

1 until after it completed the Receivership sale. Thus, nothing that occurred during the  
2 Receivership proceedings can have any binding affect on Mr. Rapaport since he was not a  
3 party to the litigation at that time. In the case of *American General Finance Corp. v. First*  
4 *Commercial Title Inc.*, 90 Nev. 303, 524 P.2d 1270 (1974), the Court specifically held that  
5 no litigant can be bound to the results an alleged fair market value hearing without receiving  
6 all the required notices for such a hearing. In the *American General* case, the Court held a  
7 hearing without the presence of a party who was actually a named defendant in the case. If  
8 the Court would make such a ruling with regard to a party who was actually a named  
9 defendant in a case, it is not difficult to imagine that such a ruling would have to apply to a  
10 person who was not a named defendant in a case at the time of the hearing.

11 There is also no merit to the Plaintiff's claim that the Order confirming the sale of the  
12 Receivership property was signed off on by Palmilla's attorney, the undersigned counsel.  
13 There is an obvious reason why the undersigned counsel signed off on the Order confirming  
14 the sale of the Receivership property. It was clear that when the Receiver sought a Court  
15 Order to sell the property, Palmilla's counsel was familiar with the *Keever* case and the  
16 statutory framework of the Anti-Deficiency statutes, while the Plaintiff's counsel was  
17 apparently oblivious to those statutes and cases. It is also possible that since the Plaintiff was  
18 only seeking a sale of the property and was not making any attempt to recover a deficiency  
19 judgment, the Plaintiff literally did not care whether the Anti-Deficiency statutes were  
20 complied with. In either case, the undersigned counsel protected the Defendants' interest  
21 regarding any potential future deficiency action by allowing the Receivership sale to go  
22 forward and to provide full cooperation for that sale. Indeed, none of the Defendants can be  
23 faulted for their counsel having recognized the benefits that such a sale would have provided  
24 to them in the event of any future claim for a deficiency.

25 This Court should keep in mind that we deal with an adversarial system of justice in  
26 America. That means the parties and their attorneys are under no obligation to educate and  
27 coach their adversaries when they see their adversaries making potential mistakes. Thus, if  
28 the undersigned counsel had jumped in and protested the lack of a public auction, it is the

1 undersigned counsel that would be facing claims of malpractice by not properly protecting  
2 his clients' best interest. Since the Plaintiff's only stated objective at the time it filed the  
3 Motion to confirm the sale of the Receivership property was to accomplish a sale of the  
4 property, Defendants naturally cooperated with that sale since it presented a clear opportunity  
5 to close the window on any future claim for a deficiency judgment. At that time,  
6 Defendants' counsel had no idea that the Plaintiff would create even further problems for  
7 itself by ignoring the statute of limitations deadline for filing a suit for a deficiency claim.

8 Plaintiff's argument also fails to recognize that if the Plaintiff had intended to pursue  
9 a deficiency judgment after the sale of the Receivership property, then it could have followed  
10 a simple procedure to preserve that right. Thus, instead of the Receiver selling the property  
11 through a privately negotiated sale, it could have simply informed its preferred buyer to  
12 appear at a public auction and engage in "competitive bidding" at that auction wherein other  
13 interested buyers could also engage in competitive bidding. Thus, if the Receiver had simply  
14 published a public notice of sale and complied with the notice procedures in NRS 107.080  
15 and then conducted a public auction as provided in NRS 107.085, then the Receiver's sale  
16 could have gone forward and the Plaintiff's deficiency claims could have been preserved.  
17 Since the Plaintiff chose to ignore that procedure, it must now face the consequences of its  
18 own choice.

### 19 CONCLUSION

20 The Defendants' Motion for Summary Judgment should be granted because the  
21 Plaintiff failed to comply with the 6-month statute of limitations set forth in NRS 40.455.  
22 The Plaintiff has not offered any bona fide argument to suggest a contrary result.  
23 Defendants' Motion for Summary Judgment should also be granted because the Plaintiff  
24 failed to follow the Anti-Deficiency rules when it chose to exhaust its security through the  
25 Receivership sale, which resulted in a privately negotiated sale rather than a publicly noticed  
26 competitive auction. Moreover, the foregoing demonstrates that there is no merit to the

27 ///

28 ///

1 Plaintiff's claims that the Defendants ever waived the aforementioned rights since such rights  
2 cannot be waived under the clear express public policy provisions and NRS 40.453.

3 DATED this 3 day of August, 2012.

4 Respectfully submitted,

5 DEANER, MALAN, LARSEN & CIULLA

6 

7 BRENT LARSEN, ESQ.  
8 Nevada Bar No. 001184  
9 720 South Fourth St., #300  
10 Las Vegas, Nevada 89101  
11 Attorney for Defendants


12 DEANER, MALAN, LARSEN & CIULLA  
13 720 South Fourth Street, Suite 300  
14 Las Vegas, Nevada 89101  
15 Telephone (702) 382-6911 • Facsimile (702) 366-0854

001370

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY, that I am an employee of DEANER, MALAN, LARSEN & CIULLA; that on the 3<sup>rd</sup> day of August, 2012, I served a copy of the above and foregoing REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT by electronic transmission and in a sealed envelope, postage prepaid, by depositing same in the United States mail, addressed to the following:

Michael F. Lynch, Esq.  
Matthew J. Forstadt, Esq.  
Kolesar & Leatham  
400 S. Rampart Blvd., Ste. 400  
Las Vegas, Nevada 89145  
[mlynch@klnevada.com](mailto:mlynch@klnevada.com)  
[mforstadt@klnevada.com](mailto:mforstadt@klnevada.com)  
Attorney for Plaintiff

  
An Employee of Deaner, Malan, Larsen  
& Ciulla

DEANER, MALAN, LARSEN & CIULLA

720 South Fourth Street, Suite 300

Las Vegas, Nevada 89101

Telephone (702) 382-6911 • Facsimile (702) 366-0854

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# Exhibit A

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# Exhibit A

**RECEIVED**  
FEB 11 2010

BY:.....

1 **MSRC**  
2 **MICHAEL F. LYNCH, ESQ.**  
3 Nevada Bar No. 8555  
4 MLynch@LRLaw.com  
5 **LEWIS AND ROCAL LLP**  
6 3993 Howard Hughes Parkway, Suite 600  
7 Las Vegas, Nevada 89169  
8 Telephone: (702) 949-8200  
9 Facsimile: (702) 949-8398  
10 *Attorneys for Plaintiff*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 U.S. Bank National Association as Trustee For The  
14 Registered Holders of ML-CFC Commercial  
15 Mortgage Trust 2007-7 Commercial Mortgage  
16 Pass-Through Certificates Series 2007-7, by and  
17 through Midland Loan Services, Inc., as its Special  
18 Servicer,

Case No. A-09-595321-C

Dept. No. IX

**MOTION TO FILE DOCUMENT  
UNDER SEAL**

19 **Plaintiff,**

20 **vs.**

21 **Palmilla Development Co., Inc., a Nevada**  
22 **corporation; and Roe Corporations X to XX,**

23 **Defendants.**

24 U.S. Bank National Association as Trustee For The Registered Holders of ML-CFC  
25 Commercial Mortgage Trust 2007-7 Commercial Mortgage Pass-Through Certificates Series  
26 2007-7, by and through Midland Loan Services, Inc., as its Special Servicer ("Lender") requests  
27 leave of court to file a document under seal.

28 **DATED February 9, 2010.**

**LEWIS AND ROCA LLP**

Michael F. Lynch  
Nevada Bar No. 8555  
3993 Howard Hughes Pkwy., Suite 600  
Las Vegas, Nevada 89169  
(702) 949-8200  
(702) 949-8398 (fax)

*Attorneys for Plaintiff*

I,

**POINTS AND AUTHORITIES**

Plaintiff in this case is contemporaneously moving the Court for an Order Approving the Sale of Receivership Property, which seeks to approve the sale of Receivership Property on terms set forth in a Purchase and Sale Agreement ("PSA").

This Application seeks leave to file that PSA under seal due to the sensitive financial information contained therein and due to the harm that could be caused to the market value of the Receivership Property if the PSA is made public, and the sale were to fall through for any reason. As with any transaction of considerable size, the due diligence required by serious prospective buyers requires significant time, expense and effort.

Moreover, during the negotiation process, both sides made concessions before agreeing to the precise terms and language. However, both sides started negotiations at the original asking price. If the PSA were made public, and then fell through, all prospective buyers from that point would begin their negotiations, not at the original asking price, but at the price point and with the concessions reflected in the PSA. In this way, making the PSA publically available prior to its approval would damage the value of the Receivership Property by effectively lowering the asking price and eliminating any room for negotiation built into the asking price.

Additionally, the marketing process for the Property has been ongoing for months, and each party who was interested in the Property had the same opportunity to bid. If the PSA were now made public, a new buyer would have the incentive to copy the agreement, add a nominal amount, and attempt to step in front of the prospective purchaser who has already put the time, costs, fees, and effort into negotiating a deal. Allowing this sort of last minute gamesmanship would chill receivership sales in the future by providing a disincentive to earnest and interested buyers from doing the initial work. All buyers would be incentivized to withhold any offer until someone else did so first, thereby chilling the sales process for future receivership properties.

...

...

...

1 II.

2 CONCLUSION

3 For the foregoing reasons, Plaintiff respectfully requests this Court enter an order allowing  
4 the PSA to be filed under seal.

5 DATED February 9, 2010.

6 LEWIS AND ROCA LLP

7 Michael F. Lynch

8 Nevada Bar No. 8555  
9 3993 Howard Hughes Pkwy., Suite 600  
10 Las Vegas, Nevada 89169  
(702) 949-8200  
(702) 949-8398 (fax)

11 *Attorneys for Plaintiff*

12 CERTIFICATE OF SERVICE

13 I hereby certify that service of the foregoing document was made on February 9, 2010, by  
14 depositing a copy for mailing, first class mail, postage prepaid, at Las Vegas, Nevada, to the  
15 following:

16 DEANER, DEANER, SCANN,  
17 MALAN & LARSEN  
18 Brent Larsen, Esq.  
19 Nevada Bar No. 1184  
720 S. Fourth Street, #300  
Las Vegas, NV 89101  
Attorneys for Defendant

20  
21 /s/ Angela Shadrick

22 An employee of Lewis and Roca LLP  
23  
24  
25  
26  
27  
28

# Exhibit B

# Exhibit B

5/24/2012

BRENT LARSEN, ESQ.  
Nevada Bar No. 001184  
DEANER, MALAN, LARSEN & CIULLA  
720 S. Fourth Street, #300  
Las Vegas, Nevada 89101  
(702) 382-6911  
Attorney for Defendant

DISTRICT COURT  
CLARK COUNTY, NEVADA

U.S. Bank National Association as Trustee )  
for The Registered Holders of ML-CFC )  
Commercial Mortgage Trust 2007-7 )  
Commercial Mortgage Pass-Through )  
Certificates Series 2007-7, by and through )  
Midland Loan Services, Inc., as its Special )  
Servicer, )

Case No.: 09-A-595321-C

Dept. No.: XX

Plaintiff,

v.

Palmilla Development Co., Inc., a Nevada )  
corporation; Hagai Rapaport, an )  
individual; Does I to X; and Roe )  
Corporations X to XX, )

Defendants.

**DEFENDANTS' THIRD SET OF INTERROGATORIES TO PLAINTIFF**

TO: U.S. BANK NA, Plaintiff; and

TO: MICHAEL F. LYNCH, ESQ., its attorney:

The Defendants, by and through their attorney, BRENT LARSEN, ESQ., of the law firm of DEANER, MALAN, LARSEN & CIULLA, and hereby request that the Plaintiff answer the following written Interrogatories separately and fully, in writing, under oath, within thirty (30) days from the date of service hereof, pursuant to Rule 33 of the Federal Rules of Civil Procedure.

These Interrogatories call for all information (including information contained in or on writings, recordings, or any other tangible thing or material) that is known or available to the Plaintiff, including all information in possession of any other persons, acting on behalf of

DEANER, MALAN, LARSEN & CIULLA

720 South Fourth Street, Suite 300

Las Vegas, Nevada 89101

Telephone (702) 382-6911 • Facsimile (702) 366-0854

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1 or under the direction or control of the Plaintiff.

2 All references in these Interrogatories to "Plaintiff" include Plaintiff and any other  
3 persons under Plaintiff's direction, control or in the Plaintiff's employ.

4 If Plaintiff cannot answer any Interrogatory fully and completely after exercising due  
5 diligence to make inquiry and secure the information to do so, please so state and answer  
6 such Interrogatory to the extent deemed possible, specifying that portion of such  
7 Interrogatory which Plaintiff is unable to answer fully and completely, and further specifying  
8 those facts upon which Plaintiff relies to support its contention that it is unable to answer  
9 fully and completely. In addition, specify what knowledge, information or belief Plaintiff  
10 has concerning the unanswered portion of any such Interrogatory and describe fully and in  
11 detail, the acts done and inquiries made by Plaintiff to show that it has exercised due  
12 diligence to make inquiry and secure the information necessary to that Interrogatory.

13 Interrogatories calling for a detailed description of the contents of a written document  
14 may be answered by submitting a copy of the written document.

#### 15 DEFINITIONS

16 The following definitions shall apply to each of the Interrogatories and shall be  
17 deemed to be incorporated therein:

18 A. "Writing" means and includes any printed, typewritten, or handwritten matter,  
19 or reproduction thereof, of whatever character, including but not limited to, contracts,  
20 agreements, letters, memoranda, telegrams and handwritten notes, whether copy or original.

21 B. "Identify" a writing means to state with respect thereto:

- 22 1. The name of the person who prepared it;
- 23 2. The name of the person who signed it or over whose name it was issued;
- 24 3. The name of each person to whom it was addressed or distributed;
- 25 4. The nature and substance of the writing with sufficient particularity to  
26 enable it to be identified adequately in a motion by Defendants for its production and  
27 copying;
- 28 5. Its date, and if it bears no date, the date when it was prepared;

1           6.     The physical location of it and the name of its custodian or custodians;  
2     and

3           7.     Whether it will be voluntarily made available to Defendants for  
4     inspection and copying.

5     C.     "Identify" an oral communication means to state:

6           1.     The name and address of each person who participated in the  
7     communication and the name and address of each person who was present at the time  
8     it was made;

9           2.     By whom each such person was employed and whom such person  
10    represented or purported to represent in making the oral communication;

11          3.     What each such person said;

12          4.     The date and the place where such oral communication was made; and

13          5.     The nature and substance of each writing or record pertaining to such  
14    oral communication with sufficient particularity to enable it to be identified in the  
15    manner described in the foregoing Paragraph B.

16     D.     "Identify" a person or "identity" of a person means to state his, her or its name  
17    and last known business address, and if a natural person, his or her last known residence  
18    address, the name of his or her employer, and his or her last known telephone number.

19     E.     "In your possession" means under your control or under the control of your  
20    employees, officers, agents, representatives, accountants, or attorneys.

21     F.     The masculine, feminine, or neuter gender and the singular or plural number,  
22    shall each be deemed to include the others.

23           These Interrogatories shall be deemed continuing so as to require supplemental  
24    answers if you or your attorneys, agents or other representatives obtain further information  
25    between the time answers are served and the time of trial.

26    **INTERROGATORY NO. 3:**

27           In your Motion for Summary Judgment filed on April 25, 2012, you ask the Court to  
28    set a Fair Market Value hearing. In this regard, state the date that you believe should be used



1 for determining the fair market value of the property that is the subject of this case.

2 **INTERROGATORY NO. 4:**

3 Page 4 of Plaintiff's Motion to Approve Receivership Sale, filed on February 11,  
4 2010, states that Plaintiff received offers to purchase the property from 31 prospective  
5 buyers. Please identify each prospective buyer and describe their offer with particularity by  
6 providing the prospective buyer's name, date on which they made their offer, the amount of  
7 their offer, and the name of the broker through which each offer was submitted.

8 **INTERROGATORY NO. 5:**

9 Identify and describe with particularity and in narrative form any and all  
10 correspondence between the receiver, the broker for the receiver, and the Plaintiff, including  
11 any and all offers to purchase the property that were communicated by the receiver to the  
12 Plaintiff.

13 **INTERROGATORY NO. 6:**

14 Identify and describe with particularity and in narrative form Plaintiff's role in  
15 reviewing any and all of the 31 offers described on page 4 of Plaintiff's Motion to Approve  
16 Receivership Sale.

17 **INTERROGATORY NO. 7:**

18 Identify and describe with particularity and in narrative form, each of the 35 registered  
19 tours of the property by providing the name of each participant, the date of each participant's  
20 registered tour, any and all of the circumstances associated with arranging such registered  
21 tour, whether such tour actually took place, and the outcome of each such registered tour.

22 **INTERROGATORY NO. 8:**

23 Identify and describe with particularity and in narrative form, each of the 25 non-  
24 registered tours of the property by providing the name of each participant, the date of each  
25 participant's non-registered tour, any and all of the circumstances associated with arranging  
26 such non-registered tour, whether such tour actually took place, and the outcome of each  
27 such non-registered tour.

28 ///

**INTERROGATORY NO. 9:**

Page 5 of Plaintiff's Motion to Approve Receivership Sale states that both the buyer and the receiver of the property made concessions in reaching the agreement ultimately presented to the Court for approval. Identify and describe with particularity and in narrative form each concession that was made by stating what each party's respective original position was, how each such concession was negotiated, and the final terms of each such concession, including any reciprocal concessions.

**INTERROGATORY NO. 10:**

Identify the original asking price for the property and describe with particularity and in narrative form how such asking price was calculated, including, but not limited to, any appraisals, comparables, or other facts that were that were considered.

DATED this 24<sup>th</sup> day of May, 2012.

Respectfully submitted,

DEANER, MALAN, LARSEN & CIULLA



BRENT LARSEN, ESQ.  
Nevada Bar No. 001184  
720 South Fourth St., #300  
Las Vegas, Nevada 89101  
Attorney for Defendants

for Brent  
Larsen

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Michael F. Lynch, Esq.  
Lewis and Roca LLP  
3993 Howard Hughes Pkwy., Ste. 600  
Las Vegas, Nevada 89169-5996  
Attorneys for Plaintiff

Suparna Sengupta  
An Employee of Deaner, Malan, Larsen  
& Ciulla

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# Exhibit C

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# Exhibit C

5/24/2012

1 BRENT LARSEN, ESQ.  
Nevada Bar No. 001184  
2 DEANER, MALAN, LARSEN & CIULLA  
720 S. Fourth Street, #300  
3 Las Vegas, Nevada 89101  
(702) 382-6911  
4 Attorney for Defendant

5  
6 DISTRICT COURT  
7 CLARK COUNTY, NEVADA

8 U.S. Bank National Association as Trustee )  
for The Registered Holders of ML-CFC )  
9 Commercial Mortgage Trust 2007-7 )  
Commercial Mortgage Pass-Through )  
10 Certificates Series 2007-7, by and through )  
Midland Loan Services, Inc., as its Special )  
11 Servicer,

Case No.: 09-A-595321-C

Dept. No.: XX

12 Plaintiff,

13 v.

14 Palmilla Development Co., Inc., a Nevada  
corporation; Hagai Rapaport, an  
15 individual; Does I to X; and Roe  
Corporations X to XX,

16 Defendants.  
17

18 **DEFENDANTS' THIRD REQUEST FOR PRODUCTION OF DOCUMENTS**

19 TO: U.S. BANK NA, Plaintiff; and

20 TO: MICHAEL F. LYNCH, its attorney:

21 REQUEST IS HEREBY MADE UPON YOU pursuant to Rule 34 of the Nevada  
22 Rules of Civil Procedure for the production of the following documents at the law offices of  
23 DEANER, MALAN, LARSEN & CIULLA, 720 South Fourth Street, Suite 300, Las Vegas,  
24 Nevada 89101, within thirty (30) days from the service of these Requests.

25 Please specify which documents are produced in response to each of the numbered  
26 paragraphs. These Requests shall be deemed continuing so as to require further and  
27 supplemental production should the requested party obtain additional documents which are  
28 responsive to these Requests subsequent to the time of initial production and inspection.

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DEANER, MALAN, LARSEN & CIULLA

720 South Fourth Street, Suite 300

Las Vegas, Nevada 89101

Telephone (702) 382-6911 • Facsimile (702) 366-0854

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## INSTRUCTIONS AND DEFINITIONS

1  
2 1. As used herein, "document" shall mean any and all written, printed, typed, or  
3 recorded materials, and graphic matter, however produced or reproduced, formal or informal,  
4 whether for internal or external use, including (but not limited to) records, reports,  
5 correspondence, letters and memoranda, computer data files, or drafts of any of the above, in  
6 the possession, custody, or control of you or your offices, directors, employees, your  
7 attorneys, your agents, your insurance carriers, or anyone else acting on your behalf or  
8 otherwise subject to your control.

9 2. If any documents otherwise required to be produced by these Requests are  
10 withheld, Plaintiff shall identify each document so withheld by stating its date, author,  
11 recipients, and the reason for its withholding. If you claim any form of privilege, whether  
12 based on statute or otherwise, as a grounds for refusing to comply, in whole or in part, with  
13 this Request for Production of Documents, please set forth in complete detail each and every  
14 fact and ground upon which the privilege is based, including sufficient facts for the court to  
15 make a full determination whether the claim of privilege is valid with respect to each and  
16 every document and item for which the privilege is claimed.

17 3. If any of the documents herein requested for were formerly in your possession,  
18 custody or control, and has been lost or destroyed, you are requested to submit in lieu of each  
19 such document a written statement which:

- 20 (a) describes in detail the nature of the document and its contents;  
21 (b) identifies the person who prepared or authored the document and, if  
22 applicable, the person to whom the document was sent;  
23 (c) specifies the date on which the document was prepared or transmitted or  
24 both; and  
25 (d) specifies, if possible, the date on which the document was lost or  
26 destroyed, and, if destroyed, the conditions or reasons for such destruction and the person  
27 requesting and performing the destruction.

28 ///

1 **REQUEST NO. 9:**

2 Produce any and all documents, including, but not limited to, correspondence, tour  
3 information, appraisals, written offers, notes, memoranda, etc. that were identified by you in  
4 response to Defendants' 3rd Set of Interrogatories to Plaintiff.


5 **REQUEST NO. 10:**

6 Produce any and all documents, including, but not limited to, correspondence, tour  
7 information, appraisals, written offers, notes, memoranda, etc. that were referenced or relied upon by  
8 you in considering and/or preparing your response to Defendants' 3rd Set of Interrogatories to  
9 Plaintiff.

10  
11 DATED this 24<sup>th</sup> day of May, 2012.

12 Respectfully submitted,

13 DEANER, MALAN, LARSEN & CIULLA

14   
15 BRENT LARSEN, ESQ.  
16 Nevada Bar No. 001184  
17 720 South Fourth St., #300  
18 Las Vegas, Nevada 89101  
19 Attorney for Defendants

for  
Brent  
Larsen

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am an employee of DEANER, MALAN, LARSEN & CIULLA; that on the 24<sup>th</sup> day of May, 2012, I served a copy of the above and foregoing DEFENDANTS' THIRD REQUEST FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF in a sealed envelope, postage prepaid, by depositing same in the United States mail, addressed to the following:

Michael F. Lynch, Esq.  
Lewis and Roca LLP  
3993 Howard Hughes Pkwy., Ste. 600  
Las Vegas, Nevada 89169-5996  
Attorneys for Plaintiff

Sergio Savoca  
An Employee of Deaner, Malan, Larsen  
& Ciulla



# Exhibit D

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# Exhibit D

**DEANER, MALAN, LARSEN & CIULLA**  
Attorneys at Law

Charles W. Deaner  
Douglas R. Malan  
Brent A. Larsen†  
Anthony Ciulla  
Shana S. Gullickson

A PROFESSIONAL CORPORATION  
720 South Fourth Street, Suite 300  
Las Vegas, Nevada 89101  
Telephone (702) 382-6911  
Fax (702) 366-0854  
www.deanerlaw.com

J. Douglas Deaner  
(1944-1990)

Also Licensed In:  
† Utah

July 23, 2012

***VIA EMAIL and U.S. MAIL***

Michael F. Lynch, Esq.  
Kolesar & Leatham  
400 S. Rampart Blvd.  
Suite 600  
Las Vegas, NV 89145

Re: *US Bank v. Palmilla Development Co., et al.*  
Case No. A595321 / JCCR

Dear Mr. Lynch:

I am writing this letter in accordance with the provisions of EDCR 2.34, which governs discovery disputes, including the prerequisites to filing a motion with the discovery commissioner. Specifically, I would like to arrange a time to discuss your client's persistent failure to respond to any of the six discovery requests that have been propounded by my office to yours. The following is a summary of the outstanding discovery:

- 1<sup>st</sup> Set of Interrogatories, *dated* April 26, 2012, *due* May 29, 2012
- 1<sup>st</sup> Request for Production, *dated* April 26, 2012, *due* May 29, 2012
- 2<sup>nd</sup> Set of Interrogatories, *dated* May 1, 2012, *due* June 4, 2012
- 2<sup>nd</sup> Request for Production, *dated* May 17, 2012, *due* June 19, 2012
- 3<sup>rd</sup> Request for Production, *dated* May 24, 2012, *due* June 26, 2012
- 3<sup>rd</sup> Set of Interrogatories, *dated* May 24, 2012, *due* June 26, 2012

As you know, the discovery rules affirmatively require you to respond to discovery requests such as the foregoing within 30 days of service, or else be liable for discovery and other sanctions. See NRCP 33(b)(3); NRCP 34(b); NRCP 37. Because the requests were mailed to you, I added 3 days above to your response deadlines to allow for mailing. On May 14, 2012, Brent Larsen of my office granted you an extension of time to answer the 1<sup>st</sup> Set of Interrogatories and the 1<sup>st</sup> Request for Production of Documents by June 13, which was 2 weeks from the date of the hearing on your Motion for Summary Judgment. However, as of the date of this letter, we have received not a single response to any of the foregoing requests, nor have you requested that we grant the professional courtesy of any further extensions of time in which to

July 23, 2012  
Page No. 2

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answer any of the requests. In the absence of your seeking our agreement to any extension of time in which to answer, your responses were due on the dates indicated.

As you know, we have also recently filed a Motion for Summary Judgment in this case. The information we sought in the various discovery requests we propounded would have been very relevant to our Motion and will be relevant to any Reply we might need to file. Your dilatory tactics in refusing to respond to our discovery requests and thereby prevent us from discovering pertinent information during this time is simply unacceptable.

Please call either me or Brent Larsen to discuss our apparent differences of opinion as regards the timeliness and due dates of the above outstanding requests. At that time, I hope that we can resolve our dispute without my office having to resort to filing a motion with the discovery commissioner to compel responses and/or for further discovery sanctions.

Brent or I will both be available to speak with you regarding this letter on Wednesday, Thursday, or Friday of this week. Please call one of us during one of the times indicated, or contact me to arrange another mutually satisfactory time to talk.

Sincerely,

DEANER, MALAN, LARSEN & CIULLA



Shana S. Gullickson, Esq.

SSG/

**DEANER, MALAN, LARSEN & CIULLA**  
Attorneys at Law

Charles W. Deaner  
Douglas R. Malan  
Brent A. Larsen†  
Anthony Ciulla  
Shana S. Gullickson

A PROFESSIONAL CORPORATION  
720 South Fourth Street, Suite 300  
Las Vegas, Nevada 89101  
Telephone (702) 382-6911  
Fax (702) 366-0854  
www.deanerlaw.com

J. Douglas Deaner  
(1944-1990)

Also Licensed In:  
† Utah

July 27, 2012

**VIA EMAIL: mforstadt@klnevada.com**

Matthew Forstadt, Esq.  
Kolesar & Leatham  
400 S. Rampart Blvd.  
Suite 400  
Las Vegas, NV 89145

Re: *US Bank v. Palmilla Development Co., et al.*  
Case No. A595321 / JCCR

Dear Mr. Forstadt:

After further reflection on our telephone conversation of yesterday, I want to convey my additional thoughts regarding our prior discovery requests to your client. As you know, we were going around in circles in yesterday's telephone conversation. You claim that many of our production requests were irrelevant and we claim that they are clearly relevant to our theory of the case. The fact remains that our theory of the case is very viable and supported by both case law and statute. Therefore our discovery requests are clearly relevant. Thus, unless you think you can obtain a court order completely dismissing our theory of the case, our discovery requests remain very relevant and we must insist that our discovery requests receive the proper response.

I understand that you have said you will do your best efforts to produce our requested documentation and answers to interrogatories by the end of the second week in August. Unfortunately that is after our Motion for Summary Judgment will be heard. Clearly, many of our discovery requests would be relevant to the forthcoming Motion for Summary Judgment. That is particularly true of our claim that your client deprived my client of the statutory protections of "competitive bidding" when your client sponsored the Receivership sale of my client's property. Thus, we must take the position that your client's failure to produce all of the written offers that were submitted to the Receiver, is an effort to suppress such evidence, I know you have stated your belief that such evidence of competitive bidding is irrelevant, nonetheless it is the Judge who must unilaterally make that determination rather than yourself.

July 27, 2012  
Page No. 2

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Accordingly, we see no reason why the bids that were received for the sale of the property should not be produced forthwith, since that particular request was made over two months ago.

If you have any comments regarding the foregoing, I would be pleased to hear from you.

Sincerely,

DEANER, MALAN, LARSEN & CIULLA



Brent Larsen, Esq.

BAL/dld

**KOLESAR & LEATHAM**

ATTORNEYS AT LAW

400 SOUTH RAMPART BLVD., SUITE 400  
LAS VEGAS, NEVADA 89145  
702.362.7800  
klnevada.com

August 1, 2012

Via Email and U.S. Mail

Brent Larsen, Esq.  
Deaner, Deaner, Scann, Malan & Larsen  
720 S. Fourth Street, Suite 300  
Las Vegas, NV 89101

RE: *US Bank v. Palmilla Development Co., et al.*  
Case No. A595321

Dear Mr. Larsen:

Reference is made to your letter of July 27<sup>th</sup>. I had taken the time to draft a point by point refutation of the assertions in your letter, but ultimately decided that an experienced lawyer who believes, as you do, that you have a "pat" hand, is not going to change his position because of an assault of logic from his adversary.

We are ahead of target on getting documents to you and hopefully will be able to deliver to you by this Thursday, a disc which, while I am sure you will contend is deficient, we believe contains everything necessary to comply with NRCP 16(a)(1). Parenthetically, for now, has Mr. Rapaport complied with Rule 16 and, if so, how and when was that done?

In terms of your Motion for Summary Judgment, we will be ready to go forward with that, as scheduled. Since your filing of that Motion constituted a certification under Rule 11 that there were no outstanding genuine issues of material fact, we assume that you will also be ready to proceed.

Should you have any questions or comments, please do not hesitate to contact me.

Very truly yours,

**KOLESAR & LEATHAM**

Matthew J. Forstadt

MJF/dt

**DEANER, MALAN, LARSEN & CIULLA**  
**Attorneys at Law**

Charles W. Deaner  
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August 1, 2012

***VIA EMAIL ([mforstadt@klnevada.com](mailto:mforstadt@klnevada.com))  
 and U.S. MAIL***

Matthew Forstadt, Esq.  
 Kolesar & Leatham  
 400 S. Rampart Blvd.  
 Suite 400  
 Las Vegas, NV 89145

Re: *US Bank v. Palmilla Development Co., et al.*  
 Case No. A595321 / JCCR

Dear Mr. Forstadt:

I am responding to the emailed letter that you sent me today, on August 1, 2012.

In your attempt at condescending sarcasm, you have completely mischaracterized or misunderstood my position about sitting on a "pat" hand. My point about a "pat" hand in our last telephone conversation was that I am just as confident in the merits of our position as you claim to be in your position. My point in writing my letter to you of July 27<sup>th</sup> was to further explain on the record that we are entitled to receive discovery on any formal request that is relevant to our theory of the case. Our theory of the case has considerable merit, regardless of your expressed opinion to the contrary. Thus, you cannot dismiss our discovery requests as irrelevant simply because you claim that such requests fall outside of your theory of the case. If you think that my discovery requests and theory of the case are lacking in logic, then I invite you to professionally provide a communication that explains how my position is in error, instead of merely trying to berate me as though you claim that I am a lawyer, who despite my years of experience, fails to understand logic. Such a tone hardly fits the bill for having a meaningful attempt to resolve this discovery dispute.

In the meantime, I do not know if we will have time to review your forthcoming CD before we file our Reply Brief. Thus, I would appreciate it if you can tell me at this time whether the CD will contain all of the offers that the Receiver received when it was attempting to sell the property. If it does, then I would further appreciate your providing us the Bates-stamped numbers of such documents when the CD is produced.

August 1, 2012  
Page No. 2

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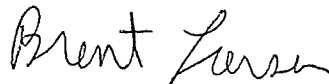
Your August 1<sup>st</sup> letter also speaks as though you are only producing documents pursuant to NRCP 16.1, as distinguished from specifically responding to our requests for production of documents and interrogatories that have been propounded to your client under NRCP 33 and 34. As explained in Ms. Gullickson's recent letter to you, it is your obligation to provide specific responses to our discovery requests, including identifying which documents are responsive to each such request.

With reference to your question as to whether Mr. Rapaport has complied with Rule 16.1, I suggest that you can easily find the answer to that question by looking at the Joint Case Conference Report and our 16.1 disclosures.

As a final matter, it is our intention to proceed with the hearing on the Motion for Summary Judgment on August 8<sup>th</sup>.

Sincerely,

DEANER, MALAN, LARSEN & CIULLA



Brent Larsen, Esq.

BAL/ss



**KOLESAR & LEATHAM**

ATTORNEYS AT LAW

400 SOUTH RAMPART BLVD., SUITE 400  
LAS VEGAS, NEVADA 89145  
702.362.7800  
klnevada.com

August 2, 2012

Via Email and U.S. Mail


Brent Larsen, Esq.  
Deaner, Deaner, Scann, Malan & Larsen  
720 S. Fourth Street, Suite 300  
Las Vegas, NV 89101

RE: *US Bank v. Palmilla Development Co., et al.*  
Case No. A595321

Dear Mr. Larsen:

Apparently, I owe someone an apology. We have been able to locate Defendants' Early Case Conference Disclosure Statement. I apologize for suggesting the contrary.

Very truly yours,

**KOLESAR & LEATHAM**

Matthew J. Forstadt

MJF/dt

cc: Michael Lynch, Esq.  
Janet Rosales, Esq.

# Exhibit E

001397

001397

# Exhibit E

RECORDING REQUESTED BY:

First American Title Ins Co

AND WHEN RECORDED MAIL TO:

Meridian Foreclosure Service  
8363 W. Sunset Rd. Suite 150  
Las Vegas, NV 89113

20090112-0005611

Fee: \$17.00 RPTT: \$0.00

N/C Fee: \$0.00

01/12/2009 15:40:39

T20090010754

Requestor:

FIRST AMERICAN NATIONAL DEFA

Debbie Conway OSA

Clark County Recorder Pgs: 4

39670220M

APN#: 124-30-312-014; 124-30-312-025 THROUGH 188, INCLUSIVE; 124-30-312-171 AND 172; 124-30-312-177; 124-30-312-180 THROUGH 182, INCLUSIVE; 124-30-311-031; 124-30-312-017 AND 018; 124-30-312-022; 124-30-312-015

Space above this line for Recorder's use

Title Order No. 3987022 Trustee Sale No. 10546NV Loan No. 030263475/PALMILLA

**IMPORTANT NOTICE****NOTICE OF DEFAULT AND ELECTION TO SELL UNDER DEED OF TRUST**

NOTICE IS HEREBY GIVEN THAT: MTDS, INC., A CALIFORNIA CORPORATION DBA MERIDIAN TRUST DEED SERVICE is either the original Trustee, the duly appointed substituted Trustee, or acting as agent for the Trustee or Beneficiary under a Deed of Trust dated 03-28-2007, executed by PALMILLA DEVELOPMENT CO., INC. A(N) NEVADA CORPORATION as Trustor, to secure certain obligations in favor of ARTESIA MORTGAGE CAPITAL CORPORATION, A DELAWARE CORPORATION under a Deed of Trust Recorded 03-30-2007, Book , Page , Instrument 20070330-0002946 of Official Records in the Office of the Recorder of CLARK County, State of Nevada, securing, among other obligations, 1 note(s) for the sum of \$20,150,000.00.

That a breach of the obligations for which said Deed of Trust is security has occurred in that payment has not been made of:

SEE ATTACHED EXHIBIT "A" MADE A PART HEREOF

You may have the right to cure the default herein and reinstate the obligation by said Deed of Trust above described. Section 107.080NRS permits certain defaults to be cured upon the payments of that portion of principal and interest, which would not be due had no default occurred. This amount is \$27,449,524.95 as of date of this Notice and will increase until your account becomes current. Where reinstatement is possible, if the default is not cured within 35 days following the recording and mailing to Trustor or Trustor's successor in interest of this notice, the right of reinstatement will terminate and the property may thereafter be sold.

That by reason thereof, the present beneficiary under such Deed of Trust, has executed and delivered to said Trustee, a written Declaration of Default and Demand for Sale, and has surrendered to said Trustee such Deed of Trust and all documents evidencing obligations secured thereby and has declared and does hereby declare all sums secured thereby immediately due and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby.

Title Order No. 3987022 Trustee Sale No. 10546NV Loan No. 030263475/PALMILLA

To find out the amount you must pay, to arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason, contact:

**LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE REGISTERED  
HOLDERS OF ML-CFC COMMERCIAL MORTGAGE TRUST 2007-7, COMMERCIAL  
MORTGAGE PASS-THROUGH CERTIFICATES. SERIES 2007-7**

**C/O Meridian Foreclosure Service**

**8363 W. Sunset Rd. Suite 150**

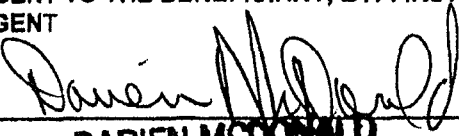
**Las Vegas, NV 89113**

**(702) 835-8830**

If you have any questions, you should contact a lawyer or the government agency, which may have insured your loan

Date: 1/12/2009

**MTDS, INC., A CALIFORNIA CORPORATION DBA MERIDIAN TRUST DEED SERVICE, AS  
AGENT TO THE BENEFICIARY, BY: FIRST AMERICAN TITLE INSURANCE COMPANY, AS  
AGENT**

  
**DARIEN MCDONALD**

MTDS, INC., A CALIFORNIA  
CORPORATION DBA MERIDIAN TRUST  
DEED SERVICE IS A DEBT COLLECTOR  
ATTEMPTING TO COLLECT A DEBT.  
ANY INFORMATION OBTAINED WILL  
BE USED FOR THAT PURPOSE.

State of California  
County of Orange

On 1/12/09 before me, \_\_\_\_\_, personally  
appeared \_\_\_\_\_, personally known to me (or proved to me  
on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to  
the within instrument and acknowledged to me that he/she/they executed the same in  
his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the  
person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

\_\_\_\_\_  
Notary Public in and for said County and State

**The undersigned hereby affirms that there is no  
Social Security number contained in this document.**

T.S. #10546NV

Exhibit "A"

The accelerated principal and accrued interest which became due in accordance with the terms of the Deed of Trust, which acceleration resulted from:

- (a) Failure to make the installment due on 10/01/2008 payment of principal and/or interest and all subsequent payments, together with late charges, impounds, advances, taxes, delinquent payments on senior liens, or assessments, attorney's fees and court costs arising from the beneficiary's protection of its security must be cured.

001400

001400

# CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

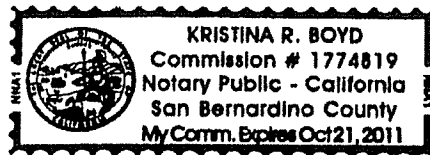
STATE OF CALIFORNIA

COUNTY OF Orange } SS

On 11/2/09 before me, Kristina R. Boyd,

NOTARY PUBLIC, personally appeared DARIEN McDONALD  
NAME(S) OF SIGNER(S)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

*[Signature]*  
SIGNATURE OF NOTARY

## OPTIONAL

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form.

### CAPACITY CLAIMED BY SIGNER

INDIVIDUAL  
CORPORATE OFFICER

TITLE(S)

PARTNER(S)  
LIMITED OR GENERAL  
ATTORNEY-IN-FACT  
TRUSTEE(S)  
GUARDIAN/CONSERVATOR  
OTHER:

SIGNER IS REPRESENTING:  
NAME OF PERSON(S) OR ENTITY(IES)

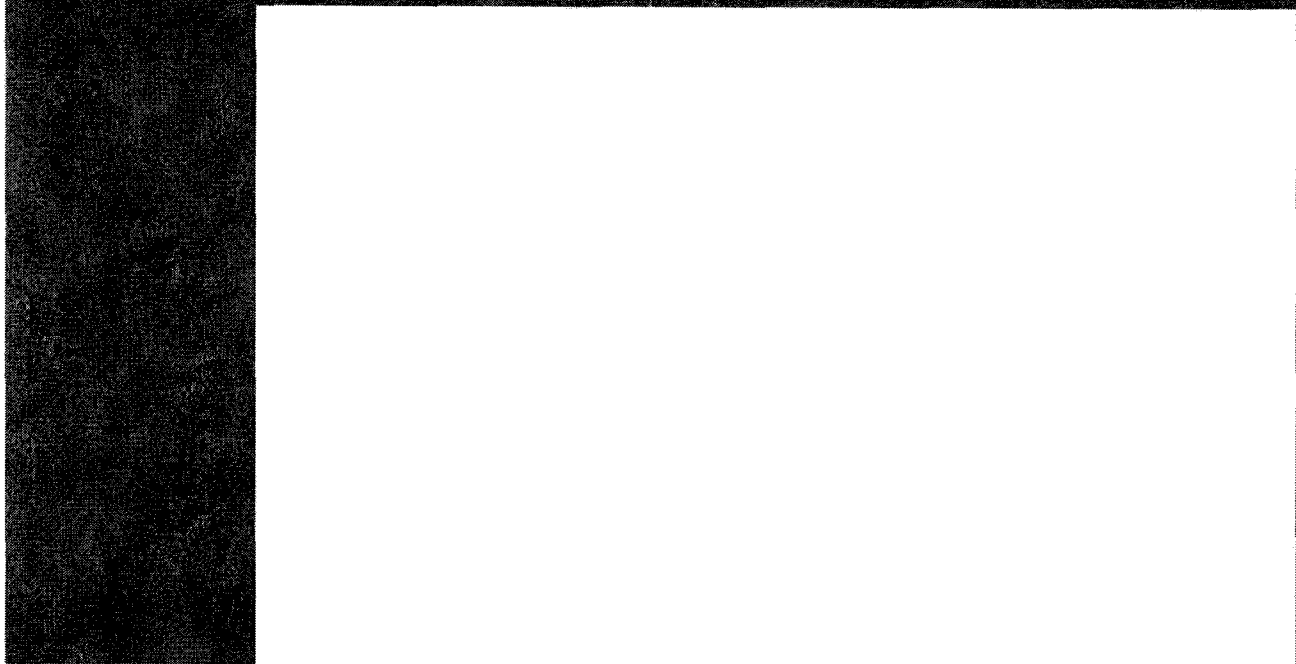
### DESCRIPTION OF ATTACHED DOCUMENT

TITLE OR TYPE OF DOCUMENT

NUMBER OF PAGES

DATE OF DOCUMENT

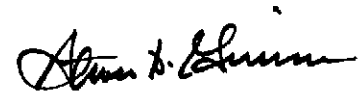
SIGNER(S) OTHER THAN NAMED ABOVE



24

24



  
CLERK OF THE COURT

RTRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

US BANK NATIONAL ASSOCIATION,

Plaintiff(s),

vs.

PALMILLA DEVELOPMENT  
COMPANY INC. AND

Defendant(s).

CASE NO. A595321

DEPT. NO. XX

BEFORE THE HONORABLE JEROME T. TAO, DISTRICT COURT JUDGE

WEDNESDAY, AUGUST 8, 2012

**RECORDER'S TRANSCRIPT OF  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT AND REQUEST FOR  
DEFICIENCY HEARING**

## APPEARANCES:

For the Plaintiff:

MICHAEL F. LYNCH, ESQ.  
MATTHEW J. FORSTADT, ESQ.

For the Defendants:

BRENT AUSTIN LARSEN, ESQ.  
SHANA S. GULLICKSON, ESQ.

RECORDED BY: SARA RICHARDSON, COURT RECORDER



1 LAS VEGAS, NEVADA, WEDNESDAY, AUGUST 8, 2012, 9:10 A.M.

2 THE COURT: Page four, U.S. Bank National Association versus Palmilla  
3 Development, A595321. All right. Can everybody state their appearances for the  
4 record?

5 MR. LARSEN: Brent Larsen for the defendants, along with my associate  
6 Shannon Gullickson. I'd also like the record to reflect that Mr. Rapaport is present in  
7 court today.

8 THE COURT: Okay.

9 MR. FORSTADT: For the plaintiff, Matthew Forstadt, Kolesar & Latham.

10 MR. LYNCH: Also present Michael Lynch, Your Honor, also on behalf of  
11 plaintiff.

12 THE COURT: All right. This is on for cross motions for summary judgment.  
13 We had the plaintiff's motion for summary judgment which was filed a couple weeks  
14 ago -- a couple months ago. And then we were here, as you guys remember, a  
15 couple weeks ago. There was an issue of some, I guess one of the exhibits was  
16 mixed up, and so there was a supplemental briefing. And then in the meantime, the  
17 defendant filed a motion for summary judgment as well.

18 All right. The central argument, as I understand it, in the defendant's  
19 motion for summary judgment is if this is a deficiency action, it's barred on three  
20 grounds. Number one, you can't under the statute seek a deficiency after a private  
21 receiver sale; number two, the notice was defective because what was noticed was  
22 a public foreclosure, but then what happened was a private receiver sale; and the  
23 third ground is that if it's a deficiency judgment it's barred by the statute of limitations  
24 because it wasn't brought within six months.

25 And then, Mr. Lynch, I wanted to start with you because I notice in

1 your -- you called it an objection rather than an opposition, and you basically say,  
2 well, it's not a deficiency at all. And then, you know, in their reply, Mr. Larsen makes  
3 an interesting point which is in your motion for summary judgment you did call it a  
4 deficiency judgment. So I wanted to hear your response to all of that.

5 MR. LYNCH: Your Honor, with your permission, Mr. Forstadt would do the  
6 oral argument today?

7 THE COURT: Okay. Sure.

8 MR. LYNCH: Thank you, Your Honor.

9 MR. FORSTADT: Your Honor, counsel have agreed, subject to the Court of  
10 course, that we would present and Mr. Larsen would present his motion first and we  
11 would respond to it. The reason for that is our motion needs some work, it really  
12 should not go forward today. The -- we have captioned it a motion for a deficiency  
13 judgment, and that's an incorrect caption. You cannot have a deficiency judgment if  
14 you didn't have the deficiency sale. And here there was not the -- the statutory  
15 Chapter 40 sale, there was a receiver sale as authorized by the Court.

16 So if we could go forward with the defendant's motion, we will recast  
17 our motion. A lot of our motion will become moot based upon what the Court does  
18 with the defendant's motion.

19 THE COURT: Well, I'm not sure what you mean by "recast." The title of your  
20 motion is "Motion for Partial Summary Judgment and Request for Deficiency  
21 Hearing Pursuant to N.R.S. 40.457." Now you're saying that N.R.S. 40 doesn't  
22 apply at all to your cause of action?

23 MR. FORSTADT: That is correct, Your Honor. That is correct.

24 THE COURT: So, when you say recast, I'm not sure what you're saying, you  
25 just want to on the fly --

1 MR. FORSTADT: Withdraw, refile.

2 THE COURT: Okay. So, are you going to be filing another written motion  
3 then?

4 MR. FORSTADT: Yes, Your Honor.

5 THE COURT: Okay. All right then let's start with the defendants' motion then.

6 MR. FORSTADT: Thank you.

7 THE COURT: Mr. Larsen, all right, well, I mean, basically, what I'm hearing  
8 happening is you're saying, oh, no, we, you know, messed up; that it's not really a  
9 deficiency judgment at all. So I guess, I mean, really the issue is your argument is  
10 this, whatever you want to call it, whether you call it a deficiency judgment or  
11 whatever, that's just a name. The issue is, it was the sale of something that was  
12 security -- real property that was security for a loan. And your argument is,  
13 therefore, whatever you call it, that falls within Chapter 40, right? Is that a, sort of,  
14 fair five-second summary of your argument?

15 MR. LARSEN: Yes.

16 THE COURT: So, what is your response to that then? I mean, whatever you  
17 call it, if you want -- whether you want to call it a deficiency, whether you want to call  
18 it a breach of contract, why isn't -- why doesn't Chapter 40 apply to the extent that  
19 this is the sale of something that was security for a mortgage?

20 MR. FORSTADT: A receivership app -- or the proceedings for a receivership,  
21 the receivership application are by statute not a proceeding under Chapter 40. I can  
22 give you the citation, Your Honor, if you wish. But it's a proceeding outside of  
23 Chapter 40. Let's look at the rule in two different ways. One, can you proceed to  
24 obtain a deficiency judgment under Chapter 40? Yes. Second, can you proceed to  
25 obtain a contractual shortfall if you do not have the rigmarole of Chapter 40? And

1 the answer to that is also yes.

2 We're not seeking -- this is our motion, which we're not here right now --  
3 we're not seeking a deficiency judgment, we're seeking a contractual shortfall. They  
4 borrowed 20 million, they paid back 10 million, there's -- I'm giving you gross  
5 figures -- there's roughly \$12 million out there that's owed. Question, why are we  
6 not entitled to get paid that 12 million? Well, they advanced three different reasons.  
7 One is the one-action rule. That doesn't apply because this is not a chapter 40  
8 proceeding for us.

9 THE COURT: Well, let me ask you this, all right, normally, if this were just  
10 sort of a generic breach of contract claim and not a foreclosure and a deficiency  
11 judgment, normally you wouldn't be able to take the house, you would have to get a  
12 general judgment against them and then execute it against assets. So, to the extent  
13 that you went directly to the house and took the house and sold the house, why  
14 doesn't that make it a foreclosure and deficiency?

15 MR. FORSTADT: If I could quote, just for a second, please, Your Honor, from  
16 the law. This is from Am.Jur., A receiver sale is one where the receiver is an agent  
17 of the court and the properties in the receiver's hands is really under the control and  
18 continuous supervision of the court. Whereas an execution sale is where an office --  
19 authority rests on the law and on the writ and it does not emanate from the Court.  
20 Now, in this case, there was a receiver that was appointed. It was not a custodial  
21 receiver, he was designed to be and was -- was a liquidating receiver where the  
22 receiver took the property, hired a broker, broker hired a consulting and marketing  
23 firm, marketing firm marketed for several weeks, bids were solicited and a purchase  
24 and sale agreement was negotiated and approved by the Court.

25 So in that sense, it's not a private sale, and it's not a, quote, deficiency

1 sale, a foreclosure sale. It's some other animal. And the other animal that it is is a  
2 receiver sale. And what we're comfortable in telling the court that since the mind of  
3 man runneth not for the contrary, receivers have always had the power under the  
4 supervision of the Court to liquidate an asset. And I would specifically refer the  
5 Court to 65 Am.Jur. 2d, Section 326. And in terms of the law of the state, it's clear  
6 that a application for a receiver is not an action for purposes of Chapter 40.

7 Did I respond, Your Honor?

8 THE COURT: All right. Mr. Larsen, what's your response to all of that?

9 MR. LARSEN: I would submit that if they want to overcome clear Nevada  
10 statutes, a multitude of Nevada Supreme Court cases, they need to come up with  
11 something better than Am.Jur.

12 MR. FORSTADT: Well, I can, Your Honor. I'm sorry.

13 MR. LARSEN: Yeah -- excuse me, I'm not finished.

14 MR. FORSTADT: I apologize.

15 MR. LARSEN: Chapter 40, N.R.S. 40.430, and I believe it's subsection one,  
16 specifically says that a receiver can be appointed. So -- and N.R.S. 107, which is  
17 the foreclosure statutes, specifically provides for the appointment of a receiver. So,  
18 just because they choose to appoint a receiver doesn't mean that they get the  
19 unilateral right to argue that this case now mysteriously falls outside of Chapter 40.

20 THE COURT: Well, I guess, their argument would be they didn't choose to  
21 appoint a receiver, the Court appoints the receiver. The Court -- and so their  
22 argument is that it's not just they can -- they willy-nilly have multiple options and they  
23 can just arbitrarily choose one, you have to make an application to the court which in  
24 theory could have been denied by the Court. And because there is judicial  
25 supervision, that's why Chapter 40 doesn't apply. You know, I understand that

1 Chapter 40, parts of it exist to protect the homeowner and his rights. I'm guessing,  
2 or I'm gathering from your argument that your argument is those rights are still  
3 protected to the extent that the receiver is subject to court supervision.

4 MR. FORSTADT: Yes, Your Honor.

5 MR. LARSEN: And more than that. But, Your Honor, they filed the motion to  
6 have a receiver appointed.

7 THE COURT: Right.

8 MR. LARSEN: The Court didn't just act *sua sponte*.

9 THE COURT: Sure.

10 MR. LARSEN: They filed a motion. All right. Now, then, that was their choice  
11 to do that. The fact that this sale was conducted under court supervision does  
12 nothing more than accomplish a sale of the property. There was no effort by anyone  
13 when the sale was approved by Judge Togliatti, to say that this particular sale is  
14 going to be made in compliance with Chapter 40 or that there were -- nor did they  
15 say that this gets us out of Chapter 40. Chapter 40, insofar as that sale is  
16 concerned, basically says the way they proposed to sell their collateral, the way --  
17 they chose to exhaust the collateral through the receiver's sale. Okay. They chose  
18 to do it. In other words, plaintiff filed the motion to confirm the sale.

19 THE COURT: Right.

20 MR. LARSEN: They came into court and said here is the offer, here is the  
21 contract we want the judge to confirm. That's all it was. And that's all they get out of  
22 it. To say now that they can come back and tell this Court and tell the defendants  
23 that we don't mean that Chapter 40 should apply, forget that we've acknowledged it  
24 in our own motion for summary judgment, now that they see that they have no way  
25 to escape from Chapter 40 because very clearly, the statute of limitations has run,

1 very clearly they did not conduct a public auction which is one of the requirements of  
2 Chapter 107, and Chapter 40, when it deals with a foreclosure sale, N.R.S. 40.455  
3 specifically says foreclosure sale, and the only definition of a foreclosure sale is in  
4 Chapter 107.

5 So 107 and 40 work hand in hand. There cannot be any bona fide  
6 dispute about that. So their having chosen to conduct this non-published auction  
7 sale, no public advertising, no ability for the other 31 offers that brought prospective  
8 buyers to know about this sale, then fine, they sold the property. That was their  
9 intended remedy at the time.

10 THE COURT: Right. Well, I think -- I think this is what their response is going  
11 to be. As a matter of policy, the reason N.R.S. Chapter 40 exists is to ensure that  
12 the owner of the property has certain protections. He knows when the foreclosure  
13 sale's going to be, he can raise objections to it. If there's a deficiency, there's a time  
14 limit so that you can't take my house or my property and then five years from now  
15 come back after me for a deficiency. And so the purpose of Chapter 40 would be to  
16 protect the -- the owner of the property.

17 I'm guessing their response would be, well, all that doesn't matter in a  
18 receivership sale because you're -- because the property owner is protected  
19 because he can always come to court and contest anything -- any application they  
20 make to the judge to -- to sell the property, to, you know, for whatever; in other  
21 words, there's another avenue there. And so to the extent that there's another  
22 avenue there, in which the owner can seek protection, doesn't -- as a matter of  
23 policy, doesn't that take it out of Chapter 40? I'm guessing that's your -- going to be  
24 your response.

25 MR. FORSTADT: Yes, we're --

1 MR. LARSEN: Well, Your Honor, that -- that may be their argument, but that  
2 doesn't -- just because they say it doesn't make it so.

3 THE COURT: No, I understand, right.

4 MR. LARSEN: Okay. Rather than look to what they're saying, I'm suggesting  
5 we look to what the Supreme Court in Nevada has said on this subject. And they  
6 have said over and over again, starting with the *McMillan* case and in the *Keever*  
7 case that we've cited, that you cannot look to the general assets of the debtor unless  
8 you've complied with all the requirements of Chapter 40. Now, in the *Keever* case  
9 there was another sale of the property and in -- in that case the debtor actually  
10 signed a contract agreeing to this particular sale that did not involve, as the Court  
11 put it, competitive bidding. And competitive bidding is what takes place when they  
12 comply with the statute and have a public auction. And so the Supreme Court said,  
13 no, you can't do that because one of the protections that the debtor is entitled to is to  
14 know that this public sale, a publicly-advertised sale under N.R.S. 107.80 -- 080,  
15 that is held at a public auction which is provided for in either 21.150, which is the  
16 general execution statute, or 107.085, which is the foreclosure statute.

17 So, you go to this public auction, and the legislature has determined  
18 and we can't override that, that what the legislature says on this subject is as binding  
19 on the Court as it is on the parties. So, they've said you have to have a public sale  
20 because that will be the best method to ensure that the highest possible price is paid  
21 for the property --

22 THE COURT: Sure.

23 MR. LARSEN: -- and that the creditor gets -- or the debtor gets the benefit of  
24 that. And then as we point out in the case we cited with the *Savage* case and the  
25 case we cited with *Keever*, if the creditor doesn't comply with those rules, there's no



1 deficiency; it's over. And that's what needs to happen here. This is -- they cannot  
2 argue that they're out of Chapter 40 because if they do that, Your Honor has to  
3 conclude that this particular note enforcement is not regulated by statute. And we've  
4 cited cases dealing with the insurance code, the uniform commercial code. It says  
5 there are certain kinds of contracts that are subject to statutory regulations. And  
6 when they deviate from the statute, the statute will control, and the statute dictates  
7 the remedy. And in this case, the statute dictates that the case be dismissed for  
8 three independent reasons, any one of which is grounds, separate grounds to  
9 dismiss this case.

