

2009-000694

Klamath County, Oregon



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01/21/2009 10:49:01 AM

Fee: \$61.00

**RECORDING REQUESTED BY AND
WHEN RECORDED RETURN TO:**

WELLS FARGO BANK, NATIONAL
ASSOCIATION
305 E. Main Street, 2nd Floor
MAC S3908-024
Mesa, Arizona 85201
Attn: Craig Boatwright

(Space Above For Recorder's Use)

**ASSIGNMENT OF LEASES AND RENTS
(Oregon)**

THE PARTIES TO THIS ASSIGNMENT OF LEASES AND RENTS ("**Assignment**"), made as of January __, 2009, are BERT JOHNSON, a married man as his sole and separate property, and KENNETH JOHNSON, an unmarried man (individually and collectively, "**Assignor**"), and WELLS FARGO BANK, NATIONAL ASSOCIATION ("**Lender**").

ARTICLE 1. RECITALS

- 1.1 Lender has made certain loans to Assignor and certain affiliates, which are evidenced by the "Notes" described in Section 2.1 below.
- 1.2 Assignor hereby makes this Assignment, which relates to certain real property in Klamath County, Oregon, the legal description of which is set forth on the attached Exhibit "A" (the "**Property**"), as a material inducement to Lender to modify the foregoing loans as more particularly described in that Global Forbearance and Modification Agreement of even date herewith ("**Modification Agreement**") and other documentation executed and delivered concurrently herewith.

ARTICLE 2. OBLIGATIONS SECURED

- 2.1 **OBLIGATIONS SECURED.** Assignor makes this Assignment for the purpose of securing: (a) the performance of the obligations contained herein and in the Modification Agreement; (b) the payment of (i) a loan from Lender to Bonita Valley Grain Company, an Arizona general partnership ("BVGC"), evidenced by a Promissory Note dated June 25, 2004, in the original principal amount of \$275,625.00, which was thereafter assumed by Kenneth H. Johnson, an unmarried man ("KHJ"), and Bert D. Johnson, also known as Bert Johnson ("BDJ"); (ii) a loan from Lender to BVGC, evidenced by a Promissory Note dated June 3, 2005, in the original principal amount of \$338,000.00, which was thereafter assumed by KHJ and BDJ; (iii) a loan from Lender to Paradise Valley Farms, an Arizona general partnership, evidenced by a Promissory Note dated April 20, 2006, in the maximum principal amount of \$2,800,000.00; (iv) a loan from Lender to KHJ and BDJ, evidenced by a Promissory Note dated March 16, 2005, in the principal amount of \$1,393,000, which was amended by Change in Terms Agreements dated September 15, 2005, December 15, 2005, and May 10, 2006 (the last of which increased the principal amount to \$7,550,000.00); and (v) a loan from Lender to KHJ evidenced by a Promissory Note dated March 15, 2006, in the maximum principal amount of \$1,500,000.00 (the instruments described in this clause (b) are collectively called the "Notes"); (c) payment to Lender of all liability, whether liquidated or unliquidated, defined, contingent, conditional or of any other nature whatsoever, and performance of all other obligations, arising under any swap, derivative, foreign exchange or hedge transaction or arrangement (or other similar transaction or arrangement howsoever described or defined) at any time entered into between Assignor and Lender in connection with any one or more of the Notes; (d) any and all extensions, renewals, or modifications of the Notes and the Modified Loan Documents (defined in the Modification Agreement), whether the same be in greater or lesser amounts; and (e) payment and performance of any future advances and other obligations that the then record owner of all or part of the Property may agree to pay and/or perform (whether as principal, surety or guarantor) for the benefit of Lender, when such future advance or obligation is evidenced by a writing which recites that it is secured by this Assignment (collectively, the "Secured Obligations").
- 2.2 **INCORPORATION.** The term "obligations" is used herein in its broadest and most comprehensive sense and shall be deemed to include, without limitation, all interest and charges, prepayment charges (if any), late charges and loan fees at any time accruing or assessed on any of the Secured Obligations, together with all costs of collecting the Secured Obligations. The obligations of Assignor under any environmental or hazardous materials indemnity agreement do not constitute Secured Obligations. All terms of the Secured Obligations and the documents evidencing such obligations are incorporated herein by this reference. All persons who may have or acquire an interest in the Property shall be deemed to have notice of this Assignment, the terms of the Secured Obligations and that the rate of interest on one or more Secured Obligations may vary from time to time.

