

**STATE BAR OF MICHIGAN
REAL PROPERTY LAW SECTION**

**35th Annual Summer Conference
Crystal Mountain Resort & Spa
July 14 – 17, 2010**

**LESSONS LEARNED FROM THE
DOWNTURN**

THE TENANT'S PERSPECTIVE

***TENANT CONCERNS WITH THE
DISTRESSED SHOPPING CENTER***

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TENANT CONCERNS WITH THE DISTRESSED SHOPPING CENTER

I. Introduction

Given the fact scenario presented in this Panel Discussion, the tenant will have several concerns with the management of the center, the viability of the center as other tenants cease operations, and the impact of these events on the tenant's continued ability to operate profitably at this location. These concerns result primarily from the financial problems of other tenants in the center. The remaining tenants are directly impacted by store closings resulting in decreased customer traffic at the center, and are indirectly impacted by the landlord's reduced cash flow and its ability to reinvest in and maintain the center.

Additional concerns of the tenants arise as the lender proceeds to take over the center, either through foreclosure or by a deed in lieu of foreclosure. Such concerns often begin with the landlord failing to pay property taxes or neglecting maintenance obligations for the center; proceed to the landlord's default on its mortgage, which will likely result in the mortgage lender's exercise of its assignment of rents, and possibly the appointment of a receiver; and culminate in the lender's takeover of the center. If the tenant desires to remain in the center under its existing lease, it will need to know whether the lender is obligated to recognize the tenant's lease. Conversely, if the tenant is paying over-market rents, it may inquire as to whether the takeover provides an opportunity to either terminate its lease and relocate, or at least renegotiate the economic terms of its lease.

If the tenant desires to continue to operate under its lease, not only will it want to ensure that the lender must recognize the tenant's possessory interest in the leased premises, but it will need to understand the other rights of the tenant under the lease that the lender will be required to recognize. The tenant will also need to know which obligations of the landlord under the lease become binding upon the lender, and which landlord obligations the lender does not assume.

The sections below attempt to provide additional insight into these questions and the other concerns of the tenant of a distressed center when the landlord defaults on its mortgage and the lender takes over the center. The legal documents that control these issues are typically (i) the lease, (ii) the assignment of rents, which can be found within a commercial mortgage or as a separate document executed with the mortgage, and (iii) the subordination, nondisturbance, attornment agreement (“SNDA”). As the discussion below highlights, the tenant should not merely execute the SNDA form presented by the landlord’s mortgage lender, but should attempt to negotiate favorable terms in the event the center fails and the lender takes over. An example of a tenant-oriented SNDA that a tenant would desire to negotiate and execute is found at [Exhibit A](#).

II. Tenant Concerns Prior to a Lender Takeover of the Shopping Center

A. Co-tenancy Clauses

A tenant may have a co-tenancy clause in its lease that permits the tenant to terminate its lease, or receive rental abatements or some other concession if other major tenants are no longer operating in the center. A smaller tenant typically signs a lease with the expectation that the major tenants of the center will be operating, since the major tenants drive customer traffic for the smaller tenants. A co-tenancy clause assures the tenant that if one or more major tenants cease operations, then the tenant with the co-tenancy requirement in its lease may be able to terminate, or threaten termination of its lease to obtain concessions from the landlord. A co-tenancy requirement in the fact scenario presented is likely based on the bookstore or the movie rental store remaining operational. Alternatively, the co-tenancy requirement could be based upon maintaining a certain occupancy level in the center, such as the following example where the co-tenancy clause provides the tenant with a reduction in its rental obligations instead of a termination right:

***Co-tenancy.** If at any time during the Lease Term (a) more than 35% of the gross leasable area of the Shopping Center is vacant (“Major Vacancy”), and (b) Tenant’s Gross Sales have decreased by 10% or more on an annualized basis since the date the Major Vacancy first occurred (the date both of the events set forth in (a) and (b) above have occurred being referred to as the “Closing Date”), then commencing on the first day of the calendar month immediately following the date of the Closing Date, Tenant shall pay to Landlord as total Rent (including, Minimum Guaranteed Rental, an amount equal to two percent (2%) of all Gross Sales for each calendar month (or portion thereof) during which the Major Vacancy continues (the “Vacancy Period”). The end of the Vacancy Period will occur when a replacement tenant or tenants leasing sufficient space such that there is no longer Major Vacancy, opens for business.*

B. Co-Tenant Use Restrictions

In many shopping center leases, tenants will require exclusive use clauses protecting their primary use to prohibit another tenant in the center from competing with such primary use. The other tenants may be able to engage in the exclusive use activity only as an ancillary use, being limited by the amount of floor area devoted to such use, or the amount of its sales that can be generated from such use. If a tenant with an exclusive use right ceases to operate such use in its premises for a certain period of time, then that tenant often loses the protected exclusive use. This situation may create an opportunity for an existing tenant, or a potential new tenant that desires to operate such use. In the fact scenario presented, it is likely that the bookstore, the movie rental store and the greeting card store were able to negotiate exclusive use clauses in their leases. These provisions would likely prohibit another tenant in the shopping center from selling books and periodicals, renting movies or selling greeting cards as its principal business activity (often there are carve-outs allowing another tenant to engage in such uses as an ancillary use to its principal business activity). However, with the movie rental store being vacant, another tenant may be able to install a movie rental machine in its store, and should discuss this possibility with the landlord. An example of an exclusive use clause that is subject to termination would be as follows:

*Landlord shall not lease, rent or occupy or permit any other premises in the Shopping Center to be occupied, whether by a tenant, sublessee, assignee, licensee or other occupant or itself, for the sale, rental or distribution, at retail or at wholesale, either singly or in any combination, of items contained in any of the following respective categories of merchandise: _____ (“**Exclusive Items**”). Notwithstanding the forgoing, any tenant or subtenant in the Shopping Center shall have the right to utilize its respective premises for the sale, rental and/or distribution of Exclusive Items within an aggregate area (which shall include an allocable portion of the aisle space adjacent to such sales, rental and/or distribution area) not to exceed the lesser of (x) five percent (5%) of the Floor Area of such tenant’s or subtenant’s premises, or (y) two thousand (2,000) square feet of Floor Area within such tenant’s or subtenant’s premises. Such exclusive rights for any such category as specified above shall terminate and be of no further force or effect with respect to such category of Exclusive Items when such category of Exclusive Items are no longer sold, rented or distributed within the Premises for said period exceeding two hundred seventy (270) consecutive days, provided that Landlord*

provides Tenant with notice thereof no later than ninety (90) days prior to the end of such 270-day period and Tenant does not resume the sale of such items on or before the end of such 270-day period.

C. Landlord's Maintenance Obligations

In a distressed shopping center, the landlord often looks for ways to cut its expenses. Most shopping center leases require the landlord to maintain the building structure and the common areas of the center. One way the landlord often reduces expenses is to defer maintenance to the building and the common areas. For example, if sections of the building roof require replacement, which is not an expense the landlord can usually charge back to the tenant, then the landlord may be more likely to continue patching the roof as long as possible. Another example would be the parking lot in need of resurfacing. If the landlord lacks the resources to pay the asphalt contractor, even if this expense can be recouped at the end of the year through a CAM expense reconciliation, or must be recovered from the tenants on an amortized basis over the life of the capital improvement, then the landlord may be more likely to continue patching potholes. As a result, the condition of the center deteriorates, it becomes less attractive for customers, and tenant sales and revenues start to decrease. The tenant will need to carefully review its lease to determine if the landlord is adequately maintaining the center. This determination may depend upon the interpretation of the lease language. The lease may require the landlord to maintain the center in "first class condition". Some leases may only require the landlord to maintain the center in "good repair" or in "good operating condition". Other leases may not set a standard for the landlord's maintenance. Examples of these lease provisions are set forth below:

Landlord shall operate, maintain, repair and replace the Common Areas as required by this Lease and otherwise to the standard by which Common Areas of first-class shopping centers in the state of Michigan are operated, maintained, repaired and replaced.

Landlord shall keep in good repair, order and condition the Common Areas of the Building,

During the Term, Landlord agrees to perform all necessary maintenance, repairs and replacements to the Common Areas.

