

# UNOFFICIAL COPY

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Helen T. Quigley, Esq. )  
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New York, New York 10022 )

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## SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT

This **SUBORDINATION, NON-DISTURBANCE, AND ATTORNMENT AGREEMENT** (the "**Agreement**") is dated as of April 22, 2016 and is by and among DELAWARE LIFE INSURANCE COMPANY, a Delaware insurance company, and DELAWARE LIFE INSURANCE COMPANY OF NEW YORK, a New York stock life insurance company, having an address at Reservoir Place, 1601 Trapelo Road, Waltham, MA 02451, Attention: James F. Alban (with each of their successors and assigns, collectively, "**Lender**"), NAKASH LINCOLN TENANT LLC, a Delaware limited liability company, having an office at 1400 Broadway, 15<sup>th</sup> Floor, New York, NY 10018, and LINCOLN 1816 TENANT LLC, a Delaware limited liability company, having an office at c/o Venable LLP, Rockefeller Center, 1270 Avenue of the Americas, 24<sup>th</sup> Floor, New York, New York 10020, Attention: Brian N. Gurtman (collectively, "**Landlord**"), and RK RESTAURANT GROUP, INC., an Illinois corporation, having an office at 820 W Lake Street, Chicago, IL 60607, Attention: Rob Katz with a copy to Harlan Kahn, Esq., Bronson & Kahn LLC, 150 North Wacker Drive, Suite 1400, Chicago, IL 60606 ("**Tenant**").

WHEREAS, Lender has made or intends to make a loan to Landlord (the "**Loan**"), which Loan shall be evidenced by one or more promissory notes (as the same may be amended, modified, restated, severed, consolidated, renewed, replaced, or supplemented from time to time, the "**Promissory Note**") and secured by, among other things, that certain Mortgage or Deed of Trust, Assignment of Leases and Rents and Security Agreement (as the same may be amended, restated, replaced, severed, split, supplemented or otherwise modified from time to time, the "**Mortgage**") encumbering Landlord's interest in the real property located in 1816

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North Clark Street, Chicago, Illinois more particularly described on Exhibit A annexed hereto and made a part hereof (the "**Property**");

WHEREAS, by an Amended and Restated Lease Agreement (the "**Lease**") effective as of September 1, 2011, between Landlord, as successor-in-interest to W-AJ Hotel Lincoln VII, L.L.C., as successor-in-interest to Hotel Lincoln Park Owner, L.L.C., and Tenant, as successor-in-interest to RK Group of 1816 N. Clark, LLC, Landlord leased to Tenant a portion of the Property, as said portion is more particularly described in the Lease (such portion of the Property hereinafter referred to as the "**Premises**");

WHEREAS, Tenant acknowledges that Lender will rely on this Agreement in making the Loan to Landlord; and

WHEREAS, Lender and Tenant desire to evidence their understanding with respect to the Mortgage and the Lease as hereinafter provided.

NOW, THEREFORE, in consideration of the mutual agreements hereinafter set forth, the parties hereto hereby agree as follows:

1. Tenant covenants, stipulates and agrees that the Lease and all of Tenant's right, title and interest in and to the Property thereunder (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 hereby, and shall at all times continue to be, subordinated and made secondary and inferior in each and every respect to the Mortgage and the lien thereof, to all of the terms, conditions and provisions thereof and to any and all advances made or to be made thereunder, so that at all times the Mortgage shall be and remain a lien on the Property prior to and superior to the Lease for all purposes, subject to the provisions set forth herein. Subordination is to have the same force and effect as if the Mortgage and such renewals, modifications, consolidations, replacements and extensions had been executed, acknowledged, delivered and recorded prior to the Lease, any amendments or modifications thereof and any notice thereof.

2. Lender agrees that if Lender exercises any of its rights under the Mortgage, including entry or foreclosure of the Mortgage or exercise of a power of sale under the Mortgage, Lender will not disturb Tenant's right to use, occupy and possess the Premises under the terms of the Lease so long as Tenant is not in default beyond any applicable grace period under any term, covenant or condition of the Lease.

3. If, at any time Lender (or any person, or such person's successors or assigns, who acquires the interest of Landlord under the Lease through foreclosure of the Mortgage or otherwise) shall succeed to the rights of Landlord under the Lease as a result of a default or event of default under the Mortgage, Tenant shall attorn to and recognize such person so succeeding to the rights of Landlord under the Lease (herein sometimes called "**Successor Landlord**") as Tenant's landlord under the Lease, said attornment to be effective and self-operative without the execution of any further instruments. Although said attornment shall be self-operative, Tenant agrees to execute and deliver to Lender or to any Successor Landlord,

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such other instrument or instruments reasonably approved by Tenant, as Lender or such other person shall from time to time request in order to confirm said attornment.

