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HMS Industrial Networks V. 3



Doc#: 0704416067 Fee: \$44.00
Eugene "Gene" Moore RHSP Fee: \$10.00
Cook County Recorder of Deeds
Date: 02/13/2007 11:34 AM Pg: 1 of 11

RECORDING REQUESTED BY AND WHEN RECORDED RETURN TO:

FOX, HEFTER, SWIBEL, LEVIN &
CARROLL, LLP
321 North Clark Street
Suite 3300
Chicago, Illinois 60610
Attn: Joseph C. Huntzicker

8336254 HANCOCK D1

(Space Above For Recorder's Use)

SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT

THIS SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT ("Agreement") is made as of December 14, 2006, by and between HMS INDUSTRIAL NETWORKS, INC., formerly known as HMS America, Inc., an Illinois corporation ("Tenant"), and FIFTH THIRD BANK (CHICAGO), a Michigan banking corporation ("Lender").

RECITALS

- A. Pursuant to a certain Construction Loan Agreement (as amended, restated, supplemented or otherwise modified, the "Loan Agreement") by and between Lender and 1901 Clybourn, LLC, an Illinois limited liability company ("Borrower"), Lender has made, or has agreed to make, a loan to Borrower in the principal amount of Thirteen Million and No/100 Dollars (\$13,000,000.00) ("Loan") which is or will be evidenced by, among other things, a promissory note executed by Borrower in favor of Lender in the principal amount of the Loan (as amended, restated, supplemented or otherwise modified, the "Note").
- B. The Note and certain other obligations of Borrower under the Loan Agreement and the Loan are secured by, among other things, a Construction Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing (as amended, restated, modified or supplemented from time to time, "Mortgage") executed by Borrower in favor of Lender, encumbering certain real property

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situated in the County of Cook, State of Illinois, all as more particularly described on Exhibit A attached hereto ("Property"). The Mortgage will be recorded in said County.

- C. Upon consummation and closing of the Loan, Borrower, as "Landlord", is and will be party to a certain lease agreement dated February 3, 1999 (the "Lease"), pursuant to which Borrower leases a portion of the Property to Tenant.
- D. In the event that the Lease contains any provision granting Tenant an option to purchase the Property, such option is hereinafter an "Option To Purchase".
- E. As a condition to making the Loan, Lender requires that the Mortgage be unconditionally and at all times remain a lien on the Property, prior and superior to all the rights of Tenant under the Lease and the Option To Purchase and that the Tenant specifically and unconditionally subordinate the Lease and the Option To Purchase to the lien of the Mortgage.
- F. Landlord and Tenant have agreed to the subordination, attornment and other agreements herein in favor of Lender.

NOW, THEREFORE, for good and sufficient consideration and subject to the terms and conditions of this Agreement, Tenant acknowledges, represents and agrees for the benefit of Lender, with knowledge that Lender is relying thereon, as follows:

1. **SUBORDINATION**. Lender and Tenant hereby agree that:
 - 1.1 **Prior and Superior Lien**. The Mortgage and any modifications, renewals or extensions thereof shall unconditionally be and at all times remain a lien on the Property prior and superior to the Lease and any Option To Purchase;
 - 1.2 **Subordination**. Tenant hereby covenants and agrees that the Lease and all rights, options, liens or charges created in the Lease are and shall continue to be subject and subordinate in all respects to: (a) the Mortgage and the lien created thereby, (b) any advances made under the Loan Agreement, the Mortgage, any assignment of leases and rents (the "Assignment") and any of the other documents executed or delivered in connection with the Loan (collectively, the "Loan Documents"), (c) any extensions, modifications or renewals of the Loan Agreement, the Mortgage, the Assignment or the other Loan Documents and (d) any other mortgage or lien on or against the Property which may hereafter be held by any of the Lender in connection with the Loan; and
 - 1.3 **Whole Agreement**. This Agreement shall be the whole agreement and only agreement with regard to the subordination of the Lease and the Option To Purchase to the lien of the Mortgage and shall supersede and cancel, but only insofar as would affect the priority between the Mortgage and the Lease and the Option To Purchase, any prior agreements as to such subordination, including, without limitation, those provisions, if any, contained in the Lease which provide for the subordination of the Lease and the Option To Purchase to a deed or deeds of trust or to a mortgage or mortgages.

