

STATE OF IDAHO }
 COUNTY OF KOOTENAI } ss
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 O'ROCK, LM
 CLERK, DISTRICT COURT
 DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

SI CONSTRUCTION, LLC, an Idaho limited liability company,
 Plaintiff,

v.

RIDGE AT BLACK ROCK BAY, INC., an Idaho corporation; THE RIDGE AT BLACK ROCK BAY HOMES, INC., an Idaho corporation; BARRY E. MOORE and SANDRA R. MOORE, husband and wife; KRE SEP/PROPERTY, L.P., a Texas limited Partnership; SUNDANCE INVESTMENTS, LLLP, an Idaho limited liability partnership; BLACK ROCK HOMEOWNERS ASSOC., INC., an Idaho corporation; KOOTENAI ELECTRIC COOPERATIVE, INC., an Idaho corporation and cooperative marketing association; BRAD L. WILLIAMS, an individual; WASHINGTON TRUST BANK, a Washington Corporation; and JOHN DOES I-X, and XYC, INC., I-X, whose true names are unknown but who may own or claim an interest in the real property hereinafter described, including, but not limited to, the unknown heirs and devisees of any of the above-named parties now deceased, any spouse of the above named persons or entities in possession of, and any and all other unknown persons or entities claiming an interest in and to the following described real property situated in Kootenai

CASE NO. CV – 09 – 4519
 DECISION RE: COURT TRIAL

County, State of Idaho, to-wit:)
The West Half of Lot 1 and all of Lots 2 and 3,)
Section 9, Township 48 North, Range 4 West,)
Boise Meridian, Kootenai County, Idaho, now)
known as THE ESTATES AT BLACK ROCK)
BAY, according to the plat recorded in the)
office of the Court recorder in Book K of Plats)
at Page 115, records of Kootenai County,)
Idaho.)

Defendants.)

SUNDANCE INVESTMENTS, L.L.L.P., an)
Idaho limited liability limited partnership,)
Counter-claimant / Cross-)
Claimant / Third Party)
Plaintiff,)

v.)

SI CONSTRUCTION, LLC, an Idaho limited)
liability company,)
Counter-Defendant,)

and)

THE RIDGE AT BLACK ROCK BAY, INC.,)
an Idaho corporation; THE RIDGE AT BLACK)
ROCK BAY HOMES, INC., an Idaho)
Corporation; KRE SEP / PROPERTY, L.P.,)
a Texas limited partnership; KOOTENAI)
ELECTRIC COOPERATIVE, INC., an)
Idaho corporation and cooperative marketing)
association; BLACK ROCK HOMEOWNER'S)
ASSOCIATION, INC., an Idaho corporation;)
84 LUMBER COMPANY L.P., an Idaho limited)
liability company; JIM L. GIBBS and PILAR A.)
GIBBS, as individuals and d/b/a GIBBS)
LUMBER; and DOES 1 through X, inclusive,)

Third Party Defendants /)
Cross-Defendants.)

The Plaintiff performed work for Defendant Ridge at Black Rock Bay, Inc. The Plaintiff wishes to foreclose on its materialmen's lien. The Defendants Sundance Investments, L.L.P. and Kootenai Electric Cooperative, Inc., also have security interests in the real property at issue. The parties presented issues of priority and valuation of the security interests for resolution by this Court.

Gregory D. Horne, GREGORY D. HORNE, ESQ., CHTD., for Plaintiff SI Construction, LLC.

Katheryn McKinley, WOLKEY & MCKINLEY, P.S., for Defendants Ridge at Black Rock Bay, Inc., and Black Rock Homeowners Association, Inc.

Corey Rippee, EBERLE, BERLIN, KADING, TURNBOW & MCKLVEEN, CHTD., for Defendant Sundance Investments, L.L.P.

Brent Schlotthauer, VASSEUR & SCHLOTTHAUER, PLLC, for Defendant Kootenai Electric Cooperative, Inc.

I. SUMMARY OF FACTS AND COURSE OF PROCEDURE

This case involves the foreclosure of the Plaintiff's materialmen's lien ("Plaintiff's Lien") against real property known as "The Estates at Black Rock Bay," and legally described as:

West ½ of Lot 1 and all of Lots 2 and 3, Section 9, Township 48, North, Range 4 West, Boise Meridian, Kootenai County, Idaho, Book K of Plats, at page 115, Kootenai County Recorder's Office.

("Subject Property"). On December 29, 2004, Blue Diamond Investments, Inc., conveyed the Subject Property via warranty deed to Defendant Ridge at Black Rock Bay Homes, Inc. ("RBRB Homes"). (Stipulation of Facts, ¶ 2.) The property was subsequently transferred from RBRB Homes to Ridge at Black Rock Bay, Inc. ("RBRB Inc."). (Stipulation of Facts, ¶ 5, Exhibit E.) The Plaintiff, a construction company, was hired by RBRB Inc. to conduct infrastructure work on the Subject Property, and the Plaintiff commenced work on May 8, 2007. (Stipulation of Facts, ¶ 8.) The Plaintiff filed

a lien claim statement on December 10, 2008, (Stipulation of Facts, ¶ 14, Exhibit M) and filed a complaint with this Court on June 9, 2009.

