

# **EXHIBIT A**

FILED

MAR 29 2012

CLERK OF THE SUPERIOR COURT  
COUNTY OF STANISLAUS

BY \_\_\_\_\_ DEPUTY

ps

1 Birgit Fladager  
2 District Attorney  
3 832 12<sup>th</sup> Street, Room 300  
4 Modesto, California  
5 Telephone: 209-525-5550

6 Attorney for Plaintiff

7  
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9  
10 IN AND FOR THE COUNTY OF STANISLAUS

11 -----oOo-----

12 DA No. 1420777

13 THE PEOPLE OF THE STATE OF CALIFORNIA )

14 No. 1439847

15 Plaintiff, )

16 INDICTMENT FOR

17 vs. )

18 DARRELL ANTHONY SOUZA )  
19 (DOB: 9/14/58) )

20 DARRELL ANTHONY SOUZA )  
21 EMBEZZLEMENT BY AGENT, )  
22 COUNT I: VIOLATION OF )  
23 SECTION 506, )  
24 CALIFORNIA PENAL )  
25 CODE, FELONY )

26 CHRISTINE LOUISE HAMLOW SOUZA )  
27 (DOB: 12/22/62 )

28 Defendants. )

29 DARRELL ANTHONY SOUZA )  
30 OFFER FALSE )  
31 INSTRUMENT FOR )  
32 RECORDING, COUNT II: )  
33 VIOLATION OF SECTION )  
34 115(a), CALIFORNIA )  
35 PENAL CODE, FELONY )

36 DARRELL ANTHONY SOUZA )  
37 OFFER FALSE )  
38 INSTRUMENT FOR )  
39 RECORDING, COUNT III: )  
40 VIOLATION OF SECTION )  
41 115(a), CALIFORNIA )  
42 PENAL CODE, FELONY )

43 DARRELL ANTHONY SOUZA )  
44 EXTORTION BY WRITING, )  
45 COUNT IV: VIOLATION )  
46 OF SECTION 523, )  
47 CALIFORNIA PENAL )  
48 CODE, FELONY )

1 ) DARRELL ANTHONY SOUZA  
2 ) FORGERY OF WRITING,  
3 ) COUNT V: VIOLATION OF  
4 ) SECTION 470(d),  
5 ) CALIFORNIA PENAL  
6 ) CODE, FELONY  
7 )  
8 ) DARRELL ANTHONY SOUZA  
9 ) FORGERY OF WRITING,  
10 ) COUNT VI: VIOLATION  
11 ) SECTION 470(d),  
12 ) CALIFORNIA PENAL  
13 ) CODE, FELONY  
14 )  
15 ) DARRELL ANTHONY SOUZA  
16 ) PERJURY, COUNT VII:  
17 ) VIOLATION OF SECTION  
18 ) 118(a), CALIFORNIA  
19 ) PENAL CODE, FELONY  
20 )  
21 ) DARRELL ANTHONY SOUZA  
22 ) AND CHRISTINE LOUISE  
23 ) HAMLOW SOUZA  
24 ) SUBSCRIPTION OF TAX  
25 ) RETURN WITH FALSE  
26 ) INFORMATION,  
27 ) COUNT VIII: VIOLATION  
28 ) OF SECTION  
19705(a)(1),  
CALIFORNIA REVENUE  
AND TAXATION CODE,  
FELONY  
THE FOLLOWING APPLIES  
TO COUNT I - VI FOR  
DARRELL ANTHONY SOUZA  
SPECIAL ALLEGATION:  
VIOLATION OF SECTION  
186.11(a)(2),  
CALIFORNIA PENAL CODE  
ENHANCEMENT:  
VIOLATION OF SECTION  
12022.6(a)(4),  
CALIFORNIA PENAL CODE  
THE FOLLOWING APPLIES  
TO COUNT I FOR  
DARRELL ANTHONY SOUZA  
SPECIAL ALLEGATION:  
VIOLATION OF SECTION  
803(c), CALIFORNIA  
PENAL CODE

) ENHANCEMENT:  
) VIOLATION OF SECTION  
) 1203.045(a),  
) CALIFORNIA PENAL CODE  
)

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DARRELL ANTHONY SOUZA AND CHRISTINE LOUISE HAMLOW SOUZA are accused by the District Attorney for the said County of Stanislaus, State of California, by this Indictment of the crimes of, APPLYING TO DARRELL ANTHONY SOUZA, COUNT I: Violation of Section 506 of the California Penal Code, COUNT II: Violation of Section 115(a) of the California Penal Code, COUNT III: Violation of Section 115(a) of the California Penal Code, COUNT IV: Violation of Section 523 of the California Penal Code, COUNT V: Violation of Section 470(d) of the California Penal Code, COUNT VI: Violation of Section 470(d) of the California Penal Code, COUNT VII: Violation of Section 118(a) of the California Penal Code, APPLYING TO DARRELL ANTHONY SOUZA AND CHRISTINE LOUISE HAMLOW SOUZA, COUNT VIII: Violation of Section 19705(a)(1) of the California Revenue and Taxation Code, felonies, committed as follows:

COUNT I: The said DARRELL ANTHONY SOUZA on or about the and between the 16th day of November, 2003 and the 22nd day of October 2008, at and in the County of Stanislaus, State of California, and prior to filing of this Indictment, did willfully, unlawfully and feloniously as an agent, assignee in trust, collector and person otherwise entrusted with and having property for the use of another person, fraudulently appropriate said property to a use and purpose not in the due and lawful execution of his trust.



1           COUNT II: The said DARRELL ANTHONY SOUZA on or about the 2nd  
2 day of October 2008, at and in the County of Stanislaus, State of  
3 California, and prior to filing of this Indictment, did willfully,  
4 unlawfully and feloniously procure, or offer any false or forged  
5 instrument to be recorded in any public office within this state,  
6 which instrument, if genuine, might be filed, registered, or recorded  
7 under any law of this state of the United States, to wit, Deed of  
8 Trust re: Van Der Meer LLC and recorded as 2008-0106985-00.

9           COUNT III: The said DARRELL ANTHONY SOUZA on or about the 2nd  
10 day of October, 2008, at and in the County of Stanislaus, State of  
11 California, and prior to filing of this Indictment, did willfully,  
12 unlawfully and feloniously procure, or offer any false or forged  
13 instrument to be recorded in any public office within this state,  
14 which instrument, if genuine, might be filed, registered, or recorded  
15 under any law of this state of the United States, to wit, Deed of  
16 Trust re: MedCal LLC, and recorded as 2088-0107197-00.

17           COUNT IV: The said DARRELL ANTHONY SOUZA on or about and between  
18 the 22nd day of October, 2008 and the 11<sup>th</sup> Day of August, 2009, at  
19 and in the County of Stanislaus, State of California, and prior to  
20 filing of this Indictment, the defendant with the intent to extort  
21 any money or other property from another person, sent or delivered  
22 to RONALD and EDITH MALIK, and or their attorneys, any letter or  
23 other writing, whether subscribed or not, expressing or implying,  
24 or adapted to imply any threat such as is specified in California  
25 Penal Code Section 519, to wit, to do an unlawful injury to the  
26 property RONALD and EDITH MALIK.

1           COUNT V: The said DARRELL ANTHONY SOUZA on or about and between  
2 the 1<sup>st</sup> day of June, 2008 through 1<sup>st</sup> day of September, 2008, at and  
3 in the County of Stanislaus, State of California, and prior to filing  
4 of this Indictment, did willfully, unlawfully, fraudulently, and  
5 feloniously make, forge, counterfeit, a document, to wit: transfer  
6 of money or assurance of money, said document being falsely backdated  
7 to January 16, 2003, knowing that said document, was false, altered,  
8 forged and counterfeited, with intent then and there to cheat and  
9 defraud the victim.

10           COUNT VI: The said DARRELL ANTHONY SOUZA on or about and between  
11 the 9th day of May, 2007 through the 1<sup>st</sup> day of November, 2008, at  
12 and in the County of Stanislaus, State of California, and prior to  
13 filing of this Indictment, did willfully, unlawfully, fraudulently,  
14 and feloniously utter, publish, pass, or attempt to pass, a document,  
15 to wit: assurance of money; due bill for payment of money; power  
16 to receive money or power to let, lease, dispose of, alien or convey  
17 lands or other estate, real or personal; said document being dated  
18 May 9, 2007, knowing that said document was false, altered forged  
19 counterfeited, with intent then and there to cheat and defraud the  
20 victim.

21           COUNT VII: The said DARRELL ANTHONY SOUZA on or about November  
22 10, 2008 and November 19, 2008, at and in the County of Stanislaus,  
23 State of California, and prior to filing of this Indictment, the  
24 defendant being a person, who, in a declaration under penalty of  
25 perjury in a case in which such declaration under penalty of perjury  
26 is permitted by law, did willfully and unlawfully state as true a  
27 material fact which he knew to be false, AND having sworn under oath  
28

1 that he would declare truly before a competent tribunal, officer  
2 and person, to wit, defendant declared:

3 In his Declaration dated November 10, 2008:

- 4 1. Mr. Malik grudgingly executed the memorandum by signing it on  
5 the hood of his vehicle.
- 6 2. I saw Mr. Malik sign it in my presence.

7 In his Declaration dated November 19, 2008:

- 8 1. For helping assemble the rest of the land Mr. Malik and I agreed  
9 upon a fee of 5% of the value of the assembled parcels. This  
10 fee was to be paid separate and apart from any commission I  
11 might earn as listing broker on a sale of the property. I stood  
12 to make \$4 million to \$5 million dollars if we were successful  
13 in completing the assemblage. We had separate commission  
14 agreements.
- 15 2. Mr. Malik grudgingly signed the May 9, 2007 memorandum on the  
16 hood of his Range Rover. A true and accurate copy of the  
17 memorandum is attached as Exhibit "AA" I personally witnessed  
18 Mr. Malik sign the memorandum. There was no one else present  
19 but Mr. Malik and me.
- 20 3. I personally witnessed Mr. Malik sign the memorandum in my  
21 presence on May 9, 2007.

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COUNT VIII: The said DARRELL ANTHONY SOUZA and CHRISTINE LOUISE  
HAMLOW SOUZA, on or about the 15th day of October, 2009, at and in  
the County of Stanislaus, State of California, and prior to filing  
of this Indictment, willfully made and subscribed a return,  
statement, or other document, that contained or was verified by a  
written declaration that it is made under penalty of perjury, and  
he or she does not believe to be true and correct as to every material  
matter, and willfully aided, assisted in, procured, counseled, and  
advised the preparation or presentation under, or in connection with  
any matter arising under, the Personal Income Tax Law or the

1 Corporation Tax Law, of a return, affidavit, claim, or other document,  
2 that is fraudulent or is false as to any material matter.

3 THE FOLLOWING APPLIES TO

4 COUNTS I through VI, ▲SOUZA, DARRELL ANTHONY:

5  
6 SPECIAL ALLEGATION: It is further alleged pursuant to Penal  
7 Code Section 186.11(a)(2), that the defendant committed two or more  
8 related felonies, a material element of which is fraud, which involve  
9 a pattern of related felony conduct, and the pattern of related felony  
10 conduct involves the taking of an amount of theft exceeding five  
11 hundred thousand dollars (\$500,000.00).

12 ENHANCEMENT: During the commission of the above offense, the  
13 defendant did intentionally take or damage in excess of three million  
14 two hundred thousand dollars (\$3,200,000) in violation of  
15 §12022.6(a)(4) of the California Penal Code.

16 THE FOLLOWING APPLIES TO

17 COUNT I ONLY ▲SOUZA, DARRELL ANTHONY:

18  
19 SPECIAL ALLEGATION: It is further alleged pursuant to Penal  
20 Code Section 803(c) that the portion of the offense alleged herein  
21 as occurring in 2003, was discovered by a law firm employed by Ron  
22 Malik on or after January 1, 2008 as part of a civil suit caused  
23 by the defendants filing a false deeds of trust. It is further  
24 alleged that the taking which occurred in March 2007 from Chicago  
25 Title was not discovered until after commencement of the same lawsuit  
26 in November 10, 2008 as part of the investigation of that case.

1 These takings were not discovered previously because the defendant  
2 hid the information.

3 ENHANCEMENT: It is further alleged pursuant to Penal Code  
4 section 1203.045(a) the amount of loss exceeded one hundred thousand  
5 dollars (\$100,000).

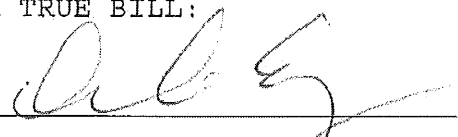
6 NOTICE: It is further alleged, pursuant to Penal Code Section  
7 1170(h)(3) and 1170(f) that the defendants, are not eligible to be  
8 sentenced to a term of imprisonment in the county jail on an executed  
9 sentence. This allegation is not subject to dismissal pursuant to  
10 Penal Code Section 1385.

11  
12 BIRGIT FLADAGER  
District Attorney

13  
14 By 

15 Brad Nix  
16 Deputy District Attorney  
in and for the County of  
Stanislaus, State of California

17 A TRUE BILL:

18   
19  
20 Foreperson of the Grand Jury  
21  
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1 NAMES OF WITNESSES EXAMINED BEFORE THE SAID  
2 GRAND JURY ON FINDING THE FOREGOING INDICTMENT

3 ~~Ronald Joseph Malik~~

4 Jason Hollingsworth

5 Torben Nord

6 Daniel Mayorga

7 James Murry

8 William Warne

9 James Nuss

10 Cort Weigand

11 Stephen Hassing

12 Frank Zumwalt

13 ~~Eric Johnson~~ ✓

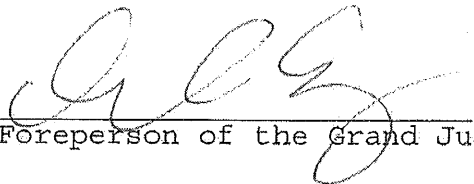
14 Nancy Wineman

15 Steve Stowa-Hail

16 Judy Eden

17 Custodian of Records, California Franchise Tax Board

18 Investigator Glenn Gulley, Stanislaus County District Attorney's  
19 Office

20  
21   
Foreperson of the Grand Jury

1 Presented by the Foreperson of the Grand Jury, in the presence  
2 of the Grand Jury, in open Superior Court of the County of  
3 Stanislaus, State of California, and filed as a record of said  
4 Court, this 29<sup>th</sup> day of March, 2012.

5  
6 MICHAEL A. TOZZI, CLERK OF THE  
7 SUPERIOR COURT

8 By [Signature]  
9 Deputy Clerk

10 BIRGIT FLADAGER, DISTRICT  
11 ATTORNEY

12 By [Signature]  
13 Brad Nix  
14 Deputy District Attorney  
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# **EXHIBIT B**



1 DOWNEY BRAND LLP  
WILLIAM R. WARNE (Bar No. 141280)  
2 RICHARD K. SUEYOSHI (Bar No. 186189)  
621 Capitol Mall, 18th Floor  
3 Sacramento, CA 95814-4731  
Telephone: (916) 444-1000  
4 Facsimile: (916) 444-2100  
bwarne@downeybrand.com  
5 rsueyoshi@downeybrand.com  
6 Attorneys for Plaintiffs  
RONALD J. MALIK; EDNA MALIK; and VAN DER  
7 MEER, LLC

ENDORSED FILED  
SOLANO SUPERIOR COURT  
09 AUG -3 PM 3:50  
BY S. WIDEMANN  
DEPUTY CLERK

ASSIGNED TO  
JUDGE SHARL L. KAYS  
FOR ALL PURPOSES

8 SUPERIOR COURT OF CALIFORNIA  
9 COUNTY OF SOLANO

BY FAX

11 RONALD J. MALIK and VAN DER  
MEER, LLC,  
12 Plaintiffs,  
13 v.  
14 COUNTY BANK, a California  
15 corporation; WESTAMERICA BANK, a  
16 California corporation; and DOES 1-20,  
inclusive,  
17 Defendants.

CASE NO. EGS034030  
COMPLAINT

19 PARTIES

- 20 1. Plaintiff Ronald J. Malik ("Malik") is an individual who resides in the County of  
21 Stanislaus, California.  
22 2. Plaintiff Van der Meer, LLC ("Van der Meer") is a California limited liability  
23 company with its principal place of business in the County of Stanislaus, California.  
24 3. Plaintiffs are informed and believe that Defendant County Bank ("County Bank") is  
25 and/or was a California corporation with its principal place of business in the County of  
26 Stanislaus, California.  
27 4. Plaintiffs are informed and believe that Defendant WestAmerica Bank  
28 ("WestAmerica") is a California corporation with its principal place of business in the County of

1 Solano, California. Plaintiffs are informed and believe that WestAmerica is the successor-in-  
2 interest to County Bank and has assumed the liabilities of County Bank that are alleged herein.

3 5. The true names and capacities of the Defendants sued herein as DOES 1 through 20,  
4 inclusive, are unknown to Plaintiffs at the time of filing this Complaint, and therefore, Plaintiffs  
5 sue said Defendants under such fictitious names. Plaintiffs will amend this Complaint to insert  
6 the true name and capacities of the fictitiously named defendants when the same become known  
7 to Plaintiffs.

8 6. At all times mentioned in this Complaint, each of the Defendants was the agent,  
9 servant, or employee of each of the other Defendants, and in doing the acts alleged in this  
10 Complaint was acting within the course and scope of that agency, employment or representation,  
11 with the knowledge, consent, and approval of each of the other defendants.

#### 12 JURISDICTION AND VENUE

13 7. The Court has subject matter jurisdiction over this action based upon the allegations  
14 set forth herein.

15 8. Venue is proper in this Court because WestAmerica has its principal place of  
16 business in the County of Solano, California.

#### 17 GENERAL ALLEGATIONS

##### 18 **Malik's First Loan And Renewals With County Bank**

19 9. Malik is a businessman in Stanislaus County and owns certain limited liability  
20 companies which he uses to purchase and sell real estate. Van der Meer is one such company and  
21 Malik is its sole member with ownership and control of this company.

22 10. On or about November 21, 2005, Malik entered into a Business Loan Agreement  
23 with County Bank ("First Loan Agreement"). In connection with the First Loan Agreement,  
24 Malik executed a promissory note, dated November 21, 2005, in favor of County Bank in the  
25 principal amount of \$10,014,000.00 (this note and subsequent renewals of this note are referred to  
26 herein as "First Note"). The First Note consolidated previous loans with County Bank. The First  
27 Note was originally intended to be a loan for a twelve month term, but due to delays associated  
28 with or caused by County Bank, including illnesses, medical-related unavailability of personnel,

1 and personnel changes, County Bank was not fully prepared and therefore, made this loan for a  
2 six month period to allow more time to consider and prepare a longer term loan. The initial  
3 maturity date for the First Note was May 21, 2006.

