

Strafford

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*Presenting a live 90-minute webinar with interactive Q&A*

# Subordination, Non-Disturbance and Attornment Agreements in Commercial Leasing and Real Estate Finance

Drafting and Negotiating SNDA Agreements to Protect Lenders, Tenants and Landlords

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THURSDAY, NOVEMBER 10, 2016

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Edward J. Levin, Chair, Real Estate Practice Group, **Gordon Feinblatt**, Baltimore

John M. Trott, Partner, **Cox Castle & Nicholson**, Los Angeles

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The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10.**

*This compares a Mortgagee's form of SNDA with a Tenant's form. A tenant that receives the Mortgagee's form may consider making the indicated changes.*

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**Mortgagee's-Tenant's Form**  
**Subordination, Non-Disturbance, and Attornment Agreement**

THIS AGREEMENT is made as of the \_\_\_ day of \_\_\_\_\_, 20\_\_, by and among [Name of Landlord / Address of Landlord] (“**Landlord**”), [Name of Tenant / Address of Tenant] (“**Tenant**”), and [Name of Mortgagee / Address of Mortgagee] (“**Mortgagee**”).

**RECITALS:**

A. By Lease dated \_\_\_\_\_ (the “**Lease**”), Landlord has leased to Tenant and Tenant has rented from Landlord the premises known as \_\_\_\_\_, \_\_\_\_\_ Maryland (the “**Premises**”) for an original term of \_\_\_\_\_ years, beginning on the date set forth in the Lease.

B. {It was a condition of the execution of the Lease that this Agreement be executed.} {Use Recital A if the Lease was in effect before the SNDA was executed. Use Recital B if the Lease and the SNDA are being executed simultaneously. }

C. Mortgagee is the holder of a mortgage or deed of trust dated \_\_\_\_\_, 20\_\_, and recorded or intended to be recorded among the Land Records of \_\_\_\_\_, , which constitutes an encumbrance against the Premises (which mortgage or deed of trust, as the same may be modified, supplemented, extended and/or renewed from time to time, is hereinafter called the “**Mortgage**”), and is the holder with respect to the Lease of an Assignment of Landlord’s Interest in Leases also dated \_\_\_\_\_, 20\_\_ and recorded or intended to be recorded among the aforesaid Land Records (the “**Assignment**”).

D. Mortgagee desires that Tenant agree to attorn to the purchaser at foreclosure of the Mortgage in the event of such foreclosure, or to Mortgagee in the event of collection of the rent by Mortgagee; and Tenant is willing to agree to so attorn if Mortgagee will recognize Tenant’s rights under the Lease to the extent hereinafter indicated.

NOW, THEREFORE, WITNESSETH for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

**SECTION 1**  
**NON-DISTURBANCE OF TENANT**

Mortgagee agrees with Tenant that ~~so long as no default exists, nor any event has occurred, which has continued to exist for such period of time (after notice, if any, required by the Lease),~~ so long as no Event of Default occurs and is continuing under the Lease as would entitle Landlord to terminate the Lease or would cause, without any further action of such Landlord, the

termination of the Lease, or would entitle Landlord to dispossess Tenant thereunder, the Lease shall not be terminated by Mortgagee, nor shall Tenant's use, possession, or enjoyment of the Premises in accordance with the terms of the Lease be interfered with by Mortgagee, nor shall the leasehold estate granted by the Lease be affected by Mortgagee in any other manner, in any foreclosure or any action or proceeding instituted under or in connection with the Mortgage, or in case Mortgagee takes possession of the Premises pursuant to any provision of the Mortgage.

## **SECTION 2 TENANT TO ATTORN TO MORTGAGEE**

Tenant agrees with Mortgagee that if the interests of Landlord in the Premises shall be transferred to and owned by Mortgagee by reason of foreclosure or other proceedings brought by it, or by any other manner, Tenant shall be bound to Mortgagee under all of the terms, covenants, and conditions of the Lease 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 Lease, with the same force and effect as if Mortgagee were the Landlord under the Lease, and Tenant does hereby attorn to Mortgagee as its Landlord. Thereupon, Mortgagee shall perform Landlord's obligations under all of the terms, covenants, and conditions of the Lease for the balance of the term remaining and any extensions or renewals thereof in accordance with any option therefor that is exercised pursuant to the Lease. Such, 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 Mortgagee's succeeding to the interest of Landlord in the Premises. Tenant has received a copy of the Assignment and consents thereto, agrees to be bound thereby, and agrees if Mortgagee shall, pursuant to the Assignment, elect to require Tenant to pay to Mortgagee the rent and other charges payable by Tenant under the Lease, Tenant shall, until Mortgagee shall have cancelled such election, be similarly bound to Mortgagee and shall similarly attorn to Mortgagee as its Landlord. ~~Tenant's obligations under this Agreement shall not be affected by its surrender of the Premises or its ouster therefrom in accordance with the provisions of the Lease by Landlord or any successor in interest to Landlord~~ Landlord hereby releases Tenant from any claim that Landlord may have against Tenant based on Tenant's compliance with Mortgagee's directions pursuant to the Assignment.

## **SECTION 36 TENANT TO ATTORN TO PURCHASER OR OTHER SUCCESSOR TO LANDLORD**

Tenant agrees with Landlord and Mortgagee that in the event of a foreclosure sale of the Premises under any present or future lien against Landlord's estate in the Premises, or in the event that Landlord's estate in the Premises passes to any other person or entity by operation of law or any other means, then Tenant shall promptly attorn to the purchaser at the foreclosure sale, or to the grantee of the Premises from Landlord, or to such other successor to Landlord's estate, under all of the terms, covenants, and conditions of the Lease; provided that such purchaser, grantee, or other successor agrees with Tenant in writing to recognize the right of possession and other rights of Tenant and its personal representatives, successors, and assigns under the Lease for the original term and any extensions or renewals thereof effected pursuant to any option therefor in the Lease.

