

# **Documents Commonly Associated With the Leasing Process**

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## **A. Estoppel Certificates**

Estoppel certificates are basically requested to show third parties that the lease is in order. It lists any defenses a tenant has to the lease, along with important lease terms. Tenants give estoppel certificate to landlords who then provide them to a prospective purchaser or mortgagee. Most leases contain a provision that allows a landlord to request an estoppel certificate from the tenant whenever one is needed. A tenant may also be able to request an estoppel certificate from the landlord for prospective subtenants or assignees. This is a more difficult and unusual request.

A sample estoppel provision:

**Within ten (10) days after written notice from Landlord, Tenant shall provide an estoppel certificate to Landlord and such other party as is directed by Landlord certifying: (a) that this Lease is in full force and effect and that it has not been assigned, modified, supplemented or amended in any way (or identifying any assignment, modification, supplement or amendment); (b) the date of commencement and expiration of the Term of applicable Renewal Term; (c) that there are no defenses or offsets thereto (or stating those claimed by Tenant); (d) the amount of Base Rent or Additional Rent that has been paid in advance and the amount of security that has been deposited with the Landlord; (e) the date to which Base Rent or Additional Rent have been paid under this Lease; (f) that any Tenant improvements have been completed in accordance with the requirements of the Lease; and (g) such other information as is reasonably requested by Landlord. Tenant hereby irrevocably appoints Landlord as its attorney in fact to execute such a certificate in the event the Tenant shall fail to do so within ten (10) days of the Landlord's notice.**

## **B. Short Form or Memorandum of Lease**

The short form or memorandum of the lease is a summary of the lease, as the name implies, and serves several purposes. First, it allows the landlord and tenant to avoid recording costs. The short form also provides that information the landlord and tenant wish to make public in lieu of recording.

It does not normally include financial details. It is also important to make sure the short form is an accurate reflection of the lease and that there are no errors. Therefore, it is recommended that the short form contain lease provisions word for word.

**C. Subordination, Non-disturbance and Attornment Agreements (SNDA)**

This agreement is almost like three separate agreements that are commonly executed together into a single provision. The agreement involves the landlord, tenant, and the landlord's mortgagee, and is usually signed at the beginning of the lease or when the landlord refinances. The SNDA serves several purposes for the three parties.

The first clause, the subordination clause, places the lease in subordination to any mortgage, whether it is signed before or after the lease. Originally, this clause was used by mortgagees to kick out tenants who were paying below market rates. Now, mortgagees are more interested in retaining tenants and avoiding high turnover. As a result many subordination agreements give the mortgagee the option of subordinating the lease or not.

Along with the subordination is the non-disturbance clause. It protects the lease for the tenant in the event of a foreclosure. A tenant will have a prior mortgagee sign the agreement to retain the tenant's right to possession after a foreclosure. The non-disturbance clause also ensures the mortgagee is the first to receive insurance proceeds. If a tenant does exchange a subordination clause for a non-disturbance clause the lease will still follow a mortgage in insurance proceeds and condemnation awards. A subtenant may also want to secure a non-disturbance agreement with the landlord.

The attornment clause is the counterpart to the non-disturbance clause. It ensures the tenant will honor the lease agreements.

The SNDA can raise problems when a landlord seeks financing for an inhabited building. The tenants will demand concessions if they are to sign a SNDA. In this situation, the landlord should include a generic provision in the original lease that subordinates the tenant's rights to a mortgagee.

A sample SNDA clause:

**Tenant agrees that this Lease shall subordinate to any present or future first or junior mortgages and to any and all advances to be made thereunder and to the interest thereon and all renewals, replacements and extensions thereof provided the mortgagees named in said mortgages shall agree to recognize this Lease in the event of foreclosure if Tenant is not in default. In the event of any mortgagee electing to have this Lease be deemed a prior lien to its mortgage, then upon such mortgagee notifying Tenant to that effect, this Lease shall be deemed prior to the lien of said mortgage, whether this Lease is dated prior to or subsequent to the date of said mortgage. This provision shall be self-operative but in the event that any such mortgagee shall require that Tenant execute a document evidencing such subordination, Tenant shall sign an instrument to that effect and in the event Tenant does not do so within ten (10) days following a written request, Landlord shall be deemed to be Tenant's attorney-in-fact for this purpose.**

A sample subordination, non-disturbance and attornment agreement is included in Appendix A.

#### **D. Lease Amendment**

A tenant should be careful to avoid giving the landlord an unqualified agreement to amend the lease. The tenant will want to make sure amendments to the lease do not encroach on the tenant's rights or increase the tenant's costs.

