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## I. INTRODUCTION

On April 24, 2014, two months after filing its complaint against appellants Wayne and Kimberly Berry, residents of New Mexico, and Commercial Construction Services, Inc. (CCS), respondent Contractors Bonding and Insurance Company (CBIC) moved for summary judgment seeking over \$330,000 it allegedly paid on a bond issued on behalf of CCS.<sup>1</sup> CBIC refused the Berrys' request to continue its motion so that the Berrys could obtain local counsel in Washington (their previous counsel having withdrawn a month earlier) and conduct discovery regarding the bond payments. On May 29, 2014, the trial court granted CBIC's motion without a continuance, nine months before the discovery deadline and ten months before the dispositive motions deadline. The trial court granted summary judgment based solely on the affidavit of a CBIC employee without any supporting documentation establishing who CBIC paid, when CBIC paid them, the amounts CBIC paid, or that any payments were actually related to the bond.

The trial court erred in granting summary judgment without allowing a continuance. It was patently unjust to grant summary

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<sup>1</sup> The appellants are collectively referred to as "the Berrys" unless otherwise stated.

judgment without allowing the Berrys a reasonable opportunity to obtain local counsel and conduct discovery. Regardless, CBIC was not entitled to summary judgment. It provided no documentation to support its bare allegation that it paid over \$330,000 on the bond, and it provided no *evidence* establishing how much it paid 11 of 12 claimants, the dates it paid those claimants, or how those claims were related to the bond. This Court should reverse the trial court's summary judgment order and remand with instructions to allow the Berrys sufficient time to obtain counsel and conduct discovery before ruling on any summary judgment motion.

## **II. ASSIGNMENT OF ERROR**

1. The trial court erred in entering its Order For Summary Judgment. (CP 81-83)

## **III. ISSUES**

1. Does a trial court err by refusing to continue a summary judgment motion filed two months after the complaint and a month after the nonmoving, nonresident party's counsel withdrew when no discovery has been conducted, the discovery deadline is nine months away, and the deadline for dispositive motions is ten months away?

2. Does a trial court err by granting summary judgment to a surety based on alleged payments made on a bond when the surety provides no documentation establishing who it paid, when it paid them, how much it paid them, and how each payment was related to the bond?

#### **IV. STATEMENT OF FACTS**

**A. The Berrys' company CCS was a subcontractor on a project bonded by CBIC.**

J. Wayne Berry is the President of Commercial Construction Services, Inc. (CCS). (CP 57) Mr. Berry lives with his wife Kimberly in Corrales, New Mexico. (CP 28)

In December 2009, CCS subcontracted with Hensel Phelps Construction New Mexico LLC to work on a project for Las Alamos National Labs. (CP 32, 58) In August 2010, Contractors Bonding and Insurance Company (CBIC) provided a bond on behalf of CCS for the Las Alamos project and agreed to serve as surety for any claims against CCS up to the subcontract's price of \$427,887. (CP 32-33) Mr. Berry signed an indemnity agreement with CBIC in his individual capacity and as the President of CCS; Mrs. Berry signed the agreement as well. (CP 34-37)

After CCS completed 95% of its work for the Las Alamos National Labs contract, a dispute arose between CCS and Hensel Phelps. (CP 58) Hensel Phelps removed CCS from the jobsite and refused to allow CCS to complete the remaining portion of the contract. (CP 58)

In August 2013, CBIC served the Berrys in New Mexico with a complaint alleging that CBIC had paid \$331,380.12 to unidentified “claimants against the bond.” (CP 1-4; RP 7) CBIC waited until February 24, 2014, to file the complaint in King County Superior Court, relying on a venue provision in the indemnity agreement that purported to allow venue in King County. (CP 7, 90) The court set a discovery deadline of March 2, 2015, a deadline for dispositive motions of April 6, 2015, and a trial date of April 20, 2015. (CP 92)

The Berrys did not have counsel in Washington state. (CP 43; RP 4) After obtaining local counsel, on March 14, 2014, the Berrys answered CBIC’s complaint, averring that they “lack[ed] information and knowledge” as to the amounts CBIC alleged it paid under the bond. (CP 9-14) The Berrys’ Washington counsel withdrew a week later, on March 21, 2014. (CP 95-99) The Berrys proceeded pro se.

**B. The trial court denied the Berrys' motion to continue CBIC's motion for summary judgment, which CBIC filed two months after bringing suit, a year before the deadline for dispositive motions, and before the Berrys could obtain new counsel.**

On April 24, 2014, CBIC moved for summary judgment. (CP 18-23) An affidavit from a CBIC employee submitted in support of CBIC's motion for the first time disclosed the claimants that CBIC alleged it had paid – although with the exception of Hensel Phelps, the affidavit did not state how much CBIC claimed to have had paid to each claimant, lumping together \$169,312.12 in payments made on disclosed dates to 11 different subcontractors. (CP 29-31; App. A)

By written motion, the Berrys moved to continue the summary judgment motion for 120 days to conduct discovery and to arrange for new Washington counsel. (CP 42-44) The Berrys' motion for continuance also explained that Mr. Berry's mother had passed away on April 8, 2014, and that he had spent the previous month caring for her in hospice. (CP 44) CBIC's counsel refused a separate request for a continuance from the Berrys' New Mexico counsel, Ilyse Hahs-Brooks. (CP 44)

The Berrys also filed an opposition to CBIC's summary judgment motion, which reiterated that the motion was

“premature” that defendants needed to “conduct discovery in order to justify their defenses in this case,” and emphasized that CBIC had not submitted any documentary evidence to “support the amounts claimed.” (CP 54-56) In a supporting affidavit Mr. Berry disputed the amounts paid by CBIC and explained that he was unable to defend CBIC’s “blanket claims” because none of the alleged payments “are broken down by contractor, scope or amount for each contractor.” (CP 57) In conjunction with their motion to continue, the Berrys served CBIC with requests for production seeking, among other things, documents supporting the amount of the alleged payments to Hensel Phelps and the 11 subcontractors. (CP 71-80)

King County Superior Court Judge Palmer Robinson heard CBIC’s summary judgment motion on May 29, 2014. The Berrys, as well as their New Mexico counsel, Ms. Hahs-Brooks, appeared at the hearing telephonically. (RP 3-4) Ms. Hahs-Brooks explained that she was in discussions with a Seattle attorney to sponsor her for admission pro hac vice, and that she needed additional time to finalize her application, but recognized that she could not present argument. (RP 5) CCS therefore had no representation at the hearing.

