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UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION	
In Re:  The Falls Event Center LLC <i>et al.</i> ,  Debtors.	Case Nos. 18-25116, 18-28140, 18-27713, 18-25419, 18-25492, 18-26653, 18-27111  Chapter 11  Hon. R. Kimball Mosier
<b>OBJECTION AND MEMORANDUM IN OPPOSITION TO CHAPTER 11 TRUSTEE’S MOTION TO SUBSTANTIVELY CONSOLIDATE THE ABOVE REFERENCED CASES AND NON-DEBTORS THE FALLS AT AUSTIN BLUFFS, LLC, THE FALLS AT CUTTEN ROAD, LLC, THE FALLS AT STONE OAK PARKWAY, LLC, THE FALLS AT BEAVERTON, LLC, AND THE FALLS AT ROSEVILLE, LLC</b>	

**NOW COMES** American Savings Life Insurance Co. (hereinafter “American”) pursuant to LBR 9013-1 and responds to the Chapter 11 Trustee’s Motion to Substantively Consolidate the Above Referenced Cases and Non-Debtors The Falls At Austin Bluffs, LLC, The Falls At Cutten Road, LLC, The Falls At Stone Oak Parkway, LLC, The Falls At Beaverton, LLC, And The Falls At Roseville, LLC filed with the United States Bankruptcy Court for the District of Utah. American believes it is the sole creditor of The Falls at Austin Bluffs, LLC (hereinafter “the Motion”) and files its objection to the Motion. American’s objection relates to the Trustee’s attempt to consolidate a non-debtor, The Falls at Austin Bluffs, LLC (hereinafter “Austin Bluffs”) into the bankruptcy and the Trustee’s attempt to effectuate the consolidation *nunc pro tunc*. American does not express an opinion regarding the consolidation of other bankruptcy cases which have already been filed, nor does American express a position regarding the

consolidation of other non-debtors listed in the Motion, but American does object to any attempt by the Trustee to bring Austin Bluffs into the bankruptcy or bankruptcies filed by the separate and distinct entities mentioned above. American requests that the Court deny the Motion.

American offers the following in support of its objection:

**Relevant Disputed Facts**

American does not have sufficient information at this stage to admit or deny the facts as asserted by the Trustee, and therefore denies such allegations as made. American offers the following information that directly disputes or casts serious doubt as to the veracity of certain facts as asserted by the Trustee:

**Response to Trustee's Asserted Fact No. 20:** This fact is denied as it relates to Austin Bluffs. TFEC is not obligated on or mentioned in the promissory note or the deed of trust related to the sole property held by Austin Bluff.<sup>1</sup>

**Response to Trustee's Asserted Fact No. 33:** American denies that using Austin Bluffs as a holding company to hold title for a single piece of real property or project constitutes a single enterprise. The simple fact that a single asset real estate ("SARE") company may appear to be a part of a "single enterprise" is insufficient to divest creditors of the special rights granted to them in SARE cases.<sup>2</sup>

**Response to Trustee's Asserted Fact No. 44:** Because the Trustee lumps together all of the "Falls Parties" it is impossible to determine if his reasoning stands for each entity. The foregoing basis for Trustee's attempt to consolidate non-debtors does not apply to Austin Bluffs.

**Response to Trustee's Asserted Fact No. 46:** The Trustee has not enumerated any

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<sup>1</sup> See Attached Exhibit 1, Promissory Note of Austin Bluffs and Steven L. Down and Colleen R. Down owed to American (hereinafter the "Promissory Note"); See Also Attached Exhibit 2, Deed of Trust securing the Exhibit 1 (hereinafter the "Deed of Trust").

<sup>2</sup> See *Meruelo Maddux Properties-760 S. Hill Street, LLC v. Bank of America, N.A. (In re Meruelo Maddux Properties, Inc.)*, 667 F.3d 1072 (9th Cir. 2012).

specific steps that render Austin Bluffs necessary for reorganization, nor has he enumerated any additional benefit the estate would derive from the consolidation of Austin Bluffs, a SARE, in the bankruptcy. In fact, Trustee has specifically elected to not include other SARE entities in his consolidation request.<sup>3</sup>

**Response to Trustee's Asserted Fact No. 47:** Consolidation of Austin Bluffs would not save resources but rather increase administrative costs. There is one sole creditor and one sole asset of Austin Bluffs. Allowing American to effectuate foreclosure of the Austin Bluffs property would be a more efficient process to deal with the SARE.

**Additional Relevant Facts**

1. TFEC is not a liable party on the Promissory Note. *See* Exhibit 1.
2. TFEC is not a liable party on the Deed of Trust. *See* Exhibit 2.
3. Austin Bluffs' sole asset is a real property located at Township 13 South Range 66 West El Paso County, Colorado (hereinafter the "Property").<sup>4</sup>
4. Austin Bluffs' only business is the business of operating the Property.
5. Austin Bluff's qualifies as a SARE under 11 U.S.C. § 101(51B).
6. Trustee has determined that consolidation of Bricktown is not necessary primarily because it is in a current SARE bankruptcy and the secured lender is seeking foreclosure of the only asset.<sup>5</sup>
7. Trustee filed the Motion to Consolidate in a separate document to his memorandum of law in support of his motion.<sup>6</sup>
8. No certificate of service accompanied Trustee's Memorandum, and American only

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<sup>3</sup> *See* Trustee Declaration ¶ 22.

<sup>4</sup> *Id.* at ¶ 6.

<sup>5</sup> *Id.* at ¶ 22.

<sup>6</sup> *See* Docket Nos. 327 & 331.

received notice of the existence of the Memorandum by retaining counsel.

**Basis for of Opposition and controlling authority**

1. Trustee failed to follow LBR 9013-1(c) when he filed his motion and memorandum in separate documents and an appropriate sanction is denial of the motion.<sup>7</sup>
2. Substantive consolidation of non-debtors should be considered beyond the jurisdictional power of the bankruptcy court.<sup>8</sup>
3. Substantive consolidation is fact intensive.<sup>9</sup> Trustee has failed to provide specific facts that warrant consolidation of Austin Bluffs.
4. Corporate structure, chosen by debtor, should not be disregarded unless the trustee provides specific facts justifying destruction of the corporate form.<sup>10</sup> Trustee has failed to provide sufficient facts to justify disregarding Austin Bluffs corporate form.
5. Consolidation should be justified by more than just a demonstration of possible veil piercing facts. The trustee should have to show that that consolidation is necessary to avoid some harm or provide some benefit.<sup>11</sup> The trustee has failed to provide facts that demonstrate that consolidation would avoid any harm. No specific facts have been pled regarding the benefit that would be captured through consolidation of Austin Bluffs.
6. *Nunc pro tunc* consolidation would violate American's due process rights and, therefore,

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<sup>7</sup> LBR 9013-1(c).

<sup>8</sup> See *Stern v. Marshall*, 564 U.S. 462 (2011); See also *In re Circle Land and Cattle Corp.*, 213 B.R. 870, 875 (Bankr. D. Kan. 1997); See also *In re Owens Corning*, 419 F.3d 195 (3d Cir. 2005); *Stone v. Eacho*, 127 F.2d 284 (4th Cir. 1942); *Soviero v. Franklin National Bank of Long Island*, 328 F.2d 446 (2d Cir. 1964); *Chemical Bank New York Trust Co. v. Kheel*, 369 F.2d 845 (2d Cir. 1966); *In re Flora Mir Candy Corp.*, 432 F.2d 1060 (2nd Cir. 1970); *Continental Vending Machine*, 517 F.2d 997 (2nd Cir. 1975); *In re DRW Property Co.*, 54 B.R. 489, 497 (Bankr. N.D. Tex. 1985); *Matter of Fesco Plastics Corp.*, 996 F.2d 152 (7th Cir. 1993).

<sup>9</sup> *Fish v. East* 114 F.2d 177, 191 (10th Cir. 1940); *Chemical Bank N.Y. Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d Cir. 1966).

