

# UNOFFICIAL COPY



Prepared By  
AVA MARK SP.

THOMAS A. MCCARTHY  
CHARLES F. BRADY LLC  
300 N. CASABLANCA ST.  
SUITE 4000  
CHICAGO, ILLINOIS 60654

Doc#: 0919118062 Fee: \$54.00  
Eugene "Gene" Moore RHSP Fee: \$10.00  
Cook County Recorder of Deeds  
Date: 07/10/2009 02:38 PM Pg: 1 of 10

## SUBORDINATION, ESTOPPEL, ATTORNMEN, AND NONDISTURBANCE AGREEMENT, AND ACKNOWLEDGMENT OF LEASE ASSIGNMENT

THIS AGREEMENT is made as of the 9<sup>th</sup> day of July, 2009, by and between TCF NATIONAL BANK, ("Mortgagee"), THE SHOPS AT KINGSBURY SQUARE, LLC ("Landlord"), and WHOLE FOODS MARKET GROUP, INC. ("Tenant").

### WITNESSETH:

WHEREAS, Mortgagee has made or proposes to make a loan to Landlord in the face amount of Twenty Three Million Dollars (\$23,000,000.00) (the "Loan"), secured or to be secured by, among other things, a mortgage dated or to be dated July 9, 2009 (the "Mortgage"), which Mortgage created or will create a first lien against the lands and premises described on Exhibit A attached hereto and made a part hereof (the "Property"), and

WHEREAS, Landlord, as lessor, and Tenant, as lessee, have entered into a certain lease agreement dated as of February 6, 2006, as amended by First Amendment dated as of October 15, 2007, Second Amendment dated October, 2008, and Third Amendment dated March 4, 2009 (the "Lease"), covering all or a portion of the Property (such leased area and any improvements located thereon being hereinafter referred to as the "Demised Premises").

NOW, THEREFORE, in consideration of the mutual covenants, conditions and agreement contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto hereby agree as follows:

1. Subordination. Subject to the provisions of this Agreement, the Lease is subject and subordinate to the lien of the Mortgage and to all renewals, modifications, consolidations, and extension thereof, and to each advance made or hereafter to be made thereunder.
2. Attornment. In the event of any foreclosure under the Mortgage, deed in lieu thereof or otherwise, and the resulting succession to the interests of Landlord by Mortgagee or by any purchaser of said interests through foreclosure sale pursuant to the Mortgage or deed in lieu thereof (which Mortgagee or purchaser shall hereinafter be referred to as the "Successor

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Landlord”), the Successor Landlord shall be bound to Tenant under the terms and conditions of the Lease, and Tenant shall attorn to and shall be bound to Successor Landlord under all of the terms and conditions in the Lease, for the balance of the term plus any extension or extensions thereof; said attornment to be effective and self-operative without the execution of any further instruments on the part of any of the parties hereto immediately upon Successor Landlord succeeding to the interest of the lessor under the Lease; provided, however, that Tenant shall be under no obligation to pay rent to Successor Landlord until Tenant receives written notice from Successor Landlord that it has succeeded to the interest of the lessor under the Lease. Any purchaser taking title to the Demised Premises and/or common areas of the Property by reason of foreclosure pursuant to the Mortgage, or deed in lieu thereof, shall take title subject to the provisions of this Agreement.

3. Non-Disturbance. In the event of any foreclosure under the Mortgage, deed in lieu thereof or other action thereunder, if Landlord shall not have notified Tenant in writing of a default under the Lease which is then continuing beyond any cure period provided by the Lease: (a) any Successor Landlord shall acquire and accept the Demised Premises and/or common areas of the Property subject to the Lease; (b) the Lease and the rights of Tenant thereunder shall not be affected or disturbed, but shall continue in full force and effect as a direct lease between the Successor Landlord and Tenant; (c) Tenant shall be entitled to lawful, quiet and peaceful possession and occupation of the Demised Premises and shall enjoy, subject to the provisions of the Lease, all of the rights therein, granted without any hindrance, ejection, molestation or interference by any person; and (d) Tenant shall not be named as a party in any proceedings which may be instituted in connection with foreclosure of the Mortgage, unless required by law.

