

**Master Lease
Subordination, Non-
Disturbance and
Attornment Agreement**
Section 232

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

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RECORDING REQUESTED BY
AND WHEN RECORDED RETURN TO:

(Space above this line for Recorder's Use)

**[SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT]
OR [SUBORDINATION AGREEMENT]
(For Master Lease Transactions)**

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.

THIS AGREEMENT ("**Agreement**"), made as of this _____ day of _____, 2_____, by and among the entities listed as borrowers on Schedule 1 attached hereto (collectively and individually "**Borrower**" or "**Landlord**"), as Landlord under the Master Lease hereinafter described, _____, a _____, as Master Tenant under the said Master Lease (the "**Master Tenant**"), the entities listed as operators on Schedule 1 (collectively and individually "**Subtenant**" or "**Operator**"), as subtenant of Master Tenant under the Sublease hereinafter described, and _____, a _____ ("**Lender**"), the owner and holder of the Security Instrument hereinafter described.

WITNESSETH:

WHEREAS, each Borrower has or will execute a Healthcare Facility Note (collectively and individually “**Note**”) evidencing a loan from Lender to Borrower (the “**Loan**”) secured by, *inter alia*, a Healthcare [*Mortgage, Deed of Trust, Deed to Secure Debt, or other designation*], Assignment of Leases, Rents and Revenue, and Security Agreement (collectively and individually “**Security Instrument**”). The Security Instrument is more specifically described on Schedule 1. The real property encumbered by the Security Instrument is described on Schedule 2 attached hereto and incorporated herein by this reference (the “**Land**”), and the Security Instrument also encumbers the healthcare facility that is operated on the Land and authorized to receive insured mortgage financing pursuant to Section 232 of the National Housing Act, as amended or any subsequent legislation (collectively and individually “**Healthcare Facility**”) and any other improvements situated on the Land (collectively and individually “**Improvements**”), (the Land, the Healthcare Facility, and any other Improvements, together with any and all assets of whatever nature or wherever situated related to the Loan, are hereinafter sometimes referred to as the “**Project**”). The Note is being insured by the Federal Housing Administration (“**FHA**”), an organizational unit of the United States Department of Housing and Urban Development (“**HUD**”) under the provisions of Section 232 of the National Housing Act and the regulations promulgated thereunder; and

WHEREAS, Borrower and Master Tenant have entered into that certain [**unrecorded**] [**title of Master Lease**] [**dated** ___ ___ , 2___/of even date herewith] (as the same may be amended from time to time, the “**Master Lease**”), relating to the Healthcare Facility for the term and upon the conditions set forth therein; and

WHEREAS, Master Tenant and each Operator have entered into a sublease relating to such Operator’s operation of a Healthcare Facility, for the term and upon the conditions set forth therein (each a “**Sublease**”); and

WHEREAS, Master Tenant and each Operator are each executing a regulatory agreement in favor of HUD in connection with the Loan (each as the same may be amended, modified and/or restated, from time to time, respectively, a “**Master Tenant Regulatory Agreement**” and an “**Operator Regulatory Agreement**”) which are being recorded against the Project; and

WHEREAS, in connection with the Loan, each Borrower and HUD entered into a Healthcare Regulatory Agreement - Borrower, which agreement is being recorded against the Project (as the same may be amended, modified and/or restated, from time to time, the “**Borrower Regulatory Agreement**”). The documents and instruments that evidence, secure and govern the Loan (including but not limited to the Note, the Security Instrument, the Borrower Regulatory Agreement, the Master Tenant Regulatory Agreement, the Operator Regulatory Agreement, 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**”; and

WHEREAS, the Master Lease and each Sublease are being assigned by the Master Tenant to the Lender to secure the Loan; 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. Unless otherwise provided, capitalized terms used herein are defined in Section 10, and where not otherwise defined shall have the meaning given them in the Security Instrument.

