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Case No. 66190-6-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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SILVERHAWK, LLC,  
Appellant,

v.

KEYBANK NATIONAL ASSOCIATION,  
Respondent.

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**APPELLANT SILVERHAWK, LLC'S  
OPENING BRIEF**

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## I. INTRODUCTION

This case involves a dispute over the correct calculation of a prepayment penalty for the early termination of a loan and interest rate swap between Respondent KeyBank National Association (“KeyBank”) and Appellant Silverhawk LLC (“Silverhawk”) (the “Loan Package”). The Loan Package was governed by a contract (the “Contract”). Silverhawk argues that the Contract required KeyBank to calculate the prepayment penalty by using market quotations. Whereas, KeyBank claims that the Contract’s prepayment penalty provision was not applicable because the Parties entered into an accord and satisfaction, so KeyBank could charge any amount it wanted to terminate the transaction.

In this case, Silverhawk paid KeyBank a prepayment penalty of \$123,167 and only after payment did Silverhawk discovered that the amount was not calculated as called for in the Contract. Silverhawk contends that KeyBank’s failure to use market quotations was a breach of the Contract that caused Silverhawk to overpay KeyBank by at least \$30,000. KeyBank disputes this and claims the Parties entered into an accord and satisfaction. KeyBank’s position is that Silverhawk’s payment was not a prepayment penalty, but rather an amount selected by KeyBank and paid by Silverhawk to terminate the Contract.

The trial court improperly granted KeyBank summary judgment on its affirmative defense of accord and satisfaction because it was not entitled to judgment as a matter of law. KeyBank failed to establish that

Silverhawk intended to create an accord and satisfaction, and further there was no bona fide dispute at the time of payment, both key elements of KeyBank's defense.

## **II. ASSIGNMENT OF ERROR**

KeyBank was not entitled to judgment as a matter of law on its affirmative defense of accord and satisfaction. Therefore, the trial court committed an error in granting KeyBank summary judgment and dismissing Silverhawk's Complaint.

## **III. ISSUES PRESENTED**

### **A. Mutual Agreement.**

Accord and satisfaction requires a mutual agreement to settle a claim by some performance other than that which is due. In this case, KeyBank offered to terminate the Contract in exchange for a specified payment, but Silverhawk understood the amount to be the market quotation-based prepayment penalty that was due under the Contract. Was there a mutual agreement to terminate the Contract?

### **B. Bona Fide Dispute.**

Accord and satisfaction also requires the existence of a bona fide dispute between the parties at the time the accord is created and performed. In this case, the dispute over the calculation of the prepayment penalty did not arise until after the penalty amount was wire transferred to KeyBank. Was there a bona fide dispute?

#### IV. STATEMENT OF THE CASE

##### A. Silverhawk Obtains the Loan Package.

In 2001, Silverhawk obtained the Loan Package from KeyBank. (CP 93). Silverhawk used its commercial property located in Auburn, Washington, as collateral to secure repayment. (CP 93). The Loan Package was comprised of two separate component transactions entered into simultaneously. (CP 93). The first transaction was a variable rate loan (the “Loan”) and second transaction was an interest rate swap (the “Swap”) (referred to together, as the “Loan Package”). (CP 93). When combined, these transactions mimicked a 10-year fixed rate loan. (CP 93). The purpose of this transaction was for Silverhawk to obtain the equivalent of a fixed-rate loan at interest rates more favorable than those otherwise available on traditional loans. (CP 93).

The Contract allowed the Parties to get out of the Loan Package at any time, but a prepayment penalty would be due. (CP 93). Since the Loan Package was a revenue stream for KeyBank, the penalty reflects the discounted present value of KeyBank’s lost revenue stream as a result of the Loan Package’s early termination. (CP 64-65). To ensure fairness, the Contract contained an objective standard to calculate the amount due. (CP 67). The Contract required KeyBank to obtain quotations for the prepayment penalty from other banks based on their current market interest rates. (CP 59-60). The ultimate prepayment penalty was a formulation of those market quotations. (CP 64-65).