4 11. As the May 21, 2006 maturity date for the First Note approached, Malik requested  
5 renewal of the loan. County Bank represented that the First Note would be renewed. However,  
6 due to delays caused by County Bank, the First Note was renewed on June 14, 2006, after the  
7 initial May 21, 2006 maturity date. Given that County Bank's delays in processing the renewal  
8 caused the renewal of the First Note to occur after the maturity date, County Bank did not charge  
9 Malik any late fees. The next maturity date on the First Note was set for September 18, 2006.

10 12. As the September 18, 2006 maturity date for the First Note approached, Malik again  
11 requested renewal of the loan. County Bank again represented that the First Note would be  
12 renewed. However, once again, due to delays caused by County Bank, the First Note was not  
13 renewed until September 26, 2006. Given that County Bank's delays in processing the renewal  
14 once again caused the renewal of the First Note to occur after the maturity date, County Bank did  
15 not charge Malik any late fees. The next maturity date on the First Note was set for September  
16 22, 2007.

17 13. As the September 22, 2007 maturity date for the First Note approached, Malik again  
18 requested renewal of the loan. County Bank again represented that the First Note would be  
19 renewed. However, once again, due to delays caused by County Bank, the First Note was not  
20 renewed until October 25, 2007. Given that County Bank's delays in processing the renewal once  
21 again caused the renewal of the First Note to occur after the maturity date, County Bank did not  
22 charge Malik any late fees. The next maturity date on the First Note was set for March 22, 2008.

23 **Malik's Second Loan And Renewals With County Bank**

24 14. On or about October 25, 2007, Malik entered into a Business Loan Agreement with  
25 County Bank ("Second Loan Agreement"). Prior to the Second Loan Agreement, Malik executed  
26 a promissory note, dated September 26, 2006, in favor of County Bank in the principal amount of  
27 \$7,000,000.00 (this note and subsequent renewals of this note are referred to herein as "Second  
28

1 Note"). The Second Loan Agreement was intended to govern the Second Note. The term of the  
2 Second Note was twelve months with a maturity date of September 22, 2007.

3 15. As the September 22, 2007 maturity date for the Second Note approached, Malik  
4 requested renewal of the loan. County Bank represented that the Second Note would be renewed.  
5 However, similar to the communications and negotiations regarding the First Note, due to delays  
6 caused by County Bank, the Second Note was renewed late, on October 25, 2007. Given that  
7 County Bank's delays in processing the renewal caused the renewal of the Second Note to occur  
8 after the maturity date, County Bank did not charge Malik any late fees. The next maturity date  
9 on the Second Note was set for March 22, 2008.

10 **County Bank's Representations And Assurances Of Renewals And Extensions**

11 16. In the months and years leading up to 2008, County Bank, through its various  
12 representatives, made representations and assurances to Malik that the First Note and Second  
13 Note would be renewed and/or extended prior to their maturity dates. As alleged above, County  
14 Bank indeed renewed the First Note on three separate occasions and renewed the Second Note  
15 once. County Bank repeatedly assured Malik that the loans would be renewed and/or extended  
16 given Malik's excellent history with County Bank, including, but not limited to, keeping accounts  
17 and payments current, not allowing accounts to fall into default, and maintaining substantial cash  
18 deposits with the bank. County Bank made repeated representations to Malik that he was an  
19 excellent customer of the bank and that County Bank wanted to continue its relationship with  
20 him. By its representations, County Bank led Malik to believe that the First Note and Second  
21 Note would be extended or renewed as needed by Malik, and these representations were  
22 consistent with County Bank's practices in renewing the First Note and Second Note. At no time  
23 prior to 2008 did County Bank make any representation to the contrary.

24 17. After the renewals of the First Note and Second Note in October 2007, both loans  
25 had a maturity date of March 22, 2008. Based upon the repeated representations and assurances  
26 made by County Bank, Malik reasonably relied upon County Bank's statements and understood  
27 that he could obtain from County Bank further renewals and/or extensions of the First Note and  
28 Second Note. In specific reliance upon County Bank's representations and assurances, Malik did

1 not seek and obtain refinancing of the First Note or Second Note in 2007, though Malik had the  
2 ability and opportunity to obtain such refinancing if it was necessary. Malik did not seek and  
3 obtain alternative financing of the First Note and Second Note simply because County Bank, by  
4 its words and actions, caused him to believe that there was no need to do so.

5 **County Bank Purposefully And Wrongfully Delayed Informing Malik That**  
6 **It Would Not Further Renew Or Extend The First Note And Second Note**

7 18. Plaintiffs are informed and believe that notwithstanding County Bank's  
8 representations and assurances to Malik, and before the fall of 2007, County Bank already knew  
9 or otherwise had reason to believe that it would not renew various land loans to its customers,  
10 including the First Note and Second Note with Malik. In 2007, County Bank was under audit  
11 and/or investigation by federal regulators and its loan portfolio was being put under close  
12 scrutiny. However, County Bank did not disclose these facts to Malik and made no suggestion at  
13 all that it might not renew the loans. Instead, in an apparent effort to keep its own options open in  
14 case it later decided to continue its relationship with Malik, County Bank continued to give Malik  
15 the impression and understanding that the First Note and Second Note would be renewed. In fact,  
16 at the same time that certain County Bank executives knew or should have known that the bank  
17 would not renew land loans generally, marketing representatives of County Bank were instructed  
18 to continue to increase the bank's loan portfolio and pursue making more land loans.  
19 Specifically, even in late 2007, County Bank's representatives made representations to Malik that  
20 County Bank desired to make an additional land loan to Malik, that Malik ultimately obtained  
21 from Premier Bank. Therefore, County Bank, through its representations and assurances to  
22 Malik, wrongfully led Malik to believe that the First Note and Second Note could and would be  
23 renewed, while at the same time, County Bank was already intending the non-renewal of such  
24 loans.

25 19. Not until sometime during the first quarter of 2008, did County Bank, for the first  
26 time, indicate to Malik that County Bank would not renew the First Note or Second Note after  
27 their respective maturity dates of March 22, 2008. This came as a shock and surprise to Malik,  
28 not only given his past excellent history with County Bank, but also because this late notice gave

1 Malik very little time to seek and obtain alternate refinancing of the First Note and Second Note.  
2 County Bank gave this notice late, such that Malik had less than three months to find alternative  
3 financing prior to the maturity dates on the loans, when County Bank reasonably knew that it  
4 would take four to six months to process a new loan under its own procedures when it was  
5 making land loans.

6 20. Further and importantly, in early 2008, the economic downturn was rapidly  
7 impacting real estate values and the availability of financing was becoming significantly worse  
8 than just months earlier. As an example, Malik had obtained a substantial loan upwards of  
9 approximately \$8,000,000.00 (unrelated to the First Note and Second Note) from Premier Bank  
10 as late as December 2007. However, lenders and loans that were available to Malik in mid-to-late  
11 2007, were becoming less and less viable options by early 2008. Thus, County Bank's delay in  
12 notifying Malik of its true intentions caused substantial detriment and harm to Malik's financial  
13 circumstances as they related to the First Note and Second Note.

14 **County Bank's Failure To Cooperate Regarding Malik's Refinancing Efforts**

15 21. In early 2008, Malik made significant efforts to seek and obtain refinancing of the  
16 First Note and Second Note. In this regard, however, County Bank did not cooperate or assist  
17 Malik. For example, Malik was in contact with one financial institution that attempted on several  
18 occasions to obtain information from County Bank regarding refinancing. County Bank,  
19 however, did not return calls from the financial institution. Malik is informed and believes that  
20 County Bank's failure to cooperate in this regard negatively impacted Malik's options and  
21 hindered his ability to obtain refinancing.

22 22. Moreover, Malik had earlier advised County Bank that the First Note and Second  
23 Note were over-collateralized in that they were secured by properties with values several times  
24 that of the loan amounts. County Bank still insisted on having far more collateral than what was  
25 reasonably necessary to secure the First Note and Second Note. However, County Bank, in  
26 acknowledgement of the fact that the loans were over-collateralized, stated that it would release  
27 properties from the deeds of trust in the future if Malik needed them to be released. County Bank  
28 never released any properties from its deeds of trust. Malik is informed and believes that by

1 County Bank's insistence on over-collateralizing the loans and failure to release any properties  
2 further negatively impacted Malik's options and hindered his ability to obtain refinancing. That  
3 is, because County Bank insisted on encumbering more properties than necessary to secure the  
4 First Note and Second Note, Malik has fewer properties that are presently unencumbered which  
5 he can offer as collateral for additional refinancing from other lenders.

#### 6 Extension And Modification Agreement

7 23. Given the facts alleged above, Malik was not able to refinance the First Note and  
8 Second Note by their maturity dates. However, given the substantial detriment that County Bank  
9 caused to Malik, the two sides began negotiating a settlement agreement which would include,  
10 among other terms, an extension for Malik on the First Note and Second Note. These  
11 negotiations continued through the summer of 2008. By or around September 26, 2008, County  
12 Bank on one hand, and Malik, his spouse, and Van der Meer, on the other hand, entered into a  
13 Extension and Modification Agreement ("Extension Agreement"). A true and correct copy of the  
14 Extension Agreement is attached hereto as Exhibit A and hereby incorporated by reference.

15 24. The Extension Agreement provided Malik with an extension of the First Note and  
16 Second Note to December 19, 2008, with the option for Malik to extend the term further to March  
17 20, 2009.

18 25. Importantly, the Extension Agreement specifically contemplated and stated in its  
19 Recitals that Malik would eventually need to arrange for payment of the First Note and Second  
20 Note either through refinancing or sale of some or all of the property securing the notes. (Ex. A,  
21 Recital F.) In this regard, the Extension Agreement specifically stated in Section 5 that County  
22 Bank shall obtain an appraisal of all of the real property subject to the deeds of trust relating to  
23 the First Note and Second Note. (*Id.* § 5.) Malik was to pay for the appraisal within ten days of  
24 demand from County Bank. (*Id.*) The appraisal was obviously very important and necessary to  
25 Malik in his effort to seek and obtain alternative financing or sales of his property. The appraisal  
26 was also required for County Bank's purposes in calculating certain payments subject to a  
27 separate section, Section 2.2 of the Extension Agreement. (*Id.* § 2.2.) Therefore, County Bank's  
28

1 obtaining of the appraisal was important to both parties and a significant bargained for term of the  
2 Extension Agreement.

3 26. In exchange for the promises and covenants agreed to by County Bank, including  
4 the requirement that the bank obtain an appraisal, Malik and Van der Meer agreed to release  
5 County Bank from Malik and Van der Meer's claims and causes of action relating to County  
6 Bank's actions and representations pertaining to the First Note and Second Note. (*Id.* § 12.)  
7 Malik and Van der Meer agreed to this release upon understanding and expectation that County  
8 Bank would fully perform its obligations under the Extension Agreement.

9 **County Bank Failed To Perform Under The Extension Agreement**

10 27. Shortly after the parties agreed to the Extension Agreement, County Bank advised  
11 Malik that it would obtain the appraisal by November 15, 2008. County Bank knew at all times  
12 that the appraisal was critically important to Malik and that he was waiting for County Bank to  
13 send him the final appraisal.

14 28. Despite the terms of Section 5 of the Extension Agreement, County Bank did not  
15 deliver the appraisal to Malik as agreed. County Bank did not have the final appraisal completed  
16 and delivered to Malik by November 15, 2008. However, County Bank, through emails and  
17 telephone calls, repeatedly represented to Malik that the appraisal would be completed shortly.  
18 Weeks passed and even by early-to-mid December 2008, County Bank continued to represent that  
19 the appraisal would be completed and delivered shortly. Malik had one lender that was  
20 specifically waiting for the appraisal, and in response to inquiries, County Bank continued to state  
21 it was not yet prepared to provide the appraisal. County Bank continued to delay. At one point,  
22 County Bank sent an invoice to Malik in excess of \$7,000.00, charging him for the appraisal even  
23 though it was not yet completed or provided to Malik in final form. In response to Malik's  
24 demand that he be provided with the appraisal that he was being billed for, County Bank  
25 responded that it was not ready yet, and that Malik may disregard the invoice.

26 29. Through this entire time, County Bank repeatedly assured Malik that the appraisal  
27 would be forthcoming. Malik, relying upon such representations and assurances, had no reason to  
28 believe that County Bank would ultimately fail to perform. Instead, Malik was repeatedly



1 promised that the appraisal was going to be completed shortly. However, by late December 2008,  
2 after inducing Malik's reliance for over a month, County Bank finally advised Malik that it would  
3 not perform under Section 5 of the Extension Agreement and Malik would not receive a final  
4 appraisal for the properties. Only then did Malik begin seeking an appraisal from an alternative  
5 source given that it was still critically needed for Malik's purposes, including the refinancing of  
6 the properties.

7 30. County Bank's failure to perform under Section 5 of the Extension Agreement was  
8 a material breach of the contract and caused substantial detriment to Malik and Van der Meer.  
9 Not only did County Bank fail to perform, but it failed to advise Malik that it would not perform  
10 until after at least a month of time was lost. Because of County Bank's delay and breach, Malik  
11 was not able to obtain an alternative appraisal until January 2009. This passage of time during a  
12 rapidly declining economy exacerbated County Bank's harm to Malik. The overall delay caused  
13 by County Bank negatively impacted Malik's options and hindered his ability to obtain  
14 refinancing.

#### 15 **Amendment Number One To Extension Agreement**

16 31. As agreed to by the parties, Malik paid County Bank \$250,000.00 to extend the  
17 term of the Extension Agreement to March 2009. (See Ex. A § 2.2.) However, WestAmerica,  
18 which had become the successor-in-interest to County Bank, disputed the status of the loans with  
19 Malik and the parties recommenced negotiations pertaining to the First Note and Second Note.  
20 Malik sought additional time from WestAmerica with respect to the First Note and Second Note  
21 given the continuing need to refinance coupled with his history with County Bank. But by this  
22 time, unrelated and separately, Malik had discovered that an individual had wrongfully recorded  
23 two deeds of trust, one of which was against the Van der Meer properties, and therefore, Malik  
24 and Van der Meer had brought litigation in part to clear the wrongfully recorded deeds of trust. It  
25 thus became both necessary and appropriate to clear the wrongfully recorded deeds of trust before  
26 refinancing the First Note and Second Note. In Malik and Van der Meer's litigation against the  
27 individual, the court set a trial date of August 4, 2009, providing an additional reason why an  
28

1 extension of the First Note and Second Note was appropriate so that the wrongfully recorded  
2 deeds of trust could be removed and then the loans refinanced.

3 32. Malik and WestAmerica continued negotiations and ultimately, in or about May  
4 2009, WestAmerica prepared an Amendment Number One to Loan Extension and Modification  
5 Agreement ("Amendment One"). The Amendment One was to provide an additional extension of  
6 the First Note and Second Note to September 1, 2009. (Ex. B § 4.) It also required Malik to pay  
7 certain amounts, including an interest payment plus an additional amount for legal fees in  
8 reimbursement to WestAmerica for the preparation of the amendment. (*Id.* § 5.) After  
9 negotiations continued for a few weeks, on or about June 24, 2009, WestAmerica specifically  
10 advised Malik that the total amount of funds due pursuant to Amendment One for accrued interest  
11 and legal fees was \$317,000.00. The interest figures were accordingly updated and modified in  
12 Amendment One, however, the dates up to when interest was calculated were inadvertently not  
13 updated. (*See id.* §§3, 5.3.) Further, WestAmerica waived a separate extension and modification  
14 fee of \$17,500.00. (*See id.* § 5.1.) The figures set forth in Amendment One as modified,  
15 reflected the \$317,000.00 payment amount. Pursuant to WestAmerica's direction, on June 25,  
16 2009, Malik and Van der Meer tendered into escrow, the original Amendment One signed by  
17 Malik and a check for \$317,000.00. Malik gave instructions for the original Amendment One to  
18 be delivered to WestAmerica for its signature. A true and correct copy of Amendment One as  
19 signed by Malik and delivered to escrow is attached hereto (without exhibits) as Exhibit B and  
20 hereby incorporated by reference.

21 33. Despite Malik's delivery of the signed original and \$317,000.00 check into escrow,  
22 WestAmerica never delivered an executed original of Amendment One to Malik. Instead,  
23 WestAmerica disputed the amount of the payment. That is, although West America previously  
24 indicated that Malik's payment was to be in the amount of \$317,000.00, WestAmerica later  
25 contacted Malik on or about June 29, 2009, and indicated that he was required to pay an  
26 additional \$54,000.00 as additional interest, without providing any explanation as to how this  
27 amount was calculated or determined. WestAmerica has refused to discuss the \$54,000.00  
28 additional charge with Malik's representatives leading up to the filing of this action. Therefore,

1 because of WestAmerica's refusal to accept Malik's payment, and its demand for additional  
2 payment not provided for in Amendment One, WestAmerica did not accept the terms of  
3 Amendment One, and its additional demand constituted a counter-offer which was not accepted  
4 by Malik. As a consequence, Amendment One never became binding or effective.

#### 5 **WestAmerica's Demand For Payment**

6 34. Without providing any legitimate justification for increasing its demand for  
7 payment after specifically advising Malik that the payment was to be \$317,000.00, WestAmerica  
8 sent a letter bearing a date of July 6, 2009 (the envelope for which was postmarked July 14,  
9 2009), in which it demanded from Malik a payment of \$1,135,849.55, applying certain default  
10 interest rates. WestAmerica demanded this payment by July 28, 2009. WestAmerica threatened  
11 Malik that if he did not pay by then, WestAmerica would exercise its remedies under the loan  
12 documents pertaining to the First Note and Second Note. Although dated July 6, 2009, the letter  
13 was apparently not sent until on or about July 14, 2009, and was not delivered to Malik until July  
14 17, 2009.

#### 15 **FIRST CAUSE OF ACTION**

##### 16 **(Declaratory Relief)**

17 35. Plaintiffs hereby incorporate the allegations of paragraphs 1 through 34 as if set  
18 forth in full herein.

19 36. An actual controversy has arisen and now exists between Plaintiffs and Defendants  
20 concerning the effectiveness and enforceability of Amendment One. WestAmerica, by and  
21 through its July 6, 2009 letter, contends that Amendment One was made binding and effective by  
22 the parties thereto. On the other hand, Plaintiffs contend that WestAmerica failed to accept  
23 Plaintiffs' performance of the conditions precedent to Amendment One and instead, made a  
24 counter-offer by way of demanding the additional \$54,000.00. This counter-offer was not  
25 accepted by Malik. Only after the dispute relating to the additional payment arose, Plaintiffs later  
26 received a copy (not an original) of a fully executed version of Amendment One, which remains  
27 ineffective due to WestAmerica's rejection of Plaintiffs' payment and WestAmerica's counter-  
28 offer, which Malik did not accept.

1           37. Plaintiffs desire a judicial declaration that Amendment One is not binding or  
2 enforceable.

