#29

FEB 12 2015

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MEMORANDUM **City Manager Memo No. MC15-009**

DATE: FEBRUARY 12, 2015

TO: MAYOR & CITY COUNCIL

THRU: RICH DLUGAS, CITY MANAGER RD
MARSHA REED, ASSISTANT CITY MANAGER MR
K. SCOTT MCCOY, ASSISTANT CITY ATTORNEY

FROM: MARIAN NORRIS, ASSISTANT TO CITY MANAGER MN

SUBJECT: REQUEST FOR AUTHORIZATION TO EXECUTE SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT FOR PROPERTY LOCATED AT SAN TAN TECH CENTER, 145 SOUTH 79TH STREET, CHANDLER, ARIZONA.

RECOMMENDATION: Staff recommends that City Council authorize the Mayor to execute the Subordination, Non-Disturbance and Attornment Agreement for the property located at San Tan Tech Center, 145 S. 79th Street, Chandler, Arizona.

BACKGROUND: In April 2010 the City entered into a 10 year lease for 38,146 square feet of space with CCI-B Chandler I, LLC. In April 2012 the City entered into a 12 year lease for an additional 25,297 square feet of space with CCI-B Chandler I, LLC, and amended the Phase I lease to terminate on the same date as the Phase II lease in 2024. In December 2013 CCI-B Chandler I, LLC, sold the property to CCMVMP San Tan Tech, LLC.

CCMVMP San Tan Tech, LLC, has requested new financing with Western Alliance Bank. Per the terms of the lease, in order for the owners to acquire new financing, the City is required to approve and execute a Subordination, Non-disturbance and Attornment Agreement.

FINANCIAL IMPLICATIONS: There are no financial implications for the City. The terms of the lease, as approved by City Council, are still in effect and do not change with this Agreement.

PROPOSED MOTION: Move to authorize the Mayor to execute the Subordination, Non-Disturbance and Attornment Agreement for the property located at San Tan Tech Center, 145 S. 79th Street, Chandler, Arizona.

Attachment A: Subordination, Non-Disturbance and Attornment Agreement

When recorded return to:

Snell & Wilmer L.L.P.
One South Church Avenue
Suite 1500
Tucson, Arizona 85701-1630
Attention: Stephen J. Young, Esq.

For Recorder's Use

SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT

DATE: January ___, 2015

PARTIES: CITY OF CHANDLER, ARIZONA, an Arizona municipal corporation, whose address is Economic Development Office, 215 E. Buffalo Street, Chandler, Arizona 85225 ("**Lessee**"); WESTERN ALLIANCE BANK, an Arizona corporation, whose address is One East Washington Street, Suite 1400, Phoenix, Arizona 85004 ("**Lender**").

RECITALS:

A. Lender has made a loan to **CCMVWP SAN TAN TECH, LLC**, a Delaware limited liability company ("**Borrower**"), in the principal amount of Eight Million Nine Hundred Forty Thousand and No/100 Dollars ($8,940,000.00) (the "**Loan**").

B. As security, in part, for repayment of the Loan and performance of Borrower's obligations to Lender, Borrower has executed and delivered to Lender, among other things, that certain Deed of Trust and Fixture Filing (With Assignment of Rents and Security Agreement), dated of even date herewith, which will be recorded contemporaneously with this Agreement in the official records of Maricopa County, Arizona (the "**Deed of Trust**"), wherein Lender is beneficiary, and Lender is trustee, granting to the Lender a lien on the real property described in **Exhibit A** attached hereto and made a part hereof by this reference (the "**Property**").

C. Lessee claims an interest in the Property by virtue of that certain Tenant Lease dated March 18, 2010 between Borrower, as successor in interest to CCI-B Chandler I, LLC, a Delaware limited liability company, as landlord, and City of Chandler, Arizona, an Arizona municipal corporation, as tenant, as amended by the First Amendment to Office Lease dated December 15, 2011 and Second Amendment to Office Lease dated June 26, 2012 (collectively, the "**Lease**") covering a portion of the Property and improvements thereon.

