

JUDGE HERB ROSS (Recalled)

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ALASKA
605 West 4th Avenue, Room 138, Anchorage, AK 99501-2253 — (Website: www.akb.uscourts.gov)
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In re

BRAYTON INVESTMENT, LLC,

Debtor(s)

Case No. A10-00515-HAR
In Chapter 7

**MEMORANDUM DECISION REGARDING
McCREADY OBJECTION TO THE WIKAS'
PROOF OF CLAIM NO. 1**

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1- **SUMMARY OF DECISION**- Brayton Investment gave the Wikas a deed of trust on real property in Anchorage to secure potential unpaid costs under a settlement agreement between the Wikas and Suzan McCready, owner of Brayton. The Wikas were to finish building three townhouses in Girdwood.

The Wikas assert a \$440,000 secured claim (net of attorney fees) for amounts due under the settlement agreement. McCready objected, alleging excessive costs.

Because the Wikas have not given an acceptable accounting of their construction costs or justified costs due to delay in completion, their proof of claim will be decreased to **\$186,394.67**.¹

2- **FACTUAL AND PROCEDURAL BACKGROUND**- This section of the memorandum contains the court's findings of fact, as well as uncontested historical facts. Additional findings are found in the Analysis section, Section 3.

2.1- **Suzan's Background and Decision to Develop Cedar Creek**- Suzan McCready owned a mortgage brokerage business in Anchorage in 2006 and was purchasing an ERA real estate brokerage. She also had investments in land and commercial properties.

She decided to expand into real estate development. Although she had subdivided raw land before, she undertook her first construction project, the Cedar Creek development in Girdwood, Alaska. Although she had hoped to build more units on the Girdwood property, she eventually received approval for three townhouses and a duplex, five units altogether. The three townhouses were known as "The Arlberg Building."

¹ This does not take into account the amount of the Wikas' recoverable attorney fees, which have yet to be determined.

1
2 Suzan² obtained a construction loan from First National Bank Alaska (FNBA) for about
3 \$900,000 for the three townhouses. She commenced construction in late 2006 or early 2007. Jim
4 Ward was employed as her construction manager. The plan was to have the three townhouses
5 completed by the end of summer or early fall in 2007. Suzan was thinking of keeping one of the
6 townhouses for herself.

7 **2.2- Suzan Agrees to Build a Townhouse for the Wikas; the Wikas Prepay-** Suzan and
8 Cheryl-Ann Wika met through their children, some of whom were in the same school. Their
9 daughters had a common interest in downhill skiing. The Wikas' three daughters were heavily
10 involved in skiing, and the Wikas wanted to have a permanent home in Girdwood, near the
11 Alyeska ski resort, so the girls could go to school and ski in the same community.

12 Suzan promoted the sale of one of the proposed Arlberg townhouses to Cheryl. Cheryl
13 visited the construction project. She talked to Jim Ward, Suzan's construction manager. And, she
14 dickered with Suzan for a favorable price. The townhouses were priced in the \$600,000 range.
15 On April 17, 2007, Suzan agreed to sell the Wikas Unit 3C (the townhouse closest to the street;
16 Unit 3A was the most desirable, being closest to the creek, and Unit 3B was the middle townhouse
17 unit). The price was a bargain \$477,500. In addition, the Wikas advanced \$172,500 to Suzan as a
18 loan, to be repaid in five years. The total, \$650,000, was to be paid over to FNBA to release the
19 lien of the construction loan from Unit 3C.³

20 The Wikas trustingly gave Suzan a \$650,000 check without any safeguards that the funds
21 would be used to actually pay FNBA. The funds were, in fact, never used for that purpose or used
22 in the construction project at all. Apparently, FNBA was not willing to grant a partial release at
23

24 ² I will use the first names of Suzan McCready and Cheryl-Ann Wika in this memorandum for ease of
25 reference. No disrespect is intended.

26 ³ Exhibit 5. Note: the Wikas' trial exhibits are marked numerically; Suzan's trial exhibits are marked
27 alphabetical.

1 that stage of construction and/or the regulated townhouse regime was not sufficiently advanced to
2 even allow such a transfer.

3 **2.3- Suzan Runs Into Financial Problems**- In May 2007, the FBI contacted Suzan and told
4 her she was the subject of a criminal investigation involving bank fraud. Shortly afterwards
5 Suzan voluntarily refunded \$485,000 of the Wikas' \$650,000 to them.⁴ Although she was
6 eventually indicted on December 17, 2007, the charges were later dropped.

7 After getting the \$485,000 refund, the Wikas were nonetheless anxious to own Unit 3C, so
8 they returned a check for \$475,000 to Suzan on about June 19, 2007. Thus, their advance to
9 Suzan was reduced to \$642,500, instead of \$650,000.

10 The investigation and the indictment had an adverse effect on Suzan's various business
11 operations. In the fall of 2007, the Arlberg construction fell behind. Cheryl noticed that work
12 seemed to have come to a standstill at the end of 2007, and delivery of Unit 3C was months
13 behind schedule.

14 **2.4- The Wikas Become Concerned; Intense Collection Efforts Begin; Suzan's Financial**
15 **Situation Becomes Dire**- The Wikas learned about Suzan's indictment in December 2007. They
16 were very concerned about the safety of their \$642,500 investment. They heard Suzan was going
17 to hide her assets. So, without legal advice, they filed three liens against Suzan's real estate
18 holdings in Anchorage, and one against the Cedar Creek development in Girdwood, in January
19 2008 for \$650,000.⁵

20 The liens were almost surely illegal under AS 34.35.900, as pointed out by one of Suzan's
21 attorneys.⁶ The Wikas refused at that time to release them, even though they delayed a sale of
22 one parcel.

24 ⁴ Exhibit C.

25 ⁵ Exhibits D and E.

26 ⁶ Exhibit H.

1 FNBA was on the verge of calling its construction loan on the Cedar Creek development
2 against Suzan in January 2008 and commencing a foreclosure.

3 In January 2008, the Wikas hired attorney William Artus to begin a collection suit in the
4 superior court in Anchorage against Suzan. A prejudgment attachment proceeding was held in
5 early March 2008 before Superior Court Judge Sen Tan. Before he ruled, however, the Wikas and
6 Suzan reached a settlement.

7 **2.5- The Settlement Agreement**- On the courthouse steps in early March 2008, the
8 parties reached a compromise. It was memorialized in the Settlement Agreement entered into on
9 March 18, 2008.⁷ The interpretation of this agreement is the centerpiece of this dispute.

10 It looked like Suzan was going to lose in front of Judge Tan in the prejudgment attachment
11 hearing. Suzan had received \$642,500 from the Wikas, which was to be used to pay off the FNBA
12 lien on Unit 3C, but none of it had been used for that purpose. So, her chances did not look good
13 and Suzan was facing the choice of an adverse ruling and/or having to file bankruptcy.

14 The attorneys and parties negotiated and came up with a plan. The Wikas were to take
15 over the completion of the three townhouses, which were then 70-80% completed. The Wikas
16 would try to assume the FNBA loan which still had funds available to draw of over \$300,000.
17 Suzan would provide some funds to release liens on the property, and provide additional security
18 (the deed of trust on the Brayton Investment property) to cover the Wikas' potential expenses.

19 Even before the agreement was finalized, Suzan quitclaimed the entire Cedar Creek
20 development to the Wikas on March 5, 2008, to facilitate their negotiation with FNBA.⁸ Based on
21 the Wikas financial strength and agreement to complete the project, FNBA approved the
22 assumption of the construction loan by the Wikas.

23 The Settlement Agreement had the following relevant terms (and, omissions):
24

25 ⁷ Attachment A to this memorandum, and Exhibit J.

26 ⁸ Exhibit 8.

- The debt owed to the Wikas by Suzan is \$650,000 (in their post-trial brief, the Wikas concede the proper amount is \$642,500).⁹
- Suzan gave the Wikas \$130,920 from the sale of other property ("Lot 6"), to be used to satisfy liens on the Cedar Creek property, as an adjunct to assuming the FNBA construction loan.
- On March 5, 2008, Suzan conveyed the "Cedar Creek Property" (consisting of the Arlberg Building and a duplex site which was partially improved with a foundation). This was also as a adjunct to assumption of the FNBA construction loan. This property was encumbered with the \$910,000 FNBA deed of trust, plus subcontractor liens and taxes.
- The parties were to cooperate in getting FNBA to approve the assumption.
- Paragraph 6 of the Settlement Agreement provided for the Wikas to hire Jim Ward to manage completion of the project:

6. Wikas will hire Jim Ward as their representative to supervise and manage the construction and completion of the Arlberg Building and hire subcontractors to (a) complete the construction of the Arlberg Building, (b) install the paving on the Cedar Creek Property that is required for the Arlberg Building, (c) do the required landscaping on the Cedar Creek Property that is required for the Arlberg Building and (d) do and perform all other work that is needed to complete the construction of the Arlberg Building so that Unit 3A and Unit 3B can be sold to third parties. Jim Ward will be paid a construction management fee of \$40,000 for his previous work as construction manager for the Arlberg Building for Suzan and his work as construction manager for completion of the Arlberg Building for Wikas. Jim Ward has given Wikas a list of the estimated costs that will be incurred to complete the construction of the Arlberg Building and the list of costs is attached to this Agreement as Exhibit A. Suzan's signature on this Agreement does not signify her agreement that Jim Ward earned fees or commission in his prior arrangements with Suzan or that the compensation being paid to Jim Ward in this paragraph is justified.

- Exhibit A to the Settlement Agreement is the two page estimate of costs given by Jim Ward to complete the construction (which did not include loan fees and some of the carrying charges). It has a handwritten figure of \$516,479 on it, but this appears to be \$4,500 high for the total of all the costs (i.e., the court's calculation shows \$511,979) and may not take into account three items marked "paid" in the total amount of \$13,605.76. So, the amount may be closer to a little less than \$500,000. The agreement does not precisely state what the purpose of the Ward estimate is (the Wikas say it is a meaningless attachment which the court should disregard; Suzan said it is an important term of the agreement). This is one of the key disputes in this claims objection proceeding.

⁹ Wikas' *Final Argument and Post Trial Brief*, at page 5. Docket No. 215.

- There was no agreed date for the Wikas to complete and market the three townhouse units.
- There are several overlapping paragraphs regarding the Wikas' accounting duties, which are key to the court's decision (§§ 7 and 9).

Paragraph 7 relates to the accounting for completion of the construction, summed up as **"the Cedar Creek Completion Costs."**

Paragraph 9 relates to any remaining deficiency in making the Wikas whole, which might exist after the Units 3A and 3B are sold; it was to cover any unpaid balance of the Cedar Creek Completion costs. This balance is called **"the Cedar Creek Deficiency."**

7. Wikas will keep complete and accurate records of all costs that they incur and pay to (a) pay the FNBA Loan, (b) satisfy and pay the liens and claims of lien against the Cedar Creek Property and the Arlberg Building, (c) obtain and pay the New FNBA Loan, (d) complete the construction of and sell Unit 3A [*sic*] and Unit 3B in the Arlberg Building, and (e) pay property taxes, insurance, permit fees, utilities and other costs for or pertaining to the Cedar Creek Property and the Arlberg Building, including their attorney fees and costs. All of such fees and costs are collectively referred to in this Agreement as "the Cedar Creek Completion Costs". Suzan will have full and complete access to all information pertaining to the Cedar Creek Completion upon written request to Wikas for such information. At or before the time this Agreement is executed Suzan will give to Wikas originals or copies of all contracts, invoices, bids, checks, plans, drawings, specifications, permits and other things (her entire file) pertaining to the Arlberg Building and construction of the Arlberg Building. Within five (5) days after this Agreement is executed Wikas will give Suzan a list of the documents and things they want Suzan to provide and Suzan will provide the requested documents and things within five (5) days of receiving the list.