10 The statute of limitations is the easiest, most obvious example to  
11 understand how Chapter 40 applies. But even the failure to conduct the public sale  
12 that involves a little more complications, but once you understand it, it's just as  
13 simple as the statute of limitations argument. And then again, we have the  
14 argument that they started a foreclosure; they were required to give notice to the  
15 guarantor and they didn't. So, I mean, to me, this is an open-and-shut case for  
16 summary judgment.

17 THE COURT: All right. So on behalf of U.S. Bank, let me flip the question  
18 around that I asked Mr. Larsen a moment ago. The question I asked Mr. Larsen  
19 was, I was presuming your argument is, hey, if there's judicial supervision, why do  
20 you need the protection of Chapter 40; so the inverse of that question is why can't  
21 the two methods be complimentary? Why can't -- why -- why doesn't the receiver  
22 have to comply with both schemes?

23 MR. FORSTADT: There's nothing that I've seen anywhere that says a  
24 receiver has to comply with the provisions for a deficiency judgment. Indeed, if we  
25 got to 40.430, which is the one-action rule, it specifically provided, and I quote, "As

1 used in this section, an 'action'," that's in quotations, "does not include any act or  
2 proceeding to appoint a receiver." A receivership proceeding, as the Court noted, is  
3 under the express supervision of the court. And what happened here is different  
4 than what Mr. Larsen has recited.

5 THE COURT: Well, let me ask you this, generally the receivership order, I  
6 mean, just because there's a receiver doesn't mean the receiver is -- and just  
7 because the receiver is under Court supervision doesn't mean the receiver is  
8 exempt from every other statute.

9 MR. FORSTADT: Of course not.

10 THE COURT: I mean, it's a general clause in the receivership order that you  
11 have to comply with all applicable statutes.

12 MR. FORSTADT: Correct.

13 THE COURT: So, I mean, yeah, I understand your argument is Chapter 40  
14 wouldn't have applied at all; and therefore, it doesn't fall within, you know, within the  
15 scope -- it's not something the receiver's going to have to comply with. But I guess  
16 I'm asking a matter of -- to the extent that we have a possible ambiguity here in the  
17 application of the statutes, I'm asking as a matter of policy, why shouldn't the  
18 receiver have to comply with all the same statutes that would have had to been  
19 complied with if this were a foreclosure and a sale through any other means?

20 MR. FORSTADT: Let me give you a business-like answer to that question if I  
21 can, please?

22 THE COURT: Okay.

23 MR. FORSTADT: This was a 157-unit, mixed-unit apartment-condo complex.  
24 It was not suitable for a receiver sale -- for a appraisal for a deficiency sale or by  
25 the -- acting under the deficiency statutes. And there's reasons as follows. There

1 are some cases where the lender just doesn't want property. It could be for  
2 environmental reasons; it could be that you don't want to sell 157 times --

3 THE COURT: He doesn't want to run an apartment complex, sure, right.

4 MR. FORSTADT: You got it, exactly correct. So, in that situation is the  
5 lender relegated to Chapter 40, or is there other remedies which is available to the  
6 lender? Here the lender chose to use the general receivership law, it's buttressed  
7 by 40.430 that the action to obtain a receiver is not an action as that term is used in  
8 Section -- in Chapter 40. Now, there's nothing that says we cannot do it. Now, the  
9 cases cited by counsel are all distinguishable on the facts and on the law. On the  
10 law they're distinguishable because they were Chapter 40 cases and this is not a  
11 Chapter 40 case.

12 On the fact they're distinguishable because, for example, in the *Keever*  
13 case, there was a clogging up of the equity of redemption; there was an agreement  
14 for a private sale, which carved out the junior lienor. Here there was no such private  
15 sale. Indeed, for a period of in excess of three months, there was solicitations of  
16 offers. To characterize this as a private sale is elite and more athletic than logical.  
17 This was advertised throughout the country. There was --

18 THE COURT: Well, let me ask you -- let me ask you this, as a matter of  
19 procedure then, you guys filed your motion for summary judgment first, and I  
20 understand that you're withdrawing it now.

21 MR. FORSTADT: Uh-huh, without -- without prejudice, if we could?

22 THE COURT: It was kind of continued -- right -- and it was continued last  
23 time because there was an issue of, as I recall it, the wrong document had been  
24 included as an exhibit and you guys wanted to -- somebody to change a document,  
25 so I said, all right, instead of ruling on it, let's just, you know, get the correct

1 document so I can look at it. But in theory, I could have granted your motion a  
2 month ago.

3 MR. FORSTADT: Uh-huh.

4 THE COURT: And we would have had a deficiency judgment hearing, and  
5 now I've already made a finding granting your motion that this is a deficiency  
6 judgment. So, as a matter of procedure, if that's what I could have done, let's  
7 even -- let's say that I did that, how can you sit here today and suddenly say, oh, I  
8 want to take it all back even though we've already had a deficiency judgment  
9 hearing and say N.R.S. Chapter 40 doesn't apply? In other words, it's sort of a  
10 judicial estoppel question is what I'm asking.

11 MR. LYNCH: Well, Your Honor, since that was my mistake let me address  
12 that. We filed our motion, I think it was in April, we came to hearing --

13 THE COURT: Right, April 25<sup>th</sup>.

14 MR. LYNCH: -- as it turns out, the assignment from bank one to bank two  
15 contained an incorrect page two. Mr. Larsen pointed that out, Your Honor correctly  
16 wanted to see that -- that corrected, and so that's what we did. But Mr. Larsen at  
17 that hearing, and if you check your minute order you'll see this, Mr. Larsen said you  
18 can't possibly grant summary judgment because I'm going to file a motion next  
19 week.

20 THE COURT: Right. But the fact that he, you know, I mean, what I was  
21 doing is trying to be considerate and say, all right, I'll look at both motions, but I  
22 could have just granted your motion that day because it's not really a defense to one  
23 motion to say, I'm going to file another motion. But --

24 MR. LYNCH: Sure, but --

25 THE COURT: -- to the extent I could have done that, we could have had a

1 deficiency judgment hearing already, you know, weeks ago. And then you'd be  
2 coming here and saying, oh, no, no, I want to walk that all back; Chapter 40 doesn't  
3 apply.

4 MR. LYNCH: Well, to be quite honest with Your Honor, that -- the purpose of  
5 that motion filed in April was to establish liability. The deficiency hearing, what I was  
6 calling a deficiency, and I think it was a fundamental misunderstanding, if -- to the  
7 extent you define a deficiency as that which exists after a foreclosure, we don't have  
8 a deficiency, right, because there's been no foreclosure.

9 THE COURT: Right. Sure. I understand your argument. Sure.

10 MR. LYNCH: If the foreclosure -- if the deficiency -- well, I didn't really  
11 understand those two concepts, and I wasn't understanding that Mr. Larsen's  
12 perspective of deficiency means something that exists after a foreclosure, and I  
13 probably just confused the terms, and I think that's what happened. But in essence,  
14 I think it depends, what I was trying to get to there was let's get the liability done and  
15 then if Your Honor wants to consider the fair-market value offset of what is owed  
16 compared to what was realized, I mean, that's kind of the whole point of these  
17 foreclosure statements is to say; listen, it's not fair for a property that's worth 10  
18 million, a creditor comes in and credit bids for a million, and then goes after the  
19 debtor for everything else, let's -- let's close this down. Here there was nothing like  
20 that. And the point of that motion was simply to establish liability and a fair market  
21 value offset.

22 Now, whether I call that a deficiency or whether you call that something  
23 that exists after a receiver sale, I think is kind of splitting hairs at this point.

24 MR. FORSTADT: I do have a concern for the Court that had the Court  
25 granted the motion for deficiency judgment, the appeal would have been stronger

1 than it need be because as logic, as counsel points out, there was not a deficiency  
2 sale. And if there was not a deficiency sale --

3 THE COURT: Well, except the problem is, if I granted the relief that you  
4 specifically requested me to grant, you actually couldn't appeal that because -- you  
5 couldn't have --

6 MR. FORSTADT: No, I'm talking about --

7 THE COURT: -- because it would have been invited error.

8 MR. FORSTADT: -- I'm talking about the appeal by Mr. Larsen at that point.

9 THE COURT: Oh, right, okay.

10 MR. FORSTADT: But I want it clear, if I could, to point out that even if this is  
11 a Chapter 40 proceeding, which it is not, we have complied with the thrust of  
12 Chapter 40 in all respects. Counsel says, well, you're out because of the statute of  
13 limitations. And he's referring to the six-month period to bring the deficiency action  
14 after the auction sale. And factually, that's erroneous, so we have a question of fact  
15 to be resolved.

16 The reason it's erroneous is the deed in this case, the sale of the  
17 property occurred on June 8<sup>th</sup>. The civil action seeking the shortfall, as it were, was  
18 filed on November 24<sup>th</sup>. So the period between June 8<sup>th</sup> and November 24<sup>th</sup> is not  
19 the six-month period and the civil action is commenced by the filing of a complaint  
20 with the court which we did. That's the *Valpert* case, 85 Nev. 437. So that six-  
21 month rule, to the extent it applied was complied with. And I can run down the other  
22 objections if the Court wishes now or later, which Mr. -- which counsel has to the  
23 foreclosure proceedings. I would point out that one of the things we're trying to do  
24 here is to have a clean record and have a logical record. And it's a logical non-  
25 sequitor from my standpoint to have a deficiency judgment after a deficiency sale

1 when there was never a deficiency sale. There was a public sale, but it did not  
2 come with the baggage of Chapter 40.

3 THE COURT: All right. Mr. Larsen, anything you want to add?

4 MR. LARSEN: Yes, this business about the statute of limitations argument he  
5 just made, they didn't mention it in their brief. And we anticipated that they may  
6 make it. But we withheld from our opening brief, the case that we were reserving for  
7 our reply and that -- if they had raised the issue. But there is a Nevada Appellate  
8 Court case that's squarely on point --

9 THE COURT: Is this one that's cited in your brief or one that you're saying  
10 you didn't cite.

11 MR. LARSEN: No, no, we didn't cite it.

12 THE COURT: Okay.

13 MR. LARSEN: We didn't cite it in the reply brief because they never raised  
14 the issue. We anticipated that they might. And so we would have been prepared.  
15 But there's a case called *Paykar Construction Inc. v. Bedrosian*, I don't have the full  
16 cite in a draft what we previously had, but I do have quotes from it with the exact  
17 pages. It's at 71 Cal.App. 4<sup>th</sup>, pages 805, 806, and 808. The quotes from that case  
18 are as follows: "We conclude that the three month," and the three-month period in  
19 California is the statute of limitations, at least at the time of that case, it says, "we  
20 conclude that the three-month period begins when the highest bid is made at the  
21 sheriff's auction and affirm the trial court's dismissal of the action. The question is  
22 what does the date of the foreclosure refer to when the sheriff sells the property  
23 referred to by the appellant as the falling of the sheriff's hammer or when the sheriff  
24 certificate of sale is recorded as the appellant urges." The Court goes on to say,  
25 "Appellant argues that to interpret the word sale as an event occurring at the time of

1 the auction, would create a forfeiture against him and a windfall for the respondent  
2 and that we should engraft an equitable tolling doctrine in his aid." Then the Court  
3 says, "None of the cases appellant cites involve anti-deficiency statutes. The  
4 legislature has declared its intention to limit strictly the right to recover deficiency  
5 judgments."

6 Now, I should also add that Chapter 40 specifically refers to the date of  
7 the foreclosure sale as the beginning of the statute, and there is another -- I don't  
8 have the exact citation -- but in Chapter 40, two or three sections after 40.430, there  
9 is a statute that says: "The trustee's deed must be recorded within 30 days of the  
10 sale." So our own statutory scheme contemplates a sale date and a recording date,  
11 but the sale date for purposes of the statute of limitations is the date of the sale itself  
12 and in this case, that was Judge Togliatti's sale confirming it in open court.

13 The fact that they waited until just before six months after the recording  
14 tells -- I think speaks volumes as to where they knew their problem was, but they  
15 have raised this issue at the very last moment and had they done so, we would have  
16 cited the *Paykar v. Bedrosian* case, but again it's at 71 Cal.App.4<sup>th</sup> at pages 805  
17 through 808. The first page I don't have and that was the first page of the decision.

18 THE COURT: All right.

19 MR. FORSTADT: Your Honor --

20 MR. LARSEN: In any case, nothing they have said exempts them from the  
21 requirements of Chapter 40, as Your Honor correctly points out. The receiver could  
22 have still complied with those statutes. If they intended -- I mean -- all their motion  
23 to sell the property asks for was permission to sell the property. If they wanted to  
24 take that sale one step further to ask for a deficiency, all they had to do was comply  
25 with the deficiency statutes. The receiver himself could have advertized at public



1 sale. The receiver could have conducted a public auction. They chose not to do  
2 that, so they chose to basically avoid a claim for a deficiency altogether, and by that  
3 choice the statute of limitations has run, and the case must be dismissed. Thank  
4 you, Your Honor.

5 MR. FORSTADT: If you please, Your Honor?

6 THE COURT: Sure.

7 MR. FORSTADT: The lender did not choose the manner in which the  
8 receiver was willing to sell the property. The receiver chose the manner in which the  
9 receiver was going to sell the property after consultation with the broker and the  
10 marketing consultant that he had hired.

11 I wish to digress for a moment. In terms of a windfall, we can't go  
12 windfall here. The note was purchased for approximately nine and a half million  
13 dollars -- I'm sorry -- for approximately 20 -- \$20 million and approximately sold for  
14 \$9 million. The windfall would be if the receiver -- if the lender doesn't have to step  
15 to the plate.

16 Now in addition to that, counsel quotes a Cal.App. case, which is all  
17 well and good, but I would support our Supreme Court's case as to when it actually  
18 commences, so we're left with the narrow question then is when is the sale? Well  
19 there's not a foreclosure sale, so I think we can skip the question; but if we want to  
20 drill down on the question, is when the sale was, the sale would be upon the deed.  
21 There was no hammer to come down. There was no procedure other than a deed  
22 to transfer the title. Upon the transfer of title, the clock, if there was one, began to  
23 run, and that clock expired six months thereafter, and well within that six months, we  
24 commenced our action, and the commencement of the action would toll the running  
25 of the clock.

1 THE COURT: All right.

2 MR. LARSEN: Could I respond to that, Your Honor.

3 THE COURT: Sure.

4 MR. LARSEN: I want to illustrate the nonsensical approach that they're  
5 suggesting. They're saying the deed was recorded in June of 2010. All right.  
6 Then -- let's take their argument a few steps further. Mr. Lynch even acknowledged  
7 that we would still have to have a fair-market value hearing; and if we're going to  
8 have a fair-market value hearing, why is that? It's only because the statute requires  
9 it.

10 THE COURT: He's misquoting me.

11 MR. LARSEN: Well, that's what I heard. In any event, then we say, if we're  
12 going to have a fair-market value hearing, is it going to be on June the -- is the  
13 valuation date going to be on June the 6<sup>th</sup>, and what occurred on June the 6<sup>th</sup> to  
14 make this judicial supervision of a sale at that price, because the hearing was back  
15 in March; and if we're talking about evaluation date of June 5<sup>th</sup> or June 6<sup>th</sup>, doesn't  
16 that clearly underscore the whole argument that they're making that there has to be  
17 a sale where the hammer falls, and that's the day you determine value, and their  
18 whole approach to this is to basically ask Your Honor: Please, please find us a way  
19 to escape from this trap that they set for themselves, and they have to face their  
20 consequences of their own choices.

21 This is a clear case for summary judgment as demonstrated by the  
22 numerous Nevada Supreme Court cases that we have cited and they have made no  
23 attempt to distinguish. The *Shields* case is very clear, yet they make no attempt to  
24 distinguish it, so summary judgment is clearly proper in this case in favor of the  
25 defendants.

1 THE COURT: All right. Here's what I'm going to do. Since this obviously is a  
2 potentially dispositive motion, first of all for the record, I'm going to allow the plaintiff  
3 to withdraw their previously-filed motion for partial summary judgment that was filed  
4 on April 25<sup>th</sup>, so all that I'm left with is the defendants' motion for summary judgment.  
5 What I'm going to do as I typically do on potentially dispositive motions is I'm going  
6 to take it under advisement, and you guys will get something in writing hopefully in a  
7 week or less. I try to get things out within seven days. If I don't get them out by  
8 then, then they tend to fall through the cracks, so expect something maybe early  
9 next week. Is that -- let me just ask you -- procedurally I know that this isn't set for  
10 trial until February, but where are we in discovery and with the deadlines coming  
11 up? Are you guys --

12 MR. FORSTADT: We're getting ready to have a fight with respect to  
13 discovery, with respect to whether or not they're entitled to certain things. If I could  
14 indulge -- with the indulgence of the Court, I didn't need to point out one thing.  
15 Counsel has said there was no fair-market value determination of this case, and that  
16 is wrong. There was a proceeding before Judge Togliatti. There's a written  
17 pleading in the file, an order in the file, saying that this sale was "within the range of  
18 the fair-market value." Now to say that there's not ever been any fair-market  
19 determination is just flat out wrong.

20 THE COURT: All right. Well --

21 MR. LARSEN: Your Honor, Mr. Rapaport was not a party to the case at that  
22 time.

23 THE COURT: No. I got that; right. All right.

24 MR. FORSTADT: Mr. Rapaport was sitting in court at the time that that  
25 occurred, so --

1 MR. LARSEN: That's not true.

2 MR. FORSTADT: -- in terms of notice -- will the order says he was. In terms  
3 of notice, he certainly had notice of what was transpired.

4 THE COURT: All right. Well, as I said, you guys will get something in a few  
5 days, and that way -- you know, the reason I like to do that is that way you guys  
6 know where I'm going with it, and if -- I guess depending on the resolution of the  
7 motion, if there's an appeal by either side, then there's a record of why I did what I  
8 did for the Supreme Court. All right? So, like I said, maybe a week or so, although  
9 we start a trial on Monday, so it might be a little bit longer than a week, maybe -- but  
10 at the very latest, it would be the latter half of next week. I hope it's sooner than  
11 that. All right? Thanks.

12 MR. FORSTADT: Thank you, Judge.

13 MR. LARSEN: Thank you, Your Honor.

14 PROCEEDING CONCLUDED AT 9:45 A.M.

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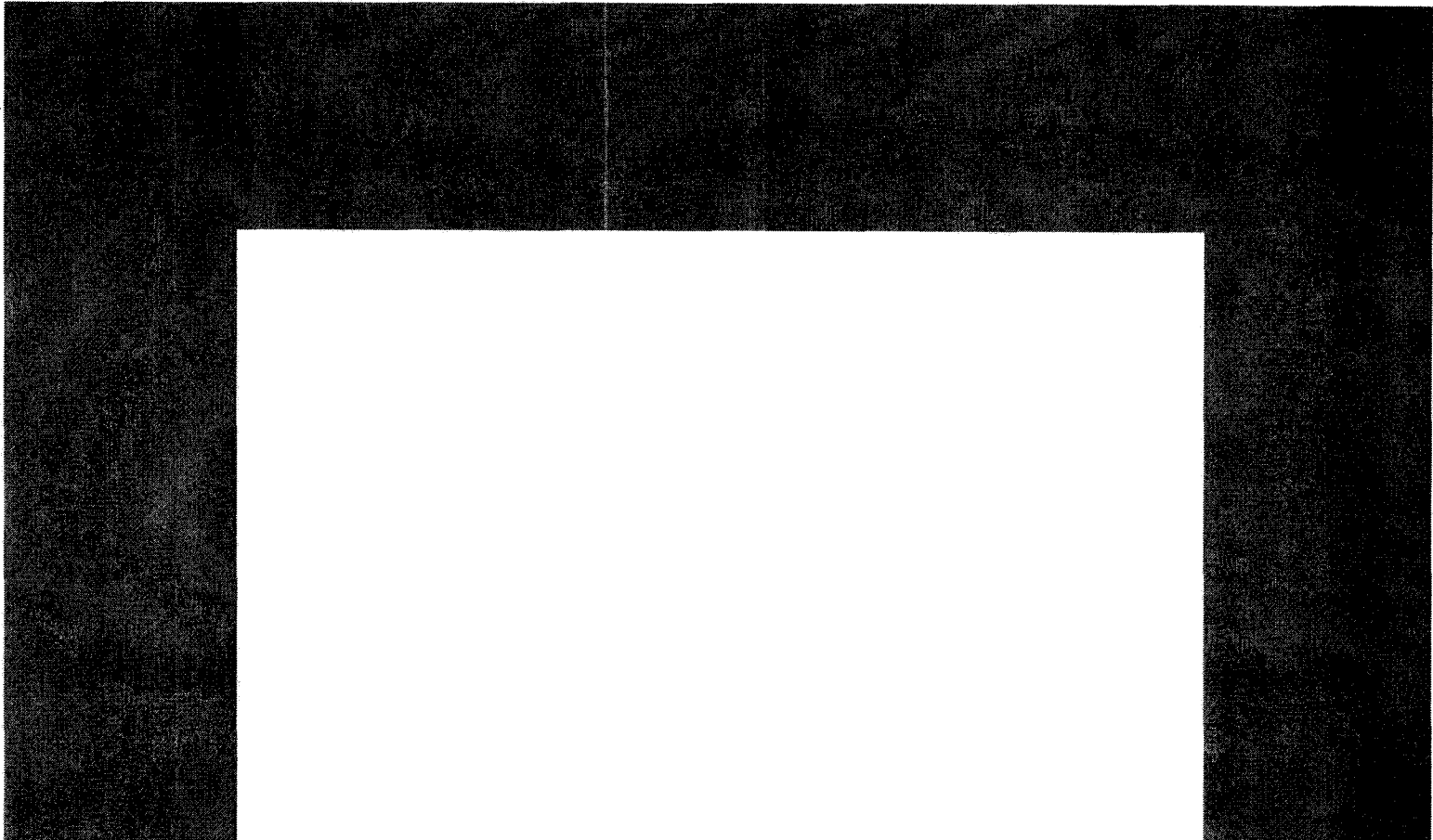
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22 video recording of this proceeding in the above-entitled case.

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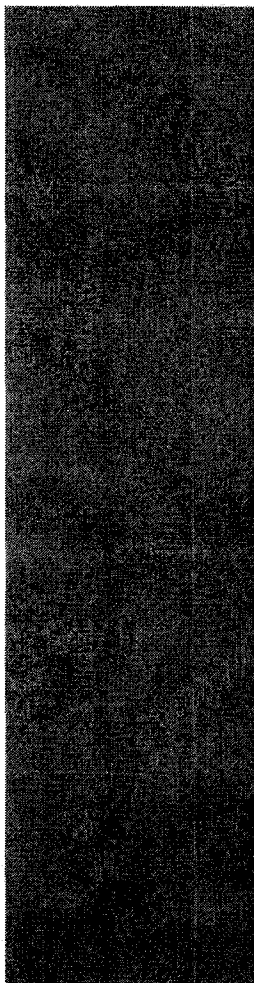
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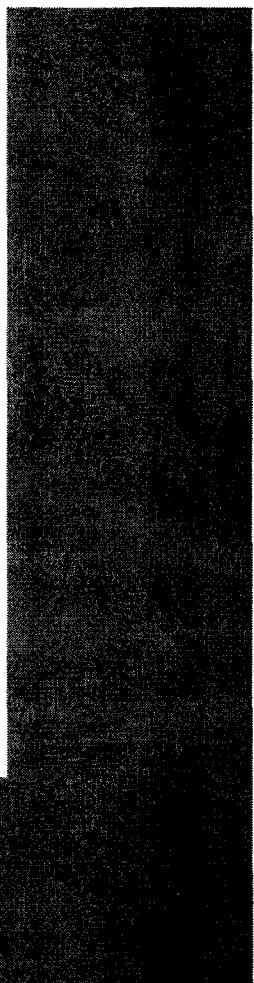
  
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Court Recorder/Transcriber



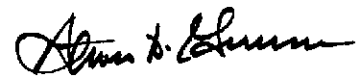
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ORDER

DISTRICT COURT

CLARK COUNTY, NEVADA

U.S. BANK NATIONAL  
ASSOCIATION AS TRUSTEE,

Plaintiff,

v.

PALMILLA DEVELOPMENT CO.,  
INC., et al.,

Defendants.

CASE NO. A595321  
DEPARTMENT NO. XX

**ORDER GRANTING**  
**DEFENDANTS' MOTION FOR**  
**SUMMARY JUDGMENT**

This matter having come before the Court on the 8<sup>th</sup> day of August, 2012, Michael F. Lynch, Esq. and Matthew J. Forstadt, Esq., appearing for and on behalf of the Plaintiff; Brent A. Larsen, Esq., and Shana S. Gullickson, Esq., appearing for and on behalf of the Defendants, and the Court being fully advised in the premises, finds:

(1) This matter comes before the Court on a Motion for Summary Judgment filed by the Defendants, Palmilla Development Co. (a Nevada corporation) and Hagai Rapaport (an individual). The Plaintiff, U.S. Bank National Association (as Trustee for the Registered Holder of certain securities by and through its special servicer) also filed a Motion for Partial Summary Judgment that was originally calendared for the same hearing date as the Defendants' Motion, but at the August 8 hearing the Plaintiff withdrew its Motion. Therefore, only the Defendants' Motion is presently before this Court.

<input type="checkbox"/> Voluntary Dis	<input type="checkbox"/> Stip Dis	<input checked="" type="checkbox"/> Sum Jdgmt	<b>FINAL DISPOSITIONS</b>
<input type="checkbox"/> Involuntary (stat) Dis	<input type="checkbox"/> Stip Jdgmt	<input type="checkbox"/> Non-Jury Trial	
<input type="checkbox"/> Jdgmt on Arb Award	<input type="checkbox"/> Default Jdgmt	<input type="checkbox"/> Jury Trial	
<input type="checkbox"/> Mtn Jo Dis (by deft)	<input type="checkbox"/> Transferred		
			<input type="checkbox"/> Time Limit Expired
			<input type="checkbox"/> Dismissed (with or without prejudice)
			<input type="checkbox"/> Judgment Satisfied/Paid in full

1 (2) Briefly, the undisputed facts of this action are as follows. This action  
2 arises from a 2007 Loan in the amount of \$20,150,000.00, evidenced by a Note and  
3 Deed of Trust, and secured against certain real property. Defendant Rapaport personally  
4 guaranteed the Loan pursuant to a written Guaranty attached as Exhibit C to the  
5 Plaintiff's "Objection." The original Loan underwent a series of assignments which need  
6 not be described in detail here as the parties agree that the Plaintiff is now currently the  
7 legal holder of all beneficial interest under the Deed of Trust. On September 3, 2009,  
8 this Court appointed a Receiver to take possession, custody and control of the real  
9 property secured by the Deed of Trust. (See, "Order Appointing Receiver," dated May  
10 19, 2010, attached as Ex. 7 to the Plaintiff's Motion for Partial Summary Judgment,  
11 withdrawn by oral motion on August 8, 2012). Subsequently, the Receiver filed a  
12 Motion to approve a sale of the property, which was unopposed and granted by the Court  
13 on March 26, 2010. (Copy attached as Ex. 8 to the Plaintiff's Motion for Partial  
14 Summary Judgment). The property was sold for the amount of \$9,500,000.00, which the  
15 parties agree is substantially less than the amount of the Loan that remained unpaid as of  
16 the date of the sale.

17  
18 (3) Initially, the Plaintiff filed a complaint seeking only the appointment of a  
19 Receiver, which was granted by this Court (per Judge Togliatti). Subsequently, the  
20 Plaintiff filed a First and Second Amended Complaint which added causes of action  
21 styled "breach of contract" but which the parties agree seek damages arising from the  
22 deficiency between the remaining balance of the Loan owed as of the date of the sale by  
23 the Receiver, and the proceeds actually obtained from the sale. On April 25, 2012, the  
24 Plaintiff filed a "Motion for Partial Summary Judgment and Request for Deficiency  
25 Hearing Pursuant to NRS 40.457." The Motion originally came before this Court for a  
26 hearing on May 30, 2012, but argument was continued because the parties indicated that  
27 certain exhibits had been incorrectly attached to that Motion and the Plaintiff wished to  
28

1 file a corrected copy of the exhibits for the Court's review. In the interim, the  
2 Defendants filed their Motion for Summary Judgment on July 5, 2012.

3 (4) By its Motion, the Defendants assert that they are entitled to judgment as a  
4 matter of law on "all issues of liability in this case" because the Plaintiff is not entitled to  
5 the relief that it seeks, namely, the recovery of the deficiency between the amount of the  
6 Loan remaining unpaid and the amount received from the sale of the property. The  
7 Defendants contend that the relief sought by the Plaintiff is barred for three separate and  
8 independent reasons under the so-called Anti-Deficiency statutes, NRS 40.451 et seq.  
9 First, the Defendants aver that because the property was sold through a private sale  
10 rather than a public auction to the highest bidder, the Plaintiffs are statutorily precluded  
11 from seeking a deficiency. Second, the Defendants assert that the claims asserted  
12 against Defendant Rapaport as guarantor of the Loan are barred by NRS 107.095  
13 because the Plaintiff failed to comply with statutorily required notice requirements prior  
14 to the sale of the property. Third, the Defendants contend that any action seeking  
15 recovery of a deficiency is time-barred by NRS 40.455 because the Plaintiff failed to file  
16 its deficiency action within six months following the date of the sale.

17  
18 (5) In response to the Defendants' Motion, the Plaintiff filed an "Objection" to  
19 the Motion which essentially asserts that because the property was privately sold by the  
20 Receiver and not through a "foreclosure," none of the statutes cited by the Defendants  
21 apply. (*See* Plaintiff's Objection, page 2, lines 6-7: "This case can not be adjudicated as  
22 a 'garden variety' deficiency case since there never was a foreclosure"; page 3, lines 5-6:  
23 "Not being a foreclosure sale, there was no [deadline under NRS 40.455] for a  
24 deficiency judgment"; lines 24-25: "there was never any foreclosure and thus there is no  
25 foreclosure date"). The Plaintiff also suggests that the Motion is premature and should  
26 be "taken off calendar" until further discovery has been conducted.

27 (6) A party seeking summary judgment under Rule 56 of the Nevada Rules of  
28



1 Civil Procedure bears the burden of demonstrating that there are no genuine issues of  
2 material fact and that it is entitled to judgment as a matter of law. In considering such a  
3 motion, the Court must view all of the evidence in the light most favorable to the non-  
4 moving party unless it is clear that there are no genuine issues of fact.

5 (7) Once the moving party demonstrates the absence of a genuine issue of fact,  
6 the burden shifts to the non-moving party to show the existence of such genuine issues  
7 of material fact through admissible evidence. To defeat summary judgment, the non-  
8 moving party cannot rely upon speculation, conjecture, or upon the unsupported  
9 arguments of counsel.

10 (8) A dispute of fact is "genuine" if a jury could return a verdict for the non-  
11 moving party on that issue. Whether a fact is "material" is determined by the governing  
12 substantive law applicable to the underlying cause of action.

13 (9) In both supporting and opposing summary judgment, the parties must rely  
14 upon evidence that would be admissible at trial under the applicable Nevada rules of  
15 evidence. A party cannot rely upon inadmissible evidence to either justify or defeat  
16 summary judgment. *See* NRCP 56(e) (affidavits in support of or in opposition to  
17 summary judgment "shall set forth such facts as would be admissible in evidence"). *See*  
18 *also, Collins v. Union Federal Savings & Loan Ass'n*, 99 Nev. 284, 301 (1983) (evidence  
19 in support of or in opposition to summary judgment must be evidence that would be  
20 admissible at trial).

21 (10) As an initial observation, while the Plaintiff suggests that the Motion is  
22 premature and should be "taken off calendar" until further discovery has been completed,  
23 the Plaintiff has not actually satisfied the requirements for seeking a continuance under  
24 NRCP 56(f). The Plaintiff fails to supply an affidavit in support of its assertions which  
25 demonstrates "how further discovery will lead to the creation of a genuine issue of  
26 material fact." *Aviation Ventures v. Joan Morris, Inc.*, 121 Nev. 113, 118 (2005). The  
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1 Court could deny relief for this omission alone. *Choy v. Ameristar Casinos*, 127 Nev.  
2 Adv. Op. 78 (November 23, 2011) (failure to include affidavit is not "substantial  
3 compliance" with an express requirement of 56(f) and therefore additional discovery not  
4 warranted). In any event, affidavit aside, the Plaintiff has failed to identify any genuine  
5 issues of fact that it cannot now discover that might be uncovered through additional  
6 discovery as required for a continuance under NRCP 56(f).

7 (11) The Court also notes that, while the Plaintiff opposes the instant Motion, it  
8 does not identify any triable issue of material fact that would preclude the granting of the  
9 Motion. Rather, the Plaintiff's Objection disputes only the legal consequences of the  
10 undisputed facts, namely, whether, as a matter of law, the provisions of NRS 40.451 et  
11 seq. bar this action. However, issues of law are for the Court, not a jury, to resolve, and  
12 therefore the existence of a disputed question of law is insufficient to preclude summary  
13 judgment when the moving party has otherwise met its burden under NRCP 56.

14 (12) Broadly, the fundamental question before the Court is whether the sale of  
15 the property in this case was of such a nature that the requirements of NRS Chapter 40  
16 (and some of the provisions of NRS Chapter 107) apply to it, including provisions  
17 limiting the right to pursue a deficiency against the debtor, the procedures for seeking  
18 recovery of such a deficiency, and any notice and timeliness requirements governing  
19 actions seeking such a deficiency. The Defendants assert that the provisions of NRS  
20 Chapter 40 (and 107) apply to the sale of any property that constituted security for a  
21 Loan whether the sale was conducted by a trustee or by the Receiver in this case, and  
22 because those provisions have not been complied with, the Plaintiff cannot seek recovery  
23 of any deficiency in this case. In contrast, the Plaintiff asserts that because the sale of  
24 the property in this case was accomplished through a private sale by the Receiver acting  
25 under the Court's supervision and authority, this action is not fundamentally an action  
26 seeking a "deficiency" under NRS Chapter 40, but rather "a simple case for damages"  
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1 arising from the breach of a contract. (Plaintiff's Objection, page 3, lines 13-14).

2 (13) At various times in this litigation, the Plaintiff appears to have admitted  
3 that NRS Chapter 40 applies to its causes of action. As noted, the Plaintiff filed its  
4 Motion for Partial Summary Judgment on April 25, 2012, specifically requesting this  
5 Court to conduct a deficiency hearing pursuant to NRS 40.457. Throughout the  
6 Defendants' Motion, the Plaintiff repeatedly referred to its own claims as seeking a  
7 deficiency judgment under NRS Chapter 40, even including an entire section titled  
8 "Deficiency Judgments." (Plaintiffs' Motion for Partial Summary Judgment, page 6).

9 The opening sentence of that section reads:

10  
11 "The law applicable to this dispute, which is the law prior to the enactment  
12 of AB 273, provides that a deficiency award for this loan secured by real  
13 property under NRS 40.459 is determined as follows...." (Plaintiff's  
14 Motion for Summary Judgment, page 6, lines 14-16).

15 (14) The same Motion contains a separate section titled "Under Chapter 40,  
16 Plaintiff is Entitled to Summary Judgment on Liability for the Deficiency Against  
17 Borrower and Guarantor." (Plaintiff's Motion, page 12). The opening sentences of that  
18 section read:

19 "NRS 40.455 provides that the court, after hearing, 'shall award a  
20 deficiency judgment'...The hearing is governed by NRS 40.457..."  
(Plaintiff's Motion, page 12, lines 23-26).

21 (15) Citing to these arguments, the Defendants' Motion avers that the Plaintiff  
22 should now be bound to the judicial admissions that it expressly made to the Court that  
23 NRS Chapter 40 provides the law governing its causes of action. However, in response  
24 to the Defendants' Motion, the Plaintiff now avers that it was mistaken in relying upon  
25 any provision of NRS Chapter 40. Therefore, at the August 8 hearing, the Plaintiff  
26 withdrew its Motion. Furthermore, in its Objection to the Defendants' Motion, the  
27 Plaintiff writes:  
28

1 "The Plaintiff is not without fault in this confusion. Unfortunately, it  
2 incorrectly captioned the pending motion as one for deficiency judgment as  
3 opposed to a Motion for Contract Damages. This is not a deficiency  
4 proceeding, it is a prove up of damages having nothing to do with a  
5 foreclosure." (Objection, page 2, footnote 3).

6 "...the Plaintiff, without conceding the efficacy of the reason given, would  
7 be willing to have its Motion for Summary Judgment 'marked off' in order  
8 that outstanding discovery can be completed. In terms of delay and in  
9 order not to be thought to be 'sandbagging' the Court, it is the intention of  
10 the Plaintiff to amend the present Motion for Summary Judgment to  
11 eliminate the Deficiency references and make it a 'straight' case of contract  
12 damages...." (Objection, page 4, lines 12-17).

13 (16) However, while the Plaintiff's position might otherwise appear reasonable  
14 and its Motion for Summary Judgment might otherwise perhaps be considered to have  
15 been a mistake that was subsequently rectified by its withdrawal of its Motion, the Court  
16 notes that the Motion for Summary Judgment is not the only pleading filed in this case in  
17 which the Plaintiff referred to its own causes of action as seeking a "deficiency  
18 judgment." For example, on June 30, 2011, the Plaintiff filed an "Opposition to  
19 Defendants' Motion to Dismiss, or in the Alternative, Motion to Require a Substantial  
20 Bond." In it, the Plaintiff sought to differentiate the Second Amended Complaint from  
21 two previously filed Complaints by asserting as follows:

22 "...the Complaint was amended to add the deficiency causes of action subsequent  
23 to the sale of the Property that established the amount of the deficiency.  
24 Therefore, Defendants' request for an additional bond...should be denied."  
25 (Plaintiff's Opposition, page 8, lines 7-10).

26 (17) Similarly, in the Joint Case Conference Report filed by the parties on  
27 November 9, 2011, the Plaintiff asserted as follows:

28 "Plaintiff is suing the Defendants to recover a deficiency judgment on a  
real estate loan that was made to Palmilla Development as the borrower  
and which was personally guaranteed by Hagai Rapaport...The property  
was later sold by the receiver on March 18, 2010...which Plaintiff claims  
results in a deficiency against the Defendants, jointly and severally...."  
(Joint Case Conference Report, page 2, lines 5-11).

1 (18) Thus, a strong argument can be made that the Plaintiff, having expressly  
2 characterized its own position in multiple motions filed throughout the litigation as an  
3 action seeking a deficiency judgment under NRS Chapter 40, should be estopped from  
4 now asserting the exact opposite in order to defeat a pending Motion for Summary  
5 Judgment filed by the opposing party. The Court could simply grant the Defendant's  
6 Motion by applying the doctrines of "judicial estoppel" or "judicial admission" without  
7 even considering the underlying arguments asserted by the parties. However, while  
8 noting the existence of this possible resolution, in the interests of justice and fairness the  
9 Court will consider the merits of the arguments presented in the Defendants' Motion and  
10 the Plaintiff's "Objection."

11 (19) Notwithstanding the arguments that it made previously in this case, the  
12 Plaintiff now maintains that this action constitutes a "simple breach of contract" case.  
13 Fundamentally, the Plaintiff avers that the various provisions of NRS Chapter 40 cited  
14 by the Defendants do not govern this action because a sale of the property by the  
15 receiver necessarily does not constitute a "foreclosure sale" or "trustee's sale." (*See*  
16 Plaintiff's Objection, page 2, lines 6-7: "This case can not be adjudicated as a 'garden  
17 variety' deficiency case since there never was a foreclosure"; page 3, lines 5-6: "Not  
18 being a foreclosure sale, there was no [deadline under NRS 40.455] for a deficiency  
19 judgment"; lines 24-25: "there was never any foreclosure and thus there is no foreclosure  
20 date").

21  
22 (20) Essentially, the Plaintiff suggests that a sale by a Receiver is, ipso facto,  
23 not a foreclosure sale and therefore by definition NRS Chapter 40 does not apply to any  
24 sale of property by a Receiver. However, the Plaintiff is incorrect in at least the broadest  
25 sense. In certain circumstances, a sale of property by a receiver can theoretically  
26 constitute a "foreclosure." NRS 32.010(2) expressly permits the appointment of a  
27 receiver in an action by a mortgagee "for the foreclosure of the mortgage and sale of the  
28

1 mortgaged property." *See generally*, Fletcher Cyclopedia of the Law of Corporations,  
2 Chapter 64, section 7667 ("The appointment of a receiver in an action to foreclose a  
3 mortgage executed by a corporation is not an unusual procedure"). Thus, it does not  
4 follow that the mere fact that the property in this case was sold by the Receiver, by itself,  
5 necessarily means as a matter of law that there could have been no foreclosure within the  
6 meaning of NRS Chapter 40.

7 (21) Interestingly, NRS 32.010 requires that, when a receiver is appointed in  
8 connection with a foreclosure and sale of a property, it must appear that "the property is  
9 probably insufficient to discharge the mortgage debt." NRS 32.010(2). Thus, NRS  
10 32.010(2) actually requires that a deficiency "probably" exist before a receiver can even  
11 be appointed, thus suggesting that the Legislature expressly contemplated that a  
12 mortgagee could still seek a deficiency judgment following a sale of the secured  
13 property by a receiver. The question before the Court is whether NRS Chapter 40 would  
14 apply to any subsequent action to recover such a deficiency.

15 (22) In determining whether the provisions of NRS Chapter 40 apply to the sale  
16 of the property by the Receiver in this case, the Court starts with the plain language of  
17 the relevant statutes. The words of a statute are assigned their ordinary meaning unless it  
18 is clear from the face of the statute that the Legislature intended otherwise. When "the  
19 language of a statute is plain and unmistakable, there is no room for construction, and  
20 the courts are not permitted to search for its meaning beyond the statute itself." *Estate of*  
21 *Smith v. Mahoney's Silver Nugget*, 127 Nev. Adv. Op. 76 (November 23, 2011). Thus, if  
22 the Legislature has independently defined any word or phrase contained within a statute,  
23 the Court must apply the definition created by the Legislature. If, and only if, the Court  
24 determines that the words of the statute are ambiguous when given their ordinary and  
25 plain meaning, then reference may be made to other sources such as the legislative  
26 history of the statute in order to clarify the ambiguity.  
27  
28

1 (23) The Anti-Deficiency provisions of NRS Chapter 40 apply to  
2 "indebtedness" arising in connection with a "foreclosure sale." NRS 40.451. The term  
3 "indebtedness" is defined as "the principal balance of the obligation secured by a  
4 mortgage or other lien on real property, together with all interest accrued and unpaid  
5 prior to the time of the foreclosure sale..."

6 (24) The phrase "foreclosure sale" is used frequently throughout the NRS. See,  
7 e.g., NRS 14.010 (requiring the filing of lis pendens "in an action for the foreclosure of a  
8 mortgage upon real property"); NRS 113.135 (certain notices required when property is  
9 sold do not apply to a sale "by foreclosure pursuant to chapter 107 of NRS"); NRS  
10 107.080(3)(b) (describing trustee's power of sale "if the property is a residential  
11 foreclosure"); NRS 107.087 (notice requirements for residential foreclosure); NRS  
12 107A.260 (permitting appointment of receiver "to foreclose the security instrument");  
13 NRS 645F.390 (licensing of "foreclosure consultants").

14 (25) The phrase "foreclosure sale" is defined in two places within the NRS.  
15 NRS 40.462(4) states as follows:  
16

17 As used in this section, "foreclosure sale" means the sale of real property  
18 to enforce an obligation secured by a mortgage or lien on the property,  
19 including the exercise of a trustee's power of sale pursuant to NRS  
20 107.080.

21 (26) NRS 107.025 provides as follows:

22 **NRS 107.025 Estate for years: Encumbrance by deed of trust;**  
23 **foreclosure by exercise of power of sale.** A deed of trust may encumber  
24 an estate for years however created, including a lease of a dwelling unit of  
25 a cooperative housing corporation, unless prohibited by the instrument  
26 creating the estate, and foreclosure may be had by the exercise of a power  
27 of sale in accordance with the provisions of this chapter.

28 (27) The Court also notes that Black's Law Dictionary (2006) defines  
"foreclosure" as follows:

1 "A legal proceeding to terminate a mortgagor's interest in property,  
2 instituted by the lender (the mortgagee) either to gain title or to force a sale  
in order to satisfy the unpaid debt secured by the property."

3 (28) Thus, a "foreclosure" is defined within the NRS as either the sale of real  
4 property to enforce an obligation secured by a mortgage including (but not limited to) a  
5 trustee's sale (NRS 40.462), or alternatively, "the exercise of a power of sale" of property  
6 encumbered by a deed of trust in accordance with the provisions of NRS Chapter 107  
7 (NRS 107.025). NRS Chapter 107 generally relates to the sale of encumbered properties  
8 via a trustee's sale, and the parties do not dispute that the sale in this case was not a  
9 trustee's sale. However, the Court also notes that NRS 107.100 also permits the  
10 appointment of a receiver after a debtor has defaulted on the indebtedness; indeed, the  
11 Plaintiff cited this provision as the legal basis for its second cause of action. (See,  
12 Complaint filed July 16, 2009, page 10, "Second Cause of Action -- Appointment of  
13 Receiver NRS 107.100 or NRS 32.010"). Therefore, it appears to the Court that, under  
14 NRS 107.025, as a matter of law, if a receiver appointed pursuant to NRS 107.100  
15 exercises the power to sell real property encumbered by a deed of trust in order to satisfy  
16 the indebtedness, such a sale expressly constitutes a "foreclosure sale."

17  
18 (29) Thus, all three of these definitions (NRS 40.462, NRS 107.025, and the  
19 dictionary definition), when interpreted literally and in accordance with their commonly  
20 accepted and plain meaning, would encompass the sale of a property by a receiver in  
21 order to satisfy an outstanding mortgage. Notably, none of the three definitions contain  
22 any restriction relating to whether the sale was "private" or "public," or whether the sale  
23 was conducted at the request of, or by, a court-appointed receiver or any other party. All  
24 that is required is that the sale was initiated by someone other than the borrower and that  
25 it was conducted for the purpose of enforcing or satisfying an obligation secured by a  
26 mortgage. The parties do not dispute that this was the purpose of the Receiver sale in  
27 this case; indeed, the Plaintiff's "Motion To Approve Sale of Receivership Property"  
28



1 filed on February 11, 2010, makes clear that the purpose of the sale was to satisfy the  
2 indebtedness and not, for example, another business purpose unrelated to the mortgage.  
3 Therefore, the sale by the Receiver in this case falls within the statutory definition of a  
4 "foreclosure sale." Consequently the Court concludes, as a matter of law, that the sale of  
5 the property in this case by the Receiver constituted a "foreclosure sale," and that the  
6 provisions and protections of NRS Chapter 40 apply to any action seeking a deficiency  
7 judgment after the sale.

8 (30) NRS 107.095 states as follows:  
9

10 **NRS 107.095 Notice of default: Mailing to guarantor or surety of**  
11 **debt; effect of failure to give.**

12 1. The notice of default required by NRS 107.080 must also be sent by  
13 registered or certified mail, return receipt requested and with postage  
14 prepaid, to each guarantor or surety of the debt. If the address of the  
15 guarantor or surety is unknown, the notice must be sent to the address of  
16 the trust property. Failure to give the notice, except as otherwise provided  
17 in subsection 3, releases the guarantor or surety from his or her obligation  
18 to the beneficiary, but does not affect the validity of a sale conducted  
19 pursuant to NRS 107.080 or the obligation of any guarantor or surety to  
20 whom the notice was properly given.

21 2. Failure to give the notice of default required by NRS 107.090,  
22 except as otherwise provided in subsection 3, releases the obligation to the  
23 beneficiary of any person who has complied with NRS 107.090 and who is  
24 or may otherwise be held liable for the debt or other obligation secured by  
25 the deed of trust, but such a failure does not affect the validity of a sale  
26 conducted pursuant to NRS 107.080 or the obligation of any person to  
27 whom the notice was properly given pursuant to this section or to NRS  
28 107.080 or 107.090.

3. A guarantor, surety or other obligor is not released pursuant to this  
section if:

(a) The required notice is given at least 15 days before the later of:

(1) The expiration of the 15- or 35-day period described in  
paragraph (a) of subsection 2 of NRS 107.080;

(2) In the case of any trust agreement which concerns owner-  
occupied housing as defined in NRS 107.086, the expiration of the period  
described in paragraph (b) of subsection 2 of NRS 107.080; or

(3) Any extension of the applicable period by the beneficiary; or

(b) The notice is rescinded before the sale is advertised.

1 (31) By way of brief summary, NRS 107.095 requires that in connection with  
2 any foreclosure sale when the indebtedness has been guaranteed by a third party, certain  
3 notices "must" be sent to the guarantor, and if those notices are not sent, the guarantor is  
4 released from its obligations to the creditor. Defendant Rapaport asserts that those  
5 notices were not sent to him as expressly required. In response, the Plaintiff does not  
6 even assert that it complied with NRS 107.095; instead, it first argues that NRS 107.095  
7 does not apply because there was no "foreclosure," and, second, avers that despite any  
8 noncompliance with NRS 107.095, Rapaport had "actual notice" of the proceedings  
9 involving the action seeking the appointment of a receiver. However, neither assertion  
10 excuses the failure to comply with the express requirements of NRS 107.095. As noted  
11 above, the Court finds as a matter of law that the sale in this case was a "foreclosure  
12 sale" within the meaning of the NRS, and thus that NRS 107.095 applies to this action.  
13 The Court also notes that NRS 107.095 is a mandatory statute which expressly states in  
14 unconditional terms that the notices "must" be sent to the guarantor. In other words, the  
15 requirements of NRS 107.095 "must" be complied with even where the guarantor might  
16 otherwise have acquired actual notice of the pendency of the action through other  
17 avenues outside of the NRS. The Plaintiff has failed to identify any genuine issue of fact  
18 which would preclude summary judgment, but rather only offers disputed interpretations  
19 of law. When the material facts are undisputed, summary judgment is appropriate when  
20 the law favors the moving party because questions of law are for the Court, not a jury, to  
21 resolve.  
22

23 (32) NRS 40.455 requires that any action seeking a deficiency judgment must  
24 be brought within six months of the foreclosure sale. Here, the Plaintiff does not dispute  
25 that it failed to assert the deficiency for more than six months following the Receiver  
26 sale. Instead, it offers two legal arguments excusing the delay. First, it contends that  
27 NRS 40.455 does not apply to its action for breach of contract as a matter of law, an  
28

1 assertion that is rendered moot by the conclusions contained hereinabove. Second, the  
2 Plaintiff contends that the six-month deadline was waived by the Defendants "to the  
3 extent provided by law." (Plaintiff's Objection, page 3, lines 7-12, citing Paragraph 7 of  
4 the Guaranty signed by Defendant Rapaport, attached as Exhibit C to the Objection).  
5 Paragraph 7 states as follows:

6 7. Waivers.

7 (a) Guarantor hereby waives, to the extent permitted by law...(iii) any  
8 statute of limitations affecting Guarantor's liability hereunder or the  
9 enforcement thereof....

10 (33) However, NRS 40.453 states as follows:

11 **NRS 40.453 Waiver of rights in documents relating to sale of real**  
12 **property against public policy and unenforceable; exception.** Except  
as otherwise provided in NRS 40.495:

13 1. It is hereby declared by the Legislature to be against public policy  
14 for any document relating to the sale of real property to contain any  
15 provision whereby a mortgagor or the grantor of a deed of trust or a  
guarantor or surety of the indebtedness secured thereby, waives any right  
secured to the person by the laws of this state.

16 2. A court shall not enforce any such provision.

17 (34) NRS 40.495 provides as follows:

18 **NRS 40.495 Waiver of rights; separate action to enforce obligation;**  
19 **limitation on amount of judgment; available defenses.**

20 1. The provisions of NRS 40.475 and 40.485 may be waived by the  
guarantor, surety or other obligor only after default.

21 2. Except as otherwise provided in subsection 5, a guarantor, surety or  
22 other obligor, other than the mortgagor or grantor of a deed of trust, may  
23 waive the provisions of NRS 40.430. If a guarantor, surety or other obligor  
24 waives the provisions of NRS 40.430, an action for the enforcement of that  
person's obligation to pay, satisfy or purchase all or part of an  
indebtedness or obligation secured by a mortgage or lien upon real  
property may be maintained separately and independently from:

25 (a) An action on the debt;

26 (b) The exercise of any power of sale;

27 (c) Any action to foreclose or otherwise enforce a mortgage or lien and  
the indebtedness or obligations secured thereby; and

28 (d) Any other proceeding against a mortgagor or grantor of a deed of

trust.

3. If the obligee maintains an action to foreclose or otherwise enforce a mortgage or lien and the indebtedness or obligations secured thereby, the guarantor, surety or other obligor may assert any legal or equitable defenses provided pursuant to the provisions of NRS 40.451 to 40.4639, inclusive.

4. If, before a foreclosure sale of real property, the obligee commences an action against a guarantor, surety or other obligor, other than the mortgagor or grantor of a deed of trust, to enforce an obligation to pay, satisfy or purchase all or part of an indebtedness or obligation secured by a mortgage or lien upon the real property:

(a) The court must hold a hearing and take evidence presented by either party concerning the fair market value of the property as of the date of the commencement of the action. Notice of such hearing must be served upon all defendants who have appeared in the action and against whom a judgment is sought, or upon their attorneys of record, at least 15 days before the date set for the hearing.

(b) After the hearing, if the court awards a money judgment against the guarantor, surety or other obligor who is personally liable for the debt, the court must not render judgment for more than:

(1) The amount by which the amount of the indebtedness exceeds the fair market value of the property as of the date of the commencement of the action; or

(2) If a foreclosure sale is concluded before a judgment is entered, the amount that is the difference between the amount for which the property was actually sold and the amount of the indebtedness which was secured, whichever is the lesser amount.

5. The provisions of NRS 40.430 may not be waived by a guarantor, surety or other obligor if the mortgage or lien:

(a) Secures an indebtedness for which the principal balance of the obligation was never greater than \$500,000;

(b) Secures an indebtedness to a seller of real property for which the obligation was originally extended to the seller for any portion of the purchase price;

(c) Is secured by real property which is used primarily for the production of farm products as of the date the mortgage or lien upon the real property is created; or

(d) Is secured by real property upon which:

(1) The owner maintains the owner's principal residence;

(2) There is not more than one residential structure; and

(3) Not more than four families reside.

6. As used in this section, "foreclosure sale" has the meaning ascribed to it in NRS 40.462.

1 (35) Thus, as a matter of law, the statute of limitations period set forth in NRS  
2 40.455 cannot be waived. Therefore, the Plaintiff's causes of action are time-barred  
3 under NRS 40.455.

4 (36) NRS 40.430 -- the so-called "one action rule" -- provides that:

5 "[T]here may be but one action for the recovery of any debt, or for the  
6 enforcement of any right secured by a mortgage or other lien upon real estate.  
7 That action must be in accordance with the provisions of NRS 40.430 to 40.459,  
8 inclusive. In that action, the judgment must be rendered for the amount found due  
9 the plaintiff, and the court, by its decree or judgment, may direct a sale of the  
encumbered property, or such part thereof as is necessary, and apply the proceeds  
of the sale as provided in NRS 40.462."

10 (37) The "one action rule" prevents a creditor from seeking to recover a  
11 deficiency judgment when "the loss of the security for the obligation was due to its own  
12 action." *Keever v. Nicholas Beers Co.*, 96 Nev. 509, 513 (1980). The Nevada Supreme  
13 Court has expressly held that the "one action" rule may, under certain circumstances,  
14 apply to private sales as well as trustee's sales. The Defendants aver that the rule of  
15 *Keever* should be extended to apply to the sale by the Receiver in this case, thus barring  
16 the Plaintiff from seeking a deficiency judgment when the existence of the deficiency  
17 was its own fault. After *Keever* was decided, the Legislature amended the "one action  
18 rule" through AB573, and a question exists whether that statute should be retroactively  
19 applied to the mortgage in this case. However, the Court need not engage in that  
20 analysis because, as noted above, the sale by the Receiver in this case was a "foreclosure  
21 sale" which failed to comply with other provisions of NRS Chapter 40.

22 (38) When the language of a statute is clear, the Court need not engage in an  
23 analysis of the public policy behind the statute. However, the Court notes that the result  
24 reached in this case appears fully consistent with the intention of the Legislature.  
25 Fundamentally, the so-called Anti-Deficiency provisions of NRS Chapter 40 (as well as  
26 NRS 107.095) were enacted in order to protect borrowers (and guarantors) whose  
27  
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1 property has already been taken and forcibly sold from also being subjected to  
2 subsequent lawsuits seeking deficiency judgments that may be repetitive, untimely, and  
3 premised upon a waiver of rights that cannot be waived under Nevada law. In order to  
4 accomplish this objective, the Legislature expressly required that actions seeking such  
5 deficiency judgments must comply with certain specific requirements relating to such  
6 things as repetition (the "one action rule"), notice, timeliness, waiver, and the like.  
7 However, the Plaintiff's position, if adopted, would enable mortgagees to easily (and  
8 unilaterally) circumvent these protections by simply choosing to seek the appointment of  
9 a receiver in every case of default rather than attempting to foreclose by way of trustee's  
10 sale or sheriff's sale. (The Court notes that the receivership statutes (NRS 32.010 and  
11 107.100) are broadly drafted and could theoretically be construed to permit a receiver to  
12 be appointed in virtually every case in which a borrower is in default). Under the  
13 Plaintiff's theory, after the receiver is appointed and sells the property, the mortgagee  
14 could then pursue deficiency actions wholly outside of the protections of NRS Chapter  
15 40, including suits that otherwise would be deemed untimely, harassing, repetitive, or  
16 illegal. Such a result would be absurd on multiple levels, including that it would  
17 substantially increase the caseload of the Court by encouraging judicial intervention and  
18 supervision in every case of default. Judicial burden aside, the Court finds it unlikely  
19 that the Legislature would have created a statutory scheme that could be so easily  
20 undermined at the will of the mortgagee. Furthermore, in principle, the appointment of a  
21 receiver, while necessary in many cases to protect the property, ought to be in the  
22 majority of cases the least desirable and least necessary method for recouping an unpaid  
23 mortgage when compared to a trustee's sale or another non-judicial foreclosure  
24 mechanism. But if the Plaintiff's argument were accepted, receivership would actually  
25 become the most rewarding and most profitable avenue for the mortgagee since it would  
26 provide the sole method of seeking a deficiency outside of the protections of NRS  
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1 Chapter 40. That could not have been what the Legislature intended.

