

No. 71114-8-1  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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BLACK DIAMOND DEVELOPMENT COMPANY, LLC, a  
Washington Limited Liability Corporation; LEE WITTENBERG,  
individually and on behalf of his marital community; WAYNE  
COURTNEY, individually and on behalf of his marital community,

Appellants,

v.

UNION BANK, N.A.,

Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE LORI SMITH

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BRIEF OF APPELLANTS BLACK DIAMOND DEVELOPMENT  
COMPANY, LLC; LEE WITTENBERG, individually and on behalf of  
his marital community; AND WAYNE COURTNEY, individually  
and on behalf of his marital community

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## I. INTRODUCTION

Black Diamond Development LLC, Lee Wittenberg, and Wayne Courtney (Appellants) appeal the dismissal of their claim against Union Bank, N.A. (Union Bank) for breach of a construction financing agreement and subsequent award of attorney fees and costs. The trial court's erroneous legal rulings — preventing discovery into relevant issues, failing to provide clarity as to the scope of its orders, and completely foreclosing Appellants' opportunity to pursue their claims — hamstrung Appellants' ability to prosecute their case.

In 2005, the predecessor to Union Bank, Frontier Bank agreed to a comprehensive \$4,000,000 construction financing agreement with Appellants to fund the development of commercial property in Black Diamond, Washington. As with most real estate development projects, the financing was to take place in two stages: a short-term construction loan and a long-term permanent loan (permanent financing). The short-term loan was to finance the actual construction of the project, and the permanent loan was designed to replace or “take out” the short-term borrowing.

Appellants paid a “commitment” fee to secure a permanent loan. Securing a commitment for permanent financing is critical in construction financing for small businesses like Black Diamond

Development because with limited capital, these companies rely on permanent financing to repay funds drawn during construction.

The construction financing agreement was contained in multiple written documents drafted by Frontier Bank. The loan documentation included, among other things, (1) a “commitment letter” explaining when Appellants would receive financing and on what terms, (2) a Construction Loan Agreement governing short-term funding for the proposed development, (3) a promissory note setting forth the terms of payment and default, and (4) a Deed of Trust securing property in favor of Frontier Bank in the event of non-payment. Each document was contemporaneously executed, approved by Frontier Bank, and maintained in bank records.

As it turned out, the loan documents contained errors and the agreement was not administered in good faith (several Frontier Bank executives, including some involved in this case, were eventually sued by the FDIC). Appellants’ agreement was no exception. The permanent loan was triggered by Appellants’ ability to meet a certain “aggregate collected rent” threshold. Once Appellants met this threshold, they requested a “conversion” to permanent financing. Despite Frontier Bank’s written promises that it would “stand by” its original commitment, the “conversion” never came.

By 2010, Union Bank acquired Frontier Bank, and agreed in its deal with the FDIC to “expressly assume” all commitments and unfunded loan obligations. Appellants again requested that their construction financing agreement be converted to a permanent loan. Union Bank did not deny an obligation to do so, nor did they claim Appellants were somehow ineligible for a permanent loan. For roughly the next two years, Appellants made, and Union Bank accepted, interest and principal payments along the previously agreed-to permanent loan terms.

Then, in 2012, Union Bank began contending that Appellants were in default, threatened to foreclose their property, and began charging default interest. Union Bank still continued to accept payments from Appellants based upon the existing agreement. Appellants responded there was no default because they were entitled to a permanent loan conversion. Union Bank belatedly denied such an obligation on the basis that the “threshold” condition for permanent financing had not been met. Union Bank did not claim there was no agreement, rather they changed course and claimed Appellants did not qualify for a permanent loan.

Union Bank moved forward with its default. In the process, Union Bank failed to credit Appellants for payments at least twice

and charged default interest on incorrect principal amounts. Faced with the threat of property foreclosure, Appellants filed a lawsuit in August 2012. Appellants then secured replacement financing for a permanent loan from another lender at greater rates than those promised in writing by Frontier Bank. Appellants paid off Union Bank, reserving the right to challenge the incorrect amounts charged on default and the permanent loan issue.

The trial court granted Union Bank summary judgment and an award of attorney fees and costs. The award was tainted by an erroneous ruling that Union Bank had no obligation to provide permanent financing. The Court went on to implicitly deny a motion to stay pending discovery even though weeks earlier, it ordered Union Bank to produce relevant documents. The Court compounded its errors by inexplicably dismissing Appellants' *separate* claim to recover incorrect amounts charged on default.

On the issue of incorrect amounts charged on default, Union Bank never moved for summary judgment on this claim, and failed to refute evidence that Appellants were overcharged. Appellants' claim was raised in their Complaint, explained in correspondence between counsel, and even investigated by Union Bank in discovery. Since there was no direct motion for summary judgment or oral

argument, why this claim was dismissed is unclear. Appellants filed a motion for clarification, but it was denied. The undisputed evidence raised a triable issue of fact as to whether the amounts charged on default were incorrect regardless of permanent financing.

As to the claim for permanent financing, despite extensive loan documentation, the trial court somehow found there was no “meeting of the minds” without explaining what terms were missing or how they were necessary to the case. The existence of a “meeting of minds” is normally an issue of fact. In Washington, not every term in an agreement must be defined so long as reasonably certain to determine breach and the appropriate remedy. Courts routinely find that the interest rate, amortization, collateral, duration, and amount are sufficiently “material” to meet this standard. Appellants presented evidence that these terms (and others) were part of the parties’ overall financing agreement.

The trial court also rejected Appellants’ motion to stay pending discovery. Just weeks before granting summary judgment, the court ordered Union Bank to produce relevant documents. These documents were never produced. The only evidence offered by Union Bank supporting the argument that the parties omitted “material terms” was a declaration from a bank representative not involved at

contract formation. Despite requests, Appellants were not granted time to depose this person. Discovery could have provided evidence of a “meeting of the minds.” When summary judgment was granted, discovery cut-off was more than two months away.

The trial court ended this case too early and incorrectly denied Appellants’ permanent financing claim. Reversal is appropriate.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred by entering its August 30, 2013 order granting Union Bank’s motion for summary judgment on the issue of permanent financing, which provided at CP 802:

Union Bank, N.A. had no obligation to extend permanent financing to Black Diamond Development Company, LLC.

2. The trial court erred by entering its August 30, 2013 order granting Union Bank’s motion for summary judgment dismissing *all* claims arising from the alleged breach of contract by Union Bank. (CP 801-02.) Because of this error, the Court also erred in its October 1, 2013 order denying Appellants’ motion for clarification as it related to the claim of incorrect and excessive amounts charged on default. (CP 805-818; CP 1214-17.)

3. The trial court erred by entering its August 30, 2013 order granting Union Bank’s motion for summary judgment and

rejecting Appellants' estoppel claim raised to defend against Union Bank's exercise of contract default provisions. (CP 801-02.)

4. The trial court abused its discretion by entering its August 30, 2013 order granting Union Bank's motion for summary judgment by implicitly denying Appellants' motion for stay pending discovery. (CP 700-01, CP 801-02.) The Court also erred in its October 1, 2013 order denying Appellants' motion for clarification as it related to Appellants' motion to stay. (CP 817, CP 1214-17.)

5. The trial court erred by awarding \$93,154.54 in attorney fees and costs to Union Bank on October 14, 2013 and entering a Judgment against Black Diamond Development, LLC, Lee Wittenberg, and Wayne Courtney. (CP 1223-1225, 1247-1250.)

6. The trial court erred in entering "Findings of Fact and Conclusions of Law" No. 1:

Union Bank is entitled to reasonable attorneys' fees and costs under the attorney fees clause of the 2005 Construction Loan Agreement.

(CP 1224.) (No legal authority cited.)

7. The trial court erred in entering "Findings of Fact and Conclusions of Law" No. 2:

Plaintiffs Lee Wittenberg and Wayne Courtney are individually liable for Union Bank's attorneys' fees under the terms of the Commercial Guaranties.

(CP 1224.) (No legal authority cited.)

8. The trial court erred in entering “Findings of Fact and Conclusions of Law” No. 3:

Because the Court dismissed all of plaintiffs’ claims on summary judgment and because all of plaintiffs’ claims arose out of plaintiffs’ mistaken belief that the Construction Loan Agreement obligated Union Bank to extend permanent financing, Union Bank is entitled to an award of all of the reasonable fees and costs incurred in defending this litigation.

(CP 1224.) (No legal authority cited.)

### **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

A. Whether the trial court erred by implicitly ruling that there was no triable issue of fact whether Union Bank charged incorrect and excessive amounts on default and/or failing to provide any clarification of its ruling.

B. Whether the trial court erred by ruling there was no triable issue of fact with Appellants’ estoppel claim seeking to prevent Union Bank from charging default penalties.

C. Whether the trial court erred by ruling there was no triable issue of fact whether the parties’ agreement did not include an enforceable obligation to provide permanent financing because there was no “meeting of the minds” as to the “material terms,” and Appellants were under the “mistaken belief” there was an agreement.

E. Whether the trial court erred in implicitly denying Appellants’ CR 56(f) motion to stay despite a pending order to

produce documents relevant to the parties' dispute and a request to depose the bank representative relied on by Union Bank.

F. Whether Union Bank may recover attorney fees from Black Diamond Development, Lee Wittenberg, and Wayne Courtney individually under the terms of the 2005 Construction Loan and/or Commercial Guaranties signed by Messrs. Wittenberg and Courtney.

#### IV. STATEMENT OF THE CASE

##### A. STATEMENT OF FACTS.<sup>1</sup>

##### 1. **Frontier Bank offers a short-term and permanent loan to Appellants.**

In fall 2005, after negotiations and offers from several banks, Black Diamond Development LLC (Black Diamond) arranged financing with Frontier Bank for the development of commercial property in Black Diamond, WA. (CP 733 at ¶ 3.) Frontier Bank did not offer the most competitive rate, or the lowest loan fee, but it presented a loan structure that best fit Black Diamond's needs. (*Id.*)

Frontier Bank reviewed the financing arrangement in a "Loan Memorandum" dated November 5, 2005. (*See* CP 768-775.) The Loan Memorandum explained "[t]he primary source of repayment

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<sup>1</sup> Argument Section A challenges the trial court's ruling on Appellants' motion for clarification and relies on evidence from that motion. Argument Sections B and C challenge rulings on summary judgment and rely on evidence in connection with that briefing. Argument Sections C and D challenge the courts' rulings on Appellants' CR 56(f) motion to stay and Union Bank's motion for attorney fees and rely on the evidence and briefing associated with those issues.

will either be the Frontier Bank permanent loan or a refinance loan with another lender,” (CP 768), and identified:

Construction Loan Terms

Loan Amount: 4,090,000	Floor: N/A
Loan Fee: 1.25%	Ceiling: N/A
Construction Index: Bank Rate	Construction Term: 18 months
Construction Margin 1.00%	Extension(s): One-6 month
Max LTV: 75%	Extension fee(s): 0.50%
Min DCR 1.20	

Permanent Loan Terms

Loan Amount: 4,090,000	Floor: N/A
Loan Fee: .50%	Ceiling: N/A
Construction Index: FHLB Seattle	Loan Term: 10 years
Permanent Margin 2.75%	Max fixed period: Five years
Max LTV: 75%	Amortization: 25 years
Min DCR 1.20	

(CP 770.) The bank approved these terms two weeks later. (CP 777.)

**2. The parties sign a construction financing agreement containing numerous subparts.**

On November 28, 2005, Black Diamond and Frontier executed a “Notice of Final Agreement” (2005 Notice). (CP 751.)

The 2005 Notice defined the parties’ “Loan Agreement” as:

[O]ne or more promises, promissory notes, agreements, undertakings, security agreements, deeds of trust, or other documents, or commitments, or any combination of those actions or documents relating to the Loan . . . .

(*Id.*) (emphasis added.) Along with the Notice, the parties executed several documents “relating to the Loan.” (CP 733-34.) Relevant loan documents are attached hereto. (*See* Appendices A-G.)

**a. Frontier Bank's "Commitment Letter"**

First, Black Diamond executed a "Commitment Letter." (CP 747-49.) The first sentence of the letter described "a First Deed of Trust Construction and Forward/Permanent loan under the following contingencies . . . ." (CP 747.) The "contingencies" included (1) borrowers, (2) guarantors, (3) security/collateral, (4) loan amount, (5) loan fee, (6) "CONSTRUCTION LOAN RATE," (7) "PERMANENT LOAN RATE OF INTEREST," (8) "CONSTRUCTION LOAN TERM," (9) "PERMANENT LOAN TERM," and (10) amortization schedule for a permanent loan. (See CP 747-48.)

The permanent loan terms in the Commitment Letter *mirrored* those found in the bank-approved November 5, 2010 Loan Memorandum. (Compare CP 770, CP 747-48, CP 710.) For example, the Commitment Letter contained a clause setting forth the terms for the "PERMANENT LOAN RATE OF INTEREST":

The rate of interest will be calculated using a 2.75% margin added to the corresponding Federal Home Loan Bank index rounded to the nearest .125%. Frontier Bank will calculate the actual rate at the time of roll over. Permanent loan repayment will be principal and interest due and payable on a monthly basis, computed on a 25-year amortization, plus the Lender's reserves for taxes and insurance. This payment will be automatically withdrawn from a Frontier Bank checking account. When all conditions governing a roll over loan have been met, Frontier Bank shall have the exclusive right to place the permanent financing of the subject property for a

maximum period of three months at terms and conditions that are acceptable to Borrower and Lender.

(CP 747 at ¶ 6; *see also* CP 711.)

The Commitment Letter also delineated when Appellants were entitled to a “conversion” to permanent financing:

The Permanent financing terms provided above will not be available until the aggregate collected rents of both buildings, “B” and “C” are equal to or greater than \$381,000. This figure will be calculated using fully executed leases on an annualized basis.

(CP 748 at ¶ 10.2)

The Commitment Letter explains it “shall serve as an outline of requirements and terms upon which the loan was approved and around which the final terms, conditions, and documentation will be structured.” Appellants were required to execute the letter if the terms and conditions were “acceptable.”

(CP 749.) These terms were then secured by a \$61,350 “commitment fee” (1.5% of the loan amount) (*Id.*) This was an “above-market fee,” but the increased cost was acceptable because Appellants believed the parties’ agreement secured favorable construction loan *and* permanent loan terms. (CP 733 at ¶ 5.)

**b. “Construction Loan Agreement”**

Second, Black Diamond was asked to sign a “Construction Loan Agreement” (Construction Loan) drafted by Frontier Bank. (CP

738-745.) The Construction Loan was for 18 months and provided short-term financing for the actual construction of the proposed Black Diamond project. (CP 738.) The Loan also identified “conditions precedent to each [payment] advance” and provisions defining events of default and the right to cure. (CP 739, 742.)

With respect to permanent financing, the Construction Loan contained a section of “AFFIRMATIVE COVENANTS” noting that the “[b]orrower covenants and agrees with Lender” that:

2.) THE PERMANENT FINANCING TERMS PROVIDED ABOVE WILL NOT BE AVAILABLE UNTIL THE AGGREGATE COLLECTED RENTS OF BOTH BUILDINGS, “B” AND “C” ARE EQUAL TO OR GREATER THAN \$381,000. THIS FIGURE WILL BE CALCULATED USING FULLY EXECUTED LEASES ON AN ANNUALIZED BASIS.

(See CP 740-41.) While a building “C” is referenced, originally, Black Diamond only asked Frontier Bank to finance building “B.” (CP 733 at ¶ 4.) Frontier Bank never advanced funds to allow for the construction of building “C,” but Black Diamond met the “aggregate collected rent” threshold of \$381,000 on building “B” alone. (*Id.*)

The permanent financing provision appears to be a “copy and paste” from the Commitment Letter where the “permanent financing terms provided above” can be found (*Compare* CP 748 at ¶ 10.2, CP 741, CP 709.) Accordingly, the Construction Loan does not contain

an “integration” or “merger” clause indicating that the Loan is the complete agreement between the parties, and instead provides:

Lender is willing to lend the loan amount to Borrower solely under the terms and conditions specified in this Agreement and in the Related Documents, to each of which Borrower agrees.

(CP 738.) (emphasis added.) The Loan defines “Related Documents” as *all* promissory notes, credit agreements (further defined as a “commitment to lend money”<sup>2</sup>), loan agreements, guaranties, deeds of trust, and “all other Instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Loan.” (CP 744.) The definition of “Related Documents” is consistent with the meaning of “Loan Agreement” in the Notice of Final Agreement. (See CP 751.)

**c. Promissory Note**

Third, Black Diamond executed a Promissory Note requiring Black Diamond to pay “so much as may be outstanding, together with interest on the unpaid principal balance of each advance.” (CP

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<sup>2</sup> The loan documents do not define credit agreement.” In Washington, under RCW 19.36.100, “credit agreement” is defined as:

[A]n agreement, promise, or commitment to lend money, to otherwise extend credit, to forbear with respect to the repayment of any debt or the exercise of any remedy, to modify or amend the terms under which the creditor has lent money or otherwise extended credit, to release any guarantor or cosigner, or to make any other financial accommodation pertaining to a debt or other extension of credit.

*Id.* (emphasis added).

715: 19-24; 726:8-16) (*See also* CP 1195) (citing CP 50.) The Promissory Note also provided terms governing payment (see “PAYMENT” clause), prepayment for “all loan fees” (see “PREPAYMENT; MINIMUM INTEREST CHARGE” clause), default (see “DEFAULT” clause), and cure rights (see “CURE PROVISIONS” clause). (CP 715: 19-24.; 726:8-16.) (*See also* CP 1195-96) (citing CP 50-51.) In six years of performance, Black Diamond never missed a monthly payment on its loan. (CP 736 at ¶14.)

#### **d. Deed of Trust**

Fourth, Black Diamond executed a Deed of Trust. (CP 715:19-24, 726:8-26; CP 1195-96.) The Deed explained that it was:

[G]IVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE [PROMISSORY] NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST.

(CP 54.) “Indebtedness” was defined as “all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents . . . .” (CP 59.) Similar to other loan documents, “Related Documents” included *all* promissory notes, credit agreements (*i.e.* “commitments to lend money”<sup>3</sup>), and “all other Instruments, agreements and documents, whether now or hereafter

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<sup>3</sup> *See* fn. 2, *supra*.

existing, executed in connection with the Indebtedness.” (CP 60.) Like the Promissory Note, the Deed of Trust set forth terms governing payment (see “PAYMENT AND PERFORMANCE” clause), default (see “DEFAULT” clause), and grantor’s cure rights (see “RIGHT TO CURE” clause). (CP 1195-96) (citing CP 54, 57.)

**3. Frontier Bank extends the financing agreement and writes it will “stand by” its “original commitment for permanent financing.”**

The Construction Loan lasted from November 28, 2005 to May 28, 2007. (CP 738.) The parties agreed to an extension in May 2007. (CP 753.) By this time, the “loan-to-value” ratio of the Black Diamond property decreased, indicating that Appellants’ investment was performing well. (See CP 712-13; CP 780-786.)

Around September 20, 2007, Frontier Bank asked Black Diamond to sign a *second* extension in a “Change-in-Terms Agreement.” (CP 734 at ¶ 9). Frontier Bank pressed Appellants to agree to the extension in less than a day. (*Id.*) Appellants found numerous errors and unannounced changes in the new proposed loan documents and noted how Frontier Bank inaccurately represented that the “proposed loan extension agreement merely extends the term of the agreement . . . .” (*Id.*; CP 760.)

After identifying these changes, Black Diamond manager Lee Wittenberg requested a “conversion” to a permanent loan:

Lastly, in lieu of or in addition to the extension, we are seeking the permanent conversion option provided to us under the original agreement. We have surpassed the lease-up milestone, and are glad to forward the necessary rent roll and lease documents as proof.

(CP 760.) Frontier Bank Vice President, Judith Peace, wrote that the bank was “willing to stand by our original commitment for permanent financing.” (CP 761.) (emphasis added.) No one challenged whether a commitment existed. (*Id.*) This written assurance was maintained in Union Bank’s loan file. (CP 765 at ¶ 1.)

Frontier Bank then set forth permanent loan terms (CP 761), most which were later incorporated in the Change-in-Terms Agreement,<sup>4</sup> (CP 734 at ¶ 8, 756-58). These terms were *identical* to those provided in the Commitment Letter (CP 747-48) and 2005 Loan Memorandum approving the parties’ agreement (CP 770). Meanwhile, Frontier Bank authored a new Loan Memorandum explaining the “Permanent Loan” was the “Specific Source and Schedule of Repayment” for the Construction Loan. (CP 784.)

The Change-in-Terms Agreement also provided terms for:

(1) payment (CP 756) (see “PAYMENT” clause), (2) pre-payment

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<sup>4</sup> According to Black Diamond’s Lee Wittenberg, “[i]t is worth pointing out the difficulty in reading this document. Given Frontier Bank’s ‘rush’ to have this agreement signed, the [a]greement was faxed and signed.” (CP 734 at ¶ 8.)

(*Id.*) (see “PREPAYMENT; MINIMUM INTEREST CHARGE” clause), (3) default (*Id.*) (see “DEFAULT” clause), and cure rights (*Id.*) (see “CURE PROVISIONS” clause). These terms were similar, if not identical, to other loan documents. (*See supra.*)

As to the preexisting obligations, the Change-in-Terms Agreement stated:

**CONTINUING VALIDITY.** Except as expressly changed by this Agreement, the terms of the original obligation or obligations, including all agreements evidenced or securing the obligation(s), remain unchanged and in full force and effect.

(CP 757.) (emphasis added.)

**4. Union Bank acquires Frontier Bank, assumes liabilities for all commitments, but denies permanent financing to Black Diamond.**

In April 2010, Union Bank acquired Frontier Bank. (CP 586 at ¶ 8.) In its “Purchase and Assumption” Agreement with the FDIC, Union Bank agreed:

The Assuming Institution [Union Bank] expressly assumes at Book Value (subject to adjustment pursuant to Article VIII) and agrees to pay, perform, and discharge all of the following liabilities of the Failed Bank as of Bank Closing . . . (i) liabilities, if any, for Commitments.

(CP 847-48.) (emphasis added.) (*See also* RP 26:22-27.)

By May 2010, Union Bank contacted Appellants to discuss the impending maturation of the Change-in-Terms Agreement. (CP

735 at ¶ 12.) Appellants once again asked for the appropriate “conversion.” (*Id.*) Following this request, Union Bank did not deny an obligation for permanent financing, nor claim there were insufficient terms for an agreement. (*Id.*) Union Bank’s loan records created *after* it purchased Frontier Bank *confirm* Union Bank considered Appellants’ financing agreement to be a permanent loan. (*See* CP 791.)

**5. Improper amounts charged on default.**

For approximately the next two years, despite the maturation of the Change-in-Terms Agreement, Black Diamond continued to make, and Union Bank accepted, interest and principal payments to repay the funds drawn under the parties’ financing agreement. (CP 736 at ¶ 13.) In January 2012, Union Bank issued its first Notice of Default, contending that Black Diamond immediately owed all funds withdrawn under the Construction Loan. (CP 1078-79.) In issuing this notice, Union Bank failed to follow the contractually mandated procedures for default. (*See e.g.* CP 5 at ¶ 20; CP 1093.) Subsequent revised notices of default were sent in June and August 2012. (CP 1081-1090.) The later Notices of Default set forth the amounts Union Bank claimed were due and owing. (*Id.*)

On multiple occasions, Black Diamond asked for a written explanation for how the amounts on default were calculated. (See CP 11:6-11, 15:24-16:12; CP 1072-74 at ¶¶ 2-9, 1092-1100). Union Bank was informed that the failure to provide information regarding the default amounts, and whether these amounts were properly calculated, was viewed “as a separate breach of the bank’s obligation” independent of permanent financing. (CP 1093.)

Black Diamond identified:

- At least two loan payments (totaling \$46,719.12) that were deposited by Union Bank, but never credited against the amount owed on default. (CP 6 at ¶ 24; CP 736 at ¶ 13; CP 1098.)
- Union Bank accepted Black Diamond loan payments and after at least forty-five (45) days returned the money, but backdated the checks by over thirty (30) days. (CP 6 at ¶ 24; CP 81-89; CP 736 at ¶ 13; CP 1073 at ¶¶ 5-6.) Union Bank charged default rates as if Black Diamond failed to make any payments. (*Id.*)
- Union Bank charged appraisal and environmental review fees for the Black Diamond property in connection with the permanent loan, but there was no permanent loan conversion, and Union Bank representatives stated these fees would not be charged to Black Diamond. (CP 6 at ¶ 24; CP 29 at ¶¶ 16, 20-22; CP 1098.)

- Union Bank charged attorney fees without providing an invoice or cost breakdown for the work. (*Id.*) Black Diamond claimed that these amounts were excessive. (*Id.*) (*See also* CP 1142 at 27.) Black Diamond eventually discovered that Union Bank’s attorneys charged at rates in excess of \$700/hr. (*See e.g.* CP 941.)

These claims were included as part of Appellants’ Complaint, which alleged in part at Paragraph 24:

Plaintiffs believe that Defendant has improperly calculated the interest, failed to properly apply payments to principal, and is seeking repayment of improper amounts in the appraisal and environmental review categories . . . .

(CP 6 at ¶ 24.) This allegation was incorporated as part of Black Diamond’s breach of contract claim. (*Id.* at ¶ 25.)

Appellants also filed a “Motion for a Preliminary Injunction and Order Directing Defendant to Provide an Accounting,” explaining that it contested charges on default as a separate basis for breach. (CP 19:19-20:3; CP 29 at ¶¶ 16, 20-22.) Appellants then asked for “an accounting of the loan that includes a breakdown of the payoff amount.” (CP 21:16-17.) Union Bank never responded to Appellants’ motion and the trial court did not rule on whether Union Bank should provide an accounting. (*Id.*)

Subsequently, Black Diamond again wrote to Union Bank identifying problems with the amount charged on default. (CP 973:6-25; CP 1097-99.) Left with the threat of property foreclosure, Appellants paid the default amounts “under protest” and explained that they did “not agree that the bank has properly calculated the amount that is owing for many reasons, which is the basis of the lawsuit.” (CP 973-74; CP 1074 at ¶ 7; CP 1100.)

On November 28, 2012, Plaintiffs served their First Requests for Production to Union Bank. (CP 974:9-25; CP 1074 at ¶¶ 8-9; CP 1102-1115.) All but two requests were tailored to obtain documents describing, indicating, or otherwise evidencing *every* line item charged against Appellants on default, and the calculations for how both principal and default amounts were determined. (*Id.*) Appellants still do not have a complete record of the amounts charged on default and how they were calculated. (CP 974:15-17.)

During litigation, Union Bank served its own discovery request seeking the basis for Appellants’ claim for improper amounts charged on default. The request asked:

Please state the factual basis for the allegations contained in paragraph 24, including but not limited to, Your calculations supporting your contentions of the “proper” Loan principal owed, accumulated interest owed under the Loan, and proper application of payments to the principal of the Loan. Please

support Your calculations with a line-by-line account or a spreadsheet that shows in detail how You have calculated that amount.

(CP 975:1-19; CP 1120.) In response, Black Diamond explained the basis for its claim, but that a full articulation of challenged amounts could not be provided until production of documents was complete.

(*Id.*) Production remained incomplete. (CP 975 at 4:9-12.)

**B. PROCEDURAL HISTORY.**

Appellants filed their Complaint on August 9, 2012 for breach of contract, estoppel, and a permanent injunction to prevent a Union Bank foreclosure of Black Diamond property. (CP 1-9.) Black Diamond secured replacement financing and paid off the Union Bank loan in October-November 2012. (CP 1100.) Union Bank did not file an Answer until June 18, 2013 at which time it counterclaimed alleging that it was entitled to attorney fees and costs against (1) Black Diamond under the terms of the Construction Loan, and (2) Lee Wittenberg and Wayne Courtney pursuant to Commercial Guaranties signed as part of the construction financing agreement. (CP 101-108.) Appellants answered Union Bank's counterclaim denying they were in default and noting that Mr. Wittenberg's and Mr. Courtney's obligations

under the Commercial Guaranties were extinguished when the amount allegedly due to Union Bank was paid in full. (CP 579-581.)

Union Bank's late Answer and Counterclaim came in the midst of a discovery dispute between the parties. (See CP 109-124; CP 125-186; CP 485-498; CP 557-663.)<sup>5</sup> Following the loan pay-off, in November 2012, Appellants served discovery requests asking for documents created by bank representatives involved with the financing agreement (CP 264.) Appellants successfully filed a motion to compel the production of these documents (CP 575-576.)

Two weeks after the trial court's discovery order, and before the compelled material was produced, Union Bank moved for summary judgment. (CP 625-646.) The issue of incorrect amounts charged on default was not addressed in the motion. (See CP 706 at 2:15-22.) Relying on the declaration of Guillermo "Bill" Herrera, Union Bank claimed there was no obligation to provide permanent financing because material terms such as "an amount for permanent financing, a rate for permanent financing, default terms, specification of collateral, cure rights, and prepayment terms" were missing. (CP 587 at ¶ 10.) Mr. Herrera is not a signatory on the loan

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<sup>5</sup> This briefing is relevant to Appellants' CR 56(f) motion to stay. See *infra*.

documentation, nor was he involved with the parties' agreement at contract formation. (See CP 737-751; CP 768-777.)

Appellants moved for a stay until Union Bank complied with the trial court's order and discovery was complete. (CP 647-658, 693-699.) Appellants asked for time to conduct discovery regarding, among other things, what the parties agreed to, how the financing agreement was administered, and the meaning of ambiguous terms. (See *e.g.* CP 655:21-26; CP 697 at ¶¶ 3(a), 3(c).) This request explained that depositions of bank officials were needed to refute the claim that there was no agreement or "meeting of the minds" to provide permanent financing. (CP 697 at ¶¶ 3(a), 3(c), 813, 815.)

The trial court granted Union Bank's motion for summary judgment. (CP 801-802.) Appellants were not allowed to depose Mr. Herrera, nor given any of the requested documents ordered by the trial court weeks prior. At oral argument, the Court explained:

There are disputed facts, but only once you determine that there's actually a contract here and the facts to determine whether there was a true meeting of the minds. You still want, by any of the documents provided, to say what the minds meant and agreed to in -- in sufficient quantity of terms to support the contract.

(RP 34:4-10.) With the exception of "prepayment" terms, the Court did not identify which terms it believed were "material" to determine whether there was a "meeting of the minds." (RP 33-34.)

Appellants moved to clarify the scope of the trial court's order on the issue of incorrect amounts charged on default. (CP 805-15.) This issue was not briefed by Union Bank or addressed before the trial court (*See* RP 33-34.) The trial court denied Appellants' motion for clarification. (CP 1214-17). In awarding attorney fees, the trial court stated:

[T]he Court dismissed all of plaintiffs' claims on summary judgment and because all of plaintiffs' claims arose out of plaintiffs' mistaken belief that the Construction Loan Agreement obligated Union Bank to extend permanent financing . . . .

(CP 1224.) (emphasis added.)

Since Union Bank prevailed on its claim on permanent financing, and the trial court found that all dismissed, it then ordered an attorney fees award against Appellants for \$93,154.54. (CP 1224.) In the process, the trial court ruled Mr. Wittenberg and Mr. Courtney were also responsible for this award (*id.*), even though the amounts owed under their Commercial Guaranties were extinguished when the loan was paid off. (*See* CP 1063-64.)

On October 31, 2013, the trial court entered final judgment for Union Bank in the amount of \$0 and an award of attorney fees and costs of \$93,154.54. (CP 1247-1250.) On November 5, 2013, Appellants filed a timely notice of appeal. (CP 1251-1257.)

## V. ARGUMENT

### A. **The Trial Court Erred By Denying Appellants' Motion for Clarification Concerning Appellants' Claim for Damages Arising From Improper Amounts Charged on Default.**

#### 1. **Standard of review.**

A motion for clarification can be considered the equivalent of a motion for summary judgment for purposes of appellate review. *See Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000) (motion for clarification treated as a motion for summary judgment on the issue of service of process). A trial court's decision on summary judgment is reviewed *de novo*. *Lakey v. Puget Sound, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013) (citations omitted). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997) (citations omitted). All reasonable inferences are drawn in favor of the party opposing summary judgment, "and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Id.*

**2. Appellants were entitled to pursue recovery of incorrect and excessive amounts charged by Union Bank upon default.**

The trial court never clarified the basis for its decision to dismiss Appellants' claim for improper (and incorrect) amounts charged on default. Union Bank did not include this issue in its summary judgment motion. There appear to be two possible grounds for such a decision: (1) the Court believed such a claim was not properly pled or (2) the Court thought that the claim somehow related to the permanent financing issue. Both are in error.