<sup>10</sup> *In re Biorge*, 2011 Bankr. LEXIS 1141 (Bankr. D. Utah 2011); *Kreister v. Goldberg*, 478 F.3d 209 (4th Cir. 2007).

<sup>11</sup> *In re Waterford Funding, LLC*, 2011 Bankr. LEXIS 330 (Bankr. D. Utah 2011); *In re Auto-Train Corp.*, 810 F.2d 270 (D.C. Cir. 1987).

consolidation is not appropriate.<sup>12</sup> Because Austin Bluffs is a SARE, American would have rights in a SARE bankruptcy if filed by Austin Bluffs. The trustee seeks to destroy such rights without justification.

### Argument

#### **I. THE TRUSTEE'S MOTION SHOULD BE DENIED BECAUSE HE FAILED TO FOLLOW LBR 9013-1(c) IN FILING HIS MOTION AND MEMORANDUM**

Local Bankruptcy Rule 9013-1(c)(1) states that “[t]he motion and any supporting memorandum must be contained in one document” unless otherwise authorized by the Local Rules. The Rules go on to state that “[f]ailure to comply with the requirements of subsection (c)(1) may result in sanctions, including: (A) returning the motion to counsel for resubmission in accordance with this rule; (B) denial of the motion; or (C) any other sanction deemed appropriate by the court.”<sup>13</sup> Additionally, 9013-1(l) states that “[u]nless otherwise ordered, a party must file a certificate of service of a motion or other paper required to be served on other parties.” The certificate of service must be “filed with the motion or paper, endorsed upon the motion or paper, or filed separately as soon as possible . . .”<sup>14</sup>

In the present matter, the Trustee filed the Motion and his supporting Memorandum as separate documents, and no exceptions applied. Because the Memorandum and Motion were filed separately, American never received the Memorandum. Neither the Memorandum nor the Motion has an associated certificate of service as required by the Local Rules, and American therefore cannot verify whether a copy of the Memorandum was ever actually sent to them. Because of this lack of notice, American fears that other creditors may not have been given an adequate opportunity to protect themselves. Because it is possible that several creditors did not

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<sup>12</sup> U.S. Const. amend. V.; *United States v. AAPC, Inc. (In re AAPC, Inc.)*, 277 B.R. 785, 789 (Bankr. D. Utah 2002); *Chemical Bank N.Y. Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d Cir.1966).

<sup>13</sup> D. Utah LBR 9013-1(c)(3).

<sup>14</sup> D. Utah LBR 9013-1(l).

receive the Memorandum, they may have had no understanding of the Trustee's basis for the Motion, and they may have been unable to adequately protect their interests. Fortunately, American was made aware of the Memorandum and its accompanying exhibits upon retaining counsel, but other creditors may not have been as fortunate.

**II. SUBSTANTIVE CONSOLIDATION OF NON-DEBTOR AUSTIN BLUFFS IS NOT APPROPRIATE BECAUSE THE COURT LACKS JURISDICTION TO ENTER AN ORDER THAT IS TANTAMOUNT TO AN INVOLUNTARY BANKRUPTCY FILED FOR AUSTIN BLUFFS.**

The bankruptcy's court jurisdiction is limited and must only be exercised when permitted by statute and the Constitution.<sup>15</sup> Bankruptcy courts are not Article III courts and sit under the direction of the District courts. A bankruptcy court's jurisdiction is limited to "all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11."<sup>16</sup> Congress has provided an illustrative list outlining what constitutes a "core proceeding" in 28 U.S.C. § 157(b)(2). Under current Supreme Court precedent in *Stern v. Marshall*, a bankruptcy court's jurisdiction may be restricted even when a matter appears to be a core proceeding.<sup>17</sup> In *Stern*, the Supreme Court took a skeptical view of a non-Article III judge's power to bind non-parties in bankruptcy proceedings.<sup>18</sup> The Court ruled that, although the bankruptcy court may have statutorily granted jurisdiction over a proceeding pursuant to 28 U.S.C. § 157(b)(2), it may still lack Constitutional authority over the proceeding.<sup>19</sup> The Court stated that "Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case," and "the fact that a given law or procedure is efficient, convenient, and useful in facilitating

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<sup>15</sup> See *Stern v. Marshall*, 564 U.S. 462 (2011).

<sup>16</sup> 28 U.S.C. § 157(b)(1).

<sup>17</sup> See *Stern v. Marshall*, 564 U.S. 462.

<sup>18</sup> *Id.* at 474.

<sup>19</sup> *Id.*

functions of government, standing alone, will not save it if it is contrary to the Constitution.”<sup>20,21</sup>

Utah’s sister bankruptcy court in the District of Kansas has taken a very critical view of the “judge-made law” of substantive consolidation.<sup>22</sup> Indeed, Judge John T. Flannagan recognized that there “is doubt, however, whether the bankruptcy court has either subject matter or personal jurisdiction over a non-debtor.”<sup>23,24</sup> It is undisputed that substantive consolidation power is exercised by the bankruptcy court under its § 105 equitable powers. However, substantive consolidation over a non-debtor is an exercise of jurisdiction not specifically granted in any statute. *Stern v. Marshall* prohibits the expansion of bankruptcy court jurisdiction under § 105.<sup>25</sup>

Other courts have held that the substantive consolidation of debtors and non-debtors is inappropriate because, among other things, it circumvents the procedures concerning involuntary bankruptcies set forth in section 303 of the Bankruptcy Code.<sup>26</sup>

American argues that substantive consolidation of a non-debtor pursuant to 11 U.S.C. § 105 is an unconstitutional exercise of jurisdiction. The Trustee’s cursory treatment of the significant jurisdictional problem by citations to pre-*Stern v. Marshall* case law is insufficient to

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<sup>20</sup> *Id.* at 499.

<sup>21</sup> *Id.* at 501.

<sup>22</sup> *In re Circle Land and Cattle Corp.*, 213 B.R. 870, 875 (Bankr. D. Kan. 1997); *See also In re Owens Corning*, 419 F.3d 195 (3d Cir. 2005); *Stone v. Eacho*, 127 F.2d 284 (4th Cir. 1942); *Soviéro v. Franklin National Bank of Long Island*, 328 F.2d 446 (2d Cir. 1964); *Chemical Bank New York Trust Co. v. Kheel*, 369 F.2d 845 (2d Cir. 1966); *In re Flora Mir Candy Corp.*, 432 F.2d 1060 (2nd Cir. 1970); *Continental Vending Machine*, 517 F.2d 997 (2nd Cir. 1975)).

<sup>23</sup> *Id.* at 876-77.

<sup>24</sup> Similarly, Michael A. McConnell, bankruptcy judge in the Northern District of Texas in 1985 expressed, “notwithstanding known rulings to the contrary, that he was “unaware of any statutory or common law authority to substantively consolidate debtor and non-debtor partnerships. The non-debtor partnerships are certainly well outside the scope of this court’s jurisdiction.” *In re DRW Property Co.*, 54 B.R. 489, 497 (Bankr. N.D. Tex. 1985)

<sup>25</sup> *See Marshall*, 564 U.S. at 474; *see also Matter of Fesco Plastics Corp.*, 996 F.2d 152 (7th Cir. 1993).

<sup>26</sup> *See, e.g., Audette v. Kasemir (In re Concepts America, Inc.)*, 2018 WL 2085615, \*6 (N.D. Ill. May 3, 2018); *In re Pearlman*, 462 B.R. 849, 854 (Bankr. M.D. Fla. 2012); *Helena Chem. Co. v. Circle Land & Cattle Corp. (In re Circle Land & Cattle Corp.)*, 213 B.R. 870, 877 (Bankr. D. Kan. 1997); *In re Hamilton*, 186 B.R. 991, 993 (Bankr. D. Colo. 1995).

establish that the bankruptcy court can exercise jurisdiction to consolidate a non-debtor. This is especially true when American's rights against a SARE would be eliminated by the consolidation as discussed in Section III, subsection c below. American requests that the bankruptcy court abstain from what it views as an unlawful extension of bankruptcy court jurisdiction.