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APPENDIX A

**SUBORDINATION, NONDISTURBANCE AND ATTORNMENT AGREEMENT**

This Subordination, Nondisturbance and Attornment Agreement (the "**Agreement**") is dated as of the \_\_\_ day of \_\_\_\_\_, 2007, between \*\*\* (the "**Lender**") having an address at \*\*\*, and \*\*\* (the "**Tenant**") having an address of \*\*\*.

RECITALS

1. Tenant is the tenant under a certain Lease (the "**Lease**"), dated \*\*\*, of premises described in the Lease (the "**Premises**") located at \*\*\*, and constituting a portion of the real property more particularly described in Exhibit A attached hereto and made a part hereof (being hereinafter referred to as the "**Property**"). \*\*\* ("**Landlord**") is the current landlord under the Lease.

2. This Agreement is being entered into in connection with a mortgage loan (the "**Loan**") being made by Lender to Landlord, to be secured inter alia, by: (a) a first mortgage on the Property (the "**Security Instrument**") to be recorded in the real estate records of \*\*\* County, Minnesota (the "**Official Records**"); and (b) a first assignment of leases and rents on the Property (the "**Assignment of Leases and Rents**") to be recorded in the Official Records. The Security Instrument and the Assignment of Leases and Rents are hereinafter collectively referred to as the "**Security Documents**".

AGREEMENT

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

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

2. Tenant agrees that, in the event of a foreclosure of the Security Instrument by Lender or the acceptance of a deed in lieu of foreclosure by Lender or any other succession of Lender to fee ownership, Tenant shall attorn to and recognize Lender as its landlord under the Lease for the remainder of the term of the Lease (including all extension periods which have been or are hereafter exercised) upon the same terms and conditions as are set forth in the Lease, and Tenant hereby agrees to pay and perform in

favor of Lender all of the obligations of Tenant under the Lease as if Lender were the original lessor under the Lease.

3. In the event that Lender succeeds to the interest of Landlord under the Lease, Lender and Tenant hereby agree to be bound to one another under all of the terms, covenants and conditions of the Lease for the balance of the term of the Lease, and so long as Tenant complies with and performs its obligations under the Lease, Lender shall not disturb Tenant's possession of the leased premises.

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

(a) liable for any act or omission of any prior Landlord (including, without limitation, the then defaulting Landlord), or

(b) subject to any defense or offsets which Tenant may have against any prior Landlord (including, without limitation, the then defaulting Landlord), or

(c) bound by any payment of rent or additional rent which Tenant might have paid for more than one (1) month in advance of the due date under the Lease to any prior Landlord (including, without limitation, the then defaulting Landlord), or

(d) bound by any obligation to make any payment to Tenant which was required to be made prior to the time Lender succeeded to any prior Landlord's interest, or

(e) accountable for any monies deposited with any prior Landlord (including security deposits), except to the extent such monies are actually received by Lender in segregated cash amounts identified to Lender in writing as such at the time received, or

(f) bound by any termination, amendment or modification of the Lease made without the consent of Lender; or

(g) obligated to complete any improvements or construction on the Property or to pay or reimburse Tenant for any tenant improvement allowance or construction allowance; or

(h) be required after a fire, casualty or condemnation of the Property or Premises to repair or rebuild the same to the extent that such repair or rebuilding requires funds in excess of the insurance or condemnation proceeds specifically allocable to the Premises and arising out of such fire, casualty or condemnation which have actually been received by Lender, and then only to the extent required by the terms of the Lease; or

(i) be responsible to provide any additional space at the Property or elsewhere for which Tenant has any option or right under the Lease, or otherwise, unless Lender at its option elects to provide the same, and Tenant hereby releases Lender from

any obligation to provide the same, and agrees that Tenant shall have no right to cancel the Lease and shall possess no right to any claim against Lender as a result of the failure to provide any such additional space; or

(j) be liable for or incur any obligation with respect to any representations or warranties of any nature set forth in the Lease or otherwise, including, but not limited to, representations or warranties relating to any latent or patent defects in construction with respect to the Property or the Premises, Landlord's title or compliance of the Property or Premises with applicable environmental, building, zoning or other laws, including, but not limited to, the Americans with Disabilities Act and any regulations pursuant thereto.

5. Tenant covenants and acknowledges that it has no right or option of any nature whatsoever, whether pursuant to the Lease or otherwise, to purchase the Property or the real property of which the Property is a part, or any portion thereof or any interest therein and to the extent that Tenant has had, or hereafter acquires any such right or option, the same is hereby acknowledged to be subject and subordinate to the Security Instrument and is hereby waived and released as against Lender.

