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principal loan secured by the Borrowers. This Court previously ruled that the Guarantors were in breach of the guaranty agreements they executed and in default on payments due under the terms of the guaranty agreements.

A **Fair Market Value** evidentiary hearing was held over the course of several days and was ultimately concluded on March 2, 2015. This Court's ruling herein follows.

PROCEDURAL HISTORY

Overview

1. Johnson Bank commenced this action in August 2013 seeking a finding that the Defendants each breached commercial guaranty agreements between Johnson Bank and each of them and that Johnson Bank is owed a deficiency judgment against the Defendants. (*See generally*, Complaint).

2. Pursuant to a Scheduling Order entered by the Court on March 7, 2014, an evidentiary hearing was to commence on October 17, 2014 to determine the fair market value of 455 acres of raw undeveloped vacant desert land located in Peoria, Arizona, as of the date of the Trustee's Sale, July 3, 2013. (Court Order dated March 7, 2014).

3. On September 10, 2014, in advance of the fair market value hearing, Johnson Bank filed a Motion for Partial Summary Judgment regarding Defendants' liability on Johnson Bank's breach of commercial guaranty claims. In the Motion for Partial Summary Judgment, Johnson Bank argued there was no genuine issue of material fact that Defendants each entered into commercial guaranty agreements with Johnson Bank, providing that they would each guarantee the debt obligations of the non-party Borrowers arising out of non-party Borrowers' default on the Loan, the Note and Deed of Trust. (Motion for Partial Summary Judgment and Separate Statement of Facts filed with the Court on September 10, 2014; Court Order dated October 15, 2014; Court Order dated November 24, 2014).

4. On October 15, 2014, and reaffirmed in Court on November 18, 2014, this Court issued a ruling granting Johnson Bank's Motion for Partial Summary Judgment. The Court ruled that Johnson Bank was entitled to judgment against the Defendants on its breach of guaranty claims as there was no dispute that these Defendants executed commercial guaranties, and that Defendants had failed to pay all sums due under the terms of the Note and the commercial guaranties after non-party Borrowers' default. The Court further ruled that these Defendants are in default of the guaranty agreements and have failed to cure this default. (Motion for Partial Summary Judgment and Separate Statement of Facts filed with the Court on September 10, 2014; Court Order dated October 15, 2014; Court Order dated November 24, 2014).

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5. After the Court granted Johnson Bank's Motion for Partial Summary Judgment, the only remaining issue is Johnson Bank's deficiency under A.R.S. § 33-814, including the fair market value of the property. (Motion for Partial Summary Judgment and Separate Statement of Facts filed with the Court on September 10, 2014; Court Order dated October 15, 2014; Court Order dated November 24, 2014).

6. On November 18, 2014, the fair market value hearing commenced. The Court heard opening statements and then proceeded to hear testimony of three (3) witnesses, two for Johnson Bank and one for Defendants. The hearing lasted three days: November 18, 2014, January 9, 2015 and March 2, 2015.

The Property

7. The property at issue consists of two distinct tracts, Tract 1 and Tract 2, which are separated by approximately one mile. Tract 1, also referred to as the South Tract, consists of 23 acres planned for neighborhood commercial property (Tract 1, Parcel "A"), and 188.37 acres planned for recreational vehicle (RV) resort development (Tract 1, Parcel "B"). Tract 2, also referred to as the North Tract, consists of 243.78 acres planned for a resort site and residential development. (Trial Exhibits 1 – 4; *see generally*, Trial Testimony of Expert Witnesses) (Counsel will provide copies of all cited transcript excerpts at the request of the Court).

The Dispute Over Valuation

8. The primary dispute between the expert appraisal witnesses concerned Parcel "B" of Tract 1, the planned RV parcel. The experts' opinions are nearly identical regarding the value of Parcel "A" of Tract 1 and also Tract 2, respectively. The appraisal experts disagree only as to the value of Parcel "B" of Tract 1 (the RV property), the development costs associated therewith, and the feasibility of Parcel "B" of Tract 1 as a RV park at this time. (November 18, 2014 Transcript, 137:23 – 138:13; March 2, 2015 Transcript, 94:16 – 95:19).

