

IN THE DISTRICT



, NEBRASKA

DSL HOSPITALITY, LLC,

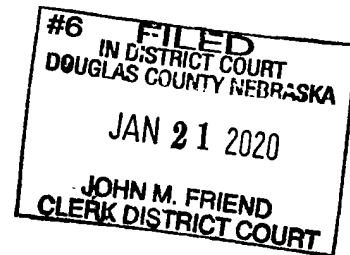
CASE NO: CI 19-8449

Plaintiff,

v.

RONCO CONSTRUCTION COMPANY,  
INC.

Defendant.



**ORDER**

- (I) ALLOWING LETTERS OF CREDIT TO SERVE AS SUBSTITUTION OF COLLATERAL UNDER NEB. REV. STAT. § 52-142()(a);
- (II) SETTING THE AMOUNT CLAIMED DUE IN THE CONSTRUCTION LIENS;
- (III) PERMITTING PLAINTIFF TO DEPOSIT WITH THE CLERK OF THIS COURT ORIGINAL LETTERS OF CREDIT AT 115% OF SUCH AMOUNTS;
- (IV) RELEASING THE REAL ESTATE OF SUCH CONSTRUCTION LIENS AND TRANSFERRING THOSE LIENS TO THE DEPOSITED LETTERS OF CREDIT; AND
- (V) SETTING CERTAIN OBLIGATIONS REGARDING THE LETTERS OF CREDIT.

On January 15, 2020, this matter came before the Court for hearing on DSL Hospitality, LLC's ("DSL"), Motion to Allow Letters of Credit to Serve as Substitution of Collateral to Transfer Construction Liens Off the Real Estate (the "Motion"). Greg Scaglione and Brady Godbout, appeared on behalf of DSL with Dan Marak, a company representative of DSL; Diana J. Vogt appeared on behalf of Ronco Construction Company, Inc. ("Ronco"); Jonathan Brown appeared on behalf of intervening lien claimant Forest City Group, LLC ("Forest City"); Brian S. Koerwitz appeared on behalf of intervening lien claimant Stephens & Smith Const. Co., Inc. ("Stephens"); and Michael J. Whaley appeared on behalf of Dundee Bank. DSL offered exhibits 4, 5 and 6, all of which were received without objection. Oral arguments were had, and the Court took the matter

under advisement. The Court, being fully advised in the premises, finds that the Motion should be sustained and finds as follows:

1. DSL owns the real estate and all improvements thereon, located at 4440 Douglas Street, Omaha, Douglas County, Nebraska 68131, and described as Lot 1, Block 0 Saddle Creek Midtown (the "Property").

2. DSL and general contractor Ronco entered into a cost for the work plus fee AIA A103 – 2007 contract on July 2, 2018 (the "Hotel Contract"), for the construction of the Home2 Suites Hotel at and on the Property (the "Hotel Project"). On or about September 9, 2017, DSL and Ronco also entered into a construction contract (the "Parking Garage Contract"), to construct a parking garage (the "Parking Garage Project") for the Hotel Project located on the DSL's Property.

3. Ronco began work on the Hotel Project shortly after, with a scheduled completion date 310 days after commencement of the component wall framing. DSL claims that the Hotel Project was not completed by the set substantial completion date of May 31, 2019, disputes arose between Ronco and DSL, and DSL refused payment on certain payment application(s) from Ronco. Disputes arose between the parties concerning alleged defective work and Ronco's alleged nonpayment to its subcontractors and suppliers for the Parking Garage Project.

4. As a result, Ronco sent a written notice to DSL that as of September 26, 2019, it was suspending work on the Hotel Project and the Parking Garage Project. DSL then terminated the Contract and the Parking Garage Contract on September 30, 2019.

5. On September 30, 2019, Ronco recorded a construction lien with the Douglas County Register of Deeds (Instrument No. 2019081804), encumbering DSL's Property (the "Construction Lien"). The Construction Lien stated an amount of \$3,235,780.29 was unpaid, whether due or not.

