



MISC 2013113012



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Fee amount: 46.00
FB: 55-00270
COMP: PN

Received - DIANE L. BATTIATO
Register of Deeds, Douglas County, NE
11/12/2013 10:16:41.00



2013113012

WHEN RECORDED, PLEASE RETURN TO:

Mortgage Loan Department
First National Bank of Omaha
Third Floor, First National Plaza
11404 West Dodge Road
Omaha, Nebraska 68154
Attn: Brian Diedrichsen

**SECOND MORTGAGE LOAN MODIFICATION AGREEMENT
(Columbo)**

THIS SECOND MORTGAGE LOAN MODIFICATION AGREEMENT ("Agreement") is executed effective as of the 8th day of November, 2013, by and between COLUMBO, LLC, 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 December 29, 2006, Borrower accepted a loan from Lender in the original amount of Four Million Six Hundred Seventy-Five Thousand and 00/100 Dollars (\$4,675,000.00) (the "Original Loan"), as evidenced by Borrower's Promissory Note to Lender dated December 29, 2006, in the amount of \$4,675,000.00 (the "Original Promissory Note"). The Original Promissory Note was modified by an Amended and Restated Promissory Note dated July 1, 2008, in the amount of \$4,675,000.00 (the "First Modified Note"; the Original Loan, as modified by the First Modified Note and First Modification Agreement (as defined below), is hereinafter the "Loan"). The Original Promissory Note and First Modified Note are each secured by a Deed of Trust, Security Agreement and Assignment of Rents, as hereinafter described, on the real estate in Douglas County, Nebraska, as legally described on Exhibit "A" attached hereto (the "Mortgaged Property"). Lender and Borrower have agreed to extend the term of the Loan and amend the principal balance of the loan to \$4,375,000.00, and to effect certain other modifications of the Loan. The parties agree that the unpaid principal balance presently advanced and outstanding on the Loan and First Modified Note is the sum of \$4,321,498.00 as of the date hereof.

2. **Loan Documents.** The obligations of Borrower in connection with the Loan, as amended, are evidenced, secured and/or guaranteed by documents and agreements executed in connection with the Loan which, as amended and modified by this Agreement, are hereinafter referred to as the "Loan Documents", that include the following:

- a. Building Loan Agreement by and between Borrower and Lender dated December 29, 2006;
- b. Deed of Trust, Security Agreement and Assignment of Rents from Borrower to Lender recorded with the Douglas County, Nebraska Register of Deeds, Mortgage Records, on

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January 9, 2007, as Instrument No. 2007003410 (the "Deed of Trust"), as modified by that certain unrecorded Mortgage Loan Modification Agreement dated July 1, 2008 (the "First Modification Agreement");

c. Assignment of Rents and Leases from Borrower to Lender recorded with the Douglas County, Nebraska Register of Deeds, Miscellaneous Records on January 9, 2007, as Instrument No. 2007003411;

d. Notice of Commencement recorded with the Douglas County, Nebraska Register of Deeds, Construction Lien Records, on January 9, 2007, as Instrument No. 2007003412;

e. Environmental Indemnity Agreement from Borrower to Lender;

f. UCC-1 Financing Statement; and

g. Guarantees of Payment (the "Guarantees") executed by Joseph H. Kutilek, John Hughes, Jr., Richard Schragar and Magnum Development Corp. dated on or about the date hereof.

3. **Present Ownership.** 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 Commonwealth Land Title Insurance Company ALTA Loan Policy of Title Insurance (Policy Number H55-0217488) issued at the Loan closing and any subsequent endorsements thereto.

