

**Third Draft**  
**Friday, December 7, 2018**

This instrument drafted by and  
When recorded return to:

Barnes & Thornburg LLP (BWJ)  
225 South Sixth Street, Suite 2800  
Minneapolis, Minnesota 55402

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

**BY AND BETWEEN**

**21<sup>ST</sup> CENTURY PUBLIC ACADEMY,**  
**as Tenant**

**CUTLER CHARITABLE FOUNDATION,**  
**as Landlord**

**AND**

**U.S. BANK NATIONAL ASSOCIATION,**  
**as Trustee**

**Dated as of December 1, 2018**

\$ \_\_\_\_\_  
**Public Finance Authority**  
**Charter School Lease Revenue Bonds**  
**(21<sup>st</sup> Century Public Academy Project)**  
**Series 2018A**

\$ \_\_\_\_\_  
**Public Finance Authority**  
**Taxable Charter School Lease Revenue Bonds**  
**(21<sup>st</sup> Century Public Academy Project)**  
**Series 2018B**

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## SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT

This Subordination, Non-Disturbance and Attornment Agreement is entered into as of December 1, 2018 (the "Agreement"), by and among 21<sup>st</sup> Century Public Academy (the "Tenant"), Cutler Charitable Foundation (the "Landlord"), and U.S. Bank National Association (the "Trustee").

### RECITALS:

A. The Landlord holds title to certain real property (the "Premises") located in Bernalillo County, New Mexico, together with all improvements located on it. The legal description for the Premises is attached hereto as Exhibit A.

B. The Public Finance Authority (the "Authority") will issue its (i) Charter School Lease Revenue Bonds (21<sup>st</sup> Century Public Academy Project), Series 2018A (the "Series 2018A Bonds"), in the original aggregate principal amount of \$ \_\_\_\_\_; and (ii) Taxable Charter School Lease Revenue Bonds (21<sup>st</sup> Century Public Academy Project), Series 2018B (the "Series 2018B Bonds" and together with the Series 2018A Bonds, the "Series 2018 Bonds"), in the original aggregate principal amount of \$ \_\_\_\_\_. The obligation of the Landlord to pay the indebtedness (the "Loan") evidenced by the Series 2018 Bonds is secured by the terms of a Loan Agreement, dated as of December 1, 2018 (the "Loan Agreement"), between the Authority and the Landlord, and the lien of an Amended and Restated Mortgage, Assignment of Rents, Security Agreement and Fixture Filing Statement, dated as of December 1, 2018 (the "Amended and Restated Mortgage"), executed by the Landlord for the benefit of the Trustee, that encumbers the Landlord's interest in the Premises. The Series 2018 Bonds, the Loan Agreement, the Amended and Restated Mortgage, this Agreement and all other documents evidencing, securing the repayment of, or relating to, the Loan are collectively referred to as the "Loan Documents."

C. The Premises is owned by the Landlord and leased from the Landlord to the Tenant pursuant to the Lease Purchase Agreement, dated May 10, 2017 (the "Original Lease"), between MELD, LLC ("MELD"), as amended by an Amendment to Lease Purchase Agreement (the "First Lease Amendment"), by and between MELD, the Landlord and the Tenant, as assigned from MELD to the Landlord pursuant to an Assignment and Assumption of Lease Purchase Agreement, dated June 29, 2018 (the "Lease Assumption"), from MELD, as assignor, to the Landlord, as assignee, as further amended by a Second Amendment to Lease Purchase Agreement, dated as of the date of issuance of the Series 2018 Bonds (the "Second Lease Amendment"), between the Landlord and the Tenant executed in connection with the issuance of the Series 2018 Bonds (the Original Lease as amended by the First Lease Amendment, the Lease Assumption, the Second Lease Amendment and as may be further amended from time to time, the "Lease").

D. The underwriter for the Series 2018 Bonds is willing to purchase the Series 2018 Bonds and the Authority is willing to make the Loan to the Landlord provided that the Landlord agrees to subordinate the Landlord's rights under the Lease to the lien or charge of the Loan Documents and to attorn to the Trustee on the terms and conditions of this Agreement. The Tenant is willing to agree to such subordination and attornment and other conditions provided the Trustee agrees not to disturb the Tenant's possession in accordance with the terms of the Lease, all as set forth more fully below.

