



W259463

E# 2259463 PG 1 OF 8
ERNEST D ROWLEY, WEBER COUNTY RECORDER
27-APR-07 9:25 AM FEE \$24.00 DEP JM
REC FOR: LANDMARK TITLE COMPANY
ELECTRONICALLY RECORDED

When recorded, please return to:
WELLS FARGO BANK, NATIONAL ASSOCIATION
Real Estate Group (AU #07572)
1512 Eureka Road, Suite 350
Roseville, CA 95661
Attn: Denise Latta
Loan No. 103649

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

This Subordination, Non-Disturbance and Attornment Agreement (this "Agreement") is made effective as of March ~~30~~, 2007, by and between WELLS FARGO BANK, NATIONAL ASSOCIATION ("Lender"), having an address at 1512 Eureka Road, Suite 350, Roseville, CA 95661, and LARRY H. MILLER THEATRES, INC., a Utah corporation ("Tenant"), having an address at 9350 S. 150 E. Suite 1000, Sandy Utah 84070.

RECITALS:

A. Tenant is the holder of a leasehold estate in a portion of those certain premises located in the County of Weber, State of Utah, and more particularly described on Exhibit A attached hereto and made a part hereof (the "Property") under and pursuant to the provisions of a certain Sub-Ground Lease dated ~~January 2, 2007~~ 2006 (the "Lease") between BOYER OGDEN MALL, L.C. as landlord ("Landlord," also referred to herein as "Borrower"), and Tenant, as tenant.

B. Landlord is, or is about to become, the owner in leasehold title of the Property and the landlord under the Lease.

C. Lender has made a loan or is about to make a loan to Landlord, evidenced or to be evidenced by a promissory note made by Landlord to the order of Lender (the "Note") and secured or to be secured by a mortgage or deed of trust (the "Security Instrument") granted by Landlord as borrower to or for the benefit of Lender and encumbering the Property.

D. Tenant has agreed to subordinate the Lease to the Security Instrument and to the lien thereof and Lender has agreed to grant non-disturbance to Tenant under the Lease on the terms and conditions hereinafter set forth.

AGREEMENT:

NOW, THEREFORE, for good and valuable consideration, the adequacy and receipt of which are hereby acknowledged, Tenant and Lender agree as follows:

1. **Subordination.** The Lease and all of the terms, covenants and provisions thereof and all rights, remedies and options of Tenant thereunder are and shall at all times continue to be

subject and subordinate in all respects to the terms, covenants and provisions of the Security Instrument and to the lien thereof, including without limitation, all renewals, increases, modifications, spreaders, consolidations, replacements and extensions thereof and to all sums secured thereby and advances made thereunder with the same force and effect as if the Security Instrument had been executed, delivered and recorded prior to the execution and delivery of the Lease.

2. **Non-Disturbance.** If any action or proceeding is commenced by Lender for the foreclosure of the Security Instrument or the sale of the Property, Tenant shall not be named as a party therein unless such joinder shall be required by law, provided, however, such joinder shall not result in the termination of the Lease or disturb the Tenant's possession or use of the premises demised thereunder, and the sale of the Property in any such action or proceeding and the exercise by Lender of any of its other rights under the Note or the Security Instrument shall be made subject to all rights of Tenant under the Lease, provided that at the time of the commencement of any such action or proceeding or at the time of any such sale or exercise of any such other rights Tenant shall not be in default under any of the terms, covenants or conditions of the Lease or of this Agreement on Tenant's part to be observed or performed beyond any applicable notice or grace period.

3. **Attornment.** If Lender or any other subsequent purchaser of the Property shall become the owner of the Property by reason of the foreclosure of the Security Instrument or the acceptance of a deed or assignment in lieu of foreclosure or by reason of any other enforcement of the Security Instrument (Lender or such other purchaser being hereinafter referred as "**Purchaser**"), and the conditions set forth in **Section 2** above have been met at the time Purchaser becomes owner of the Property, the Lease shall not be terminated or affected thereby but shall continue in full force and effect as a direct lease between Purchaser and Tenant upon all of the terms, covenants and conditions set forth in the Lease and in that event, Tenant agrees to attorn to Purchaser and Purchaser by virtue of such acquisition of the Property shall be deemed to have agreed to accept such attornment, whereupon, subject to the observance and performance by Tenant of all the terms, covenants and conditions of the Lease on the part of Tenant to be observed and performed, Purchaser shall recognize the leasehold estate of Tenant under all of the terms, covenants and conditions of the Lease for the remaining balance of the term with the same force and effect as if Purchaser were the lessor under the Lease subject to the terms of **Section 4** of this Agreement; **provided, however,** that Purchaser shall not be:

- (a) liable for the failure of any prior landlord (any such prior landlord, including Landlord and any successor landlord, being hereinafter referred to as a "**Prior Landlord**") to perform any of its obligations under the Lease which have accrued prior to the date on which Purchaser shall become the owner of the Property, provided that the foregoing shall not limit Purchaser's obligations under the Lease to correct any conditions that (i) existed as of the date Purchaser shall become the owner of the Property and (ii) violate Purchaser's obligations as landlord under the Lease; **provided, however,** that Purchaser shall have received written notice of such omissions, conditions or violations and has had a reasonable

opportunity to cure the same, all pursuant to the terms and conditions of the Lease;

- (b) subject to any offsets, defenses, abatement or counterclaims which shall have accrued in favor of Tenant against any Prior Landlord prior to the date upon which Purchaser shall become the owner of the Property;
- (c) liable for the return of rental security deposits, if any, paid by Tenant to any Prior Landlord in accordance with the Lease unless such sums are actually received by Purchaser;
- (d) bound by any payment of rents, additional rents or other sums which Tenant may have paid more than one (1) month in advance to any Prior Landlord unless (i) such sums are actually received by Purchaser or (ii) such prepayment shall have been expressly approved of by Purchaser;
- (e) bound by any agreement terminating or amending or modifying the rent, term, commencement date or other material term of the Lease, or any voluntary surrender of the premises demised under the Lease, made without Lender's or Purchaser's prior written consent prior to the time Purchaser succeeded to Landlord's interest; or
- (f) responsible for the making of repairs in or to the Property in the case of damage or destruction to the Property or any part thereof due to fire or other casualty or by reason of condemnation unless Purchaser is obligated under the Lease to make such repairs and Purchaser receives insurance proceeds or condemnation awards sufficient to finance the completion of such repairs.

In the event that any liability of Purchaser does arise pursuant to this Agreement, such liability shall be limited and restricted to Purchaser's interest in the Property and shall in no event exceed such interest.

4. **Notice to Tenant.** After notice is given to Tenant by Lender that the Landlord is in default under the Note and the Security Instrument and that the rentals under the Lease should be paid to Lender pursuant to the terms of the assignment of leases and rents executed and delivered by Landlord to Lender in connection therewith, Tenant shall thereafter pay to Lender or as directed by the Lender, all rentals and all other monies due or to become due to Landlord under the Lease and Landlord hereby expressly authorizes Tenant to make such payments to Lender and hereby releases and discharges Tenant from any liability to Landlord on account of any such payments.

5. **Notice to Lender and Right to Cure.** Tenant agrees to notify Lender by certified mail, return receipt requested, with postage prepaid, of any default on the part of Landlord under the Lease which would entitle Tenant to cancel or terminate the Lease or to abate or reduce the rent payable thereunder, and Tenant further agrees that, notwithstanding any

provisions of the Lease, no cancellation or termination of the Lease and no abatement or reduction of the rent payable thereunder shall be effective unless Lender has received notice of the same and has failed within thirty (30) days after both Lender's receipt of said notice and the time when Lender shall have become entitled under the Security Instrument (as hereinafter defined) to remedy the same, to commence to cure the default which gave rise to the cancellation or termination of the Lease or abatement or reduction of the rent payable thereunder and thereafter diligently prosecutes such cure to completion, provided that in the event Lender cannot commence such cure without possession of the Property, no cancellation or termination of the Lease and no abatement or reduction of the rent payable thereunder shall be effective if Lender commences judicial or non-judicial proceedings to obtain possession within such period and thereafter diligently prosecutes such efforts and cure to completion. In addition, if such default is not susceptible of cure by Lender and Lender obtains possession of the Property, such default shall be waived. Notwithstanding the foregoing, Lender shall have no obligation to cure any default by Landlord except as provided in Section 3 above in the event Lender shall become the owner of the Property by reason of the foreclosure of the Security Instrument or the acceptance of a deed or assignment in lieu of foreclosure or by reason of any other enforcement of the Security Instrument.

6. **Notices.** Any notice, demand, request or other communication which any party hereto may be required or may desire to give hereunder shall be in writing and shall be deemed to have been properly given (a) if hand delivered, when delivered; (b) if mailed by United States Certified Mail (postage prepaid, return receipt requested), three Business Days after mailing (c) if by Federal Express or other reliable overnight courier service, on the next Business Day after delivered to such courier service or (d) if by telecopier on the day of transmission so long as copy is sent on the same day by overnight courier as set forth below:

If to Tenant: Larry H. Miller Theatres, Inc.
9350 South 150 East, Suite 1000
Sandy, Utah 84070
Attention: Robert D. Tingey

If to Lender: WELLS FARGO BANK, NATIONAL ASSOCIATION
Real Estate Group (AU #07572)
1512 Eureka Road, Suite 350
Roseville, CA 95661
Attn: Denise Latta
Loan No. 103649

or addressed as such party may from time to time designate by written notice to the other parties. For purposes of this Section 6, the term "Business Day" shall mean a day on which commercial banks are not authorized or required by law to close in the state where the Property is located. Either party by notice to the other may designate additional or different addresses for subsequent notices or communications.

