

6-6-2013

# Credit Suisse AG v. Teufel Nursery, Inc. Respondent's Brief Dckt. 40234

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IN THE SUPREME COURT OF THE STATE OF IDAHO

CREDIT SUISSE AG, CAYMAN ISLANDS BRANCH, fka CREDIT SUISSE, CAYMAN ISLANDS BRANCH,

Plaintiff-Respondent,

vs.

TEUFEL NURSERY, INC.,

Defendant-Appellant,

and

ACTION GARAGE DOOR, INC.,

Defendant.

SUPREME COURT NO. 40234-2012

District Court Case No. CV 08-114C  
(Consolidated)

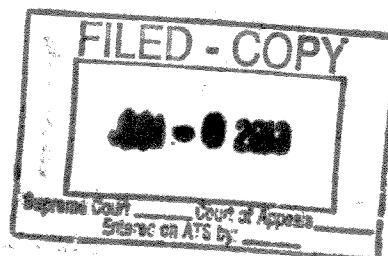
**RESPONDENT'S BRIEF**

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

Honorable Patrick H. Owen presiding

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**TABLE OF CONTENTS**

	Page
TABLE OF CASES AND AUTHORITIES.....	iii
ADDITIONAL ISSUES PRESENTED ON APPEAL.....	13
ATTORNEY FEES.....	13
ARGUMENT.....	13
I. THE DISTRICT COURT WAS CORRECT IN DECIDING THAT TEUFEL’S LIEN CLAIM WAS INFERIOR TO CREDIT SUISSE’S MORTGAGES .....	13
A. There Was Substantial Evidence To Support The District Court’s Findings That Teufel Had Four Separate Landscape Construction Agreements, Not A Continuous Single Contract .....	14
1. There Was Substantial Evidence That Teufel Had Four Written Contracts, Even Though None Was Signed. ....	14
2. The Four Written Agreements Were Unambiguous and Provided Substantial Evidence That Each Was a Separate Contract. ....	18
3. There Was Substantial Evidence That Teufel Maintained A Skeletal Crew During The Winter Months For Snow Removal. ....	24
4. Teufel Had Four Written Annual Contracts, Not An Open Account.....	26
II. THE DISTRICT COURT CORRECTLY DECIDED THE AMOUNT OF TEUFEL’S LIEN CLAIM.....	29
III. THE DISTRICT COURT CORRECTLY DECIDED TO APPLY A VARIABLE PRIME RATE TO CALCULATE PREJUDGMENT INTEREST .....	36



IV. THE DISTRICT COURT CORRECTLY DECIDED ITS AWARD OF TEUFEL’S ATTORNEY FEES AND COSTS..... 39

A. Standard of Review ..... 39

B. An Award Of 60% of Teufel’s Attorney Fees and Costs Was Within The District Court’s Discretion ..... 41

1. The District Court Perceived the Issue As One of Discretion..... 43

2. The District Court Acted Within the Boundaries of Its Discretion..... 43

3. The District Court Reached Its Decision By An Exercise of Reason. .... 44

CONCLUSION..... 45





**TABLE OF CASES AND AUTHORITIES**

Page

**Cases**

*Bouten Constr. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 992 P.2d 751, 762 (1999) .....41

*Chief Indus., Inc. v. Schwendiman*, 99 Idaho 682, 587 P. 2d 823, 828 (1978).....31

*City of Meridian v. Petra, Inc.*, 154 Idaho 425, 299 P. 3d 232 (2013)..... 18

*Elec. Wholesale Supply Co., Inc. v. Nielson*, 136 Idaho 814, 41 P. 3d 242 (2001).....39

*Franklin Bldg. Supply Co. v. Sumpter*, 139 Idaho 846, 87 P. 3d 955, 960 (2004).....27

*Hopkins Northwest Fund, LLC v. Landscapes Unlimited, LLC*, 151 Idaho 740, 264 P. 3d 379 (2011) .....30

*Hughes v. Fisher*, 142 Idaho 474, 129 P. 3d 1223 (2006).....44

*Pac. States Sav. Loan & Bldg. Co. v. Dubois*, 11 Idaho 319, 83 P. 513 (1905).....8, 13

*ParkWest Homes, LLC v. Barnson*, \_\_ P. 3d \_\_, WL 1667566 (Idaho 2013).....40

*Pimental v. Jacobsen Fishing Co., Inc.*, 102 F. 3d 638 (1<sup>st</sup> Cir. 1996) .....38

*Stueve v. N. Lights, Inc.*, 122 Idaho 720, 838 P. 2d 323 (Ct. App. 1992).....38

*Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, \_\_, 247 P. 3d 620, (2010) ..... 14

*Ultrawall, Inc. v. Washington Mut. Bank, FSB*, 135 Idaho 832, 25 P. 3d 855 (2001) .....8, 13

*Valley Lumber & Mfg. Co. v. Driessel*, 13 Idaho 662 \_\_, 93 P. 765, 768 (1907) ..... 14

*White v. Constitution Min. & Mill Co.*, 56 Idaho 403, 55 P. 2d 152 (1936) ..... 14



**Statutes**

Idaho Code §45-501.....31

Idaho Code §45-504.....31

Idaho Code §45-506.....8, 13

Idaho Code §45-507(4).....4

Idaho Code §45-508.....30, 31

Idaho Code §45-513.....39

**Appendix**

- A. *Substitute Omnibus Findings and Conclusions Re: Validity, Priority and Amount of Various Lien and Mortgage Claims*, entered August 15, 2011 (relevant pages)
- B. 2004 Landscape Construction Agreement, Trial Exhibit 9:001
- C. 2005 Landscape Construction Agreement, Trial Exhibit 9:002
- D. 2006 Landscape Construction Agreement, Trial Exhibit 9:003
- E. 2007 Landscape Construction Agreement, Trial Exhibit 9:004
- F. *Memorandum, Decision and Order Re: Various Requests for Award of Attorney Fees, and Costs and Prejudgment Interest*, entered February 3, 2012 (relevant pages)



## STATEMENT OF THE CASE

In its *Substitute Omnibus Findings and Conclusions Re: Validity, Priority and Amount of Various Lien and Mortgage Claims*,<sup>1</sup> the district court characterized the Tamarack Resort and its financial condition:

Tamarack Resort, LLC (“Tamarack”), a Delaware limited liability company, was the owner, developer and operator of the Tamarack Resort (“Resort”), a failed resort located adjacent to Lake Cascade, a few miles from the City of Donnelly in Valley County, Idaho. The Resort owned large tracts of real property and had a leasehold interest in about 2,000 acres of land owned by the State of Idaho. The development was planned as a year round resort community anchored by winter cross-country and downhill skiing, a championship golf course, other outdoor recreational activities, hotel and conference facilities, retail shopping, restaurants and lounges. Tamarack planned to market a variety of real estate offerings, including development lots, custom homes, condominiums, townhomes, chalets and cottages.

The full development of the Resort was projected in multiple phases over a number of years. Resort planning and obtaining entitlements was a lengthy and complicated process which had achieved significant milestones by 2002. The main entitlements included the Conditional Use Permits associated with the approved Valley County Planned Unit Development 98-1.

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<sup>1</sup> *Substitute Omnibus Findings and Conclusions Re: Validity, Priority and Amount of Various Lien and Mortgage Claims*, entered August 15, 2011 (R. 3821 – 3922).

Development and construction at the Resort began in 2003. Lots and housing units were built and sold in platted subdivisions. Hotel and conference facilities were developed. The ski areas and golf course were developed and operating by 2006. There were shopping and restaurant options for residents and guests.

On May 19, 2006, Tamarack entered into a Credit Agreement with a group of lenders, including Credit Suisse, Cayman Islands Branch (“Credit Suisse”). The Credit Agreement was for a loan in the amount of \$250,000,000.00 which enabled Tamarack to refinance existing debt, pay accounts receivable, and to finance the continued development of the resort. The Credit Agreement allowed Tamarack to go forward with two (2) large condominium projects: the Village Plaza Condominium Project (“Village Plaza”) and the Lake Wing Condominium Project (“Lake Wing”).

.....

In 2007, Tamarack’s financial condition deteriorated significantly. Tamarack defaulted in its obligations under the Credit Agreement. Tamarack fell behind and became unable to pay its contractors and suppliers. Tamarack’s financial condition continued to deteriorate in 2008. Tamarack suspended all construction activities at the Resort, leaving many projects unfinished and many creditors unpaid. Many of Tamarack’s contractors and suppliers recorded claims of lien against Tamarack’s property.<sup>2</sup>

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<sup>2</sup> *Id.* at pp. 4-6 (R. 3824 – 3826).

In March 2008, after the borrower had fallen into default and Credit Suisse prepared to foreclose its two mortgages (the “Mortgages”), Credit Suisse was confronted with over one-hundred laborer’s and materialman’s liens that had been recorded subsequent to the Mortgages by approximately eighty original and sub-contractors claiming a combined total of approximately \$24,000,000.00. As soon as Credit Suisse filed its mortgage foreclosure complaint, many of these lien claimants filed their own lien foreclosure lawsuits. When the dust settled, there were twenty-three cases, resulting in literally hundreds and hundreds of initial and responsive pleadings. To bring order to chaos, the twenty-three lawsuits were consolidated.<sup>3</sup>

At the urging of Credit Suisse and pursuant to its powers under I.R.C.P. 16 to manage this complex consolidated action, the district court ordered all of the lien claimants to file disclosure forms, first to among other things provide a statement of the date upon which the claimant first provided labor and material to the property, and the date claimed for priority, and subsequently to identify the claimant’s controlling contract(s) - all important information critical to determining the validity, priority and amount of the many lien claims. None of the information required by the disclosure forms required discovery. All of the information was within the knowledge of each lien claimant. Teufel Nursery, Inc. (“Teufel”) complied by filing an initial disclosure form, a

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<sup>3</sup> *Order Granting Consolidation*, entered October 17, 2008 (R. 1459 – 1465).



supplemental disclosure form, an amended disclosure form, and a second amended disclosure form, all signed by its attorney, pursuant to I.R.C.P. 11(a). In many instances, the information Teufel provided proved to be contradictory at best.

Teufel recorded its Laborer's and Materialmen's Notice and Claim of Lien<sup>4</sup> against twelve separate recorded plats within the Tamarack Resort. The information contained in Teufel's notice of claim of lien was verified by its president, Larry Teufel, pursuant to Idaho Code §45-507(4). Attached to and made a part Teufel's lien notice was the following chart, prepared by Teufel, apportioning its \$529,556.47 statement of demand (plus interest for as total claim of \$564, 460.23) among twenty-four (24) distinct activities, areas or properties:<sup>5</sup>

	Work Order	Unpaid Retention	Unpaid Invoices	Total
Arling Center	6.68	7,296.57	-	7,296.57
Chalet	02.24.240	4,069.71	-	4,069.71
Clearwater Townhomes	R-92	6,297.95	35,284.05	41,582.00
Design Plaza	03.30.307	2,222.55	-	2,222.55
Dory Custom Chalet #3	R-33	750.00	5,411.42	6,161.42
Erosion Control	03.34.340	1,808.10	52,486.57	54,294.77

<sup>4</sup> Laborer's and Materialmen's Notice and Claim of Lien, Trial Exhibit 9:006, attached to Teufel's opening brief at Appendix G.

<sup>5</sup> A more legible copy of this chart was separately introduced by Teufel as its Trial Exhibit 9:055, and is attached to Teufel's opening brief as Appendix H. The district court devised a system for marking trial exhibits. Each party was assigned a number followed by a colon. Credit Suisse was assigned 1:\_\_\_\_; Teufel was assigned 9:\_\_\_\_.

Francoise Court		83.04	1,572.77	1,655.81
General Conditions 2007		9,770.76	-	9,770.76
Golden Bar	02.24.241	27,762.12	-	27,762.12
Golf Course	05.52.521	2,586.67	-	2,586.67
Haystack Chalet #25	R-31	853.35	5,674.76	6,528.11
Heritage roadside	H-I-109	1,013.31	-	1,013.31
Members Lodge	6.60	420.66	-	420.66
Misc. hydroseeding	I-25	40.31	-	40.31
Norwood Nursery	03.31.312.3126	76.95	-	76.95
Poma			2,880.00	2,880.00
Rock Creek	01.13.131	1,429.72	-	1,429.72
Snow Front	I-16	2,260.28	42,945.00	45,205.28
South End Berm	03.30.340	1,097.82	-	1,097.82
Steelhead custom chalet	R-70	826.76	14,221.68	15,048.44
Trillium cottages	R-121	11,074.60	193,899.09	204,973.69
Trillium townhomes	R-89	3,760.95	87,081.80	90,842.75
Twin Creek	01.13.130	60.00	2,514.55	2,574.55
Village Drive	03.31.310.3100	22.50	-	22.50
		85,584.78	443,971.69	529,556.47

Due as of 03/20/08

**SUMMARY**

Unpaid invoice     \$ 443,971.69  
Unpaid retention    \$ 85,584.78  
Accrued interest    \$ 35,003.76

TOTAL DUE         \$ 564,460.23

*Teufel's Amended Complaint for Foreclosure on a Mechanic's Lien.*

In its Amended Complaint For Foreclosure on a Mechanic's Lien,<sup>6</sup> rather than describing the property in the same terms as its lien notice (i.e., Arling Center, Chalet, Clearwater Townhomes, etc.), Teufel instead described the property as Parcels A through LL. This made an assessment of Teufel's lien claim extremely difficult. Although Teufel's litigation guaranty from Stewart Title Company was helpful in determining that, for the most part, Parcels A through LL referred to individual lots within the resort, the pairing of these alphabetized parcels with the activities, areas or properties identified in Teufel's lien notice did not occur, as we explain below, until the cross-examination of Teufel's principal trial witness.<sup>7</sup>

*Initial Disclosure Form.*

Teufel filed its initial disclosure form in February 2009.<sup>8</sup> Referring to Parcels A through LL, Teufel claimed various dates in 2007 as the dates upon which it first provided labor and material to the property, and the dates for priority of its lien claim. Each of those dates in 2007 was subsequent to May 19, 2006, the date Credit Suisse

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<sup>6</sup> Amended Complaint for Foreclosure on a Mechanic's Lien (R. 1545 – 1628).

<sup>7</sup> See e.g., Tr. Vol. II, pp. 463-477.

<sup>8</sup> Notice of Lien Claimant Disclosure Form of Teufel Nursery, Inc. (R. 1696 – 1892); also Trial Exhibit 1:300.

recorded its Mortgages. Teufel also identified twenty-seven (27) recorded partial releases of its lien claim.

*Amended Disclosure Form.*

About a month later, Teufel filed an amended disclosure form with an allocation of dollar values for its work on each alphabetized parcel.<sup>9</sup> Consistent with having recorded twenty-seven partial releases, the sum of the allocated dollars was only \$429,647.15, approximately one-hundred thousand dollars (\$100,000) less than the lien notice's statement of demand (excluding interest). Again, Teufel confirmed by its attorney's signature that the start date for its work and priority date for its claim of lien was 2007, well after May 19, 2006, when Credit Suisse recorded its Mortgages.

*Supplemental Disclosure Form With Operative Contract.*

In June 2009, Teufel filed a supplemental disclosure form,<sup>10</sup> once again signed by its attorney, that supposedly identified its operative contract. Teufel attached an unsigned *Tamarack Resort Master Construction Services Agreement* and signed work orders, stating that they were "[t]he basis of Teufel Nursery, Inc.'s claim of lien in this matter." Notably, each work order had a start date sometime between June-December 2007, which

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<sup>9</sup> Notice of Amended Lien Claimant Disclosure Form of Teufel Nursery, Inc. (R. 1904 – 2102); also Trial Exhibit 1:301.

<sup>10</sup> Notice of Filing Teufel Nursery, Inc.'s Mechanics' Lien Claimant Supplemental Disclosure Form (R. 2160 – 2201), also Trial Exhibit 1:299.

was entirely consistent with the 2007 priority dates in Teufel's previous disclosure forms.<sup>11</sup>

*Second Amended Disclosure Form and New Operative Contracts.*

On a single day in August 2009, Credit Suisse filed seventeen motions for partial summary judgment to narrow the claims for trial. Each motion relied solely on disclosure forms filed by lien claimants who acknowledged that their labor and materials were first provided subsequent to the date Credit Suisse recorded its Mortgages, and were, therefore, inferior in priority to the Mortgages. *See* Idaho Code §45-506; *see also Pac. States Sav. Loan & Bldg. Co. v. Dubois*, 11 Idaho 319, 83 P. 513 (1905); *Ultrawall, Inc. v. Washington Mut. Bank, FSB*, 135 Idaho 832, 25 P. 3d 855 (2001). The wisdom and utility of the court mandated disclosure forms became obvious when sixteen of the motions were granted, all without the need to conduct any further discovery. The only motion that was not granted was the motion directed at Teufel's lien claim, which relied on the start dates and priority dates that Teufel had identified in its initial and amended disclosure forms.<sup>12</sup> In opposing Credit Suisse's motion, Teufel filed a second amended

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<sup>11</sup> At trial, Teufel identified the *Tamarack Resort Master Construction Services Agreement* as originating in mid-2007. (Tr. Vol. II., p. 302, L. 1-8).

<sup>12</sup> *See* Memorandum In Support of Credit Suisse's Motion for Partial Summary Judgment as to Teufel Nursery, Inc.'s Lien No. 330152 (R. 2202 – 2452).

disclosure form,<sup>13</sup> this time signed by its new attorney, amending all of the start and priority dates from the 2007 dates to June 14, 2004. In the second amended disclosure form, Teufel furnished a revised allocation of its labor and materials that totaled only \$392,035.78, further reducing its claim.

Teufel's opposition to Credit Suisse's partial summary judgment motion was accompanied by the affidavit of its Landscape Division Manager, Rick Christensen, who asserted that Teufel's lien priority date was from June 14, 2004.<sup>14</sup> In his affidavit, Mr. Christensen for the first time identified four Landscape Construction Agreements, dated in 2004, 2005, 2006 and 2007, respectively, as the contracts that had governed Teufel's work, rather than the *Tamarack Resort Master Construction Services Agreement* that had earlier been identified. The copies of the Landscape Construction Agreements attached to Christensen's affidavit were unsigned; however, at his subsequent Rule 30(b)(6) deposition, Christensen testified that the signed agreements were in storage.<sup>15</sup> At trial, he altered his testimony, explaining that Larry Teufel had signed two copies of each Landscape Construction Agreement; that they had been delivered to the resort owner for its signature; and that fully executed contracts had never been returned to Teufel to place

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<sup>13</sup> Notice of Second Amended Mechanic's Lien Claimant Disclosure Form of Teufel Nursery, Inc. (R. 2578 – 2781; *also* Trial Exhibit 1:298.

<sup>14</sup> Affidavit of Rick Christensen (R. 2467 – 2577).

<sup>15</sup> Tr. Vol. II, p. 421, L. 1 – 425, L. 16.

in its files.<sup>16</sup> Nevertheless, Christensen testified at trial that he had witnessed Larry Teufel's signature on each contract and he identified the four Landscape Construction Agreements as the operative contracts for Teufel's work at the resort.<sup>17</sup>

Although Teufel's notice of claim of lien contained a statement of demand for \$529,556.47 (plus interest), by the time Teufel presented its proof at trial in October 2010, Teufel had recorded thirty-three partial releases of its lien claim and had asked the district court to enter four orders releasing seven additional lots.<sup>18</sup> Teufel's trial brief informed the district court that because of these partial releases, its claim had been reduced to \$359,244.71, exclusive of unpaid interest, fees or costs.<sup>19</sup>

*The Trial of Teufel's Claim.*

The district court conducted bench trials of the mechanic's lien claims in Cascade, Idaho, for approximately one week each in September, October, and November, and for a single day in December 2010. As Plaintiff, Credit Suisse offered, among other exhibits, its Mortgages and the numerous notices of claim of lien that had all been recorded

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<sup>16</sup> Tr. Vol. II, p. 238, L. 15-20; Vol. II, p.242, L. 16 - p. 243, L. 8; Vol. II, p. 243, L. 18 - p. 244, L. 13; Vol. II, p. 257, L. 15-22; Vol. II, p. 274, L. 11- p. 275, L. 13; Vol. II, p. 287, L. 12- p. 289, L. 6.

<sup>17</sup> *Id.*; see also Tr. Vol. II, p. 299, L. 4- p. 300, L. 10 (Christensen), explaining that Teufel did not sign the Master Construction Services Agreement because it already had a Landscape Construction Agreement for 2007.

<sup>18</sup> See Trial Exhibits 1:300, 1:304, 1:305, 1:306, 1:307 and 1:308.

<sup>19</sup> Teufel Nursery Inc.'s Trial Brief at p. 17 (R. 3342), Tr. Vol. II, p. 462, L. 16 - p. 463, L. 6.

subsequent to the Mortgages. It then rested. Seven lien claimants then came forward, one at a time, and put on proof of the validity, priority and amount of their lien claims. Credit Suisse cross-examined the witnesses and called witnesses of its own. Teufel presented its proof on October 5-6, 2010.

At trial, Teufel's principal witness was Rick Christensen. Remarkably, Mr. Christensen testified that Teufel was still claiming \$529,556.47 (plus interest), even though it had reduced its claim to \$429,647.15 in its initial disclosure form, \$392,035.78 in its second amended disclosure form, and \$359,244.71 in its trial brief.<sup>20</sup> Mr. Christensen testified that he not had an opportunity to take into consideration the partial releases of Teufel's lien claim and their impact on the total amount still due and owing.<sup>21</sup> However, as the day wore on, that testimony proved to be false and it clearly impacted Christensen's overall credibility.

When he was asked on cross-examination whether he could reconcile the chart attached to Teufel's lien notice with the parcel system Teufel had utilized in its pleadings and disclosure forms, Mr. Christensen pulled several pages from his pocket calling them his "cheat sheet."<sup>22</sup> It turned out that he had, contrary to the testimony he had just given,

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<sup>20</sup> Tr. Vol. II, p. 418, L. 16 - p. 419, L. 12; Vol. II, p. 462, P.16 - p. 463, L. 7.

<sup>21</sup> Tr. Vol. II, p. 419, L. 17-20.

<sup>22</sup> Tr. Vol. II, p. 455, L. 23 - p. 461, L.14.



accounted for the numerous partial releases and had arrived at a new \$406,199.07 lien total.<sup>23</sup> We asked the bailiff to make copies and the “cheat sheet” was admitted as Trial Exhibit 9:056.<sup>24</sup>

Relying primarily on the four Landscape Construction Agreements, Affidavit of Rick Christensen, Teufel’s Trial Brief, and the “cheat sheet,” the district court found that Teufel had operated at the Tamarack Resort under four separate written agreements, not a continuous single agreement; that those written agreements in 2005, 2006 and 2007 were not renewals of the 2004 agreement; that Teufel’s lien claim related to its work in 2007 under the 2007 agreement; and that Teufel’s lien claim was, therefore, inferior in priority to Credit Suisse’s Mortgages.

The district court also carefully sorted through all of the evidence and ultimately awarded Teufel 54% of its original lien claim, or \$306,543.30. Because Teufel had failed to prove the priority of its lien claim over Credit Suisse’s Mortgages, the district court found that Teufel had only partially prevailed. Based in part on that finding, the court awarded Teufel all of its costs as a matter of right, and 60% of its attorney fees and allowed discretionary costs.

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<sup>23</sup> Tr. Vol. II, p. 462, L. 10 - 15; Vol. II, p. 480, L. 21 - p. 482, L. 3.

<sup>24</sup> Tr. Vol. II, p. 493, L. 16 - p. 496, L. 11; Cheat Sheet, Trial Exhibit 9:056, is attached to Teufel’s opening brief as Appendix J.

## **ADDITIONAL ISSUES PRESENTED ON APPEAL**

Respondent does not contend that the issues presented on appeal listed in appellant's brief are insufficient, incomplete, or raise additional issues for review.

## **ATTORNEY FEES**

Respondent is not claiming attorney fees on appeal.

## **ARGUMENT**

### **I. THE DISTRICT COURT WAS CORRECT IN DECIDING THAT TEUFEL'S LIEN CLAIM WAS INFERIOR TO CREDIT SUISSE'S MORTGAGES**

Under the lien laws, laborer's and materialman's liens share the same priority unless, as in this case, a recorded mortgage intervenes. Idaho Code §45-506. When that occurs, the priority of the liens vis-à-vis the mortgage is determined by the date each lien claimant's labor or material was furnished, either at or following the commencement of the building, improvement or structure. *Pac. States Sav. Loan & Bldg. Co. v. Dubois, supra; Ultrawall, Inc. v. Washington Mutual Bank, FSB, supra.* Determining the relative priority of the Mortgages and the lien claims became particularly important in this case because it is unlikely that the resort property is worth enough to satisfy even the Mortgages.

Teufel was paid “in full” for the work it performed at the Tamarack Resort in 2004, 2005 and 2006.<sup>25</sup> For Teufel’s 2007 work to relate back to 2004, when it first began working at the Tamarack Resort, the work must have been such as to constitute a continuous single agreement. *See Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, \_\_\_, 247 P. 3d 620, 627 (2010); *see also White v. Constitution Min. & Mill Co.*, 56 Idaho 403, 420, 55 P. 2d 152, 160 (1936). Work knowingly provided under a separate and distinct contract cannot tack to an earlier contract. *Valley Lumber & Mfg. Co. v. Driessel*, 13 Idaho 662 \_\_\_, 93 P. 765, 768 (1907). As the Supreme Court explained, a lien filed within ninety days after the completion of the labor or services may encompass the entirety of the work performed under a single contract. *Terra-West, Inc.*, 247 P. 3d at 627. The evidence was overwhelmingly against Teufel, which failed to prove that its work in 2007 was pursuant to continuous single agreement that began in 2004.

**A. There Was Substantial Evidence To Support The District Court’s Findings That Teufel Had Four Separate Landscape Construction Agreements, Not A Continuous Single Contract**

**1. There Was Substantial Evidence That Teufel Had Four Written Contracts, Even Though None Was Signed.**

In its *Substitute Omnibus Findings and Conclusions Re: Validity, Priority and Amount of Various Lien and Mortgage Claims*,<sup>26</sup> the district court found that Teufel first

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<sup>25</sup> Tr. Vol. II, p. 483, L. 3 - p. 484, L. 3.

<sup>26</sup> *See* fn.1. Relevant pages are attached hereto as Appendix A.

entered into a written Landscape Construction Agreement with Tamarack Resort, LLC (“Tamarack”) in 2004,<sup>27</sup> and subsequently in 2005,<sup>28</sup> 2006,<sup>29</sup> and 2007.<sup>30</sup> The four Landscape Construction Agreements first surfaced as exhibits to the Affidavit of Rick Christensen in opposition to Credit Suisse’s motion for partial summary judgment.

There, Christensen swore upon his oath that:

4. *“Teufel signed a Landscape Construction Agreement (“Agreement”) with Tamarack Resort, LLC, on June 4, 2004. The Agreement was to last one year and specified the portions or properties of Tamarack Resort that Teufel was to landscape that year. Attached is a true and accurate copy of the Agreement as Exhibit “A.”*

5. *Teufel signed a new Agreement in 2005, 2006 and 2007. All work done in 2008 was on a job to job basis. Attached are true and accurate copies of the 2005, 2006 and 2007 Agreements as Exhibits “B”, “C” and “D” respectively.<sup>31</sup>*

Although no executed copy of the four agreements was ever produced, Teufel offered the four Landscape Construction Agreements during its case in chief, based upon Christensen’s testimony that he had personally witnessed Larry Teufel sign each

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<sup>27</sup> 2004 Landscape Construction Agreement, Trial Exhibit 9:001, attached hereto as Appendix B.

<sup>28</sup> 2005 Landscape Construction Agreement, Trial Exhibit 9:002, attached hereto as Appendix C.

<sup>29</sup> 2006 Landscape Construction Agreement, Trial Exhibit 9:003, attached hereto as Appendix D.

<sup>30</sup> 2007 Landscape Construction Agreement, Trial Exhibit 9:004, attached hereto as Appendix E.

<sup>31</sup> Affidavit of Rick Christensen at ¶¶ 4-5 (R. 2468).

agreement. In fact, Teufel disavowed the 2007 *Tamarack Resort Master Construction Services Agreement* that it had identified in its supplemental disclosure form because it already had the 2007 Landscape Construction Agreement in place.<sup>32</sup> Christensen testified that his company required a signed written contract each year as a condition to its own commitment to its local growers to purchase trees and shrubs.<sup>33</sup> He confirmed the importance of the written contract and its attached clarification letter in 2005, “[t]o make sure that the contract was clarified, and everything that was going to be part of the deal for 2005 was down in writing, either in the contract or in this clarification letter.”<sup>34</sup> The clarification letter Christensen authored, concluded with the following statement:

*“Nic, please contact me if you have any questions. It is important for us to have an executed contract prior to starting work which, at this time is scheduled to begin April 18<sup>th</sup>, 2005. Thanks in advance for your help in getting the contract drafted.”*<sup>35</sup>

Christensen was quite certain that Teufel’s work the next year (2006) would not have started until Teufel had a signed contract in place, so that it felt secure in advancing

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<sup>32</sup> Tr. Vol. II, p. 300, L. 2-10.

<sup>33</sup> Tr. Vol. II, p. 439, L. 2-4.

<sup>34</sup> Tr. Vol. II, p. 429, L. 13 - p. 430, L.1.

<sup>35</sup> Clarification letter, Exhibit A to 2005 Landscape Construction Agreement, Trial Exhibit 9:002; *see also* Tr. Vol. II, p. 431, L. 7- p. 432, L. 23.

money to its growers.<sup>36</sup> The Tamarack Resort employee who negotiated the contracts with Teufel, Chris Kirk, agreed:

Q: (Badger) [I]t must have been that Teufel needed a new contract every year to both define the scope of work for the coming year and also to lock in their fee; is that right?

A: (Kirk) Lock in their fees and, yeah, that's it. That's a good way to summarize it yeah.

.....

Q: And did you get a sense that Teufel wanted a signed contract in place before they went ahead and ordered that [plant] material each year?

A: They wanted a comfort level that we were going to be able to provide payment for them, because it was a huge financial commitment for Teufel.

Q: Sure. And they let you know that in order to provide that comfort level to them, they wanted a signed contract in place?

A: Yes.<sup>37</sup>

All of this evidence was more than enough to support the district court's finding that the four Landscape Construction Agreements were the operative agreements for 2004, 2005, 2006 and 2007.<sup>38</sup>

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<sup>36</sup> Tr. Vol. II, p. 439, L. 24 - p. 440, L. 5.

<sup>37</sup> Tr. Vol. II, p. 546, L. 8 - p. 547, L. 4.

<sup>38</sup> Substitute Omnibus Findings and Conclusions at p. 17 (R. 3837).

