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Doc#: 0634217111 Fee: \$52.50  
Eugene "Gene" Moore RHSP Fee:\$10.00  
Cook County Recorder of Deeds  
Date: 12/08/2006 12:38 PM Pg: 1 of 15

INTERCREDITOR AND SUBORDINATION AGREEMENT

THIS INTERCREDITOR AND SUBORDINATION AGREEMENT (the "Agreement") is dated as of March 6, 2006 by an among BRIDGEVIEW BANK GROUP, an Illinois banking corporation (the "Lender"), MONGOOSE CAPITAL, INC., a Illinois corporation ("Creditor"), and CLYBOURN INVESTMENT GROUP, L.L.C., an Illinois limited liability company (the "Borrower").

WITNESSETH:

WHEREAS, on November 19, 2004 the Lender recorded a Mortgage with the Recorder of Deeds of Cook County, Illinois as Document Number 0432435089 with respect to the property commonly known and described as 1275-1281 North Clybourn, Chicago, Illinois and legally described on Exhibit A attached hereto (the "Property") to secure an original indebtedness of \$1,668,750.00 with additional advances creating a total indebtedness of up to \$3,875,000.00 all of which has been incurred by Borrower and remains unpaid (the "Original Indebtedness"), and

WHEREAS, on November 19, 2004 Creditor recorded a Security Interest (Mortgage) with the Recorder of Deeds of Cook County, Illinois as Document No. 0432435091 with respect to the Property to secure an indebtedness of \$485,000.00 which remains unpaid (the "Junior Indebtedness"), and

WHEREAS, on February 11, 2005 the Lender recorded a Mortgage with the Recorder of Deeds of Cook County, Illinois as Document No. 0508333164 with respect to the Property to further secure the indebtedness of \$3,875,000.00 which remains unpaid, and

WHEREAS, payment of the Original Indebtedness has been unconditionally guaranteed by Richard Poppenga, Edward C. Bozich, Jr. and Thomas Phimister (the "Guarantors"), and

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WHEREAS, the Guarantors have also unconditionally guaranteed payment of the Junior Indebtedness, and

WHEREAS, to complete the improvements at the Property the additional sum of \$600,000.00 is required (the "Additional Advance"), and

WHEREAS, the Guarantors will unconditionally guarantee payment of the Additional Advance, and

WHEREAS, certain issues have arisen between the Lender and the Creditor concerning the priority of their respective liens and their entitlement to the proceeds from the sale of certain condominium units being built in connection with the development of the Property, and

WHEREAS, the Creditor wishes to provide an inducement to the Lender to advance \$600,000.00 needed to complete the improvements at the Property and permit the sale of the condominium units, and

WHEREAS, the Lender and Creditor wish to reach an agreement that will facilitate the sale of the condominium units being constructed at the Property and permit the Lender and Creditor to share in the net proceeds of the sale of the condominium units in the order of priority and upon the terms hereinafter set forth, and

WHEREAS, the agreement contemplates that both Lender and Creditor will be granted additional collateral for their respective indebtedness.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants herein contained, and for other good and valuable consideration, the parties hereto agree as follows:

1. Priority of Liens. The Lender's Mortgage recorded November 19, 2004 shall be and is a first, senior and prior security interest in and lien on the Property securing payment of the Original Indebtedness and shall be superior to the Creditor's Security Interest (Mortgage) recorded November 19, 2004.

2. Subordination of Creditor Debt.

a. Except as expressly provided herein, the Creditor hereby subordinates the Junior Indebtedness to the Original Indebtedness and the Additional Advance, and the Creditor agrees that, except as otherwise provided herein, all claims of the Lender shall be paid in full in cash or otherwise satisfied as evidenced by the release of the Lender's November 19,

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2004 Mortgage before any payment may be made on the Junior Indebtedness, whether of principal or interest.

b. The Creditor agrees not to accept any payment in respect of the Junior Indebtedness, except as expressly provided herein or with the express, prior written consent of the Lender, and the Creditor agrees to pay over to the Lender any funds that may be received from the Borrower except as otherwise provided herein. In case any funds shall be paid or delivered to the Creditor in contravention of the terms hereof, such funds shall be held in trust by the Creditor for, and immediately paid and delivered to, the Lender (in the form received endorsed over to the Lender).