4. Liability. Upon Successor Landlord’s succession to the interest of the Landlord under the Lease, Tenant shall thereafter have the same remedies against Successor Landlord for breach of the Lease that Tenant might have had against Landlord if Successor Landlord had not succeeded to the interest of Landlord including, without limitation, any rights of offset which may have then accrued under the Lease; provided, however, in no event shall Successor Landlord (a) be liable to Tenant for any damages arising against Landlord, or (b) 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 (except for offsets for actual costs, the total of which do not exceed \$50,000 in the aggregate, expended by Tenant pursuant to the Lease to cure any failure by Landlord to maintain, replace or repair the Demised Premises to the extent required of Landlord under the Lease; provided, however, that Tenant provided Mortgagee with prior written notice of any such contemplated expenditures prior to incurring the obligation therefor), 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 Successor Landlord, or (c) be bound by any substantive amendment or modification of the Lease made after the date hereof without Mortgagee’s consent (which consent shall not be unreasonably withheld or delayed).

5. Assignment. Tenant acknowledges and consents to the assignment of the Lease by Landlord in favor of Mortgagee. Upon receipt by Tenant of written notice from Mortgagee that Mortgagee has elected to terminate the license granted to Landlord to collect rents, as provided in the Absolute Assignment of Rents and Landlord's Interest in Lease, and directing the payment

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of rents by Tenant to Mortgagee, Tenant shall comply with such direction to pay and shall not be required to determine whether Landlord is in default under the Loan and/or the Mortgage.

6. Tenant Estoppel. Tenant acknowledges and represents that:

(a) Lease Effective. The Lease has been duly executed and delivered by Tenant and, subject to the terms and conditions thereof, the Lease is in full force and effect, the obligations of Tenant thereunder are valid and binding and there have been no modifications or additions to the Lease, written or oral other than the First, Second and Third Amendments as referenced herein.

(b) No Default. To the best of Tenant's knowledge, as of the date hereof: (i) there exists no breach, default, or event or condition which, with the giving of notice or the passage of time or both, would constitute a breach or default under the Lease; and (ii) there are no existing claims, defenses or offsets against rental due or to become due under the Lease; provided, however, Tenant reserves all rights it may have with respect to Landlord's obligations under Exhibit E to the Lease.

(c) Entire Agreement. The Lease constitutes the entire agreement between Landlord and Tenant with respect to the Demised Premises and Tenant claims no rights with respect to the Property other than as set forth in the Lease.

(d) No Prepaid Rent. No deposits or prepayments of rent have been made in connection with the Lease.

7. Landlord Estoppel. Landlord acknowledges and represents that:

(a) Lease Effective. The Lease has been duly executed and delivered by Landlord and, subject to the terms and conditions thereof, the Lease is in full force and effect, the obligations of Landlord thereunder are valid and binding and there have been no modifications or additions to the Lease, written or oral, other than the First, Second and Third Amendments as referenced herein.

(b) No Default. To the best of Landlord's knowledge, as of the date hereof: (i) there exists no breach, default, or event or condition which, with the giving of notice or the passage of time or both, would constitute a breach or default under the Lease, and (ii) there are no existing claims, defenses or offsets against rental due or to become due under the Lease; provided, however, Landlord reserves all rights it may have with respect to Tenant's obligations under Exhibit E to the Lease (including but not limited to the Costs Schedule described in Section 5.2(a) thereto, as most recently amended by Change Order 031-Revised dated as of June 23, 2009 and executed by Landlord and Tenant on June 29, 2009).

(c) Entire Agreement. The Lease constitutes the entire agreement between Landlord and Tenant with respect to the Demised Premises.

8. Notice of Default. Prior to taking any action to terminate the Lease, Tenant will notify Mortgagee in writing of any default by Landlord under the Lease which gives rise to such right of termination, and Tenant agrees that Mortgagee 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 terminate the Lease, as to Mortgagee, if Mortgagee 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 Mortgagee within such fifteen (15) day period, the commencement of action by Mortgagee

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within such fifteen (15) day period to remedy the same shall be deemed sufficient to long as Mortgagee pursues such cure with diligence.