**III. THIS CASE DOES NOT WARRANT CONSOLIDATION OF AUSTIN BLUFFS BECAUSE SUBSTANTIVE CONSOLIDATION IS AN EXTRAORDINARY REMEDY THAT SHOULD BE USED SPARINGLY, THE TRUSTEE HAS FAILED TO SUFFICIENTLY DEMONSTRATE THAT CONSOLIDATION IS NECESSARY OR BENEFICIAL, AND *NUNC PRO TUNC* CONSOLIDATION VIOLATES AMERICAN'S DUE PROCESS RIGHTS**

**a. The facts pleaded by the Trustee do not adequately demonstrate the applicability of the *Fish* factors to the specific relationship between TFEC and Austin Bluffs.**

***i. The Trustee's recital of generalized facts is insufficient to establish that consolidation is warranted.***

If the court finds that it holds jurisdictional authority in this substantive consolidation matter, the trustee has failed to meet his burden, and consolidation of Austin Bluffs is not warranted. A court's decision to grant substantive consolidation is fact-dependent. According to the Tenth Circuit in *Fish v. East*, "the determination as to whether a subsidiary is an instrumentality is primarily a question of fact and degree."<sup>27</sup> Additionally, the Second Circuit similarly provides that "[s]ubstantive consolidation is an extraordinary remedy because it affects the substantive rights of parties. Substantive consolidation is evaluated on a case-by-case basis and is fact-intensive."<sup>28</sup> Therefore, the Trustee must provide sufficient relevant facts in order to satisfactorily prove that consolidation is merited pursuant to the factors set forth in *Fish*.

The Trustee has failed to cite sufficient specific facts regarding the relationship between

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<sup>27</sup> 114 F.2d 177, 191 (10th Cir. 1940).

<sup>28</sup> *Chemical Bank N.Y. Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d Cir. 1966).

TFEC and Austin Bluffs. In his Memorandum, the Trustee provides several general facts regarding the general relationship between TFEC and most of its subsidiaries.<sup>29</sup> Very little discussion is given to the individual relationship between TFEC and each subsidiary, including Austin Bluffs. The only facts the Trustee provides that specifically pertain to Austin Bluffs are that Austin Bluffs holds title to real property and that Austin Bluffs has not filed a bankruptcy petition.<sup>30</sup> These facts are grossly insufficient to demonstrate that corporate structure of Austin Bluffs should be disregarded. Simply put, the Trustee has not carried his burden under *Fish* with the limited, general, facts alleged.<sup>31</sup>

***ii. The Trustee fails to cite any specific facts that would justify disregarding Austin Bluffs' corporate form.***

Further, although Austin Bluffs is a subsidiary of TFEC, Austin Bluffs is a completely valid, separate business entity. In *In re Biorge*, the Bankruptcy Court for the District of Utah held that an LLC held by debtors was a separate entity and thus was not part of the debtors' bankruptcy case.<sup>32</sup> Citing a decision of the Fourth Circuit Court of Appeals, the Bankruptcy Court stated that:

It is a fundamental precept of corporate law that each corporation is a separate legal entity with its own debts and assets, even when such corporation is wholly owned by another entity. . . . Where an individual creates a corporation as a means of carrying out his business purposes, he may not ignore the existence of the corporation in order to avoid its disadvantages.<sup>33</sup>

The court thereby acknowledged the status of subsidiaries as separate legal entities and that creators of LLCs must live with LLC disadvantages as well as advantages.

In the instant case, Austin Bluffs as an LLC was created by TFEC presumably for the

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<sup>29</sup> See Memorandum of Law in Support of Chapter 11 Trustee's Motion to Consolidate at ¶¶ 4-33.

<sup>30</sup> *Id.* at ¶¶ 6, 36.

<sup>31</sup> 114 F.2d at 191.

<sup>32</sup> *In re Biorge*, 2011 Bankr. LEXIS 1141 (Bankr. D. Utah 2011).

<sup>33</sup> *Id.* at \*4 (quoting *Kreiser v. Goldberg*, 478 F.3d 209 (4th Cir. 2007)).

advantages provided by the LLC form. More specifically, TFEC likely sought the advantages of holding real property in a separate and distinct entity. American recognized the distinction and entered into a bargain with Austin Bluffs, based on its separation from TFEC. TFEC has reaped those benefits through using Austin Bluffs as a separate entity and a real estate holding company. Now, TFEC, through the Trustee, seeks to make a 180-degree turn and argue that Austin Bluffs is no more than an alter ego of its parent corporation. To accomplish this the Trustee provides no specific analysis of Austin Bluffs relationship with TFEC. American recognizes that the trustee provided some general details of TFEC's business operations as they allegedly relate to all of TFEC's subsidiaries, but Trustee's discussion fails to adequately explain why Austin Bluffs specifically should not be permitted to stand as a separate legal entity. Following *In re Biorge*, the Court should operate on the assumption that Austin Bluffs is a separate entity. The Trustee's failure to enumerate specific facts as they relate to any entanglement of Austin Bluffs with TFEC is fatal to his motion.

**b. The facts pleaded by the Trustee do not demonstrate the benefit provided by or the harm avoided by consolidation.**

The Trustee's proposed justification rests almost exclusively on the *Fish* factors from the Tenth Circuit court's opinion in 1940. However, the Bankruptcy Court for the District of Utah has also expressed approval of the test for substantive consolidation outlined by the D.C. Circuit in *In re Auto-Train Corp.*<sup>34,35</sup> The test in *Auto-Train* simplifies the factors regarding consolidation into a two part inquiry, namely that "the proponent . . . show not only a substantial identity between the entities to be consolidated, but also that consolidation is necessary to avoid some harm or to realize some benefit."<sup>36</sup> *Auto-Train* additionally states that if a creditor objects on

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<sup>34</sup> *In re Waterford Funding, LLC*, 2011 Bankr. LEXIS 330 (Bankr. D. Utah 2011).

<sup>35</sup> *In re Auto-Train Corp.*, 810 F.2d 270 (D.C. Cir. 1987).

<sup>36</sup> *Id.* at 276.

the grounds that it will be prejudiced by the consolidation, “the court may order consolidation only if it determines that the demonstrated benefits of consolidation heavily outweigh the harm.”<sup>37</sup> “One commentator has said, in the context of two debtors in bankruptcy, ‘Better, we think, to ask are any creditors going to be hurt by this consolidation and, if the answer to that is yes (or more properly, if the one seeking consolidation cannot prove the opposite), consolidation should be denied in almost every case.’”<sup>38</sup>

In this instance, there are very few benefits offered by consolidation. The Trustee offers little explanation of the specific benefits of consolidating Austin Bluffs, making no more than brief allusions to efficiency and access to assets. The Trustee already has power over Austin Falls’ assets as he controls the sole member in Austin Falls as the Trustee for TFEC. He has power to dispose of the single asset held by Austin Falls as he sees fit, regardless of whether or not Austin Falls is in a consolidated bankruptcy case. Because the Trustee already has this power, American argues that consolidating Austin Falls would do nothing more than add another layer of complexity to the management of assets. The Trustee could have avoided the time and administrative expense of filing and holding a hearing on his Motion to Consolidate and done as he sees fit with the single asset of Austin Bluffs.

