

**SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENTS:  
Meeting the Legitimate Goals of Landlords, Tenants and Lenders; Negotiation Techniques**

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In the course of negotiating leases, one of the issues most often left for the end of the process is the priority of the tenants' rights relative to present and future property financing. Similarly, in the course of negotiating and closing real estate secured loans, one of the issues most often left for the end is the priority of the loan security relative to existing and future tenants' rights.

Why are these issues often left for the end? Human nature, perhaps. When the landlord and the tenant are negotiating a lease, they are focused primarily on reaching agreement on the financially significant business terms of their lease, relative to each other, and do not have specific lender requirements on the table, unless the existing lender has already provided them to the landlord in any existing loan documents, which is not usually the case, or unless specific covenants already exist in the loan documents. The rights of landlord's lender upon "some future financing," as the landlord may view it, or upon a foreclosure of landlord's property are just not paramount in the minds of either landlord or tenant during lease negotiations. This is likewise true for a property owner and the secured lender that are negotiating or closing the loan, relative to the rights of tenants or of other secured creditors. In each case the immediacy of the principal parties' concerns relative to one another is more significant than their concerns regarding third parties. In each case, however, wise parties (translation: parties with considerable leasing and/or lending experience or parties represented by competent legal counsel) will ensure that they do focus on the rights of the affected third parties early enough to consider carefully the benefits that all can gain from doing so.

The subordination, non-disturbance and attornment agreement (commonly abbreviated as an "SNDA agreement") is the document that the landlord, tenant and lender often employ to resolve how their rights do and will intersect. As its name infers, the SNDA agreement addresses how and when the rights of tenants will be subordinate to the rights of lenders or, sometimes at lender's option, senior to the rights of lenders. It assures tenants that their rights to their premises will be preserved (that is, "non-disturbed") on defined conditions within their control, even if the landlord defaults on its loan and the lender forecloses. The final component of the SNDA agreement assures a lender, generally, that the tenant will attorn to (that is, confirm privity of contract by agreeing to continue as tenant of the new landlord) the lender or a purchaser following a foreclosure, and that, often but not always, the lender or such purchaser will have certain specified rights thereafter. The SNDA agreement also can be used to confirm or modify rights and obligations far beyond those that are summarized in this paragraph.

Virginia, for foreclosure purposes, is what is often called an "automatic foreclosure" state. A trustee's sale under a deed of trust (which frequently is referred to as a "foreclosure") in an automatic foreclosure state terminates all property interests, such as leases, that are junior in priority to the deed of

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trust.<sup>2</sup> Appendix 1 contains a chart, provided in an article written in 1989, regarding which states are “automatic foreclosure” states – it is about half of the country -- and which states allow a lender to “pick and choose” the leases it wants to retain upon foreclosure. This chart is useful in determining preliminarily, at least, the lease termination law applicable upon foreclosures in other jurisdictions, either when negotiating leases or loans governed by the laws of those states or when researching these legal issues further. For example, according to the chart, the District of Columbia is also an automatic foreclosure jurisdiction, while Maryland allows lenders to pick and choose. While determining which legal approach to foreclosure applies in the jurisdiction where the property is located obviously is significant in determining what one’s client wants to or can accomplish in negotiating its legal documents, it merely sets the stage on which the key players – usually a lender, a landlord and the tenant(s) – have the power and ability to negotiate the priorities of loans and leases relative to each other.

## I. PURPOSES AND TYPICAL OBJECTIVES OF THE PARTIES IN AN SNDA:

To understand the usefulness of subordination, non-disturbance and attornment agreements, first consider that, without SNDA agreements and, as to some states, ignoring any statutes affecting the rights of, mainly, lenders and tenants upon a foreclosure, the priorities of the lender, tenant and landlord would be determined solely on the basis of the concept of first in time priorities. That is, a tenant that had notice of an existing deed of trust (including, of course, the constructive notice deriving from recordation) and then signed a lease would be subordinate to the terms of the deed of trust and, thus, the rights of the lender therein; a foreclosure of that deed of trust would foreclose the rights of the tenant also. However, a lender that had notice of an existing lease would be subordinate to the terms of the lease, therefore a foreclosure would not foreclose the rights of that existing tenant. In other words, the results would be easily determinable, but, in a sense, random, in that only priority in time, and not any good business reasons, would determine whether a tenant would retain or lose its use of its leased premises, or whether a foreclosure would terminate or leave standing a tenant’s rights.

By executing an SNDA agreement, the three interested parties can agree on how to “de-randomize” the effects of a foreclosure, refinance or sale of secured and leased property on their respective legitimate business objectives. How and when does the need for an SNDA agreement become an issue? First this paper will examine the lender’s considerations and objectives, which usually are a driving consideration in the SNDA agreement negotiations. Adverse positions that a landlord or tenant might take will become obvious as to many of the lender’s preferences that are presented. Subsequent sections will focus more on the considerations and objectives of the tenant and of the landlord.

### A. Lender Considerations and Objectives

The owner of real property containing nonresidential leases will determine, at some point, that it wants or needs a new loan, and will know or learn that the prospective lender requires any loan to be secured against the real estate. As a key component of the lender’s evaluation of the creditworthiness of the landlord, the lender carefully will examine the value of the property as collateral. The property’s value, in turn, will be determined in large part by the revenues generated from the tenant leases on the property. The lender therefore will take lease revenues into account, but also will want assurances that those revenues will both remain in effect for a substantial period of time and will be available to a prospective foreclosure purchaser in the event that the landlord defaults in its loan obligations to the lender.

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<sup>2</sup> See, e.g., Schmidt & Wilson v. Carneal, 164 Va. 412, 180 S.E. 325 (1935) and Nagle v. Syer, 150 Va. 508, 143 S.E. 690 (1928). See, generally, 13A MICHIE’S JURISPRUDENCE, *Mortgages and Deeds of Trust* § 136.

The lender will likely review the tenant leases upon the property, or at least those that are most significant to its credit evaluation, to determine their key provisions relating to rent amount and duration; they may also look for any lease provisions providing for automatic subordination and attornment obligations of the tenants, and for any obligations of the tenants to sign estoppel certificates.<sup>3</sup> Then, the lender will require that the landlord procure tenants' signatures on the lender's own required or preferred forms of estoppel certificates and, when any material leases predate the prospective loan, of subordination and attornment agreements (whether use of the lender's forms is "required" or merely "preferred" is usually determined by the bargaining power and position of the landlord relative to the lender). Notice, though, the desire of the lender to procure "subordination and attornment" agreements, not "subordination, non-disturbance and attornment" agreements. The lender's main objectives are (1) to re-prioritize the leases into either fully subordinate or electively subordinate positions relative to the deed of trust to be recorded and any subsequent amendments, modifications and extensions of it, and (2) to ensure that the tenant is committed to recognize the lender or any purchaser at foreclosure (i.e., to attorn). Nondisturbance often is not offered by the lender in its suggested form of agreements, even if, or occasionally because, nondisturbance already is required under the leases<sup>4</sup>. This sets up part of the tension in the negotiations: the tenant will not want to sign anything it is not already required to sign unless, for starters, the lender will agree that the tenant need not fear the loss of use of the premises.

An excellent example of the kind of analysis that lenders employ, and how one prospective lender attempted to protect itself regarding maintaining the value of key tenants, appears in Teachers Insurance and Annuity Associates of America v. Ocwen Financial Corporation.<sup>5</sup> In Teachers, Teachers sought to sell its existing \$125 Million loan secured by the property to Ocwen, which viewed the recent termination of the owner's master tenant as a likely termination of the subtenants, and thus a major negative impact on the value of the collateral for the loan. Ocwen agreed to purchase the loan only if TIAA produced nondisturbance and attornment agreements ("NDA's") from twenty-eight (28) key subtenants, out of the approximately 100 subtenants at the mall. Teachers could not get all 28 NDAs, so it offered a guarantee from Teachers instead. Ocwen declined to accept this as sufficient assurances. The Court held that Ocwen's position was reasonable, and awarded Ocwen its deposit back.

Occasionally, but not often, the leases attach forms of these agreements. Also occasionally, and more often, the leases contain provisions specifying what each tenant is required to sign. In either event, though, quite often the lender will attempt to procure, or will require that the tenants sign, more pro-lender documents than the tenant is required by its lease to sign. Appendix 2 contains examples of the type of provision that one might find in an office or retail lease, addressing subordination and attornment and, then, nondisturbance. Note, in this provision, that the lender retains the right to subordinate its mortgage to the lease. By this mechanism, the lender retains the lease despite a foreclosure. It is suggested that a well-drafted SNDA could accomplish the same objective in Virginia without this mechanism, simply by rendering the lease subordinate but providing both nondisturbance for the tenant

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<sup>3</sup> An estoppel certificate is a written confirmation by a tenant, for the benefit of the landlord and, often, the landlord's lender, regarding the business terms and conditions of its lease, including its then-current status as being not in default. These certificates, while themselves often subject to negotiation in a wisely prepared lease, will not be discussed in this presentation.

<sup>4</sup> Lenders and landlords sometimes will take the position that the covenant of quiet enjoyment that usually is included in the lease constitutes a nondisturbance provision. Sometime this is correct. More typically, however, it is not, if the quiet enjoyment provision is expressed to be "subject to all other terms and conditions of this Lease." Such language renders the covenant subject to the subordination language in the lease, which allows a lender to eliminate the lease upon foreclosure.

<sup>5</sup> 98 Civ. 7137 (BSJ), 2002 U.S. Dist LEXIS 2560 (S.D.N.Y February 19, 2002).

and compelling it to attorn to the foreclosure purchaser; it may be, however, that in other states this mechanism is a safer approach. Another approach that Joshua Stein suggests<sup>6</sup> is that,

in an “automatic cut-off” state, a lender may want to defer the question of relative priority to a later date. It can achieve this by including provisions in an SNDA (for an existing lease) or in the mortgage itself (for future leases) or in the borrower’s standard form of lease (also for future leases) that allow the lender unilaterally to elect to subordinate its lien to any given lease at any time.... A lender might favor language like the following:

“Subordination Election” shall mean a written election by any Lender in which such Lender elects that the Lease shall have priority, in whole or in part (as identified by such Lender in the Subordination Election), over such Lender’s Mortgage.