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 Master Lease and Sublease, all terms and conditions set forth in the Master Lease and Sublease, the leasehold interests and estates created thereby, and the priorities, rights, privileges and powers of Master Tenant, Operator and Landlord 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 Security Instrument, all terms and conditions contained therein, any renewals, extensions, modifications or replacements thereof, and the rights, privileges and powers of the Lender thereunder, and shall hereafter be junior and inferior to the lien and charge of the Security Instrument, all on the terms and conditions of this Agreement. The parties further agree as follows:

1. Relationship to Other Agreements. It is expressly understood and agreed that this Agreement shall supersede, to the extent inconsistent herewith, the provisions of the Master Lease and Sublease relating to the subordination of the Master Lease and Sublease and the leasehold interests and estates created thereby to the lien or charge of the Security Instrument.

2. Consent to Leases. Lender consents to the Master Lease and Sublease, including any amendments to either of them proposed in connection with the Project and disclosed to Lender.

3. Project Operating Deficiencies.

(a) For purposes herein, any of the following circumstances constitute a “**Project Operating Deficiency**”:

(i) The Operator fails to make any payments pursuant to the Borrower-Operator Agreement, if such payments are intended to be used by Borrower to make the required debt service payments pursuant to the Loan Documents and if such failure, in HUD’s discretion, has a materially adverse effect on the Project;

(ii) Debt service coverage, as calculated in accordance with HUD underwriting procedures, is below 1.0 for one quarter and if, upon request by HUD or lender, the operator does not promptly provide a plan that is acceptable to HUD to improve financial operations;

(iii) Centers for Medicare and Medicaid Services (“**CMS**”), or any applicable or successor authority, issues a notice to Operator of a denial of payments by CMS (or a fiscal intermediary) for new admissions at the Healthcare

Facility and either (1) HUD concludes that the operator is not diligently and adequately working to address such denial of payments or (2) despite operator effort such denial is not released within one hundred twenty (120) days;

(iv) CMS designates the Healthcare Facility to be a “**Special Focus Facility**” or another Governmental Authority has made an equivalent designation;

(v) A notice is issued to Operator of a proposed denial, proposed refusal to issue, or proposed termination of the Permits and Approvals for the Healthcare Facility and either (1) HUD concludes that the operator is not diligently and adequately working to address the matter or (2) despite operator effort that proposed denial, proposed refusal to issue or proposed termination is not rescinded within 120 days; or

(vi) A second revisit survey is required as a result of failure to clear deficiencies cited in any survey or equivalent examination by applicable Governmental Authority.

(b) Operator shall give written notice to HUD and the Lender of any Project Operating Deficiency within two (2) business days of the occurrence of same.

(c) If a Project Operating Deficiency occurs, Lender may provide Operator with notice of the Project Operating Deficiency and, with HUD’s consent, request that Operator select and engage the services of a management consultant (“**Consultant**”). HUD shall not grant its consent if HUD is exercising its rights to request a Consultant pursuant to the Operator Regulatory Agreement. Upon Lender’s notice and request, Operator shall select and engage the services of a Consultant for the period of time necessary to remedy such Project Operating Deficiency. Such Consultant shall be unaffiliated with Operator and must be approved in advance by HUD and Lender. HUD and Lender shall not unreasonably withhold or delay their approval of the Consultant.

(d) If Operator fails to select and engage a Consultant within ten (10) days after Operator’s receipt of such notice and request by Lender, HUD and/or the Lender may select and engage a Consultant and give notice of the same to Operator. Operator shall be responsible for the payment of all reasonable fees and expenses which such Consultant incurs in carrying out its duties with respect to the Project.

(e) Consultant shall review the management of the Project, make recommendations to Operator for the correction of the Project Operating Deficiency and, subject to applicable Legal Requirements governing the confidentiality of patient records, have complete access to the Project and its records, offices and facilities in order to carry out its duties under such engagement. Operator shall instruct Consultant to prepare and deliver to HUD, the Lender and Operator a written report of Consultant’s recommendations within thirty (30) days after its engagement.