Following the hearing, the trial court granted CBIC's summary judgment motion and entered judgment against the Berrys for \$411,241.12, including \$79,861.08 in prejudgment interest. (CP 81-83) The Berrys appeal. (CP 84)

## V. ARGUMENT

### A. **The trial court erred in granting summary judgment without a continuance that the Berrys needed to obtain new counsel and to conduct discovery on the amounts CBIC alleged it paid to claimants.**

“The trial court must make justice its primary consideration in ruling on a motion for continuance.” *Keck v. Collins*, 181 Wn. App. 67, 88, ¶ 38, 325 P.3d 306 (2014), *rev. granted*, \_\_\_ P.3d \_\_\_ (Oct. 8, 2014). The trial court ignored this mandate in denying the Berrys a limited continuance to obtain counsel and conduct the discovery necessary to oppose CBIC's summary judgment motion, which CBIC filed just two months after its complaint and a year before the deadline for dispositive motions. This Court should reverse the trial court's summary judgment order and remand with instructions to allow the Berrys sufficient time to obtain counsel and conduct discovery before ruling on any summary judgment motion.

Under CR 56(f), when a party opposing summary judgment cannot “present by affidavit facts essential to justify his opposition,” a trial court can grant a continuance “to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.” A party seeking a continuance should “state what evidence would be established through the additional discovery.” *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990). This Court reviews a trial court’s decision on a motion for a continuance for an abuse of discretion, cognizant that a denial lacking “a tenable ground” or not “founded upon principle and reason” is an abuse of discretion. *Butler v. Joy*, 116 Wn. App. 291, 300, 65 P.3d 671, *rev. denied*, 150 Wn.2d 1017 (2003); *Coggle*, 56 Wn. App. at 505.

A trial court abuses its discretion by denying a continuance in the face of a party’s reasonable difficulty locating counsel. In *Coggle*, the trial court erred in denying a continuance requested by an attorney who appeared a week before a summary judgment hearing to replace the initial attorney. Noting that “[l]ittle discovery had been pursued,” this Court held that the trial court abused its discretion because the client “should not be penalized for the apparently dilatory conduct of his first attorney.” *Coggle*, 56

Wn. App. at 508. *See also Butler*, 116 Wn. App. at 299 (trial court should have granted continuance where party's initial counsel withdrew and new counsel appeared the day before summary judgment hearing); *cf. Keck*, 181 Wn. App. at 88-89, ¶¶ 39-40 (trial court abused its discretion in denying continuance where nonmoving party's counsel had been unable to prepare response due to trial in another case).

Here, the facts supporting a continuance are even more compelling than those in *Coggle*, *Butler*, and *Keck*. Unlike those cases, the Berrys had *no* legal representation in Washington, not even the "hobbled" representation that those courts held required a continuance. *Keck*, 181 Wn. App. at 88, ¶ 39; *Butler*, 116 Wn. App. at 300. The Berrys' local counsel withdrew on March 21, 2014. (CP 95-99) Barely a month later, CBIC filed its motion for summary judgment. (CP 18-23) CBIC then refused the Berrys' request to agree to a limited continuance. (CP 44) In their written motion, the Berrys explained that they needed additional time "to arrange for new Washington State counsel," and then explained at the summary judgment hearing that their New Mexico counsel was finalizing arrangements with a local attorney to sponsor her pro hac vice application. (CP 44; RP 5) The Berrys also explained at the

telephonic summary judgment hearing that they intended to challenge venue in King County over a complaint they were served with in New Mexico involving payments on a construction project located in New Mexico. (RP 26-27)

Moreover, without local counsel, CCS had no representation whatsoever. As non-attorney pro se parties, the Berrys could not represent CCS's interests. *Lloyd Enterprises, Inc. v. Longview Plumbing & Heating Co., Inc.*, 91 Wn. App. 697, 701, 958 P.2d 1035 (1998) ("corporations appearing in court proceedings must be represented by an attorney"), *rev. denied*, 137 Wn.2d 1020 (1999). The trial court also erred by not allowing CCS time to obtain representation after its attorney withdrew. *Biomed Comm, Inc. v. State Dep't of Health Bd. of Pharmacy*, 146 Wn. App. 929, 938, ¶ 20, 193 P.3d 1093 (2008) (after striking corporations' pleadings signed by non-attorney corporate officer, trial court erred by not allowing corporation reasonable time to cure the defect) (citing *Lloyd Enterprises*, 91 Wn. App. at 701-02).

The Berrys also explained the discovery they needed to properly oppose CBIC's summary judgment motion. *Coggle*, 56 Wn. App. at 507. CBIC asserted in its complaint that it paid \$331,380.12 for claims against CCS, but it failed to disclose to

whom those payments were made, when payments were made, the payment amounts, or the basis for making payments. (CP 1-4) It was not until its summary judgment motion that CBIC first asserted that it paid \$169,312.12 to 11 different subcontractors. Even then CBIC failed to disclose how much was paid to each contractor or when each contractor was paid. (CP 29-31; App. A) The Berrys could not oppose CBIC's "blanket claims" without discovery verifying the amounts CBIC paid to each claimant, that CBIC actually made those payments, that those payments were related to the bond CBIC issued on behalf of CCS, and that those payments equaled the total alleged by CBIC. (CP 42-44, 54-57) That is precisely why the Berrys submitted a discovery request seeking documents supporting the amount and nature of the alleged payments. (CP 71-80) The Berrys also sought this information because they believed CBIC acted fraudulently in paying claims on the surety bond and, as a result, the Berrys would not be bound by CBIC's decision to pay claims. (RP 18, 20, 25; CP 34)

Without any discovery having been conducted and just two months after the Berrys' local counsel withdrew, the trial court granted CBIC's summary judgment motion – more than ten months before the deadline for dispositive motions and nine months before

the discovery deadline. (CP 92) “Typically, summary judgment motions are not made until each side has had a chance to engage in formal discovery, in order to gather evidence and to assess the opposing party’s evidence.” Karl Tegland, 14A Wash. Prac., Civil Procedure § 25:3 at 104 (2d ed. 2009). Indeed, CBIC filed its summary judgment motion 59 days after filing its complaint, before the period for the Berrys to appear had even expired. *See* RCW 4.28.180 (providing out-of-state defendants sixty days to appear and answer). CBIC would have suffered no prejudice from a limited continuance to allow the Berrys to obtain new counsel and conduct discovery. *Keck*, 181 Wn. App. at 89, ¶ 39 (“With the trial date still three and one-half months away and the dispositive motions deadline still three months away, respondents would suffer no prejudice if the trial court continued the summary judgment hearing”).

