

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
The Honorable Joe M. Crosby, Master-In-Equity**

**Case No. 2011-CP-22-0180
Appellate Case No. 2013-001447**

**Kennedy Funding, Inc. as predecessor-in-interest, and BNP
Paribas.....Respondents,**

v.

**Pawleys Island North, LLC, Will Darwin Wheeler, Peggy Wheeler-Cribb, and J. Mars
Sapp, Defendants,
Of whom Pawleys Island North, LLC, Will Darwin Wheeler and Peggy Wheeler-Cribb are
Respondents and**

J. Mars Sapp is the Appellant.

RECORD ON APPEAL VOLUME II

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Attorney for Respondents Pawleys Island
North, LLC, Will Darwin Wheeler and
Peggy Wheeler-Cribb**

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SC Court of Appeals

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Exhibits and Other Materials or Documents

Exhibits

Plaintiff's Trial Exhibits:

1. Closing Binder bearing Bates Numbers KENNEDY 01135 – 01418. This Exhibit is printed as part of Wolfer Deposition 1 at page 225.	741
2. March 2, 2009 Letter with attachments from Kennedy Funding to Peggy Wheeler-Cribb, bearing Bates Numbers KENNEDY 00497 – 00504. This Exhibit is printed as part of Wolfer Deposition 1 at page 511	742
3. March 11, 2009 – March 12 E-mail chain regarding loan documents and preliminary closing checklist bearing Bates Numbers KENNEDY 00472 – 00475. This Exhibit is printed as part of Wolfer Deposition 1 at page 520..	743
4. April 28, 2009 E-mail forwarding preliminary closing checklist bearing Bates Numbers KENNEDY 01113 – 01125. This Exhibit is printed as part of Wolfer Deposition 1 at page 525	744
5. April 29, 2009 E-mail regarding status of loan documents bearing Bates Number KENNEDY 01053. This Exhibit is printed as part of Wolfer Deposition 1 at page 539	745
6. April 30, 2009 E-mail forwarding draft Loan and Security Agreement documents bearing Bates Numbers KENNEDY 00950 – 01033. This Exhibit is printed as part of Wolfer Deposition 1 at page 542	746
7. August 1, 2012 Notice of 30(b)(6) Deposition of Kennedy Funding, Inc. This Exhibit is printed as part of Wolfer Deposition 2 at page 674	747
8. November 29, 2011 Assignment of Mortgage, Assignment of Leases and Rents and Loan Documents bearing Bates Number KENNEDY 1126-01134 This Exhibit is printed as part of Wolfer Deposition 2 at page 679	748
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MEMORANDUM

TO: Jon Hornik
Evan Bell

FROM: Dorothy Mello Laguzza

CC: Michael R. Leighton, Esq.
Gordon C. Duus, Esq.
Roger M. Iorio, Esq.
Tara Duggan Ryan, Esq.

DATE: April 27, 2009

RE: Kennedy Funding, Pawleys Island North, LLC
Pawleys Island, South Carolina
Review of Environmental Due Diligence

CLIENT/MATTER NO: 31392-0569

I. Introduction

We represent Kennedy Funding, Inc. ("Kennedy") in connection with its proposed loan transaction with Pawleys Island North, LLC ("Borrower"). The Borrower has offered as collateral two lots of property, identified as Lot 3 and 4 located at 334 Myrtle Avenue on Pawleys Island, South Carolina, and are a portion of a larger tax parcel identified as #42-167-42 ("Site"). The Borrower currently owns the Site. We were asked to review a Phase I Environmental Site Assessment, ("Phase I"), dated April 6, 2009, prepared by Earthworks.

Earthworks did not identify any potential environmental areas of concern as recognized environmental conditions ("REC") meaning the presence or likely presence of hazardous substances. Therefore, Earthworks did not recommend any further action or investigation. Below is a summary of our review.

II. Review of Phase I Environmental Site Assessment

A. Site Description

The Site is comprised of two lots that are approximately 1.19 acres. The Site is vacant land and contains wetlands. The Site is proposed to be utilized for residential purposes. The Site is located in a residential area and is adjacent to a residence.

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B. On-Site Concerns

Earthworks did not identify any on-site concerns that warrant further investigation.

C. Off-Site Concerns

Earthworks reviewed the federal and state database records to determine whether any off-site conditions affect the Site. Earthworks did not identify any off-site sources in the databases that could pose an environmental concern to the Sites. Therefore, no further investigation is recommended.

D. Environmental Development Concerns

The Borrower has provided us with a survey that documents that a wetlands delineation was mapped on April 9, 2003. The Borrower received a Jurisdictional Determination dated April 15, 2003, from the Army Corps of Engineers that confirms that there are .80 acres of wetlands located on the entire 3.06 acre parcel. Approximately .51 acres of wetlands are located on the collateral. However, because the Borrower has not provided us with its development plans, we cannot opine how these wetlands may impact proposed development or whether they will need to apply for permits to construct such development. Please also note that the Jurisdictional Determination is only valid for five years and expired on April 15, 2008. Therefore, the Jurisdictional Determination will need to be reapplied for if development is planned for the Site.

Except for the above referenced wetland survey and Jurisdictional Determination dated April 15, 2003, we have not reviewed or analyzed any environmental issues that may impact the ability to develop the Site nor have we received any documents that would allow us to analyze such issues. Therefore, we cannot comment on same. Please let us know if there is anything you would like us to do to address environmental issues that could impact the development of the Site.

III. POTENTIAL LIABILITY FOR CONTAMINATION UNDER FEDERAL AND STATE LAW AND LENDER LIABILITY PROTECTIONS

A. Federal Law

The Federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") provides that owners and operators of property at the time of the discharge of a hazardous substance, or who currently own or operate a property on which a discharge of hazardous substances previously occurred, can be held liable for the cleanup of the contaminated property (even if they are in no way responsible for causing the discharge). However, CERCLA has a secured creditor exemption that provides that the term "owner or operator" does not include a lender that, without participating in the management of the property, holds indicia of ownership primarily to protect the security

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interest in the property. The term "participate in management" means actually participating in the management or operational affairs at the Site.

CERCLA further provides that a lender who does not "participate in management" does not become an owner merely by foreclosing on a property. The lender may foreclose on a property, sell it, release it, wind-up operations, maintain business operations, undertake a cleanup with the Environmental Protection Agency's supervision, or take measures to preserve the assets for sale, without being deemed responsible for contamination as an owner or operator. However, this exemption is contingent on the lender's divestiture of the property at the earliest practicable time, commercially reasonable time, on reasonable terms, taking into account market conditions, and legal and regulatory requirements.

In addition, CERCLA provides for an innocent purchaser defense to the strict liability it imposes on current owners, which may protect purchasers (e.g. borrowers) from liability for cleanup. The innocent purchaser defense only applies if a Phase I is conducted prior to purchasing the Site and no contamination is found. Here, as the Borrower currently owns the Site, they would not be eligible for the defense unless they had conducted a Phase I prior to their purchase that reached similar conclusions.

Note that, even if an innocent purchaser defense would apply, in the event contamination is discovered, the marketability of the Site and, consequently, Kennedy Funding's recourse to the Site for repayment of the loan would likely still be impaired by the contamination on the Site.

B. State Law

South Carolina's Hazardous Waste Management Act, S.C. Stat. Ann. §44-56-10 *et seq.*, has adopted by reference Section 107 of CERCLA. This has been interpreted in South Carolina to mean that limitations on lender liability under CERCLA are also adopted. Therefore, the same protections exist under state law as federal law for lenders. Additionally, under the State Underground Petroleum Environmental Response Bank Act, S.C. Stat. Ann. §44-2-10 *et seq.*, a lender is not required to perform remedial actions in response to a release of a hazardous substance from an underground storage tank, as long as the lender holds the tank indicia to ownership primarily to protect that person's security interest in the tank. The indicia of ownership exemption includes persons who acquire title to the property through foreclosure or other means necessary to enforce the security interests and who, without participating in the management, are otherwise not engaged in petroleum production, refining, and marketing. S.C. Stat. Ann. §44-2-80(B).

In addition to having adopted the CERCLA innocent purchaser defense in its Hazardous Waste Management Act, South Carolina provides for an innocent purchaser defense for releases from removed underground storage tanks. This innocent purchaser

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defense applies when the person who acquires title does not have any contractual or familial relationship with the responsible party, and allows reasonable access for cleanup. S.C. Stat. Ann. §44-2-80(C).

IV. Conclusion

The Site has undergone an environmental inspection done in general conformance with the ASTM Standard E1527-05, which did not reveal any recognized environmental conditions. Therefore, no further environmental investigation is warranted.

We have received a reliance letter which permits Kennedy to rely on the Phase I. Therefore, Kennedy would be able to assert a direct cause of action against Earthworks if it negligently prepared the Phase I report.

We have also received a certificate of insurance from Earthworks that demonstrates its general liability insurance limits of \$1,000,000 for each occurrence and \$2,000,000 in the aggregate and names Kennedy as an additional insured. This permits Kennedy to assert a direct cause of action against Earthwork's insurance carrier if the Phase I report was negligently prepared.

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KENNEDY_01413

MEMORANDUM

TO: Kennedy Funding, Inc.
FROM: Cole, Schotz, Meisel, Forman & Leonard P.A.
CC: Michael R. Leighton
DATE: April 9, 2009
RE: South Causeway, LLC

CLIENT/MATTER NO: 31392.0569

The following search results have been received:

Pawleys Island North, LLC

UCC Debtor Search (SC) – Clear through 3/28/09
UCC Debtor Search (Georgetown County) – Clear through 3/23/09
Bankruptcy Search (SC) – Clear through 4/5/09
Judgment Search (Georgetown County) – Clear through 3/23/09
State Tax Lien Search (Georgetown County) – Clear through 3/23/09
Federal Tax Lien Search – (Georgetown County) – Clear through 3/23/09
Federal Litigation (SC) – Clear through 4/3/09
Local Litigation (Georgetown County) – Clear through 3/23/09
OFAC Search – Clear through 4/3/09

Peggy Wheeler-Cribb

UCC Debtor Search (SC) – Clear through 3/28/09
UCC Debtor Search (Georgetown County) – Clear through 3/23/09
Bankruptcy Search (SC) – Clear through 4/5/09
Judgment Search (Georgetown County) – Clear through 3/23/09
State Tax Lien Search (Georgetown County) – Clear through 3/23/09
Federal Tax Lien Search – (Georgetown County) – Clear through 3/23/09
Federal Litigation (SC) – Clear through 4/3/09
Local Litigation (Georgetown County) – Clear through 3/23/09
OFAC Search – Clear through 4/3/09

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Will Darwin Wheeler

UCC Debtor Search (SC) – Clear through 3/28/09
UCC Debtor Search (Georgetown County) – Clear through 4/21/09
Bankruptcy Search (SC) – Clear through 4/5/09
Judgment Search (Georgetown County) – Clear through 4/21/09
State Tax Lien Search (Georgetown County) – Clear through 4/21/09
Federal Tax Lien Search – (Georgetown County) – Clear through 4/21/09
Federal Litigation (SC) – Clear through 4/3/09
Local Litigation (Georgetown County) – The following result was found through 4/21/09:

1. *J. Mars Sapp vs. Will D. Wheeler* Case No. 2008-CP-22-1345. Complaint for non-payment of lease payments (Wheeler is a guarantor of the lease). Amount demanded: \$556,099

OFAC Search – Clear through 4/3/09

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31392/0560-55 16328v2

KENNEDY_01415

NOTICE OF WAIVER OF APPRAISAL RIGHTS

South Carolina Code Ann. § 29-3-680 provides that except in any real estate foreclosure proceeding relating to a dwelling place, or to a consumer credit transaction, a defendant against whom a personal judgment may be taken on a real estate secured transaction may waive its right to an order of appraisal if the debtors, makers, borrowers and/or guarantors are notified in writing before the transaction that a waiver of appraisal rights will be required.

The undersigned hereby acknowledges that the borrower, guarantors and any other party liable for the loan will be required to execute a waiver of appraisal rights at closing. The waiver of appraisal rights shall contain the following language:

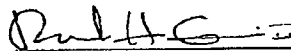
Waiver by Mortgagor. Mortgagor understands that upon default hereunder, among other remedies set out herein and in the Note, the Mortgagee may foreclose upon the mortgaged premises and ask for a deficiency judgment pursuant to Section 29-3-660, South Carolina Code of Laws (1976). The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. **THE MORTGAGOR HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.**

[SIGNATURES APPEAR ON THE FOLLOWING PAGE]

STATE OF SC)
) ss.:
COUNTY OF HORRY)

ACKNOWLEDGMENT

On the 28 day of April, 2009, before me personally came Peggy
Wheeler-Cribb, who being by me duly sworn, did depose and say that she signed
this instrument as her voluntary act and deed.


NOTARY PUBLIC

Print Name: ROBERT H. GWIN, III

My Commission Expires: 8/8/2012

[SEAL]

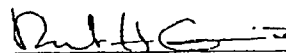
STATE OF SC)
) ss.:
COUNTY OF HORRY)

ACKNOWLEDGMENT

I certify that on April 28, 2009, Peggy Wheeler-Cribb came before me in
person and stated to my satisfaction that she:

(a) made the attached instrument; and

(b) was authorized to and did execute this instrument on behalf of and as
the Manager of Pawleys Island North, LLC, a South Carolina limited liability
company (the "Company"), the entity named in this instrument, as the free act and
deed of the Company, by virtue of the authority granted by its Operating
Agreement and its members.


NOTARY PUBLIC

Print Name: ROBERT H. GWIN, III

My Commission Expires: 8/8/2012

[SEAL]

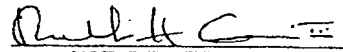
31392/0000-5408898v3

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STATE OF SC)
) ss.:
COUNTY OF Horry)

ACKNOWLEDGMENT

On the 28 day of April, 2009, before me personally came Will Darwin Wheeler, who being by me duly sworn, did depose and say that he signed this instrument as his voluntary act and deed.


NOTARY PUBLIC

Print Name: ROBERT H. GWIN, III

My Commission Expires: 8/8/2012

[SEAL]

EXHIBIT 2

Donna Horn

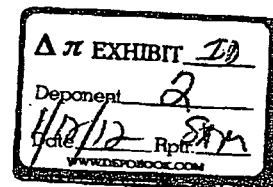
From: Sue Gold
Sent: Monday, March 02, 2009 2:36 PM
To: 'wheelercribb@aol.com'
Cc: 'dlh@sc.rr.com'; 'Neil Mautone'
Subject: South Causeway LLC - Loan Offer and Evaluation from Kevin Wolfer
Attachments: South.Wheeler-Cribb 3-2-09.pdf; South Causeway LLC Write Up (2).pdf

Yours truly,
Sue Gold

Kennedy Funding, Inc.
Tel: 201-342-8500
Fax: 201-342-8373
www.kennedyfunding.com

- DISCLAIMER: KENNEDY FUNDING, INC. IS A PRIVATELY-HELD CORPORATION SPECIALIZING IN COMMERCIAL REAL ESTATE LENDING MATTERS UTILIZING ITS OWN FUNDS AS WELL AS THE FUNDS OF ITS PARTICIPANTS. KENNEDY FUNDING, INC. IS NOT A SAVINGS AND LOAN OR DEPOSITORY BANK OR INSTITUTION. ANY REPRESENTATION TO THE CONTRARY MADE BY ANYONE AFFILIATED WITH KENNEDY FUNDING, INC. OR CLAIMING TO BE AFFILIATED WITH KENNEDY FUNDING, INC. SHOULD NOT BE RELIED UPON FOR ANY PURPOSE. FOR A MORE DETAILED DESCRIPTION OF THE COMPANY, REFER TO KENNEDY FUNDING, INC.'S WEBSITE AT WWW.KENNEDYFUNDING.COM.
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- THIS E-MAIL MESSAGE IS FOR THE SOLE USE OF THE INTENDED RECIPIENT(S) AND MAY CONTAIN CONFIDENTIAL AND PRIVILEGED INFORMATION. ANY UNAUTHORIZED REVIEW, USE, DISCLOSURE OR DISTRIBUTION IS PROHIBITED. IF YOU ARE NOT THE INTENDED RECIPIENT, PLEASE CONTACT THE SENDER BY REPLY E-MAIL AND DESTROY ALL COPIES OF THE ORIGINAL MESSAGE.

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TWO UNIVERSITY PLAZA
SUITE 402
HACKENSACK, NEW JERSEY 07601
TEL: (201) 342-8500
FAX: (201) 342-8373

March 2, 2009

VIA EMAIL: wheelercribb@aol.com

Ms. Peggy Wheeler-Cribb
South Causeway LLC
P.O. Box 3727
Pawleys Island, SC 29585

Re: Loan Offer

Dear Ms. Wheeler-Cribb:

As agreed in the Loan Commitment dated February 12, 2009, Kennedy Funding, Inc. (KFI) has concluded its initial review and due diligence concerning the value of the Collateral for the proposed Loan. Based on the evaluation prepared by Volpe Real Estate Advisors, Inc., copy attached, it has been determined that the value of the Collateral is \$1,920,000. Therefore, KFI is prepared to proceed to a closing for a Loan in the amount of \$960,000. This offer is subject to the terms and conditions in the Loan Commitment being satisfied and confirmation that the assumptions and/or conditions set forth in the attached evaluation prove true and correct.

Please call to confirm your acceptance, and have your attorney contact KFI at his earliest convenience to set up a loan closing. Alternatively, if you wish to exercise your right to dispute the value as determined by KFI, please advise.

We look forward to closing as soon as possible.

Very truly yours,


Kevin Wolfer
Co-Chief Loan Officer

KW:sg

cc: Doug Hinds, Esq., Via Email: dlh@sc.rr.com
Mr. Neil Mautone, Via Email: neil@rednyc.com

sg/offer/South.Wheeler-Cribb 3-2-09

KENNEDY_00498

Volpe Real Estate Advisors, Inc

P.O. Box 339
Johns Island, South Carolina 29457
Phone: (302) 521-5200 Fax: 305-675-2251
E-mail: bernard@volpeadvisors.com

27 February 2009

E-mailed to: Kennedy Funding, Inc.
Attention: Kevin Wolfer

South Causeway, LLC Georgetown, South Carolina

Peggy Wheeler-Cribb owns an oceanfront house along with two adjacent rental flats on 3.06 acres of land at 334 Myrtle Avenue, on Pawley's Island, South Carolina. In 2006 she subdivided the land into 4 parcels of which one (Lot 2) has her & her husband's personal house, another one (Lot 1) has the two flats, and two are vacant building lots. She is offering the two building lots, Lot 3 & Lot 4 "AS IS" as collateral for a loan.



DESCRIPTION OF COLLATERAL

The original trapezoidal shaped 3.06 acre property, Tax Parcel #42-167-42, Ref. Deed Book 1364 at page 232 owned by Will Darwin Wheeler, spanned from the channel in a salt marsh on the western side of Myrtle Avenue across Myrtle Avenue to the sandy ocean beach of the Atlantic Ocean.

The ocean frontage totaled 150.68 feet. The depth varied from 840.41 on the south to 949.7 feet on the north. The frontage along the channel in the salt marsh measured approximately 185 feet. Myrtle Avenue is at the western end running diagonally through the parcel approximately 175 feet east off the salt marsh boundary. The total 3.06 Acres included the Myrtle Avenue R.O.W.



The topology is flat with little elevation change, except for eight foot high sand dunes that protect property during rough seas. The salt marsh starts at the western side of the Myrtle Avenue R.O.W. and wetlands (originally part of the marsh) align the eastern side of Myrtle Avenue except where the entrance to the property is located. These wetlands wrap around the southern boundary of the parcel for approximately 300 feet. Several mature live oak tree clusters are along the entrance drive mostly on the south.

KENNEDY_00499

On a subdivision plan done by Earthworks Group of Murrell's Inlet dated July 9, 2006, the original parcel



is subdivided into the four lots. Lot 1 (42-0167-042-01-00) is the northern most and spans from the western side of the Myrtle Avenue to the Atlantic Ocean where there is approximately 48.74 feet of beach frontage. In its center its width narrows to only 10 feet, which is basically access from Myrtle Avenue to the units.

Lot 2 (42-0167-042-00-00) is the next southern. It spans the entire length of the original parcel, encompassing approximately 60 percent of the salt marsh west of Myrtle Avenue, then narrows to approximately 10 feet, then widens and doglegs to the south, then opens up to the southern

boundary of the original parcel and the Atlantic Ocean where there is approximately 101.94 feet of beach frontage.

Lot 3 (42-0167-042-02-00) encompasses the remainder of the salt marsh section, spans across Myrtle Avenue narrows to approximately 10 feet, then right angles and widens to the southern boundary of the original parcel. The east and west boundaries are perpendicular to the southern boundary at a distance of 93.56 feet apart. The Lot's total area is 29,566 square feet (0.68 Acres) with 13,337 square feet (0.31 Acres) attributed to salt marsh. The area where the new construction would be sited is approximately 9,360 gross square feet from which the area of the wetlands needs to be deducted. It does not have beach frontage as the building site is behind the existing construction, although since the swimming pool and pool house for the main house is on its south there is visibility to the ocean.

Lot 4 (42-0167-042-03-00) is a 22,264 square foot (0.51 Acre) five sided polygon with its northern and southern boundaries parallel and its western boundary, which is adjacent to Lot 3, square to them. The western side crosses Myrtle Avenue and doglegs to the south providing direct access from Myrtle Avenue if the wetlands were not there. There is no beach frontage as it is located "behind" Lot 3. The building area is reduced by the wetlands by Myrtle Avenue and along the southern boundary. Two clusters of live oaks are on the northern side of this lot.

On Lot 2 is the renovated and expanded beach house that Peggy and her husband call home. Next to it on the south is the swimming pool. Next to it on the north, separated by a five foot wide fire wall, is the two story/two flat rental building. Both buildings are set on pilings approximately 10 feet high under which is a concrete slab on grade used for parking.

The houses are wood frame with wood clapboard siding and partially metal roofed, architecturally compatible with and typical for the



KENNEDY_00500

neighborhood.

On the marsh side a long pier extends to the channel where there is a private floating dock.

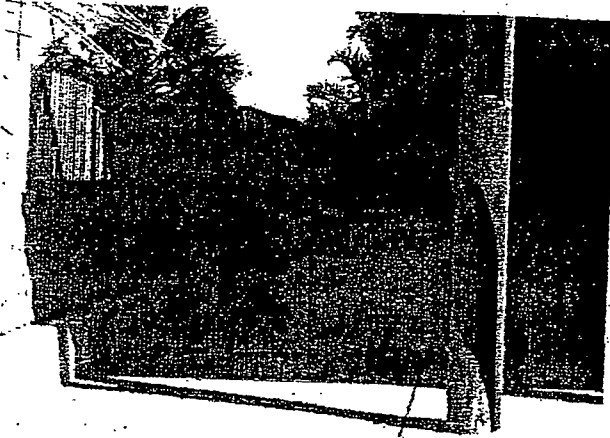
ACCESS AND COMMON EASEMENTS – Due to the location of the wetlands along Myrtle Avenue all of the lots are accessed by the existing entrance gate and drive. The gate is located near Myrtle Avenue on Lot 2 and the drive spans both of the narrow portions of Lots 2 & 3. In the east end of its length it forks onto Lot 1 and Lot 3 and reunites in front of the existing construction forming a circle. A cluster of live oaks is in the center of the circle.

To access the beach there is a five foot easement (presently concrete paved) on the northern side of the building with the flats that runs along the northern boundary from the drive circle to an existing wooden pier that extends over a sand dune to the beach.

For utilities there is a utility easement for all of the lots.

For the existing amenities there is an easement for all owners to use. These amenities include the pools and dock.

All easements are described in Article III of the "Declaration of Covenants and Reciprocal Easement Agreement" that was to be recorded with the recording of the subdivision.



ZONING

According to Declaration of Covenants and Reciprocal Easement Agreement, Lot 3 is designated, permitted, and certified as a lot within the Town of Pawley's Island, and shall be available for development and new construction according to ordinances of the Town of Pawley's Island.



Lot 4 has the same entitlements except for the limitation of one single family dwelling with a maximum size of 3,000 sq. ft. of conditioned floor area.

The lots are in the FEMA Flood Zone AE EL. 14 and AE EL. 15, which is the height above sea level that the first floors of the dwelling units must be.

According to Pawley's Island code the height of the house is limited to 35 feet above the FEMA AE elevation. Therefore, on the collateral lots a two story house can be built.

The setbacks from the property lines are:

Front yard – 20 feet
Side yard – 10 feet

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Rear yard – 15 feet

Critical Area – up to but not onto the critical area line.

Pawley's Island has no tree ordinance, so aside from the statement in the Declaration of Covenants, the live oak trees on the Lot 4 can be cut to accommodate a house. However, this conclusion should be confirmed by legal counsel.

From scaling the subdivision plan applying the provisions above, it appears that a 3,000 sq. ft. house can be built on both lots. Supposedly, Lot 3 has been approved for a 4,000 sq. ft. house which is the maximum square footage now allowed on Pawley's Island.

ENVIRONMENTAL STATUS

There were no environmental studies provided for review. There are wetlands on both lots. They are delineated on the Earth Works subdivision plan as critical areas. OCRM has to approve any house site plan prior to a building permit being issued.

PRESENT DEVELOPMENT STATUS

The two collateral lots are presently vacant. Their surfaces are in part covered with gravel that is used for guest parking.

The building envelope can be drawn applying the setbacks and side yards listed in ZONING. As is known and confirmed, a 3,000 sq. ft. house (conditioned space) can be built on Lot 4 and as is known but not confirmed, a 4,000 sq. ft. house on Lot 3.

MARKET AND MARKET VALUES

GENERAL – Pawley's Island is located approximately 23 miles south of Myrtle Beach and has historically been an exclusive location. In the 1800's plantation owners went on the island to escape the summer heat. Today it is one of the most highly desirable beach locations in South Carolina. Some say its zip code is on the level of that of the Hamptons.

Although exclusive, it is not gated (the roads are public) and does not appear so when visiting as a stranger. Many houses are dated and weathered and even the new ones are not extravagant, an appearance that has earned the neighborhood the reputation of being "shabby but arrogant".

The slowdown in the real estate markets reached the island in 2007 and continued through 2008 as there were no sales recorded for that entire year. Nor have there been any lots sold to date in 2009. However, prices have not corrected mainly due to the fact that in this high-end island sellers are generally not in distressed positions and there is no urgency to sell.

In 2007 there were three sales of comparable lots. At 217 Myrtle Avenue, not far from the subject, a lot sold for \$907,000 with no dock access in June. Another at 266B Atlantic Avenue, a little farther north, sold for \$1,100,000 in August. It was closer to the beach, but had no dock access. And the third at 609 Myrtle Avenue sold in June for \$1,000,000.

The subject lots have both beach access and dock access (although access to the ocean from the tidal creek where the dock is located is limited), making them a desirable commodity short of being directly on the beach.

MARKET VALUES – Lot 4 has recently been listed for \$1,300,000. According to the listing agent, the sellers will not take less than \$1,100,000. Lot 3 should bring a higher price since it can accommodate a larger house and is closer to the beach with a water view, possible \$1,500,000.

Considering the above coupled with the current market conditions, if the lots were to be sold within a six

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month period they may have to be sold to investors who would hold to resell. Assuming that the market rebounds and after one to two years buyers for these properties return and pay these asking prices, less a negotiated discount, their present values can be determined by applying a discount rate. If the investor desires a 25% return for the investment and risks and the sale prices were \$1,100,000 and \$1,300,000 and one sold in one year and the other in two years, the discounted prices would be \$880,000 for Lot 4 and \$1,040,000 for Lot 3. Therefore, adding the two values yields for the collateral property an

"AS IS" MARKET VALUE as Defined as Sale to a Cash Buyer in Six Months of:

\$1,920,000

CONCERNS AND RECOMMENDATIONS

1. According to Peggy the two clusters of live oak trees on Lot 4 can be cut down for the construction of the house. But the Declaration of Covenants and Reciprocal Easement Agreement, under 5. Architectural, item 5.3 it states "Trees. No trees shall be cut, removed, altered, or intentionally damaged on any lot unless such tree is dead, diseased or presents a hazard to persons and property and the Declarant has approved the cutting, removal or alteration. Although Pawley's Island does not have a tree ordinance, this restriction may apply to the trees on Lot 4. Can this restriction be waived for Lot 4 prior to closing the home?"
2. Although it is said that Lot 3 can accommodate a 4,000 sq. ft. house, no documentation confirming is in hand. The buyer should provide such.
3. "Will Serve" letters should be provided to assure adequate utility supply.

EXHIBIT 3

Donna Horn

From: Iorio, Roger [Rlorio@coleschotz.com]
Sent: Thursday, March 12, 2009 11:27 AM
To: 'Doug Hinds'; Leighton, Michael
Cc: Jon Hornik; Evan Bell; MautoneLLC@aol.com; WheelerCribb@aol.com
Subject: RE: KFI - South Causeway - draft loan documents and checklist

Doug: The documents were drafted with the name of the Borrower that was reflected in the commitment letter.

Roger M. Iorio, Esq.
Cole, Schotz, Meisel, Forman & Leonard PA
A Professional Corporation
Court Plaza North
25 Main Street
P.O. Box 800
Hackensack, New Jersey 07602-0800
201.525.6312 direct dial
201.678.6312 direct facsimile
Email: riorio@coleschotz.com
www.coleschotz.com
Legal Secretary: Christine Perna - 201.489.3000, ext. 5079

From: Doug Hinds [mailto:dlh@sc.rr.com]
Sent: Thursday, March 12, 2009 11:21 AM
To: Leighton, Michael; Iorio, Roger
Cc: Jon Hornik; EvanBell@kennedyfunding.com; MautoneLLC@aol.com; WheelerCribb@aol.com
Subject: Re: KFI - South Causeway - draft loan documents and checklist

Why are the loan documents prepared in the wrong name?

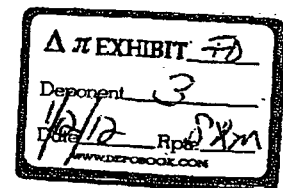
Douglas L Hinds
HINDS, COWAN, STRANGE & GEER
843-527-2441
843-527-0065 (FAX)
dlh@sc.rr.com

----- Original Message -----

From: Leighton, Michael
To: 'Doug Hinds'; Iorio, Roger
Cc: Jon Hornik; EvanBell@kennedyfunding.com; MautoneLLC@aol.com; WheelerCribb@aol.com
Sent: Wednesday, March 11, 2009 5:00 PM
Subject: RE: KFI - South Causeway - draft loan documents and checklist

I have the articles of organization

Michael R. Leighton, Esq.
Cole, Schotz, Meisel, Forman & Leonard, P.A.
A Professional Corporation
Court Plaza North
25 Main Street
Hackensack, NJ 07602-0800
201 525-6330 direct dial
201 678-6330 direct fax



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201 970-9887 cell phone
mleighton@coleschotz.com
www.coleschotz.com
Legal Secretary: Veronica Marshman 201 489-3000 ext. 5096

From: Doug Hinds [<mailto:dlh@sc.rr.com>]
Sent: Wednesday, March 11, 2009 4:40 PM
To: Iorio, Roger
Cc: Leighton, Michael; Jon Hornik; EvanBell@kennedyfunding.com; Mautonet.LC@aol.com; WheelerCribb@aol.com
Subject: Re: KFI - South Causeway - draft loan documents and checklist

I am answering this in Mr. Hinds' absence this afternoon. He will receive these documents in the morning.

First of all, the new borrower is Pawleys Island North, LLC. Copies of the Articles of Organization were emailed to Mr. Leighton yesterday. Property is presently owned by Will D. Wheeler and will be conveyed to Pawleys Island North, LLC.

Also, it is my understanding the loan was to be for \$1,200,000.00.

Douglas L Hinds
HINDS, COWAN, STRANGE & GEER
604 Front Street
Georgetown, SC 29440
843-527-2441
843-527-0065 (fax)

----- Original Message -----

From: dlh@sc.rr.com
To: 'dlh@sc.rr.com'
Cc: Leighton, Michael ; Jon Hornik ; 'EvanBell@kennedyfunding.com'
Sent: Wednesday, March 11, 2009 3:29 PM
Subject: KFI - South Causeway - draft loan documents and checklist

Mr. Hinds:

Attached for your review and comment is an initial draft of the following loan documents:

1. Promissory Note
2. Guaranty
3. Environmental Indemnity
4. Assignment of Licenses
5. Assignment of Leases
6. Loan and Security Agreement
7. Document Re-Execution Agreement
8. Mortgage
9. Waiver of Appraisal Rights

I have also attached a draft of the closing checklist for your review. Please forward us the requested due diligence as soon as possible.

Finally, attached are Lender's form of (1) resolution, (2) Manager's Certificate, (3) Amendment to Certificate of Formation, (4) Amendment to Operating Agreement, and (5) opinion of counsel.

Please note that the attached loan documents remain subject to our client's further review and comment.

Thank you,
Roger Iorio

Roger M. Iorio, Esq.
Cole, Schotz, Meisel, Forman & Leonard PA
A Professional Corporation
Court Plaza North
25 Main Street
P.O. Box 800
Hackensack, New Jersey 07602-0800
201.525.6312 direct dial
201.678.6312 direct facsimile
Email: riorio@coleschotz.com
www.coleschotz.com
Legal Secretary: Christine Perna - 201.489.3000, ext. 5079

* * * * *

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U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein.

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EXHIBIT 4

Donna Horn

From: Iorio, Roger [RIorio@coleschotz.com]
Sent: Tuesday, April 28, 2009 2:52 PM
To: 'Robert H. Gwin, III'
Cc: Leighton, Michael; Ryan, Tara Duggan; Jon Hornik; Evan Bell; Kevin Wolfer; 'MautoneLLC@aol.com'
Subject: KFI - South Causeway - updated closing checklist
Attachments: KFI - South Causeway - Closing Checklist.doc

Bob:

I have updated the closing checklist to show the status of the due diligence items. In addition to the signature pages to the loan documents which we will need today per my voicemail, there are still a few outstanding items that need to be addressed. We will call you at 3:00 (if that time is good for you) to go over the open items.

Neil, I will patch you into the call so that way you can know the status as well.

Thanks
Roger

COLE SCHOTZ

Roger M. Iorio

Cole, Schotz, Meisel, Forman & Leonard, P.A. | www.coleschotz.com
25 Main Street | Hackensack, New Jersey | 07601
Direct 201.525.6312 | Firm 201.489.3000 | Fax 201.678.6312 | riorio@coleschotz.com
New Jersey | New York | Delaware | Maryland
Legal Secretary: Christine Perna
tel 201.489.3000 ext. 5079 | cperna@coleschotz.com

* * * * *

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PRELIMINARY CLOSING CHECKLIST

Lender requires satisfaction of all conditions of the Commitment and the Loan Documents, including delivery of all applicable Closing Checklist items, at least 48 hours prior to the closing and funding of the Loan.

