

Subordination[, Non-Disturbance and Attornment] Agreement of Operator Lease

U.S. Department of Housing and Urban Development
Office of Residential Care Facilities

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Warning: Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions.

1RECORDING REQUESTED BY:

AND WHEN RECORDED RETURN TO:

(Space above this line for Recorder's Use)

INSTRUCTIONS: THIS FORM IS NOT FOR USE IN PROJECTS INVOLVING A MASTER LEASE.

NOTICE: THE SUBORDINATION PROVIDED FOR IN THIS AGREEMENT RESULTS IN YOUR LEASEHOLD ESTATE BECOMING SUBJECT TO AND OF LOWER PRIORITY THAN THE INTEREST CREATED BY SOME OTHER OR LATER INSTRUMENT.

**[SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT]
OR [SUBORDINATION AGREEMENT]
(of Operator Lease)**

This AGREEMENT (this "**Agreement**"), is entered into as of this ____ day of _____, 20__, by and between _____, a _____ organized and existing under the laws of _____ ("**Lessor**"), as lessor under the Operator Lease hereinafter described, and _____, a _____ organized and existing under the laws of _____ ("**Lessee**"), lessee under the aforementioned Operator Lease, in favor of _____, a _____ organized and existing under the laws of _____ ("**Lender**"), the owner and holder of the Borrowers Security Instrument hereinafter described.

WITNESSETH:

WHEREAS, Lessor has or will execute that certain Healthcare [Mortgage, Deed of Trust, Deed to Secure Debt, Security Deed or Other Designation as appropriate in Jurisdiction],

Assignment of Leases, Rents and Revenue and Security Agreement, dated as of _____, 20__ (the “**Borrowers Security Instrument**”), in favor of Lender and covering certain real property (the “**Land**”) located in the City of _____, County of _____, State of _____, with a legal description as set forth in Exhibit A, attached hereto and, which the Borrower’s Security Instrument is being recorded concurrently herewith; and

WHEREAS, Lessor and Lessee entered into that certain unrecorded lease dated _____, 20__, as it may thereafter be amended (the “**Operator Lease**”), relating to the Lessee’s operation of a healthcare facility (the “**Healthcare Facility**”) on the Land upon the terms and conditions set forth therein (the Land, the Healthcare Facility, and any other improvements, together with any and all assets of whatever nature, wherever situated, related to the loan from Lender to Lessor, are hereinafter sometimes referred to as the “**Project**”); and

WHEREAS, Lessee has or will execute that certain Operator Security Agreement, dated as of _____, 20____ (the “**Operators Security Agreement**”) in favor of Lender, granting lender a security interest in the Healthcare Facility; and

WHEREAS, the parties hereto now desire to enter into this Agreement to establish certain rights and obligations with respect to their interests, and to provide for various contingencies as hereinafter set forth.

NOW, THEREFORE, in consideration for the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and of the mutual benefits to accrue to the parties hereto, it is hereby declared, understood and agreed that the Operator Lease, all terms and conditions set forth in the Operator Lease, the leasehold interests and estates created thereby, and the priorities, rights, privileges and powers of Lessee and Lessor thereunder shall be and the same are hereby, and with full knowledge and understanding of the effect thereof, unconditionally made subject and subordinate to the lien and charge of the Borrower’s Security Instrument, all terms and conditions contained therein, any renewals, extensions, modifications or replacements thereof, and the rights, privileges and powers of the trustee and Lender thereunder, and shall hereafter be junior and inferior to the lien and charge of the Borrower’s Security Instrument. Any term not defined herein has the meaning given in the Borrower Security Instrument. The parties further agree as follows:

