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193 Wn.App. 413 (Wash.App. Div. 3 2016)

375 P.3d 687

First Bank of Lincoln, Appellant ,

v.

Donald C. Tuschoff et al., Respondents

No. 33192-0-III

Court of Appeals of Washington, Division 3

April 14, 2016

[375 P.3d 688] Appeal from Asotin Superior Court. Docket No: 14-2-00105-9. Judge signing: Honorable Scott D Gallina. Judgment or order under review. Date filed: 02/10/2015.

Donald C. Tuschoff, pro se.

Jane Doe Tuschoff, pro se.

Michael A. Roozkrans (of Michael A. Roozkrans PLLC); and Erika Balazs, for appellant.

Thomas T. Bassett (of Foster Pepper PLLC), for respondent Banana Belt Gaming LLC.

Authored by Robert E. Lawrence-Berrey. Concurring: George B. Fearing, Kevin M. Korsmo.

OPINION

[375 P.3d 689]

[193 Wn.App. 415] Robert E. Lawrence-Berrey, J.

[¶1] Donald Tuschoff sold a bowling alley to the Schwab family, who financed the purchase with a note secured by a deed of trust. Mr. Tuschoff and his daughter thereafter borrowed money from First Bank of Lincoln to purchase Hotel Lincoln, located in the state of Montana. As additional collateral to secure the loan from First Bank, Mr. Tuschoff assigned the Schwab/Tuschoff

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deed of trust to First Bank. First Bank properly recorded the assignment of the deed of trust. Banana Belt Gaming LLC purchased the bowling alley from the Schwab family, and paid Mr. Tuschoff the balance owing on the

Schwab/Tuschoff note but failed to secure a release of the assigned deed of trust from First Bank.

[¶2] First Bank later learned of the sale and sued Mr. Tuschoff and Banana Belt. In addition, First Bank conducted a nonjudicial sale of the Hotel Lincoln property in Montana. Banana Belt successfully moved for summary judgment. The trial court determined as a matter of law that Banana Belt's payment of the Schwab/Tuschoff note extinguished First Bank's assigned Schwab/Tuschoff deed of trust. First Bank appeals.

[¶3] Most of the issues on appeal involve whether Banana Belt's purchase of the bowling alley is subject to First Bank's recorded assigned deed of trust. In the published portion of this opinion, we answer these issues in the affirmative, in favor of First Bank. The last issue on appeal is whether First Bank's election to foreclose nonjudicially against the Hotel Lincoln property in Montana extinguished the underlying obligation and also the Schwab/Tuschoff deed of trust. In the unpublished portion, we direct Banana Belt to file suit in Montana to have this issue resolved, due to the fact that resolution of this issue requires application of Montana law and because the controlling precedent is unclear. In general, we reverse [375 P.3d 690] and remand for the trial court to proceed consistent with this opinion.

FACTS

[¶4] This case involves a series of real estate transactions related to a bowling alley located in Clarkston, Washington. Mr. Tuschoff originally bought the bowling alley in July 1994 from Rex and Mary Helen Humphrey for \$550,000. Mr. Tuschoff financed the sale by executing a note and deed of trust.

[193 Wn.App. 417] *A. Tuschoff sells the bowling alley to Schwab*

[¶5] In 1998, Mr. Tuschoff sold the bowling alley to a group of investors for \$1.1 million. The group of investors included Gene Schwab, Ladene Schwab, James Schwab, and several others (Schwab). Schwab financed the sale by executing a \$1.1 million note, payable to Mr. Tuschoff in monthly installments of \$9,791.65. To secure repayment, Schwab executed a deed of trust listing Mr. Tuschoff as the beneficiary. The Schwab/Tuschoff deed of trust stated:

This deed is for the purpose of securing performance of each agreement of Grantor herein contained, and payment of the sum of One Million One Hundred Thousand and No/100 Dollars (\$1,100,000.00) with interest, in accordance with the terms of a promissory note of even date herewith payable to Beneficiary or order, and made by Grantor, and

all renewals, modifications and extensions thereof, and also such further sums as may be advanced or loaned by Beneficiary to Grantor, or any of their successors or assigns, together with interest thereon at such rate as shall be agreed upon.

Clerk's Papers (CP) at 82. On November 2, 1998, Mr. Tuschoff recorded the Schwab/Tuschoff deed of trust with the Asotin County Auditor's Office. The Humphreys remained as senior lienholders.

[¶16] Mr. Tuschoff placed the Schwab/Tuschoff note and deed of trust in escrow with Land Title of Nez Perce County, which held the original loan documents, collected Schwab's monthly payments, and disbursed those payments to Mr. Tuschoff.

B. Tuschoff buys Hotel Lincoln and assigns the Schwab/Tuschoff deed of trust to First Bank

[¶17] On January 27, 2011, First Bank lent \$440,000 to Mr. Tuschoff and his daughter Laurie Parks so the two could buy Hotel Lincoln in Lincoln, Montana. At the time Mr. Tuschoff and Ms. Parks applied for the loan, the then-owners of Hotel Lincoln did not have adequate financial

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statements so that First Bank could analyze the business's cash flow. To secure the \$440,000 loan, Mr. Tuschoff offered to provide additional collateral to First Bank in the form of an assignment of his beneficial interest in the Schwab/Tuschoff deed of trust and a security interest in the Schwab/Tuschoff note. First Bank agreed to loan the money in exchange for the additional collateral. Mr. Tuschoff and Ms. Parks thereafter signed a promissory note for \$440,000, partially secured by a deed of trust against the purchased property. The promissory note was payable in full on February 1, 2014. It contained a due-on-sale clause that allowed First Bank to "declare the entire balance of this Note to be immediately due and payable upon the ... sale of ... any part of the Property," earlier defined as "any property ... that secures ... performance of the obligations of this Loan." CP at 72 (para 12), 70 (para. 1.E)).

[¶18] That same day, Mr. Tuschoff executed further documents to provide First Bank the additional agreed-on collateral. Specifically, Mr. Tuschoff executed an "Assignment of Deed of Trust," by which Mr. Tuschoff assigned his beneficial interest in the Schwab/Tuschoff deed of trust to First Bank. CP at 86. The assignment broadly assigned "all right title and interest in said Note and all rights accrued under said Deed of Trust." *Id.* First Bank recorded the assignment with the Asotin County auditor. Despite this purported assignment of all right title

and interest in the note, Mr. Tuschoff continued receiving monthly installment payments from Schwab.

[¶19] Mr. Tuschoff also signed a security agreement wherein he granted First Bank a security interest in all property described therein, including:

[375 P.3d 691]

B. Instruments, Documents and Chattel Paper. All instruments and rights I have now or in the future to payments including, but not limited to, rights to payment arising out of all present and future documents, instruments, tangible and electronic chattel paper, and loans and obligations receivable. This includes any rights and interests ... which I may have by law or agreement against any Account Debtor or obligor of mine.

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C. Specific Property. DEED OF TRUST *Chattel Paper Issued to DONALD C. TUSCHOFF* by . [sic] and *executed on October 22, 1998 in the amount of \$1,100,000, secured by [the bowling alley property]*. [1]

CP at 95 (emphasis added). First Bank then filed a UCC-1 statement with the Washington Department of Licensing providing notice of its secured interest in

[a]ll instruments, including ... promissory notes ... DEED OF TRUST *Chattel Paper issued to DONALD C. TUSCHOFF* by . [sic] and *executed on October 22, 1998 in the amount of \$1,100,000.00 ... secured by [the bowling alley property]*.

CP at 101-02 (emphasis added).

C. Banana Belt buys the bowling alley from Schwab

[¶10] In June 2013, Schwab agreed to sell the Clarkston, Washington, bowling alley to Banana Belt for \$1.35 million. Banana Belt hired First American Title Company to close the sale with Schwab. First American's limited practice officer, Tonja Hatcher, handled the closing. Ms. Hatcher obtained the title commitment on the bowling alley property and reviewed it. She noticed in paragraph 21 of that commitment an exception that listed the Humphreys/Tuschoff deed of trust. She also noticed in paragraph 23 an exception that listed Mr. Tuschoff's assignment of the Schwab/Tuschoff deed of trust to First Bank. She did not contact First Bank to inquire about First Bank's rights.

[¶11] Banana Belt borrowed \$600,000 from Columbia Bank to finance the purchase. Columbia Bank sent a letter instructing First American to assure that its lien rights were in first position, and "request[ed] that exceptions [listed in

paragraphs] 21 and 23 [in the title commitment] be released." CP at 222.

[193 Wn.App. 420] ¶12 Accordingly, Ms. Hatcher sent Rita Johnson, the Land Title employee who handled the Humphreys/Tuschoff and Schwab/Tuschoff note escrow accounts, an e-mail asking for a full payoff amount for the Schwab/Tuschoff note. The e-mail attached the pages of the title commitment listing both the Humphreys/Tuschoff deed of trust as well as the Schwab/Tuschoff deed of trust. Ms. Hatcher drew an arrow next to Mr. Tuschoff's assignment of the Schwab/Tuschoff deed of trust to indicate " that there [was] somebody else involved." CP at 202. Ms. Johnson did not get the title commitment pages, nor did she notice the assignment of the Schwab/Tuschoff deed of trust.

¶13 Ms. Hatcher sent a follow-up e-mail to Ms. Johnson requesting confirmation that Land Title would pay off the deeds of trust so that she would be able to guarantee clear title to Banana Belt and Columbia Bank. Ms. Johnson believed she was required to pay off Mr. Tuschoff personally and responded, " This is a wrap and both Deeds of Trust will be paid." CP at 247. Ms. Hatcher and Ms. Johnson never discussed whether Land Title would pay First Bank, as opposed to Mr. Tuschoff. Ms. Johnson testified in her deposition that she does not review the title commitment to determine who Land Title needs to pay, but instead follows the instructions in Land Title's file.

¶14 Several days later, Ms. Johnson sent Ms. Hatcher a payoff quote for the Schwab/Tuschoff note, which showed an outstanding balance of \$359,271.82. First American then sent Land Title a check for \$359,271.82, which it said represented full payoff for the Schwab/Tuschoff note. The letter specified that it sent the check in [375 P.3d 692] exchange " for a release of the original Promissory Note and original Deed of Trust/Mortgage recorded November 02, 1998." CP at 492. Land Title then disbursed \$355,375.75 to Mr. Tuschoff and \$3,855.93 to the Humphreys. This fully satisfied Schwab's obligation to Mr. Tuschoff on the Schwab/Tuschoff note. Schwab then conveyed the bowling alley to Banana Belt by statutory warranty deed.

[193 Wn.App. 421] **D.***First Bank sues Tuschoff and Banana Belt*

¶15 First Bank's Hotel Lincoln loan to Mr. Tuschoff matured on February 1, 2014, and a remaining principal balance existed of \$400,430.42. In reviewing whether to renew the loan, First Bank learned that the bowling alley had been sold and funds disbursed to Mr. Tuschoff, despite the recorded assignment to First Bank of the Schwab/Tuschoff deed of trust.

¶16 First Bank sued Mr. Tuschoff and Banana Belt in

Asotin County Superior Court, seeking a declaratory judgment that Mr. Tuschoff's assignment of his beneficial interest in the Schwab/Tuschoff deed of trust remained a valid lien against the bowling alley property.

¶17 First Bank held a nonjudicial foreclosure sale for the Hotel Lincoln property on August 25, 2014. First Bank was the only bidder at the trustee's sale and successfully purchased the property. First Bank asserts that a \$250,000 balance will remain unpaid in connection with the Montana note after First Bank liquidates the Hotel Lincoln property. First Bank never disclosed during discovery the amount it bid at the trustee's sale to reacquire Hotel Lincoln.

¶18 First Bank also sued Mr. Tuschoff in Lewis and Clark County District Court, Montana, under case no. DDV 2014-326. The Montana trial court's decision is unclear and will be discussed in further detail later. Ultimately, First Bank obtained a money judgment against Mr. Tuschoff. Mr. Tuschoff has since absconded.

¶19 On October 24, 2014, Banana Belt moved the trial court for summary judgment and an order to quiet title and reconvey the Schwab/Tuschoff deed of trust. Banana Belt's principal argument was that its payment to Schwab extinguished the Schwab/Tuschoff deed of trust. First Bank filed a cross motion for summary judgment. On February 10, 2015, the trial court granted Banana Belt's motion and denied First Bank's motion.

[193 Wn.App. 422] ¶20 First Bank appeals and requests that this court grant summary judgment in its favor as a matter of law.

ANALYSIS

¶21 This court reviews a summary judgment order de novo. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009). When reviewing a summary judgment order, the appellate court engages in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Riojas v. Grant County Pub. Util. Dist.*, 117 Wn.App. 694, 697, 72 P.3d 1093 (2003). Summary judgment is appropriate only if the moving party can 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." CR 56(c). " A material fact is one upon which the outcome of the litigation depends in whole or in part." *Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Finally, we may affirm a trial court's summary judgment order on any basis supported by the record. *Lewark v. Davis Door Servs., Inc.*, 180 Wn.App. 239, 242, 321 P.3d 274, review denied, 180 Wn.2d 1026, 328 P.3d 902 (2014).

A. A seller of property can convey only the seller's interest

[¶122] A seller of property can convey no greater interest in the property than the seller has. *Firth v. Hefu Lu*, 146 Wn.2d 608, 615, 49 P.3d 117 (2002). Applying this rule to the present facts, Mr. Tuschoff conveyed only his interest in the property when he reconveyed the deed of trust to Schwab, and Schwab conveyed only his interest in the property when he deeded the property to Banana Belt. Here, because Mr. Tuschoff could not convey the property free and clear of the Schwab/Tuschoff deed of trust that he had [375 P.3d 693] earlier assigned to First Bank, Banana Belt purchased [193 Wn.App. 423] the bowling alley property subject to First Bank's assigned deed of trust.

B. The bowling alley property secured two debts

[¶123] Banana Belt argues that its payment of the underlying Schwab/Tuschoff note satisfied the deed of trust because a security interest cannot exist without an obligation. In support of its argument, Banana Belt cites 18 William B. Stoebeck & John W. Weaver, *Washington Practice: Real Estate: Transactions* § 17.1, at 253 (2d ed. 2004). The flaw in Banana Belt's argument is that the Hotel Lincoln note created a separate obligation against the bowling alley property. Although Banana Belt's payment to Mr. Tuschoff extinguished Mr. Tuschoff's right to foreclose if Schwab failed to pay the Schwab/Tuschoff note, it did not extinguish First Bank's right to foreclose if Mr. Tuschoff failed to pay the Hotel Lincoln note--a separate obligation that encumbered the property.