**SECTION 4 ~~ESTOPPEL CERTIFICATE~~ 7**

~~Tenant certifies to Landlord and Mortgagee as follows recognizing that Landlord and Mortgagee (and their respective successors and assigns) shall be entitled to rely on the information set forth herein:~~

- ~~a. Tenant is the tenant under a Lease dated \_\_\_\_\_ between the Tenant, as tenant, and \_\_\_\_\_, as landlord, for the Premises. The Lease has not been assigned, subleased, supplemented, modified or amended except by the following documents: \_\_\_\_\_. The Lease is in full force and effect. Tenant is in actual occupancy of the Premises.~~
- ~~b. The monthly basic rent due under the Lease is \_\_\_\_\_ and has been paid through \_\_\_\_\_, 20\_\_\_. No advance rent has been paid by the undersigned to Landlord, except as follows: \_\_\_\_\_.~~
- ~~c. Tenant has commenced the payment of rents for all space subject to the Lease. The expiration date of the Lease (excluding renewal terms) is \_\_\_\_\_. [The Lease provides that Tenant may extend the term of the Lease, subject to certain conditions, for the following time periods: \_\_\_\_\_.]~~
- ~~d. All conditions and agreements under the Lease to be satisfied or performed by Landlord have been satisfied and performed. Landlord is not in default under the Lease, and there are no defenses or offsets against the enforcement of the Lease by Landlord except as follows: \_\_\_\_\_.~~
- ~~e. Tenant has not given to Landlord any security deposit, except as follows: \_\_\_\_\_.~~
- ~~f. Tenant is not in default under the Lease, and there are no defenses or offsets against the enforcement of the Lease by the undersigned except as follows: \_\_\_\_\_.~~
- ~~g. The current address of Tenant is as set forth above.~~
- ~~h. Tenant is not the subject of any bankruptcy or insolvency proceeding.~~
- ~~i. Tenant has always used the Premises in accordance with the terms of the Lease.~~
- ~~j. Tenant has not created any environmental issues at the Premises.~~
- ~~k. Tenant has no option (a) to renew the Lease or extend its term, (b) to take additional space from Landlord or an affiliate, or (c) to purchase the Premises or any portion thereof, in each case, except as follows: \_\_\_\_\_.~~
- ~~l. Tenant has not exercised any option it has or may have had under the Lease except as follows: \_\_\_\_\_.~~
- ~~m. Tenant has not created any environmental issues at the Premises.~~

**SECTION 5**  
**EXECUTION OF FUTURE ESTOPPEL CERTIFICATES**

(a) ~~At any time, and from time to time, upon the written request of Mortgagee, Tenant (within twenty (20) days of the date of such written request) agrees to execute and deliver to Mortgagee, without charge and in a form satisfactory to Mortgagee, a written statement: (i) ratifying the Lease; (ii) confirming the commencement and expiration dates of the term of the Lease; (iii) certifying that Tenant is in occupancy of the Premises and that the Lease is in full force and effect and has not been modified, assigned, supplemented, or amended except by such writings as shall be stated; (iv) certifying that all conditions and agreements under the Lease to be satisfied or performed by Landlord have been satisfied and performed except as shall be stated; (v) certifying that Landlord is not in default under the Lease and there are no defenses or offsets against the enforcement of the Lease by Landlord, or stating the defaults and/or defenses claimed by Tenant; (vi) reciting the amount of advance rent, if any, paid by Tenant and the date to which such rent has been paid; (vii) reciting the amount of monies deposited with Landlord and purpose thereof, if any; (viii) certifying that Tenant is not the subject of any bankruptcy or insolvency proceeding; (ix) certifying that Tenant has always used the Premises in accordance with the terms of the Lease; (x) certifying that Tenant has not created any environmental issues at the Premises, (x) certifying whether Tenant has any option (A) to renew the Lease or extend its term, (B) to take additional space from Landlord or an affiliate, or (C) to purchase the Premises or any portion thereof, (xi) certifying whether Tenant has exercised any option it has or may have had under the Lease, and (xii) containing any other information which Landlord or Mortgagee shall require.~~

(b) ~~The failure of Tenant to execute, acknowledge, and deliver to Mortgagee a statement in accordance with the provisions of this Section within the period set forth herein shall constitute an acknowledgment by Tenant which may be relied upon by any person holding or intending to acquire any interest whatsoever in the Premises, that the Lease has not been assigned, amended, changed, or modified, is in full force and effect, and that the annual rent required under the Lease and additional rent have been duly and fully paid not beyond the respective due dates immediately preceding the date of the request for such statement. Such failure shall also constitute as to any persons entitled to rely on such statements a waiver of any defaults by Landlord or defenses or offsets against the enforcement of the Lease by Landlord which may exist prior to the date of the written request. [Consider granting a power of attorney to Landlord to complete an estoppel certificate if Tenant does not do so within the state period of time.]~~

**SECTION 6 SUCCESSOR LANDLORD**

Tenant agrees with Mortgagee that if Mortgagee shall succeed to the interest of Landlord under the Lease, Mortgagee shall not be (a) ~~liable for any action or omission of any prior Landlord under the Lease, or (b) subject to any offsets or defenses that Tenant might have against any prior Landlord, or (c) bound by any rent or additional rent that Tenant might have paid for more than the current month to any prior Landlord and the next succeeding month to any prior landlord (unless such rent or additional rent shall have been deposited in escrow with Mortgagee and be available for application by Mortgagee), provided, or (d) however, Tenant's estimated payments towards its Common Area Charges, insurance, Real Estate Taxes, or otherwise shall not be deemed "paid in advance" when paid in accordance with the terms of the Lease, and such estimated payments shall be credited to Tenant's account and recognized by Mortgagee the same as if such estimated payments had actually been paid to Mortgagee, or (b) bound by any assignment, amendment, or modification~~

of the Lease made without Mortgagee's consent, ~~or (e) liable for any security deposit, escrow deposit for taxes, insurance, common area maintenance, or similar payment made under~~. For the purpose of clause (b) in the prior sentence, the following shall be deemed not to be assignments, amendments, or modifications of the Lease that require Mortgagee's prior consent for Mortgagee to be bound thereby: (i) an assignment that may be made under the lease without Landlord's prior consent; (ii) an agreement that does not (A) decrease Tenant's financial obligations under the Lease or (B) alter Tenant's or Landlord's rights or obligations in the event of a default by Tenant or Landlord under the Lease or (C) alter the term of the Lease (except as contemplated in the Lease following casualty loss or condemnation) or (D) increase Landlord's financial obligations under the Lease or (E) modify or amend the assignment or alterations provisions of the Lease. Tenant further agrees with Mortgagee that Tenant will not voluntarily subordinate the Lease to any lien or encumbrance without Mortgagee's consent.