If the landlord neglects its building repair or common area maintenance obligations, the tenant will need to notify the landlord of such noncompliance. Thereafter, the tenant can exercise any self-help rights it

may have under the lease, and charge the landlord for its expenses incurred for such maintenance. If the tenant is fortunate enough to have a self-help right, it may also have the right to offset its rental obligations under the lease if the landlord fails to reimburse the tenant for the cost incurred by the tenant to make such repairs. In the case of smaller tenants with less bargaining strength, such tenant's lease probably has no landlord default, self-help or offset rights. Such tenant's remedy may be limited to filing suit against the landlord. If the tenant seeks to terminate its lease on this basis, it must also consider whether the SNDA permits it to do so without first notifying the lender of such default and giving the lender a cure period, if the SNDA so provides. See Section II.D. below for further discussion.

D. The Ability of the Mortgage Lender to Cure the Landlord's Default under the Lease.

If the tenant is subject to a SNDA, the SNDA usually requires that the tenant provide written notice to the lender and give the lender an opportunity to cure the landlord's default before the tenant can terminate its lease. Some SNDA forms require that the tenant provide such notice the lender when notice is provided to the landlord, and that the landlord has the same time period as the lender to cure such default. This is typically the case where the lease contains a landlord default provision.

Tenant will notify Lender in writing of any default or breach by Landlord under the terms of the Lease at the same time the Tenant provides such notice to the Landlord. Tenant shall not (i) withhold, abate or offset rent, (ii) consent to withholding, abating or offsetting rent, (iii) cancel or terminate or consent to the cancellation or termination of the Lease, or (iv) surrender or consent to the surrender of the Leased Premises, because of a Landlord default or breach, without giving Lender the same time period given the Landlord under the Lease to cure such default. Lender is under no obligation to cure or attempt to cure any default or breach. If Lender elects within this cure period to pursue acquisition of title to the Property through foreclosure or otherwise, this cure period shall be stayed during such pursuit of acquisition of title (including without limit any period of time or delay caused by a bankruptcy proceeding stay, an injunction or other legal proceeding, or any redemption rights) so that Lender shall have a reasonable period after it acquires title to and possession of the Property within which to cure said default or breach. If any default or breach by Landlord is cured within the time periods described above, Tenant shall have no right to withhold, abate or offset rent or terminate or

cancel the Lease or surrender the Leased Premises by virtue of the default or breach, notwithstanding anything to the contrary in the Lease, at law, in equity or otherwise.

If the lease does not contain a landlord default provision, the SNDA will independently require that the tenant provide notice to the lender and give the lender an opportunity to cure the default before the tenant can terminate the lease. An example of such provision is the following:

Default. In the event Landlord shall fail to perform or observe any of the terms, conditions or agreements in the Lease, Tenant shall give written notice thereof to Lender and Lender shall have the right (but not the obligation) to cure such default. Tenant shall not take any action with respect to such default under the Lease, including without limitation any action in order to terminate, rescind or avoid the Lease or to withhold any rent or other monetary obligations thereunder, for a period of thirty (30) days after receipt of such written notice by Lender; provided, however, that in the case of any default which cannot with diligence be cured within said thirty (30) day period, if Lender shall proceed promptly to cure such default and thereafter prosecute the curing of such default with diligence and continuity, the time within which such default may be cured shall be extended for such period as may be necessary to complete the curing of such default with diligence and continuity but not to exceed sixty (60) days after such default notice is given by Tenant.

E. Common Area Maintenance Charges

If the landlord continues to maintain the common areas in the distressed center, the tenant may be required to pay a greater share of such expense. One key provision of the lease that will impact the tenant's CAM expenses, including its share of property taxes and insurance premiums for the common areas, is the basis on which tenant's proportionate share of the CAM expenses is calculated. In most leases, the tenant's proportionate share is calculated as the gross leasable area of the tenant's leased premises divided by all gross leasable area in the center, such as in the following provision:

Tenant's Pro Rata Share: A fraction whose numerator is twenty-one thousand (21,000) square feet and whose denominator is the Floor Area of the Shopping Center, as may be re-determined any time a building (and/or Floor Area) is added to or removed from the Shopping Center.

With this provision, the tenant's CAM expenses should not change as tenants vacate the center. In some leases the denominator is the gross leasable area in the center that is presently leased or occupied. With this provision, as vacancies in the center increase, the remaining tenants' proportionate share will increase. The tenant's CAM expense will increase, even though the tenant is really receiving nothing in return for this increase. It is merely subsidizing the landlord for those CAM expenses no longer being paid by tenants that have vacated the center. Examples of such lease clauses would be the following:

“Tenant’s Proportionate Share” means a fraction, the numerator of which shall be the Rentable Area of the Leased Premises, and the denominator of which shall be the total Rentable Area contained within the Center when the Center is fully leased, or the leased Rentable Area contained within the Center when the Center is partially leased.

For purposes of calculating the Additional Rent due hereunder, Tenant shall pay its “Proportionate Share” which is equal to the square footage of the Leased Premises divided by the constructed and occupied square footage of all space located within the Building.

F. Landlord's Build-out Obligations for New Tenant

A new tenant coming into the center may be concerned about the cash-strapped landlord's ability to complete its build-out obligations pursuant to the lease, or at the very least, about a delay in such build-out. Typically, the lease requires the landlord to complete some level of construction in the premises before the premises are delivered to the tenant. Quite often, with smaller tenants, the landlord is obligated to provide a "white box" to the tenant. The landlord may also be required to provide an allowance to the tenant to complete its improvements. The tenant will then complete the tenant improvements to customize the premises for its particular use. If the landlord is not timely completing the build-out, then the lease should provide for certain remedies by the tenant. There may be a penalty clause if the landlord does not complete the build-out by a certain date. Alternatively, there may be a termination right the tenant can exercise. However, the tenant will not want to terminate the lease because the tenant has expended time and money to locate this space, negotiate a lease, prepare architectural drawings, contract with contractors and provide for fixtures, equipment and inventory to be delivered to allow for the completion of the premises and store opening. A liquidated damages clause, with a termination remedy if the landlord's work is not completed within an outside time period, may read as follows:

*If the Landlord fails to deliver possession of the Premises to Tenant with the Landlord's Work completed by _____ (subject to Force Majeure and any Tenant Delay) ("**Delivery Date**"), then, in addition to any other remedies available to Tenant under this Lease, Landlord shall pay to Tenant, as liquidated reimbursement (and not as a penalty) for all of the aforesaid costs incurred by Tenant, an amount equal to the sum of: (i) Twenty-Five Thousand Dollars (\$25,000), plus (ii) One Thousand Dollars (\$1,000) for each day that delivery of possession of the Premises with the Landlord's Work completed is delayed beyond the Delivery Date. The foregoing liquidated reimbursements represent the parties' good faith agreement as to an agreed upon amount which shall have been incurred by Tenant and which shall otherwise not be susceptible of exact ascertainment.*

In addition to the provisions above, if Landlord fails to deliver possession of the Premises to Tenant with the Landlord's Work completed by _____, then Tenant shall have the right, within thirty (30) days thereafter, to terminate this Lease upon written notice to Landlord.

See the discussion at Section X below regarding the obligation of the lender to complete the tenant improvements after the lender takes over the center.

III. If the Landlord Defaults on its Mortgage, Must the Tenant Continue to Pay Rent to the Landlord?

- A. If the lender has not provided any notice to the tenant, or taken any other action to pursue the rents, then the tenant must continue to pay rent to the landlord pursuant to the terms of the lease. If the lender has properly exercised its rights to take an assignment of the rents paid by the tenant to the landlord, then the tenant is obligated to pay rent to the lender.

- B. In Michigan, the right to enforce an assignment of rents by the lender is controlled by statute. See MCLA 554.211, et seq, 554.231, et seq, attached at Exhibit B. This statute permits a lender to take an assignment of rents as additional security for a mortgage on commercial, office or industrial property, or apartment buildings with six or more units. A valid assignment may be contained within a recorded mortgage or separate assignment of rents and leases document. An example of a typical Assignment of Rents and Leases document is attached at Exhibit C. An example of an assignment of rents provision is a mortgage would be the following:

Assignment of Leases and Rents. On the date of this Mortgage, as security in addition to the property described in this Mortgage during the term of this Mortgage, the Mortgagor assigns to the Mortgagee all the Mortgagor's rights and interests in all written and oral leases, current or future, for any part of the Mortgaged Premises. However, the Mortgagee does not assume any of the Mortgagor's liabilities under any leases by this assignment. The Mortgagor also assigns to the Mortgagee the rent and profits from the Mortgaged Premises. If a default occurs under this Mortgage or the Note for the Mortgage Debt, the Mortgagee may collect the rent and profits, personally or through a receiver, as long as the default exists, during the pendency of any foreclosure proceedings, and during any redemption period. The Mortgagor consents to a receivership if the Mortgagee thinks it is necessary or desirable to enforce its rights under this

provision. The Mortgagee shall be entitled to all the rights conferred by MCLA 554.231 et seq., MSA 26.1137(1) et seq. and MCLA 554.211 et seq., MSA 26.1131 et seq. The collection of rent by the Mortgagee shall not waive the Mortgagee's right to foreclose this Mortgage in the event of a default.

