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NEW YORK STATE BAR ASSOCIATION

MODEL NONDISTURBANCE AGREEMENT AND REPORT

Joshua Stein

The following report was issued in 1994 by a New York State Bar Association subcommittee chaired by Joshua Stein.¹ The report has not been updated, but remains relevant and timely. Typos, errors, and date references have been corrected in the following reprint. Since this report was issued, major tenants have perhaps become less accommodating of lenders, and minor tenants have tried to do the same though not as successfully. Against those trends, the model form of nondisturbance agreement offered here may be more lender-oriented than the typical fully negotiated outcome. Indeed, critics have charged that this model is overly lender-oriented in any event, and thus does not meet its goal of providing a “reasonable” and “balanced” document. For that reason and others, the New York State Bar Association Commercial Leasing Committee may at some point revisit this report and model form and issue a Second Edition. That process has not started, and has been on the author’s agenda for at least ten years with no action or progress of any kind. Commercial leasing attorneys who would like to participate should communicate with the author.

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¹ Report of Subcommittee on Nondisturbance Agreements, with Model Agreement, New York State Bar Association Real Property Law Section Newsletter, Spring 1994, at 42; reprinted in New York State Bar Association, Commercial Leasing, 2004 and 2010 (Joshua Stein, editor); model agreement adapted and reprinted in Thomas G. Homburger and Lawrence A. Eiben, “Who’s on First—Protecting the Commercial Mortgage Lender,” 36 American Bar Association Real Property, Probate and Trust Journal 411 (2001).

**REPORT OF
SUBCOMMITTEE
ON NONDISTURBANCE AGREEMENTS
COMMERCIAL LEASING COMMITTEE
REAL PROPERTY LAW SECTION
NEW YORK STATE BAR ASSOCIATION**

Most commercial leases provide that the tenant's estate is "subordinate" to the landlord's mortgage. This means that if the landlord's mortgagee were to foreclose its mortgage and name the tenant as a party defendant in the foreclosure action, then the foreclosure would terminate the tenant's lease and, with it, the tenant's right to occupancy. Whoever purchased the collateral at the foreclosure sale would do so free and clear of the lease.

Most commercial tenants do not understand why, if their landlord defaults on its mortgage, the mortgagee or anyone else should have the right to terminate the tenant's occupancy. As a result, any commercial tenant that leases a significant amount of space, intends to make a significant investment in tenant improvements, or otherwise has significant negotiating strength often will not allow its lease to simply be "subordinate" to the mortgage.

Instead, commercial tenants negotiating new leases commonly insist that the landlord obtain for them a "nondisturbance" agreement from the mortgagee. This agreement states that if the mortgagee forecloses, the mortgagee will honor and recognize the tenant's lease and not disturb the tenant's rights under the lease. Such an agreement is often called a "Subordination, Nondisturbance and Attornment Agreement" or some variation thereof (an "SNDA" agreement).

In the Eighties, mortgagees generally "granted" SNDA agreements to few tenants, often only nationally recognized tenants or other tenants with significant leverage and creditworthiness, and then only after careful review of the proposed lease. Moreover, those agreements would generally limit the tenant's rights and protect the mortgagee's interests in every possible way. Mortgagees would also sometimes try to use SNDA agreements as an occasion to renegotiate leases, adding such provisions as environmental indemnities from the tenant.

In the real estate world of the Nineties, in which rent-paying tenants constitute the only meaningful source of value for real estate, mortgagees are more willing to "grant" nondisturbance. A tenant that might not have been able to obtain an SNDA agreement in 1986 will routinely ask for one, and is more likely to get it, in 1993. Moreover, mortgagees have learned that some of the provisions in SNDA agreements can serve the mortgagee's interests as well.

SNDA agreements typically address issues about the relationship between the mortgagee and the tenant, usually resolving those issues within a predictable range of outcomes. In some cases, however, a "strong" or "unreasonable" (prospective) mortgagee or a "strong" or "unreasonable" (prospective) tenant will propose an SNDA agreement that deals with the standard issues in ways outside the normal range of outcomes or raises issues outside the normal range of issues. In those cases, SNDA negotiations can evolve into a renegotiation of the lease.

These aberrational approaches can produce negotiations that are complicated, time-consuming and not completely satisfactory to anyone.

To simplify and streamline negotiations of SNDA agreements and to define a “reasonable” baseline, the Commercial Leasing Committee of the New York State Bar Association Real Property Section decided in 1992 to assign to a subcommittee the responsibility to develop a model SNDA agreement. That model is attached to this report, followed by brief instructions regarding its use.

The following comments are intended, among other things, to guide the user of this model SNDA agreement, explain some judgments and decisions the subcommittee made, and call the user’s attention to other commonly negotiated outcomes for some of these issues.

I. OVERALL APPROACH AND PURPOSE.

The model SNDA agreement is a complete agreement intended for cases where the parties want to minimize or eliminate negotiations and get the job done in a reasonable way. It is suitable for transactions of any size. It may be especially appealing for relatively small loans and relatively small tenancies that will not support significant transaction costs and negotiations. This form is also designed to be a flexible starting point or reference point for use in transactions where the parties customize their own SNDA agreement.