* * *

9. When the sales of Unit 3A and Unit 3B have been completed Wikas will provide Suzan with an accounting of the proceeds they receive from the sale of Unit 3A and 3B and of the amounts they have paid and incurred, or that they owe, for the Cedar Creek Completion Costs. The Cedar Creek Completion costs will include compensation for the time and effort that Cheryl Wika has spent and will spend to (a) deal with and negotiate with lien claimants (b) deal with other unpaid costs and claims incurred by Suzan for the Cedar Creek Property and the Arlberg Building, (c) deal with and negotiate with FNBA pertaining to the FNBA Loan and the New FNBA Loan, (d) deal with other matters pertaining to the Cedar Creek Property and the Arlberg Building. The parties agree such reasonable compensation to be paid to Cheryl Wika is three percent (3%) of the sale price of Unit 3A and Unit 3B. Wikas will also give Suzan an accounting of the remaining balance owed, if any, on the FNBA Loan or the New FNBA

Loan, as applicable, when the sales of Unit 3A and Unit 3B have been completed and the other Cedar Creek Completion Costs paid by Wikas. The remaining balance owed on the FNBA Loan or the New FNBA Loan, if, any, and the Cedar Creek Completion Costs paid by Wikas will take into account the \$130,920 of Lot 6 Proceeds received by Wikas and disbursed by them according to Paragraphs 3 and 4 of this Agreement. The remaining balance of the FNBA Loan or the New FNBA Loan will be a lien against Unit 3C. Because of her obligation to convey the completed Unit 3C to Wikas free and clear of all liens and claims Suzan will owe Wikas (a) the remaining balance of the FNBA Loan or the New FNBA Loan, plus interest that accrues and continues to accrue on such loan, and (b) the Cedar Creek Completion Costs that were paid directly by the Wikas (after taking into account the receipt and disposition of the \$130,920 of Lot 6 Proceeds). The amount Suzan will owe the Wikas after the sales of Unit 3A and Unit 3B have been completed as described in this paragraph, including interest on such amount, is referred to in this Agreement as "the Cedar Creek Deficiency". The Cedar Creek deficiency will accrue interest at the rate of interest on the FNBA Loan or the New FNBA Loan for that portion of the Cedar Creek Deficiency, and at the rate of seven percent (7%) per year from the date the sale of the second townhome in the Arlberg Building is closed and completed on the portion of the Cedar Creek Deficiency that is the Cedar Creek Completion Costs that were paid directly by the Wikas. In addition to the Cedar Creek Deficiency, Suzan will continue to owe Wikas the \$172,500 loan, plus interest from January 1, 2008, through the time the sales of Unit 3A and Unit 3B have been completed and until the loan is paid in full.

- In paragraph 15, because any potential "Cedar Creek Deficiency" was unknown, Suzan was to cause the debtor, Brayton Investment, LLC, to give a third deed of trust on its commercial building in Anchorage to secure any unpaid deficiency and any portion of the unpaid \$172,500 loan. This was designated "**the Remaining Balance Due**," which is presumably the amount the Wikas have claimed in their Proof of Claim No. 1 in this bankruptcy.
- Paragraphs 19-22 (there are two ¶ 22's, but this relates to the second one) deal with the duplex site. For our purposes, it says if the Wikas sell the duplex, the net proceeds will be applied to "the Remaining Balance Due." The duplex rights were sold to Spinnell Homes for \$400,000.
- Finally, the Settlement Agreement contains an option in paragraph 16:

At any time prior to the sale of Unit 3A or 3B Suzan will have the option to purchase, or arrange for the sale of, the unsold Unit(s) and the Duplex Rights described in Paragraph 19 by paying Wikas the Remaining Balance Due and Suzan will have access to unsold Units 3A or 3B to further this right.

Note that the option is exercisable *prior* to the sale of Units 3A or 3B by paying "the Remaining Balance Due," but paragraphs 9 and 15 describing "the Cedar Creek Deficiency" and "the Remaining Balance Due," respectively contemplate "the

1 Remaining Balance Due” is a figure derived *after* Units 3A and 3B have been sold.
2 So, the option appears to be flawed.

3 **2.6- Jim Ward and the Ward Estimate**- Jim Ward served as Suzan’s construction manager
4 before she turned the property over to the Wikas. She was not completely happy with him, as
5 reflected in ¶ 6 of the Settlement Agreement (last sentence) where she said : “Suzan's signature
6 on this Agreement does not signify her agreement that Jim Ward earned fees or commission in his
7 prior arrangements with Suzan or that the compensation being paid to Jim Ward in this paragraph
8 is justified.”¹⁰

9 Cheryl testified that the inclusion of Ward as supervisor or manager of the completion of
10 the Arlberg Building in the Settlement Agreement was required by Suzan, but the court finds he
11 was also probably voluntarily included by the Wikas. Though David Stringer of FNBA, who
12 monitored Suzan’s default and the Wikas assumption of the construction loan, did not recall a
13 requirement that the Wikas have a construction manager or a construction budget to complete
14 the project, the court finds that these items were probably a requirement, condition or step in the
15 refinancing of the construction loan. He said the loan was refinanced in part on the strength of
16 the Wikas balance sheet, but since they were not contractors and did not have construction
17 experience, it was probably an interest of FNBA that they had a capable project manager and a
18 financial projection for completing the work.¹¹

19 The \$500,000± estimate to complete the construction was not a cap, but it provided a
20 baseline. Suzan’s expert, Jim Dokoozian, testified that the estimate was reasonable and four
21 months was a reasonable time to complete the project, from March 2008 (Jim Dokoozian is
22 discussed in Section 2.16 below).

23 ¹⁰ Attachment A, *Settlement Agreement*, ¶ 6, at page 4.

24 ¹¹ See, David Stringer email to his staff, dated March 6, 2008, indicating under Other terms and
25 conditions: “b) Budget/contract needs to be provided.”

1 Dokoozian personally knew and had worked with Ward. He testified that Ward was
2 competent and his estimate was reasonable. The Ward estimate, on its face, appears to have been
3 developed using mostly price fixed bids. He specifically noted those items where he was
4 estimating the cost of completion because he did not have bids.¹²

5 For reasons which were not fully explained in the testimony, Ward gradually stopped
6 attending to the job after the Wikas took over in March 2008. Perhaps this was due to the fact
7 that the Wikas did not sign a contract Ward had prepared for them, or did not pay the first
8 \$20,000 down payment of his fee until April 6, 2008, almost three weeks after the March 18, 2008
9 Settlement Agreement.¹³

10 He did provide bids for subcontractors and materialmen, but these appear to have been
11 mostly for time and materials, instead of a fixed cost. He did not monitor the progress of the job.
12 The Wikas did not pay him the balance of his \$20,000 contract because they felt he had not
13 fulfilled his contract to them.

14 Throughout her testimony, Cheryl said that the Ward estimate in the Settlement
15 Agreement was inaccurate (too low) and did not include items that the Wikas paid for (for
16 example, some lighting cans for the front of the units). No line item detail about these costs was
17 given to the court by the Wikas, nor did the show how particular bills they incurred increased
18 particular line items of the Ward estimate.

19 **2.7- Cheryl Becomes the Job Boss; Her Record Keeping Method**- So, Cheryl felt she was
20 forced to closely monitor the progress of the construction herself. She went to the job site every
21 day, making the long trip from Anchorage to Girdwood, sometimes more than once a day. The
22 only day she took off was Christmas 2008, until the construction was completed. She is a devoted
23

24 ¹² Attachment A, *Settlement Agreement*, at Exhibit A to the agreement.

25 ¹³ Check located in Exhibit 2, which is not Bates stamped.

1 mother to her three daughters, but had to give up her close, nurturing relationship for more than
2 a year, in order to attend to the construction. She even cleaned up the construction site every day
3 by herself.

4 But, this was her first construction project (as it was Suzan's). She did not have the
5 experience to see that work was performed economically, and that it was scheduled and
6 completed in a timely manner.

7 Nor did she keep adequate records to show where the cost overruns were and why they
8 were justified – that is, why they varied so far from the Ward estimate. She paid the bills as they
9 came in, often with Ward's approval that payment was appropriate. She made no attempt to
10 organize them using a job cost methodology – that is, showing the costs of a given vendor as they
11 related to a particular aspect of the job. She made no attempt to coordinate her accounting with
12 the line item categories shown on the Ward estimate. Not that this is specifically required by the
13 Settlement Agreement, but the Wikas have provided no specific analytical record showing what
14 happened in a way that Suzan (and, the court) could determine whether the costs were reasonable
15 or excessive.

16 Until Connie Taylor was hired by the bankruptcy trustee (*see*, Section 2.11 of this
17 memorandum), there were just a pile of bills that had been put into a spreadsheet or database so
18 they could be sorted by vendor name and date, but without a report or schedule showing how
19 they related to the particular line items in the Ward estimate.

20 The court was afforded a window into the dynamics of the construction project and the
21 way that both Suzan and the Wikas performed during their respective tenures as the contractor.
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1 This was in a state court case brought by the Wikas against a decking contractor, All Decked Out
2 (ADO).¹⁴

3 Cheryl testified in this proceeding that one of the problems she inherited was due to
4 improper siding installed by ADO, which resulted in water damage and required her to retain
5 Carve Construction to redo some of the work at great expense. The problem is this testimony was
6 not coherently presented so the court could understand what the original Ward estimate entailed
7 for this particular work, why it was too low, what exactly Carve was required to do and why, and
8 what the cost overrun was as a result. No doubt the information is buried in the stack of invoices
9 provided to the court, but it is not assembled for the court. In other words, instead of a coherent
10 story, the court was given a stack of bills,¹⁵ and expected to sort it out. Unfortunately, the Wikas'
11 testimony is not presented in a manner that allows the court to reach the conclusion they seek.
12 The overruns could have either been justified or excessive – the Wikas have not shown they were
13 justified.

14 In any event, Superior Court Judge Jack Smith conducted a multi-day bench trial on just
15 the ADO aspect of the Arlberg construction. Despite Cheryl's claim of defective work by ADO,
16 Judge Smith concluded:

17 16. On a preponderance of the evidence standard, it is more likely true than
18 not true that the ADO work although incomplete was not defective. The
19 Wikas' claim that the ADO work was so defective that they were entitled to
20 a declaration that the lien should be expunged is DENIED. Wyrick can seek
21 to foreclose his amended lien pursuant to AS 34.35.110.¹⁶

21 ¹⁴ Case No. 3AN-08-07032 CI, Gregory B. Wika and Cheryl-Ann Wika vs. Dane A. Wyrick,
22 individually and d/b/a All Decked Out Co., in the Superior Court for the State of Alaska, Third Judicial District
23 at Anchorage.

23 ¹⁵ Exhibit 2.

24 ¹⁶ Case No. 3AN-07032-CI, Wika v Wyrick, *Findings of Facts and Conclusions of Law*, at page 16,
25 dated June 25, 2009, found in Suzan's objection to the Wikas' relief from stay motion early in the case. Docket

1 In our claims objection hearing, there was only cursory testimony about this issue, and
2 nothing to clearly tie the facts together to show the Wikas were justified in the expenditures they
3 incurred and the delays they suffered to the extent any cost overruns should be compensable.