NOW, THEREFORE, in consideration of the mutual covenants contained in this Subordination, Non-Disturbance and Attornment Agreement (this "**Agreement**"), the parties agree as follows:

AGREEMENTS:

1. **Subordination**. Lessee hereby subjects and subordinates any and all right, title, liens, claims, and interest it now has or hereafter acquires in and to the Property whether pursuant to the Lease or otherwise to Lender's liens on and claims against the Property. Lessee agrees that its subordination hereunder shall apply to the full extent of all principal advanced under the Loan, together with all accrued and accruing interest, and together with all other amounts secured by the Deed of Trust, including without limitation, all attorneys' fees and costs incurred by Lender in connection with the Loan or the Property. Lessee hereby agrees that the Deed of Trust and any and all claims or liens hereafter acquired by Lender in and to the Property are prior and superior to any and all right, title, claims, liens, or interest now held or hereafter acquired by Lessee in and to the Property. This subordination shall extend to any and all increases, renewals, extensions, modifications, substitutions, and consolidations of the Deed of Trust, of the Loan, and of any other documents securing the Loan, and Lender may, without notice or demand, and without affecting the subordination hereunder, (a) renew, compromise, extend, accelerate, or otherwise change the time for payment of or otherwise change the terms of the Loan or any part thereof, including, without limitation, increases or decreases in the principal amount of the Loan and the interest rate thereon, (b) waive or release any part of its lien on the Property, (c) apply proceeds from the sale of the Property and direct the order or manner of sale thereof as Lender, in its discretion, may determine, and (d) assign its rights hereunder or under the Loan, or both, in whole or in part. Lessee further declares, agrees and acknowledges that, in making disbursements of the Loan, Lender has no obligation or duty to, nor has Lender represented that it will, see to the application of such Loan proceeds by the person or persons to whom they are disbursed by Lender, and any application or use of such proceeds for purposes other than those provided for in connection with the Loan shall not defeat the subordination made in this Agreement, in whole or in part.

2. **Reliance**. Lessee acknowledges that the Loan and/or advances thereof would not have been made by Lender without the giving of this Agreement by Lessee and further acknowledges that Lender is relying upon this Agreement in making the Loan and/or advances thereof to Borrower.

3. **Transfer of Lease**. Any transfer or encumbrance of the Lease or Lessee's interest therein shall be subject to the terms of this Agreement. Lessee hereby agrees to notify any purchaser, assignee, or encumbrancer of the Lease of the terms of this Agreement.

4. **Representations and Warranties**. Lessee represents and warrants to Lender that:

(a) The Lease is a commercial lease, is in full force and effect, and has not been amended or modified in any way; and there are no documents or written agreements between Lessee and Borrower with respect to the Lease, except those disclosed herein;

(b) Lessee's interests under the Lease have not been assigned or transferred, whether for purposes of security or otherwise, and Lessee has all the requisite power and authority to enter into this Agreement with Lender;

(c) Lessee will faithfully perform all obligations of the lessee under the terms of the Lease;

(d) Lessee has prepaid no rent except as specifically set forth in the Lease; and

(e) To the best of Lessee's knowledge, no uncured event of default or breach on the part of Borrower or Lessee has occurred under the Lease, and no event has occurred which gives Lessee the right to terminate the Lease or otherwise claim defenses, offsets or damages.

5. **Covenants**. Lessee covenants and agrees that:

(a) Lessee will not pay any installment of rent or any part thereof more than one (1) month prior to the due date of such installment;

(b) No extension or modification of the Lease shall be of any force or effect unless Lender has specifically consented thereto in writing; and

(c) Except for the Lessees exercise of the Early Termination provision of Section 3.5 of the Lease, Lessee will not cancel, surrender, amend or modify the Lease without Lender's prior written consent nor terminate the Lease because of a default thereunder by Borrower unless Lessee shall have first given Lender written notice thereof and a reasonable opportunity to cure such default, but in no event shall such opportunity to cure exceed thirty (30) days; unless the nature of the default is such that it cannot be reasonably cured within such thirty (30) day period then Lender shall have such additional time as is reasonably required to cure such default provided Lender commences to cure such default within such thirty (30) day period and proceeds to prosecute such cure to its completion.

