

## MODEL TENANT ESTOPPEL CERTIFICATE (FORM)



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When a commercial real estate lender (a "Lender") accepts a mortgage on stabilized income-producing real property, Lender believes the leases of the property (the "Leases") will deliver the cash flow that the borrower (the "Borrower") needs in order to repay the Lender's loan. So the Leases matter a lot. Without them, Borrower probably won't be able to repay the loan, unless Borrower's principals decide to dip into their pockets, and they rarely do that.

Given the importance of Leases, every Lender will want to know that:

- The Leases accurately reflect the entire deal between Borrower and its tenants (the "Tenants");
- Tenants are paying rent without major issues; and
- Lender won't face any unpleasant post-closing surprises involving the Leases and Tenants that Lender might have identified and handled before closing.<sup>1</sup>

An investor that acquires commercial real estate ("Buyer") will have similar concerns.

For a typical commercial mortgage loan or acquisition closing, Lender or Buyer obtains the comfort it needs by insisting that Borrower (or Seller, for a purchase and sale) obtain Estoppel Certificates from Tenants. In these Estoppel Certificates, Tenants confirm facts about their Leases that give comfort to Lender or Buyer, and thus help to close the transaction.

In preparing to close any commercial mortgage loan, a Borrower and a Lender can negotiate—or play a game of chicken—about exactly how many Estoppel Certificates Borrower must deliver, and from which Tenants. A Lender's requirements and expectations will vary. But a Lender will usually want Estoppel Certificates from all major Tenants, and enough of the other Tenants, to cover a high percentage of the total square footage of the property. That percentage will typically be at least 5% to 10% above the loan-to-value ratio of the loan, although it is entirely a matter of the circumstances of each particular loan and each Lender's tastes.

The following model document consists of a Tenant Estoppel Certificate, suitable for use in any commercial real estate loan or acquisition that involves stabilized property with existing tenancies—which is almost all of them. This document is prepared in the first instance from Lender's perspective. It also includes provisions that accommodate a simultaneous purchase of the same real property, and considers Buyer's needs as well. For a refinancing, Tenants may object to having the Estoppel Certificate benefit Landlord, so it may make sense to delete Landlord as a party entitled to rely on the Estoppel Certificate.

This model Estoppel Certificate, or its equivalent, can be attached as an exhibit to a Lease, to avoid later disagreements about what Tenant must sign.<sup>2</sup> It can also be used as a standard Estoppel Certificate in loan documents. A careful Borrower will, however, insist that if a Lease requires a particular form of Estoppel Certificate, Borrower never needs to deliver anything more than that.

## 1. SUBSTANTIVE COMMENTS

### 1.1 “Trivial” Leases

For minor Leases, a Lender might limit the Estoppel Certificate to a confirmation that the Lease, as defined in the Estoppel Certificate (including all amendments, etc.), has not been amended and is in full force and effect. Lender’s counsel then simply needs to read the Lease and make sure it doesn’t, for example, contain a purchase option. In preparing a “bare bones” Estoppel Certificate, Lender might also want to include Tenant’s acknowledgment that the Lease has been assigned and Tenant’s agreement to pay rent to Lender (or its designee) if directed to do so. Whether these assurances are necessary or sufficient depends on the circumstances.

### 1.2. Lease Repair

If the Lease has any imperfections or ambiguities, an Estoppel Certificate might offer an opportunity to correct them. Estoppel Certificates are not, however, as reliable as actual Lease amendments, for at least these reasons:

#### Future Refinancing

An Estoppel Certificate (or SNDA) delivered to the present Lender might not help a future Lender. There’s no reason why this should always be the case, but it’s typical.

#### Lease Modification

The Estoppel Certificate might be considered a Lease modification. Tenant might later question whether the Estoppel Certificate truly could modify the Lease.

#### Successors and Assigns

If Tenant assigns its Lease, the Estoppel Certificate might not bind Tenant’s assignees. Conversely, can Lender’s or Buyer’s assignee also rely on the Estoppel Certificate? Probably yes, especially if the Estoppel Certificate says so. But what if the Estoppel Certificate says nothing on that point? And, if an Estoppel Certificate signed only by Tenant includes some form of Lease amendment, will it bind Landlord and its successors and assigns? Probably not, unless Landlord countersigned it and Landlord’s successors and assigns knew about it.

