

07-1443-CD  
Citicapital vs Brian J. Owens et al

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY  
PENNSYLVANIA

Citicapital Commercial  
(Plaintiff) Corporation

3850 Regan Blvd.  
(Street Address)

Irving, TX 75063  
(City, State ZIP)

CIVIL ACTION

No. 07-1443-CD

Type of Case: Civil

Type of Pleading: Complaint

VS.

Filed on Behalf of:

Brian J Owens Excavating  
(Defendant)

551 Industrial Park Road  
(Street Address)

Clearfield, PA 16830  
(City, State ZIP)

Plaintiff  
(Plaintiff/Defendant)

FILED  
M 12:07 PM  
SEP 05 2007

William A. Shaw  
Prothonotary/Clerk of Courts

Att'y pd. 85.00  
2 cc Sheriff

Robert L. Saldutti, Esq  
(Filed by)

Saldutti, LLC  
800 N. Kings Highway, Suite 300  
(Address)

Cherry Hill, NJ 08034  
(Phone)

856-779-0300

(Signature)

SALDUTTI, LLC  
BY: ROBERT L. SALDUTTI, ESQUIRE, Esq.  
Identification No. 63867  
800 N. Kings Highway,  
Suite 300  
Cherry Hill, NJ 08034  
(856) 779-0300

**ARBITRATION MATTER  
ASSESSMENT OF DAMAGES  
HEARING NOT REQUIRED**

Attorneys for Plaintiff  
200 Locust Street Unit  
24E, North  
Philadelphia, PA 19106

CITICAPITAL COMMERCIAL  
CORPORATION  
d/b/a Ingeroll –Rand Financial Services  
3850 Regent Boulevard  
Irving, TX 75063

Plaintiff,

v.

BRIAN J OWENS EXCAVATING LLC  
551 Industrial Park Road  
Clearfield, Pa 16830

and

BRIAN OWENS  
1984 Jerry Run Road  
Clearfield, Pa 16830

Defendant(s).

COURT OF COMMON PLEAS  
CLEARFIELD COUNTY, PA

DOCKET NO.

**CIVIL ACTION COMPLAINT**

**NOTICE**

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

**AVISO**

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Adernas, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

LLEVE ESTA DEMANDA A UN ABOGADO INMEDIATAMENTE. SI NO TIENE ABOGADO O SI NO TIENE EL DINERO SUFICIENTE DE PAGAR TAL SERVICIO, VAYA EN PERSONA O LLAME POR TELEFONO A LA OFICINA CUYA DIRECCION SE ENCUENTRA ESCRITA ABAJO PARA AVERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGAL.

Clearfield County Bar Association  
c/o PA Lawyers Reference Service  
Telephone: 800-692-7375

SALDUTTI, LLC

BY: ROBERT L. SALDUTTI, ESQUIRE, Esq.

Identification No. 63867

800 N. Kings Highway,

Suite 300

Cherry Hill, NJ 08034

(856) 779-0300

Attorneys for Plaintiff

200 Locust Street Unit

24E, North

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CITICAPITAL COMMERCIAL  
CORPORATION

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BRIAN J OWENS EXCAVATING LLC

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1984 Jerry Run Road

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COURT OF COMMON PLEAS  
CLEARFIELD COUNTY, PA

DOCKET NO.

### CIVIL ACTION COMPLAINT

1. Plaintiff, Citicapital Commercial Corporation, is a Corporation with its principal place of business located at 3850 Regent Boulevard, Irving, TX 75063

2. At all times material hereto, plaintiff is authorized to do business in the Commonwealth of Pennsylvania.

3. Defendant, Brian J Owens Excavating LLC, is a Pennsylvania corporation with a principal place of business located at 551 Industrial Park Road Clearfield, Pa 16830.

4. Defendant, Brian J. Owens is an adult individual residing at 1984 Jerry Run Road, Clearfield, PA 16830.

5. Defendant, Brian J. Owens is the owner and operator of Brian J. Owens Excavating, LLC and is authorized to conduct business on its behalf.

6. At all times relevant, the Plaintiff was in the business of loaning money on heavy equipment security agreements, including but not limited to the agreement signed by Defendants, hereinafter more fully described.

**COUNT I  
MONEY JUDGMENT**

7. On or about September 25, 2006, the Defendants entered into a written Security Agreement, (hereinafter referred to as the "Contract", a copy of which is attached hereto as Exhibit "A"), for the purpose of obtaining financing for the purchase of heavy equipment and agreed to make sixty (60) monthly payments in the amount of \$868.83 beginning on October 25, 2006, in order to purchase certain construction equipment, as more particularly described in the Contract attached hereto as Exhibit "A"

8. Pursuant to the Contract, Defendants were required to make monthly payments in the amount of \$868.83 for a period of sixty (60) months until the loan was paid in full all as is more fully set forth in the Contract.

9. Defendants have now defaulted and have failed to make any further payments thereafter, and are therefore in default of the Contract.

10. As the result of the default by the Defendants, and pursuant to the terms of the Contract, all balances due on the Contract became immediately due and payable.

11. As a result of the default by Defendants, and pursuant to the terms of the Contract, Plaintiff is permitted to repossess the construction equipment and sell same at auction with a credit given to the Defendant.

12. By reason of the default, the Defendant(s) is indebted to Plaintiff for the principle balance of \$40,552.10.

13. In addition to the foregoing, there is due from the Defendants reasonable attorney's fees in the amount of \$950.00, which amount will continue to accrue.

14. The total amount due and owing is \$41,502.10.

WHEREFORE, Plaintiff, requests judgment in its favor and against the Defendant(s), in the amount of \$41,502.10 as well as additional interest and attorneys fees that may accrue and such other and further relief as this Court may deem equitable and just.

## **COUNT II REPLEVIN**

15. Plaintiff incorporate paragraphs 1 through 14, inclusive, as fully as though same were set forth here at length.

16. Despite numerous requests from Plaintiff, that Defendants make payments due under the Contract, the Defendants have failed to do so and Plaintiff has incurred additional expenses and attorneys fees to obtain possession of its collateral security.

17. Defendants have refused and continue to refuse to return and/or otherwise surrender the Vehicle to the Plaintiff despite repeated requests to do so.

18. Defendants have retained possession of the construction equipment with the intent to conceal same and prevent Plaintiff from exercising its lawful right to repossess the collateral security for repayment of the Contract.

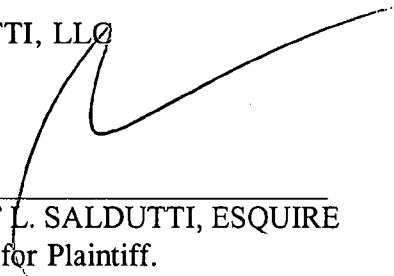
19. Pursuant to the terms and of the Contract and the applicable law in this Commonwealth, Plaintiff's purchase-money security interest in the construction equipment

takes precedence over any claim of the Defendants and Plaintiff is entitled to immediate repossession of its collateral.

WHEREFORE, Plaintiff respectfully requests Judgment in its favor and against the Defendants, and/or any other individual found to be in possession of the construction equipment, plus all costs of this action and reasonable attorneys fees.

Respectfully Submitted,

SALDUTTI, LLO



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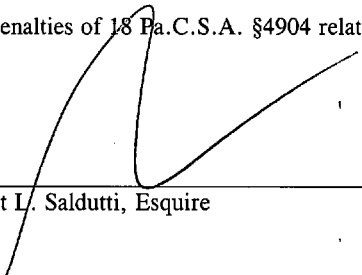
ROBERT L. SALDUTTI, ESQUIRE  
Attorney for Plaintiff.

Date: August 27, 2007

**VERIFICATION**

I, Robert L. Saldutti, Esquire, verify that I am the Attorney of record for Plaintiff, , and as such am duly authorized to make this verification on its behalf; that statements made in the foregoing Complaint are true and correct to the best of my knowledge, information and belief.

These statements are made subject to the penalties of 18 Pa.C.S.A. §4904 relating to unsworn falsification to authorities.



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Robert L. Saldutti, Esquire





## SECURITY AGREEMENT (Conditional Sale Contract)

The undersigned buyer, meaning all buyers jointly and severally ("Buyer"), having been quoted both a time sale price and cash sale price, has elected to purchase and hereby purchases from the undersigned seller ("Seller") for the time sale price shown below, under the terms and provisions of this agreement, the following described property (herein, with all present and future attachments, accessories, replacement parts, repairs, additions, and all proceeds thereof, referred to as "Collateral"):

- (1) BOBCAT UTILITY WORK MACHINE 5600T S/N 424711688
- (1) BOBCAT SALT SPREADER, S/N 006400444
- (1) BOBCAT ANGLE BROOM, S/N 231413534

The Collateral will be used primarily for: ☒ business or commercial use other than farming operations ☐ farming operations. When not in use, the Collateral will be kept at: 551 INDUSTRIAL PARK RD CLEARFIELD PA 16830  
(Street Address, City, County, State and Zip)

**PAYMENT SCHEDULE:** Buyer promises to pay Seller the UNPAID TIME BALANCE (Item 7) in 60 installments as follows:  
(Term No. of Installments)

For equal successive monthly installments:

(a) \$ 868.83 on 10/25/2006  
(Date)

and a like sum on the like date of each month thereafter until fully paid.