9. No Advance Rent. Except for items which by nature or custom are paid less frequently (such as insurance and taxes) 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.

10. Tenant's Fixtures. The Mortgage shall not cover, nor shall the lien thereof extend to Tenant's leasehold interest in the Lease or Tenant's Fixtures and Equipment (as defined in the Lease).

11. Restoration Proceeds. The holder of the Mortgage shall permit proceeds received by Tenant or Landlord from insurance, eminent domain, condemnation and the like and relating to the Demised Premises to be used as required by the provisions of the Lease.

12. Amendment. No amendment or modification of this Agreement shall be valid or binding unless in writing, signed by the party or parties to be bound thereby. No amendment or modification of the Lease after the date hereof shall be binding against Mortgagee unless in writing and approved in writing by Mortgagee, which approval shall not be unreasonably withheld or delayed.

13. Notice. Whenever and wherever in this Agreement, the Lease, the Mortgage or in any proceedings involving the foreclosure or attempt to foreclose pursuant to the Mortgage, it shall be required or permitted that notice, request or demand be given or served by any party, such notice, request or demand shall be in writing and be deemed to have been given or served upon receipt or refused of receipt after being mail, postage prepaid, by certified, registered or express mail, return receipt requested, or when delivered in person and addressed as follows:

To Landlord:                      The Shops at Kingsbury Square, LLC  
740 Waukegan Road  
Deerfield, IL 60015  
Attn: Chris Siavelis

To Tenant:                              Whole Foods Market, Inc.  
1550 N. Kingsbury Street  
Chicago, IL 60642  
Attn: Store Team Leader

Whole Foods Market Group, Inc.  
3241 N. Lincoln Avenue  
Chicago, IL 60657  
Attn: Regional President

With a copy to:

Whole Foods Market, Inc.  
550 Bowie Street, 6th Floor

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Austin, TX 78703  
Attn: General Counsel

Senn Visciano, P.C.  
1801 California Street, Suite 4300  
Denver, CO 80202  
Attn: David C. Camp, Esq.

To Mortgagee: TCF National Bank  
500 West Brown Deer Road  
Milwaukee, WI 53217  
Attn: Russell P. McMinn

or to such other addresses as may hereafter be designed by any party not less than thirty (30) days in advance by proper notice to the others.

14. Successors. This Agreement shall be binding upon and insure to the benefit of the respective successors and assigns of the parties hereto.
15. Construction. This Agreement shall be construed without reference to titles of paragraphs, which titles are inserted for convenient reference only.
16. 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.
17. Remedies Cumulative. All rights of Mortgagee 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 Mortgagee and Landlord or others.
18. Lease Guarantor's Consent. The Lease Guarantor's Consent attached hereto as Exhibit B is hereby incorporated into this Agreement by this reference.

[Remainder of this page intentionally left blank]

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LANDLORD:

The Shops at Kingsbury Square, LLC, an Illinois limited liability company

By: Kingsbury Boatyard, LLC, an Illinois limited liability company, its manager

By: [Signature]

Name: Charles R. Malk

Title: Manager

STATE OF Illinois )  
 ) ss.  
COUNTY OF Lake )

Before me, the undersigned, a Notary Public in and for said State, personally appeared Charles R. Malk, known to me and known by me to be the Manager of Kingsbury Boatyard, LLC, an Illinois limited liability company, which is the manager of The Shops at Kingsbury Square, LLC, an Illinois limited liability company, and acknowledged the execution of the foregoing Subordination, Estoppel, Attornment, Nondisturbance Agreement, and Acknowledgment of Lease Assignment for and on behalf of said company.

Given under my hand and seal of office this 9th day of July, 2009.



