

**LOOKING DOWN THE ROAD:
ESTOPPELS, SNDAs AND OTHER LEASE PROVISIONS
THAT CAN MAKE OR BREAK A SALE**

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All commercial rental properties, whether retail shopping centers, industrial parks, or multi-tenant office buildings, will eventually be sold. To maximize sales prices, owners obviously seek to keep their projects filled with credit tenants paying the highest possible rentals. However, many owners fail to recognize how important a properly drafted lease can be when it comes time to sell a project.

These days, a buyer of commercial property will require that a seller satisfy a number of technical requirements and demands as conditions to a sale, such as obtaining estoppel certificates and subordination, non-disturbance and attornment agreements (SNDAs) from project tenants. In addition, other lease provisions can have a big impact, positive or negative, on a sale. In fact, many of these lease provisions not only can serve to facilitate a smooth sale process, but also can increase (or at least preserve) the property's value and, therefore, the sale price. These materials discuss the issues relating to these lease provisions from the respective viewpoints of the interested parties—*i.e.*, seller, buyer, tenant, and lender—and attempt to provide practical solutions to some of these issues.

I. BUYER (AND, OF COURSE, LENDER) CONCERNS

In order to understand how to draft leases to maximize the potential for a successful sale, it is important to understand a buyer's two primary concerns in evaluating leases in a sale transaction: (1) lease economics and (2) potential liabilities. As you might expect, these buyer concerns are also the primary concerns of lenders that finance property acquisitions.

A buyer's first concern in understanding and evaluating the economic value and risks inherent in the leases on the property being acquired is whether any lease(s) provides a tenant with a right of first refusal or option to purchase the leased property. The buyer will also want to determine whether there are any provisions in the leases that endanger the rent payment stream for the full lease term. Consequently, most buyers will focus on the lease provisions relating to the lease term, the base rent and operating expenses, insurance requirements, maintenance and

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repair obligations, condemnation, casualty damage, and any rights of early termination or rent set-off. A prudent buyer will also conduct a thorough review of the leases to confirm that the provisions of each lease are consistent with those of the other leases and that all leases work together without potential ambiguities and problems. For example, the buyer should review all lease provisions that purport to limit the rights of other tenants and confirm that they are not being violated. Buyers are also concerned with understanding and minimizing their potential liabilities upon acquisition of the property. For all of these reasons, in drafting its leases, a landlord/owner should pay careful attention not only to the rights of other tenants and early termination rights, but also to lease provisions relating to service interruptions, landlord defaults, tenant remedies, and casualty and condemnation provisions, all of which create potential liabilities for a purchaser upon its assumption of the leases.

However, lease review alone will not provide most buyers with the comfort that they are seeking, and most buyers will need assurances from the tenants themselves to evaluate properly the tenant leases being acquired.

II. ESTOPPEL CERTIFICATES

Estoppel certificates are the most common method used by buyers to obtain the necessary assurances with respect to the terms of the tenant leases. A buyer will typically insist on obtaining from each tenant (or, at least, each major tenant) an estoppel certificate stating not only the term of the lease, the base rent, the date through which the rent has been paid, and the security deposit, but also some or all of the following assurances:

1. The lease is in effect, with no amendments other than those listed, and there are no oral or other side agreements;
2. There are no defaults, events or circumstances that, with notice or expiration of time to cure, would lead to a default on the part of either the landlord or the tenant;
3. All of the landlord's and tenant's construction and other obligations have been fully performed, all construction has been accepted, and all tenant improvement allowance amounts have been paid;
4. The number and length of extension terms, if any, are as stated in the estoppel certificate;
5. The charges (other than the rent) payable by the tenant are in the amounts specifically set forth or described in the certificate;
6. The tenant has paid no rent or other charges more than one month in advance;
7. The tenant has no right to deduct or offset any amounts from the rent;
8. Whether a security deposit has been paid and, if so, the amount of the deposit;

9. There are no outstanding concessions, rent abatements, or rent rebates due to the tenant;
10. The tenant has no defenses to the enforcement of the lease;
11. The tenant is not subleasing any part of its space, and its rights have not been assigned (including assignment to a leasehold mortgagee);
12. The tenant has received no notices of default from the landlord and has given the landlord no notices of default;
13. The tenant has previously made no claims against the landlord;
14. The tenant has no right of first refusal or option to purchase the premises or right of first refusal, right of first offer, or other expansion rights with respect to any other premises; and
15. The tenant's use of the premises has not involved the generation, storage, treatment, disposal or release of hazardous substances, and the tenant is in compliance with all environmental and other laws.

Given the number of interested parties involved—*i.e.*, seller, buyer, tenant, and lender—and their varying respective interests, negotiating tenant estoppel certificates as the closing date looms can be difficult and can complicate and even delay the closing process. A better practice is to negotiate a lease provision listing the matters to which the tenant must certify on request or even attach a form estoppel certificate as an exhibit to the lease. Although a buyer and its lender may attempt to insist on using its own estoppel form, a set of certifications approved in advance by a tenant that takes buyer and lender concerns into account will often be acceptable to potential buyers and their lenders.

Delineating in advance the matters to which the tenant will certify is also important to tenants, as buyer and lender estoppel forms often go well beyond the fundamental purposes of the estoppel and can lead to problems if not reviewed carefully. As a general matter, tenants can and should object to any statements in an estoppel that are readily ascertainable through a review of the lease, other than basic business terms such as the rent, the security deposit, and the term. From a tenant's standpoint, the estoppel certificate should not be a substitute for a buyer or lender doing its own due diligence and reviewing the lease. For example, buyers and lenders often include a certification as to whether the tenant has certain rights and options, such as renewal or expansion options, rights of first offer or refusal, or termination rights. The presence or absence of these options and rights can be easily determined by reviewing the lease, so tenants may try either to strike these types of certifications or to except from the certification any options or termination rights that are expressly provided for in the lease.

In addition, because of the potential for confusion and conflict between an estoppel certificate and the lease to which it relates, the tenant may want to include a statement that, in the event of a conflict between the estoppel and the lease, the lease provision will control. A tenant with bargaining power may also try to include a statement protecting it against liability in the event of a good faith mistake or inaccuracy in the certificate, arguing that it should not assume

liability in a transaction to which it is not a party and from which it receives no benefit. However, this type of language may not be acceptable to a buyer or lender that is relying on the statements in the certificate to make its buying or lending decision. In fact, owners, buyers, and lenders may want language specifically putting tenants on the hook for liability for misstatements, although few sophisticated tenants will agree to incur an express indemnification obligation.

