

---

**SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT**

**KIRKLAND'S STORES, INC.,  
Tenant**

**AND**

**CIBC INC.,  
Lender**

**Premises: Polar Creek Crossing Shopping Center  
SW Corner of Route 59 and 72  
Hoffman Estates, Illinois**

**Dated: as of March 6, 2013**

---

**Record and return by mail to:**

**CASSIN & CASSIN LLP  
711 Third Avenue, 20<sup>th</sup> Floor  
New York, New York 10017  
Attention: Michael J. Hurley, Jr., Esq.**

# UNOFFICIAL COPY

## SUBORDINATION, NON-DISTURBANCE AND ATTORNMENMENT AGREEMENT

THIS AGREEMENT made as of this 6<sup>th</sup> day of March, 2013, by and among **POPLAR CREEK CROSSING, LLC**, a Delaware limited liability company, and/or its successors and assigns ("Landlord"), **CIBC INC.**, a Delaware corporation ("Lender"), and **KIRKLAND'S STORES, INC.**, a Tennessee corporation ("Tenant").

### RECITALS:

A. Tenant has executed that certain lease dated December 2, 2005, as amended by written agreement dated to be effective February 1, 2012 (the foregoing, the "Lease"), with W2001 VHE REALTY, L.L.C., predecessor-in-title to Landlord, as lessor, covering the premises described in the Lease consisting of approximately a 7,200 square foot space (the "Premises") in that certain building located at Poplar Creek Crossing Shopping Center, Hoffman Estates, Illinois (the "Property") and more particularly described in Exhibit A attached hereto and made a part hereof by this reference; and

B. Lender has made (or agreed to make) a loan to Landlord secured by a mortgage or deed of trust encumbering the Property and an assignment of Landlord's interest in the Lease (said mortgage or deed of trust and assignment of leases, together with any amendments, renewals, increases, modifications, substitutions or consolidations of either of them, collectively, the "Security Instrument"); and

C. Tenant and Lender desire to confirm their understanding with respect to the Lease and the Security Instrument, and to have Landlord confirm its agreement therewith.

**NOW, THEREFORE**, in consideration of the covenants, terms, conditions, and agreements contained herein, the parties hereto agree as follows:

1. The Lease and any extensions, modifications or renewals thereof, including but not limited to any option to purchase, right of first refusal to purchase or right of first offer to purchase the Property or any portion thereof, if any, is and shall continue to be subject and subordinate in all respects to the lien of the Security Instrument.

2. Tenant agrees to deliver to Lender, in the manner set forth in Paragraph 13 of this Agreement, a copy of any notice of default sent to Landlord by Tenant. If Landlord fails to cure such default within the time provided in the lease, Lender shall have the right, but not the obligation, to cure such default on behalf of Landlord within the following time periods: (a) with respect to failures by Landlord to pay monies to Tenant, within five (5) days after the time provided for Landlord to cure such default in the Lease has expired; and (b) with respect to all defaults other than those under subparagraph (a) above within thirty (30) calendar days after the time provided for Landlord to cure such default in the Lease has expired or, if such default cannot be cured within that time, within such additional time as is reasonably necessary to cure the default, so long as Lender commences to cure such default within such thirty (30) day period and thereafter proceeds with due diligence to complete such cure. Notwithstanding anything to the contrary, in no event shall Lender be entitled to any cure period under subparagraph 2(b) above in excess of ninety (90) days after the date written notice of the applicable default is delivered to Lender. Further, Tenant shall not terminate the Lease on the basis of any default by Landlord which is incurable by Lender (such as, for example, the bankruptcy of Landlord or breach of any representation by Landlord), provided Lender is proceeding with due diligence to commence an action to appoint a receiver or to obtain title to the Property by foreclosure, deed in lieu of foreclosure, or otherwise (collectively, "Foreclosure"). Subject to Tenant receiving the benefits and protections under

# UNOFFICIAL COPY

Paragraphs 3 and 4 of this Agreement, Tenant hereby agrees that no action taken by Lender to enforce any rights under the Security Instrument or related security documents, by reason of any default thereunder (including, without limitation, the appointment of a receiver, any Foreclosure or any demand for rent under any assignment of rents or leases) shall give rise to any right of Tenant to terminate the Lease nor shall such action invalidate or constitute a breach of any of the terms of the Lease.