4 Suzan's expert, Jim Dokoozian, indicated why such cost overruns and delays often occur
5 and generally are not justified in a standard owner-builder situation, where the owner does not
6 have construction contracting experience. *See* Section 2.16 of this memorandum.

7 **2.8- Suzan Seeks to Get an Accounting from Cheryl and Reacquire the Property**- In an
8 attempt to exercise the option contained in ¶ 16 of the Settlement Agreement, Suzan made
9 overtures to reacquire the property. Her several attorneys, Erik LeRoy and Michael Brain,
10 requested accountings and proposed exercising the option. Through July 2009 and October 2009,
11 the parties parried regarding the exercise of the option.¹⁷ The main frustration on Mr. Brain's part
12 was getting an adequate accounting so that the option could be exercised. He testified that Mr.
13 Artus gave him a list of bills comprising the amount necessary, but no accounting to show how
14 the bills applied to each aspect of the job.

15 Finally, Mr. Artus wrote Mr. Brain on November 12, 2009 that Suzan did not have the
16 right to repurchase.¹⁸

17 What is striking is the refusal of Cheryl or her counsel to try to resolve the accounting
18 problem at that stage. They bet the house on the assumption that they did not have to do a more
19 adequate accounting.

20 **2.9- The Project is Completed and Two Units and the Duplex Site Are Sold**- Unit 3A was
21 sold for \$680,000 on January 29, 2009, under a Conditional Certificate of Occupancy, pending the

22 _____
23 No. 20, Exhibit C, filed July 7, 2010. The court takes judicial notice of this document.

24 ¹⁷ *See*, Exhibits K-EE of those exhibits which have been admitted.

25 ¹⁸ Exhibit CC.

1 completion of landscaping. A final Certificate of Occupancy was issued on August 4, 2009. Unit
2 3B was sold for \$600,000 in October 30, 2009.

3 The duplex land and rights were sold to Spinnell Homes for \$400,000 on December 31,
4 2009.¹⁹

5 **2.10- The Wikas Seek to Foreclose and Brayton Investment Files Chapter 7**- The Wikas
6 began a nonjudicial foreclosure on their third deed of trust on the Brayton Drive property owned
7 by the debtor, alleging a debt of about \$573,000. They also seized the rents from the property.

8 Suzan and Brayton filed a state court action in April 2009 to enjoin the sale, but a
9 preliminary injunction was denied. The Wikas were permitted by the state court to proceed with
10 the foreclosure. But, before the foreclosure could proceed, this chapter 7 case was filed.

11 The Wikas moved for relief from stay early in the case, but have agreed to the continuance
12 of the stay, hoping the trustee could sell the property first.²⁰

13 **2.11- The Trustee Hires an Accountant, Connie Taylor, to Sort Out the Accounting**- The
14 trustee hired a bookkeeper, Connie Taylor, to help him understand the Wikas' proof of claim.²¹
15 Ms. Taylor did a great service to the parties and court by sorting out the invoices, so they were
16 categorized by vendor and roughly by trade in several spreadsheets.²² She was not asked and did
17 not attempt to do a construction job cost analysis. Her report does, however, assist the court and
18 parties.

21 ¹⁹ The closing statements for the three sales are at Exhibit 11.

22 ²⁰ The facts recited in this section of the memorandum are from the Wikas' motion for relief from stay.
23 Docket No. 8.

24 ²¹ Docket Nos. 39 and 40.

25 ²² Exhibit 1.

1 About a week before the trial, during some motion practice in this proceeding, the court
2 asked Mr. Artus, the Wikas' attorney, how they intended to prove their *prima facie* case. He said
3 he would do this through Cheryl's testimony and the Taylor report (without calling Ms. Taylor,
4 herself). The court indicated the Taylor report might not be admissible, if challenged, without
5 her presence. Almost as an afterthought, Mr. Artus said it would probably be best that he call her.
6 She was not even on the Wikas witness list by name (although Suzan, named her and Cheryl
7 designated witnesses listed by Suzan).²³

8 All this is to point out that, at this late date (on the eve of trial), all that Cheryl thought she
9 had to do to prove her case was to present a list of paid invoices, without any proof at all that they
10 were reasonable, how they applied to the specific aspects of the job, and why the job was
11 performed in a timely manner.

12 **2.12- The Wikas' File Proof of Claim No. 1**- Proof of Claim No. 1 is a one page form for
13 \$573,293.67, without any explanatory attachments. It is symptomatic of the Wikas miscalculation
14 in this case, that they could easily meet their burden of proof by filing a listing of their payments,
15 sorted by vendor in chronological order.

16 **2.13- The Trustee's Objection to the Wikas' Proof of Claim No. 1**- The trustee filed an
17 objection to the Wikas' proof of claim.²⁴ The trustee raised some of the same arguments that
18 Suzan has subsequently raised, but not all of them. The court entered an interim order reducing
19 some portions of the Wikas' claim, and allowed an amount of \$458,963.03, plus some amount of
20 attorney fees, yet to be determined.²⁵

21
22
23 ²³ Exhibits 193 and 194.

24 ²⁴ Docket No. 74, filed on February 24, 2011.

25 ²⁵ Docket No. 92, filed April 11, 2011.

1 **2.14- Suzan's Objection to the Wikas' Proof of Claim No. 1**- The day before the hearing
2 on the trustee's objection, Suzan file her own objection.²⁶ She alleged that the Wika's claim was
3 excessive and that their claims in excess of the Ward estimate were unjustified, or at least
4 unexplained. She argues (and the testimony shows) that:

5 According to the surveyor's certificate on the plat (Exhibit F), the structural
6 and mechanical components of the structure were complete. McCready
7 testified, without contradiction, that the exterior of the building was
8 completed except for the rear decks; insulation and sheetrock were in and
9 painting was under way. What remained was interior trim, floor coverings,
10 kitchen cabinets and appliances, finish electrical and plumbing, and
11 landscaping.

12 Therefore, she says that they were owed very little or nothing on their Proof of Claim
13 No. 1.

14 **2.15- The Wikas' Present Claim**- In their post-hearing brief, the Wikas have calculated
15 the amount due them as of October 30, 2011, excluding attorney fees to be \$440,601.98.²⁷

16 [continued on next page]

24 ²⁶ Docket No. 87, filed March 30, 2011.

25 ²⁷ See, the Wikas' *Final Argument and Post Trial Brief*, page 19 and Exhibit A. Docket No. 215.

The Wikas Analysis of Their Allowed Secured Claim (Net of Attorney Fees)		
Costs and expenses paid by Wikas		
– Liens paid to release property for takeover	107,710.55	
– Completion costs for materials, labor, and subs	720,534.37	
– Utilities	20,203.49	
– Other Costs and expenses	189,550.43	
– Amount that should have been paid to Wyrick	20,000.00	
Total		1,037,998.84
Less amounts received by Wikas		
– Lot 6 proceeds	130,920.00	
– Insurance refund	3,031.00	
– FNBA construction draw	255,630.00	
– FNBA construction draw	50,612.41	
– Release of escrowed funds (Action Drywall)	77,177.55	
– Release of escrowed funds (Dane Wyrick)	46,010.60	
– Sale of duplex rights	359,528.50	
Total		<u>(922,850.06)</u>
Difference (Cedar Creek Deficiency)		135,145.78
Other claims		
– Interest on CCD @ 7% - 10/29/09-10/30/11	18,920.40	
– Commissions on Unit 3A (6% of \$680,000 per ¶¶ 5 & 10 of SA)	40,800.00	
– Commissions on Unit 3B (6% of \$600,000 per ¶¶ 5 & 10 of SA)	36,000.00	
– Interest on commission @ .3% - 10/29/09-10/30/11	460.80	
– \$165,000 loan	165,000.00	
--Interest on loan @ 7% - 1/1/08 - 10/30/11 (\$31.64/day x 1,398 days) - approx.	44,275.00	
Total additional claims		<u>304,456.20</u>
Total claimed by Wikas, less attorney fees (Remaining Balance Due)		440,601.98

2.16- Jim Dokoozian, Suzan's Expert- Suzan originally designated Richard Bull as her proposed expert witness to demystify the facts and conclusions which can be deduced about the Wikas' performance of the construction project that they undertook under the Settlement Agreement. Suzan began extensive discovery of the subcontractors, and the material and labor providers, as well as FNBA and the Wikas, themselves. In the end, Bull was apparently not satisfactory to Suzan, so she designated Jim Dokoozian as her expert, instead.

Dokoozian was not given enough time to analyze the details of the Ward estimate and underlying facts in as much depth as he would have preferred. So his initial report and untimely supplement were sparse in detailed analysis.²⁸ Nonetheless, Dokoozian had sufficient time, given his experience and expertise, to review the Ward estimate, the building plans, the format of the Wikas' accounting for their claim, to render persuasive testimony in Suzan's behalf. His testimony is summed up as follows:

- (a) the Ward estimate of the projected construction costs to finish the project was appropriate, given the percentage of completion when the Wikas took over;
- (b) four months was an adequate time to have completed the construction;
- (c) the Wikas' method of construction accounting, a chronological list of invoices paid, sorted by vendor, was insufficient to provide a construction job cost accounting analysis showing why the Ward estimate was justifiably exceeded and why the time for completion extended to 21 months, when four months should have been adequate; and,

²⁸ Docket No. 189, filed September 19, 2011, and Docket No. 199, filed October 3, 2011. Suzan's expert report was due on September 19, 2011. Docket No. 154.

(d) the effect of not having a competent construction manager or contractor overseeing the project (a factor in many owner-builder cases where the owner is inexperienced in construction), and how that generally plays out in construction cost overruns and delays which cost money.

Dokoozian has over three decades of experience in construction and project management in Alaska. At least twenty years of that have been related to residential construction. He has reviewed numerous sets of building documents, estimated and managed many residential projects for the owner or for the contractor.²⁹ As such, he has developed an intuition, based on experience, of what is reasonable and what is not.³⁰

He said a reasonable owner would not accept the construction accounting provided by the Wikas as justification for the construction costs in excess of the Ward estimate without further explanation of how each line item of excessive costs were justified. In a business sense, he said the Wikas had the burden of proof, and the court finds below in Section 3 of this memorandum decision that they also had the legal burden of proof which they have not met.

Dokoozian reiterated some of the problems that a person who is not experienced in managing a construction project might encounter:

- Scheduling delays abound because the manager does not properly schedule the sequential work;
- Costs are excessive because the manager does not get fixed bids and relies on more expensive cost and materials arrangements with the subs and material suppliers;

²⁹ From the testimony of Jim Dokoozian and his resume. Docket No. 189, Part 3.

³⁰ Regarding the development of intuitive expertise in a field or subject with long, consistent practice and training, see: *Thinking Fast and Slow*, by Daniel Kahneman, Chapter 18, *Taming Intuitive Predictions* (Farrar, Straus & Giroux 2011); *The Power of Intuition: How to Use Your Gut Feelings to Make Better Decisions at Work*, by Gary Klein (Crown Business 2004); *Outliers: The Story of Success*, by Malcolm Gladwell (Little, Brown & Co. reprint 2011).

- Subs and material suppliers generally extend themselves to please a contractor with whom they hope to have a future relationship, and an owner-builder often gets to deal with their B team;
- The job gets a reputation or aura of being a poorly managed project, effecting morale and performance of the subs; and,
- The owner's efforts are often inefficient (e.g., not taking advantage of large purchases to avoid multiple deliveries or having to expedite delivery of small purchases).

