



W1901212

SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT

ES-O-EN CORP.,

TENANT

AND

**CIBC INC,
Lender**

Section:
Block:
Lot:
County: Weber
State: Utah

Premises:
5645 S. 1900 W.,
Roy City, Utah

Dated: as of December 31, 2002

Record and Return by mail to:

**WINSTON & STRAWN
200 Park Avenue
New York, NY 10017**

Attn: Lydia Coplin-Rechani

**E# 1901212 BK2303 PG248
DOUG CROFTS, WEBER COUNTY RECORDER
31-DEC-02 12:41 PM FEE \$34.00 DEP SGC
REC FOR: TITLE.WEST**

TW 12/31/02

SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT

THIS AGREEMENT made as of this 31st day of December, 2002, between CIBC INC., a Delaware corporation, having an office at 622 Third Avenue, 10th Floor, New York, New York 10017, Attn: Real Estate Finance Group (hereinafter called "Lender"), and ES-O-EN CORP., a Oregon corporation, having an office at 610 E Street George Boulevard, St. George, UT 84770 (hereinafter called "Tenant"). 3475 E. Franklin Rd. Meridian, Id. 83642 SCN

WITNESSETH:

WHEREAS, by a lease (the "Original Lease") dated April, 23, 1991 between ROY CITY CENTRE REALTY LIMITED (hereinafter called "Landlord"), as landlord, and Tenant, as tenant [as amended by lease amendment[s] dated August, 1998, (the Original Lease, [as so amended,] hereinafter the "Lease"), a memorandum of which Lease was dated N/A, and was recorded in _____ in Reel _____, Page [add recording data for memoranda of amendments, if applicable], Landlord leased to Tenant certain premises known as Roy City Centre (the "Leased Premises") on the real property described in Exhibit A annexed hereto and made a part hereof (the "Property"); and

WHEREAS, Lender is about to make a loan to Landlord, which loan shall be secured by, among other things, a mortgage or deed of trust (which mortgage or deed of trust, and all amendments, renewals, increases, modifications, replacements, substitutions, extensions, spreaders and consolidations thereof and all re-advances thereunder and additions thereto, is referred to as the "Security Instrument") encumbering the Property; and

WHEREAS, Lender and Tenant desire to confirm their understanding and agreement with respect to the Lease and the Security Instrument.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, Lender and Tenant hereby agree and covenant as follows:

1. The Lease, and all of the terms, covenants, provisions and conditions thereof (including, without limitation, any right of first refusal, right of first offer, option or any similar right with respect to the sale or purchase of the Property, or any portion thereof), is, shall be and shall at all times remain and continue to be subject and subordinate in all respects to the lien, terms, covenants, provisions and conditions of the Security Instrument and to all advances and re-advances made thereunder and all sums secured thereby. This provision shall be self-operative but Tenant shall execute and deliver any additional instruments which Lender may reasonably require to effect such subordination.

2. So long as (i) Tenant is not in default (beyond any period given Tenant to cure such default) in the payment of rent or additional rent or in the performance or observance of any of the other terms, covenants, provisions or conditions of the Lease on Tenant's part to be performed or observed, (ii) Tenant is not in default under this Agreement and (iii) the Lease is in full force and effect: (a) Tenant's possession of the Leased Premises and Tenant's rights and privileges under the Lease, or any extensions or renewals thereof which may be effected in accordance with any option therefor which is contained in the Lease, shall not be diminished or interfered with by Lender, and Tenant's occupancy of the Leased Premises shall not be disturbed by Lender for any reason whatsoever during the term of the Lease or any such extensions or renewals thereof and (b) Lender will not join Tenant as a party defendant in any action or proceeding to foreclose the Security Instrument or to enforce any rights or remedies of Lender under the Security Instrument which would cut-off, destroy, terminate or extinguish the Lease or Tenant's interest and estate under the Lease (except to the extent required so that Tenant's right to receive or set-off any monies or obligations owed or to be performed by any of Lender's predecessors-in-interest shall not be enforceable thereafter against Lender or any of Lender's successors-in-interest). Notwithstanding the foregoing provisions of this paragraph, if it would be procedurally disadvantageous for Lender not to name or join Tenant as a party in a foreclosure proceeding with respect to the Security Instrument, Lender

may so name or join Tenant without in any way diminishing or otherwise affecting the rights and privileges granted to, or inuring to the benefit of, Tenant under this Agreement.

