

2198-13788-1bustk

UNOFFICIAL COPY 98700255

9217/0127 03 001 Page 1 of 13
1998-08-10 10:23:01
Cook County Recorder 45.00

This instrument prepared by and upon recordation returned to:
Burr & Forman LLP
600 West Peachtree Street
One Georgia Center - Suite 1200
Atlanta, Georgia 30308
Attn: Gary W. Farris, Esq.
Telephone: (404) 815-3000

RETURN TO: *S.L. Cooper*
CHICAGO TITLE INSURANCE
NATIONAL BUSINESS GROUP
7616 LBJ FRWY., SUITE 300
DALLAS, TEXAS 75251

NO RECORDING TAX IS PAYABLE WITH RESPECT TO THIS AGREEMENT. NOTHING HEREIN IS INTENDED TO EVIDENCE OR SECURE ANY INDEBTEDNESS OR CREATE ANY LIEN.

Location: Lincoln Highway/Cicero Avenue
Matteson, Illinois
Tax Parcel Number: 31-22-100-023

SUBORDINATION, NON-DISTURBANCE, AND ATTORMENT AGREEMENT

This Subordination, Non-Disturbance and Attornment Agreement (this "Agreement") is dated as of August 5, 1998, between RED MOUNTAIN FUNDING, L.L.C., a Delaware limited liability company ("Lender"), and CPS DEPARTMENT STORES, INC., a Delaware corporation ("Tenant").

Recitals:

Tenant is the present tenant and WEC 98C-5 LLC, a Texas limited liability company, is the present landlord under that certain Lease described in Exhibit B attached hereto (as the same might have heretofore been amended or might hereafter be amended, extended, supplemented, or restated, the "Lease"), with respect to a retail facility located on the parcel of real property more particularly described in Exhibit A attached hereto and made a part hereof. The premises demised to Tenant under the Lease, as more particularly described therein, are referred to herein as the "Premises".

Landlord has requested a loan from Lender (the "Loan"), to be secured by a first mortgage, Security Agreement and Assignment of Leases and Rents (the "Mortgage") covering the Premises, as the same may hereafter be amended, increased, renewed, extended, spread, consolidated, severed, restated, or otherwise changed from time to time (the consent of Tenant to which shall not be required). As a condition to making the Loan, Lender has required that Tenant execute this Agreement.

NOW, THEREFORE, in consideration of the mutual promises and covenants hereinafter set forth, and as an inducement to Lender to extend financing to Landlord, the parties hereto do mutually covenant and agree as follows:

BOX 333-CTI

720592
CTF
7 of 7
03/1 CR

B

UNOFFICIAL COPY

Property of Cook County Clerk's Office

1. **Subordination.** Tenant agrees that the Lease is and shall be, at the option of Lender upon notice to Tenant, at any time and from time to time, either subject and subordinate, or superior, to the Mortgage and to all present or future advances under the obligations secured thereby, and all renewals, amendments, modifications, consolidations, replacements and extensions of the secured obligations and the Mortgage, to the full extent of all amounts secured by the Mortgage from time to time. Such option of the Lender may be exercised an unlimited number of times. If subordinated, said subordination is to have the same force and effect as if the Mortgage and such renewals, modifications, consolidations, replacements and extensions thereof had been executed, acknowledged, delivered and recorded prior to the Lease, any amendments or modifications thereof and any memorandum or short form thereof. This Agreement shall constitute notice to Tenant that for the time being, until further written notice to the contrary, Lender elects that the Lease is and shall be subject and subordinate to the Mortgage as aforesaid.