C. RCW 65.08.120 does not protect a subsequent purchaser with notice

[¶124] Banana Belt argues RCW 65.08.120 allows it to pay the note payee rather than the payee's assignee because the recording of a seller's assignment is not notice that its payment was improper. RCW 65.08.120 provides:

Assignment of mortgage--Notice. The recording of an assignment of a mortgage is not in *itself* notice to the mortgagor, his or her heirs, assigns or personal representatives, to invalidate a payment made by any of them to a prior holder of the mortgage.

(Emphasis added.) Assuming without deciding that the above rule applies beyond mortgages to notes and deeds of trust, the rule does not advance Banana Belt's position. First, the rule applies to obligors and certain successors in interest to the obligor who make payments on a debt. This rule therefore would apply to payments made by Schwab to [193 Wn.App. 424] Mr. Tuschoff, but would not apply to payments made by Banana Belt to Mr. Tuschoff since Banana Belt is not an " heir, assign, or personal representative" of Schwab. Second, the rule protects

obligors on a debt and certain successors in interest to the obligor when payments are made to an assignor of the debt when the obligor or its successor had no notice that the payments should have been directed to the assignee. Here, a subsequent purchaser such as Banana Belt who actually knows of First Bank's recorded assignment may not ignore First Bank's interest by claiming it did not know of it.

D. Banana Belt is not a bona fide purchaser

[¶125] Because a bona fide purchaser can obtain rights greater than a seller has, we next determine whether this doctrine protects Banana Belt.

[1] If the purchaser has knowledge or information that would cause an ordinarily prudent person to inquire further, and if such inquiry, reasonably diligently pursued, would lead to discovery of title defects or of equitable rights of others regarding the property, then the purchaser has constructive knowledge of everything the inquiry would have revealed.

Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wn.2d 560, 573, 276 P.3d 1277 (2012). Here, Banana Belt had constructive knowledge--through either its agent First American or the recording of the assignment itself--that First Bank claimed an interest in the bowling alley property. Had First American's closing agent contacted First Bank in June 2013, First American would have learned that Mr. Tuschoff had assigned First Bank the Schwab/Tuschoff deed of trust to secure a \$440,000 promissory note that was payable in full in less than eight months, that over \$400,000 was owing on the note, and that the note had a due-on-sale clause that allowed First Bank to accelerate payment in full if the bowling alley was sold. In addition, First American would have learned that First Bank had a perfected security interest in the promissory note itself. All of this [193 Wn.App. 425] information is imputed to Banana Belt because First American was the closing agent for Banana Belt. *Nat'l Bank of Wash. v. Equity Inv'rs*, 81 Wn.2d 886, 910, 506 P.2d 20 (1973). We therefore conclude that Banana Belt was not a bona fide purchaser and was thus incapable of obtaining a greater [375 P.3d 694] interest in the bowling alley property than Schwab (through Mr. Tuschoff) had the right to convey.

E. First Bank's recorded interest is entitled to protection even though Tuschoff had not defaulted on the Hotel Lincoln note

[¶126] Banana Belt argues that First Bank merely had a conditional assignment of the Schwab/Tuschoff note and deed of trust, and that its interests did not become absolute until or unless Mr. Tuschoff defaulted.[2] Whether First Bank's interest was absolute or conditional is of no consequence to our inquiry. Mr. Tuschoff was unable to convey title free and clear of First Bank's assigned deed of

trust to Schwab, and hence Schwab was unable to convey clear title to Banana Belt.

F. Whether First Bank is precluded from recovering against Banana Belt under Montana law

[¶27] Banana Belt argues that First Bank's decision to foreclose nonjudicially against the Hotel Lincoln property prevents First Bank from collecting further on First Bank's note with Mr. Tuschoff and therefore extinguishes the assigned Schwab/Tuschoff deed of trust. First Bank responds that a Montana trial court decided this issue contrary to Banana Belt's argument, that the obligation was not extinguished, and that we should give comity to that

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decision. We reject First Bank's argument and conclude that application of comity to this issue would be inappropriate.

[¶28] The comity doctrine allows a court, acting within its discretion, to give effect to the law and resulting orders of another jurisdiction out of deference and respect, considering the interests of each jurisdiction. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 160-61, 744 P.2d 1032, 750 P.2d 254 (1987). The doctrine of comity, however, does not apply beyond the "immediate parties and the underlying claim." *In re Estate of Toland*, 180 Wn.2d 836, 848, 329 P.3d 878 (2014). Here, Banana Belt was not a party to the Montana action. Rather, the Montana action was brought by First Bank against Mr. Tuschoff. For this reason, Banana Belt had no right to appear in that controversy, could not protect its interests, and could not appeal an adverse decision. Notice of the litigation, an opportunity to participate, and the ability to appeal an adverse decision are important considerations in determining whether to apply comity. *See id.* We conclude that comity cannot be applied to a foreign state's decision where the party resisting its application did not have the right to participate or appeal the foreign state's decision.

[¶29] Reversed and remanded.

[¶30] The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with RCW 2.06.040, the rules governing unpublished opinions.

G. Montana's anti-deficiency statute

[¶31] Having concluded that comity does not preclude us from deciding the issue presented, we now turn to Montana's anti-deficiency statute, Mont. Code Ann. (MCA) § 71-1-317:

Deficiency judgment not allowed. When a trust indenture

executed in conformity with this part is foreclosed by advertisement and sale, other or further action, suit, or proceedings may not be taken or judgment entered for any deficiency against the grantor or the grantor's surety, guarantor, or successor in interest, if any, on the note, bond, or other obligation secured by the trust indenture or against any other person obligated on the note, bond, or other obligation.

[¶32] On its face, Montana's anti-deficiency statute seems to apply to nonjudicial foreclosures of any type of real property, residential or commercial. The Montana trial court cited *First Security Bank v. Abel*, 2008 MT 161, ¶ 30, 343 Mont. 313, 184 P.3d 318 for the proposition that the anti-deficiency statute does not apply to nonjudicial foreclosures of commercial properties. *Abel* did not involve a nonjudicial foreclosure. *Id.* at ¶ 8. Therefore, *Abel* is not relevant to the issue presented.

[¶33] Banana Belt asserts that *First State Bank of Forsyth v. Chunkapura*, 226 Mont. 54, 734 P.2d 1203 (1987) stands for the proposition that a lender that forecloses nonjudicially against any property has no right to a deficiency judgment. *Chunkapura*, like *Abel*, involves a judicial foreclosure. Nevertheless, *Chunkapura* contains clear dicta:

Under the Small Tract Financing Act, instead of mortgages, trust indentures (sometimes called "deeds of trust" or "trust deeds") are authorized. Such instruments have the effect of transferring the title of the borrower to a private trustee to be held by the trustee to secure the performance of the obligation by the borrower. A power of sale is by the law granted to the trustee to be exercised after a breach of the obligation for which the trust transfer is security. Section 71-1-304(2), MCA. The trust indenture is considered to be a mortgage on real property, § 71-1-305, MCA, and provisions are made in the law for the method whereby a trustee may foreclose a trust indenture by advertisement and sale. Section 71-1-313, MCA. *It is certain that when a trustee conducts a foreclosure sale, a deficiency judgment is not allowed, § 71-1-317, MCA*, and the purchaser at the trustee sale is entitled to possession of the property on the tenth day following the sale. Section 71-1-319, MCA.

Id. at 58 (emphasis added).[3]

[¶34] The *Chunkapura* court, noting that there was no statutory guidance on whether a deficiency judgment was available following a *judicial* sale, examined other western states' laws on the subject. *Id.* at 60-62. Noting that the Small Tract Financing Act of Montana, Title 71 MCA, did not include any requirement for a court to set an upset price--which would have protected a borrower by requiring the purchaser at foreclosure to pay a fair purchase price--the

Chunkapura court held that lenders were not entitled to a deficiency judgment following even a *judicial* foreclosure. *Id.* at 62-63.

[¶135] The *Chunkapura* court later restricted its opinion in an order on rehearing. It is this restriction that creates the ambiguity for this court. On rehearing, the *Chunkapura* court restricted the nondeficiency rule to future foreclosures of *residential* property. *Id.* at 67. The restrictive language seemingly allows a deficiency judgment following any foreclosure of nonresidential property, i.e., commercial property. However, it can be argued that the rehearing order was intended only to permit a deficiency judgment following a *judicial* foreclosure of commercial property, and did not alter the earlier unanimous statements from the majority and dissent which agreed that under the plain language of MCA § 71-1-317 there cannot be a deficiency judgment following a *nonjudicial* (advertisement and sale) foreclosure. *See Trs. of the Wash.-Idaho-Mont. Carpenters-Emp'rs Ret. Trust Fund v. Galleria P'ship*, 239 Mont. 250, 257-58, 780 P.2d 608 (1989) ("When a lender holding a trust indenture as security chooses to foreclose under the mortgage laws, *Chunkapura* as modified holds that except for occupied single family residential property, lenders can obtain a deficiency judgment even on trust indentures.") (emphasis added).[4]

H. Explanation for reason of disposition

[¶136] RAP 12.2 allows this court to "modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require." We take the unusual step of declining to answer a dispositive issue, but instead require Banana Belt to file suit in Montana so a Montana court can answer the dispositive issue. Only if the Montana court determines that First Bank is entitled to a deficiency judgment, it will also need to determine the amount of the judgment, which will require resolution of how much First Bank bid to purchase the Hotel Lincoln at foreclosure. For at least three reasons, we believe that it is in the interest of justice for a Montana court to resolve these issues of Montana law. First, the controlling issue is one of Montana law. Second, this court cannot reach a consensus on what Montana law requires. Third, although cases sometimes are dismissed under the doctrine of forum non conveniens because they involve questions of foreign law, the potential presence of a debt against real property in Washington convinces us that our state must retain jurisdiction to clear title of the assigned deed of trust, depending on the resolution of the Montana state issues. The lack of a procedure for an intermediate appellate court such as ours to certify an issue of Montana law to the Montana Supreme Court has resulted in this unusual remedy. *See* Mont. R. App. P. 15(3) (certification of questions of law).

I. Instructions on remand

[¶137] We remand to the trial court for it to stay further proceedings for Banana Belt to file suit in Montana. We deem it prudent for a Montana court to determine whether First Bank has a right to a deficiency judgment on its promissory note with Tuschoff following its election to foreclose against the Hotel Lincoln by advertisement and sale, and if so, the amount of the deficiency judgment.

[¶138] If the Montana court determines First Bank has no right to a deficiency judgment against Tuschoff,[5] the trial court is directed to enter judgment in favor of Banana Belt and to enter such orders as necessary to clear title of the assigned deed of trust that currently encumbers the bowling alley property. This is because First Bank's lien against the bowling alley property is extinguished without an existing obligation secured by the assigned Schwab/Tuschoff deed of trust. *See* 18 Stoebuck & Weaver, *supra*, § 17.1, at 253 (explaining that a security cannot exist without an obligation).

[¶139] If the Montana court declines to render a decision on the identified issue of Montana law despite (in our opinion) the parties having a justiciable controversy, the trial court is directed to determine these questions of Montana law. *See* RCW 5.24.020.

Fearing, C.J., and Korsmo, J., concur.

Notes:

[1] The parties dispute whether Mr. Tuschoff assigned the Schwab/Tuschoff note to First Bank but retained the right to monthly payments, or whether Mr. Tuschoff only gave First Bank a secured interest in the note. Because an owner of property does not also take a security interest in it, the execution of the security agreement makes clear that First Bank had only a security interest in the note.

[2] An assignor of a conditional security interest may foreclose on its interest. *See Uni-Com Nw., Ltd. v. Argus Publ'g Co.*, 47 Wn.App. 787, 794, 737 P.2d 304 (1987). Even after Mr. Tuschoff assigned the Schwab/Tuschoff deed of trust to First Bank, Mr. Tuschoff retained the right to foreclose if Schwab defaulted. In that event, First Bank could have protected its interests by becoming a bidder at the foreclosure sale and assuring that the bid was sufficient to pay all or part of the \$400,000 balance of the Hotel Lincoln note.

[3] The *Chunkapura* dissent agreed that a lender who forecloses by advertisement and sale, i.e., nonjudicially, has no right to a deficiency judgment. *Id.* at 64 (Weber, J.,

dissenting).

[4]First Bank further argues that it is attempting to collect as *owner* of the Schwab/Tuschoff note, not as a secured party of that note. First Bank's arguable right to collect as an owner of the Schwab/Tuschoff note does not give First Bank any right to collect against Banana Belt. This is because Banana Belt neither was the borrower on the note nor did it assume any liability on it.

[5]First Bank's right (or lack of right) to a deficiency judgment against Tuschoff on the unpaid promissory note is separate from First Bank's right against Tuschoff for conversion of funds, for which First Bank already has received a judgment. Our opinion does not alter First Bank's right to collect on its conversion judgment against Tuschoff.

FILED

JUL 19 2018

COPY

ANGIE SPARKE, Clerk of District Court
By STEVE EMGE Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

FIRST BANK OF LINCOLN,

Plaintiff,

v.

DONALD C. TUSCHOFF, LAURIE
PARKS, LANCER ENTERPRISES,
INC., and LINCOLN HOTEL,
LIMITED,

Defendants.

Cause No. DDV-2014-326

**ORDER ON
MOTION FOR
SUMMARY JUDGMENT**

LAURIE PARKS,

Counterclaim Plaintiff,

v.

FIRST BANK OF LINCOLN,

Counterclaim Defendant.

The Court has before it cross-motions for summary judgment filed by Plaintiff First Bank of Lincoln and Defendant Laurie Parks.

The parties have briefed the motions and they are ready for decision.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves the financing by the Bank of the purchase of the Hotel Lincoln by Defendants Donald Tuschoff¹ and his daughter Laurie Parks. As described later, this transaction is complicated by events and transactions in Washington State.

There have been other motions filed in this matter. The motions under consideration by the Court are the Bank's motion for summary judgment dismissing Parks' counterclaims and Parks' motion for summary judgment dismissing counts I through V of the Bank's complaint. As these other motions may affect the Court's analysis, the Court will address these other motions as well.

The Bank loaned Tuschoff and Parks \$440,000 for the purchase of the hotel. The loan was secured by a promissory note and related security interest in the hotel and by additional security interest Tuschoff held from the sale of a bowling alley in Clarkston, Washington. Tuschoff and Parks defaulted on the loan.

The Bank later learned that the bowling alley in Washington had been sold and the net proceeds had been sent directly to Tuschoff. Tuschoff refused to redirect the proceeds from the sale to the Bank, leaving the Bank, according to the Bank, in an under-secured position, with more debt owing on the hotel than it was worth.