- C. The assignment becomes effective against the landlord when the landlord defaults on its mortgage. The assignment becomes effective against the tenants only after the lender records the notice of default and serves the tenant with a copy of such notice, together with the underlying mortgage or assignment of rents creating the assignment.
- D. With an assignment of rents, the landlord and tenant cannot modify the “rental covenants” of its lease without the written consent of the lender. MCLA 554.233. In Comerica Bank v TDJ, Inc., 2000 Mich App LEXIS 2255 (April 25, 2000), an unpublished decision, the court held that when the landlord and tenant entered into a second lease modifying the leased premises and the rent, that this modification adversely affected the lender holding an assignment of rents, and was therefore invalid.
- E. The priority of the mortgage and the lease is irrelevant for purposes of exercising an assignment of rents. By statute, a lender is permitted to obtain additional security for its loan by obtaining an assignment of rents from the borrower. MCL 554.231 provides that the assignment is “binding upon the occupiers of the premises . . .” and makes no distinction in the priority of the mortgage and the lease.
- F. “Rent” subject to the assignment of rents is usually viewed broadly, and can include additional rent, meaning common area maintenance expenses, property taxes, and insurance premiums for which the tenant must reimburse the landlord. The statute does not define the term “rent”, so presumably the scope of rents can be defined expansively by the lender in the assignment of rents mortgage clause or separate document. Most assignment of rent clauses are drafted broadly to include such additional rental charges. An example of a mortgage with an assignment of rents clause that defines the term “rent” broadly reads as follows:

***Rents.** The word "**Rents**" means all of Grantor's present and future rights, title and interest in, to and under any and all present and future leases, including, without limitation, all rents, revenue,*

income, issues, royalties, bonuses, accounts receivable, cash or security deposits, advance rentals, profits and proceeds from the Property, and other payments and benefits derived or to be derived from such leases of every kind and nature, whether due now or later, including without limitation Grantor's right to enforce such leases and to receive and collect payment and proceeds thereunder.

- G. Neither the statute nor Michigan case law specify how the lender must apply any base rent or additional rent collected by the lender from the tenants. In the absence of statutory authority, the assignment clause should govern the disposition of the collected rents. Most assignment provisions authorize the lender to apply the collected rents as it desires, including for the maintenance and preservation of the property, the payment of property taxes and insurance premiums, the payment of the indebtedness and the costs of collection/enforcement. An example of such provision would be the following:

Lender may apply the Rents to pay all expenses of managing the Premises, including without limitation the salaries, fees, and wages of a managing agent and other employees that Lender may deem necessary or desirable; all expenses of operating and maintaining the Premises, including without limitation all taxes, charges, claims, assessments, water Rents, sewer Rents, and any other liens; the premiums for all insurance that Lender may deem necessary or desirable; and the cost of all alterations, renovations, repairs, or replacements, and all expenses incident to taking and retaining possession of the Premises; and the indebtedness secured by the Mortgage, together with all costs and attorney fees, in an order of priority as to any of the items mentioned in this paragraph that Lender in its sole discretion may determine, any statute, law, custom, or use to the contrary notwithstanding.

A major tenant concern when a landlord defaults on its mortgage is that the owner lacks the financial ability to pay for the maintenance of the property. This may or may not be the situation prior to the lender exercising its assignment of rents, but will definitely become an issue after such exercise when the landlord is not

receiving any funding to maintain the center. The lender usually has the option to use the rents collected to pay for building maintenance, CAM, insurance premiums, property taxes, etc. A lender will often use the rents collected to maintain the property, which preserves the value of its collateral. However, the lender could elect to apply all the rents collected to the indebtedness. This would result in the tenant paying its proportionate share of expenses for shopping center maintenance, but the center not being maintained by either the landlord or the lender.

- H. Presumably, a tenant may become liable to a lender if the tenant is properly served with the default notice and fails to pay rents to the lender. While no reported Michigan decisions could be located addressing this issue, such tenant would be in violation of MCLA 554.231. If the tenant is uncertain as to which party should rightly receive the rents, such as in the situation where the landlord notifies the tenant that it disputes the default notice, the tenant may decide to continue to pay rent to the landlord. The more prudent course of action for the tenant is to escrow the rent payments, and force the lender and the landlord to obtain a judgment or otherwise resolve their dispute. While the statute does not permit this course of action by the tenant, the conflicted tenant may use this approach in an attempt to avoid liability to either the lender or the tenant, since the escrowed rent payments will ultimately be released to the party having the legal right to such payments. The maintenance of the center until such resolution occurs may become a problem.
- I. If the tenants continue to pay rent to the landlord or escrow their rent payments, the tenants may be acting contrary to their own best interests. Often the landlord has defaulted on its mortgage and is failing to properly maintain the center, or is committing waste by failing to pay its property taxes or insurance premiums. If the tenant fails to pay rent to the lender, the landlord could divert the rents away from the center, leaving no funds to pay these center expenses. In such event, the lender is permitted by law, and most likely by the remedy clause in its mortgage, to seek the appointment of a receiver. The courts will appoint a receiver to assist the lender in collecting rents pursuant to an assignment of rents. Smith v Mutual Benefit Life Insurance Company, 362 Mich 114, 106 NW2d 515 (1960). MCLA 600.2927 also allows a lender to seek the appointment of a receiver if its mortgage construes the failure to pay property taxes or insurance premiums as waste. The appointment of a receiver is generally a discretionary decision made by the court. A tenant may be in a better position if the lender obtains the appointment of a receiver, because the receiver will often be charged by the court to prevent waste and to

otherwise preserve the value of the property, which typically includes the maintenance of the center. This determination is left to the discretion of the court. MCLA 600.2927(2).

IV. When the Lender Takes Over the Center, Will the Tenant's Lease be Recognized?

A. **Mortgage Subordinate to Lease.** The mortgage is subordinate to the lease, and must be recognized by the lender foreclosing or taking a deed in lieu of foreclosure, in the following circumstances:

- The lease was executed prior to the recording of the mortgage (and the lender had knowledge of the lease or the lease/memorandum of lease was recorded), and there is no SNDA, or
- The lease enables the lender to subordinate the mortgage to the lease, and the lender has done so.

An example of a SNDA subordination clause giving the lender the right to subordinate the mortgage to the lease, and to reverse this priority, would be the following:

At the option of Lender, the Mortgage from time to time shall become subject and subordinate, in whole or in part to the Lease upon the execution by Lender and recording of a unilateral declaration to that effect. At the option of Lender, any Mortgage so subordinated shall from time to time become superior to the Lease (and all amendments, modifications, renewals and extensions of it, and all rights and interests of Tenant under the Lease, including without limit all options, liens or charges created by the Lease, if any, and all rights and interests of Tenant in the Leased Premises) upon the execution by Lender and recording of a unilateral declaration to that effect.

A lender may choose to subordinate the mortgage to a tenant lease if the lease is valuable to the viability of the center, and the lender desires to foreclose and preserve the lease.

B. **Lease Subordinate to Mortgage.** The lease is subordinate to the mortgage, and will not likely be recognized by the lender in the following circumstances:

- The mortgage is recorded or the tenant has notice of the mortgage before the lease is executed, or
- The parties execute a SNDA subordinating the lease to the mortgage, or
- The lease contains an automatic subordination provision making it subordinate to a subsequent mortgage.

An example of an automatic subordination clause in a lease would be the following:

This Lease and Tenant's rights under this Lease are subject and subordinate to any ground or underlying lease, mortgage, indenture, deed of trust, or other lien encumbrance (each a "superior lien"), together with any renewals, extensions, modifications, consolidations, and replacements of such superior lien, now or in the future affecting or placed, charged, or enforced against the Land, the Building, or all or any portion of the Project or any interest of Landlord in them or Landlord's interest in this Lease and the leasehold estate created by this Lease (except to the extent any such instrument expressly provides that this Lease is superior to such instrument). This provision will be self-operative and no further instrument of subordination will be required in order to effect it. Notwithstanding the foregoing, Tenant will execute, acknowledge, and deliver to Landlord, within 20 days after written demand by Landlord, such documents as may be reasonably requested by Landlord or the holder of any superior lien to confirm or effect any such subordination or superiority, as applicable.

