

11-23-2015

# Union Bank, N.A. v. JV L.L.C. Respondent's Brief Dckt. 42479

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IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 42479-2014

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UNION BANK, N.A., a national banking association,

Plaintiff/Respondent,

v.

JV L.L.C., an Idaho limited liability company,

Defendant/Appellant.

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**RESPONDENT'S BRIEF**

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Appeal from the District Court of the First Judicial District for Bonner County

Case No. 2011-0135

The Honorable Michael J. Griffin, District Judge

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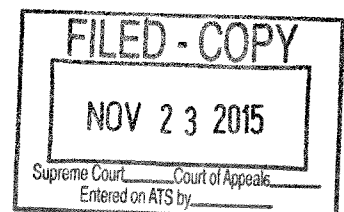
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## I. STATEMENT OF THE CASE

### A. Nature of the case.

Respondent Union Bank, N.A., through its predecessors (collectively “Union Bank”), filed this action to foreclose a mortgage on property known as “Trestle Creek.” Appellant JV L.L.C. (“JV”) claimed priority to the Trestle Creek property through an earlier mortgage. The trial court found that Union Bank’s mortgage was recorded after JV’s mortgage but that JV entered into a valid subordination agreement to reduce the priority of its lien to Union Bank’s lien. In so ruling, the trial court denied JV’s motion for judgment on the pleadings, granted Union Bank’s motion for summary judgment, and denied JV’s motion for reconsideration. In addition, after summary judgment and reconsideration, the trial court denied JV’s motion to compel discovery of an unredacted settlement agreement and refused to allow JV to participate in a trial involving Union Bank.

On appeal, JV contends the trial court erred every step of the way, but the record does not support its arguments. Union Bank was a party and third-party beneficiary to the subordination agreement, and contrary to JV’s arguments, the agreement was executed and supported by consideration. JV cannot avoid the subordination of its mortgage. In addition, JV’s allegations of fraud in the inducement of the subordination agreement are not directed to Union Bank, but a third-party borrower, and do not support setting aside the subordination agreement. The evidence presented by JV simply does not create genuine issues of material fact as to the validity or enforceability of its subordination agreement.

JV's remaining contentions involve the trial court's decision to preclude JV from the trial involving Union Bank. Even though JV's issues had been fully decided on summary judgment and reconsideration, it still maintains the trial court violated its due process rights. Again the evidence does not support these allegations. The issues of priority that lay between Union Bank and JV were fully resolved, and JV had no further interest in the trial. The Court should affirm the trial court on all issues.

**B. Statement of facts and course of proceedings.**

**1. In 2005, NIR sold a golf course and surrounding property to Pend Oreille Bonner Development, LLC for the development of the Idaho Club.**

JV once owned the Hidden Lakes Golf Course and a nearby property known as "Moose Mountain." *See* R.Vol.6 at 1380.<sup>1</sup> Both properties are located above the shores of Lake Pend Oreille near Sandpoint, Idaho. R.Vol.5 at 1035-38. In 1995, JV sold the properties to Richard Vilelli and his related entities (collectively, "Vilelli") for \$2,264,500. R.Vol.6 at 1380. Vilelli's debt to JV was secured by a first priority mortgage on the Moose Mountain property. R.Vol.6 at 1380-81; Ex. B, D.

Vilelli was the managing member of North Idaho Resorts LLC ("NIR"). *See* R.Vol.2 at 449. In January 2005, NIR sold the golf course, the Moose Mountain property, and a nearby lakefront property known as "Trestle Creek" to Pend Oreille Bonner Investments, LLC, pursuant

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<sup>1</sup> The Clerk's Record on Appeal is cited as "R.Vol.1" for volume 1, "R.Vol.2" for volume 2, and so on. The Clerk's Supplemental Record on Appeal is cited as "Supp.R." There are three volumes of Reporter's Transcripts on Appeal and are cited as "Tr.Vol.1" and so on. Trial exhibits are cited as "Ex." JV's Appellant's Opening Brief is cited as "AOB." Union Bank also includes an appendix with the key documents of this appeal.

to a Real Property Purchase and Sale Agreement. R.Vol.2 at 421-82. Pend Oreille Bonner Investments, LLC, assigned the property to Pend Oreille Bonner Development, LLC (“POBD”).<sup>2</sup> POBD planned to redesign the golf course, develop residential units on the Moose Mountain and Trestle Creek properties, and rebrand the development as the Idaho Club. R.Vol.5 at 1035-38.

Pursuant to its purchase and sale agreement with NIR, POBD assumed payment responsibility for two existing loans: the loan payable to JV (in an amount of \$2,565,000) and a loan payable to R.E. Loans, LLC (in an amount of \$8,515,000). R.Vol.2 at 447. When POBD assumed JV’s loan to Vilelli as part of the agreement, POBD obtained the Moose Mountain property subject to JV’s first priority mortgage on the property. R.Vol.6 at 1380. Following the sale, JV subordinated its lien on the Moose Mountain property to R.E. Loans in exchange for a first priority mortgage on the Trestle Creek property. R.Vol.6 at 1380-85; Supp.R. at 79-84; Ex. D. R.E. Loans also obtained a mortgage to the Trestle Creek property, which was subordinate to JV’s mortgage. R.Vol.5 at 1094.

**2. In March 2008, POBD granted Pacific Capital Bank, Union Bank’s predecessor, a mortgage to the Trestle Creek property to secure a \$5 million note.**

Union Bank entered the picture in October 2007. At that time, Union Bank’s predecessor Pacific Capital Bank, N.A. (“Pacific Capital Bank”) granted POBD a \$5 million revolving line of

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<sup>2</sup> POBD is the developer of the Idaho Club. R.Vol.5 at 1037. Pend Oreille Bonner Development Holdings, Inc. (“POBD Holdings”) is the sole and managing member of POBD. *Id.* Some of the documents relevant to this appeal were executed by POBD and some by POBD Holdings. R.Vol.6 at 1380-85. POBD Holdings assigned its interests to POBD for the purpose of developing the Idaho Club. R.Vol.5 at 1037. For that reason, and for simplicity, Union Bank refers to POBD Holdings and POBD collectively as POBD throughout this brief.

credit. R.Vol.5 at 1035-38; R.Vol.6 at 1251-1301. Then, in March 2008, Pacific Capital Bank, converted POBD's line of credit into a \$5 million loan under a revolving term note. R.Vol.5 at 1028; R.Vol.1 at 137-42. The note was due and payable two years later and secured by a mortgage to the Trestle Creek property. R.Vol.5 at 1028; R.Vol.1 at 143-58. The mortgage was recorded in Bonner County on March 25, 2008, as Instrument Nos. 748379 and 748380. Supp.R.62-77. That same day, Pacific Capital Bank obtained a title insurance policy using the legal description of the Trestle Creek property. R.Vol.5 at 1087-90. The title insurance policy reports the mortgages of JV and R.E. Loans as prior liens on the property. *Id.* at 1094.

**3. In June and July 2008, JV agreed to subordinate its first priority mortgage on the Trestle Creek property to Pacific Capital Bank's mortgage.**

In June 2008, JV and POBD entered into the "Third Amendment to Indebtedness and to Real Estate Security, and Subordination Agreement." R.Vol.6 at 1380-85. James Berry, a member of JV, signed the agreement on JV's behalf, and it was recorded in the records of Bonner County on June 24, 2008. *Id.* at 1384, 1232-36. Under the agreement, JV agreed to subordinate its first priority lien on the Trestle Creek property, as evidenced by JV's mortgage, to a lien of no more than \$5 million. *Id.* at 1382. In exchange for signing the agreement, JV received \$30,000, along with an increased interest rate on its loan to POBD. *Id.*

The next month, JV executed another subordination agreement to subordinate its lien on the Trestle Creek property—this agreement was simply called the "Subordination Agreement." Supp.R. at 86-93. Again, Berry signed the agreement on behalf of JV. *Id.* The Subordination Agreement provides that, in consideration of Pacific Capital Bank's loans and advances to

POBD, JV subordinates its mortgage on the Trestle Creek property to Pacific Capital Bank's mortgage. *Id.* The Subordination Agreement was signed by JV and POBD but not by Pacific Capital Bank. *Id.* It was recorded in Bonner County on August 6, 2008, as Instrument No. 756403. *Id.*

**4. Pacific Capital Bank, N.A. filed an action against JV and others to foreclose the Trestle Creek property and prevailed on summary judgment.**

POBD defaulted on Pacific Capital Bank's loan. R.Vol.1 at 103-04. In May 2011, Pacific Capital Bank filed a complaint to foreclose all title and interest in the Trestle Creek property and sought judgment against POBD in the full amount due and owing.<sup>3</sup> *Id.* at 122-36. Because there were numerous liens on the property, Pacific Capital Bank also named the lienholders as defendants, including JV and NIR. *See id.* JV answered and denied that its mortgage was junior to Pacific Capital Bank's mortgage. *Id.* at 184-94. JV also brought a counterclaim alleging its mortgage's priority. *Id.* Pacific Capital Bank replied, denying the allegations. R.Vol.3 at 623-29. JV also brought a cross-claim against NIR, asserting priority to NIR's interest in the Trestle Creek property. R.Vol.1 at 192.

During the litigation, Pacific Capital Bank formally changed its name to Santa Barbara Bank & Trust, N.A., R.Vol.3 at 676-77, and then Santa Barbara Bank & Trust, N.A. formally changed its name to Union Bank, *id.* at 702-03. (We refer to Union Bank and its predecessors collectively as "Union Bank" for the remainder of this brief.) Except for JV and NIR, the

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<sup>3</sup> Pacific Capital Bank's complaint also sought to reform the legal description of the Trestle Creek property based on a scrivener's error. R.Vol.1 at 129-30. Reformation of the legal description was not contested and was granted. *See* R.Vol.6 at 1352; R.Vol.8 at 1784.



remaining defendants either defaulted or stipulated that Union Bank's mortgage has priority over any lien they may have had on the Trestle Creek property. Union Bank obtained a default judgment and decree of foreclosure against POBD in April 2013. R.Vol.4 at 818-22. It obtained default judgments against other defendants in May 2013. *Id.* at 930-34.

In March 2013, JV moved for a judgment on the pleadings. R.Vol.3 at 705-06, 708-16, 717-21. After hearing the motion, the trial court denied it. Tr.Vol.1 at 5-13; R.Vol.4 at 927-28. Following discovery, Union Bank moved for summary judgment against JV and NIR. R.Vol.4 at 940-41; Supp.R. at 43-54. The trial court heard the motions and granted Union Bank summary judgment against JV but denied summary judgment against NIR. Tr.Vol.1 at 14-55; R.Vol.6 at 1340-43, 1345, 1352. With respect to JV, the trial court found that JV agreed to subordinate the priority of its mortgage to Union Bank's mortgage pursuant to the Subordination Agreement. R.Vol.6 at 1343.

Thereafter JV filed a motion to alter and amend the trial court's order on summary judgment and a motion to reconsider. R.Vol.6 at 1361-88. The trial court heard and denied the motions, again finding that Union Bank's mortgage held priority to JV's mortgage based on JV's Subordination Agreement. Tr.Vol.1 at 56-100; R.Vol.7 at 1479-83, 1484-85.

In March 2014, JV filed a motion to compel Union Bank to produce a global settlement agreement it had reached with POBD and the guarantors to the loan. R.Vol.7 at 1504-20. In response, Union Bank moved for a protective order. Supp.R. at 148-53, 154-63. After reviewing the settlement agreement, the trial court ordered Union Bank to provide a redacted

copy of the agreement to JV and also granted Union Bank's motion for a protective order.

R.Vol.7 at 1539-40; *see* Ex. SSS.

A court trial was set for May 2014. *See* Tr.Vol.1 at 98-99. Two weeks before the court trial was set to begin, JV filed a pre-trial memorandum and witness and exhibit lists. R.Vol.7 at 1551-61. On April 30, 2014, and filed on May 1, 2014, the trial court issued a letter to counsel. R.Vol.7 at 1572. The letter provided that the first issues to be tried were Union Bank's claims against NIR. *Id.* The letter explained that "[n]one of the issues between JV, LLC and Union Bank will be re-litigated. The court's prior summary judgment disposed of all issues between JV, LLC and Union Bank. JV, LLC may be present in the courtroom as a spectator, but will not be at counsel table." *Id.*

The matter proceeded to court trial on May 12, 2014. At the start of the trial, consistent with its earlier letter, the trial court noted its intention to have a bifurcated trial. Tr.Vol.2 at 106:22-23. According to the trial court, trial would start with Union Bank's claims against NIR. *Id.* at 106:23-24. The issue of priority between JV and NIR would be tried next. *Id.* at 106:23-107:10. The court trial between JV and NIR took place on May 13, 2014. Tr.Vol.3 at 395-464.

Following trial, the trial court entered findings of fact and conclusions of law. R.Vol.8 at 1718-23. The trial court held that Union Bank's mortgage was superior in priority to any vendor's lien held by NIR and that JV's mortgage was superior to NIR's lien. *Id.* at 1722. The trial court entered a judgment and decree of foreclosure as to all defendants on June 14, 2014. R.Vol.8 at 1724-31. The judgment holds that Union Bank has a first priority lien on the Trestle Creek property and that the property is subject to foreclosure by Union Bank. *Id.* On June 25,

2014, the trial court entered a final judgment as to JV and JV appealed. R.Vol.8 at 1718-23, 1724-31, 1750-60.<sup>4</sup> The Court later consolidated this appeal with an appeal brought by NIR, *Union Bank, N.A. v. NIR*, Docket No. 42467, only for the purposes of preparing the Clerk's Record and Reporter's Transcript.

## II. ISSUES PRESENTED ON APPEAL

1. Did the trial court err in denying JV's motion for judgment on the pleadings when the pleadings raised an issue regarding the priority of Union Bank's and JV's mortgages?
2. Did the trial court err in granting Union Bank's motion for summary judgment based on JV's Subordination Agreement?
3. Did the trial court err in denying JV's motion for reconsideration when JV did not allege fraud by Union Bank but fraud by POBD?
4. Did the trial court abuse its discretion by allowing discovery of a redacted settlement agreement?
5. Did the trial court violate JV's procedural due process rights by excluding it from trial and bifurcating trial despite having resolved all issues between Union Bank and JV?
6. Is Union Bank entitled to attorney fees on appeal pursuant to Idaho Code §§ 12-120(3) and 12-121?

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<sup>4</sup> The Court conditionally dismissed JV's notice of appeal twice for lack of a valid final judgment. R.Vol.8 at 1776-77, 1804-05. A proper final judgment was entered by the trial court on October 27, 2014. *Id.* at 1806-09.

### III. STANDARDS OF REVIEW

Judgment on the pleadings. On a motion for judgment on the pleadings, the moving party admits the allegations of the opposing party's pleadings and also admits the untruth of its own allegations to the extent they have been denied. *Sterling v. Bloom*, 111 Idaho 211, 212, 723 P.2d 755, 756 (1986) (superseded on other grounds by statute). "A judgment on the pleadings is properly granted when, taking all allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." *Student Loan Fund of Idaho, Inc. v. Duerner*, 131 Idaho 45, 49, 951 P.2d 1272, 1276 (1997). The Court reviews a trial court's ruling on a motion for judgment on the pleadings de novo. *Id.* at 49, 951 P.2d at 1276.

Summary judgment. The Court reviews a trial court's grant of summary judgment under the same standard applied by the trial court. *Bank of Commerce v. Jefferson Enters., LLC*, 154 Idaho 824, 828, 303 P.3d 183, 187 (2013). Summary judgment is appropriate when the pleadings, affidavits, and discovery documents show "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). The Court has further explained:

The burden of proving the absence of material facts is upon the moving party. The adverse party, however, "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in [Idaho Rule of Civil Procedure 56], must set forth specific facts showing that there is a genuine issue for trial." The moving party is therefore entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial.

*Big Wood Ranch, LLC v. Water Users' Ass'n of Broadford Slough & Rockwell Bypass Lateral Ditches, Inc.*, 158 Idaho 225, 345 P.3d 1015, 1019 (2015) (citation omitted).

When an action will be tried as a court trial, “the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences.” *Id.*

“Drawing probable inferences under such circumstances is permissible because the court, as the trier of fact, would be responsible for resolving conflicting inferences at trial.” *Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 416, 283 P.3d 728, 733 (2012) (citation omitted).

Thus, the trial court is “not required to draw all reasonable inferences in favor of the non-moving party.” *Hilliard v. Murphy Land Co.*, 158 Idaho 737, 351 P.3d 1195, 1202 (2015). As such, the Court “reviews the inferences drawn by the district judge to determine whether the record reasonably supports those inferences.” *Big Wood Ranch*, 345 P.3d at 1019 (citation omitted).

Motion for reconsideration. When reviewing a motion for reconsideration, the Court utilizes “the same standard of review used by the lower court in deciding the motion for reconsideration.” *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (citation omitted). “Thus, when the district court grants summary judgment and then denies a motion for reconsideration . . . the ‘Court reviews the district court’s denial of a motion for reconsideration de novo.’” *Id.* at 545, 328 P.3d at 525 (citation omitted). The Court “must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment.” *Id.* (citation omitted).

Discovery motions. “Control of discovery is within the discretion of the trial court.”” *McCann v. McCann*, 152 Idaho 809, 821, 275 P.3d 824, 836 (2012) (citation omitted). Thus, the Court reviews a trial court’s decision granting or denying a motion to compel and a motion for a protective order for an abuse of discretion. *Villa Highlands, LLC v. W. Cmty. Ins. Co.*, 148 Idaho 598, 609, 226 P.3d 540, 551 (2010) (motion to compel); *Westby v. Schaefer*, 157 Idaho 616, 621, 338 P.3d 1220, 1225 (2014) (motion for protective order). The Court considers three factors to determine whether a trial court abused its discretion: “whether (1) the court correctly perceived the issue as one of discretion; (2) the court acted within the boundaries of such discretion and consistently with legal standards . . .; and (3) the court reached its decision by an exercise of reason.”” *McCann*, 152 Idaho at 821, 275 P.3d at 836 (citation omitted).

#### IV. ATTORNEY FEES ON APPEAL

As explained in Section V.F. below, Union Bank requests an award of attorney fees on appeal pursuant to Idaho Code §§ 12-120(3) and 12-121.

#### V. ARGUMENT

**A. Because the trial court must take the allegations in Union Bank’s pleadings as true, it did not err in denying JV’s motion for judgment on the pleadings.**

After noting that it did not consider “any matters outside of the pleadings,” the trial court denied JV’s motion for judgment on the pleadings. R.Vol.4 at 927-28. The trial court reasoned that Union Bank “claims to have the right to foreclose against JV, and that is an issue that has been framed for trial.” *Id.* On appeal, JV contends the trial court erred because Union Bank’s pleadings did not present any factual allegations that JV’s mortgage was subordinate to Union Bank’s mortgage. AOB at 12-14. The record does not support that argument.

As noted, on a motion for judgment on the pleadings, all allegations in the pleadings must be considered true. *Sterling*, 111 Idaho at 212, 723 P.2d at 756. Judgment on the pleadings is proper “where the pleadings show upon their face that the party is entitled to recover without proof.” *Davenport v. Burke*, 27 Idaho 464, 149 P. 511, 515 (1915) (“In other words, a judgment on the pleadings is allowable, not because of lack of proof, but because of lack of an issue.”). On the other hand, judgment on the pleadings is improper “[w]here issues of fact are raised by the pleadings, which require evidence to establish before the court could intelligently determine” who is entitled to judgment. *Id.*

There is also the principle that “a claim for relief need contain only ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’”<sup>5</sup> *Gillespie v. Mountain Park Estates, L.L.C.*, 138 Idaho 27, 30, 56 P.3d 1277, 1280 (2002) (citation omitted); I.R.C.P. 8(a)(2). “‘A party’s pleadings should be liberally construed to secure a ‘just, speedy and inexpensive’ resolution of the case.’” *Gillespie*, 138 Idaho at 30, 56 P.3d at 1280 (citation omitted); I.R.C.P. 1(a). In determining the validity of a complaint, the key issue is whether the adverse party is put on notice of the claims brought against it. *Gibson v. Ada Cty. Sheriff’s Dep’t*, 139 Idaho 5, 9, 72 P.3d 845, 849 (2003).