c. The Creditor further agrees not to sell, assign, transfer or endorse any claim or claims against the Borrower or the Guarantors to anyone, except subject to the terms and conditions of this Agreement.

d. The Creditor agrees that the priority of the Original Indebtedness and the Additional Advance set forth above shall continue during any insolvency, receivership, bankruptcy, dissolution, liquidation, or reorganization proceeding, or in any other proceeding, whether voluntary or involuntary, by or against the Borrower under any bankruptcy or insolvency law or laws relating to the relief of debtors of any jurisdiction, whether now or hereafter in effect, and in any out-of-court composition, assignment for the benefit of creditors or other arrangement of any kind.

3. Forbearance from Exercise of Remedies. As long as the Original Indebtedness and the Additional Advance have not been paid in full cash and discharged, Creditor agrees that it shall not, for a period of ninety (90) days following written notice from Lender, (a) take any action or exercise any remedy against the Borrower to enforce the Junior Indebtedness, (b) take any action or exercise any remedy under the Security Interest (Mortgage) as a result of any default under the Junior Indebtedness. The Creditor understands and agrees that the Lender shall have the right, but shall have no obligation, to cure any default under the Junior Indebtedness.

4. Right to Cure. In the event Borrower defaults on the original Indebtedness, Lender shall notify Creditor of the default and Creditor shall have the right but not the obligation to cure said default within ten (10) days from the date notice is given. If Creditor fails to cure Borrower's default with said ten (10) day period, Lender shall have the right to exercise any and all remedies provided by law without further notice to Creditor.

5. Proceeds. Notwithstanding anything to the contrary contained herein, in the event of the sale of any one or more condominium units constructed at the Property, the net proceeds of sale shall be divided as follows:

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a. 85% to Lender and 15% to Creditor, until Creditor has received \$635,000.00;

b. thereafter 100% to Lender until Lender has received the remaining unpaid balance of Original Indebtedness (if any) and the Additional Advance including interest, costs, fees and expenses;

c. thereafter 100% of the remaining net proceeds to Creditor until the Junior Indebtedness has been fully satisfied.

6. The Schick Lots. In the event Borrower and/or Guarantors refinance the two (2) vacant lots adjoining the Property to the northwest (the "Schick Lots"), the proceeds shall be divided as follows: the first \$400,000.00 to Lender and the balance to Creditor. In the event Borrower and/or Guarantors sell the Schick Lots, the proceeds shall be divided as follows: Lender shall receive the greater of \$400,000 or 85% of the net proceeds and Creditor shall receive the remaining balance.

7. Additional Collateral. Borrower will execute and deliver to Lender an additional \$200,000.00 note the proceeds of which will be used to establish an interest reserve. The \$200,000.00 will be secured by a junior mortgage on the residence of Edward C. Bozich, Jr. at 7832 Forest, Munster, Indiana and a junior mortgage on the residence of Thomas Phimister at 39519 Village Run, Northville, Michigan. Creditor's Junior Indebtedness shall be further secured by a mortgage on the property commonly known and described as 420 Spivak, Schererville, Indiana.

8. Perfection and Release of Liens. Upon payment and satisfaction in full of the Junior Indebtedness, the Creditor shall release its Security Interest (Mortgage), if in existence at such time, promptly upon the request of the Lender.

9. Voided Payments. To the extent that the Borrower or the Guarantor makes any payment on the Original Indebtedness and/or the Additional Advance, that within two (2) years of the date of such payment, is subsequently invalidated, declared to be fraudulent or preferential, set aside or is required to be repaid to a trustee, receiver or any other party under any bankruptcy act, state or Federal law, common law or equitable cause (such payment being hereinafter referred to as a "Voided Payment"), then to the extent of such Voided Payment that portion of the Original Indebtedness and/or the Additional Advance which had been previously satisfied by such Voided Payment shall be revived and continue in full force and effect as if such Voided Payment had never been made.

10. Violation of Agreement by the Borrower. Except as provided in Sections 4 and 5 hereof, the Borrower agrees to make no payment whatsoever on the Junior

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Indebtedness nor Consent to or participate in any act which is in violation of the provisions of this Agreement.

