



MISC 2013002276



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Fee amount: 58.00
FB: 10-40602
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Received - DIANE L. BATTIATO
Register of Deeds, Douglas County, NE
01/08/2013 16:28:28.00



2013002276

RETURN TO: *Space Above Reserved for Recording Information*

Steven J. Woolley
MCGILL, GOTSDINER, WORKMAN & LEPP, P.C., L.L.O.
11404 W. Dodge Rd., Suite 500
Omaha, NE 68154-2584

SUBORDINATION AGREEMENT

THIS SUBORDINATION AGREEMENT (this "Agreement"), dated as of January 4, 2013, is made by and among OMAR-5, LLC, a Nebraska limited liability company ("Borrower"), LOUIS ROTELLA, JR. ("Subordinated Creditor"), and GREAT WESTERN BANK, a South Dakota banking corporation (the "Senior Creditor").

RECITALS

- A. Senior Creditor has provided and/or will provide credit facilities to Borrower.
- B. Borrower is indebted to Subordinated Creditor.
- C. Senior Creditor has indicated that it will extend or continue to extend credit to Borrower only if certain conditions are met, including without limitation the requirement that Subordinated Creditor execute this Agreement.

NOW, THEREFORE, as an inducement to Senior Creditor to extend or continue to extend credit and for other valuable consideration, the parties hereto agree as follows:

- 1. DEFINITIONS. As used herein, the following terms have the meanings set forth below:

"Bankruptcy Code" shall mean the United States Bankruptcy Code (11 U.S.C. § 101 et seq.).

"Borrower Default" shall mean an "Event of Default" as defined in any Senior Debt Document, or any other agreement or instrument evidencing, governing, or issued in connection with any Senior Indebtedness, or any default under or breach of any such agreement or instrument.

"Indebtedness" shall mean any and all advances, debts, obligations and liabilities of Borrower heretofore, now or hereafter made, incurred or created, whether voluntary or involuntary and however arising, whether due or not due, absolute or contingent, liquidated or unliquidated, determined or undetermined, including under any swap, derivative, foreign exchange, hedge, deposit, treasury management or other similar transaction or arrangement, and whether Borrower may be liable individually or jointly with others, including without limitation, obligations and liabilities arising from notes, repurchase agreements and trust receipts, and any and all interest and other amounts thereon which may accrue subsequent to Borrower becoming subject to any state or federal debtor-relief statute.

"Note" shall mean the indebtedness evidenced by the Promissory Note dated July 1, 2010 in the original principal amount of \$200,000.00 from Borrower, as maker, to Subordinated Creditor, as lender, recorded August 27, 2010 in the office of the Register of Deeds of Douglas County, Nebraska as Instrument No. 2010077301, and all amendments, re-writes, extensions and replacements to the same.

"Senior Debt Documents" shall mean promissory notes, all credit agreements, building loan agreements, indentures, deeds of trust, mortgages, security agreements, documents, instruments, assignments and contracts executed in connection with the Senior Indebtedness, as the same may be amended, restated, supplemented or otherwise modified from time to time.

"Senior Indebtedness" shall mean all Indebtedness now or at any time hereafter owing from Borrower to Senior Creditor.

"Subordinated Debt Documents" shall mean all credit agreements, indentures, notes, mortgages, security agreements, documents, instruments, assignments and contracts executed in connection with the Subordinated Indebtedness, as the same may be amended, restated, supplemented or otherwise modified from time to time.

"Subordinated Indebtedness" shall mean the Note and all Indebtedness now or at any time hereafter owing from Borrower to the Subordinated Creditor.

2. SUBORDINATION.

(a) Subordination of Indebtedness. Subordinated Creditor hereby subordinates all Subordinated Indebtedness to all Senior Indebtedness. Subordinated Creditor irrevocably consents and directs that all Senior Indebtedness shall be paid in full in cash or other immediately available funds prior to Borrower making any payment on any

Subordinated Indebtedness. As long as this Agreement is in effect, Subordinated Creditor will not take any action or initiate any proceedings, judicial or otherwise, to enforce Subordinated Creditor's rights or remedies with respect to any Subordinated Indebtedness, including without limitation, any action to enforce remedies with respect to any collateral securing any Subordinated Indebtedness or to obtain any judgment or prejudgment remedy against Borrower or any such collateral.