6. On November 7, 2019, Ronco recorded an amended construction lien with the Douglas County Register of Deeds (Instrument No. 2019097086), encumbering DSL's Property (the "Amended Construction Lien"). The Amended Construction Lien stated an amount of \$3,019,791.29 was unpaid, whether due or not.

7. On September 30, 2019, Ronco recorded a construction lien (relating to the Parking Garage Project) with the Douglas County Register of Deeds (Instrument No. 2019081805), encumbering DSL's Property (the "PG Construction Lien"). The PG Construction Lien stated an amount of \$58,014.82 was unpaid, whether due or not.

8. On November 7, 2019, Ronco recorded with the Douglas County Register of Deeds (Instrument No. 2019097085), an amended construction lien relating to the Parking Garage Project, encumbering DSL's Property (the "PG Amended Construction Lien"). The PG Amended Construction Lien stated an amount of \$58,014.82 was unpaid, whether due or not.

9. A Ronco subcontractor, Stephens, recorded a construction lien by through Ronco on the Property in the amount of \$119,665.93. A Ronco subcontractor, Forest City, recorded a construction lien by and through Ronco against the Property in the amount of \$85,925.79. A supplier of Forest City, namely Sioux City Brick & Tile, LLC ("SC Brick"), recorded a construction lien by and through Ronco on the Property in the amount of \$65,434.31. On December 16, 2019, SC Brick recorded an amended construction lien by and through Forest City on the Property in the amount of \$65,434.31.

10. Neb. Rev. Stat. § 52-142 (emphasis added) provides:

(1) Any person having an interest in real estate may release the real estate from liens which have attached to it by:

(a) Depositing in the office of the clerk of the district court of the county in which the lien is recorded a sum of money in cash, certified check, **or other bank obligation**, or a surety bond issued by a surety company authorized to do business in this state, in an amount sufficient to pay the total of the amounts claimed in the liens being released plus fifteen percent of such total; and

(b) Recording, as provided in section 52-151 , a certificate of the clerk of the district court showing that the deposit has been made.

(2) The clerk of the district court has an obligation to accept the deposit and issue the certificate.

(3) Upon release of the real estate from a lien under this section, the claimant's rights are transferred from the real estate to the deposit or surety bond and the claimant may establish his or her claim under sections 52-125 to 52-159 , and upon determination of the claim the court shall order the clerk of the district court to pay the sums due or render judgment against the surety company on the bond, as the case may be.

11. DSL proposes to have Dundee Bank issue four (4) letters of credit, one to each of

Ronco, Stephens, Forest City and SC Brick, in the form substantially as set forth in Exhibit A attached hereto and incorporated herein. No party objected to the form of the letters of credit.

12. The letters of credit are a sufficient bank obligation to act as substitution of collateral, and Dundee Bank is an acceptable bank institution to issue the letters of credit. Moreover, the Clerk of this Court has reviewed and approved the form Dundee Bank letters of credit.

13. Neb. Rev. Stat. § 52-136(3) provides "The lien of a claimant is reduced by the sum of the liens of claimants who claim through him or her." Because there are liens of claimants who claim through Ronco and Forest City, the construction lien amounts for Ronco and Forest City must be reduced.

14. Ronco's Construction Lien and PG Construction Lien combine to total \$3,077,806.11 (\$3,019,791.29 for Hotel + \$58,014.82 for Parking Garage). Forest City and Stephens claim through Ronco, so Ronco's PG Construction Lien and PG Construction Lien must be reduced by (i) Forest City (\$85,925.79) and (ii) Stephens (\$119,665.93). So, Ronco's actual lien amount for its Construction Lien and PG Construction Lien is \$2,872,214.39. There was no objection to this reduction.

15. Forest City's construction lien amount of \$85,925.79, must be reduced by the lien amount of SC Brick of \$65,434.31, as SC Brick claims through Forest City. So Forest City's actual construction lien amount is \$20,491.48. There was no objection to this reduction.