First, Appellants' claim to recover incorrect and excessive amounts on default was properly pled. CR 8 requires a party asserting a "claim" to set forth in a pleading "a short and plain statement showing that the pleader is entitled to relief . . . ." See CR 8 (a). Pleadings are construed to do "substantial justice." CR 8. A complaint fails to meet the requirements of CR 8 where it does not give the opposing party "fair notice" of plaintiff's claims and the legal grounds on which they rest. *Champagne v. Thurston Cnty.*, 163 Wn.2d 69, 86, 178 P.3d 936 (2008) (complaint comported with notice pleading rules based on the "totality" of allegations even though certain statutory claims were not directly pled); *Schoening v. Grays Harbor Community Hosp.*, 40 Wn. App. 331, 698 P.2d 593

(1985) (complaint was not a “vision of precise pleading” but sufficient to put hospital on notice that defendants were seeking to establish hospital's liability based on theory of corporate negligence).

To satisfy the “notice” requirement, Appellants needed to plead a “short and concise” statement explaining why they were entitled to relief. Paragraph 24 of Appellants’ Complaint does this. (CP 6 at ¶ 24.) Appellants alleged Union Bank “improperly calculated the interest, failed to properly apply payments to principal, and is seeking repayment of improper amounts in the appraisal and environmental review categories . . . .” (*Id.*) This claim was also explained (1) in correspondence both before and after the commencement of litigation (CP 1072-74 at ¶¶ 2-9; CP 1092-1110), (2) in several motions (CP 15:24-16:13, 19-20; CP 112:19-22; CP 242-253; CP 706:21-23; CP 972-74; CP 1061-62), and (3) during discovery on a line item basis (CP 131-143, 1101-1115).

Further demonstrating that Union Bank had ample “notice,” incorrect default amounts were the subject of a Union Bank interrogatory request. (CP 1120.) Parties use the discovery process to uncover the evidence necessary to pursue their claims and defenses, *Putman v. Wenatchee Valley Med. Ctr, P.S.*, 166 Wn.2d 974, 983, 216 P.3d 374 (2009), and that is exactly what Union Bank did in this case.

Second, while awarding attorney fees, the Court issued a “finding of fact” stating “*all* of plaintiffs’ claims arose out of plaintiffs’ mistaken belief that the Construction Loan Agreement obligated Union Bank to extend permanent financing . . . .”<sup>6</sup> (CP 1224.) (emphasis added.) There is no evidence supporting this finding. Even if the default amount issue was somehow tied to permanent financing (a contention denied by Plaintiffs), at best, this was a triable issue of fact. Either there were no facts supporting the trial court’s conclusion or this was an issue of fact for the jury. *See* CR 56. The trial court dismissed Appellants’ claim without evidence or logic.

The default amount issue is relatively mechanical, *i.e.*, an issue whether certain payments made by Appellants were properly credited and applied against the principal amount owed and/or obligations of the Appellants (such as appraisal and environmental costs). The permanent financing issue is not mechanical; it requires an analysis of what the parties’ agreement means. Because of this difference, Appellants’ response to Union Bank’s motion for summary judgment explains, “Black Diamond did not file a lawsuit simply because of a disagreement over permanent financing,” Union

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<sup>6</sup> The issue of incorrect amounts on default was briefed in Appellants’ Opposition to Union Bank’s Motion for Attorneys’ Fees and Costs. (CP 1059-1063.)

Bank also charged “incorrect amounts on default.” (CP 706:2:15-22.) Union Bank never refuted this statement.

The Declaration of Black Diamond Manager Lee Wittenberg identifies at least two payments made by the company, but never credited against the amount claimed in default. (CP 736 at ¶ 13.) His declaration also points to instances where payments were held for an extended period of time and returned to Black Diamond, but the company was charged interest as if the payments were never made. (*Id.*) He concludes, “Black Diamond challenges the accuracy of Union Bank’s calculation of amounts paid on the loan and its application of payments to interest and principal.” (*Id.*) Mr. Wittenberg’s sworn statement, reiterating issues raised in his prior declaration to enjoin the foreclosure of Black Diamond’s property (CP 25-100), was never rebutted. This is the only evidence on the issue of incorrect default amounts, and alone justifies reversal.

**3. The trial court’s error was prejudicial.**

An order erroneously granting summary judgment on a claim is inherently prejudicial and requires reversal. *Beers v. Ross*, 173 Wn. App. 566, 569, 154 P.3d 277, 279 (2007) (finding “because the record reveals issues of disputed fact, we reverse the trial court’s award of summary judgment and remand the matter for trial”).

The trial court failed to appreciate the nature and extent of Appellants' claims. Its summary judgment ruling was overbroad and removed a significant part of Appellants' action without argument or clarification. Whether there was an obligation to provide permanent financing has no logical connection to the proper administration and application of loan payments.

**B. Union Bank should have been estopped from collecting default interest from Appellants.**

Independent of overcharges on default, but equally as prejudicial, Appellants argued Union Bank should have been estopped from collecting default interest and penalties based on claiming there was no agreement to provide permanent financing. (CP 7 at ¶ 30;.) Appellants' estoppel claim deals with the issue of whether Union Bank could enforce contractual default provisions based on the conduct of Union Bank representatives. (CP 727-28.)

Equitable estoppel may be used as a defense against the enforcement of a contract. See *McCormick v. Lake Washington Sch. Dist.*, 99 Wn. App. 107, 117, 992 P.2d 511, 516 (1999) (citations omitted). As this Court of Appeals recently explained in *Top Line Builders, Inc. v. Bovenkamp*, No. 69225-9-I, --- P.3d ---, 2014 WL 948678 (Wash. Ct. App. Mar. 10, 2014), "[e]quitable estoppel precludes a party from claiming the benefits of a contract while

simultaneous attempting to avoid the burdens that contract imposes.” *Id.* at \*10 (citing *Townsend v. Quadrant Corp.*, 173 Wn.2d 454, 461, 268 P.2d 917 (2012)).

Appellants raised triable issues of fact to support their estoppel claim.<sup>7</sup> Appellants offered evidence that “[p]ermanent financing terms were later incorporated in the September 2007 Change-in-Terms Agreement.” (CP 734 at ¶ 9.) (See also CP 735 at ¶ 11.). For almost two years after that agreement “matured,” Union Bank never denied an obligation to provide permanent financing until it belatedly held Appellants in default. (CP 735-36.) Based on the written documents, Appellants continued to have a reasonable belief that there was an agreement in place. (*Id.*)

Affirming this reasonable belief, Appellants continued to make, and Union Bank accepted, loan payments along permanent financing terms (CP 735.) Relying on the actions of Union Bank, Appellants did not seek replacement financing until they were erroneously held in default and incurred high default penalties until financing from a new lender could be secured to make a loan pay-off.

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<sup>7</sup> Equitable estoppel is appropriate where (1) a party’s admission, statement, or act is inconsistent with its later claim; (2) another party acts in reliance on the first party’s act, statement, or admission; (3) and injury would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or admission. *Kramarevcky v. Dep’t of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993).

Union Bank argued that Appellants' reliance on equitable estoppel was pled in the "offensive," and with little analysis, argued such a claim was barred as a matter of law. (CP 640.) Union Bank never explained how Appellants' claim was being used as a "sword" when it was pled to "shield" against Union Bank's post hoc denial of permanent financing and resulting loan charges. Union Bank essentially took the position that every time a plaintiff pleads equitable estoppel, that claim is barred as a matter of law. (*Id.*)

**C. The Trial Court Erred by Granting Summary Judgment on Appellants' Claim Relating to Permanent Financing.**

**1. Standard of review.**

Whether Union Bank was entitled to summary judgment on the issue of permanent financing is reviewed *de novo*, with all reasonable inferences drawn in favor of the non-moving party. See *Lakey, supra*, 176 Wn.2d at 922; *Greater Harbor 2000, supra*, 132 Wn.2d at 279. Summary judgment is denied where there is "any reasonable hypothesis" entitling Appellants to the relief sought. *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980).

**2. Appellants were entitled to proceed on a permanent financing breach claim.**

In ruling in favor of Union Bank, the trial court found that "[t]here are disputed facts, but only once you determine that there's

actually a contract here and the facts to determine whether there was a true meeting of the minds.” (RP 34:4-7.) The existence of mutual assent or a “meeting of the minds” is a question of fact unless no reasonable person could conclude there was mutual assent. *Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 477, 149 P.3d 691 (2006) (correspondence supported a meeting of the minds).

Washington has not specified the “essential terms” for an enforceable agreement to extend permanent financing, but at least one reported decision is instructive. In *Farm Crop Energy Inc. v. Old Nat. Bank of Wash.*, 109 Wn.2d 923, 750 P.2d 231 (1988), a plaintiff sued a bank alleging breach of contract following the revocation of a loan commitment. *Id.* at 925-927. The trial court instructed the jury on a breach theory, stating “[t]he bank’s written loan commitment is a written contract which obligates the bank to loan money to the plaintiff . . . in accordance with the terms and conditions of the commitment.” *Id.* at 938 at fn. 1. On appeal, the Washington Supreme Court remanded the case based on a separate promissory estoppel claim, but left the breach action intact. *Id.* at 934. The commitment letter in *Farm Crop*, similar to this case, contained an (1) interest rate, (2) amortization, (3) collateral, (4)

duration/payment schedule, and (5) the loan amount. *Id.* at 934-935 (dissenting opinion providing commitment letter verbatim).

*Farm Crop* dovetails with established precedent, based on the Restatement (Second) of Contracts, finding that there need only be a “reasonable certainty” of terms to demonstrate manifestation of assent. Under the applicable standard, “[c]ontract terms are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.” See RESTATEMENT (SECOND) OF CONTRACTS § 33 (1979), *see also Andrus v. State, Dep’t of Transp.*, 128 Wn. App. 895, 898, 117 P.3d 1152 (2005) (adopting RESTATEMENT (SECOND) OF CONTRACTS § 33). Thus, a written commitment to provide permanent financing is enforceable *if* it provides a basis for determining the existence of a breach and for giving an appropriate remedy.

Appellants offered enough terms and ample evidence to support breach. Under the construction financing agreement, the obligation to provide permanent financing triggered when Black Diamond reached an “aggregate collected rent” threshold of \$381,000. Records on file with (and created by) Frontier and Union Bank confirm the parties agreed to a financing arrangement containing an obligation to furnish a “permanent loan.” Appellants

met the specified eligibility requirements for permanent financing, requested a conversion, but Union Bank refused to follow through.

In addition to setting forth the triggering condition for a permanent loan, an interest rate, amortization payment schedule, collateral, duration, and loan amount terms were defined in the parties' Commitment Letter. These terms are enough to form a basis for a remedy, *i.e.* damages arising from more expensive replacement financing. Even if these terms were somehow insufficient to allow a trier of fact to assess damages, the Change-in-Terms Agreement, (as well as the Promissory Note and Deed of Trust) provided the additional terms Union Bank alleged were missing. *See supra.*

Courts and commentators are in harmony with *Farm Crop* and RESTATEMENT (SECOND) OF CONTRACTS § 33. These authorities expressly or implicitly find that loan commitment actions depend on whether there are "essential terms" to determine the existence of a breach and an appropriate remedy. *See infra.* In turn, the "essential terms" to enforce loan commitments are (1) interest rate, (2) amortization/payment schedule, (3) specification of collateral, (4) duration, and (5) the loan amount. *Id.* Commentators explain:

Generally, the essential elements of a contract to lend money include the amount and term of the loan, the interest rate, the method of repayment, and any required collateral. Even if the parties have not

expressly stated one of these essential terms, the court may fill the gap by reference to the parties' prior dealings or to commercial practice generally.

M. Budnitz, *et. al.*, THE LAW OF LENDER LIABILITY, ¶ 1.03[3] (Definiteness of All Material Terms) (2014) (citations omitted).<sup>8</sup>

In some respects, Washington goes even further. Cases involving real estate transactions in this state<sup>9</sup> find that if an injured party performed “as far as he could by his own acts,” and the other party “voluntarily and causelessly refused to proceed,” then that party (Union Bank in this case) may not benefit from his own breach. *See Schweiter v. Halsey*, 57 Wn.2d 707, 711-12, 359 P.2d 821, 823-24 (1961) (denying recovery of earnest money paid under an purchase and sale agreement to convey real estate even though a legal description of the land was missing, because a sufficient legal description was circulated to the parties).

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<sup>8</sup> *See also T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992) (finding “a contract to loan money, the material terms will generally be: the amount to be loaned, maturity date of the loan, the interest rate, and the repayment terms”); *Union State Bank v. Woell*, 434 N.W.2d 712 (N.D.1989) (essential terms for an agreement to lend money in the future includes “the amount and duration of the loans, interest rates, and, where appropriate, the methods of repayment and collateral for the loans, if any”).

<sup>9</sup> In Washington, a *greater* degree of certainty in terms is required in an action for specific performance than an action for damages. *See Hedges v. Hurd*, 47 Wn.2d 683, 289 P.2d 706 (1955) (breach of earnest money agreement justified award of damages, even though contract was too vague to permit specific performance); *Valley Garage Inc. v. Nyseth*, 4 Wn. App. 316, 319, 481 P.2d 17 (1971) (noting “[a]lthough the parties could not be ordered to prepare and execute a real estate purchase contract (since this would require a further meeting of the minds), the contract contains the essential elements of a cash sale”).

Since Appellants met the “aggregate rent threshold” to trigger the permanent financing obligation (or at least there was an issue of fact) (RP 33:5-10), Union Bank may not benefit from its decision to “causelessly” ignore that obligation by failing to supplement the terms it alleges are missing, especially when these allegedly “missing terms” were boilerplate and provided in multiple loan documents.

**3. Union Bank’s arguments for summary judgment lacked merit.**

In seeking summary judgment, Union Bank argued that, as a matter of law, the claim for permanent financing be dismissed because (1) any agreement to provide a permanent loan was barred under 12 U.S.C. § 1823(e) (also known as the *D’Oench* doctrine), (2) if there was an agreement, it was only an “agreement to agree,” and (3) there were insufficient terms to find an agreement for permanent financing. (CP 633-640.) The trial court agreed with Union Bank’s third argument, but mostly focused on whether the Commitment Letter solely constituted an agreement to provide a permanent loan. (RP 33:12-16) (stating “[a]nd I think I have to assume that for purposes of summary judgment I think I have to assume that the commitment letter is somehow folded in. But *it* [the Commitment Letter] is missing some material provisions that defeat *it* [the Commitment Letter] as a contract. That’s the problem.”)

Union Bank's defenses lacked merit. Its motion primarily centered on whether there was an enforceable agreement under 12 U.S.C. § 1823(e). When financial institutions assume obligations from failing banks, prior agreements are enforceable if in writing, contemporaneously executed by the parties, approved by the financial institution, reflected in the bank's records, and maintained from the date of execution as an official record. *See* 12 U.S.C. § 1823(e). According to federal case law, "[t]he proper inquiry is whether any of [a borrower's] claims are premised on an obligation that is found in the loan documents or are not premised on an agreement whatsoever." *In re Beitzell & Co., Inc.*, 163 B.R. 637, 649 (1993). The financing agreement (and the written obligation for permanent financing) satisfied 12 U.S.C. § 1823(e) or presented an issue of fact.

The agreement to provide a permanent loan was reduced to writing, approved, maintained, and incorporated in the parties' global financing agreement. (*See* CP 740-41, 748.) The agreement was not just one or two documents, rather, the totality of the "Loan Agreement" included all promises, commitments, or other agreements. (CP 751.) The obligation to provide permanent financing survived 12 U.S.C. § 1823(e). *See Beitzell, supra*, 163 B.R. at

648 (“when claims are based on provisions in the loan documents themselves, such claims are not barred”). (See CP 719-724.)

Relying on *Keystone Land & Development Co. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 945 (2004), and focusing on the Commitment Letter, Union Bank went on to argue that the obligation to provide permanent financing was an “agreement to agree.” (CP 637-38.) Union Bank supported its position with language in the Commitment Letter providing that “[w]hen all conditions governing a roll over loan have been met, Frontier Bank shall have the exclusive right to place the permanent financing of the subject property for a maximum period of three months at terms and conditions that are acceptable to Borrower and Lender.” (CP 637.) At best, the language relied on by Union Bank evidenced an “agreement to negotiate.” (CP 733 at ¶ 5; see also CP 711, 726-27.)

Under Washington law, “[i]n a contract to negotiate, the parties exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time.” 152 Wn.2d at 176. The “exclusive right” language in the Commitment Letter allowed Union Bank a brief window to try and renegotiate the permanent loan terms should it choose to do so. Agreements to

negotiate are enforceable. *See Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 83, 248 P.3d 1067 (2011).

Again, relying on the Commitment Letter, Union Bank claimed there were insufficient terms for permanent financing. (CP 638-39.) No case law was provided. (*Id.*) Union Bank essentially took the position that each document comprising of the financing agreement be reviewed *independently*. (*See* CP 635-38.) Read together, the loan documents, supplied the following:

<b>Term</b>	<b>Source</b>	<b>Cite</b>
1. Permanent financing conversion	Commitment Letter and Construction Loan provide: “[t]he permanent financing terms provided above will not be available until the aggregate collected rents of both buildings, “B” and “C” are equal to or greater than \$381,000.”	CP 740; CP 748
2. Amount	Commitment Letter and Promissory Note (a “promise to pay . . . as may be outstanding”) state: “LOAN AMOUNT [of] \$4,090,000.”	CP 747; CP 761
3. Interest Rate	Commitment Letter states the “PERMANENT LOAN RATE OF INTEREST [will be calculated using a] 2.75% margin assessed to the corresponding Federal Home Loan Bank Index.”	CP 747; CP 761
4. Duration	Commitment Letter provides: ten-year term.	CP 747; CP 761
5. Amortization schedule	Commitment Letter provides: 25 year amortization schedule.	CP 747; CP 761

6. Specification of Collateral	Commitment Letter references: “First Deed of Trust on [approx.] 51K of mixed-use improvements located at 30711 3 <sup>rd</sup> Avenue in Black Diamond.”	CP 747; CP 756; CP 53
7. Default terms	Change-in-Terms Agreement, Promissory Note, and Deed of Trust, delineate: “event[s] of default.”	CP 756; CP 50; CP 57
8. Cure rights	Change-in-Terms Agreement Promissory Note, and Deed of Trust provide: “Cure Provisions” or “Right to Cure.”	CP 756; CP 50; CP 57
9. Prepayment terms	Change-in-Terms Agreement and Promissory Note contain: “PREPAYMENT: MINIMUM INTEREST CHARGE [explaining prepayment terms for] “all loan fees and other prepaid finance charges.”	CP 756; CP 50;

**4. Appellants raised triable issues of fact as to whether Frontier Bank/Union Bank agreed to provide a permanent loan.**

Appellants alleged that the parties’ agreement contained “an express term” providing for the conversion of “the existing construction loan to permanent financing based upon specified terms.” (CP 7 at ¶ 26.) Union Bank disagreed. (See CP 627.) There is considerable evidence supporting Appellants position, or at least, numerous issues of fact remained. Evidence included:

- First, a Commitment Letter and the Construction Loan expressly referencing the condition upon which Appellants could

convert their financing to a permanent loan. (CP 740-41; CP 748) The Notice of Final Agreement defines the parties' "Loan Agreement" in "one or more" promises, commitments, "or any combination." (CP 751.) Appellants reached the "aggregate collected rent" threshold for a permanent loan conversion. (CP 733 at ¶ 4.)

- Second, the basic terms for a permanent loan such as the amount, duration, interest rate, amortization payment schedule, and collateral were in the Commitment Letter, and these terms were approved in internal loan memoranda authored by Frontier and Union Bank, (CP 777; CP 784; CP 791) and through Frontier Bank's assurance to "stand by" the permanent financing obligation (CP 761). These written records were contemporaneously maintained in the Appellants' loan file. (CP 765 at ¶ 2.)

- Third, to the extent there were additional terms agreed to by the parties, these terms (*i.e.* default terms, cure rights and prepayment terms) were also incorporated in the Change-in-Terms Agreement (as well as Promissory Note and Deed of Trust) *See supra*. Union Bank never made a showing as to how these terms were necessary for a jury to decide breach or a remedy.

- Fourth, the declaration of Lee Wittenberg refuted the claim there was no meeting of the minds and explained that the

parties' agreement contained a short-term construction loan *and* long term permanent loan. (CP 733 at ¶ 5.) Union Bank offered the testimony of representative Bill Herrera who claimed terms were missing even though he was not involved with the parties' agreement at contract formation. (See CP 749, 751; CP 768-75.)

The court somehow concluded there was no "meeting of the minds" on largely undefined "missing terms." The relevant inquiry should have been whether there were sufficient terms to determine whether there was a breach and what remedy is appropriate. See RESTATEMENT (SECOND) OF CONTRACTS § 33. The loan documents undisputedly reference a permanent financing arrangement at a specified sum, based on a specified interest rate, on a defined schedule, for a period of ten years after conversion. The damages at issue arise from the failure to extend that loan on the specified terms, which in turn, required Appellants to seek an alternative permanent loan at higher interest rates.

**D. The Trial Court Erred by Implicitly Denying Appellants' Motion to Continue Pending Discovery.**

**1. Standard of review.**

The denial of CR 56(f) motion is reviewed for an abuse of discretion. *Tellevik v. Real Property*, 120 Wn.2d 68, 91, 838 P2d 111 (1992) (citation omitted). Denial of a CR 56(f) is appropriate when (1)

the requesting party does not offer a good reason for delay, (2) the requesting party does not state what evidence would be established through additional discovery, or (3) the desired evidence will not raise a genuine issue of material fact. *Id.* (citing *Turner v. Kohler*, 54 Wn.App. 688, 693, 775 P.2d 474 (1989)).

**2. Additional discovery was necessary to resolve factual issues surrounding, among other things, the intent of the parties and the meaning of terms in their agreement.**

Prior to Union Bank's motion for summary judgment, the parties engaged in extensive motion practice over discovery issues. (See CP 109-124; CP 125-186; CP 485-498; CP 557-663.) Following delays in discovery, Appellants requested that Union Bank provide correspondence in its possession to resolve ambiguity and determine the meaning of what the parties agreed to. (*Id.*) In a bizarre series of events, the trial court first granted Appellants' motion to compel, then granted summary judgment in favor of Union Bank, preventing the production of the very same documents it earlier ruled were relevant to resolve issues in the case. (CP 575-578.)

After Union Bank filed its motion for summary judgment, Appellants immediately moved to stay pending the production of withheld Union Bank documents and time to depose bank representatives. (CP 647-658; CP 693-699). Discovery was

necessary to determine (1) “what constituted the parties’ agreement and how it was administered”; (2) “the scope and meaning of the parties’ agreement, including the written permanent financing agreement”; and (3) Frontier/Union Bank’s breach of the duty to act in good faith and deal fairly. (CP 655.) Appellants explained document *and* deposition discovery of bank representatives was vital to rebut the claim that there was no provide permanent financing obligation. (CP 697 at ¶¶ 3(a), 3(c); CP 813, 815.)

The court reserved its decision on a continuance for oral argument, (CP 701), but never heard argument. Consistent with their prior request, (CP 697 at ¶¶ 3(a), 3(c)), Appellants asked for clarity, pointing out that the basis for the court’s decision (*i.e.* no meeting of the minds) was an issue of fact where Union Bank’s Bill Herrera contradicted Black Diamond Manager Lee Wittenberg and executed loan documents. (CP 813, 815.)

The court should have allowed Appellants to complete discovery to determine the intent of the parties.<sup>10</sup> Necessary information was not obtained because Union Bank refused to produce documents and the court would not stay proceedings to

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<sup>10</sup> The touchstone of contract interpretation is the parties’ intent.” *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). Extrinsic evidence is relevant to circumstances under which a contract was made as an aid to ascertaining the parties’ intent. *Top Line Builders, Inc.*, *supra*, 2014 WL 948678 at \* 6 (citing *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990)).

permit depositions. This prejudiced Appellants' ability to fully respond to Union Bank's motion for summary judgment, including the contention, apparently relied on by the trial court, that there was no "meeting of the minds." Appellants' requests were specific and explained what evidence was expected in discovery. (See CP 647-658; CP 693-699, CP 815.)

**E. The Trial Court's Award of Fees to Union Bank Should Be Reversed.**

**1. Standard of review.**

Whether a party is entitled to attorney fees is an issue of law reviewed *de novo*. *North Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 643, 151 P.3d 211 (2007). The amount of an award is reviewed for an abuse of discretion. *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 277, 215 P.3d 990 (2009). Discretion must be exercised on articulable grounds and awards based on proper findings of fact and conclusions of law. *Id. at* 281-85.

**2. Messrs. Wittenberg and Courtney were not individually liable for attorneys' fees.**

Without citation to any case law, the court ruled, "Plaintiffs Lee Wittenberg and Wayne Courtney are individually liable for Union Bank's attorneys' fees under the terms of the Commercial Guaranties." (CP 1224 at ¶ 2). The Commercial Guaranties secured

the underlying Promissory Note under the loan. (CP 880-886.) The amount under the Note was paid off on or around October 2012 and included attorney fees incurred up to that time. (See CP 1100.)

When Appellants paid Union Bank, and the principal debt under the Promissory Note was discharged, Messrs. Wittenberg and Courtney were relieved of any liability. See *Fruehauf Trailer Co. of Canada Limited v. Chandler*, 67 Wn.2d 704, 707, 409 P.2d 651 (1966) (citations omitted) (noting, “[p]laintiff concedes the general law in the state of Washington to be that, when the principal debt has been discharged, the guarantor is likewise relieved of liability”). *Fruehauf* is consistent with RCW 62A.3-601(a) which provides that “the obligation of a party to pay the instrument is discharged . . . by an act or agreement with the party which would discharge an obligation to pay money under a simple contract.” Payment of an obligation in full discharges the obligation in full. See RCW 62A.3-602(a).

**3. Any attorney fees award was premature given the failure to adjudicate the issue of incorrect amounts charged on default.**

An award of attorney fees is appropriate where there is a substantially prevailing party, however, litigation must reach its conclusion. See *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 491-92, 200 P.3d 683 (2009). Since the trial court dismissed

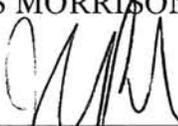
Appellants' claim for improper amounts charged on default for reasons that are unclear and legally unsupported (no case law is cited in the Courts' findings of fact and conclusions of law), it was inappropriate and an abuse of discretion to award attorney fees when a significant portion of Appellants' claim was never resolved.

## VI. CONCLUSION

For any or all of the foregoing reasons, the judgment should be reversed in its entirety. Alternatively, this case should be remanded to allow Appellants to litigate their claims of improper amounts on default and/or equitable estoppel, and any award of attorney fees and costs be reversed until all claims are resolved.

DATED this 20th day of March, 2014.

OLES MORRISON RINKER & BAKER, LLP

By: 

J. Craig Rusk  
WSBA No. 15872  
Brandon D. Young  
WSBA No. 44222

**Appendix A: 2005 Notice of Final Agreement**

# NOTICE OF FINAL AGREEMENT

Principal	Loan Date	Maturity	Loan No	Call / Coll	Account	Officer	Initials
\$4,090,000.00	11-28-2005	05-28-2007	3179407139	or		622	
References in the shaded area are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing "****" has been omitted due to text length limitations.							

**Borrower:** BLACK DIAMOND DEVELOPMENT COMPANY, LLC  
4114 B PLACE NW - SUITE 106  
AUBURN, WA 98001

**Lender:** Frontier Bank  
Tacoma Real Estate  
1102 Commerce St., Suite 600  
Tacoma, WA 98402

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

By signing this document each Party acknowledges receipt of the above notice. In addition (and not as a limitation on the legal effect of the notice), by signing this document each Party represents and agrees that: (a) The written Loan Agreement represents the final agreement between the Parties, (b) There are no unwritten oral agreements between the Parties, and (c) The written Loan Agreement may not be contradicted by evidence of any prior, contemporaneous, or subsequent oral agreements or understandings of the Parties.

As used in this Notice, the following terms have the following meanings:

**Loan.** The term "Loan" means the following described loan: a Variable Rate Nondisclosable Draw Down Line of Credit Loan to a Limited Liability Company for \$4,090,000.00 due on May 28, 2007. The reference rate (Frontier Bank Base Rate, currently 7.000%) is added to the margin of 1.000%, resulting in an initial rate of 8.000.

**Loan Agreement.** The term "Loan Agreement" means one or more promises, promissory notes, agreements, undertakings, security agreements, deeds of trust or other documents, or commitments, or any combination of those actions or documents, relating to the Loan, including without limitation the following:

**LOAN DOCUMENTS**

- |  |  |
|--|--|
| LLC Resolution: BLACK DIAMOND DEVELOPMENT COMPANY, LLC<br>WA Commercial Guaranty: LEE WITTENBERG<br>WA Deed of Trust for Real Property located at 30711 3RD AVENUE, BLACK DIAMOND, WA 98010<br>Agreement to Provide Insurance: Real Property located at 30711 3RD AVENUE, BLACK DIAMOND, WA 98010; owned by BLACK DIAMOND DEVELOPMENT COMPANY, LLC | Construction Loan Agreement<br>Promissory Note<br>WA Commercial Guaranty: WAYNE A COURTNEY<br>WA Assignment of Rents<br>WA Hazardous Substances Agreement<br>Disbursement Request and Authorization<br>Notice of Final Agreement |
|--|--|

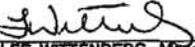
**Parties.** The term "Parties" means Frontier Bank and any and all entities or individuals who are obligated to repay the loan or have pledged property as security for the Loan, including without limitation the following:

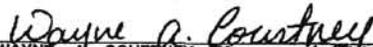
- Borrower:** BLACK DIAMOND DEVELOPMENT COMPANY, LLC  
**Grantor(s):** BLACK DIAMOND DEVELOPMENT COMPANY, LLC  
**Guarantor 1:** LEE WITTENBERG  
**Guarantor 2:** WAYNE A COURTNEY

Each Party who signs below, other than Frontier Bank, acknowledges, represents, and warrants to Frontier Bank that it has received, read and understood this Notice of Final Agreement. This Notice is dated November 28, 2005.

**BORROWER:**

BLACK DIAMOND DEVELOPMENT COMPANY, LLC

By:   
LEE WITTENBERG, Manager of BLACK DIAMOND DEVELOPMENT COMPANY, LLC

By:   
WAYNE A COURTNEY, Manager of BLACK DIAMOND DEVELOPMENT COMPANY, LLC

**GUARANTOR:**

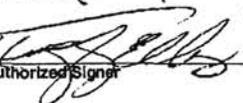
x   
LEE WITTENBERG, Individually

**GUARANTOR:**

x   
WAYNE A COURTNEY, Individually

**LENDER:**

FRONTIER BANK

x   
Authorized Signer

**Appendix B: 2005 Commitment Letter**



Black Diamond Development Company, LLC  
4114 "B" Place NW  
Suite 106  
Auburn, WA 98001

Dear Sirs:

Thank you for providing Frontier Bank with the opportunity to offer you a First Deed of Trust Construction and Forward/Permanent loan under the following contingencies:

- 1) **BORROWER:** Black Diamond Development Company, LLC (Frontier Bank must approve any changes in vesting prior to the preparation of loan documents.)
- 2) **GUARANTORS:** Lee and Orna Wittenberg  
Wayne and Maureen Courtney
- 3) **SECURITY:** First Deed of Trust on ~51k sf of mixed-use improvements located at 30711 3<sup>rd</sup> Avenue in Black Diamond  
  
**DESCRIPTION:** Proposed improvements will include two concrete tilt-up structures measuring approximately 25,200 square feet each. Each individual building will be built in two separate phases classified as Phase I or Building B and Phase II or Building C.
- 4) **LOAN AMOUNT:** \$4,090,000
- 5) **LOAN FEE:** The loan fee for this loan is 1.50% of the loan amount payable as follows: \$61,350 due at closing.
- 6) **INTEREST RATE:** **CONSTRUCTION LOAN RATE OF INTEREST:** The interest rate during the course of construction will be the Prime Rate published in the Wall Street Journal plus a 1.00% margin. Repayment will be interest only and will be due and payable on a monthly basis.