This Court issued its “Memorandum Opinion Re: Plaintiff’s Motion for Partial Summary Judgment; Defendant Ridge at Black Rock By Inc., Cross-Motion for Partial Summary Judgment; Defendant Sundance Investments, L.L.L.P. Cross-Motion for Partial Summary Judgment” (“Memorandum Opinion”) on January 3, 2011. In the Memorandum Opinion, this Court addressed the issue of the priority¹ of the parties’ security interests in the Subject Property, and found and concluded “the May 19, 2006, Deed of Trust is first in priority, and the April 10, 2007, Subordinated Real Estate Mortgage is second in priority, ahead of the May 8, 2007, Plaintiff’s Lien. Fourth in priority is the August 28, 2008, Mortgage in favor of Kootenai Electric.” (Memorandum Opinion, p.10.) The amount due under each of the respective security interests was not before this Court.

On January 31, 2010, the Plaintiff, and Defendants Sundance Investments, L.L.L.P. (“Sundance”), RBRB Inc., and Kootenai Electric Cooperative, Inc. (“Kootenai Electric”), agreed that instead of presenting evidence at a court trial, the parties would submit a set of stipulated facts and exhibits, and provide this Court with “post-trial briefing.”² Defendants Sundance and Kootenai Electric, and the Plaintiff, submitted a “Stipulation of Facts” with exhibits on February 2, 2011.³ The parties agreed that the exhibits attached to the Stipulation of Facts are true and correct and are admitted into evidence without objection. (Stipulation of Facts, ¶ 15.)

¹ This Court also addressed whether the lien waivers signed by SI Construction were supported by independent, valuable consideration. (Memorandum Opinion, p.10.)

² The parties also agreed to dismissal or default as to the other defendants.

³ RBRB Inc. deeded its interest in the property to Sundance and does not have an identifiable security interest in the Subject Property that is at issue before this Court.

The Defendant Sundance submitted a "Post Trial Memorandum" ("Sundance Memorandum") on February 10, 2011, and the Plaintiff submitted a "Post Trial Memorandum" ("Plaintiff's Memorandum") on February 11, 2011. The Defendant Sundance submitted a "Response to SI Construction, LLC's Post Trial Memorandum" ("Sundance's Response") on February 17, 2011, and the Plaintiff filed a "Post Trial Response Memorandum" ("Plaintiff's Response") the same day. Defendants RBRB Inc. and Kootenai Electric did not file briefs. This Court has reviewed the evidence and the pleadings and now issues its decision.

II. ANALYSIS

The parties present this Court with three issues for resolution:

(1) whether the future advances made under the Deed of Trust are secured by the Deed of Trust and retain priority over [the Plaintiff's Lien], (2) whether the increase in the interest rate applied to the Promissory Note is secured by the Subordinated Mortgage, and (3) based upon the determination of the foregoing, the total amount due under the Deed of Trust and the Subordinated Mortgage.

(Stipulation of Facts, ¶ D, p.8.) This Court will address each issue individually, and the findings of fact and conclusions of law this Court made in the January 3, 2011, Memorandum Opinion are hereby incorporated into this Decision.

A. The Amount Due Under the May 19, 2006, Deed of Trust is \$3,811,758.24. However, \$3,275,791.83 Has a Priority Date of May 19, 2006, and the Remaining \$535,966.41 Has a Priority Date of December 12, 2007.

1. Findings of Fact

This Court confirms the parties' Stipulation of Facts as follows, and makes additional findings of fact based on the evidence presented.

In the Stipulation of Facts,⁴ the parties agree that:

3. On May 19, 2006, Sundance loaned RBRB Homes \$3,000,000 pursuant to a Deed of Trust Note (the "Deed of Trust Note"), . . . **Exhibit "A."** Also on May 19, 2006, Sundance secured the Property with a Deed of Trust, Assignment of Rents, and Security Agreement (the "Deed of Trust"), . . . **Exhibit "B."** RBRB Homes is the grantor and Sundance is the beneficiary of the Deed of Trust. The Property is secured by the Deed of Trust. The Deed of Trust was recorded on May 19, 2006, as Instrument No. 2032434000, records of Kootenai County, Idaho.

4. On April 9, 2007, RBRB Homes and Sundance amended the Deed of Trust Note and added The Ridge at Black Rock Bay, Inc. ("RBRB") as an "additional maker," . . . **Exhibit "C"** [First Amendment to Deed of Trust Note]. Also, on April 9, 2007, RBRB Homes and Sundance amended the Deed of Trust to add RBRB as a "successor grantor," . . . **Exhibit "D"** [First Amendment to Deed of Trust].

(Stipulation of Facts, pp.3-4.) The May 19, 2006, Deed of Trust Note states in pertinent part:

FOR VALUE RECEIVED, the undersigned THE RIDGE AT BLACK ROCK BAY HOMES, INC., an Idaho Corporation ("Maker") hereby promises to pay to the order of SUNDANCE INVESTMENTS LIMITED PARTNERSHIP ("Payee") . . . the maximum principal sum of THREE MILLION DOLLARS (\$3,000,000) together with interest on the outstanding principle sum

.....

Payee may advance funds to Maker up to the Maximum Principle Amount subject to the terms and conditions contained in this Promissory Note. Upon written request from Maker for an advance, Payee shall advance of those funds, if any, which Payee elects to advance in its sole discretion.

.....

This Note is secured by a Deed of Trust of even date herewith.

(Stipulation of Facts, Exhibit A (emphasis added).) The May 19, 2006, Deed of Trust provides in part:

⁴ In the Stipulation of Facts, the parties refer to the Ridge at Black Rock Bay, Inc. as "RBRB"; in the January 3, 2011, Memorandum Opinion, this Court referred to the Ridge at Black Rock Bay, Inc. as "RBRB Inc." This Court will continue to refer to the Ridge at Black Rock Bay, Inc. as "RBRB Inc." throughout this Decision.

