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No. 63321-0-I

**COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON**

FREESTONE CAPITAL PARTNERS L.P.; FREESTONE LOW
VOLATILITY PARTNERS LP; FREESTONE CAPITAL QUALIFIED
PARTNERS L.P.; and FREESTONE LOW VOLATILITY QUALIFIED
PARTNERS LP,

Respondents,

v.

MKA REAL ESTATE OPPORTUNITY FUND I, LLC, a California
limited liability company; MKA CAPITAL GROUP ADVISORS, LLC, a
California limited liability company; MICHAEL A. ABRAHAM, an
individual; and JASON SUGARMAN, an individual,

Appellants.

**OPENING BRIEF OF APPELLANTS MICHAEL
ABRAHAM, JASON SUGARMAN, AND MKA REAL
ESTATE OPPORTUNITY FUND I, LLC.**

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I. INTRODUCTION

This case concerns California defendants who finance construction projects in California. The Washington plaintiffs reached out to California to invest in this business. The plaintiffs made loans to the California limited liability company MKA Real Estate Opportunity Fund I, LLC (“MKA”). MKA executed promissory notes in California. The loan proceeds were invested in the California construction projects. The promissory notes were secured by property interests and assets located in California. The California principals of MKA personally guaranteed some or all of the loans. The guarantees were drafted and executed in California by these California residents. They contain no choice of law provision. The guarantors had no significant personal contacts with Washington related to the guarantees. California has the most significant contacts with these transactions.

The Appellants are these defendants, MKA and the California guarantors, Sugarman and Abraham (the “Guarantors”). This is an appeal from commercial judgments against the Guarantors, and declaratory relief against MKA. The Washington Plaintiffs are business entities located in Washington (collectively “Plaintiffs”). In this lawsuit, the Guarantors were held liable under Washington law for the unpaid loans. The trial court declared MKA “in breach” of the loan agreements, but Plaintiffs did

not seek a monetary judgment against MKA. This was a failed attempt to avoid breaching a subordination agreement that Plaintiffs voluntarily entered with MKA and MKA's senior creditor. Appellants seek reversal of these judgments.

The trial court denied the Guarantors' motion to dismiss for lack of personal jurisdiction. CP 596-97. The trial court found sufficient evidence of contacts to support personal jurisdiction. CP 597; RP 1/30/09, 22:18 to 24:5, 46:3-8; CP 597. This Court should conclude that as a matter of law the Guarantors' scant personal contact with Washington is insufficient to assert personal jurisdiction.

Prior to suing the Appellants, Plaintiffs agreed to forbear collection activities on the loans in a Subordination Agreement with MKA and third party Gottex (aka "GVA ABL Portfolio Limited and/or Gottex ABI Master Fund Limited"). CP 779-86 (Subordination Agreement). *See also* CP 20-21 at ¶ 54 (Plaintiffs' Complaint). The Subordination Agreement provided that Plaintiffs would forbear any action against MKA for collection or payment, *id.* at ¶ 4, and that Plaintiffs shall not exercise any creditor's rights as a secured party until Gottex was satisfied in full. *Id.* at ¶ 6. After Plaintiffs sued them, MKA and the Guarantors asserted that Plaintiffs' lawsuit was barred by those covenants. CP 234 (MKA's Answer); CP 619-20 (Guarantors' Answer). MKA asserted a

counterclaim for breach of the Subordination Agreement. CP 235-37. Appellants also asserted that Gottex was a necessary party to the action pursuant to the Uniform Declaratory Judgment Act and CR 19, because the action required construction of the Subordination Agreement to the prejudice of Gottex. CP 234-37, 619-20. Appellants moved for dismissal on those grounds. CP 749-63. The trial court expressly recognized that Gottex had an interest in the action. RP 3/13/09 14:13-15. But the trial court did not require Gottex's joinder, construed the Subordination Agreement, dismissed the counterclaim, and entered declaratory relief on the loans that were the subject of the Subordination Agreement and judgments. CP 976, 1117-18. This Court should reverse those actions.

The trial court's application of Washington law to the guarantees was reversible error. The trial court premised application of Washington law on the Guarantors' consent, *see* RP 3/13/2009 29:14 to 30:9, but the guarantees contain no choice of law provision. *See, e.g.*, CP 632. The trial court erred in construing the documents to contain the Guarantors' consent to Washington law. Similarly, the guarantees fail to provide for recovery of attorney fees and costs incurred pursuing the Guarantors. *Id.* The trial court's award of such fees and costs against the Guarantors was reversible error.

MKA Capital Group Advisors, LLC, who was held liable only for injunctive relief concerning reporting obligations, does not appeal.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering judgment against Sugarman and Abraham when it lacked personal jurisdiction over those defendants.
2. The trial court erred in denying the Guarantors' Motion to Dismiss for Lack of Personal Jurisdiction.
3. The trial court erred in applying Washington law to the guarantees where they contain no choice of law provision, and when the Guarantors testified that they did not intend to select Washington law.
4. The trial court erred in entering judgment against all parties when it lacked subject matter jurisdiction under the Declaratory Judgment Act or CR 19(a) for failing to join senior creditor and necessary party, Gottex.
5. The trial court erred in dismissing MKA's breach of contract claim premised on the Subordination Agreement that bars collection activities including this lawsuit.
6. The trial court erred in awarding against the Guarantors attorney fees and costs incurred in pursuing the Guarantors when the documents contain no such right.
7. The trial court erred in finding that the documents permit an award of fees and costs incurred in pursuing the Guarantors.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was it legal error to deny the Guarantors' Motion to Dismiss for Lack of Personal Jurisdiction and enter judgment against Californians Sugarman and Abraham when the Washington contacts were insufficient to support personal jurisdiction either by a preponderance of the

evidence or based on a *prima facie* showing? (Assignments of Error 1 and 2).

2. Was it legal error to apply Washington law to the guarantees based on consent when the guarantees contain no contractual choice of law provision and the Guarantors testified that they did not intend to select Washington law? (Assignment of Error 3).
3. Was it legal error to enter judgment when the trial court lacked subject matter jurisdiction under the Declaratory Judgment Act or CR 19(a) for failing to join senior creditor Gottex, who had an interest which was affected by the declaration? (Assignment of Error 4).
4. Was it legal error to dismiss MKA's breach of contract claim premised on the Subordination Agreement when that agreement bars collection activities including this lawsuit? (Assignment of Error 5).
5. Was it legal error to award against Sugarman and Abraham attorney fees and costs incurred in pursuing the Guarantors when the documents contain no such right? (Assignment of Error 6 and 7).
6. Should the trial court have required segregation of the fees and costs incurred against MKA from the fees and costs incurred against the Guarantors? (Assignment of Error 6 and 7).

IV. STATEMENT OF THE CASE

The California Guarantors seek relief from the trial court's unjust and unsupportable exercise of jurisdiction and application of Washington law to the guarantees. The California Guarantors appeal the monetary judgments against them, and dismissal of their affirmative defenses. CP 1119-80. The trial court entered judgments against Abraham in principal

amounts totaling \$26,463,804.47. The trial court entered judgments against Sugarman in principal amounts totaling \$6,014,501.01.

After agreeing with MKA and MKA's senior creditor to subordinate their loans, Plaintiffs sued MKA on those very loans. MKA appeals the declaratory relief entered against it that "it is in default of its obligations to plaintiffs under a series of Secured Promissory Notes." CP 1188. It also appeals the dismissal of its affirmative defenses and counterclaim for breach of contract. *Id.*; CP 976-77.

A. MKA Finances California Construction Projects.

MKA is a California limited liability company established in 1988 with offices in Newport Beach, California. CP 203 ¶ 2; CP 346. MKA provides capital to single family home and commercial developers. CP 203 ¶ 2; CP 346. The capital comes primarily from investors. MKA manages investments from institutional and accredited individual investors through investment funds. CP 203 ¶ 2. Through those funds, MKA provides senior and junior secured debt financing to real estate developers based primarily in California. *Id.* The loans to developers are typically secured by a first or second deed of trust on the real property under development. CP 203 ¶ 4. The proceeds of Plaintiffs' loans were used to finance California developers, and the real property underlying the collateral deeds of trust is located primarily in California. CP 800.

The Guarantors are principals of MKA. CP 203 ¶ 1; CP 207. ¶ 1. They reside in California and work at MKA's offices in Newport Beach, California. CP 204 ¶ 5; CP 207 ¶ 1.

B. The Washington Plaintiffs Reached Out to California to Invest in MKA's Financing of California Construction Projects.

The California Guarantors had extremely limited contact with Washington during their business dealings with Plaintiffs. The contacts between the parties occurred overwhelmingly in California.

Plaintiffs integrated and pursued investment opportunities with MKA in California. CP 336 ¶ 11. Plaintiffs learned about MKA after they had contacted a party located in California. *Id.*, ¶ 11, Exhibit A. Plaintiffs then contacted MKA in California. CP 336 ¶ 12. *See also* CP 204, ¶ 7. Plaintiffs visited MKA in California and viewed collateral properties "probably a dozen times." CP 297 69:17-23; CP 204, ¶ 7; CP 401; CP 399-400; CP 286 22:20-21. *See also* CP 284 15:3-4 (Sugarman testified: "Freestone came to MKA's office so many times to go through our portfolios."). Plaintiffs determined to send their money to MKA in California. During 2006 and 2007, MKA executed the nine promissory notes with individual Plaintiffs. CP 623-25 ¶ 5 a-i; *see, e.g.*, CP 630-32. Of the nine notes, two were signed 5/8/06, three were signed 10/30/06,

one was signed 2/1/07, and three were signed 4/2/07. CP 1119-80.¹ Each note was accompanied by a security agreement, securing the note by MKA's assets in California. CP 626 ¶ 5 p; *see, e.g.*, CP 720-25.

Plaintiffs asked MKA employees to have Abraham and/or Sugarman, whom they knew to be located in California, guarantee the notes. CP 263 33:2-25; CP 285 20:16 to 21:23. Plaintiffs made no personal request to the Guarantors. *Id.* The guarantees were drafted in California. CP 263 32:11-17. Abraham guaranteed payment on all of the notes and Sugarman guaranteed payment on some of the notes. CP 630 622, 634, 638, 642, 646, 650, 654, 658 (the guarantees). Appellants executed the guarantees, notes and extension agreements, respectively, in California. Plaintiffs later contacted MKA's controller Brian Wagoner located in California to discuss the existing loans on multiple occasions. CP 205, ¶ 9. Mr. Wagoner never traveled to Washington. *Id.*

Abraham and Sugarman had limited contact with the State of Washington in connection with the Plaintiffs. Abraham testified that he has never "traveled to Washington to solicit Plaintiffs' business or to manage any business transaction between Plaintiffs and MKA Opportunity." CP 207 ¶ 2. Sugarman similarly testified,

¹ Seven judgments were entered on these nine notes. CP 1119-80.

I work at the headquarters of MKA Capital in Newport Beach, California. . . . Plaintiffs initially contacted me in California in 2004. Plaintiffs later traveled to California to negotiate all of the business transactions between Plaintiffs and MKA Opportunity. I did not travel to Washington to solicit Plaintiffs' business or to manage any business transaction between Plaintiffs and MKA Opportunity.

CP 204 ¶¶ 5, 7.

Plaintiffs presented evidence that Abraham and Sugarman visited Plaintiffs' representatives in Seattle on May 24, 2006. CP 341 ¶ 29. Abraham and Sugarman acknowledge that they made a social call on Plaintiffs' representatives on that date, as an afterthought when they concluded a meeting with the City of Seattle. CP 205 ¶ 10. Sugarman stated that the visit was a courtesy to Plaintiffs and no business was conducted, testifying,

During that visit to Seattle [to meet with the City], and apart from the City of Seattle meeting, Abraham and I had lunch with representatives of Plaintiffs as a courtesy to Plaintiffs. Abraham and I did not conduct business during that encounter.

CP 205 ¶ 10. Abraham testified similarly. CP 208 ¶ 3. Plaintiffs have submitted no contravening testimony from anyone present at that lunch. Plaintiffs have not asserted that the transactions at issue were discussed at the time. *See, e.g.*, CP 341 ¶ 29.

Plaintiffs also presented contested testimony that Sugarman visited their representatives in 2004. CP 336 ¶ 13 (Young Decl). Sugarman

contests the testimony, denying that any visit occurred in 2004. CP 285, 18:3-13. The trial court never resolved those evidentiary disputes. Sugarman does admit to visiting the Plaintiffs in Seattle in his official capacity one other time as another social occasion, but when that visit might have occurred has not been established. CP 284 16:10; CP 297 66:3-4.

The only remaining contacts are phone calls, letters and emails between Plaintiffs and Sugarman and Abraham in their official capacities. *See* CP 321; 336 ¶ 12.

C. The Personal Guarantees by California Residents Executed in California Have No Choice of Law Provision.

The guarantees are short. Each one states:

THE UNDERSIGNED HEREBY UNCONDITIONALLY GUARANTIES THE PAYMENT OF ALL AMOUNTS DUE UNDER THIS NOTE. UPON DEFAULT OF MAKER TO TIMELY PAY ANY AMOUNT DUE HEREUNDER, LENDER MAY IMMEDIATELY DEMAND, AND THE UNDERSIGNED SHALL IMMEDIATELY PAY, SUCH PAST DUE AMOUNT.

CP 630. These guarantees contain no choice of law provision and no attorney fees and costs provision.

D. The Subordination Agreement with Senior Creditor Gottex Prohibits Plaintiffs' Collection Activities Including This Lawsuit.

Plaintiffs entered into a subordination agreement (the "Subordination Agreement") with senior creditor Gottex and MKA on

February 20, 2007. Plaintiffs covenanted to forbear action against MKA for the collection or payment of amounts due it:

Notwithstanding anything herein to the contrary, Creditor will forbear any action against Borrower for the collection or payment of the Junior Liabilities until such time as the Senior Liabilities have been fully and indefeasibly paid, satisfied and discharged.

CP 780 ¶ 4. In addition, Plaintiffs covenanted not to exercise any rights as a secured party:

Creditor shall not, without the prior written consent of the Noteholders, exercise any rights of Creditor as a secured party, with respect to the enforcement of its rights as a secured party, until all of the obligations of the Noteholders have been satisfied in full.