If the lease is subordinate to the mortgage, and there is no SNDA, then foreclosure of the mortgage extinguishes the lease, regardless of whether the foreclosing lender desires to terminate the lease. The lease is automatically terminated and the purchaser at the foreclosure sale cannot recover rent after the redemption period expires, if there is no redemption by the mortgagor. Dolese v

Bellows-Claude Neon Co, 261 Mich 57, 245 NW 59 (1932); RJ Co v Tassos Epicurean Cuisine, Inc, 2004 Mich App LEXIS 631 (unpublished). The subordinate tenant needs the protection of the nondisturbance provision of a SNDA to prevent a foreclosure from terminating its lease. See also Michigan Land Title Standard 27.3, and the comments thereto.

- C. **Nondisturbance.** If the lease is subordinate to the mortgage and the parties have executed a SNDA, then the nondisturbance provision in the SNDA requires that the lender recognize the tenant's possessory interest in the leased premises, and possibly other terms of the lease, depending upon how the nondisturbance provision is drafted.

In a tenant-friendly SNDA, the nondisturbance provision will require the lender to recognize all or most of the tenant's rights under the lease, such as in the following example:

In the event of a foreclosure of the lien of the Mortgage or the exercise of any other right or remedy under the Mortgage, so long as Tenant is not in default (beyond any period given in the Lease to Tenant to cure such default) in the payment of rent or in the performance of any of the terms, covenants or conditions of the Lease on Tenant's part to be performed, then Tenant's possession, use and occupancy of, and other rights with respect to, the Demised Premises pursuant to the Lease shall not be extinguished or terminated by such foreclosure or exercise of rights or remedies nor interfered with or disturbed by Lender or Purchaser during the term of the Lease and any extension thereof duly exercised by Tenant.

In a lender-friendly SNDA, the nondisturbance provision will be drafted narrowly, to require the lender to only recognize the possessory right of the tenant. This brings into question whether the lender will be required to recognize the other rights of the tenant, such as renewal options, purchase options, etc. An example of this type of provision is as follows:

Lender agrees that no foreclosure (whether judicial or nonjudicial), deed-in-lieu of foreclosure, or other sale of the Property in connection with enforcement of the Security Instrument or otherwise in satisfaction of the Loan shall operate to terminate

Tenant's rights under the Lease to possess and use the Leased Space provided, however, that (a) the term of the Lease has commenced, (b) Tenant is in possession of the Leased Space, and (c) the Lease is in full force and effect and no uncured default exists under the Lease.

- D. **Tenant Default.** If the tenant is in default under the lease at the time the lender initiates foreclosure proceedings or takes a deed in lieu of foreclosure, then the nondisturbance provision of the SNDA is rendered ineffective by such default. The lender could terminate the subordinate lease by a foreclosure, as discussed in IV.B. above. If the lender elects not to foreclose and takes a deed in lieu of foreclosure, then the lender assumes the position of the landlord, and would initiate summary proceedings to terminate the lease and evict the defaulting tenant.

If the principals of the tenant guaranteed the payment and performance obligations of the tenant under the lease, then the lender would have the ability to enforce such guaranty by succeeding to the landlord's interest in the guaranty. While foreclosure proceedings could result in the termination of the lease, and cut off the liability of the tenant and the guarantor for any future obligations after such lease termination, the guarantors will likely continue to be liable for any defaults and other obligations of the tenant accruing prior to such lease termination.

V. **When the Lender Takes Over the Center, Can the Tenant Terminate an Over-Market Lease?**

If the tenant's lease was negotiated before the current recession, there is a good chance that the rental rate in the lease exceeds the current market rate, unless the tenant has been able to renegotiate with the landlord within the past couple of years. Given the abundance of space available in the market, the tenant may desire to terminate its lease and negotiate for less expensive space elsewhere. At the very least, the tenant would like the opportunity to negotiate a rental reduction with the lender to remain in the center.

If the lender forecloses, the tenant's lease will be terminated by the foreclosure if the lease is subordinate to the lien of the mortgage because (i) the mortgage was recorded before the lease was executed, or (ii) the lease provides for the automatic subordination of the lease to the mortgage, and in either case the parties did not execute a SNDA. The termination of the tenant's lease would provide the tenant with the flexibility to either renegotiate its lease (which the lender would desire to

retain the tenant) or to relocate to vacant space elsewhere. This result is somewhat counter-intuitive, because usually the tenant desires to protect its lease. In typical market conditions when rents are escalating, the tenant's best result is to continue operating under its existing lease, with predetermined rental rates. However, in a declining market such as the commercial rental market over the past couple of years, the tenant usually desires the ability to renegotiate its lease to compensate for its decreased business revenue.

If the lender forecloses or takes a deed in lieu of foreclosure and either (i) the mortgage is subordinate to the lease, or (ii) the lease is subordinate to the mortgage and the parties executed a SNDA, then the tenant will not be able to terminate the lease. The SNDA will require the tenant to attorn to the lender and recognize the lender as the successor landlord under the lease. The tenant will not be able to use the lender takeover to either renegotiate its lease or terminate and relocate.

VI. When the Lender Takes Over the Center, Is the Tenant Required to Recognize the Interest of the Lender as the Landlord Under the Lease?

The SNDA will provide for "attornment" by the tenant. The attornment provision requires the tenant to recognize the lender, or any successor purchaser of the property, as the landlord under the terms of the lease. The attornment provision is usually self-operative, with the exception of a clause in some more tenant-friendly SNDA forms providing that the tenant is not obligated to pay rent to the lender until its receives written notice from the lender that it has succeeded to the interest of the landlord under the lease. If the tenant is already paying rent to the lender because the lender properly exercised its rights under its assignment of rents, then the attornment clause would not change this payment arrangement, but would require the tenant to recognize all the rights of the lender that has succeeded the landlord. An example of an attornment provision would be the following:

Attornment. If the interests of Landlord in and to the Demised Premises become owned by Lender or another Purchaser by reason of judicial foreclosure, or non-judicial foreclosure, other proceedings brought by Lender or Purchaser or by any other manner, including, but not limited to, Lender's exercise of its rights under any collateral assignment(s) of leases and rents, whereby Purchaser succeeds to the interest of the Landlord under the Lease, Tenant shall be bound to Purchaser in accordance with all of the terms, covenants and conditions

of the Lease for the balance of the term thereof and any extension or renewal thereof duly exercised by Tenant with the same force and effect as if Purchaser were the Landlord under the Lease. Tenant does hereby attorn to Purchaser, as its Landlord, which attornment shall be effective and self-operative, without the execution of any further instruments on the part of any of the parties hereto, immediately upon Purchaser's succeeding to the interest of the Landlord under the Lease; provided, however, that Tenant shall be under no obligation to pay rent to Purchaser until Tenant receives written notice from Purchaser that it has succeeded to the interest of the Landlord under the Lease, and upon receipt of such notice, Tenant shall pay to Purchaser all rental and other payments required under the Lease for the duration of the term of the Lease and any extensions thereof duly exercised by Tenant. The respective rights and obligations of Tenant and Purchaser upon such attornment, to the extent of the then remaining balance of the term of the Lease and any extension thereof duly exercised, shall be and are the same as now set forth therein, as hereby amended, it being the intention of the parties hereto for this purpose to incorporate the Lease in this Agreement by reference, with the same force and effect as if expressly set forth herein.

VII. Is the Lender Bound by Prior Modifications to the Lease?

If the lender consented to any prior lease amendment, then the lender is bound by such amendment if it succeeds the landlord. If the lender did not consent to a prior lease amendment, then the terms of the SNDA will determine whether the lender is bound by the prior lease amendment. Generally, the SNDA binds the lender only to those lease amendments to which the lender consented. Also, if the lender exercised its assignment of rents, then the parties cannot modify the “rental covenants” in the lease without the lender’s consent. MCLA 554.233. Therefore, if a landlord and a tenant negotiated a rental reduction in exchange for a longer lease term, and the landlord did not obtain its lender’s approval to this amendment, the SNDA (and MCLA 554.233 if the lender has exercised its assignment of rents) would not obligate the lender to honor the amendment. An example of typical SNDA language relative to this provision would be the following:

Tenant shall be bound to Successor Landlord under all the terms, covenants, and conditions of the Lease for the balance of its term with the same force and effect as if Successor Landlord was the lessor under the Lease, except

that Successor Landlord shall not be bound by any amendment, modification, surrender, cancellation, or assignment of the Lease (or any sublease or other form of third party occupancy of the Leased Premises) made after the date of this Agreement without Lender's written consent or made prior to the date of this Agreement and not specified in this Agreement or in a tenant estoppel certificate delivered along with this Agreement.