AND FURTHER, Tenant declares, agrees and acknowledges for the benefit of Lender, that:

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- 1.4 **Use of Proceeds.** Lender, in making disbursements pursuant to the Loan Agreement, the Note, the Mortgage or any loan agreements with respect to the Property, is under no obligation or duty to, nor has Lender represented that it will, see to the application of such proceeds by the person or persons to whom Lender disburses such proceeds, and any application or use of such proceeds for purposes other than those provided for in such agreement or agreements shall not defeat this agreement to subordinate in whole or in part;
- 1.5 **Waiver, Relinquishment and Subordination.** Tenant intentionally and unconditionally waives, relinquishes and subordinates all of Tenant's right, title and interest in and to the Property to the lien of the Mortgage and understands that in reliance upon, and in consideration of, this waiver, relinquishment and subordination, specific loans and advances are being and will be made by Lender and, as part and parcel thereof, specific monetary and other obligations are being and will be entered into which would not be made or entered into but for said reliance upon this waiver, relinquishment and subordination.
2. **ASSIGNMENT.** Tenant acknowledges and consents to the assignment of the Lease as collateral security by Landlord in favor of Lender.
3. **AGREEMENT.** Tenant covenants and agrees that, during all such times as Lender is the beneficiary under the Mortgage:
- 3.1 **Modification, Termination and Cancellation.** Tenant will not consent to any modification, amendment, termination or cancellation of the Lease (in whole or in part) without Lender's prior written consent and will not make any payment to Landlord in consideration of any modification, termination or cancellation of the Lease (in whole or in part) without Lender's prior written consent;
- 3.2 **Notice of Default.** Tenant will notify Lender in writing concurrently with any notice given to Landlord of any default by Landlord under the Lease, and Tenant agrees that Lender has the right (but not the obligation) to cure any breach or default specified in such notice within the time periods set forth below and Tenant will not declare a default of the Lease, as to Lender, if Lender cures such default within fifteen (15) days from and after the expiration of the time period provided in the Lease for the cure thereof by Landlord; provided, however, that if such default cannot with diligence be cured by Lender within such fifteen (15) day period, the commencement of action by Lender within such fifteen (15) day period to remedy the same shall be deemed sufficient so long as Lender pursues such cure with diligence;
- 3.3 **No Advance Rents.** Tenant will make no payments or prepayments of rent more than one (1) month in advance of the time when the same become due under the Lease; and
- 3.4 **Assignment of Rents.** Upon receipt by Tenant of written notice from Lender directing the payment of rents by Tenant to Lender, Tenant shall comply with such direction to pay and shall not be required to determine whether Landlord is in default under the Loan, the Loan Agreement and/or the Mortgage.