The model SNDA agreement seeks to resolve each of the usual SNDA agreement issues in a standard and reasonable manner, reflecting industry concerns. Based on the subcommittee’s review of dozens of specimen SNDA agreements, the model also includes a few provisions that have recently begun to appear in some SNDA agreements but are not yet part of the basic issues covered in nearly every SNDA agreement. Additional issues are mentioned in these cover notes.

The model SNDA agreement reflects the subcommittee’s view of how a well-represented mortgagee and a well-represented tenant could resolve the typical SNDA agreement issues without material prejudice. Some provisions in the model SNDA agreement can be characterized as “pro-mortgagee,” others as “pro-tenant.” As a whole, however, this model form represents an appropriate accommodation of the competing interests consistent with normal marketplace outcomes of negotiations between reasonably well-represented parties. In the aggregate, the subcommittee believes it is a “fair” and even-handed document.

Although an SNDA agreement plays an important role by defining the relationship between a mortgagee and a tenant, it is ancillary to the basic contract between the mortgagee and the mortgagor, which is the mortgage, and the basic contract between the landlord and the tenant, which is the lease. The parties should make sure the mortgage and the lease do what they need to do and give each party the protections it needs, rather than rely on the SNDA agreement to repair problems and plug gaps in the landlord-tenant or mortgagor-mortgagee relationship. The starting point should always be the mortgage and the lease.

II. USE OF THE MODEL SNDA AGREEMENT.

In addition to the instructions that follow the model SNDA Agreement, the matters listed below should be considered in preparing an SNDA Agreement based on the attached model.

A. Recordation

The subcommittee believes every SNDA agreement should be recorded whether or not the lease or a memorandum thereof has been. The subcommittee disapproves of the common practice of not recording SNDA agreements. Of course, if the lease prohibits recording, tenant's counsel should consider whether recording an SNDA agreement might violate that prohibition. In arranging execution of a SNDA agreement, tenant's counsel should also prepare any ancillary affidavits, tax returns, a copy of the tenant's lease, and similar documentation that the recording office may require.

B. Use Outside New York

The model SNDA agreement should not be used outside New York State without consulting local counsel. It is, however, a generic document. The only provisions deliberately tailored to reflect New York law and practice are the cover page and choice of law. Part of the rationale for how the model SNDA agreement treats security deposits (§ 4.3) derives from New York law on treatment of security deposits in a sale of a building. If that law varies in other states, the variation may suggest a different result on security deposits. Similarly, if the model SNDA agreement is used in an "automatic cut-off" state (one where a foreclosure automatically terminates subordinate leases regardless of what the parties agree), then the mortgagee may desire to make leases be "prior" to the mortgage, on all the same terms and conditions set forth in the model SNDA agreement.

C. Estoppel Certificate

The estoppel certificate in the model SNDA Agreement (§ 7) will often need to be tailored for the particular lease, including: (a) whether the landlord has finished construction work and the tenant has taken possession; (b) identification of any presently determinable important dates, such as the "Commencement Date" or the "Rent Commencement Date"; (c) the status of any tenant termination options that may no longer exist if certain time periods lapse or certain conditions are satisfied; and (d) the extent of the tenant's obligations under the lease to deliver estoppel certificates.

III. NEGOTIABLE ISSUES.

The following are some basic issues raised by any SNDA agreement, and a description of how those issues were resolved in the model SNDA agreement, and why. Most of these issues are of a nature such that one side will "win" on the issue and the other side will "lose"; both sides cannot be accommodated. Particularly for these "zero-sum" issues, it was necessary to draw reasonable lines in the belief that the package as a whole is reasonable and sensible. Every issue can be resolved in other ways.

A. Basic Economic Terms of Lease

The subcommittee believes the tenant should be entitled to the basic economic and possessory benefits of the lease it negotiated with the landlord. The mortgagee should not be able to modify fundamental business terms or override extension options, expansion options, representations and warranties, or similar terms that the tenant was able to negotiate with the landlord. The favorable outcomes of these negotiations were presumably reflected in the rent the tenant agreed to pay, thereby creating the value to support the loan. Once the mortgagee approves the lease (or is required, under the loan documents, to live with the lease), the mortgagee should, as a starting point, honor the business terms the tenant negotiated with the landlord. This approach forces the mortgagee to carefully review the lease to identify specific objectionable provisions and try to renegotiate them with the tenant.

B. Security Deposit

The model SNDA agreement places on the tenant the risk that the landlord will misapply the tenant's security deposit (§ 4.3). The mortgagee is not responsible for security deposits unless actually received by the mortgagee. It might be reasonable to require the mortgagee to be responsible for the security deposit—effectively forcing the mortgagee to hold all security deposits from the inception of the loan—but the subcommittee decided to place the risk on the tenant. This approach tracks the normal negotiated outcome in SNDA agreements and the New York statute requiring actual delivery of security deposits to a purchaser for the purchaser to incur liability for them (N.Y. Gen. Oblig. Law § 7-105(2)).