To further limit exposure relating to estoppels, a tenant should also make certain factual certifications (*e.g.*, as to the existence of defaults, rights of offset, and claims against the landlord) only to its actual, then-current knowledge, and without duty of investigation. Most buyers and lenders will agree to these types of knowledge qualifiers because they do not really expect the tenant to certify as to matters that have not yet been discovered. The buyer's legitimate concerns should be satisfied by an actual knowledge certification with respect to these types of claims and defaults, coupled with absolute certifications—with no qualifiers—as to the rent, the term, and the fact that the lease document that is attached to or otherwise identified in the certification is the entire agreement and has not been assigned by the tenant. A tenant (particularly a larger corporate or institutional tenant) also may seek to limit its certification to the knowledge of certain identified individuals (*e.g.*, the tenant's property manager or director of leasing). This type of additional limitation often is acceptable to a buyer or lender, so long as the tenant also certifies that the identified individuals are the persons within the tenant's organization that would have direct knowledge of such issues.

A sample form estoppel, lined to show a tenant's potential comments, is attached as Appendix A to these materials.

The time required to obtain an estoppel certificate can be critical to a sale. The buyer typically wants the estoppel certificate to be dated as of a date very close to the sale date, and the purchase agreement may even obligate the seller to provide estoppel certificates dated no fewer than five or 10 days before the closing.

However, there is a downside to waiting too long to get the estoppels. The buyer will need an opportunity to review the estoppels and seek a remedy if any estoppel is not in accordance with its expectations—and few sellers will agree that a buyer will have the right to terminate all the way up to the scheduled closing date or to be liable to a buyer if one of the estoppels deviates slightly from the rent roll. Consequently, the estoppels should be obtained early enough to permit the buyer to object to any matters contained in the estoppel and, if the buyer's objections are not satisfactorily addressed, renegotiate business terms or even refuse to go forward with the sale.

Recognizing these timing issues, a landlord should draft its leases to require the tenant to provide an estoppel in a short time frame—as short as the landlord can negotiate, but no more than 10 days after request. Some larger tenants will insist on longer periods, arguing that their internal procedures will not permit a faster response. Especially in the case where a landlord permits a tenant to have 15, 20, or 30 days to deliver an estoppel certificate, the landlord will need to confirm that the estoppel delivery requirements in its purchase agreement are achievable in light of the estoppel requirements in its tenant leases.

However, even if the landlord has successfully negotiated in its leases for short turnaround times for tenant estoppels, the landlord could have problems if the tenant does not in fact comply with the lease provisions. These problems include potentially losing the sale or even incurring liability to the buyer. Therefore, a landlord/seller needs meaningful and immediate remedies to compel a tenant to deliver its estoppel certificate in a timely manner. The lease's basic default provisions will not typically provide an adequate solution for a couple of reasons. First, the landlord will probably not have the time to give a default notice and wait for the non-monetary default cure period to elapse before exercising its remedies. Second, putting the tenant in default for failure to timely deliver an estoppel is not a very practical solution, because it will typically be critical to the sale that all tenant leases are in good standing at closing.

Leases frequently will provide that, if the tenant does not timely complete and return an estoppel certificate, the landlord may execute the certificate as the tenant's attorney-in-fact. Some leases also provide that, if the estoppel certificate is not produced when required, the tenant will be deemed to have certified as to all of the matters set out in the requested certificate. However, few buyers or lenders will be satisfied with an estoppel certificate executed by the seller on behalf of its tenant (especially a significant tenant), and even fewer will be satisfied with an unsigned estoppel certificate that is deemed to be accurate. Also, while some buyers may agree in the purchase agreement to accept, in lieu of a tenant estoppel certificate, the seller's certificate with respect to the status of the lease, many sellers will not want to have this continuing liability after the sale, particularly with respect to liability for a position that may be taken by a tenant after the sale. If a buyer does to accept the seller's certificate, the buyer may require a substantial hold-back of purchase proceeds for a period of time until it is comfortable that seller's certifications are accurate.

One solution that often proves effective is a lease provision requiring the tenant to pay a significant per diem monetary penalty if the tenant does not return an estoppel certificate on time. Another option, which is much less likely to be acceptable to a tenant with bargaining power, is an acknowledgement in the lease that a failure to return the certificate on time will cause the landlord to incur significant damages and that the tenant will be liable for all losses and damages incurred by the landlord by reason of the tenant's failure, including loss of the sale. In either case, the risk of a monetary penalty or significant damages should motivate most tenants to be timely in reviewing and returning requested estoppel certificates—particularly if these risks are highlighted by the landlord when it sends the estoppel certificate to the tenant. A sophisticated tenant might argue for a second notice and cure period before any such penalties would apply and might opt for two shorter time periods (*e.g.*, an initial five day notice followed by a second five day notice), rather than one longer period, in order to avoid an administrative snafu that could lead to significant liability for the tenant.

III. LENDER CONCERNS

As noted above, a buyer's lender has all of the concerns of the buyer with respect to the terms of the leases and the certainty of the rent payment streams. Consequently, an estoppel certificate from the tenant in favor of the lender may be necessary to confirm the lease terms and that the tenant has no immediate right to terminate the lease, set amounts off from rent, or seek damages against the landlord.

In addition to these concerns, because acquisition lenders typically require that their mortgages be first-priority encumbrances, all tenant leases will need to be subordinated to these mortgages. A subordination of a lease means that, if there is a default under a mortgage, the lender will have the right to foreclose on the property and sell it free of all junior encumbrances, including the lease. However, in today's economy, few lenders that extend loans on property occupied by credit tenants will actually want a foreclosure to wipe out the leases. Therefore, the lender will also want the option to keep all leases in effect despite the borrower's bankruptcy or default, to transfer the leases as part of the property assets to pay the debt, and to have the tenants pay rent and perform lease obligations in favor of any transferee.

IV. SUBORDINATION, NON-DISTURBANCE, AND ATTORNMENT AGREEMENTS (SNDAs)

An SNDA from a tenant in favor of a lender is the document that satisfies the lender's competing concerns of (i) confirming that the leases are subordinate in priority to the mortgage, while still (ii) making sure that the lease will not terminate on a foreclosure sale.