Borrower:	Pawleys Island North LLC 334 Myrtle Avenue Pawleys Island, South Carolina 29585
Guarantor(s):	Peggy Wheeler-Cribb 334 Myrtle Avenue Pawleys Island, South Carolina 29585 Will Darwin Wheeler
Lender:	Kennedy Funding, Inc. ("KFI") Two University Plaza, Suite 402 Hackensack, New Jersey 07601 Tel: (201) 342-8500 Fax: (201) 342-8373 Attn: Jeffrey Wolfer
Loan Amount:	\$960,000
Collateral:	A. 1 st Lien on real property located on Pawley's Island, South Carolina, as further described in commitment letter. B. Such other security as KFI shall deem reasonably necessary in accordance with the terms of the commitment
Lender's In-House Counsel:	Jonathan Hornik, Esq. Vice President and General Counsel Kennedy Funding, Inc. Two University Plaza, Suite 402 Hackensack, New Jersey 07601 Tel: (201) 342-8500 Fax: (201) 342-8373 E-Mail: jonhornik@kennedyfunding.com Evan Bell, Esq. Associate General Counsel Kennedy Funding, Inc. Two University Plaza, Suite 402 Hackensack, New Jersey 07601 Tel: (201) 342-8500 Fax: (201) 342-8373

	E-Mail: evanbell@kennedyfunding.com
Lender's Counsel ("LC"):	Michael R. Leighton, Esq. Cole, Schotz, Meisel, Forman & Leonard, P.A. 25 Main Street, Court Plaza North, P.O. Box 800 Hackensack, New Jersey 07602-0800 Direct Tel: (201) 525-6330 Fax: (201) 489-1536 Direct Fax: (201) 678-6330 E-Mail: mleighton@coleschotz.com
Lender's Local Counsel ("LC")	
Borrower's Counsel ("BC"):	Gwin Law Office, LLC 2105 Cromley Circle, Suite B Myrtle Beach, South Carolina 29577 Attention: Robert H. Gwin, III, Esq. Facsimile No.: (843) 839-2244
Borrower's New Jersey Counsel ("BNJC"):	Richard H. Weiner, Esq. Gerald Salerno, Esq. Aronsohn Weiner & Salerno 263 Main Street Hackensack, New Jersey 07601 Phone 201-487-4747 Facsimile 204-487-7601 rweiner@aronsohnweiner.com
Title Insurance Company ("TIC"):	Oleander Title Agency, Inc. 2105 Cromley Circle, Suite B Myrtle Beach, South Carolina 29577

<u>Responsible Party</u>	<u>Item</u>	<u>Status/Notes</u>
<u>Loan Documents</u>		
LC	(1) Promissory Note	BC to provide executed document
LC/LLC	(2) Mortgage and Security Agreement	BC to provide executed document
LC	(3) Loan and Security Agreement	BC to provide executed document
LC	(4) Assignment of Leases and Rents	BC to provide executed document
LC	(5) Individual Guaranty	BC to provide executed document
LC	(6) Assignment of Licenses, etc.	BC to provide executed document
LC	(7) Environmental Indemnity Agreement	BC to provide executed document
LC	(8) Document Re-execution Agreement	BC to provide executed document
LC	(9) Notice of Waiver of Appraisal Rights	BC to provide executed document
LC	(10) UCC-1 Financing Statements (a) State (b) County (c) If Borrower is in another state than the Collateral, additional UCC for State of Borrower's formation	To be prepared by LC
LC	(11) Loan Closing Statement (match with Settlement Statement from title company) (a) Lender Fees (b) Title Fees (c) Brokers' Commissions (d) Appraisal Fees (e) Legal Fees (f) Payoffs	To be prepared by LC upon receipt of settlement statement
LC	(12) Closing Instruction Letter	Received
BC	(13) Opinion of Borrower's and Guarantors' South Counsel (LC to provide form)	Opinion letter needs to be completed (blanks filled in)
BNJC	(14) Opinion of Borrower's and Guarantor's NJ Counsel (LC to provide form)	Draft Received

<u>Responsible Party</u>	<u>Item</u>	<u>Status/Notes</u>
<u>Title and other Real Estate Documents</u>		
BC/TIC	(15) Title Commitment(s), with extended coverage, issued by a nationally recognized title insurance company acceptable to KFI in its sole discretion insuring KFI's Mortgage as a valid first lien (arrange for title closer) <i>Please have the following endorsements added thereto to the extent same is available:</i> 1) Comprehensive (ALTA 9 or equivalent) 2) Usury 3) Assignment of Rents 4) Zoning 5) Waiver of Arbitration 6) Street Assessment 7) Land Same as Survey 8) Commercial Environmental Lien 9) Access 10) Deletion of Creditor's Rights Exclusion 11) Doing Business 12) Subdivision 13) Tax Parcel 14) Pending Disbursement/Future Advances 15) Easements, Use of/Maintenance 16) Contiguity 17) Water rights 18) Mineral rights 19) Mechanic's liens 20) Planned Unit Development 21) Variable Interest Rate	Title proforma needs to be finalized - remove future advance clause - zoning endorsement needs to be corrected - need to discuss setbacks
BC/TIC	(16) Copies of all documents shown on Schedule B-II of the title commitment	Received, under review
BC/TIC	(17) Vesting Deed into current owner	Received, under review
BC/TIC	(18) Searches on Borrower, Guarantor and any member/shareholder/partner of Borrower or any entity Guarantor who owns at least a 20% equity interest prepared by <u>Corporation Service Company or CT Corporation System</u> (including lien and judgment searches, tax and assessment searches, litigation searches, Bankruptcy	<u>Pawleys Island</u> State UCC: Received County UCC: Received Federal Litigation: Received County Litigation: Received State Tax Liens: Received

<u>Responsible Party</u>	<u>Item</u>	<u>Status/Notes</u>
	and UCC searches, municipal searches) in each County and State where Borrower does business and in the County and State where personal Guarantor resides, performed by a nationally recognized search company or a company satisfactory to Lender	Federal Judgment Liens: Received County Judgment Liens: Received Federal Tax Liens: Received Fixture Liens: Received Bankruptcy: Received <u>Peggy Wheeler-Cribb</u> State UCC: Received County UCC: Received Federal Litigation: Received County Litigation: Received State Tax Liens: Received Federal Judgment Liens: Received County Judgment Liens: Received Federal Tax Liens: Received Fixture Liens: Received Bankruptcy: Received <u>Will Darwin Wheeler</u> State UCC: Received County UCC: Received Federal Litigation: Received County Litigation: Received State Tax Liens: Received Federal Judgment Liens: Received County Judgment Liens: Received Federal Tax Liens: Received Fixture Liens: Received Bankruptcy: Received Borrower to provide email status of litigation against Mr. Wheeler

<u>Responsible Party</u>	<u>Item</u>	<u>Status/Notes</u>
BC/TIC	(19) Evidence that neither Borrower nor Guarantor are identified on the Specially Designated Nationals and Blocked Persons list maintained by OFAC, Department of Treasury (this can be ordered by the title company)	Borrower: Received Guarantors: Received
BC/TIC	(20) Paid and receipted Real Estate Tax Bills, Tax Parcel Numbers and contact information for the local Tax Assessor/Collector	Received
TIC	(21) Title Company's Invoice (which includes all endorsement fees, policy fees, search fees, recording fees, stamp tax fees, title rundown fees, etc.)	Received
TIC	(22) Settlement Statement	TIC to provide updated settlement statement
TIC	(23) Closing Protection Letter issued by a nationally recognized title company	Received
BC/TIC	(24) Mortgagor's and Seller's Affidavits of Title (and/or any other documentation/affidavits required by title company with respect to the loan)	Draft Received BC to provide executed Affidavit at closing
BC	(25) Two (2) full size copies of an ALTA/ACSM Survey certified to TIC, Borrower, Lender and its counsel	Received copy of plat. Received Certificate
BC	(26) Wetlands and Floodplain Delineation in compliance with ALTA/ACSM standards	Received, under review
BC	(27) Flood Search	Received (shown on survey/wetlands survey)
BC	(28) Evidence of the following forms of Insurance, each naming Kennedy Funding, Inc., its successors and assigns as mortgagee and as additional insured (a) Commercial General Liability Insurance	BC to provide revised insurance certificate per comments sent

<u>Responsible Party</u>	<u>Item</u>	<u>Status/Notes</u>
	(b) Property Insurance (All Risk) (c) Builder's Risk Insurance (d) Construction General Liability Insurance (e) Workers Compensation Insurance (f) Excess/Umbrella Liability Insurance (g) Environmental Liability Insurance (h) Flood Insurance (i) Hurricane/Earthquake Insurance	
BC	(29) Evidence of Zoning Classification	Received
BC	(30) Evidence of Final Site Plan Approvals or Planned Unit Development and any Entitlements, approvals, licenses and permits in place	Per BC, only evidence of approvals, permits is the site plan and settlement agreement
BC	(31) Evidence of availability of public utilities	Water: Received Sewer: Received Electric: Received
B/BC	(32) A Performance/Completion Bond insuring Lender that the project will be completed per approved plans	Not Applicable
B/BC	(33) A complete set of architect and engineering plans, and all contracts, budgets, schedules and other construction documents, if any	Not Applicable
BC	(34) Structural engineers report for any buildings on the Collateral	Not Applicable
BC	(35) Phase I Environmental Site Assessment Report in compliance with ASTM E1527-05 standards, dated within six (6) months of Closing	Received, under review
BC	(36) Phase II Environmental Site Assessment Report	

<u>Responsible Party</u>	<u>Item</u>	<u>Status/Notes</u>
BC	(37) Reliance Letter from the environmental consultant	Received, under review
BC	(38) General Liability Insurance Certificate from the environmental consultant with limits of not less than \$2 million naming Kennedy Funding, Inc., its successors and assigns as an additional insured	Received, under review
BC	(39) The Planning and Zoning Resources Corporation Report (PZR Report) (ordered from www.pzr.com)	Received
BC	(40) Certificates of Occupancy	Not Applicable
BC	(41) Service Contract(s)	Not Applicable
BC	(42) Management Agreement(s)	Not Applicable
BC	(43) Payoff Letters and Discharges/Releases related to existing indebtedness encumbering the Collateral	Received letter from bank counsel Please provide fully executed copy of the agreement with the bank at closing
BC	(44) Copies of the loan documents of other lender(s)	Not Applicable
BC	(45) Purchase and Sale Agreement and any amendments	Not Applicable
BC	(46) Purchase and Sale Agreement (and any amendments) and closing HUD/Settlement Statements for any or all of the Collateral.	Not Applicable
BC	(47) Draft Deed(s) into Borrower	Draft received BC to provide executed copy at closing
BC	(48) Copies of all leases related to the Collateral (a) Add to Schedule B-II of title commitment as subordinated item(s) (b) Tenant Estoppel Certificates (c) Assignment and Assumption of Lease (d) Subordination, Nondisturbance and	Not Applicable

<u>Responsible Party</u>	<u>Item</u>	<u>Status/Notes</u>
	Attornment Agreements	
BC	(49) Evidence of Borrower's ready funds necessary to close held in escrow by TIC	Not Yet Received (to be determined if necessary upon receipt of settlement statement)
	(50) Evidence of Source of Borrower's funds	Not Yet Received (to be determined if necessary upon receipt of settlement statement)
BC	(51) Brokerage Agreement(s) (a) Mortgage Broker (b) Real Estate Broker	Received
BC	(52) Broker Invoice(s)/Broker Sign off(s) on Fees (a) Mortgage Broker (b) Real Estate Broker	Received
BC	(53) All subdivision documents	Per BC, only the plat exists
BC	(54) Confirming that the trees on Lot 4 can be removed to accommodate a house.	Received, under review
BC	(55) Documentation showing that Lot 3 has been approved for a 4,000 sq ft house	Received, under review
BC	(56) Assignment of the "Declarants" rights under the Declaration of Covenants to the Borrower	BC to provide executed copy at closing
BC	(57) Assignment of the "Declarants" rights under the Declaration of Covenants to KFI	BC to provide executed copy at closing (with requested change added)
<u>Authorization Documents</u>		
BC	(58) Certificate of Formation/Incorporation/Organization of Borrower and Entity Guarantor	Received
BC	(59) Amendment to Certificate of Formation/Incorporation/Organization of Borrower to incorporate SPE provisions	BC to provide Borrowers signature
BC	(60) Operating Agreement/Bylaws/Partnership	Received

<u>Responsible Party</u>	<u>Item</u>	<u>Status/Notes</u>
	Agreement of Borrower and Entity Guarantor	
BC	(61) Amendment to Operating Agreement/Bylaws/Partnership Agreement of Borrower to incorporate SPE provisions	BC to provide Borrowers signature
BC	(62) Appointment of Independent Director/Manager	Received
BC	(63) Good Standing Certificates for Borrower and Entity Guarantor	Received
BC	(64) Certified Resolutions/Consents of Authority	
BC	(a) Borrower's and Entity Guarantor's Resolution/Consents (authorizing the purchase and the loan transaction) (b) Borrower's and Entity Guarantor's Incumbency Certificate	Resolution: Draft Received Manager's Certificate: BC to provide Borrowers signature with all exhibits attached to certificate Incumbency Certificate: BC to provide Borrowers signature
BC	(65) Borrower's Tax Identification Number	Received 26-4625775
BC/B	(66) Photo Identification for Signatories	Received
BC	(67) Borrower's and Entity Guarantor's Organizational Chart	Not Applicable
<u>Underwriting Matters</u>		
Borrower	(68) Certified Financial Statements of Borrower and Guarantors	Borrower: Not Applicable Guarantor: Lender to advise if additional financial statements are required
Borrower	(69) Tax Returns of Borrower and Guarantors	Borrower: Not Applicable Guarantor: Lender to advise if additional financial statements are required
Borrower	(70) IRS Form 4506	Borrower: BC to provide executed copy at closing Guarantor: BC to provide executed

<u>Responsible Party</u>	<u>Item</u>	<u>Status/Notes</u>
		copy at closing
Lender	(71) Satisfactory Appraisals and Inspections	
<u>Miscellaneous</u>		
BC/B	(72) Appointment of New Jersey Agent for service of process	Borrower: Received Guarantor: Received
LC/BC	(73) Subordination Agreement	Not Applicable
LC	(74) Post Closing Obligation Letter	Not Applicable
Lender	(75) Set-up Sheet	For Internal Use Only
Lender	(76) Title Review Memo	For Internal Use Only
Lender	(77) Environmental Memo	For Internal Use Only
Lender	(78) Search Memo	For Internal Use Only
Lender	(79) Loan Committee Approval	For Internal Use Only
Lender	(80) Fortis Facility Eligibility Review	For Internal Use Only
Lender	(81) Fortis Appraiser Approval	For Internal Use Only
Lender	(82) Approval from insurance consultant on any and all insurance certificates, policies and limits	For Internal Use Only

EXHIBIT 5

Donna Horn

From: Iorio, Roger [Rlorio@coleschotz.com]
Sent: Wednesday, April 29, 2009 3:19 PM
To: 'Robert H. Gwin, III'
Cc: Leighton, Michael; Ryan, Tara Duggan; Jon Homik; Evan Bell; 'MautoneLLC@aol.com'
Subject: KFI - South Causeway - open item status

Can you please advise as to the status of the following:

1. The email regarding the status of the litigation against Mr. Wheeler.
2. The revised insurance certificate

Thank you
Roger

COLE SCHOTZ

Roger M. Iorio

Cole, Schotz, Meisel, Forman & Leonard, P.A. | www.coleschotz.com
25 Main Street | Hackensack, New Jersey | 07601
Direct 201.525.6312 | Firm 201.489.3000 | Fax 201.678.6312 | riorio@coleschotz.com
New Jersey | New York | Delaware | Maryland
Legal Secretary: Christine Perna
tel 201.489.3000 ext. 5079 | cperna@coleschotz.com

* * * * *

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KENNEDY_01053

EXHIBIT 6

Donna Horn

From: Iorio, Roger [Rlorio@coleschotz.com]
Sent: Thursday, April 30, 2009 3:10 PM
To: 'Robert H. Gwin, III'
Cc: Leighton, Michael; Ryan, Tara Duggan; Jon Homik; Evan Bell; 'MautoneLLC@aol.com'
Subject: KFI - South Causeway - revised loan agreement
Attachments: KFI - South Causeway - Loan and Security Agreement.doc; KFI - South Causeway - Loan and Security Agreement.blackline.doc

Bob:

Attached is a revised draft of the Loan and Security Agreement, together with a blackline showing the cumulative revisions that were made to version 3. The only additional change that was made today was the addition of Section 2(e) to coincide with the agreement made this afternoon between Borrower and Lender. Please confirm that the revision is acceptable.

Thanks
Roger

COLE SCHOTZ

Roger M. Iorio

Cole, Schotz, Meisel, Forman & Leonard, P.A. | www.coleschotz.com

25 Main Street | Hackensack, New Jersey | 07601

Direct 201.525.6312 | Firm 201.489.3000 | Fax 201.678.6312 | riorio@coleschotz.com

New Jersey | New York | Delaware | Maryland

Legal Secretary: Christine Perna

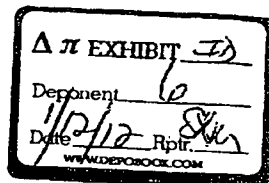
tel 201.489.3000 ext. 5079 | cperna@coleschotz.com

* * * * *

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KENNEDY_00950

be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein.

LOAN AND SECURITY AGREEMENT

Between

**PAWLEYS ISLAND NORTH, LLC,
a South Carolina limited liability company
as Borrower,**

AND

**KENNEDY FUNDING, INC.
as Agent for the
lenders named herein.**

Date: as of April 30, 2009

31392/0000-5408836v4

KENNEDY_00952

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LOAN AND SECURITY AGREEMENT

THIS LOAN AND SECURITY AGREEMENT ("Agreement"), dated as of April 30, 2009, between PAWLEYS ISLAND NORTH, LLC, a South Carolina limited liability company, having an address at 334 Myrtle Avenue, Pawleys Island, South Carolina 29585 ("Borrower"), and KENNEDY FUNDING, INC. ("Agent"), a New Jersey corporation having an address at Two University Plaza, Suite 402, Hackensack, New Jersey 07601, as agent for the lenders identified on Schedule D attached hereto and incorporated herein by reference, in each case having an address care of Kennedy Funding, Inc., Two University Plaza, Suite 402, Hackensack, New Jersey 07601 (the aforesaid Agent and lenders are hereinafter collectively referred to as "Lender").

WITNESSETH

WHEREAS, Borrower has requested that Lender make a loan to Borrower in the amount of **NINE HUNDRED SIXTY THOUSAND and 00/100 (\$960,000) DOLLARS** (the "Loan"), subject to and upon the terms and conditions hereinafter contained, which Loan shall be evidenced by a Promissory Note as of even date herewith from Borrower to Lender (as may be amended, restated or modified from time to time, the "Note");

WHEREAS, the Loan is to be secured by certain instruments, agreements and documents, including, but not limited to, those items identified in the Principal Loan Documents as set forth on Schedule B hereto and made a part hereof, and payment and performance of the Loan is to be guaranteed pursuant to that certain guaranty of even date herewith from Guarantor (as hereinafter defined) to Lender (as may be amended, restated or modified from time to time, the "Guaranty");

WHEREAS, capitalized terms not otherwise defined herein shall have those meanings assigned to them in the Loan Documents (as hereinafter defined); and

WHEREAS, Lender has agreed to make the Loan to Borrower on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the foregoing and of the covenants and conditions hereinafter set forth, Borrower and Lender hereby agree as follows:

1. **Definitions.** As used herein:

(a) "Account" or "Accounts Receivable" means, in addition to the definition of account as contained in the Uniform Commercial Code, the right of Borrower to receive payment for goods sold or leased or for services rendered which are not evidenced by an instrument or chattel paper, whether or not it has been earned by performance.

(b) "Account Debtor" means, in addition to the definition of account debtor as contained in the Uniform Commercial Code, the person or persons obligated to Borrower on an Account, or who is represented by Borrower to be so obligated.

(c) "Affiliate" of any Person (as hereinafter defined) shall mean any other Person which, directly or indirectly, controls or is controlled by, or is under common control with such Person. For the purposes of this definition, "controls" (including, with correlative meanings, the terms "controlled by" and "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities or by contract or otherwise.

(d) "Business Day" shall mean any day upon which banks located in the State of New Jersey generally are open to conduct regular banking business.

(e) "Closing Date" shall mean the date on which this Agreement is executed by the parties hereto and the conditions set forth in Paragraph 5 are fulfilled to the satisfaction of Lender.

(f) the "Collateral" shall mean the Real Property Collateral, the Collateral described in Paragraph 4 hereof, any other collateral described in any Loan Document and any other property of Borrower and/or Guarantor now or hereafter subject to a security agreement, mortgage, pledge, assignment or other document granting Lender a security interest therein and/or securing the Loan.

(g) the "Default Rate" shall have the meaning ascribed thereto in the Note.

(h) "Dollar" or "\$" or "dollar" or any other terms of similar import shall mean United States Dollars, it being understood and agreed that all advances of the Loan shall be made in U.S. Dollars and repaid or reimbursed in U.S. Dollars without reduction for currency exchange fluctuation.

(i) "Environmental Laws" shall mean a collective reference when and as applicable to (i) the Comprehensive Environmental Response, Compensation & Liability Act, as amended, 42 U.S.C. Section 9601 *et seq.*, (ii) the Resource Conservation and Recovery Act, as amended, 42 U.S.C. Section 6901 *et seq.*, and (iii) any and all other federal, state and local statutes, laws, rules, ordinances, regulations and executive orders pertaining to environmental matters applicable to the Borrower's business and/or properties, as the same may be amended or supplemented from time to time.

(j) "Governmental Authority" or "Governmental Authorities" shall mean any federal, state, county or municipal governmental agency, board, commission,

officer, official or entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government and having jurisdiction over Borrower, the Guarantor (as hereinafter defined) or the Collateral.

(k) the "Guarantor" shall collectively mean, jointly and severally, Will Darwin Wheeler and Peggy Wheeler-Cribb.

(l) the "Indemnified Party" and "Indemnified Parties" shall mean Agent and Lender as well as their directors, officers, trustees, partners, employees, agents, attorneys and shareholders.

(m) "Independent Director" or "Independent Manager" shall mean a Person, acceptable to Lender in its sole discretion, who is not at the time of initial appointment, or at any time while serving as a director or manager, as applicable, and has not been at any time during the preceding five (5) years: (a) a stockholder, director (with the exception of serving as the Independent Director or Independent Manager), officer, employee, partner, member, manager, contractor or attorney of the Borrower or any Affiliate of any of them; (b) a customer, creditor or other person who derives any of its purchases or revenues from its activities with the Borrower or any Affiliate; (c) a Person controlling or under common control with any such stockholder, director, officer, partner, member, manager, contractor, customer, creditor, supplier or other Person; or (d) a member of the immediate family of any such stockholder, director, officer, employee, partner, member, manager, contractor, customer, creditor or other Person. As used in this definition, the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of management, policies or activities of a Person, whether through ownership of voting securities, by contract or otherwise.

(n) the "Loan Documents" shall mean this Agreement, the Note, the Mortgage (as hereinafter defined), the Guaranty and any other documents or agreements given to Lender by Borrower or the Guarantor in connection with the Loan whether or not specifically set forth herein, as each may be amended, restated or modified from time to time.

(o) "Material Action" means to file any insolvency, or reorganization case or proceeding, to institute proceedings to have the Borrower be adjudicated bankrupt or insolvent, to institute proceedings under any applicable insolvency law, to seek any relief under any law relating to relief from debts or the protection of debtors, to consent to the filing or institution of bankruptcy or insolvency proceedings against the Borrower, to file a petition seeking, or consent to, reorganization or relief with respect to the Borrower under any applicable federal or state law relating to bankruptcy or insolvency, to seek or consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian, or any similar official of or for the Borrower or a substantial part of its property, to make any assignment for the benefit of creditors of the Borrower, to

admit in writing the Borrower's inability to pay its debts generally as they become due, or to take action in furtherance of any of the foregoing.

(p) "Mortgage" shall mean that certain Mortgage and Security Agreement of even date herewith, as may be amended, restated or modified from time to time, given by Borrower (as such term is defined therein), as mortgagor, in favor of Lender, as mortgagee, in connection with the Mortgaged Property, which Mortgage is given as security for the due payment of Borrower's obligations under the Note.

(q) "Person" or "Persons" shall mean any one or more individuals, partnerships, corporations (including a business trust), joint stock companies, limited liability company, trusts, unincorporated associations, joint ventures or other entities, or a foreign state or political subdivision thereof or any agency of such state or subdivision.

(r) "Personalty" shall mean all Accounts, Accounts Receivable, Equipment, Inventory, Goods (as such terms are defined in the Uniform Commercial Code) and other personal property of the Borrower, as more particularly described herein.

(s) "Real Property Collateral" or "Mortgaged Property" shall mean that certain real property owned or leased by Borrower, situated in Pawleys Island, South Carolina as more particularly described in Schedule A attached hereto and made a part hereof.

(t) "Uniform Commercial Code" shall mean the Uniform Commercial Code, as enacted in the State of New Jersey and the jurisdiction in which the Mortgaged Property is located, as applicable, as in effect from time to time.

2. The Loan.

(a) Provided that no default shall have occurred and be continuing hereunder, Lender agrees, subject to the terms and conditions hereinafter set forth, to advance to Borrower up to Nine Hundred Sixty Thousand and 00/100 (\$960,000) Dollars.

(b) Subject to a final closing statement prepared by Lender's counsel and executed by Borrower (the "Closing Statement"), the Loan proceeds shall be disbursed as follows and used only for the following purposes:

(1) The sum of One Hundred Fifteen Thousand Two Hundred and 00/100 (\$115,200) Dollars shall be disbursed by Lender on behalf of Borrower on the Closing Date and simultaneously paid to Lender (the "Prepaid Interest") which shall be credited against interest payments due under the terms of the Note, as such interest payments become due; and

(2) The sum of Fifteen Thousand Three Hundred Sixty and 00/100 (\$15,360) Dollars shall be disbursed by Lender on behalf of Borrower on the

Closing Date and simultaneously paid to Red Management, LLC (the "Broker") as full satisfaction of the Broker's commission resulting from the consummation of this Loan; and

(3) The sum of Seventy Thousand and 00/100 (\$70,000) Dollars shall be disbursed by Lender on behalf of Borrower on the Closing Date and simultaneously paid to Lender as the balance of the commitment fee ("Commitment Fee") due to Lender pursuant to the loan commitment letter entered into by and between Borrower and Lender, dated February 12, 2009;

(4) The sum of Five Hundred and 00/100 (\$500.00) Dollars shall be disbursed by Lender on behalf of Borrower on the Closing Date and simultaneously paid to UIC, Inc. in payment of its insurance consulting fees; and

(5) The sum of Twenty Seven Thousand Five Hundred and 00/100 (\$27,500) Dollars shall be disbursed by Lender on behalf of Borrower on the Closing Date and simultaneously paid to Cole, Schotz, Meisel, Forman & Leonard, P.A., in payment of its legal fees.

(c) The foregoing disbursements may be made, notwithstanding contrary directions from Borrower, and for such purpose Borrower agrees that:

A. The foregoing constitutes an irrevocable direction or authorization to so disburse the funds (said authorization being coupled with an interest) and no further direction or authorization from Borrower shall be necessary to warrant any such disbursements; and

B. All such disbursements shall satisfy the obligations of Lender to advance funds to Borrower notwithstanding any other agreement or document to the contrary and shall be secured by the Mortgage as fully as if made by Borrower, regardless of the disposition by the party to whom such disbursements are so made.

(d) Prepaid Interest. So long as no Event of Default and no event which with the passage of time and/or the giving of notice would constitute a default hereunder or under any other Loan Documents shall have occurred, Lender shall credit Borrower from Prepaid Interest to the extent of amounts not so credited for payments of interest under the Note, it being understood, however, that the Prepaid Interest does not in any way limit Borrower's obligations to make payments of interest under the Note. Any amounts not so credited from Prepaid Interest on the Maturity Date (as defined in the Note) shall be credited to the payment of the Loan, and any remaining Prepaid Interest after payment in full of the Loan shall be disbursed to Borrower. Upon an Event of Default (as hereinafter defined), the Lender may credit to the extent of amounts not so credited from the Prepaid Interest any amounts then due hereunder and under the Loan Documents.

(e) Notwithstanding anything contained herein to the contrary, provided that no Event of Default and no event which with the passage of time and/or the giving of notice would constitute an Event of Default hereunder or under any other Loan Documents shall have occurred, Lender agrees, that in the event all amounts due and owing to the Lender pursuant to the Note and the other Loan Documents are paid in full on or prior to October 30, 2009 (other than through the refinance of the Loan with Lender), Borrower shall receive a credit at the time of such final payoff of Twenty Thousand (\$20,000) Dollars.

3. **The Note.** The obligation of the Borrower to repay all monies advanced by Lender to Borrower in connection with the Loan shall be evidenced by this Agreement and the Note. The Loan shall bear interest at the rate(s) set forth in the Note and shall be payable as provided in the Note with final payment due on the Maturity Date. All of Borrower's obligations hereunder and under the Note are secured by the Mortgage and the other Loan Documents. Should the principal of or interest on the Loan become due and payable on a day other than a Business Day, the maturity thereof shall be extended to the next succeeding Business Day and, in the case of principal, interest shall be payable thereon at the rate per annum specified in the Note during such extension.

4. **Grant of Security Interest.**

(a) Borrower hereby assigns and pledges to Lender, and hereby grants to Lender a security interest in all property of the following types, wherever located and whether now owned or hereafter owned or acquired by Borrower, whether or not affixed to the Mortgaged Property, in all proceeds (including, without limitation, amounts payable under any policies of insurance with respect thereto), and Products (as such term is defined in the Uniform Commercial Code) thereof in any form, in all parts, accessories, attachments, special tools, additions, replacements, substitutions and accessions thereto or therefor, and in all increases or profits received therefrom:

(1) all Accounts, to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property;

(2) all Equipment (as such term is defined in the Uniform Commercial Code), and in all of Borrower's machinery and equipment of every kind, nature and description, as well as trucks and vehicles of every kind and description, including, but not limited to, trailers, cranes and hoisting equipment, whether presently owned by Borrower or hereafter acquired, and wherever located to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property;

(3) all Inventory (as such term is defined in the Uniform Commercial Code);

(4) all General Intangibles (as such term is defined in the Uniform Commercial Code), to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property;

(5) all deposit accounts of Borrower with Lender, now or hereafter existing, and all money, instruments, securities, documents, chattel paper, credits, claims, performance bonds, payment bonds, all other forms of surety to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property, and other property of Borrower now or hereafter in the possession or custody of Lender or any of its agents;

(6) all Chattel Paper (as such term is defined in the Uniform Commercial Code), to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property, including, but not limited to, all such Chattel Paper now or hereafter left in the possession of Lender for any purpose;

(7) all Instruments (as such term is defined in the Uniform Commercial Code), including any negotiable instruments or a securities, or any other writing which evidences a right to the payment of money and is of the type which is, in the ordinary course of business, transferred by delivery with any necessary endorsement or assignment whether presently owned by Borrower or hereafter acquired, to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property, including, but not limited to, all such Instruments now or hereafter left in the possession of Lender for any purpose;

(8) all Documents (as such term is defined in the Uniform Commercial Code);

(9) all Goods (as such term is defined in the Uniform Commercial Code), to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property whether presently owned by Borrower or hereafter acquired; and

(10) all books and records, including, without limitation, customer lists, credit files, computer programs, print-outs and other computer materials and records of Borrower pertaining to all of the Collateral.

(b) Borrower will perform any and all steps requested by Lender to create and maintain in Lender's favor a first and valid lien on and security interest in the Collateral or pledges of Collateral, including, without limitation, the execution, delivery, filing and recording of financing statements and continuation statements, supplemental security agreements, notes, filings with federal government offices and any other documents necessary, in the opinion of Lender, to protect its interest in the Collateral which liens shall be exclusive except for those liens expressly permitted elsewhere

herein. Lender and its designated officer are hereby appointed Borrower's attorney-in-fact to do all acts and things which Lender may deem necessary to perfect and continue perfected the security interests and Liens provided for in this Agreement, including, but not limited to, executing financing statements on behalf of Borrower.

5. Conditions Precedent to Lender's Obligations. Lender shall not be obligated to make the Loan hereunder unless Lender shall have received the following, all in form and substance satisfactory to the Lender in all respects:

- (a) the Note, duly executed by Borrower;
- (b) the Mortgage, duly executed by Borrower;
- (c) this Agreement, duly executed by Borrower;
- (d) the Guaranty, duly executed by Guarantor;
- (e) the Assignment of Leases and Rents, duly executed by Borrower;
- (f) the Assignment of Licenses, Contracts, Plans, etc., duly executed by Borrower;
- (g) the Environmental Indemnity Agreement, duly executed by Borrower and Guarantor;
- (h) the Document Re-Execution Agreement, duly executed by Borrower and Guarantor;
- (i) the Closing Statement, duly executed by Borrower;
- (j) certificates of insurers, or other evidence satisfactory to Lender, indicating that Borrower and Guarantor have obtained the policies of insurance as are required under the terms of the Mortgage;
- (k) a paid title insurance policy (without survey exception) in the full amount of the Loan issued by a title insurance company acceptable to Lender and insuring the Mortgage as a valid first lien on the Mortgaged Property, with such endorsements as Lender shall require and subject to the Permitted Exceptions identified in the Mortgage;
- (l) UCC-1 financing statements required to evidence or perfect Lender's security interest in the personal property now or hereafter owned by the Borrower and located on or used in connection with the Mortgaged Property and UCC-1 financing statements required to perfect Lender's security interest in the Collateral;
- (m) an appraisal of the Mortgaged Property;

- (n) financial statements and tax returns for Borrower, and the Guarantor;
- (o) evidence of a search of the public records which discloses no conditional sales contracts, chattel mortgages, leases of personalty, financing statements or title retention agreements filed or recorded against the Borrower or the Mortgaged Property;
- (p) a survey of the Mortgaged Property prepared in accordance with the "Minimum Standard Detail Requirements for ALTA and ACSM Land Title Surveys" jointly established by ALTA and ACSM in 2005, as updated, and certified to Lender by a registered land surveyor acceptable to the Lender ("Survey");
- (q) copies of all permits or approvals required by Governmental Authorities to such date with respect to Borrower or the Mortgaged Property, to the extent the same are necessary and appropriate to operate and develop the Mortgaged Property;
- (r) an environmental audit of the Mortgaged Property (Phase I and, if necessary Phase II);
- (s) the operating agreement of Borrower certified by the Manager of Borrower;
- (t) an incumbency certificate of Borrower which shall certify the names and titles of the members of the Borrower authorized to sign, in the name and on behalf of Borrower this Agreement and each other Loan Document to be delivered pursuant to this Agreement by Borrower, together with the true signatures of such officers, upon which certificate the Lender may conclusively rely;
- (u) consents of the Borrower authorizing the transactions to be entered into by Borrower in connection with this Agreement;
- (v) evidence that the Mortgaged Property is not located in a federal or state flood hazard area;
- (w) certification regarding debts and liens, executed by the owner of the Mortgaged Property;
- (x) payment of the Short Interest, and other fees and expenses required to be paid to or on behalf of Lender in connection with the Loan;
- (y) opinions of legal counsel to the Borrower with respect to such matters as the Lender may reasonably request including, but not limited to, opinions from Borrower's local South Carolina counsel and Borrower's New Jersey counsel;

(z) an opinion of legal counsel to the Guarantor with respect to such matters as the Lender may reasonably request including, but not limited to, opinions from Guarantor's local South Carolina counsel and Guarantor's New Jersey counsel;

(aa) evidence of the appointment of a New Jersey agent to accept service of process on behalf of the Borrower and Guarantor, pursuant to the requirements of the Loan Documents;

(bb) evidence demonstrating current full compliance with all applicable zoning, health, environmental and safety laws, ordinances and regulations (including, without limitation, approval of local, private or public sewage or water utility);

(cc) certification from Borrower that Borrower is not a party to any existing or pending or threatened litigation, except as previously disclosed to Lender;

(dd) evidence demonstrating receipt of all appropriate approvals meeting all applicable requirements of all Governmental Authorities having jurisdiction including, but not limited to, subdivision and site plan approvals, potable water supply, sewage discharge and sewage connection, use of septic tanks or alternatives;

(ee) satisfactory evidence that all roads and utilities necessary for the full utilization of the Collateral for its intended purposes have been completed or the presently installed and proposed roads and utilities will be sufficient for the full utilization of Collateral for its intended purposes; and

(ff) such other agreements, certificates or other documents as Lender or Title Insurance Company may reasonably request.

6. **Representations and Warranties of Borrower.** To induce Lender to make the Loan pursuant to this Loan Agreement, Borrower hereby represents and warrants to Lender as follows:

(a) By its acceptance of Lender's funds and execution of the Loan Documents, Borrower acknowledges, agrees and confirms that it has no defense, offset or counterclaim for any occurrence in relation to this Loan and Borrower acknowledges that Lender has complied with all of its obligations under the Loan Documents as of the date hereof.

(b) Borrower is a limited liability company, duly organized under the laws of the State of South Carolina and has all requisite power and authority and legal right to own its property, to carry on its business as it is now being conducted, to enter into this Agreement and the other Loan Documents entered into by it and to perform all of its obligations hereunder and thereunder.

(c) The execution and delivery by Borrower of the Loan Documents, and the performance of its obligations thereunder, have been duly authorized by all necessary action, corporate or otherwise, and do not and will not: (i) require any further action, consent or approval on the part of the members or managers of Borrower; (ii) violate any provision of law, rule, regulation, order, writ, judgment, injunction, decree, determination or award presently in effect having applicability to Borrower, or the members or managers of Borrower; or (iii) result in any breach of or constitute a default under any indenture or loan or credit agreement or any other agreement, lease or instrument to which the Borrower is a party or by which the Borrower or its properties may be bound or affected, and the Borrower is not in default under any such law, rule, regulation, order, writ, judgment, injunction, decree, determination or award or any such indenture, agreement, lease or instrument.

(d) The Loan Documents have been duly executed and delivered by Borrower and are legal, valid and binding obligations of Borrower, enforceable against Borrower in accordance with their respective terms.

(e) Except as previously disclosed to Lender, there is no material action, suit, proceeding, inquiry or investigation, at law or in equity, or before any court, governmental instrumentality, public board or arbitrator pending or threatened against or affecting Borrower or any of its properties or rights, wherein an unfavorable decision, ruling or finding would (i) to the extent not covered by insurance as to which the insurer has not disclaimed coverage, result in any material adverse change in the financial condition, business, properties or operations of Borrower; (ii) materially or adversely effect the transactions evidenced by the Loan Documents; (iii) materially impair the right of either to carry on its business substantially as now conducted; or (iv) adversely effect the validity or enforceability of the Loan Documents.

(f) To the best of Borrower's knowledge, Borrower is in compliance with all laws applicable to Borrower or its properties or assets.

(g) Borrower is a pre-existing corporation/limited liability company and is actively engaged in the operation of its business and has not been created as a vehicle to obtain the Loan. The proceeds of the Loan will be used by Borrower for the purposes set forth in Paragraph 6(o) in connection with the operation of Borrower's business.

(h) The following persons constitute the members of Borrower and their respective ownership interest in Borrower is set forth opposite their names:

Will Darwin Wheeler	99%
Peggy Wheeler-Cribb	1%

(i) There has been no material adverse change in the condition, financial or otherwise, of Borrower or the Guarantor since the date of its financial statements furnished to Lender.

(j) Borrower's properties and assets reflected on its financial statements referred to above, and all such properties and assets are free and clear of all mortgages, pledges, liens, charges or other encumbrances, except as reflected on such financial statements which have been previously provided to Agent.

(k) Borrower and the Guarantor have each filed all federal, state and other income or franchise tax returns which are required to be filed and have paid all taxes due or which may become due pursuant to such returns or pursuant to any assessment received by it.

(l) All timely authorizations, permits, approvals and consents of Governmental Authorities which may be required in connection with the valid execution and delivery of this Agreement and the other Loan Documents and the carrying out or performance of any of the activities or transactions required or contemplated hereunder or thereunder have been obtained (and remain in full force and effect).

(m) All financial statements, information and other financial data furnished by Borrower and the Guarantor to Lender in connection with the Agreement (i) were true, correct and complete in all material respects, as of the date of said financial statements, information and other data, (ii) such financial statements present fairly the financial condition of Borrower and the Guarantor at the respective dates thereof and the results of operations and changes in financial position for the periods to which they apply, and (iii) there have been no material adverse changes in the financial condition of Borrower or any Guarantor since the delivery by Borrower or the Guarantor, as the case may be, to Lender of the most recent financial statements.

(n) Borrower's assets, at a fair valuation, exceed Borrower's liabilities (including, without limitation, contingent liabilities). Borrower is paying its debts as they become due and Borrower anticipates the continuing ability to pay its debts as they become due. Borrower has capital and assets sufficient to carry on its business.

(o) Proceeds from the Loan shall be used only as set forth in this Agreement, the Closing Statement, and for other proper corporate/limited liability company purposes. No part of the proceeds of the Loan shall be used, directly or indirectly, for the purpose of purchasing or carrying any margin stock within the meaning of Regulation U of the Board of Governors of the Federal Reserve System, or for the purpose of purchasing or carrying or trading in any stock under such circumstances as to involve Borrower in a violation of Regulation U of the Board of Governors of the Federal Reserve System. In particular, without limitation of the foregoing, no part of the proceeds from the Loan are intended to be used to acquire any publicly-held stock of any

kind. As used in this subparagraph (o), the terms "margin stock" and "purpose of purchasing or carrying" shall have the meanings assigned to them in the aforesaid Regulation U, and the term "publicly-held," in respect to securities, shall have the meaning assigned to it in Section 220.7(a) of Regulation T of the Board of Governors of the Federal Reserve System.

(p) Borrower is not in violation of or in default under (nor on the Closing Date is there any waiver in effect which, if not in effect, would result in a violation or default under) any provision of Borrower's bylaws/operating agreement, or under any provision of any agreement, indenture, evidence of indebtedness, loan or financing agreement, certificate, lease or other instrument to which it is a party, or by which it is bound, or of any law, governmental order, rule or regulation, in any such case under this subparagraph (p) so as to affect adversely in any material manner its business, assets or financial conditions.

(q) All statements, representations and warranties made by Borrower or any other person in this Agreement, any other Loan Document and any other agreement, document, certificate or instrument previously furnished or to be furnished by said person to Lender under this Agreement or in connection with the Loan: (i) are and shall be true, correct and complete in all material respects at the time they were made and, in the case of those made prior to the Closing Date, on and as of the Closing Date, (ii) do not and shall not contain any untrue statement of a material fact at the time made, and (iii) do not and shall not omit to state a material fact at the time made necessary in order to make the information contained herein or therein not misleading or incomplete. Borrower understands that all such statements, representations and warranties shall be deemed to have been relied upon by Lender as a material inducement to provide the Loan.

(r) No person is entitled to receive from Borrower any brokerage commission, finder's fee or similar fee or payment in connection with the consummation of the transactions contemplated by this Agreement except as provided in Section 2 of this Agreement. No brokerage or other fee, commission or compensation is to be paid by Lender by reason of any act, alleged act or omission of Borrower with respect to the transaction contemplated hereby.

(s) Borrower has no knowledge of any of the following:

(i) The release or threatened release of any hazardous substance, pollutant or contaminant as each such term is presently defined in any applicable Environmental Laws resulting from any activity by or on behalf of Borrower or any predecessor in interest to the Mortgaged Property, including, without limitation, the generation, handling, storage, treatment, transportation or disposal of any hazardous substance, pollutant or contaminant at any of the past or present business locations and facilities of Borrower; or

(ii) Any past or future action taken or to be taken by any federal, state, county or municipal Governmental Authority or by any other person under any applicable Environmental Laws concerning the release of any hazardous substance, pollutant or contaminant into the soil, air, surface or subsurface water or the environment in general from any of the past or present business locations and facilities of Borrower; or

(iii) Any claims or actions brought or which are threatened to be brought by any Person against Borrower for damages occurring at or outside of any of the past or present business locations and facilities of Borrower resulting from the alleged release or threatened release of any hazardous substance, pollutant or contaminant by Borrower or any predecessor in interest, including, without limitation, claims for health effects to Persons, property damage and/or damage to natural resources.