3           38. Furthermore, an actual controversy has arisen and now exists between Plaintiffs and  
4 Defendants concerning whether WestAmerica may pursue any remedies regarding the First Note  
5 and Second Note, including, but not limited to, recording notices of default and taking any other  
6 actions in pursuit of foreclosure. By its letter of July 6, 2009, WestAmerica contends that it is  
7 entitled to pursue such remedies. On the other hand, Plaintiffs contend that under the facts  
8 alleged here, WestAmerica may not record notices of default or take any other action in pursuit of  
9 foreclosure under the present circumstances.

10           39. Plaintiffs desire a judicial declaration that WestAmerica may not file notices of  
11 default or take any other action in pursuit of foreclosure under the present circumstances.

12           40. Judicial determinations as to the enforceability of Amendment One and as to the  
13 ability of WestAmerica to take any action in pursuit of foreclosure are necessary and appropriate  
14 at this time under the circumstances in order that Plaintiffs may ascertain its rights and duties, as  
15 well as the rights and duties of WestAmerica. The presently unsettled state of affairs will cause  
16 financial burden and detriment to Plaintiffs if left unresolved.

17           41. Wherefore, Plaintiffs request judgment as set forth herein.

18                                   **SECOND CAUSE OF ACTION**

19                                   **(Breach Of Written Contract)**

20           42. Plaintiffs hereby incorporate the allegations of paragraphs 1 through 41 as if set  
21 forth in full herein.

22           43. Plaintiffs have performed all conditions, covenants, and promises required of it  
23 under the Extension Agreement except those terms which Plaintiffs were excused from  
24 performing due to WestAmerica and County Bank's breaches or which Plaintiffs were otherwise  
25 not required to perform under the circumstances set forth above. Specifically, because of  
26 WestAmerica and County Bank's breaches, Plaintiffs are excused from performing under the  
27 Release section of the Extension Agreement. (*See* Ex. A § 12.) Plaintiffs only agreed to release  
28

1 County Bank and WestAmerica in exchange for County Bank and WestAmerica's performance  
2 of those terms which they were required to perform under the Extension Agreement.

3 44. Despite all reasonable and prudent efforts of Plaintiffs, County Bank and  
4 WestAmerica have breached the Extension Agreement by failing to perform under Section 5 of  
5 the agreement which specifically and unequivocally required County Bank to obtain an appraisal  
6 of all of the real property subject to the deeds of trust securing the First Note and Second Note as  
7 alleged above. County Bank's timely provision of the appraisal to Plaintiffs was critical to  
8 Plaintiffs' refinancing efforts as alleged above. The breach by County Bank and WestAmerica is  
9 a material breach of the Extension Agreement. County Bank and WestAmerica have provided no  
10 justification or excuse for their failures to perform as agreed.

11 45. As a proximate and direct cause of County Bank and WestAmerica's breaches,  
12 Plaintiffs have and will suffer damages in an amount to be determined at trial and in excess of the  
13 jurisdictional minimum of this court in that Plaintiffs have been deprived of the benefit of  
14 performance under the Extension Agreement, as alleged above. Plaintiffs are also entitled to a  
15 recovery of attorney's fees as set forth in the operative documents, including the loan documents.

16 46. Wherefore, Plaintiffs request judgment as set forth herein.

### 17 THIRD CAUSE OF ACTION

#### 18 (Rescission)

19 47. Plaintiffs hereby incorporate the allegations of paragraphs 1 through 46 as if set  
20 forth in full herein.

21 48. In alternative to Plaintiffs' causes of action for breach of contract, Plaintiffs are  
22 entitled to rescission of the Extension Agreement based upon the facts set forth above. Plaintiffs  
23 may make an election of remedies at the appropriate time.

24 49. Plaintiffs' timely receipt from County Bank of the appraisal required by Section 5  
25 of the Extension Agreement was a material consideration for Plaintiffs' agreement to and entry  
26 into the Extension Agreement. The Extension Agreement specifically recited and contemplated  
27 that Plaintiffs were to obtain refinancing and/or sale of some portion of the properties. The  
28 parties were aware that timely receipt of the appraisal by Plaintiffs was critical in this regard.

1 County Bank's failure to provide the appraisal on time, and at all, was a material failure of  
2 consideration. Plaintiffs are therefore entitled to rescission of the Extension Agreement at their  
3 election.

4 50. Additionally, should the court determine that Amendment One is somehow binding  
5 and effective, Plaintiffs' payment of interest in a specifically agreed upon amount was a material  
6 consideration for Plaintiffs' agreement to and entry into Amendment One. WestAmerica's  
7 demand for additional payment and failure to abide by the payment terms as specifically agreed to  
8 by the parties constitutes a material failure of consideration of the amendment, and thereby, a  
9 material failure of consideration of the Extension Agreement. On this additional basis, Plaintiffs  
10 are therefore entitled to rescission of the Extension Agreement at their election.

11 51. Wherefore, Plaintiffs request judgment as set forth herein.

12 **FOURTH CAUSE OF ACTION**

13 **(Breach Of Implied Covenant Of Good Faith And Fair Dealing)**

14 52. Plaintiffs hereby incorporate the allegations of paragraphs 1 through 51 as if set  
15 forth in full herein.

16 53. Plaintiffs are informed and believe that Defendants did not act in good faith in their  
17 dealings with Plaintiffs as set forth above. Without good faith and through conscious and  
18 deliberate acts, Defendants failed to discharge their contractual responsibilities as required under  
19 the First Loan Agreement and Second Loan Agreement, and subsequently, under the Extension  
20 Agreement. Defendants have breached the implied covenant of good faith and fair dealing  
21 contained in the loan agreements and Extension Agreement. Plaintiffs are excused from releasing  
22 any and all claims against Defendants due to Defendants' own breaches of the Extension  
23 Agreement.

24 54. By refusing to discharge their responsibilities properly and appropriately,  
25 Defendants unfairly frustrated the purpose of the loan agreements and Extension Agreement and  
26 disappointed the reasonable expectations of Plaintiffs, thereby depriving Plaintiffs of the benefits  
27 of the agreements.

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55. As a direct and proximate cause of these breaches, Plaintiffs have been damaged in an amount to be proven at trial. Plaintiffs are also entitled to attorney's fees and costs.

56. Wherefore, Plaintiffs request judgment as set forth herein.

**FIFTH CAUSE OF ACTION**

**(Intentional Misrepresentation)**

57. Plaintiffs hereby incorporate the allegations of paragraphs 1 through 56 as if set forth in full herein.

58. As set forth in more detail above, in the months and years leading up to 2008, County Bank, through its various representatives, made representations and assurances to Malik that the First Note and Second Note would be renewed and/or extended prior to their maturity dates. County Bank repeatedly assured Malik that the loans would be renewed and/or extended and excess collateral released given Malik's excellent history with County Bank, including, but not limited to, keeping accounts and payments current, not allowing accounts to fall into default, and maintaining substantial cash deposits with the bank. County Bank made repeated representations to Malik that he was an excellent customer of the bank and that County Bank wanted to continue its relationship with him. By its representations, County Bank led Malik to believe that the First Note and Second Note would be extended or renewed, and excess collateral released, as needed by Malik, and these representations were consistent with County Bank's practices in renewing the First Note and Second Note. At no time prior to 2008 did County Bank make any representation to the contrary.

59. Based upon the repeated representations and assurances made by County Bank, Malik reasonably relied upon County Bank's statements and understood that he could obtain from County Bank a release of excess collateral and further renewals and/or extensions of the First Note and Second Note. In specific reliance upon County Bank's representations and assurances, Malik did not seek and obtain refinancing of the First Note or Second Note in 2007, though Malik had the ability and opportunity to obtain such refinancing if it was necessary. Malik did not seek and obtain alternative financing of the First Note and Second Note simply because County Bank, by its words and actions, caused him to believe that there was no need to do so.

1           60. Plaintiffs are informed and believe that notwithstanding County Bank's  
2 representations and assurances to Malik, and before the fall of 2007, County Bank already knew  
3 or otherwise had reason to believe that it would not renew various land loans to its customers,  
4 including the First Note and Second Note with Malik. However, County Bank did not disclose  
5 these facts to Malik and made no suggestion at all that it might not renew the loans. Instead, in an  
6 apparent effort to keep its own options open in case it later decided to continue its relationship  
7 with Malik, County Bank continued to give Malik the impression and understanding that the First  
8 Note and Second Note would be renewed. In fact, even in late 2007, County Bank's  
9 representatives made representations to Malik that County Bank desired to make an additional  
10 land loan to Malik. Therefore, County Bank, through its representations and assurances to Malik,  
11 wrongfully led Malik to believe that the First Note and Second Note could and would be renewed,  
12 while at the same time, County Bank was already intending the non-renewal of such loans.

13           61. County Bank made its repeated representations to Malik regarding release of excess  
14 collateral and renewal of the First Note and Second Note intentionally, and with the specific  
15 purpose of benefiting the bank to the potential detriment of Plaintiffs. County Bank made its  
16 representations with the purpose of keeping Malik as a customer as long as possible, and to  
17 prevent Malik from taking his business and his loans to another lender.

18           62. Plaintiffs were unaware of the falsity of County Bank's representations at the time  
19 they were made, acted in reliance upon the truth of such representations, and were justified in  
20 doing so. Had Plaintiffs known of the falsity of County Bank's representations, they would have  
21 sought release of excess collateral and alternative financing elsewhere and immediately, without  
22 delay and without the added exacerbation caused by the passage of time in a declining economic  
23 market.

24           63. As a direct and proximate cause of Plaintiffs' reliance upon County Bank's  
25 misrepresentations, Plaintiffs have suffered substantial damages to be proven at trial.

26           64. Should Plaintiffs discover that County Bank's misrepresentations were made with  
27 malice, oppression, or fraud, Plaintiffs are entitled to exemplary damages.

28           65. Wherefore, Plaintiffs request judgment as set forth herein.



1 SIXTH CAUSE OF ACTION

2 (Negligent Misrepresentation)

3 66. Plaintiffs hereby incorporate the allegations of paragraphs 1 through 65 as if set  
4 forth in full herein.

5 67. Alternative to Plaintiffs' cause of action for intentional misrepresentation, County  
6 Bank's repeated representations to Malik regarding the release of excess collateral and renewal of  
7 the First Note and Second Note were made negligently. County Bank knew or should have  
8 known that its representations were false, that they had no reasonable grounds for believing their  
9 representations were true, such that their representations were made negligently.

10 68. County Bank made its negligent misrepresentations with the intent to keep Malik as  
11 a customer as long as possible, and to prevent Malik from taking his business and his loans to  
12 another lender.

13 69. Plaintiffs were unaware of the falsity of County Bank's representations at the time  
14 they were made, acted in reliance upon the truth of such representations, and were justified in  
15 doing so. Had Plaintiffs known of the falsity of County Bank's representations, they would have  
16 sought release of excess collateral and alternative financing elsewhere and immediately, without  
17 delay and without the added exacerbation caused by the passage of time in a declining economic  
18 market.

19 70. As a direct and proximate cause of Plaintiffs' reliance upon County Bank's  
20 misrepresentations, Plaintiffs have suffered substantial damages to be proven at trial.

21 71. Wherefore, Plaintiffs request judgment as set forth herein.

22 PRAYER FOR RELIEF

23 Plaintiffs pray for judgment against County Bank and WestAmerica as follows:

- 24 1. For compensatory damages;
- 25 2. For punitive damages to the extent determined appropriate;
- 26 3. For injunctive relief preventing WestAmerica from taking any actions in relating  
27 to or furtherance of pursuing any default or foreclosure in connection with the First Note or  
28 Second Note; and

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4. For reasonable attorneys fees and costs of suit.

DATED: August 3, 2009

DOWNEY BRAND LLP

By: 

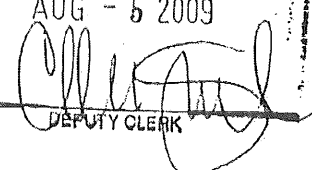
RICHARD K. SUEYOSHI  
Attorney for Plaintiffs  
RONALD J. MALIK and VAN DER MEER,  
LLC

# **EXHIBIT C**

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11 RONALD J. MALIK and VAN DER MEER, LLC

**FILED**  
Clerk of the Superior Court  
AUG - 5 2009  
By   
DEPUTY CLERK

12 SUPERIOR COURT OF CALIFORNIA

13 COUNTY OF SOLANO

14 RONALD J. MALIK and VAN DER  
15 MEER, LLC,

16 Plaintiffs,

17 v.

18 COUNTY BANK, a California  
19 corporation; WESTAMERICA BANK, a  
20 California corporation; and DOES 1-20,  
21 inclusive,

22 Defendants.

CASE NO. FLS034030

**DECLARATION OF RONALD J. MALIK  
IN SUPPORT OF EX PARTE  
APPLICATION FOR TEMPORARY  
RESTRAINING ORDER AND OSC RE:  
PRELIMINARY INJUNCTION**

Date: August 6, 2009  
Time: 8:00 a.m.  
Dept: 1  
Judge: Paul L. Beeman

**By Fax**

23 I, RONALD J. MALIK, declare as follows:

- 24 1. I am a resident of Modesto, California, and reside at 1709 Lourmarin Court which
- 25 has been my home for more than 20 years.
- 26 2. I am the Sole Member of Van der Meer, LLC, which I formed pursuant to the
- 27 express terms of an Operating Agreement dated August 9, 2002.
- 28 3. Van der Meer, LLC's business purpose is to purchase real property known to me
- (as the Sole Member), and to develop, improve, lease, manage, hold for investment, sell,
- exchange, and perform any other activities related to any property purchased through this limited
- liability company. Essentially, I created this LLC so that I could anonymously pursue certain real
- estate investment opportunities.

1           4.       Through Van der Meer, I have acquired various development properties in or  
2 around Modesto, California. When purchasing properties I would obtain financing from local  
3 banks, such as County Bank in Modesto.

4           5.       I had an excellent working relationship with County Bank. I transacted a large  
5 portion of my business with the bank, kept my payments and accounts current, and maintained  
6 substantial cash deposits. County Bank repeatedly informed me that I was an excellent customer.

7           6.       On or about November 21, 2005, I entered into a Business Loan Agreement with  
8 County Bank ("First Loan Agreement"). As a part of the First Loan Agreement, I executed a  
9 November 21, 2005 promissory note in favor of County Bank. This promissory note was for the  
10 principal amount of \$10,014,000.00 (this note and its subsequent renewals hereinafter  
11 collectively, "First Note"). The First Note consolidated previous loans I held with County Bank.  
12 The First Note was secured by the Van der Meer property designated as APNs 003-021-008, 003-  
13 018-016, 003-018-019, 003-018-020, 078-013-021, 078-013-022. The First Note was initially  
14 intended to be a twelve-month loan. However, County Bank informed me that due to delays  
15 caused by illnesses, medical-related unavailability of personnel, and personnel changes, it was  
16 unprepared to issue a twelve-month loan. Therefore, County Bank prepared the First Note as a  
17 six-month loan with a maturity date of May 21, 2006. Prior to the May 21, 2006 maturity date I  
18 requested that County Bank renew the First Note because I had expected to have a longer term  
19 loan in the first place. County Bank agreed to renew the First Note.

20           7.       Over the next two years, the First Note was renewed another three times. On each  
21 occasion I requested the renewal and County Bank agreed. Yet each time County Bank renewed  
22 the First Note there was a delay, causing the renewal to occur after the maturity date. In each  
23 instance, County Bank recognized that it had caused the delay and did not charge me any late  
24 fees. County Bank informed me that it was agreeable to the renewals of the First Note because I  
25 was an outstanding customer and they wanted to keep my business with the bank. Because  
26 County Bank continually agreed to renew the First Note, I did not take my business or the First  
27 Note to another lender.

28       ///

id186-0.1

1           8.       On or about October 25, 2007, I entered another Business Loan Agreement with  
2 County Bank ("Second Loan Agreement"). Prior to this agreement, I had executed a September  
3 26, 2006, promissory note in favor of County Bank. The principal amount of this promissory  
4 note was \$7,000,000.00 (this note and its subsequent renewals hereinafter collectively, "Second  
5 Note"). The Second Note was secured by my property designated as APNs 078-013-006 and  
6 078-013-037. The Second Note was a twelve month loan with a maturity date of September 22,  
7 2007. As the maturity date neared, I requested a renewal of the Second Note; County Bank  
8 agreed to renew the Second Note. As with the First Note, County Bank delayed the renewal of  
9 the Second Note and it was not renewed until after the maturity date. Because County Bank  
10 caused the delay, it did not charge me any late fees. Once again, County Bank informed me that  
11 it would continue to renew the Second Note as needed. As a result of County Bank's assurances I  
12 kept my business with County Bank.

13           9.       After the renewals of the First Note and Second Note, both notes were set to  
14 mature on March 22, 2008. Various County Bank representatives continued to assure me that the  
15 First Note and Second Note would be renewed or extended past the March 22, 2008 maturity  
16 date. Based on these assurances I believed that County Bank would continue to renew and extend  
17 the loans in the future. Therefore, I did not seek alternative financing for these notes, though I  
18 could have obtained such refinancing if it was necessary.

19           10.       However, in early 2008, and for the first time, County Bank informed me that I  
20 needed to obtain financing from another lender for the First Note and Second Note. This  
21 information came as a surprise and shock to me because of my excellent history with the bank. I  
22 was also surprised that County Bank gave me such short notice to obtain refinancing. At the time  
23 that County Bank informed me that I needed to take my business elsewhere, I had less than three  
24 months to obtain financing before the March 22, 2008 maturity dates. Also at this time, the  
25 economic downturn was significantly impacting real estate values and the availability of  
26 financing was considerably worse than it had been a few months earlier. For example, I obtained  
27 a substantial loan of approximately \$8,000,000.00 from Premier Bank in late December of 2007.  
28 However, the lenders and loans that were available to me in mid-to-late 2007 were increasingly

1 less available to me in early 2008. Had I known that County Bank was not going to extend/renew  
2 the First Note and Second Note, I would have taken my business to another bank and sought  
3 refinancing much earlier.

4 11. Given the short amount of time I had to obtain refinancing, I immediately began  
5 looking for another bank. However, County Bank did not cooperate with my refinancing efforts.  
6 For instance, I was negotiating with another bank who attempted to contact County Bank for  
7 information regarding the First Note and Second Note. I am informed and believe that County  
8 Bank did not return phone calls from this other financial institution. As a result, I was unable to  
9 obtain refinancing from that institution.

10 12. Further frustrating my refinancing efforts was the fact that the First Note and  
11 Second Note were highly over-collateralized. That is, the properties securing the First Note and  
12 Second Note far exceeded the values of the loan amounts. The effect of the over-collateralization  
13 was that I had fewer presently unencumbered property that I could offer as collateral for  
14 additional refinancing from other lenders. When I brought this issue to County Bank, County  
15 Bank insisted on the over-collateralization but assured me that they would release properties from  
16 the deeds of trust if I needed them to be released. County Bank never released any property from  
17 the deeds of trust.