11. Immediate Effect. This Agreement shall be effective immediately upon its execution by each of the parties hereto, and there are no conditions precedent or subsequent to the effectiveness of this Agreement.

12. Successors and Assigns; Continuing Effect, Etc. This Agreement is being entered into for the benefit of, and shall be binding upon, each of the Lender, the Creditor, the Borrower, and their respective permitted successors, assigns, heirs and personal representatives, as applicable. Any assignee or transferee shall execute and deliver to the other parties hereto an agreement pursuant to which they become parties hereto as fully as if they were signatories hereto and providing for the effectiveness of this Agreement as to such transferee or assignee and other parties, and the lien and debt priority of such party shall be that of such party's assignor and transferor. This Agreement shall be a continuing agreement, shall be irrevocable and shall remain in full force and effect so long as any of the Original Indebtedness and/or the Additional Advance or the Junior Indebtedness remains outstanding and unpaid.

13. Notices. Except as otherwise provided herein, all notices, requests and demands to or upon a party hereto to be effective shall be in writing and shall be sent by certified or registered mail, return receipt requested, personal delivery against receipt, delivery service against receipt, overnight courier service against receipt, or by telegraph or telex and, unless otherwise expressly provided herein, shall be deemed to have been validly serviced, given or delivered when delivered against receipt, or one (1) Business Day after deposit in the mail, postage prepaid, or, in the case of telegraphic notice, when delivered to the telegraph company, or, in case of telex notice, when sent, answer back received, addressed as follows:

If to Lender:

Bridgeview Bank Group  
4753 North Broadway  
Chicago, Illinois 60640  
Attn: David Grzenia  
Telephone: (773) 989-5723  
Telecopier: (773) 989-5726

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With a copy to:

Holland & Knight LLP  
131 S. Dearborn Street  
30th Floor  
Chicago, Illinois 60603  
Attn: Michael L. Weissman  
Telephone: (312) 715-5767  
Telecopier: (312) 578-6666

If to the Creditor:

Mongoose Capital, Inc.  
~~244 California Street~~  
Suite 300  
San Francisco, California 94111  
Attn: Nicholas Levenstein  
Telephone No.: (415) 462-5557  
Telecopier No.: (415) ~~462-4483~~

*576 Sacramento Street  
Fifth Floor*

*462-5583*

If to the Borrower and/or Guarantor:

Clybourn Investment Group, LLC  
1320 North Wood Street  
Chicago, Illinois 60622  
Attn: Michael Gaylor, Manager  
Telephone No.: (312)  
Telecopier No.: (312)

With a copy to: Richard Poppenga  
305 Lindy  
Ingleside, IL 60041  
Telephone: ( )

With a copy to: Edward C. Bozich, Jr.  
7833 Forest Avenue  
Munster, IN 46321  
Telephone: ( )

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With a copy to: Thomas Phimister  
 39519 Village Run Drive  
 Northville, MI 48167  
 Telephone: ( )

The parties hereto may designate such other address or telecopier number by written notice in the aforesaid manner.

14. Amendments; Modifications. This Agreement may not be modified, altered or amended except by an agreement in writing executed by all of the parties hereto.

15. Amendment of Seller Notes. The Creditor and the Borrower agree to forbear from modifying, altering or amending any payment amount or payment term of the Note evidencing the Junior Indebtedness without the prior written consent of the Lender.

16. Cost and Expenses of Enforcement. The defaulting party agrees to pay all reasonable costs, legal expenses and attorneys' and paralegals' fees of ever kind, paid or incurred by the non-defaulting party in enforcing its rights hereunder, including, but not limited to, litigation instituted in a State or Federal Court, as hereinafter provided (including proceedings under the United States Bankruptcy Code) enforcing obligations of the defaulting party under this Agreement.

