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SUBMITTED TITLECORE NATIONAL, LLC

FILED SARPY CO. NE.  
INSTRUMENT NUMBER

**2019-24754**

2019 Oct 10 03:05:56 PM

  
County Clerk/Register of Deeds  
Deb Houghtaling



**INTERCREDITOR AND SUBORDINATION AGREEMENT**  
(HIGHWAY 370 HQ, LLC)

THIS INTERCREDITOR AND SUBORDINATION AGREEMENT (this "Agreement"), is entered into effective as of October 9, 2019, by and between **FIRST NATIONAL BANK OF OMAHA**, a national banking association whose address is 11404 West Dodge Road, SC 4250 Omaha, NE 68154 ("Senior Lender") and WDD, Inc. a Nebraska corporation, whose address is 9845 South 142<sup>nd</sup> St., Omaha, NE 68138 ("Subordinate Lender").

**RECITALS:**

A. As evidenced by a certain Promissory Note (the "Senior Note") dated OCTOBER 9, 2019 from Highway 370 HQ, LLC, a Nebraska limited liability company ("Borrower" or "Mortgagor") to Senior Lender, Senior Lender has provided a loan to Borrower in the principal amount of \$7,000,000 (the "Senior Loan"), secured inter alia by a certain Deed of Trust, Security Agreement and Assignment of Rents dated OCTOBER 9, 2019 and recorded with the Sarpy County, Nebraska Register of Deeds on OCTOBER 10, 2019, as Instrument No. 2019-24738 (the "Senior Mortgage") on property owned by Borrower and located in Sarpy County, Nebraska, as legally described on Exhibit "A" attached hereto (the "Property") and secured inter alia by a certain Assignment of Rents and Leases dated OCTOBER 9, 2019 and recorded with the Sarpy County, Nebraska Register of Deeds on OCTOBER 10, 2019 as Instrument No. 2019-24739 (the "Senior Assignment") which relate to the Property.

B. Subordinate Lender has provided to Borrower a loan in the amount of \$2,366,905.32 (the "Subordinate Loan") evidenced by an Amended and Restated Promissory Note dated August 30, 2019 (the "Subordinate Note") and secured by a mortgage lien on the Property made pursuant to the Deed of Trust dated April 30, 2019, as amended by that certain First Amendment to Deed of Trust dated August 30, 2019, recorded with the Sarpy County, Nebraska Register of Deeds (the "Subordinate Mortgage").

C. The Property and all other security shared by the Senior Loan and the Subordinate Loan are collectively referred to herein as the "Shared Collateral."

Return to:  
James D. Buser  
Pansing Hogan Ernst & Bachman, LLP  
10250 Regency Circle, Suite 300  
Omaha, Nebraska 68114  
4813-7237-3158.2

D. Subordinate Lender agrees that Senior Lender has perfected or shall perfect its liens and security interests relative to the Senior Loan in the Shared Collateral by the Senior Mortgage, Senior Assignment and corresponding UCC Financing Statements.

E. Subordinate Lender's liens and security interests relative to the Subordinate Loan in the Shared Collateral are evidenced by the Subordinate Mortgage.

F. Senior Lender and Subordinate Lender desire to clarify their relative priorities with respect to their interests and claims in the Shared Collateral; Subordinate Lender to be junior and subordinate in all respects to Senior Lender;

NOW, THEREFORE, in consideration of the premises and the mutual agreements contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, for themselves and their respective legal representatives, successors and assigns, hereby agree as follows:

1. Subordination; Conditions. Senior Lender hereby consents to the encumbrance of the Shared Collateral by the Subordinate Mortgage described in Recital B above subject to all the following; which are agreeable to and accepted by Subordinate Lender:

a. The lien, priority, payment and/or performance of the indebtedness of Borrower relative to the Subordinate Note, and any and all other indebtedness and other obligations of Borrower (present and/or future) to Subordinate Lender evidenced and/or secured by the Subordinate Note and the Subordinate Mortgage described in Recital B above or otherwise and all other liens, encumbrances and/or security interests (now and/or hereafter) given to evidence and/or secure the payment and/or performance of the Subordinate Loan and/or any other obligations of payment or performance of Borrower to Subordinate Lender, whether now existing or hereafter created or acquired, are and shall be subordinated in lien priority and payment and performance of principal and interest as well as all other expenses, charges and fees, including, without limitation, interest accruing after any default or petition in bankruptcy, and subordinated in all other respects, to the indebtedness and obligations of Borrower pursuant to the Senior Loan or otherwise (now and/or hereafter), and all liens, encumbrances and security interests given to secure the payment and/or performance thereof, whether now existing or hereafter created or acquired, including, without limitation, the Senior Mortgage, the Senior Assignment, and to any and all present and/or future advances, renewals, refinancings, extensions, modifications, substitutions or other accommodations to or for the account of Borrower in connection with the Senior Note and/or relating to all or any portion of the Shared Collateral which Senior Lender may elect to enter into from time to time.