(t) (A) Borrower's address set forth above is the location of Borrower's chief executive office, and is the only location where Borrower keeps its records concerning its Accounts, and its inventory and equipment. (B) Within four (4) months of the date of this Agreement, none of Borrower's assets have been moved from any jurisdiction or other locations than the present location of assets set forth above except for inventory or equipment purchased or sold by Borrower in the ordinary course of business from persons or entities customarily selling such inventory or equipment. (C) As of the date hereof, no inventory is now stored with a bailee, warehouseman or similar party. (D) As of the date hereof, Borrower does not hold any goods belonging to third parties or in which other parties have an interest, including any goods sold on a bill and hold basis. (E) Borrower does not presently purchase or otherwise hold goods on a consignment basis. (F) None of Borrower's inventory is of a nature that contains any labels, trademarks, trade names, or other identifying characteristics which are the properties of third parties, and the use of which by Borrower is in violation of the rights of such third parties or under license, royalty or similar agreements with any third parties. (G) No persons hold any goods of Borrower. (H) Borrower has not purchased any inventory or equipment except in the ordinary course of business for value and from persons customarily in the business of selling such inventory or equipment. (I) Borrower does not hold any instrument or chattel paper connected with any Account. (J) Borrower does not own any trademarks, trade names, patents or copyrights. (K) No surety bonds have been issued on behalf of Borrower with respect to any contracts or purchase orders out of which Accounts Receivable have arisen or are expected to arise.

(u) Borrower is the owner and the operator of the Mortgaged Property.

(v) There is an adequate supply of public utilities (including, without limitation, water, sewer and electric) to support the Project and the Project has access to such public utilities.

7. **Survival of Representations and Warranties.** The foregoing representations and warranties shall survive the execution of this Loan Agreement and the closing of the Loan.

8. **Affirmative Covenants.** To induce Lender to make the Loan pursuant to this Agreement, Borrower hereby covenants and agrees that so long as the Loan shall remain outstanding hereunder, Borrower shall comply with the following covenants:

(a) Borrower shall keep and maintain complete and accurate books, accounts and records. Borrower shall permit access thereto and examination thereof by Lender and any authorized representatives of Lender, at all reasonable times and places during normal business hours (including the right to make copies thereof at the cost and expense of Borrower).

(b) Borrower shall comply in all material respects with all applicable federal, state, county and municipal laws, rules, regulations and orders of any Governmental Authority having jurisdiction over Borrower, subject to the limitations expressly set forth in the Mortgage, except to the extent contested in good faith and by proper proceedings or where the failure to so comply would not have a material adverse effect on Borrower, including, without limitation, all Environmental Laws and health and safety laws.

(c) Borrower shall promptly notify Lender of the occurrence of any Event of Default or an event which, with the giving of notice or passage of time or both, would constitute an Event of Default and of the occurrence of any event or the commencement of any action, suit or proceeding which, if adversely determined, would adversely affect the condition, financial or otherwise, of Borrower or Guarantor.

(d) Borrower shall indemnify, protect, defend and save harmless the Indemnified Parties from and against (i) any and all losses, damages, expenses or liabilities of any kind or nature and from any suits, claims, or demands, by third parties including reasonable counsel fees incurred in investigating or defending such claim, suffered by any of them and caused by, relating to, arising out of, resulting from, or in any way connected with the Loan and the transactions contemplated herein, and (ii) any and all losses, damages, expenses or liabilities sustained by Lender in connection with any environmental sampling or cleanup relating to any properties or assets owned or otherwise used by Borrower in the operation of its business, or mandated by any Environmental Law; provided, however, Borrower shall not be obligated to indemnify, protect, defend and save harmless an Indemnified Party, if the loss, damage, expense or liability was caused by or resulted from the gross negligence or willful misconduct of that Indemnified Party. In case any action shall be brought against an Indemnified Party based upon any of the above and in respect to which indemnity may be sought against Borrower, the Indemnified Party against whom such action was brought, shall promptly notify Borrower in writing, and Borrower shall assume the defense thereof, including the

employment of counsel selected by Borrower and reasonably satisfactory to the Indemnified Party, the payment of all costs and expenses and the right to negotiate and consent to settlement. Upon reasonable determination made by the Indemnified Party, the Indemnified Party shall have the right to employ separate counsel in any such action and to participate in the defense thereof at the Indemnified Party's cost and expense. Borrower shall not be liable for any settlement of any such action effected without its consent, but if settled with Borrower's consent, or if there be a final judgment for the claimant in any such action, Borrower agrees to indemnify and save harmless said Indemnified Party against whom such action was brought from and against any loss or liability by reason of such settlement or judgment. The provisions of this subparagraph (d) shall survive the termination of this Agreement and the final repayment of the Loan.

(e) If Lender shall so require, Borrower agrees to establish and maintain at a banking institution of Lender's choice a lockbox, in accordance with Lender's standard lockbox agreement in effect from time to time, and to direct all Account Debtors to make remittances on all Accounts to said lockbox. Any and all remittances received in said lockbox may be applied to the Obligations of Borrower to Lender in accordance with Paragraph (g) hereof.

(f) If, notwithstanding the notices to Account Debtors to remit payments on Accounts to the lockbox referred to above, Borrower receives any payments on Accounts or other Collateral, Borrower agrees to receive any and all payments and remittances on Accounts and Inventory and other Collateral, including cash, checks, drafts, notes, acceptances or other forms of payment in trust for Lender and to deliver such payments in the identical form in which they were received, together with collection reports in form satisfactory to Lender.

(g) All proceeds of any Account(s) and inventory and other Collateral which are delivered to or otherwise received by Lender for application to the Loan provided for herein shall be deemed received as of the date of actual receipt by Lender, and shall be applied by Lender on account of the Obligations upon Lender's receipt of same; provided, however, that no checks, drafts, or other Instruments received by Lender shall constitute payment to Lender unless and until such item of payment has actually been collected by Lender. For the sole purpose of calculation of interest due to Lender from Borrower, all such proceeds and other payments on account of the Loan provided for in this Agreement, irrespective of the type or form of payment thereof shall not be considered applied on account of the Obligations until actual clearance of such funds.

(h) Borrower shall maintain all of its property in good working condition, ordinary wear and tear excepted (including obsolete and abandoned property).

(i) Borrower shall, within ten (10) days of the end of each month, deliver to Lender an aging of its Accounts and report of its inventory, and an aging of its accounts payable in such form as may be reasonably acceptable to Lender, and within

thirty (30) days of the end of each month, a duly completed accounts receivable reconciliation report in such form as may be reasonably acceptable to Lender.

(j) Borrower will continue to hold all necessary licenses and permits for the operations of their business, including but not limited to contract vendor registrations and account numbers.

(k) Lender (by any of its officers, employees and agents) shall have the right, at any time or times during Borrower's usual business hours (provided reasonable prior notice is given except if an Event of Default has occurred and is continuing), to inspect the Collateral, all records related thereto (and to make extracts from such records) and the premises upon which any of the Collateral is located, to discuss Borrower's affairs and finances with any person and to verify the amount, quality, quantity, value and condition of, or any other matter relating to, the Collateral.

(l) (A) Lender shall have the right at any time and from time to time, without notice, to notify Account Debtors to make payments to Lender, to endorse all items of payment which may come into its hands payable to Borrower, to take control of any cash or non-cash proceeds of Accounts and of any returned or repossessed goods; to compromise, extend or renew any Account or deal with it as it may deem advisable, and to make exchanges, substitutions or surrenders of Collateral, to notify the postal authorities, after an Event of Default, to deliver all mail, correspondence or parcels addressed to Borrower to Lender at such address as Lender may choose. (B) Borrower herewith appoints Lender or its designee as Attorney-in-Fact to endorse Borrower's name on any checks, notes, acceptances, drafts or any other instrument or document requiring said endorsement and to sign Borrower's name on any invoice or bills of lading relating to any Account, or drafts against its customers, or schedules or confirmatory assignment on Accounts, or notices of assignment, financing statements under the Uniform Commercial Code, and other public records, and in verification of Accounts and in notices to Account Debtors. (C) Lender shall have no obligation to preserve any rights against any Person obligated on any Account, chattel paper, instrument or other item of Collateral. Lender shall not be permitted to exercise the rights granted to it under the foregoing clauses (A) and (B) prior to an Event of Default.

(m) Borrower will furnish Lender with at least ten (10) days' prior written notice of any change in location of or addition to its chief executive office, the office where it keeps its records concerning its Accounts, its location of Inventory, Equipment and other assets, and other business locations.

(n) Pay and discharge, and require its subsidiaries to pay and discharge, when due, all taxes, assessments or other governmental charges imposed on them or any of their respective properties, unless the same are currently being contested in good faith by appropriate proceedings and adequate reserves are maintained therefor.

(o) Operate its properties, and cause those of its subsidiaries to be operated in compliance with all applicable orders, rules and regulations promulgated by the jurisdictions and agencies thereof where such properties are located and duly file or cause to be filed such reports and/or information returns as may be required or appropriate under applicable orders, regulations or law.

(p) Permit the Lender's representatives and/or agents full and complete access to any or all of the Borrower's and its subsidiaries' properties and financial records, to make extracts from and/or audit such records and to examine and discuss the Borrower's properties, business, finances and affairs with the Borrower's officers and outside accountants.

(q) Obtain lien releases and lien waivers, in a statutory standard form, as and when Borrower pays contractors, materialmen, laborers providing labor, equipment, or materials to the Mortgaged Property and submit copies of the same to Lender.

(r) Borrower shall, within ten (10) days of the end of each month, deliver to Lender a report of the Borrower's assets, including without limitation, a report on the status of any development or construction on the Mortgaged Property, in such form as may be acceptable to Lender in its sole discretion.

(s) Borrower shall provide Lender with written evidence of flood insurance, in form and with substance satisfactory to Lender in its sole discretion, prior to any construction on the Mortgaged Property.

(t) Borrower acknowledges that simultaneously with the execution and delivery of this Agreement it has delivered to Lender, to hold in escrow, that certain Assignment of Declarant's Rights ("Assignment of Rights") pursuant to which Borrower transfers to Lender any rights which it may have as Declarant in that certain Declaration of Covenants and Reciprocal Easement Agreement dated October 30, 2006, as such rights with respect to the Mortgaged Property were thereafter assigned to Borrower. Upon an Event of Default, Lender has the right to release the Assignment of Rights from escrow and record same with the State of South Carolina, County of Georgetown.

9. **Negative Covenants of Borrower.** To induce Lender to make the Loan pursuant to this Agreement, Borrower hereby covenants and agrees that so long as the Loan shall remain outstanding, Borrower shall not:

(a) Except for Permitted Encumbrances as set forth in the Mortgage, at any time: (i) create, incur, assume or suffer to exist any mortgage, deed of trust, pledge, security interest, encumbrance, lien or charge of any nature upon or with respect to Borrower's assets and properties or (ii) sign or file under the Uniform Commercial Code of any jurisdiction a financing statement which names Borrower as a debtor or (iii) sign any security agreement authorizing any secured party thereunder to file such financing

statement. Borrower further covenants and agrees not to grant any similar negative pledge to any other lender.

(b) Except as to the sale or disposition of assets which are obsolete or worn out and are no longer used or useful in the conduct of its business, convey, sell, lease, assign, transfer, hypothecate or otherwise dispose of any of its now or hereafter acquired property, business or assets.

(c) Create, incur, suffer to exist, assume, guaranty, endorse, become a surety, or otherwise become liable for the debt or other obligations of any other Person whether directly or indirectly, or make or incur any advance, purchase commitment, other obligation or loan for the direct or indirect purpose of paying or discharging any such obligations.

(d) Make any advance, loan, extension of credit or capital contribution to, or purchase any stock, bonds, notes, debentures or other securities of or any assets constituting a business unit of, or make any other investment in any Person.

(e) Enter into any merger or consolidation or liquidate or wind-up or dissolve itself (or suffer any liquidation or dissolution) or convey, sell, lease, assign, transfer or otherwise dispose (directly or indirectly) of all or substantially all of its property, business or assets or make any material change in its present method of conducting business or permit any corporate guarantor to do any of the foregoing.

(f) Materially change, amend, alter or modify the bylaws/operating agreement or other governing documents of Borrower or permit any corporate guarantor to do any of the foregoing.

(g) Enter into or permit any Guarantor to enter into any transaction, including, without limitation, the purchase, sale or exchange of property or the rendering of any service, with any officer, director, shareholder or partner of Borrower or any Guarantor or Affiliate of any of the foregoing.

(h) Declare or pay any dividends on, distributions on or make any payment on account of, or set apart assets or a sinking fund for the purchase, redemption, defeasance, retirement or other acquisition of, any interest, shares or any class of stock or any warrant or option to purchase any such stock whether now or hereafter outstanding or make any other distribution in respect thereof, directly or indirectly whether in cash or property or obligations.

(i) Create, incur, suffer to exist any indebtedness, except (i) indebtedness in respect of the Loan; and (ii) indebtedness, if any, outstanding as of the date of this Agreement and shown on the financial statements previously delivered to Lender.

(j) Transfer, sell, lease or otherwise convey (directly or indirectly) any interest or shares of capital stock or membership or ownership interest in any guarantor.

(k) Purchase any Inventory or Equipment except in the ordinary course of business from persons customarily in the business of selling such Inventory or Equipment.

(l) Without prior written consent of Lender, remove the Collateral from its present location, except for the removal of Inventory upon its sale.

(m) Sell or transfer any Inventory to any Affiliate or subsidiary of Borrower except on arms length terms in the ordinary course of business.

(n) Sell, lease or transfer any of its equipment (except for abandoned or obsolete equipment) or other assets without the prior written consent of Lender except for sales of inventory in the ordinary course of business to good faith purchasers for value.

(o) Allow its existence of as a corporation/limited liability company to be other than in good standing and will not, without the prior written consent of Lender, dissolve or liquidate, or merge or consolidate with or acquire or affiliate with any other business entity or form any subsidiary.

(p) Change its name without furnishing to Lender at least ten (10) days' prior written notice thereof.

(q) Utilize any trade name, and will not in the future utilize any trade name without furnishing to Lender at least ten (10) days prior written notice thereof.

(r) Change the nature of its business.

(s) Sell, assign, transfer or dispose of any of its accounts or notes receivable, with or without recourse, except to the Lender.

(t) Except after notice to Lender and with Lender's prior written consent, partition or subdivide the Mortgaged Property.

(u) take any Material Action without the prior written consent of the Independent Manager (or Independent Director, as applicable).

10. **Events of Default.** The occurrence of any of the following shall constitute an "Event of Default" hereunder:

(a) failure of Borrower to make any payment of any installment of principal or interest when due under the Note;

- (b) failure of Borrower to pay any other sum when due hereunder or under the Note or any other Loan Document;
- (c) any representation or warranty of Borrower or the Guarantor made herein or in any other Loan Document or in any other writing given to Lender in connection with the Loan shall have been incorrect in any material respect as of the time when the same shall have been made or is not accurate when a further disbursement is to be made to Borrower;
- (d) the occurrence of an Event of Default under the Mortgage or any other Loan Document;
- (e) the sale, conveyance, assignment, transfer or other disposition or divestiture of Borrower's title to any of the Collateral, or the mortgage or other conveyance of a security interest in, or other encumbrance on any of the Collateral or any interest therein, whether voluntary or involuntary, except as provided herein;
- (f) any merger, consolidation, liquidation or dissolution, or the sale or transfer of all or substantially all of the assets, of the Borrower;
- (g) the transfer (directly or indirectly) of any of the stock or other ownership interest of Borrower;
- (h) any default in the performance or observance of any term, covenant or agreement to be performed by Borrower or Guarantor in this Loan Agreement or in any Loan Document;
- (i) the use of proceeds of the Loan for any purpose other than the purpose described in Paragraph 6(o);
- (j) any Loan Documents for any reason shall cease to be in full force and effect, the liens on the Collateral purported to be created thereby shall cease to be or are not valid and perfected liens having priority over all other liens except any encumbrances specifically permitted under such Loan Documents, or any Guarantor shall assert that it has no liability under the Guaranty to which it is a party;
- (k) one or more judgments or decrees shall be entered against Borrower or any Guarantor (not paid or fully covered by insurance) and all such judgments or decrees shall not have been vacated or discharged, stayed or bonded pending appeal within sixty (60) days from the entry thereof;
- (l) if Borrower or any Guarantor becomes insolvent;

(m) if Borrower or any Guarantor generally does not pay its debts as they become due and Borrower has failed to make any payment to Lender required by the Loan Documents;

(n) if Borrower or any Guarantor makes an assignment for the benefit of creditors;

(o) if Borrower or any Guarantor calls or causes to be called a meeting of creditors for the composition of debts;

(p) if there shall be filed by or with the consent or authorization of Borrower or any Guarantor a petition in bankruptcy for liquidation or for reorganization, or a custodian, receiver or agent is appointed or authorized to take charge of its properties, or Borrower or any Guarantor authorizes any such action;

(q) if there shall be filed against Borrower or any Guarantor a petition in bankruptcy, for liquidation, or for reorganization, or a custodian, receiver, or agent is appointed or authorized to take charge of its properties and Borrower or any Guarantor, as the case may be, has not consented to or authorized such action and such action is not dismissed within sixty (60) days; and

(r) if any license, permit, registration, vendor account or other approval required for the normal operation of Borrower's business or any of the Collateral shall be suspended or shall cease to be in full force and effect.

11. Remedies.

(a) Upon the occurrence of an Event of Default and at any time thereafter during the continuance of such Event of Default, in addition to any remedies available to Lender under applicable law, Lender may take one or more of the following remedial steps in any order of priority:

(i) Declare immediately due and payable the outstanding principal balance of the Note, together with all accrued and unpaid interest, fees and other sums or expenses payable thereunder and hereunder and accordingly accelerate payment thereof without presentment, demand, notice of intention to accelerate, notice of acceleration or notice of any other kind, all of which are expressly waived;

(ii) Take any action at law or in equity against Borrower or the Guarantor (a) to collect the payments then due and thereafter to become due under the Loan Documents, or (b) to enforce performance and observance of any obligation, agreement or covenant of Borrower or such other parties under the Loan Documents;

(iii) Exercise any and all rights and remedies provided for in the other Loan Documents as they relate to Borrower or any Guarantor.

(iv) Proceed with or without judicial process to take possession of all or any part of the Collateral provided for herein not already in the possession of Lender and Borrower agrees that upon receipt of notice of Lender's intention to take possession of all or any part of said Collateral, Borrower will do everything reasonably necessary to assemble the Collateral and make same available to Lender at a place to be designated by Lender. Borrower hereby waives any and all rights it may have, by statute, constitution or otherwise to notice from Lender, for Lender to obtain possession, by Court proceedings or otherwise, of the Collateral provided for in this or in any other agreement with Lender;

(v) So long as Lender acts in a commercially reasonable manner, assign, transfer and deliver at any time or from time to time the whole or any portion of the Collateral or any rights or interest therein in accordance with the Uniform Commercial Code, and without limiting the scope of Lender's rights thereunder, Lender may sell the Collateral at public or private sale, or in any other manner, at such price or prices as Lender may deem best, and either for cash or credit, or for future delivery, at the option of Lender, in bulk or in parcels and with or without having the Collateral at the sale or other disposition. Lender shall have the right to be the purchaser at any public sale. Lender shall have the right to conduct such sales on Borrower's premises or elsewhere and shall have the right to use Borrower's premises without charge for such sales for such time or times as Lender may see fit. Lender is hereby granted license or other right to use, without charge, Borrower's labels, patents, copyrights, rights of use of any name, trade secrets, trade names, trademarks and advertising matter, or any property of a similar nature, as it pertains to the Collateral, in advertising for sale and selling any Collateral and Borrower's rights under all licenses and franchise agreements shall inure to Lender's benefit. Borrower agrees that a reasonable means of disposition of Accounts shall be for Lender to hold and liquidate any and all Accounts. In the event of a sale of the Collateral, or any other disposition thereof, Lender shall apply all proceeds first to all costs and expenses of disposition, including reasonable attorneys' fees, and then to the Obligations of Borrower to Lender;

(vi) Elect to retain the Collateral or any part thereof in satisfaction of all Obligations due from Borrower to Lender upon notice of such proposed election to Borrower and any other party as may be required by the Uniform Commercial Code; and

(vii) Lender shall have the right immediately, and without notice or other action to set-off against any of any Borrower's Obligations to Lender any sum owed by Lender in any capacity to any Borrower whether due or not, and Lender shall be deemed to have exercised such right of set-off and to have made a charge against any such sum immediately upon the occurrence of an Event of Default, even though the actual book entries may be made at some time subsequent thereto.

(b) No remedy conferred in this Agreement or the other Loan Documents is intended to be exclusive of any other remedy, and each and every such

remedy shall be cumulative and shall be in addition to every other remedy conferred herein or now or hereafter existing at law or equity or by statute or otherwise.

12. Payment of Expenses.

(a) Borrower agrees that it shall pay, within five (5) days after demand, all out-of-pocket expenses incurred by Lender in connection with this transaction including, without limitation, fees and expenses for any title searches required hereunder, recording and filing fees, and reasonable attorneys' fees incurred by Lender in connection with the Loan (including any amendments and waivers), the preparation of the Loan Documents, the administration of the Loan, inspection of the Mortgaged Property during the course of the Project and the enforcement Lender's rights and remedies under the Loan Documents.

(b) If Borrower should fail to perform or observe, or to cause to be performed or observed, any covenant or obligation under this Agreement or any of the other Loan Documents, then the Lender, may (but shall be under no obligation to) take such steps as are necessary to remedy any such nonperformance or nonobservance and provide for payment thereof, if any (which shall include, without limitation, steps necessary to cure any defaults of Borrower under any lease).

(c) All amounts expended or advanced by the Lender pursuant to this Paragraph 12 shall become part of the outstanding principal balance of the Loan and the Note, shall be secured by, among other things, the Mortgage, shall become due and payable by the Borrower upon demand by Lender, and shall bear interest at the Default Rate (such interest to be calculated from the date of such advance by Lender to the date of repayment thereof by Borrower).

13. Lender's Right to Assign. Lender shall have the right to sell, assign, participate, transfer or dispose of all or any part of its interest in the Loan without the consent or approval of Borrower or Guarantor.

14. Default Interest Rate. All sums advanced and all expenses incurred by Lender pursuant to any provision of this Agreement or of the other Loan Documents which are not paid when due shall bear interest at the Default Rate set forth in the Note from the date such sum was due until such sum is paid in full and shall be secured by the Mortgage.

15. Usury Savings. Notwithstanding anything to the contrary contained herein, under no circumstances shall the aggregate amount paid or agreed to be paid hereunder or under the Note exceed the highest lawful rate permitted under applicable usury law (the "Maximum Rate") and the payment obligations of Borrower under this Agreement and the Note are hereby limited accordingly. If under any circumstances, whether by reason of advancement or acceleration of the maturity of the unpaid principal

balance hereof or otherwise, the aggregate amounts paid hereunder or under the Note shall include amounts which by law are deemed interest and which would exceed the Maximum Rate, Borrower stipulates that payment and collection of such excess amounts shall have been and will be deemed to have been the result of a mistake on the part of both Borrower and Lender or the holder of the Note, and the party receiving such excess payments shall promptly credit such excess (only to the extent such payments are in excess of the Maximum Rate) against the unpaid principal balance hereof and any portion of such excess payments not capable of being so credited shall be refunded to Borrower.

16. Notices. All notices, consents, approvals and requests required or permitted hereunder or under any other Loan Document shall be given in writing and shall be effective for all purposes if hand delivered or sent by (a) certified or registered United States mail, postage prepaid, return receipt requested or (b) expedited prepaid delivery service, either commercial or United States Postal Service, with proof of attempted delivery, and by telecopier (with answer back acknowledged), addressed as follows (or at such other address and a person as shall be designated from time to time by any party hereto, as the case may be, in a written notice to the other parties hereto in the manner provided for in this Section):

If to Lender:

Kennedy Funding, Inc.
Two University Plaza, Suite 402
Hackensack, New Jersey 07601
Attention: Jeffrey Wolfer
Facsimile No. (201) 342-8373

With a copy to:

Cole, Schotz, Meisel, Forman & Leonard P.A.
25 Main Street
Hackensack, New Jersey 07602-0800
Attention: Michael R. Leighton, Esq.
Facsimile No.: (201) 489-1536

If to Borrower:

Pawleys Island North, LLC
334 Myrtle Avenue
Pawleys Island, South Carolina 29585

With a copy to:

Gwin Law Office, LLC
2105 Cromley Circle, Suite B
Myrtle Beach, South Carolina 29577
Attention: Robert H. Gwin, III, Esq.
Facsimile No.: (843) 839-2244

A notice shall be deemed to have been given: in the case of hand delivery, at the time of delivery; in the case of registered or certified mail, when delivered or the first

attempted delivery on a business day; or in the case of expedited prepaid delivery and telecopy, upon the first attempted delivery on a business day.

17. **No Waiver.** No course of dealing between Borrower and Lender or any failure or delay on the part of Lender in exercising any rights or remedies hereunder shall operate as a waiver of any rights or remedies of Lender and no single or partial exercise of any rights or remedies hereunder shall operate as a waiver or preclude the exercise of any other rights or remedies hereunder. In the event any agreement contained in this Agreement or the other Loan Documents should be breached and thereafter waived by Lender, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder or thereunder.

18. **Failure to Exercise Rights.** Nothing herein contained shall impose upon Lender any obligation to enforce any terms, covenants or conditions contained in this Agreement and the other Loan Documents. Failure of Lender, in any one or more instances, to insist upon strict performance of any terms, covenants or conditions of this Agreement and the other Loan Documents, shall not be considered or taken as a waiver or relinquishment by Lender of its right to insist upon and to enforce in the future, by injunction or other appropriate legal or equitable remedy, strict compliance with all the terms, covenants and conditions of this Agreement and the other Loan Documents. The consent of Lender to any act or omission by Borrower shall not be construed to be a consent to any other or subsequent act or omission or a waiver of the requirement for Lender's consent to be obtained in any future or other instance.

19. **Prohibition Against Exercise of Rights Applicable Only to Individual Lenders.** Borrower is hereby prohibited from exercising against Lender or Agent any right or remedy which it might otherwise be entitled to exercise against any one or more (but less than all) of the individual parties constituting Lender, including, without limitation, any right of set-off or any defense.

20. **Miscellaneous.**

(a) **Choice of Law.** THE LOAN WAS NEGOTIATED IN THE STATE OF NEW JERSEY, THIS AGREEMENT WAS NEGOTIATED IN THE STATE OF NEW JERSEY, WAS EXECUTED AND DELIVERED BY BORROWER AND ACCEPTED BY LENDER IN THE STATE OF NEW JERSEY, AND THE PROCEEDS OF THE NOTE WERE DISBURSED FROM THE STATE OF NEW JERSEY, WHICH STATE THE PARTIES AGREE HAS A SUBSTANTIAL RELATIONSHIP TO THE PARTIES AND TO THE UNDERLYING TRANSACTION EMBODIED HEREBY, AND IN ALL RESPECTS, INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE. THIS AGREEMENT AND THE OBLIGATIONS ARISING HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED IN

ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW JERSEY, WITHOUT REGARD TO CHOICE OF LAW CONSIDERATIONS, APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE AND ANY APPLICABLE LAW OF THE UNITED STATES OF AMERICA, EXCEPT THAT AT ALL TIMES THE PROVISIONS FOR THE CREATION, PERFECTION, PRIORITY, ENFORCEMENT AND FORECLOSURE OF THE LIENS AND SECURITY INTERESTS CREATED IN THE REAL PROPERTY COLLATERAL UNDER THE LOAN DOCUMENTS SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAW OF THE JURISDICTION IN WHICH THE REAL PROPERTY COLLATERAL IS LOCATED, IT BEING UNDERSTOOD THAT, TO THE FULLEST EXTENT PERMITTED BY THE LAW OF SUCH JURISDICTION, THE LAW OF THE STATE OF NEW JERSEY SHALL GOVERN THE VALIDITY AND ENFORCEABILITY OF ALL LOAN DOCUMENTS, AND THE DEBT OR OBLIGATIONS ARISING HEREUNDER.

(b) Jurisdiction. AT LENDER'S ELECTION, TO BE ENTERED IN ITS SOLE DISCRETION, ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST BORROWER OR LENDER ARISING OUT OF OR RELATING TO THIS NOTE OR THE OTHER LOAN DOCUMENTS SHALL BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN NEW JERSEY, AND BORROWER WAIVES ANY OBJECTION WHICH IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF VENUE OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING. BORROWER DOES HEREBY DESIGNATE AND APPOINT CORPORATION SERVICE COMPANY, LOCATED AT 830 BEAR TAVERN ROAD, SUITE 305, WEST TRENTON, NEW JERSEY 08628-1020, AS ITS AUTHORIZED AGENT TO RECEIVE AND FORWARD ON ITS BEHALF SERVICE OF ANY AND ALL PROCESS WHICH MAY BE SERVED IN ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY FEDERAL OR STATE COURT IN NEW JERSEY, AND AGREES THAT SERVICE OF PROCESS UPON SAID AGENT AT SAID ADDRESS AND WRITTEN NOTICE OF SAID SERVICE MAILED OR DELIVERED TO BORROWER IN THE MANNER PROVIDED IN THE MORTGAGE, SHALL BE DEEMED IN EVERY RESPECT EFFECTIVE SERVICE OF PROCESS UPON BORROWER IN ANY SUCH SUIT, ACTION OR PROCEEDING IN THE STATE OF NEW JERSEY. BORROWER (1) SHALL GIVE PROMPT NOTICE TO THE LENDER OF ANY CHANGED ADDRESS OF ITS AUTHORIZED AGENT HEREUNDER, (2) MAY AT ANY TIME AND FROM TIME TO TIME DESIGNATE A SUBSTITUTE AUTHORIZED AGENT WITH AN OFFICE IN NEW JERSEY (WHICH OFFICE SHALL BE DESIGNATED AS THE ADDRESS FOR SERVICE OF PROCESS), AND (3) SHALL PROMPTLY DESIGNATE SUCH A SUBSTITUTE IF ITS

AUTHORIZED AGENT CEASES TO HAVE AN OFFICE IN NEW JERSEY OR IS DISSOLVED WITHOUT LEAVING A SUCCESSOR.

(c) Borrower and/or Guarantor (as applicable) agrees if Borrower and/or Guarantor is required to make any deduction or withholding of foreign taxes (or taxes imposed because Borrower and/or Guarantor is a foreign person or entity) from any payment due to Lender herein, then the amount payable to Lender upon which such deduction or withholding is based, shall be increased to the extent necessary to ensure that, after all deductions or withholdings, Lender is paid a net amount equal to the amount Lender would have been paid in the absence of such deduction or withholding. At Lender's request, Borrower and/or Guarantor shall provide Lender with documentation adequate to demonstrate payment of such deduction or withholding by Borrower and/or Guarantor under this provision.

(d) The parties hereto agree that, notwithstanding anything contained herein to the contrary, there shall be required the consent of the Agent, Borrower and Lenders holding Fifty Percent (50%) of the outstanding balance or commitment to lend under the Loan to do any of the following:

(1) Amend or modify the terms of the Note, this Agreement, the Mortgage and the other Loan Documents or execute any waiver of any material event of default under this Agreement or the other Loan Documents.

(2) Consent to or permit any substitution, withdrawal or release of any collateral, any Guarantor or any other security securing the payment of the Loan except in accordance with the terms of the Note, this Agreement and the Loan Documents.

(e) Any condition of this Agreement or any other Loan Document which requires the submission of evidence of the existence or non-existence of a specified fact or facts implies as a condition the existence or non-existence, as the case may be, of such fact or facts, and Lender shall, at all times, be free independently to establish to its reasonable satisfaction and in its absolute discretion such existence or non-existence.

(f) Borrower and each Guarantor, as the case may be, shall execute and deliver, or cause to be executed and delivered to Lender, all other instruments, certificates and agreements as Lender or Lender's counsel may reasonably require, including, but not limited to, estoppel certificates stating that the Loan is in full force and effect and that there are no defenses or offsets thereto, to effect, confirm or assure the rights, remedies and liens intended to be granted or conveyed to Lender under this Agreement or any other Loan Document.

(g) A determination that any portion of this Agreement or any of the Loan Documents is unenforceable or invalid shall not affect the enforceability or validity of any other provision, and any determination that the application of any provisions of this Agreement or any Loan Document to any person or circumstance is illegal or unenforceable shall not affect the enforceability or validity of such provisions it may apply to other persons or circumstances.

(h) Without the consent of, or notice to Borrower, Lender may add one or more additional co-agents to this Loan.

(i) This Agreement supersedes in all respects all prior agreements and understandings relating to the Loan, including, without limitation, the Loan Commitment.

21. Successors and Assigns.

(a) Borrower may not assign its rights under this Agreement without the prior written consent of Lender. Any such attempted assignment in violation of this Agreement shall be void and of no effect.

(b) All covenants and agreements in this Agreement shall bind and inure to the benefit of the respective permitted successors and assigns of the parties hereto and any holder or holders of the Note or any portion thereof.

22. Waiver of Jury Trial. BORROWER AND LENDER AGREE THAT ANY SUIT, ACTION OR PROCEEDING, WHETHER CLAIM OR COUNTERCLAIM, BROUGHT BY BORROWER OR LENDER ON OR WITH RESPECT TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT OR THE DEALINGS OF THE PARTIES WITH RESPECT HERETO OR THERETO, SHALL BE TRIED ONLY BY A COURT AND NOT BY A JURY. BORROWER AND LENDER EACH HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY SUCH SUIT, ACTION OR PROCEEDING. FURTHER, BORROWER WAIVES ANY RIGHT IT MAY HAVE TO CLAIM OR RECOVER, IN ANY SUCH SUIT, ACTION OR PROCEEDING, ANY SPECIAL, EXEMPLARY, PUNITIVE, CONSEQUENTIAL OR OTHER DAMAGES OTHER THAN, OR IN ADDITION TO, ACTUAL DAMAGES. BORROWER ACKNOWLEDGES AND AGREES THAT THIS SECTION IS A SPECIFIC AND MATERIAL ASPECT OF THIS AGREEMENT AND THAT LENDER WOULD NOT EXTEND CREDIT TO BORROWER (AS APPLICABLE) IF THE WAIVERS SET FORTH IN THIS SECTION WERE NOT A PART OF THIS AGREEMENT.

23. Releases of Collateral.

(a) The Lender may release, regardless of consideration, the obligation of any Person or Persons liable for payment of any of the Obligations secured hereby, or may release any part of the Mortgaged Property or any other collateral now or hereafter given to secure the payment of the Obligations or any part thereof, without impairing, reducing or affecting the obligations of the Borrower or Guarantors under the Loan Documents.

(b) Within thirty (30) days of Borrower's request, provided: (i) Borrower is not in default hereunder or under any other Loan Document(s); and (ii) no event has occurred which with the passage of time and/or the giving of notice would constitute a default hereunder or under any other Loan Document(s), Lender shall release portions of the Mortgaged Property from the lien created by the Mortgage ("Released Property") subject to: (i) Borrower's payment to Lender of the Release Price (as hereinafter defined) for the Released Property and (ii) Borrower's delivery to Lender of documentation evidencing a bonafide arms length transaction for the sale of the Released Property. The Release Price for the Released Property shall be equal to the greater of: (y) (i) eighty percent (80%) of the net sale price of the Released Property (subject to reasonable and customary closing adjustments and sales commissions to be approved by Lender in Lender's reasonable discretion); and (ii) seventy-five percent (75%) of the gross sale price of the Released Property; or (z) the minimum Release Price acceptable to Lender in its sole discretion.

24. Publicity.

(a) Lender shall have the right to issue news releases, and publicize and/or advertise the fact that it has provided financing with respect to the project and/or the Mortgaged Property and in connection therewith Lender shall have the right to photograph and use pictures of the Mortgaged Property in any such advertisements, brochures, print, media and other copy.

(b) At Lender's request, Borrower, at Lender's cost and expense, shall erect a suitable sign or signs at the Mortgaged Property in a location which is clearly visible to the public and otherwise reasonably acceptable to Lender. The Sign shall be prepared by Lender and may contain, among other things, that financing for the Mortgaged Property is being provided by Lender or another Person and otherwise publicize Lender's or such Person's role in the financing. Lender shall coordinate the placement and maintenance of such signs on the Mortgaged Property with Borrower.

25. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be effective only upon delivery and thereafter shall be deemed an original, and all of which shall be taken to be one and the same instrument, for the same effect as if all parties hereto had signed the same signature page. Any signature

page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signatures thereon and may be attached to another counterpart of this Agreement identical in form hereto but having attached to it one or more additional signature pages.

26. **Joint and Several Liability.** Notwithstanding anything contained herein to the contrary, if there is more than one Borrower, each Borrower shall be jointly and severally liable for a breach of any and all covenants, representations, warranties, obligations and liabilities under this Agreement.

27. **Single Purpose Entity/Separateness.** Notwithstanding anything contained herein to the contrary, Borrower represents, warrants and covenants as follows:

(a) Borrower has not owned, does not own and will not own any asset or property other than (i) the Mortgaged Property, and (ii) incidental personal property necessary for the ownership or operation of the Mortgaged Property.

(b) Borrower has not engaged and will not engage in any business other than the ownership, management and operation of the Mortgaged Property and Borrower will conduct and operate its business as presently conducted and operated.

(c) Borrower will not enter into any contract or agreement with any affiliate of the Borrower, any constituent party of Borrower, any Guarantor of the Loan or any part thereof or any affiliate of any constituent party of Borrower or any Guarantor, except upon terms and conditions that are intrinsically fair and substantially similar to those that would be available on an arms-length basis with third parties other than any such party.

(d) Except as otherwise set forth herein or in the other Loan Documents, Borrower has not incurred and will not incur any indebtedness, secured or unsecured, direct or indirect, absolute or contingent (including guaranteeing any obligation), other than the Loan. No indebtedness other than the Loan may be secured (subordinate or *pari passu*) by the Mortgaged Property.

(e) Borrower has not made and will not make any loans or advances to any third party (including any affiliate or constituent party of Borrower, any Guarantor or any affiliate or constituent party of Guarantor), and shall not acquire obligations or securities of its affiliates or any constituent party.

(f) Borrower: (i) is solvent and agrees to give prompt notice to Lender of the insolvency or bankruptcy filing of Borrower or any general partner, managing member or controlling shareholder of Borrower, or the death, insolvency or bankruptcy filing of any Guarantor; and (ii) will remain solvent.

(g) Borrower has done or caused to be done and will do all things necessary to observe organizational formalities and preserve its existence, and Borrower will not amend, modify or otherwise change the articles of organization, certificate of formation, certificate of incorporation, articles of incorporation, bylaws or operating agreement or other organizational documents of Borrower.

(h) Borrower will maintain all of its books, records, financial statements and bank accounts separate from those of its affiliates and any constituent party of Borrower and Borrower will file its own tax returns. Borrower shall maintain its books, records, resolutions and agreements as official records.

(i) Borrower will be, and at all times will hold itself out to the public as, a legal entity separate and distinct from any other entity (including any affiliate of Borrower, any constituent party of Borrower, any Guarantor or any affiliate of any such constituent party or Guarantor), shall correct any known misunderstanding regarding its status as a separate entity, shall conduct business in its own name, shall not identify itself or any of its affiliates as a division or part of the other and shall maintain and utilize separate stationery, invoices and checks.

(j) Borrower will maintain adequate capital for the normal obligations reasonably foreseeable in a business of its size and character and in light of its contemplated business operations.

(k) Neither Borrower nor any constituent party of Borrower will seek the dissolution, winding up, liquidation, consolidation or merger in whole or in part, of the Borrower.

(l) Borrower will not commingle the funds and other assets of Borrower with those of any affiliate or constituent party of Borrower, any Guarantor, or any affiliate of any constituent party or Guarantor, or any other person.

(m) Borrower has and will maintain its assets in such a manner that it will not be costly or difficult to segregate, ascertain or identify its individual assets from those of any affiliate or constituent party of Borrower, any Guarantor, or any affiliate of any constituent party or Guarantor, or any other Person.

(n) Borrower does not and will not guarantee, become obligated for or hold itself out to be responsible for the debts or obligations of any other person or entity or the decisions or actions respecting the daily business or affairs of any other person or entity.