3. So long as Tenant is not in default under the Lease beyond applicable grace, notice and/or cure periods thereunder, Lender shall not disturb the Lease or Tenant's use, possession and occupancy of the Premises during the term of the Lease.

4. If Lender or its nominee or designee, or another purchaser of the Property upon a Foreclosure (any such person or entity, a "Successor Owner") succeeds to the interest of Landlord under the Lease, the Lease will continue in full force and effect thereafter, subject to Successor Owner's right to terminate the Lease as a result of an Event of Default (as defined under the Lease) by Tenant beyond applicable grace, notice and/or cure periods. Thereupon, Successor Owner shall recognize the Lease and Tenant's rights thereunder and Tenant shall make full and complete attornment to Successor Owner as substitute landlord upon the same terms, covenants and conditions as provided in the Lease, including, but not limited to, any option to purchase, right of first refusal to purchase or right of first offer to purchase the Property as may be provided in the Lease. Notwithstanding the foregoing, Tenant agrees that any such option, right of first refusal or right of first offer to purchase the Property or any portion thereof, as may be provided in the Lease shall not apply to any Foreclosure, as defined herein, and shall not apply to any transfer of the Property by Successor Owner following such Foreclosure. In consideration of the foregoing, Lender agrees that any such option, right of first refusal or right of first offer shall not be terminated by any Foreclosure or conveyance of the Property by Successor Owner following such Foreclosure; rather, any such option, right of first refusal or right of first offer shall remain as an obligation of any party acquiring the Property following the conveyance of the Property by Successor Owner following such Foreclosure. Furthermore, Tenant expressly confirms to Lender that any acquisition of title to all or any portion of the Property pursuant to Tenant's exercise of any option, right of first refusal or right of first offer contained in the Lease shall result in Tenant taking title subject to the lien of the Security Instrument.

5. Tenant agrees that, if Successor Owner shall succeed to the interest of Landlord under the Lease, Successor Owner shall not be:

- (a) liable for (i) any prior act or omission of Landlord or any prior landlord, except to the extent Lender has failed to cure any default as herein provided, or (ii) consequential damages arising therefrom; or
- (b) subject to any offsets or defenses which Tenant might have as to Landlord or any prior landlord unless Lender has failed to cure any default by Landlord as herein provided; or
- (c) required or obligated to credit Tenant with any rent or additional rent for any rental period beyond the then current month which tenant might have paid Landlord, except to the extent such payment by Tenant is expressly required under the Lease, and/or except to the extent such payment is actually received by or credit to Lender; or
- (d) bound by any amendments or modifications of the Lease made without Lender's or Successor Owner's prior written consent to the extent that such amendments or modifications (i) shorten the term, (ii) decrease rents, or (iii) materially increase Landlord's economic obligations under the Lease; or
- (e) liable for refund of all or any part of any security deposit unless such security deposit shall have been actually received by or credited to Lender.

# UNOFFICIAL COPY

Notwithstanding anything to the contrary in this Agreement or otherwise, Lender acknowledges and agrees that, if Lender or any Successor Owner shall succeed to the interest of Landlord under the Lease, Lender or any Successor Owner, as applicable, shall be subject to Tenant's rights of termination (subject to the foregoing Paragraph 2 above), self-help and/or setoff (subject to the foregoing Paragraph 5(b) above), as provided in the Lease for any default, obligation, act or omissions of Landlord or any prior landlord under the Lease, if the Lender or such Successor Owner has failed to cure any such default, obligation, act or omission by Landlord or any prior landlord as set forth in Paragraph 2 above, and that such rights of Tenant are not limited to or impaired by the terms and provisions of this Agreement (other than as provided in Paragraphs 2 and 5(b) above).

6. Tenant agrees that, without the prior written consent of Lender in each case, Tenant shall not (a) amend or modify the Lease, to the extent that such amendment or modification (i) shortens the term, (ii) decreases rents, or (iii) materially increases Landlord's economic obligations under the Lease, (b) enter into a future agreement with Landlord to terminate or cancel the Lease or any extensions or renewals thereof, or tender a surrender of the Lease (except in each case that, upon a default by Landlord under the Lease, Tenant may exercise its rights under the Lease after giving to Lender the notice and cure period required by this Agreement), (c) make a prepayment of any rent or additional rent more than one (1) month in advance of the due date thereof, except to the extent expressly required under the Lease, or (d) subordinate or permit the subordination of the Lease to any lien subordinate to the Security Instrument. Any such purported action without such consent shall be void as against the holder of the Security Instrument. The parties hereto agree that Landlord shall be the sole party responsible for obtaining any consent of Lender required under this Agreement.

