RECEIVED

JUN 19 2013

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master-In-Equity

Case No. 2010-CP-23-3860

Independence National Bank,..... Petitioner,

v.

Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. DeCarlis,..... Respondents.

Appellate Case No. 2013-000915

APPENDIX

C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
NELSON MULLINS RILEY & SCARBOROUGH LLP
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

D. Sean Faulkner
SC Bar No. 8875
E-Mail: sean.faulkner@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for Petitioner Independence National Bank

Counsel of Record for Respondents Buncombe Professional Park, LLC and David D. DeCarlis:

Mary Leigh Arnold
MARY LEIGH ARNOLD, P.A.
749 Johnnie Dodds Blvd. Suite B
Mount Pleasant, South Carolina 29464
(843) 971-6053
(843) 971-6055 (facsimile)

APPENDIX
INDEX

Record on Appeal 1

Appendix to Record on Appeal 166

Final Brief of Appellants 178

Final Brief of Respondent 195

Final Reply Brief of Appellants 213

Court of Appeals Opinion, February 20, 2013 225

Respondent Independence National Bank's Petition for Rehearing March 7, 2013 234

Order Denying Petition for Rehearing April 18, 2013 242

19667

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Master in Equity

Case No. 2010-CP-23-3860

Independence National Bank, Respondent,

v.

Buncombe Professional Park, LLC; and
David Decarlis, s/a David D. Decarlis, Appellants.

RECORD ON APPEAL

ATTORNEY FOR RESPONDENT
M. Kyle Thompson, Esquire
Love, Thornton, Arnold, & Thomason, P.A.
PO Box 10045
Greenville, SC 29603
864-242-6360 (phone)
864-271-7972 (fax)

ATTORNEY FOR APPELLANTS
Mary Leigh Arnold, P.A.
Mary Leigh Arnold
749 Johnnie Dodds Blvd., Suite B
Mt. Pleasant, South Carolina 29464
(843) 971-6053 (phone)
(843) 971-6055 (fax)
Sammie@maryarnoldlaw.com

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. No.: 2010-CP-23-3860
	)	
Independence National Bank,	)	
	)	
Plaintiff,	)	ORDER
vs.	)	
	)	
Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. DeCarlis,	)	
	)	
Defendants.	)	

THIS MATTER came before me on April 4, 2011. The Plaintiff was represented by M. Kyle Thompson, Esquire, and the Defendants were represented by Mary Leigh Arnold, Esquire. This matter is based on a Motion to Amend Pleadings filed by the Plaintiff on March 23, 2011.

After hearing arguments of counsel, it appears that the amendment of the Complaint sought by the Plaintiff, which is to add reformation of the loan documents as a cause of action, is not a surprise to the Defendants and concerns facts that are already in dispute. There is no prejudice to the Defendants in allowing the Plaintiff to add this cause of action to the Complaint.

THEREFORE,

IT IS ORDERED that the Plaintiff's Motion to Amend Pleadings is granted over the strenuous objection of the Defendants.

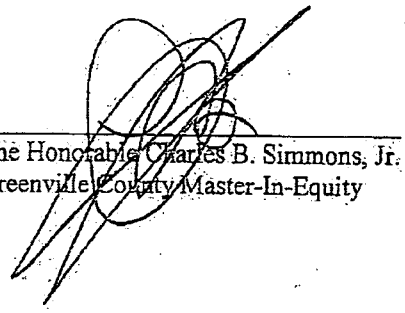
IT IS FURTHER ORDERED that Plaintiff is to file amended pleadings no later than 12:00 p.m. on April 7, 2011.

IT IS FURTHER ORDERED that the granting of this motion will not cause the hearing set for April 29, 2011, to be delayed or continued.

1

IT IS SO ORDERED.

Date: 4/5/11
Greenville, South Carolina



The Honorable Charles B. Simmons, Jr.
Greenville County Master-In-Equity

2

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) C.A. NO. 2010-CP-23-3860
COUNTY OF GREENVILLE	)
	)
Independence National Bank,	)
	)
Plaintiff,	) DECREE OF FORECLOSURE
	)
-vs-	)
	)
Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. DeCarlis;	)
	)
Defendants.	)

Pursuant to Rule 53 of the *South Carolina Rules of Civil Procedure*, and upon the stipulation and agreement of all parties hereto not in default, the above-entitled foreclosure action was referred to me for the purpose of conducting a hearing on the same, taking testimony, determining all issues of fact and law, and entering a final judgment thereon.

A hearing was conducted before me in the above-captioned case and the testimony taken on April 29, 2011. Plaintiff was represented by the law firms of Love, Thornton, Arnold & Thomason, P.A., M. Kyle Thompson appearing, and Smith Moore Leatherwood, LLP, Earle Prevost appearing. Defendants were represented by Mary Leigh Arnold. From the records and from the testimony and evidence introduced, I make the following findings of fact and conclusions of law:

(1) I find that the Lis Pendens was filed on March 15, 2010, and that the original Summons and Complaint were filed on May 14, 2010, in the Office of the Greenville County Clerk of Court.

(2) I find from the various Affidavits of Service and/or Acceptances of Service on file that all Defendants have been properly served with, or accepted service of, the Lis Pendens, Summons and Complaint.

(3) I find that the Defendants filed an Answer and Counterclaim on June 18, 2010, denying the Plaintiff's allegations and setting forth various defenses and counterclaims against the Plaintiff. The Plaintiff filed a Reply on July 15, 2010, denying the counterclaims.

(4) I find that the Plaintiff filed an Amended Complaint on April 7, 2011, setting forth the causes of action before this Court. The Defendants filed an Answer to the Amended Complaint and Counterclaim on April 19, 2011.

(5) I find that this action was brought for the foreclosure of a real estate mortgage, that the property secured by the mortgage is in Greenville County and that this Court has jurisdiction of all parties and of the subject property.

(6) I find that all Defendants and all attorneys of record were notified of the time, date and place of the hearing in this matter and were provided with a copy of the Order of Reference.

(7) I find that Buncombe Professional Park, LLC, executed and delivered the subject note on September 25, 2007, in favor of Independence National Bank, and that Buncombe Professional Park, LLC, concurrently executed a mortgage to secure same. It is further uncontroverted that attorney Thomas F. Dugas, a Partner at the Horton Law Firm and an experienced and well regarded member of the Greenville County Bar, conducted the closing and acted as agent for both the

Plaintiff and the Defendants. I further find that the amount of said note and mortgage was $1,650,000.00, with repayment terms as specified therein.

(8) I find that said mortgage encumbered and conveyed to Independence National Bank the property described below and that said mortgage was recorded on September 26, 2007 in Mortgage Book 4855 at page 978 in the Register of Deeds Office for Greenville County:

> ALL that certain piece, parcel or lot of land, lying and being situate in the State of South Carolina, County of Greenville, containing 18.56 acres, more or less, as shown on a survey prepared for Tabour Properties by Ray Dunn Land Surveyor, dated April 28, 2005 and recorded in the ROD Office for Greenville County in Platt Book 50-A at Page 13. Reference is hereby made to said survey for a more complete and accurate metes and bounds description thereof.
>
> LESS HOWEVER:
>
> ALL that certain piece, parcel or tract of land located, lying and being situate in the State of South Carolina, County of Greenville, containing 13.496 acres, more or less, being shown and designated as "Multi-Family Tract" on plat entitled "Summary Plat-Buncombe Professional Park," dated March 12, 2007, prepared by 3D Land Surveying, Inc., recorded in the Office of the Register of Deeds for Greenville County in Plat Book 1035 at Page 83, reference to which is hereby made for the metes and bounds thereof. See deed recorded in Book 2278 at Page 182.
>
> This being a portion of the property conveyed to Buncombe Professional Park, LLC by Double C. Inc. in deed recorded on June 15, 2005 in Book 2149 at Page 1728.
>
> TMS #s:G6-1-4.3 and G6-1-4.4

(9) I find that Defendant Buncombe Professional Park, LLC, was the record owner of the subject real property as of the date the Lis Pendens was filed and that Plaintiff is the lawful owner and holder of the note and mortgage being foreclosed.

(10) I find that the uncontroverted evidence presented at the hearing, including the testimony of Michael Lowery, formerly a loan officer at Independence National Bank; Tommy Dugas; and E. Fred Moore, Chief Credit Officer and Executive Vice President at Independence National Bank, along together with all the exhibits introduced, prove by clear and convincing evidence that the Plaintiff and Defendants both intended at the time of the original transaction that Plaintiff would have a first mortgage lien on the property. I note that the defendant DeCarlis failed to appear at the hearing and therefore failed to present any evidence that would contradict or challenge the testimony and evidence presented by the Plaintiff. I therefore find that Defendant DeCarlis, holder of a prior recorded mortgage on the same property, intended to give the Plaintiff a first mortgage and satisfy or subordinate his mortgage, which is found at Book 4571 Page 1071 in the Greenville County Register of Deeds with a recording date of May 25, 2006.

(11) Based on the uncontroverted clear and convincing evidence, I find that preponderance of evidence or the standard of as a result of the mutual mistake of the Plaintiff and Defendants through their common agent at the closing, Tommy Dugas, that the intent of the parties was not effectuated at the closing, as DeCarlis' personal mortgage was not satisfied or subordinated. Therefore, I am reforming both the Plaintiff's mortgage and

Defendant DeCarlis' mortgage such that the mortgage held by the Plaintiff shall be considered and is a first mortgage on the property and shall have priority over any other liens or encumbrances. I further find that the mortgage to Defendant DeCarlis is subordinated to the Plaintiff's mortgage.

(12) I find that the Defendants, by failing to appear or present any evidence, waived their counterclaims against the Plaintiff, and I find for the Plaintiff with regard to the Defendants' counterclaims.

(13) I find that said note and mortgage provided that, upon the failure by the debtor to pay the debt as specified in the note, the holder thereof might, at its option, declare the entire outstanding indebtedness immediately due and payable and further provided for the recovery of such sums advanced as may be necessary to protect the priority of its mortgage and the property secured thereby and further provided for attorney's fees and costs to be added to the outstanding indebtedness should the note and mortgage be placed in the hands of an attorney for collection.

(14) I find that Defendant Buncombe Professional Park, LLC, has defaulted in payments and that Plaintiff has exercised its option to declare the entire outstanding indebtedness immediately due and payable. I further find that Plaintiff is entitled to foreclose its mortgage.

(15) I find that the balance due and owing Plaintiff by the Defendant debtor as of the date of hearing was $1,875,008.73, exclusive of costs and attorney's fees, with a daily accrual rate of $240.77, figured at the interest rate set forth in the

subject note. I further find that the aforementioned balance was calculated as follows:

Principal Balance:	$1,651,000.00
Interest Due:	$125,172.06
Late Charges:	$81,359.12
Taxes/Insurance/Service Costs Advanced (Negative Escrow Due	$1,744.55
Escrow Items Credit	0
BALANCE DUE	$1,875,008.73

I further find that the post-judgment interest rate shall be the contract rate as specified in the loan documents.

(16) I find that the balance anticipated to be due and owing by the Defendant debtors as of Sales Day, Monday, June 13, 2011, shall be $1,885,843.38, exclusive of costs and attorney's fees, with a daily accrual rate of $240.77.

(17) I find that the Defendant DeCarlis executed a personal guaranty for all debts and obligations of Defendant Buncombe Professional Park, LLC, and is therefore personally liable to the Plaintiff for any and all amounts due the Plaintiff

(18) I find that Plaintiff has placed the subject note and mortgage in the hands of Love, Thornton, Arnold & Thomason, P.A., for foreclosure and that $15,000.00 is a reasonable attorney's fee for their services performed and anticipated to be performed until final adjudication of the within foreclosure action. Anticipated services to be performed do not include exceptional circumstances

delaying conclusion beyond the normal time. I further find that $783.75 are reasonable costs and expenses for this matter as expended by Plaintiff's attorney.

(19) I find that, according to the public records, the Defendant set out hereinafter have been joined as party Defendant by virtue of the fact that said Defendant claim(s) or may claim a lien or other interest in the property which is the subject of this foreclosure action, and that said liens or claims /are subordinate to the first mortgage lien of the Plaintiff:

Defendant DeCarlis is made a party to this proceeding by way of that certain mortgage executed on May 25, 2006, by Buncombe Professional Park, LLC, in favor of David DeCarlis in the original amount of $570,000.00, recorded on May 25, 2006, in Mortgage Book 4571 at page 1071 in the Register of Deeds Office of Greenville County;

(20) In the event there are surplus funds after payment of the Plaintiff's debt, the validity, priority and amount of any lien or claim of the Defendants set forth in the preceding paragraph will be determined at a hearing subsequent to the sale in accordance with Rule 71(c) of the *South Carolina Rules of Civil Procedure.*

(21) I find that Plaintiff specifically seeks a personal or deficiency judgment against Defendants, in the event the proceeds of sale or value of the property acquired by Plaintiff at sale is insufficient to satisfy the indebtedness due Plaintiff under the terms of the subject note and mortgage and that Plaintiff is entitled to have any equity of redemption barred and to have the property sold at public auction on Sales Day June 13, 2011, with the proceeds to be applied toward

costs and expenses, attorney's fees and the mortgage indebtedness. However, Plaintiff reserves the right to waive deficiency until the date and time of sale.

(22) I find that the Defendants are not actively in the Armed Forces of the United States and is, therefore, not entitled to the benefits of the Soldier's and Sailor's Civil Relief Acts, U.S.C.A., Title 50, App. §501, et seq.

(23) IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

That, as of the date of hearing, there is due to the Plaintiff, under the terms of the subject note and mortgage, the sum of $1,875,008.73 Dollars, plus attorney's fees of $15,000.00, all costs and expenses of this action in the amount of $783.75, with interest on said debt from the date of hearing through the date of compliance at the contract rate and thereafter, in the event of a deficiency judgment, at the legal judgment rate; that the Plaintiff's mortgage be foreclosed and any equity of redemption of the named Defendants and all persons whomsoever claiming under him, her, them, or it, be forever barred; that the mortgaged premises, as described in the Complaint and previously in this Decree, be sold at public auction on Legal Sales Day, June 13, 2011, or on some subsequent date designated by the Court; that I, as Master in Equity for Greenville County, South Carolina, after having duly advertised for the sale of the mortgaged premises according to the law and custom of this Court, sell to the highest bidder the mortgaged premises described in the Complaint and previously in this Decree, at public auction at the Greenville County Courthouse on Legal Sales Day, June 13, 2011, during the usual hours of public sale.

(25) IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

That the property shall be withdrawn from sale in the event Plaintiff or an agent of Plaintiff does not appear at the sale.

(26) IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

That the proceeds derived from such sale should be applied as follows:

First, to the payment of all costs and expenses of this action, including a fee for the Plaintiff's attorneys as heretofore provided and any; next to the payment of the amount due upon the note and mortgage owned by the Plaintiff; and finally, after disbursing the proceeds of the sale as aforesaid, that any balance thereafter remaining be held by me subject to the further Order of this Court.

(27) IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

That the afore-described property should be sold subject to any property taxes that are due, past due or accruing as of the date of sale and/or compliance and that the sale should not be final at the close of bidding, but that the bidding shall remain open for thirty (30) days, in compliance with the *Code of Laws of South Carolina*, 1976, as amended, § 15-39-720.

(28) IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

That, in compliance with § 30-9-31 of the *Code of Laws of South Carolina*, 1976, as amended, any deed of conveyance made pursuant to this sale shall be indexed in the grantor index by the Register of Deeds for Greenville County in the name of the owner of record of the subject property immediately prior to the

execution of the Master's Deed, as well as in the name of the undersigned Master in Equity who executes such deed as grantor.

(29) IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

That in the event there be any deficiency remaining on the indebtedness due Plaintiff after the proceeds of sale are applied to the indebtedness due as outlined above, said deficiency shall be assessed against all Defendants and Plaintiff shall have personal judgment against said Defendants for the amount of said deficiency.

(30) IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

That Plaintiff has reserved the right to waive deficiency until the date and time of sale. In the event Plaintiff waives its right to a deficiency at sale, the sale shall become final at the close of bidding on Legal Sales Day, June 13, 2011.

(31) IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

That this action shall remain open for any other proper purpose.

IT IS SO ORDERED!

The Honorable Charles B. Simmons, Jr.
Master-In-Equity

Greenville, South Carolina

May 12, 2011

A Certified Copy
Paul B. Wilkerson
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 5/13/11

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	) C.A. NO. 2010-CP-23-3860
Independence National Bank,	)
Plaintiff,	) ORDER
-vs-	)
Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. DeCarlis,	)
Defendants.	)

JUN 29 A 11:
FILED-CLERK OF COURT
GVILLE CO. S.C.
ENTERED COMPUTER

THIS MATTER is before me on Rule 59(e) motions filed by both the Plaintiff and Defendants in this matter. By consent of all parties, these motions were addressed in a telephone conference call that was held May 27, 2011. M. Kyle Thompson, Esquire, represented the Plaintiff and Mary Leigh Arnold, Esquire, represented the Defendants.

These motions concern the Order granting Plaintiff's foreclosure action that was entered on May 13, 2011. The Defendant filed a Motion To Reconsider on May 20, 2011, seeking reconsideration on three grounds. Those are as follows:

1. That the Court erred in allowing the Plaintiff to amend its Complaint on April 7, 2011, to include a cause of action for reformation;
2. That the Court erred by determining that Defendant DeCarlis' personal mortgage was superior to Plaintiff's mortgage lien; and
3. That the Court erred when it determined that reformation was an appropriate remedy.

The Plaintiff filed a Motion to Alter or Amend on May 23, 2011 seeking to amend the Order. The Plaintiff's Motion alleged that the Court's Order failed to address equitable subrogation and that the Order should be amended to include the Court's ruling at trial that the Plaintiff had established equitable subrogation as an alternative theory of relief.

RECEIVED
JUN 29 2011
Clerk of Court

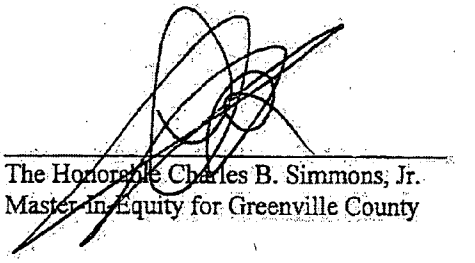
After hearing from counsel on these matters and carefully considering them, I am denying the Defendant's Motion to Reconsider. The Defendant has previously fully raised and argued these matters, and the Court has previously had the opportunity to consider them and rule on them.

The Court grants the Plaintiff's Motion to Alter or Amend over the objection of the Defendant that the Amended Complaint did not include a claim for equitable subrogation. The written Order should be made consistent with the Court's ruling at trial, so the Order of May 13, 2011, shall be amended to include the following:

> The Plaintiff sought, as an alternative theory of relief, to be equitably subrogated to the debt of First National Bank of Spartanburg, whose mortgage to Defendant was paid off with funds borrowed from the Plaintiff. The Plaintiff has proven by a preponderance of evidence:
>
> 1. That it paid the debt;
> 2. That it had a direct interest in the discharge of the debt.
> 3. That it is secondarily liable for the discharge of the debt.
> 4. That no injustice would be done to any other party by allowing equitable subrogation; and
> 5. That Plaintiff did not have actual notice of the intervening mortgage of Defendant DeCarlis,
>
> Because of the clear and uncontroverted understanding that the Bank had that the DeCarlis mortgage would be satisfied, it reasonably assumed that its mortgage would be first and therefore went forward with paying off the original first mortgage. The uncontroverted evidence shows that at all times, DeCarlis intended his mortgage to be junior to any institutional mortgage. It is also uncontroverted and unchallenged that equity demands that the Plaintiff's mortgage should be accorded its proper priority.
>
> As such, as an alternative theory of recovery in this case, the Plaintiff is entitled to be equitably subrogated in the amount of $1,457,149.94, and the Plaintiff would be entitled to receive this amount out of the sale of the property before any other debt or lien is satisfied in the event that the whole debt of the Plaintiff does not take priority over the personal mortgage to Defendant DeCarlis.
>
> THEREFORE,
>
> IT IS ORDERED that the Defendant's Motion to Reconsider is denied.

IT IS FURTHER ORDERED that Plaintiff's Motion to Alter Amend is granted as set forth above.

IT IS SO ORDERED!



The Honorable Charles B. Simmons, Jr.
Master-In-Equity for Greenville County

June 24, 2011
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	(Non-Jury)
Independence National Bank	)	
	)	C.A. NO: 2010-CP-23-3860
Plaintiff,	)	
	)	COMPLAINT
-vs-	)	
	)	Deficiency Requested as to:
Buncombe Professional Park, LLC, and David DeCarlis, s/a David D. DeCarlis	)	Buncombe Professional Park, LLC and David DeCarlis, s/a David D. DeCarlis
	)	
Defendants.	)	

FILED-CLERK OF COURT GREENVILLE CO. S.C. PAUL B. MCKENGHER
2010 MAY 14 P 2:25

NON-ELIGIBLE UNDER THE HOME AFFORDABLE MODIFICATION PROGRAM

The Plaintiff, complaining of the above-named Defendants, would respectfully show unto the Court:

I.

The Plaintiff is a banking corporation organized and existing under the laws of the United States of America and the State of South Carolina and doing business in the County of Greenville, State of South Carolina. This is an action to foreclose a mortgage covering real estate situated in the County of Greenville, State of South Carolina, and this Court therefore has jurisdiction of this action.

II.

Heretofore, Buncombe Professional Park, LLC (hereinafter sometimes referred to as "Borrower" or "Maker"), through its member, David DeCarlis, s/a David D. DeCarlis (hereinafter sometimes referred to as "Guarantor") applied for a commercial first mortgage loan from Independence National Bank (hereinafter sometimes referred to as "Lender") in the original principal sum of $1,650,000.00, which funds were to be used for the refinancing of an existing first mortgage loan with First National Bank of Spartanburg and the establishment of an interest

reserve fund to initially service the loan of Plaintiff. By loan commitment letter dated September 11, 2007 and signed by Borrower and Guarantor, Borrower and Guarantor both agreed to the terms of the loan from Plaintiff as set forth therein. A copy of said loan commitment letter is attached hereto, marked "**Exhibit A**" and incorporated herein by reference, the same as if fully set forth in this Complaint.

III.

For value received, Buncombe Professional Park, LLC executed and delivered its Commercial Promissory Note dated September 25, 2007 to Independence National Bank, containing a promise to pay Independence National Bank the principal sum of One Million, Six Hundred and Fifty Thousand Dollars, together with interest thereon upon such terms as are contained in said Note. On April 1, 2009, Defendant Buncombe Professional Park, LLC, by its member, David D. DeCarlis, executed and delivered to Plaintiff a Change In Terms Agreement to said Note. Copies of said Note and Agreement are attached hereto, marked "**Exhibit B**", and incorporated herein by reference, the same as if fully set forth in this Complaint.

IV.

At the time of closing (September 25, 2005) funds from the loan of Plaintiff were advanced on behalf of the Borrower to (i) satisfy in full the outstanding first mortgage loan of First National Bank of Spartanburg, (ii) pay the loan closing costs, and (iii) establish the interest reserve fund as set forth in the aforementioned loan commitment letter.

V.

In order to secure the payment of said Note, Buncombe Professional Park, LLC executed and delivered to Independence National Bank a mortgage of even date and identical amount, whereby there was conveyed unto Independence National Bank, by way of said mortgage, the property described as follows:

ALL that certain piece, parcel or lot of land, lying and being situate in the State of South Carolina, County of Greenville, containing 18.56 acres, more or less, as shown on a survey prepared for Tabour Properties by Ray Dunn Land Surveyor, dated April 28, 2005 and recorded in the ROD Office for Greenville County in Platt Book 50-A at Page 13. Reference is hereby made to said survey for a more complete and accurate metes and bounds description thereof.

LESS HOWEVER: ALL that certain piece, parcel or tract of land located, lying and being situate in the State of South Carolina, County of Greenville, containing 13.496 acres, more or less, being shown and designated as "Multi-Family Tract" on plat entitled "Summary Plat-Buncombe Professional Park," dated March 12, 2007, prepared by 3D Land Surveying, Inc., recorded in the Office of the Register of Deeds for Greenville County in Plat Book 1035 at Page 83, reference to which is hereby made for the metes and bounds thereof. See deed recorded in Book 2278 at Page 182.

VI.

Said mortgage was recorded in the Register of Deeds Office for Greenville County in Mortgage Book 4855 at page 978 on September 26, 2007. A copy of the aforementioned mortgage is attached to and made part of this Complaint as "**Exhibit C**" and incorporated herein by reference, the same as if fully set forth in this Complaint.

VII.

The terms of said note, and the mortgage securing same, provided, among other things, that on failure to pay, when due, any installment of either principal or interest, or any portion thereof, or if any of the conditions and requirements in said documents not be complied with, then the whole principal sum and accrued interest shall, at the option of the legal holder thereof, become immediately due and payable and collectable by foreclosure. The Maker of said documents further agreed to pay a reasonable attorney's fee in the event said note should be collected or foreclosed by an attorney.

VIII.

In order to further induce Plaintiff to make the subject loan and secure the repayment of the indebtedness evidenced by said note, David DeCarlis, s/a David D. DeCarlis executed and delivered to Plaintiff his unconditional, absolute and continuing personal guaranty thereby guaranteeing to Plaintiff the full and prompt payment of all debts and liabilities arising out of said loan to Buncombe Professional Park, LLC, including all interest, fees, charges, attorney's fees, and collection costs. A copy of said guaranty is attached to and made a part of this Complaint as **"Exhibit D"** and incorporated herein by reference, the same as if fully set forth in this Complaint.

IX.

Plaintiff is the owner and holder of said note, mortgage, and guaranty and Defendant, Buncombe Professional Park, LLC, is the record owner of the subject property. Plaintiff's mortgage constitutes a first lien upon the subject property. The subject mortgage loan account is presently in default. Plaintiff, under the terms of the subject note and mortgage, has declared the entire outstanding indebtedness to be immediately due and payable. Although demand for payment has been made or given in accordance with said loan documents, the subject mortgage loan account remains in default. There is now due and owing on said note and mortgage the sum of One Million, Six Hundred and Seventy-Six Thousand, Seven Hundred and Thirty Three and 42/100 ($1,676,733.42) Dollars with interest from March 10, 2010 at the rate set out in the subject note, together with all costs and expenses of this action, and a reasonable attorney's fee, said note and mortgage having been placed in the hands of Love, Thornton, Arnold & Thomason, P.A., for collection.

X.

Plaintiff alleges that it is entitled to have its mortgage foreclosed, the premises sold, any equity of redemption barred and the proceeds applied toward the payment of its debts.

XI.

Plaintiff is informed, believes and alleges that it is entitled to a deficiency judgment against Defendants, Buncombe Professional Park, LLC and David DeCarlis, s/a David D. DeCarlis, for any deficiency owing after application of the proceeds from the sale of the mortgaged premises and does hereby ask for a personal or deficiency judgment in the event that the proceeds of sale or value of the property acquired by Plaintiff at sale are not adequate to satisfy the indebtedness due Plaintiff under the terms of the subject note and mortgage.

XII.

This summons and complaint is an attempt to collect the debt and any information obtained will be used for that purpose.

XIII.

The Defendant set out hereinafter has been joined as a party defendant by virtue of the fact that said Defendant claims or may claim a lien or other interest in the property which is the subject of this foreclosure action. Said lien or claim is subordinate to the lien of the Plaintiff:

David DeCarlis, s/a David D. DeCarlis, is also made a party to this proceeding by way of that certain Second Mortgage of Real Estate executed on May 18, 2006 by Buncombe Professional Park, LLC in favor of David DeCarlis in the original amount of $570,000.00, which mortgage was recorded on May 25, 2006 in Mortgage Book 4571 at Page 1071 in the Register of Deeds Office for Greenville County; however, Plaintiff is informed, believes, and alleges that (i) said mortgage has either been paid and satisfied in full or (ii) said mortgage is junior and secondary to the mortgage of Plaintiff because Buncombe Professional Park, LLC and David D. DeCarlis executed the aforementioned loan commitment letter and thereby induced Plaintiff to make the subject loan, and/or (iii) said mortgage is junior and secondary to the mortgage of Plaintiff by the theory of equitable subrogation.

XIV.

The mortgage loan which is the subject of this foreclosure proceeding is not owned or guaranteed by the Federal National Mortgage Association ("Fannie Mae") or the Federal Home Loan Mortgage Corporation ("Freddie Mac") or held by a servicer who has signed an agreement to participate in the Home Affordable Modification Program ("HMP"); that Independence National Bank has signed no agreement to participate in the Home Affordable Mortgage Program.

WHEREFORE, Plaintiff prays:

(1) That Plaintiff's mortgage be declared a first lien on the subject property;

(2) That it have judgment against the mortgaged premises for the sum of One Million, Six Hundred and Seventy-Six Thousand, Seven Hundred and Thirty Three and 42/100 ($1,676,733.42) Dollars, with interest thereon from March 10, 2010, at the rate set forth in the subject note, together with a reasonable attorney's fee, necessary payment of taxes, insurance and/or advancements, and for the cost of this action.

(3) That the mortgaged premises be sold, any equity of redemption barred, the proceeds applied toward the payment of this judgment, and that Plaintiff be granted a deficiency judgment against Defendants Buncombe Professional Park, LLC and David DeCarlis, s/a David D. DeCarlis, for any deficiency remaining after the application of the proceeds of sale to the amount of judgment; and,

(4) For such other and further relief as the Court deems just and proper.

LOVE, THORNTON, ARNOLD & THOMASON, P.A.

By: S. Gray Walsh MAY 14, 2010

S. Gray Walsh, SC ID#5811
Attorneys for Plaintiff
410 East Washington St., P. O. Box 10045
Greenville, S.C. 29603 Telephone: 864-242-6360

INDEPENDENCE
NATIONAL BANK

September 11, 2007

David DeCarlis
Buncombe Professional Park, LLC
216 Cleveland Street
Greenville, SC 29601

Re: Loan Commitment to Buncombe Professional Park, LLC

Dear David:

Independence National Bank (hereafter "Independence" or "Bank") is pleased to offer you a commitment to lend on the following terms and conditions:

BORROWER:
Buncombe Professional Park, LLC (the "Borrower")

AMOUNT:
The amount of this facility shall be $1,650,000.00 in the form of a commercial mortgage loan.

PURPOSE:
This facility shall be used to refinance approximately $1,450,000 in debt at another bank that is secured by approximately 4.9 acres of land and improved as an office park known as Buncombe Professional Park on S. Buncombe Road, Greer, SC (the "Property") and to provide and additional $200,000 in funds for an interest reserve until the Property can be sold.

TERM:
This facility shall have a term of 18 months.

INTEREST RATE:
The interest rate will be a floating rate of Bank's Prime Rate of interest (Prime + 0.0%) with a cap or ceiling of 9.0%.

864.672.1776 • Fax 864.672.1777
500 East Washington Street • Greenville, SC 29601
P.O. Box 1776 • Greenville, SC 29602

864.451.5360 • Fax 864.451.5365
2801-B Wade Hampton Blvd. • Taylors, SC 29687
www.independencenb.com

EXHIBIT (A)

REPAYMENT:
This facility shall be repayable in monthly payments of interest only. In addition, as office pads are sold in the Property, 80% of the proceeds from the sale of office pads will be required by the Bank to reduce the principal balance of the loan. All remaining principal and unpaid interest shall be due and payable in full on the maturity date 18 months from the date of the closing of the loan.

PREPAYMENT PENALTY:
None.

ORIGINATION FEE:
At closing, an origination fee equal to one quarter of one per cent of the loan amount shall be due and payable, said amount being $4,125.00.

GUARANTORS:
The loan shall be unconditionally guaranteed by David D. DeCarlis.

COLLATERAL:
The Borrower shall grant Independence a title insured first real estate mortgage in the Property including all improvements presently located or subsequently constructed thereon.

DISBURSEMENTS AND INSPECTIONS:
At the time of the closing, Bank will disburse approximately $1,450,000.00 to refinance the loan currently at another bank. Thereafter, disbursements will be made based upon an application and certificate for payment and supporting invoices if applicable.

FINANCIAL STATEMENTS:
Upon request, Borrower and Guarantors shall furnish current financial information to Independence in each instance prepared in accordance with generally accepted accounting principles consistently applied and otherwise in form and substance satisfactory to Bank.

CONDITIONS PRECEDENT:
The provisions of this Commitment are subject to and conditioned upon receipt by Independence of the following, all in form and substance satisfactory to Independence:

A detailed appraisal of the Property in form and substance acceptable to the Bank showing a current fair market value of the Property satisfactory to Bank. All costs of such appraisal are to be paid by the Borrower.

EXHIBIT (A)

Independence ordered environmental database report, at Borrower's expense, which will determine whether or not any hazardous waste or other materials regulated, controlled or prohibited by the federal, state or local environmental laws are located on the Property. Bank reserves the right if deemed necessary, to require an environmental audit of the Property by an engineer or other environmental consultant satisfactory to Bank. Bank reserves the right to declare this commitment null and void if the audit discloses evidence that the Property is contaminated with hazardous or toxic materials or has ever been used as a disposal site for the same.

A commitment to issue a standard ALTA mortgagee title insurance policy in form, content and from a title insurer satisfactory to Independence, insuring the mortgage as a first lien on the Property for the full amount of the loan, with such endorsements as Independence may require. Title shall be fee simple and marketable, free and clear of all defects, liens and encumbrances, including mechanics' liens.

A current survey of the Property, certified to Independence and the title insurer, showing the boundaries of the Property by courses and distances, together with a corresponding metes and bounds description, the actual or proposed location of all improvements, encroachments and restrictions, the location and width of all easements, utility lines, rights-of-way and building set-back lines, and notes referencing book and page numbers for the instruments granting the same.

Borrower and Guarantors shall provide additional financial information as required by Bank.

DOCUMENTS:
The facility will be evidenced by documents prepared by and acceptable to Independence, containing such representations, warranties, affirmative and negative covenants, indemnities, closing conditions, defaults and remedies as are typically required by Independence and/or are customary in this type of transaction. The failure of Borrower and Independence to reach agreement on the loan documents shall not be deemed a breach by Independence of this commitment. Unless Independence agrees otherwise in writing, completion of all documents is a condition of closing.

DOCUMENT PREPARATION FEE:
A fee to cover the costs of preparing the closing documents for the loan will be collected at closing, said amount being $250.00.

COSTS:
On or before the closing Borrower shall pay all costs, expenses and fees (including, without limitation, any appraisal, survey, insurance, environmental assessment, engineering, inspections, searches, recording and attorneys' fees) associated with this transaction.

EXHIBIT (A)

DEPOSITS:
Independence shall require the Borrower maintain its primary depository relationship with Independence for loan disbursements and payments. In addition, Bank shall require that David DeCarlis maintain $100,000 on deposit at Independence in a money market account for the entire term of the loan.

CERTIFICATE OF GOOD STANDING:
Independence shall have received from Borrower certificate of the Secretary of State of the state of such Borrower's organization as to the good standing of Borrower.

ORGANIZATIONAL DOCUMENTS:
Prior to closing, Borrower shall provide Bank with copies of its articles of organization and bylaws.

Independence's obligations under this commitment are conditioned upon the fulfillment to Independence's sole satisfaction of each term and condition referenced by this commitment. These terms and conditions are not exhaustive, and this commitment is subject to certain other terms and closing conditions customarily required by Independence for similar transactions and may be supplemented prior to closing based upon Independence's investigation and/or as disclosure of Borrower's circumstances so dictate. This commitment letter will expire unless the facility is closed on or before September 26, 2007. This commitment letter shall survive closing.

Independence has made this commitment based upon the information supplied by Borrower. Independence shall have the right to cancel this commitment, whereupon Independence shall have no obligations hereunder, in the event of: (i) a material adverse change in the financial condition, operations or prospects of Borrower or any Guarantor; (ii) a material change in the accuracy of the information, representations, exhibits or other materials submitted by Borrower in connection with its request for financing; or (iii) loss of, damage to, a taking of, or the presence of any hazardous substances at or on any collateral for the loan. Borrower must immediately notify Independence of any such event.

This commitment supersedes all prior commitments and proposals with respect to this transaction, whether written or oral, including any previous loan proposals made by Independence or anyone acting with its authorization. No modification shall be valid unless made in writing and signed by an authorized officer of Independence. This commitment is not assignable, and no party other than Borrower shall be entitled to rely on this commitment.

EXHIBIT (A)

David, if the terms and conditions of this commitment letter are acceptable to you please indicate your acceptance by signing below and returning one executed copy of this commitment letter to me. This offer of commitment shall expire unless the acceptance is received by the undersigned on or before September 26, 2007.

Sincerely,

Mike Lowery
Vice President

The above terms and conditions are hereby accepted on this 25th day of September 2007.

BORROWER:

Buncombe Professional Park, LLC

By: David D DeCarlis
Print Name: David D DeCarlis
Print Title: Member

GUARANTORS:

David D. DeCarlis

EXHIBIT (A)

COMMERCIAL PROMISSORY NOTE

Independence National Bank
500 E. Washington St.
Greenville, South Carolina 29601
(864)672-1776

LOAN NUMBER	NOTE DATE	PRINCIPAL AMOUNT	LOAN TERM	MATURITY DATE
17447	September 25, 2007	$1,650,000.00	18 months	March 25, 2009

LOAN PURPOSE: Comm. RE Refinance

BORROWER INFORMATION

Buncombe Professional Park LLC
216 Cleveland Street
Greenville, SC 29601

NOTE. This Commercial Promissory Note will be referred to in this document as the "Note".

LENDER. "Lender" means Independence National Bank whose address is 500 E. Washington St., Greenville, South Carolina 29601, its successors and assigns.

BORROWER. "Borrower" means each person or legal entity who signs this Note.

PROMISE TO PAY. For value received, receipt of which is hereby acknowledged, on or before the Maturity Date, the Borrower promises to pay the principal amount of One Million Six Hundred Fifty Thousand and 00/100 Dollars ($1,650,000.00) or such lesser amount as shall have been advanced by Lender, from time to time, to or on behalf of Borrower under the terms of this Note, and all interest and any other charges, including service charges, to the order of Lender at its office at the address noted above or at such other place as Lender may designate in writing. The Borrower will make all payments in lawful money of the United States of America.

PAYMENT SCHEDULE. This loan will be paid according to the following schedule: 17 consecutive payments of interest only beginning on October 25, 2007 and continuing on the same day of each month thereafter. One final payment shall be due on the Maturity Date in an amount equal to the then unpaid principal and accrued and unpaid interest. All payments received by the Lender from the Borrower for application to the Loan may be applied to the Borrower's obligations under the Loan in such order as determined by the Lender.

INTEREST RATE AND SCHEDULED PAYMENT CHANGES. The initial variable interest rate on this Note will be 7.750% per annum. This interest rate may change on September 26, 2007, and every day thereafter. Each date on which the interest rate may change is called the "Change Date." Beginning with the first Change Date, Lender will calculate the new interest rate based on Prime in effect on the Change Date (the "Index"). If the Index is not available at that time, Lender will choose a new Index which is based on comparable information. The Index is used solely to establish a base from which the actual rate of interest payable under this Note will be calculated, and is not a reference to any actual rate of interest charged by any lender to any particular borrower. The interest rate will never be greater than 16.750% or less than 0.000%.

Nothing contained herein shall be construed as to require the Borrower to pay interest at a greater rate than the maximum allowed by law. If, however, from any circumstances, Borrower pays interest at a greater rate than the maximum allowed by law, the obligation to be fulfilled will be reduced to an amount computed at the highest rate of interest permissible under applicable law and if, for any reason whatsoever, Lender ever receives interest in an amount which would be deemed unlawful under applicable law, such interest shall be automatically applied to amounts owed, in Lender's sole discretion, or as otherwise allowed by applicable law. An increase in the interest rates will result in a higher payment amount. Interest on this Note is calculated on a 365/360 day basis. The unpaid balance of this loan after Maturity, whether by acceleration or otherwise, shall be subject to a Post-Maturity Rate of interest equal to 18.000% per annum.

LATE PAYMENT CHARGE. If any required payment is more than 10 days late, then at Lender's option, Lender will assess a late payment charge of 5% of the amount past due, subject to a minimum charge of $5.00.

PREPAYMENT PENALTY. This Note may be prepaid, in full or in part, at any time, without penalty.

ADVANCES. The Borrower and Lender agree that the Borrower may borrow up to the maximum amount of principal only one time. Subject to the terms of this Note and all of the related agreements, advances under this Note are obligatory. Regardless of the obligatory nature of this Note, principal advances will be made to the Borrower provided none of the following conditions exist.

- Maximum amount on this Note is outstanding.
- Undersigned has breached any of the terms, provisions, representations, requirements or promises contained in this Note or any other agreement.
- Undersigned makes a request for an advance after the Conversion Date.
- The Note or any other agreement relating to the extension of credit is in default.
- The Lender has deemed itself insecure or there has been a material adverse change of conditions.
- The Lender is precluded by law from making the advance.

Advances under this Note may be requested orally or in writing by the Borrower or by an authorized person.

The total of any advance requested and unpaid principal cannot exceed the available principal amount. The available principal amount refers to the principal amount minus the aggregate amount of outstanding advances, accrued but unpaid interest and outstanding fees and charges.

© 2004-2006 Copyright Compliance Systems, Inc. 3681-2A9C - 2006.10.191

EXHIBIT (B)

All advances will be charged to a loan account in Borrower's name on Lender's books, and the Lender shall debit in such account the amount of each advance made to, and credit to such account the amount of each repayment made by Borrower. The Lender shall provide to Borrower periodic statements of Borrower's loan account, which shall be deemed to be correct, accepted by, and binding upon Borrower unless Lender receives a written statement of exception from Borrower within 10 days after such statement is furnished.

SECURITY TO NOTE. Security (the "Collateral") for this Note is granted pursuant to the following security document(s):

- Mortgage in the amount of $1,650,000.00, dated September 25, 2007 evidencing security interest in the property located at 4.68 Acres South Buncombe Road Greenville SC 29650.

RIGHT OF SET OFF. To the extent permitted by law, Borrower agrees that Lender has the right to set off any amount due and payable under this Note, whether matured or unmatured, against any amount owing by Lender to Borrower including any or all of Borrower's accounts with Lender. This shall include all accounts Borrower holds jointly with someone else and all accounts Borrower may open in the future. Such right of setoff may be exercised by Lender against Borrower or against any assignee for the benefit of creditors, receiver, or execution, judgment or attachment creditor of Borrower, or against anyone else claiming through or against Borrower of such assignee for the benefit of creditors, receiver, or execution, judgment or attachment creditor, notwithstanding the fact that such right of setoff has not been exercised by Lender prior to the making, filing or issuance or service upon Lender of, or of notice of, assignment for the benefit of creditors, appointment or application for the appointment of a receiver, or issuance of execution, subpoena or order or warrant.

DISHONORED ITEM FEE. If Borrower makes a payment on the loan with a check or preauthorized charge which is later dishonored, a fee in the amount of $29.00 will be charged.

DEFAULT. Upon the occurrence of any one of the following events (each, an "Event of Default" or "default" or "event of default"), Lender's obligations, if any, to make any advances will, at Lender's option, immediately terminate and Lender, at its option, may declare all indebtedness of Borrower to Lender under this Note to be immediately due and payable without further notice of any kind notwithstanding anything to the contrary in this Note or any other agreement: (a) Borrower's failure to make any payment on time or in the amount due; (b) any default by Borrower under the terms of this Note or any other agreement, security agreement executed in connection with this Note (individually, a "Loan Document" and collectively, the "Loan Documents"); (c) any default by Borrower under the terms of any other loan agreement, security agreement, mortgage or other document in favor of Lender,; (d) the death, dissolution, or termination of existence of Borrower or any guarantor; (e) Borrower is generally not paying Borrower's debts as such debts become due; (f) the commencement of any proceeding under bankruptcy or insolvency laws by or against Borrower or any guarantor or the appointment of a receiver; (g) any default under the terms of any other indebtedness of Borrower to any other creditor; (h) any writ of attachment, garnishment, execution, tax lien or similar instrument is issued against any collateral securing the loan, if any, or any of Borrower's property or any judgment is entered against Borrower or any guarantor; (i) any part of Borrower's business is sold to or merged with any other business, individual, or entity; (j) any representation or warranty made by Borrower to Lender in any of the Loan Documents or any financial statement delivered to Lender proves to have been false in any material respect as of the time when made or given; (k) if any guarantor, or any other party to any agreement or instrument with or in favor of Lender entered into or delivered in connection with the Loan terminates, attempts to terminate or defaults under any such agreement or instrument; (l) Lender has deemed itself insecure or there has been a material adverse change of condition of the financial prospects of Borrower or any collateral securing the obligations owing to Lender by Borrower.

OTHER APPLICABLE AGREEMENTS. If this Note is secured by a security agreement, mortgage, deed of trust, trust deed, security deed or loan agreement of even or previous date, it is subject to all the terms thereof.

GENERAL WAIVERS. To the extent permitted by law, the Borrower severally waives any required notice of presentment, demand, acceleration, intent to accelerate, protest and any other notice and defense due to extensions of time or other indulgence by Lender or to any substitution or release of collateral. No failure or delay on the part of Lender, and no course of dealing between Borrower and Lender, shall operate as a waiver of such power or right, nor shall any single or partial exercise of any power or right preclude other or further exercise thereof or the exercise of any other power or right.

JOINT AND SEVERAL LIABILITY. If permitted by law, each Borrower executing this Note is jointly and severally bound.

SEVERABILITY. If a court of competent jurisdiction determines any term or provision of this Note is invalid or prohibited by applicable law, that term or provision will be ineffective to the extent required. Any term or provision that has been determined to be invalid or prohibited will be severed from the rest of this Note without invalidating the remainder of either the affected provision or this Note.

SURVIVAL. The rights and privileges of the Lender hereunder shall inure to the benefits of its successors and assigns, and this Note shall be binding on all heirs, executors, administrators, assigns and successors of Borrower.

ASSIGNABILITY. Lender may assign, pledge or otherwise transfer this Note or any of its rights and powers under this Note without notice, with all or any of the obligations owing to Lender by Borrower, and in such event the assignee shall have the same rights as if originally named herein in place of Lender. Borrower may not assign this Note or any benefit accruing to it hereunder without the express written consent of the Lender.

ORAL AGREEMENTS DISCLAIMER. This Note 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.

GOVERNING LAW. This Note is governed by the laws of the state of South Carolina except to the extent that federal law controls.

HEADING AND GENDER. The headings preceding text in this Note are for general convenience in identifying subject matter, but have no limiting impact on the text which follows any particular heading. All words used in this Note shall be construed to be of such gender or number as the circumstances require.

© 2004-2006 Copyright Compliance Systems, Inc. 3681-2A9C - 2006.10.191

EXHIBIT (B)

. ORNEYS' FEES AND OTHER COSTS. If legal proceedings are instituted to enforce the terms of this Note, Borrower agrees to pay all sts of the Lender in connection therewith, including reasonable attorneys' fees, to the extent permitted by law.

WAIVER OF JURY TRIAL. All parties to this Note hereby waive, to the fullest extent permitted by law, any right to trial by jury with respect to any dispute, whether in contract, tort, or otherwise, arising out of, in connection with, related to, or incidental to the relationship established between them in this Note or any other instrument, document, or agreement executed or delivered in connection herewith or the transaction related hereto.

By signing this Note, Borrower acknowledges reading, understanding, and agreeing to all its provisions and receipt thereof.

Buncombe Professional Park LLC

David DeCarlis 9/25/07

By: David DeCarlis Date

Its: Member

© 2004-2006 Copyright Compliance Systems, Inc. 3681-2A9C - 2006.10.191
Commercial Promissory Note - DL4006

www.complianceystems.com
800-968-8522 - Fax 616-956-1868

EXHIBIT (B)

CHANGE IN TERMS AGREEMENT

Independence National Bank
500 E. Washington St.
Greenville, South Carolina 29601
(864)672-1776

LOAN NUMBER	ORIGINAL PRINCIPAL BALANCE	CURRENT PRINCIPAL BALANCE	ORIGINAL AGREEMENT DATE	AGREEMENT CHANGE DATE
17447	$1,650,000.00	$1,590,884.25	September 25, 2007	March 25, 2009

DESCRIPTION OF THE EXISTING DEBT ("Existing Debt")

Original note in the amount of $1,650,000.

BORROWER INFORMATION

Buncombe Professional Park LLC
216 Cleveland Street
Greenville, SC 29601

BORROWER. The term "Borrower" means each party identified above.

LENDER. The term "Lender" means Independence National Bank whose address is 500 E. Washington St., Greenville, South Carolina 29601, its successors and assigns.

COLLATERAL. The following items are the security documents related to this Agreement:

- Security Instrument (Mortgage/Deed of Trust/Security Deed) in the amount of $1,650,000.00, dated September 25, 2007 evidencing a lien on the property located at 4.68 Acres South Buncombe Road Greenville SC 29650.

TERMS AND PROVISIONS. In consideration of the promises contained in this Agreement and in the instruments evidencing the Existing Debt, and of other good and valuable consideration, the sufficiency of which is acknowledged by the execution of this Agreement, Borrower agrees to the following provisions:

1. **The instrument evidencing the Existing Debt is modified and supplemented as follows:**

   Renew note for an additional 12 months with interest payable monthly beginning April 25, 2009, and monthly thereafter with all outstanding principal and unpaid interest due at maturity on March 25, 2010. The rate shall be INB Prime plus 2%, equal to 5.25%, with a floor of 5.25%.

2. **Ratification and Continued Validity.** Except for the terms expressly modified by this Agreement, by signing this Agreement Borrower acknowledges that Borrower is still bound by the terms of the instruments and prior modifications, extensions, and supplements evidencing the Existing Debt as if they were fully set forth and repeated in this Agreement and that those terms will continue to bind Borrower as provided in this Agreement and those instruments. Lender's consent to this Agreement does not waive the right to strictly enforce Lender's rights under this Agreement or the instruments evidencing the Existing Debt. Lender's consent to this Agreement does not mean that Lender must enter into another agreement like this one in the future. Lender and Borrower intend that this Agreement does not replace the Existing Debt but restates it as modified.

3. **Others Responsible for the Debt.** Lender and Borrower intend that anyone else who is liable for the Existing Debt, including, without limitation, cosigners, guarantors, and coborrowers, are not relieved of any obligation except as expressly relieved in this Agreement or other writing. Borrower agrees that the liability of each person who signed the instruments evidencing the Existing Debt, whether primary or secondary, continues in full force and effect, even if that person does not sign this Agreement. This promise applies not only to this Agreement but also to any extension, modification, or other agreement Borrower makes with Lender that represents a debt which includes cosigners, guarantors, coborrowers, and others having similar liability. Borrower understands that this Agreement is contingent on the continued liability of each person who signed the documents evidencing the Existing Debt, whether or not that person signs this Agreement.

4. **Pronouns and Gender.** In this Agreement, whenever the circumstances or the context so requires, the singular shall be construed as the plural, the masculine shall be construed as the feminine and/or the neuter and vice versa.

5. **Miscellaneous Terms.** Borrower agrees that if Lender delays or forgoes enforcing Lender's rights under this Agreement in any particular instance, Lender retains the right to strictly enforce the same provision in any other instance, or later in the same instance. Every person signing this Agreement waives, to the extent allowed by law, presentment, demand, protest, and notice of dishonor. Every person signing this Agreement agrees that Lender may renew, extend, supplement, or otherwise modify the debt represented by this Agreement and the documents evidencing the Existing Debt without the permission of any other person who is liable, and such modification will not release or reduce the liability of any party, even if that party does not sign this Agreement.

ORAL AGREEMENTS DISCLAIMER. This 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.

© 2004-2008 Copyright Compliance Systems, Inc. ASAC-09A7 - 2008.05.63
Change in Terms Agreement - DL-6006

www.complianceystems.com
800-968-8522 - Fax 616-956-1365

EXHIBIT (B)

By signing this Change In Terms Agreement, each Borrower acknowledges reading, understanding, and agreeing to all its provisions, and receiving a copy.

Buncombe Professional Parks LLC

D. DeCarlis 4/1/09

By: David DeCarlis Date
Its: Member

By signing this Change In Terms Agreement, Lender acknowledges reading, understanding, and agreeing to all its provisions.

Independence National Bank

4/1/09

By: Robert Rohrer Date
Its: Senior Vice President

© 2004-2008 Copyright Compliance Systems, Inc. ASAC-09A7 - 2008.05.02
Change In Terms Agreement - DL6006

www.complianceSystems.com
800-968-8322 - Fax 616-956-1868

EXHIBIT (B)

2007096172 MTG
8 PGS
Book:MO 4855 Page:978-985
September 28, 2007 10:01:09 AM
Rec:$14.00 Cnty Tax:$0.00 State Tax:$0.00
FILED IN GREENVILLE COUNTY,SC

LOAN NUMBER: 17447 (Space Above This Line For Recording Data)

COMMERCIAL REAL ESTATE MORTGAGE

This COMMERCIAL REAL ESTATE MORTGAGE ("Security Instrument") is made on September 25, 2007 between Buncombe Professional Park LLC, a South Carolina Limited Liability Company, whose address is 216 Cleveland Street, Greenville, South Carolina 29601 the "Mortgagor(s)" and Independence National Bank whose address is 500 E. Washington St., Greenville, South Carolina 29601 ("Lender"), which is organized and existing under the laws of the state of South Carolina. Mortgagor in consideration of loans extended by Lender up to a maximum principal amount of One Million Six Hundred Fifty Thousand and 00/100 Dollars ($1,650,000.00) ("Maximum Principal Indebtedness"), and for other valuable consideration, the receipt of which is acknowledged, hereby mortgages, grants and conveys to Lender, its successors and assigns, forever, the following described property located in the County of Greenville, State of South Carolina:

Address: 4.68 Acres South Buncombe Road, Greenville, South Carolina 29650
Legal Description: 1st Mortgage Exhibit A

Together with all easements, appurtenances abutting streets and alleys, improvements, buildings, fixtures, tenements, hereditaments, equipment, rents, income, profits and royalties, personal goods of whatever description and all other rights and privileges including all minerals, oil, gas, water (whether groundwater, subterranean or otherwise), water rights (whether riparian, appropriate or otherwise, and whether or not appurtenant to the above-described real property), wells, well permits, ditches, ditch rights, reservoirs, reservoir rights, reservoir sites, storage rights, dams and water stock that may now, or at any time in the future, be located on and/or used in connection with the above-described real property, payment awards, amounts received from eminent domain, amounts received from any and all insurance payments, and timber which may now or later be located, situated, or affixed on and used in connection therewith (hereinafter called the "Property").

RELATED DOCUMENTS. The words "Related Documents" mean all promissory notes, security agreements, prior mortgages, prior deeds of trust, business loan agreements, construction loan agreements, resolutions, guaranties, environmental agreements, subordination agreements, assignments of leases and rents and any other documents or agreements executed in connection with this Security Instrument whether now or hereafter existing. The Related Documents are hereby made a part of this Security Instrument by reference thereto, with the same force and effect as if fully set forth herein.

INDEBTEDNESS. This Security Instrument secures the principal amount shown above as may be evidenced by a promissory note or notes of even, prior or subsequent date hereto, including future advances and every other indebtedness of any and every kind now or hereafter owing from Mortgagor to Lender, howsoever created or arising, whether primary, secondary or contingent, together with any interest or charges provided in or arising out of such indebtedness, as well as the agreements and covenants of this Security Instrument and all Related Documents (hereinafter all referred to as the "Indebtedness").

© 2004-2006 Copyright Compliance Systems, Inc. 340A-1A47 - 2006.11.182
Commercial Real Estate Security Instrument - DL4007

www.complianceSystems.com
800-968-4522 - Fax 616-956-1868

EXHIBIT (C)

FUTURE ADVANCES. To the extent permitted by law, this Security Instrument will secure future advances as if such advances were made on the date of this Security Instrument regardless of the fact that from time to time there may be no balance due under the note and regardless of whether the Lender is obligated to make such future advances.

CROSS COLLATERALIZATION. It is the expressed intent of Mortgagor to cross collateralize all of its Indebtedness and obligations to the Lender, howsoever arising and whensoever incurred.

WARRANTIES. Mortgagor, for itself, its heirs, personal representatives, successors, and assigns, represents, warrants, covenants and agrees with Lender, its successors and assigns, as follows:

Performance of Obligations. Mortgagor promises to perform all terms, conditions, and covenants of this Security Instrument and Related Documents in accordance with the terms contained therein.

Defense and Title to Property. At the time of execution and delivery of this instrument, Mortgagor is lawfully seised of the estate hereby conveyed and has the exclusive right to mortgage, grant, convey and assign the Property. Mortgagor covenants that the Property is unencumbered and free of all liens, except for encumbrances of record acceptable to Lender. Further, Mortgagor covenants that Mortgagor will warrant and defend generally the title to the Property against any and all claims and demands whatsoever, subject to the easements, restrictions, or other encumbrances of record acceptable to Lender, as may be listed in the schedule of exceptions to coverage in any abstract of title or title insurance policy insuring Lender's interest in the Property.

Condition of Property. The Mortgagor promises at all times to preserve and to maintain the Property and every part thereof in good repair, working order, and condition and will from time to time, make all needful and proper repairs so that the value of the Property shall not in any way be impaired.

Removal of any Part of the Property. Mortgagor promises not to remove any part of the Property from its present location, except for replacement, maintenance and relocation in the ordinary course of business.

Alterations to the Property. Mortgagor promises to abstain from the commission of any waste on the Property. Further, Mortgagor shall make no material alterations, additions or improvements of any type whatever to the Property, regardless of whether such alterations, additionsior improvements would increase the value of the Property, nor permit anyone to do so except for tenant improvements and completion of items pursuant to approved plans and specifications, without Lender's prior written consent, which consent may be withheld by Lender in its sole discretion. Mortgagor will comply with all laws and regulations of all public authorities having jurisdiction over the premises relating to the use, occupancy and maintenance thereof and shall upon request promptly submit to Lender evidence of such compliance.

Due on Sale - Lender's Consent. Mortgagor shall not sell, further encumber or otherwise dispose of, except as herein provided, any or all of its interest in any part of or all of the Property without first obtaining the written consent of Lender. If any encumbrance, lien, transfer or sale or agreement for these is created, Lender may declare immediately due and payable, the entire balance of the Indebtedness.

Insurance. Mortgagor promises to keep the Property insured against such risks and in such form as may within the sole discretion of Lender be acceptable, causing Lender to be named as loss payee or if requested by Lender, as mortgagee. The insurance company shall be chosen by Mortgagor subject to Lender's approval, which shall not be unreasonably withheld. All insurance policies must provide that Lender will get a minimum of 10 days notice prior to cancellation. At Lender's discretion, Mortgagor may be required to produce receipts of paid premiums and renewal policies. If Mortgagor fails to obtain the required coverage, Lender may do so at Mortgagor's expense. Mortgagor hereby directs each and every insurer of the Property to make payment of loss to Lender with the proceeds to be applied, only at Lender's option, to the repair and replacement of the damage or loss or to be applied to the Indebtedness with the surplus, if any, to be paid by Lender to Mortgagor.

© 2004-2006 Copyright Compliance Systems, Inc. 340A-1A4F - 2006.11.182
Commercial Real Estate Security Instrument - DL4007

www.compliancesystems.com
800-968-8522 - Fax 616-956-1868

EXHIBIT (C)

Payment of Taxes and Other Applicable Charges. Mortgagor promises to pay and to discharge liens, encumbrances, taxes, assessments, lease payments and any other charges relating to the Property when levied or assessed against Mortgagor or the Property.

Environmental Laws and Hazardous or Toxic Materials. Mortgagor and every tenant have been, are presently and shall continue to be in strict compliance with any applicable local, state and federal environmental laws and regulations. Further, neither Mortgagor nor any tenant shall manufacture, store, handle, discharge or dispose of hazardous or toxic materials as may be defined by any state or federal law on the Property, except to the extent the existence of such materials has been presently disclosed in writing to Lender. Mortgagor will immediately notify Lender in writing of any assertion or claim made by any party as to the possible violation of applicable state and federal environmental laws including the location of any hazardous or toxic materials on or about the Property. Mortgagor indemnifies and holds Lender harmless from any liability or expense of whatsoever nature incurred directly or indirectly as a result of Mortgagor's violation of applicable local, state and federal environmental laws and regulations or Mortgagor's involvement with hazardous or toxic materials.

Financial Information. Mortgagor agrees to supply Lender such financial and other information concerning its affairs and the status of any of its assets as Lender, from time to time, may reasonably request. Mortgagor further agrees to permit Lender to verify accounts as well as to inspect, copy and to examine the books, records and files of Mortgagor.

Lender's Right to Enter. The Lender or Lender's agents shall have the right and access to inspect the Property at all reasonable times in order to attend to Lender's interests and ensure compliance with the terms of this Security Instrument. If the Property, or any part thereof, shall require inspection, repair or maintenance which the Mortgagor has failed to provide, the Lender, after reasonable notice, may enter upon the Property to effect such obligation; and the cost thereof shall be added to the Indebtedness and paid on the Lender's demand by the Mortgagor.

ASSIGNMENT OF LEASES AND RENTS. As additional security for the payment of the Indebtedness and the performance of the covenants contained herein, Mortgagor hereby assigns and transfers over to Lender all rents, income and profits ("Rents") under any present or future leases, subleases or licenses of the Property, including any guaranties, extensions, amendments or renewals thereof, from the use of the Property. So long as Mortgagor is not in default, Mortgagor may receive, collect and enjoy all Rents accruing from the Property, but not more than one month in advance of the due date. Lender may also require Mortgagor, tenant and any other user of the Property to make payments of Rents directly to Lender. However, by receiving any such payments, Lender is not, and shall not be considered, an agent for any party or entity. Any amounts collected may, at the Lender's sole discretion, be applied to protect the Lender's interest in the Property, including but not limited to the payment of taxes and insurance premiums and to the Indebtedness. At Lender's sole discretion, all leases, subleases and licenses must first be approved by Lender.

CONDEMNATION. Mortgagor shall give Lender notice of any action taken or threatened to be taken by private or public entities to appropriate the Property or any part thereof, through condemnation, eminent domain or any other action. Further, Lender shall be permitted to participate or intervene in any of the above described proceedings in any manner it shall at its sole discretion determine. Lender is hereby given full power, right and authority to receive and receipt for any and all damages awarded as a result of the full or partial taking or appropriation and in its sole discretion, to apply said awards to the Indebtedness, whether or not then due or otherwise in accordance with applicable law. Unless Lender otherwise agrees in writing, any application of proceeds to the Indebtedness shall not extend or postpone the due date of the payments due under the Indebtedness or change the amount of such payments.

MORTGAGOR'S ASSURANCES. At any time, upon a request of Lender, Mortgagor will execute and deliver to the Lender, and if appropriate, cause to be recorded, such further mortgages, assignments, assignments of leases and rents, security agreements, pledges, financing statements, or such other document as Lender may require, in

© 2004-2006 Copyright Compliance Systems, Inc. 3400-IA4F - 2006.11.182
Commercial Real Estate Security Instrument - DL4007

www.complianceone.com
800-968-8522 - Fax 616-956-1868

EXHIBIT (C)

Lender's sole discretion, to effectuate, complete and to perfect as well as to continue to preserve the Indebtedness, or the lien or security interest created by this Security Instrument.

ATTORNEY-IN-FACT. Mortgagor appoints Lender as attorney-in-fact on behalf of Mortgagor. If Mortgagor fails to fulfill any of Mortgagor's obligations under this Security Instrument or any Related Documents, including those obligations mentioned in the preceding paragraph, Lender as attorney-in-fact may fulfill the obligations without notice to Mortgagor. This power of attorney shall not be affected by the disability of the Mortgagor.

EVENTS OF DEFAULT. The following events shall constitute default under this Security Instrument (each an "Event of Default"):

(a) Failure to make required payments when due under Indebtedness;
(b) Failure to perform or keep any of the covenants of this Security Instrument or a default under any of the Related Documents;
(c) The making of any oral or written statement or assertion to the Lender that is false or misleading in any material respect by Mortgagor or any person obligated on the Indebtedness;
(d) The death, dissolution, insolvency, bankruptcy or receivership proceeding of Mortgagor or of any person or entity obligated on the Indebtedness;
(e) Any assignment by the Mortgagor for the benefit of the Mortgagor's creditors;
(f) A material adverse change occurs in the financial condition, ownership or management of Mortgagor or any person obligated on the Indebtedness; or
(g) The Lender deems itself insecure for any reason whatsoever.

REMEDIES ON DEFAULT. Upon the occurrence of an Event of Default, Lender may, without demand or notice, pay any or all taxes, assessments, premiums, and liens required to be paid by Mortgagor, effect any insurance provided for herein, make such repairs, cause the abstracts of title or title insurance policy and tax histories of the Property to be certified to date, or procure new abstracts of title or title insurance and tax histories in case none were furnished to it, and procure title reports covering the Property, including surveys. The amounts paid for any such purposes will be added to the Indebtedness and will bear interest at the rate of interest otherwise accruing on the Indebtedness until paid. In the event of foreclosure, the abstracts of title or title insurance shall become the property of the Lender. All abstracts of title, title insurance, tax histories, surveys, and other documents pertaining to the Indebtedness will remain in Lender's possession until the Indebtedness is paid in full.

IN THE EVENT OF THE SALE OF THIS PROPERTY UNDER THE PROCEDURE FOR FORECLOSURE OF A SECURITY INSTRUMENT BY ADVERTISEMENT, AS PROVIDED BY APPLICABLE LAW, OR IN THE EVENT THE LENDER EXERCISES ITS RIGHTS UNDER THE ASSIGNMENT OF LEASES AND RENTS, THE MORTGAGOR HEREBY WAIVES ANY RIGHT TO ANY NOTICE OTHER THAN THAT PROVIDED FOR SPECIFICALLY BY STATUTE, OR TO ANY JUDICIAL HEARING PRIOR TO SUCH SALE OR OTHER EXERCISE OF RIGHTS.

Upon the occurrence of an Event of Default, Lender may, without notice unless required by law, and at its option, declare the entire Indebtedness due and payable, as it may elect, regardless of the date or dates of maturity thereof and, if permitted by state law, is authorized and empowered to sell or to cause the Property to be sold at public auction, and to execute and deliver to the purchaser or purchasers at such sale any deeds of conveyance good and sufficient at law, pursuant to the statute in such case made and provided, and out of the proceeds of the sale to retain the sums then due hereunder and all costs and charges of the sale, including attorneys' fees, rendering any surplus to the party or parties entitled to it. Any such sale or a sale made pursuant to a judgment or a decree for the foreclosure hereof may, at the option of Lender, be made en masse. The commencement of proceedings to foreclose this Mortgage in any manner authorized by law shall be deemed as exercise of the above option.

Upon the occurrence of an Event of Default, Lender shall immediately be entitled to make application for and obtain the appointment of a receiver for the Property and of the earnings, income, issue and profits of it, with the powers as the court making the appointments confers. Mortgagor hereby irrevocably consents to such appointment and waives notice of any application therefor.

© 2004-2006 Copyright Compliance Systems, Inc. 340A-1A4P - 2006.11.182
Commercial Real Estate Security Instrument - DL4007

www.complianceatlanta.com
800-968-8722 - Fax 676-956-1801

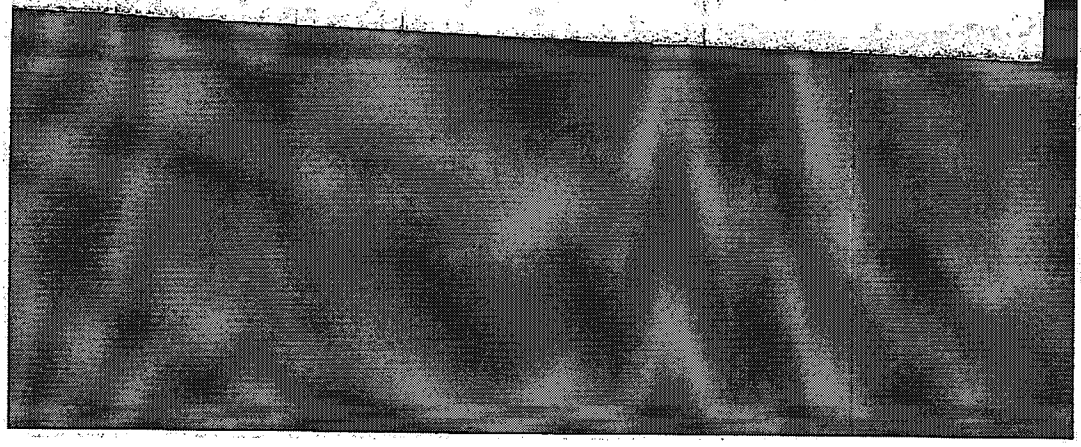


EXHIBIT (C)

NO WAIVER. No delay or failure of Lender to exercise any right, remedy, power or privilege hereunder shall affect that right, remedy, power or privilege nor shall any single or partial exercise thereof preclude the exercise of any right, remedy, power or privilege. No Lender delay or failure to demand strict adherence to the terms of this Security Instrument shall be deemed to constitute a course of conduct inconsistent with Lender's right at any time, before or after an event of default, to demand strict adherence to the terms of this Security Instrument and the Related Documents.

JOINT AND SEVERAL LIABILITY. If this Security Instrument should be signed by more than one person, all persons executing this Security Instrument agree that they shall be jointly and severally bound, where permitted by law.

SURVIVAL. The Lender's rights in this Security Instrument will continue in its successors and assigns. This Security Instrument is binding on all heirs, executors, administrators, assigns and successors of the Mortgagor.

NOTICES AND WAIVER OF NOTICE. Unless otherwise required by applicable law, any notice or demand given by Lender to any party is considered effective when it is deposited in the United States Mail with the appropriate postage, mailed to the address of the party given at the beginning of this Security Instrument unless an alternative address has been provided to Lender in writing. To the extent permitted by law, Mortgagor waives notice of Lender's acceptance of this Security Instrument, defenses based on suretyship, any defense arising from any election by Lender under the United States Bankruptcy Code, Uniform Commercial Code, as enacted in the state where the Lender is located or other applicable law or in equity, demand, notice of acceleration, notice of nonpayment, presentment, protest, notice of dishonor and any other notice.

TO THE EXTENT PERMITTED BY LAW, MORTGAGOR WAIVES ANY RIGHT TO NOTICE, OTHER THAN THE NOTICE PROVIDED ABOVE, AND WAIVES ANY RIGHT TO ANY HEARING, JUDICIAL OR OTHERWISE, PRIOR TO THE LENDER EXERCISING ITS RIGHTS UNDER THIS SECURITY INSTRUMENT.

WAIVER OF APPRAISAL RIGHTS. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may, within 30 days after the sale of the mortgaged property, apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.

LENDER'S EXPENSES. Mortgagor agrees to pay all expenses incurred by Lender in connection with enforcement of its rights under the Indebtedness, this Security Instrument or in the event Lender is made party to any litigation because of the existence of the Indebtedness or this Security Instrument, as well as court costs, collection charges and reasonable attorneys' fees and disbursements.

ASSIGNABILITY. Lender may assign or otherwise transfer this Security Instrument or any of Lender's rights under this Security Instrument without notice to Mortgagor. Mortgagor may not assign this Security Instrument or any part of the Security Instrument without the express written consent of Lender.

GOVERNING LAW AND JURISDICTION. This Security Instrument will be governed by the laws of the State of South Carolina.

SEVERABILITY. If a court of competent jurisdiction determines any term or provision of this Security Instrument is invalid or prohibited by applicable law, that term or provision will be ineffective to the extent required. Any term or provision that has been determined to be invalid or prohibited will be severed from the rest of the Security Instrument without invalidating the remainder of either the affected provision or this Security Instrument.

© 2004-2006 Copyright Compliance Systems, Inc. 340A-1A4F - 2006.1L782
Commercial Real Estate Security Instrument - DL4007

www.complianceSystems.com
800-968-8522 - Fax 616-956-1308

EXHIBIT (C)

WAIVER OF JURY TRIAL. All parties to this Mortgage waive any right to trial by jury to the extent allowed by law. This jury trial waiver applies to any claims or disputes related or incidental to the relationship established between the parties to this Mortgage.

ORAL AGREEMENTS DISCLAIMER. This Security Instrument 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.

By signing this Security Instrument, each Mortgagor acknowledges that all provisions have been read and understood. Signed, sealed and delivered by Mortgagor (s):

Buncombe Professional Park LLC

By: David DeCarlis 9/25/07
Its: Member Date

"Probate: State of South Carolina, County of Greenville, personally appeared before me the undersigned witness, who being duly sworn, deposed and said that (s)he saw the Mortgagor (and each Mortgagor if more than one) sign, seal and deliver the foregoing Mortgage and that (s)he, together with the other witness whose name appears as a witness, witnessed the execution thereof. Sworn to and subscribed before me this 9/25/2007."

Witnessed by:

Name: THOMAS F. DUCAS 9/25/07 Date

Name: JULIE G. SHEALY 9/25/07 Date

BUSINESS ACKNOWLEDGMENT

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

This instrument was acknowledged on the [redacted] 2007, by David DeCarlis, Member on behalf of Buncombe Professional Park LLC, a South Carolina Limited Liability Company, who personally appeared before me.

In witness whereof, I hereunto set my hand and official seal.

My commission expires: [redacted] 10/15/16

(Official Seal)

© 2004-2006 Compliance Systems, Inc. 340A-1A4F - 2006.11.182
Commercial Real Estate Security Instrument - DL4007

www.complianceservices.com
800-968-8532 - Fax 616-956-1863

EXHIBIT (C)

THIS INSTRUMENT PREPARED BY:
Independence National Bank
500 E. Washington St.
Greenville, SC 29601

AFTER RECORDING RETURN TO:
Independence National Bank
500 E. Washington St.
Greenville, SC 29601

© 2004-2006 Copyright Compliance Systems, Inc. 3404-1447 - 2006.11.192
Commercial Real Estate Security Instrument - DL4007

www.complianceSystems.com
800-968-8522 • Fax 616-956-1868

EXHIBIT (C)

EXHIBIT "A"

All that certain piece, parcel or lot of land, lying and being in the State of South Carolina, County of Greenville, containing 18.56 acres, more or less, as shown on a survey prepared for Tabour Properties by Ray Dunn Land Surveyor, dated April 28, 2005 and recorded in the ROD Office for Greenville County in Plat Book 50-A at Page 13. Reference is hereby made to said survey for a more complete and accurate metes and bounds description thereof.

Less however:

All that certain piece, parcel or tract of land located, lying and being in the State of South Carolina, County of Greenville, containing 13.496 acres, more or less, being shown and designated as "Multi-Family Tract" on plat entitled "Summary Plat-Buncombe Professional Park", dated March 12, 2007, prepared by 3D Land Surveying, Inc., recorded in the Office of the Register of Deeds for Greenville County in Plat Book 1035 at Page 83, reference to which is hereby made for the metes and bounds thereof. See deed recorded in Book 2278 at Page 182.

This being a portion of the property conveyed unto Buncombe Professional Park, LLC by deed of Double C. Inc., dated June 13, 2005, recorded in the Office of the Register of Deeds for Greenville County, SC on June 15, 2005 in Deed Book 2149 at Page 1728.

FILED FOR RECORD IN GREENVILLE COUNTY,SC ROD
2007096172 Book:RD 4855 Page:978-985
September 26, 2007 10:01:08 AM

Timothy L Manning

EXHIBIT (C)

COMMERCIAL LOAN GUARANTY

Independence National Bank
500 E. Washington St.
Greenville, South Carolina 29601
(864)672-1776

LOAN NUMBER	GUARANTY DATE	
17447	September 25, 2007	

GUARANTOR INFORMATION

David DeCarlis
216 Cleveland Street
Greenville, SC 29601

Type of Entity: Individual
State of Residence: South Carolina

BORROWER INFORMATION

Buncombe Professional Park LLC
216 Cleveland Street
Greenville, SC 29601

Type of Business Entity: Limited Liability Company
State of Organization/Formation: South Carolina

NOTICE TO GUARANTOR. Each undersigned Guarantor is being asked to guarantee all of Borrower's past, present and future obligations. If Borrower does not pay, any Guarantor may be required to do so. In addition, any Guarantor may be required to pay collection expenses and costs. Lender can require any Guarantor to pay without first attempting to collect from the Borrower or any other Guarantor.

UNLIMITED CONTINUING GUARANTY. The undersigned, jointly and severally hereafter called the "Guarantor" in order to induce Lender to extend or continue to extend financial accommodations to Borrower, hereby guarantees to Lender the full and prompt payment of all loans, drafts, overdrafts, notes, bills, and all other debts, obligations, and liabilities of every kind and description, whether now owing or hereafter arising out of credit previously, contemporaneously, or hereafter granted by Lender to Borrower, whether arising from dealings between Lender and Borrower, or from dealings by which Lender may become, in any manner whatever, a creditor of Borrower. The Guarantor also agrees to pay all interest, fees, charges, attorney fees, and collection costs.

This Guaranty is unconditional and absolute. It is understood that this Guaranty shall cover all obligations of Borrower to Lender. This shall be a continuing guaranty and shall not be affected by any payment made by Borrower to Lender, whether in the form of cash, property, renewal, or other consideration.

This is a guaranty of payment and not of collection.

JOINT AND SEVERAL LIABILITY. If this Guaranty is signed by more than one person, each person having executed the Guaranty acknowledges that his or her obligation hereunder shall be joint and several. Each Guarantor expressly authorizes the Lender to proceed, in its sole and absolute discretion, against each or any Guarantor, and further agrees that if the Lender proceeds against any one of them, the others waive any defense of election of remedies and agree to continue to be liable under the terms of this Guaranty for any amount remaining owing to Lender from Borrower.

CONSENT. The Guarantor consents to all extensions, renewals, and modifications made by the Lender for, or on account of, any indebtedness of Borrower to Lender. Lender may proceed directly against Guarantor in the event of any default by Borrower without resorting to any other persons, to the assets of Borrower, to any collateral security granted by Borrower to Lender, or the liquidation of any collateral security given hereunder to secure this Guaranty.

GENERAL WAIVERS. Guarantor hereby waives notice of acceptance of this Guaranty, all notices hereunder, and all notices of demand, presentment, notice of dishonor, intention to accelerate, acceleration, notice of any adverse information which Lender may have, and all notices of protest, default, and nonpayment. Guarantor waives all defenses of suretyship. Guarantor waives any defense that could be asserted by Borrower, including defenses arising out of failure of consideration, breach of warranty, fraud, payment, statute of frauds, bankruptcy, lack of capacity, statute of limitations, lender liability, accord and satisfaction, or usury.

SURVIVAL. This Guaranty shall be binding upon Guarantor, Guarantor's heirs, successors, and estate representatives, until all such indebtedness shall be fully paid to Lender.

EXERCISE OF LENDER'S RIGHTS. Any delay or failure of the Lender in exercising any of its rights under this Guaranty does not operate as a waiver of the Lender's ability to exercise all of its rights. The Lender may choose to partially exercise rights under this Guaranty, but that does not prevent the Lender from fully exercising these rights.

ASSIGNABILITY. This Guaranty shall inure to the benefit of the Lender and its successors and assigns, including every holder of any of the indebtedness here guaranteed. In the event that any person other than the Lender shall become a holder of any of the indebtedness, the reference to the Lender shall be construed to refer to each such holder.

RIGHT OF SETOFF. To the extent permitted by law, Guarantor gives Lender the right to setoff any of Guarantor's money or property which may be in Lender's possession against any amount owed under this Guaranty. This right of setoff does not extend to any Keogh account, IRA, or

© 2004-2006 Copyright Compliance Systems, Inc. DA2D-7D2F - 2006.09.76
Commercial Loan Guaranty - DL4011

www.compliancesystems.com
800-968-8522 - Fax 816-956-1868

EXHIBIT (D)

x deferred deposit. Further, the Lender shall have available all remedies under applicable state and federal laws, including the ment of wages, to the extent permitted by law.

IVER OF JURY TRIAL. All parties to this Guaranty knowingly and voluntarily waive, to the fullest extent permitted by law, all ights to trial by jury with respect to any dispute, whether in contract, tort, or otherwise, between Guarantor and Lender arising out of, in connection with, related to, or incidental to the relationship established in connection with this Guaranty or made pursuant to any other note or other instrument, document, or agreement executed or delivered by Borrower or Guarantor in connection with this Guaranty or the related transactions.

SEVERABILITY. If a court of competent jurisdiction determines any term or provision of this Guaranty is invalid or prohibited by applicable law, that term or provision will be ineffective, but only to the extent required to make it lawful. Any term or provision that has been determined to be invalid or prohibited will be severed from the rest of this Guaranty without invalidating the remainder of the provisions of this Guaranty.

GOVERNING LAW. This Guaranty will be governed by and construed in accordance with the laws of the state of South Carolina except to the extent that federal law controls.

HEADINGS AND GENDER. The headings in this Guaranty are for convenience in identifying subject matter. The headings have no limiting effect on the text that follows any particular heading. All words used in this Guaranty are read to be of whatever gender or number is appropriate under the circumstances.

ORAL AGREEMENTS DISCLAIMER. This 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.

ACKNOWLEDGMENT. This Guaranty is freely and voluntarily given to the Lender by Guarantor, without duress or coercion, and after Guarantor has either consulted with legal counsel or has been given an opportunity to do so, and Guarantor has fully and carefully read and understands all of the terms and provisions of the Guaranty.

By signing this Guaranty, Guarantor acknowledges reading, understanding, and agreeing to all its provisions.

D. DeCarlis 9/25/07

David DeCarlis
Individually

Date

© 2004-2006 Copyright Compliance Systems, Inc. DA2D-7D2F - 2006.09.76
Commercial Loan Guaranty - DL4011

www.compliancesystems.com
800-968-8522 - Fax 616-956-1864

EXHIBIT (D)

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS Case No.: 2010-CP-23-3860
INDEPENDENCE NATIONAL BANK Plaintiff, vs. BUNCOMBE PROFESSIONAL PARK, LLC; AND DAVID DECARLIS, S/A DAVID D. DECARLIS Defendants,	)	**ANSWER and COUNTERCLAIM** **(JURY TRIAL DEMANDED)**

FILED
2010 JAN 18 AM 9:48

TO: S. GRAY WALSH, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

ANSWER

The Defendants responding to the allegations in the Plaintiffs Complaint, respectfully allege unto this Honorable Court as follows:

1. Each and every allegation of the Complaint which is not admitted, qualified, or explained is denied and strict proof demanded thereof.

FOR A FIRST DEFENSE

2. Defendants admit upon information the allegations of paragraph 1.

3. In response to the allegations in Paragraph 2, Defendants crave reference to said documents mentioned and deny any allegations inconsistent with the terms and records contained therein. Defendants further affirmatively state that the documents mentioned therein have no relevance to the subject matter based on the doctrine of merger.

4. In response to the allegations in Paragraph 3, Defendants crave reference to said documents mentioned and deny any allegations inconsistent with the terms and records contained therein.

5. Defendants deny the allegations of Paragraph 4 and demand strict proof thereof.

6. In response to the allegations in Paragraphs 5, 6, 7, and 8 Defendants crave reference to said documents mentioned and the public records of Greenville County, South Carolina and deny any allegations inconsistent with the terms and records contained therein.

7. Defendants deny the allegations of Paragraph 9 and therefore demand strict Proof thereof. Defendants further affirmatively state Plaintiff does not hold a first priority lien which it is aware of thereby making this allegation completely improper.

8. The allegations of Paragraphs 10, 11 and 12 constitute legal conclusions of law which Defendants are required neither to admit nor deny.

9. Defendants deny the allegations of Paragraph 13 and therefore demand strict Proof thereof. Defendants further affirmatively state Plaintiff does not hold a first priority lien which it is aware of thereby making this allegation completely improper and that Defendant DeCarlis's lien is superior to any lien interest of Plaintiff.

10. The allegations of Paragraph 14 constitute legal conclusions of law which Defendants are required neither to admit nor deny.

FOR AND AS A SECOND DEFENSE

11. Further answering said Complaint, and as and for a further defense thereto, Defendants would allege and show that Plaintiff has failed to set forth a sufficient cause of action and, therefore, the Complaint should be dismissed.

FOR AND AS A THIRD DEFENSE

12. Further answering said Complaint, and as and for a further defense thereto,

Defendants would allege and show that Plaintiff breached the terms of the subject contract and failed to act in good faith and fair dealing and, therefore, the Complaint should be dismissed.

FOR AND AS A FOURTH DEFENSE

13. Further answering the Complaint, and as and for a further defense thereto, Defendants allege that the Plaintiff has failed to mitigate its damages, if any, as required by law.

FOR AND AS A FIFTH DEFENSE

14. Defendants specifically plead as an affirmative defense to the allegations of the Complaint, accord and satisfaction, comparative negligence, duress, fraud, illegality, laches, estoppel, no contract, statute of limitations, misrepresentation, mistake, payment, release, waiver, lack of consideration or any other matter constituting avoidance or affirmative defense which may arise and develop as discovery in this progresses.

FOR AND AS A SIXTH DEFENSE
(Unclean Hands)

15. That to the extent that Plaintiff was negligent, grossly negligent, willful, wanton and reckless, resulting in the damages allegedly sustained, Plaintiff comes to Court with unclean hands and such inequitable conduct on the part of Plaintiff constitutes a bar and complete defense to any claim for equitable relief in the form of indemnity.

FOR AND AS A SEVENTH DEFENSE
(Waiver)

16. Further answering said Complaint and for a further defense thereto, Defendant alleges claims are barred by the doctrines of waiver, laches and Estopel.

FOR AND AS A EIGHTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Breach of Contract)

17. The Defendants entered into a Note with Plaintiff for the purpose of developing certain real property.

18. With the economic downturn, in or around 2009 Defendant DeCarlis spoke with representatives of Plaintiff on several occasions to address restructuring the subject transaction.

19. Through discussions with Plaintiff's representatives Defendants were provided with terms under which the loan could be restructured.

20. Defendants relied on Plaintiff's representative's representations.

21. Plaintiff has failed to conduct itself in accordance with the agreement reached between the parties by in part but not limited to, initiating the within action prematurely, and failing to restructure the transaction as agreed.

22. The acts and omissions of the Plaintiff described herein are the direct and proximate cause of injuries and damages to the Defendants in an amount to be proven at trial, including but not limited to actual damages, lost profits, lost value, interest, attorney fees, and costs of this action.

23. The Defendants are informed and believe that they entitled to a judgment against the Plaintiff, for actual, consequential, and punitive damages in amounts to be proven at trial, together with interest, attorney fees, and costs.

FOR AND AS A NINTH DEFENSE AND BY WAY OF COUNTERCLAIM

(Promissory Estoppel)

24. Further answering the complaint herein and as a ninth defense thereto and by way of counterclaim, the Defendants reiterate all of the allegations contained above as fully as if repeated herein.

25. Plaintiff by and through its representative promised a number of things, including but not limited to restructuring the transaction and forebear from taking any action for a period of time.

26. Defendants reasonably relied on the promise made by Plaintiff.

27. Plaintiff knew or should have known and expected or it is foreseeable that Defendants would rely on the promise made by Plaintiff.

28. As a direct consequence and proximate result of Defendants' reasonable reliance on Plaintiff's failed promise the Defendants have suffered actual injury.

29. Based on the foregoing, Defendants are entitled to a judgment against the Plaintiff for actual, consequential, and punitive damages in an amount to be determined by the trier of fact.

FOR AND AS A TENTH DEFENSE AND BY WAY OF COUNTERCLAIM

(Breach Duty of Good Faith and Fair Dealing)

30. Further answering the complaint herein and as a tenth defense thereto and by way of counterclaim, the Defendants reiterate all of the allegations contained above as fully as if repeated herein.

31. That every contract imposes on the parties a duty of good faith and fair dealing.

32. Plaintiff has breach its duty of good faith and fair dealing by the acts described above.

33. The Plaintiff 's acts and omissions operate as a breach of the contract with the Defendants and obligations created by the activities of the Plaintiff.

34. The Plaintiff's actions and omissions amount to control over Defendants' property by design of Plaintiff.

35. The acts and omissions of the Plaintiff described herein are the direct and proximate cause of injuries and damages to the Defendants in an amount to be proven at trial, including but not limited to actual damages, lost value, interest, attorney fees, and costs of this

action.

36. The Defendants are informed and believe that it is entitled to a judgment against the Plaintiff for actual, consequential, and punitive damages in amounts to be proven at trial, together with interest, attorney fees, and costs.

FOR AND AS A ELEVENTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Negligent Misrepresentation)

37 Further answering the complaint herein and as a eleventh defense thereto and by way of counterclaim, the Defendants reiterate all of the allegations contained above as fully as if repeated herein.

38. Upon information and belief, the Plaintiff made false statements and misrepresentations to the Defendants regarding the terms of the contract and the circumstances surrounding it.

39. Upon information and belief, the Plaintiff owed the Defendants a duty of care to see that the representations made regarding the circumstances surrounding the transaction and the forbearance agreement were accurate.

40. The Defendants reasonably relied on the Plaintiff's actions and inactions and representations and silence.

41. The Plaintiff knew or should have known that the Defendants' would rely on it's representations.

42. The Defendants had a right to rely upon the Plaintiff's representations.

43. The Plaintiff breached its duty of due care to the Defendants, in part but not limited to, in failing to abide by the terms of the restructure agreement, forbearance agreement, initiation of this action prematurely, and failure to provided a reinstatement figure.

44. As a direct consequence and proximate result of the Defendants' reasonable reliance on the Plaintiff's false, material misrepresentations, the Defendants have sustained damages.

45. Based on the foregoing, the Defendants are entitled to a judgment against the Plaintiff for actual, consequential, and punitive damages in an amount to be determined by the trier of fact.

FOR AND AS A TWELVETH DEFENSE AND BY WAY OF COUNTERCLAIM
(Unjust Enrichment)

46. Further answering the complaint herein and as a twelveth defense thereto and by way of counterclaim, the Defendants reiterate all of the allegations contained above as fully as if repeated herein.

47. The Defendants in good faith negotiated a modification/restructure agreement with Plaintiff.

48. The Plaintiff failed and refused to abide by the terms of the restructure agreement in order to gain advantage over Defendants.

49. Upon information and belief, the Plaintiff has acted in a manner above stated improving its position as a means of profiting at the detriment of Defendants.

50. The Plaintiff, by virtue of their actions heretofore stated, breached the terms of the agreements with the Defendant.

51. The Defendants have suffered damages as a result of the Plaintiff's breach.

52. If Plaintiff will be unjustly enriched if by its failure to abide by the terms of the agreement.

53. Based upon the foregoing, the Defendants believe that they are entitled to a

judgment against the Plaintiff for damages in an amount to be determined by a trier of fact plus pre-judgment interest.

FOR AND AS A THIRTEENTH DEFENSE AND BYWAY OF A COUNTERCLAIM (Declaratory Judgment)

54. Further answering the complaint herein and as a thirteenth defense thereto and by way of counterclaim, the Defendants reiterate all of the allegations contained above as fully as if repeated herein.

55. This cause of action is brought pursuant to South Carolina statutory and common law including S.C. Code Ann. §§15-53-20, 30, 40 (1976, as amended), and pursuant to Rule 57, South Carolina Rules of Civil Procedure.

56. The Plaintiff claims to have a superior lien interest to Defendant DeCarlis but is aware that DeCaris has a lien filed of record that predates any lien interest claimed by Plaintiff.

57. Accordingly, the Defendants respectfully requests this Court for declaratory relief in the form of an Order and Judgment declaring: (1) Plaintiff's lien interest is junior and subordinate to Defendant DeCarlis' lien interest.

JURY TRIAL DEMANDED.

WHEREFORE, having fully answered the Complaint of the Plaintiff herein, Defendants pray the same be dismissed with cost, actual and punitive damages, attorneys fees and costs, prejudgment interest and that the Court protect their interest in the subject property and for such other and further relief as the court may deem just and proper.

RESPECTFULLY SUBMITTED:

MARY LEIGH ARNOLD, P.A.

Mary Leigh Arnold, Esquire
749 Johnnie Dodds Blvd, Suite B
Mt. Pleasant, South Carolina 29465
(843) 971-6053
(843) 971-6055
Sammie@maryarnoldlaw.com
Attorney for Defendants

Mt. Pleasant, SC
Dated: 6-14-10

CERTIFICATE OF SERVICE

I certify that on this 14th day of June, 2010, a copy of the within Answer and Counterclaim of Defendants was placed in the United States Mail postage pre-paid, addressed to opposing counsel as follows:

S. Gary Walsh, Esquire
Love, Thornton, Arnold, & Thomason, P.A.
410 East Washington Street (29601)
Post Office Box 10045
Greenville, SC 29603

MARY LEIGH ARNOLD, P.A.
Belinda Carlin, Paralegal

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. No.: 2010-CP-23-3860
	)	
Independence National Bank,	)	
	)	
Plaintiff,	)	**REPLY**
vs.	)	
	)	
Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. DeCarlis,	)	
	)	
Defendants.	)	

COMES NOW the Plaintiff above named and replies to the Counterclaim of the Defendants as follows:

FOR A FIRST DEFENSE
(General Denial)

1. The Plaintiff would deny each and every allegation contained in the Answer and Counterclaim (hereinafter "Counterclaim") not otherwise admitted, modified, or otherwise answered.

2. Paragraphs 1 through 16 do not require a response from the Plaintiff. To the extent that a response is required, Plaintiff denies the allegation contained in the Counterclaim.

3. As to the allegations of Paragraph 17, the Plaintiff admits the allegations of Paragraph 17 to the extent that said allegations are consistent with the allegations contained in the Plaintiff's Complaint. The Plaintiff denies the remaining allegations of Paragraph 17.

4. As to the allegations of Paragraph 18, the Plaintiff would admit that it, through its representatives, communicated with the Defendants concerning the loan that

is the subject of this action. The Plaintiff denies the remaining allegations of Paragraph 18.

5. The Plaintiff denies the allegations of Paragraph 19.

6. The Plaintiff denies the allegations of Paragraph 20.

7. The Plaintiff denies the allegations of Paragraph 21.

8. The Plaintiff denies the allegations of Paragraph 22.

9. The Plaintiff denies the allegations of Paragraph 23.

10. Paragraph 24 does not require a response from the Plaintiff. To the extent that a response is required, the Plaintiff denies the allegations of Paragraph 24.

11. The Plaintiff denies the allegations of Paragraph 25.

12. The Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the matters asserted in Paragraph 26 and therefore denies the same.

13. The Plaintiff denies the allegations of Paragraph 27.

14. The Plaintiff denies the allegations of Paragraph 28.

15. The Plaintiff denies the allegations of Paragraph 29.

16. Paragraph 30 does not require a response from the Plaintiff. To the extent that response is required, Plaintiff denies the allegations of Paragraph 30.

17. Paragraph 31 is a legal conclusion to which no response is required. To the extent that a response is required, Plaintiff denies the allegations of Paragraph 31.

18. The Plaintiff denies the allegations of Paragraph 32.

19. The Plaintiff denies the allegations of Paragraph 33.

20. The Plaintiff denies the allegations of Paragraph 34.

21. The Plaintiff denies the allegations of Paragraph 35.

22. The Plaintiff denies the allegations of Paragraph 36.

23. Paragraph 37 does not require a response from the Plaintiff. To the extent a response is required, the Plaintiff denies the allegations of Paragraph 37.

24. The Plaintiff denies the allegations of Paragraph 38.

25. The Plaintiff denies the allegations of Paragraph 39.

26. The Plaintiff denies the allegations of Paragraph 40.

27. The Plaintiff denies the allegations of Paragraph 41.

28. The Plaintiff denies the allegations of Paragraph 42.

29. The Plaintiff denies the allegations of Paragraph 43.

30. The Plaintiff denies the allegations of Paragraph 44.

31. The Plaintiff denies the allegations of Paragraph 45.

32. Paragraph 46 does not require a response from the Plaintiff. To the extent that a response is required, the Plaintiff denies the allegations of Paragraph 46.

33. The Plaintiff denies the allegations of Paragraph 47.

34. The Plaintiff denies the allegations of Paragraph 48.

35. The Plaintiff denies the allegations of Paragraph 49.

36. The Plaintiff denies the allegations of Paragraph 50.

37. The Plaintiff denies the allegations of Paragraph 51.

38. The Plaintiff denies the allegations of Paragraph 52.

39. The Plaintiff denies the allegations of Paragraph 53.

40. Paragraph 54 does not require a response from the Plaintiff. To the extent that a response is required the Plaintiff denies the allegations of Paragraph 54.

41. Paragraph 55 is a legal conclusion to which no response is required. To the extent that a response is required, the Plaintiff denies the allegations of Paragraph 55.

42. As to the allegations of Paragraph 56, the Plaintiff admits that it has a superior lien interest to Defendant DeCarlis. The Plaintiff further admits that DeCarlis has a lien that was filed prior to the mortgage filed by the Plaintiff. The Plaintiff denies the remaining allegations of Paragraph 56.

43. The Plaintiff denies the allegations of Paragraph 57.

FOR A SECOND DEFENSE
(Failure to State Facts Sufficient to Constitute a Cause of Action)

44. The Plaintiff incorporates and realleges each and every allegation contained in its foregoing defenses except such as are inconsistent herein.

45. Pursuant to Rule 12(b)(6), South Carolina Rules of Civil Procedure, the Plaintiff asserts that the Defendants have failed to state facts sufficient to constitute a cause of action under the laws of South Carolina and the United States of America.

46. Therefore, the Plaintiff would request that this Honorable Court dismiss the Counterclaim of the Defendants on this basis.

FOR A THIRD DEFENSE
(Statute of Frauds)

47. The Plaintiff incorporates and realleges each and every allegation contained in its foregoing defenses except such as are inconsistent herein.

48. The Defendants allege that the Plaintiff and the Defendants entered into an agreement to restructure the Defendants' loan, which was secured by an interest in real estate.

49. No written documents exist setting forth the terms of this alleged agreement.

50. No written documents executed by the Plaintiff or its representatives setting forth the terms of this alleged agreement exist.

51. The statute of frauds, as contained as South Carolina Code §32-3-10, bars any cause of action relating to or arising out of an agreement concerning an interest in real property unless the agreement is contained in writing and signed by the party to be charged therewith.

52. Furthermore, pursuant to South Carolina Code §37-10-107, no action for legal or equitable relief may be brought concerning repayment of money in a commercial setting unless that agreement is in writing and is signed by the party to be charged therewith.

53. Any alleged agreement as asserted by the Defendants is not in writing and therefore not enforceable pursuant to the statute of frauds as contained in South Carolina Code §§32-3-10 and 37-10-107.

54. Therefore, the counterclaims of the Defendants should be dismissed.

FOR A FOURTH DEFENSE
(Unclean Hands)

55. The Plaintiff incorporates and reallege each and every allegation contained in its foregoing defenses except such as are inconsistent herein.

56. The Defendants have acted inequitably in regard to the matters complained of, and that conduct has caused prejudice and injury to the Plaintiff.

57. The Plaintiff pleads the equitable doctrine of unclean hands as a bar to any recovery by the Defendants.

FOR A FIFTH DEFENSE
(Failure to Mitigate)

58. The Plaintiff incorporates and reallege each and every allegation contained in its foregoing defenses except such as are inconsistent herein.

59. The Plaintiff alleges that the Defendants have failed to mitigate their damages in the manner provided for by law. Such failure to mitigate is thus pled as a complete defense and bar to their claim.

60. The Plaintiff requests that the Court dismiss the Defendants' prayer for damages in its entirety or, in the alternative and in the event that it is determined that the Defendants are entitled to a judgment against the Plaintiff, that said judgment be reduced by an appropriate amount for the Defendants' failure to mitigate their damages.

WHEREFORE, having fully answered, the Plaintiff would pray as follows:

1. That the Court grant the relief sought in its Complaint;
2. That the Court dismiss the Defendants' counterclaims against it.
3. For the costs and fees of this action, and
4. For such other legal and equitable relief that the Court deems just and proper.

Respectfully submitted,
LOVE, THORNTON, ARNOLD & THOMASON, P.A.

S. Gray Walsh SC Bar No. 5811
M. Kyle Thompson SC Bar No. 68283
P.O. Box 10045
Greenville, SC 29603
(864) 242-6360
(864) 271-7972 facsimile
Attorneys for the Plaintiff

Dated: 7/12/10
Greenville, South Carolina

FILED-CLERK OF COURT
GREENVILLE CO.
PAUL D. WORTH
2011 APR -7 A 8:43

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	C.A. No.: 2010-CP-23-3860
	)	
Independence National Bank	)	
	)	
Plaintiff,	)	AMENDED COMPLAINT
	)	
-vs-	)	
	)	Deficiency Requested as to:
Buncombe Professional Park, LLC, and David DeCarlis, s/a David D. DeCarlis	)	Buncombe Professional Park, LLC and David DeCarlis, s/a David D. DeCarlis
	)	
Defendants.	)	

NON-ELIGIBLE UNDER THE HOME AFFORDABLE MODIFICATION PROGRAM

The Plaintiff, complaining of the above-named Defendants, would respectfully show unto the Court:

I.

The Plaintiff is a banking corporation organized and existing under the laws of the United States of America and the State of South Carolina and doing business in the County of Greenville, State of South Carolina. This is an action to foreclose a mortgage covering real estate situated in the County of Greenville, State of South Carolina, and this Court therefore has jurisdiction of this action.

II.

Heretofore, Buncombe Professional Park, LLC (hereinafter sometimes referred to as "Borrower" or "Maker"), through its member, David DeCarlis, s/a David D. DeCarlis (hereinafter sometimes referred to as "Guarantor") applied for a commercial first mortgage loan from Independence National Bank (hereinafter sometimes referred to as "Lender") in the original principal sum of $1,650,000.00, which funds were to be used for the refinancing of an existing first mortgage loan with First National Bank of Spartanburg and the establishment of an interest

reserve fund to initially service the loan of Plaintiff. By loan commitment letter dated September 11, 2007 and signed by Borrower and Guarantor, Borrower and Guarantor both agreed to the terms of the loan from Plaintiff as set forth therein. A copy of said loan commitment letter is attached hereto, marked "**Exhibit A**" and incorporated herein by reference, the same as if fully set forth in this Complaint.

III.

For value received, Buncombe Professional Park, LLC executed and delivered its Commercial Promissory Note dated September 25, 2007 to Independence National Bank, containing a promise to pay Independence National Bank the principal sum of One Million, Six Hundred and Fifty Thousand Dollars, together with interest thereon upon such terms as are contained in said Note. On April 1, 2009, Defendant Buncombe Professional Park, LLC, by its member, David D. DeCarlis, executed and delivered to Plaintiff a Change In Terms Agreement to said Note. Copies of said Note and Agreement are attached hereto, marked "**Exhibit B**", and incorporated herein by reference, the same as if fully set forth in this Complaint.

IV.

At the time of closing (September 25, 2005) funds from the loan of Plaintiff were advanced on behalf of the Borrower to (i) satisfy in full the outstanding first mortgage loan of First National Bank of Spartanburg, (ii) pay the loan closing costs, and (iii) establish the interest reserve fund as set forth in the aforementioned loan commitment letter.

V.

In order to secure the payment of said Note, Buncombe Professional Park, LLC executed and delivered to Independence National Bank a mortgage of even date and identical amount, whereby there was conveyed unto Independence National Bank, by way of said mortgage, the property described as follows:

ALL that certain piece, parcel or lot of land, lying and being situate in the State of South Carolina, County of Greenville, containing 18.56 acres, more or less, as shown on a survey prepared for Tabour Properties by Ray Dunn Land Surveyor, dated April 28, 2005 and recorded in the ROD Office for Greenville County in Platt Book 50-A at Page 13. Reference is hereby made to said survey for a more complete and accurate metes and bounds description thereof.

LESS HOWEVER: ALL that certain piece, parcel or tract of land located, lying and being situate in the State of South Carolina, County of Greenville, containing 13.496 acres, more or less, being shown and designated as "Multi-Family Tract" on plat entitled "Summary Plat-Buncombe Professional Park," dated March 12, 2007, prepared by 3D Land Surveying, Inc., recorded in the Office of the Register of Deeds for Greenville County in Plat Book 1035 at Page 83, reference to which is hereby made for the metes and bounds thereof. See deed recorded in Book 2278 at Page 182.

VI.

Said mortgage was recorded in the Register of Deeds Office for Greenville County in Mortgage Book 4855 at page 978 on September 26, 2007. A copy of the aforementioned mortgage is attached to and made part of this Complaint as "**Exhibit C**" and incorporated herein by reference, the same as if fully set forth in this Complaint.

VII.

The terms of said note, and the mortgage securing same, provided, among other things, that on failure to pay, when due, any installment of either principal or interest, or any portion thereof, or if any of the conditions and requirements in said documents not be complied with, then the whole principal sum and accrued interest shall, at the option of the legal holder thereof, become immediately due and payable and collectable by foreclosure. The Maker of said documents further agreed to pay a reasonable attorney's fee in the event said note should be collected or foreclosed by an attorney.

VIII.

In order to further induce Plaintiff to make the subject loan and secure the repayment of the indebtedness evidenced by said note, David DeCarlis, s/a David D. DeCarlis executed and delivered to Plaintiff his unconditional, absolute and continuing personal guaranty thereby guaranteeing to Plaintiff the full and prompt payment of all debts and liabilities arising out of said loan to Buncombe Professional Park, LLC, including all interest, fees, charges, attorney's fees, and collection costs. A copy of said guaranty is attached to and made a part of this Complaint as **"Exhibit D"** and incorporated herein by reference, the same as if fully set forth in this Complaint.

IX.

Plaintiff is the owner and holder of said note, mortgage, and guaranty and Defendant, Buncombe Professional Park, LLC, is the record owner of the subject property. Plaintiff's mortgage constitutes a first lien upon the subject property. The subject mortgage loan account is presently in default. Plaintiff, under the terms of the subject note and mortgage, has declared the entire outstanding indebtedness to be immediately due and payable. Although demand for payment has been made or given in accordance with said loan documents, the subject mortgage loan account remains in default. There is now due and owing on said note and mortgage the sum of One Million, Six Hundred and Seventy-Six Thousand, Seven Hundred and Thirty Three and 42/100 ($1,676,733.42) Dollars with interest from March 10, 2010 at the rate set out in the subject note, together with all costs and expenses of this action, and a reasonable attorney's fee, said note and mortgage having been placed in the hands of Love, Thornton, Arnold & Thomason, P.A., for collection.

X.

Plaintiff alleges that it is entitled to have its mortgage foreclosed, the premises sold, any equity of redemption barred and the proceeds applied toward the payment of its debts.

XI.

Plaintiff is informed, believes and alleges that it is entitled to a deficiency judgment against Defendants, Buncombe Professional Park, LLC and David DeCarlis, s/a David D. DeCarlis, for any deficiency owing after application of the proceeds from the sale of the mortgaged premises and does hereby ask for a personal or deficiency judgment in the event that the proceeds of sale or value of the property acquired by Plaintiff at sale are not adequate to satisfy the indebtedness due Plaintiff under the terms of the subject note and mortgage.

XII.

This summons and complaint is an attempt to collect the debt and any information obtained will be used for that purpose.

XIII.

The Defendant set out hereinafter has been joined as a party defendant by virtue of the fact that said Defendant claims or may claim a lien or other interest in the property which is the subject of this foreclosure action. Said lien or claim is subordinate to the lien of the Plaintiff:

David DeCarlis, s/a David D. DeCarlis, is also made a party to this proceeding by way of that certain Second Mortgage of Real Estate executed on May 18, 2006 by Buncombe Professional Park, LLC in favor of David DeCarlis in the original amount of $570,000.00, which mortgage was recorded on May 25, 2006 in Mortgage Book 4571 at Page 1071 in the Register of Deeds Office for Greenville County; however, Plaintiff is informed, believes, and alleges that (i) said mortgage has either been paid and satisfied in full or (ii) said mortgage is junior and secondary to the mortgage of Plaintiff because Buncombe Professional Park, LLC and David D. DeCarlis executed the aforementioned loan commitment letter and thereby induced Plaintiff to make the subject loan, and/or (iii) said mortgage is junior and secondary to the mortgage of Plaintiff by the theory of equitable subrogation.

XIV.

The mortgage loan which is the subject of this foreclosure proceeding is not owned or guaranteed by the Federal National Mortgage Association ("Fannie Mae") or the Federal Home Loan Mortgage Corporation ("Freddie Mac") or held by a servicer who has signed an agreement to participate in the Home Affordable Modification Program ("HMP"); that Independence National Bank has signed no agreement to participate in the Home Affordable Mortgage Program.

FOR A SECOND CAUSE OF ACTION
(Reformation)

XV.

The Plaintiff incorporates and realleges each and every allegation contained in its foregoing defenses except such as are inconsistent herein.

XVI.

As reflected in the commitment letter, both parties intended the mortgage loan from the Plaintiff to Buncombe Professional Park, LLC, to be a first mortgage on the property.

XVII.

The note and mortgage as executed at the loan closing failed to set forth, in accordance with the parties' wishes, that the mortgage from the Plaintiff to the Buncombe Professional Park, LLC, was to be a first mortgage on the premises, and other documents, such as a subordination, were not executed with regard to another mortgage on the same property.

XVIII.

The documents in question were prepared by the closing attorney, who was engaged by the Defendant but was working as a common agent for the purposes of the real estate closing.

XIX.

Because of the mistakes of this agent, the documents were not properly prepared to reflect the first priority position of the mortgage loan which is the subject of this proceeding.

XX.

The Plaintiff seeks, as a result of the mutual mistake of both parties through this common agent, the reformation of the loan closing documents, including the note and mortgage, to reflect that the subject loan was to be a first priority mortgage on the subject property.

WHEREFORE, Plaintiff prays:

(1) That Plaintiff's mortgage be declared a first lien on the subject property;

(2) That it have judgment against the mortgaged premises for the sum of One Million, Six Hundred and Seventy-Six Thousand, Seven Hundred and Thirty Three and 42/100 ($1,676,733.42) Dollars, with interest thereon from March 10, 2010, at the rate set forth in the subject note, together with a reasonable attorney's fee, necessary payment of taxes, insurance and/or advancements, and for the cost of this action.

(3) That the mortgaged premises be sold, any equity of redemption barred, the proceeds applied toward the payment of this judgment, and that Plaintiff be granted a deficiency judgment against Defendants Buncombe Professional Park, LLC and David DeCarlis, s/a David D. DeCarlis, for any deficiency remaining after the application of the proceeds of sale to the amount of judgment; and,

(4) For such other and further relief as the Court deems just and proper.

Respectfully Submitted,

LOVE, THORNTON, ARNOLD & THOMASON, P.A.

By: _____

S. Gray Walsh, SC ID#5811
M. Kyle Thompson, S.C. Bar No. 68283
Post Office Box 10045, F.S.
Greenville, South Carolina 29603
(864) 242-6360
(864) 271-7972 facsimile
kthompson@ltatlaw.com
Attorney for Plaintiff

Date: April 5, 2011
Greenville, South Carolina

INDEPENDENCE
NATIONAL BANK

September 11, 2007

David DeCarlis
Buncombe Professional Park, LLC
216 Cleveland Street
Greenville, SC 29601

Re: Loan Commitment to Buncombe Professional Park, LLC

Dear David:

Independence National Bank (hereafter "Independence" or "Bank") is pleased to offer you a commitment to lend on the following terms and conditions:

BORROWER:
Buncombe Professional Park, LLC (the "Borrower")

AMOUNT:
The amount of this facility shall be $1,650,000.00 in the form of a commercial mortgage loan.

PURPOSE:
This facility shall be used to refinance approximately $1,450,000 in debt at another bank that is secured by approximately 4.9 acres of land and improved as an office park known as Buncombe Professional Park on S. Buncombe Road, Greer, SC (the "Property") and to provide and additional $200,000 in funds for an interest reserve until the Property can be sold.

TERM:
This facility shall have a term of 18 months.

INTEREST RATE:
The interest rate will be a floating rate of Bank's Prime Rate of interest (Prime + 0.0%) with a cap or ceiling of 9.0%.

864.672.1776 • Fax: 864.672.1777
500 East Washington Street • Greenville, SC 29601
P.O. Box 1776 • Greenville, SC 29602

864.451.5360 • Fax: 864.451.5365
2801-B Wade Hampton Blvd. • Taylors, SC 29687
www.independencenb.com

EXHIBIT (A)

REPAYMENT:
This facility shall be repayable in monthly payments of interest only. In addition, as office pads are sold in the Property, 80% of the proceeds from the sale of office pads will be required by the Bank to reduce the principal balance of the loan. All remaining principal and unpaid interest shall be due and payable in full on the maturity date 18 months from the date of the closing of the loan.

PREPAYMENT PENALTY:
None.

ORIGINATION FEE:
At closing, an origination fee equal to one quarter of one per cent of the loan amount shall be due and payable, said amount being $4,125.00.

GUARANTORS:
The loan shall be unconditionally guaranteed by David D. DeCarlis.

COLLATERAL:
The Borrower shall grant Independence a title insured first real estate mortgage in the Property including all improvements presently located or subsequently constructed thereon.

DISBURSEMENTS AND INSPECTIONS:
At the time of the closing, Bank will disburse approximately $1,450,000.00 to refinance the loan currently at another bank. Thereafter, disbursements will be made based upon an application and certificate for payment and supporting invoices if applicable.

FINANCIAL STATEMENTS:
Upon request, Borrower and Guarantors shall furnish current financial information to Independence in each instance prepared in accordance with generally accepted accounting principles consistently applied and otherwise in form and substance satisfactory to Bank.

CONDITIONS PRECEDENT:
The provisions of this Commitment are subject to and conditioned upon receipt by Independence of the following, all in form and substance satisfactory to Independence:

A detailed appraisal of the Property in form and substance acceptable to the Bank showing a current fair market value of the Property satisfactory to Bank. All costs of such appraisal are to be paid by the Borrower.

EXHIBIT (A)

Independence ordered environmental database report, at Borrower's expense, which will determine whether or not any hazardous waste or other materials regulated, controlled or prohibited by the federal, state or local environmental laws are located on the Property. Bank reserves the right if deemed necessary, to require an environmental audit of the Property by an engineer or other environmental consultant satisfactory to Bank. Bank reserves the right to declare this commitment null and void if the audit discloses evidence that the Property is contaminated with hazardous or toxic materials or has ever been used as a disposal site for the same.

A commitment to issue a standard ALTA mortgagee title insurance policy in form, content and from a title insurer satisfactory to Independence, insuring the mortgage as a first lien on the Property for the full amount of the loan, with such endorsements as Independence may require. Title shall be fee simple and marketable, free and clear of all defects, liens and encumbrances, including mechanics' liens.

A current survey of the Property, certified to Independence and the title insurer, showing the boundaries of the Property by courses and distances, together with a corresponding metes and bounds description, the actual or proposed location of all improvements, encroachments and restrictions, the location and width of all easements, utility lines, rights-of-way and building set-back lines, and notes referencing book and page numbers for the instruments granting the same.

Borrower and Guarantors shall provide additional financial information as required by Bank.

DOCUMENTS:
The facility will be evidenced by documents prepared by and acceptable to Independence, containing such representations, warranties, affirmative and negative covenants, indemnities, closing conditions, defaults and remedies as are typically required by Independence and/or are customary in this type of transaction. The failure of Borrower and Independence to reach agreement on the loan documents shall not be deemed a breach by Independence of this commitment. Unless Independence agrees otherwise in writing, completion of all documents is a condition of closing.

DOCUMENT PREPARATION FEE:
A fee to cover the costs of preparing the closing documents for the loan will be collected at closing, said amount being $250.00.

COSTS:
On or before the closing Borrower shall pay all costs, expenses and fees (including, without limitation, any appraisal, survey, insurance, environmental assessment, engineering, inspections, searches, recording and attorneys' fees) associated with this transaction.

EXHIBIT (A)

DEPOSITS:
Independence shall require the Borrower maintain its primary depository relationship with Independence for loan disbursements and payments. In addition, Bank shall require that David DeCarlis maintain $100,000 on deposit at Independence in a money market account for the entire term of the loan.

CERTIFICATE OF GOOD STANDING:
Independence shall have received from Borrower certificate of the Secretary of State of the state of such Borrower's organization as to the good standing of Borrower.

ORGANIZATIONAL DOCUMENTS:
Prior to closing, Borrower shall provide Bank with copies of its articles of organization and bylaws.

Independence's obligations under this commitment are conditioned upon the fulfillment to Independence's sole satisfaction of each term and condition referenced by this commitment. These terms and conditions are not exhaustive, and this commitment is subject to certain other terms and closing conditions customarily required by Independence for similar transactions and may be supplemented prior to closing based upon Independence's investigation and/or as disclosure of Borrower's circumstances so dictate. This commitment letter will expire unless the facility is closed on or before September 26, 2007. This commitment letter shall survive closing.

Independence has made this commitment based upon the information supplied by Borrower. Independence shall have the right to cancel this commitment, whereupon Independence shall have no obligations hereunder, in the event of: (i) a material adverse change in the financial condition, operations or prospects of Borrower or any Guarantor; (ii) a material change in the accuracy of the information, representations, exhibits or other materials submitted by Borrower in connection with its request for financing; or (iii) loss of, damage to, a taking of, or the presence of any hazardous substances at or on any collateral for the loan. Borrower must immediately notify Independence of any such event.

This commitment supersedes all prior commitments and proposals with respect to this transaction, whether written or oral, including any previous loan proposals made by Independence or anyone acting with its authorization. No modification shall be valid unless made in writing and signed by an authorized officer of Independence. This commitment is not assignable, and no party other than Borrower shall be entitled to rely on this commitment.

EXHIBIT (A)

David, if the terms and conditions of this commitment letter are acceptable to you please indicate your acceptance by signing below and returning one executed copy of this commitment letter to me. This offer of commitment shall expire unless the acceptance is received by the undersigned on or before September 26, 2007.

Sincerely,

Mike Lowery
Vice President

The above terms and conditions are hereby accepted on this 24 day of September 2007.

BORROWER:

Buncombe Professional Park, LLC

By: David D DeCarlis
Print Name: David D DeCarlis
Print Title: Member

GUARANTORS:

David D. DeCarlis

EXHIBIT (A)

COMMERCIAL PROMISSORY NOTE

Independence National Bank
500 E. Washington St.
Greenville, South Carolina 29601
(864)672-1776

LOAN NUMBER	NOTE DATE	PRINCIPAL AMOUNT	LOAN TERM	MATURITY DATE
17447	September 25, 2007	$1,650,000.00	18 months	March 25, 2009
LOAN PURPOSE: Comm. RE Refinance				

BORROWER INFORMATION

Buncombe Professional Park LLC
216 Cleveland Street
Greenville, SC 29601

NOTE. This Commercial Promissory Note will be referred to in this document as the "Note".

LENDER. "Lender" means Independence National Bank whose address is 500 E. Washington St., Greenville, South Carolina 29601, its successors and assigns.

BORROWER. "Borrower" means each person or legal entity who signs this Note.

PROMISE TO PAY. For value received, receipt of which is hereby acknowledged, on or before the Maturity Date, the Borrower promises to pay the principal amount of One Million Six Hundred Fifty Thousand and 00/100 Dollars ($1,650,000.00) or such lesser amount as shall have been advanced by Lender, from time to time, to or on behalf of Borrower under the terms of this Note, and all interest and any other charges, including service charges, to the order of Lender at its office at the address noted above or at such other place as Lender may designate in writing. The Borrower will make all payments in lawful money of the United States of America.

PAYMENT SCHEDULE. This loan will be paid according to the following schedule: 17 consecutive payments of interest only beginning on October 25, 2007 and continuing on the same day of each month thereafter. One final payment shall be due on the Maturity Date in an amount equal to the then unpaid principal and accrued and unpaid interest. All payments received by the Lender from the Borrower for application to the Loan may be applied to the Borrower's obligations under the Loan in such order as determined by the Lender.

INTEREST RATE AND SCHEDULED PAYMENT CHANGES. The initial variable interest rate on this Note will be 7.750% per annum. This interest rate may change on September 26, 2007, and every day thereafter. Each date on which the interest rate may change is called the "Change Date." Beginning with the first Change Date, Lender will calculate the new interest rate based on Prime in effect on the Change Date (the "Index"). If the Index is not available at that time, Lender will choose a new Index which is based on comparable information. The Index is used solely to establish a base from which the actual rate of interest payable under this Note will be calculated, and is not a reference to any actual rate of interest charged by any lender to any particular borrower. The interest rate will never be greater than 16.750% or less than 0.000%.

Nothing contained herein shall be construed as to require the Borrower to pay interest at a greater rate than the maximum allowed by law. If, however, from any circumstances, Borrower pays interest at a greater rate than the maximum allowed by law, the obligation to be fulfilled will be reduced to an amount computed at the highest rate of interest permissible under applicable law and if, for any reason whatsoever, Lender ever receives interest in an amount which would be deemed unlawful under applicable law, such interest shall be automatically applied to amounts owed, in Lender's sole discretion, or as otherwise allowed by applicable law. An increase in the interest rates will result in a higher payment amount. Interest on this Note is calculated on a 365/360 day basis. The unpaid balance of this loan after Maturity, whether by acceleration or otherwise, shall be subject to a Post-Maturity Rate of interest equal to 18.000% per annum.

LATE PAYMENT CHARGE. If any required payment is more than 10 days late, then at Lender's option, Lender will assess a late payment charge of 5% of the amount past due, subject to a minimum charge of $5.00.

PREPAYMENT PENALTY. This Note may be prepaid, in full or in part, at any time, without penalty.

ADVANCES. The Borrower and Lender agree that the Borrower may borrow up to the maximum amount of principal only one time. Subject to the terms of this Note and all of the related agreements, advances under this Note are obligatory. Regardless of the obligatory nature of this Note, principal advances will be made to the Borrower provided none of the following conditions exist.

- Maximum amount on this Note is outstanding.
- Undersigned has breached any of the terms, provisions, representations, requirements or promises contained in this Note or any other agreement.
- Undersigned makes a request for an advance after the Conversion Date.
- The Note or any other agreement relating to the extension of credit is in default.
- The Lender has deemed itself insecure or there has been a material adverse change of conditions.
- The Lender is precluded by law from making the advance.

Advances under this Note may be requested orally or in writing by the Borrower or by an authorized person.

The total of any advance requested and unpaid principal cannot exceed the available principal amount. The available principal amount refers to the principal amount minus the aggregate amount of outstanding advances, accrued but unpaid interest and outstanding fees and charges.

© 2004-2005 Copyright Compliance Systems, Inc. 3681-2A9C - 2006.10.191

EXHIBIT (B)

All advances will be charged to a loan account in Borrower's name on Lender's books, and the Lender shall debit in such account the amount of each advance made to, and credit to such account the amount of each repayment made by Borrower. The Lender shall provide to Borrower periodic statements of Borrower's loan account, which shall be deemed to be correct, accepted by, and binding upon Borrower unless Lender receives a written statement of exception from Borrower within 10 days after such statement is furnished.

SECURITY TO NOTE. Security (the "Collateral") for this Note is granted pursuant to the following security document(s):

- Mortgage in the amount of $1,650,000.00, dated September 25, 2007 evidencing security interest in the property located at 4.68 Acres South Buncombe Road Greenville SC 29650.

RIGHT OF SET OFF. To the extent permitted by law, Borrower agrees that Lender has the right to set off any amount due and payable under this Note, whether matured or unmatured, against any amount owing by Lender to Borrower including any or all of Borrower's accounts with Lender. This shall include all accounts Borrower holds jointly with someone else and all accounts Borrower may open in the future. Such right of setoff may be exercised by Lender against Borrower or against any assignee for the benefit of creditors, receiver, or execution, judgment or attachment creditor of Borrower, or against anyone else claiming through or against Borrower of such assignee for the benefit of creditors, receiver, or execution, judgment or attachment creditor, notwithstanding the fact that such right of setoff has not been exercised by Lender prior to the making, filing or issuance or service upon Lender of, or of notice of, assignment for the benefit of creditors, appointment or application for the appointment of a receiver, or issuance of execution, subpoena or order or warrant.

DISHONORED ITEM FEE. If Borrower makes a payment on the loan with a check or preauthorized charge which is later dishonored, a fee in the amount of $29.00 will be charged.

DEFAULT. Upon the occurrence of any one of the following events (each, an "Event of Default" or "default" or "event of default"), Lender's obligations, if any, to make any advances will, at Lender's option, immediately terminate and Lender, at its option, may declare all indebtedness of Borrower to Lender under this Note to be immediately due and payable without further notice of any kind notwithstanding anything to the contrary in this Note or any other agreement: (a) Borrower's failure to make any payment on time or in the amount due; (b) any default by Borrower under the terms of this Note or any other agreement, security agreement executed in connection with this Note (individually, a "Loan Document" and collectively, the "Loan Documents"); (c) any default by Borrower under the terms of any other loan agreement, security agreement, mortgage or other document in favor of Lender,; (d) the death, dissolution, or termination of existence of Borrower or any guarantor; (e) Borrower is generally not paying Borrower's debts as such debts become due; (f) the commencement of any proceeding under bankruptcy or insolvency laws by or against Borrower or any guarantor or the appointment of a receiver; (g) any default under the terms of any other indebtedness of Borrower to any other creditor; (h) any writ of attachment, garnishment, execution, tax lien or similar instrument is issued against any collateral securing the loan, if any, or any of Borrower's property or any judgment is entered against Borrower or any guarantor; (i) any part of Borrower's business is sold to or merged with any other business, individual, or entity; (j) any representation or warranty made by Borrower to Lender in any of the Loan Documents or any financial statement delivered to Lender proves to have been false in any material respect as of the time when made or given; (k) if any guarantor, or any other party to any agreement or instrument with or in favor of Lender entered into or delivered in connection with the Loan terminates, attempts to terminate or defaults under any such agreement or instrument; (l) Lender has deemed itself insecure or there has been a material adverse change of condition of the financial prospects of Borrower or any collateral securing the obligations owing to Lender by Borrower.

OTHER APPLICABLE AGREEMENTS. If this Note is secured by a security agreement, mortgage, deed of trust, trust deed, security deed or loan agreement of even or previous date, it is subject to all the terms thereof.

GENERAL WAIVERS. To the extent permitted by law, the Borrower severally waives any required notice of presentment, demand, acceleration, intent to accelerate, protest and any other notice and defense due to extensions of time or other indulgence by Lender or to any substitution or release of collateral. No failure or delay on the part of Lender, and no course of dealing between Borrower and Lender, shall operate as a waiver of such power or right, nor shall any single or partial exercise of any power or right preclude other or further exercise thereof or the exercise of any other power or right.

JOINT AND SEVERAL LIABILITY. If permitted by law, each Borrower executing this Note is jointly and severally bound.

SEVERABILITY. If a court of competent jurisdiction determines any term or provision of this Note is invalid or prohibited by applicable law, that term or provision will be ineffective to the extent required. Any term or provision that has been determined to be invalid or prohibited will be severed from the rest of this Note without invalidating the remainder of either the affected provision or this Note.

SURVIVAL. The rights and privileges of the Lender hereunder shall inure to the benefits of its successors and assigns, and this Note shall be binding on all heirs, executors, administrators, assigns and successors of Borrower.

ASSIGNABILITY. Lender may assign, pledge or otherwise transfer this Note or any of its rights and powers under this Note without notice, with all or any of the obligations owing to Lender by Borrower, and in such event the assignee shall have the same rights as if originally named herein in place of Lender. Borrower may not assign this Note or any benefit accruing to it hereunder without the express written consent of the Lender.

ORAL AGREEMENTS DISCLAIMER. This Note 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.

GOVERNING LAW. This Note is governed by the laws of the state of South Carolina except to the extent that federal law controls.

HEADING AND GENDER. The headings preceding text in this Note are for general convenience in identifying subject matter, but have no limiting impact on the text which follows any particular heading. All words used in this Note shall be construed to be of such gender or number as the circumstances require.

© 2004-2006 Copyright Compliance Systems, Inc. 3681-2A9C - 2006.10.191
Commercial Promissory Note - DL4006

www.complianceystems.com
800-968-8522 - Fax 616-956-1868

EXHIBIT (B)

ORNEYS' FEES AND OTHER COSTS. If legal proceedings are instituted to enforce the terms of this Note, Borrower agrees to pay all sts of the Lender in connection therewith, including reasonable attorneys' fees, to the extent permitted by law.

WAIVER OF JURY TRIAL. All parties to this Note hereby waive, to the fullest extent permitted by law, any right to trial by jury with respect to any dispute, whether in contract, tort, or otherwise, arising out of, in connection with, related to, or incidental to the relationship established between them in this Note or any other instrument, document, or agreement executed or delivered in connection herewith or the transaction related hereto.

By signing this Note, Borrower acknowledges reading, understanding, and agreeing to all its provisions and receipt thereof.

Buncombe Professional Park LLC

David DeCarlis 9/25/07

By: David DeCarlis Date

Its: Member

© 2004-2006 Copyright Compliance Systems, Inc. 3681-2A9C - 2006.10.193

EXHIBIT (B)

CHANGE IN TERMS AGREEMENT

Independence National Bank
500 E. Washington St.
Greenville, South Carolina 29601
(864)672-1776

LOAN NUMBER	ORIGINAL PRINCIPAL BALANCE	CURRENT PRINCIPAL BALANCE	ORIGINAL AGREEMENT DATE	AGREEMENT CHANGE DATE
17447	$1,650,000.00	$1,590,884.25	September 25, 2007	March 25, 2009

DESCRIPTION OF THE EXISTING DEBT ("Existing Debt")

Original note in the amount of $1,650,000.

BORROWER INFORMATION

Buncombe Professional Park LLC
216 Cleveland Street
Greenville, SC 29601

BORROWER. The term "Borrower" means each party identified above.

LENDER. The term "Lender" means Independence National Bank whose address is 500 E. Washington St., Greenville, South Carolina 29601, its successors and assigns.

COLLATERAL. The following items are the security documents related to this Agreement:

- Security Instrument (Mortgage/Deed of Trust/Security Deed) in the amount of $1,650,000.00, dated September 25, 2007 evidencing a lien on the property located at 4.68 Acres South Buncombe Road Greenville SC 29650.

TERMS AND PROVISIONS. In consideration of the promises contained in this Agreement and in the instruments evidencing the Existing Debt, and of other good and valuable consideration, the sufficiency of which is acknowledged by the execution of this Agreement, Borrower agrees to the following provisions:

1. **The instrument evidencing the Existing Debt is modified and supplemented as follows:**

   Renew note for an additional 12 months with interest payable monthly beginning April 25, 2009, and monthly thereafter with all outstanding principal and unpaid interest due at maturity on March 25, 2010. The rate shall be INB Prime plus 2%, equal to 5.25%, with a floor of 5.25%.

2. **Ratification and Continued Validity.** Except for the terms expressly modified by this Agreement, by signing this Agreement Borrower acknowledges that Borrower is still bound by the terms of the instruments and prior modifications, extensions, and supplements evidencing the Existing Debt as if they were fully set forth and repeated in this Agreement and that those terms will continue to bind Borrower as provided in this Agreement and those instruments. Lender's consent to this Agreement does not waive the right to strictly enforce Lender's rights under this Agreement or the instruments evidencing the Existing Debt. Lender's consent to this Agreement does not mean that Lender must enter into another agreement like this one in the future. Lender and Borrower intend that this Agreement does not replace the Existing Debt but restates it as modified.

3. **Others Responsible for the Debt.** Lender and Borrower intend that anyone else who is liable for the Existing Debt, including, without limitation, cosigners, guarantors, and coborrowers, are not relieved of any obligation except as expressly relieved in this Agreement or other writing. Borrower agrees that the liability of each person who signed the instruments evidencing the Existing Debt, whether primary or secondary, continues in full force and effect, even if that person does not sign this Agreement. This promise applies not only to this Agreement but also to any extension, modification, or other agreement Borrower makes with Lender that represents a debt which includes cosigners, guarantors, coborrowers, and others having similar liability. Borrower understands that this Agreement is contingent on the continued liability of each person who signed the documents evidencing the Existing Debt, whether or not that person signs this Agreement.

4. **Pronouns and Gender.** In this Agreement, whenever the circumstances or the context so requires, the singular shall be construed as the plural, the masculine shall be construed as the feminine and/or the neuter and vice versa.

5. **Miscellaneous Terms.** Borrower agrees that if Lender delays or forgoes enforcing Lender's rights under this Agreement in any particular instance, Lender retains the right to strictly enforce the same provision in any other instance, or later in the same instance. Every person signing this Agreement waives, to the extent allowed by law, presentment, demand, protest, and notice of dishonor. Every person signing this Agreement agrees that Lender may renew, extend, supplement, or otherwise modify the debt represented by this Agreement and the documents evidencing the Existing Debt without the permission of any other person who is liable, and such modification will not release or reduce the liability of any party, even if that party does not sign this Agreement.

ORAL AGREEMENTS DISCLAIMER. This 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.

© 2004-2008 Copyright Compliance Systems, Inc. ASAC-09A7 - 2008.05.62
Change in Terms Agreement - FIE 4006

www.complianceservices.com
800-968-8322 - Fax 616-954-1909

EXHIBIT (B)

By signing this Change in Terms Agreement, each Borrower acknowledges reading, understanding, and agreeing to all its provisions, and receiving a copy.

Buncombe Professional Park LLC

D. DeCarlis 4/1/09

By: David DeCarlis Date
Its: Member

By signing this Change in Terms Agreement, Lender acknowledges reading, understanding, and agreeing to all its provisions.

Independence National Bank

4/1/09

By: Rohrer Date
Its: Vice President

© 2004-2008 Copyright Compliance Systems, Inc. ASAC-0947 - 2008.05.62
Change in Terms Agreement - DL6004

www.complianceSystems.com
800-968-4322 - Fax 616-956-1858

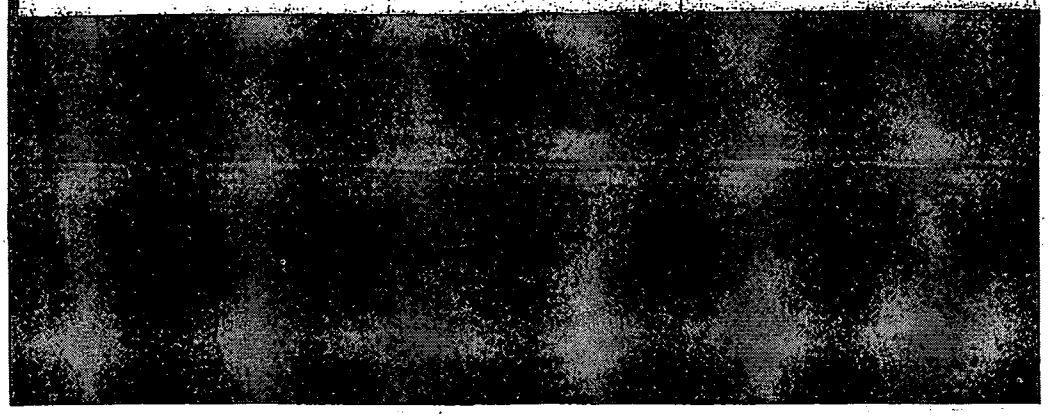


EXHIBIT (B)

2007096172 RTC
8 PGS
Book:MO 4855 Page:978-985
September 28, 2007 10:01:09 AM
Rec:$14.00 Cnty Tax:$0.00 State Tax:$0.00
FILED IN GREENVILLE COUNTY,SC

LOAN NUMBER: 17447 (Space Above This Line For Recording Data)

COMMERCIAL REAL ESTATE MORTGAGE

This COMMERCIAL REAL ESTATE MORTGAGE ("Security Instrument") is made on September 25, 2007 between Buncombe Professional Park LLC, a South Carolina Limited Liability Company, whose address is 216 Cleveland Street, Greenville, South Carolina 29601 the "Mortgagor(s)" and Independence National Bank whose address is 500 E. Washington St., Greenville, South Carolina 29601 ("Lender"), which is organized and existing under the laws of the state of South Carolina. Mortgagor in consideration of loans extended by Lender up to a maximum principal amount of One Million Six Hundred Fifty Thousand and 00/100 Dollars ($1,650,000.00) ("Maximum Principal Indebtedness"), and for other valuable consideration, the receipt of which is acknowledged, hereby mortgages, grants and conveys to Lender, its successors and assigns, forever, the following described property located in the County of Greenville, State of South Carolina:

Address: 4.68 Acres South Buncombe Road, Greenville, South Carolina 29650
Legal Description: 1st Mortgage Exhibit A

Together with all easements, appurtenances abutting streets and alleys, improvements, buildings, fixtures, tenements, hereditaments, equipment, rents, income, profits and royalties, personal goods of whatever description and all other rights and privileges including all minerals, oil, gas, water (whether groundwater, subterranean or otherwise), water rights (whether riparian, appropriate or otherwise, and whether or not appurtenant to the above-described real property), wells, well permits, ditches, ditch rights, reservoirs, reservoir rights, reservoir sites, storage rights, dams and water stock that may now, or at any time in the future, be located on and/or used in connection with the above-described real property, payment awards, amounts received from eminent domain, amounts received from any and all insurance payments, and timber which may now or later be located, situated, or affixed on and used in connection therewith (hereinafter called the "Property").

RELATED DOCUMENTS. The words "Related Documents" mean all promissory notes, security agreements, prior mortgages, prior deeds of trust, business loan agreements, construction loan agreements, resolutions, guaranties, environmental agreements, subordination agreements, assignments of leases and rents and any other documents or agreements executed in connection with this Security Instrument whether now or hereafter existing. The Related Documents are hereby made a part of this Security Instrument by reference thereto, with the same force and effect as if fully set forth herein.

INDEBTEDNESS. This Security Instrument secures the principal amount shown above as may be evidenced by a promissory note or notes of even, prior or subsequent date hereto, including future advances and every other indebtedness of any and every kind now or hereafter owing from Mortgagor to Lender, howsoever created or arising, whether primary, secondary or contingent, together with any interest or charges provided in or arising out of such indebtedness, as well as the agreements and covenants of this Security Instrument and all Related Documents (hereinafter all referred to as the "Indebtedness").

© 2004-2006 Copyright Compliance Systems, Inc. 340A-1447 - 2006.11.102
Commercial Real Estate Security Instrument - DLA007

www.complianceSystems.com
800-966-8522 - Fax 616-956-1068

EXHIBIT (C)

FUTURE ADVANCES. To the extent permitted by law, this Security Instrument will secure future advances as if such advances were made on the date of this Security Instrument regardless of the fact that from time to time there may be no balance due under the note and regardless of whether the Lender is obligated to make such future advances.

CROSS COLLATERALIZATION. It is the expressed intent of Mortgagor to cross collateralize all of its indebtedness and obligations to the Lender, howsoever arising and whensoever incurred.

WARRANTIES. Mortgagor, for itself, its heirs, personal representatives, successors, and assigns, represents, warrants, covenants and agrees with Lender, its successors and assigns, as follows:

Performance of Obligations. Mortgagor promises to perform all terms, conditions, and covenants of this Security Instrument and Related Documents in accordance with the terms contained therein.

Defense and Title to Property. At the time of execution and delivery of this instrument, Mortgagor is lawfully seised of the estate hereby conveyed and has the exclusive right to mortgage, grant, convey and assign the Property. Mortgagor covenants that the Property is unencumbered and free of all liens, except for encumbrances of record acceptable to Lender. Further, Mortgagor covenants that Mortgagor will warrant and defend generally the title to the Property against any and all claims and demands whatsoever, subject to the easements, restrictions, or other encumbrances of record acceptable to Lender, as may be listed in the schedule of exceptions to coverage in any abstract of title or title insurance policy insuring Lender's interest in the Property.

Condition of Property. The Mortgagor promises at all times to preserve and to maintain the Property and every part thereof in good repair, working order, and condition and will from time to time, make all needful and proper repairs so that the value of the Property shall not in any way be impaired.

Removal of any Part of the Property. Mortgagor promises not to remove any part of the Property from its present location, except for replacement, maintenance and relocation in the ordinary course of business.

Alterations to the Property. Mortgagor promises to abstain from the commission of any waste on the Property. Further, Mortgagor shall make no material alterations, additions or improvements of any type whatever to the Property, regardless of whether such alterations, additions or improvements would increase the value of the Property, nor permit anyone to do so except for tenant improvements and completion of items pursuant to approved plans and specifications, without Lender's prior written consent, which consent may be withheld by Lender in its sole discretion. Mortgagor will comply with all laws and regulations of all public authorities having jurisdiction over the premises relating to the use, occupancy and maintenance thereof and shall upon request promptly submit to Lender evidence of such compliance.

Due on Sale - Lender's Consent. Mortgagor shall not sell, further encumber or otherwise dispose of, except as herein provided, any or all of its interest in any part of or all of the Property without first obtaining the written consent of Lender. If any encumbrance, lien, transfer or sale or agreement for these is created, Lender may declare immediately due and payable, the entire balance of the Indebtedness.

Insurance. Mortgagor promises to keep the Property insured against such risks and in such form as may within the sole discretion of Lender be acceptable, causing Lender to be named as loss payee or if requested by Lender, as mortgagee. The insurance company shall be chosen by Mortgagor subject to Lender's approval, which shall not be unreasonably withheld. All insurance policies must provide that Lender will get a minimum of 10 days notice prior to cancellation. At Lender's discretion, Mortgagor may be required to produce receipts of paid premiums and renewal policies. If Mortgagor fails to obtain the required coverage, Lender may do so at Mortgagor's expense. Mortgagor hereby directs each and every insurer of the Property to make payment of loss to Lender with the proceeds to be applied, only at Lender's option, to the repair and replacement of the damage or loss or to be applied to the Indebtedness with the surplus, if any, to be paid by Lender to Mortgagor.

© 2004-2006 Copyright Compliance Systems, Inc. 140A-1A47 - 2006.11.182 -
Commercial Real Estate Security Instrument - DL4007

www.complianceplusone.com
800-968-8372 - Fax 619-956-1058

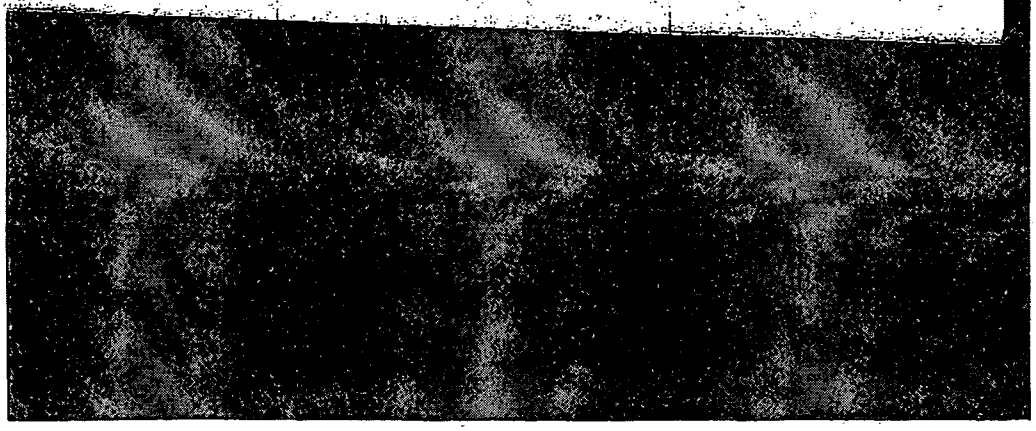


EXHIBIT (C)

Payment of Taxes and Other Applicable Charges. Mortgagor promises to pay and to discharge liens, encumbrances, taxes, assessments, lease payments and any other charges relating to the Property when levied or assessed against Mortgagor or the Property.

Environmental Laws and Hazardous or Toxic Materials. Mortgagor and every tenant have been, are presently and shall continue to be in strict compliance with any applicable local, state and federal environmental laws and regulations. Further, neither Mortgagor nor any tenant shall manufacture, store, handle, discharge or dispose of hazardous or toxic materials as may be defined by any state or federal law on the Property, except to the extent the existence of such materials has been presently disclosed in writing to Lender. Mortgagor will immediately notify Lender in writing of any assertion or claim made by any party as to the possible violation of applicable state and federal environmental laws including the location of any hazardous or toxic materials on or about the Property. Mortgagor indemnifies and holds Lender harmless from any liability or expense of whatsoever nature incurred directly or indirectly as a result of Mortgagor's violation of applicable local, state and federal environmental laws and regulations or Mortgagor's involvement with hazardous or toxic materials.

Financial Information. Mortgagor agrees to supply Lender such financial and other information concerning its affairs and the status of any of its assets as Lender, from time to time, may reasonably request. Mortgagor further agrees to permit Lender to verify accounts as well as to inspect, copy and to examine the books, records and files of Mortgagor.

Lender's Right to Enter. The Lender or Lender's agents shall have the right and access to inspect the Property at all reasonable times in order to attend to Lender's interests and ensure compliance with the terms of this Security Instrument. If the Property, or any part thereof, shall require inspection, repair or maintenance which the Mortgagor has failed to provide, the Lender, after reasonable notice, may enter upon the Property to effect such obligation; and the cost thereof shall be added to the Indebtedness and paid on the Lender's demand by the Mortgagor.

ASSIGNMENT OF LEASES AND RENTS. As additional security for the payment of the Indebtedness and the performance of the covenants contained herein, Mortgagor hereby assigns and transfers over to Lender all rents, income and profits ("Rents") under any present or future leases, subleases or licenses of the Property, including any guaranties, extensions, amendments or renewals thereof, from the use of the Property. So long as Mortgagor is not in default, Mortgagor may receive, collect and enjoy all Rents accruing from the Property, but not more than one month in advance of the due date. Lender may also require Mortgagor, tenant and any other user of the Property to make payments of Rents directly to Lender. However, by receiving any such payments, Lender is not, and shall not be considered, an agent for any party or entity. Any amounts collected may, at the Lender's sole discretion, be applied to protect the Lender's interest in the Property, including but not limited to the payment of taxes and insurance premiums and to the Indebtedness. At Lender's sole discretion, all leases, subleases and licenses must first be approved by Lender.

CONDEMNATION. Mortgagor shall give Lender notice of any action taken or threatened to be taken by private or public entities to appropriate the Property or any part thereof, through condemnation, eminent domain or any other action. Further, Lender shall be permitted to participate or intervene in any of the above described proceedings in any manner it shall at its sole discretion determine. Lender is hereby given full power, right and authority to receive and receipt for any and all damages awarded as a result of the full or partial taking or appropriation and in its sole discretion, to apply said awards to the Indebtedness, whether or not then due or otherwise in accordance with applicable law. Unless Lender otherwise agrees in writing, any application of proceeds to the Indebtedness shall not extend or postpone the due date of the payments due under the Indebtedness or change the amount of such payments.

MORTGAGOR'S ASSURANCES. At any time, upon a request of Lender, Mortgagor will execute and deliver to the Lender, and if appropriate, cause to be recorded, such further mortgages, assignments, assignments of leases and rents, security agreements, pledges, financing statements, or such other document as Lender may require, in

© 2004-2006 Copyright Compliance Systems, Inc. MBA-IA4F - 2006.11.182
Commercial Real Estate Security Instrument - DL4007

www.compliancesystems.com
800-968-4522 - Fax 614-956-1868

EXHIBIT (C)

Lender's sole discretion, to effectuate, complete and to perfect as well as to continue to preserve the Indebtedness, or the lien or security interest created by this Security Instrument.

ATTORNEY-IN-FACT. Mortgagor appoints Lender as attorney-in-fact on behalf of Mortgagor. If Mortgagor fails to fulfill any of Mortgagor's obligations under this Security Instrument or any Related Documents, including those obligations mentioned in the preceding paragraph, Lender as attorney-in-fact may fulfill the obligations without notice to Mortgagor. This power of attorney shall not be affected by the disability of the Mortgagor.

EVENTS OF DEFAULT. The following events shall constitute default under this Security Instrument (each an "Event of Default"):

(a) Failure to make required payments when due under Indebtedness;
(b) Failure to perform or keep any of the covenants of this Security Instrument or a default under any of the Related Documents;
(c) The making of any oral or written statement or assertion to the Lender that is false or misleading in any material respect by Mortgagor or any person obligated on the Indebtedness;
(d) The death, dissolution, insolvency, bankruptcy or receivership proceeding of Mortgagor or of any person or entity obligated on the Indebtedness;
(e) Any assignment by the Mortgagor for the benefit of the Mortgagor's creditors;
(f) A material adverse change occurs in the financial condition, ownership or management of Mortgagor or any person obligated on the Indebtedness; or
(g) The Lender deems itself insecure for any reason whatsoever.

REMEDIES ON DEFAULT. Upon the occurrence of an Event of Default, Lender may, without demand or notice, pay any or all taxes, assessments, premiums, and liens required to be paid by Mortgagor, effect any insurance provided for herein, make such repairs, cause the abstracts of title or title insurance policy and tax histories of the Property to be certified to date, or procure new abstracts of title or title insurance and tax histories in case none were furnished to it, and procure title reports covering the Property, including surveys. The amounts paid for any such purposes will be added to the Indebtedness and will bear interest at the rate of interest otherwise accruing on the Indebtedness until paid. In the event of foreclosure, the abstracts of title or title insurance shall become the property of the Lender. All abstracts of title, title insurance, tax histories, surveys, and other documents pertaining to the Indebtedness will remain in Lender's possession until the Indebtedness is paid in full.

IN THE EVENT OF THE SALE OF THIS PROPERTY UNDER THE PROCEDURE FOR FORECLOSURE OF A SECURITY INSTRUMENT BY ADVERTISEMENT, AS PROVIDED BY APPLICABLE LAW, OR IN THE EVENT THE LENDER EXERCISES ITS RIGHTS UNDER THE ASSIGNMENT OF LEASES AND RENTS, THE MORTGAGOR HEREBY WAIVES ANY RIGHT TO ANY NOTICE OTHER THAN THAT PROVIDED FOR SPECIFICALLY BY STATUTE, OR TO ANY JUDICIAL HEARING PRIOR TO SUCH SALE OR OTHER EXERCISE OF RIGHTS.

Upon the occurrence of an Event of Default, Lender may, without notice unless required by law, and at its option, declare the entire Indebtedness due and payable, as it may elect, regardless of the date or dates of maturity thereof and, if permitted by state law, is authorized and empowered to sell or to cause the Property to be sold at public auction, and to execute and deliver to the purchaser or purchasers at such sale any deeds of conveyance good and sufficient at law, pursuant to the statute in such case made and provided, and out of the proceeds of the sale to retain the sums then due hereunder and all costs and charges of the sale, including attorneys' fees, rendering any surplus to the party or parties entitled to it. Any such sale or a sale made pursuant to a judgment or a decree for the foreclosure hereof may, at the option of Lender, be made en masse. The commencement of proceedings to foreclose this Mortgage in any manner authorized by law shall be deemed as exercise of the above option.

Upon the occurrence of an Event of Default, Lender shall immediately be entitled to make application for and obtain the appointment of a receiver for the Property and of the earnings, income, issue and profits of it, with the powers as the court making the appointments confers. Mortgagor hereby irrevocably consents to such appointment and waives notice of any application therefor.

© 2004-2006 Copyright Compliance Systems, Inc. 3403A-IAVF - 2006.11.182
Commercial Real Estate Security Instrument - DL4007

www.compliancesystems.com
800-958-4122 - Fax 616-956-1868

EXHIBIT (C)

NO WAIVER. No delay or failure of Lender to exercise any right, remedy, power or privilege hereunder shall affect that right, remedy, power or privilege nor shall any single or partial exercise thereof preclude the exercise of any right, remedy, power or privilege. No Lender delay or failure to demand strict adherence to the terms of this Security Instrument shall be deemed to constitute a course of conduct inconsistent with Lender's right at any time, before or after an event of default, to demand strict adherence to the terms of this Security Instrument and the Related Documents.

JOINT AND SEVERAL LIABILITY. If this Security Instrument should be signed by more than one person, all persons executing this Security Instrument agree that they shall be jointly and severally bound, where permitted by law.

SURVIVAL. The Lender's rights in this Security Instrument will continue in its successors and assigns. This Security Instrument is binding on all heirs, executors, administrators, assigns and successors of the Mortgagor.

NOTICES AND WAIVER OF NOTICE. Unless otherwise required by applicable law, any notice or demand given by Lender to any party is considered effective when it is deposited in the United States Mail with the appropriate postage, mailed to the address of the party given at the beginning of this Security Instrument unless an alternative address has been provided to Lender in writing. To the extent permitted by law, Mortgagor waives notice of Lender's acceptance of this Security Instrument, defenses based on suretyship, any defense arising from any election by Lender under the United States Bankruptcy Code, Uniform Commercial Code, as enacted in the state where the Lender is located or other applicable law or in equity, demand, notice of acceleration, notice of nonpayment, presentment, protest, notice of dishonor and any other notice.

TO THE EXTENT PERMITTED BY LAW, MORTGAGOR WAIVES ANY RIGHT TO NOTICE, OTHER THAN THE NOTICE PROVIDED ABOVE, AND WAIVES ANY RIGHT TO ANY HEARING, JUDICIAL OR OTHERWISE, PRIOR TO THE LENDER EXERCISING ITS RIGHTS UNDER THIS SECURITY INSTRUMENT.

WAIVER OF APPRAISAL RIGHTS. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may, within 30 days after the sale of the mortgaged property, apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.

LENDER'S EXPENSES. Mortgagor agrees to pay all expenses incurred by Lender in connection with enforcement of its rights under the Indebtedness, this Security Instrument or in the event Lender is made party to any litigation because of the existence of the Indebtedness or this Security Instrument, as well as court costs, collection charges and reasonable attorneys' fees and disbursements.

ASSIGNABILITY. Lender may assign or otherwise transfer this Security Instrument or any of Lender's rights under this Security Instrument without notice to Mortgagor. Mortgagor may not assign this Security Instrument or any part of the Security Instrument without the express written consent of Lender.

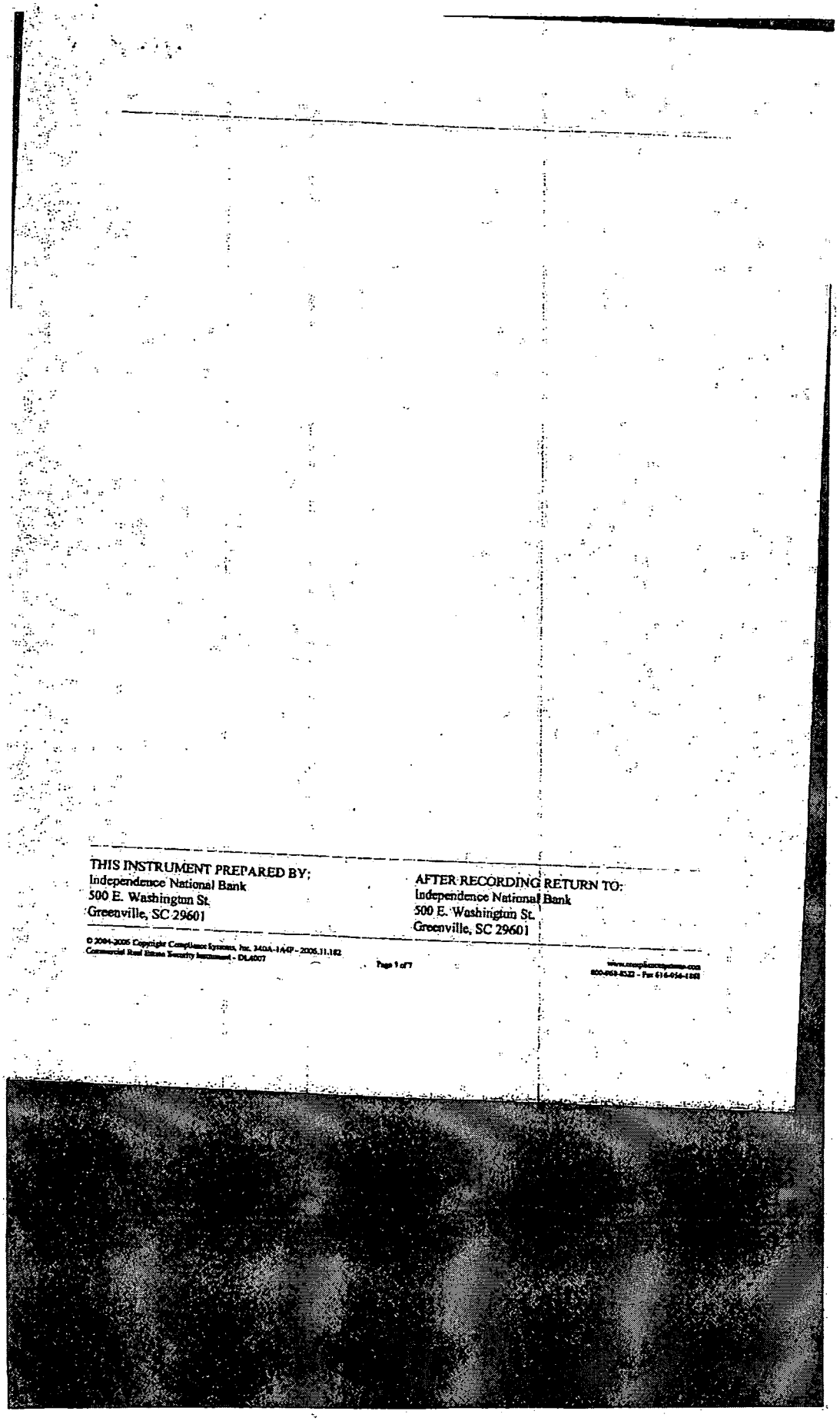
GOVERNING LAW AND JURISDICTION. This Security Instrument will be governed by the laws of the State of South Carolina.

SEVERABILITY. If a court of competent jurisdiction determines any term or provision of this Security Instrument is invalid or prohibited by applicable law, that term or provision will be ineffective to the extent required. Any term or provision that has been determined to be invalid or prohibited will be severed from the rest of the Security Instrument without invalidating the remainder of either the affected provision or this Security Instrument.

© 2004-2006 Compliance Systems, Inc. 340A-1AGF - 2006.11.162
Commercial Real Estate Security Instrument - DL4007

www.complianceamerica.com
800-964-8322 - Fax 616-954-1969

EXHIBIT (C)



THIS INSTRUMENT PREPARED BY:
Independence National Bank
500 E. Washington St.
Greenville, SC 29601

AFTER RECORDING RETURN TO:
Independence National Bank
500 E. Washington St.
Greenville, SC 29601

© 2004-2005 Copyright Compliance Systems, Inc. 3400A-1449 - 2005.11.182
Commercial Real Estate Security Instrument - DL4007

www.complianceSystems.com
800-968-8522 - Fax 614-436-1888

EXHIBIT (C)

EXHIBIT "A"

All that certain piece, parcel or lot of land, lying and being in the State of South Carolina, County of Greenville, containing 18.56 acres, more or less, as shown on a survey prepared for Tabour Properties by Ray Dunn Land Surveyor, dated April 28, 2005 and recorded in the ROD Office for Greenville County in Plat Book 50-A at Page 13. Reference is hereby made to said survey for a more complete and accurate metes and bounds description thereof.

Less however:

All that certain piece, parcel or tract of land located, lying and being in the State of South Carolina, County of Greenville, containing 13.496 acres, more or less, being shown and designated as "Multi-Family Tract" on plat entitled "Summary Plat-Buncombe Professional Park", dated March 12, 2007, prepared by 3D Land Surveying, Inc., recorded in the Office of the Register of Deeds for Greenville County in Plat Book 1035 at Page 83, reference to which is hereby made for the metes and bounds thereof. See deed recorded in Book 2278 at Page 182.

This being a portion of the property conveyed unto Buncombe Professional Park, LLC by deed of Double C. Inc., dated June 13, 2005, recorded in the Office of the Register of Deeds for Greenville County, SC on June 15, 2005 in Deed Book 2149 at Page 1728.

FILED FOR RECORD IN GREENVILLE COUNTY,SC ROD
2007096172 Book:MD 4855 Page:976-985
September 26 2007 10:01:09 AM

Timothy L. Hannah

EXHIBIT (C)

COMMERCIAL LOAN GUARANTY

Independence National Bank
500 E. Washington St.
Greenville, South Carolina 29601
(864)672-1776

LOAN NUMBER	GUARANTY DATE	
17447	September 25, 2007	

GUARANTOR INFORMATION

David DeCarlis
216 Cleveland Street
Greenville, SC 29601

Type of Entity: Individual
State of Residence: South Carolina

BORROWER INFORMATION

Buncombe Professional Park LLC
216 Cleveland Street
Greenville, SC 29601

Type of Business Entity: Limited Liability Company
State of Organization/Formation: South Carolina

NOTICE TO GUARANTOR. Each undersigned Guarantor is being asked to guarantee all of Borrower's past, present and future obligations. If Borrower does not pay, any Guarantor may be required to do so. In addition, any Guarantor may be required to pay collection expenses and costs. Lender can require any Guarantor to pay without first attempting to collect from the Borrower or any other Guarantor.

UNLIMITED CONTINUING GUARANTY. The undersigned, jointly and severally hereafter called the "Guarantor" in order to induce Lender to extend or continue to extend financial accommodations to Borrower, hereby guarantees to Lender the full and prompt payment of all loans, drafts, overdrafts, notes, bills, and all other debts, obligations, and liabilities of every kind and description, whether now owing or hereafter arising out of credit previously, contemporaneously, or hereafter granted by Lender to Borrower, whether arising from dealings between Lender and Borrower, or from dealings by which Lender may become, in any manner whatever, a creditor of Borrower. The Guarantor also agrees to pay all interest, fees, charges, attorney fees, and collection costs.

This Guaranty is unconditional and absolute. It is understood that this Guaranty shall cover all obligations of Borrower to Lender. This shall be a continuing guaranty and shall not be affected by any payment made by Borrower to Lender, whether in the form of cash, property, renewal, or other consideration.

This is a guaranty of payment and not of collection.

JOINT AND SEVERAL LIABILITY. If this Guaranty is signed by more than one person, each person having executed the Guaranty acknowledges that his or her obligation hereunder shall be joint and several. Each Guarantor expressly authorizes the Lender to proceed, in its sole and absolute discretion, against each or any Guarantor, and further agrees that if the Lender proceeds against any one of them, the others waive any defense of election of remedies and agree to continue to be liable under the terms of this Guaranty for any amount remaining owing to Lender from Borrower.

CONSENT. The Guarantor consents to all extensions, renewals, and modifications made by the Lender for, or on account of, any indebtedness of Borrower to Lender. Lender may proceed directly against Guarantor in the event of any default by Borrower without resorting to any other persons, to the assets of Borrower, to any collateral security granted by Borrower to Lender, or the liquidation of any collateral security given hereunder to secure this Guaranty.

GENERAL WAIVERS. Guarantor hereby waives notice of acceptance of this Guaranty, all notices hereunder, and all notices of demand, presentment, notice of dishonor, intention to accelerate, acceleration, notice of any adverse information which Lender may have, and all notices of protest, default, and nonpayment. Guarantor waives all defenses of suretyship. Guarantor waives any defense that could be asserted by Borrower, including defenses arising out of failure of consideration, breach of warranty, fraud, payment, statute of frauds, bankruptcy, lack of capacity, statute of limitations, lender liability, accord and satisfaction, or usury.

SURVIVAL. This Guaranty shall be binding upon Guarantor, Guarantor's heirs, successors, and estate representatives, until all such indebtedness shall be fully paid to Lender.

EXERCISE OF LENDER'S RIGHTS. Any delay or failure of the Lender in exercising any of its rights under this Guaranty does not operate as a waiver of the Lender's ability to exercise all of its rights. The Lender may choose to partially exercise rights under this Guaranty, but that does not prevent the Lender from fully exercising these rights.

ASSIGNABILITY. This Guaranty shall inure to the benefit of the Lender and its successors and assigns, including every holder of any of the indebtedness here guaranteed. In the event that any person other than the Lender shall become a holder of any of the indebtedness, the reference to the Lender shall be construed to refer to each such holder.

RIGHT OF SETOFF. To the extent permitted by law, Guarantor gives Lender the right to setoff any of Guarantor's money or property which may be in Lender's possession against any amount owed under this Guaranty. This right of setoff does not extend to any Keogh account, IRA, or

© 2004-2006 Copyright Compliance Systems, Inc. DA2D-7D2F - 2006.09.76
Commercial Loan Guaranty - DL4011

www.compliancesystems.com
800-968-8522 - Fax 616-956-1868

EXHIBIT (D)

a deferred deposit. Further, the Lender shall have available all remedies under applicable state and federal laws, including the ment of wages, to the extent permitted by law.

WAIVER OF JURY TRIAL. All parties to this Guaranty knowingly and voluntarily waive, to the fullest extent permitted by law, all rights to trial by jury with respect to any dispute, whether in contract, tort, or otherwise, between Guarantor and Lender arising out of, in connection with, related to, or incidental to the relationship established in connection with this Guaranty or made pursuant to any other note or other instrument, document, or agreement executed or delivered by Borrower or Guarantor in connection with this Guaranty or the related transactions.

SEVERABILITY. If a court of competent jurisdiction determines any term or provision of this Guaranty is invalid or prohibited by applicable law, that term or provision will be ineffective, but only to the extent required to make it lawful. Any term or provision that has been determined to be invalid or prohibited will be severed from the rest of this Guaranty without invalidating the remainder of the provisions of this Guaranty.

GOVERNING LAW. This Guaranty will be governed by and construed in accordance with the laws of the state of South Carolina except to the extent that federal law controls.

HEADINGS AND GENDER. The headings in this Guaranty are for convenience in identifying subject matter. The headings have no limiting effect on the text that follows any particular heading. All words used in this Guaranty are read to be of whatever gender or number is appropriate under the circumstances.

ORAL AGREEMENTS DISCLAIMER. This 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.

ACKNOWLEDGMENT. This Guaranty is freely and voluntarily given to the Lender by Guarantor, without duress or coercion, and after Guarantor has either consulted with legal counsel or has been given an opportunity to do so, and Guarantor has fully and carefully read and understands all of the terms and provisions of the Guaranty.

By signing this Guaranty, Guarantor acknowledges reading, understanding, and agreeing to all its provisions.

David DeCarlis 9/25/07

David DeCarlis
Individually

Date

© 2004-2006 Copyright Compliance Systems, Inc. DA2D-7D2F - 2006.09.76
Commercial Loan Guaranty - DL4011

www.compliancesystems.com
800-968-8522 - Fax 616-956-1868

EXHIBIT (D)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE) C.A. No.: 2010-CP-23-3860

Independence National Bank,)

Plaintiff,) **CERTIFICATE OF MAILING**

vs.)

Buncombe Professional Park, LLC; and)
David DeCarlis, s/a David D. DeCarlis,)

Defendants.)

CLERK OF COURT
GREENVILLE
PAUL B. WICKENSIMER
2011 APR -7 A 8:42

I, Tilda A. Burgess, hereby certify that a true and correct copy of the Amended Complaint, along with a Certificate of Service were served upon counsel by placing a copy of same in the United States Mail with proper postage affixed thereto addressed as follows:

Mary Leigh Arnold, Esquire
749 Johnnie Dodds Blvd, Suite B
Mt. Pleasant, SC 29464

LOVE, THORNTON, ARNOLD & THOMASON, P.A.

By: _____

Tilda A. Burgess, Legal Assistant to
M. Kyle Thompson
Post Office Box 10045, F.S.
Greenville, South Carolina 29603
(864) 242-6360
(864) 271-7972 facsimile

April 5, 2011
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
2011 APR 19 A 9:15		Case No.: 2010-CP-23-3860
INDEPENDENCE NATIONAL BANK	)	
FILED-CLERK OF COURT GREENVILLE CO. S.C.		
Plaintiff,	)	**AMENDED ANSWER and COUNTERCLAIM**
vs.	)	
	)	**(JURY TRIAL DEMANDED)**
BUNCOMBE PROFESSIONAL PARK, LLC; AND DAVID DECARLIS, S/A DAVID D. DECARLIS	)	
Defendants,	)	

TO: S. GRAY WALSH, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

ANSWER

The Defendants responding to the allegations in the Plaintiffs Complaint, respectfully allege unto this Honorable Court as follows:

1. Each and every allegation of the Complaint which is not admitted, qualified, or explained is denied and strict proof demanded thereof.

FOR A FIRST DEFENSE

2. Defendants admit upon information the allegations of paragraph 1.

3. In response to the allegations in Paragraph 2, Defendants crave reference to said documents mentioned and deny any allegations inconsistent with the terms and records contained therein. Defendants further affirmatively state that the documents mentioned therein have no relevance to the subject matter based on the doctrine of merger.

4. In response to the allegations in Paragraph 3, Defendants crave reference to said

documents mentioned and deny any allegations inconsistent with the terms and records contained therein.

5. Defendants deny the allegations of Paragraph 4 and demand strict proof thereof.

6. In response to the allegations in Paragraphs 5, 6, 7, and 8 Defendants crave reference to said documents mentioned and the public records of Greenville County, South Carolina and deny any allegations inconsistent with the terms and records contained therein.

7. Defendants deny the allegations of Paragraph 9 and therefore demand strict Proof thereof. Defendants further affirmatively state Plaintiff does not hold a first priority lien which it is aware of thereby making this allegation completely improper.

8. The allegations of Paragraphs 10, 11 and 12 constitute legal conclusions of law which Defendants are required neither to admit nor deny.

9. Defendants deny the allegations of Paragraph 13 and therefore demand strict Proof thereof. Defendants further affirmatively state Plaintiff does not hold a first priority lien which it is aware of thereby making this allegation completely improper and that Defendant DeCarlis's lien is superior to any lien interest of Plaintiff.

10. The allegations of Paragraph 14 constitute legal conclusions of law which Defendants are required neither to admit nor deny.

11. Answering the allegations of Paragraph 15 Defendants repeat and reallege each and every allegation contained herein.

12. Defendants deny the allegations of Paragraph 16 and demand strict proof thereof. Defendants further allege that Plaintiff's mortgage was to be junior and subordinate to Defendant's.

13. Defendants deny the allegations of Paragraph 17 and demand strict proof thereof.

14. The allegations of Paragraph 18 constitute conclusions of law which these Defendants are required to neither admit nor deny. Defendants further state they waive no attorney client privilege.

15. Defendants deny the allegations of Paragraph 19 and therefore demand strict proof thereof.

16. The allegations of Paragraph 20 constitute conclusions of law which these Defendants are required to neither admit nor deny.

FOR AND AS A SECOND DEFENSE

17. Further answering said Complaint, and as and for a further defense thereto, Defendants would allege and show that Plaintiff has failed to set forth a sufficient cause of action and, therefore, the Complaint should be dismissed.

FOR AND AS A THIRD DEFENSE

18. Further answering said Complaint, and as and for a further defense thereto, Defendants would allege and show that Plaintiff breached the terms of the subject contract and failed to act in good faith and fair dealing and, therefore, the Complaint should be dismissed.

FOR AND AS A FOURTH DEFENSE

19. Further answering the Complaint, and as and for a further defense thereto, Defendants allege that the Plaintiff has failed to mitigate its damages, if any, as required by law.

FOR AND AS A FIFTH DEFENSE

20. Defendants specifically plead as an affirmative defense to the allegations of the Complaint, accord and satisfaction, comparative negligence, duress, fraud, illegality, laches, estoppel, no contract, statute of limitations, misrepresentation, mistake, payment, release, waiver,

lack of consideration or any other matter constituting avoidance or affirmative defense which may arise and develop as discovery in this progresses.

FOR AND AS A SIXTH DEFENSE
(Unclean Hands)

21. That to the extent that Plaintiff was negligent, grossly negligent, willful, wanton and reckless, resulting in the damages allegedly sustained, Plaintiff comes to Court with unclean hands and such inequitable conduct on the part of Plaintiff constitutes a bar and complete defense to any claim for equitable relief in the form of indemnity.

FOR AND AS A SEVENTH DEFENSE
(Waiver)

22. Further answering said Complaint and for a further defense thereto, Defendant alleges claims are barred by the doctrines of waiver, laches and Estopel.

FOR AND AS A EIGHTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Breach of Contract)

23. The Defendants entered into a Note with Plaintiff for the purpose of developing certain real property.

24. With the economic downturn, in or around 2009 Defendant DeCarlis spoke with representatives of Plaintiff on several occasions to address restructuring the subject transaction.

25. Through discussions with Plaintiff's representatives Defendants were provided with terms under which the loan could be restructured.

26. Defendants relied on Plaintiff's representative's representations.

27. Plaintiff has failed to conduct itself in accordance with the agreement reached between the parties by in part but not limited to, initiating the within action prematurely, and failing to restructure the transaction as agreed.

28. The acts and omissions of the Plaintiff described herein are the direct and

proximate cause of injuries and damages to the Defendants in an amount to be proven at trial, including but not limited to actual damages, lost profits, lost value, interest, attorney fees, and costs of this action.

29. The Defendants are informed and believe that they entitled to a judgment against the Plaintiff, for actual, consequential, and punitive damages in amounts to be proven at trial, together with interest, attorney fees, and costs.

FOR AND AS A NINTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Promissory Estoppel)

30. Further answering the complaint herein and as a ninth defense thereto and by way of counterclaim, the Defendants reiterate all of the allegations contained above as fully as if repeated herein.

31. Plaintiff by and through its representative promised a number of things, including but not limited to restructuring the transaction and forebear from taking any action for a period of time.

32. Defendants reasonably relied on the promise made by Plaintiff.

33. Plaintiff knew or should have known and expected or it is foreseeable that Defendants would rely on the promise made by Plaintiff.

34. As a direct consequence and proximate result of Defendants' reasonable reliance on Plaintiff's failed promise the Defendants have suffered actual injury.

35. Based on the foregoing, Defendants are entitled to a judgment against the Plaintiff for actual, consequential, and punitive damages in an amount to be determined by the trier of fact.

FOR AND AS A TENTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Breach Duty of Good Faith and Fair Dealing)

36. Further answering the complaint herein and as a tenth defense thereto and by way of counterclaim, the Defendants reiterate all of the allegations contained above as fully as if repeated herein.

37. That every contract imposes on the parties a duty of good faith and fair dealing.

38. Plaintiff has breach its duty of good faith and fair dealing by the acts described above.

39. The Plaintiff's acts and omissions operate as a breach of the contract with the Defendants and obligations created by the activities of the Plaintiff.

40. The Plaintiff's actions and omissions amount to control over Defendants' property by design of Plaintiff.

41. The acts and omissions of the Plaintiff described herein are the direct and proximate cause of injuries and damages to the Defendants in an amount to be proven at trial, including but not limited to actual damages, lost value, interest, attorney fees, and costs of this action.

42. The Defendants are informed and believe that it is entitled to a judgment against the Plaintiff for actual, consequential, and punitive damages in amounts to be proven at trial, together with interest, attorney fees, and costs.

FOR AND AS A ELEVENTH DEFENSE AND BY WAY OF COUNTERCLAIM
(Negligent Misrepresentation)

43 Further answering the complaint herein and as a eleventh defense thereto and by way of counterclaim, the Defendants reiterate all of the allegations contained above as fully as if repeated herein.

44. Upon information and belief, the Plaintiff made false statements and

misrepresentations to the Defendants regarding the terms of the contract and the circumstances surrounding it.

45. Upon information and belief, the Plaintiff owed the Defendants a duty of care to see that the representations made regarding the circumstances surrounding the transaction and the forbearance agreement were accurate.

46. The Defendants reasonably relied on the Plaintiff's actions and inactions and representations and silence.

47. The Plaintiff knew or should have known that the Defendants' would rely on it's representations.

48. The Defendants had a right to rely upon the Plaintiff's representations.

49. The Plaintiff breached its duty of due care to the Defendants, in part but not limited to, in failing to abide by the terms of the restructure agreement, forbearance agreement, initiation of this action prematurely, and failure to provided a reinstatement figure.

50. As a direct consequence and proximate result of the Defendants' reasonable reliance on the Plaintiff's false, material misrepresentations, the Defendants have sustained damages.

51. Based on the foregoing, the Defendants are entitled to a judgment against the Plaintiff for actual, consequential, and punitive damages in an amount to be determined by the trier of fact.

FOR AND AS A TWELVETH DEFENSE AND BY WAY OF COUNTERCLAIM
(Unjust Enrichment)

52. Further answering the complaint herein and as a twelveth defense thereto and by way of counterclaim, the Defendants reiterate all of the allegations contained above as fully as if repeated herein.

53. The Defendants in good faith negotiated a modification/restructure agreement with Plaintiff.

54. The Plaintiff failed and refused to abide by the terms of the restructure agreement in order to gain advantage over Defendants.

55. Upon information and belief, the Plaintiff has acted in a manner above stated improving its position as a means of profiting at the detriment of Defendants.

56. The Plaintiff, by virtue of their actions heretofore stated, breached the terms of the agreements with the Defendant.

57. The Defendants have suffered damages as a result of the Plaintiff's breach.

58. If Plaintiff will be unjustly enriched if by its failure to abide by the terms of the agreement.

59. Based upon the foregoing, the Defendants believe that they are entitled to a judgment against the Plaintiff for damages in an amount to be determined by a trier of fact plus pre-judgment interest.

FOR AND AS A THIRTEENTH DEFENSE AND BYWAY OF A COUNTERCLAIM
(Declaratory Judgment)

60. Further answering the complaint herein and as a thirteenth defense thereto and by way of counterclaim, the Defendants reiterate all of the allegations contained above as fully as if repeated herein.

61. This cause of action is brought pursuant to South Carolina statutory and common law including S.C. Code Ann. §§15-53-20, 30, 40 (1976, as amended), and pursuant to Rule 57, South Carolina Rules of Civil Procedure.

62. The Plaintiff claims to have a superior lien interest to Defendant DeCarlis but is

aware that DeCarlis has a lien filed of record that predates any lien interest claimed by Plaintiff.

63. Accordingly, the Defendants respectfully requests this Court for declaratory relief in the form of an Order and Judgment declaring: (1) Plaintiff's lien interest is junior and subordinate to Defendant DeCarlis' lien interest.

JURY TRIAL DEMANDED.

WHEREFORE, having fully answered the Complaint of the Plaintiff herein, Defendants pray the same be dismissed with cost, actual and punitive damages, attorneys fees and costs, prejudgment interest and that the Court protect their interest in the subject property and for such other and further relief as the court may deem just and proper.

RESPECTFULLY SUBMITTED:

MARY LEIGH ARNOLD, P.A.

Mary Leigh Arnold, Esquire
749 Johnnie Dodds Blvd, Suite B
Mt. Pleasant, South Carolina 29465
(843) 971-6053
(843) 971-6055
Sammie@maryarnoldlaw.com
Attorney for Defendants

Mt. Pleasant, SC
Dated: 4-15-11

CERTIFICATE OF SERVICE

I certify that on this 15th day of April, 2011, a copy of the within Amended Answer and Counterclaim of Defendants was placed in the United States Mail postage pre-paid, addressed to opposing counsel as follows:

2011 APR 19 A 9:16

FILED-CLERK OF COURT
GREENVILLE CO. S.C.

S. Gary Walsh, Esquire
Love, Thornton, Arnold, & Thomason, P.A.
410 East Washington Street (29601)
Post Office Box 10045
Greenville, SC 29603

MARY LEIGH ARNOLD, P.A.

Belinda Carlin, Paralegal

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C. A. NO: 2010-CP-23-3860
	)	
Independence National Bank,	)	MOTION TO ALTER OR AMEND
Plaintiff,	)	
vs.	)	
	)	
Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. Decarlis,	)	
Defendants,	)	

2011 MAY 23 P 3:41

CLERK OF COURT
GREENVILLE CO. S.C.

COMES NOW the Plaintiff and moves before this Honorable Court to alter or amend the Order of the Court dated May 13, 2011 as follows:

The Court ruled at the conclusion of the hearing that the Plaintiff had proved the theory of equitable subrogation as an alternative theory of relief. The Plaintiff would be equitably subrogated to the amount of the debt that was satisfied at the closing on September 25, 2007. The Court's Order failed to reflect that alternative theory of relief, and therefore the Plaintiff would move that the Order be appropriately amended to include said theory.

Counsel certifies that consultation with opposing counsel would serve no useful purpose.

Respectfully submitted,

LOVE, THORNTON, ARNOLD & THOMASON, P.A.

M. Kyle Thompson, S.C. Bar No. 68283
Post Office Box 10045, F.S.
Greenville, South Carolina 29603
(864) 242-6360
(864) 271-7972 facsimile
Attorney for Plaintiff

_____, 2011
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. No.: 2010-CP-23-3860
	)	
Independence National Bank,	)	
	)	
Plaintiff,	)	**CERTIFICATE OF MAILING**
	)	
vs.	)	
	)	
Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. DeCarlis,	)	
	)	
Defendants.	)	

2011 MAY 23 P 3:41

FILED CLERK OF COURT GREENVILLE CO S.C.

I, Tilda A. Burgess, hereby certify that a true and correct copy of the Motion to Alter or Amend, along with a Certificate of Service were served upon counsel by placing a copy of same in the United States Mail with proper postage affixed thereto addressed as follows:

Mary Leigh Arnold, Esquire
749 Johnnie Dodds Blvd, Suite B
Mt. Pleasant, SC 29464

LOVE, THORNTON, ARNOLD & THOMASON, P.A.

By: Tilda A. Burgess

Tilda A. Burgess, Legal Assistant to
M. Kyle Thompson
Post Office Box 10045, F.S.
Greenville, South Carolina 29603
(864) 242-6360
(864) 271-7972 facsimile

May 23, 2011
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	2011 MAY 24 AM 9:14
COUNTY OF GREENVILLE	)	CASE NO.: 2010-CP-23-3860
	)	FILED-CLERK OF COURT GREENVILLE CO S C
Independence National Bank	)	
	)	
Plaintiff,	)	**NOTICE OF MOTION AND MOTION TO RECONSIDER**
	)	
Vs.	)	
	)	
Buncombe Professional Park, LLC; and David DeCarlis, s/a/ David D. DeCarlis,	)	
	)	
Defendants.	)	
	)	

TO: THE HONORABLE CHARLES B. SIMMONS, JR., MASTER IN EQUITY, KYLE THOMPSON, ESQUIRE, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendants, Buncombe Professional Park, LLC and David DeCarlis by their undersigned attorney, will move before the presiding Master in Equity for Greenville County, Greenville County, Greenville, South Carolina, at such date, time and place as the Court may appoint, to reconsider that certain Order filed May 13, 2011 and received on May 16, 2011, granting Plaintiff foreclosure pursuant to the South Carolina Rules and Civil Procedure and common law of South Carolina. The grounds for such motion are as follows:

(1) The Court erred in allowing Plaintiff to amend it's complaint on April 7, 2011, to include a cause of action for reformation days before the trial:

(2) The Court erred by not determining Defendant, DeCarlis's mortgage is superior to Plaintiff's mortgage lien.

S.C. Code Anno. Section 30-7-10 provides, in relevant part:

> All ... mortgages ... are valid so as to affect the rights of subsequent creditors ... without notice, only from the day and hour when they are recorded in the office of

> the register of deeds [for the county] ... in which the real property affected is situated. In the case of a ... subsequent lien creditor ... without notice ... the priority is determined by the time of filing for record.
>
> In addition, South Carolina Code Annotated section 30-9-40 (Supp.2001), governing the indexing of instruments filed for recording, provides:
>
> The register of deeds ... shall immediately upon the filing for record of any deed, mortgage, or other written instrument of the character mentioned in Section 30-7-10 or Chapter 9 of Title 36 enter it upon the proper indexes in his office, which constitute an integral, necessary, and inseparable part of the recordation of the deed, mortgage, or other written instrument for any and all purposes whatsoever....

The indexing of recorded mortgages is intended to provide notice to persons making subsequent inquiries. There is no evidence the register of deeds has not complied with the mandates of section 30-9-40 in recording the two mortgages in issue. Therefore, the later indexing of Independence's mortgage (a year later), establishes that DeCarlis's mortgage was presented first for recordation and is entitled to priority as the first to be recorded. *See Atlas Supply Co. v. Davis*, 273 S.C. 392, 395, 256 S.E.2d 859, 860 (1979) (Littlejohn, J., concurring) (indicating lien priority is based on the time at which an instrument is recorded and that recording is accomplished when an instrument is indexed).

The DeCarlis mortgage is superior to that of Plaintiff's and this court erred by not so finding. This Court erred by not finding Plaintiff's foreclosure action is subject to the mortgage of DeCarlis.

3. The Court erred when it determined reformation is appropriate. Plaintiff sought reformation of its subject note and mortgage to provide that its note and mortgage are superior to the mortgage interest of DeCarlis, which clearly was recorded of record prior to the recording of Plaintiff's mortgage interest. Defendants continue to contend that reformation is not appropriate here.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has this 25th day of May, 2011, served by U. S. Mail, postage prepaid a copy of the Plaintiff's Notice of Motion and Motion for To Reconsider, on opposing counsel in the above captioned case as follows:

Kyle Thompson, Esquire
Love, Thornton, Arnold & Thomason, P.A.
410 East Washington Street
Post Office Box 10045
Greenville, SC 29603

Belinda Carlin, Paralegal

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2010-CP-23-3860
Independence National Bank Plaintiff, Vs. Buncombe Professional Park, LLC; and David DeCarlis, s/a/ David D. DeCarlis, Defendant,	)	AFFIDAVIT OF DAVID DeCARLIS

Before me appeared the undersigned David D. DeCarlis, who first being duly sworn did state as follows:

1. I am a citizen and resident of Greenville County, South Carolina, am over the age of 21, and all matters set forth herein are within my personal knowledge and I am competent to testify thereto.

2. I am a named Defendant in the within action and have been involved with and am familiar with the transaction.

3. On January 28, 2009, after several conversations with Jim Rohrer, Senior Vice President of Independence National Bank, I received the email attached hereto as Exhibit "A."

4. Mr. Rohrer stated "The Bank views this as a new commitment since the loan was for land carry under the pretense that the property would be sold or developed during the original term.

5. The Bank also ultimately charges a 1% commitment fee which it received on April 1, 2009 in the amount of $16,750.00. (See Exhibit "B" attached hereto.)

Affiant Further Sayeth Naught.

David DeCarlis

Sworn to before me this ___
day of August, 2010

Notary Public for South Carolina
My Commission Expires: _____

EXHIBIT A

David DeCarlis

From: Jim Rohrer [mailto:jrohrer@IndependenceNB.com]
Sent: Wednesday, January 28, 2009 4:17 PM
To: ddecarlis@charter.net
Subject: RE: Loan renewal

David,

We can renew your loan at maturity for 12 months, interest only at Prime +2%. If we fix it the rate will be 7%. I also want to make you aware that the bank is requiring a $250.00 admin fee on all loans along with a 1% commitment fee. Any remaining interest carry that you have will remain but no additional interest carry will be funded. The bank views this as a new commitment since this loan was for land carry under the pretense that the property would be sol or developed during the original term. I will be at a closing this afternoon and unavailable until about 1:00 tomorrow you want to discuss.

Thanks,
Jim

Jim Rohrer
Senior Vice President
Independence National Bank
500 E. Washington Street
Greenville, SC 29601

864.672.1765 office
864.672.1778 fax
864.216.1653cell

APPENDIX_0104
103

EXHIBIT B

DAVID D DECARLIS

GREENVILLE, SC 29601

5307

67-160/532

4/1/09

Date

PAY to the order of Independence National Bank $ 6,750.00

Sixteen Thousand Seven Hundred and Fifty dollars and 00/100 Dollars

Security Features Details on Back

BB&T

BRANCH BANKING AND TRUST COMPANY
1-800-BANK BBT BBT.com

Elite GOLD

For 1% Fee for prepaid Interest

Signature D D DeCarlis

M

07

Hand Clarke

105

APPENDIX_0106

INDEPENDENCE
NATIONAL BANK

August 7, 2008

Mr. David DeCarlis
Buncombe Professional Park, LLC
216 Cleveland Street
Greenville, SC 29601

RE: Rate Commitment to Buncombe Professional Park, LLC

Dear David:

Independence National Bank (hereafter "Independence" or "Bank") is pleased to offer you a rate commitment on the following terms and conditions:

BORROWER:
Buncombe Professional Park, LLC (the "Borrower")

AMOUNT:
The maximum amount of this facility is $1,650,000 in the form of a commercial mortgage loan.

PURPOSE:
This facility has been used to refinance approximately $1,450,000 in debt at another bank that is secured by approximately 4.9 acres of land and improved as an office park known as Buncombe Professional Park on S. Buncombe Road, Greer, SC (the "Property") and to provide an additional $200,000 in funds for an interest reserve until the Property can be sold.

TERM:
This rate commitment shall have a term of 36 months from the date of this letter.

INTEREST RATE:
The interest rate will be a floating rate of Bank's Prime Rate of interest (Prime +0%) with a cap or ceiling of 6.8% for 7 months, which matures on March 25, 2009. Upon approval of the renewal on or about March 25, 2009, the rate cap will continue at 6.8% for the remaining 29 months.

864.672.1776 · Fax 864.672.1777
500 East Washington Street · Greenville, SC 29601
P.O. Box 1776 · Greenville, SC 29602

864.451.5360 · Fax 864.451.5365
2801-B Wade Hampton Blvd. · Taylors, SC 29687
www.independencenb.com

This facility shall continue to be repaid in monthly payments of interest only. In addition, as office pads are sold in the Property, 80% of the proceeds from the sale of office pads will be required by the Bank to reduce the principal balance of the loan. All remaining principal and unpaid interest shall be due and payable in full on the maturity date.

PREPAYMENT PENALTY:
A prepayment penalty shall apply if the loan balance is prepaid in whole (100%) or in part (any prepayment of principal over the normal amortization). The prepayment penalty will equal two percent (2%) of the principal amount prepaid.

Independence National Bank may allow Borrower to prepay the loan at a reduced penalty, at Independence's option, in whole or in part only if Borrower pays such additional amounts deemed necessary by Independence to compensate Independence for any losses, costs or expenses which Independence may be deemed to incur as a result of such prepayments.

GUARANTORS:
The loan shall be unconditionally guaranteed by David D. DeCarlis.

COLLATERAL:
The Borrower shall continue to grant Independence a title insured first real estate mortgage in the Property including all improvements presently located or subsequently constructed thereon.

Independence's obligations under this commitment are conditioned on the fulfillment to Independence's sole satisfaction of each term and condition referenced by this commitment. These terms and conditions are not exhaustive, and this commitment is subject to certain other terms and closing conditions customarily required by Independence for similar transactions and may be supplemented prior to closing based upon Independence's investigation and/or as disclosure of Borrower's circumstances so dictate.

Independence has made this rate commitment based upon the information supplied by Borrower. Independence shall have the right to cancel this commitment, whereupon Independence shall have no obligations hereunder, in the event of: (i) a material adverse change in the financial condition, operations or prospects of Borrower or any Guarantor; (ii) a material change in the accuracy of the information, representations, exhibits or other materials submitted by Borrower in connection with its request for financing; or (iii) loss of, damage to, a taking of, or the presence of any hazardous substances at or on any collateral for the loan. Borrower must immediately notify Independence of any such event.

This rate commitment supersedes all prior rate commitments and proposals with respect to this transaction, whether written or oral. No modification shall be valid unless made in

not assignable, and no party other than Borrower shall be entitled to rely on this commitment.

David, if the terms and conditions of this commitment letter are acceptable to you pleas indicate your acceptance by signing below and returning one executed copy of this commitment letter to me.

Sincerely,

Jim Rohrer
Senior Vice President

The above terms and conditions are hereby accepted on this 9th day of August, 2008.

BORROWER:

Buncombe Professional Park, LLC

BY: David D DeCarlis
David D. DeCarlis, Member

GUARANTOR:

BY: David D DeCarlis
David D. DeCarlis

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
2010-CP-23-3860

Independence National Bank,

Plaintiff,

vs.

Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. DeCarlis,

Defendants.

TRANSCRIPT OF TESTIMONY

April 29, 2011
Greenville, South Carolina

B E F O R E:

HONORABLE CHARLES B. SIMMONS, JR., MASTER IN EQUITY

A P P E A R A N C E S:

M. Kyle Thompson, Esquire
Attorney for the Plaintiff

Mary Leigh Arnold, Esquire
Attorney for the Defendants

Wanda E. Fudge, CCR
Court Reporter

Q All right. While you were employed at Independence National Bank, did you have occasion to do business with an entity known as Buncombe Professional Park and an individual known as David DeCarlis?

A Yes, sir.

Q All right. Can you briefly just tell the Court what the nature of that business was?

A I was finalizing a closing transaction on a loan for him that I actually had picked up from another officer, continued on from that point to finish the transaction.

Q All right. Let me show you what I marked for identification as Exhibit 6 and just ask if you would kind of flip through that and let me know if you recognize that document.

A Yes, I do. This is a typical commitment letter that we issue on all transactions.

Q Is this particular commitment letter the one issued to Buncombe Professional Park and David DeCarlis in regard to this transaction?

A Yes, it is.

MR. THOMPSON: Your Honor, I would move that Plaintiff's Exhibit 6 be admitted into evidence at this time.

MS. ARNOLD: Your Honor, no objection. Just to make matters easier for the Court, in this notebook the only thing that, I believe, I have objections to are 1, 2 and 5.

BY THE COURT: All right. We'll address those as they

become relevant.

MS. ARNOLD: Thank you, Your Honor.

BY THE COURT: Thank you.

(Commitment Letter entered into evidence as Plaintiff's Exhibit No. 6)

Q Mr. Lowery, did you, in fact, have a meeting with Mr. DeCarlis once you took over this loan?

A Yes, we did.

Q As part of that meeting, did you review these terms?

A Yes, we did.

Q All right. Let me call your attention on the second page to the term of collateral.

A Yes, sir.

Q Was the collateral from Buncombe Professional Park to Independence National Bank to be a title insured first real estate mortgage on the property?

A Yes, sir.

Q Was this term discussed with Mr. DeCarlis at your meeting with him?

A Yes, it was.

MS. ARNOLD: Objection, Your Honor. That I would object to, as to parole evidence. The document speaks for itself, and they're trying to change the terms of it in prior discussions. But I don't have a problem with the actual commitment letter.

MR. THOMPSON: Your Honor, what I'm trying to do is there's

been allegations there's been a mutual mistake with regard to the issues of which mortgage would get the first mortgage at the closing. I think it's important to bring in some evidence to show what the intent of the parties was.

BY THE COURT: Is one of the allegations mutual mistake?

MR. THOMPSON: It is from the Plaintiff's import, Your Honor.

MS. ARNOLD: Your Honor, in the Complaint there is no pleading as to equitable subrogation. There is a cause of action for reformation and reformation alone, and then a foreclosure action and I don't believe reformation requires mutual mistake.

BY THE COURT: All right. Then I'm going to sustain the objection unless that becomes an issue.

MS. ARNOLD: Thank you.

Q Mr. Lowery, were you ever made aware of the presence of another loan on the property?

A No, sir.

Q In your role as a commercial loan officer is that something that would be important to you?

A Yes, it would be.

Q Why is that?

A Banks do not make second mortgages on commercial property especially undeveloped land, not in my 28-year career.

Q If an individual such as Mr. DeCarlis was applying for a loan such as this, would you expect that the bank would issue --

in fact, would have a first loan, a first mortgage, on the property?

A Yes.

Q What was the amount of the loan from the bank?

A The total amount of the loan, I saw back on the letter, was $1,650,000.00.

Q Was there going to be a payoff of another mortgage as a part of this? I'll direct your attention to the second page under Disbursements and Inspections.

A Yes.

Q Was this to pay off another first mortgage on the property?

A Yes, it was.

Q Now, did you, yourself, actually attend the closing?

A Yes.

Q Did you witness Mr. DeCarlis sign all of these documents?

A Yes, I did.

Q Did you overhear any conversations between yourself, and Mr. DeCarlis and Mr. Dugas, the closing attorney?

A Yes.

Q Did Mr. Dugas review with Mr. DeCarlis the terms of this commitment letter?

A Yes, he did.

Q All right. Did Mr. DeCarlis make Mr. Dugas aware of the existence of any other mortgages or encumbrances on the property?

A No, sir.

Q Did the loan closing go through?

A Yes.

Q Had Mr. DeCarlis been asked to subordinate or satisfy an outstanding mortgage on the property and he had refused to do so, would this loan closing have gone through?

A No, sir.

MR. THOMPSON: One moment, Your Honor. (pause) Your Honor, I believe that's all I have for this witness.

BY THE COURT: All right. Your witness.

MS. ARNOLD: Nothing, Your Honor.

BY THE COURT: All right. Thank you. Thank you, sir. You can step down.

MR. THOMPSON: Your Honor, I would ask that we excuse Mr. Lowery.

BY THE COURT: Any objection?

MS. ARNOLD: No objection, Your Honor.

BY THE COURT: Thank you for coming over, Mr. Lowery.

(witness excused)

MR. THOMPSON: Your Honor, the Plaintiff's next witness would be Tommy Dugas.

THOMAS F. DUGAS, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

BY THE COURT: Come around and have a seat, please. (complies) If you'll state your full name for the court reporter.

A Yes, sir.
Q Tell me briefly, what's the general process, you know, once you get -- start the process of preparing a loan of this nature.
A Well, in this particular case, Mr. DeCarlis was friend and client of one of my partners, had done some other legal work for him. This refinance transaction, he had discussed with Independence and my partner got me involved. The first order of business is I got a copy of the commitment letter from Independence National Bank which lays out the terms of the agreement between Mr. DeCarlis and the bank.
Q Let me have you look at what I've marked for information purposes or identification purposes as Exhibit 1 in that notebook, sir.
A Okay.
Q The document that's identified as Exhibit 1 is that a copy of this draft commitment letter that you received from the bank to basically get the ball rolling on preparing this closing?
A Yes, sir, it is.
MS. ARNOLD: Your Honor, I object to that. That's a draft. We have the signed, finalized commitment letter, and I object to it on parole -- it's not a signed document.
BY THE COURT: Again, I'm going to have to sustain the objection. It may very well become relevant, but at this point, I have no option but to sustain the objection.
MR. THOMPSON: Thank you, Your Honor.

Q Tommy, as part of the process of preparing this loan, did you have a title search done on the property?
A Yes, sir.
Q What's the purpose of doing a title search?
A The purpose of the search is to make sure that -- what liens are on the property so that when you actually close the transaction you can pay off the appropriate liens and ensure that the bank has a first mortgage on the property per the commitment letter.
Q When you have a title search done, do you get back like a summary and copies of the document?
A Yes, copies of deeds, mortgages, tax notices, easements of record, restrictions, anything affecting the title to the property to be insured.
Q Is this what you use to help you prepare for the closing?
A Yes, sir.
Q Let me have you look at Tab 2, what I've marked for identification purposes as Exhibit 2. Let me ask, just tell me if you recognize the document.
A Yes, I do.
Q What is the document?
A That's the title summary sheet that my paralegal, where she summarized the abstract of the title.
MR. THOMPSON: Your Honor, I would move that Plaintiff's Exhibit 2 be admitted into evidence.

MS. ARNOLD: No objection, Your Honor.

MR. THOMPSON: Thank you.

(Title Summary entered into evidence as Plaintiff's Exhibit No. 2)

Q Tommy, down at the bottom is there a section that says "Mortgages"?

A Yes, sir.

Q All right. Is there any notes out beside where it says "Mortgages"?

A Well, the way my paralegal prepares her abstract, she references to see the notes. So, she would have had copies of the two mortgages that were of record, one of which was the first mortgage to First National Bank of Spartanburg which was to be paid off, and then there was a second mortgage to Mr. DeCarlis where I made a notation that that needed to be released.

Q And that's your handwriting?

A Yes, sir.

Q All right. Thank you. Let me have you look at what's marked for identification purposes as Exhibit 3. Do you recognize Exhibit 3?

A Yes, sir. That's the abstract of the mortgage from Buncombe Professional Park, LLC to Mr. DeCarlis.

Q Is the actual mortgage attached to it?

A Yes, sir, it is.

MR. THOMPSON: Your Honor, I would move that this be

admitted into evidence as Exhibit 3.

MS. ARNOLD: No objection.

BY THE COURT: All right.

(Title Abstract entered into evidence as Plaintiff's Exhibit No. 3)

Q Tommy, is this something that would have been in your closing file?

A Yes, sir.

Q This title abstract form indicates that this is an open mortgage, correct?

A That is correct.

Q Just in your experience in order for the bank -- in order for the lending bank to have the first mortgage, you would have to satisfy, or release or subordinate any open mortgages, correct?

A That is correct.

Q Let me get you to look at Exhibit 4, please.

A Okay.

Q That's been marked as 4 for identification. Tell me what that is, please.

A That is a title insurance commitment issued by First American Title Insurance Company of which I am their agent.

Q Is this the title commitment for this loan to Buncombe Professional Park?

A Yes, sir, it is.

MR. THOMPSON: I ask that this be admitted as Exhibit 4.

MS. ARNOLD: No objection.

(Title Insurance Commitment entered into evidence as Plaintiff's Exhibit No. 4)

Q Tommy, let me get you to look, I believe, it starts out with an Exhibit A, is that correct, that simply describes the property and the loan itself?

A That's the property description, yes, sir.

Q And then Schedule B has a list of requirements that must be met in order to insure the loan; is that correct?

A Yes, sir.

Q Down in Item 7 and Item 8, what are those requirements?

A Those are the two requirements -- again, the agreement between the parties was that Independence National Bank would be a title insured first mortgage, and in order for that to take place the mortgage to First National Bank of Spartanburg needed to be satisfied and the second mortgage to Mr. DeCarlis needed to be satisfied, released or subordinated.

Q Turn to Exhibit 5, please, Tommy. What is this document?

A This is the closing instruction letter issued by Independence National Bank when they forwarded me the loan documents for the closing.

MR. THOMPSON: I offer this as Plaintiff's Exhibit 5.

MS. ARNOLD: No objection.

MR. THOMPSON: Thank you.

would do with a borrower such as Mr. DeCarlis?
A The first thing I do is review the commitment letter with my client, the borrower, as his agent because that is the road map to the closing and lays out the agreement between the borrower and the bank.
Q All right. Again, on the second page as far as collateral, does it indicate that there was going to be a title insured first real estate mortgage on the property?
A Yes, sir. That was the requirement and the agreement.
Q Look on page 3, that second paragraph, these are some of the conditions to proceeding, does it indicate that title shall be free, and simple and marketable, free and clear of all defects, liens and encumbrances?
A Yes, sir.
Q Going to the last page, did Mr. DeCarlis sign this letter both on behalf of Buncombe Professional Park and personally as a guarantor?
A Yes, sir, he did.
Q It's your understanding this was the agreement between the bank and Buncombe Professional Park and Mr. DeCarlis, correct?
A This is the agreement. Yes, sir.
Q All right. Let me get you to look at Exhibit 7 for me, please. Can you tell me what this is?
A This is one of the loan documents which was a part of the loan package itself and it is entitled Business Loan Agreement.

Q Look at the last page, is it signed by Mr. DeCarlis?
A Yes, sir.
MR. THOMPSON: Move this be admitted as Exhibit 7.
MS. ARNOLD: No objection, Your Honor.
(Business Loan Agreement entered into evidence as Plaintiff's Exhibit No. 7)
Q Tommy, looking at page 2 of 4 up at the top of this document, there is, I guess, a caption that says, "Title and Encumbrances," does it say that, "All encumbrances on any part of the Property were disclosed to Lender in writing"?
A That's what the document says, yes, sir.
Q Looking down under the next -- go down a couple paragraphs where it says, "No Litigation/No Misrepresentations", does the last portion of that paragraph say, "all representations and warranties in this Agreement and the Loan Documents are true and correct and no material fact has been omitted"?
A What page are you on?
Q Same page, going down a couple paragraphs, then it's got in bold it says, "No Litigation/No Misrepresentations."
A Oh, yes, sir. I'm sorry.
Q And the last part of that paragraph says, "all representations and warranties in this Agreement and the Loan Documents are true and correct and no material fact has been omitted"; is that correct?
A That's what it states, yes, sir.

Q Going down a little bit further down the same page, it says, "Confirmatory Documents and Actions"; is that correct?
A Yes, sir.
Q Does that say that, "Borrower agrees that on Lender's request, Borrower will do any act or execute any additional documents that are or may be required to make the terms of the Loan conform to the conditions contained in Lender's commitment to Borrower." Is that what the document says?
A That's what it says, yes, sir.
Q Mr. DeCarlis signed this document; is that right?
A Yes, sir, he did.
Q Let me get you to go to the next document, Exhibit 8. Can you tell me what this document is?
A This is the Promissory Note.
Q Is this executed by Mr. DeCarlis on behalf of Buncombe Professional Park?
A Yes, sir.
MR. THOMPSON: Move this be admitted as Exhibit 8.
MS. ARNOLD: No objection, Your Honor.
(Commercial Promissory Note entered into evidence as Plaintiff's Exhibit No. 8)
Q What's the amount of the note?
A $1,650,000.00.
Q What's the maturity date of the note?
A March 25, 2009.

Q Is this the document that essentially promises that Mr. DeCarlis and Buncombe Professional Park is going to pay back Independence National Bank the principal plus interest?
A Yes, sir, it is.
Q Let me get you to look at number 9, please. Do you recognize this document?
A Yes, sir, I do.
Q What is it?
A It's the real estate mortgage that Mr. DeCarlis signed at closing, a copy of it.
Q I was just going to get you to turn to, looks like, page 6 of 7 just to make sure that this is the one that he signed.
A Yes, sir, it is.
MR. THOMPSON: Move that Exhibit 9 be admitted into evidence.
MS. ARNOLD: No objection, Your Honor.
(Commercial Real Estate Mortgage entered into evidence as Plaintiff's Exhibit No. 9)
Q All right. What does the mortgage do for the bank?
A It's the collateral for the loan.
Q Let me get you to look at page 3 of this document, Tommy, down at the bottom you see the section that says, "Mortgagor's Assurances"?
A Yes, sir, I do.
Q Does that say, "At any time, upon a request of Lender,

Q Let me get you to flip to tab 11 if you would, sir. Tommy, what is this document?
A This is the Settlement Statement from the closing itself.
Q Is it signed by Mr. DeCarlis on the front page and yourself on the second page?
A Yes, sir. I also signed on the first page.
Q You're right. I see that down there.
MR. THOMPSON: Your Honor, move Exhibit 11 be admitted into evidence.
MS. ARNOLD: No objection, Your Honor.
(Settlement Statement entered into evidence as Plaintiff's Exhibit No. 11)
Q Now, looking on page 1, Tommy, does it indicate it's going to be a payoff of an existing mortgage to First National Bank of -- it stops there -- but it's First National Bank of Spartanburg?
A That's correct.
Q What is the amount of the payoff?
A $1,457,149.94.
Q And that was out of this total loan of $1,650,000.00?
A Yes, sir.
Q Let me get you to look on the second page, if you would. Look at line 1201 for me.
A Okay.
Q There are some recording fees. It's $15.00 to record the mortgage to Independence National Bank; is that right?

A Yes, sir.
Q You've got releases there. You're charging Buncombe Professional Park $10.00 for releases; is that correct?
A Yes, sir. There were two mortgages.
Q So, that would be $5.00 per release; is that correct?
A Yes, sir.
Q As part of the HUD statement, you were anticipating there would be two mortgages satisfied at the time of closing, correct?
A Yes, sir.
Q One would be the First National mortgage and one would be the mortgage to DeCarlis; is that correct?
A Yes, sir.
Q Tommy, at this point let me ask you: Was there any satisfaction, release or subordination executed by Mr. DeCarlis at the loan closing?
A No, there was not.
Q Why is that?
A I made a mistake.
Q As part of the agreement, as part of your instructions were you to ensure that Independence National Bank had a first mortgage?
A That was the agreement between the parties.
Q Was it your intent to prepare some document to do something to make sure that this loan to DeCarlis was either satisfied, released, or subordinated?

Independence National Bank mortgage was being placed on?

A Yes, sir.

Q I notice that it's got your stamp on there. Is that to ensure y'all had made sure this loan was marked as satisfied?

A Yes, sir. We stamp the documents so the Register of Deeds Office returned them to my law firm.

BY THE COURT: Which exhibit is this?

MR. THOMPSON: This is 13, Judge. I apologize.

BY THE COURT: Okay. Thank you.

MR. THOMPSON: I move to have 13 admitted into evidence.

MS. ARNOLD: No objection.

(Cancelled Mortgage of First National Bank of Spartanburg entered into evidence as Plaintiff's Exhibit No. 13)

Q When Mr. -- Tommy, let me ask you this, what's the next time you had occasion to have anything to do with the loan to Buncombe Professional Park and David DeCarlis?

A I was contacted by your partner Gray Walsh. Your firm had been retained to initiate a foreclosure action. When Gray received his title work, the DeCarlis mortgage was still of record, and he contacted me about it.

Q At that point, what did you do with regard to this DeCarlis mortgage?

A Well, about that same time apparently Mr. DeCarlis had retained an attorney in Florida, the Noble Law Firm, and I sent this attorney in Florida a correspondence dated March 29, 2010

laying out the facts of what happened, telling him of my mistake and asking him to get Mr. DeCarlis to sign a Subordination Agreement so that we could get it recorded to comport with the agreement between the parties.

Q Okay. Let me get you to look at what's marked for identification purposes as Exhibit 14. Is that the letter that you've just spoken of?

A Yes, sir.

MR. THOMPSON: Your Honor, I would move---

MS. ARNOLD: No objection.

MR. THOMPSON: Thank you.

(Letter dated March 29, 2010 to Noble Law Firm entered into evidence as Plaintiff's Exhibit No. 14)

Q Again, in this letter, you asked Mr. DeCarlis essentially to sign a subordination to comport with the agreement the parties had at the time of closing; is that correct?

A Correct.

Q Did you get a response back from Mr. Noble on behalf of Mr. DeCarlis?

A Yes, sir.

Q What's the date of that response?

A If that's Exhibit 15, it looks like April 8, 2010.

Q Did Mr. DeCarlis, through Attorney Noble, agree to subordinate the personal loan to this mortgage?

A They refused.

MR. THOMPSON: Move to admit Exhibit 15.

MS. ARNOLD: No objection.

BY THE COURT: All right.

(Letter dated April 8, 2010 to Thomas F. Dugas entered into evidence as Plaintiff's Exhibit No. 15)

Q Let me ask you, Tommy, in this letter from Ray Noble to yourself on April 8th, down in the paragraph on the bottom of the first page, does he indicate whether his client was intending to subordinate his individual mortgage? Let me -- it's the second sentence. It starts, "My client does not"---

A That's what he states, yes, in the letter.

Q Did he state that he didn't have any recollection that this loan was contingent on Mr. DeCarlis subordinating the individual mortgage?

A Yes. That's what he said.

MR. THOMPSON: Thank you, Tommy. I don't have anything further.

BY THE COURT: Your witness.

MS. ARNOLD: Thank you, Your Honor.

CROSS-EXAMINATION BY MS. ARNOLD:

Q If you will look at what's been marked as Exhibit No. 5 for me which is the Attorney's Closing Instructions.

A In his book?

Q Yes, sir.

A Okay.

Q In the opening to that letter just reads that the bank's customer has hired you to do the commercial closing, correct?
A That's what it states.
Q That was putting you in the representation of Buncombe and Mr. DeCarlis in this loan transaction; is that correct?
A Representing Mr. DeCarlis and Buncombe, yes, along with the bank.
Q Mr. Dugas, there is no question that this mortgage was of record, the one that we're talking about, the prior mortgage with Mr. DeCarlis and Buncombe, at the time of this closing, is there?
A No, no question at all.
MS. ARNOLD: Nothing further at all. Thank you.
BY THE COURT: Anything else?
REDIRECT EXAMINATION BY MR. THOMPSON:
Q Just to clarify, Mr. Dugas, were you the only lawyer at the closing?
A Yes, sir.
Q Were you there to make sure both the interests of the bank and Buncombe Professional Park and Mr. DeCarlis were protected?
A Yes, sir. In a commercial transaction such as that, you wear two hats basically.
MR. THOMPSON: Thank you, Judge. Nothing further.
BY THE COURT: Thank you, Mr. Dugas. You can step down.
(witness excused)
MR. THOMPSON: Your Honor, I would call Fred Moore to the

approval comes to me. In this case -- for all of the loan officers involved that work directly for me, when a loan hits a certain dollar amount, they come through me to make sure they have the underwriting and then at another dollar level we take those loans to the Director of Loans Committee to get approved.

Q This loan -- this assessment was for $1,650,000. Would that loan have to go through this committee process that you discussed?

A Yes, it would.

Q Would Independence National Bank loan this much money to be in second position on a piece of property?

A No, sir.

Q As part of the process would the loan officers talk to the borrower about whether there were any encumbrances or other liens on the property?

A Yes, sir, they would, if there was anything else owed on the property becomes a part of the underwriting.

Q Tom Piper initially handled this loan when it first came in; is that correct?

A Yes, sir.

Q And he subsequently left the bank; is that right?

A Yes, sir.

Q And then Mr. Lowery, who testified earlier, took over; is that correct?

A That's correct.

Q You were essentially supervising both of those gentlemen; is that correct?
A Yes, sir.
Q Did either one of them ever come back and report to you that David DeCarlis had indicated that he had a personal mortgage on this property?
A No, sir.
Q If you had been -- if that had been disclosed to you, would this loan have been made?
A No, sir. I would have turned the loan down.
Q Let me get you to look -- there's a book of exhibits in front of you -- let me get you to look at Exhibit 16 for me, if you would.
A Change in Terms Agreement?
Q Yes, sir. Is this a document related to this loan to Buncombe Professional Park?
A Yes, sir.
Q All right. Was it executed by both Buncombe Professional Park and Independence National Bank?
A Yes, sir, it was.
MR. THOMPSON: I move to admit this as Exhibit 16.
MS. ARNOLD: No objection.
(Change in Terms Agreement entered into evidence as Plaintiff's Exhibit No. 16)
Q Fred, what was the purpose of this Change in Terms

Agreement?
A The loan matured and if the customer was not going to pay this off, we were going for another term period with the loan.
Q I guess the original maturity date was, as has been testified to earlier, was March 25, 2009; is that correct?
A That is correct.
Q This agreement, does it change any of the terms of the loan?
A It would change the new maturity date, it would change the rate and any other structure.
Q What was the new maturity date on this document?
A This would have went to--
Q I think it's in paragraph that's got number 1 next to it.
A --March 25, 2010.
Q Let me ask you this, Fred, was this loan paid off?
A No, sir.
Q Was any principal ever paid on this loan?
A No, sir.
Q All right. Is Buncombe Professional Park in default on this loan?
A Yes, sir.
Q Let me get you to look at what's marked as Exhibit 17 in this notebook.
A All right. Statement of Account?
Q Yes, sir. Is this a Statement of Account with regards to this loan that was signed by you?

KOD: JUDGMENTS - CHECKED 14 SEPTEMBER 200

175.00
ROD - 18.007

TITLE SUMMARY
HORTON, DRAWDY, WARD & JENKINS, P.A.

± 18.56 ACRES - SEE COPY
* LESS PROPERTY DEED 2278/1882

Lot No. ____ Subdivision BUNCOMBE PROFESSIONAL PARK, LLC Street SOUTH BUNCOMBE RO

Block Book No. (288-G-6-1-4 Valuation: Lot: ____ Bldg. (s) ____

Plat Book 1037 Page 33 REV. Dated 27 APRIL 2007 Engineer 3D LAND SURVEYING, IN

Title now vested in: BUNCOMBE PROFESSIONAL PARK, LLC

Under Deed 2149/1728 Dated 13 JUNE 2005 Recorded 15 JUNE 2005

Restrictions Declaration 2278/1876 Dated 16 JULY 2007 Recorded 16 JULY 2007

Easements in Restr. SEE COPIES 2280/1470
2278/1884 SEE COPY

Construction Problems: ____

Setbacks in Restrs. ____

Forfeiture or reversionary clause in Restrictions ____

Plat: Setback Lines shown * SEE ALL EXCEPTIONS ON PLATS - SEE REVISED PLAT AS MARKED

Easements or reservations shown: * SEE XEROX COPIES

Easements & rights of way in chains of title (Deeds, etc.) → SEE EXCEPTIONS ON DEED 1624/489

	Yes	No		Yes	No
Sewer liens	☐	☑	Judgments	☐	☑
City Taxes due	☐	☑	Lis Pendens	☐	☑
Paving Assessments	☐	☑	Federal Tax Liens	☐	☑
County Taxes due	☐	☐ ROLLBACK	Attachments	☐	☑
Mental Health Liens	☐	☑	Mechanics Liens	☐	☑
Sewer Easements	☐	☑	Indef. RW's & Ease.	☑	☐

Mortgages: Mortgagee Release 2ND TO DeCarlis
Date: ____ Book ____ Page ____ Orig. Amt. ____
Mortgagee ____
Date ____ SEE Book NOTES Page ____ Orig. Amt. ____

Other defects and exceptions ____

Zoning Applicable ____ Existing Bldgs. ____
Located in Special District: ____ Dist. Liens ____

PARTIAL RELEASES OF LIEN
* SEE DEED 1874/539 AND 1785/978

EXHIBIT 2

INDEPENDENCE
NATIONAL BANK

September 11, 2007

David DeCarlis
Buncombe Professional Park, LLC
216 Cleveland Street
Greenville, SC 29601

Re: Loan Commitment to Buncombe Professional Park, LLC

Dear David:

Independence National Bank (hereafter "Independence" or "Bank") is pleased to offer you a commitment to lend on the following terms and conditions:

BORROWER:
Buncombe Professional Park, LLC (the "Borrower")

AMOUNT:
The amount of this facility shall be $1,650,000.00 in the form of a commercial mortgage loan.

PURPOSE:
This facility shall be used to refinance approximately $1,450,000 in debt at another bank that is secured by approximately 4.9 acres of land and improved as an office park known as Buncombe Professional Park on S. Buncombe Road, Greer, SC (the "Property") and to provide and additional $200,000 in funds for an interest reserve until the Property can be sold.

TERM:
This facility shall have a term of 18 months.

INTEREST RATE:
The interest rate will be a floating rate of Bank's Prime Rate of interest (Prime + 0.0%) with a cap or ceiling of 9.0%.

864.672.1776 • Fax: 864.672.1777
500 East Washington Street • Greenville, SC 29601
P.O. Box 1776 • Greenville, SC 29602

864.451.5360 • Fax: 864.451.5365
2801-B Wade Hampton Blvd. • Taylors, SC 29687

EXHIBIT 6

REPAYMENT:
This facility shall be repayable in monthly payments of interest only. In addition, as office pads are sold in the Property, 80% of the proceeds from the sale of office pads will be required by the Bank to reduce the principal balance of the loan. All remaining principal and unpaid interest shall be due and payable in full on the maturity date 18 months from the date of the closing of the loan.

PREPAYMENT PENALTY:
None.

ORIGINATION FEE:
At closing, an origination fee equal to one quarter of one per cent of the loan amount shall be due and payable, said amount being $4,125.00.

GUARANTORS:
The loan shall be unconditionally guaranteed by David D. DeCarlis.

COLLATERAL:
The Borrower shall grant Independence a title insured first real estate mortgage in the Property including all improvements presently located or subsequently constructed thereon.

DISBURSEMENTS AND INSPECTIONS:
At the time of the closing, Bank will disburse approximately $1,450,000.00 to refinance the loan currently at another bank. Thereafter, disbursements will be made based upon an application and certificate for payment and supporting invoices if applicable.

FINANCIAL STATEMENTS:
Upon request, Borrower and Guarantors shall furnish current financial information to Independence in each instance prepared in accordance with generally accepted accounting principles consistently applied and otherwise in form and substance satisfactory to Bank.

CONDITIONS PRECEDENT:
The provisions of this Commitment are subject to and conditioned upon receipt by Independence of the following, all in form and substance satisfactory to Independence:

A detailed appraisal of the Property in form and substance acceptable to the Bank showing a current fair market value of the Property satisfactory to Bank. All costs of such appraisal are to be paid by the Borrower.

Independence ordered environmental database report, at Borrower's expense, which will determine whether or not any hazardous waste or other materials regulated, controlled or prohibited by the federal, state or local environmental laws are located on the Property. Bank reserves the right if deemed necessary, to require an environmental audit of the Property by an engineer or other environmental consultant satisfactory to Bank. Bank reserves the right to declare this commitment null and void if the audit discloses evidence that the Property is contaminated with hazardous or toxic materials or has ever been used as a disposal site for the same.

A commitment to issue a standard ALTA mortgagee title insurance policy in form, content and from a title insurer satisfactory to Independence, insuring the mortgage as a first lien on the Property for the full amount of the loan, with such endorsements as Independence may require. Title shall be fee simple and marketable, free and clear of all defects, liens and encumbrances, including mechanics' liens.

A current survey of the Property, certified to Independence and the title insurer, showing the boundaries of the Property by courses and distances, together with a corresponding metes and bounds description, the actual or proposed location of all improvements, encroachments and restrictions, the location and width of all easements, utility lines, rights-of-way and building set-back lines, and notes referencing book and page numbers for the instruments granting the same.

Borrower and Guarantors shall provide additional financial information as required by Bank.

DOCUMENTS:
The facility will be evidenced by documents prepared by and acceptable to Independence, containing such representations, warranties, affirmative and negative covenants, indemnities, closing conditions, defaults and remedies as are typically required by Independence and/or are customary in this type of transaction. The failure of Borrower and Independence to reach agreement on the loan documents shall not be deemed a breach by Independence of this commitment. Unless Independence agrees otherwise in writing, completion of all documents is a condition of closing.

DOCUMENT PREPARATION FEE:
A fee to cover the costs of preparing the closing documents for the loan will be collected at closing, said amount being $250.00.

COSTS:
On or before the closing Borrower shall pay all costs, expenses and fees (including, without limitation, any appraisal, survey, insurance, environmental assessment, engineering, inspections, searches, recording and attorneys' fees) associated with this transaction.

DEPOSITS:
Independence shall require the Borrower maintain its primary depository relationship with Independence for loan disbursements and payments. In addition, Bank shall require that David DeCarlis maintain $100,000 on deposit at Independence in a money market account for the entire term of the loan.

CERTIFICATE OF GOOD STANDING:
Independence shall have received from Borrower certificate of the Secretary of State of the state of such Borrower's organization as to the good standing of Borrower.

ORGANIZATIONAL DOCUMENTS:
Prior to closing, Borrower shall provide Bank with copies of its articles of organization and bylaws.

Independence's obligations under this commitment are conditioned upon the fulfillment to Independence's sole satisfaction of each term and condition referenced by this commitment. These terms and conditions are not exhaustive, and this commitment is subject to certain other terms and closing conditions customarily required by Independence for similar transactions and may be supplemented prior to closing based upon Independence's investigation and/or as disclosure of Borrower's circumstances so dictate. This commitment letter will expire unless the facility is closed on or before September 26, 2007. This commitment letter shall survive closing.

Independence has made this commitment based upon the information supplied by Borrower. Independence shall have the right to cancel this commitment, whereupon Independence shall have no obligations hereunder, in the event of: (i) a material adverse change in the financial condition, operations or prospects of Borrower or any Guarantor; (ii) a material change in the accuracy of the information, representations, exhibits or other materials submitted by Borrower in connection with its request for financing; or (iii) loss of, damage to, a taking of, or the presence of any hazardous substances at or on any collateral for the loan. Borrower must immediately notify Independence of any such event.

This commitment supersedes all prior commitments and proposals with respect to this transaction, whether written or oral, including any previous loan proposals made by Independence or anyone acting with its authorization. No modification shall be valid unless made in writing and signed by an authorized officer of Independence. This commitment is not assignable, and no party other than Borrower shall be entitled to rely on this commitment.

David, if the terms and conditions of this commitment letter are acceptable to you please indicate your acceptance by signing below and returning one executed copy of this commitment letter to me. This offer of commitment shall expire unless the acceptance is received by the undersigned on or before September 26, 2007.

Sincerely,

Mike Lowery
Vice President

The above terms and conditions are hereby accepted on this 25th day of September 2007.

BORROWER:

Buncombe Professional Park, LLC

By: David D DeCarlis
Print Name: David D DeCarlis
Print Title: Member

GUARANTORS:

David D DeCarlis
David D. DeCarlis

BUSINESS LOAN AGREEMENT

Independence National Bank
500 E. Washington St.
Greenville, South Carolina 29601
(864)672-1776

LOAN NUMBER	AGREEMENT DATE	AGREEMENT/ACCOUNT NUMBER
17447	September 25, 2007	17447

BORROWER INFORMATION

Buncombe Professional Park LLC
216 Cleveland Street
Greenville, SC 29601

Type of Business Entity: Limited Liability Company
State of Organization/Formation: South Carolina

GUARANTOR INFORMATION

David DeCarlis
216 Cleveland Street
Greenville, SC 29601

Type of Entity: Individual
State of Residence: South Carolina

AGREEMENT. This Business Loan Agreement will be referred to in this document as the "Agreement." This Agreement is made by Independence National Bank (Lender), Borrower and Guarantor. The consideration is the promises, representations, and warranties made in this Agreement and the Related Documents.

DEFINITIONS. These definitions are used in this Agreement.

"Collateral" means the Property that all Obligors pledge, mortgage, or give Lender a security interest in, regardless of where the Property is located and regardless of when it was or will be acquired, together with all replacements, substitutions, proceeds, and products of the Property.

"Events of Default" means any of the events described in the "Events of Default" section of this Agreement.

"Financial Statements" means the balance sheets, earnings statements, and other financial information that Obligors have, are, or will be giving to Lender.

"Indebtedness" means the Loan and all other loans and indebtedness of Borrower to Lender, including but not limited to Lender's payments of insurance or taxes, all amounts Lender pays to protect its interest in the Collateral, overdrafts in deposit accounts with Lender, and all other indebtedness, obligations, and liabilities of Borrower to Lender, whether matured or unmatured, liquidated or unliquidated, direct or indirect, absolute or contingent, joint or several, due or to become due, now existing or hereafter arising.

"Loan" means the loan or loans Lender makes to Borrower under the note or notes dated the same date as this Agreement that Borrower gives to Lender and all amendments, extensions, renewals, and refinancing.

"Obligor" means any person having any obligation to Lender, whether for the payment of money or otherwise, under this Agreement or under the Related Documents, including but not limited to Guarantor and any other guarantors of the Indebtedness.

"Parties" means all Borrowers, Guarantors, and Non-Borrower Debtors signing this Agreement.

"Party" means any Borrower, Guarantor, and Non-Borrower Debtor signing this Agreement.

"Property" means the Parties' assets, regardless of what kind of assets they are.

"Related Documents" means all documents, promissory notes, security agreements, leases, mortgages, construction loan agreements, assignments of leases and rents, guaranties, pledges, and all other documents or agreements executed in connection with this Agreement. The term includes both documents existing at the time of execution of this Agreement and documents executed after the date of this Agreement.

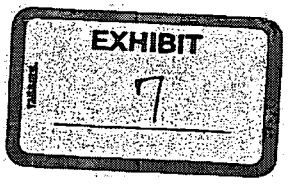
IDENTIFICATION OF INDEBTEDNESS. The following loan and any amendments, extensions, renewals or refinancing (the "Loans") thereof is subject to this Agreement:

- Loan number 17447 with a principal amount of $1,650,000.00

BORROWER'S REPRESENTATIONS AND WARRANTIES. Obligors represent and warrant to Lender the accuracy of the description of Borrower and Guarantor, the nature of Borrower's business shown above, and the statements made in this section. The representations and warranties will continue and remain in effect until all of the Indebtedness is fully paid to Lender and Obligors' obligations are fully performed.

Borrower's Existence and Authority. Borrower is duly formed and in good standing under all laws governing Borrower and Borrower's business, and the person or persons executing this Agreement have the power and authority to execute this Agreement and the Related Documents and to bind Borrower to the obligation created in this Agreement and the Related Documents.

© 2004-2006 Copyright Compliance Systems, Inc. E4EE-C54E - 2006.10.139
Business Loan Agreement - DL4004



www.compliancesystems.com
800-968-8522 - Fax 616-956-1868

Financial Information and Filing. All Financial Statements provided to Lender have been prepared and will continue to be prepared in accordance with generally accepted accounting principles, consistently applied, and fully and fairly present the financial condition of Obligors, and there has been no material adverse change in Obligors' business, Property, or condition, either financial or otherwise, since the date of Obligors' latest Financial Statements. Obligors have filed all federal, state, and local tax returns and other reports and filings required by law to be filed before the date of this Agreement and have paid all taxes, assessments, and other charges that are due and payable prior to the date of this Agreement. Obligors have made reasonable provision for these types of payments that are accrued but not yet payable. Borrower does not know of any deficiency or additional assessment not disclosed in Borrower's books and records.

Title and Encumbrances. Obligors have good title to all of Obligors' assets. All encumbrances on any part of the Property were disclosed to Lender in writing.

Compliance with General Law. Borrower is in compliance with and will conduct its business and use its assets in compliance with all laws, regulations, ordinances, directives, and orders of any level of governmental authority that has jurisdiction over Borrower, Borrower's business, or Borrower's assets.

Environmental Compliance. Obligors are in compliance with all applicable laws and rules of federal, state, and local authorities affecting the environment, as all have been or are amended.

No Litigation/No Misrepresentations. There are no existing or pending suits or proceedings before any court, government agency, arbitration panel, administrative tribunal, or other body, or threatened against Borrower that may result in any material adverse change in Borrower's business, property, or financial condition, and all representations and warranties in this Agreement and the Loan Documents are true and correct and no material fact has been omitted.

COVENANTS. On the date of this Agreement and continuing until the Indebtedness is repaid and Borrower's obligations are fully performed, Borrower covenants as follows.

Notices of Claims and Litigation/Notice of Adverse Events. Borrower will promptly notify Lender in writing of all threatened and actual litigation, governmental proceeding, default, and every other occurrence that may have a material adverse effect on Borrower's business, financial condition, or the Property.

Insurance. Borrower will maintain adequate fire and extended risk insurance coverage, business interruption, workers' compensation, commercial general liability, and other insurance required by law or as may be required by Lender. All insurance policies will be in amounts, upon terms, and in a form acceptable to Lender. All policies must be carried with insurers acceptable to Lender. Borrower will provide evidence satisfactory to Lender of all insurance and that the policies are in full force and effect and all insurance on the Collateral will name Lender as a mortgagee and loss payee, will include a lender's loss payable endorsement, and will require thirty days advance written notice to Lender of any cancellation of coverage. If the Borrower fails to maintain required insurance, the absence of the required insurance will be an Event of Default. If this happens, Lender may buy the insurance, but will have no obligation to buy it. These amounts paid by Lender will be added to the Indebtedness or will be payable on demand, at Lender's option.

Confirmatory Documents and Actions. Borrower agrees that on Lender's request, Borrower will do any act or execute any additional documents that are or may be required to make the terms of the Loan conform to the conditions contained in Lender's commitment to Borrower. Within five days of Lender's request, Borrower will furnish an estoppel certificate in a form Lender approves.

Payment of Taxes. Borrower will pay all taxes, levies, and assessments required by all local, state, and federal agencies. Borrower will make these payments when the amounts are due but before any penalty for late payment is imposed. Borrower's failure to promptly pay any tax, levy, or assessment due will be an Event of Default unless Borrower is diligently disputing the amount and Borrower has established a reserve account for the payment of the taxes if Borrower does not prevail in the dispute.

Business Existence and Operations. Borrower will keep Borrower's existence in its current organizational form in full force and effect unless Lender gives prior written consent to Borrower's proposed change. Borrower will not sell or merge Borrower's business or any part of Borrower's business without the Lender's prior written consent. Borrower will continue its business as currently conducted. Borrower will not change its name, its identification number, or its place of organization without Lender's prior written consent. Borrower will keep its books and records at the address in this Agreement. Borrower will promptly notify Lender in writing of any planned change in Borrower's principal place of business.

Environmental Compliance. Borrower will comply with all laws affecting the environment. Borrower will notify Lender within ten days after Borrower receives a summons, notice, citation, letter, or any other type of notice from any federal, state, or local authority, or any other person that claims Borrower is in violation of any law affecting the environment. Obligors indemnify and hold Lender harmless from all violations of any environmental laws. This indemnity includes all costs and expenses incurred by Lender, including reasonable attorneys' fees, that are related to a violation of any environmental laws, even if the Indebtedness has been paid at the time any proceeding, claim, or action is started against Lender. Lender may itself or through Borrower arrange for an environmental audit prepared by a qualified environmental engineering firm acceptable to Lender to confirm the continued accuracy of Borrower's environmental representations and warranties. Borrower will pay for the environmental audit.

Use of Proceeds. Borrower will use the loan proceeds in its business.

Other Information. From the date hereof until the Indebtedness is fully repaid and all of Obligors' obligations are fully performed and satisfied, the Parties cited below agree, unless otherwise consented to in writing by the Lender, they will submit the following:

Buncombe Professional Park LLC compiled Tax Returns within 120 days after the end of each calendar year in form acceptable to Lender.

© 2004-2006 Copyright Compliance Systems, Inc. E4EE-C54E - 2006.10.139

David DeCarlis compiled Personal Tax Returns within 120 days after the end of each calendar year in form acceptable to Lender.

David DeCarlis compiled Personal Financial Statements within 30 days after the end of each calendar year in form acceptable to Lender.

EVENTS OF DEFAULT. The occurrence of any of the following events will be an Event of Default.

Noncompliance with Lender Agreements. Default by Borrower or Guarantor under any provision of this Agreement, the Related Documents, or any other agreement with Lender.

False Statements. If an Obligor made or makes a false or misleading misrepresentation in the Related Documents, in any supporting material submitted to Lender or to third parties providing reports to Lender, or in Financial Statements given or to be given to Lender.

Material Adverse Change. Any material adverse change in the Borrower's business, financial condition, or the Property has occurred or is imminent; if the full performance of the obligations of any Obligor is materially impaired; or if the Collateral and its value or Lender's rights with respect thereto are materially impaired in any way. The existence or reasonable likelihood of litigation, governmental proceeding, default, or other event that may materially and adversely affect an Obligor's business, financial condition, or the Property.

Insolvency or Liquidation. An Obligor voluntarily suspends transaction of its business or does not generally pay debts as they mature. If an Obligor has or will make a general assignment for the benefit of creditors or will file, or have filed against it, any petition under federal bankruptcy law or under any other state or federal law providing for the relief of debtors if the resulting proceeding is not discharged within thirty days after filing. If a receiver, trustee, or custodian is or will be appointed for an Obligor.

Default on Unrelated Debt. If Borrower or Guarantor materially defaults under a provision of an agreement with a third party or if the indebtedness under such an agreement is accelerated.

Judgments or Attachments. If there is entered against an Obligor a judgment that materially affects the Borrower's business, financial condition, or the Property, or if a tax lien, levy, writ of attachment, garnishment, execution, or similar item is or will be issued against the Collateral or which materially affects Borrower's business, financial condition, or the Property, and which remains unpaid, unstayed on appeal, undischarged, unbonded, or undismissed for thirty days after it was issued.

Collateral Impairment. Lender has a good-faith belief that Lender's rights in the Collateral are or will soon be impaired or that the Collateral itself is or soon will be impaired.

Termination of Existence or Change in Control. If Borrower or Borrower's business is sold or merged or if Borrower or Borrower's business suspends business or ceases to exist.

Insecurity. If Lender has a good-faith belief that any Party is unable or will soon be unable to perform that Party's duties under this Agreement or under the Related Documents.

Death. The death of an individual who is an Obligor, a partner in a partnership that is an Obligor, a member in a limited liability company that is an Obligor, an officer of a corporation that is an Obligor, or an individual of similar position in any other type of business organization that is an Obligor.

REMEDIES ON DEFAULT.

Remedies, No Waiver. The remedies provided for in this Agreement, the Related Documents, and by law are cumulative and not exclusive. Lender reserves the right to exercise some, all, or none of its rights and reserves the right to exercise any right at any time that Lender has the right, without regard to how much time has passed since the right arose. Lender may exercise its rights in its sole, absolute discretion.

Acceleration, Setoff. Upon an Event of Default, the Loan and the Indebtedness may, at Lender's sole option, be declared immediately due and payable. Lender may apply Obligors' bank accounts and any other property held by Lender against the Indebtedness.

CROSS-DEFAULT. The default of any Party under this Agreement, the Related Documents, or under any other obligation to Lender is a default under this Agreement.

ATTORNEYS' FEES AND OTHER COSTS. If legal proceedings are instituted to enforce the terms of this Agreement, Borrower agrees to pay all costs of the Lender in connection therewith, including reasonable attorneys' fees, to the extent permitted by law.

EXPENSES. Obligors agree to pay all of Lender's reasonable expenses incidental to perfecting Lender's security interests and liens, all insurance premiums, Uniform Commercial Code search fees, and all reasonable fees incurred by Lender for audits, inspection, and copying of the Obligors' books and records. Obligors also agree to pay all reasonable costs and expenses of Lender in connection with the enforcement of Lender's rights and remedies under this Agreement, the Related Documents, and any other agreement between one or more Obligors and Lender, and in connection with the preparation of all amendments, modifications, and waivers of consent with respect to this Agreement, including reasonable attorneys' fees.

GOVERNING LAW/PARTIAL ILLEGALITY. This Agreement and the Related Documents are and will be governed by, and the rights of the Parties will be determined by the laws of the state of South Carolina except to the extent that federal law controls. If any part, term, or provision of this Agreement is determined to be illegal or in conflict with state or federal law, the validity of the remaining portion or provisions of this Agreement will not be affected, unless the stricken portion or provision adversely affects Lender's risk of realizing Lender's anticipated return, in which case Lender may, in its sole discretion, deem the Loan matured.

© 2004-2006 Copyright Compliance Systems, Inc. E4EE-C54E - 2006.10.139
Business Loan Agreement - DL4004

www.compliancesystems.com
800-968-8522 - Fax 616-956-1868

NOTICES. All notices required under this Agreement must be in writing and will be considered given: (i) on the day of personal delivery, or (ii) one business day after deposit with a nationally recognized overnight courier service, or (iii) three business days after deposit with the United States Postal Service sent certified mail, return receipt requested. Any of these methods may be used to give notice. All notices must be sent to the party or parties entitled to notice at the addresses first set forth in this Agreement. Any Party may change its address for notice purposes on five days prior written notice to the other Parties.

INTEGRATION AND AMENDMENT. This Agreement and other written agreements among the Parties, including but not limited to the Related Documents, are the entire agreement of the Parties and will be interpreted as a group, one with the others. None of the Parties will be bound by anything not expressed in writing, and this Agreement cannot be modified except by a writing executed by those Parties burdened by the modification.

FURTHER ACTION. Obligors will, upon request of Lender, make, execute, acknowledge, and deliver to Lender the modified and additional instruments, documents, and agreements, and will take the further action that is reasonably required, to carry out the intent and purpose of this transaction.

CONTINUING EFFECT. Unless superseded by a later Business Loan Agreement, this Agreement will continue in full force and effect until all of the Obligors' obligations to Lender are fully satisfied and the Loan and Indebtedness are fully repaid.

HEADINGS. All headings in this Agreement are included for reference only and do not have any effect on the interpretation of this Agreement.

COUNTERPARTS. This Agreement may be executed by the Parties using any number of copies of the Agreement. All executed copies taken together will be treated as a single Agreement.

TIME IS OF THE ESSENCE. Time is of the essence in the performance of this Agreement.

TRANSFERS. Borrower may not assign or transfer its rights or obligations under this Agreement without Lender's prior written consent. Lender may transfer its interest in Lender's sole discretion. Borrower waives all rights of offset and counterclaim Borrower has against Lender. The purchaser of a participation in the loan may enforce its interest regardless of any claims or defenses Borrower has against Lender.

JURISDICTION. Obligors agree to waive any objection to jurisdiction or venue on the ground that Obligors are not residents of Lender's locality. Obligors authorize any action brought to enforce Obligors' obligations to be instituted and prosecuted in any state court having jurisdiction or in the United States District Court for the District that includes Lender's location as set forth at the beginning of this Agreement. Obligors authorize Lender to elect the court at Lender's sole discretion.

WAIVER OF JURY TRIAL. All parties to this Agreement waive, to the fullest extent permitted by law, any right to trial by jury of any dispute, whether in contract, tort, or otherwise, arising out of, in connection with, related to, or incidental to the relationship established between them in this Agreement or any other instrument, document, or agreement executed or delivered in connection herewith or the transaction related hereto.

ORAL AGREEMENTS DISCLAIMER. This 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.

By signing this Agreement, Borrower acknowledges reading, understanding and agreeing to all its provisions.

Buncombe Professional Park LLC

David DeCarlis 9/25/07

By: David DeCarlis Date
Its: Member

AGREEMENT OF GUARANTOR

Guarantor (i) acknowledges reading and understanding this Agreement; (ii) consents to the provisions of this Agreement relating to Borrower; (iii) agrees to furnish the Financial Statements to Lender that Lender reasonably requests; (iv) agrees to those portions of this Agreement that apply to Guarantor; (v) acknowledges that this Agreement has been freely executed without duress and after an opportunity to consult with counsel; and (vi) confirms that Guarantor received a copy of this Agreement, the Guaranty, and the other documents Guarantor requested.

David DeCarlis 9/25/07

David DeCarlis Date
Individually

© 2004-2006 Copyright Compliance Systems, Inc. E4EE-CS4E - 2006.10.139
Business Loan Agreement - DL4004

www.compliancesystems.com
800-968-8522 - Fax 616-956-1868

2007095172 MTG
8 PGS
Book:MD 4855 Page:978-985
September 26, 2007 10:01:09 AM
Rec:$14.00 Cnty Tax:$0.00 State Tax:$0.00
FILED IN GREENVILLE COUNTY,SC

(Space Above This Line For Recording Data)

LOAN NUMBER: 17447

COMMERCIAL REAL ESTATE MORTGAGE

This COMMERCIAL REAL ESTATE MORTGAGE ("Security Instrument") is made on September 25, 2007 between Buncombe Professional Park LLC, a South Carolina Limited Liability Company, whose address is 216 Cleveland Street, Greenville, South Carolina 29601 the "Mortgagor(s)" and Independence National Bank whose address is 500 E. Washington St., Greenville, South Carolina 29601 ("Lender"), which is organized and existing under the laws of the state of South Carolina. Mortgagor in consideration of loans extended by Lender up to a maximum principal amount of One Million Six Hundred Fifty Thousand and 00/100 Dollars ($1,650,000.00) ("Maximum Principal Indebtedness"), and for other valuable consideration, the receipt of which is acknowledged, hereby mortgages, grants and conveys to Lender, its successors and assigns, forever, the following described property located in the County of Greenville, State of South Carolina:

Address: 4.68 Acres South Buncombe Road, Greenville, South Carolina 29650
Legal Description: 1st Mortgage Exhibit A

Together with all easements, appurtenances abutting streets and alleys, improvements, buildings, fixtures, tenements, hereditaments, equipment, rents, income, profits and royalties, personal goods of whatever description and all other rights and privileges including all minerals, oil, gas, water (whether groundwater, subterranean or otherwise), water rights (whether riparian, appropriate or otherwise, and whether or not appurtenant to the above-described real property), wells, well permits, ditches, ditch rights, reservoirs, reservoir rights, reservoir sites, storage rights, dams and water stock that may now, or at any time in the future, be located on and/or used in connection with the above-described real property, payment awards, amounts received from eminent domain, amounts received from any and all insurance payments, and timber which may now or later be located, situated, or affixed on and used in connection therewith (hereinafter called the "Property").

RELATED DOCUMENTS. The words "Related Documents" mean all promissory notes, security agreements, prior mortgages, prior deeds of trust, business loan agreements, construction loan agreements, resolutions, guaranties, environmental agreements, subordination agreements, assignments of leases and rents and any other documents or agreements executed in connection with this Security Instrument whether now or hereafter existing. The Related Documents are hereby made a part of this Security Instrument by reference thereto, with the same force and effect as if fully set forth herein.

INDEBTEDNESS. This Security Instrument secures the principal amount shown above as may be evidenced by a promissory note or notes of even, prior or subsequent date hereto, including future advances and every other indebtedness of any and every kind now or hereafter owing from Mortgagor to Lender, howsoever created or arising, whether primary, secondary or contingent, together with any interest or charges provided in or arising out of such indebtedness, as well as the agreements and covenants of this Security Instrument and all Related Documents (hereinafter all referred to as the "Indebtedness").

© 2004-2006 Copyright ComplianceSystems, Inc 340A-1A4F - 2006.11.182
Commercial Real Estate Security Instrument - DL4007

www.compliancesystems.com
800-968-9522 - Fax 616-956-1868

EXHIBIT
9

FUTURE ADVANCES. To the extent permitted by law, this Security Instrument will secure future advances as if such advances were made on the date of this Security Instrument regardless of the fact that from time to time there may be no balance due under the note and regardless of whether the Lender is obligated to make such future advances.

CROSS COLLATERALIZATION. It is the expressed intent of Mortgagor to cross collateralize all of its Indebtedness and obligations to the Lender, howsoever arising and whensoever incurred.

WARRANTIES. Mortgagor, for itself, its heirs, personal representatives, successors, and assigns, represents, warrants, covenants and agrees with Lender, its successors and assigns, as follows:

Performance of Obligations. Mortgagor promises to perform all terms, conditions, and covenants of this Security Instrument and Related Documents in accordance with the terms contained therein.

Defense and Title to Property. At the time of execution and delivery of this instrument, Mortgagor is lawfully seised of the estate hereby conveyed and has the exclusive right to mortgage, grant, convey and assign the Property. Mortgagor covenants that the Property is unencumbered and free of all liens, except for encumbrances of record acceptable to Lender. Further, Mortgagor covenants that Mortgagor will warrant and defend generally the title to the Property against any and all claims and demands whatsoever, subject to the easements, restrictions, or other encumbrances of record acceptable to Lender, as may be listed in the schedule of exceptions to coverage in any abstract of title or title insurance policy insuring Lender's interest in the Property.

Condition of Property. The Mortgagor promises at all times to preserve and to maintain the Property and every part thereof in good repair, working order, and condition and will from time to time, make all needful and proper repairs so that the value of the Property shall not in any way be impaired.

Removal of any Part of the Property. Mortgagor promises not to remove any part of the Property from its present location, except for replacement, maintenance and relocation in the ordinary course of business.

Alterations to the Property. Mortgagor promises to abstain from the commission of any waste on the Property. Further, Mortgagor shall make no material alterations, additions or improvements of any type whatever to the Property, regardless of whether such alterations, additions or improvements would increase the value of the Property, nor permit anyone to do so except for tenant improvements and completion of items pursuant to approved plans and specifications, without Lender's prior written consent, which consent may be withheld by Lender in its sole discretion. Mortgagor will comply with all laws and regulations of all public authorities having jurisdiction over the premises relating to the use, occupancy and maintenance thereof and shall upon request promptly submit to Lender evidence of such compliance.

Due on Sale - Lender's Consent. Mortgagor shall not sell, further encumber or otherwise dispose of, except as herein provided, any or all of its interest in any part of or all of the Property without first obtaining the written consent of Lender. If any encumbrance, lien, transfer or sale or agreement for these is created, Lender may declare immediately due and payable, the entire balance of the Indebtedness.

Insurance. Mortgagor promises to keep the Property insured against such risks and in such form as may within the sole discretion of Lender be acceptable, causing Lender to be named as loss payee or if requested by Lender, as mortgagee. The insurance company shall be chosen by Mortgagor subject to Lender's approval, which shall not be unreasonably withheld. All insurance policies must provide that Lender will get a minimum of 10 days notice prior to cancellation. At Lender's discretion, Mortgagor may be required to produce receipts of paid premiums and renewal policies. If Mortgagor fails to obtain the required coverage, Lender may do so at Mortgagor's expense. Mortgagor hereby directs each and every insurer of the Property to make payment of loss to Lender with the proceeds to be applied, only at Lender's option, to the repair and replacement of the damage or loss or to be applied to the Indebtedness with the surplus, if any, to be paid by Lender to Mortgagor.

© 2004-2006 Copyright Compliance Systems, Inc 140A-1A4F - 2006 11 182
Commercial Real Estate Security Instrument - DL4007

www.compliancesystems.com
800-968-8522 - Fax 616-956-1868

Payment of Taxes and Other Applicable Charges. Mortgagor promises to pay and to discharge liens, encumbrances, taxes, assessments, lease payments and any other charges relating to the Property when levied or assessed against Mortgagor or the Property.

Environmental Laws and Hazardous or Toxic Materials. Mortgagor and every tenant have been, are presently and shall continue to be in strict compliance with any applicable local, state and federal environmental laws and regulations. Further, neither Mortgagor nor any tenant shall manufacture, store, handle, discharge or dispose of hazardous or toxic materials as may be defined by any state or federal law on the Property, except to the extent the existence of such materials has been presently disclosed in writing to Lender. Mortgagor will immediately notify Lender in writing of any assertion or claim made by any party as to the possible violation of applicable state and federal environmental laws including the location of any hazardous or toxic materials on or about the Property. Mortgagor indemnifies and holds Lender harmless from any liability or expense of whatsoever nature incurred directly or indirectly as a result of Mortgagor's violation of applicable local, state and federal environmental laws and regulations or Mortgagor's involvement with hazardous or toxic materials.

Financial Information. Mortgagor agrees to supply Lender such financial and other information concerning its affairs and the status of any of its assets as Lender, from time to time, may reasonably request. Mortgagor further agrees to permit Lender to verify accounts as well as to inspect, copy and to examine the books, records and files of Mortgagor.

Lender's Right to Enter. The Lender or Lender's agents shall have the right and access to inspect the Property at all reasonable times in order to attend to Lender's interests and ensure compliance with the terms of this Security Instrument. If the Property, or any part thereof, shall require inspection, repair or maintenance which the Mortgagor has failed to provide, the Lender, after reasonable notice, may enter upon the Property to effect such obligation; and the cost thereof shall be added to the Indebtedness and paid on the Lender's demand by the Mortgagor.

ASSIGNMENT OF LEASES AND RENTS. As additional security for the payment of the Indebtedness and the performance of the covenants contained herein, Mortgagor hereby assigns and transfers over to Lender all rents, income and profits ("Rents") under any present or future leases, subleases or licenses of the Property, including any guaranties, extensions, amendments or renewals thereof, from the use of the Property. So long as Mortgagor is not in default, Mortgagor may receive, collect and enjoy all Rents accruing from the Property, but not more than one month in advance of the due date. Lender may also require Mortgagor, tenant and any other user of the Property to make payments of Rents directly to Lender. However, by receiving any such payments, Lender is not, and shall not be considered, an agent for any party or entity. Any amounts collected may, at the Lender's sole discretion, be applied to protect the Lender's interest in the Property, including but not limited to the payment of taxes and insurance premiums and to the Indebtedness. At Lender's sole discretion, all leases, subleases and licenses must first be approved by Lender.

CONDEMNATION. Mortgagor shall give Lender notice of any action taken or threatened to be taken by private or public entities to appropriate the Property or any part thereof, through condemnation, eminent domain or any other action. Further, Lender shall be permitted to participate or intervene in any of the above described proceedings in any manner it shall at its sole discretion determine. Lender is hereby given full power, right and authority to receive and receipt for any and all damages awarded as a result of the full or partial taking or appropriation and in its sole discretion, to apply said awards to the Indebtedness, whether or not then due or otherwise in accordance with applicable law. Unless Lender otherwise agrees in writing, any application of proceeds to the Indebtedness shall not extend or postpone the due date of the payments due under the Indebtedness or change the amount of such payments.

MORTGAGOR'S ASSURANCES. At any time, upon a request of Lender, Mortgagor will execute and deliver to the Lender, and if appropriate, cause to be recorded, such further mortgages, assignments, assignments of leases and rents, security agreements, pledges, financing statements, or such other document as Lender may require, in

© 2004-2006 Copyright Compliance Systems, Inc 140A-1A4F - 2006.11.182

Lender's sole discretion, to effectuate, complete and to perfect as well as to continue to preserve the Indebtedness, or the lien or security interest created by this Security Instrument.

ATTORNEY-IN-FACT. Mortgagor appoints Lender as attorney-in-fact on behalf of Mortgagor. If Mortgagor fails to fulfill any of Mortgagor's obligations under this Security Instrument or any Related Documents, including those obligations mentioned in the preceding paragraph, Lender as attorney-in-fact may fulfill the obligations without notice to Mortgagor. This power of attorney shall not be affected by the disability of the Mortgagor.

EVENTS OF DEFAULT. The following events shall constitute default under this Security Instrument (each an "Event of Default"):

(a) Failure to make required payments when due under Indebtedness;
(b) Failure to perform or keep any of the covenants of this Security Instrument or a default under any of the Related Documents;
(c) The making of any oral or written statement or assertion to the Lender that is false or misleading in any material respect by Mortgagor or any person obligated on the Indebtedness;
(d) The death, dissolution, insolvency, bankruptcy or receivership proceeding of Mortgagor or of any person or entity obligated on the Indebtedness;
(e) Any assignment by the Mortgagor for the benefit of the Mortgagor's creditors;
(f) A material adverse change occurs in the financial condition, ownership or management of Mortgagor or any person obligated on the Indebtedness; or
(g) The Lender deems itself insecure for any reason whatsoever.

REMEDIES ON DEFAULT. Upon the occurrence of an Event of Default, Lender may, without demand or notice, pay any or all taxes, assessments, premiums, and liens required to be paid by Mortgagor, effect any insurance provided for herein, make such repairs, cause the abstracts of title or title insurance policy and tax histories of the Property to be certified to date, or procure new abstracts of title or title insurance and tax histories in case none were furnished to it, and procure title reports covering the Property, including surveys. The amounts paid for any such purposes will be added to the Indebtedness and will bear interest at the rate of interest otherwise accruing on the Indebtedness until paid. In the event of foreclosure, the abstracts of title or title insurance shall become the property of the Lender. All abstracts of title, title insurance, tax histories, surveys, and other documents pertaining to the Indebtedness will remain in Lender's possession until the Indebtedness is paid in full.

IN THE EVENT OF THE SALE OF THIS PROPERTY UNDER THE PROCEDURE FOR FORECLOSURE OF A SECURITY INSTRUMENT BY ADVERTISEMENT, AS PROVIDED BY APPLICABLE LAW, OR IN THE EVENT THE LENDER EXERCISES ITS RIGHTS UNDER THE ASSIGNMENT OF LEASES AND RENTS, THE MORTGAGOR HEREBY WAIVES ANY RIGHT TO ANY NOTICE OTHER THAN THAT PROVIDED FOR SPECIFICALLY BY STATUTE, OR TO ANY JUDICIAL HEARING PRIOR TO SUCH SALE OR OTHER EXERCISE OF RIGHTS.

Upon the occurrence of an Event of Default, Lender may, without notice unless required by law, and at its option, declare the entire Indebtedness due and payable, as it may elect, regardless of the date or dates of maturity thereof and, if permitted by state law, is authorized and empowered to sell or to cause the Property to be sold at public auction, and to execute and deliver to the purchaser or purchasers at such sale any deeds of conveyance good and sufficient at law, pursuant to the statute in such case made and provided, and out of the proceeds of the sale to retain the sums then due hereunder and all costs and charges of the sale, including attorneys' fees, rendering any surplus to the party or parties entitled to it. Any such sale or a sale made pursuant to a judgment or a decree for the foreclosure hereof may, at the option of Lender, be made en masse. The commencement of proceedings to foreclose this Mortgage in any manner authorized by law shall be deemed as exercise of the above option.

Upon the occurrence of an Event of Default, Lender shall immediately be entitled to make application for and obtain the appointment of a receiver for the Property and of the earnings, income, issue and profits of it, with the powers as the court making the appointments confers. Mortgagor hereby irrevocably consents to such appointment and waives notice of any application therefor.

© 2004-2006 Copyright Compliance Systems, Inc 340A-1A4F - 2006 11 182
Commercial Real Estate Security Instrument - DL4007

www.compliancesystems.com
800-968-8522 - Fax 616-956-1858

NO WAIVER. No delay or failure of Lender to exercise any right, remedy, power or privilege hereunder shall affect that right, remedy, power or privilege nor shall any single or partial exercise thereof preclude the exercise of any right, remedy, power or privilege. No Lender delay or failure to demand strict adherence to the terms of this Security Instrument shall be deemed to constitute a course of conduct inconsistent with Lender's right at any time, before or after an event of default, to demand strict adherence to the terms of this Security Instrument and the Related Documents.

JOINT AND SEVERAL LIABILITY. If this Security Instrument should be signed by more than one person, all persons executing this Security Instrument agree that they shall be jointly and severally bound, where permitted by law.

SURVIVAL. The Lender's rights in this Security Instrument will continue in its successors and assigns. This Security Instrument is binding on all heirs, executors, administrators, assigns and successors of the Mortgagor.

NOTICES AND WAIVER OF NOTICE. Unless otherwise required by applicable law, any notice or demand given by Lender to any party is considered effective when it is deposited in the United States Mail with the appropriate postage, mailed to the address of the party given at the beginning of this Security Instrument unless an alternative address has been provided to Lender in writing. To the extent permitted by law, Mortgagor waives notice of Lender's acceptance of this Security Instrument, defenses based on suretyship, any defense arising from any election by Lender under the United States Bankruptcy Code, Uniform Commercial Code, as enacted in the state where the Lender is located or other applicable law or in equity, demand, notice of acceleration, notice of nonpayment, presentment, protest, notice of dishonor and any other notice.

TO THE EXTENT PERMITTED BY LAW, MORTGAGOR WAIVES ANY RIGHT TO NOTICE, OTHER THAN THE NOTICE PROVIDED ABOVE, AND WAIVES ANY RIGHT TO ANY HEARING, JUDICIAL OR OTHERWISE, PRIOR TO THE LENDER EXERCISING ITS RIGHTS UNDER THIS SECURITY INSTRUMENT.

WAIVER OF APPRAISAL RIGHTS. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may, within 30 days after the sale of the mortgaged property, apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.

LENDER'S EXPENSES. Mortgagor agrees to pay all expenses incurred by Lender in connection with enforcement of its rights under the Indebtedness, this Security Instrument or in the event Lender is made party to any litigation because of the existence of the Indebtedness or this Security Instrument, as well as court costs, collection charges and reasonable attorneys' fees and disbursements.

ASSIGNABILITY. Lender may assign or otherwise transfer this Security Instrument or any of Lender's rights under this Security Instrument without notice to Mortgagor. Mortgagor may not assign this Security Instrument or any part of the Security Instrument without the express written consent of Lender.

GOVERNING LAW AND JURISDICTION. This Security Instrument will be governed by the laws of the State of South Carolina.

SEVERABILITY. If a court of competent jurisdiction determines any term or provision of this Security Instrument is invalid or prohibited by applicable law, that term or provision will be ineffective to the extent required. Any term or provision that has been determined to be invalid or prohibited will be severed from the rest of the Security Instrument without invalidating the remainder of either the affected provision or this Security Instrument.

© 2004-2006 Copyright ComplianceSystems, Inc. 340A-1A4F - 2006.11.182.

WAIVER OF JURY TRIAL. All parties to this Mortgage waive any right to trial by jury to the extent allowed by law. This jury trial waiver applies to any claims or disputes related or incidental to the relationship established between the parties to this Mortgage.

ORAL AGREEMENTS DISCLAIMER. This Security Instrument 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.

By signing this Security Instrument, each Mortgagor acknowledges that all provisions have been read and understood. Signed, sealed and delivered by Mortgagor (s):

Buncombe Professional Park LLC

David DeCarlis 9/25/07

By: David DeCarlis Date

Its: Member

"Probate: State of South Carolina, County of Greenville, personally appeared before me the undersigned witness, who being duly sworn, deposed and said that (s)he saw the Mortgagor (and each Mortgagor if more than one) sign, seal and deliver the foregoing Mortgage and that (s)he, together with the other witness whose name appears as a witness, witnessed the execution thereof. Sworn to and subscribed before me this 9/25/2007."

Witnessed by:

9/25/07 9/25/07

Name: THOMAS F. DUGAS Date Name: JULIE G. SHEALY Date

BUSINESS ACKNOWLEDGMENT

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

This instrument was acknowledged on the 25th day of Sept. 2007, by:

David DeCarlis, Member on behalf of Buncombe Professional Park LLC, a South Carolina Limited Liability Company, who personally appeared before me.

In witness whereof, I hereunto set my hand and official seal.

My commission expires: 10/16/16

(Official Seal)

© 2004-2006 Copyright Compliance Systems, Inc. 340A-1A4F - 2006.11.182
Commercial Real Estate Security Instrument - DIL4007

www.complianceystems.com
800-968-8522 - Fax 616-956-1868

THIS INSTRUMENT PREPARED BY:
Independence National Bank
500 E. Washington St.
Greenville, SC 29601

AFTER RECORDING RETURN TO:
Independence National Bank
500 E. Washington St.
Greenville, SC 29601

© 2004-2006 Copyright Compliance Systems, Inc 340A-1A4F - 2006.11.182
Commercial Real Estate Security Instrument - DL4007

www.complianceystems.com
800-968-8522 - Fax 616-956-1868

EXHIBIT "A"

All that certain piece, parcel or lot of land, lying and being in the State of South Carolina, County of Greenville, containing 18.56 acres, more or less, as shown on a survey prepared for Tabour Properties by Ray Dunn Land Surveyor, dated April 28, 2005 and recorded in the ROD Office for Greenville County in Plat Book 50-A at Page 13. Reference is hereby made to said survey for a more complete and accurate metes and bounds description thereof.

Less however:

All that certain piece, parcel or tract of land located, lying and being in the State of South Carolina, County of Greenville, containing 13.496 acres, more or less, being shown and designated as "Multi-Family Tract" on plat entitled "Summary Plat-Buncombe Professional Park", dated March 12, 2007, prepared by 3D Land Surveying, Inc., recorded in the Office of the Register of Deeds for Greenville County in Plat Book 1035 at Page 83, reference to which is hereby made for the metes and bounds thereof. See deed recorded in Book 2278 at Page 182.

This being a portion of the property conveyed unto Buncombe Professional Park, LLC by deed of Double C. Inc., dated June 13, 2005, recorded in the Office of the Register of Deeds for Greenville County, SC on June 15, 2005 in Deed Book 2149 at Page 1728.

FILED FOR RECORD IN GREENVILLE COUNTY,SC ROD
2007096172 Book:MO 4855 Page:978-985
September 26, 2007 10:01:09 AM

OMB NO. 2502-0265

A.

U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT

SETTLEMENT STATEMENT

B. TYPE OF LOAN:
1. ☐ FHA 2. ☐ FmHA 3. ☒ CONV. UNINS. 4. ☐ VA 5. ☐ CONV. INS.

6. FILE NUMBER: 07-259BUNCOMBE
7. LOAN NUMBER: 17447
8. MORTGAGE INS CASE NUMBER:

NOTE: *This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(POC)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.*

1.0 3/98 (07-259BUNCOMBE.PFD/07-259BUNCOMBE(4)

D. NAME AND ADDRESS OF BORROWER:	E. NAME AND ADDRESS OF SELLER:	F. NAME AND ADDRESS OF LENDER:
Buncombe Professional Park, LLC 216 Cleveland Street Greenville, SC 29601		Independence National Bank 500 E. Washington Street Greenville, SC 29601

G. PROPERTY LOCATION:	H. SETTLEMENT AGENT: 57-0522927	I. SETTLEMENT DATE:
4.9 acres, S. Buncombe Road Greenville, SC 29609 Greenville County, South Carolina	Horton Drawdy Ward & Jenkins, P.A. PLACE OF SETTLEMENT 307 Pettigru Street Greenville, SC 29601	September 25, 2007

J. SUMMARY OF BORROWER'S TRANSACTION		K. SUMMARY OF SELLER'S TRANSACTION	
100. GROSS AMOUNT DUE FROM BORROWER:		**400. GROSS AMOUNT DUE TO SELLER:**	
101. Contract Sales Price		401. Contract Sales Price	
102. Personal Property		402. Personal Property	
103. Settlement Charges to Borrower (Line 1400)	14,578.50	403.	
104. Payoff existing mortgage to First National Bank of	1,457,149.94	404.	
105.		405.	
Adjustments For Items Paid By Seller in advance		*Adjustments For Items Paid By Seller in advance*	
106. City/Town Taxes to		406. City/Town Taxes to	
107. County Taxes to		407. County Taxes to	
108. Assessments to		408. Assessments to	
[redacted]		409.	
111.		410.	
112.		411.	
		412.	
120. GROSS AMOUNT DUE FROM BORROWER	1,471,728.44	*420. GROSS AMOUNT DUE TO SELLER*	
200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER:		**500. REDUCTIONS IN AMOUNT DUE TO SELLER:**	
201. Deposit or earnest money		501. Excess Deposit (See Instructions)	
202. Principal Amount of New Loan(s)	(1,650,000.00)	502. Settlement Charges to Seller (Line 1400)	
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff of first Mortgage	
205.		505. Payoff of second Mortgage	
206.		506.	
207. Draw	1,471,728.44	507.	
208.		508.	
209.		509.	
Adjustments For Items Unpaid By Seller		*Adjustments For Items Unpaid By Seller*	
210. City/Town Taxes to		510. City/Town Taxes to	
211. County Taxes to		511. County Taxes to	
212. Assessments to		512. Assessments to	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. TOTAL PAID BY/FOR BORROWER	1,471,728.44	*520. TOTAL REDUCTION AMOUNT DUE SELLER*	
300. CASH AT SETTLEMENT FROM/TO BORROWER:		**600. CASH AT SETTLEMENT TO/FROM SELLER:**	
301. Gross Amount Due From Borrower (Line 120)	1,471,728.44	601. Gross Amount Due To Seller (Line 420)	
302. Less Amount Paid By/For Borrower (Line 220)	(1,471,728.44)	602. Less Reductions Due Seller (Line 520)	( )
303. CASH (FROM) (TO) BORROWER	0.00	*603. CASH (TO) (FROM) SELLER*	0.00

The undersigned hereby acknowledge receipt of a completed copy of pages 1&2 of this statement & any attachments referred to herein.
I HAVE CAREFULLY REVIEWED THE HUD-1 SETTLEMENT STATEMENT AND TO THE BEST OF MY KNOWLEDGE AND BELIEF, IT IS A TRUE AND ACCURATE STATEMENT OF ALL RECEIPTS AND DISBURSEMENTS MADE ON MY ACCOUNT OR BY ME IN THIS TRANSACTION. I FURTHER CERTIFY THAT I HAVE RECEIVED A COPY OF THE HUD-1 SETTLEMENT STATEMENT.

Borrower Buncombe Professional Park, LLC

BY: [signature]

Seller

TO THE BEST OF MY KNOWLEDGE, THE HUD-1 SETTLEMENT STATEMENT WHICH I HAVE PREPARED IS A TRUE AND ACCURATE ACCOUNT OF THE FUNDS WHICH WERE RECEIVED AND HAVE BEEN OR WILL BE DISBURSED BY THE UNDERSIGNED AS PART OF THE SETTLEMENT OF THIS TRANSACTION.

Horton Drawdy Ward & Jenkins, P.A.
Settlement Agent

WARNING: IT IS A CRIME TO KNOWINGLY MAKE FALSE STATEMENTS TO THE UNITED STATES ON THIS OR ANY SIMILAR FORM. PENALTIES UPON CONVICTION CAN INCLUDE A FINE AND IMPRISONMENT. FOR DETAILS SEE: TITLE 18 U.S. CODE SECTION 1001 & SECTION 1010.

EXHIBIT 1

L. SETTLEMENT CHARGES

		PAID FROM BORROWER'S FUNDS AT SETTLEMENT	PAID FROM SELLER'S FUNDS AT SETTLEMENT
700. TOTAL COMMISSION Based on Price $ @ %			
Division of Commission (line 700) as Follows:			
701. $ to			
702. $ to			
703. Commission Paid at Settlement			
to			
800. ITEMS PAYABLE IN CONNECTION WITH LOAN			
801. Loan Origination Fee 0.2500 %	to Independence National Bank		
802. Loan Discount %	to	4,125.00	
803. Appraisal Fee	to Independence National Bank		
804. Credit Report	to	1,200.00	
805. Lender's Inspection Fee	to		
806. Document Preparation Fee	to Independence National Bank		
807. Assumption Fee	to	250.00	
808.			
809.			
810.			
811.			
900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE			
901. Interest From 09/25/07 to 10/01/07 @ $ /day (6 days %)			
902. Mortgage Insurance Premium for months to			
903. Hazard Insurance Premium for 1.0 years to			
904.			
905.			
1000. RESERVES DEPOSITED WITH LENDER			
1001. Hazard Insurance	months @ $ per month		
1002. Mortgage Insurance	months @ $ per month		
1003. City/Town Taxes	months @ $ per month		
1004. County Taxes	months @ $ per month		
1005. Assessments	months @ $ per month		
1006.	months @ $ per month		
1007.	months @ $ per month		
1008.	months @ $ per month		
1100. TITLE CHARGES			
Settlement or Closing Fee	to		
Abstract/Title Search/Copies	to Youngblood/Horton		
1103. Title Examination	to	258.00	
1104. Title Insurance Binder	to Pettigru Title Company, Inc.		
1105. Document Preparation	to Horton Drawdy Ward & Jenkins, P.A.	275.00	
1106. Notary Fees	to		
1107. Attorney's Fees	to Horton Drawdy Ward & Jenkins, P.A.		
(includes above item numbers:	)	775.00	
1108. Title Insurance	to Pettigru Title Company, Inc.		
(includes above item numbers:	)	2,700.00	
1109. Lender's Coverage	$ 1,650,000.00 2,700.00		
1110. Owner's Coverage	$		
1111. Document Preparation	to Horton Drawdy Ward & Jenkins, P.A.	225.00	
1112. Mortgage Payoff Processing Fee	to Horton Drawdy Ward & Jenkins, P.A.	35.00	
1113. Fees and Costs	to Horton Drawdy Ward & Jenkins, P.A. Bruce Campbell	4,696.50	
1200. GOVERNMENT RECORDING AND TRANSFER CHARGES			
1201. Recording Fees: Deed $; Mortgage $ 15.00; Releases $ 10.00		25.00	
1202. City/County Tax/Stamps: Deed ; Mortgage			
1203. State Tax/Stamps: Revenue Stamps ; Mortgage			
1204. Record Assignment of Leases	to Horton, Drawdy, Ward & Jenkins, PA	14.00	
1205.			
1300. ADDITIONAL SETTLEMENT CHARGES			
1301. Survey	to		
1302. Pest Inspection	to		
1303.			
1304.			
1305.			
1400. TOTAL SETTLEMENT CHARGES (Enter on Lines 103, Section J and 502, Section K)		14,578.50	

By signing page 1 of this statement, the signatories acknowledge receipt of a completed copy of page 2 of this two page statement.

Certified to be a true copy.

Horton Drawdy Ward & Jenkins, P.A.
Settlement Agent

(07-259BUNCOMBE / 07-259BUNCOMBE / 4)

HORTON LAW FIRM
HORTON, DRAWDY, WARD & JENKINS, P.A.

DAVID B. WARD
JOSEPH M JENKINS, JR.
WALLACE A. MULLINAX, JR.
MICHAEL A. FARRY
THOMAS E DUGAS
DAVID A. WILSON
BRUCE B. CAMPBELL

VANCE B. DRAWDY
1928-1997

JAMES G. JOHNSON, III.
1944-1990

J. WRIGHT HORTON
RETIRED

September 26, 2007

First National Bank of Spartanburg
Attn: Lisa Horton

Hand Delivered

Re: BUNCOMBE PROFESSIONAL PARK, LLC

Loan #0400991700

Dear Lisa:

Pursuant to our previous conversations with you and your instructions to us concerning the satisfaction of the above-referenced mortgage indebtedness, we are enclosing our check payable to you in the amount of $1,457,149.94 thru September 26, 2007 for a complete satisfaction of said mortgage loan.

Please ensure that the face of the original Note and Mortgage indicate that this indebtedness has been satisfied and forward the documents to us as soon as possible in order that we might have the Mortgage satisfied of record.

In the event the amount enclosed is not enough to pay the loan in full, we are submitting said amount as a prepayment under the terms of the original Promissory Note and Mortgage and are hereby directing that it be applied as a prepayment under the terms and conditions of said document. Please notify us immediately in the event the funds are applied as a prepayment, and provide us with a print out detailing the application thereof. Obviously, until the outstanding debt is completely satisfied, your mortgage lien is unaffected of record and we would not expect to receive a satisfaction thereof until payment representing a complete satisfaction of the indebtedness has been received by your Company.

Please send any escrow refund or overage in the payoff to the Borrower's address on file.

EXHIBIT 12

307 PETTIGRU STREET (29601) • POST OFFICE BOX 10167 (29603) • GREENVILLE, SOUTH CAROLINA
864.233.4351 • FAX 864.233.7142 • WWW.HORTONLAWFIRM.NET

Your prompt and professional attention to this matter would be most appreciated. We look forward to hearing from you in the very near future.

Yours truly,

HORTON, DRAWDY, WARD & JENKINS, PA

Julie G. Shealy

Julie G. Shealy
Legal Assistant to Thomas F. Dugas

Enclosures

BOOK 4448 PAGE 447

FILED
GREENVILLE, SC

2005 OCT -6 P 2:10

TIMOTHY L. NANNEY
REGISTER OF DEEDS

This document was prepared by (name, address, phone):
First National Bank of Spartanburg
Div. of First National Bank of the South
P.O. Box 3508
Spartanburg, SC 29304

State of South Carolina — Space Above This Line For Recording Data

REAL ESTATE MORTGAGE
(With Future Advance Clause)

1. **DATE AND PARTIES.** The date of this Mortgage is 10/05/2005 and the parties and their addresses are as follows:

MORTGAGOR: BUNCOMBE PROFESSIONAL PARK, LLC
307 PEBBLE CREEK DRIVE
TAYLORS, SC 29687

☐ Refer to the Addendum which is attached and incorporated herein for additional Mortgagors.

LENDER: First National Bank of Spartanburg
Div. of First National Bank of the South
P.O. Box 3508
Spartanburg, SC 29304

2. **MORTGAGE.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debt (hereafter defined), Mortgagor grants, bargains, conveys and mortgages to Lender the following described property:

SEE ATTACHED EXHIBIT "A"

Thomas F. Dugas
Horton, Drawdy, Ward & Jennings, PA
Post Office Box 13167
Greenville, South Carolina 29603

PAID IN FULL AND SATISFIED
THIS 11th DAY OF Oct 2007
FIRST NATIONAL BANK OF SPARTANBURG
BY: Pamela Pellicer
TITLE:
WITNESS:

The property is located in GREENVILLE (County) at SEE ATTACHED
LEGAL DESCRIPTION (Address), (City), South Carolina (Zip Code)

Together with all ri... diversion payments ... structures, fixtures, ... above (all referred to ... water, ditches, reserv... with the Property, ho... gas rights, crops, timber, all ... ing and future improvements, ... art of the real estate described ... id to, any and all water wells, ... lan and water rights associated

2007105367 SAT/MTG 2 PGS
Book:SAT 365 Page 365-366
October 23, 2007 11:32 06 AM
Rec $5.00 Cnty Tax $0 00 State Tax $0 00
FILED IN GREENVILLE COUNTY, SC

94620

RECORDING FEE

SOUTH CAROLINA - AGRICULTURAL/COMMERCIAL REAL ESTATE SECU... R VA USE, AND NOT FOR CONSUMER PURPOSES) (page 1 of 8)

ExpertLaw ©1994, 2001 Bankers Systems, Inc., St. Cloud, M...

EXHIBIT 13

BOOK 4448 PAGE 454

☐ **Personal Property.** Mortgagor grants to Lender a security interest in all personal property located on or connected with the Property. This security interest includes all farm products, inventory, equipment, accounts, documents, instruments, chattel paper, general intangibles, and all other items of personal property Mortgagor owns now or in the future and that are used or useful in the construction, ownership, operation, management, or maintenance of the Property. The term "personal property" specifically excludes that property described as "household goods" secured in connection with a "consumer" loan as those terms are defined in applicable federal regulations governing unfair and deceptive credit practices

☐ **Filing As Financing Statement.** Mortgagor agrees and acknowledges that this Mortgage also suffices as a financing statement and as such, may be filed of record as a financing statement for purposes of Article 9 of the Uniform Commercial Code. A carbon, photographic, image or other reproduction of this Mortgage is sufficient as a financing statement.

29. OTHER TERMS. If checked, the following are applicable to this Mortgage:

☐ **Line of Credit.** The Secured Debt includes a revolving line of credit provision. Although the Secured Debt may be reduced to a zero balance, this Mortgage will remain in effect until released.

☐ **Waiver of Appraisal Rights.** The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may, within thirty days after the sale of the mortgaged property, apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.

☐ **Separate Assignment.** The Mortgagor has executed or will execute a separate assignment of leases and rents. If the separate assignment of leases and rents is properly executed and recorded, then the separate assignment will supersede this Security Instrument's "Assignment of Leases and Rents" section.

☐ **Additional Terms.**

FILED FOR RECORD IN GREENVILLE COUNTY,SC ROD
2007105367 Book:SAT 365 Page:365-366
October 23, 2007 11:32:06 AM

Timothy L Hannicy

SIGNATURES: By signing below, Mortgagor agrees to the terms and covenants contained in this Mortgage and in any attachments. Mortgagor also acknowledges receipt of a copy of this Mortgage on the date stated above on Page 1.

☐ Actual authority was granted to the parties signing below by resolution signed and dated _____.

Entity Name: BUNCOMBE PROFESSIONAL PARK, LLC

X Theodore T Tackett 10/05/2005 (Seal)
(Signature) THEODORE T TACKETT (Date)
MEMBER

Entity Name: _____

X _____ 10/05/2005 (Seal)
(Signature) CLAY ALBRIGHT (Date)
MEMBER

Signed, Sealed and delivered in the presence of:

_____
(Witness)

Cynthia J Speed
(Witness)

☐ Refer to the Addendum which is attached and incorporated herein for additional Mortgagors, signatures and acknowledgments.

ExpereS. © 1994, 2001 Bankers Systems, Inc., St. Cloud, MN Form AGCO-RESI-SC 1/21/2003

ray@noblelawfirmpa.com
www.noblelawfirmpa.com

Noble Law Firm P.A.
Attorneys and Counselors at Law
368 S. Military Trail
Deerfield Beach, Fl 33442

Office (561) 353-9300
Facsimile (305) 675-3383

April 8, 2010

VIA FACSIMILE AND US MAIL

Thomas F. Dugas
Horton, Drawdy, Ward & Jenkins, PA
307 Pettigru Street
Greenville, SC 29601

Gray Walsh
Love Washington et al.
410 East Washington St.
Greenville, SC 29601

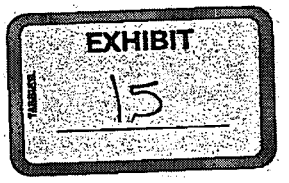
Re: Independence National Bank v. David DeCarlis and Buncombe Professional Park, LLC

Dear Mr. Dugas,

I have received your letter from March 29, 2010 and I appreciate your quick response. I have reviewed the following documents:

1) Copy of the executed Commitment Letter from Independence National Bank dated September 11, 2007
2) Copy of executed closing statement dated September 25, 2007
3) Copy of filed Second Mortgage of Real Estate from Buncombe Professional Park, LLC to David DeCarlis
4) Copy of Assignment of Membership Interest of Buncombe Professional Park, LLC and Consent to Disassociation
5) The draft of the subordination agreement

Moreover, I have talked with my client concerning the various transactions concerning the closing on September 25, 2007. My client does not have any independent recollection that the loan was contingent on my client subordinating his individual mortgage to Independence National Bank. I understand that the Commitment Letter from Independence National Bank referenced the Bank becoming the new first mortgage holder, however, the Commitment Letter also states that "Independence's obligations under this commitment are conditioned upon the fulfillment to Independence's sole satisfaction of each term and condition referenced by this commitment." It can only be assumed that Independence National Bank was satisfied even though Mr. DeCarlis' lien was not subordinated based on Independence National Bank decision to go forward with the loan.



Furthermore, the draft of the Subordination agreement that you sent states, "For Value Received". What type of value or consideration are you willing to offer my client for him voluntarily signing this subordination and unequivocally relinquishing any rights that he may have as the priority lien holder, which according to the Greenville County Public Records he currently holds?

Before my client retained my services, he tried working with Independence National Bank and offered Independence National Bank the deed in lieu of foreclosure. Independence National Bank apparently did not accept and is willing to spend thousands of dollars in litigation to foreclose on my client. It can only be assumed that Independence National Bank did not accept the deed in lieu of foreclosure because they may come after my client for a deficiency judgment. My client has no incentive to work with Independence National Bank and sign over his current first priority lien without any consideration especially if, at this point, Independence National Bank is unwilling to work with my client.

I understand your argument that this was an oversight and by no means am I using this as leverage over you or your firm, in the contrary, I am simply looking after the best interests of my client. As I am sure you are aware, there is also an argument that the transactions as they occurred were the intent of both parties. Moreover, any modification requested by Independence National Bank may be barred by the theory of laches. If this is the case, David DeCarlis mortgage would be satisfied before Independence National Bank receives any funds. To me this is a big risk to take especially when my client is willing to give Independence National Bank a deed in lieu of foreclosure with the deficiency being waived by Independence National Bank.

If your firm and Independence National Bank want to negotiate and try to settle these matters amicably without litigation and expensive costs my client is willing to work with you. However, if Independence National Bank simply chooses to litigate my client will defend both claims vigorously. In the end, assuming that Independence National Bank is successful with its foreclosure, subordination of Mr. DeCarlis' mortgage and a deficiency judgment, it would have spent tens of thousands of dollars for an academic judgment. I am confident that based on my client's financial condition with the poor real estate market that Independence National Bank will not be able to collect from my client.

I look forward from hearing from you.

Sincerely,

Kenneth R. Noble, III

CHANGE IN TERMS AGREEMENT

Independence National Bank
500 E. Washington St.
Greenville, South Carolina 29601
(864)672-1776

LOAN NUMBER	ORIGINAL PRINCIPAL BALANCE	CURRENT PRINCIPAL BALANCE	ORIGINAL AGREEMENT DATE	AGREEMENT CHANGE DATE
17447	$1,650,000.00	$1,590,884.25	September 25, 2007	March 25, 2009

DESCRIPTION OF THE EXISTING DEBT ("Existing Debt")

Original note in the amount of $1,650,000.

BORROWER INFORMATION

Buncombe Professional Park LLC
216 Cleveland Street
Greenville, SC 29601

BORROWER. The term "Borrower" means each party identified above.

LENDER. The term "Lender" means Independence National Bank whose address is 500 E. Washington St., Greenville, South Carolina 29601, its successors and assigns.

COLLATERAL. The following items are the security documents related to this Agreement:

- Security Instrument (Mortgage/Deed of Trust/Security Deed) in the amount of $1,650,000.00, dated September 25, 2007 evidencing a lien on the property located at 4.68 Acres South Buncombe Road Greenville SC 29650.

TERMS AND PROVISIONS. In consideration of the promises contained in this Agreement and in the instruments evidencing the Existing Debt, and of other good and valuable consideration, the sufficiency of which is acknowledged by the execution of this Agreement, Borrower agrees to the following provisions:

1. **The instrument evidencing the Existing Debt is modified and supplemented as follows:**

   Renew note for an additional 12 months with interest payable monthly beginning April 25, 2009, and monthly thereafter with all outstanding principal and unpaid interest due at maturity on March 25, 2010. The rate shall be INB Prime plus 2%, equal to 5.25%, with a floor of 5.25%.

2. **Ratification and Continued Validity.** Except for the terms expressly modified by this Agreement, by signing this Agreement Borrower acknowledges that Borrower is still bound by the terms of the instruments and prior modifications, extensions, and supplements evidencing the Existing Debt as if they were fully set forth and repeated in this Agreement and that those terms will continue to bind Borrower as provided in this Agreement and those instruments. Lender's consent to this Agreement does not waive the right to strictly enforce Lender's rights under this Agreement or the instruments evidencing the Existing Debt. Lender's consent to this Agreement does not mean that Lender must enter into another agreement like this one in the future. Lender and Borrower intend that this Agreement does not replace the Existing Debt but restates it as modified.

3. **Others Responsible for the Debt.** Lender and Borrower intend that anyone else who is liable for the Existing Debt, including, without limitation, cosigners, guarantors, and coborrowers, are not relieved of any obligation except as expressly relieved in this Agreement or other writing. Borrower agrees that the liability of each person who signed the instruments evidencing the Existing Debt, whether primary or secondary, continues in full force and effect, even if that person does not sign this Agreement. This promise applies not only to this Agreement but also to any extension, modification, or other agreement Borrower makes with Lender that represents a debt which includes cosigners, guarantors, coborrowers, and others having similar liability. Borrower understands that this Agreement is contingent on the continued liability of each person who signed the documents evidencing the Existing Debt, whether or not that person signs this Agreement.

4. **Pronouns and Gender.** In this Agreement, whenever the circumstances or the context so requires, the singular shall be construed as the plural, the masculine shall be construed as the feminine and/or the neuter and vice versa.

5. **Miscellaneous Terms.** Borrower agrees that if Lender delays or forgoes enforcing Lender's rights under this Agreement in any particular instance, Lender retains the right to strictly enforce the same provision in any other instance, or later in the same instance. Every person signing this Agreement waives, to the extent allowed by law, presentment, demand, protest, and notice of dishonor. Every person signing this Agreement agrees that Lender may renew, extend, supplement, or otherwise modify the debt represented by this Agreement and the documents evidencing the Existing Debt without the permission of any other person who is liable, and such modification will not release or reduce the liability of any party, even if that party does not sign this Agreement.

ORAL AGREEMENTS DISCLAIMER. This 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.

© 2004-2008 Copyright Compliance Systems, Inc. ASAC-09A7 - 2008.05.61
Change in Terms Agreement - DL6006

www.complianceystems.com
800-968-8522 - Fax 616-956-1868

EXHIBIT 16

EXHIBIT (B)

By signing this Change In Terms Agreement, each Borrower acknowledges reading, understanding, and agreeing to all its provisions, and receiving a copy.

Buncombe Professional Park LLC

D. DeCarlis 4/1/09

By: David DeCarlis Date
Its: Member

By signing this Change In Terms Agreement, Lender acknowledges reading, understanding, and agreeing to all its provisions.

Independence National Bank

4/1/09

By: [redacted] Date
Its: Vice President

© 2004-2008 Copyright Compliance Systems, Inc. ASAC-09A7 - 2008.05.63
Change In Terms Agreement - DL6006

www.compliancesystems.com
800-968-8522 - Fax 636-936-1968

EXHIBIT (B)

2006049299 MTG
3 PGS
Book:MO 4571 Page:1071-1073
May 25, 2006 11:31:09 AM
Rec $10.00 Cnty Tax:$0.00 State Tax $0.00
FILED IN GREENVILLE COUNTY,SC

State of South Carolina)
)
County of Greenville)

SECOND MORTGAGE OF REAL ESTATE

WHEREAS, **Buncombe Professional Park, LLC** (hereinafter called the Mortgagor), in and by his certain Note of even date herewith stands firmly held and bound unto **David DeCarlis** (hereinafter called the Mortgagee), for the payment of the full and just sum of Five Hundred Seventy Thousand and 00/100 Dollars ($570,000.00), with the entire balance, if not sooner paid, being due on October 1, 2007, with interest, as in and by the Note, reference being had thereto, will more fully appear.

NOW, KNOW ALL MEN BY THESE PRESENTS, that the Mortgagor, for and in consideration of the debt or sum of money aforesaid, and to better secure its payment to the Mortgagee according to the condition of the Note, and also in consideration of the further sum of Three Dollars ($3.00) to the Mortgagor in hand well and truly paid by the Mortgagee at the before the sealing the delivery of these presents, the receipt of which is hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto the Mortgagee, its/his successors, heirs and assigns, the real property described as follows:

ALL that certain piece, parcel or lot of land, lying and being in the State of South Carolina, County of Greenville, containing 18.56 acres, more or less, as shown on a survey prepared for Tabour Properties dated April 28, 2005 and recorded in the R.O.D. Office for Greenville County in Plat Book 50-A at Page 13, reference to which is hereby made for a more complete and accurate metes and bounds description thereof.

THIS being the same property conveyed to the mortgagor herein by deed of Double C. Inc. dated June 13, 2005 and recorded in the R.O.D. Office for Greenville County in Deed Book 2149, page 1728 on June 15, 2005.

TMS No. 66-1-4

Mortgagee's Address: 460 View Lane, Greenville, SC 29609

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the premises belonging, or in anywise appertaining.

TO HAVE AND TO HOLD, all and singular the premises unto the Mortgagee, its/his successors, heirs and assigns forever.

AND the Mortgagor does hereby bind itself and its successors to warrant and forever defend

all and singular the premises unto the Mortgagee, its/his successors, heirs and assigns, from and against himself and its successors, lawfully claiming, or to claim the same, or any part thereof.

AND IT IS AGREED, by and between the parties that the Mortgagor, its successors and assigns, shall keep any building erected on the premises insured against loss and damage by fire for the benefit of the Mortgagee, for an amount not less than the sum shown above, with such company as shall be approved by the Mortgagee, its/his successors, heirs and assigns, and shall deliver the policy to the Mortgagee; and in default thereof, the Mortgagee, its/his successors, heirs or assigns may effect such insurance and reimburse themselves under this Mortgage for the expense thereof, together with interest thereon at the rate provided in the Note from the date of its payment. And it is further agreed, in the event of other insurance and contribution between the insurers, that the Mortgagee, its/his successors, heirs and assigns, shall be entitled to receive from the aggregate of the insurance monies to be a sum equal to the amount of the debt secured by this Mortgage.

AND IT IS AGREED, by and between the parties, that if the Mortgagor, its successors or assigns, shall fail to pay all taxes and assessments upon the premises when they shall first become payable, then the Mortgagee, its/his successors, heirs or assigns, may cause the same to be paid, together with all penalties and costs incurred thereon, and reimburse themselves under this Mortgage for the sum so paid, with interest thereon at the rate provided in the Note from the date of such payment.

AND IT IS AGREED, by and between the parties that upon any default being made in the payment of the Note or of the insurance premiums, or of the taxes, or of the assessments hereinabove mentioned, or failure to pay any other indebtedness which constitutes a lien upon the real property when the same shall severally become payable, then the entire amount of the debt secured or intended to be secured hereby shall become due, at the option of the Mortgagee, its/his successors, heirs or assigns, although the period for the payment thereof may not then have expired.

AND IT IS AGREED, by and between the parties that should legal proceedings be instituted for the collection of the debt secured hereby, then the Mortgagee, its/his successors, heirs or assigns, shall have the right to have a receiver appointed of the rents and profits of the premises, who, after deducting all charges and expenses attending such proceedings, and the execution of the trust as receiver, shall apply the residue of the rents and profits towards the payment of the debt secured hereby.

AND IT IS FURTHER AGREED, by and between the parties that should legal proceedings be instituted for the foreclosure of this Mortgage, or should the Mortgagee become a party to any action by reason of this Mortgage, or should the debt secured hereby be placed in the hands of an attorney at law for collection, by suit or otherwise, all costs and expenses incurred by the Mortgagee, including a reasonable attorney's fee, shall thereupon become due and payable as a part of the debt secured hereby, and may be recovered and collected hereunder.

PROVIDED ALWAYS, NEVERTHELESS, and it is the true intent and meaning of the parties, that if the Mortgagor does and shall well and truly pay, or cause to be paid, unto the Mortgagee, its/his successors, heirs and assigns, the debt or sum of money aforesaid, with interest

thereon, and if any shall be due according to the true intent and meaning of the Note and this Mortgage, then this Mortgage shall cease, determine, and be utterly null and void; otherwise it shall remain in full force and virtue.

AND IT IS AGREED, by and between the parties, that the Mortgagor should hold and enjoy the premises until default or payment shall be made.

Any reference in this instrument to the plural shall include the singular, and any reference to the neuter shall include the male and female, the male shall include the female, and vice versa.

WITNESS the hand and seal of the Mortgagor(s) this 18 day of ~~April,~~ May 2006.

SIGNED, SEALED AND DELIVERED
in the presence of:

Buncombe Professional Park, LLC

BY: _____

BY: _____

BY: _____

BY: _____

State of South Carolina)
)
County of Greenville)

PROBATE

PERSONALLY APPEARED BEFORE ME the undersigned witness and made oath that (s)he saw the within-named Buncombe Professional Park, LLC sign, seal, and, as their act and deed, deliver the within-written Mortgage of Real Estate, and that (s)he, with the other witness subscribed above, witnessed the execution thereof.

SWORN to before me this 18 day of May, 2006.

_____ (SEAL)
Notary Public for South Carolina
My Commission Expires: 8/25/2013

_____

FILED FOR RECORD IN GREENVILLE COUNTY, SC ROD
2006049299 Book:MO 4571 Page:1071-1073
May 25, 2006 11:31:09 AM

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
The Honorable Charles B. Simmons, Master in Equity

Case No. 2010-CP-23-3860

Independence National Bank, Respondent,

v.

Buncombe Professional Park, LLC; and
David Decarlis, s/a David D. Decarlis, Appellants.

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that the Record on Appeal contains all materials proposed to be included by any of the parties and not any other material.

February 9, 2012

MARY LEIGH ARNOLD, P.A.

Mary Leigh Arnold
749 Johnnie Dodds Blvd., Suite B
Mt. Pleasant, South Carolina 29464
(843) 971-6053 (phone)
(843) 971-6055 (fax)
Sammie@maryarnoldlaw.com

19667

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Master in Equity

Case No. 2010-CP-23-3860

Independence National Bank,.....Respondent,

v.

Buncombe Professional Park, LLC; and
David Decarlis, s/a David D. Decarlis,.....Appellants.

APPENDIX TO THE RECORD ON APPEAL

M. Kyle Thompson, Esq.
Love Thornton Arnold & Thomason, PA
P.O. Box 10045
Greenville, S.C. 29603
(864) 242-6360 (phone)
(864) 271-7972 (fax)
ATTORNEY FOR RESPONDENT

Mary Leigh Arnold, Esq.
Mary Leigh Arnold, P.A.
749 Johnnie Dodds Blvd., Suite B
Mt. Pleasant, South Carolina 29464
(843) 971-6053 (phone)
(843) 971-6055 (fax)
Sammie@maryarnoldlaw.com
ATTORNEY FOR APPELLANTS

INDEX

Official Record Page No. at Bottom Center of Page

I. PLEADINGS

1. Plaintiff's Motion to Amend Pleadings 1

II. HEARING TRANSCRIPT

1. Transcript of Hearing, April 29, 2011 3

III. EXHIBITS

1. Plaintiff's Exhibit 8: Promissory Note, dated September 25, 2007 7

IV. CERTIFICATE OF COUNSEL 10

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	C. A. NO: 2010-CP-23-3860
Independence National Bank, Plaintiff, vs. Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. Decarlis, Defendants,	**MOTION TO AMEND PLEADINGS**

COMES NOW the Plaintiff in the above referenced matter and moves before this Honorable Court at a time and place as may be convenient to the Court, but no sooner than 10 days following the filing of this Motion, and would ask the Court for an Order allowing the Plaintiff to amend its Complaint to add a second cause of action for reformation based on mutual mistake.

This motion is based on the applicable laws and statutes and more particularly based on Rule 15, South Carolina Rules of Civil Procedure. As more than thirty days have lapsed since its last pleading, the Plaintiff cannot amend its complaint without leave of the Court. Plaintiff desires to add a cause of action to reform the Promissory Note between the Plaintiff and the Defendant to reflect that the intent of both parties was that it be a first priority lien on the subject property. Due to mutual mistake by both parties, through their common agent, the Promissory Note did not reflect the original intent of both parties, and the Note should be reformed.

Counsel certifies that consultation with opposing counsel would serve no useful purpose.

Respectfully submitted,

LOVE, THORNTON, ARNOLD & THOMASON, P.A.

M. Kyle Thompson, S.C. Bar No. 68283
Post Office Box 10045, F.S.
Greenville, South Carolina 29603
(864) 242-6360
(864) 271-7972 facsimile
Attorney for Plaintiff

March 16, 2011
Greenville, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
2010-CP-23-3860

Independence National Bank,

Plaintiff,

vs.

Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. DeCarlis,

Defendants.

TRANSCRIPT OF TESTIMONY

April 29, 2011
Greenville, South Carolina

B E F O R E:

HONORABLE CHARLES B. SIMMONS, JR., MASTER IN EQUITY

A P P E A R A N C E S:

M. Kyle Thompson, Esquire
Attorney for the Plaintiff

Mary Leigh Arnold, Esquire
Attorney for the Defendants

Wanda E. Fudge, CCR
Court Reporter

MR. THOMPSON: No, Your Honor. I know what you're looking at. I believe they're required to have actual notice. Constructive notice is not what is required when you're talking about equitable subrogation or mutual mistake. It's actual notice, and they are required to have actual notice.

BY THE COURT: Isn't public filing deemed actual notice under the law of South Carolina?

MR. THOMPSON: Your Honor, I believe that that is not -- that is constructive notice, Judge. It's out there. It's available to the bank to find it, but it's not actual notice that's actually given to them by the person that has that knowledge, via Mr. DeCarlis.

BY THE COURT: But isn't the testimony that the title exam revealed this mortgage?

MR. THOMPSON: That's correct, Judge.

BY THE COURT: So, why is that not actual knowledge?

MR. THOMPSON: Again, that was -- and that knowledge was never transmitted back to the bank. I mean, the bank was -- the loan was handled---

BY THE COURT: Wasn't it conveyed, obviously, to the bank's attorney, and isn't that notice to the bank?

MR. THOMPSON: And as he's explained, Judge, his intent was to mark that as satisfied. He charged -- DeCarlis and Buncombe Professional Park was charged money for that release to be done. It was part of the title commitment. The intent was to mark that

as satisfied. DeCarlis paid a satisfaction fee for that. He signed a term note. I mean, he signed documents where he said, "I did not fail to disclose any material facts. There's no other encumbrances on the property." His intent through the documents that he had signed was that he was giving the bank this first mortgage and that the mistake was, by Mr. Dugas, failing to have the agreement between the parties finalized by getting this other loan satisfied, released and subordinated.

BY THE COURT: All right. How is that a mutual mistake?

MR. THOMPSON: Mr. Dugas, at the time of closing and working as the agent for both the borrower and the lender -- both the borrower and the lender had intended for Mr. DeCarlis' personal mortgage to either be satisfied, released or subordinated since he had agreed he was giving a first mortgage. Mr. Dugas, as mutual agent for both, made the mistake.

Your Honor, the case is Shaw and Cannon v. Aetna Casualty & Surety Insurance Company where an insurance agent who was essentially an agent both for a client and an insurance carrier made a mistake with regard to the date on a binder. He was charged as the agent for both parties. They had both intended insurance coverage to start on a particular date. The binder was wrong. They were able to say it was a mutual mistake because both parties at the time of the agreement had intended insurance coverage to start when some other coverage lapsed, that the agent missed the date when this coverage lapsed.

Similar situation here, Judge. You have two parties that agreed that Independence National Bank is getting a first party mortgage. The mutual agent, the closing attorney, failed to make that happen through an omission. Clearly, it was intended to happen. There were costs associated with that. It was clearly intended to be done. It just failed to happen.

BY THE COURT: So, if he was a mutual agent, then Independence National Bank had actual knowledge of the DeCarlis mortgage, correct?

MR. THOMPSON: Yes, sir. He would have had knowledge of this mortgage. He was aware of that.

BY THE COURT: Let me hear from you, Ms. Arnold.

MS. ARNOLD: Yes, Judge---

BY THE COURT: Why isn't this a mistake? Everybody knew it was supposed to be a first mortgage. Now, he's found a technicality he's trying to trump back on.

MS. ARNOLD: Your Honor, if you look at -- there are two separate entities or persons, first is Buncombe, the LLC, that is actually the one that owns the property giving the mortgage and then there is Mr. DeCarlis who is a separate individual. The commitment letter is signed by both, no doubt, with the date of closing, Your Honor. What the commitment letter says, no doubt, it's black and white, it says they want a first mortgage lien. It does not say it subordinates any other mortgage liens. It does not require subordination, not -- the closing instructions

COMMERCIAL PROMISSORY NOTE

Independence National Bank
500 E. Washington St.
Greenville, South Carolina 29601
(864)672-1776

LOAN NUMBER	NOTE DATE	PRINCIPAL AMOUNT	LOAN TERM	MATURITY DATE
17447	September 25, 2007	$1,650,000.00	18 months	March 25, 2009

LOAN PURPOSE: Comm. RE Refinance

BORROWER INFORMATION

Buncombe Professional Park LLC
216 Cleveland Street
Greenville, SC 29601

NOTE. This Commercial Promissory Note will be referred to in this document as the "Note".

LENDER. "Lender" means Independence National Bank whose address is 500 E. Washington St., Greenville, South Carolina 29601 , its successors and assigns.

BORROWER. "Borrower" means each person or legal entity who signs this Note.

PROMISE TO PAY. For value received, receipt of which is hereby acknowledged, on or before the Maturity Date, the Borrower promises to pay the principal amount of One Million Six Hundred Fifty Thousand and 00/100 Dollars ($1,650,000.00) or such lesser amount as shall have been advanced by Lender, from time to time, to or on behalf of Borrower under the terms of this Note, and all interest and any other charges, including service charges, to the order of Lender at its office at the address noted above or at such other place as Lender may designate in writing. The Borrower will make all payments in lawful money of the United States of America.

PAYMENT SCHEDULE. This loan will be paid according to the following schedule: 17 consecutive payments of interest only beginning on October 25, 2007 and continuing on the same day of each month thereafter. One final payment shall be due on the Maturity Date in an amount equal to the then unpaid principal and accrued and unpaid interest. All payments received by the Lender from the Borrower for application to the Loan may be applied to the Borrower's obligations under the Loan in such order as determined by the Lender.

INTEREST RATE AND SCHEDULED PAYMENT CHANGES. The initial variable interest rate on this Note will be 7.750% per annum. This interest rate may change on September 26, 2007, and every day thereafter. Each date on which the interest rate may change is called the "Change Date." Beginning with the first Change Date, Lender will calculate the new interest rate based on Prime in effect on the Change Date (the "Index"). If the Index is not available at that time, Lender will choose a new Index which is based on comparable information. The Index is used solely to establish a base from which the actual rate of interest payable under this Note will be calculated, and is not a reference to any actual rate of interest charged by any lender to any particular borrower. The interest rate will never be greater than 16.750% or less than 0.000%.

Nothing contained herein shall be construed as to require the Borrower to pay interest at a greater rate than the maximum allowed by law. If, however, from any circumstances, Borrower pays interest at a greater rate than the maximum allowed by law, the obligation to be fulfilled will be reduced to an amount computed at the highest rate of interest permissible under applicable law and if, for any reason whatsoever, Lender ever receives interest in an amount which would be deemed unlawful under applicable law, such interest shall be automatically applied to amounts owed, in Lender's sole discretion, or as otherwise allowed by applicable law. An increase in the interest rates will result in a higher payment amount. Interest on this Note is calculated on a 365/360 day basis. The unpaid balance of this loan after Maturity, whether by acceleration or otherwise, shall be subject to a Post-Maturity Rate of interest equal to 18.000% per annum.

LATE PAYMENT CHARGE. If any required payment is more than 10 days late, then at Lender's option, Lender will assess a late payment charge of 5% of the amount past due, subject to a minimum charge of $5.00.

PREPAYMENT PENALTY. This Note may be prepaid, in full or in part, at any time, without penalty.

ADVANCES. The Borrower and Lender agree that the Borrower may borrow up to the maximum amount of principal only one time. Subject to the terms of this Note and all of the related agreements, advances under this Note are obligatory. Regardless of the obligatory nature of this Note, principal advances will be made to the Borrower provided none of the following conditions exist.

- Maximum amount on this Note is outstanding.
- Undersigned has breached any of the terms, provisions, representations, requirements or promises contained in this Note or any other agreement.
- Undersigned makes a request for an advance after the Conversion Date.
- The Note or any other agreement relating to the extension of credit is in default.
- The Lender has deemed itself insecure or there has been a material adverse change of conditions.
- The Lender is precluded by law from making the advance.

Advances under this Note may be requested orally or in writing by the Borrower or by an authorized person.

The total of any advance requested and unpaid principal cannot exceed the available principal amount. The available principal amount refers to the principal amount minus the aggregate amount of outstanding advances, accrued but unpaid interest and outstanding fees and charges.

© 2004-2006 Copyright Compliance Systems, Inc. 3681-2A9C - 2006.10.191
Commercial Promissory Note - DL4006

www.compliancesystems.com
800-968-8522 - Fax 616-956-1868

EXHIBIT
8

All advances will be charged to a loan account in Borrower's name on Lender's books, and the Lender shall debit in such account the amount of each advance made to, and credit to such account the amount of each repayment made by Borrower. The Lender shall provide to Borrower periodic statements of Borrower's loan account, which shall be deemed to be correct, accepted by, and binding upon Borrower unless Lender receives a written statement of exception from Borrower within 10 days after such statement is furnished.

SECURITY TO NOTE. Security (the "Collateral") for this Note is granted pursuant to the following security document(s):

- Mortgage in the amount of $1,650,000.00, dated September 25, 2007 evidencing security interest in the property located at 4.68 Acres South Buncombe Road Greenville SC 29650.

RIGHT OF SET OFF. To the extent permitted by law, Borrower agrees that Lender has the right to set off any amount due and payable under this Note, whether matured or unmatured, against any amount owing by Lender to Borrower including any or all of Borrower's accounts with Lender. This shall include all accounts Borrower holds jointly with someone else and all accounts Borrower may open in the future. Such right of setoff may be exercised by Lender against Borrower or against any assignee for the benefit of creditors, receiver, or execution, judgment or attachment creditor of Borrower, or against anyone else claiming through or against Borrower of such assignee for the benefit of creditors, receiver, or execution, judgment or attachment creditor, notwithstanding the fact that such right of setoff has not been exercised by Lender prior to the making, filing or issuance or service upon Lender of, or of notice of, assignment for the benefit of creditors, appointment or application for the appointment of a receiver, or issuance of execution, subpoena or order or warrant.

DISHONORED ITEM FEE. If Borrower makes a payment on the loan with a check or preauthorized charge which is later dishonored, a fee in the amount of $29.00 will be charged.

DEFAULT. Upon the occurrence of any one of the following events (each, an "Event of Default" or "default" or "event of default"), Lender's obligations, if any, to make any advances will, at Lender's option, immediately terminate and Lender, at its option, may declare all indebtedness of Borrower to Lender under this Note to be immediately due and payable without further notice of any kind notwithstanding anything to the contrary in this Note or any other agreement: (a) Borrower's failure to make any payment on time or in the amount due; (b) any default by Borrower under the terms of this Note or any other agreement, security agreement executed in connection with this Note (individually, a "Loan Document" and collectively, the "Loan Documents"); (c) any default by Borrower under the terms of any other loan agreement, security agreement, mortgage or other document in favor of Lender,; (d) the death, dissolution, or termination of existence of Borrower or any guarantor; (e) Borrower is generally not paying Borrower's debts as such debts become due; (f) the commencement of any proceeding under bankruptcy or insolvency laws by or against Borrower or any guarantor or the appointment of a receiver; (g) any default under the terms of any other indebtedness of Borrower to any other creditor; (h) any writ of attachment, garnishment, execution, tax lien or similar instrument is issued against any collateral securing the loan, if any, or any of Borrower's property or any judgment is entered against Borrower or any guarantor; (i) any part of Borrower's business is sold to or merged with any other business, individual, or entity; (j) any representation or warranty made by Borrower to Lender in any of the Loan Documents or any financial statement delivered to Lender proves to have been false in any material respect as of the time when made or given; (k) if any guarantor, or any other party to any agreement or instrument with or in favor of Lender entered into or delivered in connection with the Loan terminates, attempts to terminate or defaults under any such agreement or instrument; (l) Lender has deemed itself insecure or there has been a material adverse change of condition of the financial prospects of Borrower or any collateral securing the obligations owing to Lender by Borrower.

OTHER APPLICABLE AGREEMENTS. If this Note is secured by a security agreement, mortgage, deed of trust, trust deed, security deed or loan agreement of even or previous date, it is subject to all the terms thereof.

GENERAL WAIVERS. To the extent permitted by law, the Borrower severally waives any required notice of presentment, demand, acceleration, intent to accelerate, protest and any other notice and defense due to extensions of time or other indulgence by Lender or to any substitution or release of collateral. No failure or delay on the part of Lender, and no course of dealing between Borrower and Lender, shall operate as a waiver of such power or right, nor shall any single or partial exercise of any power or right preclude other or further exercise thereof or the exercise of any other power or right.

JOINT AND SEVERAL LIABILITY. If permitted by law, each Borrower executing this Note is jointly and severally bound.

SEVERABILITY. If a court of competent jurisdiction determines any term or provision of this Note is invalid or prohibited by applicable law, that term or provision will be ineffective to the extent required. Any term or provision that has been determined to be invalid or prohibited will be severed from the rest of this Note without invalidating the remainder of either the affected provision or this Note.

SURVIVAL. The rights and privileges of the Lender hereunder shall inure to the benefits of its successors and assigns, and this Note shall be binding on all heirs, executors, administrators, assigns and successors of Borrower.

ASSIGNABILITY. Lender may assign, pledge or otherwise transfer this Note or any of its rights and powers under this Note without notice, with all or any of the obligations owing to Lender by Borrower, and in such event the assignee shall have the same rights as if originally named herein in place of Lender. Borrower may not assign this Note or any benefit accruing to it hereunder without the express written consent of the Lender.

ORAL AGREEMENTS DISCLAIMER. This Note 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.

GOVERNING LAW. This Note is governed by the laws of the state of South Carolina except to the extent that federal law controls.

HEADING AND GENDER. The headings preceding text in this Note are for general convenience in identifying subject matter, but have no limiting impact on the text which follows any particular heading. All words used in this Note shall be construed to be of such gender or number as the circumstances require.

© 2004-2006 Copyright Compliance Systems, Inc. 3681-2A9C - 2006.10.191

ATTORNEYS' FEES AND OTHER COSTS. If legal proceedings are instituted to enforce the terms of this Note, Borrower agrees to pay all costs of the Lender in connection therewith, including reasonable attorneys' fees, to the extent permitted by law.

WAIVER OF JURY TRIAL. All parties to this Note hereby waive, to the fullest extent permitted by law, any right to trial by jury with respect to any dispute, whether in contract, tort, or otherwise, arising out of, in connection with, related to, or incidental to the relationship established between them in this Note or any other instrument, document, or agreement executed or delivered in connection herewith or the transaction related hereto.

By signing this Note, Borrower acknowledges reading, understanding, and agreeing to all its provisions and receipt thereof.

Buncombe Professional Park LLC

David DeCarlis 9/25/07

By: David DeCarlis Date

Its: Member

© 2004-2006 Copyright Compliance Systems, Inc. 3681-2A9C - 2006.10.191

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
The Honorable Charles B. Simmons, Master in Equity

Case No. 2010-CP-23-3860

Independence National Bank, Respondent,

v.

Buncombe Professional Park, LLC; and
David Decarlis, s/a David D. Decarlis, Appellants.

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that the Appendix to the Record on Appeal contains all materials proposed to be included by any of the parties and not any other material.

March 8, 2012

MARY LEIGH ARNOLD, P.A.

Mary Leigh Arnold
749 Johnnie Dodds Blvd., Suite B
Mt. Pleasant, South Carolina 29464
(843) 971-6053 (phone)
(843) 971-6055 (fax)
Sammie@maryarnoldlaw.com

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master in Equity

Case No. 2010-CP-23-3860

Independence National Bank ..... Respondent.

v.

Buncombe Professional Park, LLC; and David Decarlis,
s/a David D. DeCarlis ..... Appellants.

BRIEF OF APPELLANTS

Mary Leigh Arnold
MARY LEIGH ARNOLD P.A.
749 Johnnie Dodds Blvd. Suite B
Mount Pleasant, S.C. 29464
Phone: (843) 971-6053
Facsimile: (843) 971-6055
Email: sammie@maryarnoldlaw.co
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STANDARD OF REVIEW 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

SUMMARY OF THE ARGUMENT 4

ARGUMENT 4

I. THE MASTER IN EQUITY ERRED BY FAILING TO GIVE PRIORITY TO THE MORTGAGE THAT WAS FILED OR RECORD PRIOR TO THE MORTGAGE OF RESPONDENT 4

A. THE MORTGAGE FILED FIRST IN TIME IS ENTITLED TO FIRST IN RIGHT 4

II. REFORMATION OF THE MORTGAGE WAS IMPROPER 7

III. RESPONDENT IS NOT ENTITLED TO EQUITABLE SUBROGATION SINCE IT NEITHER PLED FOR SUCH RELIEF NOR PROVED THE NECESSARY ELEMENTS 9

A. THE FAILURE TO PLEAD EQUITABLE SUBROGATION PRECLUDED THE RECOVERY UNDER THE CAUSE OF ACTION 10

B. THE REQUIRED ELEMENTS NECESSARY EQUITABLE SUBROGATION WERE NOT ESTABLISHED AND DO NOT EXIST 10

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Aiken Petroleum Co. v. Nat'l Petroleum Underwriters, 207 S.C. 236, 36, S.E.2d 380 (1945) 11

Atlas Supply Co. v. Davis, 273 S.C. 392, 256 S.E.2d 859 (1979) 6

BB&T of South Carolina v. Kidwell,350 S.C. 382, 565 S.E.2d 316 (Ct. App. 2001) 1

Cheboygan County Const. Code Dept. v. Burke, 148 Mich. App.56, 384 N.W.2d 77 (1985) 5

Dedes v. Strickland, 307 S.C. 155, 414 S.E.2d 134 (1992) 11

E. Bus. Forms, Inc. v. Kistler, 258 S.C. 429, 189 S.E.2d 22 (1972) 8

Ellis v. Taylor, 316 S.C. 245, 449 S.E.2d 487 (1994) 8

In re Ehrlich, 59 B.R. 646 (Bankr. N.D. Ill. 19986) 5

In re Fowler, 83 B.R. 39 (Bankr. D. Mont. 1987), Subsequently aff'd, 903 F.2d 694, 22 Collier Bankr. Cas. 2d (MB) 1659, Bankr. L. Rep. (CCH) P 73390 (9th Cir. 1990) 5

Hann v. Carolina Casualty Ins. Co., 252 S.C. 518, 167 S.E.2d 420 (1969) 7

Jordan v. Security Group, Inc., 311 S.C. 227, 428 S.E.2d 705 (1993) 8

Kaiser v. Carlina Life Ins. Co., 219 S.C. 456, 65 S.E.2d 865 (1951) 8

Kuznik v. Bees Ferry Associates, 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000) 10

Leasing Enterprises, Inc. v. Livingston, 294 S.C. 204, 363 S.E.2d 410 (Ct. App. 1987) 6,7

Lewis v. Premium Inv. Corp., 351 S.C. 167, 568 S.E.2d 361 (2002) 8

MailSource, LLC v. M.A. Bailey & Assocs., 356 S.C. 363, 588 S.E.2d 635 (Ct. App. 2003) 8

Matrix Fin. Serv. Corp. v. Frazier, 394 S.C. 134,
714 S.E.2d 532 (2011) 11

McSweeney v. Prudential Ins. Co. of America, 128 F.2d 660 (4th Cir. 1942),
cert. den., 317 U.S. 658, 63 S.Ct. 57, 87 L.Ed. 529 529 (1942) 11

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. George,
516 So.2d 1068 (Fla. District. Ct. App. 4th Dist. 1987) 5

Pee Dee State Bank v. Prosser, 295 S.C. 229,
367 S.E.2d 708 (Ct. App. 1988) 11

Pelican Homestead and Sav. Ass'n v. Security First Nat. Bank,
532 So.2d 397 (La. Ct. App. 3d Cir. 1988), writ denied,
533 So. 2d 381 (La. 1988) 5

South Carolina National Bank v. Guest, 232 S.C., 102 S.E.2d 215 (1958) 6

Savoie v. Southeast Bank, N.A., 529 So.2d 1275
(Fla. Dist, Ct. App. 5th Dist. 1988) 5

Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986) 5

Sullivan v. Moore, 92 S.C. 305, 75 S.E. 497 (1912) 8

Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636,
216 S.E.2d 547 (1975) 8

Townes Assocs, Ltd. v. City of Greenville, 266 S.C. 81,
221 S.E.2d 773 (1976) 1

Valley Federal Sav. & Loan Ass'n v. T-Bird Home Centers, Inc.,
106 N.M. 223, 741 P.2d 826 (1987) 5

STATUTES, RULES, & REGULATIONS

S.C. Code Ann. Section 30-7-10 5

S.C. Code Ann. Section 30-9-40 (Supp. 2001) 5

SECONDARY AUTHORITY

7 Debtor-Creditor Law ¶31.04[B][1] (Mathew Bender 1987) 5

STATEMENT OF THE ISSUES

1. DID THE MASTER IN EQUITY ERR BY FAILING TO GIVE PRIORITY TO A MORTGAGE CLEARLY FILED PRIOR TO RESPONDENT'S MORTGAGE?

2. DID THE MASTER IN EQUITY ERR IN CONCLUDING IT WAS APPROPRIATE TO REFORM THE SUBJECT MORTGAGE?

3. DID THE MASTER IN EQUITY ERR BY AMENDING HIS ORGIGINAL ORDER TO PROVIDE FOR EQUITABLE SUBROGATION WHEN SUCH RELIEF HAD NOT BEEN SOUGHT BY RESPONDEN IN ITS PLEADINGS?

4. DID THE MASTER IN EUQITY ERR BY CONCLUDING EQUITABLE SUBROGATION WAS APPROPRIATE WHEN RESPONDENT HAD ACTUAL KNOWLEDGE OF THE PREEXISTING MORTGAGE?

STANDARD OF REVIEW

"An action to foreclose a real estate mortgage is an action in equity." BB&T of South Carolina v. Kidwell, 350 S.C. 382, 387, 565 S.E.2d 316, 319 (Ct. App. 2002). On appeal from an action in equity, this Court may "find facts in accordance with its views of the preponderance of the evidence." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

STATEMENT OF THE CASE

The transaction which is the subject of this case involves the execution of a mortgage on September 25, 2007, which is and was junior and subordinate to a mortgage of record on the same real property as of May 25, 2006, issued in favor of Defendant David DeCarlis (hereinafter "DeCarlis Mortgage"). On May 14, 2010 Respondent, Independence National Bank (hereinafter "Respondent") filed a foreclosure complaint against Appellants, Buncombe Professional Park, LLC, (hereinafter "Buncombe") and

David DeCarlis (hereinafter "DeCarlis" and hereinafter collectively "Appellants") (hereinafter "Complaint"). The Complaint consists of fourteen (14) paragraphs but contains no designated cause of action. (R. pp. 16-21). The Complaint did not set forth a cause of action for reformation. On June 18, 2010, Appellants filed an Answer and Counterclaim specifically challenging the priority of Respondent's mortgage. (R. pp. 42-50). On July 15, 2010 Respondent filed a motion for summary judgment. Appellants filed an Affidavit (R. p. 100) in opposition to the motion for summary judgment which motion was denied by the court on October 14, 2010. On March 24, 2011, Respondent filed a motion to amend the Complaint. The motion to amend was granted over Appellants objection on April 7, 2011. The Amended Complaint included a new cause of action for reformation. It did not include a cause of action for equitable subrogation. (R. p. 57). Appellants timely filed their amended Answer and Counterclaim. (R. pp. 85-93).

A hearing was held before the Honorable Charles B. Simons, Jr., Master in Equity for Greenville County, on April 29, 2011. Following the hearing, on May 13, 2011, the Court entered an Order of Foreclosure prepared by Respondent. (R. pp. 3-12). On May 20, 2011, Appellants filed a Motion to Reconsider. (R. pp. 97-99). On May 23, 2011, Respondent filed a Motion to Alter or Amend the Order of Foreclosure to include a ruling on equitable subrogation. Appellants objected to altering the Order on the grounds that equitable subrogation was never pled by Respondent. Again over the objection of Appellants, the Master In Equity allowed the Order to be amended to include a determination as to equitable subrogation.(R. pp. 13-15). Appellants timely filed the Notice of Appeal in the within action.

STATEMENT OF THE FACTS

This action is an action for foreclosure seeking a deficiency judgment. On September 25, 2007, Buncombe executed a Commercial Promissory Note in favor of Respondent in the amount of $1,650,000.00. (R. pp. 27-29). A mortgage securing the promissory note was executed on the same date and encumbers real property generally described as 4.68 acres South Buncombe Road, Greenville, South Carolina (hereinafter "Property"). (R. pp. 143-150). The mortgage does not speak in terms of its priority over any other lien or mortgage. The transaction was not a purchase money transaction.

The Commercial Promissory Note was individually guaranteed by DeCarlis. (R. pp. 40-41). A separate guaranty agreement was executed on the same day as the Commercial Promissory Note. (R. pp. 40-41). The closing was conducted by Thomas F. Dugas, Esquire. Mr. Dugas was counsel for Respondent and Appellants.(R. p. 129, lines 6-7). At the time of the closing and filing of the Mortgage, existing on the Property, executed in favor of DeCarlis, was a mortgage recorded of May 25, 2006, in the Greenville County RMC Office at Book MO 4571, page 1071-1073. (R. p. 129, lines 8-11). Notwithstanding, DeCarlis was not asked at the time of the closing to sign a subordination agreement. Nor did any document address the priority between the two mortgages.

Several years following the execution of the original Note and Mortgage, on April 1, 2009, Buncombe executed and delivered to Respondent a Change in Terms Agreement. (R. pp. 159-160). The Change in Terms agreement extended out the maturity date to March 25, 2010, but again did not address the priorities between the two mortgages. (R. pp. 159-160). On or about March 29, 2010, approximately three (3) years

after the closing, Mr. Dugas, the closing lawyer, wrote to Mr. DeCarlis's counsel and asked that he execute a subordination agreement. (R. p. 127, lines 12-25). DeCarlis declined to do so. (R. p. 128, lines 1-19).

SUMMARY OF THE ARGUMENT

Appellants respectfully submit this brief seeking reversal of the Master In Equity for Greenville County, the Honorable Charles B. Simmons, Jr.'s, Order of Foreclosure which deviates from several established principles. The Master In Equity ignored the long established principle of "race-notice" or "first in time first in right" and gave priority to a non-purchase money mortgage clearly executed and filed a year after Defendant DeCarlis' 2006 mortgage, thereby eviscerating the prior and superior lien. The Master In Equity further erred by applying the principle of reformation so as to reform a mortgage for purposes of establishing priority when such document never addressed the issue of priority within its terms. Lastly, the Master In Equity erred by amending his original Order to include a determination relating to equitable subrogation when such was never pled.

ARGUMENT

I. THE MASTER IN EQUITY ERRED BY FAILING TO GIVE PRIORITY TO THE MORTGAGE THAT WAS FILED OF RECORD PRIOR TO THE MORTGAGE OF RESPONDENT.

A. THE MORTGAGE FILED FIRST IN TIME IS ENTITLED TO FIRST IN RIGHT.

The lower Court erred by failing to give priority to Defendant, DeCarlis's mortgage which was filed first and therefore superior to Respondent's mortgage lien. The concept of "first in time, first in right" is a fundamental priority rule regarding interests in

real estate, including mortgages. The essence of the rule is that the first in time to record their encumbrance is entitled to priority over later filed encumbrances which receive a subordinate interest. See, 7 Debtor-Creditor Law ¶31.04[B][1] (Matthew Bender 1987); See also, Savoie v. Southeast Bank, N.A., 529 So. 2d 1275 (Fla. Dist. Ct. App. 5th Dist. 1988); Pelican Homestead and Sav. Ass'n v. Security First Nat. Bank, 532 So. 2d 397 (La. Ct. App. 3d Cir. 1988), writ denied, 533 So. 2d 381 (La. 1988); Cheboygan County Const. Code Dept. v. Burke, 148 Mich. App. 56,384 N.W.2d 77 (1985); Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986); In re Ehrlich, 59 B.R. 646 (Bankr. N.D. Ill. 1986); Valley Federal Sav. & Loan Ass'n v. Tbird Home Centers, Inc., 106 N.M. 223, 741 P.2d 826 (1987); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. George, 516 So. 2d 1068 (Fla. Dist. Ct. App. 4th Dist. 1987); and In re Fowler, 83 B.R. 39 (Bankr. D. Mont. 1987), subsequently affd, 903 F.2d 694, 22 Collier Bankr. Cas. 2d (MB) 1659, Bankr. L. Rep. (CCH) P 73390 (9th Cir. 1990).

South Carolina, like a number of other states, by statute is a race-notice state. S.C. Code Anno. Section 30-7-10 provides, in relevant part:

> All ... mortgages ... are valid so as to affect the rights of subsequent creditors ... without notice, only from the day and hour when they are recorded in the office of the register of deeds [for the county] ... in which the real property affected is situated. In the case of a ... subsequent lien creditor ... without notice ... the priority is determined by the time of filing for record.

In addition, South Carolina Code Annotated Section 30-9-40 (Supp. 2001), governing the indexing of instruments filed for recording, provides:

> The register of deeds , .. shall immediately upon the filing for record of any deed, mortgage, or other written instrument of the character mentioned in Section 30-7-10 or Chapter 9 of Title 36 enter it upon the proper indexes in his office, which constitute an integral, necessary, and

> inseparable part of the recordation of the deed, mortgage, or other written instrument for any and all purposes whatsoever.. ..

In 1958, the then existing recording statute was amended to require a subsequent lien creditor without notice to file the instrument evidencing his lien in order to claim under the statute. S.C. Code Ann. Section 30-7-10. Further, the statute was amended to declare priority would be determined by the time of filing for record. Leasing Enterprises Inc. v. Livingston, 294 S.C. 204, 363 S.E.2d 410 (Ct. App. 1987). The Legislature amended the statute to obviate the result in the case of South Carolina Nat'l Bank v.Guest 232 S.C. 367, 102 S.E.2d 215 (1958). See Atlas Supply Co. v. Davis, 273 S.C. 392, 256 S.E.2d 859 (1979). In the Guest case, when confronted with determining the priority between two mortgages, the South Carolina Supreme Court interpreted the then existing recording act to give priority to a mortgage recorded forty-five minutes after another mortgage closed on the same day. Guest, 232 S.C. 367, 369. "The Court pointed out that even though the first bank had executed and recorded its mortgage first in point of time the mortgage was not of record when the second bank had loaned money and its mortgage was executed. The Court classified the South Carolina recording act as being of the "notice" type which will invalidate an instrument as against a subsequent instrument acquired in good faith before the first instrument is recorded." Id. at 371. Prior to the 1958 amendment to the recording statute the "subsequent purchaser" without notice was protected under the recording act regardless of when or whether he recorded his own conveyance. Guest, 232 S.C. at 371, 102 S.E.2d at 217. In Linvingston this Court determined the amended statute had changed from a race statute to a race-notice

statute which only provides protection to a subsequent purchaser or creditor if it records first. 294 S.C. 204, 363 S.E. 2d. 410 (Ct. App. 1987).

Indeed, it is undisputed that the DeCarlis mortgage was filed of record prior to the mortgage which the Respondent foreclosed upon. Thus, the DeCarlis mortgage was entitled to priority. Respondent took its interest in the property subject to the DeCarlis mortgage of record. Respondent was bound by the recorded interests in the Greenville County RMC Office. The Master In Equity erred in failing to correctly apply the race notice rule. Respondent's mortgage is not superior to the DeCarlis mortgage thereby requiring the reversal of the Master In Equity's decision.

II. REFORMATION OF THE MORTGAGE WAS IMPROPER.

The Master In Equity erred when it determined the mortgage should be reformed. Respondent was allowed to amend its complaint immediately prior to trial to include a cause of action for reformation over Appellants' objection. Additionally, Respondent's motion to amend the original Order prepared and submitted by Respondent, was granted over Appellants' objection, to include findings and conclusions relating to reformation which were not included in the original Order. Reformation of the mortgage is not appropriate.

Before a court may reform an instrument, the complaining party must show, by clear and convincing evidence, "a mutual mistake; that both parties intended a certain thing; and that by mistake in drafting of the paper did not get what both parties intended." Hann v. Carolina Casualty Ins. Co., 252 S.C. 518, 527-28,167 S.E.2d 420, 424 (1969) (quoting Sullivan v. Moore, 92 S.C. 305, 305, 75 S.E. 497, 497 (1912). "[T]he

bedrock of the right to reformation [is] a meeting of the minds of the contracting parties which results in an agreement antecedent to the formal contract, which later fails through mutual mistake to conform to the agreement." Kaiser v. Carolina Life Ins. Co., 219 S.C. 456, 467, 65 S.E.2d 865, 869 (1951).

Parties have the right to make their own contracts. Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975); MailSource, LLC v. M.A. Bailey & Assocs., 356 S.C. 363, 369, 588 S.E.2d 635, 638-39 (Ct. App. 2003). A court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); Jordan v. Security Group, Inc., 311 S.C. 227, 230,428 S.E.2d 705, 707 (1993); and Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C.636,643,216 S.E,2d 547, 550 (1975) (stating "[T]he parties have a right to make their own contract and it is not the function of this Court to rewrite it or torture the meaning of a policy to extend coverage never intended by the parties. "). Succinctly stated, a court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction. See, e.g., Lewis v. Premium Inv. 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("It is not the function of the court to rewrite contracts for parties."); E. Bus. Forms, Inc. v. Kistler, 258 S.C. 429, 189 S.E.2d 22 (1972) (finding the court may not make a new agreement for the parties into which they did not voluntarily enter).

Here reformation is inappropriate because Respondent did not prove by clear and convincing evidence a meeting of the minds of parties. The mortgage of Respondent did not address its priority in comparison to any other interest in the property. The testimony

established Appellants did not intend to provide for priority or subordination. (The letter of April 8, 2010 of Kenneth R. Noble, III, was also entered into evidence by Plaintiff, which states "My client does not have any independent recollection that the loan was contingent on my client subordinating his individual mortgage to Independence National Bank.") (R. p. 157). The mortgage is not ambiguous. The mortgage here, does not address priority. The Master In Equity erred because his determination in essence rewrites or imposes a new contract on the parties which they themselves did not enter into. The Master In Equity rewrote the parties contract. Priority, as discussed above is determined by filing. Thus, the Master In Equity erred in reforming the mortgage to change the priority established by statute and supported by the evidence.

III. RESPONDENT IS NOT ENTITLED TO EQUITABLE SUBROGATION SINCE IT NEITHER PLED FOR SUCH RELIEF NOR PROVED THE NECESSARY ELEMENTS.

The Master In Equity erred in a number of particulars as to the application of the principle of equitable subrogation. First the Master erred by altering his Order to include findings as to the concept of equitable subrogation when relief for the same was never pled by Respondent. Additionally, the Master erred by determining equitable subrogation was appropriate when Respondent failed to establish any of the essential elements. The Master in Equity's ruling should be reversed.

A. THE FAILURE TO PLEAD EQUITABLE SUBROGATION PRECLUDED THE RECOVERY UNDER THE CAUSE OF ACTION.

The Rules of Civil Procedure and specifically Rule 12(b)(6) codified the concept that one must sufficiently plead a cause of action in order to recover under the cause. Indeed this rule applies to the cause of action for equitable subrogation. This Court in the case of Kuznik v. Bees Feny Associates, 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000), determined the Master In Equity committed reversible error by concluding the assertion of an indemnity claim was tantamount to asserting a claim for equitable subrogation. In Kuznik this Court recognized that nowhere in the pleadings had the required elements of equitable subrogation been pled and that "the claim for equitable subrogation cannot be 'bootstrapped' onto the claim for contractual indemnity." Id. at 31. Hence the failure to plead the cause of action is fatal to the recovery under the theory. Here, Respondent made no effort to plead a cause of action for equitable subrogation or any of the necessary requirements for equitable subrogation. (R. pp. 57-64). Analogous to the cause of action for indemnity in Kuznik, a cause of action for reformation cannot be confused or assumed to be a cause of action for equitable subrogation. Respondent was not entitled to recover under the theory. The Master In Equity should be reversed.

B. THE REQUIRED ELEMENTS NECESSARY TO ESTABLISH EQUITABLE SUBROGATION WERE NOT ESTABLISHED AND DO NOT EXIST.

The requirements a mortgagee must meet to qualify for equitable subrogation are: (1) the party claiming subrogation has paid the debt; (2) the party was not a volunteer, but had a direct interest in the discharge of the debt or lien; (3) the party was secondarily liable for the debt or for the discharge of the lien; (4) no injustice will be done to the

other party by the allowance of equitable subrogation; and (5) the party asserting the doctrine did not have actual notice of the prior mortgage. Matrix Fin. Serv. Corp. v. Frazier, 394 S.C. 134, 714 S.E.2d 532 (2011), citing, Dedes v. Strickland, 307 S.C. 155, 158, 414 S.E.2d 134, 136 (1992). Contrary to the conclusions made in the Amended Order, the evidence submitted did not support the theory of equitable subrogation.

When determining whether equitable subrogation is appropriate the court should determine if the asserting party had actual or constructive notice of a prior recorded mortgage. See Pee Dee State Bank v. Prosser, 295 S.C. 229, 367 S.E.2d 708 (Ct. App. 1988). "As a general rule, a principal is charged with the knowledge an agent acquired before the relationship only when the knowledge can reasonably be said to have been in the mind of the agent while acting for the principal or where he acquired it so recently as to raise the presumption he still retained it in his mind." Id. citing, Aiken Petroleum Co. v. National Petroleum Underwriters. 207 S.C. 236,36 S.E.2d 380 (1945); McSweeney v. Prudential Ins. Co. of America, 128 F.2d 660 (4th Cir.1942), cert. den. McSweeney v.Prudential Ins. Co. of America, 317 U.S. 658, 63 S.Ct. 57, 87 L.Ed. 529 (1942).

The record is clear. Respondent had notice. The title search conduct by Mr. Dugas revealed the DeCarlis Mortgage. (R. p. 116, lines 1-9; R. p. 117, lines 10-24; R. p. 118, lines 9-16). Mr. Dugas acknowledged that in order for Respondent to obtain a superior lien interest, the lien of DeCarlis had to be released. The Master In Equity erred in granting priority to Respondent's mortgage and must be reversed.

CONCLUSION

For the foregoing reasons Appellants pray that the Master in Equity's decision be reversed and that the case be remanded back to the lower court for a determination that the DeCarlis mortgage is superior and entitled to priority over Respondent's mortgage.

Respectfully Submitted,

Dated: 2/28/2022

Mary Leigh Arnold
MARY LEIGH ARNOLD P.A.
749 Johnnie Dodds Blvd. Suite B
Mount Pleasant, SC 29464
Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
The Honorable Charles B. Simmons, Master in Equity

Case No. 2010-CP-23-3860

Independence National Bank, Respondent,

v.

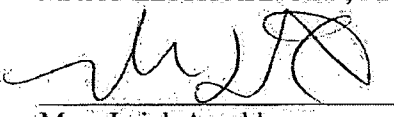
Buncombe Professional Park, LLC; and
David Decarlis, s/a David D. Decarlis, Appellants.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

I certify that Respondent's Brief is in compliance with Rule 211(b), SCACR.

February 28, 2012

MARY LEIGH ARNOLD, P.A.



Mary Leigh Arnold
749 Johnnie Dodds Blvd., Suite B
Mt. Pleasant, South Carolina 29464
(843) 971-6053 (phone)
(843) 971-6055 (fax)
Sammie@maryarnoldlaw.com

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master In Equity

C.A. NO. 2010-CP-23-3860

Independence National Bank ..... Respondent,

vs.

Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. DeCarlis ..... Appellants.

FINAL BRIEF OF RESPONDENT

M. Kyle Thompson, S.C. Bar No. 68283
LOVE, THORNTON, ARNOLD & THOMASON, P.A.
Post Office Box 10045, F.S.
Greenville, South Carolina 29603
(864) 242-6360
(864) 271-7972 facsimile
Attorneys for Respondent

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Statement of Facts 2

Arguments:

I. THE APPELLANTS' TESTIMONY, HAD IT BEEN OFFERED, WOULD HAVE BEEN ADVERSE TO THEIR POSITION 5

II. A MORTAGE FILED FIRST IN TIME IS NOT ALWAYS ENTITLED TO HAVE PRIORITY 6

III. THE MASTER-IN-EQUITY CORRECTLY RULED THAT RESPONDENT WAS ENTITLED TO AMEND ITS COMPLAINT TO ADD A CAUSE OF ACTION FOR REFORMATION 6

IV. THE MASTER-IN-EQUITY CORRECTLY RULED THAT RESPONDENT WAS ENTITLED TO REFORMATION 7

V. THE MASTER-IN-EQUITY CORRECTLY RULED THAT THE RESPONDENT WAS ENTITLED TO EQUITABLE SUBROGATION 9

A. EQUITABLE SUBROGATION WAS CLEARLY PLED AND SOUGHT BY THE RESPONDENT 9

B. IF EQUITABLE SUBROGATION WAS NOT PLED BY THE PLAINTIFF, THEN EVIDENCE PRODUCED AT TRIAL WOULD HAVE ALLOWED AMENDEMENT TO INCLUDE THE CAUSE OF ACTION 10

C. THE MASTER-IN-EQUITY CORRECTLY RULED THAT RESPONDENT SATISFIED THE ELEMENTS OF EQUITABLE SUBROGATION 11

Conclusion 13

TABLE OF AUTHORITIES

CASES

Am. Fed. Bank, FSB v. No. One Main Joint Venture, 321 S.C. 169, 467 S.E.2d 439 (1996) 13

Citizens & S. Nat. Bank of S. Carolina v. Smith, 277 S.C. 162, 284 S.E.2d 770 (1981) 6

Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335 (1962) 5

Crosby v. Protective Life Ins. Co., 293 S.C. 203, 359 S.E.2d 298 (Ct.App. 1987) ... 7

Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp., 273 S.C. 306, 257 S.E.2d 496 (1979) 6

Dedes v. Strickland, 307 S.C. 155, 414 S.E.2d 134 (1992) 11

Dodge City of Spartanburg, Inc., v. Jones, 317 S.C. 491, 454 S.E.2d 918 (Ct.App. 1995) 12

Gadson ex rel. Gadson v. ECO Services of South Carolina, Inc., 374 S.C. 171, 648 S.E.2d 585 (2007) 5

Gaskins v. Southern Farm Bureau Cas. Ins. Co., 343 S.C. 666, 541 S.E.2d 269 (Ct.App. 2000) 10

George v. Empire Fire and Marine Ins. Co., 344 S.C. 582, 545 S.E.2d 500 (2001)... 7

Kaiser v. Carolina Life Ins. Co., 219 S.C. 456, 65 S.E.2d 865 (1951) 7

Matrix Fin. Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011) 11

McGowan v. Southerland, 253 S.C. 9, 168 S.E.2d 573 (1969)..... 5

McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct.App. 1998) 8, 9, 13

Meaders Bros. v. Skelton, 234 S.C. 134, 107 S.E.2d 1 (1959) 12

Moore v. City of Columbia, 284 S.C. 278, 326 S.E.2d 157 (Ct.App. 1985) 10

Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 607 S.E.2d 711 (Ct.App. 2005) 7

Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 715 S.E.2d 348 (Ct.App. 2011) 6

Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991) 10

Shaw v. Aetna Cas. & Sur. Ins. Co., 274 S.C. 281, 262 S.E.2d 903 (1984) 7, 8

Watts v. Metro Security Agency, 346 S.C. 235, 550 S.E.2d 869 (Ct.App. 2001) 10

OTHER AUTHORITIES

Rule 8, SCRCP 9

Rule 9, SCRCP 9

Rule 15, SCRCP 6, 7, 10

STATEMENT OF ISSUES ON APPEAL

1. TIME OF FILING IS NOT THE ONLY CONSIDERATION IN DETERMINING THE PRIORITY OF ENCUMBERANCES ON REAL PROPERTY IN AN EQUITY PROCEEDING.

2. THE MASTER-IN-EQUITY DID NOT ERR IN ALLOWING RESPONDENT TO AMEND ITS COMPLAINT TO INCLUDE A CAUSE OF ACTION FOR REFORMATION.

3. THE MASTER-IN-EQUITY DID NOT ERR IN FINDING EXISTENCE OF A MUTUAL MISTAKE AND REFORMING THE PRIORITIES OF THE SUBJECT MORTGAGES ACCORDINGLY.

4. THE MASTER-IN-EQUITY DID NOT ERR IN FINDING THAT THE RESPONDENT PLED A CAUSE OF ACTION FOR EQUITABLE SUBROGATION AND SATISFIED THE ELEMENTS OF EQUITABLE SUBROGATION.

STATEMENT OF THE CASE

On May 14, 2010, the Respondent filed a foreclosure complaint against Appellant Buncombe Professional Park, LLC, [hereinafter "Buncombe"] in the Greenville County Court of Common Pleas. The Complaint also named as a defendant Appellant DeCarlis [hereinafter "DeCarlis"] pursuant to a second mortgage recorded on the property in question. Paragraph 13 of the Complaint further set forth that the Respondent believed DeCarlis' mortgage to be junior and subordinate to the mortgage of the Respondent under the theory of equitable subrogation. On June 18, 2010, the Appellants filed an Answer and Counterclaim in which they denied the Respondent's foreclosure action and alleged various claims against the Respondent. On July 15, 2010, the Respondent filed a Reply to the Counterclaim of the Appellants. The Respondent also filed a Motion for Summary Judgment that same day. On July 16, 2010, the Clerk of Court, upon motion of the Respondent, referred this matter to the Master-in-Equity pursuant to Rule 53(b), SCRCP.

On September 14, 2010, the Master-in-Equity held a hearing on the Respondent's Motion for Summary Judgment. The Master denied the Respondent's Motion and issued an Order that same day.

On March 23, 2011, Respondent filed a Motion to Amend the Pleadings to amend the Complaint to add a cause of action for reformation of the agreement between the parties. The Master-In-Equity held a hearing on April 4, 2011, and granted the Respondent's Motion to Amend the pleadings by Order dated April 5, 2011. The Respondent filed the Amended Summons and Complaint on April 7, 2011. The Appellants filed an Amended Answer and Counterclaim on April 19, 2011.

The trial took place on April 29, 2011. The Master found for the Plaintiff on all grounds and entered a Decree of Foreclosure on May 13, 2011.

On May 23, 2011, the Respondent filed a Motion to Alter or Amend the Decree of Foreclosure on the ground that the Decree failed to rule on the Respondent's cause of action with regard to equitable subrogation. On May 24, 2011, the Appellants filed a Motion to Reconsider the Court's Orders dated April 5, 2011, and May 13, 2011. The Court held a hearing on these two motions on May 27, 2011. In an Order dated June 28, 2011, and filed June 29, 2011, the Master-in-Equity denied the Appellants' motion and granted the Respondent's motion. The Appellants subsequently filed Notice of Intent to Appeal.

STATEMENT OF FACTS

This matter arises out of the foreclosure of a commercial loan secured by approximately 4.9 acres in Greenville County. Buncombe owned the property.

In September 2007, Buncombe requested from Respondent a loan in the amount of $1,650,000.00. Buncombe and Respondent executed a loan commitment letter stating that Respondent would make the requested loan to Buncombe under certain terms and conditions, one of which was that Buncombe would grant to Respondent a first real estate mortgage in the property. (R. p. 110, line 11; p. 111 line 17; pp. 134-138) Additionally, DeCarlis executed the commitment letter as a guarantor. (R. pp. 134-138) The loan from the Respondent to Buncombe was going to satisfy an existing mortgage on the same property for the First National Bank of Spartanburg. (R. p. 124, lines 13-18; pp. 153-156) DeCarlis, neither individually nor on behalf of Buncombe, never notified Respondent of his or any other mortgages or encumbrances on the property. (R. p. 112, lines 15-23; p. 113, lines 23-25; p. 130, lines 10-12; p. 131, lines 4-10)

Buncombe and DeCarlis selected attorney Tommy Dugas [hereinafter "Dugas"] to handle the closing of the loan from the Respondent to Buncombe. (R. p. 115, lines 2-10) After receiving information from Respondent concerning the details of the loan, Dugas and his firm conducted an examination of the title of this real property (R. p. 116, lines 1-3). As part of the title examination, Dugas determined that the property was encumbered by two mortgages that were of record, one to the First National Bank of Spartanburg and one that was a second mortgage from Buncombe to DeCarlis personally. (R. p. 117, lines 5-15; p. 133) Dugas intended to release or satisfy the mortgage to DeCarlis. (R. p. 117, lines 14, 15; p. 118, lines 1, 12-16) He knew the Respondent intended to have the first mortgage on the property, and that as a result the mortgage to DeCarlis would have to be satisfied, released, or subordinated. (R. p. 119, lines 13-18) In preparing for the closing, Dugas intended to mark the mortgage to DeCarlis as

satisfied and set aside fees for releasing that mortgage in the HUD-1 settlement statement signed by Buncombe. (R. 124, lines 1-6; lines 21-25; p. 125, lines 1-12; pp. 151-152)

At the closing, Dugas did not have DeCarlis subordinate his mortgage to that of the Respondent, nor was the mortgage to DeCarlis satisfied or released. (R. p. 125, lines 13-22; p. 127, lines 1-3) The commercial real estate mortgage from Respondent to Buncombe was recorded in the Greenville County Register of Deeds on September 26, 2007, at Book 4855, Page 978. (R. pp. 143-150) The mortgage to DeCarlis remained open and of record.

The maturity date for the loan from Respondent to Buncombe was originally March 25, 2009. (R. p. 122, lines 24-25) The maturity date was extended through a change in terms agreement to March 25, 2010. (R. p. 132, lines 7-13; pp. 159-160) The loan was not paid off by the maturity date. (R. p. 132, lines 14-20)

As the Respondent prepared to foreclose on the loan, it discovered that the loan to DeCarlis was still open and still on record. (R. p. 126, lines 14-20) Buncombe had previously signed a business loan agreement stating that it would execute any additional documents to make the terms of the loan conform to the conditions contained in the lender's commitment. (R. p. 120, lines 22-25; p. 121, lines 1-2; p. 122, line 1-11; pp. 139-142) The mortgage issued to Buncombe contained similar language. (R. p. 122, lines 21-25; p. 123. lines 1-9; pp. 143-150) Based on the language contained in the business loan agreement and mortgage, Dugas contacted Buncombe and DeCarlis and requested that DeCarlis sign a Subordination Agreement. (R. p. 126, lines 23-25; p. 127, lines 1-4) DeCarlis refused to execute the Subordination Agreement. (R. p. 127, lines 23-25)

ARGUMENT

I. THE APPELLANTS' TESTIMONY, HAD IT BEEN OFFERED, WOULD HAVE BEEN ADVERSE TO THEIR POSITION.

As a preliminary matter, it should be noted that neither Appellant testified nor offered any evidence in support of its positions in the case. The only witnesses that testified were those testifying on the behalf of the Respondent. Furthermore, the only evidence offered was that offered by the Respondent.

It is well established under South Carolina case law that the failure of a party to testify raises an inference that its testimony, had it been submitted, would have been unfavorable to its position. See Gadson ex rel. Gadson v. ECO Services of South Carolina, Inc., 374 S.C. 171, 648 S.E.2d 585 (2007); McGowan v. Southerland, 253 S.C. 9, 168 S.E.2d 573 (1969); Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335 (1962).

The Appellants contend that there was no evidence that DeCarlis intended to subordinate or satisfy his mortgage and that Buncombe never agreed to provide a first priority mortgage to Respondent. However, the only evidence the trial court heard clearly set out that the Appellants agreed to give Respondent a first priority mortgage (R. pp. 134-138) and agreed to take whatever steps were necessary to make that happen. (R. p. 120, lines 22-25; p. 121, lines 1-2; p. 122, line 1-11; pp.139-142) Apparently DeCarlis faced the Hobson's choice of admitting, under oath, that either he intended to subordinate his mortgage or he committed bank fraud, and as such he chose not to testify at all. Therefore, the Court's review of the testimony and evidence of this case should be viewed with the inference that Buncombe and DeCarlis would have given testimony adverse to their stated positions.

II. A MORTAGE FILED FIRST IN TIME IS NOT ALWAYS ENTITLED TO HAVE PRIORITY.

The Appellants' belief is that, because DeCarlis mortgage was filed before Respondent's, DeCarlis' mortgage always has priority, no matter what. However, the courts of this state recognize causes of action for equitable subrogation, allowing a later-in-time mortgage to take priority over an earlier recorded mortgage. Furthermore, there are other cases that set forth a variety of reasons why time of filing may not be the only factor considered in determining priority. See Citizens & S. Nat. Bank of S. Carolina v. Smith, 277 S.C. 162, 284 S.E.2d 770 (1981); Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp., 273 S.C. 306, 257 S.E.2d 496 (1979); Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 715 S.E.2d 348 (Ct.App. 2011).

Appellants also overlooked the fact that a that a mortgage foreclosure is a proceeding in equity, and equitable principles dictate that the court look at substance over form and rule in accordance with the principles of equity. See Regions Bank, supra. Clearly it would be inequitable for DeCarlis to benefit from his own deception and lies with regard to the Respondent as to the existence of a second mortgage.

III. THE MASTER-IN-EQUITY CORRECTLY RULED THAT RESPONDENT WAS ENTITLED TO AMEND ITS COMPLAINT TO ADD A CAUSE OF ACTION FOR REFORMATION.

Prior to trial, the Respondent filed a Motion to Amend its complaint to include a cause of action for reformation. Following a hearing, the Court granted the motion.

Under Rule 15(a), SCRCP, the parties should be allowed to liberally amend the pleadings. In fact, pleadings may be amended at trial to conform to the evidence presented. Rule 15(b), SCRCP. South Carolina courts have long favored the amendment of pleadings to allow parties to fully and fairly to raise all issues in one proceeding. See

Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 607 S.E.2d 711 (Ct.App. 2005).

There is no evidence of prejudice to Appellants with regard to this amendment. As the Master's Order of April 5, 2011, noted, the Appellants had been aware of the claims raised and the facts that supported this cause of action for some period of time. (R. pp. 1-2) Additionally, had there been any prejudice to the Appellants, they could have moved for a continuance of the trial date.

Based on South Carolina's liberal rules with regard to amending pleadings, the Master-in-Equity correctly allowed the Respondent to amend its complaint to include the cause of action for reformation.

IV. THE MASTER-IN-EQUITY CORRECTLY RULED THAT RESPONDENT WAS ENTITLED TO REFORMATION.

The Master-In-Equity correctly ruled that a mutual mistake was made when Dugas failed to obtain from DeCarlis a subordination or satisfaction at the closing and that reformation of the appropriate mortgages to give Respondent the first mortgage was the correct remedy.

In South Carolina, reformation of a contract or agreement is appropriate when a mutual mistake is proven by clear or convincing evidence. See George v. Empire Fire and Marine Ins. Co., 344 S.C. 582, 545 S.E.2d 500 (2001); Shaw v. Aetna Cas. & Sur. Ins. Co., 274 S.C. 281, 262 S.E.2d 903 (1984); Kaiser v. Carolina Life Ins. Co., 219 S.C. 456, 65 S.E.2d 865 (1951); Crosby v. Protective Life Ins. Co., 293 S.C. 203, 359 S.E.2d 298 (Ct.App. 1987).

In this transaction, Dugas was selected by and compensated by Buncombe and DeCarlis. (R. p. 115, lines 2-10) However, as the only attorney involved in this loan

closing, he was effectively an agent for both the lender and the borrower to the extent necessary to complete the transaction. See McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct.App. 1998). As such, any mistake by Dugas in the context of preparing the closing documents and having them executed would be attributable to both parties.

In Shaw, a similar situation occurred when an insurance agent who was serving as an agent for both an insurance company and customer failed to ensure that a new policy began as old policy coverage expired. Following a loss, the customer sought coverage from the insurance company but was informed there was no coverage at the time of the loss. The Supreme Court correctly ruled that because the agent knew the intent of the parties with regard to coverage but failed to fulfill the intentions of both parties, the mistake was mutual. As a result, the Court found that the proper remedy was to reform the insurance policy and to provide the coverage sought by the customer. See Shaw, supra, at 286, 262 S.E.2d at 905.

In the current action, the parties expressed a clear intent that Respondent have a first priority mortgage with regard to the property in exchange for making the subject loan. (R. pp. 134-138) Buncombe and DeCarlis both signed the commitment letter and both knew what Respondent expected in exchange for lending this amount of money. Employees of the Respondent testified that the Respondent would never make a loan of this nature without having a first priority mortgage. (R. p. 112, lines 15-25; p. 113, lines 1-3; p. 114, lines 3-6; p. 130, lines 10-12; p. 131, lines 4-10) This testimony, combined with the commitment letter and the lack of any testimony or evidence by the Appellants, makes it clear and convincing that the parties' intent was for Respondent to have a first priority mortgage. Because the closing attorney was an agent for both parties with regard

to handling the closing, any mistake made by him is attributable to both and therefore constitutes a mutual mistake. See McNair, supra. Therefore, it would be appropriate to reform the agreement between the parties and subordinate the loan to DeCarlis such that it is second priority to the loan from the Respondent to Buncombe.

V. THE MASTER-IN-EQUITY CORRECTLY RULED THAT THE RESPONDENT WAS ENTITLED TO EQUITABLE SUBROGATION.

A. EQUITABLE SUBROGATION WAS CLEARLY PLED AND SOUGHT BY THE RESPONDENT.

The Appellants alleged that the Respondent never set forth a cause of action for equitable subrogation and that the Court was wrong to rule on any claim for equitable subrogation. As is clearly set forth in Paragraph 13 of both the original Complaint and the Amended Complaint, the Respondent alleged that its mortgage should have priority over the mortgage of DeCarlis under the theory of equitable subrogation. (R. pp. 20, 61) The Appellants, denied the allegations of Paragraph 13 and further stated that they did not believe the Respondent had a first a priority lien and that DeCarlis' loan was superior. (R. p. 86) The language contained in Appellants' Answer clearly establishes that they were aware of the Respondent's claim and specifically refutes it. Of note, Appellants never filed a Motion for Definite Statement or a Motion to Dismiss for Failure to State a Cause of Action with regard to equitable subrogation.

Rule 8, SCRCP, states that a Complaint set forth "a short and plain statement of facts showing that the pleader is entitled to relief." Rule 9, SCRCP, goes on to list those matters that must be pled with a certain amount of specificity. Neither of these rules requires the facts and allegations of the Complaint in large bold type. The pleading contained ultimate facts sufficient to put the Appellants on notice of the Respondent's

claims. See Watts v. Metro Security Agency, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct.App. 2001) ("Rule 8, SCRCP, mandates that a pleading contain "ultimate facts" rather than "evidentiary facts" to state a cause of action").

Additionally, South Carolina courts have held that pleadings must be liberally construed in favor of the pleader in order that justice is done. See Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991); Gaskins v. Southern Farm Bureau Cas. Ins. Co., 343 S.C. 666, 541 S.E.2d 269 (Ct.App. 2000). The Court of Appeals has previously stated that "substantial justice is accomplished when clearly inadequate and frivolous pleadings are summarily dismissed on demurrer thereto but also when inartfully drawn meritorious pleadings are upheld against a demurrer challenging their legal sufficiency." Moore v. City of Columbia, 284 S.C. 278, 283, 326 S.E.2d 157, 160 (Ct.App. 1985).

B. IF EQUITABLE SUBROGATION WAS NOT PLED BY THE PLAINTIFF, THEN EVIDENCE PRODUCED AT TRIAL WOULD HAVE ALLOWED AMENDEMENT TO INCLUDE THE CAUSE OF ACTION.

Rule 15(b), SCRCP, sets forth that pleadings may be amended to conform to evidence presented at trial. In the trial of this case, the Respondent introduced, without objection, information that indicated that most of the money loaned to Buncombe was used to satisfy a mortgage held by First National Bank of Spartanburg. (R. p. 124, lines 13-18; pp. 153-156) There is also evidence that Respondent satisfied this other mortgage for the purpose of having a first priority mortgage on the property in order to secure its loan. Furthermore, there is evidence that Respondent did not have actual notice of the mortgage to DeCarlis. (R. p. 112, lines 15-23; p. 113, lines 23-25; p. 130, lines 10-12; p. 131, lines 4-10) The inference from DeCarlis' failure to testify was there would be no

injustice done to him, as he would continue to be in the same position he had been in prior to the Respondent's loan and mortgage. Based on this evidence, even if the Respondent did not clearly set forth a cause of action for equitable subrogation in its Complaint or Amended Complaint, the pleadings could have been amended to include this cause of action.

C. THE MASTER-IN-EQUITY CORRECTLY RULED THAT RESPONDENT SATISFIED THE ELEMENTS OF EQUITABLE SUBROGATION.

In multiple cases, courts in South Carolina have stated that in order for a party to be entitled to equitable subrogation, the party must meet the following requirements:

> (1) the party claiming subrogation has paid the debt; (2) the party was not a volunteer, but had a direct interest in the discharge of the debt or lien; (3) the party was secondarily liable for the debt or for the discharge of the lien; (4) no injustice will be done to the other party by the allowance of equitable subrogation; and (5) the party asserting the doctrine did not have actual notice of the prior mortgage

Matrix Fin. Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 533 (2011) (citing Dedes v. Strickland, 307 S.C. 155, 158, 414 S.E.2d 134, 136 (1992)). Once the mortgagee meets these requirements, it steps into the shoes of the prior mortgagee to the extent of the amount of the prior mortgage at the time it was paid off.

It is undisputed that the Respondent paid off the existing mortgage held by First National Bank of Spartanburg. Furthermore, it is clear that the Respondent had a direct interest in the discharge of the mortgage at the First National Bank of Spartanburg so that it would have (so it believed) a first priority mortgage on the property in order to secure the debt. Additionally, it is clear that the Respondent, through payment of this loan to Buncombe in exchange for an interest in the real property, was secondarily liable to First

National Bank of Spartanburg. The Appellants do not appear to contest that Respondent satisfied these requirements.

The next requirement is that there would be no injustice done to the other party. In this case, that party is DeCarlis. DeCarlis personally signed the loan commitment that set forth Respondent would have first priority mortgage on the real estate in question. (R. pp. 134-138) He also signed the loan commitment on behalf of Buncombe. He knew at the time the loan commitment was entered into, that Respondent expected, and Buncombe agreed, for Respondent to have the first priority mortgage. DeCarlis agreed to have his mortgage be subordinate to that of the Respondent, so he cannot now claim that this being done prejudiced him.

The final issue is whether Respondent had actual knowledge of the prior mortgage. It is clear from the testimony from Michael Lowry and Fred Moore that the Respondent did not have any knowledge of this mortgage belonging to DeCarlis. DeCarlis and Buncombe never notified them of this mortgage. (R. p. 112. lines 15-23; p. 113, lines 23-25; p. 130, lines 10-12; p. 131, lines 4-10)

Appellants argue that because the DeCarlis mortgage was a matter of public record, the Respondent had notice of the mortgage and cannot claim equitable subrogation. This is contrary to well-established case law. See, e.g. Dedes, supra; Meaders Bros. v. Skelton, 234 S.C. 134, 107 S.E.2d 1 (1959); Dodge City of Spartanburg, Inc., v. Jones, 317 S.C. 491, 454 S.E.2d 918 (Ct.App. 1995). In all other cases on this issue, the mortgages have been recorded and of public record, yet the courts have time and again allowed equitable subrogation to serve as a basis for relief.

The Appellants' other contention is that the Respondent had actual notice of the mortgage to DeCarlis because Dugas found out about DeCarlis mortgage. It is undisputed that Dugas was the only attorney involved in the transaction and that he became aware of the DeCarlis mortgage. (R. p. 117, lines 5-15; p.133) However, Dugas never gave this information to Respondent. As closing attorney, Dugas represented both parties solely with regard to the closing itself. See McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct.App. 1998). However, there is no evidence that Dugas was at any time an agent for the bank such that any knowledge he might have would imputed to the Respondent. Furthermore, whether an attorney handling a real estate closing is an agent for the lender is an issue of fact. See Am. Fed. Bank, FSB v. No. One Main Joint Venture, 321 S.C. 169, 467 S.E.2d 439 (1996). There is no evidence that Dugas was an agent for the Respondent, as the Appellants retained Dugas and compensated him.

CONCLUSION

The Court of Appeals should affirm of the Order of the Master granting the Respondent relief on its foreclosure action. The Appellants' failure to testify creates an inference that their testimony would be adverse to their own interests, and clearly the Appellants, particularly DeCarlis, chose not to testify because he would have either had to admit that the Respondent was entitled to a first mortgage on the property or he would have admitted to the federal offense of bank fraud. Clearly DeCarlis knew at the time he agreed, on he behalf of Buncombe, to give Respondent a first mortgage on the property that he held a second mortgage himself. He now wants to take advantage of a technical error on behalf of the attorney handling the closing and prevail despite any of the equities involved. The inferences against the Appellants and the testimony and evidence offered

by Respondent at trial provide clear and convincing evidence that, because of a mutual mistake, the DeCarlis mortgage was not subordinated or satisfied at the real estate closing, and as such the Master correctly ruled that reformation was appropriate to give the Respondent the first mortgage on the property. Furthermore, and in the alternative, the Master correctly found that Respondent clearly pled the cause of action for equitable subrogation, and satisfied the elements necessary to prevail on that cause of action.

Respectfully submitted,

LOVE, THORNTON, ARNOLD & THOMASON, P.A.

M. Kyle Thompson, S.C. Bar No. 68283
P.O. Box 10045
Greenville, SC 29603
Telephone: (864) 242-6360
Fax: (864) 271-7972
Email: kthompson@ltatlaw.com
Attorney for the Respondent

February 28, 2012
Greenville, South Carolina

CERTIFICATION

Counsel certifies that Final Brief of Respondent complies with Rule 211(b), S.C.A.C.R.

Respectfully Submitted,

LOVE, THORNTON, ARNOLD & THOMASON, P.A.

M. Kyle Thompson
Attorney for the Respondent

February 28, 2012
Greenville, South Carolina

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master In Equity

C.A. NO. 2010-CP-23-3860

Independence National Bank ..... Respondent,

vs.

Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. DeCarlis ..... Appellants.

FINAL REPLY BRIEF OF APPELLANTS

Mary Leigh Arnold, Esq.
MARY LEIGH ARNOLD, P.A.
749 Johnnie Dodds Blvd., suite B
Mt. Pleasant, SC 29464
Phone: (843) 971-6053
Facsimile: (843) 971-6055
Email: sammie@mararnoldlaw.com
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT I

I. A MORTGAGE FILED FIRST IN TIME IS ENTITLED TO PRIORITY 1

II. THE MASTER IN EQUITY ERRED IN RULING THAT RESPONDANT WAS ENTITLED TO REFORMATION AS AN APPROPRIATE REMEDY 2

III. THE MASTER IN EQUITY ERRED IN RULING THAT RESPONDANT WAS ENTITLED TO EQUITABLE SUBROGATION 6

a. The Master In Equity Erred in Ruling that Respondent Satisfied the Elements of Equitable Subrogation 6

b. Equitable Subrogation Was Not Clearly Plead or Sought by Respondent 7

IV. CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Allendale County Bank v. Cadle, 348 S.C. 367, 559 S.E.2d 342 (S.C. Ct. App. 2001) 1, 2

American Employers Ins. Co. v. St. Paul Fire & Marine Ins. Co., 549 F.2d 973, 977 (4th Cir. W. Va. 1979) 2

Citizens & Southern Nat'l Bank v. Smith, 277 S.C. 162, 164, 284 S.E.2d 770, 771 (S.C. 1981) 2

George v. Empire Fire and Marine Ins. Co., 344 S.C. 582, 545 S.E.2d 500 (S.C. 2001) 2

Kunzik v. Bees Ferry Associates, 342 S.C. 579, 538 S.E.2d 500 (Ct. App. 2000) 7

Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 137, 714 S.E.2d 532, 533 (S.C. 2011) 6

Prudential Ins. Co. v. Wadford, 232 S.C. 476, 102 S.E.2d 889 (S.C. 1958). 1, 2

United States v. Milliken Imprinting Co., 202 U.S. 168 (1906) 2

Statutes

South Carolina Code §30-7-10 2

South Carolina Code §30-7-20 ..... 2, 3

Rules

SCRCP, Rule 12(b)(6) 7

ARGUMENT

I. A MORTGAGE FILED FIRST IN TIME IS ENTITLED TO PRIORITY.

The mortgage (hereinafter "Decarlis Mortgage") granted by Bucombe Professional Park, LLC (hereinafter "Bucombe") to David DeCarlis (hereinafter "DeCarlis") upon the property in question was recorded prior to Independence National Bank's (hereinafter "Respondent") mortgage (hereinafter "Respondent Mortgage") therefore the DeCarlis Mortgage has priority over the Respondent Mortgage. South Carolina Code §30-7-10 provides in pertinent part:

> ". . . [A]ll mortgages or instruments in writing in the nature of a mortgage of any real property, . . . all statutory liens on buildings and lands . . . all contracts for the purchase and sale of real property, all assignments, satisfactions, releases, and contracts in the nature of subordinations, waivers . . . on real property created by law or by agreement of the parties and generally all instruments in writing conveying an interest in real estate required by law to be recorded in the office of the register of deeds . . . except as otherwise provided by statute, are valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors), or purchasers for valuable consideration without notice, only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated. In the case of a . . . subsequent lien creditor on real estate for valuable consideration without notice, the instrument evidencing the subsequent conveyance or subsequent lien must be filed for record in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and the priority is determined by the time of filing for record.

This statute sets forth the general rule of priority as between mortgages in this state, and should be firmly followed absent clear manifestation for exception. See Allendale County Bank v. Cadle, 348 S.C. 367, 559 S.E.2d 342 (S.C. Ct. App. 2001); Prudential Ins. Co. v. Wadford, 232 S.C. 476, 102 S.E.2d 889 (S.C. 1958). Respondent failed to establish a basis for ignoring the statute.

II. THE MASTER IN EQUITY ERRED IN RULING THAT RESPONDANT WAS ENTITLED TO REFORMATION AS AN APPROPRIATE REMEDY.

Respondent contends reformation on the basis of mutual mistake was an appropriate remedy. Evidence of a mutual mistake must be proven by clear and convincing evidence. George v. Empire Fire and Marine Ins. Co., 344 S.C. 582, 545 S.E.2d 500 (S.C. 2001); United States v. Milliken Imprinting Co., 202 U.S. 168 (U.S. 1906). For Reformation on the basis of mutual mistake to be an appropriate remedy a few prerequisites must be established. First, the parties must have had a meeting of the minds as to an intended agreement. Second, there must be a written instrument evidencing the purported agreement. Third, there must be "a material variance between the mutual intention of the parties and the written instrument." American Employers Ins. Co. v. St. Paul Fire & Marine Ins. Co., 594 F.2d 973, 977 (4th Cir. W. Va. 1979); see Milliken Imprinting Co., 202 U.S. 168 (U.S. 1906).

The determination of priority as to a particular mortgage is not stated or controlled by any terms laid out within the mortgage, rather the priority of a mortgage, as it relates to other security devices, is determined by the date when the mortgage is recorded. South Carolina Code §30-7-10; see Cadle, 348 S.C. 367, 559 S.E.2d 342; Wadford, 232 S.C. 476, 102 S.E.2d 889. The priority of two different mortgages upon the same piece of real estate may be switched or substituted for one another by agreement of the parties. However, "[b]ecause it alters the normal priority of the mortgagees, priority under a subordination agreement is strictly limited by the express terms of the agreement." Citizens & Southern Nat'l Bank v. Smith, 277 S.C. 162, 164, 284 S.E.2d 770, 771 (S.C. 1981) (citations omitted). South Carolina Code §30-7-20 states in order

for two parties contemplating subordinating a prior mortgage through an agreement to diverge from following the default rule of first in time priority it is necessary that such a subordination agreement be drafted, witnessed, signed, and recorded by the parties.

In this case Respondent asserts that their mortgage should be reformed to show first priority because of a mutual mistake of parties. (Respondent's Initial Brief p.7-9). This is an inappropriate remedy for two principal reasons. First, there is no written instrument to reform expressing the intent of the parties to subordinate the DeCarlis Mortgage to that of the Respondent Mortgage. Second, even in there was an appropriate written instrument evidencing the intent of the parties, the intent cannot be proved by clear and convincing evidence.

As to the First, nowhere in the terms of the Respondent Mortgage is there a description of the priority of the Respondent Mortgage. (R. pp. 143-150). This is because a mortgage by its terms does not control priority. A subordination agreement, collateral to the mortgage, may control the priority of two or more mortgages if the agreement is drafted, witnessed, and signed by the parties to conform with the requirements of South Carolina Code §30-7-20. Respondent never undertook drafting a subordination agreement to be signed by DeCarlis.[1] It is not appropriate to reform the priority of an instrument that by its terms and form does not speak to priority. Moreover, you cannot reform a nonexistent subordination agreement that is collateral to the mortgage.

[1] In this case it is important to emphasize that we are dealing with three separate individuals or entities. The Respondent entered into a loan agreement with Bucombe intending to secure the loan by a mortgage upon the property in questioned. The property in question is owned by Bucombe and prior to the loan agreement between the Respondent and Bucombe was encumbered by two mortgages. One mortgage belonged to First National Bank of Spartanburg, an independent third party, and the other mortgage belonged to DeCarlis also an independent third party.

Therefore, reformation was not an appropriate remedy absent an appropriate written instrument to reform.

Secondly, the intent of the parties to subordinate the DeCarlis Mortgage to that of the Respondent Mortgage was not proven by clear and convincing evidence. Respondent states in its Reply that the parties expressed clear intent to place the Respondent Mortgage in first priority. (Respondent's Initial Brief, p. 8). However, there is not sufficient evidence to support this assertion. There is no written subordination agreement evidencing intent to subordinate the DeCarlis mortgage. The Respondent's Loan Agreement with Bucombe, the Bucombe Note, and the Respondent Mortgage do not reference the priority of the Respondent Mortgage, nor for that matter reference the DeCarlis Mortgage at all. (R. pp. 139-150; A. to R. pp. 7-9). On the other hand, there is evidence that DeCarlis lacked knowledge the loan to Bucombe was contingent upon subordinating the DeCarlis Mortgage. (R. pp. 157-158)[2]. Additionally, though Respondent asserts that all three parties expressed clear intent to place the Respondent Mortgage in first priority, the language of their own testimony at trial, and the Respondent's Initial Brief appear uncertain whether the clear intent of the parties was to be carried out through the satisfaction of the DeCarlis Mortgage, release the DeCarlis Mortgage, or subordination of the DeCarlis Mortgage. (Respondent's Initial Brief pp3,4,7; R. p. 114, lines 3-4; R. p. 116, lines 5-9; R. p. 117, lines 14-15; R. p. 118, lines

[2] On April 8, 2010 Florida Attorney Kenneth R. Noble, in a representative capacity for his client DeCarlis, wrote a reply correspondence to Attorney Dugas. The Correspondence stated in pertinent part: "I have talked with my client concerning the various transactions concerning the closing on September 25, 2007. My client does not have any independent recollection that the loan was contingent on my client subordinating his individual mortgage to Independence National Bank."

13-14; p.119, lines 17-18; p.125, lines 7-25; A. to R. p. 4, line 22 – p. 5, line 8)[3]. Respondent asserts that the mistake is mutual because the mistake originates with the attorney Dugas who Respondent contends was acting in his capacity as an agent for both Respondent and DeCarlis in closing the loan. (Respondent's Initial Brief pp.7-8). However, though Dugas may have been acting as an agent of Respondent and Bucombe, he never was under any authority to act as the agent for DeCarlis as a third party mortgagee. There simply is not sufficient clear and convincing evidence that Respondent established with DecCarlis, as an independent third party mortgagee, regardless of his agency for BuCombe, a clear agreement to select a method of either satisfaction, release, or subordination of the DeCarlis Mortgage so that the Respondent Mortgage might move into first priority. Therefore, due to lack of clear intent a mutual mistake was not proven.

In conclusion the Master erred in ruling that reformation on the basis of mutual mistake was appropriate for two reasons which together evidence a lack of existence of mutual mistake. First, because a written instrument capable of being reformed to reflect priority, in this case a subordination agreement, does not exist to reform. Secondly, it cannot be established by clear and convincing evidence that Respondent and DeCarlis acting in an individual capacity as a third party mortgagee, rather than on behalf of Bucombe, mutually intended for Respondent Mortgage to supersede the DeCarlis Mortgage in terms of priority.

[33] Respondent appears to use the terms satisfaction, release, and subordination interchangeably when describing the intent of the parties to this transaction. These terms have very different meanings, and it would have been impossible for the parties to have reached a clear intention without clearly determining which of these means they intended to use to carry out that intention. The definition of Satisfaction: "[t]he discharge of an obligation by paying a party what is due to him (as on a mortgage, lien, or contract). ..." Release: "[a] discharge of a debt by act of party, as distinguished from an extinguishment which is a discharge by operation of law, and in distinguishing release from receipt, "receipt" is evidence of that an obligation has been discharged, but "release" is itself a discharge of it." Subordination: "[t]he act or process by which a person's rights are ranked below the rights of others. A second mortgagee's rights are subordinate to those of the first mortgagee." Blacks Law Dictionary 5th ed. (1979).

III. THE MASTER IN EQUITY ERRED IN RULING THAT RESPONDANT WAS ENTITLED TO EQUITABLE SUBROGATION.

a. The Master In Equity Erred in Ruling that Respondent Satisfied the Elements of Equitable Subrogation.

The Master in Equity erred in two particular ways as to the application of the principle of equitable subrogation. First, the Master erred by determining equitable subrogation was appropriate when Respondent failed to establish all the essential elements. Second, the Master erred by altering his Order to include findings as to the concept of equitable subrogation when sufficient facts for relief were never plead by Respondent. The Master in Equity's ruling should be reversed.

The requirements a mortgagee must meet to qualify for equitable subrogation are: (1) the party claiming subrogation has paid the debt; (2) the party was not a volunteer, but had a direct interest in the discharge of the debt or lien; (3) the party was secondarily liable for the debt or for the discharge of the lien; (4) no injustice will be done to the other party by the allowance of equitable subrogation; and (5) the party asserting the doctrine did not have actual notice of the prior mortgage. Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 137, 714 S.E.2d 532, 533 (S.C. 2011).

In this case the Respondent admitted to the Master during trial that the Respondent did have actual knowledge of the DeCarlis mortgage prior to the closing of the Respondents Loan Agreement. The Respondent's Agent Attorney Dugas had performed a title search which evidenced the DeCarlis Mortgage and the Respondents conceded to the Master during trial actual knowledge of this information. (A. to R. p. 39,

lines 7-11)[4]. Therefore the Respondent as mortgagee does not meet the required elements for equitable subrogation to be an appropriate remedy in this case.

b. Equitable Subrogation Was Not Clearly Plead or Sought by Respondent.

The Master erred by altering his Order to include findings as to the concept of equitable subrogation when sufficient facts for relief were never plead by Respondent.

The Rules of Civil Procedure and specifically Rule 12(b)(6) codified the concept that one must sufficiently plead a cause of action in order to recover under the cause. Indeed this rule applies to the cause of action for equitable subrogation. This Court in the case of Kuznik v. Bees Ferry Associates, 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000), determined the master in equity committed reversible error by concluding the assertion of an indemnity claim was tantamount to asserting a claim for equitable subrogation. In Kuznik, this Court recognized that nowhere in the pleadings had the required elements of equitable subrogation been pled and that "the claim for equitable subrogation cannot be 'bootstrapped' onto the claim for contractual indemnity." Id at 31. Hence the failure to plead sufficient facts for the cause of action is fatal to the recovery under the theory. Here, Respondent failed to plead the facts necessary to meet the elements for equitable subrogation. Nowhere in Respondent's Amended Complaint do they cite facts alleging that no injustice would ensue if the DeCarlis Mortgage was equitably subrogated to the Respondents Mortgage, nor anywhere in the Amended Complaint do they address the Respondents knowledge or assert lack thereof of the DeCarlis Mortgage. Rather Respondent simply alleges equitable subrogation at the bottom of an untitled paragraph

[4] "By the Court: So, if he was a mutual agent, then Independence National Bank had actual knowledge of the DeCarlis mortgage, correct?
Mr. Thompson: Yes, sir. He would have had knowledge of this mortgage. He was aware of that."

containing a number of unrelated allegations. (R. p. 61 ¶13). Respondent was not entitled to recover under the theory. The Master In Equity should be reversed.

CONCLUSION

The Court of Appeals should reverse the Order of the Master granting Respondent relief on its foreclosure action. Respondent failed to show by clear and convincing evidence that reformation based upon mutual mistake was an appropriate remedy for Respondent to prevail. Furthermore, Respondent failed to properly plead and provide satisfactory evidence of the necessary elements of equitable subrogation, thus it is not an appropriate remedy for Respondent to prevail in this case either.

Respectfully submitted,

Mary Leigh Arnold, P.A.

Mary Leigh Arnold, Esq.
749 Johnnie Dodds Blvd., Suite B
Mt. Pleasant, SC 29464
Telephone: (843) 971-6053
Fax: (843) 971-6055
Email: sammie@maryarnoldlaw.com

May 14, 2012
Mt. Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
The Honorable Charles B. Simmons, Master in Equity

Case No. 2010-CP-23-3860

Independence National Bank, Respondent,

v.

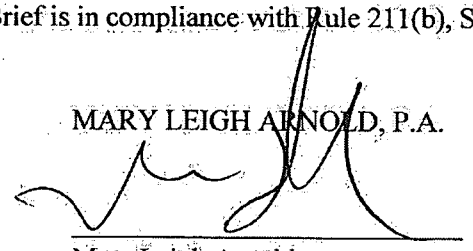
Buncombe Professional Park, LLC; and
David Decarlis, s/a David D. Decarlis, Appellants.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

I certify that Appellant's Final Reply Brief is in compliance with Rule 211(b), SCACR.

May 14, 2012

MARY LEIGH ARNOLD, P.A.



Mary Leigh Arnold
749 Johnnie Dodds Blvd., Suite B
Mt. Pleasant, South Carolina 29464
(843) 971-6053 (phone)
(843) 971-6055 (fax)
Sammie@maryarnoldlaw.com

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Independence National Bank, Respondent,

v.

Buncombe Professional Park, LLC, and David DeCarlis, s/a David D. DeCarlis, Appellants.

Appellate Case No. 2011-196049

Appeal From Greenville County
Charles B. Simmons, Jr., Master-In-Equity

Opinion No. 5090
Heard November 13, 2012 – Filed February 20, 2013

REVERSED

Mary Leigh Arnold, of Mary Leigh Arnold, PA, of Mount Pleasant, for Appellants.

Martin Kyle Thompson, of Clawson & Staubes, LLC, of Greenville, for Respondent.

LOCKEMY, J.: Buncombe Professional Park, LLC (Buncombe) and David DeCarlis (collectively Appellants) appeal the Master-In-Equity's (Master) reformation of Independence National Bank's (Independence) mortgage, which placed it in a superior position to DeCarlis's mortgage. Appellants also appeal the Master's additional finding that pursuant to the doctrine of equitable subrogation, Independence was entitled to a first and superior mortgage. We reverse.

FACTS

Buncombe obtained a commercial loan in the amount of $1.65 million from Independence, of which DeCarlis was an individual guarantor. This loan was secured by approximately 4.9 acres of land in Greenville County (Greenville property). Buncombe and DeCarlis retained attorney Tommy Dugas to handle the loan closing. Independence's loan was to satisfy a first mortgage on the Greenville property held by First National Bank of Spartanburg (First National). After receiving information from Independence regarding the details of the loan, Dugas conducted an examination of the Greenville property's title. As part of that examination, Dugas determined the Greenville property was encumbered by two mortgages of record, the one held by First National and a second mortgage held by DeCarlis individually.

At the closing, Robert M. Lowery was present on behalf of Independence, and DeCarlis was present on behalf of Buncombe and individually as a guarantor of the note. DeCarlis individually guaranteed the commercial promissory note, and a separate guaranty agreement was executed as well. Buncombe and Independence executed a loan commitment letter that stated Independence would make the requested loan to Buncombe under certain terms and conditions, one being that Buncombe would grant a first in priority real estate mortgage in the Greenville property to Independence. Specifically, one of the requirements within the conditions precedent section of the loan commitment letter stated,

> A commitment to issue a standard ALTA mortgagee title insurance policy in form, content and from a title insurer satisfactory to Independence, insuring the mortgage as a **first lien on the Property** for the full amount of the loan, with such endorsements as Independence may require. Title shall be fee simple and marketable, free and clear of all defects, liens and encumbrances, including mechanics' liens.

(emphasis added). DeCarlis signed the loan commitment letter, dated September 25, 2007, as a guarantor and on behalf of Buncombe. Moreover, the mortgage included the following language: "The words "Related Documents" mean . . . any . . . documents or agreements executed in connection with this Security Instrument whether now or hereafter existing. The Related Documents are hereby made a part of this Security Instrument by reference thereto, with the same force and effect as

if fully set forth herein." Dugas was the only attorney at the closing, representing all parties. DeCarlis, on behalf of Buncombe and individually, further signed a business loan agreement stating that any additional documents necessary to make the terms of the loan conform to the conditions contained in the lender's commitment would be executed accordingly. The commercial real estate mortgage issued to Buncombe contained similar language.

DeCarlis did not subordinate his previously recorded mortgage to that of Independence's mortgage, nor was his mortgage satisfied or released during the closing. Lowery testified that while Dugas reviewed the lender's commitment letter with DeCarlis, DeCarlis never revealed the existence of his mortgage on the Greenville property. Independence's mortgage was recorded in the Greenville County Register of Deeds (ROD) on September 26, 2007, at Book 4855, Page 978. The mortgage to DeCarlis remained open and of record.

The maturity date for Independence's loan was originally March, 25, 2009. However, through a change in terms agreement, the date was extended to March 25, 2010. The loan was not paid off by the maturity date, and Independence sought to foreclose on their mortgage. Independence then discovered that DeCarlis's loan was still open and of record. Dugas contacted Buncombe and DeCarlis regarding the issue and requested that DeCarlis sign a subordination agreement. DeCarlis declined to execute the agreement.

On May 14, 2010, Independence filed a foreclosure complaint against Appellants. On June 18, 2010, Appellants filed an answer and counterclaim challenging the priority of Independence's mortgage. On October 14, 2010, the court denied a motion for summary judgment by Independence. Thereafter, on March 24, 2011, Independence filed a motion to amend its complaint, which was granted over Appellants' objection. The amended complaint included a new cause of action for reformation.

Dugas testified at the hearing on April 29, 2011, and stated he had been aware of DeCarlis's mortgage on the Greenville property and had written himself a note that DeCarlis's mortgage needed to be released. Dugas admitted he made a mistake in failing to have DeCarlis execute a satisfaction, release, or subordination of DeCarlis's mortgage at the loan closing and stated the parties agreed Independence would have a first mortgage. However, when he tried to correct the mistake a couple of years later, DeCarlis replied through his attorney, refusing to sign a subordination agreement. He stated he did "not have any independent recollection

that the loan was contingent on [his] subordinating his individual mortgage to Independence National Bank." A manager from Independence's loan department testified that Independence would not loan $1.65 million as a second mortgage and had DeCarlis's mortgage been revealed to him, he would have refused to issue the loan.

Following the hearing, in which DeCarlis failed to appear and did not put forth any evidence, the Master entered an order of foreclosure prepared by Independence. Subsequently, Appellants filed a motion to reconsider, and Independence filed a motion to alter or amend the order to include a ruling on equitable subrogation. Appellants objected to altering the order on the grounds that equitable subrogation was not pled by Independence. The Master denied Appellants' motion, but granted Independence's motion and found it met the requirements for equitable subrogation as well. Appellants then timely filed this appeal.

ISSUES ON APPEAL

Did the Master err by failing to give priority to DeCarlis's mortgage when it was filed prior to Independence's mortgage?

Did the Master err in reforming Independence's mortgage?

Did the Master err in amending his original order to provide for equitable subrogation?

STANDARD OF REVIEW

"An action to establish lien priorities is an action in equity," *SunTrust Bank v. Bryant*, 392 S.C. 264, 267, 708 S.E.2d 821, 822 (Ct. App. 2011) (citing *Fibkens v. Fibkens*, 303 S.C. 112, 115, 399 S.E.2d 158, 160 (1990)), as is an action to foreclose a mortgage. *Rakestraw v. Dozier Assocs., Inc.*, 285 S.C. 358, 360, 329 S.E.2d 437, 438 (1985). "The appellate court's standard of review in equitable matters is our own view of the preponderance of the evidence." *SunTrust Bank*, 392 S.C. at 267, 708 S.E.2d at 822-23 (citing *Williams v. Wilson*, 349 S.C. 336, 339-40, 563 S.E.2d 320, 322 (2002)).

LAW/ANALYSIS

Appellants first argue the Master erred in giving priority to Independence's mortgage because it is clear that DeCarlis's mortgage was filed first in time, and therefore is superior.

Section 30-7-10 of the South Carolina Code (2007) provides:

> All . . . mortgages or instruments in writing in the nature of a mortgage of any real property, . . . all assignments, satisfactions, releases, and contracts in the nature of subordinations, . . . or other liens on real property created by law or by agreement of the parties and generally all instruments in writing conveying an interest in real estate required by law to be recorded in the office of the register of deeds or clerk of court in those counties where the office of the register of deeds has been abolished or in the office of the Secretary of State delivered or executed after July 31, 1934, except as otherwise provided by statute, are valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors), or purchasers for valuable consideration without notice, only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated. In the case of a subsequent purchaser of real estate, or in the case of a subsequent lien creditor on real estate for valuable consideration without notice, the instrument evidencing the subsequent conveyance or subsequent lien must be filed for record in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and **the priority is determined by the time of filing for record**.

(emphasis added). We agree that section 30-7-10, read without reference to any other doctrine or statute, indicates DeCarlis's lien is superior to Independence's lien. However, we examine whether the Master was correct in finding Independence had the superior lien pursuant to reformation of the mortgage and/or the doctrine of equitable subrogation.

Reformation

Appellants maintain the Master's reformation of the mortgage was error because Independence did not prove by clear and convincing evidence a "meeting of the minds." We agree.

"'A contract may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it.'" *George v. Empire Fire & Marine Ins. Co.*, 344 S.C. 582, 590, 545 S.E.2d 500, 504 (2001) (quoting *Crosby v. Protective Life Ins. Co.*, 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct. App. 1987)). "'A mistake is mutual where both parties intended a certain thing and by mistake in the drafting did not obtain what was intended.'" *Id.* (quoting *Crosby*, 293 S.C. at 206, 359 S.E.2d at 300). "'Reformation is the remedy by which writings are rectified to conform to the actual agreement of the parties.'" *Crosby*, 293 S.C. at 206, 359 S.E.2d at 300 (quoting *Crewe v. Blackmon*, 289 S.C. 229, 234, 345 S.E.2d 754, 757 (Ct. App. 1986)). "Before equity will reform a contract, the existence of a mutual mistake must be shown by clear and convincing evidence." *Id.* (citing *Crosby*, 293 S.C. at 206, 359 S.E.2d at 300).

The Master can reform a material element affecting subject matter or the terms and stipulations of the contract. In the present case, the error was failing to have DeCarlis sign a subrogation agreement. DeCarlis was not a party to the mortgage and reformation does not permit a court to write a new, additional party into the mortgage to correct the error. *See* 66 Am. Jur. 2d *Reformation of Instruments* § 51 (2011) ("A court of equity may not add or substitute other parties for those appearing on the face of a contract where the effect may be to make a new contract."). Thus, we find the Master erred in reforming the mortgage to alter the parties' priority rights.

Equitable Subrogation

Appellants argue the Master erred in altering his final order to include findings regarding the concept of equitable subrogation because relief for the same was never pled by Independence. Alternatively, Appellants argue even if the Master was correct in allowing Independence to allege a claim of equitable subrogation, he erred in determining it was an appropriate remedy when Independence failed to

establish any of the essential elements. We find their first argument to be without merit, but agree with their second argument.

In its amended complaint, Independence contended that DeCarlis's mortgage should be ruled junior and secondary to Independence's mortgage pursuant to the theory of equitable subrogation. In their amended answer, Appellants responded that because Independence does not hold a first priority lien and was aware it did not hold a first priority lien, its allegations in Paragraph 13, which included the equitable subrogation claim, were "completely improper." Appellants' direct response to Independence's claim of equitable subrogation indicates they had notice of the claim, and further, had time to prepare any defense or argument they may have had against the claim. We believe it was appropriate to amend the final order to include findings on the claim of equitable subrogation, and Appellants were not prejudiced by the Master's decision.

Continuing to the merits, equitable subrogation allows a subsequent creditor to assume the rights and priority of a prior creditor. To be granted the remedy of equitable subrogation, the mortgagee must establish the following requirements: (1) the party claiming subrogation has paid the debt; (2) the party was not a volunteer but had a direct interest in the discharge of the debt or lien; (3) the party was secondarily liable for the debt or for the discharge of the lien; and (4) no injustice will be done to the other party by the allowance of the equity. *Dedes v. Strickland*, 307 S.C. 155, 158, 414 S.E.2d 134, 136 (1992). "Additionally, the party asserting the doctrine must not have had actual notice of the prior mortgage." *Id.* In considering this doctrine, it is important to note that constructive notice is not a bar. *Pee Dee State Bank v. Prosser*, 295 S.C. 229, 238, 367 S.E.2d 708, 713 (1988), *overruled on other grounds by United Carolina Bank v. Caroprop, Ltd.*, 316 S.C. 1, 446 S.E.2d 415 (1994).

Independence, the party claiming subrogation, paid Buncombe's debt to First National by satisfying First National's mortgage on the Greenville property. Independence loaned Buncombe $1.65 million secured with a mortgage on the Greenville property, in part to satisfy First National's mortgage, and thus, was not a volunteer. Regarding the third requirement, Independence was secondarily liable for the discharge of First National's mortgage under the instruments creating the new mortgage. As to the fourth requirement, we also do not believe an injustice would be done to DeCarlis, because it appears from the record he was aware Independence expected a first mortgage, and he would be placed in the same position he would have been if the closing had gone as intended by the parties.

However, we find Independence had actual notice of the prior mortgage. *See Spence v. Spence*, 368 S.C. 106, 118, 628 S.E.2d 869, 875 (2006) ("[I]n the context of a real estate transaction, a purchaser of real property has actual notice of a title defect or other claim, lien, or interest adverse to his own in a particular property when he actually knows about the defect or claim, or when a reasonable person, if made aware of the same information known to the buyer, would be charged with actual notice of the defect or claim. Actual notice may consist of facts or conditions observed by a prospective purchaser as well as information conveyed orally or in writing to him."). While the record does not contain evidence that Independence was directly informed about the existence of DeCarlis's lien, we believe there was an agent-principal relationship between Dugas and Independence, such that actual notice to Dugas was actual notice to Independence. *See Nationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 242, 597 S.E.2d 165, 168 (Ct. App. 2004) ("[T]he relationship of agency need not depend upon express appointment and acceptance thereof. Rather, an agency relationship may be, and frequently is, implied or inferred from the words and conduct of the parties and the circumstances of the particular case."); *see also Citizens' Bank v. Heyward*, 135 S.C. 190, 199, 133 S.E. 709, 712 (1925) (stating notice to agent is notice to principal); *compare Pee Dee State Bank*, 295 S.C. at 238, 367 S.E.2d at 713-14 (finding no evidence in the record of any information the closing attorney had regarding other liens on the property; thus, equitable subrogation was not barred).

Independence now claims no evidence established Dugas was its agent. However, Dugas was the only attorney present at the closing, and he was the only one authorized to conduct the closing. Independence admits in its brief Dugas represented both parties with regard to the closing. Despite the fact Buncombe and DeCarlis paid for Dugas's services, Independence required them to do so in the "Costs" section of its loan commitment letter, stating "[o]n or before the closing Borrower shall pay all costs, expenses and fees (including, without limitation, any appraisal, survey, insurance, environmental assessment, engineering, inspections, searches, recording and attorneys' fees) associated with this transaction." Dugas conducted a title search before the closing and discovered DeCarlis's lien. He admitted he knew of DeCarlis's mortgage at the closing, yet failed to subordinate the mortgage to Independence's mortgage. Thus, we find Independence had actual knowledge of DeCarlis's mortgage. For the foregoing reasons, we reverse the Master's ruling that equitable subrogation was a proper remedy under these facts.

CONCLUSION

We hold neither reformation nor equitable subrogation were appropriate remedies under these facts. Accordingly, the Master's rulings are

REVERSED.

SHORT and KONDUROS, JJ., concur.

6151C

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master-In-Equity

RECEIVED
MAR 07 2013
SC Court of Appeals

C.A. NO. 2010-CP-23-3860

Independence National Bank ..... Respondent,

vs.

Buncombe Professional Park, LLC; and David DeCarlis, s/a David D. DeCarlis ..... Appellants.

PETITION FOR REHEARING

YOU WILL PLEASE TAKE NOTICE, that the Respondent, by and through its attorney, M. Kyle Thompson, Esq., does hereby Petition this Court for a Rehearing as to the Court's opinion in this matter, filed February 20, 2013. Grounds for the petition are as follows:

I. **The Court erred in determining that Respondent did not prove by clear and convincing evidence that there was a meeting of the minds that would give rise to reformation and that Appellant DeCarlis was not a party to the contract in question**

The evidence introduced at the trial of the case clearly shows by clear and convincing evidence that there was, in fact, a meeting of the minds as to the intent of all parties involved. This was a real estate refinance transaction involving three parties:

Respondent as the lending bank, Appellant Buncombe Professional Park, LLC (hereinafter "Buncombe") as the named borrower and Appellant DeCarlis (hereinafter "DeCarlis") as the guarantor.

However, DeCarlis, as the **only** member of the LLC, was the alter ego of Buncombe and was a real party in interest to the transaction in its entirety. He had total domination and control over Buncombe, and he was the only person who would benefit from the activities of Buncombe. To find otherwise and allow DeCarlis to claim he is not a party to this contract with Respondent results in an inequitable consequence, and the Supreme Court has determined that, under circumstances such as these, an entity may be in the same legal position as its alter ego. See Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty., 371 S.C. 224, 638 S.E.2d 685 (2006).

In fact, in their own Answer and Counterclaim, each of the Appellants admits that they **both** entered into the contract with Respondent. (R. p. 44) According to their counterclaim, Respondent provided **both** of them terms under which the contract could be restructured. (R. p. 45) Respondent allegedly breached the contract with **both** Appellants, and the Appellants **both** owned the property in question. (R. p. 46) The Appellants legal interests are so intertwined that they shared one lawyer for the resulting litigation. By their own admission, both Appellants, Buncombe **and** DeCarlis, were both parties to the contract with the Respondent. Therefore, the Court's reliance on secondary legal authority concerning adding parties to a contract is misplaced.

The Court failed to properly consider the evidence introduced at trial: DeCarlis, at all times, was acting both individually and as the only member of Buncombe. He was well aware that the agreement was for Respondent to have the first priority mortgage, and

at no time did he object or otherwise disclose that there would be a hindrance to this taking place. (R. p. 112, lines 15-23; p. 113, lines 23-25; p. 130, lines 10-12; p. 131, lines 4-10) It is a legal fiction for the Court to say that DeCarlis' silence prior to and at the closing, when given the opportunity to object to Respondent having a first priority mortgage, is not clear and convincing evidence of his personal intent for Respondent to have a first priority mortgage.

In South Carolina, reformation of a contract or agreement is appropriate when a mutual mistake is proven by clear or convincing evidence. See George v. Empire Fire and Marine Ins. Co., 344 S.C. 582, 545 S.E.2d 500 (2001); Shaw v. Aetna Cas. & Sur. Ins. Co., 274 S.C. 281, 262 S.E.2d 903 (1984); Kaiser v. Carolina Life Ins. Co., 219 S.C. 456, 65 S.E.2d 865 (1951); Crosby v. Protective Life Ins. Co., 293 S.C. 203, 359 S.E.2d 298 (Ct.App. 1987).

In this transaction, closing attorney was selected by and compensated by Buncombe and DeCarlis. (R. p. 115, lines 2-10) However, as the only attorney involved in this loan closing, he was effectively an agent for both the lender and the borrower to the extent necessary to complete the transaction. See McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct.App. 1998). As such, any mistake by closing attorney in the context of preparing the closing documents and having them executed would be attributable to both parties.

In Shaw, a similar situation occurred when an insurance agent who was serving as an agent for both an insurance company and customer failed to ensure that a new policy began as old policy coverage expired. Following a loss, the customer sought coverage from the insurance company but was informed there was no coverage at the time of the

loss. The Supreme Court correctly ruled that because the agent knew the intent of the parties with regard to coverage but failed to fulfill the intentions of both parties, the mistake was mutual. As a result, the Court found that the proper remedy was to reform the insurance policy and to provide the coverage sought by the customer. See Shaw, supra, at 286, 262 S.E.2d at 905. DeCarlis was a party to the proceedings and his intent was to give Respondent the first priority mortgage.

Perhaps the most compelling evidence against DeCarlis in this regard is that which was not presented at trial. The Court notes in its holding that DeCarlis failed to appear at trial or offer any testimony or evidence on his behalf. However, the Court totally ignores the significance of this absence. It is well established under South Carolina case law that the failure of a party to testify raises an inference that its testimony, had it been submitted, would have been unfavorable to its position. See Gadson ex rel. Gadson v. ECO Services of South Carolina, Inc., 374 S.C. 171, 648 S.E.2d 585 (2007); McGowan v. Southerland, 253 S.C. 9, 168 S.E.2d 573 (1969); Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335 (1962). Therefore, the Master was correct in assuming that DeCarlis or any other witness he called would have offered testimony adverse to his denials as set for in his answer and to draw the correct inference therefrom.

The Appellants' own admissions, the evidence offered by the Respondent at trial, and the negative inference assigned to the Appellants' absence from trial all combine to prove by clear and convincing evidence that DeCarlis was a part of the contract with the Respondent and that Master was correct in reforming mortgage and other contract documents to give Respondent a first priority loan.

II. The Court erred in failing to uphold the finding that, in equity, Respondent had a superior priority in its mortgage.

This matter was filed in equity and was referred to and heard by the Master-In-Equity. The Court, in determining the appropriate standard of review, confirmed that this was an action in equity. However, the Court failed to apply any equitable principles or otherwise consider the equitable issues in reaching its decision.

In this matter, Respondent lent money to Appellants in good faith and, at all times, acted equitably. DeCarlis, on the other hand, failed to disclose to Respondent the existence of the loan to him personally from his LLC at the time he entered into the agreement for the loan. (R. p. 112, lines 15-23; p. 113, lines 23-25; p. 130, lines 10-12; p. 131, lines 4-10) This failure constitutes bank fraud. If, in fact, he intended to subordinate his personal loan for the sake of the LLC and an innocent mistake occurred at the closing, the DeCarlis refused to cooperate two years later when asked to subordinate. He benefitted from another person's error at the expense of an innocent party, a result that is absolutely contrary to equity. DeCarlis, because he faced the Hobson's choice of admitting, under oath, that either he intended to subordinate his mortgage or he committed bank fraud, chose not to testify or to put up any evidence in his own defense. Any number of equitable maxims could apply to these facts: equity will not suffer a wrong to be without a remedy; equity regards as done that which ought to be done; equity regards substance rather that form; he who seeks equity must do equity; he who comes into equity must come with clean hands. In light of any of these maxims, the Court erred in reversing the Master.

Furthermore, courts of equity in this state are empowered, when determining priority of mortgages and encumbrances on real property, to determine priority though equity and not simply by time of filing. "Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." Ex parte Dibble, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (1983). For example, this Court has previously acted in equity to give priority to a mortgage that was erroneously marked as cancelled, even after other encumbrances were put on the property. See Allendale County Bank v. Cadle, 348 S.C. 367, 559 S.E.2d 342 (Ct. App. 2001). In that case, as in this one, no one was harmed by putting the priorities in the order in which they should have been but for a mistake. This Court has prevented a just result from standing.

In the present case, the Court failed to consider equitable principles or otherwise look to equity to determine the priority of the filings when it should have done so. It put form over substance. As a result, an innocent party is harmed, and DeCarlis gets away with bank fraud.

III. The Court erred in finding that Respondent should be charged with actual knowledge of prior mortgage.

The Court erred in failing to address or consider the limited agency of the closing attorney as to Respondent and speaks only in broad terms. However, the Court failed to consider the limited role of the closing attorney as to Respondent.

The parties had reached agreement with regard to the terms of the loan, and the closing attorney's only role was to give effect to that agreement. He was, in effect, a scrivener. See McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct.App. 1998). In

the moment of the closing, he was boiling down to legal documentation the agreement between the parties.

The closing attorney, and more particularly his firm, had a relationship with Appellant that predated the closing. (R. p. 115, lines 4-7) All attorney fees and closing costs, including the title examination, were paid by Appellants only. (R. p. 152). For the Court to hold that all activity conducted by closing attorney in preparation for the closing is attributable to Respondent, and thus making closing attorney the agent for Respondent at all times from the moment he is contacted about closing a loan, is upon the Respondent and, in similar situations, an agency relationship beyond what was intended or desired. See Am. Fed. Bank, FSB v. No. One Main Joint Venture, 321 S.C. 169, 467 S.E.2d 439 (1996).

Therefore, the Court erred in imputing closing attorney's actual knowledge of DeCarlis' loan to Respondent, allowing DeCarlis to prevail over Respondent as to equitable subrogation.

The Court of Appeals erred in the matters set forth above and should affirm the decision of the Master as a result.

CLAWSON AND STAUBES, LLC

M. Kyle Thompson
SC Bar No. 68283
223 West Stone Ave., Suite 100
Greenville, SC 29609
(864) 331-8940
Fax: (864) 232-29217972
Email: kthompson@clawsonandstaubes.com
Attorney for the Respondent

March ___, 2013
Greenville, South Carolina

The South Carolina Court of Appeals

Independence National Bank, Respondent,

v.

Buncombe Professional Park, LLC, and David DeCarlis, s/a David D. DeCarlis, Appellants.

Appellate Case No. 2011-196049

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Martin Kyle Thompson
Mary Leigh Arnold

FILED
18 April 2013