(o) Borrower will not permit any affiliate or constituent party of Borrower independent access to its bank accounts.

(p) Borrower shall pay the salaries of its own employees and maintain a sufficient number of employees in light of its contemplated business operations.

(q) Borrower shall have at least one (1) Independent Manager or Independent Director, as applicable.

[Remainder of this page intentionally left blank.]

IN WITNESS WHEREOF, the undersigned have executed this Loan and Security Agreement as of the day and year first set forth above.

WITNESS:

Print Name:

WITNESS:

Name:

LENDER:

KENNEDY FUNDING, INC., as Agent

By: _____

Name:

Title:

BORROWER:

**PAWLEYS ISLAND NORTH, LLC, a
South Carolina limited liability company**

By: _____

Name: Peggy Wheeler-Cribb

Title: Manager

STATE OF NEW JERSEY)

) ss.:

COUNTY OF BERGEN)

I certify that on _____, 2009, _____ personally came before me and this person acknowledged under oath, to my satisfaction, that he:

(a) executed the attached Loan and Security Agreement; and

(b) was authorized to and did execute the attached Loan and Security Agreement on behalf of and as _____ of Kennedy Funding, Inc., the entity named in this instrument, by virtue of authority granted by its bylaws and board of directors.

NOTARY PUBLIC

STATE OF

)

): ss.:

COUNTY OF

)

I certify that on April ____, 2009, Peggy Wheeler-Cribb came before me in person and stated to my satisfaction that she:

(a) made the attached instrument; and

(b) was authorized to and did execute this instrument on behalf of and as the Manager of Pawleys Island North, LLC, a South Carolina limited liability company (the "Company"), the entity named in this instrument, as the free act and deed of the Company, by virtue of the authority granted by its Operating Agreement and its members.

NOTARY PUBLIC

SCHEDULE A
DESCRIPTION OF THE COLLATERAL

31392/0000-5408836v4

A-1

KENNEDY_00989

SCHEDULE B

PRINCIPAL LOAN DOCUMENTS

1. Loan Commitment dated February 12, 2009;
2. Loan and Security Agreement dated as of the date hereof;
3. Promissory Note dated as of the date hereof;
4. Mortgage and Security Agreement dated as of the date hereof;
5. Document Re-Execution Agreement dated as of the date hereof;
6. Environmental Indemnity Agreement dated as of the date hereof;
7. Assignment of Leases and Rents dated as of the date hereof;
8. Assignment of Licenses, Contracts, Plans, Specifications, Surveys, Drawings and Reports dated as of the date hereof;
9. Guaranty dated as of the date hereof;
10. Loan Closing Statement dated as of the date hereof;
11. UCC-1 Financing Statements.

SCHEDULE C
INTENTIONALLY OMITTED

31392/0000-5408836v4

C-1

KENNEDY_00991

SCHEDULE D

LENDERS

31392/0000-5408836v4

F-1

KENNEDY_00992

LOAN AND SECURITY AGREEMENT

Between

**PAWLEYS ISLAND NORTH, LLC,
a South Carolina limited liability company
as Borrower,**

AND

**KENNEDY FUNDING, INC.
as Agent for the
lenders named herein**

Date: as of April 30, 2009

31392/0000-5408836v24

KENNEDY_00993

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Schedules

- Schedule A - Description of the Collateral
- Schedule B - Principal Loan Documents
- Schedule C - Intentionally Omitted
- Schedule D - Lenders

LOAN AND SECURITY AGREEMENT

THIS LOAN AND SECURITY AGREEMENT ("Agreement"), dated as of April 30, 2009, between **PAWLEYS ISLAND NORTH, LLC**, a South Carolina limited liability company, having an address at 334 Myrtle Avenue, Pawleys Island, South Carolina 29585 ("Borrower"); and **KENNEDY FUNDING, INC.** ("Agent"), a New Jersey corporation having an address at Two University Plaza, Suite 402, Hackensack, New Jersey 07601, as agent for the lenders identified on Schedule D attached hereto and incorporated herein by reference, in each case having an address care of Kennedy Funding, Inc., Two University Plaza, Suite 402, Hackensack, New Jersey 07601 (the aforesaid Agent and lenders are hereinafter collectively referred to as "Lender").

WITNESSETH

WHEREAS, Borrower has requested that Lender make a loan to Borrower in the amount of **NINE HUNDRED SIXTY THOUSAND and 00/100 (\$960,000) DOLLARS** (the "Loan"), subject to and upon the terms and conditions hereinafter contained, which Loan shall be evidenced by a Promissory Note as of even date herewith from Borrower to Lender (as may be amended, restated or modified from time to time, the "Note");

WHEREAS, the Loan is to be secured by certain instruments, agreements and documents, including, but not limited to, those items identified in the Principal Loan Documents as set forth on Schedule B hereto and made a part hereof, and payment and performance of the Loan is to be guaranteed pursuant to that certain guaranty of even date herewith from Guarantor (as hereinafter defined) to Lender (as may be amended, restated or modified from time to time, the "Guaranty");

WHEREAS, capitalized terms not otherwise defined herein shall have those meanings assigned to them in the Loan Documents (as hereinafter defined); and

WHEREAS, Lender has agreed to make the Loan to Borrower on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the foregoing and of the covenants and conditions hereinafter set forth, Borrower and Lender hereby agree as follows:

1. **Definitions.** As used herein:

(a) "Account" or "Accounts Receivable" means, in addition to the definition of account as contained in the Uniform Commercial Code, the right of Borrower to receive payment for goods sold or leased or for services rendered which are not evidenced by an instrument or chattel paper, whether or not it has been earned by performance.

(b) "Account Debtor" means, in addition to the definition of account debtor as contained in the Uniform Commercial Code, the person or persons obligated to Borrower on an Account, or who is represented by Borrower to be so obligated.

(c) "Affiliate" of any Person (as hereinafter defined) shall mean any other Person which, directly or indirectly, controls or is controlled by, or is under common control with such Person. For the purposes of this definition, "controls" (including, with correlative meanings, the terms "controlled by" and "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities or by contract or otherwise.

(d) "Business Day" shall mean any day upon which banks located in the State of New Jersey generally are open to conduct regular banking business.

(e) "Closing Date" shall mean the date on which this Agreement is executed by the parties hereto and the conditions set forth in Paragraph 5 are fulfilled to the satisfaction of Lender.

(f) the "Collateral" shall mean the Real Property Collateral, the Collateral described in Paragraph 4 hereof, any other collateral described in any Loan Document and any other property of Borrower and/or Guarantor now or hereafter subject to a security agreement, mortgage, pledge, assignment or other document granting Lender a security interest therein and/or securing the Loan.

(g) the "Default Rate" shall have the meaning ascribed thereto in the Note.

(h) "Dollar" or "\$" or "dollar" or any other terms of similar import shall mean United States Dollars, it being understood and agreed that all advances of the Loan shall be made in U.S. Dollars and repaid or reimbursed in U.S. Dollars without reduction for currency exchange fluctuation.

(i) "Environmental Laws" shall mean a collective reference when and as applicable to (i) the Comprehensive Environmental Response, Compensation & Liability Act, as amended, 42 U.S.C. Section 9601 et seq., (ii) the Resource Conservation and Recovery Act, as amended, 42 U.S.C. Section 6901 et seq., and (iii) any and all other federal, state and local statutes, laws, rules, ordinances, regulations and executive orders pertaining to environmental matters applicable to the Borrower's business and/or properties, as the same may be amended or supplemented from time to time.

(j) "Governmental Authority" or "Governmental Authorities" shall mean any federal, state, county or municipal governmental agency, board, commission,

officer, official or entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government and having jurisdiction over Borrower, the Guarantor (as hereinafter defined) or the Collateral.

(k) the "Guarantor" shall collectively mean, jointly and severally, Will Darwin Wheeler and Peggy Wheeler-Cribb.

(l) the "Indemnified Party" and "Indemnified Parties" shall mean Agent and Lender as well as their directors, officers, trustees, partners, employees, agents, attorneys and shareholders.

(m) "Independent Director" or "Independent Manager" shall mean a Person, acceptable to Lender in its sole discretion, who is not at the time of initial appointment, or at any time while serving as a director or manager, as applicable, and has not been at any time during the preceding five (5) years: (a) a stockholder, director (with the exception of serving as the Independent Director or Independent Manager), officer, employee, partner, member, manager, contractor or attorney of the Borrower or any Affiliate of any of them; (b) a customer, creditor or other person who derives any of its purchases or revenues from its activities with the Borrower or any Affiliate; (c) a Person controlling or under common control with any such stockholder, director, officer, partner, member, manager, contractor, customer, creditor, supplier or other Person; or (d) a member of the immediate family of any such stockholder, director, officer, employee, partner, member, manager, contractor, customer, creditor or other Person. As used in this definition, the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of management, policies or activities of a Person, whether through ownership of voting securities, by contract or otherwise.

(n) the "Loan Documents" shall mean this Agreement, the Note, the Mortgage (as hereinafter defined), the Guaranty and any other documents or agreements given to Lender by Borrower or the Guarantor in connection with the Loan whether or not specifically set forth herein, as each may be amended, restated or modified from time to time.

(o) "Material Action" means to file any insolvency, or reorganization case or proceeding, to institute proceedings to have the Borrower be adjudicated bankrupt or insolvent, to institute proceedings under any applicable insolvency law, to seek any relief under any law relating to relief from debts or the protection of debtors, to consent to the filing or institution of bankruptcy or insolvency proceedings against the Borrower, to file a petition seeking, or consent to, reorganization or relief with respect to the Borrower under any applicable federal or state law relating to bankruptcy or insolvency, to seek or consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian, or any similar official of or for the Borrower or a substantial part of its property, to make any assignment for the benefit of creditors of the Borrower, to

admit in writing the Borrower's inability to pay its debts generally as they become due, or to take action in furtherance of any of the foregoing.

(p) "Mortgage" shall mean that certain Mortgage and Security Agreement of even date herewith, as may be amended, restated or modified from time to time, given by Borrower (as such term is defined therein), as mortgagor, in favor of Lender, as mortgagee, in connection with the Mortgaged Property, which Mortgage is given as security for the due payment of Borrower's obligations under the Note.

(q) "Person" or "Persons" shall mean any one or more individuals, partnerships, corporations (including a business trust), joint stock companies, limited liability company, trusts, unincorporated associations, joint ventures or other entities, or a foreign state or political subdivision thereof or any agency of such state or subdivision.

(r) "Personalty" shall mean all Accounts, Accounts Receivable, Equipment, Inventory, Goods (as such terms are defined in the Uniform Commercial Code) and other personal property of the Borrower, as more particularly described herein.

(s) "Real Property Collateral" or "Mortgaged Property" shall mean that certain real property owned or leased by Borrower, situated in Pawleys Island, South Carolina as more particularly described in Schedule A attached hereto and made a part hereof.

(t) "Uniform Commercial Code" shall mean the Uniform Commercial Code, as enacted in the State of New Jersey and the jurisdiction in which the Mortgaged Property is located, as applicable, as in effect from time to time.

2. The Loan.

(a) Provided that no default shall have occurred and be continuing hereunder, Lender agrees, subject to the terms and conditions hereinafter set forth, to advance to Borrower up to Nine Hundred Sixty Thousand and 00/100 (\$960,000) Dollars.

(b) Subject to a final closing statement prepared by Lender's counsel and executed by Borrower (the "Closing Statement"), the Loan proceeds shall be disbursed as follows and used only for the following purposes:

(1) The sum of One Hundred Fifteen Thousand Two Hundred and 00/100 (\$115,200) Dollars shall be disbursed by Lender on behalf of Borrower on the Closing Date and simultaneously paid to Lender (the "Prepaid Interest") which shall be credited against interest payments due under the terms of the Note, as such interest payments become due; and

(2) The sum of Fifteen Thousand Three Hundred Sixty and 00/100 (\$15,360) Dollars shall be disbursed by Lender on behalf of Borrower on the

Closing Date and simultaneously paid to Red Management, LLC (the "Broker") as full satisfaction of the Broker's commission resulting from the consummation of this Loan; and

(3) The sum of Seventy Thousand and 00/100 (\$70,000) Dollars shall be disbursed by Lender on behalf of Borrower on the Closing Date and simultaneously paid to Lender as the balance of the commitment fee ("Commitment Fee") due to Lender pursuant to the loan commitment letter entered into by and between Borrower and Lender, dated February 12, 2009;

(4) The sum of Five Hundred and 00/100 (\$500.00) Dollars shall be disbursed by Lender on behalf of Borrower on the Closing Date and simultaneously paid to UIC, Inc. in payment of its insurance consulting fees; and

(5) The sum of Twenty Seven Thousand Five Hundred and 00/100 (\$ 27,500) Dollars shall be disbursed by Lender on behalf of Borrower on the Closing Date and simultaneously paid to Cole, Schotz, Meisel, Forman & Leonard, P.A., in payment of its legal fees.

(c) The foregoing disbursements may be made, notwithstanding contrary directions from Borrower, and for such purpose Borrower agrees that:

A. The foregoing constitutes an irrevocable direction or authorization to so disburse the funds (said authorization being coupled with an interest) and no further direction or authorization from Borrower shall be necessary to warrant any such disbursements; and

B. All such disbursements shall satisfy the obligations of Lender to advance funds to Borrower notwithstanding any other agreement or document to the contrary and shall be secured by the Mortgage as fully as if made by Borrower, regardless of the disposition by the party to whom such disbursements are so made.

(d) Prepaid Interest. So long as no Event of Default and no event which with the passage of time and/or the giving of notice would constitute a default hereunder or under any other Loan Documents shall have occurred, Lender shall credit Borrower from Prepaid Interest to the extent of amounts not so credited for payments of interest under the Note, it being understood, however, that the Prepaid Interest does not in any way limit Borrower's obligations to make payments of interest under the Note. Any amounts not so credited from Prepaid Interest on the Maturity Date (as defined in the Note) shall be credited to the payment of the Loan, and any remaining Prepaid Interest after payment in full of the Loan shall be disbursed to Borrower. Upon an Event of Default (as hereinafter defined), the Lender may credit to the extent of amounts not so credited from the Prepaid Interest any amounts then due hereunder and under the Loan Documents.

(e) Notwithstanding anything contained herein to the contrary, provided that no Event of Default and no event which with the passage of time and/or the giving of notice would constitute an Event of Default hereunder or under any other Loan Documents shall have occurred, Lender agrees, that in the event all amounts due and owing to the Lender pursuant to the Note and the other Loan Documents are paid in full on or prior to October 30, 2009 (other than through the refinancing of the Loan with Lender), Borrower shall receive a credit at the time of such final payoff of Twenty Thousand (\$20,000) Dollars.

3. The Note. The obligation of the Borrower to repay all monies advanced by Lender to Borrower in connection with the Loan shall be evidenced by this Agreement and the Note. The Loan shall bear interest at the rate(s) set forth in the Note and shall be payable as provided in the Note with final payment due on the Maturity Date. All of Borrower's obligations hereunder and under the Note are secured by the Mortgage and the other Loan Documents. Should the principal of or interest on the Loan become due and payable on a day other than a Business Day, the maturity thereof shall be extended to the next succeeding Business Day and, in the case of principal, interest shall be payable thereon at the rate per annum specified in the Note during such extension.

4. Grant of Security Interest.

(a) Borrower hereby assigns and pledges to Lender, and hereby grants to Lender a security interest in all property of the following types, wherever located and whether now owned or hereafter owned or acquired by Borrower, whether or not affixed to the Mortgaged Property, in all proceeds (including, without limitation, amounts payable under any policies of insurance with respect thereto), and Products (as such term is defined in the Uniform Commercial Code) thereof in any form, in all parts, accessories, attachments, special tools, additions, replacements, substitutions and accessions thereto or therefor, and in all increases or profits received therefrom:

(1) all Accounts, to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property;

(2) all Equipment (as such term is defined in the Uniform Commercial Code), and in all of Borrower's machinery and equipment of every kind, nature and description, as well as trucks and vehicles of every kind and description, including, but not limited to, trailers, cranes and hoisting equipment, whether presently owned by Borrower or hereafter acquired, and wherever located to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property;

(3) all Inventory (as such term is defined in the Uniform Commercial Code);

(4) all General Intangibles (as such term is defined in the Uniform Commercial Code), to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property;

(5) all deposit accounts of Borrower with Lender, now or hereafter existing, and all money, instruments, securities, documents, chattel paper, credits, claims, performance bonds, payment bonds; all other forms of surety to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property, and other property of Borrower now or hereafter in the possession or custody of Lender or any of its agents;

(6) all Chattel Paper (as such term is defined in the Uniform Commercial Code), to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property, including, but not limited to, all such Chattel Paper now or hereafter left in the possession of Lender for any purpose;

(7) all Instruments (as such term is defined in the Uniform Commercial Code), including any negotiable instruments or a securities, or any other writing which evidences a right to the payment of money and is of the type which is, in the ordinary course of business, transferred by delivery with any necessary endorsement or assignment whether presently owned by Borrower or hereafter acquired, to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property, including, but not limited to, all such Instruments now or hereafter left in the possession of Lender for any purpose;

(8) all Documents (as such term is defined in the Uniform Commercial Code);

(9) all Goods (as such term is defined in the Uniform Commercial Code), to the extent that the same relate to the Mortgaged Property and/or the operations at the Mortgaged Property whether presently owned by Borrower or hereafter acquired; and

(10) all books and records, including, without limitation, customer lists, credit files, computer programs, print-outs and other computer materials and records of Borrower pertaining to all of the Collateral.

(b) Borrower will perform any and all steps requested by Lender to create and maintain in Lender's favor a first and valid lien on and security interest in the Collateral or pledges of Collateral, including, without limitation, the execution, delivery, filing and recording of financing statements and continuation statements, supplemental security agreements, notes, filings with federal government offices and any other documents necessary, in the opinion of Lender, to protect its interest in the Collateral which liens shall be exclusive except for those liens expressly permitted elsewhere

herein. Lender and its designated officer are hereby appointed Borrower's attorney-in-fact to do all acts and things which Lender may deem necessary to perfect and continue perfected the security interests and Liens provided for in this Agreement, including, but not limited to, executing financing statements on behalf of Borrower.

5. Conditions Precedent to Lender's Obligations. Lender shall not be obligated to make the Loan hereunder unless Lender shall have received the following, all in form and substance satisfactory to the Lender in all respects:

- (a) the Note, duly executed by Borrower;
- (b) the Mortgage, duly executed by Borrower;
- (c) this Agreement, duly executed by Borrower;
- (d) the Guaranty, duly executed by Guarantor;
- (e) the Assignment of Leases and Rents, duly executed by Borrower;
- (f) the Assignment of Licenses, Contracts, Plans, etc., duly executed by Borrower;
- (g) the Environmental Indemnity Agreement, duly executed by Borrower and Guarantor;
- (h) the Document Re-Execution Agreement, duly executed by Borrower and Guarantor;
- (i) the Closing Statement, duly executed by Borrower;
- (j) certificates of insurers, or other evidence satisfactory to Lender, indicating that Borrower and Guarantor have obtained the policies of insurance as are required under the terms of the Mortgage;
- (k) a paid title insurance policy (without survey exception) in the full amount of the Loan issued by a title insurance company acceptable to Lender and insuring the Mortgage as a valid first lien on the Mortgaged Property, with such endorsements as Lender shall require and subject to the Permitted Exceptions identified in the Mortgage;
- (l) UCC-1 financing statements required to evidence or perfect Lender's security interest in the personal property now or hereafter owned by the Borrower and located on or used in connection with the Mortgaged Property and UCC-1 financing statements required to perfect Lender's security interest in the Collateral;
- (m) an appraisal of the Mortgaged Property;

- (n) financial statements and tax returns for Borrower, and the Guarantor;
- (o) evidence of a search of the public records which discloses no conditional sales contracts, chattel mortgages, leases of personalty, financing statements or title retention agreements filed or recorded against the Borrower or the Mortgaged Property;
- (p) a survey of the Mortgaged Property prepared in accordance with the "Minimum Standard Detail Requirements for ALTA and ACSM Land Title Surveys" jointly established by ALTA and ACSM in 2005, as updated, and certified to Lender by a registered land surveyor acceptable to the Lender ("Survey");
- (q) copies of all permits or approvals required by Governmental Authorities to such date with respect to Borrower or the Mortgaged Property, to the extent the same are necessary and appropriate to operate and develop the Mortgaged Property;
- (r) an environmental audit of the Mortgaged Property (Phase I and, if necessary Phase II);
- (s) the operating agreement of Borrower certified by the Manager of Borrower;
- (t) an incumbency certificate of Borrower which shall certify the names and titles of the members of the Borrower authorized to sign, in the name and on behalf of Borrower this Agreement and each other Loan Document to be delivered pursuant to this Agreement by Borrower, together with the true signatures of such officers, upon which certificate the Lender may conclusively rely;
- (u) consents of the Borrower authorizing the transactions to be entered into by Borrower in connection with this Agreement;
- (v) evidence that the Mortgaged Property is not located in a federal or state flood hazard area;
- (w) certification regarding debts and liens, executed by the owner of the Mortgaged Property;
- (x) payment of the Short Interest, and other fees and expenses required to be paid to or on behalf of Lender in connection with the Loan;
- (y) opinions of legal counsel to the Borrower with respect to such matters as the Lender may reasonably request including, but not limited to, opinions from Borrower's local South Carolina counsel and Borrower's New Jersey counsel;

(z) an opinion of legal counsel to the Guarantor with respect to such matters as the Lender may reasonably request including, but not limited to, opinions from Guarantor's local South Carolina counsel and Guarantor's New Jersey counsel;

(aa) evidence of the appointment of a New Jersey agent to accept service of process on behalf of the Borrower and Guarantor, pursuant to the requirements of the Loan Documents;

(bb) evidence demonstrating current full compliance with all applicable zoning, health, environmental and safety laws, ordinances and regulations (including, without limitation, approval of local, private or public sewage or water utility);

(cc) certification from Borrower that Borrower is not a party to any existing or pending or threatened litigation, except as previously disclosed to Lender;

(dd) evidence demonstrating receipt of all appropriate approvals meeting all applicable requirements of all Governmental Authorities having jurisdiction including, but not limited to, subdivision and site plan approvals, potable water supply, sewage discharge and sewage connection, use of septic tanks or alternatives;

(ee) satisfactory evidence that all roads and utilities necessary for the full utilization of the Collateral for its intended purposes have been completed or the presently installed and proposed roads and utilities will be sufficient for the full utilization of Collateral for its intended purposes; and

(ff) such other agreements, certificates or other documents as Lender or Title Insurance Company may reasonably request.

6. **Representations and Warranties of Borrower.** To induce Lender to make the Loan pursuant to this Loan Agreement, Borrower hereby represents and warrants to Lender as follows:

(a) By its acceptance of Lender's funds and execution of the Loan Documents, Borrower acknowledges, agrees and confirms that it has no defense, offset or counterclaim for any occurrence in relation to this Loan and Borrower acknowledges that Lender has complied with all of its obligations under the Loan Documents as of the date hereof.

(b) Borrower is a limited liability company, duly organized under the laws of the State of South Carolina and has all requisite power and authority and legal right to own its property, to carry on its business as it is now being conducted, to enter into this Agreement and the other Loan Documents entered into by it and to perform all of its obligations hereunder and thereunder.

(c) The execution and delivery by Borrower of the Loan Documents, and the performance of its obligations thereunder, have been duly authorized by all necessary action, corporate or otherwise, and do not and will not: (i) require any further action, consent or approval on the part of the members or managers of Borrower; (ii) violate any provision of law, rule, regulation, order, writ, judgment, injunction, decree, determination or award presently in effect having applicability to Borrower, or the members or managers of Borrower; or (iii) result in any breach of or constitute a default under any indenture or loan or credit agreement or any other agreement, lease or instrument to which the Borrower is a party or by which the Borrower or its properties may be bound or affected, and the Borrower is not in default under any such law, rule, regulation, order, writ, judgment, injunction, decree, determination or award or any such indenture, agreement, lease or instrument.

(d) The Loan Documents have been duly executed and delivered by Borrower and are legal, valid and binding obligations of Borrower, enforceable against Borrower in accordance with their respective terms.

(e) Except as previously disclosed to Lender, there is no material action, suit, proceeding, inquiry or investigation, at law or in equity, or before any court, governmental instrumentality, public board or arbitrator pending or threatened against or affecting Borrower or any of its properties or rights, wherein an unfavorable decision, ruling or finding would (i) to the extent not covered by insurance as to which the insurer has not disclaimed coverage, result in any material adverse change in the financial condition, business, properties or operations of Borrower; (ii) materially or adversely effect the transactions evidenced by the Loan Documents; (iii) materially impair the right of either to carry on its business substantially as now conducted; or (iv) adversely effect the validity or enforceability of the Loan Documents.

(f) To the best of Borrower's knowledge, Borrower is in compliance with all laws applicable to Borrower or its properties or assets.

(g) Borrower is a pre-existing corporation/limited liability company and is actively engaged in the operation of its business and has not been created as a vehicle to obtain the Loan. The proceeds of the Loan will be used by Borrower for the purposes set forth in Paragraph 6(o) in connection with the operation of Borrower's business, and the proceeds of the Loan will not be paid over or diverted by Borrower to any member, manager, officer, director, trustee, shareholder of Borrower, any Guarantor or any other person.

(h) The following persons constitute the members of Borrower and their respective ownership interest in Borrower is set forth opposite their names:

Will Darwin Wheeler	99%
Peggy Wheeler-Cribb	1%

(i) There has been no material adverse change in the condition, financial or otherwise, of Borrower or the Guarantor since the date of its financial statements furnished to Lender.

(j) Borrower's properties and assets reflected on its financial statements referred to above, and all such properties and assets are free and clear of all mortgages, pledges, liens, charges or other encumbrances, except as reflected on such financial statements which have been previously provided to Agent.

(k) Borrower and the Guarantor have each filed all federal, state and other income or franchise tax returns which are required to be filed and have paid all taxes due or which may become due pursuant to such returns or pursuant to any assessment received by it.

(l) All timely authorizations, permits, approvals and consents of Governmental Authorities which may be required in connection with the valid execution and delivery of this Agreement and the other Loan Documents and the carrying out or performance of any of the activities or transactions required or contemplated hereunder or thereunder have been obtained (and remain in full force and effect).

(m) All financial statements, information and other financial data furnished by Borrower and the Guarantor to Lender in connection with the Agreement (i) were true, correct and complete in all material respects, as of the date of said financial statements, information and other data, (ii) such financial statements present fairly the financial condition of Borrower and the Guarantor at the respective dates thereof and the results of operations and changes in financial position for the periods to which they apply, and (iii) there have been no material adverse changes in the financial condition of Borrower or any Guarantor since the delivery by Borrower or the Guarantor, as the case may be, to Lender of the most recent financial statements.

(n) Borrower's assets, at a fair valuation, exceed Borrower's liabilities (including, without limitation, contingent liabilities). Borrower is paying its debts as they become due and Borrower anticipates the continuing ability to pay its debts as they become due. Borrower has capital and assets sufficient to carry on its business.

(o) Proceeds from the Loan shall be used only as set forth in this Agreement, the Closing Statement, and for other proper corporate/limited liability company purposes. No part of the proceeds of the Loan shall be used, directly or indirectly, for the purpose of purchasing or carrying any margin stock within the meaning of Regulation U of the Board of Governors of the Federal Reserve System, or for the purpose of purchasing or carrying or trading in any stock under such circumstances as to involve Borrower in a violation of Regulation U of the Board of Governors of the Federal Reserve System. In particular, without limitation of the foregoing, no part of the proceeds from the Loan are intended to be used to acquire any publicly-held stock of any

kind. As used in this subparagraph (o), the terms "margin stock" and "purpose of purchasing or carrying" shall have the meanings assigned to them in the aforesaid Regulation U, and the term "publicly-held," in respect to securities, shall have the meaning assigned to it in Section 220.7(a) of Regulation T of the Board of Governors of the Federal Reserve System.

(p) Borrower is not in violation of or in default under (nor on the Closing Date is there any waiver in effect which, if not in effect, would result in a violation or default under) any provision of Borrower's bylaws/operating agreement, or under any provision of any agreement, indenture, evidence of indebtedness, loan or financing agreement, certificate, lease or other instrument to which it is a party, or by which it is bound, or of any law, governmental order, rule or regulation, in any such case under this subparagraph (p) so as to affect adversely in any material manner its business, assets or financial conditions.

(q) All statements, representations and warranties made by Borrower or any other person in this Agreement, any other Loan Document and any other agreement, document, certificate or instrument previously furnished or to be furnished by said person to Lender under this Agreement or in connection with the Loan: (i) are and shall be true, correct and complete in all material respects at the time they were made and, in the case of those made prior to the Closing Date, on and as of the Closing Date, (ii) do not and shall not contain any untrue statement of a material fact at the time made, and (iii) do not and shall not omit to state a material fact at the time made necessary in order to make the information contained herein or therein not misleading or incomplete. Borrower understands that all such statements, representations and warranties shall be deemed to have been relied upon by Lender as a material inducement to provide the Loan.

(r) No person is entitled to receive from Borrower any brokerage commission, finder's fee or similar fee or payment in connection with the consummation of the transactions contemplated by this Agreement except as provided in Section 2 of this Agreement. No brokerage or other fee, commission or compensation is to be paid by Lender by reason of any act, alleged act or omission of Borrower with respect to the transaction contemplated hereby.

(s) Borrower has no knowledge of any of the following:

(i) The release or threatened release of any hazardous substance, pollutant or contaminant as each such term is presently defined in any applicable Environmental Laws resulting from any activity by or on behalf of Borrower or any predecessor in interest to the Mortgaged Property, including, without limitation, the generation, handling, storage, treatment, transportation or disposal of any hazardous substance, pollutant or contaminant at any of the past or present business locations and facilities of Borrower; or

(ii) Any past or future action taken or to be taken by any federal, state, county or municipal Governmental Authority or by any other person under any applicable Environmental Laws concerning the release of any hazardous substance, pollutant or contaminant into the soil, air, surface or subsurface water or the environment in general from any of the past or present business locations and facilities of Borrower; or

(iii) Any claims or actions brought or which are threatened to be brought by any Person against Borrower for damages occurring at or outside of any of the past or present business locations and facilities of Borrower resulting from the alleged release or threatened release of any hazardous substance, pollutant or contaminant by Borrower or any predecessor in interest, including, without limitation, claims for health effects to Persons, property damage and/or damage to natural resources.

(t) (A) Borrower's address set forth above is the location of Borrower's chief executive office, and is the only location where Borrower keeps its records concerning its Accounts, and its inventory and equipment. (B) Within four (4) months of the date of this Agreement, none of Borrower's assets have been moved from any jurisdiction or other locations than the present location of assets set forth above except for inventory or equipment purchased or sold by Borrower in the ordinary course of business from persons or entities customarily selling such inventory or equipment. (C) As of the date hereof, no inventory is now stored with a bailee, warehouseman or similar party. (D) As of the date hereof, Borrower does not hold any goods belonging to third parties or in which other parties have an interest, including any goods sold on a bill and hold basis. (E) Borrower does not presently purchase or otherwise hold goods on a consignment basis. (F) None of Borrower's inventory is of a nature that contains any labels, trademarks, trade names, or other identifying characteristics which are the properties of third parties, and the use of which by Borrower is in violation of the rights of such third parties or under license, royalty or similar agreements with any third parties. (G) No persons hold any goods of Borrower. (H) Borrower has not purchased any inventory or equipment except in the ordinary course of business for value and from persons customarily in the business of selling such inventory or equipment. (I) Borrower does not hold any instrument or chattel paper connected with any Account. (J) Borrower does not own any trademarks, trade names, patents or copyrights. (K) No surety bonds have been issued on behalf of Borrower with respect to any contracts or purchase orders out of which Accounts Receivable have arisen or are expected to arise.

(u) Borrower is the owner and the operator of the Mortgaged Property.

(v) There is an adequate supply of public utilities (including, without limitation, water, sewer and electric) to support the Project and the Project has access to such public utilities.

7. **Survival of Representations and Warranties.** The foregoing representations and warranties shall survive the execution of this Loan Agreement and the closing of the Loan.

8. **Affirmative Covenants.** To induce Lender to make the Loan pursuant to this Agreement, Borrower hereby covenants and agrees that so long as the Loan shall remain outstanding hereunder, Borrower shall comply with the following covenants:

(a) Borrower shall keep and maintain complete and accurate books, accounts and records. Borrower shall permit access thereto and examination thereof by Lender and any authorized representatives of Lender, at all reasonable times and places during normal business hours (including the right to make copies thereof at the cost and expense of Borrower).

(b) Borrower shall comply in all material respects with all applicable federal, state, county and municipal laws, rules, regulations and orders of any Governmental Authority having jurisdiction over Borrower, subject to the limitations expressly set forth in the Mortgage, except to the extent contested in good faith and by proper proceedings or where the failure to so comply would not have a material adverse effect on Borrower, including, without limitation, all Environmental Laws and health and safety laws.

(c) Borrower shall promptly notify Lender of the occurrence of any Event of Default or an event which, with the giving of notice or passage of time or both, would constitute an Event of Default and of the occurrence of any event or the commencement of any action, suit or proceeding which, if adversely determined, would adversely affect the condition, financial or otherwise, of Borrower or Guarantor.

(d) Borrower shall indemnify, protect, defend and save harmless the Indemnified Parties from and against (i) any and all losses, damages, expenses or liabilities of any kind or nature and from any suits, claims, or demands, by third parties including reasonable counsel fees incurred in investigating or defending such claim, suffered by any of them and caused by, relating to, arising out of, resulting from, or in any way connected with the Loan and the transactions contemplated herein, and (ii) any and all losses, damages, expenses or liabilities sustained by Lender in connection with any environmental sampling or cleanup relating to any properties or assets owned or otherwise used by Borrower in the operation of its business, or mandated by any Environmental Law; provided, however, Borrower shall not be obligated to indemnify, protect, defend and save harmless an Indemnified Party, if the loss, damage, expense or liability was caused by or resulted from the gross negligence or willful misconduct of that Indemnified Party. In case any action shall be brought against an Indemnified Party based upon any of the above and in respect to which indemnity may be sought against Borrower, the Indemnified Party against whom such action was brought, shall promptly notify Borrower in writing, and Borrower shall assume the defense thereof, including the

employment of counsel selected by Borrower and reasonably satisfactory to the Indemnified Party, the payment of all costs and expenses and the right to negotiate and consent to settlement. Upon reasonable determination made by the Indemnified Party, the Indemnified Party shall have the right to employ separate counsel in any such action and to participate in the defense thereof at the Indemnified Party's cost and expense. Borrower shall not be liable for any settlement of any such action effected without its consent, but if settled with Borrower's consent, or if there be a final judgment for the claimant in any such action, Borrower agrees to indemnify and save harmless said Indemnified Party against whom such action was brought from and against any loss or liability by reason of such settlement or judgment. The provisions of this subparagraph (d) shall survive the termination of this Agreement and the final repayment of the Loan.

(e) If Lender shall so require, Borrower agrees to establish and maintain at a banking institution of Lender's choice a lockbox, in accordance with Lender's standard lockbox agreement in effect from time to time, and to direct all Account Debtors to make remittances on all Accounts to said lockbox. Any and all remittances received in said lockbox may be applied to the Obligations of Borrower to Lender in accordance with Paragraph (g) hereof.

(f) If, notwithstanding the notices to Account Debtors to remit payments on Accounts to the lockbox referred to above, Borrower receives any payments on Accounts or other Collateral, Borrower agrees to receive any and all payments and remittances on Accounts and Inventory and other Collateral, including cash, checks, drafts, notes, acceptances or other forms of payment in trust for Lender and to deliver such payments in the identical form in which they were received, together with collection reports in form satisfactory to Lender.

(g) All proceeds of any Account(s) and inventory and other Collateral which are delivered to or otherwise received by Lender for application to the Loan provided for herein shall be deemed received as of the date of actual receipt by Lender, and shall be applied by Lender on account of the Obligations upon Lender's receipt of same; provided, however, that no checks, drafts, or other Instruments received by Lender shall constitute payment to Lender unless and until such item of payment has actually been collected by Lender. For the sole purpose of calculation of interest due to Lender from Borrower, all such proceeds and other payments on account of the Loan provided for in this Agreement, irrespective of the type or form of payment thereof shall not be considered applied on account of the Obligations until actual clearance of such funds.

(h) Borrower shall maintain all of its property in good working condition, ordinary wear and tear excepted (including obsolete and abandoned property).

(i) Borrower shall, within ten (10) days of the end of each month, deliver to Lender an aging of its Accounts and report of its inventory, and an aging of its accounts payable in such form as may be reasonably acceptable to Lender, and within

thirty (30) days of the end of each month, a duly completed accounts receivable reconciliation report in such form as may be reasonably acceptable to Lender.

(j) Borrower will continue to hold all necessary licenses and permits for the operations of their business, including but not limited to contract vendor registrations and account numbers.

(k) Lender (by any of its officers, employees and agents) shall have the right, at any time or times during Borrower's usual business hours (provided reasonable prior notice is given except if an Event of Default has occurred and is continuing), to inspect the Collateral, all records related thereto (and to make extracts from such records) and the premises upon which any of the Collateral is located, to discuss Borrower's affairs and finances with any person and to verify the amount, quality, quantity, value and condition of, or any other matter relating to, the Collateral.

(l) (A) Lender shall have the right at any time and from time to time, without notice, to notify Account Debtors to make payments to Lender, to endorse all items of payment which may come into its hands payable to Borrower, to take control of any cash or non-cash proceeds of Accounts and of any returned or repossessed goods; to compromise, extend or renew any Account or deal with it as it may deem advisable, and to make exchanges, substitutions or surrenders of Collateral, to notify the postal authorities, after an Event of Default, to deliver all mail, correspondence or parcels addressed to Borrower to Lender at such address as Lender may choose. (B) Borrower herewith appoints Lender or its designee as Attorney-in-Fact to endorse Borrower's name on any checks, notes, acceptances, drafts or any other instrument or document requiring said endorsement and to sign Borrower's name on any invoice or bills of lading relating to any Account, or drafts against its customers, or schedules or confirmatory assignment on Accounts, or notices of assignment, financing statements under the Uniform Commercial Code, and other public records, and in verification of Accounts and in notices to Account Debtors. (C) Lender shall have no obligation to preserve any rights against any Person obligated on any Account, chattel paper, instrument or other item of Collateral. Lender shall not be permitted to exercise the rights granted to it under the foregoing clauses (A) and (B) prior to an Event of Default.

(m) Borrower will furnish Lender with at least ten (10) days' prior written notice of any change in location of or addition to its chief executive office, the office where it keeps its records concerning its Accounts, its location of Inventory, Equipment and other assets, and other business locations.

(n) Pay and discharge, and require its subsidiaries to pay and discharge, when due, all taxes, assessments or other governmental charges imposed on them or any of their respective properties, unless the same are currently being contested in good faith by appropriate proceedings and adequate reserves are maintained therefor.

(o) Operate its properties, and cause those of its subsidiaries to be operated in compliance with all applicable orders, rules and regulations promulgated by the jurisdictions and agencies thereof where such properties are located and duly file or cause to be filed such reports and/or information returns as may be required or appropriate under applicable orders, regulations or law.

(p) Permit the Lender's representatives and/or agents full and complete access to any or all of the Borrower's and its subsidiaries' properties and financial records, to make extracts from and/or audit such records and to examine and discuss the Borrower's properties, business, finances and affairs with the Borrower's officers and outside accountants.

(q) Obtain lien releases and lien waivers, in a statutory standard form, as and when Borrower pays contractors, materialmen, laborers providing labor, equipment, or materials to the Mortgaged Property and submit copies of the same to Lender.

(r) Borrower shall, within ten (10) days of the end of each month, deliver to Lender a report of the Borrower's assets, including without limitation, a report on the status of any development or construction on the Mortgaged Property, in such form as may be acceptable to Lender in its sole discretion.