**B. KeyBank Notified Loan Package Terminating Early.**

About eight years later, Silverhawk entered into an agreement to sell the Auburn property. (CP 93). In accordance with standard real estate practice, the Loan Package would be repaid at the closing with the proceeds from the sale. (CP 93). Since the Loan Package would be terminating early, Silverhawk understood that a prepayment penalty would be due as called for in their Contract. (CP 93).

On or about December 2, 2008, Silverhawk called KeyBank to notify it of the pending sale scheduled to close later that month. (CP 93). KeyBank responded by emailing Silverhawk the amount required to terminate the Loan Package, which included a prepayment penalty of \$106,283. (CP 93). However, KeyBank informed Silverhawk it was not a set figure and was based upon market conditions and, therefore, would need to be adjusted on the actual closing date. (CP 98-99).

**C. KeyBank Tells Silverhawk the Prepayment Penalty.**

In the midst of the closing on December 30, 2008, Silverhawk contacted KeyBank as directed. At that time, KeyBank provided Silverhawk the updated prepayment penalty of \$123,167. (CP 94). In the approximately three weeks since the last quotation, the penalty had increased by \$16,884. (CP 93-94). Silverhawk believed the increase was based upon market fluctuations of interest rates. Understanding it was contractually required to pay this amount, Silverhawk proceeded to make payment to KeyBank in good faith. (CP 88-89, 94). It should be reiterated that Silverhawk did not believe the increased amount to be an

arbitrary number proposed by KeyBank to commensurate an accord and satisfaction, but rather a prepayment penalty based upon actual market quotations. (*CP 88-89, 94*). Nor did Silverhawk dispute the amount based on its understanding that the amount was a prepayment penalty under the Contract, and the amount was calculated from actual market quotations as of the day of closing. (*CP 88-89, 94*).

This new prepayment penalty amount was then communicated to the escrow agent closing the sale, and the amount required to terminate the Loan Package, including the new prepayment penalty, were wire transferred to KeyBank on December 30, 2008 in one lump sum from the sale proceeds as planned. (*CP 94*).

**D. Silverhawk Discovers Prepayment Penalty Is Incorrect.**

The next day, December 31, 2008, Silverhawk asked KeyBank for a breakdown of the penalty calculation. (*CP 94*). KeyBank promptly sent Silverhawk a Termination Analysis that contained its breakdown of the calculation, including the component interest rates KeyBank used to calculate the prepayment penalty. (*CP 94, 103*). Along with the Termination Analysis, KeyBank also sent Silverhawk a Termination Agreement it told Silverhawk to sign and return. But, upon review of the Termination Analysis, Silverhawk became concerned that the prepayment penalty calculation was not correct. (*CP 89, 95*). For verification, Silverhawk asked KeyBank for copies of the market quotations used in the calculation, which were required by the Contract. (*CP 95*).

After weeks of discussion, on January 20, 2009, KeyBank finally revealed to Silverhawk that it had not obtained market quotations at all. (*CP 110*). To Silverhawk's surprise, KeyBank had instead used some unknown and unverifiable process to calculate the penalty amount, which process was both unknown nor agreed to by Silverhawk and not provided for under the Contract. (*CP 103, 105*).

When confronted, KeyBank claimed that it was not contractually obligated to obtain actual market quotations because the Parties had entered into an accord and satisfaction. (*CP 110*). In other words, the prepayment penalty was not really a prepayment penalty at all. (*CP 110*). Instead, the amount quoted by KeyBank on the closing date was just an offer to terminate the transaction, which Silverhawk paid, thereby canceling the Contract on which Silverhawk bases its claims for this action. (*CP 110*). Unsatisfied with KeyBank's explanation, Silverhawk subsequently brought this suit. (*CP 1*). According to Silverhawk's calculations, KeyBank's breach inflated the prepayment penalty and caused Silverhawk to overpay by at least \$30,000. (*CP 96*).

