

UNOFFICIAL COPY

0020812662

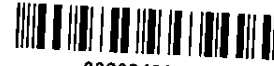
9595/0198 11 001 Page 1 of 13
2002-07-24 15:54:29
Cook County Recorder 45.50

SUBORDINATION, NONDISTURBANCE,
AND ATTORNMENT AGREEMENT

DOCUMENT NUMBER: _____

RECORDATION REQUESTED BY AND
WHEN RECORDED RETURN TO:

CIB Bank
Attn: Mr. William E. Kennedy, VP
5435 N. Emerson Way, Suite 100
Indianapolis, Indiana 46226



0020812662

SEND TAX NOTICES TO:
3500 Hoyt, L.L.C.
Attn: Mr. Brian L. Allardt
211 S. Walnut St.
Muncie, Indiana 47305

The address for the Real Estate is:
7424 S. Stony Island
Chicago, Illinois 60649

Parcel I.D. Number and/or Real Property
Tax Identification Number is: 20-26-229-034,
20-20-229-035, 20-26-229-036, and
20-29-229-028

FOR RECORDER'S USE ONLY

This Instrument Prepared by:

Reagan K. Rick, Esq.
RICK LAW FIRM, P.C.
P. O. Box 681096
Indianapolis, IN 46268

**SUBORDINATION, NONDISTURBANCE AND ATTORNMENT AGREEMENT
(This "Agreement")**

This SUBORDINATION, NONDISTURBANCE, AND ATTORNMENT AGREEMENT (this "Agreement") is entered into as of June 24, 2002 (the "Effective Date"), by and between TUFFY ASSOCIATES CORP., a Delaware corporation, whose address is 1414 Baronial Plaza Drive, Toledo, Ohio 43615 ("Tenant"), and CIB BANK, an Indiana banking corporation, whose address is 5435 North Emerson Way, Suite 100, Indianapolis, Indiana 46226 ("Mortgagee"), with reference to the following facts:

A. 3500 HOYT, L.L.C., an Indiana limited liability company, whose address is 211 S. Walnut Street, Muncie, Indiana 47305 ("Landlord"), owns, or will acquire contemporaneously

UNOFFICIAL COPY

20812662

herewith, the real property located at 7424 S. Stony Island, Illinois 60649 (such real property, including all buildings, improvements, structures and fixtures located thereon, "Landlord's Premises"), as more particularly described in Exhibit A.

B. Landlord and Mortgagee have entered into a certain Mortgage Loan Agreement dated as of even date herewith (the "Loan Agreement") whereby Mortgagee has agreed to make a loan to Landlord in the original principal amount of up to Fifteen Million Dollars (\$15,000,000) (such loan and any renewal, replacement, amendment, or restatement thereof is referred to as the "Loan").

C. To secure the Loan, Landlord has encumbered Landlord's Premises by entering into that certain Open-End Mortgage, Assignment of Rents and Leases, and Security Agreement dated as of even date herewith, in favor of Mortgagee (as amended, increased, renewed, extended, consolidated, severed, restated, or otherwise changed from time to time, the "Mortgage") to be recorded with the recorder of deeds of the county in which the Landlord's Premises is located (the "Land Records").

D. Pursuant to a Lease dated as of February 26, 2002 (the "Lease"), Landlord demised to Tenant Landlord's Premises ("Tenant's Premises").

E. Tenant and Mortgagee desire to agree upon the relative priorities of their interests in Landlord's Premises and their rights and obligations if certain events occur, and the Landlord agrees to such relative priorities, rights and obligations as set forth herein.

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

1. *Definitions.*

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

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

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

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

UNOFFICIAL COPY

20812662

1.4 *Offset Right.* An "Offset Right" means any right or alleged right of Tenant to any offset, defense (other than one arising from actual payment and performance, which payment and performance would bind a Successor Landlord pursuant to this Agreement), claim, counterclaim, reduction, deduction, or abatement against Tenant's payment of Rent or performance of Tenant's other obligations under the Lease, arising (whether under the Lease or under applicable law) (i) from Landlord's breach or default under the Lease or (ii) in relation to any other property, matter, liability or claim not directly related to the Landlord's Premises.

