

SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT



0020431328

THIS SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT (this "Agreement") is made and entered into as of the 4th day of April, 2002 by and among **SUN LIFE ASSURANCE COMPANY OF CANADA**, a Canadian corporation, whose address is One Sun Life Executive Park, Wellesley Hills, Massachusetts, 02481 Attention: Mortgage Investments Group ("Lender"), **SIDCOR DEMPSTER ASSOCIATES, L.P.**, an Illinois limited partnership, whose address is 333 Skokie Boulevard, Suite 101, Northbrook, Illinois 60062, Attention: James D. Devine ("Landlord") and **HOME DEPOT U.S.A., INC.**, a Delaware corporation, whose address is 2455 Paces Ferry Road N.W., Atlanta Georgia, 30339 Attention: Vice President - Real Estate Law Group ("Tenant").

Preliminary Statements:

A. Landlord and Tenant have entered into a lease with an Effective Date of January 21, 2002, as amended by later agreement dated March 12, 2002 (the "**Lease**") pertaining to certain premises (the "**Premises**") located in the County of Cook, City of Niles, State of Illinois, as more particularly described in the Lease located in an existing shopping center commonly known as "Dempster Plaza" located at the northwest corner of Dempster Street and Greenwood Avenue in Niles, Illinois (the "**Shopping Center Parcel**"); and

B. Lender previously has made a loan to Landlord in the original principal amount of Five Million Seven Hundred Fifty Thousand Dollars (\$5,750,000.00) secured by, among other things, a mortgage (the "**Mortgage**") upon the Shopping Center Parcel property (the "**Property**") described in **Schedule 1** attached hereto (which includes the Premises), and which Mortgage was dated January 29, 1999, and recorded on February 4, 1999, in the Official Records of Cook County as Document No. 99120097 and constitutes a lien against the Premises; and

C. Tenant has agreed to recognize and attorn to Lender in the event that Lender succeeds to the rights of the Landlord under the Lease as a result of foreclosure or otherwise, provided that Lender agrees that Tenant's use and occupancy of the Premises and the Common Areas (as defined in the Lease) and all of Tenant's rights under the Lease shall not be disturbed or affected, notwithstanding any breach or default by Landlord or the exercise of any remedies under the Mortgage by Lender.

NOW, THEREFORE, in consideration of the sum of \$10.00 in hand paid and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, by each of the parties hereto, and for and in consideration of their respective covenants herein made, the parties hereby covenant and agree as follows:

- 1. Lender Consent.** Lender hereby consents to the Lease.
- 2. Subordination.** The Lease is and shall be subject and subordinate, as set forth in this Agreement, to the lien of the Mortgage and to all renewals, modifications, consolidations, replacements and extensions of the Mortgage, to the full extent of amounts secured thereby and interest thereon, except as noted herein. The foregoing notwithstanding, in no event shall any of Tenant's trade fixtures, inventory, equipment, furniture and furnishings, accounts, books or records or other assets be or become subject or subordinate to the lien in favor of Lender.
- 3. Non-Disturbance.** So long as the Lease is in full force and effect and no default exists under the Lease by Tenant beyond any applicable grace, notice and cure period (except in due exercise of Tenant's rights and remedies thereunder), the Lease and the rights of Tenant thereunder including,

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without limitation, Tenant's possession, use and enjoyment of the Premises, the Common Areas and related signage, shall continue in full force and effect and shall not be terminated, interfered with, disturbed, impaired, diminished, or otherwise affected in any manner as a result of any act or omission of Landlord, and all rights, options and privileges of Tenant under the Lease, or any renewals, modifications, or extensions thereof (including, without limitation, the rights of first offer granted in Article XXI thereof), shall be recognized by Lender and any Successor Landlord (as hereinafter defined), and the Lease shall be deemed a direct lease and agreement between Tenant and Lender or any Successor Landlord. If any action or proceeding is commenced by Lender for the foreclosure of the Mortgage or the sale of the Property, Tenant shall not be named as a party therein unless such joinder shall be required by law and Tenant shall not thereby be subjected or exposed to any liability, cost or expense, and such joinder shall in no event create or cause a result which is contrary, inconsistent with or in violation of the first grammatical sentence of this Section 3.