Finally, the trial court also ignored the injustice of denying a continuance given the death of Mr. Berry’s mother. (CP 44) For the month following withdrawal of the Berrys’ local counsel, Mr. Berry was focused on caring for his mother – not obtaining new counsel to defend a summary judgment he had no idea CBIC would file so far in advance of the relevant deadlines. Far from making

justice its “primary consideration,” the trial court’s denial of a continuance smacks of injustice and must be reversed. *Keck*, 181 Wn. App. at 89, ¶ 40.

**B. The trial court erred in granting CBIC summary judgment without any documentation supporting the amounts CBIC allegedly paid on the bond.**

In addition to its unjust denial of a continuance, the trial court also erred in granting summary judgment based only on the assertion of a CBIC employee – without any supporting documentation – regarding the amounts it purportedly paid to 11 different subcontractors and the general contractor. The bare assertion of CBIC’s employee that it paid over \$330,000 in claims on a \$430,000 bond was not sufficient for CBIC to meet its burden on summary judgment to establish that there were no genuine issues of material fact.

CBIC submitted no documentation to support the alleged payments it made on the bond – nor were the Berries allowed to obtain this information through discovery. Further, the amount of the alleged payments conflicts with the only documentation in the record. CBIC claimed that it was forced to pay the general contractor, Hensel Phelps, based on a June 2011 letter in which Hensel Phelps asked CCS to correct six items. (CP 30, 59, 67, 69)

The items in that letter had a total value of \$3,150. (CP 59, 69)  
That is a far cry from the \$162,068 CBIC alleges it paid to Hensel  
Phelps. (CP 30)

A party is entitled to summary judgment only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). “The burden of showing that there is no issue of material fact falls upon the party moving for summary judgment; all reasonable inferences must be resolved against the moving party, and the motion should be granted only if reasonable people could reach but one conclusion.” *Hash by Hash v. Children’s Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). “If the moving party does not sustain its burden, summary judgment should not be granted, regardless of whether the nonmoving party has submitted affidavits or other evidence in opposition to the motion.” *Hash*, 110 Wn.2d at 915. This Court reviews the trial court’s summary judgment order de novo. *Lokan & Associates, Inc. v. Am. Beef Processing, LLC*, 177 Wn. App. 490, 495, ¶ 10, 311 P.3d 1285 (2013).

In *Hash*, the Supreme Court reversed a trial court’s grant of summary judgment to a doctor sued for malpractice. The Court

rejected the basis for the trial court's grant of summary judgment, an affidavit from the defendant's expert, because it lacked any specifics on how the plaintiff's injury occurred. The Court concluded that it was "impossible to uphold a ruling that there is no genuine issue as to any material fact when the record contains all questions and no facts." *Hash*, 110 Wn.2d at 916; *see also Nicholson v. Deal*, 52 Wn. App. 814, 820, 764 P.2d 1007 (1988) (statements that were "general in nature" failed to establish that there were no genuine issues of material fact).

Here, as in *Hash*, CBIC's self-serving affidavit failed to meet its initial burden on summary judgment and instead created a record that is all questions and no answers. CBIC's affidavit contained no specifics regarding the payments it allegedly made on the bond. How much did CBIC pay to each subcontractor? When did CBIC pay each subcontractor? How were those payments related to the bond? Do the payments to each subcontractor equal the total alleged by CBIC? These are all material questions CBIC failed to answer – a failure that is particularly glaring because those answers lay exclusively with CBIC, a compensated surety. *Michigan Nat. Bank v. Olson*, 44 Wn. App. 898, 905, 723 P.2d 438 ("where material facts averred in an affidavit are particularly within

the knowledge of the moving party, it is advisable that the cause proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying”), *rev. denied*, 106 Wn.2d 1011 (1986) (quoting *Felsman v. Kessler*, 2 Wn. App. 493, 496-97, 468 P.2d 691, *rev. denied*, 78 Wn.2d 994 (1970)); *Nat’l Bank of Washington v. Equity Investors*, 86 Wn.2d 545, 553, 546 P.2d 440 (1976) (“The compensated surety has never been regarded as a favorite of the law”) (quoting Simpson, *Simpson on Suretyship*, pt. 1, Ch. 3, s 30, p.1 (1950)).

CBIC was required to submit documentation verifying the six-figure payments it allegedly made on its bond before it was entitled to recover them. *Modern Builders, Inc. of Tacoma v. Manke*, 27 Wn. App. 86, 95, 615 P.2d 1332 (refusing to allow plaintiff to recover extra costs incurred in connection with contract because it “presented no documentation of such extra costs”), *rev. denied*, 94 Wn.2d 1023 (1980). This Court should reverse the trial court’s summary judgment order.

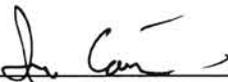
## **VI. CONCLUSION**

This Court should reverse the trial court’s summary judgment order and remand with instructions to allow the Berrys

sufficient time to obtain local trial counsel and conduct discovery  
before ruling on any summary judgment motion.

Dated this 13th day of November, 2014.

SMITH GOODFRIEND, P.S.