4. Landlord authorizes and directs Tenant to honor any written demand or notice from Lender instructing Tenant to pay rent or other sums to Lender rather than Landlord (a "**Payment Demand**"), regardless of any other or contrary notice or instruction which Tenant may receive from Landlord before or after Tenant's receipt of such Payment Demand. Tenant may rely upon any notice, instruction, Payment Demand, certificate, consent or other document from, and signed by, Lender and shall have no duty to Landlord to investigate the same or the circumstances under which the same was given. Any payment made by Tenant to Lender or in response to a Payment Demand shall be deemed proper payment by Tenant of such sum pursuant to the Lease.

5. If Lender shall become the owner of the Property or the Property shall be sold by reason of foreclosure or other proceedings brought to enforce the Mortgage or if the Property shall be transferred by deed in lieu of foreclosure, Lender or any Successor Landlord shall not be:

(a) liable for any act or omission of any prior landlord (including Landlord) that is not then continuing under the Lease, or bound by any obligation to make any payment to Tenant which was required to be made prior to the time Lender succeeded to any prior landlord (including Landlord) of which Lender or Successor Landlord have been provided notice thereof prior to succeeding to the position of Landlord; or

(b) obligated to cure any defaults of any prior landlord (including Landlord) which occurred, and is not then continuing under the Lease, or to make any payment to Tenant which was required to be paid by any prior landlord (including Landlord), prior to the time that Lender or any Successor Landlord succeeded to the interest of such landlord under the Lease of which Lender or Successor Landlord have been provided notice thereof prior to succeeding to the position of Landlord; or

(c) obligated to perform any construction obligations of any prior landlord (including Landlord) under the Lease or liable for any defects (latent, patent or otherwise) in the design, workmanship, materials, construction or otherwise with respect to improvements and buildings constructed on the Property; or

(d) subject to any offsets, defenses or counterclaims which Tenant may be entitled to assert against any prior landlord (including Landlord), unless Tenant shall have provided Lender or Successor Landlord with (A) notice of the Landlord's default that gave rise to such offset or defense, and (B) the opportunity to cure the same, all in accordance with the terms of Section 6 below; provided that Lender or Successor Landlord have been provided notice thereof prior to succeeding to the position of Landlord, and which Successor Landlord is required to cure pursuant to its obligations as landlord under the Lease; or

(e) bound by any payment of rent or additional rent by Tenant to any prior landlord (including Landlord) for more than one month in advance; or

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(f) bound by any amendment, modification, termination or surrender of the Lease made without the written consent of Lender; or

(g) liable or responsible for or with respect to the retention, application and/or return to Tenant of any security deposit paid to any prior landlord (including Landlord) whether or not still held by such prior landlord, unless and until Lender or any Successor Landlord has actually received said deposit for its own account as the landlord under the Lease as security for the performance of Tenant's obligation under the Lease (which deposit shall, nonetheless, be held subject to the provisions of the Lease).

6. Tenant hereby represents, warrants, covenants and agrees to and with Lender:

(a) to deliver to Lender, by certified mail, return receipt requested, a duplicate of each notice of default delivered by Tenant to Landlord at the same time as such notice is given to Landlord and no such notice of default shall be deemed given by Tenant under the Lease unless and until a copy of such notice shall have been so delivered to Lender. Lender shall have the right (but shall not be obligated) to cure such default. Tenant shall accept performance by Lender of any term, covenant, condition or agreement to be performed by Landlord under the Lease with the same force and effect as though performed by Landlord. Tenant further agrees to afford Lender a period of thirty (30) days beyond any period afforded to Landlord for the curing of such default during which period Lender may elect (but shall not be obligated) to seek to cure such default, or, if such default cannot be cured within that time, then such additional time as may be necessary to cure such default (including but not limited to commencement of foreclosure proceedings) during which period Lender may elect (but shall not be obligated) to seek to cure such default, prior to taking any action to terminate the Lease. If the Lease shall terminate due to a default thereunder by Landlord due to a rejection of the Lease following Landlord's bankruptcy, upon Lender's written request given within thirty (30) days after such termination, Tenant, within fifteen (15) days after such request, and within thirty (30) days after Lender becomes owner of Landlord's interest in the Premises, shall execute and deliver to Lender a new lease for the remainder of the term of the Lease and upon all the same terms, covenants and conditions of the Lease;

(b) that Tenant is the sole owner of the leasehold estate created by the Lease; and

(c) to promptly certify in writing to Lender, in connection with any proposed assignment of the Mortgage, whether or not any default on the part of Landlord then exists under the Lease and to deliver to Lender any tenant estoppel certificates required under the Lease.