C. Construction Work

Many SNDA agreements categorically excuse the mortgagee from any obligation to complete construction that the landlord failed to complete (including even initial fixturing), yet permit the mortgagee to collect rent after foreclosure premised on the space being delivered in the condition required by the lease. The subcommittee believes this position is unreasonable. It is, however, the standard treatment of this issue in mortgagees' standard form SNDA agreements. It sometimes survives tenant negotiations. The subcommittee tried to formulate a single "standard" reasonable solution to this problem, but found it impossible to do so because leases reflect different business deals regarding construction. Therefore the subcommittee left the matter for negotiation between the actual mortgagee and the actual tenant (to be memorialized in each case in a separate "schedule" to the model SNDA agreement). If the parties do not specifically address the issue and the mortgagee names the tenant as a defendant in the foreclosure action, then the mortgagee will, after foreclosure, have no obligation to complete or pay for the tenant's construction and the tenant will have no recourse against the mortgagee (§ 4.6). As one way to resolve this issue, the subcommittee considered but ultimately did not adopt the following provision, which is presented here only as a sample starting point for consideration:

If Former Landlord has failed to perform Landlord's Construction-Related Obligation(s) with respect to Tenant's initial occupancy of Tenant's Premises and Successor Landlord does not agree in writing within 30 days after Tenant's demand after the date of attornment to complete such Construction-Related

Obligation(s) within a reasonable period, then Tenant, as its sole remedy, shall have the right to elect either to terminate the Lease by written notice to Successor Landlord, or to complete and pay for such Construction-Related Obligations and offset all reasonable costs thereby incurred (the “*Construction Cost*”), together with interest on the unrecovered balance of Construction Cost, against any Rent thereafter payable, until Tenant shall have so recovered the entire Construction Cost.

D. Casualty and Condemnation Repairs

The model SNDA agreement requires the mortgagee to perform casualty and condemnation repairs to the same extent that such repairs would be required of landlord (§§ 1.1, 3.2). The subcommittee considered limiting the mortgagee’s obligation to the amount of insurance proceeds received, but concluded the mortgagee should not be entitled to a better deal than whatever the landlord and tenant negotiated. This approach prevents the mortgagee from seizing upon the building’s misfortune as the basis for early prepayment, except to the extent expressly contemplated by corresponding provisions in the lease. The subcommittee believes that a mortgagee, by properly drafting and administering its mortgage, can control the level of insurance, the insurance adjustment process, and the application of insurance proceeds. If the mortgagee fails to do its job, this should not become the tenant’s problem. A mortgagee may feel otherwise.

E. Deed in Lieu of Foreclosure

Consistent with industry standards, the model SNDA agreement provides that its mortgagee protections are triggered not only by an actual foreclosure, but also by a deed in lieu of foreclosure (“DILF”) from the landlord to the mortgagee (or its designee or nominee) (§ 1.2). A tenant may argue that in accepting a DILF, a mortgagee should succeed to exactly the same rights and obligations as the landlord, and the landlord’s delivery of a DILF should not be an occasion for any change in the landlord-tenant relationship. Regardless of any merits to the tenant’s position, the industry normally accepts the mortgagee’s position on this issue. Therefore, the model SNDA agreement does the same. The point is extremely negotiable.

F. Options

Some SNDA agreements provide that the mortgagee takes free of options to purchase, expand, contract, renew, and so on. The subcommittee believes the tenant should be entitled to preserve any options expressly provided for in the Lease, and the mortgagee should take free only of any options not set forth in the Lease. This latter point can be fully addressed with general language stating that the Lease is the entire agreement between landlord and tenant, and the only agreement by which the mortgagee will be bound (§§ D, 3.2, 7.1). No particular discussion of options is required. Tenant’s counsel should make sure the SNDA agreement expressly recognizes (and defines as part of the “Lease”) any side letters, option agreements, or other ancillary documentation giving the tenant valuable rights that should survive a foreclosure.

G. Amendments and Modifications

The model SNDA agreement permits landlord and tenant to amend the lease as they wish, but states that the mortgagee will not be bound by any amendments made without the mortgagee's consent (§ 4.4). The subcommittee believes this position is more reasonable than the mortgagee's common position prohibiting all amendments. As an intermediate position, the tenant might agree that any amendment reducing rent requires the mortgagee's consent, under the theory that such an amendment would impair cash flow and thus perhaps adversely affect the mortgagee even before foreclosure. (Likewise, the model SNDA does not prohibit rent prepayments but merely states that the mortgagee will take free of them [§ 4.2]. Some other issues receive similar treatment.)

H. Offset Rights

The model SNDA agreement tracks normal practice by prohibiting offsets against the mortgagee based on events that occurred before the date of attornment (§§ 1.4, 4.1). This means that if a tenant negotiates an offset right in a lease, the tenant should assert that right promptly because it will not survive foreclosure as to offsets that accrued before foreclosure. After foreclosure, the model SNDA agreement requires the Successor Landlord to accept the lease according to its terms, including any express offset rights (but only as to matters occurring after foreclosure) (§§ 3.2, 4.1). A mortgagee reviewing a lease with express offset rights may want to insist that the tenant agree, in the SNDA agreement, that the tenant's offset rights will terminate after foreclosure, even as to post-foreclosure matters. The model SNDA agreement defines "Offset Right" broadly (§ 1.4). The parties may prefer to limit the term to any "offset, defense, or counterclaim."

I. Estoppel Certificate

The model SNDA agreement includes a full estoppel certificate (§ 7). It may be slightly more customary to omit the estoppel provisions or put them in a separate document. Either way, tenant's counsel should carefully review with the tenant the accuracy of any "estoppel" provisions.