## **SECTION 7 NOTICE TO MORTGAGEE**

~~Tenant agrees that if Landlord is in default under the Lease, Tenant shall give written notice of such default to Mortgagee and Mortgagee shall have thirty (30) days after Tenant has sent notice to cure such default (at Mortgagee's option) or, in the event such default cannot be cured within thirty (30) days, Mortgagee shall have thirty (30) days to commence such cure and diligently pursue such cure thereafter. If Mortgagee so requests, the Lease shall not be terminated because of the occurrence of an event that Mortgagee is not able to cure, such as the filing of bankruptcy by Landlord. Notices to Mortgagee shall be sent by registered or certified return receipted mail and addressed to Mortgagee at its address above.~~

*[In many Mortgagee's forms of SNDAs, in addition to the limitations of subparts (a) and (b) above, there are clauses that Mortgagee "shall not be liable for any action or omission of any prior Landlord under the Lease" and that Mortgagee "shall not be subject to any offsets or defenses that Tenant might have against any prior Landlord." These clauses are not set forth in the prior paragraph. If such clauses are presented to Tenant, Tenant may request that the clauses have the caveats indicated below added to them:]*

*[Tenant agrees with Mortgagee that if Mortgagee shall succeed to the interest of Landlord under the Lease, Mortgagee shall not be (x) liable for any action or omission of any prior Landlord under the Lease; provided, however, Tenant may give Mortgagee notice of any event of default which originated prior to, and continues to exist subsequent to, the succession of Mortgagee to the interest of "landlord" under the Lease (a "Continuing Default"), and Mortgagee shall have the same obligation to cure any such Continuing Default, and Tenant shall have the same rights and remedies, should Mortgagee fail to cure the Continuing Default, as if the Continuing Default had originated subsequent to the succession of Mortgagee to the interest of landlord under the Lease, or (y) subject to any offsets or defenses that Tenant might have against any prior Landlord except those offsets that arise after Tenant has notified Mortgagee and given Mortgagee an opportunity to cure as provided herein and that are for funds Tenant has expended to cure Landlord's default of Landlord's maintenance obligations that directly and materially affecting the Premises after neither Landlord nor Mortgagee has cured such defaults.]*

**SECTION 8  
LEASE SUBJECT TO MORTGAGE**

~~Except as otherwise provided herein, the Lease is and shall be deemed to be subject and subordinate to the Mortgage. All provisions in the Mortgage shall control notwithstanding any conflicting provisions in the Lease. As an example, but without limitation, the provisions in the Mortgage with respect to distribution and application of insurance proceeds or of condemnation proceeds shall apply regardless of any provisions in the Lease.~~

**SECTION 9  
AMENDMENT TO LEASE**

~~Mortgagee would not have made the loan secured by the Mortgage unless Landlord and Tenant agree that the Lease be amended as follows and that Tenant waive the following rights that it otherwise has under the Lease. Landlord and Tenant, therefore, agree that the following provisions shall constitute and be an amendment to the Lease effective as of the date of this Agreement.~~

- ~~a. The provisions [in Section \_\_\_] of the Lease that provide Tenant with an option [*describe the option*] are deleted from the Lease.~~
- ~~b. The provisions in the Lease [in Section \_\_\_] that provide that Tenant's obligations under the Lease [*do not commence / are altered*] if co-tenancy requirements are not met, are deleted from the Lease.~~
- ~~c. Tenant releases Landlord from any liability for environmental issues that arise with respect to the Premises from and after the commencement date of the Lease, and Tenant agrees to indemnify and hold harmless Landlord from any loss or liability relating thereto.~~
- ~~d. Tenant waives any right it may have to enforce the following provisions [warranties made by Landlord] in the Lease: \_\_\_\_\_.~~

~~**SECTION 10** The Lease is and shall be subject and subordinate to the Mortgage, except as otherwise provided herein and provided that Mortgagee shall permit Landlord to use all insurance proceeds arising from any loss or casualty to repair, rebuild and/or restore the Premises if the Lease is not terminated as a result of such loss or casualty.~~

**SECTION 9  
CERTAIN DEFINITIONS**

The word "**Lease**" as used herein shall be deemed to be the Lease as originally executed by Landlord and Tenant, as amended or modified by written agreements hereafter made, from time to time, between Landlord and Tenant and consented to by Mortgagee. The words "**foreclosure**" and "**foreclosure sale**" as used herein shall be deemed to include the acquisition of Landlord's estate in the Premises by voluntary deed, assignment, or other disposition or transfer in lieu of foreclosure. The word "**Mortgagee**" shall include the Mortgagee herein specifically named and any of its ~~personal representatives,~~ successors and assigns, including anyone who shall have succeeded to Landlord's interest in the Premises by, through, or under foreclosure of the Mortgage or by voluntary deed, assignment, or other disposition, ~~or~~ or transfer in lieu of foreclosure.

**SECTION ~~11~~10**  
**BINDING EFFECT**

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 personal representatives, successors, and assigns; ~~provided, however, that the obligations of Landlord and of any grantee or successor or assign of Landlord pursuant to Sections 3, 4, and 5 hereof shall not constitute obligations of, or be binding against, Mortgagee (as said term has been defined in Section 10 hereof) and assigns.~~

**SECTION ~~12~~11**  
**APPLICABLE LAW; GRAMMAR**

This Agreement shall be construed according to the law of Maryland (excluding Maryland conflict of laws). The use of the neuter gender in this Agreement shall be deemed to include any other gender, and words in the singular number shall be held to include the plural, when the sense requires.

**SECTION**

~~13~~**TIME OF ESSENCE** ~~Time is of the essence in this Agreement and in every provision hereof.~~

**~~12~~SECTION 14**  
**TABLE OF CONTENTS; CAPTIONS**

The Table of Contents and the captions appearing in this Agreement are inserted only as a matter of convenience and do not define, limit, construe, or describe the scope or intent of the Sections of this Agreement nor in any way affect this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be properly executed and sealed ~~as of~~ the day and year first above written.

ATTEST/WITNESS:

**LANDLORD**

\_\_\_\_\_

\_\_\_\_\_

By \_\_\_\_\_ (SEAL)  
Name:  
Title:

ATTEST/WITNESS:

**TENANT**

\_\_\_\_\_

\_\_\_\_\_

By \_\_\_\_\_ (SEAL)  
Name:  
Title:

ATTEST/WITNESS:

**MORTGAGEE**

\_\_\_\_\_

\_\_\_\_\_

By \_\_\_\_\_ (SEAL)

Name:

Title:

| ***[ADD ACKNOWLEDGMENTS OF LANDLORD, TENANT, AND MORTGAGEE]***

**Mortgagee's Form**  
**Subordination, Non-Disturbance, and Attornment Agreement**

THIS AGREEMENT is made as of the \_\_\_ day of \_\_\_\_\_, 20\_\_, by and among [Name of Landlord / Address of Landlord] (“**Landlord**”), [Name of Tenant / Address of Tenant] (“**Tenant**”), and [Name of Mortgagee / Address of Mortgagee] (“**Mortgagee**”).

**RECITALS:**

A. By Lease dated \_\_\_\_\_ (the “**Lease**”), Landlord has leased to Tenant and Tenant has rented from Landlord the premises known as \_\_\_\_\_, \_\_\_\_\_ Maryland (the “**Premises**”) for an original term of \_\_\_\_\_ years, beginning on the date set forth in the Lease.