2 (39) For the reasons set forth above, the Court finds that no genuine issues of  
3 material fact exist and the Defendants are entitled to judgment as a matter of law that the  
4 Plaintiff cannot maintain this action seeking a deficiency judgment against the  
5 Defendants. Accordingly, the Defendants' Motion for Summary Judgment is  
6 GRANTED and judgment is hereby entered for the Defendants on the causes of action  
7 asserting breach of contract contained in the Plaintiff's Second Amended Complaint. All  
8 future hearing dates in this matter are hereby vacated.

9 DATED: August 16, 2012

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11 JEROME T. TAO  
12 DISTRICT COURT JUDGE  
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Matthew J. Forstadt, Esq. - Michael F. Lynch, Esq. - Via Facsimile: 362-9472  
Brent A. Larsen, Esq. - Shana S. Gullickson, Esq. - Via Facsimile: 366-0854

*Paula Walsh*  
Paula Walsh, Executive Assistant



## BROADCAST REPORT

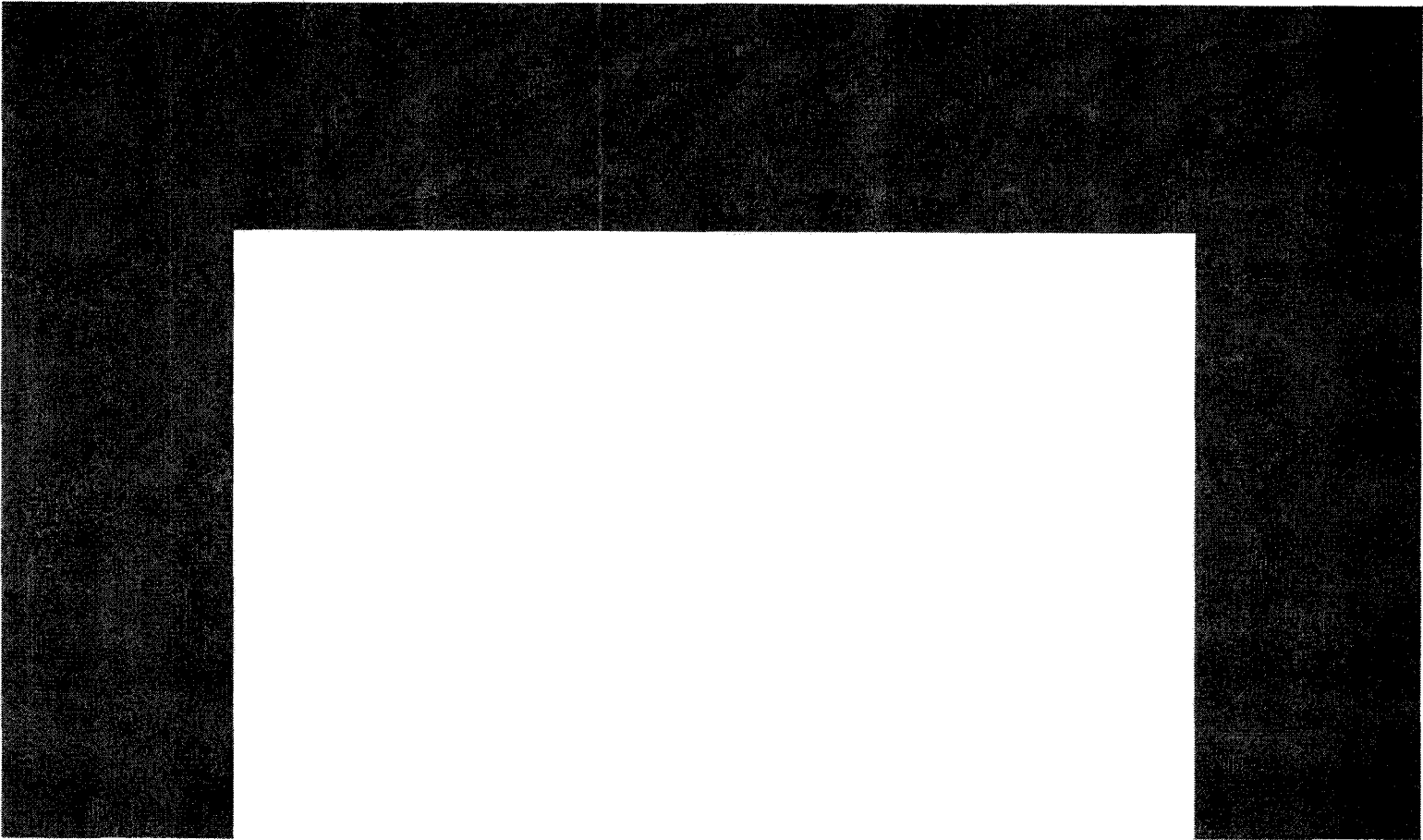
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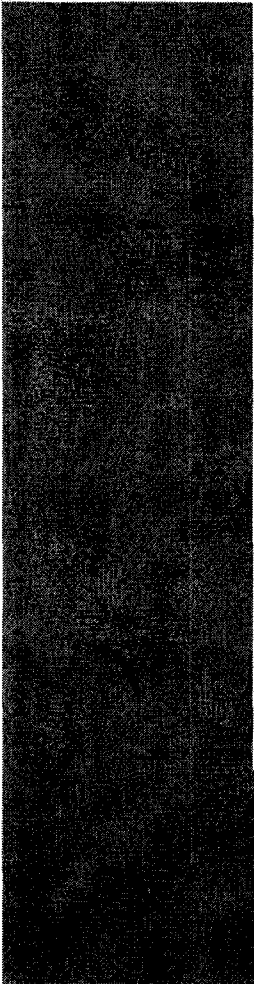
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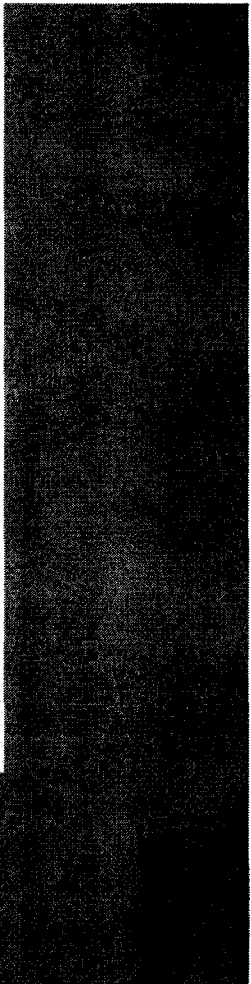
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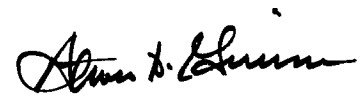


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CLERK OF THE COURT

**MAMJ**

Michael F. Lynch  
Nevada Bar No. 8555  
Howard Kim & Associates  
400 N. Stephanie Street, Suite 160  
Henderson, NV 89014  
702.413.8282 (direct)  
702.543.3279 (fax)  
mlynch@hkimlaw.com

Robert M. Charles, Jr.  
Nevada Bar No. 6593  
Lewis and Roca LLP  
3993 Howard Hughes Parkway, Suite 600  
Las Vegas, Nevada 89169-5996  
702.949.8320 (direct)  
702.949.8321 (fax)  
rcharles@LRLaw.com

*Attorneys for Plaintiff***DISTRICT COURT****CLARK COUNTY, NEVADA**

U.S. Bank National Association as Trustee For  
The Registered Holders of ML-CFC Commercial  
Mortgage Trust 2007-7 Commercial Mortgage  
Pass-Through Certificates Series 2007-7, by and  
through Midland Loan Services, as its Special  
Servicer,

Plaintiff,

vs.

Palmilla Development Co., Inc., a Nevada  
corporation; Hagai Rapaport, an individual; and  
Does I to X; and Roe Corporations X to XX,

Defendants.

Case No.: 09-A-595321-C  
Dept No.: 20

**Plaintiff's Motion to Alter or Amend  
Order Granting Defendants' Motion for  
Summary Judgment Pursuant to NRCF  
52(B) and 59(E); Alternatively, Motion  
for Reconsideration Of Order Granting  
Defendants' Motion for Summary  
Judgment**

Date of Hearing (see below)

Time of Hearing (see below)

Plaintiff U.S. Bank National Association as Trustee for the Registered Holders of ML-CFC  
Commercial Mortgage Trust 2007-7 Commercial Mortgage Pass-Through Certificates Series  
2007-7, by and through Midland Loan Services, as its Special Servicer ("Lender" or "Plaintiff")  
moves this Court to alter or amend the Court's Order Granting Defendants' Motion for Summary  
Judgment Pursuant to NRCF 52(b) and 59(e); or alternatively, for reconsideration of the Order  
(the "Motion to Amend").

1 This Motion to Amend is made and based upon the Declaration of Andrea Helm on file  
2 herein, the Declaration of Sharon G. Silverberg (the "Silverberg Declaration") attached hereto as  
3 **Exhibit "1"**, the Declaration of Dianne Burnett (the "Burnett Declaration") attached hereto as  
4 **Exhibit "2"**, the Declaration of Roberto Diaz (the "Diaz Declaration" attached hereto as  
5 **Exhibit "3"**), all pleadings and papers on file, the facts of the case, the following Memorandum of  
6 Points and Authorities, and the oral argument of counsel adduced in this case.

7 DATED this 31st day of August, 2012.

8 **HOWARD KIM & ASSOCIATES**

9 /s/ Michael F. Lynch

10 Michael F. Lynch  
11 Nevada Bar No. 8555  
12 400 N. Stephanie Street, Suite 160  
13 Henderson, NV 89014  
14 702.413.8282 (direct)  
15 702.543.3279 (fax)  
16 mlynch@hkimlaw.com

17 **LEWIS AND ROCA LLP**

18 Robert M. Charles, Jr.  
19 Nevada Bar No. 6593  
20 3993 Howard Hughes Parkway, Suite 600  
21 Las Vegas, Nevada 89169-5996  
22 702.949.8320 (direct)  
23 702.949.8321 (fax)  
24 rcharles@LRLaw.com

25 *Attorneys for Plaintiff*

26 **NOTICE OF MOTION**

27 TO: All Defendants above-named and their attorneys; and

28 TO: All parties of record and their attorneys of record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will  
bring the foregoing Motion to Amend on for hearing before the court on the 10 day of  
October, 2012, at the hour of 9:00 AM a.m. or as soon thereafter as  
counsel can be heard.

DATED this 31st day of August, 2012.

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**HOWARD KIM & ASSOCIATES**

/s/ Michael F. Lynch

Michael F. Lynch  
Nevada Bar No. 8555  
400 N. Stephanie Street, Suite 160  
Henderson, NV 89014  
702.413.8282 (direct)  
702.543.3279 (fax)  
mlynch@hkimlaw.com

**LEWIS AND ROCA LLP**

Robert M. Charles, Jr.  
Nevada Bar No. 6593  
3993 Howard Hughes Parkway, Suite 600  
Las Vegas, Nevada 89169-5996  
702.949.8320 (direct)  
702.949.8321 (fax)  
rcharles@LRLaw.com

*Attorneys for Plaintiff*

001448

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. Summary of Relief Requested**

For the reasons set forth below, Plaintiff requests, pursuant to NRCP 52(b), that the Court amend the following findings in its Order Granting Defendants' Motion For Summary Judgment (the "Judgment") (a) that Plaintiff's deficiency claims were not brought within six months of the Receiver's sale and (b) that that no material fact exists to rebut Defendants' argument that Plaintiff failed to serve adequate notice.

Plaintiff further requests that the Judgment be altered or amended under NRCP 59(e) or EDCR 2.24 in these respects as based upon errors of law that were not considered by the Court in its Judgment: (i) if a Receiver's sale is a "foreclosure", it is most like a judicial sale, not a trustee's sale, and NRS 107.095 is inapplicable; (ii) the "one-action" rule does not apply to a judicial sale, and (iii) Defendant Hagai Rapaport ("Rapaport") validly waived the "one-action" rule defense.

**II. Authority**

A court has the inherent authority to reconsider, amend, correct, modify and vacate its prior orders "for sufficient cause shown." *Trail v. Faretto*, 91 Nev. 401, 403, 536 P.2d 1026, 1027 (1975).

NRCP 52(b) provides:

**(b) Amendment.** Upon a party's motion filed not later than 10 days after service of written notice of entry of judgment, the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may later be questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

Similarly, NRCP 59(e) provides:

**(e) Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be filed no later than 10 days after service of written notice of entry of the judgment.

1 **III. The Court's Factual Finding That the "Deficiency" Claim Was Not Brought Within**  
2 **Six Months Of The Receiver's Sale Was Erroneous.**

3 This Court found that Plaintiff's claims for money damages against Defendants are  
4 deficiency claims after foreclosure, and that these claims must have been,<sup>1</sup> but were not brought  
5 within six months of the sale of the Property by Receiver. However, the money damages claims  
6 *were* brought within six months of the Receiver's sale, and the Judgment on this point is  
7 unsustainable because Defendants never established the date of the Receivership sale with  
8 admissible evidence. The Judgment should therefore be amended pursuant to NRCP 52(b).

9 Specifically, the Court found: "Here, the Plaintiff does not dispute that it failed to assert  
10 the deficiency for more than six months following the Receiver sale." *See* Order at 13:24:27.  
11 Implicit within this finding is a related and necessary foundational finding that the "deficiency"  
12 claim was not brought within the six months following the Receiver's sale. Both the explicit and  
13 the implicit findings should be amended because they are unsupported by admissible evidence and  
14 because they are factually and demonstrably incorrect.

15 On information and belief, Plaintiff did orally dispute Defendants' claim that the statute of  
16 limitations had run on the money damages claim at the August 8, 2012 hearing. A copy of the  
17 transcript has been ordered, and will be offered in supplement to this Motion to Amend when  
18 available. Even if Plaintiff did not orally dispute Defendants statute of limitations argument,  
19 however, Defendants themselves did not meet their burden to provide admissible evidence in  
20 support of their Motion for Summary Judgment, and Plaintiff now offers admissible evidence in  
21 support of this Motion to Amend that the money damages claim was brought within six months of  
22 the Receiver's sale.  
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28 <sup>1</sup> Plaintiff does not, by this Motion to Amend, waive its other factual and legal objections, which  
may be asserted on appeal.

**A. The Finding That the “Deficiency” Claim Was Not Brought Within Six Months Of The Receiver’s Sale Was Not Supported by Admissible Evidence.**

Defendants concede that Plaintiff alleged its money damages claim no later than November 24, 2010, when Plaintiff filed its First Amended Complaint.<sup>2</sup> However, because Judgment was granted on Defendants’ Motion for Summary Judgment, Defendants bore the burden of providing admissible evidence to establish the date of the Receiver’s sale. They failed to do so. As such, even if the six-month statute of limitations were properly applied to these facts, the Court was without any evidence to establish the date upon which such a period would expire.

“Evidence introduced in support of or opposition to a motion for summary judgment must be admissible evidence.” *Henry Products Inc. v. Tarmu*, 114 Nev. 1017, 1019, 967 P.2d 444, 445 (1998) (citing NRCP 56(e); *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)) (emphasis added). Because authentication is a condition precedent to admissibility, all evidence presented in connection with a summary judgment proceeding must be authenticated.<sup>3</sup> Regardless of whether Plaintiff objected to Defendants’ arguments in opposition to summary judgment, the Court should consider this evidence now.<sup>4</sup>

All three dates suggested<sup>5</sup> by Defendants as the universe of possible dates for the Receiver’s sale are factually incorrect and unsupported by admissible evidence: (a) the Receiver’s sale did not occur on the date the court-appointed Receiver executed the PSA; (b) the Receiver’s sale did not occur on the date the motion to approve the PSA was granted; and (c) the Receiver’s sale did not occur on the date notice of entry of the order approving the PSA was served. Nothing proffered by Defendants evidences the actual date of the Receiver’s sale and none of the events

<sup>2</sup> See Motion for Summary Judgment at 22:24—26 (Defendants alleging it is an undisputed fact that “[t]he Plaintiff never filed its claim for a deficiency judgment allegedly resulting from such sale until it filed its First Amended Complaint in this case on November 24, 2010.”).

<sup>3</sup> See NRS 52.015(1) (providing “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims.”).

<sup>4</sup> NRCP 52(b) provides “[w]hen findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may later be questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.”

<sup>5</sup> See Defendant’s Motion for Summary Judgment at 22:18-24.



1 pointed to by Defendants are correct. The Court's findings on this point are therefore unsupported  
2 by sufficient evidence, and should be amended under NRCP 52(b).

3 Contrary to the argument of Defendants, the execution of the PSA did not transfer  
4 ownership or title because the Receiver was without authority to sell the Property without *prior*  
5 Court approval.<sup>6</sup>

6 This requirement for prior Court approval was referenced included in the terms of the PSA,  
7 which specified that Court approval was a condition precedent:

8 5.6 Approvals and Conditions Precedent to Closing. Closing shall not  
9 occur unless and until all approvals and conditions precedent to Closing  
10 are either satisfied or waiver [sic], including, in addition to all other  
11 approvals and conditions precedent specified In this Agreement, the  
12 following (collectively, the "Conditions Precedent to Closing"):

13 (a) Approval of the Eighth Judicial District Court in Clark County,  
14 Nevada, or any other court of competent jurisdiction, of the transaction  
15 specified in this Agreement for the sale of Property of Borrower by  
16 Seller, pursuant to the powers granted Seller under the Order  
17 Appointing Receiver ("Court Approval").

18 See PSA at page 13, attached to Defendants' Motion for Summary Judgment as Exhibit B.

19 Similarly, the other two events pointed to by Defendants do not evidence the date the  
20 Receiver's sale occurred. Defendants point to the Order Approving the Receiver's Sale, but that  
21 order did not actually sell the Property, take ownership from Palmilla or convey ownership to a  
22 new owner. Rather, the Court provided:

23 The Receiver is hereby authorized to sell and to fully convey all of  
24 the interest of Palmilla Development Co., Inc., a Nevada corporation  
25 ("Borrower"), in the Property, to Buyer, and is hereby authorized to  
26 execute and deliver all documents, including without limitation a  
27 deed to convey title to the Property of Borrower, in order to  
28 consummate the sale and fully and finally convey ownership of the  
Property in its entirety.

See Order Approving the Receiver's Sale at page 3, filed on March 26, 2010.

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<sup>6</sup> See Order Appointing Receiver entered on September 4, 2009, on file herein at 7:4--19  
(providing "The Receiver is hereby given the power and authority usually held by receivers and  
reasonably necessary to accomplish the purpose of this Receivership including, without limitation,  
the specific power to ... [m]aintain, protect, collect, sell, liquidate, or otherwise dispose of 16  
property; provided, however, that the Receiver shall not sell or otherwise dispose of any property,  
other than in the ordinary course of business. Notwithstanding the foregoing, the sale, liquidation,  
or other conversion of any real property by the Receiver shall be subject to prior Court approval."  
(emphasis added).

1 The Court was therefore without any evidence to support a finding that the six-month  
2 statute of limitations under NRS 40.455, even if applicable, had begun to run on any particular  
3 date. Because Defendants did not support their arguments relating to the running of the six-month  
4 statute of limitations with any admissible evidence, the Court lacked a basis to enter the referenced  
5 findings or to grant summary judgment against Plaintiff on the statute of limitations issue.

6 **B. The Court's Finding That the "Deficiency" Claim Was Not Brought Within**  
7 **Six Months Of The Receiver's Sale Was Incorrect.**

8 The Receiver's sale was handled through First American Title Insurance Company,  
9 National Commercial Services ("First American"). As evidenced by the Declaration of Sharon G.  
10 Silverberg (the "Silverberg Declaration"), attached as Exhibit 1, Senior Commercial Escrow  
11 Officer for First American, the Receiver's sale did not close until **June 7, 2010**. The June 7, 2010,  
12 closing date for the Receiver's sale is supported by the following admissible evidence: (a) the  
13 Silverberg Declaration; (b) an authenticated copy of First American's Wire Transfer Order,  
14 attached the Silverberg Declaration as Exhibit 1(b); (c) an authenticated copy of the (consolidated)  
15 Final Settlement Statement, attached to the Silverberg Declaration as Exhibit 1(d); and (d) an  
16 authenticated copy of the recorded Grant, Bargain and Sale Deed which effectuated the Receiver's  
17 sale, attached to the Silverberg Declaration as Exhibit 1(e).

18 Defendants admit that the First Amended Complaint, on file herein, which asserted the  
19 "deficiency" claim against both Defendants, was filed on November 24, 2010. *See* Motion for  
20 Summary Judgment at 22:24—26.<sup>7</sup> Subtracting 180 days from the date of that complaint results  
21 in an operative date of May 28, 2010. In sum, if the Receiver's sale closed on or after **May 28,**  
22 **2010**, then a six-month statute of limitations could not have run on November 24, 2010.

23 The Receiver's sale closed on **June 7, 2010**, which is within six months of the First  
24 Amended Complaint. Accordingly, even if the Receiver's sale was a foreclosure and NRS 40.455  
25 applies, Plaintiff met the deadline.

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<sup>7</sup> Alleging it as an undisputed fact that "The Plaintiff never filed its claim for a deficiency  
28 judgment allegedly resulting from such sale until it filed its First Amended Complaint in this case  
on November 24, 2010."

1 **IV. The Court's Finding That Defendants Were Not Provided Proper Notice of the**  
2 **Receiver's Sale Should be Amended Because it is Not Supported by Sufficient**  
3 **Evidence and Because it is Demonstratively Incorrect**

4 This Court found that Defendants were entitled to summary judgment because Plaintiff did  
5 not comply with NRS 107.095, as to notice of default.

6 **A. The Non-Judicial Sale Requirement of NRS 107.095 Is Inapplicable**

7 The Court's ruling misapprehends the nature of foreclosure. Putting aside whether a  
8 receivership sale is a foreclosure, Nevada law plainly authorizes two types of foreclosures:

9 • **Judicial Sale** pursuant to NRS 40.430 *et seq.* The action is commenced by a  
10 complaint that seeks foreclosure of a mortgage or deed of trust. The foreclosure sale is conducted  
11 by the sheriff at execution after entry of a judgment. See NRS 21.150.

12 • **Non-Judicial Sale** or private trustee's sale under NRS 107.080 *et seq.* The sale is  
13 conducted without court process by a trustee appointed through the deed of trust. Among other  
14 procedural pre-requisites is a statement of breach and notice of default ("NOD") under NRS  
15 107.080(2)(c), lapse of at least three months under NRS 107.080(2)(d), and other statutory  
16 requirements.

17 This Court points out that the failure to give the NOD has a consequence under NRS  
18 107.095 — release of the guarantor or surety from the debt. But this is only on account of  
19 "Failure to give the notice of default **required by NRS 107.090**"... NRS 107.095(2) (emphasis  
20 added). NRS 107.090 references the NRS 107.080 NOD requirement. The NOD is not required  
21 for a judicial sale under NRS 40.430 *et seq.*, and there is no statutory basis to interpret that  
22 requirement into a judicially-authorized receivership sale.

23 This conclusion should not seem unjust given that the receivership sale occurs in a judicial  
24 proceeding commenced by a summons and complaint upon parties over which the Court has  
25 jurisdiction, who may appear and protect their rights. Presumably the Legislature understood that  
26 the complaint in a judicial foreclosure action provides the information concerning default that the  
27 non-judicial sale NOD must provide.  
28

1           **B.       The Court’s Finding That Defendants Were Not Provided Notice of the**  
2           **Receiver’s Sale Was Not Supported by Admissible Evidence.**

3           Defendants argued, again without any evidence whatsoever, that Plaintiff did not comply  
4           with the notice provisions of NRS 107.095. Neither Defendant even *argues* (much less provide a  
5           sworn declaration in support) that they did not receive notice, just that Plaintiff failed to comply  
6           with notice requirements. Defendants’ counsel’s arguments alone, without evidentiary support,  
7           does not and cannot support summary judgment as a matter of law, and this Court’s findings  
8           should be set aside on this ground alone.

9           This Court found that “Defendant Rapaport asserts that those notices were not sent to him  
10          as expressly required [under NRS 107.095].” *See* Judgment at 13:4—5. Neither Defendant  
11          alleges that. With respect to notice, Defendants only allege that Plaintiff failed to provide notice  
12          as required by NRS 107.095. Again, nowhere in the record is any affidavit or other evidence from  
13          either Defendant averring that they did not receive notice.

14           **C.       The Court’s Finding That Defendants Were Not Provided Notice of the**  
15           **Receiver’s Sale Was Incorrect.**

16          In fact, the evidence shows that Palmilla *was* served with notice of the NOD. Because  
17          Rapaport is the principal of Palmilla,<sup>8</sup> it is seems beyond reasonable argument that Rapaport, at  
18          least in his capacity as president of Palmilla, also received the NOD mailings.

19          First, the NOD was served on 161 addressees.<sup>9</sup> As conceded by Defendants, a Notice of  
20          Default and Election to Sell Under Deed of Trust was recorded against the Property on January 12,  
21          2009. *See* Exhibit E to Defendants’ Reply in Support of Motion for Summary Judgment; *see also*  
22          an authenticated copy of the Notice of Default and Election to Sell Under Deed of Trust attached  
23          to the Burnett Declaration as Exhibit 2(a); Affidavits of Mailing attached to the Declaration of  
24          Diane Burnett, attached hereto as Exhibit 2(b). Further evidence that notice satisfying NRS

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<sup>8</sup> *See* Quitclaim Deed, Exhibit 1(f) to the Silverberg Declaration (Rapaport signing as president of  
26          Palmilla).

27          <sup>9</sup> NRS 107.095(1) provides in relevant part, “The notice of default required by NRS 107.080 must  
28          also be sent by registered or certified mail, return receipt requested and with postage prepaid, to  
        each guarantor or surety of the debt. If the address of the guarantor or surety is unknown, the  
        notice must be sent to the address of the trust property.”

1 107.095 was mailed is set forth by the authenticated copies of the Domestic Return Receipts,  
2 collectively attached to the Burnett Declaration as Exhibit 2(c).

3 Plaintiff does concede that these notices were addressed to Defendant Palmilla, not  
4 Rapaport. In all, the Notice of Default and Election to Sell was sent to 161 addressees as  
5 evidenced by the Affidavits of Mailing. Although addressed to Palmilla, these mailings reached  
6 Defendant Rapaport at least one of his self-provided provided addresses. As provided by the  
7 Rapaport Guaranty, notices under that Guaranty should be sent to:

8 To Guarantor:  
9 HAGAI RAPAPORT  
2857 Paradise Road Suite 2001  
10 Las Vegas, Nevada 89109-9020

With copy to:  
Ronald E. Gillette, Esq.  
235 West Brooks Avenue, 2nd Floor  
North Las Vegas, Nevada 89030

11 See Limited Recourse obligations Guaranty at page 7, an authenticated copy of which is attached  
12 to the Helm Declaration as Exhibit 9.

13 The Affidavits of Mailing show that copies of Notice of Default and Election to Sell Under  
14 Deed of Trust were mailed both Defendants' attorney representative Ronald Gillette, Esq. as  
15 provided for in the Guaranty. Moreover, even though the Affidavit of Mailing does not appear to  
16 evidence a separate mailing to Defendant Rapaport at the Paradise Road address, service to his  
17 attorney Ronald Gillette substantially complies with both the Guaranty and with NRS 107.095.  
18 See *Leven v. Frey*, 123 Nev. 399, 408, 168 P.3d 712, 718—719 (2007) (finding “[o]ur  
19 interpretation of the statute's timing requirements and our conclusion that those requirements must  
20 be complied with strictly is consistent with the general tenet that ‘time and manner’ requirements  
21 are strictly construed, whereas substantial compliance may be sufficient for ‘form and content’  
22 requirements.”).

23 Moreover, NRS 107.095 provides that when “the address of the guarantor or surety is  
24 unknown, the notice must be sent to the address of the trust property.” NRS 107.095(1). Here,  
25 Plaintiff did not know the proper address for Defendant Guarantor. In a previous case naming  
26 Defendant Rapaport as defendant, significant efforts to serve Mr. Rapaport were undertaken, and  
27 service proved so difficult on Mr. Rapaport, that service was only effectuated on him personally  
28 outside the United States Bankruptcy Court in Woodland Hills, California. See Proof of Service  
on March 30, 2009, as evidenced by the affidavit of Roberto Diaz of Ace Messenger & Attorney

1 Service, Inc., filed in case number A585424, attached hereto as **Exhibit “3”**. There would have  
2 been no reason to incur the time and expense of attempting service of Nevada process on  
3 Defendant Rapaport outside a courtroom in Woodland Hills, California if Rapaport could have  
4 been served in Las Vegas. Accordingly, as evidenced by the extraordinary efforts to serve  
5 Rapaport in public in California just three months after service of the Notice of Default and  
6 Election to Sell was served, it is apparent that Plaintiff did not have a good address for Rapaport.  
7 Consistent with NRS 107.095, notice was served at a plethora of other addresses, including the  
8 Property address, which should have reached Rapaport. In all, the Notice of Default and Election  
9 to Sell was sent to 161 addresses, including Rapaport’s own designated attorney. Accordingly,  
10 even if NRS 107.095 were applicable to the Receiver’s sale, service upon Rapaport was sufficient.

11 Of course, the Receiver’s sale occurred in the context of a judicial proceeding commenced  
12 by service of a summons and complaint. Palmilla was represented by counsel in the proceeding,  
13 presumably communicating with Rapaport, who is Palmilla’s principal.

14 Finally, it is uncontested that both Defendants had actual notice of the Receiver’s sale prior  
15 to its closing. Defendant Rapaport personally signed (on behalf of Defendant Palmilla) a  
16 quitclaim deed to assist in the closing of the Receiver’s sale. An authenticated copy of the  
17 Quitclaim Deed signed by Defendant Rapaport is attached to the Silverberg Declaration as Exhibit  
18 1(f).

19 **D. The Court’s Finding That Defendants Were Not Provided Notice of the**  
20 **Receiver’s Sale Contradicts this Court’s Previous Findings.**

21 The Judgment should be amended because the Receiver’s sale that was approved by the  
22 Court in this above-captioned case, included the following judgment:

23 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED  
24 THAT:

25 1. The Lender has provided sufficient notice of the proposed sale  
26 and PSA to all necessary parties to this action;

27 *See Order Granting Motion to Approve Sale of Receivership Property, filed herein on March 26,*  
28 *2010. Notice of entry of that order was served on Defendants, who never took an appeal from that*

1 order. It is therefore the law of this case that all necessary parties were provided sufficient notice  
2 of the Receiver's sale.

3 **E. Lack of Notice to Rapaport Is Not A Defense to Palmilla**

4 Defendants sought summary judgment only as to Defendant Rapaport based on the NRS  
5 107.095. Defendants' Motion at 3. The conclusion that Defendant Rapaport did not receive  
6 certain notices does not justify summary judgment in favor of the borrower Palmilla Development  
7 Co., Inc. Nor would the Court absolve Palmilla of liability since it is a party to this action, was  
8 notified of the debt via the complaint, and received notice of the request for a receivership sale via  
9 service in this action. The order approving the Receiver's sale finds that "all necessary parties"  
10 received notice. In fact, Palmilla also received the NRS 107.095 notices of default, even though  
11 the private trustee's sale never occurred.<sup>10</sup>

12 **V. This Action Did Not Violate the One Action Rule (Nor May Rapaport Assert That**  
13 **Defense)**

14 The Court's discussion of the "one-action" rule does not appear necessary to the Court's  
15 decision.<sup>11</sup> It bears noting, however, that NRS 40.430(6)(a) contains the unambiguous  
16 determination of the Nevada legislature that "any act or proceeding: ... (a) To appoint a receiver  
17 for, or obtain possession of, any real or personal collateral for the debt or as provided in NRS  
18 32.015." is not an "action" within the meaning of the "one-action" rule. This is so especially here  
19 where the only "action" was the one suit before this Court. Further, unlike other provisions of  
20 Nevada law, Rapaport, the guarantor here, may waive the one-action rule, NRS 40-495(2); as  
21 Defendants implicitly acknowledge. Defendants' Motion at 9; *see Walters v. Dist. Ct.*, 127 Nev.  
22 \_\_\_, \_\_\_, \_\_\_, 263 P.3d 231, 232, 235 (2011) (noting NRS 40.495(2)'s effect). He did so here  
23 (albeit not specifically).<sup>12</sup>

24  
25 \_\_\_\_\_  
26 <sup>10</sup> Declaration of Diane Burnett, president of Meridian Foreclosure Service ¶¶ 10-12 and Exhibits  
thereto.

27 <sup>11</sup> Judgment ¶ 37.

28 <sup>12</sup> Limited Recourse Obligations Guaranty, Plaintiff's Motion for Partial Summary Judgment and  
Request For Deficiency Hearing Pursuant to NRS 40.457, Exhibit 6, ¶ 7.

1 **VI. CONCLUSION**

2 Plaintiff requests that the Court amend the Judgment:

- 3 • Finding that the Receiver's sale occurred on June 7, 2010; within six months of  
4 filing the First Amended Complaint in this action; so that if NRS 40.455(1) applies  
5 to this action, Plaintiff satisfied the requirement;
- 6 • Finding that if the Receiver's sale was a "foreclosure", it is most analogous to a  
7 judicial foreclosure, and NRS 107.095 does not apply;
- 8 • Palmilla was provided with appropriate notice and Rapaport was aware of both the  
9 loan default and the Receiver's sale;
- 10 • A Receiver's sale does not violate the "one-action" rule;
- 11 • Rapaport validly waived the "one-action" rule defense; and
- 12 • Accordingly, denying Defendants' Motion for Summary Judgment.

13 DATED this 31st day of August, 2012.

14 **HOWARD KIM & ASSOCIATES**

15 /s/ Michael F. Lynch

16 Michael F. Lynch  
17 Nevada Bar No. 8555  
400 N. Stephanie Street, Suite 160  
Henderson, NV 89014  
18 702.413.8282 (direct)  
702.543.3279 (fax)  
19 mlynch@hkimlaw.com

20 **LEWIS AND ROCA LLP**

21 Robert M. Charles, Jr.  
Nevada Bar No. 6593  
3993 Howard Hughes Parkway, Suite 600  
22 Las Vegas, Nevada 89169-5996  
702.949.8320 (direct)  
23 702.949.8321 (fax)  
rcharles@LRLaw.com

24 *Attorneys for Plaintiff*



1 **List of Exhibits:**

2 **Exhibit 1 – Declaration of Sharon G. Silverberg**

3 Exhibit 1(a) – PSA

4 Exhibit 1(b) – First American's Wire Transfer Order

5 Exhibit 1(c) – Seller's Final Settlement Statement

6 Exhibit 1(d) – (consolidated) Final Settlement Statement

7 Exhibit 1(e) – Grant, Bargain and Sale Deed (recorded) for Property by Receiver

8 Exhibit 1(f) – Quitclaim Deed for common elements by Palmilla

9 **Exhibit 2 – Declaration of Dianne Burnett**

10 Exhibit 2(a) – Palmilla Notice of Default and Election to Sell

11 Exhibit 2(b) – Declaration of Mailing

12 Exhibit 2(c) – Domestic Return Receipts

13 **Exhibit 3 – Declaration of Roberto Diaz**

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**CERTIFICATE OF SERVICE**

Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that service of the foregoing was made this date by depositing a copy for mailing, first class mail, postage prepaid, at Las Vegas, Nevada, to the following:

Brent Larsen, Esq. DEANER, DEANER, SCANN, MALAN & LARSEN 720 S. Fourth Street, #300 Las Vegas, NV 89101  <i>Attorneys for Defendants</i>	
--	--

Dated August 31, 2012.

/s/ Michael F. Lynch  
An employee of Howard Kim & Associates

# Exhibit 1

# Exhibit 1

**DECLARATION OF SHARON G. SILVERBERG**

I, Sharon G. Silverberg, make the following declarations:

1. I am Senior Commercial Escrow Officer for First American Title Insurance Company, National Commercial Services ("First American").

2. I am over 21 years old and make the following statements based on my personal knowledge, and can testify to these matters if called to testify before the court. With respect to matters based upon information and belief, I believe the statements made to be true and correct based upon the business records of First American.

3. I make this declaration in support of Plaintiff's Motion to Alter or Amend Order Granting Defendants' Motion for Summary Judgment Pursuant to NRCP 52(b) and 59(e); Alternatively, Motion for Reconsideration of Order Granting Defendants' Motion for Summary Judgment in case number A-09-595321-C.

4. In my capacity as Senior Commercial Escrow Officer, I have access to the books, records, and files pertaining First American's actions relating to my conduct of closings for the sale of real property in Nevada. I am one of the custodians of the books, records and files of First American on the files handled in my Unit.

5. I am one of the officers of First American who is responsible for the administration and monitoring of closings on the sale of real property, including ensuring that all conditions precedent to a sale of real property necessary to consummate and effectuate the sale of real property in Nevada and effectively transfer ownership and title of real property are satisfied on the files handled in my Unit.

6. The information which is set forth in this declaration was gathered and collected by myself and other persons who are regularly employed by First American from records and files which are maintained by First American in the regular and ordinary course of its business and which were prepared at or near the time of the actions or the events which are depicted in these records.

7. In my capacity as Senior Commercial Escrow Officer for First American, I am required to and have become personally familiar with the manner in which First American's

documents, books, files and records are prepared and maintained.

8. In my opinion, the methods employed by First American have proven to be an accurate and trustworthy means for First American's maintaining records and recording information about the closings of transactions.

9. I have personally reviewed the herein referenced business records of First American concerning the Sale (defined below). Based upon this review, I have reached the following conclusions.

10. I was the principal escrow officer responsible for a transaction to which First American assigned file number NCS-425712-HHLV, which was the closing on the sale of certain real property owned by Palmilla Development Co., Inc., a Nevada corporation ("Palmilla") identified by the Clark County Tax Assessor Parcel Nos:

- a. 124-30-311-031;
- b. 124-30-312-014 and 015;
- c. 124-30-312-017 and 018;
- d. 124-30-312-025 – 169, inclusive;
- e. 124-30-312-171 and 172;
- f. 124-30-312-177; and
- g. 124-30-312-180 – 182, inclusive,

(the "Property").

11. The Sale effectuated the transfer of ownership in, and title to, the Property from Palmilla as seller to Pacifica North Vegas, LLC as buyer (the "Sale") as set forth in an Agreement for Sale and Purchase of Property (Commercial Property) by and between Greystar Real Estate partners, John Rials as agent, as duly appointed Receiver of the Property, pursuant to that certain Order Appointing Receivers submitted by Lender in connection with the Lawsuit as Seller, and Pacifica Companies, LLC as Buyer (the "PSA"). A true and correct copy of the PSA is attached hereto as **Exhibit "1(a)"**.

12. First American opened and closed escrow on the Sale pursuant to the PSA.

1  
2 13. The Sale closed on June 7, 2010, as evidenced by:

- 3 a. First American's Wire Transfer Order, a true and correct copy of which is  
4 attached hereto as **Exhibit "1(b)";**  
5 b. Seller's Final Settlement Statement, a true and correct copy of which is attached  
6 hereto as **Exhibit "1(c)";** and  
7 c. The (consolidated) Final Settlement Statement, a true and correct copy of which  
8 is attached hereto as **Exhibit "1(d)".**

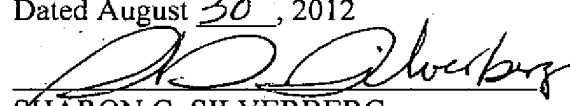
9 14. The Grant, Bargain and Sale Deed, which was made as a condition of closing on  
10 the Sale pursuant to the PSA was recorded on June 8, 2010, with the Clark County Records'  
11 Office as Document No. 20100608:0000104, a true and correct copy of which is attached hereto as  
12 **Exhibit "1(e)".**

13 15. Prior to the date of the Sale, I was made aware or became aware that there was an  
14 additional parcel of real property within the Palmilla housing development that consisted of  
15 common areas within the Palmilla development. Palmilla voluntarily quitclaimed title and  
16 ownership of the common area parcel to the Palmilla Homeowners Association.

17 16. Hagai Rapaport personally signed a quitclaim deed on behalf of Palmilla conveying  
18 these common areas to the Palmilla Homeowners Association on May 26, 2010, which deed was  
19 recorded on June 8, 2010, with the Clark County Records' Office as Document No.  
20 20100608:0000103, a true and correct copy of which is attached hereto as **Exhibit "1(f)".**

21 Under penalties of perjury of the State of Nevada, I declare that the Declarations herein  
22 above are true of my own knowledge.

23 Dated August 30, 2012

24   
25 SHARON G. SILVERBERG  
26 Senior Commercial Escrow Officer  
27 First American Title Insurance Company  
28

**List of Exhibits to the Silverberg Declaration:**

Exhibit 1(a) – PSA

Exhibit 1(b) – First American's Wire Transfer Order

Exhibit 1(c) – Seller's Final Settlement Statement

Exhibit 1(d) – (consolidated) Final Settlement Statement

Exhibit 1(e) – Grant, Bargain and Sale Deed (recorded) for Property by Receiver

Exhibit 1(f) – Quitclaim Deed for common elements by Palmilla

Exhibit 1(a)

001467

001467

Exhibit 1(a)



**AGREEMENT FOR SALE AND PURCHASE OF PROPERTY**  
**(Commercial Property)**

**SELLER:** Greystar Real Estate Partners, John Riels as agent, as duly appointed Receiver of the Property, pursuant to that certain Order Appointing Receiver submitted by Lender in connection with the Lawsuit

**BUYER:** Pacifica Companies LLC, a California limited liability company

**EXECUTION DATE:** February 5, 2010

**PROPERTY:** Palmilla Townhomes, 157 units of 300 units, generally located northeast of the intersection of West Ann Road and North Decatur Boulevard in North Las Vegas, Nevada

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**EXHIBITS**

- A LEGAL DESCRIPTION
- B TITLE COMMITMENT
- C GRANT, BARGAIN, SALE DEED
- D AFFIDAVIT
- E BILL OF SALE
- F ASSIGNMENT AND ASSUMPTION AGREEMENT
- G NOTICE TO TENANT
- H NOTICE TO SERVICE CONTRACTOR

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## AGREEMENT FOR SALE AND PURCHASE OF PROPERTY

Greystar Real Estate Partners, John Riels as agent, as duly appointed Receiver of the Property, pursuant to that certain Order Appointing Receiver submitted by Lender in connection with the Lawsuit ("Seller"), and Pacific Companies LLC, a California limited liability company ("Buyer"), whose address is 1785 Hancock Street, Suite 100, San Diego, California 92110, and whose Taxpayer Identification Number is 20-1095984, hereby agree on this 5<sup>th</sup> day of February, 2010 (the "Effective Date"), that Seller shall sell to Buyer and Buyer shall purchase from Seller, upon the following terms and conditions and for the price herein set forth, the Property, as such term is defined in Article I of this Agreement.

### ARTICLE I DEFINED TERMS

1.1 Definitions. As used herein, the following terms shall have the following meanings:

(a) "Agreement" shall mean this Agreement for Sale and Purchase of Property executed by both Seller and Buyer.

(b) "Business Day" shall mean any day on which business is conducted by national banking institutions in Clark County, State of Nevada.

(c) "Borrower" shall mean Palmilla Development Co., Inc., a Nevada corporation, and the Defendant in the Lawsuit.

(d) "Closing" shall mean the execution and delivery of the Deed, the Bill of Sale and the other instruments to be executed by Seller conveying the Property to Buyer and the payment by Buyer to Seller of the Purchase Price.

(e) "Closing Date" shall mean that certain calendar day upon which Closing occurs, which day shall be the earlier of (i) seven (7) calendar days following the mutual execution by Buyer and Seller of this Agreement or (ii) such calendar day when all Conditions Precedent to Closing, as specified herein, have been either satisfied or waived.

(f) "County" shall mean Clark County located in the State.

(g) "Deed" shall mean the grant, bargain, sale deed conveying fee title to the Real Property to Buyer, duly executed by Seller and acknowledged and in proper form for recordation.

(h) "Deposit" shall mean the amount from time to time held by the Title Company as Buyer's earnest money deposit. The Deposit shall be the sum of Five Hundred Thousand and 00/100 U.S. Dollars (\$500,000.00). The Deposit shall be increased to the extent interest accrues thereon.

(i) "Disclosed Broker" shall mean Marcus & Millichap, 3893 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169, Contact Person: Michael LaBar,

Telephone Number: (702) 215-7134, Facsimile Number: (702) 215-7110, Email: michael.laban@marcusmillichap.com.

(j) "Due Diligence Reports" shall mean all reports, documents, studies, analyses, and other written information delivered by Seller to Buyer or obtained by Buyer with respect to the Property, including results of physical inspections, engineering studies, engineering drawings and specifications, surveys, Hazardous Materials Reports, soil tests, site plans, feasibility studies, market studies, architectural plans, specifications and drawings, title reports, permits, approvals and authorizations (whether obtained from governmental authorities or third parties); and all other work product generated by or for Buyer in connection with the Property.

(k) "Execution Date" shall mean the date set forth in the first paragraph of this Agreement.

(l) "General Intangibles" shall mean any and all warranties, telephone exchange numbers, architectural or engineering plans and specifications, and development rights that relate to the Real Property or the Personal Property.

(m) "Hazardous Materials" shall mean any toxic, radioactive, caustic or otherwise hazardous substance, including petroleum, its derivatives, by-products and other hydrocarbons, or any substance having any constituent elements displaying any of the foregoing characteristics. The term "Hazardous Materials" includes, without limitation, any substance regulated under any and all federal, state and local statutes, laws (including case law), regulations, ordinances, rules, judgments, orders, decrees, codes, plans, injunctions, permits, concessions, grants, franchises, licenses, agreements and other governmental restrictions, whether now or hereafter in effect, relating to human health, the environment or to emissions, discharges or releases of pollutants, contaminants, toxic substances, hazardous substances or wastes into the environment including, without limitation, ambient air, surface water, ground water, or land, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling of pollutants, contaminants, hazardous materials or wastes or the clean-up or other remediation thereof.

(n) "Hazardous Materials Reports" shall mean any and all studies, reports, analyses, information, or other written records regarding the presence of Hazardous Materials at, on, in, under or relating to the Land.

(o) "Intangible Property" shall mean, to the extent the same is transferable by Seller, Seller's interest in the Leases, the Service Contracts, the Permits, the General Intangibles and any and all rights to the name of the improvements upon the Real Property.

(p) "Land" shall mean that certain parcel of real property located in the County and State, as more particularly described on the attached Exhibit A.

(q) "Lawsuit" shall mean that certain lawsuit captioned *U.S. Bank National Association as Trustee For The Registered Holders of ML-CFC Commercial Mortgage Trust 2007-7 Commercial Mortgage Pass-Through Certificates Series 2007-7*, by and through

*Midland Loan Services, Inc., as its Special Servicer, vs. Palmilla Development Co., Inc., a Nevada corporation, Case No. 09-A595321 pending in Department 9 of the Eighth Judicial District Court in Clark County, Nevada.*

(r) "Leases" shall mean any and all leases, tenancies, licenses and other rights of occupancy or use of or for any portion of the Real Property or the Personal Property (including all amendments and renewals thereof) that are in effect.

(s) "Lender" shall mean U.S. Bank National Association as Trustee For The Registered Holders of ML-CFC Commercial Mortgage Trust 2007-7 Commercial Mortgage Pass-Through Certificates Series 2007-7, by and through Midland Loan Services, Inc., as its Special Servicer, and the Plaintiff in the lawsuit.

(t) "Lender Group" shall mean Lender, and Lender's member and manager and such member's trustee, master servicer, special servicer and certificate holders and all of such parties' respective past, present, and future officers, directors, shareholders, general partners, limited partners, members, managers, agents, representatives, heirs, successors, assigns and attorneys and all of such parties' respective heirs, successors, and assigns.

(u) "Order Appointing Receiver" shall mean that certain Order Appointing Receiver dated August 18, 2009, submitted by Lender, as Plaintiff, in connection with the Lawsuit, and duly appointing Greystar Real Estate Partners, John Riels as agent, as Receiver of the Property and granting to the Receiver certain authority and duties, including, without limitation, the authority and specific power to sell property of Borrower in the ordinary course of business and to sell real property of Borrower subject to prior court approval.

(v) "Permits" shall mean any and all licenses, permits, authorizations, certificates of occupancy and other approvals that are in effect for the current use and operation of the Property.

(w) "Personal Property" shall mean all tangible personal property and fixtures in the possession, custody and control of Seller and owned by Borrower and located on or attached to the Real Property. "Personal Property" does not include property owned by others such as Tenants under Leases or parties to Service Contracts.

(x) "Property" shall mean collectively the Real Property, the Personal Property and the Intangible Property.

(y) "Prorations Date" shall mean the calendar day prior to the Closing Date.

(z) "Purchase Price" shall mean Nine Million Five Hundred Thousand and 00/100 U.S. Dollars (\$9,500,000.00).

(aa) "Real Property" shall mean the Land, together with Seller's interest in the buildings and other improvements and fixtures located thereon, together with all rights of ways, ingress and egress, easements, rights, privileges, hereditaments and appurtenances thereto or in any way appertaining thereto.

(bb) "Security Deposits" shall mean the security deposits, if any, in Seller's possession with respect to the Leases and which have not been forfeited by Tenants prior to Closing. Security Deposits shall not include any security deposits, whether or not provided for in the Leases, which were paid to Seller's predecessor(s) in interest to the Property and which were not delivered to Seller and are not in Seller's possession.

(cc) "Seller Group" shall mean Seller, and all of Seller's past, present, and future officers, directors, shareholders, general partners, limited partners, members, managers, agents, representatives, heirs, successors, assigns and attorneys and all of such parties' respective heirs, successors, and assigns.

(dd) "Service Contracts" shall mean any and all service, maintenance, supply, operating, or employment contracts or other agreements, however termed, written or oral, affecting the use, ownership, maintenance, or operation of all or any part of the Property (but specifically excluding any Leases and any management agreements).

(ee) "State" shall mean the State of Nevada.

(ff) "Tenants" shall mean those persons or entities holding rights of tenants under Leases.

(gg) "Title Commitment" shall mean the commitment, attached hereto as Exhibit B, for issuance of an owner's title insurance policy issued by the Title Company in favor of Buyer in the full amount of the Purchase Price.

(hh) "Title Company" shall mean First American Title Insurance Company at its office located at 2490 Pased Verde Parkway, Suite 100, Henderson, Nevada 89074, Contact Person: Julie Skinner, Telephone: (702) 731-4131, Facsimile: (866) 236-4325, E-mail: jskinner@firstam.com.

1.2 Other Defined Terms. Other capitalized terms contained in this Agreement shall have the meanings assigned to them herein.

## ARTICLE II

### PURCHASE PRICE AND TERMS OF PAYMENT; CLOSING ADJUSTMENTS

2.1 Purchase Price. The total Purchase Price shall be the Purchase Price set forth in Section 1.1 of this Agreement.

2.2 Payment of Purchase Price. The Purchase Price shall be paid as follows:

(a) Credit for Deposit. Upon execution of this Agreement by both Buyer and Seller, Buyer shall deliver to the Title Company in escrow the Initial Deposit by cashier's check or by wire transfer. If the Deposit is not received by the Title Company by the next Business Day following the Execution Date, this Agreement shall be terminated. The Deposit is consideration for the rights granted to Buyer to purchase the Property and shall

be non-refundable except as otherwise provided herein. Provided that Buyer has supplied Buyer's Taxpayer Identification Number on page one hereof and Buyer executes all necessary regulatory forms, the Deposit shall be held in an interest bearing account with a financial institution mutually approved by Seller and Buyer. Any interest accrued thereon shall become a part of the Deposit to be applied or disposed of in the same manner as the Deposit. At the Closing, Buyer shall receive a credit against the Purchase Price in the amount of the Deposit.

(b) Payment at Closing. The balance of the Purchase Price, subject to the prorations and adjustments set forth in this Agreement, shall be paid (i) by Buyer to Seller by wire transfer to Title Company's account at the time of Closing, and (ii) by the Title Company to Seller by wire transfer to Seller's account immediately upon Closing. Buyer expressly acknowledges and agrees that, to the extent Buyer will require financing to close on this transaction, this Agreement is not subject or conditioned in any way on Buyer's ability to obtain such financing. Neither Lender Group nor any entity related to Lender Group in any way or any member of Lender Group, or for which Lender Group or any member of Lender Group acts as a conduit for financing has any obligation to finance Buyer's purchase of the Property. ~~In the event Buyer elects to submit an application for~~ financing with any entity related to Lender Group or to any member of Lender Group and/or any entity for which Lender Group or any member of Lender Group is acting as a conduit for financing, such financing application shall be considered independently of this transaction, and neither the submission of the application or any decision or commitment by any entity to provide financing to Buyer shall have any effect on Buyer's or Seller's rights and obligations hereunder. Wired funds must be received in the Title Company's account prior to 3:00 p.m. State time on the Closing Date.

2.3 Closing Adjustments and Prorations. Except as otherwise provided in this Section, all adjustments and prorations to the Purchase Price payable at Closing shall be computed as of the end of the Prorations Date. Such adjustments and prorations shall include the following:

(a) Revenues and Expenses. Seller shall be entitled to receive all revenues and shall be charged with all expenses relating to the ownership and operation of the Property through the Prorations Date, and to the extent any revenues for the month of Closing are not collected prior to the Prorations Date, Seller shall be entitled to a credit for same at Closing. All revenues and expenses shall be prorated as of the Prorations Date. With respect to any delinquent rents or other revenue, Buyer shall use diligent and good faith efforts to collect the same after the Closing. All such collections in excess of the credit to Seller at Closing shall be remitted by Buyer to Seller promptly after receipt, but in any event not later than ten (10) calendar days after receipt. The foregoing shall not, however, prohibit or restrict Seller from attempting to collect in any lawful manner after the Closing any such delinquent rent or other revenue directly from the Tenant or other party owing such amounts, provided, however, that Seller shall not be entitled to seek eviction of any tenant after the Closing. In any event the first monies collected from Tenants or other parties shall be applied to the rents and other revenues delinquent as of the Closing Date until the delinquency has been cured and such collections shall be remitted to Seller in

accordance with the provisions hereof. The provisions of this Section shall survive the Closing.

(b) Lease Prepayments and Security Deposits. Buyer shall receive credits against the Purchase Price at Closing for (i) any Security Deposits, (ii) any other money, together with any earned interest, in Seller's actual possession for the account of Tenants, including, all rental, security, utility, key, damage, and other deposits, and (iii) any prepaid rents paid to Seller by the Tenants for any rent due and owing by Tenants after the Closing.

(c) Taxes and Assessments; Pending and Certified Liens. Taxes and assessments for the year of Closing shall be prorated as of the Prorations Date in accordance with the due date of the municipality or taxing unit in which the Property is located if the amount of such taxes is known at the time of Closing; if such amount cannot be then ascertained, proration shall be based upon the amount of the taxes, with the maximum discount allowed by law, if any, for the preceding fiscal year for the applicable municipality or taxing unit. In the event that, after the Closing Date, any of such taxes, charges or assessments shall be increased or reduced there shall not be any reapportionment post-closing, except as otherwise specified herein. In the event Seller has commenced a tax appeal on the Property and that such appeal for the year in which the Closing occurs results in a refund or reimbursement of taxes actually paid or due, Seller and Buyer shall each be entitled to share the refund or reimbursement of taxes in an amount equal to their pro rata share of the taxes paid at the Closing, except that Buyer's share shall be reduced by the proportionate share of any expenses incurred by Seller in prosecuting the appeal. In the event that any protest or appeal of an assessment or any re-assessment for any year prior to the year in which the Closing occurs results in a refund or reimbursement of taxes paid, the Seller shall be entitled to the full amount of such refund or reimbursement, with Buyer promptly forwarding such refund or reimbursement to Seller, if Buyer receives the same. Other assessments not included on the regular property tax bills, license fees for transferred licenses, and state or municipal fees and taxes for the Property for the applicable fiscal period during which Closing takes place shall be adjusted as of the Prorations Date on the basis of the most recent ascertainable assessments and rates, and shall not be re-prorated post-Closing.

(d) Utility Charges. Electric, water, sewer, gas, fuel, waste collection and removal and other utility and operating expenses relating to the Property shall be prorated as of the Prorations Date. It shall be assumed that the utility charges were incurred uniformly during the billing period in which the Closing occurs. If bills for the applicable period are unavailable, the amounts of such charges will be estimated based upon the latest known bills. Notwithstanding the foregoing, to the extent possible, Seller and Buyer shall request the utility companies to read the meters as of the Prorations Date, and Seller shall be responsible for all charges incurred through the Prorations Date. All prepaid deposits for utilities shall be refunded to Seller at the time of closing by the utility companies, and it shall be Buyer's responsibility to make any utility deposits required for service.

(e) Other Prorations. In addition to the previously stated adjustments and prorations at Closing the parties shall also make such adjustments and prorations to the

Purchase Price as are customary and usual in transactions similar to the transaction contemplated by this Agreement.