When a commercial rental property is sold and the sale is financed, the lender will require that the buyer provide it with an SNDA from each tenant (or, at least, each major tenant). The buyer frequently passes this obligation on to the seller, but even if the seller is not the party that will solicit the SNDAs, the seller needs to be sure that the buyer can obtain the SNDAs from the tenants, because the sale will not go forward unless the lender's requirements are satisfied. SNDAs are also frequently required during the term of a lease if the leased property is refinanced. To be sure that each tenant will deliver SNDAs when needed, the landlord must include in its leases provisions that address the content of, and the tenant's obligation to deliver, these SNDAs.

As discussed above, from the lender's standpoint, the basic purpose of the SNDA is to have the tenant acknowledge that its lease is subordinate to the mortgage (the "subordination" portion of the SNDA), but also agree that, at the lender's option, the tenant will recognize and perform its obligations in favor of the lender if the lender forecloses and becomes the landlord under the lease (the "attornment" portion of the SNDA). The *quid pro quo* for tenants is an agreement from the lender that, so long as the tenant is not in default under the lease, the lender (or any successor owner pursuant to a foreclosure sale) will recognize the tenant's rights and will not terminate the tenant's lease upon foreclosure (the "non-disturbance" portion of the SNDA). The practical effect of this non-disturbance agreement is that the acceptance of the lease by the transferee after a foreclosure sale (a sale that technically wipes out the subordinate encumbrances, including the lease) is mandatory rather than optional for the lender.

Most landlord lease forms contain a provision pursuant to which the tenant subordinates its rights to all current and future mortgages but also agrees that, at the lender's option, the tenant will recognize a foreclosure transferee as its landlord and perform its lease obligations in favor of the transferee for the rest of the term. Theoretically, a separate subordination and attornment agreement may not be needed when the lease includes this language. However, lenders generally require a separate subordination and attornment agreement that is expressly addressed to them, so most landlord lease forms require that the tenant also agree to provide a separate

subordination and attornment agreement on request.

Strong (or represented) tenants will argue that their lease should not be subordinate to a mortgage unless the mortgagee simultaneously agrees in writing that no foreclosure or other exercise of remedies under the mortgage will disturb the tenant's possession of the leased property and that, if there is a sale or other transfer pursuant to the mortgage, the transferee will accept the lease and the tenant. A non-disturbance agreement is particularly important if the leased premises are essential for or unique to tenant's business operations or if the tenant has spent significant amounts of money constructing improvements in the premises. Some landlords may resist this type of mandatory non-disturbance provision (especially for smaller leases in multi-tenant projects), arguing that it could limit the ability to procure financing, but it has become increasingly more customary in commercial leases for lenders to agree give non-disturbances. It should also be noted that, in many states, recording a non-disturbance agreement will be necessary to assure the tenant that its subordinate lease will not be terminated in the event of a foreclosure sale.

While the three basic purposes the SNDA (*i.e.*, subordination, non-disturbance, and attornment) may seem simple, the document effectuating these purposes is often the source of a great deal of negotiation and can often complicate and prolong the sales process. The seller and buyer, after all, have less control than they would like to have over an agreement between two third parties—*i.e.*, the tenant and the lender. Also, national and conduit lenders today are not satisfied with a simple subordination and attornment document. In their form SNDAs, these lenders also expect tenants to certify as to all of the facts generally included in an estoppel certificate and to agree to provisions that protect the lender or the person that purchases the property in the foreclosure sale from the consequences of the original landlord-borrower's defaults. These lender-protective provisions frequently include the following:

1. Prior to a transfer to a lender or purchaser at foreclosure,
 - (a) the tenant will not modify or cancel the lease, or surrender the premises to the original landlord, without the lender's consent;
 - (b) the tenant will not make any rent or other payments more than one month in advance;
 - (c) the tenant will give the lender notice of all landlord defaults and will not terminate the lease or exercise abatement or rent set-off rights until it has first given the lender time to cure the default, and if the default cannot be cured unless the lender takes possession of the leased space, the tenant will not terminate the lease while the lender is trying to obtain possession through foreclosure proceedings; and
 - (d) the tenant will pay its rent directly to the lender if the lender demands this payment; and
2. After the leased premises are transferred to lender or a purchaser in a foreclosure,

(a) if the original landlord has breached the lease or owes the tenant any money, the tenant will not require the lender or other foreclosure successor to cure this breach or pay this money;

(b) if the tenant has the right to offset or deduct amounts from its rent by reason of events that occurred before the transfer to the lender or other successor landlord, it will not assert this offset or deduction after the transfer;

(c) the lender or other successor landlord will not be obligated to return the tenant's security deposit unless the original landlord has turned the deposit over to the lender; and

(d) the lender or other successor landlord will not be required to repair casualty or condemnation damage unless it has received sufficient funds from the insurer or condemning authority, and even if it receives these funds, it will not be required to apply these funds to the restoration if its mortgage permits application of these proceeds to the outstanding loan amount.

Tenants may face serious concerns and issues when lenders attempt to go beyond the basic lender purposes of the SNDA (*i.e.*, the basic subordination and attornment agreements) and use the document as an opportunity to obtain assurances, protections, and tenant concessions in favor of the lenders and successor owners that were not otherwise contemplated in the original lease. As a notable example, most modern lender SNDA forms include an agreement by the tenant not to proceed against the person that acquires the property in a mortgage foreclosure for any default by the prior landlord. This type of provision typically prohibits the tenant from seeking redress from the new owner or deducting cure amounts from the rent and could leave the tenant with an action only against its original landlord, which is probably insolvent. Although a tenant is likely to be forced to give up the right to proceed against a lender or successor owner for money owed by the original landlord, a sophisticated tenant will require each new owner to assume the landlord's obligations under its lease that are to be performed after the date on which the new owner acquires ownership and, if the tenant is strong, to cure any property conditions that are not in compliance with the lease.

Some SNDAs include an express waiver by the tenant of any obligation on the part of the successor landlord to perform construction or pay tenant allowances. Even in the absence of this express waiver, tenants should be wary of this issue, as the general disclaimer of the successor owner's responsibility for defaults of the prior owner may already include this waiver by implication. A lack of recourse against a successor owner can present some very immediate problems for a tenant whose improvements have not been completed by the original landlord or who has spent its own money on construction in reliance on the prior owner's agreement to reimburse the tenant through payment of an improvement allowance. In this case, the tenant could effectively be left without a remedy, as the landlord is now out of the picture, and the lender is not obligated to complete the work or pay the tenant allowance. If the landlord was to

have constructed the improvements, a solution for the tenant is a well-defined right in the lease to finish the improvements in the event the landlord fails to do so (*i.e.*, a “self-help” right), coupled with a right to deduct the amounts spent by tenant from the rents due under the lease. If a construction allowance is not paid, the tenant may insist on the right to deduct this unpaid allowance amount from the rent, with interest.