CP 781 ¶ 6. No evidence demonstrates consent by Gottex.

E. Plaintiffs' Washington Collection Lawsuit.

Even after the notes had been extended, *see* CP 625 ¶ j to 626, ¶ o, MKA was unable to pay Plaintiffs on their notes while it was paying Gottex. CP 626 ¶ 6. Plaintiffs initiated this lawsuit on September 2, 2008. CP 1-38. In their complaint, Plaintiffs requested a declaration that MKA was in default as to all the Plaintiffs. CP 22-23 (“First Cause of Action”). Plaintiffs also sought money judgment against the Guarantors on the guarantees. CP 23-25 (“Second Cause of Action”).

Before answering, the Guarantors filed a Motion to Dismiss for Lack of Personal Jurisdiction on October 17, 2008. CP 209-20. They asserted insufficient contacts for personal jurisdiction in the State of

Washington for Abraham and Sugarman personally. *Id.* Plaintiffs opposed the motion on the basis that specific jurisdiction was established pursuant to “Washington’s long-arm statute, RCW 4.28.185.” CP 320.

Oral argument on the motion was held on January 30, 2009. RP 1/30/09. The trial court stated its satisfaction that the evidence supported personal jurisdiction. RP 1/30/09, p. 45. The trial court denied the Guarantors’ motion. CP 596.

Plaintiffs later moved for summary judgment on February 13, 2009. CP 735-48. Appellants opposed the motion. CP 787-802. Appellants brought a Motion to Dismiss for Lack of Subject Matter Jurisdiction or Alternatively, Failure to Join Necessary Parties on February 24, 2009. CP 749-65. Appellants asserted that Plaintiffs should have joined Gottex in the action under the Uniform Declaratory Judgment Act or CR 19(a). *Id.* Plaintiffs opposed that motion. CP 771-86.

The trial court heard oral argument on both motions on March 13, 2009. The trial court found that Gottex had an interest, stating, “I do think that this is an important issue with regards to Gottex. Gottex clearly does have an interest through the subordination agreements.” RP 03/13/09 14:13-15. But the trial court construed the Subordination Agreement without requiring joinder of Gottex. It held that a declaratory judgment that MKA was in default was not a “collection or payment” forbidden by

the Subordination Agreement. *Id.*, 14:16-23. The court denied the Motion to Dismiss for Lack of Subject Matter Jurisdiction. CP 1117.

At this hearing, the trial court also determined as a matter of law that Sugarman and Abraham had consented to Washington law. RP, 03/13/09, p. 29. The trial court recognized that the guarantees did not contain a choice of law provision, but instead relied upon the choice of law provision in the secured promissory notes, stating:

The two guarantors, Mr. Abraham and Mr. Sugarman, have stated in testimony that they did not intend to waive certain rights under California law, but the problem with that argument is the guarantees, which I think, maybe both counsel have described as sparse, I know Mr. Alston did I think accurately so, that I don't think either one of these law firms would draft guarantees to look like this, but they are what they are, and they are on the same document.

RP, 03/13/09, p. 29. The trial court was referring to the guarantees being on the same paper as the promissory notes which do contain a choice of law provision. *See, e.g.*, CP 630. Based on the location of the guarantees on the promissory notes, and ignoring their legal separateness, the trial court bound the Guarantors to the choice of law provision in the notes which they did not personally sign. The trial court granted Plaintiffs' Motion for Summary Judgment under Washington law on March 19, 2009. CP 976-77.

On March 26, 2009, Plaintiffs moved for fees and costs incurred in the entire action against the Guarantors. CP 1012-75. The Guarantors opposed the relief because, again, the guarantees do not contain a right to recover fees and costs incurred in their enforcement. CP 1076-78. The trial court rejected this argument and awarded against Sugarman and Abraham all fees and costs incurred. CP 1115, ¶ A. The trial court entered nine judgments against Abraham and three judgments against Sugarman on April 3, 2009. CP 1119-80.

Appellants timely appealed on April 9, 2009. CP 1191-91.

V. ARGUMENT

A. **Standards of Review.**

This Court reviews errors of law *de novo*, substituting its judgment for that of the trial court. *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001). *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). This includes *de novo* review of the following issues:

1. Personal jurisdiction. “[Q]uestions of personal jurisdiction admit of no simple solutions and . . . ultimately due process issues of reasonableness and fairness must be decided on a case-by-case basis.” *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446, 72 S. Ct. 413, 96 L. Ed. 485 (1952). Whether personal jurisdiction of an out-of-

state defendant exists is reviewed *de novo*. *MBM Fisheries, Inc. v. Bollinger Machine Shop & Shipyard, Inc.*, 60 Wn. App. 414, 418, 804 P.2d 627 (1991). Plaintiff bears the burden of proving that jurisdiction exists. *Id.*

When the trial court's ruling is based solely on a consideration of affidavits and discovery, only a *prima facie* showing of jurisdiction is required. *Id.*, citing *Pedersen Fisheries, Inc. v. Patti Industries, Inc.*, 563 F. Supp. 72, 74 (W.D. Wash. 1983). Plaintiffs' proof must "demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss." *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936) ("If [plaintiff's] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof."). If jurisdiction was resolved on the merits, however, proof must be a preponderance of the evidence. *Data Disc, Inc.*, 557 F.2d at 1285. The record indicates that the latter standard should apply. Under both standards, however, the evidence was insufficient.

2. Application of Washington law. What state's laws apply is a question of law reviewed *de novo*. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 384, 191 P.3d 845 (2008). Construction of contracts is

reviewed *de novo*. *Nishikawa v. U.S. Eagle High, L.L.C.*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007). Whether the contracts contain a choice of law provision applicable to the Guarantors is reviewed *de novo*.

3. Lack of subject matter jurisdiction. This Court reviews subject matter jurisdiction *de novo*. *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 939, 206 P.3d 364 (2009). A trial court's conclusions of law under the Uniform Declaratory Judgments Act are reviewed *de novo*. *Nollette v. Christianson*, 115 Wn.2d 594, 600, 800 P.2d 359 (1990); *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 27 P.3d 1149 (2001) (where a party seeks reversal of the trial court's legal conclusions, review of the trial court's decision on declaratory relief is *de novo*).

4. Failure to join necessary party under CR 19(a). The Court reviews the lack of subject matter jurisdiction for failure to join a necessary party under CR 19(a) for abuse of discretion, with the caveat that any legal conclusions underlying the decision are reviewed *de novo*. *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006). "A court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." *Id.* at 494. "An abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would

take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.” *Id.*

5. Dismissal of affirmative defenses and counterclaim.

Dismissal of defenses and counterclaims on summary judgment is reviewed *de novo*, viewing the evidence in the light most favorable to the nonmoving party. *Port of Longview v. International Raw Materials, Ltd.*, 96 Wn. App. 431, 436, 979 P.2d 917 (1999) (dismissal of affirmative defenses reviewed *de novo*); *Clark v. Baines*, 150 Wn.2d 905, 911, 84 P.3d 245 (2004) (dismissal of counterclaims reviewed *de novo*). Here, one of MKA’s and the Guarantors’ defenses was that the Subordination Agreement barred collection activities including this lawsuit. CP 749; CP 619. This Court reviews the trial court’s construction of the Subordination Agreement *de novo*. *Nishikawa v. U.S. Eagle High, L.L.C.*, *supra* (where the facts are undisputed, the legal effect of a contract is a question of law that an appellate court reviews *de novo*), *citing Yeats v. Estate of Yeats*, 90 Wn.2d 201, 204, 580 P.2d 617 (1978).

6. Award of attorney fees and costs pursuant to

contract. Whether a party is entitled to attorney fees under a contract is an issue of law that is reviewed *de novo*. *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126-27, 857 P.2d 1053 (1993).

In applying these standards, this Court should reverse and vacate the judgments. Alternatively, the Court should remand for fact finding.

B. The Trial Court Erred When It Denied the California Guarantors' Motion to Dismiss for Lack of Personal Jurisdiction Because the Evidence Does Not Support Washington's Personal Jurisdiction Over the Guarantors.

The trial court erred when it denied the California Guarantors' motion to dismiss for lack of personal jurisdiction concerning the transactions centered in California. Neither Guarantor had the minimum contacts with this State related to the guarantees. Subjecting either to the jurisdiction of this state is inequitable. California is the just forum. This Court should vacate the judgments against Abraham and Sugarman. Alternatively, this Court should remand for a determination of the disputed facts and whether personal jurisdiction lies.

The record contains some confusion whether the trial court decided personal jurisdiction on the merits, or only ruled that Plaintiffs met their initial *prima facie* burden. If the former, this Court reviews *de novo* whether the evidence preponderates in favor of jurisdiction; if the latter, this Court reviews *de novo* whether Plaintiffs met their *prima facie* burden. *See V.A.1., supra.*

The trial court's court written order states that a *prima facie* showing has been made. CP 597. In court, however, the trial court clearly announced his ruling on the merits, not in terms of merely acknowledging a *prima facie* case, stating,

And so for all those reasons I believe that Mr. Sugarman and Mr. Abraham [in] signing the guarantees on behalf of their businesses, the various MKA entities[,] did, in fact, purposefully avail consummate business in Washington. These causes of action do arise for a more connected to the transaction of the guarantees and the assumption of jurisdiction does not offend traditional notion[s] of fair play and justice. I deny the motion to lack of jurisdiction on Mr. Abraham and Mr. Sugarman.

1/30/09 RP 23:20 to 24:5. When later discussing the form of order, he indicated that he did not see a need to include language in the order that a *prima facie* showing was made, because he considered the matter "decided." *Id.*, 44:15 to 12. Specifically, the trial judge stated,

Right. But I think personal jurisdiction is decided on a 12 B 2 motion. If I ruled on that motion to dismiss I guess my – that motion, so I don't – I mean, jurisdiction obviously can be raised at any time but I don't know what further facts you – might you have.

1/30/09 RP 45:6-12. Plaintiffs' counsel then indicated his agreement that "I believe it's [sic] been decided." *Id.* at 45:23. Appellants' counsel then indicated his understanding that it had been decided, stating, "We won't be back in here on that, your Honor." *Id.*, 45:25 to 46:1. The court then

pronounced its satisfaction that jurisdiction was established and stated its intention to interlineate the order to include that, as follows:

I'm going to leave this in, but I will add or interlineate that of course jurisdiction can be raised at any time, but I'll say the Court today is satisfied based on the facts submitted that the Court—that the Court has jurisdiction. How's that?

1/30/09 RP 46: 3-8. Appellants counsel assented. *Id.*, 46:9. These changes were never made to the order.

This Court should review the evidence supporting personal jurisdiction for a preponderance of the evidence. The trial court made it clear that it had ruled on the merits and that Appellants should not raise the issue again unless they could present new facts. Whether this Court reviews the evidence for a *prima facie* case, or reviews for a preponderance of the evidence, it should reverse the judgments against the Guarantors.

Plaintiffs did not provide sufficient evidence to support personal jurisdiction against either Guarantor. The transactions at issue are the guarantees. These guarantees were executed in California in favor of Plaintiffs who came to California to do business in California with a California entity invested in the California real estate market. The Guarantors are California residents. The Washington contacts surrounding the guarantees are insufficient. Plaintiffs asserted specific

jurisdiction authorized by Washington's long-arm statute, RCW 4.28.185. CP 320. In determining whether specific personal jurisdiction exists, the court must determine whether (1) the defendant made a purposeful act toward the forum state, (2) the defendant's contact with the forum state caused the injury, and (3) exercising jurisdiction over the defendant violates fundamental notions of fairness. *Shaffer v. McFadden*, 125 Wn. App. 364, 370-71, 104 P.3d 742 (2005); *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 767, 783 P.2d 78 (1989); *MBM Fisheries*, 60 Wn. App. at 423. The Guarantors challenge elements one (purposeful availment) and three (fairness).

1. The Guarantors, in their personal capacities, did not make a purposeful act toward Washington.

The evidence is insufficient to support purposeful availment. The focus of the inquiry is on each Guarantor's acts. *See Walker v. Bonney-Watson Co.*, 64 Wn. App. 27, 34, 823 P.2d 518 (1992). The primary contact here is the fact that Plaintiffs came from Washington. That is insufficient. Mere execution of a contract with a Washington resident does not establish the purposeful act requirement. *MBM Fisheries*, 60 Wn. App. at 423. Purposeful availment requires more than mere negotiations. *See Precision Lab. Plastics, Inc. v. Micro Test*, 96 Wn. App. 721, 727, 981 P.2d 454 (1999). To evaluate purposeful availment, courts scrutinize the initial contacts between the parties. *See Crown Control's*

Inc. v. Smiley, 47 Wn. App. 832, 839, 737 P.2d 709 (1987) (Contacts sufficient where defendant “initiated the contacts and had the protection of Washington courts.”); *Peter Pan Seafoods, Inc. v. Mogelberg Foods, Inc.*, 14 Wn. App. 527, 532, 544 P.2d 30 (1975) (New Jersey corporation who initiated a business relationship with Washington company subject to personal jurisdiction); *Byron Nelson Co. v. Orchard Mgmt. Corp.*, 95 Wn. App. 462, 466, 975 P.2d 555 (1999) (“The fact that a foreign corporation makes initial contact for the purpose of soliciting a business connection in Washington is significant.”).

Neither Guarantor made purposeful acts toward Washington. First, Plaintiffs have presented zero evidence of any dealings with the Guarantors in their personal capacities. Plaintiffs had no personal contact with the Guarantors concerning the guarantees. Both Guarantors testified that they did not offer the guarantees to or discuss them with Plaintiffs, but that the request for the guarantees was communicated to each through MKA employees. CP 263 33:2-25; CP 285 20:16 to 21:23. The guarantees were drafted and signed in California. CP 263, 32:11-17. Plaintiffs submitted no evidence of any post-contracting contact with Abraham or Sugarman concerning their personal liability for the guarantees except for demand letters that Plaintiffs sent to California prior to filing suit. CP 340, ¶ 24; 486, 489-90. No purposeful availment of

Washington exists by Abraham or Sugarman in their personal capacities related to the guarantees.