**E. Silverhawk's Complaint is Dismissed.**

In its Complaint, Silverhawk asserted claims against KeyBank for breach of contract, violation of the Consumer Protection Act, and attorney's fees for failing to properly calculate the prepayment penalty. (*CP 1-4*). Instead of answering, KeyBank moved the trial court to dismiss Silverhawk's Complaint under CR 12(b)(6), and since evidence outside

the pleadings was presented KeyBank's motion was converted to a CR 56 motion for summary judgment. (CP 5-12).

As the moving party, KeyBank argued the affirmative defense of accord and satisfaction, claiming that the Contract on which Silverhawk based its claims was terminated. (CP 5-12). Because Silverhawk failed to address the applicability of the Contract, the trial court found no genuine issues of material fact that Silverhawk and KeyBank had entered into an accord and satisfaction, and granted KeyBank summary judgment on that basis. (CP 123).

## V. ARGUMENT

### A. Standard of Review on Appeal is De Novo.

If the parties moving or responding to a CR 12(b)(6) motion to dismiss present evidence outside the pleadings – as they did in this case – the motion is converted to a motion for summary judgment. CR 12(b)(6). The appellate court conducts *de novo* review of rulings on summary judgment and engages in the same inquiry as the trial court. Lybbert v. Grant County, State of Wash., 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Summary judgment is only appropriate:

[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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); Atherton Condo. Apartment-Owners Ass'n Bd. of Dir. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The moving

party must “demonstrate there is no issue as to a material fact and that, as a matter of law, summary judgment is proper.” *Id.* All facts submitted and the reasonable inferences therefrom are considered in the light most favorable to the nonmoving party. *Id.*

In this case, KeyBank was not entitled to summary judgment because KeyBank failed to establish the requisite elements of an accord and satisfaction. Alternatively, there are genuine issues of material fact relating to KeyBank’s defense that should have precluded summary judgment. In any event, KeyBank did not sustain its strict burden and the trial court erred in dismissing the action on summary judgment.

**B. The Contract Required the Prepayment Penalty to be Calculated Using Market Quotations.**

The Parties agree that the occurrence of an Early Termination Date under the Contract would have triggered KeyBank’s obligation to calculate the prepayment penalty by the market quotations. (*CP 117*).

The applicable Early Termination Date provisions are as follows:

**§12 Definitions.** “Early Termination Date” means the date determined in accordance with Section 6(a) or 6(b)(iii). (*CP 64*).

**§6(b)(iii) Right to Terminate.** If ...

(2) ... [A]n Additional Termination Event occurs,

either party in the case of an Illegality, any Affected Party in the case of an Additional Termination Event if there is more than one Affected Party, or the party which is not the Affected Party in the case of a Credit Event Upon Merger or an Additional Termination Event if there is only one Affected Party may, by not more than 20 days notice to the

other party and provided the relevant Termination Event is then continuing, designate a day not earlier than the day such notice is effective as an Early Termination Date. (*CP 58-59, and App. 1 hereto*).

**Schedule Part 1(i) Additional Termination Event.** For the purpose of Section 6(b)(iii) of this Agreement, it shall be an “Additional Termination Event” with [Silverhawk] being the Affected Party if (i) the loan or other indebtedness in connection with which a Transaction is entered into by [Silverhawk] for the purpose or with the effect of altering the net combined payment of [Silverhawk] from floating to fixed or fixed to floating rate basis is repaid. (*CP 67, and App. 1 hereto*).

The indebtedness referred to in Schedule Part 1(i) is a reference to the Loan. Therefore, repayment of the Loan on December 30, 2008 caused an Additional Termination Event to occur under the Contract. Under §6(b)(iii), the occurrence of an Additional Termination Event is one way to generate an Early Termination Date under the Contract.

The other way to create an Early Termination Date is to designate such a date by notice as referenced in the latter part of §6(b)(iii) that says the a party “may by not more than 20 days notice to the other party ... designate a day ... as an Early Termination Date.”

Silverhawk's interpretation of §6(b)(iii) is consistent with other provisions in the Contract, such as §6(c) that says:

Upon the occurrence or effective designation of an Early Termination Date, no further payments ... will be required to be made ... [and] the amount, if any, payable in respect of an Early Termination date shall be determined pursuant to [the market quotation calculation in] Section 6(e).

