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Fee amount: 46.00  
FB: 47-18334  
COMP: BW

Received - DIANE L. BATTIATO  
Register of Deeds, Douglas County, NE  
09/09/2016 16:49:10.00



2016074609

# INTERCREDITOR AND SUBORDINATION AGREEMENT

LOT 1, INTRANSIT ADDITION REPLAT 3, AN ADDITION TO THE CITY OF OMAHA, AS SURVEYED,  
PLATTED AND RECORDED IN DOUGLAS COUNTY, NEBRASKA

## INTERCREDITOR AND SUBORDINATION AGREEMENT

THIS INTERCREDITOR AND SUBORDINATION AGREEMENT (this "Agreement") is made and entered into effective as of September 1, 2016, by and between FIVE POINTS BANK ("Senior Lender"), and PLATTSMOUTH STATE BANK ("Junior Lender").

### WITNESSETH:

A. Senior Lender will extend/has extended credit to Tincher Investments Co., Inc., a Nebraska corporation ("Borrower"), in the amount of \$990,000.00 pursuant to the terms of that certain (i) Loan Agreement dated as of September 1, 2016, by and between Senior Lender and Borrower (as such agreement may be amended, restated or otherwise modified from time to time, the "Loan Agreement") (the indebtedness under the Loan Agreement, together with all interest on such indebtedness and all other amounts owing to Senior Lender is referred to herein as the "Senior Obligations"), and the Senior Obligations are secured by the Collateral (as defined in the Loan Agreement).

B. Junior Lender has extended credit to Borrower in the amount of \$100,000.00, which is secured by that certain Deed of Trust dated July 22, 2015 and recorded on July 28, 2015 with the Douglas County Register of Deeds as Instrument No. 2015062067, and further extended credit to the Borrower in the amount of \$160,000.00 which is secured by that certain Deed of Trust dated January 19, 2016 and recorded on January 20, 2016 with the Douglas County Register of Deeds as Instrument No. 2016004769. These amounts due and owing from Borrower to the Junior Lender together with all interest thereon now or hereafter owing to Junior Lender by Borrower or claims in favor of Junior Lender against Borrower are referred to herein as the "Junior Obligations."

C. The parties wish to provide for the relative rights and priorities of Senior Lender and Junior Lender (sometimes referred to jointly as the "Lenders", each a "Lender") with respect to the Collateral and payments made by or on behalf of Borrower in regard to Senior Obligations and Junior Obligations.

NOW, THEREFORE, in consideration of the mutual agreements, provisions and covenants contained herein, including the foregoing recitals, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Priority of Payment. Except as otherwise provided in this Agreement, payment of the Junior Obligations is subordinated to the full payment of the Senior Obligations. Upon default by Borrower of any of the Junior Obligations, Junior Lender shall provide thirty (30) days written notice to Senior Lender of such default prior to filing suit against Borrower, take or receive by way of, acceleration, set-off or counterclaim, foreclosure, either judicial or non-judicial under the power of sale, or other realization on security, dividends in bankruptcy or otherwise. However, Junior Lender shall thereafter not be entitled to receive or retain any principal, interest or reimbursement payments on, in connection with, or related to, the Junior Obligations until the Senior Obligations are paid in full.

2. Permitted Payments Prior to Discharge of Senior Obligations. Until such time as an Event of Default (as defined and described in the Loan Agreement) shall have occurred, Junior Lender shall be entitled to receive and retain the regularly scheduled payments of principal and

interest on the Junior Obligations. Upon the occurrence of an Event of Default, Junior Lender shall thereafter not be entitled to receive or retain any principal, interest or reimbursement payments on, in connection with, or related to, the Junior Obligations until the Senior Obligations are paid in full. Should any payment, distribution or security (or proceeds from such payment, distribution or security) not permitted by this Agreement be received by Junior Lender upon or with respect to the Junior Obligations, Junior Lender shall immediately deliver same to Senior Lender in the form received (except for endorsement or assignment by Junior Lender where required by Senior Lender), for application on the Senior Obligations (whether or not then due and in such order of maturity as Senior Lender elects) and, until so delivered, the same shall be held in trust by Junior Lender as the property of Senior Lender.

3. Priority of Security Interests. All rights of Junior Lender in the Collateral are subordinated to all claims or rights of Senior Lender now or later existing in any of the Collateral or other property of Borrower. The relative priorities of Senior Lender and Junior Lender in the Collateral or other property of Borrower as set forth in this Agreement shall control irrespective of the time, method or order of attachment or perfection of the liens and security interests acquired by the parties in the Collateral and irrespective of any failure to perfect or maintain perfection of a security interest or the priorities as would otherwise be determined by reference to the Uniform Commercial Code or other applicable laws. Junior Lender shall not contest the validity, priority or perfection of Senior Lender's security interest in any Collateral (regardless of whether Senior Lender's security interest in such Collateral is valid or perfected). Junior Lender agrees that Junior Lender will not interfere with the exercise by the Senior Lender of its right to collect and dispose of the Collateral, whether by foreclosure or otherwise.