B. {It was a condition of the execution of the Lease that this Agreement be executed.} {Use Recital A if the Lease was in effect before the SNDA was executed. Use Recital B if the Lease and the SNDA are being executed simultaneously.}

C. Mortgagee is the holder of a mortgage or deed of trust dated \_\_\_\_\_, 20\_\_, and recorded or intended to be recorded among the Land Records of \_\_\_\_\_, , which constitutes an encumbrance against the Premises (which mortgage or deed of trust, as the same may be modified, supplemented, extended and/or renewed from time to time, is hereinafter called the “**Mortgage**”), and is the holder with respect to the Lease of an Assignment of Landlord’s Interest in Leases also dated \_\_\_\_\_, 20\_\_ and recorded or intended to be recorded among the aforesaid Land Records (the “**Assignment**”).

D. Mortgagee desires that Tenant agree to attorn to the purchaser at foreclosure of the Mortgage in the event of such foreclosure, or to Mortgagee in the event of collection of the rent by Mortgagee; and Tenant is willing to agree to so attorn if Mortgagee will recognize Tenant’s rights under the Lease to the extent hereinafter indicated.

NOW, THEREFORE, WITNESSETH for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

**SECTION 1**  
**NON-DISTURBANCE OF TENANT**

Mortgagee agrees with Tenant that so long as no default exists, nor any event has occurred, which has continued to exist for such period of time (after notice, if any, required by the Lease) as would entitle Landlord to terminate the Lease or would cause, without any further action of Landlord, the termination of the Lease, or would entitle Landlord to dispossess Tenant, the Lease shall not be terminated by Mortgagee, nor shall Tenant’s use, possession, or enjoyment of the Premises be interfered with by Mortgagee, nor shall the leasehold estate granted by the Lease be affected by Mortgagee in any other manner, in any foreclosure or any action or

proceeding instituted under or in connection with the Mortgage, or in case Mortgagee takes possession of the Premises pursuant to any provision of the Mortgage.

## **SECTION 2 TENANT TO ATTORN TO MORTGAGEE**

Tenant agrees with Mortgagee that if the interests of Landlord in the Premises shall be transferred to and owned by Mortgagee by reason of foreclosure or other proceedings brought by it, or by any other manner, Tenant shall be bound to Mortgagee under all of the terms, covenants, and conditions of the Lease 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 Lease, with the same force and effect as if Mortgagee were the Landlord under the Lease, and Tenant does hereby attorn to Mortgagee as its Landlord. Such, 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 Mortgagee's succeeding to the interest of Landlord in the Premises. Tenant has received a copy of the Assignment and consents thereto, agrees to be bound thereby and agrees if Mortgagee shall, pursuant to the Assignment, elect to require Tenant to pay to Mortgagee the rent and other charges payable by Tenant under the Lease, Tenant shall, until Mortgagee shall have cancelled such election, be similarly bound to Mortgagee and shall similarly attorn to Mortgagee as its Landlord. Tenant's obligations under this Agreement shall not be affected by its surrender of the Premises or its ouster therefrom in accordance with the provisions of the Lease by Landlord or any successor in interest to Landlord.

## **SECTION 3 TENANT TO ATTORN TO PURCHASER OR OTHER SUCCESSOR TO LANDLORD**

Tenant agrees with Landlord and Mortgagee that in the event of a foreclosure sale of the Premises under any present or future lien against Landlord's estate in the Premises, or in the event that Landlord's estate in the Premises passes to any other person or entity by operation of law or any other means, then Tenant shall promptly attorn to the purchaser at the foreclosure sale, or to the grantee of the Premises from Landlord, or to such other successor to Landlord's estate, under all of the terms, covenants, and conditions of the Lease; *provided that* such purchaser, grantee, or other successor agrees with Tenant in writing to recognize the right of possession and other rights of Tenant and its personal representatives, successors, and assigns under the Lease for the original term and any extensions or renewals thereof effected pursuant to any option therefor in the Lease.

## **SECTION 4 ESTOPPEL CERTIFICATE**

Tenant certifies to Landlord and Mortgagee as follows recognizing that Landlord and Mortgagee (and their respective successors and assigns) shall be entitled to rely on the information set forth herein:

a. Tenant is the tenant under a Lease dated \_\_\_\_\_ between the Tenant, as tenant, and \_\_\_\_\_, as landlord, for the Premises. The Lease has not been assigned, subleased, supplemented, modified or amended except by the following documents: \_\_\_\_\_. The Lease is in full force and effect. Tenant is in actual occupancy of the Premises.

b. The monthly basic rent due under the Lease is \_\_\_\_\_ and has been paid through \_\_\_\_\_, 20\_\_\_. No advance rent has been paid by the undersigned to Landlord, except as follows: \_\_\_\_\_.

c. Tenant has commenced the payment of rents for all space subject to the Lease. The expiration date of the Lease (excluding renewal terms) is \_\_\_\_\_. [The Lease provides that Tenant may extend the term of the Lease, subject to certain conditions, for the following time periods: \_\_\_\_\_.]

d. All conditions and agreements under the Lease to be satisfied or performed by Landlord have been satisfied and performed. Landlord is not in default under the Lease, and there are no defenses or offsets against the enforcement of the Lease by Landlord except as follows: \_\_\_\_\_.

e. Tenant has not given to Landlord any security deposit, except as follows: \_\_\_\_\_.

f. Tenant is not in default under the Lease, and there are no defenses or offsets against the enforcement of the Lease by the undersigned except as follows: \_\_\_\_\_.

g. The current address of Tenant is as set forth above.

h. Tenant is not the subject of any bankruptcy or insolvency proceeding.

i. Tenant has always used the Premises in accordance with the terms of the Lease.

j. Tenant has not created any environmental issues at the Premises.

k. Tenant has no option (a) to renew the Lease or extend its term, (b) to take additional space from Landlord or an affiliate, or (c) to purchase the Premises or any portion thereof, in each case, except as follows: \_\_\_\_\_.

l. Tenant has not exercised any option it has or may have had under the Lease except as follows: \_\_\_\_\_.

m. Tenant has not created any environmental issues at the Premises.

