

2020-002331

Klamath County, Oregon

02/26/2020 01:52:04 PM

Fee: \$157.00

RECORDING REQUESTED BY AND
WHEN RECORDED MAIL TO:

MORGAN STANLEY PRIVATE BANK, NATIONAL ASSOCIATION

2000 Westchester Avenue
Purchase, New York 10577
Attention:

RE: []

**SUBORDINATION,
NON-DISTURBANCE AND ATTORNMEN AGREEMENT**

NOTICE: THIS SUBORDINATION, NON-DISTURBANCE AND ATTORNMEN AGREEMENT RESULTS IN YOUR LEASEHOLD ESTATE IN THE PROPERTY BECOMING SUBJECT TO AND OF LOWER PRIORITY THAN THE LIEN OF SOME OTHER OR LATER SECURITY INSTRUMENT.

THIS AGREEMENT (this "Agreement") is entered into this 31st day of January, 2020, by and among K Falls Fit LLC, an Oregon limited liability company, dba Planet Fitness ("Tenant"), Red Knight, LLC, an Oregon limited liability company, K Falls Center LLC, an Oregon limited liability company, L-39, an Oregon limited liability company and DKM2, LLC, an Oregon limited liability company, as tenants in common ("Borrower" or "Landlord"), and Morgan Stanley Private Bank, National Association ("Lender").

RECITALS

- A. Tenant is the lessee and Borrower is the lessor under that certain lease dated March 4, 2019 (the "Lease"). Lease recorded 3/21/19 as #2019-002586
- B. Borrower has requested that Lender make a loan (the "Loan") to Borrower to be secured by a mortgage, deed of trust or security deed from Borrower to Lender (the "Security Instrument"), covering the property wherein the premises (the "Premises") covered by the Lease are located, which Property is described more fully in Exhibit "A" attached hereto (the "Property").
Deed of Trust recorded 2/26/2020 as #2020-002315
- C. Lender is willing to make the requested loan (the "Loan"), provided that, among other things as a condition precedent thereto, Borrower and Tenant execute this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and in order to induce Lender to make the requested loan, Tenant, Borrower, and Lender hereby agree and covenant as follows:

1. Tenant and Lender hereby agree that the Lease (including specifically, without limitation, any option or options to purchase or rights of first refusal affecting the Property, or any portion thereof, contained therein) is and shall at all times be subject and subordinate in all respects (a) to the Security Instrument and all other loan documents executed in connection with the Loan (the "Loan Documents"), and to all renewals, modifications, extensions, substitutions, rearrangements and/or replacements thereof, and (b) to any and all renewals, modifications, replacements, extensions substitutions and/or rearrangements of any

and all obligations and indebtedness secured by the Security Instrument, subject, however, to the terms and conditions hereinafter set forth in this Agreement.