In contrast, the consolidation would greatly harm American. American is owed a debt secured by the sole asset held by Austin Bluffs. American’s right and ability to be made whole on its debt by access to the collateral would be complicated by the bankruptcy. Consolidation of Austin Bluffs would only serve to increase the administrative costs to dispose of the property. In addition to the increased administrative costs, a consolidation would eviscerate American’s rights under the bankruptcy code as a creditor in a SARE. The Trustee has provided no specific

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<sup>37</sup> *Id.*

<sup>38</sup> *In re Circle Land and Cattle Corp.*, 213 B.R. 870, 875-76 (Bankr. D. Kan. 1997) (Citing 3 DAVID G. EPSTEIN, ET AL., BANKRUPTCY, § 11-41. at 190 (1992)).

justification for inflicting this harm of American. The trustee's failure to demonstrate a real benefit of consolidating Austin Bluffs or the necessity of consolidation to avoid a specific harm is fatal to his motion to consolidate Austin Bluffs.

**c. *Nunc pro tunc* consolidation would violate Austin Bluffs' due process rights as a prospective creditor of the bankruptcy estate in a single asset bankruptcy.**

The Fifth Amendment states that “[n]o person shall . . . be deprived of life, liberty, or property without due process of law.”<sup>39</sup> The Bankruptcy Court for the District of Utah has said that “[a]n order consolidating multiple entities into one has the potential to dramatically affect the rights of the entities’ creditors. Consolidation should be ordered reluctantly and only after affording notice and an opportunity to be heard to all those whose rights may be affected by the order.”<sup>40</sup> Additionally, as quoted above, the Second Circuit has given a very similar caution.<sup>41</sup> Thus, consolidation is seen as a drastic remedy as it can significantly impact creditors’ rights when authorized. These impacted rights likely include due process, as a creditor’s interest in property could be adversely affected. This harm is especially significant when ordering consolidation *nunc pro tunc*, as the timing of the consolidation can drastically affect a creditor’s rights and opens the creditor to undue scrutiny, particularly with regard to actions taken during the period when the non-debtor was not legally in a bankruptcy proceeding but now will be considered to have been under bankruptcy jurisdiction.

American has been given an opportunity to be heard on the matter of consolidation via this Objection, but the possibility of *nunc pro tunc* consolidation bears heavily on American’s right to due process. Had American been aware of the possibility of Austin Bluffs being included

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<sup>39</sup> U.S. Const. amend. V.

<sup>40</sup> *United States v. AAPC, Inc. (In re AAPC, Inc.)*, 277 B.R. 785, 789 (Bankr. D. Utah 2002).

<sup>41</sup> *Chemical Bank N.Y. Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d Cir.1966) (“The power to consolidate should be used sparingly because of the possibility of unfair treatment of creditor of a corporate debtor who have dealt solely with that debtor without knowledge of its interrelationship with others.”).

in TFEC's bankruptcy when TFEC filed its petition, American would have behaved differently with respect to its relationship with Austin Bluffs. American could have obtained additional protections for its interest in Austin Bluffs' property, especially those protections provided in the unique circumstance of a SARE bankruptcy.<sup>42</sup> Such protections include adequate protection payments and accelerated ability to obtain relief from stay. American therefore argues that, because consolidation would eviscerate its rights to protect its interests in the property of Austin Bluffs, consolidation is a violation of its rights to due process.

American also draws the Court's attention to the trustee's failure to provide adequate notice to all parties in interest. It appears from the sole certificate of service that the trustee failed to serve the Trustee's Memorandum and associated exhibits. Fortunately, American was later made aware of the Memorandum upon retaining counsel, but other creditors may not have been as fortunate. Because substantive consolidation is an extraordinary form of relief, it is of utmost importance for all parties in interest to have full knowledge of the facts and arguments made by the movant prior to any hearings on the matter. Therefore, the Trustee should be required to adhere strictly to noticing requirements to ensure no creditor's due process rights have been violated.

### **CONCLUSION**

Consequently, for the reasons articulated above, American opposes the Trustee's Motion and requests that this court deny the Motion insofar as it pertains to Austin Falls.

Dated: March 8, 2019

/s/  
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Steven M. Rogers  
Attorney for American Savings Life Insurance

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<sup>42</sup> See 11 U.S.C. § 362(d)(3).

**CERTIFICATE OF SERVICE – BY NOTICE OF ELECTRONIC FILING (CM/ECF)**

I hereby certify that on **March 8, 2019** I electronically filed the foregoing AMENDED Motion to Modify Plan Pre-Confirmation with the United States Bankruptcy Court for the District of Utah by using the CM/ECF system. I further certify that the parties of record in this case, as identified below, are registered CM/ECF users and will be served through the CM/ECF system.

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- **John J. Wiest** wiest.john@dorsey.com

**CERTIFICATE OF SERVICE – MAIL, OTHER**

I hereby certify that on **March 8, 2019** I caused to be served a true and correct copy of the foregoing Motion to Modify Plan Pre-Confirmation as follows:

**Mail Service - By regular first-class United States mail, postage fully pre-paid, addressed to:**  
-NONE-

**Mail Service to Entire Matrix – By regular first-class United States mail, postage fully pre-paid,**

**addressed to all parties who did not receive electronic service as set forth herein listed on the Official Court Mailing Matrix dated March 8, 2019 attached hereto.**

*-NONE-*

\_\_\_\_\_/s/  
Jackson Alvey  
Law Clerk

Number: FAL160315

## INSTALLMENT PROMISSORY NOTE SECURED BY DEED OF TRUST

**\$462,500.00**

Mesa, Arizona

Dated: April 20, 2016

For value received, the undersigned THE FALLS AT AUSTIN BLUFFS, LLC, a Colorado Limited Liability Company, and STEVEN L. DOWN and COLLEEN R. DOWN, husband and wife, (hereafter severally and collectively called "Maker"), promise to pay to the order of AMERICAN SAVINGS LIFE INSURANCE COMPANY, or its assigns (hereafter called "Holder"), at its office at 935 E. Main Street, Suite 100, Mesa, AZ 85203, or such other address as said Holder shall direct, the sum of FOUR HUNDRED SIXTY TWO THOUSAND FIVE HUNDRED and 00/100 DOLLARS (\$462,500.00) plus interest thereon at the rate of Ten Percent (10.00%) per annum (hereafter called the "Note Rate") from May 1, 2016 until paid. All sums payable hereunder to be paid in lawful money of the United States of America.

This note shall be payable in Eleven (11) consecutive monthly installments of THREE THOUSAND EIGHT HUNDRED FIFTY FOUR AND 17/100 DOLLARS (\$3,854.17) beginning June 1, 2016, plus one BALLOON PAYMENT of all unpaid principal and interest on May 1, 2017 (the Maturity Date). Each payment shall be applied first to the payment of any costs, fees, delinquency or other charges incurred in connection with the indebtedness evidenced hereby, next to the interest due, then to impound requirements, and finally to reduce the principal balance.

Option: Provided that Maker is not in default hereunder or under any of the documents evidencing or securing the payment of this note, Maker may opt to extend the aforementioned Maturity Date an additional Six (6) months by payment of an extension fee of \$4,625.00 payable on or before the aforementioned Maturity Date, in addition to the continued payment of monthly installments as described above.

This note is secured by a deed of trust and assignment of rents on real property. In addition to the other amounts provided herein, there shall be paid into an impound account maintained by Holder a monthly sum equal to 1/12th of the amount estimated by Holder to be necessary to pay the annual property taxes and assessments, personal property taxes, insurance premiums and all similar charges on the real property covered by said deed of trust. No interest shall accrue on impound funds. Each monthly installment will be combined with the proper impound amount required. The impound funds are pledged as additional security for all sums due under this Note. If the amount of impounds are projected by Holder to be not sufficient to pay the obligations of the impound account when they are due, Maker agrees to pay Holder the projected shortage upon demand.

A prepayment fee equal to the balance of Six (6) months interest shall be paid on all principal prepayments for the first six (6) months (a six month interest guarantee).

If any installment, including the required impound amount, remains unpaid in whole or in part for more than ten (10) days after the installment date (hereafter called the "grace period"), all parties obligated on this note agree to pay as a delinquency charge the sum THREE HUNDRED EIGHTY FIVE AND 00/100 DOLLARS (\$385.00) for each overdue payment. Maker agrees to pay the aforementioned late fee even though Holder elects to increase the interest rate due to default.