By:   
Catherine W. Smith  
WSBA No. 9542  
Ian C. Cairns  
WSBA No. 43210

Attorneys for Appellants

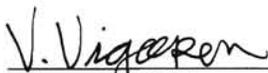
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 13, 2014, I arranged for service of the foregoing Brief of Appellants, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-File
Ilyse Haas-Brooks IDH Attorney at Law, LLC 2014 Central Avenue S.W. Albuquerque, NM 87104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
John S. York Yusen & Friedrich 215 N.E. 40th Street, Suite C-3 Seattle, WA 98105	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

**DATED** at Seattle, Washington this 13th day of November, 2014.

  
\_\_\_\_\_  
Victoria K. Vigoren

FILED

14 APR 24 AM 9:21

Honorable Judge Mary Yu  
Motion for Summary Judgment

Friday, May 30, 2014 10:00 AM

With oral argument

CASE NUMBER: 14-2-05977-9 SEA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

CONTRACTORS BONDING AND  
INSURANCE COMPANY, a surety insurer,

Plaintiff,

v.

WAYNE and KIMBERLY BERRY, husband  
and wife and the marital community composed  
thereof and Commercial Construction Services,  
Inc.

Defendants.

NO. 14-2-05977-9SEA

AFFIDAVIT OF CHRIS SIMMELINK

Chris Simmelink being duly sworn on oath deposes and states as follows:

That I am a claims examiner for Contractors Bonding and Insurance Company and  
have personal knowledge of the following facts and am competent to testify thereto.

1. That I am one of the custodians of record for Contractors Bonding and  
Insurance Company and attached hereto is a true and correct copy of the payment bond issued  
by Contractors Bonding and Insurance Company on behalf of Commercial Construction  
Services, Inc., Exhibit A, and as Exhibit B a copy of the General Indemnity Agreement signed  
by all of the Defendants herein. Contractors Bonding and Insurance Company issued the  
payment bond (Exhibit A) being bond number KA 5317 to cover any claims made against  
Commercial Construction Services, Inc. and guarantee payment of those claims in the event

AFFIDAVIT OF CHRIS SIMMELINK – Page 1

YUSEN & FRIEDRICH  
ATTORNEYS AT LAW  
215 N.E. 40<sup>TH</sup> STREET  
SUITE C-3

SEATTLE, WASHINGTON 98105-6567  
(206) 545-2123 FAX (206) 545-6828

1 that Commercial Construction Services, Inc. did not pay the claims on the job bonded by  
2 Contractors Bonding and Insurance Company. These claims were from Skill Supply,  
3 Alliance Fire Protection, CMC Construction Services, RSC Equipment Rental, A & G  
4 Heating and Air Conditioning, the Halgren Company of New Mexico, Johnson Controls, Inc.,  
5 High Desert Roofing, Inc., Norman Kirk Air Company, Inc., Sealant Specialists, Inc., and  
6 Bob's Painting, Inc., which totaled \$169,312.12.

7       2. Commercial Construction Services, Inc. initially raised some questions about these  
8 bills but was unable to supply any documentation to support their position. It soon became  
9 apparent that Commercial Construction Services, Inc. did not have the money to pay the  
10 claimants. These claimants were paid by Contractors Bonding and Insurance Company  
11 pursuant to the bond terms between June 28, 2011 and November 30, 2011. Shortly after the  
12 payment claims began to come in, Hensel Phelps Construction New Mexico, LLC the general  
13 contractor on the job sent a three day notice and demand for correction on June 6, 2011  
14 maintaining that Commercial Construction Services, Inc. was in breach of their subcontract  
15 by failing to man the job properly and provide the needed equipment and materials.  
16 Commercial Construction Services, Inc. initially contested these claims although it was  
17 unable to provide any documentation to back up their alleged defenses. At one time  
18 Commercial Construction Services, Inc. did hire an attorney in New Mexico, a Mr. Stephen  
19 Lawless however he was forced to withdraw as he was unable to obtain the necessary  
20 documentation from his client.

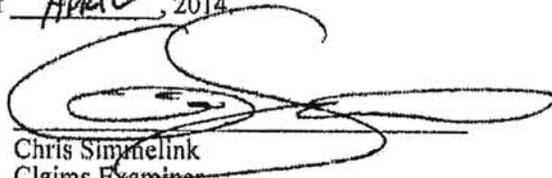
21       3. After the withdrawal of their attorney, Commercial Construction Services, Inc.  
22 failed to respond to the demands by both Contractors Bonding and Insurance Company and  
23 Hensel Phelps Construction to complete the work and provide as built drawings and  
24 warranties. On October 31, 2012 Hensel Phelps Construction was paid by Contractors  
25 Bonding and Insurance Company in the amount of \$162,068.00 to settle all claims by Hensel  
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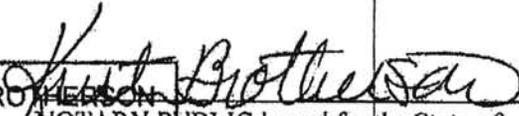
Phelps against the payment performance bond issued by Contractors Bonding and Insurance Company.

Despite repeated demands Defendants have refused to reimburse Contractors Bonding and Insurance Company for the amounts paid to claimants on the bond issued by Contractors Bonding and Insurance Company which now totals \$331,380.12.

DATED this 22<sup>nd</sup> day of April, 2014

  
Chris Simmelink  
Claims Examiner  
Contractors Bonding and Insurance Company

SUBSCRIBED AND SWORN TO before me this 22<sup>nd</sup> day of April, 2014.

  
KRISTI BROTHERSON  
STATE OF WASHINGTON NOTARY PUBLIC in and for the State of  
Washington, residing at: Sumner, WA  
NOTARY PUBLIC My Commission expires: 4/19/17  
MY COMMISSION EXPIRES  
04-19-17

**PAYMENT BOND**  
(Subcontract)

Bond No. KA5317

(If applicable)

1 I KNOW ALL BY THESE PRESENTS, that **COMMERCIAL CONSTRUCTION SERVICES, INC.** (hereinafter called the "Principal"), as  
2 Principal, and **Contractors Bonding and Insurance Company** a corporation organized and existing under the laws  
3 of the State of Washington (hereinafter called the "Surety"), as Surety, are held and firmly bound unto **Kenan Phelps**  
4 **Construction & Mfg. Co., L.L.C.**, a Delaware corporation, with principal office located at 420 East Avenue, Greeley, Colorado  
5 (hereinafter called "HPNM" as "Obligee"), in the sum of **FOUR HUNDRED TWENTY SEVEN THOUSAND EIGHT HUNDRED EIGHTY SEVEN**  
6 **AND NO/100 DOLLARS (\$427,887.00)**, for the payment of which sum well and truly to be made, the said Principal and Surety bind  
7 themselves, and their respective heirs, administrators, executors, successors and assigns, jointly and severally, firmly by these  
8 presents.