The Bank filed this action to enforce the promissory note secured by the indenture of trust for the Hotel Lincoln in the principal amount of \$440,000. The Bank also seeks to enforce collection of other funds from the sale of the Washington bowling alley pledged as collateral for that promissory note. Parks

¹ Tuschoff's default has been entered.

has counterclaimed against the Bank essentially alleging fraud by the Bank in the inducement of the loan.

On August 24, 2014, a trustee's sale was held on the steps of the Hotel Lincoln pursuant to the Montana Small Tract Financing Act, §§ 71-1-301 to -321. On that date, the Bank was owed on the note the sum of \$425,748.50. At the trustee's sale, the Bank bid the full amount owing on the debt of \$425,748.50, which was accepted by the trustee, KD Feeback. The Bank asserts nevertheless that the value of the hotel as collateral was far less than the amount loaned by the Bank. Over a year later, a subsequent purchaser paid the Bank \$193,147.70 for the real property and its improvements. This, according to the Bank, establishes the fair market value of the hotel. The Bank, therefore, claims a deficiency amount owing to it of approximately \$403,507.21, including interest and the Bank's attorney fees, being the difference between the amount truly owed to the Bank and the amount received from the subsequent sale of the hotel.

On August 26, 2014, a trustee's deed was recorded in the Lewis and Clark County Clerk's office from Trustee Feeback to the Bank in compliance with the Small Tract Financing Act.

Parks asserts that by virtue of the tender and acceptance of the bid from the Bank, the promissory note and trust indenture together with all other obligations were satisfied and extinguished and Tuschoff and Parks were released and discharged.

The Bank, on the other hand, contends that there is a deficiency amount owed to it under the terms of the promissory note and trust indenture. Further, the Bank asserts that Parks' counterclaims are without merit and should be dismissed.

////

STANDARD OF REVIEW

The standards for reviewing a motion for summary judgment are well established. “The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” M.R.Civ.P. 56(c)(3).

Summary judgment may be granted only when there is a complete absence of genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Saucier v. McDonald's Rests. of Mont., Inc.*, 2008 MT 63, ¶ 33, 342 Mont. 29, 179 P.3d 481. In determining whether a genuine issue of material fact exists, we view all evidence in the light most favorable to the non-moving party. *Saucier*, ¶ 33. If the moving party satisfies its burden of showing the absence of a genuine issue of material fact and entitlement to judgment as a matter of law, the burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue does exist. *Valley Bank v. Hughes*, 2006 MT 285, ¶ 14, 334 Mont. 335, 147 P.3d 185. If no genuine issues of material fact exist, a court must determine whether the facts entitle the moving party to judgment as a matter of law. *Saucier*, ¶ 34.

Borges v. Missoula Cty. Sheriff's Office, 2018 MT 14, ¶ 16, 390 Mont. 161, 415 P.3d 976.

DISCUSSION

A. Bank's Motion to Dismiss Parks' Counterclaims.

The Bank moves to dismiss Parks' counterclaims. These counterclaims are based generally on allegations that the Bank fraudulently induced Parks into taking out this loan for the purchase of the hotel. Parks' first claim is for breach of

contract, but the underlying allegations are that the Bank misrepresented the financial condition of the hotel, thereby breaching the contract. Parks' second and third claims are for actual and constructive fraud, again based on allegations that the bank misrepresented the financial condition of the hotel.

The Montana Supreme Court has set forth elements applicable to proving various kinds of fraud:

To establish a *prima facie* case of actual fraud, the party asserting the claim must establish the following nine elements: (1) a representation; (2) the falsity of that representation; (3) the materiality of the representation; (4) the speaker's knowledge of the representation's falsity or ignorance of its truth; (5) the speaker's intent that the representation should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of the representation's falsity; (7) the hearer's reliance upon the truth of the representation; (8) the hearer's right to rely upon the representation; and (9) the hearer's consequent and proximate injury or damages caused by their reliance on the representation.

Franks v. Kindsfather (In re Estate of Kindsfather), 2005 MT 51, ¶ 17, 326 Mont. 192, 108 P.3d 487.

Constructive fraud requires a similar kind of showing:

In order to make out a *prima facie* case of constructive fraud, a plaintiff must establish the following elements: a representation; the falsity of that representation; the materiality of that representation; the speaker's knowledge of that representation's falsity or ignorance of its truth; the hearer's ignorance of that representation's falsity; the hearer's reliance upon the truth of that representation; the hearer's right to rely upon that representation; and the hearer's consequent and

proximate injury or damage caused by reliance on that representation.

Dewey v. Stringer, 2014 MT 136, ¶ 9, 375 Mont. 176, 325 P.3d 1236.

The difference in the two sets of elements is that for actual fraud, the plaintiff must allege and prove the speaker's intent that the representation should be acted upon by the person and in the manner reasonably contemplated. There is no similar proof of intent required for constructive fraud.

An element common to both listings is the requirement that the speaker make some representation. The representation can be by omitting some material fact that the speaker has a duty to reveal. *Batten v. Watts Cycle & Marine*, 240 Mont. 113, 783 P.2d 378 (1989).

Parks' allegations of the misrepresentations made by the Bank in her counterclaim are vague and somewhat circular. Parks applied for the loan, relying on representations made by one Mr. Porterfield, who was selling the hotel. Porterfield is not a party to this action. Based on the alleged misrepresentations made by Porterfield, Parks submitted a business plan to the Bank. The Bank accepted Parks' business plan and approved the loan. Parks alleges the Bank knew or should have known that Parks' application and business plan were totally inaccurate and without merit. As to her breach of contract claim, Parks alleges similarly that the Bank made inaccurate representations concerning the financial condition of the hotel. The Bank, however, was not a party to the negotiations between Porterfield and Parks.

In this case, the Bank served requests for admissions pursuant to M.R.Civ.P. 36 upon Parks, going to the issue of what representation the Bank had made upon which Parks relied. Parks did not respond to these requests within the thirty days

called for in M.R.Civ.P. 36(a)(3). The Bank therefore asserts the requests for admission are deemed admitted.

The Bank also points to the responses from Edward Parks in the companion case of Edward Parks v. First Bank of Lincoln, No. ADV-2014-371. In that case, the Bank served the same requests for admission upon Edward Parks as were served on Laurie Parks in this case. Edward Parks is the husband of Laurie Parks and was involved in the transaction to buy the Hotel Lincoln. When requested to admit that he did not rely on advice from the Bank in making the loan application and that neither the Bank nor its President provided data or prepared the business plan, Edward so admitted.

Based on these admissions from Edward Parks, Judge Mike Menahan granted the Bank summary judgment in Cause No. ADV-2014-371.

Laurie Parks has moved to withdraw her deemed admissions to the Bank's requests for admission. For several reasons, the Court will deny this motion.

The Bank's request for admissions were served on Parks' attorney on September 4, 2015. On March 3, 2016, the Bank submitted its motion for summary judgment based in part on Parks' failure to respond to the Bank's requests for admissions. On March 14, 2016, Parks moved to withdraw her deemed admissions, claiming she had not received the Bank's requests for admission.

"A letter duly directed and mailed was received in the regular course of the mail." Section 26-1-602(24), MCA.

Were the failure to respond to the Bank's requests for admission the first instance of Parks not being timely in these proceedings, the Court might be more inclined to grant her motion to withdraw her deemed admissions. That is not the

case, however. The Court was called upon the set aside Parks' default,² entered on March 6, 2015, after she failed to answer the complaint timely. The Bank has had to move to compel Parks' answers to other discovery requests, for which non-response the Court ordered Parks to pay the Bank's expenses. Thus, Parks does not come before the Court with "clean hands" as to her paying attention to this litigation.

Second, when she belatedly filed her responses to the Bank's requests for admission, those responses were vague and incomplete. While the Court agrees that the admissions made by Edward Parks in Cause No. ADV-2014-371 are not directly admissible to establish an admission by Laurie Parks, the Court notes that in her responses, Laurie responds that Edward Parks made certain submissions to the Bank on behalf of the loan applicants, including Laurie Parks.

M.R.Civ.P. 36(b) allows for the withdrawal of a deemed admission if the Court is persuaded that it would not prejudice the requesting party in maintaining or defending the action on the merits. The Court is not persuaded that allowing Parks to withdraw her deemed admissions will not prejudice the Bank.

Further, in reviewing Parks' responses to requests for admissions, the Court only sees that the Bank is alleged to have provided Parks with an appraisal of the hotel prepared by an appraiser Seipel. There is no response to indicate that Seipel's appraisal was somehow inaccurate or misleading. Seipel, like Porterfield, is not a party to this lawsuit. According to Parks, the Seipel appraisal was only one source of information on which she relied, including information from Porterfield, marketing studies, Department of Transportation traffic studies, various Internet

² In its Order setting aside Parks' default, the Court notes that Parks had been dilatory in other ways and had been non-compliant with the Court's Orders.

sites, travel statistics for Glacier Park, and consultations with various professionals Parks has known over the years.

For the foregoing reasons, the Court concludes that Parks has not shown that the Bank has made some representation or omission that is inaccurate, or on which Parks relied in making the application for the loan.

There being no genuine issue of material fact and the Bank being entitled to summary judgment, the Court concludes the Bank's motion for summary judgment as to Parks' counterclaims should be granted.

B. Parks' Motion for Summary Judgment.

Parks moves for summary judgment on the Bank's counts I through V. Parks' motion is based on an assertion that by virtue of the Bank bidding on the hotel at the trustee's sale, the bank has received full payment and satisfaction of the underlying obligation to the Bank.

Parks points to the cases of *Trustees of the Washington-Idaho-Montana Carpenters Retirement Trust Fund v. Galleria Partnership*, 239 Mont. 250, 780 608 (1989) (*Galleria I*) and *Trustees of the Washington-Idaho-Montana Carpenters Retirement Trust Fund v. Galleria Partnership*, 250 Mont. 175, 819 P.2d 158 (1991) (*Galleria II*).

Reviewing the *Galleria* decisions, the Court concludes several principles apply to these transactions.

First, the trust indenture was not for a single-family residence, therefore a deficiency amount owing could be calculated. In foreclosing a trust indenture under the Small Tract Financing Act for a single-family residence, no deficiency is allowed. *First State Bank of Forsyth v. Chunkapura*, 226 Mont. 54, 734 P.2d 1203

(1987). The trust indenture here was for a commercial transaction, thus the rule in *Chunkapura* does not apply.

Second, under the *Galleria* cases, foreclosing on a trust indenture for a commercial transaction can result in a deficiency amount being owed to the lender. The example used is that a low-ball bid on a trust indenture foreclosure would be inappropriate in determining what the lender was owed. Thus, in this case, the Bank could claim a deficiency amount owing if the amount bid was insufficient to satisfy the Bank's loan.

A difficulty in this case arises because of the Bank's bidding in the exact amount it was calculated as owing at the trustee's sale. This was not a low-ball bid for the property. Indeed, the Bank acknowledges that it overbid for the property.

At the trustees' sale, the trustee, who was also the Bank's attorney, opened the auction with the Bank's bid of \$425,748.50, explaining that that amount represented the outstanding principal, interest, costs, property taxes and legal fees for the foreclosure.

The Bank now claims that the fair market value of the hotel was set a year later when the hotel was purchased by a third-party for \$193,147.70.

Galleria cautions against relying on the amount bid at the foreclosure sale as the sole determinant of the fair market value of the property. As explained in *Bank of Baker v. Mikelson Land Co.*, 1999 MT 76, ¶¶ 27-28, 294 Mont. 64, 979 P.2d 180:

In *Galleria I*, a group of investors defaulted on a promissory note for a \$1.2 million loan which was secured by a trust indenture on commercial property and the district court entered a decree of foreclosure directing the sheriff to sell the property. *Galleria I*, 239 Mont. at

255, 780 P.2d at 611. The beneficiaries of the trust indenture (hereinafter the Trustees) submitted the sole bid at the sale, in the amount of \$565,000, which was approximately 30 percent of the original appraised value of the property. *Galleria I*, 239 Mont. at 256, 264, 780 P.2d at 611, 616. In calculating the approximately \$1.5 million deficiency owed by the investors, the district court apparently relied solely on the amount at which the property sold at foreclosure in determining the property's fair market value. *See Galleria I*, 239 Mont. at 264, 780 P.2d at 616.

On appeal, we expressed concern over the amount of the deficiency judgment in relation to the promissory note, that the Trustees submitted the sole bid at the foreclosure sale and that the Trustees' purchasing bid was for only 30 percent of the property's originally appraised value. *Galleria I*, 239 Mont. at 263-65, 780 P.2d at 616-17. Observing that foreclosure proceedings are within our equity jurisdiction, which includes the power to fashion equitable results, we remanded to the district court for a determination of the property's fair market value at the time of the sale and a redetermination of the amount of any deficiency judgment. *Galleria I*, 239 Mont. at 265-66, 780 P.2d at 617. In doing so, we defined "fair market" as "the intrinsic value of the real property with its improvements at the time of sale under judicial foreclosure, without consideration of the impact of the foreclosure proceedings on the fair market value." *Galleria I*, 239 Mont. at 265, 780 P.2d at 617 (citation omitted). Importantly, we left the method of determining fair market value to the district court. *See Galleria I*, 239 Mont. at 265, 780 P.2d at 617.

In *Galleria*, the Court was concerned about the effect of a "low-ball" bid. Nonetheless, the Court cautions against using the amount bid at the trustee's sale

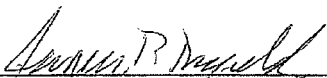
as the sole determinant of the fair market value of the property being sold. In the present case, the parties apparently acknowledged that the hotel alone was not adequate to secure the loan from the Bank to Parks. For this reason, the parties agreed to pledge additional security from the Washington bowling alley.

This raises a genuine issue of material fact which precludes granting Parks' motion for summary judgment. The Court will need to take in additional evidence to determine if the Bank is owed a deficiency amount by Parks.

IT IS ORDERED that:

1. Parks' motion to withdraw her deemed admissions is **DENIED**.
2. The Bank's motion for summary judgment dismissing Parks' counterclaims is **GRANTED**.
3. Parks' motion for summary judgment dismissing the Bank's Counts I through V is **DENIED**.

DATED this 18 day of July, 2018.