Any of the following conditions shall constitute a default hereunder:

- a. One day after the expiration of the above set forth grace period, if any amount due on this note remains unpaid in whole or in part, or
- b. fifteen days after written notice there is a failure to perform any covenant or condition of the deed of trust given to secure this note, or
- c. one day after failure to pay the BALLOON payment on the Maturity Date.

Number: FAL160315

Immediately upon a default hereunder, Maker agrees, without notice, to pay interest at the rate of **Thirteen Percent (13.00%) per annum**. Said rate shall be payable on the unpaid principal balance from the date to which the interest has been paid. Maker agrees to increase each installment payment by the increased interest amount. In the event Maker fails to cure a default condition for thirty consecutive days, Maker agrees, without notice, to pay interest at the rate of **Eighteen Percent (18.00%) per annum**. Said rate shall supersede the prior rate, and be payable on the unpaid principal balance from the date to which the interest has been paid. Maker agrees to increase each installment payment by the increased interest amount. The Note Rate shall be reinstated only after all past due installments and fees have been paid.

Upon a default hereunder, Holder, at its option, may elect that the unpaid balance of this note be payable immediately together with all interest, costs, fees and prepayment charges due thereon. Any reinstatement of this note shall also reinstate the Note Rate, effective from the date of reinstatement.

Should this note or any part of the transaction in which it was given, be placed in the hands of an attorney for interpretation, negotiation, collection, enforcement or for the prosecution or defense of any legal proceedings, irrespective of whether the Holder is the claimant or respondent, Maker agrees to pay Holder's reasonable attorney's fees and costs, including expert witness fees. The above provision concerning attorney's fees shall not be construed to limit payor's right to recover attorney's fees as provided by law. All provisions of this note shall be governed by the laws of the State of Colorado.

Maker hereby:

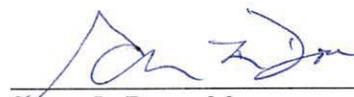
- a. agrees to be jointly and severally bound;
- b. severally waives any homestead or exemption right against said debt;
- c. severally waives presentment, protest, demand, notice of dishonor or default or notice of any kind with respect to this note;
- d. agrees to be bound by each and every term of this note;
- e. consents to any renewal, extension or acceleration of time of payment of this note or any part thereof;
- f. consents to the release of any party liable for the payment thereof or the release of any collateral given to secure this note; and
- g. severally waives any setoff right against said debt.

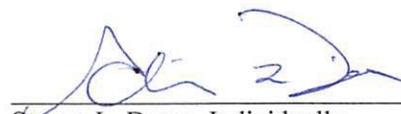
Time is of the essence of this Promissory Note and by accepting payment of any sum provided herein after its due date, Holder does not waive its right to require prompt payment when due of all other sums due or to declare default for failure to so pay.

All the obligations hereunder shall apply without notice and without affecting or releasing any liability.

Maker's obligation of this note includes all the provisions of the accompanying deed of trust, including the environmental provisions.

THE FALLS AT AUSTIN BLUFFS, LLC

 4/18/14  
 Steven L. Down, Manager Date

 4/18/14  
 Steven L. Down, Individually Date

 4/18/14  
 Colleen R. Down, Individually Date

--- Notary Acknowledgment on Following Page ---

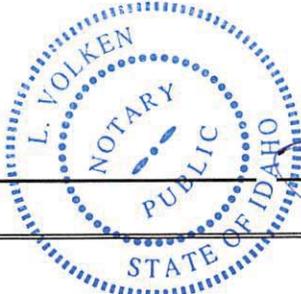
Number: FAL160315

STATE OF Idaho  
COUNTY OF Ada

This instrument above was acknowledged before me this 18th day of April, 2016, by the personal appearance of: Steven L. Down, Individually and as Manager of THE FALLS AT AUSTIN BLUFFS, LLC

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

4/10/18  
My commission will expire



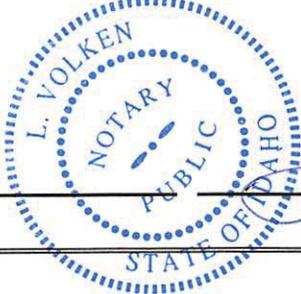
[Signature]  
Notary Public

STATE OF Idaho  
COUNTY OF Ada

This instrument above was acknowledged before me this 18th day of April, 2016, by the personal appearance of: Colleen R. Down, Individually

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

4/10/18  
My commission will expire



[Signature]  
Notary Public

Electronically Recorded Official Records El Paso County CO  
Chuck Broerman, Clerk and Recorder  
TD1000 N

<p>RECORDING REQUESTED BY:</p>  <p>When recorded mail to:</p> <p>AMERICAN SAVINGS LIFE INS. CO. 935 E. Main Street, Suite 100 Mesa, AZ 85203-8849</p>	
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Number: FAL160315

SPACE ABOVE THIS LINE FOR RECORDER'S USE

### DEED OF TRUST AND ASSIGNMENT OF RENTS

THIS DEED OF TRUST dated April 20, 2016, is made between:

**TRUSTOR:** THE FALLS AT AUSTIN BLUFFS, LLC, A Colorado Limited Liability Company  
Address: 994 East New Hope, Draper, UT 84020

**BENEFICIARY:** AMERICAN SAVINGS LIFE INSURANCE COMPANY, an Arizona Corporation  
Address: 935 E. Main Street, Suite 100, Mesa, AZ 85203

**TRUSTEE:** EL PASO COUNTY PUBLIC TRUSTEE  
Address: 105 E. Vermijo Avenue, Suite 120, Colorado Springs, Colorado 80903

The real property that is subject to and covered by this deed of trust is located in El Paso County, Colorado, and is described as follows:

**\*\*SEE SCHEDULE A\*\***

THIS DEED OF TRUST, made on the above date between the Trustor, Trustee, and Beneficiary above named,

WITNESSETH: That Trustor irrevocably grants and conveys to Trustee in Trust, with Power of Sale, the above described real property and all inventory, tools, fixtures, appliances, carpets, drapes, fences, wells, pumps and similar personal property used in any way in connection with the use, operation and occupancy of said property, its buildings and improvements, together with leases, rents, issues, profits, or income thereof, (all of which are hereinafter called 'property income'); SUBJECT, HOWEVER, to the right, power, and authority hereinafter given to and conferred upon Beneficiary to collect and apply such property income; AND SUBJECT TO existing taxes, assessments, liens, encumbrances, covenants, conditions, restriction, right of way, and easements of record.

FOR THE PURPOSE OF SECURING:

1. Performance of each agreement of Trustor herein contained.
2. Payment of the indebtedness evidenced by promissory note or notes of even date herewith, and any extension or renewal thereof in the principal sum of FOUR HUNDRED SIXTY TWO THOUSAND FIVE HUNDRED and 00/100 DOLLARS (\$462,500.00) executed by Trustor in favor of Beneficiary or order.
3. Payment of additional sums and interest thereon which may hereafter be loaned to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Deed of Trust.

25539 <sup>UT</sup>  UNITED TITLE COMPANY

Initials: SLB ARP

This Document was electronically recorded.

Date: 4/21/16

Reception No.: 216542086

RECORDING REQUESTED BY:

When recorded mail to:

AMERICAN SAVINGS LIFE INS. CO.  
935 E. Main Street, Suite 100  
Mesa, AZ 85203-8849

Number: *FAL160315*

SPACE ABOVE THIS LINE FOR RECORDER'S USE

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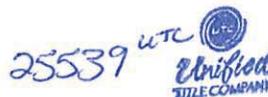
**\*\*SEE SCHEDULE A\*\***

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WITNESSETH: That Trustor irrevocably grants and conveys to Trustee in Trust, with Power of Sale, the above described real property and all inventory, tools, fixtures, appliances, carpets, drapes, fences, wells, pumps and similar personal property used in any way in connection with the use, operation and occupancy of said property, its buildings and improvements, together with leases, rents, issues, profits, or income thereof, (all of which are hereinafter called 'property income'); SUBJECT, HOWEVER, to the right, power, and authority hereinafter given to and conferred upon Beneficiary to collect and apply such property income; AND SUBJECT TO existing taxes, assessments, liens, encumbrances, covenants, conditions, restriction, right of way, and easements of record.

