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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

EAGLE SPE NV I, INC., a North
Carolina corporation,

Plaintiffs,

vs.

SOMERSETT DEVELOPMENT
COMPANY, LTD.; a Nevada limited
liability company; SOMERSETT, LLC, a
Nevada limited liability company; SMITH
REALTY FINANCE, a Nevada
corporation; G. BLAKE SMITH, an
individual; TIMOTHY CASHMAN, an
individual,

Defendants.

Case No.:

**(HEARING REQUIRED PURSUANT
TO NRS 40.457)**

APPLICATION FOR DEFICIENCY JUDGMENT (NRS 40.455)

AND

COMPLAINT FOR BREACH OF CONTRACT

Applicant/Plaintiff, EAGLE SPE NV I, INC. ("Eagle SPE"), hereby applies to this Court, pursuant to NRS 40.455, for a deficiency judgment against borrowers and grantors of a deed of trust, SOMERSETT DEVELOPMENT COMPANY, LTD. ("Somerset Dev. Co."), SMITH REALTY FINANCE, and G. BLAKE SMITH ("Smith"). Eagle SPE also hereby files this Complaint against guarantors SOMERSETT, LLC, Smith and TIMOTHY CASHMAN ("Cashman").

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1 In support of this Application/Complaint, Eagle SPE allege as follows:

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3 **JURISDICTION**

4 1. The jurisdiction of this Court over the present matter is invoked pursuant to 28 U.S.C. §
5 1332(a)(1) because the plaintiffs and defendants are citizens of different states and the amount in
6 controversy exceeds \$75,000, excluding interest and costs.

7 **THE PARTIES**

8 2. Eagle SPE is a North Carolina corporation with its principal place of business in North
9 Carolina. It is the assignee of a Promissory Note and Deed of Trust executed by Somerset Dev.
10 Co., Smith Realty Finance, and Smith for the benefit of Colonial Bank, N.A.

11 3. Somerset Dev. Co. is a Nevada limited liability company, which borrowed
12 \$8,775,000.00 from Colonial Bank, N.A. for the purpose of constructing the commercial
13 property located at 7655 and 7665 Town Square Way, Reno, Nevada 89523, commonly known
14 as Somerset Town Square (the "Subject Property").

15 4. Smith Realty Finance is a Nevada corporation and is a signor of the Promissory Note and
16 Construction Loan Agreement and a grantor of the Deed of Trust at issue in this matter.

17 5. Somerset LLC is a Nevada limited liability company. It is a guarantor of the debt
18 previously owed to Colonial Bank, N.A.

19 6. Smith is a Nevada resident, and he is also a personal guarantor of the debt previously
20 owed to Colonial Bank, N.A.

21 7. Cashman is a Nevada resident and is a personal guarantor of the debt previously owed to
22 Colonial Bank, N.A.

23 **THE LOAN TRANSACTION**

24 8. On or about December 26, 2006, Colonial Bank, N.A., agreed to extend a loan to
25 Somerset Dev. Co. in the amount of Eight Million Seven Hundred Seventy Five Thousand and
26 NO/100ths Dollars (\$8,775,000.00) induced by a Promissory Note ("Note"). A true and correct
27 copy of the Note is attached as **Exhibit 1** and incorporated herein by reference.

28 9. The purpose of the loan to Somerset Dev. Co. was to fund the construction of two (2)

1 multi tenant commercial buildings containing a total of approximately 35,544 square feet and
2 related site improvements. A true and correct copy of the Construction Loan Agreement is
3 attached as **Exhibit 2** and incorporated herein by reference.

4
5 10. The Note was secured by a Deed of Trust ("DOT") on real property and the subsequent
6 construction improvements thereon owned by Somerset Dev. Co. which consisted of
7 approximately 3.776 acres located at or near 7655 and 7665 Town Square Way, Reno, Nevada
8 89523. A true and correct copy of the DOT is attached as **Exhibit 3** and incorporated herein by
9 reference.

10 11. As a condition of the loan and as additional security for the Note, Somerset Dev. Co.,
11 executed an Assignment of Leases and Rents wherein Somerset Dev. Co. assigned to BB&T all
12 rents, issues, profits and leases of and from the Subject Property, including the improvements
13 constructed thereon.

14 12. As a further condition of the loan, Smith, Cashman and Somerset each executed a
15 Guarantee, personally guaranteeing the Note and DOT. True and correct copies of the
16 Guarantees executed by Smith, Cashman and Somerset are attached as **Exhibit 4** and
17 incorporated herein by reference.