3- ANALYSIS-

3.1- Standards for a Proof of Claim Objection- A proof of claim filed in accordance with FRBP 3001, "shall constitute *prima facie* evidence of validity and amount of such claim."³¹ An objecting party must come forward with sufficient evidence to rebut the presumption, and show there is a true dispute. If sufficient evidence is produced, "the burden will fall on whichever party would bear the burden outside bankruptcy."³²

In this case, Suzan has raised legitimate challenges to the amount of the Wikas' secured claim, so the benefit of a *prima facie* presumption of the validity and amount of their claim is not available to them.

3.2- Standards for Interpretation and Proof of Contract Claim in Alaska- To determine the rights of the parties in this case, where the substantive issue is not controlled by a bankruptcy statute or federal policy, requires the court to look to state law.³³

This case is principally about the interpretation of the Settlement Agreement. The Alaska Supreme Court said:

³¹ FRBP 3001(f).

³² 9 *Collier on Bankruptcy*, ¶ 3001.09[2] (Matthew Bender online ed. 2011); *In re Placide*, ____ BR ____, 2011 WL 5341295, *6 (9th Cir. BAP 2011).

³³ *In re Penrod*, 636 F3d 1175, 1178 (9th Cir. 2011), citing *Butner v. United States*, 440 U.S. 48, 54-57 (1979).

1 When interpreting a contract, such as the settlement agreement in this case,
2 it is our duty to give effect to the intentions of the parties. To determine
3 their intentions, we look to the words of the contract and any extrinsic
evidence regarding the parties' intentions when they entered into the
contract.³⁴

4 In their post-trial brief, the Wikas emphasize that a trial court should not rewrite the
5 contract of the parties, inserting terms they never agreed to; competent parties should be bound
6 by their agreement; a judge should not seek to "improve" a contract, according to the judge's
7 concept of equity, by inserting terms the parties did not agree to; and, ambiguity exists only
8 where terms are reasonably subject to different interpretations.³⁵

9 All this is proffered by the Wikas to persuade the court to completely disregard the Ward
10 estimate of \$516,497 as imposing any contractual duties or rights in the Settlement Agreement.

11 They argue:

12 The Ward estimate is an attachment to the Settlement Agreement. (Exhibit
13 7). The cost estimate is described in Paragraph 6 of the Settlement
14 Agreement as being just what it is: "Jim Ward has given Wikas a list of the
15 estimated cost that will be incurred to complete the construction of the
16 Arlberg Building and the list of costs is attached to this Agreement as
17 Exhibit A". There is nothing ambiguous about the description of the cost
18 estimate. It is simply an estimate of costs provided by Jim Ward. ***The parties
did not attach any significance to the estimate in the Settlement
Agreement.*** It is nothing more than an estimate without any testimony or
explanation of how the numbers were calculated or the process that was
used to come up with the numbers. The estimate should not be used by the
Court as even a guideline or yardstick for measuring the cost to complete the

19 ³⁴ Sourdough Development Services, Inc. v. Riley, 85 P.3d 463, 468 (Alaska 2004) (footnotes omitted).

20 ³⁵ *Final Argument and Post Trial Brief* by the Wikas, Docket No. 215 at pages 1-3, citing: Commercial
21 Recycling Center, Ltd. v. Hobbs Industries, Inc., 228 P.3d 93, 98-9 (Alaska 2010); Kazan v. Dough Boys, Inc.,
22 201 P.3d 508[, 514] (Alaska 2009); North Pacific Processors, Inc. v. City and Borough of Yakutat, Alaska, 113
23 P.3d 575, 586 (Alaska 2005); Ness v. National Indemnity Co. of Nebraska, 247 F.Supp. 944 (D. Alaska 1965);
24 Rego v. Decker, 482 P.2d 834, 937 (Alaska 1971); Casey v Semco Energy, Inc., 92 P.3d 379, 385 (Alaska 2004);
25 Weiner v. Burr, Pease & Kurtz, P.C., 221 P.3d 1, 9 (Alaska 2009); Nelson v Progressive Casualty Ins. Co., 162
P.3d 1228, 1234 (Alaska 2007); O'Neill Investigations, Inc. v. Illinois Employers Ins. of Wausau, 636 P.2d 1170,
1174 (Alaska 1981); Klosterman v Hickel Investment Co., 132 P.3d 262, 269 (Alaska 2006); and, Keffer v. Keffer,
852 P.2d 394, 397 (Alaska 1993).

1 construction of the townhome building. Erik LeRoy testified that he did not
2 believe that the Wikas' attorney would have allowed them to sign an
3 agreement that had any kind of a cost to complete component or limitation
4 on the costs that they could incur to complete the townhome building. Erik
5 further testified that the Settlement Agreement provided that the Wikas
6 were to be reimbursed for the actual costs they paid and incurred to
7 complete the townhome building. That was the agreement of the parties and
8 that is the agreement that must be enforced by the Court. [emphasis
9 added]³⁶

10 Suzan did attach great significance to the estimate. It was assurance that the Wikas did not
11 have an open ticket to incur unnecessary expenses. And, I do not believe Cheryl's testimony
12 when she says that the clause was not intended to have any significance. It appears to be an
13 integral part of the parties settlement and cannot and should not simply be ignored. Ignoring it
14 would be contrary to the rule of interpretation in Alaska:

15 The goal of contract interpretation is to give effect to the parties' reasonable
16 expectations, which we assess by examining the language of the disputed
17 provisions, the language of other provisions, relevant extrinsic evidence, and
18 case law interpreting similar provisions. *In reaching a reasonable
19 interpretation of a contract, we attempt to give effect to all of its terms, if
20 possible. We consider disputed language within the context of the whole
21 contract and its purposes, and the circumstances surrounding its formation.*
22 [emphasis added; footnotes omitted]³⁷

23 And, while the court should not arbitrarily make up terms for the parties, the court can supply
24 terms which fill in gaps where the contract is not complete. The Alaska Supreme Court has
25 explained this concept as follows:

26 If the superior court finds that the provision was not intended to apply in
27 this situation, it may supply a provision that is reasonable under the
28 circumstances. Under section 204 of the Restatement (Second) of Contracts,
29 "[w]hen the parties to a bargain sufficiently defined to be a contract have
30 not agreed with respect to a term which is essential to a determination of
31 their rights and duties, a term which is reasonable in the circumstances is

32 ³⁶ *Final Argument and Post Trial Brief* by the Wikas, Docket No. 215 at page 6.

33 ³⁷ *Matanuska Electric Assoc. v. Chugach Electric Assoc.*, 99 P.3d 553, 562 (Alaska 2004). *Wolff v.*
34 *Cunningham*, 187 P.3d 479, 482 (Alaska 2008).

1 supplied by the court.” Comment d to Section 204 instructs on how the
2 court should supply an omitted term:

3 The process of supplying an omitted term has sometimes been
4 disguised as a literal or purposive reading of contract language
5 directed to a situation other than the situation that arises. Sometimes
6 it is said that the search is for the term the parties would have agreed
7 to if the question had been brought to their attention. Both the
8 meaning of the words used and the probability that a particular term
9 would have been used if the question had been raised may be factors
10 in determining what term is reasonable in the circumstances. *But*
11 *where there is in fact no agreement, the court should supply a term*
12 *which comports with community standards of fairness and policy*
13 *rather than analyze a hypothetical model of the bargaining process.*
14 [emphasis in original; footnotes omitted]³⁸

15 The Settlement Agreement does not give a specific deadline for completion of the
16 construction. It is implicit that the time was not open ended, however. The longer it took, the
17 more it costs for FNBA interest, heating costs, taxes, and utilities, for example. Where no time for
18 performance is specified in a contract for performance, a reasonable time is implied. What is
19 reasonable is a question of fact.³⁹ I find that the Dokoozian estimate of four or five months to
20 complete the construction is appropriate as an implied “reasonable time.”

21 In Section 3.5 of this memorandum decision, I will reiterate my findings and conclusions
22 about how the Ward estimate affects this specific contract dispute. In general, the reasonable
23 inference I draw from the testimony and exhibits is that the Ward estimate should be treated as a
24 baseline of what was reasonable to complete the project of finishing the three townhouses to the
25 point that two of them could be sold and the third legally occupied by the Wikas.⁴⁰ To the extent
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27 ³⁸ Disotell v. Stiltner, 100 P.3d 890, 896 (Alaska 2004).

28 ³⁹ Hall v. Add-Ventures, Ltd., 655 P.2d 1081, 1089 (Alaska 1985); Commercial Recycling Center, Ltd. v. Hobbs Industries, Inc., 228 P.3d 93, 102 (Alaska 2010).

⁴⁰ Cummins v King & Sons, 453 P.2d 465, 467 (Alaska 1969) (“An inference is a fact or proposition deduced, by a process of reasoning, as a logical consequence from other established facts.”); Roach v. Benson, 503 P.2d 1392, 1394 (Alaska 1972).

1 there was a substantial variance from the estimate, it was the Wikas' burden to explain why the
2 overrun was justified or that it was not the Wikas' fault.⁴¹

3 The overrun could have been justified (for example, inclement weather, material shortage,
4 etc.). Or, the overrun might not have been justified (improper or incompetent project
5 management, unnecessary interference with the job progress, spending more on the owners' unit
6 than contract allowed, etc.). In one circumstance the Wikas should recover; in the other, they
7 have assumed the risk and should bear the excess costs.

8 **3.3- Deficiencies in Wikas' Proof Justifying Construction Cost Overruns**- "In the
9 construction industry it is an accepted truism that delay costs money."⁴² Delays result in
10 decreased efficiency.⁴³ Delays caused by the contractor may be due to management problems, the
11 management of subcontractors, inadequate resources, etc.⁴⁴ As one commentator explains:

12 **Projects completed *within budget* are seldom finished *behind schedule*.**

13 This principle of the money value of time confirms that if the project is
14 completed within schedule, then a significant opportunity to maintain or
15 improve budgeted cost expenditures exists, particularly when influenced by
16 a conscientious project management control system. This concept is
17 important because most project managers concentrate on cost expenditures
18 as the primary indicator of successful project execution rather than the
19 schedule.

20 Generally, managers use the schedule to depict progress toward schedule
21 completion for the benefit of the client as a result of contractual obligations
22 rather than as the primary means to control the methodical execution of the
23 project plan. The schedule is not used as the basic control mechanism of the
24 project which, when implemented within a properly managed project
25 controls environment, results in the identification of discrete tasks that may

21 ⁴¹ Geolar, Inc. v. Gilbert/Commonwealth, Inc. of Michigan, 874 P.2d 937, 943-45 (Alaska 1994).

22 ⁴² Acret, *Construction Litigation Handbook 2d*, § 7:1.

23 ⁴³ Bramble, *Construction Delay Claims*, § 4.04 *Lost Productivity and Efficiency* (Aspen Publishers
24 2011).

25 ⁴⁴ *Id.*, § 3.04 *Contractor Caused Delay*.

1 result in deviations to the approved project target schedule and, hence, the
2 corresponding control budget.