 JAMES P. REYNOLDS
 District Court Judge

C: Candace Payne, PO Box 1144, Helena, MT 59624
 Michael S. Kakuk, Esq., 1717 Harrison Avenue, Helena, MT 59601

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Order on Motion for Summary Judgment – page 12
 DDV-2014-326

FILED

AUG 31 2018

Candace Payne
Lucas Hamilton
Luxan & Murfitt, PLLP
24 W. Sixth Avenue
Fourth Floor, Montana Club Building
P. O. Box 1144
Helena, MT 59624
Phone: (406) 442-7450
CPayne@luxanmurfitt.com
LHamilton@luxanmurfitt.com

ANNE M. CONNOR District Court
By MAGGIE CONNOR Deputy Clerk

Attorneys for Plaintiff First Bank of Lincoln

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF MONTANA, IN AND FOR THE COUNTY OF LEWIS & CLARK

<p>FIRST BANK OF LINCOLN, Plaintiff, vs. DONALD C. TUSCHOFF; LAURIE PARKS; LANCER ENTERPRISES, INC.; and LINCOLN HOTEL, LIMITED, Defendants.</p>	<p>Cause No.: DV-2014-326 FIRST BANK OF LINCOLN'S MOTION FOR SUMMARY JUDGMENT ON THE AMOUNT OF DEFICIENCY OWED BY THE DEFENDANTS</p>
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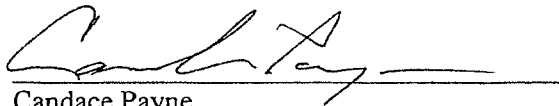
Plaintiff First Bank of Lincoln, by and through its counsel of record Candace Payne of Luxan & Murfitt, PLLP, submits this Motion for Summary Judgment pursuant to M. R. Civ. P 56(b) on issue of the amount of deficiency owed by the Defendants in this case, as described by the Court's Order dated July 18, 2018. This motion is accompanied by a supporting brief.

COPY

FIRST BANK OF LINCOLN'S MOTION FOR SUMMARY JUDGMENT ON THE AMOUNT OF DEFICIENCY OWED BY THE DEFENDANTS - 1

Dated this 31st day of August, 2018.

LUXAN & MURFITT, PLLP



Candace Payne
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing deposited in the U.S. Mail, first class,
postage prepaid to the following on the 31st day of August, 2018.

Mr. Michael S. Kakuk
1717 Harrison Avenue
Helena, Montana 59601



Candace Payne

**FIRST BANK OF LINCOLN'S MOTION FOR SUMMARY JUDGMENT ON THE AMOUNT OF
DEFICIENCY OWED BY THE DEFENDANTS - 2**

Candace Payne
Lucas Hamilton
Luxan & Murfitt, PLLP
24 W. Sixth Avenue
Fourth Floor, Montana Club Building
P. O. Box 1144
Helena, MT 59624
Phone: (406) 442-7450
CPayne@luxanmurfitt.com
LHamilton@luxanmurfitt.com

Attorneys for Plaintiff First Bank of Lincoln

FILED

AUG 31 2018

ANGUS COURT
By MAGGIE CONNOR Deputy Clerk

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF MONTANA, IN AND FOR THE COUNTY OF LEWIS & CLARK

FIRST BANK OF LINCOLN,

Plaintiff,

vs.

DONALD C. TUSCHOFF; LAURIE PARKS;
LANCER ENTERPRISES, INC.; and
LINCOLN HOTEL, LIMITED,

Defendants.

Cause No.: DV-2014-326

**FIRST BANK OF LINCOLN'S
BRIEF IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT ON
THE DEFICIENCY AMOUNT
OWED BY THE DEFENDANTS**

COMES NOW Plaintiff First Bank of Lincoln ("Bank"), by and through its counsel of record Candace Payne of Luxan & Murfitt, PLLP, and submits this Brief in Support of its Motion for Summary Judgment pursuant to M. R. Civ. P. 56(b) on the issue of the amount of the deficiency owed to the Bank by Defendants Donald C. Tuschoff, Laurie Parks, Lancer Enterprises, Inc., and Lincoln Hotel, Limited.

No dispute exists as to any material fact regarding the amount of the deficiency, and as such Plaintiff and Counterclaim Defendant First Bank of Lincoln, now known as

FIRST BANK OF LINCOLN'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON DEFICIENCY AMOUNT OWED BY THE DEFENDANTS- 1

COPY

Citizens Alliance Bank¹ is entitled to Judgment as a matter of law.

STATEMENT OF UNDISPUTED FACTS

The following facts are undisputed and show that Plaintiff First Bank of Lincoln is entitled to summary judgment as a matter of law regarding the amount of the deficiency owed by the Defendants to the Bank.

1. On July 18, 2018, this Court issued its Order on Motion for Summary Judgment, denying Parks' motion to withdraw her admissions, dismissing Parks' counterclaims against the Bank, and denying Parks' motion for summary judgment to dismiss the Bank's Counts I through V, and stating that the Court would need to take additional evidence to determine the deficiency amount owed by the Defendants.

2. The Bank's loan file documents² show that this loan was initially made to Donald Tuschoff and Laurie A. Parks in January of 2011, in the amount of \$440,000.00, secured by a Trust Indenture and a Promissory Note. (Exhibit 1, FBL000179-187; and Exhibit 2, FBL000191-195.)

3. On January 27, 2011, as additional collateral to secure the loan, Donald Tuschoff executed an Assignment of his beneficial interest in a Deed of Trust for the sale of a bowling alley located in Asotin County, Washington. The assignment of the Schwab/Tuschoff Deed of Trust and the Schwab/Tuschoff Note included Tuschoff's assignment of all right, title and interest in that note and all rights accrued under the Schwab/Tuschoff Deed of Trust. (Exhibit 3, FBL000219-220.)

¹ The bank charter for First Bank of Lincoln was formally merged with the bank charter for Citizens Alliance Bank, which is a General For-Profit Corporation in good standing with the Montana Secretary of State.

² All documents from the Bank's Loan File are designated by the letters FBL preceding the page numbers.

4. The face of the “Assignment of Deed of Trust” shows that it was filed in the records of Asotin County, Washington on February 14, 2011. (*See* Exhibit 3.)

5. On or about December 6, 2011, Defendant Laurie A. Parks and Defendant Donald Tuschoff each executed an individual personal guarantee for Promissory Note No. 6248, dated January 27, 2011, from Lincoln Hotel, Limited to First Bank of Lincoln. The personal guarantees provide, at paragraph 11, that she/he agrees to pay all expenses of collection, enforcement or protection of the Bank’s rights and remedies under this guarantee or any other document relating to the debt. (Exhibit 4, FBL000207-214.)

6. Bank records confirm that the Tuschoff/Parks loan “is secured by a security interest in a note receivable [sic] (face amount approximately \$573,000) and a first lien MT Trust Indenture on the Hotel Lincoln (valued by Joe Seiple at 448,000).” (Exhibit 5, FBL000002, Comment Sheet.)

7. Bank records further confirm in a Specific Loan Note dated January 9, 2012, that it was the unequivocal position of the Bank that if the Bank did not have an assignment on Mr. Tuschoff’s note receivable, the Bank likely would not have made the loan to Tuschoff and Parks. (Exhibit 6, FBL000003, Specific Loan Note, Hotel Lincoln.)

8. At the time of the Defendants’ default, the principal balance of \$362,000.00 plus interest was still owed on the original debt. (Exhibit 7, Affidavit of John Gill, ¶ 3.)

9. On October 30, 2015, the Bank sold the hotel property to a third party for \$193,147.70. (*See* Exhibit 8, Settlement Statement, HUD-1.)

10. The total principal, interest, and collection costs owed to the Bank by the Defendants after deducting the property’s sale price is \$292,348.70. (Exhibit 7, Aff. of

FIRST BANK OF LINCOLN’S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON DEFICIENCY AMOUNT OWED BY THE DEFENDANTS- 3

John Gill, ¶ 5.) This figure does not include legal fees and costs that are recoverable pursuant to contract. *Id.*

STANDARD OF REVIEW

According to Rule 56(c), Mont. R. Civ. P., summary judgment is appropriate when there is “no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *First Security Bank v. Kyle Abel & Abel Enters*, 2008 MT 161, ¶ 10, 343 Mont. 313, 184 P.3d 318. The party seeking summary judgment has the burden of demonstrating a complete absence of any genuine factual issues. *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 25, 304 Mont. 356, 22 P.3d 631. Where the moving party is able to demonstrate that no genuine issue as to any material fact remains in dispute, the burden then shifts to the party opposing the motion. *Lee*, ¶ 26. To raise a genuine issue of material fact, the party opposing summary judgment must present material and substantial evidence rather than merely conclusory or speculative statements. *Lee*, ¶ 26. As this Court has long observed, “proof is required to establish the absence of genuine issues of material fact, a party may not rely on the arguments of counsel.” *First Security Bank*, 2008 MT 161, ¶ 12.

ARGUMENT

I. The Bank is entitled to a deficiency of at least \$292,348.70.

As the Court concluded in its July 19, 2018, Order on Motion for Summary Judgment, the Bank’s full credit bid does not reflect the intrinsic value of the property as used in calculating a deficiency. Instead, the deficiency is determined by subtracting the “intrinsic value of the real property at the time of the sale” from the amount owed to the

FIRST BANK OF LINCOLN’S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON DEFICIENCY AMOUNT OWED BY THE DEFENDANTS- 4

creditor. *Trs. of Wash.-Idaho-Montana Carpenters-Employers Ret. Tr. Fund v. Galleria P'ship*, 250 Mont. 175, 185, 819 P.2d 158, 164 (1991) (“*Galleria IP*”).

The only material, substantial evidence of the intrinsic value of the hotel is the price at which the Bank was able to sell it: \$193,147.70. At the time of the default, the Defendants still owed \$362,000.00 in principal on the promissory note. Exhibit 7, Aff. of John Gill, ¶ 3. Even after the sale of the property is credited to the amount owed by the Defendants, they still owe the Bank \$292,348.70 in principal, interest, and collection costs as of August 7, 2018. *Id.*, ¶ 6.

There is no dispute of material fact regarding the existence of a deficiency on the Defendants’ promissory note. The only question left is the amount of that deficiency. The only substantial, material evidence of the property’s value is the price at which the Bank was able to sell it. Thus, there is no dispute of material fact that the amount of that deficiency is at least \$292,348.70, with interest accruing daily. Accordingly, the Bank is entitled to judgment as a matter of law for a deficiency of \$292,348.70 that continues to accrue interest daily.

II. The Bank is Entitled to An Award of Attorneys’ Fees, Court Costs and Other Legal Expenses, Plus Interest Thereon.

Whether a party is entitled to recover attorneys’ fees is a question of law. *Chase v. Bearpaw Ranch Ass'n.*, 2006 MT 67, ¶ 14, 331 Mont. 421, 133 P.3d 190. Contractual fee-shifting provisions are a recognized exception to the American Rule that a party generally pays its own attorneys’ fees. *Id.* at ¶ 29.

The contracts executed between the Bank and the Defendants specifically provide for

FIRST BANK OF LINCOLN’S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON DEFICIENCY AMOUNT OWED BY THE DEFENDANTS- 5

attorneys' fees, court costs, and other legal expenses, and interest on those expenses. (See Exhibit 1, Trust Indenture at paragraph 14; Exhibit 2, Promissory Note at paragraph 15; and Exhibit 4, Personal Guaranty of Laurie Parks at paragraph 11, and Personal Guaranty of Donald Tuschoff at paragraph 11.) The Bank has incurred substantial legal fees and costs associated with collection under the note and protection of the Bank's rights and remedies under the note, guarantees, and security agreements. Exhibit 7, Aff. of John Gill, ¶ 6.

The Bank is therefore entitled as a matter of law to an award of reasonable attorneys' fees incurred while protecting and pursuing its rights under the promissory note, security agreements, and guarantees. The Bank requests that the Court schedule a hearing to consider evidence of the reasonableness of the Bank's attorney fees, pursuant to the requirements of *Plath v. Schonrock*, 2003 MT 21, ¶ 36, 314 Mont. 101, 64 P.3d 984.

CONCLUSION

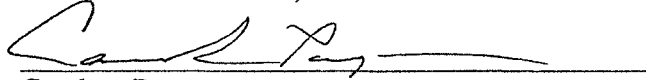
For the foregoing reasons, there is no dispute of material fact as to the existence of a deficiency in the amount of \$292,348.70, with interest accruing daily. There is likewise no dispute of material fact that the Bank is entitled to an award of reasonable attorneys' fees. The Bank is entitled to judgment as a matter of law on both fronts. Accordingly, the Bank respectfully requests summary judgment to set the amount of the deficiency described above, with daily interest accruing. The Bank also requests a hearing on the amount of reasonable attorneys' fees due and owing to the Bank.

///

FIRST BANK OF LINCOLN'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON DEFICIENCY AMOUNT OWED BY THE DEFENDANTS- 6

Dated this 31st day of August, 2018.

LUXAN & MURFITT, PLLP

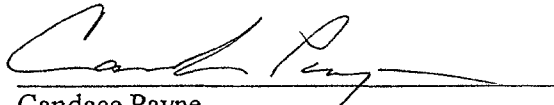


Candace Payne
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing deposited in the U.S. Mail, first class,
postage prepaid to the following on the 31st day of August, 2018.

Mr. Michael S. Kakuk
1717 Harrison Avenue
Helena, Montana 59601



Candace Payne

**FIRST BANK OF LINCOLN'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON
DEFICIENCY AMOUNT OWED BY THE DEFENDANTS- 7**

Return To: JULIE ZARSKA, FIRST
BANK OF LINCOLN , PO BOX 9,
LINCOLN, MT 59639-0009

Return to:
HELENA ABSTRACT & TITLE CO.
PO BOX 853
HELENA, MT 59624-0853
#A+rd #1071009

CERTIFIED TO BE A TRUE COPY
[Signature]

Space Above This Line For Recording Data

TRUST INDENTURE

DATE AND PARTIES. The date of this Trust Indenture (MT) (Security Instrument) is JANUARY 27, 2011. The parties and their addresses are:

GRANTOR:
DONALD TUSCHOFF
An unmarried individual
PO BOX 26
LINCOLN, MT 59639

Also known as Donald C. Tuschoff

[Signature]
D.C.T.
C.A.P.