18 13. As a result of County Bank's delay in notifying me that I needed to take the First  
19 Note and Second Note to another lender, I was unable to timely acquire refinancing and interest  
20 rates were rising.

21 14. Because I could not find alternative financing for the First Note and Second Note,  
22 and because County Bank had hindered my refinancing efforts, I entered into negotiations with  
23 County Bank regarding a settlement agreement. The negotiations continued through the summer  
24 of 2008.

25 15. On or around September 26, 2008, Van der Meer, my wife, Edna Malik, and I  
26 entered into an Extension and Modification Agreement ("Extension Agreement") with County  
27 Bank. The Extension Agreement allowed an extension of the First Note and Second Note until  
28 December 19, 2008. The Extension Agreement also included an option to extend the term further

1 to March 20, 2009. See Extension Agreement, a true and correct copy of which is attached hereto  
2 as Exhibit A.

3 16. More importantly, under the Extension Agreement County Bank agreed to  
4 complete an appraisal of the properties securing the notes. County Bank and I agreed that I  
5 would continue to seek refinancing during the extension period and an appraisal was critical to  
6 my success. The Extension Agreement also provided that I would release my claims against  
7 County Bank that arose from County Bank's delays and misrepresentations pertaining to the First  
8 Note and Second Note. I only agreed to the release because I understood that County Bank  
9 would fully perform under the Agreement, including timely completing an appraisal of the  
10 properties.

11 17. After we executed the Extension Agreement, County Bank advised me that it  
12 would obtain the appraisal by November 15, 2008. However, as of November 15, 2008 the  
13 appraisal was not ready. Through emails and telephone calls, County Bank repeatedly  
14 represented that the appraisal would be completed shortly. See emails from County Bank, true  
15 and correct copies of which are attached hereto as Exhibit B.

16 18. By early-to-mid December 2008, County Bank continued to represent that the  
17 appraisal would be completed and delivered shortly. I had one lender that was specifically  
18 waiting for the appraisal, and in response to my inquiries, County Bank continued to inform me  
19 that it was not yet prepared to provide the appraisal. At one point, County Bank sent me an  
20 invoice in excess of \$7,000.00 for payment of the appraisal cost. When I requested the appraisal,  
21 County Bank responded that it was not ready, and instructed me to disregard the invoice.

22 19. By mid-to-late December 2008, County Bank finally advised me that it would not  
23 provide a final appraisal for the properties and I should seek an alternative appraisal. At this time,  
24 I was still seeking refinancing of the property. Accordingly, I sought an appraisal elsewhere, but  
25 it was not until January 2009, that the appraisal was complete. During this time the real estate  
26 market had continued to decline. County Bank never provided me with an appraisal of the  
27 properties.

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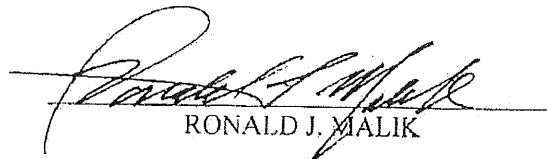
1           20.     Because I was unable to obtain another source of financing by December 19, 2008,  
2 I paid County Bank \$250,000 to extend the term of the notes to March 2009. County Bank  
3 continued to dispute the loans and I continued negotiations with County Bank, which was merged  
4 into WestAmerica Bank in or about February, 2009.

5           21.     The negotiations led to a proposed Amendment One to the Extension Agreement  
6 (“Amendment One”). In late June 2009, believing that we had agreed upon Amendment One, I  
7 delivered a signed copy of Amendment One along with WestAmerica Bank’s requested payment  
8 of \$317,000 to the escrow agent. However, WestAmerica Bank rejected the payment amount and  
9 requested an additional \$54,000. WestAmerica did not provide a legitimate explanation for its  
10 demand for the additional \$54,000 payment and negotiations ended.

11           22.     On or about July 17, 2009, I received a letter, dated July 6, 2009, and postmarked  
12 July 14, 2009, from WestAmerica Bank. By this letter, WestAmerica Bank requested a payment  
13 of \$1,135,849.55. WestAmerica Bank stated that if the payment was not received by July 28,  
14 2009, it would “exercise its remedies provided by the collective Loan Documents,” which would  
15 include recording notices of default and pursuing foreclosure. See July 6, 2009 WestAmerica  
16 Bank letter, a true and correct copy of which is attached hereto as Exhibit C.

17           23.     If WestAmerica Bank begins foreclosure proceedings on the properties, my current  
18 efforts to refinance the properties will be significantly hindered. Moreover, the properties are  
19 currently undeveloped, and if I lose the properties to foreclosure, I will lose the substantial  
20 increase in the value of the property as developed.

21           I declare under penalty of perjury pursuant to the laws of the State of California that the  
22 foregoing is true and correct and that this Declaration was executed on August 6, 2009, at  
23 Modesto, California.

24   
25 RONALD J. MALIK

26  
27  
28

# **EXHIBIT D**

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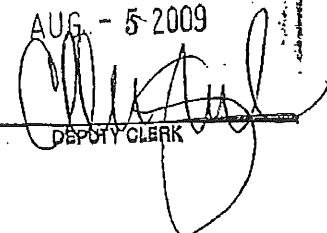
12 SUPERIOR COURT OF CALIFORNIA  
13 COUNTY OF SOLANO

14 RONALD J. MALIK and VAN DER  
15 MEER, LLC,  
16 Plaintiffs,  
17 v.  
18 COUNTY BANK, a California  
19 corporation; WESTAMERICA BANK, a  
20 California corporation; and DOES 1-20  
21 inclusive,  
22 Defendants.

CASE NO. FCS034030

PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF EX PARTE APPLICATION  
FOR TEMPORARY RESTRAINING  
ORDER AND ORDER TO SHOW CAUSE  
RE: PRELIMINARY INJUNCTION

Date: August 6, 2009  
Time: 8:00 a.m.  
Dept: 1  
Judge: Paul L. Beeman

**FILED**  
Clerk of the Superior Court  
AUG - 5 2009  
By   
DEPUTY CLERK

**By Fax**

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I. INTRODUCTION

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Pursuant to Civil Procedure Code section 527 and California Rule of Court 3.1200, et seq., Plaintiffs Ronald J. Malik ("Malik") and Van der Meer, LLC ("Van der Meer"), bring this emergency ex parte application for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction. Plaintiffs seek a TRO to maintain the status quo, by enjoining and restraining Defendant WestAmerica Bank ("WestAmerica") from taking any steps to foreclose on properties owned by Plaintiffs that currently secure certain loans that Plaintiffs have with WestAmerica. The exigency necessitating a TRO stems from a July 6, 2009 letter to Malik in which WestAmerica explicitly threatens to "exercise its remedies provided by the collective Loan Documents" if Malik does not pay \$1,135,849.55 by July 28, 2009. If WestAmerica is permitted to record Notices of Default, it will immediately harm and cause detriment to Plaintiffs' efforts to refinance the loans through other potential lenders. Moreover, if WestAmerica is permitted to pursue foreclosure, it will cause irreparable harm to Plaintiffs and incalculable damages.

As set forth herein, the relationship between Plaintiffs and County Bank was excellent in the past. However, that relationship deteriorated in the past two years due to a series of misrepresentations made by County Bank to Malik in 2007, and early 2008. Plaintiffs had two loans with County Bank (which was acquired by WestAmerica in February 2009) totaling approximately \$17,000,000.00. These loans remain secured by properties in Modesto which are intended for development and which, a portion thereof, have been most recently appraised at over \$65,000,000.00. In late 2007 and into early 2008, County Bank repeatedly represented to Malik that the loans would be renewed though County Bank had internally known that it did not intend to do so. County Bank did not make its true intentions known to Plaintiffs until less than three months prior to the maturity date for the loans, and after a delay that, in the midst of a declining economic market, caused substantial detriment to Plaintiffs and hindered their ability to refinance.

The parties resolved these issues by entering into an Extension and Modification Agreement in September 2008. However, County Bank then materially breached the agreement by failing to provide an appraisal of all properties. The appraisal was critical to Plaintiffs' refinancing efforts. County Bank not only failed to provide the appraisal, but again, only did so

1 after making repeated representations (upon which Malik reasonably and justifiably relied) that it  
 2 would provide the appraisal, all the while causing more delay. Despite County Bank's conduct,  
 3 and because of Plaintiffs' interest in resolving the dispute, Plaintiffs were again willing to settle  
 4 these issues with WestAmerica. After more negotiations, Plaintiffs agreed to an amendment to  
 5 the Extension and Modification Agreement and pursuant thereto, tendered into escrow for  
 6 delivery to WestAmerica, the signed amendment and a check for \$317,000.00, which was the  
 7 amount specifically requested by WestAmerica for accrued interest. WestAmerica surprisingly  
 8 refused to accept this payment and instead, demanded an additional \$54,000.00 without any  
 9 legitimate justification. Therefore, WestAmerica rejected the amendment, leaving the issues  
 10 unresolved, and thus, leaving Plaintiffs with the choice of commencing litigation.

11 Subsequently, WestAmerica sent its July 6, 2009 letter (which was not delivered until July  
 12 14, 2009, and not received until July 17, 2009), making its ostensible threat of foreclosure. Once  
 13 it did so, WestAmerica left Plaintiffs with no choice but to bring all of their claims against  
 14 WestAmerica, as WestAmerica cannot assert that County Bank had no responsibility or liability  
 15 in causing the circumstances which led to the present debacle. Given County Bank's  
 16 misrepresentations and breach of contract, WestAmerica has no right to pursue foreclosure.  
 17 Plaintiffs are entitled to a TRO and injunction pending trial of this action.

## 18 II. FACTUAL BACKGROUND

### 19 A. Malik's Prior Relationship With County Bank.

20 Ronald Malik is a long-standing and respected business person in Stanislaus County. He  
 21 owns various limited liability companies that he uses to pursue real estate investment  
 22 opportunities. (Declaration of Ronald J. Malik in Support of Plaintiffs' Ex Parte Application for  
 23 TRO and OSC ("Malik Decl."), ¶¶ 1-3.) Van der Meer is one of these companies, of which Malik  
 24 is the sole owner and member. (*Id.* at ¶ 2.) Through Van der Meer, Malik has acquired various  
 25 properties for development and improvement in or around Modesto, California. (*Id.* at ¶ 4.)

26 In connection with purchasing real estate through Van der Meer and other entities that he  
 27 owned, Malik would obtain financing, and would commonly direct his business to, and for the  
 28 benefit of, local banks. (*Id.*) One such bank was County Bank, which was later acquired by



1 WestAmerica in February 2009. (*Id.* at ¶¶ 4, 20.) Malik had an excellent history with County  
2 Bank, including transacting substantial business with the bank, keeping payments and accounts  
3 current, and maintaining substantial cash deposits with the bank. (*Id.* at ¶ 5; Declaration of F.  
4 Bradley Pitts In Support of Plaintiffs' Ex Parte Application for TRO and OSC ("Pitts Decl."), ¶  
5 7.) County Bank had repeatedly stated that Malik was an excellent customer of the bank and that  
6 County Bank wanted to continue its relationship with Malik. (Malik Decl., ¶ 5; Pitts Decl., ¶ 7.)

7 **B. Malik's Land Loans With County Bank.**

8 On or about November 21, 2005, Malik entered into a Business Loan Agreement with  
9 County Bank ("First Loan Agreement"). (Malik Decl. at ¶ 6.) In connection with the First Loan  
10 Agreement, Malik executed a November 21, 2005 promissory note in favor of County Bank for  
11 the principal amount of \$10,014,000.00 (this note and its subsequent renewals hereinafter  
12 collectively, "First Note"). (*Id.*) The First Note was secured by property acquired by Malik's  
13 company, Van der Meer. (*Id.*)

14 The First Note was intended to be a twelve-month loan, but due to delays caused by  
15 County Bank, including illnesses, medical-related unavailability of personnel, and personnel  
16 changes, County Bank was unprepared to issue a twelve-month loan. (*Id.*) Instead, the First Note  
17 was made for a six-month period, with a maturity date of May 21, 2006. (*Id.*) Prior to the  
18 maturity date, Malik requested that County Bank renew the First Note given his expectation to  
19 have a longer term loan in the first instance. (*Id.*) County Bank agreed to the renewal. (*Id.*)  
20 Given County Bank's strong interest in keeping Malik as a customer of the bank, and given  
21 Malik's excellent history with the bank, County Bank repeatedly represented to Malik that the  
22 First Note would be renewed, and in fact, renewed the First Note a total of three separate times  
23 over nearly two years. (*Id.* at ¶ 7.; Pitts Decl. ¶ 8.) Because County Bank repeatedly agreed to  
24 renew the First Note and indicated that it wanted to keep Malik as a customer, Malik did not take  
25 his business and loans to another lender. (Malik Decl, ¶ 7.)

26 On or about October 25, 2007, Malik entered another Business Loan Agreement with  
27 County Bank ("Second Loan Agreement"). (*Id.* at ¶ 8.) Prior to this agreement, Malik executed a  
28 September 26, 2006, promissory note in favor of County Bank in the principal amount of

1 \$7,000,000.00 (this note and its subsequent renewals hereinafter collectively, "Second Note").  
 2 (*Id.*) The Second Note was secured by Malik's property and was for twelve months with a  
 3 maturity date of September 22, 2007. (*Id.*) Similar to the First Note, as the maturity date neared  
 4 for the Second Note, Malik requested a renewal which was approved by County Bank. (*Id.*) As  
 5 with the First Note, because of County Bank's renewals and representations, Malik kept his  
 6 business and loans with County Bank. (*Id.*)

7 C. County Bank Repeatedly Represented And Assured Malik That It Would Further  
 8 Renew And Extend The First Note And Second Note.

9 County Bank's last regular renewal of the First Note and Second Note set both of them for  
 10 a maturity date of March 22, 2008. (*Id.* at ¶ 9.) As it did before, County Bank, through its  
 11 various representatives, made representations and assurances to Malik that the First Note and  
 12 Second Note could and would be renewed and/or extended further. (*Id.*; Pitts Decl., ¶ 8.) These  
 13 representations continued through 2007 and into early 2008. (Malik Decl., ¶¶ 6-10.) Indeed,  
 14 because of County Bank's prior renewals of both loans, coupled with its specific indications that  
 15 a further renewal would be possible, Malik was led to believe that the First Note and Second Note  
 16 would be extended as needed by Malik in the future. (*Id.* at ¶ 9.) At no time prior to early 2008  
 17 did County Bank make any representation to the contrary. (*Id.* at ¶ 10.)

18 Through early 2008, Malik continued to rely upon County Bank's representations. (*Id.* at  
 19 ¶ 9.) In specific reliance upon County Bank's representations and assurances that a renewal of  
 20 the First Note and Second Note would not be a problem, Malik did not seek and obtain  
 21 refinancing of the First Note or Second Note, even though Malik had the ability and opportunity  
 22 to obtain such refinancing if it was necessary. (*Id.* at ¶ 10.) Malik forwent these refinancing  
 23 opportunities simply because County Bank, by its words and actions, led him to believe that there  
 24 was no need to do so. (*Id.* at ¶¶ 7-9.)

25 D. County Bank Wrongfully And Purposefully Delayed Informing Malik That It Would  
 26 Not Extend The First Note And Second Note.

27 Notwithstanding County Bank's repeated assurances and representations that it would  
 28 extend and/or renew the First Note and Second Note, County Bank, prior to the Fall of 2007,

1 knew or should have known that it would not renew various land loans, including the First Note  
2 and Second Note. In mid 2007, County Bank was audited by federal regulators who closely  
3 scrutinized County Bank's loan portfolio. (Pitts Decl., ¶ 10.) Prompted by or as a result of this  
4 audit, County Bank ultimately determined that it would restrict its land-loans. (*Id.*) However,  
5 County Bank did not immediately disclose these facts to Malik. (*Id.* at ¶ 11.) Rather, in an  
6 apparent effort to keep its own options open with respect to a continuing relationship with Malik,  
7 County Bank continued to assure that the First Note and Second Note would be renewed. (*Id.*)

8 At the same time that County Bank knew (or should have known) that it was limiting its  
9 real estate transactions generally, County Bank marketing representatives were instructed to  
10 continue to increase the bank's loan portfolio, including the pursuit of additional land loans. (*Id.*)  
11 Therefore, County Bank, through its representations and assurances to Malik, wrongfully led  
12 Malik to believe that the First Note and Second Note could and would be renewed, while at the  
13 same time, County Bank was intending to eliminate these types of loans from its portfolio.

14 During the first quarter of 2008, and for the first time, County Bank indicated to Malik  
15 that it would not renew the First Note or Second Note after their respective maturity dates of  
16 March 22, 2008. (Malik Decl., ¶ 10.) This came as a shock and surprise to Malik, not only given  
17 his past excellent history with County Bank, but also because the late notice gave Malik very little  
18 time to seek and obtain alternate refinancing of the First Note and Second Note. (*Id.*) County  
19 Bank's late notice gave Malik as little as three months to find alternative financing prior to the  
20 loans' maturity dates. (*Id.*)

21 Moreover, in early 2008, the economic downturn was rapidly impacting real estate values  
22 and the availability of financing was becoming significantly worse than just months earlier. (*Id.*)  
23 As an example, Malik had obtained a substantial loan upwards of approximately \$8,000,000.00  
24 (unrelated to the First Note and Second Note) as late as December 2007. (*Id.*) However, lenders  
25 and loans that were available to Malik in mid-to-late 2007, were becoming less and less viable  
26 options by early 2008. (*Id.*) Thus, County Bank's delay in notifying Malik of its true intentions  
27 caused substantial detriment and harm to Malik's financial circumstances as they related to the  
28 First Note and Second Note. (*Id.* at ¶ 13.)

1 **E. County Bank Failed To Cooperate With Malik's Refinancing Efforts, Causing Malik**  
 2 **Further Harm.**

3 Despite the short timeframe for refinancing the First Note and Second Note, Malik made  
 4 significant attempts in early 2008 to obtain refinancing. (*Id.* at ¶ 11.) However, County Bank did  
 5 not cooperate or assist Malik in those efforts. (*Id.*) For instance, Malik was in contact with one  
 6 financial institution that attempted, on several occasions, to obtain information from County Bank  
 7 regarding refinancing. (*Id.*) County Bank, however, did not return calls from the financial  
 8 institution. (*Id.*) County Bank's failure to cooperate in this regard negatively impacted Malik's  
 9 options and hindered his ability to obtain refinancing. (*Id.*)

10 Moreover, the First Note and Second Note were over-collateralized by County Bank. (*Id.*  
 11 at ¶ 12; Pitts Decl., ¶ 9.) Indeed the properties securing the First Note and Second Note far  
 12 exceeded the values of the loan amounts. (*Id.*) Despite this discrepancy, County Bank insisted on  
 13 having far more collateral than reasonably necessary to secure the First Note and Second Note. In  
 14 acknowledgement of the fact that the loans were over-collateralized, County Bank stated that it  
 15 would release properties from the deeds of trust if Malik needed them to be released, yet County  
 16 Bank never did so. (Malik Decl., ¶ 12.) County Bank's insistence on over-collateralizing the  
 17 loans and its subsequent failure to release any properties further negatively impacted Malik's  
 18 refinancing as Malik had fewer presently unencumbered properties for which he could offer as  
 19 collateral for additional refinancing from other lenders.