Of course, any right on the part of a tenant to stop paying all or a portion of the rent by reason of a prior owner’s default may be problematic for a lender, as any such right diminishes the value of the lender’s collateral and is the practical equivalent of a lender obligation to pay the amounts. If a lender agrees to set-off rights, it should require that these rights be limited to specific landlord obligations (*e.g.*, a specifically negotiated build-out or allowance obligation) and should require the tenant to give generous notice and cure rights before the tenant is entitled to exercise its self-help rights. Often these set-off rights are also capped at some percentage of the rent payable by the tenant in order to preserve at least a portion of the normal rent stream under the lease.

However, because of the concerns noted above, many lenders will simply refuse to allow set-off rights for tenants. In this case, with respect to the completion of landlord improvements, the tenant may be satisfied with a right to terminate the lease if the improvements are not completed within specified time periods. More problematic is the case in which the tenant is making the improvements and is to receive payment of a large tenant allowance from landlord. In this case, the tenant is effectively lending money to the landlord by fronting the construction costs, and the lender will not want the payment of this debt to be superior in priority to the payment of the debt to the lender. Resolving this issue in a manner acceptable to the tenant and lender will generally require a more creative solution, such as a guaranty of completion by the principal of the landlord, a letter of credit, or some other security for the performance of this payment obligation, all of which could also be coupled with frequent disbursements of the tenant improvement allowance in order to minimize the tenant’s exposure.

Other typical form SNDA provisions also have the effect of amending material lease provisions. One such provision is the grant to the lender of notice and cure rights that extend beyond those given to the landlord in the lease. To avoid having to give too many duplicate notices, a tenant may want try to limit the default notices it must give to the lender to notices of those landlord defaults that could give rise to tenant termination, self-help, set-off, or abatement rights. In addition, a tenant may try to avoid giving a lender an open-ended cure period for landlord defaults that the lender claims it can cure only if it obtains possession of the leased space. The landlord’s loan documents generally will give the lender the right to cure landlord lease defaults, and if the lease already requires a tenant to accept cure or performance by the landlord’s lender, a tenant can reasonably ask why the lender should have to obtain possession of the premises in order to cure the landlord default.

Most SNDAs also provide that no amendment or modification of the lease will be binding on the lender or a successor owner unless approved in advance by the lender. Although the tenant may object to this provision on the ground that it should be able to enter into an agreement with its landlord without third party approval, the tenant is not likely to win this argument. At the very least, however, tenant should exclude from this approval requirement any

amendment that arises out of the exercise of any tenant rights under the lease (*e.g.*, an amendment memorializing tenant's expansion into new space pursuant to an right or option in the lease) and, if possible, any amendment that does not materially and adversely affect the amount of the rent or the landlord's rights or tenant's obligations under the lease.

A typical lender form of SNDA, lined to show a tenant's potential comments, is attached as Appendix B to these materials.

Many of the potential problems discussed in this section can be avoided by negotiating an acceptable form of SNDA as part of the original lease negotiations. This will, in most cases, not entail additional expense or effort on the part of a landlord, as a mortgage is often in place when the lease is executed, and a sophisticated tenant will require that an existing lender provide an SNDA anyway. This negotiated SNDA form can then be attached to the Lease, the tenant will be obligated to sign a similar form whenever the property is sold or otherwise refinanced, and the landlord will have a negotiated form to give to future lenders. Of course, the landlord should be sure that the form is, in fact, commercially reasonable and satisfies normal lender requirements. The benefit to the tenant of an agreed-upon form of SNDA is that it will have leverage in the future to refuse to sign any SNDA form that does not adequately satisfy its concerns and protect its interests. Also, if a prior lender signed or signed off on the form of SNDA at the time of lease execution, the tenant has a much better argument to make to the landlord and future lenders that the agreed-upon form is commercially reasonable and should be acceptable to the lenders.

As with estoppel certificates, the timing of obtaining SNDAs can be critical to the seller and the buyer in a sale transaction. The discussion above relating to estoppel timing issues, as well as the potential solutions to address these issues, applies equally to these SNDA timing issues.

V. OTHER LEASE PROVISIONS

Beyond the estoppel and SNDA requirements, there are a number of other lease provisions that could have a significant impact on a sale transaction, both in terms of process and sales price.

A. Termination Rights.

For obvious reasons, landlords, buyers, and their lenders do not like tenant termination rights. The value of a commercial rental property is derived in large part by the rent payment stream from the leases, and each lease's rental adds to the value of the property. Therefore, any lease provisions that may end the lease or disrupt its rental streams diminishes the property's value. As a consequence, landlords who give away too many termination rights in their leases could literally pay the price down the road.

However, not all termination rights are created equal. Some termination rights are customary and will not diminish the property's value. For example, in leases other than long-term, single-tenant net leases, the tenant will generally have the right to terminate the lease following certain fire and casualty events (typically those occurring during the last years of the lease or if the landlord cannot or does not restore within a certain amount of time) and

condemnation events. In these cases, the loss of the tenant (and its rent payments) can be cushioned by the landlord's rent loss insurance proceeds or the condemnation award. In addition, some tenants may be able to bargain for an early termination right after a specified number of years with sufficient notice and payment of a termination fee that minimizes the economic effect of the termination. A credit tenant of an in-line retail lease may also be able to negotiate a right to terminate the lease if its gross sales do not reach a certain level at a specified point in time (generally about halfway through the term).

However, most prudent landlords will avoid termination rights in other circumstances, such as service interruptions and alleged maintenance or repair issues. Only in limited circumstances involving large tenants with significant bargaining power should landlords consider termination rights in the event of landlord default (*e.g.*, failure to maintain or repair, interruption in services), and even then, termination should not be permitted unless the default makes the premises unusable for the tenant's business, was not caused by a circumstance outside the landlord's reasonable control, and continues for a certain number of days after notice from tenant to landlord specifying the default (generally no shorter than the period given to the tenant to cure non-monetary defaults).