**PERMANENT LOAN RATE OF INTEREST:** The rate of interest will be calculated using a 2.75% margin added to the corresponding Federal Home Loan Bank index rounded to the nearest .125%. Frontier Bank will calculate the actual rate at the time of rollover. Permanent loan repayment will be principal and interest due and payable on a monthly basis, computed on a 25-year amortization, plus the Lender's reserves for taxes and insurance. This payment will be automatically withdrawn from a Frontier Bank checking account. When all conditions governing a roll over loan have been met, Frontier Bank shall have the exclusive right to place the permanent financing of the subject property for a maximum period of three months at terms and conditions that are acceptable to Borrower and Lender.

  
Initials



- 7) **TERM:**                   **CONSTRUCTION LOAN TERM:** The construction loan term is for 12 months. The construction loan may be extended for an additional six (6) months by paying an extension fee of .50% of the amount of the note.
- PERMANENT LOAN TERM:** The Permanent Loan Term will be for 10 years.
- 8) **AMORTIZATION:**       The permanent loan, if executed with Frontier Bank, will be amortized over a period of twenty-five (25) years.
- 9) **DOCUMENTATION:**   All required loan documentation must be, in form and substance, satisfactory to Frontier Bank.
- 10) **CONDITIONS:**       The following are conditions that need to be agreed upon prior to the closing of this loan:
- 10.1) Construction of Phase II, or Building C per the proposed site plan that was submitted to Frontier Bank to gain loan approval, will not commence until the gross collected rental income is equal to or greater than \$160,000. This amount is calculated on an annualized basis using fully executed lease agreements.
  - 10.2) The Permanent financing terms provided above will not be available until the aggregate collected rents of both buildings, "B" and "C" are equal to or greater than \$381,000. This figure will be calculated using fully executed leases on an annualized basis.

  
Initials



The preceding information shall serve as an outline of requirements and terms upon which the loan was approved and around which the final terms, conditions and documentation will be structured.

This Commitment Letter and the specific terms herein will expire on December 1, 2005. If the terms of this Commitment Letter are acceptable, indicate your acceptance by signing and dating in the applicable space(s) below. Please return the signed original Commitment Letter on or before December 1, 2005.

Sincerely,

Frontier Bank

Timothy J. Ellis  
Vice President  
Commercial Lending

This above Commitment letter has been read, understood, and the terms are hereby acceptable:

Borrower: Black Diamond Development Company, LLC, A  
Washington State Limited Liability Company

BY Date 11-30-05  
Lee Wittenberg, Member

By \_\_\_\_\_ Date \_\_\_\_\_  
Wayne Courtney, Member

Guarantor(s): Lee and Orna Wittenberg, Husband and Wife  
Wayne Maureen Courtney, Husband and Wife

By Date 11-30-05  
Lee Wittenberg  
Guarantor

By \_\_\_\_\_ Date \_\_\_\_\_  
Wayne Courtney  
Guarantor

\_\_\_\_\_  
Initials

## **Appendix C: 2005 Construction Loan Agreement**

# CONSTRUCTION LOAN AGREEMENT

Principal	Loan Date	Maturity	Loan No.	Call / Coll	Account	Officer	Initials
\$4,090,000.00	11-28-2005	05-28-2007	3179407139	DT		622	
References in the shaded area are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing ***** has been omitted due to text length limitations.							

**Borrower:** BLACK DIAMOND DEVELOPMENT COMPANY, LLC  
4114 B PLACE NW - SUITE 106  
AUBURN, WA 98001

**Lender:** Frontier Bank  
Tacoma Real Estate  
1102 Commerce St., Suite 600  
Tacoma, WA 98402

THIS CONSTRUCTION LOAN AGREEMENT dated November 28, 2005, is made and executed between BLACK DIAMOND DEVELOPMENT COMPANY, LLC ("Borrower") and Frontier Bank ("Lender") on the following terms and conditions. Borrower has applied to Lender for one or more loans for purposes of constructing the Improvements on the Real Property described below. Lender is willing to lend the loan amount to Borrower solely under the terms and conditions specified in this Agreement and in the Related Documents, to each of which Borrower agrees. Borrower understands and agrees that: (A) in granting, renewing, or extending any Loan, Lender is relying upon Borrower's representations, warranties, and agreements as set forth in this Agreement, and (B) all such Loans shall be and remain subject to the terms and conditions of this Agreement.

**TERM.** This Agreement shall be effective as of November 28, 2005, and shall continue in full force and effect until such time as all of Borrower's Loans in favor of Lender have been paid in full, including principal, interest, costs, expenses, attorneys' fees, and other fees and charges, or until such time as the parties may agree in writing to terminate this Agreement.

**ADVANCE AUTHORITY.** The following persons currently are authorized, except as provided in this paragraph, to request advances and authorize payments under the line of credit until Lender receives from Borrower, at Lender's address shown above, written notice of revocation of their authority: LEE WITTENBERG, Manager of BLACK DIAMOND DEVELOPMENT COMPANY, LLC; and WAYNE A COURTNEY, Manager of BLACK DIAMOND DEVELOPMENT COMPANY, LLC. FOR CONSTRUCTION PURPOSES ONLY.

**LOAN.** The Loan shall be in an amount not to exceed the principal sum of U.S. \$4,090,000.00 and shall bear interest on so much of the principal sum as shall be advanced pursuant to the terms of this Agreement and the Related Documents. The Loan shall bear interest on each Advance from the date of the Advance in accordance with the terms of the Note. Borrower shall use the Loan Funds solely for the following specific purposes: FOR CONSTRUCTION PURPOSES ONLY. The Loan amount shall be subject at all times to all maximum limits and conditions set forth in this Agreement or in any of the Related Documents, including without limitation, any limits relating to loan to value ratios and acquisition and Project costs.

**PROJECT DESCRIPTION.** The word "Project" as used in this Agreement means the construction and completion of all Improvements contemplated by this Agreement, including without limitation the erection of the building or structure on the Real Property identified to this Agreement by Borrower and Lender, installation of equipment and fixtures, landscaping, and all other work necessary to make the Project usable and complete for the intended purposes. The Project includes the following work:

**CONSTRUCTION OF (2) 25,000 SF CONCRETE TILT-UPS .**

The word "Property" as used in this Agreement means the Real Property together with all Improvements, all equipment, fixtures, and other articles of personal property now or subsequently attached or affixed to the Real Property, together with all accessions, parts, and additions to, all replacements of, and all substitutions for any of such property, and all proceeds (including insurance proceeds and refunds of premiums) from any sale or other disposition of such property. The real estate described below constitutes the Real Property as used in this Agreement.

**The real estate legally described as:**

THAT PORTION OF THE NORTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 11, TOWNSHIP 21 NORTH, RANGE 6 EAST, W.M., LYING WEST OF THE WESTERLY RIGHT-OF-WAY MARGIN OF THE BLACK DIAMOND-RENTON ROAD (SR 169); SAID PARCEL BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHWEST CORNER OF SAID SECTION SUBDIVISION;  
THENCE NORTH ON THE WEST LINE THEREOF, A DISTANCE OF 341.53 FEET;  
THENCE EAST ON A LINE, BEING AT RIGHT ANGLES TO SAID WEST LINE, A DISTANCE OF 757.62 FEET, MORE OR LESS, TO THE WEST RIGHT-OF-WAY LINE OF SAID BLACK DIAMOND-RENTON ROAD (SR 169);  
THENCE SOUTH 17° 32'50" EAST ON SAID RIGHT-OF-WAY LINE A DISTANCE OF 358.19 FEET TO THE INTERSECTION OF SAID LINE WITH THE SOUTH LINE OF SAID SECTION SUBDIVISION;  
THENCE WEST ON SAID SOUTH LINE A DISTANCE OF 865.61 FEET TO SAID POINT OF BEGINNING.

SITUATE IN THE CITY OF BLACK DIAMOND, COUNTY OF KING, STATE OF WASHINGTON.

Its address is commonly known as:

Real Property located at 30711 3RD AVENUE, BLACK DIAMOND, WA 98010.

**FEES AND EXPENSES.** Whether or not the Project shall be consummated, Borrower shall assume and pay upon demand all out-of-pocket expenses incurred by Lender in connection with the preparation of loan documents and the making of the Loan, including without limitation the following: (A) all closing costs, loan fees, and disbursements; (B) all expenses of Lender's legal counsel; and (C) all title examination fees, title insurance premiums, appraisal fees, survey costs, required fees, and filing and recording fees.

**NO CONSTRUCTION PRIOR TO RECORDING OF SECURITY DOCUMENT.** Borrower will not permit any work or materials to be furnished in connection with the Project until (A) Borrower has signed the Related Documents; (B) Lender's mortgage or deed of trust and other Security Interests in the Property have been duly recorded and perfected; (C) Lender has been provided evidence, satisfactory to Lender, that Borrower has obtained all insurance required under this Agreement or any Related Documents and that Lender's liens on the Property and Improvements are valid perfected first liens, subject only to such exceptions, if any, acceptable to Lender.

**REPRESENTATIONS AND WARRANTIES.** Borrower represents and warrants to Lender, as of the date of this Agreement, as of the date of each disbursement of loan proceeds, as of the date of any renewal, extension or modification of any Loan, and at all times any Indebtedness exists:

**Organization.** Borrower is a limited liability company which is, and at all times shall be, duly organized, validly existing, and in good standing under and by virtue of the laws of the State of Washington. Borrower is duly authorized to transact business in all other states in which Borrower is doing business, having obtained all necessary filings, governmental licenses and approvals for each state in which Borrower is doing business. Specifically, Borrower is, and at all times shall be, duly qualified as a foreign limited liability company in all states in which the failure to so qualify would have a material adverse effect on its business or financial condition. Borrower has the full power and authority to own its properties and to transact the business in which it is presently engaged or presently proposes to engage. Borrower maintains an office at 4114 B PLACE NW - SUITE 106, AUBURN, WA 98001. Unless Borrower has designated otherwise in writing, the principal office is the office at which Borrower keeps its books and records including its records concerning the Collateral. Borrower will notify Lender prior to any change in the location of Borrower's state of organization or any change in Borrower's name. Borrower shall do all things necessary to preserve and to keep in full force and effect its existence, rights and privileges, and shall comply with all regulations, rules, ordinances, statutes, orders and decrees of any governmental or quasi-governmental authority or court applicable to Borrower and Borrower's business activities.

**Assumed Business Names.** Borrower has filed or recorded all documents or filings required by law relating to all assumed business names used by Borrower. Excluding the name of Borrower, the following is a complete list of all assumed business names under which Borrower does business: None.

**Authorization.** Borrower's execution, delivery, and performance of this Agreement and all the Related Documents have been duly authorized by all necessary action by Borrower and do not conflict with, result in a violation of, or constitute a default under (1) any provision of (a) Borrower's articles of organization or membership agreements, or (b) any agreement or other instrument binding upon Borrower or (2) any law, governmental regulation, court decree, or order applicable to Borrower or to Borrower's properties.

**Financial Information.** Each of Borrower's financial statements supplied to Lender truly and completely disclosed Borrower's financial condition as of the date of the statement, and there has been no material adverse change in Borrower's financial condition subsequent to the date of the most recent financial statement supplied to Lender. Borrower has no material contingent obligations except as disclosed in such financial statements.

**Legal Effect.** This Agreement constitutes, and any instrument or agreement Borrower is required to give under this Agreement when delivered will constitute legal, valid, and binding obligations of Borrower enforceable against Borrower in accordance with their respective terms.

**Properties.** Except as contemplated by this Agreement or as previously disclosed in Borrower's financial statements or in writing to Lender and as accepted by Lender, and except for property tax liens for taxes not presently due and payable, Borrower owns and has good title to all of Borrower's properties free and clear of all Security Interests, and has not executed any security documents or financing statements relating to such properties. All of Borrower's properties are titled in Borrower's legal name, and Borrower has not used or filed a financing statement under any other name for at least the last five (5) years.

**Litigation and Claims.** No litigation, claim, investigation, administrative proceeding or similar action (including those for unpaid taxes) against Borrower is pending or threatened, and no other event has occurred which may materially adversely affect Borrower's financial condition or properties, other than litigation, claims, or other events, if any, that have been disclosed to and acknowledged by Lender in writing.

**Taxes.** To the best of Borrower's knowledge, all of Borrower's tax returns and reports that are or were required to be filed, have been filed, and all taxes, assessments and other governmental charges have been paid in full, except those presently being or to be contested by Borrower in good faith in the ordinary course of business and for which adequate reserves have been provided.

**Lien Priority.** Unless otherwise previously disclosed to Lender in writing, Borrower has not entered into or granted any Security Agreements, or permitted the filing or attachment of any Security Interests on or affecting any of the Collateral directly or indirectly securing repayment of Borrower's Loan and Note, that would be prior or that may in any way be superior to Lender's Security Interests and rights in and to such Collateral.

**Binding Effect.** This Agreement, the Note, all Security Agreements (if any), and all Related Documents are binding upon the signers thereof, as well as upon their successors, representatives and assigns, and are legally enforceable in accordance with their respective terms.

**Title to Property.** Borrower has, or on the date of first disbursement of Loan proceeds will have, good and marketable title to the Collateral free and clear of all defects, liens, and encumbrances, excepting only liens for taxes, assessments, or governmental charges or levies not yet delinquent or payable without penalty or interest, and such liens and encumbrances as may be approved in writing by the Lender. The Collateral is contiguous to publicly dedicated streets, roads, or highways providing access to the Collateral.

**Project Costs.** The Project costs are true and accurate estimates of the costs necessary to complete the Improvements in a good and workmanlike manner according to the Plans and Specifications presented by Borrower to Lender, and Borrower shall take all steps necessary to prevent the actual cost of the Improvements from exceeding the Project costs.

**Utility Services.** All utility services appropriate to the use of the Project after completion of construction are available at the boundaries of the Collateral.

**Assessment of Property.** The Collateral is and will continue to be assessed and taxed as an independent parcel by all governmental authorities.

**Compliance with Governing Authorities.** Borrower has examined and is familiar with all the easements, covenants, conditions, restrictions, reservations, building laws, regulations, zoning ordinances, and federal, state, and local requirements affecting the Project. The Project will at all times and in all respects conform to and comply with the requirements of such easements, covenants, conditions, restrictions, reservations, building laws, regulations, zoning ordinances, and federal, state, and local requirements.

**Survival of Representations and Warranties.** Borrower understands and agrees that in extending Loan Advances, Lender is relying on all representations, warranties, and covenants made by Borrower in this Agreement or in any certificate or other instrument delivered by Borrower to Lender under this Agreement or the Related Documents. Borrower further agrees that regardless of any investigation made by Lender, all such representations, warranties and covenants will survive the extension of Loan Advances and delivery to Lender of the Related Documents, shall be continuing in nature, shall be deemed made and redated by Borrower at the time each Loan Advance is made, and shall remain in full force and effect until such time as Borrower's indebtedness shall be paid in full, or until this Agreement shall be terminated in the manner provided above, whichever is the last to occur.

**CONDITIONS PRECEDENT TO EACH ADVANCE.** Lender's obligation to make the initial Advance and each subsequent Advance under this Agreement shall be subject to the fulfillment to Lender's satisfaction of all of the conditions set forth in this Agreement and in the Related Documents.

**Approval of Contractors, Subcontractors, and Materialmen.** Lender shall have approved a list of all contractors employed in connection with the construction of the Improvements, showing the name, address, and telephone number of each contractor, a general description of the nature of the work to be done, the labor and materials to be supplied, the names of materialmen, if known, and the approximate dollar value of the labor, work, or materials with respect to each contractor or materialman. Lender shall have the right to communicate with any person to verify the facts disclosed by the list or by any application for any Advance, or for any other purpose.

**Plans, Specifications, and Permits.** Lender shall have received and accepted a complete set of written Plans and Specifications setting forth all Improvements for the Project, and Borrower shall have furnished to Lender copies of all permits and requisite approvals of any governmental body necessary for the construction and use of the Project.

**Architect's and Construction Contracts.** Borrower shall have furnished in form and substance satisfactory to Lender an executed copy of the Architect's Contract and an executed copy of the Construction Contract.

**Budget and Schedule of Estimated Advances.** Lender shall have approved detailed budget and cash flow projections of total Project costs and a schedule of the estimated amount and time of disbursements of each Advance.

**Borrower's Authorization.** Borrower shall have provided in form and substance satisfactory to Lender properly certified resolutions, duly authorizing the consummation of the Project and duly authorizing the execution and delivery of this Agreement, the Note and the Related Documents. In addition, Borrower shall have provided such other resolutions, authorizations, documents and instruments as Lender or its counsel, in their sole discretion, may require.

**Bond.** If requested by Lender, Borrower shall have furnished a performance and payment bond in an amount equal to 100% of the amount of the Construction Contract, as well as a materialmen's and mechanics' payment bond, with such riders and supplements as Lender may require, each in form and substance satisfactory to Lender, naming the General Contractor as principal and Lender as an additional obligee.

**Appraisal.** If required by Lender, an appraisal shall be prepared for the Property, at Borrower's expense, which in form and substance shall be satisfactory to Lender, in Lender's sole discretion, including applicable regulatory requirements.

**Plans and Specifications.** If requested by Lender, Borrower shall have assigned to Lender on Lender's forms the Plans and Specifications for the Project.

**Environmental Report.** If requested by Lender, Borrower shall have furnished to Lender, at Borrower's expense, an environmental report and certificate on the Property in form and substance satisfactory to Lender, prepared by an engineer or other expert satisfactory to Lender stating that the Property complies with all applicable provisions and requirements of the "Hazardous Substances" paragraph set forth in this Agreement.

**Soil Report.** If requested by Lender, Borrower shall have furnished to Lender, at Borrower's expense, a soil report for the Property in form and substance satisfactory to Lender, prepared by a registered engineer satisfactory to Lender stating that the Property is free from soil or other geological conditions that would preclude its use or development as contemplated without extra expense for precautionary, corrective or remedial measures.

**Survey.** If requested by Lender, Borrower shall have furnished to Lender a survey of recent date, prepared and certified by a qualified surveyor and providing that the Improvements, if constructed in accordance with the Plans and Specifications, shall lie wholly within the boundaries of the Collateral without encroachment or violation of any zoning ordinances, building codes or regulations, or setback requirements, together with such other information as Lender in its sole discretion may require.

**Zoning.** Borrower shall have furnished evidence satisfactory to Lender that the Collateral is duly and validly zoned for the construction, maintenance, and operation of the Project.

**Title Insurance.** Borrower shall have provided to Lender an ALTA Lender's extended coverage policy of title insurance with such endorsements as Lender may require, issued by a title insurance company acceptable to Lender and in a form, amount, and content satisfactory to Lender, insuring or agreeing to insure that Lender's security agreement or other security document on the Property is or will be upon recordation a valid first lien on the Property free and clear of all defects, liens, encumbrances, and exceptions except those as specifically accepted by Lender in writing. If requested by Lender, Borrower shall provide to Lender, at Borrower's expense, a foundation endorsement to the title policy upon the completion of each foundation for the Improvements, showing no encroachments, and upon completion an endorsement which insures the lien-free completion of the Improvements.

**Insurance.** Unless waived by Lender in writing, Borrower shall have delivered to Lender the following insurance policies or evidence thereof: (a) an all risks course of construction insurance policy (builder's risk), with extended coverage covering the Improvements issued in an amount and by a company acceptable to Lender, containing a loss payable or other endorsement satisfactory to Lender insuring Lender as mortgagee, together with such other endorsements as may be required by Lender, including stipulations that coverages will not be cancelled or diminished without at least thirty (30) days prior written notice to Lender; (b) owners and General Contractor general liability insurance, public liability and workmen's compensation insurance; (c) flood insurance if required by Lender or applicable law; and (d) all other insurance required by this Agreement or by the Related Documents.

**Workers' Compensation Coverage.** Provide to Lender proof of the General Contractor's compliance with all applicable workers' compensation laws and regulations with regard to all work performed on the Project.

**Payment of Fees and Expenses.** Borrower shall have paid to Lender all fees, charges, and other expenses which are then due and payable as specified in this Agreement or any Related Document.

**Satisfactory Construction.** All work usually done at the stage of construction for which disbursement is requested shall have been done in a good and workmanlike manner and all materials and fixtures usually furnished and installed at that stage of construction shall have been furnished and installed, all in compliance with the Plans and Specifications. Borrower shall also have furnished to Lender such proofs as Lender may require to establish the progress of the work, compliance with applicable laws, freedom of the Property from liens, and the basis for the requested disbursement.

**Certification.** Borrower shall have furnished to Lender a certification by an engineer, architect, or other qualified inspector acceptable to Lender that the construction of the Improvements has complied and will continue to comply with all applicable statutes, ordinances, codes, regulations, and similar requirements.

**Lien Waivers.** Borrower shall have obtained and attached to each application for an Advance, including the Advance to cover final payment to the General Contractor, executed acknowledgments of payments of all sums due and releases of mechanic's and materialmen's liens, satisfactory to Lender, from any party having lien rights, which acknowledgments of payment and releases of liens shall cover all work, labor, equipment, materials done, supplied, performed, or furnished prior to such application for an Advance.

**No Event of Default.** There shall not exist at the time of any Advance a condition which would constitute an Event of Default under this Agreement or under any Related Document.

**DISBURSEMENT OF LOAN FUNDS.** The following provisions relate to the disbursement of funds from the Loan Fund.

**Application for Advances.** Each application shall be stated on a standard AIA payment request form or other form approved by Lender, executed by Borrower, and supported by such evidence as Lender shall reasonably require. Borrower shall apply only for disbursement with respect to work actually done by the General Contractor and for materials and equipment actually incorporated into the Project. Each application for an Advance shall be deemed a certification of Borrower that as of the date of such application, all representations and warranties contained in the Agreement are true and correct, and that Borrower is in compliance with all of the provisions of this Agreement.

**Payments.** At the sole option of Lender, Advances may be paid in the joint names of Borrower and the General Contractor, subcontractor(s), or supplier(s) in payment of sums due under the Construction Contract. At its sole option, Lender may directly pay the General Contractor and any subcontractors or other parties the sums due under the Construction Contract. Borrower appoints Lender as its attorney-in-fact to make such payments. This power shall be deemed coupled with an interest, shall be irrevocable, and shall survive an Event of Default under this Agreement.

**Projected Cost Overruns.** If Lender at any time determines in its sole discretion that the amount in the Loan Fund is insufficient, or will be insufficient, to complete fully and to pay for the Project, then within ten (10) days after receipt of a written request from Lender, Borrower shall deposit in the Loan Fund an amount equal to the deficiency as determined by Lender. The judgment and determination of Lender under this section shall be final and conclusive. Any such amounts deposited by Borrower shall be disbursed prior to any Loan proceeds.

**Final Payment to General Contractor.** Upon completion of the Project and fulfillment of the Construction Contract to the satisfaction of Lender and provided sufficient Loan Funds are available, Lender shall make an Advance to cover the final payment due to the General Contractor upon delivery to Lender of endorsements to the ALTA title insurance policy following the posting of the completion notice, as provided under applicable law. Construction shall not be deemed complete for purposes of final disbursement unless and until Lender shall have received all of the following:

- (1) Evidence satisfactory to Lender that all work under the Construction Contract requiring inspection by any governmental authority with jurisdiction has been duly inspected and approved by such authority, that a certificate of occupancy has been issued, and that all parties performing work have been paid, or will be paid, for such work;
- (2) A certification by an engineer, architect, or other qualified inspector acceptable to Lender that the Improvements have been completed substantially in accordance with the Plans and Specifications and the Construction Contract, that direct connection has been made to all utilities set forth in the Plans and Specifications, and that the Project is ready for occupancy; and
- (3) Acceptance of the completed Improvements by Lender and Borrower.

**Construction Default.** If Borrower fails in any respect to comply with the provisions of this Agreement or if construction ceases before completion regardless of the reason, Lender, at its option, may refuse to make further Advances, may accelerate the indebtedness under the terms of the Note, and without thereby impairing any of its rights, powers, or privileges, may enter into possession of the construction site and perform or cause to be performed any and all work and labor necessary to complete the improvements, substantially in accordance with the Plans and Specifications.

**Damage or Destruction.** If any of the Collateral or Improvements is damaged or destroyed by casualty of any nature, within sixty (60) days thereafter Borrower shall restore the Collateral and Improvements to the condition in which they were before such damage or destruction with funds other than those in the Loan Fund. Lender shall not be obligated to make disbursements under this Agreement until such restoration has been accomplished.

**Adequate Security.** When any event occurs that Lender determines may endanger completion of the Project or the fulfillment of any condition or covenant in this Agreement, Lender may require Borrower to furnish, within ten (10) days after delivery of a written request, adequate security to eliminate, reduce, or indemnify Lender against, such danger. In addition, upon such occurrence, Lender in its sole discretion may advance funds or agree to undertake to advance funds to any party to eliminate, reduce, or indemnify Lender against, such danger or to complete the Project. All sums paid by Lender pursuant to such agreements or undertakings shall be for Borrower's account and shall be without prejudice to Borrower's rights, if any, to receive such funds from the party to whom paid. All sums expended by Lender in the exercise of its option to complete the Project or protect Lender's interests shall be payable to Lender on demand together with interest from the date of the Advance at the rate applicable to the Loan. In addition, any Advance of funds under this Agreement, including without limitation direct disbursements to the General Contractor or other parties in payment of sums due under the Construction Contract, shall be deemed to have been expended by or on behalf of Borrower and to have been secured by Lender's Deed of Trust, if any, on the Collateral.

**CESSATION OF ADVANCES.** If Lender has made any commitment to make any Loan to Borrower, whether under this Agreement or under any other agreement, Lender shall have no obligation to make Loan Advances or to disburse Loan proceeds if: (A) Borrower or any Guarantor is in default under the terms of this Agreement or any of the Related Documents or any other agreement that Borrower or any Guarantor has with Lender; (B) Borrower or any Guarantor dies, becomes incompetent or becomes insolvent, files a petition in bankruptcy or similar proceedings, or is adjudged a bankrupt; (C) there occurs a material adverse change in Borrower's financial condition, in the financial condition of any Guarantor, or in the value of any Collateral securing any Loan; or (D) any Guarantor seeks, claims or otherwise attempts to limit, modify or revoke such Guarantor's guaranty of the Loan or any other loan with Lender.

**LIMITATION OF RESPONSIBILITY.** The making of any Advance by Lender shall not constitute or be interpreted as either (A) an approval or acceptance by Lender of the work done through the date of the Advance, or (B) a representation or indemnity by Lender to any party against any deficiency or defect in the work or against any breach of any contract. Inspections and approvals of the Plans and Specifications, the Improvements, the workmanship and materials used in the Improvements, and the exercise of any other right of inspection, approval, or inquiry granted to Lender in this Agreement are acknowledged to be solely for the protection of Lender's interests, and under no circumstances shall they be construed to impose any responsibility or liability of any nature whatsoever on Lender to any party. Neither Borrower nor any contractor, subcontractor, materialman, laborer, or any other person shall rely, or have any right to rely, upon Lender's determination of the appropriateness of any Advance. No disbursement or approval by Lender shall constitute a representation by Lender as to the nature of the Project, its construction, or its intended use for Borrower or for any other person, nor shall it constitute an indemnity by Lender to Borrower or to any other person against any deficiency or defects in the Project or against any breach of any contract.

**AFFIRMATIVE COVENANTS.** Borrower covenants and agrees with Lender that, so long as this Agreement remains in effect, Borrower will:

**Notices of Claims and Litigation.** Promptly inform Lender in writing of (1) all material adverse changes in Borrower's financial condition, and (2) all existing and all threatened litigation, claims, investigations, administrative proceedings or similar actions affecting Borrower or any Guarantor which could materially affect the financial condition of Borrower or the financial condition of any Guarantor.

**Financial Records.** Maintain its books and records in accordance with GAAP, applied on a consistent basis, and permit Lender to examine and audit Borrower's books and records at all reasonable times.

**Financial Statements.** Furnish Lender with such financial statements and other related information at such frequencies and in such detail as Lender may reasonably request.

**Additional Information.** Furnish such additional information and statements, lists of assets and liabilities, agings of receivables and payables, inventory schedules, budgets, forecasts, tax returns, and other reports with respect to Borrower's financial condition and business operations as Lender may request from time to time.

**Financial Covenants and Ratios.** Comply with the following covenants and ratios:

**Other Requirements.** 1.) CONSTRUCTION OF PHASE II OR BUILDING C PER THE PROPOSED SITE PLAN THAT WAS SUBMITTED TO FRONTIER BANK TO GAIN LOAN APPROVAL WILL NOT COMMENCE UNTIL THE GROSS COLLECTED RENTAL INCOME IS EQUAL TO OR GREATER THAN \$180,000. THIS AMOUNT IS CALCULATED ON AN ANNUALIZED BASIS USING FULLY EXECUTED LEASE

AGREEMENTS. 2.) THE PERMANENT FINANCING TERMS PROVIDED ABOVE WILL NOT BE AVAILABLE UNTIL THE AGGREGATE COLLECTED RENTS OF BOTH BUILDINGS, "B" AND "C" ARE EQUAL TO OR GREATER THAN \$381,000. THIS FIGURE WILL BE CALCULATED USING FULLY EXECUTED LEASES ON AN ANNUALIZED BASIS.

Except as provided above, all computations made to determine compliance with the requirements contained in this paragraph shall be made in accordance with generally accepted accounting principles, applied on a consistent basis, and certified by Borrower as being true and correct.

**Other Agreements.** Comply with all terms and conditions of all other agreements, whether now or hereafter existing, between Borrower and any other party and notify Lender immediately in writing of any default in connection with any other such agreements.

**Insurance.** Maintain fire and other risk insurance, hail, federal crop insurance, public liability insurance, and such other insurance as Lender may require with respect to Borrower's properties and operations, in form, amounts, coverages and with insurance companies acceptable to Lender. Borrower, upon request of Lender, will deliver to Lender from time to time the policies or certificates of insurance in form satisfactory to Lender, including stipulations that coverages will not be cancelled or diminished without at least thirty (30) days prior written notice to Lender. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Borrower or any other person. In connection with all policies covering assets in which Lender holds or is offered a security interest for the Loans, Borrower will provide Lender with such lender's loss payable or other endorsements as Lender may require.

**Insurance Reports.** Furnish to Lender, upon request of Lender, reports on each existing insurance policy showing such information as Lender may reasonably request, including without limitation the following: (1) the name of the insurer; (2) the risks insured; (3) the amount of the policy; (4) the properties insured; (5) the then current property values on the basis of which insurance has been obtained, and the manner of determining those values; and (6) the expiration date of the policy. In addition, upon request of Lender (however not more often than annually), Borrower will have an independent appraiser satisfactory to Lender determine, as applicable, the actual cash value or replacement cost of any Collateral. The cost of such appraisal shall be paid by Borrower.

**Guaranties.** Prior to disbursement of any Loan proceeds, furnish executed guaranties of the Loans in favor of Lender, executed by the guarantors named below, on Lender's forms, and in the amounts and under the conditions set forth in those guaranties.

<u>Names of Guarantors</u>	<u>Amounts</u>
LEE WITTENBERG	Unlimited
WAYNE A COURTNEY	Unlimited

**Loan Fees, Charges and Expenses.** Whether or not the Project is completed, Borrower also shall pay upon demand all out-of-pocket expenses incurred by Lender in connection with the preparation of loan documents and the making of the Loan, including, without limitation, all closing costs, fees, and disbursements, all expenses of Lender's legal counsel, and all title examination fees, title insurance premiums, appraisal fees, survey costs, required fees, and filing and recording fees.

**Loan Proceeds.** Use all Loan proceeds solely for the following specific purposes: **FOR CONSTRUCTION PURPOSES ONLY.**

**Taxes, Charges and Liens.** Pay and discharge when due all of its indebtedness and obligations, including without limitation all assessments, taxes, governmental charges, levies and liens, of every kind and nature, imposed upon Borrower or its properties, income, or profits, prior to the date on which penalties would attach, and all lawful claims that, if unpaid, might become a lien or charge upon any of Borrower's properties, income, or profits.