(s) Borrower shall provide Lender with written evidence of flood insurance, in form and with substance satisfactory to Lender in its sole discretion, prior to any construction on the Mortgaged Property.

(t) Borrower acknowledges that simultaneously with the execution and delivery of this Agreement it has delivered to Lender, to hold in escrow, that certain Assignment of Declarant's Rights ("Assignment of Rights") pursuant to which Borrower transfers to Lender any rights which it may have as Declarant in that certain Declaration of Covenants and Reciprocal Easement Agreement dated October 30, 2006, as such rights with respect to the Mortgaged Property were thereafter assigned to Borrower. Upon an Event of Default, Lender has the right to release the Assignment of Rights from escrow and record same with the State of South Carolina, County of Georgetown.

9. Negative Covenants of Borrower. To induce Lender to make the Loan pursuant to this Agreement, Borrower hereby covenants and agrees that so long as the Loan shall remain outstanding, Borrower shall not:

(a) Except for Permitted Encumbrances as set forth in the Mortgage, at any time: (i) create, incur, assume or suffer to exist any mortgage, deed of trust, pledge, security interest, encumbrance, lien or charge of any nature upon or with respect to Borrower's assets and properties or (ii) sign or file under the Uniform Commercial Code of any jurisdiction a financing statement which names Borrower as a debtor or (iii) sign

any security agreement authorizing any secured party thereunder to file such financing statement. Borrower further covenants and agrees not to grant any similar negative pledge to any other lender.

(b) Except as to the sale or disposition of assets which are obsolete or worn out and are no longer used or useful in the conduct of its business, convey, sell, lease, assign, transfer, hypothecate or otherwise dispose of any of its now or hereafter acquired property, business or assets.

(c) Create, incur, suffer to exist, assume, guaranty, endorse, become a surety, or otherwise become liable for the debt or other obligations of any other Person whether directly or indirectly, or make or incur any advance, purchase commitment, other obligation or loan for the direct or indirect purpose of paying or discharging any such obligations.

(d) Make any advance, loan, extension of credit or capital contribution to, or purchase any stock, bonds, notes, debentures or other securities of or any assets constituting a business unit of, or make any other investment in any Person.

(e) Enter into any merger or consolidation or liquidate or wind-up or dissolve itself (or suffer any liquidation or dissolution) or convey, sell, lease, assign, transfer or otherwise dispose (directly or indirectly) of all or substantially all of its property, business or assets or make any material change in its present method of conducting business or permit any corporate guarantor to do any of the foregoing.

(f) Materially change, amend, alter or modify the bylaws/operating agreement or other governing documents of Borrower or permit any corporate guarantor to do any of the foregoing.

(g) Enter into or permit any Guarantor to enter into any transaction, including, without limitation, the purchase, sale or exchange of property or the rendering of any service, with any officer, director, shareholder or partner of Borrower or any Guarantor or Affiliate of any of the foregoing.

(h) Declare or pay any dividends on, distributions on or make any payment on account of, or set apart assets or a sinking fund for the purchase, redemption, defeasance, retirement or other acquisition of, any interest, shares or any class of stock or any warrant or option to purchase any such stock whether now or hereafter outstanding or make any other distribution in respect thereof, directly or indirectly whether in cash or property or obligations.

(i) Create, incur, suffer to exist any indebtedness, except (i) indebtedness in respect of the Loan; and (ii) indebtedness, if any, outstanding as of the

date of this Agreement and shown on the financial statements previously delivered to Lender.

- (j) Transfer, sell, lease or otherwise convey (directly or indirectly) any interest or shares of capital stock or membership or ownership interest in any guarantor.
- (k) Purchase any Inventory or Equipment except in the ordinary course of business from persons customarily in the business of selling such Inventory or Equipment.
- (l) Without prior written consent of Lender, remove the Collateral from its present location, except for the removal of Inventory upon its sale.
- (m) Sell or transfer any Inventory to any Affiliate or subsidiary of Borrower except on arms length terms in the ordinary course of business.
- (n) Sell, lease or transfer any of its equipment (except for abandoned or obsolete equipment) or other assets without the prior written consent of Lender except for sales of inventory in the ordinary course of business to good faith purchasers for value.
- (o) Allow its existence of as a corporation/limited liability company to be other than in good standing and will not, without the prior written consent of Lender, dissolve or liquidate, or merge or consolidate with or acquire or affiliate with any other business entity or form any subsidiary.
- (p) Change its name without furnishing to Lender at least ten (10) days' prior written notice thereof.
- (q) Utilize any trade name, and will not in the future utilize any trade name without furnishing to Lender at least ten (10) days prior written notice thereof.
- (r) Change the nature of its business.
- (s) Sell, assign, transfer or dispose of any of its accounts or notes receivable, with or without recourse, except to the Lender.
- (t) Except after notice to Lender and with Lender's prior written consent, partition or subdivide the Mortgaged Property.
- (u) take any Material Action without the prior written consent of the Independent Manager (or Independent Director, as applicable).

10. **Events of Default**. The occurrence of any of the following shall constitute an "Event of Default" hereunder:

- (a) failure of Borrower to make any payment of any installment of principal or interest when due under the Note;
- (b) failure of Borrower to pay any other sum when due hereunder or under the Note or any other Loan Document;
- (c) any representation or warranty of Borrower or the Guarantor made herein or in any other Loan Document or in any other writing given to Lender in connection with the Loan shall have been incorrect in any material respect as of the time when the same shall have been made or is not accurate when a further disbursement is to be made to Borrower;
- (d) the occurrence of an Event of Default under the Mortgage or any other Loan Document;
- (e) the sale, conveyance, assignment, transfer or other disposition or divestiture of Borrower's title to any of the Collateral, or the mortgage or other conveyance of a security interest in, or other encumbrance on any of the Collateral or any interest therein, whether voluntary or involuntary, except as provided herein;
- (f) any merger, consolidation, liquidation or dissolution, or the sale or transfer of all or substantially all of the assets, of the Borrower;
- (g) the transfer (directly or indirectly) of any of the stock or other ownership interest of Borrower;
- (h) any default in the performance or observance of any term, covenant or agreement to be performed by Borrower or Guarantor in this Loan Agreement or in any Loan Document;
- (i) the use of proceeds of the Loan for any purpose other than the purpose described in Paragraph 6(o);
- (j) any Loan Documents for any reason shall cease to be in full force and effect, the liens on the Collateral purported to be created thereby shall cease to be or are not valid and perfected liens having priority over all other liens except any encumbrances specifically permitted under such Loan Documents, or any Guarantor shall assert that it has no liability under the Guaranty to which it is a party;
- (k) one or more judgments or decrees shall be entered against Borrower or any Guarantor (not paid or fully covered by insurance) and all such judgments or

decrees shall not have been vacated or discharged, stayed or bonded pending appeal within sixty (60) days from the entry thereof;

- (l) if Borrower or any Guarantor becomes insolvent;
- (m) if Borrower or any Guarantor generally does not pay its debts as they become due and Borrower has failed to make any payment to Lender required by the Loan Documents;
- (n) if Borrower or any Guarantor makes an assignment for the benefit of creditors;
- (o) if Borrower or any Guarantor calls or causes to be called a meeting of creditors for the composition of debts;
- (p) if there shall be filed by or with the consent or authorization of Borrower or any Guarantor a petition in bankruptcy for liquidation or for reorganization, or a custodian, receiver or agent is appointed or authorized to take charge of its properties, or Borrower or any Guarantor authorizes any such action;
- (q) if there shall be filed against Borrower or any Guarantor a petition in bankruptcy, for liquidation, or for reorganization, or a custodian, receiver, or agent is appointed or authorized to take charge of its properties and Borrower or any Guarantor, as the case may be, has not consented to or authorized such action and such action is not dismissed within sixty (60) days; and
- (r) if any license, permit, registration, vendor account or other approval required for the normal operation of Borrower's business or any of the Collateral shall be suspended or shall cease to be in full force and effect.

11. Remedies.

- (a) Upon the occurrence of an Event of Default and at any time thereafter during the continuance of such Event of Default, in addition to any remedies available to Lender under applicable law, Lender may take one or more of the following remedial steps in any order of priority:
 - (i) Declare immediately due and payable the outstanding principal balance of the Note, together with all accrued and unpaid interest, fees and other sums or expenses payable thereunder and hereunder and accordingly accelerate payment thereof without presentment, demand, notice of intention to accelerate, notice of acceleration or notice of any other kind, all of which are expressly waived;
 - (ii) Take any action at law or in equity against Borrower or the Guarantor (a) to collect the payments then due and thereafter to become due under the

Loan Documents, or (b) to enforce performance and observance of any obligation, agreement or covenant of Borrower or such other parties under the Loan Documents;

(iii) Exercise any and all rights and remedies provided for in the other Loan Documents as they relate to Borrower or any Guarantor.

(iv) Proceed with or without judicial process to take possession of all or any part of the Collateral provided for herein not already in the possession of Lender and Borrower agrees that upon receipt of notice of Lender's intention to take possession of all or any part of said Collateral, Borrower will do everything reasonably necessary to assemble the Collateral and make same available to Lender at a place to be designated by Lender. Borrower hereby waives any and all rights it may have, by statute, constitution or otherwise to notice from Lender, for Lender to obtain possession, by Court proceedings or otherwise, of the Collateral provided for in this or in any other agreement with Lender;

(v) So long as Lender acts in a commercially reasonable manner, assign, transfer and deliver at any time or from time to time the whole or any portion of the Collateral or any rights or interest therein in accordance with the Uniform Commercial Code, and without limiting the scope of Lender's rights thereunder, Lender may sell the Collateral at public or private sale, or in any other manner, at such price or prices as Lender may deem best, and either for cash or credit, or for future delivery, at the option of Lender, in bulk or in parcels and with or without having the Collateral at the sale or other disposition. Lender shall have the right to be the purchaser at any public sale. Lender shall have the right to conduct such sales on Borrower's premises or elsewhere and shall have the right to use Borrower's premises without charge for such sales for such time or times as Lender may see fit. Lender is hereby granted license or other right to use, without charge, Borrower's labels, patents, copyrights, rights of use of any name, trade secrets, trade names, trademarks and advertising matter, or any property of a similar nature, as it pertains to the Collateral, in advertising for sale and selling any Collateral and Borrower's rights under all licenses and franchise agreements shall inure to Lender's benefit. Borrower agrees that a reasonable means of disposition of Accounts shall be for Lender to hold and liquidate any and all Accounts. In the event of a sale of the Collateral, or any other disposition thereof, Lender shall apply all proceeds first to all costs and expenses of disposition, including reasonable attorneys' fees, and then to the Obligations of Borrower to Lender;

(vi) Elect to retain the Collateral or any part thereof in satisfaction of all Obligations due from Borrower to Lender upon notice of such proposed election to Borrower and any other party as may be required by the Uniform Commercial Code; and

(vii) Lender shall have the right immediately, and without notice or other action to set-off against any of any Borrower's Obligations to Lender any sum owed by Lender in any capacity to any Borrower whether due or not, and Lender shall be

deemed to have exercised such right of set-off and to have made a charge against any such sum immediately upon the occurrence of an Event of Default, even though the actual book entries may be made at some time subsequent thereto.

(b) No remedy conferred in this Agreement or the other Loan Documents is intended to be exclusive of any other remedy, and each and every such remedy shall be cumulative and shall be in addition to every other remedy conferred herein or now or hereafter existing at law or equity or by statute or otherwise.

12. Payment of Expenses.

(a) Borrower agrees that it shall pay, within five (5) days after demand, all out-of-pocket expenses incurred by Lender in connection with this transaction including, without limitation, fees and expenses for any title searches required hereunder, recording and filing fees, and reasonable attorneys' fees incurred by Lender in connection with the Loan (including any amendments and waivers), the preparation of the Loan Documents, the administration of the Loan, inspection of the Mortgaged Property during the course of the Project and the enforcement Lender's rights and remedies under the Loan Documents.

(b) If Borrower should fail to perform or observe, or to cause to be performed or observed, any covenant or obligation under this Agreement or any of the other Loan Documents, then the Lender, may (but shall be under no obligation to) take such steps as are necessary to remedy any such nonperformance or nonobservance and provide for payment thereof, if any (which shall include, without limitation, steps necessary to cure any defaults of Borrower under any lease).

(c) All amounts expended or advanced by the Lender pursuant to this Paragraph 12 shall become part of the outstanding principal balance of the Loan and the Note, shall be secured by, among other things, the Mortgage, shall become due and payable by the Borrower upon demand by Lender, and shall bear interest at the Default Rate (such interest to be calculated from the date of such advance by Lender to the date of repayment thereof by Borrower).

13. Lender's Right to Assign. Lender shall have the right to sell, assign, participate, transfer or dispose of all or any part of its interest in the Loan without the consent or approval of Borrower or Guarantor.

14. Default Interest Rate. All sums advanced and all expenses incurred by Lender pursuant to any provision of this Agreement or of the other Loan Documents which are not paid when due shall bear interest at the Default Rate set forth in the Note from the date such sum was due until such sum is paid in full and shall be secured by the Mortgage.

15. **Usury Savings.** Notwithstanding anything to the contrary contained herein, under no circumstances shall the aggregate amount paid or agreed to be paid hereunder or under the Note exceed the highest lawful rate permitted under applicable usury law (the "Maximum Rate") and the payment obligations of Borrower under this Agreement and the Note are hereby limited accordingly. If under any circumstances, whether by reason of advancement or acceleration of the maturity of the unpaid principal balance hereof or otherwise, the aggregate amounts paid hereunder or under the Note shall include amounts which by law are deemed interest and which would exceed the Maximum Rate, Borrower stipulates that payment and collection of such excess amounts shall have been and will be deemed to have been the result of a mistake on the part of both Borrower and Lender or the holder of the Note, and the party receiving such excess payments shall promptly credit such excess (only to the extent such payments are in excess of the Maximum Rate) against the unpaid principal balance hereof and any portion of such excess payments not capable of being so credited shall be refunded to Borrower.

16. **Notices.** All notices, consents, approvals and requests required or permitted hereunder or under any other Loan Document shall be given in writing and shall be effective for all purposes if hand delivered or sent by (a) certified or registered United States mail, postage prepaid, return receipt requested or (b) expedited prepaid delivery service, either commercial or United States Postal Service, with proof of attempted delivery, and by telecopier (with answer back acknowledged), addressed as follows (or at such other address and a person as shall be designated from time to time by any party hereto, as the case may be, in a written notice to the other parties hereto in the manner provided for in this Section):

If to Lender: Kennedy Funding, Inc.
Two University Plaza, Suite 402
Hackensack, New Jersey 07601
Attention: Jeffrey Wolfer
Facsimile No. (201) 342-8373

With a copy to: Cole, Schotz, Meisel, Forman & Leonard P.A.
25 Main Street
Hackensack, New Jersey 07602-0800
Attention: Michael R. Leighton, Esq.
Facsimile No.: (201) 489-1536

If to Borrower: Pawleys Island North, LLC
334 Myrtle Avenue
Pawleys Island, South Carolina 29585

With a copy to: Gwin Law Office, LLC
2105 Cromley Circle, Suite B

Myrtle Beach, South Carolina 29577
Attention: Robert H. Gwin, III, Esq.
Facsimile No.: (843) 839-2244

A notice shall be deemed to have been given: in the case of hand delivery, at the time of delivery; in the case of registered or certified mail, when delivered or the first attempted delivery on a business day; or in the case of expedited prepaid delivery and telecopy, upon the first attempted delivery on a business day.

17. **No Waiver.** No course of dealing between Borrower and Lender or any failure or delay on the part of Lender in exercising any rights or remedies hereunder shall operate as a waiver of any rights or remedies of Lender and no single or partial exercise of any rights or remedies hereunder shall operate as a waiver or preclude the exercise of any other rights or remedies hereunder. In the event any agreement contained in this Agreement or the other Loan Documents should be breached and thereafter waived by Lender, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder or thereunder.

18. **Failure to Exercise Rights.** Nothing herein contained shall impose upon Lender any obligation to enforce any terms, covenants or conditions contained in this Agreement and the other Loan Documents. Failure of Lender, in any one or more instances, to insist upon strict performance of any terms, covenants or conditions of this Agreement and the other Loan Documents, shall not be considered or taken as a waiver or relinquishment by Lender of its right to insist upon and to enforce in the future, by injunction or other appropriate legal or equitable remedy, strict compliance with all the terms, covenants and conditions of this Agreement and the other Loan Documents. The consent of Lender to any act or omission by Borrower shall not be construed to be a consent to any other or subsequent act or omission or a waiver of the requirement for Lender's consent to be obtained in any future or other instance.

19. **Prohibition Against Exercise of Rights Applicable Only to Individual Lenders.** Borrower is hereby prohibited from exercising against Lender or Agent any right or remedy which it might otherwise be entitled to exercise against any one or more (but less than all) of the individual parties constituting Lender, including, without limitation, any right of set-off or any defense.

20. **Miscellaneous.**

(a) **Choice of Law.** THE LOAN WAS NEGOTIATED IN THE STATE OF NEW JERSEY, THIS AGREEMENT WAS NEGOTIATED IN THE STATE OF NEW JERSEY, WAS EXECUTED AND DELIVERED BY BORROWER AND ACCEPTED BY LENDER IN THE STATE OF NEW JERSEY, AND THE PROCEEDS OF THE NOTE WERE DISBURSED FROM THE STATE OF NEW JERSEY, WHICH STATE THE PARTIES AGREE HAS A

SUBSTANTIAL RELATIONSHIP TO THE PARTIES AND TO THE UNDERLYING TRANSACTION EMBODIED HEREBY, AND IN ALL RESPECTS, INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE. THIS AGREEMENT AND THE OBLIGATIONS ARISING HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW JERSEY, WITHOUT REGARD TO CHOICE OF LAW CONSIDERATIONS, APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE AND ANY APPLICABLE LAW OF THE UNITED STATES OF AMERICA, EXCEPT THAT AT ALL TIMES THE PROVISIONS FOR THE CREATION, PERFECTION, PRIORITY, ENFORCEMENT AND FORECLOSURE OF THE LIENS AND SECURITY INTERESTS CREATED IN THE REAL PROPERTY COLLATERAL UNDER THE LOAN DOCUMENTS SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAW OF THE JURISDICTION IN WHICH THE REAL PROPERTY COLLATERAL IS LOCATED, IT BEING UNDERSTOOD THAT, TO THE FULLEST EXTENT PERMITTED BY THE LAW OF SUCH JURISDICTION, THE LAW OF THE STATE OF NEW JERSEY SHALL GOVERN THE VALIDITY AND ENFORCEABILITY OF ALL LOAN DOCUMENTS, AND THE DEBT OR OBLIGATIONS ARISING HEREUNDER.

(b) Jurisdiction. AT LENDER'S ELECTION, TO BE ENTERED IN ITS SOLE DISCRETION, ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST BORROWER OR LENDER ARISING OUT OF OR RELATING TO THIS NOTE OR THE OTHER LOAN DOCUMENTS SHALL BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN NEW JERSEY, AND BORROWER WAIVES ANY OBJECTION WHICH IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF VENUE OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING. BORROWER DOES HEREBY DESIGNATE AND APPOINT

_____, HAVING AN ADDRESS AT _____
CORPORATION SERVICE COMPANY, LOCATED
AT 830 BEAR TAVERN ROAD, SUITE 305, WEST TRENTON, NEW JERSEY
08628-1020, AS ITS AUTHORIZED AGENT TO RECEIVE AND FORWARD ON
ITS BEHALF SERVICE OF ANY AND ALL PROCESS WHICH MAY BE
SERVED IN ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY FEDERAL
OR STATE COURT IN NEW JERSEY, AND AGREES THAT SERVICE OF
PROCESS UPON SAID AGENT AT SAID ADDRESS AND WRITTEN NOTICE
OF SAID SERVICE MAILED OR DELIVERED TO BORROWER IN THE
MANNER PROVIDED IN THE MORTGAGE, SHALL BE DEEMED IN EVERY
RESPECT EFFECTIVE SERVICE OF PROCESS UPON BORROWER IN ANY
SUCH SUIT, ACTION OR PROCEEDING IN THE STATE OF NEW JERSEY.

BORROWER (1) SHALL GIVE PROMPT NOTICE TO THE LENDER OF ANY CHANGED ADDRESS OF ITS AUTHORIZED AGENT HEREUNDER, (2) MAY AT ANY TIME AND FROM TIME TO TIME DESIGNATE A SUBSTITUTE AUTHORIZED AGENT WITH AN OFFICE IN NEW JERSEY (WHICH OFFICE SHALL BE DESIGNATED AS THE ADDRESS FOR SERVICE OF PROCESS), AND (3) SHALL PROMPTLY DESIGNATE SUCH A SUBSTITUTE IF ITS AUTHORIZED AGENT CEASES TO HAVE AN OFFICE IN NEW JERSEY OR IS DISSOLVED WITHOUT LEAVING A SUCCESSOR.

(c) Borrower and/or Guarantor (as applicable) agrees if Borrower and/or Guarantor is required to make any deduction or withholding of foreign taxes (or taxes imposed because Borrower and/or Guarantor is a foreign person or entity) from any payment due to Lender herein, then the amount payable to Lender upon which such deduction or withholding is based, shall be increased to the extent necessary to ensure that, after all deductions or withholdings, Lender is paid a net amount equal to the amount Lender would have been paid in the absence of such deduction or withholding. At Lender's request, Borrower and/or Guarantor shall provide Lender with documentation adequate to demonstrate payment of such deduction or withholding by Borrower and/or Guarantor under this provision.

(d) The parties hereto agree that, notwithstanding anything contained herein to the contrary, there shall be required the consent of the Agent, Borrower and Lenders holding Fifty Percent (50%) of the outstanding balance or commitment to lend under the Loan to do any of the following:

(1) Amend or modify the terms of the Note, this Agreement, the Mortgage and the other Loan Documents or execute any waiver of any material event of default under this Agreement or the other Loan Documents.

(2) Consent to or permit any substitution, withdrawal or release of any collateral, any Guarantor or any other security securing the payment of the Loan except in accordance with the terms of the Note, this Agreement and the Loan Documents.

(e) Any condition of this Agreement or any other Loan Document which requires the submission of evidence of the existence or non-existence of a specified fact or facts implies as a condition the existence or non-existence, as the case may be, of such fact or facts, and Lender shall, at all times, be free independently to establish to its reasonable satisfaction and in its absolute discretion such existence or non-existence.

(f) Borrower and each Guarantor, as the case may be, shall execute and deliver, or cause to be executed and delivered to Lender, all other instruments, certificates and agreements as Lender or Lender's counsel may reasonably require, including, but not

limited to, estoppel certificates stating that the Loan is in full force and effect and that there are no defenses or offsets thereto, to effect, confirm or assure the rights, remedies and liens intended to be granted or conveyed to Lender under this Agreement or any other Loan Document.

(g) A determination that any portion of this Agreement or any of the Loan Documents is unenforceable or invalid shall not affect the enforceability or validity of any other provision, and any determination that the application of any provisions of this Agreement or any Loan Document to any person or circumstance is illegal or unenforceable shall not affect the enforceability or validity of such provisions it may apply to other persons or circumstances.

(h) Without the consent of, or notice to Borrower, Lender may add one or more additional co-agents to this Loan.

(i) This Agreement supersedes in all respects all prior agreements and understandings relating to the Loan, including, without limitation, the Loan Commitment.

21. Successors and Assigns.

(a) Borrower may not assign its rights under this Agreement without the prior written consent of Lender. Any such attempted assignment in violation of this Agreement shall be void and of no effect.

(b) All covenants and agreements in this Agreement shall bind and inure to the benefit of the respective permitted successors and assigns of the parties hereto and any holder or holders of the Note or any portion thereof.

22. Waiver of Jury Trial. BORROWER AND LENDER AGREE THAT ANY SUIT, ACTION OR PROCEEDING, WHETHER CLAIM OR COUNTERCLAIM, BROUGHT BY BORROWER OR LENDER ON OR WITH RESPECT TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT OR THE DEALINGS OF THE PARTIES WITH RESPECT HERETO OR THERETO, SHALL BE TRIED ONLY BY A COURT AND NOT BY A JURY. BORROWER AND LENDER EACH HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY SUCH SUIT, ACTION OR PROCEEDING. FURTHER, BORROWER WAIVES ANY RIGHT IT MAY HAVE TO CLAIM OR RECOVER, IN ANY SUCH SUIT, ACTION OR PROCEEDING, ANY SPECIAL, EXEMPLARY, PUNITIVE, CONSEQUENTIAL OR OTHER DAMAGES OTHER THAN, OR IN ADDITION TO, ACTUAL DAMAGES. BORROWER ACKNOWLEDGES AND AGREES THAT THIS SECTION IS A SPECIFIC AND MATERIAL ASPECT OF THIS AGREEMENT AND THAT LENDER WOULD NOT EXTEND CREDIT TO

BORROWER (AS APPLICABLE) IF THE WAIVERS SET FORTH IN THIS SECTION WERE NOT A PART OF THIS AGREEMENT.

23. Releases of Collateral.

(a) The Lender may release, regardless of consideration, the obligation of any Person or Persons liable for payment of any of the Obligations secured hereby, or may release any part of the Mortgaged Property or any other collateral now or hereafter given to secure the payment of the Obligations or any part thereof, without impairing, reducing or affecting the obligations of the Borrower or Guarantors under the Loan Documents.

(b) Within thirty (30) days of Borrower's request, provided: (i) Borrower is not in default hereunder or under any other Loan Document(s); and (ii) no event has occurred which with the passage of time and/or the giving of notice would constitute a default hereunder or under any other Loan Document(s), Lender shall release portions of the Mortgaged Property from the lien created by the Mortgage ("Released Property") subject to: (i) Borrower's payment to Lender of the Release Price (as hereinafter defined) for the Released Property and (ii) Borrower's delivery to Lender of documentation evidencing a bonafide arms length transaction for the sale of the Released Property. The Release Price for the Released Property shall be equal to the greater of: (y) (i) eighty percent (80%) of the net sale price of the Released Property (subject to reasonable and customary closing adjustments and sales commissions to be approved by Lender in Lender's reasonable discretion); and (ii) seventy-five percent (75%) of the gross sale price of the Released Property; or (z) the minimum Release Price acceptable to Lender in its sole discretion.

24. Publicity.

(a) Lender shall have the right to issue news releases, and publicize and/or advertise the fact that it has provided financing with respect to the project and/or the Mortgaged Property and in connection therewith Lender shall have the right to photograph and use pictures of the Mortgaged Property in any such advertisements, brochures, print, media and other copy.

(b) At Lender's request, Borrower, at Lender's cost and expense, shall erect a suitable sign or signs at the Mortgaged Property in a location which is clearly visible to the public and otherwise reasonably acceptable to Lender. The Sign shall be prepared by Lender and may contain, among other things, that financing for the Mortgaged Property is being provided by Lender or another Person and otherwise publicize Lender's or such Person's role in the financing. Lender shall coordinate the placement and maintenance of such signs on the Mortgaged Property with Borrower.

25. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be effective only upon delivery and thereafter shall be deemed an original, and all of which shall be taken to be one and the same instrument, for the same effect as if all parties hereto had signed the same signature page. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signatures thereon and may be attached to another counterpart of this Agreement identical in form hereto but having attached to it one or more additional signature pages.

26. **Joint and Several Liability.** Notwithstanding anything contained herein to the contrary, if there is more than one Borrower, each Borrower shall be jointly and severally liable for a breach of any and all covenants, representations, warranties, obligations and liabilities under this Agreement.

27. **Single Purpose Entity/Separateness.** Notwithstanding anything contained herein to the contrary, Borrower represents, warrants and covenants as follows:

(a) Borrower has not owned, does not own and will not own any asset or property other than (i) the Mortgaged Property, and (ii) incidental personal property necessary for the ownership or operation of the Mortgaged Property.

(b) Borrower has not engaged and will not engage in any business other than the ownership, management and operation of the Mortgaged Property and Borrower will conduct and operate its business as presently conducted and operated.

(c) Borrower will not enter into any contract or agreement with any affiliate of the Borrower, any constituent party of Borrower, any Guarantor of the Loan or any part thereof or any affiliate of any constituent party of Borrower or any Guarantor, except upon terms and conditions that are intrinsically fair and substantially similar to those that would be available on an arms-length basis with third parties other than any such party.

(d) Except as otherwise set forth herein or in the other Loan Documents, Borrower has not incurred and will not incur any indebtedness, secured or unsecured, direct or indirect, absolute or contingent (including guaranteeing any obligation), other than the Loan. No indebtedness other than the Loan may be secured (subordinate or pari passu) by the Mortgaged Property.

(e) Borrower has not made and will not make any loans or advances to any third party (including any affiliate or constituent party of Borrower, any Guarantor or any affiliate or constituent party of Guarantor), and shall not acquire obligations or securities of its affiliates or any constituent party.

(f) Borrower: (i) is solvent and agrees to give prompt notice to Lender of the insolvency or bankruptcy filing of Borrower or any general partner, managing member or controlling shareholder of Borrower, or the death, insolvency or bankruptcy filing of any Guarantor; and (ii) will remain solvent.

(g) Borrower has done or caused to be done and will do all things necessary to observe organizational formalities and preserve its existence, and Borrower will not amend, modify or otherwise change the articles of organization, certificate of formation, certificate of incorporation, articles of incorporation, bylaws or operating agreement or other organizational documents of Borrower.

(h) Borrower will maintain all of its books, records, financial statements and bank accounts separate from those of its affiliates and any constituent party of Borrower and Borrower will file its own tax returns. Borrower shall maintain its books, records, resolutions and agreements as official records.

(i) Borrower will be, and at all times will hold itself out to the public as, a legal entity separate and distinct from any other entity (including any affiliate of Borrower, any constituent party of Borrower, any Guarantor or any affiliate of any such constituent party or Guarantor), shall correct any known misunderstanding regarding its status as a separate entity, shall conduct business in its own name, shall not identify itself or any of its affiliates as a division or part of the other and shall maintain and utilize separate stationery, invoices and checks.

(j) Borrower will maintain adequate capital for the normal obligations reasonably foreseeable in a business of its size and character and in light of its contemplated business operations.

(k) Neither Borrower nor any constituent party of Borrower will seek the dissolution, winding up, liquidation, consolidation or merger in whole or in part, of the Borrower.

(l) Borrower will not commingle the funds and other assets of Borrower with those of any affiliate or constituent party of Borrower, any Guarantor, or any affiliate of any constituent party or Guarantor, or any other person.

(m) Borrower has and will maintain its assets in such a manner that it will not be costly or difficult to segregate, ascertain or identify its individual assets from those of any affiliate or constituent party of Borrower, any Guarantor, or any affiliate of any constituent party or Guarantor, or any other Person.

(n) Borrower does not and will not guarantee, become obligated for or hold itself out to be responsible for the debts or obligations of any other person or entity

or the decisions or actions respecting the daily business or affairs of any other person or entity.

(o) Borrower will not permit any affiliate or constituent party of Borrower independent access to its bank accounts.

(p) Borrower shall pay the salaries of its own employees and maintain a sufficient number of employees in light of its contemplated business operations.

(q) Borrower shall have at least one (1) Independent Manager or Independent Director, as applicable.

[Remainder of this page intentionally left blank.]

IN WITNESS WHEREOF, the undersigned have executed this Loan and Security Agreement as of the day and year first set forth above.

WITNESS:

LENDER:

KENNEDY FUNDING, INC., as Agent

Print Name:

By: _____

Name:

Title:

WITNESS:

BORROWER:

PAWLEYS ISLAND NORTH, LLC, a
South Carolina limited liability company

Name:

By: _____

Name: Peggy Wheeler-Cribb

Title: Manager

STATE OF NEW JERSEY)

) ss.:

COUNTY OF BERGEN)

I certify that on _____, 2009, _____ personally came before me and this person acknowledged under oath, to my satisfaction, that he:

(a) executed the attached Loan and Security Agreement; and

(b) was authorized to and did execute the attached Loan and Security Agreement on behalf of and as _____ of Kennedy Funding, Inc., the entity named in this instrument, by virtue of authority granted by its bylaws and board of directors.

NOTARY PUBLIC

STATE OF)

) ss.:

COUNTY OF)

I certify that on April ____, 2009, Peggy Wheeler-Cribb came before me in person and stated to my satisfaction that she:

(a) made the attached instrument; and

(b) was authorized to and did execute this instrument on behalf of and as the Manager of Pawleys Island North, LLC, a South Carolina limited liability company (the "Company"), the entity named in this instrument, as the free act and deed of the Company, by virtue of the authority granted by its Operating Agreement and its members.

NOTARY PUBLIC

SCHEDULE A
DESCRIPTION OF THE COLLATERAL

31392/0000-5408836v24

A-1

KENNEDY_01030

SCHEDULE B

PRINCIPAL LOAN DOCUMENTS

1. Loan Commitment dated February 12, 2009;
2. Loan and Security Agreement dated as of the date hereof;
3. Promissory Note dated as of the date hereof;
4. Mortgage and Security Agreement dated as of the date hereof;
5. Document Re-Execution Agreement dated as of the date hereof;
6. Environmental Indemnity Agreement dated as of the date hereof;
7. Assignment of Leases and Rents dated as of the date hereof;
8. Assignment of Licenses, Contracts, Plans, Specifications, Surveys, Drawings and Reports dated as of the date hereof;
9. Guaranty dated as of the date hereof;
10. Loan Closing Statement dated as of the date hereof;
11. UCC-1 Financing Statements.

B-1

31392/0000-540836v34

KENNEDY_01031

SCHEDULE C
INTENTIONALLY OMITTED

31392/0000-5408836v34

C-1

KENNEDY_01032

SCHEDULE D

LENDERS

31392/0000-5408836v24

F-1

KENNEDY_01033

STATE OF SOUTH CAROLINA
 IN THE COURT OF COMMON PLEAS
 COUNTY OF GEORGETOWN
 CASE NO: 2011-CP-22-00180

KENNEDY FUNDING, INC., as	:
the predecessor-in-interest,	:
and BNP PARIBAS,	:
Plaintiffs,	:
	:
v.	:
	:
PAWLEYS ISLAND NORTH, LLC,	:
WILL DARWIN WHEELER, PEGGY	:
WHEELER-CRIBB and J. MARS	:
SAPP,	:
Defendants.	:

Transcript of the deposition of KEVIN
 WOLFER, called for Oral Examination in the
 above-captioned matter, said deposition taken by and
 before SILVIA P. WAGE, a Certified Shorthand
 Reporter, Certified Realtime Reporter, Registered
 Professional Reporter, and Notary Public for the
 State of New York, New Jersey, Pennsylvania and
 Delaware, at the offices of KENNEDY FUNDING, INC.,
 930 Sylvan Avenue, Suite 110, Englewood Cliffs, New
 Jersey, on Wednesday, September 12, 2012, commencing
 at 10:15 a.m.

HUDSON REPORTING & VIDEO, INC.

124 West 30th Street, 2nd Fl.

New York, New York 10001

Tel: 212-273-9911 Fax: 212-273-9915 JOB NO. 6652

New York
 Connecticut

Hudson Reporting & Video
 Nationwide 1-800-310-1769

New Jersey
 Pennsylvania

1 APPEARANCES:

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23 ALSO PRESENT:

24

25

NELSON MULLINS RILEY & SCARBOROUGH, LLP
 BY: ROBERT H. JORDAN, ESQ.
 151 Meeting Street, Sixth Floor
 PO Box 1806 (29402-1806)
 Charleston, South Carolina 29401-2239
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 Robert.jordan@nelsonmullins.com
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 Paribas
 (VIA TELEPHONE)

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 and Peggy Wheeler-Cribb
 (VIA TELEPHONE)

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New Jersey
 Pennsylvania

1 I N D E X

2	WITNESS: KEVIN WOLFER	PAGE
3	EXAMINATION BY MR. JORDAN	6/38
	EXAMINATION BY MR. GWINN	27/39
4	EXAMINATION BY MR. BUNCH	29

5

6 E X H I B I T S

7	PLAINTIFF'S	DESCRIPTION	ID	EV
8	1	Notice of 30(b)(6) Deposition of Kennedy Funding, Inc.	8	40
9	2	Assignment of Mortgage Assignment of Leases and Rents and Loan Documents Kennedy 01126 to 01134	23	40

10

11 EXHIBITS PREVIOUSLY MARKED

12	PLAINTIFF'S	DESCRIPTION	EVID
13	1	Closing Binder Kennedy_01135 to 01418	10
14	2	Documents Kennedy_00472 to 00504	41
15	3	e-mail chain Kennedy_00472 to 00475	41
	4	Documents Kennedy_01113 to 01125	41
16	5	Document Kennedy_01054	41
	6	Documents Kennedy_00950 to 01033	41

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New Jersey
Pennsylvania

1 - - -

2 DEPOSITION SUPPORT INDEX

3 - - -

4

5 Direction to Witness Not to Answer

6 Page Line Page Line Page Line Page Line

7 None

8

9

10 Request for Production of Documents

11 Page Line Page Line Page Line Page Line

12 None

13

14

15 Stipulations

16 Page Line Page Line Page Line Page Line

17 6 16 6 24

18

19

20 Question Marked

21 Page Line Page Line Page Line Page Line

22 None

23

24

25

New York
Connecticut

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New Jersey
Pennsylvania

1 K E V I N W O L F E R,

2 Kennedy Funding, Inc., 930 Sylvan Avenue,

3 Suite 110, Englewood Cliffs, New Jersey

4 07632, after having been duly sworn, was

5 examined and testified as follows:

6 MR. JORDAN: Has the witness been

7 sworn in?

8 THE STENOGRAPHER: Yes.

9 MR. BUNCH: I'm sorry. I didn't

10 catch the person's name who was there with

11 Mr. Wolfer. This is Tommy Bunch.

12 MR. DeFLORA: My name is Jordan

13 DeFlora and I am local counsel for Kennedy Funding.

14 MR. BUNCH: Okay.

15 MR. JORDAN: All right. Is everybody

16 ready?

17 MR. BUNCH: Yes.

18 MR. JORDAN: Okay. This is Robert

19 Jordan. I represent the Plaintiffs, Kennedy Funding

20 and BNP Paribas. We're here today to take a

21 30(b)(6) deposition of Kennedy Funding.

22 For the benefit of all, counsel and the

23 court reporter, Mr. Wolfer will be the designee for

24 Kennedy Funding and he was previously deposed in

25 January of this year. We are going to use the same

1 exhibits with some new ones, but we will use the
2 same exhibits we used in that same deposition and I
3 understand Mr. Wolfer brought those with him.

4 EXAMINATION BY MR. JORDAN:

5 Q. Is that correct Mr. Wolfer?

6 A. Yes.

7 MR. JORDAN: Okay. And I believe by
8 agreement of counsel, when exhibits are introduced,
9 this is not only -- we've already had what you would
10 call a discovery deposition. This is a trial
11 deposition. Mr. Wolfer will not be attending the
12 trial in person. So we have an agreement of counsel
13 that the documents we use today, as we go through
14 them, I think, will be admitted into evidence via
15 consent.

16 And when I introduce an exhibit, I will
17 confirm that consent on the record with each
18 exhibit. Is that agreeable to all counsel?

19 (There is a discussion off the record.)

20 MR. GWINN: Robert Gwinn for Pawleys
21 Island North and the Cribb's. I have no objection.

22 MR. BUNCH: Tommy Bunch on behalf of
23 Mr. Sapp. I do not object either.

24 MR. JORDAN: And we are also taking
25 this deposition pursuant to the South Carolina rules

1 of civil procedure and all objections except to the
2 form can be reserved and argued at a later date in
3 front of a presiding judge.