7. **Successors and Assigns.** This Agreement shall be binding upon and inure to the benefit of Lender, Tenant and Purchaser and their respective successors and assigns.

8. **Governing Law.** This Agreement shall be deemed to be a contract entered into pursuant to the laws of Utah and shall in all respects be governed, construed, applied and enforced in accordance with the laws of the State of Utah.

9. **Miscellaneous.** This Agreement may not be modified in any manner or terminated except by an instrument in writing executed by the parties hereto. If any term, covenant or condition of this Agreement is held to be invalid, illegal or unenforceable in any respect, this Agreement shall be construed without such provision. This Agreement may be executed in several counterparts, each of which counterparts shall be deemed an original instrument and all of which together shall constitute a single Agreement. The failure of any party hereto to execute this Agreement, or any counterpart hereof, shall not relieve the other signatories from their obligations hereunder. Whenever the context may require, any pronouns used herein shall include the corresponding masculine, feminine or neuter forms, and the singular form of nouns and pronouns shall include the plural and vice versa.

[SIGNATURE PAGE IMMEDIATELY FOLLOWS]

IN WITNESS WHEREOF, Lender and Tenant have duly executed this Agreement as of the date first above written.

LENDER

WELLS FARGO BANK, NATIONAL ASSOCIATION

By: [Signature]
Name: STEVE STRONG
Title: Vice PRESIDENT

TENANT:

LARRY H. MILLER THEATRES, INC.

By: [Signature]
Name: Lawrence H. Miller
Title: Secretary/Treasurer

JOINDER

The undersigned hereby joins in the execution of this Agreement in order to evidence its acceptance of, and agreement to, the provisions of Section 4 hereof.

Dated: March 12th 2007

BORROWER:

BOYER OGDEN MALL, L.C., a Utah limited liability company, by its Manager

THE BOYER COMPANY, L.C., a Utah limited liability company

By: [Signature]
Name: Steven B. OSHA
Title: Manager

ACKNOWLEDGMENTS

STATE OF UTAH)
 : ss.
County of Salt Lake)

On the ___ day of March, 2007, before me, the undersigned notary, personally appeared Lawrence H. Miller, the Secretary/Treasurer of LARRY H. MILLER THEATRES, INC., who duly acknowledged to and before me that s/he signed the foregoing instrument for and on behalf of said association, having all requisite authority to so act.

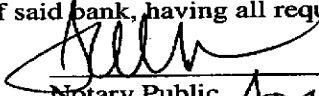
My commission expires:  **MARILYN N SMITH**
NOTARY PUBLIC • STATE of UTAH
9350 S 150 E STE 1000
SANDY UT 84070
COMMISSION EXPIRES: 05-25-2007

Marilyn N. Smith
Notary Public
Residing at: Sandy, Utah

STATE OF Utah)
 : ss.
County of Salt Lake)

On the 20th day of March, 2007, before me, the undersigned notary, personally appeared Steve Strong, the VP of WELLS FARGO BANK, NATIONAL ASSOCIATION, who duly acknowledged to and before me that s/he signed the foregoing instrument for and on behalf of said bank, having all requisite authority to so act.

My commission expires: 5-10-08


Notary Public
Residing at: Jordan, UT

STATE OF UTAH)
 : ss.
County of SALT LAKE)

 **NOTARY PUBLIC**
TIFFANY SUE NELSON
298 S MAIN ST 8TH FLOOR
SALT LAKE CITY, UT 84111
My Commission Expires Mar. 19, 2008

On the 20th day of March, 2007, before me, the undersigned notary, personally appeared Steven B. Oster, the Manager of The Boyer Company, L.C., a Utah limited liability company, the Manager of Boyer Ogden Mall, L.C., a Utah limited liability company, who duly acknowledged to and before me that he signed the foregoing instrument for and on behalf of said limited liability company, having all requisite authority to so act.

My commission expires: 8-20-07

Rachael N. Niusulu
Notary Public
Residing at: Salt Lake City

 **NOTARY PUBLIC**
Rachael N. Niusulu
99 South 400 West, Ste. 200
Salt Lake City, Utah 84101
My Comm. Exp. Aug. 20, 2007
STATE OF UTAH

Exhibit A

"Property"

Lot 10A, OGDEN CITY ENTERTAINMENT SUBDIVISION- PHASE 2 (AMENDED),
according to the official plat thereof, filed in Book 64 of Plats, at Page 78 of the Official Records
of the Weber County Recorder.

Tax Parcel No. 01-099-0006

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