9  
10 WHEREAS, HPNM has been awarded a contract (hereinafter called the "Prime Contract"), by **LOS ALAMOS NATIONAL**  
11 **SECURITY, LLC**, for the **NMSSUP II UTILITY TRUNK, UTILITY BUILDING AND STORM WATER DETENTION SYSTEM (Project)**; and

12  
13 WHEREAS, the Principal has entered into a written Subcontract with HPNM, dated **12/16/09** in the amount of **\$427,887.00**  
14 ("Subcontract Price") to perform as Subcontractor, certain portions of the work in connection with said Prime Contract, providing  
15 generally of **UTILITY BUILDING CONSTRUCTION**, which Subcontract is hereby referred to and made a part hereof.

16  
17 NOW, THEREFORE, the condition of this obligation is such that if Principal shall promptly make payment to all Claimants as  
18 hereinafter defined, for all labor, material and equipment used or reasonably required for use in the performance of the Subcontract,  
19 and any and all change orders or modifications issued to said Subcontract, then this obligation shall be void; otherwise it shall remain  
20 in full force and effect, subject however, to the following conditions:

- 21  
22 1. The purpose of this Bond is, in part, to indemnify HPNM and its surety (if any) for any payments made by HPNM or its surety,  
23 whether due to a lien or payment bond claim or otherwise, to any Claimant, as defined hereof, upon the failure of Principal or  
24 Surety to make such payment. Such indemnification shall include all legal expenses necessarily incurred by HPNM or its  
25 surety in connection with such payments, which legal expenses shall be dug and owing to HPNM in addition to, and not as a  
26 part of, the penal sum of this Bond.
- 27  
28 2. Surety agrees that no change, extension of time, alteration, addition, omission, or other modification of the terms of either the  
29 said Subcontract or the said Prime Contract, or both, or in the said work to be performed, or in the specifications, or in the  
30 place, shall in any way affect its obligation on this Bond, and it does hereby waive notice of any such changes, extensions of  
31 time, alterations, additions, omissions, and all other modifications. In addition, the penal sum of this Bond shall automatically be  
32 adjusted to reflect the additive or deductive amounts of all change orders issued to the Subcontract provided, however, that  
33 HPNM shall notify Surety if a change order increases the Subcontract Price by more than 10%, and, if at any point the  
34 aggregate amount of all change orders increases the Subcontract Price by more than 35%, Surety's consent shall be required to increase the penal sum of this Bond in excess of 35% of the Subcontract Price, such  
35 consent not to be unreasonably withheld.
- 36  
37 3. HPNM and its surety, if any, are intended beneficiaries of this Bond.
- 38  
39 4. A Claimant is defined as one supplying labor, material and/or equipment, used or reasonably required for use in the  
40 performance of the Subcontract, labor, material and equipment being construed to include that part of water, gas, power,  
41 light heat, oil, gasoline, telephone service, or other equipment directly applicable to the Subcontract. Although possessing  
42 the right to file a lien or statutory bond claim is not required to meet the definition of Claimant under this Bond, Claimants  
43 shall be deemed as anyone possessing a right to file a lien or statutory bond claim on the Project arising out of the  
44 Subcontractor's work.
- 45  
46 5. The aforesaid Principal and Surety hereby jointly and severally agree that every Claimant as defined herein, who has  
47 not been paid amounts due for labor, material or equipment used or reasonably required for use in the performance of the  
48 Subcontract may recover such amounts from Surety under this Bond. HPNM shall not be liable for the payment of any costs  
49 or expenses that may be incurred by a Claimant in recovering amounts due under this Bond.
- 50  
51 6. The penal sum of this Bond shall be reduced by and to the extent of any payment or payments made by Surety in good faith  
52 hereunder.
- 53  
54 7. In the event of a dispute between Surety and HPNM, related to the Subcontract or this Bond, the dispute shall be resolved by  
55 the dispute resolution procedures set forth in the Subcontract. Surety shall be bound by any decision or ruling issued in any  
56 legal proceedings relating to the Subcontract involving HPNM and Principal concerning the Principal's obligations under the  
57 Subcontract.
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Ex. A

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IN WITNESS WHEREOF, the above bonded parties have executed this instrument under their several seals this 3rd day of August 2010, the name and corporate seal of each corporate party being affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

Commercial Construction Services, Inc. (Seal)  
(Principal):

(Business Address)

Witness:

By \_\_\_\_\_  
Or Secretary's Attest

(Signature and Title)

Contractors Bonding and Insurance Company (Seal)  
(Surety)

8300 DTC Parkway #490, Greenwood Village, CO 80111  
(Business Address)

Witness:

By \_\_\_\_\_  
Or Secretary's Attest

(Signature and Title)

Christian B. Downey, Attorney-In-Fact

(2) Pay its bond(s), in full or in part.

(3) Incur such expense of handling a claim as it shall deem necessary, including but not limited to the expense for investigative, accounting, engineering and legal services.

B. Surety shall have the foregoing rights, irrespective of the fact that the undersigned may have assumed, or offered to assume, the defense of the Surety upon such claim.

C. If it becomes necessary or advisable in the judgment of Surety to take any action described above, or to control, administer, operate, or manage any or all matters connected with the performance of any Contract for the purpose of attempting to minimize any ultimate loss to undersigned or Surety, or for the purpose of enabling Surety to discharge its obligations of suretyship, the undersigned expressly covenant and agree that such action on the part of Surety shall be entirely within its rights and remedies under the terms of this agreement.

