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 7 REALCO, LLC, DMB COMMUNITIES LLC,  
 and DMB COMMUNITIES II, LLC  
 8

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

11 DMB ERSB LLC, an Arizona limited liability  
company,

12 Plaintiff,

13 v.

14 LONGWOOD SAN BENITO LLC, a  
California limited liability company,

15 Defendant.

16 and

17 EL RANCHO SAN BENITO LLC, a  
Delaware limited liability company,

18 Nominal Defendant.

19  
20 LONGWOOD SAN BENITO LLC, a  
California limited liability company,

21 Cross-Complainant,

22 v.

23 DMB REALCO, LLC, an Arizona limited  
liability company, DMB COMMUNITIES  
24 LLC, an Arizona limited liability company,  
DMB COMMUNITIES II LLC, an Arizona  
25 limited liability company, DMB ERSB LLC,  
an Arizona limited liability company, and  
26 DOES 1-50,

27 Cross-Defendants.

Case No. CV 09-2003 JW

**STIPULATION AND ~~PROPOSED~~  
 PROTECTIVE ORDER CONCERNING  
 CONFIDENTIAL MATERIAL  
 PRODUCED DURING DISCOVERY  
 AS AMENDED BY THE COURT**

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1 Pursuant to Civil Local Rule 7-12, the parties submit the following stipulation concerning  
2 treatment of confidential material produced during discovery, and request that the Court enter it as  
3 an order.

4 **STIPULATION**

5 1. This Stipulation shall be applicable to and govern all depositions, documents  
6 produced in response to requests for production of documents, answers to interrogatories,  
7 responses to requests for admission, and all other discovery in this action which any party  
8 (whether or not it furnished the material) designates as "confidential." The designation of  
9 "confidential" is intended to encompass material of any nature that the designating party in good  
10 faith believes qualifies for protection under standards developed under Federal Rule of Civil  
11 Procedure 26(c).

12 2. Material governed by this Stipulation shall be used by any recipient solely for the  
13 purpose of conducting this litigation, and not for any other purpose whatsoever, and such material  
14 shall not be disclosed to anyone except as provided herein.

15 3. Any material disclosed through discovery in this action may be designated by a  
16 party as confidential in the following way:

17 (a) In the case of documents, the legend "CONFIDENTIAL" must be affixed to  
18 each page that contains protected material. The designation shall be made at the time such  
19 material is produced, or as soon thereafter as the party seeking protection becomes aware of the  
20 confidential nature of the material. The term "document," as used in this Stipulation, shall have  
21 the broadest meaning permissible under the Federal Rules of Civil Procedure and shall include,  
22 without limitation, all "documents and electronically stored information" as defined in Rule 34 of  
23 the Federal Rules of Civil Procedure, all "writings," "recordings" and "photographs" as defined in  
24 Rule 1001 of the Federal Rules of Evidence, and any information stored in or through any  
25 computer system or other electronic or optical data storage device.

26 (b) In the case of depositions: (i) by a statement on the record by counsel  
27 during the deposition that the entire transcript or a portion thereof shall be designated as  
28 confidential; or (ii) by written notice of such designation sent by counsel within ten court days

1 after the deposition transcript is received by counsel for each of the parties. If any material  
2 designated as confidential is referenced during the course of a deposition, the portion of the  
3 deposition record reflecting such confidential material shall be treated in the same manner as the  
4 material itself.

5 4. Material designated as confidential under this Stipulation, including copies of the  
6 material, extracts of the material, and compilations reflecting the material, may be disclosed,  
7 described, characterized, or otherwise communicated or made available in whole or in part only to  
8 the following persons:

9 (a) personnel of the parties actually engaged in assisting in the litigation of this  
10 action and who have been advised of their obligations hereunder;

11 (b) counsel for the parties to this action and their associated attorneys,  
12 paralegals and other professional personnel (including support staff) who are directly assisting  
13 such counsel in the litigation of this action, are under the supervision or control of such counsel,  
14 and have been advised by such counsel of their obligations hereunder;

15 (c) the Court and court personnel;