2. The Four Written Agreements Were Unambiguous and Provided Substantial Evidence That Each Was a Separate Contract.

The substantial evidence that the district court relied upon in finding that Teufel had four separate written agreements, not a continuous single contract, were the written agreements themselves. The district court first addressed the language of the contracts, concluding as a matter of law that the scope of work in each Landscape Construction Agreement was plain and unambiguous.<sup>39</sup> See *City of Meridian v. Petra, Inc.*, 154 Idaho 425, 299 P. 3d 232 (2013) (“[i]n the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument.”) The court correctly found there is nothing in the four Landscape Construction Agreements that required Teufel to perform future work for Tamarack Resort. There is nothing in the agreements that required Tamarack Resort to employ Teufel in subsequent years. There is nothing in any of the four agreements that obligated either Teufel or Tamarack Resort beyond the completion dates in each contract. Teufel was under no obligation to accept future work and Tamarack Resort had no obligation to award the work to Teufel.<sup>40</sup> Although Tamarack Resort desired to have the same landscape contractor for the entire project and Teufel expected to be that contractor,

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<sup>39</sup> *Id.* at pp. 19-20 (R. 3839-3840).

<sup>40</sup> *Id.*

that intent or expectation was not made part of any binding agreement between Tamarack Resort and Teufel.<sup>41</sup>

The district court examined the scope of work and project completion dates in each of the four annual agreements, finding that none was a continuation of the prior year's contract.<sup>42</sup>

*The 2004 Landscape Construction Agreement.*

Article 2 (Scope of Work) of the 2004 Agreement<sup>43</sup> reads in its entirety:

“The owner and Contractor acknowledge that no landscape plan or specifications for Project have been created and, therefore, the Contractor's scope of Work shall be to perform all grading, landscaping, restoration, irrigation and related site work for the following projects:

1. Twenty (20) “Twin Creek” Chalets;
2. Eighteen (18) “Discovery” Chalets;
3. Twenty-four (24) Cottages;
4. Pioneer Village, including the irrigation and seeding of the snow front;
5. Ski-over and Ski-under bridges (including retaining walls);
6. Discovery Drive, including key intersections thereon;
7. Roundabouts for Whitewater Road and West Valley Road;
8. Pinnacle Place and Sugarloaf Road;
9. The Dining Yurt and existing Recreation Yurt areas;
10. Screening of parking at the entrances and other parking overflow areas;
11. At Owner's direction, screening of specific utilities throughout the Project; and

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<sup>41</sup> *Id.* at p. 21 (R. 3841).

<sup>42</sup> *Id.* at pp. 19-20 (R. 3839-3840).

<sup>43</sup> Trial Exhibit 9:001.



12. Such other tasks as may be directed by the Owner's Representative.

Despite Rick Christensen's testimony that Teufel expected to be the sole landscape contractor for the Tamarack Resort, the district court correctly found that the 2004 Landscape Construction Agreement outlined only those tasks to be completed in 2004; that the scope of work did not provide that Teufel was awarded all of the landscaping work for the entire Tamarack project. The district court bolstered its finding with Article 3 (Project Schedule) which required the Work to be substantially complete by November 30, 2004.<sup>44</sup>

*2005 Landscape Construction Agreement.*

The district court found, based on the plain language of the 2005 Landscape Construction Agreement,<sup>45</sup> that it was not a "renewal" contract.<sup>46</sup> The 2005 agreement incorporated the following scope of work to be completed by December 31, 2005:

1. Finish Landscape installation for 20 Twin Creek Chalets and Rock Creek Cottages
2. Landscape installation for 18 Discovery Chalets
3. Complete landscaping for the Entry & Whitewater Roundabouts
4. Landscape the Poma, Discovery and main entry ski over bridges and the soil nail wall

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<sup>44</sup> Substitute Omnibus Findings and Conclusions at p. 19 (R. 3839).

<sup>45</sup> Trial Exhibit 9:002.

<sup>46</sup> Substitute Omnibus Findings and Conclusions at p. 20 ( R. 3840).

5. Landscape Discovery Village
6. Landscape and screening of the Golf Mountain facility, Snow Maintenance and Fire Station
7. Plant the Golf Course water feature and tree planting in key locations on the golf course
8. Potential for new residential units: Golden Bar Townhomes (46), Payette Chalets (9), Staircase Chalets (5)
9. Arling Center landscape this fall
10. Members Lodge landscape completion prior to Christmas opening.

Article 2 of the 2005 agreement omitted the catch-all phrase found in the prior year's agreement: "such other tasks as may be directed by the Owner's Representative," and unlike the 2004 agreement, the scope of work in the 2005 agreement concluded with a statement that "Further assumptions and clarifications are set forth in the Contractor's clarification letter attached hereto as Exhibit A, to the extent not inconsistent with the body of this Agreement." It was the clarification letter to the 2005 agreement that we quoted above where Mr. Christensen wrote: "It is important for us to have an executed contract prior to starting work."

*2006 Landscape Construction Agreement.*

The 2006 Landscape Construction Agreement<sup>47</sup> was yet another new and separate contract. Article 2 (Scope of Work) recited the following list of work to be completed, according to Article 3, by December 31, 2006:

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<sup>47</sup> Trial Exhibit 9:003.

1. Landscape installation for the 46 Golden Bar Townhome units
2. Landscape installation for the 5 Steelhead Custom Chalets
3. Supplemental landscaping at Discovery Village
4. Landscape and pavers at the Arling Center Roundabout
5. Completion of the landscape for the Bayview Sales Mod
6. Landscape installation for the 18 Discovery Chalets
7. Whitewater roads and slopes seeding, planting, and establishment
8. Landscape and screening of Golf Maintenance facility and Snow Maintenance building
9. Plant and golf course water feature
10. Right of Way screening/planting

*2007 Landscape Construction Agreement.*

Rick Christensen testified that the Tamarack Resort was behind in paying its bills in 2006, but that the money began to flow that summer (undoubtedly as the result of the infusion of \$250,000,000 from Credit Suisse).<sup>48</sup> Before it agreed to sign a new contract for 2007, Teufel demanded that all of its outstanding invoices be paid “in full.”<sup>49</sup> Tamarack Resort complied and Teufel’s mechanic’s lien, therefore, related to labor and material it furnished in 2007 under its 2007 Landscape Construction Agreement.<sup>50</sup>

Article 2 of the 2007 agreement incorporated the following scope of work to be completed by December 31, 2007:

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<sup>48</sup> Tr. Vol. II, p. 483, L. 3-18.

<sup>49</sup> Tr. Vol. II, p. 483, L. 3 - p. 484, L. 3.

<sup>50</sup> *Id.*

1. Completion of Golden Bar Townhomes (balance)
2. Trillium Cottages
3. Clearwater Cottages (8)
4. Clearwater Townhomes
5. Clearwater Ridge Custom Villas (5)
6. Steelhead Custom Chalets (3)
7. Staircase Chalets (5)
8. Clearwater Custom Chalets (2)
9. Aspen Parking
10. Design Plaza
11. Arling Activity Lawn
12. Discovery Village
13. Golf Maintenance Building
14. Ski Maintenance Building
15. Golf
16. Spring – other plantings

Thus, it was clear from the contracts themselves that the Landscape Construction Agreements in 2005, 2006 and 2007 were not continuations of the 2004 agreement. The district court confirmed this fact with the affidavit testimony of Rick Christensen that we again quote

4. *“Teufel signed a Landscape Construction Agreement (“Agreement”) with Tamarack Resort, LLC, on June 4, 2004. The Agreement was to last one year and specified the portions or properties of Tamarack Resort that Teufel was to landscape that year. . . .”*

5. *“Teufel signed a new Agreement in 2005, 2006 and 2007. All work done in 2008 was on a job to job basis. Attached are true and accurate copies of the 2005, 2006 and 2007 Agreements . . . .”*<sup>51</sup>

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<sup>51</sup> Substitute Omnibus Findings and Conclusions at p. 21 (R. 3841).

3. There Was Substantial Evidence That Teufel Maintained A Skeletal Crew During The Winter Months For Snow Removal.

There was conflicting testimony at trial about the work that Teufel performed at the resort during the winter months and whether the maintenance of Teufel's forces during the winter implied that Teufel had one continuous contract, rather than four separate contracts. The district court was certainly not required to adopt all of Teufel's self-serving testimony. On cross-examination by Credit Suisse, Rick Christensen testified that Teufel completely withdrew its forces on December 23, 2004 and did not return until the following spring. During the next winter (2005-2006), Teufel kept four (4) employees working, and during the winter of 2006-2007 it kept ten (10) employees working.<sup>52</sup> According to Mike Stanger, Teufel's former project manager, those ten employees cleared snow for construction of the Trillium Cottages and Trillium Townhomes, and worked on the Staircase Chalets clearing pathways and walkways to facilitate construction and wintertime occupancy.<sup>53</sup> Tamarack Resort wanted Teufel's employees to stay during the winter so they could shovel snow and that's precisely what they did:

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<sup>52</sup> Tr. Vol. II, p. 433, L. 13 - p. 435, L. 2.

<sup>53</sup> Tr. Vol. II, p. 518, L. 19 - p. 519, L. 3.

Q: [Mr. Badger] And so the work that they did in the winter months wasn't landscaping work. The work that was contemplated by these contracts, it was shoveling snow over at the resort, right?

A: [Mr. Christensen] That is true.<sup>54</sup>

This trial testimony from Messrs. Christensen and Stanger was more than enough to support the following findings by the district court:

“The evidence did show that for some years, Teufel maintained a skeletal crew at the Resort during the winter months. There were no Teufel employees at the site after about December 23, 2004 until the spring of 2005. There were about four (4) Teufel employees at the site during the 2005 winter season and about ten (10) Teufel employees at the site during the 2006 winter season. When Teufel's employees were on site during the winter, there was no landscaping work performed. Teufel's employees did snow removal so that Tamarack's contractors and subcontractors could continue construction activities.

Teufel argues that the fact that it maintained a small crew for some winters demonstrates that Teufel had a single continuous contract since

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<sup>54</sup> Tr. Vol. II, p. 435, L. 3-12. The court reporter appears to have misplaced the punctuation. It is clear from reading the four Landscape Construction Agreements that snow removal is not mentioned. The testimony should read:

Q: [Mr. Badger] And so the work that they did in the winter months wasn't landscaping work, the work that was contemplated by these contracts. It was shoveling snow over at the resort, right?

A: [Mr. Christensen] That is true.

2004. The Court does not agree. Teufel did not have a crew present each winter. When Teufel did have a winter crew, the crew was not engaged in landscape services, only snow removal and snow removal was not part of the scope of work for any of Teufel's landscaping contracts with Tamarack."<sup>55</sup>

Teufel asked the district court to reconsider some of its evidence, notably daily time records which Teufel advocated were proof that it had performed landscaping work in addition to snow removal during the winter months. The district court correctly concluded:

"At best, Teufel's exhibits showed that Teufel's employees may have begun to work on landscaping, as opposed to snow removal, earlier than the beginning date of the contract for the particular year. This does not change the Court's findings or its conclusion that the priority of Teufel's work in 2007 did not relate back to 2004. Teufel's work in 2007 was not part of a continuous single agreement."<sup>56</sup>

#### 4. Teufel Had Four Written Annual Contracts, Not An Open Account.

Although Teufel cannot contest that it entered into separately negotiated Landscape Construction Agreements in 2004, 2005, 2006 and 2007, Teufel asserts that its

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<sup>55</sup> Substitute Omnibus Findings and Conclusions at p. 20, R. 3840.

<sup>56</sup> *Memorandum Decision and Order Denying Teufel Nursery, Inc. 's Motion for Reconsideration* at p. 4 (R. 3816).

work at the Tamarack Resort during the intervening periods between each of its annual contracts supposedly demonstrates that all of its work at the resort was under a continuous open account dating back at least to December 2004.

“An open account is:

Simply an account with a balance which has not been ascertained.

The account is kept open in anticipation of future transactions.

Where an open account exists the parties are deemed to intend that individual items on the account will not be viewed separately but that the account will be considered as a connected series of transactions.”

*Franklin Bldg. Supply Co. v. Sumpter*, 139 Idaho 846, 851, 87 P. 3d 955, 960 (2004)

citing *Kugler v. Northwest Aviation, Inc.*, 108 Idaho 884, 887, 702 P.2d 922, 925

(Ct.App.1985). Thus, the continuous open account is not substantially completed until

the last item is delivered. *Id.* An open account is typically maintained by one who

strictly furnishes materials, rather than lien claimants who furnish only labor, or labor and

materials, and are on the job site pursuant to a contract to complete all or a specified

portion of the project. *Id.*

Teufel’s argument that it ran a continuous open account from 2004 through 2007 would require this Court to either completely ignore each of the annual Landscape Construction Agreements that Teufel negotiated with the resort owner, or else treat each of those annual contracts as part of a continuous open account, which would clearly contradict both the definition of an open account as well as the evidence in the record.



As the district court pointed out, Teufel did not perform work under a continuous contract because:

- According to Rick Christensen, “Teufel signed a Landscape Construction Agreement with Tamarack Resort, LLC, on June 4, 2004. The Agreement was to last one year and specified the portions or properties of Tamarack Resort that Teufel was to landscape that year . . . Teufel signed a new Agreement in 2005, 2006 and 2007 . . . .”
- None of the written annual Landscape Construction Agreements required Teufel to perform future work;
- Tamarack Resort’s 2004 agreement with Teufel did not obligate the Owner or Teufel beyond 2004;
- Teufel had to have a signed 2005 agreement before it would order plantings for the 2005 contract;
- It was important for Teufel to have a signed agreement for 2006 before Teufel would advance payment to its growers for 2006 plant material;
- Each contract required the work specified in the contract to be substantially completed by December 31st of the contract year;
- None of the annual Landscape Construction Agreements was a renewal of the prior years’ agreement.<sup>57</sup>

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<sup>57</sup> Substitute Omnibus Findings and Conclusions at pp. 19-22 (R. 3839 – 3842).

While Teufel conceivably may have had a series of open accounts over the years for work to be performed at the resort each winter until it negotiated and signed its next annual contract in the spring, those written contracts obligated Teufel to accomplish specified landscaping projects in designated portions of the resort through December 31<sup>st</sup> for an agreed upon annual fee of \$195,000, which is the very antithesis of an open account.

The substantial evidence at trial led the district court to properly conclude that the work Teufel performed in 2007, for which it had not been paid, was not done as a continuation of the 2004 agreement. Accordingly, the priority for Teufel's claim of lien relates back to when Teufel first provided labor or materials for its work in 2007.<sup>58</sup> Thus, Teufel's lien claim is inferior in priority to Credit Suisse's Mortgages which were recorded on May 19, 2006.

## **II. THE DISTRICT COURT CORRECTLY DECIDED THE AMOUNT OF TEUFEL'S LIEN CLAIM**

Teufel filed its notice of claim of lien to secure its claim for materials, supplies and labor furnished for the construction, alteration, snow removal and repair of certain buildings, improvements, structures, and dwellings located at the Tamarack Resort.<sup>59</sup> It confined the scope of its lien to the labor, materials and services it provided to

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<sup>58</sup> *Id.* p. 21-22 (R. 3841-3842).

<sup>59</sup> *See* Laborer's And Materialmen's Notice and Claim of Lien, Trial Exhibit 9:006.

designated portions of the Tamarack Resort identified on the chart attached to its lien notice, and it specifically identified how much those portions of the resort had benefited from its labor, materials and services:

“The scope of work and the lands subject to this claim of lien is for labor, materials and services performed and delivered to those lands, buildings, improvements or other portions of the Property that may be more commonly known and identified as set forth on [the chart] attached hereto and incorporated herein by this reference; and that portion of the total lien amount that is due and owing for each of the lands, buildings, improvements or other portions of the Property subject to this claim of lien is allocated as set forth in [the chart].”<sup>60</sup>

The work Teufel performed in 2007 for Tamarack Resort, LLC, under a written Landscape Construction Agreement, was not a single project like a golf course. *See Hopkins Northwest Fund, LLC v. Landscapes Unlimited, LLC*, 151 Idaho 740, 264 P. 3d 379 (2011) (treating all work under a single golf course project, for a single owner, under a single contract, as a single improvement for purposes of Idaho Code §45-508). Rather, Teufel supplied its labor and material to custom chalets within the resort that went by names like Dory and Steelhead, and to cottage and townhome developments with names like Trillium and Clearwater, each with multiple

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<sup>60</sup> *Id.*

units.<sup>61</sup> Whether Teufel's lien was the first type of lien provided for in Idaho Code §45-501 (i.e., a building, structure or improvement lien), or the second type (i.e., a grading lien), and whether Teufel was actually required by Section 45-508 to apportion its lien claim, or whether it merely did that anyway, had no bearing on the district court's decision about how much to award Teufel for its lien claim.

Section 45-501 grants a laborer and materialman, whether claiming a building, structure or improvement lien, or a grading lien, "a lien upon the same for the work or labor done." Idaho Code §45-501.<sup>62</sup> The right of either type of lien is based on the theory that the claimant has, by his labor or materials, contributed to the construction or improvement of the property against which the lien is asserted. *Chief Indus., Inc. v. Schwendiman*, 99 Idaho 682, 687, 587 P. 2d 823, 828 (1978). Therefore, Teufel was entitled to foreclose its lien provided it could prove that it was owed for its work on the property it had liened. This is where Teufel's lien claim partially failed, and is the reason why the district court only awarded Teufel \$306,543.30.

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<sup>61</sup> Tr. Vol. II, p. 463, L. 13-18; Vol. II, p. 466, L. 4-6; Vol. II, p. 470, L. 5-20; Vol. II, 471, L. 18 - p. 472, L. 4.

<sup>62</sup> Although the Tamarack Resort is near Donnelly, Idaho, which is an incorporated city, the resort is not within the city limits. See <http://www.cityofdonnelly.org> (last visited May 27, 2013). Tamarack, Idaho is apparently a mailing address, but it is not an incorporated city or town. See <http://www.idahocities.org/index.aspx?NID=95> (last visited May 27, 2013). Accordingly, Teufel's notice of claim of lien was not obtained under Idaho Code §45-504.

Teufel recorded dozens of partial releases of its lien claim and Credit Suisse presented uncontested evidence at trial that, in addition to those releases, some of Teufel's work took place on unplatted land Teufel had not liened,<sup>63</sup> or on a convention center known as the Arling Center that had already been foreclosed by Bank of America, wiping out Teufel's lien claim against it.<sup>64</sup> By its own account, Teufel's lien varied from \$529,556.47 (plus interest) in its lien notice, \$429,647.15 and \$392,035.38 in its disclosure forms, \$359,244.71 in its trial brief, and finally \$406,199.07 in the cheat sheet.

The district court understandably called Teufel's explanation about the amount of its lien claim confusing and contradictory.<sup>65</sup> At one point the trial testimony was less than truthful, something that was not lost on the district court.<sup>66</sup> As we mention above, Teufel's primary witness testified that he had not had an opportunity to calculate the effect of the partial releases on the amount claimed in Teufel's lien. The "cheat sheet" that eventually surfaced proved otherwise. To try and make sense of the conflicting evidence, virtually all of it of Teufel's own making, we provided the district court with the following chart (without highlighting) in Credit Suisse's written

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<sup>63</sup> See Substitute Omnibus Findings and Conclusions, p. 26, fn. 78 (R. 3846); see also Tr. Vol. II, p. 469, L. 1-10.

<sup>64</sup> See Trial Exhibit 1:321.

<sup>65</sup> Substitute Omnibus Findings and Conclusions at p. 22 (R. 3842).

<sup>66</sup> *Id.* at pp. 24-25 (R. 3844 - 3845).

closing argument listing the parcels that remained after the releases.<sup>67</sup> In its Substitute Omnibus Findings and Conclusions, the district court painstakingly addressed each building or improvement in Teufel’s lien notice.<sup>68</sup> Although we urged the district court to award the lowest number Teufel had identified throughout the litigation, the court adhered to the cheat sheet and awarded the amounts highlighted.

Building or Improvement identified in Claim of Lien <sup>69</sup>	Matching parcels identified by Christensen that were not released <sup>70</sup>	Unpaid Amount according to Christensen <sup>71</sup>	Unpaid Amount according to Claim of Lien <sup>72</sup>	Unpaid Amount according to March 2009 Disclosure Form <sup>73</sup>	Unpaid amount according to September 2009 Disclosure <sup>74</sup> Form	Lowest unpaid amount between the columns to the left
Clearwater Townhomes	O, Q, U, W, BB, N and J	<b>\$21,638.33</b>	\$41,582.00	J-\$134.38;  N -\$12,771;  O, U, W, Q and BB - \$2,057.93 each;  Subtotal: \$23,195.03	J-\$134.38;  N, O, U, W and BB - \$1,905.39 each; Q - \$8,079.86;  Subtotal: \$17,741.19	\$17,741.19

<sup>67</sup> Plaintiff Credit Suisse AG’s Closing Argument Re: Mechanics Lien Claims at pp. 42-43 (R. 3622-3623).

<sup>68</sup> Substitute Omnibus Findings and Conclusions at pp. 26-27 (R. 3846-3847).

<sup>69</sup> Trial Exhibit 9:055

<sup>70</sup> Trial Exhibit 9:056 (“cheat sheet”)

<sup>71</sup> *Id.*

<sup>72</sup> Trial Exhibit 9:055

<sup>73</sup> Trial Exhibit 1:301

<sup>74</sup> Trial Exhibit 1:298

Erosion Control	? <sup>75</sup>	\$54,364.08	\$54,294.77	-0- <sup>76</sup>	-0- <sup>77</sup>	-0-
Misc. hydroseeding	G, excluding golf course, Block 19, Phase 1	\$10.08	\$40.31	\$134.38	\$2,775.38	\$10.08
Poma	B	\$2,880	\$2,880	\$134.38	\$10,803	\$134.38
Snow Front	CC	\$45,205.28	\$45,205.28	\$45,205.66	\$42,945.38	\$42,945.38
Trillium cottages	JJ	\$184,476.32	\$204,973.69	\$171,034.82	\$146,925.63	\$146,925.63
Trillium townhomes	DD, EE, LL	\$50,913.27	90,842.75	DD-\$3,480; EE-\$22,045; LL-\$15,043.80 Subtotal: \$40,568.80	DD- \$641; EE-\$5,598.86; LL-17,659.58 Subtotal: \$23,899.44	\$23,899.44
		<b>Total:</b> <b>\$359,487.36</b>	<b>Total:</b> <b>\$439,818.80</b>	<b>Total:</b> <b>\$280,273.07</b>	<b>Total:</b> <b>\$245,090.02</b>	<b>Total:</b> <b>\$231,656.10</b>

The district court did not award anything for erosion control because Mr.

Christensen was unable to identify the parcels where Teufel had performed that work,

<sup>75</sup> Mr. Christensen testified that erosion control occurred over the entire resort. (Tr. Vol. II, p.385, L. 10 – p. 387, L. 10).

<sup>76</sup> There was a significant difference in the total unpaid amount between Teufel's disclosure forms. Mr. Christensen explained that the disclosure form with the lower total omitted any unpaid amount for erosion control "because it couldn't be pigeonholed to a parcel." (Tr. Vol. II, p. 475, L. 11 – 24). The disclosure form with the higher total unpaid amount apparently spread erosion control among the various parcels.

<sup>77</sup> See *id.*

other than to say that it had taken place throughout the entire resort.<sup>78</sup> Teufel's lien notice also included \$85,584.78 of unpaid retention that we did not include in the chart because, although the cheat sheet reduced the unpaid retention to \$45,698.02, Mr. Christensen was unable, with one exception (Rock Creek),<sup>79</sup> to either identify the parcels that were impacted, or confirm that the property was owned by Tamarack Resort and was subject to the lien.<sup>80</sup>

Although Teufel had apportioned its lien claim, what mattered ultimately was whether Teufel was able to identify whether its work had been performed on one of the parcels that had not been released. Had Teufel not released any of the parcels, it is likely that the district court would have awarded closer to the entire \$406,199.07 on the cheat sheet. But the dozens of releases proved to be the rub. Where Mr. Christensen was able to match an unpaid amount to a parcel that had been liened and not released, the district court awarded that amount. However, where Mr. Christensen failed to provide that connection, the district court had no way of knowing whether the unpaid work related to

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<sup>78</sup> Substitute Omnibus Findings and Conclusions at p. 26, fn. 72 (R. 3846).

<sup>79</sup> Although we inadvertently omitted it from our chart, Rock Creek was identified by Mr. Christensen as part of two parcels (E and F) which had not been released. The district court obviously looked beyond our chart and awarded Teufel \$1,429.72 in retention for Rock Creek that we missed. *See* Substitute Omnibus Findings and Conclusions at p. 26, fn. 83 (R. 3846).

<sup>80</sup> *See e.g.* Substitute Omnibus Findings and Conclusions at p. 26, fn. 67, 68, 70, 72, 74, 75, 76, 79, 81, 85 and 90 (R. 3846-3847); *see also* fourth page of cheat sheet, Trial Exhibit 9:056.



one of the released parcels, or not. It was Teufel's burden to provide that information and it simply failed in its proof.

### **III. THE DISTRICT COURT CORRECTLY DECIDED TO APPLY A VARIABLE PRIME RATE TO CALCULATE PREJUDGMENT INTEREST**

There was no dispute before the district court about whether Teufel was entitled to prejudgment interest, or whether the 2007 Landscape Construction Agreement established a basis for interest on the past due amounts. The only issue was whether the Wells Fargo Prime Rate was variable or fixed. Teufel's award of prejudgment interest was governed by Section 6.4 of its 2007 Landscape Construction Agreement, which reads:

Payments due and unpaid under this Agreement shall bear interest from the date payment is due at a per annum rate equal to the prime rate established by Wells Fargo Bank in Boise, Idaho plus two percent (2%).<sup>81</sup>

In its calculation of prejudgment interest, Teufel first identified the Wells Fargo Bank Prime Rate in effect on the date each of its unpaid invoices became due. Then it calculated the interest for each invoice at that fixed rate (plus 2%) from the date it recorded its lien notice. Teufel's error was its use of a fixed prime rate for each unpaid invoice when the Wells Fargo Bank Prime Rate dropped steadily to 3.25% during the

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<sup>81</sup> 2007 Landscape Construction Agreement, Trial Exhibit 1:297, at §6.4.

calculation period. Credit Suisse provided the district court with an Excel spreadsheet that calculated prejudgment interest on each unpaid invoice using the actual Wells Fargo Prime Rate as it changed regularly over the calculation period.<sup>82</sup> The district court used that calculation in awarding Teufel prejudgment interest.

The issue about the variability of the prime rate came up several times in this case. The district court first addressed it with respect to another lien claimant, Banner/Sabey II, LLC, which had a memorandum of understanding with the resort owner that called for the application of the U.S. prime rate, plus 1%. In its *Memorandum, Decision and Order RE: Various Requests For Awards of Attorney Fees, Costs and Prejudgment Interest*,<sup>83</sup> the district court found that the prime rate, by its very nature, is a variable rate, and changes over time.<sup>84</sup> The district court quoted information about the prime rate found on the internet.<sup>85</sup>

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<sup>82</sup> See Affidavit of Jess Cheney In Support of Credit Suisse, AG's Memorandum In Opposition To Teufel Nursery, Inc.'s Motion For Prejudgment Interest (R. 4159-4172); see also Affidavit of Justin T. Cranney In Support of Teufel Nursery, Inc.'s Motion For Prejudgment Interest (R. 3931-3953).

<sup>83</sup> *Memorandum, Decision and Order Re: Various Requests For Awards of Attorney Fees, Costs and Prejudgment Interest*, entered February 3, 2012 (R. 4181- 4235). The pages relevant to Teufel's claim are attached hereto as Appendix F.

<sup>84</sup> *Id.* at pp. 17- 18 (R. 4197- 4198).

<sup>85</sup> "The U.S. Prime Rate is a commonly used, short-term interest rate in the banking system of the United States. All types of American lending institutions (traditional banks, credit unions, thrifts, etc.) use the U.S. Prime Rate as an index or foundation rate for pricing various short- and medium-term loan products. The Prime Rate is consistent because banks want to offer businesses and consumers loan products that are both profitable and competitive. A consistent

The district court correctly concluded that, with respect to Banner/Sabey II, LLC:

“[t]he purpose of pre-judgment interest is to compensate an injured party for the time value of money. *Stueve v. N. Lights, Inc.*, 122 Idaho 720, 722-23, 838 P. 2d 323, 325-26 (Ct. App. 1992). Where the parties have specified a rate tied to prime, the purpose of awarding pre-judgment interest is best served by applying a variable rate. This rate more closely correlates to the actual loss sustained by the party who is owed money. A fixed rate can easily overcompensate or undercompensate an injured party for the time value of money depending upon what the fixed rate is on the date of injury or loss. See *Pimental v. Jacobsen Fishing Co., Inc.*, 102 F. 3d 638, 640 (1<sup>st</sup> Cir. 1996)(use of

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U.S. Prime Rate also makes it easier and more efficient for individuals and businesses to compare similar loan products offered by competing banks.

When newspapers, academics, investors and economists refer to the National, Fed, U.S. or WSJ Prime Rate, it is widely accepted that they are in fact referring to The United States Prime Rate as listed in the Eastern print edition of the Wall Street Journal® (WSJ). Furthermore, each U.S. state does not have its own individual Prime Rate, so the “New York Prime Rate” or the “California Prime Rate” are in fact the same as the United States Prime Rate.

Prior to mid-December 2008, the WSJ Prime Rate was determined by polling thirty (30) of America’s largest banks. When twenty-three (23) of those 30 banks had changed their prime lending rate, The WSJ would respond by updating its published Prime Rate. Effective December 16, 2008, however, the WSJ now determines the Prime Rate by polling the 10 largest banks in the United States. When at least 7 out of the top 10 banks have changed their Prime, the WSJ will update its published Prime Rate.”

[www.fedprimerate.com](http://www.fedprimerate.com)

variable prime rate for calculation of prejudgment interest affirmed.)”<sup>86</sup>

The district court applied this same rationale when it considered Teufel’s prejudgment interest.<sup>87</sup> The district court was correct.

#### **IV. THE DISTRICT COURT CORRECTLY DECIDED ITS AWARD OF TEUFEL’S ATTORNEY FEES AND COSTS**

##### **A. STANDARD OF REVIEW**

Teufel correctly states in its opening brief that the Supreme Court reviews the district court’s findings of fact for clear error and freely reviews the conclusions of law. However, a different standard of review applies to the district court’s decision to award Teufel only part of its attorney fees and discretionary costs.

The award of reasonable attorney fees for prosecuting a mechanic’s lien claim is statutory, pursuant to Idaho Code §45-513: “The Court shall also allow as part of the costs the moneys paid for filing and recording the claim, and reasonable attorney’s fees.” Furthermore, an award of attorney fees under section 45-513 is mandatory.