J. Opportunity to Cure Landlord's Default

The model SNDA agreement gives the mortgagee a fairly generous cure period for landlord's defaults—longer than the norm in many SNDA agreements, and more like the mortgagee's cure period available under a ground lease (§§ 6.2, 6.3). This cure period is tempered somewhat by language stating that once a receiver is appointed, the mortgagee has the burden of causing the receiver to cure the landlord's default within a reasonable time (§ 6.3). This will not necessarily be easy, particularly as to nonemergency matters. A tenant may regard the mortgagee's cure period in the model SNDA agreement as excessive and may, for example, ask for the right to suspend or offset rent or exercise self-help during the cure period.

K. Nonrecourse

The model SNDA agreement provides that any "Successor Landlord" is automatically exculpated from personal liability under the Lease (§ 5). This provision is common but not

completely standard. The subcommittee believes that any well-represented mortgagee will ask for it. Most tenants will accept it because they are accustomed to seeing such a clause run to the benefit of the landlord. In addition, even if a lease did not contain such a clause a mortgagee could always achieve the same result by having a shell corporation bid at the foreclosure sale.

L. Landlord's Payment Obligations

If the lease requires the landlord to make payments relating to matters beyond the premises, such as "takeover payments" on a tenant's existing lease, tenant's counsel should modify the SNDA agreement to make sure this obligation will survive foreclosure.

M. Future Advances

A tenant may prefer to "subordinate" (even with nondisturbance rights) only to a mortgage securing a known loan amount, and not to any future advances of future loans that the same mortgage might later secure. In this case tenant's counsel should limit the definition of "Mortgage" (and the subordination clause) to exclude future loan increases (§§ C, 2). Absent such a limitation, the "Mortgage" to which tenant will subordinate will include future increases. This result reflects industry standards.

IV. ADDITIONAL ISSUES TO CONSIDER.

The following issues are not addressed in most SNDA agreements and thus do not appear in the model SNDA agreement. They may, however, be appropriate to consider in particular transactions and are discussed here for convenient reference.

A. Payment of Rent to Mortgagee

Based on recent experiences with assignments of rents, receiverships, bankruptcy, and "cash collateral," a mortgagee may want the tenant to agree, in the SNDA agreement, to pay rent directly to the mortgagee on request. The subcommittee decided not to include such provisions in the model SNDA agreement because (a) they are not (yet) industry practice and (b) the landlord and tenant can reasonably tell the mortgagee to rely on its ordinary legal rights and remedies in this area (e.g., appointment of a receiver; New York Real Prop. Law § 291-f). The following provisions could be included where desired:

1. Tenant's Covenant

Add the following covenant by Tenant (breach of which would cause Tenant to lose nondisturbance rights or trigger other remedies):

Rent Payment Notices. From and after Tenant's receipt of written notice from Mortgagee (a "**Rent Payment Notice**"), Tenant shall pay all Rent to Mortgagee or as Mortgagee shall direct in writing, until such time as Mortgagee directs otherwise in writing. Tenant shall comply with any Rent Payment Notice notwithstanding any contrary instruction, direction or assertion from Landlord. Mortgagee's delivery to Tenant of a Rent Payment Notice, or Tenant's compliance therewith, shall not be deemed to: (a) cause Mortgagee to succeed to

or to assume any obligations or responsibilities as Landlord under the Lease, all of which shall continue to be performed and discharged solely by Landlord unless and until any attornment has occurred pursuant to this Agreement; or (b) relieve Landlord of any obligations under the Lease.

2. Landlord's Acknowledgment

Add the following to Landlord's acknowledgment at the end of the model SNDA agreement:

Landlord irrevocably directs Tenant to comply with any Rent Payment Notice, notwithstanding any contrary direction, instruction, or assertion by Landlord. Tenant shall be entitled to rely on any Rent Payment Notice. Tenant shall be under no duty to controvert or challenge any Rent Payment Notice. Tenant's compliance with a Rent Payment Notice shall not be deemed to violate the Lease. Landlord hereby releases Tenant from, and shall indemnify and hold Tenant harmless from and against, any and all loss, claim, damage, liability, cost or expense (including payment of reasonable attorneys' fees and disbursements) arising from any claim based upon Tenant's compliance with any Rent Payment Notice. Landlord shall look solely to Mortgagee with respect to any claims Landlord may have on account of an incorrect or wrongful Rent Payment Notice. Tenant shall be entitled to full credit under the Lease for any Rent paid to Mortgagee pursuant to a Rent Payment Notice to the same extent as if such Rent were paid directly to Landlord.

B. Tenant Exculpation

If the lease includes a nonrecourse clause, the tenant may wish to include the same nonrecourse clause, verbatim, in the SNDA agreement.

C. Bankruptcy of Mortgagee

An SNDA agreement probably constitutes an executory contract that the mortgagee could reject in its own bankruptcy proceeding or similar proceedings for failed financial institutions. As part of the solution to this problem—at least in cases where the lease is being entered into before the mortgage—the tenant may insist on deleting the standard “subordination” clause in the lease and instead require that “subordination” be addressed only in the SNDA agreement, with a proviso stating that the “subordination” is effective only so long as the SNDA is effective against the mortgagee. This way, even if the SNDA agreement were rejected, the lease itself and Bankruptcy Code § 365(h) would, it is hoped, provide some protection, although the subcommittee found no case law directly supporting this proposition. Other solutions to the problem are available. Some are cumbersome, complex, and nonstandard. That does not mean every tenant should overlook the issue, which is otherwise outside the scope of the subcommittee's assignment.