9. Ralph J. Brekan, Johnson Bank's expert, opines the value of Parcel "B" of Tract 1 to be \$2,830,000.00, and Peter J. Martori, Defendants' expert, opines the value to be \$18,442,500.00 for a disputed difference of \$15,612,500.00. (November 18, 2014 Transcript, 137:23 – 138:13; March 2, 2015 Transcript, 94:16 – 95:19).

The Expert Witnesses

10. Johnson Bank relied on the testimony of its appraisal expert, Ralph J. Brekan, that the value of the undeveloped vacant desert Property was \$7,020,000.00 on July 3, 2013. Defendants, on the other hand, through their appraisal expert, Peter J. Martori, contended that the value of the Property on July 3, 2013, was in excess of \$23,000,000.00 (a dispute of greater than

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\$16,000,000.00). Johnson Bank owns the Property. (*See generally*, Trial Testimony of Experts; Trial Exhibit 3).

11. Each witness was subject to direct-examination, cross-examination and re-direct examination. Hundreds of pages of exhibits were admitted or stipulated into evidence. The parties presented oral closing arguments on March 2, 2015. At the Court's direction, the parties were required to submit proposed findings of fact and conclusions of law.

II

FINDINGS OF FACT

A. Background Information

The Parties

12. Johnson Bank is a banking corporation organized and existing under the laws of the State of Wisconsin and is duly authorized to conduct business in the State of Arizona. (Complaint, ¶1).

13. DLGC II, L.L.C., a non-party, was an Arizona limited liability company, and at relevant times was in a chapter 11 proceeding pending in the United States Bankruptcy Court in and for the District of Arizona in Jointly Administered Case No. 2:11-bk-10170-EPB. (Complaint, ¶2; Trial Exhibit 23).

14. LAKE PLEASANT GROUP, L.L.P., a non-party, was an Arizona limited liability partnership, and at relevant times was in a chapter 11 proceeding pending in the United States Bankruptcy Court in and for the District of Arizona in Jointly Administered Case No. 2:11-bk-10170-EPB. (Complaint, ¶3; Trial Exhibit 23).

15. Each of the Defendants is a personal commercial guarantor of the loan made to non-party Borrowers, as detailed below. Each of the Defendants is a member of or has an ownership interest in, the non-party Borrowers. (Trial Exhibits 1, 13-17; Court Order dated October 15, 2014; Court Order dated November 24, 2014).

The Loan Documents

16. On or about December 21, 2007, Borrowers obtained a loan from Johnson Bank in the principal amount of \$21,000,000.00 (the "Loan"), for the acquisition and development of vacant desert land totaling 455 acres located along and North of Highway 74 West of Old Lake Pleasant Road and South of Lake Pleasant, Peoria, Arizona 85383 (the "Property"). The Property

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is more fully and legally described in the Deed of Trust. (Trial Exhibits 1-2, 13).

17. The Borrowers executed and delivered to Johnson Bank a Promissory Note dated December 21, 2007 (the "Note") (Complaint, ¶10; Trial Exhibit 13).

18. The Note was secured by a Deed of Trust dated December 21, 2007, and recorded December 21, 2007, at Recorder's No. 20071336595, official records of Maricopa County Arizona ("Deed of Trust"). (Complaint, ¶11; Trial Exhibit 2).

19. Johnson Bank is the holder and beneficiary of the Loan, Note, and Deed of Trust and all other documents executed in connection therewith. (Trial Exhibits 1-2, 13-20).

The Defendants' Commercial Guaranty Agreements

20. The Note was further secured by commercial guaranty agreements dated December 21, 2007, executed by the Defendants providing that Defendants would each absolutely and unconditionally guarantee the obligations of Borrowers arising out of the Note, Deed of Trust and other Loan Documents. (*See generally*, Complaint; Trial Exhibits 14 – 17; Johnson Bank's Motion for Partial Summary Judgment regarding Liability and Separate Statement of Facts filed on September 10, 2014; Court Order dated October 15, 2014; Court Order dated November 24, 2014).

The Default

21. Johnson Bank made demand upon the Borrowers to perform their respective payment obligations under the Loan Documents. Despite demand, the Borrowers failed to pay those obligations. (Motion for Partial Summary Judgment regarding Liability and Separate Statement of Facts filed on September 10, 2014; Court Order dated October 15, 2014; Court Order dated November 24, 2014 Trial Exhibits 18 – 20, 23).

