particular attention to key tenant leases. Specifically, the buyer's lease reviews should identify and describe the following (in no particular order):

- a. construction and build-out or renovation of tenant premises, including milestone dates, tenant space delivery dates, and other significant construction obligations under the leases for either the landlord or tenant;
- b. financial penalties payable by the landlord (seller) for failure to meet tenant space delivery dates or other milestone dates;
- c. financial arrangements relating to construction, build-out and renovations (e.g., is landlord or tenant required to perform the work?; who is obligated to pay?; is there any tenant improvement allowance, and if so, how much has been disbursed? any disputes relating to design or construction? are there any mechanic liens or disputes with contractors and subcontractors?);
- d. approval rights and timetables regarding plans and specifications for the Project and/or tenant's space, as applicable;
- e. tenant estoppel letters and SNDA provisions (including any applicable forms of those documents that are attached as lease exhibits) [discussed in greater detail below];
- f. provisions relating to landlord's obligations to obtain and maintain insurance for all or any portion of the Project. Is self-insurance permitted?
- g. any non-customary provisions relating to casualty and condemnation regarding termination rights or rights to insurance and/or condemnation proceeds;
- h. lease provisions relating to the allocation of, and timing for, reimbursement of taxes, insurance, and operating expenses, as well as any landlord right to reimbursements for capital expenditures and any exclusions from operating expense reimbursements;
- i. with respect to any retail leases, tenant operating covenants, tenant opening requirements (including any co-tenancy requirements), and Project amenity requirements (e.g., operation of a fitness center, concierge service, and/or restaurant);
- j. rental payment schedules and security deposits;
- k. any provision allowing the tenant a right to terminate the lease or abate rent, and the triggers and time periods relating to any termination or abatement rights. These rights are frequently "triggered" or arise in the context of casualty; interruption of services; construction delays or failures to meet specified milestone dates; and outside dates for

failure to deliver possession. And, in other instances, a tenant might have certain periods of guaranteed free rent or other rent abatements and also the right to terminate the lease (oftentimes with notice and/or payment of a fee).

- l. right of first refusal (ROFR) and right of first offer (ROFO) provisions;
- m. tenant purchase options;
- n. lease assignment provisions and lease amendment rights; and
- o. landlord defaults and tenant remedies (including any rent offset rights and/or lease termination rights), and tenant defaults and landlord remedies (including any express or implied waivers or concessions relating to such defaults).

C. Certified Rent Rolls

In both mortgage loan transactions and acquisitions of real estate, the lender and buyer ought to require a current rent roll for the property (certified by the borrower or landlord/seller as to the accuracy of the rent roll content) in order to obtain and verify certain financial and other factual matters pertaining to the Project leases. In construction loan financings, lenders should also require re-certifications prior to any subsequent disbursement of any construction loan proceeds.

Typically, the borrower will provide a certified rent roll to the lender (i) as part of the lender's loan underwriting process, and (ii) will update that certified rent roll at loan closing. In the context of the sale and purchase of income-producing property, the landlord/seller will provide a rent roll directly to the buyer or it will be included in the seller's diligence data room and the buyer ought to review and confirm the information in the rent roll as part of the buyer's due diligence process. Furthermore, the asset purchase agreement will require that the seller certifies the rent roll as of the effective date of that agreement and that both the representation and certification be made again as a condition to the closing.

Information contained in the rent roll may include: (a) each tenant's name and identification (by floor or unit number) of the space leased by each tenant; (b) the square footage of the space leased by each tenant; (c) the lease commencement date and lease termination date for each lease; (d) annual and monthly rent (base rent and additional rent) payable under each lease; (e) the date to which each tenant has made rent payments due under each lease; and (f) an indication if any tenant is in default under its lease.

The buyer (or its counsel) should check the information contained in both the tenant estoppel certificates (see below) and the certified rent roll(s) against the corresponding provisions of the leases in order to confirm that basic lease information (e.g., rent amounts, rent payment dates, and the lease commencement dates and lease termination dates) are consistent in all three documents (i.e., the lease, rent roll and estoppel certificate). The buyer should require the landlord/seller to adequately address or otherwise explain any identified inconsistencies in those documents.

D. ESTOPPEL CERTIFICATES

General Overview

For both mortgage loan transactions and real estate acquisitions, the primary purposes of the tenant estoppel certificate are (i) to supplement the due diligence of lender or buyer, and (ii) to provide the lender or buyer with factual information regarding the lease that otherwise may not readily be available to, or understandable by, lender or buyer, based solely on a review of the lease documents.

Anatomy of an Estoppel Certificate

Some leases will contain a form of estoppel certificate which the tenant is obligated to deliver to the landlord and its lender or potential buyer. In many instances, however, the lease will simply state that the tenant is obligated to deliver an estoppel certificate to the landlord covering certain specified matters and “such other matters as landlord may reasonably request.”

The form certificate should be attached to a cover letter addressed and delivered to the tenant (in compliance with the notice provisions of the lease). Therefore, if the notice provision requires that the tenant and its counsel receive all notices by Federal Express or certified mail, it is essential that the landlord send the estoppel certificate in the precise manner required under the lease even if the document is also sent by some more convenient method.

Most estoppel certificates are two to four pages in length, follow a similar form and attempt to cover many similar issues. A typical estoppel certificate will have the following basic characteristics:

- a. the certificate will be on tenant’s letter head;
- b. include a detailed description of all of the documents which constitute the lease, and these documents will be defined, collectively, as the “Lease.” The lease documents are frequently listed on an attached exhibit and the definition of the Lease should include all formal lease amendments, letter agreements, and other similar documents. The exhibit should include the precise recitation of the name of the agreement, the parties, and date. Often, the parties have forgotten to insert the actual date of the lease, and the landlord and tenant each signed the lease on different days. In that case, the exhibit would describe the Lease, dated as of March __, 2016, between __, as landlord, and _____, as tenant, which was executed by landlord on March 15, 2016 and by tenant on March 12, 2016;
- c. copies of the entire Lease, including all of the documents listed on the exhibit, will be attached to the estoppel certificate (see form attached);
- d. contain a description of why the landlord is requesting the estoppel certificate (i.e., in connection with a loan financing or potential sale) and also include an express statement that the lender and the buyer, as the case may be, will be relying upon the statements made by the tenant in the estoppel certificate so that it is clear to the tenant

that the lender or the buyer will be relying upon the estoppel certificate in connection with its loan or purchase;

e. the main portion of the estoppel certificate will contain factual statements relating to the Lease, and these statements will be drafted similar to typical representations and warranties. The substance of these statements will typically be drafted by landlord to make it “easier” for the tenant, and are further described in the following section; and

f. signed by an authorized officer of tenant and dated (since the certificate only speaks as to the date the certificate is signed by tenant). Sometimes, the lease will require that the estoppel certificate be notarized either in an attempt to signify the document’s importance or in the hope that it might be easier to introduce into evidence at some later time if necessary.