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

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

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

2. *Subordination.*

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

3. *Nondisturbance, Recognition and Attornment.*

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

3.2 *Nondisturbance and Attornment.* If the Lease has not been terminated on account of an Event of Default by Tenant, then, when Successor Landlord takes title to Landlord's Premises: (a) Successor Landlord shall not terminate or disturb Tenant's possession of Tenant's Premises under the Lease, except in accordance with the terms of the Lease and this Agreement; (b) Successor Landlord shall be bound to Tenant under all the terms and conditions of the Lease (except as provided in this Agreement); (c) Tenant shall recognize and attorn to Successor Landlord as Tenant's direct landlord under the Lease as affected by this Agreement; and (d) the Lease shall continue in full force and effect as a direct lease, in accordance with its terms (except as provided in this Agreement), between Successor Landlord and Tenant.

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

4. *Protection of Successor Landlord.*

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

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

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

4.3 *Payment; Security Deposit.* Any obligation: (a) to pay Tenant any sum(s) that any Former Landlord owed to Tenant or (b) with respect to any security deposited with Former Landlord, unless such security was actually delivered to Mortgagee.

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

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

4.6 *Construction-Related Obligations.* Any Construction-Related Obligation of Former Landlord.

5. *Exculpation of Successor Landlord.*

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

out of any other assets of Successor Landlord or from any other obligation or liability of Tenant to Successor Landlord or any assign or successor thereof.

6. *Mortgagee's Right to Cure; Certain Lease Provisions.*

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

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

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

6.4 *Certain Lease Provisions.* As long as any portion of the Loan remains outstanding or in the event a Successor Landlord acquires any rights in any portion of the Landlord's Premises, the Tenant shall observe the following in relation to the Lease and the Landlord's Premises, notwithstanding any provision to the contrary in the Lease (all of the following references to Sections in this Section 6.4 shall be to sections in the Lease):

- a. Section 3, Title Evidence. Tenant shall not terminate the Lease or exercise any of its rights pursuant to Section 3.
- b. Section 11, Public Liability and Property Damage Insurance. Tenant shall cause the Mortgagee to be listed, at all times, as a Lender Loss Payee under the insurance policies required pursuant to Section 11.
- c. Section 14, Alterations. Tenant shall pay all bills incurred for labor and/or materials for work done on or to the Tenant's Premises within the time required to prevent the filing of any mechanics, materialman's or similar liens.
- d. Section 17, Eminent Domain. Tenant shall only be entitled to any award relating to Section 17 that (i) expressly states that such award is to compensate Tenant for loss, (ii) sets forth the specific amount of such loss

by the Tenant, and (ii) such loss is not an award for any loss or diminution of value of the Landlord's Premises.

7. *Confirmation of Facts.*

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

7.1 *Effectiveness of Lease.* The Lease is in full force and effect, has not been modified, and constitutes the entire agreement between Landlord and Tenant relating to Tenant's Premises. Tenant has no interest in Landlord's Premises except pursuant to the Lease. No unfulfilled conditions exist to Tenant's obligations under the Lease.

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

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

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

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

7.6 *Commencement Date.* The "Commencement Date" of the Lease is July 2, 2002.

7.7 *Acceptance.* Subject to any exceptions set forth following this paragraph: (a) Tenant has accepted possession of Tenant's Premises; and (b) Landlord has performed all Construction-Related Obligations related to Tenant's initial occupancy of Tenant's Premises and Tenant has accepted such performance by Landlord. The only exceptions are as follows:

NONE

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

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

8. *Miscellaneous.*

8.1 *Rent Payments; Tax Payments.* Tenant shall pay all Rent and tax payments required pursuant to the Lease to Mortgagee or as Mortgagee shall direct in writing, until such time as Mortgagee directs otherwise in writing. Tenant's compliance therewith, shall not be

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

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

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

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

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

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

8.7 *Interpretation; Governing Law.* The interpretation, validity and enforcement of this Agreement shall be governed by and construed under the internal laws of the State where Landlord's Premises are located, excluding its principles of conflict of laws.

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

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

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

[The remainder of this page is intentionally left blank.]

Property of Cook County Clerk's Office

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

CIB BANK,

TUFFY ASSOCIATES CORP.,

An Indiana banking corporation

A Delaware Corporation

By: William E. Kennedy
Name: William E. Kennedy
Title: VICE PRESIDENT

By: Keenan V. Moran
Name: Keenan V. Moran
Title: Pres.