The pithy guarantees executed by Abraham and Sugarman contain no language relating to choice-of-law or venue. *See, e.g.*, CP 632. The guarantees are contracts separate and distinct from the promissory notes and security agreements. *See Robey v. Walton Lumber Co.*, 17 Wn.2d 242, 255, 135 P.2d 95 (1943). The Guarantors did not agree to Washington law or to personal jurisdiction in Washington. Moreover, choice-of-law provisions would be insufficient to confer personal jurisdiction. *See, e.g., Burger King Corp v. Rudzewicz*, 471 U.S. 462, 482, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *Kysar v. Lambert*, 76 Wn. App. 470, 485, 887 P.2d 431, *rev. denied*, 126 Wn.2d 1019, 894 P.2d 564 (1995) (“Generally speaking, a choice-of-forum clause shows consent to personal jurisdiction, while a choice-of-law clause does not.”).

Regarding in-person contact in Washington, Abraham and Sugarman had lunch with Plaintiffs’ representatives in Seattle in May 2006. It is undisputed that Abraham and Sugarman came to Seattle for a purpose unrelated to Plaintiffs. It is undisputed that they set up a lunch with Plaintiffs’ representatives as a courtesy. CP 203, 207, 316. No representative of Plaintiffs testified as to any business discussed at those lunches, including no discussion of the guarantees. The undisputed

evidence shows this lunch was a social activity during which the transactions at issue were not discussed. Business socializing activities cannot be fairly characterized a purposeful availment. *See CTVC of Hawaii Co. v. Shinawatra*, 82 Wn. App. 699, 713-14, 919 P.2d 1243 (1996). In *Shinawatra*, this Court concluded that attendance at business dinners, where discussions involved potential business and for matters unrelated to the dispute, was not purposeful availment. *Id.* This Court remarked, “There is nothing to suggest that by these contacts, Dr. Shinawatra derived any legal protection or benefit in Washington.” *Id.* at 714. Similarly, the single lunch meeting in this case was not purposeful availment. The Guarantors derived no legal protection or benefit in Washington by this May 2006 contact.

The same is true for Sugarman’s admitted second visit with Freestone, regardless of when it occurred. The visit was in Sugarman’s official capacity and there is no evidence that the Plaintiffs discussed Sugarman’s guarantees with him.

These two events are insufficient to meet Plaintiffs’ burden. Plaintiffs did not establish purposeful availment. The focus is on each guarantor’s acts in his personal capacity. *Walker, supra; Forsythe v. Overmyer*, 576 F.2d 779, 782 (9th Cir. 1978) (“we must evaluate his contact with the state in his role as guarantor”). A corporate officer who

has contact with a forum only with regard to performance of his official duties is not subject to personal jurisdiction in that forum. *Chem Lab. Products, Inc. v. Stepanek*, 554 F.2d 371 (9th Cir. 1977). No evidence supports that Sugarman or Abraham had contact with Washington in either's personal capacity related to the guarantees.

Plaintiffs did not meet their *prima facie* burden or establish by a preponderance of the evidence purposeful conduct by Sugarman or Abraham in Washington State sufficient to warrant personal jurisdiction. The judgments against the California Guarantors should be vacated for lack of personal jurisdiction.

Alternatively, this Court may decide that additional fact finding including resolution of the disputed visits is necessary to resolve the issue of personal jurisdiction as to either or both Guarantors. In that case, it should reverse the money judgments and remand for trial on jurisdiction.

2. Exercising jurisdiction violates fundamental notions of fairness.

This Court must decide whether it is fair to exercise jurisdiction over Abraham and/or Sugarman based only on the fact that each knowingly guaranteed obligations to Washington residents who were doing business in California. In the context of this case, it is not. To decide if the exercise of personal jurisdiction is fair, this Court should consider “the quality, nature, and extent of the activity in the forum state,

the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.” *MBM Fisheries, supra*, 60 Wn. App. at 423.

All conduct touching on the Guarantors’ personal liability occurred in California. Abraham and Sugarman could fairly expect to be sued on the guarantees in California. The quality, nature and extent of each Guarantor’s activities in Washington are poor. The inconvenience to the Guarantors to litigate in their personal capacities in Washington is great. They would have to be absent from their homes and jobs. In contrast, the Plaintiffs are business entities who initiated the transactions in California and for whom litigation in California does not present equivalent hardships. The equities do not favor the assertion of jurisdiction. Plaintiffs initiated the relationship with MKA in California. It was MKA who presented to the Guarantors the Plaintiffs’ request for the guarantees. MKA drafted the guarantees in California. The Guarantors executed the guarantees in California. The loan funds came to California. The underlying transactions were centered in California and on California real estate. The loan extension agreements were executed in California. Plaintiffs sent the demand letters to the Guarantors in California. Plaintiffs presented no evidence of any dealings with Abraham or Sugarman in either’s personal capacity that occurred in Washington.

The Guarantors should not reasonably have anticipated being haled into court in Washington when they never personally solicited or transacted business in Washington. The reasonableness of Washington jurisdiction is wanting. Basic equities weigh against the Court's assertion of personal jurisdiction over the Guarantors.

C. The Trial Court Erred When It Applied Washington Law to the Guarantees Based on Consent When the Guarantees Did Not Contain Choice of Law Provisions and the Guarantors Testified that They Did Not Intend to Select Washington Law.

The guarantees contain no choice of law provision. The Guarantors did not intend to waive any of the rights afforded to guarantors under California law when they signed the guarantees. CP 789. But the trial court held on summary judgment that the choice of law provision *in the secured promissory notes* applied to the guarantors. The trial court failed to analyze the guarantees as separate legal documents. This was error. The trial court failed to recognize California's more significant relationship to the transactions. This Court should reverse for further proceedings under California law.

1. The Guarantees signed by Sugarman and Abraham are separate contracts that do not contain choice of law provisions.

The trial court erroneously applied the Washington choice of law provisions in the promissory notes to the guarantees. RP 3/13/09, p. 14.

This Court should reverse the judgments against the Guarantors based on Washington law after *de novo* analysis of the guarantees.

A guarantee is a *separate* undertaking from the principal obligor's undertaking on the notes. *Robey v. Walton Lumber Co.*, *supra*, 17 Wn.2d at 255; *see also Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207, 1121 (9th Cir. 2001). A guarantee exists independent of the original obligations between the principal obligor and the obligee. *Id.* The guarantees plainly had no choice of law provision. They are not ambiguous.

The Guarantors are not obligated on the notes themselves. It is irrelevant that the guarantees are written on the same paper as the secured promissory notes. A court must analyze the guarantees as separate documents, as noted by the Supreme Court here:

The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation. The undertaking of the former is independent of the promise of the latter; and the responsibilities which are imposed by the contract of guaranty differ from those which are created by the contract to which the guaranty is collateral. The fact that both contracts are written on the same paper or instrument does not affect the independence or separateness of the one from the other.

Robey, 17 Wn.2d at 255 *quoting* 24 Am. Jur. 875-6, § 4 (emphasis added).

In *Shannon-Vail Five, Inc.*, the Defendants argued that *Restatement* § 187 (choice-of-law provision which states the law of the state chosen by the parties will govern) should apply to promissory notes because the personal guarantees on plaintiffs' loan contained a choice-of-

law provision. *Shannon-Vail Five*, 270 F.3d at 1211. The court rejected this argument because the guarantees were a separate undertaking. *Id.* The choice of law provision in the guarantees did not integrate to the promissory notes. This same analysis applies here, where the choice of law provisions in the notes do not integrate to the guarantees.

This Court should conclude that Sugarman and Abraham did not agree to Washington law when they signed the guarantees. The guarantees are plain on their faces. The Guarantors testified that they did not intend to select Washington law. Plaintiffs offered no testimony regarding intent about choice of law for the guarantees or with Abraham and Sugarman personally. This Court should decide as a matter of law that the parties to the guarantees made no choice of law selection. It should then resolve that California law applies to the guarantees, as discussed in section 2 below, requiring reversal and remand of the money judgments.

Alternatively, the Court should reverse and remand for fact finding on intent. As the Supreme Court has said about contracts, “The parties’ intentions are questions of fact, while the legal consequences of such intentions are questions of law.” *Pardel v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008). The Guarantors are the only parties who submitted evidence of intent that concerns the guarantees, however, so there is no

dispute of fact. The uncontroverted evidence shows the parties expressed and had no intent to choose Washington law for the guarantees.

2. California law governs the guarantees because California has the most significant relationship with the contract and it was the expectation of Sugarman and Abraham that California law would apply.

California has the most significant relationship with the guarantees. The Guarantors expected California, not Washington, law to apply. Washington law is clear: “In the absence of an effective choice of law by the parties, the validity and effect of a contract are governed by the law of the state having the most significant relationship with the contract.” *Mulcahy v. Farmers Ins. Co.*, 152 Wn.2d 92, 101, 95 P.3d 313 (2004), citing *Pacific Gamble Robinson Co. v. Lapp*, 95 Wn.2d 341, 343, 622 P.2d 850 (1980); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971) (“*Restatement* § 188”). The contacts to be taken into account to determine the law applicable to an issue include: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties. *Restatement* § 188. All of these contacts weigh in favor of California law.

“These contacts are to be evaluated according to their relative importance with respect to the particular issue.” *Pacific Gamble Robinson Co.*, 95 Wn.2d at 346. “Additionally, the expectations of the parties to the contract may significantly tip the scales in favor of one jurisdiction's laws being applied over another’s.” *Mulcahy*, 152 Wn.2d at 101.

A proper examination of the guarantees as separate contracts strongly favors application of California law. The guarantees were drafted, presented, and signed in California. CP 211 § D. The subject matter of the guarantees is the secured promissory notes for the development of real estate in California. CP 210 § B. The real estate developers are in California. *Id.* The Guarantors are in California. *Id.* MKA is a California company. *Id.* California has the most significant relationship to the contracts. Plaintiffs approached MKA in California and availed themselves of California law. California has a significant interest in this matter. California has established policies regarding loans made in California, including a requirement that lenders obtain a license from the commissioner. *See California Finance Code* § 22100. California has a greater interest in this litigation than Washington.

The expectations of Sugarman and Abraham significantly tip the scales in favor of one California's laws being applied over Washington’s. *See Mulcahy*, 152 Wn.2d at 101. The Guarantors, who were not

represented by counsel, did not intend to waive the protections of California law. CP 789-90; 12:12 to 13:17; CP 283 12:10 to 13:5. Plaintiffs offered no competing testimony addressing their intent regarding the guarantees. This Court should apply California law in these circumstances.

California law is substantially different from Washington regarding guarantees. Under California law, guarantors can require the creditor to proceed against the principal and exhaust the collateral. Cal. Civ. Code §§ 2845, 2849. Under Washington law, however, a creditor may proceed first against the surety before resorting to the security interest. *Warren v Washington Trust Bank*, 92 Wn.2d 381, 390 n.1 (1979). The difference between the States' laws is critical in this case.

The Guarantors did not consent to Washington law. The guarantees do not provide for Washington law. This Court should reverse the money judgments and remand for application of California law.

D. The Trial Court Lacked Subject Matter Jurisdiction, Because Plaintiffs Failed to Join Necessary Party Gottex in Their Declaratory Judgment Action and Pursuant to CR 19(a).

The trial court did not have subject matter jurisdiction to enter declaratory relief because senior creditor Gottex, a signatory to the Subordination Agreement, is a necessary party whom Plaintiffs failed to join. The trial court recognized Gottex's interest, RP 3/13/09 14:13-16,

but it denied the Appellants' motion. CP 1117-18. This was legal error under RCW 7.24.110 and an abuse of discretion under CR 19(a).

Appellants moved the trial court for dismissal for failure to join Gottex pursuant to RCW 7.24.110 and CR 19(a). CP 749-65. Plaintiffs opposed the motion. CP 771. Plaintiffs never argued in opposition that joinder was not feasible. *Id.* CR 19(b), requiring a judicial determination that the action should proceed if joinder is not feasible, was never at issue.

As the Supreme Court explained:

Under CR 19, a trial court undertakes a two part analysis. First, the court must determine whether a party is needed for just adjudication. *Crosby v. Spokane County*, 137 Wn.2d 296, 306, 971 P.2d 32 (1999); CR 19(a). [] Second, if an absent party is needed but it is not possible to join the party, then the court must determine whether in "equity and good conscience" the action should proceed among the parties before it or should be dismissed, the absent party being thus regarded as indispensable. *Crosby*, 137 Wn.2d at 306-07; CR 19(b).

Gildon v. Simon Prop. Group, Inc., 158 Wn.2d 483, 494-95, 145 P.3d 1196 (2006). Here, the trial court never reached the second part of the analysis. The trial court did not proceed under CR 19(b), but denied the motion to dismiss under CR 19(a). CP 1117.

The Uniform Declaratory Judgment Act specifically requires joinder of Gottex. RCW 7.24.110 states the specific rule governing declaratory judgments, providing:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

RCW 7.24.110. Washington law is clear that failure to include an affected party in the action for declaratory judgment directly relates to the jurisdiction of the trial court. *Henry v. Oakville*, 30 Wn. App. 240, 243, 633 P.2d 892 (1981), citing *Williams v. Poulsbo Rural Tel. Asso.*, 87 Wn.2d 636, 643, 555 P.2d 1173 (1976). A party must be joined in a declaratory judgment action if the declaration would affect any claim or interest. RCW 7.24.110; *see also Henry v. Oakville*, 30 Wn. App. at 244-45. The trial court correctly concluded that construction of the Security Agreement necessarily affects Gottex's interest. RP 03/13/09 14:13-15 ("I do think that this is an important issue with regards to Gottex. Gottex clearly does have an interest through the subordination agreements."). It is a necessary party to Plaintiffs' action. Failure to join the Gottex deprived the trial court of jurisdiction.

