

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In re:

Chapter 7

Carefree Living of America (Burnsville), Inc.  
Carefree Living of America (St. Cloud), Inc.  
Carefree Living of America (Brainerd), Inc.

Case No. 01-33545  
01-33546  
01-33547

Debtors.

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Brian F. Leonard, Trustee,

ADV. No. 02-9117

Plaintiff,

**DEFENDANTS' OBJECTION TO  
TRUSTEE'S MOTION FOR  
SUMMARY JUDGMENT**

v.

Jane L. Strom Revocable Trust,  
Jane L. Strom, Trustee,

Defendants.

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Defendants provide this memorandum in support of their opposition to the Trustee's motion for summary judgment

**UNDISPUTED FACTS<sup>1</sup>**

Steven V. Hagberg ("Hagberg") and Jane L. Strom ("Strom") are husband and wife. Strom Depo. p. 5. Hagberg is an attorney formerly a shareholder in the firm Mahoney & Hagberg ("M&H") and predecessor firms. Hagberg Depo. pp. 3-6. Strom was formerly employed at First Bank but most recently was a homemaker and student. Strom Depo. pp. 6-7. Strom established the Jane L. Strom Revocable Trust ("Trust") in 1998 as part of her estate planning. Strom Depo. p. 10. Strom and Hagberg were both named as trustees under the Trust but Strom had the power, as settlor, to make decisions and invest the Trust assets in her sole discretion. Hagberg Depo. pp 65-69; Strom Depo Ex. 3.

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<sup>1</sup> The affidavit of Kathleen L. Zeller filed herewith corroborates many of the facts contained herein although specific cites to her affidavit may not be included.

Hagberg met Kathleen Zeller (“Zeller”) in the 1980’s. Hagberg Depo. pp. 10 - 11. Zeller and her husband Vern were referred to Hagberg for legal work likely while Hagberg was a partner in the firm Hagberg & Gronbeck. Id.

In approximately 1995, in his capacity as attorney, Hagberg formed the corporate entities that are the Debtors. Hagberg Depo. pp. 13-15. After their formation, the Debtors acquired the assets and real estate consisting of three extended care facilities. Id. Each was held in a separate corporation. Kathleen Zeller (“Zeller”) was the president of each of the Debtor entities. The majority of the stock of the Debtors was held by Summa Management, Inc. (“Summa”), a corporation controlled by Zeller. Mahoney Depo p. 12. The Debtors and other non-debtor entities controlled by Zeller generated significant legal work for M&H. Hagberg Depo . pp 29-21.

In the fall of 1996, M&H was requested to undertake a considerable amount of legal work for the Debtors. Hagberg Depo. pp 48-49. At that time, the Debtors had not paid for the work on a refinancing with Miller & Schroeder in early 1996. Id. Hagberg refused to do more work for the Debtor entities in part because of the unpaid balance and in part because of his other work. Hagberg Depo. Pp. 113-114. He asked Mahoney if he wanted to take over and Mahoney agreed. Id. Thereafter, although Hagberg did do some small amounts of work he was no longer the lead lawyer. Hagberg Depo. p.121.

Strom first met Zeller sometime between 1986 and 1991. Strom Depo. Ex. 2., p. 4. They became reacquainted at a party in late 1991. Id. The following summer, Strom and Hagberg met socially with Zeller and her husband Vern. Id. Strom considered Zeller to be a friend. Strom Depo. p. 21. Other than the loan transaction at issue in this litigation, Strom’s relationship with Zeller was purely social. Strom Depo. p. 17. While Strom knew the names of some of Zeller’s entities, she had no knowledge of the ownership interest held by Zeller. Strom Depo. pp. 22-25. Strom knew that Zeller was Hagberg’s client but did not know the relationship between Zeller and M&H or between Summa & M&H. She gained

this knowledge from Zeller. *Id.* Strom was not provided any financial information about the Debtors. Strom Depo. p. 36.

Shortly before August 2000, First Union had commenced an action to foreclose its mortgages on the properties of the Debtors. Mahoney Depo. pp. 28 – 31. Mahoney was the attorney handling the litigation. *Id.* Mahoney was at that time working on obtaining substitute financing to take out First Union. Mahoney Depo. pp. 31-35, Ex. 3. In August, 2000, Zeller came to Minnesota from her home in Andorra to deal personally with the Debtors' default on the mortgage to First Union Bank. Strom Depo. Ex. 2, p. 5.

At a dinner in late August, Zeller related to Strom in Hagberg's presence that Zeller had been successful in raising all but \$50,000 of the cash needed to cure the Union Bank mortgage defaults. Strom Depo. Ex. 2, p. 5. Zeller also related that she had obtained funds from Internet Financial and Bill Howard and was also providing some of her own funds toward the cure amount. *Id.* Zeller described the repayment terms of the loans. *Id.*; Hagberg Depo. p76, pp. 85-88. The following day, Strom offered to loan the last \$50,000 on terms the same as those being paid to Internet Financial and Howard as such terms had been described by Zeller the previously evening. *Id.*; Strom Depo. pp 59-61.

Thereafter the deal was accomplished quickly. Strom Depo. Ex. 2, p. 5. Strom caused a check to be issued from the Trust's account at US Bancorp Piper Jaffrey for \$50,000 payable to Faegre & Benson, attorneys for First Union. The \$50,000 was not deposited into any account of the Debtors. Hagberg Depo. Ex 9. To evidence the \$50,000 loan, the Debtors executed and delivered to the Trust a promissory note dated September 1, 2000 (the "Original Note"). Strom Depo. Ex. 4. The Original Note provided that it was to be paid in full on January 15, 2001 or sooner "from the proceeds of any financing by the Maker in the aggregate in excess of \$13,000,000." *See* Original Note ¶ 1. In other words, the Original Note was to be repaid at the same time and from the same funds as would be used to pay First Union. Shortly before the Original Note had been executed and delivered, Mahoney had represented to counsel

for First Union that he believed that John G. Kinnard & Co. would provide take out financing within 45 to 60 days. Kinnard had already issued a term sheet dated August 16, 2000. Mahoney Depo. Ex. 3.

The Original Note was not repaid by January 15, 2001 neither from a refinancing nor otherwise and Strom was notified that the Original Note could not be repaid on time. Strom Depo. Ex. 2, p. 5. Zeller faxed Strom a payment schedule and offered to secure the balance with a mortgage. Strom Depo. pp. 67-68, Ex. 6. Strom agreed to the terms. On about January 24, 2001, Zeller returned to Minnesota and signed a promissory note dated January 15, 2001 in the original principal amount of \$62,160.35 being the balance due under the Original Note as of that date. Strom Depo. Ex. 5. At the same time, Zeller executed and delivered three mortgages, one for each Debtor and a fourth mortgage for property owned by Carefree Living of America (Minnetonka). Thereafter Zeller returned to Andorra. Hagberg Depo. 92-97. The original mortgages were not recorded because Hagberg recognized that it would be possible to save mortgage registration tax by recording one mortgage *seriatim* in each of the counties. *Id.* When Zeller returned to Minnesota in March, 2001, she signed a replacement mortgage on March 15, 2001 which was then recorded against real property of Debtor Carefree Living of America (St. Cloud), Inc. in Benton County on March 21, 2001, recorded against real property of Debtor Carefree Living of America (Burnsville), Inc. in Dakota County on April 5, 2001, and against real property of Debtor Carefree Living of America (Brainerd), Inc. in Crow Wing County on March 28, 2001.

The Debtors filed their joint Chapter 11 petitions on August 17, 2001, more than 90 days after April 5, 2001, the latest date of recording of the mortgage.

## ARGUMENT

### **I. Burden of Proof**

In order to establish a preference, the Trustee has the burden to establish each and every element of 11 U.S.C. § 547(b) by preponderance of the evidence. 11 U.S.C. § 547(g). If the transfer the Trustee seeks to avoid occurred beyond 90 days before the petition date, as it did here, the Trustee has the additional burden of proving that the transferee [here the Trust] was an insider of the Debtors. Since the transfer at issue here, the recording of the mortgage, was made more than 90 days before the bankruptcy filings, the Trustee does not enjoy the presumption of insolvency in 11 U.S.C. § 547(f) and therefore must prove by a preponderance of admissible (and on summary judgment undisputed) evidence that the Debtors were insolvent on each of the three recording dates, March 21, 28 and April 5, 2001. The Trustee, however, has offered no evidence of the value of the properties as of any of these dates. The affidavit of the Trustee's purported expert gives his estimate of value as of March 15, 2001.

In order to prevail on summary judgment, the Trustee must prove that the material facts needed to establish two highly factual issues – insider status and insolvency are undisputed. The Trustee has failed to carry this burden and summary judgment is not appropriate.

### **II. Summary Judgment Standards.**

The standards for summary judgment are well known and will not be repeated here at length. This Court has discussed these elements in detail in *In re Northgate Computer Systems, Inc.* 240 B.R. 328, 339 (Bankr. D. Minn. 1999) and other decisions.

### **III. Defendants Are Not Insiders of The Debtors**

The insider determination hinges on the relationship between the parties which is largely a fact intensive *ad hoc* analysis. *In re Three Flint Hill L.P.*, 213 B.R. 292, 298 (D. Md. 1997). It is to be done on a case by case basis. *In re Tarricone, Inc.*, 286 B.R. 256 (Bankr. S.D.N.Y. 2002).

The Trustee contends that “The Defendants were insiders at the same time, and upon the same facts, that Steven Hagberg, Michael Mahoney, and Mahoney & Hagberg, P.A., were insiders of the Debtors.” Mitchell Aff. Ex. 1, p. 6 (Trustee’s Answers to Defendants’ Interrogatories). In other words the Trustee does not contend that the Trust or Strom are insiders as a result of any relationship they may have had with the Debtors but rather Defendants’ purported status as insiders is entirely derivative of Hagberg’s purported status as an insider. The Trustee must first prove that Hagberg is an insider and then must prove that his status as an insider can be imputed to his wife and the Trust, an impossible task. The Trustee has failed on both parts.

**A. Neither Hagberg, Strom, the Trust, nor Mahoney & Hagberg, P.A. are Insiders.**

A non-exclusive list of insiders is provided in 11 U.S.C. § 101 (31). The Trustee does not contend that Hagberg, Strom, the Trust, or Mahoney & Hagberg, P.A., or any of them, are statutory insiders. It is especially significant that the Trustee does not assert that any of these are persons in control of the debtor under 11 U.S.C. § 101(31). In other words, the Trustee concedes that whatever control that may have been exercised by any of these over the debtors (if any) was insufficient to establish insider status under § 101(31).

What the Trustee really seeks is beyond the authority of this Court to grant. The Trustee wants this Court to amend the Bankruptcy Court to provide for *per se* insider status for a law firm who represented a debtor pre-petition. Of course, this Court is without authority to do so and such a rule is contrary to the law. The mere showing that a defendant had been an attorney of the debtor was not intended by Congress to automatically trigger the insider provisions of section 547. *In re Durkay*, 9 B.R. 58, 60 (Bankr. N.D. Ohio 1981); *Kepler v. Schmalbach (In re Lemanski)*, 56 B.R. 981, 983 (Bankr. W.D. Wis. 1986). Moreover, the knowledge which M&H and/or Hagberg may or may not have acquired as attorneys during the duration of the relationship, even if significant, is not sufficient, absent more, to

make one an insider. *Ellenberg v. William Goldberg & Company, Inc. (In re Sullivan Haas Coyle, Inc.)*, 208 B.R. 239 (Bankr. N.D. Ga. 1997).

This Court has previously determined that insider status could be founded on a “complexity of relationship and conduct . . . so close that it overrode more independent business judgment. . .” *In re Northgate Computer Systems, Inc.*, 240 B.R. 328 (Bankr. D. Minn. 1999). But the Trustee makes no allegation and offers no proof that any relationship and conduct overrode independent business judgment of anyone. The Trustee is content to attempt to prove that M&H as attorneys had substantial knowledge of the financial situation of the Debtors. That is not enough to satisfy the test described in *Northgate Computer*.

Other courts have focused on the closeness of the parties, the degree to which the transferee is able to exert control or influence over the debtor, and whether the transactions between the debtor and the defendant were conducted at arm’s length. *Ellenberg v. William Goldberg & Company, Inc. (In re Sullivan Haas Coyle, Inc.)*, 208 B.R. 239 (Bankr. N.D. Ga. 1997). Although *Ellenberg* involved payments made to a consulting firm, the court analyzed cases dealing with law firms to be helpful. In *Ellenberg*, the court compared the facts in *In Koch v. Rogers (In re Broumas)*, 203 B.R. 385, 391 (D.Md.1996), wherein the attorney was held to be a non-statutory insider, with the facts in *Ellenberg*.

In *Broumas*, the attorney had bank accounts at a bank controlled by the debtor. The debtor had signatory authority on the attorney’s bank accounts. The debtor and the lawyer had invested together and made loans to each other. Their loans and investments were made without documents. The *Ellenberg* court discussed several other cases involving law firms, and real estate brokers. In concluding that the consultants were not insiders despite the fact that they had day-to-day involvement in the debtor’s cash management. The court found there was not the necessary level of control, and that the transactions were arms length. The court also relied on the fact that the consultant could not sign checks, hire or fire employees and had no role in the production or operation of the business.

Nowhere, however, in this case does the Trustee even allege, let alone prove, that the relationship between the debtors and Hagberg or the defendants was such that it “overrode more independent business judgment.” Trustee does not allege that defendants exerted any control over the debtors. Nor does Trustee allege that Hagberg exerted any influence over the debtors beyond that inherent in the attorney-client relationship. In his deposition, Mike Mahoney testified that no one at Mahoney & Hagberg had any check-signing authority, or decision-making authority of any kind. Mahoney Depo pp. 108-109.

The Trustee makes much of the fact that the M&H mortgage was signed at the same time as the mortgage to Strom. It is no coincidence says the Trustee. Of course it was no coincidence. Ms. Zeller lived in Andorra. She traveled to Minnesota in August 2000 to deal with the First Union mortgage defaults. She came back in January 2001 and in March 2001. It makes perfect sense that she would sign all documents she needed to sign before a notary at the same time, during a trip to Minnesota and that is precisely what she did. *See Zeller Aff.*

Other courts, in determining insider status have looked at a list of factors. Some of these include:

1. Whether the loan made to the debtor was documented (e.g., promissory note, mortgage, and specified repayment terms);
2. Whether the loans were made on an unsecured basis and without inquiring into the debtor's ability to repay the loans;
3. Whether the transferee knew that the debtor was insolvent at the time the debtor made the loans or recorded the security agreements;
4. Whether there were numerous loans between the parties;
5. Whether there were any strings attached as to how the debtor could use loan proceeds;
6. Whether the loans were commercially motivated;
7. Whether the transferee had an ability to control or influence the debtor;
8. Whether there was a personal, business, or professional relationship between the transferee and the debtor allowing the transferee to gain an advantage such as that attributable simply to affinity;
9. Whether the transferee had authority to make business decisions for the debtor;

10. Whether there is evidence of a desire to treat the transferee differently from all other general unsecured creditors;

11. Whether there was an agreement among the parties to share profits and losses from business transactions.

*In re Emerson*, 244 B.R. 1, 32 (Bankr.D.N.H.1999)

Application of these *Emerson* factors does not lead to a conclusion of insider status for anyone. Here the loan to the Trust was fully documented. The loan was initially made with the agreement that the loan would be paid from the proceeds of the expected refinancing. When the financing did not occur, a mortgage was given. The loan was made based in reliance of the due diligence of others who loaned significantly higher amounts at the same time. There is no evidence that the Trust, Strom or Hagberg knew the debtor entities were insolvent at the time. The owner of the Debtor entities has testified that the Debtors were not insolvent. There were not numerous loans between the parties, only the one. Moreover, the funds were specifically earmarked for payment to First Union. Strom testified that the loan was commercially motivated, she thought it would be a good investment – 25% loan fees and 22% interest would likely qualify as a good investment. There is no evidence that Strom, the Trust or Hagberg had any ability to influence the Debtors. While Hagberg and Strom were friends with Kate Zeller, there is no evidence that the loan was made or the mortgage given based on affinity. Loans on similar terms at the same time were made by Internet Financial – a creditor whose secured claim was recognized without question by the Trustee. There is no evidence that the Trustee, Strom or Hagberg had authority to make business decisions for the Debtors and Michael Mahoney and Kathleen Zeller have both testified there was no such authority. There was a desire to treat the Trust differently from unsecured creditors because the proceeds from the loan were used to pay a secured creditor and the Debtors viewed the transactions as simply one creditor stepping into the shoes of another. There was no agreement for sharing of profits.

**1. Unproven Allegations by the Trustee**

The Trustee alleges in his Amended Complaint that Strom and the Trust are insiders of the Debtors. Specifically, he avers:

3. On information and belief, the Jane L. Strom Revocable Trust (herein the “**Strom Trust**”), is a trust created under Minnesota law. Jane L. Strom, individually, is, on information and belief, a co-Trustee settlor, and beneficiary, of the Strom Trust. On information and belief, Jane L. Strom is an individual who is married to Stephen Hagberg (“**Hagberg**”). Hagberg is a principal in the law firm Mahoney & Hagberg (“**M&H**”). M&H, at all relevant times, simultaneously represented the Debtors, various affiliates of the Debtors, the corporate manager of the Debtors, and its principal Kathleen Zeller; and various purported creditors of the Debtors. Hagberg is a co-Trustee of the Strom Trust. ***By virtue thereof***, Jane L. Strom, as Trustee, and the Strom Trust, were “insiders” of the Debtors, as that term is defined in 11 U.S.C. § 101(31).

The “by virtue thereof” language means that the Trust and Strom are insiders solely on a derivative basis because of their relationship to Hagberg. Those allegations, even if true, however, do *not* establish facts sufficient to establish insider status to Strom or the Trust. They do not even establish insider status for Hagberg or M&H.

In attempting to discover the factual basis for the Trustee’s alleged insider status for Strom and the Trust, Defendants propounded the following interrogatory:

**INTERROGATORY NO. 12:** Describe the relevant time as used in the phrase “at all relevant times” in paragraph 10 of the Complaint, state the date you contend the Strom Trust and Jane Strom first became insiders and describe all facts and what event or event[s] occurred on or before such date to vest these Defendants with insider status.

The Trustee responded:

**ANSWER:** See Answer to Interrogatory No. 11. The Defendants were insiders at the same time, ***and upon the same facts***, that Steven Hagberg, Michael Mahoney, and Mahoney & Hagberg, P.A., were insiders of the Debtors. (Emphasis added).

*See Mitchell Aff, Ex. 1, p. 6.*

Trustee’s response to Interrogatory No. 12 reveals the fatal deficiency in Trustee’s theory. The Trustee believes that Strom and the Trust are insiders, not because of any relationship with or control over the Debtors but solely because Strom is married to an attorney for the Debtors.<sup>2</sup>

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<sup>2</sup> The Trustee argues that the situation is akin to the wife of a corporate executive who receives an avoidable transfer from a corporate debtor with the assistance of her CEO husband. Of course, such is not the situation here. Hagberg was not a corporate officer who actively assisted in the transfer from the debtor. Spouses of corporate officers are *statutory* insiders. Wives

The Trustee's answer to Interrogatory No. 11 (which has not been supplemented) contains all facts known to the Trustee that allegedly establish insider status for Strom and the Trust. The request was for *all facts*:

**INTERROGATORY NO. 11:** State all facts and identify all documents that reflect, refer or relate in any way to your contention that the Strom Trust and Jane Strom were insiders "at all relevant times."

The Trustee responded:

**ANSWER:** The facts involved in the relationship of Steve Hagberg and Jane Strom and the relationship of Mahoney & Hagberg, and all of its attorneys and employees to the debtors, Kathleen Zeller, Summa Management Company, and Vern Zeller. Mahoney & Hagberg were involved and were believed to have controlled the Debtor and its transactions with its affiliates and third parties, and had intimate detailed knowledge of the debtors' financial condition and transactions. **Jane Strom and Steve Hagberg also had and were privy to such knowledge, and thereby were insiders** as that term is used in the Bankruptcy Court. Mahoney & Hagberg represented an affiliate known as Carefree Living Of America (Minnetonka), Inc. in extensive and protracted litigation. Mahoney & Hagberg engineered the transfer of ownership and control of the Debtors from Will Selbak to Kathleen Zeller and Summa Management Company. (Emphasis added).

This answer reveals the second fatal flaw in the Trustee's theory, that knowledge alone, even intimate detailed knowledge, is sufficient to establish insider status. If this were the test, every law firm and every accounting firm would be insiders of their clients. If Congress had intended this result it certainly would have included attorneys and accountants in the definition. This answer also underscores two material factual disputes. First, the Trustee claims in this answer that Jane Strom was privy to intimate detailed knowledge of the debtors' financial condition and transactions. Second, he testifies that M&H were "believed" to have controlled the Debtors.

**a. *Strom Was Not "Privy" to "Intimate Detailed" (or any) Financial Information***

Strom denied under oath that she had any business transactions (other than the loan at issue here) with Zeller or any of her entities.

BY MR. LEONARD

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of the debtor corporation's attorneys are not. Congress could easily have made outside counsel an insider but chose not to. In continuing this argument, the Trustee asserts that there was no consideration or value given for the mortgage. But under 11 U.S.C. § 548(d)(2)(A) "value" is defined as including the securing of a "present or antecedent debt."

Q. Would you characterize your meetings with Ms. Zeller as being social?

A. Yes.

Q. Other than the transaction dealing with your trust that is the subject of this case, did you have any other business transactions directly or indirectly with Ms. Zeller or any of her companies?

A. No.

Strom Depo. p. 17.

Strom also testified that although she knew that Zeller's companies operated residential care facilities, she had no knowledge of the extent of Zeller's ownership of those companies.

BY MR. LEONARD

Q. What knowledge do you have of Kathleen Zeller's businesses?

A. I knew what they were. I knew the names. I mean . . .

Q. And what was your understanding of what they were?

A. They're healthcare facilities. Or, excuse me, they're residential facilities.

Q. And what knowledge did you have at that time of the ownership interest of Kathleen Zeller in those businesses?

A. Specifically, I didn't have any knowledge of that.

Strom Depo. p. 23.

Although the Trustee also testified under oath in *his* responses to Defendants' interrogatories that Strom was privy to "intimate detailed" financial information, Strom has flatly denied receiving any financial information and the Trustee has produced no evidence to the contrary.

BY MR. LEONARD

Q. Did you receive information about the financial condition of the companies from any source before you made the – before the trust made the loan that it's alleging was made?

A. No.

This line of questioning by the Trustee conclusively establishes that Strom was not privy to the kind of information the Trustee believed she had as expressed in his answers to Defendants' interrogatories. Zeller has also confirmed that Strom was not privy to such information. The Trustee has offered no evidence to the contrary and apparently has recognized that his initial belief, as articulated in his answers to interrogatories, that Strom directly received intimate detailed financial information is false. If there was evidence of direct knowledge, there would be no need for the Trustee to embark upon a lengthy (and erroneous) discussion of the law of imputed knowledge. What is clear is that the Trustee no longer claims (if he ever did) that either Strom or the Trust are insiders because of any relationship between Strom and the Trust on the one hand and the Debtors on the other.

***b. The Trustee Has Produced No Evidence of Control by M&H***

Although the Trustee testified in his answers to Defendants' interrogatories that someone (he declined to say who) believed that M&H controlled the Debtors, he has provided no evidence of any such alleged control.<sup>3</sup> In his memorandum, the Trustee makes only two passing and insignificant references to control allegedly exercised over the Debtors by M&H. The first comes from the testimony of Mahoney where he recalled Hagberg saying he was "going to secure our receivable with mortgages from the debtors, get a note and mortgage." *See Mahoney Depo.* p. 52. But Hagberg testified that he had no such conversation with Mahoney. *See Hagberg Depo.* pp. 115-116. Although this fact is disputed it is not material. Such a statement is not sufficient evidence of control over the Debtors in the sense that M&H's desire to obtain additional collateral for their debt "overrode more independent business judgment." *In re Northgate Computer Systems, Inc.*, 240 B.R. 328 (Bankr. D. Minn. 1999).<sup>4</sup> The Court can conclude as a matter of law that M&H's desire to obtain collateral is not sufficient to render them insiders.

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<sup>3</sup> Statements in affidavits made on information and belief are not competent evidence. On summary judgment. Rule 56 requires such statements to be made on personal knowledge.

<sup>4</sup> M&H were already secured creditors, albeit unperfected as to third parties, by virtue of their attorney's lien rights under Minnesota law.

The second arguable example of purported control is not really a factual example at all but rather a mere choice of words in Trustee's legal argument. The Trustee used the word "had" in the sentence "Thereupon, on March 15, 2001, the Law Firm *had* Zeller, on behalf of the Debtors, execute a mortgage in favor of the Law Firm . . ." There is no support for this implication in the record. According to the Trustee, Hagberg drafted the mortgages in favor of M&H and negotiated the terms of the note. But Hagberg *denied* drafting the mortgages and testified that he did not know who at M&H drafted the note. *See Hagberg Depo.* pp. 111-116. This fact, to the extent the Trustee intended it to be a fact at all, is disputed but again it is not material. Even if Hagberg had drafted the mortgage and note and asked Zeller to sign it, there is no evidence that M&H exerted such control over Zeller as "*overrode more independent business judgment.*"

The Trustee has not and cannot establish that Hagberg or M&H exerted such control over Zeller as "*overrode more independent business judgment*" and therefore fail to establish insider status as a matter of law, even under the expanded definition in *Northgate Computer*.

## **2. The Facts Which Are Proven Do Not Establish Insider Status.**

The Trustee has established that M&H was counsel to the Debtors for a number of years and that both Mahoney and Hagberg provided a variety of legal services. He has established that the lawyers at M&H were aware of certain of the financial results of the Debtors. He has established that M&H acted as counsel in connection with refinancing and proposed refinancing as well as the defaults under the First Union mortgage. He has established that M&H gave opinion letters in loan transactions. He has established that M&H responded to audit inquiry letters. He has established that Mahoney was actively seeking refinancing sources for the Debtors. He has established that M&H represented the Debtors in protracted litigation. He has established that M&H was aware of the Lindquist judgment, aware of the large balance due to M&H and numerous pieces of financial information. In short, the Trustee has established that M&H did what ever other competent business law firm would have done under similar

circumstances -- kept themselves well informed and provided aggressive business and litigation representation as needed. But that is not enough to make M&H an insider. M&H must have had such a relationship with the Debtors as to override more independent business judgment. No such showing is made (or even alleged) on these undisputed facts.

#### **IV. Hagberg's Knowledge Cannot Be Imputed to Strom and the Trust**

Trustee claims that any knowledge obtained by Hagberg through confidential attorney-client communications and client secrets can be imputed to Hagberg's wife and the Trust without proof of actual knowledge. This concept as applied to an attorney is absurd and contrary to law. Under the Trustee's theory all confidential attorney-client communications and client secrets may properly be deemed to be known by the attorney's wife and any entity that the attorney may have a fiduciary relationship with, such as trustee or executor. This is simply not the law.

In support of his novel proposition, the Trustee cites Section 275, Restatement (Second) of Agency, 1958. That section provides:

Except where the agent is acting adversely to the principal or where knowledge as distinguished from reason to know is important, the principal is affected by the knowledge **which an agent has a duty to disclose** to the principal or to another agent of the principal to the same extent as if the principal had the information. (Emphasis added).

Comment c to the cited section makes it clear that the section does not apply on these facts.

Comment:

c. Duty to reveal essential. The agent must have a duty to reveal the information which he has. It is not enough that the agent has a duty in relation to the subject matter. **Likewise, where an agent is privileged not to reveal relevant information which, but for the privilege, it would be his duty to reveal, the principal is not affected by the agent's knowledge.** See § 281. (Emphasis added).

Section 281, Restatement (Second) of Agency, 1958. That section provides:

A principal is not affected by the knowledge of an agent **who is privileged not to disclose** or act upon it and who does not disclose or act upon it. (Emphasis added).

Comment a to that section explains the rule:

Comment:

a. The rule stated in this Section applies most frequently where an attorney at law receives information from a client under such circumstances that he has a duty not to reveal it without the client's permission. In such cases, the attorney, in acting for other clients, is privileged to act without revealing the information and, in many cases, without reference to it. (Emphasis added).

Here Hagberg had no duty to a duty to disclose, to the contrary he had a duty *not* to disclose under Rule 1.6 of the Minnesota Rules of Professional Conduct.

Rule 1.6 of the Minnesota Rules of Professional Conduct prohibits disclosure of client secrets or confidences. The rule prohibits use of confidential information or secrets for the benefit of the lawyer without the client's consent. The rule includes information protected by the attorney-client privilege as well as information gained in the professional relationship disclosure of which would be embarrassing or detrimental to the client. Every attorney knows that Rule 1.6 prohibits disclosure of client secrets even disclosure to the attorney's spouse. In order for the Trustee's imputation theory to be correct, there would be a necessary implication that every married attorney breaches the Rules of Professional Conduct on a regular basis. It is a implication *necessary* for the Trustee's case because the Trustee can point to no direct evidence that any confidential client information was ever disclosed by Hagberg to his wife.

Being in the possession of confidential information of the debtors, Hagberg could not and did not use that information for his benefit or that of his wife or the Trust. The Trustee incorrectly states at page 14 of his memorandum that Hagberg and his wife were acting within the scope of their authority on behalf of the Trustee in extending the loan to the Debtors. For that incorrect statement, the trustee cites page 84 of Hagberg's deposition. But all that Hagberg said in that exchange was that he was aware of the duties of a trustee under a trust. He did not testify there (or anywhere else) that he acted to make the loan to the debtors. What Hagberg *did* testify to repeatedly at pages 64-79 of his deposition was that he abstained from the decision to loan the trust money and that Strom had the ability to make decisions without his consent or input.<sup>5</sup>

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<sup>5</sup> See Strom Depo Ex. 3 (Revocable Trust Agreement) § 17.2.5.2, p. 25: "Until so delegated, and except as otherwise provided herein, said rights, powers, duties and discretions shall be exercisable jointly provided that at any time I [Jane Strom]

But even if the knowledge could be imputed, knowledge alone does not make one an insider.

*Ellenberg v. William Goldberg & Company, Inc. (In re Sullivan Haas Coyle, Inc.)*, 208 B.R. 239, 246

(Bankr. N.D. Ga. 1997). Professionals are often hired by businesses in financial straits and the

knowledge gained without the type of closeness or control described in *Ellenberg* does not make such

professional an insider. *Id* at 246. Mere knowledge, even intimate detailed knowledge is insufficient to

establish insider status:

While defendant Goldberg & Co. was retained to give the debtor financial advice and, in the course of their relationship, the defendants obtained considerable knowledge about the financial condition of the debtor, this advice and knowledge alone does not make one an insider.

Professionals are often hired by businesses in financial straits, and those professionals typically give advice and obtain knowledge about the debtor's financial condition. That knowledge, without the type of closeness or control found in the cases discussed above, should not make a consultant or professional an insider, subject to the expanded one-year reach back in the preference statute.

*In re Sullivan Haas Coyle, Inc.*, 208 B.R. 239, 246 (Bankr. N.D. Ga. 1997).

In preference actions against creditors, trustees frequently assert that creditors should be considered insiders because they have control over the debtor. The degree of control must be "powerful," and the courts look at the totality of the circumstances to determine when a creditor has assumed control of the debtor. *See Clark v. Balcors Real Estate Finance, Inc. (In re Meridith Millard Partners)*, 145 B.R. 682, 688 (D.Col.1992), *aff'd sub nom. Clark v. Balcors Real Estate Finance, Inc. (In re Meridith Hoffman Partners)*, 12 F.3d 1549 (10th Cir.1993), *cert. den.* 512 U.S. 1206, 114 S.Ct. 2677, 129 L.Ed.2d 812 (1994). "In order to control a debtor, a creditor must be so powerful that the debtor becomes a mere instrument or agent of the creditor, unable to make independent policy and personnel decisions." *Id.* A debtor's inferior bargaining position does not transform a creditor into a control person. *See Balaber-Strauss v. GTE Supply Corp. (In re Coin Phones, Inc.)*, 153 B.R. 135, 141 (Bankr. S.D.N.Y. 1993).

*Id* at 245-246.

The primary focus of the determination [of insider status] is upon the degree of control. A formal relationship between the parties is persuasive but is not determinative. *Matter of Fabricators, Inc.*, 926 F.2d 1458 (5th Cir.1991).

The examination of the level of control must be made with the understanding that control over financial affairs may be an unavoidable circumstance attendant to many creditor-debtor relationships. *See ABC Elec. Serv. Inc. v. Rondout Elec., Inc. (In re ABC Elec. Serv. Inc.)*, 190 B.R. 672 (Bankr.M.D.Fla.1995). Therefore, as a general rule, the Courts have been reluctant to construe financial oversight--even intrusive oversight--as the control required to impose insider

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am serving as Trustee I shall be able to act independently and this Trust shall be able to purchase, mortgage and sell any assets with my sole signature."

status. The fact that a creditor examines, monitors, and even controls some aspects of the debtor's financial affairs does not render the creditor an insider. *In re Meridith Millard Partners*, 145 B.R. 682, 688 (D.Colo.1992), *aff'd*, 12 F.3d 1549 (10th Cir.1994), *cert. denied*, 512 U.S. 1206, 114 S.Ct. 2677, 129 L.Ed.2d 812 (1994). Financial power alone does not render a creditor an insider. *In re Vinard*, 133 B.R. 217, 220 (Bankr.S.D.Ind.1991).

*In re Armstrong*, 231 B.R. 746, 749 (Bankr. E.D. Ark.1999).

There is no evidence of any control here. The direct evidence is that there was no control or even an opportunity for control. See Mahoney Depo., pp. 106-109, Zeller Aff. ¶ 2. The Trustee has failed to establish insider status and therefore he loses on an essential element and his case must be dismissed.

#### **V. The Trustee Has Failed to Establish Insolvency**

Because the presumption of insolvency does not apply here, the Trustee must *prove* insolvency in March and April 2001, the dates the mortgages were recorded. Insolvency is determined on a modified balance sheet test. 11 U.S.C. § 101(32). *In re Northgate Computer Systems, Inc.*, 240 B.R. 328 (Bankr. D. Minn.1999). For the following reasons the Trustee has failed to prove insolvency.