Taking the allegations in Union Bank’s pleadings as true, Union Bank was entitled to foreclosure of the Trestle Creek property and held priority to the property over JV’s mortgage.

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<sup>5</sup> “The technical rules of pleading have long been abandoned in Idaho, and the ‘general policy behind the current rules of civil procedure is to provide every litigant with his or her day in court.’” *Brown v. City of Pocatello*, 148 Idaho 802, 807, 229 P.3d 1164, 1169 (2010) (quoting *Clark v. Olsen*, 110 Idaho 323, 325, 715 P.2d 993, 995 (1986)).

R.Vol.1 at 132. JV was on notice of the allegations. Union Bank claimed JV's mortgage "may be impacted, and the rights related thereto foreclosed by the plaintiff." *Id.* Union Bank prayed for a determination that its lien was "valid, enforceable and existing as against the Defendants and the property described herein, and for a decree of foreclosure." *Id.* at 135. Also in its answer, JV raised the issue of priority between it and Union Bank: "JV denies . . . Plaintiff's allegation that its Mortgage is senior and superior to the interest of JV . . . JV's mortgage is recorded first in time as concerns the real estate." *Id.* at 189.

Further, JV asserted a counterclaim against Union Bank, by which JV claimed its mortgage had priority and that Union Bank "gave no consideration and has no enforceable right against JV." *Id.* at 192. In its reply, Union Bank denied those allegations. R.Vol.3 at 626. In addition, Union Bank alleged, as an affirmative defense, "that JV prepared, assisted in the preparation of, and/or caused to be executed and recorded that certain Subordination Agreement as alleged in the First Amended Complaint of the Bank thereby relinquishing its priority in the recorded title records to the claims of the Bank as related to the real property that is the subject matter of this action." *Id.* at 628. JV clearly had notice of Union Bank's claims.

Based on the pleadings, the priority of Union Bank's and JV's mortgages was an issue raised and in dispute. Determining priority required the submission of evidence and could not be judged based solely on the pleadings due to Union Bank's assertion of its right to foreclose against JV. Taking Union Bank's allegations as true, the trial court properly found that JV was not entitled to judgment as a matter of law and properly denied JV's motion for judgment on the pleadings.



**B. The district court properly granted Union Bank’s motion for summary judgment because JV’s Subordination Agreement was enforceable by its language.**

**1. Because JV failed to support its argument with legal authority, it has waived its arguments that the trial court erred in granting Union Bank summary judgment.**

After considering the materials submitted by the parties and hearing their arguments, the trial court granted Union Bank’s motion for summary judgment and found Union Bank’s mortgage on the Trestle Creek property was senior to JV’s mortgage. R.Vol.6 at 1340-44. According to the trial court, there was no genuine issue of material fact that JV had entered into “a valid [subordination] contract ..., by which JV’s mortgage was made inferior to [Union Bank’s] mortgage.” *Id.* at 1343. On appeal, JV contends the trial court erred because there was conflicting evidence presented by the affidavit of James Berry as to whether the Subordination Agreement was enforceable. AOB at 14-23; *see* R.Vol.6 at 1232-39.

As an initial matter, JV cites no legal authority to support its arguments as required by I.A.R. 35(a)(6), *see id.*, and thus has waived those issues on appeal, *see Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010) (court will not consider issue that is not “supported by argument and authority in the opening brief”); *Bolognese v. Forte*, 153 Idaho 857, 866, 292 P.3d 248, 257 (2012) (“A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking.”) (citation omitted)). Even so, the trial court did not err in finding that there was no genuine issue of material fact that JV subordinated its mortgage in the Trestle Creek property to Union Bank’s mortgage.

**2. The trial court correctly interpreted the Subordination Agreement as a contract subordinating JV's lien to Union Bank's lien on the Trestle Creek property.**

Before addressing JV's arguments, it must be noted that the Subordination Agreement contains a choice of law clause that provides the agreement "shall be governed by and construed in conformity with the laws of California."<sup>6</sup> Supp.R. at 88. Though contract choice of law applies to substantive issues, "the procedural law of the forum court will still apply," including "allocation of burdens of proof, and admissibility and sufficiency of evidence." *Carroll v. MBNA Am. Bank*, 148 Idaho 261, 267, 220 P.3d 1080, 1086 (2009) (citing Restatement (Second) of Conflict of Laws §§ 124, 127, 133-35, 138 (1971)).

It is also important to note that the trial court correctly determined Union Bank's mortgage was superior to JV's mortgage based on the subordination agreement. "According to Idaho's recording statutes, a mortgage recorded first in time has priority against all other subsequent mortgagees." *Estate of Skvorak v. Sec. Union Title Ins. Co.*, 140 Idaho 16, 23, 89 P.3d 856, 863 (2004). There is an exception to this rule when parties enter into a subordination agreement wherein the prior recording party agrees to subordinate the priority of its lien to another. *See Blickenstaff v. Clegg*, 140 Idaho 572, 580, 97 P.3d 439, 447 (2004) (explaining that a subordination agreement is "[a]n agreement by which one holding an otherwise senior lien or other real estate interest consents to a reduction in priority vis-a-vis another person holding an

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<sup>6</sup> Before the trial court, Union Bank presented California law at summary judgment. R.Vol.6 at 1315. JV made no argument that the application of California law is improper.

interest in the same real estate.” (citation omitted)); *see also Bratcher v. Buckner*, 90 Cal. App. 4th 1177, 1185, 109 Cal. Rptr. 2d 534, 539 (2001).

Subordination agreements are contracts, and as such, they must contain the requisite elements of a binding contract and are interpreted using the laws of contract interpretation. *See Bratcher*, 90 Cal. App. 4th 1177, 1186 (2001); 59 C.J.S. *Mortgages* § 266 (“Subordination agreements must contain the requisite elements of a binding contractual relation.”). As such, they “are subject to the rule that they must be interpreted to enforce the objective intent of the parties.” *Bratcher*, 90 Cal. App. 4th at 1186. Objective intent is evidence by the words of the contract. *Lloyd’s Underwriters v. Craig & Rush, Inc.*, 32 Cal. Rptr. 2d 144, 146 (App. 1994). “The law is well settled that rights of priority under an agreement of subordination extend to and are limited strictly by the express terms and conditions of the agreement.” *Protective Equity Trust #83, Ltd. v. Bybee*, 2 Cal. Rptr. 2d 864, 870 (App. 1991).

**3. The trial court correctly found that Union Bank could enforce the Subordination Agreement because it was signed by JV, and Union Bank is the beneficiary under the agreement.**

JV argues that there was no binding agreement to subordinate between Union Bank and JV because Union Bank did not sign the Subordination Agreement. AOB at 19-20. The trial court found that the “[t]he subrogation [sic] agreement is a written document and is signed by the party that is obligated to perform, JV. The failure of an agent of [Union Bank] to sign the document does not mean there is no contract.” R.Vol.6 at 1342. The trial court was correct, and JV’s argument fails for two independent reasons.

First, JV cannot resist enforcement of the Subordination Agreement based on the absence of Union Bank's signature. In circumstances where fewer than all the proposed parties execute a document, the parties who sign the document are bound by it unless the contract dictates that they are not bound absent all the signatures. 17 C.J.S. *Contracts* § 86 (database updated 2015); see *Angell v. Rowlands*, 149 Cal. Rptr. 574, 578 (App. 1978) (concluding a contract is invalid if it is not signed by all parties only when signatories resisting enforcement show the contract was not intended to be complete until all parties signed).<sup>7</sup> Thus, while the party adversely affected by the subordination "must agree to be or become subordinate," Cal. Real Est. § 10:201 (4th ed.), "in the absence of a showing that the contract is not intended to be complete until signed by all parties, the parties who did sign will be bound." *Angell*, 149 Cal. Rptr. at 578.

Here JV is the party adversely affected by the Subordination Agreement, and it is undisputed that the Subordination Agreement was executed by Berry, a duly authorized member of JV. R.Vol.4 at 954, 961-62. JV presented no evidence that the contract was not intended to be valid and complete until Union Bank signed the agreement. The agreement itself contains no such language. See Supp.R. at 86-93. Because JV bore the burden of establishing the necessity of Union Bank's signature, and because JV presented no evidence to establish a question of fact as to that necessity, it is undisputed that JV is bound by the Subordination Agreement.

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<sup>7</sup> Cf. *Roth v. Garcia Marquez*, 942 F.2d 617, 626 (9th Cir. 1991) (applying California law and concluding that when "two parties execute a contract with the understanding that the approval of a third party is necessary for the agreement to take effect, the contract is not complete until the third party has approved"; there, the contract provided: "[t]he option shall commence upon signature by Gabriel Garcia Marquez to the formal agreement" (brackets in original)).

Second, the trial court found that Union Bank is a third-party beneficiary under the Subordination Agreement. R.Vol.6 at 1343. Under general contract principles “[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.” Cal. Civ. Code § 1559. The beneficiary must show “that the contract in question was made expressly for his benefit . . . . It has been held that ‘expressly’ means ‘in an express manner; in direct or unmistakable terms; explicitly; definitely; directly.’” *R. J. Cardinal Co. v. Ritchie*, 32 Cal. Rptr. 545, 552 (App. 1963) (citations omitted).

Union Bank is expressly named in the Subordination Agreement as the party to whom JV was subordinating its lien. Supp.R. at 86-93. In subordination agreements, a lender’s right to priority is a result of the party with a prior recorded lien agreeing to waive the right to a first lien. *Middlebrook-Anderson Co. v. Sw. Sav. & Loan Ass’n*, 96 Cal. Rptr. 338, 344 (App. 1971). It follows that the new lien holder is the third-party beneficiary to any agreement whereby the priority lien holder agrees to subordinate its lien, but only to the extent that it abides by the conditions of subordination. *Id.* “A third-party lender who relies on the subordination agreement to achieve a prior lien is a third-party beneficiary to the contract . . . who may enforce the agreement by complying with its terms.” 4 Cal. Real Est. § 10:201; see *Citizens Bus. Bank v. Gevorgian*, 160 Cal. Rptr. 3d 49, 67-69 (App. 2013).

Under the Subordination Agreement, Union Bank could not increase the amount of indebtedness owed by POBD or modify the terms of the indebtedness. Supp.R. at 87 (¶ 6). JV makes no argument that Union Bank failed to comply with those requirements. See AOB at 14-23. Nor is there any dispute that Union Bank complied. Union Bank made a \$5 million loan to

POBD, and there is no evidence that Union Bank increased the amount of POBD's debt or changed the terms of the debt. Because Union Bank was expressly named in the Subordination Agreement and complied with the agreement's conditions, the trial court correctly found that Union Bank can enforce the Subordination Agreement as a third-party beneficiary regardless of its signature to the contract.

**4. Because the Subordination Agreement explicitly outlines the consideration provided, the trial court properly concluded that there was valid consideration.**

JV also argues that the Subordination Agreement was unenforceable because JV received no consideration to subordinate its lien. AOB at 20. The Subordination Agreement, however, explicitly outlines the consideration provided. As such, the trial court correctly found that the language of the Subordination Agreement itself is presumptive evidence of consideration. R.Vol.6 at 1343.

“An enforceable subordination agreement requires consideration to the holder of the subordinated lien.” 4 Cal. Real Est. § 10:201. “A written instrument is presumptive evidence of a consideration.” Cal. Civ. Code § 1614. Further, “[a] recital of consideration is prima facie evidence that a written contract is supported by a consideration.” 14 Cal. Jur. 3d *Contracts* § 129; *Niederer v. Ferreira*, 234 Cal. Rptr. 779, 790 (App. 1987) (“The written guaranty containing the recital of consideration constituted a prima facie showing of consideration, and it was defendant's burden at trial to prove lack of consideration.”).

As stated, the Subordination Agreement explicitly provides a recital of consideration: “For valuable consideration, receipt whereof is hereby acknowledged, and in consideration of the

loans, advances, discounts, renewals or extensions now or hereafter made by [Union Bank] to or for the account of [POBD] ('Borrower'), Creditor agrees with [Union Bank] as follows ....” Supp.R. at 86. It also provides that JV subordinates its lien “to the lien of the mortgage dated March 7, 2008” to secure Union Bank’s loan of \$5 million, “the proceeds of which [POBD] has used to pay off the existing indebtedness of [POBD] . . . and/or to pay for the improvement and development of the property encumbered by” JV’s lien. *Id.* at 87 (¶ 3).

Ignoring the express language of the Subordination Agreement, JV relies on the Affidavit of James Berry to show conflicting evidence as to a lack of consideration. AOB at 15, 20. According to Berry, “JV received nothing, no consideration for the Subordination Agreement.” R.Vol.6 at 1235. Because the agreement was fully integrated, the trial court refused to consider this evidence. R.Vol.6 at 1342. That decision was also correct.

When a contract explicitly provides that it constitutes the complete agreement of the parties, the contract is fully integrated.<sup>8</sup> *Esbensen v. Userware Int’l, Inc.*, 14 Cal. Rptr. 2d 93, 96 (App. 1992). “To the extent a contract is integrated, the parol evidence rule precludes the admission of evidence of the parties’ prior or contemporaneous oral statements to contradict the terms of the writing . . . .” *Id.*; see Cal. Civ. Code § 1625; Cal. Civ. Proc. Code § 1856. The parol evidence rule is “based on the assumption that written evidence is more accurate than

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<sup>8</sup> “Whether a contract is integrated in a writing and, if so, the effects of integration are determined by the local law of the state selected” by the contractual choice of law. Restatement (Second) of Conflict of Laws § 140; see also *Julius Castle Rest. Inc. v. Payne*, 157 Cal. Rptr. 3d 839, 850-51 (App. 2013) (“[t]he parol evidence rule is not an evidentiary rule” but is a rule that excludes evidence “because as a matter of law the agreement is the writing itself”).

human memory’ and ‘the fear that fraud or unintentional invention by witnesses interested in the outcome of the litigation will mislead the finder of facts.’” *Julius Castle Rest. Inc. v. Payne*, 157 Cal. Rptr. 3d 839, 850 (App. 2013) (quoting *Masterson v. Sine*, 436 P.2d 561 (Cal. 1968)), *rev. denied* (Sept. 11, 2013).

The Subordination Agreement expressly provides that it is an integrated contract: “This Agreement [c]onstitutes the entire agreement and understanding between and among the parties hereto related to the subject matter hereof, and supersedes, all prior proposals, negotiations, agreements and understandings among the parties hereto with respect to such subject matter.” Supp.R. at 86-93 (¶ 9). Because there is no dispute that the Subordination Agreement is a fully integrated contract, Berry’s affidavit may not be used to determine the absence of consideration when such consideration is recited in the agreement itself.

As a result, the trial court did not err in finding consideration to support the Subordination Agreement. There was no genuine issue of material fact on the question of consideration, as the Subordination Agreement itself expressly details the consideration JV bargained for and received.

**5. The affidavit of James Berry did not create a genuine issue of material fact as to fraud in the inducement by Union Bank.**

Finally, JV argues that summary judgment was improper because Berry’s affidavit created a genuine issue of material fact as to the existence of fraud. AOB at 20. Berry’s affidavit asserted that Charles Reeves of POBD told JV that “POBD had arranged to borrow \$5.0 million from a bank, the funds to be used to finish platting the real estate at Trestle Creek and to build improvements, Condominiums and Townhouses.” R.Vol.6 at 1233-34. Berry alleged that



Reeves represented that POBD would be receiving a new \$5 million loan and failed to represent “that POBD had already, in 2007, obtained the loan money of \$5.0 million from [sic] the Bank.” *Id.* at 1234. Berry also alleged: “If JV had known the truth and facts that POBD was not going to receive \$5.0 million dollars on a new 2008 loan, JV would not have executed the Subordination Agreement at all.” *Id.* at 1236.

After considering those allegations, the trial court noted that Berry’s allegations were directly contradicted by the language of the Subordination Agreement. *Id.* (“The document clearly refers to past and future loans made earlier and to be made in the future by [Union Bank] ... to POBD.”). But more importantly, the trial court concluded that JV failed to present a genuine issue of material fact on an issue of fraud that was relevant to the dispute between JV and Union Bank. R.Vol.6 at 1343. As the trial court observed, after detailing JV’s allegations of misrepresentation, “JV does not argue fraud by [Union Bank], but fraud by the president of POBD. There is no showing of any fraud by [Union Bank].... Any such misconception by JV was not caused by any actions of [Union Bank].” *Id.* Again the trial court was correct.

JV alleges fraud in the inducement, which occurs when the promisor “is induced by fraud” to consent to the agreement.<sup>9</sup> *Julius Castle Rest.*, 157 Cal. Rptr. 3d at 851. A contract induced by fraud is voidable. *Id.* However, generally, a contract cannot be set aside because of the fraud of a third person when the other party to the contract was not implicated in the fraud.

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<sup>9</sup> The law chosen by the parties applies to the formalities required to enter into a valid contract and the effect of alleged misrepresentation upon a contract. Restatement (Second) of Conflict of Laws §§ 198-201 (1971).

17A C.J.S. *Contracts* § 208 (“In other words, the representation must be made by the other party to the contract, or by his or her agent, or with his or her command or consent, or must be subsequently ratified by him or her.”); *see also* Restatement (Second) of Contracts § 164 (1981) (if a party’s manifestation of assent is induced by misrepresentation, the contract is voidable by the recipient, unless the other party to the transaction in good faith and without reason to know of misrepresentation relies materially on the transaction).

Thus, the alleged fraudulent representation made by POBD inducing JV to subordinate its lien to Union Bank does not render JV’s promise voidable if Union Bank relied on JV’s promise to subordinate. Restatement (Second) of Contracts § 164. In *Gill v. Rich*, 28 Cal. Rptr. 3d 52, 60 (App. 2005), the court explained that while a party to a contract may be able to rescind the contract based on fraud in the inducement, there can be no rescission when the rights of third parties would be prejudiced. As to those parties innocent of the fraud, the defrauded party does not have a right to recession, but may seek redress in a separate action against those responsible for the fraud. *Id.* at 60-61.

Whatever the merits of JV’s fraudulent inducement claim may be against POBD, it is not a valid defense against Union Bank’s enforcement of the Subordination Agreement. It is undisputed that at “no time involving this action” did Union Bank communicate with JV regarding the Subordination Agreement. R.Vol.6 at 1233. Rather, JV relies solely on evidence that it was contacted by Reeves of POBD, and all allegations of misrepresentation are directed at what Reeves communicated to JV. *See id.* at 1233-34. Further, JV presented no evidence that Union Bank knew that such fraud was the inducement to the contract.

It is also undisputed that Union Bank relied on the Subordination Agreement. R.Vol.5 at 1026-57. Union Bank's 2008 note and mortgage "would not have been granted without the first position security interest on the real property collateral being promised." *Id.* at 1030. Indeed, Union Bank's records reflect that the 2008 note required a first priority interest in the property. *Id.* at 1030,1035-38. Without reason to know about the fraudulent representations made by POBD, with no evidence that Union Bank knew of the fraudulent misrepresentations made by POBD, and with undisputed evidence that Union Bank relied on the Subordination Agreement, the trial court properly concluded that fraudulent inducement was not a valid defense to enforcement of the Subordination Agreement as to Union Bank.