(b) Security Interest Subordination. Regardless of any priority otherwise available to the Subordinated Creditor by law or by agreement, as between the Subordinated Creditor and Senior Creditor, Senior Creditor shall hold a first priority security interest in all collateral securing payment of any Senior Indebtedness (collectively, the "Senior Collateral"), and any security interest claimed therein (including any proceeds thereof) by the Subordinated Creditor shall be and remain fully subordinate for all purposes to the security interest of Senior Creditor therein for all purposes whatsoever. Senior Collateral shall include but not be limited to the following:

10-40602

Lot 1 Walnut Hill Replat 6, an addition to the City of Omaha,
Douglas County, Nebraska

AND

10-40580

Lots 12, 13, 14, 15, 16, 17 and 18, Block 17, Walnut Hill, an
addition to the City of Omaha, Douglas County, Nebraska

3. RESTRICTION OF PAYMENT OF SUBORDINATED INDEBTEDNESS; DISPOSITION OF PAYMENTS RECEIVED BY SUBORDINATED CREDITOR. Borrower will not make, and Subordinated Creditor will not accept or receive, any payment or benefit in cash, by setoff or otherwise, directly or indirectly, on account of principal, interest or any other amounts owing on any Subordinated Indebtedness. If any payment is made in violation of this Agreement, Subordinated Creditor shall promptly deliver the same to Senior Creditor in the form received, with any endorsement or assignment necessary for the transfer of such payment or amounts setoff from Subordinated Creditor to Senior Creditor, to be either held as cash collateral securing the Senior Indebtedness or applied in reduction of the Senior Indebtedness in such order as Senior Creditor shall determine, and until so delivered, Subordinated Creditor shall hold such payment in trust for and on behalf of, and as the property of, Senior Creditor.

4. LEGEND; DISPOSITION OF EVIDENCE OF SUBORDINATED INDEBTEDNESS. The Note and any other promissory note or other evidence of the Subordinated Indebtedness now in existence or hereafter executed shall be marked with the following legend:

THE INDEBTEDNESS EVIDENCED HEREBY IS SUBORDINATE TO THE INDEBTEDNESS OF THE MAKER (OR ANY SUCCESSOR THERETO) TO GREAT WESTERN BANK, A SOUTH DAKOTA BANKING CORPORATION, PURSUANT TO THE TERMS OF A SUBORDINATION AGREEMENT DATED DECEMBER _____, 2012, AS SUCH AGREEMENT MAY FROM TIME TO TIME BE

AMENDED, RESTATED OR OTHERWISE MODIFIED (OR ANY SUCCESSOR AGREEMENT WHICH REPLACES AND REFERENCES SUCH AGREEMENT).

Subordinated Creditor, if asked to do so by Senior Creditor, will deliver the Note and any other instrument evidencing the Subordinated Indebtedness to Senior Creditor. Subordinated Creditor shall not, without the prior written consent of Senior Creditor, assign, pledge or otherwise transfer, or permit to be assigned, pledged or otherwise transferred, or execute any power of attorney with respect, to the Subordinated Indebtedness or any part thereof, except to Senior Creditor.

5. REPRESENTATIONS AND WARRANTIES; INFORMATION.

Borrower and Subordinated Creditor represent and warrant to Senior Creditor that: (a) no interest in the Subordinated Indebtedness has been assigned or otherwise transferred to any person or entity; (b) payment of the Subordinated Indebtedness has not been heretofore subordinated to any other existing creditor of Borrower; and (c) Subordinated Creditor has the requisite power and authority to enter into and perform its obligations under this Agreement. Subordinated Creditor further represents and warrants to Senior Creditor that Subordinated Creditor has established adequate, independent means of obtaining from Borrower on a continuing basis financial and other information pertaining to Borrower's financial condition. Subordinated Creditor agrees to keep adequately informed from such means of any facts, events or circumstances which might in any way affect Subordinated Creditor's risks hereunder, and Subordinated Creditor agrees that Senior Creditor shall have no obligation to disclose to Subordinated Creditor information or material about Borrower which is acquired by Senior Creditor in any manner. Senior Creditor may, at Senior Creditor's sole option and without obligation to do so, disclose to Subordinated Creditor any information or material relating to Borrower which is acquired by Senior Creditor by any means, and Borrower hereby agrees to and authorizes any such disclosure by Senior Creditor.

6. TRANSFER OF ASSETS OR REORGANIZATION OF BORROWER.

If any petition is filed or any proceeding is instituted by or against Borrower under any provisions of the Bankruptcy Code, or any other or similar law relating to bankruptcy, insolvency, reorganization or other relief for debtors, or generally affecting creditors' rights, or seeking the appointment of a receiver, trustee, custodian or liquidator of or for Borrower or any of its assets, any payment or distribution of any of Borrower's assets, whether in cash, securities or any other property, which would be payable or deliverable with respect to any Subordinated Indebtedness, shall be paid or delivered to Senior Creditor until all Senior Indebtedness is paid in full in cash or other immediately available funds. Subordinated Creditor grants to Senior Creditor the right to enforce, collect and receive any such payment or distribution and to give releases or acquittances therefor, and Subordinated Creditor authorizes Senior Creditor as its attorney-in-fact to vote and prove the Subordinated Indebtedness in any of the above-described proceedings or in any meeting of creditors of Borrower relating thereto.