Laurie A Parks
PO BOX 26
LINCOLN, MT 59639

TRUSTEE:
HELENA ABSTRACT AND TITLE COMPANY
a Montana Corporation
PO BOX 853
HELENA, MT 59624-0853

BENEFICIARY (Lender):
FIRST BANK OF LINCOLN
Organized and existing under the laws of Montana
417 MAIN STREET
LINCOLN, MT 59639-0009

Laurie A. Parks and Donald C. Tuschoff

1. CONVEYANCE. For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debts and Grantor's performance under this Security Instrument, Grantor does hereby irrevocably grant, convey and sell to Trustee, in trust for the benefit of Lender, with power of sale, the following described property:

A TRACT OF LAND IN THE NE1/4NW1/4 OF SECTION 24, TOWNSHIP 14 NORTH, RANGE 9 WEST, M.P.M., LEWIS AND CLARK COUNTY, MONTANA, MORE PARTICULARLY DESCRIBED AS FOLLOWS:
BEGINNING AT THE SOUTHWEST CORNER OF TRACT 19, SAID POINT OF BEGINNING BEARS S. 27 57'12"W., A DISTANCE OF 751.41 FEET FROM THE NORTH QUARTER CORNER OF SAID SECTION 24; THENCE S. 42 37'47" W., A DISTANCE OF 375.20 FEET TO THE TRUE POINT OF BEGINNING; THENCE S. 35 21'54" W., A DISTANCE OF 181.00 FEET; THENCE S. 89 42'16" W., A DISTANCE

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EXHIBIT
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OF 190.12 FEET; THENCE N. 01 16'50" E., A DISTANCE OF 61.14 FEET; THENCE N. 84 00'21" W., A DISTANCE OF 61.56 FEET; THENCE N. 09 19'21" E., A DISTANCE OF 274.57 FEET; THENCE N. 61 57'27" E., A DISTANCE OF 120.80 FEET; THENCE S. 39 32'14" E., A DISTANCE OF 319.89 FEET TO THE TRUE POINT OF BEGINNING, AS SHOWN ON THE CERTIFICATE OF SURVEY FILED UNDER DOC. NO. 356234. SAID TRACT IS ALSO KNOWN AS TRACT 48-A OF THE LAMBKIN-MULCARE TRACTS.)

The property is located in Lewis and Clark County at 96 SLEEPY HOLLOW LANE, LINCOLN, Montana 59639.

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, all water and riparian rights, wells, ditches and water stock, crops, timber, all diversion payments or third party payments made to crop producers and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described (all referred to as Property). This Security Instrument will remain in effect until the Secured Debts and all underlying agreements have been terminated in writing by Lender.

2. SECURED DEBTS. The term "Secured Debts" includes and this Security Instrument will secure each of the following:

A. Specific Debts. The following debts and all extensions, renewals, refinancings, modifications and replacements. A promissory note or other agreement, No. 6248, dated January 27, 2011, from Grantor to Lender, with a loan amount of \$435,000.00 and maturing on February 1, 2014.

B. Sums Advanced. All sums advanced and expenses incurred by Lender under the terms of this Security Instrument when the evidence of indebtedness specifically states that it is secured by this Security Instrument.

3. PAYMENTS. Grantor agrees that all payments under the Secured Debts will be paid when due and in accordance with the terms of the Secured Debts and this Security Instrument.

4. WARRANTY OF TITLE. Grantor warrants that Grantor is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to irrevocably grant, convey and sell the Property to Trustee, in trust, with power of sale. Grantor also warrants that the Property is unencumbered, except for encumbrances of record.

5. PRIOR SECURITY INTERESTS. With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property, Grantor agrees:

A. To make all payments when due and to perform or comply with all covenants.

B. To promptly deliver to Lender any notices that Grantor receives from the holder.

C. Not to allow any modification or extension of, nor to request any future advances under any note or agreement secured by the lien document without Lender's prior written consent.

D. To restrict lien priority of any prior security interest allowing future advances by recording a notice of limitation as provided in Mont. Code Ann. § 71-1-206(3).

6. CLAIMS AGAINST TITLE. Grantor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Grantor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Grantor's payment. Grantor will defend title to the Property against any claims that would impair the lien of this Security Instrument. Grantor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses Grantor may have against parties who supply labor or materials to maintain or improve the Property.

7: DUE ON SALE OR ENCUMBRANCE. Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of all or any part

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of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable.

8. WARRANTIES AND REPRESENTATIONS. Grantor has the right and authority to enter into this Security Instrument. The execution and delivery of this Security Instrument will not violate any agreement governing Grantor or to which Grantor is a party.

9. PROPERTY CONDITION, ALTERATIONS AND INSPECTION. Grantor will keep the Property in good condition and make all repairs that are reasonably necessary. Grantor will not commit or allow any waste, impairment, or deterioration of the Property. Grantor will keep the Property free of noxious weeds and grasses. Grantor agrees that the nature of the occupancy and use will not substantially change without Lender's prior written consent. Grantor will not permit any change in any license, restrictive covenant or easement without Lender's prior written consent. Grantor will notify Lender of all demands, proceedings, claims, and actions against Grantor, and of any loss or damage to the Property.

No portion of the Property will be removed, demolished or materially altered without Lender's prior written consent except that Grantor has the right to remove items of personal property comprising a part of the Property that become worn or obsolete, provided that such personal property is replaced with other personal property at least equal in value to the replaced personal property, free from any title retention device, security agreement or other encumbrance. Such replacement of personal property will be deemed subject to the security interest created by this Security Instrument. Grantor will not partition or subdivide the Property without Lender's prior written consent.

Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Lender will give Grantor notice at the time of or before an inspection specifying a reasonable purpose for the inspection. Any inspection of the Property will be entirely for Lender's benefit and Grantor will in no way rely on Lender's inspection.

10. AUTHORITY TO PERFORM. If Grantor fails to perform any duty or any of the covenants contained in this Security Instrument, Lender may, without notice, perform or cause them to be performed. Grantor appoints Lender as attorney in fact to sign Grantor's name or pay any amount necessary for performance. Lender's right to perform for Grantor will not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Security Instrument. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may take all steps necessary to protect Lender's security interest in the Property, including completion of the construction.

11. ASSIGNMENT OF LEASES AND RENTS. Grantor irrevocably assigns, grants, conveys to Lender as additional security all the right, title and interest in the following (Property).

A. Existing or future leases, subleases, licenses, guaranties and any other written or verbal agreements for the use and occupancy of the Property, including but not limited to any extensions, renewals, modifications or replacements (Leases).

B. Rents, issues and profits, including but not limited to security deposits, minimum rents, percentage rents, additional rents, common area maintenance charges, parking charges, real estate taxes, other applicable taxes, insurance premium contributions, liquidated damages following default, cancellation premiums, "loss of rents" insurance, guest receipts, revenues, royalties, proceeds, bonuses, accounts, contract rights, general intangibles, and all rights and claims which Grantor may have that in any way pertain to or are on account of the use or occupancy of the whole or any part of the Property (Rents).

In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement. Grantor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment.

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and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed. Grantor may collect, receive, enjoy and use the Rents so long as Grantor is not in default. Grantor will not collect in advance any Rents due in future lease periods, unless Grantor first obtains Lender's written consent. Upon default, Grantor will receive any Rents in trust for Lender and Grantor will not commingle the Rents with any other funds. When Lender so directs, Grantor will endorse and deliver any payments of Rents from the Property to Lender. Amounts collected will be applied at Lender's discretion to the Secured Debts, the costs of managing, protecting and preserving the Property, and other necessary expenses. Grantor agrees that this Security Instrument is immediately effective between Grantor and Lender. This Security Instrument will remain effective during any statutory redemption period until the Secured Debts are satisfied. Unless otherwise prohibited or prescribed by state law, Grantor agrees that Lender may take actual possession of the Property without the necessity of commencing any legal action or proceeding. Grantor agrees that actual possession of the Property is deemed to occur when Lender notifies Grantor of Grantor's default and demands that Grantor and Grantor's tenants pay all Rents due or to become due directly to Lender. Immediately after Lender gives Grantor the notice of default, Grantor agrees that either Lender or Grantor may immediately notify the tenants and demand that all future Rents be paid directly to Lender. As long as this Assignment is in effect, Grantor warrants and represents that no default exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses and landlords and tenants. Grantor, at its sole cost and expense, will keep, observe and perform, and require all other parties to the Leases to comply with the Leases and any applicable law. If Grantor or any party to the Lease defaults or fails to observe any applicable law, Grantor will promptly notify Lender. If Grantor neglects or refuses to enforce compliance with the terms of the Leases, then Lender may, at Lender's option, enforce compliance. Grantor will not sublet, modify, extend, cancel, or otherwise alter the Leases, or accept the surrender of the Property covered by the Leases (unless the Leases so require) without Lender's consent. Grantor will not assign, compromise, subordinate or encumber the Leases and Rents without Lender's prior written consent. Lender does not assume or become liable for the Property's maintenance, depreciation, or other losses or damages when Lender acts to manage, protect or preserve the Property, except for losses and damages due to Lender's gross negligence or intentional torts to the extent permitted by law. Otherwise, Grantor will indemnify Lender and hold Lender harmless for all liability, loss or damage that Lender may incur when Lender opts to exercise any of its remedies against any party obligated under the Leases.

12. DEFAULT. Grantor will be in default if any of the following events (known separately and collectively as an Event of Default) occur:

- A. **Payments.** Grantor fails to make a payment in full when due.
- B. **Insolvency or Bankruptcy.** The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against Grantor, Borrower, or any co-signer, endorser, surety or guarantor of this Security Instrument or any other obligations Borrower has with Lender.
- C. **Death or Incompetency.** Grantor dies or is declared legally incompetent.
- D. **Failure to Perform.** Grantor fails to perform any condition or to keep any promise or covenant of this Security Instrument.
- E. **Other Documents.** A default occurs under the terms of any other document relating to the Secured Debts.
- F. **Other Agreements.** Grantor is in default on any other debt or agreement Grantor has with Lender.

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G. Misrepresentation. Grantor makes any verbal or written statement or provides any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. Grantor fails to satisfy or appeal any judgment against Grantor.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. Grantor changes Grantor's name or assumes an additional name without notifying Lender before making such a change.

K. Property Transfer. Grantor transfers all or a substantial part of Grantor's money or property. This condition of default, as it relates to the transfer of the Property, is subject to the restrictions contained in the DUE ON SALE section.

L. Property Value. Lender determines in good faith that the value of the Property has declined or is impaired.

M. Insecurity. Lender determines in good faith that a material adverse change has occurred in Grantor's financial condition from the conditions set forth in Grantor's most recent financial statement before the date of this Security Instrument or that the prospect for payment or performance of the Secured Debts is impaired for any reason.

13. REMEDIES. On or after the occurrence of an Event of Default, Lender may use any and all remedies Lender has under state or federal law or in any document relating to the Secured Debts, including, without limitation, the power to sell the Property. Any amounts advanced on Grantor's behalf will be immediately due and may be added to the balance owing under the Secured Debts. Lender may make a claim for any and all insurance benefits or refunds that may be available on Grantor's default.

Subject to any right to cure, required time schedules or any other notice rights Grantor may have under federal and state law, Lender may make all or any part of the amount owing by the terms of the Secured Debts immediately due and foreclose this Security Instrument in a manner provided by law upon the occurrence of an Event of Default or anytime thereafter.

If there is an occurrence of an Event of Default, Trustee may, in addition to any other permitted remedy, at the request of Lender, advertise and sell the Property as a whole or in separate parcels at public auction to the highest bidder for cash. Trustee will give notice of the sale including the time, terms and place of sale and a description of the property to be sold as required by the applicable law in effect at the time of the proposed sale.

Upon sale of the Property and to the extent not prohibited by law, Trustee will apply the proceeds of the Property's sale in the following order: to all fees, charges and costs including those for expenses the power of sale and reasonable Trustee's fees and reasonable attorney's fees; to Lender for all moneys advances made for the repairs, taxes, insurance, liens, assessments and prior encumbrances and interests thereon; to the Secured Debt's principal and interest; and paying any surplus as required by law. Lender or its designee may purchase the Property.

All remedies are distinct, cumulative and not exclusive, and Lender is entitled to all remedies provided at law or equity, whether or not expressly set forth. The acceptance by Lender of any sum in payment or partial payment on the Secured Debts after the balance is due or is accelerated or after foreclosure proceedings are filed will not constitute a waiver of Lender's right to require full and complete cure of any existing default. By not exercising any remedy, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.

14. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after the occurrence of an Event of Default, to the extent permitted by law, Grantor agrees to pay all expenses of collection, enforcement or protection of Lender's rights and remedies under this Security Instrument or any other document relating to the Secured Debts. Grantor agrees to pay expenses for Lender to inspect and preserve the Property and for any recordation costs of releasing the Property from this Security Instrument. Expenses include, but are not limited to, reasonable attorneys' fees, court costs, and other legal

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expenses. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of the Secured Debts. In addition, to the extent permitted by the United States Bankruptcy Code, Grantor agrees to pay the reasonable attorneys' fees incurred by Lender to protect Lender's rights and interests in connection with any bankruptcy proceedings initiated by or against Grantor.

15. ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES. As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substance," "hazardous waste," "hazardous substance," or "regulated substance" under any Environmental Law.

Grantor represents, warrants and agrees that:

A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.

B. Except as previously disclosed and acknowledged in writing to Lender, Grantor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.

C. Grantor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Grantor will take all necessary remedial action in accordance with Environmental Law.

D. Except as previously disclosed and acknowledged in writing to Lender, Grantor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Grantor or any tenant of any Environmental Law. Grantor will immediately notify Lender in writing as soon as Grantor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.

E. Except as previously disclosed and acknowledged in writing to Lender, Grantor and every tenant have been, are and will remain in full compliance with any applicable Environmental Law.

F. Except as previously disclosed and acknowledged in writing to Lender, there are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.

G. Grantor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.

H. Grantor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of

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any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Grantor and any tenant are in compliance with applicable Environmental Law.

I. Upon Lender's request and at any time, Grantor agrees, at Grantor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.

J. Lender has the right, but not the obligation, to perform any of Grantor's obligations under this section at Grantor's expense.

K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Grantor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses to the extent permitted by law, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Security Instrument and in return Grantor will provide Lender with collateral of at least equal value to the Property without prejudice to any of Lender's rights under this Security Instrument.

L. Notwithstanding any of the language contained in this Security Instrument to the contrary, the terms of this section will survive any foreclosure or satisfaction of this Security Instrument regardless of any passage of title to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.

16. CONDEMNATION. Grantor will give Lender prompt notice of any pending or threatened action by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Grantor authorizes Lender to intervene in Grantor's name in any of the above described actions or claims. Grantor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds will be considered payments and will be applied as provided in this Security Instrument. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

17. ESCROW FOR TAXES AND INSURANCE. Grantor will not be required to pay to Lender funds for taxes and insurance in escrow.

18. CO-SIGNERS. If Grantor signs this Security Instrument but is not otherwise obligated to pay the Secured Debts, Grantor does so only to convey Grantor's interest in the Property to secure payment of the Secured Debts and Grantor does not agree by signing this Security Instrument to be personally liable on the Secured Debts. If this Security Instrument secures a guaranty between Lender and Grantor, Grantor agrees to waive any rights that may prevent Lender from bringing any action or claim against Grantor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws.