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4. **ATTORNMEN**. In the event of a foreclosure under the Mortgage, Tenant agrees for the benefit of Lender (including for this purpose any transferee of Lender or any transferee of Landlord's title in and to the Property by Lender's exercise of the remedy of sale by foreclosure under the Mortgage) as follows:
- 4.1 **Payment of Rent**. Tenant shall pay to Lender all rental payments required to be made by Tenant pursuant to the terms of the Lease for the duration of the term of the Lease;
- 4.2 **Continuation of Performance**. Tenant shall be bound to Lender in accordance with all of the provisions of the Lease for the balance of the term thereof, and Tenant hereby attorns to Lender as its landlord, such attornment to be effective and self-operative without the execution of any further instrument immediately upon Lender succeeding to Landlord's interest in the Lease and giving written notice thereof to Tenant;
- 4.3 **No Offset**. Lender shall not be liable for, nor subject to, any offsets or defenses which Tenant may have by reason of any act or omission of Landlord under the Lease, nor for the return of any sums which Tenant may have paid to Landlord under the Lease as and for security deposits, advance rentals or otherwise, except to the extent that such sums are actually delivered by Landlord to Lender; and
- 4.4 **Subsequent Transfer**. If Lender, by succeeding to the interest of Landlord under the Lease, should become obligated to perform the covenants of Landlord thereunder, then, upon any further transfer of Landlord's interest by Lender, all of such obligations shall terminate as to Lender.
5. **NON-DISTURBANCE**. In the event of a foreclosure under the Mortgage, so long as there shall then exist no breach, default, or event of default on the part of Tenant under the Lease, Lender agrees for itself and its successors and assigns that the leasehold interest of Tenant under the Lease shall not be extinguished or terminated by reason of such foreclosure, but rather the Lease shall continue in full force and effect and Lender shall recognize and accept Tenant as tenant under the Lease subject to the terms and provisions of the Lease except as modified by this Agreement; provided, however, that Tenant and Lender agree that the following provisions of the Lease (if any) shall not be binding on Lender: any option to purchase with respect to the Property; any right of first refusal with respect to the Property; and any provision regarding the use of insurance proceeds or condemnation proceeds with respect to the Property which is inconsistent with the terms of the Mortgage or the Loan Agreement.
6. **MISCELLANEOUS**.
- 6.1 **Heirs, Successors, Assigns and Transferees**. The covenants herein shall be binding upon, and inure to the benefit of, the heirs, successors and assigns of the parties hereto;

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- 6.2 **Notices.** All notices or other communications required or permitted to be given pursuant to the provisions hereof shall be deemed served upon delivery or, if mailed, upon the first to occur of receipt or the expiration of three (3) days after deposit in United States Postal Service, certified mail, postage prepaid and addressed to the address of Tenant or Lender appearing below:

<p><u>Tenant Address :</u> HMS Industrial Networks, Inc. 1925 N. Clybourn Ave. Suite 500 Chicago, IL 60614 Attention:</p>	<p><u>Lender Address:</u> Fifth Third Bank (Chicago) 222 S. Riverside 33rd Floor Chicago, Illinois 60606 Attention: Martha A. Hoag Schmitt</p>
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provided, however, any party shall have the right to change its address for notice hereunder by the giving of written notice thereof to the other party in the manner set forth in this Agreement. Any notice or other communication may be given the parties' respective attorneys;

- 6.3 **Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute and be construed as one and the same instrument;
- 6.4 **Remedies Cumulative.** All rights of Lender herein to collect rents on behalf of Landlord under the Lease are cumulative and shall be in addition to any and all other rights and remedies provided by law and by other agreements between Lender and Landlord or others; and
- 6.5 **Paragraph Headings.** Paragraph headings in this Agreement are for convenience only and are not to be construed as part of this Agreement or in any way limiting or applying the provisions hereof.
7. **INCORPORATION.** Exhibit A and the Landlord's Consent are attached hereto and incorporated herein by this reference.

[signatures follow]

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HMS America V. 2

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

LENDER

Fifth Third Bank (Chicago)

By: [Signature]

Name: _____

Title: Vice President

TENANT

HMS America, Inc.

By: _____

Name: _____

Title: _____

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

LENDER

Fifth Third Bank (Chicago)

By: _____

Name: _____

Title: _____

TENANT

HMS Industrial Networks, Inc.

By:  _____

Name: SHAFAN DAHLSTRÖM

Title: PRESIDENT

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HMS America V. 2

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

I, NANCY ALLEN, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that MARTHA HOAG SCHMITT, as V.P. of Fifth Third Bank (Chicago), personally known to me to be the same person whose name is subscribed to the foregoing instrument as such VICE PRESIDENT, appeared before me this day in person and acknowledged that (s)he signed and delivered said instrument as such officer of said association, as her/his own free and voluntary act and as the free and voluntary act of said association, for the uses and purposes therein set forth.

Given under my hand and Notarial seal, this 12TH day of December, 2006.