## AGREEMENTS:

The parties agree as follows:

1. Subordination. The Loan Documents (as defined in the Loan Agreement) and all supplements, amendments, modifications, renewals, replacements and extensions of and to them shall be and will remain at all times a lien or charge on the Premises prior and superior to the Lease, to the leasehold estate created by the Lease, and to all rights and privileges of the Tenant arising under the Lease. The Landlord subjects and subordinates the Lease, the Landlord's leasehold estate and all rights and privileges arising in the Landlord's favor under the terms of the Lease to the lien or charge of the Loan Documents in favor of the Trustee. The Tenant consents to the Landlord's and the Trustee's entering into the Amended and Restated Mortgage and the other Loan Documents. The Landlord further declines, agrees and acknowledges that, in making disbursements in accordance with the Loan Documents, the Trustee does not have any obligation or duty to, nor has the Trustee represented that it will, see to the application of such proceeds by the person or persons to whom the Trustee disburses such funds, and any application or use of such proceeds will not defeat the subordination that the Landlord makes in this Agreement, in whole or in part.

2. Definitions of "Transfer of the Premises" and "Purchaser". The term "Transfer of the Premises" means any transfer of the Landlord's interest in the Premises by foreclosure or trustee's sale or as a result of any other action or proceedings for the enforcement of the Amended and Restated Mortgage or any transfer by deed in lieu of foreclosure. The term "Purchaser" means any transferee, including the Trustee, that acquires the Landlord's interest in the Premises as a result of a Transfer of the Premises, and all successors and assigns, including the Trustee, of that initial transferee.

3. Non-Disturbance. Notwithstanding any Transfer of the Premises, the Trustee's seizure of possession of the Premises, any other similar action to enforce the Amended and Restated Mortgage, or any other action taken in connection with the Amended and Restated Mortgage:

(a) the holder or beneficiary of the Amended and Restated Mortgage will not name or join Tenant in any foreclosure, trustee's sale or other proceeding to enforce the Amended and Restated Mortgage unless an Event of Default (as defined in the Lease) has occurred and is continuing or the joinder is required by New Mexico law in order to perfect the foreclosure, trustee's sale or other proceeding;

(b) the enforcement of the Amended and Restated Mortgage will not terminate the Lease or disturb the Tenant in its possession and use of the Premises unless an Event of Default has occurred and is continuing under the Lease; and

(c) the leasehold estate granted by the Lease will not be affected in any manner so long as no Event of Default has occurred and is continuing and the Lease is in full force and effect, and in no event shall either the Trustee, if it becomes the Purchaser or if it takes possession of the Premises in accordance with the terms of the Amended and Restated Mortgage, or any other Purchaser:

(i) be liable for any damages attributable to any act or omission of any prior landlord (including the Landlord);

(ii) be liable for any damages attributable to any latent or patent defects in the construction of any portion of the Premises;

(iii) be subject to any offset, counterclaim or defense that the parties have not specifically contemplated in the Lease and that the Tenant may have against any prior landlord;

(iv) be bound by any prepayment that the Tenant makes more than thirty (30) days in advance of the date on which the payment becomes due under the terms of the Lease or for any security deposit not actually delivered to the Purchaser or by any modification or amendment of the Lease made without the Trustee's written consent unless the Lease specifically contemplates the prepayment, amendment or modification and the parties observe all conditions set forth in the Lease that relate to the prepayment, amendment or modification;

(v) be obligated to complete any pre-occupancy construction work;

(vi) be bound by any amendment or modification of the Lease or by any waiver or forbearance on the part of any lessor (including the Landlord) made or given without the written consent of the Trustee or any subsequent holder of the Amended and Restated Mortgage unless the Lease specifically contemplates the amendment or modification and the parties observe all conditions set forth in the Lease that relate to the amendment or modification; or

(vii) be bound by any representations or warranties of the Landlord under the Lease. The foregoing agreement will not affect the Tenant's right to exercise or to continue to exercise after a Purchaser succeeds to the Landlord's interest in the Premises any remedy, including, without limitation, the offsetting of rent, that may be available to the Tenant by virtue of any default that occurs in respect of the performance of the Landlord's obligations under the terms of the Lease and of which the Tenant has given the Trustee written notice prior to the Purchaser's succession to the Landlord's interest.