ARTICLE 3. ASSIGNMENT OF LEASES AND RENTS

- 3.1 **ASSIGNMENT.** Assignor hereby irrevocably transfers and assigns to Lender all of Assignor's right, title and interest in, to and under: (a) all present and future leases of the Property or any portion thereof, all licenses and agreements relating to the management, leasing, occupancy or operation of the Property, whether such leases, licenses and agreements are now existing or entered

into after the date hereof ("**Leases**"); and (b) the rents, issues, revenues, receipts, deposits and profits of the Property, including, without limitation, all amounts payable and all rights and benefits accruing to Assignor under the Leases ("**Payments**"). The term "Leases" shall also include all subleases and other agreements for the use or occupancy of the Property, all guarantees of and security for the tenant's performance thereunder, the right to exercise any landlord's liens and other remedies to which the landlord is entitled, and all amendments, extensions, renewals or modifications thereto. This is a present and absolute assignment, not an assignment for security purposes only, and Lender's right to the Leases and Payments is not contingent, upon and may be exercised without, possession of the Property.

- 3.2 **GRANT OF LICENSE.** Regardless of whether a Default (defined below) exists, Lender shall collect and apply the Payments pursuant to the terms hereof without notice and without taking possession of the Property. Assignor shall irrevocably instruct each tenant of the Property to send the Payments directly to Lender as they become due and payable. Any payments collected by Assignor shall be held by Assignor as trustee under a constructive trust for the benefit of Lender. Assignor hereby irrevocably authorizes and directs the tenants under the Leases to rely upon and comply with any notice or demand by Lender for the payment to Lender of any rentals or other sums which may at any time become due under the Leases, or for the performance of any of the tenants' undertakings under the Leases, and the tenants shall have no duty to inquire as to whether any Default has actually occurred or is then existing. Assignor hereby relieves the tenants from any liability to Assignor by reason of relying upon and complying with any such notice or demand by Lender. Lender shall apply any Payments so collected by Lender against any Secured Obligation under the Modified Loan Documents, in its sole discretion, whether existing on the date hereof or hereafter arising. Collection of any Payments by Lender shall not cure or waive any Default or notice of Default or invalidate any acts done pursuant to such notice.
- 3.3 **EFFECT OF ASSIGNMENT.** The foregoing irrevocable assignment shall not cause Lender to be: (a) a mortgagee in possession; (b) responsible or liable for the control, care, management or repair of the Property or for performing any of the terms, agreements, undertakings, obligations, representations, warranties, covenants and conditions of the Leases; (c) responsible or liable for any waste committed on the Property by the tenants under any of the Leases or any other parties, for any dangerous or defective condition of the Property, or for any negligence in the management, upkeep, repair or control of the Property resulting in loss or injury or death to any tenant, licensee, employee, invitee or other person; (d) responsible for or under any duty to produce rents or profits; or (e) directly or indirectly liable to Assignor or any other person as a consequence of the exercise or failure to exercise any of the rights, remedies or powers granted to Lender hereunder or to perform or discharge any obligation, duty or liability of Assignor arising under the Leases.

ARTICLE 4. RIGHTS AND DUTIES OF THE PARTIES

- 4.1 **PERFORMANCE OF SECURED OBLIGATIONS.** Assignor represents and warrants that it is the sole owner of the Rents and Leases, that it has the power and authority to execute and deliver this Assignment, and that no prior pledges of the Rents or Leases exist. Assignor shall promptly pay and perform each Secured Obligation when due. If Assignor fails to timely pay or perform any portion of the Secured Obligations (including taxes, assessments and insurance premiums), or if a legal proceeding is commenced that may significantly affect Lender's rights in the Property, then Lender may (but is not obligated to), at Assignor's expense, take such action as it considers to be

necessary to protect the value of the Property and Lender's rights in the Property, including the retaining of counsel, and any amount so expended by Lender will be added to the Secured Obligations and will be payable by Assignor to Lender on demand, together with interest thereon from the date of advance until paid at the default rate provided in any one or more of the Notes.