3 One long-standing issue regarding effective project management is whether
4 budget or schedule is more important. Rather than placing the two at odds,
5 they should both be considered vital and interrelated components of a
6 properly administered execution plan. Profit (the budget) is the reason for
the project's existence and the schedule is the means to generally achieve
the profit. However, more emphasis (than is currently given) should be
directed toward achieving the project schedule, as this effort will almost
assuredly translate to a profitable project.⁴⁵

7 In this case, a job that should have been finished in four months, took 21 months. This
8 delay more probably than not caused excess costs through inefficiency and excessively high bids.
9 The Ward estimate provided a baseline of what the construction costs should have been. It was
10 incumbent on the Wikas to explain the variance. They have steadfastly refused to provide a
11 coherent job cost accounting – that is, an accounting explaining the costs of each segment of the
12 construction they undertook. The court suggested they follow the outline of the Ward estimate
13 and break down the costs that way. The Wikas adamantly refused, and the testimony indicated
14 they refused to give such an accounting to Suzan when she sought to exercise the option to
15 purchase.

16 Although this was not a huge project, production of some type of job cost accounting was
17 incumbent on the Wikas to apprise Suzan that she was getting what she bargained for, completion
18 of the job within a reasonable budget and time frame. In describing the function of cost
19 accounting, one commentator notes:

20 [1] Accounting for Contract Costs

21 *Construction costs are accounted for by project and, within a project, these*
22 *costs are further broken down by item of work.* For example, concrete work
23 can be accounted for by structure or area within a project; then by operation
such as forming, placement, finishing, and stripping; and finally by cost
category within each operation such as labor, materials, equipment, and

24
25 ⁴⁵ 2-23 *Financial Mgt & Acctng - Construction Industry* § 23.01 (Matthew Bender & Co, Inc. 2011).

1 other costs. Along with associated costs, contractors frequently account for
2 production data. Accounting for both cost and production data permits the
3 calculation of unit cost information, which is an extremely useful tool. *In*
4 *some cases, the cost accounting detail is consistent with the manner in*
which the original estimate was prepared. In other cases, it is rearranged to
more closely reflect how the project is being built, or how the project is
*being billed to the owner.*⁴⁶ [emphasis added]

5 Whatever accounting was required, the Wikas did not provide an adequate one. The
6 Wikas have not itemized or organized their costs for subcontractors, material and labor in a way
7 that can be rationally analyzed. They have presented a list of invoices (probably about three
8 inches deep; 750-1000 pages without Bates stamping), albeit sorted by vendor and date, but not
9 tied it into the project.⁴⁷ Thus, there is no way to analyze whether the costs were excessive or
10 not. Assuming most of them were paid, it is still likely that the overruns were incurred through
11 inefficiency or inexperience.

12 The contract called for experienced project management. For reasons not fully explained
13 in the testimony, Cheryl took over managing the job from Jim Ward. Although she continued to
14 rely on him for procuring bids, she eventually did not pay about half or \$20,000 of his agreed
15 contract.

16 It was incumbent on the Wikas to show the cost overruns were justified. Even if the court
17 is wrong about the burden of proof, they had the burden to go forward with enough evidence to
18 explain the overruns. This they did not do.

19 There is an analogy to the way the court requires attorneys to support their attorney fee
20 applications in bankruptcy. A long list of time entries will not suffice. In the application, “. . .
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22

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24 ⁴⁶ 1-1 *Financial Mgt & Acctng - Construction Industry* § 1.09 (Matthew Bender & Co, Inc. 2011).

25 ⁴⁷ Exhibit 2.
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27

1 fees and expenses must: [A] be categorized to group identifiable projects separately; . . .”⁴⁸

2 Something similar was required of the Wikas in this case with respect to the construction costs.

3 **3.4- Suzan Cannot Claim an Offset for the Wikas Breach of the Option Agreement-**

4 Suzan presented testimony that the Wikas stonewalled or impeded her effort to exercise her
5 option to purchase per ¶ 16 of the Settlement Agreement:

6 **At any time prior to the sale of Unit 3A or 3B Suzan will have the option to**
7 **purchase, or arrange sale of, the unsold Unit(s) and Duplex Rights described**
8 **in Paragraph 19 by paying Wikas the Remaining Balance Due and Suzan**
9 **will have access to unsold Unit 3A or 3B to further this right.**

10 Suzan took steps to invoke the option clause both before Units 3A and 3B had been sold,
11 and also after Unit 3A was sold, but Unit 3B was still available.⁴⁹ However, because of an internal
12 inconsistency in the option, it was unworkable on its face. Paragraph 15 of the Settlement
13 Agreement defines what “the Remaining Balance Due” means. The definition says the Remaining
14 Balance Due will include “the Cedar Creek Deficiency” (as defined in paragraph 9 of the
15 agreement). Both paragraph 9 and paragraph 15 contemplate “the Cedar Creek Deficiency” is to
16 be determine *after* Units 3A and 3B are sold. Since Suzan tried to exercise the option *before* they
17 were both sold (even though the wording of the option contemplated that), it was impossible to
18 know what the option price should be.

19 Thus, the prior sale of both units was a condition precedent to being able to exercise the
20 option, and since that condition had not occurred, there was no enforceable option.⁵⁰

21 ⁴⁸ Alaska LBR 2016-1(c)(5)[A].

22 ⁴⁹ *Suzan McCready’s Post-Hearing Memorandum*, Docket No. 216, page 8-11. There was extensive
23 testimony on the option issue from Suzan, Michael Brain, Erik LeRoy and Jean Hebert, but for the purposes of
24 denying the offset, the court need only rely on Suzan’s contentions, as set forth in her brief.

25 ⁵⁰ *Jarvis v. Ensminger*, 134 P.3d 353, 358-59 (Alaska 2006); *Harris v. Ahtna, Inc.*, 107 P.3d 271, 277-78
26 (Alaska 2005).

1 And, even if there was an enforceable option, the court finds that Suzan's calculations of
2 damages to use as an offset to the Wikas' claim are not persuasive.⁵¹

3 **3.5- The Court's Conclusion About Allowable Claim of the Wikas' Proof of Claim**- In the
4 beginning, before the Wikas began collection efforts against Suzan, Suzan owed the Wikas duties
5 to perform under the original construction contract (or, one of its iterations). And, she defaulted
6 in her performance.

7 Then the parties reached a settlement, and the position of the parties reversed almost 180°.
8 The Wikas owed a duty to perform the completion of the construction of the three townhouse
9 units. As indicated in Section 3.2 of the memorandum decision, this included an implied term to
10 complete the job within a reasonable time and for a reasonable amount. The Ward estimate of
11 **\$516,479** is not a cost ceiling under the Settlement Agreement, but a baseline of expected costs. It
12 has the effect of requiring the Wikas to show how any significant overrun was justified under the
13 circumstances.

14 That is, the burden of proof is on the Wikas to show why the amounts they claim in their
15 post-hearing brief for the hard construction costs is justified – the amount is **\$720,534.37** for
16 “Completion Costs for Materials, Labor and Subcontractors” and **\$20,203.49** for “Utilities, etc.”, or
17 a total of **\$740,737.86**.⁵² This is more than 43% , or almost \$225,000, over the base amount
18 calculated by Jim Ward.

19 Suzan comes up with even a bigger overrun - **\$344,264**, or 68%.⁵³ It is not necessary for
20 the court to decide if Suzan's calculations are accurate. It is enough to find that the Wikas have
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23 ⁵¹ They are summarized in *Suzan McCready's Post-Hearing Memorandum*, Docket No. 216, page 8-11.

24 ⁵² See, Exhibit 1 to the Wikas' *Final Argumet and Post Trial Brief*. Docket No. 215.

25 ⁵³ *Suzan McCready's Post-Hearing Memorandum*, Docket No. 216, page 6, fn 6, and Exhibit 5.

1 not sufficiently explained why their claim in an amount so far exceeding the Ward estimate –
2 even using their numbers – is justified.

3 In addition, if four months is a reasonable time for completion of construction, and the
4 project took much longer, additional carrying charges for the FNBA loans, taxes, and utility costs
5 were incurred. If they were incurred due to delays attributable to the Wikas' performance of
6 their contractual obligations, they should not be recoverable.

7 So the question is:

8 do the Wikas *only* have to show they paid invoices for the \$740,000
9 and incurred the additional carrying charges to prove their right to
10 an allowed secured claim for \$440,000 (plus attorney fees, yet to be
addressed), and thus require Suzan to affirmatively show that the
amount is excessive?

11 or

12 do the Wikas have to *both* show the \$740,000 and carrying costs
13 were borne by them *and* also justify the excess costs over the Ward
estimate and the delay over the reasonable time to complete the
project?

14 The court has concluded the latter standard is the proper one. While there may well be
15 justifications for the cost overruns and time delays, the Wikas did not to produce sufficient
16 evidence for the court to make that finding.

17 The court will, nonetheless, allow a nominal 10% margin of error on the \$516,479 (giving
18 them the benefit of any footing errors in arriving at that amount and, also, not deducting the
19 amounts the Ward estimate indicated had already been paid) and bump the allowed construction
20 cost figure up to **\$570,000**.

21 Lacking adequate proof to the contrary from the Wikas, the court will assume four or five
22 months was adequate to finish construction – that is by August 2008 – and find that both Units 3A
23 and 3B, as well as the duplex foundation, should have been sold by January 2009.

1 I will reduce some of the carrying charges appropriately, and recalculate the allowed Wika
2 secured claim as follows, using the same format used by the Wikas⁵⁴ and the court in Section 2.15
3 of this memorandum, above. I have added notes to explain the reductions:

4 [continued on next page]
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25 ⁵⁴ See, the Wikas' *Final Argument and Post Trial Brief*, page 19 and Exhibit A. Docket No. 215.
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Allowed Amount of Wikas' Secured Claim (Net of Attorney Fees)		
Costs and expenses paid by Wikas		
– Liens paid to release property for takeover	107,710.55	
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– Utilities [Note 2]	10,101.75	
– Other Costs and expenses [Note 3]	134,933.63	
– Amount that should have been paid to Wyrick [Note 4]	0.00	
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– FNBA construction draw	255,630.00	
– FNBA construction draw	50,612.41	
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– Release of escrowed funds (Dane Wyrick)	46,010.60	
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Difference (Cedar Creek Deficiency)		(100,104.13)
Other claims		
– Interest on CCD @ 7% - 10/29/09-10/30/11 [Note 5]	0.00	
– Commissions on Unit 3A (6% of \$680,000 per ¶¶ 5 & 10 of SA)	40,800.00	
– Commissions on Unit 3B (6% of \$600,000 per ¶¶ 5 & 10 of SA)	36,000.00	
– Interest on commission @ .3% - 10/29/09-10/30/11	460.80	
– \$165,000 loan	165,00.00	
--Interest on loan @ 7% - 1/1/08 - 10/30/11 (\$31.64/day x 1,398 days)	44,238.08	
Total additional claims		264,498.80
Total claimed by Wikas, less attorney fees (Remaining Balance Due)		186,394.67

Notes to Court's Calculations

Note 1- This reduction from \$720,534.37 to \$570,000 is explained on the page 29, just before the preceding table.

Note 2- The reduction in utility fees to \$10,101.75 is an estimate, using one-half of the claimed \$20,203.49. The estimate is based on the finding the project should be completed in 2008, and sold out by January 2009.

Note 3- The amount claimed of \$189,550.43 was reduced to \$134,197.22 for a reduction of the FNBA interest (from \$81,541.89 to \$52,293.87), the Municipality of Anchorage taxes (from \$28,886.76 to \$13,922.66), and the fuel allowance (from \$15,652.02 by reducing it by two-thirds, or \$10,434.68).