22. The Borrowers defaulted on the Loan by failing to timely pay principal and interest installments due under the Loan. (Motion for Partial Summary Judgment regarding Liability and Separate Statement of Facts; Court Order dated October 15, 2014; Court Order dated November 24, 2014; Trial Exhibits 18 – 20, 23).

23. The Loan was modified by a Loan Modification and Extension Agreement dated March 31, 2010, which was expressly agreed to by the Defendants under the Consent and Agreement of Defendants to the Loan Modification and Extension Agreement dated March 31, 2010. (Trial Exhibits 18 - 20).

24. The Loan Modification and Extension Agreement expressly provides in part:

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As of March 30, 2010, the **principal balance of the Note is \$18,489,514.79.** Borrower acknowledges and represents that as of the date of this Agreement (a) **the above figure is true and correct.** (b) there are no offsets, and (c) **there are no defenses to payment of the Note or enforcement of the Loan Documents.**

(Emphasis Added) (Trial Exhibit 18 at 1:2).

25. On April 13, 2011, Borrowers filed for protection under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Arizona. (Complaint, ¶¶ 2, 3; Trial Exhibit 23, 1:D).

26. On November 12, 2012, while the Borrowers were in Chapter 11 bankruptcy, Johnson Bank agreed to temporarily forebear from exercising its remedy of a non-judicial trustee's sale of the Property in order to provide Borrowers an opportunity to pay off Johnson Bank, as the priority secured creditor ("Forbearance Agreement"). (March 2, 2015, Transcript, 31:11 – 17; 33:13 – 17; 34:10 – 15; Trial Exhibits 18 – 20, and 23).

27. The Forbearance Agreement expressly provides in part:

E. Lender has filed Proofs of Claim stating that as of the bankruptcy petition filing date of April 13, 2011, **Borrower was indebted or liable to Lender in the principal amount of \$18,490,247.78, with accrued and unpaid interest of \$844,739.63, together with attorneys' fees and costs.**

1. **Acknowledgment of Default.** **Borrower hereby acknowledges that each Borrower is in default under the terms of the Loan Documents,** that Zoning Approval has not been obtained, and that Borrower has not paid the extension fees under the Confirmed Plan.

5. **Waiver.** . . . the forbearance granted herein extends only to the Loan Document and the Confirmed Plan and not to any other debts or obligations owed to Lender by Borrower . . .

(Emphasis Added) (Trial Exhibit 23).

28. The Forbearance Agreement provided Defendants with an opportunity to have the Note satisfied, thus releasing them from their obligations to pay off Johnson Bank on default amounts. (March 2, 2015 Transcript, 31:11 – 17; 32:3 – 12; 33:13 – 17; 34:10 – 15; Trial Exhibits 18 – 20, 23).

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29. The purchase agreement upon which the Forbearance Agreement was based in order to pay off default amounts due Johnson Bank was cancelled, and never consummated. (January 9, 2014 Transcript, 130:22 – 131:1).

30. The Property was sold at trustee's sale on July 3, 2013. (Trial Exhibit 3).

31. Johnson Bank was the successful bidder at the July 3, 2013 trustee's sale and purchased the Property for the credit bid of \$7,210,000.00. (Trial Exhibit 3) The credit bid was \$190,000.00 more than Mr. Brekan's appraisal of \$7,020,000.00. (March 2, 2015 Transcript, 23:13 – 24:1).

32. The credit bid represented a benefit to the Defendants in that it exceeded Mr. Brekan's fair market value appraisal. (March 2, 2015 Transcript, 23:13 – 24:1).

The Current Status of the Property

33. The Property remains unimproved without road access, sewer, water, gas or dry utilities. The Property also consists of rocky desert soil, sloping topography and large deep swales. (November 18, 2014 Transcript, 39:11 – 41:10; 52:9 – 20).

B. Evidence Regarding the Fair Market Value of the Property

Johnson Bank's Witnesses

34. Johnson Bank presented expert opinion testimony from Ralph J. Brekan, an Arizona licensed commercial real estate appraiser, who testified to the fair market value of the Property. Johnson Bank also presented testimony from Robert Parsons, who is the Senior Vice President of the Special Assets Group at Johnson Bank. (*See generally*, testimony of Mr. Brekan and Mr. Parsons).