THIS DEED OF TRUST, ASSIGNMENT OF RENTS, AND SECURITY AGREEMENT, made this 19th day of May, 2006, between [RBRB Homes], . . . and SUNDANCE INVESTEMENTNS LIMITED PARTNERSHIP . . . WITNESSETH: That the grantor does hereby irrevocably GRANT, BARGAIN, SELL, CONVEY TO TRUSTEE IN TRUST, WITH POWER OF SALE that [Subject Property] . . . TOGETHER WITH, any and all buildings and improvements now or hereafter erected thereon, including but not limited to, the fixtures attachments, appliances, equipment, machinery, and other articles attached to said buildings and improvements ("Improvements").

.....

FOR THE PURPOSE OF SECURING:

a. Payment of indebtedness in the maximum principal amount of \$3,000,000 with interest thereon, evidenced by that certain [Deed of Trust Note] of even date herewith (the "Note") with an outside maturity date of June 30, 2009, executed by [RBRB Homes], which as been delivered to and is payable to the order of Beneficiary, and which by this reference is hereby made a part hereof, and any and all modifications, extensions and renewals thereof.

.....

d. Payment of all sums advanced by Beneficiary to protect the [Subject Property], with interest thereon at the rate provided in the [Deed of Trust Note].

.....

5.13 Priority of Trust Deed. The terms of the obligations secured hereby may provide that the interest rate, payment terms or balance due may be indexed, adjusted or renewed. The priority of this Deed of Trust shall not be affected by renegotiation or adjustment of the interest rate provided in the Note (which may increase or decrease the amount of periodic payments or extend or shorten the term of this Deed of Trust), an increase in the underlying obligation as a result of deferment of all or a portion of the interest payments and the addition of such payments to the outstanding balance of the obligation, or the execution of new agreements which reflect such changes.

(Stipulation of Facts, Exhibit B (emphasis added).)

Sundance and RBRB Inc. subsequently changed the financing documents:

16. On October 16, 2007, Sundance amended the Deed of Trust Note to provide that the maximum principal sum is \$3,500,000 . . . **Exhibit "N"** [Second Amendment to the Deed of Trust Note]. On October 18, 2007, Sundance loaned the additional \$500,000 to RBRB.

(Stipulation of Facts, ¶ 16.) The October 16, 2007, Second Amendment to the Deed of Trust Note provides in part:

THIS SECOND AMENDMENT TO THE DEED OF TRUST NOTE . . . is made effective as of the 16th of October, 2007, by and among [RBRB Inc.] . . . and [Sundance] . . . to amend, modify and supplement that certain Deed of Trust Note, dated effective May 19, 2006 . . . in the original principle balance of Three Million Dollars (\$3,000,000), as amended by the FIRST AMENDMENT TO DEED OF TRUST NOTE.

. . . [Sundance and RBRB Inc.] agree that the Note is hereby amended, modified and supplemented as follows:

1. The Note shall be amended to provide that the maximum principal sum under this note shall be THREE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$3,500,000).

(Stipulation of Facts, Exhibit N.)

Later, on November 1, 2007, Sundance and RBRB Inc. executed a second "Deed of Trust Note" (Stipulation of Facts, ¶ 17, Exhibit O.) The November 1, 2007, Deed of Trust Note provides:

FOR VALUE RECEIVED, the undersigned, [RBRB Inc.] . . . promises to pay to the order of [Sundance] . . . the maximum principle sum of Five Million and no/100th Dollars (\$5,000,000.00) with interest thereon fro the date first stated above at the rate of twelve percent (12%) per annum until maturity or default.

-
4. Security. This Note is secured by a Deed of Trust dated May 19, 2006, as amended by that certain First Amendment to Deed of Trust dated April 9, 2007, by and among [RBRB Inc.] . . . and [Sundance]. . .

(Stipulation of Facts, Exhibit O.) The terms of the November 1, 2007, Deed of Trust Note (Exhibit O) differ substantially from the payment terms of the May 19, 2006, Deed of Trust Note (Exhibit A) and appear to involve the sale of the lots in the Subject Property. Most importantly, the November 1, 2007, Deed of Trust Note (Exhibit O) does

not amend or refer to the May 19, 2006, Deed of Trust Note (Exhibit A) or the October 16, 2007, Second Amendment to the Deed of Trust Note (Exhibit N).

Sundance and RBRB Inc. then amended the May 19, 2006, Deed of Trust:

17. . . . on November 1, 2007, to reflect the increase in loan to \$5,000,000.00, RBRB and Sundance executed a Second Amendment to Deed of Trust . . . **Exhibit "P"** [Second Amendment to Deed of Trust]. In a series of six payments that commenced on December 18, 2007, and continued through June 17, 2008, Sundance loaned RBRB the additional \$1,500,000.

(Stipulation of Facts, ¶ 17.) This "Second Amendment to the Deed of Trust" was recorded on December 12, 2007. (Stipulation of Facts, Exhibit P.) The November 1, 2007, Second Amendment to Deed of Trust amends the May 19, 2006, Deed of Trust, by adding three additional paragraphs. Importantly, the November 1, 2007, Second Amendment to Deed of Trust adds paragraph "h":

Payment of indebtedness in the maximum principal amount of \$5,000,000.00, with interest thereon, evidence by that certain maturity date of October 31, 2011, executed by Grantor, and which has been delivered to and is payable to the order of Beneficiary and which by this reference is hereby made a part hereof, and all modifications extensions and renewals there of, and which supercedes (sic) and replaces the note referenced in paragraph a on page 2 herein.

(Stipulation of Facts, Exhibit P.) The other amendments concern the sale of lots in the Subject Property. Notably, there is no language amending Section 5.13 of the May 19, 2006, Deed of Trust regarding the priority of the additional funds Sundance loaned to RBRB Inc.