VIII. Will the Lender be Liable for Curing Defaults of the Landlord Under the Lease?

One likely default of the landlord in a distressed center under its tenant leases would probably be the failure to maintain and repair the center. Due to tenant lease defaults and terminations, the landlord often lacks the funding to maintain the center in the condition required under its leases. However, there could be other defaults by the landlord, such as its failure to make tenant improvements it is contractually obligated to make, its failure to pay property taxes (which may or may not be a default, depending upon the applicable lease provision), or its failure to enforce tenant use exclusives and restrictions.

If the mortgage is subordinate to the lease and there is no SNDA, then absent a provision in the lease to the contrary, the lender would be obligated to cure all landlord defaults, because the lender assumes all liabilities and obligations of the landlord under the lease. Quite often, the landlord's liability under the lease is limited to its interest in the center, without personal liability. Also, a lease may provide that upon any conveyance of the center by the landlord, the tenant must look to the successor landlord to remedy any defaults of the prior landlord under the lease.

If there is a SNDA, then the provisions of the SNDA typically exempt the lender from liability for any prior default of the landlord, such as in this example:

Successor Landlord shall not be:

- (a) liable for any act, default or omission of Landlord or any prior lessor.*
- (b) liable for any obligation of Landlord or any prior lessor accruing prior to the date the Successor Landlord has title to, and possession or, the Property.*

Presumably, while the lender would bear no liability for any damages incurred by the tenant due to a default of the prior landlord, the lender would be liable for curing any continuing default. For example, if the tenant exercised self-help to cure a prior landlord default such as fixing roof leaks, and the prior landlord has not reimbursed the tenant for such expense, the lender, as successor landlord, will not be liable for such reimbursement with the typical SNDA. However, if the tenant has repeatedly notified the prior landlord about the roof leaks, and the prior landlord has failed to repair the roof, then this would be a continuing obligation of the landlord for which the lender would bear responsibility when it takes over the center.

IX. Will the Lender be Obligated to Honor any Rent Concessions Given to the Tenant?

In the current market, it is common for the landlord to provide a tenant improvement allowance, free rent, reduced rent, or other rental concessions to entice a tenant to sign a lease. The tenant who has recently signed a lease with the landlord will want to ensure that such rent concession will be honored by the lender that takes over the center. The tenant must look to the terms of the SNDA to determine whether the lender is bound by any such rent concessions. If the SNDA does not exempt the lender from liability for such provision, then the lender remains liable for the rent concessions. In some SNDA forms, the lender is specifically exempted from such obligations, as in the following example:

Successor Landlord shall not be liable for any payment to Tenant of any sums, or granting to Tenant any credit, with respect to the cost of preparing, altering, furnishing or moving into the Leased Premises.

X. Will the Lender be Obligated to Make Tenant Improvements Required Under the Lease?

A related concern for the new tenant is whether the lender will be responsible to make the tenant improvements which the landlord has agreed to make under the lease. If the lender succeeds the landlord and either there is no SNDA, or the SNDA is silent on the issue, then the lender is bound by the obligation of the landlord to complete any tenant improvement requirements of the landlord under the lease. If the lender takes over the center, and the tenant executed a SNDA when it executed its lease, the SNDA may provide that the lender will not be liable for any

tenant improvements the landlord was obligated to make under the lease. Such provision may read as follows:

Successor Landlord shall not be liable for any agreement to undertake or complete demolition, construction or installation of improvements in or with respect to the Leased Premises or any part of the Property.

The tenant can find itself in the situation where the landlord has ceased work on the build-out, and the lender is not willing to fund such improvements. The tenant should have the right to terminate its lease. Provided the tenant has negotiated a very competitive lease deal, it will not want to terminate the lease for the reasons stated above, and will want the work completed. The tenant could negotiate with the lender to have the lender complete the work, since the new tenant adds value to the lender's asset. Alternatively, the tenant could offer to complete the build-out and offset rent to recoup the cost. This alternative may appeal to the lender, because the lender will not be required to expend funds up front, and will be assured the tenant will honor its lease and operate its business in the center.

XI. Will the Lender be Obligated to Reconstruct the Premises After a Casualty or Condemnation?

Many leases obligate the landlord to restore the premises in most circumstances in the event of a casualty or condemnation, at least to the extent of the insurance proceeds or condemnation award received by the landlord. These lease provisions often conflict with the landlord's mortgage, which usually provides that the lender has the right to take all insurance proceeds or condemnation awards and to apply such amounts as the lender deems appropriate. This could mean that the lender will use the funds to pay down the indebtedness and not restore the center. Alternatively, the lender could elect to make the funds available to the landlord to restore the center, and thereby preserve the lender's collateral.

The SNDA may include a provision that exempts the lender from being bound by the landlord's restoration obligations under its lease. Alternatively, the SNDA could require that the lender honor the restoration obligations of the landlord under the lease, with reasonable limitations, such as the following:

Successor Landlord shall not be liable for any repair or reconstruction following fire, other casualty or condemnation, except to the extent expressly provided in the Lease and then only to the extent of insurance, casualty

*or condemnation proceeds actually received by the
Successor Landlord.*

XII. Will the Lender be Obligated to Return a Tenant's Security Deposit at the Expiration of the Lease?

In the event a tenant's lease term expires and the tenant vacates its space, most SNDA forms provide that the lender is only liable to return the security deposit to the tenant if the lender actually received payment of the security deposit from the landlord. In most instances, the cash-strapped landlord will not have been obligated to maintain the tenant's security deposit in a separate account, so the security deposit will be commingled with other funds of the landlord and used to fund general shopping center expenses of the landlord. In such event, it is unlikely that the landlord would have the security deposit proceeds to pay to the lender, so the tenant would not be able to recover its security deposit at the end of the lease.

EXHIBIT A

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

This SUBORDINATION, ATTORNMENT AND NON-DISTURBANCE AGREEMENT ("Agreement") is made and entered into as of _____, 20__ by and among _____, a _____ ("Lender"); _____, a _____ ("Landlord"); and _____, a _____ ("Tenant").

WITNESSETH:

WHEREAS, Lender is the owner and holder of that certain Promissory Note ("Note") dated _____, 20__, in the principal sum of _____ AND NO/100 DOLLARS (\$_____), secured by that certain Mortgage _____ ("Mortgage"), dated of even date with the Note, executed by Landlord to a trustee in favor of Lender, recorded on _____, 200_, at Liber _____, Page _____ in the records of _____ County, Michigan, which Mortgage constitutes a lien on the land described in Exhibit "A" attached hereto and incorporated herein by reference for all purposes and the improvements now or hereafter located thereon ("Property"); and

WHEREAS, Tenant is the holder of a leasehold estate in and to all or a portion of the Property (the property which is the subject of such leasehold estate being referred to as the "Demised Premises") pursuant to the terms of that certain Lease ("Lease") dated _____, 20__, and executed by and between Tenant, as the tenant, and Landlord, as the landlord; and

WHEREAS, Landlord, Tenant and Lender desire to confirm their understandings with respect to the Lease and the Mortgage.

NOW, THEREFORE, in consideration of the mutual and dependent covenants and agreements herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and confessed, the parties hereto agree and covenant as follows:

1. Subordination. Subject to the terms of this Agreement, the Lease now is, and shall at all times continue to be, subject, inferior and subordinate to the lien of the Mortgage and to the lien of any and all renewals, amendments, modifications, extensions, substitutions, replacements, increases and/or consolidations of the Mortgage; and the lien of the Mortgage, and the lien of any and all renewals, amendments, modifications, extensions, substitutions, replacements, increases and/or consolidations of the Mortgage, shall be and remain, in each and every respect prior and superior to the Lease (but not with respect to insurance and/or condemnation proceeds and/or tax refunds to which Tenant is entitled to under the terms of the Lease). This Agreement shall be the whole and only agreement with regard to the subordination of the Lease to the lien of the Mortgage and shall supersede and cancel insofar as same may affect the priority between the Mortgage and the Lease, any prior agreements or provisions relating to the subordination of the Lease to the lien of the Mortgage, including, without limitation, those provisions, if any, contained in the Lease which provide for the subordination thereof to the lien of any Mortgage, mortgage or other security agreement. Nothing herein contained shall be deemed or construed as limiting or restricting the enforcement by Lender as against Landlord of any of the terms, covenants, provisions or remedies specified in the Mortgage, whether or not consistent with the Lease.