*Optional Priority.* Any Lender may make a Subordination Election at any time. If Lessor or a Lender provides Lessee with or records a Subordination Election, then such Lender’s Mortgage shall become subordinate to the Lease, whether the Lease is dated before or after the date of such Mortgage, except as to matters (such as the Loss Provisions) identified by Lender in the Subordination Election. A Lender may unilaterally retract any Subordination Election. The relative priorities of the Lease and such Lender’s Mortgage shall then be restored as they were immediately before the Subordination Election.<sup>7</sup>

A lender’s exercising this type of flexibility properly can be an issue, however. The lender did have this type of election available to it in the leading case of Dover Mobile Estates v. Fiber Form Products<sup>8</sup>— California, like Virginia, being an automatic foreclosure state -- but failed to exercise its election timely, and thus was deemed to have foreclosed, and lost the lease. In Dover, the lease’s subordination clause rendered the lease subordinate to the mortgage, but provided that lender had the right to reverse subordination at its election, thus making the lease senior and keeping it in effect despite foreclosure. The lender foreclosed, and sought to enforce the lease, claiming that by doing so it was electing to reverse the subordination. The court held, however, that by failing to give the tenant notice of its election before the foreclosure, it had foreclosed the lease before exercising its rights under it, and the tenant was not bound to remain in the space. The lender could not leave the tenant hanging, it held.

While Dover seems to make good sense, to show the type of uncertainty that good drafting might be able to avoid, consider also the subsequent cases of Miscione v. Barton Development<sup>9</sup> and Principal Mutual Life Insurance v. Vars, Pave, McCord & Freedman.<sup>10</sup> Both cases cited but distinguished Dover. In Miscione, the lender had the right, as in Dover, to make the lease senior, and did not do so before foreclosure. However, it was allowed to enforce a junior lease after foreclosure because, the court ruled, the attornment clause in the lease obligated tenants to attorn to future foreclosure purchasers, thus reading

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<sup>6</sup> Joshua Stein, The Logic of Subordination, Nondisturbance, and Attornment Agreements: Overview and Some Questions, procured from author, but believed to have been published in 1 COMMERCIAL REAL ESTATE FINANCING: WHAT BORROWERS AND LENDERS NEED TO KNOW NOW 2000 (PLI Real Estate Law and Practice Course, Handlook Series No. 456, 2000), at Sections 1.3 and 1.4.

<sup>7</sup> This sample language assumes all capitalized terms have already been defined as necessary. For sample lease language on “unilateral subordination,” please see the “Lender Protection Lease Rider” prepared by Joshua Stein and included in the 2001 PLI program book on Commercial Real Estate Financing.

<sup>8</sup> 270 Cal. Rptr. 183 (Cal. App. 1990).

<sup>9</sup> 61 Cal. Rptr. 2d 280 (Cal. App. 1997).

<sup>10</sup> 77 Cal. Rptr. 2d 479 (Cal. App. 1998).

the attornment agreement as a non-disturbance agreement. In Principal Mutual, on facts similar to Miscione, except that the landlord had been asked and had refused to provide a non-disturbance provision in the lease, the California court again ruled that the attornment agreement bound the tenant to execute a new lease with the foreclosure purchaser, even if the original lease had been terminated by foreclosure. The court reached this seemingly anomalous result by determining that under California law the foreclosure purchaser was a third party beneficiary of the lease. It is suggested that the law of third party beneficiaries in Virginia may not be so broadly construed,<sup>11</sup> and that a foreclosure would terminate any rights in a lease that were not stated to survive a foreclosure or otherwise be intended expressly for the benefit of third parties that are specified either by name or description.

Lenders also frequently have additional objectives in modifying the rights of tenants, beyond those described above, all of which the lenders assert will improve the value of the collateral. Many lenders see the attornment components of SNDA agreements as a means to create additional provisions governing the relationship with the tenant if the lender or a new landlord succeeds the original landlord following a foreclosure, or even prior to a default. These may be requested or required in proposed SNDA agreements to be signed by existing tenants as well as being required, by loan covenants, for all future leases. Typical provisions that a lender may want to add include<sup>12</sup>:

1. the tenant's waiver of claims against the lender for landlord defaults that occurred under the lease prior to foreclosure;
2. the tenant's waiver as to the lender of any offsets or defenses that the tenant may have against any prior landlord;
3. an agreement that the tenant will give the lender notice of any default under the lease and will permit the lender some additional time to cure the default (a tenant can sometimes limit this, however, to cure period that is concurrent with the landlord's cure period);
4. a prohibition against any assignment or subleasing without the lender's prior written consent;
5. a statement that the lender will not be responsible to return any security posted with the prior landlord unless actually received by the lender; and
6. a statement that the lender will not be bound by lease amendments and rent reductions made without the lender's prior approval.

Lenders may also use attornment agreements to "clean up" the lease, to ensure that the lease will not conflict with certain loan provisions required by the lender in its loan documents with the landlord, and to add obligations not found in the original lease or to require tenant waivers of rights that do appear in the lease or exist by law. These type of clean-up or additional issues could include:

7. obtaining the tenant's concurrence that, notwithstanding any contrary provisions in the lease, all insurance proceeds from a casualty, and/or proceeds from a

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<sup>11</sup> See, e.g., Valley Landscaping v. Rolland, 218 Va. 257, 237 S.E.2d 120 (1977), which held that a third party beneficiary must not be merely inferred but rather must be "clearly intended" from the language of the document from which its claim derives.

<sup>12</sup> The following list derives from Thomas C. Homburger and Lawrence A. Eiben, Who's on First --- Protecting the Commercial Mortgage Lender: A Lender's Overview of Subordination, Nondisturbance, and Attornment Agreements, 36 REAL PROPERTY, PROBATE & TRUST JOURNAL 411, 424 (Fall, 2001).

condemnation, will be applied first to the outstanding loan balance, as provided in the loan documents;

8. requiring the tenant to indemnify the lender against any liability that the lender may incur by reason of any environmental contamination on the leased premises caused by the tenant,<sup>13</sup> and, correspondingly, the tenant's waiving the right to enforce landlord warranties after a foreclosure with respect to contamination from hazardous materials<sup>14</sup>;

9. the tenant's waiving the right to be credited for prepaid -- or even any timely paid -- rent, including the tenant's prepaid estimated charges for its pro rata share of common area maintenance, repairs, and real property taxes, and to recover its security deposit from a foreclosure purchaser upon expiration of the lease term;

10. the tenant's waiving the right to right to demand completion of tenant and/or common area improvements by the foreclosure purchaser or payment of a tenant improvement allowance for improvements made to the premises, and/or the right to free rent;

11. the tenant's waiving the right to enforce landlord warranties in the lease regarding use, zoning, and title;

12. the tenant's waiving the right to a purchase option;

13. the tenant's waiving the right to rent abatement in specified circumstances, or the right to terminate the lease prior to expiration of the term upon the occurrence of certain events;

14. the tenant's waiving the right to enforce the remedies under its lease for the acts or omissions of the delinquent landlord;

15. the tenant's waiving the right to offset rent or raise defenses under its lease, even to the extent these rights against the landlord may arise subsequent to a foreclosure; and

16. the tenant's waiving the right to look to the personal liability of the foreclosure purchaser for claims under the lease arising even subsequent to a foreclosure.

All of these are intended to allow a lender upon foreclosure, or another foreclosure purchaser, to take over the landlord's position in the property without inheriting, or needing to account for or risk losses or expenses due to, problems or obligations of the prior landlord. A well-represented lender will likely seek to negotiate for as many of these provisions as its borrower, the landlord, will allow, subject only to its own evaluation of what may be overreaching and to a recognition of whether there exist current tenants whose rights could not be adversely affected; even in the latter event, however, a lender could impose new requirements on leases to be signed thereafter.

The above-listed types of lender efforts to impose new requirements or limitations on the tenants' existing rights will often reach the point, however, where tenants that have no previously existing lease-mandated obligations to accept these attempts by lenders will rebuff the attempts because of their actual or potential costs to the tenants. Once the lender and tenants reach this "tension point" in their negotiations, their being represented by competent counsel who understand these issues, and the relative bargaining power and positions of the parties, is all the more valuable. These lists of lender-desired

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<sup>13</sup> *Id.* At 424, 425.

<sup>14</sup> The last part of this numbered item, and the subsequent numbered items, derive from David P. Kassoy, *The Tension Between Lenders and Credit Tenants over SNDAs*, 23 LOS ANGELES LAWYER 16, 18 (Jan. 2001).

requirements or requests will be used in discussing the considerations and objectives of the other parties also.

#### B. Tenant Considerations and Objectives

The tenant's role usually is a reactive one, though this is not the case when, for example, a landlord courts a new anchor-type tenant for a property that already has its financing in place. In the latter situation, the tenant may have significant bargaining power and, consequently, the ability to negotiate away many or all of the waivers and other intrusive provisions that the lender's loan documents or policies may demand: after all, if a major prospective anchor tenant dislikes the requirements that the landlord is imposing due to its lender's demands, the prospective tenant has the ability to find a different (read: competing) site. It also is not reactive when a prior lease (for a master lease, for example, or for a key anchor tenant in a shopping center) contains provisions that have given a tenant the power to reject subordination altogether, or to accept subordination only on very narrowly defined and pro-tenant terms. In such situations, a tenant may be able to negotiate to sign only a non-disturbance and attornment agreement, and might require that the lender acknowledge and agree to it.