7. Tenant acknowledges that the interest of Landlord under the Lease is assigned to Lender solely as security for the Promissory Note, and Lender shall have no duty, liability or obligation under the Lease or any extension or renewal thereof, unless Lender shall specifically undertake such liability in writing or Lender becomes and then only with respect to periods in which Lender becomes, the owner of Landlord's interest in the Property.

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8. This Agreement shall be governed by and construed in accordance with the laws of the State in which the Premises is located (excluding the choice of law rules thereof).

9. This Agreement and each and every covenant, agreement and other provisions hereof shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns (including, without limitation, any successor holder of the Promissory Note) and may be amended, supplemented, waived or modified only by an instrument in writing executed by the party against which enforcement of the termination, amendment, supplement, waiver or modification is sought.

10. All notices to be given under this Agreement shall be in writing and shall be deemed served upon receipt by the addressee if served personally or, if mailed, upon the first to occur of receipt or the refusal of delivery as shown on a return receipt, after deposit in the United States Postal Service certified mail, postage prepaid, addressed to the address of Landlord, Tenant or Lender appearing below. Such addresses may be changed by notice given in the same manner. If any party consists of multiple individuals or entities, then notice to any one of same shall be deemed notice to such party.

Lender's Address: Delaware Life Insurance Company  
 Delaware Life Insurance Company of New York  
 Reservoir Place, 1601 Trapelo Road  
 Waltham, MA 02451  
 Attention: James F. Alban  
 Facsimile No.: 781-890-1049

and to: c/o Guggenheim Partners Investment Management LLC  
 100 Wilshire Boulevard, Suite 500  
 Santa Monica, CA 90401  
 Attention: Jason Anthony  
 Facsimile No.: 310-576-1271

with a copy to: Thompson & Knight LLP  
 900 Third Avenue  
 New York, New York 10022  
 Attention: Michael Peskowitz  
 Facsimile No.: (214) 999-1632

Tenant's Address: RK Restaurant Group, Inc.  
 820 W. Lake Street  
 Chicago, Illinois 60607  
 Attention: Rob Katz

With a copy to: Harlan Kahn, Esq.  
 Bronson & Kahn LLC  
 150 N. Wacker Drive, Suite 1400  
 Chicago, IL 60606

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Landlord's Address: Nakash Lincoln Tenant LLC  
1400 Broadway, 15<sup>th</sup> Floor  
New York, NY 10018  
Attention: Robert Spiegelman

Lincoln 1816 Tenant LLC  
c/o Venable LLP  
Rockefeller Center  
1270 Avenue of the Americas, 24<sup>th</sup> Floor  
New York, New York 10020  
Attention: Brian N. Gurtman  
Fax No. (212) 307-5598

11. 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.

12. In the event Lender shall acquire Landlord's interest in the Premises, Tenant shall look only to the estate and interest, if any, of Lender in the Property for the satisfaction of Tenant's remedies for the collection of a judgment (or other judicial process) requiring the payment of money in the event of any default by Lender as a Successor Landlord under the Lease or under this Agreement, and no other property or assets of Lender shall be subject to levy, execution or other enforcement procedure for the satisfaction of Tenant's remedies under or with respect to the Lease, the relationship of the landlord and tenant under the Lease or Tenant's use or occupancy of the Premises or any claim arising under this Agreement.

13. If any provision of this Agreement is held to be invalid or unenforceable by a court of competent jurisdiction, such provision shall be deemed modified to the extent necessary to be enforceable, or if such modification is not practicable, such provision shall be deemed deleted from this Agreement, and the other provisions of this Agreement shall remain in full force and effect, and shall be liberally construed in favor of Lender.

14. 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.

*[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]*

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first above written.

**TENANT:**

**RK RESTAURANT GROUP, INC.,** an Illinois corporation

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

Name: Rob Katz

Title: President

STATE OF ILLINOIS )

COUNTY OF COOK )

On April 5, 2016, before me, Max Kanter, Notary Public, personally appeared Rob Katz, the President of RK Restaurant Group, Inc., an Illinois corporation, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of Illinois that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Max Kanter

Signature

(Seal)



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**LANDLORD:**

**NAKASH LINCOLN TENANT LLC**, a Delaware limited liability company

By: Nakash Holding LLC, a Delaware limited liability company, its sole Member

By: [Signature]

Name: \_\_\_\_\_

Title: Authorized Signatory

STATE OF ~~ILLINOIS~~ NY )  
COUNTY OF ~~COOK~~ NY )