#### **A. Sampson's Testimony as to Value is Inadmissible: He is Neither Expert Nor Owner**

The arguments regarding the Trustee's failure to qualify Sampson as an expert witness and the deficiencies in his testimony even if expert status could be established are set forth in Defendants' separate objection and are incorporated herein by reference and will not be repeated here. Suffice it to say here that Sampson is not an expert on valuation and was not the owner at the relevant times. In addition, he is hopelessly biased as a result of his management of the Debtors during the Debtors' Chapter 11 cases performed with the retrospectively obvious goal of acquiring the properties as cheaply as possible. It is notable that Sampson had nothing to say about the fair value of the properties as of the date he purchased them. His only comment was that he paid what the Trustee asked.

#### **B. There is a Factual Dispute Over Value.**

Kathleen Zeller, president of the Debtors at the relevant times and shareholder of Summa, the majority shareholder of the Debtors, has testified that the value of the three properties in the aggregate in

March and April of 2001 was between \$16 million and \$18 million. An owner is competent to testify as to the value of her property. *Universal Lending Corp. v. Wirth Companies, Inc.*, 392 N.W.2d 322 (Minn.App. 1986). When such owner's opinion is supported by analysis, as here, it can be given significant weight. *In re Marion Street Partnership*, 108 B.R. 218 (Bankr. D. Minn.1989).

Zeller based her opinion in the first instance on a professional appraisal obtained by a neutral third-party appraiser. Next, she testified that since the appraisals were accomplished and through the petition date, the occupancy rates for the projects had declined minimally while revenues had steadily increased. According to her testimony which adopted certain of the figures in the appraisals, as of the date of the appraisals, Brainerd had an occupancy rate of 98.6%. Burnsville had an occupancy rate of 100%. St. Cloud had an occupancy rate of 100%. The UST reports Zeller filed for August 2001 establish that as of the petition date of August 17, 2001, Brainerd had 2 vacancies out of 70 units (97% occupancy). Burnsville had 12 vacancies out of 95 units (87% occupancy). St. Cloud had 4 vacancies out of 70 units (94% occupancy).

She testified that in December, 1997 Brainerd had scheduled annual revenue of \$16,896.00 revenue per occupied unit (67 out of 70); Burnsville had scheduled annual revenue of \$21,256 per occupied unit (91 out of 95) and St. Cloud had scheduled annual revenue of \$17,753 per occupied unit (70 out of 70). *See Zeller Aff. Ex. B.* But on the petition date, as computed from the figures in the UST reports, Brainerd had scheduled annual revenue per occupied unit of \$21,694 (68 out of 70), an increase of 28%. Burnsville had scheduled annual revenue per occupied unit of \$25,356 (83 out of 95), an increase of 19%. On the filing date, St. Cloud had scheduled annual revenue per occupied unit of \$24,713 (66 out of 70), an increase of 39%. *See Zeller Aff. Ex. D.* Zeller's opinion that the revenues had increased are supported by the record. Her testimony that income is a key factor in valuation cannot be disputed.

Because Sampson's testimony cannot be admitted, Zeller's testimony is conclusive on the valuation issue. On the relevant dates, the aggregate value of the properties was between \$16 million and \$18 million.

**B. There is a Factual Dispute as to Liabilities**

Zeller has testified that the aggregate liabilities of the Debtors as of March and April did not exceed \$12,500,000. Her testimony is based on the financial statements of the Debtors compiled by the Debtors' CPA firm on September 30, 2000, the sworn schedules filed in the bankruptcy cases and her personal knowledge.

**1. The Trustee's "Evidence" of Liabilities**

The evidence of liabilities of the Trustee is subject to serious evidentiary objections as set forth in Defendants' separate objection. In addition, the Trustee has listed only some of the liabilities in his supplemental affidavit. The Trustee seeks to establish that these listed creditors were *bona fide* creditors of the Debtors as of March 15, 2001. Yet a closer look reveals that his evidence, even if admissible, is insufficient.

**2. The Trustee is Judicially Estopped to Now Assert the Validity of Certain Claims**

The Trustee testifies at paragraph 3 of his Supplemental affidavit that a partial list of creditors owed jointly by all the Debtors as of January 1, 2001, which were unpaid as of March 15, 2001 totals \$20,293,384.84. By such testimony, the Trustee seeks to set up these creditors as holding *bona fide* undisputed claims on March 15, 2001. The Trustee neglects to mention, however, that he has objected to, and been successful in eliminating or significantly reducing Claim Nos. 35, 42, 39, 40, 45, and 41 originally filed as totaling \$5,239,602.60. Attached as Exhibit 1 is a chart listing the claims, the grounds

for the Trustee's objections and the ultimate result.<sup>6</sup> After the Trustee's successful objections, these claims are now valued in the aggregate at \$114,375.<sup>7</sup>

Despite the fact that the Trustee was successful in eliminating over \$5,000,000 in claims as a result of his objections that such claims were invalid from their inception, he now seeks to assert that these claims *did* have validity at the full filed amount for purposes of establishing insolvency. In order to do that, however, the Trustee must necessarily take an inconsistent position from that he has already successfully asserted. He argued very successfully that for one reason or another these claims were invalid. He now argues that the claims were valid and should be used to establish insolvency. In short, the Trustee asks the Court to find that these claims are valid when the Trustee has already successfully asked the Court to determine (and the Court has determined) that they are not.

The doctrine of judicial estoppel prevents the Trustee's attempts to have it both ways. The doctrine prohibits a party from taking inconsistent positions in the same or related litigation. *See United States ex rel. Gebert v. Transport Admin. Servs.*, 260 F.3d 909, 917 (8th Cir.2001); *Hossaini v. W. Mo. Med. Ctr.*, 140 F.3d 1140, 1142-43 (8th Cir.1998). Because the Trustee successfully disputed these claims, asserting they were *invalid*, he is estopped from now claiming they were *valid* claims when it suits his purpose to do so. Such is precisely the goal of the judicial estoppel doctrine.

The judicial estoppel doctrine protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. *Edwards v. Aetna Life Insurance Co.*, 690 F.2d 595, 598 (6th Cir.1982); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir.1987). The purpose of the doctrine is to protect the courts "from the perversion of judicial machinery." *Edwards*, 690 F.2d at 599. Courts have used a variety of metaphors to describe the doctrine, characterizing it as a rule against "playing 'fast and loose with the courts,'" *Scarano v. Central R.R.*, 203 F.2d 510, 513 (3d Cir.1953), "blowing hot and cold as the occasion demands," *Allen v. Zurich Insurance Co.*, 667 F.2d 1162, 1167 n. 3 (4th Cir.1982), or "hav[ing] [one's] cake and eat [ing] it too," *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1177 (D.S.C.1974).

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<sup>6</sup> Defendants request that the Court take judicial notice of the Trustee's objections as filed in the bankruptcy case and the adversary proceedings against these creditors.

<sup>7</sup> Claim No. 40 of Hinshaw & Culbertson has apparently not yet been resolved but because the Trustee has objected, the claim has lost its *prima facie* validity under 11 U.S.C. § 502. Claim No. 41 is not properly a claim for money damages as of March or April 2001. Rather it was a requirement to issue stock. Because the Trustee has alleged that he will not have enough money to pay the unsecured claims in full, there will be no distribution to this creditor.

Emerson's dictum that "a foolish consistency is the hobgoblin of little minds" cuts no ice in this context.

*Reynolds v. C.I.R.* 861 F.2d 469, 472-473 (6<sup>th</sup> Cir. 1988).

Courts have recognized that the circumstances under which judicial estoppel may appropriately be invoked are not reducible to any general formulation. Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Third, courts ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. In enumerating these factors, this Court does not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts. Pp. 1814-1815.

*New Hampshire v. Maine*, 532 U.S. 742, 743, 121 S.Ct. 1808, 1810-1811 149 L.Ed.2d 968 (2001).

Application of the factors identified in *New Hampshire v. Maine* require enforcement of judicial estoppel on the facts of this case. The Trustee objected to these claims asserting they were invalid and should be disallowed. Now he asserts that the very same claims should be given full consideration in determining insolvency. Either the claims were valid from the start or they were not. The Trustee's position is clearly inconsistent. Second, the Trustee prevailed in bankruptcy court on his objections. All of the relevant claims were either disallowed or a settlement at a significant (and in the case of Mahoney & Hagberg, huge) reduction was reached and approved by the court. The fact that the court did not necessarily decide a particular claim on the merits but rather merely approved a settlement is of no consequence. Such approval by a bankruptcy court which is charged with an affirmative obligation to make an independent judgment as to the fairness of the settlement constitutes the required judicial acceptance. *Reynolds v. C.I.R.* 861 F.2d 469, 473 (6<sup>th</sup> Cir. 1988). Third, if the bankruptcy court were to now find that the disallowed claims were valid it would appear that the court had been misled in making its earlier rulings. Finally, a finding of insolvency on the dates the mortgage to the Trust was recorded is obviously prejudicial to Defendants as insolvency is an essential element of Trustee's preference action.

A recent case out of the Bankruptcy Court for the Southern District of New York is helpful to the analysis. In *In re Trace Intern. Holdings, Inc.*, 301 B.R. 801 (Bankr. S.D.N.Y. 2003) the Chapter 7 Trustee had brought a claim under Delaware law in district court against the officers and directors claiming they had illegally authorized payment of dividends on certain preferred stock while the debtor was insolvent. The Trustee successfully argued in district court that the debtor's obligation to redeem the preferred stock was a liability that should be counted with all the other liabilities in determining insolvency. Later in the bankruptcy case, the Trustee sought to recover the dividends paid to the holders of such preferred stock on a constructive fraudulent transfer theory. The shareholders' defense was that the payments were made on antecedent debt and therefore were made for value. *See* 11 U.S.C. § 548(d)(2)(A). The court held that the trustee was judicially estopped from asserting that the preferred stock was not an antecedent debt when he had successfully argued that it was in the district court action.

The Trustee here cannot have it both ways. He cannot assert that certain claims are valid for purposes of establishing insolvency when he has already determined that the claims are invalid. These claims cannot be used in the insolvency determination.

### **3. The Claims of the Limited Partners of Brainerd Manor, Ltd, are not Properly Considered**

According to the proof of claim filed by the Limited Partners of Brainerd Manor, Ltd. *See* Leonard Supp. Aff. Claim # 41, and the Trustee's complaint in the adversary proceeding against it, under a settlement agreement reached in 1998, the Debtors were obligated to issue preferred stock to these limited partners. The stock was to be issued in settlement and in forgiveness of debt owed by the Debtors to these limited partners. The transaction is further described by the Debtors' accountants in their notes to combined financial statements dated December 31, 1998. Exhibit 4 to Hagberg's Depo. p. 16.

In March 1998, the Corporations settled a lawsuit, subject to court approval, with certain limited partners who are also debtors of the Corporations. The agreement provided for issuance of variable rate, cumulative, non-voting, convertible, preferred stock to the limited partners in exchange for debt outstanding to them.

Contrary to the Trustee's assertions, the Debtors did not owe these limited partners \$3,275,000 on March 15, 2001. The \$3,275,000 claim arose at the time of the bankruptcy when it became clear that the preferred stock would either not be issued or redeemed.<sup>8</sup> The claim arose from the breach of an agreement to issue stock and was properly subordinated under 11 U.S.C. § 510 by agreement between the Trustee and the claimants. The subordination, while effectively disposing of the claim from the estate's perspective, begs the question of whether there was a debt at all as of March 15, 2001. The Trustee has not established that there was a debt owed to these limited partners under this agreement on March 15, 2001 (or at any other time). The proof attached to these claimants' proof of claim is too minimal to establish the claim. The limited partners' claim therefore cannot be counted as a liability for purposes of determining insolvency. *See Zeller Aff.* ¶ 20 (Claimants were not creditors in March and April, 2001. Debtors obligation was to issue stock, not debt).

#### **4. The Claim of Linda Selbak is Not Properly Considered Either**

The Trustee asserts in his supplemental affidavit that Linda Selbak held a claim on August 15, 2001 against the Debtors for \$3,500,000. That statement is incorrect. The Trustee has elected to submit as evidence of this statement, only a copy of a confession of judgment provided pursuant to a Settlement Agreement dated March 26, 1998. According to the proof of claim form, the purported judgment against the Debtors was never filed. The Trustee does not provide either the Settlement Agreement or the subsequent amendment to that settlement agreement both of which are attached to Ms. Selbak's proof of claim (Claim No. 31) filed in these cases but rather has provided only a confession of judgment which was superseded by a subsequent agreement. Defendants request that the court take judicial notice of the *complete* Proof of Claim No. 31 a copy of which is attached to the affidavit of Ralph Mitchell filed herewith. Proof of Claim No. 31 contains a Settlement Agreement dated March 26, 1998, a signed

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<sup>8</sup> The back-up for the limited partners claim (one paragraph) is extremely summary and should have drawn an objection from the Trustee on that basis alone.

confession of judgment dated March 27, 1998 and an Amendment to Settlement Agreement dated November 3, 1998 ("Amendment").

In addition, the Amendment refers to a Standstill Agreement which was not provided with the proof of claim but which is provided with the affidavit of Ralph Mitchell filed herewith. Either the agreement provides that the Debtors had no further liability to Selbak other than salary and insurance, as Zeller believes, or the agreements taken in the aggregate establish that the Debtors obligations were secondary to and contingent upon failure of performance by Summa. Either way, worst case, the Debtors could be called upon to pay under the Amendment only if Summa failed to do so. Under the Standstill Agreement, the Debtors could be called upon to pay Selbak only after the First Union Bank debt had been paid in full. So there are two separate contingencies that would need to be satisfied before the Debtors could ever be called upon to pay Selbak. The question becomes whether these contingent liabilities can be considered for determining insolvency in March and April 2001 and if so what value must be placed on the obligation.

Although contingent liabilities are included in determining whether a debtor is insolvent for preference purposes, they cannot be included at face value. *Matter of Xonics Photochemical, Inc.*, 841 F.2d 198, 200 (7th Cir.1988); *In re Sierra Steel, Inc.*, 96 B.R. 275 (BAP 9th Cir.1989). To include contingent liabilities at full value would often render an entity insolvent as of the date the obligations were assumed, which would cause an "absurd" result. *Xonics*, 841 F.2d at 199. Instead, the "liability must be reduced to its present, or expected, value before a determination can be made whether the firm's assets exceed its liabilities." *Id.* "To determine a contingent liability, one must discount it by the probability that the contingency will occur and the liability will become real." *Sierra*, 96 B.R. at 279. To determine the value of a contingent liability, the court should multiply the total debt guaranteed by the probability that the debtor will be required to fulfill the guarantee. *Covey v. Commercial Nat'l Bank*, 960 F.2d 657, 659 (7th Cir.1992). Contingent liabilities are uncertain and frequently never become actual liabilities. *Xonics*,

841 F.2d at 200. Here the Trustee has offered no evidence of the probability that the Debtors would become liable determined as of the relevant dates of March and April, 2001 but seeks simply to lob the claim in at full face value. As a matter of law, the claim in its full face value cannot be considered in the computation of insolvency and since there is no other figure provided by the Trustee, the claim may not be used at all in determining insolvency.

So which creditors' claims remain? Of the 12 claims proposed by the Trustee, for the reasons discussed above and summarized as to some claims on Exhibit A, only the following are properly included in the solvency calculation:

<u>Creditor</u>	<u>Claim Amount</u>	<u>Claim No.</u>
First Union Bank	\$11,211,440.76	33
Dwight Lindquist	\$ 218,700.00	23
Mahoney & Hagberg	\$ 67,500.00	42
Jane Strom Trust	\$ 62,160.35	38
David Broberg	\$ 61,481.13	20
William Howard	\$ 46,875.00	39
Internet Financial	<u>\$ 38,370.55</u>	43
Total	\$11,706,527.79	

Of the liabilities asserted by the Trustee, only an aggregate of \$11,706,527.79 are properly counted. With the aggregate values of the properties between \$16 - \$18 million, there was aggregate equity in the properties in March and April of 2001 of between \$4,293,472.21 and \$6,293,472.21. The Debtors were not insolvent and the Trustee has failed to prove, by undisputed facts, that they were.

#### **VI. The Earmarking Doctrine Precludes Avoidance**

Even if the Trustee were able to establish insolvency and insider status, which as discussed above he has not and cannot, the earmarking doctrine applies on these facts and prevents recovery. The earmarking doctrine has been described by the Eighth Circuit as follows:

According to the earmarking doctrine, there is no avoidable transfer of the debtor's property interest when a new lender and a debtor agree to use loaned funds to pay a specified antecedent debt, the agreement's terms are actually performed, and the transaction viewed as a whole does not diminish the debtor's estate. *See McCuskey v. National Bank of Waterloo (In re Bohlen Enters., Ltd.)*, 859 F.2d 561, 566 (8th Cir.1988). No avoidable transfer is made because the loaned funds never become part of the debtor's property. *See id.* Instead, a new creditor merely steps into the shoes of an old creditor. *See Buckley v. Jeld-Wen, Inc. (In re Interior Wood Prods. Co.)*, 986 F.2d 228, 231 (8th Cir.1993).

*In re Heitkamp*, 137 F.3d 1087, 1088 -1089 (8<sup>th</sup> Cir. 1998).

The transaction between the Trust and the Debtors *viewed as a whole* satisfies all of the requirements of the earmarking doctrine. The Trust loaned the \$50,000 on a specific agreement by the Debtors that the funds would be used solely to cure defaults in the First Union mortgage. First Union held a first mortgage on the Debtors' real estate. The funds never went into or through the Debtors' hands. Instead the funds went directly to First Union via a check payable to Faegre & Benson, First Union's attorneys. The Debtors' note to the Trust required repayment out of the proceeds of the expected refinancing. In other words, just like the mortgage the \$50,000 loan reduced, the note required that the equity in the properties be used to repay the debt. The Debtors expected the refinancing to be forthcoming. A letter of intent was already in hand. As a backstop, the note was due January 15, 2002, three and a half months after the note date. When the refinancing did not materialize, and an extension was sought, it was necessary to secure the debt with a mortgage because the proceeds of the refinancing would not be available at that time to repay the debt. Overall, the transaction viewed as a whole, as it must be under the doctrine, the loan never became property of the estate and the Trust simply stepped (partially) into the shoes of First Union. The earmarking doctrine prevents the avoidance of this transaction.

## **VII. Conclusion**

The facts material to the insider issue are not disputed and the court must conclude on these undisputed material facts that neither the Trust nor Strom is an insider. Reaching that conclusion ends the case and there is no need for the court to trudge through the evidentiary issues surrounding the Sampson affidavit and the issues of valuation or deal with the judicial estoppel question or the earmarking doctrine,

although Defendants prevail on these issues as well. Summary judgment must be granted in Defendants' favor on the insider issue and denied as to the Trustee on all remaining issues.

Dated: October 13, 2004

LAPP, LIBRA, THOMSON,  
STOEBNER & PUSCH, CHARTERED  
/s/ Ralph V. Mitchell  
Ralph V. Mitchell (#184639)  
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ATTORNEYS FOR DEFENDANTS

**ANALYSIS OF DISPUTED CLAIMS IN PARAGRAPH 3  
OF TRUSTEE'S SUPPLEMENTAL AFFIDAVIT**

<u>Creditor</u>	<u>Claim Amount</u>	<u>Claim No.</u> <u>on 01-33545</u>	<u>Trustee's Objection</u>	<u>Result</u>
Kathleen Zeller	\$ 155,375	35	Claimant converted assets as "purported salary" and "unauthorized management fees," received a preferential mortgage. <i>See</i> Claim Objection of October 12, 2002.	Claim disallowed by Order of 12/05/02, Mortgage Avoided and Judgment against creditor for \$134,518.72 by Judgment entered May 6, 2003.
Mahoney & Hagberg	\$1,500,000	42	No consideration for mortgage, "improper conduct" as attorneys, "conflict of interest," "conspiracy to defraud" creditors, "breach of fiduciary duty." <i>See</i> Claim Objection of April 9, 2002. Claim objection ultimately sued out as adversary proceeding seeking avoidance of mortgage, disallowance of claim or equitable subordination.	Settled with M&H received secured claim of \$67,500 in full satisfaction of all claims.
William Howard	\$ 193,300	39	No consideration for "purported obligation under the Promissory Note"	Initially disallowed by default. Order of December 5, 2002. Motion to vacate brought. Ultimately settled with unsecured claim allowed at \$46,875
Hinshaw & Culbertson	\$ 43,915.93	40	Debtors' records show no services performed.	Objection proceedings continued indefinitely by Order of December 5, 2002
Rider, Bennett Law Firm	\$ 33,641.12	45	Debtors' records show no services performed.	Claim disallowed by Order of December 5, 2002.
Limited Partners of Brainerd Manor, Ltd.	\$3,275,000	41	Claim is for damages resulting from sale of securities subject to 11 U.S.C. § 510. (Claim arose from requirement that Debtors issue preferred stock that was never issued)	Claim subordinated in its entirety by Judgment entered April 3, 2003

**EXHIBIT 1**



Mike Mahoney. Neither Steve Hagberg nor Mike Mahoney was ever an officer, director, shareholder or person in control of any of the Debtors. Neither of them had check-signing authority and neither could hire or fire the Debtors' employees. Neither was involved in the day-to-day operations of the Debtors' businesses and neither received regular financial information about the Debtors' operations. Neither attended board meetings. Neither Mike Mahoney nor Steve Hagberg had any direct or indirect control over the Debtors. I, and I alone, not my husband or anyone else, made the decisions for the Debtors and Summa. My relationship with Mahoney & Hagberg P.A. was that of attorney-client.

3. I did become friends with Steve Hagberg and Jane Strom over the years and we would socialize together when I was in Minnesota. Except for the loan from Jane Strom's trust, my relationship with Jane Strom was strictly personal. I did not discuss details of the Debtors' or my businesses with Jane Strom. I never authorized Steve Hagberg, or Mike Mahoney or any other attorney to disclose attorney-client privileged communications or client secrets to anyone, including Jane Strom and I believe that Steve Hagberg and Mike Mahoney respected client confidences and communications. I have no knowledge that would even suggest that Steve Hagberg inappropriately disclosed confidential information to Jane Strom.

4. The Debtors maintained their books and records on computers by persons with current knowledge of the information being inputted and such information was inputted at or near the time at which such information was obtained. Included in the Debtors' books and records are records as to the Debtors' liabilities, occupancy levels and revenue levels. It was in the ordinary course of the Debtors' business to keep such records of liabilities, occupancy levels and revenues and such records were maintained in such ordinary course. As president of the Debtors, I was the ultimate custodian of these records and had final responsibility for their

maintenance, storage and accuracy. The Debtors' business records were maintained under my direct or indirect control. The information provided by the Debtors to the appraisers, information provided to the accountants and information provided to the United States Trustee in the Chapter 11 case was all obtained from the business records regularly maintained in the course of the Debtors business as provided above. To the best of my knowledge, the Debtors' business records, were accurate and complete as of the dates thereof. To the best of my knowledge, the financial information in the appraisals, the accountants' compilations and the reports provided to the United States Trustee were accurate and complete at the time and were assembled from the business records of the Debtors. I adopt the statements made in the exhibits hereto regarding the financial information of the Debtors' as my direct testimony.

5. In late 1998, the Debtors obtained aggregate refinancing from First Union National Bank of \$11,500,000. Formal written appraisals of each of the three facilities owned by the Debtors were prepared at that time for First Union by Tellatin, Louis & Andreas, Inc. from Chesterfield, Missouri ("Tellatin"). The Trustee was provided these appraisals. Tellatin valued the Brainerd facility (70 units) as of June 30, 1998 at \$3,700,000. Tellatin valued the St. Cloud facility (70 units) as of June 30, 1998 at \$4,300,000 and the Burnsville facility (95 units) as of June 30, 1998 at \$8,000,000 a total of \$16,000,000. I mention these values because they were taken into account by me in providing my value in my capacity as the principal and officer of the owners. A copy of the summary sheet of the three appraisals is attached hereto as Exhibit A.

6. I also attach as Exhibit B, excerpts from the appraisals showing the number of units, occupancy rates and annual revenues per occupied unit for each. I acknowledge that these figures are accurate as of December 31, 1997 and adopt them as my direct testimony.

7. The loan obligation to First Union fell into arrears in the summer of 2000 and the Debtors lacked sufficient cash to cure the defaults. I came to Minnesota from my home in Andorra to deal directly with this development. In August, 2000, I was able to raise \$170,000, part of the amount needed to cure the defaults, from a lender called Internet Financial Services, LLC. The loan required a 25% loan fee and a high interest rate. Late in August I had dinner with Steve Hagberg and Jane Strom and mentioned to them that the First Union loan was in default and that the Debtors needed an additional \$50,000 to cure the loan default. I told Steve Hagberg and Jane Strom that I had obtained part of the needed money. I told them about the Internet Financial fee and the interest rate and indicated to them that I was willing to offer similar terms for the last \$50,000 to anyone who would put up the money.

8. The next day, Jane Strom offered to lend the money from her trust. The understanding I reached with her was that the money would be used only to pay the default to First Union (and in fact the check would be payable and delivered directly to Faegre & Benson, attorneys for First Union) and that it would be repaid shortly from an expected loan refinancing from Kinnard which had already issued a letter of interest). The money was provided on August 30, 2000 and on September 1, 2000, I signed a note to the Strom Trust on behalf of the Debtors which provided for a 25% loan fee (the same as Internet Financial) and interest at 22% per annum (the same as Internet Financial). The note provided that it was to be repaid immediately upon refinancing or in any event on January 15, 2001 at the latest and regular payments were required.

9. The Kinnard refinancing was not obtained and when the Strom Trust note was becoming due, I asked her for an extension, since the refinancing of the real estate (from which she was supposed to have been paid) did not materialize. I offered her a mortgage on the real

estate, basically to put the Strom Trust into the same secured position as was the lender (First Union) who had received the \$50,000. I felt that the Debtors were no worse off in granting a junior mortgage for funds used to reduce the senior mortgage and that the Debtors' position was actually improved because the foreclosure had been staved off.

10. I signed a renewal note and three mortgages to Jane's trust on January 24, 2001 when I was in Minnesota. Copies of those three mortgages are attached as Exhibit C. Subsequently, I returned to Europe. Apparently the three mortgages were not recorded because at some point Steve Hagberg recognized that excess mortgage filing taxes could be avoided if I would simply sign one mortgage and have copies recorded in the three counties. When I returned to Minnesota in March, 2001, I corrected that issue by signing a replacement mortgage. It is no coincidence that I signed other mortgages, including one to Mahoney & Hagberg at the same time. It was nearly impossible for me to obtain proper notarization of documents where I lived in Europe. When I returned in March, 2001, I signed the documents that had accumulated for my signature since my last trip. I never told Jane Strom that I had also granted a mortgage to Mahoney & Hagberg or to anyone else.

11. Although the Debtors' properties were all substantially occupied, the cash flow demands were excessive and were not sufficient to pay all the obligations of the Debtors and maintain the payments on the First Union mortgage after the first default had been cured. The loan again fell into default later in 2001 and First Union again commenced a receivership action.

12. To prevent loss of the properties and to preserve the equity for the creditors, the Debtors each filed voluntary Chapter 11 bankruptcy petitions on August 17, 2001. On September 21, 2001, during the pendency of the Debtors' Chapter 11 cases, as required by the rules, I filed operating reports for each of the Debtors with the United States Trustee. Included

in these reports was a rent roll for each of the three properties. A copy of these rent rolls as filed with the UST are attached as Exhibit D.

13. I provided the values of the three facilities for the bankruptcy schedules although the schedules were signed by Vern Zeller III, a vice president of each of the Debtors. A copy of the summary schedule sheets for each of the three Debtors is attached as Exhibit E. I valued the real property of the Brainerd facility at \$3,700,000 plus personal property of \$159,978.15 for a total of \$3,859,978.15. I valued the real property of the Burnsville facility at \$7,900,000 and the personal property at \$226,327.62 for a total of \$8,126,327.62. I valued the real property of the St. Cloud facility at \$4,300,000 and the personal property at \$179,226.61 for a total of \$4,479,226.61. The total value of all of the property of \$16,465,532.38. These values were conservative and were based in part on the appraisals, and in part on the fact that the revenues since the appraisals had been done had increased significantly.

14. In contrast to the revenues existing on the appraisal date, on the *filing* date, the scheduled annual revenue per occupied unit had increased significantly. I know from my experience in owning and operating assisted living facilities, from the refinancing with First Union and the attempts to obtain refinancing with other lenders that the value of assisted living facilities is determined in large part by the levels of revenues and occupancy rates. As an officer of the then owners of the three properties, it is my opinion that the fair market value of the three facilities had increased significantly between June 1998 and August, 2001. The rents had increased and the occupancy had remained relatively consistent with occupancy fluctuating in the ordinary course of business.

15. As the officer of the then owners of these three properties and based on the analysis described above, it is my opinion that the aggregate fair market value of the three facilities in March and April 2001 was between \$16,000,000 and \$18,000,000.

16. The Debtors employed the outside CPA firm of Larson, Allen Weishair & Co., LLP., to provide compilations of the Debtors' financial condition. Those statements have been provided to the Trustee. Copies of pertinent excerpts of the September 30, 2000 compilations are attached hereto as Exhibit F. I believe that the liabilities listed in these compilations were accurate as of the date made and I adopt them as my direct testimony.

17. According to the bankruptcy schedules I filed for the three Debtors, the aggregate liabilities for each of the three Debtors on August 17, 2001 was \$11,614,881.14. Based on these figures and my personal knowledge of the financial condition of the Debtors, the aggregate liabilities of the Debtors in March and April, 2001 did not exceed \$12,500,000.

18. Considering the fair value of the three properties and the liabilities existing in March and April, 2001, the Debtors' aggregate assets at fair value exceeded its aggregate liabilities by several million dollars. It is my opinion that the Debtors were not insolvent at any time before their bankruptcy filings.

19. An amendment to the agreement with Linda Selbak provided that the obligations of the Debtors to Linda Selbak, originally secured by a confession of judgment, were transferred to and assumed by Summa Management Inc. except for her salary and medical insurance and as a result these other obligations were no longer the responsibility of the Debtors.

20. The agreement with the limited partners of Brainerd Manor, Ltd. reached in 1998 required the issuance of preferred stock in satisfaction of the debt owed to them. The preferred stock was to be paid dividends and redeemed upon sale of the properties or five years whichever

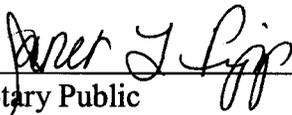
occurred first. As of March and April 2001, the obligation to redeem not arisen and the Debtors did not consider these partners to be creditors.

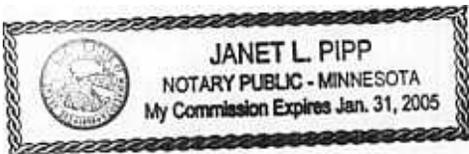
I, Kathleen L. Zeller verify under penalty of perjury that the facts in the foregoing declaration are true and correct to the best of my knowledge, information and belief.

Further your affiant says not.

  
Kathleen L. Zeller

Subscribed and sworn to before me  
this 12<sup>th</sup> day of October, 2004

  
Notary Public



Tellatin, Louis & Andreas, Inc

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15455 Conway Road  
Suite 355  
Chesterfield, Missouri 63017  
Telephone: 314-530-0009  
Facsimile: 314-530-0046

June 16, 1998

File Reference: 983056

Quinn Antshel  
Capitol Markets Officer  
First Union National Bank  
301 South College Street  
Charlotte, North Carolina 28288

RE: Brainerd Manor  
2723 East Oak Street  
Brainerd (Crow Wing County), Minnesota  
"As Is" Market Value Appraisal of the Business Enterprise  
As of June 30, 1998

Dear Mr. Antshel:

In accordance with the signed engagement letter dated May 5, 1998 (shown as Exhibit A in this report), we have appraised Brainerd Manor, a 70-unit assisted living facility.

The purpose of the appraisal is to estimate the "as is" market value of the business enterprise including the fee simple interest in the real estate. A description of the property, together with information providing a basis for estimates, is presented in the accompanying report. This appraisal is subject to the definitions, assumptions, conditions and certification contained in the attached report. We believe to have prepared this appraisal in compliance with the Code of Professional Ethics, and the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation; the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA); and the appraisal guidelines of First Union National Bank.

It is our understanding that this appraisal is to be used for . This appraisal is not based upon a requested minimum valuation, a specific valuation, or the approval of a loan.

A description of the property, together with information providing the basis of the estimates, is presented in the accompanying self-contained report. In the course of our fieldwork, we have determined that the appraised property has no natural, cultural, scientific or recreational value.



Trustee 01688

Based on the data, analyses and conclusions presented in the attached report, it is our opinion that the "as is" market value of the business enterprise of the subject property, as of June 30, 1998, is:

THREE MILLION SEVEN HUNDRED THOUSAND DOLLARS

\$3,700,000

This report and its contents are intended solely for your information and assistance for the function stated previously, and should not be relied upon for any other purpose. Otherwise, neither the whole nor any part of this appraisal or any reference thereto may be included in any document, statement, appraisal, or circular without our explicit, prior written approval of the form and context in which it appears.

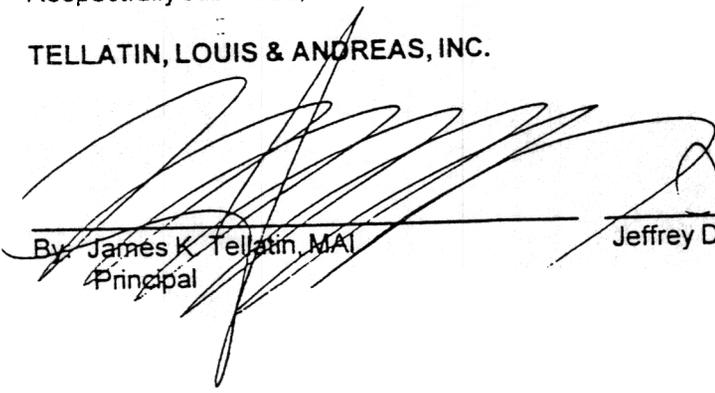
The accompanying prospective financial analysis is based on estimates and assumptions developed in connection with the appraisal. However, some assumptions inevitably will not materialize, and unanticipated events and circumstances will occur. The actual results achieved during the holding period will vary from our estimates and these variations may be material. We have not been engaged to evaluate the effectiveness of management, and we are not responsible for management's actions such as marketing efforts.