Confirmation of Lease Facts

While the prevailing trend in tenant estoppel forms appears to be “the simpler, the better”⁵, an estoppel form should request, at minimum, the following factual information:

a. whether the tenant is current in the payment to the landlord of all rents and other charges due and owing under its lease, and confirmation of the actual amount of such rent due under the lease;

b. whether the tenant has performed all non-financial obligations of the tenant under the lease that are to be performed prior to the date of the estoppel certificate;

c. whether the landlord has performed all of its obligations under the lease that are to be performed prior to the date of the estoppel certificate (e.g., substantial completion of landlord’s work);

d. confirmation by a tenant of the existence of (and any application of) any security deposit (as well as whether that deposit is in the form of cash or other security);

e. confirmation by a tenant of the lease commencement date and lease termination date;

f. clarification of any language discrepancies in the lease;⁶

g. confirmation by a tenant that no default by tenant or landlord exists under the Lease;

⁵ Sophisticated tenants will object to extensive estoppel forms that seek to regurgitate information clearly set forth in the lease (other than confirming rent amount and payment dates). Time spent negotiating estoppel provisions may result in delays in the borrower satisfying tenant estoppel delivery closing requirements, as well as additional transactions costs to the borrower. Where the lender seeks to obtain estoppel letters from only a few key tenants, perhaps a prudent approach would be to customize the estoppel form for each lease rather than using a “standard” form estoppel for all of the leases.

⁶ See Brent C. Shaffer, *Using Tenant Estoppel Letters to Cut to the Chase*, 15 Probate & Property 38, 40 (November-December 2001).

h. confirmation that the tenant is in possession, and that no assignments or subleases have occurred;

i. confirmation of whether tenant has any options to renew, terminate, expand, or surrender space and if there are any rights of first offer, rights of first refusal, purchase options or other preemptive rights in favor of tenant or any other party;

j. confirmation that the lease is in full force and effect and represents the entire agreement between landlord and tenant; and

k. confirmation of whether tenant has any right to abate or offset rent.

Case Law and Legal Issues relating to Estoppels.

In litigation involving estoppel certificates, there are a few recurring issues.

a. Does an estoppel certificate modify the “Lease” such that it is treated similar to an amendment? Most courts that have considered this question have concluded that unless there is an express statement that the estoppel certificate is an amendment and there is also mutual assent and consideration, the estoppel certificate is not an amendment to the lease. For example, in *Expo Properties, LLC v. Experient, Inc.*, No. CV GLR-14-14-688, 2016 WL 3997290 (D. Md. July 26, 2016), the court found that the estoppel certificate did not modify the lease because there was no mutual assent or consideration. Estoppel certificates that are intended to modify the terms of a lease agreement that includes an integration provision must be signed by both parties in order to have intent to be bound by the terms of the estoppel certificate. Even though an Amendment executed subsequent to the execution of the tenant estoppel certificate included the certificate in its description of “the existing Lease,” the court held that because the recitals are not an operative part of the agreement, the Amendment did not make the estoppel certificate part of the existing Lease.

Similarly, in *Pocatello Hosp., LLC v. Quail Ridge Medical Inv., LLC*, 330 P.3d 1067 (Id. 2014), the tenant had executed an estoppel certificate stating that the rent at that time was a certain amount and that the lease was in full force and effect. The court denied the tenant’s claim that the estoppel certificate fixed the rent at that amount, contrary to the lease’s scheduled rent adjustment provisions. The court stated that “if an estoppel certificate does not explicitly modify the terms of the lease [here, by stating that the rent adjustment provision was no longer in effect and rent would be fixed at the stated amount in the estoppel certificate], it is not a mechanism by which a lease agreement may be modified.”

b. Does the inadvertent inclusion of a mistaken statement concerning the rent bind the tenant? There are many cases in which the estoppel certificate is effectively used to estop the tenant from making a claim contrary to the mistaken fact contained in the estoppel certificate. These cases include the following:

- In *Plaza Freeway Ltd. P’ship v. First Mt. Bank*, 81 Cal.App.4th 616, 90 Cal.Rptr.2d 865 (4th Dist. 2000), the court held that the termination date set forth in an estoppel certificate superseded that in the Lease because “even if the estoppel certificate

contains an erroneous recitation of the lease terms, the facts contained in the certificate are conclusively presumed to be true.”

- In *K’s Merchandise Mart, Inc. v. Northgate Limited Partnership*, 359 Ill.App.3d, 1137, 296 Ill.Dec. 612, 835 N.E.2d 965, (2005), the tenant was precluded from challenging the management fee charged by landlord’s successor (the new buyer) even if it was incorrect because the tenant agreed to pay the charged amount and the estoppel certificate affirmatively stated that the landlord was not in default under the Lease (which the landlord would have been for improperly charging the wrong management fee).
- In *Liberty Property Trust v. Day-Timers, Inc.*, 815 A.2d 1045 (Pa. Super. 2003), the landlord succeeded in blocking the tenant’s reliance on an oral modification to a rent schedule in a lease because the tenant had executed a tenant estoppel certificate affirmatively representing that there were no oral modifications to the lease. The court found that an unsigned addendum to the lease was an oral modification, but did not allow the tenant to rely on it to determine the correct rent because the tenant had executed a tenant estoppel certificate that affirmatively stated there had been no oral modifications to the lease.
- In *Bed N’ Bath of Spring Valley, Inc. v. Spring Valley P’ship*, 185 A.D.2d 584, 586 N.Y.S.2d 416, (3d Dept. 1992) the court held that despite the presence of an inadvertent error in a tenant estoppel certificate that required the tenant to pay a pro rata share of management fees that was four times the customary and usual amount for the market area, the tenant was nevertheless required to pay the mistaken amount in the tenant estoppel certificate.