19. RECONVEYANCE. When Grantor has paid the Secured Debts in full and all underlying agreements have been terminated, Lender will request in writing that Trustee release the Security Instrument and will produce for Trustee, duly canceled, all notes evidencing debts secured by this Security Instrument. Trustee will release this Security Instrument and reconvey the property without further inquiry or liability.

20. SUCCESSOR TRUSTEE. Lender, at Lender's option, may from time to time remove Trustee and appoint a successor trustee in accordance with M.C.A. 71-1-306(2). The successor trustee without conveyance of the Property, will succeed to all the title, power and duties conferred upon Trustee by this Security Instrument and applicable law, including, without limitation, the right to appoint a successor or substitute trustee at any time and from time to time.

21. WAIVERS. Except to the extent prohibited by law, Grantor waives all appraisal and homestead exemption rights relating to the Property.

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22. REQUEST FOR NOTICE OF DEFAULT AND FORECLOSURE UNDER SUPERIOR SECURITY INSTRUMENT. Grantor and Lender request the holder of any mortgage, deed of trust, or other encumbrance with a lien which has priority over this Security Instrument to give notice to Lender, at Lender's address set forth on this Security Instrument of any default under the superior encumbrance and of any sale or other foreclosure action.

23. AREA OF PROPERTY. The area of the Property is not more than 40 acres.

24. FIXTURE FILING. Grantor gives to Lender a security interest in all goods that Grantor owns now or in the future and that are or will become fixtures related to the Property.

25. PERSONAL PROPERTY. Grantor gives to Lender a security interest in all personal property located on or connected with the Property, including all farm products, inventory, equipment, accounts, documents, instruments, chattel paper, general intangibles, and all other items of personal property Grantor owns now or in the future and that are used or useful in the construction, ownership, operation, management, or maintenance of the Property (all of which shall also be included in the term Property). The term "personal property" specifically excludes that property described as "household goods" secured in connection with a "consumer" loan as those terms are defined in applicable federal regulations governing unfair and deceptive credit practices.

26. APPLICABLE LAW. This Security Instrument is governed by the laws of Montana, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

27. JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS. Each Grantor's obligations under this Security Instrument are independent of the obligations of any other Grantor. Lender may sue each Grantor individually or together with any other Grantor. Lender may release any part of the Property and Grantor will still be obligated under this Security Instrument for the remaining Property. If this Security Instrument secures a guaranty between Lender and Grantor, Grantor agrees to waive any rights that may prevent Lender from bringing any action or claim against Grantor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws. Grantor agrees that Lender and any party to this Security Instrument may extend, modify or make any change in the terms of this Security Instrument or any evidence of debt without Grantor's consent. Such a change will not release Grantor from the terms of this Security Instrument. The duties and benefits of this Security Instrument will bind and benefit the successors and assigns of Lender and Grantor.

28. AMENDMENT, INTEGRATION AND SEVERABILITY. This Security Instrument may not be amended or modified by oral agreement. No amendment or modification of this Security Instrument is effective unless made in writing and executed by Grantor and Lender. This Security Instrument and any other documents relating to the Secured Debts are the complete and final expression of the agreement. If any provision of this Security Instrument is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

29. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Security Instrument.

30. NOTICE, FINANCIAL REPORTS, ADDITIONAL DOCUMENTS AND RECORDING TAXES. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Grantor will be deemed to be notice to all Grantors. Grantor will inform Lender in writing of any change in Grantor's name, address or other application information. Grantor will provide Lender any financial statements or information Lender requests. All financial

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statements and information Grantor gives Lender will be correct and complete. Grantor agrees to pay all expenses, charges and taxes in connection with the preparation and recording of this Security Instrument. Grantor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Grantor's obligations under this Security Instrument and to confirm Lender's lien status on any Property, and Grantor agrees to pay all expenses, charges and taxes in connection with the preparation and recording thereof. Time is of the essence.

SIGNATURES. By signing, Grantor agrees to the terms and covenants contained in this Security Instrument. Grantor also acknowledges receipt of a copy of this Security Instrument.

GRANTOR:

Donald Tuschoff Date 1-27-2011
DONALD TUSCHOFF *also shown as Donald C Tuschoff* *QCT*
Individually

Laurie A Parks Date 1/27/2011
LAURIE A PARKS
Individually

LENDER:

FIRST BANK OF LINCOLN

By Kenneth A. Martin Date 1-27-2011
KENNETH A. MARTIN, PRESIDENT

ACKNOWLEDGMENT.

(Individual)

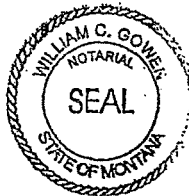
STATE OF MONTANA, COUNTY OF LEWIS AND CLARK ss.

This instrument was acknowledged before me this 27 day of January, 2011 by DONALD C. TUSCHOFF, an unmarried individual, and LAURIE A PARKS.

My commission expires:

William C. Gowen

Notary Public for the State of Montana
Residing at:



WILLIAM C. GOWEN
RESIDING AT HELENA
COMM. EXPIRES 10-1-2011

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LOAN NUMBER	LOAN NAME	ACCT. NUMBER	NOTE DATE	INITIALS
6248	DONALD TUSCHOFF		01/27/11	
NOTE AMOUNT	INDEX (w/Margin)	RATE	MATURITY DATE	LOAN PURPOSE
\$440,000.00	Wall Street Journal Prime plus 2.000%	6.000%	02/01/14	Commercial
Creditor Use Only				

PROMISSORY NOTE
(Commercial - Single Advance)

DATE AND PARTIES. The date of this Promissory Note (Note) is January 27, 2011. The parties and their addresses are:

LENDER:

FIRST BANK OF LINCOLN
417 MAIN STREET
LINCOLN, MT 59639-0009
Telephone: (406) 362-4248

BORROWER:

DONALD TUSCHOFF
PO BOX 26
LINCOLN, MT 59639

LAURIE A PARKS
PO BOX 26
LINCOLN, MT 59639

1. DEFINITIONS. As used in this Note, the terms have the following meanings:

- A. Pronouns. The pronouns "I," "me," and "my" refer to each Borrower signing this Note, individually and together. "You" and "Your" refer to the Lender.
- B. Note. Note refers to this document, and any extensions, renewals, modifications and substitutions of this Note.
- C. Loan. Loan refers to this transaction generally, including obligations and duties arising from the terms of all documents prepared or submitted for this transaction such as applications, security agreements, disclosures or notes, and this Note.
- D. Loan Documents. Loan Documents refer to all the documents executed as a part of or in connection with the Loan.
- E. Property. Property is any property, real, personal or intangible, that secures my performance of the obligations of this Loan.
- F. Percent. Rates and rate change limitations are expressed as annualized percentages.

2. PROMISE TO PAY. For value received, I promise to pay you or your order, at your address, or at such other location as you may designate, the principal sum of \$440,000.00 (Principal) plus interest from January 27, 2011 on the unpaid Principal balance until this Note matures or this obligation is accelerated.

3. INTEREST. Interest will accrue on the unpaid Principal balance of this Note at the rate of 6.000 percent (Interest Rate) until February 1, 2014, after which time it may change as described in the Variable Rate subsection.

A. Post-Maturity Interest. After maturity or acceleration, interest will accrue on the unpaid Principal balance of this Note at the variable Interest Rate in effect from time to time, plus an additional 2.000 percent, until paid in full.

B. Maximum Interest Amount. Any amount assessed or collected as interest under the terms of this Note will be limited to the maximum lawful amount of interest allowed by state or federal law, whichever is greater. Amounts collected in excess of the maximum lawful amount will be applied first to the unpaid Principal balance. Any remainder will be refunded to me.

C. Statutory Authority. The amount assessed or collected on this Note is authorized by the Montana usury laws under M.C.A. § 31-1-112(1).

D. Accrual. Other than any odd first period, interest will accrue using a counting days method that assumes equal intervals between scheduled payments.

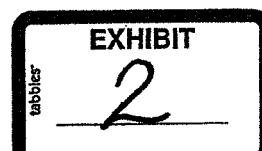
E. Variable Rate. The Interest Rate may change during the term of this transaction.

(1) Index. Beginning with the first Change Date, the Interest Rate will be based on the following index: the base rate on corporate loans posted by at least 70% of the 10 largest U.S. banks known as the Wall Street Journal U.S. Prime Rate.

DONALD TUSCHOFF
Montana Promissory Note
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Page 1



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The Current Index is the most recent index figure available on each Change Date. You do not guaranty by selecting this Index, or the margin, that the Interest Rate on this Note will be the same rate you charge on any other loans or class of loans you make to me or other borrowers. If this Index is no longer available, you will substitute a similar index. You will give me notice of your choice.

(2) Change Date. Each date on which the Interest Rate may change is called a Change Date. The Interest Rate may change February 1, 2014 and every 36 months thereafter.

(3) Calculation Of Change. On each Change Date you will calculate the Interest Rate, which will be the Current Index plus 2.000 percent. The result of this calculation will be rounded to the nearest .01 percent. Subject to any limitations, this will be the Interest Rate until the next Change Date. The new Interest Rate will become effective on each Change Date. The Interest Rate and other charges on this Note will never exceed the highest rate or charge allowed by law for this Note.

(4) Limitations. The Interest Rate changes are subject to the following limitations:

(a) Periodic. The Interest Rate will never increase or decrease on any single Change Date by more than 2.000 percent.

(b) Lifetime. The Interest Rate will never be greater than 10.000 percent or less than 6.000 percent.

(5) Effect Of Variable Rate. A change in the Interest Rate will have the following effect on the payments: The amount of scheduled payments and the amount of the final payment will change.

4. ADDITIONAL CHARGES. As additional consideration, I agree to pay, or have paid, these additional fees and charges.

A. Nonrefundable Fees and Charges. The following fees are earned when collected and will not be refunded if I prepay this Note before the scheduled maturity date.

Loan Origination. A(n) Loan Origination fee of \$4,350.00 payable from separate funds on or before today's date.

Flood Insurance Monitoring Charge. A(n) Flood Insurance Monitoring Charge fee of \$14.00 payable from separate funds on or before today's date.

Recording - Releases. A(n) Recording - Releases fee of \$140.00 payable from separate funds on or before today's date.

Recording - TRUST INDENTURE. A(n) Recording - TRUST INDENTURE fee of \$77.00 payable from separate funds on or before today's date.

Recording. A(n) Recording fee of \$22.00 payable from separate funds on or before today's date.

Owner's Title Insurance. A(n) Owner's Title Insurance fee of \$783.00 payable from separate funds on or before today's date.

Non-RE Filing. A(n) Non-RE Filing fee of \$30.00 payable from separate funds on or before today's date.

Lender's Title Insurance. A(n) Lender's Title Insurance fee of \$612.63 payable from separate funds on or before today's date.

Credit Report. A(n) Credit Report fee of \$35.22 payable from separate funds on or before today's date.

Closing. A(n) Closing fee of \$320.00 payable from separate funds on or before today's date.

Appraisal. A(n) Appraisal fee of \$1,000.00 payable from separate funds on or before today's date.

Reconveyance Fee. A(n) Reconveyance Fee fee of \$35.00 payable from separate funds on or before today's date.

DEED PREP FEE. A(n) DEED PREP FEE fee of \$70.00 payable from separate funds on or before today's date.

5. REMEDIAL CHARGES. In addition to interest or other finance charges, I agree that I will pay these additional fees based on my method and pattern of payment. Additional remedial charges may be described elsewhere in this Note.

A. Late Charge. If a payment is more than 15 days late, I will be charged 10.000 percent of the Unpaid Portion of Payment or \$50.00, whichever is less. I will pay this late charge promptly but only once for each late payment.

B. Minimum Finance Charge - Commercial/Ag. A(n) Minimum Finance Charge - Commercial/Ag equal to \$50.00.

6. PURCHASE MONEY LOAN. You may include the name of the seller on the check or draft for this Note.

7. PAYMENT. I agree to pay this Note on demand, but if no demand is made, I agree to pay this Note in 36 payments. This Note is amortized over 240 payments. A payment of \$3,155.33 will be due March 1, 2011, and on the 1st day of each month thereafter. I will make 36 scheduled payments of this amount. The scheduled payment amount may then change every 36 payments thereafter. Changes in the Interest Rate will not affect the scheduled payment amount during these periods. With each scheduled payment change the payment amount will be adjusted to reflect changes in the Interest Rate during the remaining term of this Note. In addition, changes to the scheduled payment amounts are subject to changes in the Interest Rate as described in the Variable Rate subsection of this Note. A final payment of the entire unpaid balance of Principal and interest will be due February 1, 2014.

Payments will be rounded up to the nearest \$.01. With the final payment I also agree to pay any additional fees or charges owing and the amount of any advances you have made to others on my behalf. Payments scheduled to be paid on the 29th, 30th or 31st day of a month that contains no such day will, instead, be made on the last day of such month.

Each payment I make on this Note will be applied first to interest that is due, then to principal that is due, and finally to any charges that I owe other than principal and interest. If you and I agree to a different application of

payments, we will describe our agreement on this Note. You may change how payments are applied in your sole discretion without notice to me. The actual amount of my final payment will depend on my payment record.

8. **PREPAYMENT.** I may prepay this Loan in full or in part at any time. Any partial prepayment will not excuse any later scheduled payments until I pay in full.

9. **LOAN PURPOSE.** The purpose of this Loan is purchase Hotel Lincoln.

10. **SECURITY.** The Loan is secured by separate security instruments prepared together with this Note as follows:

Document Name	Parties to Document
Assignment Of Life Insurance Policy - 7525130	DONALD TUSCHOFF
Security Agreement - DONALD TUSCHOFF, LAURIE A PARKS	DONALD TUSCHOFF, LAURIE A PARKS
Security Agreement - DONALD TUSCHOFF	DONALD TUSCHOFF
Trust Indenture (MT) - 96 SLEEPY HOLLOW LANE	DONALD TUSCHOFF, LAURIE A PARKS

11. **DEFAULT.** I understand that you may demand payment anytime at your discretion. For example, you may demand payment in full if any of the following events (known separately and collectively as an Event of Default) occur:

A. **Payments.** I fail to make a payment in full when due.

B. **Insolvency or Bankruptcy.** The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me or any co-signer, endorser, surety or guarantor of this Note or any other obligations I have with you.

C. **Death or Incompetency.** I die or am declared legally incompetent.

D. **Failure to Perform.** I fail to perform any condition or to keep any promise or covenant of this Note.

E. **Other Documents.** A default occurs under the terms of any other Loan Document.

F. **Other Agreements.** I am in default on any other debt or agreement I have with you.

G. **Misrepresentation.** I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. **Judgment.** I fail to satisfy or appeal any judgment against me.