6. **Attornment**. If the interests of Borrower shall be transferred by reason of foreclosure or exercise of power of sale or other proceeding for enforcement of the Deed of Trust, or by reason of a deed in lieu of foreclosure, Lessee shall be bound to the person acquiring the interests of landlord (the "**Purchaser**") under all of the terms, covenants, and conditions of the Lease for the balance of the term thereof remaining and any extensions or renewals thereof which may be effected in accordance with any option therefor in the Lease, with the same force and effect as if the Purchaser were the lessor under the Lease. Lessee does hereby attorn to the Purchaser, including Lender, if it is the Purchaser, as its landlord, said attornment to be effective and self-operative without the execution of any further instruments upon Purchaser succeeding to the interest of the landlord under the Lease.

7. **Non-Disturbance**. Provided Lessee is not in default in payment of rent, taxes, utility charges, or other sums payable by Lessee under the terms of the Lease, nor in default in the performance of any other covenant or provision of the Lease or this Agreement, and provided Lessee is in possession of the portion of the Property subject to the Lease, then the

right of possession of Lessee to the portion of the Property subject to the Lease shall not be affected or disturbed by Lender in the exercise of any of its rights or remedies under the Deed of Trust.

8. **Direct Payment**. Lessee agrees that upon receipt of written request therefor by Lender, rental payments will be made directly to Lender or its order at such place as Lender shall direct. Borrower hereby authorizes Lessee to accept such request from Lender and waives all claims against Lessee for any sums so paid at Lender's request and direction.

9. **Liability of Lender**. Notwithstanding anything to the contrary contained in this Agreement, Lender and its successors and assigns shall not, by virtue of this Agreement, be or become subject to any liability or obligation to Lessee under the Lease or otherwise, unless Lender or its successors and assigns shall obtain title to the Property, by foreclosure or otherwise; and, moreover, Purchaser in acquiring the interest of Borrower as a result of any such action or proceeding, and its successors and assigns, shall not be: (a) liable for any act or omission of any prior landlord under the Lease (including Borrower); or (b) liable for any damages or other relief attributable to any latent or patent defects in construction with respect to any portion of the Property; or (c) subject to any offsets or defenses which Lessee might have against any prior landlord under the Lease (including Borrower); or (d) bound by any amendment or modification of the Lease made without Lender's prior written consent; or (e) bound by, or responsible for, any security deposit paid by Lessee (unless delivered to and held by Lender); or (f) bound by or responsible for or affected by any purchase option contained in the Lease, which provisions shall be of no force and effect upon the Lender or its successors or assigns; (g) obligated to construct any improvements on the Property (provided that if Purchaser fails to construct improvements as required under the Lease, Lessee may terminate the Lease) or to pay or reimburse Lessee for any improvements Lessee constructs on the Property; or (h) bound by, or responsible for, any other term or provision of the Lease which is personal to the Borrower or which may not reasonably be performed by Purchaser or its successors and assigns in the ordinary course of business. Regardless of anything in the Lease or this Agreement to the contrary, in acquiring the interest of Borrower as a result of such action or proceeding, Purchaser shall not have any obligation or liability beyond its interest in the Property. Lessee shall look exclusively to Purchaser's interest in the Property for payment and discharge of any of Purchaser's obligations under this Agreement or under the Lease. Lessee shall not collect or attempt to collect any judgment based upon such obligations out of any other assets of Purchaser. In addition, upon any sale or transfer of its interest in the Property, Purchaser shall have no further obligation under this Agreement or the Lease with respect to matters occurring after such sale or transfer. By executing this Agreement, Borrower specifically acknowledges and agrees that nothing contained in this Section shall impair, affect, lessen, abrogate or otherwise modify the obligations of Borrower to Lessee under the Lease.

10. **No Assumption**. Notwithstanding any other provisions contained in this Agreement, Lender does not assume any responsibility or liability for any acts or conduct by any other person, including, but not limited to, a purchaser at foreclosure or trustee's sale or grantee under deed in lieu of foreclosure.

11. **Notices**. Whenever and wherever in this Agreement, the Lease, or in any proceeding involving the foreclosure or attempt to foreclose pursuant to the Deed of Trust it shall

be required or permitted that a notice or demand be given, such notice or demand shall be in writing and be deemed to have been given or served upon receipt or refusal of receipt after being mailed, postage prepaid, by certified, registered, or express mail, return receipt requested, or when delivered in person to the appropriate address set forth above or to such other address as may be hereafter designated by any party thirty (30) days in advance by proper notice to the other.