For other than equal successive monthly installments:

(b)

Description of Trade-In:

Gross Allowance \$ 0.00

Less Amount Owing To:

\$ 0.00

Trade-In (Net Allowance) \$ 0.00

(Enter above and in 2b)

1. (a) Selling Price	\$ <u>45,822.00</u>	
(b) Sales Tax	\$ <u>2,749.32</u>	
CASH SALE PRICE (a + b)		\$ <u>48,571.32</u>
2. (a) Cash Down Payment	\$ <u>4,800.00</u>	
(b) Trade-In (See above)	\$ <u>0.00</u>	
(c) Net Rental Credit	\$ <u>0.00</u>	
TOTAL DOWN PAYMENT (a + b + c)		\$ <u>4,800.00</u>
3. UNPAID BALANCE OF CASH SALE PRICE (1 Minus 2)		\$ <u>43,771.32</u>

#### 4. OTHER CHARGES

(a) Physical Damage Insurance	\$ <u>0.00</u>
(b) Official Fees	\$ <u>0.00</u>
(c) Other	\$ <u>0.00</u>
(Describe)	

TOTAL OTHER CHARGES (a + b + c) \$ 0.00

5. PRINCIPAL BALANCE (3+4) \$ 43,771.32

6. (a) Finance Charge \$ 8,108.48

(b) Administrative Fee \$ 250.00

TOTAL FINANCE CHARGE (a + b) \$ 8,358.48

7. UNPAID TIME BALANCE (5+6) \$ 52,129.80

8. TIME SALE PRICE (1+4+6) \$ 56,829.80

Annual Percentage Rate	<u>6.90 %</u>
Cost of Credit (Finance Charge plus Administrative Fee)	<u>7.10 %</u>

provided, however, that the final installment shall be in the amount of the remaining unpaid balance.

#### INSURANCE COVERAGE

**LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED IN THIS AGREEMENT.**

**PHYSICAL DAMAGE INSURANCE COVERING THE COLLATERAL IS REQUIRED;** however, Buyer has the option of furnishing the required insurance through an agent or broker of Buyer's choice.

Check if Applicable: ☐ Buyer requests and authorizes Seller to obtain insurance coverage in the nature of "All Risk" insurance (Fire, extended coverage, vandalism, theft and collision and containing exclusions from coverage acceptable to Seller) on the Collateral for 60 months from the date of this Agreement, and for the premium of \$ 0.00 with a \$ 0.00 deductible per occurrence.

**DELINQUENCY CHARGE.** For each installment not paid when due, Buyer agrees to pay to Seller a delinquency charge calculated thereon at the rate of 1 1/2 % per month for the period of delinquency or, at Seller's option, 5% of such installment, provided that such a delinquency charge is not prohibited by law, otherwise at the highest rate Buyer can legally obligate itself to pay and/or Seller can legally collect.

Page 1 of 3 of Security Agreement dated 09/25/2006 between BRIAN J. OWENS EXCAVATING, LLC (Buyer) and ELK POWER, INC. (Seller)

ORIGINAL FOR CITICAPITAL

Buyer's Initials  
BJO

## 1.0 THE COLLATERAL

- 1.1 Down Payment and Disclaimer.** Buyer represents and warrants that (a) any check or instrument presented to Seller as any portion of a "Cash Down Payment" indicated on the first page of this Agreement represents funds immediately available to Seller and will not be returned or dishonored for any reason; and (b) Buyer has title to and the full right and authority to convey title to any Trade-In listed on the first page of this Agreement and, upon payment to the party listed on the first page of this Agreement (if any) of the amount indicated, Seller shall have title to the Trade-In free and clear of any lien, claim, security interest or other interest of any party other than those claiming by through or under Seller. There are no warranties other than those made by the manufacturer of the Collateral. SELLER MAKES NO REPRESENTATION OR WARRANTIES, EXPRESS OR IMPLIED, AS TO THE QUALITY, WORKMANSHIP, DESIGN, MERCHANTABILITY, SUITABILITY, OR FITNESS OF THE COLLATERAL FOR ANY PARTICULAR PURPOSE, OR ANY OTHER REPRESENTATION OR WARRANTY WHATSOEVER, EXPRESS OR IMPLIED, unless such warranties are in writing and signed by Seller. Seller shall not under any circumstances be liable for loss of anticipatory profits or for consequential damage.
- 1.2 Collateral Receipt and Use.** Buyer warrants and agrees that: the Collateral was delivered to and accepted by Buyer in satisfactory condition; the Collateral will be used solely for business purposes; the Collateral is free from and will be kept free from all liens, claims, security interests and encumbrance other than that created hereby; notwithstanding Seller's claim to proceeds, Buyer will not, without Seller's prior written consent, sell, rent, lend, encumber, pledge, transfer, secrete or otherwise dispose of any of the Collateral, nor will Buyer permit any such act; the Collateral will be maintained in good operating condition, repair and appearance, and will be used and operated with care, only by qualified personnel in the regular course of Buyer's business and in conformity with all applicable governmental laws and regulations; the Collateral shall remain personal property and not become part of any real property regardless of the manner of affixation; Seller may inspect the Collateral and all books and records relating to the Collateral or Buyer's performance under this Agreement at all reasonable times and from time to time; the Collateral will be kept by Buyer at Buyer's place of business which is indicated immediately below Buyer's signature and will not be removed from said location without the prior written consent of Seller, except that an item of Collateral which is mobile and of a type normally used at more than one location may be used by Buyer away from said location in the regular course of Buyer's business provided that (a) such item is not removed from the United States, and (b) if such item is not returned to said location within 30 days, Buyer will immediately upon Seller's request, and each 30 days thereafter until the item is returned report the then current location thereof to Seller in writing.
- 1.3 Insurance.** Buyer shall at all times bear all risk of loss of, damage to or destruction of the Collateral. Buyer agrees to procure forthwith and maintain insurance on the Collateral, for the actual cash value thereof and for the life of this agreement, in the form of Fire Insurance with Combined Additional Coverage and Collision, Theft and/or Vandalism and Mysterious Mischief Coverage when appropriate, plus such other insurance as Seller may specify from time to time, all in form and amount and with insurers satisfactory to Seller. Buyer agrees to deliver promptly to Seller certificates or if requested, policies of insurance satisfactory to Seller, each with a standard long form loss payable endorsement naming Seller or its assigns as loss payee as their interests may appear. Each policy shall provide that Seller's interest therein will not be invalidated by the acts, omissions or neglect of anyone other than Seller, and will contain insurer's agreement to give 30 days prior written notice to Seller before cancellation of or any material change in the policy will be effective as to Seller, whether such cancellation or change is at the direction of Buyer or insurer. Seller's acceptance of policies in lesser amounts or risks will not be a waiver of Buyer's foregoing obligation. Buyer assigns to Seller all proceeds of any physical damage insurance maintained by Buyer with respect to the Collateral and any and all returned premiums, up to the amount owing hereunder by Buyer. Buyer directs all insurers to pay such proceeds directly to Seller. Buyer authorizes Seller to endorse Buyer's name to all remittances without the joinder of Buyer.
- ## 2.0 SECURITY INTEREST
- 2.1 Security Interest.** Seller retains title to and Buyer hereby grants Seller a first and perfected security interest in the Collateral to secure payment of the Time Balance indicated on first page of this Agreement and all other obligations of Buyer to Seller under this Agreement. Buyer further grants to Seller, Seller's successors and assigns and any Affiliate of any of them a security interest in the Collateral (separate and distinct from and subordinate only to the security interest granted to Seller above) to secure the payment and performance of all now existing or hereafter arising debts, liabilities and obligations of Buyer of every kind and character whether now existing or hereafter arising, and whether direct, indirect, absolute, contingent, primary, secondary, or otherwise, to Seller or Seller's successors or assigns and any Affiliate of any of them, whether under this Agreement or any other agreement, and whether due directly or acquired by assignment ("Liabilities"). For the purposes of this Agreement, an "Affiliate" of any party means and includes any direct or indirect parent, subsidiary or sister entity of that party. Any sums at any time owing to Buyer and in the possession of Seller or any such Affiliate shall secure the Liabilities of Buyer to Seller and any Affiliate of Seller. Upon any assignment of this Agreement by Seller, the security interests granted herein will be assigned to and inure to the benefit of such assignee and the Affiliates of such assignee. The security interests granted herein shall continue to be effective regardless of any retaking or redelivery of the Collateral to Buyer.
- 2.2 Perfection and Preservation of Security Interest.** Buyer agrees, at its own cost and expense: to do everything necessary or expedient to perfect and preserve the security interests of Seller obtained hereunder; to extinguish or defend any action, proceeding or claim affecting the Collateral including but not limited to any mechanic's lien, forfeiture action or proceeding; and to pay promptly any taxes, assessments, license fees and other public or private charges when levied or assessed against the Collateral, this agreement or an accompanying note. Buyer authorizes Seller or any officer, employee or designee of Seller or any assignee of Seller (or any designee of such assignee) to file a financing statement describing the Collateral for itself and as representative of its Affiliates. Buyer agrees to execute and deliver to Seller, upon Seller's request, such documents, writings, records and assurances as Seller deems necessary or advisable for the confirmation or perfection of the security interest in the Collateral and Seller's rights hereunder, including such documents, writings, records and assurances as Seller may require for filing or recording.
- 2.3 Location of Buyer.** (i) If Buyer is a corporation, limited liability company, limited partnership or other registered organization, its state of organization is in the state set forth immediately below its signature on the last page of this Agreement and Buyer agrees that it will not change its form or state of organization without 30 days prior written notice to Seller. (ii) If Buyer is an individual, his/her principal place of residence is at the address set forth immediately below his/her signature on the last page of this Agreement and, if Buyer changes Buyer's principal residence, Buyer will notify Seller in writing of a change in his/her principal place of residence within 30 days of such change. Buyer agrees to reimburse Seller for all costs incurred by Seller related to any such change.