4. Attornment. If any Transfer of the Premises occurs, the Purchaser will be bound to the Tenant and the Tenant will be bound to the Purchaser under all of the terms, covenants and conditions of the Lease for the balance of the term of the Lease and any extensions or renewals of that term, whether occurring by reason of the exercise of any valid extension or renewal option contained in the Lease or otherwise, all with the same force and effect as if the Purchaser had been the original landlord designated in the Lease. The Tenant attorns to the Purchaser, including the Trustee if it becomes the Purchaser, as the landlord under the Lease. This agreement to attorn will be effective and self-operative without the execution of any further instruments, upon the Purchaser's succession to the Landlord's interest under the terms of the Lease.

5. Use of Proceeds. So long as no Event of Default has occurred and is continuing and the Lease is in full force and effect, the Trustee will (i) permit any proceeds paid in respect of the insurance that the Tenant maintains in force in accordance with the terms of the Lease to be used for the restoration of the Premises and otherwise applied as provided in the Lease, and (ii) permit any condemnation award paid in connection with a taking of any part of the Premises or any proceeds of a sale made in lieu of condemnation of a part of the Premises to be used for the repair and alteration of the remainder of the Premises as provided in the Lease. The Trustee may, however, impose reasonable conditions on the time and manner of the disbursement of the insurance proceeds, condemnation awards or sales proceeds.

6. Default by Landlord. If the Landlord defaults in the performance of obligations it undertakes under the terms of the Loan Documents, the Tenant will recognize the assignment of rents of

the Landlord made to the Trustee in the Amended and Restated Mortgage and will pay to the Trustee, as assignee, all rents that become due under the terms of the Lease after the date of Tenant's receipt of written notice from the Trustee that the Landlord is in default under the terms of the Loan Documents. The Landlord authorizes the Tenant to accept the Trustee's direction and waives all claims against the Tenant for any sums so paid at the Trustee's direction. The Trustee acknowledges, however, that the Tenant will be making payments of rent to the Landlord by means of computer-generated checks and that the Tenant will require a period of time within which to re-program its accounts payable computer system to reflect the Tenant's receipt of the Trustee's direction. Consequently, Tenant will have no liability to Trustee for any regularly scheduled installment of rent remitted to the Landlord during the period that begins on the date of Tenant's receipt of Trustee's direction and that ends thirty (30) days after that date. Tenant's payment of rents to Trustee in accordance with the foregoing will continue until the first to occur of the following:

- (a) no further rent is due or payable under the terms of the Lease;
- (b) the Trustee gives the Tenant notice that the Landlord has rectified the default that existed in respect of its obligations under the terms of the Loan Documents and instructs the Tenant to make subsequent remittances of the rent to the Landlord; or
- (c) a Transfer of the Premises occurs and the Purchaser gives the Tenant notice of that Transfer. The Purchaser will automatically succeed to the Landlord's interest under the terms of the Lease as provided in Sections 3 and 4 above, after which time the rents and other benefits accruing in favor of the Landlord under the terms of the Lease will be payable to the Purchaser as the owner of the Premises.

7. Limitation on Trustee to Perform. Nothing in this Agreement obligates the Trustee to perform any covenant made by the Landlord as landlord in the Lease unless and until the Trustee obtains title to the Premises as Purchaser or takes possession of the Premises in accordance with the terms of the Amended and Restated Mortgage, and then only during the time when the Trustee holds title to or possession of the Premises.

8. Tenant's Covenants. During the terms of the Lease, without the Trustee's prior written consent, the Tenant may not:

- (a) pay to any landlord (including the Landlord) any installment of rent or additional rent more than one month in advance of the time it becomes due under the terms of the Lease;
- (b) cancel, terminate or surrender the Lease, except through the exercise of a right expressly accorded to Tenant in the Lease; or
- (c) assign the Lease or sublet any portion of the Premises, except as expressly permitted without the landlord's consent in the Lease.

9. Notices of Default, Material Notices. The Tenant must send to the Trustee a copy of any notice of default or similar statement connected with the Lease at the same time that it sends that notice or statement to the Landlord. The Landlord must also send to the Trustee copies of all material notices that it gives to the Tenant in connection with the Lease. The Tenant and the Landlord will deliver those notices to the Trustee in the manner and at the addresses set forth below.