**C. The trial court properly denied JV's motion for reconsideration because JV's new evidence failed to create a genuine issue of material fact on fraudulent inducement.**

JV next argues that the trial court erred in denying its motion for reconsideration. AOB at 23-30. As with its arguments that the trial court erred when it granted summary judgment to Union Bank, JV again cites no legal authority to support its argument; thus it has waived this issues on appeal. *See Bach*, 148 Idaho at 790, 229 P.3d at 1152; I.A.R. 35(a)(6). But even if JV's argument can be heard, the trial court properly denied JV's motion for reconsideration. As with JV's evidence on summary judgment, its new evidence on reconsideration failed to raise an issue of fact as to the validity of the Subordination Agreement.

On reconsideration, JV filed two exhibits. R.Vol.6 at 1361-88. The first was the Third Amendment to Indebtedness and to Real Estate Security, and Subordination Agreement (Third Amendment). *Id.* at 1380-85. The second attachment contained three emails between counsel

for JV and counsel for POBD regarding the Subordination Agreement. *Id.* at 1386-88. Union Bank objected to the new evidence. R.Vol.7 at 1472-73; Supp.R. at 140-47. In the trial court's decision denying reconsideration, the trial court considered the Third Amendment but did not admit or consider the three emails. R.Vol.7 at 1479-85.

“A motion for reconsideration is a motion which allows the court—when new law is applied to previously presented facts, when new facts are applied to previously presented law, or any combination thereof—to reconsider the correctness of an interlocutory order.” *Johnson v. N. Idaho Coll.*, 153 Idaho 58, 62, 278 P.3d 928, 932 (2012). As noted, because the trial court granted summary judgment and denied reconsideration, the issue is whether the evidence presented a genuine issue of material fact to defeat summary judgment. *Shea*, 156 Idaho at 545, 328 P.3d at 525. The new evidence presented by JV did not create such issues of material fact.

In particular, the Third Amendment was an agreement between JV and POBD, recorded on June 25, 2008. R.Vol.6 at 1380-85. According to the agreement, JV agreed to subordinate its mortgage on the Trestle Creek property: “On the TRESTLE CREEK property the present first lien priority of J.V. , LLC shall be subordinate and inferior to a new first lien priority of no more than \$5,000,000.” R.Vol.6 at 1382. Thus, it was not surprising that the trial court found the agreement added support to its reasoning on summary judgment, as it showed that POBD received \$30,000 from POBD for agreeing to subordinate its lien. R.Vol.6 at 1380-82.

As for the three emails JV presented, the trial court excluded them as parol evidence.<sup>10</sup> R.Vol.7 at 1479. On appeal, JV contends that the three emails establish an issue of fact as to the issue of fraudulent inducement by POBD. AOB at 23-26. However, even if the trial court erred in excluding the emails, they still do not show any evidence of fraud on Union Bank's part or show a genuine issue of material fact that can defeat summary judgment. *See* R.Vol.7 at 1482.

That is because the emails did not involve Union Bank but were communications between counsel for JV, Gary Finney, and counsel for POBD, Bill Sterling. R.Vol.6 at 1386-88. JV alleges that these emails evidence fraud in the inducement; however, the emails contain no representations on behalf of, or on the part of, Union Bank. *Id.* The emails support the trial court's finding that POBD was the only party making representations to JV regarding the Subordination Agreement. *Compare* R.Vol.6 at 1232-39 *with* R.Vol.6 at 1386-88.

In other words, the trial court's decision to exclude the emails was harmless. Pursuant to I.R.C.P. 61, no error in the exclusion of evidence, or error in ruling, is ground for disturbing an order "unless refusal to take such action appears to the court inconsistent with substantial justice." "A substantial right is one that potentially affects the outcome of the litigation and the burden of showing a prejudicial error rests with the appellant." *Fonseca v. Corral Agric., Inc.*,

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<sup>10</sup> While in general parol evidence "prohibits the introduction of any extrinsic evidence to alter, vary, or add to the terms of an integrated written agreement," parol evidence is admissible to show fraud, even when such evidence is in direct contradiction to the language of the agreement. *Julius Castle Rest.*, 157 Cal. Rptr. 3d at 850-51; *see* Cal. Civ. Proc. Code § 1856(f), (g); *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass'n*, 151 Cal. Rptr. 3d 93, 101 (App. 2013).

156 Idaho 142, 149, 321 P.3d 692, 699 (2014), *abrogated on other grounds by Sims v. Jacobson*, 157 Idaho 980, 342 P.3d 907, 914 (2015).

Harmless error also applies to the exclusion or admission of parol evidence. *See Rogers v. Hendrix*, 92 Idaho 141, 146, 438 P.2d 653, 658 (1968) (noting that admission of evidence in violation of parol evidence rule was harmless under the circumstances). Error is harmless when evidence is excluded if the party presented other evidence to the issue. *Bailey v. Sanford*, 139 Idaho 744, 750, 86 P.3d 458, 464 (2004) (“Excluding Quilantin’s testimony did not affect Sanford’s substantial rights because Sanford presented other direct evidence and Quilantin’s testimony.”). The exclusion of evidence is also harmless if admission of such evidence would not have changed the result. *Spongberg v. First Nat’l Bank*, 15 Idaho 671, 99 P. 712 (1909).

The excluded emails did not affect JV’s substantial rights because JV had already presented other evidence—the Berry affidavit—as to the assertions made by POBD to JV prior to the Subordination Agreement. The emails were merely cumulative of Berry’s testimony. And more importantly, even if the trial court considered the emails, JV has not shown that the result on reconsideration would be different. These emails present no evidence that Union Bank knew of the representations made by POBD, much less condoned these assertions.

As a result, JV failed to present a genuine issue of material fact as to its defense of fraudulent inducement. Because the evidence presented did not create a factual issue to defeat summary judgment, the trial court properly denied JV’s motion for reconsideration.

**D. The trial court did not abuse its discretion by limiting discovery of the settlement agreement entered into by Union Bank and POBD.**

After the trial court affirmed summary judgment in favor Union Bank, JV moved to compel a global settlement agreement reached by Union Bank and POBD. R.Vol.7 at 1504-20. After Union Bank moved for a protective order, Supp.R. at 148-63, the trial court reviewed *in camera* a redacted and non-redacted version of the settlement agreement. Based on its review, the trial court ordered Union Bank to “provide a redacted copy” of the agreement to JV but that the copy should be maintained as a confidential document. *Id.* at 1522, 1539-40. By doing so, the trial court granted JV’s motion to compel discovery in part and also granted Union Bank’s motion for a protective order.

On appeal, JV argues that the trial court erred when it refused to allow JV to discover the settlement agreement in unredacted form. AOB at 30. But again, JV has provided no authority supporting its argument. As such, JV has waived this issue too. *See Bach*, 148 Idaho at 790, 229 P.3d at 1152. Nevertheless, the trial court did not abuse its discretion. The priority dispute between Union Bank and JV had been decided and no further issues remained between the parties. And in any event, JV’s priority dispute with NIR was ongoing and the trial court properly found good cause to limit discovery of the settlement agreement while still allowing inquiry that was reasonably calculated to lead to the discovery of admissible evidence.

As noted above, controlling discovery is within the trial court’s discretion. *McCann*, 152 Idaho at 821, 275 P.3d at 836. A trial court’s discretion in considering a motion to compel is bounded by I.R.C.P. 26(b)(1). *Ketterling v. Burger King Corp.*, 152 Idaho 555, 562, 272 P.3d

527, 534 (2012). “I.R.C.P. 26(b)(1) permits broad discovery of any matter that is not privileged, even if it is inadmissible, so long as it is ‘reasonably calculated to lead to the discovery of admissible evidence.’” *Kirk v. Ford Motor Co.*, 141 Idaho 697, 703-04, 116 P.3d 27, 33-34 (2005) (quoting I.R.C.P. 26(b)(1)). A trial court, however, “can use a protective order to limit . . . discovery when a party shows good cause for that result.” *Westby*, 157 Idaho at 622, 338 P.3d at 1226; *see* I.R.C.P. 26(c).

Here, the trial court found the settlement agreement was not relevant to the remaining issues of the case. R.Vol.7 at 1539. That was true, as any priority issue between Union Bank and JV was resolved. To the extent the settlement agreement was relevant to JV’s crossclaim against NIR, its production still has no relevance to this case. But regardless, the trial court viewed the settlement agreement in both unredacted and redacted form *in camera*, and based on its discretion, found portions of the agreement confidential, and allowed the production of the redacted version. *See id.*

To that end, JV has failed to show any abuse of discretion in the redaction of the settlement agreement that affected its substantial rights. JV makes no assertion as to how the exclusion of portions of the document affected the outcome of this litigation. *See* AOB at 30-32. “Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling is a manifest abuse of the trial court’s discretion and a substantial right of the party is affected.” *Hurtado v. Land O’Lakes, Inc.*, 153 Idaho 13, 17, 278 P.3d 415, 419 (2012) (citation omitted); *see* I.R.C.P. 61. Importantly, the appellant has the burden to show that exclusion of evidence was prejudicial. *See Rogers v. Trim House*, 99 Idaho 746, 749, 588 P.2d 945, 948 (1979).



In sum, JV has not shown any alleged abuse of discretion would affect a substantial right. Further, the trial court acted within the standards of I.R.C.P. 26 in deciding to grant JV's motion to compel and Union Bank's motion for a protective order in part. JV has not shown that the trial court abused its discretion in limiting disclosure of the settlement agreement.

**E. The trial court did not violate JV's procedural due process rights by excluding it from participating in the trial between Union Bank and NIR.**

**1. JV was properly excluded from trial on May 12 and 13, 2014, on the issues previously resolved on summary judgment and after reconsideration.**

JV's final argument on appeal concerns the trial court's exclusion of JV from the trial between Union Bank and NIR held May 12 and 13, 2014. AOB at 32-40. A few weeks prior to trial, the trial court issued a letter informing counsel that the issues between Union Bank and NIR would be tried first, and the remaining issues would be bifurcated. R.Vol.7 at 1572. The trial court also explained: "None of the issues between JV, LLC and Union Bank will be re-litigated. The court's prior summary judgment disposed of all issues between JV, LLC and Union Bank. JV, LLC may be present in the courtroom as a spectator, but will not be at counsel table." *Id.* JV argues that the letter and decision to bifurcate the trial violates its procedural due process rights and violated I.R.C.P. 16(b) and 56(d). AOB at 32-36.

The trial court's letter informing JV that it would not participate in Union Bank's trial with NIR did not violate JV's due process rights. Nor did the trial court's actual decision to bifurcate the trial proceedings.<sup>11</sup> "Due process is not a rigid concept. Instead, the protections and

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<sup>11</sup> As for bifurcation, "[t]he decision of whether to order separate trials for any claims or issues is left to the sound discretion of the trial court." *Armand v. Opportunity Mgmt. Co.*, 155 (continued . . .)

safeguards necessary vary according to the situation” and as such, the Court evaluates the constitutionality of the proceedings as a whole. *Meyers v. Hansen*, 148 Idaho 283, 292, 221 P.3d 81, 90 (2009) (citations omitted). “Procedural due process requires that there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions.” *Id.* at 291, 221 P.3d at 89 (quoting *Cowan v. Bd. of Comm’rs*, 143 Idaho 501, 510, 148 P.3d 1247, 1256 (2006)). Mainly, “[a]n individual must be provided with notice and an opportunity to be heard.” *Id.* (quoting *Spencer v. Kootenai Cty.*, 145 Idaho 448, 454, 180 P.3d 487, 493 (2008)).

Further, in a civil proceeding, an essential element of due process is a hearing or at least a reasonable opportunity to be heard on the issues. 16D C.J.S. *Constitutional Law* § 1964. JV asserts that the right to be heard mandates a trial, citing *Williams v. Idaho State Board of Real Estate Appraisers*, 157 Idaho 496, 337 P.3d 655 (2014). In *Williams*, the Court explained that “the right to procedural due process requires ‘a fair trial in a fair tribunal....’” *Id.* at 505, 337 P.3d at 664 (citation omitted). *Williams* does not stand for the assertion that every litigant is entitled to a full trial. Rather, it is well established that “[t]he opportunity to be heard must occur at a meaningful time and in a meaningful manner” such that “a person is not arbitrarily deprived of his or her rights.” *Telford v. Nye*, 154 Idaho 606, 611, 301 P.3d 264, 269 (2013).

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(. . . continued)

Idaho 592, 602, 315 P.3d 245, 255 (2013). JV presents no argument that the trial court abused its discretion in the way it bifurcated the trial.

Here, JV was provided a full opportunity to be heard. JV's claims of priority to the Trestle Creek property were fully and fairly adjudicated, first on summary judgment and then on reconsideration.<sup>12</sup> R.Vol.6 at 1345-46; Tr.Vol.1 at 18-54; R.Vol.7 at 1479-83, 1484; Tr.Vol.1 at 56-100. JV thus had two opportunities to be heard on its issues, indeed JV was afforded two hearings, and the trial court fully resolved those issues. Tr.Vol.1 at 56-100. During those proceedings, JV was given notice and an opportunity to present legal argument. Following JV's motion for reconsideration there were no issues left to adjudicate between JV and Union Bank. Both parties had asserted priority to the Trestle Creek property, and the trial court determined Union Bank was entitled to judgment as a matter of law by virtue of the Subordination Agreement.

JV, in fact, has tacitly acknowledged that its claims had already been adjudicated. Two weeks before the court trial was set to begin, JV filed its Pre-Trial Memorandum, Witnesses, and Exhibits. R.Vol.7 at 1551-61. JV stated: "JV has the first recorded purchase money mortgage, recorded June 19, 2006 (Instrument No. 706470) and has first priority under Idaho Code §45-112 and Idaho Code §55-811." *Id.* at 1554. It also stated that its Subordination Agreement was void because (1) Union Bank did not sign the agreement; (2) Union Bank gave no consideration for the agreement; and (3) JV entered into the agreement due to fraud. *Id.* Of course, each of these issues had already been addressed by the trial court on summary judgment and reconsideration.

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<sup>12</sup> JV puts great weight on the fact that Union Bank styled its motion as a "partial" motion for summary judgment. *See* AOB at 33, 36. Union Bank did so because it was only moving for summary judgment against JV and NIR, not all the defendants in the action. R.Vol.3 at 940-41.

Thus, JV's contention that it was entitled to be at trial to defend and assert its counterclaim against Union Bank is without merit. JV's counterclaim against Union Bank, like Union Bank's foreclosure claim against JV, addressed the parties' priority to the Trestle Creek property. R.Vol.1 at 191. The trial court entered an order as to priority and concluded that JV did not have priority. For those reasons, the trial court did not violate JV's due process rights by excluding it from trial. And because JV had already been afforded an opportunity to be heard, the trial court did not violate I.R.C.P. 16(b) or 56(d). The rules are also permissive and do not require the procedures advocated by JV.

**2. The denial of a motion to compel discovery does not implicate procedural due process.**

Finally, JV argues that exclusion of the unredacted settlement agreement, addressed above in Section V.D., violated JV's procedural due process rights. AOB at 32, 36-40. As before, JV provides no authority for this proposition. Indeed, the authority is to the contrary: denial of a motion to compel discovery does not in itself violate procedural due process rights. *See Batagiannis v. W. Lafayette Cmty. Sch. Corp.*, 454 F.3d 738, 742 (7th Cir. 2006) (“[C]omplaints about a lack of pre-hearing discovery assume that there is such an entitlement, which there isn't. There is no constitutional right to discovery even in criminal prosecutions.”); *see Vaughn v. Vaughn*, 56 So. 3d 1283, 1287-88 (Miss. Ct. App. 2011) (concluding denial of motion to compel discovery, in itself, did not violate due process). Thus, JV's right to notice and an opportunity to be heard were not violated based on the trial court's denial of JV's motion to compel.

**F. If Union Bank prevails on appeal, it is entitled to attorney fees on appeal.**

**1. Because this matter concerns a commercial transaction, Union Bank is entitled to attorney fees pursuant to Idaho Code § 12-120(3).**

“Idaho Code § 12-120(3) allows for an award of attorney fees to the prevailing party in a civil action to recover ‘in any commercial transaction.’” *Garner v. Povey*, 151 Idaho 462, 469, 259 P.3d 608, 615 (2011). Under the statute, a commercial transaction is “all transactions except transactions for personal or household purposes.” I.C. § 12-120(3). Whether a party can recover attorney fees under the statute turns on whether the gravamen of a claim is a commercial transaction. *Sims*, 157 Idaho 980, 342 P.3d at 912. The Court has explained that “[t]here must be a commercial transaction between the parties for attorney fees to be awarded.” *Great Plains Equip., Inc. v. Nw. Pipeline Corp.*, 136 Idaho 466, 471, 36 P.3d 218, 223 (2001). The Court has also recognized that allegations that a party is a third-party beneficiary to a contract constitutes an action to recover in a commercial transaction. *See, e.g., De Groot v. Standley Trenching, Inc.*, 157 Idaho 557, 567, 338 P.3d 536, 546 (2014).

Here, Union Bank brought a claim for mortgage foreclosure, alleging that despite JV’s prior recorded interest, JV’s mortgage was subject to Union Bank’s mortgage and foreclosure. R.Vol.1 at 132. Importantly, JV entered into the Subordination Agreement with POBD and Union Bank to facilitate the subordination of JV’s lien in favor of Union Bank’s lien. Supp.R. at 86-93. The Subordination Agreement was not entered into for personal or household purposes, but to facilitate a large commercial loan.

The fact that Union Bank did not sign the agreement does not preclude an award of fees based on Idaho Code § 12-120(3), as Union Bank was clearly the beneficiary to the

Subordination Agreement. *Id.* The Subordination Agreement is integral to Union Bank's claim of foreclosure and is the basis upon which Union Bank has sought recovery. Therefore, should Union Bank prevail on appeal, Union Bank is entitled to its reasonable attorney fees pursuant to Idaho Code § 12-120(3).

**2. Union Bank is also entitled to attorney fees pursuant to Idaho Code § 12-121.**

Under Idaho Code § 12-121, the Court may award reasonable attorney fees to the prevailing party. An award of attorney fees on appeal under the statute is appropriate if the Court "determines that the action was brought or pursued frivolously, unreasonably or without foundation." *Turner v. Turner*, 155 Idaho 819, 827, 317 P.3d 716, 724 (2013). "An appeal may be deemed frivolous, and attorney fees awarded, for failure to properly comply with I.A.R. 35(a)(6)." *Woods v. Sanders*, 150 Idaho 53, 61, 244 P.3d 197, 205 (2010). An award is also appropriate under the statute "if the appeal simply invites this Court 'to second-guess the trial court on conflicting evidence.'" *Beckstead v. Price*, 146 Idaho 57, 69, 190 P.3d 876, 888 (2008).


In *Turner*, the Court awarded attorney fees to the respondent when the appellant "failed to develop an argument as to any of the issues he presented and offered little by way of citation to authority." 155 Idaho at 827, 317 P.3d at 724. Here, as offered above, JV has waived several issues on appeal due to its failure to provide argument and citation to authority and thus failed to comply with I.A.R. 35(a)(6). Also, JV has made only made superficial arguments. In short, JV has failed to present a cogent argument as to why it should prevail on appeal. As a result, an award of Union Bank's attorney fees is appropriate pursuant to Idaho Code § 12-121.

**VI. CONCLUSION**

For the reasons set forth above, the Court should affirm the trial court's judgment that Union Bank's mortgage on the Trestle Creek property has priority over JV's mortgage.

RESPECTFULLY SUBMITTED this 23 day of November, 2015.