**Performance.** Perform and comply, in a timely manner, with all terms, conditions, and provisions set forth in this Agreement, in the Related Documents, and in all other instruments and agreements between Borrower and Lender. Borrower shall notify Lender immediately in writing of any default in connection with any agreement.

**Inspection.** Permit employees or agents of Lender at any reasonable time to inspect any and all Collateral for the Loan or Loans and Borrower's other properties and to examine or audit Borrower's books, accounts, and records and to make copies and memoranda of Borrower's books, accounts, and records. If Borrower now or at any time hereafter maintains any records (including without limitation computer generated records and computer software programs for the generation of such records) in the possession of a third party, Borrower, upon request of Lender, shall notify such party to permit Lender free access to such records at all reasonable times and to provide Lender with copies of any records it may request, all at Borrower's expense.

**Compliance Certificates.** Unless waived in writing by Lender, provide Lender at least annually, with a certificate executed by Borrower's chief financial officer, or other officer or person acceptable to Lender, certifying that the representations and warranties set forth in this Agreement are true and correct as of the date of the certificate and further certifying that, as of the date of the certificate, no Event of Default exists under this Agreement.

**Construction of the Project.** Commence construction of the Project no later than November 28, 2005, and cause the Improvements to be constructed and equipped in a diligent and orderly manner and in strict accordance with the Plans and Specifications approved by Lender, the Construction Contract, and all applicable laws, ordinances, codes, regulations, and rights of adjoining or concurrent property owners. Borrower agrees to complete the Project for purposes of final payment to the General Contractor on or before May 28, 2007, regardless of the reason for any delay.

**Defects.** Upon demand of Lender, promptly correct any defect in the Improvements or any departure from the Plans and Specifications not approved by Lender in writing before further work shall be done upon the portion of the Improvements affected.

**Project Claims and Litigation.** Promptly inform Lender of (1) all material adverse changes in the financial condition of the General Contractor; (2) any litigation and claims, actual or threatened, affecting the Project or the General Contractor, which could materially affect the successful completion of the Project or the ability of the General Contractor to complete the Project as agreed; and (3) any condition or event which constitutes a breach or default under any of the Related Documents or any contract related to the Project.

**Payment of Claims and Removal of Liens.** (1) Cause all claims for labor done and materials and services furnished in connection with the Improvements to be fully paid and discharged in a timely manner, (2) diligently file or procure the filing of a valid notice of completion of the Improvements, or such comparable document as may be permitted under applicable lien laws, (3) diligently file or procure the filing of a notice of cessation, or such comparable document as may be permitted under applicable lien laws, upon the happening of cessation of labor on the Improvements for a continuous period of thirty (30) days or more, and (4) take all reasonable steps necessary to remove all claims of liens against the Collateral, the Improvements or any part of the Collateral or Improvements, or any rights or interests appurtenant to the Collateral or Improvements. Upon Lender's request, Borrower shall make such demands or claims upon or against laborers, materialmen, subcontractors, or other persons who have furnished or claim to have furnished labor, services, or materials in connection with the Improvements, which demands or claims shall under the laws of the State of Washington require diligent assertions of lien claims upon penalty of loss or waiver thereof. Borrower shall, within ten (10) days after the filing of any claim of lien that is disputed or contested by Borrower, provide Lender with a surety bond issued by a surety acceptable to Lender sufficient to release the claim of lien or deposit with Lender an amount satisfactory to Lender for the possibility that the contest will be unsuccessful. If Borrower fails to remove any lien on the Collateral or Improvements or provide a bond or deposit pursuant to this provision, Lender may pay such lien, or may contest the validity of the lien, and Borrower shall pay all costs and expenses of such contest, including Lender's reasonable attorneys' fees.

**Taxes and Claims.** Pay and discharge when due all of Borrower's indebtedness, obligations, and claims that, if unpaid, might become a lien or charge upon the Collateral or Improvements; provided, however, that Borrower shall not be required to pay and discharge any such indebtedness, obligation, or claim so long as (1) its legality shall be contested in good faith by appropriate proceedings, (2) the indebtedness, obligation, or claim does not become a lien or charge upon the Collateral or Improvements, and (3) Borrower shall have established on its books adequate reserves with respect to the amount contested in accordance with GAAP. If the indebtedness, obligation, or claim does become a lien or charge upon the Collateral or Improvements, Borrower shall remove the lien or charge as provided in the preceding paragraph.

**Environmental Studies.** Promptly conduct and complete, at Borrower's expense, all such investigations, studies, samplings and testings as may be requested by Lender or any governmental authority relative to any substance, or any waste or by-product of any substance defined as toxic or a hazardous substance under applicable federal, state, or local law, rule, regulation, order or directive, at or affecting any property or any facility owned, leased or used by Borrower.

**Additional Assurances.** Make, execute and deliver to Lender such promissory notes, mortgages, deeds of trust, security agreements, assignments, financing statements, instruments, documents and other agreements as Lender or its attorneys may reasonably request to evidence and secure the Loans and to perfect all Security Interests in the Collateral and Improvements.

**LENDER'S EXPENDITURES.** If any action or proceeding is commenced that would materially affect Lender's interest in the Collateral or if Borrower fails to comply with any provision of this Agreement or any Related Documents, including but not limited to Borrower's failure to discharge or pay when due any amounts Borrower is required to discharge or pay under this Agreement or any Related Documents, Lender on Borrower's behalf may (but shall not be obligated to) take any action that Lender deems appropriate, including but not limited to discharging or paying all taxes, liens, security interests, encumbrances and other claims, at any time levied or placed on any Collateral and paying all costs for insuring, maintaining and preserving any Collateral. All such expenditures incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Note from the

date incurred or paid by Lender to the date of repayment by Borrower. All such expenses will become a part of the Indebtedness and, at Lender's option, will (A) be payable on demand; (B) be added to the balance of the Note and be apportioned among and be payable with any installment payments to become due during either (1) the term of any applicable insurance policy; or (2) the remaining term of the Note; or (C) be treated as a balloon payment which will be due and payable at the Note's maturity.

**NEGATIVE COVENANTS.** Borrower covenants and agrees with Lender that while this Agreement is in effect, Borrower shall not, without the prior written consent of Lender:

**Indebtedness and Liens.** (1) Except for trade debt incurred in the normal course of business and indebtedness to Lender contemplated by this Agreement, create, incur or assume indebtedness for borrowed money, including capital leases, (2) sell, transfer, mortgage, assign, pledge, lease, grant a security interest in, or encumber any of Borrower's assets (except as allowed as Permitted Liens), or (3) sell with recourse any of Borrower's accounts, except to Lender.

**Continuity of Operations.** (1) Engage in any business activities substantially different than those in which Borrower is presently engaged, (2) cease operations, liquidate, merge, transfer, acquire or consolidate with any other entity, change its name, dissolve or transfer or sell Collateral out of the ordinary course of business, or (3) make any distribution with respect to any capital account, whether by reduction of capital or otherwise.

**Loans, Acquisitions and Guaranties.** (1) Loan, invest in or advance money or assets to any other person, enterprise or entity, (2) purchase, create or acquire any interest in any other enterprise or entity, or (3) incur any obligation as surety or guarantor other than in the ordinary course of business.

**Modification of Contract.** Make or permit to be made any modification of the Construction Contract.

**Liens.** Create or allow to be created any lien or charge upon the Collateral or the Improvements.

**Agreements.** Borrower will not enter into any agreement containing any provisions which would be violated or breached by the performance of Borrower's obligations under this Agreement or in connection herewith.

**GENERAL PROJECT PROVISIONS.** The following provisions relate to the construction and completion of the Project:

**Change Orders.** All requests for changes in the Plans and Specifications, other than minor changes involving no extra cost, must be in writing, signed by Borrower and the architect, and delivered to Lender for its approval. Borrower will not permit the performance of any work pursuant to any change order or modification of the Construction Contract or any subcontract without the written approval of Lender. Borrower will obtain any required permits or authorizations from governmental authorities having jurisdiction before approving or requesting a new change order.

**Purchase of Materials; Conditional Sales Contracts.** No materials, equipment, fixtures, or articles of personal property placed in or incorporated into the Project shall be purchased or installed under any Security Agreement or other agreement whereby the seller reserves or purports to reserve title or the right of removal or repossession, or the right to consider such items as personal property after their incorporation into the Project, unless otherwise authorized by Lender in writing.

**Lender's Right of Entry and Inspection.** Lender and its agents shall have at all times the right of entry and free access to the Property and the right to inspect all work done, labor performed, and materials furnished with respect to the Project. Lender shall have unrestricted access to and the right to copy all records, accounting books, contracts, subcontracts, bills, statements, vouchers, and supporting documents of Borrower relating in any way to the Project.

**Lender's Right to Stop Work.** If Lender in good faith determines that any work or materials do not conform to the approved Plans and Specifications or sound building practices, or otherwise depart from any of the requirements of this Agreement, Lender may require the work to be stopped and withhold disbursements until the matter is corrected. In such event, Borrower will promptly correct the work to Lender's satisfaction. No such action by Lender will affect Borrower's obligation to complete the Improvements on or before the Completion Date. Lender is under no duty to supervise or inspect the construction or examine any books and records. Any inspection or examination by Lender is for the sole purpose of protecting Lender's security and preserving Lender's rights under this Agreement. No default of Borrower will be waived by any inspection by Lender. In no event will any inspection by Lender be a representation that there has been or will be compliance with the Plans and Specifications or that the construction is free from defective materials or workmanship.

**Indemnity.** Borrower shall indemnify and hold Lender harmless from any and all claims asserted against Lender or the Property by any person, entity, or governmental body, or arising out of or in connection with the Property, Improvements, or Project. Lender shall be entitled to appear in any proceedings to defend itself against such claims, and all costs and expenses attorneys' fees incurred by Lender in connection with such defense shall be paid by Borrower to Lender. Lender shall, in its sole discretion, be entitled to settle or compromise any asserted claims against it, and such settlement shall be binding upon Borrower for purposes of this indemnification. All amounts paid by Lender under this paragraph shall be secured by Lender's security agreement or Deed of Trust, if any, on the Property, shall be deemed an additional principal Advance under the Loan, payable upon demand, and shall bear interest at the rate applicable to the Loan.

**Publicity.** Lender may display a sign at the construction site informing the public that Lender is the construction lender for the Project. Lender may obtain other publicity in connection with the Project through press releases and participation in ground-breaking and opening ceremonies and similar events.

**Actions.** Lender shall have the right to commence, appear in, or defend any action or proceeding purporting to affect the rights, duties, or liabilities of the parties to this Agreement, or the disbursement of funds from the Loan Fund. In connection with this right, Lender may incur and pay reasonable costs, expenses and attorneys' fees. Borrower covenants to pay to Lender on demand all such expenses, together with interest from the date Lender incurs the expense at the rate specified in the Note, and Lender is authorized to disburse funds from the Loan Fund for such purposes.

**RIGHT OF SETOFF.** To the extent permitted by applicable law, Lender reserves a right of setoff in all Borrower's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Borrower holds jointly with someone else and all accounts Borrower may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Borrower authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the Indebtedness against any and all such accounts.

**DEFAULT.** Each of the following shall constitute an Event of Default under this Agreement:

**Payment Default.** Borrower fails to make any payment when due under the Loan.

**Other Defaults.** Borrower fails to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower.

**Environmental Default.** Failure of any party to comply with or perform when due any term, obligation, covenant or condition contained in any environmental agreement executed in connection with any Loan.

**Default in Favor of Third Parties.** Borrower or any Grantor defaults under any loan, extension of credit, security agreement, purchase or sales agreement, or any other agreement, in favor of any other creditor or person that may materially affect any of Borrower's or any Grantor's property or Borrower's or any Grantor's ability to repay the Loans or perform their respective obligations under this Agreement or any of the Related Documents.

**False Statements.** Any warranty, representation or statement made or furnished to Lender by Borrower or on Borrower's behalf under this Agreement or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

**Death or Insolvency.** The dissolution of Borrower (regardless of whether election to continue is made), any member withdraws from Borrower, or any other termination of Borrower's existence as a going business or the death of any member, the insolvency of Borrower, the appointment of a receiver for any part of Borrower's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower.

**Defective Collateralization.** This Agreement or any of the Related Documents ceases to be in full force and effect (including failure of any collateral document to create a valid and perfected security interest or lien) at any time and for any reason.

**Creditor or Forfeiture Proceedings.** Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Borrower or by any governmental agency against any collateral securing the Loan. This includes a garnishment of any of Borrower's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Borrower as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Borrower gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

**Breach of Construction Contract.** The Improvements are not constructed in accordance with the Plans and Specifications or in accordance with the terms of the Construction Contract.

**Cessation of Construction.** Prior to the completion of construction of the Improvements and equipping of the Project, the construction of the

Improvements or the equipping of the Project is abandoned or work thereon ceases for a period of more than ten (10) days for any reason, or the Improvements are not completed for purposes of final payment to the General Contractor prior to May 28, 2007, regardless of the reason for the delay.

**Transfer of Property.** Sale, transfer, hypothecation, assignment, or conveyance of the Property or the Improvements or any portion thereof or interest therein by Borrower or any Borrower without Lender's prior written consent.

**Condemnation.** All or any material portion of the Collateral is condemned, seized, or appropriated without compensation, and Borrower does not within thirty (30) days after such condemnation, seizure, or appropriation, initiate and diligently prosecute appropriate action to contest in good faith the validity of such condemnation, seizure, or appropriation.

**Events Affecting Guarantor.** Any of the preceding events occurs with respect to any Guarantor of any of the Indebtedness or any Guarantor dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any Guaranty of the Indebtedness. In the event of a death, Lender, at its option, may, but shall not be required to, permit the Guarantor's estate to assume unconditionally the obligations arising under the guaranty in a manner satisfactory to Lender, and, in doing so, cure any Event of Default.

**Adverse Change.** A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of the Loan is impaired.

**Right to Cure.** If any default, other than a default on Indebtedness, is curable and if Borrower or Grantor, as the case may be, has not been given a notice of a similar default within the preceding twelve (12) months, it may be cured if Borrower or Grantor, as the case may be, after receiving written notice from Lender demanding cure of such default: (1) cure the default within ten (10) days; or (2) if the cure requires more than ten (10) days, immediately initiate steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continue and complete all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

**EFFECT OF AN EVENT OF DEFAULT; REMEDIES.** Upon the occurrence of any Event of Default and at any time thereafter, Lender may, at its option, but without any obligation to do so, and in addition to any other right Lender without notice to Borrower may have, do any one or more of the following without notice to Borrower: (a) Cancel this Agreement; (b) institute appropriate proceedings to enforce the performance of this Agreement; (c) Withhold further disbursement of Loan Funds; (d) Expend funds necessary to remedy the default; (e) Take possession of the Property and continue construction of the Project; (f) Accelerate maturity of the Note and/or Indebtedness and demand payment of all sums due under the Note and/or Indebtedness; (g) Bring an action on the Note and/or Indebtedness; (h) Foreclose Lender's security agreement or Deed of Trust, if any, on the Property in any manner available under law; and (i) Exercise any other right or remedy which it has under the Note or Related Documents, or which is otherwise available at law or in equity or by statute.

**COMPLETION OF IMPROVEMENTS BY LENDER.** If Lender takes possession of the Collateral, it may take any and all actions necessary in its judgment to complete construction of the Improvements, including but not limited to making changes in the Plans and Specifications, work, or materials and entering into, modifying or terminating any contractual arrangements, subject to Lender's right at any time to discontinue any work without liability. If Lender elects to complete the Improvements, it will not assume any liability to Borrower or to any other person for completing the Improvements or for the manner or quality of construction of the Improvements, and Borrower expressly waives any such liability. Borrower irrevocably appoints Lender as its attorney-in-fact, with full power of substitution, to complete the Improvements, at Lender's option, either in Borrower's name or in its own name. In any event, all sums expended by Lender in completing the construction of the Improvements will be considered to have been disbursed to Borrower and will be secured by the Collateral for the Loan. Any such sums that cause the principal amount of the Loan to exceed the face amount of the Note will be considered to be an additional Loan to Borrower, bearing interest at the Note rate and being secured by the Collateral. For these purposes, Borrower assigns to Lender all of its right, title and interest in and to the Project Documents; however Lender will not have any obligation under the Project Documents unless Lender expressly hereafter agrees to assume such obligations in writing. Lender will have the right to exercise any rights of Borrower under the Project Documents upon the occurrence of an Event of Default. Except as may be prohibited by applicable law, all of Lender's rights and remedies, whether evidenced by this Agreement or by any other writing, shall be cumulative and may be exercised singularly or concurrently.

**ADDITIONAL DOCUMENTS.** Borrower shall provide Lender with the following additional documents:

**Articles of Organization and Company Resolutions.** Borrower has provided or will provide Lender with a certified copy of Borrower's Articles of Organization, together with a certified copy of resolutions properly adopted by the members of the company, under which the members authorized one or more designated members or employees to execute this Agreement, the Note and any and all Security Agreements directly or indirectly securing repayment of the same, and to consummate the borrowings and other transactions as contemplated under this Agreement, and to consent to the remedies following any default by Borrower as provided in this Agreement and in any Security Agreements.

**Opinion of Counsel.** When required by Lender, Borrower has provided or will provide Lender with an opinion of Borrower's counsel certifying to and that: (1) Borrower's Note, any Security Agreements and this Agreement constitute valid and binding obligations on Borrower's part that are enforceable in accordance with their respective terms; (2) Borrower is validly existing and in good standing; (3) Borrower has authority to enter into this Agreement and to consummate the transactions contemplated under this Agreement; and (4) such other matters as may have been requested by Lender or by Lender's counsel.

**MISCELLANEOUS PROVISIONS.** The following miscellaneous provisions are a part of this Agreement:

**Amendments.** This Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

**Attorneys' Fees; Expenses.** Borrower agrees to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Agreement. Lender may hire or pay someone else to help enforce this Agreement, and Borrower shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's attorneys' fees and legal expenses whether or not there is a lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. Borrower also shall pay all court costs and such additional fees as may be directed by the court.

**Authority to File Notices.** Borrower appoints and designates Lender as its attorney-in-fact to file for the record any notice that Lender deems necessary to protect its interest under this Agreement. This power shall be deemed coupled with an interest and shall be irrevocable while any sum or performance remains due and owing under any of the Related Documents.

**Caption Headings.** Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of this Agreement.

**Governing Law.** This Agreement will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Washington without regard to its conflicts of law provisions. This Agreement has been accepted by Lender in the State of Washington.

**Choice of Venue.** If there is a lawsuit, Borrower agrees upon Lender's request to submit to the jurisdiction of the courts of Pierce County, State of Washington.

**Indemnification of Lender.** Borrower agrees to indemnify, to defend and to save and hold Lender harmless from any and all claims, suits, obligations, damages, losses, costs and expenses (including, without limitation, Lender's attorneys' fees, as well as Lender's architect's and engineering fees), demands, liabilities, penalties, fines and forfeitures of any nature whatsoever that may be asserted against or incurred by Lender, its officers, directors, employees, and agents arising out of, relating to, or in any manner occasioned by this Agreement and the exercise of the rights and remedies granted Lender under this. The foregoing indemnity provisions shall survive the cancellation of this Agreement as to all matters arising or accruing prior to such cancellation and the foregoing indemnity shall survive in the event that Lender elects to exercise any of the remedies as provided under this Agreement following default hereunder.

**Consent to Loan Participation.** Borrower agrees and consents to Lender's sale or transfer, whether now or later, of one or more participation interests in the Loan to one or more purchasers, whether related or unrelated to Lender. Lender may provide, without any limitation whatsoever, to any one or more purchasers, or potential purchasers, any information or knowledge Lender may have about Borrower or about any other matter relating to the Loan, and Borrower hereby waives any rights to privacy Borrower may have with respect to such matters. Borrower additionally waives any and all notices of sale of participation interests, as well as all notices of any repurchase of such participation interests. Borrower also agrees that the purchasers of any such participation interests will be considered as the absolute owners of such interests in the Loan and will have all the rights granted under the participation agreement or agreements governing the sale of such participation interests. Borrower further waives all rights of offset or counterclaim that it may have now or later against Lender or against any purchaser of such a participation interest and unconditionally agrees that either Lender or such purchaser may enforce Borrower's obligation under the Loan irrespective of the failure or insolvency of any holder of any interest in the Loan. Borrower further agrees that the purchaser of any such participation interests may enforce its interests irrespective of any personal claims or defenses that Borrower may have against Lender.

**No Waiver by Lender.** Lender shall not be deemed to have waived any rights under this Agreement unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Agreement shall not constitute a waiver of Lender's right to enforce the strict

compliance with that provision or any other provision of this Agreement. No prior waiver by Lender, nor any course of dealing between Lender and Borrower, or between Lender and any Grantor, shall constitute a waiver of any of Lender's rights or of any of Borrower's or any Grantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Agreement, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

**Severability.** If a court of competent jurisdiction finds any provision of this Agreement to be illegal, invalid, or unenforceable as to any circumstance, that finding shall not make the offending provision illegal, invalid, or unenforceable as to any other circumstance. If feasible, the offending provision shall be considered modified so that it becomes legal, valid and enforceable. If the offending provision cannot be so modified, it shall be considered deleted from this Agreement. Unless otherwise required by law, the illegality, invalidity, or unenforceability of any provision of this Agreement shall not affect the legality, validity or enforceability of any other provision of this Agreement.

**Successors and Assigns.** All covenants and agreements by or on behalf of Borrower contained in this Agreement or any Related Documents shall bind Borrower's successors and assigns and shall inure to the benefit of Lender and its successors and assigns. Borrower shall not, however, have the right to assign Borrower's rights under this Agreement or any interest therein, without the prior written consent of Lender.

**Survival of Representations and Warranties.** Borrower understands and agrees that in extending Loan Advances, Lender is relying on all representations, warranties, and covenants made by Borrower in this Agreement or in any certificate or other instrument delivered by Borrower to Lender under this Agreement or the Related Documents. Borrower further agrees that regardless of any investigation made by Lender, all such representations, warranties and covenants will survive the extension of Loan Advances and delivery to Lender of the Related Documents, shall be continuing in nature, shall be deemed made and redated by Borrower at the time each Loan Advance is made, and shall remain in full force and effect until such time as Borrower's Indebtedness shall be paid in full, or until this Agreement shall be terminated in the manner provided above, whichever is the last to occur.

**Time is of the Essence.** Time is of the essence in the performance of this Agreement.

**DEFINITIONS.** The following capitalized words and terms shall have the following meanings when used in this Agreement. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Agreement shall have the meanings attributed to such terms in the Uniform Commercial Code. Accounting words and terms not otherwise defined in this Agreement shall have the meanings assigned to them in accordance with generally accepted accounting principles as in effect on the date of this Agreement:

**Advance.** The word "Advance" means a disbursement of Loan funds made, or to be made, to Borrower or on Borrower's behalf on a line of credit or multiple advance basis under the terms and conditions of this Agreement.

**Agreement.** The word "Agreement" means this Construction Loan Agreement, as this Construction Loan Agreement may be amended or modified from time to time, together with all exhibits and schedules attached to this Construction Loan Agreement from time to time.

**Architect's Contract.** The words "Architect's Contract" mean the architect's contract between Borrower and the architect for the Project.

**Borrower.** The word "Borrower" means BLACK DIAMOND DEVELOPMENT COMPANY, LLC and includes all co-signers and co-makers signing the Note and all their successors and assigns.

**Collateral.** The word "Collateral" means all property and assets granted as collateral security for a Loan, whether real or personal property, whether granted directly or indirectly, whether granted now or in the future, and whether granted in the form of a security interest, mortgage, collateral mortgage, deed of trust, assignment, pledge, crop pledge, chattel mortgage, collateral chattel mortgage, chattel trust, factor's lien, equipment trust, conditional sale, trust receipt, lien, charge, lien or title retention contract, lease or consignment intended as a security device, or any other security or lien interest whatsoever, whether created by law, contract, or otherwise.

**Completion Date.** The words "Completion Date" mean May 28, 2007.

**Construction Contract.** The words "Construction Contract" mean the contract between Borrower and the general contractor for the Project, and any subcontracts with subcontractors, materialmen, laborers, or any other person or entity for performance of work on the Project or the delivery of materials to the Project.

**Event of Default.** The words "Event of Default" mean any of the events of default set forth in this Agreement in the default section of this Agreement.

**GAAP.** The word "GAAP" means generally accepted accounting principles.

**Grantor.** The word "Grantor" means each and all of the persons or entities granting a Security Interest in any Collateral for the Loan, including without limitation all Borrowers granting such a Security Interest.

**Guarantor.** The word "Guarantor" means any guarantor, surety, or accommodation party of any or all of the Loan and any guarantor under a completion guaranty agreement.

**Guaranty.** The word "Guaranty" means the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note.

**Improvements.** The word "Improvements" means all existing and future buildings, structures, facilities, fixtures, additions, and similar construction on the Collateral.

**Indebtedness.** The word "Indebtedness" means the indebtedness evidenced by the Note or Related Documents, including all principal and interest together with all other indebtedness and costs and expenses for which Borrower is responsible under this Agreement or under any of the Related Documents.

**Lender.** The word "Lender" means Frontier Bank, its successors and assigns.

**Loan.** The word "Loan" means the loan or loans made to Borrower under this Agreement and the Related Documents as described.

**Loan Fund.** The words "Loan Fund" mean the undisbursed proceeds of the Loan under this Agreement together with any equity funds or other deposits required from Borrower under this Agreement.

**Note.** The word "Note" means the promissory note dated November 28, 2005, in the original principal amount of \$4,090,000.00 from Borrower to Lender, together with all renewals of, extensions of, modifications of, refinancings of, consolidations of, and substitutions for the promissory note or agreement.

**Permitted Liens.** The words "Permitted Liens" mean (1) liens and security interests securing indebtedness owed by Borrower to Lender; (2) liens for taxes, assessments, or similar charges either not yet due or being contested in good faith; (3) liens of materialmen, mechanics, warehousemen, or carriers, or other like liens arising in the ordinary course of business and securing obligations which are not yet delinquent; (4) purchase money liens or purchase money security interests upon or in any property acquired or held by Borrower in the ordinary course of business to secure indebtedness outstanding on the date of this Agreement or permitted to be incurred under the paragraph of this Agreement titled "Indebtedness and Liens"; (5) liens and security interests which, as of the date of this Agreement, have been disclosed to and approved by the Lender in writing; and (6) those liens and security interests which in the aggregate constitute an immaterial and insignificant monetary amount with respect to the net value of Borrower's assets.

**Plans and Specifications.** The words "Plans and Specifications" mean the plans and specifications for the Project which have been submitted to and initiated by Lender, together with such changes and additions as may be approved by Lender in writing.

**Project.** The word "Project" means the construction project as described in the "Project Description" section of this Agreement.

**Project Documents.** The words "Project Documents" mean the Plans and Specifications, all studies, data and drawings relating to the Project, whether prepared by or for Borrower, the Construction Contract, the Architect's Contract, and all other contracts and agreements relating to the Project or the construction of the Improvements.

**Property.** The word "Property" means the property as described in the "Project Description" section of this Agreement.

**Real Property.** The words "Real Property" mean the real property, interests and rights, as further described in the "Project Description" section of this Agreement.

**Related Documents.** The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Loan.

**Security Agreement.** The words "Security Agreement" mean and include without limitation any agreements, promises, covenants, arrangements, understandings or other agreements, whether created by law, contract, or otherwise, evidencing, governing, representing, or creating a Security Interest.

**Security Interest.** The words "Security Interest" mean, without limitation, any and all types of collateral security, present and future, whether in the form of a lien, charge, encumbrance, mortgage, deed of trust, security deed, assignment, pledge, crop pledge, chattel mortgage, collateral chattel mortgage, chattel trust, factor's lien, equipment trust, conditional sale, trust receipt, lien or title retention contract, lease or consignment intended as a security device, or any other security or lien interest whatsoever whether created by law, contract, or otherwise.

**BORROWER ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS CONSTRUCTION LOAN AGREEMENT AND BORROWER AGREES TO ITS TERMS. THIS CONSTRUCTION LOAN AGREEMENT IS DATED NOVEMBER 28, 2005.**

**BORROWER:**

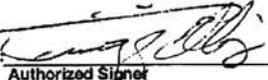
**BLACK DIAMOND DEVELOPMENT COMPANY, LLC**

By:   
LEE WITTENBERG, Manager of BLACK DIAMOND  
DEVELOPMENT COMPANY, LLC

By:   
WAYNE A. COURTNEY, Manager of BLACK  
DIAMOND DEVELOPMENT COMPANY, LLC

**LENDER:**

**FRONTIER BANK**

By:   
Authorized Signer

LASER PRO Lending, Inc. 4.28.00.004 Cap. Hybrid Financial Solutions, Inc. 1977, 2005. All Rights Reserved. - WA. C:\OFFICE\PLUG\PD TR-01484 PR-COAL\FLOC

## **Appendix D: 2005 Promissory Note**

# PROMISSORY NOTE

Principal	Loan Date	Maturity	Loan No	Call / Coll	Account	Officer	Initials
\$4,090,000.00	11-28-2005	05-28-2007	3179407139	DT		622	[Signature]

References in the shaded area are for Lender's use only and do not limit the applicability of this document to any particular loan or item.  
Any item above containing "\*\*\*\*" has been omitted due to text length limitations.

**Borrower:** BLACK DIAMOND DEVELOPMENT COMPANY, LLC  
4114 B PLACE NW - SUITE 106  
AUBURN, WA 98001

**Lender:** Frontier Bank  
Tacoma Real Estate  
1102 Commerce St., Suite 600  
Tacoma, WA 98402

**Principal Amount:** \$4,090,000.00      **Initial Rate:** 8.000%      **Date of Note:** November 28, 2005

**PROMISE TO PAY.** BLACK DIAMOND DEVELOPMENT COMPANY, LLC ("Borrower") promises to pay to Frontier Bank ("Lender"), or order, in lawful money of the United States of America, the principal amount of Four Million Ninety Thousand & 00/100 Dollars (\$4,090,000.00) or so much as may be outstanding, together with interest on the unpaid outstanding principal balance of each advance. Interest shall be calculated from the date of each advance until repayment of each advance.

**PAYMENT.** Borrower will pay this loan in one payment of all outstanding principal plus all accrued unpaid interest on May 28, 2007. In addition, Borrower will pay regular monthly payments of all accrued unpaid interest due as of each payment date, beginning December 28, 2005, with all subsequent interest payments to be due on the same day of each month after that. Unless otherwise agreed or required by applicable law, payments will be applied first to any accrued unpaid interest; then to principal; then to any unpaid collection costs; and then to any late charges. Interest on this Note is computed on a 365/365 simple interest basis; that is, by applying the ratio of the annual interest rate over the number of days in a year (366 during leap years), multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding. Borrower will pay Lender at Lender's address shown above or at such other place as Lender may designate in writing.

**VARIABLE INTEREST RATE.** The interest rate on this Note is subject to change from time to time based on changes in an index which is the Frontier Bank Base Rate (the "Index"). The Index is not necessarily the lowest rate charged by Lender on its loans and is set by Lender in its sole discretion. If the Index becomes unavailable during the term of this loan, Lender may designate a substitute index after notifying Borrower. Lender will tell Borrower the current index rate upon Borrower's request. The interest rate change will not occur more often than each day as base rate changes. Borrower understands that Lender may make loans based on other rates as well. The Index currently is 7.000% per annum. The interest rate to be applied to the unpaid principal balance of this Note will be at a rate of 1.000 percentage point over the Index, resulting in an initial rate of 8.000% per annum. NOTICE: Under no circumstances will the interest rate on this Note be more than the maximum rate allowed by applicable law.