2. Purchaser. As used herein, the term "Purchaser" shall be deemed to include Lender and any of its successors and assigns, including anyone who shall have succeeded to Landlord's interest in the Demised Premises by, through or under judicial foreclosure sale, non-judicial foreclosure sale or other similar proceedings brought pursuant to the Mortgage, deed in lieu of such foreclosure, other proceedings brought by Lender under or with respect to the Note or Mortgage, or otherwise.

3. Attornment. If the interests of Landlord in and to the Demised Premises become owned by Lender or another Purchaser by reason of judicial foreclosure, or non-judicial foreclosure, other proceedings brought by Lender or Purchaser or by any other manner, including, but not limited to, Lender's exercise of its rights under any collateral assignment(s) of leases and rents, whereby Purchaser succeeds to the interest of the Landlord under the Lease, Tenant shall be bound to Purchaser in accordance with all of the terms, covenants and conditions of the Lease for the balance of the term thereof and any extension or renewal thereof duly exercised by Tenant with the same force and effect as if Purchaser were the Landlord under the Lease. Tenant does hereby attorn to Purchaser, as its Landlord, which attornment shall be effective and self-operative, without the execution of any further instruments on the part of any of the parties hereto, immediately upon Purchaser's succeeding to the interest of the Landlord

under the Lease; provided, however, that Tenant shall be under no obligation to pay rent to Purchaser until Tenant receives written notice from Purchaser that it has succeeded to the interest of the Landlord under the Lease, and upon receipt of such notice, Tenant shall pay to Purchaser all rental and other payments required under the Lease for the duration of the term of the Lease and any extensions thereof duly exercised by Tenant. The respective rights and obligations of Tenant and Purchaser upon such attornment, to the extent of the then remaining balance of the term of the Lease and any extension thereof duly exercised, shall be and are the same as now set forth therein, as hereby amended, it being the intention of the parties hereto for this purpose to incorporate the Lease in this Agreement by reference, with the same force and effect as if expressly set forth herein.

4. Non-Disturbance. In the event of a foreclosure of the lien of the Mortgage or the exercise of any other right or remedy under the Mortgage, so long as Tenant is not in default (beyond any period given in the Lease to Tenant to cure such default) in the payment of rent or in the performance of any of the terms, covenants or conditions of the Lease on Tenant's part to be performed, then Tenant's possession, use and occupancy of, and other rights with respect to, the Demised Premises pursuant to the Lease shall not be extinguished or terminated by such foreclosure or exercise of rights or remedies nor interfered with or disturbed by Lender or Purchaser during the term of the Lease and any extension thereof duly exercised by Tenant. If at, or subsequent to, the time that Purchaser shall acquire, in whatever manner, title to the Property or Landlord's title or interest in the Demised Premises (subject to the Lease), or from time to time thereafter, any default exists or occurs under the Lease which is not cured within the time period given in the Lease, then Purchaser shall be entitled to exercise or enforce any and all rights, privileges, remedies and recourses which it may have against Tenant under or pursuant to the Lease or other applicable law (including, without limitation, if (but only if) available and applicable by the terms of the Lease, the termination of the Lease, the dispossession of Tenant from the Demised Premises, or the prosecution of an action for breach of the Lease), notwithstanding the provisions of this Agreement.

If Landlord fails to correct any condition or default that existed as of the date Purchaser succeeds to the interest of Landlord under the Lease and which violates Purchaser's obligations as landlord under the Lease, Tenant shall be entitled to offset rent, assert defenses and/or exercise other remedies against Purchaser otherwise available to Tenant under the Lease, provided notice of such event was given to Lender prior to a Purchaser succeeding to Landlord's interest in the Demised Premises. In the event Lender elects to foreclose the Mortgage or otherwise succeeds (or another Purchaser succeeds) to the interest of Landlord under the Lease, no such event shall cut off or restart any cure period granted to Landlord under the Lease, and any notice of a default given by Tenant to Landlord as required by the Lease as a condition to Tenant's exercising its rights and remedies under the Lease shall be effective as to Lender (and such Purchaser), provided, in each instance, notice of such event or default was given to Lender at the time it was given to Landlord.

5. Purchaser's Obligations. If Purchaser shall succeed to the interest of Landlord under the Lease, Purchaser shall be bound to Tenant under all of the terms, covenants and conditions of the Lease; provided, however, that Purchaser shall not be:

(a) liable for any act or omission of any prior Landlord (including Landlord) under the Lease, except to the extent and for the period of time that Purchaser continues such act or omission and/or except as set forth above in Paragraph 4; or

(b) subject to any claims, offsets or defenses which Tenant might have against any prior Landlord (including Landlord) under the Lease other than as set forth above in Paragraph 4; or

(c) bound by any rent, additional rent, advance rent or other monetary obligations which Tenant might have paid for more than the current or following month to any prior Landlord (including Landlord) under the Lease, except to the extent specifically required to be paid under the terms of the Lease in effect as of the date of this Agreement or as permitted with Lender's written consent; or

(d) bound by any security deposit of any type or advance rental deposit made by Tenant under the Lease which is not delivered or paid to Purchaser at the time of Purchaser's succession to title to the Demised Premises, and with respect to which Tenant agrees to look solely to Landlord for refund or reimbursement, but Tenant shall not be required to pay to Purchaser any such security deposit or advance rental payment; or

(e) bound by any amendment or modification of the Lease made in contravention of this Agreement; or

(f) liable or responsible under or pursuant to the terms of the Lease after it ceases to own an interest in or to the Demised Premises for landlord's obligations accruing thereafter.

6. Representations. Landlord and Tenant represent, warrant and certify to Lender (and Purchaser), as of the date hereof, to their actual knowledge, as follows:

(a) the Lease is presently in full force and effect and the Lease constitutes the entire agreement between the Tenant and Landlord;

(b) the Lease has not been cancelled, terminated, modified, amended, supplemented, replaced, restated or otherwise

changed, either orally or in writing, except as herein expressly provided;

(c) all conditions or requirements specified in the Lease that could have been satisfied as of the date hereof have been fully satisfied;

(d) no rent under the Lease has been paid for more than the current or immediately following rental period established in the Lease;

(e) no default (or any event, condition or circumstance, which with notice, grace or lapse of time could constitute a default) exists under said Lease;

(f) Tenant, as of this date, has no charge, lien, claim or offset under said Lease or otherwise against rents or other charges due or to become due under the Lease;

(g) Purchaser shall have no liability or responsibility with respect to any security deposit or advance rental deposit made by the Tenant except to the extent actually delivered and paid to Purchaser, but Tenant shall not be required to pay to Purchaser any such security deposit or advance rental payment paid to Landlord;

(h) the only persons or entities in possession of the Demised Premises is Tenant (except for such possessory rights, if any, that may exist pursuant to recorded easement or right of way documents); and

(i) Tenant has no right or interest in or under any contract, option or agreement (other than as shown in the Lease) involving the sale or transfer of the Demised Premises or the expansion of the Demised Premises or extension of the term of the Lease.

“Actual knowledge” means the actual (as distinguished from implied, imputed or constructive) knowledge of only the individual executing this Agreement in his or her corporate capacity on behalf of a party, without having made any inquiry or investigation of any kind, but which person holds a position with such party where he or she would in the course of his or her day to day responsibilities generally be familiar with the matters as to which the representation or warranty was made.

7. Negative Covenants. In the absence of the prior written consent of Lender (or Purchaser), Tenant agrees not to do any of the following: (a) prepay the rent or other monetary obligations under the Lease for more than one (1)

month in advance of the due date in the Lease, except to the extent specifically required to be paid under the terms of the Lease in effect as of the date of this Agreement or as permitted with Lender's written consent, (b) enter into any agreement, whether oral or written, with the Landlord to amend, modify, supplement, replace, restate or otherwise change the Lease, provided that Lender's (or Purchaser's) consent shall not to be unreasonably withheld, delayed or conditioned if the economic terms of the Lease are not materially altered, and provided that such consent shall not be needed with respect to any amendment or other change in connection with (i) the exercise of an existing extension or renewal option that contemplates an amendment or change to reflect the extension or renewal rent or to otherwise reflect such renewal or extension, or (ii) the exercise by Tenant of any other currently existing right under the Lease that contemplates the amendment or change of the Lease in connection therewith; and (c) sublease or assign all or any portion of the Demised Premises or the Lease except for assignments and sublettings permitted under the Lease without Landlord's consent.