**SECTION 5**  
**EXECUTION OF FUTURE ESTOPPEL CERTIFICATES**

(a) At any time, and from time to time, upon the written request of Mortgagee, Tenant (within twenty (20) days of the date of such written request) agrees to execute and deliver to Mortgagee, without charge and in a form satisfactory to Mortgagee, a written statement: (i) ratifying the Lease; (ii) confirming the commencement and expiration dates of the term of the Lease; (iii) certifying that Tenant is in occupancy of the Premises and that the Lease is in full force and effect and has not been modified, assigned, supplemented, or amended except by such writings as shall be stated; (iv) certifying that all conditions and agreements under the Lease to be satisfied or performed by Landlord have been satisfied and performed except as shall be stated; (v) certifying that Landlord is not in default under the Lease and there are no defenses or offsets against the enforcement of the Lease by Landlord, or stating the defaults and/or defenses claimed by Tenant; (vi) reciting the amount of advance rent, if any, paid by Tenant and the date to which such rent has been paid; (vii) reciting the amount of monies deposited with Landlord and purpose thereof, if any; (viii) certifying that Tenant is not the subject of any bankruptcy or insolvency proceeding; (ix) certifying that Tenant has always used the Premises in accordance with the terms of the Lease; (x) certifying that Tenant has not created any environmental issues at the Premises, (x) certifying whether Tenant has any option (A) to renew the Lease or extend its term, (B) to take additional space from Landlord or an affiliate, or (C) to purchase the Premises or any portion thereof, (xi) certifying whether Tenant has exercised any option it has or may have had under the Lease, and (xii) containing any other information which Landlord or Mortgagee shall require.

(b) The failure of Tenant to execute, acknowledge, and deliver to Mortgagee a statement in accordance with the provisions of this Section within the period set forth herein shall constitute an acknowledgment by Tenant which may be relied upon by any person holding or intending to acquire any interest whatsoever in the Premises, that the Lease has not been assigned, amended, changed, or modified, is in full force and effect, and that the annual rent required under the Lease and additional rent have been duly and fully paid not beyond the respective due dates immediately preceding the date of the request for such statement. Such failure shall also constitute as to any persons entitled to rely on such statements a waiver of any defaults by Landlord or defenses or offsets against the enforcement of the Lease by Landlord which may exist prior to the date of the written request. [*Consider granting a power of attorney to Landlord to complete an estoppel certificate if Tenant does not do so within the state period of time.*]

**SECTION 6**  
**SUCCESSOR LANDLORD**

Tenant agrees with Mortgagee that if Mortgagee shall succeed to the interest of Landlord under the Lease, Mortgagee shall not be (a) liable for any action or omission of any prior Landlord under the Lease, or (b) subject to any offsets or defenses that Tenant might have against any prior Landlord, or (c) bound by any rent or additional rent that Tenant might have paid for more than the current month to any prior Landlord, or (d) bound by any assignment, amendment,

or modification of the Lease made without Mortgagee's consent, or (e) liable for any security deposit, escrow deposit for taxes, insurance, common area maintenance, or similar payment made under the Lease. Tenant further agrees with Mortgagee that Tenant will not voluntarily subordinate the Lease to any lien or encumbrance without Mortgagee's consent.

## **SECTION 7 NOTICE TO MORTGAGEE**

Tenant agrees that if Landlord is in default under the Lease, Tenant shall give written notice of such default to Mortgagee and Mortgagee shall have thirty (30) days after Tenant has sent notice to cure such default (at Mortgagee's option) or, in the event such default cannot be cured within thirty (30) days, Mortgagee shall have thirty (30) days to commence such cure and diligently pursue such cure thereafter. If Mortgagee so requests, the Lease shall not be terminated because of the occurrence of an event that Mortgagee is not able to cure, such as the filing of bankruptcy by Landlord. Notices to Mortgagee shall be sent by registered or certified return receipted mail and addressed to Mortgagee at its address above.

## **SECTION 8 LEASE SUBJECT TO MORTGAGE**

Except as otherwise provided herein, the Lease is and shall be deemed to be subject and subordinate to the Mortgage. All provisions in the Mortgage shall control notwithstanding any conflicting provisions in the Lease. As an example, but without limitation, the provisions in the Mortgage with respect to distribution and application of insurance proceeds or of condemnation proceeds shall apply regardless of any provisions in the Lease.

## **SECTION 9 AMENDMENT TO LEASE**

Mortgagee would not have made the loan secured by the Mortgage unless Landlord and Tenant agree that the Lease be amended as follows and that Tenant waive the following rights that it otherwise has under the Lease. Landlord and Tenant, therefore, agree that the following provisions shall constitute and be an amendment to the Lease effective as of the date of this Agreement.

a. The provisions [in Section \_\_] of the Lease that provide Tenant with an option [*describe the option*] are deleted from the Lease.

b. The provisions in the Lease [in Section \_\_] that provide that Tenant's obligations under the Lease [*do not commence / are altered*] if co-tenancy requirements are not met, are deleted from the Lease.

c. Tenant releases Landlord from any liability for environmental issues that arise with respect to the Premises from and after the commencement date of the Lease, and Tenant agrees to indemnify and hold harmless Landlord from any loss or liability relating thereto.

d. Tenant waives any right it may have to enforce the following provisions [warranties made by Landlord] in the Lease: \_\_\_\_\_.

## **SECTION 10 CERTAIN DEFINITIONS**

The word “**Lease**” as used herein shall be deemed to be the Lease as originally executed by Landlord and Tenant, as amended or modified by written agreements hereafter made, from time to time, between Landlord and Tenant and consented to by Mortgagee. The words “**foreclosure**” and “**foreclosure sale**” as used herein shall be deemed to include the acquisition of Landlord’s estate in the Premises by voluntary deed, assignment, or other disposition or transfer in lieu of foreclosure. The word “**Mortgagee**” shall include the Mortgagee herein specifically named and any of its personal representatives, successors and assigns, including anyone who shall have succeeded to Landlord’s interest in the Premises by, through, or under foreclosure of the Mortgage or by voluntary deed, assignment, or other disposition, or transfer in lieu of foreclosure.

## **SECTION 11 BINDING EFFECT**

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 personal representatives, successors, and assigns; provided, however, that the obligations of Landlord and of any grantee or successor or assign of Landlord pursuant to Sections 3, 4, and 5 hereof shall not constitute obligations of, or be binding against, Mortgagee (as said term has been defined in Section 10 hereof).

## **SECTION 12 APPLICABLE LAW; GRAMMAR**

This Agreement shall be construed according to the law of Maryland (excluding Maryland conflict of laws). The use of the neuter gender in this Agreement shall be deemed to include any other gender, and words in the singular number shall be held to include the plural, when the sense requires.

## **SECTION 13 TIME OF ESSENCE**

Time is of the essence in this Agreement and in every provision hereof.

**SECTION 14  
TABLE OF CONTENTS; CAPTIONS**

The Table of Contents and the captions appearing in this Agreement are inserted only as a matter of convenience and do not define, limit, construe, or describe the scope or intent of the Sections of this Agreement nor in any way affect this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be properly executed and sealed as of the day and year first above written.