7. To the extent that the Lease shall entitle Tenant to notice of the existence of any Security Instrument and the identity of any mortgagee or any ground lessor, this Agreement shall constitute such notice to Tenant with respect to the Security Instrument and Lender.

8. Upon and after the occurrence of a default under the Security Instrument, which is not cured after any applicable notice and/or cure periods, Lender shall be entitled, but not obligated, to require that Tenant pay all rent under the Lease as directed by Lender. Tenant hereby agrees that upon Tenant's receipt from Lender of written notice of the occurrence of any default by Landlord under the Security Instrument, along with written request for Tenant to pay rents directly to Lender (herein, a "Rent Payment Notice"), Tenant shall thereafter pay all rents directly to Lender (or as Lender shall direct) beginning with the next regularly scheduled payment due after the expiration of fifteen (15) days from the date Tenant receives the Rent Payment Notice. Tenant shall be under no obligation to controvert or challenge any such written notice by Lender. Tenant's compliance with any Rent Payment Notice shall not be deemed to violate the Lease, and such payment shall, to the extent made, satisfy the obligations of Tenant under the Lease. Landlord hereby releases and agrees to hold Tenant harmless from any liability with respect to any such payments made by Tenant to Lender.

9. Nothing in this Agreement shall impose upon Lender any liability for the obligations of Landlord under the Lease unless and until Lender takes title to the Property. Anything herein or in the Lease to the contrary notwithstanding, in the event that a Successor Owner shall acquire title to the Property or the portion thereof containing the Premises, Successor Owner shall have no obligation, nor incur any liability for damages, beyond Successor Owner's then interest, if any, in the Property and proceeds therefrom (including, but not limited to, proceeds from the sale thereof), and Tenant shall look exclusively to such interest, if any, of Successor Owner in the Property and proceeds therefrom (including, but not limited to, proceeds from the sale thereof) for the payment and discharge of any obligations imposed upon Successor Owner hereunder or under the Lease. Tenant agrees that, with respect to any money judgment which may be obtained or secured by Tenant against Successor Owner,

# UNOFFICIAL COPY

Tenant shall look solely to the estate or interest owned by Successor Owner in the Property, and Tenant will not collect or attempt to collect any such judgment out of any other assets of Successor Owner.

**10. EACH OF TENANT, LENDER AND LANDLORD HEREBY IRREVOCABLY WAIVE ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT.**

11. The provisions of the Agreement shall be binding upon and insure to the benefit of the parties hereto and their respective successors and assigns. The words, "Lender", "Landlord" and "Tenant" shall include their respective heirs, legatees, executors, administrators, beneficiaries, successors and assigns.

12. All notices and all other communication with respect to this Agreement shall be directed as follows: if to Lender, 425 Lexington Avenue, New York, New York 10017, Attention: Real Estate Group, or such other address as Lender may designate in writing to Tenant; and, if to Tenant, at the address set forth in the Lease or at such other address as tenant may designate in writing to Lender. All notices shall be in writing and shall be (a) hand-delivered, (b) sent by United States express mail or by private overnight courier, or (c) served by certified mail postage prepaid, return receipt requested, to the appropriate address set forth above. Notices served as provided in (a) and (b) shall be deemed to be effective upon delivery or upon refusal thereof. Any notice served by certified mail shall be deposited in the United States mail with postage hereon fully prepaid and shall be deemed effective on the day of actual delivery as shown by the addressee's return receipt or the expiration of three business days after the date of mailing, whichever is earlier in time.

13. This Agreement contains the entire agreement between the parties and no modifications shall be binding upon any party hereto unless set forth in a document duly executed by or on behalf of such party.

14. Each of the parties to this Agreement hereby represents and warrants that it has full authority to enter into this Agreement, and such Agreement has been duly authorized by all necessary actions of such applicable party.

15. This Agreement may be executed in multiple counterparts, all of which shall be deemed originals and with the same effect as if all parties had signed the same document. All of such counterparts shall be construed together and shall constitute one instrument.