12. **Amendments**. No amendment or modification of this Agreement shall be valid or binding unless in writing, signed by the party or parties to be bound thereby.

13. **No Merger**. Borrower, Lessee and Lender agree that unless Lender shall otherwise consent in writing, Borrower's estate in and to the Property and the leasehold estate created by the Lease shall not merge, but shall remain separate and distinct, notwithstanding the union of such estates either in Borrower or Lessee or any third party by purchase, assignment or otherwise.

14. **Nondisturbance Agreement**. This Agreement satisfies any condition or requirement in the Lease relating to the granting of a nondisturbance agreement from Lender.

15. **Severability; Choice of Law**. In the event any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall, at the option of the Lender, not affect any other provisions of this Agreement, but this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein. This Agreement shall be governed by and construed according to the internal law of the State of Arizona.

16. **Successors**. This Agreement shall bind and inure to the benefit of the parties and their respective successors and assigns.

17. **Counterparts**. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same document. Signature pages may be detached from the counterparts and attached to a single copy of this Agreement to physically form one document.

18. **Miscellaneous Provisions**. Lender may but shall not be obligated to record this Agreement, at Lender's sole discretion.

[Signature Pages Follow]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

CITY OF CHANDLER ARIZONA, an Arizona municipal corporation

By:_____
Name:_____
Title:_____

"LESSEE"

STATE OF ARIZONA)
)
County of Maricopa)

On this ___ day of _____, 20___, before me personally appeared _____, whose identity was proven to me on the basis of satisfactory evidence to be the person he claims to be, and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

(seal)

_____
Notary Public

ATTEST:

By:_____
Name:_____
Title:_____

APPROVED AS TO FORM:

By:_____
Name:_____
Title:_____

WESTERN ALLIANCE BANK, an Arizona corporation

By: Ericka LeMaster
Ericka LeMaster
Senior Vice President

"LENDER"

STATE OF ARIZONA)
)
County of Maricopa)

On this 21st day of January, 2015, before me personally appeared Ericka LeMaster, whose identity was proven to me on the basis of satisfactory evidence to be the person he claims to be, and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

(seal)

OFFICIAL SEAL
BRITNEY CASSADAY
NOTARY PUBLIC - State of Arizona
MARICOPA COUNTY
My Comm. Expires January 23, 2018

Notary Public

20596832.3

Acknowledged and agreed to by Borrower as of the date first written above:

CCMVWP SAN TAN TECH, LLC, a Delaware limited liability company

By: VWP STTC Manager, LLC, an Arizona limited liability company, its Manager

By: ViaWest Properties, LLC, an Arizona limited liability company, its Manager

By: _____
Steven R. Schwarz
Manager

"BORROWER"

STATE OF ARIZONA)
)
County of MARICOPA)

On this 19 day of JANUARY, 20 15, before me personally appeared STEVEN R. SCHWARZ, whose identity was proven to me on the basis of satisfactory evidence to be the person he claims to be, and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

(seal)

MEGAN CAYWOOD
Notary Public - Arizona
Maricopa County
My Commission Expires
DECEMBER 9, 2017

_____
Notary Public

20596832.3

EXHIBIT A

Legal Description

PARCEL NO. 1:

LOTS 1 THROUGH 5, OF STELLAR INDUSTRIAL AIRPARK UNIT ONE AMENDED ACCORDING TO THE PLAT OF RECORD IN THE OFFICE OF THE COUNTY RECORDER OF MARICOPA COUNTY, ARIZONA, RECORDED IN BOOK 234 OF MAPS, PAGE 17.

From: (602) 386-2365
Patricia Moffitt
Western Alliance Bank
1 East Washington Street
Suite 1400
Phoenix, AZ 85004

Origin ID: ZSYA

FedEx Express

E

J151015011400uv

Ship Date: 22JAN15
ActWgt: 3.0 LB
CAD: 102320472/INET3610

Delivery Address Bar Code

SHIP TO: (480) 782-4545 BILL SENDER

Marian Norris
City of Chandler
175 South Arizona Ave, 5th Floor

CHANDLER, AZ 85225

Ref #
Invoice #
PO #
Dept #

FRI - 23 JAN 10:30A
PRIORITY OVERNIGHT

TRK# 0201 7726 7436 4554

98 CHDA

85225
AZ-US
PHX

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