STOEL RIVES LLP



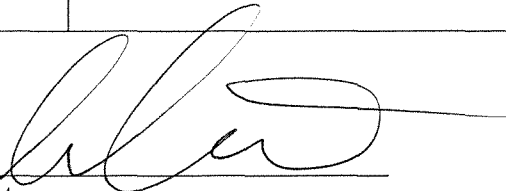
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W. Christopher Pooser  
Anna E. Courtney  
*Attorneys for Respondent Union Bank, N.A.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on November 23, 2015, I served a true and correct copy of the foregoing **RESPONDENT'S BRIEF** on the following, in the matter indicated below:

Gary A. Finney Finney Finney & Finney, P.A. 120 East Lake Street, Suite 317 Sandpoint, Idaho 83864 Facsimile: (208) 263-8211  Attorneys for Appellant JV	<input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Overnight Mail <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Email
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\_\_\_\_\_  
Anna E. Courtney



**LIST OF APPENDIX**  
**Union Bank v. JV LLC**

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App. A	Request for Judicial Notice	Supp.R. p. 56-60
	Ex. 1 - Commercial Mortgage, Security Agreement and Assignment of Leases and Rents   March 25, 2008	Supp.R. p. 62-77
	Ex. 2 - Real Estate Mortgage   June 19, 2006	Supp.R. p. 79-84
	Ex. 3 - Subordination Agreement   August 6, 2008	Supp.R. p. 86-93
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App. B	Third Amendment to Indebtedness and to Real Estate Security, and Subordination Agreement   June 24, 2008	R.Vol.6 p. 1380-85; Ex. M

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# **APPENDIX A**

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2013 JUL 1 PM 2 52

CLERK DISTRICT COURT

DEPUTY

John E. Miller – ISB #4676  
*The Law Office of John E. Miller*  
*A Professional Corporation*  
1424 Sherman Avenue, Suite 500  
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Email: [jmillerlaw@frontier.com](mailto:jmillerlaw@frontier.com)

Attorney for Plaintiff

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

STATE OF IDAHO, COUNTY OF BONNER

UNION BANK, N.A.,

Plaintiff,

vs.

PEND OREILLE BONNER DEVELOPMENT,  
LLC, a Nevada limited liability company, et al

Defendants.

) **CASE NO. CV 2011-0135**  
)  
) **REQUEST FOR JUDICIAL NOTICE**  
)  
) **Idaho Rules of Evidence, Rule 201(b)(d),**  
)  
) **DATE: JULY 29, 2013**  
) **TIME: 9:30 am**  
) **PLACE: JUDGE MICHAEL GRIFFIN'S**  
) **ASSIGNED COURTROOM**  
) **BONNER COUNTY COURT**  
)  
)  
)

TO THE COURT AND TO ALL INTERESTED PARTIES AND THEIR

ATTORNEYS OF RECORD:

REQUEST FOR JUDICIAL NOTICE  
[IDAHO RULES OF EVIDENCE,  
RULE 201(b)(d)]

PLEASE TAKE NOTICE that plaintiff, UNION BANK, N.A. (hereinafter "UB") in support of its Motions for Partial Summary Judgment Re Reformation and Priority, will request the Court to take judicial notice pursuant to Idaho Rules of Evidence, Rule 201(b)(d), of the following public records of the Kootenai County Recorder's Office:

1. Certified copy a UB's Commercial Mortgage, Security Agreement, and Assignment of Leases and Rents recorded **March 25, 2008**, as Instrument Nos. 748379 and 748380, records of Bonner County, State of Idaho.
2. Certified copy of JV L.L.C.'s Real Estate Mortgage recorded **June 19, 2006**, as Instrument number 706470, records of Bonner County, State of Idaho.
3. Certified copy of JV L.L.C.'s Subordination Agreement in favor of UB recorded **August 6, 2008**, as Instrument number 706403, records of Bonner County, State of Idaho.
4. Certified copy of Addendum to Notice of Agreement Regarding Senior Liens recorded **August 6, 2008**, as Instrument number 706411, records of Bonner County, State of Idaho.
5. Certified copy of North Idaho Resorts, LLC's Memorandum of Real Property Purchase and Sale Agreement recorded **June 19, 2006**, as Instrument number 706475, records of Bonner County, State of Idaho.

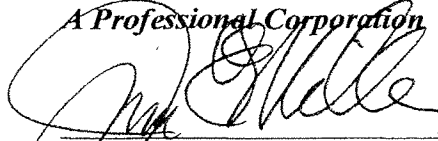
REQUEST FOR JUDICIAL NOTICE  
[IDAHO RULES OF EVIDENCE,  
RULE 201(b)(d)]

6. Certified copy of North Idaho Resorts, LLC's Partial Termination of Real Property Purchase and Sale Agreement and Partial Termination of Memorandum of Real Property Purchase and Sale Agreement recorded on **March 15, 2007** as Instrument number 724831, records of Bonner County, State of Idaho.
7. Certified copy of North Idaho Resorts, LLC's rerecording of Partial Termination of Real Property Purchase and Sale Agreement and Partial Termination of Memorandum of Real Property Purchase and Sale Agreement recorded on **March 11, 2009** as Instrument number 768269, records of Bonner County, State of Idaho.

True and correct copies of said documents are attached hereto for the ready reference of the parties; the original certified copies will be delivered to the Court for the hearing of this matter.

DATED this 28th day of June 2013

*The Law Office Of John E. Miller*  
*A Professional Corporation*



John E. Miller  
Attorney for Plaintiff

REQUEST FOR JUDICIAL NOTICE  
[IDAHO RULES OF EVIDENCE,  
RULE 201(b)(d)]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1<sup>st</sup> day of July 2013, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

mailed postage prepaid (Express mail to Mr. Stacey)  
 Facsimile transmitted to  
 personal delivery to offices of all others

Bruce Anderson  
ELSAESSER JARZABEK ANDERSON  
ELLIOTT & MACDONALD, CHTD  
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Jonathon D. Hallin  
LUKINS & ANNIS, P.S.  
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Steven C. Wetzel  
Susan P. Weeks  
JAMES, VERNON & WEEKS, PA  
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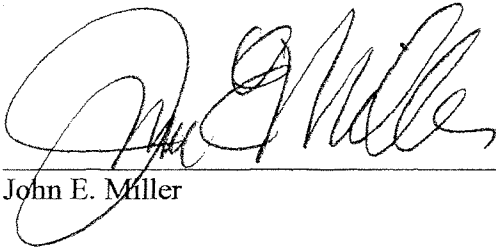
Gary A. Finney  
FINNEY FINNEY & FINNEY, P.A.  
Attorneys at Law  
Old Power House Building  
120 East Lake Street, Suite 317  
Sandpoint, ID 83864  
Fax (208) 263-8211

REQUEST FOR JUDICIAL NOTICE  
[IDAHO RULES OF EVIDENCE,  
RULE 201(b)(d)]

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Rick L. Stacey  
Meuleman Mollerup LLP  
755 W. Front Street, Ste. 200  
Boise, Idaho 83702



---

John E. Miller

REQUEST FOR JUDICIAL NOTICE  
[IDAHO RULES OF EVIDENCE,  
RULE 201(b)(d)]

**EXHIBIT 1  
TO  
APPENDIX A**



FAYCO  
229121

RECORDING REQUESTED BY:

Pacific Capital Bank, N.A.

AND WHEN RECORDED MAIL TO:

Pacific Capital Bank, N.A.  
c/o Loan Services, PO Box 60654  
Santa Barbara, California 93160-0654

FILED BY  
First American Title  
2008 MAR 25 P 2:48  
4800

MARIE SCOTT  
BONNER COUNTY RECORDER  
[Signature] DEPUTY

748379 748380

FILED BY  
First American Title  
2008 MAR 25 P 2:49  
4800

MARIE SCOTT  
BONNER COUNTY RECORDER  
[Signature] DEPUTY

SPACE ABOVE THE LINE FOR RECORDER'S USE

**COMMERCIAL MORTGAGE, SECURITY AGREEMENT AND ASSIGNMENT OF LEASES AND RENTS**

This COMMERCIAL MORTGAGE, SECURITY AGREEMENT AND ASSIGNMENT OF LEASES AND RENTS (this "Mortgage") is entered into as of **March 7, 2008**, between **Pend Oreille Bonner Development, LLC**, a Nevada limited liability company, with an address of **6900 S. McCarran Blvd., #1010, Reno, Nevada 89509** (the "Mortgagor") and Pacific Capital Bank, N.A., a national banking association, doing business as First National Bank of Central California, with an address of c/o Loan Services, PO Box 60654, Santa Barbara, California 93160-0654 (the "Bank").

The real property which is the subject matter of this Mortgage has the following address(es): **NNA, Highway 200, Sandpoint, Idaho 83864** (the "Address(es)") **RP57N01E66160A, RP57N01E213750A, RP57N01E179000A & RP57N01E166200A.**

**1. MORTGAGE, OBLIGATIONS AND FUTURE ADVANCES**

1.1 Mortgage. For valuable consideration paid and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Mortgagor hereby irrevocably and unconditionally mortgages, grants, bargains, transfers, sells, conveys, sets over and assigns to the Bank and its successors and assigns forever, all of Mortgagor's right, title and interest in and to the "Property" described below, to secure the prompt payment and performance of the Obligations (as hereinafter defined), including without limitation, all amounts due and owing to the Bank and all obligations respecting that certain **Revolving Term Note**, dated **March 7, 2008**, by **Pend Oreille Bonner Development, LLC** in favor of the Bank in the original principal amount of **\$5,000,000.00** (the "Note"; and collectively, along with all other agreements, documents, certificates and instruments delivered in connection therewith, the "Loan Documents"), and any substitutions, modifications, extensions or amendments to any of the Loan Documents.

The amount of principal obligations outstanding and evidenced by the Loan Documents and secured by this Mortgage total **\$5,000,000.00** as of the date of this Mortgage (the "Amount"), but this Mortgage shall nevertheless secure payment and performance of all Obligations, including, without limitation, any other liabilities and future advances, direct or indirect, absolute or contingent, now existing or hereafter arising from Mortgage to Bank.

1.2 Security Interest in Property. As continuing security for the Obligations the Mortgagor hereby pledges, assigns and grants to the Bank, and its successors and assigns, a security interest in any of the

Property (as hereinafter defined) constituting personal property or fixtures. This Mortgage is and shall be deemed to be a security agreement and financing statement pursuant to the terms of the Uniform Commercial Code of Idaho (the "Uniform Commercial Code") as to any and all personal property and fixtures and as to all such property the Bank shall have the rights and remedies of a secured party under the Uniform Commercial Code in addition to its rights hereunder. This Mortgage constitutes a financing statement filed as a fixture filing under Section 28-9-502(c) of the Uniform Commercial Code covering any Property which now is or later may become a fixture.

1.3 Collateral Assignment of Leases and Rents. The Mortgagor hereby irrevocably and unconditionally assigns to the Bank, and its successors and assigns, as collateral security for the Obligations all of the Mortgagor's rights and benefits under any and all Leases (as hereinafter defined) and any and all rents and other amounts now or hereafter owing with respect to the Leases or the use or occupancy of the Property. This collateral assignment shall be absolute and effective immediately, but the Mortgagor shall have a license, revocable by the Bank, to continue to collect rents owing under the Leases until an Event of Default (as hereinafter defined) occurs and the Bank exercises its rights and remedies to collect such rents as set forth herein.

1.4 Conditions to Grant. The Bank shall have and hold the above granted Property unto and to the use and benefit of the Bank, and its successors and assigns, forever; provided, however, the conveyances, grants and assignments contained in this Mortgage are upon the express condition that, if Mortgagor shall irrevocably pay and perform the Obligations in full, including, without limitation, all principal, interest and premium thereon and other charges, if applicable, in accordance with the terms and conditions in the Loan Documents and this Mortgage, shall pay and perform all other Obligations as set forth in this Mortgage and shall abide by and comply with each and every covenant and condition set forth herein and in the Loan Documents, the conveyances, grants and assignments contained in this Mortgage shall be appropriately released and discharged.

1.5 Property. The term "Property," as used in this Mortgage, shall mean that certain parcel of land and the fixtures, structures and improvements and all personal property constituting fixtures, as that term is defined in the Uniform Commercial Code, now or hereafter thereon located at the Address(es), as more particularly described in Exhibit A attached hereto, together with: (i) all rights now or hereafter existing, belonging, pertaining or appurtenant thereto; (ii) the following categories of assets as defined in the Uniform Commercial Code: goods (including inventory, equipment and any accessions thereto), instruments (including promissory notes), documents, accounts (including health-care-insurance receivables), chattel paper (whether tangible or electronic), deposit accounts, letter-of-credit rights (whether or not the letter of credit is evidenced by a writing), commercial tort claims, securities and all other investment property, general intangibles (including payment intangibles and software), supporting obligations and any and all proceeds of any thereof, whether now owned or hereafter acquired, that are located on or used in connection with, or that arise in whole or in part out of the Mortgagor's use of or business conducted on or respecting, the Property and any substitutions, replacements, accessions and proceeds of any of the foregoing; (iii) all judgments, awards of damages and settlements hereafter made as a result or in lieu of any Taking, as hereinafter defined; (iv) all of the rights and benefits of the Mortgagor under any present or future leases and agreements relating to the Property, including, without limitation, rents, issues and profits, or the use or occupancy thereof together with any extensions and renewals thereof, specifically excluding all duties or obligations of the Mortgagor of any kind arising thereunder (the "Leases"); and (v) all contracts, permits and licenses respecting the use, operation or maintenance of the Property.

1.6 Obligations. The term "Obligation(s)," as used in this Mortgage, shall mean without limitation all loans, advances, indebtedness, notes, liabilities, rate swap transactions, basis swaps, forward rate transactions, commodity swaps, commodity options, equity or equity index swaps, equity or equity index options, bond options, interest rate options, foreign exchange transactions, cap transactions, floor transactions, collar transactions, forward transactions, currency swap transactions, cross-currency rate swap transactions, currency options and amounts, liquidated or unliquidated, now or hereafter owing by the Mortgagor to the Bank at any time, of each and every kind, nature and description, whether arising under this Mortgage or otherwise, and whether secured or unsecured, direct or indirect (that is, whether

the same are due directly by the Mortgagor to the Bank; or are due indirectly by the Mortgagor to the Bank as endorser, guarantor or other surety, or as obligor of obligations due third persons which have been endorsed or assigned to the Bank, or otherwise), absolute or contingent, due or to become due, now existing or hereafter contracted, including, without limitation, payment of all amounts outstanding when due pursuant to the terms of any of the Loan Documents. Said term shall also include all interest and other charges chargeable to the Mortgagor or due from the Mortgagor to the Bank from time to time and all advances, costs and expenses referred to in this Mortgage, including without limitation the costs and expenses (including reasonable attorney's fees) of enforcement of the Bank's rights hereunder or pursuant to any document or instrument executed in connection herewith.

1.7 Cross-Collateral and Future Advances. It is the express intention of the Mortgagor that this Mortgage secure payment and performance of all of the Obligations, whether now existing or hereinafter incurred by reason of future advances by the Bank or otherwise, and regardless of whether such Obligations are or were contemplated by the parties at the time of the granting of this Mortgage. Notice of the continuing grant of this Mortgage shall not be required to be stated on the face of any document evidencing any of the Obligations, nor shall such documents be required to otherwise specify that they are secured hereby.

## 2. REPRESENTATIONS, WARRANTIES, COVENANTS

2.1 Representations and Warranties. The Mortgagor represents and warrants that:

- (a) This Mortgage has been duly executed and delivered by the Mortgagor and is the legal, valid and binding obligation of the Mortgagor enforceable in accordance with its terms, except as limited by bankruptcy, insolvency, reorganization, moratorium or other laws affecting the enforcement of creditors' rights generally;
- (b) The Mortgagor is the sole legal owner of the Property, holding good and marketable fee simple title to the Property, subject to no liens, encumbrances, leases, security interests or rights of others, other than as set forth in any title insurance policy, title report, or final title opinion issued in favor of, and accepted by, the Bank in connection with this Deed of Trust (the "Permitted Encumbrances");
- (c) The Mortgagor is the sole legal owner of the entire lessor's interest in Leases, if any, with full power and authority to encumber the Property in the manner set forth herein, and the Mortgagor has not executed any other assignment of Leases or any of the rights or rents arising thereunder;
- (d) As of the date hereof, there are no Hazardous Substances (as hereinafter defined) in, on or under the Property, except as disclosed in writing to and acknowledged by the Bank; and
- (e) Each Obligation is a commercial obligation and does not represent a loan used for personal, family or household purposes and is not a consumer transaction.

2.2 Recording; Further Assurances. The Mortgagor covenants that it shall, at its sole cost and expense and upon the request of the Bank, cause this Mortgage, and each amendment, modification or supplement hereto, to be recorded and filed in such manner and in such places, and shall at all times comply with all such statutes and regulations as may be required by law in order to establish, preserve and protect the interest of the Bank in the Property and the rights of the Bank under this Mortgage. Mortgagor will from time to time execute and deliver to the Bank such documents, and take or cause to be taken, all such other or further action, as the Bank may request in order to effect and confirm or vest more securely in the Bank all rights contemplated by this Mortgage (including, without limitation, to correct clerical errors) or to vest more fully in, or assure to the Bank the security interest in, the Property or to comply with applicable statute or law. To the extent permitted by applicable law, Mortgagor authorizes the Bank to file financing statements, continuation statements or amendments, and any such financing

statements, continuation statements or amendments may be filed at any time in any jurisdiction. The Bank may at any time and from time to time file financing statements, continuation statements and amendments thereto that describe the Property as defined in this Mortgage and which contain any other information required by Article 9 of the Uniform Commercial Code for the sufficiency or filing office acceptance of any financing statement, continuation statement or amendment, including whether Mortgagor is an organization, the type of organization and any organization identification number issued to Mortgagor; Mortgagor also authorizes the Bank to file financing statements describing any agricultural liens or other statutory liens held by the Bank. Mortgagor agrees to furnish any such information to the Bank promptly upon request. In addition, Mortgagor shall at any time and from time to time, take such steps as the Bank may reasonably request for the Bank (i) to obtain an acknowledgment, in form and substance satisfactory to the Bank, of any bailee having possession of any of the Property that the bailee holds such Property for the Bank, and (ii) otherwise to insure the continued perfection and priority of the Bank's security interest in any of the Property and the preservation of its rights therein. Mortgagor hereby constitutes the Bank its attorney-in-fact to execute and file all filings required or so requested for the foregoing purposes, all acts of such attorney being hereby ratified and confirmed; and such power, being coupled with an interest, shall be irrevocable until this Mortgage terminates in accordance with its terms, all Obligations are paid in full and the Property is released.

2.3 Restrictions on the Mortgagor. The Mortgagor covenants that it will not, nor will it permit any other person to, directly or indirectly, without the prior written approval of the Bank in each instance:

- (a) Sell, convey, assign, transfer, mortgage, pledge, hypothecate, lease or dispose of all or any part of any legal or beneficial interest in the Mortgagor or the Property or any part thereof or permit any of the foregoing, except as expressly permitted by the terms of this Mortgage;
- (b) Permit the use, generation, treatment, storage, release or disposition of any oil or other material or substance constituting hazardous waste or hazardous materials or substances under any applicable Federal or state law, regulation or rule ("Hazardous Substances"); or
- (c) Permit to be created or suffer to exist any mortgage, lien, security interest, attachment or other encumbrance or charge on the Property or any part thereof or interest therein (except for the Permitted Encumbrances), including, without limitation, (i) any lien arising under any Federal, state or local statute, rule, regulation or law pertaining to the release or cleanup of Hazardous Substances and (ii) any mechanics' or materialmen's lien. The Mortgagor further agrees to give the Bank prompt written notice of the imposition, or notice, of any lien referred to in this Section and to take any action necessary to secure the prompt discharge or release of the same. The Mortgagor agrees to defend its title to the Property and the Bank's interest therein against the claims of all persons and, unless the Bank requests otherwise, to appear in and diligently contest, at the Mortgagor's sole cost and expense, any action or proceeding that purports to affect the Mortgagor's title to the Property or the priority or validity of this Mortgage or the Bank's interest hereunder.