[no further text this page]

# UNOFFICIAL COPY

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

CIBC INC., a  
Delaware corporation



By: \_\_\_\_\_  
Name: Todd Roth  
Title: Managing Director

Property of Cook County Clerk's Office

# UNOFFICIAL COPY

STATE OF NEW YORK        )  
                                      : ss.:  
COUNTY OF NEW YORK    )

The foregoing instrument was acknowledged before me this 5<sup>th</sup> day of March, 2013  
by **TODD ROTH, MANAGING DIRECTOR** on behalf of **CIBC INC**, a Delaware limited liability  
company.

(SEAL)

\_\_\_\_\_  
(Signature of Notary Public)  
My commission expires: \_\_\_\_\_  
(expiration date)

**MICHAEL A. ROSENBERG**  
**NOTARY PUBLIC-STATE OF NEW YORK**  
**No. 02RO6177949**  
**Qualified in Westchester County**  
**My Commission Expires February 03, 2016**

Property of Cook County Clerk's Office

# UNOFFICIAL COPY

TENANT:

**KIRKLAND'S STORES, INC.,**  
a Tennessee corporation

By: W. Michael Macklen  
Name: W. Michael Macklen  
Title: SVP/CO

STATE OF TENNESSEE  
COUNTY OF DAVIDSON

On the 14<sup>th</sup> day of February in the year 2013, before me, the undersigned, personally appeared W. Michael Macklen, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me the he/she executed the same in his/her capacity as SVP/CO of KIRKLAND'S STORES, INC., a Tennessee corporation, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Michael R. Howell  
Notary Public

My commission expires: 11/5/14

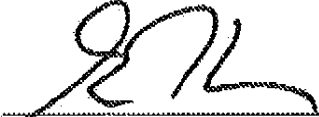




# UNOFFICIAL COPY

**LANDLORD:**

**POPLAR CREEK CROSSING, LLC,**  
a Delaware limited liability company,

By:   
\_\_\_\_\_  
Geza Henni, President

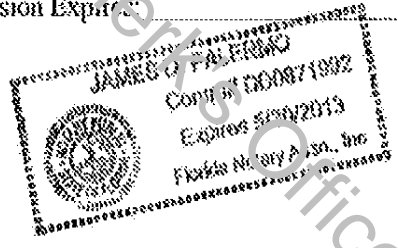
STATE OF FLORIDA  
COUNTY OF HILLSBOROUGH

The foregoing instrument was acknowledged before me this 5<sup>th</sup> day of January, 2013,  
by Geza Henni, as President of POPLAR CREEK CROSSING, LLC, a Delaware limited  
liability company, on behalf of such entity. He is personally known to me or has produced a  
\_\_\_\_\_ state driver's license, as identification.

  
\_\_\_\_\_  
Signature of Notary Public

\_\_\_\_\_  
(Print Notary Name)  
My Commission Expires: \_\_\_\_\_

AFFIX NOTARY STAMP



# UNOFFICIAL COPY

## EXHIBIT A

### Legal Description of Property

**PARCEL 1:**

..... LOT 1 IN POPLAR CREEK CROSSING RESUBDIVISION NO. 1 BEING A RESUBDIVISION OF PART .....  
OF THE SOUTHEAST 1/4 OF THE NORTHWEST 1/4 AND PART OF THE NORTHWEST 1/4 OF THE  
SOUTHWEST 1/4 ALL IN SECTION 33, TOWNSHIP 42 NORTH, RANGE 9 EAST OF THE THIRD  
PRINCIPAL MERIDIAN ACCORDING TO THE PLAT THEREOF RECORDED MAY 12, 2010 AS  
DOCUMENT 1013244050, IN COOK COUNTY, ILLINOIS.

**PARCEL 2:**

A NON- EXCLUSIVE EASEMENT FOR THE BENEFIT OF LOT 1 AS CREATED BY THE GRANT FROM  
TARGET CORPORATION, A CORPORATION OF MINNESOTA IN OPERATING AND EASEMENT  
AGREEMENT DATED FEBRUARY 23, 2005, RECORDED FEBRUARY 25, 2005 AS DOCUMENT  
0505645134 OVER PORTIONS OF THE FOLLOWING LAND FALLING IN INGRESS AND EGRESS  
AREAS: LOT 1 IN THE POPLAR CREEK CROSSING SUBDIVISION RECORDED JUNE 28, 2007 AS  
DOCUMENT 0717922001.

SW Corner of Route 59 and 72  
Hoffman Estates, Illinois  
Tax ID No. 01-33-301-005-0000