2. **Lender's Right to Cure.** Notwithstanding anything to the contrary in the Lease or this Agreement, Tenant shall give prompt written notice to Lender of any default or breach by Landlord under the Lease that are of such a nature as to give Tenant a right to terminate the Lease, to reduce rent, or to credit or offset any amounts against future rents. After Lender receives such notice, Lender shall have a period of thirty (30) days beyond the time available to Landlord under the Lease in which to cure the breach or default by Landlord. Lender shall have no obligation to cure (and shall have no liability or obligation for not curing) any breach or default by Landlord. If, in curing any such default, Lender requires access to the Premises to effect such cure, Tenant shall furnish access to the Premises to Lender as required by Lender to effect such cure at all reasonable times; provided that Tenant's occupancy, use and enjoyment of the Premises is not unreasonably disrupted thereby.

3. **Assignment of Lease.**

(a) Tenant has notice that pursuant to the Assignment of Leases and Rents delivered by Landlord to Lender and dated as of the date hereof (the "Assignment of Lease"), all of the interest of Landlord in and to the Lease has been irrevocably assigned to Lender and that all basic rent and other amounts payable to Landlord under the Lease (other than the Excepted Payments (defined below)) shall be paid directly by Tenant to Lender (or its designee) in accordance with the provisions contained therein. Tenant hereby agrees, without further notice, to so pay all such rent and other sums due under the Lease (other than the Excepted Payments) by wire transfer immediately available funds to the account designated in that certain Rent Direction Letter of even date herewith from Landlord to Tenant (the "Rent Direction Letter"), as copy of which is attached hereto as **Exhibit C**, or as otherwise required pursuant to written notice from Lender. Tenant and Landlord agree that the Rent Direction Letter cannot be revoked or modified by Landlord. By executing and delivering this certificate, Tenant hereby confirms that any notice requirements to be given by Lender to Tenant under the Lease for the purpose of granting rights to mortgagees under the Lease are fully satisfied. As used herein, the term "Excepted Payments" means the following described payments and amounts:

(i) All payments by Tenant pursuant to any indemnity under the Lease which by the terms thereof are payable to Landlord or its successors, permitted assigns, employees, officers, directors, shareholders, members, servants, agents and affiliates thereof; and

UNOFFICIAL COPY

Property of Cook County Clerk's Office

(ii) Any insurance proceeds to the extent payable under general public liability policies maintained by Tenant pursuant to Section 18 of the Lease, which, by the terms of such policies, are payable directly to Landlord or its successors, permitted assigns, employees, officers, directors, shareholders, members, servants, agents and affiliates thereof, in each such case for their own respective accounts.

(b) The interest of Landlord in the Lease has been assigned to Lender for the purposes specified in the Assignment of Lease only, and Tenant acknowledges that Lender hereby assumes no obligation, duty or liability under the Lease.

(c) Tenant consents to the Assignment of Lease, and, in the absence of manifest error, Tenant shall not for any reason whatsoever seek to recover from Lender any moneys paid to Lender by virtue of the Assignment. Until the Loan, together with any and all other amounts due from Landlord to Lender under the Mortgage or note evidencing the Loan, has been paid in full, no payment other than Excepted Payments made by Tenant to any person other than Lender shall be effective to discharge the obligations of Tenant under the Lease, to make such payments or be of any other force or effect. Tenant shall deliver to Lender duplicate original copies of all notices which it is or may be required or permitted to give, make, serve or deliver pursuant to the Lease. Tenant acknowledges that no delivery of such notice shall be of any force and effect unless a duplicate copy is delivered to Lender (or its designee).

4. **Non-Disturbance.** So long as Tenant is not in default in the payment of rent, additional rent, or other charges or conditions of the Lease, Tenant shall not be disturbed by Lender in Tenant's possession, enjoyment, use, and occupancy of the Premises during the original or any renewal term of the Lease or any extension or modification thereof nor shall the Lease be terminated or Tenant's rights thereunder be affected. Nothing contained herein shall prevent Lender from naming or joining Tenant in any foreclosure or other action or proceeding initiated by Lender pursuant to the Mortgage to the extent necessary under applicable law in order for Lender to avail itself of and complete the foreclosure or other remedy, but such naming or joinder shall not be in derogation of the rights of Tenant as set forth in this Agreement.