I. **Forfeiture.** The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. **Name Change.** I change my name or assume an additional name without notifying you before making such a change.

K. **Property Transfer.** I transfer all or a substantial part of my money or property.

L. **Property Value.** You determine in good faith that the value of the Property has declined or is impaired.

M. **Insecurity.** You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Note or that the prospect for payment or performance of the Loan is impaired for any reason.

12. **DUE ON SALE OR ENCUMBRANCE.** You may, at your option, declare the entire balance of this Note to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of all or any part of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable. However, if I am in default under this Agreement, I may not sell the inventory portion of the Property even in the ordinary course of business.

13. **WAIVERS AND CONSENT.** To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. **Additional Waivers By Borrower.** In addition, I, and any party to this Note and Loan, to the extent permitted by law, consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to this Note.

(1) You may renew or extend payments on this Note, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property securing this Note.

(4) You, or any institution participating in this Note, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of this Note to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that any of us signing this Note as a Borrower is authorized to modify the terms of this Note or any instrument securing, guarantying or relating to this Note.

DONALD TUSCHOFF
Montana Promissory Note
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Page 3

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B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in this Note, or any other Loan Document, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

14. REMEDIES. After I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Note immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any Loan Document.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on my default.

D. Payments Made On My Behalf. Amounts advanced on my behalf will be immediately due and may be added to the balance owing under the terms of this Note, and accrue interest at the highest post-maturity interest rate.

E. Attachment. You may attach or garnish my wages or earnings.

F. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Note against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Note" means the total amount to which you are entitled to demand payment under the terms of this Note at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay this Note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

G. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

15. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Note or any other Loan Document. Expenses include, but are not limited to, attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of this Note. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

16. COMMISSIONS. I understand and agree that you (or your affiliate) will earn commissions or fees on any insurance products, and may earn such fees on other services that I buy through you or your affiliate.

17. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Note. The execution and delivery of this Note will not violate any agreement governing me or to which I am a party.

18. APPLICABLE LAW. This Note is governed by the laws of Montana, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

19. JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS. My obligation to pay the Loan is independent of the obligation of any other person who has also agreed to pay it. You may sue me alone, or anyone else who is obligated on the Loan, or any number of us together, to collect the Loan. Extending the Loan or new obligations under the Loan, will not affect my duty under the Loan and I will still be obligated to pay the Loan. This Note shall inure to the benefit of and be enforceable by you and your successors and assigns and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

20. AMENDMENT, INTEGRATION AND SEVERABILITY. This Note may not be amended or modified by oral agreement. No amendment or modification of this Note is effective unless made in writing and executed by you and me. This Note and the other Loan Documents are the complete and final expression of the agreement. If any provision of this Note is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable. No present or future agreement securing any other debt I owe you will secure the payment of this Loan if, with respect to this loan, you fail to fulfill any necessary requirements or limitations of Sections 19(a), 32 or 35 of Regulation Z or if, as a result, this Loan would become subject to Section 670 of the John Warner National Defense Authorization Act for Fiscal Year 2007.

21. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Note.

DONALD TUSCHOFF
Montana Promissory Note
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22. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Borrower will be deemed to be notice to all Borrowers. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Loan and to confirm your lien status on any Property. Time is of the essence.

23. CREDIT INFORMATION. I agree to supply you with whatever information you reasonably request. You will make requests for this information without undue frequency, and will give me reasonable time in which to supply the information.

24. ERRORS AND OMISSIONS. I agree, if requested by you, to fully cooperate in the correction, if necessary, in the reasonable discretion of you of any and all loan closing documents so that all documents accurately describe the loan between you and me. I agree to assume all costs including by way of illustration and not limitation, actual expenses, legal fees and marketing losses for failing to reasonably comply with your requests within thirty (30) days.

25. SIGNATURES. By signing, I agree to the terms contained in this Note. I also acknowledge receipt of a copy of this Note.

BORROWER:

Donald Tuschoff Date 1-27-2011
DONALD TUSCHOFF
Individually

Laurie A Parks Date 1/27/2011
LAURIE A PARKS
Individually

LENDER:

FIRST BANK OF LINCOLN

By Kenneth A. Martin Date 1-27-2011
KENNETH A. MARTIN, PRESIDENT

DONALD TUSCHOFF
Montana Premissory Note
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Page 5

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Return to
First Bank of Lincoln
PO Box 9
Lincoln, MT 59639
2010807979

Inst: 323264 02/14/2011 3:57PM
Filed: ALLIANCE TITLE & ESCROW Fee Cd: A-02
Code: 006 Assgn D/T 15.00
Asotin County Auditor

ASSIGNMENT OF DEED of TRUST

Lancer Enterprises, Inc. and Donald C. Tuschoff and ~~Meredith B Tuschoff~~, as beneficiary under that certain Deed of Trust, dated October 22, 1998 and recorded November 2, 1998 as instrument no 237362, record of Asotin County, Washington, executed by Gene M Schwab, Ladene M. Schwab, James R. Schwab, Dianncy T. Huffaker, David C Prall, Kathy Prall, and David Shawn Prall, as grantors and Alliance Title and Escrow Company as trustee and Lancer Enterprises, Inc. and Donald C. Tuschoff and Meredith B Tuschoff as beneficiaries and given to secure payment of the promissory note therein described or referred to and the money due and to become due thereon with interest, has endorsed said Deed of Trust and Note and does hereby Assign, Sell, Convey and deliver to First Bank Lincoln whose mailing address is PO Box 9, Lincoln, MT 59639 all right title and interest in said Note and all rights accrued under said Deed of Trust.

Dated January 27, 2011

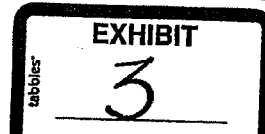
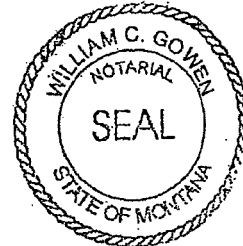
Lancer Enterprises, Inc., a dissolved corporation

By: Donald C. Tuschoff, as President
Ann A. [Signature] as Secy.

STATE OF MONTANA
COUNTY OF LEWIS AND CLARK

This instrument was acknowledged before me on 1-27-2011, by Donald C. Tuschoff as President and Secy. of Lancer Enterprises, Inc., a dissolved corporation.

[Signature]
Notary Public for the State of Montana
WILLIAM C. GOWEN
Residing at _____ RESIDING AT HELENA
My Commission expires _____ COMM. EXPIRES 10-1, 2011



FBL000219

Donald C. Tuschoff
Donald C. Tuschoff

~~Meredith B. Tuschoff~~

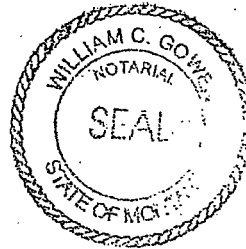
STATE OF MONTANA
COUNTY OF LEWIS AND CLARK

This instrument was acknowledged before me on 1-27-2011, by Donald C. Tuschoff and ~~Meredith B. Tuschoff~~.

William C. Gowen
Notary Public for the State of Montana

Residing at _____
My Commission expires _____

WILLIAM C. GOWEN
RESIDING AT HELENA
COMM. EXPIRES 10-1-2011



FBL000220

GUARANTY
(Continuing Debt - Unlimited)

DATE AND PARTIES. The date of this Guaranty is December 6, 2011. The parties and their addresses are:

LENDER:
FIRST BANK OF LINCOLN
417 MAIN STREET
LINCOLN, MT 59639-0009
Telephone: (406) 362-4248

BORROWER:
LINCOLN HOTEL, LIMITED
a Montana Corporation
PO BOX 26
LINCOLN, MT 59639

GUARANTOR:
LAURIE A PARKS
PO BOX 26
LINCOLN, MT 59639

1. DEFINITIONS. As used in this Guaranty, the terms have the following meanings:

- A. Pronouns. The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.
- B. Note. "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.
- C. Property. "Property" means any real, personal or intangible that secures performance of the obligations of the Note or this Guaranty.

ORIGINAL

2. SPECIFIC AND FUTURE DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce your forbearance with respect to any Debt, or to induce you to extend and/or maintain credit, or grant any other financial accommodation, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, No. 6248, dated January 27, 2011, from LINCOLN HOTEL, LIMITED (Borrower) to you, in the modified amount of \$433,555.17.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of these debts) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

A. Future Advances. I waive notice of and consent to any and all future advances made to the Borrower by you.

4. UNCONDITIONAL LIABILITY. I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me.

LAURIE A. PARKS
Montana Guaranty
MT\FAX\JZARSKE000000000000624010120611N

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Page 1

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I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you, pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

6. REVOCATION. I agree that this is an absolute and unconditional Guaranty. I agree that this Guaranty will remain binding on me, whether or not there are any Debts outstanding, until you have actually received written notice of my revocation or written notice of my death or incompetence. Notice of revocation or notice of my death or incompetence will not affect my obligations under this Guaranty with respect to any Debts incurred by or for which you have made a commitment to Borrower before you actually receive such notice, and all renewals, extensions, refinancings, and modifications of such Debts. I agree that if any other person signing this Guaranty provides a notice of revocation to you, I will still be obligated under this Guaranty until I provide such a notice of revocation to you. If any other person signing this Guaranty dies or is declared incompetent, such fact will not affect my obligations under this Guaranty.

7. PROPERTY. I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me or my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

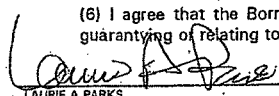
8. DEFAULT. I will be in default if any of the following events (known separately and collectively as an Event of Default) occur:

- A. Payments. I fail to make a payment when due.
- B. Insolvency or Bankruptcy. The death, dissolution or insolvency, appointment of a receiver by or on behalf of, application of any debt relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-signer, endorser, surety or guarantor of this Guaranty or any Debt.
- C. Death or Incompetency. I die or am declared legally incompetent.
- D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Guaranty.
- E. Other Documents. A default occurs under the terms of any other document relating to the Debt.
- F. Other Agreements. I am in default on any other debt or agreement I have with you.
- G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.
- H. Judgment. I fail to satisfy or appeal any judgment against me.
- I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.
- J. Name Change. I change my name or assume an additional name without notifying you before making such a change.
- K. Property Transfer. I transfer all or a substantial part of my money or property.
- L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.
- M. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

9. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.

- (1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.
- (2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.
- (3) You may release, substitute or impair any Property.
- (4) You, or any institution participating in the Debt, may invoke your right of set-off.
- (5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.
- (6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guaranteeing or relating to the Debt.



LAURIE A PARKS
Montana Guaranty
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Initials Page 2

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower; a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or other person in control or a close relative of any of these other persons.) Any Guarantor who is not an insider makes these waivers until all Debt is fully repaid.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. Waiver of Claims. I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. REMEDIES. After the Borrower or I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. Payments Made on the Borrower's Behalf. Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. Attachment. You may attach or garnish my wages or earnings.

F. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

G. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

12. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's

Laurie A Parks
LAURIE A PARKS
Montana Guaranty
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Page 3

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financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

13. RELIANCE. I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and that I have signed this Guaranty to induce you to forbear from exercising your remedies against the Borrower, extend credit to the Borrower, maintain the Borrower's credit, or grant any other financial accommodation. I represent and warrant to you that I have a direct and substantial economic interest in the Borrower and expect to derive substantial benefits from the continued existence of the Debt guaranteed hereby, and from any loan and/or financial accommodations resulting in the creation of other Debt guaranteed hereby. I agree to rely exclusively on the right to revoke this Guaranty prospectively as to future transactions in the manner as previously described in this Guaranty if at any time, in my opinion, the benefits then being received by me in connection with this Guaranty are not sufficient to warrant the continuance of this Guaranty. You may rely conclusively on a continuing warranty that I continue to be benefited by this Guaranty and you will have no duty to inquire into or confirm the receipt of any such benefits, and this Guaranty will be effective and enforceable by you without regard to the receipt, nature or value of any such benefits.

14. APPLICABLE LAW. This Guaranty is governed by the laws of Montana, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

15. AMENDMENT, INTEGRATION AND SEVERABILITY. This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty is the complete and final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

16. ASSIGNMENT. If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

17. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Guaranty.

18. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any correct and complete financial statements or other information you request. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

19. CREDIT INFORMATION. I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others.

20. SIGNATURES. By signing, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

GUARANTOR:

Laurie A Parks Date 12/5/2011
LAURIE A PARKS
Individually

LENDER:

FIRST BANK OF LINCOLN

By Kenneth A. Martin Date 12/5/2011
KENNETH A. MARTIN, PRESIDENT

LAURIE A PARKS
Montana Guaranty
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Page 4

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GUARANTY
(Continuing Debt - Unlimited)

DATE AND PARTIES. The date of this Guaranty is December 6, 2011. The parties and their addresses are:

LENDER:

FIRST BANK OF LINCOLN
417 MAIN STREET
LINCOLN, MT 59639-0009
Telephone: (406) 362-4248

BORROWER:

LINCOLN HOTEL, LIMITED
a Montana Corporation
PO BOX 26
LINCOLN, MT 59639

GUARANTOR:

DONALD TUSCHOFF
PO BOX 26
LINCOLN, MT 59639

1. DEFINITIONS. As used in this Guaranty, the terms have the following meanings:

- A. Pronouns. The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.
- B. Note. "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.
- C. Property. "Property" means all property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

2. SPECIFIC AND FUTURE DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce your forbearance with respect to any Debt, or to induce you to extend and/or maintain credit, or grant any other financial accommodation, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, No. 6248, dated January 27, 2011, from LINCOLN HOTEL, LIMITED (Borrower) to you, in the modified amount of \$433,555.17.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation; overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of these debts) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

A. Future Advances. I waive notice of and consent to any and all future advances made to the Borrower by you.

4. UNCONDITIONAL LIABILITY. I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me.

DONALD TUSCHOFF
Montana Guaranty
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Page 1

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I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you, pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

6. REVOCATION. I agree that this is an absolute and unconditional Guaranty. I agree that this Guaranty will remain binding on me, whether or not there are any Debts outstanding, until you have actually received written notice of my revocation or written notice of my death or incompetence. Notice of revocation or notice of my death or incompetence will not affect my obligations under this Guaranty with respect to any Debts incurred by or for which you have made a commitment to Borrower before you actually receive such notice, and all renewals, extensions, refinancings, and modifications of such Debts. I agree that if any other person signing this Guaranty provides a notice of revocation to you, I will still be obligated under this Guaranty until I provide such a notice of revocation to you. If any other person signing this Guaranty dies or is declared incompetent, such fact will not affect my obligations under this Guaranty.