The parties agree that RBRB Inc. repaid \$1,700,000 of the \$5,000,000 principle and interest loaned by Sundance:

18. On August 11, 2008, RBRB repaid \$650,000.00 of the principal then outstanding.

19. On September 12, 2008, RBRB repaid \$1,050,000.00 of the principal then outstanding.

20. On February 19, 2010, Sundance gave RBRB an interest credit. Sundance and RBRB negotiated the amount of the interest rate credit to be \$1,224,859.76.

21. A . . . summary of Sundance's loans to RBRB, and the amount due and owing after applying all just credits and offsets, is . . . [\$3,275,791.83 (not including additional loans) or \$3,811,758.24 (including the additional loans] **Exhibit "Q."**

(Stipulation of Facts, ¶¶ 18-21.)

2. Conclusions of Law

This Court previously determined in the Memorandum Opinion that the May 19, 2006, Deed of Trust is first in priority in relation to all other security interests in the Subject Property. The parties agree that the May 19, 2006, Deed of Trust secures the original \$3,000,000 loan from Sundance to RBRB Homes, plus interest at a rate of 12% per annum, and therefore the amount due under the May 19, 2006, Deed of Trust, plus interest is at least \$3,275,791.83. (Plaintiff's Memorandum, p.3; Sundance's Memorandum, p.3.) Thus, the amount in dispute is the \$535,966.41 in principle and interest from the additional monies Sundance loaned to RBRB Inc. after October 16, 2007.

There are three issues for this Court regarding the amount due under the May 19, 2006, Deed of Trust: 1) whether the additional monies loaned by Sundance to RBRB Inc. are secured by the May 19, 2006, Deed of Trust; 2) whether the additional monies loaned by Sundance to RBRB Inc. have a priority date of May 19, 2006; and 3) whether the amount due under the May 19, 2006, Deed of Trust should be reduced by the two payments made by RBRB Inc. in the amount of \$1,700,000.

a. The additional monies loaned by Sundance after October 16, 2007, are secured by the May 19, 2006, Deed of Trust.

The Plaintiff does not appear to argue that the additional monies loaned by Sundance to RBRB Inc. after October 16, 2007, are not secured by the May 19, 2006, Deed of Trust via the Second Amendment to Deed of Trust recorded on December 12, 2007. Sundance also does not provide argument or authority on this issue.

The parties agree that “on November 1, 2007, RBRB [Inc.] executed a Deed of Trust Note that is secured by the [May 19, 2006,] Deed of Trust.” (Stipulation of Facts, ¶ 17.) The October 16, 2007, “Second Amendment to Deed of Trust Note” includes the following language: “[t]he terms of the Note, as modified by this Amendment, shall continue in full force and effect.” (Stipulation of Facts, Exhibit N.) Additionally, the November 1, 2007, Deed of Trust Note states that “[t]his Note is secured by a Deed of Trust dated May 19, 2006, . . . by and among [RBRB Inc.] . . . and [Sundance]. . . .” (Stipulation of Facts, Exhibit O.) The “Second Amendment to Deed of Trust,” executed on November 1, 2007, clearly amends the May 19, 2006, Deed of Trust to secure the additional monies loaned by Sundance pursuant to the October 16, 2007, Second Amendment to Deed of Trust Note and the November 1, 2007, Deed of Trust Note. (Stipulation of Facts, Exhibit P.) Therefore, this Court concludes that the May 19, 2006, Deed of Trust via the Second Amendment to Deed of Trust recorded December 12, 2007, secures the additional monies loaned by Sundance to RBRB Inc. after October 16, 2007, and as a result, the total amount due under the May 19, 2006, Deed of Trust is \$3,811,758.24. However, as discussed below, the entire amount due is not entitled to the priority date of May 19, 2006.

- b. Sundance is entitled to first priority under the May 19, 2006, Deed of Trust in the amount of \$3,275,791.58. The remaining \$535,966.41 has a priority date of December 12, 2007.**

The Plaintiff argues that any additional funds loaned by Sundance to RBRB Inc. after May 8, 2007, are subordinate to the Plaintiff's Lien. More specifically, the Plaintiff argues that "only the initial \$3,000,000.00 loaned by Sundance on the Deed of Trust Note, together with \$275,791.83 in interest, is entitled to priority over [the Plaintiff's lien]." (Plaintiff's Memorandum, p.3) Conversely, Sundance argues that the additional funds loaned to RBRB Inc. and the accompanying interest are entitled to the same priority date of May 19, 2006.

This Court notes that it is questionable that the additional funds loaned by Sundance to RBRB Inc. after October 16, 2007, are "future advances" as contemplated by the original loan documents, but instead appear to be additional loans for which the parties executed new documents and then secured the new principle balance with an amendment to the May 19, 2006, Deed of Trust. It seems, then, that the October 16, 2007, Second Amendment to Deed of Trust Note, and the November 1, 2007, Deed of Trust Note and the Second Amended Deed of Trust, are actually separate additional loans that Sundance secured with the May 19, 2006, Deed of Trust.

Regardless, the general rule is that "[w]here a mortgage is given to secure a specific debt named, the recorded, stated sum of the mortgage is sufficient notice of that indebtedness and will not be extended beyond the amount on the face of the mortgage." Beirsdorff v. Brumfield, 93 Idaho 569, 572, 468 P.2d 301, 304 (1970). "A senior mortgage for future advances will maintain seniority for advances made after actual notice of a junior lien if, but only if, there was a contractual obligation to make

such advances existing prior to the notice of the junior lien.” Beirsdorff, 93 Idaho 569, 572, 468 P.2d 301, 304 (1970). The Plaintiff advocates for application of the case of Idaho National Bank v. Wells, 100 Idaho 256, 596 P.2d 429 (1979), which further interprets Beirsdorff.