CR 19(a) also requires joinder of persons needed for a just adjudication "if feasible." CR 19(a). This includes a person with an interest in the subject matter of the action whose interest may be impaired or impeded. The rule requires joinder of a person who,

claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his

ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

CR 19(a). A necessary party is one who has sufficient interest in the litigation so that the judgment cannot be determined without affecting that interest or leaving it unresolved. *Harvey v. Board of County Comm'rs*, 90 Wn. 2d 473, 584 P. 2d 391 (1978). It is mandatory upon the court to bring in parties necessary to complete determination of controversy. *McKinnis v. Los Lugos Gold Mines*, 188 Wash. 447, 62 P.2d 1092 (1936). *State ex rel. Continental Casualty Co. v. Superior Court for Spokane County*, 33 Wn.2d 839, 207 P.2d 707 (1949).

The trial court abused its discretion when it adjudicated Gottex's interest without requiring joinder. In light of the trial court's express recognition of Gottex's interest, RP 03/13/09 14:13-15, it had no tenable basis to reject joinder under CR 19(a).

The trial court's error is underscored by this Court's decision in *National Homeowners Ass'n v. City of Seattle*, 82 Wn. App. 640, 919 P.2d 615 (1996). In that case, Eagle Hardware planned to build a new store on land previously occupied by a mobile home park. Eagle Hardware submitted a relocation plan to the City for the home owners. *Id.* at 641-42. An association of mobile home owners sued the City to revoke the approval of the relocation plan. *Id.* at 642. They failed to join Eagle. *Id.*

This Court affirmed the trial court's dismissal for failure to join Eagle as a necessary party. *Id.* at 643. The Court explained that Eagle's absence impaired its ability to protect its interest in a land use project in which it had invested considerable time and money, stating:

As the purchaser of the property and the project developer, Eagle had invested considerable time and money in designing, planning, and obtaining permits for the project. Thus, Eagle's absence would impair its ability to protect its interest.

Id.

Just as Eagle was necessary, Gottex was necessary because this litigation requires interpretation of the Subordination Agreement. Gottex invested time and energy in obtaining the Subordination Agreement to maintain its position as senior creditor. Gottex had received and given valuable consideration in exchange for Plaintiffs' forbearance. The objective of the Subordination Agreement was to secure Gottex's investment in MKA by preventing any collection activities that would drain assets from MKA, divert its attention, or precipitate liquidity issues. By suing MKA and the Guarantors, Plaintiffs undermined these objectives and breached the agreement. Gottex's absence from the lawsuit impaired its ability to protect its interests under the Subordination Agreement.

The trial court lacked jurisdiction to enter declaratory relief because Plaintiffs failed to join Gottex. Joinder should have been required

under CR 19(a). This Court should reverse and remand, requiring joinder of Gottex.

E. The Trial Court Erred When It Dismissed MKA's Breach of Contract Claim Arising from Plaintiffs' Breach of the Subordination Agreement.

MKA asserted a breach of contract claim against Plaintiffs based on the same violation of the Subordination Agreement. CP 236 § C. Appellants presented sufficient evidence to the trial court to support these claims, showing that Plaintiffs breached the Subordination Agreement, causing harm to MKA and hindering MKA's ability to repay Gottex. CP 791-92; 749-65. The trial court erred when it summarily dismissed MKA's counterclaim. CP 976. This Court should reverse and remand for trial of the breach of contract claim.

When a court examines a contract, it must read it as the average person would read it; it should be given a practical and reasonable rather than a literal interpretation, and not a strained or forced construction leading to absurd results. *Allstate Ins. Co. v. Hammonds*, 72 Wn. App. 664, 667, 865 P.2d 560 (1994); *Forest Mktg. Enters. v. Dep't of Natural Res.*, 125 Wn. App. 126, 133, 104 P.3d 40 (2005). Here, the parties do not claim that the Subordination Agreement is ambiguous. Its interpretation is a matter of law. *Mayer v. Pierce County Medical Bureau*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995).

The Subordination Agreement states: “Creditor will forbear any action against Borrower for the collection or payment of the Junior Liabilities until such time as the Senior Liabilities have been fully and indefeasibly paid, satisfied and discharged.” CP 780 ¶ 4 (emphasis added). Plaintiffs agreed to this.

Plaintiffs violated the Subordination Agreement when they commenced this lawsuit. The lawsuit is an action to collect a debt. Plaintiffs sought to remedy MKA’s alleged nonpayment of a debt. The trial court wrongly reasoned that a declaratory judgment is prior to “collection or payment,” and thus not violative of the Subordination Agreement. RP, 3/13/09, p. 14. The trial court’s view contradicts the intent and meaning of the Subordination Agreement. Plaintiffs’ election not to seek an enforceable judgment from MKA does not change the nature of the action as one for collection or payment of the liabilities. The lawsuit distracts MKA from its business, requires resources from MKA and impedes MKA’s ability to repay Gottex. The lawsuit against the principals of MKA in their personal capacities is similarly distracting to MKA and prevents MKA from performing its obligations to Gottex. The Plaintiffs sought against Guarantors and received attorney fees and costs awards for pursuing MKA based on fee provisions in the notes. This contradicts their covenants under the Security Agreement. The trial court

awarded them monetary benefits based on rights that they voluntarily subordinated. This Court should reverse and remand MKA's claim for trial.

When Plaintiffs sought the declaration that they were entitled to judgment on the Notes, they exercised their rights as secured parties. This is another breach of the Subordination Agreement, which states: "Creditor shall not, without the prior written consent of the Noteholders, exercise any rights of Creditor as a secured party, with respect to the enforcement of its rights as a secured party, until all of the obligations of the Noteholders have been satisfied in full." CP 780 ¶ 6. The record contains no evidence of consent by Gottex.

Plaintiffs agreed to forbear action against MKA for collection or payment. Plaintiffs agreed that they would not exercise their rights as secured parties until all of the obligations to Gottex were satisfied in full. Gottex has not been paid in full. MKA presented sufficient evidence that Plaintiffs breached the Subordination Agreement when they initiated this lawsuit. The trial court erred. This Court should reinstate MKA's breach of contract claim for trial.

F. The Trial Court Erred When It Awarded Attorney Fees and Costs Incurred in Pursuing the Guarantors Because the Guarantees Do Not Contain a Fee Provision.

The guarantees provide no right to attorney fees and costs for their enforcement. CP 632. The trial court incorrectly awarded such fees and costs against the Guarantors. CP 1114-16. The trial court awarded all fees and costs incurred by Plaintiffs in this litigation without requiring segregation. This requires reversal of the attorney fee and cost awards.

“The rule in Washington is that absent a contract, statute, or recognized ground of equity, attorney fees will not be awarded as part of the costs of litigation.” *Tradewell Group, Inc. v. Mavis, supra*, 71 Wn. App. at 126, citing *Pennsylvania Life Ins. Co. v. Employment Sec. Dep’t.*, 97 Wn.2d 412, 413, 645 P.2d 693 (1982). Whether a contract provision provides for fees “usually is straightforward: the relevant statute or contract either provides for an award of fees or it does not.” *Id.* at 126. *See also* RCW 4.84.330 (attorney fees awarded on a contract where such contract or lease “specifically provides” for the award).

The analysis in this case is straightforward. The guarantees do *not* provide for an award of fees and costs for enforcement of the guarantees. The text does not contain it. The promissory notes and the loan extension agreements obligated *MKA* for attorney fees and costs *incurred enforcing the notes against MKA*. The Guarantors guaranteed that obligation by

MKA. The Guarantors had no obligation of their own related to attorney fees and costs. And the Subordination Agreement prohibited Plaintiffs from enforcing the notes against MKA, so none of the awarded fees and costs could be proper.

The guarantees speak for themselves. The guarantees are independent and separate from the notes. Even if this Court looked to the promissory notes, however, they say nothing regarding attorney fees incurred to enforce the guarantees. The promissory notes signed by MKA and not the guarantors contain a fee clause restricted to fees incurred enforcing the notes, stating,

If any proceeding is commenced which arises out of or relates to this Note, the prevailing party shall be entitled to recover from the other party such sums as may be adjudged to be reasonable attorneys' fees, in addition to costs and expenses otherwise allowed by law. In all other situations, including any matter arising out of or relating to any Insolvency Proceeding, Maker agrees to pay all of Lender's and Lender's agents costs and expenses, including attorneys' fees, which may be incurred in enforcing or protecting Lender's or Lender's agents rights or interests.

CP 630-32 ¶ 9.

The note extension agreements similarly confine themselves to *MKA's* obligation to pay attorney fees and costs for enforcement of the notes, security agreements, extensions or other agreements *between MKA and FCP (Plaintiffs)*, not between FCP and the Guarantors. They state:

MKA agrees to pay FCP on demand, and Guarantor acknowledges that his guarantee includes the obligation to

pay to FCP, all fees and expenses, including, without limitation, reasonable attorneys' fees and disbursements incurred by FCP (a) in all efforts made to enforce payment of any of the obligations under the FCP Note, the FCP Security Agreement, this Agreement, or any other instrument or agreement between MKA and FCP, or (b) in connection with the modification, amendment, administration and enforcement of the obligations under the FCP Note, the FCP Security Agreement, this Agreement, or any interpretation, enforcement or performance of the FCP Note, the FCP Security Agreement, this Agreement, or any instrument or agreement between MKA and FCP, in any event whether through judicial proceedings, including bankruptcy, or otherwise.

CP 666-73, ¶ 10. The specified documents do not include the guarantees. They are necessarily excluded. *See State v. Schelin*, 147 Wn.2d 562, 589, 55 P.3d 632 (2002) (“*expressio unius est exclusion alterius*’—the inclusion of one is the exclusion of the other.”) The paragraph clearly refers to agreements “between MKA and FCP.” The Guarantors are not MKA or FCP. The Guarantors are not included by this provision. Plaintiffs have no contractual right to fees and costs arising from efforts to enforce the guarantees.

Even if this Court were to consider the note extension agreements ambiguous, which they are not, the Court should construe against Plaintiffs, who drafted the note extension agreements. CP 1077; 1082, ¶ 3. *See Forbes v. Am. Bldg. Maint. Co. W.*, 148 Wn. App. 273, 288, 198 P.3d 1042 (2009) (ambiguity in a contract is resolved against the drafter).

The trial court erred when it awarded fees and costs against the Guarantors for all of the fees and costs Plaintiffs incurred in this litigation. CP 1114-16. The majority of the fees and costs in this action were incurred in efforts against the Guarantors. Those are not recoverable. The trial court should have required segregation of the fees and costs incurred in the action against MKA from the fees and costs incurred against the Guarantors. Segregation is required where attorneys fees are authorized for only some of the claims. *See Gagliardi v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 450, 815 P.2d 1362 (1991); *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 100 Wn.2d 826, 849-50, 762 P.2d 8 (1986).

That Plaintiffs claim attorney fees and costs incurred enforcing the notes against MKA further demonstrates that Plaintiffs' lawsuit violates the Subordination Agreement. Plaintiffs seek the very benefits they agreed to subordinate. Additionally, if this Court rules in favor of MKA, this Court should reverse that portion of the money judgments awarded for pursuing the claims against MKA.

This Court should reverse the awards of fees and costs with prejudice. None of the fees and costs incurred pursuing the guarantees are recoverable. If MKA prevails on appeal, Plaintiffs are no longer entitled to the smaller portion of fees and costs incurred pursuing claims against MKA. Alternatively, this Court should reverse the awards of fees and

costs and remand for segregation and a determination of a reasonable amount of attorney fees and costs incurred obtaining relief only against MKA.

VI. REQUEST FOR ATTORNEY FEES AND COSTS ON APPEAL

If this Court finds in favor of any Appellant, that Appellant may be entitled to an award of fees and costs. This Court should analyze each Appellant's success on appeal to decide this issue. If MKA prevails, it will be entitled to fees and costs on appeal based on the fee provisions in the promissory notes and note extension agreements. The Guarantors are only entitled to fees and costs on appeal if the Guarantors do not prevail in Assignments of Error # 6 and # 7, meaning that this Court holds that the guarantees do provide a right to attorney fees and costs between the Guarantors and MKA. If such a right exists, and if the Guarantors succeed in obtaining vacation of the judgments, they are entitled to fees and costs.

“A contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal.” *Reeves v. McClain*, 56 Wn. App. 301, 311, 783 P.2d 606 (1989). RCW 4.84.330 requires that unilateral fee award provisions be made available to either party to the controversy. *QFC v. Mary Jewell T, L.L.C.*, 134 Wn. App. 814, 817-18, 142 P.3d 206 (2006). The documents provide that MKA is obligated for fees and costs Plaintiffs incur enforcing the loan obligations. Pursuant to

RCW 4.84.330 and *QFC v. Mary Jewell, L.L.C.*, these provisions are reciprocal. Similarly, if this Court construes the documents to contain a fee and cost provision for enforcement of the guarantees, then such contract terms are also reciprocal.

VII. CONCLUSION

The trial court lacked personal jurisdiction over the Guarantors. This Court should reverse the judgments against the Guarantors for lack of personal jurisdiction, or remand for more fact finding on that issue. The Guarantors had no significant, personal contact with Washington related to the guarantees. By contrast, all significant contacts occurred in California. These guarantees were executed in California in favor of Plaintiffs who came to California to do business in California with a California entity invested in the California real estate market. The Guarantors are California residents. The only Washington contact is that the corporate Plaintiffs come from Washington. The money judgments should be reversed for lack of personal jurisdiction.

The simple guarantees signed by the Guarantors did not contain a choice of law provision. The Guarantors made no agreement regarding choice of law. California had the most significant relationship with the guarantees. The trial court incorrectly applied Washington law. This requires reversal and remand of the money judgments.

Plaintiffs brought a collection action seeking a declaratory judgment regarding subordinated loans. Plaintiffs were a party to the Subordination Agreement that forbids this litigation. Moreover, Gottex should have been joined. This Court should reverse and remand for Gottex's joinder and trial of MKA's counterclaim.

The trial court incorrectly awarded attorney fees and costs against the Guarantors when the guarantees and evidence do not provide for them. This requires reversal and remand of the fee and cost awards.

Respectfully submitted this 28th day of September, 2009.



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SECURED PROMISSORY NOTE

\$8,100,000

May 8, 2006

FOR VALUE RECEIVED, MKA REAL ESTATE OPPORTUNITY FUND I, LLC, a California limited liability company ("Maker") promises to pay to FREESTONE CAPITAL PARTNERS L.P. ("Lender"), at such address as Lender from time to time may designate in writing, the principal sum of eight million one hundred thousand dollars (\$8,100,000), advanced to Maker hereunder plus interest (the "Loan") in accordance with the terms of this secured promissory note (the "Note").