## Future Estoppel Certificates

When the parties later amend the Lease (or Tenant signs a future Estoppel Certificate), they might not remember to list the Estoppel Certificate as one of the documents that is part of the Lease. The future Lease amendment (or even some future Estoppel Certificate) might effectively erase the Estoppel Certificate (and its favorable provisions) from the record of Lease documents.

### 1.3. Economic Terms

Some Lenders like to restate the fundamental economic terms of a Lease in the Estoppel Certificate, reducing the more burdensome Lease review process to an Estoppel Certificate review process. Sophisticated Tenants typically reject that approach, as it shifts the risk of transcription errors to them. They will usually only:

- Confirm that the Lease has not been amended except as the Estoppel Certificate states;
- Provide some factual assurances that cannot be confirmed from the face of the Lease; and then
- Insist that Lender read the Lease.

The form of Estoppel Certificate offered here requires Tenant to confirm the amount of Fixed Rent only if it has been subject to variable adjustments. It does not otherwise require Tenant to summarize or confirm financial terms of the Lease. If Lender prefers a more exhaustive form of Estoppel Certificate, this one will need to be changed. That may produce a more difficult pre-closing process.

### 1.4. Guarantor

If a guaranty (a “Guaranty”) backstops Tenant’s obligations under the Lease, then obtain a confirmation similar to an Estoppel Certificate, but of more limited scope, from the guarantor (“Guarantor”). That confirmation will mostly refer to the Guaranty rather than the Lease. It can appear at the end of the Tenant Estoppel Certificate. This model Estoppel Certificate includes sample language, after the full menu of assurances Buyer or Lender might obtain from Tenant.

### 1.5. Effect on Lease

A careful Tenant will often insist that an Estoppel Certificate say that nothing in it modifies or waives anything in the Lease. Depending on wording, such a

qualification can limit the Estoppel Certificate's usefulness. It is, however, not unreasonable for a Tenant to ask that Lender read and understand the Lease, with the Estoppel Certificate just confirming the scope of the Lease documents and addressing only factual circumstances that cannot be understood or confirmed merely by reading the Lease. This model contains no such limiting language.

### 1.6. Why Bother?

Estoppel Certificates assume Seller or Borrower is lying to Buyer or Lender. These documents require a significant amount of work to obtain. They also give Tenants an opportunity to whine and claim leverage. If a creditworthy guarantor gives Buyer or Lender assurances equivalent to those in Estoppel Certificates, the parties might dispense with Estoppel Certificates.<sup>3</sup> If an Estoppel Certificate arises for a ground Lease, where an existing space lease will become a sublease, the ground lessor might provide representations and warranties and allow the ground lessee to offset rent if those representations and warranties prove wrong.

### 1.7. Estoppel Certificate for Acquisition

If this form of Estoppel Certificate is used for a simultaneous acquisition of the property, then Buyer/Borrower will want to confirm that the purchase and sale documents match up to the requirements for delivery of Estoppel Certificates in the loan commitment.

## 2. INTERACTION WITH SUBORDINATION, NONDISTURBANCE, AND ATTORNMENT AGREEMENTS

### 2.1. Inclusion of SNDA Provisions

In addition to an Estoppel Certificate, Lender will often obtain a subordination, nondisturbance, and attornment agreement (an "SNDA") from each Tenant, to deal with hypothetical eventualities and risks after the closing. The parties could eliminate an SNDA by adding a few paragraphs to an Estoppel Certificate. Sample language to that effect appears in the optional provisions in the model Estoppel Certificate. The first part of that language covers only SNDA issues that tend not to create controversy:

- Pure subordination<sup>4</sup>;
- Lease continuation after foreclosure; and
- Protecting the successor owner from "Landlord-Tenant Conspiracies."

The last paragraph of the SNDA-type language covers SNDA issues that do tend to create controversy, described as "Lender-Tenant Risk Shifting." To the extent that one can successfully cover these issues in an Estoppel Certificate, rather than an SNDA, this can certainly speed up loan closing. But one might fail, for at least these reasons:

### Issues and Delays

If the Lease does not already obligate Tenant to sign an Estoppel Certificate with SNDA-type provisions, then inclusion of those provisions can create issues and delays that otherwise would not occur.

### Lender Obligations

To the extent SNDA-type provisions impose obligations on Lender and protect Tenant, Tenant will want Lender to agree to them. This can certainly be done without negotiating a traditional SNDA between Lender and Tenant. For example, Lender can sign a one-paragraph letter agreeing to the Lender obligations and Tenant protections. It adds another piece of paper to the transaction, as well as a deviation from ordinary closing procedures.