- 4.2 **TAXES AND ASSESSMENTS.** Assignor shall also pay prior to delinquency all taxes, assessments, levies and charges imposed upon the Property by any public authority or upon Lender by reason of its interest in any Secured Obligation or in the Property, or by reason of any payment made to Lender pursuant to any Secured Obligation; provided, however, Assignor shall have no obligation to pay taxes which may be imposed from time to time upon Lender and which are measured by and imposed upon Lender's net income.
- 4.3 **LIENS, ENCUMBRANCES AND CHARGES.** Assignor shall not encumber fee simple title to the Property without Lender's prior written consent (which may be granted or withheld in Lender's sole and absolute discretion), and shall immediately discharge any lien not approved by Lender in writing that has or may attain priority over this Assignment.
- 4.4 **DUE ON SALE OR ENCUMBRANCE.** If the Property or any interest therein shall be sold, transferred, mortgaged, assigned, further encumbered or leased, whether directly or indirectly, whether voluntarily, involuntarily or by operation of law, without the prior written consent of Lender, THEN Lender, in its sole discretion, may at anytime thereafter declare all Secured Obligations immediately due and payable.
- 4.5 **DEFENSE AND NOTICE OF LOSSES, CLAIMS AND ACTIONS.** At Assignor's sole expense, Assignor shall protect, preserve and defend the Property and title to and right of possession of the Property, the security hereof and the rights and powers of Lender hereunder against all adverse claims. Assignor shall give Lender prompt notice in writing of the assertion of any claim, of the filing of any action or proceeding, of any material damage to the Property and of any condemnation offer or action.
- 4.6 **COMPENSATION; EXCULPATION; INDEMNIFICATION.** **ASSIGNOR HEREBY AGREES TO INDEMNIFY LENDER, AND HOLD LENDER HARMLESS FOR, FROM, AND AGAINST ALL LOSSES, DAMAGES, LIABILITIES, CLAIMS, CAUSES OF ACTION, JUDGMENTS, COURT COSTS, ATTORNEYS' FEES AND OTHER LEGAL EXPENSES, COST OF EVIDENCE OF TITLE, COST OF EVIDENCE OF VALUE, AND OTHER EXPENSES WHICH EITHER MAY SUFFER OR INCUR: (i) BY REASON OF THE PERFORMANCE OF ANY ACT REQUIRED OR PERMITTED HEREUNDER OR BY LAW; (ii) AS A RESULT OF ANY FAILURE OF ASSIGNOR TO PERFORM ASSIGNOR'S OBLIGATIONS; OR (iii) BY REASON OF ANY ALLEGED OBLIGATION OR UNDERTAKING ON LENDER'S PART TO PERFORM OR DISCHARGE ANY OF THE REPRESENTATIONS, WARRANTIES, CONDITIONS, COVENANTS OR OTHER OBLIGATIONS CONTAINED IN ANY OTHER DOCUMENT RELATED TO THE PROPERTY.** The above obligation of Assignor to indemnify and hold harmless Lender shall survive the release and cancellation of the Secured Obligations and the release or partial release of the lien of this Assignment.

- 4.7 **RIGHT OF INSPECTION.** Lender, its agents and employees may enter the Property at any reasonable time for the purpose of inspecting the Property and ascertaining Assignor's compliance with the terms hereof.
- 4.8 **ADDITIONAL COVENANTS.** Assignor shall not, without the prior written consent of Lender, (a) enter into any new Lease or extend, renew, amend or modify any Lease (other than extensions, renewals, amendments or modifications in accordance with the terms of a Lease previously approved by Lender); (b) consent to or permit the assignment or subletting of any Lease (other than assignments or subleases in accordance with the terms of a Lease previously approved by Lender); (c) cancel or terminate any Lease; or (d) alter, amend, modify, change or terminate the terms of any guaranties of any Lease.