2. If the interests of Borrower are acquired by Lender or any successor to or transferee of Lender, including, without limitation, any purchaser at a foreclosure sale, whether by foreclosure, deed in lieu of foreclosure or any other method (any such successor, assignee or transferee and its successors and assignee being hereinafter referred to as "Purchaser"), the Lease and the rights of Tenant thereunder shall continue in full force and effect and, provided no default exists under the Lease which continues beyond applicable notice and cure periods, shall not be terminated or disturbed except in accordance with the terms of the Lease or this Agreement. In addition, Tenant's right of quiet and exclusive possession of the Premises, and its other rights and privileges arising under the Lease, or under any extensions or renewals thereof, shall all be fully recognized by Lender or Purchaser and shall not be disturbed, canceled, terminated, diminished, or otherwise interfered with by Lender or Purchaser and Tenant's occupancy shall not be disturbed by Lender or Purchaser during the term of the Lease, or any extensions or renewals thereof. Tenant shall be bound to Lender, or any Purchaser under all of the terms, covenants and conditions of the Lease for the balance of the term thereof remaining, and any extension or renewal thereof which may be effected in accordance with any option contained in the Lease, with the same force and effect as if Lender or Purchaser were named lessor under the Lease, and Tenant does hereby attorn to Lender, its successors and assigns, as its lessor, said attornment to be effective and self-operative immediately upon Lender or Purchaser succeeding to the interest of Borrower under the Lease without the execution of any other or further instruments on the part of any party hereto. Tenant, at no additional cost to Tenant and without limiting Tenant's rights nor increasing Tenant's obligations under the Lease, shall do all acts and execute all such instruments as shall be reasonably requested by Lender or Purchaser to do or execute for the purposes fully carrying out and effectuating this Agreement and the intent hereof, and evidencing this Agreement whether by filing with any public office or agency or otherwise.
3. Tenant agrees that during the term of the Lease, Tenant will not, without Lender's written consent:
 - (a) pay any rent or additional rent in advance for more than one month to any landlord (including Borrower), except to the extent that the Lease expressly requires such a prepayment; or
 - (b) enter into any modification or amendment of the Lease, or any waiver of any terms of the Lease, which has the effect of (i) reducing the rent and other amounts payable by Tenant under the Lease, (ii) shortening the term of the Lease or (iii) altering the financial obligations imposed on any landlord under the Lease (including Borrower).
4. If Lender or any Purchaser succeeds to the interest of Borrower under the Lease and if Tenant then is not, and for so long as Tenant is not in default of the terms, provisions and conditions of the Lease and this Agreement beyond applicable notice and cure periods, Lender shall be bound to Tenant under all of the terms, covenants and conditions of the Lease, and Tenant shall, from and after Lender's succession to the interests of Borrower under the Lease, have the same remedies against Lender for breach of the Lease that Tenant would have had under the Lease against Borrower if Lender had not succeeded to the interests of Borrower; provided, however, that Lender shall not be liable or bound by any of the following matters:
 - (a) Any right or alleged right of Tenant to any offset, defense, claim, counterclaim, reduction, deduction, or abatement against Tenant's payment of rent or performance of Tenant's other obligations under the Lease, arising (whether under the Lease or other applicable law) from the landlord's breach or default under the Lease ("Offset Right") that Tenant may have against any landlord under the Lease (including Borrower) relating to any event or occurrence before the date of attornment (except to the extent such Offset Right is expressly provided under the terms of the Lease), including any claim for

damages of any kind whatsoever as the result of any breach by the landlord under the Lease (including Borrower) that occurred before the date of attornment. The foregoing shall not limit either (i) Tenant's right to exercise against Lender or Purchaser any Offset Right otherwise available to Tenant because of events occurring after the date of attornment, or (ii) Lender's or Purchaser's obligation to correct any conditions that existed as of the date of attornment and violate Lender's or Purchaser's obligations as landlord under the Lease.); or

- (b) Any payment of rent that Tenant may have made to any landlord under the Lease (including Borrower) 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 date of attornment other than, and only to the extent that, the Lease expressly required such a prepayment; or
 - (c) Any obligation to pay Tenant any sum(s) that any prior landlord under the Lease (including Borrower) owed to Tenant, specifically excluding the landlord's obligation under the Lease to pay or reimburse Tenant (through allowance or otherwise) for any alterations, demolition, or other improvements or work at the Premises ("Construction-Related Obligations"). Construction-Related Obligations shall not include: (a) reconstruction or repair following fire, casualty or condemnation; or (b) day-to-day maintenance and repairs; or
 - (d) Any modification or amendment of the Lease, or any waiver of any terms of the Lease, which has the effect of (i) reducing the rent and other amounts payable by Tenant under the Lease, (ii) shortening the term of the Lease or (iii) altering the financial obligations imposed on the landlord under the Lease (including Borrower), made without Lender's written consent; or
 - (e) Any consensual or negotiated surrender, cancellation, or termination of the Lease, in whole or in part, agreed upon between Borrower and Tenant, unless effected unilaterally by Tenant pursuant to the express terms of the Lease; or
 - (f) Any Construction-Related Obligation to be performed by any landlord under the Lease (including Borrower), specifically excluding Landlord's Work.
5. Borrower, Tenant and Lender agree that unless Lender shall otherwise expressly consent in writing, fee title to the Property and the leasehold estate created by the Lease shall not merge but shall remain separate and distinct, notwithstanding the union of said estates either in the Borrower or the Tenant or any third-party by purchase, assignment or otherwise.
6. Tenant, from and after the date hereof, shall send a copy of any notice of default by the landlord under the Lease to Lender at the same time such notice or statement is sent to the landlord under the Lease. Such notices shall be delivered to Lender at the following address:

MORGAN STANLEY PRIVATE BANK, NATIONAL ASSOCIATION
2000 Westchester Avenue
Purchase, New York 10577
Attention:

7. Anything herein or in the Lease to the contrary notwithstanding, in the event that Lender or any Purchaser shall acquire title to the premises covered by the Lease, neither Lender nor Purchaser shall have any obligation, or incur any liability, beyond Lender's or Purchaser's (as applicable) then interest, if any, in the Premises, including insurance and condemnation proceeds and all profits from the Premises (collectively, the "Successor Landlord's Interest"), and Tenant shall look exclusively to such Successor Landlord's Interest, if any, in the Premises for the payment and discharge of any obligations imposed upon Lender and Purchaser hereunder or under the Lease.