(CP 59). Section 6(c) specifically refers to two distinct scenarios: the “occurrence of an Early Termination Date,” and the “effective designation of an Early Termination Date.” The first occurs by default upon repayment of the Loan as discussed above, and the second happens upon notice of an Early Termination Date. Under both scenarios, KeyBank must calculate the prepayment penalty according to the Contract. (CP 59). In this case, the Loan was repaid and KeyBank claims it gave no notice designating a date, so an Early Termination Date occurred on the December 30, 2008 Loan repayment date by default. (CP 7).

It is important to keep in mind the purpose of the prepayment penalty provision. As stated above, the Loan Package was an income stream to KeyBank and the prepayment penalty represented the discounted net present value of that lost income stream. KeyBank required the prepayment penalty to ensure that it would receive the economic benefit of the deal even if the transaction terminated early. The prepayment penalty provision makes no sense unless the borrower (in this case Silverhawk) can in fact terminate the transaction before the expiration date under the Contract terms. Otherwise, the prepayment penalty provision is meaningless.

Since Silverhawk has established the existence of an Early Termination Date under the Contract, the amount paid by Silverhawk was in fact a prepayment penalty, albeit incorrectly calculated by KeyBank, which is a breach of the Contract.

**C. There was No Accord and Satisfaction.**

KeyBank attempts to overcome its contractual obligations by asserting the affirmative defense of accord and satisfaction. The elements of accord and satisfaction are: (1) a bona fide dispute; (2) an agreement to settle the dispute; and (3) performance of the agreement. Paopao v. State, Dep't. of Social and Health Services, 145 Wn. App. 40, 46, 185 P.3d 640 (2008). KeyBank bases its defense on the disputed verbal exchange between Silverhawk and KeyBank on December 30, 2008. (CP 9-10). During that verbal exchange, KeyBank claims it “offered” to terminate Loan Package in exchange for \$123,167 and Silverhawk “accepted” by making payment of that amount. (CP 116). In direct conflict with KeyBank’s characterization, Silverhawk claims that it understood the payment to be the prepayment penalty due under the Contract. (CP 89). KeyBank’s defense fails for two reasons. First, there was no mutual agreement to create an accord. Second, there was no bona fide dispute.

**1. There Was No Mutual Agreement.**

“Accord is an agreement for the settlement of a claim by some performance other than that which is due, and is governed by the principals of contract.” Boyd-Conlee Co. v. Gillingham, 44 Wn.2d 152, 155, 266 P.2d 339 (1954). To create it, there must be an intention by both parties to make such an agreement. Id. “The important question is whether there was a meeting of the minds as to a genuine compromise, arrived at through mutual agreement, and not ‘fallen into inadvertently.’” James S. Black & Co. v. Charron, 22 Wn. App. 11, 15, 587 P.2d 196

(1978)(citations omitted). In order to satisfy this element, the intended compromise must be made clear to both parties. Boyd-Conlee Co., 44 Wn.2d at 155.

In this case, KeyBank has failed to show that Silverhawk agreed to terminate KeyBank's obligation to calculate the prepayment penalty by market quotations. First, there is no evidence that KeyBank made its intentions to do so clear to Silverhawk. In fact, KeyBank masked its true intentions. First, the Contract called for a prepayment penalty, but KeyBank never indicated that it was operating outside the framework of the Contract. (*CP 88-89, 94, 111-12*). For this reason, Silverhawk had no cause to think the amount quoted by KeyBank was anything but the prepayment penalty required under the Contract. (*CP 94, 88-89, 111-12*). Second, KeyBank's representations led Silverhawk to believe that KeyBank was operating in accordance with the underlying Contract. KeyBank stated that the prepayment penalty was based on market conditions, which is consistent with the Contract. (*CP 89-99, 101*). Further, KeyBank represented that the transaction could not be terminated until the Loan was repaid, which is also consistent with the Contract. (*CP 98-99, 101*). These facts show that Silverhawk was unaware and, in fact, had no reason to know of KeyBank's intention to create an accord and satisfaction.