*Elec. Wholesale Supply Co., Inc. v. Nielson*, 136 Idaho 814, 824, 41 P. 3d 242 (2001).

An award of attorney fees for a mechanic’s lien is governed by section 45-513, and not

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<sup>86</sup> *Memorandum, Decision and Order Re: Various Requests For Awards of Attorney Fees, Costs and Prejudgment Interest* at p. 17 (R. 41978).

<sup>87</sup> *Id.* at p. 40 (R. 4220).

sections 12-120 or 12-121. *ParkWest Homes, LLC v. Barnson*, \_\_\_ P. 3d. \_\_\_, WL 1667566 (Idaho 2013).

Rule 54 of the Idaho Rules of Civil Procedure directs the district court to consider the final judgment or result of the action in order to determine which party or parties prevailed. When a party prevails only in part, the award of attorney fees and costs may be equitably adjusted. Rule 54(d)(1)(B) provides this direction to the court concerning an award of costs as follows:

(B) Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

I.R.C.P. 54(d)(1)(B).<sup>88</sup>

Rules 54(e)(5) applies the rule concerning an award of costs to an award of attorney fees: “*Attorney Fees as Costs*. Attorney fees, when allowable by statute or

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<sup>88</sup> The prevailing party definition in Rule 54(d)(1)(B) applies to the award of attorney fees in addition to costs. See I.R.C.P. 54(e)(1) which states in part: “In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. . .”.

contract, shall be deemed as costs in an action and processed in the same manner as costs . . .” I.R.C.P. 54(e)(5).

The “[d]etermination of who is a prevailing party is committed to the sound discretion of the trial court and will not be disturbed absent abuse of discretion.” *Bouten Constr. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 767, 992 P.2d 751, 762 (1999). In determining whether the trial court has abused its discretion, the Supreme Court applies a three-factor test: “(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.” *Id.*

**B. AN AWARD OF 60% OF TEUFEL’S ATTORNEY FEES AND COSTS WAS WITHIN THE DISTRICT COURT’S DISCRETION**

Teufel presented the district court with its Memorandum of Costs and Attorney’s Fees seeking attorney fees incurred by three different law firms that had represented Teufel throughout the litigation, including their fees to release approximately forty (40) parcels from Teufel’s lien claim.<sup>89</sup> Teufel also sought costs as a matter of right and discretionary costs. The district court allowed all of the costs as a matter of right, and

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<sup>89</sup> Teufel’s Memorandum of Costs and Attorney’s Fees (R. 3968-4112); *see also* Credit Suisse AG’s Motion To Disallow Part of Teufel Nursery, Inc.’s Costs, Disbursements and Attorney Fees (R. 4121- 4141).

disallowed the cost of trial supplies that were sought as discretionary costs because they were not out of the ordinary, unusual or exceptional.<sup>90</sup>

Most importantly, the district court determined that Teufel had only partially prevailed on its lien claim, at least partly because it did not prevail on the most important issue: its priority over Credit Suisse's Mortgages.<sup>91</sup> "As a practical matter, the lack of priority will mean that Teufel will be very unlikely to share in any foreclosure proceeds."<sup>92</sup>

Obviously aware that attorney fees are merged with and become a part of the principal debt for which foreclosure of the lien is sought,<sup>93</sup> the district court determined that the fees for preparing the lien releases should not be charged against the property. Taking this and its prevailing party determination into account, and having determined that Teufel was only entitled to 54% of the statement of demand in its lien notice,<sup>94</sup> the

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<sup>90</sup> *Memorandum Decision and Order Re: Various Requests For Awards of Attorney Fees, Costs and Pre-Judgment Interest* at pp. 39-40 (R. 4219-4220).

<sup>91</sup> *Id.* at p. 38 (R.4218).

<sup>92</sup> *Id.*

<sup>93</sup> *See Elec. Wholesale Supply Co., Inc. v. Nielson, supra.*

<sup>94</sup> Teufel's statement of demand in its lien notice was \$564,560.23 (including interest) (Trial Exhibit 9:006). As Teufel's representative, Rick Christensen maintained during his direct examination that Teufel was entitled to recover that amount, until his "cheat sheet" surfaced during his cross-examination. After that, Teufel reduced its demand to \$406,199.07. The district court awarded Teufel \$306,543.30, or 54% of its original lien claim (i.e., \$306,543.23 is 54% of \$564,560.23).

district court awarded Teufel 60% of its attorney fees and allowed discretionary costs.<sup>95</sup>

1. The District Court Perceived the Issue As One of Discretion.

The district court correctly perceived the issue as one of discretion: “The determination of who is the prevailing party *is committed to the trial court’s discretion.*” “[A]s an exercise of discretion, the Court will find that Teufel only partially prevailed. . . . [T]aking all of the foregoing into account, *as an exercise of discretion*, and having reviewed the detailed billing records, the Court will make the following awards to Teufel reflecting an overall reduction of 40% of the fee requests: . . .”<sup>96</sup> (italics added).

2. The District Court Acted Within the Boundaries of Its Discretion

The district court acted well within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it.

Pursuant to Rule 54, the district court was required to: (a) determine which party prevailed by considering the final judgment or result of the action in relation to the relief sought by the respective parties; and, (b) then exercise its sound discretion by apportioning the costs and attorney fees between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and

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<sup>95</sup> *Memorandum Decision and Order Re: Various Requests For Awards of Attorney Fees, Costs and Pre-Judgment Interest* at pp. 36-39 (R. 4216-4219).

<sup>96</sup> *Id.* at p. 38 (R. 4218).



the resultant judgment or judgments obtained. See I.R.C.P. 54(d)(1)(B); see also *Hughes v. Fisher*, 142 Idaho 474, 485, 129 P. 3d 1223, 1234 (2006). The district court did exactly that. It determined that Teufel had only partially prevailed, partly because it had not proven the priority of its lien claim, a critical part of its case. The court took into consideration that Teufel was ultimately awarded only part of its lien claim, that it was allowed to recover its fees associated with its involvement in the Tamarack Resort, LLC involuntary bankruptcy proceedings in order to protect its lien claim, and that its fees to prepare the lien releases were not recoverable. After reviewing the detailed billing records, the district court awarded Teufel 60% of its attorney fees and allowed discretionary costs, in light of having awarded Teufel just 54% of its lien claim. It would be difficult to argue that this was not equitable.

3. The District Court Reached Its Decision By An Exercise of Reason.

The district court took into consideration the arguments expressed by both Teufel and Credit Suisse, and applied the law that permitted it to apportion the fees and costs in a fair and equitable manner. It explained itself fully, taking into account the amount of Teufel's lien claim, whether it was the prevailing party, and the detailed billing records.<sup>97</sup>

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<sup>97</sup> *Id.* at pp. 36-40 (R. 4216-4220).


## CONCLUSION

For the reasons set forth above, the rulings, decisions, orders and judgments of the district court that are adverse to Teufel Nursery, Inc., and from which Teufel Nursery, Inc. has appealed, should be affirmed, including, without limitation, the following:

1. Order Denying Teufel Nursery, Inc.'s Motion for Summary Judgment, entered August 2, 2010 (R. 3324 – 3325);
2. Memorandum Decision and Order Denying Teufel Nursery, Inc.'s Motion for Reconsideration, entered July 28, 2011 (R. 3812 - 3816);
3. Substitute Omnibus Findings and Conclusions Re: Validity, Priority and Amount of Various Lien and Mortgage Claims, entered August 15, 2011 (R. 3821 – 3922);
4. Memorandum Decision and Order Re: Various Requests for Awards of Attorney Fees, Costs and Prejudgment Interest, entered February 3, 2012 (R. 4181-4235);
5. Second Amended Second Revised Judgment and Decree of Foreclosure and Order of Sale, entered June 18, 2012 (R. 4236 – 4387).

Respectfully submitted this 6<sup>th</sup> day of June, 2013.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 6<sup>th</sup> day of June 2013, I caused to be served two (2) true and accurate copies of the foregoing **RESPONDENT'S BRIEF** by depositing said document in the United State Mail, first class postage prepaid, addressed as follows:

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\_\_\_\_\_



A



ARCHIE N. BANBURY, CLERK  
BY: [Signature] DEPUTY

AUG 15 2011

Case No. \_\_\_\_\_ Inst. No. \_\_\_\_\_  
Filed: 8:40 A.M. \_\_\_\_\_ P.M.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

IN RE  
TAMARACK RESORT FORECLOSURE  
AND RELATED PROCEEDINGS

Case No. CV-08-114C

SUBSTITUTE

**OMNIBUS FINDINGS AND  
CONCLUSIONS RE: VALIDITY,  
PRIORITY AND AMOUNT OF  
VARIOUS LIEN AND MORTGAGE  
CLAIMS**

Consolidated Cases

- |                    |                    |
|--------------------|--------------------|
| Case No CV-08-310C | Case No CV-08-502C |
| Case No CV-08-311C | Case No CV-08-508C |
| Case No CV-08-312C | Case No CV-08-509C |
| Case No CV-08-324C | Case No CV-08-510C |
| Case No CV-08-335C | Case No CV-08-511C |
| Case No CV-08-356C | Case No CV-08-512C |
| Case No CV-08-357C | Case No CV-08-513C |
|                    | Case No CV-08-514C |
| Case No CV-08-532C | Case No CV-08-521C |
| Case No CV-08-557C | Case No CV-08-528C |
|                    |                    |
| Case No CV-08-583C | Case No CV-08-580C |
|                    | Case No CV-08-584C |

**Syllabus of Decision**

**Explanation for Substitute Opinion** .....3

**Background and Prior Proceedings**.....4

**Discussion**.....13

    1. Secesh Engineering, Inc. ("Secesh").....13

    2. Teufel Nursery, Inc. ("Teufel").....14



1  
2  
3  
4  
5  
6  
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14  
15  
16  
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18  
19  
20  
21  
22  
23  
24  
25  
26

- A. Teufel’s lien claim is valid and enforceable.....15
- B. Teufel’s lien claim is subsequent to and inferior to the Credit Suisse mortgages.....16
- C. The amount of Teufel’s claim of lien is \$ 306,543.30.....22
- 3. YMC, Inc. (“YMC”).....27
  - A. The YMC Village Plaza liens are valid and enforceable.....28
  - B. The YMC Village Plaza liens are subsequent to and inferior to the Credit Suisse mortgages.....29
  - C. The amount of the YMC Village Plaza lien claims is \$1,499,223.45.....32
- 4. Kesler Construction, Inc. (“Kesler”).....32
- 5. MHTN Architects, Inc. (“MHTN”).....33
  - A. The amount of MHTN’s Village Plaza lien claim is \$1,084,842.66.....35
  - B. MHTN’s Village Plaza lien claim will be reduced pursuant to Idaho Code § 45-511.....39
  - C. The MHTN Lake Wing lien is prior to and superior to the Credit Suisse mortgages.....40
  - D. The amount of the MHTN Lake Wing lien is \$464,600.98.....41
- 6. EZA, Inc. d/b/a OZ Architecture of Boulder (“OZ”).....42
  - A. The amount of the Village Plaza lien claim is \$719,552.94.....44
  - B. The remaining issues as to the amount and apportionment of the OZ Trillium Townhomes lien claims and the Elan Collection/B11 Claim of Lien have been resolved.....47
- 7. Application of Idaho Code § 45-512 to the Scott Hedrick Construction, Inc. (“Hedrick”) and OZ lien claims against Trillium Townhome Lot 122.....50
- 8. Tri-State Electric, Inc. (“Tri-State Electric”).....57
  - A. The Tri-State Electric Village Plaza liens are valid and enforceable.....58

1           B. The Tri-State Electric Village Plaza lien claims are prior to and superior to  
the Credit Suisse mortgages.....58

2           C. The Tri-State Electric Village Plaza lien claim is for \$1,216,466.39.....62

3           9. Banner/Sabey II, LLC (“Banner/Sabey”).....64

4                A. The Banner/Sabey Village Plaza lien is valid and enforceable.....68

5                B. The amount due pursuant to the Banner/Sabey Village Plaza claim of lien  
6                is \$5,760,045.38 .....68

7                C. The Banner/Sabey Village Plaza lien will be reduced pursuant to  
8                Idaho Code § 45-511.....86

9           10. BAG Property Holdings, LLC. (“BAG”).....87

10                A. Waiver does not bar the vendee’s liens asserted by BAG.....95

11                B. Equitable-estoppel does not bar the vendee’s liens asserted by BAG.....97

12                C. Quasi-estoppel does not bar the vendee’s liens asserted by BAG.....98

13                D. Unjust enrichment does not bar the vendee’s liens asserted by BAG.....100

14           **Conclusion**.....101

**Explanation for Substitute Omnibus Decision**

15

16           On May 11, 2011, the Court entered its Omnibus Findings and Conclusions Re: Validity,  
17           Priority and Amount of Various Lien and Mortgage Claims. On May 17, 2011 Teufel filed a  
18           motion to clarify. On May 25, 2011 Teufel filed a motion to reconsider. On May 25, 2011, Credit  
19           Suisse filed a motion to clarify. These matters were fully briefed and argued. On July 28, 2011,  
20           the Court entered decisions granting the motions to clarify, but denying Teufel’s motion to  
21           reconsider. *See* Memorandum Decision and Order Re: Credit Suisse’s Motion to Clarify;  
22           Memorandum Decision and Order Granting Teufel Nursery, Inc.’s Motion to Clarify the Amount  
23           of Its Lien Claim; and Memorandum Decision and Order Denying Teufel Nursery Inc.’s Motion  
24           

25

26

1 for Reconsideration; all entered July 28, 2011. The clarifications are reflected in bold in this  
2 Substitute decision.

3 In the earlier decision, the Court determined that the amount of Banner/Sabey's Village  
4 Plaza lien was entitled to include amounts incurred through January 25, 2008. As explained in the  
5 earlier decision, Banner/Sabey's Asset Pay Application # 2 is for the period January 25, 2008 to  
6 March 15, 2008. The Court gave Banner/Sabey leave to make a supplemental submission  
7 identifying the charges and expenses in Banner/Sabey's Asset Pay Application # 2 that were  
8 incurred on or before (but not after) January 25, 2008. On May 18, 2011, Banner/Sabey filed a  
9 supplemental submission. Credit Suisse filed a response on May 24, 2011. The analysis of these  
10 submissions and further findings are incorporated in bold below under the Banner/Sabey heading.  
11

12 Further, in reviewing the May 17, 2011 decision, the Court found a number of clerical  
13 errors and/or omissions. These have been corrected in this Substitute decision.

#### 14 **Background and Prior Proceedings**

15 Tamarack Resort, LLC ("Tamarack")<sup>1</sup>, a Delaware limited liability company, was the  
16 owner, developer and operator of the Tamarack Resort ("Resort"), a failed resort located adjacent  
17 to Lake Cascade, a few miles from the City of Donnelly in Valley County, Idaho.<sup>2</sup> The Resort  
18 owned large tracts of real property and had a leasehold interest in about 2,000 acres of land owned  
19 by the State of Idaho. The development was planned as a year round resort community anchored  
20 by winter cross-country and downhill skiing, a championship golf course, other outdoor  
21 recreational activities, hotel and conference facilities, retail shopping, restaurants and lounges.  
22

23 \_\_\_\_\_  
24 <sup>1</sup> Tamarack formerly was known as WestRock Associates, LLC ("WestRock"). WestRock changed its name to  
Tamarack in 2002.

25 <sup>2</sup> Tamarack has had numerous subsidiary and related entities, including Village Plaza Construction, LLC, Tamarack  
Whitewater Construction, LLC, Lake Plaza, LLC, Tamarack Resort Realty, LLC, Trillium Valley Construction, LLC.  
26 These subsidiaries may have been merged into Tamarack in 2008. See Second Amended Complaint at 3 - 4, ¶¶ 4 - 6.  
Unless the context requires otherwise, these entities will all be referred to as Tamarack.

1 Tamarack planned to market a variety of real estate offerings, including development lots, custom  
2 homes, condominiums, townhomes, chalets and cottages.

3 The full development of the Resort was projected in multiple phases over a number of  
4 years. Resort planning and obtaining entitlements was a lengthy and complicated process which  
5 had achieved significant milestones by 2002. The main entitlements included the Conditional Use  
6 Permits associated with the approved Valley County Planned Unit Development 98-1.<sup>3</sup>

7 Development and construction at the Resort began in 2003. Lots and housing units were  
8 built and sold in platted subdivisions. Hotel and conference facilities were developed. The ski  
9 areas and golf course were developed and operating by 2006. There were shopping and restaurant  
10 options for residents and guests.

11 On May 19, 2006, Tamarack entered into a Credit Agreement<sup>4</sup> with a group of lenders,  
12 including Credit Suisse, Cayman Islands Branch ("Credit Suisse").<sup>5</sup> The Credit Agreement was for  
13 a loan in the amount of \$250,000,000.00 which enabled Tamarack to refinance existing debt, pay  
14 accounts receivable, and to finance the continued development of the resort.<sup>6</sup> The Credit  
15 Agreement allowed Tamarack to go forward with two (2) large condominium projects: the Village  
16 Plaza Condominium Project ("Village Plaza") and the Lake Wing Condominium Project ("Lake  
17 Wing").<sup>7</sup>

22 <sup>3</sup> See May 19, 2006 Credit Agreement (attached as Exhibit B to Second Amended Complaint) at Schedule 4.36 (List of  
Current Entitlements).

23 <sup>4</sup> A copy of the Credit Agreement is attached as Exhibit B to the Second Amended Complaint.

24 <sup>5</sup> Credit Suisse, Cayman Island Branch, is now known as Credit Suisse AG, Cayman Island Branch. In addition to  
being one of the lenders, Credit Suisse had a number of additional roles under the Credit Agreement. Credit Suisse  
was the "Administrative Agent" for the lenders, and the "Collateral Agent." See Preamble to Credit Agreement.

25 <sup>6</sup> See Credit Agreement, *supra* note 4, Recitals at A.

26 <sup>7</sup> This project was also called the B-25 Site Project, the Lodge at Osprey Meadows, East Wing and the Lodge at  
Osprey Meadows, Lake Wing.

1           **The Credit Suisse loan was secured by two (2) mortgages on nearly all of Tamarack's**  
2 **fee and leasehold property.** <sup>8</sup> **Tamarack was the mortgagor for the mortgage recorded in**  
3 **Valley County on May 19, 2006, as Instrument No. 308953 (the "Tamarack mortgage"). A**  
4 **copy of this mortgage was admitted as Trial Exhibit 1:002A. Tamarack's subsidiaries**  
5 **Whitewater Construction LLC and Village Plaza Construction LLC were the mortgagors of**  
6 **the other mortgage recorded in Valley County on May 19, 2006, as Instrument No. 308952 (the**  
7 **"Whitewater/Village Plaza mortgage"). A copy of this mortgage was admitted as Trial Exhibit**  
8 **1:003. Each reference herein to a finding of priority regarding "the Credit Suisse mortgages"**  
9 **or the "Credit Suisse Valley County mortgages" is intended and shall be construed to refer**  
10 **only to the mortgage or mortgages – the Tamarack mortgage and/or the Whitewater/Village**  
11 **Plaza mortgage – that create(s) a lien on the specific property to which the priority finding**  
12 **relates.**

13  
14           In 2007, Tamarack's financial condition deteriorated significantly. Tamarack defaulted in  
15 its obligations under the Credit Agreement. Tamarack fell behind and became unable to pay its  
16 contractors and suppliers. Tamarack's financial condition continued to deteriorate in 2008.  
17 Tamarack suspended all construction activities at the Resort, leaving many projects unfinished and  
18 many creditors unpaid. Many of Tamarack's contractors and suppliers recorded claims of lien  
19 against Tamarack's property.

20           As agent for the lenders, Credit Suisse filed this mortgage foreclosure action on March 11,  
21 2008, as Valley County Case No. CV-2008-114C. Credit Suisse named as defendants all parties  
22

23  
24 <sup>8</sup> While almost all of the Resort's property is in Valley County, a small portion is in Adams County. The Valley  
25 County mortgage executed by Tamarack was recorded as Instrument No. 308953 in Valley County on May 19, 2006.  
26 The Valley County mortgage executed by Tamarack's subsidiaries Tamarack Whitewater Construction, LLC and  
Village Plaza Construction, LLC was recorded as Instrument No. 308952 in Valley County on May 19, 2006. The  
Adams County mortgage executed by Tamarack was recorded in Adams County on May 22, 2006, as Instrument No.  
111741.

1 who claimed any interests in Tamarack's real property including the contractors, subcontractors,  
2 suppliers and others who had filed claims of lien. Credit Suisse has amended or supplemented its  
3 complaint on three occasions, in part to add defendants who subsequently claimed any interest in  
4 or filed a lien against Tamarack's property.<sup>9</sup>

5 A number of these same contractors, subcontractors and suppliers filed separate actions  
6 against Tamarack and/or Tamarack's property. In a series of orders, the Court consolidated these  
7 cases with this foreclosure action.<sup>10</sup> These cases generated numerous counterclaims, cross-claims  
8 and third party claims. There were approximately one hundred parties named in these consolidated  
9 proceedings.

10 In October 2008, the Court appointed a Receiver for Tamarack. The Court authorized the  
11 Receiver to enter into a receivership credit facility to borrow funds to protect and preserve  
12 Tamarack's property and to open the ski area.<sup>11</sup> The original receivership credit facility was in the  
13 amount of \$10 million. The principal amount of the credit facility was increased to  
14 \$12,162,810.00<sup>12</sup> In connection with the credit facility, the Receiver provided collateral to the  
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18 <sup>9</sup> See First Amended Complaint, filed August 28, 2008; Second Amended Complaint, filed December 18, 2008;  
19 Supplement to Second Amended Complaint, filed May 28, 2010.

20 <sup>10</sup> See Orders Granting Consolidation, entered September 18, 2010 (CV-08-310C, CV-08-311C, CV-08-312C, CV-08-  
21 324C, CV-08-335C, CV-08-356C, CV-08-357C) (cases filed by Tri-State Electric, Inc., YMC, Inc., and Interior  
22 Systems, Inc.), October 1, 2008 (CV-08-502C, CV-08-508C, CV-08-509C, CV-08-510C, CV-08-511C, CV-08-512C,  
23 CV-08-513C, CV-08-514C, CV-08-521C, CV-08-528C) (cases filed by MHTN Architects, Petra, Inc., Interior  
24 Systems, Inc., YMC, Inc., EZA, P.C. d/b/a OZ Architecture of Boulder, Teufel Nursery, Inc. and Quality Tile Roofing,  
25 Inc.), November 12, 2008 (CV-08-532C, CV-08-557C) (cases filed by Timber Tech Construction, LLC and EZA P.C.  
26 d/b/a OZ Architecture of Boulder), January 27, 2009 (CV-08-583C) (cases filed by Scott Hedrick Construction, Inc.)  
and April 26, 2010 (CV-08-580, CV-08-584C) (cases filed by EZA, P.C. d/b/a OZ Architecture of Boulder and Scott  
Hedrick Construction, Inc.).

<sup>11</sup> See Memorandum Decision and Order Re: Receiver's Motion for Authorization to Issue a Receiver's Certificate,  
entered October 29, 2008.

<sup>12</sup> See Amended [Proposed] Order Authorizing Issuance of a Receiver's Certificate of Indebtedness Secured by  
Mortgages, entered October 29, 2008; Order Re: Receiver's Motion for Approval of Budget Extension, entered  
February 25, 2009; Order Amending the Receivership Facility, Authorizing the Issuance of Amended and Restated  
Receiver's Certificate No. 1, and Approving the Budget for March 1, 2009 Through April 30, 2009, entered March 17,  
2009; Order Amending the Restructured Receivership Facility and Authorizing the Issuance of a Second Amended and  
Restated Receiver's Certificate No. 1, entered May 1, 2009.

1 receivership lenders in the form of a mortgage, security agreement, assignment and security  
2 interest against Tamarack's property. The priority of the receivership lenders is senior to the Credit  
3 Suisse mortgages, but junior to any lien claimant whose lien is superior to the Credit Suisse  
4 mortgages. The Receivership was terminated effective July 31, 2009.<sup>13</sup> The receivership lenders  
5 have not been named or joined as parties to this action, and as far as the Court is aware, there has  
6 been no effort by Credit Suisse, the receivership lenders, or any other interested party, to foreclose  
7 the receivership security interests in this proceeding.

8 Throughout most of these proceedings, Tamarack had been represented by attorney Steven  
9 J. Millemann, and his firm, Millemann, Pittenger, McMahan & Pemberton and by attorney Jess R.  
10 Bressi, admitted *pro hac vice*, Luce, Forward, Hamilton & Scripps LLP, Irvine, California. The  
11 Court granted leave for these attorneys to withdraw on March 4, 2010. The Order Granting Leave  
12 to Withdraw provided that the Court could grant default and default judgment, and dismiss all of  
13 Tamarack's claims if Tamarack failed to enter an appearance.<sup>14</sup> Since the Court granted leave to  
14 withdraw, no licensed attorney has appeared for Tamarack.<sup>15</sup> Accordingly, as necessary to resolve  
15 other issues in this case, the Court has entered some orders of default against Tamarack.<sup>16</sup>  
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20 <sup>13</sup> See Order Re: Termination of Receivership, Discharge of Receiver and Related Matters, entered July 7, 2009.

21 <sup>14</sup> See Order Granting Motion for Leave to Withdraw as Attorney of Record at 2, entered March 4, 2010.

22 <sup>15</sup> Tamarack's Chief Executive Officer, Jean-Pierre Boespflug, purported to file a *pro se* appearance on behalf of  
23 Tamarack. However, Mr. Boespflug is not a licensed Idaho attorney and his *pro se* appearance does not constitute an  
24 appearance for Tamarack. See *Indian Springs LLC v. Indian Springs Land Inv. LLC*, 147 Idaho 737, 744-45, 215 P.3d  
25 457, 464-65 (2009).

26 <sup>16</sup> E.g. Memorandum Decision and Order Re: BAG Property Holdings, LLC's Motions for Summary Judgment,  
entered August 5, 2010; Memorandum Decision and Order Re: West Mountain Golf LLC's Motion for Summary  
Judgment Against Tri-State Electric, Inc., entered August 5, 2010; and Memorandum Decision and Order Re: West  
Mountain Golf LLC's Motion for Summary Judgment Against Credit Suisse AG, Cayman Islands Branch, entered  
August 5, 2010; Order Granting Plaintiff's Motion for (1) Entry of Default; and (2) Dismissal with Prejudice of  
Tamarack Resort LLC's Counterclaims Against Plaintiff and Third-Party Claims Against Credit Suisse Securities  
(USA) LLC, entered February 1, 2011.

1 On December 9, 2009, a number of defendants in this action filed an involuntary  
2 bankruptcy petition against Tamarack.<sup>17</sup> The filing of the bankruptcy action resulted in an  
3 automatic stay of this state court proceeding. In an Order entered on February 3, 2010, the  
4 Honorable Terry L. Meyers, Chief U.S. Bankruptcy Judge for the District of Idaho, modified and  
5 lifted the automatic stay to permit this Court to determine the "validity, priority and amount  
6 (including attorneys fees and costs) of any and all mortgages, liens, claims or interests" regarding  
7 Tamarack's real property.<sup>18</sup>

8 Prior to the entry of the bankruptcy stay, this Court already had entered a number of rulings  
9 regarding the validity and priority of certain lien claims.<sup>19</sup> Following the bankruptcy order  
10 modifying and lifting the automatic stay, the Court made additional rulings regarding the validity,  
11 priority and amount of numerous other lien claims.<sup>20</sup>

14 <sup>17</sup> See *In Re: Tamarack Resort, LLC*, Case No. 09-03911-TLM (U.S. Bankruptcy Ct. for Dist. of Idaho).

15 <sup>18</sup> *Id.* (Order Regarding the Amended Motion of Credit Suisse, AG for Relief from the Automatic Stay at 4-5, entered  
February 3, 2010).

16 <sup>19</sup> See Substitute Opinion replacing November 5, 2009 Memorandum Decision and Order Re: Priority Between Credit  
Suisse and Various Lien Claimants, entered January 10, 2011; Memorandum Decision and Order Re: Banner/Sabey II,  
17 LLC's Motion for Partial Summary Judgment, entered May 1, 2009; Memorandum Decision and Order [re: whether  
an architect has the right to a mechanic's or materialman's lien], entered September 14, 2009.

18 <sup>20</sup> See Memorandum Decision and Order Re: Credit Suisse's Motion for Partial Summary Judgment as to  
Banner/Sabey II, LLC's Lien Nos. 329073, 330107, entered March 11, 2010; Memorandum Decision and Order Re:  
19 TMG/DP Miller Lien No. 326813, entered June 9, 2010; Memorandum Decision and Order Re: Credit Suisse AG's  
Second Motion for Partial Summary Judgment as to Banner/Sabey II, LLC, Lien Nos. 329073, 330107, entered June  
20 14, 2010; Memorandum Decision and Order Re: MHTN Architects, Inc.'s Motion for Partial Summary Judgment Re:  
Validity and Priority of its Liens over Credit Suisse's Mortgages, entered June 15, 2010; Memorandum Decision and  
Order Re: EZA, P.C., d/b/a OZ Architecture of Boulder's Motion for Partial Summary Judgment Re: Priority of its  
21 Lien over Credit Suisse's Mortgage, entered June 16, 2010; Memorandum Decision and Order Re: EZA, P.C., d/b/a  
OZ Architecture of Boulder's Motion for Partial Summary Judgment Re: Lien Nos. 332702, 332741, 332742 and  
332746, entered June 16, 2010; Order Granting Plaintiff's Motion for Partial Summary Judgment as to Borrower and  
22 the Borrower Subsidiaries on the Validity of Plaintiff's Mortgages, entered June 17, 2010; Memorandum Decision and  
Order Re: BAG Property Holdings, LLC's Motion for Summary Judgment, entered August 5, 2010; Memorandum  
23 Decision and Order Re: West Mountain Golf LLC's Motion for Summary Judgment against Tri-State Electric, Inc.,  
entered August 5, 2010; Memorandum Decision and Order Re: West Mountain Golf LLC's Motion for Summary  
24 Judgment as to Credit Suisse AG, Cayman Islands Branch, entered August 5, 2010; Memorandum Decision and Order  
Re: Kesler Construction, Inc.'s Motion for Partial Summary Judgment Against Credit Suisse as to Village Plaza,  
25 entered August 9, 2010; Order Granting Plaintiff's Motion for Partial Summary Judgment as to All Defendants Re:  
Validity, Enforceability and Recordation Date of, and Amount Secured by Plaintiff's Mortgages. entered on August  
26 12, 2010; Order Granting Credit Suisse's Motion for Summary Judgment as to Defendant Jeffrey Carroll, entered



1 The Court also entered summary judgment against defendants who were served, but did not  
 2 answer or appear.<sup>21</sup> In addition, both before the bankruptcy stay and after the order modifying and  
 3 lifting the automatic stay, numerous lien claimants either disclaimed or dismissed some or all of  
 4 their lien claims. The Court entered orders either granting summary judgment against these  
 5 defendants or dismissing the claims.<sup>22</sup> As a result of these various orders of dismissal and  
 6 summary judgment, the number of actual lien disputes in the case was narrowed significantly.

