



MISC 2009115428



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 Register of Deeds, Douglas County, NE
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2009115428

MORTGAGE LOAN MODIFICATION AGREEMENT **(Elk Creek Pine)**

THIS MORTGAGE LOAN MODIFICATION AGREEMENT ("Agreement") is executed effective as of the 30th day of June, 2009, by and between ELK CREEK PINE, L.L.C., a Nebraska limited liability company ("Borrower"), and FIRST NATIONAL BANK OF OMAHA, a national banking association ("Lender").

Preliminary Matters

1. **Original Loan.** On or about the 15th day of February, 2006, Borrower secured a loan from Lender in the original amount of \$3,465,000 (the "Loan"), as evidenced by Borrower's Promissory Note to Lender dated February 15, 2006, in the amount of \$3,465,000 (the "Original Promissory Note"), for the development of certain real estate located north and east of the intersection of West Maple Road and 168th Street, Douglas County, Nebraska. The Original Promissory Note is secured by a Deed of Trust, as hereinafter described, on the real estate in Douglas County, Nebraska, as legally described on Exhibit "A" attached hereto (the "Mortgaged Property"). The parties agree that the unpaid principal balance presently advanced and outstanding on the Original Promissory Note is the sum of \$1,527,335 as of the date hereof.

2. **Loan Documents.** The obligations of Borrower in connection with the Original Promissory Note are further evidenced, secured and/or guaranteed by documents and agreements executed contemporaneously with the Original Promissory Note which, and together with the Original Promissory Note are hereinafter referred to as the "Loan Documents", that include the following:

- i. Building Loan Agreement executed by Borrower and Lender;
- ii. Deed of Trust, Security Agreement and Assignment of Rents from Borrower to Lender (the "Deed of Trust");
- iii. Notice of Commencement;
- iv. Assignment of Plans, Specifications, Construction and Service Contracts;
- v. Environmental Indemnity Agreement from Borrower to Lender;
- vi. UCC-1 Financing Statement;
- vii. Change in Terms Agreement.

WHEN RECORDED, PLEASE RETURN TO:

Mortgage Loan Department - TRACY
 First National Bank of Omaha
 Third Floor, First National Plaza
 11404 West Dodge Road
 Omaha, Nebraska 68154

RETURN TO:
 SPENCE TITLE SERVICES
 BOX 16 -

1739046

TA-57486

3. **Present Ownership.** To Borrower's knowledge, Borrower represents, covenants and warrants to Lender that it remains the owner of the fee title to the Mortgaged Property, subject only to the liens and security interests arising out of the Loan Documents and the exceptions to title set forth in ALTA Loan Policy of Title Insurance issued at the Loan closing and any subsequent endorsements thereto.

4. **Modification of Loan.** The parties hereto have agreed to modify the Loan terms as follows:

a. The principal amount of the Loan shall be adjusted from \$3,465,000 to \$1,527,335.

b. The interest rate shall be modified to be a fixed rate of five and 25/100 percent (5.25%) through September 30, 2010, following which time the interest rate shall be a variable rate of four hundred (400) basis points greater than the three (3) month LIBOR, adjusted monthly, with a floor rate of five and 00/100 percent (5.00%) and a ceiling rate of seven and 00/100 percent (7.00%), as specified in the "Modified Promissory Note", as hereinafter defined.

c. The maturity date of the Loan shall be extended to June 30, 2011.

Now, therefore, it is hereby agreed by and among the parties as follows:

5. **Incorporation of Preliminary Matters.** All of the provisions and statements in the foregoing Preliminary Matters are affirmed by Lender and Borrower.

6. **Modified Promissory Note.**

Concurrently with the execution hereof, Borrower has executed and delivered to Lender a Modified Promissory Note, in the amount of \$1,527,335 (the "Modified Promissory Note"), which the parties agree represents the unpaid principal balance advanced under the Loan, and which the parties agree shall be substituted for the Original Promissory Note, which shall be cancelled and returned to Borrower. Borrower hereby acknowledges and agrees that the Modified Promissory Note, and the repayment thereof, shall continue to be secured by the remaining Loan Documents, as amended by this Agreement.