In James S. Black, the court addressed the necessity of a genuine compromise for an accord and satisfaction, emphasizing that an accord cannot be "fallen into inadvertently." James S. Black, 22 Wn. App. at 15.

In that case, there was a dispute between and landlord and tenant. Id. at 12-13. The tenant was liable for repairs to his unit, and the landlord sued for damages. Id. Due to a clerical error, the landlord accidentally returned the tenant's security deposit. Id. at 14-15. The tenant claimed that the return of the security deposit was an accord and satisfaction that discharged the landlord's claims for damages to the rental unit. Id. at 15. That court found that the inadvertent return of a security deposit did not operate as an accord and satisfaction because there was no mutual agreement to settle a dispute. Id. Similarly here, the inadvertent payment of an amount Silverhawk thought was the prepayment penalty due under the Contract does not establish a mutual agreement to settle a dispute.

KeyBank relies on the Termination Agreement as evidence the alleged oral agreement between Silverhawk and KeyBank, but KeyBank improperly characterizes the significance of this document. (*CP 9-10*). The Termination Agreement was actually not an agreement at all, but simply an acknowledgement of the transaction's termination for the Parties' records, which is common in the commercial context. It should also be noted that Silverhawk did not receive the Termination Agreement until December 31, 2008 – *after* payment in full was made to KeyBank and the transaction had already been consummated. (*CP 94*). The document could, therefore, only be considered a record of the prepayment penalty paid by Silverhawk, and the resultant termination of the transaction. Further, the document was not properly executed and,

therefore, could never be considered a binding contract as suggested by KeyBank. (*CP 116*).

It should also be noted, that payment of an amount that one is legally bound to pay and agrees is due, is not consideration sufficient to create an accord and satisfaction. Dodd v. Polack, 63 Wn.2d 828, 389 P.2d 289 (1964). In this case, Silverhawk was legally bound to pay a prepayment penalty upon early termination of the transaction. Since Silverhawk only paid an amount that it was legally bound to pay – albeit incorrectly, arbitrarily and unilaterally calculated solely by KeyBank – the payment could not have constituted proper consideration for an accord and satisfaction.

In sum, since Silverhawk did not have full knowledge of the facts, specifically that the amount quoted by KeyBank was not the amount required under the Contract and instead some arbitrary amount offered to terminate the Contract, there could have been no meeting of the minds. Without the intention of both parties to make such an agreement KeyBank's defense fails. KeyBank's mere allegation of an oral agreement – which Silverhawk flatly denies – is not sufficient to constitute an accord and satisfaction and the trial court erred in granting it as a matter of law. Alternatively, the existence of an accord is a disputed issue of material fact that also precludes summary judgment.

## **2. There Was No Bona Fide Dispute.**

Not only does KeyBank fail to establish an accord, but it also fails to establish the existence of a bona fide dispute. A bona fide dispute must exist at the time the accord is created and performed. Housing Auth. of County of King v. Northeast Lake Wash. Sewer and Water Dist., 56 Wn. App. 589, 596, 784 P.2d 1284 (1990).

In this case, the prepayment penalty was wire transferred to KeyBank on December 30, 2008. (CP 94). At that time, both Parties knew that Silverhawk was obligated to pay a prepayment penalty as a result of the Loan Package's early termination, so there was no dispute. (CP 93). The bona fide dispute did not arise until nearly three weeks later, on January 20, 2009, when KeyBank revealed that it had improperly calculated the amount. (CP 95-96). Indeed, Silverhawk had no reason to dispute the charge until it realized that market quotations had not been used by KeyBank. (CP 95-96, 110). Although, KeyBank disputes the payment date, claiming payment was not made until "on or about January 7, 2008," this factual dispute is not relevant. (CP 17). Even assuming KeyBank's later payment date is correct, the bona dispute relating to the payment amount still arose after payment, which again rules out the existence a bona fide dispute.