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 8  
 9 November 1, 2010; Order Granting North Lake Recreational Sewer and Water District's Motion for Summary  
 Judgment on LID 2003-1, LID 2004-1, LID 2004-2 and LID 2005-1.

10 <sup>21</sup> See Order Granting Credit Suisse's Motion for Summary Judgment as to Certain Non-Responding Defendants,  
 entered June 17, 2010 (affects Action Door, Inc. by virtue of the lien it recorded on April 25, 2008, as Instrument No.  
 11 331150; Epikos LLC aka Epikos Land Planning and Architecture by virtue of the lien it recorded on March 25, 2008,  
 as Instrument No. 330218; Knothe-Zior-Casali Construction, LLC by virtue of the liens recorded on April 25, 2008, as  
 12 Instrument Nos. 331126, 331112; Marc A. Anderson d/b/a Independent Metal Fab by virtue of the lien recorded on  
 March 27, 2008, as Instrument No. 330281; Morrow Equipment Company, LLC by virtue of the lien recorded on  
 13 August 22, 2008, as Instrument No. 334327; O-K Gravel Works, LLC by virtue of the lien recorded on May 6, 2008,  
 as Instrument No. 331397; Overhead Door, Inc. by virtue of the lien recorded on April 18, 2008, as Instrument No.  
 330890; SPF Water Engineering, LLC by virtue of the lien recorded on October 24, 2008, as Instrument No. 336056;  
 14 Inland Waterproofing Services, LLC by virtue of the lien recorded on July 23, 2008, as Instrument No. 333491; and  
 United Subcontractors, Inc. d/b/a G & G Insulation by virtue of the lien recorded on March 14, 2008, as Instrument  
 No. 330000); Order Granting Credit Suisse's Motion for Summary Judgment as to Non-Responding Supplemental  
 15 Defendants, entered October 5, 2010, (affects Melanie Baldwin by virtue of that judgment recorded on August 5,  
 2009, as Instrument No. 344003; David Brahs by virtue of that judgment recorded on July 23, 2009 as Instrument No.  
 16 343604; Holly Wild Dyson by virtue of that judgment recorded on August 17, 2009, as Instrument No. 344364; Edwin  
 H. Eijkelhof by virtue of that judgment recorded on April 14, 2009, as Instrument No. 340949; Le Lodge LLC by  
 17 virtue of those judgments recorded on November 13, 2008 and December 8, 2008, as Instrument Nos. 336602 and  
 337228; Jena Rae MacConkey by virtue of that Judgment recorded on July 29, 2009, as Instrument No. 343777;  
 18 Dominic S. McDaid by virtue of that judgment recorded on June 25, 2009, as Instrument No. 342647; Phoenix7  
 Group, Inc. by virtue of that judgment recorded on December 12, 2008, as Instrument No. 337287; The State of Idaho,  
 19 by the Idaho Commerce and Labor Department, notices filed at different dates in 2009 with the Idaho Secretary of  
 State as Nos. T403752, T403753, T415454, and T432362; Jennifer M. Stiffler by virtue of that judgment recorded on  
 20 June 11, 2009, as Instrument No. 342205; The Stucco Company, Inc. by virtue of that lien recorded on October 1,  
 2008, as Instrument No. 342205).

21 <sup>22</sup> See Orders of Dismissal Re: Western States Crane Company, J.H. Masonry and Timber Tech Construction, LLC,  
 entered June 17, 2010; Order Granting Plaintiff's Motion for Summary Judgment as to Certain Disclaiming/Releasing  
 22 Defendants, entered June 17, 2010 (affects Construction Alternatives, LLC (Instrument No. 330078); CHSQA  
 (Instrument Nos. 331145, 331146); Eagle Precast Company, d/b/a Hanson Eagle Precast Company (Instrument No.  
 334207); Gem State Staffing (Instrument No. 329343); Jacksons Food Stores (Instrument No. 332130); Materials  
 23 Testing & Inspection (Instrument Nos. 330169, 330170, 330934, 340156); Neptune Industries (Instrument No.  
 335209); Riverside Construction, Inc. (Instrument No. 330441); Tates Rents, Inc. (Instrument No. 331255); TMC Inc.  
 24 (Instrument Nos. 330875, 330876); Volkl Sport America, Inc., Marker USA, Inc., and Marker Volkl USA, Inc.  
 (Instrument No. 333717); Western States Equipment Company d/b/a CAT Rental Store (Instrument Nos. 329252,  
 25 329468, 330898); Columbia Paint & Coating Company (Instrument No. 330976); Insulfoam, LLC (Instrument No.  
 239959); McCall Spa Company, LLC (Instrument Nos. 331229, 331230); Ruscitto/Latham/Blanton Architecture  
 26 (Instrument No. 330421); Order of Dismissal of All Claims of CHM2Hill, entered April 12, 2010.

1 In these various rulings, the Court determined as a matter of law that: (1) the Credit Suisse  
2 mortgages were valid and enforceable against all lien claimants and defendants; (2) the Valley  
3 County mortgages were properly recorded in Valley County on May 19, 2006;<sup>23</sup> and (3) the  
4 amount of Tamarack's debt that was secured by the Credit Suisse Valley County mortgages was  
5 \$306,585,272.92, as of June 29, 2010.<sup>24</sup> While the total amount of the mechanic's and  
6 materialmen's lien claims has not been finally determined, certainly these lien claims constitute  
7 many more millions of dollars of claims against Tamarack's property. In addition to these liens,  
8 there are other substantial claims against Tamarack's property including the vendee's liens  
9 asserted by BAG Property Holdings, LLC, North Lake Recreational Sewer and Water District  
10 Local Improvement District's assessment liens, as well as the secured interests of the receivership  
11 lenders. In all, the total amount of the existing lien claims against Tamarack's property is  
12 substantially more than \$300,000,000.00.

14 Because it appears that the amount Tamarack owes is far greater than the current value of  
15 the foreclosure property,<sup>25</sup> the question of lien priority has been the focus of much of the pretrial  
16 motion practice in this foreclosure action. As a practical matter, because the property value is  
17 almost certainly much less than the total of claims, it is unlikely that any lien claimant whose  
18 interest is inferior or subordinate to Credit Suisse will receive any part of the foreclosure proceeds.

20 <sup>23</sup> The Adams County mortgages were properly recorded on May 22, 2006. However, the Court is not aware of any  
21 lien dispute involving the portion of Tamarack's fee or leasehold property in Adams County.

22 <sup>24</sup> See Memorandum Decision and Order Re: Priority Between Credit Suisse and Various Lien Claimants at 7-8,  
23 entered November 9, 2009; Memorandum Decision and Order Re: Credit Suisse AG's Second Motion for Partial  
24 Summary Judgment as to Banner/Sabey II, LLC Lien Nos. 329073, 330107 at 6-7, entered June 14, 2010; Order  
Granting Plaintiff's Motion for Partial Summary Judgment as to Borrower and the Borrower Subsidiaries on the  
Validity of Plaintiff's Mortgages, entered June 17, 2010; Order Granting Plaintiff's Motion for Partial Summary  
Judgment as to All Defendants Re: Validity, Enforceability, Recording Date of, and Amount Secured by Plaintiff's  
Mortgages, entered August 12, 2010.

25 <sup>25</sup> According to an appraisal done at the request of Credit Suisse, as of September 9, 2008, the market value of  
26 Tamarack's property was only \$236,300,000.00. See Affidavit of Christopher T. Donaldson in Support of Plaintiff's  
Motion to Appoint Receiver at 3, ¶ 6, filed September 23, 2008. Given present economic circumstances, the actual  
value of the property today is almost certainly very much less.

1 By the same token, it is more likely that those claimants whose interests are prior to and superior to  
2 the Credit Suisse mortgages will have their claims paid from the foreclosure proceeds.

3 Pursuant to scheduling orders, the Court set deadlines for the filing and determination of all  
4 foreclosure issues that could be determined in summary fashion. More than twenty (20) motions  
5 for summary judgment or partial summary judgment were filed by Credit Suisse and other lien  
6 claimants. In ruling on these motions, the Court has determined the validity and priority of a  
7 number of lien claims. The Court determined that some lien claims had priority over the Credit  
8 Suisse mortgages, and the Court determined that other lien claims were junior to the Credit Suisse  
9 mortgages.<sup>26</sup>

10 The Court scheduled court trials to resolve all remaining lien claim issues that could not be  
11 determined by summary judgment. Court trials were set to determine the remaining issues relating  
12 to the validity, priority and amount of the claims of Banner/Sabey II, LLC, Inland Crane Inc., Tri-  
13 State Electric, Inc., YMC, Inc., Kesler Construction, Inc., MHTN Architects, Inc., EZA, P.C. d/b/a  
14 OZ Architecture of Boulder, Secesh Engineering, Inc., Teufel Nursery, Inc., United Rentals  
15 Northwest, Inc., Interior Systems, Inc., Scott Hedrick Construction, Inc., Banc of America Leasing  
16 and Capital, LLC and BAG Holdings, LLC.

17 Not all of these claims proceeded to trial. Some of the claims were resolved or dismissed  
18 prior to trial, including American Stair Corporation, Inc.,<sup>27</sup> Inland Crane, Inc.,<sup>28</sup> United Rentals  
19  
20  
21  
22

23 <sup>26</sup> See the various Memorandum Decisions, *supra* notes 19, 20. While the Court entered formal decisions on most  
24 summary judgment issues, in a few instances, the Court did not issue a written decision when it denied some motions  
25 for summary judgment. If the Court did not issue a written ruling, the Court stated its reasons for denying summary  
26 judgment on the record (e.g. Rulings denying summary judgment motions by Banc of America Leasing and Capital,  
LLC., and Teufel Nursery, Inc.).

<sup>27</sup> See Disclaimer of Interest, filed September 23, 2010.

<sup>28</sup> See Orders of Dismissal, entered December 6, 2010 (Instrument Nos. 329729, 329730).

1 Northwest, Inc.,<sup>29</sup> North Lake Recreational Sewer and Water District,<sup>30</sup> and Banc of America  
 2 Leasing and Capital, LLC.<sup>31</sup> Some of these lien claimants elected not to participate or present any  
 3 further evidence, including Scott Hedrick Construction, Inc. and Interior Systems, Inc.

4 The Court presided over the remaining lien claims that required court trials during portions  
 5 of September, October, **November**, December 2010 and January 2011. In an Order dated January  
 6 11, 2011, the bankruptcy court dismissed the involuntary bankruptcy proceeding against  
 7 Tamarack, effectively lifting any stay upon these proceedings.<sup>32</sup> The Court received written  
 8 closing arguments from the parties. This omnibus decision will constitute the Court's findings of  
 9 fact and conclusions of law as to the court trials of the lien claims that went to trial.

#### 10 Discussion

##### 11 1. Secesh Engineering, Inc. ("Secesh")

12 Secesh is a licensed professional engineering and surveying firm. Secesh provided  
 13 surveying and related services for the Resort and Tamarack. Secesh first began to provide services  
 14 in 2002. Secesh recorded its claim of lien in Valley County on March 31, 2008, as Instrument No.  
 15 330343.<sup>33</sup> The Secesh lien was filed against all of Tamarack's Valley County property.

17 The court trial of the issues relating to the validity, priority and amount of the Secesh lien  
 18 was tried at the Valley County Courthouse on October 4 and 5, 2010. Secesh was represented by  
 19 Samuel A. Diddle, Eberle, Berlin, Kading, Turnbow & McKIveen, Chartered, Boise, Idaho. Credit  
 20

21  
 22  
 23 <sup>29</sup> See Orders of Dismissal, entered November 1, 2010 (Instrument No. 330822).

24 <sup>30</sup> See Order Granting North Lake Recreational Sewer and Water District's Motion for Summary Judgment  
 on LID 2003-1, LID 2004-1, LID 2004-2 and LID 2005-1, entered July 20, 2010.

25 <sup>31</sup> See Order Approving Stipulation, entered May 11, 2011

26 <sup>32</sup> See Order *In Re: Tamarack Resort, LLC*, Case No. 09-03911-TLM (U.S. Bankruptcy Ct. for the District of Idaho)  
 (Doc. 528) (entered January 27, 2011).

<sup>33</sup> See Trial Exhibit 1:043.

1 Suisse was represented by P. Bruce Badger, *pro hac vice*, Fabian & Clendenin, Salt Lake City,  
 2 Utah, and Elizabeth W. Walker, *pro hac vice*, Sidley Austin, LLP, Los Angeles, California.

3 Following the court trial, Secesh resolved its lien claim and its claim has been dismissed.<sup>34</sup>

4 **2. Teufel Nursery, Inc. ("Teufel")**

5 Teufel provided landscaping and other services for Tamarack at the Resort from 2004 until  
 6 early 2008. Teufel filed its claim of lien in Valley County on March 21, 2008, as Instrument No.  
 7 330152.<sup>35</sup> The lien is against most of Tamarack's platted property.<sup>36</sup> The lien is for the amount  
 8 \$564,560.23. There is an attachment to the claim of lien which apportions the lien claim amount  
 9 among twenty four (24) distinct activities, areas or properties.<sup>37</sup> Teufel filed an action to foreclose  
 10 this lien on September 22, 2008 as Valley County Case No. CV-2008-521C.

11 The court trial of the validity, priority and amount of the Teufel lien was tried at the Valley  
 12 County Courthouse on October 5 and 6, 2010. Teufel was represented by Teri R. Pickens, Pickens  
 13 Law, P.A. Credit Suisse was represented by P. Bruce Badger, *pro hac vice*, Fabian & Clendenin,  
 14 Salt Lake City, Utah, and Elizabeth W. Walker, *pro hac vice*, Sidley Austin, LLP, Los Angeles,  
 15 California. Testimony was presented from Rick Christensen, one of Teufel's managers, Stanley J.  
 16 Tharp, a Boise attorney who assisted in preparing and serving copies of the lien, Mike Stanger,  
 17

18  
 19 <sup>34</sup> See Order of Dismissal, entered March 30, 2011.

20 <sup>35</sup> See Trial Exhibits 1:044, 9:006.

21 <sup>36</sup> The claim of lien recites that it is filed as to all of the "Tamarack Resort Third Amended Belvedere Ridge Hotel  
 22 Condominium," the "Tamarack Resort Lake Wing Condominium," the "Tamarack Resort Members Lodge," the  
 23 "Tamarack Resort Planned Unit Development Phase 1 Final Plat," the "Tamarack Resort Planned Unit Development  
 Phase 2.1," the "Tamarack Resort Planned Unit Development Phase 1 Village," the "Tamarack Resort Planned Unit  
 Development Phase 2 Village," the "Tamarack Resort Planned Unit Development Phase 2.2," the "Tamarack Resort  
 Planned Unit Development Phase 2.3," the "Tamarack Resort Planned Unit Development Phase 2.4," the "Tamarack  
 Resort Planned Unit Development Phase 3" and the "Tamarack Resort Village Plaza Condominium."

24 <sup>37</sup> The following descriptions are contained in the exhibit: "Arling Center," "Chalet," "Clearwater Townhomes,"  
 25 "Design Plaza," "Dory Custom Chalet #3," "Erosion Control," "Francoise Court," "General Conditions 2007,"  
 "Golden Bar," "Golf Course," "Haystack Chalet #25," "Heritage roadside," [sic] "Member's Lodge," "Misc  
 hydroseeding," "Norwood Nursery," "Poma," "Rock Creek," "Snow Front," "South End Berm," "Steelhead custom  
 chalet," "Trillium Cottages," "Trillium townhomes," "Twin Creek," "Village Drive." A clearer copy of this attachment  
 was admitted as Trial Exhibit 9:055.

1 Teufel's manager for the Tamarack project, Chris Kirk, one of Tamarack's former managers, and  
 2 Kit Yates, one of Tamarack's former managers. Numerous exhibits were admitted.

3 **A. Teufel's lien claim is valid and enforceable.**

4 Based upon substantial and mostly uncontradicted evidence, the Court will find that  
 5 Teufel's claim of lien is valid and enforceable. Teufel was a registered contractor and provided  
 6 labor and material at the request of the owner which improved the Resort. Teufel had the right to  
 7 file a lien pursuant to Idaho Code § 45-501.<sup>38</sup> Teufel's lien was timely filed, contained the  
 8 information required, was properly verified and properly served, all as required by Idaho Code §  
 9 45-507.<sup>39</sup> The action to foreclose the lien was timely filed pursuant to Idaho Code § 45-510.<sup>40</sup>

11  
 12 <sup>38</sup> "Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of  
 13 any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct  
 14 to create hydraulic power, or any other structure, or who grades, fills in, levels, surfaces or otherwise improves any  
 15 land, or who performs labor in any mine or mining claim, and every professional engineer or licensed surveyor under  
 16 contract who prepares or furnishes designs, plans, plats, maps, specifications, drawings, surveys, estimates of cost, on-  
 17 site observation or supervision, or who renders any other professional service whatsoever for which he is legally  
 18 authorized to perform in connection with any land or building development or improvement, or to establish  
 19 boundaries, has a lien upon the same for the work or labor done or professional services or materials furnished,  
 20 whether done or furnished at the instance of the owner of the building or other improvement or his agent; and every  
 21 contractor, subcontractor, architect, builder or any person having charge of any mining claim, or of the construction,  
 22 alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be  
 23 the agent of the owner for the purpose of this chapter: provided, that the lessee or lessees of any mining claim shall not  
 24 be considered as the agent or agents of the owner under the provisions of this chapter." Idaho Code § 45-501.

25 <sup>39</sup> (1) Any person claiming a lien pursuant to the provisions of this chapter must file a claim for record with the county  
 26 recorder for the county in which such property or some part thereof is situated.

(2) The claim shall be filed within ninety (90) days after the completion of the labor or services, or furnishing of  
 materials.

(3) The claim shall contain:

(a) A statement of his demand, after deducting all just credits and offsets;

(b) The name of the owner, or reputed owner, if known;

(c) The name of the person by whom he was employed or to whom he furnished the materials; and

(d) A description of the property to be charged with the lien, sufficient for identification.

(4) Such claim must be verified by the oath of the claimant, his agent or attorney, to the effect that the affiant believes  
 the same to be just.

(5) A true and correct copy of the claim of lien shall be served on the owner or reputed owner of the property either by  
 delivering a copy thereof to the owner or reputed owner personally or by mailing a copy thereof by certified mail to  
 the owner or reputed owner at his last known address. Such delivery or mailing shall be made no later than five (5)  
 business days following the filing of said claim of lien." Idaho Code § 45-507.

<sup>40</sup> "No lien provided for in this chapter binds any building, mining claim, improvement or structure for a longer period  
 than six (6) months after the claim has been filed, unless proceedings be commenced in a proper court within that time  
 to enforce such lien. . . ." Idaho Code § 45-510.

**B. Teufel's lien claim is subsequent to and inferior to the Credit Suisse mortgages.**

1  
2 During the course of these proceedings, the Court directed all lien claimants to file lien  
3 disclosures containing additional details and information about the lien claims including a  
4 statement of the date upon which the claimant first provided labor or material on the property, and  
5 the date claimed for lien priority.<sup>41</sup> On February 10, 2009, Teufel filed a disclosure in which it  
6 stated that the start dates, and the lien priority dates, for all of the work covered by its claim of lien  
7 were on various dates, all in 2007.<sup>42</sup> On March 3, 2009, Teufel filed an amended disclosure which  
8 again asserted that the start dates, and the lien priority dates, for all of the work covered by the  
9 claim of lien were all on various dates in 2007.<sup>43</sup> Both these disclosures were filed by Teufel's  
10 counsel of record, W. John Thiel, W. John Thiel, P.L.L.C. On June 30, 2009, new counsel  
11 appeared for Teufel, Teri R. Pickens, Pickens Law, P.A.  
12

13 On August 13, 2009, Credit Suisse filed a motion for partial summary judgment that  
14 Teufel's lien claim was inferior and subordinate to the Credit Suisse mortgages. Credit Suisse  
15 asserted that Teufel's lien disclosure forms established that Teufel's earliest lien priority was in  
16 2007. Because the Credit Suisse Valley County mortgages were recorded on May 19, 2006, Credit  
17 Suisse argued that the Teufel claim of lien was subsequent, inferior and subordinate to the Credit  
18 Suisse mortgages.  
19

20 However, prior to the time set for the argument on Credit Suisse's motion for summary  
21 judgment, on September 24, 2009 Teufel's new counsel filed a second amended lien disclosure  
22 form in which Teufel amended all of the start dates, and priority dates, from the 2007 dates to June  
23

24 <sup>41</sup> See Scheduling Conference Order, entered January 12, 2009; Order Re: Mechanic's Lien Claimant Disclosure Form  
and Vendee's Lien Claimant Disclosure Form, entered February 10, 2009; Order Requiring the Completion, Filing and  
25 Service of the Mechanic's Lien Claimant Supplemental Disclosure Form, entered May 14, 2009.

<sup>42</sup> See Trial Exhibit 1:300.

<sup>43</sup> See Trial Exhibit 1:301.

1 14, 2004.<sup>44</sup> Teufel asserted that June 14, 2004 was the date it first provided labor and material to  
2 the project site. June 14, 2004 is also the date that appears in Teufel's claim of lien as the date that  
3 Teufel first began to furnish labor and material to the project. Along with its opposition to Credit  
4 Suisse's motion for summary judgment, Teufel filed an affidavit from its Landscape Division  
5 Manager asserting that its lien priority date was from June 14, 2004. The Court denied Credit  
6 Suisse's motion for summary judgment finding that there was a genuine issue of fact concerning  
7 the priority date.<sup>45</sup>

9 On April 29, 2010, Teufel filed a motion for summary judgment that its lien had priority  
10 over the Credit Suisse mortgages. Teufel argued that its lien related back to June 14, 2004 when it  
11 first provided labor and material to the project. The Court heard argument on this motion on June  
12 27, 2010. The Court orally denied Teufel's motion for summary judgment at the conclusion of the  
13 oral argument. The Court found that there was a genuine issue of fact as to Teufel's priority date.

14 Teufel first entered into a written contract with Tamarack in 2004. Teufel was not able to  
15 produce a signed copy, but based upon the evidence, the court will find that Trial Exhibit 9:001 is  
16 a copy of the operative agreement. Teufel also entered into separate written contracts with  
17 Tamarack for 2005, 2006 and 2007. Teufel was not able to produce a signed copy of these  
18 agreements either. However, based upon the evidence, the court will find that Trial Exhibits 9:002,  
19 9:003 and 9:004 are copies of the operative agreements for 2005, 2006 and 2007.  
20  
21  
22  
23  
24

25 <sup>44</sup> See Trial Exhibit 1:298.

26 <sup>45</sup> See Substitute Opinion replacing November 5, 2009 Memorandum Decision and Order Re: Priority Between Credit Suisse and Various Lien Claimants, entered January 10, 2011 at 21-22.



1 The determination of the priority between a mechanic or materialman lien claimant and a  
2 mortgagee is governed by Idaho Code § 45-506,<sup>46</sup> as interpreted by the Idaho Supreme Court in  
3 *Pacific States Savings, Loan and Building Co. v. Dubois*, 11 Idaho 319, 83 P. 513 (1905) and  
4 *Ultrawall, Inc. v. Washington Mut. Bank*, 135 Idaho 832, 25 P.3d 855 (2001). The priority date for  
5 a mortgagee is the date the mortgage was recorded. The priority date for a materialman is the date  
6 that labor or material was first supplied. A mortgagee is entitled to priority over the claim of a  
7 materialman who first supplied labor or material after the mortgage was recorded. A lien claimant  
8 is entitled to lien priority over a mortgagee that was recorded after labor or material was first  
9 supplied.

10 The lien of a mechanic or materialman will almost always relate back to an earlier date  
11 because the lien attaches when the work was first performed, not when the work was completed.  
12 Idaho Code § 45-506. The evidence at trial showed that Teufel had been paid for all of its work in  
13 2004, 2005 and 2006. Teufel's lien claim was entirely for work Teufel began in 2007. For the  
14 2007 work to relate back to 2004, the work must have been such as to constitute a continuous  
15 single agreement. See *Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, \_\_\_, 247 P.3d  
16 620, 627 (2010). See also *White v. Construction Mining & Mill Co.*, 56 Idaho 403, 420, 55 P.2d  
17 152, 160 (1936). As the Supreme Court explained, a lien filed within ninety days after the  
18 completion of the labor or service may encompass the entirety of the work performed under a  
19 single contract. *Terra-West, Inc.*, 247 P.3d at 627.  
20  
21

22 <sup>46</sup> "The liens provided for in this chapter shall be on equal footing with those liens within the same class of liens,  
23 without reference to the date of the filing of the lien claim or claims and are preferred to any lien, mortgage or other  
24 encumbrance, which may have attached subsequent to the time when the building, improvement or structure was  
25 commenced, work done, equipment, materials or fixtures were rented or leased, or materials or professional services  
26 were commenced to be furnished; also to any lien, mortgage, or other encumbrance of which the lienholder had no  
notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done,  
equipment, materials or fixtures were rented or leased, or materials or professional services were commenced to be  
furnished." Idaho Code § 45-506.

1 Teufel claims that the priority date for its claim of lien should relate back to June 2004,  
2 when it first began to provide labor and material to the Resort, and the date of the first contract  
3 with Tamarack. Teufel asserts that the contracts for 2005, 2006 and 2007 were "renewals" of the  
4 original contract, not separate and distinct undertakings. Teufel argues that it had a single contract  
5 to provide all landscaping for the entire Resort development and that the subsequent written  
6 agreements were merely extensions of the original agreement.

7 Credit Suisse argues that Teufel's lien is subordinate to the Credit Suisse Valley County  
8 mortgages because Teufel's lien claim arises out of work Teufel performed pursuant to the 2007  
9 contract with Tamarack. Credit Suisse argues that Teufel entered into separate agreements with  
10 Tamarack each year. Credit Suisse asserts that Teufel's priority can only relate back to 2007  
11 because that is when Teufel began to provide labor and materials under the 2007 agreement.  
12

13 If its terms are plain and unambiguous, the determination of a contract's meaning and its  
14 legal effect are questions of law for the court to determine. *Page v. Pasquali*, 150 Idaho 150,  
15 \_\_\_\_, 244 P.3d 1236, 1238 (2010) (quoting *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 779,  
16 69 P.3d 1035, 1040 (2003)). However, if the contract is ambiguous, its meaning is a question of  
17 fact which focuses upon the intent of the parties. *Id.*

18 The Court has reviewed the 2004 contract between Tamarack and Teufel. Article 2  
19 contains a scope of work detailing eleven (11) specific tasks and "such other tasks as may be  
20 directed by the Owner's Representative." The Court finds that the scope is plain and unambiguous.  
21 The contract outlines those tasks that are to be completed in 2004. The scope does not provide that  
22 Teufel was awarded all of the landscaping work for the entire Tamarack project. Article 3 contains  
23 a project schedule which required work to be substantially complete by November 30, 2004.  
24  
25  
26

1 The Court has examined the 2005 contract. It is not a "renewal" contract. Article 2 contains  
2 a new scope of work that details ten (10) specific tasks. The work was to be substantially  
3 completed by December 31, 2005. The 2005 contract is a new contract for a different scope of  
4 work. Likewise, neither the 2006 contract nor the 2007 contract is a "renewal" contract. Each has a  
5 new scope of work and a substantial completion date. There is nothing in these agreements that  
6 required Teufel to perform future work for Tamarack. There is nothing in the agreements that  
7 required Tamarack to employ Teufel in subsequent years. There is nothing in the 2004 contract  
8 that obligates either Tamarack or Teufel beyond the 2004 contract. Teufel was under no obligation  
9 to accept future work and Tamarack had no obligation to award the work to Teufel.

10 The evidence did show that for some years, Teufel maintained a skeletal crew at the Resort  
11 during the winter months. There were no Teufel employees at the site after about December 23,  
12 2004 until the spring of 2005.<sup>47</sup> There were about four (4) Teufel employees at the site during the  
13 2005 winter season and about ten (10) Teufel employees at the site during the 2006 winter  
14 season.<sup>48</sup> When Teufel's employees were on site during the winter, there was no landscaping work  
15 performed. Teufel's employees did snow removal so that Tamarack's contractors and  
16 subcontractors could continue construction activities.<sup>49</sup>

18 Teufel argues that the fact that it maintained a small crew for some winters demonstrates  
19 that Teufel had a single continuous contract since 2004. The Court does not agree. Teufel did not  
20 have a crew present each winter. When Teufel did have a winter crew, the crew was not engaged  
21 in landscape services, only snow removal and snow removal was not part of the scope of work for  
22 any of Teufel's landscaping contracts with Tamarack.  
23

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24  
25 <sup>47</sup> See Trial Transcript at 109 (October 6, 2010 Testimony of Rick Christensen).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 110-111; Trial Transcript at 194-95 (October 6, 2010 testimony of Mike Stanger.)

1 The evidence did establish that Tamarack desired to have the same landscape contractor for  
 2 the entire project. Teufel expected to be the landscape contractor for the entire project. However,  
 3 that intent or expectation was not made part of any binding agreement between Tamarack and  
 4 Teufel. Tamarack's 2004 agreement with Teufel did not obligate either Tamarack or Teufel  
 5 beyond 2004. At trial, Teufel's Manager, Rick Christensen, testified that Teufel had to have a  
 6 signed 2005 agreement before it would order plantings for the 2005 contract.<sup>50</sup> Christensen also  
 7 testified it was important to have a signed agreement for 2006 before Teufel would advance  
 8 payment to its growers for 2006 plant material.<sup>51</sup>

9 The conclusion that Teufel did not perform continuous work under a single contract is  
 10 further supported by the affidavit testimony of Rick Christensen who stated:

- 11
- 12 5. Teufel signed a Landscape Construction Agreement ("Agreement") with Tamarack  
 13 Resort, LLC, on June 4, 2004. The Agreement was to last one year and specified the  
 14 portions or properties of Tamarack Resort that Teufel was to landscape that year. . . .  
 15 6. Teufel signed a new Agreement in 2005, 2006 and 2007. . . .<sup>52</sup>

16 The Court recognizes that lien laws are to be liberally construed in favor of the persons  
 17 providing labor and/or services. *Park West Homes LLC v. Burnson*, 149 Idaho 603, 605, 238 P.3d  
 18 203, 205 (2010). However, the rule of liberal construction does not permit the court to create a  
 19 lien priority that was not intended by the legislature. *E.g. Great Plains Equipment, Inc. v.*  
*Northwest Pipeline Corp.*, 132 Idaho 754, 761-62, 979 P.2d 627, 633-34 (1999).