B. Limitations on Landlord's Liability.

When a commercial rental property is sold, a landlord/seller will not want to continue to be liable to its tenants for lease defaults by the new owner. For this reason, the lease should provide that, when each successive owner of the property sells, the seller is automatically released from all liability under the lease arising after the sale, and the tenant must automatically pay its rent to and perform its lease obligations in favor of the new owner. A sophisticated tenant will provide that this release is effective only upon an express assumption by the new owner of the landlord's obligations under the lease and that, after the sale, the tenant retains its right to make claims against landlord and the proceeds of the sale for defaults that occurred before the sale—particularly because most transferees will assume the landlord's obligations only from and after the date of the transfer. If the estoppel certificates are sufficiently detailed and are obtained from all of the tenants, the landlord should know of all claimed defaults and be able to make arrangements for its post-sale liabilities.

The common lease provision stating that the landlord's liability is limited to its equity interest in the property is also helpful to a seller when the property is sold. When the selling owner sells the property, it no longer has an equity interest in the property, and the selling owner can assert that it has no further liability under the Lease or, at least, no liability beyond the proceeds that it received from the sale. Tenants may want to expand the concept of "equity interest" in these provisions to add a right to proceed against any rentals or other proceeds (*e.g.*, insurance or condemnation proceeds) derived from the property. A landlord that is a special purpose entity with limited assets (in many cases, just the leased property) may not be as concerned about this issue, but a buyer that has other assets or that is a limited or general partnership may insist on such a lease provision. Also, a prospective lender may look for this clause when evaluating the lease as collateral.

C. Financial Information.

Another lease clause that may help a landlord when it is time to sell or finance a property is a requirement that the tenant provide financial information (and, in retail leases, sales information) upon landlord's request. Buyers and their lenders need to confirm the creditworthiness of the tenants in order to confirm the certainty of the rental streams that create the value of the property. With respect to a retail property, the buyer or lender may also want to confirm that the sales derived from the property are good—to confirm both the tenant's satisfaction with the property and, if the tenant defaults or becomes insolvent, the likelihood of finding a tenant that will pay the same or more rent. The retail landlord's lease form should, therefore, require sales figures annually, even from tenants that are not paying percentage rent (although many tenants not paying percentage rents will object to these reporting requirements as overly intrusive and burdensome). As with estoppels and SNDAs, timing is important, and landlords should add lease provisions that require the tenant to provide current information quickly upon request.

Tenants may reasonably request that the landlord treat any non-public information confidentially, although the landlord should be sure that potential buyers, lenders, and their financial and legal consultants are permitted to view the financial information notwithstanding any confidentiality agreement. A public company tenant may also wish to include a statement that it will not be required to produce financial information so long as such information is available to the public at no or nominal charge.

D. Short Form or Memorandum of Lease.

Short form leases or memoranda of lease are sometimes used to provide public record notice of a lease and certain tenant rights. While not as common for small tenants or in multi-tenant projects, and not common in some states because of cost, these instruments are customary in ground lease situations (especially when a leasehold mortgage is involved) or in other situations where the tenant has valuable rights that it wants to protect (*e.g.*, an option or right of first refusal to purchase the premises).

As one might expect, however, persons buying or lending on property do not want the property's title to be littered with recorded lease notices that encumber title. These recorded lease notices are particularly troublesome when they remain in the public records after a tenant's lease has expired or been terminated. If a landlord agrees to allow a lease notice to be recorded, the landlord would be advised to provide in the lease that the tenant must cancel all recorded lease notices when the lease expires or otherwise terminates. In this case, the lease may also require the tenant to be liable for any legal fees or even lost sales or financings that the landlord incurs by reason of the tenant's failure to terminate its lease recordation. In some cases, the landlord may even want to obtain, at the time of lease execution, a signed termination of the recorded instrument to be held in escrow until expiration or termination of the lease. In this case, the lease should expressly authorize the landlord to record the termination upon expiration or termination of the lease, with or without tenant's further consent (although sophisticated tenants may not agree to this). In addition, landlords should ensure that any recorded short form or memorandum of lease includes language automatically subordinating such instrument to an existing or future mortgage. While these are not necessarily fail-safe solutions, the incorporation of one or more of them in the lease may help avoid delays and other problems in connection with a sale or financing.

E. Future Lender Requirements.

Most lenders have other requirements beyond estoppel and SNDA requirements. In order to address unanticipated lender requirements in ever-changing markets, a landlord should include in its leases a broad tenant obligation to make any future lease modifications reasonably requested by a lender. This type of provision presents obvious risks for tenants, so a wary tenant should insist on language providing that it will only be obligated to agree to modifications requested by institutional lenders that do not impose additional obligations or liabilities on the tenant or diminish the tenant's rights.

VI. GROUND LEASE ISSUES

The concerns outlined above are even more important if the seller holds its interest in the rental property as a tenant under a ground lease. Not only will the seller/tenant need to obtain estoppel certificates and SNDAs from its (sub)tenants, but it will also need to obtain estoppel certificates and consents and agreements from its ground landlord before its buyer and the buyer's lender will be willing to go forward with the transaction. The buyer is paying for a secure property interest, and the lender is lending based on a transferable property interest. Therefore, the ground landlord must give the buyer and its lender assurance that the leasehold interest held by the ground tenant is in effect and free from defaults, that the ground landlord will accept the buyer as its tenant, and that the buyer's lender will have the right and ability to keep the ground lease in effect notwithstanding the default or bankruptcy of the ground tenant.

Similar to the lender SNDA requirements discussed above, the buyer's lender will insist that the ground landlord agree that, if the lender must foreclose to cure the tenant's defaults, the landlord will not terminate the ground lease as long as these proceedings are moving forward. The lender will also insist on written assurances that, if the ground lease is terminated by reason of the tenant's defaults or is rejected in a bankruptcy, (1) the ground landlord will enter into a new ground lease with the lender or its designee on the same terms as the original ground lease and (2) the improvements on the property will not become the ground landlord's property, but rather will be the property of the tenant under the new lease. A savvy ground landlord may require that the rent be paid by the lender in a timely fashion while the lender is curing the tenant's defaults, obtaining possession of the tenant's interest by foreclosure, or having a new lease executed. The lender will not like this provision because it requires the lender to advance additional money while the loan is in default, but many lenders will agree to this so long as the ground landlord's only remedy for the lender's failure to make a rent payment after notice is the termination of the ground lease and not a suit against the lender for the unpaid or remaining rent. Some ground landlords may be willing to agree to forego rent for a few months during a cure or a bankruptcy to satisfy the lender's requirement, but this type of concession by a ground landlord is likely only when the lease is initially executed and in order to induce the tenant (and its lender) to develop the property.