1. It is expressly understood and agreed that this Agreement shall supersede, to the extent inconsistent herewith, the provisions of the Operator Lease relating to the subordination of the Operator Lease and the leasehold interests and estates created thereby to the lien or charge of the Borrower’s Security Instrument.
2. Lender consents to the Operator Lease.
3. In the event Lender or any other purchaser at a foreclosure sale or sale under private power contained in the Borrower’s Security Instrument, or by acceptance of a deed in lieu of foreclosure, succeeds to the interest of Lessor under the Operator Lease, or by any manner, it is agreed as follows:

(a) Lessee shall be bound to Lender or such other purchaser under all of the terms, covenants and conditions of the Operator Lease for the remaining balance of the term thereof, with the same force and effect as if Lender or such other purchaser were the lessor under the Operator Lease, and Lessee does hereby agree to attorn to Lender or such other purchaser as its lessor, such attornment to be effective and self-operative without the execution of any further instruments on the part of any of the parties to this Agreement, immediately upon Lender or such other purchaser succeeding to the interest of Lessor under the Operator Lease.

(b) **[Remove this Section 3(b) if there is an identity of interest between the Lessor and Lessee, and this Agreement is intended to be only a Subordination Agreement, and insert “Intentionally Omitted” to preserve paragraph enumeration:]** Subject to the observance and performance by Lessee of all the terms, covenants and conditions of the Operator Lease on the part of Lessee to be observed and performed, Lender or such other purchaser shall recognize the leasehold estate of Lessee under all of the terms, covenants and conditions of the Operator Lease for the remaining balance of the term (as the same may be extended in accordance with the provisions of the Operator Lease) with the same force and effect as if Lender or such other purchaser were the lessor under the Operator Lease, and the Operator Lease shall remain in full force and effect and shall not be terminated, except in accordance with the terms of the Operator Lease or this Agreement; provided, however, that Lender or such other purchaser shall not be (i) liable for any act or omission of Lessor or any other prior lessor, (ii) obligated to cure any defaults of Lessor or any other prior lessor under the Operator Lease which occurred prior to the time that Lender or such other purchaser succeeded to the interest of Lessor or any other prior lessor under the Operator Lease, (iii) subject to any offsets or defenses which Lessee may be entitled to assert against Lessor or any other prior lessor, (iv) bound by any payment of rent or additional rent by Lessee to Lessor or any other prior lessor for more than one (1) month in advance, (v) bound by any amendment or modification of the Operator Lease made without the written consent of Lender or such other purchaser, or (vi) liable or responsible for or with respect to the retention, application and/or return to Lessee of any security deposit paid to Lessor or any other prior landlord, whether or not still held by Lessor, unless and until Lender or such other purchaser has actually received for its own account as lessor the full amount of such security deposit. The non-disturbance provisions of this Section 3(b) are conditioned upon Lessor at all times having no identity of ownership interest with Lessee, any management agent of the Healthcare Facility, any service provider to the Healthcare Facility, or any sub-contractor or supplier to the Healthcare Facility.

4. Lessee hereby agrees that it will not exercise any right granted it under the Operator Lease, or which it might otherwise have under applicable law, to terminate the Operator Lease on account of a default of Lessor thereunder or the occurrence of any other event without first giving to Lender prior written notice of its intent to terminate, which notice shall include a statement of the default or event on which such intent to terminate is based. Thereafter, Lessee shall not take any action to terminate the Operator Lease if Lender (a) within thirty (30) days after service of such written notice on Lender by Lessee of its intention to terminate the Operator Lease, shall cure such default or event if the same can be cured by the payment or expenditure of money, or (b) shall diligently take action to obtain possession of the Healthcare Facility, as such term is defined in the Borrower’s Security Instrument (including possession by receiver) and to cure such default or event in the case of a default or event which cannot be cured unless and until

Lender has obtained possession, but in no event to exceed ninety (90) days after service of such written notice on Lender by Lessee of its intention to terminate.

5. For the purposes of facilitating Lender's rights hereunder, Lender shall have, and for such purposes is hereby granted by Lessee and Lessor, the right to enter upon the Land and the Healthcare Facility thereon for the purpose of effecting any such cure.