c. Is the buyer or lender entitled to rely on the estoppel certificate and, if so, what are the consequences to the tenant if it later turns out that the estoppel certificate was not accurate? The court held in *Lakeview Management, Inc. v. Care Realty LLC*, No. 07-cv-303-SM, No. 2009 DNH 036, 2009 WL 903818 (N.H. March 30, 2009) that the buyer was entitled to rely on a tenant estoppel certificate delivered to the buyer that stated that rent was calculated in accordance with the lease attached to the certificate even though the landlord, the buyer’s predecessor in interest, and the tenant had worked out a change in how Additional Rent was calculated and modified the definition of Gross Revenues, which tenant claimed was in effect and determinative of how rent should be calculated. The court held that the tenant’s affirmative representations in the estoppel certificate were material and the tenant knew the buyer would reasonably rely on those affirmative representations.

d. If a party makes a statement in an estoppel certificate, is that party estopped from making any allegation in the future contrary to the statement made in the estoppel? Most courts have held that the party will be estopped from making such contrary statement. For example, in *Office Depot, Inc. v. The District at Howell Mill*, 2011 Ga. App. LEXIS 381 (May 6, 2011), the tenant’s claim of an alleged breach of a restrictive covenant in the lease prohibiting the landlord from leasing to another business in the same shopping center that primarily sold the same type of product failed because the tenant had executed an estoppel certificate stating that the landlord was not in violation of any terms of the lease.

See also *Office Depot Learns That an Estoppel Certificate Can Stop a Tenant in Retail Lease Suit Over Exclusive Use Provision, and What About No Waiver Clauses in Leases?*, Georgia Real Estate Litigation Blog, <http://georgiarealestatelitigationblog.blogspot.com/2011/06/office-depot-learns-that-estoppel.html>.

In addition, in *Katz v. M.M.B. Co.*, No. 50579, 1986 WL 5298 (Ohio App. May 8, 1986), the tenant's claim that it had overpaid rent failed because it had executed estoppel letters affirmatively stating that it had no claims or set-offs with respect to rent paid under the lease. The court held that the tenant's signature on the estoppel certificate when he was on constructive notice of violations of terms of the lease precluded the tenant from asserting claims of violation of the lease later. And, in a situation where the landlord executed an estoppel certificate, the court held in *JRK Franklin, LLC v. 164 E. 87th St. LLC*, 2006 NY Slip Op. 02438, 27 AD3d 392 (March 30, 2006) that the landlord could not claim a default under the lease due to prior tenant's installation of a shed without the landlord's approval when the landlord had executed an estoppel certificate stating that there was no existing or prior event that would constitute a default under the lease.

In each of these cases, the information contained in the estoppel certificate gave the lender or buyer a basis for refuting any subsequent claims of the tenant relating to the period covered by the estoppel certificate in the event that tenant subsequently makes a claim relating to that period that is inconsistent with the information contained in the estoppel certificate.

Landlord and Tenant Concerns

Often, the lender or buyer will require certain specific statements to be included in the estoppel certificate, and the landlord will then prepare the estoppel based on its understanding of the factual circumstances surrounding those issues. The landlord has to balance the lender's and buyer's likely desire to include the kitchen sink with the reality of whether any tenant will actually sign an overreaching estoppel.

For the tenant, it is prudent for the tenant's counsel to review and mark-up the estoppel before it is signed and returned to the landlord. The tenant's counsel will have the same concerns and issues as with any contractual representation. Accordingly, the tenant will seek to make the factual statements as narrow and specific as possible; add knowledge qualifiers; and perform whatever basic inquiry is required to make sure that the statements contained in the estoppel are actually true, and, if not, to revise the estoppel to reflect the particular facts and circumstances. The tenant does not want to inadvertently state that the landlord is not in default and later be estopped from claiming that a default actually exists.

In addition, the tenant ought to insert a statement that the Lease remains the authoritative document, and if there are instances when the estoppel certificate and Lease differ, the Lease controls. It should be clear that the officer signing the certificate is doing so in his/her corporate capacity and not individually.

* * *

Attached as Exhibit A to this article is a sample “middle of the road” tenant estoppel certificate.

E. Subordination, Non-Disturbance and Attornment Agreements

Both the lender and the tenant under a significant space lease may find it advantageous to negotiate and execute an SNDA, notwithstanding the existence of subordination and attornment language in the tenant’s lease. Having an SNDA creates direct privity of contract between the lender and the tenant, and sets forth certain obligations in the event that the lender becomes the owner of the Project.⁷ Specifically, in the SNDA:

- a. the tenant agrees to subordinate its leasehold interest in the Project to the lien of the lender’s mortgage;⁸
- b. the lender agrees that in the event the lender becomes the owner of the Project it will not disturb the tenant’s leasehold interest in the Project, provided that the tenant continues to comply with the provisions of the lease; and
- c. the tenant agrees to recognize the lender (and the lender’s successors and assigns) as the new landlord under the lease (i.e., attornment) following the lender’s acquisition of title to the Project as the result of the lender’s exercise of remedies upon a borrower default.

In addition, the SNDA may contain some or all of the following provisions that effectively modify the terms of the lease as between the lender and the tenant: (i) giving the lender a cure period (in addition to the cure period afforded landlord) in the event of a landlord default under the lease; (ii) stating that borrower and tenant cannot amend the lease without the lender’s prior consent; (iii) limiting the lender’s liability under the lease to events that first occur after the lender becomes the owner of the Project; and (iv) specifying procedures for the collection and application of casualty and/or condemnation proceeds.⁹

The parties to the SNDA should decide whether to record the SNDA. Sometimes the provisions of the lease require the recording of the document; also, the lender may elect to record the document if a memorandum of the underlying lease is of record.

Attached as Exhibit B to this article is a sample Subordination, Non-Disturbance and Attornment Agreement.

⁷ The lender and the tenant (and the borrower) also may use the SNDA to document and resolve any lease issues or discrepancies identified in the tenant estoppel certificate.

⁸ See generally, Mark A. Senn, *Commercial Real Estate Leases: Selected Issues in Drafting and Negotiating in Today’s Market*, ALI CLE Course of Study Materials (May 2016) (comprehensive discussion of lease subordination provisions in context of mortgage foreclosure procedures in various states).