In a ground lease transaction, it is crucial to the marketability of the ground lease interest that the ground landlord agree in the lease that the lease is freely transferable and that it will enter into the estoppels, consents, and other agreements that will be required by buyers and their lenders in a timely manner. Of course, these agreements should be made terms of the ground

lease itself, but each buyer and lender will want to have an agreement in its name directly with the ground landlord, so the ground landlord should also be required to put these provisions in a separate agreement. Again, attaching forms that will be executed by the ground landlord in the future (particularly the form negotiated between the landlord and the initial tenant's lender, which will be executed when the tenant still has the leverage of agreeing to invest money in the landlord's property in the future) will avoid future disputes with and delays caused by the ground landlord.

VII. CONCLUSION

Through careful planning and thoughtful lease drafting, owners of commercial rental properties can facilitate smooth sale transactions, while still addressing and accommodating the respective, and often contradictory, interests of tenants, buyers, and lenders.

APPENDIX A

FORM OF TENANT ESTOPPEL CERTIFICATE
(WITH LINED TENANT COMMENTS)

The undersigned (“**Tenant**”) hereby certifies to _____ (“**Seller**”) and to _____ (together with its successors and assigns, “**Buyer**”) and _____ (together with its successors and assigns, “**Lender**”) in connection with Buyer’s proposed purchase of that certain building located at [Street Address], [City], [State] (the “**Building**”) that, as of the date of this certificate:

1. Tenant is the lessee of certain space (the “**Premises**”) in the Building, containing approximately _____ square feet and known as Suite No. _____, under a lease dated _____, _____ (collectively, the “**Lease**”) entered into between Tenant and Seller, as landlord (“**Landlord**”).

2. The Lease is currently in full force and effect and Tenant is not in default thereunder. Tenant has not given Landlord any notice of termination under the Lease and has no currently existing right to terminate the Lease.

3. The Lease, an accurate and complete copy of which is attached hereto as **Exhibit A**, constitutes the entire agreement between Landlord and Tenant with respect to the leasing and occupancy of the Premises; there are no other promises, agreements, understandings or commitments of any kind between Landlord and Tenant with respect thereto; and there are no amendments, supplements or modifications of any kind, whether written or oral, to the Lease except as referenced in Paragraph 1 above and included in **Exhibit A**. Tenant neither expects nor has been promised any inducement, concession or consideration for entering into the Lease, except as stated in the Lease, and there are no side agreements or understandings between Landlord and Tenant.

4. Tenant has accepted the Premises, subject to the terms and conditions of the Lease **[Note: Insert any applicable construction requirements or warranties]**, and is paying rent under the Lease.

5. The term of the Lease commenced on _____, _____, and will end on _____, with _____ options to extend the term for extension periods of _____ years each. ~~Except as otherwise set forth in the Lease, Tenant has no right to vacate the Premises or cease to operate its business therefrom.~~

6. The rent currently paid by Tenant under the Leases is \$ _____ per month, consisting of the following:

Base rent of \$ _____ per month; and

Pro rata share of estimated expenses of \$ _____ per month.

Such rent has been paid through the month of _____, 200__.

7. Tenant is required to pay its pro rata share of operating expenses of the Building and Tenant’s pro rata share of the Building’s real property taxes and insurance costs, subject to the terms and conditions set forth in the Lease. Tenant's pro rata share is _____%. If Tenant's pro rata share of actual operating expenses, real property taxes and insurance costs is more than the estimated

payments made by Tenant, Tenant is responsible for the payment of the deficiency in accordance with the Lease on the terms and conditions set forth in the Lease.

8. Tenant is current with respect to, and is paying the full rent and other charges stipulated in the Lease (including, without limitation, its pro rata share of operating expenses, real property taxes and insurance costs) with no offsets, deductions, defenses or claims.

9. ~~As of the date hereof,~~ To Tenant's actual knowledge, Tenant is not entitled to any credits, reductions, offsets, defenses, free rent, rent concessions or abatements of rent under the Lease or otherwise against the payment of rent or other charges under the Lease.

10. ~~As of the date of this certificate,~~ To Tenant's actual knowledge, no uncured default, event of default or breach by Landlord exists under the Lease, no facts or circumstances exist that, with the passage of time or giving of notice, will or could constitute a default, event of default, or breach by Landlord under the Lease, and Landlord has performed all obligations of Landlord under the Lease. Tenant has made no claim against Landlord alleging Landlord's default under the Lease. ~~Ne~~To Tenant's actual knowledge, no circumstances have occurred or currently exist that, by themselves or with the passage of time and/or giving of notice, give rise to a right of Tenant to (a) abate, reduce or offset sums against rent or additional rent or (b) terminate or cancel the Lease.

11. The amount of the security deposit and prepaid rent, if any, paid under the terms of the Lease is \$ _____. No advance rentals have been paid, and no other sums have been deposited with Landlord. To Tenant's actual knowledge, Tenant has no unsatisfied claims against Landlord.

12. The undersigned has not entered into any sublease, assignment or any other agreement of any kind (whether oral or written) transferring any of its interest in the Lease or the Premises except as follows: [Enter "None" or details of agreement].

13. Tenant is in full and complete possession of the Premises and has accepted the Premises, including any work of Landlord performed thereon pursuant to the terms and provisions of the Lease, subject to any express warranties provided by Landlord in the Lease and Landlord's performance of any and all construction obligations under the Lease.

14. ~~To the best of~~ Tenant's actual knowledge and belief, there are no rental, lease, or similar commissions payable with respect to the Lease, except as may be expressly set forth therein.

15. After receipt of written notice of the conveyance of the Building to Buyer, Tenant will deliver to Lender a copy of all notices Tenant serves on or receives from Landlord to [Lender's notice address]; provided, Tenant's failure to provide any notice to Lender shall not affect the sufficiency or effectiveness of such notice unless such notice relates to a Landlord default that could give rise to a termination, abatement, self-help, or rent set-off right of Tenant.