ATTEST/WITNESS:

**LANDLORD**

\_\_\_\_\_

\_\_\_\_\_

By \_\_\_\_\_ (SEAL)

Name:

Title:

ATTEST/WITNESS:

**TENANT**

\_\_\_\_\_

\_\_\_\_\_

By \_\_\_\_\_ (SEAL)

Name:

Title:

ATTEST/WITNESS:

**MORTGAGEE**

\_\_\_\_\_

\_\_\_\_\_

By \_\_\_\_\_ (SEAL)

Name:

Title:

***[ADD ACKNOWLEDGMENTS OF LANDLORD, TENANT, AND MORTGAGEE***

**Tenant's Form**  
**Subordination, Non-Disturbance, and Attornment Agreement**

THIS AGREEMENT is made as of the \_\_\_ day of \_\_\_\_\_, 20\_\_, by and among [Name of Landlord / Address of Landlord] (“**Landlord**”), [Name of Tenant / Address of Tenant] (“**Tenant**”), and [Name of Mortgagee / Address of Mortgagee] (“**Mortgagee**”).

**RECITALS:**

A. By Lease dated \_\_\_\_\_ (the “**Lease**”), Landlord has leased to Tenant and Tenant has rented from Landlord the premises known as \_\_\_\_\_, \_\_\_\_\_ Maryland (the “**Premises**”) for an original term of \_\_\_\_\_ years, beginning on the date set forth in the Lease.

B. {It was a condition of the execution of the Lease that this Agreement be executed.} {Use Recital A if the Lease was in effect before the SNDA was executed. Use Recital B if the Lease and the SNDA are being executed simultaneously. }

C. Mortgagee is the holder of a mortgage or deed of trust dated \_\_\_\_\_, 20\_\_, and recorded or intended to be recorded among the Land Records of \_\_\_\_\_, which constitutes an encumbrance against the Premises (which mortgage or deed of trust, as the same may be modified, supplemented, extended and/or renewed from time to time, is hereinafter called the “**Mortgage**”), and is the holder with respect to the Lease of an Assignment of Landlord’s Interest in Leases also dated \_\_\_\_\_, 20\_\_ and recorded or intended to be recorded among the aforesaid Land Records (the “**Assignment**”).

D. Mortgagee desires that Tenant agree to attorn to the purchaser at foreclosure of the Mortgage in the event of such foreclosure, or to Mortgagee in the event of collection of the rent by Mortgagee; and Tenant is willing to agree to so attorn if Mortgagee will recognize Tenant’s rights under the Lease to the extent hereinafter indicated.

NOW, THEREFORE, WITNESSETH for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

**SECTION 1**  
**NON-DISTURBANCE OF TENANT**

Mortgagee agrees with Tenant that, so long as no Event of Default occurs and is continuing under the Lease as would entitle Landlord to terminate the Lease or would cause, without any further action of such Landlord, the termination of the Lease or would entitle Landlord to dispossess Tenant thereunder, the Lease shall not be terminated by Mortgagee, nor shall Tenant’s use, possession, or enjoyment of the Premises in accordance with the terms of the Lease be interfered with by Mortgagee, nor shall the leasehold estate granted by the Lease be affected by Mortgagee in any other manner, in any foreclosure or any action or proceeding

instituted under or in connection with the Mortgage or in case Mortgagee takes possession of the Premises pursuant to any provision of the Mortgage.

**SECTION 2  
TENANT TO ATTORN TO MORTGAGEE**

Tenant agrees with Mortgagee that if the interests of Landlord in the Premises shall be transferred to and owned by Mortgagee by reason of foreclosure or other proceedings brought by it, or by any other manner, Tenant shall be bound to Mortgagee under all of the terms, covenants, and conditions of the Lease 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 Lease, with the same force and effect as if Mortgagee were the Landlord under the Lease, and Tenant does hereby attorn to Mortgagee as its Landlord. Thereupon, Mortgagee shall perform Landlord's obligations under all of the terms, covenants, and conditions of the Lease for the balance of the term remaining and any extensions or renewals thereof in accordance with any option therefor that is exercised pursuant to the Lease. Such, 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 Mortgagee's succeeding to the interest of Landlord in the Premises. Tenant has received a copy of the Assignment and consents thereto, agrees to be bound thereby, and agrees if Mortgagee shall, pursuant to the Assignment, elect to require Tenant to pay to Mortgagee the rent and other charges payable by Tenant under the Lease, Tenant shall, until Mortgagee shall have cancelled such election, be similarly bound to Mortgagee and shall similarly attorn to Mortgagee as its Landlord. Landlord hereby releases Tenant from any claim that Landlord may have against Tenant based on Tenant's compliance with Mortgagee's directions pursuant to the Assignment.

**SECTION 6  
TENANT TO ATTORN TO PURCHASER OR OTHER SUCCESSOR TO LANDLORD**

Tenant agrees with Landlord and Mortgagee that in the event of a foreclosure sale of the Premises under any present or future lien against Landlord's estate in the Premises, or in the event that Landlord's estate in the Premises passes to any other person or entity by operation of law or any other means, then Tenant shall promptly attorn to the purchaser at the foreclosure sale, or to the grantee of the Premises from Landlord, or to such other successor to Landlord's estate, under all of the terms, covenants, and conditions of the Lease; provided that such purchaser, grantee, or other successor agrees with Tenant in writing to recognize the right of possession and other rights of Tenant and its personal representatives, successors, and assigns under the Lease for the original term and any extensions or renewals thereof effected pursuant to any option therefor in the Lease.

**SECTION 7  
SUCCESSOR LANDLORD**

Tenant agrees with Mortgagee that if Mortgagee shall succeed to the interest of Landlord under the Lease, Mortgagee shall not be (a) bound by any rent or additional rent that

Tenant might have paid for more than the current month and the next succeeding month to any prior landlord (unless such rent or additional rent shall have been deposited in escrow with Mortgagee and be available for application by Mortgagee), *provided, however*, Tenant's estimated payments towards its Common Area Charges, insurance, Real Estate Taxes, or otherwise shall not be deemed "paid in advance" when paid in accordance with the terms of the Lease, and such estimated payments shall be credited to Tenant's account and recognized by Mortgagee the same as if such estimated payments had actually been paid to Mortgagee, or (b) bound by any assignment, amendment, or modification of the Lease made without Mortgagee's consent. For the purpose of clause (b) in the prior sentence, the following shall be deemed not to be assignments, amendments, or modifications of the Lease that require Mortgagee's prior consent for Mortgagee to be bound thereby: (i) an assignment that may be made under the lease without Landlord's prior consent; (ii) an agreement that does not (A) decrease Tenant's financial obligations under the Lease or (B) alter Tenant's or Landlord's rights or obligations in the event of a default by Tenant or Landlord under the Lease or (C) alter the term of the Lease (except as contemplated in the Lease following casualty loss or condemnation) or (D) increase Landlord's financial obligations under the Lease or (E) modify or amend the assignment or alterations provisions of the Lease. Tenant further agrees with Mortgagee that Tenant will not voluntarily subordinate the Lease to any lien or encumbrance without Mortgagee's consent.