**PREPAYMENT; MINIMUM INTEREST CHARGE.** Borrower agrees that all loan fees and other prepaid finance charges are earned fully as of the date of the loan and will not be subject to refund upon early payment (whether voluntary or as a result of default), except as otherwise required by law. In any event, even upon full prepayment of this Note, Borrower understands that Lender is entitled to a minimum interest charge of \$5.00. Other than Borrower's obligation to pay any minimum interest charge, Borrower may pay without penalty all or a portion of the amount owed earlier than it is due. Early payments will not, unless agreed to by Lender in writing, relieve Borrower of Borrower's obligation to continue to make payments of accrued unpaid interest. Rather, early payments will reduce the principal balance due. Borrower agrees not to send Lender payments marked "paid in full", "without recourse", or similar language. If Borrower sends such a payment, Lender may accept it without losing any of Lender's rights under this Note, and Borrower will remain obligated to pay any further amount owed to Lender. All written communications concerning disputed amounts, including any check or other payment instrument that indicates that the payment constitutes "payment in full" of the amount owed or that is tendered with other conditions or limitations or as full satisfaction of a disputed amount must be mailed or delivered to: Frontier Bank, Tacoma Real Estate, 1102 Commerce St., Suite 600 Tacoma, WA 98402.

**LATE CHARGE.** If a payment is 10 days or more late, Borrower will be charged 5.000% of the regularly scheduled payment or \$10.00, whichever is greater.

**INTEREST AFTER DEFAULT.** Upon default, including failure to pay upon final maturity, Lender, at its option, may, if permitted under applicable law, increase the variable interest rate on this Note to 6.000 percentage points over the Index. The interest rate will not exceed the maximum rate permitted by applicable law.

**DEFAULT.** Each of the following shall constitute an event of default ("Event of Default") under this Note:

**Payment Default.** Borrower fails to make any payment when due under this Note.

**Other Defaults.** Borrower fails to comply with or to perform any other term, obligation, covenant or condition contained in this Note or in any of the related documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower.

**Default in Favor of Third Parties.** Borrower or any Grantor defaults under any loan, extension of credit, security agreement, purchase or sales agreement, or any other agreement, in favor of any other creditor or person that may materially affect any of Borrower's property or Borrower's ability to repay this Note or perform Borrower's obligations under this Note or any of the related documents.

**Environmental Default.** Failure of any party to comply with or perform when due any term, obligation, covenant or condition contained in any environmental agreement executed in connection with any loan.

**False Statements.** Any warranty, representation or statement made or furnished to Lender by Borrower or on Borrower's behalf under this Note or the related documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

**Death or Insolvency.** The dissolution of Borrower (regardless of whether election to continue is made), any member withdraws from Borrower, or any other termination of Borrower's existence as a going business or the death of any member, the insolvency of Borrower, the appointment of a receiver for any part of Borrower's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower.

**Creditor or Forfeiture Proceedings.** Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Borrower or by any governmental agency against any collateral securing the loan. This includes a garnishment of any of Borrower's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Borrower as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Borrower gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

**Events Affecting Guarantor.** Any of the preceding events occurs with respect to any Guarantor of any of the indebtedness or any Guarantor dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any guaranty of the indebtedness evidenced by this Note. In the event of a death, Lender, at its option, may, but shall not be required to, permit the Guarantor's estate to assume unconditionally the obligations arising under the guaranty in a manner satisfactory to Lender, and, in doing so, cure any Event of Default.

**Adverse Change.** A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of this Note is impaired.

**Cure Provisions.** If any default, other than a default in payment is curable and if Borrower has not been given a notice of a breach of the same provision of this Note within the preceding twelve (12) months, it may be cured if Borrower, after receiving written notice from Lender demanding cure of such default: (1) cures the default within ten (10) days; or (2) if the cure requires more than ten (10) days, immediately initiates steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

**LENDER'S RIGHTS.** Upon default, Lender may declare the entire unpaid principal balance on this Note and all accrued unpaid interest immediately due, and then Borrower will pay that amount.

**ATTORNEYS' FEES; EXPENSES.** Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount. This includes, subject to any limits under applicable law, Lender's attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. If not prohibited by applicable law, Borrower also will pay any court costs, in addition to all other sums provided by law.

**GOVERNING LAW.** This Note will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Washington without regard to its conflicts of law provisions. This Note has been accepted by Lender in the State of Washington.

**CHOICE OF VENUE.** If there is a lawsuit, Borrower agrees upon Lender's request to submit to the jurisdiction of the courts of Pierce County, State of Washington.

**DISHONORED ITEM FEE.** Borrower will pay a fee to Lender of \$20.00 if Borrower makes a payment on Borrower's loan and the check or

PROMISSORY NOTE  
(Continued)

preauthorized charge with which Borrower pays is later dishonored.

**RIGHT OF SETOFF.** To the extent permitted by applicable law, Lender reserves a right of setoff in all Borrower's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Borrower holds jointly with someone else and all accounts Borrower may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Borrower authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the indebtedness against any and all such accounts.

**COLLATERAL.** Borrower acknowledges this Note is secured by the following collateral described in the security instruments listed herein:

(A) a Construction Deed of Trust dated November 28, 2005, to a trustee in favor of Lender on real property located in KING County, State of Washington.

(B) an Assignment of All Rents to Lender on real property located in KING County, State of Washington.

**LINE OF CREDIT.** This Note evidences a straight line of credit. Once the total amount of principal has been advanced, Borrower is not entitled to further loan advances. Advances under this Note may be requested either orally or in writing by Borrower or as provided in this paragraph. Lender may, but need not, require that all oral requests be confirmed in writing. All communications, instructions, or directions by telephone or otherwise to Lender are to be directed to Lender's office shown above. The following persons currently are authorized, except as provided in this paragraph, to request advances and authorize payments under the line of credit until Lender receives from Borrower, at Lender's address shown above, written notice of revocation of their authority: **LEE WITTENBERG, Manager of BLACK DIAMOND DEVELOPMENT COMPANY, LLC; and WAYNE A COURTNEY, Manager of BLACK DIAMOND DEVELOPMENT COMPANY, LLC. FOR CONSTRUCTION PURPOSES ONLY.** Borrower agrees to be liable for all sums either: (A) advanced in accordance with the instructions of an authorized person or (B) credited to any of Borrower's accounts with Lender. The unpaid principal balance owing on this Note at any time may be evidenced by endorsements on this Note or by Lender's internal records, including daily computer print-outs.

**SUCCESSOR INTERESTS.** The terms of this Note shall be binding upon Borrower, and upon Borrower's heirs, personal representatives, successors and assigns, and shall inure to the benefit of Lender and its successors and assigns.

**NOTIFY US OF INACCURATE INFORMATION WE REPORT TO CONSUMER REPORTING AGENCIES.** Please notify us if we report any inaccurate information about your account(s) to a consumer reporting agency. Your written notice describing the specific inaccuracy(ies) should be sent to us at the following address: Frontier Bank 332 SW Everett Mall Way Everett, WA 98204.

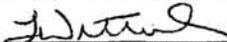
**GENERAL PROVISIONS.** Lender may delay or forgo enforcing any of its rights or remedies under this Note without losing them. Borrower and any other person who signs, guarantees or endorses this Note, to the extent allowed by law, waive presentment, demand for payment, and notice of dishonor. Upon any change in the terms of this Note, and unless otherwise expressly stated in writing, no party who signs this Note, whether as maker, guarantor, accommodation maker or endorser, shall be released from liability. All such parties agree that Lender may renew or extend (repeatedly and for any length of time) this loan or release any party or guarantor or collateral; or impair, fail to realize upon or perfect Lender's security interest in the collateral; and take any other action deemed necessary by Lender without the consent of or notice to anyone. All such parties also agree that Lender may modify this loan without the consent of or notice to anyone other than the party with whom the modification is made. The obligations under this Note are joint and several.

**PRIOR TO SIGNING THIS NOTE, BORROWER READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS NOTE, INCLUDING THE VARIABLE INTEREST RATE PROVISIONS. BORROWER AGREES TO THE TERMS OF THE NOTE.**

**BORROWER ACKNOWLEDGES RECEIPT OF A COMPLETED COPY OF THIS PROMISSORY NOTE.**

**BORROWER:**

**BLACK DIAMOND DEVELOPMENT COMPANY, LLC**

By:   
LEE WITTENBERG, Manager of BLACK DIAMOND  
DEVELOPMENT COMPANY, LLC

By:   
WAYNE A COURTNEY, Manager of BLACK  
DIAMOND DEVELOPMENT COMPANY, LLC

**Appendix E: 2005 Construction Deed of Trust**

**RETURN ADDRESS:**  
Frontier Bank  
Tacoma Real Estate  
1102 Commerce St., Suite  
600  
Tacoma, WA 98402



**CONSTRUCTION DEED OF TRUST**

**DATE:** November 28, 2005

*RT- 20183160 ①*

**Reference # (if applicable):** TAREXX7139

Additional on page \_\_\_\_

**Grantor(s):**

1. BLACK DIAMOND DEVELOPMENT COMPANY, LLC

**Grantee(s)**

1. Frontier Bank
2. LANDAMERICA COMMERCIAL SERVICES, Trustee

*9 | 41*

**Legal Description:** PTN NE 1/4 OF NW 1/4, SECTION 11, TOWNSHIP 21N, RANGE 6E

Additional on page 2

**Assessor's Tax Parcel ID#:** 112106 9069

**THIS DEED OF TRUST is dated November 28, 2005, among BLACK DIAMOND DEVELOPMENT COMPANY, LLC, whose address is 4114 B PLACE NW - SUITE 106, AUBURN, WA 98001; a Washington Limited Liability Company ("Grantor"); Frontier Bank, whose mailing address is Tacoma Real Estate, 1102 Commerce St., Suite 600, Tacoma, WA 98402 (referred to below sometimes as "Lender" and sometimes as "Beneficiary"); and LANDAMERICA COMMERCIAL SERVICES, whose mailing address is 601 UNION STREET - SUITE 1100, SEATTLE, WA 98101 (referred to below as "Trustee").**

FILED FOR RECORD AT REQUEST OF  
TRANSACTION TITLE INSURANCE CO

**DEED OF TRUST  
(Continued)**

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**CONVEYANCE AND GRANT.** For valuable consideration, Grantor conveys to Trustee in trust with power of sale, right of entry and possession and for the benefit of Lender as Beneficiary, all of Grantor's right, title, and interest in and to the following described real property, together with all existing or subsequently erected or affixed buildings, improvements and fixtures; all easements, rights of way, and appurtenances; all water, water rights and ditch rights (including stock in utilities with ditch or irrigation rights); and all other rights, royalties, and profits relating to the real property, including without limitation all minerals, oil, gas, geothermal and similar matters, (the "Real Property") located in KING County, State of Washington:

**THAT PORTION OF THE NORTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 11, TOWNSHIP 21 NORTH, RANGE 6 EAST, W.M., LYING WEST OF THE WESTERLY RIGHT-OF-WAY MARGIN OF THE BLACK DIAMOND-RENTON ROAD (SR 169); SAID PARCEL BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:**

**BEGINNING AT THE SOUTHWEST CORNER OF SAID SECTION SUBDIVISION;  
THENCE NORTH ON THE WEST LINE THEREOF, A DISTANCE OF 341.53 FEET;  
THENCE EAST ON A LINE, BEING AT RIGHT ANGLES TO SAID WEST LINE, A DISTANCE OF 757.62 FEET, MORE OR LESS, TO THE WEST RIGHT-OF-WAY LINE OF SAID BLACK DIAMOND-RENTON ROAD (SR 169);  
THENCE SOUTH 17 32'50" EAST ON SAID RIGHT-OF-WAY LINE A DISTANCE OF 358.19 FEET TO THE INTERSECTION OF SAID LINE WITH THE SOUTH LINE OF SAID SECTION SUBDIVISION;  
THENCE WEST ON SAID SOUTH LINE A DISTANCE OF 865.61 FEET TO SAID POINT OF BEGINNING.**

**SITUATE IN THE CITY OF BLACK DIAMOND, COUNTY OF KING, STATE OF WASHINGTON.**

**The Real Property or its address is commonly known as 30711 3RD AVENUE, BLACK DIAMOND, WA 98010. The Real Property tax identification number is 112106 9069.**

Grantor hereby assigns as security to Lender, all of Grantor's right, title, and interest in and to all leases, Rents, and profits of the Property. This assignment is recorded in accordance with RCW 65.08.070; the lien created by this assignment is intended to be specific, perfected and choate upon the recording of this Deed of Trust. Lender grants to Grantor a license to collect the Rents and profits, which license may be revoked at Lender's option and shall be automatically revoked upon acceleration of all or part of the Indebtedness.

**THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST. THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS ALSO GIVEN TO SECURE ANY AND ALL OF GRANTOR'S OBLIGATIONS UNDER THAT CERTAIN CONSTRUCTION LOAN AGREEMENT BETWEEN GRANTOR AND LENDER OF EVEN DATE HEREWITH. ANY EVENT OF DEFAULT UNDER THE CONSTRUCTION LOAN AGREEMENT, OR ANY OF THE RELATED DOCUMENTS REFERRED TO THEREIN, SHALL ALSO BE AN EVENT OF DEFAULT UNDER THIS DEED OF TRUST. THIS DEED OF TRUST IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS:**

**PAYMENT AND PERFORMANCE.** Except as otherwise provided in this Deed of Trust, Grantor shall pay to Lender all amounts secured by this Deed of Trust as they become due, and shall strictly and in a timely manner perform all of Grantor's obligations under the Note, this Deed of Trust, and the Related Documents.

**CONSTRUCTION MORTGAGE.** This Deed of Trust is a "construction mortgage" for the purposes of Sections 9-334 and 2A-309 of the Uniform Commercial Code, as those sections have been adopted by the State of Washington.

**POSSESSION AND MAINTENANCE OF THE PROPERTY.** Grantor agrees that Grantor's possession and use of the Property shall be governed by the following provisions:

**Possession and Use.** Until the occurrence of an Event of Default, Grantor may (1) remain in possession and control of the Property; (2) use, operate or manage the Property; and (3) collect the Rents from the Property (this privilege is a license from Lender to Grantor automatically revoked upon default). The following provisions relate to the use of the Property or to other limitations on the Property. The Real Property is not used principally for agricultural purposes.

**Duty to Maintain.** Grantor shall maintain the Property in tenable condition and promptly perform all repairs, replacements, and maintenance necessary to preserve its value.

**Nuisance, Waste.** Grantor shall not cause, conduct or permit any nuisance nor commit, permit, or suffer any stripping of or waste on or to the Property or any portion of the Property. Without limiting the generality of the foregoing, Grantor will not remove, or grant to any other party the right to remove, any timber, minerals (including oil and gas), coal, clay, scoria, soil, gravel or rock products without Lender's prior written consent.

**Removal of Improvements.** Grantor shall not demolish or remove any Improvements from the Real Property without Lender's prior written consent. As a condition to the removal of any Improvements, Lender may require Grantor to make arrangements satisfactory to Lender to replace such Improvements with Improvements of at least equal value.

**Lender's Right to Enter.** Lender and Lender's agents and representatives may enter upon the Real Property at all reasonable times to attend to Lender's interests and to inspect the Real Property for purposes of Grantor's compliance with the terms and conditions of this Deed of Trust.

**Compliance with Governmental Requirements.** Grantor shall promptly comply, and shall promptly cause compliance by all agents, tenants or other persons or entities of every nature whatsoever who rent, lease or otherwise use or occupy the Property in any manner, with all laws, ordinances, and regulations, now or hereafter in effect, of all governmental authorities applicable to the use or occupancy of the Property, including without limitation, the Americans With Disabilities Act. Grantor may contest in good faith any such law, ordinance, or regulation and withhold compliance during any proceeding, including appropriate appeals, so long as Grantor has notified Lender in writing prior to doing so and so long as, in Lender's sole opinion, Lender's interests in the Property are not jeopardized. Lender may require Grantor to post adequate security or a surety bond, reasonably satisfactory to Lender, to protect Lender's interest.

**DEED OF TRUST  
(Continued)**

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**Duty to Protect.** Grantor agrees neither to abandon or leave unattended the Property. Grantor shall do all other acts, in addition to those acts set forth above in this section, which from the character and use of the Property are reasonably necessary to protect and preserve the Property.

**Construction Loan.** If some or all of the proceeds of the loan creating the indebtedness are to be used to construct or complete construction of any improvements on the Property, the improvements shall be completed no later than the maturity date of the Note (or such earlier date as Lender may reasonably establish) and Grantor shall pay in full all costs and expenses in connection with the work. Lender will disburse loan proceeds under such terms and conditions as Lender may deem reasonably necessary to insure that the interest created by this Deed of Trust shall have priority over all possible liens, including those of material suppliers and workmen. Lender may require, among other things, that disbursement requests be supported by receipted bills, expense affidavits, waivers of liens, construction progress reports, and such other documentation as Lender may reasonably request.

**DUE ON SALE - CONSENT BY LENDER.** Lender may, at Lender's option, (A) declare immediately due and payable all sums secured by this Deed of Trust or (B) increase the interest rate provided for in the Note or other document evidencing the indebtedness and impose such other conditions as Lender deems appropriate, upon the sale or transfer, without Lender's prior written consent, of all or any part of the Real Property, or any interest in the Real Property. A "sale or transfer" means the conveyance of Real Property or any right, title or interest in the Real Property; whether legal, beneficial or equitable; whether voluntary or involuntary; whether by outright sale, deed, installment sale contract, land contract, contract for deed, leasehold interest with a term greater than three (3) years, lease-option contract, or by sale, assignment, or transfer of any beneficial interest in or to any land trust holding title to the Real Property, or by any other method of conveyance of an interest in the Real Property. If any Grantor is a corporation, partnership or limited liability company, transfer also includes any change in ownership of more than twenty-five percent (25%) of the voting stock, partnership interests or limited liability company interests, as the case may be, of such Grantor. However, this option shall not be exercised by Lender if such exercise is prohibited by federal law or by Washington law.

**TAXES AND LIENS.** The following provisions relating to the taxes and liens on the Property are part of this Deed of Trust:

**Payment.** Grantor shall pay when due (and in all events prior to delinquency) all taxes, special taxes, assessments, charges (including water and sewer), fines and impositions levied against or on account of the Property, and shall pay when due all claims for work done on or for services rendered or material furnished to the Property. Grantor shall maintain the Property free of all liens having priority over or equal to the interest of Lender under this Deed of Trust, except for the lien of taxes and assessments not due and except as otherwise provided in this Deed of Trust.

**Right to Contest.** Grantor may withhold payment of any tax, assessment, or claim in connection with a good faith dispute over the obligation to pay, so long as Lender's interest in the Property is not jeopardized. If a lien arises or is filed as a result of nonpayment, Grantor shall within fifteen (15) days after the lien arises or, if a lien is filed, within fifteen (15) days after Grantor has notice of the filing, secure the discharge of the lien, or if requested by Lender, deposit with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender in an amount sufficient to discharge the lien plus any costs and attorneys' fees, or other charges that could accrue as a result of a foreclosure or sale under the lien. In any contest, Grantor shall defend itself and Lender and shall satisfy any adverse judgment before enforcement against the Property. Grantor shall name Lender as an additional obligee under any surety bond furnished in the contest proceedings.

**Evidence of Payment.** Grantor shall upon demand furnish to Lender satisfactory evidence of payment of the taxes or assessments and shall authorize the appropriate governmental official to deliver to Lender at any time a written statement of the taxes and assessments against the Property.

**Notice of Construction.** Grantor shall notify Lender at least fifteen (15) days before any work is commenced, any services are furnished, or any materials are supplied to the Property, if any mechanic's lien, materialmen's lien, or other lien could be asserted on account of the work, services, or materials. Grantor will upon request of Lender furnish to Lender advance assurances satisfactory to Lender that Grantor can and will pay the cost of such improvements.

**PROPERTY DAMAGE INSURANCE.** The following provisions relating to insuring the Property are a part of this Deed of Trust.

**Maintenance of Insurance.** Grantor shall procure and maintain policies of fire insurance with standard extended coverage endorsements on a replacement basis for the full insurable value covering all improvements on the Real Property in an amount sufficient to avoid application of any coinsurance clause, and with a standard mortgagee clause in favor of Lender. Grantor shall also procure and maintain comprehensive general liability insurance in such coverage amounts as Lender may request with Trustee and Lender being named as additional insureds in such liability insurance policies. Additionally, Grantor shall maintain such other insurance, including but not limited to hazard, business interruption, and boiler insurance, as Lender may reasonably require. Policies shall be written in form, amounts, coverages and basis reasonably acceptable to Lender and issued by a company or companies reasonably acceptable to Lender. Grantor, upon request of Lender, will deliver to Lender from time to time the policies or certificates of insurance in form satisfactory to Lender, including stipulations that coverages will not be cancelled or diminished without at least thirty (30) days prior written notice to Lender. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Grantor or any other person. Should the Real Property be located in an area designated by the Director of the Federal Emergency Management Agency as a special flood hazard area, Grantor agrees to obtain and maintain Federal Flood Insurance, if available, within 45 days after notice is given by Lender that the Property is located in a special flood hazard area, for the full unpaid principal balance of the loan and any prior liens on the property securing the loan, up to the maximum policy limits set under the National Flood Insurance Program, or as otherwise required by Lender, and to maintain such insurance for the term of the loan.

**Application of Proceeds.** Grantor shall promptly notify Lender of any loss or damage to the Property. Lender may make proof of loss if Grantor fails to do so within fifteen (15) days of the casualty. Whether or not Lender's security is impaired, Lender may, at Lender's election, receive and retain the proceeds of any insurance and apply the proceeds to the reduction of the indebtedness, payment of any lien affecting the Property, or the restoration and repair of the Property. If Lender elects to apply the proceeds to restoration and repair, Grantor shall repair or replace the damaged or destroyed improvements in a manner satisfactory to Lender. Lender shall, upon satisfactory proof of such expenditure, pay or reimburse Grantor from the proceeds for the reasonable cost of repair or restoration if Grantor is not in default under this Deed of Trust. Any proceeds which have not been disbursed within 180 days after their receipt and which Lender has not committed to the repair or restoration of the Property shall be used first to pay any amount owing to Lender under this Deed of Trust, then to pay accrued interest, and the remainder, if any, shall be applied to the principal balance of the indebtedness. If Lender holds any proceeds after payment in full of the indebtedness, such proceeds shall be paid without interest to Grantor as Grantor's interests may appear.

**Grantor's Report on Insurance.** Upon request of Lender, however not more than once a year, Grantor shall furnish to Lender a report on each existing policy of insurance showing: (1) the name of the insurer; (2) the risks insured; (3) the amount of the policy; (4) the property insured, the then current replacement value of such property, and the manner of determining that value; and (5) the expiration date of the policy. Grantor shall, upon request of Lender, have an

**DEED OF TRUST  
(Continued)**

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Independent appraiser satisfactory to Lender determine the cash value replacement cost of the Property.

**LENDER'S EXPENDITURES.** If any action or proceeding is commenced that would materially affect Lender's interest in the Property or if Grantor fails to comply with any provision of this Deed of Trust or any Related Documents, including but not limited to Grantor's failure to discharge or pay when due any amounts Grantor is required to discharge or pay under this Deed of Trust or any Related Documents, Lender on Grantor's behalf may (but shall not be obligated to) take any action that Lender deems appropriate, including but not limited to discharging or paying all taxes, liens, security interests, encumbrances and other claims, at any time levied or placed on the Property and paying all costs for insuring, maintaining and preserving the Property. All such expenditures incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Note from the date incurred or paid by Lender to the date of repayment by Grantor. All such expenses will become a part of the indebtedness and, at Lender's option, will (A) be payable on demand; (B) be added to the balance of the Note and be apportioned among and be payable with any installment payments to become due during either (1) the term of any applicable insurance policy; or (2) the remaining term of the Note; or (C) be treated as a balloon payment which will be due and payable at the Note's maturity. The Deed of Trust also will secure payment of these amounts. Such right shall be in addition to all other rights and remedies to which Lender may be entitled upon Default.

**WARRANTY; DEFENSE OF TITLE.** The following provisions relating to ownership of the Property are a part of this Deed of Trust:

**Title.** Grantor warrants that: (a) Grantor holds good and marketable title of record to the Property in fee simple, free and clear of all liens and encumbrances other than those set forth in the Real Property description or in any title insurance policy, title report, or final title opinion issued in favor of, and accepted by, Lender in connection with this Deed of Trust, and (b) Grantor has the full right, power, and authority to execute and deliver this Deed of Trust to Lender.

**Defense of Title.** Subject to the exception in the paragraph above, Grantor warrants and will forever defend the title to the Property against the lawful claims of all persons. In the event any action or proceeding is commenced that questions Grantor's title or the interest of Trustee or Lender under this Deed of Trust, Grantor shall defend the action at Grantor's expense. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of Lender's own choice, and Grantor will deliver, or cause to be delivered, to Lender such instruments as Lender may request from time to time to permit such participation.

**Compliance With Laws.** Grantor warrants that the Property and Grantor's use of the Property complies with all existing applicable laws, ordinances, and regulations of governmental authorities.

**Survival of Representations and Warranties.** All representations, warranties, and agreements made by Grantor in this Deed of Trust shall survive the execution and delivery of this Deed of Trust, shall be continuing in nature, and shall remain in full force and effect until such time as Grantor's indebtedness shall be paid in full.

**CONDEMNATION.** The following provisions relating to condemnation proceedings are a part of this Deed of Trust:

**Proceedings.** If any proceeding in condemnation is filed, Grantor shall promptly notify Lender in writing, and Grantor shall promptly take such steps as may be necessary to defend the action and obtain the award. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of its own choice all at Grantor's expense, and Grantor will deliver or cause to be delivered to Lender such instruments and documentation as may be requested by Lender from time to time to permit such participation.

**Application of Net Proceeds.** If all or any part of the Property is condemned by eminent domain proceedings or by any proceeding or purchase in lieu of condemnation, Lender may at its election require that all or any portion of the net proceeds of the award be applied to the indebtedness or the repair or restoration of the Property. The net proceeds of the award shall mean the award after payment of all reasonable costs, expenses, and attorneys' fees incurred by Trustee or Lender in connection with the condemnation.

**IMPOSITION OF TAXES, FEES AND CHARGES BY GOVERNMENTAL AUTHORITIES.** The following provisions relating to governmental taxes, fees and charges are a part of this Deed of Trust:

**Current Taxes, Fees and Charges.** Upon request by Lender, Grantor shall execute such documents in addition to this Deed of Trust and take whatever other action is requested by Lender to perfect and continue Lender's lien on the Real Property. Grantor shall reimburse Lender for all taxes, as described below, together with all expenses incurred in recording, perfecting or continuing this Deed of Trust, including without limitation all taxes, fees, documentary stamps, and other charges for recording or registering this Deed of Trust.

**Taxes.** The following shall constitute taxes to which this section applies: (1) a specific tax upon this type of Deed of Trust or upon all or any part of the indebtedness secured by this Deed of Trust; (2) a specific tax on Grantor which Grantor is authorized or required to deduct from payments on the indebtedness secured by this type of Deed of Trust; (3) a tax on this type of Deed of Trust chargeable against the Lender or the holder of the Note; and (4) a specific tax on all or any portion of the indebtedness or on payments of principal and interest made by Grantor.

**Subsequent Taxes.** If any tax to which this section applies is enacted subsequent to the date of this Deed of Trust, this event shall have the same effect as an Event of Default, and Lender may exercise any or all of its available remedies for an Event of Default as provided below unless Grantor either (1) pays the tax before it becomes delinquent, or (2) contests the tax as provided above in the Taxes and Liens section and deposits with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender.

**SECURITY AGREEMENT; FINANCING STATEMENTS.** The following provisions relating to this Deed of Trust as a security agreement are a part of this Deed of Trust:

**Security Agreement.** This instrument shall constitute a Security Agreement to the extent any of the Property constitutes fixtures, and Lender shall have all of the rights of a secured party under the Uniform Commercial Code as amended from time to time.

**Security Interest.** Upon request by Lender, Grantor shall take whatever action is requested by Lender to perfect and continue Lender's security interest in the Rents and Personal Property. In addition to recording this Deed of Trust in the real property records, Lender may, at any time and without further authorization from Grantor, file executed counterparts, copies or reproductions of this Deed of Trust as a financing statement. Grantor shall reimburse Lender for all expenses incurred in perfecting or continuing this security interest. Upon default, Grantor shall not remove, sever or detach the Personal Property from the Property. Upon default, Grantor shall assemble any Personal Property not affixed to the Property in a manner and at a place reasonably convenient to Grantor and Lender and make it available to Lender within three (3) days after receipt of written demand from Lender to the extent permitted by applicable law.

**Addresses.** The mailing addresses of Grantor (debtor) and Lender (secured party) from which information concerning the security interest granted by this Deed of Trust may be obtained (each as required by the Uniform Commercial Code) are as stated on the first page of this Deed of Trust.

**FURTHER ASSURANCES; ATTORNEY-IN-FACT.** The following provisions relating to further assurances and attorney-in-fact are a part of this Deed of Trust:

**DEED OF TRUST  
(Continued)**

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**Further Assurances.** At any time, and from time to time, upon request of Lender, Grantor will make, execute and deliver, or will cause to be made, executed or delivered, to Lender or to Lender's designee, and when requested by Lender, cause to be filed, recorded, refiled, or rerecorded, as the case may be, at such times and in such offices and places as Lender may deem appropriate, any and all such mortgages, deeds of trust, security deeds, security agreements, financing statements, continuation statements, instruments of further assurance, certificates, and other documents as may, in the sole opinion of Lender, be necessary or desirable in order to effectuate, complete, perfect, continue, or preserve (1) Grantor's obligations under the Note, this Deed of Trust, and the Related Documents, and (2) the liens and security interests created by this Deed of Trust as first and prior liens on the Property, whether now owned or hereafter acquired by Grantor. Unless prohibited by law or Lender agrees to the contrary in writing, Grantor shall reimburse Lender for all costs and expenses incurred in connection with the matters referred to in this paragraph.

**Attorney-in-Fact.** If Grantor fails to do any of the things referred to in the preceding paragraph, Lender may do so for and in the name of Grantor and at Grantor's expense. For such purposes, Grantor hereby irrevocably appoints Lender as Grantor's attorney-in-fact for the purpose of making, executing, delivering, filing, recording, and doing all other things as may be necessary or desirable, in Lender's sole opinion, to accomplish the matters referred to in the preceding paragraph.

**FULL PERFORMANCE.** If Grantor pays all the indebtedness when due, and otherwise performs all the obligations imposed upon Grantor under this Deed of Trust, Lender shall execute and deliver to Trustee a request for full reconveyance and shall execute and deliver to Grantor suitable statements of termination of any financing statement on file evidencing Lender's security interest in the Rents and the Personal Property. Any reconveyance fee shall be paid by Grantor, if permitted by applicable law. The grantee in any reconveyance may be described as the "person or persons legally entitled thereto", and the recitals in the reconveyance of any matters or facts shall be conclusive proof of the truthfulness of any such matters or facts.

**EVENTS OF DEFAULT.** Each of the following, at Lender's option, shall constitute an Event of Default under this Deed of Trust:

**Payment Default.** Grantor fails to make any payment when due under the Indebtedness.

**Other Defaults.** Grantor fails to comply with or to perform any other term, obligation, covenant or condition contained in this Deed of Trust or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Grantor.

**Compliance Default.** Failure to comply with any other term, obligation, covenant or condition contained in this Deed of Trust, the Note or in any of the Related Documents.

**Default on Other Payments.** Failure of Grantor within the time required by this Deed of Trust to make any payment for taxes or insurance, or any other payment necessary to prevent filing of or to effect discharge of any lien.

**Default in Favor of Third Parties.** Should Grantor default under any loan, extension of credit, security agreement, purchase or sales agreement, or any other agreement, in favor of any other creditor or person that may materially affect any of Grantor's property or Grantor's ability to repay the indebtedness or perform their respective obligations under this Deed of Trust or any of the Related Documents.

**False Statements.** Any warranty, representation or statement made or furnished to Lender by Grantor or on Grantor's behalf under this Deed of Trust or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

**Defective Collateralization.** This Deed of Trust or any of the Related Documents ceases to be in full force and effect (including failure of any collateral document to create a valid and perfected security interest or lien) at any time and for any reason.

**Death or Insolvency.** The dissolution of Grantor's (regardless of whether election to continue is made), any member withdraws from the limited liability company, or any other termination of Grantor's existence as a going business or the death of any member, the insolvency of Grantor, the appointment of a receiver for any part of Grantor's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Grantor.