### Understanding the File

After closing, anyone trying to understand the Lender-Tenant relationship will probably look for an SNDA, not an Estoppel Certificate. The Estoppel Certificate might simply get lost unless it has been recorded. This rarely happens for Estoppel Certificates.

### Nonstandard

Using an Estoppel Certificate to cover SNDA issues deviates from usual practice. Real estate people usually don't like to do that. Deviation can invite left-field objections and problems that are difficult to anticipate. The parties may prefer to use a full-blown SNDA just because that's what people usually do.

Even in the face of all these limitations and issues, Lender may still build limited SNDA provisions into an Estoppel Certificate. For those occasions, the sample language offered here should do the job. Lender could easily decide to disregard the issues above.

### 2.2 Assignment of Existing SNDA

If a new Lender refinances a loan held by an existing Lender that previously entered into a satisfactory

SNDA with this Tenant, which often happens, then the existing Lender could assign the SNDA to the new Lender, to avoid the need to negotiate and obtain Tenant signatures on a new SNDA. That approach makes particular sense in New York, where the existing Lender will typically assign the existing mortgage to the new Lender anyway. Something similar could be done anywhere else. An assignment document just needs to include the existing SNDA. If the parties do that, then the Estoppel Certificate could include language giving the new Lender comfort on the SNDA already in place and its assignment. Sample language to this effect appears in the optional provisions below. A careful Tenant might ask the new Lender to confirm and agree to any Lender obligations and Tenant protections in the assigned SNDA. This could require an appropriate countersignature of the assignment, a one-paragraph letter from the new Lender, or a statement in the loan documents.

### **3. USING THIS MODEL ESTOPPEL CERTIFICATE**

#### **3.1. Scope**

This model Estoppel Certificate offers a “base case” first, followed by a range of optional provisions that might apply based on particular circumstances. A typical transaction will require few or none of these optional provisions, which are explained within the model Estoppel Certificate.

#### **3.2. Knowledge**

Some Tenant assurances in this model Estoppel Certificate are limited by actual knowledge. These limitations are market standard. Lender might choose to take a more aggressive position.

#### **3.3. Customization**

Like any other document, an Estoppel Certificate will need to be customized for the particular transaction. Brackets, footnotes, and comments in this model indicate provisions most likely to need adjustment.

#### **3.4. Fact Checking**

When Borrower or Landlord prepares Estoppel Certificates for execution by Tenants, Borrower/Landlord should rigorously check the Lease files to identify and list all possible documents that modify the Lease. These could include side letters, correspondence,

confirmation letters (e.g., regarding exercise of an option), and even emails.

#### **3.5. Exhibits**

Update the list of exhibits to this Estoppel Certificate to reflect which exhibits, if any, are attached. For user convenience, the parties may prefer to collect in one exhibit all Lease-specific exceptions and variable items. This way, the text of the Estoppel Certificate would not vary much for individual Leases. This approach may save some work and coordination, if one person prepares the text of the Estoppel Certificate and another prepares the Lease-specific exhibits. On the other hand, it is not too hard to tailor the form of Estoppel Certificate for the details of each particular Lease.

#### **3.6. Deal-Specific Assurances**

Consider whether to obtain any assurances from Tenant specific to a particular Lease, such as:

- Tenant’s option to cancel has expired without exercise;
- The same applies for any similar option of Landlord; and
- Tenant has taken possession of and accepted the space. Any deal-specific language for an Estoppel Certificate will need to be identified through early and thorough due diligence review of the Leases.

#### **3.7. Obtaining from Tenant**

A Tenant may use any request for an Estoppel Certificate as an opportunity to complain and raise issues. Even if a Tenant does not do so, at a minimum, Tenant will want to assure that the Estoppel Certificate is right. For those reasons, and because any Estoppel Certificate benefits only Buyer/Lender and not Tenant, the process of obtaining Estoppel Certificates from Tenants is sometimes slow and difficult. Smaller Tenants not accustomed to dealing with Estoppel Certificates may reach out to counsel, which will take a while. Therefore, allow plenty of lead time. The more information the Estoppel Certificate requests, and the longer and more off-market it is, the longer Tenants will take. Lenders should usually make it clear they will tolerate exceptions in the Estoppel Certificate, rather than let Tenants believe an imperfect Estoppel Certificate will create an opportunity to bog down or derail a transaction. Typically, a Lender or Buyer would prefer to receive an

Estoppel Certificate with minor exceptions and issues than no Estoppel Certificate at all.