In Housing Auth. of County of King, the Northeast Lake Wash Sewer and Water District ("District") under charged the Housing Authority for utility services. Housing Auth. of County of King, 56 Wn. App. at 591. When the District later tried to collect the undercharges, the

Housing Authority claimed that the District's acceptance of its payment constituted an accord and satisfaction, which discharged the Housing Authority's obligation to pay the additional amounts due. *Id.* at 598. The court in that case found there was "no accord and satisfaction because there was no dispute at the time the bills were rendered [by the District] and paid [by the Housing Authority]." *Id.* In the same way, payment by Silverhawk could not have been made to settle a dispute because at the time the alleged accord was created and performed both parties understood such an amount was due, and Silverhawk thought the amount was properly calculated under the Contract. As such, KeyBank has failed to establish another necessary element of accord and satisfaction, and its defense again fails. Alternatively, there are genuine issues of material as to when the dispute arose and the payment date, which also preclude summary judgment.

### **3. Silverhawk Did Not Assume the Risk of Mistake.**

In addition, KeyBank tried to establish that Silverhawk's payment was not a mistake. KeyBank claims that Silverhawk agreed to pay the prepayment penalty it quoted without knowing whether it was accurate, and, therefore, Silverhawk bore the risk that the amount was not correct and cannot be afforded relief. (*CP 10-11*). For its proposition, KeyBank primarily relies on the decision in *CLP (Delaware) LLC v. Conley*, 110 Wn. App. 786, 791, 40 P.3d 679 (2002). The other cases cited by

KeyBank on involve personal injury liability releases and are not factually relevant.

In CLP (Deleware) LLC, CLP entered into a contract to buy nursing facilities from Conley for \$48 million plus an “earn out” payment contingent on the facility’s earnings. The parties used both Conley’s and CPL’s financial statements to calculate the earnout payment of \$2 million. After making payment, CLP notified Conley that it had discovered that the earnout payment calculation was incorrect and demanded refund. The court found that CPL was not entitled to a refund because it assumed the risk of the mistaken calculation. In that case, CPL had information showing the unreliability the financial information used to calculate the earnout payment. CLP (Delaware) LLC is distinguishable for two reasons. First, in that case both parties had full access to the information used for the basis of the calculation. Second, both parties knew the information used in the calculation was unreliable, but despite this decided to proceed.

Unlike CLP (Delaware) LLC, KeyBank was designated as the sole Calculating Agent in the Contract and was responsible for providing an accurate calculation based on the Contract provisions. (*CP 67-68*). Further, Silverhawk had no information that the penalty was incorrect or unreliable, nor did it have access to any of the financial information used to calculate the prepayment penalty. For these reasons, CLP (Delaware) LLC is not controlling in this case. KeyBank should not be allowed use this inapplicable legal theory to circumvent its contractual obligations.

## VI. CONCLUSION

In conclusion, repayment of the Loan constituted an Early Termination Date under the Contract, and triggered KeyBank's obligation to calculate the prepayment penalty by actual market quotations. Its unilateral decision to ignore these contractual safeguards for its own profit is not justified under the doctrine of accord and satisfaction, but is a breach of contract for which Silverhawk is entitled to damages.

For the forgoing reasons, Silverhawk asks that the trial court's Order granting KeyBank's Motion to Dismiss on summary judgment be reversed. And further, that this Court remand this case for further fact-finding and proceedings on Silverhawk's claims for breach of contract, violation of the Consumer Protection Act, and attorney fees.

DATED this 24th day of January, 2011.

  
\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this 24th day of January, 2011, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

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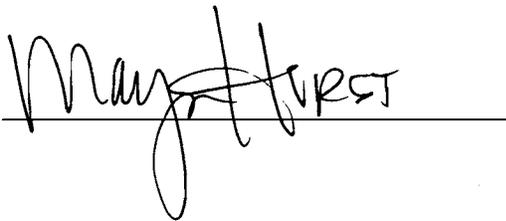
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of January, 2011, at Federal Way, Washington.