(f) Reproration and Post-Closing Adjustments. All prorations, adjustments and credits made and determined as herein provided shall be final as of the Closing Date, unless otherwise specified herein. This provision shall survive the Closing.

2.4 Costs and Expenses. Seller and Buyer shall each pay 1/2 of the Escrow Fee charged by the Title Company, if any, and Seller and Buyer shall each pay 1/2 of all State real property transfer taxes. Seller shall pay the title insurance premium for the standard coverage owner's title insurance policy to be issued to Buyer by the Title Company. Buyer shall pay all costs of recording, the cost of any extended coverage and endorsements to the title policy requested or required by Buyer and the cost of any survey obtained by Buyer. Attorneys' fees, consulting fees, and other due diligence expenses shall be borne by the party incurring such expense. The provisions of this Section shall survive the Closing.

### ARTICLE III CONDITION

3.1 Information Regarding Property. Seller has provided and may in the future provide to Buyer documents and information pertaining to the Property. All of such information is provided simply as an accommodation to Buyer, and Seller makes no representations as to their accuracy or completeness. Buyer understands that some of the foregoing documents were provided by others to Seller and were not prepared by or verified by Seller. In no event shall Seller be obligated to deliver or make available to Buyer any of Seller's internal memoranda, attorney-client privileged materials or appraisals of the Property, if any.

#### 3.2 Condition of the Property.

(a) Buyer hereby acknowledges that Seller has provided Buyer sufficient opportunity to make such independent factual, physical and legal examinations and inquiries as Buyer deems necessary and desirable with respect to the Property and the transaction contemplated by this Agreement and that Buyer has approved the Property in all respects.

(b) Buyer does hereby acknowledge, represent, warrant and agree to and with Seller that, except as otherwise expressly provided in this Agreement: (i) Buyer is expressly purchasing the Property in its existing condition "as is, where is, and with all faults" and specifically and expressly without any warranties, representations or guarantees, either express or implied, of any kind, nature, or type whatsoever from or on behalf of Seller with respect to all facts, circumstances, conditions and defects; (ii) Seller has no obligation to inspect for, repair or correct any such facts, circumstances, conditions or defects or to compensate Buyer for same; (iii) Seller has specifically bargained for the assumption by Buyer of all responsibility to inspect and investigate the Property and of all risk of adverse conditions and has structured the Purchase Price and other terms of this Agreement in consideration thereof; (iv) Buyer has undertaken all such inspections and investigations of the Property as Buyer deems necessary or appropriate under the



circumstances as to the condition of the Property and the suitability of the Property for Buyer's intended use, and based upon same, Buyer is and will be relying strictly and solely upon such inspections and examinations and the advice and counsel of its own consultants, agents, legal counsel and officers and Buyer is and will be fully satisfied that the Purchase Price is fair and adequate consideration for the Property; (v) Seller is not making and has not made any warranty or representation with respect to any materials or other data provided by Seller to Buyer (whether prepared by or for the Seller or others) or the education, skills, competence or diligence of the preparers thereof or the physical condition or any other aspect of all or any part of the Property as an inducement to Buyer to enter into this Agreement and thereafter to purchase the Property or for any other purpose; (vi) Seller is in possession, custody and control of the Property and was granted the authority and specific power to sell the Property pursuant to the Order Appointing Receiver under the terms of such sale as specified therein and consequently Seller has minimal direct or actual knowledge concerning the physical or economic characteristics of the Property, and (vii) by reason of all the foregoing, Buyer assumes the full risk of any loss or damage occasioned by any fact, circumstance, condition or defect pertaining to the Property. Without limiting the generality of any of the foregoing, Buyer specifically acknowledges that Seller does not represent or in any way warrant the accuracy of any marketing information or pamphlets listing or describing the Property or the information, if any, provided by Seller to Buyer; and

(c) Seller hereby disclaims all warranties of any kind or nature whatsoever (including warranties of condition, merchantability, habitability and fitness for particular purposes), whether expressed or implied, including, but not limited to warranties with respect to the Property, tax liabilities, zoning, land value, subdivision or land use, availability of access or utilities, ingress or egress, governmental approvals, or the soil conditions of the Land. Buyer further acknowledges that Buyer is buying the Property "as is" and in its present condition and that except as otherwise expressly provided in this Agreement, Buyer is not relying upon any representation of any kind or nature made by Seller, Seller Group or Lender Group, or any member of Seller Group or Lender Group, or any of Seller's, Seller Group's or Lender Group's employees or agents with respect to the Land or Property, and that, in fact, no such representations were made except as expressly set forth in this Agreement; and

(d) Further and without in any way limiting any other provision of this Agreement, Seller makes no warranty with respect to the presence on or beneath the Land (or any parcel in proximity thereto) of Hazardous Materials. By acceptance of this Agreement and the Deed, Buyer acknowledges that Buyer's opportunity for inspection and investigation of such Land (and other parcels in proximity thereto) has been adequate to enable Buyer to make Buyer's own determination with respect to the presence on or beneath the Land (and other parcels in proximity thereto) of such Hazardous Materials. Furthermore, Buyer's closing hereunder shall be deemed to constitute an express waiver of Buyer's and its successors' and assigns' rights to sue any of the Seller Group or the Lender Group and of Buyer's right to cause any of the Seller Group or the Lender Group to be joined in an action brought under any federal, state or local law, rule, act, or regulation now existing or hereafter enacted or amended which prohibits or regulates the use, handling, storage, transportation or

disposal of Hazardous Materials or which requires removal or remedial action with respect to such hazardous materials, specifically including but not limited to federal "CERCLA", "RCRA", and "SARA" acts.

### 3.3 Release.

(a) Without in any way limiting the generality of the preceding paragraphs, Buyer, on behalf of itself, its successors and assigns, specifically acknowledges and agrees that it forever waives, releases and discharges any claim it has, might have had or may have against the Seller Group or the Lender Group, with respect to the condition of the Property, either patent or latent, Seller's ability or inability to obtain or maintain building permits, either temporary or final certificates of occupancy or other licenses for the use or operation of the Property, and/or certificates of compliance for the Property, the actual or potential income or profits to be derived from the Property, the real estate taxes or assessments now or hereafter payable thereon, the compliance with any environmental or occupational protection, pollution, subdivision or land use laws, rules, regulations or requirements or liability for violations thereof, and any other state of facts which exist with respect to the Property.

(b) Buyer specifically acknowledges that Buyer has carefully reviewed the foregoing provisions and discussed its import with legal counsel, is fully aware of its consequences, and that the provisions of this paragraph are a material part of this Agreement. The provisions of Article II and of this Article III shall survive the termination of this Agreement, or the delivery of the Deed and the Bill of Sale and the Closing.

3.4 Maintenance of Property. Except as Buyer may otherwise consent in writing, until the Closing Date, unless this Agreement is sooner terminated, Seller shall: (i) carry on the business of the Property in the ordinary course and in a manner consistent with Seller's prior practice; (ii) subject to the terms of Section 12.1 hereof, maintain the Property in its present condition and repair ordinary wear and tear excepted; (iii) maintain the existing insurance policies for the Property (and any replacement thereof) in full force and effect; (iv) not sell, transfer, encumber, mortgage or place any lien upon the Property or in any way create or consent to the creation of any title condition affecting the Property; and (v) not enter into any Service Contracts or other similar agreements relating to the maintenance and repair of the Property unless they are cancelable upon thirty (30) days or less notice.

3.5 Entry Onto Property. Buyer shall obtain Seller's consent before entering the Property prior to Closing. Any entry upon the Property by or on behalf of Buyer shall be at Buyer's sole risk and expense, all work performed by or on behalf of Buyer shall be performed using reasonable efforts to minimize interference with Seller's and any tenants' use and occupancy of the Real Property and be performed in a workmanlike and commercially reasonable manner, and the Property shall at all times be kept in a safe condition. If requested by Seller, Buyer shall provide Seller with a certificate of comprehensive general liability insurance, in form, in an amount, and issued by a carrier reasonably acceptable to Seller, insuring Seller and any other party Seller may reasonably designate from all risks and loss associated with Buyer's exercise of its rights under this Paragraph. Buyer shall not cause or permit any damage to the Property or the imposition of

any lien on the Property. Buyer promptly and at its own expense shall cause any such lien to be removed, and, in the event of such damage, shall restore the Property to the condition existing immediately prior to Buyer's (or Buyer's agent's) entry. Buyer shall indemnify, defend and hold Seller, Seller Group and Lender Group and each member thereof harmless from and against any claims, damages, expenses or losses, resulting from or related to Buyer's (or Buyer's agent's) entry upon the Real Property or activities in respect of the Property.

3.6 The provisions of this Article III shall survive the Closing.

#### ARTICLE IV TITLE

4.1 Evidence of and Encumbrances Upon Title. The Title Commitment is attached hereto as Exhibit B. Buyer acknowledges receipt of copies of all exceptions reflected therein, provided Buyer had previously made, prior to the Effective Date hereof, a written request to Seller with regard to receipt of the same. The Title Commitment was and is the basis upon which Buyer reviewed the status of title to the Land. Buyer shall take title subject to all Acceptable Encumbrances and the following shall be deemed "Acceptable Encumbrances":

- (a) Real property taxes and assessments for the year in which the sale and purchase shall be closed, which shall be prorated as provided for herein;
- (b) The standard printed exceptions contained in owner's title insurance policies;
- (c) Zoning and other regulatory laws and ordinances affecting the Property, including, without limitation, any rules or regulations or association documents affecting the Property;
- (d) Matters that would be disclosed by an accurate survey;
- (e) Easements for public utilities and all conditions, covenants, restrictions, agreements, limitations, reservations, declarations, dedications and easements of record;
- (f) Any plat affecting the Property;
- (g) Any other matters of record reflected in the title commitments from Title Company, File No. \_\_\_\_\_, dated \_\_\_\_\_, 20\_\_\_\_; and
- (h) Any matters that are approved in writing by Buyer or deemed approved by Buyer in accordance with this Agreement.

4.2 Updated Title Commitment. On or before the Closing Date, Buyer and/or Seller may cause the Title Company to update the Title Commitment. If the updated Title Commitment contains exceptions that do not constitute Acceptable Encumbrances, Buyer may file written objection thereto prior to the completion of the Closing. If Buyer timely and properly files written objection to any item other than an Acceptable Encumbrance, then Seller shall have

the right but not the obligation to use reasonable diligence to remove, discharge or correct such liens, encumbrances or objections and shall have a period of sixty (60) days after receipt of written notice thereof in which to do so (and if necessary the Closing Date shall be extended). Seller shall not in any event be obligated to pay any sums of money or to litigate any matter in order to remove, discharge or correct any lien, encumbrance or objection. If Seller shall be unwilling or unable to remove or discharge such other liens, encumbrances or objections within such period, then Buyer may, at its option, no later than five (5) days after Seller notifies Buyer of Seller's unwillingness or inability, either terminate this Agreement or accept title in its then existing condition without reduction of the Purchase Price. If Buyer shall elect to terminate this Agreement as provided in this Section, the Deposit shall be delivered to Buyer, this Agreement shall terminate, and thereafter neither Seller nor Buyer shall have any further rights or obligations hereunder except that Buyer shall remain obligated with respect to the indemnities and obligations of this Agreement which specifically survive termination. If the updated Title Commitment contains no exceptions other than the Acceptable Encumbrances or if Buyer fails to give written notice of objection to Seller prior to completion of Closing, all matters reflected on the updated Title Commitment shall be deemed Acceptable Encumbrances, this Agreement shall remain in full force and effect and Buyer shall be obligated to complete the transaction as required by this Agreement.

4.3 Title Policy. At Closing and as a condition to Buyer's obligation to close, the Title Company shall issue or be irrevocably and unconditionally committed to issue to Buyer an owner's title insurance policy, insuring that title is vested in Buyer as the fee simple owner of the Land in the full amount of the Purchase Price and subject to only the Acceptable Encumbrances.

#### ARTICLE V ESCROW AND CLOSING

5.1 Escrow Instructions. Upon execution of this Agreement, the parties hereto shall deposit an executed copy of this Agreement with the Title Company, and this Agreement shall serve as the instructions to the Title Company as the escrow holder for consummation of the purchase and sale contemplated hereby. Seller and Buyer agree to execute such reasonable additional and supplementary escrow instructions as may be appropriate to enable the Title Company to comply with the terms of this Agreement; provided, however, that in the event of any conflict between the provisions of this Agreement and any supplementary escrow instructions, the terms of this Agreement shall control.

5.2 Time and Place. Closing shall take place on the Closing Date or such earlier date as may be mutually acceptable to the parties with all deliveries to be made in escrow to the Title Company prior to or on the Closing Date; provided, however, that pursuant to Section 4.2, Seller, at Seller's option, may extend the Closing Date for purposes of curing objections to the status of title that were timely and properly raised by Buyer. Buyer acknowledges that Seller may at Seller's option use closing proceeds to satisfy any mortgage or lien on the Property.

5.3 Seller's Deposit of Documents. At or before Closing, Seller shall deposit or cause to be deposited into escrow with the Title Company the following items:

(a) an executed Deed with respect to the Land, in the form of Exhibit C hereto, together with any State, County and local transfer tax declarations and forms required to be executed by Seller.

(b) an executed Affidavit in the form of Exhibit D hereto.

(c) an executed Bill of Sale (without representations or warranties) with respect to the Personal Property, if any, in the form of Exhibit E hereto.

(d) two counterparts of an executed Assignment and Assumption Agreement with respect to the Intangible Property, in the form of Exhibit F hereto, together with originals or copies of any Leases, Service Contracts and Permits, to the extent in Seller's possession (which such Leases, Service Contracts and Permits shall be delivered at Seller's property manager's office).

(e) a form letter executed by Seller to advise all Tenants under Leases in the form of Exhibit G hereto and a form letter executed by Seller to advise all contractors under Service Contracts, if any, in the form of Exhibit H hereto, of the sale to Buyer.

(f) unforfeited Security Deposits, if any, shall be transferred to Buyer unless credited to Buyer against the Purchase Price.

(g) an executed Buyer - Seller Closing Statement reflecting all financial aspects of the transaction.

(h) all plans, specifications, permits, licenses and keys in Seller's actual possession with respect to the Property (which shall be delivered at Seller's property manager's office).

5.4 Buyer's Deposit of Documents. At or before Closing Buyer shall deposit or cause to be deposited into escrow the following:

(a) cash to close in the amount required by Section 2.2, including payment for all adjustments and prorations as identified in Section 2.3 and for all costs and expenses identified in Section 2.4.

(b) any State, County and local transfer tax declarations and forms required to be executed by Buyer.

(c) two counterparts of an executed Assignment and Assumption Agreement, in the form of Exhibit F hereto.

(d) an executed Buyer - Seller Closing Statement.

(e) evidence reasonably satisfactory to Seller and the Title Company reflecting that all documents executed by Buyer at Closing were duly authorized and executed.

(f) an executed Certificate of Buyer that all of Buyer's warranties and representations remain true as of Closing.

(g) an executed Corporate Resolution or Limited Liability Certificate or partnership or trust certificate, as appropriate, of Buyer authorizing Buyer to consummate the transaction contemplated hereby and to perform all of Buyer's obligations hereunder.

(h) Certificate of Good Standing from the Secretary of State of the state in which Buyer is organized (if other than the State, a certificate of the Secretary of State of the State authorizing Buyer to do business in the State will also be required).

(i) an executed Incumbency Certificate as to the existing officers and directors, partners or members or managers of Buyer (if Buyer is a corporation, partnership or limited liability company).

~~5.5 Other Documents.~~ Buyer and Seller shall each deliver such other documents as are otherwise required by this Agreement to consummate the purchase and sale of the Property in accordance with the terms hereof. Unless the parties otherwise agree in writing, the Title Company is hereby designated as the "Reporting Person" for the transaction pursuant to Section 6045(e) of the United States Code and the regulations promulgated thereunder. If requested in writing by either party, the Title Company shall confirm its status as the "Reporting Person" in writing, which such writing shall comply with the requirements of Section 6045(e) of the United States Code and the regulations promulgated thereunder.

5.6 Approvals and Conditions Precedent to Closing. Closing shall not occur unless and until all approvals and conditions precedent to Closing are either satisfied or waived, including, in addition to all other approvals and conditions precedent specified in this Agreement, the following (collectively, the "Conditions Precedent to Closing"):

(a) Approval of the Eighth Judicial District Court in Clark County, Nevada, or any other court of competent jurisdiction, of the transaction specified in this Agreement for the sale of Property of Borrower by Seller, pursuant to the powers granted Seller under the Order Appointing Receiver ("Court Approval").

(b) Approval by Lender and by Lender's senior management of Buyer's creditworthiness to enter into and perform Buyer's obligations hereunder ("Credit Approval").

(c) Buyer has delivered evidence reasonably satisfactory to Seller and to Lender that Buyer has satisfied any and all OFAC (as hereinafter defined) and any and all other background checks required by governmental authorities or by Lender or Lender's senior management ("OFAC Approval").

5.7 Effect of Failure to Satisfy Certain Conditions Precedent to Closing. Should either Court Approval or Credit Approval not be obtained, then this Agreement shall terminate, the

Deposit shall be delivered to Buyer, and thereafter neither Seller nor Buyer shall have any further rights or obligations hereunder except that Buyer shall remain obligated with respect to the indemnities and obligations of this Agreement which specifically survive termination. If OFAC Approval is not satisfied, then this Agreement shall terminate, the Deposit shall not be delivered to Buyer, and thereafter neither Seller nor Buyer shall have any further rights or obligations hereunder except that Buyer shall remain obligated with respect to the indemnities and obligations of this Agreement which specifically survive termination.

5.8 Possession. Possession of the Property, subject to the Leases, shall be surrendered to Buyer at the Closing.

#### ARTICLE VI ENVIRONMENTAL MATTERS

6.1 Release. Without limiting Section 3.3, Buyer acknowledges that Seller Group and Lender Group is each not in any manner responsible to Buyer for the presence of any Hazardous Materials at, on, in, under or relating to the Property, if any. Buyer hereby specifically releases the Seller Group and the Lender Group from any and all claims, losses, liabilities, fines, charges, damages, injuries, penalties, response costs, and expenses of any and every kind whatsoever (whether known or unknown) relating to the presence on, under or about, or the escape, seepage, leakage, spillage, discharge, emission or release of any Hazardous Materials on the Property, if any, including without limitation, any residual contamination, in, on, under or about the Property or affecting natural resources, whether prior to or following Closing, and also including, without limitation, any liability due to asbestos-containing materials at the Property. Each covenant, agreement, representation, and warranty of Buyer contained in this Section 6.1 of this Agreement shall survive the Closing or termination of this Agreement.

6.2 Indemnification. Without limiting the provisions of Section 3.2 and Section 3.3, Buyer hereby indemnifies and agrees to defend, protect, save and hold Seller Group and Lender Group harmless from and against any and all losses, liabilities, fines, charges, damages, injuries, penalties, response costs, expenses (including attorneys fees and costs at all levels) and claims of any and every kind whatsoever paid, incurred or suffered by, or asserted against (i) Seller or Seller Group or any member of Seller Group or (ii) Lender or Lender Group or any member of Lender Group, with respect to or as a direct or indirect result of the presence on or under, or the escape, seepage, leakage, spillage, discharge, emission or release of any Hazardous Material from, the Property. The foregoing indemnification includes (a) all foreseeable and unforeseeable consequential damages to the maximum extent permitted by law; (b) the costs of any required or necessary repair, remediation, or decontamination of the Property; and (c) any fines and penalties that may be imposed. This agreement to defend, indemnify, protect, save and hold harmless shall survive the Closing of this Agreement and shall be in addition to any other obligations or liability that Buyer may have to Seller Group or to Lender Group at common law or by statute or otherwise.

6.3 Confidentiality. Unless and until the Closing actually occurs, Buyer, its agents, consultants and employees shall keep confidential all Hazardous Materials Reports and

other information, received or completed by Buyer in Buyer's independent factual, physical and legal examinations and inquiries of the Property, except that: (a) Buyer shall promptly after receipt provide copies thereof to Seller; and (b) Buyer may disclose same to its consultants if Buyer first obtains the agreement in writing of such consultants to keep such Hazardous Materials Reports and related documentation confidential. Unless and until the Closing actually occurs, neither the contents nor the results of any test, report, analysis, opinion or other information shall be disclosed by Buyer, its agents, consultants and employees without Seller's prior written approval unless and until Buyer is legally required to make such disclosure. The provisions of this Section 6.3 shall survive the termination of this Agreement.

#### **ARTICLE VII**

#### **WARRANTIES AND REPRESENTATIONS**

7.1 Buyer's Warranties and Representations. Buyer warrants and represents that: (a) Buyer has the full right, power, and authority to purchase the Property from Seller as provided in this Agreement and to carry out Buyer's obligations hereunder; (b) Buyer is a limited liability company, duly organized and in good standing under the laws of its state of formation and authorized to transact business in the State; (c) all requisite action necessary to authorize Buyer to enter into this Agreement and to carry out Buyer's obligations has been obtained; (d) this Agreement has been duly authorized, executed and delivered by Buyer; and (e) the execution of this Agreement and the Closing to occur hereunder do not and will not violate any organizational or formation document of Buyer or any contract, covenant or other Agreement to which Buyer may be a party or by which Buyer may be bound. The provisions of this Section shall survive the Closing.

7.2 Seller's Warranties and Representations. Seller warrants and represents that: (a) Seller has the full right, power, and authority to sell the Property to Buyer as provided in this Agreement and to carry out Seller's obligations hereunder; (b) Seller is duly organized and in good standing under the laws of its state of formation; (c) all requisite action necessary to authorize Seller to enter into this Agreement and to carry out Seller's obligations has been obtained; (d) this Agreement has been duly authorized, executed and delivered by Seller; and (e) the execution of this Agreement and the Closing to occur hereunder do not and will not violate any contract, covenant or other Agreement to which Seller may be a party or by which Seller may be bound. The provisions of this Section shall survive the Closing.

#### **ARTICLE VIII**

#### **ASSIGNMENT**

Buyer's reputation, experience, and financial status constitute a material inducement and a substantial part of the consideration for sale of the Property by Seller to Buyer. Therefore, Buyer may not assign this Agreement, nor may any of Buyer's rights hereunder or any ownership interest in Buyer be transferred in any manner to any person or entity, without Seller's specific prior written consent, which consent may be withheld by Seller for any reason whatsoever except, however, that Buyer shall have the right to assign this Agreement, without Seller's consent, to an entity owned and controlled by Buyer or Buyer's principals; provided, however, any such assignment shall be binding on Seller only to the



extent Buyer provides Seller with written intent to so assign, specifically naming the assignee and providing to Seller any and all other information or documentation, including, without limitation, such assignee's Taxpayer Identification Number, as Seller shall request of Buyer, no later than ten (10) Business Days prior to Closing. If Buyer assigns this Agreement pursuant to the terms hereof: (a) the assignee shall be liable (jointly and severally with assignor) for all of Buyer's obligations hereunder; (b) the assignor (i.e., the original Buyer hereunder) shall remain obligated (but jointly and severally with assignee) with respect to all of Buyer's obligations hereunder; and (c) the assignor and any assignee shall execute such instruments of assignment and assumption in such form as Seller may require in confirmation of the provisions hereof.

#### ARTICLE IX BROKERAGE

Buyer represents and warrants to Seller that Buyer has not contacted or entered into any agreement or taken any action with any real estate broker, agent, finder, or any other party in connection with this transaction other than the Disclosed Broker and that Buyer has not taken any action which would result in any real estate broker's finder's, or other fees or commissions being due or payable to any other party with respect to this transaction. Seller represents and warrants to Buyer that Seller has not contacted or entered into any agreement with any real estate broker, agent, finder, or party in connection with this transaction other than the Disclosed Broker and that Seller has not taken any action which would result in any real estate broker's, finder's, or other fees or commissions being due and payable to any other party with respect to this transaction. Each party hereby indemnifies, protects, defends and agrees to hold the other party harmless from any loss, liability, damage, cost, or expense (including, but not limited to, reasonable attorneys' fees) resulting to the other party from a breach of the representation and warranty made by such party herein. Seller agrees to pay the Disclosed Broker a commission in accordance with a separate written agreement including Seller and Disclosed Broker as parties, which commission shall be paid only if, as and when Closing actually occurs and the Purchase Price is received by Seller. The provisions of this Article shall survive the Closing and termination of this Agreement.

#### ARTICLE X DEFAULT

10.1 Buyer's Default. If Buyer shall fail to close the transaction contemplated hereby as and when required or if Buyer shall otherwise be in default of its obligations hereunder prior to Closing, with failure of Buyer to satisfy the OFAC Approval being a default hereunder, the Deposit shall be paid over to Seller as agreed and liquidated damages, it being acknowledged by Buyer and Seller that in such event Seller will suffer substantial damages but such damages are incapable of exact ascertainment. After payment to Seller of the Deposit, neither Seller nor Buyer shall have any further rights or obligations hereunder except that Buyer shall remain obligated pursuant to the provisions hereof which survive termination. If subsequent to Closing Buyer shall fail to comply with its obligations contained herein which survive Closing, Seller, in addition to any rights and remedies provided herein, shall be entitled to any and all remedies available at law or in equity.

10.2 Seller's Default. If this transaction shall not be closed because of default of Seller, Buyer may, as its sole and exclusive remedy, by serving a written notice upon Seller and allowing Seller a minimum of five (5) Business Days in which to cure such objection or default, either, upon such default of Seller not being cured following expiration of such notice and cure period, (1) refund the Deposit to Buyer on demand, and, after repayment of the Deposit to Buyer, this Agreement shall be null and void and neither Seller nor Buyer shall have any further rights or obligations hereunder except that Buyer shall remain obligated pursuant to the provisions hereof which survive termination, or (2) sue for specific performance of this Agreement, provided that such specific performance remedy shall be available to Buyer only upon (a) Buyer's full satisfaction of each of Buyer's obligations under this Agreement, including without limitation Buyer's obligation to deliver the Deposit to the Title Company and delivering sufficient proof to the Title Company and Seller that Buyer is ready, willing and able to close this transaction, (b) satisfaction of all Conditions Precedent to Closing, and (c) Buyer commences its action of specific performance against Seller within thirty (30) days after the Closing Date. The option selected by Buyer shall be Buyer's sole and exclusive remedy, and in no event shall Buyer be entitled to damages, including but not limited to punitive damages, consequential damages, incidental damages, and any and all other manner of damages, whether founded in law or in equity. Buyer agrees to indemnify, defend, protect, save and hold harmless Seller Group and Lender Group, and each member of Seller Group and of Lender Group, each of such member's directors, officers, employees, agents, affiliates, members, managers, stockholders and other principals and representatives from and against any and all losses, claims, liabilities, damages, injuries, penalties and other costs and expenses of any and every kind whatsoever (collectively the "Losses") paid, incurred or suffered by or asserted against Seller Group or Lender Group or any member of Seller Group or any member of Lender Group as a result of or arising out of Buyer wrongfully seeking, commencing and/or prosecuting a specific performance action against Seller or in any way wrongfully filing a lis pendens or similar action against the Property, which Losses shall include without limitation any amounts which would otherwise have been realized by Seller had Seller been able to sell, transfer or convey the Property to any other buyer free of any such specific performance, lis pendens or other similar action.

10.3 No Obligation of Seller after Closing. Buyer expressly acknowledges and agrees that Seller has no obligations with respect to the Property that survive the Closing, except as specifically set forth herein. The provisions of this Section shall survive the Closing.

**ARTICLE XI**  
**NO JOINT VENTURE**

Buyer acknowledges and agrees that neither Seller nor any other member of the Seller Group nor any member of the Lender Group is a venturer, co-venturer, insurer, guarantor or partner of Buyer in Buyer's development of, construction upon and resale of the Property, and that Seller, Seller Group and Lender Group bear and shall bear no liability whatsoever resulting from or arising out of Buyer's ownership and development of, and construction upon, the Property. Therefore, Buyer agrees to indemnify and hold harmless the Seller Group, the Lender Group and each member of Seller Group and each member of Lender Group from and against any and all losses, claims, demands, damages, costs and expenses of whatsoever kind or nature including reasonable attorneys' fees, related to or arising out of any claims against Seller or any other member of the Seller Group or any member of the Lender Group as a result of Buyer's ownership or development of, or construction upon, or resale of, the Property. The provisions of this Article shall survive the Closing.

**ARTICLE XII**  
**MISCELLANEOUS**

12.1 Risk of Loss. Seller agrees to give Buyer prompt notice of any fire or other casualty affecting the Property after the Execution Date or of any actual or threatened (to the extent that Seller has current actual knowledge thereof) taking or condemnation of all or any portion of the Property after the Execution Date. If after the Execution Date and prior to Closing, there shall occur, damage to the Property caused by fire or other casualty which would cost an amount, greater than, or equal to, ten percent (10%) of the Purchase Price to repair, or the taking or condemnation of all or any portion of the Property which would materially interfere with the present use of such Property, then, in such event, Buyer shall have the right to terminate this Agreement by giving written notice to Seller in the form of the Termination Agreement, together with copies and originals of all Due Diligence Reports, within ten calendar (10) days after Buyer has received notice from Seller or otherwise learns of that event. Upon such termination and delivery of copies and originals of all Due Diligence Reports, the Deposit shall be delivered to Buyer and neither party shall have any further rights or obligations hereunder, except, however, that Buyer shall remain obligated with respect to the indemnities and obligations herein which specifically survive termination. If Buyer does not so timely elect to terminate this Agreement, then the Closing shall take place as provided herein and pursuant to the terms hereof and there shall be assigned to Buyer at the Closing all interest of Seller in and to any insurance proceeds or condemnation awards payable to Seller on account of that event (the "Proceeds") in an amount up to, but not including, any Proceeds in excess of the Purchase Price (the "Excess Proceeds", the Proceeds minus any Excess Proceeds shall be hereinafter referred to as the "Buyer's Proceeds"), less sums which Seller incurs before the Closing to repair any of the damage.

If after the Execution Date and prior to Closing there shall occur damage to the Property caused by fire or other casualty which would cost less than ten percent (10%) of the Purchase Price to repair, or the taking or condemnation of a portion of the Property which would not materially interfere with the present use of the Property, then, Buyer may

not terminate this Agreement and there shall be assigned to Buyer at the Closing all interest of Seller in and to the Buyer's Proceeds, less sums which Seller incurs before the Closing to repair any of the damage.

If after the Execution Date and prior to Closing, there shall occur damage to the Property caused by fire or other casualty which would cost an amount greater than or equal to fifty percent (50%) of the Purchase Price to repair, then, in such event, Seller shall have the right to terminate this Agreement by written notice thereof delivered to Buyer within ten (10) days after that event. Upon such termination, the Deposit shall be delivered to Buyer and neither party shall have any further rights or obligations hereunder, except, however, that Buyer shall remain obligated with respect to the indemnities and obligations herein which specifically survive termination, and Buyer shall deliver to Seller within ten calendar (10) days after Buyer has received written notice from Seller of such termination, copies and originals of all Due Diligence Reports. If Seller does not so timely elect to terminate this Agreement, then, provided that Buyer has not terminated this Agreement as provided for in the first paragraph of this Section, the Closing shall take place as provided herein and pursuant to the terms hereof and there shall be assigned to Buyer at the Closing all interest of Seller in and to the Buyer's Proceeds, less sums which Seller incurs before the Closing to repair any of the damage.

If any Buyer's Proceeds in connection with a casualty to the Property are assigned to Buyer at Closing in accordance with this Section 12.1, Seller shall retain the exclusive right to process and handle the claim with Seller's insurance company. Seller and Buyer agree to use good faith efforts to cooperate with each other in resolving the amount of the Proceeds, including, without limitation, promptly providing any and all materials requested by the insurance company and promptly responding to any and all inquiries from the insurance company. Seller shall not have the right to agree to the amount of Buyer's Proceeds with the insurance company without the prior reasonable written consent of Buyer unless the Buyer's Proceeds equal the Purchase Price. Upon payment by the insurance company, the Buyer's Proceeds shall be disbursed to Buyer and the Excess Proceeds, if any, shall be disbursed to Seller. Seller makes no representation or warranty with respect to the amount of the Proceeds that will be paid by the insurance company in connection with any such casualty, including, without limitation, whether Buyer will be entitled to the actual cash value or the replacement cost of the Property. The provisions of this paragraph shall survive the Closing.

**12.2 Construction.** The terms "Seller" and "Buyer" whenever used in this Agreement shall include the heirs, personal representatives, successors and assigns of the respective parties hereto; provided, however, that Buyer's right of assignment is restricted by the provisions hereof. Whenever used, the singular number shall include the plural and the plural the singular, and the use of any gender shall include all genders. The term "including" as used herein shall in all instances mean "including, but not limited to". The headings in this Agreement are intended solely for convenience of reference and shall be given no effect in the interpretation of this Agreement. This Agreement and any related instruments shall not be construed more strictly against one party than against the other by virtue of the fact that initial drafts may have been prepared by counsel for one of the parties.

it being recognized that this Agreement and any related instruments are the product of extensive negotiations between the parties hereto.

12.3 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which will constitute the same Agreement. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signatures thereon and may be attached to another counterpart of this Agreement identical in form hereto, but having attached to it one or more additional signature pages.

12.4 Severability and Waiver. Invalidation of any one Section or provision of this Agreement by judgment or court order shall in no way affect any other Section or provision. Failure of any party to this Agreement to insist on the full performance of any of its provisions by the other party (or parties) shall not constitute a waiver of such performance unless the party failing to insist on full performance of the provision declares in writing signed by it that it is waiving such performance. A waiver of any breach under this Agreement by any party, unless otherwise expressly declared in writing, shall not be a continuing waiver or waiver of any subsequent breach of the same or other provision of this Agreement. The provisions of this Section shall survive the Closing.

12.5 Governing Law. The laws of the State (without regard to conflicts of law) shall govern the validity, construction, enforcement and interpretation of this Agreement.

12.6 Further Acts. In addition to the acts and deeds recited in this Agreement and contemplated to be performed, executed, and/or delivered under this Agreement, Seller and Buyer agree to perform, execute and/or deliver or cause to be delivered, executed and/or delivered at Closing or after Closing all further acts, deeds, and assurances reasonably necessary to consummate the transactions contemplated hereby.

12.7 Notices. All notices, demands, requests, and other communications required or permitted hereunder shall be in writing. All such notices, demands, requests and other communications (and copies thereof) shall be deemed to be delivered: (a) if sent by messenger, upon personal delivery to the party to whom the notice is directed; (b) if sent by facsimile, upon electronic or telephonic confirmation of receipt; (c) if sent by overnight courier, with request for next Business Day delivery, on the next Business Day after sending; or (d) whether actually received or not, two (2) Business Days after deposit in a regularly maintained receptacle for the United States mail, registered or certified, return receipt requested, postage prepaid, addressed as follows (or to such other address as the parties may specify by notice given pursuant to this Section):

TO SELLER:

Greystar Real Estate Partners  
3200 E Camelback Road Suite 255  
Phoenix, AZ 85018

Attention: John Rals  
Facsimile: 602-522-1220

## WITH A COPY TO:

[Counsel for Seller]

Lewis & Roca LLP3993 Howard Hughes Parkway Suite 600Las Vegas, NV 89169Fax: 702-949-8321

Lender: U.S. Bank National Association as Trustee  
 For The Registered Holders of ML-CFC  
 Commercial Mortgage Trust 2007-7 Commercial  
 Mortgage Pass-Through Certificates Series 2007-7  
 c/o Midland Loan Services  
 10851 Mastin, Suite 700  
 Overland Park, KS 66210  
 Attention: Bryan Turner  
 Facsimile: (913) 253-9723

Counsel for Lender: Lewis and Roca LLP

3993 Howard Hughes Parkway, Suite 600Las Vegas, NV 89169Attention: Rob CharlesFax (702) 949-8321

## TO BUYER:

Pacific Companies LLC, a California limited  
 liability company

1786 Hancock Street, Suite 100San Diego, California 92110Attention: Deepak IsraniFacsimile: (619) 296-6090E-mail: [disrani@pacificacompanies.com](mailto:disrani@pacificacompanies.com)

## WITH A COPY TO:

Thomas P. Sayer, Jr., Esq.

9974 Scripps Ranch Blvd. #284San Diego, CA 92131Fax: 602-796-4203E-mail: [tsayer1@sanjr.com](mailto:tsayer1@sanjr.com)

12.8 Entire Agreement and Amendment. This Agreement contains the entire understanding between Buyer and Seller with respect to the subject matter hereof. Neither this Agreement nor any provision hereof may be modified, amended, changed, waived, discharged or terminated orally. Any such action may occur only by an instrument in writing signed by the party against whom enforcement of the modification, change, waiver, discharge or termination is sought.

12.9 Recording. Buyer agrees not to record or file this Agreement or any notice or memorandum or reference to this Agreement in any public records, including, without

limitation, the Recorder's Office in the County. Any such recordation or filing shall constitute a default, and upon such default Seller (a) may declare this Agreement null and void and exercise this option by recording or filing a notice that this Agreement is null and void in the public records; and (b) have the remedies provided by Article 10, above.

**12.10 Exhibits.** The Exhibits that are referenced in and attached to this Agreement are incorporated in, and made a part of, this Agreement for all purposes.

**12.11 Time of the Essence.** Seller and Buyer expressly agree that time is of the essence with respect to this Agreement. If the final day of any period or any date of performance under this Agreement falls on a date which is not a Business Day, then the final day of the period or the date of performance, as applicable, shall be extended to the next day which is a Business Day.

**12.12 No Third Party Beneficiary.** This Agreement is solely between Seller and Buyer, and is acknowledged by Lender with regard to Section 12.18.

**12.13 Back-Up Contract(s).** Buyer understands that Seller may negotiate with other parties and may enter into back-up contracts for the sale of the Property. The back-up contracts will be subject and subordinate to this Agreement so long as this Agreement is in full force and effect and Buyer is not in default hereunder.

**12.14 Requisite Senior Management Approval.** Prior to execution and delivery of this Agreement by Seller, this Agreement is subject to approval by Seller Group's and by Lender Group's senior management. Neither the submission of any proposal or this Agreement for examination to Buyer, nor any correspondence or course of dealing between Buyer and Seller shall constitute a reservation of or option for the Property or in any manner bind Seller. No contract or obligation on the part of Seller shall arise until this Agreement is approved as appropriate by senior management and fully executed and unconditionally delivered by Seller. If, however, Seller executes and returns this Agreement to Buyer, the requirement for Senior Group Management Approval shall be deemed satisfied.

**12.15 Limitation on Liability.** Buyer expressly agrees that the obligations and liabilities of Seller under this Agreement and any document referenced herein shall not constitute personal obligations of the officers, directors, employees, agents, trustees, partners, members, managers, representatives, stockholders or other principals and representatives of Seller Group. Notwithstanding anything to the contrary, Seller Group's liability, if any, arising in connection with this Agreement or with the Property shall be limited to Seller's interest in the Property for the recovery of any judgment against Seller, and neither Seller Group nor any member thereof shall be personally liable for any such judgment or deficiency after execution thereon. The limitations of liability contained in this paragraph shall apply equally and inure to the benefit of Seller Group's present and future officers, directors, trustees, shareholders, agents, employees, partners, members, managers, representatives, or other principals and representatives of Seller Group, and their respective heirs, successors and assigns.

**12.16 Mold Disclosure.** Mold and/or other microscopic organisms can be found almost anywhere. They occur naturally in the environment and can grow on virtually any organic substance as long as moisture and oxygen are present. Mold and/or other microscopic organisms may cause property damage and/or health problems. Buyer acknowledges and agrees that neither Seller Group nor Lender Group shall be responsible for any damages, liabilities, claims or losses arising out of or relating to mold and/or other microscopic organisms at the Property including but not limited to property damages, personal injury, adverse health effects, loss of income, emotional distress, death, loss of use or loss of value and Buyer hereby releases Seller Group and Lender Group from the same. Buyer hereby acknowledges that it has read and understood this disclosure and release and agrees to the provisions contained herein. The provisions of this Section shall survive the Closing or termination of this Agreement.

**12.17 Prohibited Persons.** Neither Buyer nor any of its respective officers, directors, shareholders, partners, members or affiliates (including without limitation indirect holders of equity interests in Buyer) is or will be an entity or person (i) that is listed in the Annex to, or is otherwise subject to the provisions of Executive Order 13224 issued on September 24, 2001 ("EO13224"), (ii) whose name appears on the United States Treasury Department's Office of Foreign Assets Control ("OFAC") most current list of "Specifically Designated National and Blocked Persons" (which list may be published from time to time in various mediums including, but not limited to, the OFAC website, <http://www.treasury.gov/offices/enforcement/ofac/sdn/t11sdn.pdf>), (iii) who commits, threatens to commit or supports "terrorism," as that term is defined in EO13224, (iv) is subject to sanctions of the United States government or is in violation of any federal, state, municipal or local laws, statutes, codes, ordinances, orders, decrees, rules or regulations relating to terrorism or money laundering, including, without limitation, EO13224 and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, or (v) who is otherwise affiliated with any entity or person listed above (any and all parties described in clauses (i) – (v) above are herein referred to as a "Prohibited Person"). Buyer covenants and agrees that neither Buyer nor any of its respective officers, directors, shareholders, partners, members or affiliates (including without limitation indirect holders of equity interests in Buyer) shall (aa) conduct any business, nor engage in any transaction or dealing, with any Prohibited Person, including, but not limited to, the making or receiving of any contribution of funds, goods, or services, to or for the benefit of a Prohibited Person, or (bb) engage in or conspire to engage in any transaction that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in EO13224. The provisions of this Section shall survive the Closing or termination of this Agreement.

**12.18 Reservation of Rights.** Buyer acknowledges that Lender's submittal, in conjunction with the Lawsuit, of the Order Appointing Receiver, and Seller's actions pursuant to the authority and duties granted to Seller, as receiver, thereunder, including, without limitation, the specific power and authority to sell Property of Borrower subject to prior court approval, as specified in the Order Appointing Receiver, and the parties entering into this Agreement or the Closing of the transaction contemplated herein in no way impairs or waives Lender's rights and interest in the Property of Borrower and in no way impairs or waives any rights or remedies available to Lender because of the default of Borrower, as such default is



specified in the Lawsuit, whether such rights or remedies are available to Lender at law or in equity or granted pursuant to any of those certain loan documents by and between Lender, as assignee thereof, and Borrower, including, without limitation, that certain Commercial Deed of Trust, Security Agreement, Fixture Filing Financing Statement and Assignment of Leases, Rents, Income and Profits (as same may have been amended) recorded in the Clark County Recorder's Office as Document No. 20070330-0002948, and that certain Assignment of Leases, Rents, Income and Profits (as same may have been amended) recorded in the Clark County Recorder's Office as Document No. 20070330-0002947, including, without limitation, the specific reservation of the right to pursue recovery of any deficiency against either Borrower or Hagai Rapaport, an individual ("Guarantor"), or the specific reservation to pursue any and all rights or remedies that may be available against Guarantor.

#### **ARTICLE XIII ESCROW TERMS**

~~The Title Company shall hold the Deposit in escrow on the following terms and conditions:~~

(a) The maturity of the investment for the Deposit shall not exceed ninety (90) days or the anticipated date of the Closing, whichever is earlier, and if such maturity shall occur prior to the Closing, the Deposit shall be reinvested under the same terms and conditions.

(b) The Title Company shall deliver the Deposit to Seller or Buyer, as the case may be, in accordance with the provisions of this Agreement.

(c) Any notice to or demand upon the Title Company shall be in writing and shall be sufficient only if received by the Title Company within the applicable time periods set forth herein, if any. Notices to or demands upon the Title Company shall be sent by United States mail, registered or certified, return receipt requested, postage prepaid, or overnight courier service, with respect for next day delivery, to the address set forth in Section 1.1 of this Agreement, Attention: \_\_\_\_\_, or served personally upon the Title Company with receipt acknowledged in writing by the Title Company. Notices from the Title Company to Seller or Buyer shall be mailed to them in accordance with Section 12.7 of this Agreement.

(d) If the Title Company shall have received notice signed by either party advising that litigation between the parties over entitlement to the Deposit has been commenced, the Title Company shall, on demand of either party, deposit the Deposit with the clerk of the court in which such litigation is pending. If at any time the Title Company is uncertain of its duties hereunder or if the Title Company for any other reason is no longer willing to serve as escrow agent, the Title Company may, on notice to the parties, take such affirmative steps as it may, at its option, elect in order to terminate its duties as the Title Company, including, but not limited to, the deposit of the Deposit with a court of competent jurisdiction and the commencement of an action for interpleader, the reasonable costs of which shall be borne

by whichever of the parties is the losing party. Upon the taking by the Title Company of such action described, the Title Company shall be released of and from all liability hereunder as escrow agent.

(e) The Title Company shall not incur any liability in acting upon any signature, notice, demand, request, waiver, consent, receipt or other paper or document believed by the Title Company to be genuine. The Title Company may assume that any person purporting to give it any notice on behalf of any party in accordance with the provisions hereof has been duly authorized to do so, or is otherwise acting or failing to act under this Section except in the case of the Title Company's gross negligence or willful misconduct.

(f) The terms and provisions of this Article shall create no right in any person, firm or corporation other than the parties and their respective successors and permitted assigns and no third party shall have the right to enforce or benefit from the terms hereof.

(g) The Title Company has executed this Agreement for the sole purpose of agreeing to act as such in accordance with the terms of this Agreement.

---

#### ARTICLE XIV LITIGATION

14.1 Attorneys' Fees; Jurisdiction; Venue. In the event of any litigation arising out of or under this Agreement and/or out of Buyer's ownership, development or construction upon the Property, the prevailing party shall be entitled to collect from the non-prevailing party reasonable attorneys' fees and costs. Buyer and Seller submit to the jurisdiction of the Eighth Judicial District Court for Clark County, in the State and the United States District Court for the District of Nevada in respect of any suit or other proceeding brought in connection with or arising out of this Agreement. The provisions of this Section shall survive the Closing.

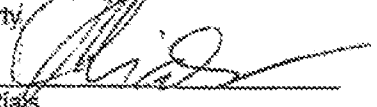
14.2 WAIVER OF JURY TRIAL. The parties hereby knowingly, voluntarily and intentionally waive the right either may have to a trial by jury in respect of any litigation based hereon, or arising out of, under or in connection with this Agreement and any document executed in connection herewith or related hereto, or any course or conduct, course of dealing, statements (whether oral or written) or actions of either party. This provision is a material inducement for the parties to enter into this transaction.

[SIGNATURES ON THE FOLLOWING PAGES]

IN WITNESS WHEREOF, Buyer and Seller have executed this Agreement as of  
the Execution Date.

SELLER:

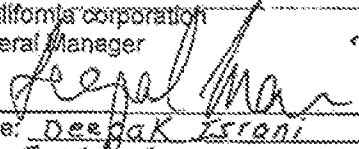
Greystar Real Estate Partners, John Riels as  
agent, as duly appointed Receiver of the  
Property.

  
John Riels

BUYER:

Pacifica Companies LLC,  
a California limited liability company,

By: PAC Investors Inc.,  
a California corporation  
Its: General Manager

By:   
Name: Deepak Israni  
Its: Secretary

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

Exhibit 1(b)

001495

001495

Exhibit 1(b)

# Wire Transfer Order

Number: 8083

*First American Title Insurance Company National*

File No.: NCS-425712-HHLV	Issued By: Sharon Silverberg
PR: NATLAC - National Commercial Services Division	Issued Date/Time: 06/07/2010 01:21:05 PM
Office: 108 - Las Vegas-NCSD (2043)	Transmission Date/Time: 06/07/2010
Officer: Sharon Silverberg	Amount: \$8,976,385.90

## ORIGINATOR

Account Number 3020430000	Bank Name First American Trust-Santa Ana -
Information 425712	

## RECEIVING BANK

ABA Number 053000219	Bank Name Wachovia Bank NA
Bank Address	

## BENEFICIARY

Account Number 5077594011216	Beneficiary Name FUMC Income Property Account
Beneficiary Address	
Additional Information Palmilla 358100638	

## CUSTOMER AUTHORIZATION

_____ Signature	_____ Signature
_____ Printed Name and Title	_____ Printed Name and Title

## BANK USE ONLY

Fund Held/Credit	Credit Code	CALLBACK	
Available Funds		Name Time	Initials
Fees <input type="checkbox"/> Analysis <input type="checkbox"/> Charge To Account <input type="checkbox"/> Waived <input type="checkbox"/> Included in Check <input type="checkbox"/> Other		Method of Payment <input type="checkbox"/> Debit Account Number <input type="checkbox"/> Check Received <input type="checkbox"/> Incoming Wire <input type="checkbox"/> Other	
SPECIAL INSTRUCTIONS/NOTES			

001496

001496

Exhibit 1(c)

001497

001497

Exhibit 1(c)



**First American Title Insurance Company**  
**National Commercial Services**  
 2490 Paseo Verde Parkway, #100 • Henderson, NV 89074

**Seller's Final Settlement Statement**

**Property:** 124-30-311-031, et al., NV

**File No:** NCS-425712-HHLV

**Officer:** Sharon Silverberg/sgs

**New Loan No:**

**Settlement Date:** 06/07/2010

**Disbursement Date:**

**Print Date:** 6/8/2010, 10:04 AM

**Buyer:** PacificaNorthVegasLLC;QEA IncboPacifica as Qualified Intermediary for Pacifica North Vegas LLC

**Address:** 1785 Hancock Street, #100, San Diego, CA 92110

**Seller:** Palmilla Development Co., Inc.

**Address:** 3200 E. Camelback Road, Suite 255, Pheonix, AZ 85018

Charge Description	Seller Charge	Seller Credit
<b>Consideration:</b>		
Total Consideration		9,500,000.00
<b>Adjustments:</b>		
Security Deposits	35,611.35	
Other Deposits	2,000.00	
Held for Misc, to be refunded post closing	2,000.00	
<b>Prorations:</b>		
Rents 06/07/10 to 07/01/10 @\$140161.85/mo	112,129.48	
HOA Assessment 06/07/10 to 07/01/10 @\$15896.25/mo		12,717.00
Personal Property Taxes using Est basis 01/01/10 to 06/07/10 @\$2845.17/yr	1,223.81	
County Tax 8 parcels @799.78 ea 06/07/10 to 07/01/10 @\$6398.24/yr		420.71
County Tax 8 parcels @924.44 ea 06/07/10 to 07/01/10 @\$7395.52/yr		486.28
County Tax 8 parcels @941.82 ea 06/07/10 to 07/01/10 @\$7534.56/yr		495.42
County Tax 8 parcels @1,011.45 ea 06/07/10 to 07/01/10 @\$8091.60/yr		532.05
County Tax 12 parcels @997.05 ea 06/07/10 to 07/01/10 @\$11964.60/yr		786.71
County Tax 4 parcels @ 779.82 ea 06/07/10 to 07/01/10 @\$3119.28/yr		205.10
County Tax 1 parcel @780.46 ea 06/07/10 to 07/01/10 @\$780.46/yr		51.32
County Tax 1 parcel @1,183.05 ea 06/07/10 to 07/01/10 @\$1183.05/yr		77.79
County Tax 9 parcels @780.46 ea 06/07/10 to 07/01/10 @\$7024.14/yr		461.86
County Tax 11 parcels @918.10 ea 06/07/10 to 07/01/10 @\$10099.10/yr		664.05
County Tax 14 parcels @971.65 ea 06/07/10 to 07/01/10 @\$13603.10/yr		894.45
County Tax 11 parcels @ 901.25 ea 06/07/10 to 07/01/10 @\$9913.75/yr		651.86
County Tax 10 parcels @985.58 ea 06/07/10 to 07/01/10 @\$9855.80/yr		648.05
County Tax 4 parcels @ 761.13 ea 06/07/10 to 07/01/10 @\$3044.52/yr		200.19
County Tax 8 parcels @912.83 ea 06/07/10 to 07/01/10 @\$7302.64/yr		480.17
County Tax 8 parcels @790.12 ea 06/07/10 to 07/01/10 @\$6320.96/yr		415.62
County Tax 8 parcels @ 929.94 ea 06/07/10 to 07/01/10 @\$7439.52/yr		489.17
County Tax 8 parcels @998.53 ea 06/07/10 to 07/01/10 @\$7988.24/yr		525.25
County Tax 12 parcels @ 984.37 ea 06/07/10 to 07/01/10 @\$11812.44/yr		776.71
County Tax 4 parcels @770.49 ea 06/07/10 to 07/01/10 @\$3081.96/yr		202.65
<b>Commission:</b>		
Commission Paid at Settlement to Marcus & Millichap	285,000.00	
<b>Title/Escrow Charges to:</b>		
Policy-Standard ALTA 2006 Owner's - First American Title Insurance Company National Commercial Services	9,025.00	
Closing-Escrow Fee 1/2 each - First American Title Insurance Company National Commercial Services	2,950.00	
Transfer Tax 1/2 each - First American Title Insurance Company National Commercial Services	24,225.00	
Transfer Tax County Common Area - First American Title Insurance Company National Commercial Services	5.10	
<b>Disbursements Paid:</b>		
Taxes, penalties, interest and mailing fees to Clark County Treasurer	55,730.52	
HOA Fees @ 101.25x157 to Pamilla Homeowners Association c/o P.W. James Management & Consulting	15,896.25	
<b>Cash (X To) ( From) Seller</b>	8,976,385.90	
<b>Totals</b>	9,522,182.41	9,522,182.41

Initials:

*Seller's Final Settlement Statement*

**Settlement Date:** 06/07/2010  
**Print Date:** 6/8/2010

**File No:** NCS-425712-HHLV  
**Officer:** Sharon Silverberg/sgs

First American Title Insurance Company National  
Commercial Services

By   
Sharon Silverberg



Exhibit 1(d)

001500

001500

Exhibit 1(d)

IN THE SUPREME COURT OF NEVADA

U.S. BANK NATIONAL ASSOCIATION as  
trustee for the Registered Holders of ML-  
CFC Commercial Mortgage Trust 2007-7  
Commercial Mortgage Pass-Through  
Certificates Series 2007-7, by and through  
MIDLAND LOAN SERVICES, as its Special  
Servicer,

Appellant,

vs.

PALMILLA DEVELOPMENT CO., INC., a  
Nevada corporation, and HAGAI RAPAPORT,  
an individual,

Respondents.