2.4 Operation of Property. The Mortgagor covenants and agrees as follows:

- (a) The Mortgagor will not permit the Property to be used for any unlawful or improper purpose, will at all times comply with all Federal, state and local laws, ordinances and regulations, and the provisions of any Lease, easement or other agreement affecting all or any part of the Property, and will obtain and maintain all governmental or other approvals relating to the Mortgagor, the Property or the use thereof, including without limitation, any applicable zoning or building codes or regulations and any laws or regulations relating to the handling, storage, release or cleanup of Hazardous Substances, and will give prompt written notice to the Bank of (i) any violation of any such law, ordinance or regulation by the Mortgagor or relating to the Property, (ii) receipt of notice from any Federal, state or local authority alleging any such violation and (iii) the presence or release on the Property of any Hazardous Substances;

- (b) The Mortgagor will at all times keep the Property insured for such losses or damage, in such amounts and by such companies as may be required by law and which the Bank may require, provided that, in any case, the Mortgagor shall maintain: (i) physical hazard insurance on an "all risks" basis in an amount not less than 100% of the full replacement cost of the Property; (ii) flood insurance if and as required by applicable Federal law and as otherwise required by the Bank; (iii) comprehensive commercial general liability insurance; (iv) rent loss and business interruption insurance; and (v) such other insurance as the Bank may require from time to time, including builder's risk insurance in the case of construction loans. All policies regarding such insurance shall be issued by companies licensed to do business in the state where the policy is issued and also in the state where the Property is located, be otherwise acceptable to the Bank, provide deductible amounts acceptable to the Bank, name the Bank as mortgagee, loss payee and additional insured, and provide that no cancellation or material modification of such policies shall occur without at least Thirty (30) days prior written notice to the Bank. Such policies shall include (i) a mortgage endorsement determined by the Bank in good faith to be equivalent to the "standard" mortgage endorsement so that the insurance, as to the interest of the Bank, shall not be invalidated by any act or neglect of the Mortgagor or the owner of the Property, any foreclosure or other proceedings or notice of sale relating to the Property, any change in the title to or ownership of the Property, or the occupation or use of the Property for purposes more hazardous than are permitted at the date of inception of such insurance policies; (ii) a replacement cost endorsement; (iii) an agreed amount endorsement; (iv) a contingent liability from operation endorsement; and (v) such other endorsements as the Bank may request. The Mortgagor will furnish to the Bank upon request such original policies, certificates of insurance or other evidence of the foregoing as are acceptable to the Bank. The terms of all insurance policies shall be such that no coinsurance provisions apply, or if a policy does contain a coinsurance provision, the Mortgagor shall insure the Property in an amount sufficient to prevent the application of the coinsurance provisions;
- (c) Mortgagor will not enter into or modify the Leases in any material respect without the prior written consent of the Bank, execute any assignment of the Leases except in favor of the Bank, or accept any rentals under any Lease for more than one month in advance and will at all times perform and fulfill every term and condition of the Leases;
- (d) Mortgagor will at all times (i) maintain complete and accurate records and books regarding the Property in accordance with generally accepted accounting principles and (ii) permit the Bank and the Bank's agents, employees and representatives, at such reasonable times as the Bank may request, to enter and inspect the Property and such books and records; and
- (e) Mortgagor will at all times keep the Property in good and first-rate repair and condition (damage from casualty not excepted) and will not commit or permit any strip, waste, impairment, deterioration or alteration of the Property or any part thereof.

2.5 Payments. The Mortgagor covenants to pay when due: all Federal, state, municipal, real property and other taxes, betterment and improvement assessments and other governmental levies, water rates, sewer charges, insurance premiums and other charges on the Property, this Mortgage or any Obligation secured hereby that could, if unpaid, result in a lien on the Property or on any interest therein. If and when requested by the Bank, the Mortgagor shall deposit from time to time with the Bank sums determined by the Bank to be sufficient to pay when due the amounts referred to in this Section. The Mortgagor shall have the right to contest any notice, lien, encumbrance, claim, tax, charge, betterment assessment or premium filed or asserted against or relating to the Property; provided that it contests the same diligently and in good faith and by proper proceedings and, at the Bank's request, provides the Bank with adequate cash security, in the Bank's reasonable judgment, against the enforcement thereof. The Mortgagor shall furnish to the Bank the receipted real estate tax bills or other evidence of payment of real estate taxes for the Property within thirty (30) days prior to the date from which interest or penalty would accrue for nonpayment thereof. The Mortgagor shall also furnish to the Bank evidence of all other payments referred to above within fifteen (15) days after written request therefor by the Bank. If Mortgagor shall fail to pay such sums, the Bank may, but shall not be obligated to, advance such sums.

Any sums so advanced by the Bank shall be added to the Obligations, shall bear interest at the highest rate specified in any note evidencing the Obligations, and shall be secured by the lien of this Mortgage.

2.6 Notices; Notice of Default. The Mortgagor will deliver to the Bank, promptly upon receipt of the same, copies of all notices or other documents it receives that affect the Property or its use, or claim that the Mortgagor is in default in the performance or observance of any of the terms hereof or that the Mortgagor or any tenant is in default of any terms of the Leases. The Mortgagor further agrees to deliver to the Bank written notice promptly upon the occurrence of any Event of Default hereunder or event that with the giving of notice or lapse of time, or both, would constitute an Event of Default hereunder.

2.7 Takings. In case of any condemnation or expropriation for public use of, or any damage by reason of the action of any public or governmental entity or authority to, all or any part of the Property (a "Taking"), or the commencement of any proceedings or negotiations that might result in a Taking, the Mortgagor shall immediately give written notice to the Bank, describing the nature and extent thereof. The Bank may, at its option, appear in any proceeding for a Taking or any negotiations relating to a Taking and the Mortgagor shall immediately give to the Bank copies of all notices, pleadings, determinations and other papers relating thereto. The Mortgagor shall in good faith and with due diligence and by proper proceedings file and prosecute its claims for any award or payment on account of any Taking. The Mortgagor shall not settle any such claim without the Bank's prior written consent. The Mortgagor shall hold any amounts received with respect to such awards or claims, by settlement, judicial decree or otherwise, in trust for the Bank and immediately pay the same to the Bank. The Mortgagor authorizes any award or settlement due in connection with a Taking to be paid directly to the Bank in amounts not exceeding the Obligations. The Bank may apply such amounts to the Obligations in such order as the Bank may determine.

2.8 Insurance Proceeds. The proceeds of any insurance resulting from any loss with respect to the Property shall be paid to the Bank and, at the option of the Bank, be applied to the Obligations in such order as the Bank may determine; provided, however, that if the Bank shall require repair of the Property, the Bank may release all or any portion of such proceeds to the Mortgagor for such purpose. Any insurance proceeds paid to the Mortgagor shall be held in trust for the Bank and promptly paid to it.

### 3. CERTAIN RIGHTS OF THE BANK

3.1 Legal Proceedings. The Bank shall have the right, but not the duty, to intervene or otherwise participate in any legal or equitable proceeding that, in the Bank's reasonable judgment, might affect the Property or any of the rights created or secured by this Mortgage. The Bank shall have such right whether or not there shall have occurred an Event of Default hereunder.

3.2 Appraisals/Assessments. The Bank shall have the right, at the Mortgagor's sole cost and expense, to obtain appraisals, environmental site assessments or other inspections of the portions of the Property that are real estate at such times as the Bank deems necessary or as may be required by applicable law, or its prevailing credit or underwriting policies.

3.3 Financial Statements. The Bank shall have the right, at the Mortgagor's sole cost and expense, to require delivery of financial statements in form and substance acceptable to the Bank from the Mortgagor or any guarantor of any of the Obligations and the Mortgagor hereby agrees to deliver such financial statements and/or cause any such guarantor to so deliver any such financial statement when required by the Bank.

3.4 Leases and Rent Roll. The Mortgagor shall deliver to the Bank (i) during each calendar year and at such other times as the Bank shall request a rent roll for the Property, in form acceptable to the Bank, listing all tenants and occupants and describing all of the Leases; and (ii) at such times as the Bank shall request executed copies of all the Leases.

#### 4. DEFAULTS AND REMEDIES

4.1 Events of Default. Event of Default shall mean the occurrence of any one or more of the following events:

- (a) default of any liability, obligation, covenant or undertaking of the Mortgagor or any guarantor of the Obligations to the Bank, hereunder or otherwise, including, without limitation, failure to pay in full and when due any installment of principal or interest or default of the Mortgagor or any guarantor of the Obligations under any other Loan Document or any other agreement with the Bank continuing for 10 days with respect to the payment of money or continuing for 30 days with respect to any other default;
- (b) failure by the Mortgagor or any guarantor of the Obligations to perform, observe or comply with any of the covenants, agreements, terms or conditions set forth in this Mortgage or the Loan Documents continuing for 30 days;
- (c) the (i) occurrence of any material loss, theft, damage or destruction of, or (ii) issuance or making of any levy, seizure, attachment, execution or similar process on a material portion of the Property;
- (d) failure of the Mortgagor or any guarantor of the Obligations to maintain aggregate collateral security value satisfactory to the Bank continuing for 30 days;
- (e) default of any material liability, obligation or undertaking of the Mortgagor or any guarantor of the Obligations to any other party continuing for 30 days;
- (f) if any statement, representation or warranty heretofore, now or hereafter made by the Mortgagor or any guarantor of the Obligations in connection with this Mortgage or in any supporting financial statement of the Mortgagor or any guarantor of the Obligations shall be determined by the Bank to have been false or misleading in any material respect when made;
- (g) if the Mortgagor or any guarantor of the Obligations is a corporation, trust, partnership or limited liability company, the liquidation, termination or dissolution of any such organization, or the merger or consolidation of such organization into another entity, or its ceasing to carry on actively its present business or the appointment of a receiver for its property;
- (h) the death of the Mortgagor or any guarantor of the Obligations and, if the Mortgagor or any guarantor of the Obligations is a partnership or limited liability company, the death of any partner or member;
- (i) the institution by or against the Mortgagor or any guarantor of the Obligations of any proceedings under the Bankruptcy Code 11 USC §101 *et seq.* or any other law in which the Mortgagor or any guarantor of the Obligations is alleged to be insolvent or unable to pay its debts as they mature, or the making by the Mortgagor or any guarantor of the Obligations of an assignment for the benefit of creditors or the granting by the Mortgagor or any guarantor of the Obligations of a trust mortgage for the benefit of creditors;
- (j) the service upon the Bank of a writ in which the Bank is named as trustee of the Mortgagor or any guarantor of the Obligations;
- (k) a judgment or judgments for the payment of money shall be rendered against the Mortgagor or any guarantor of the Obligations, and any such judgment shall remain unsatisfied and in effect for any period of thirty (30) consecutive days without a stay of execution;

- (l) any levy, lien (including mechanics lien), seizure, attachment, execution or similar process shall be issued or levied on any of the property of the Mortgagor or any guarantor of the Obligations;
- (m) the termination or revocation of any guaranty of the Obligations; or
- (n) the occurrence of such a change in the condition or affairs (financial or otherwise) of the Mortgagor or any guarantor of the Obligations, or the occurrence of any other event or circumstance, such that the Bank, in its sole discretion, deems that it is insecure or that the prospects for timely or full payment or performance of any obligation of the Mortgagor or any guarantor of the Obligations to the Bank has been or may be impaired.

4.2 Remedies. On the occurrence of any Event of Default the Bank may, at any time thereafter, at its option and, to the extent permitted by applicable law, without notice, exercise any or all of the following remedies:

- (a) Declare the Obligations due and payable, and the Obligations shall thereupon become immediately due and payable, without presentment, protest, demand or notice of any kind, all of which are hereby expressly waived by the Mortgagor except for Obligations due and payable on demand, which shall be due and payable on demand whether or not an event of default has occurred hereunder;
- (b) Enter, take possession of, manage and operate the Property (including all personal property and all records and documents pertaining thereto) and any part thereof and exclude the Mortgagor therefrom, take all actions it deems necessary or proper to preserve the Property and operate the Property as a mortgagee in possession with all the powers as could be exercised by a receiver or as otherwise provided herein or by applicable law; provided, however, the entry by the Bank upon the Property for any reason shall not cause the Bank to be a mortgagee in possession, except upon the express written declaration of the Bank;
- (c) With or without taking possession, receive and collect all rents, income, issues and profits ("Rents") from the Property (including all real estate and personal property and whether past due or thereafter accruing), including as may arise under the Leases, and the Mortgagor appoints the Bank as its true and lawful attorney with the power for the Bank in its own name and capacity to demand and collect Rents and take any action that the Mortgagor is authorized to take under the Leases. The Bank shall (after payment of all costs and expenses incurred) apply any Rents received by it to the Obligations in such order as the Bank determines, or in accordance with any applicable statute, and the Mortgagor agrees that exercise of such rights and disposition of such funds shall not be deemed to cure any default or constitute a waiver of any foreclosure once commenced nor preclude the later commencement of foreclosure for breach thereof. The Bank shall be liable to account only for such Rents actually received by the Bank. Lessees under the Leases are hereby authorized and directed, following notice from the Bank, to pay all amounts due the Mortgagor under the Leases to the Bank, whereupon such lessees shall be relieved of any and all duty and obligation to the Mortgagor with respect to such payments so made;
- (d) In addition to any other remedies, to sell the Property or any part thereof or interest therein at public auction on terms and conditions as the Bank may determine, or otherwise foreclose this Mortgage in any manner permitted by law, and upon such sale the Mortgagor shall execute and deliver such instruments as the Bank may request in order to convey and transfer all of the Mortgagor's interest in the Property, and the same shall operate to divest all rights, title and interest of the Mortgagor in and to the Property. In the event this Mortgage shall include more than one parcel of property or subdivision (each hereinafter called a "portion"), the Bank shall, in its sole and exclusive discretion and to the extent permitted by applicable law, be empowered to foreclose upon any such portion without impairing its right to foreclose



subsequently upon any other portion or the entirety of the Property from time to time thereafter. In addition, the Bank may in its discretion subordinate this Mortgage to one or more Leases for the sole purpose of preserving any such Lease in the event of a foreclosure;

- (e) Cause one or more environmental assessments to be taken, arrange for the cleanup of any Hazardous Substances or otherwise cure the Mortgagor's failure to comply with any statute, regulation or ordinance relating to the presence or cleanup of Hazardous Substances, and the Mortgagor shall provide the Bank or its agents with access to the Property for such purposes; provided that the exercise of any of such remedies shall not be deemed to have relieved the Mortgagor from any responsibility therefor or given the Bank "control" over the Property or cause the Bank to be considered to be a mortgagee in possession, "owner" or "operator" of the Property for purposes of any applicable law, rule or regulation pertaining to Hazardous Substances; and
- (f) Take such other actions or proceedings as the Bank deems necessary or advisable to protect its interest in the Property and ensure payment and performance of the Obligations, including, without limitation, appointment of a receiver (and the Mortgagor hereby waives any right to object to such appointment) and exercise of any of the Bank's remedies provided herein or in any other document evidencing, securing or relating to any of the Obligations or available to a secured party under the Uniform Commercial Code or under other applicable law.

In addition, the Bank shall have all other remedies provided by applicable law, including, without limitation, the right to pursue a judicial sale of the Property or any portion thereof by deed, assignment or otherwise.

The Mortgagor agrees and acknowledges that the acceptance by the Bank of any payments from either the Mortgagor or any guarantor after the occurrence of any Event of Default, the exercise by the Bank of any remedy set forth herein or the commencement, discontinuance or abandonment of foreclosure proceedings against the Property shall not waive the Bank's subsequent or concurrent right to foreclose or operate as a bar or estoppel to the exercise of any other rights or remedies of the Bank. The Mortgagor agrees and acknowledges that the Bank, by making payments or incurring costs described herein, shall be subrogated to any right of the Mortgagor to seek reimbursement from any third parties, including, without limitation, any predecessor in interest to the Mortgagor's title or other party who may be responsible under any law, regulation or ordinance relating to the presence or cleanup of Hazardous Substances.

4.3 Advances. If the Mortgagor fails to pay or perform any of its obligations respecting the Property, the Bank may in its sole discretion do so without waiving or releasing Mortgagor from any such obligation. Any such payments may include, but are not limited to, payments for taxes, assessments and other governmental levies, water rates, insurance premiums, maintenance, repairs or improvements constituting part of the Property. Any amounts paid by the Bank hereunder shall be, until reimbursed by the Mortgagor, part of the Obligations and secured by this Mortgage, and shall be due and payable to the Bank, on demand, together with interest thereon to the extent permitted by applicable law, at the highest rate permitted under any of the notes evidencing the Obligations.

4.4 Cumulative Rights and Remedies. All of the foregoing rights, remedies and options (including without limitation the right to enter and take possession of the Property, the right to manage and operate the same, and the right to collect Rents, in each case whether by a receiver or otherwise) are cumulative and in addition to any rights the Bank might otherwise have, whether at law or by agreement, and may be exercised separately or concurrently and none of which shall be exclusive of any other. The Mortgagor further agrees that the Bank may exercise any or all of its rights or remedies set forth herein without having to pay the Mortgagor any sums for use or occupancy of the Property.

4.5 Mortgagor's Waiver of Certain Rights. To the extent permitted by applicable law, the Mortgagor hereby waives the benefit of all present and future laws (i) providing for any appraisal before sale of all or

any portion of the Property or (ii) in any way extending the time for the enforcement of the collection of the Obligations or creating or extending a period of redemption from any sale made hereunder.

## 5. MISCELLANEOUS

5.1 Costs and Expenses. To the extent permitted by applicable law, the Mortgagor shall pay to the Bank, on demand, all reasonable expenses (including attorneys' fees and expenses and reasonable consulting, accounting, appraisal, brokerage and similar professional fees and charges) incurred by the Bank in connection with the Bank's interpretation, recordation of this Mortgage, exercise, preservation or enforcement of any of its rights, remedies and options set forth in this Mortgage and in connection with any litigation, proceeding or dispute whether arising hereunder or otherwise relating to the Obligations, together with interest thereon to the extent permitted by applicable law, until paid in full by the Mortgagor at the highest rate set forth in any of the notes evidencing the Obligations. Any amounts owed by the Mortgagor hereunder shall be, until paid, part of the Obligations and secured by this Mortgage, and the Bank shall be entitled, to the extent permitted by law, to receive and retain such amounts in any action for a deficiency against or redemption by the Mortgagor, or any accounting for the proceeds of a foreclosure sale or of insurance proceeds.

5.2 Indemnification Regarding Leases. The Mortgagor hereby agrees to defend, and does hereby indemnify and hold the Bank and each of its directors, officers, employees, agents and attorneys (each an "Indemnitee") harmless from all losses, damages, claims, costs or expenses (including attorneys' fees and expenses) resulting from the assignment of the Leases and from all demands that may be asserted against such Indemnitees arising from any undertakings on the part of the Bank to perform any obligations under the Leases. It is understood that the assignment of the Leases shall not operate to place responsibility for the control or management of the Property upon the Bank or any Indemnitee or make them liable for performance of any of the obligations of the Mortgagor under Leases, respecting any condition of the Property or any other agreement or arrangement, written or oral, or applicable law.