FOR THE PURPOSE OF SECURING:

1. Performance of each agreement of Trustor herein contained.
2. Payment of the indebtedness evidenced by promissory note or notes of even date herewith, and any extension or renewal thereof in the principal sum of FOUR HUNDRED SIXTY TWO THOUSAND FIVE HUNDRED and 00/100 DOLLARS (\$462,500.00) executed by Trustor in favor of Beneficiary or order.
3. Payment of additional sums and interest thereon which may hereafter be loaned to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Deed of Trust.



Initials: SLB ARP

TO PROTECT THE SECURITY OF THIS DEED OF TRUST, TRUSTOR AGREES:

4. To keep said property in good condition and repair; not to remove or demolish any building thereon; to complete or restore promptly, and in good and workmanlike manner any building which may be constructed, damaged, or destroyed thereon, and to pay when due all claims for labor performed and materials furnished therefore; to comply with all laws affecting said property or requiring any alterations or improvements to be made thereon; not to commit or permit waste thereof; not to commit, suffer, or permit any act upon said property in violation of law; and do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general.

5. a) To provide, maintain, and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The amount collected under any fire or other insurance policy may be applied by Beneficiary upon any indebtedness secured hereby and in such order as Beneficiary may determine, or at option of Beneficiary the entire amount so collected or any part thereof may be released to Trustor. Such application or release shall not cure or waive any default or notice of Trustee's sale hereunder or invalidate any act done pursuant to such notice.

b) In the event of loss, Trustor shall give Beneficiary immediate notice by mail. Beneficiary may make proof of loss if not made promptly by Trustor. Each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Beneficiary, instead of payment to Trustor and Beneficiary jointly.

c) Trustor hereby appoints Beneficiary as Trustor's Attorney-In-Fact to act in Trustor's capacity to obtain fire insurance in Trustor's name, only in the event that Trustor fails to provide or maintain or deliver to Beneficiary fire insurance satisfactory to Beneficiary.

d) In the event that Trustor fails to provide or maintain or deliver to Beneficiary fire insurance satisfactory to Beneficiary, Beneficiary shall have no obligation to acquire insurance of any type for benefit of Trustor, and only at Beneficiary's sole discretion and as Beneficiary may see fit, shall Beneficiary obtain, renew or replace fire insurance.

e) The rights, powers and authority of Beneficiary to exercise any and all of the rights and powers herein granted as Trustor's Attorney-In-Fact, shall commence and be in full force and effect upon the execution of this deed of trust by Trustor, and shall remain in full force and effect until this deed of trust is released.

6. To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; and to pay all costs and expenses of Beneficiary and Trustee, including cost of evidence of title and attorneys' fees in a reasonable sum, in any such action or proceeding in which Beneficiary or Trustee may appear or be named, and in any suit brought by Beneficiary or Trustee to foreclose this Deed of Trust.

7. a) To pay: before delinquent, all taxes and assessments affecting said property; when due, all encumbrances, charges, and liens, with interest, on said property or any part thereof, which appear to be prior or superior hereto; all costs, fees, and expenses of this Trust, including, without limiting the generality of the foregoing, the fees of Trustee for issuance of any Deed of Partial Release and Partial Reconveyance or Deed of Release and Full Reconveyance, and all lawful charges, costs and expenses in the event of reinstatement of, following default in, this Deed of Trust or the obligations secured hereby.

b) Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest, or compromise any encumbrance, charge, or lien which in the judgment of either appears to be prior or superior hereto; and, in exercising any such powers, pay necessary expenses, employ counsel, and pay his reasonable fees.

8. To pay immediately and without demand all sums expended by Beneficiary or Trustee pursuant to the provisions hereof, together with interest from date of expenditure at the highest default rate as is provided for in the note secured by this Deed of Trust. Any amounts so paid by Beneficiary or Trustee shall become a part of the debt secured by this Deed of Trust and a lien on said premises or immediately due and payable at option of Beneficiary or Trustee.

9. To pay an effective rate of interest, which is equal to the rate provided for in the Note, plus any additional rate of interest resulting from and charges of, or in the nature of, interest paid in connection with the loan evidenced by the Note, that certain commitment letter issued by Beneficiary to Trustor and Funding Instructions. Notwithstanding any provision herein, or in the Note or in any related agreement between Trustor and Beneficiary, the total liability of Trustor for payments in the nature of interest shall not exceed the limits imposed by the usury laws of the State of Colorado. If Beneficiary receives as interest an amount which would exceed such limits, such amount which would be excessive interest shall be applied to the reduction of the unpaid principal balance and not to the payment of the interest; and if a surplus remains after full payment of principal and lawful interest, the surplus shall be remitted to Trustor by Beneficiary, and Trustor hereby agrees to accept such remittance. Trustor shall not institute any action or file or defend any action based upon the charging or collection of usurious interest hereunder or under the Note unless Trustor shall give Beneficiary written notice of an intent to do so with the right of Beneficiary to comply with applicable law by notification and refund to Trustor, and making necessary adjustments as aforesaid within fifteen (15) days after receipt by Beneficiary of such written notice from Trustor.

IT IS MUTUALLY AGREED:

10. That any award of damages in connection with any condemnation or any such taking, or for injury to the property by reason of public use, or for damages for private trespass or injury thereto, is assigned and shall be paid to Beneficiary as further security for all obligations secured hereby (reserving unto the Trustor, however, the right to sue therefore and the ownership thereof subject to this Deed of Trust), and upon receipt of such moneys Beneficiary may hold the same as such further security, or apply or release the same in the same manner and with the same effect as above provided for disposition of proceeds of fire or other insurance.

11. That time is of the essence of this Deed of Trust, and that by accepting payment of any sum secured hereby after its due date, Beneficiary does not waive his right either to require prompt payment when due of all other sums so secured or to declare default for failure so to pay.

12. That at any time or from time to time, and without notice, upon written request of Beneficiary and presentation of this Deed of Trust, and said note(s) for endorsement, and without liability therefore, and without affecting the personal liability of any person for payment of the indebtedness secured hereby, and without affecting the security hereof for the full amount secured hereby on all property remaining subject hereto, and without the necessity that any sum representing the value or any portion thereof of the property affected by the Trustee's action be credited on the indebtedness, and upon payment of its fees, the Trustee may (a) release and reconvey all or any part of said property; (b) consent to the making and recording, or either, of any map or plat of the property or any part thereof; (c) join in granting any easement thereon; (d) join in or consent to any extension agreement or any agreement subordinating the lien, encumbrance, or charge hereof.

13. That upon written request of Beneficiary stating that all sums secured hereby have been paid, and upon surrender of this Deed of Trust and said note(s) to Trustee for cancellation and retention, and upon payment of its fees. Trustee shall release and reconvey, without covenant or warranty, express or implied, the property then held hereunder. The recitals in such reconveyance of any matters or facts shall be conclusive proof of the truthfulness thereof. The grantee in such reconveyance may be described as "the person or persons legally entitled thereto."

14. That as additional security, Trustor hereby gives to and confers upon Beneficiary the right, power, and authority, during the continuance of this Trust, to collect the property income, reserving to Trustor the right, prior to any default by Trustor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, to collect and retain such property income as it becomes due and payable. Upon any such default, Beneficiary may at any time, without notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof in his own name, sue for or otherwise collect such property income, including that past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorneys' fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine. Trustor hereby waives any requirement for a receiver's bond. The entering upon and taking possession of said property, the collection of such property income, and the application thereof as aforesaid, shall not cure or waive any default or notice of Trustee's sale hereunder or invalidate any act done pursuant to such notice.