The \$189,550.43 claimed by the Wikas came from the schedule of "Other Costs and Expense" in the Wikas' post-trial brief.⁵⁵

The FNBA interest deduction was arrived at by deleting interest after January 2009, by which time the court finds Units 3A and 3B, and the duplex rights should have been sold. The court used Connie Taylor's calculations to make this reduction.⁵⁶

The MOA deduction to \$13,932.66 was derived by prorating the Connie Taylor calculation to include amounts only through January 2009.⁵⁷

The reduction in the fuel allowance is based on the finding that the project should have been managed by Jim Ward, not Cheryl, and allowance of the amount appears excessive. Jim Ward's fee of \$40,000 was already calculated in his estimate of \$516,479.

Note 4- The \$20,000 claim for amounts due Wyrick was deleted since the Wikas apparently did not pay it.

Note 5- The interest on the Cedar Creek Deficiency is deleted as there was no deficiency.

* * *

The parties have squabbled about whether or not the Wikas got the benefit of a \$12,294 check Suzan gave to Cheryl before the Wikas took over the project. Because the court cannot

⁵⁵ Wikas' *Final Argument and Post Trial Brief*, at page 19 and Exhibit 1 (page 2, Schedule D). Docket No. 215.

⁵⁶ Connie Taylor's detail on the FNBA interest is found in Exhibit 1, page 45 of 47. The court simply subtracted the interest after January 2009 to arrive at \$52,293.87.

⁵⁷ Connie Taylor's detail on the MOA taxes is found in Exhibit 1, page 12 of 47. Ms. Taylor's figures varied slightly (about \$30) from those shown by the Wikas in their closing brief.

determine what the effect of this is on my calculations, or where it fits in to the big picture, I will disregard the issue.

4- CONCLUSION- The amount of the Wikas' allowed secured claim to date, \$186,394.67, is still net of attorney fees. The court will enter an order implementing this memorandum decision, but it will not be a final order that needs to be appealed until the court determines what the Wikas' allowable attorney fees are.

The court will order a status conference to address the attorney fee issue.

DATED: December 1, 2011

/s/ Herb Ross
HERB ROSS
U.S. Bankruptcy Judge

Serve:
David Bundy, Esq., for Suzan McCready
William Artus, Esq., for Gregory and Cheryl-Ann Wika
Gary Spraker, Esq., for the trustee
Robert Hume, Esq., for Jean Hebert
Kenneth Battley, Trustee
United States Trustee- Anchorage

12/1/2011

D7528

ATTACHMENT A

**Settlement Agreement of March 18, 2008
between Gregory G. Wika and Cheryl-Ann Wika
and Suzan McCready and Brayton Investment, LLC**

SETTLEMENT AGREEMENT

This Agreement is made and entered into on March 18, 2008 by and between Gregory G. Wika and Cheryl-Ann Wika, 4742 Potter Crest Circle, Anchorage, Alaska 99516 ("Wikas"), Suzan McCready, 5710 DeArmoun Road, Anchorage, Alaska 99516 ("Suzan") and Brayton Investment, LLC, an Alaska limited liability company, 5710 DeArmoun Road, Anchorage, Alaska 99516 ("Brayton").

RECITALS

1. On April 17, 2007 Wikas entered into an agreement to purchase a townhome from Suzan that is one of three townhome units in a building that was under construction on Lot 1A, Block 2, Alyeska Subdivision, according to Plat No. 99-107, Anchorage Recording District, Third Judicial District, State of Alaska. Prior to March 5, 2008 Suzan owned the development rights for Lot 1A, Block 2, Alyeska Subdivision.

2. The purchase price for the townhome that Wikas agreed to purchase from Suzan was and is \$477,500, including upgrades. The physical address of the townhome that Wikas agreed to purchase from Suzan is 304 Arlberg Street in Girdwood, Alaska. The townhome is Unit 3C of a three unit townhome building that Suzan was building on Lot 1A, Block 2, Alyeska Subdivision. The other two units in the townhome building are Unit 3A and Unit 3B. The townhome that Wikas agreed to purchase from Suzan is referred to in this Agreement as Unit 3C. The three unit townhome building is referred to in this Agreement as "the Arlberg Building". Prior to March 5, 2008 Suzan owned the Arlberg Building.

3. At the time Wikas entered into the agreement to purchase Unit 3C from Suzan they also agreed to loan \$172,500 to Suzan. The loan from Wikas to Suzan was separate from and in addition to the \$477,500 that was and is the purchase price for Unit 3C.

4. On April 18, 2007 Wikas gave McCready a check for \$650,000. The \$650,000 check was payment in full for Unit 3C (\$477,500) and the balance of \$172,500 was a loan from Wikas to Suzan.

5. Suzan obtained a construction loan from First National Bank Alaska ("FNBA") to build the Arlberg Building ("the FNBA Loan"). The FNBA Loan is in default.

6. In addition to the Arlberg Building Lot 1A, Block 2, Alyeska Subdivision, includes a foundation for a duplex townhome building. The duplex foundation is part of the development rights for the property. Lot 1A, Block 2, Alyeska Subdivision, the development rights for the property and the Arlberg Building are collectively referred to in this Agreement as "the Cedar Creek Property."

7. The Arlberg Building has been partially completed. Suzan does not have the money or resources to complete the Arlberg Building. FNBA has a deed of trust lien against the Cedar Creek Property as security for payment of the FNBA Loan and FNBA has advised Suzan and Wikas

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that it may foreclose its deed of trust lien against the Cedar Creek Property.

8. Suzan is in default of her obligations to the Wikas because of her failure to deliver free and clear title to the completed Unit 3C and for her failure to repay the \$172,500 loan. Wikas have filed a lawsuit against Suzan in the Alaska Superior Court because of her defaults under the agreements with the Wikas. As part of the lawsuit Wikas have filed a motion for a prejudgment writ of attachment against Suzan and all real property and personal property owned by Suzan in Alaska.

9. The parties have reached an agreement to settle and resolve all issues, matters and disputes pertaining to the \$477,500 payment from Wikas to Suzan, the purchase and construction of Unit 3C, the \$172,500 loan from Wikas to Suzan and all other outstanding matters. On March 5, 2008, in anticipation of the settlement between the parties and the execution of this Agreement, (a) Suzan executed a quitclaim deed in favor of Wikas for the Cedar Creek Property, and (b) Brayton executed a deed of trust in favor of Wikas against Lot One "D" (1D), Block "J", Murray Subdivision, as security for payment of the amounts she owes and will owe Wikas and as security for performance of her obligations under this Agreement.

NOW THEREFORE, the parties agree as follows:

1. Suzan acknowledges and agrees that before she conveyed the Cedar Creek Property to the Wikas she owed Wikas \$650,000 and Wikas acknowledge and agree that \$650,000 was the principal amount of the debt owed them by Suzan. Of this amount, \$477,500 was owed for her default and failure to complete the construction of Unit 3C and her default and failure to deliver to Wikas free and clear title to Unit 3C. Suzan also owes Wikas \$172,500 for the loan that she received from the Wikas on April 18, 2007. This obligation accrues interest at the rate of seven percent (7%) per year from January 1, 2008.

2. Suzan formerly owned Lot 6, McCready Meadows Subdivision, according to Plat No. 2006-66 ("Lot 6"). Suzan sold Lot 6 to Robert Stophlet and Cynthia Stophlet for \$220,000. After payment of the FNBA mortgage lien against Lot 6 and the other selling and closing costs, Suzan received \$135,920 in net proceeds from the sale of Lot 6 ("the Lot 6 Proceeds"). Suzan agrees that \$130,920 of the Lot 6 Proceeds will be paid to Wikas to satisfy, or partially satisfy, the liens and claims described in Paragraphs 3 and 4 of this Agreement. The Lot 6 Proceeds have been disbursed to the Erik LeRoy Client Trust Account pursuant to the Continued Restraining Order entered by Judge Tan on February 20, 2008. Suzan will direct and authorize Erik LeRoy to disburse \$130,920 of the Lot 6 Proceeds to the Wikas and Wikas will use the money to satisfy, or partially satisfy, the liens and claims described in Paragraphs 3, 14 and 15 of this Agreement.

3. On March 5, 2008 Suzan executed a quitclaim deed in favor of Wikas for the Cedar Creek Property. The conveyance of the Cedar Creek Property to Wikas is subject to the FNBA Loan that that has an outstanding balance, including principal and accrued interest, of approximately \$910,000. The conveyance of the Cedar Creek Property to Wikas is also subject to certain recorded liens, claims of lien, assessments, property taxes and other liens, claims and encumbrances against or that affect the Cedar Creek Property or the Arlberg Building. Wikas will complete the construction of the Arlberg Building. Wikas will use their best efforts to assume the FNBA Loan,

including the undisbursed amount remaining on the FNBA Loan. Suzan will sign a novation and/or any other documents required by FNBA to allow Wikas to assume the FNBA Loan. The undisbursed portion of the FNBA Loan will be used by Wikas to pay the costs that are incurred to complete the construction of the Arlberg Building, (b) the outstanding property taxes against the Cedar Creek Property, (c) the outstanding liens and claims of lien against the Cedar Creek Property (To the extent such funds are available from the FNBA Loan, and (d) the reasonable attorney fees and costs that the Wikas have incurred and will incur because of the default by Suzan in her obligations to the Wikas. If the undisbursed portion of the FNBA Loan is not sufficient to pay the costs that are incurred to complete the construction of the Arlberg Building Wikas will pay such costs from other funds. If Wikas are unable to assume the FNBA Loan they will apply for a loan from a different bank or lender to pay off the FNBA Loan and complete the construction of the Arlberg Building. If a new loan is obtained by Wikas, whether obtained from FNBA or a different bank or lender, it is referred to in this Agreement as "the New FNBA Loan".

4. The \$130,920 received by the Wikas from the sale of Lot 6 will be used by them to pay and satisfy, or to partially pay and satisfy, the outstanding liens and claims of lien against the Cedar Creek Property and/or the claims described in paragraphs 16 and 17 of this Agreement. In addition to the outstanding liens and claims of lien against the Cedar Creek Property Suzan owes other persons and entities who supplied labor and/or materials for the Cedar Creek Property, the Arlberg Building and the duplex foundation. Wikas do not assume and expressly do not agree to pay any persons or entities who supplied labor or materials for the Cedar Creek Property except for those persons or entities who have filed liens or claim of lien against the Cedar Creek Property and who must be paid to clear the title to the Cedar Creek Property. Suzan understands and acknowledges that the Wikas are not responsible for any currently outstanding debts pertaining to the Cedar Creek Property and that she will continue to be responsible for all debts pertaining to the Cedar Creek property that are not voluntarily paid by Wikas. Wikas have negotiated with the persons and entities who have filed liens and claims of lien against the Cedar Creek Property and they have obtained a reduction in the amounts that they will have to pay to obtain a release of the outstanding liens and claims of lien. Suzan understands and acknowledges that she may be responsible for any amounts owed to those persons or entities who have filed liens or claim of lien against the Cedar Creek Property that are not paid by Wikas from the \$130,920 of Lot 6 Proceeds.

5. Wikas have not and will not tell any persons or entities who release liens against the Cedar Creek Property that they continue to hold claims against Suzan. The discounts from the lien claimants described in Paragraph 4 that have been obtained by Wikas total \$105,000. Cheryl-Ann Wika will be paid three percent (3%) of the sale prices on Units 3A and 3B as compensation for her efforts as described in Paragraph 8. If Suzan pays all or a portion of the balance owed to any lien claimant who is paid by Wikas Cheryl-Ann Wika will contribute to Suzan a pro rata portion of the three percent (3%) compensation described in Paragraph 8. The amount contributed by Cheryl-Ann to Suzan will be the same percentage of the three percent (3%) compensation received by Cheryl-Ann as the amount paid by Suzan to a lien claimant is a percentage of \$105,000.