Mary Hirst

## APPENDIX 1

(2) to perform, or for any Credit Support Provider of such party to perform, any contingent or other obligation which the party (or such Credit Support Provider) has under any Credit Support Document relating to such Transaction;

(ii) **Credit Event Upon Merger.** If "Credit Event Upon Merger" is specified in the Schedule as applying to the party, such party ("X"), any Credit Support Provider of X or any applicable Specified Entity of X consolidates or amalgamates with, or merges with or into, or transfers all or substantially all its assets to, another entity and such action does not constitute an event described in Section 5(a)(viii) but the creditworthiness of the resulting, surviving or transferee entity is materially weaker than that of X, such Credit Support Provider or such Specified Entity, as the case may be, immediately prior to such action (and, in such event, X or its successor or transferee, as appropriate, will be the Affected Party); or

(iii) **Additional Termination Event.** If any "Additional Termination Event" is specified in the Schedule or any Confirmation as applying, the occurrence of such event (and, in such event, the Affected Party or Affected Parties shall be as specified for such Additional Termination Event in the Schedule or such Confirmation).

(c) **Event of Default and Illegality.** If an event or circumstance which would otherwise constitute or give rise to an Event of Default also constitutes an illegality, it will be treated as an illegality and will not constitute an Event of Default.

### 6. Early Termination

(a) **Right to Terminate Following Event of Default.** If at any time an Event of Default with respect to a party (the "Defaulting Party") has occurred and is then continuing, the other party (the "Non-defaulting Party") may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions. If, however, "Automatic Early Termination" is specified in the Schedule as applying to a party, then an Early Termination Date in respect of all outstanding Transactions will occur immediately upon the occurrence with respect to such party of an Event of Default specified in Section 5 (a)(vii)(1), (3), (5), (6) or, to the extent analogous thereto, (8), and as of the time immediately preceding the institution of the relevant proceeding or the presentation of the relevant petition upon the occurrence with respect to such party of an Event of Default specified in Section 5(a)(vii)(4) or, to the extent analogous thereto, (8).

### (b) Right to Terminate Following Termination Event.

(i) **Notice.** If a Termination Event occurs, an Affected Party will, promptly upon becoming aware of it, notify the other party, specifying the nature of that Termination Event and each Affected Transaction and will also give such other information about that Termination Event as the other party may reasonably require.

(ii) **Two Affected Parties.** If an illegality under Section 5(b)(i)(1) occurs and there are two Affected Parties, each party will use all reasonable efforts to reach agreement within 30 days after notice thereof is given under Section 6(b)(i) on action to avoid that Termination Event.

### (iii) Right to Terminate. If—

- (1) an agreement under Section 6(b)(ii) has not been effected with respect to all Affected Transactions within 30 days after an Affected Party gives notice under Section 6(b)(i); or
- (2) an illegality other than that referred to in Section 6(b)(i), a Credit Event Upon Merger or an Additional Termination Event occurs,

either party in the case of an illegality, any Affected Party in the case of an Additional Termination Event if there is more than one Affected Party, or the party which is not the Affected Party in the case of a Credit

Event Upon Merger or an Additional Termination Event if there is only one Affected Party may, by not more than 20 days notice to the other party and provided that the relevant Termination Event is then continuing, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all Affected Transactions.

(c) **Effect of Designation.**

(i) If notice designating an Early Termination Date is given under Section 6(a) or (b), the Early Termination Date will occur on the date so designated, whether or not the relevant Event of Default or Termination Event is then continuing.

(ii) Upon the occurrence or effective designation of an Early Termination Date, no further payments or deliveries under Section 2(a)(i) or 2(d) in respect of the Terminated Transactions will be required to be made, but without prejudice to the other provisions of this Agreement. The amount, if any, payable in respect of an Early Termination Date shall be determined pursuant to Section 6(e).

**Calculations.**

(i) **Statement.** On or as soon as reasonably practicable following the occurrence of an Early Termination Date, each party will make the calculations on its part, if any, contemplated by Section 6(e) and will provide to the other party a statement (1) showing, in reasonable detail, such calculations (including all relevant quotations and specifying any amount payable under Section 6(e)) and (2) giving details of the relevant account to which any amount payable to it is to be paid. In the absence of written confirmation from the source of a quotation obtained in determining a Market Quotation, the records of the party obtaining such quotation will be conclusive evidence of the existence and accuracy of such quotation.