4. Liquidation. Upon any distribution to creditors of Borrower in a liquidation or dissolution of Borrower or in a bankruptcy, reorganization, insolvency, foreclosure, receivership or similar proceedings relating to Borrower or Borrower's property or in an assignment for the benefit of creditors or any marshalling of the assets and liabilities of Borrower, Senior Lender shall be entitled to receive full payment of all of the Senior Obligations before Junior Lender shall be entitled to receive any payment of Junior Obligations.

5. Rights of Senior Lender. Senior Lender, in its sole discretion, with notice to Junior Lender, may release, exchange, enforce and otherwise deal with any security now or later held by Senior Lender for payment of the Senior Obligations or release any party now or later liable for payment of the Senior Obligations without affecting in any manner Senior Lender's rights under this Agreement. Junior Lender acknowledges and agrees that Senior Lender has no obligation to acquire or perfect any lien on or security interest in any asset(s), whether realty or personal, to secure payment of the Senior Obligations.

6. Reinstatement. Notwithstanding any prior revocation, termination, surrender or discharge of this Agreement in whole or in part, the effectiveness of this Agreement shall automatically continue or be reinstated in the event that any payment received or credit given by Senior Lender in respect of the Senior Obligations is returned, disgorged or rescinded under any applicable state or federal law, including, without limitation, laws pertaining to bankruptcy or insolvency, in which case this Agreement, shall be enforceable against Junior Lender as if the returned, disgorged or rescinded payment or credit had not been received or given by Senior Lender, and whether or not Senior Lender relied upon this payment or credit or changed its position as a consequence of it. In the event of continuation or reinstatement of this Agreement, Junior Lender agrees upon demand by Senior Lender to execute and deliver to Senior Lender those documents which Senior Lender determines are appropriate to further evidence (in the public records or otherwise) this continuation or reinstatement, although the failure of Junior Lender to do so shall not affect in any way the reinstatement or continuation.

7. Waiver by Junior Lender. Junior Lender waives, to the extent not expressly prohibited by applicable law, any right to require Senior Lender to: (i) proceed against any person or property; or (ii) pursue any other remedy in Senior Lender's power. Junior Lender waives notice of acceptance of this Agreement and presentment, demand, protest, notice of protest, dishonor, notice of dishonor, notice of default, notice of intent to accelerate or demand payment of any Senior Obligations, any and all other notices to which the Junior Lender might otherwise be entitled, and diligence in collecting any Senior Obligations, and agrees that Senior Lender may, once or any number of times, modify the terms of any Senior Obligations, compromise, extend, increase, accelerate, renew or forbear to enforce payment of any or all Senior Obligations, all with notice to Junior Lender and without affecting in any manner the unconditional obligations of Junior Lender under this Agreement, provided that Senior Lender shall not permit Borrower to increase or incur additional Senior Obligations, except as may be necessary to preserve and protect the Lenders' collateral, without the written consent of the Junior Lender. Junior Lender waives any defense against the enforceability of this Agreement based upon or arising by reason of the application by Borrower of the proceeds of any Senior Obligations for purposes other than the purposes represented by Borrower to Senior Lender or intended or understood by Senior Lender or Junior Lender. Junior Lender also waives all rights to require Senior Lender to marshall the Collateral or any other property Senior Lender may at any time have as security for the Senior Obligations and waives all right to require Senior Lender to first proceed against any guarantor or other person the Collateral.

8. Assignment by Lender. Junior Lender acknowledges that Senior Lender has the right to sell, assign, transfer, negotiate or grant participations or any interest in, any or all of the Senior Obligations and any related obligations, including without limitation this Agreement. In connection with the above, but without limiting its ability to make other disclosures to the full extent allowable, Senior Lender may disclose all documents and information which Senior Lender now or later has or acquires relating to Junior Lender and this Agreement, however obtained. Junior Lender further agrees that Senior Lender may disclose such documents and information to Borrower. Junior Lender further agrees that Senior Lender may provide information relating to this Agreement or relating to the Junior Lender to Senior Lender's, affiliates, subsidiaries and service providers.

9. Notices. All notices and other communications under this Agreement shall be in writing and shall be given by registered or certified mail (postage prepaid, return receipt requested) to the parties hereto at the addresses set forth in this Section 12 (or at such other addresses as may be specified by a party in writing given pursuant to this Section 12):

If to Senior Lender:

Five Points Bank  
Attn: Tom Kelley  
8820 Arbor St.  
Omaha, NE \_\_\_\_\_

If to Junior Lender:

Plattsmouth State Bank  
Attn: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

10. Survival. All rights and interests of any Lender under this Agreement, and all agreements and obligations of the Lenders under this Agreement, shall remain in full force and effect irrespective of: (i) any amendment or waiver of or any consent to departure from any related loan document of the respective Lender; (ii) any exchange, release or non-perfection of any Collateral; or (iii) any other circumstance which might otherwise constitute a defense available to, or discharge of Borrower in respect of any related loan document.