20 The Court concludes that the work that Teufel performed in 2007 was not done as part of  
 21 Teufel's 2004 contract. The priority for Teufel's claim of lien relates back to when Teufel first  
 22 provided labor or materials for the work specified in the 2007 contract. Teufel did not provide any  
 23

24

25 <sup>50</sup> Trial transcript at 107-08 (Oct. 6, 2010 testimony of Rick Christensen).

26 <sup>51</sup> *Id.* at 115.

<sup>52</sup> See Affidavit of Rick Christensen, filed September 21, 2009.

1 labor or material under the 2007 contract until 2007. Accordingly, under Idaho Code § 45-506,  
2 Teufel's claim of lien is inferior to the Credit Suisse Valley County mortgages.

3 **C. The amount of Teufel's claim of lien is \$306,543.30.**

4 The evidence at trial demonstrated that Tamarack paid Teufel in full for all amounts billed  
5 in 2004, 2005 and 2006. At the time it filed its lien, Teufel had not been paid a total of  
6 \$529,556.47 for work done in 2007 and 2008. The amount Teufel claimed in its lien was  
7 \$564,560.23, which includes Teufel's calculation of interest on the outstanding principal amount.

8 The amount of Teufel's foreclosure lien was disputed, and the evidence relating to the  
9 calculation of the amount was, in many respects, confusing. Teufel's lien was filed against all of  
10 the platted property identified in its lien claim.<sup>53</sup> There is an attachment to the claim of lien that  
11 apportions the total amount among twenty four (24) described activities, areas or parcels described  
12 in the exhibit.<sup>54</sup> Trial Exhibit 9:055 is a clearer copy of this attachment. There is no information in  
13 the lien or the attachment which explains how the twenty four (24) activities, areas or parcels  
14 described in the exhibit relate to the property that is actually identified in the lien.  
15

16 In its Amended Complaint for Foreclosure filed February 10, 2009, Teufel identified the  
17 property it sought to foreclose differently than stated by Teufel in the lien and attachment. In the  
18 complaint, Teufel did not seek to foreclose all of the platted properties that were set forth in its  
19 recorded lien. Teufel did not seek to foreclose on the twenty four (24) activities, areas or parcels  
20 that were described in the attachment to the claim of lien. Rather, Teufel alleged that it was  
21 seeking to foreclose upon forty four (44) distinct parcels which Teufel identified as parcels A –  
22  
23  
24

25 <sup>53</sup> See Trial Exhibits 1:044 and 9:006, *supra* notes 35, 36.

26 <sup>54</sup> *Id.*

1 LL.<sup>55</sup> Parcel A was described as the "Proposed Tamarack Resort Planned Unit Development Phase  
2 4.1."<sup>56</sup> The Court understands that this is a reference to all or part of the unplatted property at the  
3 Resort, also called the "Heritage" area. However, this property is not identified as part of Teufel's  
4 lien claim because Teufel's claim of lien did not attach to any unplatted property.<sup>57</sup> The remainder  
5 of the parcels were identified by a plat description, such as "Lot \_\_\_\_, Block \_\_\_\_, Tamarack  
6 Planned Unit Development Phase \_\_\_\_."<sup>58</sup>

7 Teufel apparently obtained these parcel descriptions from a litigation guarantee done by  
8 Stewart Title Guaranty Company. How Teufel, its counsel and/or Stewart Title determined that  
9 these forty four (44) parcels were the parcels that should be foreclosed upon is not fully understood  
10 and was not well explained at trial. In any event, in the foreclosure complaint, Teufel sought  
11 foreclosure of the parcels using the parcel descriptions from Stewart Title, and not the property  
12 described in its claim of lien or the twenty four (24) items listed in the lien attachment.

13  
14 In the lien disclosure orders, the Court required lien claimants to state whether the lien  
15 amount was allocated to more than one work or improvement.<sup>59</sup> In the lien disclosure forms,  
16 Teufel allocated or apportioned its lien claim among the forty four (44) parcels listed in the  
17 foreclosure complaint.<sup>60</sup> Teufel also disclosed in the lien disclosure forms that Teufel had recorded  
18 partial lien releases affecting twenty seven (27) of the forty four (44) parcels it sought to  
19  
20  
21  
22

23 <sup>55</sup> See Teufel's February 10, 2009 Amended Complaint for Foreclosure of a Materialman's Lien at ¶¶ 1, 175, Exhibits  
24 A to LL.

<sup>56</sup> *Id.* at Exhibit A.

<sup>57</sup> See Trial Exhibit 9:006.

<sup>58</sup> See Teufel's February 10, 2009 Amended Complaint for Foreclosure of a Materialman's Lien at Exhibits B to LL.

<sup>59</sup> See Orders, *supra* note 41.

<sup>60</sup> See Notice of Amended Lien Claimant Disclosure Form of Teufel Nursery, Inc., filed March 4, 2009.

1 foreclose.<sup>61</sup> However, the lien disclosures did not detail or explain what effect, if any, the releases  
2 would have on Teufel's foreclosure request.

3 Rick Christensen was Teufel's project manager for Tamarack. He testified at the trial.  
4 During his direct examination, Mr. Christensen explained how the total lien claim was determined  
5 and how that claim was allocated among the twenty four (24) distinct activities, areas or properties  
6 that were described in the attachment to the claim of lien. Mr. Christensen testified that Trial  
7 Exhibits 9:011 to 9:036 contained the documentation for the total amount claimed as well as the  
8 amount allocated between each of the twenty-four (24) separate items in the lien attachment.  
9 However, the Trial Exhibits 9:011 to 9:036 did not refer in any way to the parcels A – LL that  
10 were specified in the foreclosure complaint. While Mr. Christensen acknowledged that there were  
11 a few clerical errors of calculation, he testified that the amount stated in the claim of lien,  
12 \$529,556.47, was the principal amount that Tamarack owed Teufel for work done in 2007 and  
13 2008. Mr. Christensen testified that he was aware that Teufel had released its lien as to certain  
14 parcels, but he testified he had not had an opportunity to calculate the effect of the releases on the  
15 amount claimed in the lien.<sup>62</sup>

17 Prior to trial, Teufel filed a trial brief in which it acknowledged that its lien claim had to be  
18 reduced as a result of the released parcels. Teufel stated: "Incorporating these deductions for the  
19 released property we found owed to Teufel under the mechanic's liens is \$359,244.71."<sup>63</sup> The trial  
20 brief contains a chart detailing this calculation.<sup>64</sup> Mr. Christensen was asked about this statement  
21 from Teufel's trial brief during cross examination. Despite his earlier testimony on direct  
22

24 <sup>61</sup> *Id.*

25 <sup>62</sup> Christensen testimony, *supra* note 50, at 95.

<sup>63</sup> *See* Teufel Nursery, Inc.'s Trial Brief, filed August 10, 2010.

26 <sup>64</sup> *Id.* at 17-19.

1 examination that he had not had an opportunity to calculate the effect of the released parcels, Mr.  
2 Christensen testified that the lien amount was reduced to \$406,199.07.<sup>65</sup>

3 While testifying on re-direct examination, Mr. Christensen produced a type-written  
4 summary that he had been referring to during his testimony. This was marked and admitted as  
5 Trial Exhibit 9:056. This exhibit contains a detailed explanation of Mr. Christensen's testimony  
6 that the releases reduced the lien amount to \$406,199.07. It does not appear that this document  
7 had ever been produced to Credit Suisse prior to Mr. Christensen producing it during his trial  
8 testimony. Teufel made no effort to explain the discrepancy between the amount claimed in Trial  
9 Exhibit 9:056 and the lesser amount identified in Teufel's trial brief, \$359,244.71. Teufel made no  
10 attempt to explain how Mr. Christensen could have knowledge about this exhibit, and yet testify  
11 earlier that he had not had an opportunity to determine what effect the dismissed parcels had on the  
12 amount of the lien claim. Trial Exhibit 9:056 does provide some basis for understanding how the  
13 forty four (44) parcels that were identified by Stewart Title relate to the twenty four (24) distinct  
14 activities, areas or properties amounts that were described in the attachment to the recorded claim  
15 of lien.  
16

17 In the second amended lien disclosure, Teufel listed twenty seven (27) partial releases.  
18 During trial, Credit Suisse established that there were additional released parcels.<sup>66</sup>

19 Teufel's explanation about the amount of the lien claim was confusing and contradictory.  
20 Even so, based upon a preponderance of the evidence, the court will find that Teufel has met its  
21 burden in demonstrating that the lien amount consists of the following items:  
22  
23  
24

25 <sup>65</sup> Christensen testimony, *supra* note 50, at 136-38.

26 <sup>66</sup> Trial Exhibits 1:304, 1:305, 1:306, 1:307 and 1:308.



	Arling Center	\$0.00 <sup>67</sup>
1	Chalet	\$0.00 <sup>68</sup>
2	Clearwater Townhomes:	\$21,638.33 <sup>69</sup>
	Design Plaza	\$0.00 <sup>70</sup>
3	Dory Custom Chalet	\$0.00 <sup>71</sup>
	Erosion Control	\$0.00 <sup>72</sup>
4	Francoise Court	\$0.00 <sup>73</sup>
	General Conditions	\$0.00 <sup>74</sup>
5	Golden Bar	\$0.00 <sup>75</sup>
	Golf Course	\$0.00 <sup>76</sup>
6	Haystack Chalet #25	\$0.00 <sup>77</sup>
	Heritage Raodside [sic]	\$0.00 <sup>78</sup>
7	Member's Lodge	\$0.00 <sup>79</sup>
	Misc. Hydroseeding	\$0.00 <sup>80</sup>
8	Norwood Nursery	\$0.00 <sup>81</sup>
	Poma	\$2,880.00 <sup>82</sup>
9	Rock Creek	\$1,429.72 <sup>83</sup>
10	Snow Front	\$45,205.66 <sup>84</sup>
	South End Berm	\$0.00 <sup>85</sup>
11	Steelhead Custom Chalet	\$0.00 <sup>86</sup>

<sup>67</sup> The evidence showed that Tamarack did not own the Arling Center. *See* Trial Exhibit 1:321.

<sup>68</sup> The evidence did not demonstrate which foreclosure parcel "Chalet" referred to. *See* Exhibit 9:056.

<sup>69</sup> This is the amount apportioned to Parcels O, Q, U, W, BB, N, J, as reflected on Trial Exhibit 9:056.

<sup>70</sup> The evidence did not demonstrate which parcel "Design Plaza" referred to. *See* Exhibit 9:056.

<sup>71</sup> This relates to one of the released parcels. *See* Exhibit 9:056.

<sup>72</sup> Teufel failed to demonstrate that this item is related to any specific parcel for which foreclosure is sought or that the work was done within and for the benefit of the platted parcels that were not released. *See* Exhibit 9:056.

<sup>73</sup> This relates to a released parcel. *See* Exhibit 9:056.

<sup>74</sup> Teufel failed to demonstrate that this item is related to any specific parcel for which foreclosure is sought or that the work was done within and for the benefit of the platted parcels that were not released. *See* Exhibit 9:056.

<sup>75</sup> Teufel failed to demonstrate that this item is related to any specific parcel for which foreclosure is sought or that the work was done within and for the benefit of the platted parcels that were not released. *See* Exhibit 9:056.

<sup>76</sup> There was insufficient evidence to demonstrate that this property was owned by Tamarack or subject to the lien. *See* Exhibit 9:056.

<sup>77</sup> This relates to a released parcel. *See* Exhibit 9:056.

<sup>78</sup> The Heritage area of the Resort was unplatted. Teufel's claim of lien did not attach to any unplatted area of the Resort.

<sup>79</sup> There was insufficient evidence to demonstrate that this property was owned by Tamarack or subject to the lien. *See* Exhibit 9:056.

<sup>80</sup> Teufel failed to demonstrate that this item related to any specific parcel for which foreclosure is sought or that the work was done within and for the benefit of the platted parcels that were not released. *See* Exhibit 9:056.

<sup>81</sup> There was insufficient evidence to demonstrate that this property was subject to the lien. *See* Exhibit 9:056.

<sup>82</sup> This relates to Parcel B as reflected on Trial Exhibit 9:056.

<sup>83</sup> This relates to Parcels E, F as reflected on Trial Exhibit 9:056.

<sup>84</sup> This relates to Parcel CC as reflected on Trial Exhibit 9:056.

<sup>85</sup> There was insufficient evidence to demonstrate that this property was subject to the lien.

<sup>86</sup> This relates to one of the released parcels. *See* Exhibit 9:056.

Trillium Cottages	\$184,476.32 <sup>87</sup>
Trillium Townhomes	\$50,913.27 <sup>88</sup>
Twin Creek	\$0.00 <sup>89</sup>
Village Drive	\$0.00 <sup>90</sup>
	<hr/>
Total:	\$306,543.30 <sup>91</sup>

### 3. YMC, Inc. ("YMC")

YMC is a mechanical/HVAC contractor. YMC was Banner/Sabey II LLC's ("Banner/Sabey") subcontractor for mechanical/HVAC work on both Village Plaza and Lake Wing. YMC also performed some Village Plaza work directly for Tamarack. YMC's lien claims were recorded in Valley County on various dates as Instrument Nos. 329986 (March 14, 2008 Village Plaza claim of lien as subcontractor to Banner/Sabey), 330090 (March 19, 2008 Lake Wing claim of lien), 330121 (March 20, 2008 Amended and Restated Village Plaza claim of lien as subcontractor to Banner/Sabey), and 331256 (April 4, 2008 Village Plaza claim of lien as contractor to Tamarack).<sup>92</sup> The YMC lien against the Lake Wing property has been dismissed.<sup>93</sup> The YMC lien against Village Plaza for work done directly for Tamarack has been dismissed.<sup>94</sup>

The Village Plaza Claim of Lien filed as Instrument No. 329986 charged the entire Village Plaza property. The amount of the lien was \$1,499,423.00 plus interest, costs and fees. The Village Plaza Amended and Restated Claim of Lien was for the same amount and also charged the entire Village Plaza project. However, the Amended and Restated Claim of Lien apportioned the lien

<sup>87</sup> This relates to two parcels: JJ and KK. Teufel released its lien on Parcel KK. The lien amount on Parcel JJ is \$184,476.32. See Exhibit 9:056.

<sup>88</sup> This relates to Parcels DD, EE, LL as reflected on Trial Exhibit 9:056.

<sup>89</sup> This relates to a released parcel. See Exhibit 9:056.

<sup>90</sup> Teufel failed to demonstrate that this item is related to any specific parcel for which foreclosure is sought. See Exhibit 9:056.

<sup>91</sup> This is the total of the principal amount for which Teufel has the right to foreclose, not the amount which Tamarack may owe Teufel.

<sup>92</sup> See Trial Exhibits 1:052, 1:053, 1:054, 1:055.

<sup>93</sup> See Order Dismissing Claims Related to YMC's Claim of Lien Nos. 330090 and 331256 With Prejudice, entered May 11, 2010.

<sup>94</sup> *Id.*



B



**LANDSCAPE CONSTRUCTION AGREEMENT**

**THIS AGREEMENT** made as of this 4<sup>th</sup> day of June, 2004,

between the Owner

Tamarack Resort LLC  
960 Broadway Ave., Suite 100  
Boise, Idaho 83706

and the Contractor

TEUFEL NURSERY, INC. Idaho license # C154041  
12345 NW Barnes Road  
Portland, Oregon 97229

The Project is

General Landscaping Work  
Tamarack Resort  
2099 West Mountain Road  
Donnelly, Idaho 83615

The Landscape Architect is

W & H Pacific  
9755 SW Barnes Road  
Portland, Oregon 97225

The Owner and Contractor agree as follows.

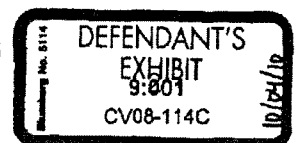
**ARTICLE 1 RELATIONSHIP OF THE PARTIES**

The Contractor accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Landscape Architect and exercise the Contractor's skill and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner's interests. The Owner agrees to furnish or approve, in a timely manner, information required by the Contractor and to make payments to the Contractor in accordance with this Agreement.

**ARTICLE 2 SCOPE OF WORK**

The Owner and Contractor acknowledge that no landscape plans or specifications for Project have been created and, therefore, the Contractor's scope of Work shall be to perform all grading, landscaping, restoration, irrigation and related site work for the following projects:

1. Twenty (20) "Twin Creek" Chalets;
2. Eighteen (18) "Discovery" Chalets;
3. Twenty-four (24) Cottages;
4. Pioneer Village, including the irrigation and seeding of the snow front;
5. Ski-over and Ski-under bridges (including retaining walls);
6. Discovery Drive, including key intersections thereon;
7. Roundabouts for Whitewater Road and West Valley Road;
8. Pinnacle Place and Sugarloaf Road;



9. The Dining Yurt and existing Recreation Yurt areas;
10. Screening of parking at the entrance and other parking overflow areas;
11. At Owner's direction, screening of specific utilities throughout the Project; and
12. Such other tasks as may be directed by the Owner's Representative.

Further assumptions and clarifications are set forth in the Contractor's clarification letter attached hereto as Exhibit A, to the extent not inconsistent with the body of this Agreement.

### ARTICLE 3 PROJECT SCHEDULE

The Contractor shall commence the Work as of the date of this Agreement and achieve substantial completion of the entire Work not later than November 30, 2004. If and when requested by the Owner, the Contractor shall submit for Owner's approval a schedule for the performance of the Work, including interim milestones. Once approved by the Owner, the Contractor shall not exceed the schedule without the Owner's consent.

### ARTICLE 4 CONTRACT SUM

4.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of this Agreement. The Contract Sum shall be the actual Cost of the Work, as defined in Section 4.3, plus the Contractor's Fee set forth in Section 4.2.

4.2 The Contractor's Fee shall be One Hundred Ninety-five Thousand Four Hundred Fifteen Dollars (\$195,415). The Contractor's Fees includes all costs for overhead, profit, supervision, mobilization and general conditions for the Project.

4.3. The term Cost of the Work shall mean costs necessarily incurred by the Contractor in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in this Section 4.3.

4.3.1 Unit Price Basis. For tasks that have unit prices identified on Exhibit B, the Cost of the Work will be as set forth in such unit prices, plus applicable Idaho sales taxes.

4.3.2 Time and Materials Basis. For tasks that do not have unit priced identified on Exhibit B, the Contractor shall make a unit price proposal for the Owner's review. If no unit price is mutually agreed upon, or if Owner directs such Work without a unit price, the Work shall be done on a time and materials basis in accordance with the following rates:

- .1 Costs of construction workers directly employed by the Contractor at the rates set for on Exhibit C, attached hereto. Labor charges for supervisions shall only be applied in the event that the supervisory services pertain to Work outside the Contractor's scope of Work set forth in Section 2 above.
- .2 Cost of equipment directly employed by the Contractor at the rates set forth in Exhibit C. For equipment not identified on Exhibit C, at the actual costs incurred by the Contractor.
- .3 Cost of materials incorporated into the Work, including reasonable amounts for spoilage, or consumed in the prosecution of the Work at the cost incurred by the Contractor, including the costs of transportation and storage such materials.
- .4 Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which the Contractor is liable.

## ARTICLE 5 ACCOUNTING RECORDS; AUDIT

5.1 The Contractor shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement, and the accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's accountants shall be afforded access to, and shall be permitted to audit and copy, the Contractor's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Agreement, and the Contractor shall preserve these for a period of three years after final payment, or for such longer period as may be required by law.

5.2 Owner shall have the right, at its expense and upon at least ten (10) days' prior written notice, to audit and copy any or all of the records. In the event of an audit, Contractor shall (i) provide Owner with adequate workspace in Contractor's principal place of business to conduct the audit, (ii) provide all of records in the same manner as the records are kept in the ordinary course of the Contractor's business, and (iii) require Contractor's record keeping personnel to provide reasonable assistance to Owner in locating any particular documents or records. Owner shall have the right, at its own expense, to send any or all of the records to any third-party service for copying. If an audit discloses any error in Contractor's determination of the Cost of the Work (or the portion thereof audited by Owner) in favor of Contractor, Contractor shall promptly, but in not less than 60 days after presentation of Owner's findings, pay such difference to Owner. If the error is greater than one-half of one percent (0.5%) of the total Cost of the Work (or the portion thereof audited by Owner), Contractor shall reimburse Owner for its reasonable audit costs within 30 days of the presentation of such costs.

## ARTICLE 6 PAYMENTS

6.1 **Initial Payment.** Upon execution of this Agreement, Owner shall pay Contractor an initial payment of Sixty Thousand Dollars (\$60,000), which shall be applied to the initial applications for payment until exhausted.

### 6.2 Progress Payments.

6.2.1 Based upon Applications for Payment submitted to the Landscape Architect by the Contractor and Certificates for Payment issued by the Landscape Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor. The period covered by each Application for Payment shall be one calendar month ending on the last day of the month. Payment shall be made by the Owner not later than twenty (20) days after the Landscape Architect receives the Application for Payment. With each Application for Payment, the Contractor shall submit a partial lien release for all prior payments. If requested by the Owner, the Contractor shall secure partial lien releases for all prior payments from all major suppliers and subcontractors as a condition precedent to progress payments.

6.2.2 Applications for Payment shall show the Cost of the Work actually incurred by the Contractor through the end of the period covered by the Application for Payment.

6.2.3 Subject to other provisions this Agreement, the amount of each progress payment shall be computed as follows:

- .1 take the Cost of the Work, as described in Section 4.3, less retainage of five percent (5%);
- .2 add the Contractor's Fee, as set forth in Section 4.2, which shall be earned by the Contractor in six (6) equal monthly amounts of \$32,569.16, less retainage of five percent (5%);
- .3 subtract the aggregate of previous payments made by the Owner;
- .4 subtract the shortfall, if any, resulting from errors subsequently discovered by the Owner's accountants in such documentation; and
- .5 subtract amounts, if any, for which the Owner or Landscape Architect has withheld or withdrawn from a Certificate for Payment.

Upon final completion of each individual project identified in Article 2 (e.g., final completion of the twenty (20) "Twin Creek" chalets) and certified by the Landscape Architect and Owner, Owner shall release the retainage allocable to such project to the Contractor, provided that the Contractor is not then in default under this Agreement.



### 6.3 Final Payment

6.3.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when:

- .1 the Contractor has fully performed all Work under this Agreement, except for the Contractor's responsibility to correct Work as provided in Article 7 below, and to satisfy other requirements, if any, which extend beyond final payment; and
- .2 a final Certificate for Payment has been issued by the Landscape Architect.

The Owner's final payment to the Contractor shall be made no later than 30 days after the issuance of the Landscape Architect's final Certificate for Payment.

6.3.2 The Owner's accountants will review and report in writing on the Contractor's final accounting within 30 days after delivery of the final accounting to the Landscape Architect by the Contractor. Based upon such Cost of the Work as the Owner's accountants report to be substantiated by the Contractor's final accounting, and provided the other conditions of Section 6.3.1 have been met, the Landscape Architect will, within seven days after receipt of written report of the Owner's accountants, either issue to the Owner a final Certificate for Payment with a copy to the Contractor or notify the Contractor and Owner in writing of the Landscape Architect's reasons for withholding a certificate.

6.3.3 If the Owner's accountants report the Cost of the Work as substantiated by the Contractor's final accounting to be less than claimed by the Contractor, Contractor shall promptly, but in not less than 30 days after presentation of Owner's findings, notify Owner whether or not it disagrees with any part of Owner's findings. Failure of the Contractor to respond within this 30-day period shall result in the substantiated amount reported by the Owner's accountants becoming binding on the Contractor. Such notification shall be accompanied with complete explanation of its disagreement with Owner's findings and all information necessary to support Contractor's disagreement with Owner's findings. Contractor shall pay any amounts not in disagreement to Owner within 30 days of such notification. In the event Contractor disagrees with any of Owner's findings, Owner shall have the right, but not the obligation, to seek arbitration of such dispute in accordance with the provisions of Title 7, Chapter 9, Idaho Code, by a single arbitrator select by mutual agreement of the parties, or in absence of mutual agreement within 15 days, in accordance with Idaho Code § 7-903. Unless the arbitrator seeks additional information from the parties, the arbitrators decision shall be based solely on (i) Owner's findings presented to Contractor, (ii) the explanation and supporting information provided to Owner by Contractor, and (iii) Owner's response thereto. The parties shall share all fees and costs of the arbitrator equally. The decision of the arbitrator shall be final and binding upon the parties.

6.4 Interest on Unpaid Payments. Payments due and unpaid under this Agreement shall bear interest from the date payment is due at a per annum rate equal to the prime rate published by Wells Fargo Bank in Boise, Idaho, plus two percent (2%).

### ARTICLE 7 CONTRACTOR'S WARRANTIES

7.1 The Contractor warrants to the Owner and Landscape Architect that materials and equipment furnished under this Agreement will be of good quality, meet applicable ANSI standards for quality and be new unless otherwise required or permitted by the Owner or Landscape Architect, that the Work will be free from defects not inherent in the quality permitted or required. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and usage. If required by the Owner or Landscape Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. The Contractor shall perform all Work in compliance with the permits and applicable laws, ordinances, rules, regulations or orders of any public authority having jurisdiction over the Project, and in compliance with the Owner's safety requirements.

7.2 The Contractor shall promptly correct Work rejected by the Architect or Owner failing to meet the standards set forth in Section 7.1 above. If any Work is found to be not in accordance with the standards set forth in Section

7.1 above for a period of one-year after the date of Substantial Completion, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so.

7.3 Provided that the Contractor is retained to provide year-round maintenance services for the applicable period, the Contractor warrants to Owner that all plant material will remain healthy for a period of two (2) years after the date of substantial completion of the Work, and Contractor will, without cost to Owner, replace any unhealthy plantings (as reasonably determined by Owner) one time during such two year period. Maintenance services are not included in this Agreement, and must be set forth in a separate agreement between Owner and Contractor. No landscape maintenance is included in the unit prices set forth in Exhibit B.

## ARTICLE 8 INSURANCE

The Contractor shall procure and maintain in force Workers' Compensation Insurance, Employer's Liability Insurance, Business Automobile Liability Insurance, and Commercial General Liability Insurance. The Commercial General Liability policy shall include coverage for liability arising from premises, operations, independent contractors, products, completed operations, personal injury and advertising injury, contractual liability, and broad form property damage. The Commercial General Liability shall name the Owner as an additional insured for liability arising out of the Contractor's Work and shall contain a provision that it will not be cancelled or allowed to expire until at least thirty (30) days' prior written notice has been given to the Owner. The policies above shall be written with limits of liability not less than the following:

Employer's Liability	As required by law	
Business Auto Liability	\$ 2,000,000	Each Accident
Commercial General Liability	\$ 2,000,000	Each Occurrence
	\$ 6,000,000	Umbrella

## ARTICLE 9 TERMINATION OR SUSPENSION

9.1 **Termination for Cause.** This Agreement may be terminated by the Owner or Contractor for cause as provided in Article 14 of AIA Document A201-1997. However, the amount to be paid to the Contractor under Section 14.1.3 of AIA Document A201-1997 shall not exceed the amount the Contractor would be entitled to receive under Section 9.2 below.

9.2 **Termination for Convenience.** The Owner may terminate this Agreement for convenience pursuant to Paragraph 14.4 of AIA Document A201-1997; provided, however, the Owner shall then pay the Contractor an amount calculated as follows:

- .1 Take the Cost of the Work incurred by the Contractor to the date of termination;
- .2 Add the Contractor's Fee computed as of the date of termination, and
- .3 Subtract the aggregate of previous payments made by the Owner.

9.3 The Owner shall also pay the Contractor fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Contractor that the Owner elects to retain and that is not otherwise included in the Cost of the Work. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Contractor shall, as a condition of receiving the payments referred to in this Article 9, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Contractor, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Contractor under such subcontracts or purchase orders.

9.4 **Suspension by Owner for Convenience.** The Owner may, without cause, order the Contractor in writing to suspend the Work as provided in Paragraph 14.3 of AIA Document A201-1997. In such case, the Contract Sum and Project Schedule may be increased, if appropriate, as provided in Section 14.3.2 of AIA Document A201-1997, except that the term "profit" shall be understood to mean the Contractor's Fee as described in Section 4.2 of this Agreement.

**ARTICLE 9 MISCELLANEOUS PROVISIONS**

9.1 The Owner's representative is:

Christopher Kirk, Project Manager  
Tamarack Resort, LLC – Site Office  
2099 West Mountain Road  
Donnelly, Idaho 83615  
Office: 208-325-8524  
Fax: 208-325-8528  
Mobile: 208-573-6445  
Email: ckirk@tamarackidaho.com

9.2 The Contractor's representative is:

Rick Christensen, Project Manager  
TEUFEL NURSERY, INC.  
12345 NW Barnes Road  
Portland, Oregon 97229  
Office: 503-646-1111, ext. 461  
Fax: 503-672-5070  
Mobile: 503-680-1111  
Email: rickc@teufel.com

9.3 **General Provisions.** No modification or termination shall be binding on the parties unless it is in writing and signed by both parties. The headings contained in this Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation hereof. Neither party's right to require performance of the other party's obligations under this agreement shall be affected by any previous waiver, forbearance, or course of dealing. This agreement shall be governed by the laws, including conflicts of laws, in the State of Idaho as an agreement between residents of the State of Idaho and to be performed within the State of Idaho. This Agreement and each and every provision thereof is for the exclusive benefit of the Owner and Contractor and not for the benefit of any third party nor any third party beneficiary thereof.

This Agreement is entered into as of the day and year first written above.

**OWNER**  
TAMARACK RESORT, LLC

**CONTRACTOR:**  
TEUFEL NURSERY, INC.

By: \_\_\_\_\_  
Jean-Pierre Boespflug, CEO

By: \_\_\_\_\_  
Larry Teufel, President

**Exhibits:**

- Exhibit A – Contractor's Clarification Letter
- Exhibit B – Unit Prices
- Exhibit C – Hourly Rates for Equipment and Labor

C



**LANDSCAPE CONSTRUCTION AGREEMENT**

**THIS AGREEMENT** made as of this 12th day of April, 2005,

between the Owner

Tamarack Resort LLC  
960 Broadway Ave., Suite 100  
Boise, Idaho 83706

and the Contractor

TEUFEL NURSERY, INC.  
12345 NW Barnes Road  
Portland, Oregon 97229

Idaho license # C154041

The Project is

General Landscaping Work  
Tamarack Resort  
2099 West Mountain Road  
Donnelly, Idaho 83615

The Landscape Architect is

W & H Pacific  
9755 SW Barnes Road  
Portland, Oregon 97225

The Owner and Contractor agree as follows.