16. As such, the Clerk of this Court should be directed to accept the original letters of credit ("LOC") from Dundee Bank in substantially the same form as the attached Exhibit

A and in the following amounts:

- a. Ronco's Letter of Credit Amount: **\$3,303,046.55** (\$2,872,214.39 x 115%);
- b. Stephens' Letter of Credit Amount: **\$137,615.82** (\$119,665.93 x 115%);
- c. Forest City's Letter of Credit Amount: **\$23,565.20** (\$20,491.48 x 115%); and
- d. Sioux City Brick's Letter of Credit Amount: **\$75,249.46** (\$65,434.31 x 115%).

17. DSL claims that once it has the construction liens transferred off of the Property and on to the letters of credit, DSL will close a PACE loan for \$2mm with City of Omaha approval (granted October 21, 2019) and will then pay for certain work on the Hotel Project and Parking Garage Projects, including paying various of Ronco's subcontractors and supplier. DSL and Dundee Bank request that Dundee Bank's obligation under the Ronco related letter of credit be reduced as such payments are made.

18. DSL has agreed to be subject to an order of this Court with regard to any such payment to a Ronco subcontractor and supplier, in order to secure such reduction of Dundee Bank's liability under the Ronco related letter of credit:

- a. The original Ronco letter of credit shall remain with the Clerk of this Court until further order of this Court;
- b. DSL shall confer with Ronco as to how much is due to any of Ronco subcontractors and suppliers, and Ronco shall, within three (3) business days of DSL's written request, identify the amount Ronco believes is due to and from its subcontractors and suppliers on the Hotel Project and the Parking Garage Project, together with supporting documentation, payment history and contract(s) and change order(s);
- c. Regarding the written materials referenced below, DSL shall seek the input of Ronco's and Dundee Bank's legal counsel as to suggested terms and conditions;
- d. DSL shall assume in writing the contract(s) and change order(s) of any Ronco

subcontractor and supplier that DSL pays;

- e. Any paid Ronco subcontractor or supplier shall consent in writing to such assumption;
- f. Any paid Ronco subcontractor and supplier shall release in writing Ronco, and any additional subcontractors if claiming through said subcontractor's lien, from its obligation to pay them amounts due plus any interest, on the Hotel Project and/or the Parking Garage Project, to the extent of the amount DSL paid to such subcontractor or supplier;
- g. Any paid Ronco subcontractor and supplier shall release or waive in writing liens for its work and/or materials supplied on the Hotel Project and/or the Parking Garage Project, to the extent of the amount DSL paid to such subcontractor or supplier;
- h. Within three (3) business days of payment to any Ronco subcontractor and supplier, DSL shall deliver such written materials referenced herein to Ronco and Dundee Bank; and
- i. If DSL follows these procedures and requirements, Dundee Bank's liability under the Ronco related letter of credit shall be reduced in the amount of each qualifying payment by DSL to a Ronco subcontractor and/or supplier on the Hotel Project and/or the Parking Garage Project. This section only addressed Dundee's Bank's liability; as for DSL's potential liability, if this Court later determines that any lien, invoice, or demand for payment of Ronco subcontractor or supplier is deemed invalid in total, and Ronco timely provided DSL adequate notice of such invalidity, and DSL chooses thereafter to pay that subcontractor or supplier without regard to the potential invalidity of the lien, invoice, or demand for payment, DSL does so at risk of the Court later determining that DSL should remain liability to Ronco under any contractual obligation.

IT IS THEREFORE ORDERED AND DECREED as follows:

- (A) DSL shall be allowed to deposit with the Clerk of this Court letters of credit in the substantial form as set forth in Exhibit A attached hereto and incorporated herein, to act as substitution of collateral, and Dundee Bank is an acceptable bank institution to issue such letters of credit;
- (B) Per Neb. Rev. Stat. § 52-142(2), the Clerk of this Court is directed to accept the

original Letters of Credit from Dundee Bank in substantially the same form as the attached Exhibit A and in the following amounts:

- a. Ronco's Letter of Credit Amount: **\$3,303,046.55** (\$2,872,214.39 x 115%) on Ronco's Construction Lien and PG Construction Lien;
  - b. Stephens' Letter of Credit Amount: **\$137,615.82** (\$119,665.93 x 115%);
  - c. Forest City's Letter of Credit Amount: **\$23,565.20** (\$20,491.48 x 115%); and
11. Sioux City Brick's Letter of Credit Amount: **\$75,249.46** (\$65,434.31 x 115%).