20 **F. County Bank and Malik Enter an Extension and Modification Agreement Pertaining**  
 21 **To The First Note and Second Note.**

22 Given the circumstances caused by County Bank, Malik was unable to refinance the First  
 23 Note and Second Note prior to their March 22, 2008 maturity dates. (Malik Decl., ¶ 13.)  
 24 Considering the substantial detriment that County Bank caused, the two sides began negotiating a  
 25 settlement agreement which would include, among other terms, an extension for Malik on the  
 26 First Note and Second Note. (*Id.* at ¶ 14.) These negotiations continued through the summer of  
 27 2008. (*Id.*) By or around September 26, 2008, County Bank on one hand, and Malik, his spouse,  
 28 and Van der Meer, on the other hand, entered into an Extension and Modification Agreement

1 (“Extension Agreement”). (*Id.* at ¶ 15, Ex. A.) The Extension Agreement provided Malik with  
2 an extension of the First Note and Second Note to December 19, 2008, with the option for Malik  
3 to extend the term further to March 20, 2009. (*Id.*, Ex. A. §§ 2.1, 2.2.)

4 Importantly, the Extension Agreement specifically contemplated and stated in its Recitals  
5 that Malik would eventually need to arrange for payment of the First Note and Second Note either  
6 through refinancing or sale of some or all of the property securing the notes. (*Id.*, Ex. A, Recital  
7 F.) In this regard, the Extension Agreement specifically stated that County Bank “*shall obtain an*  
8 *appraisal of all of the real property subject to the Deeds of Trust*” relating to the First Note and  
9 Second Note. (*Id.* at ¶ 16, Ex. A § 5.) Malik was to pay for the appraisal within ten days of  
10 demand from County Bank. (*Id.*) This appraisal was obviously crucial to Malik’s efforts in that  
11 it would be required either in connection with refinancing or a sale of any properties. (*Id.* at ¶  
12 16.) The appraisal was also required for County Bank’s purposes in calculating certain payments.  
13 (*See Id.* at Ex. A § 2.2) Therefore, County Bank’s obtaining of the appraisal was important to  
14 both parties and a significant bargained-for term of the Extension Agreement.

15 In exchange for the promises and covenants agreed to by County Bank, including the  
16 requirement that the bank obtain an appraisal, Plaintiffs agreed to release County Bank from the  
17 claims and causes of action relating to County Bank’s actions and misrepresentations pertaining  
18 to the First Note and Second Note. (*Id.* at Ex. A § 12.) Plaintiffs agreed to this release only upon  
19 understanding and expectation that County Bank would fully perform its obligations.

20 **G. County Bank Failed To Perform And Materially Breached The Extension**  
21 **Agreement.**

22 Shortly after the parties agreed to the Extension Agreement, County Bank advised Malik  
23 that it would obtain the appraisal by November 15, 2008. (*Id.* at ¶ 17.) County Bank knew at all  
24 times that the appraisal was critically important to Malik and that he was waiting for County  
25 Bank to send him the final appraisal. Despite the terms of the Extension Agreement, County  
26 Bank did not deliver the appraisal to Malik as agreed. Through emails and telephone calls,  
27 County Bank repeatedly represented to Malik that the appraisal would be completed shortly. (*Id.*  
28 at ¶ 17, Ex. B.) Weeks passed and even by early-to-mid December 2008, County Bank continued

1 to represent that the appraisal would be completed and delivered shortly. (*Id.* at ¶ 18.) Malik had  
2 one lender that was specifically waiting for the appraisal, and in response to inquiries, County  
3 Bank continued to state it was not yet prepared to provide the appraisal. (*Id.*) County Bank  
4 continued to delay. At one point, County Bank sent an invoice to Malik, charging him for the  
5 appraisal even though it was not yet complete. (*Id.*) Malik responded by requesting the appraisal.  
6 County Bank answered that it was not ready yet and Malik should disregard the invoice. (*Id.*)

7 By late December 2008, after inducing Malik's reliance for over a month, County Bank  
8 finally advised Malik that it would not perform under Section 5 of the Extension Agreement and  
9 Malik would not receive a final appraisal for the properties. (*Id.* at ¶ 19.) Only then did Malik  
10 begin seeking an appraisal from an alternative source given that it was still critically needed for  
11 Malik's purposes, including the refinancing of the properties. (*Id.*) Not only did County Bank  
12 fail to perform, but it failed to advise Malik that it would not perform until after an entire month  
13 of time was lost. (*Id.*) Because of County Bank's delay and breach, Malik was not able to obtain  
14 an alternative appraisal until January 2009. (*Id.*) This passage of time during a rapidly declining  
15 economy exacerbated the harm to Malik. (*Id.*)

16 H. Although Malik Attempted To Resolve Issues With County Bank, And Later, With  
17 WestAmerica, Negotiations Failed And WestAmerica Sent Its Demand Letter.

18 Because Malik was unable to obtain another source of financing by December 19, 2008,  
19 Malik opted to pay County Bank \$250,000.00 in order to extend the term to extend the term to  
20 March 2009. (*Id.* at ¶ 20.) Nonetheless, County Bank, which by February 2009, was acquired by  
21 WestAmerica, continued to dispute the status of the loans and the parties recommenced  
22 negotiations pertaining to the First Note and Second Note. (*Id.*) The parties' negotiation led to a  
23 proposed amendment to the Extension Agreement. (*Id.* at ¶ 21.) In late June 2009, Malik,  
24 believing that the parties had agreed upon the amendment, tendered to WestAmerica (through  
25 escrow) his signature and a payment of \$317,000.00, which was the amount of accrued interest  
26 specifically requested request by WestAmerica pursuant to the proposed amendment. (*Id.*)  
27 WestAmerica refused Malik's payment, claiming that he was required to pay an additional  
28 \$54,000.00. (*Id.*)

1 WestAmerica provided no basis or legitimate explanation for its added demand for  
2 payment and negotiations ceased. (*Id.*) On July 17, 2009, Malik received a letter from  
3 WestAmerica bearing the date of July 6, 2009. (*Id.* at ¶ 22, Ex. C.) In the letter, WestAmerica  
4 demanded payment from Malik of \$1,135,849.55. (*Id.*) WestAmerica demanded this payment by  
5 July 28, 2009, or else it would "exercise its remedies provided by the collective Loan  
6 Documents," which includes recording notices of default and pursuing foreclosure. (*Id.*)

7 **III. ARGUMENT**

8 A. **Plaintiffs Are Entitled To A Temporary Restraining Order And Order To Show**  
9 **Cause Re: Preliminary Injunction Against Defendants, Preventing Them From**  
10 **Recording Notices of Default Or Taking Steps In Pursuit Of Foreclosure.**

11 Plaintiffs are entitled to a TRO and OSC re: preliminary injunction that will maintain the  
12 status quo and prevent Defendants from filing notices of default against Plaintiffs properties or  
13 otherwise taking steps in pursuit of foreclosure. Civil Procedure Code section 526 sets forth the  
14 series of grounds that are appropriate for the court's granting of an injunction (and thus, a TRO),  
15 including where the moving party demonstrates a likelihood of success on the merits, where the  
16 moving party would suffer irreparable harm in the absence of an injunction, and when the moving  
17 party does not have an adequate remedy at law. Cal. Civ. Proc. Code § 526(a)(1), (2), (4). The  
18 California Supreme Court has discussed the standard for granting injunctive relief, also noting  
19 that courts must balance the strength of each factor and the equities between the parties:

20 In deciding whether to issue a preliminary injunction, a court must weigh two  
21 "interrelated" factors: (1) the likelihood that the moving party will ultimately  
22 prevail on the merits and (2) the relative interim harm to the parties from issuance  
23 or nonissuance of the injunction. [Citation.] Appellate review is limited to  
24 whether the trial court's decision was an abuse of discretion. [Citation.] The trial  
25 court's determination must be guided by a "mix" of the potential-merit and  
26 interim-harm factors; the greater the plaintiff's showing on one, the less must be  
27 shown on the other to support an injunction. [Citation.]

28 *Butt v. State of California* (1992) 4 Cal.4th 668, 677-678 (citations omitted)

In the present case, when considering the potential-merit and interim-harm factors as set  
forth by the California Supreme Court and Civil Procedure Code section 526, Plaintiffs can  
clearly demonstrate that they are entitled to a TRO and OSC re: preliminary injunction against  
Defendants. Indeed, while a successful moving party may obtain injunctive relief through a

1 mixed showing of strength among the factors, in this case, Plaintiffs' showing on each and every  
 2 applicable factor is supported by the great weight of evidence, necessitating the issuance of a  
 3 TRO and OSC directed to Defendants.

4 1. Plaintiffs Will Succeed On The Merits Because It Is Undisputed That County  
 5 Bank (and therefore, WestAmerica) Breached The Extension Agreement By  
 6 Failing To Obtain The Appraisal; And WestAmerica Is Further Liable For  
 7 County Bank's Misrepresentations.

8 Plaintiffs will prevail on their claim against WestAmerica for County Bank's material  
 9 breach of the Extension Agreement. In determining whether to issue a TRO or injunction, the  
 10 moving party must show a "reasonable probability" that it will prevail on the merits. *San*  
 11 *Francisco Newspaper Printing Co., Inc. v. Super. Ct.* (1985) 170 Cal.App.3d 438, 442; *see also*  
 12 Cal. Civ. Proc. Code § 526(a)(1). In this case, however, it is indisputable that County Bank  
 13 breached the Extension Agreement.

14 The Extension Agreement, in Section 5, plainly states: "Bank *shall* obtain an appraisal of  
 15 all of the real property subject to the Deeds of Trust . . . ." (Malik Decl., Ex. A § 5.) This was a  
 16 specially bargained-for provision that was material to the contract. And it was a provision that  
 17 was material to both parties. Section 2.2 provides that the appraisal will serve as a basis for  
 18 County Bank to calculate a further extension payment. While County Bank could presumably  
 19 waive (which it apparently did) this need for the appraisal, the Recitals of the Extension  
 20 Agreement set forth the most important reason for the appraisal – and the reason that was to  
 21 directly benefit Malik. (*Id.*, Ex. A Recital F.) Recital F specifically states that central to the  
 22 Extension Agreement is the understanding among the parties that Malik is "to make arrangements  
 23 for the payment of the Notes, *whether through refinancing, sale of some or all of the property*  
 24 *securing the Notes or a combination thereof.*" (*Id.*) Therefore, it was clear that Malik needed to  
 25 get refinancing or sell the property – both of which options would require an appraisal of the  
 26 property. Given that Malik was to pay for the appraisal per Section 5, it was as much his to  
 27 utilize as he needed as it was for the bank to use for its purposes.

28 Shortly after the Extension Agreement was signed, County Bank specifically stated that  
 the appraisal would be completed by November 15, 2008. (*Id.* at ¶ 17.) However, despite the



1 terms of Section 5, County Bank never delivered the appraisal. (*Id.* at ¶ 19.) Far worse, County  
2 Bank did not simply refuse to perform the appraisal at the outset, giving Malik time to schedule  
3 and acquire an appraisal on his own. Rather, County Bank, through emails and telephone calls,  
4 repeatedly represented to Malik that the appraisal would be completed shortly. (*Id.* ¶ 18, Ex. B.)  
5 Weeks passed and even by early-to-mid December 2008, County Bank continued to represent that  
6 the appraisal would be completed and delivered shortly. (*Id.*) Malik had one lender that was  
7 specifically waiting for the appraisal, and in response to inquiries, County Bank continued to state  
8 it was not yet prepared to provide the appraisal. (*Id.*) County Bank continued to delay.

9 Malik, relying upon such representations and assurances, had no reason to believe that  
10 County Bank would ultimately fail to perform. And because Malik was required to pay for the  
11 appraisal that County Bank was supposed to obtain, it made no sense for Malik to disregard  
12 County Bank's assurances and order another appraisal, especially when they were time-  
13 consuming to perform and in excess of \$7,000.00 to purchase. (*See Id.*, Ex. A § 5.) Finally,  
14 however, by late December 2008, after inducing Malik's reliance for over a month, County Bank  
15 finally told Malik that it would not perform under Section 5 of the Extension Agreement and  
16 Malik would not receive a final appraisal for the properties. (*Id.* at ¶ 19.) Only then did Malik  
17 begin seeking an appraisal from an alternative source given that it was still critically needed for  
18 Malik's purposes, including the refinancing of the properties. (*Id.*) By the time Malik obtained  
19 an appraisal on his own, it was January 2009. (*Id.*) In the meantime, the loss of time caused by  
20 County Bank, coupled with and exacerbated by the declining economic market, obviously and  
21 significantly impacted Malik's refinancing and sale options. (*Id.*)

22 Given these facts, there is no dispute that County Bank, and thereby WestAmerica, is  
23 liable for breach of the Extension Agreement. Plaintiffs will prevail on the merits and  
24 demonstrate the impact of County Bank's misrepresentations and delays upon Malik's efforts to  
25 refinance the properties. Further, because County Bank is in breach of the Extension Agreement,  
26 it may not proceed with recording notices of default or otherwise pursuing foreclosure.

27 Additionally, while County Bank's breach of the Extension Agreement for failure to  
28 obtain the appraisal is clear and sufficient to support issuance of a TRO and OSC, Plaintiffs'

1 ability to demonstrate a likelihood of success on the merits does not end with their breach of  
2 contract cause of action. Because County Bank materially breached the Extension Agreement,  
3 Plaintiffs are excused from performing any further under that agreement. This is especially  
4 important given that Plaintiffs only agreed to release their lender liability claims (stemming from  
5 County Bank's prior misrepresentations regarding renewal of the First Note and Second Note) in  
6 exchange for County Bank's performance of all terms required of it under the Extension  
7 Agreement. Because County Bank breached the contract, Plaintiffs have brought and will prevail  
8 on their lender liability claims.

9 Plaintiffs have a probability of success on their remaining claims, including, for example,  
10 intentional and negligent misrepresentation and breach of the implied covenant of good faith and  
11 fair dealing. As previously explained, County Bank's continual misrepresentations, whether  
12 intentional or merely negligent, have caused the urgent situation Plaintiffs face today. (*See* Malik  
13 Decl.) Absent County Bank's numerous misrepresentations that it would refinance and/or extend  
14 the First Note and Second Note, Malik would have sought refinancing from another lender in  
15 2007, prior to the continuing and increasing impact of the economic downturn. (*Id.* at ¶¶ 7-9.)

16 Indeed, as an example of how critical timing was during this period, in December 2007,  
17 Malik received financing from another bank for \$8,000,000 (unrelated to the First Note and  
18 Second Note). (*Id.* at ¶10.) Accordingly, had County Bank been upfront at the outset regarding  
19 its intention to not extend the First Note and Second Note, Malik would have likely been able to  
20 obtain refinancing from another source. However, County Bank's misrepresentations caused  
21 unjustified delays and irreversible harm in that Plaintiffs were forced to seek refinancing much  
22 later, and during the height of the economic downturn. (*Id.*) Malik has been unsuccessful to date  
23 in securing refinancing. County Bank's misconduct caused this situation, and neither County  
24 Bank nor its successor, WestAmerica, should be permitted to benefit from its wrongdoing.

25 In sum, it is abundantly clear that Plaintiffs will succeed on the merits in establishing that  
26 Defendants breached the Extension Agreement. Moreover, Plaintiffs certainly have a likelihood  
27 of success on the merits for their remaining claims. Therefore it is appropriate to grant Plaintiffs'  
28 request for TRO and OSC re: preliminary injunction.

1           2.     Plaintiffs Will Suffer Imminent Irreparable Harm If A Temporary  
 2                   Restraining Order And Order To Show Cause Are Not Issued Because A  
 3                   Notice of Default Will Greatly Impede Plaintiffs' Current Refinancing Efforts

4           Plaintiffs are entitled to a TRO and OSC re: preliminary injunction because in the absence  
 5 of such provisional relief, Plaintiffs will suffer immediate and irreversible harm. The court may  
 6 impose injunctive relief where the moving party would otherwise be significantly hurt in a way  
 7 that cannot be later repaired. *See People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater*  
 8 (1981) 118 Cal.App.3d 863, 870-871; Cal. Civ. Proc. Code § 526(a)(2). An injunction may be  
 9 appropriate where the threatened harm to the moving party is imminent. *Korean Philadelphia*  
 10 *Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084.

11           Here, there is no question that Plaintiffs face imminent irreparable harm if a TRO and  
 12 OSC re: preliminary injunction is not issued. On July 6, 2009, WestAmerica issued a demand  
 13 letter to Plaintiffs whereby it sought the immediate payment of over \$1,100,000 to extend the  
 14 First Note and Second Note. Importantly, WestAmerica specifically threatened Malik that if such  
 15 payment was not received by July 28, 2009, "it is the Bank's intention to exercise its remedies  
 16 provided by the collective Loan Documents." (Malik Decl., Ex. C.) Clearly and obviously,  
 17 WestAmerica is threatening the recording of Notices of Default and the pursuit of foreclosure. If  
 18 WestAmerica is allowed to proceed even with a recordation of a Notice of Default, such  
 19 recording will greatly impede the already difficult task of obtaining refinancing for the properties.  
 20 Such action has the potential, in this economic climate, to prevent Plaintiffs from obtaining  
 21 refinancing altogether. The damage caused to Plaintiffs thereby would be immense and  
 22 immeasurable, especially if it ultimately results in Plaintiffs loss of properties which will be worth  
 23 tens of millions, if not far more, upon development. The imminent and irreparable harm is clear.

24           3.     Plaintiffs Are Without An Adequate Remedy At Law, Further Necessitating  
 25                   A Temporary Restraining Order And Order To Show Cause.

26           Just as Plaintiffs face imminent irreparable harm, they are similarly without an adequate  
 27 remedy of law, given the valuable and unique properties at stake. A court may issue injunctive  
 28 relief where a suit for damages will not provide a clear remedy to the moving party or where it  
 would be extremely difficult to ascertain the amount of compensation that would afford the

1 moving party adequate relief. *See Thayer Plymouth Center, Inc. v. Chrysler Motors* (1967) 255  
 2 Cal.App.2d 300, 307; *Pacific Decision Sciences Corp. v. Super. Ct.* (2004) 121 Cal.App.4th  
 3 1100, 1110; Cal. Civ. Proc. Code § 526(a)(4), (5). Further, in particular cases involving  
 4 agreements to convey real property, the property is usually deemed unique implying that injury or  
 5 loss cannot be compensated in damages and warranting injunctive relief. *See* Cal. Civ. Code §  
 6 3387 (damages presumed inadequate for breach of agreement to convey real property); *see*  
 7 generally *Jessen v. Keystone Savings & Loan Assoc.* (1983) 142 Cal.App.3d 454, 458 (finding  
 8 that damages were adequate remedy, but only where real property consists of condominium units  
 9 *being held for investment purposes and having an established market price*).