In the more typical situation, though, an in-place tenant may find itself asked to sign estoppels and SNDA agreements that it perceives to be overreaching or unfair. Essentially, and usually unless the tenant is a co-owner of the property, the tenant merely wants to be left alone to operate its business, and has no great interest in the landlord's loan negotiations. Logically, therefore, the tenant's objective is to sign whatever the landlord and lender want it to sign that confirms any provisions requiring subordination that are already in its lease, and to ensure that any such document includes agreements flowing back to the tenant that it will not be evicted following a foreclosure. The tenant has no interest, however, in signing most of the waivers and cleanup provisions described in part IA, above, if doing so was not already required by the terms of the lease. The well-informed and/or well-represented tenant, if it had average or better bargaining power when it negotiated its lease, will not have accepted a lease that contained any of such provisions except, perhaps, for the first 5 or 6 (see page 5, above), which are commonly included in well-drafted lease forms, due either to existing requirements of the landlord's financing or to the knowledge of landlords that lenders are likely to require such agreements from tenants in any subsequent financing.

In the typical situation of a tenant's being presented with an SNDA agreement to sign after a lease already is in place, often the imprecision or deliberate vagueness of the existing lease provisions, regarding the tenant's obligations to subordinate its position and to attorn and its right to receive nondisturbance confirmations or agreements, leaves open to debate the fairness of SNDA language that a lender may request. This requires the tenant, in preparing to negotiate its best available position, to perform a cost-benefit analysis to estimate the likely costs of refusing certain provisions and the benefits of retaining the bargain that it thought it had made originally. A tenant faced with unclear language in its lease, such as language that often appears and that without much or any elaboration states that the "tenant will execute such subordination [and attornment] agreements as landlord or its mortgagee may request from time to time," has little guidance regarding how to proceed, and can only consult with experienced commercial real estate brokers and attorneys in its area to seek to determine what may be considered a reasonable negotiating position.

#### C. Landlord Considerations and Objectives

The landlord generally has one consideration: to get "the deal" done, whether the deal is a lease or a loan, and its focus will vary accordingly. The landlord may be required already, by very specific existing loan covenants, to procure certain types of commitments from future tenants, such as those listed above in Section IA, items 1 through 16. If this is the case, then the landlord's obligations to its lender

likely will drive its efforts to procure certain types of SNDA terms. Furthermore, loan documents will often contain requirements for provisions that are necessary in leases that it will approve, or that leases will not need to be submitted for lender approval if they contain certain provisions. The following separate provisions that a lender and landlord negotiated in one loan agreement in an office building financing are typical, for example:

**Lease Form** : The standard form of lease to be used by Borrower for all leases relating to the Project, which has been approved by Lender as of the Closing Date, and as the same may, from time to time thereafter, be amended by Borrower with the approval of Lender.<sup>15</sup>

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**Qualified Leases** : Leases of portions of the Project which: (a) (i) are on the Lease Form, without material deviation therefrom, (ii) are in conformity with the Leasing Guidelines, (iii) are for not more than 5,000 square feet of space, (iv) are not with an Affiliate of any Borrower Person, or (b) are otherwise approved by Lender as set forth in Section 7.4.

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**7.4 Restriction on Leases** . Except for Qualified Leases, Borrower shall not, without the prior written consent of Lender, enter into any Lease or other rental or occupancy arrangement or concession agreement with respect to the Project or any portion thereof. Lender shall have ten (10) Business Days from the date of receipt from Borrower of: (a) the proposed lease; (b) a credit report from a reputable reporting agency, for the proposed tenant, (c) financial statements of the proposed tenant, (d) and such other documents and instruments as Lender may reasonably request with respect to any such proposed lease or other rental or occupancy arrangement or concession agreement (the “**Proposed Lease Materials**”), in which to approve or disapprove of the proposed lease. If Lender does not approve of such lease, Lender shall notify Borrower within said ten (10) Business Day period advising Borrower of such disapproval. If Lender fails to give its approval or disapproval within ten (10) Business Days from the date of its receipt of all of the Proposed Lease Materials, Lender shall be deemed to have consented to such proposed lease. Borrower shall not modify, amend or terminate (except upon a default by a tenant) or accept the termination of, any Leases affecting any part of the Project, without Lender’s consent.

Knowing the landlord’s lender’s requirements, the landlord will be able to proceed to negotiate leases that it knows either will be acceptable to its lender or will need to be approved specially by its lender. With language like this, vagueness in what an SNDA agreement must or can require of a tenant can be avoided; however, the negotiations between the landlord and the lender whose money it wants and needs become critical in ensuring that the landlord retains a reasonable amount of flexibility in what it must require of tenants in its future leasing efforts.

A landlord negotiating with its lender for loan documents should avoid simply accepting all the lender’s requirements, without first putting itself into the shoes of a prospective tenant to try to sense what may constitute overreaching. If a landlord does not anticipate the tenant’s likely concerns, or is too rushed or financially pressed at the time of financing to do so, it will often find that it is unable to achieve adequate leasing of its property due to the harshness of those requirements, thus requiring additional negotiations with a lender that believes that the landlord already made its deal and should not be

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<sup>15</sup> Author’s note: The “Lease Form” would be expected to contain whatever SNDA language the lender and landlord agree will be required in leases.



“renegotiating.” If repeated often enough, this pattern will likely signal the start of a stressful relationship between the landlord and the lender and, perhaps ultimately, a troubled if not financially failing project.

Even if the landlord is not required by existing loan covenants to procure any particular types of lender-favoring SNDA or other covenants from a tenant, nonetheless the wise landlord will give close consideration, in negotiating a lease, to including language to address the anticipated requirements of a future lender. The landlord should recognize the rationale behind many lenders’ most typical requirements or objectives, and recognize also that many of them may also not only make the landlord’s property more financeable but also more readily marketable by virtue of their improved financeability. The type of language that a landlord could negotiate to include in a proposed lease could range all the way from very general language, such as obligating the tenant “to execute and deliver such documents as the lender or any third party purchaser at foreclosure may require in its sole discretion,” which could be quite a basis for contentious negotiations due to the lack of specificity of what is to be required, to specific language that the tenant agrees to execute and deliver, such as, optimally for the sake of certainty, attaching a form SNDA to the lease. In between the two opposite poles described above exist a broad range of options that a landlord may consider to be fair and reasonable.

Some form SNDA agreements are attached hereto, as Appendices 3 (a basic and simple form SNDA agreement), 4 (a pro-lender form SNDA agreement), 5 (the New York State Bar Association’s model form), 6 (a basic and simple SNDA agreement involving a ground lessor, lessee and lender), 7 (an SNDA agreement involving a lease of rooftop antennas, a building owner and its lender) and 8 (SNDA provisions for use in leases with federal government), for your review and consideration.<sup>16</sup> Different landlords, and different markets, both geographically and in terms of changing degrees of competition, can dictate the use of differently proposed SNDA agreements or lease language.

#### D. RELATED CONSIDERATIONS AND CONCLUSION

Other situations can give rise to other considerations of how SNDA agreements may be used in circumstances that are similar in many respects, but not necessarily all, to the positions of a lender, tenant or landlord as discussed above. Ground lessors of subleased properties, for one example, may also become involved in issues pertaining to SNDA agreements. If a ground lessor were leasing property on which a building or mall is built, then its position would be analogous to the position of a lender, in that it would want assurances from the ground lessee’s (tenant’s) subtenants that if the ground lessee defaulted on its ground lease or its financing documents, the ground lessor could step into the ground lessee’s shoes, cure the loan default (if that is what had occurred) and the subtenants would attorn. This is illustrated in part by Appendix 6, for example. Generally stated, a ground lessor’s interests are similar to those of a landlord/owner. However, a ground lease may often be a long-term commitment that obligates the ground lessor to subordinate its ownership to, or even to join in deeds of trust securing, the financing obligations of its ground lessee. Because the nature and extent of a ground lessor’s interests can be so extremely variable, it is not useful to hypothesize particular interests that a ground lessor may have.

Rooftop antenna leases create another slightly different situation, as demonstrated in Appendix 7, for example. In this situation, the purchaser of the leases (or, in slightly different circumstances, each antenna tenant) has interests that align most closely with those of the tenant in the more typical situation as described in part I.

For leases between a property owner and the federal government as a tenant – often, the General Services Administration – the SNDA provisions appearing in the Code of Federal Regulations usually are

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<sup>16</sup> While the author has developed and/or used some of these, others derive from other sources as noted in the SNDA agreements themselves.

required, as shown in [Appendix 8](#). There is no irony in noticing that when the federal government is the tenant, the deal it makes with its initial landlord is the deal it will maintain throughout any foreclosures or other changes in ownership: the SNDA provisions in C.F.R. contain absolutely no lender cleanup provisions of the kind discussed in part IA above. One presumes that the absence of such provisions is the result of the bargaining power of this tenant.

Note, also, that subordination agreements, though not SNDA agreements, also can be used to resolve priorities between creditors in creditor-creditor arrangements.<sup>17</sup> While the analysis applicable to intercreditor agreements is similar in rationale to that applicable to SNDA agreements relative to leasing, such agreements could be wholly unrelated to any leases.

In conclusion, the advantageousness or disadvantageousness of the terms of the SNDA agreement that a party will sign derives entirely from the relative bargaining power of the party. Its bargaining power, in turn, can derive from its legal position, which is established by the lease and/or loan documents that it has in place prior to the negotiations, if any, or from its desirability as a tenant, which is purely a financial analysis, or from a combination of the two. For most non-anchor tenants and for most landlords being asked to sign an SNDA agreement, the optimum position is to have in place clear and appropriate existing documents that are likely to be acceptable to the future lender, which removes most of the uncertainty from what can be required. For most lenders, the optimum position as to future tenants of the lender's customer/landlord is to specify in the loan documents – the deed of trust being the best of all – precisely what will be required of future tenants in terms of SNDA agreements. Each of these “best-case” scenarios is best established by good planning and good legal representation.

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<sup>17</sup> See, e.g., [In re Lantana Motel](#), 124 B.R. 252 (U.S. Bankr. Ct. S.D. Ohio 1990), for a good analysis of intercreditor debt subordination issues in a particular situation, containing general principles worth understanding in the SNDA context. (“Here the Court is asked to construe the intent and scope of Subordination Agreements which are so unskillfully crafted that meaningful interpretation approaches the impossible.” [Id.](#) at 255.)