b. To the extent the provisions of the Subordinate Note and the Subordinate Mortgage described in Recital B above and/or any other security or loan documents related to the Subordinate Loan are inconsistent or conflict with this Agreement or the subordination to the Senior Note, the Senior Mortgage and the Senior Assignment or any other Senior Lender security or loan documents as provided herein, the provisions of this Agreement shall control.

c. Subordinate Lender agrees and covenants that it shall (simultaneously with the giving of notice to Borrower) provide Senior Lender with a copy of each written notice which Subordinate Lender gives to Borrower advising Borrower of the occurrence of a default under any of the Subordinate Loan security and loan documents.

d. If Subordinate Lender should receive any payment (whether in cash, securities or other property) from Borrower or any guarantor(s) of the Senior Loan during the existence of a default or event of default under the Senior Note, the Senior Mortgage and the Senior Assignment or any other Senior Lender security or loan document or during any bankruptcy or insolvency proceedings related to Borrower, Subordinate Lender shall be deemed to hold such payment(s) in trust for Senior Lender, and provided that Subordinate Lender has received notice of such default, shall segregate the same from other cash assets in its possession and shall immediately deliver the same to Senior Lender in the form received by the Subordinate Lender (together with any endorsement required to make the payment negotiable by Senior Lender) to be applied to payment or prepayment of the Senior Note.

e. Subordinate Lender agrees to execute and deliver to Senior Lender, from time to time and as shall be reasonably required by Senior Lender, such subordination agreements, in recordable form, as Senior Lender shall deem reasonably necessary to preserve the first priority lien and security interest of the Senior Mortgage and the Senior Assignment in the Shared Collateral and any future improvements constructed thereon.

f. Except for a foreclosure, trustees sale or equivalent proceeding, Subordinate Lender shall not be entitled or permitted to initiate any legal proceeding to collect or realize (collectively the "Proceedings") on the Subordinate Note or the Subordinate Mortgage described in Recital B above or otherwise against Borrower, its successors or assigns, or any guarantor(s) of the Senior Loan, or regarding the Shared Collateral or to seek appointment of a receiver for Borrower, without the prior written consent of Senior Lender, which consent may be granted or withheld by Senior Lender in Senior Lender's sole and absolute discretion unless any Proceedings have been previously initiated by Senior Lender relative to the Senior Loan and remain pending. If Senior Lender terminates any Proceedings as to the Senior Loan, Subordinate Lender shall promptly terminate all Proceedings as to the Subordinate Loan.

g. Subordinate Lender irrevocably waives any right to marshaling and/or to assert priority over any future advances (or equivalent) made by Senior Lender (in its discretion) to protect Senior Lender's collateral position.

h. Subordinate Lender represents and warrants that the Subordinate Loan does (and will) not call for a demand of payment or an accrual of interest or additional principal without the approval of Senior Lender.

i. Subordinate Lender shall not hold, accept or receive any pledge of any equity interest in Borrower (or equivalent).

2. Effect of Certain Actions. In the event of any proceeding, state or federal, affecting Borrower and/or the Property under any bankruptcy, receivership, assignment or insolvency laws

relating to relief of debtors, readjustment, composition or extension of indebtedness, rehabilitation or reorganization, state or judicial sale, any distribution of property ordered by any court or payments which are ordered by any court out of the proceeds of the Property or rents or other property relating thereto, Subordinate Lender agrees that in any such proceeding, Subordinate Lender will vote (as a creditor) as directed by Senior Lender and/or shall assign Subordinate Lender's voting rights to Senior Lender, as Senior Lender may elect in Senior Lender's sole and absolute discretion.

3. Extensions, Modifications, Etc. Senior Lender and Subordinate Lender agree that notice of amendment, extension, substitution, refinancing modification, or renewal of any Senior Loan documents, now existing or hereafter created, is hereby waived and that Senior Lender may make future advances to Borrower without further notice to Subordinate Lender, which advances will in no way alter the priority of the parties' respective rights as between themselves, in accordance with the terms of this Agreement. This Agreement and the obligations of Subordinate Lender hereunder shall terminate upon payment in full of the Senior Note and release or reconveyance of the Senior Mortgage.

4. Miscellaneous. This Agreement constitutes the entire agreement between Subordinate Lender and Senior Lender and shall be binding upon and inure to the benefit of their respective legal representatives, successors and assigns. The parties agree that any party hereto may cause this Agreement to be recorded.