5. **Attornment.** If, at any time, Lender or any person or entity or any of their successors or assigns shall acquire the interest of Landlord in and to the Premises through foreclosure, deed-in-lieu of foreclosure, assignment-in-lieu of foreclosure or any other method (each, a "Successor Landlord"), then so long as Tenant complies with this Agreement, and no default (a "Default") on the part of Tenant exists under the Lease, the Lease shall continue in full force and effect and shall not be terminated or disturbed except in accordance with the terms thereof. Tenant shall thereupon be bound to Successor Landlord, and Successor Landlord shall be bound to Tenant, under all the terms, covenants, and conditions of the Lease for the balance of the term thereof remaining, and any extensions or renewals thereof, with the same force and effect as if Successor Landlord was the original landlord under the Lease. Tenant does hereby attorn to Successor Landlord as its landlord, said attornment to be effective and self-operative without the execution of any additional documents by the parties hereto immediately upon Successor Landlord's succeeding to the interest of Landlord under the Lease.

6. **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:

UNOFFICIAL COPY

Property of Cook County Clerk's Office

(a) Except for any default or breach of which Lender has been notified pursuant to Section 2 hereof but has failed to cure, any default or breach in Landlord's obligations under the Lease occurring prior to the time Successor Landlord succeeds to the interest of Landlord in the Premises;

(b) Any payment of rent (including fixed rent, percentage rent, or additional rent) that Tenant might have made to Landlord more than thirty (30) days before the date such rent was first due and payable under the Lease with respect to any period after the time Successor Landlord succeeds to the interest of Landlord in the Premises;

(c) Any deposit or security which was delivered to Landlord but which was not subsequently delivered to Successor Landlord;

(d) Any modification or amendment to the Lease, or any waiver of any terms of the Lease, made without Lender's prior written consent;

(e) Any consensual or negotiated surrender, cancellation, or termination of the Lease, in whole or in part, agreed upon between Landlord and Tenant;

(f) Any warranty or indemnity of any nature whatsoever made by Landlord, including any warranties or indemnities regarding use, compliance with zoning, hazardous wastes or environmental laws, Landlord's title, Landlord's authority, habitability, fitness for purpose, or possession; or

(g) Any obligation of Landlord under the Lease to make, pay for, or reimburse Tenant for the initial build-out of the Premises.

7. **Tenant's Option to Purchase and Right of First Refusal.** Pursuant to Sections 40 and 46 of the Lease respectively, Tenant is granted the option to purchase the Premises and the right of first refusal with respect to any offer to purchase obtained by Landlord with respect to the Premises (collectively, the "Purchase Rights"). Notwithstanding anything to the contrary in the Lease, Tenant acknowledges and agrees as follows:

(a) If any sale or transfer of the Premises to Tenant pursuant to the Purchase Rights occurs during any period during which the Loan cannot be prepaid pursuant to the terms of the Mortgage or the Note evidencing the Loan, a copy of which has been provided to Tenant, which expires on July 1, 2023 (the "Lockout Period"), such sale or transfer to Tenant shall be subject to the Loan and the terms and conditions of the Mortgage or the Note evidencing the Loan, a copy of which has been provided to Tenant (including, without limitation, the provisions of Section 9 of the Mortgage). In no event shall the Loan be prepaid during the Lockout Period. Nothing herein shall prevent Tenant, upon acquiring title to the Premises, from defeasing the Loan in accordance with, but subject to the conditions of, the Defeasance Rider attached to the note evidencing the Loan (the "Defeasance Rider"). Lender agrees that, so long as the Lease is in effect, it shall not agree to

UNOFFICIAL COPY

Property of Cook County Clerk's Office

(i) any change in the interest rate in effect on the Loan or (ii) any amendment or modification to the Defeasance Rider without Tenant's prior written consent.