10 In the present case, if WestAmerica proceeds with non-judicial foreclosure, it will be  
 11 extremely difficult to determine the amount of damages that Malik would be entitled to from  
 12 Defendants, other than the readily apparent fact that damages may be in the tens of millions of  
 13 dollars, if not more. The most recent appraisal that Malik has obtained for a portion of Van der  
 14 Meer's properties places the value upwards of \$65,000,000.00. However, if Malik loses  
 15 ownership of the properties through foreclosure, the lost value of the property to Malik given its  
 16 future development, potential changes in the market, added value to the property, and other  
 17 variables, is virtually, if not actually, impossible to ascertain. The only certainty is that all of this  
 18 value will be lost if Plaintiffs' properties are lost to foreclosure. This is not a situation where the  
 19 properties are already built, held for investment purposes, and have an established market price  
 20 (as was the case in *Jessen*). Rather, the nature and value of the properties and their future  
 21 development give the property the same uniqueness as other real property transactions which  
 22 require injunctive relief. Thus, it is plainly evident that Plaintiffs are without an adequate remedy  
 23 of law if they are denied provisional relief and left to seek only monetary damages at trial.

24 4. Plaintiffs Will Suffer Far Greater Harm In Absence Of A Temporary  
 25 Restraining Order And Order To Show Cause While Defendants Will Suffer  
 26 Little Harm Should The Court Issue Such Relief.

27 While Plaintiffs have already made a substantial showing for issuance of a TRO and OSC,  
 28 there is similarly no doubt that a balancing of the equities tilts strongly in favor of granting  
 Plaintiffs the requested relief. The court must exercise its discretion "in favor of the party most

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1 likely to be injured . . . . If denial of an injunction would result in great harm to the plaintiff, and  
2 the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to  
3 grant the preliminary injunction.” *Robbins v. Super. Ct.* (1985) 38 Cal.3d 199, 205; *see also*  
4 *Shoemaker v. City of Los Angeles* (1995) 37 Cal.App.4th 618, 633.

5 In this instance, the evidence overwhelmingly indicates that Plaintiffs will suffer greater  
6 harm in the absence of injunctive relief than Defendants will experience in the presence of such  
7 relief. The harm to Plaintiffs has been explained in detail above. As for Defendants, the court  
8 will note that the issuance of a TRO and OSC maintains the current status quo. Defendants will  
9 maintain their first position as a creditor of the property and remain over-collateralized. Further,  
10 no bond should be necessary given that in lieu of any bond, Plaintiffs are willing to reach a  
11 reasonable agreement to pay on a month-to-month basis pending trial of this matter, interest per  
12 the non-default rates and amounts provided for in the First Note and Second Note. Simply put,  
13 there is far more at stake for Plaintiffs and very little at stake for WestAmerica in granting this  
14 application and a preliminary injunction.

15 **IV. CONCLUSION**

16 For all of the reasons set forth above and in the supporting papers filed herewith, Plaintiffs  
17 request that the court immediately issue a TRO and OSC re: Preliminary Injunction preventing  
18 Defendants, and any persons or entities acting in concert with or aiding and abetting Defendants,  
19 from executing and recording Notices of Default or otherwise pursuing foreclosure against any of  
20 Plaintiffs’ properties as delineated in the Extension Agreement.

21 DATED: August 5, 2009 DOWNEY BRAND LLP

22  
23 By:   
24 RICHARD K. SUEYOSHI  
25 Attorney for Plaintiffs  
26 RONALD J. MALIK and VAN DER MEER, LLC  
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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Downey Brand LLP, 621 Capitol Mall, 18th Floor, Sacramento, California 95814-4731. On August 5, 2009, I served the within document(s):

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION**

- BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.
- BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
- BY PERSONAL DELIVERY:** by causing personal delivery by Nationwide Legal of the document(s) listed above to the person(s) at the address(es) set forth below.

\* SEE LIST OF PARTIES ATTACHED BELOW \*

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 5, 2009, at Sacramento, California.

Mariah A. Crabtree  
Mariah A. Crabtree

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# **EXHIBIT E**



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Attorneys for Defendant: WESTAMERICA BANK

FILED  
SOLANO SUPERIOR COURT

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**IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SOLANO**

RONALD J. MALIK and VAN DER MEER, LLC, ) Case No. FCS034030  
)  
)

Plaintiffs,

) **MEMORANDUM OF POINTS AND  
) AUTHORITIES IN OPPOSITION TO  
) ORDER TO SHOW CAUSE RE:  
) PRELIMINARY INJUNCTION**

v.

COUNTY BANK, a California corporation;  
WESTAMERICA BANK, a California  
corporation; and DOES 1-20, inclusive,

) Date: August 21, 2009  
) Time: 9:00 a.m.  
) Dept: 1  
)

Defendants.

FILED BY [Signature]

WESTAMERICA BANK ("WAB"), successor-in-interest to Plaintiff COUNTY BANK ("County Bank") under that certain Purchase and Assumption Agreement Whole Bank All Deposits with the Federal Deposit Insurance Corporation (the "FDIC"), respectfully submits the following memorandum of points and authorities in support of its opposition to order to show cause re: preliminary injunction.

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TABLE OF AUTHORITIES

Federal Cases

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California Cases

*14859 Moorpark Homeowner's Assn. v. VRT Corp.* (1998) 63 Cal.App.4<sup>th</sup> 1396, , 1402, 1408. . . . 12, 19

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*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 441-442 . . . . . 12

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*Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.* (2001) 91 Cal.App.4<sup>th</sup> 678, 695-696. . . 12

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9 12 U.S.C. section 1823(e) .....1, 13, 14

10 California Statues

11 Code of Civil Procedure section 564(b)(8) ..... 21

12 Other Authorities

13 ABA Comm. On Ethics and Prof'l Responsibility, Informal Op. 86-1518 (1986) .....8

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I.

INTRODUCTION AND STATEMENT OF FACTS

On February 6, 2009, County Bank was closed by the California Department of Financial Institutions, which appointed the FDIC as receiver. (Declaration of Donald Jordan ["Jordan Decl.,"] at ¶ 6.) That same day, WAB purchased the assets of County Bank, such that it is now successor-in-interest to County Bank's assets, including the loans that are the subject of this action. (*Ibid.*)

As discussed below in greater detail, upon appointment of FDIC as receiver, the powerful doctrine known as "D'Oench, Duhme", and its statutory counterpart at 12 U.S.C. section 1823(e), came into existence. This doctrine holds that the FDIC and WAB as assignee may not be held liable for claims against County Bank that are inconsistent with the written documents. As such, the D'Oench, Duhme doctrine holds that oral side agreements with County Bank cannot be used now against WAB. The contention that County Bank breached oral agreements to continue advancing monies, not accelerate the loans, and to extend the subjects loans is inaccurate, and would be barred by the statute of frauds, the terms of the loan documents and the unconditional waivers and releases which Mr. Malik has given in exchange for the various extensions--even if these loans were still in the possession of County Bank.

With the takeover of County Bank, and the sale of these loans by the FDIC to WAB, these contentions are barred by the D'Oench, Duhme doctrine and 12 U.S.C. § 1823(e); Mr. Malik's arguments are simply irrelevant. Because the basis for Plaintiffs' arguments and causes of action focus on County Bank's alleged misrepresentations, the present request for issuance of a preliminary injunction must be denied in that Plaintiffs cannot establish a likelihood of success on the merits.

Moreover, the equities favor WAB. It is not disputed that Mr. Malik owes over \$16,000,000.00 to WAB and he has stopped repaying his obligation. Mr. Malik has been in default and operating under short term loan extensions and informal forbearances for over a year based upon repeated promises of impending refinancings with other lenders. Mr. Malik was advised nearly two years ago that County Bank wanted him to refinance with another institution and has made repeated promises to refinance or sell property and to pay off his loans. In his pleading, Mr. Malik conspicuously fails to note that County Bank in fact offered to extend his loans before any dispute arose. In March of 2008, County Bank offered Mr. Malik a further one year extension of the loans, and Mr. Malik rejected the extension because

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2 he did not like the terms. Mr. Malik also fails to disclose that the alleged dispute or confusion regarding  
3 the Amendment to Loan Extension and Modification Agreement (the "Amendment") is in fact the result  
4 of changes which Mr. Malik or his representatives made to the Amendment without disclosing the  
5 changes to WAB, its counsel or presumably his own counsel.

6 It has become clear over this two year period that Mr. Malik simply is unable or unwilling to  
7 repay these loans. WAB has no obligation to continue to indefinitely extend these loans, and has a  
8 contractual and statutory right to proceed with foreclosure in light of the present default and Mr. Malik's  
9 inability or unwillingness to comply with his obligations. If Mr. Malik truly believes that he has  
10 substantial equity in this property and can restructure his affairs with a little more time, his appropriate  
11 venue is to seek reorganization in the bankruptcy courts and to gain the further time needed through the  
12 bankruptcy court's automatic stay. It is no doubt likely that Mr. Malik will file for bankruptcy prior to  
13 the completion of a foreclosure and an injunction against foreclosure simply gives Mr. Malik a windfall  
14 further delay. The present request for imposition of a preliminary injunction should be denied in its  
15 entirety.

16 Finally even though WAB believes it is entitled to default interest as set forth in the default letter  
17 sent to Mr. Malik in July, in order to avoid even the potential for a dispute over accounting of the loan  
18 balance which might justify a delay in the foreclosure, WAB has elected to not to seek the default interest  
19 in this foreclosure and sent an amended default letter on August 12, 2009 (attached as Exhibit "A" to the  
20 Declaration of Peter N. Zeitler). This further default letter does not include default interest or any other  
21 amount which Mr. Malik could reasonably dispute. WAB has done so not because of any error in the  
22 prior demand letter, but rather in order to avoid any possible specter of a dispute in this matter. WAB  
23 intends to file amended notices of default based upon the revised amounts as soon as the Court lifts any  
24 injunction against it.

25 **A. Background Facts.**

26 **1. The Original Loans.** The real property in question secured two loans that County Bank  
27 (now WAB) extended to Mr. Malik. The first promissory note (the "First Note") was originally dated  
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1 November 21, 2005. The Note was formally restated and extended several times over the next few years  
2 on June 14, 2006, September 26, 2006 and October 25, 2007. The second promissory note (the "Second  
3 Note") was originally dated September 26, 2006 and was formally extended on and restated on October  
4 25, 2007. The last extensions of both the First Note and the Second Note (the "Notes") expired on March  
5 22, 2008 at which point both Notes were due and payable in full. (Jordan Decl. at ¶ 7.)

6       **2. Mr. Pitts First Version of Events.** F. Bradley Pitts was a Vice President of County Bank  
7 and directly responsible for the Malik loans. Mr. Pitts' employment with County Bank was terminated as  
8 part of a staff reduction in force, and he has subsequently been working for Mr. Malik. Mr. Pitts has  
9 submitted a declaration which implies that County Bank told Mr. Malik it would continue to extend his  
10 loans. Mr. Pitts was the primary person communicating with Mr. Malik regarding these loans. However  
11 his declaration is inconsistent with both his instructions from senior bank management regarding the  
12 handling of these loans, and with the e-mails and memorandum which he provided to other County Bank  
13 personnel explaining the history of these loans when this credit first became a problem in early 2008.  
14 (Jordan Decl. at ¶¶ 8-10.) On April 11, 2008, shortly after the term of the last extension expired Mr. Pitts  
15 sent a one page e-mail to Don Briggs (then acting as *de facto* CEO of County Bank) briefly summarizing  
16 the background of these credits. A true and correct copy of the e-mail is attached as Exhibit "B" to the  
17 Declaration of Peter N. Zeitler. On August 11, 2008, when Mr. Malik's counsel first began claiming that  
18 County Bank was breaching verbal agreements made by Mr. Pitts, Mr. Pitts prepared a two page  
19 memorandum summarizing these credits in more detail. (Jordan Decl. at ¶ 9; Exh. "A" attached thereto.)  
20 Mr. Pitts' current declaration is not only inconsistent with his prior explanations, but is also inconsistent  
21 with the brief six month term of the last extension of Mr. Malik's loans. Mr. Pitts' prior version of events  
22 is summarized in the next two paragraphs.

23       According to Mr. Pitts' original version of events, he held a series of meetings with Mr. Malik in  
24 the fall of 2007 in which he expressed concern regarding the length of time that the land loans had been  
25 outstanding. Mr. Malik had a sale of the property pending therefore the loans were extended for six  
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1 months to March 22, 2008, although the loan which was a line of credit was frozen.<sup>1</sup> In February of  
2 2008, Mr. Malik informed Mr. Pitts that his sale would not be closing immediately and requested a  
3 further extension. County Bank was willing to extend for another year but informed Mr. Malik that it  
4 would be increasing the interest rate and charging an extension fee. Mr. Malik became angry that the  
5 Bank was increasing his borrowing costs, and he therefore refused to sign the one year extension. Mr.  
6 Malik instead informed County Bank that he was obtaining refinancing with another lender (Cathay  
7 Bank). The simple truth is that even though County Bank did not want to extend Mr. Malik's loans in the  
8 spring of 2008, it was willing to do so. Mr. Malik refused the extension because he did not like the terms  
9 the bank had offered and created his own financial difficulties.

10 The Cathay Bank loan took longer than anticipated to process and in the meantime Mr. Malik's  
11 sale fell through. Finally after substantial delays the Cathay Bank loan was scheduled to close in July of  
12 2008. On July 18, 2008, County Bank was informed that Cathay Bank would not approve the loan to Mr.  
13 Malik.

14 **3. The Default and the September Extension Agreement.** At the point that the Cathay  
15 Bank loan fell through, Mr. Malik's loans with County Bank were nearly four months past due. County  
16 Bank sent a default letter to Mr. Malik. Mr. Malik then threatened to sue County Bank alleging in vague  
17 fashion that County Bank was somehow responsible for his financial woes. After some discussion and  
18 negotiation, on September 26, 2008, County Bank and Plaintiffs entered into the Extension and  
19 Modification Agreement (the "September Extension") in which Plaintiffs provided an absolute, complete  
20 and unconditional release of any and all claims against County Bank. Mr. Malik's obligations to repay  
21 the Notes were extended to December 19, 2008 in order to give him an opportunity to refinance his loans.  
22 The September Extension also provided Mr. Malik with the option to obtain a further 90 day extension to  
23 March 19, 2009 at a higher interest rate, the payment of a 1% extension fee and a principal paydown.  
24 The principal paydown was to be an amount sufficient to bring the loan to value ratio of the two loans to  
25 50% or lower, but in no event less than \$1,000,000.00.

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27 1 The fact that the loans were only extended for six months and that the line of credit was frozen is inconsistent with the  
28 allegations by both Malik and Pitts that County Bank was promising to continue to extend the loans indefinitely, but is very  
consistent with Mr. Pitt's earlier version of events.

1 In order to determine the loan to value ratio County Bank was to obtain an appraisal of the real  
2 property at Mr. Malik's cost. The appraisal was to be by an appraiser selected by County Bank in its sole  
3 discretion and was clearly intended for County Bank's benefit. The appraiser was not able to provide the  
4 appraisal on a timely basis by the December 19 renewal date, therefore County Bank elected to waive the  
5 appraisal and simply require Mr. Malik to pay the \$1,000,000.00 principal paydown. Mr. Malik failed to  
6 pay the 1% extension fee and the minimum \$1,000,000.00 principal paydown as of December 19, 2008  
7 as required by Section 2.2 of the September Extension and therefore was again in default under his  
8 obligations to County Bank. As an excuse for non-payment Mr. Malik asserted that the appraisal was  
9 intended for his benefit and that County Bank had breached its obligations to him thereby relieving him  
10 of the obligation to pay for the renewal.<sup>2</sup>

11 A brief stalemate ensued during which Mr. Malik again threatened to sue County Bank if it  
12 pursued default proceedings against him, claiming that he had replacement financing which would close  
13 any time and which refinancing had been delayed because County Bank had not provided him with an  
14 appraisal. In January and February of 2009 Mr. Malik had made repeated promises and assurances that he  
15 would close his replacement financing and pay off the County Bank loans. On January 20, 2009, County  
16 Bank sent Mr. Malik yet another default letter. In late January Mr. Malik paid \$250,000 which he  
17 proposed be applied to the principal of the loans if paid by March 1, 2009. (Jordan Decl. at ¶ 13; Exh.  
18 "B" attached thereto.) County Bank agreed to this application of these funds and informally agreed to  
19 give Mr. Malik until March 1, 2009, but clarified that is was planning to assess default interest against  
20 these loans. (Jordan Decl. at ¶ 13; Exhs. "C" & "D" attached thereto.) In February of 2009, County  
21 Bank was taken over by the FDIC.  
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25 2 In addition to being factually incorrect, this argument is flawed in several respects. There was no date by which County  
26 Bank was to obtain the appraisal therefore any requirement to obtain the appraisal would have been subject to a  
27 reasonableness standard. Any delays by the appraiser would thus not have been the responsibility of County Bank. Upon  
28 being advised by County Bank that it was canceling the appraisal request if Mr. Malik truly had a lender available and was  
relying on the appraisal he could easily have simply instructed the appraiser to continue with the appraisal directly. Therefore  
there was no delay attributable to County Bank. This is simply another sham argument by Malik to evade his own inability to  
perform.

1 **B. Facts Relevant to Dispute with WAB.**

2 The foregoing facts are provided by way of background as to the relationship between Mr. Malik  
3 and County Bank. They are not directly relevant to the current dispute since any claims based allegations  
4 by Mr. Malik regarding the time prior to the FDIC takeover are barred by the D'Oench, Duhme doctrine.  
5 The only allegations which affect WAB and which are relevant to this preliminary injunction hearing are  
6 those related to events which took place after the FDIC takeover.