11. Purpose and Agency. This Agreement is entered into solely for the purposes set forth in the recitals above and, except as is expressly set forth herein, neither Lender shall be deemed the agent of the other Lender for any purpose.

12. Modification. No waiver or modification of any of its rights under this Agreement shall be effective unless the waiver or modification shall be in writing and signed by an authorized officer on behalf of each Lender. Each waiver or modification shall be a waiver or modification only with respect to the specific matter to which the waiver or modification relates and shall in no way impair the rights of either Lender in any other respect.

13. Assignment. Junior Lender shall not assign this Agreement, or any rights under this Agreement, without the prior written consent of the Senior Lender, which consent shall not be unreasonably withheld, conditioned or delayed provided that any such assignee recognizes, consents to, and assumes the terms and obligations of this Agreement. Any purported assignment in violation of this Section 13 shall be null and void.

14. Severability. Should any term of this Agreement be deemed to be invalid or unenforceable, it shall be severed from this Agreement and not affect the validity of any other term or provision herein.

15. Successors and Assigns. This Agreement shall bind and be for the benefit of each Lender and their respective successors and permitted assigns.

16. Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be an original, but all of which shall constitute a single agreement. Executed signature pages exchanged by the Lenders by way of facsimile or electronic mail transmission will be deemed original signatures of the Lenders.

17. Governing Law and Consent to Forum. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEBRASKA WITHOUT REGARD TO CONFLICT OF LAWS PRINCIPLES. JUNIOR LENDER HEREBY CONSENTS TO THE JURISDICTION OF ANY STATE COURT LOCATED WITHIN DOUGLAS COUNTY, NEBRASKA OR FEDERAL COURT IN THE DISTRICT OF NEBRASKA. JUNIOR LENDER WAIVES ANY OBJECTION TO JURISDICTION AND VENUE OF ANY ACTION INSTITUTED AGAINST JUNIOR LENDER IN SUCH FORUM AS PROVIDED ABOVE AND AGREES NOT TO ASSERT ANY DEFENSE BASED ON LACK OF JURISDICTION OR VENUE IN SUCH FORUM. JUNIOR LENDER FURTHER AGREES NOT TO ASSERT AGAINST SENIOR LENDER (EXCEPT BY WAY OF A DEFENSE OR COUNTERCLAIM IN A PROCEEDING INITIATED BY SENIOR LENDER) ANY CLAIM OR OTHER ASSERTION OF LIABILITY WITH RESPECT TO THIS AGREEMENT, SENIOR LENDER'S CONDUCT OR OTHERWISE IN ANY JURISDICTION OTHER THAN THE FOREGOING JURISDICTIONS.

**[Remainder of This Page Intentionally Left Blank; Signature Page Follows]**

IN WITNESS WHEREOF, each party has executed this Agreement the date first above written.

**FIVE POINTS BANK**

By: [Signature]  
Name: Thomas C. Kelly  
Its: Chairman

STATE OF NEBRASKA     )  
  ) ss.  
COUNTY OF DOUGLAS    )

The foregoing instrument was acknowledged before me this 9 day of September, 2016, by Tom Kelley, the Chairman and CEO of Five Points Bank, on behalf of the Five Points Bank.

[Signature]  
Notary Public



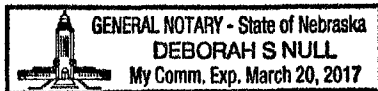
**PLATTSMOUTH STATE BANK**

By: [Signature]  
Name: Laura A. Schneider  
Its: President

STATE OF Nebraska     )  
  ) ss.  
COUNTY OF Cass        )

The foregoing instrument was acknowledged before me this 1st day of September, 2016, by Laura A. Schneider, the President of Plattsmouth State Bank, a Bank, on behalf of the Plattsmouth State Bank.

[Signature]  
Notary Public



## ACKNOWLEDGEMENT AND CONSENT

The undersigned hereby acknowledges and consents to the terms and conditions of the foregoing Intercreditor Agreement, and hereby causes this Acknowledgement and Consent to be duly executed and delivered as of the date first above written.

**TINCHER INVESTMENTS CO., INC.**

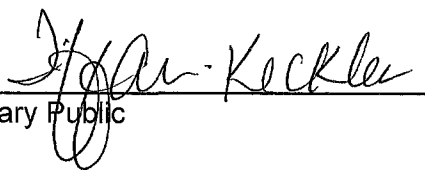
By: 

Name: Mark Tinch

Its: President

STATE OF Nebraska )  
 ) ss.  
COUNTY OF Douglas )

The foregoing instrument was acknowledged before me this 1 day of September, 2016, by Mark Tinch, a President of Tinch Investments Co., Inc., a Nebraska corporation, on behalf of the Corporation.

  
Notary Public