(b) If Tenant acquires title to the Premises pursuant to the Purchase Rights or otherwise, and such sale or transfer either (i) occurs during the Lockout Period or (ii) occurs after the Lockout Period but the Loan is not paid in full at the time of such sale or transfer or is not defeased in accordance with the Defeasance Rider, then no merger of Tenant's title to the Premises shall occur, and the Lease and any guaranty of the Lease shall remain in full force and effect in accordance with their respective terms.

8. **Exculpation of Successor Landlord.** Notwithstanding anything to the contrary in 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 the Premises from time to time, Successor Landlord's interest in the Lease, and the proceeds from any sale or other disposition of the Premises by Successor Landlord (collectively, the "Successor Landlord's Interest"). Tenant shall look exclusively to Successor Landlord's Interest for payment or discharge of any obligations of Successor Landlord under the Lease as affected by this Agreement. Tenant shall not collect or attempt to collect any such obligations out of any other assets of Successor Landlord.

9. **Notices.** Any notice, election, communication, request or other document or demand required or permitted under this Agreement shall be in writing and shall be deemed delivered on the earlier to occur of (i) receipt or (ii) the date of delivery, refusal, or nondelivery indicated on the return receipt, if deposited in a United States Postal Service Depository, postage prepaid, sent certified or registered mail, return receipt requested, or if sent via a reputable overnight courier service providing for a receipt, addressed to Tenant or Lender, as the case may be, at the following addresses:

If to Tenant:

CPS Department Stores, Inc.
c/o Proffitts, Inc.
5810 Shelby Oaks Drive
Memphis, Tennessee 38134 53203
Attn: Senior Vice President
for Real Estate and
Chief Real Estate Counsel

UNOFFICIAL COPY

Property of Cook County Clerk's Office

With a copy to: CPS Department Stores, Inc.
 c/o Proffitt's Inc.
 750 Lake Shore Parkway
 Birmingham, Alabama 35211
 Attn: General Counsel

If to Lender: *Mailing address:*
 Red Mountain Funding, LLC
 P. O. Box 12645
 Birmingham, Alabama 35202

Delivery address:
 Red Mountain Funding, LLC
 SouthTrust Tower - 9th Floor
 420 North Twentieth Street
 Birmingham, Alabama 35203

10. **Successors and Assigns.** This Agreement shall bind and benefit the parties, their successors and assigns. If Lender 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.

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

12. **Interaction with Lease with Mortgage.** If this Agreement conflicts with the Lease, then this Agreement shall govern as between Tenant and Lender, 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. Lender confirms that Lender has consented to Landlord's entering into the Lease.

13. **Interpretation; Governing Law.** The interpretation, validity, and enforcement of this Agreement shall be governed by and construed in accordance with the laws of the state in which the Premises are located.

14. **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.

UNOFFICIAL COPY

Property of Cook County Clerk's Office

15. **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.

[THE REMAINDER OF THIS PAGE WAS LEFT BLANK INTENTIONALLY]

Property of Cook County Clerk's Office

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

Property of Cook County Clerk's Office

RED MOUNTAIN FUNDING, L.L.C., a Delaware limited liability company

By: W. Neil Fox
Name: W. Neil Fox
Title: Authorized Signatory

Date of execution: _____

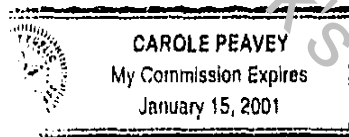
STATE OF Texas)
COUNTY OF Dallas) SS

I, Carole Peavey a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that W. Neil Fox, the Authorized Signatory of Red Mountain Funding, L.L.C., a Delaware limited liability company, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed and delivered said instrument as such officer of such corporation, as his own free and voluntary act and as the free and voluntary act of such corporation for the uses and purposes therein set forth.

GIVEN under my hand and Notarial Seal this 31st day of July, 1998.