### 3.8. Recordation

Estoppel Certificates are seldom recorded, whether or not a memorandum of Lease was recorded. In the disfavored case where an Estoppel Certificate modifies a Lease, it should be recorded if a memorandum of Lease was recorded. There, the parties should just relabel the document as a Lease amendment, because that's what it is. If an Estoppel Certificate will be recorded, think about any necessary forms, affidavits, and tax returns. The Estoppel Certificate will also need to meet local recording requirements.

### 3.9. Signed Estoppel Certificates

As Tenants sign and return Estoppel Certificates, track and collect them in an organized way. Sometimes Estoppel Certificates disclose problems. If you simply receive Estoppel Certificates, check them off a list, and drop them in folders, then problems will almost certainly slip through the cracks. As obvious as it may sound, whoever required the Estoppel Certificate(s) should read them as they arrive and, if they raise concerns, do something quickly.

Tenant: \_\_\_\_\_

Premises: \_\_\_\_\_

## TENANT ESTOPPEL CERTIFICATE<sup>5</sup>

**THIS TENANT ESTOPPEL CERTIFICATE** (the "Estoppel Certificate") is delivered as of \_\_\_\_\_, 20\_\_ (the "Effective Date"), by \_\_\_\_\_, a \_\_\_\_\_ ("Tenant"), to \_\_\_\_\_, a \_\_\_\_\_ ("Landlord"),<sup>6</sup> to benefit Landlord and \_\_\_\_\_, a \_\_\_\_\_ ("Lender").

Tenant delivers this Estoppel Certificate based on these facts:

**A.** Landlord has advised Tenant that Landlord owns or is simultaneously acquiring the real property known as \_\_\_\_\_ (the "Building").

**B.** Landlord or its predecessor in interest has leased to Tenant [the part of] the Building [commonly known as \_\_\_\_\_] (the "Premises"), under only

these documents and agreements (collectively, the "Lease"):<sup>7</sup>

- Lease dated as of \_\_\_\_\_, 20\_\_;
- [First Amendment of Lease] dated as of \_\_\_\_\_, 20\_\_;
- [Letter Agreement on Commencement Date] dated as of \_\_\_\_\_, 20\_\_; and
- \_\_\_\_\_.

**C.** Landlord has advised Tenant that Landlord [is acquiring the Building and] intends to mortgage the Building and collaterally assign the Lease to Lender.

**NOW, THEREFORE,** Tenant certifies, acknowledges, and agrees, in each case only as of the Effective Date (for purposes of which, any blank space means "NO EXCEPTIONS" [and any Section number refers to the Lease]):

### 1. Tenant Status

Tenant:

- Is tenant under the Lease;
- Has not assigned, encumbered or hypothecated the Lease, Tenant's estate under the Lease, or any part of either; and
- Has not agreed to do any of the foregoing.

### 2. Lease Status

The Lease:

- Is in full force and effect;
- Has not been amended, canceled, modified, supplemented, surrendered, terminated, or waived, in whole or part, orally or in writing, except as the definition of "Lease" states; and
- Represents the entire agreement between Tenant and Landlord on Tenant's rights regarding the Premises and all related matters. All conditions to effectiveness of the Lease have been met.

### 3. No Offset

[Subject only to adjustments of escalation and percentage rents in the ordinary course for the current year,<sup>8</sup>] Tenant has no claim, counterclaim, defense, offset, right to receive any refund<sup>9</sup> or recoupment (whether of any



overpayment or otherwise), setoff, or any other basis to reduce any payment the Lease requires, including any base rent, additional rent, and other charges the Lease requires Tenant to pay (collectively, "Rent").

#### 4. Rent Commencement

All conditions to commencement of Tenant's obligation to pay Rent have been met, except \_\_\_\_\_.

#### 5. No Landlord Default

To Tenant's knowledge:

- Landlord is not in default under the Lease; and
- Nothing has occurred that, with passage of time or giving of notice, would constitute such a default. Tenant has given Landlord no notice of any uncured default under the Lease. Tenant has commenced no legal proceeding against Landlord.<sup>10</sup>

#### 6. Tenant's Funds

Landlord holds no security deposit, prepaid Rent, or other funds of Tenant (or for which Tenant is entitled to credit) of any kind except \_\_\_\_\_. Tenant has paid no Rent more than 30 days before due except as the Lease expressly requires.