7 **1. Mr. Malik Requests Another Forbearance.**

8 In mid or late February, Mr. Malik contacted what was now WAB and admitted that he had been  
9 sued by a prior employee named Darrell Souza who had filed a lis pendens against Malik's property, and  
10 asserted that the lis pendens was the real reason that he was unable to complete his refinancing. Mr.  
11 Malik's initial attempts to remove the lis pendens were apparently unsuccessful and he therefore  
12 eventually requested that WAB grant him another extension to September 1, 2009 in order to allow him  
13 one last chance to resolve his personal and financial difficulties. WAB agreed to do so and in late April  
14 counsel for WAB submitted to Mr. Malik's counsel for review a draft of the Amendment which provided  
15 Mr. Malik with an extension until September 1, 2009, to repay the Notes. A true and correct copy of the  
16 Amendment and enclosing e-mail to William Warne is attached as Exhibit "C" to the Zeitler Declaration.  
17 As of April 28, 2009 (the day that the Amendment was submitted to Mr. Malik's counsel), the  
18 outstanding principal balance under the Second Note was \$6,810,204.86 together with accrued and  
19 unpaid base interest in the amount of \$96,600.21 (not including default interest), together with all  
20 accruing interest, fees, costs and expenses provided in the loan documents. In addition, as of April 28,  
21 2009, the outstanding principal balance under the First Note was \$9,733,485.38, together with accrued  
22 and unpaid base interest of \$138,406.43 (not including default interest) together with all accruing interest,  
23 fees, costs and expenses provided in the loan documents. Under the terms of the Amendment as  
24 negotiated by the parties and submitted to Mr. Malik and his counsel to review Mr. Malik was to pay  
25 interest accrued through April 30, pay a loan extension fee of \$17,500 and reimburse WAB's attorneys  
26 fees in the amount of \$5000. Mr. Malik was thereafter to make monthly payments of principal and  
27 interest of \$73,159.48 and \$51,271.43 respectively on the last day of each month on the Notes.

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1 The draft of this brief, four page document was delivered to Mr. Malik's counsel in April and it  
2 was anticipated that the Amendment would be executed and delivered in May of 2009. Throughout May  
3 and then into June, counsel for WAB repeatedly asked counsel for Mr. Malik the status of their review of  
4 the documents and if Mr. Malik had any questions or proposed changes. Counsel for Mr. Malik  
5 responded repeatedly that he and Mr. Malik's accountant were reviewing the agreement. Mr. Malik's  
6 counsel never provided any questions, comments or suggested changes to the Amendment. True and  
7 correct copies of e-mail correspondence between counsel are attached as Exhibits "C", "D", "E" and "F"  
8 to the Declaration of Peter Zeitler. Finally on or about June 26, 2009, Mr. Malik through his agent Mr.  
9 Pitts delivered the documents, together with a check in the amount of \$317,000.00. Since no changes had  
10 been requested or discussed between counsel, WAB assumed that the Amendment had been signed as  
11 submitted and reviewed.

12 **2. Mr. Malik Secretly Changes the Agreement.** Unknown to WAB at that time, and  
13 indeed not discovered by WAB until it was preparing this Opposition, Mr. Pitts had made undisclosed  
14 changes to the Amendment. (Jordan Decl. at ¶ 17.) Allegedly these changes were made to update  
15 interest figures, but the changes were made incorrectly. Mr. Pitts has asserted that he informed Mr.  
16 Jordan that he was making these changes, but Mr. Jordan does not recall being so advised. (*Ibid.*) To the  
17 extent that there is any ambiguity in either the Amendment or in the amount that Mr. Malik was obligated  
18 to pay, it is the result of these secret undisclosed changes to the Amendment. Making these changes  
19 without disclosure is tantamount to fraud and Mr. Malik should not be entitled to benefit therefrom.  
20 *Wright v. Pennamped* (1995) 657 N.E.2d 1223; and *Hennig v. Heartland Development Corporation*  
21 (1999) 601 N.W.2d 14. Further as discussed in more detail below, the \$317,000.00 that Mr. Malik  
22 tendered is not sufficient to satisfy his obligations under the original version of the Amendment, the  
23 incorrectly changed version or the version that Mr. Pitts now claims he intended to implement. Therefore  
24 Mr. Malik is in breach regardless of how the facts are construed.

25 On or about May 17, 2009, Mr. Pitts contacted Mr. Jordan and asked for the per diem interest  
26 calculation though that date. They also discussed waiving a portion (but not all) of the loan fee if Mr.  
27 Malik paid interest current through the date of closing. No specific agreement on modifying the terms  
28 was reached in that discussion. Thereafter numerous calls were made by Mr. Jordan to Mr. Malik and his

1 representatives asking for the status of the documents. He was told repeatedly that it was still being  
2 reviewed by Mr. Malik's accountant and attorney. Changes to the Amendment were not discussed again  
3 with Mr. Jordan. On June 8, 2009, counsel for Malik confirmed that the final review of the documents  
4 would be made by counsel after receiving Mr. Malik's accountant's comments. (E-mail attached as  
5 Exhibit E to the Declaration of Peter Zeitler). As late as June 10, 2009, counsel for WAB confirmed to  
6 Mr. Malik's counsel that it was his expectation and Mr. Jordan's expectation that all proposed changes  
7 would be submitted through counsel (E-mail dated June 10, 2009 attached as Exhibit F to the Declaration  
8 of Peter Zeitler Declaration). Mr. Malik's counsel did not inform WAB's counsel of these changes  
9 (Paragraph 10 of the Declaration of Peter Zeitler).<sup>3</sup> Eventually, Mr. Pitts delivered the signed  
10 Amendment together with a check in the wrong amount. However Mr. Pitts had made unilateral  
11 undisclosed changes to the dollar amounts set forth in the Amendment for accrued unpaid interest in an  
12 apparent attempt to update those figures based upon his preliminary discussion with Mr. Jordan. Mr.  
13 Pitts made the changes incorrectly, and as written the document actually requires Mr. Malik to pay more  
14 than the bank believes was payable or demanded.<sup>4</sup> These undisclosed changes, even if well intentioned,  
15 are tantamount to fraud.

### 16 **3. Mr. Malik Fails to Make All the Payments Required Under the Amendment.**

17 Mr. Malik should not be allowed to benefit from the alleged "dispute" which has arisen over the  
18 amount of the payment he was required to make to WAB for at least two reasons. First any uncertainty  
19 in the amount arises solely due to Mr. Malik's unilateral secret changes to the Amendment. Mr. Malik  
20 should not be permitted to obtain injunctive or any other equitable relief based upon misconduct, even if  
21 well intentioned. Second, the dollar amount which Mr. Malik tendered was incorrect in every  
22 conceivable respect since it consisted only of accrued interest through May 17. No matter whose  
23 proposal or version of events is accepted this amount is less than Mr. Malik was obligated to tender. It  
24 was certainly far less than required under the secretly revised agreement as written. As currently written

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26 <sup>3</sup> We assume Mr. Malik and Mr. Pitts did not inform his counsel of the changes or discuss them with him, both because they  
27 were made incorrectly and because Malik's counsel would have been ethically obligated to inform WAB's counsel of the  
28 changes. See, e.g. *Wright v. Pennamped, supra*; *Hennig v. Heartland Development Corporation, supra*, and ABA Comm. on  
Ethics and Prof'l Responsibility, Informal Op. 86-1518 (1986).

1 the Amendment requires on its face a payment of \$458,930.91. As originally written before Mr. Pitt's  
2 secret changes the Amendment would have required a payment of \$389,290.31. Finally, it was less than  
3 would have been owing under Mr. Pitts tentative proposal (i.e. per diem interest through the date of  
4 delivery of the Amendment in exchange for a partial waiver of the extension fee) since Mr. Malik only  
5 tendered interest due through May 17, and not the date of delivery of June 26.

6 **4. Mr. Malik Then Removed the Funds Without Providing Replacement Monies.**

7 After seeing the check which was then deposited with the escrow, Mr. Jordan realized it was  
8 short. Mr. Jordan called and explained to Mr. Pitts the amount actually owing as of the date the  
9 Amendment was delivered and Mr. Pitts stated that Mr. Malik agreed to pay the additional amount. Mr.  
10 Pitts informed Mr. Jordan that Mr. Malik were going to issue another check to cover the deficiency.  
11 WAB was told that Mr. Malik would issue another check to cover the shortfall within a few days, and no  
12 later than June 30, 2009. On June 30, 2009, Mr. Jordan called Mr. Pitts and again inquired into the status  
13 of the additional check. Mr. Pitts informed Mr. Jordan that Mr. Malik had not prepared the check yet but  
14 it would be ready late that same afternoon or the next morning. (Jordan Decl. at ¶¶ 20-22.)

15 On July 1, 2009, Mr. Pitts telephoned Mr. Jordan and said that Mr. Malik wanted to replace the  
16 check with a single check in the full amount instead of providing a supplemental second check.<sup>5</sup> Mr.  
17 Pitts informed WAB during that same telephone conversation that Mr. Malik was sending down another  
18 employee, Jason Hollingsworth, to the escrow company to pick up the check. Mr. Jordan informed Mr.  
19 Pitts that the check was not to be picked up unless Mr. Malik was going to replace it with the owed  
20 amount. Instead Mr. Hollingsworth withdrew the check and did not provide a replacement.

21 On July 3, 2009, Mr. Jordan spoke with Mr. Hollingsworth and confirmed that Mr. Hollingsworth  
22 had picked up the check from the title company on July 2, 2009, but no additional check was provided in  
23 its place. As of July 6, 2009, Mr. Malik still had not provided any funds as required under the  
24 Amendment and WAB received no further communication from Mr. Malik regarding why he had  
25 removed the check without either (1) supplementing it with a second check to cover the deficient interest

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27 4 Although Mr. Pitts has stated that he believed he had informed Mr. Jordan, Mr. Jordan does not recall being advised that Mr.  
Pitts had made any changes.

28 5 By this date the June monthly payment was now due and payable, and again this amount was never tendered by Mr. Malik.

1 accrued or (2) providing a new check to cover the total amount owed. Nor did Mr. Malik dispute the  
2 amounts which WAB asserted were owed or offer his own accounting or any proffer or tender of any  
3 amounts other than the clearly deficient check.

4 **5. Because Mr. Malik Refused to Provide the Funds Owed Under the Forbearance**  
5 **Agreement, WAB Initiated Foreclosure.**

6 As a result of Mr. Malik's failure to provide WAB the required payments, Mr. Jordan prepared a  
7 letter to alert Mr. Malik that a default had occurred (the "Default Letter"). A true and correct copy of the  
8 Default Letter is attached to the Jordan Declaration as Exhibit "C".<sup>6</sup> The notice of default was  
9 sent out only after Mr. Malik failed to pay the amounts required under the Amendment. Following the  
10 mailing of the letter, WAB recorded notices of default on July 31, 2009. (Jordan Decl. at ¶ 23.)

11 In the Default Letter, WAB included default interest from December 19, 2008, forward since that  
12 was the date of the earliest uncured default. The interest calculated in the Amendment was base interest  
13 only. Nothing contained in the Amendment constituted a waiver of default interest from that date  
14 forward. WAB was nonetheless not planning to assess default interest if Mr. Malik performed under the  
15 Amendment. When Mr. Malik breached the terms of the Amendment by failing to make payments,  
16 however, Mr. Jordan elected to accrue the default interest back to December 19, 2008, in the Default  
17 Letter. Mr. Jordan explained the basis for these calculations to Mr. Hollingsworth on July 22, 2009 and  
18 offered to provide further explanation or answer any questions. (Jordan Decl. at ¶ 24.) Neither Mr.  
19 Malik nor Mr. Hollingsworth indicated any disagreement with the calculations or provided their own  
20 calculation or tender of any amount. Again, Mr. Malik did not dispute the amounts which WAB asserted  
21 were owed or offer his own accounting or any proffer or tender of any amounts. Instead of attempting to  
22 resolve the issue or make any payment or tender of payment Mr. Malik filed this action, clearly seeking  
23 to obtain more time despite the complete and utter non-performance of his obligations. Mr. Malik's  
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26 6 The letter was prepared on July 6, 2009, but due to a staff vacation was not mailed until approximately a week later and the  
27 date of the letter was inadvertently not updated. However by Mr. Malik's own admission he received the letter 12 days before  
28 the expiration of the cure period set forth therein. The Notes do not require any cure period be given in connection with a non-  
monetary default therefore providing a cure period was a courtesy and was not required. The inadvertent misdating of the  
letter did not prejudice Mr. Malik's contractual rights under the agreements and is a non-issue.

1 payment deficiency is now up to nearly six months, and the term of his current extension expires at the  
2 end of this month. (Jordan Decl. at ¶ 25.)

3 **6. WAB Has Sent a Revised Demand Letter in Order to Eliminate Even the Confusion**  
4 **Caused by Mr. Malik.**

5 Because the changes to the Amendment were not disclosed to WAB, WAB did not realize that  
6 Mr. Pitts had made changes to the Amendment until reviewing the documents to reconcile the  
7 discrepancies in the allegations made by Mr. Malik in the course of preparing this Opposition. It is clear  
8 that Mr. Malik is either unable or unwilling to live up to his contracts and commitments to WAB. It is  
9 equally clear from the many prior statements and threats by Mr. Malik over the past 18 months and the  
10 specious allegations and mischaracterizations contained in this action that he will do or say anything to  
11 delay the inevitable foreclosure. WAB believes that it is entitled to the default interest through last  
12 December under the terms of the loan documents. However in order to avoid Mr. Malik's inevitable  
13 attempt to delay the foreclosure by seeking to raise an accounting issue (despite the fact that it seems  
14 clear he could not make the payment in any event), WAB decided not to pursue the default interest for  
15 prior periods, and on August 12 sent one final formal demand upon Mr. Malik. (See letter attached as  
16 Exhibit "A" to the Zeitler Declaration). The dollar amounts stated in that Revised Demand Letter resolve  
17 even the ambiguities caused by Mr. Malik's misconduct in secretly changing the Amendment. It is  
18 WAB's intention (assuming that the preliminary injunction is not granted) to file new notices of default  
19 based upon this most recent default letter.

20 Finally it should be noted that the term of the extension granted in the Amendment would expire  
21 on September 1, 2009 even if Mr. Malik had performed under the Agreement (Section 4). WAB has no  
22 obligation to provide any further extensions or forbearances. Unless Mr. Malik has cured the current  
23 defaults as required by the Revised Demand Letter (in which event he will have to September 1, 2009),  
24 the notices of default will be filed shortly after the hearing. This brief acceleration does not materially  
25 prejudice Mr. Malik, and this is yet another reason why this preliminary injunction should not be granted.

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II.

POINTS AND AUTHORITIES

A. The Trial Court Must Scrutinize Plaintiffs' Request To Grant An Injunction.

The grant or denial of a preliminary injunction rests in the trial court's sound discretion, and its order may not be interfered with on appeal except for an abuse of discretion. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69; see also *ReadyLink Healthcare v. Cotton* (2005) 126 Cal.App.4th 1006, 1016; *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999.) A proper exercise of discretion requires the court to evaluate the two factors that must be considered in deciding whether to grant a preliminary injunction. (*Hunt v. Superior Court, supra*, 21 Cal.4th at p. 999; see also *King v. Meese* (1987) 43 Cal.3d 1217, 1226.) A trial court abuses its discretion if it exceeds the bounds of reason or contravenes uncontradicted evidence in making its decision. (*Pro-Family Advocates v. Gomez* (1996) 46 Cal.App.4th 1674, 1680; see also *14859 Moorpark Homeowner's Assn. v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1402.)

In deciding whether or not to grant a preliminary injunction, courts must evaluate the following two factors: (1) the likelihood that the applicant will prevail on the merits at trial; and (2) the balance of any interim harm to the applicant if the injunction is denied compared with the harm to the responding party if the injunction is issued. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 441-442; see also *Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.* (2001) 91 Cal.App.4th 678, 695-696.)

Although a court must consider both factors in making its decision, it may deny a preliminary injunction if either of the two factors alone would support a ruling denying relief. (*King v. Meese* (1987) 43 Cal.3d 1217, 1226; see also *Abrams v. St. John's Hospital & Health Center* (1994) 25 Cal.App.4th 628, 636; *Jessen v. Keystone Savings & Loan Assn.* (1983) 142 Cal.App.3d 454, 459.) For example, a court should not issue an injunction if there is no possibility of success, even if issuing the injunction might prevent irreparable harm because there is no justification in delaying harm where, although irreparable, it is also inevitable. (*Scates v. Rydingsword* (1991) 229 Cal.App.3d 1085, 1096; see also *14859 Moorpark Homeowner's Assn. v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1408.)

1 Here, Mr. Malik's request for imposition of a preliminary injunction fails to satisfy either of these  
2 two factors. Mr. Malik does not demonstrate a likelihood that he will prevail on his claims, and the  
3 balance of harm that WAB will suffer far outweighs the risks to Plaintiffs.

4 **B. Based On The "D'Oench, Duhme" Doctrine, Mr. Malik Cannot Show The Required Success On**  
5 **The Merits As To Claims Of Misrepresentation By County Bank.**

6 A trial court may not grant a preliminary injunction regardless of the balance of harm unless the  
7 plaintiff can demonstrate a likelihood that the plaintiff would ultimately prevail on the merits of the  
8 claim. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999; see also *Teachers Ins. & Annuity Assn. v.*  
9 *Furlotti* (1999) 70 Cal.App.4th 1487, 1493.) Success may be determined with respect to the ultimate  
10 merits of the action or the merits of a pending motion. (*Dodge, Warren & Peters Insurance Services,*  
11 *Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1418.)

12 Here, under the D'Oench, Duhme doctrine, Mr. Malik cannot show the required success on the  
13 merits for the imposition of a preliminary injunction because this doctrine, as a matter of law, holds  
14 WAB harmless for any alleged misrepresentations by County Bank.

15 **1. The D'Oench, Duhme Doctrine Protects WAB From Claims of Misrepresentation by**  
16 **County Bank.**

17 "The *D'Oench, Duhme* doctrine, an equitable rule of estoppel, emanates from the United States  
18 Supreme Court decision in *D'Oench, Duhme & Co.*, where the Federal Deposit Insurance Corporation  
19 (FDIC) sued on a promissory note which had been assigned to it in connection with a bank failure. In  
20 defense, the obligors alleged the bank had orally agreed it would not call the note for payment. Rejecting  
21 the defense, the Supreme Court held an obligor who 'lent himself to a scheme or arrangement' that was  
22 'likely to . . . misle[a]d' bank examiners may not assert against the FDIC any part of an agreement that  
23 might diminish the value of his written loan obligation. (*Id.* at p. 460 [86 L.Ed. at pp. 963-964].) The  
24 Supreme Court based its ruling on a 'federal policy . . . to protect [the FDIC] . . . from misrepresentations  
25 made to induce or influence [its] action[s], including misstatements as to the genuineness or integrity of  
26 securities in the portfolios of banks which it insures or to which it makes loans.' [Citation.] Congress  
27 thereafter codified the doctrine at 12 United States Code section 1823(e)." (*Walsh v. New West Federal*  
28

1. *Savings & Loan Assn.* (1991) 234 Cal.App.3d 1539, 1543; see also *RTC Mortg. Trust 1994-S2 v.*

2. *Shlens* (1998) 62 Cal.App.4th 304, 315 (quoting same.)