**Creditor or Forfeiture Proceedings.** Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Grantor or by any governmental agency against any property securing the Indebtedness. This includes a garnishment of any of Grantor's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Grantor as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Grantor gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

**Breach of Other Agreement.** Any breach by Grantor under the terms of any other agreement between Grantor and Lender that is not remedied within any grace period provided therein, including without limitation any agreement concerning any indebtedness or other obligation of Grantor to Lender, whether existing now or later.

**Events Affecting Guarantor.** Any of the preceding events occurs with respect to any Guarantor of any of the Indebtedness or any Guarantor dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any Guaranty of the Indebtedness. In the event of a death, Lender, at its option, may, but shall not be required to, permit the Guarantor's estate to assume unconditionally the obligations arising under the guaranty in a manner satisfactory to Lender, and, in doing so, cure any Event of Default.

**Adverse Change.** A material adverse change occurs in Grantor's financial condition, or Lender believes the prospect of payment or performance of the Indebtedness is impaired.

**Right to Cure.** If any default, other than a default in payment is curable and if Grantor has not been given a notice of a breach of the same provision of this Deed of Trust within the preceding twelve (12) months, it may be cured if Grantor, after receiving written notice from Lender demanding cure of such default: (1) cures the default within ten (10) days; or (2) if the cure requires more than ten (10) days, immediately initiates steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

**RIGHTS AND REMEDIES ON DEFAULT.** If an Event of Default occurs under this Deed of Trust, at any time thereafter, Trustee or Lender may exercise any one or more of the following rights and remedies:

**Election of Remedies.** Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of Grantor under this Deed of Trust, after Grantor's failure to perform, shall not affect Lender's right to declare a default and exercise its remedies.

**Accelerate Indebtedness.** Lender shall have the right at its option to declare the entire Indebtedness immediately due

**DEED OF TRUST  
(Continued)**

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and payable, including any prepayment penalty which Grantor would be required to pay.

**Foreclosure.** With respect to all or any part of the Real Property, the Trustee shall have the right to exercise its power of sale and to foreclose by notice and sale, and Lender shall have the right to foreclose by judicial foreclosure, in either case in accordance with and to the full extent provided by applicable law.

**UCC Remedies.** With respect to all or any part of the Personal Property, Lender shall have all the rights and remedies of a secured party under the Uniform Commercial Code.

**Collect Rents.** Lender shall have the right, without notice to Grantor to take possession of and manage the Property and collect the Rents, including amounts past due and unpaid, and apply the net proceeds, over and above Lender's costs, against the Indebtedness. In furtherance of this right, Lender may require any tenant or other user of the Property to make payments of rent or use fees directly to Lender. If the Rents are collected by Lender, then Grantor irrevocably designates Lender as Grantor's attorney-in-fact to endorse instruments received in payment thereof in the name of Grantor and to negotiate the same and collect the proceeds. Payments by tenants or other users to Lender in response to Lender's demand shall satisfy the obligations for which the payments are made, whether or not any proper grounds for the demand existed. Lender may exercise its rights under this subparagraph either in person, by agent, or through a receiver.

**Appoint Receiver.** Lender shall have the right to have a receiver appointed to take possession of all or any part of the Property, with the power to protect and preserve the Property, to operate the Property preceding or pending foreclosure or sale, and to collect the Rents from the Property and apply the proceeds, over and above the cost of the receivership, against the Indebtedness. The receiver may serve without bond if permitted by law. Lender's right to the appointment of a receiver shall exist whether or not the apparent value of the Property exceeds the Indebtedness by a substantial amount. Employment by Lender shall not disqualify a person from serving as a receiver.

**Tenancy at Sufferance.** If Grantor remains in possession of the Property after the Property is sold as provided above or Lender otherwise becomes entitled to possession of the Property upon default of Grantor, Grantor shall become a tenant at sufferance of Lender or the purchaser of the Property and shall, at Lender's option, either (1) pay a reasonable rental for the use of the Property, or (2) vacate the Property immediately upon the demand of Lender.

**Other Remedies.** Trustee or Lender shall have any other right or remedy provided in this Deed of Trust or the Note or by law.

**Notice of Sale.** Lender shall give Grantor reasonable notice of the time and place of any public sale of the Personal Property or of the time after which any private sale or other intended disposition of the Personal Property is to be made. Reasonable notice shall mean notice given at least ten (10) days before the time of the sale or disposition. Any sale of the Personal Property may be made in conjunction with any sale of the Real Property.

**Sale of the Property.** To the extent permitted by applicable law, Grantor hereby waives any and all rights to have the Property marshalled. In exercising its rights and remedies, the Trustee or Lender shall be free to sell all or any part of the Property together or separately, in one sale or by separate sales. Lender shall be entitled to bid at any public sale on all or any portion of the Property.

**Attorneys' Fees; Expenses.** If Lender institutes any suit or action to enforce any of the terms of this Deed of Trust, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and upon any appeal. Whether or not any court action is involved, and to the extent not prohibited by law, all reasonable expenses Lender incurs that in Lender's opinion are necessary at any time for the protection of its interest or the enforcement of its rights shall become a part of the Indebtedness payable on demand and shall bear interest at the Note rate from the date of the expenditure until repaid. Expenses covered by this paragraph include, without limitation, however subject to any limits under applicable law, Lender's attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees and expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services, the cost of searching records, obtaining title reports (including foreclosure reports), surveyors' reports, and appraisal fees, title insurance, and fees for the Trustee, to the extent permitted by applicable law. Grantor also will pay any court costs, in addition to all other sums provided by law.

**Rights of Trustee.** Trustee shall have all of the rights and duties of Lender as set forth in this section.

**POWERS AND OBLIGATIONS OF TRUSTEE.** The following provisions relating to the powers and obligations of Trustee (pursuant to Lender's instructions) are part of this Deed of Trust:

**Powers of Trustee.** In addition to all powers of Trustee arising as a matter of law, Trustee shall have the power to take the following actions with respect to the Property upon the written request of Lender and Grantor: (a) join in preparing and filing a map or plat of the Real Property, including the dedication of streets or other rights to the public; (b) join in granting any easement or creating any restriction on the Real Property; and (c) join in any subordination or other agreement affecting this Deed of Trust or the interest of Lender under this Deed of Trust.

**Obligations to Notify.** Trustee shall not be obligated to notify any other party of a pending sale under any other trust deed or lien, or of any action or proceeding in which Grantor, Lender, or Trustee shall be a party, unless required by applicable law, or unless the action or proceeding is brought by Trustee.

**Trustee.** Trustee shall meet all qualifications required for Trustee under applicable law. In addition to the rights and remedies set forth above, with respect to all or any part of the Property, the Trustee shall have the right to foreclose by notice and sale, and Lender shall have the right to foreclose by judicial foreclosure, in either case in accordance with and to the full extent provided by applicable law.

**Successor Trustee.** Lender, at Lender's option, may from time to time appoint a successor Trustee to any Trustee appointed under this Deed of Trust by an instrument executed and acknowledged by Lender and recorded in the office of the recorder of KING County, State of Washington. The instrument shall contain, in addition to all other matters required by state law, the names of the original Lender, Trustee, and Grantor, the book and page or the Auditor's File Number where this Deed of Trust is recorded, and the name and address of the successor trustee, and the instrument shall be executed and acknowledged by Lender or its successors in interest. The successor trustee, without conveyance of the Property, shall succeed to all the title, power, and duties conferred upon the Trustee in this Deed of Trust and by applicable law. This procedure for substitution of Trustee shall govern to the exclusion of all other provisions for substitution.

**NOTICES.** Subject to applicable law, and except for notice required or allowed by law to be given in another manner, any notice required to be given under this Deed of Trust, including without limitation any notice of default and any notice of sale shall be given in writing, and shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Deed of Trust. All copies of notices of foreclosure from the holder of any lien which has priority over this Deed of Trust shall be sent to Lender's address, as shown near the beginning of this Deed of Trust. Any party may change its address for notices under this Deed of Trust by giving formal written notice to the other parties, specifying that the purpose of

DEED OF TRUST  
(Continued)

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the notice is to change the party's address. For notice purposes, Grantor agrees to keep Lender informed at all times of Grantor's current address. Subject to applicable law, and except for notice required or allowed by law to be given in another manner, if there is more than one Grantor, any notice given by Lender to any Grantor is deemed to be notice given to all Grantors.

**MISCELLANEOUS PROVISIONS.** The following miscellaneous provisions are a part of this Deed of Trust:

**Amendments.** This Deed of Trust, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Deed of Trust. No alteration of or amendment to this Deed of Trust shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

**Annual Reports.** If the Property is used for purposes other than Grantor's residence, Grantor shall furnish to Lender, upon request, a certified statement of net operating income received from the Property during Grantor's previous fiscal year in such form and detail as Lender shall require. "Net operating income" shall mean all cash receipts from the Property less all cash expenditures made in connection with the operation of the Property.

**Caption Headings.** Caption headings in this Deed of Trust are for convenience purposes only and are not to be used to interpret or define the provisions of this Deed of Trust.

**Merger.** There shall be no merger of the interest or estate created by this Deed of Trust with any other interest or estate in the Property at any time held by or for the benefit of Lender in any capacity, without the written consent of Lender.

**Governing Law.** This Deed of Trust will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Washington without regard to its conflicts of law provisions. This Deed of Trust has been accepted by Lender in the State of Washington.

**Choice of Venue.** If there is a lawsuit, Grantor agrees upon Lender's request to submit to the jurisdiction of the courts of Pierce County, State of Washington.

**No Waiver by Lender.** Lender shall not be deemed to have waived any rights under this Deed of Trust unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Deed of Trust shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Deed of Trust. No prior waiver by Lender, nor any course of dealing between Lender and Grantor, shall constitute a waiver of any of Lender's rights or of any of Grantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Deed of Trust, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

**Severability.** If a court of competent jurisdiction finds any provision of this Deed of Trust to be illegal, invalid, or unenforceable as to any circumstance, that finding shall not make the offending provision illegal, invalid, or unenforceable as to any other circumstance. If feasible, the offending provision shall be considered modified so that it becomes legal, valid and enforceable. If the offending provision cannot be so modified, it shall be considered deleted from this Deed of Trust. Unless otherwise required by law, the illegality, invalidity, or unenforceability of any provision of this Deed of Trust shall not affect the legality, validity or enforceability of any other provision of this Deed of Trust.

**Successors and Assigns.** Subject to any limitations stated in this Deed of Trust on transfer of Grantor's interest, this Deed of Trust shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the Property becomes vested in a person other than Grantor, Lender, without notice to Grantor, may deal with Grantor's successors with reference to this Deed of Trust and the indebtedness by way of forbearance or extension without releasing Grantor from the obligations of this Deed of Trust or liability under the indebtedness.

**Time is of the Essence.** Time is of the essence in the performance of this Deed of Trust.

**Waiver of Homestead Exemption.** Grantor hereby releases and waives all rights and benefits of the homestead exemption laws of the State of Washington as to all indebtedness secured by this Deed of Trust.

**DEFINITIONS.** The following capitalized words and terms shall have the following meanings when used in this Deed of Trust. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Deed of Trust shall have the meanings attributed to such terms in the Uniform Commercial Code:

**Beneficiary.** The word "Beneficiary" means Frontier Bank, and its successors and assigns.

**Borrower.** The word "Borrower" means BLACK DIAMOND DEVELOPMENT COMPANY, LLC and includes all co-signers and co-makers signing the Note and all their successors and assigns.

**Deed of Trust.** The words "Deed of Trust" mean this Deed of Trust among Grantor, Lender, and Trustee, and includes without limitation all assignment and security interest provisions relating to the Personal Property and Rents.

**Default.** The word "Default" means the Default set forth in this Deed of Trust in the section titled "Default".

**Event of Default.** The words "Event of Default" mean any of the events of default set forth in this Deed of Trust in the events of default section of this Deed of Trust.

**Grantor.** The word "Grantor" means BLACK DIAMOND DEVELOPMENT COMPANY, LLC.

**Guarantor.** The word "Guarantor" means any guarantor, surety, or accommodation party of any or all of the Indebtedness.

**Guaranty.** The word "Guaranty" means the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note.

**Improvements.** The word "Improvements" means all existing and future improvements, buildings, structures, mobile homes affixed on the Real Property, facilities, additions, replacements and other construction on the Real Property.

**Indebtedness.** The word "Indebtedness" means all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents, together with all renewals of, extensions of, modifications of, consolidations of and substitutions for the Note or Related Documents and any amounts expended or advanced by Lender to discharge Grantor's obligations or expenses incurred by Trustee or Lender to enforce Grantor's obligations under this Deed of Trust, together with interest on such amounts as provided in this Deed of Trust.

**Lender.** The word "Lender" means Frontier Bank, its successors and assigns.

**Note.** The word "Note" means the promissory note dated November 28, 2005, in the original principal amount of \$4,090,000.00 from Grantor to Lender, together with all renewals of, extensions of, modifications of, refinancings of, consolidations of, and substitutions for the promissory note or agreement. **NOTICE TO GRANTOR: THE**

DEED OF TRUST  
(Continued)

NOTE CONTAINS A VARIABLE INTEREST RATE.

**Personal Property.** The words "Personal Property" mean all equipment, fixtures, and other articles of personal property now or hereafter owned by Grantor, and now or hereafter attached or affixed to the Real Property; together with all accessions, parts, and additions to, all replacements of, and all substitutions for, any of such property; and together with all issues and profits thereon and proceeds (including without limitation all insurance proceeds and refunds of premiums) from any sale or other disposition of the Property.

**Property.** The word "Property" means collectively the Real Property and the Personal Property.

**Real Property.** The words "Real Property" mean the real property, interests and rights, as further described in this Deed of Trust.

**Related Documents.** The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the indebtedness; provided, that the environmental indemnity agreements are not "Related Documents" and are not secured by this Deed of Trust.

**Rents.** The word "Rents" means all present and future rents, revenues, income, issues, royalties, profits, and other benefits derived from the Property.

**Trustee.** The word "Trustee" means LANDAMERICA COMMERCIAL SERVICES, whose mailing address is 601 UNION STREET - SUITE 1100, SEATTLE, WA 98101 and any substitute or successor trustees.

GRANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS DEED OF TRUST, AND GRANTOR AGREES TO ITS TERMS.

GRANTOR:

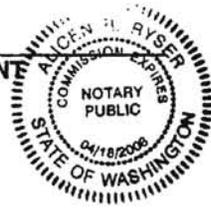
BLACK DIAMOND DEVELOPMENT COMPANY, LLC

By: [Signature]  
LEE WITTENBERG, Manager of BLACK DIAMOND DEVELOPMENT COMPANY, LLC

By: [Signature]  
WAYNE A. COURTNEY, Manager of BLACK DIAMOND DEVELOPMENT COMPANY, LLC

LIMITED LIABILITY COMPANY ACKNOWLEDGMENT

STATE OF Washington )  
 )  
COUNTY OF King ) SS



On this 1<sup>st</sup> day of December, 20 05, before me, the undersigned Notary Public, personally appeared LEE WITTENBERG, Manager of BLACK DIAMOND DEVELOPMENT COMPANY, LLC, and personally known to me or proved to me on the basis of satisfactory evidence to be a member or designated agent of the limited liability company that executed the Deed of Trust and acknowledged the Deed of Trust to be the free and voluntary act and deed of the limited liability company, by authority of statute, its articles of organization or its operating agreement, for the uses and purposes therein mentioned, and on oath stated that he or she is authorized to execute this Deed of Trust and in fact executed the Deed of Trust on behalf of the limited liability company.

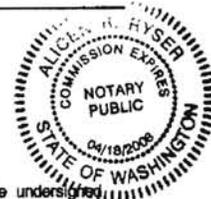
By: [Signature]  
Notary Public in and for the State of WA

Residing at Black Diamond  
My commission expires 4-18-08

DEED OF TRUST  
(Continued)

LIMITED LIABILITY COMPANY ACKNOWLEDGMENT

STATE OF Washington )  
 ) SS  
COUNTY OF King )



On this 1<sup>st</sup> day of December, 2005, before me, the undersigned, Notary Public, personally appeared WAYNE A COURTNEY, Manager of BLACK DIAMOND DEVELOPMENT COMPANY, LLC, and personally known to me or proved to me on the basis of satisfactory evidence to be a member or designated agent of the limited liability company that executed the Deed of Trust and acknowledged the Deed of Trust to be the free and voluntary act and deed of the limited liability company, by authority of statute, its articles of organization or its operating agreement, for the uses and purposes therein mentioned, and on oath stated that he or she is authorized to execute this Deed of Trust and in fact executed the Deed of Trust on behalf of the limited liability company.

By [Signature] Residing at Black Diamond  
Notary Public in and for the State of WA My commission expires 4-18-08

REQUEST FOR FULL RECONVEYANCE

To: \_\_\_\_\_, Trustee  
The undersigned is the legal owner and holder of all indebtedness secured by this Deed of Trust. You are hereby requested, upon payment of all sums owing to you, to reconvey without warranty, to the persons entitled thereto, the right, title and interest now held by you under the Deed of Trust.

Date: \_\_\_\_\_ Beneficiary: \_\_\_\_\_  
By: \_\_\_\_\_  
Its: \_\_\_\_\_

LASER PRO Lending, Inc. 8.28.03.04 Corp. Harbor Financial Solutions, Inc. 1997, 2006. All Rights Reserved. - WA C/C/F/L/P/D/E/L/F/C TR-31484 PL-COMER/LDC

**Appendix F: Commercial Guaranty  
(Lee Wittenberg)**

**Commercial Guaranty  
(Wayne A. Courtney)**

# COMMERCIAL GUARANTY

Principal	Loan Date	Maturity	Loan No	Call / Coll DT	Account	Officer 622	Initials
References in the shaded area are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing ***** has been omitted due to text length limitations.							

**Borrower:** BLACK DIAMOND DEVELOPMENT COMPANY, LLC  
4114 B PLACE NW - SUITE 106  
AUBURN, WA 98001

**Lender:** Frontier Bank  
Tacoma Real Estate  
1102 Commerce St., Suite 600  
Tacoma, WA 98402

**Guarantor:** LEE WITTENBERG  
5472 COLT TERRACE  
SAN DIEGO, CA 92130

**CONTINUING GUARANTEE OF PAYMENT AND PERFORMANCE.** For good and valuable consideration, Guarantor absolutely and unconditionally guarantees full and punctual payment and satisfaction of the Indebtedness of Borrower to Lender, and the performance and discharge of all Borrower's obligations under the Note and the Related Documents. This is a guaranty of payment and performance and not of collection, so Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness, this Guaranty or any other guaranty of the Indebtedness. Guarantor will make any payments to Lender or its order, on demand, in legal tender of the United States of America, in same-day funds, without set-off or deduction or counterclaim, and will otherwise perform Borrower's obligations under the Note and Related Documents. Under this Guaranty, Guarantor's liability is unlimited and Guarantor's obligations are continuing.

**INDEBTEDNESS.** The word "Indebtedness" as used in this Guaranty means all of the principal amount outstanding from time to time and at any one or more times, accrued unpaid interest thereon and all collection costs and legal expenses related thereto permitted by law, attorneys' fees, arising from any and all debts, liabilities and obligations of every nature or form, now existing or hereafter arising or acquired, that Borrower individually or collectively or interchangeably with others, owes or will owe Lender. "Indebtedness" includes, without limitation, loans, advances, debts, overdraft indebtedness, credit card indebtedness, lease obligations, other obligations, and any present or future judgments against Borrower, future advances, loans or transactions that renew, extend, modify, refinance, consolidate or substitute these debts, liabilities and obligations whether: voluntarily or involuntarily incurred; due or to become due by their terms or acceleration; absolute or contingent; liquidated or unliquidated; determined or undetermined; direct or indirect; primary or secondary in nature or arising from a guaranty or surety; secured or unsecured; joint or several or joint and several; evidenced by a negotiable or non-negotiable instrument or writing; originated by Lender or another or others; barred or unenforceable against Borrower for any reason whatsoever; for any transactions that may be voidable for any reason (such as infancy, insanity, ultra vires or otherwise); and originated then reduced or extinguished and then afterwards increased or reinstated.

The above limitation on liability is not a restriction on the amount of the Note of Borrower to Lender either in the aggregate or at any one time. If Lender presently holds one or more guaranties, or hereafter receives additional guaranties from Guarantor, Lender's rights under all guaranties shall be cumulative. This Guaranty shall not (unless specifically provided below to the contrary) affect or invalidate any such other guaranties. Guarantor's liability will be Guarantor's aggregate liability under the terms of this Guaranty and any such other unexpired guaranties.

**CONTINUING GUARANTY.** THIS IS A "CONTINUING GUARANTY" UNDER WHICH GUARANTOR AGREES TO GUARANTEE THE FULL AND PUNCTUAL PAYMENT, PERFORMANCE AND SATISFACTION OF THE INDEBTEDNESS OF BORROWER TO LENDER, NOW EXISTING OR HEREAFTER ARISING OR ACQUIRED, ON AN OPEN AND CONTINUING BASIS. ACCORDINGLY, ANY PAYMENTS MADE ON THE INDEBTEDNESS WILL NOT DISCHARGE OR DIMINISH GUARANTOR'S OBLIGATIONS AND LIABILITY UNDER THIS GUARANTY FOR ANY REMAINING AND SUCCEEDING INDEBTEDNESS EVEN WHEN ALL OR PART OF THE OUTSTANDING INDEBTEDNESS MAY BE A ZERO BALANCE FROM TIME TO TIME.

**DURATION OF GUARANTY.** This Guaranty will take effect when received by Lender without the necessity of any acceptance by Lender, or any notice to Guarantor or to Borrower, and will continue in full force until all the Indebtedness incurred or contracted before receipt by Lender of any notice of revocation shall have been fully and finally paid and satisfied and all of Guarantor's other obligations under this Guaranty shall have been performed in full. If Guarantor elects to revoke this Guaranty, Guarantor may only do so in writing. Guarantor's written notice of revocation must be mailed to Lender, by certified mail, at Lender's address listed above or such other place as Lender may designate in writing. Written revocation of this Guaranty will apply only to advances or new Indebtedness created after actual receipt by Lender of Guarantor's written revocation. For this purpose and without limitation, the term "new Indebtedness" does not include the Indebtedness which at the time of notice of revocation is contingent, unliquidated, undetermined or not due and which later becomes absolute, liquidated, determined or due. This Guaranty will continue to bind Guarantor for all the Indebtedness incurred by Borrower or committed by Lender prior to receipt of Guarantor's written notice of revocation, including any extensions, renewals, substitutions or modifications of the Indebtedness. All renewals, extensions, substitutions, and modifications of the Indebtedness granted after Guarantor's revocation, are contemplated under this Guaranty and, specifically will not be considered to be new Indebtedness. This Guaranty shall bind Guarantor's estate as to the Indebtedness created both before and after Guarantor's death or incapacity, regardless of Lender's actual notice of Guarantor's death. Subject to the foregoing, Guarantor's executor or administrator or other legal representative may terminate this Guaranty in the same manner in which Guarantor might have terminated it and with the same effect. Release of any other guarantor or termination of any other guaranty of the Indebtedness shall not affect the liability of Guarantor under this Guaranty. A revocation Lender receives from any one or more Guarantors shall not affect the liability of any remaining Guarantors under this Guaranty. It is anticipated that fluctuations may occur in the aggregate amount of the Indebtedness covered by this Guaranty, and Guarantor specifically acknowledges and agrees that reductions in the amount of the Indebtedness, even to zero dollars (\$0.00), prior to Guarantor's written revocation of this Guaranty shall not constitute a termination of this Guaranty. This Guaranty is binding upon Guarantor and Guarantor's heirs, successors and assigns so long as any of the Indebtedness remains unpaid and even though the Indebtedness may from time to time be zero dollars (\$0.00).

**OBLIGATIONS OF MARRIED PERSONS.** If I am married, I hereby expressly agree that the recourse under this agreement may be had against both my separate and community property.

**GUARANTOR'S AUTHORIZATION TO LENDER.** Guarantor authorizes Lender, either before or after any revocation hereof, without notice or demand and without lessening Guarantor's liability under this Guaranty, from time to time: (A) prior to revocation as set forth above, to make one or more additional secured or unsecured loans to Borrower, to lease equipment or other goods to Borrower, or otherwise to extend additional credit to Borrower; (B) to alter, compromise, renew, extend, accelerate, or otherwise change one or more times the time for payment or other terms of the Indebtedness or any part of the Indebtedness, including increases and decreases of the rate of interest on the Indebtedness; extensions may be repeated and may be for longer than the original loan term; (C) to take and hold security for the payment of this Guaranty or the Indebtedness, and exchange, enforce, waive, subordinate, fail or decide not to perfect, and release any such security, with or without the substitution of new collateral; (D) to release, substitute, agree not to sue, or deal with any one or more of Borrower's sureties, endorsers, or other guarantors on any terms or in any manner Lender may choose; (E) to determine how, when and what application of payments and credits shall be made on the Indebtedness; (F) to apply such security and direct the order or manner of sale thereof, including without limitation, any nonjudicial sale permitted by the terms of the controlling security agreement or deed of trust, as Lender in its discretion may determine; (G) to sell, transfer, assign or grant participations in all or any part of the Indebtedness; and (H) to assign or transfer this Guaranty in whole or in part.

**GUARANTOR'S REPRESENTATIONS AND WARRANTIES.** Guarantor represents and warrants to Lender that (A) no representations or agreements of any kind have been made to Guarantor which would limit or qualify in any way the terms of this Guaranty; (B) this Guaranty is executed at Borrower's request and not at the request of Lender; (C) Guarantor has full power, right and authority to enter into this Guaranty; (D) the provisions of this Guaranty do not conflict with or result in a default under any agreement or other instrument binding upon Guarantor and do not result in a violation of any law, regulation, court decree or order applicable to Guarantor; (E) Guarantor has not and will not, without the prior written consent of Lender, sell, lease, assign, encumber, hypothecate, transfer, or otherwise dispose of all or substantially all of Guarantor's assets, or any interest therein; (F) upon Lender's request, Guarantor will provide to Lender financial and credit information in form acceptable to Lender, and all such financial information which currently has been, and all future financial information which will be provided to Lender is and will be true and correct in all material respects and fairly present Guarantor's financial condition as of the dates the financial information is provided; (G) no material adverse change has occurred in Guarantor's financial condition since the date of the most recent financial statements provided to Lender and no event has occurred which may materially adversely affect Guarantor's financial condition; (H) no litigation, claim, investigation, administrative proceeding or similar action (including those for unpaid taxes) against Guarantor is pending or threatened; (I) Lender has made no representation to Guarantor as to the creditworthiness of Borrower; and (J) Guarantor has established adequate means of obtaining from Borrower on a continuing basis information regarding Borrower's financial condition. Guarantor agrees to keep adequately informed from such means of any facts, events, or circumstances which might in any way affect Guarantor's risks under this Guaranty, and Guarantor further agrees that, absent a request for information, Lender shall have no obligation to disclose to Guarantor any information or documents acquired by Lender in the course of its relationship with Borrower.

**GUARANTOR'S WAIVERS.** Except as prohibited by applicable law, Guarantor waives any right to require Lender (A) to continue lending money or to extend other credit to Borrower; (B) to make any presentment, protest, demand, or notice of any kind, including notice of any nonpayment of the Indebtedness or of any nonpayment related to any collateral, or notice of any action or nonaction on the part of Borrower, Lender, any surety, endorser, or other guarantor in connection with the Indebtedness or in connection with the creation of new or additional loans or obligations of Borrower; (C) to proceed directly or at once against any person, including Borrower or any other guarantor; (D) to proceed directly against or exhaust

any collateral held by Lender from Borrower, any other guarantor, or any other person; (E) to pursue any other remedy within Lender's power; or (F) to commit any act or omission of any kind, or at any time, with respect to any matter whatsoever.

In addition to the waivers set forth herein, if now or hereafter Borrower is or shall become insolvent and the Indebtedness shall not at all times until paid be fully secured by collateral pledged by Borrower, Guarantor hereby forever waives and gives up in favor of Lender and Borrower, and Lender's and Borrower's respective successors, any claim or right to payment Guarantor may now have or hereafter have or acquire against Borrower, by subrogation or otherwise, so that at no time shall Guarantor be or become a "creditor" of Borrower within the meaning of 11 U.S.C. section 547(b), or any successor provision of the Federal bankruptcy laws.

Guarantor also waives any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale; (B) any election of remedies by Lender which destroys or otherwise adversely affects Guarantor's subrogation rights or Guarantor's rights to proceed against Borrower for reimbursement, including without limitation, any loss of rights Guarantor may suffer by reason of any law limiting, qualifying, or discharging the Indebtedness; (C) any disability or other defense of Borrower, of any other guarantor, or of any other person, or by reason of the cessation of Borrower's liability from any cause whatsoever, other than payment in full in legal tender, of the Indebtedness; (D) any right to claim discharge of the Indebtedness on the basis of unjustified impairment of any collateral for the Indebtedness; (E) any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding Indebtedness which is not barred by any applicable statute of limitations; or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness. If payment is made by Borrower, whether voluntarily or otherwise, or by any third party, on the Indebtedness and thereafter Lender is forced to remit the amount of that payment to Borrower's trustee in bankruptcy or to any similar person under any federal or state bankruptcy law or law for the relief of debtors, the Indebtedness shall be considered unpaid for the purpose of the enforcement of this Guaranty.

Guarantor further waives and agrees not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim of setoff, counterclaim, counter demand, recoupment or similar right, whether such claim, demand or right may be asserted by the Borrower, the Guarantor, or both.

**GUARANTOR'S UNDERSTANDING WITH RESPECT TO WAIVERS.** Guarantor warrants and agrees that each of the waivers set forth above is made with Guarantor's full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law. If any such waiver is determined to be contrary to any applicable law or public policy, such waiver shall be effective only to the extent permitted by law or public policy.

**RIGHT OF SETOFF.** To the extent permitted by applicable law, Lender reserves a right of setoff in all Guarantor's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Guarantor holds jointly with someone else and all accounts Guarantor may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Guarantor authorizes Lender, to the extent permitted by applicable law, to hold these funds if there is a default, and Lender may apply the funds in these accounts to pay what Guarantor owes under the terms of this Guaranty.

**SUBORDINATION OF BORROWER'S DEBTS TO GUARANTOR.** Guarantor agrees that the Indebtedness, whether now existing or hereafter created, shall be superior to any claim that Guarantor may now have or hereafter acquire against Borrower, whether or not Borrower becomes insolvent. Guarantor hereby expressly subordinates any claim Guarantor may have against Borrower, upon any account whatsoever, to any claim that Lender may now or hereafter have against Borrower. In the event of insolvency and consequent liquidation of the assets of Borrower, through bankruptcy, by an assignment for the benefit of creditors, by voluntary liquidation, or otherwise, the assets of Borrower applicable to the payment of the claims of both Lender and Guarantor shall be paid to Lender and shall be first applied by Lender to the Indebtedness. Guarantor does hereby assign to Lender all claims which it may have or acquire against Borrower or against any assignee or trustee in bankruptcy of Borrower; provided however, that such assignment shall be effective only for the purpose of assuring to Lender full payment in legal tender of the Indebtedness. If Lender so requests, any notes or credit agreements now or hereafter evidencing any debts or obligations of Borrower to Guarantor shall be marked with a legend that the same are subject to this Guaranty and shall be delivered to Lender. Guarantor agrees, and Lender is hereby authorized, in the name of Guarantor, from time to time to file financing statements and continuation statements and to execute documents and to take such other actions as Lender deems necessary or appropriate to perfect, preserve and enforce its rights under this Guaranty.

**MISCELLANEOUS PROVISIONS.** The following miscellaneous provisions are a part of this Guaranty:

**Amendments.** This Guaranty, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty. No alteration or amendment to this Guaranty shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

**Attorneys' Fees; Expenses.** Guarantor agrees to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Guaranty. Lender may hire or pay someone else to help enforce this Guaranty, and Guarantor shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's attorneys' fees and legal expenses whether or not there is a lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. Guarantor also shall pay all court costs and such additional fees as may be directed by the court.

**Caption Headings.** Caption headings in this Guaranty are for convenience purposes only and are not to be used to interpret or define the provisions of this Guaranty.

**Governing Law.** This Guaranty will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Washington without regard to its conflicts of law provisions. This Guaranty has been accepted by Lender in the State of Washington.