#### 7. No Other Interest

Except under the Lease, Tenant has no:

- Right, title, or interest, including any option to expand, renew, or purchase, in or to the Building; or
- Right of first refusal or first offer.

#### SCOPE; OPTIONAL PROVISIONS

The paragraphs above add up to a standard Estoppel Certificate. For optional provisions, see sample language after the Tenant signature blocks.

Tenant acknowledges and consents that this Estoppel Certificate will be relied upon, in accordance with its terms, as of the Effective Date only, by:

- Landlord;<sup>11</sup>
- Lender;
- Any title insurance company insuring either;

- Any future Lender to Landlord or a mezzanine lender providing financing or preferred equity to Borrower's direct or indirect owners;
- Any rating agency, issuer, trustee, or servicer in any securitization that includes Lender's mortgage; and
- The successors and assigns of (and counsel to) all the foregoing. This Estoppel Certificate shall bind Tenant and its representatives, successors, and assigns.

#### [TENANT SIGNATURE BLOCK]

#### FACTUAL CONFIRMATIONS

The next few paragraphs relate to factual matters that can arise for particular Leases. When they do arise, it is entirely appropriate for Lender to seek comfort through an Estoppel Certificate. Tenant should have no problem providing the comfort suggested here, assuming the Lease requires it and Tenant confirms the statements are factually correct.

#### 8. Options

Tenant has exercised only these option(s) under the Lease:

- Option to extend through \_\_\_\_\_, under Section \_\_\_\_;
- Option to expand the Premises to include \_\_\_\_\_ under Section \_\_\_\_\_; and
- Option to \_\_\_\_\_ under Section \_\_\_\_\_. Tenant has exercised no other option under the Lease.

#### 9. Waiver of First Right

Tenant has received notice of Landlord's purchase of the Building, as Section \_\_\_\_ requires. Tenant has declined to exercise, and waives, any rights of Tenant under Section \_\_\_\_\_ because of that purchase. Those rights have now expired without exercise. [That does not limit Tenant's rights either:

- If, as of \_\_\_\_\_, Landlord has not closed its acquisition of the Building; or
- After Landlord's acquisition of the Building.]

## 10. Rent Adjustment

The [Fixed Rent] under the Lease:

- Was last adjusted on \_\_\_\_\_;
- After taking into account that adjustment, is \$\_\_\_\_\_ per month (\$\_\_\_\_\_ per year); and
- Will next adjust on \_\_\_\_\_.<sup>12</sup>

## 11. Base Amounts

“Base Real Estate Taxes” are \$\_\_\_\_\_. “Base Operating Expenses” are \$\_\_\_\_\_. These amounts are final and not subject to audit or adjustment.

## 12. Dates

The “Commencement Date” of the Lease was \_\_\_\_\_. The “Rent Commencement Date” of the Lease was \_\_\_\_\_. The “Expiration Date” of the Lease, taking into account only any options Tenant has exercised, will be \_\_\_\_\_.<sup>13</sup>

## 13. Notice Address

Tenant’s notice address is: \_\_\_\_\_.

## 14. Build-Out and Possession

Tenant has approved the plans and specifications for construction of the Premises listed in Exhibit \_\_\_. Except as Exhibit \_\_\_ states:

- Landlord has [commenced / completed] Landlord’s obligations, if any, to construct the Premises in a timely manner as the Lease requires; and
- Tenant has taken possession of the Premises.

## SUBORDINATION, NONDISTURBANCE, AND ATTORNMEN T PROVISIONS

The next few paragraphs give Lender protections more typically found in an SNDA. For comments, see the preceding cover notes.

## 15. Subordination

Tenant acknowledges that the Lease and Tenant’s claims under the Lease are subject and subordinate to Lender’s mortgage on Landlord’s Premises.

## 16. Notice of Default

If Tenant intends to terminate the Lease because of Landlord’s default, then Tenant shall first notify Lender of that default and give Lender a reasonable opportunity to cure it. [That does not limit any other right or remedy of Tenant, except by deferring any right Tenant may otherwise have to terminate the Lease for Landlord’s default.]