15. That upon default by Trustor in the payment of any indebtedness secured hereby or in performance of any agreement hereunder, Beneficiary may declare all sums secured hereby immediately due and payable by delivery to Trustee of written notice thereof, setting forth the nature thereof, and of election to cause to be sold said property under this Deed of Trust. Beneficiary also shall deposit with Trustee this Deed of Trust, said note(s), and all documents evidencing expenditures secured hereby. Trustee shall record and give notice of Trustee's sale in the manner required by law, and after the lapse of such time as may then be required by law, Trustee shall sell, in the manner required by law, said property at public auction at the time and place fixed by it in said notice of Trustee's sale to the highest bidder for cash in lawful money of the United States, payable at time of sale. Trustee may postpone or continue the sale by giving notice of postponement or continuance by public declaration at the time and place last appointed for the sale. Trustee shall deliver to such purchaser its Deed conveying the property so sold, but without any covenant or warranty, expressed or implied. Any persons, including Trustor, Trustee, or Beneficiary, may purchase at such sale. After deducting all costs, fees, and expenses of Trustee and of this Trust, including cost of evidence of title and cost of environmental reports in connection with sale and reasonable attorneys' fees, Trustee shall apply the proceeds of sale to payment of: All sums then secured hereby and all other sums due under the terms hereof, with accrued interest; and the remainder, if any, to the person or persons legally entitled thereto, or as provided by the laws of the State of Colorado. To the extent permitted by law, an action may be maintained by Beneficiary to recover a deficiency judgment for any balance due hereunder.

16. That Beneficiary may foreclose this Deed of Trust, insofar as it encumbers the Land, Fixtures and Improvements (collectively the "Property"), either by judicial action or through Trustee. It is hereby specifically agreed and understood that the Mortgaged Property is not agricultural real estate as defined in § 38-38-302(4), C.R.S. If Beneficiary elects to foreclose through the Trustee, such action will be initiated by Beneficiary's filing of its notice of election and demand for sale with Trustee. Upon the filing of such notice of election and demand for sale, Trustee shall promptly comply with all notice and other requirements of the laws of Colorado then in force with respect to such sales, and shall give four (4) weeks' public notice of the time and place of such sale by advertisement weekly in some newspaper of general circulation then published in the County or City and County in which the Property is located. Any sale conducted by Trustee pursuant to this Section shall be held at such place as similar sales are then customarily held in such County or City and County, provided that the actual place of sale shall be specified in the notice of sale. The proceeds of any sale under this Section shall be applied first to the fees and expenses of the officer conducting the sale, and then to the reduction or discharge of the Indebtedness; any surplus remaining shall be paid over to Trustor or to such other person or persons as may be lawfully entitled to such surplus. At the conclusion of any foreclosure sale, the officer conducting the sale shall execute and deliver to the purchaser at the sale a certificate of purchase which shall describe the property sold to such purchaser and shall state that upon the expiration of the applicable periods of redemption, the holder of such certificate will be entitled to a deed to the property described in the certificate. After the expiration of all applicable periods of redemption, unless the property sold has been redeemed, upon request from the holder of the certificate of purchase or the last certificate of redemption, as the case may be, and receipt by the officer who conducted such sale of the original certificate of purchase if no

redemption by a junior lienor has occurred, and all applicable fees, all right, title and interest, whether legal or equitable, in the property described in the certificate of purchase or last certificate of redemption, as the case may be, shall pass to the holder of such certificate; and the officer who conducted such sale shall execute a deed confirming the title of such holder. Nothing in this Section dealing with foreclosure procedures or specifying particular actions to be taken by Beneficiary or Trustee or any similar officer shall be deemed to contradict or add to the requirements and procedures now or hereafter specified by Colorado law, and any such inconsistency shall be resolved in favor of Colorado law applicable at the time for foreclosure.

17. That Beneficiary may, at its option, accomplish all or any of the aforesaid in such a manner as permitted or required by the Colorado Revised Statutes regarding foreclosure or real estate and the Colorado Uniform Commercial Code. Nothing contained in this Section shall be construed to limit in any way Trustee's right to sell the Mortgaged Property by private sale if, and to the extent that such private sale is permitted under the laws of the State of Colorado, or by public or private sale after entry of a judgment by any court of competent jurisdiction ordering same. At any such sale:

a) whether made under the power herein contained, any other Legal Requirement or by virtue of any judicial proceedings or any other legal right, remedy or recourse, it shall not be necessary for Trustee to have physical possession, or to have constructive possession of, the Mortgaged Property (Trustor shall deliver to Trustee any portion of the Mortgaged Property not actually or constructively possessed by Trustee immediately upon demand by Trustee) and the title to and right of possession of any such property shall pass to the purchaser thereof as completely as if the same had been actually present and delivered to purchaser at such sale;

b) each and every recital contained in any instrument of conveyance made by Trustee shall conclusively establish the truth and accuracy of the matters recited therein, including without limitation, nonpayment of the Indebtedness, advertisement and conduct of such sale in the manner provided herein and otherwise by law and appointment of any successor Trustee hereunder;

c) any and all prerequisites to the validity thereof shall be conclusively presumed to have been performed;

d) the receipt of Trustee or of such other party or officer making the sale shall be sufficient to discharge to the purchaser or purchasers for his or their purchase money, and no such purchaser or purchasers, or his or their assigns or personal representatives, shall thereafter be obligated to see to the application of such purchase money or be in any way answerable for any loss, misapplication or nonapplication thereof;

e) to the fullest extent permitted by law, Trustor shall be completely and irrevocably divested of all of its right, title, interest, claim and demand whatsoever, either at law or in equity, in and to the property sold (subject to Trustor's rights to redeem, if any) and such sale shall be a perpetual bar, both at law and in equity, against Trustor and against all other persons claiming or to claim the property sold or to any part thereof by, through or under Trustor; and

f) to the extent and under such circumstances as are permitted by law, Beneficiary may be a purchaser at any such sale.

18. That Beneficiary may appoint a successor Trustee in the manner prescribed by law. A successor Trustee herein shall, without conveyance from the predecessor Trustee, succeed to all the predecessor's title, estate, rights, powers, and duties. Trustee may resign by mailing or delivering notice thereof to Beneficiary and Trustor.

19. That this Deed of Trust applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors, and assigns. The term Beneficiary shall mean the owner and holder of the note(s) secured hereby, whether or not named as Beneficiary herein. In this Deed of Trust, whenever the context so requires, the masculine gender includes the feminine and neuter, and the singular number includes the plural.

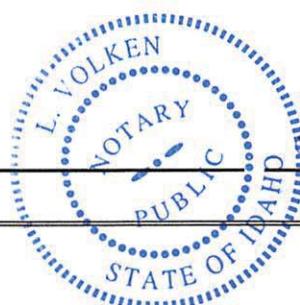
20. That Trustee accepts this Trust when this Deed of Trust, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party unless brought by Trustee.

21. That the trust relationship created by this Deed of Trust is limited solely to the creation and enforcement of a security interest in real property. All of Trustee's duties, whether fiduciary or otherwise, are strictly limited to those duties imposed by this instrument and the laws of the State of Colorado, inclusive, and no additional duties, burdens or responsibilities are or shall be placed on Trustee.

22. To the provisions in the addendum attached hereto. The undersigned Trustor requests that a copy of any notice of Trustee's sale hereunder be mailed to him at this address herein before set forth.