Carole Peavey
NOTARY PUBLIC

My Commission Expires:



UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

Property of Cook County Clerk's Office

Consent of Guarantor

The undersigned, a guarantor of Tenant's obligations under the Lease (a "Guarantor"), consents to Tenant's execution, delivery, and performance of the foregoing Agreement. From and after any attornment pursuant to the foregoing Agreement, that certain Corporate Guaranty dated _____ (the "Guaranty") executed by Guarantor in favor of WEC 98C-5 LLC, a Texas limited liability company, shall automatically benefit and be enforceable by Lender with respect to Tenant's obligations under the Lease. Lender's rights under the Guaranty shall not be subject to any defense, offset, claim, counterclaim, reduction or abatement of any kind resulting from any act, omission, or waiver by Landlord for which Lender would, pursuant to the foregoing Agreement, not be liable or answerable after an attornment. The foregoing sentence does not limit any waivers or other provisions contained in the Guaranty. Guarantor confirms that the Guaranty is in full force and effect and Guarantor presently has no offset, defense (other than any arising from actual payment or performance by Tenant, which payment or performance would bind Lender under the Agreement), claim, counterclaim, reduction, deduction, or abatement against Guarantor's obligations under the Guaranty.

PROFFITT'S, INC., a Tennessee corporation

By: _____
Name: Charles Hansen
Title: _____

[Affix corporate seal]

STATE OF Alabama
COUNTY OF Jefferson) SS

I, Jennifer Backus, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that Charles Hansen, the VP of Proffitt's, Inc., a Tennessee corporation, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed and delivered said instrument as such officer of such corporation, as his own free and voluntary act and as the free and voluntary act of such corporation for the uses and purposes therein set forth.

GIVEN under my hand and Notarial Seal this 29th day of July, 1998.

Jennifer Backus
NOTARY PUBLIC

My Commission Expires: 12/10/2001

UNOFFICIAL COPY

Property of Cook County Clerk's Office

LINCOLN MALL

EXHIBIT A TO LINCOLN MALL LEASE

PARCEL 1:

LOT 2 IN LINCOLN MALL, BEING A SUBDIVISION OF PART OF THE SOUTH WEST 1/4 OF SECTION 22, TOWNSHIP 35 NORTH, RANGE 13 EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS

PARCEL 2:

THE RECIPROCAL AND NON-EXCLUSIVE EASEMENTS FOR INGRESS AND EGRESS, PARKING OF VEHICLES, PASSAGE AND ACCOMMODATION OF PEDESTRIANS, THE INSTALLATION, OPERATION, MAINTENANCE, REPAIR, REPLACEMENT, RELOCATION AND REMOVAL OF STORM AND SANITARY SEWERS, WATER LINES AND GAS MAINS, ELECTRICAL POWER LINES, TELEPHONE LINES AND OTHER UTILITY LINES, STORM WATER RETENTION BASIN, FIRE PROTECTION WATER STORAGE TANK AND PUMPHOUSE FACILITIES, THE CONSTRUCTION, RECONSTRUCTION, ERECTION AND MAINTENANCE OF COMMON FOUNDATIONS, FOOTINGS, SUPPORTS, CANOPIES, ROOFS, BUILDING AND OTHER OVERHANGS, AWNINGS, ALARM BELLS, SIGNS, LIGHTS AND LIGHTING DEVICES, UTILITY VAULTS AND OTHER SIMILAR APPURTENANCES, AND FOR THE PURPOSE OF THE DEVELOPMENT AND CONSTRUCTION OR RECONSTRUCTION OF IMPROVEMENTS, CREATED AND GRANTED AS APPURTENANCES TO THE AFORESAID PARCEL 1, ALL CREATED, DEFINED AND LIMITED BY THAT CERTAIN RECIPROCAL CONSTRUCTION OPERATION AND EASEMENT AGREEMENT DATED MARCH 7, 1972 AND RECORDED ON MARCH 24TH 1972 AS DOCUMENT NUMBER 21846183 BY AND BETWEEN CHICAGO TITLE AND TRUST COMPANY, A CORPORATION OF ILLINOIS, AS TRUSTEE UNDER TRUST AGREEMENT DATED JUNE 4, 1971 AND KNOWN AS TRUST NUMBER 57420, CARSON PIRIE SCOTT AND COMPANY, A DELAWARE CORPORATION, J. C. PENNY PROPERTIES, INC., A DELAWARE CORPORATION, MONTGOMERY WARD DEVELOPMENT CORPORATION, A DELAWARE CORPORATION AND WIEBOLDT STORES, INC., AN ILLINOIS CORPORATION, IN, ON, OVER, UPON AND UNDER LOTS 1, 3, 4, 5 AND 6 IN LINCOLN MALL SUBDIVISION AFORESAID AS SHOWN ON THE PLAT PLAN ATTACHED TO SAID RECIPROCAL CONSTRUCTION OPERATION AND EASEMENT AGREEMENT