ARTICLE 5. DEFAULT PROVISIONS

- 5.1 **DEFAULT.** For all purposes hereof, the term "**Default**" shall mean any default or event of default under any of the Modified Loan Documents, including this Assignment.
- 5.2 **RIGHTS AND REMEDIES.** At any time after Default, the License shall automatically be revoked, cease and terminate without notice to Assignor and without regard to the adequacy or inadequacy of Lender's security under this Assignment or the other Modified Loan Documents. Thereupon, Lender shall be entitled to exercise any and all rights and remedies provided in this Assignment and the other Modified Loan Documents. Lender may apply any Rents collected under this Assignment to the Secured Obligations in such order and manner as it may determine in its sole discretion. The rights and remedies provided in this Assignment shall not be deemed exclusive of any rights or remedies granted to Lender in the other Modified Loan Documents or by law, but shall be deemed special and additional rights and remedies and shall be cumulative with those rights and remedies granted in the other Modified Loan Documents or by law.
- 5.3 **PAYMENT OF COSTS, EXPENSES AND ATTORNEYS' FEES.** Assignor agrees to pay to Lender immediately and without demand all costs and expenses incurred by Lender pursuant to this Article 5 (including, without limitation, court costs and attorneys' fees, whether or not incurred in litigation, including, without limitation, at trial, on appeal or in any bankruptcy or other proceeding). In the event of any legal proceedings, court costs and attorneys' fees shall be set by the court and not by jury and shall be included in any judgment obtained by Lender.
- 5.4 **POWER TO FILE NOTICES AND CURE DEFAULTS.** Assignor hereby irrevocably appoints Lender and its successors and assigns, as its attorney-in-fact, which agency is coupled with an interest, to prepare, execute and file or record any document necessary to create, perfect or preserve Lender's security interests and rights in or to any of the Property, and upon the occurrence of an event, act or omission which, with notice or passage of time or both, would constitute a Default, Lender may perform any obligation of Assignor hereunder.
- 5.5 **REMEDIES CUMULATIVE.** All rights and remedies of Lender provided hereunder are cumulative and are in addition to all rights and remedies provided by applicable law or in any other agreements between Assignor and Lender. No failure on the part of Lender to exercise any of its rights hereunder arising upon any Default shall be construed to prejudice its rights upon the occurrence of any other or subsequent Default. No delay on the part of Lender in exercising any

such rights shall be construed to preclude it from the exercise thereof at any time while that Default is continuing. Lender may enforce any one or more remedies or rights hereunder successively or concurrently. By accepting payment or performance of any of the Secured Obligations after its due date, Lender shall not waive the agreement contained herein that time is of the essence, nor shall Lender waive either its right to require prompt payment or performance when due of the remainder of the Secured Obligations or its right to consider the failure to so pay or perform a Default.