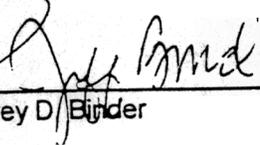
A copy of this report, together with the field data from which it was prepared, is retained in our files. These data are available for your inspection upon request.

James K. Tellatin, MAI, is a Minnesota certified appraiser who meets the appraisal standards defined by the State Licensing Law.

Respectfully submitted,

TELLATIN, LOUIS & ANDREAS, INC.

  
By: James K. Tellatin, MAI  
Principal

  
Jeffrey D. Binder

Tellatin, Louis & Andreas, Inc

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onway Road  
Suite 355  
Chesterfield, Missouri 63017  
Telephone: 314-530-0009  
Facsimile: 314-530-0046

June 23, 1998

File Reference: 983058

Quinn Antshel  
Capitol Markets Officer  
First Union National Bank  
301 South College Street  
Charlotte, North Carolina 28288

RE: Carefree Living of Burnsville  
600 Nicollet Boulevard  
Burnsville (Dakota County), Minnesota  
"As Is" Market Value Appraisal of the Business Enterprise  
As of June 30, 1998

Dear Mr. Antshel:

In accordance with the signed engagement letter dated May 5 1998 (shown as Exhibit A in this report), we have appraised Carefree Living of Burnsville, a 95-unit assisted living facility.

The purpose of the appraisal is to estimate the "as is" market value of the business enterprise including the fee simple interest in the real estate. A description of the property, together with information providing a basis for estimates, is presented in the accompanying report. This appraisal is subject to the definitions, assumptions, conditions and certification contained in the attached report. We believe to have prepared this appraisal in compliance with the Code of Professional Ethics, and the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation; the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA); and the appraisal guidelines of First Union National Bank.

It is our understanding that this appraisal is to be used for collateral valuation. This appraisal is not based upon a requested minimum valuation, a specific valuation, or the approval of a loan.

A description of the property, together with information providing the basis of the estimates, is presented in the accompanying self-contained report. In the course of our fieldwork, we have determined that the appraised property has no natural, cultural, scientific or recreational value.

Trustee 01972

Based on the data, analyses and conclusions presented in the attached report, it is our opinion that the "as is" market value of the business enterprise of the subject property, as of June 30, 1998, is:

EIGHT MILLION DOLLARS

\$8,000,000

This report and its contents are intended solely for your information and assistance for the function stated previously, and should not be relied upon for any other purpose. Otherwise, neither the whole nor any part of this appraisal or any reference thereto may be included in any document, statement, appraisal, or circular without our explicit, prior written approval of the form and context in which it appears.

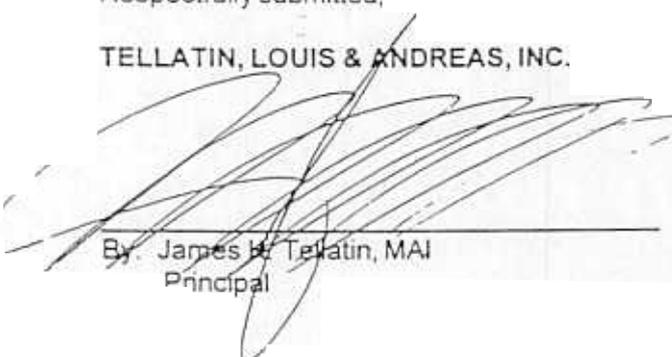
The accompanying prospective financial analysis is based on estimates and assumptions developed in connection with the appraisal. However, some assumptions inevitably will not materialize, and unanticipated events and circumstances will occur. The actual results achieved during the holding period will vary from our estimates and these variations may be material. We have not been engaged to evaluate the effectiveness of management, and we are not responsible for management's actions such as marketing efforts.

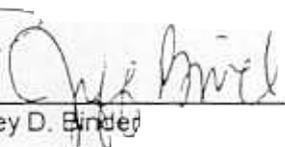
A copy of this report, together with the field data from which it was prepared, is retained in our files. These data are available for your inspection upon request.

James K. Tellatin, MAI, is a Minnesota certified appraiser who meets the appraisal standards defined by the State Licensing Law.

Respectfully submitted,

TELLATIN, LOUIS & ANDREAS, INC.

  
By: James K. Tellatin, MAI  
Principal

  
Jeffrey D. Binder

Tellatin, Louis & Andreas, Inc

---

15455 Conway Road  
Suite 355  
Chesterfield, Missouri 63017  
Telephone: 314-530-0009  
Facsimile: 314-530-0046

November 13, 1998

File Reference: 983057

Quinn Antshel  
Capitol Markets Officer  
First Union National Bank  
301 South College Street  
Charlotte, North Carolina 28288

RE: Carefree Living of St. Cloud  
1225 Division Street  
St. Cloud (Benton County), Minnesota  
"As Is" Market Value Appraisal of the Business Enterprise  
As of June 30, 1998

Dear Mr. Antshel:

In accordance with the signed engagement letter dated May 5, 1998 (shown as Exhibit A in this report), we have appraised Carefree Living of St. Cloud, a 70-unit assisted living facility.

The purpose of the appraisal is to estimate the "as is" market value of the business enterprise including the fee simple interest in the real estate. A description of the property, together with information providing a basis for estimates, is presented in the accompanying report. This appraisal is subject to the definitions, assumptions, conditions and certification contained in the attached report. We believe to have prepared this appraisal in compliance with the Code of Professional Ethics, and the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation; the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA); and the appraisal guidelines of First Union National Bank.

It is our understanding that this appraisal is to be used for collateral evaluation. This appraisal is not based upon a requested minimum valuation, a specific valuation, or the approval of a loan.

A description of the property, together with information providing the basis of the estimates, is presented in the accompanying self-contained report. In the course of our fieldwork, we have determined that the appraised property has no natural, cultural, scientific or recreational value.

Trustee 01825

Based on the data, analyses and conclusions presented in the attached report, it is our opinion that the "as is" market value of the business enterprise of the subject property, as of June 30, 1998, is:

FOUR MILLION THREE HUNDRED THOUSAND DOLLARS

**\$4,300,000**

This report and its contents are intended solely for your information and assistance for the function stated previously, and should not be relied upon for any other purpose. Otherwise, neither the whole nor any part of this appraisal or any reference thereto may be included in any document, statement, appraisal, or circular without our explicit, prior written approval of the form and context in which it appears.

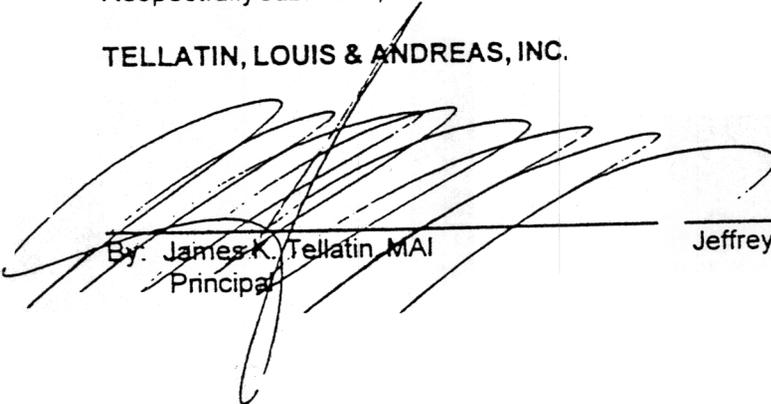
The accompanying prospective financial analysis is based on estimates and assumptions developed in connection with the appraisal. However, some assumptions inevitably will not materialize, and unanticipated events and circumstances will occur. The actual results achieved during the holding period will vary from our estimates and these variations may be material. We have not been engaged to evaluate the effectiveness of management, and we are not responsible for management's actions such as marketing efforts.

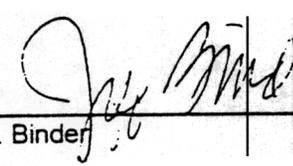
A copy of this report, together with the field data from which it was prepared, is retained in our files. These data are available for your inspection upon request.

James K. Tellatin, MAI, is a Minnesota certified appraiser who meets the appraisal standards defined by the State Licensing Law.

Respectfully submitted,

**TELLATIN, LOUIS & ANDREAS, INC.**

  
By: James K. Tellatin, MAI  
Principal

  
Jeffrey D. Binder

**A SELF-CONTAINED  
APPRAISAL REPORT OF**  
Brainerd Manor  
2723 East Oak Street  
Brainerd (Crow Wing County), Minnesota

Valuation Date  
June 30, 1998

Prepared for  
First Union National Bank

Appraised By  
Tellatin, Louis & Andreas, Inc.  
15455 Conway Road, Suite 355  
Chesterfield, Missouri 63017  
314-530-0009

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Trustee 01686

Table H-1 Summary of Subject Census and Revenue Data

Occupancy Data	31-Dec-96	31-Dec-97	31-Dec-98			
Total Resident Days	24,850	24,364	25,000			
Total Units	70	70	70			
Available Resident Days	25,550	25,550	25,550			
Occupancy Rate	97.3%	95.4%	97.8%			
Average Occupied Unit	68	67	68			
	---Total Revenues---			-----Per Occupied Unit-----		
Revenues By Payment Source	31-Dec-96	31-Dec-97	31-Dec-98	31-Dec-96	31-Dec-97	31-Dec-98
Resident Rental Income	\$1,098,296	\$1,112,606	\$1,145,228	\$ 16,132	\$ 16,668	\$ 16,720
Double Occupancy Income	0	0	0			
---	0	0	0			
---						
Total Routine Patient Revenue	\$1,098,296	\$1,112,606	\$1,145,228	\$ 16,132	\$ 16,668	\$ 16,720
Meals	\$4,745	\$8,182	\$14,841	\$ 70	\$ 122	\$ 214
Beauty Shop	11,607	10,157	0	170	152	-
Miscellaneous	(9,053)	(3,104)	0	(133)	(47)	-
Bad Debt	-	-	-	-	-	-
Total Revenue from All Sources	\$1,105,595	\$1,127,821	\$1,159,869	\$16,239	\$16,899	\$16,934

Summary of Subject Expense Data

Departmental Expenses	---Total Expenses---			-----Per Occupied Unit-----			-----% Revenues-----		
	31-Dec-96	31-Dec-97	31-Dec-98	31-Dec-96	31-Dec-97	31-Dec-98	31-Dec-96	31-Dec-97	31-Dec-98
General & Administrative	\$182,390	\$199,149	\$194,848	\$2,385	\$2,984	\$2,842	14.7%	17.7%	16.8%
Management Fee	0	185,090	222,650	-	2,773	3,251	0.0%	16.4%	19.2%
Marketing	4,572	4,920	8,845	67	74	129	0.4%	0.4%	0.8%
Social Services & Activities	4,465	4,178	17,200	66	63	251	0.4%	0.4%	1.5%
Nursing - Home Health	0	1,146	0	-	17	-	0.0%	0.1%	0.0%
Ancillary	0	0	0	-	-	-	0.0%	0.0%	0.0%
**** Employee Benefits & Taxes	0	0	0	-	-	-	0.0%	0.0%	0.0%
Dietary	243,918	282,692	284,835	3,583	3,935	4,158	22.1%	23.3%	24.5%
Laundry/Housekeeping	49,903	55,633	58,895	733	833	880	4.5%	4.9%	5.1%
Utilities	41,204	43,976	57,070	605	659	848	3.7%	3.8%	5.0%
Plant Operations	34,824	59,220	56,981	511	887	832	3.1%	5.3%	4.9%
Property Insurance	32,742	23,922	15,281	481	358	223	3.0%	2.1%	1.3%
Property Taxes	29,625	30,996	31,427	435	464	459	2.7%	2.7%	2.7%
Total Operating Expenses	\$603,643	\$870,922	\$948,509	\$ 8,868	\$ 13,048	\$13,848	54.8%	77.2%	81.8%
Total Effective Gross Revenue	\$1,105,595	\$1,127,821	\$1,159,869	\$ 16,239	\$ 16,899	\$16,934	100.0%	100.0%	100.0%
Net Operating Income	\$501,952	\$256,899	\$211,359	\$ 7,373	\$ 3,849	\$3,086	45.4%	22.8%	18.2%

**A SELF-CONTAINED  
APPRAISAL REPORT OF**

Carefree Living of Burnsville  
600 Nicollet Blvd  
Burnsville (Dakota County), Minnesota

Valuation Date  
June 30, 1998

Prepared for  
First Union National Bank

Appraised By  
Tellatin, Louis & Andreas, Inc.  
15455 Conway Road, Suite 355  
Chesterfield, Missouri 63017  
314-530-0009

Copyright 1998

Trustee 01971

Table H-1 Summary of Subject Census and Revenue Data

Occupancy Data	31-Dec-96	31-Dec-97	31-Dec-98						
Total Resident Days	23,178	33,093	33,215						
Total Units	78	95	95						
Available Resident Days	27,831	34,875	34,875						
Occupancy Rate	68.8%	95.4%	95.8%						
Average Occupied Unit	51	91	91						
	-----Total Revenues-----			-----Per Occupied Unit-----					
Revenues By Payment Source	31-Dec-96	31-Dec-97	31-Dec-98	31-Dec-96	31-Dec-97	31-Dec-98			
Resident Rental Income	\$1,382,575	\$1,911,709	\$2,113,253	\$ 26,734	\$ 21,085	\$ 23,223			
Double Occupancy Income	0	0	0						
***	0	0	0						
***									
Total Routine Patient Revenue	\$1,382,575	\$1,911,709	\$2,113,253	\$ 26,734	\$ 21,085	\$ 23,223			
Meals	\$0	\$1,811	\$21,324	\$ -	\$ 20	\$ 234			
Beauty Shop	14,792	21,469	0	290	237				
Miscellaneous	(1,591)	(7,740)	0	(31)	(85)				
Bad Debt	-	-	-	-	-	-			
Total Revenue from All Sources	\$1,375,776	\$1,927,249	\$2,134,577	\$26,993	\$21,256	\$23,457			
* 1996 - Addition Completed in September to Raise Units from 70 to 95									
Summary of Subject Expense Data									
	-----Total Expenses-----			-----Per Occupied Unit-----			-----% Revenues-----		
Departmental Expenses	31-Dec-96	31-Dec-97	31-Dec-98	31-Dec-96	31-Dec-97	31-Dec-98	31-Dec-96	31-Dec-97	31-Dec-98
General & Administrative	\$230,401	\$270,792	\$368,804	\$4,521	\$2,987	\$4,053	16.7%	14.1%	17.3%
Management Fee	0	189,690	243,333	-	2,092	2,674	0.0%	9.8%	11.4%
Marketing	12,592	11,057	18,530	247	122	204	0.9%	0.6%	0.9%
Social Services & Activities	22,050	20,519	14,053	433	228	154	1.6%	1.1%	0.7%
Nursing - Home Health	4,778	3,512	0	94	39	-	0.3%	0.2%	0.0%
Ancillary	0	0	0	-	-	-	0.0%	0.0%	0.0%
Dietary	261,734	327,878	358,024	5,135	3,614	3,934	19.0%	17.0%	16.8%
Laundry/Housekeeping	61,838	57,058	68,178	1,209	629	749	4.5%	3.0%	3.2%
Utilities	58,432	55,171	69,557	1,167	609	764	4.1%	2.9%	3.3%
Plant Operations	43,988	45,940	57,862	883	507	634	3.2%	2.4%	2.7%
Property Insurance	32,582	23,922	15,261	639	264	168	2.4%	1.2%	0.7%
Property Taxes	49,912	77,325	78,402	979	853	862	3.6%	4.0%	3.7%
Total Operating Expenses	\$776,087	\$1,082,662	\$1,291,784	\$ 15,227	\$ 11,941	\$14,195	58.4%	56.2%	60.5%
Total Effective Gross Revenue	\$1,375,776	\$1,927,249	\$2,134,577	\$ 26,993	\$ 21,256	\$23,457	100.0%	100.0%	100.0%
Net Operating Income	\$599,689	\$844,587	\$842,793	\$ 11,766	\$ 9,315	\$9,261	43.6%	43.8%	39.5%

**A SELF-CONTAINED  
APPRAISAL REPORT OF**

Carefree Living of St. Cloud  
1225 Division Street East  
St. Cloud (Benton County), Minnesota

Valuation Date  
June 30, 1998

Prepared for  
First Union National Bank

Appraised By  
Tellatin, Louis & Andreas, Inc.  
15455 Conway Road, Suite 355  
Chesterfield, Missouri 63017  
314-530-0009

Copyright 1998

Trustee 01824

Table H-1 Summary of Subject Census and Revenue Data

Occupancy Data	31-Dec-96	31-Dec-97	31-Dec-98			
Total Resident Days	23,755	25,398	24,942			
Total Units	70	70	70			
Available Resident Days	25,550	25,550	25,550			
Occupancy Rate	93.0%	99.4%	97.6%			
Average Occupied Unit	65	70	66			

Revenues By Payment Source	Total Revenues			Per Occupied Unit		
	31-Dec-96	31-Dec-97	31-Dec-98	31-Dec-96	31-Dec-97	31-Dec-98
Resident Rental Income	\$1,109,177	\$1,227,788	\$1,290,689	\$ 17,042	\$ 17,645	\$ 18,888
Double Occupancy Income	0	0	0	-	-	-
***	0	0	0	-	-	-
Total Routine Patient Revenue	\$1,109,177	\$1,227,788	\$1,290,689	\$ 17,042	\$ 17,645	\$ 18,888
Meals	\$3,707	\$2,877	\$4,161	\$ 57	\$ 38	\$ 61
Beauty Shop	6,374	5,497	0	98	79	-
Miscellaneous	(5,186)	(627)	0	(80)	(9)	-
Bad Debt	-	-	-	-	-	-
Total Revenue from All Sources	\$1,114,072	\$1,235,335	\$1,294,850	\$17,118	\$17,753	\$18,949

Summary of Subject Expense Data

Departmental Expenses	Total Expenses			Per Occupied Unit			% Revenues		
	31-Dec-96	31-Dec-97	31-Dec-98	31-Dec-96	31-Dec-97	31-Dec-98	31-Dec-96	31-Dec-97	31-Dec-98
General & Administrative	\$174,989	\$209,817	\$277,288	\$2,889	\$3,015	\$4,058	15.7%	17.0%	21.4%
Management Fee	0	166,850	182,500	-	2,398	2,671	0.0%	13.5%	14.1%
Marketing	3,827	3,234	1,716	58	46	25	0.3%	0.3%	0.1%
Social Services & Activities	6,872	0	17,200	106	-	252	0.6%	0.0%	1.3%
Nursing - Home Health	0	0	0	-	-	-	0.0%	0.0%	0.0%
Ancillary	0	0	0	-	-	-	0.0%	0.0%	0.0%
Dietary	210,702	212,889	241,435	3,237	3,059	3,533	18.9%	17.2%	18.6%
Laundry/Housekeeping	75,271	90,507	90,577	1,157	1,301	1,326	6.8%	7.3%	7.0%
Utilities	44,100	43,233	30,433	678	621	445	4.0%	3.5%	2.4%
Plant Operations	33,164	38,898	70,303	510	559	1,029	3.0%	3.1%	5.4%
Property Insurance	32,742	23,922	15,261	503	344	223	2.9%	1.9%	1.2%
Property Taxes	49,130	54,190	54,945	755	779	804	4.4%	4.4%	4.2%
Total Operating Expenses	\$630,597	\$843,540	\$981,855	\$ 9,689	\$ 12,123	\$14,368	56.6%	68.3%	75.8%
Total Effective Gross Revenue	\$1,114,072	\$1,235,335	\$1,294,850	\$ 17,118	\$ 17,753	\$18,949	100.0%	100.0%	100.0%
Net Operating Income	\$483,475	\$391,795	\$313,194	\$ 7,429	\$ 5,631	\$4,583	43.4%	31.7%	24.2%

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By Corporation or Partnership  
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(reserved for mortgage registry  
tax payment data)  
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MORTGAGE REGISTRY TAX DUE HEREON:

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: :  
(reserved for recording data) :  
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THIS INDENTURE, Made this 15th day of January 2001, between Carefree Living of America (Brainerd), Inc., a corporation under the laws of the state of Delaware Mortgagor, and Jane L. Strom, Trustee, Mortgagee,

WITNESSETH, That Mortgagor, in consideration of the sum of TEN DOLLARS, to Mortgagor in hand paid by Mortgagee, the receipt whereof is hereby acknowledged, does hereby convey unto Mortgagee, forever, real property in Crow Wing County, Minnesota, described as follows:

(SEE SCHEDULE A, ATTACHED HERETO)

together with all hereditaments and appurtenances belonging thereto (the Property).

TO HAVE AND TO HOLD THE SAME, to Mortgagee forever. Mortgagor covenants with Mortgagee as follows: That Mortgagor is lawfully seized of the Property and has good right to convey the same; that the Property is free from all encumbrances, except as follows:

NONE

that Mortgagee shall quietly enjoy and possess the same; and that Mortgagor will warrant and defend the title to the same against all lawful claims not hereinbefore specifically excepted.

PROVIDED, NEVERTHELESS, That if Mortgagor shall pay to Mortgagee the sum of Sixty-Two Thousand, One Hundred and Sixty and 35/100 Dollars (\$62,160.35) according to the terms of a promissory note of even date herewith (the Note), with interest at the rate provided in the NOTE, and shall repay to Mortgagee, at the times and with interest as specified, all sums advanced in protecting the lien of this Mortgage, in payment of taxes on the Property and assessments payable therewith, insurance premiums covering buildings thereon, principal or interest on any prior liens, expenses and attorney's fees herein provided for



and sums advanced for any other purpose authorized herein, and shall keep and perform all the covenants and agreements herein contained, then this Mortgage shall be null and void; and shall be released at Mortgagor's expense.

AND MORTGAGOR covenants with Mortgagee as follows

- 1 to pay the principal sum of money and interest as specified in the Note;
- 2 to pay all taxes and assessments now due or that may hereafter become liens against the Property before penalty attaches thereto;
- 3 to keep all buildings, improvements and fixtures now or later located on or a part of the Property insured against loss by fire, extended coverage perils, vandalism, malicious mischief and, if applicable, steam boiler explosion, for at least the amount of \$62,160.35 at all times while any amount remains unpaid under this Mortgage. If any of the buildings, improvements or fixtures are located in a federally designated flood prone area, and if flood insurance is available for that area, Mortgagor shall procure and maintain flood insurance in amounts reasonably satisfactory to Mortgagee. Each insurance policy shall contain a loss payable clause in favor of Mortgagee affording all rights and privileges customarily provided under the so-called standard mortgage clause. In the event of damage to the Property by fire or other casualty, Mortgagor shall promptly give notice of such damage to Mortgagee and the insurance company. The insurance shall be issued by an insurance company or companies licensed to do business in the State of Minnesota and acceptable to Mortgagee. The insurance policies shall provide for not less than ten days written notice to Mortgagee before cancellation, non-renewal, termination, or change in coverage, and Mortgagor shall deliver to Mortgagee a duplicate original or certificate of such insurance policies;
- 4 to pay, when due, both principal and interest of all prior liens or encumbrances, if any, and to keep the Property free and clear of all other prior liens or encumbrances;
- 5 to commit or permit no waste on the Property and to keep it in good repair;
6. to complete forthwith any improvements which may hereafter be under course of construction on the Property; and
- 7 to pay any other expenses and attorney's fees incurred by Mortgagee by reason of litigation with any third party for the protection of the lien of this Mortgage.

In case of failure to pay said taxes and assessments, prior liens or encumbrances, expenses and attorney's fees as above specified, or to insure said buildings, improvements, and fixtures and deliver the policies as aforesaid, Mortgagee may pay such taxes, assessments, prior liens, expenses and attorney's fees and interest thereon, or obtain such insurance, and the sums so paid shall bear interest from the date of such payment at the same rate set forth in the Note, and shall be impressed as an additional lien upon the Property and be immediately due and payable from Mortgagor to Mortgagee and this Mortgage shall from date thereof secure the repayment of such advances with interest.

In case of default in any of the foregoing covenants, Mortgagor confers upon the Mortgagee the option of declaring the unpaid balance of the Note and the interest accrued thereon, together with all sums advanced hereunder, immediately due and payable without notice, and hereby authorizes and empowers Mortgagee to foreclose this Mortgage by judicial proceedings or to



# Schedule A

Parcel 3:

All of the Southeast Quarter Northeast Quarter (SE1/4 NE1/4), Section Thirty (30), Township Forty-five (45), Range Thirty (30), EXCEPT that part thereof platted as "Parkdale Addition to the City of Brainerd";

AND ALSO

Lots One (1), Two (2), Five (5), Six (6), Seven (7), Eight (8) and Nine (9); AND the East Half of Lot Three (E1/2 L3) of Parkdale Addition to the City of Brainerd, EXCEPT: Commencing at the Southwest corner of the SE1/4 NE1/4, Section 30, Township 45, Range 30, thence North along the West boundary of said SE1/4 NE1/4 a distance of 704 feet more or less to the point of beginning, said point of beginning being the Northeast corner of Block Thirty-six (36), Cuyuna Range Addition to the City of Brainerd; thence North along said West boundary a distance of 617 feet, more or less, to a point being the Northwest corner of said SE1/4 NE1/4; thence East along the North boundary of said SE1/4 NE1/4 a distance of 551.54 feet more or less to a point being the Southwest corner of Block 27 of Cuyuna Range Addition to the City of Brainerd; thence in a Southwesterly direction to the point of beginning.

Being registered property as evidenced by certificate of Title No. 63536

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By Corporation or Partnership  
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(reserved for mortgage registry : :  
tax payment data) : :  
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MORTGAGE REGISTRY TAX DUE HEREON:

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: : :  
: (reserved for recording data) :  
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THIS INDENTURE, Made this 15th day of January 2001, between Carefree Living of America (Burnsville), Inc., a corporation under the laws of the state of Delaware, Mortgagor, and Jane L. Strom, Trustee, Mortgagee,

WITNESSETH, That Mortgagor, in consideration of the sum of TEN DOLLARS, to Mortgagor in hand paid by Mortgagee, the receipt whereof is hereby acknowledged, does hereby convey unto Mortgagee, forever, real property in Dakota County, Minnesota, described as follows:

SEE SCHEDULE A, ATTACHED HERETO)

together with all hereditaments and appurtenances belonging thereto (the Property).

TO HAVE AND TO HOLD THE SAME, to Mortgagee forever. Mortgagor covenants with Mortgagee as follows: That Mortgagor is lawfully seized of the Property and has good right to convey the same; that the Property is free from all encumbrances, except as follows:

NONE

that Mortgagee shall quietly enjoy and possess the same; and that Mortgagor will warrant and defend the title to the same against all lawful claims not hereinbefore specifically excepted.

PROVIDED, NEVERTHELESS, That if Mortgagor shall pay to Mortgagee the sum of Sixty-Two Thousand, One Hundred and Sixty and 35/100 Dollars (\$62,160.35) according to the terms of a promissory note of even date herewith (the Note), with interest at the rate provided in the NOTE, and shall repay to Mortgagee, at the times and with interest as specified, all sums advanced in protecting the lien of this Mortgage, in payment of taxes on the Property and assessments payable therewith, insurance premiums covering buildings thereon, principal or interest on any prior liens, expenses and attorney's fees herein provided for

and sums advanced for any other purpose authorized herein, and shall keep and perform all the covenants and agreements herein contained, then this Mortgage shall be null and void, and shall be released at Mortgagor's expense.

AND MORTGAGOR covenants with Mortgagee as follows:

- 1 to pay the principal sum of money and interest as specified in the Note;
- 2 to pay all taxes and assessments now due or that may hereafter become liens against the Property before penalty attaches thereto;
3. to keep all buildings, improvements and fixtures now or later located on or a part of the Property insured against loss by fire, extended coverage perils, vandalism, malicious mischief and, if applicable, steam boiler explosion, for at least the amount of \$62,160.35 at all times while any amount remains unpaid under this Mortgage. If any of the buildings, improvements or fixtures are located in a federally designated flood prone area, and if flood insurance is available for that area, Mortgagor shall procure and maintain flood insurance in amounts reasonably satisfactory to Mortgagee. Each insurance policy shall contain a loss payable clause in favor of Mortgagee affording all rights and privileges customarily provided under the so-called standard mortgage clause. In the event of damage to the Property by fire or other casualty, Mortgagor shall promptly give notice of such damage to Mortgagee and the insurance company. The insurance shall be issued by an insurance company or companies licensed to do business in the State of Minnesota and acceptable to Mortgagee. The insurance policies shall provide for not less than ten days written notice to Mortgagee before cancellation, non-renewal, termination, or change in coverage, and Mortgagor shall deliver to Mortgagee a duplicate original or certificate of such insurance policies;
- 4 to pay, when due, both principal and interest of all prior liens or encumbrances, if any, and to keep the Property free and clear of all other prior liens or encumbrances;
- 5 to commit or permit no waste on the Property and to keep it in good repair;
6. to complete forthwith any improvements which may hereafter be under course of construction on the Property; and
- 7 to pay any other expenses and attorney's fees incurred by Mortgagee by reason of litigation with any third party for the protection of the lien of this Mortgage.

In case of failure to pay said taxes and assessments, prior liens or encumbrances, expenses and attorney's fees as above specified, or to insure said buildings, improvements, and fixtures and deliver the policies as aforesaid, Mortgagee may pay such taxes, assessments, prior liens, expenses and attorney's fees and interest thereon, or obtain such insurance, and the sums so paid shall bear interest from the date of such payment at the same rate set forth in the Note, and shall be impressed as an additional lien upon the Property and be immediately due and payable from Mortgagor to Mortgagee and this Mortgage shall from date thereof secure the repayment of such advances with interest.

In case of default in any of the foregoing covenants, Mortgagor confers upon the Mortgagee the option of declaring the unpaid balance of the Note and the interest accrued thereon, together with all sums advanced hereunder, immediately due and payable without notice, and hereby authorizes and empowers Mortgagee to foreclose this Mortgage by judicial proceedings or to

sell the Property at public auction and convey the same to the purchaser in fee simple in accordance with the statute, and out of the moneys arising from such sale to retain all sums secured hereby, with interest and all legal costs and charges of such foreclosure and the maximum attorney's fee permitted by law, which costs, charges and fees Mortgagor agrees to pay. The terms of this Mortgage shall run with the Property and bind the parties hereto and their successors in interest.

IN TESTIMONY WHEREOF, Mortgagor has hereunto set its hand the day and year first above written.

MORTGAGOR  
CAREFREE LIVING OF AMERICA  
(BURNSVILLE), INC.

By *Kathleen L. Zeller*  
Its PRESIDENT

STATE OF MINNESOTA

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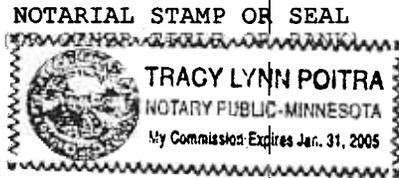
COUNTY OF HENNEPIN

The foregoing instrument was acknowledged before me this 24<sup>th</sup> day of January, 2001, by Kathleen L. Zeller, President, of Carefree Living of A America (Burnsville), Inc., a corporation under the laws of Delaware, on behalf of the corporation.

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THIS INSTRUMENT WAS DRAFTED  
BY (NAME AND ADDRESS):

Mahoney & Hagberg  
A Professional Association  
109 Bushaway Road  
Minneapolis, MN 55391

*Tracy Lynn Poitra*  
SIGNATURE OF PERSON TAKING  
ACKNOWLEDGMENT



-----  
FAILURE TO RECORD OR FILE THIS MORTGAGE  
MAY AFFECT THE PRIORITY OF THIS MORTGAGE.

# Schedule A

COUNTY OF DAKOTA-STATE OF MINNESOTA

Lot 1, Block 1, COPPERTOP II  
Being Abstract land.

Known as 600 Nicollet Boulevard, Burnsville, Minnesota

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By Corporation or Partnership  
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: (reserved for mortgage registry  
: tax payment data)  
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MORTGAGE REGISTRY TAX DUE HEREON:

(reserved for recording data) :  
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THIS INDENTURE, Made this 15th day of January 2001, between Carefree Living of America (St. Cloud), Inc., a corporation under the laws of the state of Delaware, Mortgagee, and Jane L. Strom, Trustee, Mortgagor,

WITNESSETH, That Mortgagor, in consideration of the sum of TEN DOLLARS, to Mortgagor in hand paid by Mortgagee, the receipt whereof is hereby acknowledged, does hereby convey unto Mortgagee, forever, real property in Benton County, Minnesota, described as follows:

(SEE SCHEDULE A, ATTACHED HERETO)

together with all hereditaments and appurtenances belonging thereto (the Property).

TO HAVE AND TO HOLD THE SAME, to Mortgagee forever. Mortgagor covenants with Mortgagee as follows: That Mortgagor is lawfully seized of the Property and has good right to convey the same; that the Property is free from all encumbrances, except as follows:

NONE

that Mortgagee shall quietly enjoy and possess the same; and that Mortgagor will warrant and defend the title to the same against all lawful claims not hereinbefore specifically excepted.

PROVIDED, NEVERTHELESS, That if Mortgagor shall pay to Mortgagee the sum of Sixty-Two Thousand, One Hundred and Sixty and 35/100 Dollars (\$62,160.35) according to the terms of a promissory note of even date herewith (the Note), with interest at the rate provided in the Note, and shall repay to Mortgagee, at the times and with interest as specified, all sums advanced in protecting the lien of this Mortgage, in payment of taxes on the Property and assessments payable therewith, insurance premiums covering buildings thereon, principal or interest on any prior liens, expenses and attorney's fees herein provided for

and sums advanced for any other purpose authorized herein, and shall keep and perform all the covenants and agreements herein contained, then this Mortgage shall be null and void, and shall be released at Mortgagor's expense.