6. If Lessee gives a notice of default under the Operator Lease, Lessee hereby agrees to concurrently provide Lender a copy of such notice, and no such notice given to Lessor which is not concurrently given to Lender shall be valid or effective against Lender for any purpose.

7. Subordination of the Operator Lease to the Borrowers Security Instrument and Regulatory Agreements and Program Obligations.

(a) The Operator Lease and all estates, rights, options, liens and charges therein contained or created under the Operator Lease are and shall be subject and subordinate to the lien or interest of (i) the Borrower's Security Instrument on Lessor's interest in the Land in favor of Lender, its successors and assigns insofar as it affects the real and personal property comprising the Mortgaged Property (as such term is defined in the Borrower's Security Instrument and not otherwise owned or licensed by Lessee) or located thereon or therein, and to all renewals, modifications, consolidations, replacements and extensions of the Borrower's Security Instrument, and to all advances made or to be made thereunder, to the full extent of amounts secured thereby and interests thereon, (ii) that certain Healthcare Regulatory Agreement – Borrower between Lessor and the U.S. Department of Housing and Urban Development (“HUD”) to be recorded against the Land (the “**Borrowers Regulatory Agreement**”), and (iii) that certain Healthcare Regulatory Agreement – Operator between Lessee and HUD to be recorded against the Land (the “**Operators Regulatory Agreement**”) ((ii) and (iii) are collectively referred to herein as the “**Regulatory Agreements**”). The documents and instruments that evidence, secure and govern the loan from Lender to Lessor (including but not limited to the promissory note from Lessor to Lender, the Borrower's Security Instrument, the Regulatory Agreements, any security agreements, and this Agreement), as each of the same may be amended, modified and/or restated from time to time, shall hereinafter be referred to collectively as the “**Loan Documents**”.

(b) The parties to the Operator Lease agree to execute and deliver to Lender and/or HUD such other instrument or instruments as Lender and/or HUD, or their respective successors or assigns, shall reasonably request to effect and/or confirm the subordination of the Operator Lease to the lien of the Borrower's Security Instrument and the Regulatory Agreements. To the extent that any provision of the Operator Lease shall be in conflict with Program Obligations (as such term is defined below), Program Obligations shall be controlling.

(c) In the event HUD succeeds to the interest of Lessor under the Operator Lease by reason of any foreclosure of the Borrower's Security Instrument or by HUD's acceptance of a deed in lieu of foreclosure, or by any other manner, it is agreed as follows:

(i) HUD can terminate the Operator Lease (A) for any violation of the Operator Lease that is not cured within any applicable notice and cure period given in the Operator Lease, (B) for any violation of the Operator's Regulatory Agreement, pursuant to its terms; (C) for any violation of Program Obligations or Healthcare Requirements (both as defined below) that is not cured within thirty (30) days of Lessee's receipt of written notice of such violation; provided, however, that if such cure reasonably requires more than thirty (30) days to cure, HUD may not terminate the Operator Lease if Lessee commences such cure within such thirty (30) day period and thereafter diligently prosecutes such cure to completion, (D) if HUD, as a result of the occurrence of any of the events described in the foregoing items (A), (B), or (C) is required to advance funds for the operation of the Healthcare Facility, or (E) if the Lessor has an identity of interest with the Lessee, for any reason.

(ii) As used in this Agreement:

(A) **"Program Obligations"** means (1) all applicable statutes and any regulations issued by HUD pursuant thereto that apply to the Healthcare Facility, except that changes subject to notice and comment rulemaking shall become effective upon completion of the rulemaking process, and (2) all current requirements in HUD handbooks and guides, notices, and mortgagee letters that apply to the Healthcare Facility, and all future updates, changes and amendments thereto, as they become effective, except that changes subject to notice and comment rulemaking shall become effective only upon completion of the rulemaking process, and provided that such future updates, changes and amendments shall be applicable to the Healthcare Facility only to the extent that they interpret, clarify and implement terms in this Agreement rather than add or delete provisions from such document. Handbooks, guides, notices and mortgagee letters are available on HUD's official website: <http://www.hud.gov/offices/adm/hudclips/index.cfm> or a successor location to that site.