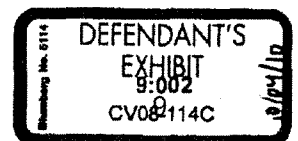
**ARTICLE 1 RELATIONSHIP OF THE PARTIES**

The Contractor accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Landscape Architect and exercise the Contractor's skill and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner's interests. The Owner agrees to furnish or approve, in a timely manner, information required by the Contractor and to make payments to the Contractor in accordance with this Agreement.

**ARTICLE 2 SCOPE OF WORK**

The Owner and Contractor acknowledge that no landscape plans or specifications for Project have been created and, therefore, the Contractor's scope of Work shall be to perform all grading, landscaping, restoration, irrigation and related site work for the following projects:

1. Finish landscape installation for 20 Twin Creek Chalets and Rock Creek Cottages
2. Landscape installation for 18 Discovery Chalets
3. Complete landscaping for the Entry & Whitewater Roundabouts
4. Landscape the Poma, Discovery and main entry ski over bridges and the soil nail wall
5. Landscape Discovery Village
6. Landscape and screening of the Golf Maintenance facility, Snow Maintenance and Fire Station
7. Plant the Golf Course water feature and tree planting in key locations on the golf course



8. Potential for new residential units: Golden Bar Townhomes (46), Payette Chalets (9), Staircase Chalets (5)
9. Arling Center landscape this fall
10. Members Lodge landscape completion prior to Christmas opening

Further assumptions and clarifications are set forth in the Contractor's clarification letter attached hereto as Exhibit A, to the extent not inconsistent with the body of this Agreement.

### ARTICLE 3 PROJECT SCHEDULE

The Contractor shall commence the Work as of the date of this Agreement and achieve substantial completion of the entire Work not later than December 31, 2005. If and when requested by the Owner, the Contractor shall submit for Owner's approval a schedule for the performance of the Work, including interim milestones. Once approved by the Owner, the Contractor shall not exceed the schedule without the Owner's consent.

### ARTICLE 4 CONTRACT SUM

4.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of this Agreement. The Contract Sum shall be the actual Cost of the Work, as defined in Section 4.3, plus the Contractor's Fee set forth in Section 4.2.

4.2 The Contractor's Fee shall be One Hundred Ninety Five Thousand Four Hundred Fifteen (\$195,415). The Contractor's Fees includes all costs for overhead, profit, supervision, mobilization and general conditions for the Project.

4.3. The term Cost of the Work shall mean costs necessarily incurred by the Contractor in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in this Section 4.3.

4.3.1 Unit Price Basis. For tasks that have unit prices identified on Exhibit B, the Cost of the Work will be as set forth in such unit prices, plus applicable Idaho sales taxes.

4.3.2 Time and Materials Basis. For tasks that do not have unit priced identified on Exhibit B, the Contractor shall make a unit price proposal for the Owner's review. If no unit price is mutually agreed upon, or if Owner directs such Work without a unit price, the Work shall be done on a time and materials basis in accordance with the following rates:

- .1 Costs of construction workers directly employed by the Contractor at the rates set for on Exhibit C, attached hereto. Labor charges for supervisions shall only be applied in the event that the supervisory services pertain to Work outside the Contractor's scope of Work set forth in Section 2 above.
- .2 Cost of equipment directly employed by the Contractor at the rates set forth in Exhibit C. For equipment not identified on Exhibit C, at the actual costs incurred by the Contractor.
- .3 Cost of materials incorporated into the Work, including reasonable amounts for spoilage, or consumed in the prosecution of the Work at the cost incurred by the Contractor, including the costs of transportation and storage such materials.
- .4 Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which the Contractor is liable.

## ARTICLE 5 ACCOUNTING RECORDS; AUDIT

5.1 The Contractor shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement, and the accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's accountants shall be afforded access to, and shall be permitted to audit and copy, the Contractor's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Agreement, and the Contractor shall preserve these for a period of three years after final payment, or for such longer period as may be required by law.

5.2 Owner shall have the right, at its expense and upon at least ten (10) days' prior written notice, to audit and copy any or all of the records. In the event of an audit, Contractor shall (i) provide Owner with adequate workspace in Contractor's principal place of business to conduct the audit, (ii) provide all of records in the same manner as the records are kept in the ordinary course of the Contractor's business, and (iii) require Contractor's record keeping personnel to provide reasonable assistance to Owner in locating any particular documents or records. Owner shall have the right, at its own expense, to send any or all of the records to any third-party service for copying. If an audit discloses any error in Contractor's determination of the Cost of the Work (or the portion thereof audited by Owner) in favor of Contractor, Contractor shall promptly, but in not less than 60 days after presentation of Owner's findings, pay such difference to Owner. If the error is greater than one-half of one percent (0.5%) of the total Cost of the Work (or the portion thereof audited by Owner), Contractor shall reimburse Owner for its reasonable audit costs within 30 days of the presentation of such costs.

## ARTICLE 6 PAYMENTS

6.1 **Initial Payment.** Upon execution of this Agreement, Owner shall pay Contractor an initial payment of One Hundred Nine Thousand Two Hundred Eight and .59/100 Dollars (\$109,208.59), which shall be applied to the initial applications for payment in 6 increments or until exhausted.

### 6.2 Progress Payments.

6.2.1 Based upon Applications for Payment submitted to the Landscape Architect by the Contractor and Certificates for Payment issued by the Landscape Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor. The period covered by each Application for Payment shall be one calendar month ending on the last day of the month. Payment shall be made by the Owner not later than twenty (30) days after the Landscape Architect receives the Application for Payment. With each Application for Payment, the Contractor shall submit a partial lien release for all prior payments. If requested by the Owner, the Contractor shall secure partial lien releases for all prior payments from all major suppliers and subcontractors as a condition precedent to progress payments.

6.2.2 Applications for Payment shall show the Cost of the Work actually incurred by the Contractor through the end of the period covered by the Application for Payment.

6.2.3 Subject to other provisions this Agreement, the amount of each progress payment shall be computed as follows:

- .1 take the Cost of the Work, as described in Section 4.3, less retainage of five percent (5%);
- .2 add the Contractor's Fee, as set forth in Article 2, which shall be earned by the Contractor in six (6) equal monthly amounts of \$32,569.17, less retainage of five percent (5%);
- .3 subtract the aggregate of previous payments made by the Owner;
- .4 subtract the shortfall, if any, resulting from errors subsequently discovered by the Owner's accountants in such documentation; and
- .5 subtract amounts, if any, for which the Owner or Landscape Architect has withheld or withdrawn from a Certificate for Payment.



Upon final completion of each individual project identified in Article 2 (e.g., final completion of the twenty (20) "Twin Creek" chalets) and certified by the Landscape Architect and Owner, Owner shall release the retainage allocable to such project to the Contractor, provided that the Contractor is not then in default under this Agreement.

### 6.3 Final Payment

6.3.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when:

- .1 the Contractor has fully performed all Work under this Agreement, except for the Contractor's responsibility to correct Work as provided in Article 7 below, and to satisfy other requirements, if any, which extend beyond final payment; and
- .2 a final Certificate for Payment has been issued by the Landscape Architect.

The Owner's final payment to the Contractor shall be made no later than 30 days after the issuance of the Landscape Architect's final Certificate for Payment.

6.3.2 The Owner's accountants will review and report in writing on the Contractor's final accounting within 30 days after delivery of the final accounting to the Landscape Architect by the Contractor. Based upon such Cost of the Work as the Owner's accountants report to be substantiated by the Contractor's final accounting, and provided the other conditions of Section 6.3.1 have been met, the Landscape Architect will, within seven days after receipt of written report of the Owner's accountants, either issue to the Owner a final Certificate for Payment with a copy to the Contractor or notify the Contractor and Owner in writing of the Landscape Architect's reasons for withholding a certificate.

6.3.3 If the Owner's accountants report the Cost of the Work as substantiated by the Contractor's final accounting to be less than claimed by the Contractor, Contractor shall promptly, but in not less than 30 days after presentation of Owner's findings, notify Owner whether or not it disagrees with any part of Owner's findings. Failure of the Contractor to respond within this 30-day period shall result in the substantiated amount reported by the Owner's accountants becoming binding on the Contractor. Such notification shall be accompanied with complete explanation of its disagreement with Owner's findings and all information necessary to support Contractor's disagreement with Owner's findings. Contractor shall pay any amounts not in disagreement to Owner within 30 days of such notification. In the event Contractor disagrees with any of Owner's findings, Owner shall have the right, but not the obligation, to seek arbitration of such dispute in accordance with the provisions of Title 7, Chapter 9, Idaho Code, by a single arbitrator select by mutual agreement of the parties, or in absence of mutual agreement within 15 days, in accordance with Idaho Code § 7-903. Unless the arbitrator seeks additional information from the parties, the arbitrator's decision shall be based solely on (i) Owner's findings presented to Contractor, (ii) the explanation and supporting information provided to Owner by Contractor, and (iii) Owner's response thereto. The parties shall share all fees and costs of the arbitrator equally. The decision of the arbitrator shall be final and binding upon the parties.

6.4 **Interest on Unpaid Payments.** Payments due and unpaid under this Agreement shall bear interest from the date payment is due at a per annum rate equal to the prime rate published by Wells Fargo Bank in Boise, Idaho, plus two percent (2%).

## ARTICLE 7 CONTRACTOR'S WARRANTIES

7.1 The Contractor warrants to the Owner and Landscape Architect that materials and equipment furnished under this Agreement will be of good quality, meet applicable ANSI standards for quality and be new unless otherwise required or permitted by the Owner or Landscape Architect, that the Work will be free from defects not inherent in the quality permitted or required. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and usage. If required by the Owner or Landscape Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. The Contractor shall perform all Work in compliance with the permits and applicable laws, ordinances, rules, regulations or orders of any public authority having jurisdiction over the Project, and in compliance with the Owner's safety requirements.

7.2 The Contractor shall promptly correct Work rejected by the Architect or Owner failing to meet the standards set forth in Section 7.1 above. If any Work is found to be not in accordance with the standards set forth in Section 7.1 above for a period of one-year after the date of Substantial Completion, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so.

7.3 Provided that the Contractor is retained to provide year-round maintenance services for the applicable period, the Contractor warrants to Owner that all plant material will remain healthy for a period of two (2) years after the date of substantial completion of the Work, and Contractor will, without cost to Owner, replace any unhealthy plantings (as reasonably determined by Owner) one time during such two year period. Maintenance services are not included in this Agreement, and must be set forth in a separate agreement between Owner and Contractor. No landscape maintenance is included in the unit prices set forth in Exhibit B.

## ARTICLE 8 INSURANCE

The Contractor shall procure and maintain in force Workers' Compensation Insurance, Employer's Liability Insurance, Business Automobile Liability Insurance, and Commercial General Liability Insurance. The Commercial General Liability policy shall include coverage for liability arising from premises, operations, independent contractors, products, completed operations, personal injury and advertising injury, contractual liability, and broad form property damage. The Commercial General Liability shall name the Owner as an additional insured for liability arising out of the Contractor's Work and shall contain a provision that it will not be cancelled or allowed to expire until at least thirty (30) days' prior written notice has been given to the Owner. The policies above shall be written with limits of liability not less than the following:

Employer's Liability	As required by law	
Business Auto Liability	\$ 2,000,000	Each Accident
Commercial General Liability	\$ 2,000,000	Each Occurrence
	\$ 6,000,000	Umbrella

## ARTICLE 9 TERMINATION OR SUSPENSION

9.1 **Termination for Cause.** This Agreement may be terminated by the Owner or Contractor for cause as provided in Article 14 of AIA Document A201-1997. However, the amount to be paid to the Contractor under Section 14.1.3 of AIA Document A201-1997 shall not exceed the amount the Contractor would be entitled to receive under Section 9.2 below.

9.2 **Termination for Convenience.** The Owner may terminate this Agreement for convenience pursuant to Paragraph 14.4 of AIA Document A201-1997; provided, however, the Owner shall then pay the Contractor an amount calculated as follows:

- .1 Take the Cost of the Work incurred by the Contractor to the date of termination;
- .2 Add the Contractor's Fee computed as of the date of termination, and
- .3 Subtract the aggregate of previous payments made by the Owner.

9.3 The Owner shall also pay the Contractor fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Contractor that the Owner elects to retain and that is not otherwise included in the Cost of the Work. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Contractor shall, as a condition of receiving the payments referred to in this Article 9, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Contractor, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Contractor under such subcontracts or purchase orders.

9.4 **Suspension by Owner for Convenience.** The Owner may, without cause, order the Contractor in writing to suspend the Work as provided in Paragraph 14.3 of AIA Document A201-1997. In such case, the Contract Sum and Project Schedule may be increased, if appropriate, as provided in Section 14.3.2 of AIA Document A201-1997,

except that the term "profit" shall be understood to mean the Contractor's Fee as described in Section 4.2 of this Agreement.

**ARTICLE 9 MISCELLANEOUS PROVISIONS**

9.1 The Owner's representative is:

Christopher Kirk, Project Manager  
Tamarack Resort, LLC – Site Office  
2099 West Mountain Road  
Donnelly, Idaho 83615  
Office: 208-325-8524  
Fax: 208-325-8528  
Mobile: 208-573-6445  
Email: ckirk@tamarackidaho.com

9.2 The Contractor's representative is:

Rick Christensen, Project Manager  
TEUFEL NURSERY, INC.  
12345 NW Barnes Road  
Portland, Oregon 97229  
Office: 503-646-1111, ext. 461  
Fax: 503-672-5070  
Mobile: 503-680-1111  
Email: rickc@teufel.com

9.3 **General Provisions.** No modification or termination shall be binding on the parties unless it is in writing and signed by both parties. The headings contained in this Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation hereof. Neither party's right to require performance of the other party's obligations under this agreement shall be affected by any previous waiver, forbearance, or course of dealing. This agreement shall be governed by the laws, including conflicts of laws, in the State of Idaho as an agreement between residents of the State of Idaho and to be performed within the State of Idaho. This Agreement and each and every provision thereof is for the exclusive benefit of the Owner and Contractor and not for the benefit of any third party nor any third party beneficiary thereof.

This Agreement is entered into as of the day and year first written above.

**OWNER**

TAMARACK RESORT, LLC

**CONTRACTOR:**

TEUFEL NURSERY, INC.

By: \_\_\_\_\_  
Jean-Pierre Boespflug, CEO

By: \_\_\_\_\_  
Larry Teufel, President

**Exhibits:**

- Exhibit A – Contractor's Clarification Letter
- Exhibit B – Unit Prices
- Exhibit C – Hourly Rates for Equipment and Labor

## Exhibit "A"

April 8, 2005

Tamarack Resort  
 Donnelly, Idaho  
 Attn: Nic Stover  
 Director of Contracts & Planning

RE: 2005 Landscape Contract

Subject: scope clarifications

Nic:

As before, there are no finished landscape plans or specifications. Landscape work will be performed on the following areas at the direction of the owners representative:

- Finish landscape installation for the 20 Twin Creek Chalets and 24 Rock Creek Cottages
- Landscape installation for 18 Discovery Chalets
- Complete landscaping for the Entry and Whitewater Roundabouts
- Landscape the Poma, Discovery, and main entry ski over bridges and the soil nail wall
- Landscape Discovery Village
- Landscape and screening of Golf Maintenance facility, Snow Maintenance & Fire Station
- Plant the golf course water feature and tree planting in key locations on the golf course
- Potential for new residential units: Golden Bar Townhomes (46), Payette Chalets (9), Staircase Chalets (5)
- Arling Center landscape this fall
- Members Lodge landscape completion prior to Christmas opening

As was the case last year, our unit costs and hourly rates have been established without the benefit of a completed landscape plan. For the 2004 Landscape Contract we relied on site visits, conversations with both Chris Kirk and Tom Jones of W & H Pacific, and using the "Design and Development Guidelines dated 12/23/03". Of course, we now have an entire years worth of experience to add to our understanding of the site and Tamarack's expectations.

Finish grading in landscape areas, which can include excavation, haul off or import of material, is best handled using hourly labor and equipment rates. Catch basins, sumps, and below ground drainage systems are not included in our pricing, but can be performed on an as needed basis. Likewise, placement of on site boulders or imported stone, building boulder retaining walls, and transplanting existing on site plant material is best performed under field direction using the hourly rates listed.

Irrigation system unit prices are based on the assumption that points of connection and power for controllers will be provided by the owner where needed. Backflow prevention devices, gate valves, automatic control valves, and quick couple valves will all be installed in appropriate sized valve boxes, included in the unit costs. Irregular components (moisture sensors, flow sensors, weather station, and central computer controller) have not been identified, so cannot be included in this proposal. The system will utilize drip irrigation primarily and where spray irrigation is required rotor heads will be used for peak efficiency, otherwise spray heads will be used in smaller areas. Head to head coverage will not be needed since the goal is to establish and

maintain the native grass mix and plantings of native trees and shrubs rather than closely mowed turf. Pipe will be installed at an average depth of between 12 to 18 inches to minimize soil and tree root disturbance. Backfill of irrigation lines will be with select native material from the trenching operation. Sand bedding of pipe, if needed, would be an extra charge. The entire system will need to be winterized using compressed air each fall prior to the first deep freeze.

Unit prices for trees, shrubs, and perennials include the plant material meeting ANSI standards, plant material warranty for two year period, installation, and backfill using native topsoil available from on site screened stockpiles provided by the owner and a collar of mulch material to retain moisture during establishment period. Staking and/or guying of trees is included. For 2005 we understand that we will be establishing a holding nursery on the Weilmunster Ranch site. Since trees will be delivered to the site during the first two weeks in May, it will be necessary for us to have access to this site starting April 18th.

Maintenance of plant material and native grass seeded areas will be needed immediately upon installation. The extended two year warranty on plant material is only valid if adequate plant maintenance is provided. It is our intent to provide year around landscape maintenance service at an agreed upon rate.

For the 2005 Landscape Contract our General Conditions fee remains unchanged at \$195,415. We agreed for this to be paid in 6 equal payments to be included with our first six progress billings. General conditions are made up of costs for us to gear up, mobilize, and run this job at a remote location (office trailer, storage trailer, dedicated site superintendent, administrative support, vehicles, mobilization and demobilization of equipment).

Initial payment, paid by Tamarack in advance of work starting, is to cover the up front costs incurred from deposits needed to secure plant material for the 2005 calendar year. Fifteen percent of the plant total (\$728,057.25 from Exhibit "B") is \$109,208.59. This represents the full spring and summer plan and 25% of the fall plan pending construction progress which is subject to modification. The \$109,208.59 shall be credited back monthly at \$18,201.43 for 6 months.

Materials, which are not part of our unit costs, purchased at the Tamarack owners representative direction, are passed along at our cost plus fifteen percent.

Prices do not reflect Idaho state sales tax.

Nic, please contact me if you have any questions. It is important for us to have an executed contract prior to starting work, which at this time is scheduled to begin April 18, 2005. Thanks in advance for your help in getting the contract drafted.

Sincerely,  
TEUFEL NURSERY, INC.

Rick Christensen  
Landscape Division Manager

Cc: Chris Kirk  
Larry Teufel

Exhibit B

TAMARACK RESORT  
2005 Plant Reservation

revised 3/30/05

Plant Delivery Timing

Botanical	Common Name	Fall	Fall	Fall	Fall	Fall	order Total	25% of fall total	Unit Price	25% of fall total	Extension
		Golden Bar Townhomes(46)	Payette Chalets(9)	Staircase Chalets(5)	Arling Center	Members Lodge					
<b>TREES - conifer</b>											
Abies lasiocarpa 3-5' single	Alpine fir						0	0	183.000	0	0.00
Abies lasiocarpa 3-5' double	Alpine fir						0	0	230.000	0	0.00
Abies lasiocarpa 5-7' single	Alpine fir						0	0	257.000	0	0.00
Abies lasiocarpa 5-7' multi	Alpine fir						0	0	373.000	0	0.00
Abies lasiocarpa 8-10' single	Alpine fir						0	0	380.000	0	0.00
Abies lasiocarpa 8-10' multi	Alpine fir						0	0	551.000	0	0.00
Abies lasiocarpa 11-12' single	Alpine fir						0	0	557.000	0	0.00
Abies lasiocarpa 11-12' multi	Alpine fir						0	0	878.000	0	0.00
Abies lasiocarpa 13-14' single	Alpine fir						0	0	825.000	0	0.00
Abies lasiocarpa 13-14' multi	Alpine fir						0	0	1,075.000	0	0.00
Picea engelmannii 7'	Engelmann Spruce						0	0	76.000	0	0.00
Picea pungens 4-5 FT	Spruce						0	0	115.000	0	0.00
Picea pungens 6-7 FT	Spruce	40					40	10	176.000	1,760	7,040.00
Picea pungens 8-10 FT	Spruce	20					20	5	344.000	1,720	6,880.00
Picea pungens 10-12 FT	Spruce		12	12			24	6	563.000	3,378	13,512.00
Picea pungens 12-14 FT	Spruce	12					12	3	840.000	2,520	10,080.00
Picea pungens 16'	Spruce	12					12	3	1,063.000	3,249	12,996.00
Picea pungens 18'	Spruce	12	12	12	12		48	12	1,228.000	14,736	58,944.00
Picea pungens 20'	Spruce	12	12	12			36	9	1,474.000	13,266	53,064.00
Pinus ponderosa 6-8'	Ponderosa Pine						0	0	209.000	0	0.00
Pinus ponderosa 10-12'	Ponderosa Pine	20					20	5	491.000	2,455	9,820.00
Pinus ponderosa 12-14'	Ponderosa Pine	30	6	6			42	11	674.000	7,077	28,308.00
Pinus ponderosa 16-18'	Ponderosa Pine	20	6	6	6		38	10	978.000	9,291	37,164.00
							0	0	0	0	0.00
							0	0	0	0	0.00
<b>TREES - deciduous</b>											
Acer glabrum douglasii 5 Gallon	Rocky Mtn Maple						0	0	34.000	0	0.00
Acer glabrum douglasii 10 Gallon	Rocky Mtn Maple						0	0	106.000	0	0.00
Alnus rubra 6-7 FT	Red Alder						0	0	63.000	0	0.00
Alnus rubra 8-10 FT	Red Alder						0	0	122.000	0	0.00
Populus tremuloides 6-7' single	Aspen	115	24	20	22		182	46	96.000	3,003	12,012.00
Populus tremuloides 6-7' multi	Aspen	114	24	20	30		208	52	80.000	4,160	16,640.00
Populus tremuloides 1'-1.25' single	Aspen	84					84	21	138.000	2,898	11,592.00
Populus tremuloides 1'-1.25' multi	Aspen	66					66	17	180.000	2,840	10,560.00
Populus tremuloides 1.25'-1.75' single	Aspen	75			24		99	25	189.000	4,678	18,711.00
Populus tremuloides 1.5'-1.75' multi	Aspen	75			24		99	25	211.000	5,222	20,889.00
Populus tremuloides 2'-2.25' single	Aspen	8			8		8	2	228.000	456	1,824.00
Populus tremuloides 2'-2.25' multi	Aspen	60		24			84	21	249.000	5,229	20,916.00
Populus tremuloides 2.5'-2.75' single	Aspen	60		24			84	21	257.000	5,397	21,588.00
Populus tremuloides 2.5'-2.75' multi	Aspen	0					0	0	278.000	0	0.00
Populus tremuloides 3' Cal	Aspen	75	30	20	24		149	37	293.000	10,914	43,657.00
Populus tremuloides 3' Multi	Aspen	75	30	20	24		149	37	322.000	11,995	47,978.00
Populus 'swedish' 1.75-2.25' single	Swedish Aspen	0					0	0	242.000	0	0.00
Populus 'swedish' 1.5'-2.25' double	Swedish Aspen	0					0	0	300.000	0	0.00
Rhus glabra 5 Gallon	Slagbom Sumac						0	0	34.000	0	0.00
							0	0	0	0	0.00
							0	0	0	0	0.00

Exhibit B

TAMARACK RESORT  
2005 Plant Reservation

revised 3/30/05

Plant Delivery Timing

Botanical Common Name Golden Bar Townhomes(46) Fall Payolla Chalets(9) Fall Staircase Chalets(5) Fall Arling Center Fall Members Lodge Fall

SHRUBS

Botanical	Common Name	Golden Bar Townhomes(46)	Payolla Chalets(9)	Staircase Chalets(5)	Arling Center	Members Lodge
Amelanchier alnifolia	Serviceberry	60	24	24	24	
Cornus alonifera	Red Twig Dogwood					
Cornus alonifera	Red Twig Dogwood					
Cornus alonifera	Red Twig Dogwood					
Cornus alonifera	Red Twig Dogwood	50	24	24	24	
Cornus alonifera	Red Twig Dogwood	60	12	12	12	
Malva repens	Dragon Grape-leaf					
Philadelphus lewisii	Serrano	50	18	18	18	
Pinus murrayana	Mugho Pine					
Potentilla fruticosa		72	24			
Potentilla fruticosa		72	24			
Ribes aureum	White Currant					
Ribes sanguineum	Red Currant					
Rosa wendoi	Wood Rose					
Rosa wendoi	Wood Rose					
Rosa wendoi	Wood Rose	100	20	24	24	
Rosa wendoi	Wood Rose	75	12	12	12	
Rosa wendoi	Wood Rose	24	12	12	12	
Rosa wendoi	Wood Rose					
Rosa wendoi	Wood Rose					
Rubus parviflorus	Thimbleberry	12	12			
Rubus parviflorus	Thimbleberry	120	20			
Salix scouleriana						
Salix purpurea	Blue Arctic Willow					
Sambucus caerulea	Blue Elderberry					
Spirea douglasii	Western Spirea	72				
Spirea douglasii	Western Spirea	72	24	24	24	
Symphoricarpos albus	Snowberry	72	24	24	24	
Symphoricarpos albus	Snowberry	72	24	24	24	

PERENNIALS / GROUND COV

Aquilegia formosa	Western Columbine		24	24	24	
Aquilegia vulgaris	Western Columbine		24	24	24	
Arctostaphylos uva-ursi	Kinnikinnick		24	24	24	
Ceanothus velutinus	Tobacco Bush		24	24	24	
Delphinium sp	Blue Delphinium		24	24	24	
Geranium viscosissimum			24	24	24	
Echinacea purpurea	Purple Cone Flower		24	24	24	
Gaillardia aristata	Blanket Flower		24	24	24	
Lupinus lewisii	Wild Blue Flax		24	24	24	
Lupinus argenteus	Blue Lupine		24	24	24	
Penstemon sp	Blue Penstemon		24	24	24	
Polystichum monilum	Meadow Rue		24	24	24	
Thymus dasycarpus	Creeping Thyme		24	24	24	
Thymus sp. Tobe pack		100		100	100	
Grand Total						

order Total	40% of fall total	Unit Price	25% of fall total	Extension
132	53	9,500	314	1,254.00
0	0	34,000	0	0.00
0	0	52,000	0	0.00
122	51	66,000	2,013	8,052.00
86	22	87,000	2,086	8,342.00
0	0	9,000	0	0.00
100	25	49,000	1,225	4,900.00
0	0	318,000	0	0.00
96	24	13,500	324	1,296.00
96	24	34,000	816	3,264.00
0	0	16,500	0	0.00
0	0	18,500	0	0.00
0	0	14,000	0	0.00
0	0	20,000	0	0.00
168	42	66,000	2,772	11,088.00
111	28	87,000	2,692	10,767.00
80	15	112,000	1,680	6,720.00
0	0	125,000	0	0.00
0	0	125,000	0	0.00
24	5	14,000	84	336.00
140	35	15,000	525	2,100.00
0	0	80	0	0.00
0	0	118,000	0	0.00
0	0	28,000	0	0.00
72	18	14,000	252	1,008.00
144	36	15,500	558	2,232.00
144	36	14,000	504	2,016.00
144	36	15,500	558	2,232.00
0	0		0	0.00
0	0		0	0.00
72	18	9,000	162	648.00
72	18	9,500	171	684.00
72	18	12,000	216	864.00
72	18	9,000	162	648.00
72	18	9,500	171	684.00
72	18	9,500	171	684.00
72	18	9,500	171	684.00
72	18	9,500	171	684.00
72	18	9,500	171	684.00
72	18	9,500	171	684.00
72	18	9,500	171	684.00
72	18	9,500	171	684.00
300	75	4,750	356	1,425.00
		total	\$135,042.75	\$540,171.00







TAMARACK RESORT  
Landscape Unit Prices

Exhibit "C"  
4/8/2005

<u>ITEM</u>	<u>UNIT</u>	<u>UNIT PRICE</u>
Native seed - hydromulch application	square foot	\$0.076
flagstone path	square foot	\$21
retaining wall - dry stack	square foot	\$22
<b>Irrigation field design / install:</b>		
Backflow device - 2" complete	each	\$765
Backflow device - 1" complete	each	\$388
Commercial temporary use:		
Controller - ESP 4 station	each	\$259
Controller - ESP 6 station	each	\$279
Controller - ESP 8 station	each	\$300
Controller - ESP 12 station	each	\$395
Controller - ESP 16 station	each	\$490
Controller - ESP 24 station	each	\$680
Residential permanent installation:		
Controller - Rainbird ESP	each	\$636
Gate valves: 2 to 2.5" (w/valve box)	each	\$106
Electric control valves: 1.5 to 2" complete	each	\$260
Electric control valves: 1" complete	each	\$230
Mainline: 2.5" pipe and control wire	lineal foot	\$4.80
Rotor heads: head, fittings, lateral pipe	each	\$59
Spray heads: head, fittings, lateral pipe	each	\$42.70
Quick couple valves: 3/4" complete	each	\$70.20
Drip Irrigation: includes 1" ACV w / "Y" strainer, box, PRV, pipe (PVC & poly)	lineal foot	\$0.26

TAMARACK RESORT  
HOURLY RATES

Exhibit "D"  
4/8/2005

<u>ITEM</u>	<u>UNIT PRICE</u>
Equipment w/o operator:	
Dump truck	\$ 35.00
Pickup truck	\$ 10.00
Mini excavator	\$ 30.00
Excavator - 315	\$ 60.00
Skid steer loader	\$ 30.00
Loader IT-18	\$ 40.00
Dozer D-4	\$ 45.00
Tractor (15-25 HP)	\$ 25.00
Trencher - walk behind	\$ 20.00
Plate compactor	\$ 9.00
*Labor:	
Landscape technician	\$ 36.00
Irrigation specialist	\$ 42.00
Equipment operator	\$ 45.00
Skilled equip. operator	\$ 54.00
Supervision	\$ 47.50

\*overtime calculation is 1.5 times the standard labor rate  
for those hours worked more than 40 hours per week.

D



LANDSCAPE CONSTRUCTION AGREEMENT

THIS AGREEMENT made as of this 16th day of May, 2006

between the Owner

Tamarack Resort LLC  
Idaho license # RC10396  
960 Broadway Ave., Suite 100  
Boise, Idaho 83706

and the Contractor

TEUFEL NURSERY, INC.  
Idaho license # C154041  
12345 NW Barnes Road  
Portland, Oregon 97229

The Project is

General Landscaping Work  
Tamarack Resort  
2099 West Mountain Road  
Donnelly, Idaho 83615

The Landscape Architect is

CSHQA  
250 S. 5<sup>th</sup> Street  
Boise, Idaho 83702

The Owner and Contractor agree as follows.