Electronically Filed  
Aug 27 2013 09:01 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

**APPEAL**

from the Eighth Judicial District Court, Clark County  
The Honorable JEROME T. TAO, District Judge  
District Court Case No. A595321

**APPELLANT'S APPENDIX  
VOLUME 6  
PAGES 1251-1500**

DANIEL F. POLSENBERG  
Nevada Bar No. 2376  
ROBERT M. CHARLES, JR.  
Nevada Bar 6593  
JOEL D. HENRIOD  
Nevada Bar No. 8492  
LEWIS AND ROCA LLP  
3993 Howard Hughes Pkwy., Suite 600  
Las Vegas, Nevada 89169  
(702) 474-2616  
DPolsenberg@LRLaw.com  
RCharles@LRLaw.com  
JHenriod@LRLaw.com

*Attorneys for Appellant*

## **CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX**

<b>Tab</b>	<b>Document</b>	<b>Date</b>	<b>Vol.</b>	<b>Pages</b>
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02	Defendant's Opposition to Application for Order to Show Cause	08/12/09	1	123-145
03	Notice of Entry of Order Appointing Receiver	09/09/09	1	146-164
04	Notice of Filing Exhibit in Support of Plaintiff's Motion to Approve Sale of Receivership Property	02/24/10	1	165-211
05	Notice of Non-Opposition to Motion to Approve Sale of Receivership Property	03/10/10	1	212-215
06	Order Granting Motion to Approve Sale of Receivership Property	03/26/10	1	216-222
07	Motion to Approve Receiver's Final Accounting and Report and to Discharge Receiver	09/02/10	1 2	223-250 251-293
08	Notice of Entry of Order Granting Motion Seeking Approval of Receiver's Final Accounting and Report and to Discharge Receiver	11/02/10	2	294-299
09	First Amended Complaint	11/24/10	2	300-423
10	Second Amended Complaint	04/11/11	2 3	424-500 501-557
11	Motion to Dismiss, or in the Alternative, Motion to Require a Substantial Bond from Plaintiff and to Stay the Proceedings Until the Bond is Posted	06/13/11	3	558-599
12	Opposition to Defendant's Motion to Dismiss, or in the Alternative, Motion to Require a Substantial Bond from Plaintiff and to Stay the Proceedings Until the Bond is Posted	06/30/11	3	600-667
13	Defendants' Answer to Second Amended Complaint	08/19/11	3	668-678
14	Notice of Entry of Order Denying Defendants' Motion to Dismiss	09/13/11	3	679-683
15	Plaintiff's Motion for Partial Summary Judgment and Request for Deficiency Hearing Pursuant to NRS 40.457	04/25/12	3 4	684-750 751-908

16	Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment	05/16/12	4	909-958
17	Reply in Support of Motion for Partial Summary Judgment and Request for Deficiency Hearing Pursuant to NRS 40.457	05/25/12	4	959-968
18	Defendants' Supplemental Opposition to Plaintiff's Motion for Partial Summary Judgment	05/29/12	4	969-974
19	Recorder's Transcript of Plaintiff's Motion for Partial Summary Judgment and Request for Deficiency Hearing	05/30/12	4	975-990
20	Declaration of Andrea Helm in Support of Plaintiff's Motion for Partial Summary Judgment and Request for Deficiency Hearing Pursuant to NRS 40.457	06/28/12	4 5	991-1000 1001-1178
21	Defendants' Motion for Summary Judgment	07/05/12	5 6	1179-1250 1251-1312
22	Plaintiff's Objection to Motion for Summary Judgment	07/23/12	6	1313-1352
23	Reply Brief in Support of Defendants' Motion for Summary Judgment	08/03/12	6	1353-1401
24	Recorder's Transcript of Defendant's Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment and Request for Deficiency Hearing	08/08/12	6	1402-1423
25	Order Granting Defendants' Motion for Summary Judgment	08/16/12	6	1424-1444
26	Plaintiff's Motion to Alter or Amend Order Granting Defendants' Motion for Summary Judgment Pursuant to NRCP 52(B) and 59(E); Alternatively, Motion for Reconsideration of order Granting Defendants' Motion for Summary Judgment	08/31/12	6 7	1445-1500 1501-1596
27	Declaration of Andrea Helm in Support of Plaintiff's Motion to Alter or Amend Order Granting Defendants' Motion for Summary Judgment Pursuant to NRCP 52(B) and 59(E); Alternatively, Motion for Reconsideration or order granting Defendants' Motion for Summary Judgment	09/13/12	7	1597-1610
28	Opposition to Plaintiff's Motion to Amend Order or, Alternatively, Motion for Reconsideration	09/20/12	7	1611-1654

29	Reply in Support of Plaintiff's Motion to Alter or Amend Order Granting Defendants' Motion for Summary Judgment Pursuant to NRCP 52(B) and 59(E); Alternatively, Motion for Reconsideration of order Granting Defendants' Motion for Summary Judgment	10/04/12	7 8	1655-1750 1751-1826
30	Notice of Entry of Judgment	10/12/12	8	1827-1859
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32	Case Appeal Statement	11/09/12	8	1897-1901

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20	Declaration of Andrea Helm in Support of Plaintiff's Motion for Partial Summary Judgment and Request for Deficiency Hearing Pursuant to NRS 40.457	06/28/12	4 5	991-1000 1001-1178
27	Declaration of Andrea Helm in Support of Plaintiff's Motion to Alter or Amend Order Granting Defendants' Motion for Summary Judgment Pursuant to NRCP 52(B) and 59(E); Alternatively, Motion for Reconsideration or order granting Defendants' Motion for Summary Judgment	09/13/12	7	1597-1610
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07	Motion to Approve Receiver's Final Accounting and Report and to Discharge Receiver	09/02/10	1 2	223-250 251-293
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31	Notice of Appeal	11/09/12	8	1860-1896
30	Notice of Entry of Judgment	10/12/12	8	1827-1859
03	Notice of Entry of Order Appointing Receiver	09/09/09	1	146-164

14	Notice of Entry of Order Denying Defendants' Motion to Dismiss	09/13/11	3	679-683
08	Notice of Entry of Order Granting Motion Seeking Approval of Receiver's Final Accounting and Report and to Discharge Receiver	11/02/10	2	294-299
04	Notice of Filing Exhibit in Support of Plaintiff's Motion to Approve Sale of Receivership Property	02/24/10	1	165-211
05	Notice of Non-Opposition to Motion to Approve Sale of Receivership Property	03/10/10	1	212-215
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28	Opposition to Plaintiff's Motion to Amend Order or, Alternatively, Motion for Reconsideration	09/20/12	7	1611-1654
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26	Plaintiff's Motion to Alter or Amend Order Granting Defendants' Motion for Summary Judgment Pursuant to NRCp 52(B) and 59(E); Alternatively, Motion for Reconsideration of order Granting Defendants' Motion for Summary Judgment	08/31/12	6 7	1445-1500 1501-1596
22	Plaintiff's Objection to Motion for Summary Judgment	07/23/12	6	1313-1352
24	Recorder's Transcript of Defendant's Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment and Request for Deficiency Hearing	08/08/12	6	1402-1423
19	Recorder's Transcript of Plaintiff's Motion for Partial Summary Judgment and Request for Deficiency Hearing	05/30/12	4	975-990
23	Reply Brief in Support of Defendants' Motion for Summary Judgment	08/03/12	6	1353-1401

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29	Reply in Support of Plaintiff's Motion to Alter or Amend Order Granting Defendants' Motion for Summary Judgment Pursuant to NRCP 52(B) and 59(E); Alternatively, Motion for Reconsideration of order Granting Defendants' Motion for Summary Judgment	10/04/12	7 8	1655-1750 1751-1826
10	Second Amended Complaint	04/11/11	2 3	424-500 501-557



1 LaBar Declaration at ¶ 5. The Property was also made available to all of Marcus & Millichap's  
2 apartment/retail specialists nationwide to help identify section 1031 buyers within the MNet  
3 system. LaBar Declaration at ¶ 6. Over 90 Marcus & Millichap agents presented offering  
4 memorandums for the Property. LaBar Declaration at ¶ 7. Over 1000 direct marketing calls for  
5 the Property to principals. LaBar Declaration at ¶ 8.

6 Additionally, an e-brochure for the Property was sent to over 250 principals, brokers, and  
7 executives. LaBar Declaration at ¶ 9. Moreover, Marcus & Millichap provided comprehensive  
8 due diligence documentation (including rent rolls, by-laws, etc) to over 30 active investors. LaBar  
9 Declaration at ¶ 11. Approximately 35 registered tours of the Property were conducted with listing  
10 agents, and approximately 25 non-registered tours and drive-by viewings were conducted. LaBar  
11 Declaration at ¶ 12. Marcus & Millichap also targeted the following major commercial brokerages  
12 in connection with the marketing of this Property: CBRE, Cushman & Wakefield, Grub & Ellis,  
13 Hendricks & Partners, and Sperry Van Ness. LaBar Declaration at ¶ 13.

14 C) The Purchase and Sale Agreement

15 As noted above, the Property has been exhaustively marketed for over 3 months. Written  
16 offers to purchase the Property were received from 31 prospective purchasers, and based upon  
17 certain criteria, with an emphasis on the prospective buyers' ability to close the transaction, 10  
18 offerors were contacted and solicited for their best and final offer. LaBar Declaration at ¶ 14. The  
19 best offer to purchase was selected from these offers, and on or about February 5, 2010, the  
20 prospective purchaser and Receiver entered into purchase and sale agreement ("PSA"). LaBar  
21 Declaration at ¶ 15. The prospective buyer has tendered \$500,000 non-refundable<sup>2</sup> earnest money.

22 Lender is contemporaneously applying for leave to file the PSA under seal, due to the  
23 sensitive financial information contained therein and the harm that could be caused to the market  
24 value of the Receivership Property if the PSA is made public, and the sale were to fall through for  
25 any reason. *See* LaBar Declaration at ¶ 16. As with any transaction of considerable size, the due  
26 diligence required by serious prospective buyers is a requires significant time, expense and effort.

---

27  
28 <sup>2</sup> Subject to this Court's approval of the proposed sale.

1 Moreover, during the negotiation process, both sides made concessions before agreeing to  
2 the precise terms and language. However, both sides started negotiations at the original asking  
3 price. If the PSA were made public, and then fell through, all prospective buyers from that point  
4 would begin their negotiations, not at the original asking price, but at the price point and with the  
5 concessions reflected in the PSA. In this way, making the PSA publically available prior to its  
6 approval would damage the value of the Receivership Property by effectively lowering the asking  
7 price and eliminating any room for negotiation built into the asking price.

8 Additionally, the marketing process for the Property has been ongoing for months, and  
9 each party who was interested in the Property had the same opportunity to bid. If the PSA were  
10 now made public, a new buyer would have the incentive to copy the agreement, add a nominal  
11 amount, and attempt to step in front of the prospective purchaser who has already put the time,  
12 costs, fees, and effort into negotiating a deal. Allowing this sort of last minute gamesmanship  
13 would chill receivership sales in the future by providing a disincentive to earnest and interested  
14 buyers from doing the initial work. All buyers would be incentivized to withhold any offer until  
15 someone else did so first, thereby chilling the sales process for future receivership properties.

16 C) Claims Against the Receivership Estate

17 Lender is unaware of any other creditors who have a claim against the proceeds from the  
18 sale of the Receivership Property. As the market value of the Property is lower than the amount of  
19 Plaintiff's security interest in the Property, no money from the sale of the Property will be paid to  
20 the Borrower, or anyone else other than Lender.

21 II.

22 CONCLUSION

23 Borrower has repeatedly requested Lender sell the Property, and has even requested  
24 Lender foreclose on the Property rather than proceed with the alternate remedy of a receivership.<sup>3</sup>  
25 Receiver has actively marketed the Property for several months, and a price has been negotiated in  
26 the open market. Given the widespread marketing efforts undertaken, and the number of offers

---

27  
28 <sup>3</sup> See e.g., Defendant's Opposition to Application for Order to Show Cause [Why Receiver Should not be Appointed] filed on August 14, 2009, at p 3 (arguing that the Plaintiff should foreclose rather than seek a receiver).

1 received and considered, the PSA represents the fair market value price for the Property. The  
2 Lender therefore requests this Court (a) approve the PSA as a full and final disposition of the  
3 Property, (b) enter a finding of fact that the sale price contained within the PSA is the fair market  
4 value for the Property (c) order that the Receiver shall be authorized to sell the Property and shall  
5 be authorized to effectuate any documents to consummate the sale and fully and finally convey  
6 ownership of the Property.

7 DATED February 11, 2010.

8 LEWIS AND ROCA LLP

9 /s/ Michael F. Lynch  
10 Nevada Bar No. 8555  
11 3993 Howard Hughes Pkwy., Suite 600  
12 Las Vegas, Nevada 89169  
13 (702) 949-8200  
14 (702) 949-8398 (fax)

15 *Attorneys for Plaintiff*  
16  
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26  
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28

Exhibit “1”

001254

001254

Exhibit “1”

**Lynch, Michael**

---

**From:** Lynch, Michael  
**Sent:** Tuesday, October 27, 2009 1:10 PM  
**To:** 'Brent Larsen Esq. (blarsen@deanerlaw.com)'  
**Subject:** Palmilla – Marcus and Millichap Listing Agreement.PDF; Marcus and Millichap Offering Memorandum.PDF  
**Importance:** High  
**Attachments:** Marcus and Millichap Listing Agreement.PDF; Marcus and Millichap Offering Memorandum.PDF

Dear Brent:

During this morning's status check in Palmilla, you requested three things relating to the efforts to market the Palmilla Receivership Property, 1) the listing price; 2) the listing agreement; and 3) the Offering Memorandum (what I was loosely referring to as the marketing "brochure").

The attachments to this email cover all of these requests. Please be aware, however, that in accord with the Receiver's authority as set forth in the Order Appointing Receiver, the listing agreement had already been signed, and the Offering Memorandum had already been published (i.e., it is actually listed), so if you have any comments or concerns whatsoever, please let me know immediately. As I stated in open Court, if you wish to be heard on any issue in connection with the receivership, I will certainly do my best to address it informally, and if that fails, to stipulate to an OST should you desire. If you have any concerns, we do request that you set forth these concerns in detail, and support them with evidence so that we may evaluate any alleged issues or deficiencies.

If you have any trouble opening these attachments, please let me know.

Regards,  
Michael

<b>LEWIS AND ROCA</b> — LLP — LAWYERS LEWIS AND ROCA LLP PHOENIX TUCSON LAS VEGAS ALBUQUERQUE RENO	<b>Michael F. Lynch</b> Trial Attorney  Telephone: (702) 474-2683 Facsimile: (702) 216-6191 E-mail: <a href="mailto:mlynch@LRLaw.com">mlynch@LRLaw.com</a>  3993 Howard Hughes Pkwy, STE 600 Las Vegas, Nevada 89169 <a href="http://www.lewisandroca.com">www.lewisandroca.com</a> <a href="http://www.lewisandroca.com/MLynch">www.lewisandroca.com/MLynch</a>
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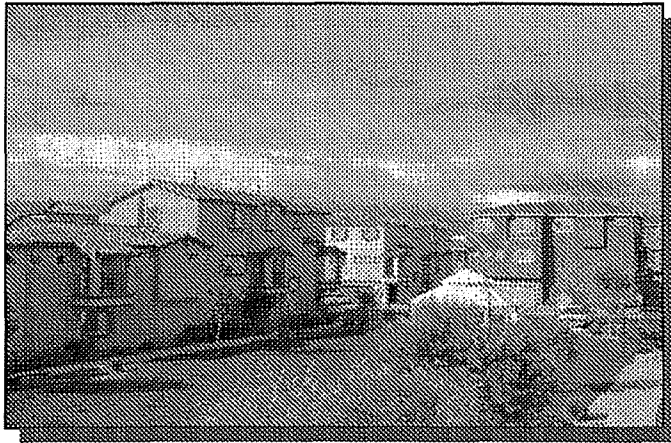
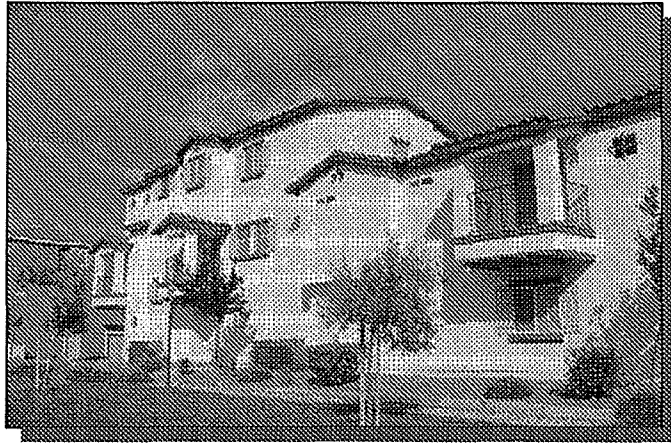
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# Exhibit “2”

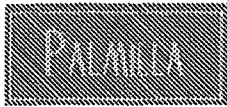
# PALMILLA

NORTH LAS VEGAS, NV

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OFFERING MEMORANDUM



## CONFIDENTIALITY AND DISCLAIMER

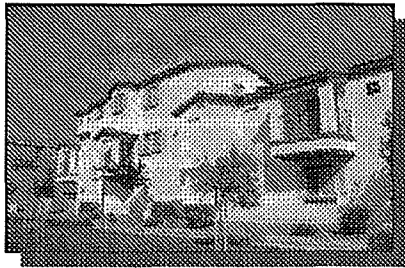
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SECTION ONE	PROPERTY DESCRIPTION
SECTION TWO	RENT COMPARABLES
SECTION THREE	RECENT SALES
SECTION FOUR	PRICING & FINANCIAL ANALYSIS
SECTION FIVE	DEMOGRAPHIC ANALYSIS

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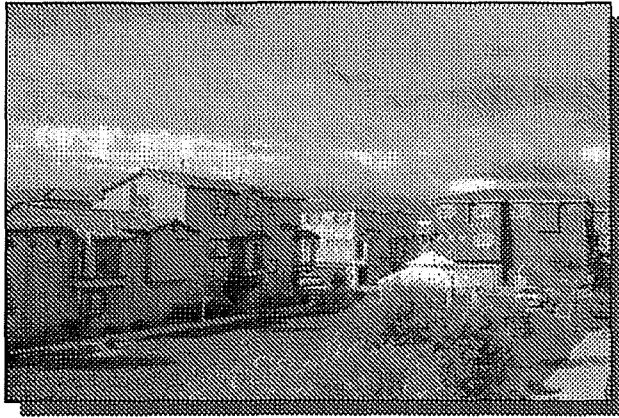
**PALMILLA**

NORTH LAS VEGAS, NV

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## Investment Overview



### INVESTMENT HIGHLIGHTS

*Spacious Town-House Design*

*\$43 SF/ 40% of Replacement Cost!*

*52.3% Control of HOA*

*Adjacent to Aliante Masterplan Community*

*Units include direct access two space garage!*

*Seller Financing to be considered!*

*Lender Owned (REO Opportunity)*

*Offers Due December 4, 2009*

Marcus & Millichap is pleased to announce the exclusive listing of the Palmilla Townhomes, this bulk townhome offering is comprised of 157 units out of 300 in the community. Palmilla was constructed between 2006 and 2007 with ninety-percent of Phase One sold to individual owners and Phase Two built as a rental property. Of the subject property's 157 spacious townhomes, 144 contiguous units are spread across twelve buildings located in Phase Two, with the remaining 13 noncontiguous units spread across four buildings in Phase One.

The community is adjacent to the 1,905 acre masterplanned community called "Aliante" that includes 6,500 homes, commercial centers and 428 acres of recreational parks that encompass a 34 mile interconnecting trail system. Palmilla is minutes from the New Aliante Station Hotel & Casino as well as the Centennial Hills Hospital & medical campus.

Palmilla features six different floor plans that range from 1,185 to 1,758 square feet. Each individually parceled unit includes a direct access two space garage, full size washer/dryer and walk-in closets. Common area amenities include a resort-style pool, cabana, playground, large grass courtyards and a gated/controlled access entry into community.

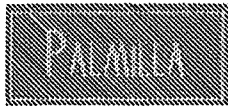
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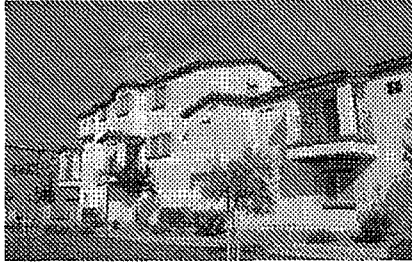
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PROPERTY DESCRIPTION

001261



## Property Summary



### THE OFFERING

Property	Palmilla
Property Address	5850 Palmilla Street North Las Vegas, NV 89031
Assessor's Parcel	Multiple
Zoning	R-3

### SITE DESCRIPTION

Number of Units	157
Number of Buildings	Sixteen
Number of Stories	Two & Three
Year Built/Phase 2	2006 / 2007
Rentable Square Feet	244,101
Lot Size	8.98 Acres
Type of Ownership	Fee Simple
Density	17.5 Units/Acre
Parking	347
Parking Ratio	2.21/Unit
Landscaping	Lush Greens/Xeroscape
Topography	Flat

### UTILITIES

Water	North Las Vegas Water District
Phone	Embarq
Electric	NV Energy
Gas	Southwest Gas Co.

### CONSTRUCTION

Foundation	Concrete Slab
Framing	Wood
Exterior	Stucco
Parking Surface	Asphalt
Roof	Pitched Tile

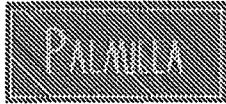
### MECHANICAL

HVAC	Individual
Wiring	2006 Code
Fire Protection	Wetpipe Sprinklers, Alarm System, Smoke

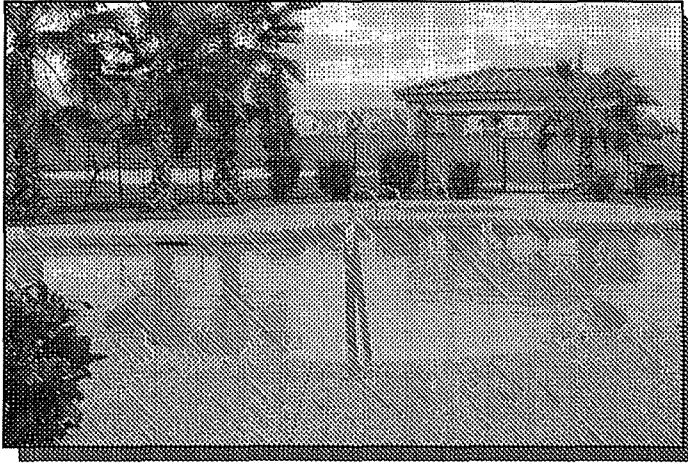
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## Amenities



### COMMON AREA AMENITIES

*Gated/Controlled Access Community*

*Resort-Style Pool*

*Children's Playground*

*Lush Greens/Gazebo*

*BBQ/Picnic Areas*

PROPERTY DESCRIPTION

### UNIT AMENITIES

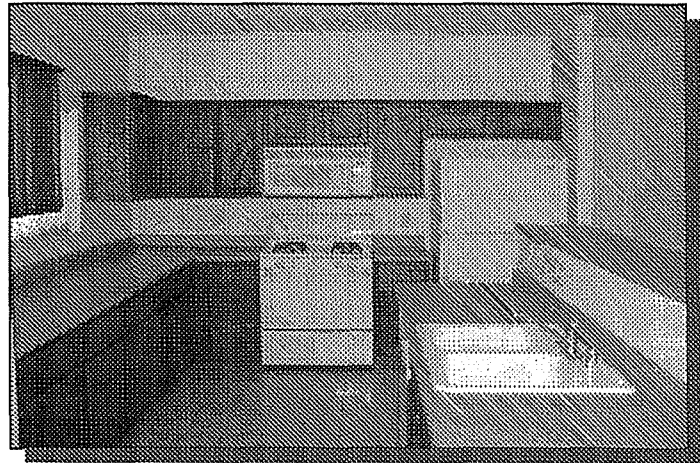
*Fully-Equipped Gourmet Kitchens*

*Full size Washer and Dryer*

*Private Balconies*

*Incandescent Lighting*

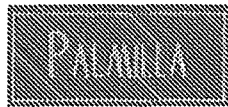
*Direct Access 2 Car Garages*



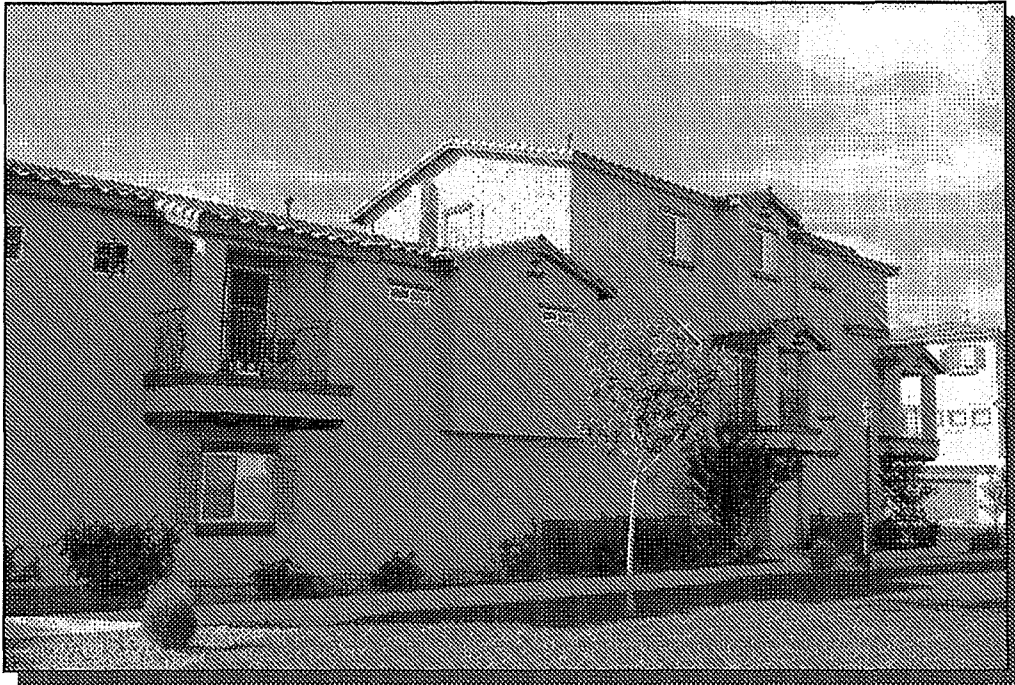
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## Property Photos



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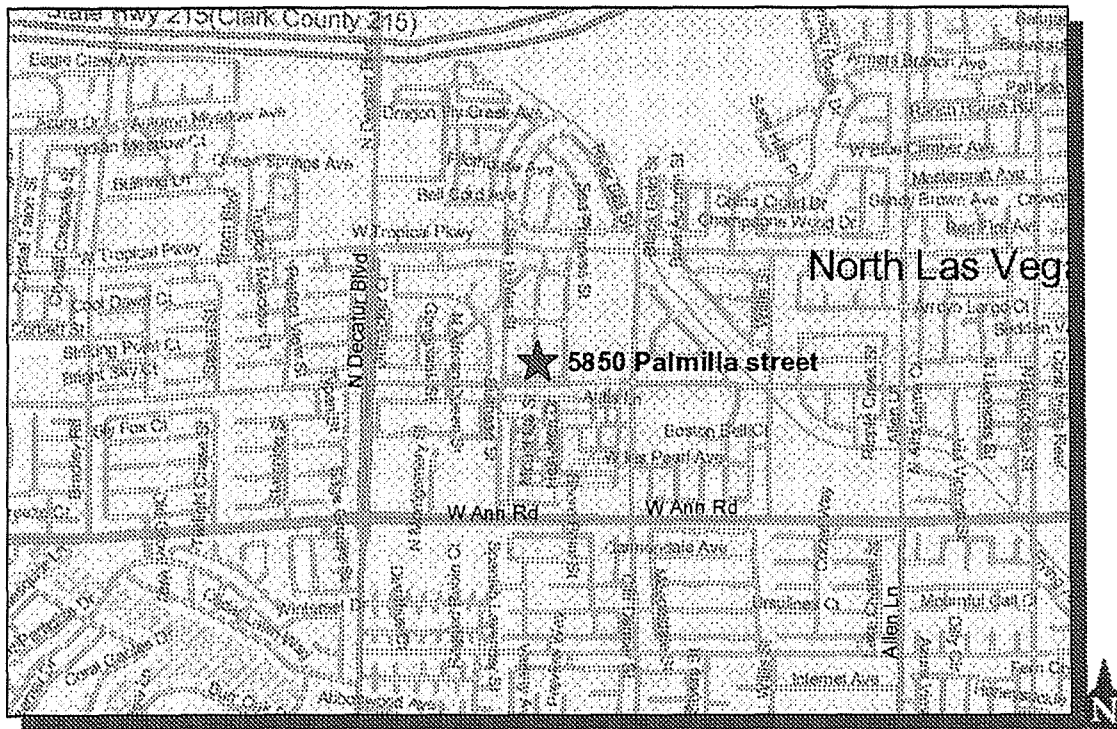
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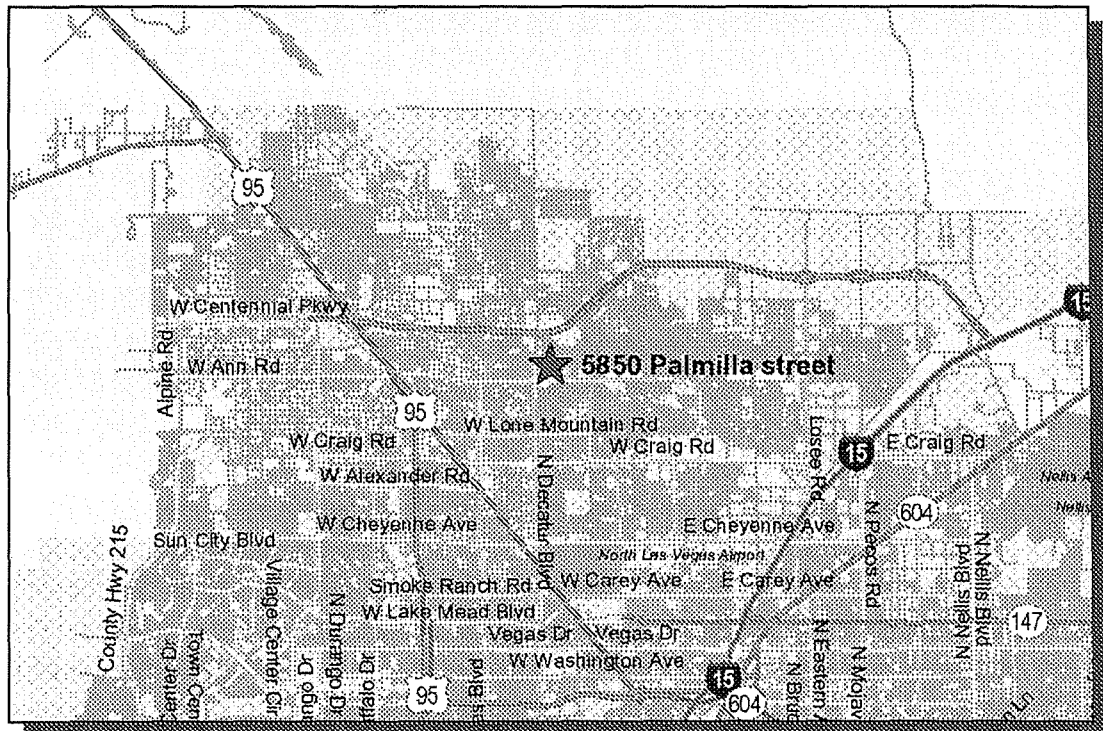
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## Area Maps



## LOCAL MAP



## REGIONAL MAP

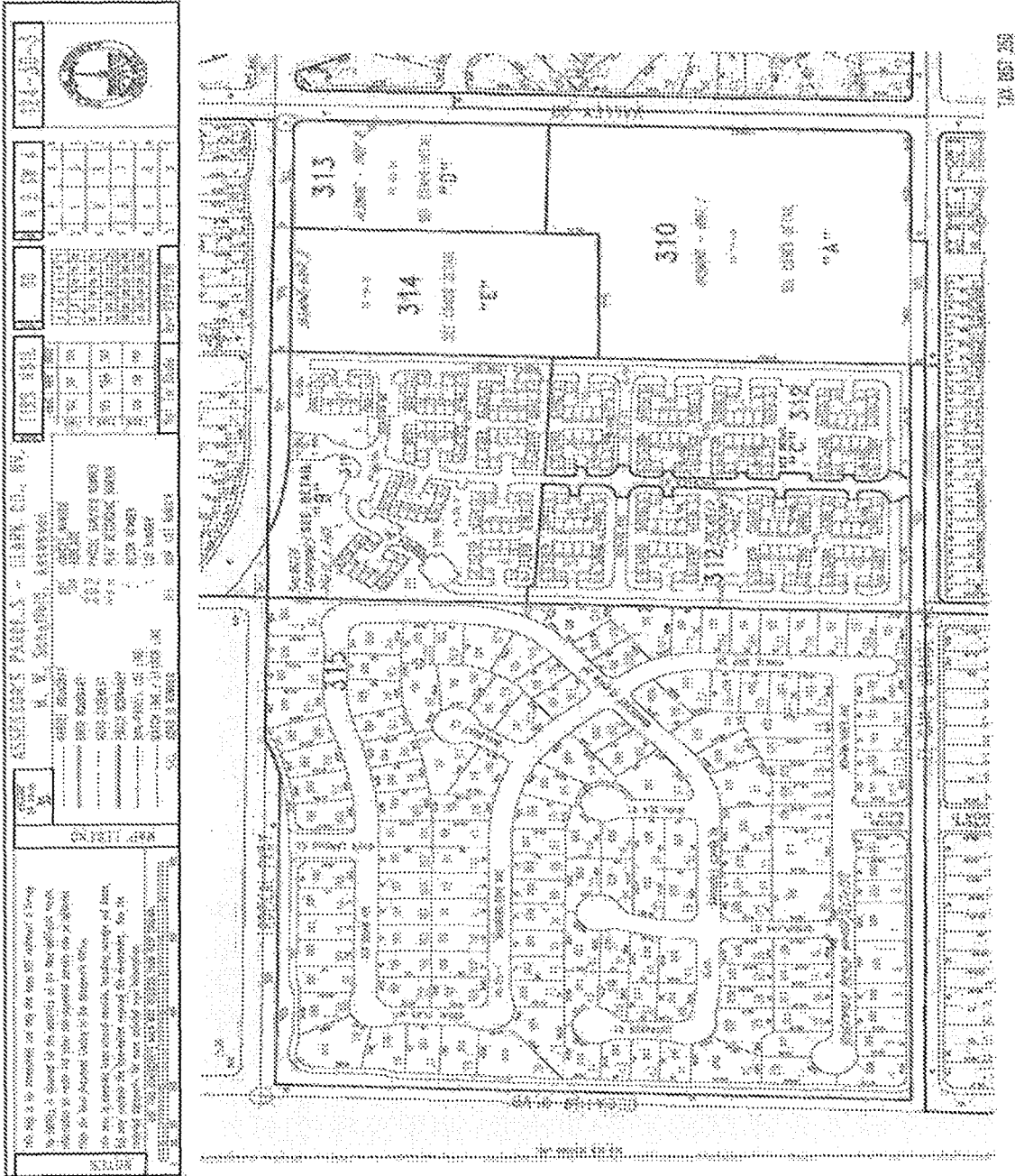
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# Site Plan



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## Floor Plans/Acapulco

## PROPERTY DESCRIPTION



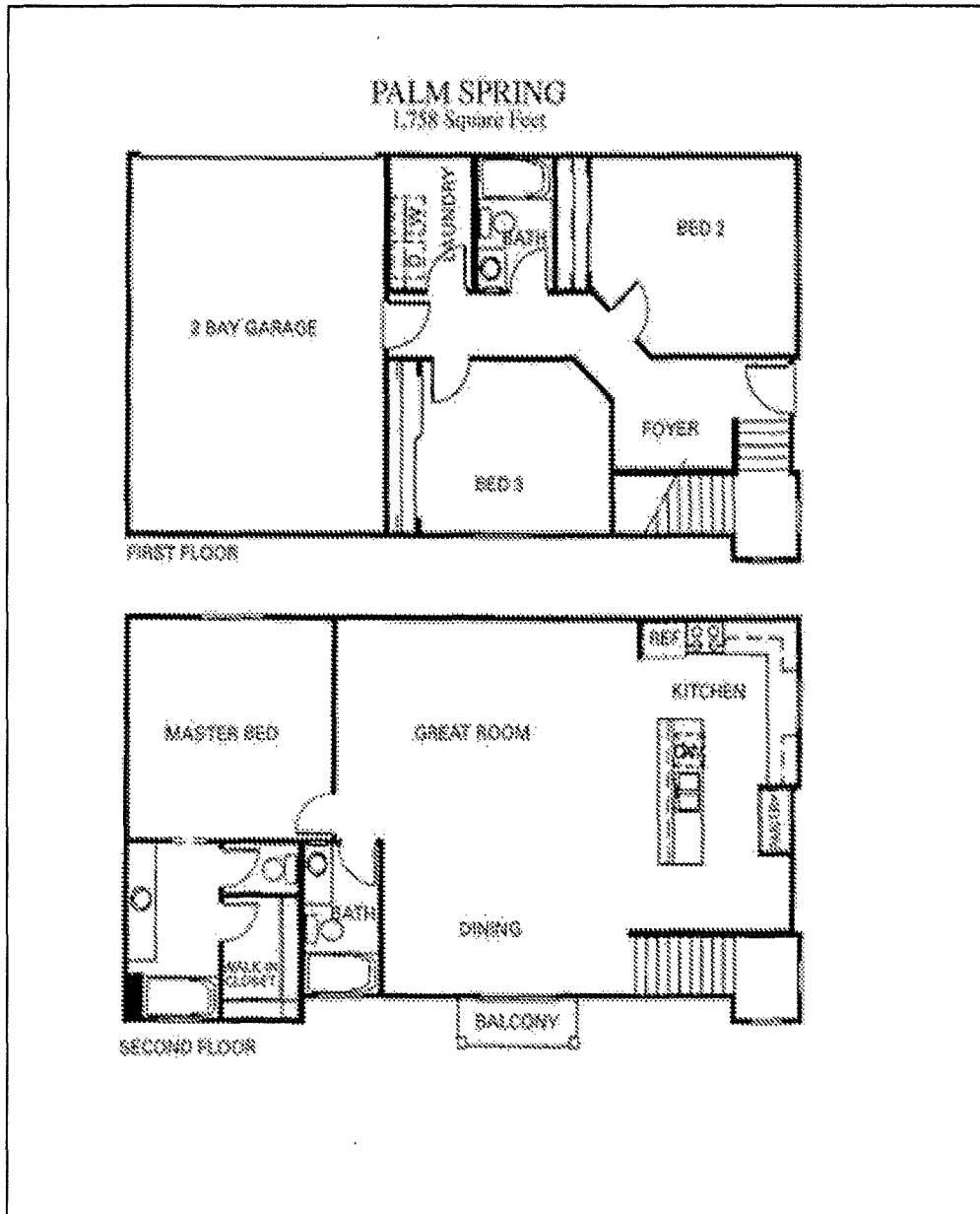
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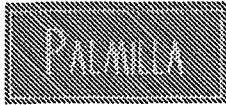
## Palm Spring

### PROPERTY DESCRIPTION



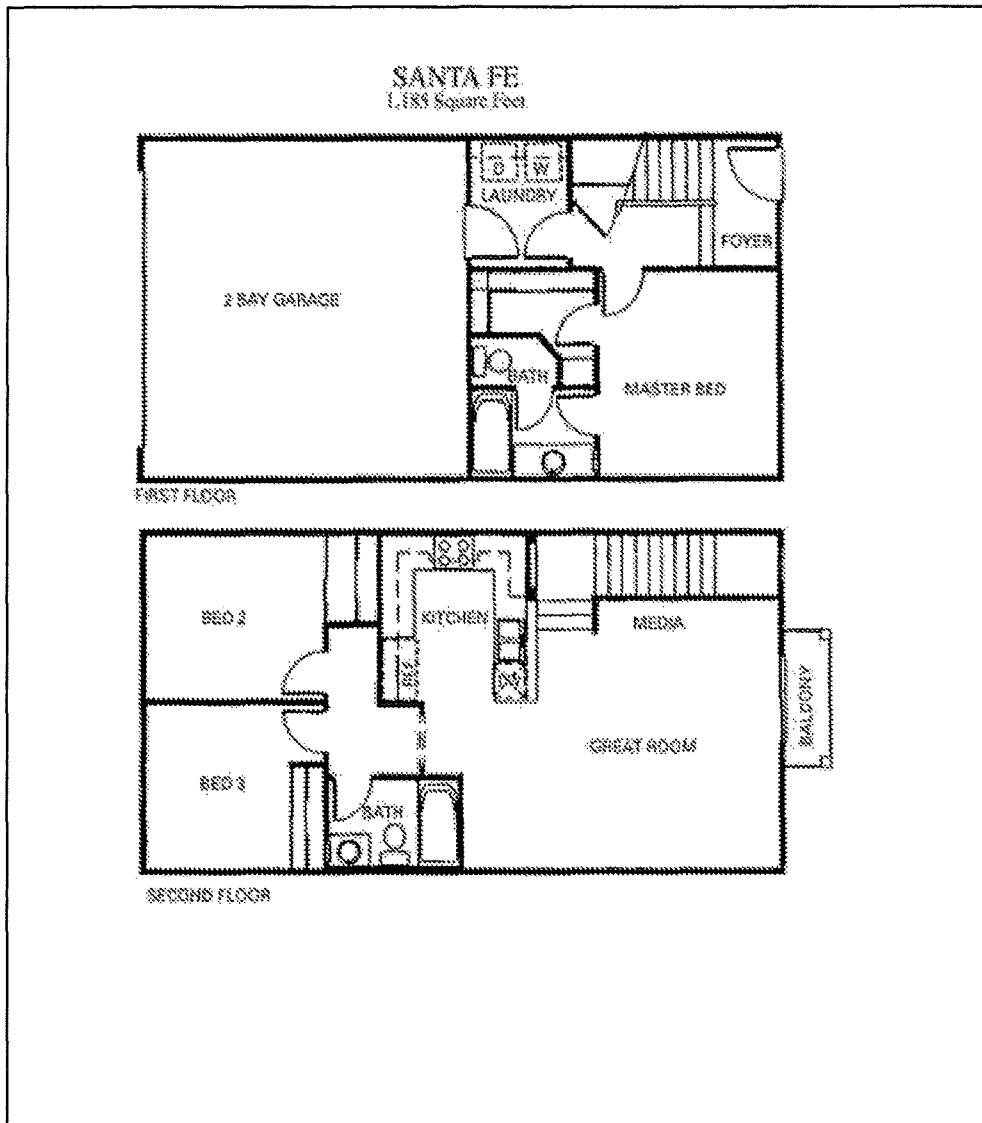
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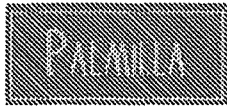
## Santa Fe

## PROPERTY DESCRIPTION



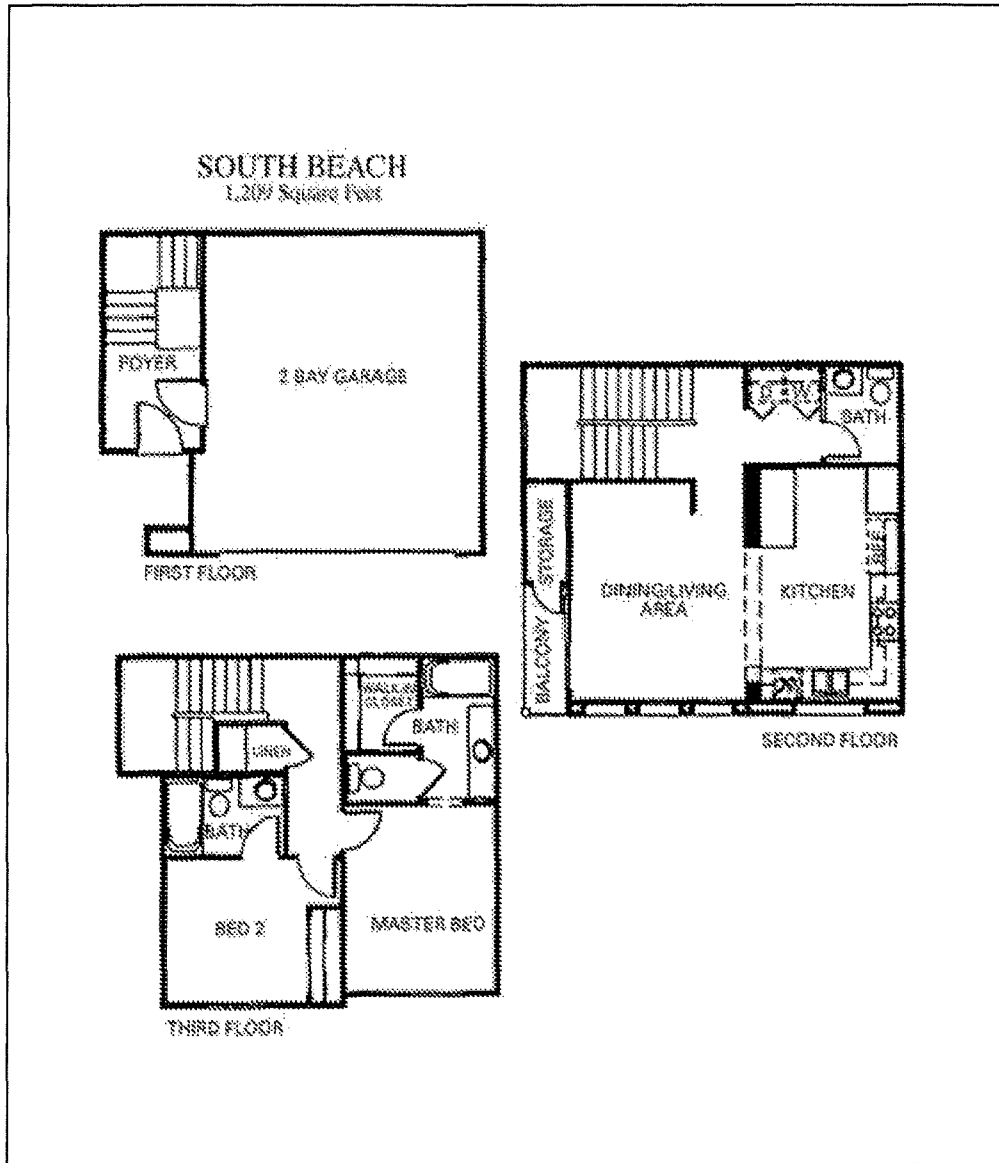
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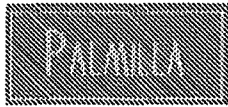
## South Beach

### PROPERTY DESCRIPTION



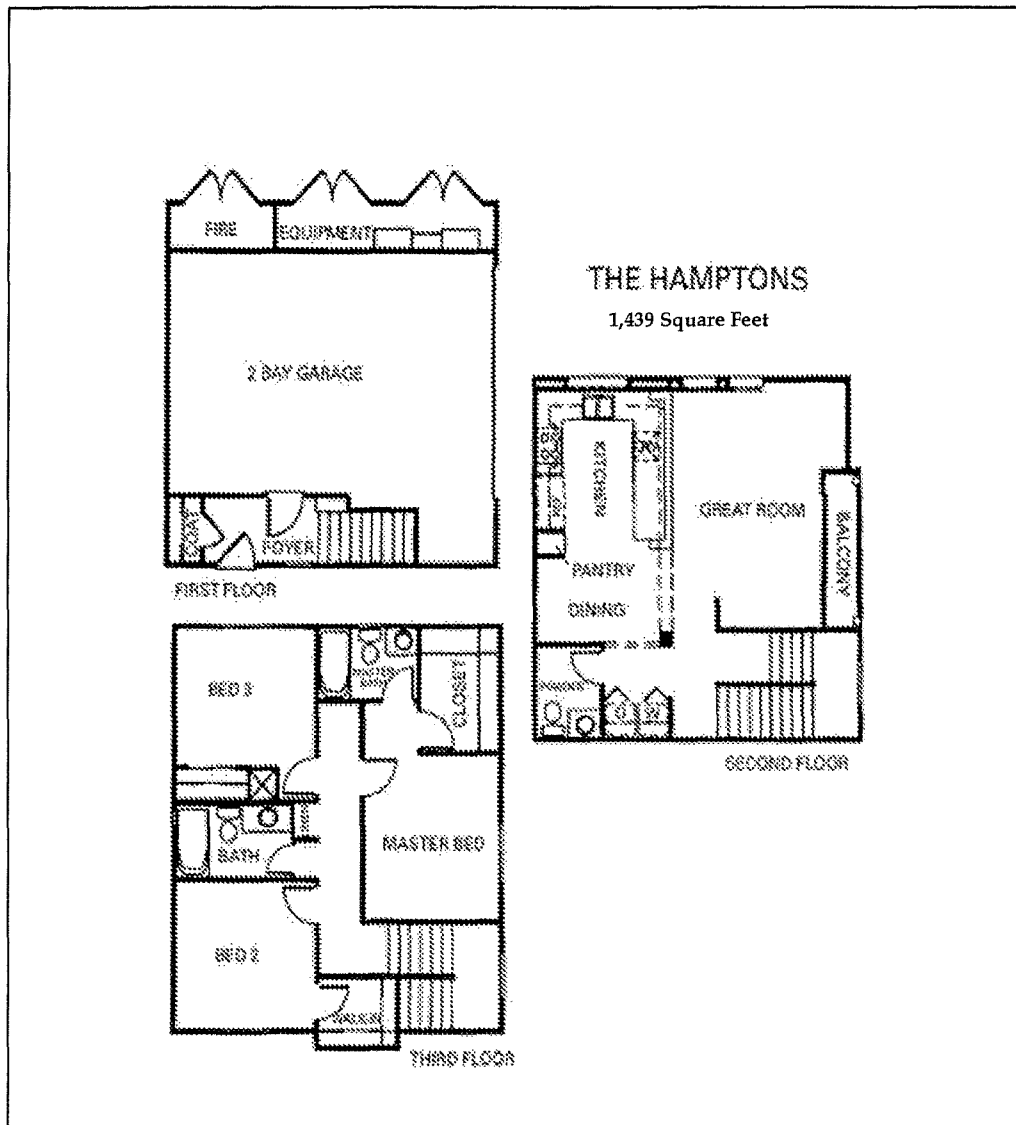
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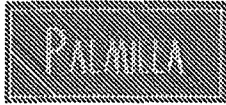
## The Hamptons

### PROPERTY DESCRIPTION



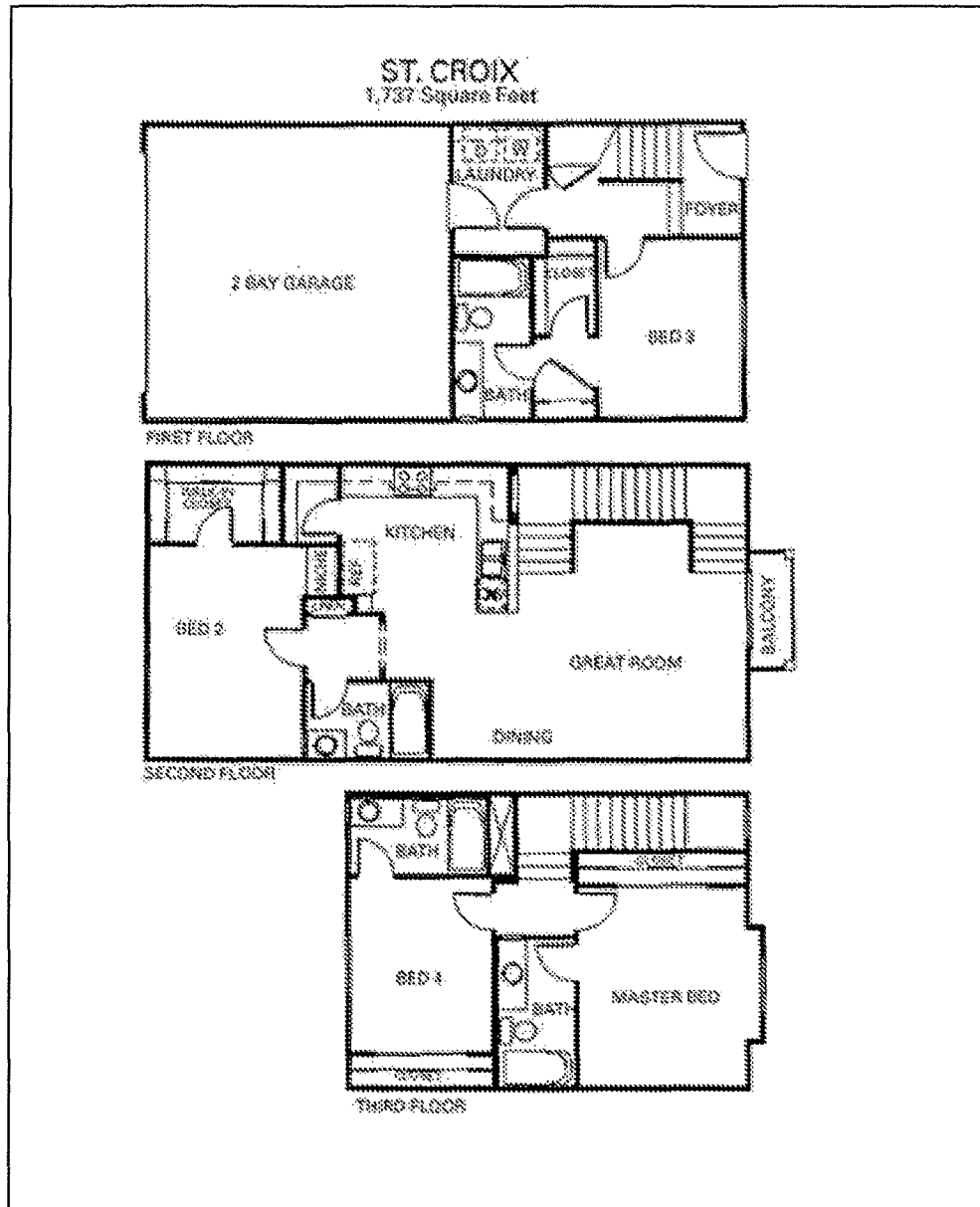
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## St. Croix

## PROPERTY DESCRIPTION



001272

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## Aerial Photo

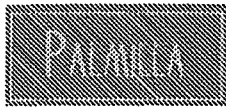


## PROPERTY DESCRIPTION

001273

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## Aerial Photo



## PROPERTY DESCRIPTION

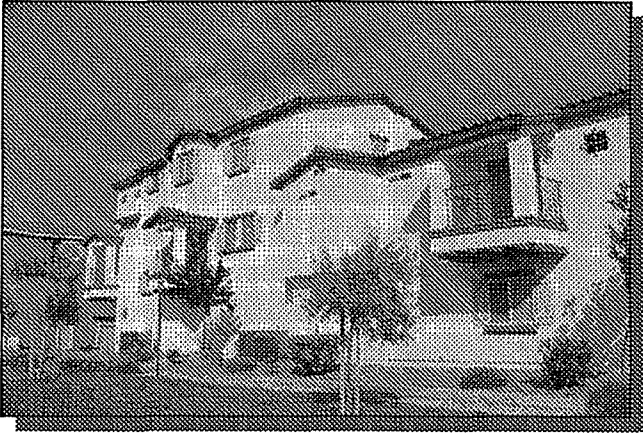
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RENT COMPARABLES



**PALMILLA**

NORTH LAS VEGAS, NV

**Marcus & Millichap**  
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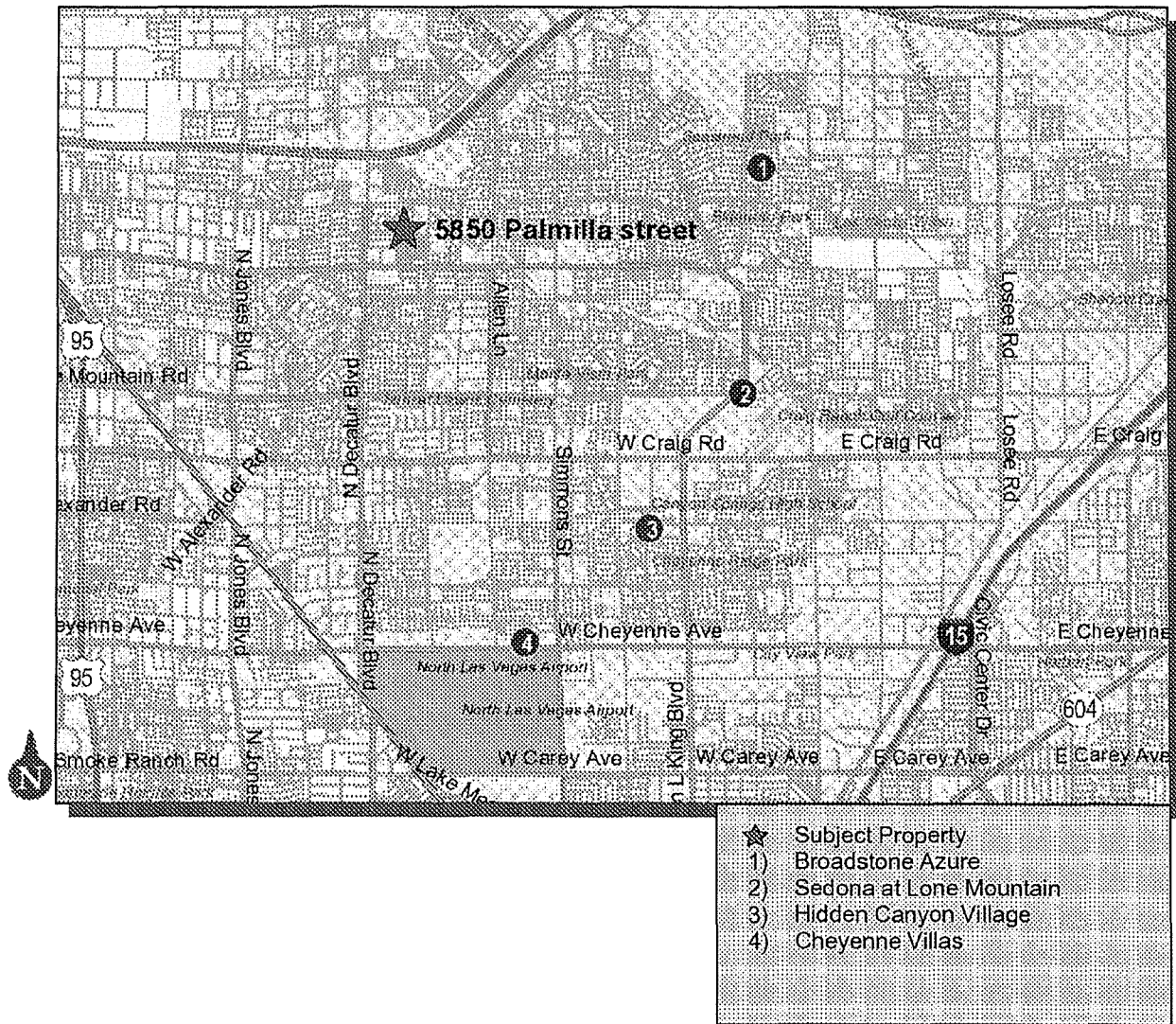


## Rent Comparables Map

## RENT COMPARABLES

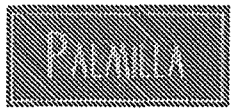
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001276



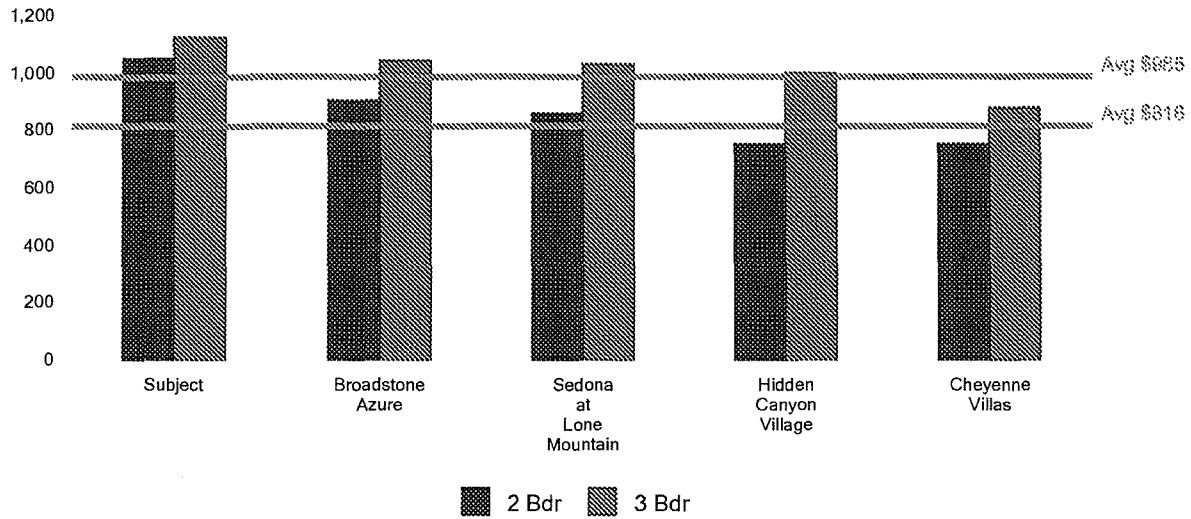
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## Average Rents

AVERAGE RENTS - 2 & 3 BEDROOMS



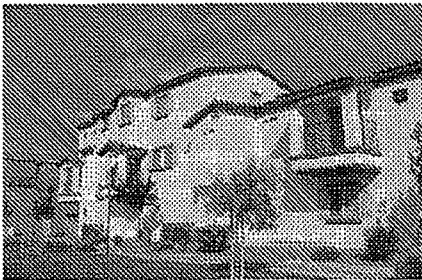
RENT COMPARABLES

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## Rent Comparables



### SUBJECT PROPERTY

No. of Units 157  
Occupancy: 75%  
Year Built/Phase 2: 2006/2007

### PALMILLA

5850 Palmilla Street  
North Las Vegas, NV 89031

Unit Type	No. of Units	SF	Rent	Rent/SF
3 Bdr 2 Bath Twnhs	12	1,185	\$999	\$0.89
2 Bdr 2.5 Bath Twnhs	26	1,209	\$1,050	\$0.95
3 Bdr 2.5 Bath Twnhs	27	1,439	\$1,150	\$0.87
3 Bdr 2.5 Bath Twnhs	27	1,709	\$1,150	\$0.78
4 Bdr 4 Bath Twnhs	39	1,737	\$1,150	\$0.79
3 Bdr 3 Bath Twnhs	26	1,758	\$1,200	\$0.80
<b>Total/Wtd. Avg.</b>	<b>157</b>	<b>244,101</b>	<b>\$1,117</b>	<b>\$0.73</b>

RENT COMPARABLES

1



No. of Units 312  
Occupancy: N/A  
Year Built: 2007

### BROADSTONE AZURE

650 East Azure Avenue  
North Las Vegas, NV 89031

Unit Type	No. of Units	SF	Rent	Rent/SF
1 Bdr 1 Bath	132	664 - 789	\$613 - \$705	\$0.91
2 Bdr 2 Bath	156	1,031 - 1,112	\$896 - \$915	\$0.85
3 Bdr 2 Bath	24	1,260 - 1,260	\$1,041 - \$1,041	\$0.83

<b>Total/ Avg.</b>	<b>312</b>	<b>291,612</b>	<b>\$868</b>	<b>\$0.86</b>
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2



No. of Units 320  
Occupancy: N/A  
Year Built: 1999

### SEDONA AT LONE MOUNTAIN

770 West Lone Mountain Road  
North Las Vegas, NV 89031

Unit Type	No. of Units	SF	Rent	Rent/SF
1 Bdr 2 Bath Den	120	1,056 - 1,056	\$860 - \$860	\$0.81
2 Bdr 2 Bath	120	1,056 - 1,056	\$860 - \$860	\$0.81
3 Bdr 2 Bath Den	80	1,240 - 1,240	\$1,030 - \$1,030	\$0.83

<b>Total/ Avg.</b>	<b>320</b>	<b>332,640</b>	<b>\$916</b>	<b>\$0.82</b>
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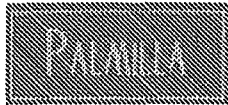
### COMMENTS

Management is currently waiving deposits.