5.3 Indemnification Regarding Hazardous Substances. The Mortgagor hereby agrees to defend, and does hereby indemnify and hold harmless each Indemnitee from and against any and all losses, damages, claims, costs or expenses, including, without limitation, litigation costs and attorneys' fees and expenses and fees or expenses of any environmental engineering or cleanup firm incurred by such Indemnitee and arising out of or in connection with the Property or resulting from the application of any current or future law, regulation or ordinance relating to the presence or cleanup of Hazardous Substances on or affecting the Property. The Mortgagor agrees its obligations hereunder shall be continuous and shall survive termination or discharge of this Mortgage and/or the repayment of all debts to the Bank including repayment of all Obligations.

5.4 Indemnitee's Expenses. If any Indemnitee is made a party defendant to any litigation or any claim is threatened or brought against such Indemnitee concerning this Mortgage or the Property or any part thereof or therein or concerning the construction, maintenance, operation or the occupancy or use thereof by the Mortgagor or other person or entity, then the Mortgagor shall indemnify, defend and hold each Indemnitee harmless from and against all liability by reason of said litigation or claims, including attorneys' fees and expenses incurred by such Indemnitee in connection with any such litigation or claim, whether or not any such litigation or claim is prosecuted to judgment. The within indemnification shall survive payment of the Obligations, and/or any termination, release or discharge executed by the Bank in favor of the Mortgagor.

5.5 Waivers. The Mortgagor waives notice of nonpayment, demand, presentment, protest or notice of protest of the Obligations and all other notices, consents to any renewals or extensions of time of payment thereof, and generally waives any and all suretyship defenses and defenses in the nature thereof. No delay or omission of the Bank in exercising or enforcing any of its rights, powers, privileges, remedies, immunities or discretion (all of which are hereinafter collectively referred to as "the Bank's rights and remedies") hereunder shall constitute a waiver thereof; and no waiver by the Bank of any default of the Mortgagor hereunder or of any demand shall operate as a waiver of any other default

hereunder or of any other demand. No term or provision hereof shall be waived, altered or modified except with the prior written consent of the Bank, which consent makes explicit reference to this Mortgage. Except as provided in the preceding sentence, no other agreement or transaction, of whatsoever nature, entered into between the Bank and the Mortgagor at any time (whether before, during or after the effective date or term of this Mortgage) shall be construed as a waiver, modification or limitation of any of the Bank's rights and remedies under this Mortgage (nor shall anything in this Mortgage be construed as a waiver, modification or limitation of any of the Bank's rights and remedies under any such other agreement or transaction) but all the Bank's rights and remedies not only under the provisions of this Mortgage but also under any such other agreement or transaction shall be cumulative and not alternative or exclusive, and may be exercised by the Bank at such time or times and in such order of preference as the Bank in its sole discretion may determine.

5.6 Joint and Several. If there is more than one Mortgagor, each of them shall be jointly and severally liable for payment and/or performance of all obligations secured by this Mortgage and the term "Mortgagor" shall include each as well as all of them.

5.7 Severability. If any provision of this Mortgage or portion of such provision or the application thereof to any person or circumstance shall to any extent be held invalid or unenforceable, the remainder of this Mortgage (or the remainder of such provision) and the application thereof to other persons or circumstances shall not be affected thereby.

5.8 Complete Agreement. This Mortgage and the other Loan Documents constitute the entire agreement and understanding between and among the parties hereto relating to the subject matter hereof, and supersedes all prior proposals, negotiations, agreements and understandings among the parties hereto with respect to such subject matter.

5.9 Binding Effect of Agreement. This Mortgage shall run with the land and be binding upon and inure to the benefit of the respective heirs, executors, administrators, legal representatives, successors and assigns of the parties hereto, and shall remain in full force and effect (and the Bank shall be entitled to rely thereon) until all Obligations are fully and indefeasibly paid. The Bank may transfer and assign this Mortgage and deliver any collateral to the assignee, who shall thereupon have all of the rights of the Bank; and the Bank shall then be relieved and discharged of any responsibility or liability with respect to this Mortgage and such collateral. Except as expressly provided herein or in the other Loan Documents, nothing, expressed or implied, is intended to confer upon any party, other than the parties hereto, any rights, remedies, obligations or liabilities under or by reason of this Mortgage or the other Loan Documents.

5.10 Notices. Any notices under or pursuant to this Mortgage shall be deemed duly received and effective if delivered in hand to any officer or agent of the Mortgagor or Bank, or if mailed by registered or certified mail, return receipt requested, addressed to the Mortgagor or Bank at the address set forth in this Mortgage or as any party may from time to time designate by written notice to the other party.

5.11 Governing Law. This Mortgage shall be governed by Idaho law.

5.12 Reproductions. This Mortgage and all documents which have been or may be hereinafter furnished by the Mortgagor to the Bank may be reproduced by the Bank by any photographic, photostatic, microfilm, xerographic or similar process, and any such reproduction shall be admissible in evidence as the original itself in any judicial or administrative proceeding (whether or not the original is in existence and whether or not such reproduction was made in the regular course of business).

5.13 Jurisdiction and Venue. The Mortgagor irrevocably submits to the nonexclusive jurisdiction of any Federal or state court sitting in California and any Federal or state court sitting in Idaho, over any suit, action or proceeding arising out of or relating to this Mortgage. The Mortgagor irrevocably waives, to the fullest extent it may effectively do so under applicable law, any objection it may now or hereafter have to the laying of the venue of any such suit, action or proceeding brought in any such court and any claim

that the same has been brought in an inconvenient forum. The Mortgagor hereby consents to process being served in any such suit, action or proceeding (i) by the mailing of a copy thereof by registered or certified mail, postage prepaid, return receipt requested, to the Mortgagor's address set forth herein or such other address as has been provided in writing to the Bank and (ii) in any other manner permitted by law, and agrees that such service shall in every respect be deemed effective service upon the Mortgagor.

5.14 Arbitration. THE PARTIES AGREE TO ATTEMPT IN GOOD FAITH TO RESOLVE ANY DISPUTES WHICH MAY ARISE AMONG THEM IN CONNECTION WITH THE INTERPRETATION OR ENFORCEMENT OF THE PROVISIONS OF THIS AGREEMENT, OR THE APPLICATION OR VALIDITY THEREOF. IN THE EVENT THAT ANY DISPUTE CANNOT BE SO RESOLVED, AND UNLESS THE RELIEF SOUGHT REQUIRES THE EXERCISE OF THE EQUITY POWERS OF A COURT OF COMPETENT JURISDICTION, SUCH DISPUTE SHALL BE SUBMITTED TO ARBITRATION. SUCH ARBITRATION PROCEEDINGS SHALL BE HELD IN THE COUNTY OF SANTA BARBARA, CALIFORNIA, IN ACCORDANCE WITH THE ARBITRATION PROVISIONS OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. THIS AGREEMENT TO ARBITRATE SHALL BE SPECIFICALLY ENFORCEABLE. ANY AWARD RENDERED IN ANY SUCH ARBITRATION PROCEEDINGS SHALL BE FINAL AND BINDING ON EACH OF THE PARTIES HERETO, AND JUDGEMENT MAY BE ENTERED THEREON IN ANY COURT OF COMPETENT JURISDICTION. THE FOREGOING AGREEMENT TO ARBITRATE DOES NOT LIMIT THE RIGHT OF ANY PARTY TO (I) FORECLOSE AGAINST REAL OR PERSONAL PROPERTY COLLATERAL; (II) EXERCISE SELF-HELP REMEDIES RELATING TO COLLATERAL OR PROCEEDS OF COLLATERAL SUCH AS SETOFF OR REPOSSESSION; OR (III) OBTAIN PROVISIONAL OR ANCILLARY REMEDIES SUCH AS REPLEVIN, INJUNCTIVE RELIEF, ATTACHMENT OR THE APPOINTMENT OF A RECEIVER, BEFORE DURING OR AFTER THE PENDENCY OF ANY ARBITRATION PROCEEDING. THIS EXCLUSION DOES NOT CONSTITUTE A WAIVER OF THE RIGHT OR OBLIGATION OF ANY PARTY TO SUBMIT ANY DISPUTE TO ARBITRATION HEREUNDER, INCLUDING THOSE ARISING FROM THE EXERCISE OF THE ACTIONS DETAILED IN THE FOREGOING CLAUSES (I), (II) AND (III).

EXECUTED as of the date first above written.

Mortgagor:

Pend Oreille Bonner Development, LLC

By: Pend Oreille Bonner Development Holdings, Inc.,  
Manager

By:   
Charles W. Reeves, President

STATE OF IDAHO )

) SS

COUNTY OF BONNER )

On MARCH 21, 2008 before me, BETTY J. FALETTO, personally appeared Charles W. Reeves, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: Betty J. Falitto

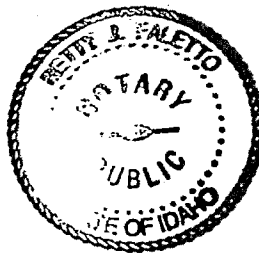


EXHIBIT "A"

Property Description

Real property in the County of Bonner, State of Idaho, described as follows:

**PARCEL 1:**

That portion of the Southwest quarter of the Southwest quarter of Section 16, Township 57 North, Range 1 East, Boise Meridian, lying West of the State Highway No. 200 right of way and East of the Northern Pacific Railway right of way and lying North of the North line of the following described tract:

Beginning at a point where the Section line between Sections 16 and 21, Township 57 North, Range 1 West, Boise Meridian, intersects the State Highway on the Westerly side as it now exists; thence in a Northwesterly direction along the Westerly side of said Highway, 752 feet; thence in a Southwesterly direction, 97 feet; thence in a Southeasterly direction 672 feet to the Section line between Sections 16 and 21; thence East on said Section line between said Sections 16 and 21, 104.25 feet, more or less, to the place of beginning.

Said parcel is now described as follows:

A tract of land situated in the Southwest quarter of the Southwest quarter of Section 16, Township 57 North, Range 1 East of the Boise Meridian, Bonner County, Idaho, lying Southwest of the right of way of State Highway No. 200 and Northeast of the right of way of Montana Rail Link Railway, being a portion of that property described as Parcel 1 of Instrument No. 168846 and more particularly described as follows:

Commencing at the intersection of the South line of the Southwest quarter of the Southwest quarter of Section 16 and the Northeasterly right of way of Montana Rail Link Railway which is South 88° 10' 56" East, 944.95 feet from the Southwest corner of Section 16; thence leaving said South line and along said right of way North 23° 38' 59" West, 672.00 feet to the true point of beginning; thence continuing along said right of way North 23° 38' 59" West, 786.99 feet to the intersection with the North line of the Southwest quarter of the Southwest quarter; thence leaving said right of way and along said North line South 88° 43' 23" East, 241.38 feet to the Westerly right of way of State Highway No. 200; thence leaving said North line and along said right of way the following four (4) courses:

on a non-tangential curve to the right having a central angle of 01° 19' 25" (radial bearing = South 73° 15' 16" West), a radius of 768.50 feet, for an arc length of 17.75 feet (chord = South 16° 06' 41" East, 17.75 feet); thence along a line offset 50.00 feet Westerly of and parallel to a spiral curve (centerline is = 200 feet, a = 3.5, S = 7°) for a chord of South 10° 43' 01" East, 193.87 feet); thence South 08° 25' 19" East, 86.06 feet; thence on a curve to the left having a central angle of 13° 56' 48", a radius of 1482.53 feet, for an arc length of 360.87 feet (chord = South 15° 23' 43" East, 359.98 feet);

thence leaving said right of way South 44° 37' 10" West, 106.45 feet (record = "Southwesterly 97 feet") to the true point of beginning.

**PARCEL 2:**

That part of the Southwest quarter of the Southwest quarter in Section 16, Township 57 North, Range 1 East of the Boise Meridian, lying South and West of the Burlington Northern Inc. Railway right of way and Government Lot 5 in Section 17, Township 57 North, Range 1 East of the Boise Meridian, save and excepting therefrom:

The South 350 feet of Government Lot 5 in said Section 17, and also that part of the Southwest quarter of the Southwest quarter in said Section 16 lying Westerly of said Burlington Northern Inc. right of way as now in use and described as follows:

Beginning at the Southwest corner of said Section 16; thence North along the West Section

line 350 feet; thence East to the centerline of Trestle Creek; thence Southeasterly along said centerline to the South line of Section 16; thence West along the Section line 720 feet, more or less, to the point of beginning.

Said parcel is now described as follows:

A tract of land situated in the Southwest quarter of the Southwest quarter of Section 16, lying Southwest of Montana Rail Link Railroad right of way and Government Lot 5 of Section 17, all in Township 57 North, Range 1 East, of the Boise Meridian, Bonner County, Idaho, being a portion of that property described as Parcel 2 of Instrument No. 168846 and more particularly described as follows:

Beginning at the intersection of the South line of the Southwest quarter of the Southwest quarter of Section 16 and the Southwesterly right of way of Montana Rail Link Railway which is South  $88^{\circ} 10' 56''$  East, 834.19 feet from the Southwest corner of Section 16; thence leaving said South line and along said right of way North  $23^{\circ} 38' 59''$  West, 1457.84 feet to the intersection with the North line of the Southwest quarter of the Southwest quarter; thence leaving said right of way and along the North line of the Southwest quarter of the Southwest quarter, North  $88^{\circ} 43' 23''$  West, 243.71 feet to the Northwest corner of the Southwest quarter of the Southwest quarter; thence along the North line of Government Lot 5 in Section 17, North  $89^{\circ} 23' 45''$  West, 1223.84 feet to the meander line of Lake Pend Oreille, as defined by the original GLO Survey; thence leaving said North line and along said meander line the following two (2) courses:

South  $52^{\circ} 55' 48''$  East, 561.00 feet; thence South  $37^{\circ} 55' 48''$  East, 798.96 feet to a point on a line lying 350.00 feet North of and parallel to the South line of the Southwest quarter of the Southwest quarter of Section 16;

thence along said parallel line, South  $88^{\circ} 10' 56''$  East, 281.27 feet to the West line of the said Southwest quarter of the Southwest quarter; thence continuing South  $88^{\circ} 10' 56''$  East, 159.02 feet to the intersection with the centerline of Trestle Creek; thence along the centerline of Trestle Creek the following eight (8) courses:

South  $52^{\circ} 54' 34''$  East, 63.58 feet; thence South  $44^{\circ} 37' 26''$  East, 117.83 feet; thence South  $42^{\circ} 08' 45''$  East, 77.28 feet; thence South  $80^{\circ} 05' 07''$  East, 145.49 feet; thence South  $55^{\circ} 15' 32''$  East, 86.34 feet thence South  $46^{\circ} 56' 31''$  East, 113.98 feet; thence South  $75^{\circ} 43' 10''$  East, 58.83 feet; thence South  $37^{\circ} 48' 28''$  East, 27.37 feet to the intersection with the South line of the Southwest quarter of the Southwest quarter;

thence leaving said creek centerline and along said South line South  $88^{\circ} 10' 56''$  East, 116.80 feet to the true point of beginning.

**PARCEL 3:**

A portion of the Northeast quarter of the Northwest quarter and Government Lot 1 in Section 21, Township 57 North, Range 1 East, Boise Meridian, Bonner County, Idaho, described as follows:

Beginning at a point where the South line of the Northeast quarter of the Northwest quarter of Section 21, Township 57 North, Range 1 East, Boise Meridian, Bonner County, Idaho, intersects the West line of the Northern Pacific Railroad Company right-of-way; thence 600 feet Northerly along said railroad right-of-way; thence West to the meander line of the lake; thence 600 feet Southerly to the the South line of Lot 1 of said Section 21; thence East to the Point of Beginning.

Said parcel is now described as follows:

A tract of land situated in the Northeast quarter of the Northwest quarter and Government Lot 1 of Section 21, Township 57 North, Range 1 East of the Boise Meridian, Bonner County,

112390  
112353

Idaho, more particularly described as follows:

Beginning at the intersection of the South line of the Northeast quarter of the Northwest quarter of Section 21 and the Westerly right of way of Montana Rail Link Railroad which is South 88° 55' 48" East, 139.54 feet from the Southwest corner of said Northeast quarter of the Northwest quarter; thence leaving said South line and along said right of way the following two (2) courses:

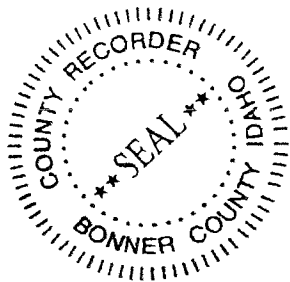
on a non-tangential curve to the left having a central angle of 10° 44' 25" (radial bearing = South 65° 01' 49" West) a radius of 2664.79 feet, for an arc length of 499.53 feet (chord = North 30° 20' 24" West, 498.80 feet); thence North 25° 10' 12" West, 100.47 feet;

thence leaving said right of way and parallel to the South line of Government Lot 1, North 88° 55' 48" West, 936.05 feet to the meander line of Lake Pend Oreille as defined in the original GLO Survey; thence along said meander line the following two (2) courses:

South 14° 25' 48" East, 271.54 feet; thence South 46° 40' 48" East, 378.00 feet to the intersection with the South line of Government Lot 1;

thence along said South line South 88° 55' 48" East, 748.52 feet to the Southeast corner of Government Lot 1; thence along the South line of the Northeast quarter of the Northwest quarter, South 88° 55' 48" East, 139.54 feet to the true point of beginning.

Commonly known as: NNA, Sandpoint, ID 83864



STATE OF IDAHO  
County of Bonner

I, Marie Scott, County Recorder in and for the county and state aforesaid, do hereby certify that the foregoing instrument is a true and correct copy of the original thereof recorded in my office by instrument number 748379.  
Witness my hand and seal,

the 24 day of June 2013  
MARIE SCOTT, COUNTY RECORDER

By Cynthia Blanner Deputy





**EXHIBIT 2  
TO  
APPENDIX A**

FILED BY  
SANDPOINT TITLE INSURANCE  
2006 JUN 19 P 1:37  
MARIE SCOTT  
BONNER COUNTY RECORDER  
DEPUTY

706470

**REAL ESTATE MORTGAGE**

Escrow No.:41847-NA

**For Value Received Pend Oreille Bonner Development Holdings Inc, a Nevada corporation,**

the Mortgagor, does hereby Grant, Bargain, Sell and Convey unto J.V. LLC, an Idaho Limited liability company,

the Mortgagee, the following described premises in Bonner County, ID, to-wit:

See attached Exhibit "A" (AKA: the real estate referred to as Section D, Parcels 1, 2, and 3)

To have and to hold the said premises, with their appurtenances, unto the said mortgagees heirs and assigns forever.

This conveyance is a first priority lien mortgage to secure payment of the sum of \$2,565,000.00 on the real estate attached as Exhibit "A"

With interest, in accordance with the terms of a promissory note dated October 20, 1995, payable to the order of the mortgagee, with final payment due June 19<sup>th</sup> 2008, as modified in amendment dated June 16, 2006, and providing for acceleration of the due date of the principal for default in the payment of interest or any installment of principal, and providing for a reasonable attorney's fee in case of suit or action.

The Mortgagor covenants and agrees with the mortgagee as follows:

That he/she or they are the owner in fee simple of the above described premises and that they are free from all encumbrances.

That he/she or they will pay the indebtedness hereby secured promptly, according to the terms of said promissory note.

That he/she or they will pay all taxes, liens and assessments of any nature hereafter levied or imposed, or becoming payable, upon said premises not later than the twentieth day before delinquency.

That he/she or they will keep the buildings on said premises insured against loss or damage by fire, by an insurance company acceptable to the mortgagee with loss payable to the mortgagee as their interest may appear, in a sum not less than the outstanding balance of the indebtedness secured hereby; and deliver such policy to the mortgagee, until the sums secured by this mortgage are fully paid with interest. The mortgagee may from time to time and whenever it so desires, cause an abstract of title to be continued to the then date or procure a title report from a reputable Title Company and the mortgagor agrees to pay the cost thereof upon demand.