7. OTHER AGREEMENTS; NO THIRD PARTY BENEFICIARIES.

Senior Creditor shall not have any direct or indirect obligations to Subordinated Creditor of any kind with respect to the manner or time in which Senior Creditor exercises (or refrains

from exercising) any of its rights or remedies with respect to the Senior Indebtedness, Borrower or any of the Senior Collateral. Subordinated Creditor understands that the Senior Debt Documents shall not confer any benefits on Subordinated Creditor other than as may be specifically stated therein. Subordinated Creditor further acknowledges that Senior Creditor may administer the Senior Indebtedness and any of the Senior Debt Documents in any way Senior Creditor deems appropriate, without regard to Subordinated Creditor or the Subordinated Indebtedness. Subordinated Creditor waives any right Subordinated Creditor might otherwise have to require a marshalling of any assets constituting Senior Collateral or to direct or affect the manner or timing with which Senior Creditor enforces its security interest in any of the Senior Collateral. Nothing in this Agreement shall impair or adversely affect any right, privilege, power or remedy of Senior Creditor with respect to the Senior Indebtedness, Borrower or any Senior Collateral, including without limitation, Senior Creditor's right to: (a) waive, release or subordinate any of Senior Creditor's security or rights; (b) waive or ignore any defaults by Borrower; and/or (c) restructure, renew, modify or supplement any Senior Indebtedness, or any portion thereof, or any Senior Debt Document. All rights, privileges, powers and remedies of Senior Creditor may be exercised from time to time by Senior Creditor without notice to or consent of Subordinated Creditor.

8. **BREACH OF AGREEMENT BY BORROWER OR SUBORDINATED CREDITOR.** In the event of any breach of this Agreement by Borrower or Subordinated Creditor which remains uncured for a period of fifteen (15) days following written notice from Senior Creditor, then and at any time thereafter Senior Creditor shall have the right to declare immediately due and payable all or any portion of the Senior Indebtedness without presentment, demand, notice of nonperformance, protest, notice of protest or notice of dishonor, all of which are hereby expressly waived by Borrower and Subordinated Creditor. No delay, failure or discontinuance of Senior Creditor in exercising any right, privilege, power or remedy hereunder shall be deemed a waiver of such right, privilege, power or remedy; nor shall any single or partial exercise of any such right, privilege, power or remedy preclude, waive or otherwise affect the further exercise thereof or the exercise of any other right, privilege, power or remedy. Any waiver, permit, consent or approval of any kind by Senior Creditor with respect to this Agreement must be in writing and shall be effective only to the extent set forth in such writing.

9. **CONTINUING EFFECT.** This Agreement shall constitute a continuing agreement of subordination, and Senior Creditor may, subject to the provisions of the Senior Debt Documents and without notice to or consent by Subordinated Creditor, modify any of the Senior Debt Documents in reliance upon this Agreement. Without limiting the generality of the foregoing, Senior Creditor may, at any time and from time to time, either before or after receipt of any such notice of revocation, without the consent of or notice to Subordinated Creditor and without incurring responsibility to Subordinated Creditor or impairing or releasing any of Senior Creditor's rights or any of Subordinated Creditor's obligations hereunder:

(a) change the interest rate or change the amount of payment or extend the time for payment or renew or otherwise alter the terms of any Senior Indebtedness or any instrument evidencing the same in any manner;

(b) sell, exchange, release or otherwise deal with any Senior Collateral securing payment of Senior Indebtedness or any part thereof;

(c) release anyone liable in any manner for the payment or collection of Senior Indebtedness or any part thereof; and

(d) exercise or refrain from exercising any right against Borrower or any other person.

10. LIQUIDATED DAMAGES. Inasmuch as the actual damages which could result from an uncured breach by Subordinated Creditor of its duties under this Agreement are uncertain and would be impractical or extremely difficult to fix, Subordinated Creditor shall pay to Senior Creditor, in the event of any such breach by Subordinated Creditor, as liquidated and agreed damages, and not as a penalty, all sums received by Subordinated Creditor in violation of this Agreement on account of the Subordinated Indebtedness, which sums represent a reasonable endeavor to estimate a fair compensation for the foreseeable losses that might result from such a breach; provided however, that any such amounts received from Subordinated Creditor shall be applied to the outstanding Indebtedness.