ORIGINAL FOR CITICAPITAL

Buyer's Initials

BJO

### 3.0 ACCOUNT MANAGEMENT AND PAYMENT PROCESSING

- 3.1 **Application of Payments.** All payments made by Buyer to Seller pursuant to this Agreement may be applied first to any indebtedness which is not secured, then to delinquency charges, then to finance charges, then to insurance payments, then to any other fees or other amounts payable hereunder other than the Liabilities secured by a purchase money security interest in the Collateral, until all of such Liabilities are paid in full, and then to the Liabilities secured by a purchase money security interest in the Collateral in the order in which the Liabilities were incurred. This provision controls over any conflicting provision or language in this Agreement or in any other agreement between Seller and Buyer unless the parties mutually agree in writing in a subsequent agreement to override this provision.
- 3.2 **Debit Transactions.** Seller or any assignee or other holder of this Agreement (collectively "Holder") may but shall not be required to offer Buyer the option of paying any of Buyer's obligations to Holder through printed or electronic checks, drafts or charges ("Debit Transactions"). Each such Debit Transaction may be orally authorized by Buyer, any representative or officer of Buyer or any other party having access to or control of the account upon which the Debit Transaction is to be charged. Buyer authorizes Holder or any officer, employee or assignee of Holder to initiate Debit Transactions from Buyer's account in the verbally authorized amount plus the Holder's then Debit Transaction Fee. This authorization may be canceled at any time by Buyer giving at least three-business day's prior written notice to Buyer's bank and Holder. Buyer authorizes Holder to substitute a Debit Transaction for any check or other remittance submitted by Buyer in the amount of that remittance. Payment by Debit Transactions is not required by Seller nor is its use a factor in the approval of credit.
- 3.3 **Payment Processing.** Buyer hereby agrees that any payment made by Buyer hereunder by remittance and received by Seller at an address other than the address specified on the related invoice may be replaced by the Holder with a substitute written or electronic instrument of equal amount and presented to Buyer's financial institution for payment from the account referenced on the remittance from Buyer.
- 3.4 **Returned Payments.** In the event that a check, draft or other remittance sent by Buyer or a Debit Transaction authorized by Buyer is returned unpaid or rejected for any reason other than the lack of a proper endorsement by Seller, Seller agrees that the application of such payment to Buyer's Liabilities will be reversed and Buyer agrees to immediately pay Seller the amount of such returned payment, plus any delinquency charge accruing as the result of the reversal of any such payment. Buyer further agrees to pay Seller any amount charged to Seller by any depository institution because of such return and an additional handling charge in the amount, if any, equal to \$20, or in the event applicable law limits or restricts the amount of such reimbursement and/or handling charge, the amounts chargeable under this provision will be limited and/or restricted in accordance with applicable law.
- 3.5 **Authorization to Share Information.** Seller or any assignee of this Agreement may receive from or disclose to any assignee of Seller or any Affiliate of either of them, the seller or manufacturer of any Equipment, any Guarantor or other party having a disclosed or undisclosed obligation related to the Liabilities or Collateral, or any potential purchaser, participant or investor in Buyer's Liabilities or any assignee or affiliate of any of them (herein collectively, the "Entity"), and any credit reporting agency for any purpose, information about Buyer's accounts, credit application and credit experience with Seller or any Entity. Buyer authorizes any Entity to release to Seller or any assignee, or any Affiliate of either of them any information related to Buyer's accounts, credit experience and account information regarding Buyer. This shall be continuing authorization for all present and future disclosures of Buyer's account information, credit application and credit experience on Buyer made by Seller, or any Entity requested.

### 4.0 PERFORMANCE BY SELLER

- 4.1 **Performance.** If Buyer fails to perform any of its obligations hereunder, including, without limitation, Buyer's obligation to insure the Collateral or to protect and preserve the security interest of Buyer, Seller may perform the same, but shall not be obligated to do so, for the account of Buyer to protect the interest of Seller or Buyer or both, at Seller's option. Buyer shall immediately repay to Seller any amounts paid by Seller together with interest thereon at the rate payable upon acceleration of Buyer's obligations under this Agreement. Performance by Seller will not constitute a waiver of any default by Buyer.
- 4.2 **Power of Attorney.** BUYER HEREBY APPOINTS SELLER OR ANY OFFICER, EMPLOYEE OR DESIGNEE OF SELLER, OR ANY ASSIGNEE OF SELLER (OR ANY DESIGNEE OF SUCH ASSIGNEE) AS BUYER'S ATTORNEY IN FACT TO, 1. BUYER'S OR SELLER'S NAME: (a) PREPARE, EXECUTE AND SUBMIT ANY NOTICE OR PROOF OF LOSS IN ORDER TO REALIZE THE BENEFITS OF ANY INSURANCE POLICY INSURING THE COLLATERAL; (b) PREPARE, EXECUTE AND FILE ANY AGREEMENT, DOCUMENT, FINANCING STATEMENT, TITLE APPLICATION, INSTRUMENT (OR ANY OTHER WRITING OR RECORD) THAT, IN SELLER'S OPINION, IS NECESSARY TO PERFECT AND/OR GIVE PUBLIC NOTICE OF THE INTERESTS OF SELLER IN ANY COLLATERAL THAT SECURES OR THAT MAY SECURE ANY OBLIGATIONS OR INDEBTEDNESS OF BUYER TO SELLER; AND (c) ENDORSE BUYER'S NAME ON ANY REMITTANCE REPRESENTING PROCEEDS OF ANY INSURANCE RELATING TO THE COLLATERAL OR THE PROCEEDS OF THE SALE, LEASE OR OTHER DISPOSITION OF THE COLLATERAL (WHETHER OR NOT THE SAME IS A DEFAULT HEREUNDER). This power is coupled with an interest and is irrevocable as long as any Liabilities remain unpaid.

### 5.0 DEFAULT AND REMEDIES

- 5.1 **Events of Default.** Time is of the essence. An event of default shall occur if: (a) Buyer fails to pay when due any amount owed by it to Seller, any assignee or any Affiliate, successor or assign of either of them under this Agreement or under the terms of any promissory note delivered in conjunction with this Agreement; (b) or if Buyer fails to pay any Liabilities when due to Seller or an assignee or any Affiliate, successor or assign of either of them or is otherwise in default under any other document, agreement or instrument; (c) Buyer defaults under the terms of any secured indebtedness or indebtedness of a material amount to any other party; (d) Buyer fails to perform or observe any other term or provision to be performed or observed by it hereunder or under any other instrument or agreement furnished by Buyer to Seller or an assignee or to any Affiliate, successor or assign of either of them or otherwise acquired by Seller or an assignee or any Affiliate, successor or assign of either of them; (e) Buyer becomes insolvent or ceases to do business as a going concern; (f) any of the Collateral is lost or destroyed; (g) Buyer makes an assignment for the benefit of creditors or takes advantage of any law for the relief of debtors; (h) a petition in bankruptcy or for an arrangement reorganization, or similar relief is filed by or against Buyer; (i) any property of Buyer is attached, or a trustee or receiver is appointed for Buyer or for substantial part of its property, or Buyer applies for such appointment; (j) Seller in good faith believes that the prospect of payment or performance hereunder is impaired; (k) Buyer fails to pay any final judgment, court order, or, for sovereign borrowers, any declaration of moratorium; (l) if there shall occur an appropriation, confiscation, requisition, or seizure of control, custody or possession of any Collateral by any governmental authority including without limitation, any municipal, state, federal or local governmental entity or any governmental agency or instrumentality (all such entities, agencies and instrumentalities shall hereinafter be collectively referred to as "Governmental Authority");

(m) if anyone in the control, custody or possession of any Collateral or the Buyer is accused or alleged or charged (whether or not subsequently arraigned, indicted or convicted) by any Governmental Authority to have used any Collateral in connection with the commission of any crime (other than a misdemeanor moving violation); (n) there shall be a material adverse change in any of the (i) condition (financial or otherwise), business performance, prospects, operations or properties of the Buyer; (ii) legality, validity or enforceability of this Agreement; (iii) perfection or priority of the lien granted in favor of Seller pursuant to this Agreement; (iv) the ability of the Buyer to repay the indebtedness or perform its obligations under this Agreement or; (v) rights and remedies of the Seller under this Agreement are impaired; (o) there shall be a death of Buyer or a majority owner of Buyer or a guarantor of the Buyer's Liabilities; p) except for the security interest, lien or reservation of title in favor of Seller or as otherwise granted herein, there shall be any lien, claim or encumbrance on any of the Collateral securing the indebtedness or obligation of Buyer to Seller; or (q) Buyer defaults under any guaranty, collateral agreement, or other support agreement.