16 (d) expert witnesses or consultants retained by the parties or their counsel to  
17 furnish technical, consulting, or other services in connection with this action or to give testimony  
18 with respect to the subject matter of this action;

19 (e) court reporters, interpreters, and videographers employed in connection  
20 with this action;

21 (f) any person whose testimony is taken, or is scheduled to be taken, in this  
22 action; and

23 (g) any other person agreed to by the parties in writing **or as ordered by the Court.**

24 5. Except for (i) counsel of record for a party (or staff or supporting personnel of such  
25 counsel); (ii) in-house counsel for a party (or staff or supporting personnel of such counsel); and  
26 (iii) the Court or court personnel, each person set forth in Paragraph 4 to whom material  
27 designated as confidential under this Stipulation is to be disclosed shall, prior to receiving or  
28 reviewing such information or materials, be furnished with a copy of this Stipulation and

1 Protective Order and a copy of the Non-Disclosure Agreement attached hereto as Exhibit A, which  
2 the person shall read and sign prior to such review and/or receipt of the material. Counsel for the  
3 party seeking to disclose confidential material to any such person shall be responsible for retaining  
4 the executed originals of all Non-Disclosure Agreements. Copies of such agreements shall be  
5 provided to counsel for the designating party upon request.

6 6. Nothing contained in this Stipulation shall affect the right of any party to object to,  
7 claim a privilege in response to, or otherwise contest an interrogatory, request for production of  
8 documents, request for admission, subpoena, or question at a deposition, or to seek further relief or  
9 a protective order from the Court as permitted by the Federal Rules of Civil Procedure. Nothing  
10 in this Stipulation shall affect the right of any party to redact material for privilege. Nothing in  
11 this Stipulation shall constitute an admission or waiver of any claim or defense by any party.

12 7. In the event that any material designated as confidential is included, described,  
13 characterized, excerpted, or referenced in any submission to the Court in connection with this  
14 litigation, it shall not lose its confidential status through such use, and the parties shall take all  
15 steps reasonably required to protect its confidentiality. Any party wishing to file material  
16 designated as confidential by the other party shall seek to file such material under seal pursuant to  
17 the Civil Local Rules of this Court, except that the filing party shall first determine whether the  
18 designating party will consent to the filing of the material in the public record.

19 8. Any material produced by nonparties, pursuant to subpoena or otherwise, may be  
20 designated as confidential by any party.

21 9. A party shall not be obligated to challenge the propriety of the confidentiality  
22 designation of any material at the time the designation is made, and failure to do so shall not  
23 preclude a subsequent challenge. In the event that any party to this litigation disagrees at any  
24 point in these proceedings with a particular confidentiality designation, such party shall  
25 **meet and confer directly (in voice-to-voice dialogue; other forms of communication are not sufficient)**  
26 **with counsel for the Designating Party and** provide to the designating party a letter stating its  
27 objection to the designation and the basis of that objection.  
28 If the designating party will not agree to withdraw the designation, it must, within five court days  
of the objecting party's letter, file a duly noticed motion with the Court seeking a protective order.

The burden of proving that material has been properly designated as confidential is on the

1 designating party. The failure of the designating party to file a motion for a protective order  
2 within five days of receiving the notification of the objection shall constitute a waiver of the  
3 designation.

4 10. Nothing in this Stipulation shall preclude any party from: (a) showing a document  
5 designated as confidential to an individual who either prepared or received the document prior to  
6 the filing of this action; or (b) disclosing or using, in any manner or for any purpose, any material  
7 from the party's own files which the party itself has designated as confidential. Nothing in this  
8 Stipulation shall prevent disclosure beyond the terms of this Stipulation if the party that designated  
9 the material consents in writing to such disclosure, or if a court orders such disclosure.