16. ~~All~~To Tenant's actual knowledge, all of the obligations of Landlord under the Lease have been duly performed and completed including, without limitation, any obligations of Landlord to make or to pay Tenant for any improvements, alterations or work done on the Premises, and the improvements described in the Lease have been constructed in accordance with the plans and specifications therefor and have been accepted by us, subject to any express warranties provided by Landlord in the Lease and Landlord's performance of any and all construction obligations under the Lease.

17. Tenant has no option or right to purchase the property of which the Premises are a part, or any part thereof, except as expressly provided in the Lease.

18. Tenant has not at any time and does not currently use the Premises for the generation, manufacture, refining, transportation, treatment, storage or disposal of any unlawful levels of hazardous substance or waste or for any purpose which poses a substantial risk of imminent damage to public health or safety or to the environment, and to the extent hazardous substances customarily used in Tenant's business are used at the Premises, they other than toner, cleaning fluids and other substances in types and quantities typically used in general office space, which are stored, handled and used in compliance with all applicable laws.

19. The undersigned representative of Tenant is duly authorized and fully qualified to execute this instrument on behalf of Tenant thereby binding Tenant.

20. Neither Tenant nor any guarantor of the Lease is currently the subject of any proceeding pursuant to the United States Bankruptcy Code of 1978, as amended.

21. All Exhibits attached hereto are by this reference incorporated fully herein. Tenant makes the statements in this certificate for Buyer's, Lender's and Seller's benefit and protection with the understanding that Buyer intends to rely upon these statement in connection with Buyer's intended purchase of the Building from Seller and Lender's making a mortgage loan that will be evidenced by a note secured by a mortgage upon the Building; provided, however, in the event any statement or certification by Tenant in this Tenant Estoppel proves inaccurate, Tenant shall be estopped from taking a position contrary to the inaccurate statement or certification but shall not be subject to any damages or liability for such inaccuracy except in the event of fraud or intentional misrepresentation. The undersigned agrees that it will, upon receipt of written notice from Seller, commence to pay all rents to Buyer (or its assignee) or to any agent acting on behalf of Buyer or its assignee.

22. In the event of a conflict between any statement or certification in this Tenant Estoppel and any provision of the Lease, the Lease provision shall control.

23. As used in this Tenant Estoppel, the term "Tenant's actual knowledge" means the actual current knowledge, as of the date of this Tenant Estoppel and without investigation, of *[Insert individual's name—e.g., property manager, director of leasing]*, whom Tenant represents to be the individual in Tenant's organization most likely to have direct knowledge of the issues set forth in this Tenant Estoppel.

Dated: _____, 200__.

[TENANT], a _____

By: _____

Name: _____

Title: _____

APPENDIX B

FORM OF SNDA
(WITH LINED TENANT COMMENTS)

SUBORDINATION NON-DISTURBANCE AND ATTORNMENT AGREEMENT

THIS SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT (the "***Agreement***") is dated as of the _____ day of _____ 200__, between _____, a _____ ("***Lender***"), and _____, a _____ ("***Tenant***").

RECITALS

Tenant is the tenant under a certain office lease (the "***Lease***") dated _____, 200__, with _____, a _____ ("***Landlord***"), of premises described in the Lease (the "***Premises***") located in an office building located at _____, City of _____, _____ County, _____ and more particularly described in **Exhibit A** attached hereto and made a part hereof (such office building, including the Premises, is hereinafter referred to as the "***Property***").

Lender is the owner and holder of a mortgage/deed of trust and security agreement (the "***Mortgage***") and an assignment of leases and rents on the Property (the "***Assignment of Leases and Rents***") together with the Mortgage, the "***Security Documents***") recorded in the Real Property Records of _____ County, _____, which documents secure a Promissory Note now payable to Lender and the lien of which encumbers all or part of the Premises.

C. The parties desire to enter into this Agreement to define their obligations to one another under the terms of the Lease and the Mortgage.

AGREEMENT

For mutual consideration, including the mutual covenants and agreements set forth below, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Tenant agrees that, subject to the terms of this Agreement, the Lease is and shall be subject and subordinate to the Security Documents and to all present or future advances under the obligations secured thereby and all renewals, amendments, modifications, consolidations, replacements and extensions of the secured obligations and the Security Documents, to the full extent of all amounts secured by the Security Documents from time to time. Said subordination is to have the same force and effect as if the Security Documents and such renewals, modifications, consolidations, replacements and extensions thereof had been executed, acknowledged, delivered and recorded prior to the Lease, any amendments or modifications thereof and any notice thereof.

2. Lender agrees that, so long as Tenant is not in default of any term, covenant or condition of the Lease beyond all applicable notice and cure periods, if the Lender exercises any of its rights under the Security Documents, including an entry by Lender pursuant to the Mortgage or a foreclosure of the Mortgage, Tenant's rights and privileges under the Lease shall not be terminated, diminished or interfered with by Lender in the exercise of any of Lender's rights under the Mortgage,

and Lender will not join Tenant as a party defendant in any action or proceeding for the purpose of foreclosing the Mortgage unless required by applicable law.

3. Tenant agrees that, in the event of a foreclosure of the Mortgage by Lender or the acceptance of a deed in lieu of foreclosure by Lender or any other succession of Lender to fee ownership, ~~at Lender's option,~~ Tenant will attorn to and recognize the transferee of Landlord's interest as its landlord, and the transferee of Landlord's interest shall recognize Tenant as its tenant, under the Lease for the remainder of the term of the Lease (including all extension periods which have been or are hereafter exercised) upon the same terms and conditions as are set forth in the Lease, subject to the terms of this Agreement, and Tenant hereby agrees to pay and perform all of the obligations of Tenant pursuant to the Lease, and the transferee shall pay and perform all of the obligations of Landlord pursuant to the Lease.