*[In many Mortgagee's forms of SNDAs, in addition to the limitations of subparts (a) and (b) above, there are clauses that Mortgagee "shall not be liable for any action or omission of any prior Landlord under the Lease" and that Mortgagee "shall not be subject to any offsets or defenses that Tenant might have against any prior Landlord." These clauses are not set forth in the prior paragraph. If such clauses are presented to Tenant, Tenant may request that the clauses have the caveats indicated below added to them:*

*[Tenant agrees with Mortgagee that if Mortgagee shall succeed to the interest of Landlord under the Lease, Mortgagee shall not be (x) liable for any action or omission of any prior Landlord under the Lease; provided, however, Tenant may give Mortgagee notice of any event of default which originated prior to, and continues to exist subsequent to, the succession of Mortgagee to the interest of "landlord" under the Lease (a "**Continuing Default**"), and Mortgagee shall have the same obligation to cure any such Continuing Default, and Tenant shall have the same rights and remedies, should Mortgagee fail to cure the Continuing Default, as if the Continuing Default had originated subsequent to the succession of Mortgagee to the interest of landlord under the Lease, or (y) subject to any offsets or defenses that Tenant might have against any prior Landlord except those offsets that arise after Tenant has notified Mortgagee and given Mortgagee an opportunity to cure as provided herein and that are for funds Tenant has expended to cure Landlord's default of Landlord's maintenance obligations that directly and materially affecting the Premises after neither Landlord nor Mortgagee has cured such defaults.]*

**SECTION 8  
LEASE SUBJECT TO MORTGAGE**

The Lease is and shall be subject and subordinate to the Mortgage, except as otherwise provided herein and provided that Mortgagee shall permit Landlord to use all insurance proceeds arising from any loss or casualty to repair, rebuild and/or restore the Premises if the Lease is not terminated as a result of such loss or casualty.

**SECTION 9  
CERTAIN DEFINITIONS**

The word “**Lease**” as used herein shall be deemed to be the Lease as originally executed by Landlord and Tenant, as amended or modified by written agreements hereafter made, from time to time, between Landlord and Tenant and consented to by Mortgagee. The words “**foreclosure**” and “**foreclosure sale**” as used herein shall be deemed to include the acquisition of Landlord’s estate in the Premises by voluntary deed, assignment, or other disposition or transfer in lieu of foreclosure. The word “**Mortgagee**” shall include the Mortgagee herein specifically named and any of its successors and assigns, including anyone who shall have succeeded to Landlord’s interest in the Premises by, through, or under foreclosure of the Mortgage or by voluntary deed, assignment, or other disposition or transfer in lieu of foreclosure.

**SECTION 10  
BINDING EFFECT**

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.

**SECTION 11  
APPLICABLE LAW; GRAMMAR**

This Agreement shall be construed according to the law of Maryland (excluding Maryland conflict of laws). The use of the neuter gender in this Agreement shall be deemed to include any other gender, and words in the singular number shall be held to include the plural, when the sense requires.

**SECTION 12  
TABLE OF CONTENTS; CAPTIONS**

The Table of Contents and the captions appearing in this Agreement are inserted only as a matter of convenience and do not define, limit, construe, or describe the scope or intent of the Sections of this Agreement nor in any way affect this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be properly executed and sealed the day and year first above written.

ATTEST/WITNESS:

\_\_\_\_\_

**LANDLORD**

\_\_\_\_\_

By \_\_\_\_\_ (SEAL)  
Name:  
Title:

ATTEST/WITNESS:

\_\_\_\_\_

**TENANT**

\_\_\_\_\_

By \_\_\_\_\_ (SEAL)  
Name:  
Title:

ATTEST/WITNESS:

\_\_\_\_\_

**MORTGAGEE**

\_\_\_\_\_

By \_\_\_\_\_ (SEAL)  
Name:  
Title:

***[ADD ACKNOWLEDGMENTS OF LANDLORD, TENANT, AND MORTGAGEE]***



Relating to Real Estate

## Who Needs an SNDA (Subordination, Non-Disturbance, and Attornment Agreement)?

For More Information Contact: [Edward J. Levin](#)

July 17, 2013

One of the closing documents in a real estate financing transaction when the property is leased is a Subordination, Non-disturbance, and Attornment Agreement (“SNDA”). SNDAs have a number of purposes and uses, and they serve to connect the lender with the tenant.

### Basic Provisions of an SNDA

Let’s consider each of the terms in the title of the agreement.

#### 1. Subordination

Subject to private agreements (and occasionally equitable principles), priority is typically established by order of creation under the rule: first in time is first in right. If a landowner mortgages its property and then signs a lease covering all or part of it, the mortgage is senior to the lease, and the lease is regarded as subordinate to the mortgage. On the other hand, if the lease were executed before the mortgage, the mortgage would be deemed to be subordinate to the lease.

If one instrument is superior to another, the provisions of the first instrument will control over those of the second to the extent of any conflict. For example, if a fire damages or destroys all or part of the property or if a condemnation takes all or part of it, questions regarding application of insurance or condemnation proceeds (among other issues) would be decided based upon the relative priority of the lease and mortgage. If the lease is prior, the lease provisions will control. These may mandate that the landlord use insurance proceeds to rebuild the premises. In contrast, if the mortgage is first, the mortgagee would be entitled to take all of the insurance proceeds and use them to reduce the debt, if the mortgage so provides.

A lender typically wants to use an SNDA if in the absence of such an agreement the lease would be prior to the mortgage. In order to ensure that the terms of the mortgage will govern, the lender will insist that its borrower (which is also the landowner and the landlord) and the tenant enter into an SNDA with the lender.

Another effect of characterization of one instrument as being subordinate to another may be

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even more dramatic than the issue of what clause controls in particular circumstances. The general principle is that the termination of a senior instrument will terminate all instruments that are junior to it and controlled by it. Therefore, if a mortgage is senior to a lease, the foreclosure of the mortgage will terminate the lease, unless there is an agreement that provides otherwise. However, if the lease is senior to the mortgage, the foreclosure of the mortgage will not affect the lease - other than to place a new party in the role of landlord.

## 2. Non-Disturbance

As suggested above, the subordination of the lease to the mortgage could have disastrous consequences to the tenant - the lease could be terminated if the mortgage were foreclosed. Therefore, subordination of its lease, by itself, would be unacceptable to a tenant. To avoid the lease's being put in peril of its existence, in the non-disturbance part of the SNDA the lender agrees that if it forecloses on the property or if the property is transferred by a deed in lieu of foreclosure, the lease will continue. Under either of these situations, with a non-disturbance clause the tenant remains in possession of the property and the new owner of the property (whether it be the purchaser at a foreclosure sale or the transferee of a deed in lieu of foreclosure) becomes the successor landlord.