7. **Loan Document Modifications.** Effective upon the execution hereof:

a. All references in the Loan Documents to the Original Promissory Note shall be modified to mean the Modified Promissory Note;

b. All references in the Loan Documents to the Loan amount of \$3,465,000 shall be changed to \$1,527,335;

c. The reference to the scheduled Maturity Date of the Promissory Note as set forth in the Deed of Trust on page 3 is hereby modified from February 28, 2009 to June 30, 2011; and

d. The legal description of the Mortgaged Property is amended for purposes of the Loan Documents to mean the legal description attached as Exhibit "A" to this Agreement.

e. Except as modified herein, all of the terms, conditions and provisions of the Loan Documents are hereby ratified and confirmed and shall remain in full force and effect.

8. **Representations and Warranties.**

Borrower hereby represents and warrants to Lender that:

a. To Borrower's knowledge, each of the representations and warranties set forth in this Agreement and in the Loan Documents amended hereby are true and correct as of the date hereof;

b. this Agreement constitutes the legal, valid and binding obligation of Borrower and is enforceable in accordance with its terms; and

c. as of the date hereof, there exists no event of default under the Modified Promissory Note or any of the other Loan Documents executed by Borrower in connection with the Loan as amended by this Agreement.

9. **Conflict.**

In the event of any conflict or inconsistency between the provisions of this Agreement or any of the other Loan Documents heretofore executed by Borrower in connection with the Loan, the provisions of this Agreement shall govern.

10. **Successors and Assigns.**

This Agreement shall be binding upon, and inure to the benefit of Borrower, Lender and their respective successors and assigns.

11. **Nonwaiver.**

Borrower hereby acknowledges and agrees that:

a. except as specifically set forth herein, Lender's execution and performance of this Agreement is not, and shall not be construed to be, a waiver, release, amendment or modification of, or to any rights or remedies which Lender currently has, or may hereafter acquire, with respect to any of the obligations owed to Lender by Borrower by virtue of any documents or instruments evidencing, securing, guaranteeing or relating to such obligations; nor shall it be deemed to be an agreement to forbear from exercising any rights or remedies which Lender currently has or may hereafter acquire.

b. Lender's agreement herein shall not be construed as, or be deemed to create, any course of dealing between Borrower and Lender, nor shall it be deemed to require or imply any future settlements; nor shall it be construed as a waiver of any defaults of Lender's rights or remedies with regard thereto, or as an amendment to any other agreements, except as expressly set forth herein.

12. **Additional Covenants and Provisions.**

a. Borrower agrees to pay or reimburse Lender for any and all fees, costs and expenses incurred by Lender relating to the Agreement including, without limitation, title expenses, recording fees and attorney fees.

b. Borrower agrees that Borrower has no defense to the payment of the Modified Promissory Note and Borrower has no defenses to the terms or provisions of the Deed of Trust or other Loan Documents, as amended herein, or right of offset to claim against Lender. Borrower specifically acknowledges and agrees that Lender has performed each and all of its obligations, commitments and agreements under the Loan Documents and all other agreements related to the indebtedness up to and including the date of this Agreement and further agrees that Lender is not in default in the observance or performance of any obligation, commitment, agreement or covenant, express or implied, including, but not limited to, covenants of good faith and fair dealing, to be observed or performed by Lender and that no fact exists and that no event has occurred which now or hereafter will authorize Borrower to fail or refuse to abide by the terms of the Loan Documents or form the basis, in whole or in part, for a claim of any kind against Lender.

c. This Agreement contains the entire agreement between the parties with respect to the modification of the Original Promissory Note and the other Loan Documents modified herein and that no statement, promise or inducement made by any party, or the agent of any party, that is not contained in this Agreement shall be valid or binding upon Lender.

d. Borrower agrees that time is of the essence with respect to all dates for payment and performance, as set forth in the Loan Documents, as amended herein.

e. Invalidity of any of the provisions of this Agreement or any paragraph, sentence, clause, phrase or word herein, or the application thereof to any given circumstance, shall not affect the validity of the remainder of this Agreement.

f. This Agreement shall be construed in accordance with the laws of the State of Nebraska. Borrower hereby irrevocably submits to the jurisdiction of the courts of the State of Nebraska in any suit, action or proceeding. Borrower agrees that any and all service of process and any such suit, action or proceeding mailed or delivered in the manner provided for the delivery of notices in the Deed of Trust, as amended herein, shall be deemed in every respect effective service of process upon Borrower.

g. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall comprise a single instrument.