In Idaho National Bank, the bank loaned \$23,000 to a corporation, with an option for future advances in the amount of \$30,000. 100 Idaho at 257, 596 P.2d at 430. Mr. Wells, a principle of the corporation, signed a personal guarantee, guaranteeing the corporation’s debts up to \$200,000. Id. The \$23,000 loan was secured by a mortgage on the corporation’s real property. Id. Another person, Mr. Hughes, held \$8,000 recorded mortgage against the corporation’s property that was second in priority. Id. Mr. Wells personally also held third and fourth mortgages against the corporation’s real property. The bank loaned a total of \$44,100.00 to the corporation. Id. The bank foreclosed on the property after the corporation defaulted, and the property sold for \$35,000. Id. The bank claimed \$23,000 of the proceeds of sale (the face value of the initial mortgage) and sought the remaining \$21,100 from Mr. Wells via the personal guarantee. Id.

Mr. Wells counterclaimed that the bank was obligated to foreclose for the full amount due, including the advances made beyond the original \$23,000 loan, before asserting a claim for the remaining balance under the personal guarantee. Id. On appeal of the trial court’s dismissal of Mr. Wells’ counterclaim, the Idaho Supreme Court applied the following general rule:

If a future advance is obligatory, it takes its priority from the original date of the mortgage and the subsequent creditor is junior to it. However, if the advance is optional, and if the mortgagee has notice when the advance is

made that a subsequent creditor has acquired an interest in the land, then the advance loses its priority to that creditor

Id. (emphasis added.) The Idaho Supreme Court then affirmed, and held that the bank did not have senior mortgage rights in the property to the full extent of the \$53,000 secured by the mortgage, but could only recover the face value of the mortgage (\$23,000) because the additional \$21,000 loaned was not “obligatory.”

Id. at 260, 596 P.2d at 433. The holding meant that the remaining proceeds from the sale must be used to pay the second mortgage held by Mr. Hughes, and the third and fourth mortgages held by Mr. Wells, and the bank could then recover the deficiency from Mr. Wells under the personal guarantee.

The Plaintiff in this case likens the Plaintiff’s Lien to that of Mr. Hughes, arguing that the additional monies loaned by Sundance pursuant to the October 16, 2007, Second Amendment to Deed of Trust Note, and the November 1, 2007, Deed of Trust Note and Second Amendment to Deed of Trust, were “optional.” The plain language of the May 19, 2006, Deed of Trust Note supports the Plaintiff’s position:

Payee may advance funds to Maker up to the Maximum Principle Amount subject to the terms and conditions contained in this Promissory Note. Upon written request from Maker for an advance, Payee shall advance of those funds, if any, which Payee elects to advance in its sole discretion.

(Stipulation of Facts, Exhibit A.) Thus, under Idaho National Bank, the Plaintiff’s Lien has priority over the additional monies loaned by Sundance after October 16, 2007, because the additional monies were optional.

However, the inquiry does not end there. The Plaintiff must also show that Sundance had notice of the Plaintiff’s Lien prior to advancing the additional funds. As per I.C. § 45-506, a materialmen’s lien attaches when the lien claimant commences work. It is undisputed that the Plaintiff commenced work at the Subject Property on May

8, 2007. (Stipulation of Facts, ¶ 8.) To show that Sundance had notice, the Plaintiff provides copies of Sundance's answers to interrogatories (Exhibit T). Sundance's answers to the Plaintiff's rather direct interrogatories appear to be evasive, but it is clear that Sundance admits that persons from Sundance visited the Subject Property before October 16, 2007, and that "Sundance was aware that improvements were being made to the property." (Stipulation of Facts, Exhibit T.) Sundance provides no contradicting evidence except for vague assertions that it did not know specifically that it was the Plaintiff company that was performing the work, and that Sundance did not hire any contractors to perform work at the site. (Id.) A fact of note is that Sundance, when it acquired the Subordinate Mortgage from RBRB Inc. in September 2007 (as discussed below), received a "preliminary project cost estimate" dated September 6, 2006. (Stipulation of Facts, Exhibit I.)

"It is the province of the trial court to weigh conflicting evidence, to determine the credibility of witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence." KMST, LLC v. County of Ada, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003). Given the evidence presented and Sundance's admission, this Court concludes that Sundance was aware that work had commenced on the property on the Subject Property prior to October 16, 2007.

Sundance argues that the Idaho National Bank case was "implicitly overruled" by the passage of I.C. § 45-116. This section provides:

- 1) The lien of a mortgage and its priority shall not be affected by provisions in the mortgage instrument or in the note or other agreement evidencing the obligation that the mortgage secures, or by the exercise of such provisions by the mortgagee:

(a) which provide for the renegotiation or adjustment of the interest rate at designated intervals, the effect of which may be to increase or decrease the number of periodic payments to be made, or extend or shorten the terms of payment or both; or

(b) which results in an increase in the underlying mortgage obligation during a portion of the designated term of the mortgage because of deferment of all or a portion of interest payments and the addition of such payments to the outstanding principal balance of the mortgage.

The mortgagee may issue new notes at designated intervals during the term of the mortgage to reflect the modifications described herein.

(2) the provisions of subsection (1) of this section shall apply where the terms of the obligation provide that the interest rate, payment terms, or balance due on the loan may be indexed, adjusted, renewed or renegotiated and the mortgage instrument received for recordation discloses that fact.