4. Tenant agrees that, in the event Lender succeeds to the interest of Landlord under the Lease, Lender shall not be:

(a) liable for any act or omission of any prior Landlord (including, without limitation, the then defaulting Landlord), except to the extent that such act or omission is of a continuing nature and Lender has been given notice and an opportunity to cure as provided herein **[Note: Landlord construction obligations may require additional arrangements – e.g., self-help rights];** or

(b) subject to any defense or offsets which Tenant may have against any prior Landlord (including, without limitation, the then defaulting Landlord), except to the extent that such defense or offset relates to a default of a continuing nature, and Lender has been given notice and an opportunity to cure as provided herein; or

(c) bound by any payment of rent or additional rent which Tenant might have paid for more than one month in advance of the due date under the Lease to any prior Landlord or accountable for any other monies deposited with any prior Landlord, (including security deposits) except to the extent such monies are actually received by Lender; or

(d) bound by any obligation to make any payment to Tenant which was required to be made prior to the time Lender succeeded to any prior Landlord's interest; provided, however, in the event Landlord fails to pay any portion of the Improvement Allowance to Tenant in accordance with the terms and conditions of the Lease, which failure is not cured by Landlord or Lender within ten (10) days after written notice, Tenant may offset any such unpaid improvement allowance against the next due rentals due under the Lease; or

(e) bound by any surrender, termination, amendment or modification of the Lease made without the consent of Lender; provided, however, Lender's consent shall not be required for any amendment or modification (i) arising out of the exercise of any of Tenant's expansion, right of first refusal, renewal or other rights expressly set forth in this Lease, (ii) confirming the commencement or expiration dates of this Lease, (iii) relating to any assignment or sublease permitted under the Lease without Landlord's consent, or (iv) that does not materially and adversely affect the amount of rent payable by Tenant or landlord's or tenant's obligations and rights under the Lease.

5. Tenant agrees that, notwithstanding any provision hereof to the contrary, the terms of the ~~Mortgage~~ Lease shall continue to govern with respect to the disposition of any insurance proceeds

or eminent domain awards, and any obligations of Landlord to restore the real estate of which the Premises are a part shall be limited, insofar as they apply to Lender, to insurance proceeds or eminent domain awards received by Lender after the deduction of all costs and expenses incurred in obtaining such proceeds or awards. [Note: If the lease requires Tenant to restore the premises following a casualty or condemnation event, it is particularly important to confirm that the proceeds will be disbursed and applied to restoration in accordance with the terms of the Lease.]

6. Tenant hereby agrees to use commercially reasonable efforts to give to Lender copies of all notices of Landlord default(s) under the Lease in the same manner as, and whenever, Tenant shall give any such notice of default to Landlord, ~~and~~. With respect to any such notice of a Landlord default that could give rise to termination, abatement, self-help, or rent set-off rights (“Material Defaults”), no such notice of default shall be deemed given to Landlord unless and until a copy of such notice shall have been so delivered to Lender. Lender shall have the right to remedy any Landlord default under the Lease, or to cause any default of Landlord under the Lease to be remedied, ~~and for such purpose within the time frames provided to Landlord for curing defaults in the Lease; provided, with~~ respect to Material Defaults, Tenant hereby grants Lender an additional five (5) days beyond any grace period given to Landlord in the Lease for any monetary default and thirty (30) days beyond any grace period given to Landlord in the Lease for any non-monetary default; ~~provided, however, if possession of the Premises is required in order to cure such default, or if such default is not susceptible of being cured by Lender, Lender shall have such reasonable period of time as is required to pursue such cure to its completion, as long as Lender, in good faith, shall have notified Tenant that Lender intends to institute proceedings under the Security Documents, and, thereafter, as long as such proceedings shall have been instituted and shall be prosecuted with reasonable diligence.~~ Tenant shall accept performance by Lender of any term, covenant, condition or agreement to be performed by Landlord under the Lease with the same force and effect as though performed by Landlord. Lender shall have the right, without Tenant’s consent, to foreclose the Mortgage or to accept a deed in lieu of foreclosure of the Mortgage or to exercise any other remedies under the Security Documents.

7. Tenant hereby consents to the Assignment of Leases and Rents from Landlord to Lender in connection with the Lender’s loan to Landlord (the “**Loan**”). Tenant acknowledges that the interest of the Landlord under the Lease is to be assigned to Lender solely as security for the purposes specified in said assignment, and Lender shall have no duty, liability or obligation whatsoever under the Lease or any extension or renewal thereof, either by virtue of said assignment or by any subsequent receipt or collection of rents thereunder, unless Lender shall specifically undertake such liability in writing or unless Lender or its designee or nominee becomes the fee owner of the Premises, and then only with respect to periods during which Lender or its designee or nominee is the fee owner of the Premises. Tenant agrees that upon receipt of a written notice from Lender of a default by Landlord under the Loan, Tenant will thereafter, if requested by Lender, pay rent to Lender in accordance with the terms of the Lease. Landlord consents in advance to such payment and waives all claims against Tenant for such payments.

~~8. The Lease shall not be assigned by Tenant without Lender’s prior written consent in each instance, which shall not be unreasonably withheld if the conditions of the Lease have been satisfied.~~

8. ~~9~~—Any notice, election, communication, request or other document or demand required or permitted under this Agreement shall be in writing and shall be deemed delivered on the earlier to occur of (a) receipt or (b) the date of delivery, refusal or nondelivery indicated on the return receipt, if deposited in a United States Postal Service Depository, postage prepaid, sent certified or registered

mail, return receipt requested, or if sent via a recognized commercial courier service providing for a receipt, addressed to Tenant or Lender, as the case may be, at the following addresses:

If to Tenant _____

Attention: _____

If to Lender: _____

9. ~~10.~~–The term “**Lender**” as used herein includes any successor or assign of the named Lender herein, including without limitation, any co-lender at the time of making the Loan, any purchaser at a foreclosure sale and any transferee pursuant to a deed in lieu of foreclosure, and their successors and assigns, and the terms “**Tenant**” and “**Landlord**” as used herein include any successor and assign of the named Tenant and Landlord herein, respectively; provided, however, that such reference to Tenant’s or Landlord’s successors and assigns shall not be construed as Lender’s consent to any assignment or other transfer by Tenant or Landlord.

10. ~~11.~~–If any provision of this Agreement is held to be invalid or unenforceable by a court of competent jurisdiction, such provision shall be deemed modified to the extent necessary to be enforceable, or if such modification is not practicable, such provision shall be deemed deleted from this Agreement, and the other provisions of this Agreement shall remain in full force and effect.

11. ~~12.~~–Neither this Agreement nor any of the terms hereof may be terminated, amended, supplemented, waived or modified orally, but only by an instrument in writing executed by the party against which enforcement of the termination, amendment, supplement, waiver or modification is sought.

This Agreement shall be construed in accordance with the laws of the state of in which the Property is located.

The person executing this agreement on behalf of Tenant is authorized by Tenant to do so and execution hereof is the binding act of Tenant enforceable against Tenant.

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[Signature and notary blocks omitted from Appendix B]