8. While Borrower may have made representations as to an intended use of the proceeds of the Loan, the parties to this Agreement hereby agree that any such use is not material to this Agreement and Lender has no obligation to Tenant or otherwise to assure or exert any control over the use of the proceeds of the Loan. Any application or use of such proceeds for purposes other than those provided for in any of the Loan Documents shall not defeat the subordination herein made, either in whole or in part.
9. In the event of default by Borrower in its performance of the terms, provisions and conditions of any Loan Document, Tenant agrees to recognize the assignment of the lease made by Borrower to Lender pursuant to the Assignment of Leases and, following thirty (30) days written notice from Lender to Tenant, shall pay to Lender, as assignee, the rents under the Lease which are due or which would become due to Borrower under the terms of the Lease at or after the time Lender gives Tenant such notice that Borrower is in default under the terms of any of the Loan Documents and directs Tenant to pay the rents under the Lease to Lender, without inquiry as to whether a default actually exists under the Loan and notwithstanding any contrary instructions of or demands from Borrower. Such payments of rents to Lender by Tenant by reason of such assignment and of Borrower's default shall continue until the first to occur of the following:
- (a) No further rent is due or payable by Tenant under the Lease;
 - (b) Lender gives Tenant thirty (30) days notice that the default of Borrower under the Loan Documents has been cured and instructs Tenant that the rents shall thereafter be payable to Borrower; or
 - (c) The lien of the Security Instrument has been foreclosed and Purchaser gives Tenant notice of such foreclosure. Purchaser shall thereupon succeed to the interests of Borrower under the Lease as provided in Paragraphs 3 and 4 hereof, after which time the rents and other benefits of Borrower under the Lease shall be payable to Purchaser as the owner thereof.
10. In complying with the provisions of Paragraph 9 hereof, Tenant shall be entitled to rely solely upon the notices given by Lender which are referred to in Paragraph 9 hereof and Borrower agrees to indemnify, defend and hold Tenant harmless from and against any and all loss, claim, damage or liability arising out of Tenant's compliance with such notice. Tenant shall be entitled to full credit under the Lease for any rents paid to Lender or other Purchaser in accordance with the provisions of Paragraph 9 hereof to the same extent as if such rents were paid directly to Borrower. Any dispute between Lender (or other Purchaser) and Borrower as to the existence or continuance of a default by Borrower under the terms of any of the Loan Documents, or with respect to the extent or nature of such default, or with respect to foreclosure of the Security Instrument by Lender, shall be dealt with and adjusted solely between Lender (or other Purchaser) and Borrower, and Tenant shall not be made a party thereto (unless required by law).
11. So long as the Lease has not been terminated on account of Tenant's default that has continued beyond applicable cure periods, Lender shall not name or join Tenant as a defendant in any exercise of Lender's rights and remedies arising upon a default under the Loan unless applicable law requires Tenant to be made a party thereto as a condition to proceeding against Borrower or prosecuting such rights and remedies. In the latter case, Lender may join Tenant as a defendant in such action only for such purpose and not to terminate the Lease or otherwise adversely affect Tenant's rights under the Lease or this Agreement in such action.
12. Borrower acknowledges and agrees for itself and its heirs, successors and assigns that this Agreement does not constitute a waiver by Lender of any of Lender's rights under any of the Loan Documents or in any way release Borrower from its obligations to comply with the terms, provisions, conditions, covenants, agreements and clauses of the Loan Documents, and each of them.