(3) As used in this section, the term “mortgage” includes a deed of trust.

Id. Sundance claims that because the “balance due” under the May 19, 2006, Deed of Trust may be “adjusted or modified” at Sundance’s discretion when Sundance makes “future advances,” then the priority of the future advances should be the same as the underlying mortgage.

The Plaintiff responds that Sundance “wholly ignore[s] subsections 1(a) and (b), which define the parameters of when the statute applies.” (Plaintiff’s Memorandum, p.4.) The Plaintiff is correct, and this Court notes that subparagraph (b) is similar to paragraph 5.13 of the May 19, 2006, Deed of Trust. Sundance provides no specific argument for the proposition that I.C. § 45-116 overrules Idaho National Bank, and Sundance offers no analytical comparison of the case and the statute. Notably, the statute does not address the additional loans made by a beneficiary of a deed of trust by amending the maximum principle balance and executing new loan documents. More

importantly, the plain language of subsections (a) and (b) restricts the application of I.C. § 45-116 to “renegotiation or adjustment of the interest rate at designated intervals,” or “an increase in the underlying mortgage obligation during a portion of the designated term of the mortgage because of deferment of all or a portion of interest payments and the addition of such payments to the outstanding principal balance of the mortgage.” (Emphasis added.) It is difficult to see how the additional loans by Sundance to RBRB Inc. beginning after October 16, 2007, and the additional interest that accrued thereon, fall into either of these subsections. Therefore, this Court concludes that I.C. § 45-116 does not implicitly overrule Idaho National Bank and that subsections (a) and (b) limit the statute’s application to other circumstance besides those present in this case.

Sundance also advocates for the application of the Restatement (Third) of Property, Mortgages, §§ 7.3, which states “if a Deed of Trust is modified by the parties, the modification retains priority as against junior interest . . . except to the extent that the modification is materially prejudicial to the holders of such interests.” The Plaintiff is correct that no Idaho appellate court has found a need to apply this authority, and given the existence of the Idaho National Bank case this Court sees no need to apply the Restatement provision in the place of good precedential authority.

Based on the evidence presented and the arguments of the parties, as well as the Stipulation of Facts, this Court concludes that the two part analysis of Idaho National Bank applies. This Court also concludes that the plain language of the May 19, 2006, Deed of Trust Note shows that the additional loans made by Sundance after October 16, 2007, are optional loans. Further, the evidence in this case shows that Sundance had notice that work had commenced on the Subject Property prior to October 16,

2007. As a result, the additional loans, and the interest thereon, made by Sundance pursuant to the October 16, 2007, Second Amendment to Deed of Trust Note, and the November 1, 2007, Deed of Trust Note and Second Amendment to Deed of Trust, have a priority date of December 12, 2007. The amount due under the May 19, 2006, Deed of Trust is \$3,811,758.24. An amount of \$3,275,791.58 has a priority date of May 19, 2006. The remaining \$535,966.41 has a priority date of December 12, 2007.

- c. Sundance may apply the payments from RBRB Inc. to the additional loans. Therefore the amount due under the May 19, 2006, Deed of Trust may not be reduced.**

The Plaintiff also contends that “the payments made by RBRB [Inc.] on the Deed of Trust Note, to-wit, the \$650,000.00 payment made on August 11, 2008, and the \$1,050,000.00 payment made on September 12, 2008, should reduce the \$3,275,791.83 balance stated above, rather than serve as a reduction of the future advances balance.” (Stipulation of Facts, p.9.) The Plaintiff does not expound on this position in its Plaintiff’s Memorandum. Conversely, Sundance asserts that “it had the right to apply the payments as it saw fit pursuant to Smith v. Thomas, 42 Idaho 975, 245 P. 399 (1926), and it has applied the payments against the future advances.” (Stipulation of Facts, p.9.) Sundance is correct that Smith allows for application of the payments to future advances, and there is no evidence in the record that any document or direction from RBRB Inc. required Sundance to apply the payments to the initial principle balance and interest (\$3,275,791.83). This Court concludes that the amount due under the May 19, 2006, Deed of Trust is not be reduced by \$1,700,000.

B. The Amount Due Under the April 10, 2007, Subordinated Real Estate Mortgage is \$4,729,457.48.

1. Findings

This Court confirms the parties' stipulation of facts as follows, and makes additional findings of fact based on the evidence presented.

On April 9, 2007, RBRB Homes transferred ownership of the Subject Property to RBRB Inc. by warranty deed and recorded the deed on April 10, 2007. (Stipulation of Facts, Exhibit E.) The next day,

6. On April 10, 2007, RBRB executed a promissory note in the amount of \$3,765,861.28 in favor of RBRB Homes . . . **Exhibit "F"** [Promissory Note].

(Stipulation of Facts, p. 4.) The April 10, 2007, Promissory Note states in pertinent part that the interest on the \$3,765,861.28 loan is 5.5% per annum. (Stipulation of Facts, Exhibit F.) Importantly, the Promissory Note states: "5. Security. This Note is secured by a Mortgage of even date herewith ("the Mortgage") in favor of [RBRB Homes] and covering [the Subject Property]" (Id.) The mortgage that the April 10, 2007, Promissory Note refers to is the April 10, 2007, "Subordinated Real Estate Mortgage" ("Subordinated Mortgage"). The Subordinated Mortgage states as follows:

6. . . . Also on April 10, 2007, RBRB executed a Subordinated Real Estate Mortgage (the "Subordinated Mortgage") in the amount of \$3,765,861.28 in favor of RBRB Homes, . . . **Exhibit "G"** [Subordinated Real Estate Mortgage]. RBRB is the mortgagor and RBRB Homes is the mortgagee of the Subordinated Mortgage. The [Subject] Property is secured by the Subordinated Mortgage. The Subordinated Mortgage specifically states that it is subordinate to the [May 19, 2006] Deed of Trust. The Subordinated Mortgage was recorded on April 10, 2007, as Instrument No. 2093296000.