1. The Maker agrees to pledge, assign, mortgage or otherwise grant a security interest in any or all assets of the Maker, to execute and deliver to the Lender such security agreements, assignments, mortgages, financing statements, hypothecations, agreements not to encumber and other agreements as may be requested by the Lender from time to time.

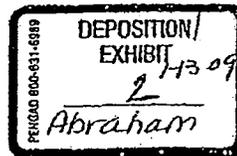
2. Interest shall accrue in arrears on the principal of this Note outstanding at any time at the rate of one percent (1.00%) per month (the "Interest Rate") from the date of this Note to and including the Maturity Date (as defined herein) computed daily on the basis of a three hundred sixty (360)-day year and actual days elapsed. Interest shall be payable in full on the Maturity Date.

3. The Loan shall be paid to Maker in three installments as follows: \$3,000,000 on November 30, 2006, \$2,000,000 on January 31, 2007 and the remaining principal balance of \$3,100,000 and all accrued unpaid interest on March 30, 2007 (the "Maturity Date"). This Note may be prepaid, in whole or in part, at any time, provided that if Maker elects to prepay this Note, Maker will also pay to Lender a prepayment fee in the amount of one percent (1%) of the principal amount being prepaid at the time of such prepayment.

4. The Maker attests that the only credit arrangements they have in place as of the date of this note are with PFF/Alliance for forty-five million dollars (\$45,000,000) and Gottex Fund Management Ltd. for twenty million dollars (\$20,000,000), not including promissory notes with the Lender or affiliates of the Lender. Maker attests that they do not have any other agreements with creditors other than those listed in item 4 and have not assigned, pledged, mortgaged or otherwise granted a security interest in any of its assets to another creditor.

5. Maker agrees to provide the Lender with unaudited financial statements within 30 days of the end of each month that there is a balance payable on the Loan.

6. If Maker fails to make any payment hereunder within ten (10) days after it becomes due and payable, or renew the Note with the Lender, Maker agrees that the note shall continue to accrue interest at the Interest Rate and to pay to Lender a late charge (the "Late Charge") equal to three percent (3%) of such delinquent payment including accrued interest. Maker acknowledges that in the event Maker fails to make any payment when due hereunder, the damages to Lender would be difficult to ascertain and would include the loss of use of funds and expenses incurred in connection with such default, and that the Late Charge is a fair and reasonable estimate of the loss to Lender as a result of such default.



7. If any of the following "Events of Default" occur the balance of all principal and interest under this Note shall, at the Lender's option, exercisable in Lender's sole discretion, become immediately due and payable without notice of default, presentment or demand for payment, protest or notice of nonpayment or dishonor, or other notices or demands of any kind or character:

- (a) Maker fails to perform any other obligation under this Note to pay money and does not cure that failure within five (5) days after written notice from Lender;
- (b) Maker receives notice to redeem and/or pays redemptions to its shareholders, partners, members or owners, and such value exceeds 20% of the Maker's net asset value prior to the payment of such redemptions;
- (c) Maker pays redemptions to its shareholders, partners, members or owners, and the cumulative value of such redemptions from the date of the Note exceeds 30% of the Maker's net asset value as of the date of the Note;
- (d) Maker becomes the subject of any bankruptcy or other voluntary or involuntary proceeding, in or out of court, for the adjustment of debtor-creditor relationships ("Insolvency Proceeding"), or
- (e) Maker's debt to equity ratio exceeds 25%.

The Maker agrees to notify the Lender of any such "Events of Default" immediately. Additionally, if an "Event of Default" occurs, Maker agrees to pay Lender any amounts owed under this Note prior to making distributions to shareholders, partners, members or owners.

8. All amounts payable under this Note are payable in lawful money of the United States. Checks constitute payment only when collected. Except as otherwise expressly provided herein, all payments made hereunder shall be applied first to Late Charges, then to additional sums due hereunder, then to accrued, unpaid interest until all Late Charges, additional sums and accrued, unpaid interest are paid and finally to principal.

9. If any proceeding is commenced which arises out of or relates to this Note, the prevailing party shall be entitled to recover from the other party such sums as may be adjudged to be reasonable attorneys' fees, in addition to costs and expenses otherwise allowed by law. In all other situations, including any matter arising out of or relating to any Insolvency Proceeding, Maker agrees to pay all of Lender's, and Lender's agents costs and expenses, including attorneys' fees, which may be incurred in enforcing or protecting Lender's or Lender's agents rights or interests.

10. This Note is governed by the laws of the State of Washington, without regard to the choice of law rules of that State.

11. Maker agrees that the Lender may accept security for this Note, or release any security or any party liable for this Note, or extend or renew this Note, all without notice to Maker and without affecting the liability of Maker.

12. If Lender delays in exercising or fails to exercise any of its rights under this Note, that delay or failure shall not constitute a waiver of any of Lender's rights, or of any breach, default or failure of condition of or under this Note. No waiver by Lender of any of its rights, or of any such breach,

default or failure of condition shall be effective, unless the waiver is expressly stated in a writing signed by Lender. All of Lender's remedies in connection with this Note or under applicable law shall be cumulative, and Lender's exercise of any one or more of those remedies shall not constitute an election of remedies. Maker hereby waives demand, presentment, protest, notice of dishonor, suit against any party and all other requirements necessary to charge or hold Maker on any obligation.

13. This Note inures to and binds the heirs, legal representatives, successors and assigns of Maker, Lender, and Lenders' agents; provided, however, that Lender in its sole discretion may assign or transfer all or any portion of this Note, all without notice to, or the consent of, Maker.

14. Time is of the essence with respect to every provision contained herein in which time is a factor.

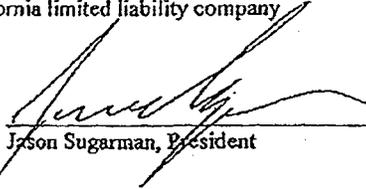
15. It is the intention of Maker and Lender to conform strictly to the usury laws now or hereafter in force in the State of Washington, and any interest payable under this Note shall be subject to reduction to the amount not in excess of the maximum non-usurious amount allowed under the usury laws of the State of Washington as now or hereafter construed by the courts having jurisdiction over such matters. In the event any payment made hereunder is in violation of the usury laws now or hereafter in force in the State of Washington, then earned interest will not include more than the maximum amount permitted by law, and any interest in excess of the maximum amount permitted by law shall be deemed canceled automatically upon the payment thereof by Maker and shall, at the option of Lender, either be rebated to Maker or credited on the principal amount of this Note or, if all principal has been paid, then the excess shall be rebated to Maker.

IN WITNESS WHEREOF, the undersigned has duly executed and delivered this Unsecured Promissory Note as of the date first above written.

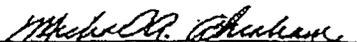
MAKER

MKA REAL ESTATE OPPORTUNITY FUND I, LLC,
a California limited liability company

By: _____


Jason Sugarman, President

THE UNDERSIGNED HEREBY UNCONDITIONALLY GUARANTIES THE PAYMENT OF ALL AMOUNTS DUE UNDER THIS NOTE. UPON DEFAULT OF MAKER TO TIMELY PAY ANY AMOUNT DUE HEREUNDER, LENDER MAY IMMEDIATELY DEMAND, AND THE UNDERSIGNED SHALL IMMEDIATELY PAY, SUCH PAST DUE AMOUNT.


Michael A. Abraham

default or failure of condition shall be effective, unless the waiver is expressly stated in a writing signed by Lender. All of Lender's remedies in connection with this Note or under applicable law shall be cumulative, and Lender's exercise of any one or more of those remedies shall not constitute an election of remedies. Maker hereby waives demand, presentment, protest, notice of dishonor, suit against any party and all other requirements necessary to charge or hold Maker on any obligation.

13. This Note inures to and binds the heirs, legal representatives, successors and assigns of Maker, Lender, and Lenders' agents; provided, however, that Lender in its sole discretion may assign or transfer all or any portion of this Note, all without notice to, or the consent of, Maker.

14. Time is of the essence with respect to every provision contained herein in which time is a factor.

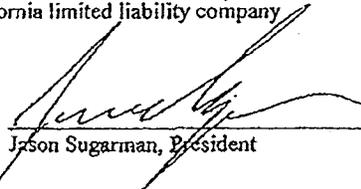
15. It is the intention of Maker and Lender to conform strictly to the usury laws now or hereafter in force in the State of Washington, and any interest payable under this Note shall be subject to reduction to the amount not in excess of the maximum non-usurious amount allowed under the usury laws of the State of Washington as now or hereafter construed by the courts having jurisdiction over such matters. In the event any payment made hereunder is in violation of the usury laws now or hereafter in force in the State of Washington, then earned interest will not include more than the maximum amount permitted by law, and any interest in excess of the maximum amount permitted by law shall be deemed canceled automatically upon the payment thereof by Maker and shall, at the option of Lender, either be rebated to Maker or credited on the principal amount of this Note or, if all principal has been paid, then the excess shall be rebated to Maker.

IN WITNESS WHEREOF, the undersigned has duly executed and delivered this Unsecured Promissory Note as of the date first above written.

MAKER

MKA REAL ESTATE OPPORTUNITY FUND I, LLC,
a California limited liability company

By: _____


Jason Sugarman, President

THE UNDERSIGNED HEREBY UNCONDITIONALLY GUARANTIES THE PAYMENT OF ALL AMOUNTS DUE UNDER THIS NOTE. UPON DEFAULT OF MAKER TO TIMELY PAY ANY AMOUNT DUE HEREUNDER, LENDER MAY IMMEDIATELY DEMAND, AND THE UNDERSIGNED SHALL IMMEDIATELY PAY, SUCH PAST DUE AMOUNT.


Michael A. Abraham

NOTE EXTENSION AGREEMENT (FCP)

THIS AGREEMENT ("Agreement") is entered into as of February 21, 2008, by and among FREESTONE CAPITAL PARTNERS L.P. ("FCP"), MKA REAL ESTATE OPPORTUNITY FUND-I, LLC, a California limited liability company ("MKA"), MKA Capital Group Advisors, LLC ("Manager"), and MICHAEL A. ABRAHAM, an individual ("Guarantor").

RECITALS

A. MKA is the maker of that certain Promissory Note, dated May 8, 2006, in favor of FCP in the original principal amount of \$8,100,000.00 (the "FCP Note").

B. MKA executed and delivered to FCP a Security Agreement, dated May 8, 2006, granting FCP a security interest in collateral as defined therein to secure MKA's obligations under the FCP Note (the "FCP Security Agreement").

C. Guarantor guaranteed immediate payment by MKA of the FCP Note.

D. At the request of MKA, FCP has from time to time extended the due date for payments of principal under the FCP Note, such that as of January 31, 2008 (and in the absence of the execution and delivery to FCP of this Agreement), the principal balance outstanding on the FCP Note would be payable as follows:

| | |
|---|------------------|
| Principal payment due October 31, 2007: | \$1,800,000 |
| Principal payment due December 31, 2007 | 2,700,000 |
| Principal payment due March 31, 2008 | <u>2,600,000</u> |
| Total principal balance | \$7,100,000 |

Interest accrues on the principal balance outstanding on the FCP Note at the rate of 1% per month. As of January 31, 2008, interest was accrued and unpaid for December 2007 and January 2008 in the amount of \$142,000.

E. MKA has requested that FCP further extend the dates on which principal and interest are due and payable under the FCP Note. FCP is willing to extend the due dates for payment of principal and interest under the FCP Note on the terms and conditions set forth below.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, receipt of which is hereby acknowledged, and for the mutual benefits and covenants as set forth herein, the parties agree as follows:

1. Reaffirmation of Obligations under FCP Note. MKA reaffirms the obligations to FCP under the FCP Note and the FCP Security Agreement, and acknowledges that the amount and due dates of the obligations under the FCP Note set forth in the Recitals are correct. All

terms of the FCP Note and FCP Security Agreement are expressly ratified, reaffirmed and remain unchanged except as modified in this Agreement.

2. Reaffirmation of Guarantee. Guarantor hereby reaffirms his guarantee of the obligations of MKA under the FCP Note and further acknowledges that the amount and due dates of the obligations under the FCP Note set forth in the Recitals are correct, and that in the absence of payment by MKA, he is and continues to be obligated to immediately pay all amounts due under the FCP Note.

3. Extension of Payment Due Dates. In the absence of the occurrence of an Event of Default (as defined in the FCP Note), payments under the FCP Note shall be due and payable as follows:

| <u>Original Due Date</u> | <u>New Due Date</u> | <u>Amount</u> |
|--------------------------|---------------------|---------------|
| October 31, 2007 | March 31, 2008 | \$1,800,000 |
| December 31, 2007 | March 31, 2008 | \$2,700,000 |
| March 31, 2008 | March 31, 2008 | \$2,600,000 |

In addition, accrued and unpaid interest from December 2007 through March 2008 in the amount of \$284,000 shall be due and payable on March 31, 2008.

4. Reporting. Until all amounts due to FCP under the FCP Note are paid in full, MKA shall, and Manager and Guarantor shall cause MKA to furnish to FCP:

- (a) On or before the last day of each month, a balance sheet, statement of income (or loss), and cash flow statement for MKA for the prior month, prepared in accordance with Generally Accepted Accounting Principles;
- (b) On or before Wednesday of each week, a report in a form reasonably satisfactory to FCP summarizing all cash receipts during the prior week, including without limitation, payments received by MKA on account of loans and investments from or with third parties; and
- (c) On or before the last day of each month, a report in a form reasonably satisfactory to FCP, summarizing as of the last day of the prior month each outstanding note receivable held by MKA, including the name of the borrower, the amount outstanding, a description of the collateral, the amount of all other known claims against the collateral (and the priority thereof), the most recent valuation of the collateral (including the date and source of the valuation); and
- (d) Such other financial information and reports as FCP may reasonably request from time to time.