18 13. On or about August 29, 2008, the maturity date of the Note was extended by agreement
19 until September 28, 2008. A True and correct copy of the Amendment to Promissory Note
20 Secured by Deed of Trust is attached as **Exhibit 5** and incorporated herein by reference.

21 14. On or about December 31, 2008, the Construction Loan Agreement was modified by
22 agreement of Somerset Dev. Co. and Colonial Bank, N.A. The Construction Loan Agreement
23 was modified to convert or roll the loan into permanent financing. The maturity date of the loan
24 was also extended until September 28, 2010.

25 15. In addition to changing the maturity date and converting the loan into permanent
26 financing, the Guarantees signed by Somerset LLC, Smith and Cashman were modified so that
27 the Guarantors' maximum liability would not exceed an amount equal to the outstanding
28 principal and interest due under the Note, multiplied by the percentage of the "leaseable square

1 footage” of 32,111 square feet of the structures and improvements built on the Property which
2 had not been leased to third parties.

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4 16. Upon information and belief, Somerset Dev. Co., Somerset LLC, and Smith Realty
5 Finance are alter egos of Smith, who should accordingly be held personally liable for the debts of
6 Somerset Dev. Co., Somerset LLC, and Smith Realty Finance. There is such a unity of interest
7 and ownership and commingling of funds amongst Smith, Somerset Dev. Co., Somerset LLC,
8 and Smith Realty Finance that each corporate entity is inseparable from its principal(s), and
9 adherence to the corporate fiction of each entity would sanction a fraud and/or promote injustice.

10 **SOMERSETT’S DEFAULT AND THE SUBSEQUENT TRUSTEE’S SALE**

11 17. In or about August, 2009, Somerset Dev. Co. was in default of its obligation under the
12 Note, the Construction Loan Agreement and the security agreements for its failure to make loan
13 payments as agreed.

14 18. On or about August 14, 2009, Colonial Bank, N.A. was seized by the Alabama State
15 Banking Department and placed into receivership by the FDIC. Branch Banking and Trust
16 Company (“BB&T”), pursuant to a Purchase and Assumption Agreement, acquired certain of
17 Colonial Bank’s assets, including the loan at issue in this matter.

18 19. On or about January 19, 2010, BB&T caused to be filed and recorded a Notice of Default
19 and Election to Sell Under Deed of Trust. An amended Notice of Default and Election to Sell
20 Under Deed of Trust was subsequently filed and recorded on or about March 19, 2010. Copies
21 of the original and amended Notices of Default are attached hereto as **Exhibit 6** and incorporated
22 herein by reference.

23 20. On or about February 2, 2010, BB&T exercised its right to begin collecting rents from
24 the tenants of the Subject Property.

25 21. On or about July 13, 2010, the Subject Property had an appraised value of \$4,040,000.
26 See Summary of Hutchinson Valuation, Inc. Appraisal Report, attached hereto as **Exhibit 7** and
27 incorporated herein by reference.

28 22. On or about July 22, 2010, BB&T assigned the Note and DOT executed by Somerset

1 Dev. Co. for the benefit of Colonial Bank to Eagle SPE.

2 23. On or about June 30, 2010, a Notice of Trustee's Sale (Doc#3897525) concerning the
3 Subject Property was recorded, which provided notice, pursuant to Nevada law, of the pending
4 Trustee's Sale of the Subject Property, to occur on July 30, 2010. A true and correct copy of the
5 Notice of Trustee's Sale is attached as **Exhibit 8** and incorporated herein by reference.

6 24. The July 30, 2010 trustee's sale of the Subject Property was first orally postponed until
7 August 13, 2010, at which time it was again orally postponed until September 14, 2010. Copies
8 of the Certificates of Postponement are attached hereto as **Exhibit 9** and incorporated herein by
9 reference.

10 25. Pursuant to the Notice of the Trustee's Sale and subsequent Certificates of Postponement,
11 the Trustee did sell the Subject Property on September 14, 2010.

12 26. Pursuant to the trustee's sale, a Trustee's Deed was recorded evidencing the purchase of
13 the Subject Property by Eagle SPE for the sum of \$3,232,000.00. A true and correct copy of the
14 Trustee's Deed is attached as **Exhibit 10** and incorporated herein by reference.

15 27. Eagle SPE seeks recovery of the deficiency with accrued interest, plus recoverable costs
16 and fees, in an amount to be proven at the NRS 40.455 hearing, which shall include, among other
17 things, fees for appraisals conducted in connection with the foreclosure of the property, trustee's
18 fees, attorney fees and court costs.