17. FORUM; AGENT; VENUE; JURY TRIAL WAIVER. TO INDUCE THE LENDER TO ACCEPT THIS AGREEMENT, EACH OF THE BORROWER AND THE CREDITOR IRREVOCABLY AGREES THAT, SUBJECT TO THE LENDER'S SOLE AND ABSOLUTE ELECTION, ALL ACTIONS OR PROCEEDINGS IN ANY WAY, MANNER OR RESPECT, ARISING OUT OF OR FROM OR RELATED TO THIS AGREEMENT SHALL BE LITIGATED ONLY IN COURTS HAVING SITUS WITHIN CHICAGO, ILLINOIS. EACH OF THE BORROWER AND THE CREDITOR HEREBY CONSENTS AND AGREES THAT THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, OR, AT THE LENDER'S OPTION, THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, SHALL HAVE EXCLUSIVE JURISDICTION TO HEAR AND DETERMINE ANY CLAIMS OR DISPUTES BETWEEN THE LENDER AND ANY OTHER PARTY HERETO PERTAINING TO THIS AGREEMENT OR TO ANY MATTER ARISING OUT OF OR RELATED TO THIS AGREEMENT. EACH OF THE BORROWER AND THE CREDITOR HEREBY IRREVOCABLY WAIVES THE RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY ACTION IN WHICH IT IS A PARTY.

18. Governing Law. This Agreement shall be governed and controlled by the laws of the State of Illinois without regard to principles of conflict of laws.

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19. Severability. In the event any one or more of the provisions contained herein shall for any reason be held invalid, illegal or unenforceable in any respect by a court of competent jurisdiction, such invalidity, illegality or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

20. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed one original and all of which taken together shall constitute one and the same instrument.

21. The Borrower's and Guarantors' Acknowledgment. The Borrower and each Guarantor hereby consents to this Agreement and agrees to abide by the terms hereof.

IN WITNESS WHEREOF the parties hereto have executed this Intercreditor and Subordination Agreement the day and year first above written.

Property of Cook County Clerk's Office



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**CREDITOR:**

Mongoose Capital, Inc.


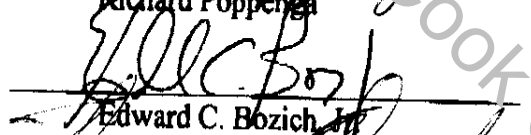

By: \_\_\_\_\_  
Title:

**BORROWER**

Clybourn Investment Group, L.L.C.

By:   
Name: Michael Gaylor  
Title: Manager

**GUARANTORS:**

  
Richard Poppena  
  
Edward C. Bozich, Jr.  
  
Thomas Phimister

**LENDER**

Bridgeview Bank Group

By: \_\_\_\_\_  
David Grzenia, Senior Vice President

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CREDITOR:  
Mongoose Capital, Inc.

By: \_\_\_\_\_  
Title: *President*

BORROWER  
Clybourn Investment Group, L.L.C.

By: \_\_\_\_\_  
Name: Michael Gaylor  
Title: Manager

GUARANTORS:

\_\_\_\_\_  
Richard Poppenga

\_\_\_\_\_  
Edward C. Bozich, Jr.

\_\_\_\_\_  
Thomas Phimister

LENDER  
Bridgeview Bank Group

By: \_\_\_\_\_  
David Grzenia, Senior Vice President

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ACKNOWLEDGMENT

STATE OF CALIFORNIA )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

On March \_\_\_\_, 2006, before me, the undersigned, a Notary Public in and for the county and state aforesaid, personally appeared Nicholas Levenstein personally known to me (or proved to me on the basis of satisfactory evidence) to be the \_\_\_\_\_ of Mongoose Capital, Inc. and to be the person who executed the within Agreement and acknowledged to me that the execution thereof was his free and voluntary act and for the uses and purposes therein mentioned.

WITNESS my hand and official seal.

*Please see ATTACHED CERTIFICATE*

(SEAL)

\_\_\_\_\_  
Notary Public in and for the County of \_\_\_\_\_  
State of California

My commission expires:

ACKNOWLEDGMENT

STATE OF ILLINOIS )  
 ) SS.  
COUNTY OF COOK )

On March \_\_\_\_, 2006, before me, the undersigned, a Notary Public in and for the county and state aforesaid, personally appeared Michael Gaylor personally known to me (or proved to me on the basis of satisfactory evidence) to be the Manager of Clybourn Investment Group, LLC and the person who executed the within instrument and acknowledged to me that the execution thereof was his free and voluntary act and for the uses and purposes therein mentioned.

WITNESS my hand and official seal.