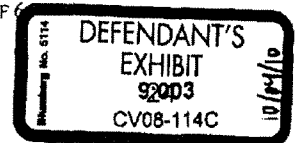
ARTICLE 1 RELATIONSHIP OF THE PARTIES

The Contractor accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Landscape Architect and exercise the Contractor's skill and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner's interests. The Owner agrees to furnish or approve, in a timely manner, information required by the Contractor and to make payments to the Contractor in accordance with this Agreement.

ARTICLE 2 SCOPE OF WORK

The Owner and Contractor acknowledge that no landscape plans or specifications for Project have been created and, therefore, the Contractor's scope of Work shall be to perform all grading, landscaping, restoration, irrigation and related site work for the following projects:

- Landscape installation for the 46 Golden Bar Townhome units
- Landscape installation for the 5 Steelhead Custom Chalets
- Supplemental landscaping at Discovery Village
- Landscape and pavers at the Arling Roundabout
- Completion of the landscape for the Bayview Sales Mod



- Landscape installation for the 18 Discovery Chalets
- Whitewater roads and slopes seeding, planting, and establishment
- Landscape and screening of Golf Maintenance facility and Snow Maintenance building
- Plant the golf course water feature
- Right Of Way screening / planting

Further assumptions and clarifications are set forth in the Contractor's clarification letter attached hereto as Exhibit A, to the extent not inconsistent with the body of this Agreement.

### ARTICLE 3 PROJECT SCHEDULE

The Contractor shall commence the Work as of the date of this Agreement and achieve substantial completion of the entire Work not later than December 31, 2006. If and when requested by the Owner, the Contractor shall submit for Owner's approval a schedule for the performance of the Work, including interim milestones. Once approved by the Owner, the Contractor shall not exceed the schedule without the Owner's consent.

### ARTICLE 4 CONTRACT SUM

4.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of this Agreement. The Contract Sum shall be the actual Cost of the Work, as defined in Section 4.3, plus the Contractor's Fee set forth in Section 4.2.

4.2 The Contractor's Fee shall be One Hundred Ninety-five Thousand Four Hundred Fifteen Dollars (\$195,415). The Contractor's Fees includes all costs for overhead, profit, supervision, mobilization and general conditions for the Project.

4.3 The term Cost of the Work shall mean costs necessarily incurred by the Contractor in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in this Section 4.3.

4.3.1 Unit Price Basis. For tasks that have unit prices identified on Exhibit B & C, the Cost of the Work will be as set forth in such unit prices, plus applicable Idaho sales taxes.

4.3.2 Time and Materials Basis. For tasks that do not have unit priced identified on Exhibit B & C, the Contractor shall make a unit price proposal for the Owner's review. If no unit price is mutually agreed upon, or if Owner directs such Work without a unit price, the Work shall be done on a time and materials basis in accordance with the following rates:

- .1 Costs of construction workers directly employed by the Contractor at the rates set for on Exhibit D, attached hereto. Labor charges for supervisions shall only be applied in the event that the supervisory services pertain to Work outside the Contractor's scope of Work set forth in Section 2 above.
- .2 Cost of equipment directly employed by the Contractor at the rates set forth in Exhibit D. For equipment not identified on Exhibit D, at the actual costs incurred by the Contractor.
- .3 Cost of materials incorporated into the Work, including reasonable amounts for spoilage, or consumed in the prosecution of the Work at the cost incurred by the Contractor, including the costs of transportation and storage such materials.
- .4 Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which the Contractor is liable.

## ARTICLE 5 ACCOUNTING RECORDS; AUDIT

5.1 The Contractor shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement, and the accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's accountants shall be afforded access to, and shall be permitted to audit and copy, the Contractor's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Agreement, and the Contractor shall preserve these for a period of three years after final payment, or for such longer period as may be required by law.

5.2 Owner shall have the right, at its expense and upon at least ten (10) days' prior written notice, to audit and copy any or all of the records. In the event of an audit, Contractor shall (i) provide Owner with adequate workspace in Contractor's principal place of business to conduct the audit, (ii) provide all of records in the same manner as the records are kept in the ordinary course of the Contractor's business, and (iii) require Contractor's record keeping personnel to provide reasonable assistance to Owner in locating any particular documents or records. Owner shall have the right, at its own expense, to send any or all of the records to any third-party service for copying. If an audit discloses any error in Contractor's determination of the Cost of the Work (or the portion thereof audited by Owner) in favor of Contractor, Contractor shall promptly, but in not less than 60 days after presentation of Owner's findings, pay such difference to Owner. If the error is greater than one-half of one percent (0.5%) of the total Cost of the Work (or the portion thereof audited by Owner), Contractor shall reimburse Owner for its reasonable audit costs within 30 days of the presentation of such costs.

## ARTICLE 6 PAYMENTS

6.1 **Initial Payment.** Upon execution of this Agreement, Owner shall pay Contractor an initial payment of One Hundred Twenty One Thousand Five Hundred Forty Five Dollars (\$121,545), which shall be applied to the initial applications for payment until exhausted.

### 6.2 Progress Payments.

6.2.1 Based upon Applications for Payment submitted to the Landscape Architect by the Contractor and Certificates for Payment issued by the Landscape Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor. The period covered by each Application for Payment shall be one calendar month ending on the last day of the month. Payment shall be made by the Owner not later than thirty (30) days after the Landscape Architect receives the Application for Payment. With each Application for Payment, the Contractor shall submit a partial lien release for all prior payments. If requested by the Owner, the Contractor shall secure partial lien releases for all prior payments from all major suppliers and subcontractors as a condition precedent to progress payments.

6.2.2 Applications for Payment shall show the Cost of the Work actually incurred by the Contractor through the end of the period covered by the Application for Payment.

6.2.3 Subject to other provisions this Agreement, the amount of each progress payment shall be computed as follows:

- .1 take the Cost of the Work, as described in Section 4.3, less retainage of five percent (5%);
- .2 add the Contractor's Fee, as set forth in Section 4.2, which shall be earned by the Contractor in six (6) equal monthly amounts of \$32,569.16, less retainage of five percent (5%);
- .3 subtract the aggregate of previous payments made by the Owner;
- .4 subtract the shortfall, if any, resulting from errors subsequently discovered by the Owner's accountants in such documentation; and
- .5 subtract amounts, if any, for which the Owner or Landscape Architect has withheld or withdrawn from a Certificate for Payment.

Upon final completion of each individual project identified in Article 2 (e.g., final completion of the forty six Golden Bar Townhome units (46)) and certified by the Landscape Architect and Owner, Owner shall release the



retainage allocable to such project to the Contractor, provided that the Contractor is not then in default under this Agreement.

### 6.3 Final Payment

6.3.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when:

- .1 the Contractor has fully performed all Work under this Agreement, except for the Contractor's responsibility to correct Work as provided in Article 7 below, and to satisfy other requirements, if any, which extend beyond final payment; and
- .2 a final Certificate for Payment has been issued by the Landscape Architect.

The Owner's final payment to the Contractor shall be made no later than 30 days after the issuance of the Landscape Architect's final Certificate for Payment.

6.3.2 The Owner's accountants will review and report in writing on the Contractor's final accounting within 30 days after delivery of the final accounting to the Landscape Architect by the Contractor. Based upon such Cost of the Work as the Owner's accountants report to be substantiated by the Contractor's final accounting, and provided the other conditions of Section 6.3.1 have been met, the Landscape Architect will, within seven days after receipt of written report of the Owner's accountants, either issue to the Owner a final Certificate for Payment with a copy to the Contractor or notify the Contractor and Owner in writing of the Landscape Architect's reasons for withholding a certificate.

6.3.3 If the Owner's accountants report the Cost of the Work as substantiated by the Contractor's final accounting to be less than claimed by the Contractor, Contractor shall promptly, but in not less than 30 days after presentation of Owner's findings, notify Owner whether or not it disagrees with any part of Owner's findings. Failure of the Contractor to respond within this 30-day period shall result in the substantiated amount reported by the Owner's accountants becoming binding on the Contractor. Such notification shall be accompanied with complete explanation of its disagreement with Owner's findings and all information necessary to support Contractor's disagreement with Owner's findings. Contractor shall pay any amounts not in disagreement to Owner within 30 days of such notification. In the event Contractor disagrees with any of Owner's findings, Owner shall have the right, but not the obligation, to seek arbitration of such dispute in accordance with the provisions of Title 7, Chapter 9, Idaho Code, by a single arbitrator select by mutual agreement of the parties, or in absence of mutual agreement within 15 days, in accordance with Idaho Code § 7-903. Unless the arbitrator seeks additional information from the parties, the arbitrator's decision shall be based solely on (i) Owner's findings presented to Contractor, (ii) the explanation and supporting information provided to Owner by Contractor, and (iii) Owner's response thereto. The parties shall share all fees and costs of the arbitrator equally. The decision of the arbitrator shall be final and binding upon the parties.

6.4 **Interest on Unpaid Payments.** Payments due and unpaid under this Agreement shall bear interest from the date payment is due at a per annum rate equal to the prime rate published by Wells Fargo Bank in Boise, Idaho, plus two percent (2%).

## ARTICLE 7 CONTRACTOR'S WARRANTIES

7.1 The Contractor warrants to the Owner and Landscape Architect that materials and equipment furnished under this Agreement will be of good quality, meet applicable ANSI standards for quality and be new unless otherwise required or permitted by the Owner or Landscape Architect, that the Work will be free from defects not inherent in the quality permitted or required. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and usage. If required by the Owner or Landscape Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. The Contractor shall perform all Work in compliance with the permits and applicable laws, ordinances, rules, regulations or orders of any public authority having jurisdiction over the Project, and in compliance with the Owner's safety requirements.

7.2 The Contractor shall promptly correct Work rejected by the Architect or Owner failing to meet the standards set forth in Section 7.1 above. If any Work is found to be not in accordance with the standards set forth in Section 7.1 above for a period of one-year after the date of Substantial Completion, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so.

7.3 Provided that the Contractor is retained to provide year-round maintenance services for the applicable period, the Contractor warrants to Owner that all plant material will remain healthy for a period of two (2) years after the date of substantial completion of the Work, and Contractor will, without cost to Owner, replace any unhealthy plantings (as reasonably determined by Owner) one time during such two year period. Maintenance services are not included in this Agreement, and must be set forth in a separate agreement between Owner and Contractor. No landscape maintenance is included in the unit prices set forth in Exhibit B.

#### ARTICLE 8 INSURANCE

The Contractor shall procure and maintain in force Workers' Compensation Insurance, Employer's Liability Insurance, Business Automobile Liability Insurance, and Commercial General Liability Insurance. The Commercial General Liability policy shall include coverage for liability arising from premises, operations, independent contractors, products, completed operations, personal injury and advertising injury, contractual liability, and broad form property damage. The Commercial General Liability shall name the Owner as an additional insured for liability arising out of the Contractor's Work and shall contain a provision that it will not be cancelled or allowed to expire until at least thirty (30) days' prior written notice has been given to the Owner. The policies above shall be written with limits of liability not less than the following:

Employer's Liability	As required by law	
Business Auto Liability	\$ 2,000,000	Each Accident
Commercial General Liability	\$ 2,000,000	Each Occurrence
	\$ 6,000,000	Umbrella

#### ARTICLE 9 TERMINATION OR SUSPENSION

9.1 **Termination for Cause.** This Agreement may be terminated by the Owner or Contractor for cause as provided in Article 14 of AIA Document A201-1997. However, the amount to be paid to the Contractor under Section 14.1.3 of AIA Document A201-1997 shall not exceed the amount the Contractor would be entitled to receive under Section 9.2 below.

9.2 **Termination for Convenience.** The Owner may terminate this Agreement for convenience pursuant to Paragraph 14.4 of AIA Document A201-1997; provided, however, the Owner shall then pay the Contractor an amount calculated as follows:

- .1 Take the Cost of the Work incurred by the Contractor to the date of termination;
- .2 Add the Contractor's Fee computed as of the date of termination, and
- .3 Subtract the aggregate of previous payments made by the Owner.

9.3 The Owner shall also pay the Contractor fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Contractor that the Owner elects to retain and that is not otherwise included in the Cost of the Work. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Contractor shall, as a condition of receiving the payments referred to in this Article 9, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Contractor, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Contractor under such subcontracts or purchase orders.

9.4 **Suspension by Owner for Convenience.** The Owner may, without cause, order the Contractor in writing to suspend the Work as provided in Paragraph 14.3 of AIA Document A201-1997. In such case, the Contract Sum and Project Schedule may be increased, if appropriate, as provided in Section 14.3.2 of AIA Document A201-1997, except that the term "profit" shall be understood to mean the Contractor's Fee as described in Section 4.2 of this Agreement.

ARTICLE 9 MISCELLANEOUS PROVISIONS

9.1 The Owner's representative is:

Nic Stover, VP of Construction  
Tamarack Resort, LLC - Boise Office  
960 Broadway, Suite 100  
Boise, Idaho 83706  
Office: 208-472-1750  
Fax: 208-472-1759  
Mobile: 208-573-6743  
Email: [nstover@tamarackidaho.com](mailto:nstover@tamarackidaho.com)

Christopher Kirk, Project Manager  
Tamarack Resort, LLC - Site Office  
2099 West Mountain Road  
Donnelly, Idaho 83615  
Office: 208-325-1093  
Fax: 208-325-8528  
Mobile: 208-271-6231  
Email: [ckirk@tamarackidaho.com](mailto:ckirk@tamarackidaho.com)

9.2 The Contractor's representative is:

Rick Christensen, Project Manager  
Teufel Nursery, Inc.  
12345 NW Barnes Road  
Portland, Oregon 97229  
Office: 503-646-1111, ext. 461  
Fax: 503-672-5070  
Mobile: 503-680-1111  
Email: [ricke@teufel.com](mailto:ricke@teufel.com)

Mike Jerome, Project Manager  
Teufel Nursery, Inc.  
950 Valley River Drive  
McCall, Idaho 83638  
Office: 208-325-8127  
Fax: 208-271-6010  
Mobile: 208-271-6010  
Email: [mikej@teufel.com](mailto:mikej@teufel.com)

9.3 General Provisions. No modification or termination shall be binding on the parties unless it is in writing and signed by both parties. The headings contained in this Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation hereof. Neither party's right to require performance of the other party's obligations under this agreement shall be affected by any previous waiver, forbearance, or course of dealing. This agreement shall be governed by the laws, including conflicts of laws, in the State of Idaho as an agreement between residents of the State of Idaho and to be performed within the State of Idaho. This Agreement and each and every provision thereof is for the exclusive benefit of the Owner and Contractor and not for the benefit of any third party nor any third party beneficiary thereof.

This Agreement is entered into as of the day and year first written above.

OWNER  
TAMARACK RESORT, LLC

CONTRACTOR:  
TEUFEL NURSERY, INC.

By: \_\_\_\_\_  
Jean-Pierre Boespflug, CEO

By: \_\_\_\_\_  
Larry Teufel, President

Exhibits:

- Exhibit A - Contractor's Clarification Letter
- Exhibit B - Unit Prices - Plant Reservation
- Exhibit C - Landscape Unit Prices
- Exhibit D - Hourly Rates for Equipment and Labor

**Exhibit "A"**

April 14, 2006

Tamarack Resort LLC  
Donnelly, Idaho  
Attn: Nic Stover  
Vice President of Construction

RE: 2006 Landscape Contract

Subject: scope letter

Nic:

Landscape work will be performed on the following areas at the direction of the owners representatives:

- Landscape installation for the 46 Golden Bar Townhome units
- Landscape installation for the 5 Steelhead Custom Chalets
- Supplemental landscaping at Discovery Village
- Landscape and pavers at the Arling Roundabout
- Completion of the landscape for the Bayview Sales Mod
- Landscape installation for the 18 Discovery Chalets
- Whitewater roads and slopes seeding, planting, and establishment
- Landscape and screening of Golf Maintenance facility and Snow Maintenance building
- Plant the golf course water feature
- Right Of Way screening / planting

Plant material for the above referenced work has been quantified by Chris Kirk (see attached Exhibit B) with the plants on order from regional growers, scheduled for deliver to the Norwood holding nursery as soon as the snow has melted and the roadways can support delivery equipment. Possible additional landscape work has been identified for fall 2006 installation, but plants will not be secured until needed. Possible fall installations include Golden Bar II Townhomes, Golden Bar II Cottages, and Clearwater Townhomes.

As in the past, landscape installation is performed without a completed landscape plan, but based on direction from the owners representatives and using the "Design and Development Guidelines dated 12/23/03". Of course, our past years experience on site add to our understanding of Tamrack's expectations.

Finish grading in landscape areas, which can include excavation, haul off or import of material, is best handled using hourly labor and equipment rates. Catch basins, sumps, and below ground drainage systems are not included in our pricing, but can be performed on an as needed basis. Likewise, placement of on site boulders or imported stone, building boulder retaining walls, and transplanting existing on site plant material is best performed under field direction using the hourly rates listed.

Irrigation system unit prices are based on the assumption that points of connection and power for controllers will be provided by the owner where needed. Backflow prevention devices, gate valves, automatic control valves, and quick couple valves will all be installed in appropriate sized

valve boxes, included in the unit costs. Irregular components (moisture sensors, flow sensors, weather station, and central computer controller) have not been identified, so cannot be included in this proposal. The system will utilize rotor heads for peak efficiency where possible, otherwise using spray heads in smaller areas. Head to head coverage will not be needed since the goal is to establish and maintain the native grass mix and plantings of native trees and shrubs rather than closely mowed turf. Pipe will be installed at an average depth of between 12 to 18 inches to minimize soil and tree root disturbance. Backfill of irrigation lines will be with select native material from the trenching operation. Sand bedding of pipe, if needed, would be an extra charge. The entire system will need to be winterized using compressed air each fall prior to the first deep freeze.

Unit prices for trees, shrubs, and perennials include the plant material meeting ANSI standards, plant material warranty for two year period, installation, and backfill using native topsoil available from on site screened stockpiles provided by the owner and a collar of mulch material to retain moisture during establishment period. Staking and/or guying of trees is included. For 2006 we will continue to use the holding nursery on the Welmunster Ranch site on Norwood Rd. Irrigation will be from the pumping system from the site well, provided by the owner.

As in the past, the extended two year warranty on plant material is only valid if adequate plant maintenance is provided. It is our intent to provide year around landscape maintenance service for all landscape areas at an agreed upon rate.

We are offering our General Conditions fee unchanged for the third year at \$195,415. In the past we have agreed for this to be paid in 6 equal payments, included with our first six progress billings. General conditions are made up of operational costs specific to running your job on site, including our rent for office space, storage trailers, dedicated site superintendent, administrative support, vehicles, down time on equipment specifically dedicated to this site, and mobilization and demobilization of other equipment.

Initial payment, paid by Tamarack in advance of work starting, is to cover the up front costs incurred from deposits needed to secure plant material for the 2006 calendar year. Fifteen percent of the plant total (\$810,300 from Exhibit "B") is \$121,545.

Materials, which are not part of our unit costs, purchased at the Tamarack owners representative direction, are passed along at our cost plus fifteen percent.

Prices do not reflect Idaho state sales tax.

Nic, thanks in advance for your help in getting the contract drafted.

Sincerely,  
TEUFEL NURSERY, INC.

Rick Christensen  
Landscape Division Manager

Cc: Chris Kirk  
Larry Teufel

**TAMARACK RESORT**  
Landscape Unit Prices

**Exhibit "C"**  
4/14/2006

<u>ITEM</u>	<u>UNIT</u>	<u>UNIT PRICE</u>
Native seed - hydromulch application	square foot	\$0.080
Old World Cobble pavers	square foot	\$16.50
<b>Irrigation field design / install:</b>		
Backflow device - 2" complete	each	\$825
Backflow device - 1" complete	each	\$427
<b>Commercial temporary use:</b>		
Controller - ESP 4 station	each	\$272
Controller - ESP 6 station	each	\$293
Controller - ESP 8 station	each	\$315
Controller - ESP 12 station	each	\$415
Controller - ESP 16 station	each	\$515
Controller - ESP 24 station	each	\$714
<b>Residential permanent installation:</b>		
Controller - Rainbird ESP	each	\$687
Gate valves: 2 to 2.5" (w/valve box)	each	\$118
Electric control valves: 1.5 to 2" complete	each	\$286
Electric control valves: 1" complete	each	\$253
Mainline: 2.5" pipe and control wire	lineal foot	\$6.48
Rotor heads: head, fittings, lateral pipe	each	\$71
Spray heads: head, fittings, lateral pipe	each	\$58.00
Quick couple valves: 3/4" complete	each	\$77.00
Drip irrigation: includes 1" ACV w / "Y" strainer, box, PRV, pipe (PVC & poly)	lineal foot	\$0.035

**TAMARACK RESORT  
HOURLY RATES**

**Exhibit "D"  
4/14/2006**

<u>ITEM</u>	<u>UNIT PRICE</u>
Equipment w/o operator:	
Dump truck	\$ 38.00
Pickup truck	\$ 11.00
Mini excavator	\$ 33.00
Excavator - 315	\$ 60.00
Skid steer loader	\$ 33.00
Loader IT-18	\$ 43.00
Dozer D-4	\$ 48.00
Tractor (15-25 HP)	\$ 28.00
Trencher - walk behind	\$ 22.00
Plate compactor	\$ 10.00
*Labor:	
Landscape technician	\$ 37.50
Irrigation specialist	\$ 44.00
Equipment operator	\$ 47.00
Skilled equip. operator	\$ 57.00
Supervision	\$ 50.00

\*overtime calculation is 1.5 times the standard labor rate for those hours worked more than 40 hours per week.





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## LANDSCAPE CONSTRUCTION AGREEMENT

THIS AGREEMENT made as of this 2nd day of May, 2007

between the Owner

Tamarack Resort LLC  
Idaho license # RC10396  
960 Broadway Ave., Suite 100  
Boise, Idaho 83706

and the Contractor

TEUFEL NURSERY, INC.  
Idaho license # C154041  
100 SW Miller Road  
Portland, Oregon 97225

The Project is

General Landscaping Work  
Tamarack Resort  
2099 West Mountain Road  
Tamarack, Idaho 83615

The Landscape Architect is

Chris Kirk  
321 Village Drive  
Tamarack, Idaho 83615

The Owner and Contractor agree as follows.

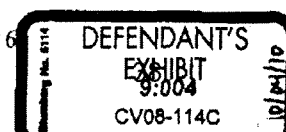
**ARTICLE 1 RELATIONSHIP OF THE PARTIES**

The Contractor accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Landscape Architect and exercise the Contractor's skill and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner's interests. The Owner agrees to furnish or approve, in a timely manner, information required by the Contractor and to make payments to the Contractor in accordance with this Agreement.

**ARTICLE 2 SCOPE OF WORK**

The Owner and Contractor acknowledge that no landscape plans or specifications for Project have been created and, therefore, the Contractor's scope of Work shall be to perform all grading, landscaping, restoration, irrigation and related site work for the following projects:

- Completion of Golden Bar Townhomes (balance)
- Trillium Cottages
- Clearwater Cottages (8)
- Clearwater Townhomes
- Clearwater Ridge Custom Villas (5)
- Steelhead Custom Chalets (3)
- Staircase Chalets (5)
- Clearwater Custom Chalets (2)



- Aspen Parking
- Design Plaza
- Arling Activity Lawn
- Discovery Village
- Golf Maintenance Building
- Ski Maintenance Building
- Golf
- Spring – other plantings

Further assumptions and clarifications are set forth in the Contractor's clarification letter attached hereto as Exhibit A, to the extent not inconsistent with the body of this Agreement.

### ARTICLE 3 PROJECT SCHEDULE

The Contractor shall commence the Work as of the date of this Agreement and achieve substantial completion of the entire Work not later than December 31, 2007. If and when requested by the Owner, the Contractor shall submit for Owner's approval a schedule for the performance of the Work, including interim milestones. Once approved by the Owner, the Contractor shall not exceed the schedule without the Owner's consent.

### ARTICLE 4 CONTRACT SUM

4.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of this Agreement. The Contract Sum shall be the actual Cost of the Work, as defined in Section 4.3, plus the Contractor's Fee set forth in Section 4.2.

4.2 The Contractor's Fee shall be One Hundred Ninety-five Thousand Four Hundred Fifteen Dollars (\$195,415). The Contractor's Fees includes all costs for overhead, profit, supervision, mobilization and general conditions for the Project.

4.3. The term Cost of the Work shall mean costs necessarily incurred by the Contractor in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in this Section 4.3.

4.3.1 Unit Price Basis. For tasks that have unit prices identified on Exhibit B & C, the Cost of the Work will be as set forth in such unit prices, plus applicable Idaho sales taxes.

4.3.2 Time and Materials Basis. For tasks that do not have unit priced identified on Exhibit B & C, the Contractor shall make a unit price proposal for the Owner's review. If no unit price is mutually agreed upon, or if Owner directs such Work without a unit price, the Work shall be done on a time and materials basis in accordance with the following rates:

- .1 Costs of construction workers directly employed by the Contractor at the rates set for on Exhibit D, attached hereto. Labor charges for supervisions shall only be applied in the event that the supervisory services pertain to Work outside the Contractor's scope of Work set forth in Section 2 above.
- .2 Cost of equipment directly employed by the Contractor at the rates set forth in Exhibit D. For equipment not identified on Exhibit D, at the actual costs incurred by the Contractor.
- .3 Cost of materials incorporated into the Work, including reasonable amounts for spoilage, or consumed in the prosecution of the Work at the cost incurred by the Contractor, including the costs of transportation and storage such materials.
- .4 Sales, use or similar taxes imposed by a governmental authority that are related to the Work and for which the Contractor is liable.

## ARTICLE 5 ACCOUNTING RECORDS; AUDIT

5.1 The Contractor shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement, and the accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's accountants shall be afforded access to, and shall be permitted to audit and copy, the Contractor's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to this Agreement, and the Contractor shall preserve these for a period of three years after final payment, or for such longer period as may be required by law.

5.2 Owner shall have the right, at its expense and upon at least ten (10) days' prior written notice, to audit and copy any or all of the records. In the event of an audit, Contractor shall (i) provide Owner with adequate workspace in Contractor's principal place of business to conduct the audit, (ii) provide all of records in the same manner as the records are kept in the ordinary course of the Contractor's business, and (iii) require Contractor's record keeping personnel to provide reasonable assistance to Owner in locating any particular documents or records. Owner shall have the right, at its own expense, to send any or all of the records to any third-party service for copying. If an audit discloses any error in Contractor's determination of the Cost of the Work (or the portion thereof audited by Owner) in favor of Contractor, Contractor shall promptly, but in not less than 60 days after presentation of Owner's findings, pay such difference to Owner. If the error is greater than one-half of one percent (0.5%) of the total Cost of the Work (or the portion thereof audited by Owner), Contractor shall reimburse Owner for its reasonable audit costs within 30 days of the presentation of such costs.

## ARTICLE 6 PAYMENTS

6.1 **Initial Payment.** Upon execution of this Agreement, Owner shall pay Contractor an initial payment of Two Hundred Ninety Three Thousand Five Hundred Seventy Eight Dollars (\$293,578.), which shall be applied to the initial applications for payment until exhausted.

### 6.2 Progress Payments.

6.2.1 Based upon Applications for Payment submitted to the Owners Representative by the Contractor and Certificates for Payment issued by the Landscape Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor. The period covered by each Application for Payment shall be one calendar month ending on the last day of the month. Payment shall be made by the Owner not later than thirty (30) days after the Landscape Architect receives the Application for Payment. With each Application for Payment, the Contractor shall submit a partial lien release for all prior payments. If requested by the Owner, the Contractor shall secure partial lien releases for all prior payments from all major suppliers and subcontractors as a condition precedent to progress payments.

6.2.2 Applications for Payment shall show the Cost of the Work actually incurred by the Contractor through the end of the period covered by the Application for Payment.

6.2.3 Subject to other provisions this Agreement, the amount of each progress payment shall be computed as follows:

- .1 take the Cost of the Work, as described in Section 4.3,.2 add the Contractor's Fee, as set forth in Section 4.2, which shall be earned by the Contractor in six (6) equal monthly amounts of \$32,569.16, less retainage of five percent (5%);
- .3 subtract the aggregate of previous payments made by the Owner;
- .4 subtract the shortfall, if any, resulting from errors subsequently discovered by the Owner's accountants in such documentation; and
- .5 subtract amounts, if any, for which the Owner or Landscape Architect has withheld or withdrawn from a Certificate for Payment.

Upon final completion of each individual project identified in Article 2 and certified by the Landscape Architect and Owner, Owner shall release the retainage allocable to such project to the Contractor, provided that the Contractor is not then in default under this Agreement.



### 6.3 Final Payment

6.3.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when:

- .1 the Contractor has fully performed all Work under this Agreement, except for the Contractor's responsibility to correct Work as provided in Article 7 below, and to satisfy other requirements, if any, which extend beyond final payment; and
- .2 a final Certificate for Payment has been issued by the Landscape Architect.

The Owner's final payment to the Contractor shall be made no later than 30 days after the issuance of the Landscape Architect's final Certificate for Payment.

6.3.2 The Owner's accountants will review and report in writing on the Contractor's final accounting within 30 days after delivery of the final accounting to the Landscape Architect by the Contractor. Based upon such Cost of the Work as the Owner's accountants report to be substantiated by the Contractor's final accounting, and provided the other conditions of Section 6.3.1 have been met, the Landscape Architect will, within seven days after receipt of written report of the Owner's accountants, either issue to the Owner a final Certificate for Payment with a copy to the Contractor or notify the Contractor and Owner in writing of the Landscape Architect's reasons for withholding a certificate.

6.3.3 If the Owner's accountants report the Cost of the Work as substantiated by the Contractor's final accounting to be less than claimed by the Contractor, Contractor shall promptly, but in not less than 30 days after presentation of Owner's findings, notify Owner whether or not it disagrees with any part of Owner's findings. Failure of the Contractor to respond within this 30-day period shall result in the substantiated amount reported by the Owner's accountants becoming binding on the Contractor. Such notification shall be accompanied with complete explanation of its disagreement with Owner's findings and all information necessary to support Contractor's disagreement with Owner's findings. Contractor shall pay any amounts not in disagreement to Owner within 30 days of such notification. In the event Contractor disagrees with any of Owner's findings, Owner shall have the right, but not the obligation, to seek arbitration of such dispute in accordance with the provisions of Title 7, Chapter 9, Idaho Code, by a single arbitrator select by mutual agreement of the parties, or in absence of mutual agreement within 15 days, in accordance with Idaho Code § 7-903. Unless the arbitrator seeks additional information from the parties, the arbitrator's decision shall be based solely on (i) Owner's findings presented to Contractor, (ii) the explanation and supporting information provided to Owner by Contractor, and (iii) Owner's response thereto. The parties shall share all fees and costs of the arbitrator equally. The decision of the arbitrator shall be final and binding upon the parties.