D. Bankruptcy of Landlord

Many SNDA agreements provide that a tenant's nondisturbance rights terminate if the lease terminates, without carving out a lease termination that occurs because the tenant's lease is rejected in the landlord's bankruptcy under 11 U.S.C. § 365(h). Although the Bankruptcy Code allows the tenant to remain in possession under these facts, the tenant's lease has probably still been "terminated." *Carlton Restaurant, Inc.*, 151 Bankr. 353 (E.D. Pa. 1993). This "termination" of the tenant's lease may allow the mortgagee, during or after foreclosure, to deny the tenant nondisturbance rights (because the lease has "terminated") and simply remove the tenant under the subordination clause of the SNDA agreement. Thus a mortgagee may be able to get around a nondisturbance covenant by manipulating the landlord's bankruptcy. The model SNDA agreement solves this problem by providing that the tenant loses nondisturbance rights only if the lease terminated because of an Event of Default by tenant.

E. Miscellaneous

A mortgagee might want to be able to require the tenant to give the mortgagee the same periodic deliveries the landlord can require under the lease, such as updated financial information or updated estoppel certificates. A mortgagee might want the right to participate in legal proceedings relating to the determination of rights of parties to the lease, including arbitration. If the transaction involves out-of-state parties it may be appropriate to include a consent to jurisdiction. To prevent a desirable lease from terminating if a junior mortgagee forecloses, a first mortgagee may want the tenant to agree not to subordinate its estate to the lien of any junior mortgagee. None of these provisions are common in SNDA agreements. None are included here.

The Subcommittee on Nondisturbance Agreements hopes that the above comments, and the model SNDA agreement that follows, will help standardize and streamline practice in this area. Subcommittee members will welcome comments and suggestions based on experience using the model SNDA agreement. If warranted, a second edition will be prepared and released.

Respectfully Submitted,

SUBCOMMITTEE ON
NONDISTURBANCE AGREEMENTS

Joshua Stein, Chair
Andrea Paretts Ascher
Hugh P. Finnegan
Richard M. Frome²
November 19, 1993
New York, New York

Sheldon M. Goldstein
Andrew L. Herz
Barry C. Ross
W. Stephen Tierney

² Has unofficially withdrawn his name from this report.

_____ (“Mortgagee”)

and

_____ (“Tenant”)

SUBORDINATION, NONDISTURBANCE,
AND ATTORNMENT AGREEMENT³

_____, 201_

This instrument affects real property situated, lying and being in the County of _____,
State of New York, known as follows:

Section: _____
Volume: _____
Block(s): _____
Lot(s): _____
Street Address: _____
[New York City Only] _____

RECORD AND RETURN TO:

_____, New York _____
Att’n: _____
File No.: _____
Document No.: _____

NO MORTGAGE RECORDING TAX IS
PAYABLE WITH RESPECT TO THIS
AGREEMENT. NOTHING IN THIS
AGREEMENT IS INTENDED TO
EVIDENCE OR SECURE ANY
INDEBTEDNESS OR TO CREATE ANY
LIEN.

³ Copyright (c) 1993 New York State Bar Association. Consent is granted to modify and adapt this model SNDA agreement for specific transactions. See instructions following model SNDA agreement.

**SUBORDINATION, NONDISTURBANCE AND
ATTORNMENMENT AGREEMENT**

This SUBORDINATION, NONDISTURBANCE, AND ATTORNMENMENT AGREEMENT (this “*Agreement*”) is entered into as of _____, 201_ (the “*Effective Date*”), between _____, a _____, whose address is _____ (“*Mortgagee*”), and _____, a _____, whose address is _____ (“*Tenant*”), with reference to the following facts:

A. _____, a _____, whose address is _____ (“*Landlord*”), owns the real property located at _____ (such real property, including all buildings, improvements, structures and fixtures located thereon, “*Landlord’s Premises*”), as more particularly described in **Schedule A**.

B. Mortgagee has made a loan to Landlord in the original principal amount of \$_____ (the “*Loan*”).

C. To secure the Loan, Landlord has encumbered Landlord’s Premises by entering into that certain *Mortgage, Consolidation and Modification Agreement* dated _____, 201__, in favor of Mortgagee (as amended, increased, renewed, extended, spread, consolidated, severed, restated, or otherwise changed from time to time, the “*Mortgage*”) [to be] recorded [on _____, at Book _____, Page _____,] in the Official Records of the County of _____, State of New York (the “*Land Records*”).

D. Pursuant to a *Lease* dated as of _____, 201_, as amended on _____, 201_, and _____, 201__ (the “*Lease*”), Landlord demised to Tenant [a portion of] Landlord’s Premises (“*Tenant’s Premises*”). Tenant’s Premises are commonly known as _____.

[E. A memorandum of the Lease [is to be recorded in the Land Records prior to the recording of this Agreement.] [was recorded in the Land Records on _____, at Book _____, Page _____.]

F. Tenant and Mortgagee desire to agree upon the relative priorities of their interests in Landlord’s Premises and their rights and obligations if certain events occur.