**5.2 Remedies.** Upon the occurrence of an event of default, and at any time thereafter as long as the default continues, Seller may, at its option, with or without notice to Buyer (i) declare this agreement to be in default, (ii) declare the indebtedness hereunder to be immediately due and payable, (iii) declare all other debts then owing by Buyer to Seller, or any successor or assignee of Seller or any Affiliate of any of them to be immediately due and payable, (iv) cancel any insurance and credit any refund to the indebtedness, and (v) exercise all of the rights and remedies of a secured party under the Uniform Commercial Code and any other applicable laws, including the right to require Buyer to assemble the Collateral and deliver it to Seller at a place to be designated by Seller which is reasonably convenient to both parties and to lawfully enter any premises where the Collateral may be without judicial process and take possession thereof. Acceleration of any Liabilities or indebtedness, if so elected by Seller, shall be subject to all applicable laws including those pertaining to refunds and rebates of unearned charge. Any property other than Collateral that is in or upon the Collateral at the time of repossession may be taken and held without liability until its return requested by Buyer. Unless otherwise provided by law, any requirement of reasonable notice which Seller may be obligated to give regarding the sale or other disposition of Collateral will be met if such notice is mailed to Buyer at its address shown herein or to the most current address designated by Buyer to Seller in writing at least ten days before a time of sale or other disposition. Seller may dispose of any Collateral at a public or private sale or at auction. Seller may buy at any sale and become the owner of the Collateral. Buyer agrees that Seller may bring any legal proceedings it deems necessary to enforce the payment and performance of Buyer's obligations hereunder in any court in the State shown in Sellers address set forth herein, and service of process may be made upon Buyer by mailing a copy of the summons to Buyer at its address shown herein. The inclusion of a trade name or division name in the identification of Buyer hereunder shall not limit Seller's right, after the occurrence of an event of default, to proceed against all of Buyer's assets, including those held or used by Buyer individually or under another trade or division name. Expenses of retaking, holding, preparing for sale, selling and the like shall include (a) the reasonable fees of any attorney retained by Seller, and (b) all other legal expenses incurred by Seller. Buyer agrees that Buyer is liable for all amounts due hereunder, including any deficiency remaining after any disposition of Collateral after default. Seller may sell the Collateral without giving any warranties as to the Collateral. Seller may disclaim any warranties of title, possession, quiet enjoyment, or the like. This procedure will not be considered to adversely affect the commercial reasonableness of any sale of the Collateral.

**5.3 Acceleration Interest.** Buyer agrees to pay Seller, upon acceleration of the above indebtedness, interest on all sums then owing hereunder at the rate of 1 1/2% per month if not prohibited by law, otherwise at the highest rate Buyer can legally obligate itself to pay or Seller can legally collect. Any note taken herewith evidences indebtedness and not payment.

## 6.0 PREPAYMENT

**6.1 Partial Prepayment and Automatic Reschedule.** Buyer does not have the right to prepay only a portion of the balance of this Agreement prior to maturity without the consent of Seller. (a) In the event that there are several units subject to this Agreement and all of that portion of the obligation that relates to a specific unit is paid in full either as a result of a casualty loss related to the unit which is reported in writing to Seller or the sale of the unit with the prior consent of Seller, Seller will apply the proceeds received by Seller and identified as relating to any such transaction to the balance due under this Agreement and reschedule the remaining monthly payments under this Agreement over the then remaining term. (b) In the event that Buyer is obligated to Seller or to an assignee of Seller under the terms of any other agreement, and Seller or such assignee receives one or more remittance(s) (other than as indicated in 6.1(a) above) with respect to this Agreement at a time when any amount is past due under another agreement, Seller or Seller's assignee will have the right to apply any portion of such excess to the payments then due or past due under the other agreement. (c) In the event that Seller receives one or more remittance(s) (other than as indicated in 6.1(a) or 6.1(b) above) with respect to this Agreement in an aggregate amount in excess of the then amounts due and unpaid under this Agreement, and the aggregate excess amount is equal to or less than four regularly scheduled payments under this Agreement, Seller will apply the amount of such excess to the immediately succeeding monthly payments under this Agreement. In the event that Seller receives one or more remittance(s) with respect to this Agreement in an aggregate amount in excess of the then amounts due and unpaid under this Agreement, and the excess amount is in an aggregate amount greater than four regularly scheduled payments under this Agreement, or Seller will, at Seller's option either (i) apply the amount of such excess to the final maturing installment payments under this Agreement, or (ii) apply the amount of such excess to the balance due under this Agreement and reschedule the monthly payments under this Agreement over the then remaining term. The interest or finance charge included in this Agreement is precomputed and early payment of one or more installments prior to their maturity date may not reduce the total interest or finance charge payable by Buyer under this Agreement unless the monthly payments are rescheduled. (d) In the event that Seller elects to reschedule the monthly payments under this Agreement, the portion of the balance remaining unpaid under this Agreement at the time of reschedule will be calculated in the same manner as upon prepayment (but without penalty). The Finance Charge or Annual Percentage Rate applicable to the rescheduled payments will be the lesser of the rate included in this Agreement and the maximum rate allowed by applicable law. Buyer's rescheduled payments will appear on Buyer's account statement.

**6.2 Prepayment in Full.** Buyer has the right to prepay the indebtedness under this Agreement in full (but not in part) at any time. Upon prepayment Buyer will receive a rebate of the unearned portion of the finance charge calculated using an actuarial method or such other method as is required by any applicable law minus, if the prepayment is made prior to the last twelve months of the contract, a prepayment processing fee equal to the lesser of (a) 1% of the originally scheduled balance on the date of prepayment for each full twelve month period remaining under the term of this Agreement as of prepayment and (b) the maximum prepayment and/or acquisition charge allowed by applicable law, provided, however that no such prepayment and/or acquisition charge shall be due if this Agreement is subject to the laws of Arizona, Connecticut (and the cash sale price is \$50,000 or less with respect to trailer or motor vehicle collateral or \$16,000 or less with respect to non-vehicular collateral), Idaho, Montana, Nebraska, New York, Rhode Island, or West Virginia. All accrued and unpaid late charges and other amounts chargeable to Buyer under this Agreement will be payable immediately upon such prepayment.

## 7.0 ASSIGNMENT AND GENERAL PROVISIONS

- 7.1 Chattel Paper.** This Agreement is entered into by Seller and Buyer on the express understanding that this Agreement will be purchased by Ingersoll-Rand Financial Services, a division of CitiCapital Commercial Corporation or one of its Affiliates ("CitiCapital"). This agreement is to be assigned only to CitiCapital and is subject to the security interest of CitiCapital. The only copy of this Agreement that constitutes "Chattel Paper" for all purposes of the Uniform Commercial Code is the copy marked "ORIGINAL FOR CITICAPITAL" which is delivered to and held by CitiCapital. Any assignment or transfer of this Agreement to any assignee other than CitiCapital without the express written consent of CitiCapital violates the rights of CitiCapital. Any attempted assignment to any other party without the express written consent of CitiCapital shall be VOID and of no force and effect. No assignee or secured party other than CitiCapital or a party receiving an assignment with the express written consent of CitiCapital will under any circumstances acquire any rights in, under or to this Agreement or any sums due hereunder.
- 7.2 Assignment.** Seller intends to assign this agreement to CitiCapital. As an inducement to CitiCapital to accept an assignment of this Agreement from Seller, Buyer hereby (a) consents to such assignment and agrees not to assert against CitiCapital claims, counterclaim, claims in recoupment, abatement, reduction, defenses, or set-offs for breach of warranty or for any other reason which Buyer could assert against Seller or the manufacturer of the Equipment, except defenses which cannot be waived under the Uniform Commercial Code; (b) agrees to make and/or settle any and all claims with regard to the Collateral directly and exclusively against and with Seller or the manufacturer and Buyer agrees not to assert any of such claims against CitiCapital; and (c) agrees that, upon assignment, the security interests granted herein will inure to the benefit of CitiCapital and its Affiliates. Any sums at any time owing to Buyer and in the possession of CitiCapital or any such Affiliate shall secure the Liabilities of Buyer to CitiCapital and any Affiliate of CitiCapital.
- 7.3 General.** (a) Waiver of any default shall not be a waiver of any other default. (b) All of Seller's rights here cumulative and not alternative. (c) No waiver or change in this Agreement or in any related note shall bind Seller unless in writing signed by one of its officers. (d) The term "Seller" shall include an assignee of Seller who is the holder of this agreement. (e) Any provision hereof contrary to, prohibited by or invalid under applicable laws or regulations shall be inapplicable and deemed omitted herefrom, but shall not invalidate the remaining provisions hereof. (f) Buyer waives all exemptions to the extent permitted by law. (g) Seller may correct patent errors herein. (h) Any variations to the provisions of this Agreement are for convenience only and do not limit or affect the application or interpretation of this Agreement. (i) All of the terms and provisions of this agreement shall apply to and be binding upon Buyer, its heirs, personal representatives, successors and assigns and shall inure to the benefit of Seller, its successor and assigns. (j) The acceptance by Seller of any remittance from a party other than Buyer shall in no way constitute Seller's consent to the transfer of any of the Equipment to such party. (k) If allowed by law, the "reasonable fees of attorney" retained by Seller shall include the amount of any flat fee, retainer, contingent fee or the hourly charges of any attorney retained by Seller in enforcing any of Seller's rights hereunder or in the prosecution or defense of any litigation related to this Agreement or the transactions contemplated by this Agreement. (l) Buyer represents and warrants that there is no material pending or threatened investigation by any governmental authority, litigation or other legal proceeding. (m) So long as any of the Liabilities remains unpaid or unperformed, Buyer will provide Seller with such financial information as Seller may reasonably request, including copies of Buyer's financial statements prepared in accordance with generally accepted accounting principles consistently applied within 30 days of the end of each of Buyer's fiscal quarters and within 90 days after the end of each of Buyer's fiscal years. Such financial statements shall be prepared on the same basis (reviewed, audited, etc.) as Buyer's financial statements are currently prepared unless advised by the Seller otherwise, at which time the Buyer will comply with the Seller's request. (n) Buyer waives any right it may have to direct the application of any payments made by it to Seller, and Seller may at its option offset and deduct any liability or obligation of Buyer from any or all sums owed by it to Buyer.
- 7.4 Additional Covenants and Oral Agreement.** Buyer and Seller agree that this is a five-page agreement and each page hereof constitutes a part of this Agreement. THIS WRITTEN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.
- 7.5 Waiver of Trial By Jury.** Seller and Buyer hereby waive any right to trial by jury in any action relating to this Agreement. Seller and Buyer hereby, for themselves, their successors and assigns, WAIVE ANY RIGHT TO SUE FOR OR COLLECT FROM THE OTHER PARTY ANY DIRECT, INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES OF ANY CHARACTER AS A RESULT OF OR RELATING TO THIS AGREEMENT, THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT OR THE ENFORCEMENT BY EITHER PARTY OF ITS RIGHTS UNDER THIS AGREEMENT EXCEPT TO THE EXTENT THAT ANY SUCH DAMAGES ARE PROVEN TO BE THE DIRECT RESULT OF THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE OTHER PARTY.