D. The undersigned promise to promptly pay to Surety upon demand all expenses incurred in the exercise of any right of Surety under paragraph IV or elsewhere. In no event shall Surety's option to exercise the rights herein conferred be construed as mandatory upon Surety, and the undersigned agree that Surety shall not have any liability to undersigned for exercising or not exercising the rights conferred herein or elsewhere in this agreement.

#### V. COLLATERAL SECURITY

If a claim or demand for performance of any obligation under any Bond is made against Surety, or if Surety deems it necessary to establish a reserve for potential claims or demands or for loss adjustment expense (including but not limited to attorneys' fees), upon demand from Surety (including the filing of a proof of claim in bankruptcy) the undersigned shall deposit with Surety cash or other property acceptable to Surety, as collateral security, in sufficient amount to protect Surety with respect to such claim(s) or potential claims and any expense or attorneys' fees. The reserve for loss may vary from time to time as Surety deems necessary to protect itself from loss and if Surety deems it necessary to increase its reserve it may make a new or further demand for increased collateral. Cash collateral equal to the reserve for loss shall be adequate. Other collateral shall be adequate if the net equity value of the collateral, as determined by Surety, is equal to 166% of the reserve for loss. In the event that suit is necessary to enforce this paragraph, the undersigned shall supply to Surety a list of the undersigned's assets and the assets of Principal and any Affiliate, indicating the address of the assets and the person(s) having custody. Surety may insist on cash security. At the same time that the undersigned provide collateral to Surety, they shall also immediately take all actions and provide all documents necessary to allow Surety to perfect its lien on and/or security interest in the collateral under all applicable law. Specific performance of this paragraph shall be a remedy available to Surety. All post-judgment procedures for executing on judgments may be available to enforce Surety's decree of specific performance, in addition to all pre-judgment procedures available by law. Collateral may be held by Surety until it has received evidence of its complete discharge from any and all such claims or potential claims even if said claims are made against Surety after collateral is deposited or are made against a different Bond, and until Surety has been fully reimbursed for all loss, expenses and attorneys' fees. All expense of Surety, including attorneys' fees, in connection with taking, administering, realizing upon or releasing collateral, whether deposited under this paragraph or as a requirement prior to execution of any Bond, shall be covered by the indemnity hereunder. The undersigned agree to indemnify, defend and hold Surety harmless from any and all liability of any type to any person, entity or governmental body resulting from the collateral provided, including but not limited to any claim under the Federal Comprehensive Environmental Response Compensation Liability Act of 1980 (CERCLA), as amended, the Federal Resource Conservation and Recovery Act (RCRA), as amended, and any other applicable federal, state or local law.

#### VI. TRUST FUNDS

The undersigned agrees and hereby expressly declares that all funds due or to become due to Principal or its successors or assigns from any Contract covered by a Bond are trust funds, whether in the possession of the Principal or another, for the benefit and payment of all persons to whom the Principal incurs obligations in the performance of such Contract and for which the Surety would be liable under the Bond. If the Surety discharges any such obligation, it shall be entitled to assert the claim of such person to the trust funds.

#### VII. ASSIGNMENT

A. As security for the performance of all provisions of this agreement, including but not limited to Surety's right to payment for indemnity contained in paragraph II, the undersigned hereby irrevocably pledge, grant a security interest in, assign, transfer, and convey to Surety, effective as of the date of this agreement or the date any Bond is executed by Surety, whichever is earlier, but subject to the trust herein created, the following, whether now held or after acquired:

(1) All rights in connection with any contract (whether or not bonded by Surety) held by the undersigned, including but not limited to:

a. All subcontracts let by the undersigned and the subcontractor's surety bonds,

b. Any and all sums due or which may hereafter become due under any contract including but not limited to progress payments, retainages, compensation for extra work, deferred payments, and any damage claims and/or any proceeds of any damage claims in which the undersigned may have an interest,

(2) All rights arising out of insurance policies,

(3) Any and all accounts receivable, chattel paper, general intangibles, documents of title, and bills of lading held by the undersigned or in which the undersigned may have an interest,

(4) Any and all machinery, plant, equipment, and tools in which the undersigned may have an interest,

(5) Any and all materials and/or inventory in which the undersigned may have an interest.

B. The Surety is irrevocably authorized to assert and prosecute any right or claim hereunder assigned, transferred or conveyed in the name of the Principal and to compromise and settle on behalf of the Principal and Surety any such right or claim, and/or litigation based thereon, on such terms as it considers reasonable under the circumstances.

C. Surety may at any time and at its option file or record this agreement or any other document executed by any or all of the undersigned, individually or jointly, as a security agreement or as part of a financing statement or as a notice of its prior interest and assignment under the provisions of the Uniform Commercial Code or any other statute, ordinance or regulation of any jurisdiction or agency, but the filing or recording of such document shall be solely at the option of Surety and the failure to do so shall not release or impair any obligations of the undersigned under this agreement. A carbon, photographic, or other reproduction of this agreement, or of any other document so filed or recorded by the Surety, is sufficient as a financing statement, security agreement, or notice of prior interest, under this agreement.

#### VIII. POWER OF ATTORNEY

The undersigned hereby irrevocably nominate, constitute, appoint and designate Surety or its designee as their attorney-in-fact with the right, but not the obligation, to exercise all of the rights assigned, transferred and set over to Surety by the undersigned in this agreement, and to make, execute and deliver any and all additional or other assignments, agreements, directions, documents, pleadings or papers, including but not limited to the execution of instruments referred to in Section VII and the endorsement of checks or other instruments representing payment of contract monies deemed necessary and proper by the Surety in order to give full effect, not only to the intent and meaning of the within assignment, but also to the full protection intended to be herein given to Surety under all other provisions of this agreement. The undersigned hereby ratify and affirm all acts and actions taken and done by Surety or its designee as attorney-in-fact.

#### IX. GENERAL PROVISIONS

A. The obligations of the undersigned hereunder are joint and several. Surety may bring separate suits hereunder against any or all of the undersigned at causes of action may occur hereunder. Surety need not proceed first against the Principal. Release of any one or more of the undersigned shall not release the others. No action or inaction of Surety with respect to anyone other than the undersigned shall relieve the undersigned of any duties hereunder. The undersigned shall not be released from liability hereunder because of the status, condition, or situation of any other signator to this agreement or any Affiliate as defined herein.