5. Negative Covenants. Without the prior written consent of FCP, until all amounts due to FCP are paid in full, MKA shall not:

- (a) Make or contract to make capital expenditures, including leasehold improvements, or incur liability for rentals of property (including both real and personal property);
- (b) Create, incur or assume additional indebtedness except for trade debt incurred in the normal course of business and indebtedness to FCP contemplated by this Agreement;
- (c) Cease operations, liquidate, merge, transfer, acquire or consolidate with any other entity, change ownership, dissolve or transfer or sell assets out of the ordinary course of business,
- (d) Declare or make any dividend payment or other distribution of assets, property, cash, rights, obligations, or securities on account of any equity interests in MKA, or purchase, redeem, retire or otherwise acquire for value any equity interest in MKA, including without limitation, make any "Tier 1" or "Tier 2" distributions to holders of interests in MKA;
- (e) Loan, invest in or advance money or assets, purchase, create or acquire any interest in any other enterprise or entity, or incur any obligation as surety or guarantor;
- (f) Except for reimbursements to Manager of out of pocket expenses incurred in the ordinary course of business, make any payments to MKA Offshore or any affiliate of MKA, Manager or Guarantor; or
- (g) Make any payments outside of the ordinary course of business of MKA other than (i) payments to Gottex Fund Management, Limited, as agent for the benefit of Gottex ABI Master Fund Limited, Gottex ABL (Cayman) Limited, GVA ABL Portfolio Limited, Hudson ABL Fund Limited (collectively, the "Gottex Funds"), on account of notes outstanding as of the date hereof.

6. MKA, Manager and Guarantor Representations and Warranties. MKA, Manager, and Guarantor represent and warrant to FCP as of the Effective Date:

- (a) Each of MKA, the Manager and Guarantor, and the persons signing on behalf of each of them, has full power and authority to execute this Agreement and perform its obligations hereunder;
- (b) The execution, delivery and performance of this Agreement by MKA, Manager and Guarantor have been fully and validly authorized; and all requisite corporate or other action has been taken by MKA, Manager, and Guarantor to make this Agreement valid and binding upon MKA, Manager and Guarantor and enforceable in accordance with its terms; and
- (c) All financial information provided to FCP (including without limitation all financial statements provided pursuant to paragraph 5, above) is true and correct in all respects as of the date provided to FCP.

7. Guarantor Financial Statement. On or before March 4, 2008, Guarantor shall provide FCP with a financial statement setting forth his assets and liabilities, as of December 31, 2007, along with a statement of any material changes since that date.

8. Effective Date. This Agreement shall become effective on the date (the "Effective Date") on which each of MKA, Manager and Guarantor has properly executed and delivered to FCP this Agreement.

9. Assignment of FCP Note Upon Payment in Full. Upon or following payment in full of the FCP Note, at the request of MKA, FCP shall cause any holder of the FCP Note, at no cost to FCP or any such holder, to take any and all steps reasonably necessary to assign the FCP Note to a third party identified by MKA, including, without limitation, delivering such documents as are reasonably necessary or appropriate to effect such assignment of the FCP Note, provided however, that such assignment shall be on an as is, where is basis and without recourse to FCP, and FCP shall not incur any liability in connection with such assignment, or be required to make any representations or warranties (other than customary warranties of due authorization and no encumbrance of title to such note) to any assignee, MKA, or any other third party in connection with such assignment.

10. Fees and Expenses. MKA agrees to pay FCP on demand, and Guarantor acknowledges that his guarantee includes the obligation to pay to FCP, all fees and expenses, including, without limitation, reasonable attorneys' fees and disbursements incurred by FCP (a) in all efforts made to enforce payment of any of the obligations under the FCP Note, the FCP Security Agreement, this Agreement, or any other instrument or agreement between MKA and FCP, or (b) in connection with the modification, amendment, administration and enforcement of the obligations under the FCP Note, the FCP Security Agreement, this Agreement, or any instrument or agreement between MKA and FCP, or (c) in any dispute relating to the interpretation, enforcement or performance of the FCP Note, the FCP Security Agreement, this Agreement, or any instrument or agreement between MKA and FCP, in any event whether through judicial proceedings, including bankruptcy, or otherwise.

11. Release by MKA, Manager, and Guarantors. In consideration for FCP's agreement to enter into this Agreement, each of MKA, Manager and Guarantor (each, a "Releasor") releases and forever discharges FCP and Freestone Investments, LLC, their predecessors and successors in interest, and their respective directors, officers, employees, representatives and agents from any and all claims, damages, liabilities, obligations, actions and causes of action, whether sounding in tort, contract, equity or otherwise, whether known or unknown, whether suspected or unsuspected, and whether arising directly in favor of the Releasor, or by way of assignment, subrogation, or indemnification held by the Releasor, and all of the foregoing as may have arisen from any act, failure to act, event or state of facts occurring on or prior to the Effective Date.

12. Section 1542 Waiver. Releasors waive and relinquish, to the fullest extent that the law permits, the provisions, rights, and benefits of California Civil Code § 1542 and other statutes or common law principles of similar effect. Releasors acknowledge that they are familiar with, and/or have been advised by their legal counsel of, the provisions of California Civil Code § 1542, which provides as follows:

[Certain claims not affected by general release.] A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

13. Acknowledgment and Consideration. MKA and Guarantors hereby acknowledge and warrant that the forbearance and extension of the maturity date by FCP hereunder constitutes fair, adequate and contemporaneous exchange of consideration for the performance of their promises pursuant to the terms of this Agreement.

14. No Waiver; Remedies Cumulative. No failure by FCP to exercise, and no delay in exercising, any right, power or remedy under the FCP Note, the FCP Security Agreement, this Agreement or any related document shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or remedy under the FCP Note, the FCP Security Agreement, this Agreement or any related document preclude any other or further exercise thereof or the exercise of any other right, power, or remedy. The rights and remedies provided herein and therein are cumulative and not exclusive of any right or remedy provided by law.

15. Entire Agreement; Amendment. Except as otherwise stated, this Agreement supersedes any prior arrangements and includes all understandings of the parties with regard to the extension of new credit and forbearance from collection of any obligations or the enforcement of the FCP Note or the FCP Security Agreement. Any and all changes to this Agreement must be in writing and signed by all the parties. The parties agree to execute properly and promptly and to deliver any additional documents, and to do all reasonable things that may be necessary or appropriate to render this Agreement legally and practically effective.

16. Counterparts. This Agreement or the signature pages hereto may be executed in any number of counterparts for the convenience of the parties, all of which, when taken together and after execution by all parties hereto, shall constitute one and the same agreement.

17. Independent Legal Advice. Each of MKA, Manager and Guarantors has had the opportunity to seek advice of independent legal counsel of his or its choice in connection with this Agreement, and the agreements and transactions contemplated herein.

18. No Representations or Warranties by FCP. Except as expressly set forth herein, FCP makes no representations, warranties, promises, or commitments to loan money, extend credit, or forbear from enforcing repayment in connection with any of the documents or transactions contemplated hereunder. Each of MKA, Manager and Guarantor acknowledges that he or it has received the following notice:

ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT, OR TO FORBEAR FROM ENFORCING REPAYMENT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.

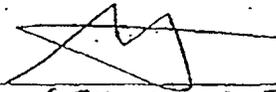
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IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

FREESTONE CAPITAL PARTNERS L.P.
By Freestone Investments, LLC

By: _____
Name:
Title:

MKA REAL ESTATE OPPORTUNITY FUND I, LLC
By MKA Capital Group Advisors, LLC

By: 
Name: GREGORIO COMINO
Title: PRESIDENT

MKA CAPITAL GROUP ADVISORS, LLC

By: _____
Name:
Title:

MICHAEL A. ABRAHAM

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

FREESTONE CAPITAL PARTNERS L.P.
By Freestone Investments, LLC

By: _____
Name:
Title:

MKA REAL ESTATE OPPORTUNITY FUND I, LLC
By MKA Capital Group Advisors, LLC

By: _____
Name:
Title:

MKA CAPITAL GROUP ADVISORS, LLC

By: Michael A. Abraham
Name: MICHAEL ABRAHAM
Title: CHAIRMAN OF THE BOARD

Michael A. Abraham
MICHAEL A. ABRAHAM

FIRST AMENDMENT TO
NOTE EXTENSION AGREEMENT (FLVQP)

THIS FIRST AMENDMENT TO NOTE EXTENSION AGREEMENT (FLVQP) ("First Amendment") is entered into as of March 29, 2008, by and among FREESTONE LOW VOLATILITY QUALIFIED PARTNERS L.P. ("FLVQP"), MKA REAL ESTATE OPPORTUNITY FUND I, LLC, a California limited liability company ("MKA"), MKA Capital Group Advisors, LLC ("Manager"), MICHAEL A. ABRAHAM, an individual ("Abraham") and JASON SUGARMAN ("Sugarman").

RECITALS

A. FLVQP, MKA, Manager, Abraham and Sugarman are parties to that certain Note Extension Agreement (FLVQP) dated as of February 21, 2008 (the "Note Extension Agreement (FLVQP)") pursuant to which FLVQP, subject to the terms and conditions contained therein, agreed to extend the dates on which principal and interest are due and payable under the FLVQP Notes. Unless otherwise defined herein, capitalized terms shall have the meanings ascribed to them in the Note Extension Agreement (FLVQP).

B. MKA, Manager, Abraham and Sugarman have requested that FLVQP further extend the dates on which principal and interest are due and payable under the FLVQP Notes.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, receipt of which is hereby acknowledged, and for the mutual benefits and covenants as set forth herein, the parties agree as follows:

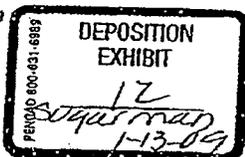
1. Amendment to Note Extension Agreement (FLVQP). Paragraph 3 of the Note Extension Agreement (FLVQP) is deleted in its entirety and replaced with the following:

3. Extension of Payment Due Dates. In the absence of the occurrence of an Event of Default (as defined in the FLVQP Notes), payments under the FLVQP Notes shall be due and payable as follows:

| | <u>Original Due Date</u> | <u>New Due Date</u> | <u>Amount</u> |
|----------------------------|--------------------------|---------------------|---------------|
| October 2006 FLVQP Note | February 28, 2008 | April 30, 2008 | \$2,000,000 |
| April 2007 FLVQP Note | January 31, 2008 | April 30, 2008 | \$3,000,000 |

In addition, accrued and unpaid interest from December 2007 through April 2008 in the amount of \$250,000 shall be due and payable on April 30, 2008.

2. No Further Amendment. Except as expressly modified by this First Amendment, the Note Extension Agreement (FLVQP) shall remain unmodified and in full force and effect



and the parties hereby ratify their respective obligations thereunder. MKA, Manager, Abraham and Sugarman acknowledges and agree that the execution and delivery by FLVQP of this First Amendment shall not be deemed to create a course of dealing or otherwise obligate FLVQP to forbear or execute similar amendments under the same or similar circumstances in the future.

3. Entire Agreement. This First Amendment comprises the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior oral or written agreements, representations or commitments.

4. Counterparts. This First Amendment may be executed in any number of counterparts and by facsimile or electronic transmission for the convenience of the parties, all of which, when taken together and after execution by all parties hereto, shall constitute one and the same agreement.

5. Governing Law. This First Amendment and the rights and obligations of the parties hereto shall be construed and interpreted in accordance with the laws of the State of Washington, excluding its conflicts of law provisions.

ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT, OR TO FORBEAR FROM ENFORCING REPAYMENT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.

[Remainder of Page Intentionally Left Blank]

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

FREESTONE LOW VOLATILITY QUALIFIED
PARTNERS, L.P.
By Freestone Investments, LLC

By: 
Name: Ken Migost
Title: Member, Freestone Investments LLC

MKA REAL ESTATE OPPORTUNITY FUND I, LLC
By MKA Capital Group Advisors, LLC

By: _____
Name: _____
Title: _____

By MKA CAPITAL GROUP ADVISORS, LLC

By: _____
Name: _____
Title: _____

MICHAEL A. ABRAHAM

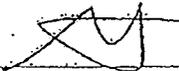
JASON SUGARMAN

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

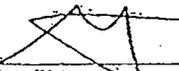
FREESTONE LOW VOLATILITY QUALIFIED
PARTNERS L.P.
By Freestone Investments, LLC

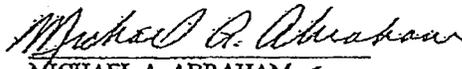
By: _____
Name:
Title:

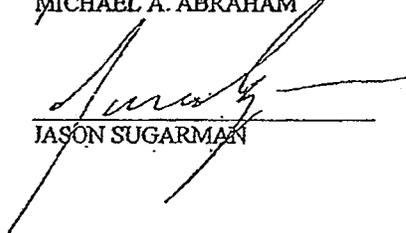
MKA REAL ESTATE OPPORTUNITY FUND I, LLC
By MKA Capital Group Advisors, LLC

By:  _____
Gregory Contillo
President

By MKA CAPITAL GROUP ADVISORS, LLC

By:  _____
Gregory Contillo
President


MICHAEL A. ABRAHAM


JASON SUGARMAN

SECURITY AGREEMENT

THIS SECURITY AGREEMENT (this "Agreement") is made and entered into as of April 2, 2007, by and between MKA REAL ESTATE OPPORTUNITY FUND I, LLC, a California limited liability company having its principal place of business at 26 Corporate Plaza Drive Suite 250 Newport Beach, CA 92660 (the "Debtor"), and Freestone Low Volatility Qualified Partners LP having its principal place of business at 1191 Second Avenue, Suite 2100, Seattle, Washington 98101 (the "Lender").

The Debtor and the Lender hereby agree as follows:

I. DEFINITIONS.

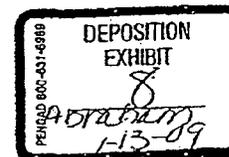
Each reference herein to:

- (a) "Accounts," "chattel paper," "documents," "equipment," "financial assets," "fixtures," "general intangibles," "goods," "instruments," "investment property," "equipment," "cash," "deposit accounts," "proceeds," "securities," and "securities accounts," shall have the meaning assigned to each in the Uniform Commercial Code (the "UCC") from time to time in effect in the State (as defined below).
- (b) "Books and records" shall mean all books, correspondence, credit files, records and other documents relating directly or indirectly to the Obligations and the Collateral, including, without limitation, all tapes, cards, runs, data bases, software programs, diskettes, and other papers and documents in the possession or control of the Debtor, any computer service bureau, or other agent or independent contractor.
- (c) "Note" shall mean the Secured Promissory Note issued by the Debtor in favor of the Lender and dated April 2, 2007.
- (d) "Obligations" shall mean all indebtedness and liabilities evidenced by the Note.
- (e) "Person" shall mean an individual, a corporation, a government or governmental subdivision or agency, business trust, estate, trust, partnership or association, limited liability company, two or more persons having a joint or common interest, or any other legal or commercial entity.
- (f) "State" shall mean the State of Washington.