8. Default. In the event Landlord shall fail to perform or observe any of the terms, conditions or agreements in the Lease, Tenant shall give written notice thereof to Lender and Lender shall have the right (but not the obligation) to cure such default. Tenant shall not take any action with respect to such default under the Lease, including without limitation any action in order to terminate, rescind or avoid the Lease or to withhold any rent or other monetary obligations thereunder, for a period of thirty (30) days after receipt of such written notice by Lender; provided, however, that in the case of any default which cannot with diligence be cured within said thirty (30) day period, if Lender shall proceed promptly to cure such default and thereafter prosecute the curing of such default with diligence and continuity, the time within which such default may be cured shall be extended for such period as may be necessary to complete the curing of such default with diligence and continuity but not to exceed sixty (60) days after such default notice is given by Tenant.

9. Notices. All notices or other communications required or permitted to be given pursuant to the provisions hereof shall be in writing and shall be considered as properly given if (i) mailed to the addressee by first class United States mail, postage prepaid, registered or certified with return receipt requested, (ii) by delivering same in person to the addressee, or (iii) by delivery to a third party commercial delivery service for same day or next day delivery to the office of the addressee with proof of delivery. Notice so given shall be effective, as applicable, (i) two days after its deposit with the U.S. Postal Service, (ii) delivery to the addressee, or (iii) one day after delivery to such third party delivery service. Notice given in any other manner shall be effective only if and when received by the addressee. For purposes of notice, the addresses of the parties shall be:

Lender: _____

Attention: _____

Landlord: _____

Tenant: _____

Notwithstanding the foregoing, any party shall have the right to change its address for notice hereunder to any other location within the continental United States by the giving of thirty (30) days' notice to the other parties in the manner set forth herein.

10. Counterparts. To facilitate execution, this instrument may be executed in as many counterparts as may be convenient or required. It shall not be necessary that the signature or acknowledgment of, or on behalf of, each party, or that the signature of all persons required to bind any party, or the acknowledgment of such party, appear on each counterpart. All counterparts shall collectively constitute a single instrument. It shall not be necessary in making proof of this instrument to produce or account for more than a single counterpart containing the respective signatures of, or on behalf of, and the respective acknowledgments of, each of the parties hereto. Any signature or acknowledgment page to any counterpart may be detached from such counterpart without impairing the legal effect of the signatures or acknowledgments thereon and thereafter attached to another counterpart identical thereto except having attached to it additional signature or acknowledgment pages.

11. Amendment. This Agreement may not be modified orally or in any manner other than by an agreement, in writing, signed by the parties hereto or their respective successors in interest.

12. Successors. This Agreement shall inure to the benefit of and be binding upon the parties hereto, their successors and assigns.

13. Remedies Cumulative. All remedies provided for herein are cumulative and shall be in addition to, but not in lieu of, any and all other rights and remedies provided by law and by any and all other agreements between Lender and either Landlord or Tenant.

14. Further Assurances. At the request of Lender, Landlord and Tenant shall execute, acknowledge, and deliver such other documents and/or

instruments as may be reasonably required by Lender in order to effectuate the intent and purpose of this Agreement; provided, however, that no such document or instrument shall modify the rights and obligations of Landlord and Tenant as provided herein.

15. Attorneys' Fees. The prevailing party in any action brought against the other parties hereto to enforce any rights, obligations or duties under this Agreement shall be entitled to recover from the nonperforming party the prevailing party's reasonable costs and expenses (including attorneys' fees) incurred in connection with the enforcement hereof.

16. Termination. This Agreement shall be of no further force and effect and shall become null and void upon the recording in the applicable records of Lender's written release of the lien of the Mortgage.

17. Jury Waiver. **The parties, after consulting (or having had the opportunity to consult) with counsel of their choice, each knowingly and voluntarily waive their right to trial by jury in any action, proceeding or counterclaim brought by any of the parties hereto against the other on any matters whatsoever arising out of or in any way connected with this Agreement or the Lease.**

EXHIBIT B

554.212 Assignment; validity against mortgagor and occupiers of premises.

Sec. 2. The assignment of rents and profits, when so made, shall be a good and valid assignment of rents as against the mortgagor or mortgagors or those claiming under or through them from the date of the recording of the trust mortgage or deed of trust, and shall operate against and be binding upon the occupiers of the premises from the date of the filing by the trustee or trustees in the office of the register of deeds for the county in which the property is located of a notice of default in the terms and conditions of the trust mortgage or deed of trust, and service of a copy of such notice upon the occupiers of the mortgaged premises.

History: 1925, Act 228, Eff. Aug. 27, 1925;—CL 1929, 13499; —CL 1948, 554.212.

554.213 Trust mortgage; definition.

Sec. 3. The term "trust mortgage" as used in this act, means and includes, among other forms of trust mortgages, any mortgage given to any person or corporation engaged in the business of financing or refinancing buildings or building enterprises, securing a note, notes, bonds or obligations, and which by its terms contemplates a sale thereof in part or parts and which is actually sold in part or parts in form of certificates of participation or by assignments of undivided interests therein.

History: Add. 1933, Act 55, Imd. Eff. Apr. 14, 1933, —CL 1948, 554.213.

554.231 Assignment of rents to accrue from leases as additional mortgage security.

Sec. 1. Hereafter, in or in connection with any mortgage on commercial or industrial property other than an apartment building with less than 6 apartments or any family residence to secure notes, bonds or other fixed obligations, it shall be lawful to assign the rents, or any portion thereof, under any oral or written leases upon the mortgaged property to the mortgagee, as security in addition to the property described in such mortgage. Such assignment of rents shall be binding upon such assignor only in the event of default in the terms and conditions of said mortgage, and shall operate against and be binding upon the occupiers of the premises from the date of filing by the mortgagee in the office of the register of deeds for the county in which the property is located of a notice of default in the terms and conditions of the mortgage and service of a copy of such notice upon the occupiers of the mortgaged premises.

History: 1953, Act 210, Eff. Oct. 2, 1953; —Am. 1966, Act 151, Imd. Eff. June 24, 1966.

554.232 Assignment of rents; validity.

Sec. 2. The assignment of rents, when so made, shall be a good and valid assignment of the rents to accrue under any lease or leases in existence or coming into existence during the period the mortgage is in effect, against the mortgagor or mortgagors or those claiming under or through them from the date of the recording of such mortgage, and shall be binding upon the tenant under the lease or leases upon service of a copy of the instrument under which the assignment is made, together with notice of default as required by section 1.

History: 1953, Act 210, Eff. Oct. 2, 1953; —Am. 1966, Act 151, Imd. Eff. June 24, 1966.

554.233 Modification of mortgage.

Sec. 3. While the mortgage remains in force no modification of the rental covenants in such lease shall be binding upon the holder of such mortgage without his written consent thereto.

History: 1953, Act 210, Eff. Oct. 2, 1953.

EXHIBIT C

ASSIGNMENT OF RENT AND LEASES

This assignment (the Assignment) is effective as of **[date]**, between **[borrower name]**, a **[business form of borrower]**, whose address is **[address]**, Michigan (Borrower), and **[name of lender]**, a **[business form of lender]**, with an address of **[address]**, (Lender), on the terms and conditions set forth below.

1. **Background.** Concurrently on this date, Lender is making a loan (the Loan) to Borrower. Borrower is signing and delivering a promissory note to Lender in the aggregate amount of **[\$amount]** (the Note), in accordance with a Loan agreement dated **[date of note]**. The obligations and liabilities of Borrower to Lender under the Note are secured by a mortgage dated **[date]** (the Mortgage), from Borrower to Lender, dated the same as this Assignment. (The Note, the Mortgage, the Assignment, the Permanent Loan Agreement, and all other documents for the Loan are referred to as the Loan Documents). The Mortgage encumbers the real property in **[county]**, Michigan, which is described in Exhibit A (the Premises). Borrower has entered into leases for portions of the Premises and may enter into additional leases during the term of the Mortgage. The existing leases are described on the attached Exhibit B. To issue the Loan, Lender has required additional security in the form of this Assignment in addition to the collateral provided by the other Loan Documents.

2. **Assignment of rents and leases.** Borrower signs and delivers this Assignment in consideration of receiving the Loan to secure the compliance of Borrower with the Note, the Mortgage, and this Assignment and the payment of all other debts now or later owing to Lender by Borrower. Borrower assigns, conveys, grants a security interest in, and warrants to Lender and its successors and assigns all the following property:

a. all the rent, issues, profits, revenues, income, and accounts of the Premises now or later due under current and future leases, use agreements, and other agreements, including all rights conferred by MCL 554.231 et seq., and MCL 554.211 et seq.

b. all Borrower's rights and interests as landlord under the existing leases listed on Exhibit B

c. all Borrower's rights and interests in any future leases and any existing or future licenses, contracts, and other occupancy and use agreements for any portion of the Premises

3. **Term of the Assignment.** This Assignment shall be terminated when Lender is paid the principal, interest, and other amounts due under the Note without any deductions or credits for taxes or other similar impositions paid by Borrower, provided that Borrower has performed all its obligations under the Note and this Assignment. Until these event occur, it remains in effect.