B. Undersigned shall, on request of Surety, procure the discharge of Surety from any Bond, and all liability by reason thereof.

C. Undersigned warrant that each of them is specifically and beneficially interested in the obtaining of each Bond.

D. Undersigned waive notice of any Default or of the making of a claim against Surety.

E. Undersigned agree to give to Surety prompt notice of any facts which might give rise to any claims or suits against Surety upon any Bond.

F. Surety may consent to any changes or alterations in a Contract, without affecting the liability hereunder of the undersigned.

G. Surety shall have every right, defense or remedy which a personal surety without compensation would have, including the right of exoneration.

H. At any time and until such time as Surety has been furnished with conclusive evidence that its liability under any Bond is terminated and/or until such time as Surety has been indemnified as provided in paragraph II above, the Surety shall have the right to free access to all of the books, records, and accounts of the undersigned for the purpose of examining them and copying them. Time is of the essence, and Surety shall have such right of free access at any time of day and any day of the week. However, should Surety demand such access outside of the hours of 8:00 a.m. through 4:00 p.m., Monday through Friday, the undersigned may charge Surety a fee not to exceed \$10 per hour.

I. Undersigned waive all rights to claim any property, including homestead, as exempt from legal process in any action hereunder.

J. If the execution hereof by any of the undersigned may be defective or invalid for any reason, such defect or invalidity shall not affect the validity hereof as to any other of the undersigned. Invalidity of any provisions hereof by reason of the law of any state or for any other reason shall not render the other provisions hereof invalid.

K. Surety shall have the right to fill in any blanks left herein and to correct any errors in filling in any blanks herein and to fill in or correct errors in any other documents required of the undersigned in connection with execution of any Bond.

L. Undersigned waive any defense that this instrument was executed subsequent to the date of any Bond, admitting and covenanting that such Bond was executed pursuant to the undersigned's request and in reliance on the undersigned's promise to execute this agreement.

M. This agreement may not be changed or modified orally. No change or modification shall be effective unless specifically agreed to by Surety in writing.

N. In the event any of the undersigned become insolvent, or in case any of the undersigned who execute this agreement shall not be bound for any reason, the other undersigned shall, nevertheless, be bound hereunder for the full amount of the liability as defined in paragraph II hereof.

O. Repeated actions on this agreement, as breaches thereof may occur, may be maintained by Surety, its successors or assigns, without any former action operating as a bar to any subsequent action brought on this agreement for breaches hereunder.

P. Whenever used in this agreement the plural shall include the singular and the singular shall include the plural, as the circumstances require.

Q. The liability of undersigned hereunder shall not be affected by the failure of the Principal to sign any Bond or Bonds or by any claim that other indemnity or security was to have been obtained, nor by the release of any indemnity or the return or exchange of any collateral that may have been obtained, whether or not notice of said actions has been given to undersigned.

R. Neither execution by Principal, any other undersigned, or any Affiliate (1) of any application for any bond or (2) of any other agreement of indemnity on behalf of Principal, any other undersigned, or any Affiliate, nor the taking of the indemnity of any other person by Surety with regard to any Bond for Principal, any other undersigned, or any Affiliate, shall in any way be deemed to waive, diminish, or abrogate any rights of Surety under this agreement.

S. Any suit brought upon this agreement shall be brought in a court of competent jurisdiction in King County, Washington, and the undersigned consent to venue and personal jurisdiction in King County, Washington for that purpose. This agreement is governed by the laws of the state of Washington. Surety shall have the right, in its sole discretion, to waive venue and/or jurisdiction in King County, Washington. Any waiver by Surety of the venue and/or jurisdiction herein shall not waive the choice of law herein agreed to.

T. Undersigned shall not claim as a defense to undersigned's obligations hereunder that the person or entity appearing on any Bond executed by Surety is not a Principal as defined herein, where: (1) any undersigned or any representative of any undersigned gave Surety reason to believe that the person or entity appearing on Bond should be a Principal as defined herein; or (2) the differences between such Bond and Principal's name herein arose because of typographical error or good faith mistake and it is reasonably apparent that the person(s) or entity(ies) named in such Bond and the person(s) or entity(ies) named herein should be treated as one and the same. No undersigned shall claim as a defense to undersigned's obligations hereunder that any name set forth herein or in any Bond is not the exact legal name of the undersigned or Principal.

U. If more than one Principal is named in this agreement, conjunctively or disjunctively, this agreement applies in its entirety to Bonds for any and all such Principals, singly or in combination.

V. Neither this agreement, nor acceptance by Surety of payment for its suretyship, nor agreement to accept or acceptance at any time of other security, nor any act by undersigned, nor assent to any act of undersigned by Surety, shall in any way abridge, defer, or limit Surety's right to be subrogated to any right or remedy, nor limit or abridge any remedy which Surety might otherwise have, acquire, exercise, or enforce, nor create any liability on the part of Surety which would not exist were this agreement not executed.

W. The Principal's and the other undersigned's right to recover damages against Surety caused by Surety's fault or negligence shall not exceed \$2,000. Surety will not be liable for damages resulting from loss of profits or for incidental or consequential damages, even if advised of the possibility of such damage. This limitation will apply regardless of the form of the action, whether in contract or tort, including negligence.

X. Undersigned agree that they have a duty to review all Bonds executed by Surety for errors and omissions prior to delivery of the Bond to the obligee.

Y. The undersigned shall have no rights of indemnity against each other or each others' property until its/their obligations to Surety under this agreement have been satisfied.

Z. If the undersigned desire that a claim or demand against Surety, to which Surety has determined a meritorious defense exists, be resisted and litigated, the undersigned shall (1) give written notice to Surety to this effect, (2) simultaneously deposit with Surety cash or other collateral as defined in paragraph V herein satisfactory to Surety in an amount sufficient to cover the claim or demand and interest thereon to the probable date of disposition, and (3) either deposit simultaneously with Surety cash or other collateral as defined in paragraph V herein satisfactory to Surety in an amount sufficient to cover the expenses and fees of defense, or take over the resistance and litigation of the claim provided, however, Surety shall have the right to be represented by separate counsel of its choice and the undersigned understand that, as agreed in paragraph II herein, they shall be obligated to indemnify Surety for attorneys' fees incurred if Surety chooses to be represented by separate counsel of its choice.