(f) Operator shall promptly implement any and all reasonable recommendations made by Consultant in order to promptly correct or cure the Project Operating Deficiency;

provided, however, that in no event shall Operator implement any recommendation that would constitute a violation of applicable Legal Requirements or would otherwise constitute a default under the Loan Documents unless HUD and the Lender consent in writing to such recommendation. HUD and Lender may give or withhold their consent in their sole and absolute discretion. Nothing herein shall impose any liability or obligation on HUD or the Lender to (a) request the appointment of a Consultant or (b) otherwise remedy such Project Operating Deficiency, nor shall anything in this Section 3 cause HUD or the Lender to be deemed the operator of the Healthcare Facility.

A Project Operating Deficiency is not necessarily an Event of Default and shall not be considered an Event of Default unless such circumstance meets the requirements for an Event of Default pursuant to the relevant Loan Document.

4. Master Tenant and/or Operator Rights to Cure.

[Remove this Section 4 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 Borrower default to Master Tenant and Operator, provided that there is no Material Risk of Termination, and there is no payment default under the Loan Documents: (i) Lender shall provide Master Tenant and Operator a concurrent thirty (30) days to cure any default by Borrower 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 Master Tenant and Operator an additional concurrent ninety (90) days. 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.

5. Release of a Project from Master Lease.

Upon the occurrence of any of the following events, the Lender and HUD shall consent to: (a) termination of the Operator Regulatory Agreement and the Master Tenant Regulatory Agreement related to the applicable Project; (b) release of the Project from the Master Lease; and (c) termination, amendment, and/or assignment of the Sublease (collectively, a “**Master Lease Release**”):

- (i) the bona fide sale or assignment by Landlord to a third party which is not an Affiliate of Landlord of the interests of Landlord in the Project;
- (ii) the bona fide sale or assignment by Operator to a third party which is not an Affiliate of Operator of the interests of Operator in the Project;
- (iii) the payment in full of the Loan; or

- (iv) any date upon which either (1) the contract of mortgage insurance is no longer in effect with regard to the Loan, or (2) HUD is no longer the owner, holder or insurer of the Loan;

provided, that:

- (1) each such preceding event is subject to consent by Lender and HUD to the extent set forth in the Loan Documents and Program Obligations;
- (2) each such preceding event may be subject to the rights of Borrower, Master Tenant, and Operator, as applicable, pursuant to the Master Lease and/or Sublease;
- (3) the Lender and HUD receive a written application of Master Tenant and/or Operator, as applicable, for each such release (each, a “**Release Application**”); and
- (4) the following conditions are satisfied:

- (A) the Lease Coverage Ratio with respect to the healthcare facilities that will remain subject to the Master Lease after such Master Lease Release is at least 1.45 to 1.00 as of the date the Lender receives a Release Application, subject to HUD’s right to reduce the required Lease Coverage Ratio;

- (B) in connection with subsections (i) and (ii) above, the purchaser or assignee of the interests of the Landlord or Operator in the Project obtains previous participation clearance and completes the documents required by Program Obligations; and

- (C) in connection with subsections (i) and (ii) above, HUD reasonably approves the purchaser or assignee of the interests of the Operator in the Project as a qualified operator of the Healthcare Facility in accordance with Program Obligations, including without limitation HUD’s normal and customary criteria applied in evaluating the experience, reputation, litigation and claims history, insurability, and financial strength of a proposed operator of the Healthcare Facility.

6. Lender’s Right to Cure.

(a) Master Tenant and Operator hereby each agrees that it will not exercise any right granted to them under the Master Lease and Sublease, respectively, or which it might otherwise have under applicable law, to terminate the Master Lease on account of a default of Borrower, or to terminate the Sublease as a result of a default of Master Tenant, 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, Master Tenant shall not take any action to terminate the Master Lease, and Operator shall not take any action to terminate the Sublease, if Lender (i) within thirty (30) days after such notice, shall cure such default or event if the same can be cured by the payment or expenditure of money, or (ii) shall diligently take action to obtain possession of the Project (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 one hundred eighty (180) days after such written notice to Lender by Master Tenant or Operator of its intention to terminate.

Notwithstanding any other provision of this Agreement, in no event shall Master Tenant declare a default of the Master Lease against Borrower if Master Tenant is affiliated with Borrower, nor shall Operator declare a default of the Sublease against Master Tenant if Operator is affiliated with Master Tenant, unless either is requested to do so by HUD.