⁹ See generally, Ruth A. Schoemeyer, *Leases, Tenant, Estoppels and SNDAs*, Commercial Real Estate Financing 2016, Real Estate Law and Practice Course Handbook Series Ch. 5 (Practicing Law Institute 2016) (discussion of the lender’s and the tenant’s respective negotiating positions on various SNDA provisions); see also, Senn, *supra* note 10 §25.06.

F. SNDAs and Subordinate Ground Leases

As noted previously, SNDAs are most-often evaluated and analyzed in the typical space tenant context. The consequences of executing an SNDA in the context of a ground lease, however, are vastly different and can be much more severe to the tenant. The focus of this Section is on the ability to finance a leasehold estate when the underlying ground lease is subordinate to a mortgage encumbering the fee simple estate.

1. Avoid this Fact Pattern.

Consider the following hypothetical:

a. Your developer client built a shopping center on a parcel of land she leased from the fee owner pursuant to a 99-year ground lease.

b. You did not negotiate the ground lease, but it contains all the typical provisions and even includes a comprehensive section with excellent leasehold mortgagee protection provisions. The ground lease also includes the following provisions:

i. “Fee Mortgages and Subordination: Ground Lessor shall have the right to grant a mortgage on Ground Lessor’s fee simple estate in and to the Property. This Ground Lease is and shall be subordinate to any fee mortgage granted by Ground Lessor, provided that any holder of such fee mortgage shall execute and deliver to Ground Lessee a non-disturbance agreement.”

ii. “Casualty and Condemnation Proceeds: Upon the occurrence of any casualty, Ground Lessee shall be entitled to receive all insurance proceeds. Upon the occurrence of any taking of all or any portion of the Property by eminent domain, Ground Lessee shall be entitled to receive proceeds attributable to the value of the Improvements and the value of Ground Lessee’s leasehold estate in the Property so taken. . . .”

iii. “Option to Purchase: From and after the 5th lease year, the Ground Lessee shall have the right and option to purchase Ground Lessor’s fee simple estate for the sum of \$1,000,000. . . .”

c. Six months ago, ground lessor obtained a \$1,500,000 loan secured by a mortgage on ground lessor’s fee simple title to the ground leased property. Counsel to the fee mortgagee provided a standard form of SNDA to your client, as the tenant under the Ground Lease. Because an SNDA is a routine document, you gave it to a first year associate, who you recently trained to review and negotiate SNDAs in connection with your representation of a space tenant in another shopping center. Your client signs the SNDA, with minimal revisions.

d. Your client just signed a term sheet for a permanent loan and plans to grant a leasehold mortgage on the ground leased property.

2. Roadblocks to Financing the Leasehold Estate with a Subordinate Ground Lease.

There are three significant issues created by the above fact pattern that make it difficult and expensive, if not impossible, to finance the leasehold estate. Two of those issues could have been avoided when the tenant under the ground lease signed the SNDA. The third issue could only have been avoided when negotiating the ground lease. The three issues are summarized as follows:

a. Casualty and Condemnation Proceeds. In most ground leases, the tenant leases the land from the landlord and constructs the improvements. Because the tenant paid for the cost of constructing the improvements, the expectation is that the tenant under the ground lease (or its leasehold mortgagee) will receive all insurance proceeds following a casualty and will also receive condemnation proceeds equal to no less than the value of the leasehold improvements and the residual value of the leasehold estate so taken. If the ground lease is subordinate to a fee mortgage, however, either by the express terms of the ground lease or by virtue of an SNDA, the tenant under the ground lease has likely agreed that the fee mortgagee has superior rights to the casualty and condemnation proceeds.¹⁰ This is a harsh and perhaps unintended consequence, but words matter and it's extremely important to use the right words when entering into what some would consider to be a routine document.

Would it have made a difference if the SNDA had limited the extent of the subordination to the "lien of the mortgage" instead of the "terms and conditions of the mortgage"? While many sophisticated tenants are careful to make this distinction when negotiating SNDAs, surprisingly, there is virtually no case law directly addressing this distinction.¹¹ In a commercial lease context, subordination means the tenant who holds the

¹⁰ See, e.g., *Miscione v. Barton Dev. Co.*, 61 Cal. Rptr. 2d 280, 285, 52 Cal. App. 4th 1320, 1328 (1997) ("It should be noted that SNDA provisions may alter the rights of the parties not only with respect to foreclosure actions, but also in connection with distribution of insurance proceeds, condemnation awards, and promises made outside the lease."); Note, however, while the subordination provisions of an SNDA theoretically subordinate the tenant's leasehold interest to the lender's mortgage, which would include an interest in condemnation awards, that subordination may be rendered inoperative if the condemnation ousts the tenant from the property, as subordination is usually conditioned on a tenant's continued enjoyment of the premises. For example, in an unpublished Wisconsin Circuit Court opinion, *HSBC Realty Credit Corp. v. City of Glendale*, No. 04CV010624, slip op. at 23-5 (Wisc. Cir. Ct. May 31, 2005), the tenant had agreed to subordinate the tenant's lease to the mortgage, but conditioned the subordination on preserving "the covenants, terms and conditions of the [SNDA]." Within the SNDA, the lender had promised the tenant continued occupancy of the premises in the event of an ownership change. *Id.* Condemnation triggered a change in ownership, and the court held that the tenant was not required to subordinate its leasehold interest and its claim to the condemnation awards because the tenant was not allowed to continue occupying the premises in light of the condemnation. *Id.* Similarly, in a 1992 case, the Georgia Court of Appeals held that because the SNDA conditioned the tenant's subordination of his leasehold interest on the tenant's continued and undisturbed occupancy, condemnation rendered the subordination inoperative because the tenant's occupancy was disturbed. *Raiford v. Dept. of Transp.*, 424 S.E.2d 789 (Ga. App. 1992). Thus, conditioning the validity of the lease's subordination on the tenant's continued enjoyment of the property may render subordination inoperative in the context of condemnation. *Id.* Instead, parties should draft an SNDA that expressly addresses condemnation and delineates priority to condemnation awards in the event of a taking.