The non-disturbance right under an SNDA is typically premised on the tenant's being in compliance with the terms of its lease.

The credit of the tenant is often a basis for the underwriting of the loan, and the lender typically wants the lease to continue even after a foreclosure sale or a transfer in lieu of foreclosure. Section 7-105.6(c) of the Real Property Article of the Maryland Code enables lenders to choose which subordinate leases they want to continue after the sale by stating in the advertisement for the foreclosure sale which will survive. By virtue of an amendment to the predecessor of this section in 1985 sponsored by the Real Property Section of the Maryland State Bar Association, lenders have the right to make this election even if the mortgage does not have a provision about it.

## 3. Attornment

The final term in the name of an SNDA is "attornment" which is the act by the current tenant agreeing to become the tenant of the holder of the remainder or reversionary estate. (The word "attornment" has the same root as "attorney" which literally means one who is appointed to act in place of another.) Under the attornment provisions of an SNDA, the current tenant agrees to be bound by all of the terms of the lease to any person or party to whom the remainder or reversion is transferred by reason of foreclosure of or other proceedings brought pursuant to or under the loan documents. These provisions are supplemented by §8-101 of the Real Property Article of the Maryland Code ("RP"), which provides that transferees of the reversion in leased property are entitled to the same remedies, and are subject to the same obligations contained in the lease, as the original landlord.

### **Additional Provisions in SNDAs**

In addition to the three points mentioned above, SNDAs often contain other provisions such as the following (which might be called the "additional provisions").

#### a. Estoppel Provisions

SNDAs may have portions that are essentially estoppel certificates from the tenants. These may include an identification of the original lease and all amendments and all collateral agreements regarding it; an acknowledgment

that the landlord does not have any remaining construction obligations; an assertion that the tenant is not in default under the lease, a statement that the landlord is not in default under the lease and that the tenant has no claim against the landlord, or a description of any defaults or claims; or a representation that the tenant has not assigned, sublet, or mortgaged its interest in the property. The estoppel provisions may also include other information that the lender may consider relevant, such as whether the tenant has exercised any option or rights under the lease; whether the tenant has any remaining options or rights under the lease; or whether other agreements, such as reciprocal easement agreements, are in effect.

Instead of including these estoppel provisions within an SNDA, the parties may agree to set them forth in a separate document.

b. Additional Notice

Sometimes SNDAs provide that the tenant will give to the lender not only copies of all notices that the tenant is required to furnish to the landlord but also that the lender will have an extra period of time to cure any defaults. Further, lenders sometimes require that SNDAs state that if the tenant alleges that there is a default under the lease, and the lender is in the process of exercising its rights under the loan documents, the lender will be given as much time as it needs to complete a foreclosure of the property or otherwise to gain possession of the property before the cure period commences.

c. Use of the Property

Some lenders add certifications by the tenant that it has always used the property in accordance with the lease and that it has not created any environmental problems on the property.

d. After the Foreclosure Sale

The lender may also request certain agreements from the tenant with regard to what happens if the lender forecloses or the property is transferred by action in lieu of foreclosure. The lender may ask the tenant to agree that the lender has no liability to the tenant for any defaults that the original landlord may have committed under the lease. Additionally, the lender may disclaim any liability to the tenant for the return of its security deposit except to the extent that the lender, or other successor of the landlord, has actually received the security deposit.

e. Future Agreements and Limitations on Actions

In some cases lenders will include provisions in SNDAs requiring that tenants execute estoppel certificates in the future and that the tenants agree that without the lender's consent they will not surrender, cancel, or terminate their leases, except due to an uncured default by the landlord.

## Read the Lease

I recently represented a borrower on a refinance loan transaction in which the lender requested an SNDA regarding the lease that covered the entire property. Although the basic points of the SNDA - the subordination, non-disturbance, and attornment aspects of it - were

readily agreed to by the parties, the additional points of the proposed SNDA were more problematic. Specifically, the tenant did not want to release the lender or other successor to the original landlord from any claims that the tenant may have against the original landlord, the tenant did not want to agree that it would not look to the lender or other successor to the original landlord for the return of the tenant's security deposit upon the termination of the lease - even if the successor never actually received the security deposit, and the tenant was not inclined to allow the lender more time to cure landlord defaults than the original landlord had bargained for in the lease.

As I watched the lender and tenant dig into their positions, I feared that an SNDA might not get signed and that the loan closing might be in jeopardy. I read the lease in question, and I found that it contained a paragraph that was very helpful to my client, the property owner. The relevant provision provided that the lease was subject and subordinate not only to any mortgage or deed of trust that encumbered the property at the time that the lease was signed, but the lease was also subject and subordinate to any mortgage or deed of trust that the landlord may enter into in the future. Further the lease stated that the tenant agreed to execute any SNDA that a lender requested in order to implement the provisions of that paragraph.

I pointed out these provisions to counsel for the lender, and I suggested that in light of them the lender did not need an SNDA to ensure that its loan documents would control over conflicting provisions in the lease, and that in reliance on RP §7-105.6(c) the lender would have the ability to decide whether to keep the lease in place if it were to foreclose on its loan. The lender and its counsel realized that the lender would have the basic rights that it sought under an SNDA even without such a document, and it agreed to proceed to the loan closing without an SNDA.

What the lender gave up were the "additional provisions" noted above. However, the lender did not consider the additional provisions to be important enough to hold up the loan transaction.

Note that it is more normal for a lease to provide that a tenant will subordinate its leasehold interest to future financing *only if* the lender will agree to provide non-disturbance protection for the tenant. To the extent that the lease that I was looking at did not have such a clause, it was defective from the tenant's prospective.

### **So Who Needs an SNDA?**

The lender that takes a lien on real property subject to an existing lease wants an SNDA so that its loan documents will control. It wants the additional provisions described above so that if it takes over the property it will have time to cure any landlord defaults and it will not be subject to claims that the tenant may have against the original landlord, including a claim for the return of the security deposit that the lender may have not received.

The tenant that signs its lease when a mortgage or deed of trust already encumbers the property wants the assurance that if its landlord (the loan borrower) defaults under the loan, the tenant's lease will not be affected.

The landlord (the loan borrower) does not care about the terms of an SNDA. The SNDA will be effective, by and large, at a time when the borrower has defaulted and has lost its interest in the property. The borrower's sole interest is that the process in obtaining an SNDA is not costly and will not hold up the loan closing.

For questions about this, please contact [Ed Levin](#) at (410) 576-1900.