**Choice of Venue.** If there is a lawsuit, Guarantor agrees upon Lender's request to submit to the jurisdiction of the courts of Pierce County, State of Washington.

**Integration.** Guarantor further agrees that Guarantor has read and fully understands the terms of this Guaranty; Guarantor has had the opportunity to be advised by Guarantor's attorney with respect to this Guaranty; the Guaranty fully reflects Guarantor's intentions and parcel evidence is not required to interpret the terms of this Guaranty. Guarantor hereby indemnifies and holds Lender harmless from all losses, claims, damages, and costs (including Lender's attorneys' fees) suffered or incurred by Lender as a result of any breach by Guarantor of the warranties, representations and agreements of this paragraph.

**Interpretation.** In all cases where there is more than one Borrower or Guarantor, then all words used in this Guaranty in the singular shall be deemed to have been used in the plural where the context and construction so require; and where there is more than one Borrower named in this Guaranty or when this Guaranty is executed by more than one Guarantor, the words "Borrower" and "Guarantor" respectively shall mean all and any one or more of them. The words "Guarantor," "Borrower," and "Lender" include the heirs, successors, assigns, and transferees of each of them. If a court finds that any provision of this Guaranty is not valid or should not be enforced, that fact by itself will not mean that the rest of this Guaranty will not be valid or enforced. Therefore, a court will enforce the rest of the provisions of this Guaranty even if a provision of this Guaranty may be found to be invalid or unenforceable. If any one or more of Borrower or Guarantor are corporations, partnerships, limited liability companies, or similar entities, it is not necessary for Lender to inquire into the powers of Borrower or Guarantor or of the officers, directors, partners, managers, or other agents acting or purporting to act on their behalf, and any indebtedness made or created in reliance upon the professed exercise of such powers shall be guaranteed under this Guaranty.

**Notices.** Subject to applicable law, and except for notice required or allowed by law to be given in another manner, any notice required to be given under this Guaranty shall be given in writing, and, except for revocation notices by Guarantor, shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Guaranty. All revocation notices by Guarantor shall be in writing and shall be effective upon delivery to Lender as provided in the section of this Guaranty entitled "DURATION OF GUARANTY." Any party may change its address for notices under this Guaranty by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Guarantor agrees to keep Lender informed at all times of Guarantor's current address. Subject to applicable law, and except for notice required or allowed by law to be given in another manner, if there is more than one Guarantor, any notice given by Lender to any Guarantor is deemed to be notice given to all Guarantors.

**No Waiver by Lender.** Lender shall not be deemed to have waived any rights under this Guaranty unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Guaranty shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Guaranty. No prior waiver by Lender, nor any course of dealing between Lender and Guarantor, shall constitute a waiver of any of Lender's rights or of any of Guarantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Guaranty, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the discretion of Lender.

**Successors and Assigns.** Subject to any limitations stated in this Guaranty on transfer of Guarantor's interest, this Guaranty shall bind Lender and its successors and assigns.

COMMERCIAL GUARANTY  
(Continued)

upon and inure to the benefit of the parties, their successors and assigns.

**DEFINITIONS.** The following capitalized words and terms shall have the following meanings when used in this Guaranty. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Guaranty shall have the meanings attributed to such terms in the Uniform Commercial Code:

**Borrower.** The word "Borrower" means BLACK DIAMOND DEVELOPMENT COMPANY, LLC and includes all co-signers and co-makers signing the Note and all their successors and assigns.

**Guarantor.** The word "Guarantor" means everyone signing this Guaranty, including without limitation LEE WITTENBERG, and in each case, any signer's successors and assigns.

**Guaranty.** The word "Guaranty" means this guaranty from Guarantor to Lender.

**Indebtedness.** The word "Indebtedness" means Borrower's indebtedness to Lender as more particularly described in this Guaranty.

**Lender.** The word "Lender" means Frontier Bank, its successors and assigns.

**Note.** The word "Note" means and includes without limitation all of Borrower's promissory notes and/or credit agreements evidencing Borrower's loan obligations in favor of Lender, together with all renewals of, extensions of, modifications of, refinancings of, consolidations of and substitutions for promissory notes or credit agreements.

**Related Documents.** The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

**EACH UNDERSIGNED GUARANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS GUARANTY AND AGREES TO ITS TERMS. IN ADDITION, EACH GUARANTOR UNDERSTANDS THAT THIS GUARANTY IS EFFECTIVE UPON GUARANTOR'S EXECUTION AND DELIVERY OF THIS GUARANTY TO LENDER AND THAT THE GUARANTY WILL CONTINUE UNTIL TERMINATED IN THE MANNER SET FORTH IN THE SECTION TITLED "DURATION OF GUARANTY". NO FORMAL ACCEPTANCE BY LENDER IS NECESSARY TO MAKE THIS GUARANTY EFFECTIVE. THIS GUARANTY IS DATED NOVEMBER 28, 2005.**

**GUARANTOR:**

x   
LEE WITTENBERG

**CONSENT OF GUARANTOR'S SPOUSE.** The undersigned spouse hereby consents to the above Guaranty on behalf of the marital community, and without binding the separate property of the consenting spouse. This consent is dated November 28, 2005.

x   
ORNA WITTENBERG



any collateral held by Lender from Borrower, any other guarantor, or any other person; (E) to pursue any other remedy within Lender's power; or (F) to commit any act or omission of any kind, or at any time, with respect to any matter whatsoever.

In addition to the waivers set forth herein, if now or hereafter Borrower is or shall become insolvent and the Indebtedness shall not at all times until paid be fully secured by collateral pledged by Borrower, Guarantor hereby forever waives and gives up in favor of Lender and Borrower, and Lender's and Borrower's respective successors, any claim or right to payment Guarantor may now have or hereafter have or acquire against Borrower, by subrogation or otherwise, so that at no time shall Guarantor be or become a "creditor" of Borrower within the meaning of 11 U.S.C. section 547(b), or any successor provision of the Federal bankruptcy laws.

Guarantor also waives any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale; (B) any election of remedies by Lender which destroys or otherwise adversely affects Guarantor's subrogation rights or Guarantor's rights to proceed against Borrower for reimbursement, including without limitation, any loss of rights Guarantor may suffer by reason of any law limiting, qualifying, or discharging the Indebtedness; (C) any disability or other defense of Borrower, of any other guarantor, or of any other person, or by reason of the cessation of Borrower's liability from any cause whatsoever, other than payment in full in legal tender, of the Indebtedness; (D) any right to claim discharge of the Indebtedness on the basis of unjustified impairment of any collateral for the Indebtedness; (E) any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding Indebtedness which is not barred by any applicable statute of limitations; or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness. If payment is made by Borrower, whether voluntarily or otherwise, or by any third party, on the Indebtedness and thereafter Lender is forced to remit the amount of that payment to Borrower's trustee in bankruptcy or to any similar person under any federal or state bankruptcy law or law for the relief of debtors, the Indebtedness shall be considered unpaid for the purpose of the enforcement of this Guaranty.

Guarantor further waives and agrees not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim of setoff, counterclaim, counter demand, recoupment or similar right, whether such claim, demand or right may be asserted by the Borrower, the Guarantor, or both.

**GUARANTOR'S UNDERSTANDING WITH RESPECT TO WAIVERS.** Guarantor warrants and agrees that each of the waivers set forth above is made with Guarantor's full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law. If any such waiver is determined to be contrary to any applicable law or public policy, such waiver shall be effective only to the extent permitted by law or public policy.

**RIGHT OF SETOFF.** To the extent permitted by applicable law, Lender reserves a right of setoff in all Guarantor's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Guarantor holds jointly with someone else and all accounts Guarantor may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Guarantor authorizes Lender, to the extent permitted by applicable law, to hold these funds if there is a default, and Lender may apply the funds in these accounts to pay what Guarantor owes under the terms of this Guaranty.

**SUBORDINATION OF BORROWER'S DEBTS TO GUARANTOR.** Guarantor agrees that the Indebtedness, whether now existing or hereafter created, shall be superior to any claim that Guarantor may now have or hereafter acquire against Borrower, whether or not Borrower becomes insolvent. Guarantor hereby expressly subordinates any claim Guarantor may have against Borrower, upon any account whatsoever, to any claim that Lender may now or hereafter have against Borrower. In the event of insolvency and consequent liquidation of the assets of Borrower, through bankruptcy, by an assignment for the benefit of creditors, by voluntary liquidation, or otherwise, the assets of Borrower applicable to the payment of the claims of both Lender and Guarantor shall be paid to Lender and shall be first applied by Lender to the Indebtedness. Guarantor does hereby assign to Lender all claims which it may have or acquire against Borrower or against any assignee or trustee in bankruptcy of Borrower; provided however, that such assignment shall be effective only for the purpose of assuring to Lender full payment in legal tender of the Indebtedness. If Lender so requests, any notes or credit agreements now or hereafter evidencing any debts or obligations of Borrower to Guarantor shall be marked with a legend that the same are subject to this Guaranty and shall be delivered to Lender. Guarantor agrees, and Lender is hereby authorized, in the name of Guarantor, from time to time to file financing statements and continuation statements and to execute documents and to take such other actions as Lender deems necessary or appropriate to perfect, preserve and enforce its rights under this Guaranty.

**MISCELLANEOUS PROVISIONS.** The following miscellaneous provisions are a part of this Guaranty:

**Amendments.** This Guaranty, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty. No alteration of or amendment to this Guaranty shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

**Attorneys' Fees; Expenses.** Guarantor agrees to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Guaranty. Lender may hire or pay someone else to help enforce this Guaranty, and Guarantor shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's attorneys' fees and legal expenses whether or not there is a lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. Guarantor also shall pay all court costs and such additional fees as may be directed by the court.

**Caption Headings.** Caption headings in this Guaranty are for convenience purposes only and are not to be used to interpret or define the provisions of this Guaranty.

**Governing Law.** This Guaranty will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Washington without regard to its conflicts of law provisions. This Guaranty has been accepted by Lender in the State of Washington.

**Choice of Venue.** If there is a lawsuit, Guarantor agrees upon Lender's request to submit to the jurisdiction of the courts of Pierce County, State of Washington.

**Integration.** Guarantor further agrees that Guarantor has read and fully understands the terms of this Guaranty; Guarantor has had the opportunity to be advised by Guarantor's attorney with respect to this Guaranty; the Guaranty fully reflects Guarantor's intentions and parole evidence is not required to interpret the terms of this Guaranty. Guarantor hereby indemnifies and holds Lender harmless from all losses, claims, damages, and costs (including Lender's attorneys' fees) suffered or incurred by Lender as a result of any breach by Guarantor of the warranties, representations and agreements of this paragraph.

**Interpretation.** In all cases where there is more than one Borrower or Guarantor, then all words used in this Guaranty in the singular shall be deemed to have been used in the plural where the context and construction so require; and where there is more than one Borrower named in this Guaranty or when this Guaranty is executed by more than one Guarantor, the words "Borrower" and "Guarantor" respectively shall mean all and any one or more of them. The words "Guarantor," "Borrower," and "Lender" include the heirs, successors, assigns, and transferees of each of them. If a court finds that any provision of this Guaranty is not valid or should not be enforced, that fact by itself will not mean that the rest of this Guaranty will not be valid or enforced. Therefore, a court will enforce the rest of the provisions of this Guaranty even if a provision of this Guaranty may be found to be invalid or unenforceable. If any one or more of Borrower or Guarantor are corporations, partnerships, limited liability companies, or similar entities, it is not necessary for Lender to inquire into the powers of Borrower or Guarantor or of the officers, directors, partners, managers, or other agents acting or purporting to act on their behalf, and any indebtedness made or created in reliance upon the professed exercise of such powers shall be guaranteed under this Guaranty.

**Notices.** Subject to applicable law, and except for notice required or allowed by law to be given in another manner, any notice required to be given under this Guaranty shall be given in writing, and, except for revocation notices by Guarantor, shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Guaranty. All revocation notices by Guarantor shall be in writing and shall be effective upon delivery to Lender as provided in formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Guarantor agrees to keep Lender informed at all times of Guarantor's current address. Subject to applicable law, and except for notice required or allowed by law to be given in another manner, if there is more than one Guarantor, any notice given by Lender to any Guarantor is deemed to be notice given to all Guarantors.

**No Waiver by Lender.** Lender shall not be deemed to have waived any rights under this Guaranty unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Guaranty shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Guaranty. No prior waiver by Lender, nor any course of dealing between Lender and Guarantor, shall constitute a waiver of any of Lender's rights or of any of Guarantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Guaranty, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the future.

**Successors and Assigns.** Subject to any limitations stated in this Guaranty on transfer of Guarantor's interest, this Guaranty shall be binding on Guarantor's successors and assigns.

COMMERCIAL GUARANTY  
(Continued)

upon and inure to the benefit of the parties, their successors and assigns.

**DEFINITIONS.** The following capitalized words and terms shall have the following meanings when used in this Guaranty. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Guaranty shall have the meanings attributed to such terms in the Uniform Commercial Code:

**Borrower.** The word "Borrower" means BLACK DIAMOND DEVELOPMENT COMPANY, LLC and includes all co-signers and co-makers signing the Note and all their successors and assigns.

**Guarantor.** The word "Guarantor" means everyone signing this Guaranty, including without limitation WAYNE A COURTNEY, and in each case, any signer's successors and assigns.

**Guaranty.** The word "Guaranty" means this guaranty from Guarantor to Lender.

**Indebtedness.** The word "Indebtedness" means Borrower's indebtedness to Lender as more particularly described in this Guaranty.

**Lender.** The word "Lender" means Frontier Bank, its successors and assigns.

**Note.** The word "Note" means and includes without limitation all of Borrower's promissory notes and/or credit agreements evidencing Borrower's loan obligations in favor of Lender, together with all renewals of, extensions of, modifications of, refinancings of, consolidations of and substitutions for promissory notes or credit agreements.

**Related Documents.** The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

EACH UNDERSIGNED GUARANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS GUARANTY AND AGREES TO ITS TERMS. IN ADDITION, EACH GUARANTOR UNDERSTANDS THAT THIS GUARANTY IS EFFECTIVE UPON GUARANTOR'S EXECUTION AND DELIVERY OF THIS GUARANTY TO LENDER AND THAT THE GUARANTY WILL CONTINUE UNTIL TERMINATED IN THE MANNER SET FORTH IN THE SECTION TITLED "DURATION OF GUARANTY". NO FORMAL ACCEPTANCE BY LENDER IS NECESSARY TO MAKE THIS GUARANTY EFFECTIVE. THIS GUARANTY IS DATED NOVEMBER 28, 2005.

GUARANTOR:

x Wayne A. Courtney  
WAYNE A. COURTNEY

**CONSENT OF GUARANTOR'S SPOUSE.** The undersigned spouse hereby consents to the above Guaranty on behalf of the marital community, and without binding the separate property of the consenting spouse. This consent is dated November 28, 2005.

x Maureen S. Courtney  
MAUREEN S. COURTNEY

**Appendix G: September 2007 Change in Terms Agreement**

### CHANGE IN TERMS AGREEMENT

REFERENCES in the boxed areas are for Lender's use only and do not limit the applicability of the document to any particular loan or term. Any item to be so referenced has been omitted due to text length limitations.

**Borrower:** BLACK DIAMOND DEVELOPMENT COMPANY, LLC  
30771 3RD AVENUE  
SLACK DIAMOND, WA 98010

**Lender:** Frontier Bank  
Tacoma Real Estate  
1102 Commerce St., Suite 400  
Tacoma, WA 98402

**Principal Amount:** \$3,098,261.22      **Initial Rate:** 7.730%      **Date of Agreement:** September 25, 2007

**DESCRIPTION OF EXISTING INDEBTEDNESS.** ON NOVEMBER 28, 2006, BORROWER BECAME INDEBTED TO FRONTIER BANK ON A NOTE IN THE ORIGINAL PRINCIPAL AMOUNT OF \$4,090,000.00 AND ALSO TO INCLUDE ALL SUBSEQUENT CHANGE IN TERMS AND RENEWALS.

**DESCRIPTION OF COLLATERAL.** COLLATERAL IS SECURED BY, BUT NOT LIMITED TO, A DEED OF TRUST ON REAL PROPERTY LOCATED IN KING COUNTY, STATE OF WASHINGTON.

**DESCRIPTION OF CHANGE IN TERMS.** THIS REPRESENTS A CHANGE IN THE MATURITY DATE. ALL OTHER TERMS AND CONDITIONS REMAIN THE SAME. SEE BELOW FOR NEW PAYMENT SCHEDULE.

**PROMISE TO PAY.** BLACK DIAMOND DEVELOPMENT COMPANY, LLC ("Borrower") promises to pay to Frontier Bank ("Lender"), or order, in lawful money of the United States of America, the principal amount of Three Million Ninety-Eight Thousand Two Hundred Sixty-One & 22/100 Dollars (\$3,098,261.22), together with interest on the unpaid principal balance from September 28, 2007, until paid in full.

**PAYMENT.** Subject to any payment abatement resulting from changes in the Index, Borrower will pay this loan in 36 regular payments of \$23,389.66 each and one irregular last payment estimated at \$2,964,225.42. Borrower's first payment is due October 28, 2007, and all subsequent payments are due on the same day of each month after that. Borrower's first payment will be due on September 23, 2010, and will be for all principal and all accrued interest not yet paid. Payments include principal and interest. Unless otherwise agreed or required by applicable law, payments will be applied first to any accrued unpaid interest that is principal, then to any unpaid collection costs; and then to any late charges. Interest on this loan is computed on a 365/365 simple interest basis; that is, by applying the rate of the annual interest rate over the number of days in a year (365) during leap years, multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding. Borrower will pay Lender at Lender's address shown above or at such other place as Lender may designate in writing.

**VARIABLE INTEREST RATE.** The interest rate on this loan is subject to change from time to time based on changes in an independent index which is the Weekly average rate on Federal Home Loan Bank of Seattle fixed rate advance for a three year term. (The index is based on the weekly average rate for the week whose information is made available on the Tuesday prior to the 15th of the month (the "index"). The index is not necessarily the lowest rate charged by Lender on its loans. If the index becomes unavailable during the term of this loan, Lender may designate a substitute index after notifying Borrower. Lender will tell Borrower the current index rate upon Borrower's request. The interest rate change will not occur more often than each third year. Borrower understands that Lender may make loans based on other rates as well. The index currently is 4.880% per annum. The interest rate to be applied to the unpaid principal balance during this loan will be at a rate of 2.750 percentage points over the index, resulting in an initial rate of 7.730% per annum. **NOTICE:** Under no circumstances will the interest rate on this loan be more than the maximum rate allowed by applicable law. Whenever increases occur in the interest rate, Lender, at its option, may do one or more of the following: (A) increase Borrower's payments to ensure Borrower's loan will pay off by its original final maturity date, (B) increase Borrower's payments to cover accruing interest, (C) increase the number of Borrower's payments, and (D) continue Borrower's payments at the same amount and increase Borrower's final payment.

**PREPAYMENT; MINIMUM INTEREST CHARGE.** In any event, even upon full prepayment of this Agreement, Borrower understands that Lender is entitled to a minimum interest charge of \$5.00. Other than Borrower's obligation to pay any minimum interest charge, Borrower may pay without penalty all or a portion of the amount owed earlier than it is due. Early payments will not, unless agreed to by Lender in writing, reduce Borrower's obligation to continue to make payments under the payment schedule. Rather, early payments will reduce the principal balance due and may result in Borrower's making fewer payments. Borrower agrees not to send Lender payments marked "paid in full" without receipt, or similar language. If Borrower sends such a payment, Lender may accept it without losing any of Lender's rights under this Agreement, and Borrower will remain obligated to pay any further amount owed to Lender. All written communications concerning disputed amounts, including any check or other payment instrument that indicates that the payment constitutes "payment in full" of the amount owed or that is troubled with other conditions or limitations or as full satisfaction of a disputed amount must be mailed or delivered to: Frontier Bank, Tacoma Real Estate, 1102 Commerce St., Suite 400 Tacoma, WA 98402.

**LATE CHARGE.** If a payment is 10 days or more late, Borrower will be charged 5.000% of the regularly scheduled payment of \$10.00, whichever is greater.

**INTEREST AFTER DEFAULT.** Upon default, including failure to pay upon final maturity, the interest rate on this loan shall be increased by adding a 5.000 percentage point margin ("Default Rate Margin"). The Default Rate Margin shall also apply to each succeeding interest rate change that would have applied had there been no default. If judgment is entered in connection with this Agreement, interest will continue to accrue after the date of judgment of the rate in effect at the time judgment is entered. However, in no event will the interest rate exceed the maximum interest rate limitations under applicable law.

**DEFAULT.** Each of the following shall constitute an Event of Default under this Agreement:

- Payment Default.** Borrower fails to make any payment when due under the indebtedness.
- Other Defaults.** Borrower fails to comply with or to perform any other terms, covenants, conditions or agreements contained in this Agreement or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower.
- Default in Favor of Third Parties.** Borrower defaults under any loan, extension of credit, security agreement, purchase or sale agreement, or any other agreement, in favor of any other creditor or person that may materially affect any of Borrower's property or Borrower's ability to perform Borrower's obligations under this Agreement or any of the Related Documents.
- False Statements.** Any warranty, representation or statement made or furnished to Lender by Borrower or on Borrower's behalf under this Agreement or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.
- Death or Insolvency.** The dissolution of Borrower (regardless of whether dissolution is needed), any member withdraws from Borrower, or any other termination of Borrower's existence as a going business or the death of any member, the insolvency of Borrower, the appointment of a receiver for any part of Borrower's property, any assignments for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower.
- Creditor or Tortfeasor Proceedings.** Commencement of foreclosure or tortfeasor proceedings, whether by judicial proceedings, self-help, repossession or any other method, by any creditor of Borrower or by any governmental agency against any collateral securing the indebtedness. This includes a garnishment of any of Borrower's accounts, including deposit accounts, with Lender. However, the Event of Default shall not occur if there is a good faith dispute by Borrower as to the validity or reasonableness of the claim which is the basis of the creditor or tortfeasor proceeding and if Borrower gives Lender written notice of the creditor or tortfeasor proceeding and deposits with Lender monies or a surety bond for the creditor or tortfeasor proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.
- Events Affecting Guarantor.** Any of the preceding events occurs with respect to any Guarantor of any of the indebtedness or any Guarantor dies or becomes incompetent or revokes or disputes the validity of, or is liable under, any Guaranty of the indebtedness evidenced by this Note. In the event of a death, Lender, at its option may, but shall not be required to, permit the Guarantor's estate to assume unconditionally the obligations arising under the guaranty in a manner satisfactory to Lender, and, in doing so, cure any Event of Default.
- Adverse Change.** A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of the indebtedness is impaired.
- Cure Provisions.** If any default, other than a default in payment is curable and if Borrower has not been given a notice of a breach of the terms provision of this Agreement within the preceding twelve (12) months, it may be cured if Borrower, after receiving written notice from Lender demanding cure of such default (1) cures the default within ten (10) days; or (2) if the cure requires more than ten (10) days, immediately initiates steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

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**CHANGE IN TERMS AGREEMENT  
(Continued)**

Page 2

**LENDER'S RIGHTS.** Upon default, Lender may declare the entire unpaid principal balance under this Agreement and all accrued unpaid interest immediately due, and then Borrower will pay that amount.

**ATTORNEYS' FEES; EXPENSES.** Lender may hire or pay someone else to help collect this Agreement if Borrower does not pay. Borrower will pay Lender that amount. This includes, subject to any limits under applicable law, Lender's attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any consumer stay or injunction), and appeals. If not prohibited by applicable law, Borrower also will pay any court costs. In addition to all other sums provided by law.

**GOVERNING LAW.** This Agreement will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Washington without regard to its conflicts of law provisions. This Agreement has been accepted by Lender in the State of Washington.

**CHOICE OF VENUE.** If there is a lawsuit, Borrower agrees upon Lender's request to submit to the jurisdiction of any courts of Pierce County, State of Washington.

**DISHONORED ITEM FEE.** Borrower will pay a fee to Lender of \$28.00 if Borrower makes a payment on Borrower's loan via the check or preauthorized charge with which Borrower pays its debt.

**RIGHT OF SETOFF.** To the extent permitted by applicable law, Lender reserves a right of setoff in all Borrower's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Borrower holds jointly with someone else and all accounts Borrower may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Borrower authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the indebtedness against any and all such accounts.

**COLLATERAL.** Borrower acknowledges this Agreement is secured by the following collateral described in the security instrument listed herein: a Mortgage or Deed of Trust to a trustee in favor of Lender on real property located in KING County, State of Washington.

**CONTINUING VALIDITY.** Except as expressly amended by this Agreement, the terms of the original obligation of obligations, including all agreements evidenced or securing the obligations, remain unchanged and in full force and effect. Consent by Lender to this Agreement does not waive Lender's right to enforce performance of the obligations as changed, nor obligate Lender to make any future changes in terms. Nothing in this Agreement will constitute a satisfaction of the obligations. It is the intention of Lender to retain all rights and remedies of the original obligation(s), including accommodation parties, unless a party is expressly released by Lender in writing. Any maker or endorser, including accommodation makers, will not be released by virtue of this Agreement. If any person who signed the original obligation does not sign this Agreement below, then all persons signing below acknowledge that this Agreement is given conditionally, based on the representation to Lender that the re-signing party consents to the changes and provisions of this Agreement or otherwise will not be released by it. This waiver applies not only to any initial exception, modification or release, but also to all such subsequent actions.

**SUCCESSORS AND ASSIGNS.** Subject to any limitations stated in this Agreement on transfer of Borrower's interest, this Agreement shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the collateral becomes vested in a person other than Borrower, Lender, without notice to Borrower, may deal with Borrower's successors with reference to this Agreement and the indebtedness by way of foreclosure or otherwise without releasing Borrower from the obligations of this Agreement or liability under the indebtedness.

**NOTIFY US OF INACCURATE INFORMATION WE REPORT TO CONSUMER REPORTING AGENCIES.** Please notify us if we report any inaccurate information about your accounts to a consumer reporting agency. Your written notice describing the error (if necessary) should be sent to us at the following address: Frontier Bank 332 SW Everett Mall Way Everett, WA 98204.

**MISCELLANEOUS PROVISIONS.** If any part of this Agreement cannot be enforced, this fact will not affect the rest of the Agreement. Lender may delay or forego enforcing any of its rights or remedies under this Agreement without losing them. Borrower and any other person who signs, guarantees or endorses this Agreement, to the extent allowed by law, waive presentment, demand for payment, and notice of dishonor. Upon any change in the terms of this Agreement, and unless otherwise expressly stated in writing, no party who signs this Agreement, whether as maker, guarantor, accommodation maker or endorser, shall be released from liability. All such parties agree that Lender may renew or extend (repeatably and for any length of time) this loan or release any party or guarantor or co-maker or co-signer, fail to realize upon or perfect Lender's security interest in the collateral; and take any other action deemed necessary by Lender without the consent of or notice to anyone. All such parties also agree that Lender may modify this loan without the consent of or notice to anyone other than the party with whom the modification is made. The obligations under this Agreement are joint and several.

**PRIOR TO SIGNING THIS AGREEMENT, BORROWER READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS AGREEMENT, INCLUDING THE VARIABLE INTEREST RATE PROVISIONS. BORROWER AGREES TO THE TERMS OF THE AGREEMENT.**

**BORROWER:**

BLACK DIAMOND DEVELOPMENT COMPANY, LLC  
By:   
LEE WITTMANN, Director/Manager of BLACK DIAMOND DEVELOPMENT COMPANY, LLC

By:   
WAYNE A COURTNEY, Member/Manager of BLACK DIAMOND DEVELOPMENT COMPANY, LLC

CHANGE IN TERMS AGREEMENT

References in the boxes above are for Lender's use only and do not limit the applicability of the document to any particular loan or term. Any item above containing "\*\*\*\*" has been omitted due to legal length limitations.

**Borrower:** BLACK DIAMOND DEVELOPMENT COMPANY, LLC  
30711 3RD AVENUE  
BLACK DIAMOND, WA 98010  
**Lender:** Frontier Bank  
Tacoma Real Estate  
1102 Commerce St., Suite 600  
Tacoma, WA 98402

**Principal Amount:** \$3,098,261.22 **Initial Rate:** 7.730% **Date of Agreement:** September 25, 2007

**DESCRIPTION OF EXISTING INDEBTEDNESS.** ON NOVEMBER 28, 2006, BORROWER BECAME INDEBTED TO FRONTIER BANK ON A NOTE IN THE ORIGINAL PRINCIPAL AMOUNT OF \$4,050,000.00 AND ALSO TO INCLUDE ALL SUBSEQUENT CHANGE IN TERMS AND RENEWALS.

**DESCRIPTION OF COLLATERAL.** DELIBERATION IS SECURED BY, BUT NOT LIMITED TO, A DEED OF TRUST ON REAL PROPERTY LOCATED IN KING COUNTY, STATE OF WASHINGTON.

**DESCRIPTION OF CHANGES IN TERMS.** THIS REPRESENTS A CHANGE IN THE MATURITY DATE. ALL OTHER TERMS AND CONDITIONS REMAIN THE SAME. SEE BELOW FOR NEW PAYMENT SCHEDULE.

**PROMISE TO PAY.** BLACK DIAMOND DEVELOPMENT COMPANY, LLC ("Borrower") promises to pay to Frontier Bank ("Lender"), or order, in lawful currency of the United States of America, the principal amount of THREE MILLION NINEHUNDY EIGHT THOUSAND TWO HUNDRED SIXTY-ONE & 22/100 DOLLARS (\$3,098,261.22), together with interest on the unpaid principal balance from September 25, 2007, until paid in full.

**PAYMENT.** Subject to any payment changes resulting from changes in the index, Borrower will pay this loan in 36 regular payments of \$23,382.55 each and one irregular last payment estimated at \$2,964,225.42. Borrower's first payment is due October 26, 2007, and all subsequent payments are due on the same day of each month after that. Borrower's final payment will be due on September 23, 2010, and will be for all principal and all accrued interest not yet paid. Payments include principal and interest. Unless otherwise agreed or required by applicable law, payments will be applied first to any accrued unpaid interest that is principal, then to any unpaid call amount or other fees, and then to any late charges. Interest on this loan is computed on a 365/365 simple interest basis that is, by applying the rate of the annual interest rate over the number of days in a year (365 during leap year), multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding. Borrower will pay Lender at Lender's address shown above or at such other place as Lender may designate in writing.

**VARIABLE INTEREST RATE.** The interest rate on this loan is subject to change from time to time based on changes in an independent index which is the Weekly Average Rate on Federal Home Loan Bank of Seattle fixed rate advances for a three year term. The index is based on the weekly average rate for the week whose information is made available on the Tuesday prior to the 15th of the month (the "Index"). The index is not necessarily the lowest rate charged by Lender on its loans. If the index becomes unavailable during the term of this loan, Lender may designate a substitute index after notifying Borrower. Lender will tell Borrower the current index rate upon Borrower's request. The interest rate change will not occur more often than each third year. Borrower understands that Lender may make loans based on other rates as well. The index currently is 4.890% per annum. The interest rate to be applied to the unpaid principal balance during this loan will be at a rate of 2.750 percentage points over the index, resulting in an initial rate of 7.730% per annum. **NOTICE:** Under no circumstances will the interest rate on this loan be more than the maximum rate allowed by applicable law. Whenever increases occur in the interest rate, Lender, at its option, may do one or more of the following: (A) increase Borrower's payments to ensure Borrower's loan will pay off by its original time maturity date; (B) increase Borrower's payments to cover accruing interest; (C) increase the number of Borrower's payments; and (D) continue Borrower's payments at the same amount and increase Borrower's final payment.

**PREPAYMENT: MINIMUM INTEREST CHARGE.** In any event, upon full prepayment of this Agreement, Borrower understands that Lender is entitled to a minimum interest charge of \$15.00. Other than Borrower's obligation to pay any minimum interest charge, Borrower may pay without penalty all or a portion of the amount owed earlier than it is due. Early payments will not, unless agreed to by Lender in writing, relieve Borrower of Borrower's obligation to continue to make payments under the payment schedule. Rather, early payments will reduce the principal balance due and may result in Borrower's making fewer payments. Borrower agrees not to send Lender payments marked "paid in full", "without recourse", or similar language. If Borrower sends such a payment, Lender may accept it without losing any of Lender's rights under this Agreement and Borrower will remain obligated to pay any further amount owed to Lender. All written communications concerning unpaid amounts, including any check or other payment instrument that indicates that the payment constitutes "payment in full" of the amount owed or that it is tendered with other conditions or limitations or as full satisfaction of a disputed amount must be mailed or delivered to: Frontier Bank, Tacoma Real Estate, 1102 Commerce St., Suite 600 Tacoma, WA 98402.