11. COSTS, EXPENSES AND ATTORNEYS' FEES. If any party hereto institutes any arbitration or judicial or administrative action or proceeding to enforce any provisions of this Agreement, or alleging any breach of any provision hereof or seeking damages or any remedy, the losing party or parties shall pay to the prevailing party or parties all costs and expenses, including reasonable attorneys' fees (to include outside counsel fees and all allocated costs of such prevailing party's in-house counsel), expended or incurred by the prevailing party or parties in connection therewith, whether incurred at the trial or appellate level, in an arbitration proceeding or otherwise, and including any of the foregoing incurred in connection with any bankruptcy proceeding (including without limitation, any adversary proceeding, contested matter or motion brought by Senior Creditor or any other person) relating to Borrower, Subordinated Creditor or any other person or entity.

12. SUCCESSORS; ASSIGNS; AMENDMENT. This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties. This Agreement may be amended or modified only in writing signed by all parties hereto.

13. SEVERABILITY OF PROVISIONS. If any provision of this Agreement shall be held to be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such waiver or other provision or any remaining provisions of this Agreement.

14. GOVERNING LAW. This Agreement shall be governed by and construed in accordance with the laws of the State of Nebraska.

15. NOTICES. All notices and other communications hereunder shall be in writing and shall be (a) personally delivered, (b) transmitted by registered mail, postage prepaid, or (c) transmitted by telecopy, in each case addressed to the party to whom notice

is being given at its address as set forth on the signature page hereto or at such other address as may hereafter be designated in writing by that party. All such notices or other communications shall be deemed to have been given on (a) the date received if delivered personally, (b) the date of posting if delivered by mail, or (c) the date of transmission if delivered by telecopy.

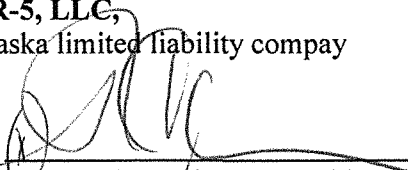
16. TERMINATION OF AGREEMENT. This Agreement shall remain in full force and effect until the indefeasible payment in full of the Senior Indebtedness and the termination of all commitments of Senior Creditor to lend under the Senior Debt Documents, after which this Agreement shall terminate without further action on the part of the parties hereto.

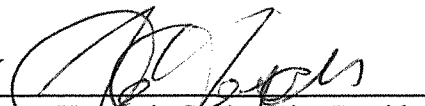
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IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

OMAR-5, LLC,
a Nebraska limited liability company

GREAT WESTERN BANK,
a South Dakota banking corporation

By: 
Raymond C. Trimble, President

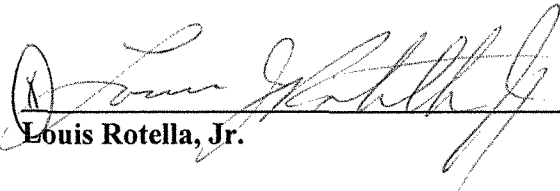
By: 
Gordon Harnisch, Senior Vice President

Address for notices:

Address for notices:

4383 Nicholas Street
Omaha, Nebraska 68131
Attention: Raymond C. Trimble, President

Commercial Real Estate Division
14545 W. Center Road
Omaha, Nebraska 68144
Attention: Gordon Harnisch,
Senior Vice President

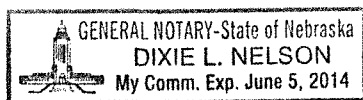

Louis Rotella, Jr.

Address for notices:

3213 South 174th Circle
Omaha, Nebraska 68130

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

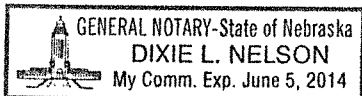
The foregoing instrument was acknowledged before me, a Notary Public, this 4th day of January, 2013 by Raymond C. Trimble, President of OMAR-5, LLC, a Nebraska limited liability company, on behalf of said company.




Notary Public

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

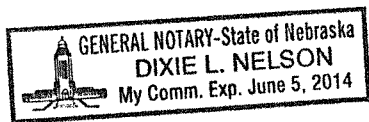
The foregoing instrument was acknowledged before me, a Notary Public, this 4th day of January, 2013 by Gordon Harnisch, Senior Vice President of Great Western Bank, a South Dakota banking corporation, on behalf of said corporation.



Dixie L. Nelson
Notary Public

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

The foregoing instrument was acknowledged before me, a Notary Public, this 4th day of January, 2013 by Louis Rotella, Jr.



Dixie L. Nelson
Notary Public