On April 20, 2016, before me, Valerie Hansen Notary Public, personally appeared Robert Spigelm, the Authorized Signatory of Nakash Lincoln Tenant LLC, a Delaware limited liability company, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of NY Illinois that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

[Signature]  
Signature

(Seal)

**VALERIE HANSEN**  
Notary Public, State of New York  
No. 01HA4803669  
Qualified in New York County  
Commission Expires Dec. 31 2018

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LINCOLN 1816 TENANT LLC, a Delaware limited liability company

By: Lincoln 1816 Holdings LLC, a Delaware limited liability company, its sole Member

By: PL Lincoln LLC, a Delaware limited liability company, its Managing Member

By: [Signature]  
Name: \_\_\_\_\_  
Title: Authorized Signatory

STATE OF ~~ILLINOIS~~ <sup>Florida</sup> )  
COUNTY OF ~~COOK~~ <sup>Miami Dade</sup> )

On April 20, 2016, before me, Farah Pierre Notary Public, personally appeared Jonathan Bennett, the Authorized Signatory of Lincoln 1816 Tenant LLC, a Delaware limited liability company, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of Illinois that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

[Signature]  
Signature

(Seal)

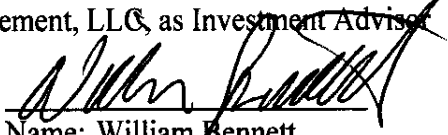


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**LENDER:**

**DELAWARE LIFE INSURANCE COMPANY,**  
a Delaware limited liability company

By: Guggenheim Partners Investment  
Management, LLC, as Investment Advisor

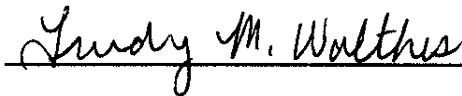
By:   
Name: William Bennett  
Title: Managing Director

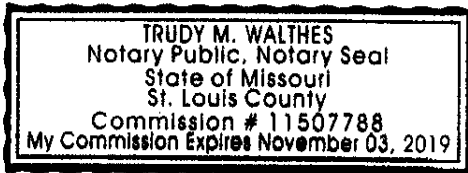
STATE OF Missouri  
COUNTY OF St. Louis

On April 19<sup>th</sup>, 2016, before me, Trudy M. Walther Notary Public, personally appeared William Bennett, the Managing Director of Guggenheim Partners Investment Management, LLC, as Investment Advisor to Delaware Life Insurance Company, a Delaware limited liability company, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of Missouri that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

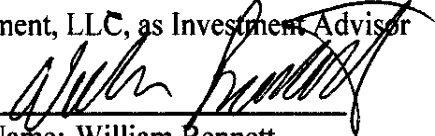




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**DELAWARE LIFE INSURANCE COMPANY  
OF NEW YORK**, a New York stock life insurance  
company

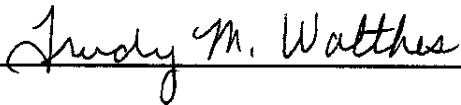
By: Guggenheim Partners Investment  
Management, LLC, as Investment Advisor

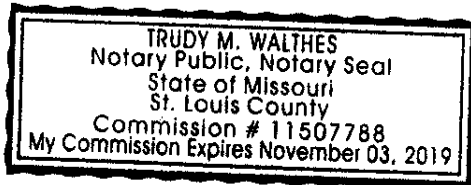
By:   
Name: William Bennett  
Title: Managing Director

STATE OF Missouri  
COUNTY OF St. Louis

On April 19<sup>th</sup>, 2016, before me, Trudy M. Walthes Notary Public, personally appeared William Bennett, the Managing Director of Guggenheim Partners Investment Management, LLC, as Investment Advisor to Delaware Life Insurance Company of New York, a New York stock life insurance company, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument. I certify under PENALTY OF PERJURY under the laws of the State of Missouri that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.





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## Exhibit A

### Legal Description of Property

#### PARCEL 1:

LOTS 1 AND 2 IN ASSESSORS' SECOND DIVISION OF BLOCK 47 IN CANAL TRUSTEES' SUBDIVISION OF SECTION 33, TOWNSHIP 40 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY ILLINOIS.

#### PARCEL 2.

THAT TRACT OR PARCEL OF LAND LYING EAST OF AND ADJOINING SAID LOTS 1 AND 2 AND WEST OF THE WEST LINE OF CLARK STREET, AS ESTABLISHED BY ORDINANCE PASSED BY THE COUNCIL OF THE CITY OF CHICAGO ON OCTOBER 11, 1875 AND APPROVED ON OCTOBER 15, 1875, IN COOK COUNTY ILLINOIS.

COMMON ADDRESS: 1816 North Clark Street, Chicago, Illinois

PIN NO.: 14-33-411-001-0000