(SEAL)

\_\_\_\_\_  
Notary Public in and for the County of \_\_\_\_\_  
State of Illinois

My commission expires:

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## CALIFORNIA ALL-PURPOSE ACKNOWLEDGEMENT

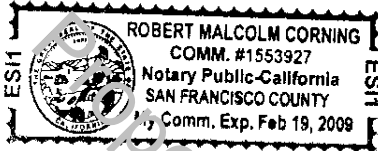
State of CALIFORNIA

County of SAN FRANCISCO

On 3/16/06 before me, ROBERT MALCOLM CORNING NOTARY PUBLIC  
Name and Title of Officer (e.g., "Jane Doe, Notary Public")

personally appeared NICHOLAS LEVENSTEIN  
Name(s) of Signer(s)

personally known to me -OR-  proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



WITNESS my hand and official seal

Robert Malcolm Corning  
Signature of Notary Public

### OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

### Description of Attached Document

Title or Type of Document: INTELCREDITOR (M) SUBORDINATION AGREEMENT

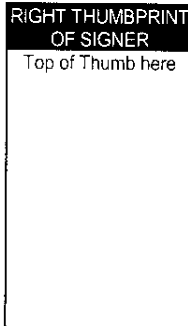
Document Date: \_\_\_\_\_ Number of Pages: \_\_\_\_\_

Signer(s) Other Than Named Above: \_\_\_\_\_

### Capacity(ies) Claimed by Signer(s)

Signer's Name: \_\_\_\_\_

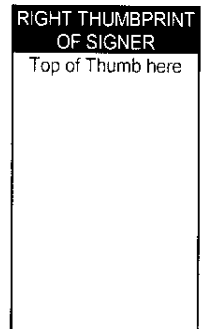
- Individual
- Corporate Officer
- Title(s): \_\_\_\_\_
- Partner -  Limited  General
- Attorney-in-Fact
- Trustee
- Guardian or Conservator
- Other: \_\_\_\_\_



Signer Is Representing: \_\_\_\_\_

Signer's Name: \_\_\_\_\_

- Individual
- Corporate Officer
- Title(s): \_\_\_\_\_
- Partner -  Limited  General
- Attorney-in-Fact
- Trustee
- Guardian or Conservator
- Other: \_\_\_\_\_



Signer Is Representing: \_\_\_\_\_

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## ACKNOWLEDGMENT

STATE OF CALIFORNIA )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

On March \_\_\_\_, 2006, before me, the undersigned, a Notary Public in and for the county and state aforesaid, personally appeared Nicholas Levenstein personally known to me (or proved to me on the basis of satisfactory evidence) to be the \_\_\_\_\_ of Mongoose Capital, Inc. and to be the person who executed the within Agreement and acknowledged to me that the execution thereof was his free and voluntary act and for the uses and purposes therein mentioned.

WITNESS my hand and official seal.

(SEAL)

\_\_\_\_\_  
Notary Public in and for the County of \_\_\_\_\_  
State of California

My commission expires:

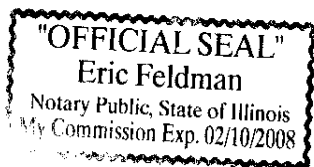
## ACKNOWLEDGMENT


STATE OF ILLINOIS )  
 ) SS.  
COUNTY OF COOK )

On March 13, 2006, before me, the undersigned, a Notary Public in and for the county and state aforesaid, personally appeared Michael Gaylor personally known to me (or proved to me on the basis of satisfactory evidence) to be the Manager of Clybourn Investment Group, LLC and the person who executed the within instrument and acknowledged to me that the execution thereof was his free and voluntary act and for the uses and purposes therein mentioned.

WITNESS my hand and official seal.

(SEAL)



  
\_\_\_\_\_  
Notary Public in and for the County of \_\_\_\_\_  
State of Illinois

My commission expires:



**UNOFFICIAL COPY****EXHIBIT A****Legal Description**

LOTS 4, 5, 6, 7, 8 AND 9 IN SUBDIVISION OF LOT 22 IN BUTTERFIELD ADDITION TO CHICAGO, BEING A SUBDIVISION OF THE WEST 1/2 OF THE NORTHWEST 1/4 AND THE SOUTHEAST 1/4 OF THE NORTHWEST 1/4 OF SECTION 4, TOWNSHIP 39 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

PIN: 17-04-122-086  
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