6. Wikas will hire Jim Ward as their representative to supervise and manage the construction and completion of the Arlberg Building and hire subcontractors to (a) complete the construction of the Arlberg Building, (b) install the paving on the Cedar Creek Property that is

required for the Arlberg Building, (c) do the required landscaping on the Cedar Creek Property that is required for the Arlberg Building and (d) do and perform all other work that is needed to complete the construction of the Arlberg Building so that Unit 3A and Unit 3B can be sold to third parties. Jim Ward will be paid a construction management fee of \$40,000 for his previous work as construction manager for the Arlberg Building for Suzan and his work as construction manager for completion of the Arlberg Building for Wikas. Jim Ward has given Wikas a list of the estimated costs that will be incurred to complete the construction of the Arlberg Building and the list of costs is attached to this Agreement as Exhibit A. Suzan's signature on this Agreement does not signify her agreement that Jim Ward earned fees or commission in his prior arrangements with Suzan or that the compensation being paid to Jim Ward in this paragraph is justified.

7. Wikas will keep complete and accurate records of all costs that they incur and pay to (a) pay the FNBA Loan, (b) satisfy and pay the liens and claims of lien against the Cedar Creek Property and the Arlberg Building, (c) obtain and pay the New FNBA Loan, (d) complete the construction of and sell Unit 3A and Unit 3B in the Arlberg Building, and (e) pay property taxes, insurance, permit fees, utilities and other costs for or pertaining to the Cedar Creek Property and the Arlberg Building, including their attorney fees and costs. All of such fees and costs are collectively referred to in this Agreement as "the Cedar Creek Completion Costs". Suzan will have full and complete access to all information pertaining to the Cedar Creek Completion upon written request to Wikas for such information. At or before the time this Agreement is executed Suzan will give to Wikas originals or copies of all contracts, invoices, bids, checks, plans, drawings, specifications, permits and other things (her entire file) pertaining to the Arlberg Building and construction of the Arlberg Building. Within five (5) days after this Agreement is executed Wikas will give Suzan a list of the documents and things they want Suzan to provide and Suzan will provide the requested documents and things within five (5) days of receiving the list.

8. When the Arlberg Building has been completed Wikas will sell Unit 3A and Unit 3B to disinterested third party purchasers for the fair market value of the two townhome units. The proceeds from the sales of Unit 3A and Unit 3B will be applied to and reduce the FNBA Loan or the New FNBA Loan. The parties understand and acknowledge that the net proceeds from the sales of Units 3A and 3B may not be sufficient to pay in full the FNBA Loan or the New FNBA Loan.

9. When the sales of Unit 3A and Unit 3B have been completed Wikas will provide Suzan with an accounting of the proceeds they receive from the sale of Unit 3A and 3B and of the amounts they have paid and incurred, or that they owe, for the Cedar Creek Completion Costs. The Cedar Creek Completion costs will include compensation for the time and effort that Cheryl Wika has spent and will spend to (a) deal with and negotiate with lien claimants (b) deal with other unpaid costs and claims incurred by Suzan for the Cedar Creek Property and the Arlberg Building, (c) deal with and negotiate with FNBA pertaining to the FNBA Loan and the New FNBA Loan, (d) deal with other matters pertaining to the Cedar Creek Property and the Arlberg Building. The parties agree such reasonable compensation to be paid to Cheryl Wika is three percent (3%) of the sale price of Unit 3A and Unit 3B. Wikas will also give Suzan an accounting of the remaining balance owed, if any, on the FNBA Loan or the New FNBA Loan, as applicable, when the sales of Unit 3A and Unit 3B have been completed and the other Cedar Creek Completion Costs paid by Wikas. The remaining balance owed on the FNBA Loan or the New FNBA Loan, if, any, and the Cedar Creek

Completion Costs paid by Wikas will take into account the \$130,920 of Lot 6 Proceeds received by Wikas and disbursed by them according to Paragraphs 3 and 4 of this Agreement. The remaining balance of the FNBA Loan or the New FNBA Loan will be a lien against Unit 3C. Because of her obligation to convey the completed Unit 3C to Wikas free and clear of all liens and claims Suzan will owe Wikas (a) the remaining balance of the FNBA Loan or the New FNBA Loan, plus interest that accrues and continues to accrue on such loan, and (b) the Cedar Creek Completion Costs that were paid directly by the Wikas (after taking into account the receipt and disposition of the \$130,920 of Lot 6 Proceeds). The amount Suzan will owe the Wikas after the sales of Unit 3A and Unit 3B have been completed as described in this paragraph, including interest on such amount, is referred to in this Agreement as "the Cedar Creek Deficiency". The Cedar Creek deficiency will accrue interest at the rate of interest on the FNBA Loan or the New FNBA Loan for that portion of the Cedar Creek Deficiency, and at the rate of seven percent (7%) per year from the date the sale of the second townhome in the Arlberg Building is closed and completed on the portion of the Cedar Creek Deficiency that is the Cedar Creek Completion Costs that were paid directly by the Wikas. In addition to the Cedar Creek Deficiency, Suzan will continue to owe Wikas the \$172,500 loan, plus interest from January 1, 2008, through the time the sales of Unit 3A and Unit 3B have been completed and until the loan is paid in full.

10. Unit 3A and Unit 3B are or were listed for sale through Gallery Real Estate of Alaska, Inc, dba ERA Gallery Homes Real Estate. Suzan, on behalf of ERA Gallery Homes Real Estate, agrees and acknowledges the listing agreement for Unit 3A and Unit 3B has expired. The parties agree that if the sale of Unit 3B to David Marquez and Pam Marquez is completed the only commission that may be paid is a negotiated commission paid to Dynamic Properties. If the sale of Unit 3B to David Marquez and Pam Marquez is not completed and Cheryl-Ann Wika is able to sell Unit 3A or Unit 3B for fair market value without using a realtor and without paying a real estate commission she will be paid a selling fee of three percent (3%) of the sale price of one or both units.

11. Suzan owns a \$20,000 certificate of deposit at KeyBank that is a completion bond or security for payment of the landscaping that is required as part of the building permit for the Arlberg Building. At the time this Agreement is executed Suzan will (a) provide to Wikas a copy of the certificate of deposit and the building permit or agreement with the Municipality of Anchorage that requires the certificate of deposit, and (b) convey, assign and transfer the certificate of deposit to the Wika on the form provided by the Wikas. Suzan will be entitled to a credit against the Cedar Creek Completion Costs for the amount of the certificate of deposit if and when it is paid to and received by the Wikas. If Suzan is not able to convey, assign and transfer the certificate of deposit to the Wikas she will cash in the certificate of deposit at the time the landscaping for the Arlberg Building is completed and the certificate of deposit is released by the Municipality of Anchorage and the amount received by Suzan for the certificate of deposit will be paid to Wikas and applied to the Cedar Creek Deficiency.

12. Suzan has casualty insurance for the Arlberg Building through Assurance Company of America, Policy No. BR65391445. At the time this agreement is executed Suzan will give Wikas a copy of the Certificate of Insurance for the Arlberg Building. When requested by Wikas Suzan will cancel the casualty insurance for the Arlberg Building and assign, transfer and convey to Wikas the unearned premium from the insurance policy and Suzan will execute the necessary form or

forms to transfer the unearned insurance premium to the Wikas and the amount of the unearned insurance premium shall be credited against the Cedar Creek Completion Costs.

13. At the time this Agreement is executed Suzan will resign as an officer and/or director of Cedar Creek Townhomes Association.

14. Suzan will be responsible for and pay, and indemnify and hold Wikas harmless from any loss, liability, claim or demand of any kind, including attorney fees, of or from Western Construction & Equipment, Paul Light and/or John Light. In addition, Suzan promises and agrees that the storage shack on the Cedar Creek property and any equipment owned by Western Construction & Equipment, Paul Light and/or John Light that is located or stored on the Cedar Creek Property will be removed by March 30, 2008. If the storage shack on the Cedar Creek property and/or any equipment owned by Western Construction & Equipment, Paul Light and/or John Light that is located or stored on the Cedar Creek Property is not removed by March 30, 2008 Wikas may cause the removal of the storage shack or equipment and the cost of such removal will be added to the Cedar Creek Completion Costs and the Cedar Creek Deficiency.

15. Wikas and Suzan are unable to know and determine the amount of the Cedar Creek Deficiency at the time the sales of Unit 3A and Unit 3B will be completed. The amount of the Cedar Creek Deficiency, including the reasonable attorney fees and costs incurred by Wikas because of the defaults by Suzan under the agreements for the purchase of Unit 3C and the \$172,500 loan, and the balance of the \$172,500 loan, plus accrued interest, will be determined at the time the sales of Unit 3A and Unit 3B have been completed. This total balance due (the Cedar Creek Deficiency, including reasonable attorney fees and costs incurred by Wikas, plus the balance of the \$172,500 loan, including interest) is referred to in this Agreement as "the Remaining Balance Due". The Remaining Balance Due will continue to accrue interest at the rate of seven percent (7%) per year until it is paid in full. Subject to and contingent upon compliance with the requirements of paragraph 15, the Remaining Balance Due will be due and payable in full by Suzan not later than September 1, 2009. As security for payment of the Cedar Creek Deficiency and the Remaining Balance Due Brayton has executed a deed of trust lien in favor of Wikas against Lot 1D, Block J, Murray Subdivision, according to Plat No. 93-82, Anchorage Recording District, Third Judicial District, State of Alaska. The deed of trust is a third position deed of trust behind only the following two deeds of trust:

- a. A deed of trust in the original amount of \$656,250 in favor of First National Bank Alaska. The deed of trust (a) is dated March 18, 2004, (b) was recorded on March 19, 2004 and (c) has a current balance of approximately \$608,000
- b. A deed of trust in the original amount of \$253,500 in favor of First National Bank Alaska. The deed of trust (a) is dated February 21, 2006, (b) was recorded on February 23, 2004 and (c) has a current balance of approximately \$191,420.

Suzan will timely make all payments required by the promissory notes that are secured by the two deeds of trust and Suzan will timely pay all other payments and obligations required by the promissory notes, the two deeds of trust and any other agreements that are secured by the two deeds

of trust. The failure of Suzan to make any such payments when due, or within thirty (30) days after the due date, will be a default under this Agreement and Wikas will be entitled to foreclose the deed of trust that was executed by Suzan on March 5, 2008.

16. The parties understand and acknowledge that there may be a balance due under the FNBA Loan or the New FNBA Loan after the sales of Unit 3A and Unit 3B have been completed. The parties further understand and acknowledge that the balance of the FNBA Loan or a New FNBA Loan, as applicable, will be a lien against Unit 3C that will be owned by Wikas. When the sales of Unit 3A and Unit 3B have been completed Wikas will use their best efforts to (a) obtain an extension of time to pay the FNBA Loan or New FNBA Loan by making monthly payments in an amount that is acceptable to FNBA or the new lender, or (b) obtain a new mortgage loan to pay the balance of the FNBA Loan or New FNBA Loan. If Wikas are able to extend the FNBA Loan or the New FNBA Loan, or obtain a new mortgage loan to pay the FNBA Loan or New FNBA Loan, Suzan will pay all loan fees, appraisal fees, title insurance fees and other costs and fees incurred by Wikas to extend the FNBA Loan or New FNBA Loan or obtain a new mortgage loan and Suzan will timely make the monthly payments or other payments required for the extension of the FNBA Loan or New FNBA Loan or the new mortgage loan (excluding any payment or reserve for real property taxes or casualty insurance) from the time of the extension of the New FNBA Loan, or from the time the new mortgage loan is extended, whichever is applicable, through August 2009. The failure of Suzan to timely make such monthly payments will be a default under this Agreement and Wikas will be entitled to foreclose the deed of trust that was executed by Brayton on March 5, 2008. At any time prior to the sale of Unit 3A or 3B Suzan will have the option to purchase, or arrange for the sale of, the unsold Unit(s) and the Duplex Rights described in Paragraph 19 by paying Wikas the Remaining Balance Due and Suzan will have access to unsold Units 3A or 3B to further this right.