6. Anything herein or in the Lease to the contrary notwithstanding, in the event that Lender shall acquire title to the Property, Lender shall have no obligation, nor incur any liability, beyond Lender's then interest in the Property, and Tenant shall look exclusively to such interest of Lender in the Property for the payment and discharge of any obligations imposed upon Lender hereunder or under the Lease, or otherwise, subject to the limitation of Lender's obligations provided for in Paragraph 4 above.

7. Tenant hereby agrees to give to Lender copies of all notices of Landlord default(s) under the Lease in the same manner as, and whenever, Tenant shall give any such notice of default to Landlord, and no such notice of default shall be deemed given to Landlord unless and until a copy of such notice shall have been so delivered to Lender. Lender shall have the right to remedy any Landlord default under the Lease, or to cause any default of Landlord under the Lease to be remedied, and for such purpose Tenant hereby grants Lender such additional period of time as may be reasonable to enable Lender to remedy, or cause to be remedied, any such default in addition to the period given to Landlord for remedying, or causing to be remedied, any such default. Tenant shall accept performance by Lender of any term, covenant, condition or agreement to be performed by Landlord under the Lease with the same force and effect as though performed by Landlord. No Landlord default under the Lease shall exist or shall be deemed to exist (i) as long as Lender, in good faith, shall have commenced to cure such default within the above referenced time period and shall be prosecuting the same to completion with reasonable diligence, subject to force majeure, or (ii) if possession of the Premises is required in order to cure such default, or if such default is not susceptible of being cured by Lender, as long as Lender, in good faith, shall have notified Tenant that Lender intends to institute proceedings under the Security Documents, and, thereafter, as long as such proceedings shall have been instituted and shall be prosecuted with reasonable diligence. The Lease shall not be assigned (except in the event of an assignment that is permitted in the Lease without Landlord's consent) by Tenant,

modified, amended or terminated (except in the event of a termination that is permitted in the Lease without Landlord's consent) without Lender's prior written consent in each instance. Neither Lender nor its designee or nominee shall become liable under the Lease unless and until Lender or its designee or nominee becomes, and then only with respect to periods in which Lender or its designee or nominee becomes, the fee owner of the Premises. Lender shall have the right, without Tenant's consent, to foreclose the Security Instrument or to accept a deed in lieu of foreclosure of the Security Instrument or to exercise any other remedies under the Security Documents.

8. Tenant has no knowledge of any prior assignment or pledge of the rents accruing under the Lease by Landlord. Tenant hereby consents to that certain Assignment of Leases and Rents from Landlord to Lender executed in connection with the Loan. Tenant acknowledges that the interest of the Landlord under the Lease is to be assigned to Lender solely as security for the purposes specified in said assignments, and Lender shall have no duty, liability or obligation whatsoever under the Lease or any extension or renewal thereof, either by virtue of said assignments or by any subsequent receipt or collection of rents thereunder, unless Lender shall specifically undertake such liability in writing. Tenant agrees that upon receipt of a written notice from Lender of a default by Landlord under the Loan, Tenant will thereafter, if requested by Lender, pay rent to Lender in accordance with the terms of the Lease.

9. If Tenant is a corporation, each individual executing this Agreement on behalf of said corporation represents and warrants that s/he is duly authorized to execute and deliver this Agreement on behalf of said corporation, in accordance with a duly adopted resolution of the Board of Directors of said corporation or in accordance with the by-laws of said corporation, and that this Agreement is binding upon said corporation in accordance with its terms. If Tenant is a partnership or limited liability company, each individual executing this Agreement on behalf of said partnership or limited liability company, as the case may be, represents and warrants that he is duly authorized to execute and deliver this Agreement on behalf of said partnership or limited liability company, as the case may be, in accordance with the partnership agreement or operating agreement for said entity.

10. Any notice, election, communication, request or other document or demand required or permitted under this Agreement shall be in writing and shall be deemed delivered on the earlier to occur of (a) receipt, or (b) the date of delivery, refusal or nondelivery indicated on the return receipt, if deposited in a United States Postal Service Depository, postage prepaid, sent certified or registered mail, return receipt requested, or if sent via a recognized commercial courier service providing for a receipt, addressed to Tenant or Lender, as the case may be, at the following addresses:

If to Tenant:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

with a copy to:

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If to Lender:

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with a copy to:

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

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

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

(NO FURTHER TEXT ON THIS PAGE)



STATE OF \_\_\_\_\_ )  
 )ss.  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_  
\_\_\_\_\_, 2007, by \*\*\*, \*\*\* of \*\*\*, Lender.

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Notary Public  
Stamp and/or Seal

THIS INSTRUMENT DRAFTED BY:

Mansfield Tanick & Cohen, P.A.  
1700 U.S. Bank Plaza South  
220 South Sixth Street  
Minneapolis, Minnesota 55403-4511

**EXHIBIT A**

Legal Description