3. (A) After notice is given by Lender that the Security Instrument is in default and that the rentals under the Lease should be paid to Lender, Tenant will attorn to Lender and pay to Lender, or pay in accordance with the directions of Lender, all rentals and other monies due and to become due to Landlord under the Lease or otherwise in respect of the Leased Premises. Such payments shall be made regardless of any right of set-off, counterclaim or other defense which Tenant may have against Landlord, whether as the tenant under the Lease or otherwise.

(B) In addition, if Lender (or its nominee or designee) shall succeed to the rights of Landlord under the Lease through possession or foreclosure action, delivery of a deed or otherwise, or another person purchases the Property or the portion thereof containing the Leased Premises upon or following foreclosure of the Security Instrument or in connection with any bankruptcy case commenced by or against Landlord, then at the request of Lender (or its nominee or designee) or such purchaser (Lender, its nominees and designees, and such purchaser, and their respective successors and assigns, each being a "Successor-Landlord"), Tenant shall attorn to and recognize Successor-Landlord as Tenant's landlord under the Lease and shall promptly execute and deliver any instrument that Successor-Landlord may reasonably request to evidence such attornment. Upon such attornment, the Lease shall continue in full force and effect as, or as if it were, a direct lease between Successor-Landlord and Tenant upon all terms, conditions and covenants as are set forth in the Lease. If the Lease shall have terminated by operation of law or otherwise as a result of or in connection with a bankruptcy case commenced by or against Landlord or a foreclosure action or proceeding or delivery of a deed in lieu, upon request of Successor-Landlord, Tenant shall promptly execute and deliver a direct lease with Successor-Landlord which direct lease shall be on substantially the same terms and conditions as the Lease (subject, however, to the provisions of clauses (i)-(v) of this paragraph 3(B)) and shall be effective as of the day the Lease shall have terminated as aforesaid. Notwithstanding the continuation of the Lease, the attornment of Tenant thereunder or the execution of a direct lease between Successor-Landlord and Tenant as aforesaid, Successor-Landlord shall not:

- (i) be liable for any previous act or omission of Landlord under the Lease;
- (ii) be subject to any off-set, defense or counterclaim which shall have theretofore accrued to Tenant against Landlord;
- (iii) be bound by any modification of the Lease or by any previous prepayment of rent or additional rent for more than one (1) month which Tenant might have paid to Landlord, unless such modification or prepayment shall have been expressly approved in writing by Lender;
- (iv) be liable for any security deposited under the Lease unless such security has been physically delivered to Lender or Successor-Landlord; and
- (v) be liable or obligated to comply with or fulfill any of the obligations of the Landlord under the Lease or any agreement relating thereto with respect to the construction of, or payment for, improvements on or about the Leased Premises (or any portion thereof), leasehold improvements, tenant work letters and/or similar items.

4. Tenant agrees that without the prior written consent of Lender, it shall not (a) amend, modify, terminate or cancel the Lease or any extensions or renewals thereof, (b) tender a surrender of the Lease, (c) make a prepayment of any rent or additional rent more than one (1) month in advance of the due date thereof, or (d) subordinate or permit the subordination of the Lease to any lien subordinate to the Security Instrument. Any such purported action without such consent shall be void as against the holder of the Security Instrument.

5. (A) Tenant shall promptly notify Lender of any default by Landlord under the Lease and of any act or omission of Landlord which would give Tenant the right to cancel or terminate the Lease or to claim a partial or total eviction.