AND MORTGAGOR covenants with Mortgagee as follows

1. to pay the principal sum of money and interest as specified in the Note;
  2. to pay all taxes and assessments now due or that may hereafter become liens against the Property before penalty attaches thereto;
  3. to keep all buildings, improvements and fixtures now or later located on or a part of the Property insured against loss by fire, extended coverage perils, vandalism, malicious mischief and, if applicable, steam boiler explosion, for at least the amount of \$62,160.35 at all times while any amount remains unpaid under this Mortgage. If any of the buildings, improvements or fixtures are located in a federally designated flood prone area, and if flood insurance is available for that area, Mortgagor shall procure and maintain flood insurance in amounts reasonably satisfactory to Mortgagee. Each insurance policy shall contain a loss payable clause in favor of Mortgagee affording all rights and privileges customarily provided under the so-called standard mortgage clause. In the event of damage to the Property by fire or other casualty, Mortgagor shall promptly give notice of such damage to Mortgagee and the insurance company. The insurance shall be issued by an insurance company or companies licensed to do business in the State of Minnesota and acceptable to Mortgagee. The insurance policies shall provide for not less than ten days written notice to Mortgagee before cancellation, non-renewal, termination, or change in coverage, and Mortgagor shall deliver to Mortgagee a duplicate original or certificate of such insurance policies;
- to pay, when due, both principal and interest of all prior liens or encumbrances, if any, and to keep the Property free and clear of all other prior liens or encumbrances;
5. to commit or permit no waste on the Property and to keep it in good repair;
  6. to complete forthwith any improvements which may hereafter be under course of construction on the Property; and
  7. to pay any other expenses and attorney's fees incurred by Mortgagee by reason of litigation with any third party for the protection of the lien of this Mortgage.

In case of failure to pay said taxes and assessments, prior liens or encumbrances, expenses and attorney's fees as above specified, or to insure said buildings, improvements, and fixtures and deliver the policies as aforesaid, Mortgagee may pay such taxes, assessments, prior liens, expenses and attorney's fees and interest thereon, or obtain such insurance, and the sums so paid shall bear interest from the date of such payment at the same rate set forth in the Note, and shall be impressed as an additional lien upon the Property and be immediately due and payable from Mortgagor to Mortgagee and this Mortgage shall from date thereof secure the repayment of such advances with interest.

In case of default in any of the foregoing covenants, Mortgagor confers upon the Mortgagee the option of declaring the unpaid balance of the Note and the interest accrued thereon, together with all sums advanced hereunder, immediately due and payable without notice, and hereby authorizes and empowers Mortgagee to foreclose this Mortgage by judicial proceedings or to

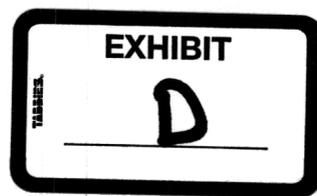


# Schedule A

COUNTY OF BENTON-STATE OF MINNESOTA

All of Lot 3, and that part of Lot 4, Block 3, Eastern Park Addition, City of St. Cloud, Benton County, Minnesota, which lies westerly of a line 26.00 feet east of, as measured at a right angle to and parallel with the west line of said Lot 4, and which lies northerly of that certain highway easement described in Book 28 of Miscellaneous on Page 420, according to the files of the Benton County Recorder.  
Benton County, Minnesota

ROOM	RESIDENT	RENT ROLLS DEPOSIT RECEIVED FOR		RENT	AUGUST		OTHER DUE	OTHER PAID	ADMIT FEE	DUE
		JULY	AUGUST		R	R				
101	HAGSTROM, SIDONIA	951.67	1,542.67	1,542.67	921.67	653.00	79.00	30.00		968.67
102	BORASH, AGNES	1,408.33	2,061.33	2,061.33	1,408.33	653.00				967.33
103	MAIER, WILLIAM	293.00	1,949.00	1,949.00	1,121.00					1,121.00
104	KOLAND, ARTHUR	(616.27)	616.27							(1,655.00)
105	THEILEN, ANNETTA		1,755.00	1,755.00		1,655.00				(1,655.00)
106	SHOGRIN, GERTIE	1,257.83	1,878.83	1,878.83	1,225.83	653.00	15.00	115.00		(1,655.00)
107	GOODRICH, LORRAINE	1,699.00	2,396.00	2,396.00	1,743.00	563.00	54.00	32.00		(1,279.83)
108	BORG, ISOBEL	(1,162.00)	1,655.00	1,655.00		1,655.00	31.00	46.00		1,774.00
109	RANNEY, VAL	(1,655.00)	1,655.00	1,655.00		1,655.00	54.00	93.00		(2,858.00)
110	WILMAR, RUTH		979.40	979.40			47.00	47.00		(1,655.00)
111	ZUMBRUNNEN, GLADYS	1,253.83	1,878.83	1,878.83	1,245.83	653.00		8.00		1,225.83
112	DECHAMNE, ALICE	1,185.00	1,818.00	1,818.00	1,185.00	646.00		7.00		1,165.00
113	FLANNIGAN, RAY	1,732.50	2,365.50	2,365.50	1,732.50	653.00				1,712.50
114	EASTMAN, TED		1,655.00	1,655.00		1,655.00				
115	GRANGE, IRENE	(1,655.00)	1,655.00	1,655.00			46.00	46.00		(1,655.00)
116	LAUMAN, DORIS	(653.00)	2,743.00	2,743.00	.045.00		38.00	38.00		392.00
201	SHEW, AUDREY	39.00	2,175.00	2,175.00		2,175.00	54.00	39.00		54.00
202	KEIL, RENALDA	1,264.83	1,878.83	1,878.83	.225.83	653.00	46.00	39.00		1,271.83
203	STANFOTH, ASTRID	15.00	1,740.00	1,740.00		1,740.00	38.00	15.00		38.00
204	HAYNES, ARLENE	1,232.83	1,878.83	1,878.83	1,225.83	653.00	7.00	7.00		1,232.83
205	MORSS, EDNA	1,530.00	2,440.00	2,440.00	1,530.00	910.00				1,530.00
206	SWENSON, WARNE	517.18	828.00	828.00	517.18	828.00				(0.00)
207	KREIBS, VIVIAN	4.00	1,825.00	1,825.00		1,825.00		4.00		
208	PETER, GLENN	2,016.67	2,669.67	2,669.67	2,016.67	653.00				2,016.67
209	OWENS, MARGARET	431.67	2,871.87	2,871.87	1,651.67		54.00			1,705.67
210	OLSON, BERTHA	818.17	2,122.17	2,122.17	1,469.17		32.00			1,501.17
211	AREY, LENA	16.00	1,655.00	1,655.00		1,655.00		16.00		
212	DUMKE, DOROTHY	222.76	1,944.76	1,944.76	1,083.76	168.00	38.00			598.76
213	DALLY, DONNA	1,225.83	1,878.83	1,878.83	1,225.83	653.00				1,225.83
214	JOHNSON, ROBERTA	30.00	1,631.25	1,631.25		1,631.25	47.00	30.00		47.00
215										



216	CHRISTIANSON, JOHN	County Client	(241.00)	2,061.33	412.00	1,825.00	1,825.00	1,165.00	1,165.00	1,408.33
217	AHLGRIM, BARBARA	County Client	823.00	1,628.00	828.00	800.00	800.00	800.00	808.00	808.00
218	HANSON, ADELAINÉ	County Client	1,225.83	1,878.83	653.00	1,225.83	1,225.83	1,225.83	225.83	225.83
219	HELGESON, EBBA	Private Pay		1,970.00	970.00					
220	PRUSHEK, DEAN	County Client	1,165.00	1,818.00	653.00	1,165.00	1,165.00	1,165.00	1,165.00	1,165.00
221	LAMONT, ELMIRA	Private Pay	(1,825.00)	1,825.00					(1,825.00)	(1,825.00)
222	GUSTAFSON, ERVIN	Private Pay		979.40	979.40				7.00	7.00
223	RUTZ, ARTHUR	Private Pay		1,825.00	825.00					
224	HUGHES, MARTHA	County Client	(28.00)	1,628.00		800.00	800.00	800.00	800.00	800.00
225	GOLD, HELEN	County Client	(128.00)	1,728.00		800.00	800.00	800.00	839.00	839.00
226	WALSH, PEARL	County Client	1,530.00	2,183.00	653.00	1,530.00	1,530.00	1,530.00	1,530.00	1,530.00
227	SCHACH, CARL	Private Pay		2,175.00	2,175.00				7.00	7.00
301	HENDRICKSON, CAROL	Private Pay		1,673.00	1,689.00					
302	SECHSER, BEA	County Client	948.67	1,574.67	653.00	941.67	941.67	941.67	(16.00)	(16.00)
303	LOVOI, BOB	Private Pay	(1,825.00)	1,825.00					921.67	921.67
304	DANCE, LILA	Private Pay		1,523.20	1,523.00				0.20	0.20
305	DWYER, JAMES	County Client	803.00	1,757.00	957.00	803.00	803.00	803.00	800.00	800.00
306	HENGEL, VIOLET	County Client	(4.00)	1,604.00	800.00	800.00	800.00	800.00	(4.00)	(4.00)
307	OLSON, ALFRED	County Client		2,589.17	1,120.00		804.00	804.00	1,469.17	1,469.17
308	ERICKSON, DOROTHY	County Client	921.67	1,787.67	816.00	921.67	921.67	921.67	921.67	921.67
309	WARNER, ROBERT	Private Pay	(2,175.00)	2,175.00					(2,175.00)	(2,175.00)
310	WILLE, PEARL	County Client	982.50	1,635.50	653.00	982.50	982.50	982.50	982.50	982.50
311	SOUICIE, DORA	County Client	1,056.50	1,635.50	653.00	1,002.50	1,002.50	1,002.50	329.50	329.50
312	VODICKA, JAMES	County Client	2,583.10	1,931.05	653.00	2,556.10	2,556.10	2,556.10	7.00	7.00
313	MUHAR, JOHN	Private Pay	1,530.00			1,530.00	1,530.00	1,530.00	1,305.05	1,305.05
314	DOTEN, SIGNE	County Client	24.00	2,674.00	887.00				24.00	24.00
315	FLASKERUD, OLE	County Client	1,610.83	2,243.83	653.00	610.83	610.83	610.83	1,818.00	1,818.00
316	KIRKEGAARD, MARY	Private Pay		916.15					1,590.83	1,590.83
317	DOESKIN, MARGARET	County Client		1,079.38	1,079.38				916.15	916.15
318										
319	KELLEY, JACK	Private Pay		2,175.00	2,175.00				(2,175.00)	(2,175.00)
320	WUNDERLICH, KAREN	Private Pay		979.40	979.40					
321	HEWSON, DOROTHY	County Client	572.83	1,878.83		1,225.83	1,225.83	1,225.83	572.83	572.83
322	SCHLEH, DOLORES	County Client	1,743.00	2,396.00	653.00	1,743.00	1,743.00	1,743.00	1,743.00	1,743.00
323	BREDESEN, HENRY	County Client	1,767.00	2,595.00	828.00	1,767.00	1,767.00	1,767.00	1,767.00	1,767.00



BURNSVILLE 95 ROOMS ROOM	RESIDENT	PAST DUE	RENT	RENT ROLLS DEPOSIT RECEIVED FOR		AUGUST SEPTEMBER	OTHER DUE	BALANCE DUE
				JULY	AUGUST			
107	MENOUGH, MARIE	1,831.00	2,531.00	1,831.00	900.00			1,631.00
108	HOFF, ESTHER	1,892.00	2,658.18	1,812.00	653.00	26.00	26.00	1,985.18
109	WEAVER, GEORGE	1,154.04	2,054.04	1,154.04	900.00	48.00	48.00	1,154.04
110	NELSON, ALVINA	1,841.08	1,712.00	512.00	653.00			1,154.04
111	SUTTER, GERALD	1,313.00	2,030.00	2,022.00	2,030.00			2,388.08
112	LARSON, WANITA	1,720.00	2,030.00	2,022.00	2,030.00	45.00	45.00	(2,030.00)
113	PUETT, JOHANNA	(1,720.00)	(1,720.00)					1,191.18
114	LIEN, JULETTA	2,030.00	2,030.00	2,006.48	2,030.00			(2,054.00)
114	WHITE, HELEN	848.30	2,030.00	1,280.56	920.00	24.00	24.00	1,353.48
115	RIPKA, FRED	1,260.56	2,160.56	1,280.56	920.00			1,220.56
118	MALONE, MILDRED	1,655.00	2,308.00	1,875.00	653.00	36.00	36.00	1,635.00
117	BOHER, OLGA							
119								
120	FIOLA, NEIL	1,539.72	2,192.72	1,539.72	653.00			1,539.72
121	FRTZ, STELLA	1,253.56	2,153.56	1,253.56	900.00			1,253.56
122	HOMWOOD, SHIRLEY	4,955.70	2,665.23	1,765.23	900.00	58.00	58.00	3,898.70
123	DEGROFF, ELSIE		2,030.00	2,030.00	2,030.00	36.00	36.00	
124	THOMAS, JUNE		2,030.00	2,030.00	2,030.00			
125	WISTROM, LUELLA	0.00	2,166.00	1,513.00	653.00			(2,030.00)
126	BAMBENEK, HELEN	1,499.00	2,172.00	1,519.00	653.00	45.00	45.00	1,499.00
127	REYAK, RAYMOND	360.56	2,160.56	1,260.56	653.00			360.56
128	STREET, TRUDIS	1,081.00	2,407.00	1,734.00	900.00			1,734.00
129	HAMANN, HAZELLE	1,080.00	1,773.00	1,100.00	653.00			1,100.00
205								
206								
207	ERICKSON, ZONIA	1,171.56	2,071.56	1,171.56	900.00			1,171.56
208	HEIDENREICH, ALICE	1,248.56	2,160.56	1,260.56	900.00	12.00	12.00	1,248.56
209	CLARK, WILLIAM	1,812.45	2,465.45	1,812.45	653.00			1,812.45
210	HANSEN, MYRTLE	2,030.00	2,030.00	2,260.24	176.24	114.00	162.00	922.52
211	SHELTON, MARGE	2,400.00	2,400.00	2,400.00	176.24	105.00	105.00	2,400.00
212								
213	CUSICK, JOAN	3,583.12	2,916.56	1,177.00	900.00			5,599.68
214	BERTELL, BERNHARD	504.00	1,850.00	1,177.00	653.00			524.00
215								
216	DAHLKE, ALICE	1,354.00	2,007.00	1,354.00	653.00			1,354.00
217	SEWELL, HILTON	(2,030.00)	2,030.00					
218	JOHNSON, SID & JOAN		2,150.00					
219	SCHLIE, HAZEL		2,450.00					
220	ERICKSON, RUBY	1,653.08	2,266.00	20.00	2,150.00	48.00	129.00	(2,331.00)
221	BOYLES, WILLIAM		2,030.00		2,030.00	48.00	48.00	3,246.08
						12.00	24.00	(2,042.00)



330	SWANSON, HAROLD	County Client	1,593.00	2,166.00	1,148.00	1,060.00						
331	DREWLOW, HELEN & I	County Client	1,389.00	1,997.00	1,384.00	653.00						1,551.00
332	MEYER, MARGARET	County Client	1,465.00	2,138.00	1,485.00	653.00						1,349.00
333	COYLE, EDNA	County Client	983.00	2,086.00	1,268.00	900.00						1,465.00
334	INGLE, MARGARET	County Client	1,731.72	2,651.72	1,751.72	920.00						901.00
335	LOMBARDO, DOROTHY	County Client	188.00	2,000.00	1,100.00							1,711.72
336	HYNES, MARY	County Client	3,753.00	2,213.00	20.00	653.00		2.00				1,100.00
337	CAST, MARGARET	County Client	1,596.00	2,440.35	1,758.35	653.00		6.00	96.00			5,293.00
338	BRUYER, JEANNE	County Client	(0.00)	653.00	20.00	633.00						1,625.00
339	WAGNER, MARGARET	Private Pay		2,030.00		2,030.00						(653.00)
340	FEIGUM, FRANCES	County Client	60.56	1,968.56	,068.56							
	GRAND TOTAL		68,743.68	175,377.58	74,732.31	72,956.24	22,560.00	1,556.00	1,462.00	250.00	250.00	73,716.71
			68,743.68	175,377.58	74,732.31	72,956.24	22,560.00	1,556.00	1,462.00	250.00	250.00	73,716.71
												0.00

ST. CLOUD 70 ROOMS ROOM	RESIDENT	PAST DUE	RENT	RENT ROLLS DEPOSIT - RECEIVED FOR		AUGUST SEPTEMBER	OTHER DUE	OTHER PAID	ADMIT FEE	BALANCE DUE
				JULY	AUGUST					
101	ANDERSON, A DON	2,183.60	2,836.60	653.00	653.00					4,367.20
102	HACKETT, JOPSEPHINE	1,056.60	2,056.60	1,403.60	314.00		8.00			1,403.60
103	KLINKER, BERNICE	2,153.76	2,189.60	532.74	653.00					3,157.62
104	OLSON, DENNIS	72.30	1,653.80	1,000.80						725.30
105	LIBBY, LAVERNE		1,695.00	1,695.00	1,695.00		65.00	65.00		
106	WINKELMAN, VERNON		1,695.00	1,695.00	1,695.00		98.00	146.00		
107	WITSCHENM, CRYL	(1,695.00)	1,695.00			1,695.00				(1,743.00)
108	GIBBOINS, RONALD	1,433.60	2,086.60	1,433.60	653.00					(1,695.00)
109	FELLING, JOYCE	766.04	2,249.40	212.00	212.00					1,433.60
110	MOSER, BESS	(1,456.75)	1,440.75			441.00				2,362.44
111	HAVANES, MARY	(1,730.00)	1,695.00			1,693.00		12.00		(1,695.00)
112	HEDLUND, ALICE	1,461.60	2,114.60				16.00			
113	GROW, ORVAL	1,317.90	2,059.30			371.00		26.60		2,923.20
114	ZAK, DORA	871.32	2,208.60	1,813.12	282.00					2,724.20
115	PEEL, MILTON	973.80	1,648.80	973.85	653.00					613.80
116	SCHAUER, NAOMI	2,330.60	2,983.60							973.75
201	LICHTENEGGER, BEN		2,010.00	2,010.00	2,010.00					4,661.20
202	CARLSON, MARVIN	111.44	1,695.00	111.44	1,695.00					
203	VOGEL, MILDRED	1,640.40	2,377.40	1,624.40	753.00		14.00	11.00		1,643.40
204	CHAUVIN, RICHARD	2,028.60	2,028.60	1,375.60	653.00					2,028.60
205	LUESMIER, ALVINA	1,553.60	1,750.16	1,545.60	761.00					997.16
206	DIITZ, MARCIA	2,561.91	3,202.80	2,562.80	653.00					2,548.91
207										
208	SCHLEPPENBACH, LIZ	2,545.00	2,198.10	2,545.00	441.00					1,757.10
209	STADEM, MARGARET	558.60	2,365.10	1,436.60			32.00			1,518.10
210	HAUWILLER, ROSEMAR		1,695.00	1,695.00	1,695.00					(1,695.00)
211	LINNEMAN, JUDY		163.11							163.11
212	PLY, SHIRLEY		1,440.75		440.75			35.00		
213	KRUEGER, JEROME	493.00	1,985.00	1,228.00						1,229.00
214	WITT, FLORENCE	196.40	2,684.40							2,880.80
215	RADEL, MARIE		1,695.00		1,695.00					
216	DEURMIER, MARILYN	1,439.40	2,092.40	1,695.00	653.00					2,678.80
217	CZECJ, DELPHINE	1,375.60	2,028.60	653.00	653.00					2,751.20
218	ROEHL, MARY ELLEN	1,393.60	2,046.60	1,393.65	653.00		8.00			1,393.55
219	MAYERHOFER, LAVERN	1,418.60	2,568.60		1,150.00					2,837.20
220	GULDE, JOE		1,695.00		1,695.00					
221	MEYER, ANN		1,805.00		1,805.00					
222	FARNAM, ELLEN	1,418.60	2,071.60	653.00	653.00		28.00	28.00		2,260.20
223	HLEBAIN, MARY JANE	1,418.60	2,071.60	1,418.60	653.00	577.00				1,418.60
224	BIALKE, MARCELLA	1,056.40	2,097.40	265.00	265.00					2,888.80
225	RUFF, LORAIN	2,124.80	(139.70)				72.00	66.05		1,991.05

225	THEISEN, JOSEPHINE	County client	237.36	653.00	75.00	63.00	312.36
226	MEYER, WILMA	County client	1,797.60		63.00		2,289.20
227	LINDELL, MARIE	Private Pay	2,010.00	2,010.00			2,929.20
301	MARKS, BERNICE	County client	2,226.60	871.00			1,998.79
302	MAY, MARY	County client	1,738.80	753.00			2,624.80
303	JOHNSON, MAY	County client	1,965.40	653.00			2,614.60
304	KUSCHEL, RENEE	County client	2,160.30	753.00			
305	MERTES, PETER	Private Pay	1,895.00	1,895.00			1,248.80
306	HARTMEN, CLARA	Private Pay	1,534.25	1,533.75			1,194.70
307	HERHOLTZ, THELMA	County client	1,901.80	653.00			1,131.20
308	TOLBERT, CHESTER	County client	1,848.70	653.00			3,434.60
309	TOLBERT, OLINE	County client	1,784.20	553.00			
309	OLSON, ROBERT	County client	2,846.80	100.00			
310					8.00	8.00	1,012.85
311	BOHN, YVONNE	Private Pay	480.00	480.00			(2,050.00)
312	ROTHSTEIN-YAEGER, M	County client	548.12				1,274.90
313	TESSARI, THELMA	Private Pay	2,050.00	2,050.00			1,461.00
314	SNEIDE, JONAL	County client	2,614.40	653.00		33.50	970.00
315	BROWNIE, ALMA	County client	2,114.00	653.00			1,375.60
316	STILLMAN, JUNE	County client	1,623.00	653.00			(1,703.00)
317	MASLOWSKI, PATRICIA	County client	2,028.60	653.00			4,420.15
318					32.00	32.00	2,838.60
319	LUTGEN, HARRY	Private Pay	1,695.00	1,695.00			1,409.60
320	STERLING, JOAN	County client	2,825.00	1,050.00			2,819.20
321	WEYRAUCH, LUCILLE	County client	2,365.60	653.00			(1,703.00)
322	FLEMING, LAJRA	County client	2,194.60	753.00			(2,065.40)
323	OSOINAK, RUBY	County client	2,058.60	653.00			
324	KOONTZ, JOHN	County client	1,805.00	1,805.00			
325	SCHREIFEIS, RICHARD	Private Pay	1,805.00	1,805.00			
326	VAN VICKLE, BEATRICE	County client	2,341.60	212.00			
327	OTHER		1,588.60		417.00	417.00	1,743.24
	GRAND TOTAL		53,512.74	51,058.50	14,803.00	1,073.15	1,743.24
			52,474.01	51,058.50	1,170.80	1,073.15	(0.00)
			1,038.73				

**United States Bankruptcy Court  
District of Minnesota**

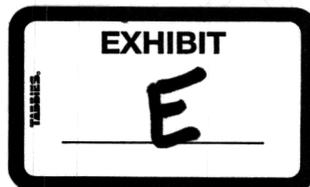
In re **Carefree Living of America (Brainerd), Inc.**  
41-1813995

Case No. **01-33547**  
Chapter **11**

**SUMMARY OF SCHEDULES**

AMOUNTS SCHEDULED

NAME OF SCHEDULE	ATTACHED (YES/NO)	NO. OF SHEETS	ASSETS	LIABILITIES	OTHER
A - Real Property	YES	1	\$ 3,700,000.00		
B - Personal Property	YES	3	\$ 159,978.15		
C - Property Claimed As Exempt	YES	1			
D - Creditors Holding Secured Claims	YES	2		\$ 2,999,548.67	
E - Creditors Holding Unsecured Priority Claims	YES	1		\$ 0.00	
F - Creditors Holding Unsecured Nonpriority Claims	YES	10		\$ 633,094.33	
G - Executory Contracts and Unexpired Leases	YES	1			
H - Codebtors	YES	1			
I - Current Income of Individual Debtor(s)	YES	0			\$ 0.00
J - Current Expenditures of Individual Debtor(s)	YES	0			\$ 0.00
Total Number of sheets in ALL Schedules >		20			
Total Assets >			\$ 3,859,978.15		
				Total Liabilities >	\$ 3,632,643.00



Filed on SEP 10 2007  
Patrick G. De Wane, Clerk  
By lma Deputy Clerk

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**United States Bankruptcy Court  
District of Minnesota**

In re Carefree Living of America (Burnsville), Inc.  
41-1813993

Case No. 01-33545  
Chapter 11

**SUMMARY OF SCHEDULES**

AMOUNTS SCHEDULED

NAME OF SCHEDULE	ATTACHED (YES/NO)	NO. OF SHEETS	ASSETS	LIABILITIES	OTHER
A - Real Property	YES	1	\$ 7,900,000.00		
B - Personal Property	YES	3	\$ 226,327.62		
C - Property Claimed As Exempt	YES	1			
D - Creditors Holding Secured Claims	YES	1		\$ 5,877,147.86	
E - Creditors Holding Unsecured Priority Claims	YES	1		\$ 0.00	
F - Creditors Holding Unsecured Nonpriority Claims	YES	11		\$ 670,176.12	
G - Executory Contracts and Unexpired Leases	YES	1			
H - Codebtors	YES	1			
I - Current Income of Individual Debtor(s)	YES	0			\$ 0.00
J - Current Expenditures of Individual Debtor(s)	YES	0			\$ 0.00
Total Number of sheets in ALL Schedules >		20			
Total Assets >			\$ 8,126,327.62		
Total Liabilities >				\$ 6,547,323.98	

Filed on SEP 10 2001  
 Patrick B. DeWane, Clerk  
 By *[Signature]* Deputy Clerk

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**United States Bankruptcy Court  
District of Minnesota**

In re **Carefree Living of America (St. Cloud), Inc.**  
41-1813994

Case No. **01-33546**  
Chapter **11**

**SUMMARY OF SCHEDULES**

AMOUNTS SCHEDULED

NAME OF SCHEDULE	ATTACHED (YES/NO)	NO. OF SHEETS	ASSETS	LIABILITIES	OTHER
A - Real Property	YES	1	\$ 4,300,000.00		
B - Personal Property	YES	3	\$ 179,226.61		
C - Property Claimed As Exempt	YES	1			
D - Creditors Holding Secured Claims	YES	2		\$ 3,409,207.31	
E - Creditors Holding Unsecured Priority Claims	YES	1		\$ 0.00	
F - Creditors Holding Unsecured Nonpriority Claims	YES	9		\$ 581,911.76	
G - Executory Contracts and Unexpired Leases	YES	1			
H - Codebtors	YES	1			
I - Current Income of Individual Debtor(s)	YES	0			\$ 0.00
J - Current Expenditures of Individual Debtor(s)	YES	0			\$ 0.00
Total Number of sheets in ALL Schedules >		19			
Total Assets >			\$ 4,479,226.61		
Total Liabilities >				\$ 3,991,119.07	

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Filed on SEP 10 2001  
Patrick G. De Wane, Clerk  
By [Signature] Deputy Clerk

CAREFREE LIVING OF AMERICA-BRAINERD  
 BALANCE SHEET  
 SEPTEMBER 30, 2000  
 (SEE ACCOUNTANT'S COMPILATION REPORT)

TENTATIVE STATEMENTS  
 FOR DISCUSSION PURPOSES ONLY  
 SUBJECT TO REVISION

ASSETS

CURRENT ASSETS		
-----		
CASH IN BANK	(60,560.87)	
ACCOUNTS RECEIVABLE	38,854.84	
PREPAID EXPENSES	(16.92)	
ESCROW-ASSET REPLACE	15,818.40	
ESCROW - INSURANCE	10,807.18	
ESCROW - RE TAX	20,176.78	
INVENTORY-FOOD & SUPPLIES	5,068.41	30,147
TOTAL CURRENT ASSETS		
FIXED ASSETS		
-----		
LAND	113,000.00	
BUILDING & FIXTURES	2,482,079.60	
FURNISHINGS & EQUIPMENT	103,527.92	
LESS ACCUMULATED DEPRECIATION	(553,525.34)	
TOTAL FIXED ASSETS		2,145,082.18
OTHER ASSETS		
-----		
FINANCING COSTS	138,580.07	
LESS AMORTIZATION	(52,185.00)	
TOTAL OTHER ASSETS		86,395.07
TOTAL ASSETS		2,261,625.07



Trustee 01467

CAREFREE LIVING AMERICA BRAINERD  
 BALANCE SHEET  
 SEPTEMBER 2000  
 (SEE ACCOUNTANT COMPILATION REPORT)

LIABILITIES AND EQUITY  
 -----

TEMPERATIVE STATEMENTS  
 FOR DISCLOSURE PURPOSES ONLY  
 SUBJECT TO REVISION

CURRENT LIABILITIES	248	
ACCOUNTS PAYABLE	12,422	
ACCRUED PAYROLL		566
ACCRUED VACATION		
ACCRUED INTEREST		339
ACCRUED PROPERTY TAX		
ACCRUED SALES		885
ACCRUED INCOME TAX		
UNEARNED RESIDENT RENTS		
CURRENT MATURITIES LT/DEBT		389,011
TOTAL CURRENT LIABILITIES		
LONG TERM LIABILITIES		
-----		
1ST UNION MORTGAGE	581,332	
LESS CURRENT MATURITIES	(35,974)	
NOTE PAYABLE-BROBERG-BRADLEY		166,057
LIABILITY-LTD PART		
TOTAL LONG TERM LIABILITIES		728,117
TOTAL LIABILITIES		
EQUITY		821,900
-----		
COMMON STOCK		594,077
COMMON STOCK-PAR		
PREFERRED STOCK-APIC		
SPECIAL PREFERRED STOCK	560,277	
PREFERRED STOCK-PAR	(16,257)	
STOCK SUBSCRIPTIONS		
DIVIDENDS		406,505
CAPITAL		
RETAINED EARNINGS		(212,615)
CONTRIBUTED CAPITAL FROM		(240,739)
CONTRIBUTED CAPITAL TO AFF		
CURRENT PERIOD PROFIT (LOSS)		
TOTAL EQUI		
TOTAL LIABILITIES AND EQUITY		624

Trustee 01468

CAREFREE LIVING AMERICA-BURNSVILLE  
 BALANCE SHEET  
 SEPTEMBER 2000  
 (SEE ACCOUNTANT COMPILATION REPORT)

TENTATIVE STATEMENTS  
 FOR DISCLOSURE PURPOSES ONLY  
 SUBJECT TO REVISION

ASSETS

CURRENT ASSETS

-----  
 CASH IN BANK  
 ACCOUNTS RECEIVABLE  
 PREPAID EXPENSES  
 ESCROW-ASSET REPLACE  
 ESCROW - INSURANCE  
 ESCROW - RE TAX  
 INVENTORY-FOOD & SUPPLIES  
 TOTAL CURRENT ASSETS

811  
 510  
 705  
 880  
 12,898  
 104  
 675

594

FIXED ASSETS

LAND  
 BUILDING & FIXTURES  
 FURNISHINGS & EQUIPMENT  
 LESS ACCUMULATED DEPRECIATION  
 TOTAL FIXED ASSETS

288,000  
 322,210  
 195,889  
 (862,528)

OTHER ASSETS

-----  
 FINANCING COSTS  
 LESS AMORTIZATION  
 TOTAL OTHER ASSETS

489  
 (535.00)

227,954

TOTAL ASSETS

CAREFREE LIVING OF AMERICA-BURNSVILLE  
 BALANCE SHEET  
 SEPTEMBER 30, 2000  
 (SEE ACCOUNTANT'S COMPILATION REPORT)

LIABILITIES AND EQUITY  
 -----

TENTATIVE STATEMENTS  
 FOR SIGNATURE PURPOSES ONLY  
 SUBJECT TO REVISION

CURRENT LIABILITIES  
 -----

ACCOUNTS PAYABLE	100,571.95	
ACCRUED PAYROLL	11,365.90	
ACCRUED VACATION	10,926.61	
ACCRUED PAYROLL TAXES	(1,398.40)	
ACCRUED INTEREST	39,651.63	
ACCRUED PROPERTY TAX	123,647.88	
ACCRUED SALES TAX	270.00	
ACCRUED INCOME TAX	3,385.17	
UNEARNED RESIDENT RENTS	26,348.00	
CURRENT MATURITIES LT/DEBT	67,735.00	
	-----	
TOTAL CURRENT LIABILITIES		382,501.74

LONG TERM LIABILITIES  
 -----

1ST UNION MORTGAGE	5,511,760.24	
(LESS CURRENT MATURITIES	(67,735.00)	
NOTE PAYABLE/BROBERG-BRADLEY	16,700.95	
L.T. LIABILITY-LTD PART	190,785.00	
	-----	
TOTAL LONG TERM LIABILITIES		5,651,511.19
		-----
TOTAL LIABILITIES		6,034,014.93

EQUITY  
 -----

COMMON STOCK	1,371,900.00	
COMMON STOCK-PAR	100.00	
PREFERRED STOCK-APIC	797,471.00	
SPECIAL PREFERRED STOCK	10.00	
PREFERRED STOCK-PAR	80.00	
STOCK SUBSCRIPTIONS	(1,169,031.07)	
DIVIDENDS	(21,559.04)	
CAPITAL	30,411.00	
RETAINED EARNINGS	(1,583,225.64)	
CONTRIBUTED CAPITAL FROM A	25,857.00	
CONTRIBUTED CAPITAL TO AFF	(1,099,688.55)	
CURRENT PERIOD PROFIT (LOSS)	(140,362.24)	
	-----	
TOTAL EQUITY		(1,788,037.54)
		-----

TOTAL LIABILITIES AND EQUITY 4,245,977.39

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CAREFREE LIVING OF AMERICA-ST. CLOUD  
 BALANCE SHEET  
 SEPTEMBER 30, 2000  
 (SEE ACCOUNTANT'S COMPILATION REPORT)

ASSETS  
 -----

TENTATIVE STATEMENT  
 FOR DISCUSSION PURPOSES ONLY  
 SUBJECT TO REVISION

CURRENT ASSETS  
 -----

CASH IN BANK	77,274.08	
ACCOUNTS RECEIVABLE	45,057.19	
PREPAID EXPENSES	(249.76)	
ESCROW-ASSET REPLACE	16,328.57	
ESCROW - INSURANCE	11,155.76	
ESCROW - RE TAX	28,430.80	
INVENTORY-FOOD & SUPPLIES	6,278.91	
	-----	
TOTAL CURRENT ASSETS		184,275.55

FIXED ASSETS  
 -----

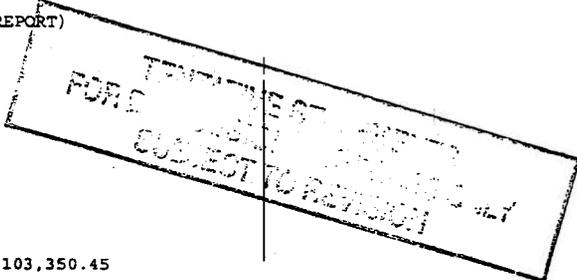
LAND	185,000.00	
BUILDING & FIXTURES	2,081,584.00	
FURNISHINGS & EQUIPMENT	103,215.62	
LESS ACCUMULATED DEPRECIATION	(487,981.00)	
	-----	
TOTAL FIXED ASSETS		1,881,818.62

OTHER ASSETS  
 -----

FINANCING COSTS	156,481.78	
LESS AMORTIZATION	(52,920.00)	
	-----	
TOTAL OTHER ASSETS		103,561.78

TOTAL ASSETS		2,169,655.95
	-----	-----

CAREFREE LIVING OF AMERICA-ST. CLOUD  
BALANCE SHEET  
SEPTEMBER 30, 2000  
(SEE ACCOUNTANT'S COMPILATION REPORT)



LIABILITIES AND EQUITY  
-----

CURRENT LIABILITIES  
-----

ACCOUNTS PAYABLE	103,350.45
ACCRUED PAYROLL	21,163.18
ACCRUED VACATION	11,105.01
ACCRUED PAYROLL TAXES	422.85
ACCRUED INTEREST	21,577.83
ACCRUED PROPERTY TAX	58,149.78
ACCRUED SALES TAX	252.00
ACCRUED INCOME TAX	8,391.40
UNEARNED RESIDENT RENTS	13,866.00
CURRENT MATURITIES LT/DEBT	40,507.00

-----  
TOTAL CURRENT LIABILITIES 278,785.50

LONG TERM LIABILITIES  
-----

1ST UNION MORTGAGE	2,999,934.89
LESS CURRENT MATURITIES	(40,507.00)
NOTE PAYABLE/BROBERG-BRADLEY	16,701.03
L.T. LIABILITY-LTD PART	168,157.51

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TOTAL LONG TERM LIABILITIES 3,144,286.43

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TOTAL LIABILITIES 3,423,071.93

EQUITY  
-----

COMMON STOCK	1,479,900.00
COMMON STOCK-PAR	100.00
PREFERRED STOCK-APIC	702,753.00
SPECIAL PREFERRED STOCK	9.00
PREFERRED STOCK-PAR	70.00
STOCK SUBSCRIPTIONS	(1,261,053.93)
DIVIDENDS	(16,825.62)
CAPITAL	32,798.00
RETAINED EARNINGS	(1,045,952.90)
CONTRIBUTED CAPITAL FROM A	24,463.00
CONTRIBUTED CAPITAL TO AFF	(1,081,955.86)
CURRENT PERIOD PROFIT (LOSS)	(87,720.67)

-----  
TOTAL EQUITY (1,253,415.98)

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TOTAL LIABILITIES AND EQUITY 2,169,655.95

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In re:

Chapter 7

Carefree Living of America (Burnsville), Inc.  
Carefree Living of America (St. Cloud), Inc.  
Carefree Living of America (Brainerd), Inc.