(ii) **Payment Date.** An amount calculated as being due in respect of any Early Termination Date under Section 6(e) will be payable on the day that notice of the amount payable is effective (in the case of an Early Termination Date which is designated or occurs as a result of an Event of Default) and on the day which is two Local Business Days after the day on which notice of the amount payable is effective (in the case of an Early Termination Date which is designated as a result of a Termination Event). Such amount will be paid together with (to the extent permitted under applicable law) interest thereon (before as well as after judgment), from (and including) the relevant Early Termination Date to (but excluding) the date such amount is paid, at the Applicable Rate. Such interest will be calculated on the basis of daily compounding and the actual number of days elapsed.

(e) **Payments on Early Termination.** If an Early Termination Date occurs, the following provisions shall apply based on the parties' election in the Schedule of a payment measure, either "Market Quotation" or "Loss", and a payment method, either the "First Method" or the "Second Method". If the parties fail to designate a payment measure or payment method in the Schedule, it will be deemed that "Market Quotation" or the "Second Method", as the case may be, shall apply. The amount, if any, payable in respect of an Early Termination Date and determined pursuant to this Section will be subject to any Set-off.

(i) **Events of Default.** If the Early Termination results from an Event of Default:—

(1) **First Method and Market Quotation.** If the First Method and Market Quotation apply, the Defaulting Party will pay to the Non-defaulting Party the excess, if a positive number, of (A) the sum of the Settlement Amount (determined by the Non-defaulting Party) in respect of the Terminated Transactions and the Unpaid Amounts owing to the Non-defaulting Party over (B) the Unpaid Amounts owing to the Defaulting Party.

(2) **First Method and Loss.** If the First Method and Loss apply, the Defaulting Party will pay to the Non-defaulting Party, if a positive number, the Non-defaulting Party's Loss in respect of this Agreement.

SCHEDULE TO THE MASTER AGREEMENT

dated as of November 5, 1998

between KeyBank National Association and Silver Hawk LLC
("Party A") ("Party B")

Part 1. Termination Provisions.

(a) "Specified Entity" means in relation to Party A for the purpose of:

- Section 5(a)(v), None
Section 5(a)(vi), None
Section 5(a)(vii), None
Section 5(b)(ii), None

and in relation to Party B for the purpose of:

- Section 5(a)(v), Any current or future Affiliate of Party B
Section 5(a)(vi), Any current or future Affiliate of Party B
Section 5(a)(vii), Any current or future Affiliate of Party B
Section 5(b)(ii), Any current or future Affiliate of Party B

- (b) "Specified Transaction" will have the meaning specified in Section 12 of this Agreement.
(c) The "Cross Default" provisions of Section 5(a)(vi) will apply to Party B.
(d) "Specified Indebtedness" will have the meaning specified in Section 12 of this Agreement.
(e) "Threshold Amount" means \$100,000.
(f) The "Credit Event Upon Merger" provisions of Section 5(b)(ii) will apply to Party B.
(g) The "Automatic Early Termination" provision of Section 6(a) will apply to Party B.
(h) Payments on Early Termination. For the purpose of Section 6(e) of this Agreement:
- The Second Method and Market Quotation will apply.

(i) Additional Termination Event: For the purpose of Section 5(b)(iii) of this Agreement, it shall be an "Additional Termination Event" with Party B being the Affected Party if (i) the loan or other indebtedness in connection with which a Transaction is entered into by Party B for the purpose or with the effect of altering the net combined payment of Party B from a floating to fixed or a fixed to floating rate basis is repaid, whether upon acceleration of principal, at maturity, or otherwise, or for any other reason ceases to be an obligation of Party B, with or without the consent of Party A, or (ii) any Credit Support Document expires, terminates, or ceases to be in full force and effect for the purpose of this Agreement unless this Agreement is expressly amended in writing to reflect that it is no longer a Credit Support Document hereunder.