Testimony of Appraisal Expert Ralph J. Brekan

35. Mr. Brekan is a commercial real estate appraiser with forty (40) years of service in the real estate industry and real estate development space in Arizona. He also has been a commercial broker for decades. He has received the designation of Member of the Appraisal Institute. He has an undergraduate degree in finance and a masters degree in business administration. Since 1989, he has been the president and owner of Greater Southwest Valuation, Inc. dba the Brekan-Nava Group which is an appraisal company specializing in performing appraisals on vacant land, subdivisions, master planned developments, apartments, condominiums, golf courses, resorts, **RV parks**, mobile home parks, office, both single user and

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multi high rise, commercial, industrial and even the Raytheon Missile Plan. (Emphasis Added) (November 18, 2014, Transcript, 29:14 – 31:19; 32:9 – 19).

36. Mr. Brekan's opinions concerning valuation of the Property were made in accordance with the Uniform Standards of Professional Appraisal Practice ("USPAP"). (November 18, 2014 Transcript, 45:18 – 46:24).

37. During the course of developing his appraisal opinions, Mr. Brekan was assisted by Perry Warner, an employee of Brekan-Nava Group, who specialized in land appraisals. Mr. Warner is an appraiser with over 25 years of experience. Mr. Warner now works for the State Land Department. (November 18, 2014 Transcript, 60:23 – 61:19).

38. Mr. Brekan testified that he has appraised approximately ten (10) RV parks. Defendants' expert testified that he has not appraised a single RV park. (November 18, 2014, Transcript, 32:24 – 4; March 2, 2015, Transcript, 110:22 – 111:11).

39. Mr. Brekan confirmed that the Property at issue consists of two distinct tracts: Tract 1 and Tract 2, which are separated by about one mile. Tract 1, also referred to as the South Tract, consists of 23 acres planned for neighborhood commercial property (Parcel "A"), and 188.37 acres planned for recreational vehicle (RV) resort development with 750 single RV units (Parcel "B"). Tract 2, also referred to as the North Tract, consists of 243.78 acres planned for a resort site and residential development planned for a 240 room resort. (November 18, 2014 Transcript, 68:15 – 71:3).

40. Mr. Brekan confirmed that there is no sewer or water infrastructure available on the Property. (November 18, 2014 Transcript, 63:16 – 18; 72:20-24; 76:20 – 77:5; 122:18 – 123:19).

41. Mr. Brekan confirmed that "paper" water and sewer companies have been formed, but that those companies are owned by Defendant Donald Leo. (November 18, 2014 Hearing Transcript, 76:5 – 77:19).

42. Mr. Brekan testified that due to topography constraints associated with the Property he commissioned Dibble Engineering, a well-established and respected third-party engineering firm, to provide him with a comprehensive analysis of sewer and water, and onsite and offsite development costs for the Property. (November 18, 2014 Transcript, 89:5 - 25; 93:2 – 6; January 9, 2015 Transcript, 115:8 – 119:2; Trial Exhibits 25 and 66).

43. The purpose of involving Dibble Engineering was to confirm Mr. Brekan's conclusions as to development costs and valuation, something Mr. Brekan, as an appraiser, has

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done many times throughout his career. Mr. Brekan testified that it is an accepted and common practice for an expert appraiser to obtain development cost estimates from professional engineers. (November 18, 2014 Transcript, 89:5 - 25; 93:2 - 6; January 9, 2015 Transcript, 115:8 - 119:2; Trial Exhibits 25 and 66).

44. Dibble Engineering generated a development cost report for Mr. Brekan's review. (November 18, 2014 Transcript, 89:5 - 25; 93:2 - 6; January 9, 2015 Transcript, 115:8 - 119:2; Trial Exhibits 25 and 66).

45. Mr. Brekan confirmed that he analyzed Dibble Engineering's development costs, and that based on his knowledge and experience, the costs provided by Dibble Engineering were reasonable and accurate. (November 18, 2014 Transcript, 93:24 - 94:5; January 9, 2014, 118:14 - 18; Trial Exhibits 25 and 66).

46. Mr. Brekan confirmed that the total cost to develop the entire Property, including water and sewer, is \$118,000,000.00. (November 18, 2014 Transcript, 96:11 - 25; Trial Exhibits 25 and 66).

47. Mr. Brekan testified that after reviewing the Dibble Engineering development cost report, confirming with commercial brokers, and based on his experience, that it would cost \$50,000,000.00 to develop the RV Park alone, Tract 1, Parcel B. (January 9, 2015, Transcript, 94:11 - 95:24; Trial Exhibits 25 and 66).