Case No. 01-33545  
01-33546  
01-33547

Debtors.

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Brian F. Leonard, Trustee,

ADV. No. 02-9117

Plaintiff,

**AFFIDAVIT OF RALPH MITCHELL**

v.

Jane L. Strom Revocable Trust,  
Jane L. Strom, Trustee,

Defendants.

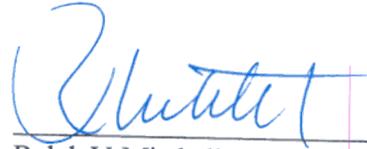
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STATE OF MINNESOTA     )  
  )     ss  
COUNTY OF HENNEPIN    )

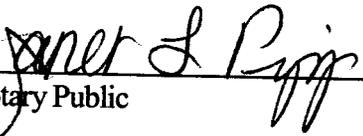
Your affiant being first duly sworn on oath states as follows:

1. I am one of the attorneys for the Defendants in the above matter. I have personal knowledge of the facts herein and if called upon to testify thereto could do so competently. I believe these facts to be undisputed.
2. Attached hereto as Exhibit A are the Trustee's answers to Defendants' Interrogatories.
3. Attached hereto as Exhibit B is a *complete* copy of the Proof of Claim No. 31 filed by attorney Cass Weil on behalf of Linda Simmons fka Linda Selbak.
4. Pursuant to a subpoena, I obtained from Mr. Weil a copy of the Standstill Agreement referred to in the Amendment to Settlement Agreement. A copy is attached hereto as Exhibit C.

5. Further your affiant says not.

  
\_\_\_\_\_  
Ralph V. Mitchell

Subscribed and sworn to before me  
this 13<sup>th</sup> day of October, 2004

  
\_\_\_\_\_  
Notary Public



UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In Re:

Chapter 7

Carefree Living of America (Burnsville), Inc.  
Carefree Living of America (St. Cloud), Inc.  
Carefree Living of America (Brainerd), Inc.

Case No. 01-33545  
01-33546  
01-33547

Debtors.

---

Brian F. Leonard, Trustee,

ADV Case No. 02-9117

Plaintiff,

v.

**PLAINTIFF'S ANSWERS TO DEFENDANTS'  
FIRST SET OF INTERROGATORIES AND  
REQUEST FOR PRODUCTION OF DOCUMENTS**

Jane L. Strom Revocable Trust,  
Jane L. Strom, Trustee, and  
Jane L. Strom, individually,

Defendants.

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**TO: DEFENDANTS AND THEIR ATTORNEYS, RALPH V. MITCHELL, LAPP, LIBRA,  
THOMSON, STOEBNER & PUSCH, CHARTERED, ONE FINANCIAL PLAZA,  
SUITE 2500, 120 SOUTH SIXTH STREET, MINNEAPOLIS, MINNESOTA 55402.**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Plaintiff

Brian F. Leonard ("Plaintiff") hereby submits his Answers and his attorneys submit their objections to Defendants' Interrogatories to Plaintiff.

Answers are made without in any way waiving or intending to waive, but on the contrary, intending to preserve and preserving:



1. All questions as to competence, relevance, materiality, privilege and admissibility in evidence for any purpose, of the answer or subject matter thereof, in any subsequent proceeding in, or at the trial of, this or any other action;

2. The right to object to the use of any of said Answers, or subject matter thereof, in any subsequent proceeding in, or at the trial of, this or any other action;

3. The right to object on any ground at any time to a demand for further response to these or any other interrogatories or other discovery procedures involving or relating to the subject matter of the interrogatories herein answered; and

4. The right at any time to revise, correct, add to, or clarify any of the answers propounded herein.

Subject to these objections and without waiving the same, Plaintiff, for his Answers to Defendants' Interrogatories, Answer as follows:

**INTERROGATORIES**

**INTERROGATORY NO. 1:** Identify all persons providing answers to these interrogatories.

**ANSWER:** Brian F. Leonard, Trustee.

**INTERROGATORY NO. 2:** Identify all persons, by name, address and relationship to Debtors, that you believe to have knowledge of any of the facts relevant to the allegations in the complaint and for each summarize the knowledge you believe such person to have.

**ANSWER:**

Brian F. Leonard

Merle Sampson, 2020 East Hennepin Avenue, Suite 300, Minneapolis, MN 55413-2725. Mr. Sampson has knowledge of the operations of the debtors, the value of the debtors' assets and facilities and the financial statements generated by the debtors.

Kathleen Zeller, address unknown, believed to be in the principality of Andorra. She has knowledge of the operations of the debtors prior to January 4, 2002.

Steve Hagberg, Mike Mahoney, Mark Peery, and other attorneys, staff and employees of Mahoney & Hagberg. All of the foregoing have knowledge of the business operations of the debtors and the debtors' affiliates.

Vern Zeller, address unknown, believed to be related to Kathleen Zeller, who has knowledge of the operations of the Debtors prior to January 4, 2002, by virtue of being an employee thereof.

**INTERROGATORY NO. 3:** Identify each and every witness you intend to call at trial and for each summarize the testimony you expect such witness to provide.

**ANSWER:** Witnesses to be called for trial have not been determined, and will be disclosed pursuant to pretrial orders of the court.

**INTERROGATORY NO. 4:** Identify each and every document you intend to introduce at trial.

**ANSWER:** Documents to be introduced at trial have not been determined and will be identified pursuant to pretrial orders of the court.

**INTERROGATORY NO. 5:** Identify each and every debtor, affiliate of the debtor[s] corporate manager of the debtor[s], and creditor of the debtor you claim Mahoney & Hagberg (M&H) simultaneously represented and state all facts and identify all documents that support your contention that such simultaneous representations makes the Jane Strom Trust and Jane Strom insiders.

**ANSWER:** Each of the debtors, Summa Management Company, Kathleen Zeller, Vern Zeller, Will Sellback, and all entities and individuals identified and named in the documents

filed in connection with the Proof of Claim filed by Mahoney & Hagberg in these cases, and in connection with responses of Mahoney & Hagberg to the Trustee's objection to its claim.

**INTERROGATORY NO. 6:** Describe the relevant times as used in the phrase "at all relevant times" in paragraph 3 of the Complaint.

**ANSWER:** The relevant times are from the date Kathleen Zeller and Summa Management Inc. obtained control of the debtors to the present date.

**INTERROGATORY NO. 7:** Describe in detail all facts and identify all documents that support your allegation that the Strom Trust advanced \$50,000 to the law firm Faegre & Benson.

**ANSWER:** See copy of check submitted as an exhibit to the Defendant's motion for dismissal of case.

**INTERROGATORY NO. 8:** List each and every payment by date, amount, check number, bank and account drawn, signatory and place of deposit, you contended were made by the debtor[s] to the Strom Trust and identify each and every documents that supports your contention.

**ANSWER:** The Plaintiff bases his allegations with respect thereto on the difference between the Promissory Note No. 2 and the Proof of Claim filed by the Defendants, which taken together reflect a reduction in the indebtedness of \$20,000.00. The documents requested are in the possession of the Defendants and their counsel.

**INTERROGATORY NO. 9:** Identify all facts and documents that support your contention that the debtors were insolvent for all purposes during the one year preceding the petition date.

**ANSWER:** Interviews with Merle Sampson, together with the fact that the debtors' facilities were in foreclosure and the subject of receivership actions, and were being mismanaged by the debtors' management.

**INTERROGATORY NO. 10:** Identify all persons who have made estimates or appraisals of all of the debtor's property and for each identify the person making such estimate appraisal, the date such estimate appraisal made, the date which such property valued and the dollar amount of such estimate appraisal, broken down into such components the person providing the estimate appraisal may have made

**ANSWER:** Merl Sampson Mr Sampson is experienced buying and selling nursing home and health facilities. His opinions were formed during the time his company Spectrum Community Health, Inc. hired by the Trustee for the management of the debtors' facilities.

**INTERROGATORY NO. 11:** State all facts and identify all documents that reflect, refer or relate in any way to your contention that the Trust and Jane Strom were insiders at all relevant times.

**ANSWER:** The facts involved in the relationship of Steve Hagberg and Jane Strom and the relationship of Mahoney & Hagberg, and all of its attorneys and employees to the debtors, Kathleen Zeller, Summa Management Company and Vicki Zeller. Mahoney & Hagberg were involved and were believed to have controlled the Debtor and its transactions with its affiliates and third parties, and had intimate detailed knowledge of the debtors financial condition and transactions. Jane Strom and Steve Hagberg also had and were privy to such knowledge, and thereby were insiders as that term is used in the Bankruptcy Court. Mahoney & Hagberg represented an affiliate known as Carefree Living of America (Minnetonka) Inc. in extensive and protracted litigation. Mahoney & Hagberg engineered the transfer of ownership and control of the Debtors from Will Selbak to Kathleen Zeller and Summa Management Company.

**INTERROGATORY NO. 12:** Describe the relevant times as used in the phrase "at all relevant times" in paragraph 10 of the Complaint, state the date you contend the Strom Trust and Jane Strom first became insiders and describe all facts and what event or event[s] occurred on or before such date to vest these Defendants with insider status.

**ANSWER:** See Answer to Interrogatory No. 11. The Defendants were insiders at the same time, and upon the same facts, that Steven Hagberg, Michael Mahoney, and Mahoney & Hagberg, P.A., were insiders of the Debtors.

**INTERROGATORY NO. 13:** Describe in detail and identify all documents that support your contention that the Debtors received no consideration for the execution of Note 1, Note 2, and the Mortgage.

**ANSWER:** The check paid by the Strom Trust to the law firm of Faegre & Benson does not reflect that the Debtors received a benefit from that payment. To the extent that the proceeds of said check ultimately were received by First Union as a payment on the obligations owed by the Debtors to First Union, then and to that extent, the Plaintiff would agree that consideration was received by the Debtors for the execution of Note 1. However, information to that effect has not been supplied by the Defendants in their Motion to Dismiss. The Plaintiff is unaware of any new value given in exchange for the Mortgage.

**INTERROGATORY NO. 14:** Describe in detail what steps you took to verify that the amounts claimed by First Union were accurate and state whether the steps you took revealed that \$50,000 was paid to First Union by Faegre & Benson on or about September 11, 2000.

**ANSWER:** The undersigned does not understand what is meant by "steps you took to verify that the amounts claimed by First Union were accurate". The undersigned assumes that the question

refers to the amounts owed by First Union under their mortgage and loan agreements with the Debtors. The payoff to First Union on the sale of the Debtors' facilities was in an amount less than the amount claimed by First Union. First Union was claiming approximately \$12.3 million, and it agreed to a reduction of its payoff to \$12.0 million, in order to facilitate the sale of the facilities. The buyer in that transaction assumed the \$12.0 million mortgage balance, and First Union's motivation for reducing its payoff was the value of having a stable owner and proper management for the facilities, on which First Union retained a \$12.0 million mortgage.

**INTERROGATORY NO. 15:** Do you contend that the \$50,000 check identified as Exhibit D to Defendants' Memorandum in Support of Motion to Dismiss and for Stay of Discovery dated November 25, 2002 did not contain funds from an account owned by the Strom Trust, was not endorsed by Faegre & Benson and paid to First Union, or was not applied by First Union to the debtor[s] mortgage[s]? If you do, describe in detail each and every fact and identify each and every document that supports such contention.

**ANSWER:** See Answer to Interrogatory No. 13.

**INTERROGATORY NO. 16:** For all payments made and the Mortgage at all times it was recorded in the counties of Benton, Crow Wing and Dakota, describe in detail all facts and identify all documents that support your contention in paragraph 14 of the Complaint that the Defendants received more than they would have in a chapter 7, identifying all cash in the estate, the source of such cash, all expenditures or anticipated expenditures from the estate (including attorneys' fees and trustee fees), non-cash property of the estate remaining to be administered and the likely recovery from any avoidance or turnover actions.

**ANSWER:** The Debtors substantially and considerably insolent the time the mortgage was conveyed by the Debtors to the Defendants. The value of the Debtors' assets at the time, was substantially less than the amounts owed to First Union, Internet Financial and other purported lienholders the Debtors' assets. **It is** believed that the aggregate value of the Debtors' assets at the time of the transfer of the mortgage to the Defendants, was less than 2. million. This valuation is based, in large part, upon the mismanagement of the Debtors' facilities, and the payments made from the Debtors to Summa Management, Inc. and Kathleen Zeller which contributed to the cash flow drain of the Debtors. In addition, the mortgage foreclosure and receivership actions against the Debtors further exerted downward pressure on the value of the Debtors' assets. The bankruptcy estate has approximately \$600,000.00 in its bank accounts. The Defendants can access the claims filed against the estate on the Court's website.

**INTERROGATORY NO. 17:** Describe in detail all facts and identify all documents that support your contention that there existed an intent to hinder, delay or defraud creditors, and identify which creditors were intended to be hindered, delayed or defrauded.

**ANSWER:** The facts identified and set forth in the plaintiff's responsive memorandum to the plaintiff's motion to dismiss in this case. In summary, the Mortgage purportedly given to the Defendants by the Debtor was part of an overall "asset grab" by Mahoney & Hagberg. And the Defendants, in order to hinder and delay legitimate creditors of the Debtors.

**INTERROGATORY NO. 18:** Describe in detail all facts and identify all documents that support your contention that the alleged transfers by the debtors were made without consideration or reasonably equivalent value.

**ANSWER:** No new consideration was given by the Defendants for the transfer of the Mortgage. The Defendants have failed to identify any such new consideration in their pleadings and in their motion to dismiss.

**INTERROGATORY NO. 19:** Describe in detail all facts and identify all documents that support your contention that the debtors were engaged in a business for which the remaining assets of the debtors were unreasonably small in relation to the debtor's business or that the debtors intended to incur or reasonably should have believed that the debtors would incur debts beyond the debtor's ability to pay as they became due.

**ANSWER:** The facts which support this contention are the facts surrounding the foregoing actions, and receivership actions, to which the Debtors were subject, and the constant state of default in which the Debtors were relative to their mortgage obligations and creditor obligations. The documents which support this contention are the Petition and Schedules filed by the Debtors, together with the underlying records of the Debtors reflecting the amounts owed to its creditors.

**INTERROGATORY NO. 20:** State whether you contend that the mortgages granted by the debtors to First Union were not valid and enforceable liens in the debtor[s] real property and whether you contend that they are avoidable or invalid in any way.

**ANSWER:** The Plaintiff does not contend that the First Union Mortgage were invalid or unenforceable or avoidable.

**INTERROGATORY NO. 21:** Describe in detail all facts and identify all documents that reflect, refer or relate to the debtors' transaction[s] with Internet Financial.

**ANSWER:** Internet Financial apparently held a lien on the debtors' personal property assets, based upon loan documents and UCC-1 filings made at the time the loan to the Debtors was made.

## DOCUMENT REQUESTS

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff hereby submits his responses to the Request for Production of Documents. All documents produced herewith are made without in any way waiving or intending to waive, but on the contrary, intending to preserve and preserving:

1 All questions as to competence, foundation, relevance, materiality, privilege and admissibility in evidence for any purpose in any subsequent proceeding, or at the trial of this or any other action;

2. The right to object to the use of said documents or subject matter thereof, in any subsequent proceeding or at the trial of this or any other action;

3 The right to object on any ground at any time to demand further answers or responses to these or any other interrogatories or requests for production of documents or other discovery procedures involving or relating to the documents produced herewith; and

4. The right at any time to revise, correct, add to, or supplement the answers and responses made herein.

Subject to the foregoing objections, Plaintiff hereby responds as follows:

### DOCUMENT REQUESTS

**REQUEST NO. 1:** All documents identified in your responses to Defendants' First Set of Interrogatories to Plaintiff or referred to by you in answering such interrogatories.

**RESPONSE:** The Plaintiff believes that Defendants have all documents identified in his responses to the Defendants' First Set of Interrogatories.

**REQUEST NO. 2:** All documents you expect to use as exhibits at trial.

**RESPONSE:** All such documents will be produced pursuant to the court's pretrial order.

**REQUEST NO. 3:** All estimates or appraisals of value, formal or informal for any of the debtor's real or personal property.

**RESPONSE:** The appraisals were made by, or on behalf of, First Union at the time it initially placed its mortgage on the Debtors' premises, and will be produced at a mutually agreed time and place.

**REQUEST NO. 4:** All financial statements prepare by, or for, the debtors for all months, quarterly and annually for the years 2000, 2001 and 2002.

**RESPONSE:** Such financial statements as are in the possession of the undersigned are available for inspection and copying at a mutually arranged time.

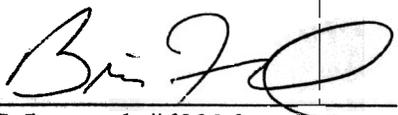
**REQUEST NO. 5:** All documents evidencing any contingent assets or liabilities of the debtor existing at any time in the year 2002.

**RESPONSE:** The Plaintiff does not understand what Defendants mean by "contingent assets or liabilities". The Plaintiff will produce all documents in his possession relating to the Debtors' financial condition at a time and place to be mutually arranged.

**AS TO OBJECTIONS:**

**LEONARD, O'BRIEN  
WILFORD, SPENCER & GALE, LTD.**

Dated: March 4, 2003

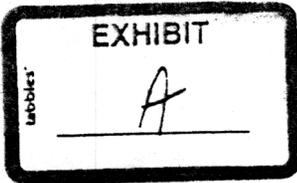
By   
\_\_\_\_\_  
Brian F. Leonard, #62236  
Attorneys for Plaintiff  
100 South Fifth Street, Suite 1200  
Minneapolis, Minnesota 55402-1216  
(612) 332-1030

Dated: March 4, 2003

  
\_\_\_\_\_  
Brian F. Leonard, Trustee

<b>United States Bankruptcy Court - District of Minnesota</b>		<b>PROOF OF CLAIM</b>
Name of Debtor <b>Carefree Living of America (Burnsville), Inc. et a</b>		Case Number <b>01-33545-7</b>
Name of Creditor (The person or other entity to whom the debtor owes money or property): <b>Linda Simmons fka Linda Selbak</b>		<div style="border: 1px solid black; padding: 5px;"> <p style="font-size: 24px; margin: 0;">RECEIVED</p> <p style="font-size: 18px; margin: 0;">01 DEC -6 AM 10: 06</p> <p style="margin: 0;">U.S. BANKRUPTCY COURT ST. PAUL, MN</p> </div> <p style="font-size: 10px; margin-top: 10px;">THIS SPACE IS FOR COURT USE ONLY</p>
Name and address where notices should be sent: <b>Cass S. Weil, Esq. Moss &amp; Barnett 4800 Wells Fargo Center 90 South Seventh street Minneapolis, MN 55402</b>		
Telephone number: <b>(612) 381-9436</b>		
Account or other number by which creditor identifies debtor:		<input type="checkbox"/> Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.  <input type="checkbox"/> Check box if you have never received any notices from the bankruptcy court in this case.  <input type="checkbox"/> Check box if the address differs from the address on the envelope sent to you by the court.
1. Basis for Claim <input type="checkbox"/> Goods sold <input type="checkbox"/> Services performed <input type="checkbox"/> Money loaned <input type="checkbox"/> Personal injury/wrongful death <input type="checkbox"/> Taxes <input checked="" type="checkbox"/> Other <u>See attached</u>		<input type="checkbox"/> Retiree benefits as defined in 11 U.S.C. § 1114(a) <input type="checkbox"/> Wages, salaries, and compensation (fill out below) Your SS #: _____  Unpaid compensation for services performed from _____ to _____ (date) (date)
2. Date debt was incurred: <b>3/26/98</b>		3. If court judgment, date obtained:
4. Total Amount of Claim at Time Case Filed: <b>\$ 3,500,000.00</b> If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below.		
<input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.		
5. Secured Claim. <input type="checkbox"/> Check this box if your claim is secured by collateral (including a right of setoff).  Brief Description of Collateral: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other _____  Value of Collateral: \$ _____  Amount of arrearage and other charges at time case filed included in secured claim, if any: \$ _____		6. Unsecured Priority Claim. <input type="checkbox"/> Check this box if you have an unsecured priority claim Amount entitled to priority \$ _____ Specify the priority of the claim: <input type="checkbox"/> Wages, salaries, or commissions (up to 4,650)* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor business, whichever is earlier - 11 U.S.C. § 507(a)(3). <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4). <input type="checkbox"/> Up to \$2,100* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6). <input type="checkbox"/> Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8). <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. § 507(a)( ): _____ <small>*Amounts are subject to adjustment on 4/1/04 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</small>
7. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.		THIS SPACE IS FOR COURT USE ONLY
8. Supporting Documents: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.		<div style="font-size: 48px; font-weight: bold; opacity: 0.5;">31</div>
9. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.		
Date <b>December 4, 2001</b>	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):  <div style="text-align: center;"> <p><b>Cass S. Weil, Attorney for Linda Simmons</b></p> </div>	
Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 11 U.S.C. §§ 152 and 171		





**AGREEMENT**

This Agreement is entered into effective the 26<sup>th</sup> day of March, 1998 by and among Summa Management, Inc., a Delaware corporation ("Summa"), Minnesota Home Health Care, Inc., f/k/a Carefree Living Home Health Agency, Inc., a Minnesota corporation, Carefree Living of America (Minnetonka), Inc., Carefree Living of America (Burnsville), Inc., Carefree Living of America (St. Cloud), Inc., and Carefree Living of America (Brainerd), Inc., all Delaware corporations (collectively, the "Entities"), and Linda Marie Selbak ("Ms. Selbak").

**RECITALS**

**WHEREAS**, Ms. Selbak has been awarded certain rights and damages against Wilnard L. Selbak, a/k/a Will Selbak, pursuant to the Amended Final Judgment of Dissolution of Marriage entered by the Collier County Circuit Court, Florida (Case No. 95-2039-CA-01-HDH) ("Order");

**WHEREAS**, the Entities and Summa, which is the majority shareholder of record of each of the Entities wish to acquire ownership of all rights, title and interest Ms. Selbak has arising out of the Order that affect any right, title, interests or assets affecting the Entities, including stock ownership and voting rights in the Entities;

**WHEREAS**, the Entities have brought suit against Ms. Selbak in the United States District Court for Minnesota, Court File No. 97-902 PAM/JGL and Court File No. 4-96-1239;

**WHEREAS**, Ms. Selbak denies that any such claims have merit and has brought a counterclaim against the Entities;

**WHEREAS**, the Entities and Ms. Selbak have agreed to amicably resolve all of their disputes;

**WHEREAS**, Ms. Selbak was an employee of some of the Entities and acquired knowledge and information which could be used to compete with the Entities.

**NOW, THEREFORE**, in consideration of the mutual covenants, agreements, representations and warranties set forth herein the parties hereto do hereby agree and covenant as follows:

**ARTICLE I**

**SETTLEMENT**

1.1 Settlement. Subject to the terms and conditions set forth in this Agreement ("Agreement"), at the Closing, as defined in Paragraph 7.1, the Entities acting jointly shall make the payments to Ms. Selbak as hereinafter provided in Article

II, and Ms. Selbak shall irrevocably assign and convey to the Entities certain rights, title, interests and claims arising out of the Order affecting the interests of Wilnard L. Selbak as hereinafter provided in Article II, as a full and complete settlement of all claims and as compromise of alleged losses and attorneys' fees that Ms. Selbak and the Entities may have against each other.

## ARTICLE II

### SETTLEMENT, PAYMENT AND RELEASE

2. Settlement Price. Subject to the terms and conditions set forth in this Agreement, the Entities at the Closing shall: (a) pay Ms. Selbak \$12,000; (b) issue to Ms. Selbak those shares of Special Preferred Stock of each of the Entities having the rights, privileges, terms and conditions set forth in Paragraph 3.1(a) of this Agreement, which number of shares is calculated as set out in Schedule 2.1 of this Agreement; and (c) on or before May 31, 1998, pay Ms. Selbak \$10,250.
- 2.2 Covenant Not to Compete. Subject to the terms and conditions set forth in this Agreement, the Entities shall pay to Ms. Selbak the sum of \$10,000 payable on the fifteenth (15<sup>th</sup>) day of each month commencing on April 15, 1998, until Ms. Selbak's death. In consideration of such payments, Ms. Selbak shall not in any way compete, directly or indirectly, with the business of the Entities in the State of Minnesota or in any state or province in which the Entities have any facility or do any business. The Entities acknowledge and agree that in the event Ms. Selbak dies before March 15, 2008, the Entities shall continue to make the same payments otherwise due hereunder to Ms. Selbak's heirs through March 15, 2008. Thereafter, the Entities shall have no further liability or obligation to Ms. Selbak's heirs.
- 2.3 Employment. Subject to the terms and conditions set forth in this Agreement, the Entities shall hire and retain Ms. Selbak as an employee of the Entities commencing at the Closing date and continuing until terminated in accordance with the terms of this Agreement to provide the Entities with such advice with respect to such matters as she has knowledge and information or experience, especially whatever knowledge she has with respect to matters provided to her by Wilnard L. Selbak as founder of the Entities. In consideration of such services the Entities shall pay to Ms. Selbak the sum of \$250 on the first (1<sup>st</sup>) day of each month. In addition, Ms. Selbak shall be entitled to the same group medical benefits as the other employees of the Entities, provided Ms. Selbak shall be subject to such conditions and requirements of coverage as are all employees of the Entities. Ms. Selbak shall provide such advice as the Entities shall reasonably request. The Entities may terminate this employment agreement only for cause and cease making such payments, except that the obligation to provide medical insurance shall continue until July 30, 2011 or until Ms. Selbak is entitled to receive Medicare benefits, whichever is later. Cause shall consist of a criminal act by Ms. Selbak against the interests of the Entities.

Severance Payment Option. The Entities shall have the right to make a severance or lump sum payment to terminate all obligations to continue to make payment of the sums due under the provisions of the Covenant Not to Compete and Employment paragraphs of this Agreement (Paragraphs 2.2 and 2.3). The Entities have no right to terminate or limit their obligations to provide medical insurance as provided in Paragraph 2.3. Such severance payment shall be calculated using the actuarial tables set out in Volume 43 of Minnesota Statutes Annotated, which currently indicate a life expectancy for Ms. Selbak of 31.2 years. The severance payment shall be calculated by computing the present value of the stream of payments of \$10,250 per month over the actuarially determined remaining life of Ms. Selbak taken from the actuarial tables described above. The discount rate to be used shall be six percent (6%). The present value of the stream of monthly payments of \$10,250 over Ms. Selbak's actuarially determined remaining life is currently approximately \$1,733,200. Such actuarial value will decrease at the discount rate based upon the actuarial tables mentioned above.

- 2.5 Power of Attorney. Subject to the terms and conditions hereof, at the Closing Ms. Selbak shall execute and deliver to the Entities a power-of-attorney appointing the Entities, or their agents and representatives, as attorney-in-fact with full authority to act on her behalf with respect to the enforcement of the rights that she assigned to the Entities under this Agreement, including, but not limited to, the enforcement of all rights, title, and interest Ms. Selbak has assigned to the Entities arising out of the Order that affect any right, title, interest or asset of the Entities, including stock ownership and voting rights.

Release and Dismissal. In consideration of payment of the payments provided in Paragraph 2.3 and upon fulfillment of the other conditions of Closing, the Entities and Ms. Selbak shall agree to the following releases:

- (a) Without admitting liability, the Entities on behalf of themselves, their agents, representatives, officers, shareholders, employees, subsidiaries, affiliates, predecessors, successors and assigns, do hereby release and forever discharge Ms. Selbak, her agents, representatives, officers, shareholders, employees, subsidiaries, affiliates, predecessor, successors and assigns from any and all claims, counterclaims, crossclaims, actions, causes, causes of action, administrative claims, claims of interest, liquidated or punitive damages, attorneys' fees, costs and disbursements, individual and class action claims, and demands of any kind whatsoever which could have been asserted by the Entities, in connection with their claims in the United States District Court of Minnesota, captioned Minnesota Home Health Care, Inc., et al. v. Linda Marie Selbak, and filed as Civil Number 97-902 (PAM/JGL), and Minnesota Home Health Care, Inc. et al. v. Emeritus Corporation and Linda Marie Selbak, filed as Civil Number 4-96-1239 (JMR/FLN), and in connection with the Order, prior to the execution of this Agreement, or any claim whether arising in tort,

contract or by statute, whether known, suspected or unknown, arising in law or in equity and however originating or existing from the beginning of time to the date of the execution of this Agreement.

(b) Without admitting liability, Ms. Selbak on behalf of herself, her agents, representatives, officers, shareholders, employees, subsidiaries, affiliates, predecessors, successors and assigns, does hereby release and forever discharge the Entities, their agents, representatives, officers, shareholders, employees, subsidiaries, affiliates, predecessor, successors and assigns from any and all claims, counterclaims, crossclaims, actions, causes, causes of action, administrative claims, claims of interest, liquidated or punitive damages, attorneys' fees, costs and disbursements, individual and class action claims, and demands of any kind whatsoever which could have been asserted by Ms. Selbak, in connection with her counterclaims in the United States District Court of Minnesota, captioned Minnesota Home Health Care, Inc. et al. v. Linda Marie Selbak, and filed as Civil Number 97-902 (PAM/JGL), and Minnesota Home Health Care, Inc. et al. v. Emeritus Corporation and Linda Marie Selbak, filed as Civil Number 4-96-1239 (JMR/FLN), prior to the execution of this Agreement, or any claim whether arising in tort, contract or by statute, whether known, suspected or unknown, arising in law or in equity and however originating or existing from the beginning of time to the date of the execution of this Agreement.

(c) Immediately following the Closing, Ms. Selbak shall dismiss without prejudice her pending actions against the Entities in the case of Minnesota Home Health Care, Inc. et al. v. Linda Marie et al., in the United States District Court for Minnesota, Court File No. 97-902 PAM/JGL, and Minnesota Home Health Care, Inc. et al. v. Emeritus Corporation and Linda Marie Selbak, filed as Civil Number 4-96-1239 (JMR/FLN), and her petition for the appointment of a receiver of Wilnard L. Selbak. Immediately following the Closing, the Entities shall dismiss without prejudice their pending action against Ms. Selbak in the case of Minnesota Home Health Care, Inc. et al. v. Linda Marie Selbak et al., in the United States District Court, Court File No. 97-903 PAM/JGL and Minnesota Home Health Care, Inc. et al. v. Emeritus Corporation and Linda Marie Selbak, filed as Civil Number 4-96-1239 (JMR/FLN). These actions may be commenced again by either party hereto in the event of default and termination of this Agreement.