**LATE CHARGE.** If a payment is 10 days or more late, Borrower will be charged 5.000% of the regularly scheduled payment of \$23.00, whichever is greater.

**INTEREST AFTER DEFAULT.** Upon default, including failure to pay upon final maturity, the interest rate on this loan shall be increased by adding a 5.000 percentage point margin ("Default Rate Margin"). The Default Rate Margin shall also apply to such succeeding interest rate change that would have applied had there been no default. If judgment is entered in connection with this Agreement, interest will continue to accrue until the date of judgment of the rate in effect at the time judgment is entered. However, in no event will the interest rate exceed the maximum interest rate limitations under applicable law.

**DEFAULT.** Each of the following shall constitute an Event of Default under this Agreement:

- Payment Default.** Borrower fails to make any payment when due under the indebtedness.
- Other Defaults.** Borrower fails to comply with or to perform any other term, condition, covenant or obligation contained in this Agreement or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower.
- Default in Favor of Third Parties.** Borrower defaults under any loan, extension of credit, security agreement, purchase or lease agreement, or any other agreement in favor of any other creditor or person that may materially affect any of Borrower's property or Borrower's ability to perform Borrower's obligations under this Agreement or any of the Related Documents.
- Fraud Statements.** ANY WARRANTY, REPRESENTATION OR STATEMENT MADE OR FURNISHED TO LENDER BY BORROWER OR ON BORROWER'S BEHALF UNDER THIS AGREEMENT OR THE RELATED DOCUMENTS IS FALSE OR MISLEADING IN ANY MATERIAL RESPECT, EITHER NOW OR AT THE TIME MADE OR FURNISHED OR BECOMES FALSE OR MISLEADING AT ANY TIME THEREAFTER.
- Death or Insolvency.** The disposition of Borrower (regardless of whether objection to continue is made), any member withdraws from Borrower, or any other termination of Borrower's existence as a going business or the death of any member, the insolvency of Borrower, the appointment of a receiver for any part of Borrower's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower.
- Credit or Tortfeasor Proceedings.** Commencement of tortfeasor or tortfeasor proceedings, whether by judicial proceeding, self-help repossession or any other method, by any creditor of Borrower or by any governmental agency against any collateral securing the indebtedness. This includes a garnishment of any of Borrower's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Borrower as to the validity or reasonableness of the claim which is the basis of the creditor or tortfeasor proceeding and if Borrower gives Lender written notice of the creditor or tortfeasor proceeding and deposits with Lender monies or a surety bond for the creditor or tortfeasor proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.
- Events Affecting Guarantor.** Any of the preceding events occurs with respect to any Guarantor of any of the indebtedness or any Guarantor that becomes insolvent, or revokes or alleges the validity of, or liability under, any Guaranty of the indebtedness warranted by this Note. In the event of a death, Lender, at its option, may, but shall not be required to, permit the Guarantor's estate to resume unconditionally the obligations arising under the guaranty in a manner satisfactory to Lender, and, in doing so, cure any Event of Default.

**Advance Charge.** A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of the indebtedness is impaired.

**Cure Provisions.** If any default, other than a default in payment, is curable and if Borrower has not been given a notice of a breach of the cure provision of this Agreement within the preceding twelve (12) months, it may be cured by Borrower, after receiving written notice from Lender demanding cure of such default: (1) cure the default within ten (10) days; or (2) if the cure requires more than ten (10) days, immediately initiate steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continue and complete all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

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CHANGE IN TERMS AGREEMENT  
(Continued)

Page 2

**LENDER'S RIGHTS.** Upon default, Lender may declare the entire unpaid principal balance under this Agreement and all accrued unpaid interest immediately due, and then Borrower will pay that amount.

**ATTORNEY'S FEES; EXPENSES.** Lender may hire or pay someone else to help collect this Agreement if Borrower does not pay. Borrower will pay Lender that amount. This includes, subject to any limits under applicable law, Lender's attorney's fees and Lender's legal expenses, whether or not there is a lawsuit, including attorney's fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. If not prohibited by applicable law, Borrower also will pay any court costs. In addition to all other sums provided by law.

**GOVERNING LAW.** This Agreement will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Washington without regard to its conflicts of law provisions. This Agreement has been accepted by Lender in the State of Washington.

**CHOICE OF VENUE.** If there is a lawsuit, Borrower agrees upon Lender's request to submit to the jurisdiction of the courts of Pierce County, State of Washington.

**DISHONORED ITEM FEE.** Borrower will pay a fee to Lender of \$25.00 if Borrower makes a payment on Borrower's loan and the check or preauthorized charge with which Borrower pays is later dishonored.

**RIGHT OF SETOFF.** To the extent permitted by applicable law, Lender reserves a right of setoff in all Borrower's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Borrower holds jointly with someone else and all accounts Borrower may open in the future. However, this does not include any IRA or Roth accounts, or any trust accounts for which setoff would be prohibited by law. Borrower authorizes Lender, to the extent permitted by applicable law, to charge or collect all sums owing on the indebtedness against any and all such accounts.

**COLLATERAL.** Borrower acknowledges this Agreement is secured by the following collateral described in the security instrument listed herein: a Mortgage or Deed of Trust to a trustee in favor of Lender on real property located in King County, State of Washington.

**CONTINUING VALIDITY.** Except as expressly changed by this Agreement, the terms of the original obligation of collection, including all agreements evidenced or securing the obligation(s), remain unchanged and in full force and effect. Consent by Lender to this Agreement does not waive Lender's right to strict performance of the obligation(s) as changed, nor obligate Lender to make any terms changes in terms. Nothing in this Agreement will constitute a satisfaction of the obligation(s). It is the intention of Lender to remain as liable parties as the maker and endorser of the original obligation(s), including accommodation parties, unless a party is expressly released by Lender in writing. Any maker or endorser, including accommodation makers, will not be released by virtue of this Agreement. If any person who signed the original obligation does not sign this Agreement below, then all persons signing below acknowledge that this Agreement is given conditionally, based on the representation to Lender that the remaining party consents to the changes and provisions of this Agreement or otherwise will not be released by it. This waiver applies not only to any initial extension, modification or release, but also to all such subsequent actions.

**SUCCESSORS AND ASSIGNS.** Subject to any limitations stated in this Agreement on transfer of Borrower's interest, this Agreement shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the collateral becomes vested in a person other than Borrower, Lender, without notice to Borrower, may deal with Borrower's successors with reference to this Agreement and the indebtedness by way of foreclosure or extension without releasing Borrower from the obligations of this Agreement or liability under the indebtedness.

**NOTIFY US OF INACCURATE INFORMATION WE REPORT TO CREDIT REPORTING AGENCIES.** Please notify us if we report any inaccurate information about your accounts to a consumer reporting agency. Your written notice describing the errors (inaccuracy) should be sent to us at the following address: Frontier Bank 832 SW Everett Mall Way Everett, WA 98204.

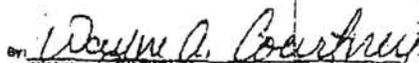
**MISCELLANEOUS PROVISIONS.** If any part of this Agreement cannot be enforced, this fact will not affect the rest of the Agreement. Lender may delay or forgo enforcing any of its rights or remedies under this Agreement without losing them. Borrower and any other person who signs, guarantees or endorses this Agreement, to the extent allowed by law, waive reimbursement, demand for payment, and notice of dishonor. Upon any change in the terms of this Agreement, and unless otherwise expressly stated in writing, no party who signs this Agreement, whether as maker, guarantor, accommodation maker or endorser, shall be released from liability. All such parties agree that Lender may renew or extend (repeatably and for any length of time) this loan or release any party or guarantor or collector or holder, fail to realize upon or perfect Lender's security interest in the collateral; and take any other action deemed necessary by Lender without the consent of or notice to anyone. All such parties also agree that Lender may modify this loan without the consent of or notice to anyone other than the party with whom the modification is made. The obligations under this Agreement are joint and several.

**PRIOR TO SIGNING THIS AGREEMENT, BORROWER READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS AGREEMENT, INCLUDING THE VARIABLE INTEREST RATE PROVISIONS, BORROWER AGREES TO THE TERMS OF THE AGREEMENT.**

**BORROWER:**

BLACK DIAMOND DEVELOPMENT COMPANY, LLC

By:   
LEE WITTMANN, Member/Manager of BLACK DIAMOND DEVELOPMENT COMPANY, LLC

By:   
WAYNE A. COURTNEY, Member/Manager of BLACK DIAMOND DEVELOPMENT COMPANY, LLC

# CHANGE IN TERMS AGREEMENT

Principal	Loan Date	Maturity	Loan No	Call / Coll	Account	Officer	Initials
\$3,098,261.22	09-25-2007	09-25-2010	3179407139	DT		546	CS

References in the boxes above are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing "\*\*\*\*" has been omitted due to text length limitations.

**Borrower:** BLACK DIAMOND DEVELOPMENT COMPANY, LLC  
30711 3RD AVENUE  
BLACK DIAMOND, WA 98010

**Lender:** Frontier Bank  
Tacoma Real Estate  
1102 Commerce St., Suite 600  
Tacoma, WA 98402

**Principal Amount: \$3,098,261.22      Initial Rate: 7.730%      Date of Agreement: September 25, 2007**

**DESCRIPTION OF EXISTING INDEBTEDNESS.** ON NOVEMBER 28, 2005, BORROWER BECAME INDEBTED TO FRONTIER BANK ON A NOTE IN THE ORIGINAL PRINCIPAL AMOUNT OF \$4,090,000.00 AND ALSO TO INCLUDE ALL SUBSEQUENT CHANGE IN TERMS AND RENEWALS.

**DESCRIPTION OF COLLATERAL.** OBLIGATION IS SECURED BY, BUT NOT LIMITED TO, A DEED OF TRUST ON REAL PROPERTY LOCATED IN KING COUNTY, STATE OF WASHINGTON.

**DESCRIPTION OF CHANGE IN TERMS.** THIS REPRESENTS A CHANGE IN THE MATURITY DATE. ALL OTHER TERMS AND CONDITIONS REMAIN THE SAME. SEE BELOW FOR NEW PAYMENT SCHEDULE.

**PROMISE TO PAY.** BLACK DIAMOND DEVELOPMENT COMPANY, LLC ("Borrower") promises to pay to Frontier Bank ("Lender"), or order, in lawful money of the United States of America, the principal amount of Three Million Ninety-eight Thousand Two Hundred Sixty-one & 22/100 Dollars (\$3,098,261.22), together with interest on the unpaid principal balance from September 25, 2007, until paid in full.

**PAYMENT.** Subject to any payment changes resulting from changes in the Index, Borrower will pay this loan in 35 regular payments of \$23,359.56 each and one irregular last payment estimated at \$2,984,225.42. Borrower's first payment is due October 25, 2007, and all subsequent payments are due on the same day of each month after that. Borrower's final payment will be due on September 25, 2010, and will be for all principal and all accrued interest not yet paid. Payments include principal and interest. Unless otherwise agreed or required by applicable law, payments will be applied first to any accrued unpaid interest; then to principal; then to any unpaid collection costs; and then to any late charges. Interest on this loan is computed on a 365/365 simple interest basis; that is, by applying the ratio of the annual interest rate over the number of days in a year (366 during leap years), multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding. Borrower will pay Lender at Lender's address shown above or at such other place as Lender may designate in writing.

**VARIABLE INTEREST RATE.** The interest rate on this loan is subject to change from time to time based on changes in an independent index which is the Weekly average rate on Federal Home Loan Bank of Seattle fixed rate advance for a three year term. The index is based on the weeks average rate for the week whose information is made available on the Tuesday prior to the 15th of the month (the "Index"). The Index is not necessarily the lowest rate charged by Lender on its loans. If the Index becomes unavailable during the term of this loan, Lender may designate a substitute index after notifying Borrower. Lender will tell Borrower the current index rate upon Borrower's request. The interest rate change will not occur more often than each third year. Borrower understands that Lender may make loans based on other rates as well. The Index currently is 4.980% per annum. The interest rate to be applied to the unpaid principal balance during this loan will be at a rate of 2.750 percentage points over the Index, resulting in an initial rate of 7.730% per annum. NOTICE: Under no circumstances will the interest rate on this loan be more than the maximum rate allowed by applicable law. Whenever increases occur in the interest rate, Lender, at its option, may do one or more of the following: (A) increase Borrower's payments to ensure Borrower's loan will pay off by its original final maturity date, (B) increase Borrower's payments to cover accruing interest, (C) increase the number of Borrower's payments, and (D) continue Borrower's payments at the same amount and increase Borrower's final payment.

**PREPAYMENT; MINIMUM INTEREST CHARGE.** In any event, even upon full prepayment of this Agreement, Borrower understands that Lender is entitled to a minimum interest charge of \$5.00. Other than Borrower's obligation to pay any minimum interest charge, Borrower may pay without penalty all or a portion of the amount owed earlier than it is due. Early payments will not, unless agreed to by Lender in writing, relieve Borrower of Borrower's obligation to continue to make payments under the payment schedule. Rather, early payments will reduce the principal balance due and may result in Borrower's making fewer payments. Borrower agrees not to send Lender payments marked "paid in full", "without recourse", or similar language. If Borrower sends such a payment, Lender may accept it without losing any of Lender's rights under this Agreement, and Borrower will remain obligated to pay any further amount owed to Lender. All written communications concerning disputed amounts, including any check or other payment instrument that indicates that the payment constitutes "payment in full" of the amount owed or that is tendered with other conditions or limitations or as full satisfaction of a disputed amount must be mailed or delivered to: Frontier Bank, Tacoma Real Estate, 1102 Commerce St., Suite 600 Tacoma, WA 98402.

**LATE CHARGE.** If a payment is 10 days or more late, Borrower will be charged 5.000% of the regularly scheduled payment or \$10.00, whichever is greater.

**INTEREST AFTER DEFAULT.** Upon default, including failure to pay upon final maturity, the interest rate on this loan shall be increased by adding a 5.000 percentage point margin ("Default Rate Margin"). The Default Rate Margin shall also apply to each succeeding interest rate change that would have applied had there been no default. If judgment is entered in connection with this Agreement, interest will continue to accrue after the date of judgment at the rate in effect at the time judgment is entered. However, in no event will the interest rate exceed the maximum interest rate limitations under applicable law.

**DEFAULT.** Each of the following shall constitute an Event of Default under this Agreement:

**Payment Default.** Borrower fails to make any payment when due under the Indebtedness.

**Other Defaults.** Borrower fails to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower.

**Default in Favor of Third Parties.** Borrower defaults under any loan, extension of credit, security agreement, purchase or sales agreement, or any other agreement, in favor of any other creditor or person that may materially affect any of Borrower's property or Borrower's ability to perform Borrower's obligations under this Agreement or any of the Related Documents.

**False Statements.** Any warranty, representation or statement made or furnished to Lender by Borrower or on Borrower's behalf under this Agreement or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

**Death or Insolvency.** The dissolution of Borrower (regardless of whether election to continue is made), any member withdraws from Borrower, or any other termination of Borrower's existence as a going business or the death of any member, the insolvency of Borrower, the appointment of a receiver for any part of Borrower's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower.

**Creditor or Forfeiture Proceedings.** Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Borrower or by any governmental agency against any collateral securing the Indebtedness. This includes a garnishment of any of Borrower's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Borrower as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Borrower gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

**Events Affecting Guarantor.** Any of the preceding events occurs with respect to any Guarantor of any of the Indebtedness or any Guarantor dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any Guaranty of the Indebtedness evidenced by this Note. In the event of a death, Lender, at its option, may, but shall not be required to, permit the Guarantor's estate to assume unconditionally the obligations arising under the guaranty in a manner satisfactory to Lender, and, in doing so, cure any Event of Default.

**Adverse Change.** A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of the Indebtedness is impaired.

**Cure Provisions.** If any default, other than a default in payment is curable and if Borrower has not been given a notice of a breach of the same provision of this Agreement within the preceding twelve (12) months, it may be cured if Borrower, after receiving written notice from Lender demanding cure of such default: (1) cures the default within ten (10) days; or (2) if the cure requires more time, immediately initiates steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

**LENDER'S RIGHTS.** Upon default, Lender may declare the entire unpaid principal balance under this Agreement and all accrued interest immediately due, and then Borrower will pay that amount.

**APPENDIX G**  
Page 5 of 7  
LIB000106

# CHANGE IN TERMS AGREEMENT

Principal	Loan Date	Maturity	Loan No	Call / Coll	Account	Officer	Initials
\$4,090,000.00	05-28-2007	07-28-2007	R3179407139	DT		546	<i>[Signature]</i>
References in the shaded area are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing ***** has been omitted due to text length limitations.							

**Borrower:** BLACK DIAMOND DEVELOPMENT COMPANY, LLC  
30711 3RD AVENUE  
BLACK DIAMOND, WA 98010

**Lender:** Frontier Bank  
Tacoma Real Estate  
1102 Commerce St., Suite 600  
Tacoma, WA 98402

**Principal Amount: \$4,090,000.00      Initial Rate: 9.250%      Date of Agreement: May 28, 2007**

**DESCRIPTION OF EXISTING INDEBTEDNESS.** ON NOVEMBER 28, 2005 CUSTOMER BECAME INDEBTED TO FRONTIER BANK ON A NOTE IN THE ORIGINAL PRINCIPAL AMOUNT OF \$4,090,000.00, AND INCLUDES ALL SUBSEQUENT RENEWALS/CHANGE IN TERMS.

**DESCRIPTION OF COLLATERAL.** OBLIGATION IS SECURED BY BUT NOT LIMITED TO A DEED OF TRUST DATED NOVEMBER 28, 2005, TO A TRUSTEE IN FAVOR OF LENDER ON REAL PROPERTY LOCATED IN KING COUNTY, STATE OF WASHINGTON.

**DESCRIPTION OF CHANGE IN TERMS.** THIS REPRESENTS AN EXTENSION OF THE MATURITY DATE FROM MAY 28, 2007 TO JULY 28, 2007, ALL OTHER TERMS AND CONDITIONS REMAIN THE SAME. SEE PAYMENT SCHEDULE BELOW.

**PROMISE TO PAY.** BLACK DIAMOND DEVELOPMENT COMPANY, LLC ("Borrower") promises to pay to Frontier Bank ("Lender"), or order, in lawful money of the United States of America, the principal amount of Four Million Ninety Thousand & 00/100 Dollars (\$4,090,000.00) or so much as may be outstanding, together with interest on the unpaid outstanding principal balance of each advance. Interest shall be calculated from the date of each advance until repayment of each advance.

**PAYMENT.** Borrower will pay this loan in one payment of all outstanding principal plus all accrued unpaid interest on July 28, 2007. In addition, Borrower will pay regular monthly payments of all accrued unpaid interest due as of each payment date, beginning June 28, 2007, with all subsequent interest payments to be due on the same day of each month after that. Unless otherwise agreed or required by applicable law, payments will be applied first to any accrued unpaid interest; then to principal; then to any unpaid collection costs; and then to any late charges. Interest on this loan is computed on a 365/365 simple interest basis; that is, by applying the ratio of the annual interest rate over the number of days in a year (366 during leap years), multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding. Borrower will pay Lender at Lender's address shown above or at such other place as Lender may designate in writing.

**VARIABLE INTEREST RATE.** The interest rate on this loan is subject to change from time to time based on changes in an index which is the Frontier Bank Base Rate (the "index"). The index is not necessarily the lowest rate charged by Lender on its loans and is set by Lender in its sole discretion. If the index becomes unavailable during the term of this loan, Lender may designate a substitute index after notifying Borrower. Lender will tell Borrower the current index rate upon Borrower's request. The interest rate change will not occur more often than each day as base rate changes. Borrower understands that Lender may make loans based on other rates as well. The index currently is 8.250% per annum. The interest rate to be applied to the unpaid principal balance during this loan will be at a rate of 1.000 percentage point over the index, adjusted if necessary for any minimum and maximum rate limitations described below, resulting in an initial rate of 9.250% per annum. NOTICE: Under no circumstances will the interest rate on this loan be less than 9.000% per annum or more than the maximum rate allowed by applicable law.

**PREPAYMENT; MINIMUM INTEREST CHARGE.** Borrower agrees that all loan fees and other prepaid finance charges are earned fully as of the date of the loan and will not be subject to refund upon early payment (whether voluntary or as a result of default), except as otherwise required by law. In any event, even upon full prepayment of this Agreement, Borrower understands that Lender is entitled to a minimum interest charge of \$5.00. Other than Borrower's obligation to pay any minimum interest charge, Borrower may pay without penalty all or a portion of the amount owed earlier than it is due. Early payments will not, unless agreed to by Lender in writing, relieve Borrower of Borrower's obligation to continue to make payments of accrued unpaid interest. Rather, early payments will reduce the principal balance due. Borrower agrees not to send Lender payments marked "paid in full", "without recourse", or similar language. If Borrower sends such a payment, Lender may accept it without losing any of Lender's rights under this Agreement, and Borrower will remain obligated to pay any further amount owed to Lender. All written communications concerning disputed amounts, including any check or other payment instrument that indicates that the payment constitutes "payment in full" of the amount owed or that is tendered with other conditions or limitations or as full satisfaction of a disputed amount must be mailed or delivered to: Frontier Bank, Tacoma Real Estate, 1102 Commerce St., Suite 600 Tacoma, WA 98402.

**LATE CHARGE.** If a payment is 10 days or more late, Borrower will be charged 5.000% of the regularly scheduled payment or \$10.00, whichever is greater.

**INTEREST AFTER DEFAULT.** Upon default, including failure to pay upon final maturity, the interest rate on this loan shall be increased by adding a 5.000 percentage point margin ("Default Rate Margin"). The Default Rate Margin shall also apply to each succeeding interest rate change that would have applied had there been no default. If judgment is entered in connection with this Agreement, interest will continue to accrue after the date of judgment at the rate in effect at the time judgment is entered. However, in no event will the interest rate exceed the maximum interest rate limitations under applicable law.

**DEFAULT.** Each of the following shall constitute an Event of Default under this Agreement:

**Payment Default.** Borrower fails to make any payment when due under the Indebtedness.

**Other Defaults.** Borrower fails to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower.

**Default in Favor of Third Parties.** Borrower defaults under any loan, extension of credit, security agreement, purchase or sales agreement, or any other agreement, in favor of any other creditor or person that may materially affect any of Borrower's property or Borrower's ability to perform Borrower's obligations under this Agreement or any of the Related Documents.

**False Statements.** Any warranty, representation or statement made or furnished to Lender by Borrower or on Borrower's behalf under this Agreement or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

**Death or Insolvency.** The dissolution of Borrower (regardless of whether election to continue is made), any member withdraws from Borrower, or any other termination of Borrower's existence as a going business or the death of any member, the insolvency of Borrower, the appointment of a receiver for any part of Borrower's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower.

**Creditor or Forfeiture Proceedings.** Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Borrower or by any governmental agency against any collateral securing the Indebtedness. This includes a garnishment of any of Borrower's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Borrower as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Borrower gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

**Events Affecting Guarantor.** Any of the preceding events occurs with respect to any Guarantor of any of the Indebtedness or any Guarantor dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any Guaranty of the Indebtedness evidenced by this Note. In the event of a death, Lender, at its option, may, but shall not be required to, permit the Guarantor's estate to assume unconditionally the obligations arising under the guaranty in a manner satisfactory to Lender, and, in doing so, cure any Event of Default.

**Adverse Change.** A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of the Indebtedness is impaired.

**Cure Provisions.** If any default, other than a default in payment is curable and if Borrower has not been given a notice of a breach of the same provision of this Agreement within the preceding twelve (12) months, it may be cured if Borrower, after receiving written notice from Lender demanding cure of such default: (1) cures the default within ten (10) days; or (2) if the cure requires more than ten (10) days, immediately initiates steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

**LENDER'S RIGHTS.** Upon default, Lender may declare the entire unpaid principal balance under this Agreement and all accrued unpaid interest immediately due, and then Borrower will pay that amount.

**ATTORNEYS' FEES; EXPENSES.** Lender may hire or pay someone else to help collect this Agreement if Borrower does not pay. Borrower will pay

**APPENDIX G**

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UB000107

**CHANGE IN TERMS AGREEMENT  
(Continued)**

Lender that amount. This includes, subject to any limits under applicable law, Lender's attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. If not prohibited by applicable law, Borrower also will pay any court costs, in addition to all other sums provided by law.

**GOVERNING LAW.** This Agreement will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Washington without regard to its conflicts of law provisions. This Agreement has been accepted by Lender in the State of Washington.

**CHOICE OF VENUE.** If there is a lawsuit, Borrower agrees upon Lender's request to submit to the jurisdiction of the courts of Pierce County, State of Washington.

**DISHONORED ITEM FEE.** Borrower will pay a fee to Lender of \$20.00 if Borrower makes a payment on Borrower's loan and the check or preauthorized charge with which Borrower pays is later dishonored.

**RIGHT OF SETOFF.** To the extent permitted by applicable law, Lender reserves a right of setoff in all Borrower's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Borrower holds jointly with someone else and all accounts Borrower may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Borrower authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the indebtedness against any and all such accounts.

**COLLATERAL.** Borrower acknowledges this Agreement is secured by the following collateral described in the security instrument listed herein: a Deed of Trust to a trustee in favor of Lender on real property located in KING County, State of Washington.

**LINE OF CREDIT.** This Agreement evidences a straight line of credit. Once the total amount of principal has been advanced, Borrower is not entitled to further loan advances. The following persons currently are authorized, except as provided in this paragraph, to request advances and authorize payments under the line of credit until Lender receives from Borrower, at Lender's address shown above, written notice of revocation of their authority: **LEE WITTENBERG, Member/Manager of BLACK DIAMOND DEVELOPMENT COMPANY, LLC; and WAYNE A COURTNEY, Member/Manager of BLACK DIAMOND DEVELOPMENT COMPANY, LLC. FOR CONSTRUCTION PURPOSES ONLY.** Borrower agrees to be liable for all sums either: (A) advanced in accordance with the instructions of an authorized person or (B) credited to any of Borrower's accounts with Lender. The unpaid principal balance owing on this Agreement at any time may be evidenced by endorsements on this Agreement or by Lender's internal records, including daily computer print-outs.

**CONTINUING VALIDITY.** Except as expressly changed by this Agreement, the terms of the original obligation or obligations, including all agreements evidenced or securing the obligation(s), remain unchanged and in full force and effect. Consent by Lender to this Agreement does not waive Lender's right to strict performance of the obligation(s) as changed, nor obligate Lender to make any future change in terms. Nothing in this Agreement will constitute a satisfaction of the obligation(s). It is the intention of Lender to retain as liable parties all makers and endorsers of the original obligation(s), including accommodation parties, unless a party is expressly released by Lender in writing. Any maker or endorser, including accommodation makers, will not be released by virtue of this Agreement. If any person who signed the original obligation does not sign this Agreement below, then all persons signing below acknowledge that this Agreement is given conditionally, based on the representation to Lender that the non-signing party consents to the changes and provisions of this Agreement or otherwise will not be released by it. This waiver applies not only to any initial extension, modification or release, but also to all such subsequent actions.

**SUCCESSORS AND ASSIGNS.** Subject to any limitations stated in this Agreement on transfer of Borrower's interest, this Agreement shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the Collateral becomes vested in a person other than Borrower, Lender, without notice to Borrower, may deal with Borrower's successors with reference to this Agreement and the indebtedness by way of forbearance or extension without releasing Borrower from the obligations of this Agreement or liability under the indebtedness.

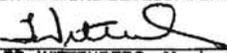
**NOTIFY US OF INACCURATE INFORMATION WE REPORT TO CONSUMER REPORTING AGENCIES.** Please notify us if we report any inaccurate information about your account(s) to a consumer reporting agency. Your written notice describing the specific inaccuracy(ies) should be sent to us at the following address: Frontier Bank 332 SW Everett Mall Way Everett, WA 98204.

**MISCELLANEOUS PROVISIONS.** If any part of this Agreement cannot be enforced, this fact will not affect the rest of the Agreement. Lender may delay or forgo enforcing any of its rights or remedies under this Agreement without losing them. Borrower and any other person who signs, guarantees or endorses this Agreement, to the extent allowed by law, waive presentment, demand for payment, and notice of dishonor. Upon any change in the terms of this Agreement, and unless otherwise expressly stated in writing, no party who signs this Agreement, whether as maker, guarantor, accommodation maker or endorser, shall be released from liability. All such parties agree that Lender may renew or extend (repeatedly and for any length of time) this loan or release any party or guarantor or collateral; or impair, fail to realize upon or perfect Lender's security interest in the collateral; and take any other action deemed necessary by Lender without the consent of or notice to anyone. All such parties also agree that Lender may modify this loan without the consent of or notice to anyone other than the party with whom the modification is made. The obligations under this Agreement are joint and several.

**PRIOR TO SIGNING THIS AGREEMENT, BORROWER READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS AGREEMENT, INCLUDING THE VARIABLE INTEREST RATE PROVISIONS. BORROWER AGREES TO THE TERMS OF THE AGREEMENT.**

**BORROWER:**

**BLACK DIAMOND DEVELOPMENT COMPANY, LLC**

By:   
LEE WITTENBERG, Member/Manager of BLACK  
DIAMOND DEVELOPMENT COMPANY, LLC

By:   
WAYNE A COURTNEY, Member/Manager of BLACK  
DIAMOND DEVELOPMENT COMPANY, LLC

No. 71114-8-I  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

BLACK DIAMOND DEVELOPMENT COMPANY, LLC, a  
Washington Limited Liability Corporation; LEE WITTENBERG,  
individually and on behalf of his marital community; WAYNE  
COURTNEY, individually and on behalf of his martial community,

Appellants,

v.

UNION BANK, N.A.,  
Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE LORI SMITH

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DECLARATION OF SERVICE OF BRIEF OF APPELLANTS BLACK  
DIAMOND DEVELOPMENT COMPANY, LLC; LEE  
WITTENBERG, individually and on behalf of his marital  
community; AND WAYNE COURTNEY, individually and on behalf  
of his marital community

---

OLES MORRISON RINKER & BAKER, LLP

J. Craig Rusk  
WSBA No. 15872  
Brandon D. Young  
WSBA No. 44222  
701 Pike Street, Suite 1700  
Seattle, WA 98101  
(206) 623-3427

Attorneys for BLACK DIAMOND DEVELOPMENT COMPANY,  
LLC; LEE WITTENBERG, individually and on behalf of his marital  
community; AND WAYNE COURTNEY, individually and on behalf  
of his marital community

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2014 MAR 20 AM 11:45

ORIGINAL

I, Judith A. Morland, declare as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause.

2. I am employed by the law firm of Oles Morrison Rinker & Baker LLP. My business and mailing address is 701 Pike Street, Suite 1700, Seattle, Washington 98101-3930.

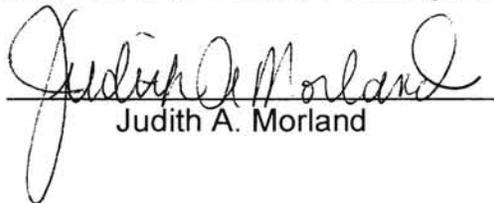
3. On March 20, 2014 I caused to be served true and correct copies of the following documents by ABC Legal Messengers on the following parties:

Stellman Keehnel  
Katherine Heaton  
DLA Piper LLP (US)  
701 Fifth Avenue, Suite 7000  
Seattle, WA 98104

Entitled:

1. Brief of Appellants Black Diamond Development Company, LLC, Lee Wittenberg, individually and on behalf of his marital community; and Wayne Courtney, individually and on behalf of his marital community; and
2. this Declaration of Service.

DATED this 20<sup>th</sup> day of March, 2014, in Seattle, Washington.

  
Judith A. Morland