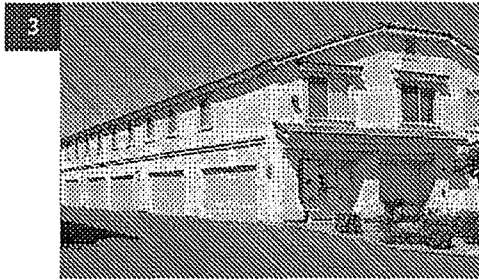
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001278



## Rent Comparables

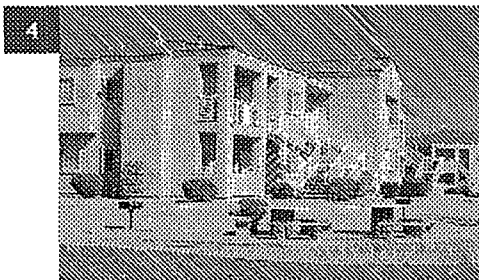


No. of Units 148  
Occupancy: N/A  
Year Built: 2001

**HIDDEN CANYON VILLAGE**  
3940 Scott Robinson  
North Las Vegas, NV 89032

Unit Type	No. of Units	SF	Rent	Rent/SF
2 Bdr 2.5 Bath Twnhs	96	1,042 - 1,042	\$750 - \$750	\$0.72
3 Bdr 2.5 Bath Twnhs	52	1,184 - 1,256	\$995 - \$995	\$0.82

Total/ Avg.	148	163,472	\$872	\$0.77
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No. of Units 369  
Occupancy: N/A  
Year Built: 2001

**CHEYENNE VILLAS**  
3260 Fountain Falls Way  
North Las Vegas, NV 89032

Unit Type	No. of Units	SF	Rent	Rent/SF
2 Bdr 2 Bath	185	1,056 - 1,056	\$749 - \$749	\$0.71
3 Bdr 2 Bath	184	1,240 - 1,240	\$875 - \$875	\$0.71

Total/ Avg.	369	423,520	\$812	\$0.71
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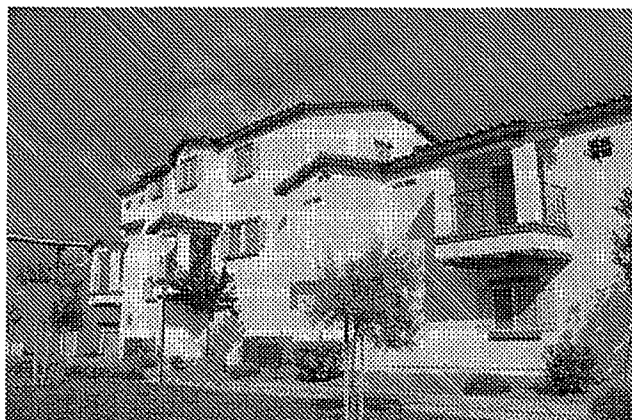
RENT COMPARABLES

001279

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Real Estate Investment Services

## RECENT SALES

**PALMILLA**

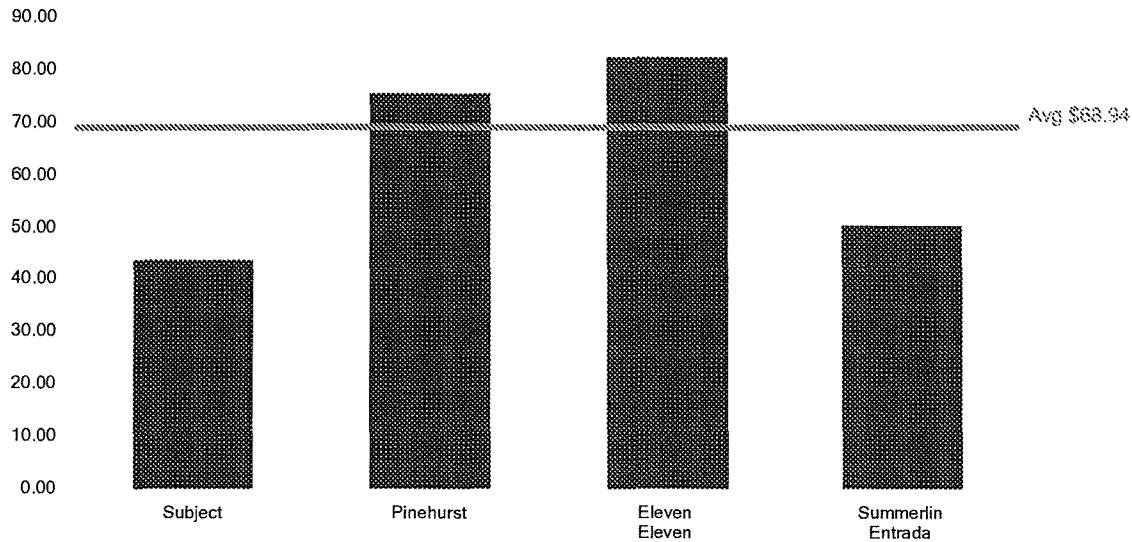
NORTH LAS VEGAS, NV

**Marcus & Millichap**  
Real Estate Investment Services

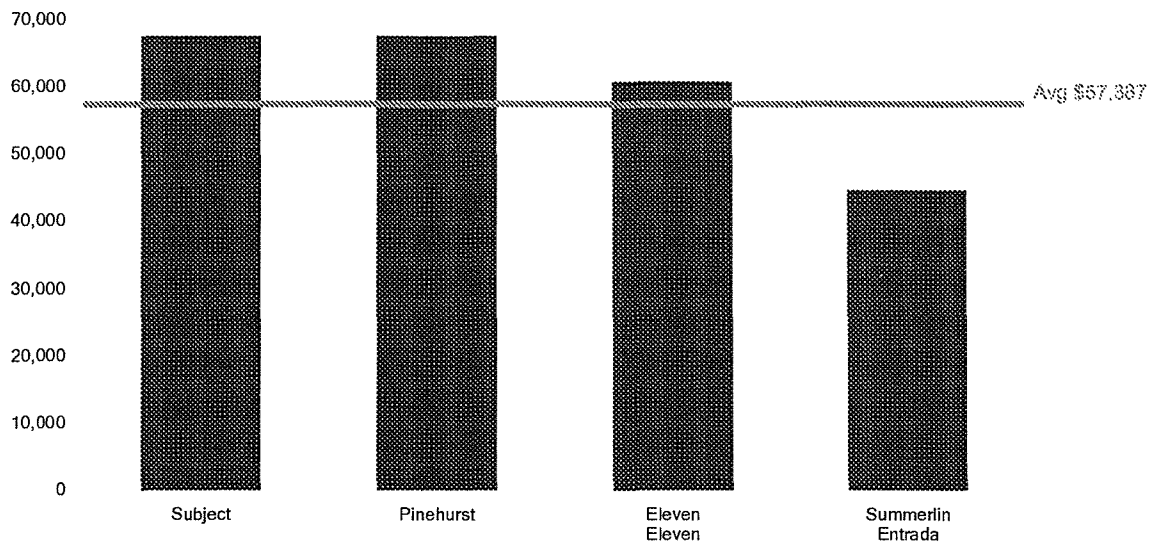


## Price/SF & Price/Unit

### AVERAGE PRICE/SF



### AVERAGE PRICE/UNIT

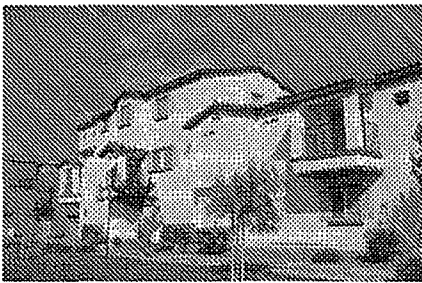


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## Recent Sales



**SUBJECT PROPERTY**

**PALMILLA**  
5850 Palmilla Street  
North Las Vegas, NV 89031

No. of Units:	157	No. of Units	Unit Type
Year Built:	2006 / 2007	12	3 Bdr 2 Bath Twnhs
Sale Price:	\$10,550,000	26	2 Bdr 2.5 Bath Twnhs
Price/Unit:	\$67,197	27	3 Bdr 2.5 Bath Twnhs
Price/SF:	\$43.22	27	3 Bdr 2.5 Bath Twnhs
CAP Rate:	8.00%	39	4 Bdr 4 Bath Twnhs
GRM:	4.95	26	3 Bdr 3 Bath Twnhs



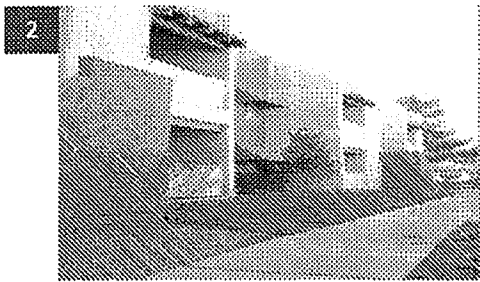
Close of Escrow 6/1/2009

**PINEHURST**  
6650 West Warm Springs  
Las Vegas, NV 89118

No. of Units:	193	No. of Units	Unit Type
Year Built:	2001	81	1 Bdr 1 Bath
Sale Price:	\$12,999,999	91	2 Bdr 2 Bath
Price/Unit:	\$67,358	21	3 Bdr 2 Bath
Price/SF:	\$75.00		
CAP Rate:	N/A		
GRM:	N/A		

### COMMENTS

This is a fractured condo deal -167 of the original 360 total are held by individual owners; 193 units remain as rentals under single ownership. Buyer paid all cash!



Close of Escrow On Market

**ELEVEN ELEVEN**  
1111 Warbonnet  
Las Vegas, NV 89117

No. of Units:	124	No. of Units	Unit Type
Year Built:	1988	26	1 Bdr 1 Bath
Sale Price:	\$7,500,000	86	2 Bdr 2 Bath
Price/Unit:	\$60,484		
Price/SF:	\$82.00		
CAP Rate:	N/A		
GRM:	N/A		

### COMMENTS

This property is currently on the market with Nevada State Bank. A loan in the amount of \$6,800,000, held by Nevada State Bank was foreclosed on 03/11/2009. 12 units of the 124 units have been sold to individual owners. Only a handful of units have been

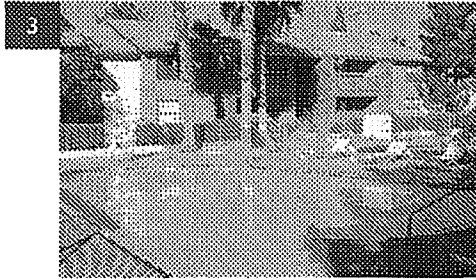
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## Recent Sales



Close of Escrow 10/08/2009

### COMMENTS

Short sale, buyer paid all cash.

**SUMMERLIN ENTRADA**  
1701 Rock Springs Drive  
Las Vegas, NV 89128

No. of Units:	352	No. of Units	Unit Type
Year Built:	1987 / N/A	176	1 Bdr 1 Bath
Sale Price:	\$15,600,000	160	2 Bdr 2 Bath
Price/Unit:	\$44,318	16	3 Bdr 2 Bath
Price/SF:	\$49.82		
CAP Rate:	N/A		
GRM:	N/A		

RECENT SALES

001283

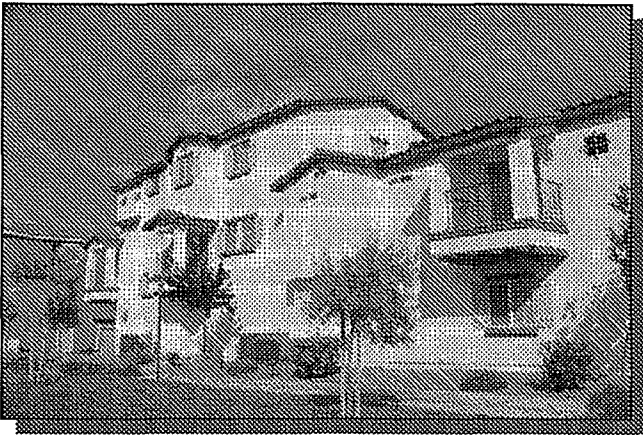
001283

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## PRICING &amp; FINANCIAL ANALYSIS

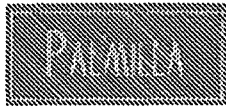
001284

**PALMILLA**

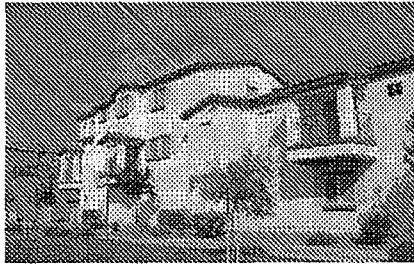
NORTH LAS VEGAS, NV

**Marcus & Millichap**  
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001284



## Offering Summary



Price	\$10,550,000
Down Payment	100% \$10,550,000
Price/Unit	\$67,197
Price/SF	\$43.22
Number of Units	157
Rentable Square Feet	244,101
Number of Buildings	Sixteen
Number of Stories	Two & Three
Year Built/Phase 2	2006 / 2007
Lot Size	8.98 Acres

### VITAL DATA

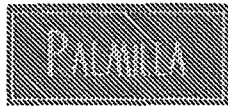
CAP Rate - Stabilized	8.00%
GRM - Stabilized	4.95
Net Operating Income - Stabilized	\$844,403
Total Return - Stabilized	8.0% \$844,403

## PRICING & FINANCIAL ANALYSIS

SUBJECT TO COURT APPROVAL

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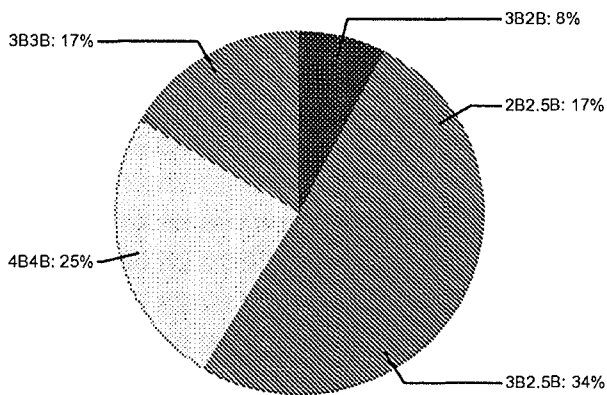
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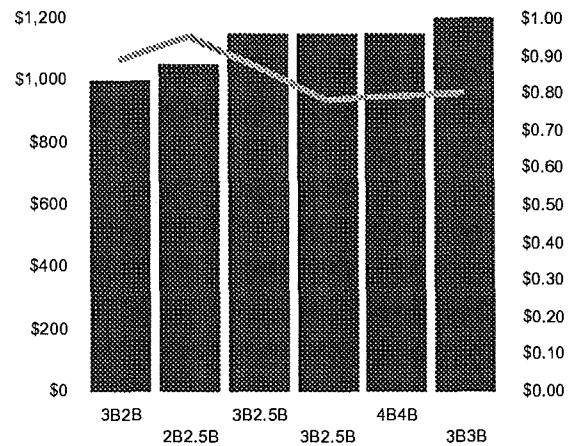
# PRICING & FINANCIAL ANALYSIS

No. of Units	Unit Type	Approx. Square Feet	Stabilized Rents	Rent/SF	Monthly Income
12	3 Bdr 2 Bath Twnhs	1,185	\$999	\$0.89	\$11,988
26	2 Bdr 2.5 Bath Twnhs	1,209	\$1,050	\$0.95	\$27,300
27	3 Bdr 2.5 Bath Twnhs	1,439	\$1,150	\$0.87	\$31,050
27	3 Bdr 2.5 Bath Twnhs	1,709	\$1,150	\$0.78	\$31,050
39	4 Bdr 4 Bath Twnhs	1,737	\$1,150	\$0.79	\$44,850
26	3 Bdr 3 Bath Twnhs	1,758	\$1,200	\$0.80	\$31,200
157	TOTAL	244,101			\$177,438

## UNIT MIX



## UNIT RENT & RENT/SF



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## Income & Expenses

Total Number of Units:	157
Total Rentable Area:	244,101 SF

INCOME	STABILIZED	PER UNIT
GROSS POTENTIAL RENT	\$2,129,256	\$13,562
Other Income		
	46,830	298
Total Other Income	\$46,830	\$298
GROSS POTENTIAL INCOME	\$2,176,086	\$13,860
Vacancy/Collection Allowance (GPR)	(22.0%) \$468,436	2,984
Concessions (GPR)	(3.0%) \$63,878	407
EFFECTIVE GROSS INCOME	\$1,643,772	\$10,470
EXPENSES		
Real Estate Taxes*	\$168,775	\$1,075
Insurance	18,500	118
Repairs & Maintenance*	98,000	624
Marketing & Promotion*	24,600	157
On-Site Payroll*	205,000	1,306
Management Fee	(2.5%) \$41,094	262
General & Administrative	22,000	140
Reserves & Replacements	31,400	200
HOA (CAM/ electricity, water, sewer, trash)	190,000	1,210
TOTAL EXPENSES	\$799,369	\$5,092
Expenses per SF	\$3.27	
% of EGI	48.6%	
NET OPERATING INCOME	\$844,403	\$5,378

PRICING & FINANCIAL ANALYSIS

001287

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## Financial Overview

### LOCATION

5850 Palmilla Street  
North Las Vegas, NV 89031

Price	\$10,550,000
Down Payment	100% \$10,550,000
Number of Units	157
Price/Unit	\$67,197
Rentable Square Feet	244,101
Price/SF	\$43.22
CAP Rate - Stabilized	8.00%
GRM - Stabilized	4.95
Year Built/Phase 2	2006 / 2007
Lot Size	8.98 Acres
Type of Ownership	Fee Simple

### ANNUALIZED OPERATING DATA

#### INCOME

#### STABILIZED

Gross Potential Rent	\$2,129,256
Other Income	46,830
Gross Potential Income	\$2,176,086
Less: Vacancy/Deductions (GPR)	(25.0%) 532,314
Effective Gross Income	\$1,643,772
Less: Expenses	799,369
<b>Net Operating Income</b>	<b>\$844,403</b>

#### EXPENSES

Real Estate Taxes*	168,775
Insurance	18,500
Repairs & Maintenance*	98,000
Marketing & Promotion*	24,600
On-Site Payroll*	205,000
Management Fee	41,094
General & Administrative	22,000
Reserves & Replacements	31,400
HOA (CAM/ electricity, water, sewer,	190,000
<b>TOTAL EXPENSES</b>	<b>\$799,369</b>
<b>EXPENSES/UNIT</b>	<b>\$5,092</b>
<b>EXPENSES/SF</b>	<b>\$3.27</b>
<b>% of EGI</b>	<b>48.63%</b>

### SUBJECT TO COURT APPROVAL

### SCHEDULED INCOME

No. of Units	Unit Type	Approx. Square Feet	Stabilized Rents	Rent/SF	Monthly Income
12	3 Bdr 2 Bath Twnhs	1,185	\$999	\$0.89	\$11,988
26	2 Bdr 2.5 Bath Twnhs	1,209	\$1,050	\$0.95	\$27,300
27	3 Bdr 2.5 Bath Twnhs	1,439	\$1,150	\$0.87	\$31,050
27	3 Bdr 2.5 Bath Twnhs	1,709	\$1,150	\$0.78	\$31,050
39	4 Bdr 4 Bath Twnhs	1,737	\$1,150	\$0.79	\$44,850
26	3 Bdr 3 Bath Twnhs	1,758	\$1,200	\$0.80	\$31,200
<b>157</b>	<b>Total/Wtd. Avg.</b>	<b>244,101</b>			<b>\$177,438</b>

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DEMOGRAPHIC ANALYSIS

001289

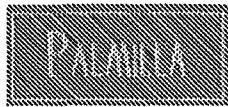


**PALMILLA**

NORTH LAS VEGAS, NV

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001289



## Demographic Report

## DEMOGRAPHIC ANALYSIS

	1 Miles:	3 Miles:	5 Miles:
1990 Population	649	9,282	45,726
2000 Population	7,299	63,647	162,598
2008 Population	16,946	107,899	294,400
2013 Population	21,820	132,108	362,784
1990 Households	260	3,166	15,713
2000 Households	2,689	21,834	56,542
2008 Households	5,974	37,264	101,816
2013 Households	7,652	45,607	125,365
2008 Average Household Size	2.84	2.88	2.88
2008 Daytime Population	1,152	16,297	81,063
1990 Median Housing Value	\$116,132	\$113,855	\$103,477
2000 Median Housing Value	\$135,109	\$137,295	\$136,073
2000 Owner Occupied Housing Units	86.6%	86.9%	73.7%
2000 Renter Occupied Housing Units	5.9%	8.7%	20.3%
2000 Vacant	7.52%	4.43%	6.00%
2008 Owner Occupied Housing Units	77.7%	76.2%	64.4%
2008 Renter Occupied Housing Units	11.4%	15.4%	25.8%
2008 Vacant	10.97%	8.34%	9.75%
2013 Owner Occupied Housing Units	75.9%	74.4%	63.0%
2013 Renter Occupied Housing Units	11.7%	15.8%	25.8%
2013 Vacant	12.37%	9.80%	11.16%
\$ 0 - \$ 14,999	2.8%	3.4%	6.8%
\$ 15,000 - \$24,999	4.3%	4.2%	6.9%
\$ 25,000 - \$34,999	6.2%	5.7%	7.4%
\$ 35,000 - \$49,999	12.0%	12.0%	14.9%
\$ 50,000 - \$74,999	29.1%	25.8%	22.3%
\$ 75,000 - \$99,999	21.8%	22.0%	17.3%
\$100,000 - \$124,999	12.9%	13.0%	10.9%
\$125,000 - \$149,999	7.6%	7.2%	6.1%
\$150,000 - \$200,000	2.5%	3.9%	4.2%
\$200,000 to \$249,999	0.3%	1.0%	1.2%
\$250,000 +	0.6%	1.9%	2.0%
Median Household Income	\$71,737	\$74,103	\$65,117
Per Capita Income	\$24,759	\$27,018	\$25,407
Average Household Income	\$70,961	\$78,476	\$72,882

Demographic data © 2008 by Experian/Applied Geographic Solutions.

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**Marcus & Millichap**  
Real Estate Investment Services





## Summary Report

Geography: 5 Miles

### Population

In 2008, the population in your selected geography is 294,400. The population has changed by 81.06% since 2000. It is estimated that the population in your area will be 362,784 five years from now, which represents a change of 23.23% from the current year. The current population is 49.49% male and 50.51% female. The median age of the population in your area is 34.2, compare this to the US average which is 36.9. The population density in your area is 3,748.42 people per square mile.

### Households

There are currently 101,816 households in your selected geography. The number of households has changed by 80.07% since 2000. It is estimated that the number of households in your area will be 125,365 five years from now, which represents a change of 23.13% from the current year. The average household size in your area is 2.88 persons.

### Income

In 2008, the median household income for your selected geography is \$65,117, compare this to the \$US average which is currently \$52,599. The median household income for your area has changed by 15.93% since 2000. It is estimated that the median household income in your area will be \$71,783 five years from now, which represents a change of 10.24% from the current year.

The current year per capita income in your area is \$25,407, compare this to the \$US average, which is \$26,464. The current year average household income in your area is \$72,882, compare this to the \$US average which is \$68,953.

### Race & Ethnicity

The current year racial makeup of your selected area is as follows: 66.92% White, 16.29% Black, 0.55% Native American and 5.98% Asian/Pacific Islander. Compare these to US% averages which are: 73.52% White, 12.40% Black, 0.77% Native American and 4.60% Asian/Pacific Islander.

People of Hispanic origin are counted independently of race. People of Hispanic origin make up 23.81% of the current year population in your selected area. Compare this to the US% average of 15.50%.

### Housing

The median housing value in your area was \$136,073 in 2000, compare this to the \$US average of \$115,194 for the same year. In 2000, there were 44,307 owner occupied housing units in your area and there were 12,235 renter occupied housing units in your area. The median rent at the time was \$751.

### Employment

In 2008, there are 81,063 employees in your selected area, this is also known as the daytime population. The 2000 Census revealed that 55.9% of employees are employed in white-collar occupations in this geography, and 44.1% are employed in blue-collar occupations. In 2008, unemployment in this area is 4.49%. In 2000, the median time traveled to work was 25.2 minutes.

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**Marcus & Millichap**  
Real Estate Investment Services

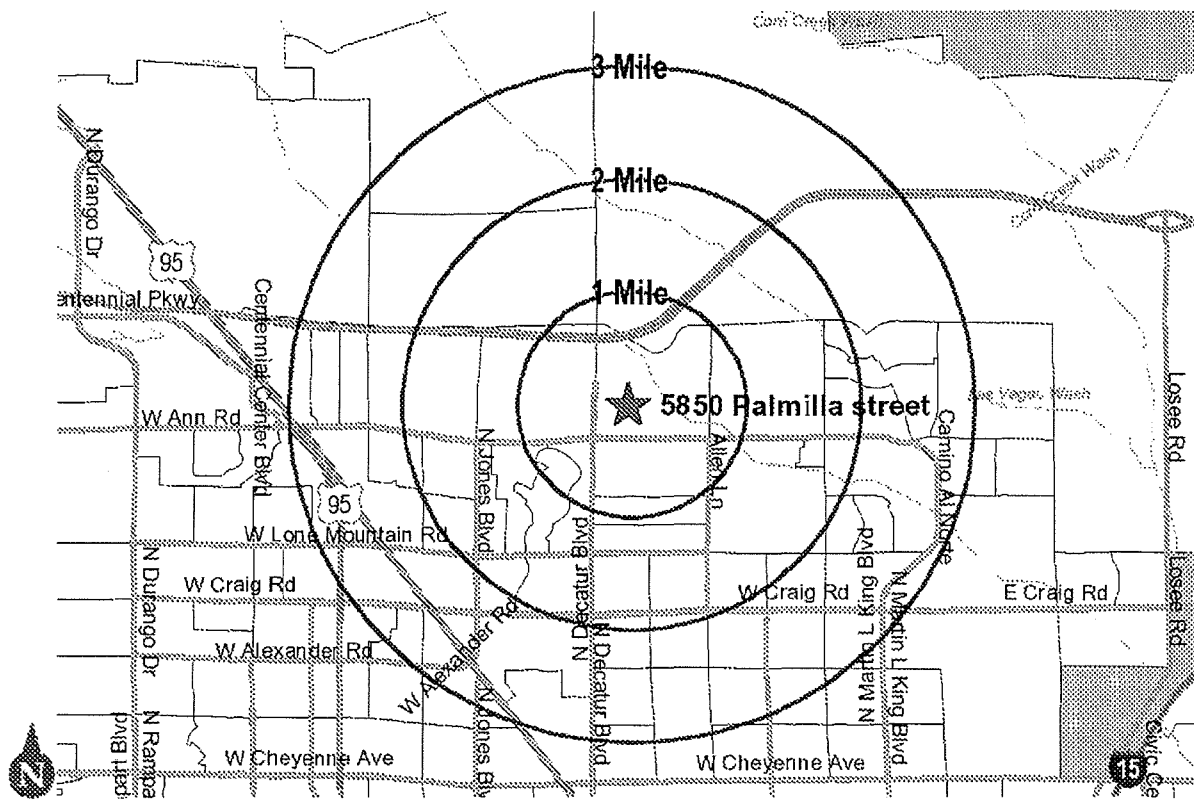
DEMOGRAPHIC ANALYSIS

001291



## Population Density

## DEMOGRAPHIC ANALYSIS



### Population Density

Theme	Low	High
High	170	or more
Above Average	107	170
Average	67	107
Below Average	42	67
Low	less than	42

Number of people living in a given area per square mile.

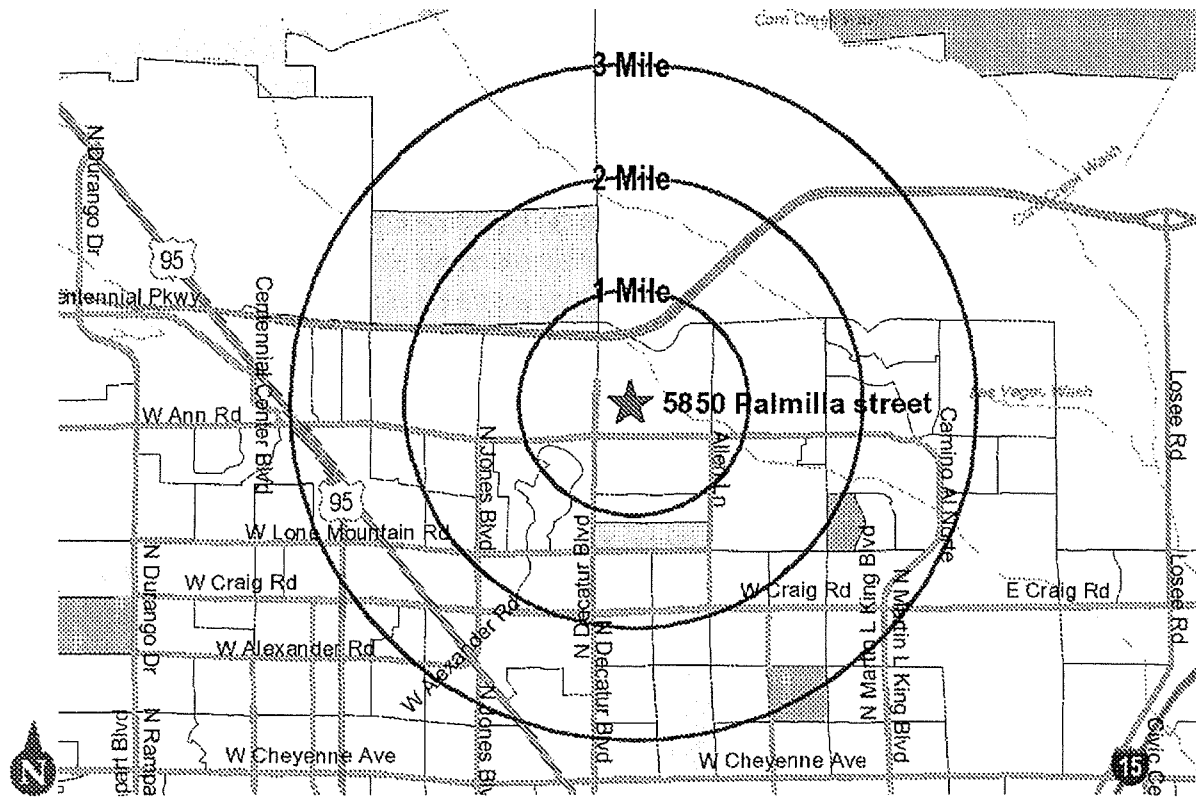
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## Employment Density

## DEMOGRAPHIC ANALYSIS



Demographic data © 2008 by Experian/Applied Geographic Solutions.

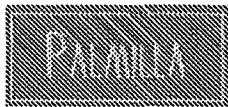
### Employment Density

Theme	Low	High
High	80	or more
Above Average	50	80
Average	32	50
Below Average	20	32
Low	less than	20

The number of people employed in a given area per square mile.

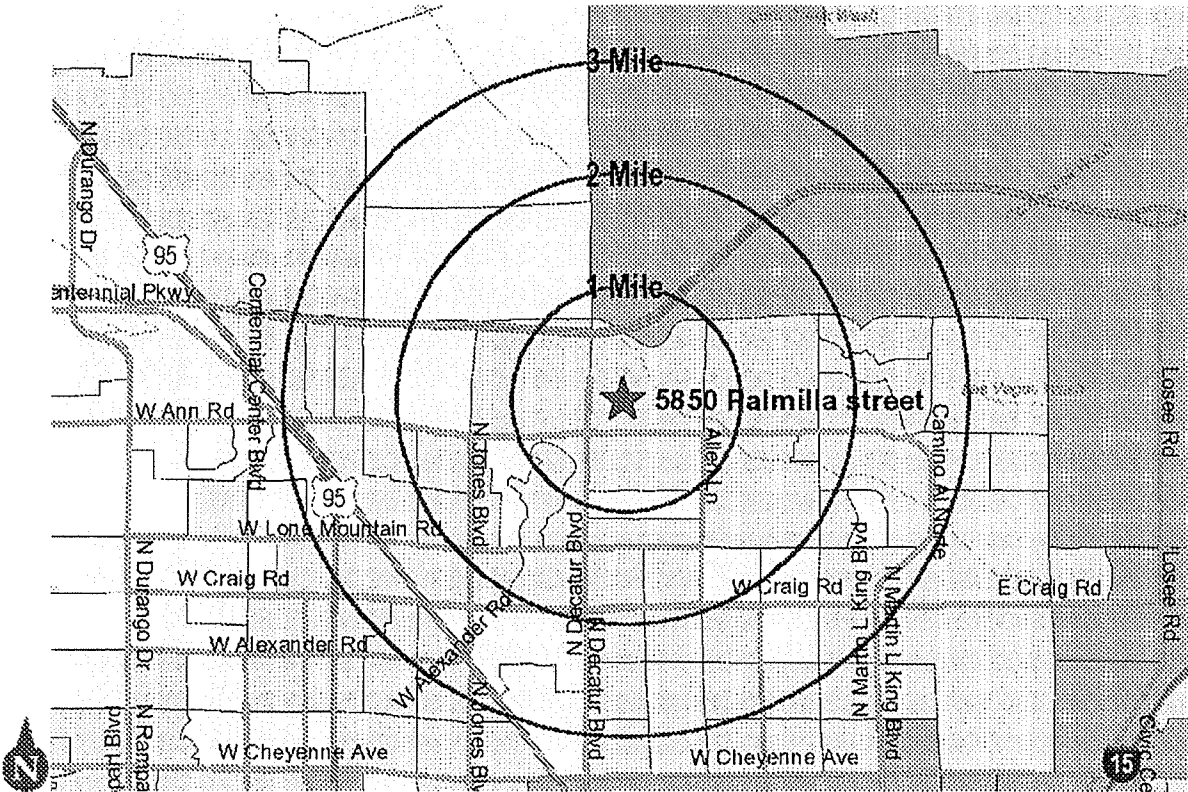
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## Average Household Income

## DEMOGRAPHIC ANALYSIS



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### Average Household Income

Theme	Low	High
High	\$137,906	or more
Above Average	\$86,875	\$137,906
Average	\$54,728	\$86,875
Below Average	\$34,477	\$54,728
Low	less than	\$34,477

Average income of all the people 15 years and older occupying a single housing unit.

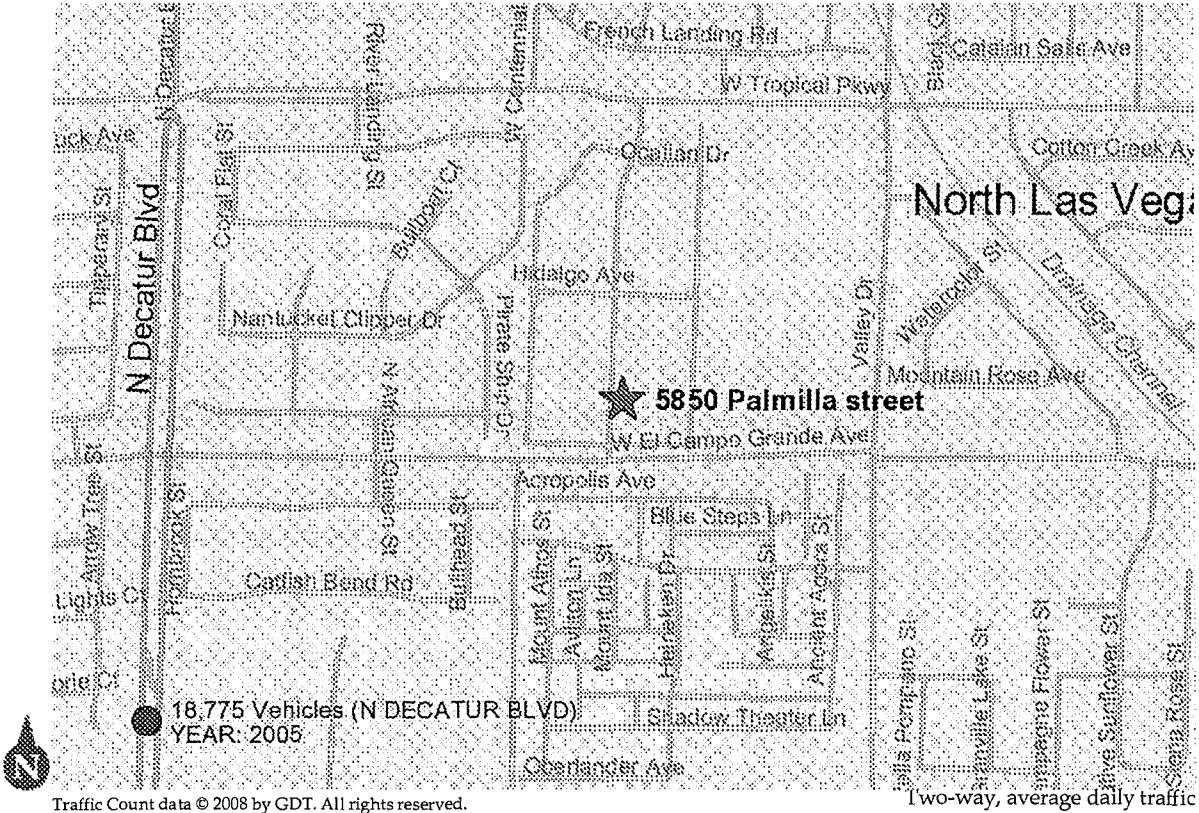
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Real Estate Investment Services



## Traffic Counts

## DEMOGRAPHIC ANALYSIS



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Two-way, average daily traffic

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Real Estate Investment Services

**Marcus & Millichap**  
Real Estate Investment Services

## **PALMILLA**

NORTH LAS VEGAS, NV

### **OFFERING MEMORANDUM**

*Exclusively Listed By:*

**Michael LaBar**  
Vice President Investments  
Director, National Multi Housing Group  
Las Vegas Office  
Tel: (702) 215-7134  
Fax: (702) 215-7110  
Michael.LaBar@marcusmillichap.com  
www.marcusmillichap.com/mlabar1  
License: NV: S.0051874

**Evan Griffith**  
Associate  
National Multi Housing Group  
Las Vegas Office  
Tel: (702) 215-7131  
Fax: (702) 215-7110  
Evan.Griffith@marcusmillichap.com  
License: NV: S.0078131

Offices Nationwide  
[www.MarcusMillichap.com](http://www.MarcusMillichap.com)

Exhibit “3”

Exhibit “3”

**DECLARATION OF MICHAEL R. LABAR**

I, Michael R. LaBar, make the following declarations:

1. I am over 21 years old. I make the following statements based on my personal knowledge, and can testify to these matters if called to testify before the court. I make this declaration in support of Plaintiff's Motion to Approve Sale of Receivership Property in case number A-09-595321-C pending before Department IX of the Eighth Judicial District Court for Clark County, Nevada (the "Lawsuit").

2. I am Vice President of Investments and the Director of National Multi-Housing Group for Marcus & Millichap Real Estate Investment Services. In that capacity, I oversaw the marketing of the Property (as that term is defined in the Lawsuit).

3. As of the date of this Declaration I have personally closed over \$400 million in multi-housing transactions.

4. Marcus & Millichap has actively marketed the Property since October 2009. The Property was advertised on the following websites:

www.marcusmillichap.com,  
www.loopnet.com,  
www.costar.com,  
Press Release M & M Website,  
www.propertyline.com,  
www.GlobeSt.com,  
www.cityfeet.com, and  
Globe St Interview-Press Release.

5. The Property was active in Marcus & Millichap's MNet System<sup>1</sup> to over 1,300 agents, and over 50 buyers were identified in Marcus & Millichap's Automated Buyer Matching system.

6. The Property was also made available to all of Marcus & Millichap's apartment/retail specialists nationwide to help identify to 1031 buyers within the MNet system.

---

<sup>1</sup> The MNet system is a proprietary internal marketing system consisting of an integrated web-based tool, which enables the instantaneous communication of listing information across the country. The listing was entered into the MNet system, by which agents presented and marketed the Property to investors.



7. Over 90 Marcus & Millichap agents presented offering memorandums for the Property.

8. Over 1000 direct marketing calls for the Property were placed to principals.

9. Additionally, an executive summary was distributed to over 250 principals, brokers, and executives.

10. Marcus & Millichap provided comprehensive due diligence documentation for the Property (including rent rolls, by-laws, etc.) to over 30 active investors.

11. Approximately 35 registered tours of the Property were conducted with listing agents, and approximately 25 non-registered tours and drive-by viewings were conducted.

12. Marcus & Millichap also targeted the following major commercial brokerages in connection with the marketing of this Property: CBRE, Cushman & Wakefield, Grub & Ellis, Hendricks & Partners, and Sperry Van Ness.

13. Written offers to purchase the Property were received from 31 prospective purchasers, and based upon certain criteria, with an emphasis on the prospective buyers' ability to close the transaction, 10 offerors were contacted and solicited for their best and final offer.

14. The best offer to purchase was selected from these offers, and on or about February 5, 2010, the prospective purchaser and Receiver entered into a Purchase and Sale Agreement (the "PSA").

15. I believe that making the PSA publically available prior to Court approval of the sale would diminish the market value of the Property if the sale fell through for any reason, and would further run the risk of chilling future negotiations for the purchase of receivership properties, including for this Property.

...

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...

16. I believe the terms contained in the PSA represent the current fair market value for the Property.

17. Under penalties of perjury of the State of Nevada, I declare that the Declarations herein above are true of my own knowledge.

/s/ Michael R. LaBar  
Dated February 9, 2010

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# Exhibit E

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# Exhibit E

5/24/2012

1 BRENT LARSEN, ESQ.  
 Nevada Bar No. 001184  
 2 DEANER, MALAN, LARSEN & CIULLA  
 720 S. Fourth Street, #300  
 3 Las Vegas, Nevada 89101  
 (702) 382-6911  
 4 Attorney for Defendant

5  
 6 DISTRICT COURT  
 7 CLARK COUNTY, NEVADA

8 U.S. Bank National Association as Trustee )  
 for The Registered Holders of ML-CFC )  
 9 Commercial Mortgage Trust 2007-7 )  
 Commercial Mortgage Pass-Through )  
 10 Certificates Series 2007-7, by and through )  
 Midland Loan Services, Inc., as its Special )  
 11 Servicer,

Case No.: 09-A-595321-C

Dept. No.: XX

12 Plaintiff,

13 v.

14 Palmilla Development Co., Inc., a Nevada )  
 corporation; Hagai Rapaport, an )  
 15 individual; Does I to X; and Roe )  
 Corporations X to XX,

16 Defendants.

17  
 18 **DEFENDANTS' THIRD SET OF INTERROGATORIES TO PLAINTIFF**

19 TO: U.S. BANK NA, Plaintiff; and

20 TO: MICHAEL F. LYNCH, ESQ., its attorney:

21 The Defendants, by and through their attorney, BRENT LARSEN, ESQ., of the law  
 22 firm of DEANER, MALAN, LARSEN & CIULLA, and hereby request that the Plaintiff  
 23 answer the following written Interrogatories separately and fully, in writing, under oath,  
 24 within thirty (30) days from the date of service hereof, pursuant to Rule 33 of the Federal  
 25 Rules of Civil Procedure.

26 These Interrogatories call for all information (including information contained in or  
 27 on writings, recordings, or any other tangible thing or material) that is known or available to  
 28 the Plaintiff, including all information in possession of any other persons, acting on behalf of

1 or under the direction or control of the Plaintiff.

2 All references in these Interrogatories to "Plaintiff" include Plaintiff and any other  
3 persons under Plaintiff's direction, control or in the Plaintiff's employ.

4 If Plaintiff cannot answer any Interrogatory fully and completely after exercising due  
5 diligence to make inquiry and secure the information to do so, please so state and answer  
6 such Interrogatory to the extent deemed possible, specifying that portion of such  
7 Interrogatory which Plaintiff is unable to answer fully and completely, and further specifying  
8 those facts upon which Plaintiff relies to support its contention that it is unable to answer  
9 fully and completely. In addition, specify what knowledge, information or belief Plaintiff  
10 has concerning the unanswered portion of any such Interrogatory and describe fully and in  
11 detail, the acts done and inquiries made by Plaintiff to show that it has exercised due  
12 diligence to make inquiry and secure the information necessary to that Interrogatory.

13 Interrogatories calling for a detailed description of the contents of a written document  
14 may be answered by submitting a copy of the written document.

#### 15 DEFINITIONS

16 The following definitions shall apply to each of the Interrogatories and shall be  
17 deemed to be incorporated therein:

18 A. "Writing" means and includes any printed, typewritten, or handwritten matter,  
19 or reproduction thereof, of whatever character, including but not limited to, contracts,  
20 agreements, letters, memoranda, telegrams and handwritten notes, whether copy or original.

21 B. "Identify" a writing means to state with respect thereto:

- 22 1. The name of the person who prepared it;
- 23 2. The name of the person who signed it or over whose name it was issued;
- 24 3. The name of each person to whom it was addressed or distributed;
- 25 4. The nature and substance of the writing with sufficient particularity to  
26 enable it to be identified adequately in a motion by Defendants for its production and  
27 copying;
- 28 5. Its date, and if it bears no date, the date when it was prepared;

1           6.     The physical location of it and the name of its custodian or custodians;  
2     and

3           7.     Whether it will be voluntarily made available to Defendants for  
4     inspection and copying.

5     C.     “Identify” an oral communication means to state:

6           1.     The name and address of each person who participated in the  
7     communication and the name and address of each person who was present at the time  
8     it was made;

9           2.     By whom each such person was employed and whom such person  
10    represented or purported to represent in making the oral communication;

11          3.     What each such person said;

12          4.     The date and the place where such oral communication was made; and

13          5.     The nature and substance of each writing or record pertaining to such  
14    oral communication with sufficient particularity to enable it to be identified in the  
15    manner described in the foregoing Paragraph B.

16     D.     “Identify” a person or “identity” of a person means to state his, her or its name  
17    and last known business address, and if a natural person, his or her last known residence  
18    address, the name of his or her employer, and his or her last known telephone number.

19     E.     “In your possession” means under your control or under the control of your  
20    employees, officers, agents, representatives, accountants, or attorneys.

21     F.     The masculine, feminine, or neuter gender and the singular or plural number,  
22    shall each be deemed to include the others.

23           These Interrogatories shall be deemed continuing so as to require supplemental  
24    answers if you or your attorneys, agents or other representatives obtain further information  
25    between the time answers are served and the time of trial.

26    **INTERROGATORY NO. 3:**

27           In your Motion for Summary Judgment filed on April 25, 2012, you ask the Court to  
28    set a Fair Market Value hearing. In this regard, state the date that you believe should be used

1 for determining the fair market value of the property that is the subject of this case.

2 **INTERROGATORY NO. 4:**

3 Page 4 of Plaintiff's Motion to Approve Receivership Sale, filed on February 11,  
4 2010, states that Plaintiff received offers to purchase the property from 31 prospective  
5 buyers. Please identify each prospective buyer and describe their offer with particularity by  
6 providing the prospective buyer's name, date on which they made their offer, the amount of  
7 their offer, and the name of the broker through which each offer was submitted.

8 **INTERROGATORY NO. 5:**

9 Identify and describe with particularity and in narrative form any and all  
10 correspondence between the receiver, the broker for the receiver, and the Plaintiff, including  
11 any and all offers to purchase the property that were communicated by the receiver to the  
12 Plaintiff.

13 **INTERROGATORY NO. 6:**

14 Identify and describe with particularity and in narrative form Plaintiff's role in  
15 reviewing any and all of the 31 offers described on page 4 of Plaintiff's Motion to Approve  
16 Receivership Sale.

17 **INTERROGATORY NO. 7:**

18 Identify and describe with particularity and in narrative form, each of the 35 registered  
19 tours of the property by providing the name of each participant, the date of each participant's  
20 registered tour, any and all of the circumstances associated with arranging such registered  
21 tour, whether such tour actually took place, and the outcome of each such registered tour.

22 **INTERROGATORY NO. 8:**

23 Identify and describe with particularity and in narrative form, each of the 25 non-  
24 registered tours of the property by providing the name of each participant, the date of each  
25 participant's non-registered tour, any and all of the circumstances associated with arranging  
26 such non-registered tour, whether such tour actually took place, and the outcome of each  
27 such non-registered tour.

28 ///

1 **INTERROGATORY NO. 9:**

2 Page 5 of Plaintiff's Motion to Approve Receivership Sale states that both the buyer  
3 and the receiver of the property made concessions in reaching the agreement ultimately  
4 presented to the Court for approval. Identify and describe with particularity and in narrative  
5 form each concession that was made by stating what each party's respective original position  
6 was, how each such concession was negotiated, and the final terms of each such concession,  
7 including any reciprocal concessions.


8 **INTERROGATORY NO. 10:**

9 Identify the original asking price for the property and describe with particularity and  
10 in narrative form how such asking price was calculated, including, but not limited to, any  
11 appraisals, comparables, or other facts that were that were considered.

12  
13 DATED this 24<sup>th</sup> day of May, 2012.

14 Respectfully submitted,

15 DEANER, MALAN, LARSEN & CIULLA

16  
17   
18 BRENT LARSEN, ESQ. *for Brent*  
19 Nevada Bar No. 001184 *Larsen*  
20 720 South Fourth St., #300  
21 Las Vegas, Nevada 89101  
22 Attorney for Defendants  
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Swann Savindra  
An Employee of Deaner, Malan, Larsen  
& Ciulla

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# Exhibit F

001308

001308

# Exhibit F

5/24/2012

1 BRENT LARSEN, ESQ.  
Nevada Bar No. 001184  
2 DEANER, MALAN, LARSEN & CIULLA  
720 S. Fourth Street, #300  
3 Las Vegas, Nevada 89101  
(702) 382-6911  
4 Attorney for Defendant

5  
6 DISTRICT COURT  
7 CLARK COUNTY, NEVADA

8 U.S. Bank National Association as Trustee )  
for The Registered Holders of ML-CFC )  
9 Commercial Mortgage Trust 2007-7 )  
Commercial Mortgage Pass-Through )  
10 Certificates Series 2007-7, by and through )  
Midland Loan Services, Inc., as its Special )  
11 Servicer,

Case No.: 09-A-595321-C

Dept. No.: XX

12 Plaintiff,

13 v.

14 Palmilla Development Co., Inc., a Nevada )  
corporation; Hagai Rapaport, an )  
15 individual; Does I to X; and Roe )  
Corporations X to XX,

16 Defendants.  
17

18 **DEFENDANTS' THIRD REQUEST FOR PRODUCTION OF DOCUMENTS**

19 TO: U.S. BANK NA, Plaintiff; and

20 TO: MICHAEL F. LYNCH, its attorney:

21 REQUEST IS HEREBY MADE UPON YOU pursuant to Rule 34 of the Nevada  
22 Rules of Civil Procedure for the production of the following documents at the law offices of  
23 DEANER, MALAN, LARSEN & CIULLA, 720 South Fourth Street, Suite 300, Las Vegas,  
24 Nevada 89101, within thirty (30) days from the service of these Requests.

25 Please specify which documents are produced in response to each of the numbered  
26 paragraphs. These Requests shall be deemed continuing so as to require further and  
27 supplemental production should the requested party obtain additional documents which are  
28 responsive to these Requests subsequent to the time of initial production and inspection.

## INSTRUCTIONS AND DEFINITIONS

1  
2 1. As used herein, "document" shall mean any and all written, printed, typed, or  
3 recorded materials, and graphic matter, however produced or reproduced, formal or informal,  
4 whether for internal or external use, including (but not limited to) records, reports,  
5 correspondence, letters and memoranda, computer data files, or drafts of any of the above, in  
6 the possession, custody, or control of you or your offices, directors, employees, your  
7 attorneys, your agents, your insurance carriers, or anyone else acting on your behalf or  
8 otherwise subject to your control.

9 2. If any documents otherwise required to be produced by these Requests are  
10 withheld, Plaintiff shall identify each document so withheld by stating its date, author,  
11 recipients, and the reason for its withholding. If you claim any form of privilege, whether  
12 based on statute or otherwise, as a grounds for refusing to comply, in whole or in part, with  
13 this Request for Production of Documents, please set forth in complete detail each and every  
14 fact and ground upon which the privilege is based, including sufficient facts for the court to  
15 make a full determination whether the claim of privilege is valid with respect to each and  
16 every document and item for which the privilege is claimed.

17 3. If any of the documents herein requested for were formerly in your possession,  
18 custody or control, and has been lost or destroyed, you are requested to submit in lieu of each  
19 such document a written statement which:

- 20 (a) describes in detail the nature of the document and its contents;  
21 (b) identifies the person who prepared or authored the document and, if  
22 applicable, the person to whom the document was sent;  
23 (c) specifies the date on which the document was prepared or transmitted or  
24 both; and  
25 (d) specifies, if possible, the date on which the document was lost or  
26 destroyed, and, if destroyed, the conditions or reasons for such destruction and the person  
27 requesting and performing the destruction.

28 ///

1 **REQUEST NO. 9:**

2 Produce any and all documents, including, but not limited to, correspondence, tour  
3 information, appraisals, written offers, notes, memoranda, etc. that were identified by you in  
4 response to Defendants' 3rd Set of Interrogatories to Plaintiff.


5 **REQUEST NO. 10:**

6 Produce any and all documents, including, but not limited to, correspondence, tour  
7 information, appraisals, written offers, notes, memoranda, etc. that were referenced or relied upon by  
8 you in considering and/or preparing your response to Defendants' 3rd Set of Interrogatories to  
9 Plaintiff.

10  
11 DATED this 24<sup>th</sup> day of May, 2012.

12 Respectfully submitted,


13 DEANER, MALAN, LARSEN & CIULLA

14   
15 BRENT LARSEN, ESQ.  
16 Nevada Bar No. 001184  
17 720 South Fourth St., #300  
18 Las Vegas, Nevada 89101  
19 Attorney for Defendants  
20  
21  
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28

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that I am an employee of DEANER, MALAN, LARSEN & CIULLA; that on the 24<sup>th</sup> day of May, 2012, I served a copy of the above and foregoing DEFENDANTS' THIRD REQUEST FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF in a sealed envelope, postage prepaid, by depositing same in the United States mail, addressed to the following:

Michael F. Lynch, Esq.  
Lewis and Roca LLP  
3993 Howard Hughes Pkwy., Ste. 600  
Las Vegas, Nevada 89169-5996  
Attorneys for Plaintiff

  
An Employee of Deaner, Malan, Larsen  
& Ciulla

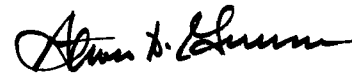
DEANER, MALAN, LARSEN & CIULLA

720 South Fourth Street, Suite 300

Las Vegas, Nevada 89101

Telephone (702) 382-6911 • Facsimile (702) 366-0854





CLERK OF THE COURT

**OPPS**

MICHAEL F. LYNCH

Nevada Bar No. 008555

Matthew J. Forstadt, Esq.