If the mortgagor shall fail to pay any such tax or lien, abstract or title report charge, or fail to maintain such fire insurance, the mortgagee may pay the same or procure said insurance, abstract continuation or title report and pay the cost thereof, and all payments by the mortgagee for any such purpose shall be added to the indebtedness hereby secured and shall be repayable on demand, with interest.

For the purpose of further securing said indebtedness and performance of the covenants herein contained, the mortgagor hereby sells and assigns to the mortgagee any and all rentals accruing, or to accrue on said premises, during the life of this mortgage.

Now, if the said mortgagor shall pay or cause to be paid all moneys which may become due upon said promissory note and shall otherwise comply with the terms and conditions hereof, this conveyance shall be void; but in case default shall be made in the payment of the indebtedness hereby secured, or any part thereof, principal and interest, or in any of the covenants or agreements herein contained, then the mortgagee or assigns, at his option, may declare the entire indebtedness hereby secured immediately due and payable, and foreclose this mortgage and cause said mortgaged premises to be sold in the manner provided by law, and out of the moneys arising from such sale retain principal and interest together with any sums advanced as provided herein, with interest as aforesaid, together with the costs and charges of such foreclosure suit and sale, including such sum as the court may adjudge reasonable as an attorney's fee to be allowed the plaintiff, and the overplus, if any there be, pay over to the mortgagor, heirs and assigns.

June 16, 2006

Pend Oreille Bonner Development Holdings Inc.

Charles W. Reeves  
By: Charles W. Reeves, President

STATE OF IDAHO }  
COUNTY OF Bonner } SS

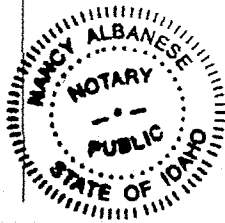
RECORDING DATA:

On 16<sup>th</sup> day of June, 2006, before me, the undersigned, a Notary Public in and for the said State, personally appeared Charles W. Reeves known or identified to me to be the President of the corporation that executed this instrument or the person/s whose executed the instrument on behalf of said corporation and acknowledged to me that said corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my seal the day and year in this certificate first above written.

Nancy Albanese  
Notary Public in and for said County and State

Residing at: Sandpoint  
Commission Exp.: 1-31-11



SECTION D:

PARCEL 1:

That portion of the Southwest quarter of the Southwest quarter of Section 16, Township 57 North, Range 1 East, Boise Meridian, lying West of the State Highway No. 200 right of way and East of the Northern Pacific Railway right of way; and lying North of the North line of the following described tract:

Beginning at a point where the Section line between Sections 16 and 21, Township 57 North, Range 1 West, Boise Meridian, intersects the State Highway on the Westerly side as it now exists;

thence in a Northwesterly direction along the Westerly side of said Highway, 752 feet;

thence in a Southwesterly direction, 97 feet;

thence in a Southeasterly direction, 672 feet to the Section line between Sections 16 and 21;

thence East on said Section line between said Sections 16 and 21, 104.25 feet, more or less, to the place of beginning.

SAID parcel is now described as follows:

A tract of land situated in the Southwest quarter of the Southwest quarter of Section 16, Township 57 North, Range 1 East of the Boise Meridian, Bonner County, Idaho, lying Southwest of the right of way of State Highway No.200 and Northeast of the right of way of Montana Rail Link Railway; being a portion of that property described as Parcel 1 of Instrument No. 168846 and more particularly described as follows:

Commencing at the intersection of the South line of the Southwest quarter of the Southwest quarter of Section 16 and the Northeasterly right of way of Montana Rail Link Railway which is South  $88^{\circ} 10'56''$  East, 944.95 feet from the Southwest corner of Section 16;

Thence leaving said South line and along said right of way North  $23^{\circ} 38'59''$  West, 672.00 feet to the true point of beginning;

Thence continuing along said right of way North  $23^{\circ} 38'59''$  West, 786.99 feet to the intersection with the North line of the Southwest quarter of the Southwest quarter;

Thence leaving said right of way and along said North line South  $88^{\circ} 43'23''$  East, 241.38 feet to the Westerly right of way of State Highway No. 200;

Thence leaving said North line and along said right of way the following four (4) courses:

on a non-tangential curve to the right having a central angle of  $01^{\circ} 19'25''$  (radial bearing = South  $73^{\circ} 15'16''$  West), a radius of 768.50 feet, for an arc length of 17.75 feet (chord = South  $16^{\circ} 06'41''$  East, 17.75 feet);

Thence along a line offset 50.00 feet Westerly of and parallel to a spiral curve (centerline  $ls = 200$  feet,  $a = 3.5$ ,  $S = 7^{\circ}$ ) for a chord of South  $10^{\circ} 43'01''$  East 193.87 feet);

Thence South  $08^{\circ} 25'19''$  East, 86.06 feet;

Thence on a curve to the left having a central angle of  $13^{\circ} 56'48''$ , a radius of 1482.53 feet, for an arc length of 360.87 feet (chord = South  $15^{\circ} 23'43''$  East, 359.98 feet);

Thence leaving said right of way South  $44^{\circ} 37'10''$  West, 106.45 feet (record = "Southwesterly 97 feet") to the true point of beginning.

PARCEL 2:

That part of the Southwest quarter of the Southwest quarter in Section 16, Township 57 North, Range 1 East of the Boise Meridian, lying South and West of the Burlington Northern Inc. Railway right of way and Government Lot 5 in Section 17, Township 57 North, Range 1 East, of the Boise Meridian, save and excepting therefrom:

The South 350 feet of Government Lot 5 in said Section 17, and also that part of the Southwest quarter of the Southwest quarter in said Section 16 lying Westerly of said Burlington Northern Inc. right of way as now in use and described as follows:

Beginning at the Southwest corner of said Section 16;

thence North along the West Section line 350 feet;

thence East to the centerline of Trestle Creek;

thence Southeasterly along said centerline to the South line of Section 16;

thence West along the Section line 720 feet, more or less, to the point of beginning.

SAID parcel is now described as follows:

A tract of land situated in the Southwest quarter of the Southwest quarter of Section 16, lying Southwest of Montana Rail Link Railroad right of way and Government Lot 5 of Section 17, all in Township 57 North, Range 1 East of the Boise Meridian, Bonner County, Idaho; being a portion of that property described as Parcel 2 of Instrument No. 168846 and more particularly described as follows:

Transnation Title Insurance Company

Beginning at the intersection of the South line of the Southwest quarter of the Southwest quarter of Section 16 and the Southwesterly right of way of Montana Rail Link Railway which is South  $88^{\circ} 10'56''$  East, 834.19 feet from the Southwest corner of Section 16;

Thence leaving said South line and along said right of way North  $23^{\circ} 38'59''$  West, 1457.84 feet to the intersection with the North line of the Southwest quarter of the Southwest quarter;

Thence leaving said right of way and along the North line of the Southwest quarter of the Southwest quarter, North  $88^{\circ} 43'23''$  West, 243.71 feet to the Northwest corner of the Southwest quarter of the Southwest quarter;

Thence along the North line of Government Lot 5 in Section 17, North  $89^{\circ} 23'45''$  West, 1223.84 feet to the meander line of Lake Pend Oreille, as defined by the original GLO Survey;

Thence leaving said North line and along said meander line the following two (2) course:

South  $52^{\circ} 55'48''$  East, 561.00 feet;

Thence South  $37^{\circ} 55'48''$  East, 798.96 feet to a point on a line lying 350.00 feet North of and parallel to the South line of the Southwest quarter of the Southwest quarter of Section 16;

Thence along said parallel line, South  $88^{\circ} 10'56''$  East, 281.27 feet to the West line of the said Southwest quarter of the Southwest quarter;

Thence continuing South  $88^{\circ} 10'56''$  East, 159.02 feet to the intersection with the centerline of Trestle Creek;

Thence along the centerline of Trestle Creek the following eight (8) courses:

South  $52^{\circ} 54'34''$  East, 63.58 feet;

Thence South  $44^{\circ} 37'26''$  East, 117.83 feet;

Thence South  $42^{\circ} 08'45''$  East, 77.28 feet;

Thence South  $80^{\circ} 05'07''$  East, 145.49 feet;

Thence South  $55^{\circ} 15'32''$  East, 86.34 feet;

Thence South  $46^{\circ} 56'31''$  East, 113.98 feet;

Thence South  $75^{\circ} 43'10''$  East, 58.83 feet;

Thence South  $37^{\circ} 48'28''$  East, 27.37 feet to the intersection with the South line of the Southwest quarter of the Southwest quarter;

Thence leaving said creek centerline and along said South line South  $88^{\circ} 10'56''$  East, 116.80 feet to the true point of beginning.

PARCEL 3:

A portion of the Northeast quarter of the Northwest quarter and Government Lot 1 of Section 21, Township 57 North, Range 1 East, Boise Meridian, Bonner County, Idaho, described as follows:

Beginning at a point where the South line of the Northeast quarter of the Northwest quarter of Section 21, Township 57 North, Range 1 East of the Boise Meridian, Bonner County, Idaho, intersects the West line of the Northern Pacific Railroad Company right of way;

Transnation Title Insurance Company

thence 600 feet Northerly along said railroad right of way;  
thence West to the meander line of lake;  
thence 600 feet Southerly to the South line of Lot 1 of said Section 21;  
thence East to the Point of Beginning.

SAID parcel is now described as follows:

A tract of land situated in the Northeast quarter of the Northwest quarter and Government Lot 1 of Section 21, Township 57 North, Range 1 East of the Boise Meridian, Bonner County, Idaho, more particularly described as follows:

Beginning at the intersection of the South line of the Northeast quarter of the Northwest quarter of Section 21 and the Westerly right of way of Montana Rail Link Railroad which is South 88° 55'48" East, 139.54 feet from the Southwest corner of said Northeast quarter of the Northwest quarter;

Thence leaving said South line and along said right of way the following two (2) courses:

On a non-tangential curve to the left having a central angle of 10° 44'25" (radial bearing = South 65° 01'49" West) a radius of 2664.79 feet, for an arc length of 499.53 feet (chord = North 30° 20'24" West, 498.80 feet);

Thence North 25° 10'12" West, 100.47 feet;

Thence leaving said right of way and parallel to the South line of Government Lot 1, North 88° 55'48" West, 936.05 feet to the meander line of Lake Pend Oreille as defined in the original GLO Survey;

Thence along said meander line the following two (2) courses:

South 14° 25'48" East, 271.54 feet;

Thence South 46° 40'48" East, 378.00 feet to the intersection with the South line of Government Lot 1;

Thence along said South line South line South 88° 55'48" East, 748.52 feet to the Southeast corner of Government Lot 1;

Thence along the South line of the Northeast quarter of the Northwest quarter, South 88° 55'48" East, 139.54 feet to the true point of beginning.



STATE OF IDAHO

County of Bonner

I, Marie Scott, County Recorder in and for the county and state aforesaid, do hereby certify that the foregoing instrument is a true and correct copy of the original thereof recorded in my office by instrument number 706470.  
Witness my hand and seal.

the 24 day of June 2023.  
MARIE SCOTT COUNTY RECORDER

By Cynthia Braam Deputy

**EXHIBIT 3  
TO  
APPENDIX A**



FATED  
239217

When recorded mail to:  
Pacific Capital Bank, N.A.,  
c/o Loan Services  
PO Box 60654  
Santa Barbara, CA 93160-0654

FILED BY  
First American Title  
2008 AUG -6 P. 3:47  
24<sup>00</sup>  
MARIE SCOTT  
BONNER COUNTY RECORDER  
CB DEPUTY

Loan No.

756403

### SUBORDINATION AGREEMENT

This Subordination Agreement ("**this Agreement**") is entered into as of July 31, 2008, between J.V. LLC, an Idaho limited liability company ("**Creditor**") and Pacific Capital Bank, N.A., a national banking association, doing business as First National Bank of Central California with an address of c/o Loan Services, PO Box 60654, Santa Barbara, California 93160-0654 ("**FNB**").

For valuable consideration, receipt whereof is hereby acknowledged, and in consideration of the loans, advances, discounts, renewals or extensions now or hereafter made by FNB to or for the account of PEND OREILLE BONNER DEVELOPMENT, LLC, a Nevada limited liability company ("**Borrower**"), Creditor agrees with FNB as follows:

1. The parties acknowledge that Borrower is indebted to Creditor pursuant to an original promissory note as amended. The original promissory note (the "**Original Note**") is entitled *Secured Promissory Note* and dated October 20, 1995 in the principal amount of Two Million Two Hundred Sixty-Four Thousand Five Hundred Dollars ((2,264,500)); it was made in favor of Creditor by Richard Vilelli *et al.* (collectively "**Vilelli**"). The Original Note has been amended (i) by an instrument (the "**First Amendment**") entitled *Agreement to Release Right of First Refusal Upon Payment, Agreement for Payment On Profit Sharing Agreement and To Release Upon Payment, and Modifications to Promissory Note and Real Estate Mortgage* executed on February 7, 2005 by Vilelli and Creditor, (ii) by an instrument (the "**Second Amendment**") entitled *Amendment of Promissory Note* dated as of June 19, 2006 and executed by Creditor and Pend Oreille Bonner Development Holdings, Inc., a Nevada corporation ("**Holdings, Inc.**"); and (iii) and by an instrument (the "**Third Amendment**") entitled *Third Amendment to Promissory Note* dated as of March \_\_, 2008 and executed by Creditor and Holdings, Inc. As used in this Amendment, the term "**Creditor's Note**" shall mean the Original Note as amended by the First Amendment, the Second Amendment and the Third Amendment.

2. Creditor's Note is presently secured by an instrument ("**Creditor's Deed of Trust**") entitled *Real Estate Mortgage* dated June 16, 2006, executed by Holdings, Inc. and recorded on June 19, 2006 in the Office of the Recorder of Bonner County, Idaho as Instrument No. 706470. Creditor's Deed of Trust encumbers the property described on Exhibit A hereto in addition to other property.

3. Creditor hereby subordinates the lien of Creditor's Deed of Trust, but only as said lien encumbers and pertains to the property described on Exhibit A hereto, to the lien of the mortgage dated March 7, 2008 and recorded March 25, 2008 as Instrument No. 748379 and 748380 (the "FNB Mortgage") to secure a loan (the "FNB Loan") which FNB has heretofore made to Borrower which FNB amount of Five Million Dollars (\$5,000,000), the proceeds of which Borrower has used to pay off the existing indebtedness of Borrower and/or Holdings, Inc. and/or to pay for the improvement and development of property encumbered by Creditor's Deed of Trust, including the property described on Exhibit A and/or interest, fees, and charges payable to FNB on account of the FNB Loan. JTB  
JAB

4. In order to carry out the terms and the intent of this Agreement more effectively, Creditor will do all acts and execute all further instruments necessary or convenient to preserve for FNB the benefit of this Subordination Agreement.

5. No waiver shall be deemed to be made by FNB of any of its rights hereunder unless the same shall be in writing and shall be a waiver only with respect to the specific instance involved; and it shall in no way impair FNB's rights or the Creditor's obligations to it in any other respect or any other time. This Agreement incorporates all discussions and negotiations between Creditor and FNB concerning the subordination provided by the Creditor hereby, and no such discussions or negotiations shall limit, modify or otherwise affect the provisions hereof, and no provision hereof may be altered, amended, waived, canceled or modified, except by a written instrument executed by a duly authorized officer of FNB.

6. Without the prior written consent of Creditor, Borrower and FNB shall not increase the amount of the indebtedness owed by Borrower to FNB pursuant to the FNB Loan or otherwise modify, in any respect whatsoever, the terms of any such indebtedness., FNB may, however, FNB, without any need for Creditor's consent, grant extensions of the time of payment or performance to and make compromises, including releases of collateral or guaranties, and settlements with Borrower and all other persons, in each case without the consent of Creditor or Borrower and without affecting the agreements of Creditor or Borrower contained in this Agreement. Nothing contained in this paragraph shall constitute a waiver of the right of Borrower itself to agree or consent to a settlement or compromise of a claim which FNB may have against Borrower. JTB  
WAT

7. All notices and other communications under or pursuant to this Agreement shall be by registered or certified mail, return receipt requested, addressed to Creditor, Borrower or FNB at the address set forth in this Agreement or as any party may from time to time designate by written notice to any other party.

8. If any warranty herein contained shall prove to have been materially false when made or in the event of a breach by Borrower or Creditor in the performance of any of their respective obligations hereunder, FNB may, at its option, declare all obligations of Borrower to FNB to be forthwith due and payable, without presentment, demand, protest or notice of any kind, notwithstanding any time or credit otherwise allowed.

9. This Agreement constitutes the entire agreement and understanding between and

among the parties hereto relating to the subject matter hereof, and supersedes, all prior proposals, negotiations, agreements and understandings among the parties hereto with respect to such subject matter.

10. This Agreement shall bind on and shall inure to the benefit of the parties and their heirs, successors, assigns and legal representatives, and shall be governed by and construed in conformity with the laws of California. Except as expressly provided herein, nothing, expressed or implied, is intended to confer upon any party, other than the parties hereto, any rights, remedies, obligations or liabilities under or by reason of this agreement.

11. This Agreement may be executed in counterparts, each of which shall be deemed an original, and said collective counterparts shall together constitute one agreement, binding all of the parties, notwithstanding that all of the parties are not signatory to the same counterparts. For all purposes, including, without limitation, recordation, filing, and delivery, duplicate unexecuted and unacknowledged pages of the counterparts may be discarded and the remaining pages may be assembled as one document.

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

Pacific Capital Bank, N.A.

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

Name: Niraj Maharaj

Title: Senior Relationship Manager

J.V. LLC, an Idaho limited liability company

By: 

James W. Berry, Member

By: Hidden Lakes Ltd Partnership, Member

By: 

William A. Berry

By: Sun Mountain, Inc.. Member

By: 

William A. Berry. President

Address for Notice

Jim Berry


P.O. Box B

Sandpoint, ID 83864

**SEE NEXT PAGE FOR BORROWER'S SIGNATURE**

Borrower hereby acknowledges notice of the within and foregoing subordination and agrees to be bound by all the terms, provisions and conditions thereof.

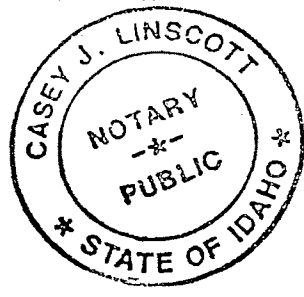
PEND OREILLE BONNER  
DEVELOPMENT, LLC, a Nevada limited  
liability company  
By PEND OREILLE BONNER  
DEVELOPMENT HOLDING, INC., a Nevada  
corporation, its managing member

By   
Charles W. Reeves, President

STATE OF Idaho )  
 )  
 )ss.  
COUNTY OF Bonner )

On Aug 5, 2008 ~~2007~~, before me Casey J. Linscott, a  
Notary Public in and for said State and County, personally appeared  
Chuck W. Peenes, personally known to me (or proved to me on the basis of  
satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within  
instrument and acknowledged to me that he/she/they executed the same in his/her/their  
authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or  
the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

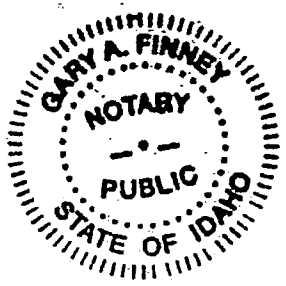


[Signature]  
Commission Exp: 12/4/2013

STATE OF Idaho )  
 )  
 )ss.  
COUNTY OF Bonner )

On Aug 1, 2008, before me Gary A Finney, a  
Notary Public in and for said State and County, personally appeared  
Wm G Berry & James W Berry, personally known to me (or proved to me on the basis  
of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within  
instrument and acknowledged to me that he/she/they executed the same in his/her/their  
authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or  
the entity upon behalf of which the person(s) acted, executed the instrument for JV LLC  
and Sun Mountain Inc.