NOW, THEREFORE, for good and sufficient consideration, Tenant and Mortgagee agree:

1. *Definitions*

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

1.1 *Construction-Related Obligation*. A “**Construction-Related Obligation**” means any obligation of Landlord under the Lease to make, pay for, or reimburse Tenant for any alterations, demolition, or other improvements or work at Landlord’s Premises, including Tenant’s Premises. “Construction-Related Obligations” shall not include: (a) reconstruction or repair following fire, casualty or condemnation; or (b) day-to-day maintenance and repairs.

1.2 *Foreclosure Event.* A “**Foreclosure Event**” means: (a) foreclosure under the Mortgage; (b) any other exercise by Mortgagee of rights and remedies (whether under the Mortgage or under applicable law, including bankruptcy law) as holder of the Loan and/or the Mortgage, as a result of which Successor Landlord becomes owner of Landlord’s Premises; or (c) delivery by Landlord to Mortgagee (or its designee or nominee) of a deed or other conveyance of Landlord’s interest in Landlord’s Premises in lieu of any of the foregoing.

1.3 *Former Landlord.* A “**Former Landlord**” means Landlord and any other party that was landlord under the Lease at any time before the occurrence of any attornment under this Agreement.

1.4 *Offset Right.* An “**Offset Right**” means any right or alleged right of Tenant to any offset, defense (other than one arising from actual payment and performance, which payment and performance would bind a Successor Landlord pursuant to this Agreement), claim, counterclaim, reduction, deduction, or abatement against Tenant’s payment of Rent or performance of Tenant’s other obligations under the Lease, arising (whether under the Lease or under applicable law) from Landlord’s breach or default under the Lease.

1.5 *Rent.* The “**Rent**” means any fixed rent, base rent or additional rent under the Lease.

1.6 *Successor Landlord.* A “**Successor Landlord**” means any party that becomes owner of Landlord’s Premises as the result of a Foreclosure Event.

1.7 *Termination Right.* A “**Termination Right**” means any right of Tenant to cancel or terminate the Lease or to claim a partial or total eviction arising (whether under the Lease or under applicable law) from Landlord’s breach or default under the Lease.

2. *Subordination*

The Lease shall be, and shall at all times remain, subject and subordinate to the Mortgage, the lien imposed by the Mortgage, and all advances made under the Mortgage.

3. *Nondisturbance, Recognition and Attornment.*

3.1 *No Exercise of Mortgage Remedies Against Tenant.* So long as the Lease has not been terminated on account of Tenant’s default that has continued beyond applicable cure periods (an “**Event of Default**”), Mortgagee shall not name or join Tenant as a defendant in any exercise of Mortgagee’s rights and remedies arising upon a default under the Mortgage unless applicable law requires Tenant to be made a party thereto as a condition to proceeding against Landlord or prosecuting such rights and remedies. In the latter case, Mortgagee may join Tenant as a defendant in such action only for such purpose and not to terminate the Lease or otherwise adversely affect Tenant’s rights under the Lease or this Agreement in such action.

3.2 *Nondisturbance and Attornment.* If the Lease has not been terminated on account of an Event of Default by Tenant, then, when Successor Landlord takes title to Landlord’s Premises: (a) Successor Landlord shall not terminate or disturb Tenant’s possession of Tenant’s Premises under the Lease, except in accordance with the terms of the Lease and this Agreement; (b) Successor Landlord shall be bound to Tenant under all the terms and conditions of the Lease

(except as provided in this Agreement); (c) Tenant shall recognize and attorn to Successor Landlord as Tenant's direct landlord under the Lease as affected by this Agreement; and (d) the Lease shall continue in full force and effect as a direct lease, in accordance with its terms (except as provided in this Agreement), between Successor Landlord and Tenant.

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

4. *Protection of Successor Landlord.*

Notwithstanding anything to the contrary in the Lease or the Mortgage, Successor Landlord shall not be liable for or bound by any of the following matters:

4.1 *Claims Against Former Landlord.* Any Offset Right that Tenant may have against any Former Landlord relating to any event or occurrence before the date of attornment, including any claim for damages of any kind whatsoever as the result of any breach by Former Landlord that occurred before the date of attornment. (The foregoing shall not limit either (a) Tenant's right to exercise against Successor Landlord any Offset Right otherwise available to Tenant because of events occurring after the date of attornment or (b) Successor Landlord's obligation to correct any conditions that existed as of the date of attornment and violate Successor Landlord's obligations as landlord under the Lease.)

4.2 *Prepayments.* Any payment of Rent that Tenant may have made to Former Landlord more than thirty days before the date such Rent was first due and payable under the Lease with respect to any period after the date of attornment other than, and only to the extent that, the Lease expressly required such a prepayment.

4.3 *Payment; Security Deposit.* Any obligation: (a) to pay Tenant any sum(s) that any Former Landlord owed to Tenant or (b) with respect to any security deposited with Former Landlord, unless such security was actually delivered to Mortgagee. This paragraph is not intended to apply to Landlord's obligation to make any payment that constitutes a "Construction-Related Obligation."

4.4 *Modification, Amendment, or Waiver.* Any modification or amendment of the Lease, or any waiver of any terms of the Lease, made without Mortgagee's written consent.