(B) In the event of a default by Landlord under the Lease which would give Tenant the right, immediately or after the lapse of a period of time, to cancel or terminate the Lease or to claim a partial or total eviction, or in the event of any other act or omission of Landlord which would give Tenant the right to cancel or terminate the Lease, Tenant shall not exercise such right (i) until Tenant has given written notice of such default, act or omission to Lender and (ii) unless Lender has failed, within sixty (60) days after Lender receives such notice, to cure or remedy the default, act or omission or, if such default, act or omission shall be one which is not reasonably capable of being remedied by Lender within such sixty (60) day period, until a reasonable period for remedying such default, act or omission shall have elapsed following the giving of such notice and following the time when Lender shall have become entitled under the Security Instrument to remedy the same (which reasonable period shall in no event be less than the period to which Landlord would be entitled under the Lease or otherwise, after similar notice, to effect such remedy), provided that Lender shall with due diligence give Tenant written notice of its intention to and shall commence and continue to, remedy such default, act or omission. If Lender cannot reasonably remedy a default, act or omission of Landlord until after Lender obtains possession of the Leased Premises, Tenant may not terminate or cancel the Lease or claim a partial or total eviction by reason of such default, act or omission until the expiration of a reasonable period necessary for the remedy after Lender secures possession of the Leased Premises. To the extent Lender incurs any expenses or other costs in curing or remedying such default, act or omission, including, without limitation, attorneys' fees and disbursements, Lender shall be subrogated to Tenant's rights against Landlord.

(C) Notwithstanding the foregoing, Lender shall have no obligation hereunder to remedy such default, act or omission.

6. To the extent that the Lease shall entitle Tenant to notice of the existence of any mortgage and the identity of any mortgagee or any ground lessor, this Agreement shall constitute such notice to Tenant with respect to the Security Instrument and Lender.

7. Upon and after the occurrence of a default under the Security Instrument, which is not cured after any applicable notice and/or cure periods, Lender shall be entitled, but not obligated, to exercise the claims, rights, powers, privileges and remedies of Landlord under the Lease and shall be further entitled to the benefits of, and to receive and enforce performance of, all of the covenants to be performed by Tenant under the Lease as though Lender were named therein as Landlord.

8. Anything herein or in the Lease to the contrary notwithstanding, in the event that a Successor-Landlord shall acquire title to the Property or the portion thereof containing the Leased Premises, Successor-Landlord shall have no obligation, nor incur any liability, beyond Successor-Landlord's then interest, if any, in the Property, and Tenant shall look exclusively to such interest, if any, of Successor-Landlord in the Property for the payment and discharge of any obligations imposed upon Successor-Landlord hereunder or under the Lease, and Successor-Landlord is hereby released or relieved of any other liability hereunder and under the Lease. Tenant agrees that, with respect to any money judgment which may be obtained or secured by Tenant against Successor-Landlord, Tenant shall look solely to the estate or interest owned by Successor-Landlord in the Property, and Tenant will not collect or attempt to collect any such judgment out of any other assets of Successor-Landlord.

9. Notwithstanding anything to the contrary in the Lease, Tenant agrees for the benefit of Landlord and Lender that, except as permitted by, and fully in accordance with, applicable law, Tenant shall not generate, store, handle, discharge or maintain in, on or about any portion of the Property, any asbestos, polychlorinated biphenyls, or any other hazardous or toxic materials, wastes and substances which are defined, determined or identified as such (including, but not limited to, pesticides and petroleum products if they are defined, determined or identified as such) in any federal, state or local laws, rules or regulations (whether now existing or hereafter enacted or promulgated) or any judicial or administrative interpretation of any thereof, including any judicial or administrative orders or judgments.

10. If the Lease provides that Tenant is entitled to expansion space, Successor-Landlord shall have no obligation nor any liability for failure to provide such expansion space if a prior landlord

(including, without limitation, Landlord), by reason of a lease or leases entered into by such prior landlord with other tenants of the Property, has precluded the availability of such expansion space.

11. Except as specifically provided in this Agreement, Lender shall not, by virtue of this Agreement, the Security Instrument or any other instrument to which Lender may be a party, be or become subject to any liability or obligation to Tenant under the Lease or otherwise.

12. (A) Tenant agrees that this Agreement satisfies and complies in all respects with the provisions of Article __ of the Lease and that, to the extent inconsistent with the Lease, this Agreement supersedes the provisions of such Article and any other provision of the Lease relating to the priority or subordination of the Lease and the interests or estates created thereby to the Security Instrument.