48. Mr. Brekan testified that he studied expense comparables of other property developments to compare and contrast development costs for those other properties with development costs related to the subject Property and that what he learned of other property development costs "reassured" him of the costs for the Property. (January 9, 2015 Transcript, 119:3 - 20; 120:24 - 121:20).

49. Mr. Brekan testified that the RV resort for Tract 1, Parcel B is not feasible at the present time because of development cost constraints, but it may be feasible in the future when market development improves in the area where the Property is located. (November 18, 2014 Transcript, 110:8 - 13).

50. Mr. Brekan testified that he used the sales comparison approach to value the Property, which is the most reliable and preferred method used by appraisers when performing land appraisals. (November 18, 2014, 110:14 - 111:11; 112:8 - 24).

51. The sales comparison approach involves locating sales that have similar unimproved and remote characteristics to that of the Property. The goal is to try to identify sales

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close as possible to the appraisal date of July 3, 2013. (November 18, 2014, 110:14 – 111:11; 112:8 – 24)

52. Mr. Brekan testified that because Tract 1, Parcel B and Tract 2 are similar in nature he used the same comparable sales to determine their value. Mr. Brekan studied around forty (40) comparable sales and cited five (5) comparables sales in his report and testimony that were most similar to the Property. (November 18, 2104, 114:7 – 10; Exhibit 12)

53. Mr. Brekan testified that the five comparables he cited were similar in development and nature to the Property. Other properties were not comparables as they were much more superior in nature. Those properties had sewer, water, streets, curbs, gutters and were surrounded by various existing development, unlike the Property here. (November 18, 2014 Transcript, 136:12 – 23).

- 53.1. The price for comparable number 1 was \$15,024.00 per acre.
- 53.2. The price for comparable number 2 was \$5,000.00 per acre.
- 53.3. The price for comparable number 3 was \$15,041.00 per acre.
- 53.4. The price for comparable number 4 \$6,329.00 per acre.
- 53.5. The price for comparable number 5 was \$6,292.00 per acre.

(Trial Exhibit 12).

54. The comparable sales used by Mr. Brekan are a reliable indicator of the value of Tract 1, B and Tract 2 of the Property. (Trial Exhibit 12).

55. Mr. Brekan testified that based on his experience, knowledge, analysis and expertise it is his opinion that the fair market value on July 3, 2013 for Tract 1, Parcel B was \$15,000.00 per acre, totaling \$2,830,000.00 for Tract 1, Parcel B. (November 18, 2014 Transcript, 137:23 – 138:13).

56. Mr. Brekan testified that based on his experience, knowledge, analysis and expertise it is his opinion that the fair market value on July 3, 2013 for Tract 2 was \$9,000.00 per acre, totaling \$2,190,000.00 for Tract 1, Parcel B. (November 18, 2014 Transcript, 139:10 - 18).

57. Mr. Brekan testified that Tract 2 per acre value is slightly less than Tract 1, Parcel B because Tract 2 has an inferior location in that it has poor access, is not part of the service area for the existing paper water and sewer companies, and would be developed after Tract 1, Parcel B. (November 18 Transcript, 138:18 - 139: 9).

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58. Mr. Brekan testified that he used five (5) commercial sales concerning Tract 1, Parcel A, which is the commercial parcel.

- 58.1. The price for comparable number 1 was \$3.55 per square foot.
- 58.2. The price for comparable number 2 was \$2.19 per square foot.
- 58.3. The price for comparable number 3 was \$2.30 per square foot.
- 58.4. The price for comparable number 4 \$2.38 per square foot.
- 58.5. The price for comparable number 5 was \$2.87 per square foot.

(Trial Exhibit 77; November 18 Transcript, 140:21 – 25).

59. Mr. Brekan testified that based on his experience, knowledge, analysis and expertise it is his opinion that the fair market value on July 3, 2013 for Tract 1, Parcel A was \$2.00 per square foot, after making slight adjustments, totaling \$2,000,000.00 for Tract 1, Parcel A. (November 18, 2014, Transcript, 153:5 – 7).

60. Mr. Brekan testified that his fair market value of the Property included sewer and water. (January 9, 2014 Transcript, 115:5 – 7).