## IMPORTANT INFORMATION ABOUT ESTABLISHING A RELATIONSHIP WITH CITICAPITAL

To help the United States Government fight terrorism and money laundering, Federal law requires us to obtain, verify, and record information that identifies each person or business that opens an account or establishes a relationship. What this means for you: when you open an account or establish a relationship, we will ask for your name, street address, date of birth, and identification number, such as a social security number or taxpayer identification number. For businesses, we will ask for the business name, street address and tax identification number. Federal law requires us to obtain this information. We may also ask to see your driver's license or other identifying documents that will allow us to identify you. We appreciate your cooperation.

Page 5 of 8 of Security Agreement dated 09/25/2006 between BRIAN J. OWENS EXCAVATING, INC. (Buyer) and ELK POWER, INC. (Seller)

3-021828 Rev. 1.12 02/2006  
Comm'l Non-Veh-Variou States (R.D.)

ORIGINAL FOR CITICAPITAL

Buyer's Initials

BJO

DELIVERY AND ACCEPTANCE OF COLLATERAL  
(Check Appropriate Box)

- ☒ On 10/2/06, the Collateral was delivered to Buyer with all installation and other work necessary for the proper use of the Collateral completed at the location agreed upon by Buyer and Seller; the Collateral was inspected by Buyer and found to be in satisfactory condition in all respects and delivery was unconditionally accepted by Buyer.
- ☐ The Collateral has not yet been delivered to or accepted by Buyer and, upon delivery, Buyer agrees to execute a delivery and acceptance certificate in a form acceptable to Seller or Seller's assignee.

THIS WRITTEN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES. Buyer and Seller agree that this is a six page agreement and each page hereof constitutes a part of this agreement. NOTICE TO BUYER - DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES. YOU ARE ENTITLED TO A COPY OF THE AGREEMENT YOU SIGN.

Date: 09/25/2006

Buyer hereby acknowledges receipt of an exact copy of this contract.

Seller  
ELK POWER, INC.

By: [Signature]  
Print Name: Daniel C. Elschroth  
Title: Sec. Pres.  
1355 ROSELEY AVENUE  
(Street address)  
ST MARY'S PA 15857  
(City, State and Zip Code)

Buyer

BRIAN J. OWENS EXCAVATING LLC

By: [Signature]  
Print Name: Brian J. Owens  
Title: sole proprietor  
State of Organization: PA Date of Birth: N/A  
(Sole Proprietor only)  
Federal Taxpayer ID or SSN: \_\_\_\_\_  
Principal Residence/Chief Executive Office/Place of Business  
551 INDUSTRIAL PARK RD  
(Street address)  
CLEARFIELD PA 16830  
(City, State and Zip Code)

Co-Buyer

By: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
State of Organization: \_\_\_\_\_ Date of Birth: \_\_\_\_\_  
(Sole Proprietor only)  
Federal Taxpayer ID or SSN: \_\_\_\_\_  
Principal Residence/Chief Executive Office/Place of Business  
\_\_\_\_\_  
(Street address)  
\_\_\_\_\_  
(City, State and Zip Code)

Page 6 of 6 of Security Agreement dated 09/25/2006 between BRIAN J. OWENS EXCAVATING LLC (Buyer)  
and ELK POWER, INC. (Seller)



## CONTINUING GUARANTY

For Valuable Consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned, for themselves, their heirs, executors, personal representatives, successors and assigns (individually called "Guarantor" and collectively called "Guarantors") jointly and severally and in solidum, hereby unconditionally guarantee to **ELK POWER, INC.** its successors, endorseees

(Secured Party or Lessor)

and assigns, (collectively called "IRFS") that **BRIAN J. OWENS EXCAVATING LLC** (Party to be Guaranteed)

(the "Company"), whose address is

**551 INDUSTRIAL PARK RD**

**CLEARFIELD**

**PA 16830**

(Street Address, City, State & Zip)

shall promptly and fully perform, pay and discharge all of its present and future liabilities, obligations and indebtedness to IRFS, whether direct or indirect, joint or several, absolute or contingent, secured or unsecured, matured or unmatured, and whether originally contracted with or otherwise acquired by IRFS (all of which liabilities, obligations and indebtedness are herein individually and collectively called the "Indebtedness"). This Guaranty is an absolute and unconditional guarantee of payment and not of collectibility. The liability of each Guarantor hereunder is not conditional or contingent upon the genuineness, validity, sufficiency or enforceability of the Indebtedness or any instruments, agreements or chattel paper related thereto (collectively called "Agreements") or any security or collateral therefor (collectively called "Security") or the pursuit by IRFS of any rights or remedies which it now has or may hereafter have. If the Company fails to pay the indebtedness promptly as the same becomes due, or otherwise fails to perform any obligation under any of the Agreements, each Guarantor agrees to pay on demand the entire Indebtedness and all losses, costs, attorneys' fees and expenses which may be suffered by IRFS by reason of the Company's default or the default of any Guarantor hereunder, and agrees to be bound by a judgment to pay on demand any deficiency established by the sale of any of the Agreements or Security, all without relief from valuation and appraisal laws and without requiring IRFS to (i) proceed against the Company by suit or otherwise, (ii) foreclose, proceed against, liquidate or exhaust any of the Agreements or Security, or (iii) exercise, pursue or enforce any right or remedy IRFS may have against the Company, any co-Guarantor (whether hereunder or under a separate instrument) or any other party. Each Guarantor agrees that this Guaranty shall not be discharged or affected by any circumstances which constitute a legal or equitable discharge of a Guarantor or surety, or by the death of any Guarantor; the records of IRFS shall be received as conclusive evidence of the amount of the Indebtedness at any time owing; one or more successive or concurrent suits may be brought and maintained against any or all of the Guarantors, at the option of IRFS, with or without joinder of the Company or any of the other Guarantors as parties thereto; such Guarantor will not avail itself of any defense whatsoever which the Company may have against IRFS, other than full payment of the Indebtedness; and such Guarantor will not seek change of venue from any jurisdiction or court in which any action, proceeding or litigation is commenced.

EACH GUARANTOR HEREBY WAIVES NOTICE OF ANY ADVERSE CHANGE IN THE COMPANY'S CONDITION OR OF ANY OTHER FACT WHICH MIGHT MATERIALLY INCREASE SUCH GUARANTOR'S RISK, WHETHER OR NOT IRFS HAS KNOWLEDGE OF THE SAME. EACH GUARANTOR ALSO HEREBY WAIVES ANY CLAIM, RIGHT OR REMEDY WHICH SUCH GUARANTOR MAY NOW HAVE OR HEREFTER ACQUIRE AGAINST THE COMPANY THAT ARISES HEREUNDER AND/OR FROM THE PERFORMANCE BY ANY GUARANTOR HEREUNDER INCLUDING, WITHOUT LIMITATION, ANY CLAIM, REMEDY OR RIGHT OF SUBROGATION, REIMBURSEMENT, EXONERATION, CONTRIBUTION, INDEMNIFICATION, OR PARTICIPATION IN ANY CLAIM, RIGHT OR REMEDY OF IRFS AGAINST THE COMPANY OR ANY SECURITY WHICH IRFS NOW HAS OR HEREFTER ACQUIRES; WHETHER OR NOT SUCH CLAIM, RIGHT OR REMEDY ARISES IN EQUITY, UNDER CONTRACT, BY STATUTE, UNDER COMMON LAW OR OTHERWISE.