Landlord consents and agrees to the foregoing Agreement, which was entered into at Landlord's request. The foregoing Agreement shall not alter, waive or diminish any of Landlord's obligations under the Mortgage or the Lease. The above Agreement discharges any obligations, if any, of Mortgagee under the Mortgage and related loan documents to enter into a nondisturbance agreement with Tenant. Landlord is not a party to the above Agreement. Landlord irrevocably directs Tenant to comply with any Rent and tax payment directions set forth in the foregoing Agreement, notwithstanding any contrary direction, instruction, or assertion by Landlord; and Tenant's compliance with any Rent and tax payment directions in the foregoing Agreement shall not be deemed to violate the Lease. Tenant shall be entitled to full credit under the Lease for any Rent and/or tax payments paid to Mortgagee pursuant to the foregoing Agreement to the same extent as if such Rent and/or tax payments were paid directly to Landlord.

3500 HOYT, L.L.C., An Indiana limited liability company

By: 3A, L.L.C., its Member and an Indiana limited liability company

By: L L C/A
Printed: AMAR L. ALLARIE
Its: MEMBER

Dated: June 24, 2002

Attachments:
Schedule A = Description of Landlord's Premises

UNOFFICIAL COPY

20812662

ACKNOWLEDGMENT

STATE OF Ohio)
) SS:
COUNTY OF Lucas)

BEFORE ME, a Notary Public, in and for the said State, personally appeared Keenan V. Moran the duly authorized President of TUFFY ASSOCIATES CORP., a Delaware corporation, who acknowledged that he/she signed the foregoing instrument on behalf of said corporation and that the same is his/her free act and deed as such President and the free act and deed of such corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 3rd day of July, 2002.

Richard E. Wolff
Signature RICHARD E. WOLFF
Attorney - at - Law
Notary Public — State of Ohio
My Commission Has No Expiration Date
Section 147.03 O.B.C.

Printed Notary Public

My Commission Expires:

County of Residence:
Lucas

Property of Cook County Clerk's Office

ACKNOWLEDGMENT

STATE OF Indiana)
) SS:
COUNTY OF Delaware)

BEFORE ME, a Notary Public, in and for the said State, personally appeared William E. Kennedy the duly authorized Vice President of CIB BANK an Indiana banking corporation, who acknowledged that he/she signed the foregoing instrument on behalf of said corporation and that the same is his/her free act and deed as such Vice President and the free act and deed of such corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 24th day of June, 2002.

LAURA A. WOOLARD
NOTARY PUBLIC
STATE OF INDIANA
DELAWARE COUNTY
MY COMMISSION EXPIRES 5/22/07

Laura A Woolard
Signature

Laura A Woolard
Printed Notary Public

My Commission Expires:

5/22/07

County of Residence:

Delaware

UNOFFICIAL COPY

20812862

ACKNOWLEDGMENT

STATE OF Indiana)
) SS:
COUNTY OF Delaware)

BEFORE ME, a Notary Public, in and for the said State, personally appeared Brian L. Allard the duly authorized member of 3A, L.L.C., an Indiana limited liability company, who acknowledged that he/she signed the foregoing instrument on behalf of said company and that the same is his/her free act and deed as such member and the free act and deed of such company.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 24th day of June, 2002.

LAURA A. WOOLARD
NOTARY PUBLIC
STATE OF INDIANA
DELAWARE COUNTY
MY COMMISSION EXPIRES 5/22/07

Laura A Woolard
Signature

Laura A Woolard
Printed Notary Public

My Commission Expires:

5/22/07

County of Residence:

Delaware

This instrument was prepared by Reagan K. Rick, Esq., RICK LAW FIRM, P.C., P. O. Box 681096, Indianapolis, Indiana 46268

UNOFFICIAL COPY

20812662

EXHIBIT A

LEGAL DESCRIPTION

LOTS 8, 9, 10, 11 and 12, -IN T.P. KEEFE'S SUBDIVISION OF THE NORTH ½ OF THE SOUTH EAST ¼ OF THE SOUTHEAST ¼ OF THE NORTHEAST ¼ OF SECTION 26, TOWNSHIP 38 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERICIAN IN COOK COUNTY, ILLINOIS.

Property of Cook County Clerk's Office