(B) Tenant agrees to enter into a subordination, non-disturbance and attornment agreement with any lender which shall succeed Lender as lender with respect to the Property, or any portion thereof, if such agreement is substantially similar to this Agreement. Tenant does herewith irrevocably appoint and constitute Lender as its true and lawful attorney-in-fact in its name, place and stead to execute such subordination, non-disturbance and attornment agreement, without any obligation on the part of Lender to do so. This power, being coupled with an interest, shall be irrevocable as long as the indebtedness secured by the Security Instrument remains unpaid. Lender agrees not to exercise its rights under the preceding two (2) sentences if Tenant promptly enters into the subordination, non-disturbance and attornment agreement as required pursuant to the first sentence of this subparagraph (B).

13. (A) Any notice required or permitted to be given by Tenant to Landlord shall be simultaneously given also to Lender, and any right of Tenant dependent upon notice shall take effect only after notice is so given. Performance by Lender shall satisfy any conditions of the Lease requiring performance by Landlord, and Lender shall have a reasonable time to complete such performance as provided in Paragraph 5 hereof.

(B) All notices or other communications required or permitted to be given to Tenant or to Lender pursuant to the provisions of this Agreement shall be in writing and shall be deemed given only if mailed by United States registered mail, postage prepaid, or if sent by nationally recognized overnight delivery service (such as Federal Express or United States Postal Service Express Mail), addressed as follows: to Tenant, at the address first set forth above, Attention: General Counsel; to Lender, at the address first set forth above, Attention: Real Estate Finance; or to such other address or number as such party may hereafter designate by notice delivered in accordance herewith. Except as otherwise provided in this Agreement, all such notices shall be deemed given three (3) business days after delivery to the United States Post office registry clerk if given by registered mail, or on the next business day after delivery to an overnight delivery courier.

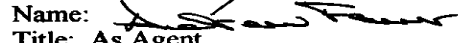
14. This Agreement may be modified only by an agreement in writing signed by the parties hereto, or their respective successors-in-interest. This Agreement shall inure to the benefit of and be binding upon the parties hereto, and their respective successors and assigns. The term "Lender" shall mean the then holder of the Security Instrument. The term "Landlord" shall mean the then holder of the landlord's interest in the Lease. The term "person" shall mean an individual, joint venture, corporation, partnership, trust, limited liability company, unincorporated association or other entity. All references herein to the Lease shall mean the Lease as modified by this Agreement and to any amendments or modifications to the Lease which are consented to in writing by Lender. Any inconsistency between the Lease and the provisions of this Agreement shall be resolved, to the extent of such inconsistency, in favor of this Agreement.

15. **BOTH TENANT AND LENDER HEREBY IRREVOCABLY WAIVE ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT.**

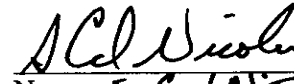
16. This Agreement shall be governed by and construed in accordance with the laws of the State in which the Property is located.

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

CIBC INC., a Delaware corporation

By: 
Name: 
Title: As Agent

ES-O-EN CORP., a Oregon corporation

By: 
Name: S. Carl Nicolaysen
Title: President

AGREED AND CONSENTED TO:

ROY CITY CENTRE REALTY LIMITED

By: See attached Signature Page
Name:
Title:



1901212 BK2303 PG253

RC CENTRE, L.C.,
a Utah limited liability company

By: Woodbury Amsource, Inc.,
a Utah corporation
its Manager

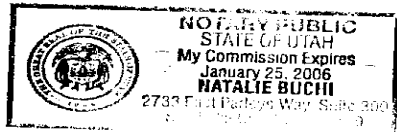
By: *W. Richards Woodbury*
Name: W. Richards Woodbury
Title: Chairman

By: *John R. Gaskill*
Name: John R. Gaskill
Title: President

[Acknowledgment of Landlord]

STATE OF UTAH)
)
COUNTY OF SALT LAKE)

The foregoing instrument was acknowledged before me this 20th day of December, 2002, by, W. Richards Woodbury and John R. Gaskill, as Chairman and President of RC Centre, L.C., a Utah limited liability company, on behalf of the Company. He/she is personally known to me.