¹¹ Courts that have encountered SNDAs have failed to recognize the difference between subordinating the lease to the "lien of the mortgage" versus the "terms and conditions of the mortgage." For example, the Seventh Circuit asserted generally that in an SNDA, "the subordination provision subordinates the lease to the mortgage." *CWCapital Asset Mgmt., LLC v. Chicago Properties, LLC*, 610 F.3d 497, 502 (7th Cir. 2010). In *CWCapital Asset Mgmt.*, the specific language of the underlying SNDA did not inform the Seventh Circuit's understanding of subordination. *Id.* Thus, the

senior leasehold interest agrees to convert that interest to a junior interest, switching the basic “first in time, first in right” rule, which, simply stated, means that in the case of a conflict between the lease and the fee mortgage, the prior document will prevail and proceeds will be awarded to the fee mortgagee.¹²

A better approach, and one that could have been accomplished by a single sentence in the SNDA, would have been to explicitly state that the subordination of the ground lease to the mortgage has no impact on the distribution of casualty and condemnation proceeds. Instead, the tenant in the hypothetical described above must either (i) go back to the fee mortgagee and request an amendment to the SNDA to clarify that the tenant (or its leasehold mortgagee) is the party entitled to these proceeds (good luck if the original fee mortgagee was a commercial mortgage-backed securities (“**CMBS**”) lender and now the fee mortgage is under the control of a servicer) or (ii) purchase a Condemnation and/or Property Damage Loss Insurance Policy to provide supplemental insurance to the leasehold mortgagee.¹³ In either case, the tenant in the hypothetical just added significant and avoidable transaction costs to obtain a leasehold mortgage.

b. Option to Purchase. As noted in the hypothetical above, the tenant under the ground lease has an option to purchase fee simple title to the property for \$1,000,000, but the tenant agreed that the ground lease is subordinate to the \$1,500,000 fee mortgage. Could the tenant force the fee mortgagee to release the fee mortgage by paying \$1,000,000 based on the terms of the ground lease or, since the ground lease is subordinate to the fee mortgage, does that mean that the tenant must pay off the \$1,500,000 fee mortgage in order to exercise the purchase option? Since the \$1,000,000 option price is less than the amount of the fee mortgage, we can most likely assume that the option price is substantially less than the fair market value of the fee estate. Was the proposed leasehold mortgagee relying on the below fair market value option price as part of its collateral package in agreeing to make the leasehold mortgage? Regardless of the answer to that question, the tenant has a big problem to solve.

The case law regarding the impact of SNDAs on options to purchase is also scarce, but not surprisingly, the outcome is very similar to the discussion above on casualty and condemnation proceeds. Courts that have considered SNDAs in conjunction with an option

court did not recognize any nuances in the SNDA’s subordination language that impacted the extent to which the lease was subordinate to the mortgage. *Id.* However, the underlying dispute in *CWCapital Asset Mgmt.* involved the tenant’s payment of rent to the lender following its abandonment of the property. *Id.* Additionally, the Ninth Circuit analyzed the effect of two SNDAs in which the tenant agreed to “subordinate its rights [under the lease] to the lien of any mortgage or deed” which should remain “at all times a lien or charge on the Real Property prior and superior to the Lease and all rights of the Lessor and Lessee thereunder.” *Goldilocks Corp. of S. California v. Ramkibir Motor Inn Inc.*, 26 F. App’x 693, 695–96 (9th Cir. 2002). When the Ninth Circuit applied the language of the SNDA to the relationship between the tenant’s lease and the lender’s mortgage, the court simply stated that the two SNDAs rendered the leases “junior” to the deed. *Id.* at 696. Thus, the court failed to acknowledge any particular implications from subordinating “all rights of the Lessor and Lessee” to the mortgage or deed. *Id.*

¹² A subordination agreement is “an agreement by which one who holds an otherwise senior interest agrees to subordinate that interest to a normally lesser interest.” *BLACK’S LAW DICTIONARY* 68 (7th ed. 1999).

¹³ Based on experience, these policies are only available from one insurance carrier and the minimum premium is \$75,000.

to purchase have held that subordination agreements make a tenant's option to purchase subordinate to the mortgage.¹⁴ For example, in *Germain Real Estate Co., LLC*, a lease agreement gave the lessee an option to purchase real property.¹⁵ Soon after the lease was executed, the property was mortgaged.¹⁶ The lessee entered into an SNDA with the lender providing that "[t]he Lease and all terms thereof, including, without limitation, *any options to purchase*, rights of first refusal, rights of set off, and any similar rights, are and shall be subject and subordinate to the Mortgage."¹⁷ Analyzing this provision, the Western District of Arkansas held that the SNDA amended the purchase options that were originally contemplated in the lease agreement.¹⁸ Specifically, the plain language of the SNDA rendered all options to purchase subordinate to the lender's rights and subject to the lender's final approval.¹⁹ As such, the mortgage holder's interest took preference over the lessee's option to purchase.²⁰

What does all this mean to your hypothetical tenant who agreed that the ground lease is subordinate to the fee mortgage? It means that in order to exercise the option to purchase and take title to the property free and clear of the fee mortgage, the tenant must pay off, in full, the fee mortgage. The tenant might be able to make an argument that the ground lessor is responsible for paying any amounts in excess of the \$1,000,000 option price, but that argument probably won't give much comfort to the leasehold mortgagee, who presumably is relying on the below market option price as part of its collateral. Accordingly, the tenant, by not specifically carving out the option to purchase when entering into the SNDA, effectively increased the option price from \$1,000,000 to \$1,500,000.

c. Rejection of Non-Disturbance in Bankruptcy. In early 2016, Moody's Investor Service, one of the rating agencies heavily involved in rating CMBS bonds, issued a bulletin (the "**Moody's Bulletin**") pointing out two significant flaws in financing ground leases.²¹ One of the two major flaws is subordinate ground leases. As the Moody's Bulletin points out, it should not be necessary to subordinate a ground lease to a fee mortgage. The fee mortgagee is presumably underwriting the rent paid by the tenant under the ground lease and the value of the reversionary interest in the land. Since the tenant under the ground lease (and not the ground lessor) typically pays the cost of constructing improvements, the fee mortgagee's appraisal should not include the value of the

¹⁴ *Germain Real Estate Co., LLC v. HCH Toyota, LLC*, No. 5:13-CV-05069, 2013 WL 4498789, at *3 (W.D. Ark. Aug. 21, 2013), *aff'd*, 778 F.3d 692 (8th Cir. 2015); *NRC Golf Course, LLC v. JMR Golf, LLC*, No. 09 CVS 1835, 2010 WL 5557510, at *6 (N.C. Super. Dec. 29, 2010), *aff'd*, 731 S.E.2d 474 (N.C. App. 2012).