13. This Agreement shall be the whole and only agreement with regard to the subordination of the Lease and the leasehold estate created thereby, together with all rights and privileges of Tenant thereunder, to the lien or charge of the Loan Documents. Lender's rights under the Loan Documents and the liens thereof, shall supersede and cancel any prior agreements as to such subordination, including, but not limited to, those provisions contained in the Lease which provide for the subordination of the Lease and the leasehold estate created thereby; to a deed or deeds of trust or to a mortgage or mortgages, but only insofar as such other agreements would affect the priority between the Lease and the Loan Documents. Tenant acknowledges that this Agreement satisfied any condition or requirement in the Lease related to Lender granting a non-disturbance agreement in favor of Tenant.
14. This Agreement may not be modified orally or in any other manner other than by an agreement in writing signed by the parties hereto or their respective successor in interest. This Agreement shall inure to the benefit of and be binding upon the parties hereto, and their respective heirs, successors and assigns.
15. This Agreement shall be governed by and construed under the laws of the State where the Premises is situated.
16. [Intentionally deleted].
17. If any action or proceeding is brought by any party against any other party under this Agreement, the prevailing party shall be entitled to recover for the fees of its attorneys in such action or proceeding in such amount as the court may adjudge reasonable.
18. All notices and demands which may or are required to be given by any party to any other party hereunder shall be in writing and shall be deemed to have been fully given when deposited in the United States mail, certified or registered, postage prepaid, and addressed to such party at the address herein below set forth beside its signature or such other address as such party may designate by notice to the other parties in the future.
19. The provisions of the Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. The words, "Lender", "Borrower" and "Tenant" shall include their respective heirs, legatees, executors, administrators, beneficiaries, successors and assigns.

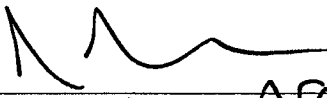
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IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

NOTICE: THIS SUBORDINATION, NON-DISTURBANCE AND ATTORNMENMENT AGREEMENT RESULTS IN YOUR LEASEHOLD ESTATE IN THE PROPERTY BECOMING SUBJECT TO AND OF LOWER PRIORITY THAN THE LIEN OF SOME OTHER OR LATER SECURITY INSTRUMENT.

"TENANT"

K FALLS FIT LLC
an Oregon limited liability company
dba Planet Fitness

By: 
Printed Name: Dan Afraasiabi
Its: Managing Member

Address: K Falls Fit LLC
c/o Bravo Fit, LLC
15171 Bangy Road
Lake Oswego, OR 97035

[Signatures continued on next page]

ACKNOWLEDGMENT

STATE OF OREGON)
) ss
County of Clackamas)



This instrument was acknowledged before me on February 5th, 2020, by
Dan Afraasiabi as Managing Member of K Falls Fit LLC, an Oregon
limited liability company.

Notary Public for State of Oregon
My commission expires: 4-11-2021

"BORROWER"

Red Knight, LLC
an Oregon limited liability company

By: Richard A Carone
Printed Name: RICHARD A CARONE
Its: member

KFalls Center LLC
an Oregon limited liability company
By: see attached
Printed Name: _____
Its: _____

L-39, LLC
an Oregon limited liability company
By: Matthew G Dickerhoof
Printed Name: MATTHEW G DICKERHOOF
Its: MANAGER

DKM2, LLC
an Oregon limited liability company
By: Darren Dickerhoof
Printed Name: DARREN DICKERHOOF
Its: MANAGER

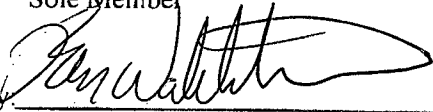
Address:

[Signatures continued on next page]

LANDLORD:

KFALLS CENTER, LLC, an
Oregon limited liability company

By: **BEN WAHLSTROM REVOCABLE TRUST**, its
Sole Member

By: 

Name: Ben Wahlstrom

Title: Trustee

STATE OF Oregon)
COUNTY OF Deschutes) ss.

I, Angela Rose Ballou, a Notary Public in and for the said County in the State aforesaid, do hereby certify that **BEN WAHLSTROM**, known to me to be the same person whose name is subscribed to the foregoing instrument as the trustee of the **BEN WAHLSTROM REVOCABLE TRUST** the sole member of **KFALLS CENTER, LLC**, an Oregon limited liability company, appeared before me this day in person and acknowledged that he, being thereunto duly authorized, signed, and delivered the said instrument as the free and voluntary act of said limited liability company, on behalf of the limited liability company, and as his own free and voluntary act, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this 30 day of February, 2020.

Angela Rose Ballou

NOTARY PUBLIC, STATE OF Oregon

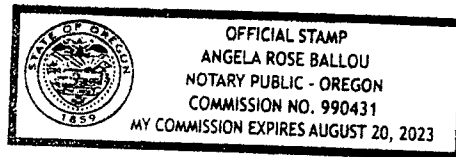
(Name of Notary Public, Print, Stamp or
Type as Commissioned)

☐ Personally known to me, or

☒ Produced Identification

Driver License

(Type of Identification Produced)

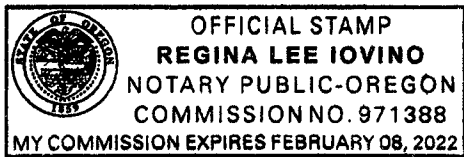


[SIGNATURE APPEARS ON FOLLOWING PAGE]

ACKNOWLEDGMENT

STATE OF Oregon)
) ss:
COUNTY OF Benton)
) p

On the 10th day of Feb in the year 2020 before me, the undersigned, personally appeared Richard Carone, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me the he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.