61. Mr. Brekan's fair market value:

Subject Identification	Land Area (Net Acres)	Planned Use	Value Type	Opinion of Value
Tract 1 (Parcel A) [South Tract]	23.00	Neighborhood Commercial	Fair Market Value	\$2,000,000 [\$2.00 per square foot]
Tract 1 (Parcel B) [South Tract]	188.37	RV Resort	Fair Market Value	\$2,830,00 [\$15,000.00 per acre]
Tract 2 [North Tract]	243.78	Traditional Resort and Single-Family Homes	Fair Market Fair Market Value	\$2,190,000 [\$9,000.00 per acre]

62. Mr. Brekan testified that his **opinion as to the fair market value of the entire Property is \$7,020,000.00** (March 2, 2015 Transcript, 23:13 – 24:1).

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The Valuation Dispute Between the Experts Concerns the RV Resort – Tract 1, Parcel B

63. Mr. Brekan testified that comparables selected by Mr. Martori were not good comparables in that they were dissimilar to the Property in that they had been much further developed and are located in highly developed areas. Mr. Brekan testified that it is unreasonable and unsupportable for Mr. Martori to opine that the value of Tract 1, B is \$100,000.00 per acre (Mr. Brekan's value is at \$15,000.00 per acre), but then agree with Mr. Brekan that Tract 2 is \$10,000.00 per acre. (November 18 Transcript, 155:19 – 156:20).

64. Mr. Brekan testified that the highest and best use for Tract 1, Parcel B is future use. (January 9, 2015 Transcript, 129:5 – 20).

Defendants' Reliance on the Pensus Offer As Evidence of Fair Market Value is Unsupportable

65. During the time in which the Borrowers were in chapter 11 bankruptcy, there was a Purchase and Sales Agreement and Joint Escrow Instructions dated "June __, 2011" between Lake Pleasant Group LLP and DLGC II LLC, as sellers, and Pensus Cholla Hills RV Resort LLC, as buyer, which was voluntarily cancelled on or about June 2, 2012, greater than one year prior to the July 3, 2013 trustee's sale. ("Pensus Offer"). The Pensus Offer has never been or will be, consummated. (Johnson Bank's Motion *in Limine*; Trial Exhibits 18, 23 and 51).

66. Mr. Brekan testified that he reviewed the Pensus Offer and determined that it was a "bogus offer" having nothing to do with fair market value. Specifically:

66.1. There are no comps or sales or market information available that support a \$23,000,000.00 offer for the Property.

66.2. Many commercial brokers agreed with Mr. Brekan's analysis and confirmed that there were no interested buyers at such a high price when other RV developments were available for much less.

66.3. The Property development costs are prohibitively high.

66.4. There are no buyers at \$23,000,000.00.

66.5. The Pensus Offer contained financing contingencies.

66.6. Defendant Donald Leo was a member of Pensus Cholla Hills RV Resort, LLC, the buyer. Defendant Donald Leo was also the executor of the David Maule Ffinch estate. Mr. Ffinch was the owner of Pensus Cholla Hills RV Resort, LLC, the buyer.

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66.7. Commercial brokers confirmed that there was one offer on the Property for \$7,500,000.00, which was contingent on getting title to the water and sewer companies owned by Defendant Donald Leo.

66.8. The Pensus Offer was signed while the non-party borrowers were in bankruptcy, and was cancelled and never consummated.

66.9. The Pensus Offer was not an arms-length transaction.

(January 9, 2015 Transcript, 124:18 – 129:4; 130:22 – 131:1).

Testimony of Robert Parsons

67. Mr. Parsons is the Senior Vice President for Johnson Bank and is responsible for administering and collecting the debt owed by Defendants. (March 2, 2015 Transcript, 25:12 – 22).

68. Mr. Parsons testified that the loan extension was made to provide the Borrowers an opportunity to pay back the loan, get the bank paid, and get the guarantors relieved of their responsibilities. (March 2, 2015 Transcript, 32:3 – 12; Trial Exhibits 18 - 20).

69. Mr. Parsons confirmed that Johnson Bank agreed to enter a forbearance agreement with the Borrowers only because the Borrowers were in default under their payment obligations owed Johnson Bank. (March 2, 2015, Transcript, 31:11 – 17; 33:13 – 17; Trial Exhibits 18 – 20, and 23).

Defendants' Witness

70. Defendants called one witness, Peter J. Martori, who was hired by Defendants to offer testimony regarding fair market value of the Property.