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

a. The Loan amount shall be modified to be \$4,375,000.00.

b. The maturity date of the Loan shall be extended to November 8, 2020.

c. The amortization period shall be 21 years.

d. Fix the Note Rate at 4.69%.

e. Effective December 31, 2013, Borrower shall maintain a debt service coverage ratio of not less than 1.10 to 1 during the remaining term of the Loan. For purposes hereof, debt service coverage ratio shall mean the "Project net income", as hereinafter defined, for the prior twelve (12) months after taxes and divided by the annual debt service on the Mortgaged Property for the following twelve (12) month period. "Project net income" shall mean the operating revenues generated by the Mortgaged Property for the period for which debt service coverage ratio is being calculated, minus the "Project operating expenses", as that term is hereinafter defined. The term "Project operating expenses" shall mean expenses of every kind reasonably incurred in the normal course of business with respect to the operating of the Mortgaged Property during the period for which debt service coverage ratio is being calculated, including, but not limited to, expenses for taxes, insurance, repairs, replacements which are not capitalized, maintenance and management fees, salaries, advertising expenses, professional fees, wages and utilities, but excluding: (i) principal, interest and fees payable with respect to the Loan; and (ii) noncash allowances for depreciation and amortization.

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 new Modified Promissory Note in the amount of \$4,375,000.00 (the "Modified Promissory Note"), which the parties agree shall be substituted for the Original Promissory Note and First Modified 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 Deed of Trust and the Loan Documents, as amended by this Agreement.

7. **Guarantees of Payment.** Concurrently with the execution hereof, Borrower shall cause the parties to the Guarantees to execute amended and restated guarantees of the Loan (or in the case of Magnum Development Corp. to execute a guarantee of the Loan), in form and substance acceptable to Lender.

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

a. All references on the Loan Documents to the Loan amount shall be modified to be \$4,375,000.00;

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

c. The reference to the scheduled Maturity Date of the Promissory Note as set forth in the Deed of Trust is hereby modified to November 8, 2020;

d. Effective December 31, 2013, Borrower shall maintain a debt service coverage ratio of not less than 1.10 to 1 during the remaining term of the Loan. For purposes hereof, debt service coverage ratio shall mean the "Project net income", as hereinafter defined, for the prior twelve (12) months after taxes and divided by the annual debt service on the Mortgaged Property for the following twelve (12) month period. "Project net income" shall mean the operating revenues generated by the Mortgaged Property for the period for which debt service coverage ratio is being calculated, minus the "Project operating expenses", as that term is hereinafter defined. The term "Project operating expenses" shall mean expenses of every kind reasonably incurred in the normal course of business with respect to the operating of the Mortgaged Property during the period for which debt service coverage ratio is being calculated, including, but not limited to, expenses for taxes, insurance, repairs, replacements which are not capitalized, maintenance and management fees, salaries, advertising expenses, professional fees, wages and utilities, but excluding: (i) principal, interest and fees payable with respect to the Loan; and (ii) noncash allowances for depreciation and amortization; and

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.

9. **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, Borrower is not aware of any default or 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.

10. **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.

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

12. **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 forebear 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.

13. **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 for endorsement of the Title Policy, recording fees and reasonable 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. Invalidation 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.

14. **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.

15. **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.

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

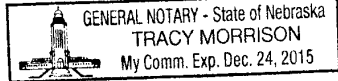
BORROWER:

COLUMBO, LLC, a Nebraska limited liability company

By: [Signature]
John Hughes, Jr., Manager

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

The foregoing instrument was acknowledged before me this 8TH day of November, 2013, by John Hughes, Jr., as Manager of Columbo, LLC, a Nebraska limited liability company, for and on behalf of the company.

[Signature]
Notary Public


LENDER:

FIRST NATIONAL BANK OF OMAHA, a national banking association

By: [Signature]
Name: BRIAN DIEDRICHSEN
Title: VICE PRESIDENT

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

The foregoing instrument was acknowledged before me this 8TH day of November, 2013, by BRIAN DIEDRICHSEN, as VICE PRESIDENT of First National Bank of Omaha, on behalf of the bank.

[Signature]
Notary Public


EXHIBIT "A"
Legal Description

Lot 1, Aksarben Place, an Addition to the City of Omaha, as surveyed, platted and recorded in Douglas County, Nebraska.