4.5 *Surrender, Etc.* Any consensual or negotiated surrender, cancellation, or termination of the Lease, in whole or in part, agreed upon between Landlord and Tenant, unless effected unilaterally by Tenant pursuant to the express terms of the Lease.

4.6 *Construction-Related Obligations.* Any Construction-Related Obligation of Former Landlord, except as expressly provided for in **Schedule B** (if any) attached to this Agreement. *[Note: Please see Paragraph 3 of Instructions following model SNDA agreement.]*

5. *Exculpation of Successor Landlord.*

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

6. *Mortgagee's Right to Cure.*

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

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

6.3 *Extended Cure Period.* In addition, as to any breach or default by Landlord the cure of which requires possession and control of Landlord's Premises, provided only that Mortgagee undertakes to Tenant by written notice to Tenant within thirty days after receipt of the Default Notice to exercise reasonable efforts to cure or cause to be cured by a receiver such breach or default within the period permitted by this paragraph, Mortgagee's cure period shall continue for such additional time (the "**Extended Cure Period**") as Mortgagee may reasonably require to either (a) obtain possession and control of Landlord's Premises and thereafter cure the breach or default with reasonable diligence and continuity or (b) obtain the appointment of a receiver and give such receiver a reasonable period of time in which to cure the default.

7. *Confirmation of Facts.*

Tenant represents to Mortgagee and to any Successor Landlord, in each case as of the Effective Date:

7.1 *Effectiveness of Lease.* The Lease is in full force and effect, has not been modified, and constitutes the entire agreement between Landlord and Tenant relating to Tenant's Premises.

Tenant has no interest in Landlord's Premises except pursuant to the Lease. No unfulfilled conditions exist to Tenant's obligations under the Lease.

7.2 *Rent.* Tenant has not paid any Rent that is first due and payable under the Lease after the Effective Date.

7.3 *No Landlord Default.* To the best of Tenant's knowledge, no breach or default by Landlord exists and no event has occurred that, with the giving of notice, the passage of time or both, would constitute such a breach or default.

7.4 *No Tenant Default.* Tenant is not in default under the Lease and has not received any uncured notice of any default by Tenant under the Lease.

7.5 *No Termination.* Tenant has not commenced any action nor sent or received any notice to terminate the Lease. Tenant has no presently exercisable Termination Right(s) or Offset Right(s).

7.6 *Commencement Date.* The "Commencement Date" of the Lease was _____, 201__.
[Note: Please see Paragraph 2 of Instructions following model SNDA agreement.]

7.7 *Acceptance.* Except as set forth in **Schedule B** (if any) attached to this Agreement: (a) Tenant has accepted possession of Tenant's Premises; and (b) Landlord has performed all Construction-Related Obligations related to Tenant's initial occupancy of Tenant's Premises and Tenant has accepted such performance by Landlord. *[Note: Please see Paragraph 3 of Instructions following model SNDA agreement.]*

7.8 *No Transfer.* Tenant has not transferred, encumbered, mortgaged, assigned, conveyed or otherwise disposed of the Lease or any interest therein, other than sublease(s) made in compliance with the Lease.

7.9 *Due Authorization.* Tenant has full authority to enter into this Agreement, which has been duly authorized by all necessary actions.

8. *Miscellaneous.*

8.1 *Notices.* All notices or other communications required or permitted under this Agreement shall be in writing and given by certified mail (return receipt requested) or by nationally recognized overnight courier service that regularly maintains records of items delivered. Each party's address is as set forth in the opening paragraph of this Agreement, subject to change by notice under this paragraph. Notices shall be effective the next business day after being sent by overnight courier service, and five business days after being sent by certified mail (return receipt requested).

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

8.3 *Entire Agreement.* This Agreement constitutes the entire agreement between Mortgagee and Tenant regarding the subordination of the Lease to the Mortgage and the rights and obligations of Tenant and Mortgagee as to the subject matter of this Agreement.

8.4 *Interaction with Lease and with Mortgage.* If this Agreement conflicts with the Lease, then this Agreement shall govern as between the parties and any Successor Landlord, including upon any attornment pursuant to this Agreement. This Agreement supersedes, and constitutes full compliance with, any provisions in the Lease that provide for subordination of the Lease to, or for delivery of nondisturbance agreements by the holder of, the Mortgage. Mortgagee confirms that Mortgagee has consented to Landlord's entering into the Lease.

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

8.6 *Interpretation; Governing Law.* The interpretation, validity and enforcement of this Agreement shall be governed by and construed under the internal laws of the State of New York, excluding its principles of conflict of laws.

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

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

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

IN WITNESS WHEREOF, this Agreement has been duly executed by Mortgagee and Tenant as of the Effective Date.

MORTGAGEE

TENANT

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Landlord consents and agrees to the foregoing Agreement, which was entered into at Landlord's request. The foregoing Agreement shall not alter, waive or diminish any of Landlord's

obligations under the Mortgage or the Lease. The above Agreement discharges any obligations of Mortgagee under the Mortgage and related loan documents to enter into a nondisturbance agreement with Tenant. Landlord is not a party to the above Agreement.