WITNESS my hand and official seal.



[Signature]  
Commission Exp. 10/14/2011

EXHIBIT A

*Treatle Creek (Gandy Ferry)*

PARCEL 1:

That portion of the Southwest quarter of the Southwest quarter of Section 16, Township 57 North, Range 1 East, Boise Meridian, lying West of the State Highway No. 200 right of way and East of the Northern Pacific Railway right of way and lying North of the North line of the following described tract:

Beginning at a point where the Section line between Sections 16 and 21, Township 57 North, Range 1 West, Boise Meridian, intersects the State Highway on the Westerly side as it now exists; thence in a Northwesterly direction along the Westerly side of said Highway, 752 feet; thence in a Southwesterly direction, 97 feet; thence in a Southeasterly direction 672 feet to the Section line between Sections 16 and 21; thence East on said Section line between said Sections 16 and 21, 104.25 feet, more or less, to the place of beginning.

Said parcel is now described as follows:

A tract of land situated in the Southwest quarter of the Southwest quarter of Section 16, Township 57 North, Range 1 East of the Boise Meridian, Bonner County, Idaho, lying Southwest of the right of way of State Highway No. 200 and Northeast of the right of way of Montana Rail Link Railway, being a portion of that property described as Parcel 1 of Instrument No. 168846 and more particularly described as follows:

Commencing at the intersection of the South line of the Southwest quarter of the Southwest quarter of Section 16 and the Northeasterly right of way of Montana Rail Link Railway which is South  $88^{\circ} 10' 56''$  East, 944.95 feet from the Southwest corner of Section 16; thence leaving said South line and along said right of way North  $23^{\circ} 38' 59''$  West, 672.00 feet to the true point of beginning; thence continuing along said right of way North  $23^{\circ} 38' 59''$  West, 786.99 feet to the intersection with the North line of the Southwest quarter of the Southwest quarter; thence leaving said right of way and along said North line South  $88^{\circ} 43' 23''$  East, 241.38 feet to the Westerly right of way of State Highway No. 200; thence leaving said North line and along said right of way the following four (4) courses:

on a non-tangential curve to the right having a central angle of  $01^{\circ} 19' 25''$  (radial bearing = South  $73^{\circ} 15' 16''$  West), a radius of 768.50 feet, for an arc length of 17.75 feet (chord = South  $16^{\circ} 06' 41''$  East, 17.75 feet); thence along a line offset 50.00 feet Westerly of and parallel to a spiral curve (centerline is = 200 feet,  $a = 3.5$ ,  $S = 7^{\circ}$ ) for a chord of South  $10^{\circ} 43' 01''$  East, 193.87 feet); thence South  $08^{\circ} 25' 19''$  East, 86.06 feet; thence on a curve to the left having a central angle of  $13^{\circ} 56' 48''$ , a radius of 1482.53 feet, for an arc length of 360.87 feet (chord = South  $15^{\circ} 23' 43''$  East, 359.98 feet);

thence leaving said right of way South  $44^{\circ} 37' 10''$  West, 106.45 feet (record = "Southwesterly 97 feet") to the true point of beginning.

PARCEL 2:

*Trestle Creek (Gary Jones)*

That part of the Southwest quarter of the Southwest quarter in Section 16, Township 57 North, Range 1 East of the Boise Meridian, lying South and West of the Burlington Northern Inc. Railway right of way and Government Lot 5 in Section 17, Township 57 North, Range 1 East of the Boise Meridian, save and excepting therefrom:

The South 350 feet of Government Lot 5 in said Section 17, and also that part of the Southwest quarter of the Southwest quarter in said Section 16 lying Westerly of said Burlington Northern Inc. right of way as now in use and described as follows:

Beginning at the Southwest corner of said Section 16; thence North along the West Section line 350 feet; thence East to the centerline of Trestle Creek; thence Southeasterly along said centerline to the South line of Section 16; thence West along the Section line 720 feet, more or less, to the point of beginning.

Said parcel is now described as follows:

A tract of land situated in the Southwest quarter of the Southwest quarter of Section 16, lying Southwest of Montana Rail Link Railroad right of way and Government Lot 5 of Section 17, all in Township 57 North, Range 1 East, of the Boise Meridian, Bonner County, Idaho, being a portion of that property described as Parcel 2 of Instrument No. 168846 and more particularly described as follows:

Beginning at the intersection of the South line of the Southwest quarter of the Southwest quarter of Section 16 and the Southwesterly right of way of Montana Rail Link Railway which is South  $88^{\circ} 10' 56''$  East, 834.19 feet from the Southwest corner of Section 16; thence leaving said South line and along said right of way North  $23^{\circ} 38' 59''$  West, 1457.84 feet to the intersection with the North line of the Southwest quarter of the Southwest quarter; thence leaving said right of way and along the North line of the Southwest quarter of the Southwest quarter, North  $88^{\circ} 43' 23''$  West, 243.71 feet to the Northwest corner of the Southwest quarter of the Southwest quarter; thence along the North line of Government Lot 5 in Section 17, North  $89^{\circ} 23' 45''$  West, 1223.84 feet to the meander line of Lake Pend Oreille, as defined by the original GLO Survey; thence leaving said North line and along said meander line the following two (2) courses:

South  $52^{\circ} 55' 48''$  East, 561.00 feet; thence South  $37^{\circ} 55' 48''$  East, 798.96 feet to a point on a line lying 350.00 feet North of and parallel to the South line of the Southwest quarter of the Southwest quarter of Section 16;

thence along said parallel line, South  $88^{\circ} 10' 56''$  East, 281.27 feet to the West line of the said Southwest quarter of the Southwest quarter; thence continuing South  $88^{\circ} 10' 56''$  East, 159.02 feet to the intersection with the centerline of Trestle Creek; thence along the centerline of Trestle Creek the following eight (8) courses:

South  $52^{\circ} 54' 34''$  East, 63.58 feet; thence South  $44^{\circ} 37' 26''$  East, 117.83 feet; thence South  $42^{\circ} 08' 45''$  East, 77.28 feet; thence South  $80^{\circ} 05' 07''$  East, 145.49 feet; thence South  $55^{\circ} 15' 32''$  East, 86.34 feet thence South  $46^{\circ} 56' 31''$  East, 113.98 feet; thence South  $75^{\circ} 43' 10''$  East, 58.83 feet; thence South  $37^{\circ} 48' 28''$  East, 27.37 feet to the intersection with the South line

of the Southwest quarter of the Southwest quarter;

thence leaving said creek centerline and along said South line South  $88^{\circ} 10' 56''$  East, 116.80 feet to the true point of beginning.

PARCEL 3: (*Mary & Finley, Treaty Creek*)

A portion of the Northeast quarter of the Northwest quarter and Government Lot 1 in Section 21, Township 57 North, Range 1 East, Boise Meridian, Bonner County, Idaho, described as follows:

Beginning at a point where the South line of the Northeast quarter of the Northwest quarter of Section 21, Township 57 North, Range 1 East, Boise Meridian, Bonner County, Idaho, intersects the West line of the Northern Pacific Railroad Company right-of-way; thence 600 feet Northerly along said railroad right-of-way; thence West to the meander line of the lake; thence 600 feet Southerly to the the South line of Lot 1 of said Section 21; thence East to the Point of Beginning.

Said parcel is now described as follows:

A tract of land situated in the Northeast quarter of the Northwest quarter and Government Lot 1 of Section 21, Township 57 North, Range 1 East of the Boise Meridian, Bonner County, Idaho, more particularly described as follows:

Beginning at the intersection of the South line of the Northeast quarter of the Northwest quarter of Section 21 and the Westerly right of way of Montana Rail Link Railroad which is South  $88^{\circ} 55' 48''$  East, 139.54 feet from the Southwest corner of said Northeast quarter of the Northwest quarter; thence leaving said South line and along said right of way the following two (2) courses:

on a non-tangential curve to the left having a central angle of  $10^{\circ} 44' 25''$  (radial bearing = South  $65^{\circ} 01' 49''$  West) a radius of 2664.79 feet, for an arc length of 499.53 feet (chord = North  $30^{\circ} 20' 24''$  West, 498.80 feet); thence North  $25^{\circ} 10' 12''$  West, 100.47 feet;

thence leaving said right of way and parallel to the South line of Government Lot 1, North  $88^{\circ} 55' 48''$  West, 936.05 feet to the meander line of Lake Pend Oreille as defined in the original GLO Survey; thence along said meander line the following two (2) courses:

South  $14^{\circ} 25' 48''$  East, 271.54 feet; thence South  $46^{\circ} 40' 48''$  East, 378.00 feet to the intersection with the South line of Government Lot 1;

thence along said South line South  $88^{\circ} 55' 48''$  East, 748.52 feet to the Southeast corner of Government Lot 1; thence along the South line of the Northeast quarter of the Northwest quarter, South  $88^{\circ} 55' 48''$  East, 139.54 feet to the true point of beginning.

STATE OF IDAHO

County of Bonner

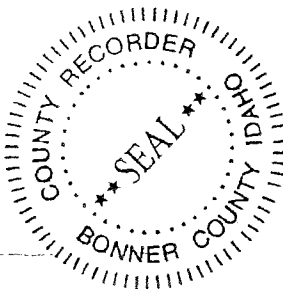
I, Marie Scott, County Recorder in and for the county and state aforesaid, do hereby certify that the foregoing instrument is a true and correct copy of the original thereof recorded in my office by instrument number 756403<sup>8</sup>

Witness my hand and seal,

the 24 day of June 2013

MARIE SCOTT, COUNTY RECORDER

By Cynthia Brannon Deputy 093





# **APPENDIX B**

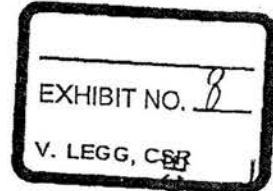
June 24, 2008

Recorded 6/24/08  
Instrument No. 753907

**THIRD AMENDMENT TO INDEBTEDNESS AND TO REAL ESTATE SECURITY, AND SUBORDINATION AGREEMENT**  
(TO BE RECORDED)

**PARTIES:**

- A. **HOLDER AND MORTGAGEE:** J.V., LLC, an Idaho limited liability company  
P.O. Box B  
Sandpoint, Idaho, 83864
  
- B. **PAYOR AND MORTGAGOR:** Pend Oreille Bonner Development Holdings, Inc., a Nevada corporation



ADMITTED IN EVIDENCE  
DATE 5-13-2014 SKA  
DEPUTY CLERK

**C. INDEBTEDNESS AND REAL ESTATE SECURITY**

This Agreement concerns and effects the following Indebtedness and Real Estate Security:

1. A Promissory Note from V.P., Inc., an Idaho corporation, in the original sum of \$2,264,500.00 payable to the payee and holder, J.V., LLC, secured by a Real Estate Mortgage recorded October 24, 1995 as Instrument No. 474746 records of Bonner County, Idaho. This referenced real estate is referred to as MOOSE MOUNTAIN.
  
2. A Modification to Promissory Note and Real Estate Mortgage was signed by V.P., Inc. and J.V., LLC, dated February 7, 2005, which is not a recorded document.
  
3. Amendment of Promissory Note. This amendment includes a Subordination Agreement, and was signed by J.V., LLC and by the then new "Buyer" of the MOOSE MOUNTAIN real estate, Pend Oreille Bonner Development Holdings, Inc., and is dated June 19, 2006, which is not a recorded document. This document provided for additional real estate security to secure the original \$2,264,500.00 Promissory Note, dated October 20, 1995, which real estate is referred to as TRESTLE CREEK. The TRESTLE CREEK real estate was mortgaged to additionally secure J.V., LLC as Mortgagee by Pend Oreille Bonner Development Holdings, Inc., as Mortgagor, by a first priority lien by a Real Estate Mortgage,



recorded June 19, 2006, Instrument No. 706470 records of Bonner County, Idaho, on the TRESTLE CREEK real estate.

4. Subordination Agreement. A Subordination Agreement between Pend Oreille Bonner Development Holdings, Inc., as Owner, and J.V., LLC, as holder and mortgagee secured party was recorded June 19, 2006 as Instrument No. 706474 which was recorded again on June 20, 2006 as Instrument No. 706582 records of Bonner County, Idaho, which Subordination Agreement has the effect of subordinating J.V., LLC's original Promissory Note (\$2,264,500.00) and Real Estate Mortgage (recorded October 19, 1995, Instrument No. 474746) to a new Lender, R.E. Loans, Inc., on a Mortgage on MOOSE MOUNTAIN real estate to secure \$20,500,000.00 by a new Mortgage recorded June 19, 2006 as Instrument No. 706471 records of Bonner County, Idaho.

5. Second Subordination Agreement. A Second Subordination Agreement between V.P., Inc. and Pend Oreille Bonner Development Holdings, Inc. was recorded March 15, 2007 as Instrument No. 724833 records of Bonner County, Idaho.

**D. COLLECTION AND INDEBTEDNESS - ESCROW AGENT**

The Promissory Note and Real Estate Mortgage held by J.V., LLC are held for collection on behalf of J.V., LLC at Panhandle Escrow Company, Sandpoint, Idaho, Escrow No. 2067429 and the present interest rate is 10% and the last principal balance was \$1,771,002.41 as of April 1, 2008.

**E. THIRD AMENDMENT**

The terms and conditions of this Third Amendment are agreed upon, as follows:

1. Pend Oreille Bonner Development Holdings, Inc. represents and warrants that it has paid the R.E. Loans, Inc.'s first priority Real Estate Mortgage indebtedness down from \$20.5 million to \$8 million secured on the MOOSE MOUNTAIN property and that J.V., LLC's Real Estate Mortgage, Instrument No. 474746 is the second priority lien on MOOSE MOUNTAIN by reason of the Subordination Agreement, Instrument No. 474746.

2. Pend Oreille Bonner Development Holdings, Inc. shall on or before July 1, 2008 pay the interest current and also pay in principal a sum of money to J.V., LLC through Panhandle Escrow No. 2067429 so that the principal balance is reduced to

\$1,500,000.00 as of June 15, 2008. The Sum of money to be paid under this provision is approximately:

a.	Interest	\$ 36,650.00
b.	Principal	\$271,002.00
	TOTAL	<u>\$307,752.00</u>

3. In addition to the payment of the sums set forth in paragraph 2 above, and simultaneously with the payment referred to in paragraph 2 above, Pend Oreille Bonner Development Holdings, Inc. as and for an agreed consideration for J.V., LLC to enter into this agreement, shall also pay \$30,000.00 directly to J.V., LLC. This \$30,000.00 is over, above, and in addition to any sums or indebtedness owed to J.V., LLC and does not apply to interest, principal, or indebtedness.

4. As of June 15, 2008, the interest rate on the indebtedness due J.V., LLC shall increase from 10% to 12%, simple annual interest.

5. The payor, Pend Oreille Bonner Development Holdings, Inc., commencing on July 15, 2008 and on the 15<sup>th</sup> of each month thereafter shall pay the monthly accrued interest at 12% per annum to J.V., LLC through the escrow agent. The Promissory Note and indebtedness shall be extended for 36 months from June 15, 2008, and the entire remaining principal and interest shall be due and payable on June 15, 2011. The real estate maturity date on all of the real estate mortgages to J.V., LLC shall be June 15, 2011.

6. After the payments referred to above are paid, the Payor may prepay at any time without penalty.

7. J.V., LLC agrees to further subordinate the indebtedness owed to it and the Real Estate Mortgage referred to in this Agreement, on MOOSE MOUNTAIN and on TRESTLE CREEK, to a second priority lien position on both MOOSE MOUNTAIN real estate and the TRESTLE CREEK real estate, as follows:

a. On MOOSE MOUNTAIN the second priority lien of J.V., LLC shall be inferior and subordinate to a first priority lien of no more than \$25,000,000.00.

b. On the TRESTLE CREEK property the present first lien priority of J.V., LLC shall be subordinate and inferior to a new first lien priority of no more than \$5,000,000.00.

8. J.V., LLC agrees to execute partial releases of its Real Estate Mortgages provided the interest on the indebtedness is paid current for and in consideration of principal payments, as follows:

a. On the MOOSE MOUNTAIN real estate at \$8,000.00 per acre, which is the present agreed upon release payment rate.

b. On the TRESTLE CREEK real estate, which presently does not have a release payment provision, the partial release of mortgage sums to be paid J.V., LLC in principal payments shall be:

i. For the release of any land upon which a condominium unit is constructed the partial release of mortgage sums to be paid J.V., LLC in principal payments is \$20,000.00 per each of such condominium units.

ii. For the release of a platted single family lot the partial release of mortgage sums to be paid J.V., LLC in principal payments is \$20,000.00 per lot.

F. EXISTING TERMS AND DOCUMENTS

Except for the modification and provisions set forth in this Agreement, all of the terms, conditions, and documents existing between the parties shall remain in force an effect as written.

G. TIME FOR PERFORMANCE

In the event Pend Oreille Bonner Development Holdings, Inc. does not perform and pay the sums due to J.V., LLC under this agreement and also bring the existing payments current on Panhandle Escrow Account No. 2067429 by August 1, 2008 this Agreement is rescinded and terminated.

IN WITNESS WHEREOF, the parties have hereunto set their hands hereto on the 20<sup>th</sup> day of June, 2008.

PEND OREILLE BONNER DEVELOPMENT  
HOLDINGS, INC., a Nevada  
corporation

By: Charles W. Reeves  
CHARLES W. REEVES, President  
Date: 6/20/08

STATE OF IDAHO )  
 : ss.  
County of Bonner )

On this 20<sup>th</sup> day of June, 2008, before me, the undersigned  
Notary Public, personally appeared, CHARLES W. REEVES, proved to  
me on the basis of satisfactory evidence, to be the President of  
PEND OREILLE BONNER DEVELOPMENT HOLDINGS, INC. that executed the  
instrument or the person who executed the instrument on behalf  
of the corporation and acknowledged to me that such corporation  
executed the same.



Kathleen Groenewald  
Notary Public-State of Idaho  
Residing at: SPENDPOINT  
Commission Expires: 4/20/2013

J.V. LLC, an Idaho limited  
liability company

By: Hidden Lakes Limited  
Partnership, member

By: James W. Berry  
JAMES W. BERRY, a general partner  
Date: 6/23/08

By: William A. Berry  
WILLIAM A. BERRY, a general partner  
Date: 6/23/08

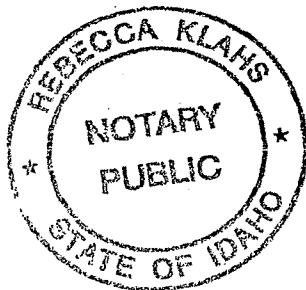
By: Sun Mountain, Inc., a managing member

By: *William A. Berry*  
WILLIAM A. BERRY, President  
Date: 6/23/08

By: *James W. Berry*  
JAMES W. BERRY, Secretary  
Date: 6/23/08

STATE OF IDAHO            )  
                                  ):     ss.  
COUNTY OF BONNER     )

On this 23<sup>rd</sup> day of June, 2008, before me, the undersigned Notary Public, personally appeared, WILLIAM A. BERRY and JAMES W. BERRY, known to me or proved to me on the basis of satisfactory evidence, to be the MANAGERS, PARTNERS, and OFFICERS who subscribed said J.V. LLC name to the foregoing instrument, and acknowledged to me that they executed the same in said name of J.V. LLC, by its members, the partnership & corporation.



*Rebecca Klans*  
Notary Public-State of Idaho  
Residing at: Sandpoint  
My Commission Expires: 12/14/2011