13. **Loan Participation.**

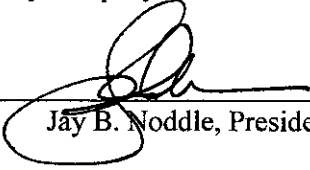
Lender hereby discloses to Borrower and Borrower hereby acknowledges and agrees that Lender may sell participation interests in the Loan, and in conjunction with such Loan participations may furnish any information concerning Borrower or guarantors in its possession from time to time to participants and prospective participants and may furnish information in response to credit inquiries consistent with general banking practices and applicable laws.

14. **Credit Agreement.** A CREDIT AGREEMENT MUST BE IN WRITING TO BE ENFORCEABLE UNDER NEBRASKA LAW. TO PROTECT YOU (BORROWER) AND US (LENDER) FROM ANY MISUNDERSTANDINGS OR DISAPPOINTMENTS, ANY CONTRACT, PROMISE, UNDERTAKING, OR OFFER TO FOREBEAR REPAYMENT OF MONEY OR TO MAKE ANY OTHER FINANCIAL ACCOMMODATION IN CONNECTION WITH THIS LOAN OF MONEY OR GRANT OR EXTENSION OF CREDIT, OR ANY AMENDMENT OF, CANCELLATION OF, WAIVER OF, OR SUBSTITUTION FOR ANY OR ALL OF THE TERMS OR PROVISIONS OF ANY INSTRUMENT OR DOCUMENT EXECUTED IN CONNECTION WITH THIS LOAN OF MONEY OR GRANT OR EXTENSION OF CREDIT, MUST BE IN WRITING TO BE EFFECTIVE.

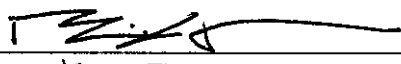
**[Space Below Intentionally Left Blank –
Signature Page to Follow]**

IN WITNESS WHEREOF, the undersigned have executed and delivered this Agreement to be effective as of the day and year first above written.

BORROWER:
ELK CREEK PINE, L.L.C., a Nebraska limited liability company

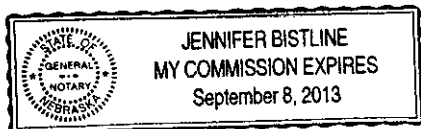
By: 
Jay B. Noddle, President and Member

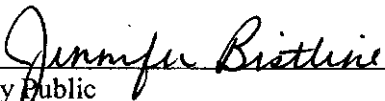
LENDER:
FIRST NATIONAL BANK OF OMAHA, a national banking association

By: 
Title: VICE PRESIDENT

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

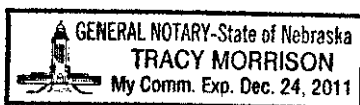
The foregoing instrument was acknowledged before me this 21st day of October, 2009, by Jay B. Noddle, President and Member of Elk Creek Pine, L.L.C., a Nebraska limited liability company, on behalf of the company.




Notary Public

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

The foregoing instrument was acknowledged before me this 21st day of October, 2009, by Michael J. Kuester, Vice President of First National Bank of Omaha, a national banking association, on behalf of said association.



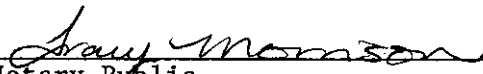

Notary Public

EXHIBIT "A"
Legal Description

Lots 3, 4, 7 and 9, Elk Creek Pine^{me} a subdivision as surveyed, platted and recorded in Douglas County, Nebraska, and

Lot 2, Replat 1 of Elk Creek Pine^{me} a subdivision as surveyed, platted and recorded in Douglas County, Nebraska.