LANDLORD

By: _____

Name: _____

Title: _____

Dated: _____, 201__

Each of the undersigned, a guarantor of Tenant’s obligations under the Lease (a “*Guarantor*”), consents to Tenant’s execution, delivery and performance of the foregoing Agreement. From and after any attornment pursuant to the foregoing Agreement, that certain Guaranty dated _____, 201__ (the “*Guaranty*”) executed by Guarantor in favor of _____ shall automatically benefit and be enforceable by Successor Landlord with respect to Tenant’s obligations under the Lease as affected by the foregoing Agreement. Successor Landlord’s rights under the Guaranty shall not be subject to any defense, offset, claim, counterclaim, reduction or abatement of any kind resulting from any act, omission or waiver by any Former Landlord for which Successor Landlord would, pursuant to the foregoing Agreement, not be liable or answerable after an attornment. The foregoing does not limit any waivers or other provisions contained in the Guaranty. Guarantor confirms that the Guaranty is in full force and effect and Guarantor presently has no offset, defense (other than any arising from actual payment or performance by Tenant, which payment or performance would bind a Successor Landlord under the foregoing Agreement), claim, counterclaim, reduction, deduction or abatement against Guarantor’s obligations under the Guaranty.

GUARANTOR

By: _____

Its: _____

Dated: _____, 201__

Attachments:

Acknowledgments

Schedule A—Description of Landlord's Premises

Schedule B—Landlord's Construction-Related Obligations

ACKNOWLEDGMENTS

[Individual General Partner]

STATE OF NEW YORK)
) ss
COUNTY OF _____)

On the ___ day of _____, 201__, before me personally came _____, to me known, who, being by me duly sworn, did depose and say that (s)he resides at _____, that (s)he is a general partner of _____, the partnership named in the foregoing instrument; and that (s)he executed such instrument as the act and deed of, and on behalf of, said partnership.

Notary Public

[Corporation]

STATE OF NEW YORK)
) ss
COUNTY OF _____)

On the ___ day of _____, 201__, before me personally came _____, to me known, who, being by me duly sworn, did depose and say that (s)he resides at _____, that (s)he is the _____ of _____, the corporation described in and which executed the foregoing instrument; and that (s)he signed h__ name thereto by authority of the board of directors of said corporation.

Notary Public

[Individual]

STATE OF NEW YORK)

) ss

COUNTY OF _____)

On the ___ day of _____, 201__, before me personally came _____, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that (s)he executed the same.

Notary Public

[Corporate General Partner of Limited Partnership]

STATE OF NEW YORK)

) ss

COUNTY OF _____)

On the ___ day of _____, 201__, before me personally came _____, to me known, who, being by me duly sworn, did depose and say that (s)he resides at _____, that (s)he is the _____ President of _____, the corporation described in and which executed the foregoing instrument as general partner of _____, the limited partnership named in the foregoing instrument; that (s)he signed h__ name thereto by authority of the board of directors of said corporation; and that (s)he executed such instrument as the act and deed of, and on behalf of, said limited partnership acting through its corporate general partner.

Notary Public

Schedule A

Description of Landlord's Premises

ALL THAT CERTAIN REAL PROPERTY lying, being and situated in the City of _____, County of _____, and State of New York, more particularly described as follows:

Schedule B**Construction-Related Obligations**

- A. Construction-Related Obligations Remaining to Be Performed as of Effective Date.

[Summarize and Describe]

- B. Successor Landlord's Construction-Related Obligations After Attornment.

[Negotiate and Describe]

INSTRUCTIONS FOR MODEL SNDA AGREEMENT

1. *Overall.* Modify as appropriate for the particular transaction. Fill in blanks. Consider deleting or editing bracketed language.
2. *Important Dates.* Modify or supplement Section 7.6 to tie down the Commencement Date and any other important dates referred to in the Lease, i.e., any dates that must be known in order to understand the lease term or calculation of rent.
3. *Construction-Related Obligations.* In Schedule B, summarize any “Construction-Related Obligations” of Landlord that remain unperformed as of the Effective Date, and describe the extent (if any) to which Successor Landlord has agreed to be obligated to perform such “Construction-Related Obligations” after any attornment. Edit Section 7.7 based on the status of construction.
4. *Acknowledgments.* Sample acknowledgments are provided at the end of the document. Duplicate and edit as necessary for all parties signing, including landlord and any guarantors.
5. *Subleases.* Although the subcommittee regards it as unnecessary, a mortgagee may desire a list of all subleases entered into by the tenant. This could be attached as another Schedule.
6. *Non-Fee Estates.* This SNDA agreement assumes Landlord holds a fee estate. If this is not the case, modify accordingly.
7. *Lease Review.* In preparing an SNDA agreement, mortgagee’s counsel should review the underlying lease; consider whether the mortgagee is willing to “nondisturb” the lease; and, if so, whether the mortgagee should insist on renegotiating any of the terms of the lease. The SNDA agreement can incorporate the outcome of such negotiations, in the form of an agreement between mortgagee and tenant that would come into effect only if and when landlord is out of the picture. It is beyond the scope of this report to list issues that mortgagee’s counsel should consider in reviewing a lease.
8. *Loan Documents.* Mortgagee’s counsel should consider the interaction between the SNDA agreement and the terms of the loan documents, so they work well together. Many provisions of the model SNDA agreement (or optional provisions discussed in this report) require conforming or implementing language in the loan documents. This area is outside the scope of the subcommittee’s responsibilities.