## 17. Rent Redirection

If Lender gives Tenant written notice requiring Tenant to pay Rent to Lender (not Landlord) or any other party then, [starting \_\_\_ days] after Tenant receives that notice, Tenant shall pay to Lender (or as Lender’s notice requires) all Rent later due under the Lease, without regard to any contrary notice, instruction, or direction from Landlord.<sup>14</sup>

## 18. Foreclosure Event

If Lender forecloses under its mortgage, or exercises any right or remedy similar to such a foreclosure, or accepts (or arranges for a third party to accept) an assignment or conveyance in lieu of such foreclosure (any of the foregoing, a “Foreclosure Event”), then, notwithstanding anything to the contrary in the Lease, from and after the Foreclosure Event:

- The Lease shall not terminate;
- Tenant shall have no right to terminate the Lease because of the Foreclosure Event;
- The new owner of Landlord’s Premises (with its successors and assigns, “Successor Landlord”) shall not be bound by any amendment, modification, waiver, termination, cancellation or surrender of the Lease made without Lender’s consent;
- Successor Landlord shall not be bound by any prepayment of Rent for more than 30 days except as the Lease required (or if paid to a lockbox under Lender’s or Successor Landlord’s control);
- Successor Landlord shall have no liability or responsibility for Tenant’s security deposit except to the extent Lender or Successor Landlord actually received it; and
- Successor Landlord’s liability arising from or relating to the Lease shall never extend beyond its interest in Landlord’s Premises. Nothing in this paragraph limits

Tenant's exercise of any unilateral termination right under the Lease, provided that: (a) it does not arise from a Foreclosure Event; and (b) if it arises from Landlord's default, then Tenant has first given Lender a reasonable opportunity to cure that default.

### 19. Successor Landlord's Liability

Any Successor Landlord shall not be:

- Subject to any abatement, claim, counterclaim, credit, deduction, or setoff against Tenant's obligations under this Lease (an "Offset") arising from acts or omissions of the prior Landlord (except, in the case of any Offset the Lease expressly allows, only to the extent of any actual direct damages that both: (a) the Lease, subject to this Estoppel Certificate, would allow Tenant to assert against Landlord; and (b) accrue after [the Foreclosure Event] [Tenant has given Lender notice of the matters giving rise to the Offset]); or
- Obligated to pay or reimburse Tenant for any sum for which the Lease required the prior Landlord to pay or reimburse Tenant.<sup>15</sup>

### NONSTANDARD PROVISIONS

The remaining numbered paragraphs contain more assurances a Lender or Buyer might want in an Estoppel Certificate. These assurances go beyond merely preventing Tenant from asserting facts inconsistent with the Estoppel Certificate. Instead, they ask Tenant to provide affirmative assurances, and seem particularly likely to trigger objections. Tenant would typically prefer not to cover any of these matters, characterizing them as unusual, noncustomary, overkill, and in many cases over-conceived and under-considered. Each of these provisions does, however, sometimes appear in Estoppel Certificates—as do a range of others not included here, such as asking Tenant to assume new environmental obligations to Lender, a request that even the most aggressive Lender's lawyer would probably consider inappropriate but nevertheless sometimes shows up in an Estoppel Certificate. In some cases, however, these additional provisions may make sense.

### 20. Loss Proceeds

In the event of any inconsistency between Tenant's and Lender's rights on any condemnation award or insurance proceeds, that inconsistency shall be resolved in favor of Lender.

### 21. Existing SNDA

On \_\_\_\_\_, Tenant entered into a [Subordination, Nondisturbance, and Attornment Agreement] (the "SNDA") with \_\_\_\_\_ ("Previous Lender"). Tenant has been advised that, on or about the Effective Date, Previous Lender is assigning the SNDA to Lender. [A copy of the SNDA (including all prior amendments, if any) is attached as Exhibit \_\_\_] [The SNDA was recorded on \_\_\_\_\_ at Book \_\_\_\_\_, Page \_\_\_\_\_ in the Official Records of \_\_\_\_\_ County, \_\_\_\_\_.] The SNDA has not been amended or modified except as the definition of SNDA states. The SNDA is in full force and effect and continues to bind Tenant[, provided that Lender assumes and agrees to be bound by it<sup>16</sup>]. Previous Lender is not in default under the SNDA. Tenant has received:

- Notice that Previous Lender has assigned the SNDA to Lender; and
- No notice that Previous Lender assigned the SNDA to anyone else. Wherever the SNDA refers to Previous Lender, it shall be deemed to refer instead to Lender.