(Stipulation of Facts, p. 4.) The Subordinated Mortgage conveys the Subject Property and provides that:

This conveyance is intended as a Mortgage to secure the payment of the sum of Three Million Seven Hundred Sixty-Five Thousand Eight Hundred Sixty-One and 28/100ths Dollars (\$3,765,861.28) with interest (together with any further advances made by Mortgages to Mortgagor, or expended by Mortgagee to protect the Property or Mortgagee's interest therein), in accordance with the terms of a promissory note of even date herewith, in such amount (the "Note"), payable to the order of Mortgagee, with payment due in accordance with such Note and providing for acceleration of the due date of the principal for default in the payment of interests or any installment of principal as required under the Note, and providing for reasonable attorney fees in case of suit or action.

(Stipulation of Facts, Exhibit G.)

RBRB Inc. subsequently assigned the Subordinated Mortgage to Sundance on September 13, 2007. (Stipulation of Facts, ¶ 9, Exhibit H.) Two days later, on September 15, 2007, Sundance purchased the April 10, 2007, Promissory Note that is secured by the April 10, 2007, Subordinated Mortgage. (Stipulation of Facts, ¶ 10, Exhibit I.) The acquisition was pursuant to an "Agreement for Purchase of Black Rock Note and Seller's Interest in the Purchase and Sale Agreement" ("Purchase Agreement"). (Stipulation of Facts, ¶ 10, Exhibit I.)

On March 24, 2008, RBRB Inc. executed an allonge to the April 10, 2007, Promissory Note secured by the Subordinated Mortgage, that made Sundance the payee (Stipulation of Facts, ¶ 11, Exhibit J), and on April 3, 2008, RBRB Inc. executed an allonge to the April 10, 2007, Promissory Note secured by the Subordinated Mortgage, that changed the interest rate on the Promissory Note from five and one-half percent (5.5%) to seven percent (7.0%) (Stipulation of Facts, ¶ 12, Exhibit K).

RBRB Inc. did not make any payments under the April 7, 2007, Promissory Note or the Subordinated Mortgage. (Stipulation of Facts, p.7.) The outstanding balance due on the Promissory Note at the 5.5% interest rate is \$4,555,763.58, but the outstanding

balance due on the Promissory Note at the amended interest rate of 7.7% from January 1, 2008, is \$4,729,457.48. (Stipulation of Facts, Exhibit R.)

2. Conclusions of Law

As previously determined in the Memorandum Opinion, the April 10, 2007, Subordinated Mortgage security interest is second in priority, behind the May 19, 2006, Deed of Trust. The issue presented by the parties for determination in regards to the Subordinated Mortgage is whether the increase in the interest rate retains the priority date of April 10, 2007, or if the priority date is April 3, 2008. The parties agree that under the April 10, 2007, Promissory Note and Subordinated Mortgage the amount due is at least \$4,555,763.58 (5.5% interest rate). The amount at issue is an additional \$173,693.90 in interest resulting from the increase in interest rate to 7.7% on April 3, 2008.

The Plaintiff and Sundance each present arguments regarding whether this Court should apply I.C. § 45-116 or the Restatement of Property (Third) of Mortgages, § 7.3. The Plaintiff argues that I.C. § 45-116 does not apply because the subsections do not address the facts presented in this case. (Plaintiff's Memorandum, pp.8-9.) Sundance advocates for the application of I.C. § 45-116, claiming that the Subordinated Mortgage "provides that the interest rate may be modified on default." (Sundance's Memorandum p. 8.)

Subsection 2 of I.C. § 45-116, states that the statute only applies if the "terms of the obligation provide that the interest rate . . . may be . . . adjusted, . . . or renegotiated and the mortgage instrument received for recordation discloses that fact." The Subordinated Mortgage provides:

This conveyance is intended as a Mortgage to secure payment of the sum of Three million Seven Hundred Sixty-Five Thousand Eight Hundred Sixty-One and 28/100ths Dollars (\$3,765,861.28) with interests . . . in accordance with the terms of a promissory note of even date herewith, in such amount . . . payable to the order of Mortgagee, with payment due in accordance with such Note and providing for acceleration of the due date of the principal for default in the payment of interest or any installment of principal as required under the Note

(Stipulation of Facts, Exhibit G.) This document is recorded. The Promissory Note provides:

Upon default, Payee may declare the entire unpaid principal balance on this Note and all accrued unpaid interest immediately due, without notice, and then Maker will pay that amount. Further, upon default and without notice, the interest rate shall increase to twelve percent (12%) per annum and Maker also agrees to pay that amount.

(Stipulation of Facts, Exhibit F.) This document is not recorded.

The statute requires that the "obligation", in this case the Promissory Note, provide that an interest rate be adjustable or negotiable. The Promissory Note does not provide for adjustment or negotiation of the interest rate, but only allows for an increase in interest upon default. Similarly, the Subordinated Mortgage does not provide for any such adjustment or negotiation in the interest rate. Thus, I.C. 46-116 does not apply.