[Signature]  
Notary Public, State of Illinois  
Notary's Name (printed): Lolly Blank  
My Commission is/expires: 07-23-13

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**MORTGAGEE:**

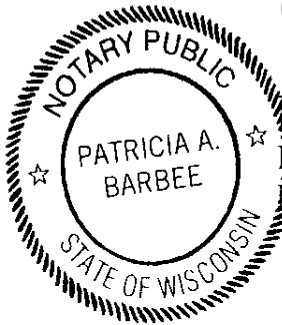
**TCF National Bank**

By: *R McMin*  
Name: Russell P. McMin  
Title: Senior Vice President

STATE OF WISCONSIN )  
COUNTY OF MILWAUKEE ) ss.

Before me, the undersigned, a Notary Public in and for said State, personally appeared RUSSELL P. MCMINN, known to me and known by me to be the SENIOR VICE PRESIDENT of TCF National Bank, a national bank, and acknowledged the execution of the foregoing Subordination, Estoppel, Attornment, Nondisturbance Agreement, and Acknowledgment of Lease Assignment for and on behalf of the bank.

Given under my hand and seal of office this 9<sup>TH</sup> day of July, 2009.



*Patricia Barbée*  
Notary Public, State of WISCONSIN  
Notary's Name (printed): PATRICIA A. BARBEE  
My Commission is/expires: 7.18.2010

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TENANT:

Whole Foods Market Group, Inc.

By: *Michael Bashaw*  
Name: *Michael Bashaw*  
Title: *Regional President - Midwest*

STATE OF *Illinois* )  
COUNTY OF *Cook* ) ss.

Before me, the undersigned, a Notary Public in and for said State, personally appeared *Michael Bashaw*, known to me and known by me to be the *Regional President Midwest* of Whole Foods Market Group, Inc., a Delaware corporation and acknowledged the execution of the foregoing Subordination, Estoppel, Attornment, Nondisturbance Agreement, and Acknowledgment of Lease Assignment for and on behalf of said corporation.

Given under my hand and seal of office this *9th* day of July, 2009.



*Breisa Grandolfo*  
Notary Public, State of *Illinois*  
Notary's Name (printed): *Breisa Grandolfo*  
My Commission is/expires: *February 26, 2012*



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## Exhibit A Legal Description of Property

The Property is located in the City of Chicago, County of Cook, State of Illinois and is described as follows:

LOTS 1 THROUGH 12, INCLUSIVE, IN BLOCK 46 IN CHICAGO LAND COMPANY'S RESUBDIVISION OF BLOCKS 36, 37, 46, 47, 48, 55, 56, 62, 63, 70, 71, 74 AND 84 TOGETHER WITH LOT 1 IN BLOCK 50, ALL IN ELSTON ADDITION TO CHICAGO, BEING A SUBDIVISION OF PART OF SECTION 5, TOWNSHIP 39 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT THEREOF FILED FOR RECORD MAY 26, 1873 AND RECORDED JUNE 11, 1873 IN BOOK 4 OF PLATS ON PAGE 83 AS DOCUMENT NUMBER 104948, IN COOK COUNTY, ILLINOIS.

Address: 1550 N. Kingsbury Street, Chicago, Illinois

Tax Parcel Numbers: 17-05-212-001-0000  
17-05-212-002-0000  
17-05-212-003-0000  
17-05-212-004-0000  
17-05-212-005-0000  
17-05-212-006-0000  
17-05-212-007-0000  
17-05-212-008-0000  
17-05-212-009-0000  
17-05-212-010-0000

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## Exhibit B

### Lease Guarantor's Consent

The undersigned ("Lease Guarantor") consents to the foregoing Subordination, Estoppel, Attornment, Non-Disturbance Agreement, and Acknowledgment of Lease Assignment and the transactions contemplated thereby and reaffirms its obligations under the Guaranty (the "Lease Guaranty") dated February 7, 2006. Lease Guarantor further reaffirms that its obligations under the Lease Guaranty are separate and distinct from Tenant's obligations.

Agreed:

Dated as of July 14, 2009

"Lease Guarantor"

Whole Foods Market, Inc.

By: \_\_\_\_\_

Name: JIM SUB

Title: Executive Vice President