71. Mr. Martori confirmed that he had never appraised an RV Resort before this case. (March 2, 2015 Transcript, 110:23 – 25).

72. Mr. Martori confirmed that the topography of the Property is “unique.” (March 2, 2105 Transcript, 122:11 – 14).

73. Mr. Martori confirmed that he did not seek third-party development costs from a professional engineering company. (*See generally*, Transcript of Mr. Martori's Testimony).

74. Mr. Martori confirmed that he relied on developments costs provided to him by David Maule-Ffinch, an individual and the buyer in the Pensus Offer, based on oral conversations he had with Mr. Ffinch nearly two years before the July 3, 2013 trustee's sale.

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(March 2, 2015 Transcript, see generally, transcripts of Mr. Martori; 145:19 – 146:7; 146:19 – 22).

75. Mr. Martori confirmed that he did not review the Dibble Engineering report on development costs; therefore, he has no criticisms of it. (March 2, 2015 Transcript, 146:23 – 25).

76. Based upon the foregoing testimony regarding fair market value, the Court finds that the background investigation, methodology, and objective support for Mr. Brekan's calculations to be convincing.

77. The Court concludes that Mr. Martori's fair market value opinion regarding Parcel "B" of Tract 1 [the planned RV parcel] is not supportable.

78. The Court concludes that the **Fair Market Value of the Property on July 3, 2013 to be \$7,210,000.00**, the amount of the credit bid.

79. To the extent any of the following conclusions of law should be considered findings of fact, they are incorporated herein by reference.

III

CONCLUSIONS OF LAW

80. To the extent any of the above findings of fact should be considered conclusions of law, they are incorporated herein by reference.

81. This Court previously granted Johnson Bank's Motion for Partial Summary Judgment regarding Liability holding that there is no dispute the Defendants personally guaranteed the Note and Loan taken out by the original non-party Borrowers and that the non-party Borrowers are in default. (Court Order dated October 15, 2014; Court Order dated November 24, 2014)

82. Defendants guaranteed payment of the Note and Loan. By failing to pay for amounts due under the Note and Loan, Defendants have breached their obligations to Johnson Bank under the commercial guaranties. (Court Order dated October 15, 2014; Court Order dated November 24, 2014)

83. The Court finds that the only remaining factual and legal issue in this case is the deficiency owed Johnson Bank, including fair market value of the Property as of July 3, 2013.

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84. In determining fair market value, the Court must consider A.R.S. § 33-814(A) which defines "Fair Market Value" as:

the most probable price, as of the date of the execution sale, in cash, or in terms equivalent to cash, or in other precisely revealed terms, after deduction of prior liens and encumbrances with interest to the date of sale, for which the real property or interest therein would sell after reasonable exposure in the market under conditions requisite to fair sale, with the buyer and seller each acting prudently, knowledgeably and for self-interest, and assuming that neither is under duress.

(See also *TCC Enters. v. Estate of Erny*, 149 Ariz. 257, 258, 717 P.2d 936, 937 (App. 1986). [fair market value is "that price a desirous but unobligated purchaser would pay a desirous but unobligated seller after consideration of all uses to which the property is adapted and for which it is capable of being used"]; *Honeywell Info. Sys., Inc. v. Maricopa* 118 Ariz. 171, 174, 575 P.2d 801, 804 (App. 1977) [fair market value is "what the property would sell for between a willing buyer and a willing seller in an arms-length transaction"]).

85. The Court finds that Johnson Bank's appraisal expert Ralph J. Brekan's opinions as to fair market value, prepared by his own independent analysis, supported by his personal industry experience, confirmed through independent validation of third-party developments costs and comparable land values and expenses, is more credible, than Mr. Martori's opinions, in establishing the fair market value for the Property, including Parcel "B" of Tract 1, on July 3, 2013.

86. The Court rejects Mr. Martori's opinion as to the value of Tract 1, Parcel "B".

87. The Court finds that the Pensus Offer is not an arms-length transaction.

88. The Court finds that the comparables and adjustments used by Mr. Brekan to determine value of Tract 1, Parcel "B" and Tract 2 to be a reliable indicator of the value of the Property.

89. The Court finds that the comparables and adjustments used by Mr. Brekan to determine value of Tract 1 Parcel "A" to be a reliable indicator of the value of the Property.

90. The Court finds that the development costs for the Property relied on by Mr. Brekan to be a reliable indicator of the value of the Property.