Even if this Court accepted the Defendant's reasoning and concluded that the Promissory Note provided for an interest rate adjustment, and that the language of the Subordinated Mortgage, the "instrument received for recordation," disclosed the language in the Promissory Note, the Plaintiff is correct subsections (a) and (b) would still prevent the Defendant from obtaining a priority date of April 10, 2007, for the additional interest. This is because Subsections (1)(a) and (1)(b) allow for priority to be retained where the instrument provides for "renegotiation or adjustment of the interest

rate at designated intervals,” or “an increase of the underlying mortgage obligation because of deferment of all or a portion of the interest payments.” Neither subsection addresses acceleration of the interest rate upon default. Thus, this Court concludes that I.C. § 45-116 does not support the Defendant Sundance’s position.

It appears, then, that the statute is silent on the issue of whether a mortgage and its priority shall not be affected by an increase in an interest rate upon default on the underlying obligation. Given the silence of the statute, both parties argue for application of the Restatement of Property (Third) of Mortgages, § 7.3: “if a senior mortgage is modified by the parties, the modification retains priority as against junior interest . . . except to the extent that the modification is materially prejudicial to the holders of such interests.” The Plaintiff asserts under the Restatement provision that it is materially prejudiced by the increase in the interest rate from 5.5% to 7.7%. Sundance argues that the Plaintiff is not.

As discussed above, no Idaho appellate court has adopted the Restatement (Third) of Property, Mortgages, § 7.3, and this Court will not do so now. A court need not adopt a Restatement simply because a statute is silent on an issue. Instead, it logically follows that because the legislature did not include the increase of an interest rate upon default in I.C. § 45-116, then legislature did not intend to extend the protections of I.C. § 45-116 to such a situation. Therefore, the amount due as a result of the increased interest rate has a priority date of April 3, 2008.

This Court concludes that Sundance’s Subordinated Mortgage retains its priority of April 10, 2007. Thus, the amount due under the April 10, 2007, Subordinated

Mortgage is \$4,729,457.48. However, the Plaintiff's Lien has priority over \$173,693.90 of this amount. The remaining \$173,693.90 has a priority date of April 3, 2008.

C. The Amount Due Under the May 8, 2007, Plaintiff's Lien is \$99,646.64. The Amount Due Under Kootenai Electric's August 8, 2008, Mortgage is \$252,404.

The Plaintiff filed an "Affidavit of Computation" on January 31, 2011 stating that the amount due under the Plaintiff's Lien, including prejudgment interest at the legal rate, is \$99,646.61. The parties also stipulated:

8. RBRB then hired SI to perform construction work on the Property. SI commenced its construction work on the Property on May 8, 2007. The total amount of construction work that SI performed on the Property for which it remains unpaid is \$78,446.67, plus accrued interest from November 1, 2008.

...

After applying all just credits and offsets to SI's Lien, and including interest at the rate of twelve percent (12%) per annum from November 1, 2008 through January 31, 2011, the total amount due to SI is **\$99,646.61**.

(Stipulated Facts, pp.5, 9.) There is no evidence that controverts the Plaintiff's computation, which is based on the amount due and owing of \$78,446.67. Based on the evidence before this Court, this Court finds and concludes that the amount due under the Plaintiff's Lien is \$99,646.61. Further, as found and concluded in the Memorandum Opinion, the Plaintiff's Lien has a priority date of May 8, 2007.

On August 7, 2008, RBRB Inc. executed a "Mortgage" in favor of Kootenai Electric in the amount of \$282,100, and recorded the Mortgage on August 8, 2008, as Instrument No. 2172886000. (Stipulation of Facts, Exhibit L.) The parties stipulate that the amount due to Kootenai Electric under the August 28, 2008, Mortgage is \$252,404 as of January 31, 2011.

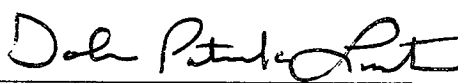
In its Memorandum Opinion, this Court held that the August 8, 2008, Mortgage was fourth in priority, but this Court had not addressed the amount due under the May 19, 2006, Deed of Trust or the April 10, 2007, Subordinated Mortgage. As discussed above, an amount of \$535,966.41 due under the May 19, 2006, Deed of Trust has a priority date of December 12, 2007, and an amount of \$173,693.90 due under the April 10, 2007, Subordinated Mortgage has a priority date of April 3, 2008. Therefore, Kootenai Electric's security interest is now sixth in priority.

V. CONCLUSION

Based on the foregoing, the priority and amount due under the respective securities interests is as follows:

PRIORITY	INSTRUMENT	AMOUNT DUE
FIRST	May 19, 2006 Deed of Trust (Sundance) – Exhibits A, B, C, and D, plus outstanding interest	\$3,275,791.58
SECOND	April 10, 2007, Promissory Note and Subordinated Real Estate Mortgage (Sundance), Exhibits F & G	\$4,555,763.58
THIRD	May 7, 2007, Plaintiff's Lien plus prejudgment interest	\$99,646.61
FOURTH	December 12, 2007, Additional Monies Loaned by Sundance to RBRB Inc. pursuant to Exhibits N, O, and P, plus outstanding interest.	\$535,966.41
FIFTH	April 3, 2008, increase in interest rate of Subordinated Mortgage and Promissory Note pursuant to Exhibits J and K	\$173,693.90
SIXTH	August 8, 2008 Mortgage (Kootenai Electric Cooperative)	\$252,404.00

DATED this 23rd day of March, 2011.



 John P. Luster
 District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing DECISION RE: COURT TRIAL was sent by U.S. Mail, postage prepaid, sent by facsimile transmission, or sent by interoffice mail on the 23 day of March, 2011, to the following:

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Clifford T. Hayes
Clerk of the District Court

By: 

Deputy Clerk