(b) For the purposes of facilitating Lender's rights hereunder, Lender shall have, and for such purposes is hereby granted by Borrower, Master Tenant and Operator, the right to enter upon the Project thereon for the purpose of affecting any such cure.

(c) Master Tenant and Operator each hereby agrees to give to Lender concurrently with the giving of any notice of default under the Master Lease or Sublease, a copy of such notice by mailing the same to Lender in the manner set forth hereinbelow, and no such notice given to Borrower or Master Tenant which is not at or about the same time also given to Lender shall be valid or effective against Lender for any purpose.

7. Attornment and Non-Disturbance. **[Remove this Section 7 if using Subordination Agreement for affiliated Borrowers and Operators, and insert "Intentionally Omitted" to preserve paragraph enumeration]**. In the event Lender or any other purchaser at a foreclosure sale or sale under private power contained in the Security Instrument, or by acceptance of a deed in lieu of foreclosure, succeeds to the interest of Landlord under the Master Lease, it is agreed as follows:

(a) Master Tenant shall be bound to Lender or such other purchaser pursuant to all of the terms, covenants and conditions of the Master Lease for the balance of the term thereof (as the same may be extended in accordance with its terms), with the same force and effect as if Lender or such other purchaser were the lessor originally named in such Master Lease, and Master Tenant 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 Landlord under the Master Lease.

(b) Subject to the observance and performance by Master Tenant and Operator of all the terms, covenants and conditions of the Master Lease and Sublease, respectively, Lender or such other purchaser shall recognize the leasehold estates of Master Tenant and Operator under the Master Lease and Sublease for the balance of their terms (as the same may be extended in accordance with the provisions of the Master Lease and/or Sublease) with the same force and effect as if Lender or such other purchaser were the lessor under the Master Lease, and the Master Lease and Sublease shall remain in full force and effect and shall not be terminated, except in accordance with the terms of the Master Lease, Sublease or this Agreement; provided, however, that Lender or such other purchaser shall not be (a) liable for any act or omission of Landlord, or any other prior lessor, (b) obligated to cure any defaults of Landlord, or any other prior lessor under the Master Lease which occurred prior to the time that Lender or such other purchaser succeeded to the interest of Landlord or any other prior lessor under the Master Lease (c) subject to any offsets or defenses which Master Tenant or Operator may be entitled to assert

against Landlord, or any other prior lessor, (d) bound by any payment of rent or additional rent by Master Tenant to Landlord or Operator to Master Tenant, or any other prior lessor for more than one (1) month in advance, (e) bound by any amendment or modification of the Master Lease made without the written consent of Lender or such other purchaser, or (f) liable or responsible for or with respect to the retention, application and/or return to Master Tenant or Operator of any security deposit paid to Landlord, or any other prior lessor, whether or not still held by Landlord unless and until Lender or such other purchaser has actually received for its own account as lessor the full amount of such security deposit.

Notwithstanding any other provision of this Agreement, the provisions of this Section 7(b) are conditioned upon Borrower at all times having no identity of ownership interest with either of the Master Tenant or Operator.

8. Subject to the terms and conditions of this Agreement, the Master Lease and Sublease and all estates, rights, options, liens and charges therein contained or created under the Master Lease and Sublease are and shall be subject and subordinate to the lien or interest of (a) the Security Instrument on the Landlord's interest in the Project in favor of Lender, its successors and assigns insofar as it affects the real and personal property comprising the Project, and to all renewals, modifications, consolidations, replacements and extensions thereof, and to all advances made or to be made thereunder, to the full extent of amounts secured thereby and interest thereon, (b) the Borrower Regulatory Agreement, (c) the Master Tenant Regulatory Agreement, (d) the Operator Regulatory Agreement, and (e) any security agreements entered into by Master Tenant and/or Operator relating to the Project. The parties to the Master Lease and Sublease agree to execute and deliver to Lender and/or HUD such other instrument or instruments as the Lender and/or HUD, or their respective successors or assigns, shall reasonably request to effect and/or confirm the subordination of the Master Lease and Sublease to the lien of the Security Instrument and the above-described Regulatory Agreements and security agreements.