II. GRANT OF SECURITY INTEREST.

Security Interest; Collateral; Obligations. The Debtor hereby grants to the Lender a security interest in and agrees and acknowledges that the Lender has and will continue

NY01/GARRJ/997417 2



to have a security interest in and lien on all property and assets of the Debtor of every kind and nature, wherever located, now owned or hereafter acquired or arising, and all products and proceeds thereof, including, without limitation, all goods, accounts including without limitation all accounts receivable, all deposit accounts and all securities accounts, contract rights, rights to the payment of money including tax refund claims, insurance proceeds and tort claims, cash, chattel paper, documents, financial assets, instruments, general intangibles, securities, patents, trademarks, trade names, copyrights, service marks, applications for patents, trademarks, copyrights and service marks, books and records, furniture, fixtures, equipment, inventory, investment property and all other capital assets (all such properties, assets and rights hereinafter called, collectively, the "Collateral")

III. REPRESENTATIONS, WARRANTIES AND COVENANTS.

Debtor hereby represents, warrants, covenants and agrees that:

1. **Organization and Powers.** The Debtor is duly organized, validly existing and in good standing under the laws of the state of California. The Debtor has the power and authority to own its properties and to carry on its business as now being conducted and is qualified to do business in every jurisdiction where such qualification is necessary. The Debtor has the power to execute and perform this Agreement and to grant the security interests in the Collateral to the Lender. The execution and performance by the Debtor of the terms and provisions of this Agreement have been duly authorized by all requisite action.
2. **Location of Principal Executive Office.** The Debtor represents to the Lender that the location of the Debtor's principal executive office and the location where the books and records of the Debtor are kept is 26 Corporate Plaza Drive Suite 250 Newport Beach, CA 92660. The Debtor agrees that it will not change its name, the location of its principal executive office or the location where its books and records are kept without prior written notice to Lender and will advise the Lender as to any change in the location (except for temporary changes in the normal and customary use thereof) for any property comprising a part of the Collateral at least thirty (30) days prior to such change.
3. **Preservation of Collateral.** If an Event of Default under the Note has occurred and is continuing, the Lender may, at its election, discharge taxes and liens levied or placed on the Collateral, pay for insurance on the Collateral and pay for the maintenance and preservation of the Collateral. The Debtor agrees to reimburse the Lender on demand for any payment made, or any expense incurred by the Lender pursuant to the foregoing authorization, and in any event all such payments and expenses shall constitute an Obligation hereunder.
4. **Possession and Use.** Until an Event of Default, the Debtor may have possession of the Collateral, provided that the Debtor will not use the Collateral in any unlawful manner or in a manner inconsistent with this Agreement.
5. **Power of Attorney.** In the Event of Default, the Debtor irrevocably designates and appoints the Lender, its true and lawful attorneys with full power of substitution, and revocation to execute, deliver, and record in the name of the Debtor all financing statements, amendments, continuation statements, title certificate lien applications and other documents

deemed by the Lender to be necessary or advisable to perfect or to continue the perfection of the security interests granted hereunder.

6. **Assignments or Liens.** The Debtor will not create or permit to be created any lien, encumbrance or security interest of any kind on any of the Collateral other than for the benefit of the Lender, nor grant or permit to be granted any guaranty other than for the benefit of the Lender, except in connection with (i) loans obtained by Debtor which do not result in Debtor's outstanding debt being in an amount greater than twenty five percent (25%) of Debtor's total debt and equity capital, as shown on Debtor's most recent financial statements, or (ii) debt expressly subordinate to the Note. Nothing contained herein shall be deemed to restrict Debtor's right to grant participations in its assets to co-managed entities.

7. **Remedies.**

Upon an Event of Default (as defined in the Note), the Lender may, subject to the other terms of this Agreement, without notice or demand declare this Agreement to be in default, and thereafter, to the fullest extent permitted by applicable law:

- (a) The Lender shall have, in addition to all other rights and remedies given it by any instrument or other agreement evidencing, or executed and delivered in connection with, any of the Obligations and otherwise allowed by law, the rights and remedies of a secured party under the Uniform Commercial Code as enacted in any jurisdiction in which the Collateral may be located, and without limiting the generality of the foregoing, the Lender may, without (to the fullest extent permitted by law) demand of performance or advertisement or notice of intention to sell or of time or place of sale or of redemption or other notice or demand whatsoever (except that the Lender shall give the Debtor at least ten days' notice of the time and place of any proposed sale or other disposition), all of which are hereby expressly waived to the fullest extent permitted by law, sell at public or private sale or otherwise realize upon, at such place as shall be determined by the Lender, the whole or from time to time any part of the Collateral in or upon which the Lender shall have a security interest or lien hereunder, or any interest which the Debtor may have therein, and after deducting from the proceeds of sale or other disposition of the Collateral all expenses (including all reasonable expenses for legal services) shall apply the residue of such proceeds toward the payment of the Obligations, the Debtor remaining liable for any deficiency remaining unpaid after such application. If notice of any sale or other disposition is required by law to be given to the Debtor, the Debtor hereby agrees that a notice given as provided herein shall be reasonable notice of such sale or other disposition. The Debtor also agrees to assemble the Collateral at such place or places as the Lender reasonably designates by written notice. At such sale or other disposition the Lender may, and any other

person or entity owed any Obligation may itself, purchase the whole or any part of the Collateral sold, free from any right of redemption on the part of the Debtor, which right is hereby waived and released to the fullest extent permitted by law.

- (b) Furthermore, without limiting the generality of any of the rights and remedies conferred upon the Lender under this Section 8, the Lender to the fullest extent permitted by law, may enter upon the premises of the Debtor, exclude the Debtor therefrom and take immediate possession of the Collateral, either personally or by means of a receiver appointed by a court therefor, using all necessary force to do so, and may, at their option, use, operate, manage and control the Collateral in any lawful manner and may collect and receive all income, revenue, earnings, issues and profits therefrom, and may maintain, repair, renovate, alter or remove the Collateral as the Lender may determine in its discretion, and any such moneys so collected or received by the Lender shall be applied to, or may be accumulated for application upon, the Obligations in accordance with this Agreement.
- (c) The Lender agrees that it will give notice to the Debtor of any enforcement action taken by them pursuant to this Section 8 promptly after commencing such action.

IV. MISCELLANEOUS.

1. **Fees and Expenses.** Any and all reasonable fees, costs and expenses, of whatever kind or nature, including reasonable attorneys' fees and legal expenses and other reasonable professional fees and expenses incurred by the Lender, in connection with the payment or discharge of any taxes, liens, security interests or encumbrances, insurance premiums, or otherwise protecting, maintaining or preserving the Collateral, the release or partial release of Collateral from the security interest of this Agreement, in attempting to collect the Obligations, or the enforcing, foreclosing, retaking, holding, storing, processing, selling or otherwise realizing upon the Collateral and the Lender's security interest therein, whether through judicial proceedings or otherwise, or in defending or prosecuting any actions or proceedings arising out of or related to the transaction to which this Agreement relates, shall be deemed Obligations hereunder and shall be borne and paid by the Debtor on demand to the Lender.

2. **Waiver.** No failure to exercise, or delay in exercising, on the part of the Lender, any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or privilege hereunder or thereunder preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

3. **Choice of Law; Unenforceability.** This Agreement shall be construed in accordance with and governed by the local laws (excluding the conflict of laws rules, so-called) of the State. The provisions of this Agreement are severable, and if any clause or provision shall

be held invalid or unenforceable in whole or in part in any jurisdiction, then such invalidity or unenforceability shall affect only such clause or provision, or part thereof, in such jurisdiction and shall not in any manner affect such clause or provision in any other jurisdiction, or any other clause or provision of this Agreement in any jurisdiction.

4. **Modification.** This Agreement is subject to modification only by a writing signed by the Lender and the Debtor.

5. **Successors and Assigns.** The benefits and burdens of this Agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the Debtor and Lender; provided, however, that the rights and obligations of the Debtor under this Agreement shall not be assigned or delegated without the prior written consent of the Lender, and any purported assignment or delegation without such consent shall be void.

6. **Jurisdiction and Venue.** The Debtor hereby irrevocably consents that any legal action or proceeding against it or any of its property with respect to any matter arising under or relating to this Agreement may be brought in any court of the State, or any Federal Court of the United States of America located in the State, as the Lender may elect, and by execution and delivery of this Agreement the Debtor hereby submits to and accepts with regard to any such action or proceeding, for itself and in respect of its property, generally and unconditionally, the jurisdiction of the aforesaid courts. The Debtor further irrevocably consents to the service of process in any such action or proceeding by the mailing of copies thereof by registered or certified mail, postage prepaid, to the Debtor at its address set forth herein. The foregoing, however, shall not limit the Lender's rights to serve process in any other manner permitted by law or to bring any legal action or proceeding or to obtain execution of judgment in any other jurisdiction.

7. **Notices.** Except as otherwise specifically provided for herein, any notice, demand or communication hereunder shall be given in writing (including facsimile transmission or telex) and mailed or delivered to each party at its address set forth below, or, as to each party, at such other address as shall be designated by such party by a prior notice to the other party in accordance with the terms of this provision. Any notice to a Lender shall be sent as follows:

Freestone Low Volatility Qualified Partners L.P.
1191 Second Avenue, Suite 2100
Seattle, Washington 98101
Attention: Arthur Goldman
Telephone: (206) 398-1100
Telecopy: (206) 398-0310

with a copy to

Finn Dixon & Herling LLP
177 Broad Street, 15th Floor
Stamford, CT 06901
Attention: Matthew S. Eisenberg
Telephone (203) 325-5084
Telecopy 203) 325-5001

Any notice to the Debtor shall be sent as follows:

MKA Capital Group Inc.
26 Corporate Plaza Drive Suite 250
Newport Beach, CA 92660
Attention: Jason Sugarman
Telephone: (949) 729-1660
Telecopy: (949) 729-1665

All notices hereunder shall be effective (i) five (5) business days after such notice is mailed, by registered or certified mail, postage prepaid (return receipt requested), (ii) upon delivery by hand, and (iii) in the case of any notice or communication by telex, telex or telecopy, on the date when sent.

8. **Counterparts.** This Agreement may be executed by the parties hereto individually or in any combination, in one or more counterparts, each of which shall be an original and all of which shall together constitute one and the same agreement.

9. **Descriptive Headings; Context.** The captions in this Agreement are for convenience of reference only and shall not define or limit any provision. Whenever the context requires, reference in this Agreement to the neuter gender shall include the masculine and/or feminine gender, and the singular number shall include the plural, and, in each case, vice versa.

IN WITNESS WHEREOF, the Debtor and the Lender have executed the foregoing Security Agreement as of the 2nd day of April, 2007.

DEBTOR

MKA REAL ESTATE OPPORTUNITY FUND I, LLC
By: MKA Capital Group Inc., manager

By: *Michael Abraham*
Name: Michael Abraham
Title: CEO

LENDER

FREESTONE LOW VOLATILITY QUALIFIED
PARTNERS L.P.
By: Freestone Investments LLC, its General Partner

By: _____
Name: Gary I. Furukawa
Title: Manager

SUBORDINATION AGREEMENT

This Subordination Agreement (the "Agreement") is made and entered into on this 20th day of February, 2007, among Freestone Capital Partners L.P., Freestone Capital Qualified Partners L.P., Freestone Low Volatility Partners LP, Freestone Low Volatility Qualified Partners LP (collectively, the "Creditor"); Gottex Fund Management Ltd., as administrative agent (the "Administrative Agent") to GVA ABL Portfolio Limited, Gottex ABL (Cayman) Limited (collectively, the "Original Noteholders") and Gottex ABI Master Fund Limited (the "New Noteholder" and collectively with the Original Noteholders, the "Noteholders") and MKA Real Estate Opportunity Fund I, LLC, a California limited liability company (together with its successors and assigns, "Borrower").

WHEREAS, each of the Original Noteholders purchased one or more secured registered promissory notes in an aggregate principal amount of \$60,000,000; and

WHEREAS, it is a condition precedent to the New Noteholder agreeing to purchase a secured promissory note from Borrower (the "New Note") that Creditor enter into this Agreement.

NOW, THEREFORE, to induce the New Noteholder to purchase the New Note, and for other valuable consideration, receipt of which is hereby acknowledged, the parties to this Agreement, intending to be legally bound hereby, agree as follows:

1. All obligations of Borrower, howsoever created, arising or evidenced, whether as principal obligor, guarantor, surety, accommodation party, or otherwise, direct or indirect, absolute or contingent or now or hereafter existing or due or to become due are hereinafter called "Liabilities." "Senior Liabilities" means all Liabilities to the Noteholders, the aggregate principal amount of which shall not exceed \$135,000,000, including, but not limited to (i) those Liabilities arising pursuant to or in connection with each secured registered promissory note purchased by a Noteholder from Borrower from time to time (collectively, the "Notes"), and all documents required to be executed or delivered pursuant thereto or in connection therewith (collectively with the Notes, the "Facility Documents") and (ii) any and all interest accruing on any of the Senior Liabilities after the commencement of any proceedings referred to in paragraph 3 hereof, notwithstanding any provision or rule of law which might restrict or otherwise impair the rights of the Noteholders, as against Borrower or anyone else, to collect such interest. "Junior Liabilities" means all Liabilities to the Creditor now and hereafter existing. Each of Creditor and Borrower agree that, to the extent and manner hereinafter set forth, the repayment to Creditor of all or any portion of the Junior Liabilities is, and shall at all times be, subordinate to the prior indefeasible payment in full of all of the Senior Liabilities. For purposes of this Agreement, the Senior Liabilities shall not be deemed to have been paid in full until the Noteholders shall have been indefeasibly paid in full by Borrower in United States dollars.