ARTICLE 6. MISCELLANEOUS PROVISIONS

- 6.1 **ATTORNEYS' FEES.** If any Note is placed with an attorney for collection or if an attorney is engaged by Lender to exercise rights or remedies or otherwise take actions to collect thereunder or under any other Modified Loan Document, or if suit be instituted for collection, enforcement of rights and remedies, then in all events, Assignor agree(s) to pay all reasonable costs of collection, exercise of remedies or rights or other assertion of claims, including, but not limited to, reasonable attorneys' fees, whether or not court proceedings are instituted, and, where instituted, whether in district court, appellate court, or bankruptcy court.
- 6.2 **SUCCESSORS IN INTEREST.** The terms, covenants, and conditions herein contained shall be binding upon and inure to the benefit of the heirs, successors and assigns of the parties hereto; provided, however, that this Section does not waive or modify the provisions of the Section above titled "Due on Sale or Encumbrance".
- 6.3 **GOVERNING LAW.** This Assignment is delivered in, and shall be governed by and construed according to the substantive laws and judicial decisions of, Arizona (without regard for Arizona conflict of laws principles or the location, residence, domicile or place of business of Assignor or any present or future principal thereof) and applicable federal laws, rules and regulations. Notwithstanding the foregoing choice of law provision, the laws of California shall govern procedural matters relating to the perfection and enforcement of Lender's liens, rights and remedies against the Rents and Leases. However, in the event that the enforceability or validity of any provision of this Assignment is challenged or questioned, such provision shall be governed by whichever applicable state or federal law would uphold or enforce such challenged or questioned provision. The Secured Obligations have been applied for, considered, approved and made, and all necessary loan documents have been accepted by Lender, in the state of Arizona, which is also the location of all other collateral for the Secured Obligations. No one-action, security-first or anti-deficiency statutes or rules of any kind shall apply to the enforcement of this Assignment or the Secured Obligations.
- 6.4 **EXHIBITS INCORPORATED.** All exhibits, schedules or other items attached hereto are incorporated into this Assignment by such attachment for all purposes.
- 6.5 **NOTICES.** All notices, demands or other communications required or permitted to be given pursuant to the provisions of this Assignment shall be in writing and shall be considered as properly given if delivered personally or sent by first class United States Postal Service mail, postage prepaid, except that notice of Default may be sent by certified mail, return receipt requested, or by Overnight Express Mail or by overnight commercial courier service, charges prepaid. Notices so sent shall be effective 3 days after mailing, if mailed by first class mail, and otherwise upon receipt at the address set forth below; provided, however, that non-receipt of any communication as the

result of any change of address of which the sending party was not notified or as the result of a refusal to accept delivery shall be deemed receipt of such communication. For purposes of notice, the address of the parties shall be:

Assignor:	BERT JOHNSON 10343 Highway 32 South Walhalla, ND 58282 KENNETH JOHNSON 10343 Highway 32 South Walhalla, ND 58282
Lender:	WELLS FARGO BANK, NATIONAL ASSOCIATION 305 E. Main Street, 2nd Floor MAC S3908-024 Mesa, Arizona 85201 Attn: Craig Boatwright

Any party shall have the right to change its address for notice hereunder to any other location within the United States by the giving of 30 days notice to the other party in the manner set forth hereinabove.

Assignor requests a copy of any statutory notice of default and a copy of any statutory notice of sale be mailed to Assignor at the address set forth above.

- 6.6 **WAIVER OF MARSHALING RIGHTS.** Assignor, for itself and for all parties claiming through or under Assignor, and for all parties who may acquire a lien on or interest in the Property, hereby waives all rights to have its interest in the Property and/or any other property marshaled upon any foreclosure of the lien of this Assignment or on a foreclosure of any other lien securing the Secured Obligations.

IN WITNESS WHEREOF, Assignor has executed this Assignment as of the day and year set forth above.

"ASSIGNOR"

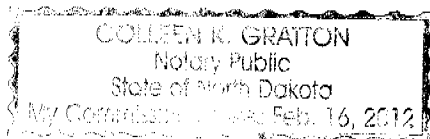

BERT JOHNSON


KENNETH JOHNSON

STATE OF NORTH DAKOTA)

County of Pembina) ss.

The foregoing was acknowledged before me this 9th day of January, 2009, by **Bert Johnson**.

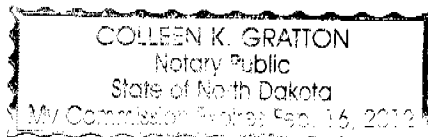


Colleen K. Gratton
Notary Public

STATE OF NORTH DAKOTA)

County of Pembina) ss.

The foregoing was acknowledged before me this 9th day of January, 2009, by **Kenneth H. Johnson**.



Colleen K. Gratton
Notary Public

EXHIBIT "A"

LEGAL DESCRIPTION

THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 4, TOWNSHIP 41 SOUTH, RANGE 12 EAST OF THE WILLAMETTE MERIDIAN, SAVING AND EXCEPTING A 30 FOOT STRIP FOR ROAD ACROSS THE SOUTH SIDE.