7. PROPERTY: I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me or my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

8. DEFAULT. I will be in default if any of the following events (known separately and collectively as an Event of Default) occur:

- A. Payments. I fail to make any payment when due.
- B. Insolvency or Bankruptcy. The death, dissolution, or insolvency, appointment of a receiver by or on behalf of, application of any debt relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-signer, endorser, surety or guarantor of this Guaranty or any Debt.
- C. Death or Incompetency. I die or am declared legally incompetent.
- D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Guaranty.
- E. Other Documents. A default occurs under the terms of any other document relating to the Debt.
- F. Other Agreements. I am in default on any other debt or agreement I have with you.
- G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.
- H. Judgment. I fail to satisfy or appeal any judgment against me.
- I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.
- J. Name Change. I change my name or assume an additional name without notifying you before making such a change.
- K. Property Transfer. I transfer all or a substantial part of my money or property.
- L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.
- M. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

9. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

- A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.
 - (1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.
 - (2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.
 - (3) You may release, substitute or impair any Property.
 - (4) You, or any institution participating in the Debt, may invoke your right of set-off.
 - (5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.
 - (6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

DONALD TUSCHOFF
Mortgage Guaranty
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(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or other person in control or a close relative of any of these other persons.) Any Guarantor who is not an insider makes these waivers until all Debt is fully repaid.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. Waiver of Claims. I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. REMEDIES. After the Borrower or I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. Payments Made on the Borrower's Behalf. Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. Attachment. You may attach or garnish my wages or earnings.

F. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

G. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

12. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's

DONALD TUSCHOFF
Montana Guaranty
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Page 2

FBL000213

COMMENT SHEET

FOR 5459233

Donald C. Tuschoff and Laurie Parks
Hotel Lincoln LTD

Include: income, debts, credit score, debt-to-income ratio and loan rating.

PORTFOLIO #3852

PHONE #: 406-362-4822

Address: PO Box 26
Lincoln, MT 59639-0416

2/17/2011

WJM

NOTE # 6248. \$440,000. (\$150,000 sold as a participation to First Security Bank of Deer Lodge). Loan has an interest rate of NY Prime + 2% (floor of 6%) and is a 3 year balloon. Loan is secured by a security interest in a note receivable (face amount approximately \$573,000) and a first lien MT Trust Indenture on the Hotel Lincoln (valued by Joe Seipel at 448,000). Loan is to Don Tuschoff and his daughter Laurie Parks, both of whom plan to live in the motel and run it. Laurie Parks has a history of working in the hotel/resaurant business. She also receives SSDI of approximately \$800 per month. The note receivable yields over \$9500 per month and our payment is approximate \$3400 per month. The note receivable is "seasoned" as it has been paid thru the title company in Clarkston Idaho for more than 10 years. We also have a first lien on two 2002 Chryslers and a security interest in Don Tuschoff's life insurance policy.

note

WJM

Note modified (for purpose of (your residence) to Hotel Lincoln, LLC with personal guarantees by Don Tuschoff and Laurie A Parks.


EXHIBIT
5

FBL000002

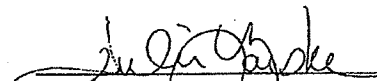
1/9/2012.

Specific Loan Note, Hotel Lincoln (NOTE #)

I met with Ed Parks in my office on Friday, January 6, 2012. Mr. Parks presented me with his lawsuit filing vs. Richard Porterfield (previous owner of the Hotel). Mr. Parks wanted me to know that his only concern at this point with the bank was that we would consider renewing the loan at maturity. I first reminded Mr. Parks that, while I acknowledge that he is an officer of the corporation, he is not on the bank note. I also told him that it was the practice of this bank to renew matured notes at current market interest rates SO LONG AS the note was performing and the collateral was still had value to substantially support the debt. He seemed satisfied with that, but wanted to continue to discuss his lawsuit. I thought it best to call Julie Zarske, Loan Officer, into my office (for a third party) and shut the door. I told Mr. Parks that I wanted to make something "crystal clear"—that this bank and its directors, as well as the participating bank, made this loan on the strength of Don Tuchsoff's Note receivable and the equity in the real property (appraisal of the Hotel Lincoln **without an income stream.**) Specifically, the lawsuit is based on Mr. Porterfield's representation of the historical occupancy of the Hotel—I made sure that Mr. Parks understood that this bank **did not** give any weight to cash-flow projections of the business, and that **IF** the bank did not have an assignment on Mr. Tuschoff's note receivable, we likely would **not** have made loan. I asked Mr. Parks if he understood what I was saying, and he said without hesitation, "yes".



 Kenny Martin



 Julie Zarske



FBL000003

3. The Bank's loan file documents show that the Bank made the loan on the basis of Don Tuschoff's note receivable and the appraised equity in the property. The Bank gave no weight to the hotel's projected cash flows.

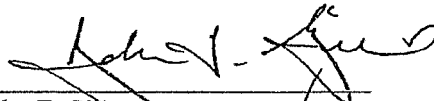
4. When the Bank determined that the loan was in default based on the payoff of the assigned deed of trust, there was still owed \$362,000.00 in principal, plus interest accrued.

5. On October 30, 2015, a subsequent purchaser paid the Bank \$193,147.70 for the property.

6. Prior to the subsequent sale of the property, the Bank paid property taxes, recording fees, publication and service of the foreclosure notice, utilities, and other expenses associated with maintaining the property before it sold which are considered "collection costs" for purposes of the Bank's records.

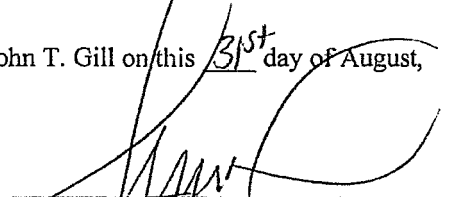
7. Not including contractually required legal fees and costs or additional accruing interest, the total principal, interest, and collection costs owed to the Bank by the Defendants after deducting the property's sale price is \$292,348.70.

DATED this 31 day of August, 2018.



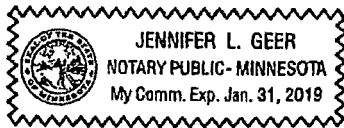
John T. Gill

Subscribed and sworn to before me by John T. Gill on this 31st day of August, 2018.



Notary Public for the State of Minnesota

(Notarial Seal/Stamp Above)



AFFIDAVIT OF JOHN T. GILL, PRESIDENT OF CITIZENS ALLIANCE BANK, f/k/a FIRST BANK OF LINCOLN - 2



A. Settlement Statement (HUD-1)

B. Type of Loan

1. <input type="checkbox"/> FHA	2. <input type="checkbox"/> RHS	3. <input checked="" type="checkbox"/> Conv. Unins.	6. File Number: L&C100493	7. Loan Number: 6388	8. Mortgage Insurance Case Number:
4. <input type="checkbox"/> VA	5. <input type="checkbox"/> Conv. Ins.				

C. Note: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. Name and Address of Borrower: Lincoln Log Hotel, LLC PO Box 245 Lincoln, MT 59639	E. Name and Address of Seller: First Bank of Lincoln 503 Main Street, PO Box 9 Lincoln, MT 59639	F. Name and Address of Lender: First Bank of Lincoln P.O. Box 9 Lincoln, MT 59639
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G. Property Location: 96 Sleepy Hollow Lane Lincoln, MT 59639 Lewis & Clark County, Montana 48-A Lambkin Mulcare	H. Settlement Agent: First Montana Land Title Company 400 North Park Avenue Helena, MT 59601 Ph. (406)443-4422 Place of Settlement: 400 North Park Avenue Helena, MT 59601	I. Settlement Date: October 30, 2015 Disburse: 11/02/15
--	---	---

J. Summary of Borrower's transaction		K. Summary of Seller's transaction	
100. Gross Amount Due from Borrower:		400. Gross Amount Due to Seller:	
101. Contract sales price	210,000.00	401. Contract sales price	210,000.00
102. Personal property		402. Personal property	
103. Settlement Charges to Borrower (Line 1400)	4,399.09	403.	
104. Payoff to First Bank of Lincoln/Loan # 6364	15,684.10	404.	
105. Hold/Pay 1st half 2015 Taxes to Lewis and Clark Co	1,703.03	405.	
Adjustments for items paid by Seller in advance		Adjustments for items paid by Seller in advance	
106. City/Town Taxes to		406. City/Town Taxes to	
107. County Taxes to		407. County Taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. Gross Amount Due from Borrower	231,786.22	420. Gross Amount Due to Seller	210,000.00
200. Amounts Paid by or In Behalf of Borrower		500. Reductions in Amount Due Seller:	
201. Deposit or earnest money	500.00	501. Excess deposit (see instructions)	
202. Principal amount of new loan(s)	231,423.36	502. Settlement charges to Seller (Line 1400)	12,887.50
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff First Mortgage/NO PAYOFF	
205.		505. Payoff Second Mortgage	
206.		506.	
207.		507. Hold/Pay 1st half 2015 Taxes to Lewis and Clark Co	1,885.56
208. Owners Title Ins. pd by seller	836.00	508. Owners Title Ins. pd by seller	836.00
209.		509.	
Adjustments for items unpaid by Seller		Adjustments for items unpaid by Seller	
210. City/Town Taxes to		510. City/Town Taxes to	
211. County Taxes 07/01/15 to 11/02/15	1,243.14	511. County Taxes 07/01/15 to 11/02/15	1,243.14
212. Assessments to		512. Assessments to	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. Total Paid by/or Borrower	234,002.50	520. Total Reduction Amount Due Seller	16,852.30
300. Cash at Settlement from/to Borrower		600. Cash at settlement to/from Seller	
301. Gross amount due from Borrower (line 120)	231,786.22	601. Gross amount due to Seller (line 420)	210,000.00
302. Less amount paid by/or Borrower (line 220)	(234,002.50)	602. Less reductions due Seller (line 520)	(16,852.30)
303. Cash <input type="checkbox"/> From <input checked="" type="checkbox"/> To Borrower	2,216.28	603. Cash <input checked="" type="checkbox"/> To <input type="checkbox"/> From Seller	193,147.70

* Paid outside of closing by borrower(s), seller(s), lender(s), or third party(ies)
The undersigned hereby acknowledge receipt of a completed copy of this statement & any attachments referred to herein

Borrower
Lincoln Log Hotel, LLC
BY: *[Signature]*
Margo Kolve, Managing Member
BY: *[Signature]*
Glen Kolve, Managing Member

Seller
First Bank of Lincoln
BY: *[Signature]*
President

ATTEST:
[Signature]
Secretary

TO THE BEST OF MY KNOWLEDGE, THE HUD-1 SETTLEMENT STATEMENT WHICH I HAVE PREPARED IS A TRUE AND ACCURATE ACCOUNT OF THE FUNDS WHICH WERE RECEIVED AND HAVE BEEN OR WILL BE DISBURSED BY THE UNDERSIGNED AS PART OF THE SETTLEMENT OF THIS TRANSACTION.

First Montana Land Title Company, Settlement Agent

WARNING: IT IS A CRIME TO KNOWINGLY MAKE FALSE STATEMENTS TO THE UNITED STATES ON THIS OR ANY SIMILAR FORM. PENALTIES UPON CONVICTION CAN BE IMPRISONMENT AND/OR FINE. THIS FORM IS SUBJECT TO THE FEDERAL HOUSING ADMINISTRATION'S (FHA) REGULATIONS. THIS FORM IS NOT TO BE USED FOR ANY OTHER PURPOSE. THIS FORM IS NOT TO BE USED FOR ANY OTHER PURPOSE. THIS FORM IS NOT TO BE USED FOR ANY OTHER PURPOSE.



Candace Payne
Lucas Hamilton
Luxan & Murfitt, PLLP
24 W. Sixth Avenue
Fourth Floor, Montana Club Building
P. O. Box 1144
Helena, MT 59624
Phone: (406) 442-7450
CPayne@luxanmurfitt.com
LHamilton@luxanmurfitt.com

Attorneys for Plaintiff First Bank of Lincoln

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF MONTANA, IN AND FOR THE COUNTY OF LEWIS & CLARK

<p>FIRST BANK OF LINCOLN, Plaintiff, vs. DONALD C. TUSCHOFF; LAURIE PARKS; LANCER ENTERPRISES, INC.; and LINCOLN HOTEL, LIMITED, Defendants.</p>	<p>Cause No.: DDV-2014-326 AFFIDAVIT OF JOHN T. GILL, PRESIDENT OF CITIZENS ALLIANCE BANK, f/k/a FIRST BANK OF LINCOLN</p>
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STATE OF MINNESOTA)
 : ss.
County of Chippewa)

John T. Gill, being first duly sworn on oath, deposes and says:

1. I am the President and Chief Operating Officer of Citizens Alliance Bank ("the Bank"), which merged with Plaintiff First Bank of Lincoln on April 23, 2016. I have personal knowledge of the facts set forth in this affidavit.
2. The Bank's loan file documents show that this loan was initially made to Donald Tuschoff and Laurie A. Parks in January of 2011, in the amount of \$440,000.00.

AFFIDAVIT OF JOHN T. GILL, PRESIDENT OF CITIZENS ALLIANCE BANK, f/k/a FIRST BANK OF LINCOLN - 1

3. The Bank's loan file documents show that the Bank made the loan on the basis of Don Tuschoff's note receivable and the appraised equity in the property. The Bank gave no weight to the hotel's projected cash flows.

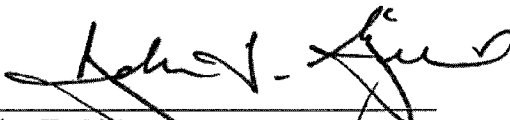
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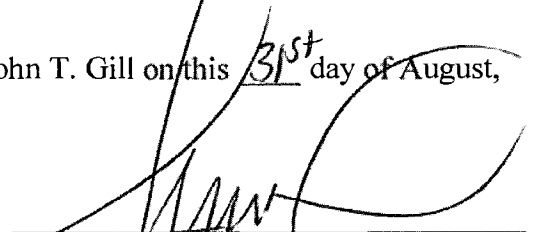
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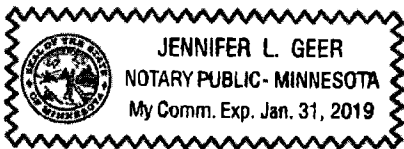
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AFFIDAVIT OF JOHN T. GILL, PRESIDENT OF CITIZENS ALLIANCE BANK, f/k/a FIRST BANK OF LINCOLN - 2