4 Is that agreeable to all counsel?

5 MR. GWINN: Again, Bob Gwinn. I have
6 no objection.

7 MR. BUNCH: And Tommy Bunch. I do
8 not object either.

9 BY MR. JORDAN:

10 Q. Okay. Mr. Wolfer, can you please
11 state your name.

12 A. Kevin Wolfer.

13 Q. And who do you work for?

14 A. Kennedy Funding.

15 Q. And what is your title?

16 A. President and CEO.

17 Q. As president and CEO, did you have
18 responsibility for reviewing and monitoring the loan
19 that is at issue in this lawsuit?

20 A. Yes.

21 Q. And that's a loan that was made to
22 Pawleys Island North, LLC; is that correct?

23 A. Yes.

24 Q. And you previously were deposed on
25 January the 12th, 2012 on this loan; is that

1 correct?

2 A. Yes.

3 Q. And you've since then had a chance to
4 review the loan and are familiar with the account;
5 is that correct?

6 A. Yes.

7 MR. JORDAN: For the court reporter,
8 we previously had the six exhibits in the first
9 deposition which should be in front of you. I have
10 one that will be -- I think I'll be adding.

11 At this time I'd like to make the 30(b)(6)
12 notice an exhibit. I guess we would call that
13 Exhibit 7.

14 (There is a discussion off the record.)

15 (Plaintiff's Exhibit No. 1, Notice of
16 30(b)(6) Deposition of Kennedy Funding, Inc., was
17 marked for identification.)

18 MR. JORDAN: Does the witness have
19 Plaintiff's Exhibit 1 in front of him?

20 A. Yes.

21 Q. Okay. Mr. Wolfer, this is the first
22 two pages of the notice that required you to be at
23 the deposition today.

24 If you will please turn to the third page.
25 It says "Exhibit A" at the top.

1 A. Yes.

2 Q. And there are four areas of inquiry
3 there that you're being called upon to testify about
4 today.

5 Have you had a chance to review this exhibit
6 before?

7 A. Yes.

8 Q. And are you knowledgeable about the
9 four areas of inquiry listed on this exhibit?

10 A. Yes.

11 Q. Okay. Do you have Exhibit 1 from the
12 first deposition in front of you?

13 A. Yes.

14 Q. And what is that?

15 A. That is the closing binder for the
16 loan.

17 MR. JORDAN: Okay. For the benefit
18 -- since we're on the phone, I'll also try to state
19 Bates Nos. for counsel.

20 Exhibit 1 from the first deposition, I
21 believe, is Kennedy Bates No. 01135 through Kennedy
22 01418.

23 MR. DeFLORA: Go to the last page.

24 MR. JORDAN: And I believe by consent
25 I'm going to move this exhibit into evidence.

1 Objections?

2 MR. GWINN: Bob Gwinn. I have no
3 objection.

4 MR. BUNCH: Tommy Bunch. No
5 objection.

6 (Exhibit previously marked Plaintiff's 1,
7 Closing Binder, is moved into evidence.)

8 Q. Mr. Wolfer, if you would, please,
9 turn to Bates No. 1141.

10 A. Yes.

11 Q. And what is that document?

12 A. Loan and Security Agreement.

13 Q. And what day was that loan agreement
14 signed?

15 MR. BUNCH: Tommy Bunch. I didn't
16 get the Bates No, please.

17 MR. JORDAN: It's 01141.

18 Q. And, to move this along, Mr. Wolfer,
19 the date of the agreement is on that page as well,
20 the bottom.

21 A. April 30th, 2009.

22 Q. And who was the lender on this loan?

23 A. Kennedy Funding, Inc., as agent for
24 the lenders.

25 Q. All right. And who was the borrower?

1 A. Pawleys Island North, LLC.

2 Q. And what was the amount of the loan?

3 A. \$960,000.

4 Q. And was there collateral pledged for

5 the loan?

6 A. Yes.

7 Q. What was the collateral?

8 A. Two lots in Pawleys Island.

9 Q. And I believe if you turn to Kennedy

10 001181 --

11 A. Yes.

12 Q. -- okay, is that the physical

13 description of the two lots?

14 A. Yes.

15 Q. Do you recall at the time the loan

16 was made the value of those lots?

17 A. It was, approximately, a million

18 900,000 dollars, approximately.

19 Q. Okay. And at the time the Loan and

20 Security Agreement was signed, I believe, a

21 promissory note was also signed; is that correct?

22 A. Yes.

23 Q. If you turn to 01185.

24 A. (The witness complies.)

25 Q. Is that the promissory note signed in

- 1 conjunction with this loan agreement?
- 2 A. Yes.
- 3 Q. And how much is the amount of the
- 4 note?
- 5 A. \$960,000.
- 6 Q. And who was the borrower?
- 7 A. Pawleys Island North, LLC.
- 8 Q. I believe, also, in conjunction with
- 9 this loan and note, a mortgage agreement was signed;
- 10 is that correct?
- 11 A. Yes.
- 12 Q. If you turn to 01193.
- 13 A. Yes.
- 14 Q. Is that the Mortgage and Security
- 15 Agreement?
- 16 A. Yes.
- 17 Q. And is the -- well, again, tell me
- 18 who the mortgagor was.
- 19 A. Sure, Pawleys Island North, LLC.
- 20 Q. And the mortgagee?
- 21 A. Kennedy Funding, Inc.
- 22 Q. And the two lots whose physical
- 23 description that we just looked at, were those the
- 24 lots pledged in support of this mortgage?
- 25 A. Yes.

1 Q. I believe there was also a Guaranty
2 Agreement signed in conjunction with this loan and
3 mortgage; is that correct?

4 A. Yes.

5 Q. And if you'll turn to 01267.

6 A. Yes.

7 Q. Okay. Is that the Guaranty
8 Agreement?

9 A. Yes.

10 Q. And the amount of that guaranty is
11 \$960,000 and it was also signed on April 30th, 2009;
12 is that correct?

13 A. Yes.

14 Q. Would you please turn to 01276, which
15 is the signature page.

16 A. Okay.

17 Q. Who are the guarantors on this
18 Guaranty Agreement?

19 A. Peggy Wheeler-Cribb and Will Darwin
20 Wheeler.

21 Q. And they personally guarantied the
22 full amount of the loan; is that correct?

23 A. Yes.

24 Q. Will you please turn to
25 Document 01257.

1 A. The Assignment of Leases and Rent?

2 Q. Right?

3 In conjunction with this loan and mortgage
4 that we just reviewed, did the borrower also assign
5 leases and rents to Kennedy Funding as agent through
6 the lenders?

7 A. Yes.

8 Q. And I'll have you look at two more
9 documents. The next one would be 01290, so that's
10 1290.

11 A. Okay. Assignment of Licenses,
12 Contracts, Plans, Specifications, Surveys, Drawings
13 and Reports.

14 Q. And it states that this was executed
15 the same day as the loan and mortgage and then the
16 borrower, Pawleys Island North, made this assignment
17 to Kennedy Funding?

18 A. Yes.

19 Q. And the final document I want you to
20 look at in this closing binder for now is
21 Document 1246.

22 A. Okay, UCC Financing Statement.

23 Q. Did the borrower, likewise, give
24 Kennedy Funding a financing statement in conjunction
25 with this loan and mortgage?

1 A. Yes.

2 Q. Okay. Prior to closing this loan,
3 did Kennedy Funding have a title search performed?

4 A. Yes.

5 Q. Did the search reflect any existing
6 liens by J. Mars Sapp or any entity related to J.
7 Mars Sapp?

8 A. I leave that up to our attorneys,
9 both our outside attorneys and in-house attorneys.

10 So -- but, no, there were no, obviously, superior
11 liens or liens that I was made aware of, or they
12 would have made me aware of that.

13 Q. So when it comes to obtaining --
14 doing the title work and, I guess, ultimately,
15 obtaining title insurance, you rely on the advice of
16 counsel; is that correct?

17 A. Yes.

18 Q. Okay. Would you turn to Document No.
19 1366, please.

20 A. Yes.

21 Q. And this is a Proforma Loan Policy of
22 Title Insurance issued by Chicago Title and I
23 believe it's for the title which is the subject of
24 this loan; is that your understanding?

25 A. Yes.

1 Q. Is it further your understanding that
2 Kennedy Funding obtained title insurance for this
3 closing?

4 A. Absolutely, yes.

5 Q. Finally, I'm going to ask you to look
6 at Document No. 1396.

7 A. Okay.

8 Q. Actually, back up to 1394.

9 A. (The witness complies.)

10 Q. Are you there?

11 A. Just one second, I'll be right there.

12 Q. Okay.

13 A. Yes, I have it.

14 Q. Okay. This is a letter from Mr.
15 Gwinn, who is on the phone today.

16 And do you know what this letter is?

17 A. Yes.

18 Q. What is it?

19 A. It's an opinion letter.

20 Q. And did it further state that
21 Mr. Gwinn was representing the borrowers in this
22 transaction?

23 A. Yes.

24 Q. And did Kennedy Funding require a
25 letter from Mr. Gwinn or counsel representing the

1 borrowers affirming certain facts about the loan?

2 A. Yes.

3 MR. BUNCH: What's the Bates No, I'm
4 sorry?

5 MR. JORDAN: It starts, Tommy, at
6 1394.

7 MR. BUNCH: All right, I'll try to
8 pay closer attention. My apologies.

9 MR. JORDAN: That's okay.

10 MR. BUNCH: It's hard to keep up with
11 all the numbers.

12 MR. JORDAN: I understand.

13 Q. Okay. If you'll flip to 1395, Mr.
14 Wolfer.

15 A. Yes.

16 Q. And this document already has been
17 admitted into evidence. The Court can review it on
18 its own.

19 But I would just like you to go ahead and
20 publish or read Paragraph 9. Can you read that into
21 the record, please.

22 A. Yes. "There is no action, suit
23 proceeding or investigation at law or in equity by
24 or before any court, governmental instrumentality or
25 other agency now pending or to the best of our

1 knowledge threatened against the borrower or the
2 guarantors or any of the borrowers' or the
3 guarantors' properties or rights which if determined
4 adversely to the borrower or the guarantors would
5 impair or materially affect (i) such entities' right
6 to carry on its business substantially as now
7 conducted, (ii) the value of the collateral securing
8 the loan documents, (iii) such entities' ability to
9 carry out its obligations under the loan documents
10 to which it is a party or (iiii) the validity or
11 enforceability of each of the loan documents
12 executed by the borrower or the guarantors. Neither
13 borrower nor guarantors are in default with respect
14 to any order, judgment, writ, injunction, decree or
15 demand of any court or governmental authority."

16 Q. Thank you.

17 Obviously, there are a lot of other
18 paragraphs in this opinion letter from borrower's
19 counsel, 20 to be exact.

20 Would Kennedy Funding have closed had
21 borrower's counsel not provided this letter?

22 A. No.

23 Q. Would Kennedy Funding had closed if
24 it had not obtained title insurance on this loan?

25 A. No.

1 Q. Moving forward, the loan closed on
2 April 30th, 2009.

3 Did the loan ultimately go into default?

4 A. Yes.

5 Q. And what was the basis for the
6 default?

7 A. Failure to make monthly interest
8 payments.

9 Q. And did Kennedy Funding call the note
10 and the mortgage?

11 A. Yes.

12 Q. And, ultimately, Kennedy Funding
13 brought suit to foreclose on the mortgage and to
14 take a judgment on the guaranties; is that correct?

15 A. Yes.

16 Q. Okay. At anytime after the closing
17 of this transaction, did Kennedy Funding enter into
18 any written amendments to the loan documents?

19 A. No.

20 Q. When I say, "the loan documents," to
21 be clear, I'm primarily referring to the loan, the
22 promissory note, the mortgage and the personal
23 guaranties; is that clear?

24 A. That is clear.

25 Q. And, to the best of your knowledge,

1 did Kennedy Funding amend in writing any of those
2 agreements?

3 A. No.

4 Q. What about the guaranty agreement, is
5 it in default?

6 A. Yes.

7 Q. And, again, this might be repetitive.

8 But was there any written amendment after
9 the closing of this loan or the signing of the
10 guaranty agreement to the guaranty agreement?

11 A. No.

12 Q. After the closing, did Kennedy
13 Funding or anyone on its behalf agree orally with
14 the Wheeler's or Pawleys Island North to relieve or
15 forgive any of the obligations under the loan
16 document?

17 A. No.

18 Q. Any agreement written or oral to
19 relieve the personal guaranty agreement?

20 A. No.

21 Q. I believe in your first deposition we
22 looked at what was then the original complaint.

23 For your benefit, I will tell you it was
24 filed on February the 9th of 2011.

25 Did Kennedy Funding authorize my law firm to

1 file suit to foreclose on the real property at issue
2 in this loan?

3 A. Yes.

4 Q. And at the time we filed suit, the
5 principal amount of 960,000 was due under the loan;
6 is that correct?

7 A. Yes, correct.

8 Q. At that time we stated and it was
9 verified by Kennedy Funding that 172,000 in interest
10 in fees had accrued; is that correct?

11 A. Yes.

12 Q. Had borrowers made any payments --
13 borrowers or guarantors made any payments on the
14 loan since suit filed?

15 A. No.

16 Q. And, in that suit, Kennedy Funding
17 requested the Court foreclose on the real property;
18 is that correct?

19 A. Yes.

20 Q. And Kennedy Funding further was
21 seeking a deficiency judgment, if any, against the
22 guarantors based on the personal guaranties; is that
23 correct?

24 A. Yes.

25 Q. And, finally, it's your understanding

1 that Kennedy Funding under the loan documents is
2 also seeking to recover its fees and costs
3 associated with pursuing this action?

4 A. Yes.

5 Q. Now, is Kennedy Funding still the
6 agent for the co-lenders on this loan?

7 A. No.

8 Q. Okay. I'd like to show you -- it's
9 Bates labeled Document 01126 and it's an assignment
10 agreement with BNP Paribas.

11 Do you have that in front of you?

12 A. Just give us a moment; 01126.

13 MR. DeFLORA: Was this previously
14 marked, Robert?

15 MR. JORDAN: This was not. This
16 would be the one new exhibit other than the
17 deposition notice that I'm introducing.

18 (There is a discussion off the record.)

19 A. I apologize. We don't have that in
20 front of us. One second.

21 MR. DeFLORA: I may have to recopy
22 it.

23 MR. JORDAN: Let's go off the record.

24 MR. DeFLORA: Okay.

25 (Recess taken 10:36 to 10:41 a.m.)

1 (Plaintiff's Exhibit No. 2, Assignment of
2 Mortgage Assignment of Leases and Rents and Loan
3 Documents Kennedy 01126 to 01134, was marked for
4 identification.)

5 Q. Okay. Mr. Wolfer, when we broke, I
6 asked you whether or not Kennedy Funding was still
7 the agent for the lenders on this loan and you
8 answered, I believe, I think that Kennedy Funding
9 was no longer the lender; is that correct?

10 A. Correct.

11 Q. Was this loan assigned?

12 A. Yes.

13 Q. And we're looking now at Plaintiff's
14 Exhibit 2:

15 Is this the assignment agreement that
16 assigned all rights, interests and obligations to
17 this loan from Kennedy Funding to BNP Paribas?

18 A. Yes.

19 Q. And I believe we have a date on this
20 agreement.

21 A. Yes, November 10th, 2011.

22 Q. Okay. Is it your understanding as
23 president and CEO of Kennedy Funding that Kennedy
24 Funding no longer has any rights or obligations
25 under these loan documents and those are all now

1 properly assigned to BNP Paribas?

2 A. Yes.

3 Q. I want to go back, if you could --

4 this was marked as Exhibit 2 in your original

5 deposition and it starts at Kennedy 00497.

6 A. I have it in front of me.

7 Q. Okay. If you flip to the next page,

8 00498, you'll see a letter there that you wrote; is

9 that your signature?

10 A. Yes.

11 Q. And you've written it to Miss Peggy

12 Wheeler-Cribb; is that correct?

13 A. Yes.

14 Q. I believe following that letter or

15 probably it was attached to it was the appraisal

16 done in conjunction with this loan; is that correct?

17 A. Yes.

18 Q. And now looking at this letter and

19 seeing the appraisal, is it your recollection that

20 the two lots appraised prior to the closing at

21 \$1,920,000?

22 A. Yes.

23 Q. And you, obviously, loaned \$960,000;

24 is that correct?

25 A. Yes.

1 Q. I went to law school because math was
2 not involved.

3 I believe that's exactly 50 percent --

4 A. Exactly.

5 Q. -- appraised value; is that correct?

6 A. Yes.

7 Q. So, in your industry, is that a loan
8 to value ratio of 50 percent?

9 A. Yes.

10 Q. And, I mean, would this be considered
11 a risky loan at that ratio, in your industry?

12 A. It should not be.

13 Q. If there was still \$960,000 of equity
14 in the property, is that correct?

15 A. Yes.

16 Q. And I also wanted to ask you, if you
17 could, to flip back to the beginning of Exhibit 1,
18 the closing binder, on Page 1138 and 1139.

19 A. Yes.

20 Q. All right. This is the loan closing
21 statement, correct?

22 A. Yes.

23 Q. And this reflects the amount of money
24 disbursed by Kennedy Funding, which was \$960,000; is
25 that correct?

1 A. Yes.

2 Q. And that it shows all of the
3 disbursements to various parties for the usual loan
4 fees and costs.

5 I draw your attention to Paragraph L. Do
6 you see that?

7 A. Yes.

8 Q. And that's a \$300,000 payment to
9 First South Bank for a mortgage payoff.

10 Is it your understanding that you were
11 paying off a lien on one of the lots?

12 A. Yes.

13 Q. Post-closing did Kennedy Funding
14 receive any -- to the best of your knowledge --
15 receive any rebates or money back out of this loan
16 closing?

17 A. No.

18 Q. Okay. Mr. Wolfer, those are all the
19 question I have at this time.

20 I'm going to open it up to the other counsel
21 to ask any questions if they want to.

22 A. Okay.

23 MR. BUNCH: Bob, do you have any
24 questions?

25 MR. GWINN: Yes, I do, Tom. Do you

1 want me to go first?

2 MR. BUNCH: If you want to, feel
3 free.

4 EXAMINATION BY MR. GWINN:

5 Q. Mr. Wolfer, this is Bob Gwinn. I
6 represent Pawleys Island North, LLC, Peggy
7 Wheeler-Cribb and Will Darwin Wheeler.

8 How are you doing this morning?

9 A. Fine. How are you?

10 Q. Fine.

11 During your testimony, you indicated that
12 this loan was secured by two lots in Pawleys Island;
13 is that correct?

14 A. Yes.

15 Q. For purposes -- do you recall an
16 abbreviated description of these lots being Lots 3
17 and 4?

18 A. Yes.

19 Q. Okay. Do you mind if I refer to them
20 as Lots 3 and 4 in some of my questions?

21 A. I do not mind at all.

22 Q. Okay. During the time that you were
23 underwriting this loan, were you aware that Lots 3
24 and 4, prior to the closing, were titled in the name
25 of Will Wheeler?

1 A. I leave that up to our attorneys,
2 both our outside attorneys and in-house attorneys.
3 So I don't recall, exactly.

4 Q. Do you recall whether or not it was a
5 requirement of Kennedy Funding that Lots 3 and 4 be
6 in the name of Pawleys Island North, LLC, as a
7 condition of the loan?

8 A. Yes, yes, I do recall that. And,
9 yes, we did require that.

10 Q. Okay. Were you aware that Pawleys
11 Island North, LLC, was a newly formed limited
12 liability company?

13 A. Yes.

14 Q. Were you also aware that Will Wheeler
15 owned 99 percent -- had a 99 percent membership
16 interest in Pawleys Island North, LLC?

17 A. I don't recall if and when I became
18 aware of that. But, again, I leave that up to my
19 attorneys.

20 Q. In the loan approval process of this
21 loan, did you rely primarily on the credit history
22 of Will Wheeler?

23 A. No.

24 Q. In the underwriting of this loan,
25 were you aware that Will Wheeler also owned Lots 1

1 and 2 in that same subdivision?

2 A. I don't recall.

3 Q. Did you require a financial statement
4 on Will Wheeler in doing the loan underwriting?

5 A. I believe so, yes.

6 Q. Do you recall what Mr. Wheeler's net
7 worth was at the time that this loan was being
8 underwritten?

9 A. I do not recall.

10 Q. And were you aware of the litigation
11 of Mr. Sapp against Mr. Will Wheeler at the time
12 this loan was made?

13 A. I don't recall if I was aware of it.
14 at the time. Again, we leave that to our outside
15 attorneys and in-house attorneys.

16 Q. That's all the questions I have.

17 EXAMINATION BY MR. BUNCH:

18 Q. Mr. Wolfer, I'm Tommy Bunch. I had
19 some questions for you several months ago in your
20 previous 30(b)(6) deposition.

21 A. Yes.

22 Q. I represent Mars Sapp. Do you recall
23 that?

24 A. Yes.

25 Q. Let me refer you back to the document

1 you were just looking at when Mr. Jordan was asking
2 you questions and that's the loan closing statement
3 at Bates Nos. Kennedy 1138 and 1139.

4 A. I have it in front of me.

5 Q. Okay. Out of that loan closing
6 statement, you actually paid yourself \$185,000?
7 "You" being Kennedy Funding.

8 A. Yes.

9 Q. Okay. You paid a bunch of other
10 vendors, appraisers, title insurance, First South
11 Bank, a bunch of other people, somewhere -- what,
12 300 something thousand dollars?

13 A. Yes, correct.

14 Q. Okay. And out of that loan,
15 \$960,000, it appears that Pawleys Island North, LLC,
16 received a total sum of \$397,438.50?

17 A. Yes.

18 Q. Did they receive anything else?

19 A. Not that I'm aware of.

20 Q. Let me ask you -- let's go back to
21 what was Exhibit No. 1 in the first deposition. I
22 think you should have it there in front of you, Page
23 1394, Mr. Gwinn's letter.

24 A. Okay, wait. I'm sorry, one second.

25 Exhibit 1?

1 MR. DeFLORA: Exhibit 1 is the
2 closing binder.

3 MR. BUNCH: Right, the closing binder
4 and Kennedy Bates label 1394.

5 A. Okay. Give me one second.

6 I have it in front of me, yes.

7 Q. Okay. This is the letter from
8 Mr. Gwinn, his opinion letter; is that right?

9 A. Yes.

10 Q. Okay. And, typically, what you all
11 do is provide that opinion letter to the borrower's
12 counsel; is that right?

13 A. No, not necessarily. I don't know.
14 I leave it up to our attorneys.

15 Q. Okay.

16 A. But it all depends. Some attorneys
17 have their own form and, you know, again, I leave
18 that to the attorneys to decide.

19 Q. Okay. But if the closing binder
20 indicated that, in fact, this form was provided to
21 counsel, you wouldn't disagree with that; is that
22 right?

23 A. Correct.

24 Q. And you got title insurance on this
25 loan?

1 A. Yes.

2 Q. So if the Court would, ultimately,
3 determine that Mr. Sapp had some sort of priority,
4 he would be able to make a claim on your lender's
5 title policy?

6 MR. JORDAN: Objection to the form.
7 This is Mr. Jordan.

8 You can answer.

9 A. I guess -- I mean, that's a legal
10 question, I think, but I mean...

11 Q. Well, have you ever made a title
12 insurance claim before?

13 A. Has Kennedy Funding ever, yes, we
14 have.

15 Q. Okay. And the purpose of the title
16 insurance is to make sure -- the lender's policy is
17 to make sure you have priority as to your position
18 on the property; is that right?

19 A. Yes.

20 MR. JORDAN: Object to form.

21 You can answer.

22 THE WITNESS: Sorry.

23 A. I believe so, yes.

24 Q. Okay. So it's your position it's not
25 where you thought you would be, you may have a claim

1 on the title policy; is that right?

2 MR. JORDAN: Same objection.

3 A. Yes, we may.

4 Q. Okay. And, as to this loan, you
5 think -- Kennedy Funding thought it would be in a
6 first position?

7 A. Yes.

8 Q. Okay. So, if you're not in a first
9 position, you may have a first position in terms of
10 a lien priority, you may have a claim on the title
11 insurance policy; is that right?

12 A. Yes.

13 MR. JORDAN: Same objection.

14 THE WITNESS: Oh, sorry.

15 A. Yes.

16 Q. Did you answer yes, Mr. Wolfer?

17 A. Yes.

18 Q. If you would, Mr. Wolfer, refer
19 please to the previous Deposition Exhibit No. 4.

20 A. Okay, I have it in front of me.

21 Q. All right. If you would go to the
22 page that's Bates labeled Kennedy 01118 and 01119.

23 A. Okay.

24 Q. All right. If you remember at the
25 previous deposition, we discussed Item 18 on Page

1 01118, that Kennedy Funding had caused some sort of
2 search of the public records of the borrower and the
3 guarantors; is that right?

4 A. Yes.

5 Q. All right. And at the bottom of Page
6 Kennedy 01119, it indicated that Kennedy Funding was
7 to be provided an e-mail status of litigation
8 against Mr. Wheeler; is that right?

9 A. Yes.

10 Q. All right. Now, let's also refer to
11 Exhibit No. 5, the first page of that exhibit from
12 the previous deposition. Exhibit 5 is Kennedy
13 01053.

14 A. Yes.

15 Q. All right. And that's from your
16 lawyer, Mr. Roger Iorio with Cole Schotz; is that
17 right, that e-mail?

18 A. Yes.

19 Q. It's addressed to Mr. Gwinn?

20 A. Yes.

21 Q. All right. It's dated April
22 the 29th --

23 A. Yes.

24 Q. -- of 2009; is that right?

25 A. Yes.

1 Q. Okay. And that predated the closing
2 of April 30th; is that right?

3 A. Yes.

4 Q. All right. And, also, Exhibit 4
5 predated the closing by two days, at least, the
6 preliminary closing checklist in Exhibit 4 was
7 provided April the 28th?

8 A. Yes.

9 Q. All right. And you can see that you
10 received a copy -- on Kennedy 01113, Exhibit No. 4,
11 is that you, Mr. Wolfer, getting a copy of that
12 e-mail?

13 A. It appears so, yes.

14 Q. Okay. So, prior to closing, your
15 company and your lawyers were on notice that there
16 was litigation pending against Mr. Sapp?

17 A. Yes.

18 Q. All right. What response did Kennedy
19 Funding get from Mr. Gwinn as to the status of that
20 litigation?

21 A. I do not know. Again, our attorneys
22 would handle that. But I do not know what the
23 response was.

24 Q. To your knowledge, did you receive
25 any response?

1 A. I do not know. All I know is our
2 attorneys said everything was clean and clear to go
3 to close and our attorneys --

4 Q. Where does your attorney say
5 everything was clear and clean to go to close?

6 A. I don't know where it stated it in an
7 e-mail. But I know each and every loan closing, we
8 do not close unless our attorney gives us the green
9 light that everything is clean and clear.

10 Q. And you got a title insurance policy?

11 A. Correct.

12 Q. So you don't know what response was
13 received, if any, as to the status of the litigation
14 pending against Mr. Wheeler?

15 A. I do not.

16 Q. You just know that, in fact, the
17 company knew about it ahead of time and went ahead
18 with the closing?

19 A. Again, our attorneys would handle it.
20 So our attorneys must have gotten comfortable with
21 whatever was received or discussed or whatever.
22 But, again, I didn't deal with that.

23 Q. Okay. But you knew prior to closing
24 that litigation was pending and you closed the loan
25 with that knowledge?

1 A. Again, our attorneys make that
2 decision as to whether or not that's an issue and I
3 don't know what response they received. All I know
4 is that they informed us that we're clear to close.

5 Q. Okay. I'm not asking when you made
6 the decision.

7 I'm just seeking to confirm what I think
8 you've already testified to, that you and your
9 attorneys knew of the pending litigation and elected
10 to proceed with closing; is that right?

11 A. Correct. But, again, I don't know if
12 that litigation was resolved or not. I have no
13 idea.

14 Q. Right. Do you know that it went to a
15 jury verdict against Mr. Sapp -- I mean, I'm sorry,
16 against Mr. Wheeler, don't you?

17 A. No.

18 Q. Okay. Well, the public records would
19 show that.

20 No further questions.

21 MR. JORDAN: Bob, this is Rob. Do
22 you have any questions?

23 MR. GWINN: I have no follow-up.

24 MR. JORDAN: I'm sorry?

25 MR. GWINN: No, sir, I have no

1 questions.

2 MR. JORDAN: I've got two or three.

3 This is Mr. Jordan.

4 EXAMINATION BY MR. JORDAN:

5 Q. Mr. Wolfer, you've just been asked
6 questions about what I'll call the Sapp litigation,
7 which is Mr. Bunch's client in a suit that he had
8 against Mr. Wheeler and an unrelated LLC. Do you
9 understand that?

10 A. Yes.

11 Q. And, prior to closing, did the
12 Wheeler's ever discuss with you or, to your
13 knowledge, anyone at Kennedy Funding concern that
14 the Sapp litigation might render the Wheeler's
15 personally insolvent?

16 MR. BUNCH: Objection to the form.

17 A. No, not at all.

18 Q. Did the Wheeler's discuss with you or
19 anyone at Kennedy Funding that the Sapp litigation
20 may impact their ability to pay back this loan?

21 A. Not at all.

22 MR. BUNCH: Objection to form.

23 Q. Did the Wheeler's discuss with you or
24 anyone at Kennedy Funding what I would call a scheme
25 to hide assets from Mr. Sapp or any other creditor?

1 A. Not at all.

2 MR. BUNCH: Object to form.

3 I'm going to continue to object to leading
4 questions along those lines.

5 A. Not at all.

6 Q. All right. That's all the questions
7 I have.

8 MR. JORDAN: Anybody else?

9 MR. BUNCH: Not for Mr. Sapp.

10 EXAMINATION BY MR. GWINN:

11 Q. Mr. Wolfer, on those same lines, did
12 you have any discussions with either of the
13 Wheeler's or anyone on behalf of Pawleys Island
14 North that making this loan would have rendered them
15 insolvent?

16 MR. BUNCH: Object to the form.

17 A. Would you repeat the question,
18 please?

19 Q. Did you have any discussions with
20 Mr. Wheeler, Miss Wheeler-Cribb or anyone on behalf
21 of Pawleys Island North that either the transfer of
22 the properties to Pawleys Island North or the
23 mortgage made by Kennedy Funding would render
24 Pawleys Island North or any of the guarantors
25 insolvent?

1 A. No, not at all.

2 MR. BUNCH: Object to the form.

3 Q. Did you have any discussions with
4 anyone on behalf of Pawleys Island North or any of
5 the guarantors that this -- the making of this loan
6 would be or impair their ability to pay any
7 prospective judgment in the Mars Sapp litigation?

8 MR. BUNCH: Object to the form.

9 A. No, not at all.

10 Q. And that's all the questions I have.

11 MR. JORDAN: Nothing further for
12 Mr. Jordan.

13 MR. BUNCH: Nothing further from me
14 on behalf of Mr. Sapp.

15 MR. JORDAN: Okay. I believe that we
16 are finished then.

17 (There is a discussion off the record.)

18 MR. JORDAN: I moved Exhibit 1 from
19 the first deposition.

20 I'd also like to move Plaintiff's 1 and
21 Plaintiff's 2, which I introduced into evidence
22 without objection, I believe; is that correct,
23 counsel?

24 (Plaintiff's Exhibit 1 and Plaintiff's
25 Exhibit 2 are moved into evidence.)

1 MR. BUNCH: I thought all exhibits
2 from the prior deposition were into evidence based
3 on your statement earlier.

4 MR. GWINN: And that's what my
5 understanding was, that all of them would be.

6 MR. JORDAN: That's fine. I knew one
7 of them I actually said it.

8 But, on behalf of the Plaintiff's, we agree
9 that all exhibits from the first deposition and the
10 second deposition taken today are admitted into
11 evidence without objection.

12 (Exhibits previously marked Plaintiff's 2
13 through Plaintiff's 6 are moved into evidence.)

14 (There is a discussion off the record.)

15 MR. JORDAN: This is Mr. Jordan. I
16 would like to order a copy of the transcript,
17 please, with exhibits.

18 MR. GWINN: This is Mr. Gwinn. I
19 would like to order a copy of the transcript, also.

20 MR. BUNCH: And this is Tommy Bunch.
21 I would like an electronic version of the
22 transcript. I don't think I need the exhibits.

23 THE STENOGRAPHER: Thank you.

24 MR. JORDAN: For counsel, on the
25 record, typically, in South Carolina, we -- the

1 party taking the deposition receives the original.

2 Madam Court Reporter, would you send me the
3 original, or do you keep the original in New York?

4 THE STENOGRAPHER: No, I will send it
5 to you.

6 MR. JORDAN: Okay. So I will receive
7 the original.

8 And we currently have a trial date of
9 September 24th. Do you anticipate a problem getting
10 the deposition to us by next Wednesday or Thursday?

11 THE STENOGRAPHER: No, that shouldn't
12 be a problem.

13 MR. JORDAN: Okay, thank you.

14 (Time noted: 11:02 a.m.)

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1 C E R T I F I C A T E

2

3 I, SILVIA P. WAGE, a Certified Court
4 Reporter, Certified Realtime Reporter, Registered
5 Professional Reporter and Notary Public do hereby
6 certify that, pursuant to notice, the deposition of
7 KEVIN WOLFER, was duly taken at the offices of
8 KENNEDY FUNDING, INC., 930 Sylvan Avenue, Suite 110,
9 Englewood Cliffs, New Jersey, on Wednesday,
10 September 12, 2012, commencing at 10:15 a.m. before
11 me.

12 Said witness was first duly sworn by me
13 according to law to tell the truth, the whole truth
14 and nothing but the truth and thereupon did testify
15 as set forth in the above transcript of testimony.
16 The testimony was taken down stenographically by me.

17 I do further certify that the above
18 deposition is full, complete and a true record of
19 all the testimony given by the said witness.

20

21

22

23

24 SILVIA P. WAGE, a Certified Court
Reporter, Certified Realtime Reporter,
Registered Professional Reporter and Notary
Public
25 Dated: September 13, 2012

New York
Connecticut

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New Jersey
Pennsylvania

INSTRUCTIONS TO WITNESS

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Please read your deposition over carefully
and make any necessary corrections. You should
state the reason in the appropriate space on the
errata sheet for any corrections that are made.

After doing so, please sign the errata sheet
and date it.

You are signing same subject to the changes
you have noted on the errata sheet, which will be
attached to your deposition.

It is imperative that you return the
original errata sheet to the deposing attorney
within thirty (30) days of receipt of the deposition
transcript by you. If you fail to do so, the
deposition transcript may be deemed to be accurate
and may be used in court.

ACKNOWLEDGMENT OF DEPONENT

I, _____, do hereby certify that I have read the foregoing pages, 1 - 42 PGS, and that the same is a correct transcription of the answers given by me to the questions therein propounded, except for the corrections or changes in form or substance, if any, noted in the attached Errata Sheet.

KEVIN WOLFER

DATE _____

Subscribed and sworn
to before me this

_____ day of _____, 20____.

My commission expires:

Notary Public

1 ERRATA SHEET FOR THE TRANSCRIPT OF:

2 Case Name: KENNEDY FUNDING, et al., v. PAWLEYS
3 ISLAND NORTH, LLC, et als.

4 Dep. Date: SEPTEMBER 12, 2012

5 Deponent: KEVIN WOLFER

6

7 PAGE LINE CHANGE

8 _____

9 REASON: _____

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11 REASON: _____

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Exhibits

Page 1

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN
CASE NO: 2011-CP-22-00180

KENNEDY FUNDING, INC., as :
the predecessor-in-interest, :
and BNP PARIBAS, :
Plaintiffs, :
v. :
PAWLEYS ISLAND NORTH, LLC, :
WILL DARWIN WHEELER, PEGGY :
WHEELER-CRIBB and J. MARS :
SAPP, :
Defendants. :

Transcript of the deposition of KEVIN
WOLFER, called for Oral Examination in the
above-captioned matter, said deposition taken by and
before SILVIA P. WAGE, a Certified Shorthand
Reporter, Certified Realtime Reporter, Registered
Professional Reporter, and Notary Public for the
State of New York, New Jersey, Pennsylvania and
Delaware, at the offices of KENNEDY FUNDING, INC.,
930 Sylvan Avenue, Suite 110, Englewood Cliffs, New
Jersey, on Wednesday, September 12, 2012, commencing
at 10:15 a.m.

HUDSON REPORTING & VIDEO, INC.

124 West 30th Street, 2nd Fl.

New York, New York 10001

Tel: 212-273-9911 Fax: 212-273-9915 JOB NO. 6652

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EXHIBIT 1

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF GEORGETOWN) Civil Action No. 2011-CP-22-00180

Kennedy Funding, Inc.,)
)
) Plaintiff,)

vs.)

Pawleys Island North, LLC, Will)
Darwin Wheeler, Peggy Wheeler-Cribb)
and J. Mars Sapp,)
) Defendants.)

NOTICE OF 30(b)(6) DEPOSITION
OF KENNEDY FUNDING, INC.

TO: THOMAS W. BUNCH, II, ESQ. AND ROBERT H. GWIN, III

Please take notice that, pursuant to Rule 30(b)(6) of the South Carolina Rules of Civil Procedure, the undersigned attorneys, on behalf of plaintiff Kennedy Funding, Inc. will take the oral deposition of a representative of Kennedy Funding, Inc. from among the officers, directors, managing agents, or such other persons who consent to testify on its behalf regarding the topics identified in Exhibit A, attached hereto. The deposition shall take place via telephone on Wednesday, September 12, 2012, beginning at 10:00 a.m., at the offices Kennedy Funding, Inc., 930 Sylvan Avenue, Suite 110, Englewood Cliffs, New Jersey.

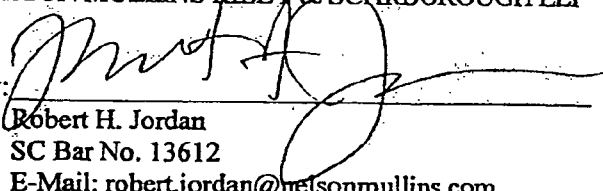
The deposition will be taken before a certified court reporter by stenographic means and shall continue from day to day until adjourned.

You are invited to attend as is fit and proper.

[SIGNATURE BLOCK ON FOLLOWING PAGE]



NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Robert H. Jordan

SC Bar No. 13612

E-Mail: robert.jordan@nelsonmullins.com

151 Meeting Street / Sixth Floor

Post Office Box 1806 (29402-1806)

Charleston, SC 29401-2239

(843) 853-5200

Attorneys for Plaintiff

Charleston, South Carolina

8/31, 2012

EXHIBIT A

1. All matters related to the underwriting, servicing, and account history of the mortgage and note at issue in this case from Kennedy Funding to Pawley's Island North, LLC (and any previous applicant offering any property for security owned by Pawley's Island North or any other Defendant), including, but not limited to, Borrowers' default under the terms of the mortgage and note and all amounts owed pursuant to the default.
2. All matters related to the personal guarantees given by Will Darwin Wheeler and Peggy Wheeler-Cribb, in connection with the mortgage and note.
3. All communications between any Defendant and all of their agent and representatives, and Kennedy Funding and all of its agents and representatives related to the matters at issue in the case.
4. The holder of the Note and Mortgage at issue in this case, any conveyance or assignment thereof, and all communications regarding the conveyance by and between Kennedy Funding and the transferee or assignee

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for BNP Paribas, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by sending a copy of the same by electronic mail and United States Mail, postage prepaid, to the following address(es):

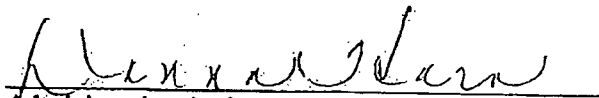
Pleadings:

NOTICE OF 30(b)(6) DEPOSITION OF KENNEDY FUNDING, INC.