6.4 Interest on Unpaid Payments. Payments due and unpaid under this Agreement shall bear interest from the date payment is due at a per annum rate equal to the prime rate published by Wells Fargo Bank in Boise, Idaho, plus two percent (2%).

## ARTICLE 7 CONTRACTOR'S WARRANTIES

7.1 The Contractor warrants to the Owner and Landscape Architect that materials and equipment furnished under this Agreement will be of good quality, meet applicable ANSI standards for quality and be new unless otherwise required or permitted by the Owner or Landscape Architect, that the Work will be free from defects not inherent in the quality permitted or required. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and usage. If required by the Owner or Landscape Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. The Contractor shall perform all Work in compliance with the permits and applicable laws, ordinances, rules, regulations or orders of any public authority having jurisdiction over the Project, and in compliance with the Owner's safety requirements.

7.2 The Contractor shall promptly correct Work rejected by the Architect or Owner failing to meet the standards set forth in Section 7.1 above. If any Work is found to be not in accordance with the standards set forth in Section 7.1 above for a period of one-year after the date of Substantial Completion, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so.

7.3 Provided that the Contractor is retained to provide year-round maintenance services for the applicable period, the Contractor warrants to Owner that all plant material will remain healthy for a period of two (2) years after the date of substantial completion of the Work, and Contractor will, without cost to Owner, replace any unhealthy plantings (as reasonably determined by Owner) one time during such two year period. Maintenance services are not included in this Agreement, and must be set forth in a separate agreement between Owner and Contractor. No landscape maintenance is included in the unit prices set forth in Exhibit B.

## ARTICLE 8 INSURANCE

The Contractor shall procure and maintain in force Workers' Compensation Insurance, Employer's Liability Insurance, Business Automobile Liability Insurance, and Commercial General Liability Insurance. The Commercial General Liability policy shall include coverage for liability arising from premises, operations, independent contractors, products, completed operations, personal injury and advertising injury, contractual liability, and broad form property damage. The Commercial General Liability shall name the Owner as an additional insured for liability arising out of the Contractor's Work and shall contain a provision that it will not be cancelled or allowed to expire until at least thirty (30) days' prior written notice has been given to the Owner. The policies above shall be written with limits of liability not less than the following:

Employer's Liability	As required by law	
Business Auto Liability	\$ 2,000,000	Each Accident
Commercial General Liability	\$ 2,000,000	Each Occurrence
	\$ 6,000,000	Umbrella

## ARTICLE 9 TERMINATION OR SUSPENSION

9.1 **Termination for Cause.** This Agreement may be terminated by the Owner or Contractor for cause as provided in Article 14 of AIA Document A201-1997. However, the amount to be paid to the Contractor under Section 14.1.3 of AIA Document A201-1997 shall not exceed the amount the Contractor would be entitled to receive under Section 9.2 below.

9.2 **Termination for Convenience.** The Owner may terminate this Agreement for convenience pursuant to Paragraph 14.4 of AIA Document A201-1997; provided, however, the Owner shall then pay the Contractor an amount calculated as follows:

- .1 Take the Cost of the Work incurred by the Contractor to the date of termination;
- .2 Add the Contractor's Fee computed as of the date of termination, and
- .3 Subtract the aggregate of previous payments made by the Owner.

9.3 The Owner shall also pay the Contractor fair compensation, either by purchase or rental at the election of the Owner, for any equipment owned by the Contractor that the Owner elects to retain and that is not otherwise included in the Cost of the Work. To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Contractor shall, as a condition of receiving the payments referred to in this Article 9, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Contractor, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Contractor under such subcontracts or purchase orders.

9.4 **Suspension by Owner for Convenience.** The Owner may, without cause, order the Contractor in writing to suspend the Work as provided in Paragraph 14.3 of AIA Document A201-1997. In such case, the Contract Sum and Project Schedule may be increased, if appropriate, as provided in Section 14.3.2 of AIA Document A201-1997, except that the term "profit" shall be understood to mean the Contractor's Fee as described in Section 4.2 of this Agreement.

**ARTICLE 9 MISCELLANEOUS PROVISIONS****9.1 The Owner's representative is:**

Christopher Kirk, Project Manager  
 Tamarack Resort, LLC – Site Office  
 321 Village Drive, Design Plaza  
 Donnelly, Idaho 83615  
 Office: 208-325-1093  
 Fax: 208-325-1818  
 Mobile: 208-271-6231  
 Email: [ckirk@tamarackidaho.com](mailto:ckirk@tamarackidaho.com)

**9.2 The Contractor's representative is:**

Rick Christensen, Landscape Div. Mgr.  
 Teufel Nursery, Inc.  
 100 SW Miller Road  
 Portland, Oregon 97225  
 Office: 503-646-1111, ext. 1461  
 Fax: 503-672-5070  
 Mobile: 503-680-1111  
 Email: [ricke@teufel.com](mailto:ricke@teufel.com)

Mike Jerome, Project Manager  
 Teufel Nursery, Inc. 100 SW Miller Rd  
 PO Box 254  
 McCall, Idaho 83638  
 Office: 208-325-8127  
 Fax:  
 Mobile: 208-271-6010  
 Email: [mikej@teufel.com](mailto:mikej@teufel.com)

**9.3 General Provisions.** No modification or termination shall be binding on the parties unless it is in writing and signed by both parties. The headings contained in this Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation hereof. Neither party's right to require performance of the other party's obligations under this agreement shall be affected by any previous waiver, forbearance, or course of dealing. This agreement shall be governed by the laws, including conflicts of laws, in the State of Idaho as an agreement between residents of the State of Idaho and to be performed within the State of Idaho. This Agreement and each and every provision thereof is for the exclusive benefit of the Owner and Contractor and not for the benefit of any third party nor any third party beneficiary thereof.

This Agreement is entered into as of the day and year first written above.

**OWNER**

TAMARACK RESORT, LLC

**CONTRACTOR:**

TEUFEL NURSERY, INC.

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

Jean-Pierre Boespflug, CEO

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

Larry Teufel, President

**Exhibits:**

- Exhibit A – Contractor's Clarification Letter
- Exhibit B – Unit Prices – Plant Reservation
- Exhibit C – Landscape Unit Prices
- Exhibit D – Hourly Rates for Equipment and Labor

F



ARCHIE N. BANBURY, CLERK  
BY: *[Signature]* DEPUTY  
FEB 03 2012

Case No. \_\_\_\_\_ Inst. No. \_\_\_\_\_  
Filed 11:00 A.M. \_\_\_\_\_ P.M.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IN RE  
TAMARACK RESORT FORECLOSURE  
AND RELATED PROCEEDINGS

Case No. CV-08-114C

**MEMORANDUM, DECISION AND  
ORDER RE: VARIOUS REQUESTS  
FOR AWARDS OF ATTORNEY  
FEES, COSTS AND PRE-  
JUDGMENT INTEREST**

Consolidated Cases

- Case No. CV-08-310C Case No. CV-08-502C
- Case No. CV-08-311C Case No. CV-08-508C
- Case No. CV-08-312C Case No. CV-08-509C
- Case No. CV-08-324C Case No. CV-08-510C
- Case No. CV-08-335C Case No. CV-08-511C
- Case No. CV-08-356C Case No. CV-08-512C
- Case No. CV-08-357C Case No. CV-08-513C
- Case No. CV-08-532C Case No. CV-08-514C
- Case No. CV-08-532C Case No. CV-08-521C
- Case No. CV-08-557C Case No. CV-08-528C
- Case No. CV-08-583C Case No. CV-08-580C
- Case No. CV-08-584C

Before the Court are numerous motions for an award of attorney's fees, costs and pre-judgment interest. Most, but not all, of these motions relate to requests by mechanic lien claimants pursuant to Idaho Code § 45-513. The other motions relate to requests made by Banc of America Leasing and Capital, LLC, North Lake Recreational Sewer and Water District and Scott Hedrick Construction, Inc. The motions will be granted and denied, in whole and in part, as explained below.

### Background and Prior Proceedings<sup>1</sup>

Credit Suisse, AG, Cayman Islands Branch, formerly Credit Suisse, Cayman Islands Branch (“Credit Suisse”), a large international financial institution, along with a consortium of other lenders, advanced approximately \$250 million to Tamarack Resort, LLC (“Tamarack”) under the terms of a May 19, 2006 Credit Agreement. The Credit Suisse loan was secured by two (2) mortgages encumbering most, but not all, of Tamarack’s fee and leasehold properties. The failure of the Tamarack Resort (the “Resort”) resulted in many liens and other claims being asserted against Tamarack and its property.

Credit Suisse filed the first foreclosure action against Tamarack’s property in Valley County on March 11, 2008. This case was assigned Valley County Case No. CV-2008-114C. Over the course of these proceedings, Credit Suisse has attempted to identify, and name as defendants, all persons and entities claiming any interest in Tamarack’s property. Many other lien claimants filed separate actions for foreclosure and other relief. Pursuant to a series of orders, these other actions have been consolidated with the original Credit Suisse foreclosure case.

On December 11, 2009, some of the parties in these consolidated proceedings filed an involuntary bankruptcy petition against Tamarack.<sup>2</sup> The bankruptcy filing resulted in an automatic stay of these state court proceedings. In an order entered February 3, 2010, the bankruptcy judge, the Honorable Terry L. Meyers, Chief U.S. Bankruptcy Judge, modified and

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<sup>1</sup> A more comprehensive review of the history of this case is set forth in the August 15, 2011 Substitute Omnibus Findings and Conclusions Re: Validity, Priority and Amount of Various Lien and Mortgage Claims.

<sup>2</sup> The petition was filed by Banc of America Leasing & Capital, LLC, Petra, Inc., Hobson Fabricating Corp., TMG/DPMiller, LLC. See Involuntary Petition filed December 11, 2009, *In re: Tamarack Resort, LLC*, Case No. 009-03911-TLM (U.S. Bankruptcy Court for the District of Idaho).

1 partially lifted the automatic stay to permit this Court to determine “the validity, priority and  
2 amount (including attorney’s fees and costs) of any and all mortgages, liens, claims or interests”  
3 regarding Tamarack’s property.<sup>3</sup> About a year later, in January 2011, the bankruptcy court  
4 dismissed the Tamarack bankruptcy proceeding, effectively terminating any stay. This Court has  
5 had full jurisdiction over these proceedings since then.

6 Both before the bankruptcy filing, and pursuant to the authority of the order modifying  
7 the automatic stay, and after the order lifting the stay, the Court entered many rulings concerning  
8 the validity, priority and amount of many of Tamarack’s lien claimants. The court trials of the  
9 foreclosure issues could not be determined by summary judgment took place during portions of  
10 the months of September, October, November and December 2010 and January 2011. On May  
11 11, 2011, the Court entered its Omnibus Findings and Conclusions Re: Validity, Priority and  
12 Amount of Various Lien and Mortgage Claims. As a result of a number of motions to reconsider  
13 and clarify, on August 15, 2011, the Court entered its Substitute Omnibus Findings and  
14 Conclusions Re: Validity, Priority and Amount of Various Lien and Mortgage Claims  
15 (hereinafter the “Substitute Omnibus Decision.”) The Substitute Omnibus Decision resolved the  
16 balance of the issues relating to the validity, priority and amount of the competing lien and  
17 mortgage claims.  
18  
19

20 Pursuant to a further scheduling order, in August 2011, various lien and other claimants  
21 filed motions for awards of costs, attorney’s fees and pre-judgment interest. Motions were filed  
22 by Banner/Sabey II, LLC, Tri-State Electric, Inc., Teufel Nursery, Inc., Kesler Construction, Inc.,  
23

24 <sup>3</sup> See February 3, 2010 Order Regarding the Amended Motion of Credit Suisse, AG for Relief from the Automatic  
25 Stay at 4-5, *In Re: Tamarack Resort, LLC*, Case No. 09-03911-TLM (U.S. Bankruptcy Court for the District of  
26 Idaho).



1 MHTN Architects, Inc., EZA, Inc. d/b/a OZ Architecture of Boulder, Scott Hedrick Construction,  
2 Inc., Banc of America Leasing & Capital, LLC, and North Lake Recreational Sewer and Water  
3 District. Credit Suisse filed its responses and objections in October 2011. Replies were filed in  
4 November 2011.

5 The Court conducted a hearing into the requests for awards of costs, attorney's fees and  
6 pre-judgment interest on December 1, 2011. Randall A. Peterman, Moffatt, Thomas, Barrett,  
7 Rock & Fields, Chartered, Boise, Idaho, Elizabeth N. Walker, *pro hac vice*, Sidley Austin, LLP,  
8 Los Angeles, California, and P. Bruce Badger, *pro hac vice*, Fabian and Clendenin, Salt Lake  
9 City, Utah, appeared for Credit Suisse. John T. John, *pro hac vice*, Graham & Dunn, P.C.,  
10 Seattle, Washington, appeared by telephone conference for Banc of America Leasing & Capital,  
11 LLC, William F. Nichols, White, Peterson, Gigray, Rossman, Nye & Nichols, P.A., Nampa,  
12 Idaho, appeared for North Lake Recreational Sewer and Water District. Bart W. Harwood, Hall,  
13 Farley, Oberrecht & Blanton, P.A., Boise, Idaho and Kevin A. Bay, *pro hac vice*, Ryan, Swanson  
14 & Cleveland, PLLC., Seattle, Washington, appeared for Banner/Sabey II, LLC. Terri R. Pickens,  
15 Pickens Law, P.A., Boise, Idaho, appeared for Teufel Nursery, Inc. David T. Krueck, Trout  
16 Jones Gledhill Fuhrman, P.A., Boise, Idaho, appeared for Kesler Construction, Inc. Michael E.  
17 Band, Davison, Coppel, Coppel & Coppel, Boise, Idaho, appeared for Tri-State Electric, Inc.  
18 Clay M. Shockley, Sasser & Inglis, P.C., Boise, Idaho, appeared for MHTN Architects, Inc. John  
19 K. Olson, Hawley Troxell Ennis & Hawley, LLP, Boise, Idaho, appeared for EZA, Inc. d/b/a OZ  
20 Architecture of Boulder. Scott Hedrick Construction, Inc.'s motion was submitted without  
21 argument or opposition. The Court took the various motions under advisement.  
22  
23  
24  
25

foreclosure. Therefore, the Court will approve of an award of costs for the balance of the copying costs, in the amount of \$5,633.35.<sup>17</sup>

### 3. Prejudgment Interest

Banner/Sabey also filed a motion asserting that it is entitled to prejudgment interest on its unpaid invoices at either the statutory rate of twelve per cent (12%)<sup>18</sup> or the alternative rate as provided in a Memorandum of Understanding ("MOU") document entered into between Banner/Sabey and Tamarack.<sup>19</sup> Credit Suisse concedes that Banner/Sabey is entitled to an award of pre-judgment interest. However, Credit Suisse contends that Banner/Sabey's calculations are flawed. In its opposition, Credit Suisse points out that there were two (2) MOUs and that the second MOU controls.<sup>20</sup> According to Credit Suisse, using the rate provided in the second MOU, the applicable interest rate for Pay Applications 6, 7, 9, 12, 15 and 16 would be prime plus 1%. Credit Suisse agrees that the applicable rate of interest on the other invoices is 12%. Additionally, Credit Suisse contends that the court should use a variable prime rate of interest since the reference rate for prime rate - the U.S. Prime Rate - changes regularly. In reply, Banner/Sabey agrees that the prime plus 1% in the second MOU applies to Pay Applications 6, 7,

<sup>17</sup> \$14,066.50 - \$8,433.15 = \$5,633.35

<sup>18</sup> "(1) When there is no express contract in writing fixing a different rate of interest, interest is allowed at the rate of twelve cents (12¢) on the hundred by the year on:

1. Money due by express contract.
2. Money after the same becomes due.
3. Money lent.
4. Money received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied.
5. Money due on the settlement of mutual accounts from the date the balance is ascertained.
6. Money due upon open accounts after three (3) months from the date of the last item." Idaho Code § 28-22-104.

<sup>19</sup> This MOU was introduced as Trial Exhibit 2:004.

<sup>20</sup> The second MOU was introduced as Trial Exhibit 2:005.

1 9, 12, 15 and 16. However, Banner/Sabey argues that the court should not apply a variable rate  
2 once the applicable prime rate is identified. Rather, Banner/Sabey argues that the court should  
3 apply the prime rate that existed at the times the payments became overdue, and the Court should  
4 use that rate for the remainder of the calculations.

5 As an exercise of discretion, the Court will apply a variable prime rate in determining an  
6 award of prejudgment interest to Banner/Sabey. Banner/Sabey argues that the parties did not  
7 agree to a variable rate. The Court does not agree. The prime rate, by its very nature, is a  
8 variable rate, and changes regularly over time. According to information found at  
9 [www.fedprimerate.com](http://www.fedprimerate.com):  
10

11 The U.S. Prime Rate is a commonly used, short-term interest rate in the  
12 banking system of the United States. All types of American lending institutions  
13 (traditional banks, credit unions, thrifts, etc.) use the U.S. Prime Rate as an index  
14 or foundation rate for pricing various short- and medium-term loan products. The  
15 Prime Rate is consistent because banks want to offer businesses and consumers  
16 loan products that are both profitable and competitive. A consistent U.S. Prime  
17 Rate also makes it easier and more efficient for individuals and businesses to  
18 compare similar loan products offered by competing banks.

19 When newspapers, academics, investors and economists refer to the  
20 National, Fed, U.S. or WSJ Prime Rate, it is widely accepted that they are in fact  
21 referring to The United States Prime Rate as listed in the Eastern print edition of  
22 the Wall Street Journal® (WSJ). Furthermore, each U.S. state does not have its  
23 own individual Prime Rate, so the "New York Prime Rate" or the "California  
24 Prime Rate" are in fact the same as the United States Prime Rate.

25 Prior to mid-December 2008, the WSJ Prime Rate was determined by  
26 polling thirty (30) of America's largest banks. When twenty-three (23) of those 30  
banks had changed their prime lending rate, The WSJ would respond by updating  
its published Prime Rate. Effective December 16, 2008, however, the WSJ now  
determines the Prime Rate by polling the 10 largest banks in the United States.  
When at least 7 out of the top 10 banks have changed their Prime, the WSJ will  
update its published Prime Rate.

27 [www.fedprimerate.com](http://www.fedprimerate.com) (accessed January 16, 2012). By definition the prime rate changes

1 regularly over time. Exhibit B to the October 28, 2011 Affidavit of Jess A. Cheney shows the  
2 history of the prime rate from December 1947 until the present time. The rate has fluctuated  
3 greatly up and down over time.

4 The purpose of pre-judgment interest is to compensate an injured party for the time value  
5 of money. *Stueve v. N. Lights, Inc.*, 122 Idaho 720, 722-23, 838 P.2d 323, 325-26 (Ct. App.  
6 1992). Where, as here, the parties have specified a rate tied to prime, the purpose of awarding  
7 pre-judgment interest is best served by applying a variable rate. This rate more closely correlates  
8 to the actual loss sustained by the party who is owed money. A fixed rate can easily  
9 overcompensate or undercompensate an injured party for the time value of money depending  
10 upon what the fixed rate is on the date of an injury or loss. *See Pimentel v. Jacobsen Fishing*  
11 *Co., Inc.*, 102 F.3d 638, 640 (1st Cir. 1996) (use of variable prime rate for calculation of  
12 prejudgment interest affirmed).

14 As set forth in the table attached as Exhibit C to the October 28, 2011 Affidavit of Jess A.  
15 Cheney, the Court will award pre-judgment interest in the amount of \$1,948,799.02 through  
16 September 30, 2011. Thereafter, the Court will award the per diem as calculated in the affidavit.

18 **B. Tri-State Electric, Inc. ("Tri-State Electric")**

19 Tri-State Electric was the electrical sub-contractor for both the Lake Wing Plaza and the  
20 Village Plaza Project. Tri-State also provided a wide range of other electrical services for  
21 Tamarack, including electrical work for the Lodge at Osprey Meadows. Tri-State filed three (3)  
22 lien claims: a general lien claim asserted against all of Tamarack's property for various work  
23 (Instrument No. 330136), a Lake Wing lien (Instrument No. 330116), and a Village Plaza lien  
24 (Instrument Nos. 330135, 331827). Credit Suisse named Tri-State Electric as a defendant in the  
25

Village Plaza lien.

### 3. Prejudgment Interest

Kesler asserts it is entitled to prejudgment interest in the amount of 12%. Kesler calculates prejudgment interest in the amount of \$5,486.25 through May 18, 2011, with per diem interest being calculated at \$4.75. Credit Suisse does not object to the award of prejudgment interest or Kesler's calculation. The Court will grant prejudgment interest as requested by Kesler.

### F. Teufel Nursery, Inc. ("Teufel")

Teufel Nursery provided landscaping and other services to Tamarack beginning in 2004. The central issue involving Teufel's lien claim was whether the Teufel lien had priority over the Credit Suisse Valley County. Prior to trial, the Court denied motions filed by both Credit Suisse and Teufel concerning this issue. Ultimately, the Court concluded that Teufel's lien was subsequent and inferior to the Credit Suisse mortgages.<sup>44</sup> The Court also determined that the amount of the lien was \$306,543.30.<sup>45</sup>

### 1. Attorney's Fees

Teufel seeks an award of attorney's fees under Idaho Code §§ 45-513 and 12-120. As discussed earlier in this decision, as a successful lien claimant, Teufel is entitled to an award of fees under Idaho Code § 45-513. Teufel seeks an award of \$270,942.00 consisting of fees incurred with Pickens Law, P.A. (\$191,383.25), The Law Office of W. John Thiel, PLLC, (\$37,768.25) and Eberle, Berlin, Kading, Turnbow & McKlveen, Chtd., (\$42,140.50). Teufel

<sup>44</sup> See Substitute Omnibus Decision at 19-22.

<sup>45</sup> *Id.* at 22-37.

1 submitted detailed billing records in support of its requests. In opposition, Credit Suisse argues  
2 that Teufel's fee request should be reduced because Teufel only partially prevailed, in that Teufel  
3 did not prove its entire lien amount. Credit Suisse argues that the fee request should be further  
4 reduced because a portion of the fees charged by the Eberle Berlin and Pickens firms were related  
5 to releasing Teufel's liens on about forty (40) parcels that should not have been liened in the first  
6 place, or that were settled. Credit Suisse argues that the fees should be reduced because some of  
7 the fees were incurred in connection with a motion to amend that was not granted. Lastly, Credit  
8 Suisse argues that no fees should be awarded for participation in the Tamarack involuntary  
9 bankruptcy.  
10

11 In reply, Teufel concedes that some reduction of the Eberle Berlin fees would be  
12 appropriate for the fees associated with lien releases. Teufel argues that Pickens' fees for the lien  
13 releases should be allowed. Teufel argues that the fees associated with the motion to amend and  
14 the bankruptcy should be allowed as incident to the foreclosure.

15 Idaho Rule of Civil Procedure 54(d)(1)(B) provides guidance for determining whether a  
16 party prevailed as follows:

17 In determining which party to an action is a prevailing party and entitled to costs,  
18 the trial court shall in its sound discretion consider the final judgment or result of  
19 the action in relation to the relief sought by the respective parties. The trial court  
20 in its sound discretion may determine that a party to an action prevailed in part  
21 and did not prevail in part, and upon so finding may apportion the costs between  
22 and among the parties in a fair and equitable manner after considering all of the  
23 issues and claims involved in the action and the resultant judgment or judgments  
24 obtained.

25 I.R.C.P. 54(d)(1)(B). Moreover, the prevailing party question should be determined "from an  
26 overall view, not a claim-by-claim analysis." *Crump v. Bromley*, 148 Idaho 172, 174, 219 P.3d  
1188, 1190 (2009) (quoting *Shore v. Peterson*, 146 Idaho 903, 914, 204 P.3d 1114, 1125 (2009)).

1 The determination of who is the prevailing party is committed to the trial court's discretion. In  
 2 addition, when both parties are partially successful, "it is within the court's discretion to decline  
 3 an award of attorney fees to either side." *Id.*

4 With this guidance, the Court will take an overall view of this action. The Court will not  
 5 allow or disallow fees on an issue-by-issue basis. Also, for the reasons stated earlier in this  
 6 decision, the Court will allow fees incurred in the bankruptcy proceeding. The Court agrees that  
 7 fees incurred to release liens should not be charged against the property.

8 Lastly, as an exercise of discretion, the Court will find that Teufel only partially  
 9 prevailed. While it did not prove the entire amount of its lien, the Court will find that Teufel is a  
 10 partially prevailing party because Teufel did not prevail on the most important issue: whether  
 11 Teufel has priority over the bank. Teufel does not have priority. As a practical matter, the lack  
 12 of priority will mean it will be very unlikely that Teufel will participate in any foreclosure  
 13 proceeds. I.R.C.P. 54(d)(1)(B) provides that if a party partially prevailed, the district court may  
 14 "apportion the costs between and among the parties in a fair and equitable manner after  
 15 considering all of the issues and claims involved in the action and the resultant judgment or  
 16 judgments obtained." *Hughes v. Fisher*, 142 Idaho 474, 485, 129 P.3d 1223, 1234 (2006).  
 17  
 18

19 Taking all of the foregoing into account, as an exercise of discretion, and having reviewed  
 20 the detailed billing records, the Court will make the following awards to Teufel reflecting an  
 21 overall reduction of 40% of the fee requests:

22	Pickens Law	\$ 114,829.95
23	W. John Thiel	\$ 22,660.95
24	Eberle Berlin <i>et al</i>	<u>\$ 25,284.30</u>

**Total                      \$ 162,775.20**

1    The reduction accounts for fees charged for lien releases as well as for not prevailing as to  
 2 priority.  
 3

**2. Costs**

4    Teufel requests an award of costs as a matter of right in the amount of \$4,329.23. Credit  
 5 Suisse does not object to an award of these costs. The Court will award these costs as a matter of  
 6 right.  
 7

8    Teufel requests an award of discretionary costs in the amount of \$8,843.27. This amount  
 9 includes legal research in the amount of \$593.71. Credit Suisse objects to requests for the  
 10 following costs: 1) the copying charges (\$5,206.68); 2) travel costs for a deposition (\$292.10);  
 11 and 3) the cost of trial preparation supplies (\$140.30). Credit Suisse also argues that the total of  
 12 discretionary costs awarded should be reduced because Teufel only prevailed in part.  
 13

14    The Court will disallow the request for trial preparation supplies because such costs  
 15 appear to be ordinary and usual, not exceptional. The Court will disallow the request for legal  
 16 research, since this item is included as part of the reduced fees which the Court approved. In all  
 17 other respects, the Court will find that the discretionary costs were necessary and exceptional,  
 18 reasonably incurred and should, in the interest of justice, become part of the foreclosure.  
 19

20 However, the Court will reduce the award of discretionary costs by 40% because Teufel only  
 21 prevailed in part. Accordingly, as an exercise of discretion, the Court will award the following  
 22 discretionary costs:  
 23  
 24  
 25



1	Total requested:	\$ 8,843.27
2	Less	-\$593.71 (legal research)
3	Less	<u>-\$140.30</u> (trial preparation supplies)
4	Subtotal	\$ 8,109.26
5	Less 40%	<u>-\$ 3,243.70</u>
6	<b>Total Award</b>	<b>\$ 4,865.56</b>

### 3. Prejudgment Interest

8 Teufel's contract provides for prejudgment interest at a rate "equal to the prime rate  
9 established by Wells Fargo Bank in Boise, Idaho plus two percent (2%). Credit Suisse does not  
10 object to the request for prejudgment interest, but asserts that Teufel should have used a variable  
11 prime rate to determine the amount. Teufel used the prime rate that was in effect at the various  
12 times that invoices became overdue, but did not adjust that rate as the prime declined over time.  
13

14 Teufel objects to the opposition filed by Credit Suisse, arguing that it was untimely.  
15 According to the September 13, 2011 Further Scheduling Order, the opposition was to have been  
16 filed on or before October 15, 2011. The Credit Suisse opposition was filed on November 9,  
17 2011. As an exercise of discretion, the Court will permit the late filing. This issue has been  
18 raised in several of the other applications for prejudgment interest. Teufel does not assert that it  
19 has been prejudiced by the late filing, and the Court would have given Teufel more time to reply  
20 if needed.  
21

22 For the reasons stated earlier in this decision, the Court will allow pre-judgment interest  
23 at the variable rates set forth by Credit Suisse.  
24  
25

### G. Banc of America Leasing & Capital, LLC ("BALC")

1  
2 In October and November 2006, BALC participated in a financing arrangement involving  
3 certain equipment located at the resort including two (2) chairlifts, two (2) passenger shuttle  
4 buses and other equipment. As described in the financing documents, Tamarack sold the  
5 equipment to BALC, and BALC leased the equipment back to Tamarack on a long term basis.  
6 The leases were guaranteed by Tamarack's principals including Jean Pierre Boespflug  
7 ("Boespflug"), Tamarack's chief executive officer.

8  
9 In March 2008, Credit Suisse named BALC as a defendant in the original foreclosure  
10 complaint. In the complaint, Credit Suisse alleged that BALC's interests were subordinate to the  
11 Credit Suisse mortgage.<sup>46</sup> In its answer, BALC denied that the Credit Suisse mortgage had  
12 priority.<sup>47</sup> BALC did not file a cross-claim against Tamarack.

13 On March 9, 2009, BALC filed a Complaint for Breach of Contract and for Claim and  
14 Delivery in a separate action in Valley County, *Banc of America Leasing and Capital, LLC v.*  
15 *Tamarack Resort, LLC, et al*, Valley County Case No. CV-2009-114-C. In this action, BALC  
16 asserted it was the owner of the equipment described above. The defendants included Tamarack  
17 and Tamarack's principals who guaranteed the BALC leases.<sup>48</sup> This case has been assigned to  
18 Fourth District Judge McLaughlin. BALC refers to this as the "Guarantor Action."  
19

20 On June 18, 2009 Tamarack filed a motion to consolidate the Guarantor action with these  
21 proceedings. Later, this Court denied the motion to consolidate.  
22  
23

24 <sup>46</sup> See Credit Suisse Complaint, Valley County Case No. CV-2008-114C, at 8, ¶ 20.

25 <sup>47</sup> See BALC Answer filed April 1, 2008 at 2, ¶ 1.

26 <sup>48</sup> At the time of the filing of this case, this Court had appointed a Receiver, Douglas P. Wilson, for Tamarack in the original foreclosure action. The BALC complaint also named Tamarack's Receiver as a defendant.