¹⁵ *Germain Real Estate Co., LLC*, 2013 WL 4498789, at *3.

¹⁶ *Id.* at *2.

¹⁷ *Id.* at *4 (emphasis added).

¹⁸ *Id.* at *7.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *The Top Two Ground Lease Financing Flaws: Deficient "New Lease" Clauses and Superior Fee Mortgages*, Structured Finance Report (Moody's Global Credit Research), Jan. 6, 2016.

improvements, nor should the fee mortgagee have any expectation of receiving loss proceeds attributable to those improvements. As we have seen based on the discussion above, there are many reasons to avoid subordinating a ground lease to a fee mortgage, but the issue raised by the Moody's Bulletin is perhaps the most significant reason to avoid a subordinate ground lease.

The Moody's Bulletin accurately points out that an SNDA (or an NDA, if the subordination provision in the ground lease is self-operative) "may be deemed an executory contract that could be rejected under Code § 365 by the fee lender in its own bankruptcy or declared unenforceable upon the fee lender's insolvency and takeover by the Federal Deposit Insurance Corporation (FDIC) under 12 US Code § 1823(e)."²² If non-disturbance can be rejected by a lender, particularly when the subordination language in the ground lease is self-operative and the lender provides only an NDA, that means the ground lease is subordinate to the fee mortgage without any non-disturbance which, in most states, means the fee mortgagee can terminate the ground lease following a foreclosure event involving the associated fee mortgage.²³ That would, in turn, result in the termination of the leasehold mortgage which would convert the leasehold mortgagee into an unsecured lender.

Unfortunately, there is no quick "fix" for this issue and if you're representing a borrower or lender in a CMBS loan, you have a big problem. At best, your borrower client should expect an increase in the interest rate for the leasehold mortgage loan to compensate the lender for the risk. At worst, your client has a leasehold estate that cannot be financed, at least not by a non-recourse lender.

Conclusion

Given the importance of Project cash flows, not only for payment of current debt service, but also for funding Project operational expenses and making the Project an attractive candidate for sale and/or refinancing transactions, the lender absolutely must have a comprehensive understanding of the Project leases. That understanding, together with (i) current and accurate information provided by tenants in estoppel certificates, by the borrower in its certified rent roll(s), and by parties to other estoppel certificates, and (ii) the careful drafting and negotiation of SNDAs, give the lender the best opportunity for the ultimate repayment of its loan (either through refinancing the Project or the lender's acquisition and subsequent sale of the Project following a borrower default).

²² *Id.* at 3 (citing *Kimzey Wash, LLC v. LG Auto Laundry, LP*, 418 SW 3d 291 (Tex. App. 2013) (using 12 US Code § 1823(e) and the D'Oench, Duhme doctrine to declare the SNDA unenforceable)); *see also, In re Butler Services International, Inc.*, No. 09-11914(KJC), 2209 WL 42446431 (Bankr. D. Del. 2009) (holding that an SNDA is an executory contract that may be rejected in a bankruptcy action).

²³ *See, e.g., 52 C.J.S. Landlord & Tenant* § 163 (2016).

EXHIBIT A

SAMPLE TENANT ESTOPPEL FORM

TENANT ESTOPPEL CERTIFICATE

_____, 20__

Attn: _____

Re: [ADDRESS OF PROPERTY]

The undersigned hereby certifies as follows:

1. The undersigned is the tenant under the lease described in Exhibit A annexed hereto, covering the space in the building known as _____ (the “**Property**”) described on Exhibit A (the “**Premises**”), which lease has not been amended or supplemented (orally or in writing) except as set forth on Exhibit A (as so amended or supplemented, the “**Lease**”). The Lease contain[s] all of the understandings and agreements between Landlord and the undersigned with respect to the Premises.

2. Except as indicated on Exhibit A, the undersigned has not assigned the Lease or sublet all or any portion of the Premises. The undersigned has not pledged its interest thereunder. All items of construction, if any, required to be completed by Landlord as of the date hereof have, to Tenant’s knowledge, been satisfactorily completed in accordance with the terms and conditions of the Lease and any payments, credits, or inducements made or to be made to the undersigned by Landlord as of the date hereof under the terms of the Lease have been fully paid or performed. To the best knowledge of the undersigned, all conditions to the Lease to be performed by Landlord as of the date hereof and necessary to the enforceability of the Lease have been satisfied.

3. The Lease is in full force and effect. As of the date hereof (i) the undersigned has neither sent nor received any notice of default under the Lease and, to the undersigned’s knowledge, there are no defaults under the Lease by either Landlord or the undersigned, nor are there any conditions or events existing which, with or without notice or the lapse of time, or both, could constitute a default under the Lease, and (ii) to the undersigned’s knowledge, the undersigned has no charge, lien, claim or offsets under the Lease against Landlord or the rent or other amounts payable thereunder. The undersigned has not advanced any funds for or on behalf of Landlord for which the undersigned has a right to deduct from or offset against future rent payments.

4. The amount of the security deposit held under the Lease is set forth on Exhibit A. No portion of the security deposit has been utilized or applied by Landlord.

5. The dates of commencement and expiration of the term of the Lease are set forth in Exhibit A. The amount of fixed annual rent is set forth on Exhibit A and all such amounts have been paid through the date set forth on Exhibit A. There exists no present or future concession in

or abatement of rent or other charges payable under the Lease except as set forth on Exhibit A. There are no options to renew or extend the term of the Lease except as set forth on Exhibit A.

6. All additional rent and other charges payable to Landlord under the Lease are described on Exhibit A. Such amounts have been paid through the date set forth on Exhibit A. No fixed rent or other amounts have been paid more than thirty (30) days in advance of their respective due dates.

7. No notice to terminate the Lease has been given or received by the undersigned.

8. The undersigned is not the subject, whether voluntary or otherwise, of any bankruptcy, insolvency or similar proceeding in any federal, state or other court or jurisdiction.

9. To the best of Tenant's knowledge, hazardous wastes or substances have not been treated, stored or disposed of by the undersigned on the Premises except as permitted by the Lease.