Regina Lee Iovino
Notary Public
Printed Name: Regina Lee Iovino
My Commission Expires: 2-8-2020

ACKNOWLEDGMENT

STATE OF OREGON)
) ss:
COUNTY OF BENTON)

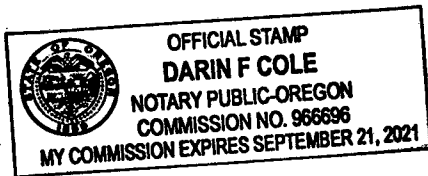
On the 7 day of FEB in the year 2020 before me, the undersigned, personally appeared MATTHEW G DICKERHOOF, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me the he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Darin F. Cole

Notary Public

Printed Name: Darin F. Cole

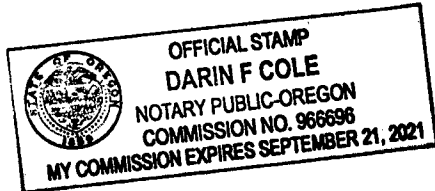
My Commission Expires: September 21, 2021



ACKNOWLEDGMENT

STATE OF OREGON)
) ss:
COUNTY OF BENTON)

On the 7 day of FEB in the year 2020 before me, the undersigned, personally appeared DARREN DICKERHOOF, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me the he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.



Darin F. Cole
Notary Public
Printed Name: Darin F. Cole
My Commission Expires: September 21, 2021

"LENDER"

MORGAN STANLEY PRIVATE BANK, NATIONAL ASSOCIATIONS

By: 
Its: _____

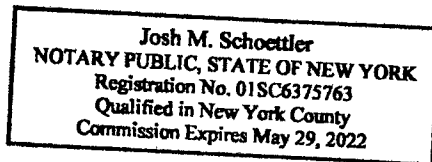
Address: 2000 Westchester Avenue
Purchase, New York 10577
Attention:

ACKNOWLEDGMENT

STATE OF New York)
) ss:
COUNTY OF New York)

On the 12 day of February in the year 2020 before me, the undersigned, personally appeared Andrew Crocco, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me the he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Josh M. Schoettler
Notary Public
Printed Name: Josh M. Schoettler
My Commission Expires: 5/29/22



"EXHIBIT A"

LEGAL DESCRIPTION OF REAL PROPERTY

Real property in the County of Klamath, State of Oregon, described as follows:

PARCEL 1 OF LAND PARTITION NO. 48-05, A REPLAT OF A PORTION OF LOTS 35 AND 44 OF ENTERPRISE TRACTS LOCATED IN THE WEST 1/2 OF THE NORTHWEST 1/4 OF SECTION 3, TOWNSHIP 39 SOUTH, RANGE 9 EAST OF THE WILLAMETTE MERIDIAN, KLAMATH COUNTY, OREGON.

LESS AND EXCEPT THAT PORTION DEEDED TO THE CITY OF KLAMATH FALLS AND ITS SUCCESSORS AND ASSIGNS ON JULY 15, 2008 IN 2008-10156, RECORDS OF KLAMATH COUNTY, OREGON.

(EASEMENT PARCEL)

TOGETHER WITH RECIPROCAL EASEMENT AND MAINTENANCE AGREEMENT AS DISCLOSED BY DOCUMENT RECORDED DECEMBER 8, 1995 IN VOLUME M95 PAGE 33582, RECORDS OF KLAMATH COUNTY, OREGON.

ALSO TOGETHER WITH NONEXCLUSIVE EASEMENTS FOR COMMON PARKING AND REASONABLE PEDESTRIAN AND VEHICULAR ACCESS, INGRESS AND EGRESS OVER ALL PAVED DRIVEWAYS, ROADWAYS AND WALKWAYS AS PRESENTLY OR HEREAFTER CONSTRUCTED AND CONSTITUTING A PART OF THE COMMON AREA, AND FOR MAINTENANCE AS GRANTED IN DECLARATION OF EASEMENTS, COVENANTS, CONDITIONS AND RESTRICTIONS RECORDED DECEMBER 21, 2005 AS DOCUMENT MOS 71541, RECORDS OF KLAMATH COUNTY, OREGON.