AA. A facsimile copy of this agreement shall be considered an original and shall be admissible in a court of law to the same extent as the original agreement.

#### X. DECLINE EXECUTION

Unless otherwise specifically agreed in writing, Surety may decline to execute any bond for any reason, and Surety shall not be liable to the undersigned, or any other person or entity (other than an obligee on a bid or proposal Bond) where Surety declines executing any bond, including the final bond for an awarded contract upon award of the contract. If Surety executes a bid or proposal Bond and then declines to execute the final bond(s) for that bid or proposal Bond for any reason including, but not limited to, bid spread, financial or financing or funding conditions, change in scope of the work, failure to provide information or documentation or to meet a condition imposed by Surety, unsatisfactory terms or conditions contained in the contract to be bonded or the bond form required, or change in underwriting criteria, the undersigned shall nevertheless be obligated to indemnify Surety with respect to the bid or proposal Bond.

#### XI. TERMINATION

This agreement is a continuing obligation of undersigned unless terminated by written notice to Surety as hereinafter provided, and such termination as to an undersigned shall in no way affect the obligation of any other undersigned who has not given such notice. The liability of undersigned hereunder as to future Bonds of Principal shall not terminate by reason of the failure of Surety to disclose fact(s) known or learned by Surety about the Principal, even though such fact(s) materially increase the risk beyond that which undersigned might intend to assume. Surety may have reason to believe such fact(s) are unknown to undersigned, and Surety may have reasonable opportunity to communicate such fact to undersigned; and undersigned hereby waive notice of such fact(s). In order to terminate liability as to future Bonds of Principal, undersigned must:

A. Give written notice to Surety of such termination at its Home Office, 1213 Valley Street, P.O. Box 9271, Seattle, Washington 98109-0271; and

B. State in such notice the effective date (not less than thirty days after receipt thereof by Surety) of termination of such undersigned's liability for future Bonds.

After the effective date of such termination, the undersigned who has given notice of termination shall nonetheless be liable hereunder for:

A. Bonds executed or authorized prior to such date and modifications thereof;

B. Bonds executed pursuant to a bid or proposal Bond executed or authorized prior to such date, and modifications thereof; and

C. Any maintenance or guarantee Bonds thereafter executed incidental to any other Bond, which is executed prior to such date, and modifications thereof.

Modifications, as used in this paragraph, include but are not limited to renewals, substitutions, riders, endorsements, reinstatements, replacements, increases or decreases in penal sum, continuations, and extensions. A Bond is authorized when approved for execution by Surety's underwriters or promised to Principal or any third party, where in Surety's sole discretion Surety shall deem itself liable or potentially liable in any way for failure to execute such bond.

#### XII. AUTHORIZATION TO CHECK CREDIT

Surety and its agents are authorized to investigate the undersigned's credit (including, but not limited to, obtaining account numbers and/or account balances from financial institutions), now and at any time in the future, with any creditor, supplier, customer, financial institution, and any other person or entity. Authorization is hereby granted, now or at any time in the future, to release information to Surety and/or its agents pertaining to the undersigned's credit, including but not limited to disclosing to Surety and/or its agents, the undersigned's account numbers and/or account balances.

I HAVE READ THE ABOVE GENERAL INDEMNITY AGREEMENT, WHICH CONSISTS OF 4 PAGES OF FORM IdmEGNL.01-US020299 FULLY UNDERSTAND MY OBLIGATIONS HEREUNDER, AND FREELY CONSENT TO ITS TERMS.

SIGNATURES OF THE PRINCIPAL AND OTHER INDEMNITORS

Commercial Construction Services, Inc.

BY: Wayne Berry, President

BY: Kimberly Berry, Secretary

BY: Wayne Berry, Individually

BY: Kimberly Berry, Individually

BY: Wayne Berry, Individually

BY: Kimberly Berry, Individually

BY: \_\_\_\_\_

**Firm/Partnership/LLC Acknowledgment**

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

On this \_\_\_\_\_ day of \_\_\_\_\_, 2011 (year),  
before me personally appeared \_\_\_\_\_,  
to me known and known to me to be the \_\_\_\_\_  
of the firm of \_\_\_\_\_  
described in and who executed the foregoing instrument, and s/he/they thereupon acknowledged to me that s/he/they executed the same as and for the act and deed of said firm.

Notary Public  
My commission expires \_\_\_\_\_

**Corporate Acknowledgment**

STATE OF New Mexico

COUNTY OF Bernalillo

On this 20th day of January, 2011 (year),  
before me personally appeared Wayne Berry  
to me known, who being by me duly sworn, did depose and say that s/he/they resided in the State of New Mexico that s/he/they is/are the President of Commercial Construction Solutions, Inc., the corporation described in and which executed the foregoing instrument that s/he/they knew the seal of said corporation that the seal affixed to said instrument was such corporate seal; that it was affixed by order of the Board of Directors of said corporation, and that s/he/they signed his/their name thereunto by like order.

Christian B. Downey  
Notary Public  
My commission expires 4-16-2014

**Individual Acknowledgment**

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

On this \_\_\_\_\_ day of \_\_\_\_\_, 2011 (year),  
before me personally appeared \_\_\_\_\_  
to me known and known to be the person(s) described in and who executed the foregoing instrument, and s/he/they thereupon duly acknowledged to me that s/he/they executed the same.

Notary Public  
My commission expires \_\_\_\_\_

**Individual Acknowledgment**

STATE OF New Mexico

COUNTY OF Bernalillo

On this 20th day of January, 2011 (year),  
before me personally appeared Wayne Berry and Kimberly Berry  
to me known and known to be the person(s) described in and who executed the foregoing instrument, and s/he/they thereupon duly acknowledged to me that s/he/they executed the same.

Christian B. Downey  
Notary Public  
My commission expires 4-16-2014