10. The undersigned does not have a right or option or right of first refusal pursuant to the Lease or otherwise to purchase all or any part of the Premises or the Property. The undersigned does not have any right or option for additional space at the Property or to cancel or terminate the Lease except as set forth on Exhibit A.

11. Attached hereto as Exhibit B is a true and correct copy of the Lease and all the amendments, modifications, and supplements thereto.

12. The undersigned hereby certifies to the addressees named above the truth and accuracy hereof and acknowledges that such addressees are relying on the terms hereof in consummating the transactions described above.

13. This certificate shall be binding upon the undersigned and its successors and assigns and shall inure to the benefit of and be enforceable by the addressees hereof and their successors and assigns, including any purchaser at a foreclosure sale or any person receiving a deed in lieu of foreclosure.

Very truly yours,

_____, a _____

By: _____

Name: _____

Title: _____

By: _____

Name: _____

Title: _____

EXHIBIT A TO
TENANT ESTOPPEL CERTIFICATE

1. Description of Lease and of each amendment thereto by title, date, and parties:
_____.
2. Space covered by the Lease by rentable square feet, suite number, and floor: As set forth in the Lease.
3. Subleases, assignments or pledges: None.
4. Security deposit: As set forth in the Lease.
5. Dates of commencement and expiration of the term: As set forth in the Lease.
6. Amount of annual fixed rent: As set forth in the Lease.
7. Option for additional space (describe): As set forth in the Lease.
8. Right to cancel or terminate the Lease (describe): As set forth in the Lease.
9. Options to renew or extend the Lease (describe): As set forth in the Lease.
10. Additional rent and other charges (describe): As set forth in the Lease.
11. Date(s) through which fixed rent, additional rent, and other charges have been paid:
_____.
12. Concessions or abatements of rent or other charges: As set forth in the Lease.

EXHIBIT B TO
TENANT ESTOPPEL CERTIFICATE

[SEE ATTACHED LEASE]

EXHIBIT B

**SAMPLE SUBORDINATION NON-DISTURBANCE
AND ATTORNMENT AGREEMENT**

This Instrument Prepared by:

Attention: _____

After Recording Return to:

Attention: _____

For Recorder's Use Only

**SUBORDINATION NON-DISTURBANCE
AND ATTORNMENT AGREEMENT**

THIS AGREEMENT is made as of _____, 20__, by and between _____, having an office at _____ ("**Tenant**"), and _____, having an office at _____, as administrative agent for the Lenders and as a Lender (together with its respective successors and/or assigns, the "**Lender**").

WITNESSETH:

WHEREAS, Lender has provided financing to _____ ("**Landlord**"), for certain real property commonly known as _____ (individually and collectively, the "**Property**");

WHEREAS, the Property is legally described on Exhibit A attached hereto and incorporated herein by this reference;

WHEREAS, under a certain lease dated _____ (the "**Lease**"), Landlord's predecessor-in-interest did lease, let and demise a portion of the Property (such portion of the Property is hereinafter called the "**Premises**") to Tenant;

WHEREAS, Lender is the owner of indebtedness evidenced by that certain Loan Agreement dated as of _____, 20__ (as the same may be amended from time to time, the "**Loan Agreement**") and secured by, among other things, the Security Instrument (as defined in

the Loan Agreement) granted by Landlord to Lender (as the same may be amended from time to time, the “**Security Instrument**”);

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

1. The Lease and all rights and liens created thereby shall be subject and subordinate in all respects to the Security Instrument and the lien created thereby, to any advancements made thereunder, and to any increases, extensions, modifications or renewals thereof, and to any and all sums secured thereby, with the same force and effect as if the Security Instrument had been executed, delivered and recorded prior to the execution and delivery of the Lease. Nothing contained in this Agreement shall in any way impair the lien(s) created by the Security Instrument. Lender may join Tenant as a defendant in any foreclosure action but, for so long as Tenant is not in default beyond any applicable notice and cure period under the Lease or this Agreement, such joinder shall not result in a termination of the Lease.
2. So long as Tenant is not in default under the Lease beyond any applicable grace or cure period, Lender hereby covenants to Tenant that in the event Lender obtains title to the Premises, either by foreclosure or by deed in lieu of foreclosure, and thereafter obtains the right of possession of the Premises, that the Lease will continue in full force and effect, and Lender shall recognize the Lease and Tenant’s rights thereunder, subject to the provisions of this Agreement.
3. Notwithstanding anything to the contrary in the Lease or this Agreement, Tenant agrees that from and after the date hereof, in the event of any act, omission, condition or event which would give Tenant the right, either immediately or after the lapse of a period of time, to cancel or terminate the Lease, to claim partial or total eviction, to exercise any so-called self-help remedy, or to abate or setoff against any or all of the rents, additional rents or other sums payable under the Lease, Tenant will not exercise any such right (a) until it has given written notice of such act, omission, condition or event to Lender in accordance with Paragraph 13 hereof, and (b) until and unless Lender fails to remedy such act or omission within thirty (30) days for any act or omission which can be cured by the payment of money, or in the case of any other act or omission, as long as necessary to remedy such act or omission, provided (i) Lender causes such remedy to be commenced within thirty (30) days, and (ii) Lender causes completion of such remedy to be pursued with due diligence following such giving of notice and following the time when Lender shall have become entitled under the Security Instrument to remedy the same. It is specifically agreed that Tenant shall not, as to Lender, be entitled to require cure of any such default which is personal to Landlord, and therefore not susceptible of cure by Lender, and that no such uncured default shall entitle Tenant to exercise any rights under the Lease with respect to Lender.
4. In the event the interests of Landlord under the Lease shall be transferred to any nominee, designee, assignee of Lender or any purchaser at foreclosure sale or power of sale (“**Lender Party**”) by reason of foreclosure or power of sale, deed in lieu of foreclosure, or similar transaction, Tenant hereby covenants and agrees to make, for the benefit and reliance of

Lender, full and complete attornment to the Lender Party as substitute Landlord upon the same terms, covenants and conditions as provided in the Lease, except to the extent otherwise set forth herein.