10. Limitation on Liability. Except as provided below, regardless of anything in the Lease or this Agreement apparently to the contrary, the Tenant may not seek to satisfy any judgment that the

Tenant obtains by reason of the negligence of any Purchaser or any of its directors, officers, agents, employees or contractors or by reason of that Purchaser's failure to perform any of the obligations incumbent upon the landlord under the terms of the Lease from any source other than that Purchaser's interest in the Premises and the revenue generated by the operation of the Premises. The Tenant may, however, satisfy any such judgment by offsetting the amount of the judgment against rent becoming due under the terms of the Lease. The foregoing limitation on the sources of the Tenant's recovery will not apply in those instances (i) where proceeds of any insurance are available to satisfy such judgment, (ii) where the Tenant obtains such judgment because of the Purchaser's misapplication of funds that an insurer or a condemning authority pays to the Purchaser and that the Purchaser must use for restoration of the Premises in accordance with the terms of the Lease, (iii) where the Tenant obtains such judgment because of the Purchaser's misapplication of funds that the Tenant pays to the Purchaser for remittance to a third party, such as a taxing authority, or (iv) where the Tenant obtains the judgment because of the Purchaser's fraud. Except as expressly provided above, after application of the proceeds of any insurance that are available to satisfy a judgment that the Tenant obtains by reason of the negligence of any Purchaser or any of its directors, officers, agents, employees or contractors or by reason of that Purchaser's failure to perform any of the obligations incumbent upon the landlord under the terms of the Lease, the Tenant may not seek to satisfy the balance of such judgment remaining after such application from any source other than that Purchaser's interest in the Premises and the revenue generated by the operation of the Premises. Nothing contained in this Section impairs, affects, lessens, abrogates or otherwise modifies the obligations of the Landlord to the Tenant under the terms of the Lease.

11. Trustee's Right to Cure Default. If any act or omission by the Landlord gives the Tenant the right to terminate the Lease or to claim a partial or total eviction, the Tenant may not exercise that right or make that claim until it has given the Trustee written notice of the occurrence of that act or omission and the Trustee has failed to rectify the condition giving rise to that right or that claim within (i) ten (10) business days, if the Trustee can accomplish the rectification by the mere payment of money, (ii) thirty (30) business days, if the Trustee cannot accomplish the rectification by the mere payment of money and the rectification does not require the Trustee to obtain possession of the Premises, and (iii) a reasonable time, if the Trustee cannot accomplish the rectification by the mere payment of money, the rectification requires the Trustee to obtain possession of the Premises, and the Trustee both commences efforts to obtain possession of the Premises and to rectify the condition within fifteen (15) business days after the delivery of the Tenant's written notice and diligently and continuously pursues those efforts. The foregoing does not obligate the Trustee to undertake the rectification of any default by the Landlord in respect of the performance of its obligations under the terms of the Lease.

12. Termination of Agreement. If no Transfer of the Premises occurs, this Agreement becomes void upon payment in full of the indebtedness evidenced by the Series 2018 Bonds and the recordation of a reconveyance, release or satisfaction of the Amended and Restated Mortgage.

13. Integration. This Agreement integrates all of the terms and conditions of the parties' agreement regarding the subordination of the Lease and the leasehold estate that it creates to the lien or charge of the Loan Documents. This Agreement supersedes and cancels all oral negotiations and all prior writings relating to that subordination including any provisions of the Lease that provide for the subordination of the Lease. The parties intend this Agreement as the final expression of their agreement relating to the subordination of the Lease to the operation and effect of the Loan Documents. The parties may amend this Agreement only by means of a written agreement that the parties or their respective successors in interest sign.

14. Notices. All notices connected with this Agreement must be in writing and the parties must deliver those notices by means of messenger service, Federal Express overnight delivery service, or by registered or certified United States mail, postage prepaid, sent to the recipient at its address specified

below. Notices will be effective upon receipt or when the recipient refuses proper delivery. Any party may change its address for the delivery of notices connected with this Agreement by delivering notice to all other parties in accordance with this Section.

To Trustee: U.S. Bank National Association  
633 West 5<sup>th</sup> Street, 24<sup>th</sup> Floor  
Los Angeles, CA 90071  
Attn: U.S. Bank Global Corporate Trust

To Landlord: Cutler Charitable Foundation  
4300 Cutler Avenue Northeast  
Albuquerque, NM 87109  
Attn: Board Chair

To Tenant: 21st Century Public Academy  
4300 Cutler Avenue Northeast  
Albuquerque, NM 87109  
Attn: Board Chair

To the extent that the Lease shall entitle the Tenant to notice of any Amended and Restated Mortgage, this Agreement shall constitute such notice to the Tenant with respect to the Amended and Restated Mortgage and the Tenant hereby waives notice of any and all renewals, modifications, extensions, substitutions, replacements, and/or consolidations of the Amended and Restated Mortgage.