3. "Since its inception, courts have dramatically expanded the reach of the common law doctrine and  
4. its statutory counterpart. [Citations.] The doctrine applies, for example, not only to defensive use of  
5. alleged oral promises (such as in the original *D'Oench, Duhme* case), but also to offensive use, such as  
6. fraud or breach of contract claims based upon alleged oral agreements. [Citations.] Courts hold the  
7. defense applies, moreover, even where the party asserting an oral agreement was innocent of any  
8. wrongdoing. The relevant question is not whether the oral 'agreement was itself fraudulent or whether  
9. the borrower intended to deceive banking authorities, but rather whether the borrower "lent himself to a  
10. scheme or arrangement" whereby [the] authorities were likely to be misled.' [Citation.]" (*Walsh v. New*  
11. *West Federal Savings & Loan Assn.*, *supra*, 234 Cal.App.3d at p. 1544; see also *RTC Mortg. Trust 1994-*  
12. *S2*, *supra*, 62 Cal.App.4th at p. 316 [quoting same].)

13. "As the Supreme Court recently explained, a primary purpose of the doctrine 'is to allow federal  
14. and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets.'  
15. (*Langley v. FDIC* (1987) 484 U.S. 86, 91.) Such evaluations must frequently 'be made "with great  
16. speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an  
17. interruption in banking services." [Citation.] The doctrine also seeks to 'ensure mature consideration of  
18. unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the  
19. collusion of bank employees, when a bank appears headed for failure.' [Citation.] Thus, "[t]he doctrine  
20. encourages debtors to memorialize all agreements in writing and reflects the equitable principle that  
21. losses incurred as a result of unrecorded arrangements should not fall on deposit insurers, depositors, or  
22. creditors but rather upon the person who could have best avoided the loss.'" (*Walsh v. New West*  
23. *Federal Savings & Loan Assn.*, *supra*, 234 Cal.App.3d at p. 1544; see also *RTC Mortg. Trust 1994-S2*,  
24. *supra*, 62 Cal.App.4th at p. 316 [quoting same].)

25. The Fifth District Court of Appeal explained in *Weber v. New West Federal Savings & Loan*  
26. *Assn.* (1992) 10 Cal.App.4th 97: "Title 12 United States Code section 1823(e) (section 1823(e)) is a  
27. section of the Federal Deposit Insurance Act which invalidates certain agreements between a bank and its  
28. obligor(s) that tend to diminish the interest of the Federal Deposit Insurance Corporation (FDIC) in assets

1 acquired by it in its corporate capacity. In sum, section 1823(e) provides that unless a bank and its  
2 borrower(s) execute a written agreement which has gone through all the normal approval processes of the  
3 bank, and said agreement is a part of the bank's records, the FDIC is not required to honor the agreement  
4 when it takes over the assets of the bank, should the bank fail. [¶] Section 1823(e) is a partial  
5 codification of the so-called *D'Oench, Duhme* doctrine (*D'Oench, Duhme & Co. v. F.D.I.C.* (1942) 315  
6 U.S. 447 [86 L.Ed. 956, 62 S.Ct. 676]), widely recognized and applied as an equitable rule of estoppel."  
7 (*Id.*, at p. 99.)

8 "Assignees of the FDIC and the FSLIC enjoy the protection of the doctrine, as do so-called  
9 'bridge banks' - institutions authorized by the FDIC and FSLIC to operate failed banks and savings and  
10 loans ..." (*Weber v. New West Federal Savings & Loan Assn.*, *supra*, 10 Cal.App.4th at p. 105; *Webb v.*  
11 *Superior Court* (1990) 225 Cal.App.3d 990, 1001; see also *RTC Mortg. Trust 1994-S2*, *supra*, 62  
12 Cal.App.4th at p. 316 [quoting same]<sup>7</sup>.)

13 Here, as assignee of the FDIC, WAB enjoys the protection of the D'Oench, Duhme doctrine and  
14 related authority. To obtain the present injunction, Mr. Malik argues that he should not be held legally  
15 responsible to repay the \$17,000,000 owed because County Bank engaged in either intentional or  
16 negligent misrepresentation. (Pls.'s P's & A's at pp.5:8-13; 7:22-27; & 11:9-21.) The purported oral  
17 agreements and misrepresentations by County Bank, however, are encompassed by the D'Oench, Duhme  
18 doctrine. As a result, Mr. Malik's allegations of intentional misrepresentation and/or negligent  
19 misrepresentation against WAB, vis-à-vis County Bank, fail as a matter of law. As such, Mr. Malik's  
20 Fifth and Sixth Causes of Action in his complaint against WAB are without merit and preclude the  
21 issuance of the requested preliminary injunction.

22 **C. Mr. Malik Will Not Prevail On A Breach Of Contract Claim.**

23 As noted above, D'Oench, Duhme requires strict compliance with the written loan agreements.  
24 Here, Mr. Malik released County Bank from any and all claims associated with the September 26, 2008,  
25 Extension, including claims based on County Bank's alleged omissions and claims not yet known or  
26 \_\_\_\_\_

27 <sup>7</sup> *RTC Mortg. Trust 1994-S2*, *supra*, involved an action for judicial foreclosure and deficiency judgment; the court held that  
28 D'Oench, Duhme precluded the trustor from asserting a nonrecourse defense to apply to documentation contained in the  
defunct lender's records but that was not signed by the lender. (62 Cal.App.4th at pp. 318-319.)

1 realized. (See ¶ 12 of Exh. "A" to Pls' Ex Parte App.) Further, upon execution of the Amendment, Mr.  
2 Malik provided WAB with another full release and waiver of any claims against WAB, whether known  
3 or unknown. (See ¶ 6 of Exh. "B" to Pls' Ex Parte App.) Despite the release and waiver contained in the  
4 written documents, Mr. Malik now insists that he is likely to prevail on the merits as to a breach of  
5 contract claim because County Bank failed to obtain an appraisal of the Real Property, repeatedly  
6 represented to Mr. Malik that the appraisal would be completed shortly, and failed to work with other  
7 lenders so that Mr. Malik could obtain additional financing. (Pls' Memo of P's & A's at pp. 6:3-19;  
8 11:3-8 & 11:27-12:8.) Mr. Malik insists that County Bank's misrepresentations in this regard lulled Mr.  
9 Malik into delaying the obtainment of separate financing. (*Id.*)

10 The D'Oench, Duhme, doctrine, however, estopps Mr. Malik from claiming that WAB is liable  
11 for County Bank's alleged oral misrepresentations. Further, the waivers contained in the agreements bar  
12 Mr. Malik from now claiming WAB is in breach of contract.

13 Just as importantly, however, is that Mr. Malik's "version" of events is at odds with WAB's  
14 evidence, such that it is not likely he will prevail on a breach of contract claim. For instance, WAB  
15 recently discovered that Mr. Pitts unilaterally altered the figures in the Amendment without the  
16 knowledge or consent of WAB. (Jordan Decl. at ¶ 17.) Also, it was Mr. Malik who voluntarily removed  
17 the June Check from escrow, without subsequently providing sufficient funds to WAB, after Mr. Malik  
18 was made aware that his first check was insufficient. (Jordan Decl. at ¶¶ 20-22.) Finally, County Bank  
19 never breached the contract when it failed to obtain an appraisal of the real property at Mr. Malik's cost.  
20 The appraisal was to be by an appraiser selected by County Bank in its sole discretion and was clearly  
21 intended for County Bank's benefit. The appraiser was not able to provide the appraisal on a timely basis  
22 by the December 19 renewal date; therefore, County Bank elected to waive the appraisal and simply  
23 required Mr. Malik to pay the \$1,000,000.00 principal paydown. (Jordan Decl. at ¶¶ 11-12.) Even  
24 assuming *arguendo* that Mr. Malik's assertion that the appraisal was for his benefit, Mr. Malik could  
25 easily have simply instructed the appraiser to continue with the appraisal and in doing so would have  
26  
27  
28

1 incurred no delay.<sup>8</sup> Instead Mr. Malik failed to pay the 1% extension fee and the minimum  
2 \$1,000,000.00 principal paydown as of December 19, 2008, as required by Section 2.2 of the September  
3 Extension and, therefore, was again in default under his obligations to County Bank. (Jordan Decl. at ¶  
4 12.) As an excuse for non-payment, Mr. Malik now asserts that the appraisal was intended for his benefit  
5 and that County Bank had breached its obligations to him thereby relieving him of the obligation to pay  
6 for the renewal. This argument is without merit under the facts.

7 Based on the above, Mr. Malik's First, Second, Third, and Fourth causes of action against WAB  
8 are without merit. Mr. Malik cannot show a likelihood of success on the merits and a preliminary  
9 injunction should not be imposed.

10 **1. Mr. Malik is Estopped From Now Claiming He Owes No Additional Money Under**  
11 **the Notes.**

12 The law is clear that when a creditor realizes that it has accepted less than full payment from a  
13 debtor and the creditor takes reasonable steps to correct the error, such as by giving the debtor notice of  
14 the underpayment, the debtor cannot argue estoppel for the remaining obligation. (*Sanguansak v. Myers*  
15 (1986) 178 Cal.App.3d 110, 117.) Likewise, a creditor cannot be estopped to initiate foreclosure  
16 proceedings where the debtor is on notice of the additional obligation owed where it appears in the  
17 executed documents. (*Ibid.* at p. 118.)

18 Here, it is not disputed that Mr. Malik's June Check was insufficient. (Jordan Decl. at ¶ 20.)  
19 Plaintiffs provide no evidence, and, indeed, none exists, that establishes that WAB agreed to waive the  
20 remaining monies owed. To the contrary, the Amendment expressly states that the interest rate and  
21 monthly payment on the Notes were still in effect and Mr. Malik was obligated to make payments as set  
22 forth in Section 7(a) and the first two sentences of Section 7(b) of the September 28, 2009, Extension.  
23 (See ¶ 4 of Exh. "A" to Pls' Ex Parte App.; see also Exh. "B" at ¶ 7(a), (b).) The continuing obligation  
24 required Mr. Malik to pay WAB for May and June, which he refused to do.

25 \_\_\_\_\_  
26 <sup>8</sup> Interestingly throughout his pleadings Mr. Malik repeatedly asserts that County Bank's actions prevented him from  
27 obtaining replacement financing. However Mr. Malik provides no evidence in support thereof. For example he has provided  
28 no evidence that any such financing was available (binding commitment letters etc.) and provides no evidence that County  
Bank impacted any pending financing (letters from lenders denying credit based on delay etc.). All Mr. Malik provides is  
vague unsubstantiated claims.

1 Unknown to WAB at that time, and indeed not discovered by WAB until it was preparing this  
2 Opposition, Mr. Pitts had made undisclosed changes to the Amendment. (Jordan Decl. at ¶ 17.)  
3 Allegedly these changes were made to update interest figures, but the changes were made incorrectly.  
4 Mr. Pitts has asserted that he informed Mr. Jordan that he was making these changes, but Mr. Jordan does  
5 not recall being so advised. To the extent that there is any ambiguity in either the Amendment or in the  
6 amount that Mr. Malik was obligated to pay, it is the result of these secret undisclosed changes to the  
7 Amendment. Making these changes without disclosure is tantamount to fraud and Mr. Malik should not  
8 be entitled to benefit therefrom. Further as discussed in more detail above, the \$317,000.00 that Mr.  
9 Malik tendered is not sufficient to satisfy his obligations under the original version of the Amendment,  
10 the incorrectly changed version or the version that Mr. Pitts now claims he intended to implement.  
11 Therefore Mr. Malik is in breach regardless of how the facts are construed.

12 On or about May 17, 2009, Mr. Pitts contacted Mr. Jordan and asked for the per diem interest  
13 calculation though that date. They also discussed waiving a portion (but not all) of the loan fee if Mr.  
14 Malik paid interest current through the date of closing. No specific agreement on modifying the terms  
15 was reached in that call. Thereafter numerous calls were made by Mr. Jordan to Mr. Malik and his  
16 representatives asking for the status of the documents. He was told repeatedly that it was still being  
17 reviewed by Mr. Malik's accountant and attorney. Changes to the Amendment were not discussed again,  
18 nor did Mr. Malik's counsel inform WAB's counsel of these changes. Eventually, Mr. Pitts delivered the  
19 signed Amendment together with a check in the wrong amount. However Mr. Pitts had made unilateral  
20 changes to the dollar amounts set forth in the Amendment for accrued unpaid interest in an apparent  
21 attempt to update those figures based upon his preliminary discussion with Mr. Jordan. Mr. Pitts made  
22 the changes incorrectly, and as written the document actually requires Mr. Malik to pay more than the  
23 bank believes was payable or demanded. These undisclosed changes, even if well intentioned, are  
24 tantamount to fraud. *Wright v. Pennamped* (1995) 657 N.E.2d 1223; see also *Hennig v. Heartland*  
25 *Development Corporation* (1999) 601 N.W.2d 14.

26 It is a precondition to any attempt to enjoin a foreclosure that the plaintiff tender the undisputed  
27 amount owing. (*Bisno v. Sax* (1959) 175 Cal.App.2d 714, 724; see also *Young v. Burchill* (1929) 96  
28 Cal.App. 341, 344.) Mr. Malik only tendered interest through May 17, therefore under any interpretation

1 of the Amendment or the discussions related thereto his tender was insufficient. Assuming arguendo that  
2 Mr. Malik's argument that the Amendment should be set aside for a lack of meeting of the minds, then he  
3 is over six months delinquent in the agreed monthly payments of principal and interest set forth in  
4 Section 7.2 of the September Extension Agreement. By any interpretation of the facts Mr. Malik has not  
5 tendered or in good faith attempted to tender the amount owed to WAB. For that reason alone Mr.  
6 Malik's request for injunctive relief should be denied.

7       Upon receipt of the June Check, WAB, through its Vice-President, Don Jordan, contacted Mr.  
8 Malik's representatives within 24 hours to request the deficit. Instead of simply providing the deficiency,  
9 Mr. Malik insisted on removing the June Check from escrow in favor of a single check to cover the full  
10 amount owed. WAB never rejected the "tender" of payment and took reasonable steps to alert Mr. Malik  
11 that he owed additional funds. Mr. Malik had already executed the Amendment; there was no "counter-  
12 offer" as he claims and WAB merely insisted that he pay the obligation that was owed. Mr. Malik cannot  
13 now claim estoppel based on his unilateral decision to remove the June Check without providing a  
14 prompt replacement. Mr. Malik's unilateral removal of the check from the escrow over the bank's  
15 express objection does not constitute a rejection of a tender by the bank. As a result, the present request  
16 for issuance of a preliminary injunction must fail because the evidence does not establish that Mr. Malik  
17 is more likely than not to prevail on his claims.

18 **D. The Balancing of the Respective Harms Favors Defendants and Not Plaintiff.**

19       The burden is on the applicant to show all of the elements necessary to support issuance of a  
20 preliminary injunction; the applicant must affirmatively show that harm is likely to result if the injunction  
21 is not granted. (*Casmalia Resources, Ltd. v. County of Santa Barbara* (1987) 195 Cal.App.3d 827, 838.)  
22 In determining this requirement, the court must consider such things as the inadequacy of other remedies,  
23 the degree of irreparable harm, and the necessity of preserving the status quo. (*14859 Moorpark*  
24 *Homeowner's Assn. v. VRTC Corp.* (1998) 63 Cal.App.4th 1396, 1402; see also *O'Connell v. Superior*  
25 *Court* (2006) 141 Cal.App.4th 1452.) By balancing the respective equities, the trial court should  
26 conclude whether or not to grant an injunction that restrains defendant's rights pending the trial. (*Pro-*  
27 *Family Advocates v. Gomez* (1996) 46 Cal.App.4th 1674, 1681.)  
28



1                   **1.     WAB Will Be Prejudiced if it is Not Permitted to Either Collect Due Interest and**  
2                   **Payments or Foreclose on the Collateral.**

3                   It is not disputed that Mr. Malik is in breach of the Notes to WAB. Mr. Malik presently owes  
4 over \$16,000,000.00 on the Notes. (Jordan Decl. at ¶ 27.) If this injunction is granted Mr. Malik will be  
5 allowed to again delay payment of over \$16,000,000.00 in real and undisputed monies which have been  
6 due for over 18 months. The fact that Mr. Malik has been unable or unwilling to obtain replacement  
7 financing during that lengthy period is not WAB's responsibility. The present request for a preliminary  
8 injunction is merely an attempt to delay foreclosure. WAB should be permitted its contractual right to  
9 enforce the terms of the loan agreements and hold Mr. Malik accountable for his repeated failure to  
10 satisfy the Notes as agreed. Anything less would permit Mr. Malik to receive a windfall. Indeed,  
11 California courts have noted that one who seeks equity must do equity and equity is not served if a debtor  
12 is permitted to enjoin foreclosure when he refuses to make the required monthly payments. (*Meetz v.*  
13 *Mohr* (1904) 141 Cal. 667, 673.)

14                  Under the terms of the Extension, Mr. Malik's obligations would come due on September 1, 2009  
15 in any event even if he were not in default. Assuming arguendo that Mr. Malik's argument that the  
16 Extension and Amendment are ineffective is correct, the Notes have been due and payable for over a  
17 year.<sup>9</sup> There is no question on the face of the written documents that these notes are due and payable.  
18 Mr. Malik refuses to provide any monies to WAB and, at the same time, contends an injunction is  
19 warranted to prevent WAB from enforcing its contractual rights. WAB will be prejudiced if it is not now  
20 allowed to pursue foreclosure of these long overdue obligations. The balancing of equities does not favor  
21 the imposition of an injunction and to do so gives Mr. Malik a windfall.

22                   **2.     WAB Will Be Prejudiced if it Cannot Impose a Receiver.**

23                  When a debtor is in default, California courts recognize the creditor's right to appoint a receiver  
24 to protect the enforcement of the covenants in the security instrument relating to possession of property  
25

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26  
27 <sup>9</sup> Rescission of contract requires the parties to return any consideration so as to restore the status quo. (*Tippett v. Terich*  
28 (*1995*) 37 Cal.App.4th 1517, 1535 [overruled on other grounds by *Cortez v. Purolator Air Filtration Products Co.* (2000) 23  
Cal.4th 163, 171].) Assuming arguendo Mr. Malik's argument to set aside the September Extension and the Amendment were  
correct these loans have been delinquent for 18 months.

1 and the assignment of rents. (Code Civ. Proc., § 564, subd. (b)(8); see also *Snyder v. Western Loan &*  
2 *Bldg. Co.* (1934) 1 Cal.2d 697, 703.)

3 Here, WAB is informed and believes that Mr. Malik is receiving rents on the Real Property.  
4 (Jordan Decl. at ¶ 26.) WAB intends to exercise its contractual and statutory right to impose a receiver to  
5 protect the Real Property collateral and obtain rents. The equities favor the denial of a preliminary  
6 injunction so that WAB may protect its financial interests in this matter.

7 **III.**

8 **CONCLUSION**

9 WAB respectfully requests that the present request for a preliminary injunction be denied in its  
10 entirety and the temporary restraining order be vacated.

11 Dated: August 13, 2009

FISHMAN, LARSEN, GOLDRING & ZEITLER

12  
13  
14 BY: 

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