## Appendix 1<sup>1</sup>

### EFFECT OF FORECLOSURE ON LEASES SUBSEQUENT (SUBORDINATE) TO TRUST DEED OR MORTGAGE

	Terminated Only If Lessee Made a Party to Foreclosure <u>Action (Pick-and-Choose)</u>	Terminated Whether Lessee Made a Party or Not (Automatic)
ALABAMA	Note 1	
ALASKA	X	
ARIZONA	X	
ARKANSAS	X	
CALIFORNIA		X
COLORADO		X
CONNECTICUT	X	
DELAWARE	X	
DISTRICT OF COLUMBIA		X
FLORIDA	X	
GEORGIA		X
HAWAII		X
IDAHO		Note 2
ILLINOIS	Note 3	
INDIANA	X	
IOWA		X
KANSAS	X	
KENTUCKY		X
LOUISIANA		X
MAINE		Note 4
MARYLAND	Note 7	
MASSACHUSETTS		Note 4
MICHIGAN		X
MINNESOTA		X
MISSISSIPPI		X
MISSOURI		X
MONTANA	X	
NEBRASKA	X	
NEVADA	X	
NEW HAMPSHIRE		X
NEW JERSEY	X	
NEW MEXICO	X	
NEW YORK	X	

<sup>1</sup> From Robert D. Feinstein and Sidney A. Keyles, Foreclosure: Subordination, Non-Disturbance and Attornment Agreements, PROBATE AND PROPERTY JOURNAL, July/August, 1989 (Copyright 1989 by the American Bar Association; Robert D. Feinstein and Sidney A. Keyles).

NORTH CAROLINA		X
NORTH DAKOTA	X	
OHIO		X
OKLAHOMA		X
OREGON		X
PENNSYLVANIA	Note 5	
PUERTO RICO	X	
RHODE ISLAND		X
SOUTH CAROLINA	X	
SOUTH DAKOTA		X
TENNESSEE		X
TEXAS	X	
UTAH	X	
VERMONT	Note 6	
VIRGINIA		X
WASHINGTON	X	
WEST VIRGINIA		X
WISCONSIN		X
WYOMING		X

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Note 1: Alabama--Lease terminated only if notice given of foreclosure sale.

Note 2: Idaho--Automatic cut off if lease is unrecorded; if lease recorded, lessee must be made a party.

Note 3: Illinois--If mortgage foreclosure, lessee must be made party; if by power of sale in deed of trust, lease automatically terminates.

Note 4: Maine and Massachusetts--Lease is terminated by entry and possession.

Note 5: Pennsylvania--Lessee does not become a party, but must be served notice of action.

Note 6: Vermont--Debtor retains possession during redemption period.

Note 7: Maryland--If mortgage or deed of trust authorizes and advertisement of sale discloses, sale can be made subject to subsequent (subordinate) leases.

## Appendix 2

### PROVISION IN OFFICE/RETAIL LEASE:

23.1 **Subordination; Nondisturbance.** This Lease is and shall be and remain, as applicable, subject and subordinate to all ground or underlying leases and to any Mortgage(s) which may now or hereafter affect such leases or the Land and to all renewals, modifications, consolidations, replacements and extensions thereof. This subordination shall be self-operative; however, in confirmation thereof, Tenant shall execute and deliver to Landlord within ten (10) days after Landlord's request any instrument that does not contradict the terms of this Lease that Landlord or any Mortgagee may request confirming such subordination. If Tenant fails to timely execute and deliver any such instrument within said time period, then Tenant shall pay to Landlord as additional Rent, within five (5) days after demand therefor, (i) the sum of **[\$per diem interest cost]** for each day beyond the tenth day after request for such instrument until the instrument is duly executed by Tenant and delivered to Landlord, and (ii) all amounts actually and reasonably incurred by Landlord in connection with such delay, including, without limitation, attorneys' fees. Notwithstanding the foregoing, before any foreclosure sale under a Mortgage, or any deed in lieu thereof, the Mortgagee shall have the right to subordinate the Mortgage to this Lease **[by written notice to Tenant not less than \_\_\_\_\_ days prior to such a sale]**, and, in the event of a foreclosure, or any deed in lieu thereof, this Lease may continue in full force and effect and Tenant shall attorn to and recognize as its landlord the purchaser of Landlord's interest under this Lease. Tenant shall, upon the request of a Mortgagee or purchaser at foreclosure, or any deed in lieu thereof, execute, acknowledge and deliver any instrument that does not contradict the terms of this Lease that has for its purpose and effect the subordination of the lien of any Mortgagee to this Lease or Tenant's attornment to such Purchaser; provided, however, that said Mortgagee or purchaser recognizes this Lease and Tenant's right to possess the Premises for so long as [the Tenant is not in default under this Lease beyond any applicable cure period] **[this Lease is not terminated due to Tenant's default and failure to cure within any applicable cure period]**; agrees to perform and assume the obligations and liabilities of the Landlord hereunder; and provides to Tenant an acceptable nondisturbance agreement as set forth herein. Notwithstanding the above provisions, the applicable Mortgagee or successor-in-interest to Landlord shall execute and deliver to Tenant, as promptly as commercially reasonable after Tenant's request, an executed non-disturbance agreement in a commercially reasonable and recordable form, agreeing that such Mortgagee, purchaser in a foreclosure (or by deed in lieu thereof) or other successor-in-interest shall recognize Tenant's (and its permitted designees', assignees' and sublessees') rights under this Lease. In addition, as promptly as commercially possible following Tenant's request, Landlord shall secure for and promptly deliver to Tenant such a non-disturbance agreement recognizing Tenant's (and its designees', assignees' and sublessees') rights under this Lease from each Mortgagee now or at any time hereafter encumbering the Building.

**Appendix 3<sup>18</sup>**

**SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT  
(Simple)**

THIS AGREEMENT dated the \_\_\_\_ day of \_\_\_\_\_, 19\_\_ between [\_\_\_\_ Company], a corporation duly organized and existing under the laws of the Commonwealth of Virginia, having its principal place of business at \_\_\_\_\_ Street, \_\_\_\_\_, Virginia (hereinafter referred to as "Lender"), and \_\_\_\_\_ (hereinafter referred to as "Tenant"),

WITNESSETH:

WHEREAS, Tenant has entered into a lease dated the \_\_\_\_\_ (hereinafter referred to as said lease) leasing certain premises in \_\_\_\_\_, said premises more particularly described in said lease, and

WHEREAS, Lender is the holder of a certain Note in the sum of \$\_\_\_\_\_ secured by a Deed of Trust upon premises of which the leased premises are a portion, the lien of said Deed of Trust being prior to the Tenant's leasehold estate, and

WHEREAS, Tenant desires to be assured of the continued use and occupancy of the premises under the terms of said Lease, and

WHEREAS, Lender agrees to such continued use and occupancy by Tenant provided that by these presents Tenant agrees to recognize an attorn to Lender of purchaser in the event of foreclosure or otherwise.

NOW, THEREFORE, in consideration of the premises and the sum of \$1.00 by each party in hand paid to the other, receipt of which is hereby acknowledged, it is hereby mutually covenanted and agreed as follows:

1. In the event it should become necessary to foreclose the said Deed of Trust or Lender should otherwise come into possession of the premises, Lender will not join Tenant under said lease in summary or foreclosure proceedings and will not disturb the use and occupancy of Tenant under said lease so long as Tenant is not in default under any of the terms, covenants, or conditions of said Lease **[said Lease is not terminated due to Tenant's default and failure to cure within any applicable cure period]**; and has not prepaid the rent except monthly in advance as provided by the terms of said lease **[(although absent another default, Tenant's rights hereunder shall not be disturbed due to any such prepayment, but Tenant shall not be entitled to credit therefor)]**.

2. Tenant agrees that in the event any proceedings are brought for the foreclosure of any such Deed of Trust, it will attorn to the purchaser of such foreclosure sale and recognize such purchaser as the landlord under said lease. Said purchaser by virtue of such foreclosure to be deemed to have assumed and agreed to be bound, as substitute Landlord, by the terms and conditions of said lease until the resale or other disposition of its interest by such purchaser, except that such assumption shall not be deemed of itself an acknowledgment of such purchaser of the validity of any then existing claims of Tenant against the prior Landlord. All rights and obligations herein and hereunder to continue as though such foreclosure proceedings had not been brought, except as aforesaid. Tenant agrees to execute and

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<sup>18</sup> Form prepared by other counsel in prior CLE materials several years ago but slightly edited thereafter; source no longer known.

deliver to any such purchaser such further assurance and other documents, including a new lease upon the same terms and conditions as the said lease, confirming the foregoing as such purchaser may reasonably request. Tenant waives the provisions of any statute or rule of law now or hereafter in effect which may give or purport to give it any right or election to terminate or otherwise adversely affect the said lease and the obligations of Tenant thereunder by reason of any such foreclosure proceeding.

3. The provisions of this Agreement are binding upon and shall inure to the benefit of the heirs, successors, and assigns of the parties hereto.

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

\_\_\_\_\_ Company

By: \_\_\_\_\_

\_\_\_\_\_, Tenant

By: \_\_\_\_\_

The terms of the above Agreement are hereby consented and agreed to.

\_\_\_\_\_, Owner and Landlord

By: \_\_\_\_\_

Appendix 4<sup>19</sup>

**SUBORDINATION, NONDISTURBANCE AND ATTORNMENT AGREEMENT**

(Sample Pro-Lender Form)

NOTICE: THIS SUBORDINATION, NONDISTURBANCE AND ATTORNMENT AGREEMENT RESULTS IN YOUR LEASEHOLD ESTATE IN THE PROPERTY BECOMING SUBJECT TO AND OF LOWER PRIORITY THAN THE LIEN OF SOME OTHER OR LATER SECURITY INSTRUMENT.