4. **Attornment.** Tenant agrees that if title to the Premises or any other interest therein, which includes the right to receive payment of rent or to enforce the performance of other obligations under the Lease, is transferred as a result of any foreclosure, deed in lieu of foreclosure, sale or otherwise, Tenant will attorn to the purchaser or transferee who acquires such title or other interest ("**Successor Landlord**") and will recognize such Successor Landlord as landlord under the Lease subject to the terms of the Lease, and such Successor Landlord shall be subject to the terms of this Agreement, deemed to have assumed all of Landlord's duties and obligations under the Lease, and shall be bound by all of the terms and obligations imposed by the Lease. Without limiting the foregoing, and controlling over any contrary or inconsistent provision of the Mortgage, (a) the proceeds of any property and casualty insurance pursuant to the terms of the Lease shall be used only for the repair, reconstruction or replacement of the Premises and/or other improvements in the HD Development as required by the Lease, unless the Lease is terminated as a result of the casualty for which the proceeds are to be paid, and (b) in the event of a condemnation of all or any portion of the Premises which results in the termination of the Lease, the allocation and disposition of the condemnation award, and Tenant's rights respecting such award, shall be as set forth in the Lease, and no provision of the Mortgage shall limit or affect Tenant's right to seek compensation in the event of a total or partial condemnation in accordance with the terms of the Lease.

5. **Performance by Tenant.** If Tenant receives any notice from Lender or any Successor Landlord to pay rent or other sums or render any other performance under the Lease to such Lender or Successor Landlord, Tenant may render performance in accordance with such notice without any duty of inquiry and despite any knowledge or notice to the contrary with the same force and effect as if such payment or performance were rendered to Landlord under the Lease.

6. **Successor Landlord Liability.** Tenant shall have the same rights and remedies for a breach of the Lease against any Successor Landlord, including Lender in the event that Lender shall succeed to the interest of Landlord under the Lease, that Tenant might have had under the Lease against Landlord; provided, however, that Lender or any Successor Landlord shall not:

(a) be liable for any act or omission of any prior landlord (including the Landlord) under the Lease, except for non-monetary defaults of a continuing nature (but only to the extent that they continue beyond the date title is transferred); or

(b) be subject to any offsets or defenses which Tenant might have against any prior landlord (including the Landlord), except for the exercise of rights expressly set forth in Sections 5.5, 7.2(c) and (d), 8.3(g), 9.5(a), 11.1(e), 12.3(b) and 14.2 of the Lease; or

(c) be bound by any rent which Tenant might have paid for more than one month in advance to any prior landlord (including the Landlord); or

(d) be bound by any amendment or modification of the Lease made after the date hereof without Lender's consent, which consent shall not be unreasonably withheld, conditioned or delayed.

Provided, however, that nothing herein shall excuse Lender or any Successor Landlord from liability or responsibility for, or limit any right or remedy of Tenant with respect to, any breach or default which continues from and after the date when Lender or such Successor Landlord obtains title to or takes possession or control of the Premises. Nothing herein contained shall impose any obligations upon Lender to perform any of the obligations of Landlord under the Lease, unless and until Lender shall become owner or mortgagee in possession of the Premises.

7. **Notice of Landlord Default.** Lender and Tenant shall each provide to the other, a copy of any notice of default served upon Landlord under the Mortgage or the Lease, respectively, at the address set forth above, and the recipient of such default notice shall have the same right, but shall have no obligation, to cure any such default on behalf of Landlord (within the time period provided Landlord for such cure) as is provided in the Mortgage or the Lease, respectively. All notices between Lender and Tenant shall be sent in the manner set forth under the Lease.

8. **Successors and Assigns.** For purposes of this Agreement, (a) the terms "Lender", "Successor Landlord" and "Landlord" shall include such parties and any successors or assigns, including any successors in title to the Premises, and (b) the term "Tenant" shall include any permitted assignee or sublessee.

9. **Applicable Law.** This Agreement shall be governed by and construed in accordance with laws of the State of Illinois.

10. **Binding Effect.** This Agreement shall bind and benefit the heirs, legal representatives, successors and assigns of the respective parties hereto, and all covenants, conditions and agreements herein contained shall be construed as running with the land.

11. **Non-waiver.** Landlord agrees that, except as expressly provided herein, this Agreement does not constitute a waiver by Lender of any of its rights under the Mortgage or related documents, and that the Mortgage and any related documents remain in full force and effect and shall be complied with in all respects by Landlord.

12. **Modification.** No material modification, amendment, waiver or release of any provision of this Agreement or of any right, obligation, claim or cause of action arising hereunder shall be valid or effective unless in writing and signed by the parties.