2.7 Collateral for Payment. In order to secure payment of the obligations of the Entities to Ms. Selbak under this Agreement, the Entities hereby agree to use their best efforts to grant Ms. Selbak a security interest in the assets of the Entities as well as a mortgage on the real property interests of the Entities. The Entities will execute an assignment of the proceeds from any sale of the assets of the Entities, all subject to all existing liens and encumbrances. The Entities may refuse to take

any action to grant such protection to Ms. Selbak in the event that any principal lender or lien holder refuses to permit such encumbrances. However, the Entities are aware of no impediment to the execution and recording of the assignment of proceeds contemplated in this paragraph. Ms. Selbak acknowledges that it is desirous or may be advantageous to the Entities to refinance the existing financing, liens and encumbrances and acknowledges and agrees that any rights she may have under any security interest, mortgage or assignment shall be subordinate to the interests of any financing or refinancing by the Entities used primarily for debt repayment or working capital of the Entities up to one hundred twenty five percent (125%) of the amount of existing indebtedness plus any amounts to which Ms. Selbak may agree upon a showing by the Entities of a reasonable need for working capital. Ms. Selbak agrees to execute and file any document reasonably necessary to carry out the intention of this agreement to subordinate in the future at the reasonable request of the Entities.

Acknowledgment Regarding Subsequent Discovery. Ms. Selbak hereby acknowledges that she might discover facts in addition to or different from the those which she knows of or believes to be true and that it is her intention, in return for the rights provided by this Agreement to fully, finally and forever settle and release any and all claims against the Entities, known or unknown, suspected or unsuspected, contingent or noncontingent, whether concealed or hidden which now exist, may hereafter exist, or may heretofore have existed, without regard to the subsequent discovery of existence of such different or additional facts.

Prior Notice of Sale or Reorganization. The Entities and Summa shall not sell any or all of their assets or make any change in their capital organizational structures or issue any unissued (as of the date of closing) stock without not less than ten (10) days prior written notice to Ms. Selbak. The Entities and Summa agree that they will not make any such sale, change or issuance unless such sale, change or issuance is for a legitimate business purpose and does not unreasonably jeopardize Ms. Selbak's rights under this Agreement.

### ARTICLE III

## ENTITIES' REPRESENTATIONS, WARRANTIES, AND COVENANTS

- 3.1 Representations and Warranties: The Entities represent and warrant as set forth below in this Paragraph 3.1.
- (a) Designation and Issuance of Preferred Stock. The Entities within ten (10) days of approval of the Settlement Agreement with the Limited Partners, a copy of which has been provided to Ms. Selbak, but in no event no later than ninety (90) days after closing shall create and designate a variable rate, cumulative, non-voting Special Preferred Stock. The creation and designation of the Special Preferred Stock shall be by corporate resolutions of the Entities substantially in the form attached hereto as Exhibit 3.1. The shares of such Special Preferred Stock shall be issued by

each Entity in such numbers of shares as shall be equal to five percent (5%) of the then to be outstanding shares of capital stock of each Entity.

The Special Preferred Stock shall be nonvoting except under an Event of Default, as defined in Section 3.3, continuing for more than ninety (90) days. In the case of a default continuing for more than ninety (90) days, the Special Preferred Stock shall become voting stock entitling the holder thereof to one vote on all matters submitted to a vote of an Entity's stockholders. The Preferred Stock will provide Ms. Selbak with the right to receive in the aggregate five percent (5%) of all amounts distributed to shareholders as a result of any liquidation or sale of an Entity in addition to any other payments to which she is entitled pursuant to this Agreement. In the event an Entity is liquidated or sold, and if in conjunction with such sale or liquidation the Entities elect to exercise their severance payment option set forth in Paragraph 2.4, Ms. Selbak will receive five percent (5%) of the shareholder distribution proceeds of such liquidation or sale in addition to the severance payment amount.

- (b) Organization and Good Standing; Qualification. Each of the Entities and Summa is a corporation duly organized, validly existing and in good standing under the laws of its state of incorporation, with all requisite corporate power and authority to carry on the business in which it is engaged, to own properties it owns, to execute and deliver this Agreement and to consummate the transactions contemplated hereby.
- (c) Authorization and Validity. The execution, delivery and performance of the Entities and Summa of this Agreement and other agreements contemplated hereby to which each Entity and Summa is or will be a party, and the consummation by each Entity and Summa of the transactions contemplated hereby and thereby, have been duly authorized by proper corporate action of each Entity and Summa. This Agreement has been, and each other agreement contemplated hereby to which each Entity and Summa is or will be a party will as of the Closing Date be, duly executed and delivered by each Entity and Summa and constitutes or will constitute the legal, valid and binding obligation of each Entity and Summa, enforceable against each Entity and Summa in accordance with its terms, except as may be limited by applicable bankruptcy, insolvency, or similar laws affecting creditors' rights generally and subject to principles of equity and public policy that affect enforceability of agreements in general.
- (d) Capitalization. The authorized capital stock of Carefree Living of America (Brainerd), Inc., Carefree Living of America (Burnsville), Inc., and Carefree Living of America (St. Cloud), Inc., all Delaware Corporations, consists of for each entity: (i) 9,000 shares of Class A non-voting common stock, par value \$.01 per share, of which 9,000 shares are

issued and outstanding; and (ii) 1,000 shares of Class B voting common stock, par value \$.01 per share, of which 1,000 shares are issued and outstanding. The authorized capital stock of Carefree Living of America (Minnetonka), Inc., a Delaware Corporation, consists of: (i) 10,000 shares of common stock, par value \$.01, of which 10,000 shares are issued and outstanding; and (ii) 180 shares of preferred stock, par value \$.01 per share, of which no shares are issued and outstanding. The authorized capital stock of Minnesota Home Health Care, Inc., a Minnesota corporation, consists of 5,000 shares of common stock, par value \$.01 per share, of which 500 shares are issued and outstanding. All of the issued and outstanding shares of capital stock of the Entities is duly authorized, validly issued, fully paid and nonassessable.

Carefree Living of America (Brainerd), Inc., Carefree Living of America (Burnsville), Inc., and Carefree Living of America (St. Cloud), Inc. shall amend their certificates of incorporation to authorize each to have 100,000 shares of variable rate, cumulative, non-voting, convertible, preferred stock, par value \$.01, of which 27,500 of those shares shall be issued and distributed among Carefree Living of Burnsville, Ltd., Brainerd Manor, Ltd., and St. Cloud Manor, Ltd., all Minnesota limited partnerships, upon closing of a final settlement agreement.

- (e) Accuracy of Records Furnished. Any records furnished to Ms. Selbak by the Entities and Summa in connection with the transactions contemplated hereby are materially accurate and complete to the best of the Entities knowledge.
- (f) Statements Regarding Future Financial Condition. Notwithstanding anything in this Agreement to the contrary, the Entities and Summa make no warranty or representation, express or implied, with respect to the future financial condition or future results of operations, or the future assets or liabilities of the Entities. Nothing in this Agreement, however, will be construed to limit or otherwise qualify the effectiveness of the representations made in this Agreement.
- (g) Representations True at Closing. All representations made by the Entities and Summa in this Article III will be true on the Closing Date.

3.2 Covenants. Unless waived in writing by Ms. Selbak, as long as any shares of Special Preferred Stock remain outstanding, the Entities shall:

- (a) Financial Statements and Review. The Entities shall provide Ms. Selbak with copies of whatever annual financial statements are prepared by the Entities on an annual basis within ninety (90) days of the Entities year-end. Such Financial Statements shall be deemed confidential and shall not be disseminated by Ms. Selbak to anyone other than her lawyers and accountants except pursuant to court order. The Entities shall grant Ms.

Selbak or her lawyers at any reasonable time and place access to the Entities' financial books and records for her review for purposes of determining the Entities full and complete compliance with the terms and conditions of this Agreement. If an Event of Default (as defined below) occurs, Ms. Selbak and her agent shall have the right to inspect the financial records of the Entities upon forty-eight (48) hours notice.

- (b) Confession of Judgment. Subject to the terms and conditions set forth in this Agreement, the Entities and Summa shall execute and deliver to Ms. Selbak Confessions of Judgment, substantially in the form attached hereto as Exhibit 3.2(b), that may be filed by Ms. Selbak in the Event of a Default, as defined in Section 3.3, or failure to provide insurance required under this Article III that continues for more than ninety (90) days from receipt of written notice, except that a Confession of Judgment against Summa shall only be filed if an assignment of rights of the Entities under Paragraph 5.2 actually occurs. The Confessions of Judgment shall provide for acceleration of the entire balance under the Agreement, without discount, as well as collection costs and reasonable attorneys' fees incurred in enforcing Ms. Selbak's rights under the Confessions of Judgment.
- (c) Notices. As soon as practicable, the Entities and Summa, only if an assignment of rights of the Entities under Paragraph 5.2 actually occurs, shall give notice to Ms. Selbak and to Moss & Barnett as counsel to Ms. Selbak of:
- (1) The commencement of any litigation against an Entity and/or Summa involving claimed damages in excess of \$49,999 or relating to the transactions contemplated by this Agreement;
  - (2) The commencement of any material arbitration or governmental proceeding or investigation not previously disclosed to Ms. Selbak which has been instituted or, to the knowledge of an Entity and/or Summa, is threatened against an Entity and/or Summa or its property which, if determined adversely to an Entity and/or Summa, would have a material adverse effect on the business, operations or condition (financial or otherwise) of an Entity and/or Summa; and
  - (3) Any Event of Default, as defined in Section 3.3, under this Agreement.
- (d) Duties After Closing. The Entities and Summa understand and agree that any and all duties set forth in this Article III, or in Article II, shall continue beyond the Closing of this Agreement.

3.3 Events of Default. An event of default ("Event of Default") shall occur hereunder upon any of the following, except that Summa shall not be considered to be in default unless an assignment of rights of the Entities under Paragraph 5.2 actually occurs:

- (a) Failure to comply with or perform any of the terms, conditions or covenants of this Agreement; or
- (b) Any material representation or warranty made by an Entity or Summa herein, shall be false, breached or dishonored; or
- (c) An Entity and/or Summa shall be dissolved, liquidated or wound up or shall fail to maintain its corporate existence in violation of Paragraph 2.9 above; or
- (d) Sale of any material portion of the assets of any of the Entities in violation of Paragraph 2.9 above; or
- (e) Commencement of actual foreclosure on any asset of any Entity by Miller & Schroeder and/or Carefree Living of Burnsville, Ltd., Brainerd Manor, Ltd., or St. Cloud Manor, Ltd; or
- (f) Material change in the capitalization, corporate organization or issuance of stock of any Entity in violation of Paragraph 2.9 above.

3.4 Special Notice Provision. All notice required under this Agreement will be deemed to have been duly given to the Entities and/or Summa if personally delivered or mailed certified, return receipt requested to:

Michael C. Mahoney, Esq.  
Mahoney, Hagberg & Rice,  
A Professional Association  
109 Bushaway Road  
Wayzata, MN 55391

or such other address as the Entities and Summa may, in writing, specify.

3.5 Late Payment Liquidated Damages. Notwithstanding any other provision of this Agreement, if an Event of Default, as defined in Section 3.3, shall occur, which continues for more than ten (10) days, a liquidated damages assessment of ten percent (10%) of the past-due amount shall be due without notice.

## ARTICLE IV.

### MS. SELBAK'S REPRESENTATIONS, WARRANTIES AND COVENANTS

4. Representations and Warranties: Ms. Selbak represents and warrants as set forth below in this Article IV to the best of her knowledge, information and belief, formed after reasonable inquiry.
- (a) Authorization and Validity. The execution, delivery and performance by Ms. Selbak of this Agreement and the other agreements contemplated hereby to which she is a party, and the consummation of the transactions contemplated hereby and thereby, have been duly authorized by Ms. Selbak. This Agreement has been, and each other agreement contemplated hereby to which Ms. Selbak is a party will be as of the Closing Date, duly executed and delivered by Ms. Selbak and constitutes or will constitute legal, valid and binding obligations of Ms. Selbak, enforceable against her in accordance with their respective terms, except as may be limited by applicable bankruptcy, insolvency or similar laws affecting creditors' rights generally and subject to principles of equity and public policy that affect enforceability of agreements generally.
  - (b) No Violation. Neither the execution, delivery or performance of this Agreement or the other agreements contemplated hereby nor the consummation of the transactions contemplated hereby or thereby will (i) conflict with, or result in a violation or breach of the terms, conditions and provisions of, or constitute a default under any material agreement, indenture or other instrument under which Ms. Selbak is bound or (ii) violate or conflict with any judgment, decree, order, statute, rule or regulation of any Governmental Authority having jurisdiction over Ms. Selbak or the properties or assets of Ms. Selbak.
  - (c) Information about the Entities. Ms. Selbak has had the opportunity to ask questions of, and receive answers from, the Entities, or an agent or representative of the Entities, concerning the terms and conditions of the ownership of the Special Preferred Stock Shares (the "Shares") and the business affairs of the Entities and to obtain any additional information necessary to verify such information, and Ms. Selbak has received such additional information concerning the Entities as Ms. Selbak considers necessary or advisable in order to form a decision concerning an investment in the Entities.
  - (d) High Degree of Risk. Ms. Selbak realizes that the Shares involve a high degree of risk, including the risks of receiving no return on the investment and of losing the investment in the Entities.
  - (e) Business Advice. Ms. Selbak has had access to sophisticated and knowledgeable advisors of her own choosing who are capable of assisting her in evaluating the merits and risks of ownership of the Shares of the Entities.

- (f) Residency. Ms. Selbak is a resident of the State of Florida.
- (g) Investment Purpose in Acquiring the Shares. Ms. Selbak, the Entities and Summa acknowledge that the Shares have not been registered under the Act, as amended, or applicable state securities laws and that such Shares will be issued to Ms. Selbak in reliance on exemptions from the registration requirements of the Act and applicable state securities laws and in reliance on Ms. Selbak's and the Entities' representations and agreements contained herein. Ms. Selbak is purchasing to acquire the Shares for the account of Ms. Selbak for investment purposes only and not with a view of their resale or distribution. Ms. Selbak has no present intention to divide her participation with others, to resell, or otherwise dispose of all or any part of the Shares. In making these representations, Ms. Selbak understands that, in the view of the Securities and Exchange Commission (the "Commission"), an exemption of the Shares from the registration requirements of the Act would not be available if, notwithstanding the representations of Ms. Selbak, Ms. Selbak has in mind merely acquiring the Shares for resale upon the occurrence or nonoccurrence of some predetermined event.
- (h) Compliance with Securities Act. Ms. Selbak agrees that if the Shares or any part thereof are sold or distributed in the future, Ms. Selbak shall sell or distribute them pursuant to the requirements of the Act and applicable state securities laws. Ms. Selbak agrees that Ms. Selbak will not transfer any part of the Shares without: (i) obtaining a "no action" letter from the Commission and the applicable state securities offices in form and substance acceptable to the Entities and counsel to the Entities to the effect that such transfer is exempt from the registration requirements under the Act and applicable state securities laws; (ii) opinion of counsel satisfactory to the Entities that such transfer may lawfully be made without registration under the 1933 Act, Minnesota Securities laws or the securities laws of any other applicable state; or (iii) such registration.
- (i) Restrictive Legend. Ms. Selbak agrees that the Entities may place a restrictive legend on the documents representing the Shares containing substantially the following language:
- "The securities represented by this certificate have not been registered under the Securities Act of 1933, as amended (the "Act"), and have not been registered under any state securities laws. These securities may not be sold, offered for sale, or transferred in the absence of an effective Registration Statement under the Act, as amended, and under the applicable state securities laws, or receipt by the Company and its counsel of an opinion of counsel that such transaction is exempt from registration under the Act, as amended, and under the applicable state securities laws."
- (j) Knowledge of Restrictions Upon the Transfer of Shares. Ms. Selbak understands that the Shares are not freely transferable and may in fact be

prohibited from sale for an extended period of time and that, as a consequence thereof, she must bear the economic risk of investment in the Shares for an indefinite period of time and may have extremely limited opportunities to dispose of the Shares. Ms. Selbak understands that Rule 144 of the Commission permits the transfer of "restricted securities" of the type here involved only under certain conditions, including a minimum two-year holding period and the availability to the public of certain information about the Entities.

- (k) Absence of Bankruptcy Proceedings. There are no bankruptcy, reorganization or arrangement proceedings pending against, being contemplated by, or to Ms. Selbak's knowledge threatened against her.
- (l) No Assignment. Ms. Selbak warrants that she has not assigned or otherwise transferred, voluntarily or involuntarily, any of her rights or claims and covenants not to sue any party hereto, except to enforce the rights and duties under this Agreement.
- (m) Ownership of Capital Stock of Entities. Pursuant to the Order, Ms. Selbak has been awarded fifty-one percent (51%) of Wilnard L. Selbak's interest in the Entities outstanding capital stock; except for Carefree Living of America (Minnetonka), Inc. in which she was awarded thirty percent (30%) of Wilnard L. Selbak's interest in the outstanding capital stock.
- (n) Rights as Applied to Wilnard L. Selbak. Upon Closing, the Entities shall be entitled to enforce Ms. Selbak's right to compel Wilnard L. Selbak to sign all necessary documents conveying to the Entities as assignee of Ms. Selbak his rights in the outstanding capital stock of the Entities described above.
- (o) Voting Rights. Upon Closing, the Entities to the same extent as Ms. Selbak shall be entitled to exercise all voting rights of all shares of the Entities owned by Wilnard L. Selbak not conveyed to Ms. Selbak pursuant to the Order to the extent those rights were awarded to Ms. Selbak by the Order;
- (p) Sums Owed by Wilnard L. Selbak. Upon Closing, the Entities shall not be limited or prohibited by the Order or this Agreement from recovering all sums due such Entities by Wilnard L. Selbak;
- (q) Enforcement of Obligations. Upon Closing, the Entities shall have whatever rights of enforcement Ms. Selbak has been granted to cause Wilnard L. Selbak to perform all obligations under the Order that are assigned to the Entities by this Agreement.
- (r) Purported Settlement Agreement. The purported settlement agreement entered into between Ms. Selbak and Wilnard L. Selbak has been cancelled by Ms. Selbak pursuant to its terms and, to the best of her knowledge, information, and belief, is null and void and of no force or effect.

- (s) Entities Responsibilities Relating to Order. The Entities shall have no responsibility or liability to anyone arising out of or related to the Order or otherwise;
- (t) Attorneys' Fees. The Entities shall not be responsible for any of Ms. Selbak's attorneys' fees in connection with any of the matters that are subject to this Agreement.
- (u) Representations True at Closing. All representations made by Ms. Selbak in this Article IV will be true on the Closing Date.

4.2 Covenants: Unless waived in writing by the Entities, Ms. Selbak covenants as follows in this Paragraph 4.2.

- (a) Assignment of Rights. Subject to the terms and conditions set forth in this Agreement, at the Closing Ms. Selbak shall execute and deliver to the Entities an Assignment of Rights, substantially in the form attached hereto as Exhibit 4.2(a), irrevocably assigning and conveying to the Entities all rights, title, and interests described in Paragraphs 4.1 (m), (n), and (o).
- (b) Duty of Cooperation. Ms. Selbak acknowledges and agrees that enforcement of the rights assigned by her to the Entities is of such significant value and importance that the possible loss of such rights would destroy the value of this Agreement to the Entities. To ensure such rights, Ms. Selbak shall take all such steps, sign such additional documents, attend such hearings, and file such papers as may be reasonably necessary or appropriate to carry out the intention of the parties to this Agreement. The Entities shall pay all additional costs of travel and other expenses necessary for such acts, including reasonable attorneys' fees and witness fees.
- (c) Confidentiality. To the extent permitted by law, Ms. Selbak will preserve in the strictest confidence all nonpublic information and communications regarding this Agreement.
- (d) Motion for Receiver. Immediately after execution of this Agreement, Ms. Selbak will continue her Motion for Appointment of Receiver of Wilnard L. Selbak and immediately following the Closing, such proceeding shall be dismissed without prejudice.
- (e) Duties After Closing. Ms. Selbak understands and agrees that any and all duties set forth in this Article IV, or in Article II, shall continue beyond the Closing of this Agreement.

## ARTICLE V.

### OTHER AGREEMENTS

- 5.1 Settlement Costs and Fees. Except as otherwise expressly provided in this Agreement, Ms. Selbak and the Entities will bear their own expenses in connection with this Agreement and the Closing, including the fees and disbursements of their counsel, accountants, financial advisors and other representatives, whether or not the transactions contemplated hereby are consummated. Ms. Selbak agrees that she shall pay any fees and expenses she incurs after the Closing. The Entities agree to pay fees and expenses of Ms. Selbak, including reasonable attorneys' fees, incurred in pursuing any rights as a result of an Event of Default, as provided in this Agreement.
- 5.2 Assignment Rights of the Entities. Any and all rights, title and interests obtained under this Agreement may be assigned to Summa. Such assignment is fully guaranteed as to performance by Summa which is indicating its guaranty by executing this Agreement to be binding on Summa, its successors, and assigns in accordance with the terms of the Agreement. To the extent indicated in the relevant portions of this Agreement, Summa joins the Entities in the representations, warranties and covenants and further agrees that it will take no action which will materially impair Ms. Selbak's rights under this Agreement. Any assignment of such Assignment of Rights shall not be effective unless notice is given to Ms. Selbak within twenty (20) days of the assignment.

## ARTICLE VI.

### CLOSING CONDITIONS

- 6.1 Entities' Closing Conditions. The obligations of Entities under this Agreement are subject, at the option of Entities, to the satisfaction at or prior to the Closing of the following conditions:
- (a) All representations of Ms. Selbak contained in Article IV will be true in all material respects at and as of the Closing as if such representations were made at and as of the Closing, and Ms. Selbak will have performed and satisfied all agreements required by this Agreement to be performed and satisfied by Ms. Selbak at or prior to the Closing;
  - (b) All necessary consents of and filings with third parties for the Entities' issuance of Special Preferred Stock will have been obtained, accomplished or waived. The Entities and Summa represent that they have been informed by counsel for third parties that the third parties are not opposed in principle to the issuance of the Special Preferred Stock.

- 6.2 Ms. Selbak's Closing Conditions. The obligations of Ms. Selbak under this Agreement are subject, at the option of Ms. Selbak, to the satisfaction at or prior to the Closing of the following conditions:
- (a) All representations of the Entities contained in Article III will be true in all material respects at and as of the Closing as if such representations were made at and as of the Closing, and the Entities will have performed and satisfied all agreements required by this Agreement to be performed and satisfied by the Entities at or prior to the Closing.
  - (b) All necessary consents of and filings with third parties necessary for the Entities' issuance of the Special Preferred Stock will have been obtained, accomplished or waived. The Entities, Summa and Ms. Selbak agree that the issuance to Ms. Selbak of the Special Preferred Stock is a material inducement to her entering into the Agreement. Failure of the Entities to issue any or all of the Special Preferred Stock shall constitute a sufficient failure of consideration for Ms. Selbak upon her sole discretion to declare this Agreement null and void for failure of consideration. In that event, all parties to this Agreement shall be restored to the status quo, except that Ms. Selbak shall retain all sums therefore paid to her pursuant to the Agreement.
  - (c) Ms. Selbak will have received all documents, duly executed in form reasonably satisfactory to Ms. Selbak and her counsel, referred to in Section 7.2.
- 6.3 Waiver. The parties may waive in writing any Closing conditions contained in this Article VI.

## ARTICLE VII

### CLOSING

- 7.1 Closing. The closing of the transaction contemplated by this Agreement ("Closing") will be held at 10:00 a.m. Central Standard Time at the offices of Mahoney, Hagberg & Rice, A Professional Association, 109 Bushaway Road, Wayzata, Minnesota 55391 on March 31, 1998 or as soon thereafter as practicable, or at such other date or place as may be agreed to by counsel or the respective parties ("Closing Date").
- 7.2 Entities Closing Obligations. At Closing, Entities will deliver to Ms. Selbak the following:
- (a) A certificate from each of the Entities attesting to the fact that each Entity will deliver the shares of Special Preferred Stock to Ms. Selbak by making

the corporate resolutions substantially in the form attached hereto as Exhibit 3.1;

- (b) A copy of resolutions of the Board of Directors of the Entities and Summa authorizing the execution, delivery and performance of this Agreement and all related documents and agreements, certified by the Secretaries of the Entities and Summa as being true and correct copies of the originals thereof subject to no modifications or amendments;
- (c) Certificates of an executive officer of the Entities, dated the Closing Date (i) as to the truth and correctness of the representations of the Entities under Article III as of the Closing Date, (ii) as to the performance of and compliance by the Entities with the covenants of the Entities contained herein on and as of the Closing Date and (iii) certifying that all conditions precedent of the Entities to the Closing have been satisfied or are waived;
- (d) Certificates of the Secretary of the Entities and Summa certifying as to the incumbency of the directors and officers of the Entities and as to the signatures of all directors and officers who have executed documents delivered at the Closing on behalf of the Entities;
- (e) An opinion of Mahoney, Hagberg & Rice, A Professional Association, counsel to the Entities, reasonably acceptable to Ms. Selbak and her counsel, dated as of the closing date, with respect to matters set forth in Exhibit 7.2(e);
- (f) Duly-executed documents in form satisfactory to Ms. Selbak and her counsel pursuant to which the Entities provide the release and dismissal of claims required by Article II;
- (g) Such other instrument or instruments as will be necessary or appropriate, as Ms. Selbak or her counsel reasonably request, to vest Ms. Selbak good and marketable title to the Special Preferred Stock;
- (h) Ms. Selbak may waive in writing any of the Closing Obligations contained in this Paragraph 7.2.

7.3 Ms. Selbak's Closing Obligations. At Closing, Ms. Selbak will deliver to the Entities the following:

- (a) An opinion of Moss & Barnett, A Professional Association, counsel to Ms. Selbak, with respect to the matters set forth in Exhibit 7.3(a);
- (b) Duly-executed documents in form satisfactory to the Entities and their counsel pursuant to which Ms. Selbak provides the release and dismissal of claims required by Articles II and IV;

- (c) Such other instrument or instruments as will be necessary or appropriate, as the Entities or their counsel reasonably request.
  - (d) The Entities may waive in writing any of the Closing Obligations contained in this Paragraph 7.3.
- 7.4 Taking of Necessary Action. Subject to the terms and conditions of this Agreement and to applicable law, each of the parties to this Agreement will use all reasonable efforts promptly to take or cause to be taken all action and promptly to do or cause to be done all things necessary, proper or advisable under applicable laws to consummate and make effective the transactions contemplated by this Agreement. Without limiting the foregoing, each of the parties to this Agreement will, and will cause each of its subsidiaries to, use reasonable efforts to obtain and make all consents, approvals, assurances or filings of or with third parties and Governmental Authorities necessary or, in the opinion of Entities, advisable for the consummation of the transactions contemplated hereby. Each party will cooperate with the other in good faith to help the other satisfy its obligations in this Paragraph 7.4.

## ARTICLE VIII

### LIMITATIONS ON WARRANTIES AND REMEDIES; INDEMNIFICATION

- 8.1 Limitations. The representations of the Entities contained in this Agreement are exclusive and are in lieu of all other representations and warranties, express, implied or statutory, including without limitation any representation or warranty with respect to the Entities. To the maximum extent permitted by Law, the Entities and Ms. Selbak waive all provisions of the Minnesota Deceptive Trade Practices Act.
- 8.2 Survival; Time Limit for Claims. Each representation, warranty, covenant or agreement made in this Agreement will survive the Closing until the expiration of the relevant statute of limitations period. In addition, the definitions set forth in this Agreement shall survive the Closing to the same extent. Notwithstanding the foregoing, nothing contained herein shall be deemed to limit Ms. Selbak's or the Entities' right to assert a claim based on fraud in connection with the transactions contemplated hereby.
- 8.3 Indemnification by Ms. Selbak. From and after the Closing, Ms. Selbak agrees to indemnify, defend and hold harmless the Entities and their past, present and future officers, directors, employees, consultants and agents, jointly and severally from and against any losses and obligations relating to breach of any representations, warranty, covenant or agreement of Ms. Selbak set forth in this Agreement.
- 8.4 Indemnification by Entities; Limitations on Liability. From and after the Closing, the Entities agree to indemnify, defend and hold harmless Ms. Selbak from and

against any losses and obligations relating to breach of any representations, warranty, covenant or agreement of Entities set forth in this Agreement.

## ARTICLE IX.

### DEFAULT AND REMEDIES

9. Remedies. Upon failure of either party to comply with this Agreement by or after the Closing Date, as it may be extended in accordance with this Agreement, the other party will be entitled to pursue, exercise and enforce any and all remedies, rights, powers and privileges available at law or in equity, including rescission in the event of a material breach or falsity with regard to the representations and warranties contained in Section 3.1.
- 9.2 Termination and Remedies after March 31, 1998. If no final settlement agreement has been executed by March 31, 1998, the letter agreement, attached hereto and incorporated by reference as Exhibit 9.2, will be null and void, except that Ms. Selbak shall retain all sums paid thereunder.

## ARTICLE X.

### MISCELLANEOUS

10. Confidentiality of Proprietary Information. Subsequent to the execution of this Agreement, neither the Entities nor any of their affiliates will for themselves or on behalf of any corporation, person, firm, partnership, association, or other entity (whether as an individual, agent, servant, employee, employer, director, officer, shareholder, investor, principal, consultant or in any other capacity) disclose to any person or entity any of the confidential information, trade secrets, data, methods, systems, procedures, data bases or software programs or applications or processes of, or utilized by, the Entities; provided that (after reasonable measures have been taken to maintain the confidentiality and after giving reasonable notice to Ms. Selbak specifying the information involved and the manner and extent of the proposed disclosure thereof) (i) any disclosure of such information may be made to the extent required by applicable Law or judicial or regulatory process, (ii) such information may be used as evidence in or in connection with any pending or threatened litigation relating to this Agreement or any transaction contemplated hereby, (iii) any disclosure of such information may be made to the extent that such information is in the public domain (other than by or through the Entities), and (iv) any disclosure of such information may be made to the extent required by any agreement or agreements under which the Entities are bound or to which the Special Preferred Stock or any of the assets of the Entities are subject.
- 10.2 Public Announcements. Except as set forth in the following sentence, the parties to this Agreement agree that prior to making any public announcement or statement with respect to the transactions contemplated by this Agreement, the party desiring

to make such public announcement or statement will consult with the other party and exercise reasonable efforts to (i) agree upon the text of a joint public announcement or statement to be made by all of such parties or (ii) obtain approval of the other party to the text of a public announcement or statement to be made solely by Entities or Ms. Selbak, as the case may be. Nothing contained in this Section will be construed to require either party to obtain approval of the other party to disclose information, or to submit any such disclosed information for review by the other party, with respect to any disclosure (i) required by applicable Law or (ii) necessary to comply with disclosure requirements of any applicable stock exchange.

Notices. Except as otherwise expressly provided in this Agreement, all communications required or permitted under this Agreement will be in writing and any such communication or delivery will be deemed to have been duly given and received when actually delivered to the address set forth below of the party to be notified personally (by a recognized commercial courier or delivery service that provides a receipt) or by telecopier (confirmed in writing by a personal delivery as set forth above), addressed as follows:

If to Entities:

14505 Minnetonka Dr.  
Minnetonka, MN 55345

With a copy to:

Mahoney, Hagberg & Rice  
A Professional Association  
109 Bushaway Road  
Wayzata, MN 55391

If to Ms. Selbak:

Linda Marie Selbak  
4505 Snowy Egret Court  
Naples, FL 34119

With a copy to:

Cass Weil, Esq.  
Moss & Barnett,  
A Professional Association  
Suite 4800  
90 South Seventh Street  
Minneapolis, MN 55402

Any party may, by written notice so delivered to the other, change the address to which delivery will thereafter be made.

Incidental Expenses. Ms. Selbak will bear and pay (i) all transfer or documentary taxes incident to the transfer of Preferred Stock to Ms. Selbak (ii) all filing, recording or registration fees for any assignment or conveyance delivered under this Agreement.

Assumption of Risk. Effective if and only if the Closing occurs, Ms. Selbak shall assume all risk of diminution in the value of the Preferred Stock due to a change in the condition of the Assets or the business of the Entities until Closing (INCLUDING, WITHOUT LIMITATION, ANY SUCH DIMINUTION OR CHANGE ATTRIBUTABLE TO THE NEGLIGENCE OF THE ENTITIES OR ANY SUBSIDIARY), except to the extent any change of condition is attributable to the willful misconduct or gross negligence of the Entities, their officers, directors, employees and agents.

Entire Agreement. This Agreement, including all schedules and exhibits, embodies the entire agreement between the parties with respect to the subject matter of this Agreement (superseding all prior agreements, arrangements, understandings and solicitations of interest or offers related to the subject matter of this Agreement), and may be supplemented, altered, amended, modified or revoked by writing only, signed by all of the parties to this Agreement. The headings in this Agreement are for convenience only and will have no significance in the interpretation of any term or provision of this Agreement.

Governing Law. This Agreement will be governed and construed and enforced in accordance with the laws of the State of Minnesota, without regard to rules concerning conflicts of laws.

Counterparts. This Agreement may be executed in any number of counterparts, and each and every counterpart will be deemed for all purposes one agreement.

Waiver. Any of the terms, provisions, covenants, representations or conditions contained in this Agreement may be waived only by a written instrument executed by the party waiving compliance. The failure of any party at any time or times to require performance of any provision of this Agreement will in no manner affect such party's right to enforce the same. No waiver by any party of any condition, or of the breach of any term, provision, covenant or representation contained in this Agreement, whether by conduct or otherwise, in any one or more instances, will be deemed to be or construed as a further or continuing waiver of any such condition or breach or a waiver of any other condition or of the breach of any other term, provision, covenant or representation.