THIS AGREEMENT is entered into by and among Tenant, Landlord, and Beneficiary and affects the Property described in Exhibit A attached hereto. The terms “**Tenant**,” “**Landlord**,” “**Beneficiary**,” “**Premises**,” “**Lease**,” “**Property**,” “**Loan**,” “**Note**,” and “**Mortgage**” are defined in the Schedule of Definitions attached hereto as Exhibit B<sup>20</sup>. This Agreement is entered into with reference to the following facts:

- A. Landlord and Tenant have entered into the Lease covering the Premises in the Property.
- B. Beneficiary has agreed to make the Loan to Landlord to be evidenced by the Note, which Note is to be secured by the Mortgage covering the Property, provided that the Lease is subordinated to the lien of the Mortgage.
- C. For the purposes of completing the Loan, the parties hereto desire expressly to subordinate the Lease to the lien of the Mortgage, it being a condition precedent to Beneficiary’s obligation to consummate the Loan that the lien of the Mortgage be unconditionally and at all times prior and superior to the leasehold interests and estates created by the lease.
- D. Tenant has requested that Beneficiary agree not to disturb Tenant’s possessor rights in the Premises in the event Beneficiary should foreclose the Mortgage; provided that Tenant is not then in default under the Lease [**and have failed to cure within any applicable cure period**]; and provided further that Tenant attorns to Beneficiary or the purchaser at any foreclosure or trustee’s sale of the Property.

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

- 1. **Subordination.** Notwithstanding anything to the contrary set forth in the Lease, the Lease and the leasehold estate created thereby and all of Tenant’s rights thereunder shall be and shall at all times remain subject, subordinate and inferior to the Mortgage and the lien thereof, and all rights of Beneficiary thereunder and to any and all renewals, modifications, consolidations, replacements and extensions thereof.
- 2. **Nondisturbance.** If it becomes necessary to foreclose the Mortgage, Beneficiary shall neither terminate the Lease nor join Tenant in summary or foreclosure proceeding so long as Tenant is not

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<sup>19</sup> Slightly edited/modified version of form prepared by or for Pamela L. Westhoff, Esquire, of O’Melveny & Myers LLP in Los Angeles, California. In considering this form, recall that California is an automatic foreclosure jurisdiction.

<sup>20</sup> Note: no exhibits referenced in this Agreement are attached here.



in default under any of the terms, covenants, or conditions of the Lease [**beyond any applicable cure period**];.

3. **Attornment.** Tenant shall attorn to and recognize any purchaser at a foreclosure sale under the Mortgage, any transferee who acquires the Premises by deed in lieu of foreclosure, and the successors and assigns of such purchaser(s), as its landlord for the unexpired balance (and any extensions, if exercised) of the term of the Lease on the same terms and conditions set forth in the Lease.

4. **Acknowledgment and Agreement by Tenant.** Tenant acknowledges and agrees that:

(a) Beneficiary would not make the Loan without this Agreement;

(b) It consents to and approves the Mortgage and the agreements evidencing and securing the Loan; and

(c) Beneficiary, in making any disbursements to Landlord, is under no obligation or duty to oversee or direct the application of the proceeds of such disbursements, and such proceeds may be used by Landlord for purposes other than improvement of the Property.

(d) From and after the date hereof, in the event of any act or omission by Landlord which would give Tenant the right, either immediately or after the lapse of time, to terminate the Lease or to claim a partial or total eviction, Tenant will not exercise any such right:

(i) until it has given written notice of such act or omission to Beneficiary;  
and

(ii) until the same period of time as is given to Landlord under the Lease to cure such act or omission shall have elapsed following such giving of notice to Beneficiary and following the time when Beneficiary shall have become entitled under the Mortgage to remedy the same.

(e) It has notice that the Lease and the rent and all other sums due thereunder have been assigned or are to be assigned to Beneficiary as security for the Loan secured by the Mortgage. In the event that Beneficiary notifies Tenant of a default under the Mortgage and demands that Tenant pay its rent and all other sums due under the Lease to Beneficiary, Tenant shall honor such demand and pay its rent and all other sums due under the Lease directly to Beneficiary or as otherwise required pursuant to such notice.

(f) It shall send a copy of any notice or statement under the Lease to Beneficiary at the same time such notice or statement is sent to Landlord.

(g) It has no right or option of any nature whatsoever, whether pursuant to the Lease or otherwise, to purchase the Premises or the Property, or any portion thereof or any interest therein, and to the extent that Tenant has had, or hereafter acquires, any such right or option the same is hereby acknowledged to be subject and subordinate to the Mortgage and is hereby waived and released as against Beneficiary.

(h) This Agreement satisfies any condition or requirement in the Lease relating to the granting of a nondisturbance agreement.

5. **Foreclosure and Sale.** In the event of foreclosure of the Mortgage, or upon a sale of the Property pursuant to the trustee's power of sale contained therein, or foreclosure, then:

(a) So long as Tenant complies with this Agreement and is not in default under any of the terms, covenants, or conditions of the Lease[**beyond any applicable cure period**], the Lease shall continue in full force and effect as a direct lease between the succeeding owner of the Property and Tenant, upon and subject to all of the terms, covenants and conditions of the Lease, except as set forth in Exhibits C and D attached hereto, for the balance of the term of the Lease, Tenant hereby agrees to adhere to and accept any such successor owner as landlord under the Lease, and to be bound by and perform all of the obligations imposed by the Lease, and Beneficiary, or any such successor owner of the Property, will not disturb the possession of Tenant, and will be bound by all of the obligation imposed on the Landlord by the Lease, except as set forth in Exhibits C and D attached hereto; provided, however, that Beneficiary, or any purchaser at a trustee's or sheriff's sale or any successor owner of the Property, shall not be:

- (i) liable for any act or omission of a prior landlord (including Landlord);
- (ii) liable for the return of any security deposit unless such deposit has been delivered by Beneficiary, by Landlord or is deposited in an escrow fund available to Beneficiary;
- (iii) liable or obligated to expand the Property, pay tenant improvement allowances, construct additional improvements or otherwise expend funds which are capital in nature, other than expenses for ordinary maintenance and repair;
- (iv) liable to reconstruct the Premises or the Property to the extent insurance proceeds are not available therefore;
- (v) liable for any obligation to indemnify or reimburse Tenant, any leasehold mortgagee, or any other third party or any of their respective successors and assigns from and against any loss, liability, damage or cost relating to or arising from the presence of any toxic or hazardous materials on, under or about the Property.
- (vi) liable or bound by any right of first refusal or option to purchase all or any portion of the Property set forth in the Lease;
- (vii) subject to any offsets or defenses which Tenant might have against any prior landlord (including Landlord);
- (viii) bound by any rent or additional rent which Tenant might have paid in advance to any prior landlord (including Landlord) for a period in excess of one month or by any security deposit, cleaning deposit or other prepaid charge which Tenant might have paid in advance to any prior landlord (including Landlord); or
- (ix) bound by any agreement or modification of the Lease made without the prior written consent of Beneficiary.

(b) Upon the written request of either Beneficiary or Tenant to the other given at the time of any foreclosure, trustee's sale or conveyance in lieu thereof, the parties agree to execute a lease of the Premises upon the same terms and conditions as the Lease between Landlord and Tenant, with the changes set forth in Exhibits C and D attached hereto, which lease shall cover any unexpired term of the Lease existing prior to such foreclosure, trustee's sale or conveyance in lieu of foreclosure.

(c) The provisions of the Lease set forth in Exhibit C shall be of no force or effect and shall not be binding upon Beneficiary or any purchaser or transferee acquiring the Property as a result of such foreclosure, trustee's sale or conveyance in lieu thereof, and in the event of such foreclosure, trustee's sale, or conveyance in lieu thereof, the provisions set forth in Exhibit D shall be added to the Lease and shall be effective and binding upon Tenant.

(d) Beneficiary shall have no responsibility to provide (or liability for not providing) any additional space for which Tenant has any option or right under the Lease unless Beneficiary at its option elects to provide the same and Tenant hereby releases Beneficiary from any obligation it may otherwise have to provide the same, and agrees that Tenant shall have no right to cancel the Lease, abate rent or assert any claim against Beneficiary as a result of the failure to provide any option space.

(e) Beneficiary shall have no liability to Tenant or any other party for any conflict between the provisions of the Lease and the provisions of any other lease affecting the Property, including, but not limited to, any provisions relating to renewal options and options to expand, and in the event of such a conflict, Tenant shall have no right to cancel the Lease or take any other remedial action against Beneficiary or action against any other party for which Beneficiary would be liable.

6. **Acknowledgment and Agreement by Landlord.** Landlord, as landlord under the Lease and mortgagor or trustor under the Mortgage, acknowledges and agrees for itself and its heirs, successor and assigns, that:

(a) This Agreement does not:

(i) constitute a waiver by Beneficiary or any of its rights under the Mortgage; and/or

(ii) in any way release Landlord from its obligations to comply with the terms, provisions, conditions, covenants, agreements and clauses of the Mortgage;

(b) The provisions of the Mortgage remain in full force and effect and must be complied with by Landlord; and

(c) In the event of a default under the Mortgage, Tenant may pay all rent and all other sums due under the Lease to Beneficiary as provided in this Agreement.

7. **No Obligation of Beneficiary.** Beneficiary shall have no obligation or incur any liability with respect to the erection or completion of the improvements in which the Premises are located or for completion of the Premises or any improvements for Tenant's use and occupancy, either at the commencement of the term of the Lease or upon any renewal or extension thereof or upon the addition of additional space, pursuant to any expansion rights contained in the Lease.

8. **Notice.** All notices hereunder to Beneficiary shall be deemed to have been duly given if mailed by United States registered or certified mail, with return receipt requested, postage prepaid to Beneficiary at its address set forth in Exhibit B attached hereto (or at such other address as shall be given in writing by Beneficiary to Tenant) and shall be deemed complete upon any such mailing.

9. **Miscellaneous.**

(a) This Agreement supersedes any inconsistent provisions of the Lease.

(b) Nothing contained in this Agreement shall be construed to derogate from or in any way impair or affect the lien and charge or provisions of the Mortgage.