No termination hereof shall be effective until the Guarantors deliver to IRFS a written notice signed by them electing not to guarantee any new extension of credit that may be granted by IRFS to the Company after its receipt of such notice, but such notice shall not affect the obligations of the guarantors hereunder as to any and all indebtedness existing at the time such notice is received. Each Guarantor hereby waives (i) notice of acceptance hereof and notice of extensions of credit given by IRFS to the Company from time to time; (ii) presentment, demand, protest, and notice of non-payment or protest as to any note or other evidence of indebtedness signed, accepted, endorsed or assigned to IRFS by the Company; (iii) all exemptions and homestead laws; (iv) any other demands and notices required by law; and (v) any right to trial by jury. IRFS may at any time and from time to time, without notice to or the consent of any Guarantor, and without affecting or impairing the obligation of any Guarantor hereunder; (a) renew, extend or refinance any part or all of the Indebtedness of the Company or any indebtedness of its customers, or of any co-Guarantor (whether hereunder or under a separate instrument) or any other party; (b) accept partial payments of the Indebtedness and apply such payments to any part of the Indebtedness; (c) settle, release (by operation of law or otherwise), compound, compromise, collect or liquidate, in any manner, any of the Indebtedness, any Security, or any indebtedness of any co-Guarantor (whether hereunder or under a separate instrument) or any other party; (d) consent to the transfer of any Security, or any indebtedness of any co-Guarantor (whether hereunder or under a separate instrument) or any other party; (e) bid and purchase at any sale of any of the Agreements or Security; and (f) exercise any and all rights and remedies available to IRFS by law or agreement even if the exercise thereof may affect, modify or eliminate any rights or remedies which a Guarantor may have against the Company. Each Guarantor shall continue to be liable under this Guaranty, the provisions hereof shall remain in full force and effect, and IRFS shall not be estopped from exercising any rights hereunder, notwithstanding (i) IRFS failure to take new, additional or substitute security or collateral for the indebtedness; (ii) any release of, or failure on the part of, or (iii) IRFS failure to take new, additional or substitute security or collateral for the indebtedness.

Each Guarantor agrees that IRFS may bring any legal proceedings it deems necessary to enforce any or all of such Guarantor's obligations hereunder in any court in the State in which IRFS's office administering the Indebtedness is located; and service of process may be made upon such Guarantor by mailing a copy of the summons to such Guarantor at its address last known to IRFS. All rights and remedies of IRFS are cumulative and not alternative. Each provision of this Guaranty is intended to be severable. Any term or provision hereof declared to be contrary to, prohibited by or invalid under applicable laws or regulations shall be inapplicable and deemed omitted herefrom, but shall not invalidate the remaining terms and provisions hereof.

IN WITNESS WHEREOF the Guarantors have executed this Guaranty on **09/25/2006**

Witness 

Guarantor **BRIAN J. OWENS** (L.S.)

(Name of individual, corporation or partnership)

Witness

By  Title **Individual**

(If corporate guarantor, an authorized officer must sign and show corporate title. If partnership guarantor, a general partner must sign and show "Partner" after name. If individual guarantor, show "Individual" after name.)

Guarantor's Federal Taxpayer Identification or Social Security Number is

**160669281**

**551 INDUSTRIAL PARK RD**

Address **CLEARFIELD PA 16830**

(Street Address, City, State & Zip)

Note: Insert exact company names where appropriate. Individual guarantors must sign guaranty without titles. Sign simply "John Smith, Individually," not "John Smith, President." DO NOT USE THIS FORM if the guarantor resides or has a principal place of business in Kentucky.

3- 820881

Rev. 1.03 03/2006  
Page 1 of 1

Ingersoll-Rand Financial Services is a division of CiticCapital Commercial Corporation and CiticCapital Commercial Leasing Corporation.

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SALDUTTI, LLC  
BY: Robert L. Saldutti, Esquire  
Identification No. PA63867  
800 N. Kings Highway, Suite 300  
Cherry Hill, NJ 08034  
(856) 779-0300  
Attorney for Plaintiff

**FILED** 200  
m/11:18/07 Amy  
OCT 31 2007 Saldutti  
William A. Shaw  
Prothonotary/Clerk of Courts (62)

CITICAPITAL COMMERCIAL CORPORATION Plaintiff v. BRIAN J OWENS EXCAVATING LLC AND BRIAN OWENS Defendant(s).	CLEARFIELD COUNTY COURT OF COMMON PLEAS  Case No. 07-1443-CD
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**PETITION FOR ORDER DIRECTING SHERIFF  
TO RETURN AFFIDAVIT'S OF SERVICE**

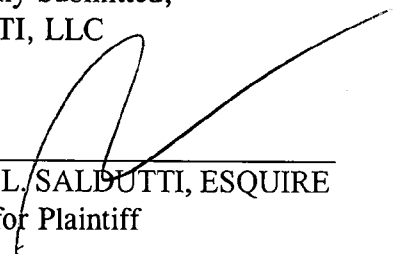
Plaintiff, Citicapital Commercial Corporation, by and through its counsel, Robert L. Saldutti, Esquire, hereby prays this Honorable Court to grant its Petition for an Order Directing Sheriff to Return Affidavit's of Service pursuant to Pa.R.C.P. §405(a). In support hereof, Plaintiff avers the following:

1. On September 5, 2007, Plaintiff filed the Civil Action Complaint.
2. On September 28, 2007, we were notified by the Office of the Clearfield County Sheriff that we would not be receiving Affidavit's of service as they were backed-up from May 2007 in returning same; however defendant's were served on September 10, 2007.
3. The Sheriff's representative further advises that the only way to obtain the Affidavit's of service would be to wait or to petition the Court for an Order directing Sheriff to return same. The plaintiff has lost a considerable amount of funds.



WHEREFORE, Plaintiff prays this Honorable Court to grant its Petition for an  
Order Directing Sheriff to Return Affidavit's of Service.

Respectfully Submitted,  
SALDUTTI, LLC



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ROBERT L. SALDUTTI, ESQUIRE  
Attorney for Plaintiff

Date: October 29, 2007

SALDUTTI, LLC  
BY: Robert L. Saldutti, Esquire  
Identification No. PA63867  
800 N. Kings Highway, Suite 300  
Cherry Hill, NJ 08034  
(856) 779-0300  
Attorney for Plaintiff

CITICAPITAL COMMERCIAL CORPORATION Plaintiff v.  BRIAN J OWENS EXCAVATING LLC AND BRIAN OWENS Defendant(s).	CLEARFIELD COUNTY COURT OF COMMON PLEAS  Case No. 07-1443-CD
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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S PETITION FOR  
ORDER DIRECTING SHERIFF TO RETURN AFFIDAVIT'S OF SERICE**

The Pennsylvania Rules of Civil Procedure mandate service of original process generally by the Sheriff, or in some cases a qualified process server. See, *Pa.R.C.P.* §400 as well as *Philadelphia Local Rule 400.1*.

When service has been completed in accordance with the requirements of *Rule 400*, the rules provide that "...the sheriff or other person making service shall make a return of service forthwith."

Therefore, Plaintiff prays this Honorable Court to enter an Order Directing Sheriff of Clearfield County to return affidavit's of service to Robert L. Saldutti, Esquire.

Respectfully Submitted,  
SALDUTTI, LLC

ROBERT L. SALDUTTI, ESQUIRE  
Attorney for Plaintiff

Date: October 29, 2007

**FILED**

**OCT 31 2007**

William A. Shaw  
Prothonotary/Clerk of Courts

IN RE: [illegible]  
[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

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[illegible]

[illegible]

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DOCKET # 103167  
NO: 07-1443-CD  
SERVICE # 1 OF 2  
COMPLAINT

PLAINTIFF: CITICAPITAL COMMERCIAL CORPORATION

vs.

DEFENDANT: BRIAN J. OWENS EXCAVATING LLC and BRIAN OWENS

**SHERIFF RETURN**

---

NOW, September 10, 2007 AT 8:51 AM SERVED THE WITHIN COMPLAINT ON BRIAN J. OWENS EXCAVATING LLC DEFENDANT AT 551 INDUSTRIAL PARK ROAD, CLEARFIELD, CLEARFIELD COUNTY, PENNSYLVANIA, BY HANDING TO BRANDY WITHERITE, ADULT AT RESIDENCE A TRUE AND ATTESTED COPY OF THE ORIGINAL COMPLAINT AND MADE KNOWN THE CONTENTS THEREOF.