9. Notices. All notices, demands and other communications ("**Notice**") under or concerning this Agreement shall be in writing. Each Notice shall be addressed to the intended recipients at their respective addresses set forth herein, and shall be deemed given on the earliest to occur of (1) the date when the Notice is received by the addressee; (2) the first or second Business Day after the Notice is delivered to a recognized overnight courier service, with arrangements made and payment of charges for next or second Business Day delivery, respectively; or (3) the third Business Day after the Notice is deposited in the United States mail with postage prepaid, certified mail, return receipt requested.

Any Notice hereunder shall be addressed as follows:

To Master Tenant
and Operator: _____

Attn: _____
Tel: _____

Fax: _____

With a copy to:

Attn: _____
Tel: _____
Fax: _____

To Landlord:

Attn: _____
Tel: _____
Fax: _____

To Lender:

Attn: _____
Tel: _____
Fax: _____

or to such other address as a party may hereafter notify the other parties in writing by notice sent to the above address.

10. MISCELLANEOUS.

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

(b) Governing Law. This Agreement shall, in all respects, be governed by and construed and interpreted in accordance with the laws of _____ (insert state governing the master lease).

(c) Agreement Runs with Land. 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.

(d) **Definitions.** For the purposes of this Agreement, except as otherwise expressly specified or required or unless the context clearly indicates a contrary intent, the following words shall be defined as follows:

“**Affiliate**” is defined in 24 CFR 200.215, or any successor regulation.

“**EBITDAR**” means, relating to any period, the following amounts of the Operators on a consolidated basis for all the Healthcare Facilities, other than the Healthcare Facility proposed to be released from the Master Lease: earnings (net income or net loss) from operations before (a) interest expense, (b) income tax expense, (c) depreciation expense, (d) amortization expense, and (e) fixed rent payments pursuant to the Subleases.

“**Governmental Authority**” shall mean any court, board, agency, commission, office or other authority of any nature whatsoever for any governmental unit (federal, state, county, district, municipal, city or otherwise), including Healthcare Authorities, whether now or hereafter in existence.

“**Healthcare Authorities**” shall mean any Governmental Authority or quasi-Governmental Authority or any agency, intermediary, board, authority or entity with jurisdiction over the ownership, operation, use or occupancy of the Healthcare Facility as a skilled nursing or assisted living facility or nursing home.

“**Lease Coverage Ratio**” shall mean a ratio for the preceding twelve (12) month period in which:

(a) the numerator is EBITDAR of the Operators for such period as set forth in the financial statements required hereunder for that period; and

(b) the denominator is the amount of principal and interest due and payable on the Loans (exclusive of any prepayment penalties or premiums).

“**Legal Requirements**” shall mean all federal, state, county, municipal and other governmental statutes, laws, rules, orders, regulations, ordinances, judgments, decrees and injunctions of Governmental Authorities or Healthcare Authorities affecting the Project or any part thereof, or the construction, use, alteration or operation thereof, or any part thereof, whether now or hereafter enacted and in force, and all permits, licenses and authorizations and regulations relating thereto, and all covenants, agreements, restrictions and encumbrances contained in any instruments, either of record or known to Operator, at any time in force affecting the Project or any part thereof, including, without limitation, any which may (a) require repairs, modifications or alterations in or to the Project or any part thereof, or (b) in any way limit the use and enjoyment thereof.

“**Material Risk of Termination**” shall be deemed to occur when any of the applicable Permits and Approvals 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.

“Permits and Approvals” has the meaning set forth in the Operator Regulatory Agreement.

SIGNATURE PAGE

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

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

(Insert appropriate signature blocks for each)

LENDER: 

MASTER TENANT: 

OPERATOR: 

LANDLORD: 

SCHEDULE 1

(include at least the following information:)

BORROWER	OPERATOR	FACILITY NAME	FACILITY ADDRESS	SECURITY INSTRUMENT

SCHEDULE 2

[insert all legal descriptions]