TEXT OF AGREEMENT ENDS HERE; SIGNATURE PAGE TO FOLLOW

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

LANDLORD: SIDCOR DEMPSTER ASSOCIATES, L.P.,
an Illinois limited partnership

By: [Signature]
Print Name: DD DEVINE
Title: GENERAL PARTNER

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

I, Donna Clare Hutcheon, a Notary Public in and for said County, in the State aforesaid, do hereby certify that James D. Devine, the general partner of SIDCOR DEMPSTER ASSOCIATES, L.P., an Illinois limited partnership, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he/she signed, sealed and delivered said instrument, on behalf of said limited partnership as his/her free and voluntary act and as the free and voluntary act of said limited partnership, for the uses and purposes therein set forth.

Given under my hand and seal this 29th day of March, 2002.

Donna Clare Hutcheon
Notary Public

My Commission Expires:
2-5-2005



LANDLORD SIGNATURE PAGE TO SNDA

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TENANT: HOME DEPOT U.S.A., INC.,
a Delaware corporation

By: *Jeff Israel*
Name: Jeff Israel
Title: Senior Corporate Counsel - Real Estate

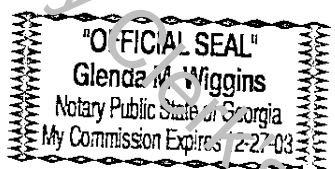
STATE OF GEORGIA)
)SS.
COUNTY OF COBB)

On this 29th day of March, 2002, before me appeared *Jeff Israel*, to me personally known, who, being by me duly sworn, did say that he/she is the Se. Corp. Counsel - R.E. of HOME DEPOT U.S.A., INC., a Delaware corporation, and that said instrument was signed on behalf of said corporation; and said individual acknowledged said instrument to be the free and act and deed of said corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid, the day and year first above written.

Glenda M. Wiggins
Notary Public

My term expires: 12-27-03



TENANT SIGNATURE PAGE TO SNDA

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LENDER: SUN LIFE ASSURANCE COMPANY OF CANADA,
a Canadian corporation

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By: [Signature]
For President
Name: DIANNA E. HAYES

By: [Signature]
For Secretary
Name: LEO J. BARRETT, JR.

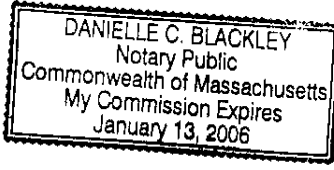
STATE OF MASSACHUSETTS)
)SS.
COUNTY OF NORFOLK)

I, Danielle C. Blackley, a Notary Public in and for said County in the State aforesaid, do hereby certify that Dianne E. Hayes, the signing for the President, and Leo J. Barrett, Jr., the signing for the Secretary of SUN LIFE ASSURANCE COMPANY OF CANADA, a Canadian Corporation, personally known to me to be the same persons whose names are subscribed to the foregoing instrument as such President and Secretary, appeared before me this day in person and acknowledged that they signed and delivered such instrument as their own free and voluntary act and as the free and voluntary act of said corporation, for the uses and purposes set forth therein.

GIVEN under my hand and notarial seal this 4th day of April, 2002.

[Signature]
Notary Public

My Commission Expires:
January 13, 2006



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SCHEDULE 1

Legal Description of Shopping Center Parcel

That part of the Southwest 1/4 of the Southwest 1/4 of Section 14, and part of the East 327.63 feet, measured on the South line thereof, of the Southeast 1/4 of Section 15, lying South of the South line of Ballard Road, all in Township 41 North, Range 12 East of the Third Principal Meridian, lying South of the following described line:

Commencing at the intersection of the East line of the Southwest 1/4 of the Southwest 1/4 of said Section 14 with a line 618 feet North, measured at right angles and parallel with the South line of said Quarter Quarter Section; thence West along the said parallel line 710.61 feet; thence South at right angles 110 feet; thence West parallel with and 508 feet North, measured at right angles to the South line of said Quarter Quarter Section of said Section 14, 350 feet; thence South at right angles 25 feet; thence West parallel with and 493 feet North, measured at right angles, to the South line of said Quarter Quarter of said Section 14 and said line extended West, 600.75 feet to a point on the West line of the East 327.63 feet, measured on the South line thereof of the Southeast 1/4 of Section 15, as aforesaid, in Cook County, Illinois.

Less and except that portion conveyed to the Department of Transportation by Trustees Deed from American National Bank and Trust Company of Chicago, as Trustee under Trust Agreement dated November 22, 1985 and known as Trust No. 65675, dated November 6, 1995 and recorded August 1, 1997 as Document 97559150 and also less and except that portion of the land taken for street purposes by condemnation case 74L-17220.

Tax Nos. 09-14-308-010 and 09-15-403-070

address: Dempster Plaza
Niles, IL

prepared by, return to:

John Graham
Seyfarth Shaw
55 E. Monroe, 42nd Floor
Chicago IL 60603