### 22. Copy of Lease

**Exhibit** \_\_\_ is a true, correct, and complete copy of the Lease.<sup>17</sup>

### 23. Repairs

Tenant knows of no condition in the Premises that the Lease requires Landlord to repair.<sup>18</sup>

### 24. Negotiations

Landlord and Tenant are not negotiating any Lease amendment.<sup>19</sup>

### 25. Payments

Tenant has received notice directing Tenant to make all payments under the Lease to \_\_\_\_\_. Tenant shall comply with that notice. Tenant acknowledges that Landlord may not revoke it without Lender's consent.

### 26. No Tenant Default

To Tenant's knowledge:



- Tenant is not in default under the Lease and has received no notice of any such default that has not been cured; and
- Landlord has not commenced any proceedings against Tenant and is not presently threatening to do so. [The statements in this paragraph were also correct at all times during the previous 12 months.]

### 27. Other Consideration

At no time [within \_\_\_\_ months before the Effective Date] has Landlord, any predecessor in interest to Landlord, or any person related to or affiliated with or otherwise acting for any of them directly or indirectly, except as the Lease discloses:

- Made any loan or payment to Tenant or anyone related to Tenant;
- Waived, released, or deferred any obligation of Tenant under the Lease; or
- Given or received any payment or other consideration to induce Tenant to enter into the Lease or deliver this Estoppel Certificate, including any so-called “key money” or “fixture fee” or any obligation to pay rent or modify or cancel any lease at any other location.<sup>20</sup>

### 28. Tenant’s Equity Ownership

All Equity Interests of Tenant are owned and held as follows: \_\_\_\_\_.

### 29. Binding and Enforceable

The Lease and this Estoppel Certificate bind, and are enforceable against, Tenant in accordance with their terms.

### 30. Optional Priority

Lender may elect in writing at any time [by notice to Tenant] [by a recorded document] that all (or any part, as Lender designates) of Lender’s right, title, and interest in Landlord’s Premises shall be subordinate to the Lease and Tenant’s rights and claims under the Lease.

### 31. Tenant’s Property

**Exhibit** \_\_ accurately identifies all personal property Tenant owns in or at the Premises.

## GUARANTOR LANGUAGE

The following language contains assurances Buyer or Lender may want from a Guarantor of the Lease. Any such Guarantor will want to avoid assuming new liability by signing this Guarantor’s Confirmation, but should be willing to provide the comfort offered here, assuming the Guaranty or the Lease requires it. Although this language is fairly short, the parties may wish to trim it further.

## GUARANTOR’S CONFIRMATION

**THIS GUARANTOR’S CONFIRMATION** (the “Confirmation”) is delivered by \_\_\_\_\_, a \_\_\_\_\_ (“Guarantor”). All parties entitled to rely on the above Estoppel Certificate may rely on and enforce this Confirmation. Definitions in that Estoppel Certificate apply in this Confirmation. The “Guaranty” means the [Lease Guaranty] dated \_\_\_\_\_, 20\_\_, signed by Guarantor in favor of Landlord. Only as of the Effective Date, Guarantor confirms:

### A. Status

The Guaranty and the Lease remain in full force and effect. No defense, claim, counterclaim, or offset exists against Guarantor’s obligations under the Guaranty. The Guaranty has not been amended, released, or waived, in whole or in part. Nothing has occurred that would in any way render Landlord liable to Guarantor.

### B. Copy

**Exhibit** \_\_ consists of a true and correct copy of the Guaranty.<sup>21</sup>

### C. Estoppel Certificate

Guarantor [consents to the Estoppel Certificate and]<sup>22</sup> shall be estopped by and shall assert nothing inconsistent with the Estoppel Certificate, but makes no representations or warranties beyond any in the Guaranty, all of which remain accurate [in all material respects].

### D. Address

Guarantor’s address for notices in the Guaranty remains correct.

### E. SNDA

If by operation of the Subordination, Nondisturbance, and Attornment Agreement dated \_\_\_\_\_,

20\_\_ among Tenant, Landlord, and Lender, the Lease becomes a direct lease between Tenant and Lender or its designee, the new landlord under that Lease shall have the benefit of, and may enforce, the Guaranty.

If multiple guarantors signed the Guaranty, then Guarantor provides this Confirmation only as it relates to Guarantor, and not as it relates to any other signer.