Nancy A. Allen
Notary Public



STATE OF _____)
)
COUNTY OF _____)

STATE OF ILLINOIS)
) SS.
COUNTY OF _____)

I, _____, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that _____, as _____ of _____, personally known to me to be the same person whose name is subscribed to the foregoing instrument as such _____, appeared before me this day in person and acknowledged that (s)he signed and delivered said instrument as such officer of said association, as his/her own free and voluntary act and as the free and voluntary act of said association, for the uses and purposes therein set forth.

Given under my hand and Notarial seal, this ___ day of December, 2006.

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STATE OF ILLINOIS)
) SS.
COUNTY OF _____)

I, _____, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that _____, as _____ of Fifth Third Bank (Chicago), personally known to me to be the same person whose name is subscribed to the foregoing instrument as such _____, appeared before me this day in person and acknowledged that (s)he signed and delivered said instrument as such officer of said association, as her/his own free and voluntary act and as the free and voluntary act of said association, for the uses and purposes therein set forth.

Given under my hand and Notarial seal, this ____ day of December, 2006.

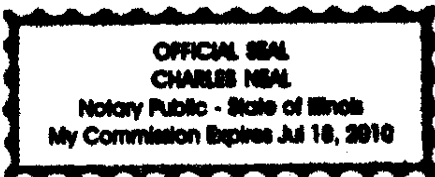
Notary Public

STATE OF _____)
)
COUNTY OF _____)

STATE OF ILLINOIS)
) SS.
COUNTY OF Melrose)

I, Charles Neal, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that Staffan Dahlstrom, as PRESIDENT of HMS INDUSTRIAL NETWORKS, personally known to me to be the same person whose name is subscribed to the foregoing instrument as such PASSANT, appeared before me this day in person and acknowledged that (s)he signed and delivered said instrument as such officer of said association, as his/her own free and voluntary act and as the free and voluntary act of said association, for the uses and purposes therein set forth.

Given under my hand and Notarial seal, this 16th day of January 2007, 2006.



[Signature]
Notary Public

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LANDLORD'S CONSENT

The undersigned Landlord hereby consents to the execution of the foregoing Subordination, Non-Disturbance and Attornment Agreement and to the agreements and transactions provided for therein.

AGREED:

Dated as of: December 14, 2006

LANDLORD

1901 CLYBOURN, LLC

By: [Signature]
Name: John Figlioli
Title: Manager

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

I, MICHELLE POWERS a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that JOHN FIGLIOLI, as MANAGER of 1901 Clybourn, LLC, an Illinois limited liability company, personally known to me to be the same person whose name is subscribed to the foregoing instrument as such JOHN FIGLIOLI, appeared before me this day in person and acknowledged that he signed and delivered said instrument as such officer of said association, as his own free and voluntary act and as the free and voluntary act of said association, for the uses and purposes therein set forth.

Given under my hand and Notarial seal, this 14th day of December, 2006.



Michelle E. Powers
Notary Public

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EXHIBIT A

LEGAL DESCRIPTION

Parcel 1:

LOTS 100 TO 102 AND 104 TO 114 IN THE SUBDIVISION OF LOT 3 AND THE NORTH PART OF LOT 2 IN BLOCK 9 IN SHEFFIELD'S ADDITION TO CHICAGO IN SECTION 32, TOWNSHIP 40 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

Parcel 2:

LOTS 42, 43 AND 44 IN HAPGOOD AND BARRY'S SUBDIVISION OF LOT 1 AND THE SOUTH PART OF LOT 2 IN BLOCK 9 IN SHEFFIELD'S ADDITION TO CHICAGO IN SECTION 32, TOWNSHIP 40 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

PIN: 14-32-401-012-0000
14-32-401-013-0000
14-32-401-014-0000
14-32-401-015-0000
14-32-401-016-0000
14-32-401-017-0000
14-32-401-040-0000
14-32-401-041-0000
14-32-401-042-0000

ADDRESS: 1901 - 1937 N. CLYBOURN AND 1907-1914 MAUD, CHICAGO, ILLINOIS

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