(C) If and as DSL delivers any of the original letters of credit referenced above, the Clerk of this Court shall issue the certificate or certificates referenced in Neb. Rev. Stat. § 52-142. Upon the recording of such certificate(s) with the Douglas County Register of Deeds, the construction liens referenced in such certificate(s) shall be released from the Property and transferred to the applicable letter of credit.

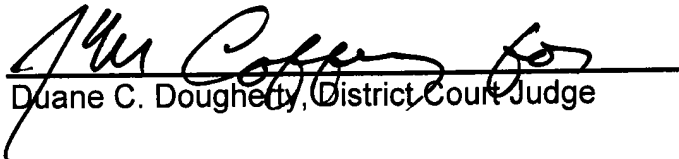
(D) As DSL pays a Ronco subcontractor and supplier, in order to secure such reduction of Dundee Bank's liability under the Ronco related letter of credit, DSL and Ronco shall comply with the following terms:

- a. The original Ronco letter of credit shall remain with the Clerk of this Court until further order of this Court;
- b. DSL shall confer with Ronco as to how much is due to any of Ronco subcontractors and suppliers, and Ronco shall, within three (3) business days of DSL's written request, identify the amount Ronco believes is due to and from its subcontractors and suppliers on the Hotel Project and the Parking Garage Project, together with supporting documentation, payment history and contract(s) and change order(s);
- c. Regarding the written materials referenced below, DSL shall seek the input of Ronco's and Dundee Bank's legal counsel as to suggested terms and conditions;
- d. DSL shall assume in writing the contract(s) and change order(s) of any Ronco subcontractor and supplier that DSL pays;

- e. Any paid Ronco subcontractor or supplier shall consent in writing to such assumption;
- f. Any paid Ronco subcontractor and supplier shall release in writing Ronco, and any additional subcontractors if claiming through said subcontractor's lien, from its obligation to pay them amounts due plus any interest, on the Hotel Project and/or the Parking Garage Project, to the extent of the amount DSL paid to such subcontractor or supplier;
- g. Any paid Ronco subcontractor and supplier shall release or waive in writing liens for its work and/or materials supplied on the Hotel Project and/or the Parking Garage Project, to the extent of the amount DSL paid to such subcontractor or supplier;
- h. Within three (3) business days of payment to any Ronco subcontractor and supplier, DSL shall deliver such written materials referenced herein to Ronco and Dundee Bank; and
- j. If DSL follows these procedures and requirements, Dundee Bank's liability under the Ronco related letter of credit shall be reduced in the amount of each qualifying payment by DSL to a Ronco subcontractor and/or supplier on the Hotel Project and/or the Parking Garage Project. This section only addressed Dundee's Bank's liability; as for DSL's potential liability, if this Court later determines that any lien, invoice, or demand for payment of Ronco subcontractor or supplier is deemed invalid in total, and Ronco timely provided DSL adequate notice of such invalidity, and DSL chooses thereafter to pay that subcontractor or supplier without regard to the potential invalidity of the lien, invoice, or demand for payment, DSL does so at risk of the Court later determining that DSL should remain liability to Ronco under any contractual obligation.

DATED this 21<sup>st</sup> of January 2020.