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91. The Court finds that it is reasonable to expect a prospective buyer to review all the comparables used by Mr. Brekan.

92. The Court finds that the **Fair Market Value of the Property on July 3, 2013 to be \$7,210,000.00**, the amount of the credit bid.

The Deficiency Judgment

93. On or about December 21, 2007, the non-party Borrowers obtained a loan from Johnson Bank in the principal amount of \$21,000,000.00 (the "Loan"), the proceeds of which were to be used for the acquisition and development of 455 acres of vacant desert land located near Lake Pleasant in Peoria, Arizona (Trial Exhibits 1, 2, 13).

94. The Loan was secured by a Deed of Trust dated December 21, 2007, and recorded December 21, 2007, at Recorder's No. 20071336595, official records of Maricopa County Arizona. (Trial Exhibits 1, 2 and 13).

95. Non-Party Borrowers defaulted on the Loan and filed for Chapter 11 bankruptcy protection. (Complaint, ¶¶ 2, 3; Trial Exhibit 23).

96. Johnson Bank initiated and conducted a duly noticed trustee's sale of the Property on July 3, 2013 under the terms of the Deed of Trust and Arizona Law. (Trial Exhibits 2, 3).

97. Johnson Bank was the successful bidder at the July 3, 2013 trustee's sale and purchased the Property for the credit bid of \$7,210,000.00. (Trial Exhibit 3).

98. As of July 3, 2013, the date of the Trustee's Sale, the Borrowers were indebted to Johnson Bank under the loan documents for principal in the amount of \$18,035,205.54 plus accrued interest at 4.25% in the amount of \$2,537,980.89, with interest continuing to accrue at that rate, attorneys' fees to be determined by a fee application to be filed by Johnson Bank at a later date, and costs (collectively, the "Indebtedness"). (Trial Exhibits 1, 13 – 18, 23).

99. After applying the net proceeds of the Trustee's Sale in the amount of \$7,210,000.00, a deficiency balance remains under the Loan in the amount of \$13,363,186.43, as of July 3, 2013, with interest continuing to accrue at the default rate of 4.25% per annum until paid in full, plus legal fees and costs (collectively, the "Deficiency Balance").

100. On January 8, 2013, Johnson Bank received condemnation proceeds in Maricopa County Superior Court Case No. CV2010-015022 in the amount of \$326,926.61, which amount

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is to be applied against the Deficiency Balance. (Condemnation Proceeds Check Attached hereto as Exhibit "A"; Johnson Bank's Supplemental Disclosure Statements).

101. On October 31, 2014, the Bank conducted a certain UCC sale whereby the Bank entered a credit bid of \$500,000.00, which amount is to be applied against the Deficiency Balance.

102. The Court finds that pursuant to A.R.S. § 33-814(A), Johnson Bank is entitled to a Deficiency Judgment against Defendants in the amount of \$13,363,186.43 less credit amounts identified above, together with interest thereon from July 3, 2013 until paid.

103. The Court finds that Johnson Bank is entitled to its reasonable attorneys' fees and costs pursuant to the Note, the commercial guaranties, and A.R.S. §§ 12-341, 12-341.01 and 33-814(A).

104. All of the foregoing constitutes the Court's findings of facts and conclusions of law. To the extent that the factual recitals also constitute legal conclusions and to the extent that legal conclusions also constitute factual recitals, such recitals, findings and conclusions shall be so construed.

Based on the foregoing,

IT IS ORDERED that Plaintiff Johnson Bank is entitled to a Deficiency Judgement Against Defendants Donald R. Leo, Sr., and Paula V. Leo; James G. Blondin and Elisabeth H. Blondin; Gilbert G. Cyphert, and David B. Waller in the amount of \$13,363,186.43, less the credit amount identified in this Court ruling, together with interest therefrom from July 3, 2013 until paid.

IT IS FURTHER ORDERED awarding Plaintiff attorney fees and taxable costs incurred in connection with this matter. Plaintiff shall timely file an Affidavit of Attorney Fees and a Statement of Taxable Costs.

IT IS FURTHER ORDERED that Plaintiff shall timely file a Form of Judgment consistent with this Court's findings, conclusions of law and orders.

/s/ HONORABLE J. RICHARD GAMA

DATE

JUDICIAL OFFICER OF THE SUPERIOR COURT