Natalie Buchi
Notary Public Signature
Printed/Typed Name: Natalie Buchi
Commission No.: _____
My commission expires: 1-25-06

STATE OF _____)
 : ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this _____ day of _____, 2002, by _____, the _____ of _____, a personally known to me to be the same person whose name is subscribed to the foregoing instrument and acknowledged that he/she signed and delivered the said instrument for the uses and purposes therein set forth.

[SEAL]

Printed Name:
Address:

Notary Public, State of _____

My commission: _____

STATE OF IDAHO)
 : ss.
COUNTY OF ADA)

The foregoing instrument was acknowledged before me this 11 day of DECEMBER 2002, by S. CARL NICOLAYSEN, the PRESIDENT & CEO of ES-O-EN CORP, a personally known to me to be the same person whose name is subscribed to the foregoing instrument and acknowledged that he/she signed and delivered the said instrument for the uses and purposes therein set forth.

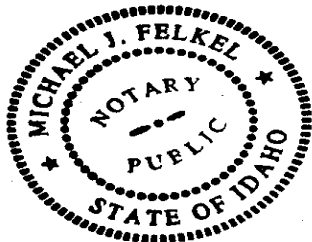
[SEAL]

Michael J. Felkel

Printed Name: MICHAEL JAY FELKEL
Address: 3475 E. FRANKLIN RD
MERIDIAN, ID 83642

Notary Public, State of IDAHO

My commission: EXPIRES 9/7/06



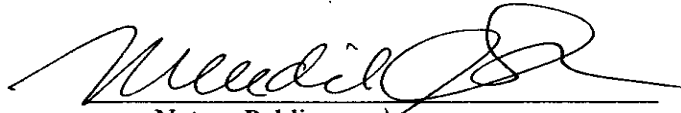
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STATE OF NEW YORK

COUNTY OF NEW YORK

On the 30th day of December in the year ²⁰⁰²~~2000~~, before me, the undersigned, personally appeared Andrew Fawer, 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 that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

MEREDITH A. SMITH
Notary Public, State of New York
No. 01SM6002175
Qualified in Nassau County
Commission Expires February 2, 2006



Notary Public

My commission expires: _____



E# 1901212 BK2303 PG256

Exhibit "A"

Lots 1,3,4,5,6,7 and 8, ROY CITY CENTRE, according to the official plat thereof on file and of record in the office of the Weber County Recorder.

Less and excepting:

A parcel of land in fee for the widening of an existing roadway, State Route 97 (Roy 5600 South), known as Project No. 0097, being part of an entire tract of property situate in the Northeast quarter of the Northeast quarter of Section 23, Township 5 North, Range 2 West, Salt Lake Base and Meridian. The boundaries of said parcel of land are described as follows:

Beginning on the Southerly right of way line of said project at a point 13.500 meters (44.29 feet) perpendicularly distant Southerly from the centerline of said project at Engineer Station 13+004.115, said point also being approximately 221.304 meters (726.06 feet) North 89°50'57" West (North 89°43'33" West highway bearing) along the Section line and 13.500 meters (44.29 feet) South 00°27'45" West (South 00°16'27" West highway bearing) from the Northeast corner of said Section 23, and running thence North 00°27'45" East (North 00°16'27" East, highway bearing) 1.308 meters (4.29 feet) to the Northwest corner of said entire tract; thence South 89°50'57" East (South 89°43'33" East, highway bearing) 151.155 meters (495.92 feet) along the North boundary line of said entire tract; thence South 00°27'51" West (South 00°39'09" West, highway bearing) 1.308 meters (4.29 feet); thence North 89°50'57" West (North 89°43'33" West, highway bearing) 151.155 meters (495.92 feet) along the Southerly highway right of way line of said project to the point of beginning.

TAX ID: ~~09-340-0001, 09-340-0003, 09-340-0004, 09-340-0005, 09-340-0006~~
~~09-340-0007, 09-370-0008~~

↙
09-340-0001, 0003, 0004, 0005, 0006
0007, 0008