Counsel Served:

Thomas W. Bunch, II, Esq.
Robinson, McFadden & Moore, P.C.
PO Box 944
Columbia, SC 29201

Robert H. Gwinn, III, Esq.
Gwinn Law Office, LLC
4701-A Oleander Drive
Myrtle Beach, SC 29577



Administrative Assistant

Aug 31, 2012

EXHIBIT 2



This Instrument prepared by
and after recording return to:

Richard Favata
Hughes Hubbard & Reed LLP
1 Battery Park Plaza
New York, NY 10004

COPY

201100011899
Filed for Record in
GEORGETOWN SC
WANDA PREVATTE, REGISTER OF DEEDS
11-29-2011 At 11:21:11 AM.
ASSIGNMENT 14.00
Book 1794 Page 184 - 192

**ASSIGNMENT OF MORTGAGE, ASSIGNMENT OF LEASES AND RENTS AND
LOAN DOCUMENTS**

Pursuant to this Assignment of Mortgage, Assignment of Leases and Rents and Loan Documents (this "Assignment") the undersigned, KENNEDY FUNDING, INC. a New Jersey corporation (the "Agent"), for good and valuable consideration, the receipt of which is hereby acknowledged, does hereby ASSIGN, REMISE, RELEASE, CONVEY, GRANT, TRANSFER AND DELIVER unto BNP PARIBAS, as agent on behalf of certain co-lenders, with an address at 787 Seventh Avenue, New York, New York (Attn: Harry Nullet) ("Assignee"), all the right, title, interest, claim or demand whatsoever of Agent in, through or by that certain Mortgage and Security Agreement, dated April 28, 2009 and recorded in the land records of Georgetown County, South Carolina in Book 1225, Page 109 (the "Mortgage") Assignment of Leases and Rents, dated April 28, 2009 and recorded in the land records of Georgetown County, South Carolina in Book 1225, Page 161 (the "ALR"), the Loan Documents (as defined in the Mortgage), the Co-Lenders Agreement, dated as of April 30, 2009, by and among and the Agent and the lenders party to the Loan Documents, and any amendments, restatements, supplements, subordinations to or of, or other modifications to any of the foregoing or related to the premises more particularly described on Exhibit A.

TO HAVE AND TO HOLD the same together with all right, title, interest, privileges, claims, demands and equities existing and to exist in connection therewith whatsoever, unto Assignee, its successors and assigns forever.

The Agent expressly waives and releases in favor of Assignee any and all rights that it may now have or hereafter have to establish or enforce any lien or security interest, if any, securing payment of the indebtedness arising pursuant to the Mortgage, the ALR and the Loan Documents. The Agent directs that all payments hereafter due under the Mortgage, the ALR and the Loan Documents or any other document, instrument or agreement evidencing, creating or securing the loans described in the Mortgage, the ALR and the Loan Documents be made directly to Assignee.

The Agent hereby represents and warrants to Assignee as follows: (i) the Agent is the secured party, on behalf of the lenders, under the Mortgage, the ALR and the Loan Documents and has not previously assigned, transferred, pledged or conveyed its rights and duties as the agent thereunder; (ii) the Agent has the full right and authority to assign the same to Assignee; (iii) the person executing this Assignment on behalf of the Agent has the power and authority to do so and (iv) no other party's consent is required in connection with this Assignment.

Assignment (Agent) - Pawleys Island

KENNEDY_01126

Assignee expressly acknowledges and agrees that except as set forth herein, the Assignment is made by the Agent without any recourse, representation or warranty, express or implied, of any type, kind, character or nature.

This Assignment shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

[signature page to follow]

IN WITNESS WHEREOF, this Assignment has been executed as of this 10th day of November, 2011.

KENNEDY FUNDING, INC.

By: Ken Woon
Name: Ken Woon
Title: CO-CEO

WITNESS #1

Amy Minervini
Name: Amy Minervini

WITNESS #2

Jersey Silver
Name: Jersey Silver

BNP PARIBAS

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

WITNESS #1

Name: _____

WITNESS #2

Name: _____

Assignment of Agent - Pawleys Island

KENNEDY_01128

STATE OF New Jersey)
COUNTY OF Bergen)

I, Dawn M. Doherty, a Notary Public in and for said County, in the State aforesaid, do hereby certify that Karin Weber, a Co-CEO of Kennedy Funding, Inc., personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he/she signed, and delivered said instrument as his/her own free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 4th day of November, 2011.

Dawn M. Doherty
Notary Public

STATE OF _____)
COUNTY OF _____)

DAWN M. DOHERTY
Notary Public of New Jersey
I.D. NO. 2287487
My Commission Expires 03/5/2013

I, _____, a Notary Public in and for said County, in the State aforesaid, do hereby certify that _____, a _____ of BNP Paribas, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he/she signed, and delivered said instrument as his/her own free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this _____ day of November, 2011.

Notary Public

STATE OF _____)
COUNTY OF _____)

I, _____, a Notary Public in and for said County, in the State aforesaid, do hereby certify that _____, a _____ of BNP Paribas, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he/she signed, and delivered said instrument as his/her own free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this _____ day of November, 2011.

Notary Public

Assignment (Agent) - Pawleys Island

KENNEDY_01129

IN WITNESS WHEREOF, this Assignment has been executed as of this 10th day of November, 2011.

KENNEDY FUNDING, INC.

By: _____
Name: _____
Title: _____

WITNESS #1

Name: _____

WITNESS #2

Name: _____

BNP PARIBAS

By: *Harry T. Nullet*
Name: **Harry T. Nullet**
Title: **Managing Director**

By: *Govind Gupta*
Name: **Govind Gupta**
Title: **Vice President**

WITNESS #1

Aracelis Valentin
Name: **Aracelis Valentin**

WITNESS #2

Jonathan Cope
Name: **JONATHAN COPE**

Assignment of Agent - Pawleys Island

KENNEDY_01130

STATE OF _____)
COUNTY OF _____)

I, _____, a Notary Public in and for said County, in the State
aforesaid, do hereby certify that _____, a _____ of Kennedy Funding, Inc.,
personally known to me to be the same person whose name is subscribed to the foregoing instrument,
appeared before me this day in person and acknowledged that he/she signed, and delivered said
instrument as his/her own free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this _____ day of November, 2011.

Notary Public

STATE OF _____)
COUNTY OF _____)

I, R. Sonny Sampayan-Sampayan, a Notary Public in and for said County, in the State
aforesaid, do hereby certify that Harry Nullet, a Managing Director of BNP Paribas, personally
known to me to be the same person whose name is subscribed to the foregoing instrument, appeared
before me this day in person and acknowledged that he/she signed, and delivered said instrument as
his/her own free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this _____ day of November, 2011.

STATE OF _____)
COUNTY OF _____)

Notary Public

R. SONNY SAMPAYAN-SAMPAYAN
Notary Public, State of New York
No. 01SA8217385
Qualified in Queens County
Certificate Filed in New York County
Commission Expires Feb. 28, 2014

I, R. Sonny Sampayan-Sampayan, a Notary Public in and for said County, in the State
aforesaid, do hereby certify that Gorin Gupta, a Vice President of BNP Paribas, personally
known to me to be the same person whose name is subscribed to the foregoing instrument, appeared
before me this day in person and acknowledged that he/she signed, and delivered said instrument as
his/her own free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this _____ day of November, 2011.

Notary Public

R. SONNY SAMPAYAN-SAMPAYAN
Notary Public, State of New York
No. 01SA8217385
Qualified in Queens County
Certificate Filed in New York County
Commission Expires Feb. 28, 2014

Assignment (Agent) - Pawleys Island

KENNEDY_01131

Exhibit A
Legal Description

KENNEDY_01132

LOT 3

ALL THAT CERTAIN piece, parcel or lot of land lying, being and situate on Pawleys Island, Georgetown County, State of South Carolina, being that certain lot of land designated as LOT 3 on a plat prepared by The Earthworks Group, dated July 9, 2006 and recorded in the Office of the Clerk of the Court for Georgetown County, South Carolina in Plat Slide 625 at page 10.

LOT 4

ALL THAT CERTAIN piece, parcel or lot of land lying, being and situate on Pawleys Island, Georgetown County, State of South Carolina, being that certain lot of land designated as LOT 4 on a plat prepared by The Earthworks Group, dated July 9, 2006 and recorded in the Office of the Clerk of the Court for Georgetown County, South Carolina in Plat Slide 625 at page 10.

Legal Description - Pawleys Island

KENNEDY_01133

ALLONGE

To Promissory Note, dated April 30, 2009, made by Pawleys Island North, LLC, in favor of Kennedy Funding, Inc., as agent for the lenders, in the original principal amount of \$960,000.

Pay to the order of BNP Paribas, as agent for the lenders, with an office at 787 Seventh Avenue, New York, New York 10019.

KENNEDY FUNDING, INC.

By: _____

Name: _____

Title: _____

GREGG WOLFER
CO-CEO

STATE OF New Jersey
COUNTY OF Essex

I, JORDAN B. NEFFLER, a Notary Public in and for said County, in the State aforesaid, do hereby certify that GREGG WOLFER, a CO-CEO of Kennedy Funding, Inc., personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he/she signed, and delivered said instrument as his/her own free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 10th day of Sept, 2011.

Jordan B. Neffler
Notary Public

Commission Expires 12/31/12
State of New Jersey

- February 11, 2013

Page 1

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN) CASE NO. 2011-CP-22-180
Kennedy Funding, Inc.,)
as)
predecessor-in-)
interest, and BNP)
Paribas,)
Plaintiff,)
vs.)
Pawleys Island North,)
LLC, Will Darwin)
Wheeler, Peggy)
Wheeler-Cribb and J.)
Mars Sapp,)
Defendants.)

* * * * *
PROCEEDINGS HELD HONORABLE JOE M. CROSBY
BEFORE:

DATE TAKEN: February 11, 2013

TIME: 1:05 P.M.

PLACE: Georgetown County Courthouse
401 Cleland Street
Georgetown, SC

REPORTED BY: DENISE LAUDER
Registered Professional
Reporter and Notary Public

* * * * *

POST OFFICE BOX 21784
CHARLESTON, SOUTH CAROLINA 29413-1784

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- February 11, 2013

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A P P E A R A N C E S

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18	DFT. EXH. 5 in evidence	31	12
19	DFT. EXH. 6 in evidence	31	13
20	(Plaintiff's Exhibit Numbers 1 - 8 previously		
21	marked for identification)		
22			
23			
24			
25			

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1 (The following proceedings were had.

2 THE COURT: When you're ready.

3 MR. JORDAN: If it please the Court.

4 Your Honor, I'm Robert Jordan. I
5 representative the Plaintiffs in this foreclosure
6 action. Kennedy Funding, Inc. originated the loan
7 as predecessor-in-interest to BNP Paribas, so I
8 would refer to those as the lender. BNP via
9 assignment now has the mortgage and the note.

10 Maybe by way of housekeeping I can
11 update the Court on where we are and that may make
12 this a lot more efficient.

13 THE COURT: Sure.

14 MR. JORDAN: So in this instance, Your
15 Honor, we've got a commercial loan on raw land on
16 Pawleys Island. We've appeared before Your Honor
17 twice on my Motion for Summary Motion Judgment and
18 a Motion to Reconsider. And that involved a
19 dispute between the lienholders. Again, I
20 represent the originator of the mortgage.
21 Mr. Bunch represents Mr. Sapp who is an alleged
22 judgment creditor. And I argued a Summary Judgment
23 Motion in front of you a while back that you
24 granted, declaring that, to the extent Mr. Sapp had
25 a lien, he was junior to us.

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1 Mr. Bunch challenged that in
2 reconsideration. We argued that back at -- I think
3 at the end of the summer in front of you. That
4 remains under advisement, and so that issue is one
5 that potentially dictates how this trial goes.

6 Regarding the trial itself, Your Honor,
7 we took two depositions of Kennedy Funding, the
8 originator. And this loan was assigned during the
9 course of this litigation. Mr. Bunch Noticed a
10 30(b)(6) Kennedy Funding, took that. This witness
11 was out of state. I then took a trial deposition a
12 couple of months ago. I'm going to present via
13 deposition what I would call my liability case,
14 establishing the loan documents, breach of the loan
15 documents, and the assignment to BNP.

16 In those depositions, Counsel -- I need
17 to note, Mr. Gwinn represents the borrowers. In
18 those depositions we I believe agreed that all of
19 the exhibits would be admitted without objection.
20 Mr. Bunch has identified a couple of extra exhibits
21 that were produced during discovery. And I believe
22 that all the parties have agreed to their
23 admissibility.

24 So we have testimony to present to you
25 in the form of a deposition. I also brought a

1 representative from BNP, Mr. Harry Nullet, who will
2 primarily simply testify to the statement of
3 accounts. And that's our case. The remaining
4 issues you might want to hear from other counsel at
5 this point on, obviously the lien issue between the
6 two creditors. That's my summary of where I am and
7 so I'll have a pretty short case, Your Honor.

8 THE COURT: Yes, sir.

9 MR. BUNCH: Thank you, Your Honor. My
10 name is Tommy Bunch. I represent Mars Sapp. In
11 2008, Mr. Sapp filed a lawsuit against Mr. Will
12 Wheeler, who is one of the Defendants in the case.
13 He claimed that Mr. Wheeler was a guarantor under a
14 lease agreement, commercial lease agreement, and
15 that Mr. Wheeler had defaulted and owed him money.
16 That -- that lawsuit ultimately went to trial in
17 2010.

18 In the meantime, Mr. Wheeler had among
19 his holdings out there, which I believe he's lost
20 all of or most of all of now, he had an
21 unencumbered lot on Pawleys Island, which is
22 referred to during the course of this case probably
23 as Lot 3. While that suit was pending and before
24 it went to a verdict, Mr. Wheeler conveyed that
25 property to Pawleys Island North, LLC for \$5 and no

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1 other consideration.

2 So that's -- the genesis of our case
3 and why we're here now is that Mr. Sapp succeeded
4 in getting a judgment against Mr. Wheeler for
5 approximately \$300,000, just north of \$300,000. We
6 would contend that the conveyance to Pawleys Island
7 North, LLC was a fraudulent conveyance. We would
8 contend that the lender, Kennedy Funding, knew of
9 the fraudulent conveyance, knew of the pending
10 litigation, and that they come to this court with
11 unclean hands as well as having participated in the
12 -- in the lending of the money.

13 We would also contend that they loaned
14 36 percent of the value of the property, which is
15 grossly inadequate consideration. That's why we're
16 here today, Your Honor. We would believe -- and
17 this ties back into the Summary Judgment Motion
18 which you granted in favor of Kennedy Funding, we
19 would contend that in fact Mr. Sapp should have a
20 priority lien in this matter. I believe you have
21 ruled otherwise and that motion -- that Motion to
22 Reconsider remains under advisement, as Mr. Jordan
23 indicated.

24 THE COURT: All right. Anything else,
25 Counsel?

- February 11, 2013

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1 MR. GWINN: No, Your Honor, with the
2 exception that the borrower of the guarantors deny
3 there has been any fraudulent conveyance in
4 connection with the transaction.

5 THE COURT: And certainly, Mr. Bunch,
6 with the previous arguments and, again, the
7 opportunity to just go over what you just went over
8 again, there aren't any new or other issues that
9 weren't considered by the Court in your prior
10 order. As such, I'm going to deny that Motion to
11 Reconsider. And I'm going to issue an order at
12 this point denying your previous order -- I'm
13 sorry, on your previous Motion to Reconsider.
14 Okay.

15 MR. BUNCH: Okay. Are you -- have you
16 -- just for clarification, have you gone into any
17 detail or interest in issuing a Form 4 denying the
18 motion?

19 THE COURT: I will go into some more
20 detail when I draft the order denying the motion.
21 At this point, it's going to be very similar to the
22 previous order.

23 MR. BUNCH: Okay.

24 THE COURT: Is that sufficient?

25 MR. BUNCH: Yeah. I just wanted to

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1 know where we stood. Actually, I did think there
2 were some matters in the record that the Court did
3 not cover in the first order and that would, you
4 know, make that order subject to review, I believe.

5 THE COURT: Okay.

6 MR. BUNCH: I just wanted to clarify
7 where we might be in that regard.

8 THE COURT: Anything else?

9 MR. JORDAN: Your Honor, one thing I
10 would add, and Mr. Bunch and I discussed this, that
11 the judgment that Mr. Sapp has has been on appeal.
12 We noted that in our prior arguments.

13 THE COURT: Right.

14 MR. JORDAN: I was informed by Mr.
15 Bunch that that appeal was argued in the Court of
16 Appeals in November. Is that correct?

17 MR. BUNCH: Correct.

18 MR. JORDAN: And so --

19 THE COURT: The validity of the
20 judgment.

21 MR. JORDAN: The validity of the
22 judgment, and so you know it certainly -- it --
23 well, it could go any way. I just want the Court
24 to know that generally I think the Court of Appeals
25 is under like a three- or four-month rolling

1 process, so we may have a decision that meets their
2 entire case and maybe not, but I raise that for the
3 Court's --

4 THE COURT: Okay.

5 MR. JORDAN: With that, if the Court
6 will permit me, I will call my first witness, which
7 will be via deposition. I'm certainly happy to
8 have you publish, but if the Court is willing and
9 the other parties consent, I will just submit these
10 depositions to the Court.

11 THE COURT: Counsel? Mr. Bunch?

12 MR. GWINN: I have no objection.

13 MR. BUNCH: No objection to the
14 publication of either deposition that's been taken
15 in the case, as well as the entry of the exhibits
16 from those depositions by Mr. Sapp.

17 THE COURT: Thank you.

18 MR. JORDAN: And, Judge, good news;
19 these are both very brief. One is 40 pages and the
20 other is 50 pages, so you can review them pretty
21 quickly. I have the originals and I have copies
22 that I can distribute, and the copies have the
23 exhibits attached. I would propose a copy would be
24 easier for Your Honor.

25 MR. BUNCH: That's fine.

1 THE COURT: If Counsel has had a
2 chance to take a look at that copy and they're
3 happy with it, I'm certainly happy to take that.

4 MR. JORDAN: For the record, Your
5 Honor, our first witness is Kevin Wolfer. He was
6 a 30(b)(6) designee of Kennedy Funding, the
7 original lender on the loan. He was deposed
8 September 12th, 2012. All counsel of record here
9 today participated in that deposition. He was then
10 deposed again on January 12, 2012. And, again, all
11 counsel were present for that deposition and
12 participated.

13 Attached to these depositions are
14 exhibits which we're going to move into evidence.
15 From a housekeeping perspective, Counsel, do you
16 want me to separately move these in or do you want
17 me to identify them in the deposition? It doesn't
18 matter to me.

19 MR. BUNCH: I'm sorry?

20 MR. JORDAN: Seven of the exhibits that
21 we are admitting are attached to the depositions.
22 Do you want me to move them that way or do you want
23 me to separate them out?

24 MR. BUNCH: You mean enter them
25 collectively or --

1 MR. JORDAN: No. I'll identify them,
2 but I'm just saying, they're attached to the
3 deposition.

4 MR. BUNCH: I'm sorry, I'm not sure
5 exactly what you're asking, but I don't have a -- I
6 don't think it matters to me how you do it.

7 MR. JORDAN: I have separate copies. I
8 can do it that way. It's just more paper for the
9 Court.

10 THE COURT: Separate copies of what?

11 MR. JORDAN: For example, Judge, the
12 first exhibit is the loan closing document. It's
13 over 100 pages. It's going to be my Exhibit 1. I
14 can identify it in the deposition or I can
15 separately pass up a copy and have the Court
16 Reporter mark it.

17 THE COURT: I think I would prefer that
18 it be attached to the deposition.

19 MR. BUNCH: That's fine with me. I
20 wasn't sure what he was asking.

21 MR. GWINN: That's fine, Your Honor.

22 MR. JORDAN: For the record, the
23 January 12, 2012 deposition of Kevin Wolfer
24 contains six exhibits. Without objection, I will
25 move all of these into evidence. And then the

- February 11, 2013

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1 September 12, 2012 deposition contains two exhibits
2 which I will likewise move into evidence without
3 objection.

4 MR. BUNCH: The only question I have, I
5 was under the impression that the September 12,
6 2012 deposition, the second deposition, included
7 all of the exhibits from the first deposition.

8 MR. JORDAN: It did by reference.

9 MR. BUNCH: And so they're also part of
10 the second deposition, they're just not part of
11 this document itself?

12 MR. JORDAN: Yes.

13 MR. BUNCH: Okay.

14 THE COURT: Thank you for clarifying.

15 MR. JORDAN: May I approach, Your
16 Honor?

17 THE COURT: Yes, sir.

18 MR. JORDAN: So I would suggest that we
19 label these Plaintiff's 1 through 6 and 7 and 8.

20 THE COURT: Without objection?

21 MR. BUNCH: Without objection.

22 MR. GWINN: Without
23 objection.

24 (PLF. EXH. 1 - 8, deposition exhibits
25 attached to Kevin Wolfer's transcript, moved into

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1 evidence.)

2 MR. JORDAN: Your Honor, the
3 deposition, specifically the second one, as I
4 stated in my opening, establishes that Kennedy
5 Funding entered into a loan security agreement, a
6 promissory note, a mortgage agreement, and a
7 guaranty agreement with the borrowers. The
8 borrower was Pawleys Island North, LLC. The
9 personal guarantors were Peggy Wheeler-Cribb and
10 Will Darwin Wheeler. So we submit those to the
11 Court. They establish our liability case. And I
12 would now call Mr. Harry Nullet to establish our
13 damages case.

14 THE COURT: Okay. Sir, if you will
15 come around. Place your left hand on the Bible and
16 raise your right, the Court Reporter will swear you
17 in.

18 HARRY NULLET,
19 being first duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. JORDAN:

22 Q. Mr. Nullet, would you please state your
23 name for the record?

24 A. Harry T. Nullet.

25 Q. And who is your employer?

1 A. BNP Paribas.

2 Q. And what is your title?

3 A. I'm managing director.

4 Q. What are your basic job
5 responsibilities in terms of handling mortgage
6 loans?

7 A. I'm a team leader in the work-out group
8 for BNP Paribas, and my job is -- I'm obligated to
9 attempt to recover the maximum value for problem
10 defaulted loans and assets.

11 Q. Are you familiar with the loan at issue
12 in this case that was made to Pawleys Island North,
13 LLC?

14 A. Yes.

15 Q. And is BNP now the lender on that loan?

16 A. As agent, yes.

17 Q. And how did you become agent for the
18 lenders?

19 A. We took assignment from Kennedy
20 Funding, which was the former agent, via settlement
21 agreement -- global settlement.

22 Q. Let me show you a document here that's
23 already been admitted into evidence. This would be
24 Exhibit 2 to the second deposition. I believe
25 that's going to be Plaintiff's Number 7.

1 Do you recognize that document, Mr.
2 Nullet?

3 A. Yes.

4 Q. And what is it?

5 A. It is the Assignment of Mortgage, the
6 Assignment of Leases, and Rents and Loan Documents.

7 Q. Is that the document you just
8 referenced in your testimony, the transfer of the
9 lender's rights from Kennedy Funding to BNP Paribas
10 as agent?

11 A. Yes.

12 Q. Mr. Nullet, are the borrowers in
13 default under the loan?

14 A. Yes.

15 Q. And have you run a statement of account
16 reflecting the amounts owed under the loan?

17 A. Yes.

18 (PLF. EXH. 9, Copy of Pawleys Claims
19 Tables, was marked for identification.)

20 BY MR. JORDAN:

21 Q. Let me show you a document that's
22 marked as Plaintiff's Exhibit Number 9, which
23 states, Pawleys Claims Table, at the top. Are you
24 familiar with this document?

25 A. Yes.

1 Q. What is it?

2 A. It's the statement of claims on this
3 loan, both the Kennedy Funding claim as well as the
4 BNP claims since we took assignment.

5 Q. And was this drafted under your
6 direction?

7 A. Yes.

8 Q. Is it a true and accurate copy of the
9 amounts owed --

10 A. Yes.

11 Q. -- under the loan documents?

12 A. Yes.

13 MR. JORDAN: Your Honor, this was not a
14 deposition exhibit so at this moment I would like
15 to move it into evidence as Plaintiff's Exhibit
16 Number 9.

17 MR. BUNCH: No objection.

18 MR. GWINN: No objection, Your Honor.

19 THE COURT: Entered without
20 objection.

21 (PLF. EXH. 9 in evidence.)

22 BY MR. JORDAN:

23 Q. Mr. Nullet, just briefly, does this
24 reflect that the principal amount of the loan was
25 \$960,000?

1 A. It does.

2 Q. And how was the interest calculated on
3 this statement?

4 A. It was calculated on this statement
5 from the period 11/10/11, which is the date of
6 assignment to BNP Paribas, Agent, to 1/31/13, at an
7 interest rate of 25 percent per annum on a 30 over
8 360-day basis.

9 Q. And that interest rate is a default
10 interest rate?

11 A. It is.

12 Q. So if I'm reading this correctly, the
13 subtotal of the claim is \$1,619,334.80; is that
14 correct?

15 A. That's correct.

16 Q. And then additionally I see some costs
17 here. You have three interest for real estate
18 taxes. Can you explain that to me?

19 A. They were past due real estate taxes
20 due on the properties, and the bank paid them in
21 order not to lose the property.

22 Q. And you've paid that for 2010, 2011,
23 and 2012; is that correct?

24 A. On the dates shown, that's correct.

25 Q. And the total of those taxes paid is

1 \$55,266.94?

2 A. That's correct.

3 Q. And your final amount owed under this
4 loan is \$1,674,601.74?

5 A. It is.

6 Q. Are you here today on behalf of BNP
7 asking this Court to foreclose on this mortgage?

8 A. BNP Paribas, as Agent, yes.

9 Q. And in that same capacity, are you
10 asking the Court to enforce the promissory note
11 that was entered into with the borrowers?

12 A. Yes.

13 Q. And, finally, are you asking the Court
14 to enforce the guaranty given by the two
15 guarantors?

16 A. Yes.

17 Q. Additionally, are you asking the Court
18 to award fees and costs pursuant to the notes?

19 A. Yes.

20 MR. JORDAN: I have no further
21 questions at this time, Your Honor.

22 THE COURT: Okay.

23 MR. GWINN: With the Court's indulgence
24 for just a moment.

25 Your Honor, we have no questions of

1 this witness.

2 THE COURT: Mr. Bunch.

3 CROSS-EXAMINATION

4 BY MR. BUNCH:

5 Q. Just a couple of questions.

6 Sir, I did not catch your last name.

7 A. Nullet, N-U-L-L-E-T.

8 Q. Okay. Mr. Nullet, you're familiar with
9 the loan at issue in this matter?

10 A. Yes.

11 Q. And are you familiar with the fact --
12 well, what does the lender have security -- on what
13 property does the lender have security?

14 A. Two parcels of real estate in Pawleys
15 Island, which I believe my Counsel has already
16 mentioned.

17 Q. And those might be known as Lots 3 and
18 4 for the property description?

19 A. I don't have the specific property
20 description in front of me. If you want, I can
21 refer to it.

22 Q. Okay. Let me show you this document.
23 This is the Quitclaim Deed from Mr. Will Wheeler of
24 Pawleys Island North. Do you recognize that as
25 being the title of the document and that the

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1 grantor is Will Wheeler and the grantee is Pawleys
2 Island North, LLC?

3 A. That's what this document says, yes.

4 Q. Okay. And that's granting the mortgage
5 on Lots 3 and 4?

6 A. That's what it does, yes.

7 Q. And those are lots on which you are
8 foreclosing today, your company is?

9 A. I would like to see a copy of the --
10 copy of the -- of the -- the Kennedy Funding
11 document that has that as a reference. This is a
12 Quitclaim Deed and I don't recognize where it goes
13 to.

14 Q. I'm going to show you the loan and
15 security agreement for Kennedy Funding. And the
16 property description contained in that loan and
17 security agreement.

18 A. They are the same descriptions, yes.

19 Q. So the description in the Quitclaim
20 Deed is the same property on which Kennedy Funding
21 took a mortgage back in 2009?

22 A. Yes.

23 Q. Okay. And at the time that Kennedy
24 Funding took a mortgage on those lots, it paid off
25 a \$300,000 loan to a bank in South Carolina that

1 was encumbered on Lot 4?

2 A. I'm not personally familiar with that.

3 Q. You don't know anything about that?

4 A. I'm not personally familiar with it.

5 Q. Did you study those documents before
6 coming today?

7 A. No.

8 Q. All you know about it is what amount
9 you claim is owed the bank in this matter?

10 A. I know what the bank claims in this
11 matter, I had it prepared and I've seen the
12 documents before at the time we took assignment.

13 MR. BUNCH: Your Honor, it was my
14 understanding from Counsel earlier we were
15 stipulating to all exhibits in the matter. So, if
16 so, I would like to move this Quitclaim Deed into
17 evidence.

18 MR. JORDAN: No objection.

19 MR. GWINN: No objection, Your Honor.

20 THE COURT: Make sure it's identified
21 for the record.

22 MR. BUNCH: I need to get an exhibit
23 sticker on it.

24 (DFT. EXH. 1, Copy of Quitclaim Deed,
25 was marked for identification.)

1 (DFT. EXH. 1, in evidence.)

2 BY MR. BUNCH:

3 Q. So other than picking up this loan in a
4 work-out situation, you're not familiar with how
5 the loan came about or any of the background
6 dealing with the loan?

7 A. No, sir.

8 Q. Okay. You're charging 25 percent
9 interest on the loan?

10 A. Yes.

11 Q. Do you know whether an income statement
12 was ever taken from Mr. Wheeler or
13 Mrs. Wheeler-Cribb as to repayment of the loan?

14 A. We didn't get one at BNP Paribas. I
15 wouldn't know what Kennedy Funding did.

16 MR. BUNCH: Okay. All right. Nothing
17 further.

18 THE COURT: Thank you. Anything else?

19 MR. JORDAN: Nothing further.

20 THE COURT: Thank you, sir. You may
21 step down.

22 THE WITNESS: Yes, sir.

23 MR. JORDAN: Judge, we have no further
24 witnesses at this time. We would rest our case
25 with the right to recall Mr. Nullet, if necessary.

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1 THE COURT: Okay.

2 Yes, sir.

3 MR. GWINN: Your Honor, Pawleys Island
4 North, Mr. Wheeler and Mrs. Wheeler-Cribb do not
5 wish to present any testimony in opposition to the
6 Plaintiff's case.

7 THE COURT: Mr. Bunch?

8 MR. BUNCH: I would call Mr. Sapp, Your
9 Honor.

10 THE COURT: Sure. Mr. Sapp, if you
11 would come around. Place your left hand on the
12 Bible and raise your right.

13 MR. BUNCH: Tell you what, if we could
14 beg the Court's indulgence to get these exhibits
15 marked.

16 (DFT. EXH. 2, Copy of Lawsuit, was
17 marked for identification.)

18 (DFT. EXH. 3, Copy of Amended Lawsuit,
19 was marked for identification.)

20 (DFT. EXH. 4, Copy of Judgment, was
21 marked for identification.)

22 (DFT. EXH. 5, Copy of Judgment, was
23 marked for identification.)

24 (DFT. EXH. 6, Copy of Execution, was
25 marked for identification.)

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1 J. MARS SAPP,

2 being first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. BUNCH:

5 Q. Mr. Sapp, go ahead and identify
6 yourself, please, for the record.

7 A. My name is John Mars Sapp.

8 Q. And you are from Columbia?

9 A. That's correct.

10 Q. Do you own a building in Surfside
11 Beach, in the local area here?

12 A. Yes, I do.

13 Q. And what is that building used for?

14 A. It's used for retail and different
15 things.

16 Q. Okay. Is it a commercial property?

17 A. Yes, commercial property.

18 Q. And you rent it out?

19 A. Yes.

20 Q. All right. And several years prior to
21 this, many years prior to this, maybe in the 1980s,
22 you rented that -- or maybe the 1990s, you rented
23 that property out to a company owned by Mr. Will
24 Wheeler?

25 A. Yes. I believe it was around 1994.

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1 Q. All right. And Mr. Wheeler personally
2 guaranteed that lease?

3 A. Yes. We had a surety signed that --
4 everything was documented.

5 Q. Okay. And going on into the 2007/2008
6 timeframe, did that lease go into default?

7 A. Yes.

8 Q. Did Mr. Wheeler pay on the guaranty for
9 the lease?

10 A. He paid nothing.

11 Q. Ultimately, did you file suit in
12 Georgetown County against Mr. Wheeler and the
13 company PI Leasing Management?

14 A. That's correct, yes.

15 Q. And PI Leasing Management was the
16 original tenant in the building?

17 A. Yes.

18 Q. And is this a copy of that suit that
19 we've premarked as Exhibit 2?

20 A. Yes.

21 Q. All right. And I will note that
22 lawsuit was filed September 30th, 2008; is that
23 right?

24 A. Yes.

25 Q. All right. That's noted on the

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1 document?

2 A. Yes, September 30th, 2008.

3 Q. Okay. And then did you later amend the
4 pleadings in that case, amend the Complaint to add
5 two other Defendants, named Kenneth Altman and
6 JDBD, LLC?

7 A. That's correct.

8 Q. When was that Amended Complaint filed?

9 A. October 6, 2009.

10 Q. Okay. Your Honor, the original suit
11 we've marked as Exhibit -- Defendant's Exhibit for
12 Sapp Number 2 and the amended pleadings we've
13 marked as Sapp Defendant's Exhibit 3.

14 THE COURT: Thank you. Those are
15 entered without objection?

16 MR. JORDAN: Without objection.

17 MR. GWINN: I -- without objection,
18 Your Honor.

19 (DFT. EXH. 2 in evidence.)

20 (DFT. EXH. 3 in evidence.)

21 BY MR. BUNCH:

22 Q. Did you ultimately go to trial over the
23 case with Mr. Wheeler?

24 A. Yes.

25 Q. And is this a copy of the Judgment that

1 was entered in the court?

2 A. Yes, it was.

3 Q. Okay. And what date does it show?

4 MR. BUNCH: Your Honor, this is
5 Defendant's Exhibit 4, Sapp Exhibit 4.

6 THE WITNESS: It was June 10th --
7 June 4, 2010, excuse me.

8 MR. BUNCH: June 4, 2010. Your Honor,
9 we would admit that into evidence.

10 THE COURT: Entered without objection,
11 correct?

12 MR. JORDAN: Without objection.

13 (DFT. EXH. 4 in evidence.)

14 BY MR. BUNCH:

15 Q. And if you will look on the second page
16 of Sapp Defendant's Exhibit 4, what is the total
17 amount of the judgment against Mr. Wheeler?

18 A. \$252,000, and then --

19 Q. 252,000 and how much?

20 A. 798.

21 Q. 798?

22 A. 252,798.

23 Q. You obtained a judgment affective
24 June 4, 2010, for \$252,798?

25 A. That's correct.

1 Q. All right. And then later on there
2 were some post trial motions filed in the case,
3 including one by me on your behalf for the award of
4 attorney's fees in the case?

5 A. Yes.

6 Q. All right. And I would ask if this is
7 an order that addresses in part the award of
8 attorney's fees; it would be labeled Sapp
9 Exhibit 5?

10 A. Yes.

11 Q. All right. And you will -- that order
12 was entered on what date, Mr. Sapp?

13 A. March 10, 2011.

14 Q. All right. And against Mr. Wheeler,
15 what was the award of attorney's fees that was
16 awarded by Judge Thomas W. Cooper, Junior?

17 A. \$48,929.

18 Q. Okay. So you got a total judgment
19 against Mr. Wheeler just north of \$300,000?

20 A. That's correct.

21 Q. All right. And then did you later
22 cause an execution to be issued by the Clerk of
23 Court and delivered to the Georgetown County
24 Sheriff's Department?

25 A. Yes.

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1 Q. Okay. And let me show you what is
2 Exhibit 6. This would be the execution?

3 A. Yes, that's correct.

4 Q. Okay. And when you -- when that was
5 done on page 2 of Exhibit 6 --

6 MR. BUNCH: Which we also move, I
7 think, in case we haven't already, 5 and 6 into
8 evidence, Your Honor.

9 THE COURT: Correct. Entered without
10 objection.

11 MR. BUNCH: Thank you, Your Honor.

12 (DFT. EXH. 5 in evidence.)

13 (DFT. EXH. 6 in evidence.)

14 BY MR. BUNCH:

15 Q. What happened when this was sent to the
16 Sheriff, if you will just read the second page of
17 Defendant's Exhibit Number 6?

18 A. Okay. Dated 4/11/2011, This is to
19 clarify (sic) that I am unable to find personal or
20 real property to satisfy the within execution. I
21 hereby Nulla Bona this execution, A. Lane Cribb,
22 Sheriff of Georgetown County.

23 Q. And it's not clarify, it's actually to
24 certify?

25 A. Certify, yes, sir.

1 Q. Okay. Before you started this lawsuit
2 against -- or maybe around the time you started the
3 lawsuit in 2008 against Mr. Wheeler, did you have
4 occasion to cause to have his assets searched, his
5 holdings, his property holdings?

6 A. Yes.

7 Q. And at that time did he own what has
8 been referred to earlier as Lots 3 and 4 on Pawleys
9 Island?

10 A. That's correct.

11 Q. Okay. And what did you learn about Lot
12 Number 3?

13 A. Three had no loans on it.

14 Q. There was no mortgage on Lot 3?

15 A. It was free and clear, I guess would be
16 the best way to say.

17 Q. And you did this before -- you did this
18 about the time you filed suit, but certainly well
19 before trial?

20 A. Exactly.

21 Q. Okay. And then what did you find out
22 after the verdict had been rendered and you had a
23 judgment for approximately \$300,000 against
24 Mr. Wheeler?

25 A. That he had approached and gotten a --

1 leveraged the property, gotten a loan.

2 Q. First, did you learn that he had
3 conveyed it to Pawleys Island North?

4 A. Yes, that's what I understood.

5 Q. And for \$5 and no other consideration?

6 A. Yes, which I found kind of fishy
7 because I sued him for \$300,000 and then he
8 conveyed it to someone, to avoid my suit, for \$5.

9 MR. GWINN: Objection; calls for a
10 conclusion by the witness. Speculation.

11 THE COURT: Proceed, Mr. Bunch.

12 BY MR. BUNCH:

13 Q. Nevertheless you learned, as the deed
14 recited, you have it right there in front of you,
15 that the property had been conveyed for \$5 and no
16 other consideration; is that right?

17 A. That's correct.

18 Q. Okay. And you also learned at the time
19 that he granted a mortgage to Kennedy Funding, as
20 recorded in the records of Georgetown County?

21 A. Yes.

22 Q. Okay. Now, have you discovered any
23 other assets that you've been able -- in the course
24 of your discovery, have you discovered any other
25 assets available to satisfy the judgment that's

1 been entered against Mr. Wheeler?

2 A. No.

3 MR. BUNCH: Nothing further.

4 THE COURT: Yes, sir.

5 MR. JORDAN: Briefly, Your Honor.

6 CROSS-EXAMINATION

7 BY MR. JORDAN:

8 Q. Mr. Sapp, you understand that you did
9 not obtain your judgment until 14 months after this
10 mortgage closed; is that correct?

11 A. I don't have the date in front of me.

12 Q. You understand it's more than a year?

13 A. What are the dates on there?

14 Q. On the date of your judgment and the
15 date the mortgage closed? If you would look at --
16 I believe it's going to be -- Exhibit Number 5, is
17 that in front of you? Do you see the stamp on
18 there that says, -- this is the judgment you
19 received against Will Wheeler, dated June 4, 2010;
20 do you see that?

21 A. Yes.

22 Q. And we've already admitted the note and
23 mortgage which were dated -- between Kennedy
24 Funding and Pawleys Island North on April 30th,
25 2009. By my calculation that's 14 months. You

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1 don't dispute that?

2 A. Yes.

3 Q. Prior to obtaining the judgment, you
4 did not file a lis pendens on this property, did
5 you?

6 A. You have to explain that.

7 Q. Did you file a lis pendens on the two
8 lots, Lots 3 and 4, that have been identified by
9 your Counsel, prior to obtaining that judgment?