SERVED BY: DEHAVEN /

FILED No. 00.  
0/3:00 am  
NOV - 1 2007  
William A. Shaw  
Prothonotary/Clerk of Courts

**IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA**

DOCKET # 103167  
NO: 07-1443-CD  
SERVICE # 2 OF 2  
COMPLAINT

PLAINTIFF: CITICAPITAL COMMERCIAL CORPORATION  
vs.  
DEFENDANT: BRIAN J. OWENS EXCAVATING LLC and BRIAN OWENS

**SHERIFF RETURN**

---

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SHERIFF RETURN

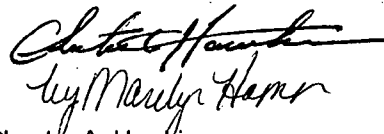
RETURN COSTS

Description	Paid By	CHECK #	AMOUNT
SURCHARGE	LARIO	3478	20.00
SHERIFF HAWKINS	LARIO	3478	26.00

Sworn to Before Me This

\_\_\_\_\_ Day of \_\_\_\_\_ 2007

So Answers,



Chester A. Hawkins  
Sheriff

**FILED**

**NOV - 1 2007**

William A. Shaw  
Prothonotary/Clerk of Courts

SALDUTTI, LLC  
BY: Robert L. Saldutti, Esquire  
Identification No. PA63867  
800 N. Kings Highway, Suite 300  
Cherry Hill, NJ 08034  
(856) 779-0300  
Attorney for Plaintiff

200 Locust Street  
Unit 24E, North  
Philadelphia, PA 19106

**FILED**

NOV 16 2007

William A. Shaw  
Prothonotary/Clerk of Courts

SENT w/ NOTIC  
TO EACH DEPT  
+  
ATT

CITICAPITAL COMMERCIAL  
CORPORATION  
Plaintiff

v.

BRIAN J OWENS EXCAVATING LLC  
AND BRIAN OWENS  
Defendant(s)

CLEARFIELD COUNTY COURT OF  
COMMON PLEAS

CASE NO. 07-1443-CD

**PRAECIPE TO ENTER DEFAULT JUDGMENT**

To the Prothonotary:

Enter judgment in favor of plaintiff and against defendant(s) Brian J. Owens  
Excavating, LLC and Brian Owens for failure to answer or otherwise respond to the  
complaint filed in the above-captioned action.

On September 10, 2007, service was made by the Sheriff of Clearfield County upon  
the following defendants at their last known addresses: Brian J. Owens Excavating, LLC  
and Brian Owens. See Sheriff Returns attached hereto as Exhibit "A".

A Notice Praecipe to Enter Default Judgment was served on the defendants, Brian J.  
Owens Excavating, LLC and Brian Owens on October 24, 2007 by certified and first class  
mail. Copies of the Notices are attached hereto as Exhibit "B".

Pursuant to the Notice, defendants, Brian J. Owens Excavating, LLC and Brian  
Owens, had an additional ten (10) days in which to answer the Complaint. The ten day  
period expired on November 3, 2007.



SALDUTTI, LLC  
BY: Robert L. Saldutti, Esquire  
Identification No. PA63867  
800 N. Kings Highway, Suite 300  
Cherry Hill, NJ 08034  
(856) 779-0300  
Attorney for Plaintiff

200 Locust Street  
Unit 24E, North  
Philadelphia, PA 19106

CITICAPITAL COMMERCIAL  
CORPORATION  
Plaintiff

v.

BRIAN J OWENS EXCAVATING LLC  
AND BRIAN OWENS  
Defendant(s)

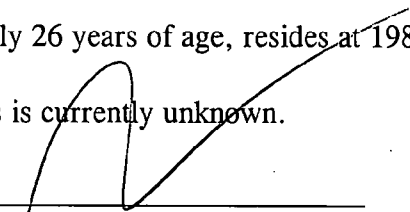
CLEARFIELD COUNTY COURT OF  
COMMON PLEAS

CASE NO. 07-1443-CD

**AFFIDAVIT OF NON-MILITARY SERVICE**

The undersigned, being duly sworn according to law, deposes and states that the Defendant, Brian J. Owens Excavating is a corporation and therefore cannot be in the military. Also, defendant, Brian Owens, is not in the Military or Naval Service of the United States or its Allies, or otherwise within the provisions of the Soldier' and Sailors' Relief Act of Congress of 1940 as amended. See attached Military Status Report.

That defendant, Brian Owens, is approximately 26 years of age, resides at 1984 Jerry Run Road, Clearfield, PA and his employment status is currently unknown.

  
ROBERT L. SALDUTTI, ESQUIRE  
Attorney for Plaintiff

Sworn to and subscribed  
Before me this 1 day  
Of November, 2007.

  
Notary Public

KATHLEEN M. SHEEHAN  
A Notary Public of New Jersey  
My Commission Expires 9/25/2009



Military Status Report  
Pursuant to the Servicemembers Civil Relief Act

◀ Last Name	First/Middle	Begin Date	Active Duty Status	Service/Agency
OWENS	Brian	Based on the information you have furnished, the DMDC does not possess any information indicating that the individual is currently on active duty.		

Upon searching the information data banks of the Department of Defense Manpower Data Center, based on the information that you provided, the above is the current status of the individual as to all branches of the Military.

*Mary M. Snavelly-Dixon*

Mary M. Snavelly-Dixon, Director  
Department of Defense - Manpower Data Center  
1600 Wilson Blvd., Suite 400  
Arlington, VA 22209-2593

The Defense Manpower Data Center (DMDC) is an organization of the Department of Defense that maintains the Defense Enrollment and Eligibility Reporting System (DEERS) database which is the official source of data on eligibility for military medical care and other eligibility systems.

The Department of Defense strongly supports the enforcement of the Servicemembers Civil Relief Act [50 USCS Appx. §§ 501 et seq] (SCRA) (formerly the Soldiers' and Sailors' Civil Relief Act of 1940). DMDC has issued hundreds of thousands of "does not possess any information indicating that the individual is currently on active duty" responses, and has experienced a small error rate. In the event the individual referenced above, or any family member, friend, or representative asserts in any manner that the individual is on active duty, or is otherwise entitled to the protections of the SCRA, you are strongly encouraged to obtain further verification of the person's active duty status by contacting that person's Military Service via the "defenselink.mil" URL provided below. If you have evidence the person is on active-duty and you fail to obtain this additional Military Service verification, provisions of the SCRA may be invoked against you.

If you obtain further information about the person ( e.g., an SSN, improved accuracy of DOB, a middle name), you can submit your request again at this Web site and we will provide a new certificate for that query.

This response reflects current active duty status only. For historical information, please contact the Military Service SCRA points-of-contact.

See: <http://www.defenselink.mil/faq/pis/PC09SLDR.html>

**WARNING:** This certificate was provided based on a name and Social Security number (SSN) provided by the requester. Providing an erroneous name or SSN will cause an erroneous certificate to be provided.

Report ID: YYROWOSJNJ

SALDUTTI, LLC  
BY: Robert L. Saldutti, Esquire  
Identification No. PA63867  
800 N. Kings Highway, Suite 300  
Cherry Hill, NJ 08034  
(856) 779-0300  
Attorney for Plaintiff

200 Locust Street  
Unit 24E, North  
Philadelphia, PA 19106

CITICAPITAL COMMERCIAL CORPORATION Plaintiff  v.  BRIAN J OWENS EXCAVATING LLC AND BRIAN OWENS Defendant(s)	CLEARFIELD COUNTY COURT OF COMMON PLEAS  CASE NO. 07-1443-CD
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**CERTIFICATION OF ADDRESSES**

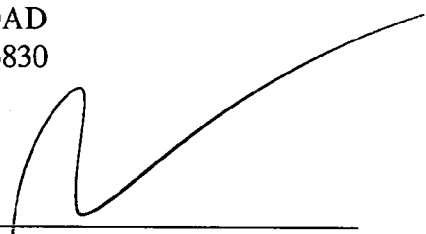
It is hereby certified that the parties have the following addresses:

Plaintiff: CITICAPITAL COMMERCIAL CORPORATION  
3850 REGENT BOULEVARD  
IRVING, TX 75063

Defendants: BRIAN J. OWENS EXCAVATING, LLC.  
551 INDUSTRIAL PARK ROAD  
CLEARFIELD, PA 16830

BRIAN OWENS  
1984 JERRY RUN ROAD  
CLEARFIELD, PA 16830

Dated: November 7, 2007

  
\_\_\_\_\_  
Robert L. Saldutti, Esquire  
Attorney for Plaintiff  
Attorney ID #63867

SALDUTTI, LLC  
BY: Robert L. Saldutti, Esquire  
Identification No. PA63867  
800 N. Kings Highway, Suite 300  
Cherry Hill, NJ 08034  
(856) 779-0300  
Attorney for Plaintiff

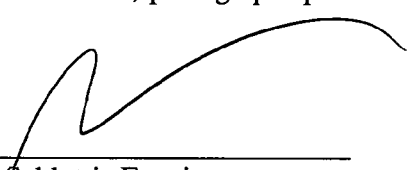
200 Locust Street  
Unit 24E, North  
Philadelphia, PA 19106

CITICAPITAL COMMERCIAL CORPORATION Plaintiff  v.  BRIAN J OWENS EXCAVATING LLC AND BRIAN OWENS Defendant(s)	CLEARFIELD COUNTY COURT OF COMMON PLEAS  CASE NO. 07-1443-CD
---	---

**CERTIFICATE OF IMPORTANT NOTICE**

I, Robert L. Saldutti, do hereby certify that a Notice Praecipe to Enter Default Judgment was served upon the defendants, Brian J. Owens Excavating, LLC and Brian Owens, on or about October 24, 2007 by certified and first class, postage pre-paid.