(c) Beneficiary shall have no obligations nor incur any liability with respect to any warranties of any nature whatsoever, whether pursuant to the Lease or otherwise, including, without limitation, any warranties respecting use, compliance with zoning, Landlord's title, Landlord's authority, habitability, fitness for purpose or possession.

(d) In the event that Beneficiary shall acquire title to the Premises or the Property, Beneficiary shall have no obligation, nor incur any liability, beyond Beneficiary's then equity interest, if any, in the Premises, and Tenant shall look exclusively to such equity interest of Beneficiary, if any, in the Premises for the payment and discharge of any obligations imposed upon Beneficiary hereunder or under the Lease, and Beneficiary is hereby released and relieve of any other obligations hereunder and under the Lease.

(e) This Agreement shall inure to the benefit of the parties hereto, their respective successors and permitted assigns; provided however, that in the event of the assignment or transfer of the interest of Beneficiary, all obligations and liabilities of Beneficiary under this Agreement shall terminate, and thereupon all such obligations and liabilities shall be the responsibility of the party to whom Beneficiary's interest is assigned or transferred; and provided further that the interest of Tenant under this Agreement may not be assigned or transferred without the prior written consent of Beneficiary.

(f) This Agreement shall be governed by and construed in accordance with the laws of the State in which the Property is located.

**IN WITNESS WHEREOF**, the parties have executed this Subordination, Nondisturbance, and Attornment Agreement as of \_\_\_\_\_, 20\_\_.

[add signature blocks and acknowledgements]

## Appendix 5<sup>21</sup>

### SUBORDINATION, NONDISTURBANCE, AND ATTORNMENMENT AGREEMENT

THIS SUBORDINATION, NONDISTURBANCE, AND ATTORNMENMENT AGREEMENT ("Agreement") is made as of the \_\_\_ day of \_\_\_, \_\_\_, by and among \_\_\_, a(n) \_\_\_ ("Landlord"), \_\_\_, a(n) \_\_\_ ("Tenant"), and \_\_\_, a(n) \_\_\_ ("Mortgagee").

#### Recitals:

A. Mortgagee and Landlord entered into a Loan Agreement dated as of \_\_\_, \_\_\_, whereby Mortgagee agreed to make a loan to Landlord in the aggregate amount of \$ \_\_\_ ("Loan") on the terms and conditions contained therein. Landlord executed and delivered to Mortgagee a certain promissory note ("Note") dated as of \_\_\_, \_\_\_, payable to the order of Mortgagee in the original principal amount of \$ \_\_\_ with interest and principal payable as therein provided. The Loan and Note were secured by a mortgage ("Mortgage") dated \_\_\_, \_\_\_, and recorded with the Recorder of Deeds of \_\_\_ County, \_\_\_ ("Recorder") on \_\_\_, \_\_\_, as Document No. \_\_\_, encumbering, among other things, the property described on Exhibit A attached hereto and made a part hereof and all improvements thereon ("Real Estate").

B. Tenant has entered into a Lease Agreement dated \_\_\_, \_\_\_ ("Lease"), with Landlord as landlord pursuant to which Landlord has leased the Real Estate to Tenant for the term and on the terms and conditions set forth in the Lease.

C. The parties desire to agree upon the relative priority of their interests in the Real Estate and their rights and obligations if certain events occur.

NOW, THEREFORE, in consideration of the mutual covenants and agreements of the parties, the parties do hereby covenant and agree as follows:

1. Definitions. The following terms shall have the following meanings for purposes of this Agreement:

(a) "Foreclosure Event" means (i) foreclosure under the Mortgage; (ii) any other exercise by Mortgagee of rights and remedies (whether under the Mortgage or under applicable law, including bankruptcy law) as holder of the Note and/or the Mortgage, as a result of which Successor Landlord becomes owner of the Real Estate; or (iii) delivery by Trustee to Mortgagee (or its designee or nominee) of a deed or other conveyance of Trustee's interest in the Real Estate in lieu of any of the foregoing.

(b) "Successor Landlord" means any party that becomes owner of the Real Estate as the result of a Foreclosure Event.

(c) Initially capitalized terms used in this Agreement and not expressly defined herein have the meanings given them in the Mortgage.

2. Subordination of Lease. The parties acknowledge and agree that the Lease is and shall be subject and subordinate, in right, interest, and lien, and for all purposes, to the Mortgage, and to all renewals, modifications, consolidations, replacements, and extensions thereof, and to any subsequent mortgage with which the Mortgage may be spread or consolidated, to the full extent of the principal sum and all other amounts secured thereby and interest thereon.

3. Nondisturbance and Attornment.

(a) No Exercise of Mortgage Remedies Against Tenant. So long as the Lease is in full force and effect and Tenant is not in default under the Lease beyond any applicable cure period,

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<sup>21</sup> This Agreement is based on a model form promulgated by the New York State Bar Association in 1994, and may need to be updated and/or modified for use in other states.

Mortgagee shall not name or join Tenant as a defendant in any exercise of Mortgagee's rights and remedies arising upon a default under the Mortgage unless applicable law requires Tenant to be made a party thereto as a condition to proceeding against Landlord or pursuing such rights and remedies. In the latter case, Mortgagee may join Tenant as a defendant in such action only for such purpose and not to terminate the Lease or otherwise adversely affect Tenant's rights under the Lease or this Agreement in such action.

(b) **Nondisturbance and Attornment.** If the Lease has not been terminated, then, when Successor Landlord takes title to Landlord's Premises: (a) Successor Landlord shall not terminate or disturb Tenant's possession of tenant's premises under the Lease, except in accordance with the terms of the Lease and this Agreement; (b) Successor Landlord shall be bound to Tenant under all terms and conditions of the Lease (except as provided in this Agreement); (c) Tenant shall recognize and attorn to Successor Landlord as Tenant under the Lease as affected by this Agreement as provided in paragraph 4 herein; and (d) the Lease shall continue in full force and effect as a direct lease, in accordance with its terms (except as provided in this Agreement), between Successor Landlord and Tenant.

(c) **Further Documentation.** The provisions of this Agreement shall be effective and self-operative without any need for Successor Landlord or Tenant to execute any further documents. Tenant and Successor Landlord shall, however, confirm the provisions of this Agreement in writing upon request by either of them.

4. **Attornment.** If Successor Landlord shall succeed to the interest of the Landlord under the Lease, and the Lease shall not have expired or been terminated in accordance with the terms of the Lease or this Agreement, Tenant shall, from and after such event, attorn to Successor Landlord, all rights and obligations under the Lease to continue as though the interest of Landlord had not terminated or such foreclosure proceedings had not been brought. Such attornment shall be effective and self-operative without the execution of any further instrument on the part of the parties hereto. Tenant agrees, however, to execute and deliver at any time and from time to time, upon the request of Successor Landlord, any instrument or certificate which, in the sole judgment of Successor Landlord, may be necessary or appropriate in any such foreclosure proceeding or otherwise to evidence such attornment.

5. **Rights and Obligations of Successor Landlord under Lease.** Successor Landlord in the event of attornment shall have the same remedies in the event of any default by Tenant (beyond any period given Tenant to cure such default) in the payment of annual base rent or additional rent or in the performance of any of the terms, covenants, and conditions of the Lease on Tenant's part to be performed that are available to Landlord under the Lease. Tenant shall have the same remedies against Successor Landlord for the breach of an agreement contained in the Lease that Tenant might have had against Landlord if Successor Landlord had not succeeded to the interest of Landlord; provided, however, that Successor Landlord shall not be:

(a) liable for any act or omission of or any claims against any prior landlord (including Landlord); or

(b) subject to any offsets or defenses which Tenant might have against any prior landlord (including Landlord); or

(c) bound by any rent or additional rent which Tenant might have paid for more than the current month to any prior landlord (including Landlord); or

(d) bound by any amendment or modification of the Lease, or waiver of any of its terms, made without its consent; or

(e) liable for any sum that any prior landlord (including Landlord) owed to Tenant, including without limitation any security deposit, unless the amount owed was actually delivered to Successor Landlord; or

(f) bound by any surrender, cancellation, or termination of the Lease, in whole or in part, agreed upon between Landlord and Tenant; or

(g) liable for any construction obligation of any prior landlord, including Landlord;  
or

(h) liable for any breach of representation or warranty of any prior landlord, including Landlord.

6. Exculpation of Successor Landlord. Notwithstanding anything to the contrary in this Agreement or the Lease, upon any attornment pursuant to this Agreement, the Lease shall be deemed to have been automatically amended to provide that Successor Landlord's obligations and liability under the Lease shall never extend beyond Successor Landlord's (or its successors' or assigns') interest, if any, in the Real Estate from time to time, including insurance and condemnation proceeds and Successor Landlord's interest in the Lease (collectively, "Successor Landlord's Interest"). Tenant shall look exclusively to Successor Landlord's Interest (or that of its successors and assigns) for payment or discharge of any obligations of Successor Landlord under the Lease as amended or affected by this Agreement. If Tenant obtains any money judgment against Successor Landlord with respect to the Lease or the relationship between Successor Landlord and Tenant, then Tenant shall look solely to Successor Landlord's Interest (or that of its successors and assigns) to collect such judgment. Tenant shall not collect or attempt to collect any such judgment out of any other assets of Successor Landlord.

7. Mortgagee's Right to Cure.

(a) Notice to Mortgagee. Notwithstanding anything to the contrary in the Lease or this Agreement, before exercising any remedies under the Lease, Tenant shall provide Mortgagee with notice of the breach or default by Landlord giving rise to same ("Default Notice") and, thereafter, the opportunity to cure such breach or default as provided for below.

(b) Mortgagee's Cure Period. After Mortgagee receives a Default Notice, Mortgagee shall have a period of thirty (30) days beyond the time available to Landlord under the Lease in which to cure the breach or default by Landlord. Mortgagee shall have no obligation to cure (and shall have no liability or obligation for not curing) any breach or default by Landlord, except to the extent that Mortgagee agrees or undertakes otherwise in writing.