BY THE COURT:

  
Duane C. Dougherty, District Court Judge



**Prepared and Submitted By:**

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Attorneys for Plaintiff

**EXHIBIT A**

**IRREVOCABLE STANDBY LETTER OF CREDIT**

Letter of Credit Number.   
Amount: U.S. \$  ( dollars and  cents U.S. DOLLARS)

This Letter of Credit is issued on January , 2020 by Issuer in favor of the Beneficiary for the account of Applicant. The parties' names and their addresses are as follows:

**APPLICANT:**

DSL HOSPITALITY, LLC C/O GREG SCAGLIONE OF KOLEY JESSEN P.C., L.L.O.  
Entity Type: Limited Liability Company  
1125 S 103RD ST, STE 800  
OMAHA, NE 68124

**BENEFICIARY:**

JOHN FRIEND, CLERK OF THE DOUGLAS COUNTY DISTRICT COURT  
Entity Type: Domestic Government Unit  
1701 FARNAM ST 3RD FLOOR  
OMAHA, NE 68183

**IN CARE OF LIEN CLAIMANT**

Entity Type:

**ISSUER:**

DUNDEE BANK  
5015 Underwood Ave  
Omaha, NE 68132

**1. LETTER OF CREDIT.** Issuer establishes this Irrevocable Standby Letter of Credit (Letter of Credit) in favor of Beneficiary in the amount indicated above. Beneficiary may draw on this Letter of Credit with a Draft (or Drafts, if the maximum number of drawings is greater than one). Each Draft shall be signed on behalf of Beneficiary and be marked "Drawn under Dundee Bank Letter of Credit No.  dated January , 2020." Drafts must be presented at Issuer's address shown above on or before the Expiration Date. The presentation of any Draft shall reduce the Amount available under this Letter of Credit by the amount of the draft.

This Letter of Credit sets forth in full the terms of Issuer's obligation to Beneficiary. This obligation cannot be modified by any reference in this Letter of Credit, or any document to which this Letter of Credit may be related.

This Letter of Credit expires on the Expiration Date.

**2. DRAWINGS.** Beneficiary shall be permitted to make multiple drawings on this Letter of Credit. The maximum number of drawings that may be made on this Letter of Credit is AS NEEDED. "Draft" means a draft drawn at sight.

**3. DOCUMENTS.** Each Draft must be accompanied by the following, in original and two copies except as stated:

A. The original Letter of Credit, together with any amendments

B. A sight draft drawn by Beneficiary on Issuer or Court Order issued by the District Court of Douglas County, Nebraska.

Issuer shall be entitled to accept a draft and the documentation described above, as required by the terms of this Letter of Credit, from any person purporting to be an authorized officer or representative of Beneficiary without any obligation or duty on the part of Issuer to verify the identity or authority of the person presenting the draft and such documentation.

**4. EXPIRATION DATE.** This Letter of Credit will expire on the earliest of any of the following to occur: (a) The litigation involving the construction lien at issue is dismissed; or (b) The litigation involving the construction lien at issue is settled by all parties; or (c) The Lien Claimant is paid and releases the construction lien at issue; or (d) The construction lien at issue expires or terminates by operation of law; or (e) a judgment is granted in favor of the Lien Claimant in the litigation involving the construction lien and that judgment is satisfied. Issuer agrees to honor all Drafts presented in strict compliance with the provisions of this Letter of Credit on or before the Expiration Date.

**5. NON-TRANSFERABLE.** This Letter of Credit is not transferable.

**6. APPLICABLE LAW.** This Letter of Credit is governed by the International Standby Practices 1998 (ISP98). This Letter of Credit is also governed by the laws of Nebraska, except as those laws conflict with the International Standby Practices 1998 (ISP98).

**ISSUER:**

Dundee Bank

By \_\_\_\_\_ Date \_\_\_\_\_  
Adnan Hernandez, Senior Vice President

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on January 22, 2020 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Diana J Vogt  
law@sherrets.com

Brian S Koerwitz  
bkoerwitz@eptlawfirm.com

Greg Scaglione  
greg.scaglione@koleyjessen.com

Jonathan M Brown  
jbbrown@womglaw.com

Date: January 22, 2020

BY THE COURT:

*John M. Friend*  
CLERK