5. Governing Law; Jurisdiction. This Agreement is made under and will be governed in all cases by the substantive laws of the State of Nebraska. The parties expressly waive the right to trial by jury in any lawsuit or proceeding related to this Agreement. The parties hereby designate all courts of record sitting in Nebraska and having jurisdiction over the subject matter, state and federal, as forums where any action, suit or proceeding in respect of or arising out of this Agreement or its validity or performance may be prosecuted as to all parties, their successors and assigns, and by the foregoing designation, the parties consent to the jurisdiction and venue of any such court.

6. Additional Definitions; No Benefit to Third Parties; Equity Pledge.

a. The term "Senior Lender" shall include First National Bank of Omaha, its legal representatives, successors and assigns, and any lender, and its legal representatives, successors and assigns, which provides refinancing of all or any part of Borrower's obligations to First National Bank of Omaha and/or its legal representatives, successors and/or assigns and the terms "Senior Note", "Senior Mortgage", "Senior Assignment", and "Senior Loan" shall include the same with respect to each Senior Lender. The term "Subordinate Lender" shall include WDD, Inc., its legal representatives, successors and assigns, and any lender, and its legal representatives, successors and assigns, which provides refinancing of all or any part of Borrower's obligations to WDD, Inc. and/or its legal representatives, successors and/or assigns and the terms "Subordinate Note", "Subordinate Mortgage", and "Subordinate Loan" shall include the same with respect to each Subordinate Lender.

b. The parties, by executing this Agreement, intend no benefit to be granted to or conferred upon any other person, except as set forth in paragraph 6(a) and with the exception of the parties' respective legal representatives, successors and/or assigns. This Agreement is not intended as a third-party beneficiary agreement and shall not be interpreted or construed to confer upon Borrower, its legal representatives, successors or assigns, any rights or remedies.

c. In the event of any conflict between the terms of any document evidencing and/or securing the Subordinate Loan and the terms hereof, the latter shall govern and control. Additionally, in the event of any conflict between the terms of any document evidencing and/or securing the Subordinate Loan and the terms of any document evidencing and/or securing the Senior Loan, the latter shall govern and control.

d. Each party reserves all of its legal and equitable rights and remedies in the event of a breach hereof. No amendment hereto shall be enforceable unless the same is in writing, signed by the party against whom enforcement is sought. In the event of a breach hereof, the defaulting party shall be liable for all liabilities, costs and expenses (including legal fees) of the non-defaulting party.

e. Time is of the essence in and to this Agreement. This Agreement may be executed in counterparts.

-THIS SPACE INTENTIONALLY LEFT BLANK-

IN WITNESS WHEREOF, Senior Lender and Subordinate Lender hereby have duly executed this Agreement on the date set forth below their names.

**FIRST NATIONAL BANK OF OMAHA,**  
a national banking association

By: \_\_\_\_\_

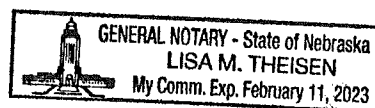
Print Name: Jake R. Holderness

Its: Vice President

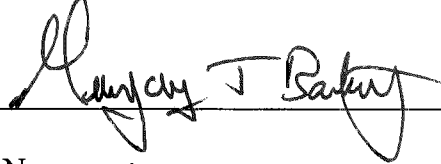
STATE OF NEBRASKA     )  
  ) ss.  
COUNTY OF DOUGLAS    )

The foregoing instrument was acknowledged before me, a Notary Public, this 7<sup>th</sup> day of October, 2019, by Jake R. Holderness, Vice President of First National Bank of Omaha, a national banking association, on behalf of the association.

Lisa M. Theisen  
Notary Public



WDD, Inc., a Nebraska Corporation

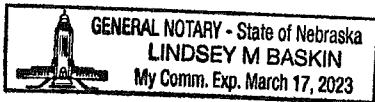
By: 

Print Name: GREGORY J. BOULAY

Its: SHAREHOLDER AND DIRECTOR

STATE OF NEBRASKA     )  
  ) ss.  
COUNTY OF Douglas)

The foregoing instrument was acknowledged before me, a Notary Public, this 9<sup>th</sup> day of OCTOBER, 2019, by GREGORY J. BOULAY, SHAREHOLDER AND DIRECTOR of WDD, Inc. a Nebraska corporation, on behalf of the corporation.



  
Notary Public

**EXHIBIT "A"**  
**LEGAL DESCRIPTION**

**Parcel 1:**

**Lot 2, 370 North Replat One, a subdivision as surveyed, platted and recorded in Sarpy County, Nebraska.**

**Parcel 2:**

**A non-exclusive storm water drainage easement as described in Storm Water Drainage Easement recorded June 21, 2017 as Instrument Number 2017-14414 of the Records of Sarpy County, Nebraska.**