10 11. If, when producing or otherwise disclosing material, a party inadvertently fails to  
11 designate the material as confidential, it shall not be deemed a waiver in whole or in part of the  
12 party's claim of confidentiality, either as to the specific material disclosed or as to any other  
13 material relating thereto or on the same or related subject matter. As soon as the receiving party is  
14 informed that previously disclosed material is being designated as confidential, the material must  
15 be treated as if it had been timely designated under this Stipulation, and the receiving party must  
16 endeavor in good faith to obtain any material that has been distributed or disclosed to persons not  
17 authorized to access such material by this Stipulation.

18 12. Within 60 days after the final termination of litigation between the parties,  
19 including any appeal, all material designated as confidential and all copies thereof (including  
20 summaries and excerpts) shall either be returned to the party that produced it or destroyed and a  
21 certification of destruction supplied to the producing party; provided, however, that counsel of  
22 record for the parties may retain one copy of any pleadings, motion papers, discovery responses,  
23 deposition transcripts, deposition and trial exhibits, and documents constituting attorney work  
24 product which contain or reflect confidential material. Any retained copies of such papers shall be  
25 maintained in a file accessible only by counsel and their staff who are authorized to access the  
26 material under the provisions of this Stipulation. This Stipulation shall survive the final  
27 termination of this litigation with respect to any such retained confidential material.

28 **For a period of six months after the final termination of this action, this court will retain jurisdiction to enforce the terms of this protective order.**

1           13.     Notwithstanding the foregoing, the parties acknowledge that many of the types of  
2 documents and information that has been requested in discovery to date is information that  
3 Longwood and/or DMB is entitled to have as a member of ERSB. In addition, Longwood and/or  
4 DMB may seek to disclose certain information to third parties in the context of soliciting new  
5 sources of debt or equity capital. In this connection, on or about June 19, 2009, the parties  
6 memorialized their agreement regarding the treatment of such documents and information (the  
7 “June 19 Agreement”). The parties agreed that information that “Members are entitled to receive  
8 in their capacity as members of ERSB or as Members of the Executive Committee of ERSB, shall  
9 not be treated as confidential settlement negotiations or discussions.” They further agreed that  
10 Longwood was entitled to disclose “information regarding the project to third parties in the  
11 context of soliciting new sources or debt or equity capital . . . provided that Longwood first  
12 obtains a Nondisclosure Agreement from any such third party.” The parties now confirm and  
13 ratify their agreements set forth in the June 19 Agreement. Nothing in this Stipulation is intended  
14 to or does place any restriction whatsoever on Longwood’s ability to disclose the above-  
15 referenced information as permitted by the June 19 Agreement and, as a consequence, no such  
16 information shall be marked “confidential” pursuant to the terms hereof.

17  
18 DATED: April 5, 2010

COBLENTZ, PATCH, DUFFY & BASS LLP

19  
20 By: /s/ Richard R. Patch  
21 Richard R. Patch  
22 Attorneys for Plaintiff and Cross-Defendant DMB  
23 ERSB LLC and Cross-Defendants DMB  
REALCO, LLC, DMB COMMUNITIES LLC,  
and DMB COMMUNITIES II, LLC

24 DATED: April 5, 2010

DLA PIPER LLP (US)

25  
26 By: /s/ Matthew S. Covington  
27 Matthew S. Covington  
28 Attorneys for Defendant and Cross-Complainant  
LONGWOOD SAN BENITO LLC

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**PROTECTIVE ORDER**

Pursuant to the parties' stipulation, and as amended by the court, IT IS SO ORDERED.

DATED: April 6, 2010

  
HOWARD R. LLOYD  
United States Magistrate Judge

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EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, \_\_\_\_\_ [print or type full name], of \_\_\_\_\_ [print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the United States District Court for the Northern District of California on [date] in the case of \_\_\_\_\_ **[insert formal name of the case and the number and initials assigned to it by the court]**. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the Northern District of California for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint \_\_\_\_\_ [print or type full name] of \_\_\_\_\_ [print or type full address and telephone number] as my California agent for service of process in connection with this action or any proceedings related to enforcement of this Stipulated Protective Order.

Date: \_\_\_\_\_

City and State where sworn and signed: \_\_\_\_\_

Printed name: \_\_\_\_\_  
[printed name]

Signature: \_\_\_\_\_  
[signature]