19 **FIRST CLAIM FOR RELIEF**

20 **(Deficiency/NRS 40.455, et. seq.)**

21 28. Applicant/Plaintiff incorporates all allegations as though fully set forth herein.

22 29. Eagle SPE is entitled to a Judgment of Deficiency, pursuant to NRS 40.455, including all
23 costs and fees associated with the sale of the property and this action.

24 30. As set forth above, the Subject Property was sold at trustee's sale on September 14, 2010.

25 31. The trustee's sale was conducted pursuant to the Notice of Default and Election to Sell
26 Under Deed of Trust, and the Notice of Sale, pursuant to NRS 107.080, et seq., in order to satisfy
27 the obligation of the Note.

28

32. After the trustee’s sale, there remains a deficiency of the proceeds of the sale and a balance remaining due to Eagle SPE.

33. As of September 1, 2010, the unpaid balance of the Note, plus interest, unpaid property taxes, costs, trustee’s fees and legal fees was \$9,354,482.78, which is broken down as follows:

Unpaid Balance of the Note.....	\$8,670,428.54
Interest.....	\$507,005.85
Appraisal.....	\$3,300.00
Environmental Indemnity.....	\$2,100.00
Trustee’s Fees.....	\$48,251.20
Legal Fees.....	\$11,793.10
Property Taxes.....	\$94,104.09
Rent Collection Services.....	\$17,500.00
TOTAL.....	\$9,354,482.78

34. The unpaid balance accrues per diem interest in the amount of \$1,204.23.

35. The most recent appraisal of the Subject Property, conducted by Hutchinson Appraisals on July 13, 2010, indicated that on that date the fair market value of the Subject Property was \$4,040,000.00. **Exhibit 7.**

36. Pursuant to NRS 40.459, the amount of the deficiency judgment to which Eagle SPE is entitled is equal to the difference between the unpaid balance of the Note, plus all additional costs and fees, and the fair market value of the Subject Property at the time of the trustee’s sale. Accordingly, the amount of the judgment should be \$5,314,482.78, plus interest which continues to accrue.

SECOND CLAIM FOR RELIEF

(Breach of Contract—Guarantees)

37. Applicant/Plaintiff incorporates all allegations as though fully set forth herein.

38. Smith, Cashman, and Somerset LLC each executed separate Guarantees of the indebtedness of Somerset Dev. Co. (**Exhibit 4**).

1 39. Each Guarantee constitutes a valid and enforceable contract, the benefit of which has
2 been assigned to Eagle SPE.

3 40. Pursuant to the Guarantees, each guarantor's obligation is cumulative and not alternative
4 to the obligations of all other guarantors. (**Exhibit 4** at 4, ¶ 9).

5 41. Pursuant to each separate Guarantee, each guarantor's maximum liability under its
6 respective Guarantee is equal to the outstanding principal and interest due under the Note
7 multiplied by the percentage of leasable square footage within the Subject Property, which has
8 not been preleased to third parties pursuant to agreements acceptable to the lender. (**Exhibit 4** at
9 1, ¶ 1).

10 42. The separate guarantee obligations undertaken by Smith, Cashman, and Somerset LLC
11 were to terminate once not less than 95% of the leasable square footage is preleased to third
12 parties acceptable to the lender and the project established a debt service coverage ratio of not
13 less than 1.25 to 1.00. (**Exhibit 4** at 1-2, ¶ 1).

14 43. Neither of the termination conditions set forth in Paragraph 39 was ever met.

15 44. Pursuant to the Guarantees, each guarantor remains liable for the outstanding principal
16 and interest due under the Note multiplied by the percentage of leasable square footage within
17 the Subject Property, which has not been preleased to third parties pursuant to agreements
18 acceptable to the lender.

19 45. Each guarantor has denied and refused to pay its obligation under its respective
20 Guarantee, and each guarantor is therefore in breach of its contractual obligation.

21 WHEREFORE, Applicant/Plaintiff prays for judgment as follows:

22 1. For a Judgment of Deficiency in an amount to be proven at the deficiency hearing,
23 pursuant to NRS 40.455;

24 2. For judgment to be entered against defendants in an amount in excess of \$75,000,
25 including interest thereon as provided for in the Note, the DOT, the Guarantees, and pursuant to
26 Nevada law;

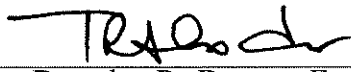
27 3. For attorneys' fees and as allowed by law;

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4. For costs of the suit herein incurred; and
 5. For such other relief that this Court deems just and proper.

Dated: November 3, 2010.

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