The Falls at Austin Bluffs, LLC

Steven L. Down 4/18/16  
Steven L. Down, Manager Date

STATE OF <u>Idaho</u> COUNTY OF <u>Ada</u>	This instrument above was acknowledged before me this <u>18<sup>th</sup></u> day of <u>April</u> , 20 <u>16</u> , by the personal appearance of: Steven L. Down, Manager of The Falls at Austin Bluffs, LLC, a Colorado Limited Liability Company.
IN WITNESS WHEREOF, I have hereunto set my hand and official seal.	
<u>4/10/18</u> My commission will expire	 <u>[Signature]</u> Notary Public

## ***ADDENDUM TO DEED OF TRUST***

A. Trustor agrees not to rent, lease, sell, transfer, encumber, convey or dispose of the trust property without the prior written consent of Beneficiary. In the event Beneficiary gives its written consent to any such transaction on the premises, such transaction shall be inferior and junior to the lien of this deed of trust. Trustor agrees to pay all expenses incurred by Beneficiary and Trustee in connection with any such transaction or request for same, including a reasonable fee charged by Beneficiary. In the event of any subsequent transfer or encumbrance, Trustor agrees not to allow any default, trustee's sale or foreclosure proceeding on said subsequent lien or encumbrance. Beneficiary shall not unreasonably withhold its consent to any of the above transactions; provided, however, that any rental or lease of the premises shall: (a) require the payment of a commercial monthly rental; (b) provide that the landlord shall not collect more than one month's rent in advance, except the last month's rent; and (c) provide that the tenant upon notice and demand from Beneficiary that payment under this deed of trust and accompanying note is in default, will make all future rental or lease payments to Beneficiary. EXCEPTION: Trustor may rent the Trust property without the prior written consent of Lender provided such rental is for a term not to exceed one year and meets the requirements stated above.

(1) Trustor shall timely (within 30 days) provide Beneficiary with new leases of the subject property, including amendments, changes or extensions to existing leases. All leases shall include a subordination provision to this Deed of Trust, satisfactory to Beneficiary.

B. ENVIRONMENTAL PROVISIONS: Environmental Protection Obligation. The following covenants, representations, warranties, obligations, agreements of indemnity and related agreements are collectively referred to as the Trustor's "Environmental Protection Obligation." Trustor as used herein shall refer to the Trustor identified above.

(1) Trustor represents and covenants that: (a) Trustor has not caused or suffered to occur and Trustor will not hereafter cause or suffer to occur, a discharge, spillage, uncontrolled loss, seepage of filtration of oil or petroleum or chemical liquids or solids, liquid or gaseous products or hazardous waste (a "spill"), or hazardous substance as those terms are used in or the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as the same may be amended from time to time (collectively the "Act"), at, upon, under or within the Mortgaged Property or any contiguous real estate which has been included in the property description of the Mortgaged Property within the preceding three years; (b) Trustor has not been, nor will be involved in operations at or in the Mortgaged Property which could lead to the imposition on Trustor of liability or the creation of a lien on the Mortgaged Property, under the Act or under any similar applicable laws or regulations; and (c) Trustor has not permitted and will not permit any tenant or occupant of the Mortgaged Property to engage in any activity that could lead to the imposition of liability on such tenant or occupant, Trustor or any other owner of any the Mortgaged Property, or the creation of a lien on the Mortgaged Property, under the Act or any similar applicable laws or regulations;

(2) Trustor shall comply strictly and in all aspects with the requirements of the Act and related regulations and with all similar applicable laws and regulations and shall notify Beneficiary promptly in the event of any spill or location of hazardous substance upon the Mortgaged Property, and shall promptly forward to Beneficiary copies of all orders, notices, permits, applications or other communications and reports in connection with any spill or any other matters relating to the Act or related regulations or any similar applicable laws or regulations, as they may affect the Mortgaged Property;

(3) Trustor shall indemnify Beneficiary and hold Beneficiary harmless from and against all loss, liability, damage and expense, including attorneys' fees and environmental report fees, suffered or incurred by Beneficiary, whether as holder of this Deed of Trust, as mortgagee in possession or as successor in interest to Trustor as owner of the Mortgaged Property by virtue of foreclosure or acceptance of a deed in lieu of foreclosure, but excluding acts or omissions occurring subsequent to the date Trustor is an owner of the Mortgaged Property, (a) under or on account of the Act or related regulations or any similar applicable laws or regulations, including the assertion of any lien thereunder; (b) with respect to any spill or hazardous substance



## SCHEDULE A

TRACT OF LAND BEING A PORTION OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 2, TOWNSHIP 13 SOUTH, RANGE 66 WEST OF THE SIXTH PRINCIPAL MERIDIAN, CITY OF COLORADO SPRINGS, EL PASO COUNTY, COLORADO, BEING DESCRIBED AS FOLLOWS:

BASIS OF BEARINGS: THE WEST LINE OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 2, TOWNSHIP 13 SOUTH, RANGE 66 WEST OF THE SIXTH PRINCIPAL MERIDIAN EL PASO COUNTY, COLORADO BEING MONUMENTED AT THE NORTH END BY A 2-1/2" ALUMINUM SURVEYORS CAP STAMPED "19586" AND AT THE SOUTH END BY A 2" ALUMINUM SURVEYORS CAP STAMPED "19586", IS ASSUMED TO BEAR N00°00'16"W, A DISTANCE OF 1317.01 FEET.

COMMENCING AT THE SOUTHEAST SIXTEENTH CORNER OF SECTION 2, TOWNSHIP 13 SOUTH, RANGE 66 WEST OF THE SIXTH PRINCIPAL MERIDIAN, EL PASO COUNTY, COLORADO, SAID POINT BEING ON THE EASTERLY BOUNDARY OF TRACT B AS PLATTED IN WOODSIDE FILING NO. 5 RECORDED UNDER RECEPTION NO. 201038861, RECORDS OF EL PASO COUNTY, COLORADO, SAID POINT BEING THE POINT OF BEGINNING;

THENCE N89°28'45"E, ON THE NORTH LINE OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SAID SECTION 2 AND THE BOUNDARY OF SAID WOODSIDE FILING NO. 5, A DISTANCE OF 134.41 FEET TO THE WESTERLY RIGHT OF WAY LINE OF AUSTIN BLUFFS PARKWAY DESCRIBED IN A DOCUMENT RECORDED UNDER RECEPTION NO. 97079953; THENCE ON SAID WESTERLY RIGHT OF WAY LINE, THE FOLLOWING SEVEN (7) COURSES:

1. S12°33'38"E, A DISTANCE OF 139.48 FEET TO A POINT OF CURVE;
2. ON THE ARC OF A CURVE TO THE LEFT HAVING A DELTA OF 40°15'00", A RADIUS OF 860.00 FEET AND A DISTANCE OF 604.15 FEET TO A POINT OF TANGENT;
3. S52°48'38"E, A DISTANCE OF 182.91 FEET TO A POINT OF CURVE;
4. ON THE ARC OF A CURVE TO THE RIGHT HAVING A DELTA OF 52°15'04", A RADIUS OF 500.00 FEET AND A DISTANCE OF 455.98 FEET TO A POINT OF TANGENT;
5. S00°33'34"W, A DISTANCE OF 156.92 FEET;
6. S44°26'26"W, A DISTANCE OF 14.14 FEET;
7. S00°33'34"E, A DISTANCE OF 5.00 FEET TO A POINT ON THE SOUTH LINE OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SAID SECTION 2;

THENCE S89°26'26"W, ON SAID SOUTH LINE, A DISTANCE OF 819.40 FEET TO THE EAST SIXTEENTH CORNER OF SAID SECTION 2;

THENCE N00°00'16"W, ON THE WEST LINE OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SAID SECTION 2, ON THE EASTERLY BOUNDARY OF WOODSIDE AT BRIARGATE FILING NO. 1 AS RECORDED IN BOOK W-3 AT PAGE 110 AND THE EASTERLY BOUNDARY OF SAID WOODSIDE FILING NO. 5, A DISTANCE OF 1317.01 FEET TO THE POINT OF BEGINNING.

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a.k.a.: The NW corner of Austin Bluffs Pkwy & E Woodmen Rd; Colorado Springs, CO 80918  
APN: 6302400009