(c) Extended Cure Period. In addition, as to any breach or default by Landlord the cure of which requires Mortgagee to possess and control the Real Estate, provided only that Mortgagee undertakes to Tenant by written notice to Tenant within thirty (30) days after receipt of the Default Notice to exercise reasonable efforts to cure such breach or default within the period permitted by this paragraph, Mortgagee's cure period shall continue for such additional time ("Extended Cure Period") as Mortgagee may reasonably require to obtain possession and control of the Real Estate and thereafter to cure the breach or default with reasonable diligence and continuity. So long as any receiver of the Real Estate has been appointed and is continuing to serve, Mortgagee shall be deemed to have possession and control of the Real Estate.

8. Miscellaneous.

(a) Successors and Assigns. This Agreement shall bind and benefit the parties, their successors and assigns, any Successor Landlord, and its successors and assigns. If Mortgagee assigns the Mortgage, then upon delivery to Tenant of written notice thereof accompanied by the assignee's written assumption of all obligations under this Agreement, all liability of the assignor shall terminate.

(b) Entire Agreement. This Agreement constitutes the entire agreement among Mortgagee, Landlord, and Tenant regarding the rights and obligations of Tenant, Landlord, and Mortgagee as to the subject matter of this Agreement.

(c) Interaction with Lease and with Mortgage. If this Agreement conflicts with the Lease, then this Agreement shall govern as between the parties and any Successor Landlord, including upon any attornment. This Agreement supersedes, and constitutes full compliance with, any provisions in the Lease that provide for delivery of nondisturbance agreements by the holder of the Mortgage.

(d) Mortgagee's Rights and Obligations. Except as expressly provided for in this Agreement, Mortgagee shall have no obligations to Tenant with respect to the Lease. If an attornment occurs pursuant to this Agreement, then all rights and obligations of Mortgagee under this Agreement shall terminate, without thereby affecting in any way the rights and obligations of Successor Landlord provided for in this Agreement, or the amendments to the Lease set forth herein.

(e) Interpretation; Governing Law. The interpretation, validity, and enforcement of this Agreement shall be governed by and construed under the internal laws of the State of \_\_\_\_, excluding its principles of conflicts of law.

(f) Amendments. This Agreement may be amended, discharged, or terminated, or any of its provisions waived, only by a written instrument executed by the party to be charged.

(g) Execution. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

(h) Mortgagee's Representation. Mortgagee represents that Mortgagee has full authority to enter into this Agreement, and Mortgagee's entry into this Agreement has been duly authorized by all necessary actions.

10. Notices. All notices, waivers, demands, requests, or other communications required or permitted hereunder shall, unless otherwise expressly provided, be in writing and be deemed to have been properly given, served, and received (i) if delivered by messenger, when delivered; (ii) if mailed, on the third business day after deposit in the United States Mail, certified or registered, postage prepaid, return receipt requested; (iii) if telexed, telegraphed, or telecopied, six (6) hours after being dispatched by telex, telegram, or telecopy, if such sixth hour falls on a business day within the hours of 9:00 a.m. through 4:00 p.m. of the time in effect at the place of receipt, or at 9:00 a.m. on the next business day thereafter if such sixth hour is later than 4:00 p.m.; or (iv) if delivered by reputable overnight express courier, freight prepaid, the next business day after delivery to such courier; in every case addressed to the party to be notified as follows:

In the case of Mortgagee, to:

with copy to:

In the case of Tenant, to:

with copy to:

In the case of Landlord, to:

with copy to:



or such other address or in care of such other person as hereafter shall be designated in writing by the applicable party and shall be deemed to have been given as of the date of receipt.

The parties have executed this Agreement as of the date first above written.

MORTGAGEE:

\_\_\_\_  
a(n) \_\_\_\_

By: \_\_\_\_  
Name:  
Title:

TENANT:

\_\_\_\_,  
a(n) \_\_\_\_

By: \_\_\_\_  
Name:  
Title:

LANDLORD:

\_\_\_\_,  
a(n) \_\_\_\_

By: \_\_\_\_  
Name:  
Title:

This instrument was prepared by and when recorded return to:

[Add notarial acknowledgments and legal description]

## Appendix 6<sup>22</sup>

### SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT (Simple - For Ground Lease)

THIS AGREEMENT made and entered into the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_, by and between \_\_\_\_\_ (hereinafter called "Tenant"), \_\_\_\_\_ (hereinafter called "Ground Lessor"), and \_\_\_\_\_ Insurance Company, a Virginia corporation (hereinafter called "Lender"),

WITNESSETH:

WHEREAS, the Ground Lessor is owner of the fee simple title to the premises situated at \_\_\_\_\_, known as \_\_\_\_\_ and more particularly described in the Ground Lease dated \_\_\_\_\_, between Ground Lessor and \_\_\_\_\_, Ground Lessee (hereinafter called Landlord), for a term of \_\_\_\_ ( ) years, which Lease is recorded in \_\_\_\_\_ (hereinafter called Ground Lease), and

WHEREAS, Landlord entered into a Sublease with Tenant dated \_\_\_\_\_, by which Landlord leased to Tenant space located in the aforesaid premises, and

WHEREAS, Lender as a condition to making a mortgage loan on said premises has requested the execution of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained and to induce Lender to make said mortgage loan upon said premises and in consideration of the sum of \$1.00 by each of the parties hereto paid to the other, receipt of which is hereby acknowledged, the parties do hereby covenant and agree as follows:

1. Ground Lessor agrees that so long as Tenant is not in default in the payment of rent or additional rent, or in the performance of any of the terms, covenants and conditions of the Sublease on the Tenant's part to be performed, **[in either event beyond any period given to cure such default,]** Tenant's possession of the premises and its rights and privileges under the Sublease, or any renewal thereof, shall not be diminished or interfered with by Ground Lessor.

2. So long as Tenant is not in default (beyond any period given to cure such default) in the performance of any of the terms, covenants, or conditions of said Sublease on the Tenant's part to be performed, Lender will not join Tenant as a party defendant in any action or proceeding for the purpose of terminating Tenant's interest and estate under said Sublease in the event of default under the mortgage or otherwise.

3. Tenant agrees that in the event said Ground Lease is terminated for any reason other than the expiration of the term or any extension of the term thereof, or in the event any proceedings are brought for the foreclosure of said mortgage, it does hereby attorn to the Ground Lessor its successors and assigns (successors and assigns being herein defined to include Lender and/or purchaser at any foreclosure sale of the premises), said Ground Lessor, its successors and assigns being deemed to have assumed and agreed to be bound, as substitute lessor, by the terms and conditions of said Sublease until the resale or other disposition of the interest of the Ground Lessor, its successors and assigns, in said premises, except that such assumption shall not be deemed of itself an acknowledgment by the Ground

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<sup>22</sup> Form prepared by other counsel in prior CLE materials several years ago; source no longer known.

Lessor, its successors and assigns, of the validity of any then existing claims of Tenant against the prior Landlord; all rights and obligations under said Sublease to continue as though said Ground Lease had not terminated or such foreclosure proceedings had not been brought, except as aforesaid.

4. Tenant's attornment by these presents is effective and self-operative without the execution of any other instruments on the part of the parties hereto immediately upon such substitute lessor succeeding to the interest of the Landlord under said Sublease, provided however, that Tenant shall be under no obligation to pay rent to such substitute lessor until Tenant receives written notice from such substitute lessor that it has succeeded to the interest of the Landlord under the said Sublease.

5. Tenant hereby waives the provisions of any statute or rule of law now or hereafter in effect which may give or purport to give it any right or election to terminate or otherwise adversely affect its said Sublease and the obligations of Tenant thereunder by reason of the termination of said Ground Lease or any foreclosure proceeding.

6. This agreement may not be altered, modified, or amended except in writing signed by all the parties hereto.

7. This agreement shall be binding upon the parties, their respective heirs, successors, and assigns.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

## Appendix 7<sup>23</sup>

### SUBORDINATION, ATTORNMENT, NON-DISTURBANCE AND ASSIGNMENT AGREEMENT

THIS SUBORDINATION, ATTORNMENT, NON-DISTURBANCE AND ASSIGNMENT AGREEMENT (this "Agreement") is made as of the \_\_\_\_\_ day of November, 1998, by and among AB CORPORATION, a Maryland corporation ("ABC"), to be indexed as a grantor; XYZ, L.L.C., a Delaware limited liability company ("XYZ"), to be indexed as a grantor and as a grantee; and BANK, a \_\_\_\_\_ (together with its successors and assigns as beneficiaries of the Deed of Trust described below, "Lender"), to be indexed as a grantor and as a grantee.

#### Recitals:

A. By Deed of Trust dated \_\_\_\_\_, recorded in Deed Book \_\_, at Page among the land records of \_\_\_\_\_ (the "Deed of Trust") between the ABC and Lender, ABC deeded certain property to Trustees, in trust for the benefit of Lender as more particularly described therein. The property secured by the Deed of Trust is described on Exhibit A attached hereto and made a part hereof (the "Property"). [ADDITIONAL LANGUAGE SHOULD BE ADDED IF THE PROPERTY DESCRIPTION CHANGED AFTER THE ORIGINAL DEED OF TRUST, OR IF THE TRUST WAS AMENDED IN ANY WAY, OR IF THERE ALSO EXISTS A RELATED ASSIGNMENT OF LEASES, RENTS, OR THE LIKE.]

B. By a Master Rooftop Lease Agreement by and between ABC and XYZ dated \_\_\_\_\_, \_\_\_\_\_ ("MRLA"), by which, among other things, ABC assigned to XYZ and XYZ assumed all Rooftop Licenses (as defined therein) upon and subject to the terms, covenants and conditions set forth in said MRLA.

C. Pursuant to certain provisions of the MRLA, including without limitation Sections 4 and 9, ABC is required to use its best efforts to procure, and XYZ needs ABC to procure and has certain remedies if ABC is unable to procure, among other things, the consent of Lender to said MRLA and Lender's execution of this Agreement.