Nevada Bar No. 10586

**KOLESAR & LEATHAM**

400 S. Rampart Blvd., Suite 400

Las Vegas, Nevada 89145

Telephone: (702) 362-7800

Facsimile: (702) 362-9472

E-Mail: mlynch@klnevada.com

mforstadt@klnevada.com

*Attorneys for Plaintiff***DISTRICT COURT****CLARK COUNTY, NEVADA**

\* \* \*

U.S. Bank National Association as Trustee for  
The Registered Holders of ML-CFC  
Commercial Mortgage Trust 2007-7  
Commercial Mortgage Pass-Through  
Certificates Series 2007-7, by and through  
Midland Loan Services, Inc., as its Special  
Servicer,

Plaintiff,

vs.

Palmilla Development Co., Inc., a Nevada  
corporation; Hagai Rapaport, an individual;  
Does I to X; and Roe Corporations X to XX,

Defendants.

CASE NO. A-09-595321-C  
DEPT NO. XX

**Hearing Date: August 8, 2012****Hearing Time: 9:00 A.M.****PLAINTIFF'S OBJECTION TO MOTION FOR SUMMARY JUDGMENT**

Plaintiff U.S. Bank National Association as Trustee for The Registered Holders of ML-CFC Commercial Mortgage Trust 2007-7 Commercial Mortgage Pass-Through Certificates Series 2007-7, by and through Midland Loan Services, Inc., as its Special Servicer, by and through its counsel of record, KOLESAR & LEATHAM, hereby files their objection to Defendants' Motion for Summary Judgment as follows:

Plaintiff's objection to Defendants' Motion to Summary Judgment is somewhat nuanced. In the first instance, the Defendants' Motion can not be granted since most of the propositions

KOLESAR & LEATHAM  
400 South Rampart Boulevard, Suite 400  
Las Vegas, Nevada 89145  
Tel: (702) 362-7800 / Fax: (702) 362-9472



1 asserted by it are improper as a matter of law and inconsistent with the true facts of this case.<sup>1</sup>  
 2 Defendants argue that, as a deficiency judgment, they are exculpated from liability because of  
 3 the retroactive effect of AB 273. However, that statute has been determined by Judge Gonzalez  
 4 not to have the retroactive application which the Defendants urge.<sup>2</sup> The Defendants also are  
 5 defending this claim as if it were a deficiency proceeding subsequent to a decree of foreclosure.  
 6 This is a fatal error. This case can not be adjudicated as a “garden variety” deficiency case since  
 7 there never was a foreclosure.<sup>3</sup>

8 What happened in this case was that there was a Receiver appointed by the Court.<sup>4</sup> In  
 9 terms of notice, the individual guarantor, Mr. Rapaport was acutely aware of the appointment of  
 10 the Receiver and indeed his counsel participated in the drafting of the terms of the Receivership  
 11 and “signed” off on the Receivership Order. Furthermore, the Guarantor committed in the  
 12 written guarantee to “keep itself fully informed as to all aspects of Borrower’s financial  
 13 condition and the performance of the Guaranteed Obligations. **Exhibit C** <sup>5</sup>. The Defendant’s  
 14 Motion for Summary Judgment is predicated, in part, upon the thesis that the Guarantor, who  
 15 pledged to keep himself informed and whose lawyer approved the form for the Receivership, did  
 16 not get notice of the foreclosure within the statutory time limit. Opp. P. 2 L8 *et. seq.* Having  
 17 committed to keep himself informed, his present purported lack of knowledge, even assuming it  
 18 to be true, is of no avail. Legally, he can not blame the Plaintiff for the Defendants’ Ostrich Like  
 19 approach which is inconsistent with his contractual obligations. It is also significant that there

20 <sup>1</sup> For example, a theme running through the Defendants’ papers is that the bidding was “chilled”. (Def. Opp. P. 3  
 21 L10). The problem is that there are no facts to support the conclusion and certainly the thesis is not an uncontested  
 22 material fact. Indeed, it is in conflict with the findings contained in **Exhibit B**.

23 <sup>2</sup> Judge Cadish has ruled the other way in a case before her and the Supreme Court will have to reconcile that split  
 24 of authority. In the interim, there is no reason for this Court to step into that fray. On this point, the parties are in  
 25 agreement. The Defendants invite this Court not to decide the applicability of AB 473 until after the Supreme Court  
 26 has ruled. Obj. p. 5 l. 9. The Plaintiff has no objection to that deferral assuming, *arguendo*, that the Court not, at  
 27 this point in time, alter the trial date.

28 <sup>3</sup> The Plaintiff is not without fault in this confusion. Unfortunately, it incorrectly captioned the pending motion as  
 one for deficiency judgment as opposed to a Motion for Contract Damages. This is not a deficiency proceeding, it is  
 a prove up of damages having nothing to do with a foreclosure.

<sup>4</sup> See **Exhibit A** attached hereto and made a part hereof.

1 are no affidavits forthcoming from the Defendants that they did not have actual  
 2 contemporaneous notice of the proceedings.

3 The Receiver sold the property at a price deemed appropriate by the Court, *albeit* for less  
 4 than the indebtedness. Thus this case is not even a distant cousin of a foreclosure case since  
 5 there has never been a foreclosure sale. Not being a foreclosure sale, there was no six month  
 6 clock ticking for a deficiency judgment and no differential between fair market value and  
 7 indebtedness to rear its ugly head. Even if the 6 month limitation of NRS 40.455 were  
 8 otherwise applicable, the Defendant has waived this defense. See Guaranty par. 7. It will be  
 9 seen from an examination of the guaranty that the guarantor has waived the 6 month rule, "to the  
 10 extent provided by law". The law allows such a waiver, *McDonald v. D.P. Alexander v & Las*  
 11 *Vegas Blvd. LLC*, 121 Nev. 812 (2005).<sup>6</sup> Thus, the 6 month rule, to the extent it were otherwise  
 12 applicable has no bearing on this case.

13 This is a simple case for damages. The breach of the contract was occasioned by a  
 14 default in the payment on the Note. The formula for damages in this case is like any other  
 15 contract case. Subtract from the outstanding indebtedness the amount received by the Receiver  
 16 in his sale and *voila* that is the amount of the damages.<sup>7</sup> The balance remaining on amount after  
 17 crediting the amount received by the Receiver is the only quantification of damages which is  
 18 necessary. It is not necessary to determine fair market value since, *inter alia*, the Court has  
 19 already ruled on the fairness of the sale price. "The purchase price is in the range of fair market  
 20 value for the Property, is commercially reasonable and is an arm's length transaction". (See  
 21 **Exhibit B.**)

22 Notwithstanding the foregoing, the Defendants argue that they are entitled to a hearing to  
 23 determine the fair market value of the property as of the foreclosure date. There are two fallacies  
 24 with the argument. In the first instance, there was never any foreclosure and thus there is no  
 25 foreclosure date. However, to the extent that the Defendants want to have their day in Court as

26 <sup>5</sup> Limited Recourse Obligations Guaranty ("Guaranty") par. 5(a)

27 <sup>6</sup> N.B. the Guarantor has also waived any defenses arising from the fact that the loan was secured by real estate.  
 Guaranty par. 7(e).

28 <sup>7</sup> Plus interest, attorney's fees and costs.

KOLESAR & LEATHAM  
400 South Rampart Boulevard, Suite 400  
Las Vegas, Nevada 89145  
Tel: (702) 362-7800 / Fax: (702) 362-9472

1 to value—they already had it.<sup>8</sup> The Court held a hearing and made a determination as to the  
2 purchase price for the Receiver's sale being within the range of Fair Market Value. Whether Mr.  
3 Rapaport was or was not technically a party to this case at that time is immaterial. He had  
4 committed to keep himself informed and his attorney approved the Receiver's Order as to form.

5 Defendants argue that their must be a value set as of the sale date in order to determine  
6 the deficiency. That is wrong, as a matter of law since AB 473 is not retroactive and the  
7 Defendants had their day in Court and a determination of value was made by the Court. **Exhibit**  
8 **B.** But, in any event, the amount of the shortfall between what was received from the Receiver's  
9 sale and the amount of the debt then owing is a simple matter of mathematical inquiry and is not  
10 dependent on the fair market value of anything.<sup>9</sup>

11 Defendant claims that the Plaintiff's motion is premature (Obj. P. 5). As to this point, the  
12 Plaintiff, without conceding the efficacy of the reason given, would be willing to have its Motion  
13 for Summary Judgment "marked off" in order that outstanding discovery can be completed. In  
14 terms of delay and in order not to be thought to be "sandbagging" the Court, it is the intention of  
15 the Plaintiff to amend the present Motion for Summary Judgment to eliminate the Deficiency  
16 references<sup>10</sup> and make it a "straight" case of contract damages plus any provable damages arising  
17 from the financial misdealings of Mr. Rapaport. Doing that will stream line the handling of this  
18 case and will obviate most if not all of the objections which Defendants seek to use in their  
19 Motion for Summary Judgment.

20 All of this will be done within the time frame for trial as presently scheduled. It also  
21 appears that the original of the note can not be located and it is the intention of Attorney Forstadt  
22

23 <sup>8</sup> It should also be noted that the whole panacea of foreclosure defenses are cognizable, if at all, solely because the  
24 loan was secured by real estate. However, the Defendant Rapaport expressly waived those defenses. Guaranty par.  
7(e).

25 <sup>9</sup> It should be noted that, at no time, do the Defendants seek to argue that the amount generated by the Receiver's  
26 sale was an "unfair" or "inequitable" number and thus the sale should be set aside. They merely argue that it was  
27 arrived at by the Court using a procedure other than the protocol for a foreclosure deficiency. That point is  
28 irrelevant since the Court did not have before it then or now a foreclosure complaint.

<sup>10</sup> Note that the *ad damnum* of the Second Amended Complaint does not seek a deficiency judgment. Rather, it  
claims contract damages and supplemental damages, if any there be, for fraudulent conduct arising from the  
Defendants' misuse of the rental proceeds.

1 to present a lost note affidavit and to accord Attorney Larsen the opportunity to take discovery  
2 with respect to that new development.

3 The Plaintiff's Motion for Summary Judgment should go off calendar to be brought back  
4 when discovery is complete. As to Defendants' Motion, it should be denied and counsel should  
5 be "invited" to submit a new scheduling order for discovery and dispositive motions while  
6 holding as sacrosanct the present trial date of February 4, 2013.

7 DATED this 23<sup>rd</sup> day of July, 2012.

8 KOLESAR & LEATHAM

9  
10 By 

Matthew J. Forstadt, Esq.  
Nevada Bar No. 10586  
400 S. Rampart Blvd., Suite 400  
Las Vegas, Nevada 89145

Attorneys for Plaintiff  
U.S. Bank National Association as Trustee for  
The Registered Holders of ML-CFC  
Commercial Mortgage Trust 2007-7  
Commercial Mortgage Pass-Through  
Certificates Series 2007-7, by and through  
Midland Loan Services, Inc., as its Special  
Servicer

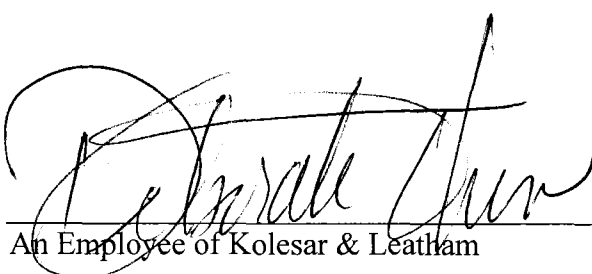
11  
12  
13  
14  
15  
16  
17 **CERTIFICATE OF SERVICE**

18 I hereby certify that I am an employee of Kolesar & Leatham, and that on the 23<sup>rd</sup> day  
19 of July, 2012, I caused to be served a true and correct copy of foregoing PLAINTIFFS'  
20 OBJECTION TO MOTION FOR SUMMARY JUDGMENT in the following manner:

21 (UNITED STATES MAIL) By depositing a copy of the above-referenced document for  
22 mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, to the  
23 parties listed below at their last-known mailing addresses, on the date above written:

24 Brent Larsen, Esq.  
25 Deaner, Deaner, Scann, Malan & Larsen  
26 720 S. Fourth St., Suite 300  
Las Vegas, NV 89101

27 *Attorneys for Defendants*

28   
An Employee of Kolesar & Leatham

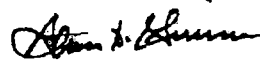
KOLESAR & LEATHAM  
400 South Rampart Boulevard, Suite 400  
Las Vegas, Nevada 89145  
Tel: (702) 362-7800 / Fax: (702) 362-9472

**EXHIBIT A**

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**EXHIBIT A**

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**ORDER**  
**MICHAEL F. LYNCH, ESQ.**  
 Nevada Bar No. 8555  
MLynch@LRLaw.com  
**LEWIS AND ROCAL LLP**  
 3993 Howard Hughes Parkway, Suite 600  
 Las Vegas, Nevada 89169  
 Telephone: (702) 949-8200  
 Facsimile: (702) 949-8398  
*Attorneys for Plaintiff*

**DISTRICT COURT****CLARK COUNTY, NEVADA**

U.S. Bank National Association as Trustee For The  
 Registered Holders of ML-CFC Commercial  
 Mortgage Trust 2007-7 Commercial Mortgage  
 Pass-Through Certificates Series 2007-7, by and  
 through Midland Loan Services, Inc., as its Special  
 Servicer,

Case No. A-09-595321-C

Dept. No. IX

**ORDER GRANTING MOTION TO  
 APPROVE SALE OF RECEIVERSHIP  
 PROPERTY**

vs.

Plaintiff,

Palmilla Development Co., Inc., a Nevada  
 corporation; and Roe Corporations X to XX,

Date of Hearing: 3/18/2010  
 Time of Hearing: 9:00 a.m.

Defendants.

This matter came before this Court on March 18, 2010, on the unopposed Motion to  
 Approve Sale of Receivership Property (the "Motion") filed and served on February 11, 2010, by  
 U.S. Bank National Association as Trustee For The Registered Holders of ML-CFC Commercial  
 Mortgage Trust 2007-7 Commercial Mortgage Pass-Through Certificates Series 2007-7, by and  
 through Midland Loan Services, Inc., as its Special Servicer ("Lender"). Lender filed and served a  
 Notice of Filing [the proposed Purchase and Sale Agreement] Exhibit in Support of the Motion on  
 February 24, 2010. Lender filed and served a Notice of Non-Opposition to the Motion on March  
 10, 2010.

...

...

1 The Court finds that Greystar Real Estate Partners, with John Rials as its agent  
 2 ("Receiver"), was appointed as receiver in this action on September 3, 2009, to take possession,  
 3 custody, and control of the real property identified by the Clark County Tax Assessor Parcel Nos:

- 4 a. 124-30-311-031;
- 5 b. 124-30-312-014 and 015;
- 6 c. 124-30-312-017 and 018;
- 7 d. 124-30-312-025 - 169, inclusive;
- 8 e. 124-30-312-171 and 172;
- 9 f. 124-30-312-177; and
- 10 g. 124-30-312-180 - 182, inclusive,

11 (the "Property") colloquially referred to as the Palrnilla Townhomes, generally located northeast  
 12 of the intersection of West Ann Road and North Decatur Boulevard in North Las Vegas.

13 Having read and considered the Motion and the Notice of Filing Proposed Purchase and  
 14 Sale Agreement of the Property by and between Receiver and Pacifica Companies, LLC ("Buyer")  
 15 with an execution date of February 5, 2010, (the "PSA") and the oral argument of counsel together  
 16 with the pleadings and papers on file herein, and finding good cause therefor:

17 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

- 18 1. The Lender has provided sufficient notice of the proposed sale and PSA to all  
 19 necessary parties to this action;
- 20 2. The PSA is hereby approved as a full and final disposition of the Property;
- 21 3. The purchase price contained within the PSA is in the range of fair market value for  
 22 the Property, is commercially reasonable, and is an arms' length transaction; and

23 ...

24 ...

25 ...

26 ...

27 ...

28 ...

1           4.     The Receiver is hereby authorized to sell and to fully convey all of the interest of  
2     Palmilla Development Co., Inc., a Nevada corporation ("Borrower"), in the Property, to Buyer,  
3     and is hereby authorized to execute and deliver all documents, including without limitation a deed  
4     to convey title to the Property of Borrower, in order to consummate the sale and fully and finally  
5     convey ownership of the Property in its entirety.

6                             Dated March 23<sup>rd</sup>, 2010.

7                             Spring P. Inglett  
8                             DISTRICT COURT JUDGE  
9                             *as to form* EW  
                              (approved / disapproved)

10     Respectfully submitted by:

11     LEWIS AND ROCA LLP

12     Michael F. Lynch

13     Michael F. Lynch, Esq.  
14     Nevada Bar No. 8555  
15     3993 Howard Hughes Pkwy., Suite 600  
16     Las Vegas, Nevada 89169  
17     (702) 949-8200  
18     (702) 949-8398 (fax)

19     Attorneys for U.S. Bank National Association  
20     as Trustee For The Registered Holders of ML-  
21     CFC Commercial Mortgage Trust 2007-7  
22     Commercial Mortgage Pass-Through  
23     Certificates Series 2007-7, by and through  
24     Midland Loan Services, Inc., as its Special  
25     Servicer

26     DEANER, DEANER, SCANN,  
27     MALAN & LARSEN

28     Brent Larsen

      Brent Larsen, Esq.  
      Nevada Bar No. 1184  
      720 S. Fourth Street, #300  
      Las Vegas, NV 89101  
      (702) 382-6911  
      (702) 366-0854 (fax)

      Attorneys for Palmilla Development Co., Inc., a  
      Nevada corporation

29                             CERTIFIED COPY  
30                             DOCUMENT ATTACHED IS A  
31                             TRUE AND CORRECT COPY  
32                             OF THE ORIGINAL ON FILE

33                             Paul H. [Signature]  
34                             CLERK OF THE COURT

35                             APR 30 2010



**EXHIBIT B**

**EXHIBIT B**

1 ORD  
 2 MICHAEL F. LYNCH, ESQ.  
 3 Nevada Bar No. 8555  
 4 MLynch@lrllaw.com  
 5 LEWIS AND ROCA LLP  
 6 3993 Howard Hughes Parkway, Suite 600  
 7 Las Vegas, Nevada 89169-5996  
 8 Telephone: (702) 949-8200  
 9 Facsimile: (702) 949-8398  
 10 *Attorneys for Plaintiff*

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DISTRICT COURT  
 CLARK COUNTY, NEVADA

11 U.S. Bank National Association as Trustee  
 12 For The Registered Holders of ML-CFC  
 13 Commercial Mortgage Trust 2007-7  
 14 Commercial Mortgage Pass-Through  
 15 Certificates Series 2007-7, by and through  
 16 Midland Loan Services, Inc., as its Special  
 17 Servicer,

Plaintiff,

vs.

18 Palmilla Development Co., Inc., a Nevada  
 19 corporation; and Roc Corporations X to XX,

Defendants.

Case No.: 09-A595321

Dept. No.: IX

FINDINGS OF FACT, CONCLUSIONS  
 OF LAW, AND

ORDER APPOINTING RECEIVER

Date of Hearing: 8/18/2009

Time of Hearing: 9:00 a.m.

20 This matter came before the Court on August 18, 2009, on U.S. Bank National  
 21 Association as Trustee For The Registered Holders of ML-CFC Commercial Mortgage Trust  
 22 2007-7 Commercial Mortgage Pass-Through Certificates Series 2007-7, by and through  
 23 Midland Loan Services, Inc., as its Special Servicer's ("Plaintiff") Application for an Order to  
 24 Appear and Show Cause Why a Receiver Should not be Appointed on Order Shortening Time,  
 25 which was originally scheduled to come on for hearing on August 13, 2009.

26 Palmilla Development Co., Inc. ("Defendant") filed a Countermotion for a Continuance  
 27 and Opposition to Application for Order to Show Cause. On August 13, the Court granted  
 Defendant a continuance of the hearing to August 18. On August 17, Plaintiff filed a Reply

1 Brief in Support of Appointment of Receiver. No other documents or briefing was submitted in  
2 connection with the order to show cause hearing.

3 Michael F. Lynch, Esq. appeared on behalf of Plaintiff and Brent Larson, Esq. appeared  
4 on behalf of Defendant. Also present was Mr. Hagai Rapaport, a corporate representative of  
5 Defendant.

6 The Court read and considered the pleadings and papers filed herein, the oral argument  
7 of counsel, and good cause appearing therefor, the Court rules as follows:

8 **FINDINGS OF FACT**

9 Plaintiff provided credible and admissible prima facie evidence of the following facts.  
10 Unless otherwise noted herein, Defendant either conceded and/or failed to dispute the following  
11 facts in the briefing and papers filed in connection with the Order to Show Cause hearing or  
12 otherwise during oral argument. Therefore, good cause appearing, the Court therefore makes  
13 following findings of facts:

14 1. Defendant borrowed \$20,150,000.00 with interest from Artesia Mortgage Capital  
15 Corporation, a Delaware corporation ("Original Lender") on or about March 28, 2007 (the  
16 "Loan").

17 2. The Loan is evidenced by, among other things, that certain Fixed Rate Note  
18 dated March 28, 2007, bearing an authorized signature on behalf of the Borrower (the  
19 "Promissory Note"). (A true and correct copy of the Promissory Note was attached to  
20 Plaintiff's Application as Exhibit "3").

21 3. The Loan was and is secured by that certain Commercial Deed of Trust,  
22 Security Agreement, Fixture Filing Financing Statement and Assignment of Leases, Rents,  
23 Income and Profits (as same may have been amended) recorded in the Clark County Records'  
24 Office as Document No. 20070330-0002946 ("Deed of Trust"). (A true and correct copy of the  
25 Deed of Trust was attached to Plaintiff's Application as Exhibit "4").

26 4. The Loan was and is further secured by that certain Assignment of Leases,  
27 Rents, Income and Profits (as same may have been amended) recorded in the Clark County

1     Recorders' Office as Document No. 20070330-0002947 ("Assignment of Rents"). (A true and  
2     correct copy of the Assignment of Rents was attached to Plaintiff's Application as Exhibit "5")

3             5.     Original Lender assigned all of its rights and interests in and to the Deed of Trust  
4     and the Assignment of Rents to the Plaintiff pursuant to that certain Assignment of (a)  
5     Commercial Deed of Trust, Security Agreement, Fixture Filing Financing Statement and (b)  
6     Assignment of Leases, Rents, Income and Profits And Assignment of Assignment of Leases,  
7     Rents, Income and Profits recorded in the Clark County Recorders' Office as Document No.  
8     20080103-0000543 (the "Assignment of Deed of Trust"). (A true and correct copy of the  
9     Assignment of Deed of Trust was attached to Plaintiff's Application as Exhibit "6").

10            6.     LaSalle Bank resigned its position as trustee on or about June 30, 2008, and  
11     Wells Fargo Bank, N.A., was appointed as successor trustee (A true and correct copy of the  
12     Resignation of Trustee and Notice of Appointment of Successor Trustee were collectively  
13     attached was attached to Plaintiff's Application as Exhibit "7").

14            7.     Wells Fargo Bank, N.A., then resigned its position as trustee on or about  
15     December 30, 2008, and U.S. Bank National Association was appointed as successor trustee (A  
16     true and correct copy of the Resignation of Trustee and Notice of Appointment of Successor  
17     Trustee were collectively attached to Plaintiff's Application as Exhibit "8").

18            8.     Pursuant to the Assignment of Deed of Trust, the Plaintiff holds all beneficial  
19     interest under the Deed of Trust and the Assignment of Rents, and is thereby authorized and  
20     empowered to bring this action.

21            9.     As detailed more fully in the Deed of Trust, the real property securing the  
22     Promissory Note (the "Real Property") is identified by the Clark County Tax Assessor Parcel  
23     Nos:

- 24                   a.     124-30-311-031;
- 25                   b.     124-30-312-014 and 015;
- 26                   c.     124-30-312-017 and 018;
- 27                   d.     124-30-312-025 - 169, inclusive;

1 c. 124-30-312-171 and 172;  
2 f. 124-30-312-177; and  
3 g. 124-30-312-180 – 182, inclusive,  
4 more commonly referred to as the Palmilla Townhomes, generally located northeast of the  
5 intersection of West Ann Road and North Decatur Boulevard in North Las Vegas, and more  
6 specifically described in the Legal Description attached was attached to Plaintiff's Application  
7 as Exhibit "9".

8 10. The Real Property is a development of an estimated 155<sup>1</sup> single-family rental  
9 townhomes, each of which is currently generating, or capable of generating, rental income.  
10 Occupancy is estimated to be approximately 80%.

11 11. The Promissory Note and the Deed of Trust provided that Defendant was to  
12 remit monthly payments in a constant amount of \$111,530.40, with a final maturity date of  
13 April 11, 2018.

14 12. Defendant is in substantial arrears on interest and other monies owed to Plaintiff  
15 including fees, other penalties, and other fees and costs.

16 13. Defendant is in default of its obligations to Plaintiff, by its failure to make past  
17 due payments. This failure constitutes "Events of Default" under the Loan, the Promissory  
18 Note, the Deed of Trust, and the Limited Recourse Obligations Guarantee.

19 14. Defendant's counsel conceded in open court that the Deed of Trust authorizes the  
20 appointment of a receiver, but Defendant nevertheless argued against it on the alleged grounds  
21 that a receiver was unnecessary because the Plaintiff could acquire actual ownership of the  
22 property within the next 21 days, by proceeding with noticing a foreclosure sale of the property.

23 15. Greystar Real Estate Partners, with John Rials as its agent ("Receiver") is  
24 qualified to act as Receiver in this action, to take possession, custody, and control of the  
25 Property.

26 \_\_\_\_\_  
27 <sup>1</sup> Plaintiff believes a more accurate estimate is 157 units.

1           16. Plaintiff has asserted that the proposed compensation schedule for the Receiver  
2 is reasonable and customary rate for properties of this size and type. Defendant orally disputed  
3 that the proposed Receiver's compensation schedule is reasonable and/or customary during the  
4 August 18th hearing. The Court shall defer its final determination of whether the  
5 aforementioned proposed Receiver fees are reasonable and customary, pending a hearing on the  
6 further briefing from the parties as may be submitted.

7                                   **CONCLUSIONS OF LAW**

8           The Court makes the following legal conclusions:

9           17. The Loan Documents are valid and enforceable contracts.

10          18. The Loan Documents provide for the appointment of a Receiver upon the  
11 occurrence of an Event of Default.

12          19. Events of Default and/or other breaches of the Loan Documents have been  
13 committed by Defendant and remain uncured as of August 18, 2009.

14          20. The appointment of a Receiver is authorized and is necessary to conserve,  
15 preserve, protect, administer, and continue to operate certain real property and improvements  
16 commonly known as relating to the Property, to allow the Receiver to:

- 17           a. Appraise the Property;  
18           b. Evaluate the physical and financial condition of the Property;  
19           c. Evaluate the current tenancies for market reasonableness, suitability, and  
20           stability;  
21           d. Evaluate the best method of marketing, disposing, or otherwise  
22           converting the Property into cash, such that the damages and any  
23           deficiency between the amount owed by Defendant and the amount  
24           realized by such conversion are minimized;  
25           e. In light of the results of these aforementioned evaluations, determine and  
26           select options for maximizing the market value and/or marketability of  
27           the Property; and

f. Undertake efforts to maximize the market value and/or marketability of the Property.

21. In light of the foregoing findings of fact and conclusions of law, Plaintiff is contractually entitled to the Appointment of a Receiver, on the terms and conditions as provided for herein, subject to further order of the Court.

**ORDER**

Therefore, IT IS HEREBY ORDERED as follows:

1. Receiver's Oath

The Receiver shall execute a Receiver's Oath. The Receiver's Oath may be filed by facsimile transmission and this Order shall become effective upon the Court's receipt of such facsimile transmission; provided, however, that the Receiver replace the facsimiles with originals within seven (7) days of filing.

2. Receiver's Fees

The Court's final determination of the Receiver's Fees shall be deferred pursuant to the following conditions. Defendant shall file any opposition to the reasonableness of the proposed Receiver's Fees on or before September 8, 2009. Plaintiff shall file its reply within 10 days of any such objection, by September 18. Regardless of whether Defendant files an objection, the Court will make its final determination on the proposed Receiver's Fees on September 24, 2009, at 9:00 a.m., or as soon thereafter as counsel may be heard.

The deferral of the Receivership fees notwithstanding, in addition to whatever Receiver fees are ultimately approved, the Receiver shall also be reimbursed for all costs and expenses as are reasonable and necessary for the Receiver to accomplish the purposes and tasks set forth in this Order, including, but not limited to legal expenses, the premium incurred to obtain the Receiver's bond, travel, mileage, faxes, copies, photographs, printing and similar Receiver-provided benefits, which shall be accounted for in the monthly financial report. Five (5) days after submission of the monthly report, without further Order of the Court, the Receiver shall be entitled to its fees and costs. Notwithstanding periodic payment of fees and expenses, the

1 Defendant reserves the right to object to any fees or costs at such time as the receiver files its  
2 periodic reports to seek confirmation of all their transactions.

3 3. Receiver's Authority and Duties

4 (A) Except as otherwise provided in Paragraph 10, the Receiver shall take  
5 immediate and exclusive possession, custody and control of all real and personal property  
6 owned by Defendant,<sup>2</sup> including, without limitation, all equipment, fixtures, furnishings,  
7 records, inventory, assets, royalties, rents, receivables, accounts, deposits, equities, and profits  
8 whatsoever. Receiver shall care for, preserve and maintain the Property, and may incur any  
9 expenses necessary for this purpose. All such expenses shall be paid from funds of the  
10 Receivership Estate.

11 (B) The Receiver is hereby given the power and authority usually held by  
12 receivers and reasonably necessary to accomplish the purpose of this Receivership including,  
13 without limitation, the specific power to:

14 i. Change any and all locks on the Property and limit access thereto;  
15 ii. Maintain, protect, collect, sell, liquidate, or otherwise dispose of  
16 property; provided, however, that the Receiver shall not sell or otherwise dispose of any  
17 property, other than in the ordinary course of business. Notwithstanding the foregoing, the sale,  
18 liquidation, or other conversion of any real property by the Receiver shall be subject to prior  
19 Court approval;

20 iii. Except as otherwise provided in Paragraph 10, take possession of  
21 all funds in all bank and other deposit accounts of the Defendant; open, transfer and change all  
22 bank and trade accounts relating to the Property, so that all such accounts are in the name of the  
23 \_\_\_\_\_

24 <sup>2</sup> With respect to the computer(s) that is/are located at the Property used by Defendant or its  
25 employees in operating the Property, Defendant has represented to Plaintiff that these are not  
26 the property of Defendant. As such, Defendant shall be allowed to remove the computer(s)  
27 from the Property, but Plaintiff and Receiver reserve all rights to contest or challenge  
Defendant's ownership or possessory rights to said computer(s) in the future. Defendant and  
Plaintiff shall work together in good faith to allow the Receiver to harvest Property-related data  
from the computer(s). Receiver shall take all reasonable efforts to refrain from accessing or  
taking data unrelated to the Property.



1 Receiver; and make disbursements in payment of expenses incurred by the Receiver in  
2 accordance with this Order;

3           iv. Hire, on a contract basis, professionals, employees, real estate  
4 brokers, general contractors, tradesmen, and other personnel or entities necessary to manage,  
5 preserve, market and sell the Receivership Property;

6           v. Retain existing employees of the Defendant or related parties as  
7 Defendant's employees in order to continue any business operations. As of the date and time  
8 this order is entered, Defendant shall no longer be deemed to be the employer of any employee  
9 working at or on the Property. If the Receiver chooses to retain any such employee(s), the  
10 Receiver shall carry said employee on its books in connection with payroll taxes, workers  
11 compensation insurance, and related costs;

12           vi. Hire, employ, pay and terminate servants, agents, employees,  
13 clerks and accountants; purchase materials, supplies, advertising, and other services at ordinary  
14 and usual rates and prices using funds that shall come into the Receiver's possession; collect or  
15 compromise debts of the Receivership Estate; incur risks and obligation ordinarily incurred by  
16 owners, managers, and operators of similar enterprises, which in the Receiver's reasonable  
17 judgment, are necessary for the operation of the business, and no such risk or obligation  
18 incurred shall be the personal risk or obligation of the Receiver but only that of the Receivership  
19 Estate;

20           vii. Reject any leases or unexpired contracts of the Defendant that are,  
21 in the Receiver's judgment, burdensome on the Receivership Estate, subject to Court approval;

22           viii. Make and enter into leases for a term not exceeding one year,  
23 obtain and eject tenants, and set or modify rents and terms of rent without this Court's prior  
24 approval;

25           ix. Borrow funds from Plaintiff required to continue operation of the  
26 existing business. Nothing in this Order shall obligated Receiver to advance any such funds.  
27 Nothing in this Order shall obligate Plaintiff to provide such funds and Plaintiff shall be entitled

1 to the issuance of a Receiver's Certificate in the event it does advance such funds, in accordance  
2 with Section 16 of this order;

3 x. Collect all rents, profits and income, which now or hereafter may  
4 be due from the operation of any business connected with the Property and improvements  
5 thereon, including such rents, income and profits presently held in bank accounts for the  
6 Property;

7 xi. Employ and compensate unlawful detainer attorneys or eviction  
8 services with respect to the operation of the Property without prior Court approval;

9 xii. With prior Court approval, abandon property the Receiver  
10 considers to be of little or no value to the Receivership Estate;

11 xiii. Retain inspectors and others reasonably necessary to investigate  
12 the status and condition of the Property. The Receiver shall report to the Court what it learns  
13 from such inspections, and recommend to the Court what action should be taken with regard to  
14 repairs and rehabilitation of the Property;

15 xiv. The Receiver shall not make any capital expenditure in excess of  
16 \$5,000 without prior approval from the Court, except for matters pertaining to health, safety, or  
17 welfare or exigent circumstances; and

18 xv. The Receiver shall have the discretion, but not the obligation, to  
19 exercise such rights as Receiver deems necessary to preserve and protect the Receivership  
20 Property.

21 (C) The Receiver shall not be obligated to file any federal or state income tax,  
22 returns, schedules or other forms, which continue to be an obligation of the Defendant.

23 4. Overhead Expenses of Receiver

24 All fees and expenses incurred by the Receiver, which pertain solely to the Receiver's  
25 general office administration and/or overhead, including, but not limited to office supplies,  
26 employee wages, taxes and benefits and other charges shall not be an expense of the  
27

1 Receivership Estate unless incurred directly and solely for the benefit of the Receivership  
2 Estate.

3 5. Inventory

4 Within thirty (30) days after entry of this Order hereunder, the Receiver shall file an  
5 inventory of all of the personal property taken into possession pursuant to this Order.

6 6. Security Deposits

7 Any security or other deposits which tenants have paid to Defendant or its agents and  
8 which are not paid to the Receiver, and over which the Receiver has no control, shall be  
9 obligations of the Defendant and the Receiver may, but shall not be obligated to, refund such  
10 deposits without an Order of this Court. Any other security or other deposits that tenants have  
11 paid or may pay to the Receiver or which Defendant actually turns over to the Receiver, if  
12 otherwise refundable under the terms of their leases or agreements with the Receiver, may be  
13 refundable by the Receiver in accordance with the leases or agreements.

14 7. Monthly Reports

15 The Receiver shall prepare and serve on Plaintiff and Defendant interim reports of the  
16 condition and operation of the Property in the Receivership Estate within thirty (30) days of the  
17 closing of each accounting period or month. These interim reports shall include the Receiver's  
18 fees and expenses of the Receivership Estate, including fees and costs of accountants and  
19 attorneys authorized by the Court, incurred for each reporting period in the operation and  
20 administration of the Receivership Estate. The Receiver shall follow accounting standards  
21 typical for similar properties, and may enlist the aid of accountants for preparation of Receiver's  
22 reports to the Court. Any objections to the Monthly Reports must be received within twenty  
23 (20) days of service of said interim report(s) in order to be timely and considered by the Court.

24 8. Management of the Property and/or Business Entity

25 Receiver shall operate and manage the Property including, but not limited to, collecting  
26 rent, and operating any related business entity. The Receiver may employ such agents,  
27 independent contractors, employees and management companies to assist Receiver in managing

1 the Receivership Property including, but not limited to, a company in which Receiver is a  
2 principal, provided the amount of compensation paid to any such agent or firm is comparable to  
3 that charged by similar entities for similar services. Receiver may undertake the risks and  
4 obligations ordinarily incurred by owners, managers and operators of similar businesses and  
5 enterprises and Receiver shall pay for these services from the funds of the Receivership Estate.  
6 No such risk or obligation so incurred shall be the personal risk or obligation of this Receiver,  
7 but shall be the risk and obligation of the Receivership Estate. All who are acting, or have acted,  
8 on behalf of the Receiver at the request of the Receiver are protected and privileged with the  
9 same protections of this Court as the Receiver has.

10 9. Police Assistance

11 Receiver may request assistance of law enforcement officials when taking possession, or  
12 at any other time during the term of the Receivership, if in the opinion of Receiver, such  
13 assistance is necessary to preserve the peace and protect the Receivership assets.

14 10. Bank Accounts

15 With reference to the Order Granting Motion for Relief from the Automatic Stay,  
16 entered on July 2, 2009, in *In re: Palmilla Development Company, Inc.*, 1:09-bk-11504 MT,  
17 pending in the United States Bankruptcy Court, Central District of California, and subject to the  
18 entry of an order from that Court clarifying the Stay Relief Order as it relates to funds now  
19 remaining in Defendant's/Debtor in Possession's accounts, the Receiver shall take possession  
20 of, and receive from all depositories, banks, brokerages and otherwise, any money on deposit in  
21 such institutions belonging to or arising from the operation of the Property, whether such funds  
22 be in accounts titled in the name of the Defendant or not, and Receiver may indemnify the  
23 institution upon whom such demand is made, and is empowered to open or close any other  
24 accounts.

25 Receiver shall deposit monies and funds collected and received in connection with the  
26 Receivership Estate at federally-insured banking institutions or savings associations which are  
27 not parties to this case. Monies coming into the possession of the Receiver and not expended for

1 any purposes herein authorized shall be held by the Receiver pending further orders of this  
2 Court. Additionally, Monies on deposit as of August 28, 2009, shall not be considered in  
3 calculating the Receiver's management fee of 3% of the Total Income, or a minimum of \$25 per  
4 unit per month, whichever is greater (simply stated, the Receiver shall not receive 3% of these  
5 funds simply for accepting tender of these funds by Defendant).

6 11. Use of Funds

7 The Receiver shall pay only those bills that are reasonable and necessary for the  
8 operation or the protection of the Receivership Property and shall allocate funds in the  
9 following order of priority: (1) the costs and expense of the Receiver and the Receivership  
10 Estate including its utilities, insurance premiums, salaries and wages of employees working at  
11 the Receivership Property, general and special taxes or assessments levied on the Property and  
12 improvements thereon; (2) amounts due to Plaintiff; and (3) the creation and retention by the  
13 Receiver of a reasonable working capital fund.

14 12. Utilities

15 Any utility company providing services to the Property, including gas, electricity, water,  
16 sewer, trash collection, telephone, communications or similar services, shall be prohibited from  
17 discontinuing service to the Property based upon unpaid bills incurred by Defendant. Further,  
18 such utilities shall transfer any deposits held by the utility to the exclusive control of such  
19 Receiver and be prohibited from demanding that the Receiver deposit additional funds in  
20 advance to maintain or secure such services. New accounts under the name of the Receivership  
21 shall be established within thirty (30) days. Utility companies are prohibited from discontinuing  
22 service while the new Receivership accounts are in process of being established.

23 13. Mail

24 Receiver may issue demand that the U.S. Postal service grant exclusive possession and  
25 control of mail including postal boxes as may have been used by Defendant and may direct that  
26 certain mail related to the Property and its business be re-directed to Receiver.  
27

1           14.   Insurance

2           The Receiver shall determine upon taking possession of the Property whether in the  
3 Receiver's judgment, there is sufficient insurance coverage. With respect to any insurance  
4 coverage in existence or obtained, the Receiver, Plaintiff and the property management  
5 company, if any one exists, shall be named as an additional insured on the policies for the  
6 period of the Receivership. If sufficient insurance coverage does not exist, the Receiver shall  
7 immediately notify the parties to this lawsuit and shall have thirty (30) calendar days to procure  
8 sufficient all-risk and liability insurance on the Property (excluding earthquake and flood  
9 insurance) provided, however, that if the Receiver does not have sufficient funds to do so, the  
10 Receiver shall seek instructions from the Court with regard to adequately insuring the Property.  
11 The Receiver shall not be responsible for claims arising from the lack of procurement or  
12 inability to obtain insurance.

13           15.   Legal Counsel

14           Receiver may hire independent legal counsel and pay such persons for their services at  
15 such rates as the Receiver deems reasonably appropriate for the services provided, and subject  
16 to prior Court approval.

17           16.   Receiver's Certificates

18           In the event that income from the operation of the Property is insufficient to meet  
19 normal operating expenses and costs, the Receiver is authorized to borrow money from Plaintiff  
20 and to issue Receiver's Certificates to secure such indebtedness. The total amount of all monies  
21 borrowed and Receiver's Certificates issued shall be subject to the further order of this Court, as  
22 provided for in Plaintiff's security instrument.

23           17.   Plaintiff to Notify Receiver of the Appearances of all Parties

24           Plaintiff is ordered to promptly notify the Receiver of the names, addresses, and  
25 telephone numbers of all parties and their counsel who appear in the action, so that the Receiver  
26 may give notice to all parties of any matters affecting the Receivership.

27

1           18.   Receiver's Final Report and Account

2           As soon as is practicable after the Receivership terminates, the Receiver shall file, serve,  
3 and set for hearing in this Court its Final Report and Account. Notice shall be given to all  
4 persons whom the Receiver has received notice of potential claims against the Receivership  
5 Estate.

6           The motion to approve the final report and accounting, and for discharge of the  
7 Receiver, shall contain a summary of the Receivership accounting including enumeration, by  
8 major categories, of total revenues and total expenditures, the net amount of any surplus or  
9 deficit with supporting facts, a declaration under penalty of perjury of the basis for the  
10 termination of the Receivership, and evidence to support an order for the distribution of any  
11 surplus, or payment of any deficit, in the Receivership Estate.

12           19.   Instructions from the Court

13           The Receiver and the parties to this case may at any time apply to this Court for  
14 instructions or orders. The Court may grant any order requested by the Receiver, without further  
15 notice of hearing, if no objection is filed with the Court and served on the Receiver and the  
16 parties within twenty (20) days after the filing and service of Receiver's request.

17           20.   General Provisions

18           (A)   No person or entity shall file suit against the Receiver, or take other  
19 action against the Receiver, without an order of this Court permitting the suit or action;  
20 provided, however, that no prior Court order is required to file a motion in this action to enforce  
21 the provisions of this Order or any other order of this Court in this action.

22           (B)   The Receivership Estate and its employees, agents, attorneys and all  
23 professionals and management companies retained by the Receiver shall have no liability for  
24 any obligations, or debts incurred by Defendant. The Receiver and its employees, agents and  
25 attorneys shall have no personal liability, and they shall have no claim asserted against them  
26 relating to the Receiver's duties under this Order, without prior authority from this Court as  
27 stated in (A) above.

1 (C) Nothing contained in the Order of the Court shall be construed as  
 2 obligating or permitting the Receiver to advance its own funds to pay any costs and expense of  
 3 the Receivership Estate.

4 (D) The parties to this litigation shall refrain from interfering with the  
 5 Receiver's taking or exercising of custody, control, or possession of the Property (including the  
 6 applicable books, records, bank accounts, and financial statements), or with the Receiver's  
 7 conduct of its duties as set forth in this Order.

8 DATED this 3rd day of September, 2009.

JENNIFER P. TOGLIATTI

DISTRICT COURT JUDGE

11 September 2nd 2009.

September 2, 2009.

12 Submitted by:

Approved as to form and content by:

13 LEWIS AND ROCA LLP

DEANER, DEANER, SCANN, MALAN &  
LARSEN

14 Michael F. Lynch  
 15 Michael F. Lynch, Esq.  
 16 Nevada Bar No. 8555  
 17 3993 Howard Hughes Pkwy., Suite 600  
 Las Vegas, Nevada 89169

Brent Larsen  
 Brent Larsen, Esq.  
 Nevada Bar No. 1184  
 720 S. Fourth Street, #300  
 Las Vegas, NV 89101

18 *Attorneys for Plaintiff*

*Attorneys for Defendant*

CERTIFIED COPY  
 DOCUMENT ATTACHED IS A  
 TRUE AND CORRECT COPY  
 OF THE ORIGINAL ON FILE

E. J. Smith  
 CLERK OF THE COURT

SEP 04 2009



## Exhibit 8

...

## Exhibit 8

|

Inst #: 201005050002309  
 Fees: \$18.00  
 N/C Fee: \$0.00  
 05/05/2010 11:34:08 AM  
 Receipt #: 338842  
 Requestor:  
 PARADIGM ATTORNEY SERVICE  
 |  
 Recorded By: ANI Pgs: 5  
 DEBBIE CONWAY  
 CLARK COUNTY RECORDER

124-30-311-031  
 APN# PLEASE SEE ATTACHMENT A.  
 11-digit Assessor's Parcel Number may be obtained at:  
<http://redrock.co.clark.nv.us/assrrealprop/owner.aspx>

ORDER GRANTING MOTION TO APPROVE SALE OF

RECEIVERSHIP PROPERTY

Type of Document

(Example: Declaration of Homestead, Quit Claim Deed, etc.)

Recording Requested By:

Michael F. Lynch, Lewis and Roca LLP

Return Documents To:

Name Michael F. Lynch, Lewis and Roca LLP

Address 3993 Howard Hughes Parkway, Suite 600

City/State/Zip Las Vegas, Nevada 89169

This page added to provide additional information required by NRS 111.312 Section 1-2

(An additional recording fee of \$1.00 will apply)

This cover page must be typed or printed clearly in black ink only.

**EXHIBIT C**

**EXHIBIT C**

LOAN NO. 010-00001895

**LIMITED RECOURSE OBLIGATIONS GUARANTY**

THIS LIMITED RECOURSE OBLIGATIONS GUARANTY (this "Guaranty"), is made and entered into as of March 28, 2007, by HAGAI RAPAPORT (whether one or more, "Guarantor"), to and for the benefit of ARTESIA MORTGAGE CAPITAL CORPORATION, a Delaware corporation, and its successors and/or assigns ("Lender"). All initially-capitalized terms used herein without definition shall have the meanings given such terms in that certain Fixed Rate Note (together with all modifications, extensions, renewals and replacements thereof, the "Note") of even date herewith, in the amount of Twenty Million One Hundred and Fifty Thousand and 00/100 Dollars (\$20,150,000.00), made payable by PALMILLA DEVELOPMENT CO., INC., a(n) Nevada corporation ("Borrower"), to the order of Lender.

1. **Guaranteed Obligations.** In order to induce Lender to loan to Borrower the sum of Twenty Million One Hundred and Fifty Thousand and 00/100 Dollars (\$20,150,000.00) (the "Loan"), evidenced by the Note, the undersigned hereby unconditionally, irrevocably, jointly and severally guarantee(s) to Lender and to its successors, endorsees and/or assigns the full and prompt payment when due, by acceleration or otherwise, of all amounts owing by Borrower to Lender under the Loan Documents (as defined in the Security Instrument), subject, however, to the limitations on Lender's recourse set forth in Section 2 below.

2. **Limitations on Recourse.** Except with respect to the matters set forth in subsections (a) and (b) below, Lender's source of satisfaction of the indebtedness evidenced by the Note and all other covenants and obligations under the Note and any other of the Loan Documents shall be limited to the Property (as defined in the Security Instrument), and Lender shall not seek to procure payment out of other assets of Guarantor, or seek a judgment (except as hereinafter provided) for any sums which are or may be payable under the Note or any other of the Loan Documents, or claim or seek judgment for any deficiency remaining after foreclosure of the Security Instrument; provided, however, that the foregoing clause shall not prejudice the right of Lender to enforce the lien of the Security Instrument or other security given for the payment thereof or to exercise any of its remedies at law other than the entry of a personal money judgment against the Borrower. The foregoing notwithstanding:

(a) Guarantor shall be and remain personally liable for all losses, costs, damages, or expenses incurred by Lender in the following instances:

(i) failure to pay or cause to be paid Taxes (except to the extent that Borrower has deposited funds with Lender pursuant to the Security Instrument for the purpose of paying such items) or to pay or cause to be paid charges for labor or materials, or other charges which can create liens on any portion of the Property;

(ii) as a result of waste (except ordinary wear and tear), arson committed or instigated by Borrower, any Guarantor or any partner, member or shareholder in Borrower, or a violation of the provisions in the Security Instrument regarding removal, demolition or structural alteration of any portion of the Property;

(iii) breach or failure to perform or comply with any of the insurance provisions of the Loan Documents;

(iv) all court costs and reasonable attorneys' fees, costs and expenses actually incurred by Lender pursuant to the Note or any other Loan Documents;

(v) Borrower's breach or failure to perform or comply with Section 1.03 (captioned "Hazardous Waste") of the Security Instrument, or Borrower's or any Guarantor's breach or failure to perform or comply with the provisions of the Environmental Indemnification Agreement of even date herewith executed by Borrower for the benefit of Lender;

(vi) misapplication of or failure to deliver to Lender (in accordance with the terms of the Loan Documents) the following: (1) any insurance or condemnation proceeds; (2) rents, issues or profits received by Borrower/Guarantor or its agent after Lender makes written demand therefor pursuant to any Loan Document; or (3) prepaid rents or tenant security deposits; or

(vii) violation of any of the provisions of Sections 1.29 and 1.30 (captioned "Single Purpose Entity" and "ERISA", respectively) of the Security Instrument.

(b) Guarantor shall be and remain personally liable without exculpation or limitation of liability whatsoever for the entire amount of the indebtedness evidenced by the Note (including all principal, interest, and other charges) and all other sums due or to become due under the other Loan Documents, whether at maturity or by acceleration or otherwise, in the following instances:

(i) violation of any of the provisions of Sections 1.15(c) and (d) of the Security Instrument (captioned, "No Sale/Encumbrance" and "Permitted Transfers", respectively);

(ii) fraud or intentional misrepresentation in connection with the Property, Loan Documents, or Loan Application;

(iii) the Stabilized Operating Threshold (as defined in the Reserve Agreement of even date herewith executed by Borrower in connection with the Loan) is not satisfied, provided there shall no liability under this Subsection 2(b)(iii) from and after the date such Stabilized Operating Threshold has first been satisfied; or

(iv) the Property or any part thereof becomes an asset in: (1) a voluntary bankruptcy or insolvency proceeding commenced by Borrower; or (2) an involuntary bankruptcy or insolvency proceeding in which: (A) such proceeding was commenced by any entity controlling, controlled by or under common control with Borrower (individually or collectively, "Affiliate"), including but not limited to any creditor or claimant acting in concert with Borrower or any Affiliate; or (B) any Affiliate objects to a motion by Lender for relief from any stay or injunction from the foreclosure of the Security Instrument or any other remedial action permitted under the Note, Security Instrument or other Loan Documents.

The obligations guaranteed pursuant to this Section 2 are hereinafter collectively referred to as the "Guaranteed Obligations".

3. Continuing Liability. Guarantor agrees as follows:

(a) Guarantor shall continue to be liable under this Guaranty and the provisions hereof shall remain in full force and effect notwithstanding: (i) any modification, agreement or stipulation between Borrower and Lender, or their respective successors and assigns, with respect to the Note or any of the other Loan Documents or the obligations encompassed thereby; (ii) Lender's waiver of or failure to enforce any of the terms, covenants or conditions contained in the Loan Documents or in any modification thereof; (iii) any release of Borrower or any other guarantor from any liability with respect to the Guaranteed Obligations or any portion thereof; (iv) any release or subordination of any real or personal property then held by Lender as security for the performance of the Guaranteed Obligations or any portion thereof; or (v) Lender's enforcement of or failure to enforce any other guaranty of all or any portion of the Guaranteed Obligations.

(b) Guarantor's liability under this Guaranty shall continue until the earlier to occur of: (i) the full and complete satisfaction of the Guaranteed Obligations; or (ii) the full and complete payment of the principal and all accrued interest due under the Note and all other amounts payable by Borrower under the Loan Documents, and shall not be reduced by virtue of any partial payment by Borrower of any

amount due under the Note or under any of the Loan Documents or by Lender's recourse to any collateral or security.

(c) The obligations of Guarantor hereunder shall be in addition to any obligations of Guarantor under any other guaranties of the Guaranteed Obligations and/or any obligations of the Borrower or any other persons or entities heretofore given or hereafter to be given to Lender, and this Guaranty shall not affect or invalidate any such other guaranties. The liability of Guarantor to Lender shall at all times be deemed to be the aggregate liability of Guarantor under the terms of this Guaranty and of any other guaranties heretofore or hereafter given by Guarantor to Lender.

4. Representations and Warranties. Guarantor hereby represents and warrants as follows:

(a) Lender's agreement to make the Loan to Borrower is of substantial and material benefit to Guarantor. Guarantor now has and will continue to have full and complete access to any and all information concerning the transactions contemplated by the Loan Documents or referred to therein, the value of the assets owned or to be acquired by Borrower, Borrower's financial status and its ability to perform the Secured Obligations.

(b) Guarantor has reviewed and approved the Loan Documents and is fully informed of the remedies Lender may pursue, with or without notice to Borrower, in the event of a default under the Loan Documents.

(c) Guarantor has the requisite power and authority to own and manage its properties, to carry on its business as now being conducted, and to execute and deliver this Guaranty and to perform its obligations hereunder. Guarantor is in compliance with all laws, regulations, ordinances and orders of governmental or public authorities applicable to it.

(d) The execution, delivery and performance by Guarantor of this Guaranty are within the power and capacity of Guarantor, and will not violate any provision of law, any order of any court or agency of government, or any indenture, agreement or any other instrument to which Guarantor is a party or by which Guarantor or its property is bound, or be in conflict with, result in a breach of or constitute (with due notice and/or lapse of time) a default under any such indenture, agreement or other instrument, or result in the creation or imposition of any lien, charge or encumbrance of any nature whatsoever upon any of its property or assets, except as contemplated by the provisions of the Loan Documents. This Guaranty, when delivered to Lender, will constitute a legal, valid and binding obligation enforceable against Guarantor in accordance with its terms.

(e) All financial statements and data that have been given to Lender by Guarantor (i) are complete and correct in all material respects as of the date given; (ii) accurately present the financial condition of Guarantor on each date as of which, and the results of Guarantor's operations for the periods for which, the same have been furnished; and (iii) have been prepared in accordance with generally accepted accounting principles consistently applied throughout the periods covered thereby. There has been no material adverse change in the financial condition or operations of Guarantor since the date of the most recent financial statement given to Lender.

(f) Guarantor is not a party to any agreement or instrument which materially and adversely affects Guarantor's present or proposed business, properties or assets, or operations or conditions (whether financial or otherwise); and Guarantor is not in default in the performance, observance or fulfillment of any of the material obligations, covenants or conditions set forth in any agreement or instrument to which Guarantor is a party.

(g) There is not now pending against or affecting Guarantor, nor to the knowledge of Guarantor is there threatened, any action, suit or proceeding at law or in equity or by or before any

governmental or administrative agency that, if adversely determined, would materially and adversely impair or affect the financial condition or operations of Guarantor.

(h) Guarantor has filed all federal, state, county, municipal and other income tax returns required to have been filed by Guarantor and has paid all taxes that have become due pursuant to such returns or pursuant to any assessments received by Guarantor, and Guarantor does not know of any basis for any material additional assessment against it in respect of such taxes.

(i) Neither Guarantor, nor any borrower in any loan transaction in which Guarantor has been a guarantor, has received any discounted payoff(s), loan modifications(s) and/or similar matters in any previous mortgage loan transaction as a result of Guarantor's or any such borrower's failure to meet the terms and conditions of the documentation for such transaction.

5. **Covenants and Agreements.** Guarantor covenants and agrees that, so long as any part of the Guaranteed Obligations shall remain unsatisfied, Guarantor shall, unless Lender shall otherwise consent in advance in writing:

(a) keep itself fully informed as to all aspects of Borrower's financial condition and the performance of the Guaranteed Obligations;

(b) file all federal, state, county, municipal and other income tax returns required to be filed by it and pay before the same become delinquent all taxes that become due pursuant to such returns or pursuant to any assessments received by it;

(c) promptly and faithfully comply with all laws, ordinances, rules, regulations and requirements, both present and future, of every duly constituted governmental or public authority having jurisdiction that may be applicable to it; and

(d) maintain full and complete books of account and other records reflecting the results of its operations, in form reasonably satisfactory to Lender, and furnish to Lender such information about the financial condition of Guarantor as Lender shall reasonably request, including, but not limited to, the financial statements and documents referred to in Section 1.24 (captioned "Books, Records and Financial Statements") of the Security Instrument.

6. **Unconditional Liability.** The liability of Guarantor under this Guaranty is a guaranty of performance and not of collectibility, and is not conditional or contingent upon the genuineness, validity, regularity or enforceability of the Loan Documents or other instruments relating to the creation or performance of the Guaranteed Obligations or the pursuit by Lender of any remedies which it now has or may hereafter have with respect thereto under the Loan Documents, at law, in equity or otherwise.