17. James McCollum, Esq. has prepared an amendment to the Declaration of Cedar Creek Townhomes - Phase 1, to permit the inclusion of the Arlberg Building and the three townhomes in the Cedar Creek Townhomes project. James McCollum may also have prepared an amendment to the Public Offering Statement for Cedar Creek Townhomes to include and incorporate the Arlberg Building and the three townhomes. Suzan will request and authorize James McCollum to provide to Wikas all amendments, documents and other things he has prepared for Cedar Creek Townhomes and Suzan will sign any request or authorization requested by James McCollum as a condition of providing the documents and things to the Wikas and/or amending the documents to name the Wikas as the Declarant for the Arlberg Building townhomes and the owner of the development rights for the Cedar creek property. Wikas understand that they will be required to pay outstanding costs and fees owed by Suzan to James McCollum in order to obtain the amendments, documents and other things he has prepared or will prepare for Cedar Creek Townhomes and the Cedar Creek Property. The costs and fees paid to James McCollum by Wikas will be added to and included in the Cedar Creek Completion Costs.

18. In addition to James McCollum Suzan has hired other persons or entities to prepare documents and things pertaining to the Arlberg Building and the Cedar Creek Property such as a plat, survey, building plans and other things that will be needed by the Wikas to (a) complete and sell the Arlberg Building, (b) build and sell the duplex townhome building on the Cedar Creek Property, or (c) sell the development rights for the duplex townhome building. Suzan will request and authorize



all such persons and companies to provide to Wikas the documents and other things that they have prepared for the Arlberg Building and the Cedar Creek Property and Suzan will sign any request or authorization requested by such persons and companies as a condition of providing the documents and things to the Wikas. Wikas understand that they may be required to pay outstanding costs and fees owed by Suzan to the persons or entities who prepared documents and things pertaining to the Arlberg Building and the Cedar Creek Property that they will need to do the things described in this Agreement. Wikas do not assume any of such obligations and any payment they make to such persons or entities will be a voluntary payment. All such amounts paid by Wikas will be added to and included in the Cedar Creek Completion Costs.

19. In addition to the Arlberg Building the Cedar Creek Property includes development rights and a foundation for a duplex townhome building and Wikas, as the owners of the Cedar Creek Property will, subject to any zoning requirements or other limitations or requirements, have the right and option, but not the obligation, to construct a duplex townhome building on the Cedar Creek Property and sell the two townhome units to disinterested third parties. Wikas will also have the option of selling the duplex foundation and the right to build the duplex townhome building on the Cedar Creek Property. The duplex foundation and the right to build the duplex townhome building are collectively referred to in this Agreement as "the Duplex Rights."

20. If Wikas elect to sell the Duplex Rights to a third party, the proceeds from the sale of the Duplex Rights will be applied to the costs incurred to sell the Duplex Rights and the balance of the sale proceeds will be applied to the Remaining Balance Due. Suzan shall have the right of first refusal to purchase the Duplex Rights by paying the Remaining Balance Due, plus any Duplex Completion Costs paid by Wikas, within fifteen (15) days after the construction of the Arlberg Building has been completed. If the proceeds from the sale of the Duplex Rights exceed the costs incurred to sell the Duplex Rights, and Duplex Completion Costs paid by Wikas and the Remaining Balance Due, one hundred percent (100%) of such excess will be paid to Suzan when the Duplex Rights are sold.

21. If Wikas elect, at their sole option, to construct and build the two townhome units on the duplex foundation and sell the two townhome units, they will calculate all costs incurred and paid to (a) satisfy any liens and claims of lien against the Duplex Rights that were not previously paid, (b) obtain a construction loan to build the townhome units, including loan fees, interest, appraisal costs and other bank charges and fees, (c) design, build and construct the two townhome units, (d) pay property taxes, insurance, permit fees, inspection fees, utilities and other costs for or pertaining to the duplex townhome units, including attorney fees and costs, (e) build and sell the two townhome units, all of which costs, payments and amounts are collectively referred to in this Agreement the "the Duplex Completion Costs". The Duplex Completion Costs will include compensation for the time and effort that Cheryl-Ann Wika will spend on the construction of the two townhome units. The parties agree such reasonable compensation to be paid to Cheryl-Ann Wika is five percent (5%) of the sale price of the duplex units. The two townhome units will be sold to disinterested third party purchasers for the fair market value of the two townhome units. If the net sale proceeds received by Wikas from the sale of the two duplex townhome units exceeds the Duplex Completion Costs, one hundred percent (100%) of the excess sale proceeds will be applied to the Remaining Balance Due at the time the second townhome unit is sold or one hundred percent



(100%) of the excess sale proceeds will be paid to Suzan after the Remaining Balance Due has been paid in full.

22. If Cheryl-Ann Wika is able to sell one or both of the two townhome units in the duplex building for fair market value without using a realtor and without paying a real estate commission she will be paid a selling fee of three percent (3%) of the sale price of one or both units, as applicable, and the selling fee will be added to and included in the Duplex Completion Costs.

22. In the event that there is an outstanding balance of the Remaining Balance Due after (a) the sale of Lot 6, (b) the completion and sale of Unit 3A and Unit 3B, and (c) the sale of the Duplex Rights or the construction and sale of the two duplex units and payment of the Duplex Completion Costs, that amount will be due and payable in full by Suzan to Wikas on September 1, 2009 provided that Suzan complies with the requirements of paragraph 16. Wikas will give Suzan a written accounting of the Remaining Balance Due after the second townhome in the duplex building is sold. If Suzan fails to pay the Remaining Balance Due, including accrued interest and attorney fees, by September 1, 2009, or if Suzan fails to comply with the requirements of paragraph 16, Wikas will have the right to foreclose the deed of trust that is described in paragraph 7 of this Agreement.

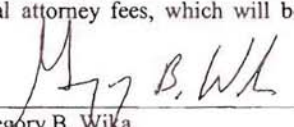
24. This Agreement is and is intended to be a complete and full settlement of all disputes, matters and issues between Suzan and the Wikas. Brayton is a party to this Agreement because it is the owner of the property that will be pledged as security and collateral for the obligations of Suzan to Wikas. This Agreement may not be amended except by a written amendment or addendum signed by all parties. If Wikas foreclose the deed of trust lien described in Paragraph 15 Wikas will not have any deficiency or other claim against Suzan.

25. The parties have had an opportunity to obtain counsel of their own choosing and to review all of the terms and provisions of this Agreement with counsel of their own choosing. The legal principle that an agreement is to be construed against the drafter of the agreement is not and will not be applicable to the enforcement or interpretation of this Agreement.

26. The parties agree to execute such further, other and additional documents that may be necessary or required to enforce and make effective the terms and provisions of this Agreement. A telefax signature of any party will be valid as the original signature of such party.

22. The interpretation and enforcement of this Agreement is governed by the laws of the State of Alaska. Any dispute between the parties about the meaning or enforcement of this Agreement shall be resolved by arbitration in Anchorage, Alaska. The prevailing party in any arbitration proceeding will be entitled to actual attorney fees, which will be included in any arbitration award or decision.

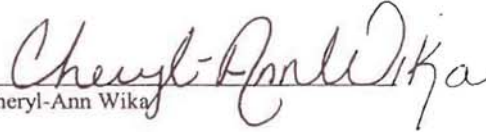
DATE: March 18, 2008.



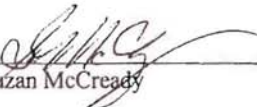
Gregory B. Wika



DATE: March 18, 2008.

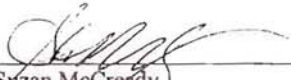

Cheryl-Ann Wikar

DATE: March 18, 2008.


Suzan McCready

Brayton Investments, LLC

DATE: March 18, 2008.

By 
Suzan McCready
Sole Member



Estimate to Complete Cedar Creek Tri-Plex						
	Description	Unit 3A	Unit 3B	Unit 3C	Cost Complete	Paid
Carpentry	Interior Trim Labor	10000	10000	10000	30000	
	T&G Pine Install	4500	0	0	4500	
Millwork	Interior Trim Package	10000	10000	10000	30000	5408.76
Hardware	Included in Millwork				0	
Electrical	Light Fixtures	6145	3000	3000	12145	
	Trim Labor	3500	3500	3500	10500	
Plumbing	Trim Labor	5000	5000	5000	15000	
Mechanical	Trim Labor	1000	1000	1000	3000	
Pilings	Decks	2200	2200	2200	6600	
Materials Lumber	Rear Decks & Stairs	5000	5000	5000	15000	
Materials Cable	Front Decks	1200	1200	1200	3600	
Framing	Decks Entry Stairs	350	350	350	1050	
	Decks & Stairs @ Rear	7500	7500	7500	22500	
	Railings Front Cable	1500	1500	1500	4500	
Siding	Finish Siding & Trim				10000	
	Note: Estimate, not a bid					
Stone	Stone Veneer Installed	15000	15000	15000	45000	
Paint	Interior	5115	5115	5115	15345	2557
	Exterior	5180	5180	5180	15540	
Cleaning	Miscellaneous jobsite	700	700	700	2100	
	Cleaning interior final	850	850	850	2550	
Interior Finishings	S.B.S.	61725	30715	30715	123155	
	Note: This allowance references the original layouts, allowances and specification sheets. The unit price includes floor coverings, tile and countertops.					
Cabinets	S.B.S.	5640	6000	6000	17640	
Appliances	S.B.S.	6654	4000	4000	14654	5640



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	Description	Unit 3A	Unit 3B	Unit 3C	Cost Complete	Paid
Mirror & Glass	Capitol Glass	2200	2200	2200	6600	
Landscaping	Per Site Plan				20000	
	<i>Note: Escrow amount</i>					
Category	Description	Unit 3A	Unit 3B	Unit 3C	Cost Complete	Paid
Site Work	Site Grade for drainage				5000	
	<i>Note: Estimate, not a bid.</i>					
	Burn Materials & Labor		500		3000	
	<i>Note: Estimate, not a bid. Some on site material available to use for burn.</i>					
	Street widening inserts				3000	
	<i>Note: Estimate, not a bid. See site plan for detail of street widening inserts.</i>					
	Culvert @ Entry				2500	
	<i>Note: Estimate, not a bid.</i>					
	Asphalt Street				10000	
	Asphalt Driveway	1500	1500	1500	4500	
	<i>Note: Some site work costs including site grade, burn, culvert, general excavation, street widening inserts and asphalt street to be shared in duplex costs.</i>					
Gutters	Recommended	2000	2000	2000	6000	
Supervision	Ward per Contract				40000	
Contingency					5000	
Utilities	Enstar Natural Gas				1000	
	Chugatch Electric				1000	
	Dumster				1000	
	Porta Potty				500	
Inspections	Girdwood Services	1000	1000	1000	3000	
Marketing					*****	
Lot Payoff					*****	
Closing Costs					*****	
*						



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A \$516,479⁰⁰