2. The payment of principal of (and premium, if any) and interest and other payment obligations in respect of the Junior Liabilities shall be subordinate to the prior payment in full of the Senior Liabilities to the extent that no payments of principal of (or premium, if any)

or interest on, or otherwise due in respect of such Junior Liabilities, may be permitted for so long as any default on the Senior Liabilities exists.

3. In the event of any dissolution, winding up, liquidation, readjustment, reorganization or other similar proceedings relating to Borrower or to its creditors, as such, or to its property (whether voluntary or involuntary, partial or complete, and whether in bankruptcy, insolvency, or receivership, or upon an assignment for the benefit of creditors, or any other marshalling of the assets and liabilities of Borrower, or any sale of all or substantially all of the assets of Borrower, or otherwise), the Senior Liabilities shall first be indefeasibly paid in full before Creditor shall be entitled to receive and to retain any payment or distribution in respect of the Junior Liabilities (other than membership interests of Borrower as reorganized or readjusted, or debt securities of Borrower or any other entity provided for by a plan of reorganization or adjustment, which securities are subordinated to the payment of the Senior Liabilities and securities received in lieu thereof which may at the time be outstanding (collectively, the "Permitted Securities"), and, in order to effect the foregoing (a) all payments and distributions of any kind or character in respect of the Junior Liabilities (other than Permitted Securities) to which Creditor would be entitled if the Junior Liabilities were not subordinated, or subordinated and pledged or assigned, pursuant to this Agreement shall be made directly to the Noteholders, (b) Creditor shall promptly file a claim or claims, in the form required in such proceedings, for the full outstanding amount of the Junior Liabilities, and shall cause said claim or claims to be approved and all payments and other distributions in respect thereof other than Permitted Securities to be made directly to the Noteholders, and (c) Creditor hereby irrevocably agrees that the Noteholders may, at its sole discretion, in the name of Creditor or otherwise, demand, sue for, collect and receive any and all such payments or distributions (other than with respect to any Permitted Securities).

4. Notwithstanding anything herein to the contrary, Creditor will forbear any action against Borrower for the collection or payment of the Junior Liabilities until such time as the Senior Liabilities have been fully and indefeasibly paid, satisfied and discharged.

5. If, after an Event of Default (as defined in the Notes) has been declared by a Noteholder, all applicable cure periods with respect to the relevant Event of Default have expired and Creditor has been notified of such declaration, Creditor receives any payment or other distribution of any kind or character from Borrower or any other source whatsoever in respect of any of the Junior Liabilities, other than as expressly permitted by the terms of this Agreement, such payment or other distribution shall be received in trust for the Noteholders and promptly turned over by Creditor to the Administrative Agent, together with all necessary and appropriate endorsements thereto. Creditor will mark its books and records, and cause Borrower to mark its books and records, so as to clearly indicate that the Junior Liabilities are subordinated in accordance with the terms of this Agreement, and will cause any promissory note or other instrument which at any time evidences any of the Junior Liabilities to be conspicuously marked as follows:

This instrument is subject to the terms of a Subordination Agreement by and among Freestone Capital Partners L.P., Freestone Capital Qualified Partners L.P., Freestone Low Volatility Partners LP, Freestone Low Volatility Qualified Partners LP, Gottex Fund Management Ltd., and MKA

Real Estate Opportunity Fund I, LLC. Notwithstanding any contrary statement contained in this instrument, no payment on account of principal or interest thereof shall be received by the holder except in accordance with the terms of such Subordination Agreement.

Creditor will execute such further documents or instruments and take such further action as the Noteholders may reasonably request from time-to-time in order to carry out the intent of this Agreement.

6. Creditor shall not, without the prior written consent of the Noteholders, exercise any rights of Creditor as a secured party, with respect to the enforcement of its rights as a secured party, until all of the obligations to the Noteholders have been satisfied in full. Creditor hereby subordinates any and all security interests which Creditor now has or hereafter acquires in any assets of MKA, to the security interests of the Administrative Agent, as agent to the Noteholders, which the Administrative Agent now has or hereafter acquires, in any and all of the assets of MKA (the "Collateral"). The subordination and priorities specified herein are applicable irrespective of the time or order of attachment or perfection of the security interests referred to herein and the time or order of filing of financing statements. The Administrative Agent's claim, on behalf of the Noteholders, to proceeds realized or received by MKA from the sale, collection, liquidation or other disposition of Collateral shall have priority over Creditor's claim to such proceeds. Any proceeds received by Creditor with respect to the enforcement of its security interest in contravention of this Agreement shall be deemed to have been collected or received by Creditor as trustee for the Noteholders and shall be paid over to the Administrative Agent, on behalf of the Noteholders, on account of the obligations due and owing by Borrower to the Noteholders. Creditor agrees not to permit any of the terms of the Junior Liabilities to be changed in a manner adverse to the Noteholders' interest under this Agreement, without the prior written consent of the Noteholders. The parties hereby agree that if a Noteholder declares an Event of Default (as defined in the Notes) under any Note, Freestone shall have the right to declare an event of default, default, or the like, under its loan agreement, or the like, with MKA.

7. Creditor agrees not to assign or transfer the Junior Liabilities without (a) prior notice to the Noteholders, and (b) written agreement by the assignee or transferee to be bound by the terms of this Subordination Agreement.

8. This Agreement shall in all respects be a continuing agreement and shall remain in full force and effect until the Senior Liabilities shall have been indefeasibly paid in full.

9. The Noteholders may, from time-to-time, whether before or after any discontinuance of this Agreement, at its sole discretion and without notice to Creditor, take any or all of the following actions: (a) retain or obtain a security interest in any property of Borrower to secure any of the Senior Liabilities, (b) extend or renew for one or more periods (whether or not longer than the original period), alter or exchange any of the Senior Liabilities, or release or compromise any obligation of any nature of any obligor with respect to any of the Senior Liabilities, and (c) release its security interest in, or surrender, release or permit any substitution or exchange for, all or any part of any property securing any of the Senior Liabilities, or extend or renew for one or more periods (whether or not longer than the original period) or release,

compromise, alter or exchange any obligations of any nature of any obligor with respect to any such property.

10. The Noteholders may, from time-to-time, whether before or after any discontinuance of this Agreement, assign or transfer any or all of the Senior Liabilities or any interest therein; and, notwithstanding any such assignment or transfer thereof, such Senior Liabilities shall be and remain Senior Liabilities for the purposes of this Agreement, and every immediate and successive assignee or transferee of any of the Senior Liabilities or of any interest therein shall, to the extent of the interest of such assignee or transferee in the Senior Liabilities, be entitled to the benefits of this Agreement to the same extent as if such assignee or transferee were the Noteholders; provided, however, that, unless the Noteholders shall otherwise consent in writing, the Noteholders shall have an unimpaired right, prior and superior to that of any such assignee or transferee, to enforce this Agreement, for the benefit of the Noteholders, as to those of the Senior Liabilities which the Noteholders has not assigned or transferred. The parties hereby agree that any assignee or transferee of all or any portion of the Senior Liabilities, or any interest therein, shall be, irrevocably, third party beneficiaries of this Agreement. For the avoidance of doubt, Gottex shall notify Creditor prior to making any such transfer or assignment, as the case may be.

11. The Noteholders shall not be prejudiced in its right under this Agreement by any act or failure to act of Borrower or Creditor, or any noncompliance of Borrower or Creditor with any agreement or obligation, regardless of any knowledge thereof which the Noteholders may have or with which the Noteholders may be charged; and no action of the Noteholders permitted hereunder shall in any way affect or impair the rights of the Noteholders and the obligations of Creditor under this Agreement.

12. No delay on the part of the Noteholders in the exercise of any right or remedy shall preclude other or further exercise thereof or the exercise of any other right or remedy; nor shall any modification or waiver of any of the provisions of this Agreement be binding upon the Noteholders except as expressly set forth in a writing duly signed and delivered on behalf of the Noteholders.

13. The provisions of this Agreement are solely for the purposes of defining the relative rights of the holder of Junior Liabilities and the holders of Senior Liabilities. Nothing contained in this Agreement is intended to or shall impair, as between Borrower and the holder of the Junior Liabilities, the obligation of Borrower to pay the Junior Liabilities as and when the same shall become due and payable in accordance with their terms, nor shall anything herein prevent the holder of the Junior Liabilities from exercising all remedies otherwise permitted by applicable law or under or with respect to the Junior Liabilities upon default, subject to the restrictions set forth in this Agreement and the rights, if any, under this Agreement of the holders of Senior Liabilities in respect of cash, property, or securities (other than Permitted Securities) of Borrower received upon the exercise of any such remedy.

14. This Agreement shall be binding upon Creditor and upon its personal representatives, successors and assigns.

15. This Agreement shall be construed in accordance with and governed by the laws of the State of New York (without regard to its conflicts of laws principles). Wherever possible each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be enjoined by or invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

16. Creditor shall provide the Noteholders with written notice of any default by Borrower under the Junior Liabilities contemporaneously with the giving of such notice to Borrower. Upon the declaration of any Event of Default (as defined in the Notes) under a Note, the Administrative Agent shall provide Creditor with prompt written notice of such declaration.

17. Borrower shall indemnify the Administrative Agent, the Noteholders, their respective agents, employees, affiliates, officers and directors (each, an "Indemnitee") against, and hold each Indemnitee harmless from, any and all losses, claims, damages, liabilities and related expenses (including the fees, charges and disbursements of any counsel for any Indemnitee) incurred by any Indemnitee or asserted against any Indemnitee by any third party or by Borrower or any of its affiliates, arising out of, in connection with, or as a result of (i) the execution or delivery of this Agreement, any or any agreement or instrument contemplated hereby or thereby, the performance by the parties hereto of their respective obligations hereunder or thereunder or the consummation of the transactions contemplated hereby or thereby, or (ii) any actual or prospective claim, litigation, investigation or proceeding relating to any of the foregoing, whether based on contract, tort or any other theory, whether brought by a third party or by Borrower or any of its affiliates, and regardless of whether any Indemnitee is a party thereto, provided that such indemnity shall not, as to any Indemnitee, be available to the extent that such losses, claims, damages, liabilities or related expenses (x) are determined by a court of competent jurisdiction by final and nonappealable judgment to have resulted from the gross negligence or willful misconduct of such Indemnitee or (y) result from a claim brought by Borrower or any affiliate thereof against an Indemnitee for breach in bad faith of such Indemnitee's obligations hereunder, if Borrower or such affiliate has obtained a final and nonappealable judgment in its favor on such claim as determined by a court of competent jurisdiction.

18. This Agreement may be signed in counterparts each of which shall be an original and all of which, when taken together, shall constitute one and the same instrument. Delivery of an executed counterpart of a signature page of this Agreement by facsimile shall be effective as delivery of a manually executed counterpart of this Agreement.

19. Each of Gottex and Borrower hereby represent, warrant and covenant that the aggregate principal amount outstanding under the Notes shall not exceed \$135,000,000.

[SIGNATURE PAGE TO FOLLOW]

2nd IN WITNESS WHEREOF, this Subordination Agreement has been entered into as of this
day of February, 2007.

GOTTEX FUND MANAGEMENT LTD.

By: _____
Name:
Title:

MKA REAL ESTATE OPPORTUNITY FUND I,
LLC

BY: MKA CAPITAL GROUP ADVISERS LLC
KS. MORGAN

By: [Signature]
Name: JEFF MONAHAN
Title: CEO

FREESTONE CAPITAL PARTNERS L.P.

By: _____
Name:
Title:

FREESTONE CAPITAL QUALIFIED
PARTNERS L.P.

By: _____
Name:
Title:

FREESTONE LOW VOLATILITY PARTNERS
LP

By: _____
Name:
Title:

FREESTONE LOW VOLATILITY QUALIFIED
PARTNERS LP

By: _____
Name:
Title:

BEST AVAILABLE IMAGE POSSIBLE

IN WITNESS WHEREOF, this Subordination Agreement has been entered into as of this
___ day of February, 2007.

GOTTEX FUND MANAGEMENT LTD.

By: [Signature]
Name: William H. Campbell
Title: Managing Director

MKA REAL ESTATE OPPORTUNITY FUND I,
LLC

By: _____
Name: _____
Title: _____

FREESTONE CAPITAL PARTNERS L.P.

By: _____
Name: _____
Title: _____

FREESTONE CAPITAL QUALIFIED
PARTNERS L.P.

By: _____
Name: _____
Title: _____

FREESTONE LOW VOLATILITY PARTNERS
LP

By: _____
Name: _____
Title: _____

FREESTONE LOW VOLATILITY QUALIFIED
PARTNERS LP

By: _____
Name: _____
Title: _____

IN WITNESS WHEREOF, this Subordination Agreement has been entered into as of this 20th day of February, 2007.

GOTTEX FUND MANAGEMENT LTD.

By: _____
Name:
Title:

MKA REAL ESTATE OPPORTUNITY FUND L
LLC

By: _____
Name:
Title:

FREESTONE CAPITAL PARTNERS L.P.

By: Ken Miyoshi
Name: Ken Miyoshi
Title: Member of the General Partner

FREESTONE CAPITAL QUALIFIED
PARTNERS L.P.

By: Ken Miyoshi
Name: Ken Miyoshi
Title: Member of the General Partner

FREESTONE LOW VOLATILITY PARTNERS
LP

By: Ken Miyoshi
Name: Ken Miyoshi
Title: Member of the General Partner

FREESTONE LOW VOLATILITY QUALIFIED
PARTNERS LP

By: Ken Miyoshi
Name: Ken Miyoshi
Title: Member of the General Partner

California Finance Code § 22100 states:

No person shall engage in the business of a finance lender or broker without obtaining a license from the commissioner.

CERTIFICATE OF SERVICE

I certify and declare that on the 28th day of September 2009, I caused to be served by legal messenger service the foregoing Opening Brief on the following parties at the following addresses:

Ragan Powers
Brad Fisher
Davis Wright Tremaine LLP
1201 Third Ave Ste 2200
Seattle, WA 98101-3045


Averil Rothrock
Averil Rothrock, WSBA #24248