7. **Waivers.**

(a) Guarantor hereby waives, to the extent permitted by law: (i) all notices to Guarantor, to Borrower or to any other person, including, but not limited to, notices of the acceptance of this Guaranty or the creation, renewal, extension or modification of the Guaranteed Obligations, or of default in the performance of the Guaranteed Obligations (or any portion thereof) and enforcement of any right or remedy with respect thereto or notice of any other matters relating thereto; (ii) diligence and demand of performance; (iii) any statute of limitations affecting Guarantor's liability hereunder or the enforcement thereof; (iv) any rights Guarantor might otherwise have under any applicable statute or rule of law by reason of release of fewer than all guarantors, if more than one, of the Guaranteed Obligations; and (v) all principles or provisions of law which conflict with the terms of this Guaranty. Guarantor further agrees that Lender may enforce this Guaranty upon the occurrence of a default or an event of default under the Note or any of the Loan Documents (as "Event of Default" is defined therein), notwithstanding the existence of any dispute between Borrower and Lender with respect to the existence of the Event of Default or performance of the Guaranteed Obligations (or any portion thereof) or any counterclaim, set-off

or other claim which Borrower may allege against Lender with respect thereto. Moreover, Guarantor agrees that its obligations shall not be affected by any circumstances which constitute a legal or equitable discharge of a guarantor or surety.

(b) Guarantor further agrees that nothing contained herein shall prevent Lender from suing on the Note or from exercising any rights available to it thereunder or under any of the Loan Documents, and that the exercise of any of the aforesaid rights shall not constitute a legal or equitable discharge of Guarantor. Guarantor understands that the exercise by Lender of certain rights and remedies contained in the Loan Documents may affect or eliminate Guarantor's right of subrogation against Borrower and that Guarantor may therefore incur a partially or totally non-reimbursable liability hereunder; nevertheless, Guarantor hereby authorizes and empowers Lender to exercise, in its sole discretion, any right and remedies, or any combination thereof, which may then be available, since it is the intent and purpose of Guarantor that the obligations hereunder shall be absolute, independent and unconditional under any and all circumstances. Notwithstanding any foreclosure of the lien of the Security Instrument with respect to any or all of any real or personal property secured thereby, whether by the exercise of the power of sale contained therein, by an action for judicial foreclosure or by an acceptance of a deed in lieu of foreclosure, and notwithstanding any enforcement of any other guaranty, Guarantor shall remain bound under this Guaranty.

(c) Guarantor agrees that it shall have no right of subrogation against Borrower or against any collateral or security provided for in the Loan Documents unless and until the Guaranteed Obligations have been fully satisfied, all obligations owed to Lender under the Loan Documents have been fully performed and Lender has released, transferred or disposed of all of its right, title and interest in such collateral or security. Guarantor further agrees that to the extent the waiver of its rights of subrogation as set forth herein is found by a court of competent jurisdiction to be void or voidable for any reason, any rights of subrogation Guarantor may have against Borrower or against such collateral or security shall be junior and subordinate to any rights Lender may have against Borrower and to all right, title and interest Lender may have in such collateral or security. Lender may use, sell or dispose of any item of collateral or security as it sees fit without regard to any subrogation rights that Guarantor may have, and upon any disposition or sale, any rights of subrogation Guarantor may have shall terminate.

(d) Guarantor's sole right with respect to any foreclosure of real or personal property collateral shall be to cure, bid at such sale or redeem from sale in accordance with applicable statutory law of the State where the Property is located. Guarantor acknowledges and agrees that Lender may also bid at any such sale and in the event such collateral is sold to Lender in whole or partial satisfaction of the obligations owed to Lender, Guarantor shall not have any further right or interest with respect thereto. Notwithstanding anything to the contrary herein, no provision of this Guaranty shall be deemed to limit, decrease, or in any way to diminish any rights of set-off Lender may have with respect to any cash, cash equivalents, certificates of deposit, notes or the like which may now or hereafter be put on deposit with Lender by Borrower or by Guarantor. Upon the occurrence and during the continuance of any Event of Default under any of the Loan Documents, Lender is hereby authorized at any time and from time to time, to the fullest extent permitted by law, to set off and apply any and all deposits (general or special, time or demand, provisional or final) at any time held and other indebtedness at any time owing by Lender to or for the credit or the account of Guarantor against any and all of the obligations of Guarantor now or hereafter existing under this Guaranty, irrespective of whether or not Lender shall have made any demand under this Guaranty and although such obligations may be contingent and unmatured. Lender agrees promptly to notify Guarantor after any set-off and application, provided that the failure to give such notice shall not affect the validity of such set-off and application or this Guaranty. The rights of Lender under this Section 7(d) are in addition to other rights and remedies (including, without limitation, other rights to set-off) which Lender may have.

(e) Guarantor waives all right and defenses that Guarantor may have because Borrower's debt is secured by real property. This means, among other things:

(f) Lender may collect from Guarantor without first foreclosing on any real or personal property collateral pledged by Borrower.



(ii) If Lender forecloses on any real property collateral pledged by Borrower:

I. The amount of the debt may be reduced only by the price for which that collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price.

II. Lender may collect from Guarantor even if Lender, by foreclosing on the real property collateral, has destroyed any right Guarantor may have to collect from Borrower.

This is an unconditional and irrevocable waiver of any rights and defenses Guarantor may have because Borrower's debt is secured by real property.

8. **Direct Enforcement.** Guarantor agrees that Lender may enforce this Guaranty without the necessity of resorting to or exhausting any security or collateral securing the Guaranteed Obligations, without the necessity of proceeding against any other guarantor (whether under this Guaranty or any other guaranty), and without the necessity of proceeding against Borrower. Guarantor hereby waives the right to require Lender to proceed against Borrower, to foreclose any lien on any real or personal property securing the Guaranteed Obligations, to exercise any right or remedy under the Loan Documents, to pursue any other remedy or to enforce any other right.

9. **Not Affected by Bankruptcy.** Notwithstanding any modification, discharge or extension of the Guaranteed Obligations or any amendment, modification, stay or cure of Lender's rights which may occur in any bankruptcy or reorganization case or proceeding concerning Borrower, whether permanent or temporary, and whether assented to by Lender, Guarantor hereby agrees that it shall be obligated hereunder to pay and perform the Guaranteed Obligations and discharge its other obligations in accordance with the terms of the Guaranteed Obligations and the terms of this Guaranty in effect on the date hereof. Guarantor understands and acknowledges that by virtue of this Guaranty, it has specifically assumed any and all risks of a bankruptcy or reorganization case or proceeding with respect to Borrower. Without in any way limiting the generality of the foregoing, any subsequent modification of the Guaranteed Obligations in any reorganization case concerning Borrower shall not affect the obligation of Guarantor to pay and perform the Guaranteed Obligations in accordance with their original terms.

10. **Security Interest**

(a) In addition to all liens upon and rights of setoff against moneys, securities or other property of Guarantor given to Lender by law, Guarantor hereby assigns to Lender, and grants a security interest to Lender in, all moneys, securities and other property owned by Guarantor now or hereafter in the constructive or actual possession of or on deposit with Lender, whether held in general or special account or deposit, or for safekeeping or otherwise, and every such lien and right of setoff may be exercised without demand upon or notice to Guarantor. Lender shall have all of the rights and remedies of a "secured party" under Article 9 of the Uniform Commercial Code of the State where the Property is located with respect to such moneys, securities and other property. No lien or right of setoff shall be deemed to have been waived by any act or conduct on the part of Lender, or by any neglect to exercise such right of setoff or to enforce such lien, or by any delay in so doing, and every right of setoff and lien shall continue in full force and effect until such right of setoff or lien is specifically waived or released by an instrument in writing executed by Lender.

(b) Guarantor hereby grants Lender a security interest in any personal property of Borrower in which Guarantor now has or hereafter acquires any right, title or interest. Guarantor agrees that such security interest shall be additional security for the obligations hereby guaranteed. Such security interest shall be superior to any rights of Guarantor in such property or assets until the Guaranteed Obligations have been fully satisfied and performed.

11. **Written Waivers by Lender Required.** No lien or right of setoff shall be deemed to have been waived by any act or conduct on the part of Lender, or by any neglect to exercise such right of setoff or to enforce such lien, or by any delay in so doing, and every right of setoff and lien shall continue in full force and effect until such right of setoff or lien is specifically waived or released by an Instrument in writing executed by Lender.

12. **Notices.** Whenever Guarantor or Lender shall desire to give or serve any notice, demand, request or other communication with respect to this Guaranty, each such notice, demand, request or communication shall be given in writing at the address of the intended recipient set forth below by any of the following means: (a) personal service (including service by overnight courier service); (b) electronic communication, whether by telex, telegram or telecopying (if confirmed in writing sent by personal service or by registered or certified, first class mail, return receipt requested; or (c) registered or certified, first class mail, return receipt requested:

**To Lender:** ARTESIA MORTGAGE CAPITAL CORPORATION  
1180 NW Maple Street, Suite 202  
Issaquah, Washington 98027  
Attn: Servicing Department  
Fax: (425) 313-1005

**with a copy to:** BEST & FLANAGAN LLP  
225 South Sixth Street, Suite 4000  
Minneapolis, Minnesota 55402  
Attn: Thomas G. Garry  
Fax: (612) 339-5897

**To Guarantor:** HAGAI RAPAPORT  
2857 Paradise Road, Suite 2001  
Las Vegas, Nevada 89109-8020  
Fax: (702) 399-6243

**with a copy to:** Ronald E. Gillette, Esq.  
235 West Brooks Avenue, 2nd Floor  
North Las Vegas, Nevada 89030  
Fax: (702) 399-6243

Such addresses may be changed by notice to the other parties given in the same manner as provided above. Any notice, demand or request sent pursuant to either subsection (a) or (b) hereof shall be deemed received upon such personal service or upon dispatch by electronic means, and, if sent pursuant to subsection (c) shall be deemed received five (5) days following deposit in the mail.

13. **Survival of Representations and Certain Agreements.** All agreements, indemnities, representations and warranties made herein shall survive the execution and delivery of this Guaranty, the making of the Loan and the execution and delivery of the Note. All representations and warranties made in this Guaranty shall further survive any and all investigations and inquiries made by Lender, shall remain true, correct and complete in all material respects and shall remain continuing obligations so long as any portion of the Guaranteed Obligations remains outstanding or unsatisfied. Notwithstanding anything herein to the contrary, in the event that, pursuant to any insolvency, bankruptcy, reorganization, receivership or other debtor relief law, any judgment, order or decision thereunder, or any other operation of law, Lender must rescind or restore any payment, or any part thereof, received by Lender in satisfaction of the Guaranteed Obligations or the Loan, any prior release or discharge from the terms of this Guaranty given to Guarantor by Lender under the terms of this Guaranty or otherwise shall be without effect, and this Guaranty shall remain in full force and effect. It is the intention of Borrower and Guarantor that Guarantor's obligations hereunder shall not be discharged except by Guarantor's full and complete performance of such obligations and then only to the extent of such performance.

14. **Partial Performance.** Guarantor's performance of a portion, but not all, of the Guaranteed Obligations shall in no way limit, affect, modify or abridge Guarantor's liability for that portion of the Guaranteed Obligations which is not performed. Without in any way limiting the generality of the foregoing, in the event that Lender is awarded a judgment in any suit brought to enforce Guarantor's covenant to perform a portion of the Guaranteed Obligations, such judgment shall in no way be deemed to release Guarantor from its covenant to perform any portion of the Guaranteed Obligations which is not the subject of such suit.

15. **Guaranty Reinstated.** Guarantor agrees that to the extent Borrower makes a payment or a payment is made for or on behalf of Borrower to Lender, which payment, or any part thereof, is subsequently invalidated, determined to be fraudulent or preferential, set aside and/or required to be repaid to any trustee, receiver, assignee or any other party whether under any bankruptcy, state or federal law, common law or equitable cause or otherwise, then, to the extent thereof, the obligation or part thereof intended to be satisfied thereby, shall be revived, reinstated and continued in full force and effect as if said payment or payments had not originally been made by or on behalf of Borrower.

16. **No Third Party Beneficiaries.** This Guaranty is solely for the benefit of Lender and its successors and assigns and is not intended to nor shall it be deemed to be for the benefit of any third party, including Borrower.

17. **Successors and Assigns. Rules of Construction.** This Guaranty shall be binding upon Guarantor and its heirs, executors, legal representatives, distributees, successors and assigns and shall inure to the benefit of and shall be enforceable by Lender and its successors, endorsees and assigns. As used herein, the singular shall include the plural and the masculine shall include the feminine and neuter and vice versa, if the context so requires. Article and Section headings in this Guaranty and the other Loan Documents are included for convenience of reference only and shall not constitute a part of this Guaranty or such other Loan Documents for any other purpose or be given any substantive effect. The recitals to this Guaranty and to each of the other Loan Documents are incorporated herein and therein and made a part hereof and thereof. Any married person who signs this Guaranty hereby expressly agrees that recourse may be had against his or her separate and community property for all of his or her obligations under this Guaranty.

18. **Attorneys' Fees and Costs.** In the event of any litigation regarding the enforcement or validity of this Guaranty (including, without limitation, any bankruptcy or appellate proceedings), Guarantor shall be obligated to pay all charges, costs and expenses (including attorneys' fees and costs) incurred by Lender, whether or not such litigation is prosecuted to judgment. The recovery of post-judgment fees, costs and expenses are separate and several and shall survive the merger of this Guaranty into any judgment. As used herein, "attorneys' fees and costs" shall have the meaning given in the Security Instrument.

19. **Jurisdiction and Venue.** Guarantor, in order to induce Lender to accept this Guaranty, agrees that all actions or proceedings arising directly, indirectly or otherwise in connection with this Guaranty shall be litigated, at Lender's sole election, only in courts having a situs within the county and State where the Property is located, in any jurisdiction in which Borrower or Guarantor (or any individual or entity comprising Borrower or Guarantor) may reside or hold assets, or in any one or more of the foregoing jurisdictions. Guarantor hereby consents and submits to the jurisdiction of any local, state or federal court located therein. Guarantor hereby waives any right it may have to transfer or change the venue of any litigation brought against it by Lender on this Guaranty in accordance with this paragraph.

20. **Applicable Law.** This Guaranty shall be governed by and construed and enforced in accordance with the laws of the State where the Property is located.

21. **Severability.** Every provision of this Guaranty is intended to be severable. In the event any term or provision herein, or the application thereof, is declared to be illegal, invalid or unenforceable for any reason whatsoever by a court of competent jurisdiction, such illegality, invalidity or

unenforceability shall not affect the balance of the terms and provisions hereof or any other application thereof, which terms and provisions shall remain in full force and effect.

22. **Counterparts.** This Guaranty may be executed in counterparts, all of which executed counterparts shall together constitute a single document. Signature pages may be detached from the counterparts and attached to a single copy of this Guaranty to physically form one document. The failure of any party hereto to execute this Guaranty, or any counterpart hereof, shall not relieve the other signatories from their obligations hereunder.

23. **Jury Trial Waiver.** IN ORDER TO AVOID DELAYS IN TIME AND ANY PREJUDICE THAT MAY ARISE FROM TRIAL BY JURY AND IN LIGHT OF THE COMPLEXITIES OF THIS TRANSACTION, IN THE EVENT OF LITIGATION ARISING OUT OF OR RELATING TO THIS GUARANTY, THE NOTE AND/OR THE OTHER LOAN DOCUMENTS, AND/OR IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT TO THIS GUARANTY, THE NOTE, THE OTHER LOAN DOCUMENTS AND/OR ANY OTHER INSTRUMENT, DOCUMENT OR AGREEMENT EXECUTED OR DELIVERED IN CONNECTION HERewith, OR THE TRANSACTION RELATED HERETO OR THERETO, IN EACH CASE, WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE, GUARANTOR, WITH THE PRIOR ADVICE OF COUNSEL, KNOWINGLY, INTELLIGENTLY, AND AS A BARGAINED FOR MATTER, WAIVES ITS RIGHT TO TRIAL BY JURY AND AGREES AND CONSENTS THAT ANY CLAIM, DEMAND, ACTION OR CAUSE OF ACTION IN RESPECT TO SUCH LITIGATION SHALL BE DECIDED BY TRIAL TO THE COURT WITHOUT A JURY.

24. **Disclosure of Information.** Guarantor hereby acknowledges and agrees that upon the request of any partner, member or shareholder of Guarantor, as applicable, Lender may disclose to such party any information (including, without limitation, financial information) relating to the Loan and Guarantor's performance of its obligations hereunder. Guarantor hereby indemnifies and agrees to defend and hold harmless Lender (its officers, shareholders, directors, representatives, agents, and attorneys) from and against any and all expenses, loss, claims, damage or liability, including, without limitation, attorneys' fees and costs, arising by reason of any disclosure of information by Lender under this Section 24.

25. **Joint and Several Liability.** If there shall be more than one (1) Guarantor, each Guarantor agrees that: (i) the obligations of the Guarantor hereunder are joint and several; (ii) a release of any one (1) or more Guarantor, or any limitation of this Agreement in favor of or for the benefit of one (1) or more Guarantor, shall not in any way be deemed a release of or limitation in favor of or for the benefit of any other Guarantor; and (iii) a separate action hereunder may be brought and prosecuted against one (1) or more Guarantor.

26. **Entire Guaranty.** This Guaranty sets forth the entire understanding between Guarantor and Lender relative to the Loan and this Guaranty and the same supersede all prior agreements and understandings relating to the subject matter hereof or thereof.

27. **Time is of the Essence.** Time is strictly of the essence of this Guaranty and the other Loan Documents.

28. **Subordination of Borrower's Obligations to Guarantor.** Any indebtedness of Borrower to any Guarantor, now or hereafter existing, together with any interest thereon, shall be and hereby is deferred, postponed and subordinated to the prior payment in full of the Loan. Further, Guarantor agrees that should such Guarantor receive any payment, satisfaction or security for any indebtedness owed by Borrower to it, the same shall be delivered to Lender in the form received (endorsed or assigned as may be appropriate) for application on account of, or as security for, the Loan and until so delivered to Lender, shall be held in trust for Lender as security for the Loan.

29. **Lender Transferees; Secondary Market Activities.** Guarantor acknowledges and agrees that Lender, without notice to Guarantor or any Guarantor's prior consent, may assign all or any

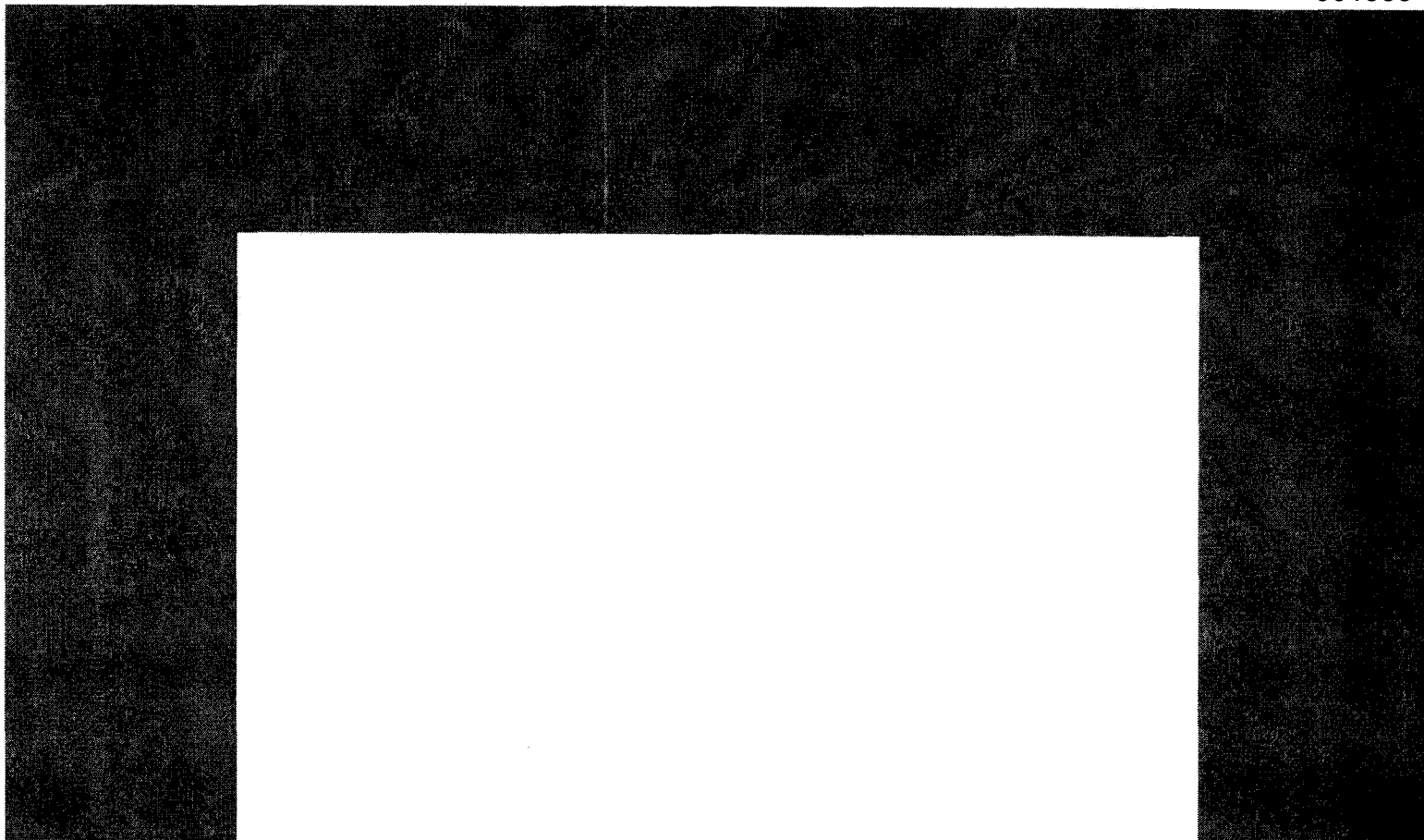
portion of its rights hereunder in connection with any sale or assignment of the Loan or servicing rights related to the Loan, each grant of participations in the Loan, a transfer of the Loan as part of a Securitization in which Lender assigns its rights to a securitization trustee, or a contract for the servicing of the Loan, and that each assignee, participant or servicer shall be entitled to exercise all of Lender's rights and remedies hereunder. Guarantor further acknowledges that Lender may provide to third parties with an existing or prospective interest in the servicing, enforcement, ownership, purchase, participation or Securitization of the Loan, including, without limitation, any Rating Agency rating the securities issued in respect of a Securitization or participation of the Loan, and any entity maintaining databases on the underwriting and performance of commercial mortgage loans, any and all information which Lender now has or may hereafter acquire relating to the Loan, the Property or with respect to Borrower or Guarantor, as Lender determines necessary or desirable. Guarantor irrevocably waives all rights it may have under applicable law, if any, to prohibit such disclosure, including, without limitation, any right of privacy.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, Guarantor has executed this Guaranty as of the year and date first above written.

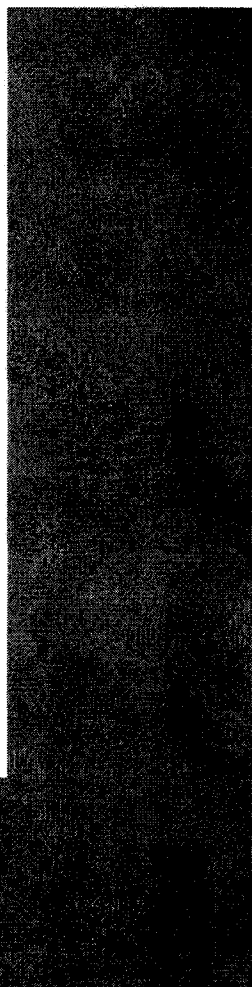
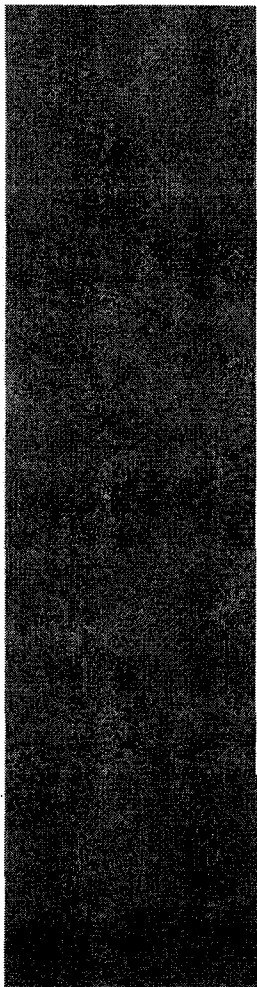
HAGAI RAPAPORT

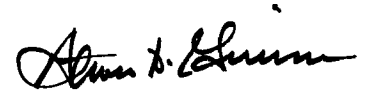
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CLERK OF THE COURT

1 RIS  
BRENT LARSEN, ESQ.  
2 Nevada Bar No. 001184  
DEANER, MALAN, LARSEN & CIULLA  
3 720 S. Fourth Street, #300  
Las Vegas, Nevada 89101  
4 (702) 382-6911  
Attorney for Defendants  
5

6 DISTRICT COURT  
7 CLARK COUNTY, NEVADA

8 U.S. Bank National Association as Trustee  
9 for The Registered Holders of ML-CFC  
Commercial Mortgage Trust 2007-7  
10 Commercial Mortgage Pass-Through  
Certificates Series 2007-7, by and through  
11 Midland Loan Services, Inc., as its Special  
Servicer,

12 Plaintiff,

13 v.

14 Palmilla Development Co., Inc., a Nevada  
15 corporation; Hagai Rapaport, an  
individual; Does I to X; and Roe  
16 Corporations X to XX,

17 Defendants.  
18

Case No.: 09-A-595321-C

Dept. No.: XX

Hearing Date: 08/08/2012

Hearing Time: 9:00 a.m.

19 **REPLY BRIEF IN SUPPORT OF DEFENDANTS'**  
**MOTION FOR SUMMARY JUDGMENT**

20 COME NOW, the Defendants, by and through their attorney, BRENT LARSEN,  
21 ESQ. of the law firm of DEANER, MALAN, LARSEN & CIULLA, and hereby submit their  
22 Reply in Support of Defendants' Motion for Summary Judgment.

23 **1. A fatal flaw in the Plaintiff's newfound theory of its case is that it fails to**  
24 **acknowledge that the Promissory Note that the Plaintiff is suing on is**  
**specifically governed by statutory protections and requirements.**

25 Before the Defendants filed their comprehensive Motion for Summary Judgment, the  
26 Plaintiff filed its own Motion for Summary Judgment, and in doing so it boldly requested that  
27 "this Court set a date for a prove-up hearing pursuant to NRS 40.457 on the deficiency  
28 claims against Defendants. See Conclusion at p. 13 of Plaintiff's Motion for Summary

DEANER, MALAN, LARSEN & CIULLA  
720 South Fourth Street, Suite 300  
Las Vegas, Nevada 89101  
Telephone (702) 382-6911 • Facsimile (702) 366-0854

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1 Judgment. Then, when the Plaintiff had to address the Defendants' Motion for Summary  
2 Judgment, the Plaintiff attempted to make a miraculous change of course by claiming that  
3 this action is not a deficiency action after all, that it is now merely a suit for breach of  
4 contract, and that the Plaintiff should be allowed to unilaterally decide that the Anti-  
5 Deficiency rules no longer apply to this case. The question arises as to how the Plaintiff  
6 came to this conclusion? The Plaintiff claims that all of its problems under the Anti-  
7 Deficiency rules mysteriously go away simply because it chose to exhaust the collateral for  
8 its loan by resorting to a Receiver sale rather than a foreclosure sale. The Plaintiff makes this  
9 argument, however, without citing a single statutory provision or a single case to support its  
10 untenable position that a Receivership sale completely takes this case out of the realm of the  
11 specific statutory protections and requirements codified in NRS 40.451 to 40.462.

12 Just as the Defendants' Memorandum of Points and Authorities in support of its  
13 Motion for Summary Judgment apparently "slam dunked" the Plaintiff into implicitly  
14 acknowledging that it can no longer make a claim for "a deficiency," and thus caused the  
15 Plaintiff to reverse its field by now contending that this lawsuit is now just a simple damage  
16 collection suit on a Promissory Note, the Points and Authorities in this brief will further  
17 attempt to "slam dunk" the Plaintiff's "Objection" by clearly pointing out that the Plaintiff  
18 has not and cannot escape from the Anti-Deficiency rules set forth in NRS 40.451 to 40.462,  
19 inclusive.

20 The Plaintiff's new claim that this lawsuit is no longer a suit for a deficiency judgment  
21 is incredible where Plaintiff's own Motion for Summary Judgment is primarily addressed to  
22 whether AB 273 is retroactive, when AB 273 only concerns amendments to Nevada's One  
23 Action Rule and Anti-Deficiency rules. Moreover, p. 6 of Plaintiff's Motion highlighted and  
24 boldfaced the heading "**B. Deficiency Judgments.**" Thereafter, Plaintiff cited portions of  
25 NRS 40.495, which sets forth the standards for determining how a deficiency award should  
26 be determined. Yet, according to the Plaintiff's newfound theory of its case, NRS 40.459,  
27 and apparently all of the other Anti-Deficiency statutes set forth in NRS 40.451 to 40.462,  
28 inclusive, have now miraculously disappeared from having any relevancy in this action solely

1 because the Plaintiff wants to recast its lawsuit in the form of a simple action for breach of  
2 contract damages rather than a suit for a deficiency.

3 What the Plaintiff stubbornly refuses to acknowledge in making such argument,  
4 however, is that this lawsuit remains a suit that is governed by all the Anti-Deficiency rules  
5 when all the pertinent facts and law are applied to this case. The Promissory Note and  
6 Guaranty that the Plaintiff is attempting to sue on are not "garden variety" obligations that  
7 can be converted into a simple lawsuit for breach of contract damages because such  
8 obligations were collateralized by real property that was secured by a Deed of Trust. Thus,  
9 when the Promissory Note and Guaranty were executed, those obligations immediately  
10 became and remained subject to the Anti-Deficiency rules set forth in NRS 40.451 to 40.462,  
11 inclusive. That is the clear statutory dictate of NRS 40.495(2) and (3). Such rules include  
12 the statute of limitations defense set forth in NRS 40.455, as well as the fair market value  
13 defense and highest bid price defense as set forth in NRS 40.459, which come into play when  
14 determining any alleged amount of "indebtedness."

15 The Plaintiff is desperate to avoid those defenses because they are insurmountably  
16 fatal to the Plaintiff's case. That is why the Plaintiff has reversed its course by trying to  
17 construct a new theory that the Guaranty apparently waives all of those defenses. In making  
18 such argument, however, the Plaintiff has made no effort to address the Defendants' Motion  
19 for Summary Judgment, which points out that under NRS 40.453 and NRS 40.495(2) and (3),  
20 those defenses cannot be waived. Accordingly, this case is most certainly not a simple or  
21 "garden variety" breach of contract action because the contractual rights, responsibilities and  
22 duties, as well as alleged waivers in this case are specifically governed by statutory rules.

23 The rights and responsibilities under the contract documents in this case are governed  
24 by statutory provisions in the same manner that an insurance contract is governed by statutes  
25 (*see Grand Hotel Gift Shop v. Granite State Ins. Co.*, 108 Nev. 811, 839 P.2d 599 (1992)), or  
26 how an Article 9 security interest is governed by statutes. *See Love v. Wells*, 96 Nev. 12, 604  
27 P.2d 362 (1980). For instance, in both the *Grand Hotel* case and the *Love* case, the rights  
28 and responsibilities in the parties' contracts were governed by the provisions of a specific

1 statute and the statutes “reigned supreme” over any contractual provision that deviated from  
2 the statutorily protected right. Thus, adverse consequences followed when the parties to a  
3 contract failed to comply with the provisions of a statutorily protected right.

4 Accordingly, the Plaintiff’s failure to comply with NRS 40.451 to 40.462, inclusive,  
5 as well as NRS 107.080, 085 and 095 results in the statutorily mandated consequence that the  
6 Plaintiff’s case be dismissed in its entirety because it failed to comply with (1) the 6-month  
7 statute of limitations requirement in NRS 40.455 and (2) the “public auction” requirement of  
8 selling the property as provided in NRS 107.080 and 085. The Plaintiff simply cannot  
9 overcome the fact that the Note and Guaranty obligations that it is now suing upon are still  
10 governed by NRS 40.451 to 40.462, inclusive. Thus, this is not a simple case of breach of  
11 contract action that can allow the Plaintiff to ignore the Anti-Deficiency rules codified in  
12 such statutes.

13 The Plaintiff’s “Objection” to the Defendants’ Motion for Summary Judgment reads  
14 as though the Plaintiff has literally no understanding of how the Anti-Deficiency rules, the  
15 One-Action Rule, or any attempted waiver of those rules operate. It is apparent from the  
16 Plaintiff’s “Objection” to Defendants’ Motion for Summary Judgment that the Plaintiff has  
17 either never read or never understood the case of *Keever v. Nicholas Beers Co.*, 96 Nev. 509,  
18 611 P.2d 107 (1980), which the Defendants cited in their Motion for Summary Judgment.  
19 The *Keever* case specifically articulates the public policy provisions of NRS 40.453 and  
20 discusses how certain rights that are protected by statute cannot be waived when real  
21 property is used as security for payment of a promissory note. *See also Lowe Enterprises*  
22 *Residential Partners, LP v. Eighth Jud’l Dist. Ct. ex rel. County of Clark*, 40 3.d 405, 113  
23 Nev. 92 (2002) (noting that NRS 40.453 specifically protects the anti-deficiency defenses  
24 from waiver).

25 Because the Plaintiff’s newfound arguments attempt to confuse this Court by trying to  
26 divert attention away from the Anti-Deficiency rules, it has become necessary to further  
27 explain the parallels between the lender’s action in the *Keever* case with the  
28 Plaintiff’s/Lender’s action in this case. The lender in the *Keever* case brought a suit on a

1 promissory note by arguing that it was a simple breach of contract action even though the  
2 note was secured by a second deed of trust. The Supreme Court pointed out, however, that  
3 the lender in *Keever* was not a “sold-out junior” and therefore the Court held that the lender’s  
4 lawsuit was still subject to both the “One-Action” rule and the Anti-Deficiency rules. The  
5 lender in *Keever* was also similarly situated with the Plaintiff/Lender in the instant case  
6 because both lenders also received partial satisfaction of their debt through a sale of the  
7 collateralized property, and both such sales were not foreclosure sales that involved  
8 “competitive bidding.” In *Keever*, the Court further held that such a private sale procedure  
9 disqualified the lender from thereafter seeking a deficiency judgment against the borrower.  
10 Thus, the Supreme Court reversed the district court judgment that was entered in favor of the  
11 lender.

12 The *Keever* Court also rejected the lender’s “waiver” argument which parallels the  
13 waiver argument that the Plaintiff is attempting to make in this case. The District Court in  
14 *Keever* found in favor of the creditor based upon loan documents that stated that the debtor  
15 agreed to “waive” the One-Action Rule.<sup>1</sup> However, the District Court was reversed because  
16 it failed to recognize that such waiver was unenforceable under NRS 40.453 because of the  
17 public policy provisions expressed in that statute. The Court stated that:

18 The right to have a secured creditor proceed against the security before  
19 attacking the general assets of the debtor is one of the “right[s] secured  
... by the laws of this state, . . .” 96 Nev. at 513.

20 The Court further stated that,

21 Appellants’ consent to respondent’s release of its security interest was  
22 therefore ineffective to waive their right under NRS 40.430 to have the  
secured creditor pursue the security and procure a deficiency judgment

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23  
24 <sup>1</sup> The One-Action Rule basically requires a creditor to first exhaust the collateral for its loan through  
25 a foreclosure sale of that collateral before instituting any separate action on any unpaid balance of the Note.  
26 As the Defendants explained in their Motion for Summary Judgment, the *Keever* case was decided at a time  
27 when the “One-Action Rule” could not be waived. In 1987, the Legislature amended NRS 40.495 by adding  
28 subsection 2, which allowed a limited waiver of the One-Action Rule. *See* Statutes of Nevada, 1987 at 1643.  
Yet, as is later explained in this brief, there is no statutory provision that allows a waiver of the Anti-  
Deficiency rules, because NRS 40.495(2) and (3) specifically provide for a preservation of those rules  
against any claim of waiver. *See also Lowe, supra*. The unenforceability of such waivers, as specifically  
articulated in the *Keever* case, remains the law in Nevada regarding deficiency suits. That is true  
notwithstanding any amendments to the One-Action Rule as codified in NRS 40.430.

1 for any amount by which the amount of the debt exceeded the fair market  
2 value of the security at the time of sale, determined by a judicial hearing,  
3 NRS 40.457, or by **competitive bidding** at a trustee's sale, . . .  
4 [Emphasis added.] 96 Nev. at 514.

5 In *Keever*, the Court further held that because the creditor was not a "sold-out junior,"  
6 any pre-arranged sales procedure that was designed to avoid competitive bidding at a  
7 foreclosure sale would preclude the right to seek a deficiency judgment. With regard to the  
8 prearranged private sale that the borrower and lender agreed to in the *Keever* case, the Court  
9 held that such an arrangement was sufficient to actually accomplish a sale of the secured  
10 property, but such a sale would nonetheless preclude a creditor from thereafter seeking a  
11 deficiency judgment against the debtors. That holding is the same argument that the  
12 Defendants are making in this case.

13 Thus, the *Keever* case clearly supports and underscores the Defendants' arguments  
14 that the Plaintiff's choice to avoid a public auction for the sale of the secured property in the  
15 instant case has the consequence of denying the Plaintiff any right to proceed with the  
16 collection of any alleged deficient amount it claims is still owed on the Promissory Note that  
17 it is suing on. However, even though the *Keever* case provides powerful precedents for  
18 dismissing the Plaintiff's lawsuit, the Plaintiff attempts to avoid any discussion of that case in  
19 the hope that it can create confusion through its argument that a sale conducted by a Receiver  
20 somehow causes all the statutory anti-deficiency protections to completely evaporate from  
21 this case. Yet, the Plaintiff has offered no authority in the form of statutes or case law that  
22 would support such an untenable theory.

23 Thus, this Court would be well served by carefully following the dictates in the  
24 *Keever* case, which specifically explains how a waiver of a public sale without "competitive  
25 bidding" will close any window of opportunity to thereafter seek a deficiency judgment or  
26 otherwise collect on the debt owed on the Promissory Note or Guaranty.

27 **2. Plaintiff's newfound theory of its case also fails to recognize that the One-**  
28 **Action Rule can be waived but the Anti-Deficiency rules cannot be waived**  
**under the clear provisions of NRS 40.495(2) and (3).**

After the *Keever* case was decided, the Legislature amended NRS 40.430 to allow

1 numerous exceptions to the One-Action Rule. NRS 40.495 was also amended to allow a  
 2 borrower and guarantor to waive the "One-Action Rule" as codified in NRS 40.430. *See*  
 3 subsections 2 and 3 of NRS 40.495, before the AB 273 amendment, which provides as  
 4 follows:

5           2. Except as otherwise provided in subsection 4, a guarantor, surety  
 6 or other obligor, other than the mortgagor or grantor of a deed of trust,  
 7 may waive the provisions of NRS 40.430. If a guarantor, surety or other  
 8 obligor waives the provisions of NRS 40.430, an action for the  
 enforcement of that person's obligation to pay, satisfy or purchase all or  
 part of an indebtedness or obligation secured by a mortgage or lien upon  
 real property may be maintained separately and independently from:

- 9           (a) An action on the debt;
- 10           (b) The exercise of any power of sale;
- 11           (c) Any action to foreclose or otherwise enforce a mortgage or  
 lien and the indebtedness or obligations secured thereby; and
- 12           (d) Any other proceeding against a mortgagor or grantor of a  
 deed of trust.

13           3. If the obligee maintains an action to foreclose or otherwise enforce  
 14 a mortgage or lien and the indebtedness or obligations secured thereby,  
 15 the guarantor, surety or other obligor may assert any legal or equitable  
 16 defenses provided pursuant to the provisions of NRS 40.451 to 40.462,  
 17 inclusive. [Emphasis added.]

18 Even with the recent amendments to AB 273, none of the foregoing provisions ever changed,  
 19 other than the numbering system of the statute.

20           It is important to recognize that subsection 2 only allows a waiver of the One-Action  
 21 Rule as codified in NRS 40.430. There is no language in NRS 40.495 that authorizes a  
 22 waiver of the Anti-Deficiency rules set forth in NRS 40.451 through 40.462, inclusive.  
 23 Indeed, subsection 3 specifically states that those Anti-Deficiency rules as codified in such  
 24 statutes are expressly preserved to the guarantor, so that if a creditor proceeded to sue the  
 25 guarantor before the security was exhausted,<sup>2</sup> then the creditor could do so under the One-  
 26 Action Rule, but in such circumstances, the guarantor is still entitled to the anti-deficiency  
 27 protections set forth in NRS 40.451 to 40.462, inclusive. Those protections include the  
 28 statute of limitations defense as contained in NRS 40.455, as well as the fair market value  
 defense or the highest public sale bid price defense set forth in NRS 40.459.

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<sup>2</sup> In this case, the Plaintiff clearly chose to exhaust its collateral before it filed its amended suit in  
 this case seeking a deficiency judgment. Plaintiff also made that choice by voluntarily dismissing the  
 previous two lawsuits that it filed in this case, which also sought a deficiency judgment.

1 Therefore, Plaintiff's reliance on Defendants' alleged waivers are clearly  
2 unenforceable as a matter of law under the clear public policy declaration set forth in NRS  
3 40.453 and as reiterated in NRS 40.495(3).

4 **3. The Plaintiff's Opposition to Defendants' Motion for Summary Judgment**  
5 **contains numerous misrepresentations of the Defendants' arguments, case**  
6 **law, and the facts of this case.**

7 The Plaintiff's brief in opposition to the Defendants' Motion for Summary Judgment  
8 contains three material misrepresentations to this Court. The *first* such misrepresentation is  
9 the Plaintiff's statement at p. 2, ll. 2-3 of its brief which states:

10 Defendants argue that, as a deficiency judgment, they are exculpated from  
11 liability because of the retroactive effect of AB 273.

12 That statement is a blatant misrepresentation of the Defendants' argument because the  
13 Defendants have never stated that AB 273 exculpates them from any liability in this case.  
14 The Defendants have made it very clear in their Motion for Summary Judgment that their  
15 statute of limitations defense and all of their other anti-deficiency defenses are not influenced  
16 in any way by AB 273. The only relevance that AB 273 could have to this case is **if** the  
17 Plaintiff had complied with the 6-month statute of limitations and all the other  
18 aforementioned Anti-Deficiency rules, then the amount of indebtedness could be decreased  
19 under the new subsection 1(c) of NRS 40.459. That potential situation could only arise  
20 because the Plaintiff is not the original holder of the Note that it is suing upon, but rather is  
21 an assignee of that Note. Subsection 1(c) merely creates a limitation on the amount of  
22 indebtedness that an assignee of a note can recover on a deficiency claim. The question of  
23 whether subsection 1(c) of NRS 40.459 can be applied to pending cases, such as the present  
24 case, remains before the Nevada Supreme Court. As such there is no need for this Court to  
25 rule upon the applicability of subsection 1(c) at this time, and in particular in the Defendants'  
26 pending Motion for Summary Judgment, because the Defendants' right to obtain a dismissal  
27 of this case is not dependent in any way on the passage of AB 273.

28 Moreover, the Plaintiff should clearly know that the three separate grounds that are set  
forth in the Defendants' Motion for Summary Judgment are not in any way dependent on AB

273 because none of the specific statutory rules that the Defendants rely upon were ever amended by AB 273. Thus, the Plaintiff's blatant misrepresentation of the Defendants' position is absolutely shameful.

The *second* material misrepresentation in the Plaintiff's brief is its claim made in fn. 1 where it erroneously states that there are no facts supporting the Defendants' argument that the bidding process used by the Receiver resulted in chilled bids for purposes of pursuant a deficiency judgment. The best evidence that the Receiver chilled a "competitive bidding" process<sup>3</sup> is that the Receiver admittedly failed to conduct a public auction of the property as specifically required by NRS 107.085 or NRS 21.150. That is not in dispute. The Plaintiff attempts to counter its chilled bid process problem by contending that the Court's Order approving the sale of the property was allegedly a fair market value hearing as required by NRS 40.457.

Even assuming, arguendo, that such a hearing was a "fair market value" hearing, as required by NRS 40.457, as a prerequisite to obtaining a deficiency judgment, the fact remains that a price higher than a "fair market value" determination could have been obtained if the Receiver's sale process involved competitive bidding at a public auction. Thus, the Plaintiff's own Motion to seal the contents of the sale agreement admits that they did not want the sale price to result in other buyers making competitive bids because the other interested buyers would have raised the price by a "nominal amount." See **Exhibit A**. However, common sense suggests that if all 31 buyers were allowed to participate in open public bidding, that "nominal amount" could have increased the ultimate sale price significantly with each additional bid. Yet, the Plaintiff chose to bypass that procedure

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<sup>3</sup> Further uncontested evidence that warrants an indisputable conclusion that the Receivership sale process chilled competitive bidding is that the Plaintiff itself acknowledged in its motion to confirm the sale (Exh. D to Defendants' Motion for Summary Judgment and Exh. 3 to Plaintiff's Motion to Approve Sale) that there were 31 written offers received on the property. Yet, none of those other potential buyers were given the opportunity to engage in "competitive bidding" as described in the case of *Keever v. Nicholas Beers Co.*, 96 Nev. 509, 514, 611 P.2d 1079 (1980). Thus, as the Supreme Court recognized in the case of *Savage Construction Inc. v. Challenge - Book Cook Brothers*, 102 Nev. 34, 714 P.2d 573 (1986), cited at p. 17 of Defendants' opening brief, which case the Plaintiff refuses to deal with, when a sale procedure is designed to turn away potentially competitive bids, such action by the creditor must result in the Court denying any recovery of a deficiency judgment.



1 thereby attempting to deny the Defendants of all the protections set forth in NRS 40.459  
2 which provides for the limitations on any deficiency judgment.

3 It is also completely erroneous for the Plaintiff to claim that the Motion to approve the  
4 sale was a “fair market value” hearing as required by NRS 40.457. How could there be any  
5 credible argument that the hearing to approve the sale could be a “fair market value” hearing  
6 for purposes of NRS 40.457, when there was no deficiency action pending against the  
7 Defendants at the time that hearing was held? Such an argument defies any sense of logic or  
8 application of any Constitutional principles of due process.

9 It must be remembered that the Plaintiff chose to dismiss two prior lawsuits that it  
10 filed against Hagai Rapaport before it filed the instant action. When it filed this third action,  
11 it chose to refrain from naming Hagai Rapaport as an initial Defendant in this case. Plaintiff  
12 never sought a deficiency in the present action until after the Receivership sale was  
13 accomplished, and thereafter the Plaintiff amended its Complaint to seek a deficiency  
14 judgment. Yet, the Plaintiff has the temerity to suggest that Mr. Hagai Rapaport had his “day  
15 in court” when the motion to confirm the sale was heard.

16 The Plaintiff is sponsoring reversible error if it truly expects this Court to buy in to  
17 such a nonsensical argument. How could any Appellate Court in the country be expected to  
18 affirm a ruling that a person who is not a party to a lawsuit at the time court action is taken is  
19 nonetheless bound by the repercussions of that court action? It should not require research to  
20 any citation of authority to conclude that such a position is plainly in defiance of  
21 Constitutional principles of law that protect the right to notice and an opportunity to be heard  
22 as guaranteed by the Fifth Amendment.

23 The Plaintiff’s argument that Mr. Rapaport should have been aware of the  
24 Receivership proceedings and subsequent sale of the property, and that he should not be  
25 allowed to act like an alleged “ostrich” is not the kind of an argument that satisfies the  
26 Constitutional demands of due process. In plain and simple terms, if the Plaintiff intended to  
27 have Hagai Rapaport bound by any Court proceedings that occurred before he was actually  
28 named a party to the instant case, then the Plaintiff should have named Hagai Rapaport a

1 party to this case when it first filed its Complaint, and most certainly before the Plaintiff  
2 asked the Court to confirm a sale of the Receivership property.

3 Thus, the Plaintiff's reliance on the Order approving the sale fails to recognize the  
4 limited purpose of that Order. The Order was merely made for the purpose of accomplishing  
5 a transfer of property from Palmilla to the new buyer who was brought to the Court by the  
6 Receiver. There was no intent anywhere expressed in that Order that it was designed to  
7 either avoid or accomplish compliance with the rules on seeking a deficiency judgment  
8 following such sale. The Defendants have repeatedly stated that they are not trying to set  
9 aside the sale or the Order approving the sale. The Order stands as it is, but it certainly  
10 cannot stand for the proposition that such Order somehow excuses the Plaintiff's failure to  
11 comply with the anti-deficiency rules.

12 Additional evidence that the Plaintiff "chilled" the bidding process in the sale of the  
13 secured property is manifested by the Plaintiff's failure to produce any of the 31 other offers  
14 that the Receiver obtained from such interested buyers. On May 24, 2012 (*see Exhs. B and*  
15 *C*) the Defendants made discovery requests to the Plaintiff to produce such offers. That  
16 request was made because the Defendants suspect that some of those offers provided a  
17 greater sales price than what was ultimately paid for the property. As of the date of the  
18 writing of this brief, however, the Plaintiff has repeatedly failed and refused to respond to  
19 that discovery request. The Plaintiff has not even provided the courtesy of formally objecting  
20 to that discovery request. The parties have engaged in attempts to resolve that issue as  
21 manifested by the letters attached hereto as **Exh. D**. Yet the Plaintiff still has not properly  
22 responded to such requests. While the Defendants had hoped to use such evidence during  
23 their forthcoming hearing on their Motion for Summary Judgment, the absence of producing  
24 such requested documents, however, need not delay the summary judgment hearing or an  
25 adjudication on the summary judgment because NRS 47.250 provides a disputable  
26 presumption in the Defendants' favor that "evidence willfully suppressed would be adverse if  
27 produced." *See* NRS 47.250(3). Thus, the Defendants are entitled to a disputable  
28 presumption that if such documents were produced, they would be adverse to the Plaintiff.

1 The Plaintiff has offered nothing to dispute that presumption.

2 The *third* flagrant misrepresentation in the Plaintiff's brief is its representation that the  
3 case of *McDonald v. DP Alexander and Las Vegas Blvd. LLC*, 121 Nev. 812, 123 P.3d 748  
4 (2005), allegedly stands for the proposition that a guarantor can waive the 6-month statute of  
5 limitations defense.<sup>4</sup> Nowhere in the *McDonald* case is the statute of limitations defense  
6 even mentioned. Moreover, the *McDonald* case only dealt with the One Action Rule as  
7 codified in NRS 40.430 which, as explained above, is a separate and distinct legal doctrine  
8 from the anti-deficiency defenses as codified in NRS 40.451 to 40.462, inclusive.

9 The Court affirmed the deficiency judgment in the *McDonald* case because of two  
10 exemptions to the One Action Rule. One exemption dealt with the lender being stayed from  
11 pursuing a foreclosure when a borrower files bankruptcy,<sup>5</sup> and the second exemption dealt  
12 with a lender becoming a "sold-out junior." The Court held that both exemptions applied to  
13 that case because the bankruptcy proceeding actually resulted in the lender becoming a "sold-  
14 out junior." Thus, there is nothing in the *McDonald* case that in any way diminishes or  
15 detracts from the Defendants' Motion for Summary Judgment in this case, which is  
16 specifically premised upon the anti-deficiency defenses codified in NRS 40.455, 457 and  
17 459.

18 This Court should further take notice that the *McDonald* case is the only case the  
19 Plaintiff cites in its brief. The Defendants submit that the reason the Plaintiff has avoided  
20 any discussion of the cases previously cited by the Defendants is because the Plaintiff hopes  
21

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22 <sup>4</sup> The context in which an alleged waiver arose in the *McDonald* case had to do with the guarantor  
23 attempting to use the waiver of NRS 107.095 as a sword rather than a shield of protection against liability.  
24 Moreover, the waiver argument was solely confined to a provision in NRS 40.430(i), which deals with notice  
25 requirements under NRS 107.095 in the event that a foreclosure proceedings is stayed by a bankruptcy filing.  
In this case, the Defendants argue that NRS 107.095 shields them from any liability on the Guaranty because  
the Plaintiff has failed to provide any evidence that it complied with the notice requirements of NRS 107.095  
when it initiated its foreclosure on January 12, 2009. See Notice of Breach attached hereto as **Exhibit E**.

26 <sup>5</sup> The bankruptcy that Palmilla previously filed did not present any obstacle to the Plaintiff  
27 complying with the Anti-Deficiency rules insofar as this case is concerned because there was never been a  
28 bankruptcy stay at any time following the Plaintiff's filing of this third lawsuit against the Defendants.  
Moreover, the Plaintiff cannot claim the status of being a "sold-out junior" since a "sold-out junior" only  
applies to a junior lien holder who, without any fault of its own, has its junior lien interest foreclosed upon  
by a senior mortgage interest. *McMillan v. United Mortgage Co.*, 84 Nev. 99, 102, 437 P.2d 878 (1968).

1 to create confusion and divert attention away from such cases because those cases  
2 conclusively demonstrate that the Defendants are entitled to judgment as a matter of law, as a  
3 result of the Plaintiff's failure to comply with the Anti-Deficiency rules set forth in NRS  
4 40.451 to 40.462, inclusive. For instance, the case of *First Interstate Bank v. Shields*, 102  
5 Nev. 616, 730 P.2d 429 (1986) is absolutely dispositive and fully supportive of the  
6 Defendants' argument that the Plaintiff's case is time-barred because Plaintiff failed to  
7 comply with the 6-month statute of limitations set forth in NRS 40.455 before filing the  
8 instant lawsuit. Similarly, the *Keever* case is dispositive of the Defendants' argument that the  
9 failure to conduct a public auction that involves competitive bidding must result in the denial  
10 of a deficiency claim because such a procedure violates NRS 40.459.

11 Thus, in view of the foregoing, the only relevance that the *McDonald* case has to the  
12 instant case and either of the parties' Motion for Summary Judgment, is that *McDonald* could  
13 ostensibly stand for the proposition that the Court would hypothetically recognize a waiver of  
14 NRS 107.095. However, even the Plaintiff's "Objection" points out that any waivers are  
15 only allowed "to the extent provided by law." See p. 3, l. 10. In this case the potential  
16 waiver of NRS 107.095 that Plaintiff are presumably relying upon is found in ¶ 7(a) of the  
17 Guaranty which states that the guarantor waives "all notices." The Guaranty, however, does  
18 not make any specific reference to a waiver of NRS 107.095. Moreover, the question of  
19 whether and under what circumstances NRS 107.095 can be waived was not addressed in the  
20 *McDonald* case. Thus, the *McDonald* Court never addressed the situation of whether an  
21 alleged waiver of that statute in a contract of guaranty could be enforceable under the  
22 doctrine that a waiver requires an "intentional relinquishment of a known right." See *State*  
23 *Board of Psychological Examiners v. Norman*, 100 Nev. 241, 679 P.2d 1263 (1984).

24 Therefore, the Defendants submit that many of the waiver provisions in the  
25 Defendants' Guaranty are unenforceable insofar as the waiver attempts to avoid enforcement  
26 of statutorily protected rights that are founded on public policy considerations. The  
27 aforementioned *Norman* case clearly illustrates the Defendants' argument that an alleged  
28 waiver of statutory notice requirements cannot be enforced where the party asserting the

1 waiver has not made a showing that the waiver was an “intentional relinquishment of a  
 2 known right.” In the *Norman* case, the State Board of Psychological Examiners obtained a  
 3 summary judgment in their favor by arguing to the district court that the appellant had  
 4 waived the right to certain statutory notice protections. The Supreme Court reversed that  
 5 summary judgment by stating:

6           The Board contends, however, that Norman waived these procedural  
 7           protections in his letter to the Board. Considering the pleadings and  
 8           affidavits in the light most favorable to the Board we are compelled to  
 9           conclude that a valid waiver was not established. Waiver is the  
           intentional relinquishment of a known right. [Citation omitted.] A party  
           cannot be said to have waived a right of which he is unaware. 100 Nev.  
           at 244.

10           There is no evidence in this case that Mr. Rapaport “intentionally waived a known  
 11 right.” Most certainly a party cannot be held to have intentionally waived a known statutory  
 12 right when the statute expressly states that certain statutorily protected rights cannot be  
 13 waived. Thus, the anti-waiver provisions in NRS 40.453 cannot be overcome by the  
 14 Plaintiff.

15 **4. There is no merit to the Plaintiff’s argument that its decision to sell the**  
 16 **property through a Receiver sale, and Palmilla cooperation in that sale,**  
 17 **can somehow remove the Plaintiff’s collection efforts from of the anti-**  
 18 **deficiency protections as codified in NRS 40.451 through 40.462, inclusive.**

19           The Plaintiff erroneously argues that it has exempted itself out of the framework of  
 20 the Anti-Deficiency statutes simply because the Defendant Palmilla, Inc., cooperated with the  
 21 Plaintiff’s choice to exhaust its collateral through a privately negotiated Receiver sale, rather  
 22 than through a public auction foreclosure sale. In making such an argument, the Plaintiff  
 23 apparently expects this Court to believe that there is something sacred about a Receiver’s sale  
 24 that would cause this Court to erroneously conclude that the Anti-Deficiency statutes cannot  
 25 be applied to this case. Yet, Plaintiff cites no such law to support such an absurd argument.  
 26 As the Defendants have repeatedly stated, the anti-deficiency protections cannot be waived.  
 27 The Plaintiff’s argument further ignores the most salient fact that during the entire course of  
 28 the Receivership proceedings, the Plaintiff chose to dismiss the prior cases filed against  
       Hagai Rapaport, and further chose to avoid naming Mr. Rapaport as a Defendant in this case