#### [GUARANTOR SIGNATURE BLOCK]

#### Notes

- 1 For problems that first arise after closing, Lenders rely on other mechanisms, such as a subordination, nondisturbance, and attornment agreement (an "SNDA"). An Estoppel Certificate focuses on the condition of leases and tenancies only at the moment of closing. Sometimes Lender's counsel will try to expand an Estoppel Certificate to include post-closing obligations. Some examples of that appear in the optional provisions below. That approach may create issues and problems, hence is disfavored.
  - 2 For added comfort, though, Landlord will also want to include a provision in the Lease in which Tenant agrees to sign any other reasonable form of Estoppel Certificate that a Lender or Buyer later requires.
  - 3 Such certificates, when given, are often called "Seller Estoppel Certificates" or "Borrower Estoppel Certificates." In fact, they are not Estoppel Certificates at all, but warranty certificates that often repeat ordinary representations and warranties from the underlying deal documents. If they don't come from a creditworthy party—or if they are subject to the nonrecourse clause in the loan documents or limitations of liability in a purchase and sale agreement—then they add little or no value.
  - 4 The issue of pure "subordination" rarely matters much. For more on SNDA's, see Joshua Stein, "Needless Disturbances? Do Nondisturbance Agreements Justify All the Time and Trouble?," 37 American Bar Association Real Property, Probate and Trust Journal, Winter 2003, at 701.
  - 5 Ideally, the Lease should: (a) attach a form of Estoppel Certificate to avoid all discussions and deliberations suggested in this Estoppel Certificate and its cover notes and footnotes; and (b) require Tenant to provide other assurances as a future Lender or Buyer reasonably requests.
  - 6 Tenant may ask why this Estoppel Certificate should bestow any rights or benefits on Landlord or in any way alter the Landlord-Tenant relationship. The Estoppel Certificate is being requested for a third party dealing with Landlord. Why should that fortuitously give Landlord any benefit? Tenant's position is reasonable, at least for a refinancing. If Landlord simultaneously acquires the Property, then Landlord should have the right to rely upon an Estoppel Certificate.
  - 7 List all documents that define Tenant's rights and obligations. Don't miss letter agreements, option exercise notices, previous Estoppel Certificates that modified the Lease (although such Estoppel Certificates are inadvisable), written waivers, arbitration awards, judgments, and other substantive documents that define the Landlord-Tenant relationship.
  - 8 What about refunds Landlord might owe for previous years' overpayments of escalation rents and percentage rents? The references later in this sentence to refunds and overpayments may cover such refunds, but one might want more comfort.
- 9 This language is broad enough to capture any refunds due from prior overpayments of real estate taxes.
  - 10 It would be off-market but conceivable to add: "Tenant does not now contemplate doing so. All statements in this paragraph were correct at all times in the last 12 months."
  - 11 As noted above, Tenant may argue that the Estoppel Certificate should not benefit Landlord.
  - 12 Use this paragraph only if: (a) Lender plans to rely on the Estoppel Certificate in place of Lease review; or (b) because of escalation formulas, the actual current rent cannot be determined from the face of the Lease. The reliance mentioned in item "(a)" may be "unreasonable" if the Estoppel Certificate doesn't match the Lease. This approach often triggers objections from both Landlord and Tenant because of the extra work it creates and the risk it places on Tenant. In general, if anyone can identify a date or a number by reading the Lease, Tenant can reasonably object to confirming it here.
  - 13 Add only if uncertainty exists. Use this provision to pin down any other significant but otherwise uncertain dates.
  - 14 Tenant should insist that Landlord countersign this Estoppel Certificate, or otherwise approve and confirm the concept in this paragraph.
  - 15 This paragraph collects in one place the provisions in an SNDA that typically trigger Tenant objections. A Lender can certainly add more items to this list.
  - 16 If Lender takes Previous Lender's mortgage by assignment, does Lender have the option of not being bound by the SNDA that Previous Lender signed?
  - 17 Include this paragraph only if circumstances require, for example because the parties cannot locate a complete copy of the Lease and all amendments. This paragraph is unlikely to be included if the parties plan to record the Estoppel Certificate. If the parties need to use this paragraph, Landlord should also join in the Estoppel Certificate to confirm Landlord concurs with Tenant's identification of the entire Lease.
  - 18 This and the next paragraph are unusual and rarely seen.
  - 19 This sentence is nonstandard but seeks to ferret out pending Lease amendments, which could be material.
  - 20 This may be overkill. The author knows of transactions in which Seller or Borrower used strategic loans or gifts to Tenants to mask chronic payment problems with Tenants.
  - 21 Include only if circumstances dictate.
  - 22 Include this language if the Estoppel Certificate amends the Lease in some way.