D. The parties desire and intend, by this Agreement, that Lender subordinate certain of its rights under the Deed of Trust [AND ASSIGNMENT OF LEASES, RENTS, ETC., AS APPLICABLE AND IF SEPARATE] to the rights of and for the benefit of XYZ; that XYZ and ABC acknowledge that XYZ's payment obligations to ABC under the MRLA shall be assigned hereby to Lender to the same extent as other leases upon the Property; that XYZ agrees to attorn to the purchaser of the Property at foreclosure of the Deed of Trust in the event of such foreclosure, or to the Lender in the event of collection of the rents owing from XYZ to ABC by the Lender; and that XYZ is willing to agree to attorn if Lender and such purchaser will recognize XYZ's rights under the MRLA to the extent hereinafter indicated.

E. All capitalized words and terms that are used, but not defined, herein shall have the meanings ascribed to them in the MRLA.

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<sup>23</sup> Negotiated by author in rooftop lease transfer situation, for transferee of existing rooftop leases to procure subordination of owner's lender's rights to grantee's rights, but with grantee agreeing to attorn to lender following a foreclosure of owner's interests.

NOW THEREFORE, for and in consideration of the sum of One Dollar (\$1.00) paid in hand by each of the parties hereto to the other, receipt whereof is acknowledged, and for and in consideration of the Recitals set forth above, which are incorporated herein by this reference, and the terms, covenants and conditions herein made, the parties agree as follows:

1. ABC and Lender hereby confirm to XYZ that the Deed of Trust is in full force and effect and that as of the date of this Agreement, there is no event of default under the Deed of Trust by ABC.

2. Subject to the provisions hereof, the lien and provisions of the Deed of Trust [AND THE PROVISIONS OF AND RIGHTS OF LENDER UNDER THE ASSIGNMENT] shall be subject and subordinate to the terms, covenants and conditions of the MRLA, for the period of the initial term of the MRLA and any renewals or extensions thereof and for such period following its expiration or termination as XYZ has the right to receive any payments from Rooftop Tenants thereunder.

3. XYZ hereby is authorized to exercise all its rights under the MRLA, free of any interests, rights of consent, assignments of rents, or other involvement or rights of, from or on behalf of Lender. Specifically this authorization shall include, without limitation, all rights, title and interest in and to Licenses with Rooftop Tenants, whether now existing or created hereafter, being free of any interests of Lender. XYZ shall be free to enter into, terminate, and compromise contracts with Rooftop Tenants, and to pledge, hypothecate, assign and otherwise deal with Rooftop Tenants and their Licenses, all without any involvement or interest of Lender. XYZ acknowledges, however, that its payment obligations to ABC under the MRLA shall be collaterally assigned hereby to Lender to the same extent as the rental obligations of tenants under other leases upon the Property are assigned to Lender.

4. If the interest of ABC in the Property shall be transferred to and owned by Lender by reason of foreclosure or other proceedings brought by it, or by deed in lieu of foreclosure or any other manner, or if Lender otherwise shall assume possession of the Property, XYZ shall be bound to Lender under all of the terms, covenants and conditions of the Deed of Trust for the balance of the term thereof remaining and any extensions or renewals thereof which may be effected in accordance with any option therefor in the Deed of Trust, with the same force and effect as if Lender had been the original grantor under the Deed of Trust, subject, however, to the provisions of this Agreement. XYZ does hereby attorn to (a) Lender as its landlord when Lender is in possession of the Property, (b) a receiver appointed in any action or proceeding to foreclose the Deed of Trust, (c) any party acquiring title to the Property and (d) any successor to ABC. Said attornment shall be effective and self-operative without the execution of any further instruments on the part of any of the parties hereto immediately upon Lender's succeeding to the interest of ABC in the Property. The respective rights and obligations of XYZ and Lender upon such attornment, to the extent of the then remaining balance of the term of the Deed of Trust and any such extensions and renewals, shall be and are the same as now set forth therein. Upon request, XYZ will execute a written attornment agreement in favor of Lender at such time as Lender succeeds to ABC's interest in the Property, provided that Lender in any such agreement shall acknowledge the subordination of its lien, and the non-disturbance provisions of this Agreement, as provided in this Agreement.

5. So long as no event of default has occurred which has continued to exist for such period of time (after notice, if any, required by the MRLA) as would entitle ABC under the MRLA to terminate the MRLA or would cause, without any further action of ABC, the termination of the MRLA, the MRLA shall not be terminated, nor shall XYZ's use, possession or enjoyment of, or its rights in and to, the Property be interfered with, nor shall the rights of XYZ granted by the MRLA be affected in any other manner, in any foreclosure or any action or proceeding instituted under or in connection with the Deed of Trust or, in case Lender takes possession of the Property, pursuant to the provisions of the Deed of Trust.

6. If Lender shall succeed to the interest of ABC under the MRLA, Lender shall not be (a) liable for any act or omission of any prior landlord (including ABC), (b) subject to any offsets or defenses which XYZ might have against any prior landlord (including ABC), (c) bound by any rent, security deposit or additional rent which XYZ might have paid for more than one month in advance to any prior landlord (including ABC), (d) bound by any amendment or modification of the MRLA made without Lender's consent or (e) except for acts or omissions occurring during Lender's period of actual or legal possession, bound to XYZ beyond the date on which it shall transfer title to the Property to a third party.

7. At any time after an event of default has occurred under the Deed of Trust and XYZ has received written notice thereof from or on behalf of Lender, XYZ shall make payments under the MRLA directly to Lender. Receipt of Lender's written certification that such an event of default has occurred shall be the only condition to XYZ's making payments directly to Lender, and XYZ shall not be required to investigate or verify the nature or extent of any default. ABC, by its execution of this Agreement, irrevocably consents to such direct payment by XYZ and agrees to hold XYZ harmless for the application of any payments so made.

8. XYZ agrees to certify to Lender from time to time, on reasonable written notice, as to whether the MRLA is in effect and whether there are any defaults thereunder.

9. All notices hereunder must be in writing and, unless otherwise provided herein, shall be deemed validly given if sent by certified mail, return receipt requested, postage prepaid, by overnight delivery via a nationally recognized delivery service or by personal delivery against receipt, addressed as follows (or to any other address which the party to be notified may designate by proper notice to the other party). Such notices shall be deemed effective upon the earlier of (i) actual receipt by the addressee thereof, (ii) one (1) business day after deposit thereof with a nationally recognized delivery service, or (iii) three (3) days after deposit thereof with the United States mail. Should ABC, XYZ or Lender have a change of address, the other party shall immediately be notified as provided in this Section of such change.

XYZ:

With a copy to:

and with a copy to: Any Successor to XYZ of which ABC receives notice.

ABC:

With a copy to:

Bank:

With a copy to:

10. The words "foreclosure" and "foreclosure sale" as used herein shall be deemed to include the acquisition of ABC's estate in the Property by voluntary deed (or assignment) in lieu of foreclosure. The word "Lender" shall include the Lender herein specifically named and any of its nominees, successors, and assigns, including anyone who shall have succeeded to ABC's interest in the Property by, through or under foreclosure of the Deed of Trust, or by voluntary deed.

11. All of the terms, covenants and conditions hereof shall run with the land and shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors and assigns.

WITNESS the signatures and seals of the parties hereto as of the day and year first above written.....

[Page Break]

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EXHIBIT A

Legal Description

## Appendix 8<sup>24</sup>

### GENERAL CLAUSES (for Acquisition of Leasehold Interests in Real Property)

#### 4.552.270-23 - SUBORDINATION, NONDISTURBANCE AND ATTORNMENT (SEP. 1999)

- (a) Lessor warrants that it holds such title to or other interest in the premises and other property as is necessary to the Government's access to the premises and full use and enjoyment thereof in accordance with the provisions of this lease. Government agrees, in consideration of the warranties and conditions set forth in this clause, that this lease is subject and subordinate to any and all recorded mortgages, deeds of trust and other liens now or hereafter existing or imposed upon the premises, and to any renewal, modification or extension thereof. It is the intention of the parties that this provision shall be self-operative and that no further instrument shall be required to effect the present or subsequent subordination of this lease. Government agrees, however, within twenty (20) business days next following the Contracting Officer's receipt of a written demand, to execute such instruments as Lessor may reasonably request to evidence further the subordination of this lease to any existing or future mortgage, deed of trust or other security interest pertaining to the premises, and to any water, sewer or access easement necessary or desirable to serve the premises or adjoining property owned in whole or in part by Lessor if such easement does not interfere with the full enjoyment of any right granted the Government under this lease.
- (b) No such subordination, to either existing or future mortgages, deeds of trust or other lien or security instrument shall operate to affect adversely any right of the Government under this lease so long as the Government is not in default under this lease. Lessor will include in any future mortgage, deed of trust or other security instrument to which this lease becomes subordinate, or in a separate nondisturbance agreement, a provision to the foregoing effect. Lessor warrants that the holders of all notes or other obligations secured by existing mortgages, deeds of trust or other security instruments have consented to the provisions of this clause, and agrees to provide true copies of all such consents to the Contracting Officer promptly upon demand.
- (c) In the event of any sale of the premises or any portion thereof by foreclosure of the lien of any such mortgage, deed of trust or other security instrument, or the giving of a deed in lieu of foreclosure, the Government will be deemed to have attorned to any purchaser, purchasers, transferee or transferees of the premises or any portion thereof and its or their successors and assigns, and any such purchasers and transferees will be deemed to have assumed all obligations of the Lessor under this lease, so as to establish direct privity of estate and contract between Government and such purchasers or transferees, with the same force, effect and relative priority in time and right as if the lease had initially been entered into between such purchasers or transferees and the Government; provided, further, that the Contracting Officer and such purchasers or transferees shall, with reasonable promptness following any such sale or deed delivery in lieu of foreclosure, execute all such revisions to this lease, or other writings, as shall be necessary to document the foregoing relationship.
- (d) None of the foregoing provisions may be deemed or construed to imply a waiver of the Government's rights as a sovereign.

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<sup>24</sup> From 48 CFR § 552.270-23.