4. **Covenants of Borrower.** Borrower agrees with Lender as follows:

a. As long as this Assignment remains in effect, Borrower agrees that, without consent from Lender, it shall not

i. further assign, convey, encumber, or otherwise transfer any interest in the rent or current or future leases;

ii. offer or accept any prepayment of rent more than 31 days in advance of its due date; or

iii. consent to any assignments or subleases of the tenants' interests in the current or future leases.

b. As long as this Assignment remains in effect, Borrower agrees that it will

i. discharge all its obligations under current and future leases,

ii. enforce the performance of all the tenants' obligations under current and future leases at its expense, and

iii. promptly notify Lender of any defaults or events under those leases that could constitute defaults with the passage of time or notice under current or future leases.

c. Borrower warrants to Lender and its successors and assigns that

i. it has the complete right and authority to assign the rent and the current and future leases;

ii. it has not assigned, encumbered, or pledged the rent of current or future leases;

iii. it has not accepted any prepayment of rent more than 31 days in advance of its due date;

iv. it has not waived any obligations of tenants under the leases shown in exhibit B;

v. the Leases shown in Exhibit B remain in effect;

vi. except as disclosed in writing to Lender, the leases shown in exhibit B have not been modified in any way;

vii. the tenants under the leases shown in exhibit B have no claims or rights to setoffs against Borrower except as have been disclosed to Lender in writing; and

viii. no defaults or events that could constitute a default with the passage of time or notice under the leases shown in exhibit B exist.

d. The parties agree that as long as there are no defaults under the Note, the Mortgage, or this Assignment, the relationship of landlord and tenant shall exist between Borrower and the tenants under current and future leases, and Borrower shall continue to collect all rent, but only as it accrues. Borrower may maintain any actions or proceedings against tenants to enforce current or future leases. Borrower shall appear in and defend any actions related to current or future leases at its expense. Lender shall not be obligated to discharge any obligations of the landlord under current or future leases because of this Assignment. Except for events occurring during any time period during which Borrower has tendered exclusive possession and control of the mortgaged property to Lender and Lender has accepted possession and control, Borrower agrees to indemnify Lender for all liability for or damages under current or future leases. If Lender incurs any such liability because of this Assignment, including costs, expenses, and reasonable attorney fees, Borrower shall reimburse Lender for such amounts on demand. Interest shall accrue on all such amounts owing to Lender from the date the amounts are incurred at the interest rate stated in the note and shall be secured by the Mortgage and this Assignment.

5. **Additional documents from Borrower.** Borrower shall sign or acknowledge and shall give any other documents and shall perform any other acts that Lender reasonably requests to confirm and protect the lien, transfer, and other provisions of this Assignment and to accomplish the purposes of this Assignment, including the specific Assignment of any future lease.

6. **Payment by Borrower of Lender's costs.** If Borrower fails to meet any obligation under this Assignment, Lender may, without notifying Borrower or releasing Borrower from any obligations, perform Borrower's obligations, including the obligation to appear in and defend any action purporting to affect the security position of Lender in the leases or the rights of Borrower and any obligations of the landlord under current or future leases. In this event, Borrower will immediately pay, on demand, all sums Lender spends under the authority of this provision, with interest at the rate in the Note. Any such amounts shall be secured by the Mortgage.

7. **Lender's remedies on default under the Loan Documents.**

a. In addition to any other remedies available to Lender, in the event of any default under the Note, the Mortgage, this Assignment, or any other documents securing Borrower's debt to Lender, Lender or its successors or assigns may accelerate the entire debt without demand, and Lender's representatives, agents, or employees may enter the Premises; assume the management of the Premises; enforce current or future leases against the tenants; and collect, in its name or Borrower's name, the rent and other income from current or future leases. On any such default, the tenants of the Premises shall pay all rent and other amounts due to Borrower under current or future leases to Lender, on demand, whether or not Lender has taken possession of the Premises. Borrower authorizes Lender and its successors and assigns to maintain and operate the Premises as Borrower would, including to cancel, enforce, modify, or enter into leases; to evict tenants; or to fix or modify rent. If Lender takes possession of the Premises, it shall apply all rent first to the operating expenses of the Premises and shall apply any excess to Borrower's debt to Lender. Lender has the sole discretion in the application of the net income. Any action of Lender to enter and to take possession of the Premises or to collect or to apply the rent or issues from the Premises shall not affect any default or right of Lender under this Assignment, the Mortgage, or any other documents securing the Note. Lender shall not be liable for any losses sustained by Borrower that result from Lender's failure to lease the Premises or for any other act or omission in managing the Premises.

b. In the event of a default by Borrower under the Loan Documents, Lender, on application to a court of competent jurisdiction, shall be entitled, as a matter of right, without notice and without regard to the occupancy or the value of any security for the debt secured by this Assignment, to the appointment of a receiver to take possession of the Premises, to operate it, and to collect and apply the rent and issues from it. The receiver shall have all the rights and powers permitted by law. Borrower shall reimburse Lender, on demand, for all expenses, including receiver fees, attorney fees, and agents' compensation, incurred under this section or under this Assignment. All expenses shall be secured by this

Assignment and shall bear interest at the rate stated in the Note. Lender shall be entitled to all the rights and benefits allowed under MCL 554.231 et seq. and MCL 554.211 et seq. The collection of rent by Lender or a receiver shall not waive the right of Lender to foreclose the Mortgage in the event of any default.

c. Lender may receive and collect the rent and issues of the Premises personally or through a receiver as long as any such default exists, including during the pendency of any foreclosure proceedings and during any redemption period. Borrower consents to a receivership if Lender deems it necessary or desirable to protect Lender's rights.

8. **Notices.** All notices required under this Agreement shall be effective only if in writing or in a form of electronic or facsimile transmission that provides evidence of receipt and shall be personally served, electronically transmitted, or sent with postage prepaid to the appropriate party at its address as set forth in the introductory paragraph of this Agreement. Any party may change its address by giving notice of the change or a facsimile transmission number to the other parties as provided in this section.

9. **Jurisdiction and venue.** This assignment shall be construed and enforced according to the laws of the State of Michigan. Venue for any disputes shall lie in [county], Michigan.

10. **Unenforceability of a provision.** If any provision of this Assignment is invalid against any party or in any circumstance or is unenforceable to any extent, the application of the rest of this Assignment in regard to other parties or circumstances shall not be affected but shall be enforced to the greatest extent permitted by law.

11. **Rights cumulative.** The rights and remedies of Lender under the Mortgage and this Assignment are not exclusive but are cumulative, concurrent, and in addition to any other right or remedy under this Assignment or the Mortgage, at law or in equity, including, without limitation, the statutory assignment of rents and profits provided for by MCL 554.231 et seq. and MCL 554.211 et seq.

12. **Binding effect.** This Assignment shall run with the land and shall benefit Borrower; Lender; and their heirs, executors, legal representatives, successors, and assigns. Any references in this Assignment to Borrower or Lender include their heirs, executors, legal representatives, successors, and assigns. This Agreement shall continue to be operative during the foreclosure or any other proceedings taken to enforce the Loan Documents. In the event of a sale or foreclosure that results in a deficiency, this Agreement shall stand as security during the redemption period for the payment of the deficiency.

13. **Amendment.** No amendment to this Agreement shall be effective without the prior written consent of all the parties to this Agreement.

14. **Entire agreement.** This Agreement and all exhibits constitute the entire agreement between the parties with respect to the subject matter of this Agreement, and all prior negotiations and agreements with respect to this Assignment between the parties, whether written or oral, shall be of no further force and effect.

15. **Exhibits.** The following exhibits are attached to and a part of this Agreement:

- Exhibit A-Premises
- Exhibit B-Current Leases

16. **Effective date.** This Agreement has been signed and shall be effective as of the date first stated above.

BORROWER:

By: _____

Its: _____

STATE OF MICHIGAN)
) SS:
COUNTY OF _____)

Acknowledged before me in [county] County, Michigan, on [date] by [name of person acknowledged].

[Notary public's name, as it appears on application for commission]
Notary public, State of Michigan, County of [county].
My commission expires [date].
[Acting in the County of [county].]

Drafted by and when recorded return to:
[Name and address of drafting attorney]