(B) **"Healthcare Requirements"** means, relating to the Land, all federal, state, county, municipal and other governmental statutes, laws, rules, orders, regulations, ordinances, judgments, decrees and injunctions or agreements, in each case, pertaining to or concerned with the establishment, construction, ownership, operation, use or occupancy of the Healthcare Facility or any part thereof as a healthcare facility, and all material permits, licenses and authorizations and regulations relating thereto, including all material rules, orders, regulations and decrees of and agreements with healthcare authorities pertaining to the Healthcare Facility.

(d) To the extent there is any inconsistency between the terms of this Agreement, and the Operator Lease, the terms of this Agreement shall be controlling.

8. [Remove this Section 8 if using Subordination Agreement for affiliated Borrowers and Operators, and insert "Intentionally Omitted" to preserve paragraph enumeration]. Notwithstanding any other provision of the Loan Documents and subject to HUD's rights under the Loan Documents, the Lender agrees that, upon providing written notice

of a Lessor default to Lessee, provided that there is no Material Risk of Termination, there is no payment default under the Loan Documents and the Borrower has the right under the Loan Documents to cure such default: (i) Lender shall provide Lessee a concurrent period of thirty (30) days to cure any default by Lessor under the Loan Documents, provided that such default can be reasonably cured and such cure is being diligently pursued; and (ii) if such default of this Agreement can be cured, but cannot be cured within thirty (30) days, and if such cure is commenced within such initial thirty (30) day period and diligently pursued continuously thereafter, Lender shall provide Lessee an additional period of up to ninety (90) days, concurrent with any additional cure period extended to the Lessor. After such thirty (30) day period, as it may be extended, Lender shall be entitled to declare an Event of Default under the Loan Documents.

“Material Risk of Termination” shall be deemed to occur when any of the applicable Permits and Approvals (as such term is defined in the Operator’s Regulatory Agreement) material to the operation of the Healthcare Facility is at substantial and imminent risk of being terminated, suspended or otherwise restricted in such a way that such termination, suspension or restriction would have a materially adverse effect on the operation of the Healthcare Facility, including without limitation, HUD’s determination that there is a substantial risk that deficiencies identified by applicable state and/or federal regulatory and/or funding agencies cannot be cured in such manner and within such time periods as would avoid the loss, suspension, or diminution of any Permits and Approvals that would have a materially adverse effect on the Project.

9. Notices to be given to Lender hereunder shall be sent by U.S. certified mail, return receipt requested, postage prepaid, to Lender at the following address:

[Insert Address]

or to such other address as Lender may provide Lessee in writing by notice sent to Lessee at the Healthcare Facility, or such other address as Lessee may provide in writing by notice sent to Lender.

10. The agreements contained herein shall run with the land and shall be binding upon and inure to the benefit of the respective heirs, administrators, executors, legal representatives, successors and assigns of the parties hereto.

11. This Agreement may be executed in one or more counterparts, all of which when taken together shall constitute a single instrument.

12. This Agreement and all rights and obligations under this Agreement, including matters of construction, validity and performance, shall be governed by the laws of the state in which the Healthcare Facility is located, without giving effect to conflicts of law principles.

13. The following Exhibit is attached to this Agreement:

Exhibit A Legal Description of the Land

[SEE ATTACHED SIGNATURE PAGES]

IN WITNESS WHEREOF, the undersigned have executed this instrument as of the day and year first above written.

LESSOR:

By: _____
Name: _____
Title: _____

LESSEE:

By: _____
Name: _____
Title: _____

LENDER:

By: _____
Name: _____
Title: _____

EXHIBIT A

[LEGAL DESCRIPTION OF THE LAND]