5. The provisions of this Agreement are real property covenants running with the Property, and shall be binding upon and inure to the benefit of the respective parties hereto and their respective heirs, executors, administrators, beneficiaries, successors and assigns, including without limitation any Lender Party.
6. Notwithstanding anything contained herein to the contrary, or anything to the contrary in the Lease, Lender and any Lender Party shall not be:
 - (a) liable for any act, omission or the breach of any warranty of Landlord;
 - (b) subject to any offsets, claims, counterclaims, or defenses which Tenant might have against Landlord;
 - (c) bound by any rent, additional rent, or other sums that were prepaid more than one (1) month in advance of the due date thereof;
 - (d) bound by any obligation under the Lease to (x) make any payment to Tenant which was required to be made prior to the time Lender or such Lender Party succeeded to Landlord's interest or (y) make, pay for, or reimburse Tenant for any alterations, demolition or other improvements or work at the Premises, other than ongoing day-to-day maintenance and repairs required to be made by Landlord under the Lease;
 - (e) bound by any amendments or modifications or voluntary termination of the Lease made without Lender's prior written consent, other than exercise of rights, options or elections contained in the Lease;
 - (f) bound by or subject to the provisions of the Lease relating to the collection and application of any (i) condemnation proceeds and/or (ii) insurance proceeds following the occurrence of a casualty at the Property or any portion thereof (and Tenant agrees that the provisions of the Loan Documents [as defined in the Loan Agreement] shall govern the collection and application of all condemnation proceeds and insurance proceeds); or
 - (g) bound to or liable for refund of any security deposit, except to the extent actually received by Lender.

Notwithstanding the provisions of Paragraph 6(a) and Paragraph 6(b) above, from and after the date Lender or any Lender Party succeeds to the interest of Landlord under the Lease, Lender or such Lender Party shall be obligated, subject to the final sentence of Paragraph 3 above, to perform all obligations of the prior landlord under the Lease which accrue on or following the date Lender or such Lender Party succeeds to such interests (including any such obligations which the prior landlord shall have failed to perform, if the same are of a continuing nature, such as

maintenance and repair obligations), and Tenant shall not be considered as having waived its rights to require that Lender or such Lender Party perform the same.

7. Tenant shall not, without the express written consent of Lender:
 - (a) cancel, terminate or surrender the Lease, except as provided therein or in any modification or amendment specified herein or hereafter consented to by Lender;
 - (b) after the date hereof, enter into any agreement with Landlord or its successors or assigns, which grants any concession with respect to the Lease or which materially compromises, discounts or otherwise reduced the rent called for thereunder; or
 - (c) after the date hereof, prepay rent more than one (1) month in advance.
8. Tenant hereby agrees for the benefit and reliance of Lender, that neither this Agreement, nor any assignment of the Lease for collateral purposes, nor anything to the contrary in the aforesaid Lease or in any modifications or amendment thereto shall, prior to Lender's acquisition of Landlord's interest in and possession of the Property (and thereafter, only to the extent of the Property and not personally), operate to give rise or create any responsibility or liability upon Lender for the control, care, management or repair of the Property by any party whatsoever or for any dangerous or defective condition of the Property; or impose responsibility for the carrying out by Lender of any of the covenants, terms and conditions of the Lease or any modification or amendment whether or not hereafter consented to by Lender, or for any negligence in the management, upkeep, repair or control of said Property resulting in loss, injury or death to any tenant, licensee, invitee, guest, employee, agent or stranger. Notwithstanding anything to the contrary in the Lease, Lender, their successors and assigns (and any Lender Party, as appropriate), shall be responsible for performance of only those covenants and obligations of the Lease accruing after Lender's, their successors' and assigns' (or Lender Party's, as appropriate), acquisition of Landlord's interests in and possession of the Property; and in the event that Lender or any Lender Party shall acquire title to the Premises or the Property, Lender or any Lender Party shall have no obligation, nor incur any liability, beyond Lender's or any Lender Party's then equity interest, if any, in the Property or the Premises.
9. In the event that Lender notifies Tenant of an event of default under the Security Instrument (as described therein) and demands that Tenant pay its rent and all other sums due under the Lease directly to Lender, Tenant shall honor such demand and pay the full amount of its rent and all other sums due under the Lease directly to Lender, or as otherwise required pursuant to such notice, beginning with the payment next due after such notice of default, without inquiry as to whether an event of default actually exists under the Security Instrument and notwithstanding any contrary instructions of or demands from Landlord.
10. Tenant agrees that this Agreement satisfies any condition or requirement in the Lease relating to the granting of a non-disturbance agreement.

11. THIS AGREEMENT AND ITS VALIDITY, ENFORCEMENT AND INTERPRETATION SHALL BE GOVERNED BY THE LAWS OF THE STATE IN WHICH THE PROPERTY IS LOCATED AND APPLICABLE UNITED STATES FEDERAL LAW.
12. If any bankruptcy proceedings shall hereafter commence with respect to Landlord, and if the Lease is rejected by the trustee pursuant to Section 365 of the United States Bankruptcy Code, Tenant agrees with Lender that, if Lender or any Lender Party obtains title to the Premises, either by foreclosure or by deed in lieu of foreclosure or otherwise, Tenant, upon request by Lender or a Lender Party, shall (i) not treat such lease as terminated or execute a new lease with Lender or any Lender Party on the same terms as the Lease, and (ii) remain in possession of the Premises.
13. Any notices hereunder shall be effective upon mailing by certified mail, return receipt requested, or delivery by a nationally recognized overnight courier addressed to the recipient at its address set forth in the preambles hereof or as to each party, to such other address as the party may designate by a notice given in accordance with the requirements contained herein.
14. This Agreement contains the entire agreement between the parties hereto. This instrument may be executed in multiple counterparts, all of which shall be deemed originals and with the same document. Signature and acknowledgment pages may be detached from the counterparts and attached to a single copy of this document to physically form one document.

[Signature Page to Follow]

IN WITNESS WHEREOF, the parties hereto have executed these presents as of the day and year first above written.

LENDER:

By: _____

Name:

Title:

TENANT:

By: _____

Name:

Title:

STATE OF _____)
) ss.:
COUNTY OF _____)

On the ____ day of _____ in the year 20__ before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

STATE OF _____)
) ss.:
COUNTY OF _____)

On the ____ day of _____ in the year 20__ before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Given under my hand and Notary Seal, this ____ day of _____, 20__.

Notary Public (SEAL)

EXHIBIT A TO SNDA
LEGAL DESCRIPTION