Dated: November 7, 2007

  
\_\_\_\_\_  
Robert L. Saldutti, Esquire  
Attorney for Plaintiff  
Attorney ID #63867

**OFFICE OF THE PROTHONOTARY  
COURT OF COMMON PLEAS**

<b>CITICAPITAL COMMERCIAL CORPORATION</b> Plaintiff  v.  <b>BRIAN J OWENS EXCAVATING LLC AND BRIAN OWENS</b> Defendant(s)	<b>CLEARFIELD COUNTY COURT OF COMMON PLEAS</b>  CASE NO. 07-1443-CD
---	---

**NOTICE**

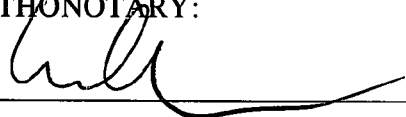
Pursuant to Pa.R.C.P. 236 of the Supreme Court of Pennsylvania, you are hereby notified that a judgment has been entered against you in the above proceeding as indicated below:

<u>  X  </u>	Judgment by Default: <b>\$42,808.10</b>
<u>      </u>	Money Judgment
<u>      </u>	Judgment on Award of Arbitrators
<u>      </u>	Money Judgment Transferred by Other Jurisdiction
<u>      </u>	Other:

**IF YOU HAVE ANY QUESTIONS CONCERNING THIS NOTICE, PLEASE CALL  
ATTORNEY:**

Robert L. Saldutti, Esquire at this telephone number: (856) 779-0300

PROTHONOTARY:

  
\_\_\_\_\_

## **EXHIBIT “A”**

**IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA**

DOCKET # 103167  
NO: 07-1443-CD  
SERVICE # 1 OF 2  
COMPLAINT

COPY

PLAINTIFF: CITICAPITAL COMMERCIAL CORPORATION

vs.

DEFENDANT: BRIAN J. OWENS EXCAVATING LLC and BRIAN OWENS

**SHERIFF RETURN**

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NOW, September 10, 2007 AT 8:51 AM SERVED THE WITHIN COMPLAINT ON BRIAN J. OWENS EXCAVATING LLC DEFENDANT AT 551 INDUSTRIAL PARK ROAD, CLEARFIELD, CLEARFIELD COUNTY, PENNSYLVANIA, BY HANDING TO BRANDY WITHERITE, ADULT AT RESIDENCE A TRUE AND ATTESTED COPY OF THE ORIGINAL COMPLAINT AND MADE KNOWN THE CONTENTS THEREOF.

SERVED BY: DEHAVEN /

**IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA**

DOCKET # 103167  
NO: 07-1443-CD  
SERVICE # 2 OF 2  
COMPLAINT

PLAINTIFF: CITICAPITAL COMMERCIAL CORPORATION  
vs.  
DEFENDANT: BRIAN J. OWENS EXCAVATING LLC and BRIAN OWENS

**SHERIFF RETURN**

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SERVED BY: DEHAVEN /



## **EXHIBIT "B"**



800 N. KINGS HIGHWAY  
SUITE 300  
CHERRY HILL, NJ 08034  
TEL: 856-779-0300  
FAX: 856-779-0355  
WWW.SALDUTTICOLLECT.COM

7592

October 24, 2007

**VIA CERTIFIED & REGULAR MAIL**

Brian J Owens Excavating LLC  
551 Industrial Park Road  
Clearfield, PA 16830

RE: Citicapital Commercial Corporation v. Brian J Owens Excavating LLC  
and Brian Owens  
Clearfield County Court Of Common Pleas, Case No. 07-1443-CD

Dear Sir/Madam:

Enclosed please find a ten (10) day notice of default which is self-explanatory. This is being served upon you due to your failure to respond to Plaintiff's Complaint served upon you on September 10, 2007. Unless an answer to Plaintiff's Complaint is filed with the Court within ten (10) days from the date of this notice, a default judgment may be entered against you.

If you would like to discuss a resolution to this matter, please contact me at my New Jersey office.

Thank you for your prompt attention to this matter.

Very truly yours,  
SALDUTTI, LLC

ROBERT L. SALDUTTI

RLS/pw

Enc

THIS CORRESPONDENCE IS AN ATTEMPT TO COLLECT A DEBT. IF YOU ARE NOT THE DEBTOR, YOU SHOULD IMMEDIATELY ADVISE THE CREDITOR. IF YOU ARE THE DEBTOR, YOU WILL BE USED FOR THAT PURPOSE. THIS FIRM

7007 0710 0004 8124 7910

U.S. Postal Service <sup>TM</sup>	
CERTIFIED MAIL <sup>TM</sup> RECEIPT	
(Domestic Mail Only; No Insurance Coverage Provided)	
For delivery information visit our website at <a href="http://www.usps.com">www.usps.com</a>	
OFFICIAL USE	
Postage \$	
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees \$	
Postmark Here	
Sent To: Brian J Owens Excavating LLC	
Street, Apt. No., or PO Box No.	
City, State, Zip+4	
PS Form 3800, August 2006 See Reverse for Instructions	

SALDUTTI, LLC  
Robert L. Saldutti, Esquire  
Identification No. PA-63867  
800 N. Kings Highway, Suite 300  
Cherry Hill, NJ 08034  
(856) 795-4345  
Attorney for Plaintiff

200 Locust Street  
Unit 24 E., North  
Philadelphia, PA. 19106

CITICAPITAL COMMERCIAL CORPORATION Plaintiff	CLEARFIELD COUNTY COURT OF COMMON PLEAS
v.	CASE NO. 07-1443-CD
BRIAN J OWENS EXCAVATING LLC AND BRIAN OWENS Defendant(s)	

**IMPORTANT NOTICE**

**TO: BRIAN OWENS  
1984 JERRY RUN ROAD  
CLEARFIELD, PA 16830**

**DATE: October 24, 2007**

YOU ARE IN DEFAULT BECAUSE YOU HAVE FAILED TO FILE AN ANSWER IN THIS CASE. UNLESS YOU TAKE ACTION WITHIN TEN (10) DAYS FROM THE DATE OF THIS NOTICE, A JUDGMENT MAY BE ENTERED AGAINST YOU WITHOUT A HEARING, AND YOU MAY LOSE YOUR RIGHTS TO DEFEND AND THEREBY LOSE PROPERTY OR OTHER IMPORTANT RIGHTS. YOU SHOULD TAKE THIS NOTICE TO A LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE FOLLOWING OFFICE TO FIND OUT WHERE YOU CAN GET LEGAL HELP:

PENNSYLVANIA BAR ASSOCIATION  
LAWYER REFERRAL SERVICE  
P.O. Box 186, Harrisburg, PA 17108  
(717) 238-6807 or (800) 692-7375

SALDUTTI, LLC

  
ROBERT L. SALDUTTI, ESQ

SALDUTTI, LLC  
BY: Robert L. Saldutti, Esquire  
Identification No. PA63867  
800 N. Kings Highway, Suite 300  
Cherry Hill, NJ 08034  
(856) 779-0300  
Attorney for Plaintiff

CITICAPITAL COMMERCIAL  
CORPORATION

Plaintiff

v.

BRIAN J OWENS EXCAVATING LLC  
AND BRIAN OWENS  
Defendant(s).

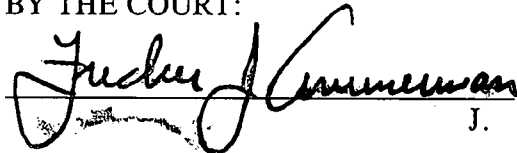
CLEARFIELD COUNTY COURT OF  
COMMON PLEAS

Case No. 07-1443-CD

ORDER

AND NOW, on this 31<sup>st</sup> day of October, 2007, it is hereby ORDERED  
AND DECREED that Plaintiff's Petition for an Order Directing Sheriff to Return Affidavit's of  
Service, pursuant to Pa.R.C.P. 405(a) is hereby GRANTED, directing Sheriff of Clearfield  
County to return affidavit's of service to Robert L. Saldutti, Esquire for entry of judgment.

BY THE COURT:

  
J.

FILED <sup>acc</sup>  
014:00/301 Atty Saldutti  
OCT 31 2007

William A. Shaw 1 CC Sheriff  
Prothonotary/Clerk of Courts (without memo)  
(GR)

FILED

OCT 31 2007

William A. Shaw  
Prothonotary/Clerk of Courts  
DATE: 10/31/07

☒ You are responsible for serving all appropriate parties.

☒

The Prothonotary's office has provided service to the following parties:

☐ Plaintiff(s) ☐ Attorney ☐ Other

☐ Defendant(s) ☐ Defendant(s) Attorney

☐ Special Instructions: