

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM Horry County
Court of Common Pleas
The Honorable Steven H. John, Circuit Court Judge

FEB 21 2013

S.C. Supreme Court

Case No. 2010-CP-26-08505

Carolina First Bank n/k/a TD Bank, NA, ... Petitioner,

v.

BADD, LLC, William McKown and Charles A.
Christenson, ... Defendants.

Of whom BADD, LLC and William McKown are Respondents.

BADD, LLC and William McKown, Third-Party Plaintiffs,

v.

William Rempher, Third-Party Defendant.

APPENDIX

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A. Mattison Bogan
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APPENDIX INDEX

Record on Appeal	1
Final Brief of Appellant.....	163
Final Brief of Respondent	177
Court of Appeals Opinion, October 24, 2012.....	196
Petition for Rehearing, December 3, 2012	200
Court of Appeals Letter, December 4, 2012	217
Order Denying Petition for Rehearing, December 12, 2012	219

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No: 2010-CP-26-8505

Carolina First Bank

Respondent,

v.

BADD, LLC, William M. McKown, and Charles A. Christianson,

Defendants,

Of Whom BADD, LLC and William McKown are

Appellants.

BADD, LLC and William McKown,

Third Party Plaintiffs,

v.

William Rempher,

Third Party Defendant.

RECORD ON APPEAL

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INDEX

Order Granting Plaintiff's Motion for Order of Reference dated February 15, 2011.....	1
Complaint dated September 9, 2010	10
Motion for Order of Reference dated September 9, 2010	75
Answer and Counterclaim dated October 29, 2010	79
Plaintiff's Reply to Counterclaim dated November 11, 2010	85
Motion to Amend Answer and Counterclaim dated January 19, 2011.....	90
Amended Answer, Counterclaim and Third Party Complaint dated January 19, 2011.....	106
Memorandum in Opposition to Motion to Refer dated January 19, 2011.....	117
Transcript of Hearing dated February 8, 2011 pages: 1-3, 5-7, and 14-21.....	125
Plaintiff's Reply to Counterclaim dated February 18, 2011	139
Notice of Appeal dated March 9, 2011	147
Certificate of Appellant	159

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Carolina First Bank, n/k/a TD
Bank, N.A.,

Plaintiff,

v.

BADD, LLC, William McKown,
and Charles A. Christenson,

Defendants.

BADD, LLC, and William McKown,

Third Party Plaintiffs,

v.

William Rempher,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
2010-CP-26-8505

ORDER GRANTING PLAINTIFF'S
MOTION FOR ORDER OF
REFERENCE

FILED
HORRY COUNTY
2011 FEB 15 PM 3:36
JELANIE HUGGINS-WARD
CLERK OF COURT

This matter came before this Court by way of Plaintiff's Motion for Order of Reference seeking to have the above-captioned matter referred to the Honorable Cynthia Graham Howe, Master-in-Equity for Horry County, South Carolina, to take testimony arising under the pleadings, to make findings of fact and conclusions of law with authority to dispose of any and all issues and enter a final judgment in the case pursuant to Rule 53 of the *South Carolina Rules of Civil Procedure*, to hear any issue after said judgment relating to this action, including, without limitation, judgment of sale and foreclosure pursuant to Rule 71(b), *South Carolina Rules of Civil Procedure*, with all appeals being made directly to the South Carolina Court of Appeals or to the South Carolina Supreme Court. Plaintiff's Motion to Appoint a Receiver and Defendants BADD, LLC, and William McKown's Motion to Amend their Answer were also before the Court. Plaintiff's Motion to Appoint a Receiver was resolved by the parties and is addressed in a separate Consent Order Appointing a Receiver. Defendant BADD, LLC, and

1 of 8
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William McKown's Motion to Amend their Answer is addressed in a separate order and was granted by this Court prior to the hearing on Plaintiff's Motion for Order of Reference. Appearing at the hearing was William W. DesChamps, III, as counsel for Plaintiff, and Richard R. Gleissner, as counsel for Defendants BADD, LLC, and William McKown. Defendant Charles A. Christenson did not make an appearance and was previously held in default for failure to file and serve a responsive pleading to Plaintiff's Complaint, as evidenced by that certain Entry of Default attached with an Affidavit of Service and Affidavit of Default previously filed on November 8, 2010 with the Horry County Clerk of Court.

Counsel for Defendants BADD, LLC (hereinafter referred to as "BADD"), and William McKown (hereinafter referred to as "McKown") accepted service of Plaintiff's Summons and Complaint along with its Motion for Order of Reference on October 4, 2010. Plaintiff commenced this action against BADD, as maker and mortgagor, seeking judgment for the full amount to be found due on the subject promissory notes and mortgages, and foreclosure and sale of the three parcels of real property secured by those mortgages. Plaintiff, in its Complaint, also requested judgment against Defendants McKown and Charles A. Christenson, as guarantors of the above-referenced promissory notes and mortgages, for payment of the residue of the mortgage indebtedness remaining after the foreclosure and sale of the mortgaged properties. Plaintiff attached the two promissory notes, two mortgages, and guarantees at issue in this action as exhibits to its Complaint. In the Amended Answer, McKown demanded a jury trial as to the two guarantees he allegedly executed (hereinafter referred to as "McKown Guarantees"). Defendants BADD and McKown demanded a jury trial as to their counterclaim for breach of contract against Plaintiff and as to their third-party claims against William Rempher for Breach of Contract, Intentional Interference with Contractual Relations and Prospective Business Relations, and Breach of Fiduciary Duty. McKown further demanded a jury trial as to his counterclaim for Civil Conspiracy against Plaintiff and as to his third-party claim against William Rempher for Civil Conspiracy.

Defendant McKown demanded a jury trial as to Plaintiff's request for judgment against him under the McKown Guarantees. McKown contended that he was entitled to a jury trial because the allegations in the Complaint pertaining to the McKown Guarantees related to a contract, and an action to construe such a contract and a breach thereof was an action at law. Plaintiff contended that the main purpose of its Complaint was an equitable action to foreclose

238
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two real estate mortgages even though Plaintiff sought recovery from McKown under the McKown Guarantees for the full amount of any deficiency judgment awarded to it after the foreclosure and sale of the mortgaged properties.

Defendants BADD and McKown contended that they were entitled to a jury trial as to the counterclaims alleged against Plaintiff in the Amended Answer because those counterclaims were legal and compulsory in nature. In support of their contention that the counterclaims against Plaintiff for civil conspiracy and breach of contract were compulsory in nature, BADD and McKown asserted that the matters alleged in the Amended Answer were all involved in the same transaction and occurrence, and that those matters all involved the alleged default that the Plaintiff sued upon. Plaintiff contended that the counterclaims and issues raised in the Amended Answer were equitable and should be tried by the Court on its equity side since Defendants alleged that their counterclaims involved the same transaction and affected Plaintiff's right to seek foreclosure and sale of the subject properties. Plaintiff further contended that McKown was not entitled to a jury trial on his counterclaim for Civil Conspiracy because it was a permissive counterclaim that was asserted in an equitable action to foreclose two real estate mortgages. The parties did not dispute that McKown's counterclaim for Civil Conspiracy was legal in nature.

FINDINGS OF FACT

The two promissory notes and two real estate mortgages were executed by McKown and Charles A. Christenson as members of BADD, LLC. The McKown Guarantees specifically reference the mortgage indebtedness which Plaintiff seeks to recover from Defendants BADD, McKown, and Charles A. Christenson as a result of the alleged default under the terms of the subject promissory notes and mortgages. Paragraph 9 on page 2 of each of the subject promissory notes provides that the purpose of the subject loan is to provide financing for the acquisition of income producing real estate.

Plaintiff's Complaint specifically demanded judgment against BADD for the full amounts to be found due on the subject promissory notes and mortgages, with the right to reduce the judgment amount by the amount realized by the Plaintiff from the proceeds of the sale of the mortgaged properties. Plaintiff's Complaint also alleged that McKown must answer for the judgment against BADD for all monies found to be due on the subject promissory notes and mortgages as a result of the McKown Guarantees he executed to secure the mortgage

388
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indebtedness. The Amended Answer alleged an equitable counterclaim for an accounting against Plaintiff and an equitable defense of unconscionability as to the terms of the two McKown Guarantees. The Amended Answer also alleged that the McKown Guarantees were unenforceable because they were unconscionable adhesion contracts. Defendants admitted in Paragraph 3 of their Amended Answer that this action involves the foreclosure of real property in Horry County and that this is a matter which should be referred with finality to the Master-in-Equity as to Defendant BADD.

McKown and Charles A. Christenson executed the promissory note attached to Plaintiff's Complaint as Exhibit A and the real estate mortgage attached to Plaintiff's Complaint as Exhibit C on March 14, 2008. The above-referenced mortgage was recorded in Mortgage Book 5046 at Page 735 on March 18, 2008 in the office of the Horry County Register of Deeds. McKown and Charles A. Christenson executed the promissory note attached to Plaintiff's Complaint as Exhibit B and the real estate mortgage attached to Plaintiff's Complaint as Exhibit E on April 1, 2008. The above-referenced mortgage was recorded in Mortgage Book 5054 at Page 990 on April 4, 2008 in the office of the Horry County Register of Deeds. At hearing, counsel for Defendants BADD and McKown stated that the actions alleged in the counterclaims for Civil Conspiracy and Breach of Contract arose after April of 2008. The Amended Answer alleges that the actions on the part of the Plaintiff and the actions on the part of William Rempher that gave rise to Defendants' counterclaims and third-party claims occurred in 2009.

CONCLUSIONS OF LAW

The Court reviewed and used the cases supplied by counsel while rendering its decision as to the main purpose of Plaintiff's Complaint. "Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Verenes v. Alvanos*, 387 S.C. 11, 15-16, 690 S.E.2d 771, 773 (citing *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997)). "The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable." *Id.* "In actions to foreclose mortgages ... if the mortgage debt is secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgage premises against such other person." S.C.

408
B.A.A.

Code Ann. § 29-3-660. "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 by verified petition to the clerk of court in which the decree or order of sale was taken for an order of appraisal." S.C. Code Ann. § 29-3-680 (2010). In *Anderson Brothers Bank v. Adams*, 305 S.C. 25, 406 S.E.2d 173 (1991), the South Carolina Supreme Court held that the guarantors were entitled to the Appraisal Statute's benefit because the Plaintiff made them party defendants in the mortgage foreclosure proceeding and sought personal judgments against them. The South Carolina Supreme Court has also held that a guarantor of a promissory note is not entitled to the benefit of the Appraisal Statute when the action does not involve a real estate foreclosure proceeding. See *Citizens & S. Nat'l Bank v. Lanford*, 313 S.C. 540, 443 S.E.2d 549 (1994). In his opposing memorandum, McKown cited *Pruitt v. South Carolina Med. Malpractice Liability Joint Underwriting Assoc.*, 343 S.C. 335, 540 S.E.2d 843 (2001) and *State Farm Mut. Auto. Ins. Co. v. Moorer*, 330 S.C. 46, 496 S.E.2d 875 (Ct. App. 1998) to support his contention that an action to construe the McKown Guarantees was an action at law that gave him the right to a jury trial. In *U.S. Bank Trust Nat'l Assoc. v. Bell*, 385 S.C. 364, 684 S.E.2d 199, 207 (2009), the South Carolina Court of Appeals issued a written opinion on an appeal from the Master-In-Equity in a nonjury foreclosure action and referenced the above-cases cited in Defendants' memorandum by stating "the construction of a clear and unambiguous contract presents a question of law for the court." *Id.* at 364, 684 S.E.2d at 207.

The supporting authority cited in Defendants' memorandum to support McKown's contention that an action to construe the McKown Guarantees is an action at law that should be tried by a jury does not discuss the issue of whether a party-defendant who is a guarantor in a mortgage foreclosure action has a right to a jury trial. Defendants admitted in Paragraph 3 of the Amended Answer that Plaintiff's action involves the foreclosure of real property in Horry County and that it is a matter which should be referred with finality to the Master-in-Equity as to Defendant BADD. Plaintiff's Complaint seeks judgment against McKown under the McKown Guarantees for the full amount to be found due on the subject promissory notes and mortgages. The McKown Guarantees were alleged to secure the mortgage indebtedness. McKown will be liable for the full amount of the deficiency judgment awarded to the Plaintiff after the sale of the subject properties if the allegations in the Complaint are found to be true at trial. McKown will have no liability under the subject promissory notes, mortgages, and McKown Guarantees if the

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Plaintiff is awarded judgment and the proceeds from the foreclosure sale realized by the Plaintiff are sufficient to satisfy the mortgage indebtedness found to be due from Defendants by that judgment. The Amended Answer alleged an equitable cause of action for an accounting and an equitable defense of unconscionability as to the terms of the McKown Guarantees. The issue of whether the McKown Guarantees are unconscionable adhesion contracts is matter to be determined by the Court, not the jury. Therefore, the main purpose of this action is to foreclose two real estate mortgages as Plaintiff seeks recovery from McKown and Charles A. Christenson, as guarantors, for the full amount of any deficiency judgment awarded to it after the sale of the subject properties, and McKown has raised an equitable defense to challenge the enforceability of the McKown Guarantees.

The following analysis was adopted by the South Carolina Supreme Court to determine the trial of legal and equitable issues in complaints and counterclaims: 1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court; 2) If both are at law, the issues are triable by a jury; 3) If the complaint is equitable and the counterclaim is legal and permissive the defendant waives his right to a jury trial; 4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has the right to a jury trial on the counterclaim. *Johnson v. South Carolina Nat'l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987). "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *First Citizens Bank & Trust Co. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). In *Sue & Sam Manuf. Co. v. B-L-S Const. Co.*, 538 F.2d 1048 (4th Cir. 1976), the United States Court of Appeals for the Fourth Circuit applied four different tests "to determine whether a claim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." *Id.* at 1051. "A party does not waive its right to a jury trial on a counterclaim asserted in an equity action if the counterclaim is legal and compulsory in nature." *North Carolina Federal S & L v. DAV Corp.*, 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989). The South Carolina Supreme Court has adopted the logical relationship test to determine whether a counterclaim is compulsory. *See Id.* at 518, 381 S.E.2d at 905. In applying the logical relationship test to determine whether the counterclaims at issue were compulsory, the Court in *Sue & Sam Manuf. Co.* found that the counterclaim for damages arising from the collapse of the roof in the 1973 snowstorm were not logically related to the 1971 rain damage claim as the "differences in time, the causes of action, the cause of the damage, the

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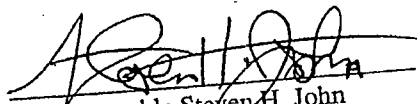
proof of facts, and the issues would rule out a logical relation between the claim for indemnity on account of the rain damage and the counterclaim on account of the snow damage." *Sue & Sam Manuf. Co.*, 538 F.2d at 1053. In *North Carolina Federal S & L v. DAV Corp.*, the South Carolina Supreme Court held that the defendant's sixth counterclaim was not logically related to the plaintiff's foreclosure action because the alleged breach by the Plaintiff of the alleged agreements did not affect the enforceability of the promissory note. 298 S.C. at 519, 381 S.E.2d at 905. The other counterclaims in the above-cited case were held by the Court to be compulsory as they alleged that Plaintiff's "right to bring suit on the note was modified by its oral agreement to provide additional financing as contemplated in the joint venture agreement." *Id.* at 518, 381 S.E.2d at 905. The South Carolina Supreme Court also held that third party claims are permissive, and the Defendant waived the right to a jury trial on those claims by asserting them in the foreclosure action. *Id.* at 519, 381 S.E.2d at 906.

In the present action, the Court reviewed the dates on which the original promissory notes and McKown Guarantees were executed, the dates on which the subject mortgages were recorded, and the time in which the allegations occurred that gave rise to McKown's counterclaims against the Plaintiff for Civil Conspiracy and Breach of Contract. The actions alleged in the counterclaims against the Plaintiff for Civil Conspiracy and Breach of Contract involved a party who was not a party to the original action and arose after the time when the subject mortgages were recorded. Further, the counterclaims alleged against Plaintiff do not affect the validity of the subject promissory notes and mortgages, or the McKown Guarantees. There is no logical relationship between Plaintiff's mortgage foreclosure action and the counterclaims alleged in the Amended Answer. Therefore, the counterclaims alleged in the Amended Answer are permissive as they do not arise out of the same transaction or occurrence as Plaintiff's action. The actions alleged in the third-party claims involved a party who was not a party to the original action and arose after the time in which the subject mortgages were recorded. The causes of action alleged against Third-Party Defendant William Rempher may be brought by Defendants BADD and McKown for their own trial since those causes of action are not necessary to the resolution of the action brought by the Plaintiff. This Court finds that Defendants BADD and McKown are not entitled to a jury trial on the allegations raised in the pleadings as the main purpose of Plaintiff's Complaint is an equitable action to foreclose two real estate mortgages, and the counterclaims and third-party claims alleged in the Amended

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J.L.N.

Answer are permissive. Therefore, it is

ORDERED that the above-captioned matter is referred to the Honorable Cynthia Graham Howe, Master-in-Equity for Horry County, South Carolina, to take testimony arising under the pleadings, to make findings of fact and conclusions of law with authority to dispose of any and all issues and enter a final judgment in the case pursuant to Rule 53, *South Carolina Rules of Civil Procedure*, to hear any issue after said judgment relating to this action, including, without limitation, judgment of sale and foreclosure pursuant to Rule 71(b), *South Carolina Rules of Civil Procedure*, with all appeals being made directly to the South Carolina Court of Appeals or to the South Carolina Supreme Court.


The Honorable Steven H. John
Resident Judge
Fifteenth Judicial Circuit

February 15, 2011
Conway, South Carolina

Master-in-Equity Hearing Scheduled for:
Date: _____
Time: _____



FORM 4

JUDGMENT IN A CIVIL CASE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

FILED
HORRY COUNTY

CASE NO. 2010-CP-26-8505

Carolina First Bank

11 FEB 15 PM 3:24

BADD LLC

Et al

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

☐

JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐

DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐

ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐

ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify Arbitration award; ☐ other:

☐

DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

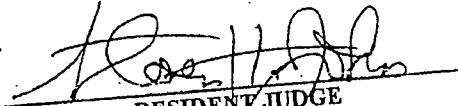
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See Attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Defendant's Motion/Alter and Amend is granted. Plaintiff's Motion/Order of Reference is Granted and Plaintiff's Motion/Appointment of Receiver is Resolved. A formal order followed by Atty. William W. DesChamp within seven days of today's date.

Dated at Conway, South Carolina, this 8th day of February, 2011.


RESIDENT JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ Day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

William W DesChamp III

Richard R. Glessner

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

COPY

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Carolina First Bank,

Plaintiff,

v.

BADD, LLC, William McKown,
and Charles A. Christenson,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2010-CP-26-8505

SUMMONS

FILED
CLERK OF DISTRICT
CLERK
HORRY COUNTY
SEP -9 PM 1:47

TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, or to otherwise appear and defend, and to serve a copy of your Answer to said Complaint upon the subscriber at his office, 1551 21st Avenue North, Ste. 14, Myrtle Beach, SC 29577, within **Thirty (30) days** after service hereof, exclusive of the date of service; and if you fail to answer the Complaint within the time aforesaid, or otherwise appear and defend, the Plaintiff in this action will apply to the Court for the relief demanded therein and judgment by default will be rendered against you for the relief demanded in the Complaint.

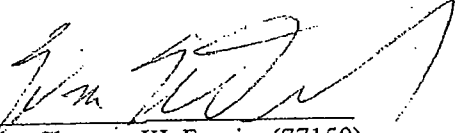
YOU WILL ALSO TAKE NOTICE that the Plaintiff is moving for an Order of Reference to refer the above-captioned matter to the Master-in-Equity for Horry County, which Order shall, pursuant to Rules 53 and 71 of the South Carolina Rules of Civil Procedure, specifically provide that the said Master-in-Equity is authorized and empowered to enter a final judgment in this action, including, without limitation, a final judgment on sale and foreclosure.

YOU WILL ALSO TAKE NOTICE that the Plaintiff is moving for an Order Appointing a Receiver pursuant to provisions of the mortgage given by Defendant BADD, LLC, in favor of Plaintiff, and the separate assignment of rents and profits.

[SIGNATURE APPEARS ON FOLLOWING PAGE]



DESCHAMPS LAW FIRM



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September 1, 2010
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Carolina First Bank

Plaintiff(s)

vs.

BADD, LLC, et al

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2010-CP - 26- 8505

COPY

(Please Print)

Submitted By: William W. DesChamps, III

William W. DesChamps, Jr.

Address: P.O. Box 2402

Myrtle Beach, South Carolina 29578

SC Bar #: 77150 and 01658

Telephone #: (843) 448-2391

Fax #: (843) 448-3308

Other:

E-mail: trey@deschampsllaw.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|---|--|
| Contracts <ul style="list-style-type: none">☐ Constructions (100)☐ Debt Collection (110)☐ Employment (120)☐ General (130)☐ Breach of Contract (140)☐ Other (199) | Torts - Professional Malpractice <ul style="list-style-type: none">☐ Dental Malpractice (200)☐ Legal Malpractice (210)☐ Medical Malpractice (220)☐ Notice/ File Med Mal (230)☐ Other (299) | Torts - Personal Injury <ul style="list-style-type: none">☐ Assault/Stander/Libel (300)☐ Conversion (310)☐ Motor Vehicle Accident (320)☐ Premises Liability (330)☐ Products Liability (340)☐ Personal Injury (350)☐ Wrongful Death (360)☐ Other (399) | Real Property <ul style="list-style-type: none">☐ Claim & Delivery (400)☐ Condemnation (410)☒ Foreclosure (420)☐ Mechanic's Lien (430)☐ Partition (440)☐ Possession (450)☐ Building Code Violation (460)☐ Other (499) |
| Inmate Petitions <ul style="list-style-type: none">☐ PCR (500)☐ Mandamus (520)☐ Habeas Corpus (530)☐ Other (599) | Judgments/Settlements <ul style="list-style-type: none">☐ Death Settlement (700)☐ Foreign Judgment (710)☐ Magistrate's Judgment (720)☐ Minor Settlement (730)☐ Transcript Judgment (740)☐ Lis Pendens (750)☐ Other (799) | Administrative Law/Relief <ul style="list-style-type: none">☐ Reinstate Driver's License (800)☐ Judicial Review (810)☐ Relief (820)☐ Permanent Injunction (830)☐ Forfeiture-Petition (840)☐ Forfeiture-Consent Order (850)☐ Other (899) | Appeals <ul style="list-style-type: none">☐ Arbitration (900)☐ Magistrate-Civil (910)☐ Magistrate-Criminal (920)☐ Municipal (930)☐ Probate Court (940)☐ SCDOT (950)☐ Worker's Comp (960) |
| Special/Complex /Other <ul style="list-style-type: none">☐ Environmental (600)☐ Automobile Arb. (610)☐ Medical (620)☐ Other (699) | <ul style="list-style-type: none">☐ Pharmaceuticals (630)☐ Unfair Trade Practices (640)☐ Out-of State Depositions (650)☐ Sexual Predator (510) | <ul style="list-style-type: none">☐ Administrative Law Judge (980)☐ Public Service Commission (990)☐ Employment Security Comm (991)☐ Other (999) | |

Submitting Party Signature: _____

Date: _____

9/1/10

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

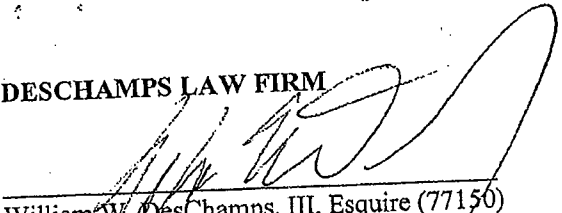
**CERTIFICATE OF EXEMPTION
FROM ARBITRATION**

I CERTIFY THAT THIS ACTION IS EXEMPT FROM ARBITRATION BECAUSE:

- ☐ monetary relief requested in this case exceeds \$25,000;
- ☐ this is a class action;
- ☒ this case involves (check one or more of the following)
 - ☐ title to real estate;
 - ☐ wills, trusts and decedents' estates;
 - ☒ mortgage foreclosure;
 - ☐ sale of property
 - ☐ mechanic's lien foreclosure;
 - ☐ partition;
- ☐ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
- ☐ monetary relief requested in this case is unspecified but exceeds \$25,000;
- ☐ this case is a companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue;
- ☐ this action is appellate in nature;
- ☐ this is a post-conviction relief matter;
- ☐ this is a forfeiture proceeding brought by the State; or
- ☐ this is a contempt of court proceeding.

FILED
CLERK OF COURT
2010 SEP -9 PM 1:47
JAMES H. DESCHAMPS, III

DESCHAMPS LAW FIRM


William W. DesChamps, III, Esquire (77150)
William W. DesChamps, Jr., Esquire (01658)
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1551 21st Avenue North, Suite 14
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September 1, 2010
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Carolina First Bank,

Plaintiff,

v.

BADD, LLC, William McKown,
and Charles A. Christenson,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2010-CP-26-8505

NOTICE OF LIS PENDENS

COPY
FILED IN CLERK'S OFFICE
HORRY COUNTY, SOUTH CAROLINA
JAN 11 2011
JAN 11 2011

NOTICE IS HEREBY GIVEN that the above entitled action will be commenced by the Plaintiff against the above-named Defendants, and will be pending in the Court of Common Pleas for the County of Horry, South Carolina, for, inter alia, the foreclosure of the mortgages filed of record in the Horry County Register of Deeds Office as follows:

Mortgagor: BADD, LLC.

Mortgagee: Carolina First Bank

Mortgage Recorded in Mortgage Book 5046 at Page 735 on March 18, 2008, Horry County records

Legal Description:

ALL AND SINGULAR, that certain piece, parcel or lot of land situate, lying and being near the Town of Surfside Beach, Socastee Township, Horry County, South Carolina and being designated as **PARCELS E and F** of **LOT 29** as shown and delineated on a plat entitled: Caropines Lot 29 – Section A Units A – G, survey for Gibraltar Enterprises, LLC, prepared by Huntley & Associates, Inc., Land Surveyor, said survey dated 1/19/07 and recorded 2/28/07 in Plat Book 222 at Page 154, records of the Register of Deeds for Horry County.

This being the identical property conveyed to BADD, LLC by deed of Gibraltar Enterprises, LLC, dated February 21, 2008 and recorded February 22, 2008 in Deed Book 3316 at Page 2133 in the office of the Register of Deeds for Horry county, South Carolina.

Parcel E – Tax Map No.: 191-15-05-038

[Handwritten signature]

Parcel F – Tax Map No.: 191-15-05-039

Mortgagor: BADD, LLC.

Mortgagee: Carolina First Bank

Mortgage Recorded in Mortgage Book 5054 at Page 990 on April 4, 2008, Horry County records

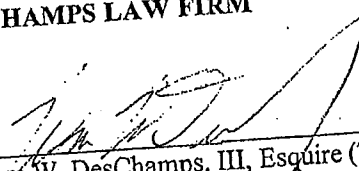
Legal Description:

ALL AND SINGULAR, that certain piece, parcel or lot of land situate, lying and being near the Town of Surfside Beach, Socastee Township, Horry County, South Carolina and being designated as **PARCEL D of LOT 29** as shown and delineated on a plat entitled: Caropines Lot 29 – Section A Units A – G, survey for Gibraltar Enterprises, LLC, prepared by Huntley & Associates, Inc., Land Surveyor of said survey dated 1/19/07 and recorded 2/28/07 in Plat Book 222 at Page 154, records of the Register of Deeds for Horry County, South Carolina.

This is a portion of the identical property conveyed to BADD, LLC, by deed from Gibraltar Enterprises, LLC. Said deed is dated March 31, 2008 and was recorded on April 4, 2008 in Deed Book 3325 at Page 2689, records of the Register of Deeds for Horry County, South Carolina.

Parcel D – Tax Map No.: 191-15-05-037

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September 1, 2010
Myrtle Beach, South Carolina

COPY

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Carolina First Bank,

Plaintiff,

v.

BADD, LLC, William McKown,
and Charles A. Christenson,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2010-CP-26-8505

COMPLAINT

(NON-JURY TRIAL DEMANDED)

(FORECLOSURE OF MORTGAGE,
DEFICIENCY JUDGMENT
DEMANDED, SUIT ON
GUARANTIES)

NOW comes the Plaintiff Carolina First Bank (hereinafter sometimes referred to as "Carolina First") for foreclosure against Defendants BADD, LLC (hereinafter sometimes referred to as "BADD"), William McKown (hereinafter sometimes referred to as "Mr. McKown"), and Charles A. Christenson (hereinafter sometimes referred to as "Mr. Christenson"), alleges as follows:

PARTIES

1. The Plaintiff Carolina First is a banking institution organized and existing under the laws of the State of South Carolina doing business in Horry County, South Carolina.
2. Upon information and belief, the Defendant BADD is a limited liability company organized and existing under the laws of the State of South Carolina doing business in Horry County, South Carolina.
3. Upon information and belief, the Defendant Mr. McKown is a citizen and resident of Georgetown County, South Carolina.
4. Upon information and belief, the Defendant Mr. Christenson is a citizen and resident of Horry County, South Carolina.
5. Upon information and belief, the Defendant Mr. McKown is not in the military service of the United States pursuant to the provisions of the Service Members Civil Relief Act (2003).
6. Upon information and belief, the Defendant Mr. Christenson is not in the military service of the United States pursuant to the provisions of the Service Members Civil Relief Act (2003).

[Handwritten signature]

JURISDICTION

7. This action involves the foreclosure of real property located in Horry County, South Carolina.
8. This Court has both subject matter and personal jurisdiction over the property and the parties to this action.
9. This is a matter which should be referred with finality to the Master-in-Equity for Horry County, with any appeal from the Order of said Master-in-Equity to be to the South Carolina Supreme Court or the South Carolina Court of Appeals.

FOR A FIRST CAUSE OF ACTION
(Foreclosure of BADD Mortgage and Deficiency)

10. Carolina First reiterates and re-alleges, as if fully set forth herein, the allegations above as if repeated herein verbatim.
11. The Temporary Restraining Order (TRO) issued by the Honorable Jean H. Toal on May 4, 2009, does not apply to this foreclosure action because the underlying loan is not owned or guaranteed by Fannie Mae, Freddie Mac, or held by a servicer who has signed an agreement to participate in the Home Affordable Modification Program (HMP). In addition, the underlying loan is a commercial loan and complies with the Administrative Order issued by the Honorable Jean H. Toal, Chief Justice, on May 22, 2009 regarding mortgage foreclosures and the Home Affordable Modification Program (HMP).
12. On or about March 14, 2008, for value received, BADD executed and delivered to Carolina First a promissory note (loan no.: 5121073309), a copy of which is attached hereto and incorporated herein by reference as Exhibit "A", by which according to the terms and conditions thereof, set out therein, it promised to pay the principal sum of \$246,758.00, together with interest as set forth therein. Said loan was made to provide financing for the acquisition of income producing real estate which is set forth and described more fully in Exhibit "D".
13. On or about April 1, 2008, for value received, BADD executed and delivered to Carolina First a promissory note (loan no.: 5121075590), a copy of which is attached hereto and incorporated herein by reference as Exhibit "B", by which according to the terms and conditions thereof, set out therein, it promised to pay the principal sum of \$127,758.00,

together with interest as set forth therein. Said loan was made to provide financing for the acquisition of income producing real estate which is set forth and described more fully in Exhibit "F".

14. In order to better secure the payment of the promissory note with loan no.: 5121073309 and any and all extensions, renewals, modifications, and substitutions thereof, BADD was required by Carolina First to execute and deliver a mortgage securing the principal balance and future advances on the real property described in Exhibit "D", which said mortgage was recorded on March 18, 2008 in Mortgage Book 5046 at Page 735, office of the Register of Deeds for Horry County. Said mortgage is attached hereto and incorporated herein by reference as Exhibit "C". The real property secured by the mortgage is the subject matter of the foreclosure under this First Cause of Action and is described more fully in Exhibit "D" attached hereto and made a part and parcel hereof.
15. In order to better secure the payment of the promissory note with loan no.: 5121073309 and any and all extensions, renewals, modifications, and substitutions thereof, BADD was required by Carolina First to execute and deliver an Assignment of Leases and Rents securing the principal balance and future advances on the real property described in Exhibit "D", which said Assignment of Leases and Rents was recorded on March 18, 2008 in Deed Book 3321 at Page 2353, office of the Register of Deeds for Horry County.
16. In order to better secure the payment of the promissory note with loan no.: 5121075590 and any and all extensions, renewals, modifications, and substitutions thereof, BADD was required by Carolina First to execute and deliver a mortgage securing the principal balance and future advances on the real property described in Exhibit "F", which said mortgage was recorded on April 4, 2008 in Mortgage Book 5054 at Page 990, office of the Register of Deeds for Horry County. Said mortgage is attached hereto and incorporated herein by reference as Exhibit "E". The real property secured by the mortgage is the subject matter of the foreclosure under this First Cause of Action and is described more fully in Exhibit "F" attached hereto and made a part and parcel hereof.
17. In order to better secure the payment of the promissory note with loan no.: 5121075590 and any and all extensions, renewals, modifications, and substitutions thereof, BADD was required by Carolina First to execute and deliver an Assignment of Leases and Rents securing the principal balance and future advances on the real property described in

Exhibit "F", which said Assignment of Leases and Rents was recorded on April 4, 2008 in Deed Book 3325 at Page 2692, office of the Register of Deeds for Horry County.

18. The above-referenced promissory notes and any and all extensions, renewals, modifications, and substitutions thereof, were secured by the two mortgages described above.
19. The terms and conditions of the promissory notes, the mortgages, and other documents securing the promissory notes provide that in the event of a default in any of the terms and conditions of the promissory notes, mortgages, or other loan documents held by Carolina First, the entire unpaid balance and all accrued interest, at the option of Carolina First, shall become due and payable at once, and that Carolina First shall have the right to foreclose the mortgages.
20. The Defendant BADD has failed to make the payments of principal and interest under the above-referenced promissory notes and has otherwise defaulted under its obligation under its mortgages in favor of Carolina First by failing to pay the obligations in connection therewith. By reason thereof, BADD is in default of the terms and conditions of the promissory notes and mortgages.
21. Carolina First does hereby declare the total principal balance, plus interest, plus other amounts chargeable under the mortgage as described below, due and payable, and does hereby elect to foreclose the mortgages.
22. Pursuant to the terms and conditions of the above-referenced mortgages, upon breach by Defendant BADD of any covenant or agreement in the promissory notes or mortgages, Carolina First is entitled to collect in any such proceedings, all reasonable costs and expense of foreclosure, including, but not limited to, reasonable attorney's fees and costs.
23. Pursuant to the terms and conditions of the two mortgages referenced above, at any time after default (whether before or after judgment), lender may take possession of any collateral for the loan or obtain the appointment of a receiver pursuant to § 15-65-10 South Carolina Code Ann. (1976), or otherwise as permitted by law. Lender or any receiver may collect any rents and profits from the collateral and may rent, sell, operate, or manage the collateral without notice to Mortgagor or any other party (Mortgagor waives any right to notice) and without consideration of the value of the collateral or Mortgagor's solvency. All amounts collected by Lender or receiver shall, after the

expenses of taking possession, renting, selling, operating and managing (and if any receivership), be applied to the payment of the loan. If Lender should take possession or if a receiver should be appointed or if there should be a sale of the collateral, Mortgagor, or any person in possession of the collateral, shall become a tenant at will of Lender, the receiver or the purchaser, and may be removed by writ of ejectment, summary ejectment, or other lawful remedy.

24. Defendant BADD remains in possession of the real property secured by the above-referenced mortgages and more specifically described in Exhibit "D" and Exhibit "F".
25. The balance, inclusive of principal, interest, prepayment fee, appraisal fee, and late fees due and payable on the promissory note with loan number: 5121073309 through September 1, 2010 was \$239,146.08, together with interest accrual at the rate of \$35.40 per day, and any other late charges due, reasonable attorney's fees, and the costs of this action.
26. The balance, inclusive of principal, interest, prepayment fee, appraisal fee, and late fees due and payable on the promissory note with loan number: 5121075590 through September 1, 2010 was \$121,832.11, together with interest accrual at the rate of \$17.51 per day, and any other late charges due, reasonable attorney's fees, and the costs of this action.
27. Carolina First specifically demands judgment against Defendant BADD for the full amount found to be due to Carolina First on the above-referenced promissory notes and mortgages to be entered immediately, with the right to reduce same by the amount realized thereon from the proceeds of the sale, pursuant to Section 29-30-650 of the Code of Laws of South Carolina (1976).
28. Carolina First respectfully requests this Honorable Court for an Order Appointing a Receiver to take possession of the real property that is the subject matter of this foreclosure action until a Final Order of Foreclosure and Sale is executed and entered, and that such receiver shall apply the rents and profits from the property in accordance with the loan documents pursuant to the terms of said Order.
29. Carolina First does not waive and specifically demands a deficiency judgment against the Defendant BADD should the sale of Carolina First's security interest in the First Cause of Action be insufficient to pay in full all amounts due to Carolina First.

FOR A SECOND CAUSE OF ACTION
(Judgment under Guaranty Agreements)

30. Carolina First reiterates and re-alleges, as if fully set forth herein, the allegations above as if repeated herein verbatim.
31. On or about March 14, 2008, for value received, BADD executed and delivered to Carolina First a promissory note (loan no.: 5121073309), by which according to the terms and conditions thereof, set out therein, it promised to pay the principal sum of \$246,758.00, together with interest as set forth therein. Said loan was made to provide financing for the acquisition of income producing real estate which is set forth and described more fully in Exhibit "D".
32. Because of the desire of BADD to transact business with, and to obtain credit or a continuation of credit from Carolina First, its present and future affiliates, successors and assigns, to induce Carolina First, in its sole discretion, to extend credit or continue to extend credit to, or enter into a business transaction with BADD and to enable Carolina First to better secure any and all liabilities, obligations, agreements, and undertakings of BADD to Carolina First, whether then existing or thereafter arising, for value received, the Defendant Mr. McKown, on or about March 14, 2008, entered into an unlimited guaranty personally and unconditionally guaranteeing to Carolina First performances of and payment, when due, of any and all obligations of BADD to Carolina First. A copy of the McKown Guaranty is attached hereto and incorporated herein by reference as Exhibit "G".
33. Because of the desire of BADD to transact business with, and to obtain credit or a continuation of credit from Carolina First, its present and future affiliates, successors and assigns, to induce Carolina First, in its sole discretion, to extend credit or continue to extend credit to, or enter into a business transaction with BADD and to enable Carolina First to better secure any and all liabilities, obligations, agreements, and undertakings of BADD to Carolina First, whether then existing or thereafter arising, for value received, the Defendant Mr. Christenson, on or about March 14, 2008, entered into an unlimited guaranty personally and unconditionally guaranteeing to Carolina First performances of and payment, when due, of any and all obligations of BADD to Carolina First. A copy of

the Christenson Guaranty is attached hereto and incorporated herein by reference as Exhibit "H".

34. On or about April 1, 2008, for value received, BADD executed and delivered to Carolina First a promissory note (loan no.: 5121075590), by which according to the terms and conditions thereof, set out therein, it promised to pay the principal sum of \$127,758.00, together with interest as set forth therein. Said loan was made to provide financing for the acquisition of income producing real estate which is set forth and described more fully in Exhibit "F".
35. Because of the desire of BADD to transact business with, and to obtain credit or a continuation of credit from Carolina First, its present and future affiliates, successors and assigns, to induce Carolina First, in its sole discretion, to extend credit or continue to extend credit to, or enter into a business transaction with BADD and to enable Carolina First to better secure any and all liabilities, obligations, agreements, and undertakings of BADD to Carolina First, whether then existing or thereafter arising, for value received, the Defendant Mr. McKown, on or about April 1, 2008, entered into an unlimited guaranty personally and unconditionally guaranteeing to Carolina First performances of and payment, when due, of any and all obligations of BADD to Carolina First. A copy of the McKown Guaranty is attached hereto and incorporated herein by reference as Exhibit "I".
36. Because of the desire of BADD to transact business with, and to obtain credit or a continuation of credit from Carolina First, its present and future affiliates, successors and assigns, to induce Carolina First, in its sole discretion, to extend credit or continue to extend credit to, or enter into a business transaction with BADD and to enable Carolina First to better secure any and all liabilities, obligations, agreements, and undertakings of BADD to Carolina First, whether then existing or thereafter arising, for value received, the Defendant Mr. Christenson, on or about April 1, 2008, entered into an unlimited guaranty personally and unconditionally guaranteeing to Carolina First performances of and payment, when due, of any and all obligations of BADD to Carolina First. A copy of the Christenson Guaranty is attached hereto and incorporated herein by reference as Exhibit "J".

37. As more particularly alleged supra, the promissory notes, mortgages securing same, and guaranties securing same are in default, and by reason thereof, the Defendants Mr. McKown and Mr. Christenson, must answer to the judgment against Defendant BADD for all monies due on the promissory notes, mortgages, and guaranties securing same.
38. Carolina First is entitled to judgment against Defendants, Mr. McKown and Mr. Christenson, jointly and severally, in the total sum due under the promissory notes, referenced hereinabove, inclusive of principal, interest, late charges, attorney's fees and costs.

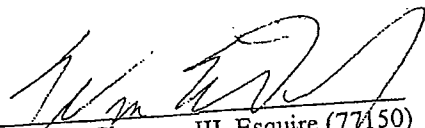
WHEREFORE, the Plaintiff Carolina First prays upon this Honorable Court to enter a judgment for the following relief:

- a. For an Order referring this matter with finality to the Master-in-Equity for Horry County with any appeal to be to the South Carolina Supreme Court or the South Carolina Court of Appeals;
- b. For an Order Appointing a Receiver to take possession of the real property which is the subject matter of this foreclosure action and manage the units and profits until a Final Order of Foreclosure and Sale is executed and entered;
- c. That the amount due under the promissory notes, mortgages, guaranty agreements, and the loan documents held by Carolina First, be ascertained and determined, together with interest, the costs of this action, and attorney's fees, to be entered immediately as a personal judgment against Defendants BADD, Mr. McKown, and Mr. Christenson, jointly and severally, pursuant to §29-3-660 South Carolina Code Ann. (1976);
- d. That the BADD mortgages in favor of Carolina First be declared valid first mortgages, having priority over any junior lien holders on the real property described in attached Exhibit "D" and Exhibit "F" that may appear now or later in the case, and that Carolina First have judgment of foreclosure for the amounts so found to be due and owing thereon, with interest, attorney's fees, and for the costs of this action;
- e. That the mortgaged parcels of real property which are the subject of this action be sold according to law and the practice of this Court, that the equity of redemption

be barred, and that the proceeds of the sale be applied as follows:

1. to the costs and expenses of this action;
 2. to the payment and discharge of the amounts due under the promissory notes, mortgages, and guaranties, securing same;
 3. to the payment of attorney's fees incurred; and
 4. that any surplus monies be held subject to further order of this Court;
- f. For such other further relief as this Court may deem just and proper.

DESCHAMPS LAW FIRM



William W. DesChamps, III, Esquire (77150)
William W. DesChamps, Jr., Esquire (01658)
Attorney for Plaintiff, Carolina First Bank
1551 21st Avenue North, Suite 14
Myrtle Beach, South Carolina 29577
(843) 448-2391
E-mail: trey@deschampsllaw.com

September 1, 2010
Myrtle Beach, South Carolina

**NOTICE REQUIRED BY THE
FAIR DEBT COLLECTION PRACTICES ACT**

In accordance with the Fair Debt Collection Practices Act (15 U.S.C. 1692), we advise you as follows:

- I. This is a lawsuit brought on behalf of Carolina First Bank ("Plaintiff") in an attempt to collect from you a debt in the amount of \$239,146.08 as to Loan No.: 5121073309 and \$121,832.11 as to Loan No.: 5121075590 as of September 1, 2010, plus interest at a per diem rate of \$35.40 as to Loan No.: 5121073309 and a per diem rate of \$17.51 as to Loan No.: 5121073309, and attorney's fees and costs accruing on said amounts. Said amounts are set forth in paragraphs 25 and 26 of Plaintiff's Complaint.
- II. Unless you dispute the validity of your debt or any portion of such debt to Plaintiff within thirty (30) days after receipt of this notice, we will assume that the debt is valid.
- III. If you notify Plaintiff's attorney within thirty (30) days after you receive this notice that your debt to Plaintiff or any portion thereof is disputed, we will mail you a verification of the debt and, upon your written request within the thirty-day period, Plaintiff's attorney will provide you with the name and address of the original creditor, if different from the current creditor.
- IV. Written requests should be addressed to The DesChamps Law Firm, 1551 21st Avenue North Ste. 14, Myrtle Beach, SC 29577.
- V. Please be advised that the time period within which you have to dispute the amount of your debt and request additional information in no way alters or affects the time period set forth in the Summons within which you must file an Answer to the Complaint.

**PLEASE BE ADVISED THAT THIS IS AN ATTEMPT TO COLLECT A DEBT. ANY
INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.**

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Carolina First Bank,
Plaintiff,

v.

BADD, LLC, William McKown,
and Charles A. Christenson,
Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2010-CP-26-_____

VERIFIED STATEMENT OF ACCOUNT

FILED
2010 DEC 9 PM 1:46
CLERK OF COURT
FIFTEENTH JUDICIAL CIRCUIT
SOUTH CAROLINA

TO: THE DEFENDANTS ABOVE-NAMED:

PERSONALLY APPEARED BEFORE ME, William A. Rodwell, who being first duly sworn, deposes and says that he is Senior Vice President of Carolina First Bank, the Plaintiff herein, and that he has read and knows the contents of the attached or foregoing Summons and Complaint and that the allegations therein contained are true and correct to the best of his own knowledge. He also verifies that the amount due and owing to Carolina First Bank from the above named Defendants is as follows:

Promissory Note 5121073309 as of 9/1/2010

\$239,146.08 inclusive of principal,
interest, late charges, prepayment
fee, and appraisal fee with interest
accrual at a rate of \$35.40 per diem.

Promissory Note 5121075590 as of 9/1/2010

\$121,832.11 inclusive of principal,
interest, late charges, prepayment
fee, and appraisal fee with interest
accrual at a rate of \$17.51 per diem.

Attorney's Fees

\$285 per hour For Senior Counsel
\$150 per hour for Associate

[SIGNATURE APPEARS ON FOLLOWING PAGE]

CAROLINA FIRST BANK

William A. Rodwell

Name: William A. Rodwell
Its: Senior Vice President

SWORN to and subscribed before
me this 2nd day of September, 2010

Stenia D. McManus

Notary Public for State of South Carolina
My Commission Expires: 12/6/15

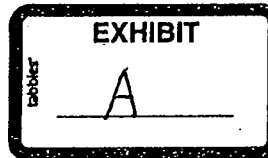
LOAN NUMBER	LOAN NAME	ACCT. NUMBER	NOTE DATE	INITIALS
	BADD, LLC		03/14/08	
NOTE AMOUNT	INDEX (w/Margin)	RATE	MATURITY DATE	LOAN PURPOSE
\$248,758.00	Not Applicable	5.880%	04/02/13	Commercial
Creditor Use Only				

PROMISSORY NOTE
(Commercial - Single Advance)

DATE AND PARTIES. The date of this Promissory Note (Note) is March 14, 2008. The parties and their addresses are:

LENDER:

CAROLINA FIRST BANK
104 South Main Street
Greenville, South Carolina 29601
Telephone: (800) 478-6400



BORROWER:

BADD, LLC
a South Carolina Limited Liability Company
116 N DOGWOOD DRIVE
SURFSIDE BEACH, South Carolina 29575

1. DEFINITIONS. As used in this Note, the terms have the following meanings:

- A. **Pronouns.** The pronouns "I," "me," and "my" refer to each Borrower signing this Note, individually and together. "You" and "Your" refer to the Lender.
- B. **Note.** Note refers to this document, and any extensions, renewals, modifications and substitutions of this Note.
- C. **Loan.** Loan refers to this transaction generally, including obligations and duties arising from the terms of all documents prepared or submitted for this transaction such as applications, security agreements, disclosures or notes, and this Note.
- D. **Loan Documents.** Loan Documents refer to all the documents executed as a part of or in connection with the Loan.
- E. **Property.** Property is any property, real, personal or intangible, that secures my performance of the obligations of this Loan.
- F. **Percent.** Rates and rate change limitations are expressed as annualized percentages.

2. PROMISE TO PAY. For value received, I promise to pay you or your order, at your address, or at such other location as you may designate, the principal sum of \$248,758.00 (Principal) plus interest from March 14, 2008 on the unpaid Principal balance until this Note matures or this obligation is accelerated.

3. INTEREST. Interest will accrue on the unpaid Principal balance of this Note at the rate of 5.880 percent (Interest Rate).

- A. **Interest After Default.** If you declare a default under the terms of the Loan, including for failure to pay in full at maturity, you may increase the Interest Rate otherwise payable as described in this section. In such event, interest will accrue on the unpaid Principal balance of this Note at a rate equal to the rate in effect prior to default, plus 4.000 percent, until paid in full.
- B. **Maximum Interest Amount.** Any amount assessed or collected as interest under the terms of this Note will be limited to the maximum lawful amount of interest allowed by state or federal law, whichever is greater. Amounts collected in excess of the maximum lawful amount will be applied first to the unpaid Principal balance. Any remainder will be refunded to me.
- C. **Statutory Authority.** The amount assessed or collected on this Note is authorized by the South Carolina usury laws under S.C. Code Ann. §§ 37-3-605, 37-3-105 and 37-10-101 et. seq.
- D. **Accrual.** Interest accrues using an Actual/360 days counting method.

4. ADDITIONAL CHARGES. As additional consideration, I agree to pay, or have paid, these additional fees and charges.

- A. **Nonrefundable Fees and Charges.** The following fees are earned when collected and will not be refunded if I prepay this Note before the scheduled maturity date.
 - Flood Determination. A(n) Flood Determination fee of \$8.00 payable from the loan proceeds.
 - Document Preparation. A(n) Document Preparation fee of \$250.00 payable from the loan proceeds.

5. REMEDIAL CHARGES. In addition to interest or other finance charges, I agree that I will pay these additional fees based on my method and pattern of payment. Additional remedial charges may be described elsewhere in this Note.

- A. **Late Charge.** If a payment is more than 20 days late, I will be charged 5.000 percent of the Unpaid Portion of Payment or \$25.00, whichever is greater. I will pay this late charge promptly but only once for each late payment.

BADD, LLC
South Carolina Promissory Note
SC/411w1388600022000005848018031308N

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Page 1

8. **Returned Check Charge.** I agree to pay a fee not to exceed \$25.00 for each check, negotiable order of withdrawal or draft I issue in connection with the Loan that is returned because it has been dishonored.

9. **PURCHASE MONEY LOAN.** You may include the name of the seller on the check or draft for this Note.

7. **PAYMENT.** I agree to pay this Note in 60 payments. This Note is amortized over 180 payments. I will make 59 payments of \$2,057.10 beginning on May 2, 2008, and on the 2nd day of each month thereafter. A single "balloon payment" of the entire unpaid balance of Principal and interest will be due April 2, 2013.

Payments will be rounded to the nearest \$.01. With the final payment I also agree to pay any additional fees or charges owing and the amount of any advances you have made to others on my behalf. Payments scheduled to be paid on the 29th, 30th or 31st day of a month that contains no such day will, instead, be made on the last day of such month.

Each payment I make on this Note will be applied first to interest that is due then to principal that is due, and finally to any charges that I owe other than principal and interest. If you and I agree to a different application of payments, we will describe our agreement on this Note. You may change how payments are applied in your sole discretion without notice to me. The actual amount of my final payment will depend on my payment record.

8. **PREPAYMENT.** I may prepay this Loan under the following terms and conditions. I may prepay principal on this Note in whole or in part at any time under the following terms and conditions: if paid during the first year from the date of the Note, a prepayment fee equal to 3% of the amount prepaid shall be due; if paid during the second year from the date of the Note, a prepayment fee equal to 2% of the amount prepaid shall be due; and if paid after the second year from the date of the Note, a prepayment fee equal to 1% of the amount prepaid shall be due. Notwithstanding the foregoing, a prepayment fee shall be due only if the prepayment exceeds the lesser of: (i) 26% of the outstanding principal balance on the Note; or (ii) \$50,000. Any partial prepayment will not excuse any later scheduled payments until I pay in full.

9. **LOAN PURPOSE.** The purpose of this Loan is TO PROVIDE FINANCING FOR ACQUISITION OF INCOME PRODUCING REAL ESTATE.

10. **SECURITY.** The Loan is secured by separate security instruments prepared together with this Note as follows:

Document Name

Leases And Rents Assignment - 475 E & F
SANDY LANE

Mortgage - 475 E & F SANDY LANE

Parties to Document

BADD, LLC

BADD, LLC

11. **DEFAULT.** I will be in default if any of the following occur:

A. **Payments.** I fail to make a payment in full when due.

B. **Insolvency or Bankruptcy.** The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence, by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me or any co-signer, endorser, surety or guarantor of this Note or any other obligations I have with you.

C. **Business Termination.** I merge, dissolve, reorganize, and my business or existence, or a partner or majority owner dies or is declared legally incompetent.

D. **Failure to Perform.** I fail to perform any condition or to keep any promise or covenant of this Note.

E. **Other Documents.** A default occurs under the terms of any other Loan Document.

F. **Other Agreements.** I am in default on any other debt or agreement I have with you.

G. **Misrepresentation.** I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. **Judgment.** I fail to satisfy or appeal any judgment against me.

I. **Forfeiture.** The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. **Name Change.** I change my name or assume an additional name without notifying you before making such a change.

K. **Property Transfer.** I transfer all or a substantial part of my money or property.

L. **Property Value.** You determine in good faith that the value of the Property has declined or is impaired.

M. **Material Change.** Without first notifying you, there is a material change in my business, including ownership, management, and financial conditions.

N. **Insecurity.** You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Note or that the prospect for payment or performance of the Loan is impaired for any reason.

12. **DUE ON SALE OR ENCUMBRANCE.** You may, at your option, declare the entire balance of this Note to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of all or any part of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 691), as applicable.

BADD, LLC
South Carolina Promissory Note
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Page 2

30

13. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers By Borrower. In addition, I, and any party to this Note and Loan, to the extent permitted by law, consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to this Note.

(1) You may renew or extend payments on this Note, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property securing this Note.

(4) You, or any institution participating in this Note, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of this Note to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that any of us signing this Note as a Borrower is authorized to modify the terms of this Note or any instrument securing, guarantying or relating to this Note.

(7) I agree that you may inform any party who guarantees this Loan of any Loan accommodations, renewals, extensions, modifications, substitutions or future advances.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in this Note, or any other Loan Document, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

14. REMEDIES. After I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Note immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any Loan Document.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on my default.

D. Payments Made On My Behalf. Amounts advanced on my behalf will be immediately due and may be added to the balance owing under the terms of this Note, and accrue interest at the highest post-maturity interest rate.

E. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Note against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Note" means the total amount to which you are entitled to demand payment under the terms of this Note at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay this Note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

15. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Note or any other Loan Document. Expenses include, but are not limited to, attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of this Note. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

16. COMMISSIONS. I understand and agree that you (or your affiliate) will earn commissions or fees on any insurance products, and may earn such fees on other services that I buy through you or your affiliate.

17. WARRANTIES AND REPRESENTATIONS. I make to you the following warranties and representations which will continue as long as this Note is in effect:

A. Power. I am duly organized, and validly existing and in good standing in all jurisdictions in which I operate. I have the power and authority to enter into this transaction and to carry on my business or activity as it is now being conducted and, as applicable, am qualified to do so in each jurisdiction in which I operate.

B. Authority. The execution, delivery and performance of this Note and the obligation evidenced by this Note are within my powers, have been duly authorized, have received all necessary governmental approval, will not violate any provision of law, or order of court or governmental agency, and will not violate any agreement to which I am a party or to which I am or any of my Property is subject.

BAOD, LLC
South Carolina Promissory Note
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Page 3

31

C. Name and Place of Business. Other than previously disclosed in writing to you I have not changed my name or principal place of business within the last 10 years and have not used any other trade or fictitious name. Without your prior written consent, I do not and will not use any other name and will preserve my existing name, trade names and franchises.

18. **INSURANCE.** I agree to obtain the insurance described in this Loan Agreement.

A. **Property Insurance.** I will insure or retain insurance coverage on the Property and abide by the insurance requirements of any security instrument securing the Loan.

B. **Flood Insurance.** Flood insurance is not required at this time. It may be required in the future should the property be included in an updated flood plain map. If required in the future, I may obtain flood insurance from anyone I want that is reasonably acceptable to you.

C. **Insurance Warranties.** I agree to purchase any insurance coverages that are required, in the amounts you require, as described in this or any other documents I sign for the Loan. I will provide you with continuing proof of coverage. I will buy or provide insurance from a firm licensed to do business in the State where the Property is located. If I buy or provide the insurance from someone other than you, the firm will be reasonably acceptable to you. I will have the insurance company name you as loss payee on any insurance policy. You will apply the insurance proceeds toward what I owe you on the outstanding balance. I agree that if the insurance proceeds do not cover the amounts I still owe you, I will pay the difference. I will keep the insurance until all debts secured by this agreement are paid. If I want to buy the insurance from you, I have signed a separate statement agreeing to this purchase.

19. **APPLICABLE LAW.** This Note is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

20. **JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS.** My obligation to pay the Loan is independent of the obligation of any other person who has also agreed to pay it. You may sue me alone, or anyone else who is obligated on the Loan, or any number of us together, to collect the Loan. Extending the Loan or new obligations under the Loan, will not affect my duty under the Loan and I will still be obligated to pay the Loan. This Note shall inure to the benefit of and be enforceable by you and your successors and assigns and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

21. **AMENDMENT, INTEGRATION AND SEVERABILITY.** This Note may not be amended or modified by oral agreement. No amendment or modification of this Note is effective unless made in writing and executed by you and me. This Note and the other Loan Documents are the complete and final expression of the agreement. If any provision of this Note is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

22. **INTERPRETATION.** Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Note.

23. **NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES' section, or to any other address designated in writing. Notice to one Borrower will be deemed to be notice to all Borrowers. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Loan and to confirm your lien status on any Property. Time is of the essence.

24. **CREDIT INFORMATION.** I agree to supply you with whatever information you reasonably request. You will make requests for this information without undue frequency, and will give me reasonable time in which to supply the information.

25. **ERRORS AND OMISSIONS.** I agree, if requested by you, to fully cooperate in the correction, if necessary, in the reasonable discretion of you or any and all loan closing documents so that all documents accurately describe the loan between you and me. I agree to assume all costs including by way of illustration and not limitation, actual expenses, legal fees and marketing losses for failing to reasonably comply with your requests within thirty (30) days.

26. **SIGNATURES.** By signing under seal, I agree to the terms contained in this Note. I also acknowledge receipt of a copy of this Note.

BORROWER:

BADD, LLC

By

CHARLES A. CHRISTINSON, MEMBER

By

WILLIAM MCKOWN, MEMBER

LOAN NUMBER	LOAN NAME	ACCT. NUMBER	NOTE DATE	INITIALS
	BADD, LLC		04/01/08	
NOTE AMOUNT	INDEX (w/Margin)	RATE	MATURITY DATE	LOAN PURPOSE
\$127,758.00	Not Applicable	5.430%	04/02/13	Commercial
Creditor Use Only				

PROMISSORY NOTE
(Commercial - Single Advance)

DATE AND PARTIES. The date of this Promissory Note (Note) is April 1, 2008. The parties and their addresses are:

LENDER:
CAROLINA FIRST BANK
104 South Main Street
Greenville, South Carolina 29601
Telephone: (800) 476-6400



BORROWER:
BADD, LLC
a South Carolina Limited Liability Company
116 N DOGWOOD DRIVE
SURFSIDE BEACH, South Carolina 29575

1. **DEFINITIONS.** As used in this Note, the terms have the following meanings:
 - A. **Pronouns.** The pronouns "I," "me," and "my" refer to each Borrower signing this Note, individually and together. "You" and "Your" refer to the Lender.
 - B. **Note.** Note refers to this document, and any extensions, renewals, modifications and substitutions of this Note.
 - C. **Loan.** Loan refers to this transaction generally, including obligations and duties arising from the terms of all documents prepared or submitted for this transaction such as applications, security agreements, disclosures or notes, and this Note.
 - D. **Loan Documents.** Loan Documents refer to all the documents executed as a part of or in connection with the Loan.
 - E. **Property.** Property is any property, real, personal or intangible, that secures my performance of the obligations of this Loan.
 - F. **Percent.** Rates and rate change limitations are expressed as annualized percentages.
2. **PROMISE TO PAY.** For value received, I promise to pay you or your order, at your address, or at such other location as you may designate, the principal sum of \$127,758.00 (Principal) plus interest from April 1, 2008 on the unpaid Principal balance until this Note matures or this obligation is accelerated.
3. **INTEREST.** Interest will accrue on the unpaid Principal balance of this Note at the rate of 5.430 percent (Interest Rate).
 - A. **Interest After Default.** If you declare a default under the terms of the Loan, including for failure to pay in full at maturity, you may increase the Interest Rate otherwise payable as described in this section. In such event, interest will accrue on the unpaid Principal balance of this Note at a rate equal to the rate in effect prior to default, plus 4.000 percent, until paid in full.
 - B. **Maximum Interest Amount.** Any amount assessed or collected as interest under the terms of this Note will be limited to the maximum lawful amount of interest allowed by state or federal law, whichever is greater. Amounts collected in excess of the maximum lawful amount will be applied first to the unpaid Principal balance. Any remainder will be refunded to me.
 - C. **Statutory Authority.** The amount assessed or collected on this Note is authorized by the South Carolina usury laws under S.C. Code Ann. §§ 37-3-605, 37-3-105 and 37-10-101 et. seq.
 - D. **Accrual.** Interest accrues using an Actual/360 days counting method.
4. **ADDITIONAL CHARGES.** As additional consideration, I agree to pay, or have paid, these additional fees and charges.
 - A. **Nonrefundable Fees and Charges.** The following fees are earned when collected and will not be refunded if I prepay this Note before the scheduled maturity date.
 - Flood Determination. A(n) Flood Determination fee of \$8.00 payable from the loan proceeds.
 - Document Preparation. A(n) Document Preparation fee of \$250.00 payable from the loan proceeds.
5. **REMEDIAL CHARGES.** In addition to interest or other finance charges, I agree that I will pay these additional fees based on my method and pattern of payment. Additional remedial charges may be described elsewhere in this Note.
 - A. **Late Charge.** If a payment is more than 20 days late, I will be charged 5.000 percent of the Unpaid Portion of Payment or \$25.00, whichever is greater. I will pay this late charge promptly but only once for each late payment.

BADD, LLC
South Carolina Promissory Note
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Page 1

B. Returned Check Charge. I agree to pay a fee not to exceed \$25.00 for each check, negotiable order of withdrawal or draft I issue in connection with the Loan that is returned because it has been dishonored.

6. PURCHASE MONEY LOAN. You may include the name of the seller on the check or draft for this Note.

7. PAYMENT. I agree to pay this Note in 60 payments. This Note is amortized over 180 payments. I will make 60 payments of \$1,047.66 beginning on May 2, 2008, and on the 2nd day of each month thereafter. A single "balloon payment" of the entire unpaid balance of Principal and Interest will be due April 2, 2013.

Payments will be rounded to the nearest \$.01. With the final payment I also agree to pay any additional fees or charges owing and the amount of any advances you have made to others on my behalf. Payments scheduled to be paid on the 29th, 30th or 31st day of a month that contains no such day will, instead, be made on the last day of such month.

Each payment I make on this Note will be applied first to interest that is due then to principal that is due, and finally to any charges that I owe other than principal and interest. If you and I agree to a different application of payments, we will describe our agreement on this Note. You may change how payments are applied in your sole discretion without notice to me. The actual amount of my final payment will depend on my payment record.

8. PREPAYMENT. I may prepay this Loan under the following terms and conditions. I may prepay principal on this Note in whole or in part at any time under the following terms and conditions: if paid during the first year from the date of the Note, a prepayment fee equal to 3% of the amount prepaid shall be due; if paid during the second year from the date of the Note, a prepayment fee equal to 2% of the amount prepaid shall be due; and if paid after the second year from the date of the Note, a prepayment fee equal to 1% of the amount prepaid shall be due. Notwithstanding the foregoing, a prepayment fee shall be due only if the prepayment exceeds the lesser of: (i) 25% of the outstanding principal balance on the Note; or (ii) \$50,000. Any partial prepayment will not excuse any later scheduled payments until I pay in full.

9. LOAN PURPOSE. The purpose of this Loan is TO PROVIDE FINANCING FOR ACQUISITION OF INCOME PRODUCING REAL ESTATE.

10. SECURITY. The Loan is secured by separate security instruments prepared together with this Note as follows:

Document Name	Parties to Document
Leases And Rents Assignment - 475 SANDY LANE, STE D	BADD, LLC
Mortgage - 475 SANDY LANE, STE D	BADD, LLC

11. DEFAULT. I will be in default if any of the following occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me or any co-signer, endorser, surety or guarantor of this Note or any other obligations I have with you.

C. Business Termination. I merge, dissolve, reorganize, and my business or existence, or a partner or majority owner dies or is declared legally incompetent.

D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Note.

E. Other Documents. A default occurs under the terms of any other Loan Document.

F. Other Agreements. I am in default on any other debt or agreement I have with you.

G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. I fail to satisfy or appeal any judgment against me.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. I change my name or assume an additional name without notifying you before making such a change.

K. Property Transfer. I transfer all or a substantial part of my money or property.

L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.

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N. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Note or that the prospect for payment or performance of the Loan is impaired for any reason.

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Page 2

34

13. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers By Borrower. In addition, I, and any party to this Note and Loan, to the extent permitted by law, consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to this Note.

(1) You may renew or extend payments on this Note, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property securing this Note.

(4) You, or any institution participating in this Note, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of this Note to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that any of us signing this Note as a Borrower is authorized to modify the terms of this Note or any instrument securing, guarantying or relating to this Note.

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B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in this Note, or any other Loan Document, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

14. REMEDIES. After I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Note immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any Loan Document.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on my default.

D. Payments Made On My Behalf. Amounts advanced on my behalf will be immediately due and may be added to the balance owing under the terms of this Note, and accrue interest at the highest post-maturity interest rate.

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My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Note" means the total amount to which you are entitled to demand payment under the terms of this Note at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay this Note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

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16. COMMISSIONS. I understand and agree that you (or your affiliate) will earn commissions or fees on any insurance products, and may earn such fees on other services that I buy through you or your affiliate.

17. WARRANTIES AND REPRESENTATIONS. I make to you the following warranties and representations which will continue as long as this Note is in effect:

A. Power. I am duly organized, and validly existing and in good standing in all jurisdictions in which I operate. I have the power and authority to enter into this transaction and to carry on my business or activity as it is now being conducted and, as applicable, am qualified to do so in each jurisdiction in which I operate.

B. Authority. The execution, delivery and performance of this Note and the obligation evidenced by this Note are within my powers, have been duly authorized, have received all necessary governmental approval, will not violate any provision of law, or order of court or governmental agency, and will not violate any agreement to which I am a party or to which I am or any of my Property is subject.

C. Name and Place of Business. Other than previously disclosed in writing to you I have not changed my name or principal place of business within the last 10 years and have not used any other trade or fictitious name. Without your prior written consent, I do not and will not use any other name and will preserve my existing name, trade names and franchises.

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19. **APPLICABLE LAW.** This Note is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

20. **JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS.** My obligation to pay the Loan is independent of the obligation of any other person who has also agreed to pay it. You may sue me alone, or anyone else who is obligated on the Loan, or any number of us together, to collect the Loan. Extending the Loan or new obligations under the Loan, will not affect my duty under the Loan and I will still be obligated to pay the Loan. This Note shall inure to the benefit of and be enforceable by you and your successors and assigns and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

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25. **ERRORS AND OMISSIONS.** I agree, if requested by you, to fully cooperate in the correction, if necessary, in the reasonable discretion of you or any and all loan closing documents so that all documents accurately describe the loan between you and me. I agree to assume all costs including by way of illustration and not limitation, actual expenses, legal fees and marketing losses for failing to reasonably comply with your requests within thirty (30) days.

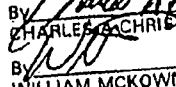
26. **SIGNATURES.** By signing under seal, I agree to the terms contained in this Note. I also acknowledge receipt of a copy of this Note.

BORROWER:

BADD, LLC

By  (Seal)

CHARLES CHRISTENSON, MEMBER

By  (Seal)

WILLIAM MCKOWN, MEMBER

BADD, LLC
South Carolina Promissory Note
SC/4ae1688400022000005848018032808N

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Page 4

36

5121073309

Instrument# 2008000036039, MTG BK
5046 PG 735 DOCTYPE 002 03/18/2008
at 10:20 34 AM, 1 OF 10
BALLERY V SKIPPER, Horry County,
SC REGISTRAR OF DEEDS



Space Above This Line For Recording Data
This document was prepared by Loan Preparation Department, Carolina First Bank, Post Office Box 1029,
Greenville, South Carolina 29602

MORTGAGE

DATE AND PARTIES. The date of this Mortgage, (Security Instrument) is MARCH 14, 2008. The parties and their addresses are:

MORTGAGOR:
BADD, LLC
A South Carolina Limited Liability Company
116 N DOGWOOD DRIVE
SURFSIDE BEACH, South Carolina 29576

ORIGINAL

LENDER
CAROLINA FIRST BANK
Organized and existing under the laws of South Carolina
104 South Main Street
Greenville, South Carolina 29601

1 CONVEYANCE. For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debts and Mortgagor's performance under this Security Instrument, Mortgagor grants, bargains, conveys and mortgages to Lender, the following described property

SEE EXHIBIT 'A' WHICH IS ATTACHED HERETO AND MADE A PART HEREOF

The property is located in Horry County at 475 E & F SANDY LANE, SURFSIDE BEACH, South Carolina 29576. Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, all water and riparian rights, wells, ditches and water stock, crops, timber, all diversion payments or third party payments made to crop producers and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described (all referred to as Property). This Security Instrument will remain in effect until the Secured Debts and all underlying agreements have been terminated in writing by Lender.

2. MAXIMUM OBLIGATION LIMIT. The total principal amount secured by this Security Instrument at any one time will not exceed \$246,758.00. This limitation of amount does not include interest and other fees and charges validly made pursuant to this Security Instrument. Also, this limitation does not apply to advances made under the terms of this Security Instrument to protect Lender's security and to perform any of the covenants contained in

BADD, LLC
South Carolina Mortgage
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this Security Instrument. Interest under the Note will be deferred, accrued or capitalized, however, Lender will not be required to defer, accrue or capitalize any interest except as provided in the Note.

3. SECURED DEBTS. The term "Secured Debts" includes and this Security Instrument will secure each of the following

A. Specific Debts. The following debts and all extensions, renewals, refinancings, modifications and replacements: A promissory note or other agreement, dated March 14, 2008, from Mortgagor to Lender, with a loan amount of \$248,758.00 and maturing on April 2, 2013.

B. All Debts. All present and future debts from Mortgagor to Lender, even if this Security Instrument is not specifically referenced, or if the future debt is unrelated to or of a different type than this debt. If more than one person signs this Security Instrument, each agrees that it will secure debts incurred either individually or with others who may not sign this Security Instrument. Nothing in this Security Instrument constitutes a commitment to make additional or future loans or advances. Any such commitment must be in writing. In the event that Lender fails to provide any required notice of the right of rescission, Lender waives any subsequent security interest in the Mortgagor's principal dwelling that is created by this Security Instrument. This Security Instrument will not secure any debt for which a non-possessory, non-purchase money security interest is created in "household goods" in connection with a "consumer loan," as those terms are defined by federal law governing unfair and deceptive credit practices. This Security Instrument will not secure any debt for which a security interest is created in "margin stock" and Lender does not obtain a "statement of purpose," as defined and required by federal law governing securities.

C. Sums Advanced. All sums advanced and expenses incurred by Lender under the terms of this Security Instrument.

4. PAYMENTS. Mortgagor agrees that all payments under the Secured Debts will be paid when due and in accordance with the terms of the Secured Debts and this Security Instrument.

5. WARRANTY OF TITLE. Mortgagor warrants that Mortgagor is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to grant, bargain, convey, sell and mortgage the Property. Mortgagor also warrants that the Property is unencumbered, except for encumbrances of record.

6. PRIOR SECURITY INTERESTS. With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property, Mortgagor agrees

A. To make all payments when due and to perform or comply with all covenants.

B. To promptly deliver to Lender any notices that Mortgagor receives from the holder.

C. Not to allow any modification or extension of, nor to request any future advances under any note or agreement secured by the lien document without Lender's prior written consent.

7. CLAIMS AGAINST TITLE. Mortgagor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Mortgagor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Mortgagor's payment. Mortgagor will defend title to the Property against any claims that would impair the lien of this Security Instrument. Mortgagor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses Mortgagor may have against parties who supply labor or materials to maintain or improve the Property.

8. DUE ON SALE OR ENCUMBRANCE. Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of all or any part of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 691), as applicable.

9. TRANSFER OF AN INTEREST IN THE MORTGAGOR. If Mortgagor is an entity other than a natural person (such as a corporation or other organization), Lender may demand immediate payment if

A. A beneficial interest in Mortgagor is sold or transferred

B. There is a change in either the identity or number of members of a partnership or similar entity.

C. There is a change in ownership of more than 25 percent of the voting stock of a corporation or similar entity.

However, Lender may not demand payment in the above situations if it is prohibited by law as of the date of this Security Instrument.

10. WARRANTIES AND REPRESENTATIONS. Mortgagor makes to Lender the following warranties and representations which will continue as long as this Security Instrument is in effect.

BADD, LLC
South Carolina Mortgage
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Page 2

A. Power. Mortgagor is duly organized, and validly existing and in good standing in all jurisdictions in which Mortgagor operates. Mortgagor has the power and authority to enter into this transaction and to carry on Mortgagor's business or activity as it is now being conducted and, as applicable, is qualified to do so in each jurisdiction in which Mortgagor operates.

B. Authority. The execution, delivery and performance of this Security Instrument and the obligation evidenced by this Security Instrument are within Mortgagor's powers, have been duly authorized, have received all necessary governmental approval, will not violate any provision of law, or order of court or governmental agency, and will not violate any agreement to which Mortgagor is a party or to which Mortgagor is or any of Mortgagor's property is subject.

C. Name and Place of Business. Other than previously disclosed in writing to Lender, Mortgagor has not changed Mortgagor's name or principal place of business within the last 10 years and has not used any other trade or fictitious name. Without Lender's prior written consent, Mortgagor does not and will not use any other name and will preserve Mortgagor's existing name, trade names and franchises.

11. PROPERTY CONDITION, ALTERATIONS AND INSPECTION. Mortgagor will keep the Property in good condition and make all repairs that are reasonably necessary. Mortgagor will not commit or allow any waste, impairment, or deterioration of the Property. Mortgagor will keep the Property free of noxious weeds and grasses. Mortgagor agrees that the nature of the occupancy and use will not substantially change without Lender's prior written consent. Mortgagor will not permit any change in any license, restrictive covenant or easement without Lender's prior written consent. Mortgagor will notify Lender of all demands, proceedings, claims, and actions against Mortgagor, and of any loss or damage to the Property.

No portion of the Property will be removed, demolished or materially altered without Lender's prior written consent except that Mortgagor has the right to remove items of personal property comprising a part of the Property that become worn or obsolete, provided that such personal property is replaced with other personal property at least equal in value to the replaced personal property, free from any title retention device, security agreement or other encumbrance. Such replacement of personal property will be deemed subject to the security interest created by this Security Instrument. Mortgagor will not partition or subdivide the Property without Lender's prior written consent.

Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Lender will give Mortgagor notice at the time of or before an inspection specifying a reasonable purpose for the inspection. Any inspection of the Property will be entirely for Lender's benefit and Mortgagor will in no way rely on Lender's inspection.

12. AUTHORITY TO PERFORM. If Mortgagor fails to perform any duty or any of the covenants contained in this Security Instrument, Lender may, without notice, perform or cause them to be performed. Mortgagor appoints Lender as attorney in fact to sign Mortgagor's name or pay any amount necessary for performance. Lender's right to perform for Mortgagor will not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Security Instrument. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may take all steps necessary to protect Lender's security interest in the Property, including completion of the construction.

13. DEFAULT. Mortgagor will be in default if any of the following occur

A. Payments. Mortgagor fails to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against Mortgagor, Borrower, or any co-signer, endorser, surety or guarantor of this Security Instrument or any other obligations Borrower has with Lender.

C. Business Termination. Mortgagor merges, dissolves, reorganizes, ends its business or existence, or a partner or majority owner dies or is declared legally incompetent.

D. Failure to Perform. Mortgagor fails to perform any condition or to keep any promise or covenant of this Security Instrument.

E. Other Documents. A default occurs under the terms of any other document relating to the Secured Debts.

F. Other Agreements. Mortgagor is in default on any other debt or agreement Mortgagor has with Lender.

- G. Misrepresentation.** Mortgagor makes any verbal or written statement or provides any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.
- H. Judgment.** Mortgagor fails to satisfy or appeal any judgment against Mortgagor.
- I. Forfeiture.** The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.
- J. Name Change.** Mortgagor changes Mortgagor's name or assumes an additional name without notifying Lender before making such a change.
- K. Property Transfer.** Mortgagor transfers all or a substantial part of Mortgagor's money or property. This condition of default, as it relates to the transfer of the Property, is subject to the restrictions contained in the DUE ON SALE section.
- L. Property Value.** Lender determines in good faith that the value of the Property has declined or is impaired.
- M. Material Change.** Without first notifying Lender, there is a material change in Mortgagor's business, including ownership, management, and financial conditions.
- N. Insecurity.** Lender determines in good faith that a material adverse change has occurred in Mortgagor's financial condition from the conditions set forth in Mortgagor's most recent financial statement before the date of this Security Instrument or that the prospect for payment or performance of the Secured Debts is impaired for any reason.

14. REMEDIES. On or after default, Lender may use any and all remedies Lender has under state or federal law or in any document relating to the Secured Debts. Any amounts advanced on Mortgagor's behalf will be immediately due and may be added to the balance owing under the Secured Debts. Lender may make a claim for any and all insurance benefits or refunds that may be available on Mortgagor's default. Subject to any right to cure, required time schedules or any other notice rights Mortgagor may have under federal and state law, Lender may make all or any part of the amount owing by the terms of the Secured Debts immediately due and foreclose this Security Instrument in a manner provided by law upon the occurrence of a default or anytime thereafter.

All remedies are distinct, cumulative and not exclusive, and the Lender is entitled to all remedies provided at law or equity, whether or not expressly set forth. The acceptance by Lender of any sum in payment or partial payment on the Secured Debts after the balance is due or is accelerated or after foreclosure proceedings are filed will not constitute a waiver of Lender's right to require full and complete cure of any existing default. By not exercising any remedy, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.

At any time after default (whether before or after judgment), Lender may take possession of any collateral for the loan or obtain the appointment of a receiver pursuant to SC Code §15-65-10, et seq. or otherwise as permitted by law. Any receiver shall be vested with all of the powers, rights and duties of receivers generally. Lender or any receiver may collect any rents and profits from the collateral and may rent, sell, operate or manage the collateral without notice to Mortgagor or any other party (Mortgagor waives any right to notice) and without consideration of the value of the collateral or Mortgagor's solvency. All amounts collected by Lender or the receiver shall, after the expenses of taking possession, renting, selling, operating and managing (and of any receivership), be applied to payment of the loan. If Lender should take possession or if a receiver should be appointed or if there should be a sale of the collateral, Mortgagor, or any person in possession of the collateral, shall become a tenant at will of Lender, the receiver or the purchaser and may be removed by a writ of ejectment, summary ejectment or other lawful remedy.

15. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after Default, to the extent permitted by law, Mortgagor agrees to pay all expenses of collection, enforcement or protection of Lender's rights and remedies under this Security Instrument or any other document relating to the Secured Debts. Mortgagor agrees to pay expenses for Lender to inspect and preserve the Property and for any recordation costs of releasing the Property from this Security Instrument. Expenses include, but are not limited to, attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of the Secured Debts. In addition, to the extent permitted by the United States Bankruptcy Code, Mortgagor agrees to pay the reasonable attorneys' fees incurred by Lender to protect Lender's rights and interests in connection with any bankruptcy proceedings initiated by or against Mortgagor.

16. ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES. As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA,

42 U.S.C. 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance, and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substance," "hazardous waste," "hazardous substance," or "regulated substance" under any Environmental Law.

Mortgagor represents, warrants and agrees that

A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.

B. Except as previously disclosed and acknowledged in writing to Lender, Mortgagor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.

C. Mortgagor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Mortgagor will take all necessary remedial action in accordance with Environmental Law.

D. Except as previously disclosed and acknowledged in writing to Lender, Mortgagor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property, or (2) any violation by Mortgagor or any tenant of any Environmental Law. Mortgagor will immediately notify Lender in writing as soon as Mortgagor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.

E. Except as previously disclosed and acknowledged in writing to Lender, Mortgagor and every tenant have been, are and will remain in full compliance with any applicable Environmental Law.

F. Except as previously disclosed and acknowledged in writing to Lender, there are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.

G. Mortgagor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.

H. Mortgagor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property, (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Mortgagor and any tenant are in compliance with applicable Environmental Law.

I. Upon Lender's request and at any time, Mortgagor agrees, at Mortgagor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.

J. Lender has the right, but not the obligation, to perform any of Mortgagor's obligations under this section at Mortgagor's expense.

K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Mortgagor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain, and (2) at Lender's discretion, Lender may release this Security Instrument and in return Mortgagor will provide Lender with collateral of at least equal value to the Property without prejudice to any of Lender's rights under this Security Instrument.

L. Notwithstanding any of the language contained in this Security Instrument to the contrary, the terms of this section will survive any foreclosure or satisfaction of this Security Instrument regardless of any passage of title.

to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived

17. CONDEMNATION. Mortgagor will give Lender prompt notice of any pending or threatened action by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Mortgagor authorizes Lender to intervene in Mortgagor's name in any of the above described actions or claims. Mortgagor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds will be considered payments and will be applied as provided in this Security Instrument. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

18. INSURANCE. Mortgagor agrees to keep the Property insured against the risks reasonably associated with the Property. Mortgagor will maintain this insurance in the amounts Lender requires. This insurance will last until the Property is released from this Security Instrument. What Lender requires pursuant to the preceding two sentences can change during the term of the Secured Debts. Mortgagor may choose the insurance company, subject to Lender's approval, which will not be unreasonably withheld.

All insurance policies and renewals will include a standard "mortgage clause" and, where applicable, "loss payee clause". If required by Lender, Mortgagor agrees to maintain comprehensive general liability insurance and rental loss or business interruption insurance in amounts and under policies acceptable to Lender. The comprehensive general liability insurance must name Lender as an additional insured. The rental loss or business interruption insurance must be in an amount equal to at least coverage of one year's debt service, and required escrow account deposits (if agreed to separately in writing).

Mortgagor will give Lender and the insurance company immediate notice of any loss. All insurance proceeds will be applied to restoration or repair of the Property or to the Secured Debts, at Lender's option. If Lender acquires the Property in damaged condition, Mortgagor's rights to any insurance policies and proceeds will pass to Lender to the extent of the Secured Debts.

Mortgagor will immediately notify Lender of cancellation or termination of insurance. If Mortgagor fails to keep the Property insured, Lender may obtain insurance to protect Lender's interest in the Property and Mortgagor will pay for the insurance on Lender's demand. Lender may demand that Mortgagor pay for the insurance all at once, or Lender may add the insurance premiums to the balance of the Secured Debts and charge interest on it at the rate that applies to the Secured Debts. This insurance may include coverages not originally required of Mortgagor, may be written by a company other than one Mortgagor would choose, and may be written at a higher rate than Mortgagor could obtain if Mortgagor purchased the insurance. Mortgagor acknowledges and agrees that Lender or one of Lender's affiliates may receive commissions on the purchase of this insurance.

19. ESCROW FOR TAXES AND INSURANCE Mortgagor will not be required to pay to Lender funds for taxes and insurance in escrow.

20. CO-SIGNERS. If Mortgagor signs this Security Instrument but is not otherwise obligated to pay the Secured Debts, Mortgagor does so only to mortgage Mortgagor's interest in the Property to secure payment of the Secured Debts and Mortgagor does not agree by signing this Security Instrument to be personally liable on the Secured Debts. If this Security Instrument secures a guaranty between Lender and Mortgagor, Mortgagor agrees to waive any rights that may prevent Lender from bringing any action or claim against Mortgagor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws.

21. WAIVERS. Except to the extent prohibited by law, Mortgagor waives all homestead exemption rights relating to the Property.

22. FIXTURE FILING Mortgagor gives to Lender a security interest in all goods that Mortgagor owns now or in the future and that are or will become fixtures related to the Property.

23. PERSONAL PROPERTY: Mortgagor gives to Lender a security interest in all personal property located on or connected with the Property, including 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 (all of which shall also be included in the term 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.

24. OTHER TERMS The following are applicable to this Security Instrument:

A. Additional Terms. This Agreement (along with all deposit accounts, mortgages, security agreements, pledge agreements and any and all other security instruments and items of collateral that I have at any time in the past given to you or that I may at any time in the future give to you) shall secure any and all of the obligations that I currently owe you or that I may at any time in the future owe you

Notwithstanding the foregoing maximum obligation limit of \$248,758.00 specified in paragraph 2 above, pursuant to the provisions of Section 29-3-50 et seq. of the South Carolina Code of Laws, as amended, this Mortgage shall secure payment of all future advances and/or extensions of credit that may subsequently be made to Mortgagor by Lender, when evidenced by promissory notes specifically referring to this Mortgage and all extensions and renewals thereof, the maximum principal amount of all existing indebtedness, future advances, extensions of credit and all other indebtedness outstanding at any one time and to be secured by this Mortgage not to exceed THREE HUNDRED SEVENTY THOUSAND ONE HUNDRED THIRTY-SEVEN DOLLARS AND 00/100, (\$370,137.00), plus interest thereon, attorneys' fees and court costs, and any advances necessary for the protection of the security or title thereto, including, but not limited to, advances for taxes and insurance premiums and all other payments or liabilities otherwise provided for in this Mortgage. This Mortgage may secure interest which is deferred, accrued or capitalized as provided in the aforesaid statute.

25. APPLICABLE LAW. This Security Instrument is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

26. JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS. Each Mortgagor's obligations under this Security Instrument are independent of the obligations of any other Mortgagor. Lender may sue each Mortgagor individually or together with any other Mortgagor. Lender may release any part of the Property and Mortgagor will still be obligated under this Security Instrument for the remaining Property. If this Security Instrument secures a guaranty between Lender and Mortgagor, Mortgagor agrees to waive any rights that may prevent Lender from bringing any action or claim against Mortgagor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws. Mortgagor agrees that Lender and any party to this Security Instrument may extend, modify or make any change in the terms of this Security Instrument or any evidence of debt without Mortgagor's consent. Such a change will not release Mortgagor from the terms of this Security Instrument. The duties and benefits of this Security Instrument will bind and benefit the successors and assigns of Lender and Mortgagor.

27. AMENDMENT, INTEGRATION AND SEVERABILITY. This Security Instrument may not be amended or modified by oral agreement. No amendment or modification of this Security Instrument is effective unless made in writing and executed by Mortgagor and Lender. This Security Instrument and any other documents relating to the Secured Debts are the complete and final expression of the agreement. If any provision of this Security Instrument is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

28. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Security Instrument.

29. NOTICE, FINANCIAL REPORTS, ADDITIONAL DOCUMENTS AND RECORDING TAXES. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Mortgagor will be deemed to be notice to all Mortgagors. Mortgagor will inform Lender in writing of any change in Mortgagor's name, address or other application information. Mortgagor will provide Lender any financial statements or information Lender requests. All financial statements and information Mortgagor gives Lender will be correct and complete. Mortgagor agrees to pay all expenses, charges and taxes in connection with the preparation and recording of this Security Instrument. Mortgagor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Mortgagor's obligations under this Security Instrument and to confirm Lender's lien status on any Property, and Mortgagor

agrees to pay all expenses, charges and taxes in connection with the preparation and recording thereof. Time is of the essence

SIGNATURES. By signing under seal, Mortgagor agrees to the terms and covenants contained in this Security Instrument. Mortgagor also acknowledges receipt of a copy of this Security Instrument

MORTGAGOR.

BADD, LLC

By

Charles A. Christenson, member (Seal)
CHARLES A. CHRISTENSON, MEMBER

(Witness)

(Witness)

By

William Mckown, Member (Seal)
WILLIAM MCKOWN, MEMBER

(Witness)

(Witness)

ACKNOWLEDGMENT.

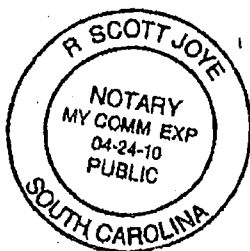
(Business or Entity)

I, R. Scott Joye a notary public for South Carolina ss. South Carolina do hereby certify that CHARLES A. CHRISTENSON - MEMBER of BADD, LLC a Limited Liability Company, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 14th day of March, 2008

R. Scott Joye
Signature of Notary Public

My commission expires. 4-24-10



(Business or Entity)

State South Carolina County Georgetown OF South Carolina ss.

I, R. Scott Joye a notary public for South Carolina, do hereby certify that WILLIAM MCKOWN - MEMBER of BADD, LLC a Limited Liability Company, personally appeared before me this day and acknowledged the due execution of the foregoing instrument

Witness my hand and official seal this March day of 2008

[Signature]
Signature of Notary Public

My commission expires: 4-24-10

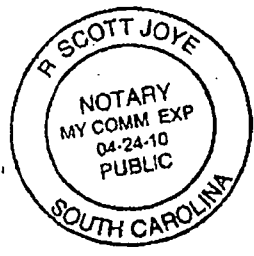


EXHIBIT "A"

ALL AND SINGULAR, that certain piece, parcel or lot of land situate, lying and being in the Socastee Township, Horry County, South Carolina and being designated as **PARCELS E AND F** of **LOT 29** as shown and delineated on a plat entitled **Caropines Lot 29 - Section A Units A - G**, survey for Gibraltar Enterprises, LLC, prepared by Huntley & Associates, Inc., Land Surveyor, said survey dated 1/19/07 and recorded 2/28/07 in Plat Book 222 at Page 154, records of the Register of Deeds for Horry County.

This being the identical property conveyed to BADD, LLC by deed of Gibraltar Enterprises, LLC, dated February 21, 2008 and recorded February 22, 2008 in Deed Book 3316 at Page 2133 in the office of the Register of Deeds for Horry County, South Carolina

EXHIBIT "D"

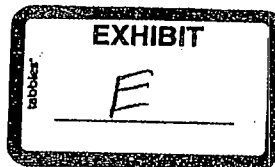
ALL AND SINGULAR, that certain piece, parcel or lot of land situate, lying and being near the Town of Surfside Beach, Socastee Township, Horry County, South Carolina and being designated as **PARCELS E and F** of **LOT 29** as shown and delineated on a plat entitled: Caropines Lot 29 – Section A Units A – G, survey for Gibraltar Enterprises, LLC, prepared by Huntley & Associates, Inc., Land Surveyor, said survey dated 1/19/07 and recorded 2/28/07 in Plat Book 222 at Page 154, records of the Register of Deeds for Horry County.

This being the identical property conveyed to BADD, LLC by deed of Gibraltar Enterprises, LLC, dated February 21, 2008 and recorded February 22, 2008 in Deed Book 3316 at Page 2133 in the office of the Register of Deeds for Horry county, South Carolina.

Parcel E – Tax Map No.: 191-15-05-038

Parcel F – Tax Map No.: 191-15-05-039

3154/990 Filed
4/4/2008
@ 1:54 pm



Space Above This Line For Recording Data

This document was prepared by Loan Preparation Department, Carolina First Bank, Post Office Box 1029, Greenville, South Carolina 29602

MORTGAGE

DATE AND PARTIES. The date of this Mortgage (Security Instrument) is APRIL 1, 2008. The parties and their addresses are:

MORTGAGOR:

BADD, LLC

A South Carolina Limited Liability Company
116 N DOGWOOD DRIVE
SURFSIDE BEACH, South Carolina 29575

LENDER:

CAROLINA FIRST BANK

Organized and existing under the laws of South Carolina
104 South Main Street
Greenville, South Carolina 29601

1. CONVEYANCE. For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debts and Mortgagor's performance under this Security Instrument, Mortgagor grants, bargains, conveys and mortgages to Lender, the following described property:

SEE EXHIBIT 'A' WHICH IS ATTACHED HERETO AND MADE A PART HEREOF

The property is located in HORRY County at 475 SANDY LANE, STE D, SURFSIDE BEACH, South Carolina 29575. Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, all water and riparian rights, wells, ditches and water stock, crops, timber, all diversion payments or third party payments made to crop producers and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described (all referred to as Property). This Security Instrument will remain in effect until the Secured Debts and all underlying agreements have been terminated in writing by Lender.

2. MAXIMUM OBLIGATION LIMIT. The total principal amount secured by this Security Instrument at any one time will not exceed \$127,768.00. This limitation of amount does not include interest and other fees and charges validly made pursuant to this Security Instrument. Also, this limitation does not apply to advances made under the terms of this Security Instrument to protect Lender's security and to perform any of the covenants contained in

BADD, LLC
South Carolina Mortgage
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Page 1

this Security Instrument. Interest under the Note will be deferred, accrued or capitalized; however, Lender will not be required to defer, accrue or capitalize any interest except as provided in the Note.

3. SECURED DEBTS. The term "Secured Debts" includes and this Security Instrument will secure each of the following:

A. Specific Debts. The following debts and all extensions, renewals, refinancings, modifications and replacements. A promissory note or other agreement, dated April 1, 2008, from Mortgagor to Lender, with a loan amount of \$127,758.00 and maturing on April 2, 2013.

B. All Debts. All present and future debts from Mortgagor to Lender, even if this Security Instrument is not specifically referenced, or if the future debt is unrelated to or of a different type than this debt. If more than one person signs this Security Instrument, each agrees that it will secure debts incurred either individually or with others who may not sign this Security Instrument. Nothing in this Security Instrument constitutes a commitment to make additional or future loans or advances. Any such commitment must be in writing. In the event that Lender fails to provide any required notice of the right of rescission, Lender waives any subsequent security interest in the Mortgagor's principal dwelling that is created by this Security Instrument. This Security Instrument will not secure any debt for which a non-possessory, non-purchase money security interest is created in "household goods" in connection with a "consumer loan," as those terms are defined by federal law governing unfair and deceptive credit practices. This Security Instrument will not secure any debt for which a security interest is created in "margin stock" and Lender does not obtain a "statement of purpose," as defined and required by federal law governing securities.

C. Sums Advanced. All sums advanced and expenses incurred by Lender under the terms of this Security Instrument.

4. PAYMENTS. Mortgagor agrees that all payments under the Secured Debts will be paid when due and in accordance with the terms of the Secured Debts and this Security Instrument.

5. WARRANTY OF TITLE. Mortgagor warrants that Mortgagor is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to grant, bargain, convey, sell and mortgage the Property. Mortgagor also warrants that the Property is unencumbered, except for encumbrances of record.

6. PRIOR SECURITY INTERESTS. With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property, Mortgagor agrees:

A. To make all payments when due and to perform or comply with all covenants.

B. To promptly deliver to Lender any notices that Mortgagor receives from the holder.

C. Not to allow any modification or extension of, nor to request any future advances under any note or agreement secured by the lien document without Lender's prior written consent.

7. CLAIMS AGAINST TITLE. Mortgagor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Mortgagor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Mortgagor's payment. Mortgagor will defend title to the Property against any claims that would impair the lien of this Security Instrument. Mortgagor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses Mortgagor may have against parties who supply labor or materials to maintain or improve the Property.

8. DUE ON SALE OR ENCUMBRANCE. Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of all or any part of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 691), as applicable.

9. TRANSFER OF AN INTEREST IN THE MORTGAGOR. If Mortgagor is an entity other than a natural person (such as a corporation or other organization), Lender may demand immediate payment if:

A. A beneficial interest in Mortgagor is sold or transferred.

B. There is a change in either the identity or number of members of a partnership or similar entity.

C. There is a change in ownership of more than 25 percent of the voting stock of a corporation or similar entity.

However, Lender may not demand payment in the above situations if it is prohibited by law as of the date of this Security Instrument.

10. WARRANTIES AND REPRESENTATIONS. Mortgagor makes to Lender the following warranties and representations which will continue as long as this Security Instrument is in effect:

WADD, LLC
South Carolina Mortgage
SC/4aej188840002200b00684801803280BY

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Page 2

A. Power. Mortgagor is duly organized, and validly existing and in good standing in all jurisdictions in which Mortgagor operates. Mortgagor has the power and authority to enter into this transaction and to carry on Mortgagor's business or activity as it is now being conducted and, as applicable, is qualified to do so in each jurisdiction in which Mortgagor operates.

B. Authority. The execution, delivery and performance of this Security Instrument and the obligation evidenced by this Security Instrument are within Mortgagor's powers, have been duly authorized, have received all necessary governmental approval, will not violate any provision of law, or order of court or governmental agency, and will not violate any agreement to which Mortgagor is a party or to which Mortgagor is or any of Mortgagor's property is subject.

C. Name and Place of Business. Other than previously disclosed in writing to Lender, Mortgagor has not changed Mortgagor's name or principal place of business within the last 10 years and has not used any other trade or fictitious name. Without Lender's prior written consent, Mortgagor does not and will not use any other name and will preserve Mortgagor's existing name, trade names and franchises.

11. PROPERTY CONDITION, ALTERATIONS AND INSPECTION. Mortgagor will keep the Property in good condition and make all repairs that are reasonably necessary. Mortgagor will not commit or allow any waste, impairment, or deterioration of the Property. Mortgagor will keep the Property free of noxious weeds and grasses. Mortgagor agrees that the nature of the occupancy and use will not substantially change without Lender's prior written consent. Mortgagor will not permit any change in any license, restrictive covenant or easement without Lender's prior written consent. Mortgagor will notify Lender of all demands, proceedings, claims, and actions against Mortgagor, and of any loss or damage to the Property.

No portion of the Property will be removed, demolished or materially altered without Lender's prior written consent except that Mortgagor has the right to remove items of personal property comprising a part of the Property that become worn or obsolete, provided that such personal property is replaced with other personal property at least equal in value to the replaced personal property, free from any title retention device, security agreement or other encumbrance. Such replacement of personal property will be deemed subject to the security interest created by this Security Instrument. Mortgagor will not partition or subdivide the Property without Lender's prior written consent.

Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Lender will give Mortgagor notice at the time of or before an inspection specifying a reasonable purpose for the inspection. Any inspection of the Property will be entirely for Lender's benefit and Mortgagor will in no way rely on Lender's inspection.

12. AUTHORITY TO PERFORM. If Mortgagor fails to perform any duty or any of the covenants contained in this Security Instrument, Lender may, without notice, perform or cause them to be performed. Mortgagor appoints Lender as attorney in fact to sign Mortgagor's name or pay any amount necessary for performance. Lender's right to perform for Mortgagor will not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Security Instrument. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may take all steps necessary to protect Lender's security interest in the Property, including completion of the construction.

13. DEFAULT. Mortgagor will be in default if any of the following occur:

A. Payments. Mortgagor fails to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against Mortgagor, Borrower, or any co-signer, endorser, surety or guarantor of this Security Instrument or any other obligations Borrower has with Lender.

C. Business Termination. Mortgagor merges, dissolves, reorganizes, ends its business or existence, or a partner or majority owner dies or is declared legally incompetent.

D. Failure to Perform. Mortgagor fails to perform any condition or to keep any promise or covenant of this Security Instrument.

E. Other Documents. A default occurs under the terms of any other document relating to the Secured Debts.

F. Other Agreements. Mortgagor is in default on any other debt or agreement Mortgagor has with Lender.

G. Misrepresentation. Mortgagor makes any verbal or written statement or provides any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. Mortgagor fails to satisfy or appeal any judgment against Mortgagor.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. Mortgagor changes Mortgagor's name or assumes an additional name without notifying Lender before making such a change.

K. Property Transfer. Mortgagor transfers all or a substantial part of Mortgagor's money or property. This condition of default, as it relates to the transfer of the Property, is subject to the restrictions contained in the DUE ON SALE section.

L. Property Value. Lender determines in good faith that the value of the Property has declined or is impaired.

M. Material Change. Without first notifying Lender, there is a material change in Mortgagor's business, including ownership, management, and financial conditions.

N. Insecurity. Lender determines in good faith that a material adverse change has occurred in Mortgagor's financial condition from the conditions set forth in Mortgagor's most recent financial statement before the date of this Security Instrument or that the prospect for payment or performance of the Secured Debts is impaired for any reason.

14. REMEDIES. On or after default, Lender may use any and all remedies Lender has under state or federal law or in any document relating to the Secured Debts. Any amounts advanced on Mortgagor's behalf will be immediately due and may be added to the balance owing under the Secured Debts. Lender may make a claim for any and all insurance benefits or refunds that may be available on Mortgagor's default.

Subject to any right to cure, required time schedules or any other notice rights Mortgagor may have under federal and state law, Lender may make all or any part of the amount owing by the terms of the Secured Debts immediately due and foreclose this Security Instrument in a manner provided by law upon the occurrence of a default or anytime thereafter.

All remedies are distinct, cumulative and not exclusive, and the Lender is entitled to all remedies provided at law or equity, whether or not expressly set forth. The acceptance by Lender of any sum in payment or partial payment on the Secured Debts after the balance is due or is accelerated or after foreclosure proceedings are filed will not constitute a waiver of Lender's right to require full and complete cure of any existing default. By not exercising any remedy, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.

At any time after default (whether before or after judgment), Lender may take possession of any collateral for the loan or obtain the appointment of a receiver pursuant to SC Code §15-85-10, et seq. or otherwise as permitted by law. Any receiver shall be vested with all of the powers, rights and duties of receivers generally. Lender or any receiver may collect any rents and profits from the collateral and may rent, sell, operate or manage the collateral without notice to Mortgagor or any other party (Mortgagor waives any right to notice) and without consideration of the value of the collateral or Mortgagor's solvency. All amounts collected by Lender or the receiver shall, after the expenses of taking possession, renting, selling, operating and managing (and of any receivership), be applied to payment of the loan. If Lender should take possession or if a receiver should be appointed or if there should be a sale of the collateral, Mortgagor, or any person in possession of the collateral, shall become a tenant at will of Lender, the receiver or the purchaser and may be removed by a writ of ejectment, summary ejectment or other lawful remedy.

15. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after Default, to the extent permitted by law, Mortgagor agrees to pay all expenses of collection, enforcement or protection of Lender's rights and remedies under this Security Instrument or any other document relating to the Secured Debts. Mortgagor agrees to pay expenses for Lender to inspect and preserve the Property and for any recordation costs of releasing the Property from this Security Instrument. Expenses include, but are not limited to, attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of the Secured Debts. In addition, to the extent permitted by the United States Bankruptcy Code, Mortgagor agrees to pay the reasonable attorneys' fees incurred by Lender to protect Lender's rights and interests in connection with any bankruptcy proceedings initiated by or against Mortgagor.

16. ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES. As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA,

42 U.S.C. 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substance," "hazardous waste," "hazardous substance," or "regulated substance" under any Environmental Law.

Mortgagor represents, warrants and agrees that:

A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.

B. Except as previously disclosed and acknowledged in writing to Lender, Mortgagor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.

C. Mortgagor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Mortgagor will take all necessary remedial action in accordance with Environmental Law.

D. Except as previously disclosed and acknowledged in writing to Lender, Mortgagor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Mortgagor or any tenant of any Environmental Law. Mortgagor will immediately notify Lender in writing as soon as Mortgagor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.

E. Except as previously disclosed and acknowledged in writing to Lender, Mortgagor and every tenant have been, are and will remain in full compliance with any applicable Environmental Law.

F. Except as previously disclosed and acknowledged in writing to Lender, there are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.

G. Mortgagor will regularly inspect the Property, monitor the activities and operations on the Property; and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.

H. Mortgagor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Mortgagor and any tenant are in compliance with applicable Environmental Law.

I. Upon Lender's request and at any time, Mortgagor agrees, at Mortgagor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.

J. Lender has the right, but not the obligation, to perform any of Mortgagor's obligations under this section at Mortgagor's expense.

K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Mortgagor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Security Instrument and in return Mortgagor will provide Lender with collateral of at least equal value to the Property without prejudice to any of Lender's rights under this Security Instrument.

L. Notwithstanding any of the language contained in this Security Instrument to the contrary, the terms of this section will survive any foreclosure or satisfaction of this Security Instrument regardless of any passage of title.

to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.

17. CONDEMNATION. Mortgagor will give Lender prompt notice of any pending or threatened action by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Mortgagor authorizes Lender to intervene in Mortgagor's name in any of the above described actions or claims. Mortgagor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds will be considered payments and will be applied as provided in this Security Instrument. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

18. INSURANCE. Mortgagor agrees to keep the Property insured against the risks reasonably associated with the Property. Mortgagor will maintain this insurance in the amounts Lender requires. This insurance will last until the Property is released from this Security Instrument. What Lender requires pursuant to the preceding two sentences can change during the term of the Secured Debts. Mortgagor may choose the insurance company, subject to Lender's approval, which will not be unreasonably withheld.

All insurance policies and renewals will include a standard "mortgage clause" and, where applicable, "loss payee clause." If required by Lender, Mortgagor agrees to maintain comprehensive general liability insurance and rental loss or business interruption insurance in amounts and under policies acceptable to Lender. The comprehensive general liability insurance must name Lender as an additional insured. The rental loss or business interruption insurance must be in an amount equal to, at least, coverage of one year's debt service, and required escrow account deposits (if agreed to separately in writing).

Mortgagor will give Lender and the insurance company immediate notice of any loss. All insurance proceeds will be applied to restoration or repair of the Property or to the Secured Debts, at Lender's option. If Lender acquires the Property in damaged condition, Mortgagor's rights to any insurance policies and proceeds will pass to Lender to the extent of the Secured Debts.

Mortgagor will immediately notify Lender of cancellation or termination of insurance. If Mortgagor fails to keep the Property insured, Lender may obtain insurance to protect Lender's interest in the Property and Mortgagor will pay for the insurance on Lender's demand. Lender may demand that Mortgagor pay for the insurance all at once, or Lender may add the insurance premiums to the balance of the Secured Debts and charge interest on it at the rate that applies to the Secured Debts. This insurance may include coverages not originally required of Mortgagor, may be written by a company other than one Mortgagor would choose, and may be written at a higher rate than Mortgagor could obtain if Mortgagor purchased the insurance. Mortgagor acknowledges and agrees that Lender or one of Lender's affiliates may receive commissions on the purchase of this insurance.

19. ESCROW FOR TAXES AND INSURANCE. Mortgagor will not be required to pay to Lender funds, for taxes and insurance in escrow.

20. CO-SIGNERS. If Mortgagor signs this Security Instrument but is not otherwise obligated to pay the Secured Debts, Mortgagor does so only to mortgage Mortgagor's interest in the Property to secure payment of the Secured Debts and Mortgagor does not agree by signing this Security Instrument to be personally liable on the Secured Debts. If this Security Instrument secures a guaranty between Lender and Mortgagor, Mortgagor agrees to waive any rights that may prevent Lender from bringing any action or claim against Mortgagor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws.

21. WAIVERS. Except to the extent prohibited by law, Mortgagor waives all homestead exemption rights relating to the Property.

22. FIXTURE FILING. Mortgagor gives to Lender a security interest in all goods that Mortgagor owns now or in the future and that are or will become fixtures related to the Property.

23. PERSONAL PROPERTY. Mortgagor gives to Lender a security interest in all personal property located on or connected with the Property, including 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 (all of which shall also be included in the term 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.

24. OTHER TERMS. The following are applicable to this Security Instrument:

ADD, LLC
South Carolina Mortgage
SC/4ae1688400022000008B48018032809Y

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Page 6

A. Additional Terms. This Agreement (along with all deposit accounts, mortgages, security agreements, pledge agreements and any and all other security instruments and items of collateral that I have at any time in the past given to you or that I may at any time in the future give to you) shall secure any and all of the obligations that I currently owe you or that I may at any time in the future owe you.

Notwithstanding the foregoing maximum obligation limit of \$127,758.00 specified in paragraph 2 above, pursuant to the provisions of Section 29-3-50 et seq. of the South Carolina Code of Laws, as amended, this Mortgage shall secure payment of all future advances and/or extensions of credit that may subsequently be made to Mortgagor by Lender, when evidenced by promissory notes specifically referring to this Mortgage and all extensions and renewals thereof, the maximum principal amount of all existing indebtedness, future advances, extensions of credit and all other indebtedness outstanding at any one time and to be secured by this Mortgage not to exceed ONE HUNDRED NINETY ONE THOUSAND SIX HUNDRED THIRTY-SEVEN DOLLARS AND NO/100 (\$191,637.00), plus interest thereon, attorneys' fees and court costs, and any advances necessary for the protection of the security or title thereto, including, but not limited to, advances for taxes and insurance premiums and all other payments or liabilities otherwise provided for in this Mortgage. This Mortgage may secure interest which is deferred, accrued or capitalized as provided in the aforesaid statute.

25. APPLICABLE LAW. This Security Instrument is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

26. JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS. Each Mortgagor's obligations under this Security Instrument are independent of the obligations of any other Mortgagor. Lender may sue each Mortgagor individually or together with any other Mortgagor. Lender may release any part of the Property and Mortgagor will still be obligated under this Security Instrument for the remaining Property. If this Security Instrument secures a guaranty between Lender and Mortgagor, Mortgagor agrees to waive any rights that may prevent Lender from bringing any action or claim against Mortgagor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws. Mortgagor agrees that Lender and any party to this Security Instrument may extend, modify or make any change in the terms of this Security Instrument or any evidence of debt without Mortgagor's consent. Such a change will not release Mortgagor from the terms of this Security Instrument. The duties and benefits of this Security Instrument will bind and benefit the successors and assigns of Lender and Mortgagor.

27. AMENDMENT, INTEGRATION AND SEVERABILITY. This Security Instrument may not be amended or modified by oral agreement. No amendment or modification of this Security Instrument is effective unless made in writing and executed by Mortgagor and Lender. This Security Instrument and any other documents relating to the Secured Debts are the complete and final expression of the agreement. If any provision of this Security Instrument is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

28. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Security Instrument.

29. NOTICE, FINANCIAL REPORTS, ADDITIONAL DOCUMENTS AND RECORDING TAXES. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Mortgagor will be deemed to be notice to all Mortgagors. Mortgagor will inform Lender in writing of any change in Mortgagor's name, address or other application information. Mortgagor will provide Lender any financial statements or information Lender requests. All financial statements and information Mortgagor gives Lender will be correct and complete. Mortgagor agrees to pay all expenses, charges and taxes in connection with the preparation and recording of this Security Instrument. Mortgagor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Mortgagor's obligations under this Security Instrument and to confirm Lender's lien status on any Property, and Mortgagor

agrees to pay all expenses, charges and taxes in connection with the preparation and recording thereof. Time is of the essence.

SIGNATURES. By signing under seal, Mortgagor agrees to the terms and covenants contained in this Security Instrument. Mortgagor also acknowledges receipt of a copy of this Security Instrument.

MORTGAGOR:

BADD, LLC

By

Charles A. Christenson (Seal)
CHARLES A. CHRISTENSON, MEMBER

(Witness)

Kara S. Stovall

(Witness)

By William A. Christenson (Seal)
WILLIAM A. CHRISTENSON, MEMBER

(Witness)

Kara S. Stovall

(Witness)

ACKNOWLEDGMENT.

(Business or Entity)

I, Kara S. Stovall a notary public for South Carolina do hereby certify that Charles A. Christenson - MEMBER of BADD, LLC a Limited Liability Company, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 1 day of April, 2008.

Kara S. Stovall
Signature of Notary Public

My commission expires:

4-26-11



BADD, LLC
South Carolina Mortgage
SC14ae1688400022000005848016032808Y

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Page 8

55

(Business or Entity)

State South Carolina OF Charleston County OF Charleston ss.

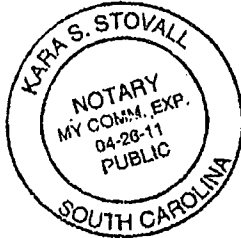
I, Kara S. Stovall, a notary public for South Carolina, do hereby certify that WILLIAM MCKOWN - MEMBER of BADD, LLC a Limited Liability Company, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 1 day of April, 2008.

Kara S. Stovall
Signature of Notary Public

My commission expires:

4-26-11



ADD, LLC
South Carolina Mortgage
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Page 9

EXHIBIT "A"

ALL AND SINGULAR, all that certain piece, parcel or lot of land situate, lying and being near the Town of Surfside Beach, Socastee Township, Horry County, South Carolina, and being designated as Lot Twenty-Nine (29) of the Caro Pine Subdivision (aka Caropine) as shown on a plat of said subdivision made by Caison Engineering Company, Inc. dated December 15, 1975 and recorded in Plat Book 59 at Page 66, records of the Register of Deeds for Horry County, reference to which is craved as forming a part of these presents.

This being the identical property conveyed to Gibraltar Enterprises, LLC by deed of One Eighty One, Inc., dated March 17, 2006 and recorded March 20, 2006 in Deed Book 3065 at Page 1385 in the office of the Register of Deeds for Horry County, South Carolina.

EXHIBIT "F"

ALL AND SINGULAR, that certain piece, parcel or lot of land situate, lying and being near the Town of Surfside Beach, Socastee Township, Horry County, South Carolina and being designated as **PARCEL D** of **LOT 29** as shown and delineated on a plat entitled: Caropines Lot 29 – Section A Units A – G, survey for Gibraltar Enterprises, LLC, prepared by Huntley & Associates, Inc., Land Surveyor of said survey dated 1/19/07 and recorded 2/28/07 in Plat Book 222 at Page 154, records of the Register of Deeds for Horry County, South Carolina.

This is a portion of the identical property conveyed to BADD, LLC, by deed from Gibraltar Enterprises, LLC. Said deed is dated March 31, 2008 and was recorded on April 4, 2008 in Deed Book 3325 at Page 2689, records of the Register of Deeds for Horry County, South Carolina.

Parcel D – Tax Map No.: 191-15-05-037

GUARANTY
(Continuing Debt - Unlimited)

DATE AND PARTIES. The date of this Guaranty is March 14, 2008. The parties and their addresses are:

LENDER:

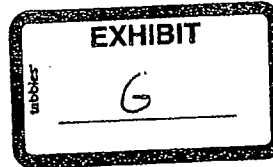
CAROLINA FIRST BANK
104 South Main Street
Greenville, South Carolina 29601
Telephone: (800) 475-8400

BORROWER:

BADD, LLC
a South Carolina Limited Liability Company
116 N DOGWOOD DRIVE
SURFSIDE BEACH, South Carolina 29575

GUARANTOR:

WILLIAM MCKOWN
1954 POMFANO DRIVE
GARDEN CITY BEACH, South Carolina 29576



1. DEFINITIONS. As used in this Guaranty, the terms have the following meanings:

- A. Pronouns.** The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.
- B. Note.** "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.
- C. Property.** "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

2. SPECIFIC AND FUTURE DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce you, at your option, to make loans or engage in any other transactions with the Borrower from time to time, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, dated March 14, 2008, from BADD, LLC (Borrower) to you, in the amount of \$246,758.00. In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of these debts) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note. You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

- A. Future Advances.** I waive notice of and consent to any and all future advances made to the Borrower by you.

4. UNCONDITIONAL LIABILITY. I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you, pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any

WILLIAM MCKOWN
South Carolina Guaranty
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Page 1

other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

6. REVOCATION. I agree that this is an absolute and unconditional Guaranty. I agree that this Guaranty will remain binding on me, whether or not there are any Debts outstanding, until you have actually received written notice of my revocation or written notice of my death or incompetence. Notice of revocation or notice of my death or incompetence will not affect my obligations under this Guaranty with respect to any Debts incurred by or for which you have made a commitment to Borrower before you actually receive such notice, and all renewals, extensions, refinancings, and modifications of such Debts. I agree that if any other person signing this Guaranty provides a notice of revocation to you, I will still be obligated under this Guaranty until I provide such a notice of revocation to you. If any other person signing this Guaranty dies or is declared incompetent, such fact will not affect my obligations under this Guaranty.

7. PROPERTY. I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me or my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

8. DEFAULT. I will be in default if any of the following occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-signer, endorser, surety or guarantor of this Guaranty or any Debt.

C. Death or Incompetency. I die or am declared legally incompetent.

D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Guaranty.

E. Other Documents. A default occurs under the terms of any other document relating to the Debt.

F. Other Agreements. I am in default on any other debt or agreement I have with you.

G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. I fail to satisfy or appeal any judgment against me.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. I change my name or assume an additional name without notifying you before making such a change.

K. Property Transfer. I transfer all or a substantial part of my money or property.

L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.

M. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

9. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "Insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or

other person in control or a close relative of any of these other persons.) Any Guarantor who is not an insider makes these waivers until all Debt is fully repaid.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt Instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. Waiver of Claims. I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. REMEDIES. After the Borrower or I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. Payments Made on the Borrower's Behalf. Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

12. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

13. RELIANCE. I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and I have signed this Guaranty to induce you to extend such credit. I represent and warrant to you that I have a direct and substantial economic interest in the Borrower and expect to derive substantial benefits from any loans and financial accommodations resulting in the creation of indebtedness guaranteed hereby. I agree to rely exclusively on the right to revoke this Guaranty prospectively as to future transactions in the manner as previously described in this Guaranty if at any time, in my opinion, the benefits then being received by me in connection with this Guaranty are not sufficient to warrant the continuance of this Guaranty. You may rely conclusively on a continuing warranty that I continue to be benefited by this Guaranty and you will have no duty to inquire into or confirm the receipt of any such benefits, and this Guaranty will be effective and enforceable by you without regard to the receipt, nature or value of any such benefits.

14. APPLICABLE LAW. This Guaranty is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

15. AMENDMENT, INTEGRATION AND SEVERABILITY. This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty is the complete and final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

16. ASSIGNMENT. If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

17. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Guaranty.

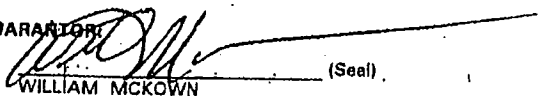
18. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

19. CREDIT INFORMATION. I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others.

20. ADDITIONAL TERMS. THIS GUARANTOR'S SOCIAL SECURITY NUMBER IS 264-27-6328. THIS GUARANTOR'S DATE OF BIRTH IS 06/15/1956.

21. SIGNATURES. By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

GUARANTOR


WILLIAM MCKOWN

(Seal)

Individually

WILLIAM MCKOWN
South Carolina Guaranty
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Page 4

GUARANTY
(Continuing Debt - Unlimited)

DATE AND PARTIES. The date of this Guaranty is March 14, 2008. The parties and their addresses are:

LENDER:

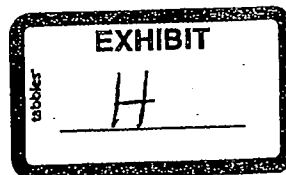
CAROLINA FIRST BANK
104 South Main Street
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BORROWER:

BADD, LLC
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118 N DOGWOOD DRIVE
SURFSIDE BEACH, South Carolina 29575

GUARANTOR:

CHARLES A. CHRISTENSON
711 TRIPLE OAK
GARDEN CITY BEACH, South Carolina 29576



1. DEFINITIONS. As used in this Guaranty, the terms have the following meanings:

A. Pronouns. The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.

B. Note. "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.

C. Property. "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

2. SPECIFIC AND FUTURE DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce you, at your option, to make loans or engage in any other transactions with the Borrower from time to time, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, dated March 14, 2008, from BADD, LLC (Borrower) to you, in the amount of \$246,768.00.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of these debts) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

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5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you, pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any

CHARLES A. CHRISTENSON
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Page 1

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(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or

other person in control or a close relative of any of these other persons.) Any Guarantor who is not an insider makes these waivers until all Debt is fully repaid.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. Waiver of Claims. I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. REMEDIES. After the Borrower or I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. Payments Made on the Borrower's Behalf. Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

12. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

13. RELIANCE. I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and I have signed this Guaranty to induce you to extend such credit. I represent and warrant to you that I have a direct and substantial economic interest in the Borrower and expect to derive substantial benefits from any loans and financial accommodations resulting in the creation of indebtedness guaranteed hereby. I agree to rely exclusively on the right to revoke this Guaranty prospectively as to future transactions in the manner as previously described in this Guaranty if at any time, in my opinion, the benefits then being received by me in connection with this Guaranty are not sufficient to warrant the continuance of this Guaranty. You may rely conclusively on a continuing warranty that I continue to be benefited by this Guaranty and you will have no duty to inquire into or confirm the receipt of any such benefits, and this Guaranty will be effective and enforceable by you without regard to the receipt, nature or value of any such benefits.

14. APPLICABLE LAW. This Guaranty is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

15. AMENDMENT, INTEGRATION AND SEVERABILITY. This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty is the complete and final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

16. ASSIGNMENT. If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

17. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Guaranty.

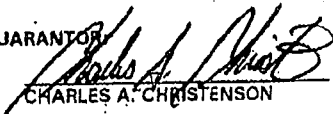
18. **NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

19. **CREDIT INFORMATION.** I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others.

20. **ADDITIONAL TERMS.** THIS GUARANTOR'S SOCIAL SECURITY NUMBER IS 248-53-9806. THIS GUARANTOR'S DATE OF BIRTH IS 01/04/1968.

21. **SIGNATURES.** By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

GUARANTOR


CHARLES A. CHRISTENSON (Seal)
Individually

GUARANTY
(Continuing Debt - Unlimited)

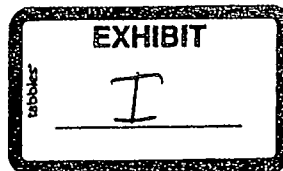
DATE AND PARTIES. The date of this Guaranty is April 1, 2008. The parties and their addresses are:

LENDER:

CAROLINA FIRST BANK
104 South Main Street
Greenville, South Carolina 29601
Telephone: (800) 476-6400

BORROWER:

BADD, LLC
a South Carolina Limited Liability Company
116 N DOGWOOD DRIVE
SURFSIDE BEACH, South Carolina 29576



GUARANTOR:

WILLIAM MCKOWN
1964 POMPANO DRIVE
GARDEN CITY BEACH, South Carolina 29576

1. DEFINITIONS. As used in this Guaranty, the terms have the following meanings:

- A. Pronouns.** The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.
- B. Note.** "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.
- C. Property.** "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

2. SPECIFIC AND FUTURE DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce you, at your option, to make loans or engage in any other transactions with the Borrower from time to time, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, dated April 1, 2008, from BADD, LLC (Borrower) to you, in the amount of \$127,758.00.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of these debts) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

A. Future Advances. I waive notice of and consent to any and all future advances made to the Borrower by you.

4. UNCONDITIONAL LIABILITY. I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you, pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any

WILLIAM MCKOWN
South Carolina Guaranty
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Page 1

other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

6. REVOCATION. I agree that this is an absolute and unconditional Guaranty. I agree that this Guaranty will remain binding on me, whether or not there are any Debts outstanding, until you have actually received written notice of my revocation or written notice of my death or incompetence. Notice of revocation or notice of my death or incompetence will not affect my obligations under this Guaranty with respect to any Debts incurred by or for which you have made a commitment to Borrower before you actually receive such notice, and all renewals, extensions, refinancings, and modifications of such Debts. I agree that if any other person signing this Guaranty provides a notice of revocation to you, I will still be obligated under this Guaranty until I provide such a notice of revocation to you. If any other person signing this Guaranty dies or is declared incompetent, such fact will not affect my obligations under this Guaranty.

7. PROPERTY. I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me or my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

8. DEFAULT. I will be in default if any of the following occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-signer, endorser, surety or guarantor of this Guaranty or any Debt.

C. Death or Incompetency. I die or am declared legally incompetent.

D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Guaranty.

E. Other Documents. A default occurs under the terms of any other document relating to the Debt.

F. Other Agreements. I am in default on any other debt or agreement I have with you.

G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. I fail to satisfy or appeal any judgment against me.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. I change my name or assume an additional name without notifying you before making such a change.

K. Property Transfer. I transfer all or a substantial part of my money or property.

L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.

M. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

9. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or

other person in control or a close relative of any of these other persons.) Any Guarantor who is not an insider makes these waivers until all Debt is fully repaid.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. Waiver of Claims. I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. REMEDIES. After the Borrower or I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. Source. You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. Payments Made on the Borrower's Behalf. Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

12. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

13. RELIANCE. I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and I have signed this Guaranty to induce you to extend such credit. I represent and warrant to you that I have a direct and substantial economic interest in the Borrower and expect to derive substantial benefits from any loans and financial accommodations resulting in the creation of indebtedness guaranteed hereby. I agree to rely exclusively on the right to revoke this Guaranty prospectively as to future transactions in the manner as previously described in this Guaranty if at any time, in my opinion, the benefits then being received by me in connection with this Guaranty are not sufficient to warrant the continuance of this Guaranty. You may rely conclusively on a continuing warranty that I continue to be benefited by this Guaranty and you will have no duty to inquire into or confirm the receipt of any such benefits, and this Guaranty will be effective and enforceable by you without regard to the receipt, nature or value of any such benefits.

14. APPLICABLE LAW. This Guaranty is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

15. AMENDMENT, INTEGRATION AND SEVERABILITY. This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty is the complete and final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

16. ASSIGNMENT. If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

17. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Guaranty.

WILLIAM MCKOWN
South Carolina Guaranty
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Page 3

18. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

19. CREDIT INFORMATION. I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others.

20. ADDITIONAL TERMS. THIS GUARANTOR'S SOCIAL SECURITY NUMBER IS 264-27-6328. THIS GUARANTOR'S DATE OF BIRTH IS 06-15-1956

21. SIGNATURES. By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

GUARANTOR

WILLIAM MCKOWN

Individually

(Seal)

GUARANTY
(Continuing Debt - Unlimited)

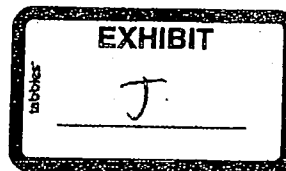
DATE AND PARTIES. The date of this Guaranty is April 1, 2008. The parties and their addresses are:

LENDER:

CAROLINA FIRST BANK
104 South Main Street
Greenville, South Carolina 29601
Telephone: (800) 478-8400

BORROWER:

BADD, LLC
a South Carolina Limited Liability Company
118 N DOGWOOD DRIVE
SURFSIDE BEACH, South Carolina 29575



GUARANTOR:

CHARLES A. CHRISTENSON
711 TRIPLE OAK
GARDEN CITY BEACH, South Carolina 29576

1. DEFINITIONS. As used in this Guaranty, the terms have the following meanings:

- A. Pronouns.** The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.
- B. Note.** "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.
- C. Property.** "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

2. SPECIFIC AND FUTURE DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce you, at your option, to make loans or engage in any other transactions with the Borrower from time to time, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, dated April 1, 2008, from BADD, LLC (Borrower) to you, in the amount of \$127,768.00.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of these debts) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

A. Future Advances. I waive notice of and consent to any and all future advances made to the Borrower by you.

4. UNCONDITIONAL LIABILITY. I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you, pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any

CHARLES A. CHRISTENSON
South Carolina Guaranty
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Page 1

other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

6. REVOCATION. I agree that this is an absolute and unconditional Guaranty. I agree that this Guaranty will remain binding on me, whether or not there are any Debts outstanding, until you have actually received written notice of my revocation or written notice of my death or incompetence. Notice of revocation or notice of my death or incompetence will not affect my obligations under this Guaranty with respect to any Debts incurred by or for which you have made a commitment to Borrower before you actually receive such notice, and all renewals, extensions, refinancings, and modifications of such Debts. I agree that if any other person signing this Guaranty provides a notice of revocation to you, I will still be obligated under this Guaranty until I provide such a notice of revocation to you. If any other person signing this Guaranty dies or is declared incompetent, such fact will not affect my obligations under this Guaranty.

7. PROPERTY. I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me or my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

8. DEFAULT. I will be in default if any of the following occur:

A. **Payments.** I fail to make a payment in full when due.

B. **Insolvency or Bankruptcy.** The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-signer, endorser, surety or guarantor of this Guaranty or any Debt.

C. **Death or Incompetency.** I die or am declared legally incompetent.

D. **Failure to Perform.** I fail to perform any condition or to keep any promise or covenant of this Guaranty.

E. **Other Documents.** A default occurs under the terms of any other document relating to the Debt.

F. **Other Agreements.** I am in default on any other debt or agreement I have with you.

G. **Misrepresentation.** I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. **Judgment.** I fail to satisfy or appeal any judgment against me.

I. **Forfeiture.** The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. **Name Change.** I change my name or assume an additional name without notifying you before making such a change.

K. **Property Transfer.** I transfer all or a substantial part of my money or property.

L. **Property Value.** You determine in good faith that the value of the Property has declined or is impaired.

M. **Insecurity.** You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

9. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. **Additional Waivers.** In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or

other person in control or a close relative of any of these other persons.) Any Guarantor who is not an insider makes these waivers until all Debt is fully repaid.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt Instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. Waiver of Claims. I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. REMEDIES. After the Borrower or I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. Payments Made on the Borrower's Behalf. Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

12. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

13. RELIANCE. I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and I have signed this Guaranty to induce you to extend such credit. I represent and warrant to you that I have a direct and substantial economic interest in the Borrower and expect to derive substantial benefits from any loans and financial accommodations resulting in the creation of indebtedness guaranteed hereby. I agree to rely exclusively on the right to revoke this Guaranty prospectively as to future transactions in the manner as previously described in this Guaranty if at any time, in my opinion, the benefits then being received by me in connection with this Guaranty are not sufficient to warrant the continuance of this Guaranty. You may rely conclusively on a continuing warranty that I continue to be benefited by this Guaranty and you will have no duty to inquire into or confirm the receipt of any such benefits, and this Guaranty will be effective and enforceable by you without regard to the receipt, nature or value of any such benefits.

14. APPLICABLE LAW. This Guaranty is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

15. AMENDMENT, INTEGRATION AND SEVERABILITY. This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty is the complete and final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

16. ASSIGNMENT. If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

17. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Guaranty.

CHARLES A. CHRISTENSON
South Carolina Guaranty
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Page 3

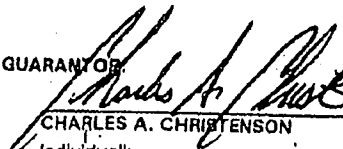
18. **NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

19. **CREDIT INFORMATION.** I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others.

20. **ADDITIONAL TERMS.** THIS GUARANTOR'S SOCIAL SECURITY NUMBER IS 248-53-9808. THIS GUARANTOR'S DATE OF BIRTH IS 01-04-1968

21. **SIGNATURES.** By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

GUARANTOR


CHARLES A. CHRISTENSON

(Seal)

Individually

CHARLES A. CHRISTENSON
South Carolina Guaranty
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Page 4

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Carolina First Bank,

Plaintiff,

v.

BADD, LLC, William McKown,
and Charles A. Christenson,

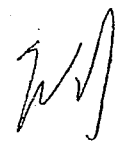
Defendants.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2010-CP-26-8505

NOTICE OF MOTION AND MOTION
FOR ORDER OF REFERENCE

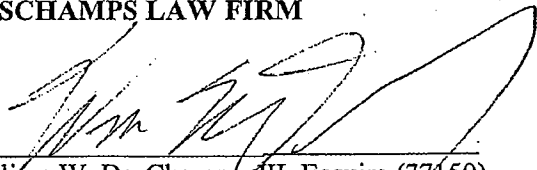
TO: THE DEFENDANTS ABOVE-NAMED:

The Plaintiff, Carolina First Bank, pursuant to Rules 53 and 71 of the *South Carolina Rules of Civil Procedure*, hereby moves before the Court for an order referring this action for a mortgage foreclosure, to the Master-in-Equity for Horry County to take testimony arising under the pleadings, to make findings of fact and conclusions of law with authority to dispose of any and all issues and enter a final judgment in the case, and to hear any issue after said judgment relating to this action. The Plaintiff further moves that the Court provide in its Order of Reference that any appeal from the decision of the Master-in-Equity shall be directly to the South Carolina Supreme Court. The Plaintiff has requested the reference in its Summons and its Complaint having alleged that this is a proper matter to be referred to the Master-in-Equity for Horry County with finality with any appeal from the Order of said Master-in-Equity to be to the South Carolina Supreme Court or the South Carolina Court of Appeals and, further, praying that an Order be entered referring this matter with finality to the Master-in-Equity for Horry County, with any appeal from the Order of said Master-in-Equity to be to the South Carolina Supreme Court or the South Carolina Court of Appeals. For Rule 11 purposes, additional and/or prior consultation with Defendant William McKown's counsel would serve no useful purpose. As this Motion for an Order Appointing a Receiver is being filed and served with the pleadings, the other named Defendants have yet to retain counsel and, therefore, Rule 11 certification is not required.



WHEREFORE, the Plaintiff requests that this Honorable Court refer this matter with finality to the Master-in-Equity for Horry County pursuant to Rules 71 and 53 of the *South Carolina Rules of Civil Procedure*, specifically providing that said Master-in-Equity be authorized and empowered to enter a final judgment in the action including, without limitation, judgment and sale on foreclosure pursuant to Rule 71(b), *SCRCP*.

DESCHAMPS LAW FIRM



William W. DesChamps, III, Esquire (77150)
William W. DesChamps, Jr., Esquire (01658)
Attorney for Plaintiff, Carolina First Bank
1551 21st Avenue North, Suite 14
Myrtle Beach, South Carolina 29577
(843) 448-2391
E-mail: trey@deschampsllaw.com

September 1, 2010
Myrtle Beach, South Carolina

CLERK'S VERIFICATION

Collected by: _____

Date filed: _____

MOTION FEE COLLECTED: _____

CONTESTED - AMOUNT DUE: _____

IN THE STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Carolina First Bank,

Plaintiff,

vs.

BADD, LLC, William McKown, and
Charles A. Christenson,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2010-CP-26-8505

ANSWER AND
COUNTERCLAIM
JURY TRIAL DEMANDED

2010 NOV - 1 PM 3:45
CLERK OF COURT

NOW COMES BADD, LLC and William McKown, (the "Defendants"), and responds to the complaint against them by Carolina First Bank ("Carolina First" or the "Plaintiff"); as follows:

FOR A FIRST DEFENSE
(General Denial)

1. All allegations of the Complaint (the "Complaint") are denied unless otherwise admitted herein.
2. Upon information and belief, the allegations of Paragraph 1, 2, 3, 4, 5, 6, and 8 are admitted.
3. The Defendant BADD would admit the allegation of paragraph 7 and 9 as to it, however McKown would deny the allegation of paragraph 7 and 9 as to him.
4. The Defendants would show as to the allegations of paragraphs 10, and 30 of the Complaint, these allegations refer to and incorporate other allegations contained in the Complaint and to the extent necessary, the Defendant would incorporate his responses to these allegations in response to these paragraphs.
5. The Defendants admit the allegations of paragraph 11 of the Complaint.

6. The allegations of paragraphs 11, 12, 13, 14, 15, 16, 17, 18, and 19 refer to documents and to the extent that the documents alleged therein differ from the allegations contained in this paragraphs and to the extent that the court finds these documents unenforceable, the allegations are denied.

7. Defendants lack sufficient information to admit or deny the allegations contained in paragraphs 20 of the Complaint. The reason the Defendants lack sufficient information to admit or deny these allegations is because with the Plaintiff's permission, BADD retained a rental company to manage the property and have the rental company pay the rental income associated with the property directly to the Plaintiff. It is the Defendants understanding that the rental income was sufficient or should have been sufficient to maintain the payments due to the Plaintiff.

8. The Defendants deny the allegations of paragraph 21, 22, and 23.

9. The Defendants deny the allegation of paragraph 24 and would reallege that with the Plaintiff's permission a real estate broker was selected to manage the property and the real estate broker is in possession fo the real property.

10. The Defendants deny the allegations of paragraph 25, 26, 27, 28, and 29 of the Complaint.

11. The allegations of paragraphs 31, 32, 34, 35, and 37 refer to documents and to the extent that the documents alleged therein differ from the allegations contained in this paragraphs and to the extent that the court finds these documents unenforceable, the allegations are denied.

12. The Defendants lack sufficient information to admit or deny the allegations contained in paragraphs 33 and 36 of the complaint and would therefore deny the same and demand strict proof thereof.

13. The Defendants deny the allegations of paragraphs 38 and deny the Plaintiff's prayers

for relief.

FOR A SECOND DEFENSE
(Demand for Jury Trial - Accounting for Damages Alleged)

The Defendant reasserts the prior allegations of this pleading as if included herein verbatim.

14. The Plaintiff is seeking a money judgment against McKown based upon a contract. The request for a money judgment is not an equitable action, it is an action at law in which the Defendant is entitled to a Jury Trial.

15. The Plaintiff is seeking monetary damages against McKown for moneys lent to a third party. McKown entitled to an accounting of the money lent to the third party and an accounting of each payment made by the third party to the Plaintiff prior to an award being granted for the monetary damages.

16. Wherefore, McKown demands a jury trial on this action at law and demands a strict accounting of all damages alleged against McKown.

FOR A THIRD DEFENSE AND FIRST COUNTERCLAIM
(A Determination that the Guarantees are Unconscionable Adhesion Contracts)

The Defendants reassert the prior allegations of this pleading as if included herein verbatim.

17. If the document included as exhibits to the Complaint is the guarantee (the "Guarantee") executed by McKown ("the Guarantor"), this document was presented to the Guarantor as required documents that could not be altered by the Guarantor. As such, it was an adhesion contract.

18. Further, because of the bargaining positions of the parties, the Plaintiff included in the Guarantee provisions that no reasonable person would have agreed to. As such, the Guarantee is unconscionable and unenforceable. Specifically, the Guarantee include provisions that purport to make the Guarantor liable, even if:

- a. the underlying obligation is illegal, invalid and unenforceable. See ¶ 4.
- b. the underlying obligation was based upon a forgery. See ¶ 4.
- c. whether or not there are any debts outstanding. See ¶6.
- d. Whether or not the Plaintiff acted negligently or intentionally to the detriment of the Guarantors. See ¶ 7. and
- e. Whether or not the borrower is released from all liability. See ¶9(2),

19. Such provisions are unreasonable and defeat the general purpose and understanding of a guaranty. As such, these provisions make the Guarantee unconscionable and unenforceable.

20. Wherefore, McKown is entitled to have this matter dismissed as to him.

FOR A FOURTH DEFENSE AND SECOND COUNTERCLAIM
(Preservation of Defenses and Counterclaims)

The Defendants reassert the prior allegations of this pleading as if included herein verbatim.

21. The Defendants herein preserve their possible defenses of estoppel, waiver, accord and satisfaction, impairment of collateral, fraud in the factum, and any other affirmative defense that discovery may establish are available to the Defendants.

22. Similarly, the Defendants herein preserve their possible breach of contract causes of action against Plaintiff as well as any and all possible causes of action in equity and in law that could be based upon the discovery.

WHEREFORE, the Defendants, having fully responded to the Complaint of the Plaintiff would respectfully pray that this Court issue its order:

- a. Dismissing this Complaint;
- b. Awarding the Defendants a money judgment in the amount of their damages for the Plaintiff's breach of contract;

- c. Awarding the Defendant a money judgment for the costs of defending this action including reasonable attorney fees; and
- d. Award such other and further relief as the court deems just and proper

Respectfully Submitted,



Richard R. Gleissner, Esquire
S.C. Bar Number 15139
Gleissner Law Firm, L.L.C.
3610 Landmark Drive, Suite G
Columbia, South Carolina 29204
(803) 603-2229
Attorneys for the Defendants,
BADD, LLC and William McKown

Dated: October 29, 2010

IN THE STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Carolina First Bank,

Plaintiff,

vs.

BADD, LLC, William McKown, and
Charles A. Christenson,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2010-CP-26-8505

CERTIFICATE OF SERVICE

2010 NOV - 1 PM 3:45
CLERK OF COURT

I, the undersigned employee of the Gleissner Law Firm, LLC, hereby certify that I have served Defendants BADD, LLC's and William McKown's Answer and Counterclaim in the above captioned matter by placing a copy in the first class mail with sufficient postage prepaid addressed to:

William W. DesChamps, III, Esquire
1551 21st Avenue North, Suite 14
Post Office Box 2402
Myrtle Beach, SC 29578



Anissa Terpstra, Paralegal
Gleissner Law Firm, L.L.C.
3610 Landmark Drive, Suite G
Columbia, South Carolina 29204
(803) 603-2229
Attorneys for the Defendants,
BADD, LLC and William M. McKown

Dated: October 29, 2010

COPY

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Carolina First Bank, n/k/a TD
Bank, N.A.,)

Plaintiff,)

v.)

BADD, LLC, William McKown,
and Charles A. Christenson,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2010-CP-26-8505

REPLY TO DEFENDANTS', BADD,
LLC, AND WILLIAM MCKOWN,
COUNTERCLAIM

NOW COMES THE Plaintiff Carolina First Bank, now known as TD Bank, N.A.
(hereinafter sometimes referred to as "Carolina First"), in answering the Counterclaim of
Defendants BADD, LLC, and William McKown (hereinafter sometimes referred to as
"Defendants"), does hereby allege as follows:

FOR A FIRST DEFENSE

1. Carolina First does hereby deny each and every allegation in its entirety in the
Defendants' Counterclaim unless hereinafter specifically admitted.

FOR A SECOND DEFENSE

2. Paragraphs 1 through 13 of Defendants' Answer and Counterclaim represent an
answer to Carolina First's Complaint in this action and, therefore, do not require a
response from Carolina First. However, to the extent that an answer is required,
Carolina First denies the same and demands strict proof thereof.
3. Carolina First denies the allegations in paragraph 14 of Defendants' Answer and
Counterclaim and demands strict proof thereof. More specifically, Carolina First is
seeking a judgment against Defendant William McKown based upon the full amount
found to be due to it on the promissory notes and mortgages referenced in its
Complaint, with the right to reduce same by the amount realized thereon from the
proceeds of the sale, pursuant to Section 29-30-650 of the Code of Laws of South
Carolina (1976). The guaranty in favor of Plaintiff and referenced in Defendants'

RV

Answer and Counterclaim was delivered as security to induce said Plaintiff to extend credit to Defendant BADD, LLC. Further, the questions raised by Defendants' defenses and counterclaims directly affect the consideration and arise out of the transaction in which the mortgage liens were created.

4. Carolina First denies the allegations in paragraph 15 of Defendants' Answer and Counterclaim and demands strict proof thereof. More specifically, said monies were advanced to Defendant BADD, LLC, an entity in which Defendant William McKown is a member and authorized signatory. Further, Defendant William McKown executed all of the promissory notes and mortgages referenced in Plaintiff's Complaint on behalf of Defendant BADD, LLC.
5. Carolina First denies the allegations in paragraph 16 of Defendants' Answer and Counterclaim and demands strict proof thereof. More specifically, the Guaranty Agreement executed by Defendant William McKown in favor of Plaintiff was delivered to Plaintiff in order to induce Plaintiff to lend sums of money and/or as consideration for lending said sums of money under the subject promissory notes secured by the subject mortgages. Further, Defendant William McKown, in said paragraph 16, only alleges an equitable proceeding as well as an improper legal conclusion in his effort to demand a jury trial.
6. Carolina First denies the allegations in paragraphs 17, 18, 19, 20, 21, and 22 of Defendants' Answer and Counterclaim and demands strict proof thereof.

FOR A THIRD DEFENSE

(Motion to Dismiss and/or Strike Counterclaims)

7. Carolina First re-alleges all prior allegations and denials as if fully repeated herein verbatim.
8. Defendant William McKown alleges in his Answer and Counterclaim that he is entitled to a jury trial with respect to his accounting remedy and, therefore, he disputes any ground for the existence of equitable jurisdiction. Further, Defendant William McKown has failed to state facts sufficient to constitute a cause of action for an accounting.

9. Defendants deny the existence of any ground for the existence of equitable jurisdiction as to the guaranty executed by Defendant William McKown and, therefore, should not be entitled to seek equitable relief to avoid liability arising from the enforcement of said guaranty. Further, the subject guaranty executed by William McKown expressly provides that he represents and warrants to Plaintiff that he has a direct and substantial economic interest in the borrower and expects to derive substantial benefits from any loans and financial accommodations resulting in the creation of the indebtedness guaranteed hereby. Said guaranty also provides that Defendant William McKown represents and warrants that he entered into said guaranty at the request of borrower, and that said borrower is authorized to modify the terms of the debt or any instrument securing, guarantying or relating to the debt.
10. Plaintiff respectfully requests this Honorable Court to dismiss and/or strike Defendants' Counterclaims pursuant to Rule 12(b)(6) and/or Rule 12(f), *South Carolina Rules of Civil Procedure*.

FOR A FOURTH DEFENSE

(Motion to Strike Defendants' Demand for a Jury Trial)

11. Carolina First re-alleges all prior allegations and denials as if fully repeated herein verbatim.
12. Carolina First hereby moves, pursuant to Rule 12(f), *South Carolina Rules of Civil Procedure*, to strike paragraphs 14 and 16 of Defendants' Answer and Counterclaim as the allegations therein are immaterial, asserted without a basis in fact, and are impertinent or scandalous allegations as they request a jury trial under facts which give rise to an equitable cause of action and equitable defense which will determine the outcome of the case.

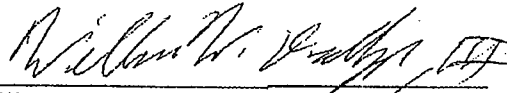
FOR A FIFTH DEFENSE

13. Carolina First re-alleges all prior allegations and denials as if fully repeated herein verbatim.
14. Carolina First reserves and does not waive any additional or further defenses which may be revealed by discovery.

WHEREFORE, Carolina First having fully answered the Counterclaim of Defendants,
prays that this Honorable Court inquire into the matters as set forth herein and:

- a. That Defendants' Counterclaims be dismissed with prejudice;
- b. That Defendants' demand for a jury trial be stricken from the Answer and Counterclaim; and
- c. For any other and further relief as this Court deems just and proper.

DESCHAMPS LAW FIRM



William W. DesChamps, III, Esquire (77150)
William W. DesChamps, Jr., Esquire (01658)
Attorney for Plaintiff, Carolina First Bank
1551 21st Avenue North, Suite 14
Myrtle Beach, South Carolina 29577
(843) 448-2391
E-mail: wwd@deschampsllaw.com
trey@deschampsllaw.com

November 3, 2010
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

CAROLINA FIRST BANK,)

Plaintiff,)

v.)

BADD, LLC, WILLIAM MCKOWN,
And CHARLES A. CHRISTENSON,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2010-CP-26-8505

CERTIFICATE OF SERVICE BY MAIL

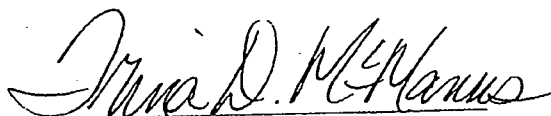
The undersigned hereby certifies that a true and exact copy (or copies) of the within-named document(s) have been served upon the following counsel of record or parties by delivering a copy of same to counsel or party via First Class, US Mail, postage prepaid, addressed as shown below, this 3rd day of November, 2010.

DOCUMENT(S):

Plaintiff's Reply to Defendants' Counterclaim

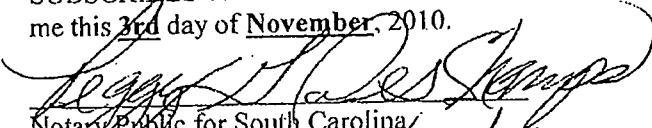
ADDRESSEE:

Richard Gleissner, Esquire
Gleissner Law Firm
3610 Landmark Drive, Suite G
Columbia, SC 29204



Trina D. McManus
Legal Assistant

SUBSCRIBED and sworn to before
me this 3rd day of November, 2010.



Notary Public for South Carolina

My Commission Expires: 7/28/2018

IN THE STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Carolina First Bank,

Plaintiff,

vs.

BADD, LLC, William McKown, and
Charles A. Christenson,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2010-CP-26-8505

MOTION TO AMEND

HORRY COUNTY
11 JAN 21 PM 2:13
MELANIE HUGHES-WARD
CLERK OF COURT

The Defendants BADD, LLC ("Badd") and William McKown ("McKown") (collectively the Defendants"), by and through their undersigned counsel does hereby, pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, request permission to amend their Answer and Counterclaim based upon information obtained subsequent to the filing of the initial Answer and Counterclaim. The Defendants also seek to add a third party defendant.

The Defendants have not requested the consent of the Plaintiffs to this amendment because they do not believe that the Plaintiff would be willing to allow the amendment. The Plaintiff's attorney is under extreme time line pressures and therefore, the Defendants believe that any consultation as required by Rule 11 would be useless.

Standard for Amending Pleadings

Rule 15(a) provides in pertinent part that, upon a request of a party to amend, "leave shall be freely given when justice so requires and does not prejudice any other party." S.C.R.C.P., Rule 15(a). The standard for amendments is stated as follows by the South Carolina Court of Appeals in *Parker v. Spartanburg Sanitary Sewer District*:

A motion to amend is addressed to the sound discretion of the trial judge. *Stanley v. Kirkpartrick*, 357 S.C. 169, 592 S.E.2d 296 (2004); *City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 599 S.E.2d 462 (Ct. App. 2004). Leave to amend pleadings pursuant to Rule 15, SCRCP, shall be liberally and freely given when justice so requires and does not prejudice any other party. *Crestwood Gold Club, Inc. V. Potter*, 328 S.C. 201, 493 S.E.2d 8926 (1977); *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998). The prejudice Rule 15 envisions is a lack of notice that the new issues is going to be tried, and the lack of opportunity to refute it. *Tanner v. Florence County Treasurer*, 336 S.C. 552, 521 S.E.2d 153 (1999); *Lewis-Davis* 360 S.C. at 232, 599 S.E.2d at 465. The party opposing the amendments has the burden establishing prejudice. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 431 S.E.2d 587 (1993); *Pruitt*, 330 S.C. at 489, 499 S.E.2d at 253. This rule strongly favors amendments and the court is encouraged to freely grant leave to amend. *Jarrell v. Seaboard Sys. R.R.*, 294 S.C. 183, 363 S.E.2d 398 (Ct. App. 1987).

362 S.C. 276, 286, 600 S.E.2d 711, 716-17 (Ct. App. 2005) (finding that the trial court abused its discretion in denying a motion to amend defendant's answer).

In addition to the relief available under Rule 15(a), Rule 13(f) provides that "[w]hen a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment." S.C.R.C.P., Rule 13(f).

Lastly, as it relates to the third party complaint, the Defendants seek to join William Rempher, a citizen of Horry County, South Carolina. Thus, the claims against him are subject to the jurisdiction of this court and his joinder is permitted under Rules 19 and 20, S.C.R.C.P. In fact, the joinder of claims into one action is encouraged under Rule 18, S.C.R.C.P.

The Facts Justifying Amendment

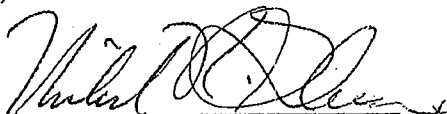
In the Second Counterclaim, the Defendants specifically seek to preserve their breach of contract causes of action against Plaintiff. The reason that this preservation is necessary is because of the time lines associated with foreclosure actions. In the typical civil practice, defense attorneys

routinely request additional time to respond to complaints and plaintiff attorneys routinely grant those requests. In foreclosure actions, because of time lines imposed upon the foreclosure attorney, they are prohibited from providing these routine courtesies. Thus, the defense attorney must respond prior to being fully informed of the nature of the defenses and counterclaims. The defense attorney must then seek to amend the answer and counterclaim upon his investigation.

In this case, after the complaint was served, the Defendants sought to resolve the dispute with the Plaintiff. Such resolution included the necessity of locating an investor willing to purchase the notes for a considerable amount of money from the Plaintiff. Those settlement overtures continued after the filing of the initial Answer and Counterclaim. But, the initial settlement overtures were rejected by the Plaintiff.

In this case, BADD and McKown are seeking to amend their answer and counterclaim. Attached hereto is a copy of the First Amended Answer, Counterclaim and Third Party Complaint (the "Amended Answer"). The matters alleged in the Amended Answer are all involved in the same transaction and occurrence and all involve the alleged default that the Plaintiff is suing upon. Therefor they are compulsory in nature and the Court should allow the Amendment.

GLEISSNER LAW FIRM, L.L.C.
3610 Landmark Drive, Suite G
Columbia, South Carolina 29204
(803) 603-2228
Attorney for the Defendants
BADD, LLC and William McKown

BY: 
RICHARD R. GLEISSNER
SC Bar Number 15139

Columbia, South Carolina
January 19, 2011

EXHIBIT TO MOTION TO AMEND

PROPOSED FIRST AMENDED ANSWER,
COUNTERCLAIM AND THIRD PARTY COMPLAINT

2010-CP-26-8505

IN THE STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS)
COUNTY OF HORRY)	
Carolina First Bank,)	Civil Action No.: 2010-CP-26-8505
Plaintiff,)	
vs.)	
BADD, LLC, William McKown, and)	FIRST AMENDED ANSWER,
Charles A. Christenson,)	COUNTERCLAIM
Defendants.)	AND THIRD PARTY COMPLAINT
_____)	JURY TRIAL DEMANDED
BADD, LLC, and William McKown,)	
Third Party Plaintiff,)	
v.)	
William Rempher)	
Third Party Defendant,)	

Civil Action No.: 2010-CP-26-8505

**FIRST AMENDED ANSWER,
COUNTERCLAIM
AND THIRD PARTY COMPLAINT
JURY TRIAL DEMANDED**

NOW COMES BADD, LLC and William McKown, (the "Defendants"), and responds to the complaint against them by Carolina First Bank ("Carolina First" or the "Plaintiff"), and for its Third Party Complaint alleges as follows:

FOR A FIRST DEFENSE
(General Denial)

1. All allegations of the Complaint (the "Complaint") are denied unless otherwise admitted herein.
2. Upon information and belief, the allegations of Paragraph 1, 2, 3, 4, 5, 6, and 8 are admitted.

3. The Defendant BADD would admit the allegation of paragraph 7 and 9 as to it, however McKown would deny the allegation of paragraph 7 and 9 as to him.

4. The Defendants would show as to the allegations of paragraphs 10, and 30 of the Complaint, these allegations refer to and incorporate other allegations contained in the Complaint and to the extent necessary, the Defendant would incorporate his responses to these allegations in response to these paragraphs.

5. The Defendants admit the allegations of paragraph 11 of the Complaint.

6. The allegations of paragraphs 11, 12, 13, 14, 15, 16, 17, 18, and 19 refer to documents and to the extent that the documents alleged therein differ from the allegations contained in this paragraphs and to the extent that the court finds these documents unenforceable, the allegations are denied.

7. Defendants lack sufficient information to admit or deny the allegations contained in paragraphs 20 of the Complaint. The reason the Defendants lack sufficient information to admit or deny these allegations is because with the Plaintiff's permission, BADD retained a rental company to manage the property and have the rental company pay the rental income associated with the property directly to the Plaintiff. It is the Defendants understanding that the rental income was sufficient or should have been sufficient to maintain the payments due to the Plaintiff.

8. The Defendants deny the allegations of paragraph 21, 22, and 23.

9. The Defendants deny the allegation of paragraph 24 and would reallege that with the Plaintiff's permission a real estate broker was selected to manage the property and the real estate broker is in possession fo the real property.

10. The Defendants deny the allegations of paragraph 25, 26, 27, 28, and 29 of the Complaint.

11. The allegations of paragraphs 31, 32, 34, 35, and 37 refer to documents and to the extent that the documents alleged therein differ from the allegations contained in this paragraphs and to the extent that the court finds these documents unenforceable, the allegations are denied.

12. The Defendants lack sufficient information to admit or deny the allegations contained in paragraphs 33 and 36 of the complaint and would therefore deny the same and demand strict proof thereof.

13. The Defendants deny the allegations of paragraphs 38 and deny the Plaintiff's prayers for relief.

FOR A SECOND DEFENSE

(Demand for Jury Trial - Accounting for Damages Alleged)

The Defendant reasserts the prior allegations of this pleading as if included herein verbatim.

14. The Plaintiff is seeking a money judgment against McKown based upon a contract. The request for a money judgment is not an equitable action, it is an action at law in which the Defendant is entitled to a Jury Trial.

15. The Plaintiff is seeking monetary damages against McKown for moneys lent to a third party. McKown entitled to an accounting of the money lent to the third party and an accounting of each payment made by the third party to the Plaintiff prior to an award being granted for the monetary damages.

16. Wherefore, McKown demands a jury trial on this action at law and demands a strict accounting of all damages alleged against McKown.

FOR A THIRD DEFENSE AND FIRST COUNTERCLAIM

(A Determination that the Guarantees are Unconscionable Adhesion Contracts)

The Defendants reassert the prior allegations of this pleading as if included herein verbatim.

17. If the document included as exhibits to the Complaint is the guarantee (the

"Guarantee") executed by McKown ("the Guarantor"), this document was presented to the Guarantor as required documents that could not be altered by the Guarantor. As such, it was an adhesion contract.

18. Further, because of the bargaining positions of the parties, the Plaintiff included in the Guarantee provisions that no reasonable person would have agreed to. As such, the Guarantee is unconscionable and unenforceable. Specifically, the Guarantee include provisions that purport to make the Guarantor liable, even if:

- a. the underlying obligation is illegal, invalid and unenforceable. See ¶ 4.
- b. the underlying obligation was based upon a forgery. See ¶ 4.
- c. whether or not there are any debts outstanding. See ¶ 6.
- d. Whether or not the Plaintiff acted negligently or intentionally to the detriment of the Guarantors. See ¶ 7. and
- e. Whether or not the borrower is released from all liability. See ¶ 9(2).

19. Such provisions are unreasonable and defeat the general purpose and understanding of a guaranty. As such, these provisions make the Guarantee unconscionable and unenforceable.

20. Wherefore, McKown is entitled to have this matter dismissed as to him.

**FOR A FOURTH DEFENSE, SECOND COUNTERCLAIM
AND FIRST CAUSE OF ACTION
(Civil Conspiracy)**

The Defendants reassert the prior allegations of this pleading as if included herein verbatim.

21. Charles A. Christenson ("Christenson") and McKown were members of Badd.

22. Through the recommendation and initiative of Christenson, Badd purchased three warehouse units located in a single building in Myrtle Beach, South Carolina (the "Three Units")

and obtained two loans from the Plaintiff in order to purchase these three units. Christenson had no money to invest and so McKown contributed \$90,000 toward the purchase of these three units. The financing from CFB included the two loans involved in this matter, with one of the loans being collateralized with two units and the other loan being collateralized with one unit.

23. The building has a total of seven (7) warehouse units.

24. As it relates to the history of the project and the third party defendant, William Rempher ("Rempher"), the developer of the building, Rock Richardson, had defaulted on his loan. Using his contacts with the bank that Richardson had borrowed the money from, Rempher was able to negotiate a purchase of Richardson's note to the bank at a discount. Similarly, Rempher purchased that note from a bank on another unit at a discount.

25. Thus, Rempher has an interest in two units in the building through the purchasing of the note and mortgages associated with those units.

26. After the initial purchase of the three units by BADD, McKown was responsible for (a) collecting the rents, (b) maintaining the property, (c) paying the mortgage out of the rents, and (d) making any distributions associated with any excess revenues to himself and Christenson. Although there were no excess revenues, the Three Units were able to generate enough revenue to pay the maintenance and keep the payments current with the Plaintiff.

27. In 2009, Christenson began having financial difficulties. Christenson brought Rempher to Badd and McKown. Christenson sought to sell to Rempher his interest in member of Badd but McKown was the only person to have invested any equity in Badd. Thus, Christenson needed McKown consent to allow Rempher to purchase Christenson's interest.

28. At this time, Rempher represented to McKown that Rempher would (a) become a member of Badd, (b) obtain refinancing for the debt with the Plaintiff, without the necessity of a

guarantee by McKown, and (c) become responsible for the day to day operations of the Three Units, including all of the previous duties performed by McKown.

29. In addition, Rempher agreed to pay McKown approximately \$30,000 in order to partially equal out the capital accounts of Badd.

30. McKown agreed to allow Rempher to become a member of Badd and take the place of Christenson. As part of the agreement, McKown allowed Rempher to take over the operation and management of the Three Units.

31. Upon information and belief, Rempher discussed the situation with the Plaintiff.

32. Upon information and belief, Rempher and the Plaintiff entered into a conspiracy to harm McKown.

33. Soon after taking control, the people that were renting the Three Units terminated their leases. Upon information and belief, these tenants left because of the actions of Rempher. Further, new potential tenants for the Three Units were directed away from leasing the Three Units. In one instance, Rempher rented one of the units to a friend at a significant discount. Thus, the revenues collected for the Three Units began to decline.

34. Even though there was still sufficient funds to make the necessary payments to the Plaintiff, Rempher intentionally failed to make the payments, thereby causing a default in the loan documents with BADD.

35. Upon information and belief, Rempher created this default as part of the conspiracy with the Plaintiff and for the purpose of allowing the Plaintiff to foreclose upon the Three Units. Upon information and belief, the Plaintiff and Rempher agreed that Rempher would purchase the Three Units at a significant reduction in the fair market value at the foreclosure sale.

36. Upon notice of Rempher's default in making payments to the Plaintiff, McKown has

made commercially reasonable offers to the Plaintiff in an effort to resolve the dispute. The Plaintiff's refusal to consider these offers is evidence of the Plaintiff's involvement in a conspiracy with Rempher.

37. The conspiracy is between two or more people, for the purpose of causing special harm to McKown. That special harm to McKown is the difference between the fair market value of the Three Units and the significantly reduced price of the Three Units at the foreclosure sale.

38. Wherefore, McKown prays that this court award him judgment against the Plaintiff and Rempher for the amount of the special damages as will be shown at trial.

**FOR A FIFTH DEFENSE, THIRD COUNTERCLAIM
AND SECOND CAUSE OF ACTION
(Breach of Contract)**

The Defendants reassert the prior allegations of this pleading as if included herein verbatim.

39. Rempher agreed to obtain financing for the Three Units without the necessity of a guarantee from McKown. Rempher has breached this agreement.

40. Rempher agreed to manage the Three Units and to perform for Badd all of the previous duties that were being performed by McKown. Rempher has breached this agreement, failed to manage the Three Units in such a way as to allow for excess revenues to be paid to McKown, and even failed to make the payments to the Plaintiff as required under the loan documents.

41. Upon information and belief, the Plaintiff's participation in the conspiracy and its discussions with Rempher concerning the Three Units, is a breach of the covenant of good faith and fair dealing that is included and implied in all contracts in South Carolina. The note, mortgage and guarantee are all contracts that have the implied covenant of good faith and fair dealing.

42. Wherefore, Rempher and the Plaintiff have breached contracts with Badd and

McKown and Badd and McKown demand judgment for the damages for the breaches of these contracts as to be shown at trial.

FOR A THIRD CAUSE OF ACTION
(Intentional Interference with Contractual Relations
and Prospective Business Relations)

The Defendants reassert the prior allegations of this pleading as if included herein verbatim.

43. Rempher knew of the contracts between the Defendants and the Plaintiff.

44. Rempher intentionally interfered with the contracts between the Defendants and the Plaintiff with the intent to harm the Defendants.

45. Badd owns the Three Units. Badd had potential business relations with potential tenants for the leasing of these Three Units. Rempher knew of these potential business relations and intentionally interfered with these potential business relations with the intent to harm the Defendants.

46. Because the actions of Rempher were so willful, wanton, in total disregard for the rights of Badd and McKown, and intentional, Badd and McKown are entitled to punitive damages.

47. Wherefore, the Defendants have been damaged by the intentional interference with contractual relations and the intentional interference with prospective business relations in an amount to be shown at trial.

48. Wherefore, the Defendants are entitled to judgment against Rempher for its tortious acts of interfering with the Defendants contracts and prospective business relations.

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty)

The Defendants reassert the prior allegations of this pleading as if included herein verbatim.

49. McKown and Badd placed a special trust in Rempher when they allowed Rempher

to manage the Three Units.

50. Rempher breached that special trust in failing to manage the Three Units in the best interests of Badd and McKown. Instead, Rempher managed the Three Units to serve Rempher's purposes.

51. Rempher further breached its fiduciary duty by failing to fully disclose and failing to fulfill the duty of utmost loyalty and good faith toward Badd and McKown.

52. Because the actions of Rempher were so willful, wanton, in total disregard for the rights of Badd and McKown, and intentional, Badd and McKown are entitled to punitive damages.

53. Wherefore, Badd and McKown are entitled to judgment against Rempher for its breach of fiduciary duty in an amount to be shown at trial.

WHEREFORE, the Defendants, having fully responded to the Complaint of the Plaintiff and having fully alleged its Third Party Complaint, would respectfully pray that this Court issue its order:

- a. Dismissing this Complaint;
- b. Awarding the Defendants a money judgment in the amount of their damages for the Plaintiff's involvement in the conspiracy and for its breach of contract;
- c. Awarding the Defendants a money judgment against the Third Party Defendant for its involvement in the conspiracy, for breach of contract, for its intentional interference with contract and business relations and for its breach of fiduciary duty, including punitive damages;
- d. Awarding the Defendants a judgment for the costs of defending this action including reasonable attorney fees; and

- e. Award such other and further relief as the court deems just and proper

Respectfully Submitted,

Richard R. Gleissner, Esquire
S.C. Bar Number 15139
Gleissner Law Firm, L.L.C.
3610 Landmark Drive, Suite G
Columbia, South Carolina 29204
(803) 603-2229
Attorneys for the Defendants,
BADD, LLC and William McKown

Dated: _____

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Carolina First Bank,
☐ Plaintiff

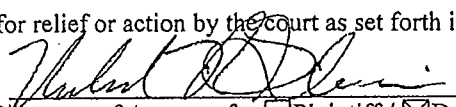
v.

BADD, LLC, William Mckown, Et Al
☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2010-CP-26-8505

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: William W. Deschamps, III, Esq., Bar No. Address: P.O. Box 2402 Myrtle Beach, SC 29578 phone: 843-448-2391 fax: 843-448-3308 e-mail: other:		Defendant's Attorney: Richard R. Gleissner, Bar No. 15139 Address: 3610 Landmark Drive, Suite G Columbia, SC 29204 phone: 803-603-2228 fax: 803-787-0505 e-mail: rick@gleissnerlaw.com other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: Motion to Amend Answer Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for ☐ Plaintiff / ☒ Defendant January 19, 2011 Date submitted			
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE: Date:	
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

SCCA/233 (11-03)

105

IN THE STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
)

Carolina First Bank,

) Civil Action No.: 2010-CP-26-8505
)

Plaintiff,

vs.

) **THIRD PARTY SUMMONS**
)

BADD, LLC, William McKown, and
Charles A. Christenson,

Defendants.

BADD, LLC and William McKown,

Third Party Plaintiffs,

vs.

William Rempher,

Third Party Defendant.

FILED 10 PM 3:37
CLERK OF COURT
COUNTY

TO THE ABOVE NAMED THIRD PARTY DEFENDANT:

YOU ARE HEREBY SUMMONED and required to answer the Third Party Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said pleading upon the subscribers at their offices, 3610 Landmark Drive, Suite G, Columbia, South Carolina 29204, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Third Party Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Third Party Complaint.

Gleissner Law Firm, L.L.C.
3610 Landmark Drive, Suite G
Columbia, South Carolina 29204
(803) 603-2228

BY:


Richard R. Gleissner, Esquire
Attorneys for the Defendants/Third-Party
Plaintiffs, BADD, LLC and William McKown

February 9, 2011

IN THE STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Carolina First Bank,

Plaintiff,

vs.

BADD, LLC, William McKown, and
Charles A. Christenson,

Defendants.

BADD, LLC, and William McKown,

Third Party Plaintiff,

v.

William Rempher

Third Party Defendant,

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2010-CP-26-8505

**FIRST AMENDED ANSWER,
COUNTERCLAIM
AND THIRD PARTY COMPLAINT
JURY TRIAL DEMANDED**

FILED
JAN 10 PM 3:37
CLERK OF COURT

NOW COMES BADD, LLC and William McKown, (the "Defendants"), and responds to the complaint against them by Carolina First Bank ("Carolina First" or the "Plaintiff"), and for its Third Party Complaint alleges as follows:

FOR A FIRST DEFENSE
(General Denial)

1. All allegations of the Complaint (the "Complaint") are denied unless otherwise admitted herein.
2. Upon information and belief, the allegations of Paragraph 1, 2, 3, 4, 5, 6, and 8 are admitted.

3. The Defendant BADD would admit the allegation of paragraph 7 and 9 as to it, however McKown would deny the allegation of paragraph 7 and 9 as to him.

4. The Defendants would show as to the allegations of paragraphs 10, and 30 of the Complaint, these allegations refer to and incorporate other allegations contained in the Complaint and to the extent necessary, the Defendant would incorporate his responses to these allegations in response to these paragraphs.

5. The Defendants admit the allegations of paragraph 11 of the Complaint.

6. The allegations of paragraphs 11, 12, 13, 14, 15, 16, 17, 18, and 19 refer to documents and to the extent that the documents alleged therein differ from the allegations contained in this paragraphs and to the extent that the court finds these documents unenforceable, the allegations are denied.

7. Defendants lack sufficient information to admit or deny the allegations contained in paragraphs 20 of the Complaint. The reason the Defendants lack sufficient information to admit or deny these allegations is because with the Plaintiff's permission, BADD retained a rental company to manage the property and have the rental company pay the rental income associated with the property directly to the Plaintiff. It is the Defendants understanding that the rental income was sufficient or should have been sufficient to maintain the payments due to the Plaintiff.

8. The Defendants deny the allegations of paragraph 21, 22, and 23.

9. The Defendants deny the allegation of paragraph 24 and would reallege that with the Plaintiff's permission a real estate broker was selected to manage the property and the real estate broker is in possession fo the real property.

10. The Defendants deny the allegations of paragraph 25, 26, 27, 28, and 29 of the Complaint.

11. The allegations of paragraphs 31, 32, 34, 35, and 37 refer to documents and to the extent that the documents alleged therein differ from the allegations contained in this paragraphs and to the extent that the court finds these documents unenforceable, the allegations are denied.

12. The Defendants lack sufficient information to admit or deny the allegations contained in paragraphs 33 and 36 of the complaint and would therefore deny the same and demand strict proof thereof.

13. The Defendants deny the allegations of paragraphs 38 and deny the Plaintiff's prayers for relief.

FOR A SECOND DEFENSE

(Demand for Jury Trial - Accounting for Damages Alleged)

The Defendant reasserts the prior allegations of this pleading as if included herein verbatim.

14. The Plaintiff is seeking a money judgment against McKown based upon a contract. The request for a money judgment is not an equitable action, it is an action at law in which the Defendant is entitled to a Jury Trial.

15. The Plaintiff is seeking monetary damages against McKown for moneys lent to a third party. McKown entitled to an accounting of the money lent to the third party and an accounting of each payment made by the third party to the Plaintiff prior to an award being granted for the monetary damages.

16. Wherefore, McKown demands a jury trial on this action at law and demands a strict accounting of all damages alleged against McKown.

FOR A THIRD DEFENSE AND FIRST COUNTERCLAIM

(A Determination that the Guarantees are Unconscionable Adhesion Contracts)

The Defendants reassert the prior allegations of this pleading as if included herein verbatim.

17. If the document included as exhibits to the Complaint is the guarantee (the

"Guarantee") executed by McKown ("the Guarantor"), this document was presented to the Guarantor as required documents that could not be altered by the Guarantor. As such, it was an adhesion contract.

18. Further, because of the bargaining positions of the parties, the Plaintiff included in the Guarantee provisions that no reasonable person would have agreed to. As such, the Guarantee is unconscionable and unenforceable. Specifically, the Guarantee include provisions that purport to make the Guarantor liable, even if:

- a. the underlying obligation is illegal, invalid and unenforceable. See ¶ 4.
- b. the underlying obligation was based upon a forgery. See ¶ 4.
- c. whether or not there are any debts outstanding. See ¶6.
- d. Whether or not the Plaintiff acted negligently or intentionally to the detriment of the Guarantors. See ¶ 7. and
- e. Whether or not the borrower is released from all liability. See ¶9(2).

19. Such provisions are unreasonable and defeat the general purpose and understanding of a guaranty. As such, these provisions make the Guarantee unconscionable and unenforceable.

20. Wherefore, McKown is entitled to have this matter dismissed as to him.

**FOR A FOURTH DEFENSE, SECOND COUNTERCLAIM
AND FIRST CAUSE OF ACTION
(Civil Conspiracy)**

The Defendants reassert the prior allegations of this pleading as if included herein verbatim.

21. Charles A. Christenson ("Christenson") and McKown were members of Badd.

22. Through the recommendation and initiative of Christenson, Badd purchased three warehouse units located in a single building in Myrtle Beach, South Carolina (the "Three Units")

and obtained two loans from the Plaintiff in order to purchase these three units. Christenson had no money to invest and so McKown contributed \$90,000 toward the purchase of these three units. The financing from CFB included the two loans involved in this matter, with one of the loans being collateralized with two units and the other loan being collateralized with one unit.

23. The building has a total of seven (7) warehouse units.

24. As it relates to the history of the project and the third party defendant, William Rempher ("Rempher"), the developer of the building, Rock Richardson, had defaulted on his loan. Using his contacts with the bank that Richardson had borrowed the money from, Rempher was able to negotiate a purchase of Richardson's note to the bank at a discount. Similarly, Rempher purchased that note from a bank on another unit at a discount.

25. Thus, Rempher has an interest in two units in the building through the purchasing of the note and mortgages associated with those units.

26. After the initial purchase of the three units by BADD, McKown was responsible for (a) collecting the rents, (b) maintaining the property, (c) paying the mortgage out of the rents, and (d) making any distributions associated with any excess revenues to himself and Christenson. Although there were no excess revenues, the Three Units were able to generate enough revenue to pay the maintenance and keep the payments current with the Plaintiff.

27. In 2009, Christenson began having financial difficulties. Christenson brought Rempher to Badd and McKown. Christenson sought to sell to Rempher his interest in member of Badd but McKown was the only person to have invested any equity in Badd. Thus, Christenson needed McKown consent to allow Rempher to purchase Christenson's interest.

28. At this time, Rempher represented to McKown that Rempher would (a) become a member of Badd, (b) obtain refinancing for the debt with the Plaintiff, without the necessity of a

guarantee by McKown, and (c) become responsible for the day to day operations of the Three Units, including all of the previous duties performed by McKown.

29. In addition, Rempher agreed to pay McKown approximately \$30,000 in order to partially equal out the capital accounts of Badd.

30. McKown agreed to allow Rempher to become a member of Badd and take the place of Christenson. As part of the agreement, McKown allowed Rempher to take over the operation and management of the Three Units.

31. Upon information and belief, Rempher discussed the situation with the Plaintiff.

32. Upon information and belief, Rempher and the Plaintiff entered into a conspiracy to harm McKown.

33. Soon after taking control, the people that were renting the Three Units terminated their leases. Upon information and belief, these tenants left because of the actions of Rempher. Further, new potential tenants for the Three Units were directed away from leasing the Three Units. In one instance, Rempher rented one of the units to a friend at a significant discount. Thus, the revenues collected for the Three Units began to decline.

34. Even though there was still sufficient funds to make the necessary payments to the Plaintiff, Rempher intentionally failed to make the payments, thereby causing a default in the loan documents with BADD.

35. Upon information and belief, Rempher created this default as part of the conspiracy with the Plaintiff and for the purpose of allowing the Plaintiff to foreclose upon the Three Units. Upon information and belief, the Plaintiff and Rempher agreed that Rempher would purchase the Three Units at a significant reduction in the fair market value at the foreclosure sale.

36. Upon notice of Rempher's default in making payments to the Plaintiff, McKown has

made commercially reasonable offers to the Plaintiff in an effort to resolve the dispute. The Plaintiff's refusal to consider these offers is evidence of the Plaintiff's involvement in a conspiracy with Rempher.

37. The conspiracy is between two or more people, for the purpose of causing special harm to McKown. That special harm to McKown is the difference between the fair market value of the Three Units and the significantly reduced price of the Three Units at the foreclosure sale.

38. Wherefore, McKown prays that this court award him judgment against the Plaintiff and Rempher for the amount of the special damages as will be shown at trial.

**FOR A FIFTH DEFENSE, THIRD COUNTERCLAIM
AND SECOND CAUSE OF ACTION
(Breach of Contract)**

The Defendants reassert the prior allegations of this pleading as if included herein verbatim.

39. Rempher agreed to obtain financing for the Three Units without the necessity of a guarantee from McKown. Rempher has breached this agreement.

40. Rempher agreed to manage the Three Units and to perform for Badd all of the previous duties that were being performed by McKown. Rempher has breached this agreement, failed to manage the Three Units in such a way as to allow for excess revenues to be paid to McKown, and even failed to make the payments to the Plaintiff as required under the loan documents.

41. Upon information and belief, the Plaintiff's participation in the conspiracy and its discussions with Rempher concerning the Three Units, is a breach of the covenant of good faith and fair dealing that is included and implied in all contracts in South Carolina. The note, mortgage and guarantee are all contracts that have the implied covenant of good faith and fair dealing.

42. Wherefore, Rempher and the Plaintiff have breached contracts with Badd and

McKown and Badd and McKown demand judgment for the damages for the breaches of these contracts as to be shown at trial.

FOR A THIRD CAUSE OF ACTION
(Intentional Interference with Contractual Relations
and Prospective Business Relations)

The Defendants reassert the prior allegations of this pleading as if included herein verbatim.

43. Rempher knew of the contracts between the Defendants and the Plaintiff.

44. Rempher intentionally interfered with the contracts between the Defendants and the Plaintiff with the intent to harm the Defendants.

45. Badd owns the Three Units. Badd had potential business relations with potential tenants for the leasing of these Three Units. Rempher knew of these potential business relations and intentionally interfered with these potential business relations with the intent to harm the Defendants.

46. Because the actions of Rempher were so willful, wanton, in total disregard for the rights of Badd and McKown, and intentional, Badd and McKown are entitled to punitive damages.

47. Wherefore, the Defendants have been damaged by the intentional interference with contractual relations and the intentional interference with prospective business relations in an amount to be shown at trial.

48. Wherefore, the Defendants are entitled to judgment against Rempher for its tortious acts of interfering with the Defendants contracts and prospective business relations.

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty)

The Defendants reassert the prior allegations of this pleading as if included herein verbatim.

49. McKown and Badd placed a special trust in Rempher when they allowed Rempher

to manage the Three Units.

50. Rempher breached that special trust in failing to manage the Three Units in the best interests of Badd and McKown. Instead, Rempher managed the Three Units to serve Rempher's purposes.

51. Rempher further breached its fiduciary duty by failing to fully disclose and failing to fulfill the duty of utmost loyalty and good faith toward Badd and McKown.

52. Because the actions of Rempher were so willful, wanton, in total disregard for the rights of Badd and McKown, and intentional, Badd and McKown are entitled to punitive damages.

53. Wherefore, Badd and McKown are entitled to judgment against Rempher for its breach of fiduciary duty in an amount to be shown at trial.

WHEREFORE, the Defendants, having fully responded to the Complaint of the Plaintiff and having fully alleged its Third Party Complaint, would respectfully pray that this Court issue its order:

- a. Dismissing this Complaint;
- b. Awarding the Defendants a money judgment in the amount of their damages for the Plaintiff's involvement in the conspiracy and for its breach of contract;
- c. Awarding the Defendants a money judgment against the Third Party Defendant for its involvement in the conspiracy, for breach of contract, for its intentional interference with contract and business relations and for its breach of fiduciary duty, including punitive damages;
- d. Awarding the Defendants a judgment for the costs of defending this action including reasonable attorney fees; and

IN THE STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Carolina First Bank,

Plaintiff,

vs.

BADD, LLC, William M. McKown, and
Charles A. Christenson,

Defendants.

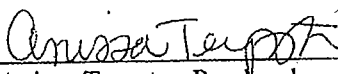
IN THE COURT OF COMMON PLEAS

Civil Action No.: 2010-CP-26-8505

CERTIFICATE OF SERVICE

I, the undersigned employee of the Gleissner Law Firm, LLC, hereby certify that I have served Defendants BADD, LLC and William M. McKown's Amended Answer, Counterclaim and Third-Party Complaint in the above captioned matter by placing a copy in the first class mail with sufficient postage prepaid addressed to:

William E. DesChamps, III, Esquire
1551 21st Avenue North, Suite 14
P.O. Box 2402
Myrtle Beach, SC 29578


Anissa Terpstra, Paralegal
Gleissner Law Firm, L.L.C.
3610 Landmark Drive, Suite G
Columbia, South Carolina 29204
(803) 603-2229
Attorneys for the Defendants,
BADD, LLC and William M. McKown

Dated: 2/18/11

HORRY COUNTY
11 FEB 22 PM 2:39
CLERK OF COURT

IN THE STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Carolina First Bank,

Plaintiff,

vs.

BADD, LLC, William McKown, and
Charles A. Christenson,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2010-CP-26-8505

**MEMORANDUM IN OPPOSITION TO
MOTION TO REFER**

NOW COMES BADD, LLC ("Badd") and William McKown, ("McKown", collectively the "Defendants"), and objects to the motion of the Plaintiff to refer the above-referenced matter to the Master-in-Equity. The Plaintiff alleges that this matter may be referred pursuant to Rule 53(b), South Carolina Rules of Civil Procedure. Rule 53(b) applies to actions (1) where the parties consent, (2) in a default case, or (3) an action for foreclosure. Rule 53(b), S.C.R.C.P. The action against Badd is for foreclosure. Thus, that action falls within the confines of Rule 53(b). However, McKown does not consent, is not in default and is not involved in a foreclosure action. Thus, Rule 53(b) does not apply and no reference may be had, as to McKown.

In this case, the allegations as to McKown relate to a contract, specifically, an alleged guarantee. The Plaintiff seeks monetary damages against McKown for his alleged breach of contract. Actions to construe a written contract or for breach of contract are actions at law, not in equity. *Pruitt v. South Carolina Med. Malpractice Liability Joint Underwriting Assoc.*, 343 S.C. 335, 540 S.E.2d 843 (2001); *State Farm Mut. Auto. Ins. Co. v. Moorer*, 330 S.C. 46, 496 S.E.2d 875 (Ct. App. 1998). Because this involves actions at law, seeking monetary damages, McKown is entitled to a jury trial.

The first Counterclaim against the Plaintiff is for a determination that the alleged guarantee of McKown is an Unconscionable Adhesion Contract. The Plaintiff attached to the complaint an exhibit that it alleges he document included as exhibits to the Complaint is the guarantee (the "Guarantee") executed by McKown ("the Guarantor"), this document was presented to the Guarantor as required documents that could not be altered by the Guarantor. As such, it was an adhesion contract. Further, because of the bargaining positions of the parties, the Plaintiff included in the Guarantee provisions that no reasonable person would have agreed to and provisions that no reasonable person would have accepted. As such, the Guarantee is unconscionable and unenforceable. Specifically, the Guarantee include provisions that purport to make the Guarantor liable, even if:

1. the underlying obligation is illegal, invalid and unenforceable. See ¶ 4.
2. the underlying obligation was based upon a forgery. See ¶ 4.
3. whether or not there are any debts outstanding. See ¶6.
4. Whether or not the Plaintiff acted negligently or intentionally to the detriment of the Guarantors. See ¶ 7. and
5. Whether or not the borrower is released from all liability. See ¶9(2),

Such provisions are unreasonable and defeat the general purpose and understanding of a guaranty. Further, there is no severability clause in the guaranty. The court cannot simply ignore these provisions. These provisions make the entire Guarantee unconscionable and unenforceable.

In determining unconscionability, courts are limited to considering facts and circumstances existing when the contract was executed." *Hardee v. Hardee*, 348 S.C. 84, 95-96, 558 S.E.2d 264, 269-70 (Ct.App.2001) (citing Restatement (Second) of Contracts § 208 (1981)), *aff'd as modified*, 355 S.C. 382, 585 S.E.2d 501 (2003); *see also Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 397, 498 S.E.2d 898, 903 (Ct.App.1998)("If the court finds that a contract clause was unconscionable at the

time it was made, the court may refuse to enforce the contract clause or limit the application of the unconscionable clause to avoid any unconscionable result.”). “A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.” 17A Am.Jur.2d *Contracts* § 279 (2004); *see also* 17 C.J.S. *Contracts* § 4 (1999) (“The determination of unconscionability is fact specific, and the totality of the circumstances must be assessed.”).

Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (S.C. Ct. App. 2005). Thus, the determination of whether the contract is unconscionable is fact specific and should rightly be delayed until after the parties have had the opportunity to conduct discovery.

In the Second Counterclaim, the Defendants preserve their breach of contract causes of action against Plaintiff. The reason that this preservation is necessary is because of the time lines associated with foreclosure actions. In the typical civil practice, defense attorneys routinely request additional time to respond to complaints and plaintiff attorneys routinely grant those requests. In foreclosure actions, because of time lines imposed upon the foreclosure attorney, they are prohibited from providing these routine courtesies. Thus, the defense attorney must respond prior to being fully informed of the nature of the defenses and counterclaims. The defense attorney must then seek to amend the answer and counterclaim upon his investigation.

In this case, BADD and McKown are seeking to amend their answer and counterclaim. In addition, the Defendants are seeking to bring a third party complaint.

These same time lines, imposed upon the foreclosure attorney, are the reason that the Plaintiff is pressing the request to refer the matter to the master-in-equity. Simply, the Plaintiff seeks to get this matter sent to the master in hopes of depriving the Defendants of their right to a jury trial.

Upon the providing of the factual basis for the breach of contract counterclaim, both Defendants are entitled to a jury trial. *Pruitt v. South Carolina Med. Malpractice Liability Joint Underwriting Assoc.*, 343 S.C. 335, 540 S.E.2d 843 (2001); *State Farm Mut. Auto. Ins. Co. v.*

Moorer, 330 S.C. 46, 496 S.E.2d 875 (Ct. App. 1998). The Defendants attached their drafted First Amended Answer, Counterclaim and Third Party Complaint to this memorandum and file the motion to amend associated with this pleading contemporaneously with the filing of this memorandum in opposition to the Motion to Refer.

Therefore, the Defendants pray that the court deny the motion for a reference.

It is possible that the Court may contemplate bifurcating this case to allow the foreclosure portion of the matter to be referred to the Master-in-Equity. The Defendants would oppose this bifurcation at this time as well. The Defendants would oppose the bifurcation or severance because: (1) the Plaintiff would have the burden to show why bifurcation should take place and the Plaintiff has not met its burden; (2) the claims of the Defendants are compulsory counterclaims; (3) there will be no judicial economy because the many of the same witnesses will be testifying to both the Plaintiffs claim as well as the Defendants counterclaims; (4) the matter will not be expedited; and (5) the real reason is not to avoid prejudice in the legal sense of the term and there is no showing of legal prejudice.

The Burden is on the Movant

Motions to bifurcate or sever are left to the sound discretion of the trial judge. However, the burden is on the movant to establish the grounds for the bifurcation. Wright and Miller, 9A Federal Practice and Procedure, ¶2388, at p. 124 (3rd Ed. 2008) (hereinafter "Federal Practice") ("The party seeking separate trials, however, has the burden of proving that separation of the cases is necessary"). Here, the Plaintiff offers no proof. Therefore, the Plaintiff has not met its burden of proof.

The claims of the Defendants are compulsory counterclaims.

In the case of *Flagstar Corporation v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331

(S.C. 2000), the South Carolina Supreme Court cautioned the trial bench that its ruling was “in any way lessening the level of responsibility to determine appropriate severability in deciding a Rule 42(b) motion.” The Court went further in stating: “In exercising their discretion, trial judges should take care to analyze whether or not the issues are overlapping or not distinct, in determining whether or not the “separate issue” mandate of Rule 42(b) is met.” *Id.* n. 8, 341 S.C. at 73, 533 S.E.2d at 333. Here, the Plaintiff seeks to foreclose upon a debt. The Defendants challenge that debt and allege (1) the potential involvement of the Bank in a conspiracy relating to the administration of that debt; (2) breach of the mortgage and note contracts; (3) accounting of that debt; (4) breach of the covenant of good faith and fair dealing that is included in the contracts; and (5) unfair trade practice in the administration of that debt. Each of these counterclaims are compulsory counterclaims. Each of these counterclaims relates to the initiation of the debt, the administration of the debt, and whether the Plaintiff has the right to foreclose on this property. Simply, the issues involved in the Plaintiff’s case and the Defendants’ case are overlapping and they are not distinct.

Many of the same witnesses will be testifying to both the Plaintiffs claim as well as the Defendants counterclaims

Bifurcation should not be ordered where evidence overlaps between the two issues sought to be separated. *See Creighton v. Coligny Plaza Limited Partnership*, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998) (“Where evidence relevant to the issues of both liability and damages overlap, bifurcation is inappropriate.”). In this case, the same witnesses will testify as to the amount of the debt, the initiation of the loan, and the collateral for the loan - the Plaintiff’s case - as will testify on the breaches of the loan documents that occurred during the administration of the loan, the lack of good faith and fair dealing on the part of the Plaintiff during the administration of the loan and in bringing this foreclosure action, and the potential conspiracy relating to the administration of this

loan.

The matter will not be expedited

The entire case will have to be tried. The jury trial will have to be decided first. *See Johnson v. S.C. National Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987). There is no time saving or expediting of this case based upon its bifurcation. The same number of witnesses will be called. The resolution of the Plaintiff's case does not decide the Defendant's counterclaims. The resolution of the Defendants' counterclaims does not decide the Plaintiff's case. All of the issues will have to be tried.

There is no real "prejudice"

The case law dealing with bifurcation speaks in terms of prejudice. The most common issue of prejudice is when the trial of one issue will disclose the existence of insurance. See *Federal Practice*, ¶2388, at p. 108-13 ("separate trial ordered even though a single trial otherwise would be preferable, because if a single trial were conducted the jury would learn that the defendant is insured"). In that situation, there is clear prejudice because it may result in a jury considering matters that should not be considered in rendering a decision. Here, no such circumstance exists.

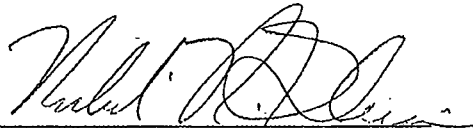
Conclusion

At this time, the Defendants request that the Plaintiff motion to refer this matter be denied. McKown is clearly entitled to a jury trial, even if the amendment to the Answer and Counterclaim is not allowed. As it relates to the possible severing of this action, as stated in *Federal Practice*, the decision to bifurcate a trial is a practical one and should be examined on a case-by-case basis according to the following factors: (1) convenience, (2) prejudice, (3) expedition, (4) economy, (5) whether the issues sought be tried separately are significantly different, (6) whether they are triable by jury or the court, (7) whether discovery has been directed to a single trial of all issues, (8) whether

the evidence required for each issue is substantially different, (9) whether one party would gain some unfair advantage from separate trials, (10) whether a single trial of all issues would create the potential for jury bias or confusion, and (11) whether bifurcation would enhance or reduce the possibility of a pretrial settlement. Federal Practice, ¶2388, at p. 123 (citing *K.W. Muth Co. v. Bing-Lear Mfg. Group, LLC*, 2002 W.L. 1879943, (D.C. Mich. 2002)). In this case, there is no showing of convenience, prejudice, expedition, or economy. The issues of the claim and counterclaims are not significantly different. Discovery has been directed at all issues. The evidence is the same for both the claims and counterclaims. There is no potential for jury bias, and bifurcation does not increase the possibility of a settlement. The only factor that weighs in the favor of bifurcation is that the foreclosure action is equitable and many of the counterclaims are tried before the jury. This factor alone should not justify a bifurcation of this trial.

Therefore, the Defendants would respectfully submit that not only should the court deny the motion to refer, but the Court should not sever the foreclosure action at this time.

Respectfully Submitted,



Richard R. Gleissner, Esquire
S.C. Bar Number 15139
Gleissner Law Firm, L.L.C.
3610 Landmark Drive, Suite G
Columbia, South Carolina 29204
(803) 603-2229
Attorneys for the Defendants,
BADD, LLC and William McKown

Dated: JANUARY 17, 2011

IN THE STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Carolina First Bank,
Plaintiff,

vs.

BADD, LLC, William M. McKown, and
Charles A. Christenson,
Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2010-CP-26-8585

CERTIFICATE OF SERVICE

HORRY COUNTY
11 JAN 21 PM 2:13
CLERK OF COURT
CLARENCE FUGGINS-WARD

I, the undersigned employee of the Gleissner Law Firm, LLC, hereby certify that I have served Defendants BADD, LLC and William M. McKown's Memorandum in Opposition to Motion to Refer in the above captioned matter by placing a copy in the first class mail with sufficient postage prepaid addressed to:

William E. DesChamps, III, Esquire
1551 21st Avenue North, Suite 14
P.O. Box 2402
Myrtle Beach, SC 29578

Anissa Terpstra
Anissa Terpstra, Paralegal
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3610 Landmark Drive, Suite G
Columbia, South Carolina 29204
(803) 603-2229
Attorneys for the Defendants,
BADD, LLC and William M. McKown

Dated: January 19, 2011

1	STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS NON-JURY
2	COUNTY OF HORRY	)	(10-CP-26-08505)
3		)	
4	CAROLINA FIRST BANK	)	
5	VERSUS	)	TRANSCRIPT OF RECORD
6		)	
7	BADD, LLC, William M.	)	February 8, 2011
8	McKown and Charles	)	Conway, S. C.
	Christenson	)	

9
10 B E F O R E:
11 HONORABLE STEVEN H. JOHN, Judge.

12 A P P E A R A N C E S:
13 William W. DesCHAMPS, III, ESQ.
14 WILLIAM W. DesCHAMPS, Jr., ESQ.
ATTORNEYS FOR PLAINTIFF
15 RICHARD R. GLEISSNER, ESQ.
16 ATTORNEY FOR DEFENDANTS
17
18
19

20 DIXIE COX EUBANK
21 CIRCUIT COURT REPORTER
22 FIFTEENTH JUDICIAL CIRCUIT
23
24
25

1 (THE FOLLOWING TAKES PLACE ON FEBRUARY 8, 2011.)

2 THE COURT: All right, the next matter we have is
3 Carolina First Bank, Plaintiff, versus BADD, LLC, William
4 McKown, Charles A. Christenson. I believe there was a Motion
5 to Refer, if I'm not mistaken. Is that -- Motion for an Order
6 of Reference, and there's opposition filed in that matter by
7 the Defendants, BADD, LLC, and William McKown. The other
8 Defendant apparently is Charles A. Christenson.

9 Is Mr. Christenson represented or not, or what's ---

10 MR. TREY DesCHAMPS: No, Your Honor, he's in default
11 for failure to file responsive pleadings.

12 THE COURT: All right. Very good.

13 All right, counsel, if y'all would state your name, who
14 you are, and who you represent, please.

15 MR. TREY DesCHAMPS: Trey DesChamps on behalf of
16 Plaintiff, Carolina First Bank.

17 MR. GLEISSNER: May it please the Court, I'm Rick
18 Gleissner. I'm here on behalf of BADD, LLC, and William
19 McKown, and I think, Your Honor -- I think also on the roster
20 today is my Motion to Amend the Answer and Counterclaim and
21 bring a Third-Party Complaint.

22 THE COURT: All right, sir.

23 MR. GLEISSNER: And with the Court's permission I'm
24 going to hand up a copy of my Motion to Amend, and my
25 Memorandum in Opposition to the Motion to Refer.

1 THE COURT: All right. Let me -- let me look at your -
2 - you've got your Supplemental Proceeding -- Supplemental
3 Pleadings attached hereto ---

4 MR. GLEISSNER: I have attached ---

5 THE COURT: Proposed copy.

6 MR. GLEISSNER: ---A draft copy of the motion -- of the
7 proposed complaint, Your Honor.

8 THE COURT: Let me -- let me look through that real
9 quick, please, before y'all start.

10 All right. Why don't we start with the Motion to Amend
11 the Pleadings, as that might affect the other matters
12 involved. I think that motion is pretty plain on it's face.
13 Let me just hear from the Plaintiff, Carolina First Bank, as
14 to your reply to the Defendant, BADD, LLC, and William
15 McKown's Motion to Amend their Answer, to file a answer
16 counterclaim and third-party complaint.

17 MR. TREY DesCHAMPS: Your Honor, as to their Motion to
18 Amend, generally under Rule 15 I know leave is freely given,
19 however, as this case is a mortgage foreclosure action the
20 Plaintiff is proceeding under a remedy that was codified by
21 the Legislature, and if I may hand up the following case,
22 Rosenbaum versus S-M-S 32, found at 311 S.C. 140, 427 S.E. 2d
23 897. It's a 1993 Supreme Court case.

24 THE COURT: All right, sir.

25 MR. TREY DesCHAMPS: This case was an action to try a

1 and our position is that the Defendant shouldn't be permitted
2 to evade the intent of the Legislature in it's mortgage
3 foreclosure action to -- to request or obtain a right to a
4 jury trial.

5 As to his counterclaims they are -- we don't have an
6 op -- oppose him adding those counterclaims. They can be
7 referred to the Master, and I think -- I guess we'll get into
8 it later in my Motion for Order of Reference. I think, even
9 if he's entitled to amend his Answer it doesn't affect the
10 reference.

11 THE COURT: Any brief reply that you would like to
12 give, Mr. Gleissner?

13 MR. GLEISSNER: Your Honor, I was listening to him. I
14 didn't really hear an argument against ---

15 THE COURT: The Motion to Amend ---

16 MR. GLEISSNER: Right.

17 THE COURT: ---But it's the effect of it, and I know
18 we've gone -- probably gone beyond the Motion to Amend. I
19 think where the -- where the case is, I'm going to -- as the
20 Supreme Court and the Court of Appeals have indicated,
21 liberally construe Rule 15 and allow an amendment. It's what
22 the effect of the amendment is. Does it allow then for a
23 reference because you are adding to an equity action, or does
24 it then keep it in Circuit Court for a jury trial. I just
25 would go back to ---

1 MR. GLEISSNER: Okay. Now I understand where you are,
2 Your Honor ---

3 THE COURT: All right.

4 MR. GLEISSNER: ---And as it relates to that specific
5 point even if the Court didn't allow the Motion to Amend the
6 Court still wouldn't refer this matter to a master in equity,
7 and the reason for that is -- I mean, the foreclosure action
8 against BADD, LLC -- I mean, that's provided for under Rule
9 50-3(B), I mean that applies -- foreclosure actions get
10 referred. There is nothing in Rule 53(B) that talks about a
11 complaint against the guarantor. That's a pure breach of
12 contract cause of action and they are seeking a monetary
13 judgment based upon that pure breach of contract cause of
14 action, and because of that, and because there is no rule
15 allowing for a referral of a guaranty cause of action, Your
16 Honor, that stays in Circuit Court at the jury level, so even
17 if -- even if, you know, we were just dealing with their claim
18 against Mr. McKown saying, you've breached this contract, we
19 want a money judgment against you, that stays in Circuit
20 Court, we are entitled to a jury trial on that.

21 Now, in our original Answer and Counterclaim we did, in
22 the broadest terms humanly possible, frame a Counterclaim in
23 this case on behalf of both BADD and Mr. McKown, and we did
24 that because -- just the pure time pressures, Your Honor.
25 This particular complaint was filed on September 9th. We

1 accepted service on October 4th, 2020. We answered and filed
2 our Answer and Counterclaim on October 29th. We didn't take
3 the full thirty days, Judge, because -- well ---

4 THE COURT: Well, let's just take it that I'm going to
5 allow you to amend your Answer to raise the additional
6 counterclaims and the crossclaim that -- you had a crossclaim
7 in there too, right, the Third-Party Complaint ---

8 MR. GLEISSNER: Well, Third-Party Complaint, Your
9 Honor.

10 THE COURT: Third Party Complaint. I'm sorry.

11 MR. GLEISSNER: That's correct.

12 THE COURT: So just take it that I'm going to allow you
13 to do so, and that's going to be the pleading that you are
14 dealing with.

15 MR. GLEISSNER: Okay. Well, I mean, Your Honor, the --

16 --

17 THE COURT: If that's the case ---

18 MR. GLEISSNER: If that's the case, I mean I've got
19 breach of contract, I've got intentional interference with
20 contractual relations, I've got intentional interference with
21 prospective business relations, and I've got conspiracy, and
22 all of those causes of action are to be tried in front of a
23 jury, and that's the reason why I think we should leave it
24 here.

25 THE COURT: All right.

1 And as to the Third-Party Claims, Third-Party Cause of
2 Action against Mr. Rempher as a Third-Party Defendant, those
3 are permissive, so those don't -- he waived his right to a
4 jury trial by asserting those in an equitable action to
5 foreclosure two real estate mortgages.

6 And if I may add, the Plaintiff's Motion to Alter and
7 Amend -- and they allege that these Counterclaims all involve
8 the same transaction and occurrence, so under South Carolina
9 Law if the counterclaims arise out of the same transaction
10 that the mortgage lien was created they are equitable actions
11 and should be referred to the Master-in-Equity.

12 THE COURT: Mr. Gleissner, let me ask you a couple of
13 questions, please sir.

14 MR. GLEISSNER: Yes sir.

15 THE COURT: Looking at your Civil Conspiracy Cause of
16 Action the only date I see in there is in Paragraph Twenty-
17 Seven in 2009. Is that when you allege a conspiracy took
18 place, in 2009, or in 2010, or when is it that you allege the
19 conspiracy originated and took place?

20 MR. GLEISSNER: Well, Your Honor, because we are not
21 part of the conspiracy it's a little difficult for us to
22 specifically identify, you know, when the conspirators engaged
23 in the action ---

24 THE COURT: How about ---

25 MR. GLEISSNER: We believe that the conspiracy took

1 place when -- or began when Mr. Christenson -- that's the
2 defaulting Defendant -- brought Mr. Rempher to the table. Mr.
3 Rempher walked to the table -- I mean, Judge, we have
4 conversations between ---

5 THE COURT: And that was approximately when?

6 MR. GLEISSNER: That began in 2009, Your Honor.

7 THE COURT: 2009.

8 MR. GLEISSNER: And in 2010 Mr. Rempher took over the
9 collection of rents, and the handling of the tenants on this
10 property, and we have -- you know, my client witnessed
11 conversations between Mr. Rempher and Carolina First Bank. We
12 have received e-mails between Mr. Rempher and Carolina First
13 Bank, and all of those e-mails, I believe, are in 2010, Your
14 Honor, but in 2009 is when Mr. Rempher came to the table as it
15 were.

16 THE COURT: How about then let's look at the Third
17 Counterclaim, Second Cause of Action, Breach of Contract, the
18 Third Cause of Action, Intentional Interference with
19 Contractual Relationships, the Fourth Cause of Action, Breach
20 of Fiduciary Duty. Are they all in the same time frame that
21 we were just talking about with the Civil Conspiracy?

22 MR. GLEISSNER: Yes, Your Honor.

23 THE COURT: All right.

24 MR. GLEISSNER: If Your Honor would like I'll be happy
25 to make my Amended Complaint -- or Amended Answer and

1 Counterclaim and Third-Party Complaint, I would be happy to
2 make it more definite and certain to provide time line.

3 THE COURT: That's all right. What I'm trying to do is
4 just figure out the time frame here. Would it be fair to say
5 that these things occurred after the origination of the note
6 and mortgage?

7 MR. GLEISSNER: Yes, Your Honor.

8 THE COURT: From the allegations they ---

9 MR. GLEISSNER: Yes, Your Honor.

10 THE COURT: ---Necessarily would have had to have
11 occurred after that.

12 MR. GLEISSNER: Absolutely, Your Honor.

13 THE COURT: Okay. All right.

14 Let me ask another question. When a Court would be
15 faced with the issue of an adhesion contract, where something
16 is unconscionable because it's an adhesion contract, is that
17 not a question for the Court, not a question for a jury? When
18 that is a defense to, you know, a claim on the -- on the
19 contract, whether it, you know, originates in a -- you know,
20 where it often originates is, you have these mobile home
21 agreements, and they have these arbitration agreements in
22 them, or you have other contracts that have these arbitration
23 agreements that might be buried, and the Court talks about
24 whether the matters are adhesion contracts or not, in trying
25 to -- whether or not those arbitration provisions ought to be

1 enforced.

2 Is an adhesion contract, that decision, is that not a
3 matter for the Court? That is nothing something you leave to
4 the jury to decide, whether a con -- whether it's an adhesion
5 contract or not.

6 MR. GLEISSNER: Your Honor, the answer to your question
7 is, yes, that's an equitable defense. There's a -- it's a
8 two-step process. The first step is to determine whether it's
9 an adhesion contract, and I don't think there's any dispute
10 that this is an adhesion contract. It's here, sign this,
11 that's the end of it. Now, whether or not it's also
12 unconscionable, that's the second step, I mean, so we alleged
13 in our First Counterclaim is, in fact, an equitable
14 counterclaim, Your Honor, and it relates to whether or not the
15 Guaranty itself is enforceable because of the provisions
16 associated with the Guaranty that -- for instance, even if the
17 underlying obligation is found to be illegal they are still
18 going to try to enforce this Guaranty.

19 THE COURT: Okay.

20 MR. GLEISSNER: Even if the underlying obligation is
21 based on a forgery they are still going to try to enforce this
22 Guaranty. So, Your Honor, those factors, we believe, weigh
23 into the condition that this is not only an adhesion contract,
24 but goes further and becomes an unconscionable contract.

25 But you are right, Your Honor, that is purely an

1 equitable Counterclaim. It's ---

2 THE COURT: And so -- and the -- the accounting also.

3 MR. GLEISSNER: The accounting ---

4 THE COURT: When you ask for an accounting ---

5 MR. GLEISSNER: Yes, Your Honor, an accounting is an
6 equitable counterclaim.

7 THE COURT: Okay. All right.

8 MR. GLEISSNER: It is the causes of action for breach
9 of contract, the causes of action for Intentional Interference
10 with Contractual Relations and Prospective Business Relations.
11 It is the breach of fiduciary duty seeking monetary recover.

12 And Your Honor, as it relates to the case that they
13 cited on breach of fiduciary duty, it's the Verenes case ---

14 THE COURT: Yes sir.

15 MR. GLEISSNER: ---That they've cited. The Court in
16 that case specifically holds, "This Court has held that an
17 action alleging a breach of fiduciary duty is an action at
18 law, however, breach of fiduciary duty may sound in equity if
19 the relief sought is equitable", and in that case, the
20 Verenes, the relief sought was restitution and disgorgement.
21 In this case I'm seeking monetary damages. That's the
22 difference between this case and the case that I have.

23 THE COURT: All right.

24 MR. GLEISSNER: Also, Your Honor, in the Geiger -- I'm
25 sorry, it's the Lanford case -- a friend represented Mr.

1 Geiger in the case, that's the reason I call it the Geiger
2 case, Your Honor.

3 THE COURT: All right.

4 MR. GLEISSNER: In that case -- that was before a Court
5 on summary judgment, and Your Honor, we are not here on
6 summary judgment. We are not here on a finding that the
7 Guaranty is enforceable and unconscion -- I mean, we are not
8 on that. We are here on simply, are you going to refer it, or
9 --- well, I guess we are not, and so I'm going to be quiet now
10 and sit down.

11 THE COURT: Okay. Thank you.

12 MR. GLEISSNER: Thank you, Your Honor.

13 THE COURT: All right. I appreciate it.

14 Looking at the Counterclaims that the Defendant --
15 Defendants had raised in this matter, the original Answer,
16 which -- let's see, in your original Answer and Counterclaim
17 there was the Counterclaim for it to be an unconscionable
18 adhesion contract and preservation of basically other
19 counterclaims or claims as far as estoppel, waiver, accord and
20 satisfaction, impairment, etcetera.

21 Looking at cases that the Supreme Court and Court of
22 Appeals have decided in this issue -- and there's just a
23 number of them -- the Courts came up with a test that a
24 counterclaim is compulsory if the counterclaim arises out of
25 the same transaction or occurrence that is the subject matter

1 of the opposing party's claim. Two tests the Court may use in
2 determining whether a claim arises out of the same transaction
3 or occurrence are whether the issues of fact and law are
4 raised by the claim and the counterclaim are largely the same,
5 and whether there is any logical relation between the claim
6 and the counterclaim. The counterclaim is compulsory if the
7 question posed by either test is affirm -- is answered
8 affirmatively.

9 Also, "A party is entitled to a jury trial on it's
10 counterclaims when -- again, when the counterclaim is legal
11 and compulsory in nature, but where a defendant is in an
12 action begun in equity, and asserts a permissive counterclaim
13 that is legal in nature the defendant is deemed to have waived
14 the right to a jury trial on the issues raised by the
15 counterclaim."

16 In this particular matter there's a distinction between
17 the Counterclaim for the -- on the matter of the guaranty in
18 an -- unconscionable adhesion contracts and the other
19 Counterclaims that are in the Amended Answer and Counterclaim
20 and Third-Party Complaint. It is for the Court to determine
21 whether or not a matter is an adhesion contract. That is not
22 a question for the jury, therefore, it can be properly placed,
23 and part of a foreclosure action.

24 Now, the issues of Civil Conspiracy, Breach of Contract
25 as alleged in the Third Counterclaim, Second Cause of Action,

1 and the Intentional Interference with Contractual
2 Relationships, the Third Cause of Action, and Fourth Cause of
3 Action, Breach of Fiduciary Duty, we have to look at when
4 those matters arose, look at the original note and mortgage,
5 and look at these tests that the Court just stated. The
6 original Note and Mortgage as I find alleged -- heard in 2008,
7 and I believe they were recorded on or about April 4th of
8 2008, were the recording dates for the ones that are being --
9 I believe being foreclosed upon, the actions that are alleged
10 as against the Plaintiff, and in the Breach of Contract, those
11 two Counterclaims arose after that. In the causes of action
12 those involve a party not a party to the original
13 transactions. While these actions for Civil Conspiracy,
14 Breach of Contract, Intentional Interference with a
15 Contractual Relationship and Prospective Business
16 Relationships and Breach of Fiduciary Duty might normally be
17 allowed to have a jury trial the Court would find, in this
18 particular matter, that they are permissive, that they were
19 not compulsory.

20 I appreciate you are not going to agree with me, sir.
21 Thank you.

22 But they are compul -- they are not compulsory, they are
23 permissive. Further, the action against the Third-Party
24 Defendant, if that Third-Party Defendant has an objection to
25 that and wants to raise defenses to which it is entitled,

COPY

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Carolina First Bank, n/k/a TD
Bank, N.A.,)

Plaintiff,)

v.)

BADD, LLC, William McKown,
and Charles A. Christenson,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2010-CP-26-8505

REPLY TO DEFENDANTS BADD,
LLC, AND WILLIAM MCKOWN'S
FIRST AMENDED ANSWER AND
COUNTERCLAIMS

NOW COMES THE Plaintiff Carolina First Bank, now known as TD Bank, N.A. (hereinafter sometimes referred to as "Plaintiff"), in answering the First Amended Answer and Counterclaims of Defendants BADD, LLC, and William McKown (hereinafter sometimes referred to as "Defendants"), does hereby allege as follows:

FOR A FIRST DEFENSE

1. Plaintiff does hereby deny each and every allegation in its entirety in the Defendants' First Amended Answer and Counterclaims unless hereinafter specifically admitted.

FOR A SECOND DEFENSE

2. Paragraphs 1 through 13 of Defendants' First Amended Answer and Counterclaims represent an answer to Plaintiff's Complaint in this action and, therefore, do not require a response from Plaintiff. However, to the extent that an answer is required, Plaintiff denies the same and demands strict proof thereof.
3. Plaintiff re-alleges all prior allegations and denials as if fully repeated herein verbatim in response to Defendants' allegations listed above paragraph 14 in Defendants' First Amended Answer and Counterclaims that allege Defendants reassert the prior allegations of this pleading as if included herein verbatim.
4. Plaintiff denies the allegations in paragraph 14 of Defendants' First Amended Answer and Counterclaims and demands strict proof thereof. More specifically, Plaintiff is seeking a judgment against Defendant William McKown based upon the full amount

WV

found to be due to it on the promissory notes and mortgages referenced in its Complaint, with the right to reduce same by the amount realized thereon from the proceeds of the sale, pursuant to Section 29-30-650 of the Code of Laws of South Carolina (1976). The guarantees in favor of Plaintiff and referenced in Defendants' First Amended Answer and Counterclaims were delivered as security to induce said Plaintiff to extend credit to Defendant BADD, LLC.

5. Plaintiff denies the allegations in paragraph 15 of Defendants' First Amended Answer and Counterclaims and demands strict proof thereof. More specifically, said monies were advanced to Defendant BADD, LLC, an entity in which Defendant William McKown is a member and authorized signatory. Further, Defendant William McKown executed all of the promissory notes and mortgages referenced in Plaintiff's Complaint on behalf of Defendant BADD, LLC.
6. Plaintiff denies the allegations in paragraph 16 of Defendants' First Amended Answer and Counterclaims and demands strict proof thereof. More specifically, the Guarantees executed by Defendant William McKown in favor of Plaintiff were delivered to Plaintiff in order to induce Plaintiff to lend sums of money and/or as consideration for lending said sums of money under the subject promissory notes secured by the subject mortgages. Further, Defendant William McKown, in said paragraph 16, only alleges an equitable proceeding as well as an improper legal conclusion in his effort to demand a jury trial.
7. Plaintiff re-alleges all prior allegations and denials as if fully repeated herein verbatim in response to Defendants allegations listed above paragraph 17 in Defendants' First Amended Answer and Counterclaims that allege Defendants reassert the prior allegations of this pleading as if included herein verbatim.
8. Plaintiff denies the allegations in paragraphs 17, 18, 19 and 20 of Defendants' First Amended Answer and Counterclaims and demands strict proof thereof.
9. Plaintiff re-alleges all prior allegations and denials as if fully repeated herein verbatim in response to Defendants allegations listed above in paragraph 21 in Defendants' First Amended Answer and Counterclaims that allege Defendants reassert the prior allegations of this pleading as if included herein verbatim.

10. Upon information and belief, Plaintiff admits the allegations in paragraph 21 of Defendants' First Amended Answer and Counterclaims.
11. Upon information and belief, Plaintiff admits the allegations in paragraph 22 of Defendants' Amended Answer and Counterclaims only to the extent that Badd purchased three warehouse units located in an single building, obtained two loans from the Plaintiff in order to purchase these three units, and the financing from Plaintiff included the two loans involved in this matter, with one of the loans being collateralized with two units and the other loan being collateralized with one unit. Plaintiff is without sufficient information or knowledge to form an opinion or belief as to the remaining allegations in said paragraph 22 and, therefore, denies the same and demands strict proof thereof.
12. Upon information and belief, Plaintiff admits the allegations in paragraph 23 of Defendants' First Amended Answer and Counterclaims.
13. Plaintiff is without sufficient information or knowledge to form an opinion or belief as to the allegations in paragraphs 24, 25, 26, 27, 28, 29, and 30 of Defendants' First Amended Answer and Counterclaims and, therefore, denies the same and demands strict proof thereof.
14. Plaintiff denies the allegations in paragraphs 31, 32, 35, 36, 37, and 38 of Defendants' First Amended Answer and Counterclaims and demands strict proof thereof.
15. Plaintiff is without sufficient information or knowledge to form an opinion or belief as to the allegations in paragraphs 33 and 34 of Defendants' First Amended Answer and Counterclaims and, therefore, denies the same and demands strict proof thereof.
16. Plaintiff re-alleges all prior allegations and denials as if fully repeated herein verbatim in response to Defendants allegations listed above paragraph 39 in Defendants' First Amended Answer and Counterclaims that allege Defendants reassert the prior allegations of this pleading as if included herein verbatim.
17. Plaintiff is without sufficient information or knowledge to form an opinion or belief as to the allegations in paragraph 39 of Defendants' First Amended Answer and Counterclaims and, therefore, denies the same and demands strict proof thereof.
18. Plaintiff denies the allegations in paragraph 40 of Defendants' First Amended Answer and Counterclaims wherein Defendants allege that Rempher failed to make the

26. Defendant William McKown alleges in the First Amended Answer and Counterclaims that he is entitled to a jury trial with respect to his accounting remedy and, therefore, he disputes any ground for the existence of equitable jurisdiction. Further, Defendant William McKown has failed to state facts sufficient to constitute a cause of action for an accounting.
27. Defendants deny the existence of any ground for the existence of equitable jurisdiction as to the guarantees executed by Defendant William McKown and, therefore, said Guarantor should not be entitled to seek equitable relief to avoid liability arising from the enforcement of said guarantees. Further, the subject guarantees executed by William McKown expressly provide that he represents and warrants to Plaintiff that he has a direct and substantial economic interest in the borrower and expects to derive substantial benefits from any loans and financial accommodations resulting in the creation of the indebtedness guaranteed hereby. Said guaranty also provides that Defendant William McKown represents and warrants that he entered into said guarantees at the request of borrower.
28. Plaintiff respectfully requests this Honorable Court to dismiss and/or strike Defendants' counterclaim for an accounting pursuant to Rule 12(b)(6) and/or Rule 12(f), *South Carolina Rules of Civil Procedure*.

FOR A FOURTH DEFENSE

(Motion to Dismiss and/or Strike William McKown's Counterclaims)

29. Plaintiff re-alleges all prior allegations and denials as if fully repeated herein verbatim.
30. Defendant William McKown's counterclaim against Plaintiff for civil conspiracy references allegations as to Plaintiff's alleged conspiracy to foreclose upon the three units and sell them to Rempher at a significant reduction in the fair market at the foreclosure sale.
31. Defendants' First Amended Answer and Counterclaims allege that Defendant BADD, LLC, is the owner of the three units. It is undisputed that Defendant William McKown has no ownership interest in the three units, and that said Defendant is not a party to the subject promissory notes and mortgages. Therefore, Defendant William

McKown is not the real party in interest and lacks capacity to sue on any claims against Plaintiff arising out of the subject properties, promissory notes, and mortgages.

32. Therefore, Defendant William McKown's counterclaims for civil conspiracy and breach of contract as to the subject promissory notes and mortgages must be dismissed with prejudice and/or stricken from Defendants' First Amended Answer and Counterclaims pursuant to Rule 12(b)(6) and Rule 12(f) of the *South Carolina Rules of Civil Procedure*.

FOR A FIFTH DEFENSE

(Motion to Strike Defendants' Demand for a Jury Trial)

33. Plaintiff re-alleges all prior allegations and denials as if fully repeated herein verbatim.
34. Plaintiff hereby moves, pursuant to Rule 12(f), *South Carolina Rules of Civil Procedure*, to strike paragraphs 14 and 16 of Defendants' First Amended Answer and Counterclaims as the allegations therein are immaterial, asserted without a basis in fact, and are impertinent or scandalous allegations as they request a jury trial under facts which give rise to an equitable cause of action and equitable defense which will determine the outcome of the case.
35. Plaintiff further reserves any motion to strike Defendants' demand for a jury trial on its counterclaims and third-party claims as those causes of action are permissive and Defendants waived any right to a jury trial on those causes of action by asserting them in an equitable action.

FOR A SIXTH DEFENSE

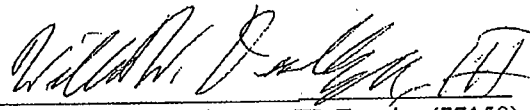
36. Plaintiff re-alleges all prior allegations and denials as if fully repeated herein verbatim.
37. Plaintiff reserves and does not waive any additional or further defenses which may be revealed by discovery.



WHEREFORE, Plaintiff having fully answered the Defendants' First Amended Answer and Counterclaims, prays that this Honorable Court inquire into the matters as set forth herein and:

- a. That Defendants' Counterclaims be dismissed with prejudice;
- b. That Defendants' demand for a jury trial be stricken from the First Amended Answer and Counterclaims; and
- c. For any other and further relief as this Court deems just and proper.

DESCHAMPS LAW FIRM



William W. DesChamps, III, Esquire (77150)

William W. DesChamps, Jr., Esquire (01658)

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Myrtle Beach, South Carolina 29577

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trey@deschampsllaw.com

February 18, 2011
Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2010-CP-26-8505

CAROLINA FIRST BANK,)
Plaintiff,)

v.)

CERTIFICATE OF SERVICE BY MAIL

BADD, LLC, WILLIAM MCKOWN,)
And CHARLES A. CHRISTENSON,)
Defendants.)

BADD, LLC and WILLIAM MCKOWN,)
Third Party Plaintiffs,)

v.)

WILLIAM REMPHER,)
Third Party Defendant.)

The undersigned hereby certifies that a true and exact copy (or copies) of the within-named document(s) have been served upon the following counsel of record or parties by delivering a copy of same to counsel or party via First Class, US Mail, postage prepaid, addressed as shown below, this 18th day of February, 2011.

DOCUMENT(S):

- 1) Plaintiff's Reply to Defendants BADD, LLC, and William McKown's First Amended Answer and Counterclaims; and
- 2) Order Granting Plaintiff's Motion for Order of Reference

ADDRESSEE:

Richard Gleissner, Esquire
Gleissner Law Firm
3610 Landmark Drive, Suite G
Columbia, SC 29204

[SIGNATURES APPEAR ON NEXT PAGE]

Sarah H. DesChamps

Sarah H. DesChamps
Legal Assistant

SUBSCRIBED and sworn to before

me this 18th day of February, 2011.

Mona D. McManus
Notary Public for South Carolina

My Commission Expires: 12/6/15

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No: 2010-CP-26-8505

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SC Court of Appeals

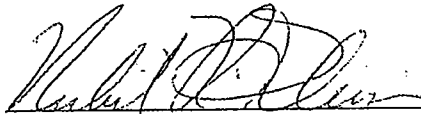
BADD, LLC and William McKown Appellant,

v.

Carolina First Bank, n/k/a TD Bank, N.A. Respondents

NOTICE OF APPEAL

Defendant/Appellant files this Notice of Appeal in regard to the attached Order Defendant received or about February 15, 2011. The attached Order appears to be a finalized version of the ruling of Judge Steven H. John in regard to Plaintiff's Motion for an Order of Reference.



Richard R. Gleissner, Esquire
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3610 Landmark Drive, Suite G
Columbia, South Carolina 29204
(803) 603-2228
Attorneys for Appellants

Columbia, South Carolina
March 9, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No: 2010-CP-26-8505

BADD, LLC and William McKown Appellant,

v.

Carolina First Bank, n/k/a TD Bank, N.A. Respondents

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on March 9, 2011, addressed to its attorney of record as follows:

William W. DesChamps, III, Esquire
1551 21st Avenue North, Suite 14
Post Office Box 2402
Myrtle Beach, SC 29578



Richard R. Gleissner
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3610 Landmark Drive, Suite G
Columbia, South Carolina 29204
(803) 603-2229
Attorneys for the Appellant,
BADD, LLC and William M. McKown

Dated: March 9, 2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

Carolina First Bank, n/k/a TD
Bank, N.A.,)

Plaintiff,)

v.)

BADD, LLC, William McKown,
and Charles A. Christenson,)

Defendants.)

BADD, LLC, and William McKown,)

Third Party Plaintiffs,)

v.)

William Rempher,)

Third-Party Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
2010-CP-26-8505

ORDER GRANTING PLAINTIFF'S
MOTION FOR ORDER OF
REFERENCE

CLERK OF COURT
ELANIE HUGGINS-WARD

FEB 15 PM 3:35

HORRY COUNTY

This matter came before this Court by way of Plaintiff's Motion for Order of Reference seeking to have the above-captioned matter referred to the Honorable Cynthia Graham Howe, Master-in-Equity for Horry County, South Carolina, to take testimony arising under the pleadings, to make findings of fact and conclusions of law with authority to dispose of any and all issues and enter a final judgment in the case pursuant to Rule 53 of the *South Carolina Rules of Civil Procedure*, to hear any issue after said judgment relating to this action, including, without limitation, judgment of sale and foreclosure pursuant to Rule 71(b), *South Carolina Rules of Civil Procedure*, with all appeals being made directly to the South Carolina Court of Appeals or to the South Carolina Supreme Court. Plaintiff's Motion to Appoint a Receiver and Defendants BADD, LLC, and William McKown's Motion to Amend their Answer were also before the Court. Plaintiff's Motion to Appoint a Receiver was resolved by the parties and is addressed in a separate Consent Order Appointing a Receiver. Defendant BADD, LLC, and

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[Signature]

William McKown's Motion to Amend their Answer is addressed in a separate order and was granted by this Court prior to the hearing on Plaintiff's Motion for Order of Reference. Appearing at the hearing was William W. DesChamps, III, as counsel for Plaintiff, and Richard R. Gleissner, as counsel for Defendants BADD, LLC, and William McKown. Defendant Charles A. Christenson did not make an appearance and was previously held in default for failure to file and serve a responsive pleading to Plaintiff's Complaint, as evidenced by that certain Entry of Default attached with an Affidavit of Service and Affidavit of Default previously filed on November 8, 2010 with the Horry County Clerk of Court.

Counsel for Defendants BADD, LLC (hereinafter referred to as "BADD"), and William McKown (hereinafter referred to as "McKown") accepted service of Plaintiff's Summons and Complaint along with its Motion for Order of Reference on October 4, 2010. Plaintiff commenced this action against BADD, as maker and mortgagor, seeking judgment for the full amount to be found due on the subject promissory notes and mortgages, and foreclosure and sale of the three parcels of real property secured by those mortgages. Plaintiff, in its Complaint, also requested judgment against Defendants McKown and Charles A. Christenson, as guarantors of the above-referenced promissory notes and mortgages, for payment of the residue of the mortgage indebtedness remaining after the foreclosure and sale of the mortgaged properties. Plaintiff attached the two promissory notes, two mortgages, and guarantees at issue in this action as exhibits to its Complaint. In the Amended Answer, McKown demanded a jury trial as to the two guarantees he allegedly executed (hereinafter referred to as "McKown Guarantees"). Defendants BADD and McKown demanded a jury trial as to their counterclaim for breach of contract against Plaintiff and as to their third-party claims against William Rempher for Breach of Contract, Intentional Interference with Contractual Relations and Prospective Business Relations, and Breach of Fiduciary Duty. McKown further demanded a jury trial as to his counterclaim for Civil Conspiracy against Plaintiff and as to his third-party claim against William Rempher for Civil Conspiracy.

Defendant McKown demanded a jury trial as to Plaintiff's request for judgment against him under the McKown Guarantees. McKown contended that he was entitled to a jury trial because the allegations in the Complaint pertaining to the McKown Guarantees related to a contract, and an action to construe such a contract and a breach thereof was an action at law. Plaintiff contended that the main purpose of its Complaint was an equitable action to foreclose

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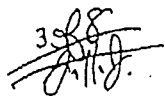
two real estate mortgages even though Plaintiff sought recovery from McKown under the McKown Guarantees for the full amount of any deficiency judgment awarded to it after the foreclosure and sale of the mortgaged properties.

Defendants BADD and McKown contended that they were entitled to a jury trial as to the counterclaims alleged against Plaintiff in the Amended Answer because those counterclaims were legal and compulsory in nature. In support of their contention that the counterclaims against Plaintiff for civil conspiracy and breach of contract were compulsory in nature, BADD and McKown asserted that the matters alleged in the Amended Answer were all involved in the same transaction and occurrence, and that those matters all involved the alleged default that the Plaintiff sued upon. Plaintiff contended that the counterclaims and issues raised in the Amended Answer were equitable and should be tried by the Court on its equity side since Defendants alleged that their counterclaims involved the same transaction and affected Plaintiff's right to seek foreclosure and sale of the subject properties. Plaintiff further contended that McKown was not entitled to a jury trial on his counterclaim for Civil Conspiracy because it was a permissive counterclaim that was asserted in an equitable action to foreclose two real estate mortgages. The parties did not dispute that McKown's counterclaim for Civil Conspiracy was legal in nature.

FINDINGS OF FACT

The two promissory notes and two real estate mortgages were executed by McKown and Charles A. Christenson as members of BADD, LLC. The McKown Guarantees specifically reference the mortgage indebtedness which Plaintiff seeks to recover from Defendants BADD, McKown, and Charles A. Christenson as a result of the alleged default under the terms of the subject promissory notes and mortgages. Paragraph 9 on page 2 of each of the subject promissory notes provides that the purpose of the subject loan is to provide financing for the acquisition of income producing real estate.

Plaintiff's Complaint specifically demanded judgment against BADD for the full amounts to be found due on the subject promissory notes and mortgages, with the right to reduce the judgment amount by the amount realized by the Plaintiff from the proceeds of the sale of the mortgaged properties. Plaintiff's Complaint also alleged that McKown must answer for the judgment against BADD for all monies found to be due on the subject promissory notes and mortgages as a result of the McKown Guarantees he executed to secure the mortgage

388


indebtedness. The Amended Answer alleged an equitable counterclaim for an accounting against Plaintiff and an equitable defense of unconscionability as to the terms of the two McKown Guarantees. The Amended Answer also alleged that the McKown Guarantees were unenforceable because they were unconscionable adhesion contracts. Defendants admitted in Paragraph 3 of their Amended Answer that this action involves the foreclosure of real property in Horry County and that this is a matter which should be referred with finality to the Master-in-Equity as to Defendant BADD.

McKown and Charles A. Christenson executed the promissory note attached to Plaintiff's Complaint as Exhibit A and the real estate mortgage attached to Plaintiff's Complaint as Exhibit C on March 14, 2008. The above-referenced mortgage was recorded in Mortgage Book 5046 at Page 735 on March 18, 2008 in the office of the Horry County Register of Deeds. McKown and Charles A. Christenson executed the promissory note attached to Plaintiff's Complaint as Exhibit B and the real estate mortgage attached to Plaintiff's Complaint as Exhibit E on April 1, 2008. The above-referenced mortgage was recorded in Mortgage Book 5054 at Page 990 on April 4, 2008 in the office of the Horry County Register of Deeds. At hearing, counsel for Defendants BADD and McKown stated that the actions alleged in the counterclaims for Civil Conspiracy and Breach of Contract arose after April of 2008. The Amended Answer alleges that the actions on the part of the Plaintiff and the actions on the part of William Rempher that gave rise to Defendants' counterclaims and third-party claims occurred in 2009.

CONCLUSIONS OF LAW

The Court reviewed and used the cases supplied by counsel while rendering its decision as to the main purpose of Plaintiff's Complaint. "Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Verenes v. Alvanos*, 387 S.C. 11, 15-16, 690 S.E.2d 771, 773 (citing *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997)). "The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable." *Id.* "In actions to foreclose mortgages ... if the mortgage debt is secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgage premises against such other person." S.C.

408
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Code Ann. § 29-3-660. "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 by verified petition to the clerk of court in which the decree or order of sale was taken for an order of appraisal." S.C. Code Ann. § 29-3-680 (2010). In *Anderson Brothers Bank v. Adams*, 305 S.C. 25, 406 S.E.2d 173 (1991), the South Carolina Supreme Court held that the guarantors were entitled to the Appraisal Statute's benefit because the Plaintiff made them party defendants in the mortgage foreclosure proceeding and sought personal judgments against them. The South Carolina Supreme Court has also held that a guarantor of a promissory note is not entitled to the benefit of the Appraisal Statute when the action does not involve a real estate foreclosure proceeding. See *Citizens & S. Nat'l Bank v. Lanford*, 313 S.C. 540, 443 S.E.2d 549 (1994). In his opposing memorandum, McKown cited *Pruitt v. South Carolina Med. Malpractice Liability Joint Underwriting Assoc.*, 343 S.C. 335, 540 S.E.2d 843 (2001) and *State Farm Mut. Auto. Ins. Co. v. Moorer*, 330 S.C. 46, 496 S.E.2d 875 (Cl. App. 1998) to support his contention that an action to construe the McKown Guarantees was an action at law that gave him the right to a jury trial. In *U.S. Bank Trust Nat'l Assoc. v. Bell*, 385 S.C. 364, 684 S.E.2d 199, 207 (2009), the South Carolina Court of Appeals issued a written opinion on an appeal from the Master-In-Equity in a nonjury foreclosure action and referenced the above-cases cited in Defendants' memorandum by stating "the construction of a clear and unambiguous contract presents a question of law for the court." *Id.* at 364, 684 S.E.2d at 207.

The supporting authority cited in Defendants' memorandum to support McKown's contention that an action to construe the McKown Guarantees is an action at law that should be tried by a jury does not discuss the issue of whether a party-defendant who is a guarantor in a mortgage foreclosure action has a right to a jury trial. Defendants admitted in Paragraph 3 of the Amended Answer that Plaintiff's action involves the foreclosure of real property in Horry County and that it is a matter which should be referred with finality to the Master-in-Equity as to Defendant BADD. Plaintiff's Complaint seeks judgment against McKown under the McKown Guarantees for the full amount to be found due on the subject promissory notes and mortgages. The McKown Guarantees were alleged to secure the mortgage indebtedness. McKown will be liable for the full amount of the deficiency judgment awarded to the Plaintiff after the sale of the subject properties if the allegations in the Complaint are found to be true at trial. McKown will have no liability under the subject promissory notes, mortgages, and McKown Guarantees if the

5/28
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Plaintiff is awarded judgment and the proceeds from the foreclosure sale realized by the Plaintiff are sufficient to satisfy the mortgage indebtedness found to be due from Defendants by that judgment. The Amended Answer alleged an equitable cause of action for an accounting and an equitable defense of unconscionability as to the terms of the McKown Guarantees. The issue of whether the McKown Guarantees are unconscionable adhesion contracts is matter to be determined by the Court, not the jury. Therefore, the main purpose of this action is to foreclose two real estate mortgages as Plaintiff seeks recovery from McKown and Charles A. Christenson, as guarantors, for the full amount of any deficiency judgment awarded to it after the sale of the subject properties, and McKown has raised an equitable defense to challenge the enforceability of the McKown Guarantees.

The following analysis was adopted by the South Carolina Supreme Court to determine the trial of legal and equitable issues in complaints and counterclaims: 1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court; 2) If both are at law, the issues are triable by a jury; 3) If the complaint is equitable and the counterclaim is legal and permissive the defendant waives his right to a jury trial; 4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has the right to a jury trial on the counterclaim. *Johnson v. South Carolina Nat'l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987). "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *First Citizens Bank & Trust Co. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). In *Sue & Sam Manuf. Co. v. B-L-S Const. Co.*, 538 F.2d 1048 (4th Cir. 1976), the United States Court of Appeals for the Fourth Circuit applied four different tests "to determine whether a claim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." *Id.* at 1051. "A party does not waive its right to a jury trial on a counterclaim asserted in an equity action if the counterclaim is legal and compulsory in nature." *North Carolina Federal S & L v. DAV Corp.*, 298 S.C. 514, 517, 38 S.E.2d 903, 905 (1989). The South Carolina Supreme Court has adopted the logical relationship test to determine whether a counterclaim is compulsory. *See Id.* at 518, 381 S.E.2d at 905. In applying the logical relationship test to determine whether the counterclaims at issue were compulsory, the Court in *Sue & Sam Manuf. Co.* found that the counterclaim for damages arising from the collapse of the roof in the 1973 snowstorm were not logically related to the 1971 rain damage claim as the "differences in time, the causes of action, the cause of the damage, the

658
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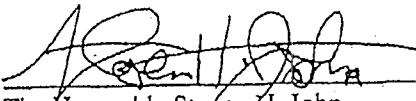
proof of facts, and the issues would rule out a logical relation between the claim for indemnity on account of the rain damage and the counterclaim on account of the snow damage." *Sue & Sam Manuf. Co.*, 538 F.2d at 1053. In *North Carolina Federal S & L v. DAY Corp.*, the South Carolina Supreme Court held that the defendant's sixth counterclaim was not logically related to the plaintiff's foreclosure action because the alleged breach by the Plaintiff of the alleged agreements did not affect the enforceability of the promissory note. 298 S.C. at 519, 381 S.E.2d at 905. The other counterclaims in the above-cited case were held by the Court to be compulsory as they alleged that Plaintiff's "right to bring suit on the note was modified by its oral agreement to provide additional financing as contemplated in the joint venture agreement." *Id.* at 518, 381 S.E.2d at 905. The South Carolina Supreme Court also held that third party claims are permissive, and the Defendant waived the right to a jury trial on those claims by asserting them in the foreclosure action. *Id.* at 519, 381 S.E.2d at 906.

In the present action, the Court reviewed the dates on which the original promissory notes and McKown Guarantees were executed, the dates on which the subject mortgages were recorded, and the time in which the allegations occurred that gave rise to McKown's counterclaims against the Plaintiff for Civil Conspiracy and Breach of Contract. The actions alleged in the counterclaims against the Plaintiff for Civil Conspiracy and Breach of Contract involved a party who was not a party to the original action and arose after the time when the subject mortgages were recorded. Further, the counterclaims alleged against Plaintiff do not affect the validity of the subject promissory notes and mortgages, or the McKown Guarantees. There is no logical relationship between Plaintiff's mortgage foreclosure action and the counterclaims alleged in the Amended Answer. Therefore, the counterclaims alleged in the Amended Answer are permissive as they do not arise out of the same transaction or occurrence as Plaintiff's action. The actions alleged in the third-party claims involved a party who was not a party to the original action and arose after the time in which the subject mortgages were recorded. The causes of action alleged against Third-Party Defendant William Rempher may be brought by Defendants BADD and McKown for their own trial since those causes of action are not necessary to the resolution of the action brought by the Plaintiff. This Court finds that Defendants BADD and McKown are not entitled to a jury trial on the allegations raised in the pleadings as the main purpose of Plaintiff's Complaint is an equitable action to foreclose two real estate mortgages, and the counterclaims and third-party claims alleged in the Amended

758
BADD

Answer are permissive. Therefore, it is

ORDERED that the above-captioned matter is referred to the Honorable Cynthia Graham Howe, Master-in-Equity for Horry County, South Carolina, to take testimony arising under the pleadings, to make findings of fact and conclusions of law with authority to dispose of any and all issues and enter a final judgment in the case pursuant to Rule 53, *South Carolina Rules of Civil Procedure*, to hear any issue after said judgment relating to this action, including, without limitation, judgment of sale and foreclosure pursuant to Rule 71(b), *South Carolina Rules of Civil Procedure*, with all appeals being made directly to the South Carolina Court of Appeals or to the South Carolina Supreme Court.


The Honorable Steven H. John
Resident Judge
Fifteenth Judicial Circuit

February 15, 2011
Conway, South Carolina

Master-in-Equity Hearing Scheduled for:
Date: _____
Time: _____

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

FILED

CASE NO. 2010-CP-26-8505

Carolina First Bank

11 FEB 15 PM 3:24

BADD LLC

RELATIVES-WARD
CLERK OF COURT

Et al

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify Arbitration award; ☐ other:
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

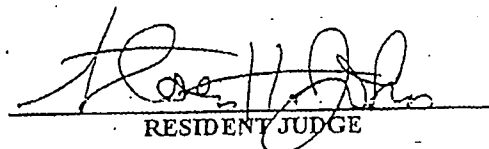
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See Attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Defendant's Motion/Alter and Amend is granted. Plaintiff's Motion/Order of Reference is Granted and Plaintiff's Motion/Appointment of Receiver is Resolved. A formal order followed by Atty. William W. DesChamp within seven days of today's date.

Dated at Conway, South Carolina, this 8th day of February, 2011.


RESIDENT JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ Day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

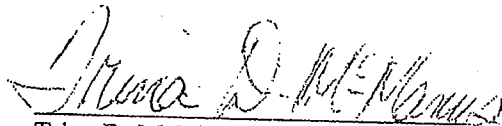
William W DesChamp III

Richard R. Glessner

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

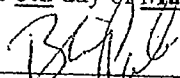
CLERK OF COURT



Trina D. McManus
Legal Assistant

SUBSCRIBED and sworn to before

me this 8th day of March, 2011.



Notary Public for South Carolina

My Commission Expires: 6-21-2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No: 2010-CP-26-8505

Carolina First Bank

Respondent,

v.

BADD, LLC, William M. McKown, and Charles A. Christianson,

Defendants,

Of Whom BADD, LLC and William McKown are

Appellants.

BADD, LLC and William McKown,

Third Party Plaintiffs,

v.

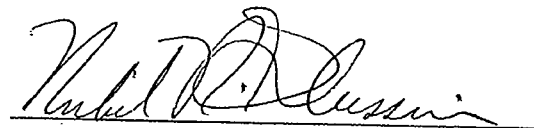
William Rempher,

Third Party Defendant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

September 23, 2011



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(803) 603-2228
Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No: 2010-CP-26-8505

Carolina First Bank

Respondent,

v.

BADD, LLC, William M. McKown, and Charles A. Christianson,

Defendants,

Of Whom BADD, LLC and William McKown are

Appellants.

BADD, LLC and William McKown,

Third Party Plaintiffs,

v.

William Rempher,

Third Party Defendant.

FINAL BRIEF OF APPELLANTS

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Table of Contents

Table of Authorities	ii
----------------------------	----

Statement of Issues on Appeal	1
-------------------------------------	---

Whether the Defendant William M. McKown can be denied his constitutional right to a jury trial on a legal claim against him because the Plaintiff elected to bring the legal claim against him in combination with an equitable cause of action against a different defendant?

Whether the trial court erred in finding that the counterclaims asserted by the Defendant William McKown and BADD, LLC that Plaintiff breached the contracts it is seeking to enforce and engaged in a civil conspiracy to deprive BADD, LLC of the property being foreclosed upon do not have a logical relationship to the Plaintiff's complaint and were therefore permissive counterclaims instead of compulsory counterclaims?

Whether the trial court erred in referring the entire case to the master instead of following the guidance of the South Carolina Court of Appeals that requires the preservation of a party's constitutional right to a jury trial when possible.

Statement of the Case	1
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Standard of Review	2
--------------------------	---

Facts	2
-------------	---

Legal Argument	3
----------------------	---

The South Carolina Constitution requires that the right to a jury remain inviolate and the Plaintiff cannot be allowed to waive a Defendant's right to a jury simply by including an equitable cause of action against a different Defendant. 3

The Defendants counterclaims alleging that the Plaintiff breached the same contract it is seeking to enforce and alleging that the Plaintiff engaged in a civil conspiracy in an effort to deprive the Defendant BADD, LLC of the property that the Plaintiff is seeking to foreclose upon have a logical relationship to the Plaintiff's complaint and are therefore compulsory counterclaims that the Defendants were required to bring in this action. 4

The Defendants did not waive their right to a jury when they asserted legal compulsory counterclaims against the Plaintiff. 5

If there is any doubt as to whether a counterclaim is compulsory or permissive, the Court is required to preserve the Defendant's right to a jury and not allow the dilemma caused by this doubt to result in a waiver of the right to a jury. 6

Conclusion 7

TABLE OF AUTHORITIES

Cases

<i>Aetna Insurance Co. v. Kennedy</i> , 301 U.S. 380, 57 S.Ct. 809, 81 L.Ed. 1177 (1937).....	3
<i>Beacon Theatres, Inc. v. Westover</i> , 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959).....	3
<i>First-Citizens Bank and Trust Co. of South Carolina v. Hucks</i> , 305 S.C. 296, 408 S.E.2d 222 (1991)	5, 6
<i>Green v. Lewis Truck Lines, Inc.</i> , 314 S.C. 303, 443 S.E.2d 906 (1994).....	2
<i>Johnson v. South Carolina Nat. Bank</i> , 292 S.C. 51, 354 S.E.2d 895 (1987).....	3, 5-6
<i>Keels v. Pierce</i> , 315 S.C. 339, 433 S.E.2d 902 (1993).....	6
<i>Knotts v. S.C. Dept. of Natural Resources</i> , 348 S.C. 1, 558 S.E.2d 511 (2002).....	2
<i>North Carolina Federal Sav. and Loan Ass'n v. DAV Corp.</i> , 298 S.C. 514, 381 S.E.2d 903 (1989).....	5, 6

Statutes, Rules and Other

Article 1, Section 14 of the South Carolina Constitution	3
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STATEMENT OF ISSUES ON APPEAL

- I. *Whether the Defendant William M. McKown can be denied his constitutional right to a jury trial on a legal claim against him because the Plaintiff elected to bring the legal claim against him in combination with an equitable cause of action against a different defendant?*
- II. *Whether the trial court erred in finding that the counterclaims asserted by the Defendant William McKown and BADD, LLC that Plaintiff breached the contracts it is seeking to enforce and engaged in a civil conspiracy to deprive BADD, LLC of the property being foreclosed upon do not have a logical relationship to the Plaintiff's complaint and were therefore permissive counterclaims instead of compulsory counterclaims?*
- III. *Whether the trial court erred in referring the entire case to the master instead of following the guidance of the South Carolina Court of Appeals that requires the preservation of a party's constitutional right to a jury trial when possible.*

STATEMENT OF THE CASE

Carolina First Bank (the "Bank") sued BADD, LLC (the "Debtor") and sought to foreclose upon a mortgage given by the Debtor to the Bank. See Record at p. 24. With its complaint, the Bank made a motion to refer the matter to the Master-in-Equity pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure (the "Rules"). See Record at p. 75. Also in the complaint, the Bank elected to include a request for relief against William M. McKown (the "Guarantor") based upon his independent and completely separate guarantee agreement. See Record at p. 24, ¶38. Both the Debtor and the Guarantor timely answered, demanded a jury trial and brought a counterclaim that seeks to preserve their breach of contract cause of action against the Plaintiff. See Record p. 79-84.

The Court scheduled a hearing on the motion to refer, but prior to the hearing, the Debtor and the Guarantor moved to amend their Answer and Counterclaim to provide greater specificity to the second counterclaim, to include a counterclaim for civil conspiracy and to bring a third party

complaint. See Record at p. 90- 116 (the "Amended Answer"). At the hearing on the Motion to Refer, the Court granted the motion to amend and indicated that it would consider the motion and the response based upon the averments of the Amended Answer. See Record at 130, lines 4-7. The Court found that the Counterclaims and Third Party Complaint were permissive, that the Defendants had waived their right to a jury trial because they were permissive and referred the entire matter to the Master-in-Equity. See Record at p. 1-8.

STANDARD OF REVIEW

In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. *Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 443 S.E.2d 906 (1994). If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced. See *Knotts v. S.C. Dept. of Natural Resources*, 348 S.C. 1, 558 S.E.2d 511 (2002).

FACTS

In March and April 2008, the Debtor borrowed money from the Bank and purchased three warehouse units in a building that contained seven total units (the "Warehouse Units") and pledged the Warehouse Units as collateral for the loan from the Bank. See Record at p. 18-19, ¶ 12, 13, 14, and 16; Record at p. 107-116 (the "Amended Answer"), ¶22 and 23. In 2009, Charles A. Christenson ("Christenson") who was a member of the Debtor was having financial problems and brought a third party in to take over his obligations. Record at p. 111, ¶27. Pursuant to the Amended Answer, this third party was allowed to take over the operations of the Debtor and pursuant to an alleged conspiracy with the Bank, proceeded to create a default in the loan obligations in an effort to allow the Bank to foreclose on the Warehouse Units so that he could purchase the property at a

significantly reduced price at a foreclosure sale. Record p. 112-113, ¶31 through 38. Because of the default, the Plaintiff foreclosed against the debtor and included in the foreclosure, a claim against the Guarantor. Record at p. 8, ¶38.

LEGAL ARGUMENT

- I. *The South Carolina Constitution requires that the right to a jury remain inviolate and the Plaintiff cannot be allowed to waive a Defendant's right to a jury simply by including an equitable cause of action against a different Defendant.*

Article 1, Section 14 of the South Carolina Constitution states that "The right of trial by jury shall be preserved inviolate." Courts that examine the waiver of this inviolate right generally follow the rulings of the United States Supreme Court and hold:

The Seventh Amendment right to trial by jury is a fundamental right. Courts will narrowly construe any waiver of this right and will indulge in every reasonable presumption against waiver.

See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959); *Aetna Insurance Co. v. Kennedy*, 301 U.S. 380, 57 S.Ct. 809, 81 L.Ed. 1177 (1937).

In this case, the Guarantor was sued on a breach of contract cause of action. In *Johnson v. South Carolina Nat. Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987), the South Supreme Court examined the issue of whether a suit on a guarantee was legal or equitable. Specifically, South Carolina National Bank had answered the Johnsons' Complaint and asserted a cause of action for damages against Johnson based upon his guarantee. The Supreme Court held, that the Counterclaim was a legal Counterclaim and that it entitled the Johnsons to a jury trial. 292 S.C. at 53, 354 S.E.2d at 896. Thus, there is no doubt, no question and no legal issue that the Guarantor is entitled to a jury trial and the trial court erred in referring this case to the Master in Equity.

- II. *The Defendants counterclaims alleging that the Plaintiff breached the same contract it is seeking to enforce and alleging that the Plaintiff engaged in a civil conspiracy in an effort to deprive the Defendant BADD, LLC of the property that the Plaintiff is seeking to foreclose upon have a logical relationship to the Plaintiff's complaint and are therefore compulsory counterclaims that the Defendants were required to bring in this action.*

In the Order, the trial court and the parties agree that the Civil Conspiracy counterclaim and the breach of contract counterclaim are legal in nature and entitle the Defendants to a jury trial if they are compulsory. In the Order and at the hearing, the trial court examines the date of the loan origination and the date of the allegations of the counterclaims. The court finds that because the loans were originated in 2008 and the conspiracy and breach of contract by the Bank began in 2009, the allegations of Plaintiff's complaint could have no logical relationship to the allegations of the Defendants' counterclaims. See Record, at p. 138, lines 3-19. Specifically, the Order states "the Court reviewed the dates on which the original promissory notes and McKown Guarantees were executed, the dates on which the subject mortgages were recorded and the time in which the allegations occurred that gave rise to ... the Counterclaims." Record at p. 7.

In fact, the Plaintiff is not suing on the a note, mortgage or guarantee. The Plaintiff is suing and alleging a breach of the promises contained in the note, mortgage and guarantee. This breach has a direct and logical relationship with the allegations of the Counterclaims. Specifically, the Plaintiff caused the breach as part of its conspiracy with the Third Party and in conspiring with the Third Party breached the promises contained in the note, mortgage and guarantee.

Even if the court were to adopt the simplistic chronological approach to determining the logical relationship between the complaint and the counterclaims, in this case, the counterclaims allege breaches beginning in 2009 and the complaint alleges a breach in September 2010. So, as

alleged in the counterclaims, the breach of the Debtor was chronologically after the breach by the Bank and therefore "logically related."

Legally, the courts do not look at the date to determine a logical relation. In *First-Citizens Bank and Trust Co. of South Carolina v. Hucks*, 305 S.C. 296, 408 S.E.2d 222 (1991), a trustee sued on an equitable cause of action. The defendant's counterclaim alleged a breach of an agreement with the trustee and breach of a fiduciary duty. That court held the causes of action were compulsory, legal counterclaims entitling the defendant to a jury trial.

In the case cited by the trial court in its order, *North Carolina Federal Sav. and Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989), five of the six counterclaims were held to be compulsory legal counterclaims that had a logical relationship with the foreclosure action. All five of these compulsory counterclaim had one thing in common, they all went to the issue of the alleged breach by the Plaintiff. The court held that they were compulsory because they challenged the issue of breach and whether the Plaintiff was entitled to enforce the documents it was relying upon for the foreclosure action.

Clearly, in this case, the counterclaims are compulsory and the trial court erred in finding them permissive and referring this matter to the master in equity.

III. *The Defendants did not waive their right to a jury when they asserted legal compulsory counterclaims against the Plaintiff.*

As stated in by the South Carolina Supreme Court,

A party does not waive its rights to a jury trial on a counterclaim asserted in an equity action if the counterclaim is legal and compulsory in nature. *North Carolina Federal S & L v. DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989). "If the complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim." *Johnson v. South Carolina*

Nat. Bank, 292 S.C. 51, 52, 354 S.E.2d 895, 896 (1987).

First-Citizens Bank and Trust Co. of South Carolina v. Hucks, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991).

The trial court clearly erred when it found that the Defendants had waived their right to a jury on the compulsory counterclaims and clearly erred when it referred the matter to the master-in-equity.

IV. *If there is any doubt as to whether a counterclaim is compulsory or permissive, the Court is required to preserve the Defendant's right to a jury and not allow the dilemma caused by this doubt to result in a waiver of the right to a jury.*

While the Defendants do not believe that there is any doubt that the counterclaims in this case are compulsory and are legal, if there is any doubt, the South Carolina Court of Appeals has held as follows:

If it is uncertain whether a counterclaim is compulsory or permissive, the pleader may simply plead the claim and make demand for a jury trial on it. If it is compulsory, he retains his right to a jury trial. *See Johnson v. South Carolina National Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987). If it is permissive, the court, on its own motion or the motion of the pleader, may order a separate trial of the counterclaim pursuant to Rule 42(b) to avoid prejudice to the pleader's right to a jury trial. *See* Rule 13(i), SCRPC. The rule laid out in *Hollingsworth, supra*, and *Massengale, supra*, applies only when it is clear the counterclaim is permissive. In that situation, the pleader is on notice that asserting an obviously permissive counterclaim, which under the Rule 13 could be asserted in a separate jury trial, waives the right to trial by jury by operation of law. However, if uncertainty exists, the pleader does not waive his right to a jury trial if the court later decides the claim is permissive. The right of trial by jury is highly favored, and waivers of the right are always strictly construed and not lightly inferred or extended by implication. *In re Gilliland*, 248 N.C. 517, 103 S.E.2d 807 (1958).

Keels v. Pierce, 315 S.C. 339, 341-342, 433 S.E.2d 902, 903 (1993). Thus, the proper ruling in this

case would be to determine if there is any doubt as to whether the legal counterclaims are compulsory or permissive. If there is doubt, the trial court should not have referred. If they are compulsory, the trial could should not have referred. Only if it is obvious that the counterclaims are permissive, would it not have been legal error for the trial court to do what it did.

Here, the Plaintiff seeks to foreclose upon a debt. The Defendants challenge that debt and allege (1) the potential involvement of the Bank in a conspiracy relating to the administration of that debt; (2) breach of the mortgage and note contracts; and the (3) breach of the covenant of good faith and fair dealing that is included in the contracts. Each of these counterclaims are compulsory counterclaims. Each of these counterclaims relates to the administration of the debt, and whether the Plaintiff has the right to foreclose on this property.

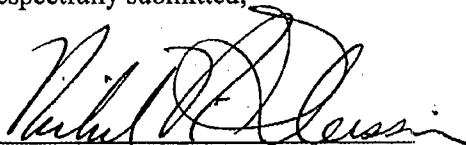
Simply, the trial court erred in not finding a logical relation between the complaint and the counterclaims. The trial court erred in referring the mater to the master-in-equity.

CONCLUSION

The trial court made clear legal error in finding that the separate claim against the Guarantor did not entitle the Guarantor to a jury trial on the Plaintiff's complaint against him. The trial court made clear legal error when it found the Defendants' counterclaims were not compulsory based upon a simplistic, and mistaken, chronological analysis. The trial court made clear error when it found the Defendants had waived their right to a jury. And, the trial court made clear error when it referred this matter to the Master-in-Equity. The trial court's order must be reversed.

Respectfully submitted,

By:



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October 14, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No: 2010-CP-26-8505

Carolina First Bank

Respondent,

v.

BADD, LLC, William M. McKown, and Charles A. Christianson,

Defendants,

Of Whom BADD, LLC and William McKown are

Appellants.

BADD, LLC and William McKown,

Third Party Plaintiffs,

v.

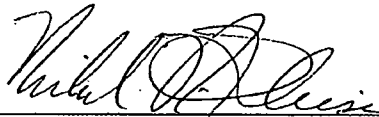
William Rempher,

Third Party Defendant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

October 14, 2011



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
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Honorable Steven H. John, Circuit Court Judge

Case No: 2010-CP-26-8505

Carolina First Bank, n/k/a TD Bank, NA, ... Respondent,

v.

BADD, LLC, William McKown, and Charles A. Christenson Defendants,

Of Whom BADD, LLC and William McKown are Appellants.

BADD, LLC and William McKown, ... Third-Party Plaintiffs,

v.

William Rempher Third-Party Defendant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	2
Statement of Facts	4
Standard of Review	6
Arguments	
I. A PARTY IN A MORTGAGE FORECLOSURE ACTION THAT IS NAMED AS A DEFENDANT DUE TO THE EXECUTION AND DELIVERY OF A MORTGAGE AND A PERSONAL GUARANTY OF PAYMENT AND PERFORMANCE OF THE MORTGAGE INDEBTEDNESS IS NOT ENTITLED TO A JURY TRIAL ON THE MORTGAGEE'S CAUSES OF ACTION ALLEGED IN THE COMPLAINT FOR THE RESIDUE OF THE MORTGAGE INDEBTEDNESS REMAINING AFTER THE JUDICIAL SALE OF THE MORTGAGED PROPERTY	7
II. THE TRIAL COURT WAS CORRECT WHEN IT FOUND THAT THE COUNTERCLAIMS AGAINST RESPONDENT WERE PERMISSIVE SINCE THEY INVOLVED A NON-PARTY AND AROSE AFTER THE DATES ON WHICH THE MCKOWN GUARANTEES WERE EXECUTED AND THE MORTGAGE LIENS WERE RECORDED.....	10
III. A DEFENDANT WHO ASSERTS A THIRD-PARTY CLAIM INVOLVING AN ACTION, AT LAW BY IMPLEADING A THIRD- PARTY DEFENDANT WAIVES THE RIGHT TO A JURY TRIAL ON THAT THIRD-PARTY CLAIM BY ASSERTING IT IN AN EQUITABLE ACTION TO FORECLOSE TWO REAL ESTATE MORTGAGES.....	13
Conclusion	14
Certificate of Counsel	15

TABLE OF AUTHORITIES

CASES

<u>Anderson Brothers Bank v. Adams,</u> 305 S.C. 25, 406 S.E.2d 173 (1991)	9
<u>Carsten v. Wilson,</u> 241 S.C. 516, 129 S.E.2d 431 (1963)	7
<u>Citizens & S. Nat'l Bank v. Lanford,</u> 313 S.C. 540, 443 S.E.2d 549 (1994)	9
<u>Collier v. Green,</u> 244 S.C. 367, 137 S.E.2d 277 (1964)	7
<u>In re Campbell,</u> 379 S.C. 593, 666 S.E.2d 908 (2008)	6
<u>Johnson v. South Carolina Nat'l Bank,</u> 292 S.C. 51, 354 S.E.2d 895 (1987)	9, 10
<u>Lester v. Dawson,</u> 327 S.C. 263, 491 S.E.2d 240 (1997)	7
<u>North Carolina Federal S & L v. DAV Corp.,</u> 298 S.C. 514, 381 S.E.2d 903 (1989)	9, 10, 11
<u>Perpetual Bldg. & Loan Ass'n of Anderson v. Braun,</u> 270 S.C. 338, 242 S.E.2d 407 (1978)	7, 8
<u>Tatnall v. Gardner,</u> 350 S.C. 135, 564 S.E.2d 377 (Ct. App. 2002)	13
<u>U.S. Bank Trust Nat'l Ass'n v. Bell,</u> 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009)	7
<u>Verenes v. Alvanos,</u> 387 S.C. 11, 690 S.E.2d 771 (2010)	6, 7

STATUTES

S.C. Code Ann. § 29-3-660 (1976).....	8, 9
S.C. Code Ann. § 29-3-680 (1976).....	9
S.C. Code Ann. § 29-3-10 (2010).....	14

OTHER AUTHORITIES

Rule 53, SCRCP	2
Rule 71, SCRCP	2

STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN FINDING THAT APPELLANTS WERE NOT ENTITLED TO A JURY TRIAL ON RESPONDENT'S CAUSES OF ACTION WHEN THE MAIN PURPOSE OF THE COMPLAINT IS AN EQUITABLE ACTION TO FORECLOSE TWO REAL ESTATE MORTGAGES?
- II. DID THE TRIAL COURT ERR IN FINDING THAT THE COUNTERCLAIMS ALLEGED AGAINST RESPONDENT WERE PERMISSIVE WHEN THEY INVOLVED AN INDIVIDUAL WHO WAS NOT A PARTY TO THE ORIGINAL TRANSACTION AND AROSE AFTER THE DATES ON WHICH THE SUBJECT GUARANTY AGREEMENTS WERE EXECUTED AND THE MORTGAGE LIENS WERE RECORDED?
- III. DOES A PARTY-DEFENDANT WHO ASSERTS A THIRD-PARTY CLAIM INVOLVING AN ACTION AT LAW BY IMPLEADING A THIRD-PARTY DEFENDANT HAVE A RIGHT TO A JURY TRIAL ON THE THIRD-PARTY CLAIM WHEN THE MAIN PURPOSE OF THE COMPLAINT IS AN EQUITABLE ACTION TO FORECLOSE TWO MORTGAGES?

STATEMENT OF THE CASE

On September 9, 2010, Respondent Carolina First Bank (hereinafter sometimes referred to as "Carolina First") filed an action against Appellant BADD, LLC (hereinafter sometimes referred to as "BADD"), as maker and mortgagor, seeking judgment for the full amount to be found due on the subject promissory notes and mortgages, and foreclosure and sale of the three parcels of real property secured by those mortgages. (R. p. 2). Carolina First, in its Complaint, requested judgment against Appellant William McKown (hereinafter sometimes referred to as "McKown"), as guarantor of the subject promissory notes and mortgages, for payment of the residue of the mortgage indebtedness, if any, remaining unsatisfied after the judicial sale of the three parcels of real property secured by the subject mortgages. (R. p. 2). Carolina First, pursuant to Rule 53 and Rule 71 of the South Carolina Rules of Civil Procedure, filed a Notice of Motion and Motion for Order of Reference to refer the mortgage foreclosure action to the Master-in-Equity for Horry County to take testimony arising under the pleadings, to make findings of fact and conclusions of law with authority to dispose of any and all issues, and enter a final judgment in the case. (R. p. 75). Appellants filed an Answer and Counterclaim wherein they demanded a jury trial on Carolina First's cause of action against McKown under the subject guaranty agreements, and requested the Trial Court to grant an accounting and render a decision finding the subject guaranty agreements to be unconscionable adhesion contracts. (R. pp. 81-82). On November 10, 2010, Carolina First filed a Reply to Appellants' Initial Answer and Counterclaim. (R. p. 85). Carolina First, in its Initial Reply, alleged that it sought judgment against McKown based upon the full amount to be found due to it on the subject promissory notes and mortgages, with the right to reduce that amount by the proceeds received from the sale of the three mortgaged properties. (R. pp. 85-86). On February 10, 2011, Appellants filed an

Amended Answer, Counterclaim, and Third-Party Complaint. (R. p. 94). At the hearing on Appellants' Motion to Amend their Answer and Carolina First's Motion for Order of Reference, the Trial Court granted Appellants' Motion to Amend and considered their Amended Answer, Counterclaim, and Third-Party Complaint while hearing arguments from counsel as to Carolina First's Motion for Order of Reference. (R. p. 130, lines 4-14). In the Amended Answer, Counterclaim, and Third-Party Complaint, McKown demanded a jury trial on Carolina First's cause of action against him under the subject guaranty agreements, and both BADD and McKown requested the Trial Court to grant an accounting. (R. p. 96, ¶ 14-16). McKown alleged that he was entitled to a jury trial on Carolina First's cause of action against him under the subject guaranty agreements because Carolina First's request for a money judgment against him under the subject guaranty agreements was an action at law. (R. p. 98). Appellants alleged counterclaims against Carolina First for a determination that the subject guaranty agreements were unconscionable adhesion contracts, civil conspiracy, and breach of contract in their Amended Answer, Counterclaim, and Third-Party Complaint. (R. pp. 96-101). Appellants also impleaded William Rempher as a third-party defendant by alleging third-party causes of action against him for civil conspiracy, breach of contract, intentional interference with contractual relations and prospective business relations, and breach of fiduciary duty. (R. pp. 97-102). After reviewing the pleadings, Appellants' Memorandum in Opposition to Refer, and hearing the arguments of counsel at hearing, the Trial Court granted Respondent's Motion for Order of Reference as it found that the main purpose of the Complaint was an equitable action to foreclose two mortgages, and that the counterclaims and third-party claims alleged by Appellants were permissive. (R. pp. 7-8). On February 22, 2011, Respondent filed a Reply to Appellants' Amended Answer, Counterclaim, and Third-Party Complaint. (R. p. 139).

STATEMENT OF FACTS

This mortgage foreclosure action arises out of Appellant BADD's failure to make payments of principal and interest as required under the two subject promissory notes and mortgages. (R. p. 20, ¶ 20). On March 14, 2008, Charles Christenson and McKown, as members of BADD, executed a promissory note and mortgage to obtain financing for the acquisition of income producing real estate. (R. p. 18, ¶ 12; R. p. 19, ¶ 14; R. pp. 37-46). McKown, on March 14, 2008, entered into an unlimited guaranty personally and unconditionally guaranteeing performance and payment of the above-referenced promissory note. (R. p. 22, ¶ 32). Said guaranty agreement executed by McKown on March 14, 2008 is hereinafter referred to as "First McKown Guaranty." The mortgage securing the repayment of the promissory note, dated March 14, 2008, from BADD in the amount of \$246,758.00 was recorded with the office of the Register of Deeds for Horry County, South Carolina on March 18, 2008 in Mortgage Book 5046 at Page 735. (R. p. 4). On April 1, 2008, Charles Christenson and McKown, as members of BADD, executed a promissory note and mortgage to obtain financing for the acquisition of income producing real estate. (R. pp. 18-19; R. p. 3-4). McKown, on April 1, 2008, entered into an unlimited guaranty personally and unconditionally guaranteeing performance and payment of the above-referenced promissory note. (R. p. 23, ¶ 35). Said guaranty agreement executed by McKown on April 1, 2008 is hereinafter referred to as "Second McKown Guaranty." The mortgage securing the repayment of the promissory note, dated April 1, 2008, from BADD in the amount of \$127,758.00 was recorded in the office of the Register of Deeds for Horry County, South Carolina on April 4, 2008 in Mortgage Book 5054 at Page 990. (R. p. 4).

Appellants admit that Carolina First's action against BADD is for foreclosure, and that the action falls within the confines of Rule 53(b), South Carolina Rules of Civil Procedure. (R.

p. 117). The First McKown Guaranty and the Second McKown Guaranty specifically reference the mortgage indebtedness that Carolina First seeks to recover from BADD and McKown as a result of the alleged default under the subject promissory notes and mortgages. (R. p. 3). The two subject promissory notes state that the purpose of the two subject mortgage loans is to provide financing for the acquisition of income producing real estate. (R. p. 3).

The counterclaim against Carolina First for civil conspiracy arises from McKown's allegations that Carolina First entered into a conspiracy to harm him by allowing Third-Party Defendant William Rempher to default under the subject promissory notes and mortgages for the purpose of seeking foreclosure upon the three mortgaged properties, and to subsequently sell those properties to said Third-Party Defendant at a purchase price that would be significantly lower than the fair market value at the time of the judicial sale. (R. pp. 112, ¶ 32 - p. 113, ¶ 38). However, McKown previously alleged that he was not involved in Carolina First's foreclosure action against BADD. (R. p. 117). Third-Party Defendant William Rempher was not a party to the subject promissory notes, nor did he execute those promissory notes as a member of BADD. (R. p. 32; R. pp. 29-36). McKown and Third-Party Defendant William Rempher are not parties to the subject mortgages securing the three mortgaged properties that were alleged to be the subject of McKown's counterclaim against Carolina First for civil conspiracy. (R. pp. 37-55). The Trial Court found that Third-Party Defendant William Rempher was not a party to the mortgage transactions involving the subject promissory notes and mortgages, First McKown Guaranty, and Second McKown Guaranty. (R. p. 138, lines 11-13). Appellants, in their second counterclaim alleged in their Initial Answer, stated that they sought to preserve their breach of contract causes of action against Carolina First due to the time lines associated with foreclosure actions. (R. p. 119). Appellants, in support of their breach of contract counterclaim against

Carolina First, allege that Carolina First's participation in the conspiracy with Third-Party Defendant William Rempher constituted a breach of the implied covenant of good faith and fair dealing included in the subject promissory notes and mortgages, First McKown Guaranty, and Second McKown Guaranty. (R. p. 113, ¶ 41- p. 114, ¶ 42).

At the hearing on Carolina First's Motion for Order of Reference, Appellants' counsel stated that the alleged actions on the part of Carolina First and on the part of Third-Party Defendant William Rempher giving rise to Appellants' counterclaims and third-party claims for civil conspiracy, breach of contract, intentional interference with contractual relationships, and breach of fiduciary duty occurred in 2009. (R. p. 131, line 25 - p. 132, line 22). Additionally, Appellants' counsel stated that the counterclaims alleged against Carolina First which demanded an accounting and raised the issue of unconscionability as to the First McKown Guaranty and Second McKown Guaranty were equitable counterclaims. (R. p. 134, line 20 - p. 135, line 6). The First McKown Guaranty and Second McKown Guaranty are hereinafter collectively referred to as "McKown Guarantees."

STANDARD OF REVIEW

"Whether a party is entitled to a jury trial is a question of law." Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "An appellate court may decide questions of law with no particular deference." Id. at 15, 690 S.E.2d at 772-773 (citing In re Campbell, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008)).

ARGUMENT

Carolina First respectfully requests that this Court affirm the Order granting its Motion for Order of Reference as the main purpose of the complaint is to foreclose two real estate mortgages, and the counterclaims and third-party claims alleged by Appellants are permissive.

I. A Party in a Mortgage Foreclosure Action that is Named as a Defendant Due to the Execution and Delivery of a Mortgage and a Personal Guaranty of Payment and Performance of the Mortgage Indebtedness is Not Entitled to a Jury Trial on the Mortgagee's Causes of Action Alleged in the Complaint for the Residue of the Mortgage Indebtedness Remaining After the Judicial Sale of the Mortgaged Property.

When determining whether a defendant has a right to a jury trial on a cause of action alleged in the complaint, the relevant question "is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." Verenes at 15, 690 S.E.2d at 773 (citing Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997)). The main purpose of the plaintiff bringing an action determines whether the causes of action alleged in the complaint are equitable or legal. Id. at 16, 690 S.E.2d at 773. "The main purpose of the action should generally be ascertained from the body of the complaint." Id. The Court may also reference the prayer for relief in the complaint, or any other facts of the action in question which may clarify the main purpose of the plaintiff's action. See, Id. "An action for the foreclosure of a real estate mortgage is one in equity." Collier v. Green, 244 S.C. 367, 370, 137 S.E.2d 277, 279 (1964) (citing Carsten v. Wilson, 241 S.C. 516, 129 S.E.2d 431 (1963)). In a mortgage foreclosure action, the "mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action." U.S. Bank Trust Nat'l Ass'n v. Bell, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009). South Carolina Courts have found "that if the mortgaged premises are sold under a foreclosure decree and fail to bring a sufficient amount to satisfy the debt, the mortgagee is entitled, absent any statutory limitation or waiver on his part, to a personal judgment for the remaining deficiency." Perpetual Bldg. & Loan Ass'n of Anderson v. Braun, 270 S.C. 338, 340, 242 S.E.2d 407, 408 (1978). "A mortgagee is not denied the full amount due ... merely because he elects initially to pursue his remedy by

foreclosure; as an action for a deficiency judgment as a sequel to foreclosure is taken as a matter of course.” Id. at 341, 242 S.E.2d at 408.

Carolina First commenced this action against BADD, as maker and mortgagor, for foreclosure of two real estate mortgages. In its complaint, Carolina First seeks judgment against BADD for the full amount to be found due on the subject promissory notes and mortgages, and foreclosure and sale of the three parcels of real property secured by those mortgages. The Order granting Carolina First’s Motion for Order of Reference found that Appellants admitted in paragraph 3 of their Amended Answer, Counterclaim, and Third-Party Complaint that the action set forth in the Complaint involved the foreclosure of real property in Horry County, and that the action is a matter which should be referred with finality to the Master-in-Equity as to Appellant BADD. The prayer for relief in the Complaint requests judgment against BADD and McKown, jointly and severally, pursuant to S.C. Code Ann. § 29-3-660 (1976), and that the proceeds from the sale of the mortgaged properties be first applied to the costs and expenses of the action, and then to the payment and discharge of the amounts due under the subject promissory notes, mortgages, and McKown Guarantees. Appellants’ contention that Carolina First is not suing on the subject promissory notes, mortgages, and McKown Guarantees lacks merit as the complaint clearly seeks the foreclosure of two real estate mortgages while reserving the right to demand a deficiency judgment against Appellants, jointly and severally, for the residue of the mortgaged premises remaining after the foreclosure sale. Therefore, Carolina First’s cause of action against BADD, as mortgagor, cannot be construed to constitute a breach of contract action which constitutes an action at law to be tried by a jury.

Pursuant to S.C. Code Ann. § 29-3-660 (2010), the mortgagee in a mortgage foreclosure action may join a guarantor as a party defendant in the action if the mortgage debt is secured by

the covenant or obligation of that person, and the Court may issue a judgment against that person for the residue of the mortgage debt remaining unsatisfied after the sale of the mortgaged property. In Anderson Brothers Bank v. Adams, 305 S.C. 25, 27, 406 S.E.2d 173, 174 (1991), the guarantors of the mortgage indebtedness were joined as party defendants in a mortgage foreclosure action which sought judgments against them and the mortgagor for the deficiency remaining after the judicial sale of the mortgaged property. After the sale of the mortgaged property, the defendant guarantors petitioned for an appraisal. Id. The South Carolina Supreme Court held that under the plain and unambiguous terms of S.C. Code Ann. § 29-3-680, guarantors who are made party defendants in a mortgage foreclosure action wherein a personal judgment is sought against them are entitled to the Appraisal Statute's benefit. Id. at 27, 406 S.E.2d at 175. However, the South Carolina Supreme Court has held that when a guarantor of a promissory note is joined as a party defendant in an action not involving the foreclosure of a real estate mortgage, that guarantor may not rely on the Appraisal Statute "since its application is limited to real estate foreclosure actions." Citizens & S. Nat'l Bank v. Lanford, 313 S.C. 540, 544, 443 S.E.2d 549, 551 (1994).

Carolina First joined McKown as a party defendant to this mortgage foreclosure action seeking judgment against McKown, as guarantor of the mortgage indebtedness, and against BADD, as mortgagor, for the deficiency remaining after the judicial sale of the mortgaged property. The Order of Reference found that McKown will have no liability under the subject promissory notes, mortgages, and McKown Guarantees if the proceeds from the judicial sale of the mortgaged properties are sufficient to satisfy the mortgage indebtedness. Appellants rely on Johnson v. South Carolina Nat'l Bank, 292 S.C. 51, 354 S.E.2d 895 (1987), to support their contention that a suit on a guaranty in a mortgage foreclosure proceeding is a legal action.

However, Johnson did not involve a proceeding brought by a mortgagee seeking foreclosure of a real estate mortgage. Instead, the guarantor was the plaintiff who brought the initial action to rescind the guaranty at issue on the grounds of fraud, and the defendant bank asserted a counterclaim for damages under that guaranty. See, Id. at 52-53, 354 S.E.2d at 895-96. Therefore, the facts in Johnson substantially differ from the present mortgage foreclosure action against Appellants.

Appellants' argument that Carolina First's action under the McKown Guarantees is an action at law entitling him to a jury trial is misplaced as the South Carolina Supreme Court's holdings in Adams and Lanford along with the language set forth in the Appraisal Statute and Deficiency Judgment Statute indicate that a mortgage foreclosure action involving a guarantor as a party defendant that requests the Court to adjudge payment of the residue of the mortgage indebtedness remaining unsatisfied after the sale of the mortgaged property against that guarantor is an action to foreclose a mortgage. Therefore, the Trial Court was correct when it found that the main purpose of the complaint was an equitable action seeking foreclosure of two real estate mortgages.

II. The Trial Court Was Correct when it Found that the Counterclaims Against Respondent were Permissive Since They Involved a Non-Party and Arose After the Dates on Which the McKown Guarantees Were Executed and the Mortgage Liens Were Recorded.

A defendant waives the right to a jury trial as to a legal and permissive counterclaim asserted against the plaintiff when the complaint is an equitable action against that defendant. Johnson v. South Carolina Nat'l Bank, 292 S.C. 51, 56, 354 S.E.2d 895, 897 (1987). To resolve the issue of whether a party waives the right to a jury trial by asserting a counterclaim in an equitable action, the Court must determine whether the counterclaim is legal and compulsory. See, North Carolina Federal S & L v. DAV Corp., 298 S.C. 514, 381 S.E.2d 903 (1989). "By

definition a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." Id. at 517, 381 S.E.2d at 905. The South Carolina Supreme Court applies the logical relationship test to determine whether a counterclaim is compulsory. See, Id. at 518, 381 S.E.2d at 905. In DAV Corp., the plaintiff brought an action to foreclose a note and a mortgage given by a joint venture composed of the defendant and a wholly owned subsidiary of the mortgagee. Id. at 516, 381 S.E.2d at 904. At issue was whether defendant was entitled to a jury trial on its six counterclaims. Id. at 517, 381 S.E.2d at 905. The promissory note secured by the mortgage and the joint venture agreement were executed on the same date. Id. at 518, 381 S.E.2d at 905. The defendant's first five counterclaims alleged that the plaintiff's right to bring an action on the promissory note secured by the mortgage was modified by the plaintiff's oral agreement to provide additional financing, which was contemplated by the joint venture agreement. Id. The South Carolina Supreme Court found that there was "a logical relationship between the enforceability of the note which is the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture." Id. However, the Supreme Court also held that the sixth counterclaim was permissive because it involved the alleged breach of two oral agreements which did not affect the enforceability of the subject note and were not part of the transaction involving the subject note and joint venture agreement. Id. at 519, 381 S.E.2d at 905.

McKown alleged a counterclaim against Carolina First for civil conspiracy by alleging that at sometime during 2009, or sometime thereafter, Carolina First entered into a conspiracy with Third-Party Defendant William Rempher to create a default under the promissory notes and mortgages to enable Carolina First to sale the mortgaged properties to Mr. Rempher at a significant reduction in the fair market value. (See R. p. 99, ¶ 35). However, McKown was not

a party to the subject promissory notes and mortgages as he alleged that he was not involved in Carolina First's foreclosure action against BADD. Neither Third-Party Defendant William Rempher nor McKown were makers of the subject promissory notes or mortgagors on the subject mortgages as BADD was the party to those documents. McKown's liability under the subject promissory notes and mortgages only arises as a result of his execution of the McKown Guarantees. McKown's counterclaim against Carolina First for civil conspiracy involves alleged conduct which occurred after the dates on which the subject mortgage loan transactions took place, and after the dates on which the subject mortgage liens were recorded in the office of the Register of Deeds for Horry County. Further, McKown's counterclaim for civil conspiracy does not affect the enforceability of the subject promissory notes, mortgages, or McKown Guarantees as Respondent would have to be successful in its action to collect the mortgage indebtedness under those documents for McKown to incur the special damages alleged in paragraph 37 of the Amended Answer, Counterclaim, and Third-Party Complaint. (R. p. 100). Therefore, the Trial Court was correct when it found that McKown's counterclaim against Carolina First for civil conspiracy was not logically related Carolina First's action to foreclose the subject real estate mortgages.

Appellants, in support of their third counterclaim against Carolina First, alleged that Carolina First breached the implied covenant of good faith and fair dealing that is included in the subject promissory notes, mortgages, and McKown Guarantees by entering into a conspiracy with the Third-Party Defendant William Rempher as set forth in the above paragraph. The Amended Answer, Counterclaim, and Third-Party Complaint does not allege that Carolina First entered into a conspiracy to cause special damage to BADD, nor has BADD ever alleged a cause of action for civil conspiracy against Carolina First. Carolina First would have to prevail in its

mortgage foreclosure action and sell the mortgaged properties at a judicial sale in order to act in furtherance of the alleged conspiracy, and thereafter obtain a deficiency judgment against McKown for him to incur any type of loss. As the alleged breach of contract cannot occur until the time of the judicial sale of the mortgaged properties, Appellants' counterclaim for breach of contract against Carolina First cannot affect the validity of the subject promissory notes, mortgages, and McKown Guarantees. Therefore, the Trial Court was correct when it found that there is no logical relationship between Carolina First's mortgage foreclosure action and Appellants' Counterclaim for Breach of Contract.

III. A Defendant Who Asserts a Third-Party Claim Involving an Action at Law by Impleading a Third-Party Defendant Waives the Right to a Jury Trial on that Third-Party Claim by Asserting it in an Equitable Action to Foreclose Two Real Estate Mortgages.

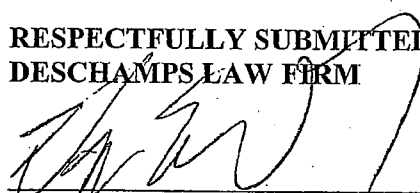
All third-party claims are deemed permissive. Tatnall v. Gardner, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002); see also, DAV Corp., at 519, 381 S.E.2d at 906.

Third-Party Defendant William Rempher was not a party to the mortgage transactions involving the subject promissory notes, mortgages, and McKown Guarantees. Additionally, the third-party causes of action involve a party who was not an original party to Respondent's mortgage foreclosure action, and alleged conduct which occurred after the recordation of the subject mortgages. Appellants have the option assert the third-party claims in a separate proceeding if they do not wish to waive their right to a jury trial in this mortgage foreclosure action as those third-party claims do not affect the enforceability of the subject promissory notes, mortgages, and McKown Guarantees. Therefore, the third-party causes of action alleged by Appellants are permissive and do not entitle them to a jury trial in this mortgage foreclosure action.

CONCLUSION

Respondent's mortgage foreclosure action is a codified remedy created by the legislature. The legislative intent set forth in S.C. Code Ann. §29-3-10 (2010), the Appraisal Statute, and the Deficiency Judgment Statute indicates that an action seeking a deficiency judgment against a guarantor in a mortgage foreclosure action does not constitute a separate breach of contract action. The Appellants may not evade the intent of the legislature and obtain the right to a jury in the present mortgage foreclosure action by alleging that Respondent's election to seek deficiency judgment under the subject promissory notes, mortgages, and McKown Guarantees creates a jury issue. The counterclaims asserted against Respondent for civil conspiracy and breach of contract are permissive counterclaims as they arose after the recordation of the subject mortgages and do not affect the enforceability of the promissory notes, mortgages, and McKown Guarantees. As third-party claims asserted in a legal proceeding are always permissive, the Trial Court was correct when it found that Appellants were not entitled to a jury trial in this mortgage foreclosure action and granted Respondent's Motion for Order of Reference.

**RESPECTFULLY SUBMITTED,
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Dated: October 7, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Steven H. John, Circuit Court Judge

Case No: 2010-CP-26-8505

Carolina First Bank, ... Respondent,

v.

BADD, LLC, William McKown, and Charles A. Christianson, ... Defendants,

Of Whom BADD, LLC and William McKown are Appellants.

.....
BADD, LLC and William McKown, ... Third-Party Plaintiffs,

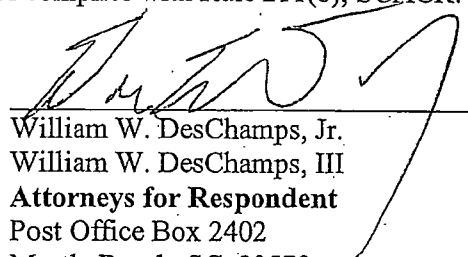
v.

William Rempfer, ... Third-Party Defendant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

October 7, 2011



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carolina First Bank, n/k/a TD Bank, NA, Respondent,

v.

BADD, LLC, William McKown, and Charles A.
Christenson, Defendants,

Of whom BADD, LLC and William McKown are
Appellants.

BADD, LLC and William McKown, Third-Party
Plaintiffs,

v.

William Rempher, Third-Party Defendant.

Appellate Case No. 2011-187747

Appeal From Horry County
Steven H. John, Circuit Court Judge

- Published Opinion No. 5041
Heard September 13, 2012 – Filed October 24, 2012

REVERSED AND REMANDED

Richard R. Gleissner, of Gleissner Law Firm, LLC, of
Columbia, for Appellants.

WILLIAMS, J.: BADD, LLC (BADD) and William McKown appeal the circuit court's order referring the instant case to the master-in-equity (master), arguing the circuit court erred in (1) referring Carolina First Bank's (Carolina First) claim against McKown as guarantor to the master based on its finding that the main purpose of the action was equitable in nature; and (2) referring BADD and McKown's counterclaims to the master based on its finding that those claims were permissive counterclaims asserted in an equitable action and, thus, that BADD and McKown waived their right to a jury trial on those claims. We reverse.

I. FACTS

On March 14, 2008, Charles Christenson and McKown, as members of and on behalf of BADD, executed a promissory note and mortgage to obtain financing for the acquisition of income-producing real estate. McKown also executed a guaranty at the same time, personally guaranteeing performance and payment of the promissory note. On April 1, 2008, Christenson and McKown, again on behalf of BADD, executed another promissory note and mortgage to obtain additional financing for income-producing real estate (collectively Notes and Mortgages). McKown executed a second guaranty on the same day (collectively Guaranties). In 2009, Christenson began experiencing financial problems and sought McKown's consent to allow William Rempher to buy his interest in BADD and assume responsibility for the operations of BADD. McKown agreed to the arrangement, and Rempher became a member of BADD.

On September 9, 2010, Carolina First filed an action against BADD seeking judgment for the full amount owed on the Notes and Mortgages and foreclosure and sale of the properties secured by the Mortgages. In addition, Carolina First sought a judgment against McKown, as guarantor of the Notes and Mortgages, for payment of the residue of the mortgage indebtedness, if any, remaining unsatisfied after the judicial sale of the properties. In response, McKown demanded a jury trial on Carolina First's claim against him based on the Guaranties and, along with BADD, filed several counterclaims against Carolina First, including civil conspiracy, breach of contract, and a claim seeking a determination that the Guaranties were unconscionable and, thus, unenforceable. In addition, McKown impleaded Rempher as a third-party defendant by alleging causes of action against him for civil conspiracy, breach of contract, intentional interference with

contractual relations and prospective business relations, and breach of fiduciary duty. Carolina First filed a motion to refer the entire case to a master-in-equity, and the circuit court granted the motion, finding that the action brought by Carolina First was an equitable action to foreclose two mortgages and that BADD and McKown waived their right to a jury trial on their counterclaims because the claims were permissive. This appeal followed.

II. STANDARD OF REVIEW

"Whether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "An appellate court may decide questions of law with no particular deference to the [circuit] court." *Id.* at 15, 690 S.E.2d at 772-73.

III. LAW/ANALYSIS

McKown argues that Carolina First's claim against him for any indebtedness resulting after the sale of the subject properties is a breach of contract claim arising from the Guaranties and is legal in nature. Accordingly, McKown asserts the circuit court erred in referring this claim to the master. In addition, McKown and BADD argue the circuit court erred in referring their legal counterclaims for civil conspiracy and breach of contract to the master. We agree.

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). "A mortgage foreclosure is an action in equity." *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009) (internal quotation marks omitted). However, "[i]t is well settled that a guarantor's liability is an independent contractual obligation." *TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 295, 478 S.E.2d 63, 65 (Ct. App. 1996). Accordingly, a claim to recover on a guaranty agreement is one at law, even if the plaintiff seeks a deficiency judgment resulting from the foreclosure of real property. *See S. Bank & Trust Co. v. Harley*, 295 S.C. 423, 424, 368 S.E.2d 908, 909 (1988) (noting that a plaintiff's case seeking a deficiency judgment on a guaranty agreement after the foreclosure of real properties "was a law case"); *see also Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 53, 354 S.E.2d 895, 896 (1987) (classifying a party's counterclaim for damages under a guaranty agreement as a "legal counterclaim"). "When a complaint raises both legal and equitable issues and rights, the legal issues are determined by a jury

while equitable issues are for the judge." *JASDIP Props. SC, LLC v. Estate of Richardson*, 395 S.C. 633, 639, 720 S.E.2d 485, 488 (Ct. App. 2011).

In its order referring this case to the master, the circuit court found that the main purpose of the instant action was to foreclose on the properties securing the Notes and that it was therefore appropriate to refer the claims on the Guaranties to the master as well as the foreclosure claim. This reasoning traces its roots to the case of *Alford v. Martin*, in which our supreme court explained that "[t]he character of an action is determined by the complaint in its main purpose and broad outlines and not merely by allegations that are merely incidental." 176 S.C. 207, 212, 180 S.E.13, 15 (1935). However, our supreme court more recently expressed its concern in *Floyd v. Floyd* "that, as courts have sought to ascertain the 'main purpose' of lawsuits, the pendulum appears to have swung with steadied progress toward decisions tending to place within the sole purview of the equity judge issues properly triable only by jury." 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991). Consequently, "[w]ith a view toward harmonizing the case law on this issue," the supreme court clarified "that in instances where legal and equitable issues or rights are asserted in the same complaint, the legal issues are for determination by a jury and the equitable issues are to be decided by the court." *Id.*

Based on the supreme court's holding in *Floyd*, we hold the circuit court erred in referring Carolina First's claim against McKown arising from the Guaranties to the master. This claim was separate and distinct from the foreclosure action and was legal in nature. Accordingly, McKown was entitled to a jury trial on this claim, and we reverse the circuit court's order referring this claim to the master. Further, the filing of a legal counterclaim in response to an equitable complaint amounts to a waiver of the right to a trial by jury only when the counterclaim is permissive. *See Johnson*, 292 S.C. at 55-56, 354 S.E.2d at 897. Because we find Carolina First's complaint against BADD and McKown contained both a legal and an equitable claim, we find BADD and McKown did not waive their right to a jury trial by filing legal counterclaims against Carolina First. Accordingly, we also reverse the circuit court's order to the extent it referred BADD and McKown's counterclaims for breach of contract and civil conspiracy to the master and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

FEW, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Steven H. John, Circuit Court Judge

Civil Action No. 2010-CP-26-08505
Appellate Case No. 2011-187747
Opinion No. 5041

Carolina First Bank n/k/a TD Bank, NA, ... Respondent,

v.

BADD, LLC, William McKown and Charles A.
Christenson, ... Defendants,

Of whom BADD, LLC and William McKown are Appellants.

BADD, LLC and William McKown, ... Third-Party Plaintiffs,

v.

William Rempher, ... Third-Party Defendant.

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Carolina First Bank n/k/a TD Bank, NA ("TD Bank") hereby petitions for rehearing of this Court's October 24, 2012 Opinion No. 5041 ("the Opinion") in the above-captioned appeal. *See Carolina First Bank n/k/a TD Bank, NA v. BADD, LLC, et. al.*, Op. No. 5041 (S.C. Ct. App. filed October 24, 2012) (Shearouse Adv. Sh. No. 38 at 55.) The Court should grant rehearing and issue a revised opinion in favor of TD Bank affirming the trial court's order referring this foreclosure action to the Master-in-Equity for a bench trial based on the grounds set forth below.

Introduction

This Court held that Appellants are entitled to a jury trial in this foreclosure action because TD Bank, in its foreclosure complaint, also sought a judgment against the guarantor for any deficiency that may remain following the foreclosure and sale of the subject property. The Court's holding overlooks statutes and prior decisions of our appellate courts that pertain to foreclosure actions which establish that no jury trial rights accrue in this matter.

First, this Court's Opinion, if not altered, would mean that every foreclosure action in South Carolina wherein a deficiency judgment is sought would be determined by a jury. The Court held that the deficiency claim was a "legal" action for breach of contract thereby purportedly triggering Appellants' right to a jury trial because TD Bank's complaint sought judgment "for any indebtedness resulting after the sale of the subject properties." (Opinion at p. 57.) However, since 1791, South Carolina has recognized that a foreclosure action seeking a deficiency judgment sounds in equity and no right to a jury trial exists in such an action. This remains true today. S.C. Code Ann. § 29-3-650 and § 29-3-660 provide that in a foreclosure action where a deficiency judgment is sought, the *court* determines whether the mortgagee is entitled to a deficiency—not a jury. Such was the statutory basis upon which TD Bank's foreclosure complaint is founded.

Second, the Court erred in utilizing the *Floyd* case to support its conclusion that Appellants were entitled to a jury trial. As demonstrated by the applicable foreclosure statutes and the cases interpreting those statutes, foreclosure suits seeking a deficiency judgment sound in equity. The Court overlooked this in its Opinion.

Third, Appellants did not cite the *Floyd* case or argue that the trial court's ruling on the main purpose rule was in error in its briefing. Appellants' failure to specifically raise this argument bars this Court from using it as the basis for reversal. Hence, this Court's use of the *Floyd* case and its interpretation of the main purpose rule to reverse the trial court is improper.

Fourth, due to the Court's ruling based on *Floyd*, the Court failed to properly address Appellants' counterclaims and third-party claims. The counterclaims and third-party claims as raised in this action are permissive because Appellants were not compelled to raise their claims in response to the foreclosure complaint. The Appellants could have brought independent suits to raise the grounds alleged in their counterclaims and third-party claims. By electing to raise them as counterclaims and third-party claims in response to the foreclosure suit, however, the Appellants affirmatively waived their right to a jury trial on those claims.

Accordingly, rehearing is necessary in this matter because the Opinion does not comport with South Carolina law. The Court should issue a revised Opinion to affirm the trial court's order referring this matter to the Master-in-Equity for a bench trial.

Law/Analysis

- I. **A request for a deficiency judgment in a foreclosure suit brought pursuant to S.C. Code Ann. § 29-3-650 and § 29-3-660 sounds in equity and Appellants are not entitled to a jury trial.**

The Court erred in finding that TD Bank's foreclosure action, which included a request for a deficiency judgment against the mortgagor and guarantor, gave rise to a right to a jury trial. The Court reached this erroneous conclusion by incorrectly holding that a claim for a deficiency judgment is a separate breach of contract action (*i.e.*, a

“legal” action as opposed to an equitable one). The South Carolina statutory regime pled by TD Bank in its complaint establishes that the trial judge—not a jury—makes the determination of whether a mortgagee is entitled to a deficiency judgment when the request for a deficiency is brought within the foreclosure action. The request for a deficiency is part of the foreclosure proceeding. It does not give rise to an independent action or divisible rights for the mortgagor or guarantor in the context of the foreclosure suit such that jury determinations concerning deficiencies are made.

TD Bank filed this foreclosure suit and requested a deficiency judgment for any remaining indebtedness that may exist following the foreclosure and sale of the subject properties. (R. pp. 9-77.) In its complaint, TD Bank alleged that S.C. Code Ann. § 29-3-650 and § 29-3-660 provided it with the right to foreclose and seek a deficiency judgment against those persons liable for any remaining indebtedness following the foreclosure sale. (R. pp. 21, 24.) Contemporaneous with its complaint, TD Bank filed a motion for an order of reference of the foreclosure suit to the Master-in-Equity pursuant to Rule 53 of the South Carolina Rules of Civil Procedure. (R. pp. 75-77.) The trial court granted the motion, based in part, on the finding that the applicable statutory scheme did not give rise to a right to a jury trial. (R. pp. 1-9). In reversing the trial court, however, this Court did not cite or analyze sections 29-3-650 and 29-3-660. This oversight necessitates rehearing.

Prior to 1791, South Carolina adhered to the common law principle of mortgages whereby an action to foreclose a mortgage was regarded as strictly *in rem*. *Perpetual Bldg. and Loan Ass’n of Anderson v. Braun*, 270 S.C. 338, 341-42, 242 S.E.2d 407, 409 (1978). Prior to 1791, in the event of default, the mortgagee was required to commence

an action in a court of equity to foreclose the mortgage, to bar the mortgagor's right to equity of redemption and to confirm good title in the mortgagee. *Id.* In case a personal or deficiency judgment was sought, the mortgagee was required to commence a separate action at law to obtain a judgment. *Id.*

In 1791, the South Carolina Legislature changed the nature of a mortgage from that of a conveyance on condition to a mere lien. *Id.* Thus, at the time of the adoption of The South Carolina Constitution of 1868, no jury trial right existed in a foreclosure action seeking a deficiency judgment in the same action. See *Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 145, 621 S.E.2d 344, 345-46 (2005) ("The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868.").

The Courts of this state have long-abided by the legislative pronouncement evincing the lack of a jury trial right in a foreclosure action seeking a deficiency. In *Anderson v. Pilgram*, 30 S.C. 499, 9 S.E. 587 (1888), the South Carolina Supreme Court stated that in this State, an action for foreclosure was a proceeding *in personam* as well as *in rem*, and therefore, a deficiency judgment could be granted in a foreclosure suit sounding in equity. Similarly, in *McConnell, et al. v. Barnes, et al.*, 142 S.C. 112, 140 S.E. 310 (1927), the South Carolina Supreme Court recognized that a judgment for deficiency is an incident of the relief sought a foreclosure action. In *McConnell*, the Supreme Court noted that the Act of 1791 integrated the action for foreclosure and the action for the deficiency after sale, abandoning the strict distinction between actions *in rem* and *in personam*. *Id.* Thus, two centuries ago, South Carolina adopted a structure by

which rights arising under mortgage obligations are adjudged when the proceeding an action for foreclosure and deficiency judgment are filed together.

This structure exists under the current version of the South Carolina Code and provides that a mortgagee:

shall be deemed the . . . owner of the money lent or due and the mortgagee shall be entitled to recover satisfaction for such money out of the land by *foreclosure and sale according to law*.

S.C. Code Ann. § 29-3-10 (emphasis added). In codifying these rights, the General Assembly then established the mechanism through which a mortgagee can obtain payment for the money lent or due under a mortgage contract—foreclosure sale and deficiency judgment. The General Assembly empowered *the court*, not a jury, with the duty to determine whether payment for any remaining indebtedness is owed by a mortgagor or guarantor. The Code states:

In actions to foreclose mortgages *the court may adjudge and direct the payment* by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage *and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment* of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.

S.C. Code Ann. § 29-3-660 (emphasis added). The General Assembly further provided that the power of the court to render such deficiency judgments can arise at the same time as the issuance of the order of foreclosure and sale. Specifically the General Assembly directed:

The court may also render judgment against the parties liable for the payment of the debt secured by the mortgage and direct at the same time the sale of the mortgaged premises. Such judgment so rendered may be

entered and docketed in the clerk's office in the same manner as other judgments. Upon the sale of the mortgaged premises the officer making the sale under the order of the court shall credit upon the judgment so rendered for the debt the amount paid to the plaintiff from the proceeds of the sale.

S.C. Code Ann. § 29-3-650 (emphasis added).

Respectfully, this Court overlooked the above statutes in its Opinion. This Court instead concluded that because the action for the deficiency sought was based on a contractual obligation, the request for a deficiency was one that was more akin to a breach of contract action. (Opinion p. 57.) This conclusion is incorrect and defies the long-standing statutory provisions governing foreclosure proceedings.

Moreover, the Opinion overlooks other cases that directly contradict this Court's conclusion on whether a right to a jury trial exists in this scenario. In 1912, based on prior versions of the above-cited statutes, the South Carolina Supreme Court held that a foreclosure action which also seeks a deficiency judgment against a guarantor is an action sounding in equity. *See, e.g., Welborn v. Cobb*, 92 S.C. 384, 75 S.E. 681 (1912) (holding that a foreclosure action which also seeks a deficiency judgment is an equitable action); *see also General Plywood Corp. v. Richard Jones, Inc.*, 216 S.C. 322, 57 S.E.2d 636 (1950) (holding that a foreclosure suit seeking a deficiency sounds in equity and is properly referable to the equity court). In following the above-cited statutory procedure, the South Carolina Supreme Court has continued to recognize the importance of these provisions in the context of foreclosure proceedings in more recent cases. The Supreme Court has "explained that a mortgage 'represents security for an obligation, [but] not full payment thereof.'" *Am. Gen. Fin. Servs. v. Brown*, 376 S.C. 580, 583, 658 S.E.2d 99, 100 (2008) (quoting *Perpetual Bldg. and Loan Ass'n of Anderson v. Braun*, 270 S.C. 338,

340, 242 S.E.2d 407, 408 (1978)). As a result, the deficiency judgment becomes an incident to the foreclosure to ensure full payment of the debt obligation. *Braun*, 270 S.C. at 340, 242 S.E.2d at 408.

In *American General Financial Services*, the Supreme Court reversed the Master-in-Equity who ruled that he had discretion as to whether he would enter a deficiency judgment in a case where the foreclosure sale did not satisfy the entire amount due the lender. *Id.* The Supreme Court held that in a foreclosure action where the sale leaves money owed to the lender, the Master-in-Equity *must* enter a deficiency judgment. *Id.* Hence, the general rule is that "if the mortgaged premises are sold under a foreclosure decree and fail to bring a sufficient amount to satisfy the debt, the mortgagee is entitled, absent any statutory limitation or waiver on his part, to a personal judgment for the remaining deficiency." *Perpetual Bldg. and Loan Ass'n of Anderson v. Braun*, 270 S.C. at 340, 242 S.E.2d at 408 (internal citation and quotation omitted).

The right to a deficiency judgment in a foreclosure proceeding is not an insignificant right. The Legislature intended for a deficiency judgment to be denied only when it has been "expressly waived" by the mortgagee. *Braun*, 270 S.C. at 343, 242 S.E.2d at 409. TD Bank did not waive its right to a deficiency and expressly pled for a deficiency judgment. (R. pp. 24-25.) In *Bartles v. Livingston*, this Court reversed the trial court's denial of a deficiency judgment for the mortgagee, stating that:

Absent grounds to set aside the decree of foreclosure, there is no discretion to cut off the right to a deficiency after sale where (1) the complaint in the foreclosure action asks for personal judgment, (2) the amount of the debt is fixed in the foreclosure decree, and (3) the sale is insufficient to satisfy the entire debt.

Bartles, 282 S.C. 448, 461, 319 S.E.2d 707, 715 (Ct. App. 1984). Like the list of above cases, *Bartles* similarly recognized the united nature of the foreclosure action coupled with the request for a deficiency judgment. No room exists under the statutes for a finding that the foreclosure action is to be determined by the court and the deficiency claim is to be determined by a jury.

Accordingly, as established by the General Assembly, the Supreme Court, and by this Court in *Bartles*, the right to a deficiency judgment arises in connection with the foreclosure suit by operation of law and the action is one that sounds only in equity. No jury trial right exists in a foreclosure action because the court is vested with authority over the entirety of a foreclosure action, including the deficiency judgment determination. This procedure has been in place since 1791.

II. The main purpose rule and *Floyd v. Floyd* do not apply to foreclosure proceedings because a foreclosure action, including a request for a deficiency judgment, sounds in equity.

As outlined above, the complaint as filed by TD Bank requested a foreclosure sale and deficiency judgment pursuant to S.C. Code Ann. § 29-3-650 and § 29-3-660. This Court reached the erroneous conclusion that the Supreme Court case of *Floyd v. Floyd*, 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991), which addressed the “main purpose rule,” applied to this foreclosure complaint.

The main purpose rule is designed to address instances when a plaintiff brings legal and equitable claims in the same complaint. See *Verenes v. Alvanos*, 387 S.C. 11, 16 n. 3, 690 S.E.2d 771, 773 (2010) (“[T]he main purpose rule evolved from a determination that where a plaintiff has prayed for money damages in addition to equitable relief, characterization of the action as equitable or legal depends on the

plaintiff's main purpose in bringing the action.") (citing *Floyd v. Floyd*, 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991)). This Court relied upon *Floyd v. Floyd* in error due to the Court's conclusion that TD Bank's request for a deficiency was an action at law. In *Floyd v. Floyd*, the Supreme Court noted that the primary function of the "main purpose rule" is to administratively categorize an action in which parties seek both equitable relief and legal redress. 306 S.C. at 380, 412 S.E.2d at 399. When properly applied, the main purpose rule reduces the complexity of litigation and does not deprive litigants of the right to a jury trial where appropriate. *Id.*

As shown above, an action for foreclosure, including a request for a deficiency judgment against a guarantor, sounds in equity. *Welborn v. Cobb*, 92 S.C. at 390, 75 S.E. at 684; *see also General Plywood Corp. v. Richard Jones, Inc.*, 216 S.C. at 32, 57 S.E.2d at 638 (holding that a foreclosure suit seeking a deficiency sounds in equity and is properly referable to the equity court). Hence, there is no need for application of the main purpose rule in this matter as an initial matter.

An examination of the Complaint also shows the true nature of this action. The foreclosure complaint before this Court does not seek damages. (R. pp. 24-25). The suit only seeks repayment of the monies owed to the mortgagee pursuant to S.C. Code Ann. §29-3-650 and § 29-3-660. (*Id.*) The Court had no reason to consider the main purpose rule in this matter, because no claims for legal relief were raised in the complaint. Thus, in South Carolina, as a matter of law, the foreclosure action is a single, indivisible action sounding in equity—not at law. Rehearing is warranted and the Court should revise its Opinion to affirm the trial court's order referring the foreclosure suit to the Master-in-Equity.

III. This Court Improperly Reversed on an Argument Not Raised by Appellant.

Appellants did not cite the *Floyd* case or argue that the trial court's ruling on the main purpose rule was in error in its briefing. Appellants' failure to specifically raise this argument bars this Court from using it as the basis for reversal. An issue not argued by a party is deemed abandoned and is not preserved for appellate review. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (issue deemed abandoned where appellant failed to provide arguments or supporting authority for his assertion); *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review."); *Allen v. Pinnacle Healthcare Sys., LLC*, 394 S.C. 268, 277, 715 S.E.2d 362, 367 (Ct. App. 2011) (finding the appellate court does not need to address an argument on the merits where it was not included in the statement of issues on appeal). Thus, this Court's use of the *Floyd* case and its interpretation of the main purpose rule to reverse the trial court is improper, as the argument was not made by the Appellants. As shown above, the main purpose rule has no application to a foreclosure action seeking a deficiency which sounds at equity. Nevertheless, the trial court relied upon the main purpose rule in part as additional support for its reference of the matter. The Appellant did not argue the *Floyd* case or make any argument that the trial court's interpretative use of the main purpose rule was in error. Hence, it was error for this Court to cite *Floyd* and reverse the trial court on such basis.

IV. The Court did not address the trial court's ruling that Appellants' counterclaims and third-party claims were permissive. It should affirm the trial court's ruling on this issue.

The Court did not substantively address whether the Appellants' counterclaims and third-party claims were permissive or compulsory. The Court concluded that because it had determined that Appellants were entitled to a jury trial on the request for a deficiency, Appellants were entitled to a jury trial on its counterclaims as well. Because the Court erred in its analysis as to whether the request for a deficiency triggered a right to a jury trial, the Court further erred by failing to address the ruling of the trial court that the Appellants' offensive claims were permissive, thereby waiving any right to a jury trial concerning those claims.

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Mortgage Electronic Systems, Inc. v. White*, 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009) (citing *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997)). "If the complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim." *Id.* (citing *C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986)). If a defendant asserts a counterclaim which is not legal and compulsory in an equitable action, he waives any right to a jury trial on that counterclaim. *See N.C. Federal Savings and Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 516, 381 S.E.2d 903, 904 (1989); *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 54, 354 S.E.2d 895, 897 (1987) (summarizing the proper analysis for determining the trial of legal and equitable issues in complaints and counterclaims, holding, "[i]f the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial"). Foreclosure proceedings are equitable proceedings in South Carolina. *See, e.g., DAV Corp.*, 298 S.C. at 516, 381 S.E.2d at 904

(referring to foreclosure proceeding as equitable). Therefore, Defendants must assert a counterclaim that is **both legal and compulsory** to be entitled to a jury trial.

Legal counterclaims asserted in a foreclosure proceeding are permissive unless they are logically related to enforceability of the note. *See DAV Corp.*, 298 S.C. at 518, 381 S.E.2d at 905 (adopting “logical relationship” test to determine whether counterclaims were permissive). In *DAV Corp.*, the South Carolina Supreme Court determined that counterclaims related to an oral agreement whose breach could not have avoided a default on the note at issue were permissive. The Supreme Court reasoned that the counterclaims were permissive because they “do not affect the enforceability of the Note.” *Id.* Recently, this Court applied the logical relationship test to determine that a violation of the attorney-preference statute was not logically related to the enforceability of the note and mortgage because the statute provided for damages for its violation, but not rescission. *Wells Fargo Bank v. Smith*, 398 S.C. 487, 730 S.E.2d 328 (Ct. App. 2012).

In examining Appellants proposed amended answer and counterclaim and third-party complaint (R. pp. 94-103), Appellants have styled five causes as counterclaims and third-party claims.¹ Appellants raise claims based on unconscionability, civil conspiracy, breach of contract, intentional interference with contractual relations and prospective business relations, and breach of fiduciary duty. (R pp. 96-103.)

¹ While Appellants have not separately identified their counterclaims and third-party claims in their amended answer and counterclaim, all third-party claims are by their nature deemed permissive by the courts. *Tainall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002). Thus, to any extent the court seeks to distinguish the combined claims brought against TD Bank and third-party defendant William Rempher, the claims against Rempher are deemed permissive by operation of law, notwithstanding the above analysis on this issue.

While the unconscionability claim attacks the debt obligations giving rise to any deficiency, the unconscionability claim is in and of itself an equitable claim under South Carolina law. *Wells Fargo Bank v. Smith*, 398 S.C. at 497, 730 S.E.2d at 333 (noting that because the only remedies available for common law unconscionability are equitable, there is no right to a jury trial on this claim) (citing *Brown v. Greenwood Sch. Dist. 50 Bd. of Trs.*, 344 S.C. 522, 525, 544 S.E.2d 642, 643 (Ct. App. 2001)). Thus, no jury trial right exists for the unconscionability claim.

Beyond the unconscionability claim, the other four offensive causes of action are legal claims that relate to events that occurred after the execution of the debt obligations. Thus, there is no logical relationship between the legal causes of action and the debt obligations relied upon by TD Bank in its complaint. In sum, Appellants allege that through negligent business management and self-serving control of revenues, Appellants' business counterparts allowed the debt obligations to go into default to Appellants' detriment. (R. pp. 96-102.) Hence, the claims for civil conspiracy, breach of contract, intentional interference with contractual relations and prospective business relations, and breach of fiduciary duty all arise *after* the execution of the instruments at issue in the foreclosure complaint. None of these four legal cases of action attack the enforcement of the debt instruments sought in the foreclosure suit. Therefore, no logical relationship exists between the foreclosure complaint and the claims for civil conspiracy, breach of contract, intentional interference with contractual relations and prospective business relations, and breach of fiduciary duty. As a result, the trial court properly concluded these counterclaims are permissive and that the Appellants waived their right to a jury trial on each. *See Johnson v. S.C. Nat'l Bank*, 292 S.C. at 54, 354 S.E.2d at 897 (stating,

"[i]f the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial").

Conclusion

Rehearing is necessary in this matter. Based on the above, the Court should issue a revised Opinion affirming the order of the trial court referring the entire action to the Master-in-Equity.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Attorneys for Carolina First Bank n/k/a TD Bank, NA

Columbia, South Carolina

Dec. 3rd, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

RECEIVED

DEC 03 2012

The Honorable Steven H. John, Circuit Court Judge, Court of Appeals

Case No. 2010-CP-26-08505

Carolina First Bank n/k/a TD Bank, NA, ... Respondent,

v.

BADD, LLC, William McKown and Charles A.
Christenson, ... Defendants.

Of whom BADD, LLC and William McKown are Appellants.

BADD, LLC and William McKown, ... Third-Party Plaintiffs,

v.

William Rempher, ... Third-Party Defendant.

PROOF OF SERVICE

I, the undersigned, of the law offices of Nelson Mullins Riley & Scarborough
LLP, attorneys for Carolina First Bank n/k/a TD Bank, NA, do hereby certify that I
have served all counsel in this action with a copy of the pleading(s) hereinbelow
specified by to the following address(es):

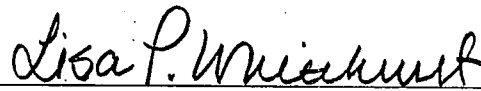
Pleadings:

Petition for Rehearing

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Lisa P. Whitehurst
Administrative Assistant

December 3, 2012



rec'd 12/5/12
04387/01819
document

The South Carolina Court of Appeals

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V. CLAIRE ALLEN
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December 04, 2012

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Re: Carolina First v. Badd, LLC
Appellate Case No. 2011-187747

Dear Counsel:

This will acknowledge receipt of the Petition for Rehearing.

By copy of this letter, opposing counsel is requested to file an original and six (6) copies of a return to this motion no later than ten (10) days from the date of this letter.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Mid 1/2/2013
04387/01819

The South Carolina Court of Appeals

Carolina First Bank, n/k/a TD Bank, NA, Respondent,

v.

BADD, LLC, William McKown and Charles A.
Christenson, Defendants, Of whom BADD, LLC and
William McKown are Appellants.

BADD, LLC and William McKown, Third Party
Plaintiffs,

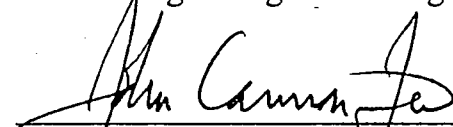
v.

William Rempher, Third Party Defendant.

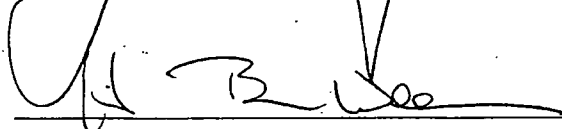
Appellate Case No. 2011-187747

ORDER

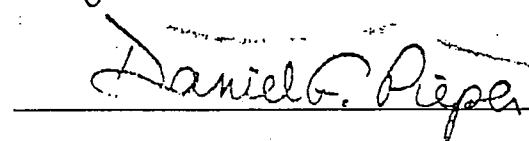
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



J.

Columbia, South Carolina

cc:

William Wayne DesChamps, III

Richard R. Gleissner

C. Mitchell Brown

Thomas Wm. McGee, III

Allen Mattison Bogan

FILED

December 21, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No. 2010-CP-26-08505

Carolina First Bank n/k/a TD Bank, NA, ... Petitioner,

v.

BADD, LLC, William McKown and Charles A.
Christenson, ... Defendants.

Of whom BADD, LLC and William McKown are Respondents.

BADD, LLC and William McKown, Third-Party Plaintiffs,

v.

William Rempher, Third-Party Defendant.

PROOF OF SERVICE

I, the undersigned, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Carolina First Bank n/k/a TD Bank, NA, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by to the following address(es):

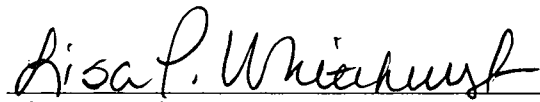
Pleadings:

Appendix

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A handwritten signature in black ink, reading "Lisa P. Whitehurst", written over a horizontal line.

Lisa P. Whitehurst
Administrative Assistant

February 21, 2013