PARCEL 3:

THE RECIPROCAL AND NON-EXCLUSIVE EMENTS FOR INGRESS AND EGRESS AND FOR THE INSTALLATION, OPERATION, MAINTENANCE, REPAIR, REPLACEMENT, RELOCATION AND REMOVAL OF STORM AND SANITARY SEWERS, WATER LINES AND GAS MAINS, ELECTRICAL POWER LINES, TELEPHONE LINES AND OTHER UTILITY LINES, CREATED AND GRANTED AS APPURTENANCES TO THE AFORESAID PARCEL 1, ALL CREATED, DEFINED AND LIMITED BY THE CERTAIN TOTAL SITE AGREEMENT DATED MARCH 7, 1972 AND RECORDED MARCH 24, 1972 AS DOCUMENT 21846182 BY AND BETWEEN CHICAGO TITLE AND TRUST COMPANY, A CORPORATION OF ILLINOIS, AS TRUSTEE UNDER TRUST AGREEMENT DATED JUNE 4, 1971 AND KNOWN AS TRUST NUMBER 57420, CARSON PIRIE SCOTT AND COMPANY, A DELAWARE CORPORATION, MONTGOMERY WARD DEVELOPMENT CORPORATION, A DELAWARE CORPORATION, WIEBOLDT STORES, INC., AN ILLINOIS CORPORATION, AND CHICAGO TITLE AND TRUST COMPANY, A CORPORATION OF ILLINOIS, AS TRUSTEE UNDER TRUST AGREEMENT DATED JULY 30, 1971 AND KNOWN AS TRUST NUMBER 57855, IN, ON, OVER, UPON AND UNDER LOTS 1, 3, 4, 5, 8, 9, 10, 11 AND 12 IN LINCOLN MALL SUBDIVISION AFORESAID AS SHOWN ON THE PLOT PLAN ATTACHED TO THE SAID TOTAL SITE AGREEMENT.

PIN 31-22-300-023

300 Lincoln mall Matteson IL 60443

UNOFFICIAL COPY

Property of Cook County Clerk's Office

EXHIBIT B

Description of Lease

That certain Lease dated October 31, 1985, by and between Chicago Title & Trust Company, as trustee under a Trust Agreement dated June 15, 1985, and known as Trust No. 1085200, and Six Anchors Limited Partnership, a Maryland limited partnership ("Original Landlord"), and CPS Realty Partnership, an Illinois general partnership (the "Original Tenant"), as amended by Amendment of Lease dated as of August 1, 1993, between Original Landlord and CPS Department Stores, Inc., a Delaware corporation (as successor tenant to Original Tenant by assignment) ("Tenant"), as further amended and extended by Second Amendment to Lease of even date herewith between WEC 98C-5 LLC ("Landlord") (as successor landlord to Original Landlord by assignment) and Tenant (as so amended and extended, the "Lease")

RETURN TO: SL Group
CHICAGO TITLE INSURANCE
NATIONAL BUSINESS GROUP
2616 LBJ FRWY., SUITE 300
DALLAS, TEXAS 75251