15. Attorneys' Fees. If any lawsuit or arbitration arising out of or relating to this Agreement commences, the prevailing party is entitled to recover from each other party, in addition to costs and expenses otherwise allowed by law, such sums as the court or arbitrator may adjudge to be reasonable attorneys' fees in the action or arbitration, including the reasonable value of services rendered by in-house counsel.

16. Waiver of Jury Trial. TO THE EXTENT PERMITTED BY LAW, THE LANDLORD, THE TENANT AND THE TRUSTEE HEREBY JOINTLY AND SEVERALLY WAIVE ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING RELATING TO THIS AGREEMENT. THE LANDLORD, THE TENANT AND THE TRUSTEE EACH REPRESENTS TO THE OTHER THAT THIS WAIVER IS KNOWINGLY, WILLINGLY AND VOLUNTARILY GIVEN.

17. Miscellaneous Provisions. This Agreement inures to the benefit of and binds the parties and their respective successors and assigns. This Agreement may be executed in counterparts for the convenience of the parties. Any provisions governing the rights, immunities and protections of the trustee under the Loan Documents are incorporated by reference into this Agreement as being applied to the Trustee as through fully set forth herein. The laws of the state where the Premises are located, without regard to the choice of law rules of that State, will govern the interpretation and enforcement of this Agreement. As used in this Agreement, the word "include(s)" means "include(s), without limitation," and the word "including" means "including, without limitation."

IN WITNESS WHEREOF, the parties have executed this Subordination, Non-Disturbance and  
Attornment Agreement on the day and year first above written.

**CUTLER CHARITABLE FOUNDATION**, a New  
Mexico nonprofit corporation

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

Its: \_\_\_\_\_

STATE OF NEW MEXICO    )  
  )ss.  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_,  
2018, by \_\_\_\_\_, the \_\_\_\_\_ of Cutler Charitable  
Foundation, a New Mexico nonprofit corporation on behalf of said nonprofit corporation.

(SEAL)

\_\_\_\_\_  
Notary Public

(Signature page to Subordination, Non-Disturbance and Attornment Agreement  
re 21<sup>st</sup> Century Public Academy)



**21<sup>ST</sup> CENTURY PUBLIC ACADEMY**, a New Mexico  
nonprofit corporation

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

Its: \_\_\_\_\_

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

Its: \_\_\_\_\_

STATE OF NEW MEXICO    )  
  )ss.  
COUNTY OF \_\_\_\_\_)

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2018, by \_\_\_\_\_ and \_\_\_\_\_, the \_\_\_\_\_ and \_\_\_\_\_, respectively, of 21<sup>st</sup> Century Public Academy, a New Mexico nonprofit corporation on behalf of said nonprofit corporation.

(SEAL)

\_\_\_\_\_  
Notary Public

(Signature page to Subordination, Non-Disturbance and Attornment Agreement  
re 21<sup>st</sup> Century Public Academy)

**U.S. BANK NATIONAL ASSOCIATION**, a national  
banking association

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

Its: \_\_\_\_\_

STATE OF \_\_\_\_\_ )  
  )ss.  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_,  
2018, by \_\_\_\_\_, the \_\_\_\_\_ of U.S. Bank  
National Association, on behalf of said national banking association.

(SEAL)

\_\_\_\_\_  
Notary Public

(Signature page to Subordination, Non-Disturbance and Attornment Agreement  
re 21<sup>st</sup> Century Public Academy)

## EXHIBIT A

### LEGAL DESCRIPTION OF THE PREMISES

#### Parcel 1

Tract "B-1A" of the Plat of Tracts B-1A through B-1F, NETHERWOOD PARK ADDITION, Situate within Section 11, Township 10 North, Range 3 East, N.M.P.M., Albuquerque, New Mexico, as the same is shown and designated on the Plat thereof, filed in the office of the County Clerk of Bernalillo County, New Mexico on February 5, 1998 in Plat Book 98C, Page 40.

#### Parcel 2

Non-exclusive rights of easement for private access, drainage and utilities, as set forth in the Reciprocal Easement Agreement by and between MELD, Limited Liability Company, a New Mexico limited liability company, and DePonte Investments, Inc., a New Mexico corporation, recorded February 6, 1998 in Book 9805, Page 1844 as Document No. 1998013281; amended by First Amendment to Reciprocal Easement Agreement recorded March 16, 2010 as Document No. 2010021916, records of Bernalillo County, New Mexico.

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