Binding Effect; Assignment. All the terms, provisions, covenants, representations and conditions of this Agreement will be binding upon and inure to the benefit of and be enforceable by the parties to this Agreement and their respective successors and assigns, except as modified by Section 2.2. This Agreement and the rights and obligations hereunder will be assignable by the Entities to any affiliate without the prior written consent of Ms. Selbak.

- 10.11 No Recordation. Ms. Selbak and the Entities expressly covenant and agree not to record or place of record this Agreement or any copy or memorandum thereof in any real property records, except the Assignment of Proceeds.

10.12 Time Periods. Time is of the essence in the performance of this Agreement.

10.13 Construction. Each party hereby acknowledges and agrees that such party has consulted legal counsel in connection with the negotiation of this Agreement to the extent such party deemed such consultation necessary. Accordingly, the parties agree the rule of contract construction to the effect that an agreement will be construed against the draftsman will have no application in the construction or interpretation of this Agreement.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized officers as of the first date above written.

**MINNESOTA HOME HEALTH CARE, INC.**

By: Kathryn  
Its: VICE-PRESIDENT

**CAREFREE LIVING OF AMERICA  
(BRAINERD), INC.**

By: Kathryn  
Its: PRESIDENT

**CAREFREE LIVING OF AMERICA  
(BURNSVILLE), INC.**

By: Kathryn  
Its: PRESIDENT

**CAREFREE LIVING OF AMERICA  
(MINNETONKA), INC.**

By: Kathryn  
Its: PRESIDENT

CAREFREE LIVING OF AMERICA  
(ST. CLOUD), INC.

By: *Kathleen*  
Its: PRESIDENT

SUMMA MANAGEMENT, INC.

By: *Kathleen*  
Its: PRESIDENT

*Linda Marie Selbak*  
LINDA MARIE SELBAK

EXHIBIT

B

AMENDMENT  
TO  
SETTLEMENT AGREEMENT  
BETWEEN  
THE CAREFREE ENTITIES  
AND  
LINDA M. SELBAK

THIS AMENDMENT made and entered into effective the 9<sup>th</sup> <sup>NOVEMBER</sup> day of ~~October~~, 1998 between the Carefree Entities, Linda M. Selbak and Summa Management, Inc:

RECITALS:

FIRST: Each of the Carefree Entities and Linda M. Selbak ("Selbak") entered into an Agreement on or about March 26, 1998 (the "Agreement"). Each capitalized term used herein has the meaning set forth in the Agreement unless the context clearly requires otherwise;

SECOND: Under the terms of the Agreement, the Carefree Entities have agreed to pay Selbak certain sums of money over a specified period and under certain conditions;

THIRD: Under the terms of the Agreement, Selbak was granted certain rights with respect to the proceeds from the sale of assets and others rights affecting the Carefree Entities;

FOURTH: The Carefree Entities desire to have Selbak enter into Subordination and Standstill Agreements ("Standstill") so that certain of the Carefree Entities can borrow, in the aggregate, approximately \$11,500,000 from First Union Bank;

FIFTH: Summa Management, Inc. ("Summa") owns at least a controlling interest in the Carefree Entities and is willing to assume the primary responsibility for certain payments to Selbak and provide her with additional consideration and collateral; and

SIXTH: Selbak is willing to enter into the proposed Standstill provided that Selbak receives certain additional consideration.

NOW, THEREFORE, In consideration of the mutual covenants contained herein, the receipt and sufficiency of which is hereby acknowledged, the parties hereto hereby agree as follows:

1. Amendment. The parties hereto hereby amend and modify the Agreement. Except as set forth in this Amendment, the Agreement shall remain in full force and effect without change or modification.

Assignment and Delegation. The Carefree Entities acknowledge that they have assigned and delegated all rights and responsibilities of the Carefree Entities under the Agreement, except for those obligations related to Selbak's employment by the Carefree Entities and maintenance of insurance for Selbak which shall remain the obligations of the Carefree Entities, to Summa and, subject to the terms and conditions hereof at Closing, Summa shall assume all responsibilities of the Carefree Entities under the Agreement, except for those obligations related to Selbak's employment by the Carefree Entities and maintenance of insurance for Selbak which shall remain the obligations of the Carefree Entities.

Standstill Agreement. Subject to the terms and conditions hereof, at Closing Selbak shall sign and deliver to the Carefree Entities the Standstill requested by First Union Bank substantially in the form provided to Selbak.

4. Additional Collateral. Subject to the terms and conditions hereof, at Closing Summa shall grant Selbak a security interest in all of Summa's assets, including without limitation, cash, accounts receivable, contract rights, general intangibles and other assets but specifically excluding Summa's interests in the capital stock of the Carefree Entities ("Collateral") to guarantee performance of all of Summa's obligations to Selbak. Summa warrants that as of the date of Closing no obligations to the holders of any existing security interests in Summa assets will be in default. Subsequent to Closing, any default in any obligation to the holder of any security interest in Summa assets shall be an event of default under the Settlement Agreement. Summa warrants that except as previously disclosed to Selbak's counsel there are no security interests or pledges of any of the Collateral. So long as any obligations remain due from Summa to Selbak under the Settlement Agreement, Summa shall not create or allow to be created any other security interests, pledges, liens or charges against any of its assets without Selbak's prior consent which will not be unreasonably withheld. So long as any obligations remain due from the Entities or Summa to Selbak under the Settlement Agreement except for redemption of shares of Preferred Stock, Summa shall not cause or consent to the redemption of any capital stock in the Entities for any purpose whatsoever without the prior written consent of Selbak which will not be unreasonably withheld. Summa shall forthwith execute such documents and cooperate in all respects reasonably required by Selbak to create, preserve and perfect the interest granted to her in Summa assets granted herein.
5. PROXY. Subject to the terms and conditions hereof, at Closing Summa shall deliver to Selbak an executed irrevocable proxy, designating Selbak as proxy, to vote the shares of capital stock of the Carefree Entities owned of record by Summa solely for the purpose of directing the Carefree Entities Board of Directors and appropriate officers to cause the payments due Selbak under the Settlement Agreement which are unpaid as of the date of such order and direction to be made, exercisable at any time twenty (20) days following receipt by Summa of written notice (by facsimile to Summa's legal counsel) of an event of default under the Settlement Agreement and the failure to cure such defaults under such Settlement Agreement. The Proxy, all rights thereunder and all rights of Selbak to payments from the Carefree Entities under the Settlement Agreement shall be subject to the terms and conditions of the Subordination and Standstill Agreement between Selbak and First Union National Bank executed on or about the same date as this Agreement. The Proxy to be granted to Selbak pursuant to this paragraph shall be in substantially the form attached hereto As Exhibit B. All rights under this Proxy shall cease upon payment of all sums due Selbak under the Settlement Agreement until and only in the event that a default again arises under such Settlement Agreement for failure to make the required payments in which event the proxy rights may again be utilized from time to time to secure such payments.
6. Payment of Attorneys' Fees. Summa shall pay to Selbak's attorney all fees and costs incurred in connection with the First Union refinance in the amount of approximately \$10,000 prior to Closing. This preclosing payment shall cover all of Selbak's attorney's fees and costs incurred through the date of Closing. Selbak's attorneys shall provide statements supporting all requested payments. After Closing, Summa shall pay to Selbak's attorneys all additional attorney's fees and costs reasonably required to complete the First Union refinance. In addition, Summa agrees to pay all costs incurred by Selbak, including reasonable attorney's fees, in enforcing Selbak's rights under the Settlement Agreement, this Amendment and the Standstill.
- Additional Payment. Subject to the terms and conditions hereof, at Closing Summa shall pay Selbak \$75,000 as a bonus payment to induce here to provide First Union Bank with the documents required by First Union Bank to close its financing with the Carefree Entities.
8. Closing. Closing shall take place by exchange of facsimile counterparts (followed by immediate delivery by overnight mail of the originals) on or about November 2, 1998.

9. Covenants Not To Sue. Subject to the terms and conditions hereof, at Closing the Carefree Entities and Selbak shall execute and deliver Covenants Not To Sue the other(s) for any claim or cause of action arising out of any actions prior to the Agreement.
10. Dismissal With Prejudice. Subject to the terms and conditions hereof, at Closing Selbak and the Carefree Entities shall deliver a mutual Dismissal With Prejudice in connection with all suits by Selbak against the Carefree Entities and Summa.
11. Notices. Except as otherwise expressly provided in this Agreement, all communications required or permitted under this Agreement will be in writing, and any such communication or delivery will be deemed to have been duly given and received when actually delivered to the address set forth below of the party to be notified personally (by a recognized commercial courier or delivery service that provides a receipt) or by telecopier (confirmed in writing by a personal delivery as set forth above), addressed as follows:

If to Entities: 14505 Minnetonka Dr.  
Minnetonka, MN 55345

With a copy to: Mahoney, Hagberg & Rice  
A Professional Association  
109 Bushaway Road  
Wayzata, MN 55391

If to Ms. Selbak: Linda Marie Selbak  
4505 Snowy Egret Court  
Naples, FL 34119

With a copy to: Cass Weil, Esq.  
Moss & Barnett,  
A Professional Association  
Suite 4800  
90 South Seventh Street  
Minneapolis, MN 55402

Any party may, by written notice so delivered to the other, change the address to which delivery will thereafter be made.

12. Entire Agreement. This Agreement, including all schedules and exhibits, embodies the entire agreement between the parties with respect to the subject matter of this Agreement (superseding all prior agreements, arrangements, understandings and solicitations of interest or offers related to the subject matter of this Agreement), and may be supplemented, altered, amended, modified or revoked by writing only, signed by all of the parties to this Agreement. The headings in this Agreement are for convenience only and will have no significance in the interpretation of any term or provision of this Agreement.
- Governing Law. This Agreement will be governed and construed and enforced in accordance with the laws of the State of Minnesota, without regard to rules concerning conflicts of laws.
14. Counterparts. This Agreement may be executed in any number of counterparts, and each and every counterpart will be deemed for all purposes one agreement.
15. Waiver. Any of the terms, provisions, covenants, representations or conditions contained in this Agreement may be waived only by a written instrument executed by the party waiving compliance. The failure of any party at any time or times to require performance of any provision

of this Agreement will in no manner affect such party's right to enforce the same. No waiver by any party of any condition, or of the breach of any term, provision, covenant or representation contained in this Agreement, whether by conduct or otherwise, in any one or more instances, will be deemed to be or construed as a further or continuing waiver of any such condition or breach or a waiver of any other condition or of the breach of any other term, provision, covenant or representation.

- 16. Binding Effect. Assignment. All the terms, provisions, covenants, representations and conditions of this Agreement will be binding upon and inure to the benefit of and be enforceable by the parties to this Agreement and their respective successors and assigns, except as modified by Section 2.2. This Agreement and the rights and obligations hereunder will be assignable by the Entities to any affiliate without the prior written consent of Ms. Selbak.
- 17. Time Period. Time is of the essence in the performance of this Agreement.
- 18. Construction. Each party hereby acknowledges and agrees that such party has consulted legal counsel in connection with the negotiation of this Agreement to the extent such party deemed such consultation necessary. Accordingly, the parties agree the rule of contract construction to the effect that an agreement will be construed against the draftsman will have no application in the construction or interpretation of this Agreement.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized officers as of the first date above written.

**MINNESOTA HOME HEALTH CARE, INC.**

By: *Kasprk*  
Its: VICE-PRESIDENT

**CAREFREE LIVING OF AMERICA (BRainerD), INC.**

By: *Kasprk*  
Its: PRESIDENT

**CAREFREE LIVING OF AMERICA (BURNSVILLE), INC.**

By: *Kasprk*  
Its: PRESIDENT

**CAREFREE LIVING OF AMERICA (MINNETONKA), INC.**

By: *Kasprk*  
Its: PRESIDENT

CAREFREE LIVING OF AMERICA  
(ST. CLOUD), INC.

By: *[Signature]*  
Is: PRESIDENT

SUMMA MANAGEMENT, INC.

By: *[Signature]*  
Is: PRESIDENT

LINDA MARIE SELBAK

Is: \_\_\_\_\_

CAREFREE LIVING OF AMERICA  
(MINNETONKA), INC.

By: \_\_\_\_\_

Is: \_\_\_\_\_

CAREFREE LIVING OF AMERICA  
(ST. CLOUD), INC.

By: \_\_\_\_\_

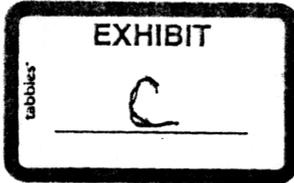
Is: \_\_\_\_\_

SUMMA MANAGEMENT, INC.

By: \_\_\_\_\_

Is: \_\_\_\_\_

*Linda Marie Selrak*  
LINDA MARIE SELRAK



STATE OF MINNESOTA  
COUNTY OF HENNEPIN

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

CASE TYPE: Contract

Linda M. Selbak,

COURT FILE NO.

Plaintiff

**CONFESSION OF JUDGMENT**

v

Minnesota Home Health Care, Inc., a  
Minnesota corporation; Carefree Living of  
America (Brainerd), Inc.; Carefree Living  
of America (Minnetonka), Inc.; Carefree  
Living of America (Burnsville), Inc.;  
Carefree Living of America (St. Cloud),  
Inc.; all Delaware corporations,

Defendants.

This Confession of Judgment is entered into by and between:

Linda M. Selbak ("Selbak"), Plaintiff in the above-captioned matter.

2 Minnesota Home Health Care, Inc., a Minnesota corporation; Carefree  
Living of America (Brainerd), Inc.; Carefree Living of America (Minnetonka), Inc.;  
Carefree Living of America (Burnsville), Inc.; Carefree Living of America (St. Cloud),  
Inc.; all Delaware corporations, Defendants in the above-captioned action

**RECITALS**

**FIRST:** Selbak commences the captioned action to recover judgment against  
the Defendants on account of amounts owed to her pursuant to that certain Settlement  
Agreement between and among the parties, dated March 26, 1998 in the amount of

\$3,837,600. A copy of the Settlement Agreement is annexed hereto and incorporated herein by reference.

**SECOND:** There is now due and owing on account of the Settlement Agreement the following amount which shall hereinafter be referred to as the "Judgment Debt":  
\$3,837,600.

**THIRD:** Defendants acknowledge and agree that the Judgment Debt is immediately due and payable in full, without offset, deduction, counterclaim or defense of any kind whatsoever.

**FOURTH:** The Settlement Agreement settled litigation between the parties in two cases that were pending in the United States District Court for the District of Minnesota styled as Minnesota Home Health Care, et al v. Linda Marie Selbak, Court File No. 97-902 PAM/JGL and Court File No. 4-96-1239, which actions have been dismissed pursuant thereto.

**FIFTH:** The parties wish to resolve this matter without further litigation.

**NOW, THEREFORE,** in consideration of the premises and for other good and valuable consideration, the receipt of which is hereby acknowledged, the parties agree as follows:

- 1 Recitals. The foregoing recitals are true and correct and are hereby made a part of this Agreement.
- 2 Confession of Judgment. Defendants and each of them hereby confess judgment to the full amount of the Judgment Debt and agree that in the event of any

default by Defendants in the performance of any obligation imposed upon Defendants under any provision of this Confession of Judgment, or in the event that the Defendants fail to pay the amounts due to Selbak or perform or fail to perform any other obligation in violation of the terms of the Settlement Agreement.

a. Selbak may, at her sole option, docket judgment against any or all of the Defendants for the full amount of the Judgment Debt, plus costs and reasonable attorneys' fees, minus any amounts actually paid pursuant to the Settlement Agreement, which judgment may be docketed by affidavit, *ex parte*, in such jurisdiction as Selbak may deem advisable;

b. Interest shall accrue on the Judgment Debt at the statutory rate from the date of docketing such judgment;

c. In addition to any remedies provided herein, Selbak may exercise any other remedies available to her at law or equity including rescission of the Settlement Agreement pursuant to paragraph 9.1 of the Settlement Agreement;

d. Any expenses incurred by Selbak in connection with the exercising of her rights herein shall be added to the Judgment Debt;

e. Selbak shall give Defendants notice of default before exercising any right hereunder, which notice shall provide the Defendants ninety (90) days from the effective date of the notice to cure the default specified

3. Dismissal of Action, etc. Upon full and prompt performance of Defendants' obligations under this Confession of Judgment, including payment of all

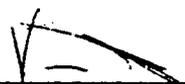
amounts under the terms of the Settlement Agreement, Selbak shall, upon the written request of Defendants.

- a. Dismiss the captioned action, with prejudice and on the merits
- b. Cancel and return all instruments evidencing the Debt

4 Notice. Any notice required or contemplated hereunder shall be in writing and shall be effective if it is served or delivered in conformance with paragraph 10.3 of the Settlement Agreement

MINNESOTA HOME HEALTH CARE, INC.

Dated: MAR 27th 1998.

BY  \_\_\_\_\_

CAREFREE LIVING OF AMERICA (MINNETONKA), INC

Dated: MAR 27th 1998

By  \_\_\_\_\_

CAREFREE LIVING OF AMERICA (ST. CLOUD), INC.

Dated: MAR 27th 1998

By  \_\_\_\_\_

CAREFREE LIVING OF AMERICA (BURNSVILLE), INC.

Dated: MAR 27th 1998

By  \_\_\_\_\_

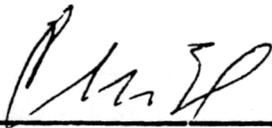
CAREFREE LIVING OF AMERICA (BRAINERD), INC.

Dated: MAR 27th, 1998

By  \_\_\_\_\_

Dated: March 31, 1998

MOSS & BARNETT  
A Professional Association

By  \_\_\_\_\_

Cass S. Weil #115228  
Attorneys for Plaintiff  
4800 Norwest Center  
90 South Seventh Street  
Minneapolis MN 55402-4129  
Telephone: (612) 347-0300









STATE OF MINNESOTA  
COUNTY OF HENNEPIN

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

Linda M. Selbak,  
Plaintiff,

COURT FILE NO

v.

VERIFICATION OF CONFESSION  
OF JUDGMENT

Minnesota Home Health Care, Inc. a  
Minnesota Corporation; Carefree Living of  
America (Brainerd), Inc.; Carefree Living  
of America (Minnetonka), Inc.; Carefree  
Living of America (Burnsville), Inc.;  
Carefree Living of America (St. Cloud),  
Inc.; all Delaware corporations,

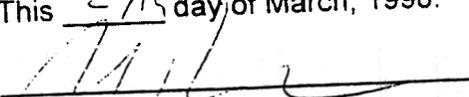
Defendant

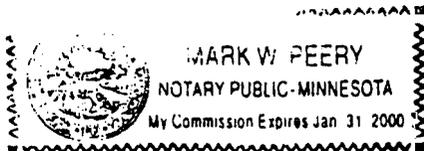
STATE OF MINNESOTA )  
ss  
COUNTY OF HENNEPIN

Vern G. Zeller, III, being first duly sworn on oath deposes and states that  
he is the Vice President of Carefree Living of America (St. Cloud), Inc.,  
Defendant in the captioned action, that he has read the foregoing Confession of  
Judgment, knows the contents thereof, and that the foregoing Confession of  
Judgment is true and correct to his own knowledge and belief.

  
Vern G. Zeller, III

Subscribed and sworn to before me  
This 27th day of March, 1998.

  
Notary Public



**MOSS & BARNETT**  
A Professional Association  
4800 Norwest Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402-4129  
Telephone (612) 347-0300 Facsimile (612) 339-6686

**FACSIMILE TRANSMITTAL LETTER**

This transmittal consists of 19 pages including this cover letter.

Original Will Not Follow by Mail

DATE: October 11, 2004 FILE NO.: 99999.4  
TO: **Ralph Mitchell, Esq.** FROM: **Cass S. Weil**  
COMPANY: DIRECT DIAL NO.: (612) 347-0327  
FACSIMILE NUMBER: 612/338-6651  
TELEPHONE NUMBER: 612/338-5815

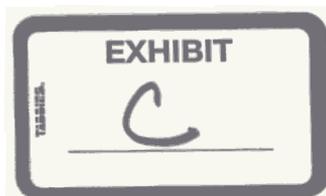
**COMMENTS:**

Attached is the Subordination Agreement you requested by Supoena served upon me today at 2:15 PM. I presume that this satisfies the demands of the Supoena. I am not planning on appearing at your office tomorrow morning.

Cass S. Weil

cc: Brian Leonard, Esq. via fax (612) 332-2740( w/encl.)

The information contained in this facsimile message is privileged and is intended only for the use of the individual/entity named. Any dissemination of this communication by anyone besides the intended recipient is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us by mail at the above address. Thank you.



LINDA SELBAK

-and-

FIRST UNION NATIONAL BANK

SUBORDINATION AND  
STANDSTILL AGREEMENT

Dated: October \_\_, 1998

DOCSNY1489205.5  
8113-614 MKJ

**SUBORDINATION AND STANDSTILL AGREEMENT**

THIS SUBORDINATION AND STANDSTILL AGREEMENT made as of the \_\_\_\_\_ day of October, 1998 by LINDA SELBAK (the "Subordinate Interest Holder") and FIRST UNION NATIONAL BANK, a national banking association, having an office at One First Union Center TW-8, Charlotte, North Carolina 28288 (the "Bank").

**WITNESSETH:**

WHEREAS, the Subordinate Interest Holder now owns and holds an interest in proceeds from the sale of the assets of Carefree Living of America (St. Cloud) Inc., Carefree Living of America (Brainerd) Inc., and Carefree Living of America (Burnsville) Inc., each Delaware corporations (individually and collectively, the "Borrower"), together with other interests pursuant to the terms of a settlement agreement dated on or about March 26, 1998 as amended by Amendment to Settlement Agreement dated as of \_\_\_\_\_, 1998 (collectively, the "Settlement Agreement") as modified by the terms of this agreement, which Settlement Agreement is by and among Surma Management, Inc., Minnesota Home Health Care, Inc., Carefree Living of America (Minnetonka), Inc., Carefree Living of America (Burnsville), Inc., Carefree Living of America (St. Cloud), Inc., Carefree Living of America (Brainerd), Inc. and the Subordinate Interest Holder, which agreement is attached hereto as Exhibit A (collectively, the "Subordinate Interest").

WHEREAS, the Borrower is about to borrow the aggregate principal sum of between \$11,500,000 and \$11,600,000 from the Bank (collectively, the "Loan") and with respect thereto, is about to execute and deliver to the Bank one or more notes (collectively, the "Superior Note") in such aggregate principal sum and one or more mortgages or deeds of trust, as applicable (collectively, the "Superior Mortgage"), securing the Superior Note, which Superior Mortgage will encumber each of the premises more particularly described in Exhibit B annexed hereto (collectively, the "Premises"), together with all improvements thereon (collectively, the "Mortgaged Property"); and

WHEREAS, the Bank is unwilling to make the aforesaid Loan unless: (a) the Subordinate Interest is subordinated to the Superior Mortgage in the manner hereinafter set forth; and (b) the rights of the Subordinate Interest Holder under the Settlement Agreement and/or otherwise are, among other things, limited such that (i) the Subordinate Interest Holder can take no action against the Borrower or the Mortgaged Property while the Superior Mortgage remains unpaid, and (ii) the Subordinate Interest Holder can take no actions to delay refinancing, foreclosure or collection of the Superior Mortgage.

WHEREAS, the Bank and the Subordinate Interest Holder have agreed that the Subordinate Interest pursuant to the Settlement Agreement and/or otherwise is to be subordinated such that, among other things, it will provide limited rights to the Subordinate Interest Holder against the Borrower and the Mortgaged Property until such time as the Borrower owns the Mortgaged Property free and clear of the Superior Mortgage and the Loan has been repaid.

NOW, THEREFORE, in consideration of the mutual premises contained herein and other good and valuable consideration, the receipt and sufficiency are hereby acknowledged, the Subordinate Interest Holder and the Bank hereby agree as follows:

1. Capitalized words and phrases used but not otherwise defined herein shall have the respective meanings assigned below:

"Bankruptcy Code" shall mean Title II of the United States Code (11 U.S.C. Sec. 101 et seq.), as amended from time to time, and any successor statute or rule promulgated pursuant thereto.

"Enforcement Action" shall mean the commencement or continuation of the exercise of any remedies against the Borrower and/or the Mortgaged Property including, without limitation, the commencement or continuation of any litigation or proceeding (including any foreclosure proceeding), the exercise of any power of sale, the sale by advertisement, the taking of a deed or assignment in lieu of foreclosure, the obtaining of a receiver or the taking of any other enforcement action against, or the taking of possession or control of, the Borrower or any of the Mortgaged Property, but specifically excludes (a) requests and demands made upon the Borrower by delivery of notices to the Borrower and the cure by the Subordinate Interest Holder of any default by the Borrower under the Superior Loan Documents as provided in paragraph 7 hereof, (b) assertion or enforcement of any right of the Subordinate Interest Holder to receive payment from proceeds of a foreclosure sale of any property incident to foreclosure of the liens or security interests of the Superior Loan Documents which may remain after payment of costs and expenses of such foreclosure and payment and satisfaction in full of the Superior Indebtedness, and (c) the filing of claims in any Insolvency Proceeding concerning the Borrower as may be required to protect and preserve the right of the Subordinate Interest Holder to participate in such Insolvency Proceeding as creditor and to participate in distributions of assets of the Borrower in said Insolvency Proceeding with respect to the Subordinate Indebtedness after payment and satisfaction in full of the Superior Indebtedness, but subject in all respects to paragraph 11(c) hereof and to the rights of the Bank under and as provided in this Agreement and without in any way impairing or affecting the right of the Bank to require performance and observance by the Subordinate Interest Holder of or the obligations of the Subordinate Interest Holder to perform and observe the covenants, undertakings and agreements of the Subordinate Interest Holder under and as provided in this Agreement.

"Expenses" shall mean the aggregate amount paid by the Borrower during each month in connection with the Mortgaged Property for (i) principal, interest and other amounts payable pursuant to the Superior Loan Documents, (ii) general maintenance, repairs and replacements, (iii) required reserves and expenditures for capital improvements and tenant improvements, (iv) premiums for insurance, (v) charges (including applicable taxes) for electricity, fuel oil and other utilities (vi) real estate taxes, assessments, water charges and sewer rents, (vii) management fees, and (viii) leasing commissions.

"Gross Income" shall mean the aggregate of all income received by Borrower in respect of the Mortgaged Property during each month other than (i) proceeds from the refinancing of the Superior Mortgage, (ii) insurance proceeds (except for the proceeds of business interruption or rent loss insurance) to the extent used to restart the Mortgaged Property, (iii) refunds of

insurance premiums, (iv) security deposits (except to the extent such sums are applied by the Borrower to the payment of any rent or additional rent due under any lease of the Mortgaged Property), and (v) additional rents and pass-throughs such as taxes and insurance premiums to the extent (x) payable under any lease, (y) used to pay for such items, and (z) not included in Expenses.

"Insolvency Proceeding" shall mean any proceeding under the Bankruptcy Code, or any state bankruptcy, insolvency or similar law or any other insolvency, liquidation, reorganization or other similar proceeding concerning the Borrower, any action for the dissolution of the Borrower, any proceeding (judicial or otherwise) concerning the application of the assets of the Borrower, for the benefit of its creditors, the appointment of or any proceeding seeking the appointment of a trustee, receiver or other similar custodian for all or any substantial part of the assets of the Borrower or any other action concerning the adjustment of the debts of the Borrower, the cessation of business by the Borrower, except following a sale, transfer or other disposition of all or substantially all of the assets of the Borrower in a transaction permitted under the Superior Loan Documents.

"Net Excess Cash Flow" shall mean the amount by which Gross Income in such month exceeds Expenses in such month.

"Subordinate Indebtedness" shall mean, collectively, all of the indebtedness, liabilities and obligations of the Borrower pursuant to the Settlement Agreement attached hereto as Exhibit A, and all amounts due or that become due from the Borrower under the Settlement Agreement.

"Superior Indebtedness" shall mean, collectively, all of the indebtedness, liabilities and obligations of the Borrower evidenced by the Superior Note, and all amounts due or that become due pursuant to the Superior Loan Documents.

"Superior Loan Documents" shall mean the Superior Note, the Superior Mortgage and all documents executed in connection therewith.

2. The Subordinate Interest and all of the indebtedness evidenced thereby is hereby, and shall continue to be, subject and subordinate in priority and payment to the lien of the Superior Mortgage and to all advances under the Superior Mortgage without regard to the application of such advances, and to all interest and all other sums due or to become due under the Superior Mortgage, and the notes secured thereby, and to all of the terms, covenants and conditions of the Superior Mortgage, and to any extensions, substitutions, modifications, amendments, renewals, refinancing, replacements and consolidations thereof including, without limitation, any (a) change to the term thereof (b) increase or decrease of the stated principal amount of the Superior Mortgage, or (c) change to the stated interest rate thereof.

Except as specifically provided in paragraphs 5(b) and 6 hereof, no payment shall be made by the Borrower for or on account of the Subordinate Indebtedness, and the Subordinate Interest Holder shall not take or receive from the Borrower, directly or indirectly, in cash or other property or by setoff or in any other manner, including, without limitation, from or by way of collateral, payment of all or any of the Subordinate Indebtedness, unless and until the Superior Indebtedness shall have been indefeasibly paid in full.

3. The Subordinate Interest Holder hereby represents and warrants that it is now the owner and holder of the Subordinate Interest, that the Settlement Agreement is now in full force and effect, that except as set forth in this Agreement, the Settlement Agreement has not been modified or amended, that the Borrower is not in default in the observance and/or performance of any of the obligations thereunder required to be observed and performed by the Borrower, that no event has occurred, which, with the passing of time or the giving of notice or both would constitute a default thereunder, and that all payments due thereon to and including the date hereof, have been paid in full.

4. The Subordinate Interest Holder hereby represents and warrants that all sums evidenced by the Subordinate Interest are set forth in that Settlement Agreement, attached hereto as Exhibit A.

5. The Subordinate Interest Holder hereby agrees that so long as any sum shall remain outstanding on the Subordinate Interest:

(a) The Subordinate Interest Holder shall simultaneously send to the Bank notices of all defaults under the Settlement Agreement or in respect of the Subordinate Interest and copies of all notices required to be delivered to the Borrower pursuant to the Subordinate Interest and/or the Settlement Agreement. Notice delivered to the Borrower in respect of the Subordinate Interest shall not be deemed effective until a copy of such notice has been received by the Bank. The Bank shall have the right, but shall not have the obligation, to cure any such default within ten (10) days after the expiration of the applicable grace period permitted to the Borrower thereunder, if any, unless any such default with reasonable efforts are incapable of being cured within any such period or unless no such period is provided, in which event the Bank shall be entitled to a reasonable period of time to cure such default, provided the Bank gives the Subordinate Interest Holder written notice of its intention to cure any such default within fifteen (15) days after the Bank has received notice thereof and, provided further, that the Bank diligently proceeds to commence and thereafter expeditiously and continuously proceeds to complete such cure;

(b) Notwithstanding the Subordinate Interest Holder's rights under applicable law or any provision in the Settlement Agreement to the contrary, the Subordinate Interest Holder acknowledges and agrees that she shall not, without the prior written consent of the Bank, accept any prepayment of principal, interest or other sums in respect of the Subordinate Interest from Borrower, accept any scheduled payment of principal, interest or other sums due under the Settlement Agreement from Borrower or in respect of the Subordinate Interest in an amount exceeding the Net Excess Cash Flow for the immediately preceding month, declare a default under the Settlement Agreement as to Borrower, accelerate the Subordinate Indebtedness as to Borrower, obtain or file a confession of judgment against Borrower, obtain an assignment of cash flow or other proceeds from Borrower or the Mortgaged Property or any portion thereof or otherwise encumber the Mortgaged Property or any portion thereof, or exercise any of its rights under the Settlement Agreement or under any other agreement or order, or at law or in equity against the Borrower (including, without limitation, replacing any officers or directors of the Borrower or Summa Management, Inc.) or take any Enforcement Action against Borrower, in any such case until ninety-one (91) days following the earlier to occur of (i) payment in full of

the Superior Indebtedness, and (ii) acquisition of the Superior Indebtedness by the Subordinate Interest Holder.

(c) In the event the Bank shall release, for the purposes of restoration of all or any part of the improvements on or within the Mortgaged Property, its right, title and interest in and to the proceeds under policies of insurance thereon, and/or its right, title and interest in and to any awards, or its right, title and interest in and to any other compensation made for any damages, losses or compensation for other rights by reason of a taking in eminent domain, the Subordinate Interest Holder shall release for such purpose all of its right, title and interest, if any, in and to all such insurance proceeds, awards or other compensation and the Subordinate Interest Holder agrees that the balance of such proceeds, awards or other compensation remaining shall be applied to the reduction of principal under the Superior Mortgage;

(d) The Subordinate Interest Holder shall not acquire, by subrogation or otherwise, any lien, estate, right or other interest in the Mortgaged Property which is or may be prior in right to the Superior Mortgage;

(e) The Subordinate Interest Holder hereby waives any and all rights (i) she may acquire by subrogation or otherwise to the lien of the Superior Mortgage or any portion thereof except in the event that all unpaid principal, accrued interest and all other sums due under the Superior Mortgage shall have been paid, and (ii) she may have to require that the Bank marshal any assets of the Borrower or Summa in favor of the Subordinate Interest Holder;

(f) The Subordinate Interest Holder shall not pledge, assign, hypothecate, transfer, convey or sell the Subordinate Interest or any interest in the Subordinate Interest or modify, waive or amend any of the terms or provisions of the Settlement Agreement with respect to Borrower, without the prior written consent of the Bank; and

(g) If the Subordinate Interest Holder shall receive any cash distributions in receipt of, or other proceeds of or from, the Borrower or the Mortgaged Property (including, without limitation, (i) any distribution arising directly or indirectly by reason of or in connection with an Insolvency Proceeding and (ii) any distribution arising directly or indirectly from any lien of the Bank being avoided, declared fraudulent, or otherwise set aside under the provisions of any law governing fraudulent conveyances or transfers), in excess of what the Subordinate Interest Holder is entitled to pursuant to the Settlement Agreement and paragraph 6 hereof (or would have been entitled to if such Insolvency Proceeding has not occurred or if any such lien had not been avoided, declared to be fraudulent or otherwise set aside under the provisions of any law governing fraudulent conveyances or transfers), the Subordinate Interest Holder shall hold the same in trust, as trustee, for the benefit of the Bank and shall promptly deliver the same to or at the direction of the Bank for the benefit of the Bank in precisely the form received) (except for the endorsement or assignment thereof by such Subordinate Interest Holder without recourse or warranty), it being understood that it is the intention of the parties that until the Superior Indebtedness (without regard to any modification thereof arising by reason of or in connection with an Insolvency Proceeding) is repaid in full, the Bank shall receive all proceeds relating to any realization upon, distribution in respect of or interest in any of the Mortgaged Property as and to the extent set forth in the Superior Loan Documents.

6. Notwithstanding any provision contained herein to the contrary, so long as no event of default has occurred under the Superior Mortgage or other Superior Loan Documents, the Subordinate Interest Holder may receive and retain monthly payments from the Borrower in accordance with the terms of the Settlement Agreement, provided, however, that the amount of such payments received from the Borrowers shall not exceed the Net Excess Cash Flow for the immediately preceding month.

7. The Bank shall accept performance by the Subordinate Interest Holder of any of the obligations of the Borrower within the cure period, if any, set forth in the Superior Loan Documents as though performance by the Borrower. Notwithstanding any such performance by the Subordinate Interest Holder of any such obligations of the Borrower, the Subordinate Interest Holder hereby absolutely and irrevocably waives, to the fullest extent permitted by applicable law, any rights it may have, by contract, at law or in equity, to be subrogated to the Bank's rights against the Borrower under the Superior Loan Documents or to the Bank's liens on any of the Mortgaged Property until payment in full of the Superior Indebtedness or acquisition of the Superior Indebtedness by the Subordinate Interest Holder until, in any such case, the earlier of (x) ninety-one days following the satisfaction in full of the Superior Indebtedness, and (y) ninety-one days following the acquisition of the Superior Indebtedness by the Subordinate Interest Holder.

8. To further evidence the subordinations and agreements referred to herein, the Subordinate Interest Holder agrees that, within five (5) days after request by the Bank, the Subordinate Interest Holder shall do, execute, acknowledge and deliver all and every such further acts, deeds, conveyances and instruments (in recordable form if requested) as the Bank may reasonably request for the better assuring and evidencing of the foregoing subordinations and agreements, all at the Borrower's expense.

9. If the Subordinate Interest Holder shall have received notice that the Bank is curing or attempting to cure any default on the part of the Borrower under the Superior Mortgage such as, by way of example only, paying delinquent real estate taxes or obtaining proper insurance coverage, the Subordinate Interest Holder agrees to forebear from availing herself of any right or so-called "self-help" remedies against the Borrower granted under the Settlement Agreement, if any, to cure such default.

10. Anything contained in the Settlement Agreement to the contrary notwithstanding, it is hereby acknowledged and agreed that if and to the extent (a) the Bank agrees to grant non-disturbance agreements to any tenants of the Mortgaged Property, the Subordinate Interest Holder shall enter into nondisturbance agreements on substantially similar terms and conditions with such tenants, and (b) the Bank gives its consent to an act or action to be taken by the Borrower in connection with the use, operation and maintenance of the Mortgaged Property, the Subordinate Interest Holder shall be deemed to have consented to such act or action without any further act on its part.

11. (a) This Agreement shall be applicable both before and after the commencement, whether voluntary or involuntary, of any case by or against the Borrower under the Bankruptcy Code, or any state bankruptcy, insolvency or similar law, and all references herein to the Borrower shall be deemed to apply to the fee title owner of the Premises as a

debtor-in-possession and to any trustee in bankruptcy for the estate of the fee title owner of the Premises.

(b) In the event the Bank is required under any bankruptcy or other law to return to the Borrower, the estate in bankruptcy thereof, any third party or any trustee, receiver or other similar representative of the Borrower any payment or distribution of assets, whether in cash, property or securities, including, without limitation all or any portion of the Mortgaged Property or any proceeds of the Mortgaged Property previously received by the Bank on account of the Superior Mortgage (a "Reinstatement Distribution"), then to the maximum extent permitted by law, this Agreement and the subordination of any lien of the Subordinate Interest with respect to such Mortgaged Property or proceeds shall be reinstated with respect to any such Reinstatement Distribution. The Bank shall not be required to contest its obligation to return such Reinstatement Distribution.

(c) Until ninety-one (91) days following the earlier of (i) payment in full of the Superior Indebtedness, and (ii) acquisition of the Superior Indebtedness by the Subordinate Interest Holder, the Subordinate Interest Holder hereby covenants and agrees that it will not acquiesce, petition or otherwise invoke or cause any other person to invoke the process of the United States of America, any state or other political subdivision thereof or any other jurisdiction, any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government for the purpose of commencing or sustaining a case against the Borrower, under the Bankruptcy Code or any state bankruptcy, insolvency or similar law or appointing a receiver, liquidator, assignee, trustee, custodian, sequestrator or other similar official of the Borrower or all or any part of either of its property or assets or ordering the winding-up or liquidation of the affairs of the Borrower.

(d) Without limiting the foregoing, the Subordinate Interest Holder shall not at any time while the Superior Indebtedness is outstanding and unpaid petition or join anyone else in a petition for involuntary bankruptcy of the Borrower.

(e) The Subordinate Interest Holder hereby acknowledges and agrees that she will not assert any claim against the Borrower in any bankruptcy or similar proceeding of the Borrower which is greater than or otherwise expands the rights she now has under this Agreement.

12. Without limiting the generality of any other provisions of this Agreement, the Subordinate Interest Holder hereby acknowledges and agrees that the Bank may at any time and from time to time without the consent of, or notice to the Subordinate Interest Holder, and without incurring responsibility to the Subordinate Interest Holder, upon or without any terms or conditions and in whole or in part:

(a) Change the manner, place or terms of payment or performance of, and/or change or extend the time of payment or performance of, renew or alter, any portion of the Superior Indebtedness or any other obligations of any person evidenced or secured by the Superior Loan Documents, any security therefor, or any liability incurred directly or indirectly in respect thereof;

(b) Sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property by whomsoever at any time pledged or mortgaged to secure, or howsoever securing, the Superior Indebtedness or any other obligations of any person evidenced or secured by the Superior Loan Documents, or any liabilities incurred directly or indirectly in respect thereof, and/or any offset there against;

(c) Exercise or refrain from exercising any rights against the Borrower or others or otherwise act or refrain from acting;

(d) Settle or compromise any portion of the Superior Indebtedness or any other obligations of any person evidenced or secured by the Superior Loan Documents, any security therefor or any liability incurred directly or indirectly in respect thereto;

(e) Apply any sums by whomsoever paid or howsoever realized to any liability or liabilities of the Borrower to the Bank regardless of what liability or liabilities of the Borrower remain unpaid or unperformed; and/or

(f) Consent to or waive any breach of, or any act, omission or default under, any of the Superior Loan Documents, or otherwise amend, modify or supplement any of the Superior Loan Documents or any other instruments or agreements executed and delivered in connection therewith or otherwise relating thereto.

13. The Subordinate Interest Holder hereby makes the following representations and warranties to the Bank as of the date hereof:

(a) The Subordinate Interest Holder has the power, authority and legal right to execute, deliver and perform this Agreement. This Agreement has been duly authorized by all necessary action of the Subordinate Interest Holder, duly executed and delivered by the Subordinate Interest Holder and constitutes valid and binding obligations of the Subordinate Interest Holder enforceable against the Subordinate Interest Holder in accordance with its terms, subject to applicable bankruptcy, insolvency and similar laws affecting rights of creditors generally, and subject, as to enforceability, to general principles of equity (regardless of whether enforcement is sought in a proceeding in equity or at law);

(b) Neither the execution, delivery or performance by the Subordinate Interest Holder of this Agreement nor compliance by it with the terms and provisions hereof, (i) will contravene any provision of any law, statute, rule or regulation or any order, writ, injunction or decree of any court or governmental instrumentality, or (ii) will conflict or be inconsistent with or result in any breach of any of the terms, covenants, conditions or provisions of, or constitute a default under, or result in the creation or imposition of (or the obligation to create or impose) any lien upon any of the property or assets of the Subordinate Interest Holder pursuant to the terms of any indenture, mortgage, deed of trust, credit agreement, loan agreement, partnership agreement or any other agreement, contract or instrument to which the Subordinate Interest Holder is a party or by which it or any of its property or assets is bound or to which it may be subject;

(c) No order, consent, approval, license, authorization or validation of, or filing, recording or registration with (except as have been obtained or made prior to the date hereof), or exemption by, any governmental or public body or authority, or any subdivision

thereof, is required to authorize, or is required in connection with, (i) the execution, delivery and performance by the Subordinate Interest Holder of this Agreement or (ii) the legality, validity, binding effect or enforceability of this Agreement with respect to the Subordinate Interest Holder,

(d) The making of the Settlement Agreement and/or any payments thereunder will not result in the imposition of any withholding tax or similar charge or levy payable by the Borrower (whether pursuant to law or contract); and

(e) The Subordinate Interest Holder entered into the transactions contemplated by the Settlement Agreement without reliance upon any information or advice from the Bank. The Subordinate Interest Holder made its own underwriting analysis in connection with the Settlement Agreement, its own credit review of the Borrower and investigated all matters pertinent, in the Subordinate Interest Holder's judgment, to its determination to enter into the Settlement Agreement and to execute and deliver the Settlement Agreement and any related documents.

(f) The Settlement Agreement constitutes and includes the true, correct and complete understandings and agreements between the Subordinate Interest Holder and the Borrower and the Settlement Agreement has not been modified or amended, except as expressly set forth herein.

14. THE SUBORDINATE INTEREST HOLDER AND THE BANK EACH EXPRESSLY AND UNCONDITIONALLY WAIVES, IN CONNECTION WITH ANY SUIT, ACTION OR PROCEEDING RELATING TO THIS AGREEMENT, ANY AND EVERY RIGHT IT MAY HAVE TO A TRIAL BY JURY.

15. Any legal suit, action or proceeding against the Subordinate Interest Holder or the Bank arising out of or relating to this Agreement shall be instituted in any Federal or state court in Minnesota, and the Subordinate Interest Holder waives any objection which it may now or hereafter have to the laying of venue of any such suit, action or proceeding, and the Subordinate Interest Holder hereby irrevocably submits to the jurisdiction of any such court in any suit, action or proceeding.

16. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original. Such counterparts shall constitute but one and the same instrument and shall be binding upon, and shall inure to the benefit of, each of the undersigned individually as fully and completely as if all had signed one instrument.

17. Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

18. (a) No waiver shall be deemed to be made by the Bank of any of its rights hereunder, or under the Superior Loan Documents, unless the same shall be in writing and signed by the Bank, and each waiver, if any, shall be a waiver only with respect to the specific instances

involved and shall in no way impair the rights of the Bank in any other respect or at any other time.

(b) No waiver shall be deemed to be made by the Subordinate Interest Holder of any of its rights hereunder, or under the Settlement Agreement (except as set forth in this Agreement), unless the same shall be in writing and signed by the Subordinate Interest Holder, and each waiver, if any, shall be a waiver only with respect to the specific instances involved and shall in no way impair the rights of the Subordinate Interest Holder in any other respect or at any other time.

19. This Agreement shall be construed in accordance with and governed by the laws of the State of Minnesota, without reference to principles of conflicts of laws.

20. This Agreement shall be the entire and only agreement with regard to the subordination of the Subordinate Interest to the lien or charge of the Superior Mortgage and shall supersede and cancel, but only insofar as would affect the priority between the mortgages or deeds of trust, as applicable, herein specifically described, any prior agreements as to such subordination, including, but not limited to, those provisions, if any, contained in the Settlement Agreement or otherwise, which provide for the subordination of the lien or charge to another deed or deeds of trust or to another mortgage or mortgages.

21. All notices, demands, requests and other communications made hereunder shall be in writing and shall be properly given and deemed delivered on the date of delivery if sent by personal delivery or nationally recognized overnight courier and on the third (3rd) business day following mailing if sent by certified or registered mail, postage prepaid, return receipt requested, as follows:

If to the Bank: First Union National Bank,  
a national banking association,  
One First Union Center, DC6  
301 South College Street,  
Charlotte, North Carolina 28288-0166  
Attn: Craig Lieberman

with a copy to: Orrick, Herrington & Sutcliffe LLP  
666 Fifth Avenue  
New York, NY 10103  
Attn: Mitchell S. Kaplan, Esq.

If to the Subordinate  
Interest Holder: Linda Selbak  
4505 Snowy Egret Court  
Naples, Florida 34119

with a copy to: Moss & Barnett, A Professional Association  
4800 Norwest Center  
90 South Seventh Street  
Minneapolis, MN 55402  
Attn: Cass S. Weil, Esq.

or to such other addresses as any party hereto may request by notice served as required hereunder.

22. This Agreement may not be changed, terminated or modified except by an agreement in writing, signed by each of the parties hereto.

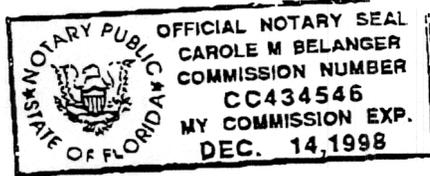
23. No person or entity (including, without limitation, the Borrower) is intended to be a third party beneficiary of, and no person or entity other than the Bank, the Subordinate Interest Holder and their respective successors and assigns shall have any rights under this Agreement.

24. This Agreement shall be binding upon and shall inure to the benefit of the Bank, the Subordinate Interest Holder and their respective successors and assigns.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the day and year first above written.

*Linda Selbak*  
Linda Selbak

Subscribed and sworn to before me this 27<sup>th</sup> day of OCTOBER 1998, by Linda Selbak, an individual.



(NOTARIAL STAMP OR SEAL)

*Carole M. Belanger*  
Notary Public

FIRST UNION NATIONAL BANK,  
a national banking association

(CORPORATE SEAL)

By: \_\_\_\_\_  
Name:  
Title:

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 1998, by \_\_\_\_\_, the \_\_\_\_\_ of First Union National Bank, a national banking association.

(NOTARIAL STAMP OR SEAL)

\_\_\_\_\_  
Notary Public

**EXHIBIT A**

**[Settlement Agreement Attached]**

## EXHIBIT B

### Legal Description of Premises

#### Parcel 1:

All of Lot 3, and that part of Lot 4, Block 3, Eastern Park Addition, City of St. Cloud, Benton County, Minnesota, which lies westerly of a line 26.00 feet east of, as measured at a right angle to and parallel with the west line of said Lot 4, and which lies northerly of that certain highway easement described in Book 28 of Miscellaneous on Page 420, according to the files of the Benton County Recorder, Benton County, Minnesota.

Being Abstract land.

Known as 1225 Division Street, St. Cloud, Minnesota

#### Parcel 2:

Lot 1, Block 1, COPPERTOP II  
Being Abstract Land.

Known as 600 Nicollet Boulevard, Burnsville, Minnesota

#### Parcel 3:

All of the Southeast quarter Northeast quarter (SE1/4 NE1/4), Section Thirty (30), Township Forty-Five (45), Range Thirty (30), EXCEPT that part thereof platted as "Parkdale Addition to the City of Brainerd";

AND ALSO

Lots One (1), Two (2), Five (5), Six (6), Seven (7), Eight (8) and Nine (9);  
AND the East Half of Lot Three (E1/2 L3) of Parkdale Addition to the City of Brainerd, EXCEPT: Commencing at the Southwest corner of the SE1/4 NE1/4, Section 30, Township 45, Range 30, thence North along the West boundary of said SE1/4 NE1/4 a distance of 704 feet more or less to the point of beginning, said point of beginning being the Northeast corner of Block Thirty-six (36), Cuyuna Range Addition to the City of Brainerd, thence North along said West boundary a distance of 617 feet, more or less, to a point being the Northwest corner of said SE1/4 NE1/4; thence East along the North boundary of said SE1/4 NE1/4 a distance of 551.54 feet more or less to a point being the Southwest corner of Block 27 of Cuyuna Range Addition to the City of Brainerd; thence in a Southwesterly direction to a point of beginning.

Being registered property as evidenced by certificate of Title No. 63536.

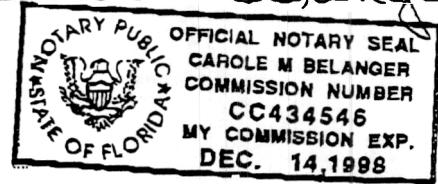
NOTE: The owner's Duplicated Certificate of Title must be submitted at closing.

Known as 2723 East Oak Street, Brainerd, Minnesota

AGREED AND ACCEPTED TO THIS  
DAY OF NOVEMBER, 1998:

*Carole M Belanger*

*Linda Selbak*  
LINDA SELBAK



CASS WELL, attorney for Linda Selbak

GERALD E. BRINK, on behalf of and as  
the legally designated representative  
of St. Cloud Manor, Ltd., Carefree  
Living of Burnsville, Ltd., Brainerd  
Manor, Ltd., and each of their past  
and present limited partners

ROLFE A. WORDEN, attorney for  
George E. Brink

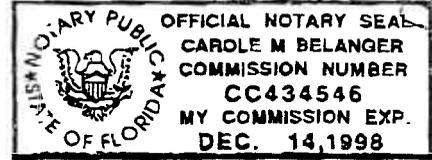
MILLER & SCHROEDER INVESTMENTS  
CORPORATION

By \_\_\_\_\_  
Name:  
Title:

AGREED AND ACCEPTED TO THIS \_\_\_\_\_  
DAY OF NOVEMBER, 1998:

Linda Selbak  
LINDA SELBAK

Carole M Belanger



CASS WEIL, attorney for Linda Selbak

GERALD E. BRINK, on behalf of and as  
the legally designated representative  
of St. Cloud Manor, Ltd., Carefree  
Living of Burnsville, Ltd., Brainerd  
Manor, Ltd., and each of their past  
and present limited partners

ROLFE A. WORDEN, attorney for  
George E. Brink

MILLER & SCHROEDER INVESTMENTS  
CORPORATION

By \_\_\_\_\_  
Name:  
Title:

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In re:

Chapter 7

Carefree Living of America (Burnsville), Inc.  
Carefree Living of America (St. Cloud), Inc.  
Carefree Living of America (Brainerd), Inc.

Case No. 01-33545  
01-33546  
01-33547

Debtors.

---

Brian F. Leonard, Trustee,

ADV. No. 02-9117

Plaintiff,

v.

**EVIDENTIARY OBJECTIONS  
TO SAMPSON AFFIDAVIT AND  
MOTION TO STRIKE**

Jane L. Strom Revocable Trust,  
Jane L. Strom, Trustee,

Defendants.

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Defendants object to the qualifications and substance of Merle Sampson's affidavit and hereby move to strike said affidavit in its entirety. Merle Sampson is the Trustee's putative valuation expert. His testimony is relevant only to establish value for purposes of meeting the Trustee's burden on the insolvency issue. For the reasons stated below, Sampson is not qualified to provide expert valuation testimony and his affidavit is not otherwise admissible.

**ARGUMENT**

**A. Sampson's Affidavit Does Not Qualify Him as a Valuation Expert.**

Expert testimony is governed by Rule 702 of the Federal Rules of Evidence which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert

by *knowledge, skill, experience, training, or education*, may testify thereto in the form of an opinion or otherwise. (Emphasis added).

As was the case with the Goetz affidavit in *In re Northgate Computer Systems, Inc.*, 240 B.R. 328 (Bankr. D.Minn. 1999), Sampson's affidavit is "utterly devoid" of any evidence to establish Sampson as an expert on valuation of the Debtors' residential care facilities.

### **1. Sampson Has No Appraiser's License and His Appraisal is Illegal**

Minnesota law requires Sampson to be a licensed appraiser. His affidavit is an "appraisal report" as defined in Minn. Stat. § 82B.02 Subd.5 for which a license is required. An "appraisal report" is an oral or written communication of an appraisal for compensation. Minn. Stat. § 82B.02 Subd. 5. An appraisal includes an opinion of value of real estate. Minn. Stat. § 82B.02 Subd. 3.

Moreover, to provide an opinion of value of commercial real estate, Sampson is required to hold the highest level of five licenses issued by the State of Minnesota, a Certified General Real Property Appraiser license. Such license requires 180 classroom hours of courses, including 15 hours related to the standards of professional appraisal practice. Minn. Stat. § 82B.13, Subd. 5. Sampson has none. In addition, the necessary license requires 3,000 hours experience in real property appraiser of which at least 1,500 hours must be non-residential. Minn. Stat. § 82B.14(a). Sampson has none. Violation of the licensing requirements is a gross misdemeanor. Minn. Stat. § 82B.201.

### **2. Sampson Has No Education or Training in Appraisal**

Although required by state law to have a minimum of 180 classroom hours to perform appraisals, Sampson has not taken even one seminar in real estate valuation. He has never performed an appraisal or even assisted in the preparation of one. He has never worked for an appraisal firm. True, he has managed nursing homes and "participated" in an undefined way in

the acquisition of nursing homes, but his role is comparable to Minnesota Twins manager Ron Gardenhire opining on the value of the team. Certainly Carl Pohlad is competent to do so but not the team manager.

### **3. Sampson is Without Knowledge, Skill or Experience in Valuation**

Sampson does claim that his role at GNI was to determine the value of the health care facilities, he does not claim that he ever actually performed any valuations. He says he was “closely involved” as a part of the team responsible for the acquisition of Five assisted living facilities while he was at Good Samaritan. He has been “involved” in other transactions. The fact that Sampson may have worked for entities that owned nursing homes or assisted living facilities does not make him an expert in valuing them. Managing facilities does not require the same experience as is required for valuing them.

In *In re Reynolds*, 193 B.R. 195, 204 (D.N.J. 1996) the district court affirmed the bankruptcy court’s refusal to qualify a trained appraiser as an expert on residential real estate where the appraiser had performed only five residential appraisals and could not recall the locations of those. Similarly, in *In re Spatz*, 222 B.R. 157 (N.D. Ill. 1998), the court disqualified trustee’s real estate valuation expert although the expert had extensive training, education and experience in valuating businesses because only about one-third of the expert’s business valuations involved real estate and in three out of four instances, the expert had used other experts for the real estate value.

### **4. Even If He Could be Qualified, His Opinion is Without Foundation**

Sampson does not describe how (or if) he applied the three commonly used appraisal approaches, income, replacement cost or comparable sales. See *In re Kellogg Square*

*Partnership*, 160 B.R. 343 (Bankr. D. Minn. 1993) (Discussing three methods). It is clear from his affidavit that he did not. He does not even mention these approaches.

Although Sampson did not begin his tenure as manager to the Debtors properties until January 4, 2002, he claims that the “conditions” existing as of January 4, 2002 also existed in March, 2001. He knows this he claims based on his review of unidentified “financial records” and his knowledge of operations gained after January 4, 2002. First, the financial records Sampson claims to have relied on are the same financial records and affairs he claimed in paragraph 9 were in extreme disarray and did not accurately reflect the Debtors’ financial condition. Sampson recites no basis existing in March 2001 for his opinion of value.

**B. Sampson Cannot Be a Fact Witness Either.**

Sampson has no personal knowledge of the condition or value of the Debtors’ properties in March and April of 2001. He did not begin managing the properties until January 2002. While he may be competent to testify as to what he saw and did and what he ultimately paid for the properties, such facts are irrelevant because he is not competent to value the properties before he owned them unless he can be qualified as an expert, which he cannot.

**C. Sampson’s Affidavit is Largely Based on Hearsay.**

His statements in paragraph 9 as to his review of the financial statements is hearsay. His statements as to the mixing of cash and accrual methods being improper, inaccurate and misleading is testimony without foundation. Sampson is not an accountant and not an expert in accounting practices. His statements lack foundation. The claimed omissions of debts he supposedly learned of from his review of the files is also hearsay and without personal knowledge as is the bulk of the remainder of paragraph 9. Paragraph 10 is entirely hearsay and not based on personal knowledge. His statements as to the offers made by others in paragraph 11

is inadmissible hearsay. His statements in paragraph 12 as to how these facilities are valued is not based on personal knowledge, lacks foundation and is based on hearsay. The amounts he allegedly spent upgrading the facilities is irrelevant. His testimony about industry standards is without foundation and is hearsay. His comments about the relationship with the Dakota County Welfare Dept are all hearsay.

### **CONCLUSION**

Sampson is not an appraiser and is not qualified to testify as to value. He has no foundation to base his testimony that the value of the properties in the aggregate in March 2001 was between \$8.5 and \$9.5 Million because he did not even arrive at the properties until January 2002. The balance of his affidavit is largely hearsay statements of others not based on personal knowledge of Sampson. His affidavit should be stricken.

Dated: October 13, 2004

LAPP, LIBRA, THOMSON,  
STOEBNER & PUSCH, CHARTERED

/e/ Ralph V. Mitchell

Ralph V. Mitchell (#184639)  
One Financial Plaza, Suite 2500  
120 South Sixth Street  
Minneapolis, MN 55402  
(612) 338-5815  
ATTORNEYS FOR DEFENDANTS

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In re:

Chapter 7

Carefree Living of America (Burnsville), Inc.  
Carefree Living of America (St. Cloud), Inc.  
Carefree Living of America (Brainerd), Inc.

Case No. 01-33545  
01-33546  
01-33547

Debtors.

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Brian F. Leonard, Trustee,

ADV. No. 02-9117

Plaintiff,

v.

**EVIDENTIARY OBJECTIONS  
TO TRUSTEE'S AFFIDAVITS  
AND OTHER "EVIDENCE"**

Jane L. Strom Revocable Trust,  
Jane L. Strom, Trustee,

Defendants.

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Defendants hereby provide these evidentiary objections to the Affidavit of Brian Leonard ("First Affidavit") and the Supplemental Affidavit of Brian Leonard ("Supplemental Affidavit").

In addition, Defendants object to certain cited portions of the various depositions cited in Trustee's memorandum

**ARGUMENT**

Affidavits provided in support of motions for summary judgment must be made on personal knowledge by a competent witness and contain such facts as would be admissible at trial. Rule 56 of the Federal Rules of Civil Procedure made applicable to these proceedings by Fed.R.Bankr.P. 7056 requires that affidavits be made on personal knowledge, set forth facts that would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein.

## **Objections to First Affidavit**

Paragraph 3. “The facts stated in this affidavit are based on (a) the financial and business records of the Debtor, and my review thereof, (b) the records produced by Mahoney & Hagberg, PA in Adv. Proc 03-3154. (c) the deposition testimony of Michael Mahoney, Steven V. Hagberg, and Jane Strom (attached as Exhibits hereto), and (d) the records and information in the bankruptcy estates of the Debtors which are under my control as the Trustee of such estates.”

Objection: The Trustee has admittedly no personal knowledge of his claimed facts “facts.” His alleged facts are based on are his review of unidentified documents which are obvious hearsay, lack foundation and are not qualified under the business records exception. Similarly, Defendants object to the wholesale “farming in” of deposition testimony. The deposition testimony of Mike Mahoney is entirely hearsay as is the deposition of Steven Hagberg. While there may be admissions by a party-opponent in the deposition of Jane Strom, those admissions must be identified in specific references. Defendants object to the admission of any portions of those depositions except those specifically cited by the Trustee of the Defendants in their respective memoranda. In addition, Defendants may object to specific references on additional grounds as hereinafter set forth.

Paragraph 5. “My examination of the Debtors’ financial and business records reflected the following partial list of liabilities owed jointly by all the Debtors as of January 1, 2001, which were unpaid as of March 15, 2001.”

Objection: The statement lacks foundation as to what financial and business records were allegedly examined and is a hearsay recitation of out of court statements. As discussed in Defendants’ memorandum, the Trustee formally objected to the claims of each of these creditors except Linda Selbak and the *prima facie* validity of the proofs of claim that may have arisen

under Fed. R. Bankr. Pro. 3001(f) has been lost by such objection. *See* 11 U.S.C. § 502(a) claim deemed allowed unless party in interest objects.

Paragraph 7. “The assets of the Debtors consisted solely of the three assisted living facilities located in Burnsville, St. Cloud and Brainerd. The aggregate value of the assets of the Debtor as of March 15, 2001 was \$9.5 million or less, as stated in the Affidavit of Merle Sampson filed herewith.”

Objection. The Trustee is not qualified to provide expert testimony and the testimony as to value he purports to give is a hearsay repetition of the affidavit of Merle Sampson which is the subject of a separate objection and motion to strike.

Paragraph 11. [The paragraph is too lengthy to repeat here but contains the purported facts why the Defendants are insiders].

Objection. The statements are not made on personal knowledge by the Trustee, the statements lack foundation (the Trustee does not even identify from whence these alleged facts were taken) and are based entirely on hearsay. Paragraph 11 is argument, not evidence.

Paragraphs 16, 17, 18. Attaching deposition transcripts.

Objection. Hearsay, wholesale farming in of deposition transcripts. Objection limited to sections not specifically cited in Trustee’s memorandum or Defendants’ memorandum.

### **Supplemental Affidavit**

Paragraph 3. Listing of claims.

Objection. Same as the objection to paragraph 5 of the Affidavit. Other than claims by First Union Bank, Linda Selbak and the Trust, the Trustee has successfully objected to all of the other claims and is judicially estopped from introducing them as valid claims. *See* Defendants’ Memorandum discussing judicial estoppel.

Paragraph 4. Attaching copies of excerpts from certain proofs of claim.

Objection. Hearsay, no foundation, incomplete. These proofs of claim have lost their evidentiary *prima facie* validity as a result of the successful objections by the Trustee as discussed above. Divested of such validity, the claims are mere hearsay and lack foundation. Moreover, the excerpts are incomplete, especially in the case of the Claim of Linda Selbak.

### **Trustee's Memorandum**

Page 4. "The Debtors transferred a mortgage interest in the Debtors' real estate to the Defendants on March 15, 2001."

Page 5. "Subsequently, on March 15, 2001, the Debtors granted the above-mentioned mortgage to the Defendants as collateral for the Debtors obligations under the replacement promissory note. (Hagberg depo. 76, 77, 86, 89, 97, 98.)"

Objection: Misstates the testimony. Hagberg testified that mortgages were originally executed in January, 2001. *See* Hagberg depo. 92-94.

Page 9(g). "The Trust had never made any other loans to any other businesses up to that time."

Objection: Taken out of context. At page 71, Hagberg explained that the Trust had purchased preexisting notes.

Page 9 (h). "An unsecured promissory note was then executed by Zeller on behalf of the Debtors in favor of the Trust on that date [January 15, 2001] in the amount of \$62,160.35 (the 'replacement note')."

Objection: Misstates the testimony. Hagberg testified that the note was dated January 15, 2001. The note was *signed* on or about January 24, 2001. *See* Ex 2 Strom depo. p. 5.

Page 10(h). The Strom Trust Mortgage was filed in the offices of the County Recorder of the affected counties between the dates of March 16, 2001 and March 28, 2001.

Objection: No cited evidence supports this statement. The mortgages were recorded as follows:

Crow Wing County (Brainerd): March 28, 2001

Dakota County (Burnsville): April 5, 2001

Benton County (St. Cloud): March 21, 2001. *See* Strom Proof of Claim #

Page 11(i). Thereafter, on March 15, 2001, the Law Firm had Zeller, on behalf of the Debtors, execute a mortgage in favor of the Law Firm on all of the Debtor's real estate (the "Law Firm Mortgage")."

Objection: States facts not in evidence, misstates the sworn testimony. Nowhere in the record is there any testimony that the Law Firm "*had*" Zeller execute a mortgage in the sense that the Law Firm directed or ordered her to do so.

Page 12. "Lastly and most tellingly, the Debtors obligation owed to the Law Firm of \$1.5 million as of March, 2001 (an amount which had accumulated over the previous five years) was not only well known to Mr. Hagberg, but caused he and Mr. Mahoney serious concern."

Objection: Misstates the sworn testimony. At page 117 of his deposition, Hagberg testify that the debt did *not* cause him significant concern because of the equity in the properties.

Defendant request that the Court decline to receive or consider the objectionable evidence as described herein.

Dated: October 13, 2004

LAPP. LIBRA, THOMSON,  
STOEBNER & PUSCH, CHARTERED

/e/ Ralph V. Mitchell

Ralph V. Mitchell (#184639)  
One Financial Plaza, Suite 2500  
120 South Sixth Street  
Minneapolis, MN 55402  
(612) 338-5815  
ATTORNEYS FOR DEFENDANTS

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In re: Chapter 7  
Carefree Living of America (Burnsville), Inc., Case No.: 01-35545  
Carefree Living of America (St. Cloud), Inc., 01-33546  
Carefree Living of America (Brainerd), Inc., 01-33547

Debtors.

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Brian F. Leonard, Trustee, ADV No.: 02-9117  
Plaintiff,

v.

Jane L. Strom Revocable Trust,  
Jane L. Strom, Trustee, and

Defendants.

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**UNSWORN CERTIFICATE OF SERVICE**

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I, Janet L. Pipp, declare under penalty of perjury that on October 13, 2004, I served a copy of the following documents:

1. Defendants' Objection to Trustee's Motion for Summary Judgment, with attached exhibit;
2. Affidavit of Kathleen L. Zeller, with attached exhibits;
3. Affidavit of Ralph V. Mitchell, with attached exhibits;
4. Evidentiary Objections to Sampson Affidavit and Motion to Strike; and
5. Evidentiary Objections to Trustee's Affidavits and Other "Evidence"

on:

Mr. Brian F. Leonard  
Leonard, O'Brien, Spencer, Gale & Sayre, Ltd.  
100 South Fifth Street, Suite 2500  
Minneapolis, MN 55402

*Attorney for Plaintiff*

by handing to and leaving with Kate Quinlan, a copy thereof, enclosed in an envelope, directed to said attorney at the above address, the last known address of said attorney(s).

Executed on: October 13, 2004

/e/ Janet L. Pipp

Janet L. Pipp, Legal Secretary

Lapp, Libra, Thomson, Stoebner &  
Pusch, Chartered

120 South Sixth Street, Suite 2500

Minneapolis, MN 55402

612/338-5815