10 A. I'd have to ask my attorney on that.

11 Q. You're not aware whether one was filed
12 or not?

13 A. Not exactly, no, because my attorneys
14 handled it.

15 Q. Okay. Do you have any evidence for the
16 Court that Kennedy Funding and Pawleys Island North
17 or the Wheelers had any pre-existing relationship
18 prior to this loan agreement?

19 A. No.

20 Q. Did your discovery in your other
21 lawsuit turn up that Kennedy Funding had previously
22 loaned money to Will Wheeler or Pawleys Island
23 North?

24 A. Not to my knowledge.

25 Q. In the --

1 MR. BUNCH: Your Honor, he didn't -- I
2 object. He didn't have any knowledge of the matter
3 until after he got his judgment, so how can the
4 discovery even disclose such information?

5 THE COURT: He can answer the
6 question. I think he said, not that I know of.

7 THE WITNESS: It's kind of like I
8 didn't know what they were doing, living in
9 Columbia. I filed a suit and then I win the suit,
10 and the next thing I know, Kennedy Funding is
11 trying to get in front of me. That's about as
12 simplistic of terms I can put in laymen's words. I
13 don't know what went on with Kennedy Funding or
14 Wheeler or -- but I know I put in for a suit on the
15 8th and won it. And then I find out that Kennedy
16 Funding's shopping for us, and I'm here now.

17 BY MR. JORDAN:

18 Q. I appreciate your answer. Back to my
19 question, though, in your lawsuit against the
20 Wheelers, I assume you had the opportunity to
21 conduct discovery. You may not know what discovery
22 is, but that's the lawyers asking questions of each
23 other, correct? Do you understand that?

24 A. I guess.

25 Q. Okay. Did you attend any depositions

1 of the Wheelers in your lawsuit?

2 A. I don't think so.

3 Q. Do you know if they were deposed?

4 A. Not to my knowledge.

5 Q. Okay. Do you recall whether or not
6 your Counsel requested any of the financial records
7 in your lawsuit?

8 A. Whose financial?

9 Q. The Wheelers' financial records in your
10 lawsuit?

11 A. No, I'm not sure.

12 Q. Do you have any proof that there was
13 any pre-existing relationship between Kennedy
14 Funding and the Wheelers before this loan that
15 we're here about today?

16 A. No.

17 MR. JORDAN: That's all the questions I
18 have, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. GWINN:

21 Q. Mr. Sapp, you indicated that prior to
22 your lawsuit you had assets searched -- an asset
23 search conducted on Mr. Wheeler?

24 A. Yes.

25 Q. And in addition to Lots 3 and 4 that

1 you mentioned, weren't you also -- discovered Lots
2 1 and 2 in that same subdivision?

3 A. I don't believe that they were free and
4 clear.

5 Q. You believe lots 1 and 2 were free and
6 clear?

7 A. Were not.

8 Q. Were not. Did you check the tax
9 notices? Did you know that there were houses on
10 Lots 1 and 2?

11 A. Yes.

12 Q. Okay. Did you do anything to check
13 whether or not Mr. Wheeler had any equity in those
14 Lots 1 and 2?

15 A. I think my attorney did.

16 Q. Okay. Do you know what your attorney
17 determined in checking whether or not he had equity
18 in Lots 1 and 2?

19 A. You would have to ask him on that.

20 Q. Okay. Did -- you mentioned that Lot 4
21 had a mortgage on it also?

22 A. I believe so.

23 Q. Okay. Did you check to see whether or
24 not there was any equity in Lot 4?

25 A. I'm not sure.

1 Q. Did your asset search determine any
2 other real estate owned by Mr. Wheeler in
3 Georgetown County?

4 A. According to the Sheriff, there were no
5 others.

6 Q. In your asset search conducted before
7 the lawsuit, did you determine whether or not there
8 was any real estate owned by Mr. Wheeler in
9 Georgetown County?

10 A. Say that again.

11 Q. In the asset search conducted prior to
12 your lawsuit, did you determine whether or not
13 there was any other real estate owned by
14 Mr. Wheeler in Georgetown County?

15 A. No.

16 Q. Did your asset search check any
17 properties in Horry County?

18 A. Not to my knowledge.

19 Q. Okay. And are you aware that
20 Mr. Wheeler is a 99 percent owner, member of
21 Pawleys Island North, LLC?

22 A. I wouldn't know the percentage that he
23 would own.

24 Q. And I believe the judgment that you are
25 presently testifying about is still on appeal with

1 the South Carolina Court of Appeals?

2 A. Yes.

3 MR. GWINN: With the Court's indulgence .
4 for just a moment. That's all the questions I have
5 of Mr. Sapp.

6 MR. BUNCH: Nothing further, Your
7 Honor.

8 THE COURT: You can sit down, sir.
9 Thank you, Mr. Sapp.

10 MR. BUNCH: The exhibits are all up
11 there.

12 THE COURT: He's going to bring them
13 down here.

14 MR. BUNCH: Your Honor, I don't have
15 any further questions. I would note in response to
16 the questions asked of Mr. Sapp about Mr. Wheeler
17 being a 99 percent owner of that LLC, that is in
18 the record. It's in the exhibits from the
19 Plaintiff's case.

20 THE COURT: Yes. Yes, it is.

21 Anything else?

22 MR. JORDAN: Judge, nothing further
23 from the Plaintiff. We would rest our case and I'm
24 happy to now state the relief we're seeking.

25 THE COURT: Proceed.

1 MR. JORDAN: We're seeking that the
2 Court -- you have in front of you the entire loan
3 package, which includes the loan and security
4 agreement, the promissory note to the LLC, the
5 mortgage agreement and the guaranty with the two
6 Wheelers; we're asking that all of those be
7 enforced, that the note be enforced as written and
8 that the mortgage be foreclosed upon; and,
9 additionally, that the guaranty be enforced.

10 I have not brought a proposed order
11 simply because I didn't know what was going to
12 happen; obviously, with your ruling, but also
13 vis-a-vis the Sapp lien, but we would ask that we
14 be declared the first lien on the collateral. And
15 I would be happy to submit a proposed order to the
16 Court. I have additionally withheld submission of
17 attorney's fees at this time pending the Court's
18 ruling.

19 THE COURT: Mr. Bunch, anything?

20 MR. BUNCH: Your Honor, I would simply
21 say that I don't know that his attorney's fees in
22 fighting the Sapp part of this litigation would be
23 recoverable under the note that Mr. Wheeler entered
24 into and that's probably 90-plus percent of their
25 legal fees, but other than that, I don't have

1 anything to say.

2 THE COURT: Okay.

3 MR. GWINN: Nothing from the
4 Defendants, Your Honor.

5 THE COURT: Okay.

6 MR. BUNCH: Can I just ask for
7 clarification on something? When Mr. Gwinn said,
8 nothing for the Defendants, were -- was -- I'm not
9 sure if the question was asked in reference to
10 moving forward with the case or whether he intended
11 to put up any witnesses.

12 THE COURT: Do you have any witness
13 you wish to call?

14 MR. GWINN: Your Honor, I can confer
15 with my client, but I -- Your Honor, we have no
16 witnesses.

17 THE COURT: Okay. Thank you.

18 And just so we're clear, everyone has
19 presented the evidence, testimony, exhibits that
20 they wish to submit for today's hearing; is that
21 correct? Mr. Gwinn?

22 MR. GWINN: That's correct, Your Honor.

23 THE COURT: Mr. Bunch?

24 MR. BUNCH: That is correct, although I
25 do have a very brief argument, Your Honor, on the

1 cross-claim.

2 THE COURT: Mr. Jordan?

3 MR. JORDAN: That's correct, Your
4 Honor.

5 THE COURT: Yes, sir, Mr. Bunch.

6 MR. BUNCH: Your Honor, the evidence
7 before this Court is that Lot 3 -- and you have to
8 go into the -- a lot of the exhibits, you know, are
9 like that thick (Indicating), but it was clear that
10 Lot 3 was free and clear of any liens during the
11 course of the Sapp litigation until a year after he
12 filed -- or ten months or so after he filed the
13 suit, at which time Mr. Wheeler conveyed that
14 property. When he was indebted to Mr. Sapp, he
15 conveyed that property, and as such, when he
16 conveyed it for \$5 and no other valuable
17 consideration to a family-owned LLC, I believe that
18 that would satisfy the conditions of being a
19 fraudulent conveyance.

20 And I would cite the Court specifically
21 to the Albertson v. Robinson case, decided in 2006
22 by our Court of Appeals. There is other legal
23 precedent upon which that relied, which says, you
24 don't have to have a judgment in order for there to
25 be a fraudulent conveyance. As long as the money

1 was owed, and we contend at that time that the
2 money was owed, and there are pleadings in the
3 record that there was a \$500,000 claim which the
4 jury ultimately determined to be about 250, and
5 when he conveyed it for \$5 and no other valuable
6 consideration to a family-owned partnership, that
7 that established a fraudulent conveyance.

8 And when it is conveyed inner family
9 like that, among family members or, you know, to a
10 family-owned partnership, the law is clear, Gardner
11 versus Kirbin, that the burden is on the
12 transferee. Here the burden is on Pawleys Island
13 North, LLC to establish valuable consideration and
14 the bona fides of the transaction by clear and
15 convincing evidence.

16 And there's been no testimony from
17 Pawleys Island North or from Mr. Wheeler as to the
18 consideration or the bona fides of the transaction.
19 So we would think we would be entitled to a
20 directed verdict on the issue of the fraudulent
21 conveyance.

22 MR. JORDAN: Briefly, Your Honor.
23 We've argued this twice before, Your Honor, on
24 Summary Judgment and in our Motion to Reconsider.
25 I refer the Court to our briefings on both of those

1 motions, which we submitted, as well as the
2 arguments made on those dates.

3 The heart of the matter, Your Honor,
4 this would -- the relief that Mr. Sapp is seeking
5 -- the term lien law upside down in South Carolina.
6 The idea that a -- in an arms-length transaction, a
7 lender can loan \$960,000 at a time when the
8 property has no liens on it, except for one that
9 was paid off in the closing, there's no lis pendens
10 filed, the title work is clean, and 14 months later
11 a judgment is obtained for significantly less than
12 the equity that was left in the property -- I mean,
13 you're paying a judgment for \$250,000; at the time
14 Kennedy Funding loaned the money, we're still
15 \$960,000 into equity in the property. And that's
16 in the record.

17 The appraisal is before Your Honor. It
18 appraised for 1.9 at the time 960 was loaned. So
19 to say that 14 months later you can undo an
20 arms-length transaction for -- with now
21 consideration. Mr. Bunch focuses on this transfer
22 from the individual LLC, which is simply a
23 pass-through for the mortgage to be obtained with
24 Kennedy Funding. Had Kennedy Funding loaned that
25 money directly to Mr. Wheeler, he would have no

1 argument. It should be no different, because it
2 was a pass-through to an LLC.

3 The consideration here is \$960,000.

4 And so when you have consideration, under the law
5 that we previously cited, he has to prove that we
6 actually participated. And I say, we, the lender,
7 Kennedy Funding participated in a scheme to defraud
8 a creditor. There's no proof. There's not even a
9 claim made against Kennedy Funding via cross and
10 counterclaim that we even participated in any
11 fraud. So absent that proof, we should be a first
12 lien mortgage holder and our loan should not be
13 undone based on the evidence presented.

14 THE COURT: Yes, sir.

15 MR. GWINN: Yes, Your Honor. I would
16 simply take the position that the Court's previous
17 ruling on the Summary Judgment Motion is res
18 judicata as to this, since to deem the transfer
19 from Pawleys Island North to -- or transfer from
20 Mr. Wheeler to Pawleys Island North would be
21 derivative of invalidating the mortgage from
22 Pawleys Island North to Kennedy Funding. That's
23 already been ruled upon or, at a minimum, Mr. Sapp
24 is barred from -- collaterally estopped from
25 arguing this point.

1 We would also point out, as indicated,
2 that Pawleys Island North is -- Mr. Wheeler is a
3 99 percent owner of Pawleys Island North;
4 therefore, his membership interest in Pawleys
5 Island North would be subject to levy and
6 attachment by Mr. Sapp in the event of the
7 collection. So there was no action taken which was
8 in order to defraud Mr. Sapp. As Mr. Jordan said,
9 it was a pass-through transaction to a family-owned
10 LLC that Mr. Wheeler had a 99 percent interest in.

11 THE COURT: Okay.

12 Yes, sir.

13 MR. BUNCH: That's, you know, good we
14 can levy on his membership interest. His
15 membership interest in which the LLC owns two
16 pieces of property that are now here under
17 foreclosure. I mean, that does us really no good.
18 I hadn't even argued our position as to Kennedy
19 Funding, figuring that those were gone based on
20 your Summary Judgment ruling. The only thing I was
21 arguing was that based on our cross-claim against
22 Pawleys Island North and Mr. Wheeler, that that was
23 a fraudulent conveyance and should be set aside.

24 Now, because of the consequences that
25 flow from that, as you can see in the records, and,

1 you know, this is probably an issue for appeal, but
2 since they raised it, the consequences that flow
3 from that, if you look at the documents presented
4 by -- in their -- in their case, the Wheelers --
5 Pawleys Island North, gave away by mortgage
6 100 percent of their two pieces of property. In
7 exchange they got about 36 percent in value, which
8 is wholly inadequate consideration under the laws
9 of your cases.

10 I think there was one case -- I can't
11 remember if -- it's the Coleman v. Daniel case, I
12 believe it was, where over 50 percent was deemed
13 inadequate consideration.

14 THE COURT: I think you mentioned
15 58 percent.

16 MR. BUNCH: 58 percent I believe it
17 was.

18 THE COURT: And I guess the question I
19 would have, is that a sale or is that a mortgage?
20 A mortgage at least would imply that you generally
21 have an obligation to make a payment or you suffer
22 a penalty of losing the property, versus an
23 absolute conveyance.

24 MR. BUNCH: Right. And so the question
25 then becomes, what position does the mortgage

1 holder hold? And the mortgage holder, if he knows
2 about the conveyance, has no standing to pursue a
3 foreclosure action. I guess he has standing, but
4 their mortgage can be subordinated. And I would
5 point to the -- by the way, the Articles of
6 Incorporation are here at -- Kennedy Funding 1305
7 is the Bates number, showing the 99 percent
8 interest in the Articles of Organization.

9 Here we have in what I believe is going
10 to be Plaintiff's Exhibit 3, in March of 2009,
11 March 11, 2009, which is 50 days prior to closing
12 approximately, an e-mail to the attorney for
13 Kennedy Funding, saying that the property is now
14 owned by Will Wheeler and will be conveyed to
15 Pawleys Island North, LLC. We've got that. In the
16 same e-mail they prepared the opinion letter for
17 Counsel for Mr. Wheeler and Pawleys Island North.

18 In the closing statement, two days
19 before closing, Your Honor, in Exhibit 4, the
20 closing checklist, the attorney for Kennedy Funding
21 says -- he sent him the closing checklist and the
22 closing checklist had a statement in there that
23 said, litigation pending against Wheeler needed --
24 needed -- need an explanation from borrower's
25 Counsel. And that's attached as part of

- February 11, 2013

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1 Plaintiff's Exhibit 4. It's Bates label Kennedy
2 1119.

3 The next day -- they didn't get an
4 answer to that e-mail, so the next day, again,
5 Counsel for Kennedy Funding writes Mr. Gwinn here
6 and says, can you please advise the status of the
7 following, the e-mail regarding the status of the
8 litigation against Mr. Wheeler.

9 The point I'm making, Your Honor, is
10 buyer beware. Kennedy Funding entered into this
11 transaction with full knowledge that Mr. Wheeler
12 was being sued, and knowing he was conveying this
13 property for virtually no consideration, \$5 and no
14 other consideration. And so then they know they
15 are entering into this transaction under a buyer
16 beware type of standard, and, yet, they go ahead
17 and go forward with the transaction.

18 And that's essentially -- and then I
19 cited the Court I believe at the last hearing to
20 that Texas case, which is Rilling v. Schultze,
21 where a bank in Texas went ahead and took a
22 mortgage on a piece of property that was subject to
23 an existing -- that was subject to a debt and --
24 and the judgment creditor took priority over that
25 mortgage, even though the -- you know, the timing

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1 of the transaction was such that the judgment
2 creditor should not have taken priority, but given
3 the fact that the bank knew about the -- knew about
4 the judgment creditor's -- the obligation of the
5 judgment debtor to the judgment creditor, the Court
6 said the judgment creditor is going to take
7 priority. I have a copy of that case if the Court
8 would like it.

9 I kind of felt like that all of this
10 was foreclosed upon based on your order, but just
11 to protect the record, I'm going to go ahead and
12 repeat it since -- or bring it up since that's
13 where Mr. Jordan.

14 THE COURT: Okay.

15 MR. BUNCH: And I would be glad to hand
16 up this Rilling case if the Court would like it.

17 THE COURT: I don't have an issue with
18 you putting it on the record, but I agree I have
19 already ruled on that. All right.

20 Anything further, Mr. Jordan?

21 MR. JORDAN: Nothing further at this
22 time, Your Honor.

23 THE COURT: Okay. Obviously, I'm
24 going to need a little bit of time to review these.
25 Please contact my office in about a week for a

- February 11, 2013

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1 decision. Okay.

2 MR. BUNCH: All right.

3 THE COURT: Thank you very much.

4 Sorry for the delay.

5 (These proceedings were concluded at
6 2:04 p.m.)

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- February 11, 2013

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CERTIFICATE OF REPORTER

I, Carol Denise Lauder, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 5th day of June, 2013 at Charleston, Charleston County, South Carolina.

Denise Lauder

Carol Denise Lauder
Registered Professional
Reporter, CP
My Commission expires
August 2, 2017



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PLAINTIFF'S EXHIBIT 1

Closing Binder Bearing Bates Numbers KENNEDY 01135-01418

This Exhibit is Exhibit 1 to Wolfer Deposition 1, R. pp. 225

PLAINTIFF'S EXHIBIT 2

**March 2, 2009 Letter with attachments from Kennedy Funding to
Peggy Wheeler-Cribb, bearing Bates Numbers
KENNEDY 00497 – 00504.**

This Exhibit is Exhibit 2 to Wolfer Deposition 1, R. pp. 511

PLAINTIFF'S EXHIBIT 3

March 11, 2009 – March 12 E-mail chain regarding loan documents and preliminary closing checklist bearing Bates Numbers KENNEDY 00472 - 00475

This Exhibit is Exhibit 3 to Wolfer Deposition 1, R. pp. 520

PLAINTIFF'S EXHIBIT 4

**April 28, 2009 E-mail forwarding preliminary closing checklist
bearing Bates Numbers KENNEDY 01113 – 01125**

This Exhibit is Exhibit 4 to Wolfer Deposition 1, R. pp. 525

PLAINTIFF'S EXHIBIT 5

**April 29, 2009 E-mail regarding status of loan documents bearing
Bates Number KENNEDY 01053**

This Exhibit is Exhibit 5 to Wolfer Deposition 1, R. pp. ⁵³⁹_____

PLAINTIFF'S EXHIBIT 6

**April 30, 2009 E-mail forwarding draft Loan and Security
Agreement documents bearing Bates Numbers
KENNEDY 00950 – 01033**

This Exhibit is Exhibit 6 to Wolfer Deposition 1, R. pp. 542

PLAINTIFF'S EXHIBIT 7

**August 1, 2012 Notice of 30(b)(6) Deposition
of Kennedy Funding, Inc**

This Exhibit is Exhibit 1 to Wolfer Deposition 2, R. pp. 674

PLAINTIFF'S EXHIBIT 8

**November 29, 2011 Assignment of Mortgage, Assignment of
Leases and Rents and Loan Documents bearing
Bates Number KENNEDY 1126-01134**

This Exhibit is Exhibit 2 to Wolfer Deposition 2, R. pp. 679

Pawley's Claims Tables

Interest Due Post Agency Settlement as of 01.31.2013

From	To	Days*	Principal	Int. rate	Int. Per diem	Interest Due Balance
11/10/11	11/30/11	20	960,000.00	25%	666.67	\$ 13,333.40
11/30/11	12/31/11	30	960,000.00	25%	666.67	20,000.10
12/31/11	01/31/12	30	960,000.00	25%	666.67	20,000.10
01/31/12	02/29/12	30	960,000.00	25%	666.67	20,000.10
02/29/12	03/31/12	30	960,000.00	25%	666.67	20,000.10
03/31/12	04/30/12	30	960,000.00	25%	666.67	20,000.10
04/30/12	05/31/12	30	960,000.00	25%	666.67	20,000.10
05/31/12	06/30/12	30	960,000.00	25%	666.67	20,000.10
06/30/12	07/31/12	30	960,000.00	25%	666.67	20,000.10
07/31/12	08/31/12	30	960,000.00	25%	666.67	20,000.10
08/31/12	09/30/12	30	960,000.00	25%	666.67	20,000.10
09/30/12	10/31/12	30	960,000.00	25%	666.67	20,000.10
10/31/12	11/30/12	30	960,000.00	25%	666.67	20,000.10
11/30/12	12/31/12	30	960,000.00	25%	666.67	20,000.10
12/31/12	01/31/13	30	960,000.00	25%	666.67	20,000.10
Total Int.						293,334.80

* Day basis are 30/360

Past due interest at Agency Settlement 11.10.2011 366,080.00

Total accrued and unpaid Interest 659,934.80

Global principal balance due as of 01.31.2013 960,000.00

Subtotal Claim (Principal + Interest) 1,619,934.80

Protective Advances paid on behalf of the co-lender group

Type	Payment date	Amount
Real estate taxes 2010	11/23/2011	17,848.52
Real estate taxes 2011	10/4/2012	19,569.80
Real estate taxes 2012	1/14/2013	17,848.52
Total Protective Advances		55,266.94

Total Claim (Principal + Interest + Protective Advances) \$ 1,674,601.74



KENNEDY_01504

STATE TAX .00
COUNTY TAX .00
Book 1223 Page 103 - 108

(Please do not write above this line - Reserved for Register of Deeds Office)

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

QUITCLAIM DEED

KNOW ALL MEN BY THESE PRESENTS, that Will D. Wheeler (hereinafter called "Grantor"), for and in consideration of the sum of FIVE AND NO/100 DOLLARS (\$5.00) and no other consideration to the Grantor in hand paid at and before the sealing of these presents by Pawleys Island North, LLC, (the receipt whereof is hereby acknowledged, subject to the matters set forth below has remised, released and forever quit-claimed, and by these presents does remise, release and forever quit-claim unto the said Pawleys Island North, LLC its successors and assigns forever, the following described property, to wit:

42-167-42.2 (Lot 3)
42-167-42.3 (Lot 4)
SPE
GEORGETOWN COUNTY, SOUTH CAROLINA

LOT 3

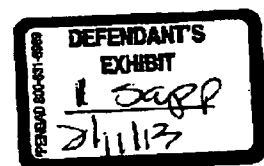
ALL THAT CERTAIN piece, parcel or lot of land lying, being and situate on Pawleys Island, Georgetown County, State of South Carolina, being that certain lot of land designated as LOT 3 on a plat prepared by The Earthworks Group, dated July 9, 2006 and recorded in the Office of the Clerk of Court for Georgetown County, South Carolina in Plat Slide 625 at page 10.

Being the same lands and premises as were conveyed to Will D. Wheeler by Deed from Porter B. Rose, John I. Rose, III, Bennett S. Rose and Patricia R. Gilmore dated March 11, 2003, recorded in the office of the Register of Deeds for Georgetown County, South Carolina in Slide 625 at page 10.

LOT 4

ALL THAT CERTAIN, piece, parcel or lot of land lying, being and situate on Pawleys Island, Georgetown County, State of South Carolina, being that certain lot of land designated as LOT 4 on a plat prepared by The Earthworks Group Dated July 9, 2006 and recorded in the Office of the Clerk of court for Georgetown County, South Carolina in Plat Slide 625 at page 10.

Being the same lands and premises as were conveyed to Will D. Wheeler by Deed from Porter B. Rose, John I. Rose, III, Bennett S. Rose and Patricia R. Gilmore dated March 11, 2003, recorded in the office of the Register of Deeds for Georgetown County, South Carolina in Slide 625 at page 10.



Tax Map #: 42-167-0420300 & 42-167-040200

Property Address: 334 Myrtle Avenue, Pawleys Island, SC 29585

Grantee(s) Address: 334 Myrtle Ave., Pawleys Island, SC 29585

THIS CONVEYANCE IS MADE SUBJECT TO easements and restrictions of record and otherwise affecting the property.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the said premises before mentioned unto the said Pawleys Island North, LLC, its successors and assigns, forever — so that neither he, the said Will D. Wheeler nor his heirs and assigns, nor any other person or persons, claiming under him, shall at any time hereafter, by any way or means, have, claim or demand any right or title to the aforesaid premises or appurtenances, or any part or parcel thereof, forever.

[Signature]
1st Witness
[Signature]
2nd Witness

Will D. Wheeler (L.S.)
Will D. Wheeler

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that (s)he was present and saw the within Grantor sign, seal, and as act and deed, deliver the within Warranty Deed; that deponent with the other witness whose name is subscribed above, witnessed the execution thereof.

SWORN to before me this
April 21, 2009.

[Signature]
Notary Public for
My Commission Expires: 10000000

[Signature]
Witness

(SEAL)

File # 09-RE-150

Notary Public for the State of Florida, Notary Public for the State of Florida, Notary Public for the State of Florida.

1. I have read the information on this affidavit and I understand such information.

2. The property being transferred is located at 334 Myrtle Ave., bearing County Tax Map Number 42-167-0428300 & 42-167-0402800, was transferred by Will D. Wheeler to Pawleys Island North, LLC on April 28, 2009.

3. Check one of the following: The Deed is

- a. ☐ subject to the Deed recording fee as a transfer for consideration paid or to be paid in money or money's worth
- b. ☐ subject to the Deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary
- c. ☒ exempt from the Deed recording fee because (See Information section of affidavit): #8
(If exempt, please skip items 4-7, and go to item 8 of this affidavit)

If exempt under exemption #14 as described in the information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty?

Check Yes ☐ No ☐

4. Check one of the following if either item 3(a) or item 3(b) above has been checked (See Information section of this affidavit).

- (a) ☐ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of _____
- (b) ☐ The fee is computed on the fair market value of the realty which is _____
- (c) ☐ The fee is computed on the fair market value of the realty as established for property tax purposes which is _____

5. Check Yes ☐ or No ☐ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "Yes," the amount of the outstanding balance of this lien or encumbrance is: _____

6. The Deed recording fee is computed as follows:

- (a) Place the amount listed in item 4 above here: _____
- (b) Place the amount listed in item 5 above here: _____
(If no amount is listed, place zero here)
- (c) Subtract Line 6(b) from Line 6(a) and place result here: _____

7. The Deed recording fee due is based on the amount listed on Line 6(c) above and the Deed recording fee due is: _____

8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as SELLER.

9. I further understand that a person required to furnish this Affidavit who willfully furnishes a false or fraudulent Affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than One Thousand and no/100 Dollars (\$1,000.00) or imprisoned not more than one year, or both.

Will D. Wheeler

Purchaser, Seller, Legal Representative of the Purchaser or other Responsible Person Connected with this Transaction

SWORN to before me this
28 day of April, 2009.

Paul H. G.
Notary Public for SC
My Commission Expires: 12/8/2012

used, and the surrendering of any right. The fair market value of the consideration must be used in calculating the consideration paid in money's worth. Taxpayers may elect to use the fair market value of the realty being transferred in determining fair market value of the consideration. In the case of realty transferred to a trust or as a distribution to a trust beneficiary, "value" means the realty's fair market value. A deduction from value is allowed for the amount of any lien or encumbrance existing on the land, tenement, or realty before the transfer and remaining on the land, tenement, or realty after the transfer. Taxpayers may elect to use the fair market value for property tax purposes in determining fair market value under the provisions of the law.

Exempted from the fee are Deeds:

1. transferring realty in which the value of the realty, as defined in Code Section 12-24-30, is equal to or less than one hundred dollars;
2. transferring realty to the federal government or to a state, its agencies and departments, and its political subdivisions, including school districts;
3. that are otherwise exempted under the laws and Constitution of this State or of the United States;
4. transferring realty in which no gain or loss is recognized by reason of Section 1041 of the Internal Revenue Code as defined in Section 12-6-40(A);
5. transferring realty in order to partition realty as long as no consideration is paid for the transfer other than the interests in the realty that are being exchanged in order to partition the realty;
6. transferring an individual grave space at a cemetery owned by a cemetery company licensed under Chapter 55 of Title 39;
7. that constitute a contract for sale of timber to be cut;
8. transferring realty to a corporation, a partnership, or a trust in order to become, or as, a stockholder, partner, or trust beneficiary of the entity provided no consideration is paid for the transfer other than stock in the corporation, interest in the partnership, beneficiary interest in the trust, or the increase in value in such stock or interest held by the grantor. However, the transfer of realty from a corporation, a partnership, or a trust to a stockholder, partner, or trust beneficiary of the entity is subject to the fee even if the realty is transferred to another corporation, a partnership, or trust;
9. transferring realty from a family partnership to a partner or from a family trust to a beneficiary, provided no consideration is paid for the transfer other than a reduction in the grantee's interest in the partnership or trust. A "family partnership" is a partnership whose partners are all members of the same family. A "family trust" is a trust, in which the beneficiaries are all members of the same family. The beneficiaries of a family trust may also include charitable entities. "Family" means the grantor and the grantor's spouse, parents, grandparents, aunts, brothers, children, stepchildren, grandchildren, and the spouses and lineal descendants of any of the above. A "charitable entity" means an entity which may receive deductible contributions under Section 170 of the Internal Revenue Code as defined in Section 12-6-40(A);
10. transferring realty in a statutory merger or consolidation from a constituent corporation to the continuing or new corporation;
11. transferring realty in a merger or consolidation from a constituent partnership to the continuing or new partnership; and,
12. that constitute a Corrective Deed or a Quitclaim Deed used to confirm title already vested in the grantee, provided that no consideration of any kind is paid or is to be paid under the Corrective or Quitclaim Deed;
13. transferring realty subject to a Mortgage to the Mortgagee whether by a Deed in Lieu of Foreclosure executed by the Mortgagor or Deed pursuant to Foreclosure proceedings;
14. transferring realty from an agent to the agent's principal in which the realty was purchased with funds of the principal, provided that a notarized document is also filed with the Deed that establishes the fact that the agent and principal relationship existed at the time of the original purchase as well as for the purpose of purchasing the realty;
15. transferring title to facilities for transmitting electricity that is transferred, sold, or exchanged by electrical utilities, municipalities, electric cooperatives, or political subdivisions to a limited liability company which is subject to regulation under the Federal Power Act (16 U.S.C. Section 791(a)) and which is formed to operate or to take functional control of electric transmission assets as defined in the Federal Power Act.

Instrument Book Page
200900028046 1225 108

84221 Gwin

200900028046
Filed for Record in
GEORGETOWN SC
WANDA PREVATTE **EXEMPT**
05-05-2009 At 11:54 am.
DEED 12.00
STATE TAX .00
COUNTY TAX .00
Book 1225 Page 103 - 108
Wanda J. Prevatte

RECORD THIS DATE

AUDITOR GEORGETOWN CO.
LINDA S. MOCK

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS

J. Mars Sapp

Plaintiff(s)

CIVIL ACTION COVERSHEET

2008 CP 221345

2008-CP-22-

v.

Will D. Wheeler and P.L. Leasing & Management, Inc.

Defendant(s)

(Please Print)

Submitted By: Thomas W. Bunch, II

Address: Robinson, McFadden & Moore, P.C.

Post Office Box 944

Columbia, SC 29202

SC Bar #: 1011

Telephone #: (803) 779-8900

Fax #: (803) 771-9411

Other:

E-mail: tbunch@RobinsonLaw.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 (certificate attached).

NATURE OF ACTION

(Check One Box Below)

Contracts	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
☐ Construction (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☒ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	☐ Notice/File Med Mal (230)	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☐ Breach of Contract (140)	☐ Other (299)	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)		☐ Personal Injury (350)	☐ Possession (450)
		☐ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☐ Other (499)
-
Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
☐ PCR (500)	☐ Death Settlement (700)	☐ Reinstate Driver's License (800)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Foreign Judgment (710)	☐ Judicial Review (810)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Magistrate's Judgment (720)	☐ Relief (820)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Minor Settlement (730)	☐ Permanent Injunction (830)	☐ Municipal (930)
	☐ Transcript Judgment (740)	☐ Forfeiture - Petition (840)	☐ Probate Court (940)
	☐ Lis Pendens (750)	☐ Forfeiture - Consent Order (850)	☐ SCDOT (950)
	☐ Other (799)	☐ Other (899)	☐ Worker's Comp (960)
-
Special/Complex/Other			
☐ Environmental (600)	☐ Pharmaceuticals (630)		
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)		
☐ Medical (620)	☐ Out-of-State Depositions (650)		
☐ Other (699)	☐ Sexual Predator (610)		

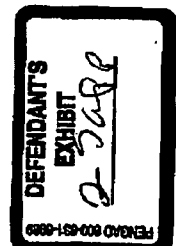
Submitting Party Signature: Thomas W. Bunch, II

Date: September 26, 2008

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.

SCCA / 234 (4/08)

Page 1 of 2



FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

**SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN
ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.**

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

J. Mars Sapp,

Plaintiff,

v.

Will D. Wheeler and P.I. Leasing &
Management, Inc. ,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No.: 2008-CP-22-

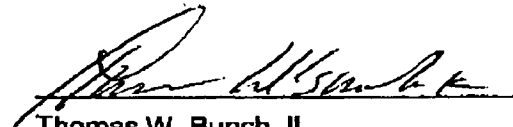
2008CP221345

**SUMMONS
(Collection)
(Non-Jury)**

FILED
GEORGETOWN COUNTY, S.C.
2008 SEP 30 AM 8:45
ALMA Y. WHITE
CLERK OF COURT

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this
action, a copy of which is herewith served upon you, and to serve a copy of your
Answer on the subscribers at Post Office Box 944, Columbia, South Carolina 29202,
within thirty (30) days of the date of service, exclusive of such day. In the event you fail
to answer within the stated time, judgment by default will be rendered against you for
the relief demanded in the Complaint.


Thomas W. Bunch, II
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

September 26, 2008

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

J. Mars Sapp,

Plaintiff,

v.

Will D. Wheeler,

Defendant.

)
) IN THE COURT OF COMMON PLEAS
)

Case No.: 2008-CP-22-

2008CP221345

**Complaint
(Collection)
(Non-Jury)**

ALMA Y. WHITE
CLERK OF COURT

2008 SEP 30 AM 8:43

FILED
GEORGETOWN COUNTY, S.C.

Plaintiff alleges:

1. Plaintiff J. Mars Sapp is a citizen and resident of Richland County, South Carolina.
2. "On information and belief, the Defendant Will D. Wheeler ("Guarantor") is a citizen and resident of Georgetown County, South Carolina.
3. On information and belief P.I. Leasing & Management, Inc. ("Tenant") was a corporation organized and existing under the laws of the State of South Carolina. On further information and belief, it is no longer in business and it was dissolved as of July 30, 2007 with the South Carolina Secretary of State's office.
4. On or about September 27, 1994, Tenant entered into a Lease Agreement with J. Mars Sapp by which Tenant leased premises located at 1918 Highway 17 North, Surfside Beach, South Carolina. The term of Tenant's Lease expires October 1, 2014.
5. The Defendant Will D. Wheeler personally guaranteed performance by P.I. Leasing & Management, Inc. of the lease obligations including payment of rent.
6. Tenant defaulted in payment of its lease obligations and was evicted by the Magistrate's Court of Horry County, South Carolina.

7. Despite demand for payment, neither Tenant nor Guarantor has paid their lease obligations.

8. Plaintiff has sustained damages by Guarantor's failure to perform and pay rent. These damages include, but are not limited to, loss of rental income, brokerage fees, legal fees, utility expenses, upfit costs, and other incidental and consequential damages to be proved.

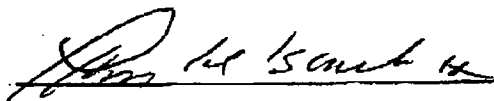
9. Through September 2008 Plaintiff has incurred damages in the amount of \$80,319.00

10. Plaintiff elected to and does hereby accelerate the balance due under the Lease for all rent due.

11. Plaintiff has re-leased a portion of the leased premises for a three year term ending in March 2011. Discounting accelerated rent and damages for the amount to be received from the current tenant, Plaintiff has sustained damages of \$465,780.00 through the term of Tenant's lease

12. Plaintiff is entitled to all damages occasioned by Tenant and Guarantor's default under the Lease including reasonable legal fees as provided for in the Lease.

WHEREFORE, Plaintiff prays for judgment against Defendant in the liquidated amount of \$556,099.00, plus legal fees and costs, and for such other and further relief as the Court deems just and proper.



Thomas W. Bunch, II
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

September 26, 2008

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

J. Mars Sapp,

Plaintiff,

v.

Will D. Wheeler and P.I. Leasing &
Management, Inc.,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No.: 2008-CP-22-1345

AMENDED SUMMONS

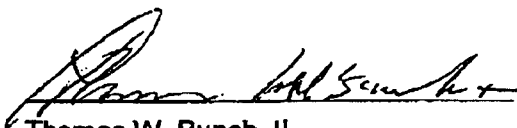
ALISA Y. WHITE
CLERK OF COURT

2009 OCT -6 AM 10:13

FILED
GEORGETOWN COUNTY, S.C.

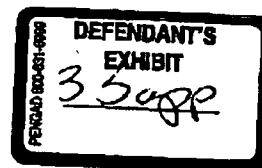
TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer on the subscribers at Post Office Box 944, Columbia, South Carolina 29202, within thirty (30) days of the date of service, exclusive of such day. In the event you fail to answer within the stated time, judgment by default will be rendered against you for the relief demanded in the Complaint.



Thomas W. Bunch, II
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

October 2, 2009



6. The facts giving rise to the claims asserted herein occurred in Georgetown County.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract / Collection on Guaranty)

7. To the extent not inconsistent herewith, Plaintiff incorporates by reference the foregoing allegations of this Complaint.

8. On or about September 27, 1994, Tenant entered into a Lease Agreement with J. Mars Sapp by which Tenant leased premises located at 1918 Highway 17 North, Surfside Beach, South Carolina (hereinafter "Leased Premises"). The term of Tenant's Lease expires October 1, 2014.

9. The Defendant Will D. Wheeler personally guaranteed performance by P.I. Leasing & Management, Inc. of the lease obligations including payment of rent.

10. On or about April 24, 1998, Plaintiff Sapp consented to Tenant assigning the Lease Agreement to Resort Properties South, Inc. with the provisos that the Tenant remained liable under the Lease Agreement after its assignment, and that Defendant Wheeler's guaranty remained in full force and effect.

11. Tenant defaulted in payment of its lease obligations and was evicted by the Magistrate's Court of Horry County, South Carolina.

12. Despite demand for payment, neither Tenant nor Guarantor has paid their lease obligations.

13. Plaintiff has sustained damages by Guarantor's failure to perform and pay rent. These damages include, but are not limited to, loss of rental income, brokerage fees, legal fees, utility expenses, upfit costs, and other incidental and consequential damages to be proved.

14. Through June 2009 Plaintiff has incurred damages in the amount of \$108,784.29.

15. Plaintiff elected to and does hereby accelerate the balance due under the Lease for all rent due.

16. Plaintiff is entitled to all damages occasioned by Tenant and Guarantor's default under the Lease including reasonable legal fees as provided for in the Lease.

FOR A SECOND CAUSE OF ACTION
(As to Defendants Kenneth D. Altman, II and JDBD, LLC)
(SC Code Ann. § 27-35-60)

17. To the extent not inconsistent herewith, Plaintiff incorporates all previous allegations contained in this Complaint.

18. Defendant Kenneth D. Altman, II (hereinafter "Altman") is the Registered Agent of P.I. Leasing and Management, Inc.

19. On information and belief Altman is a member and managing member of Defendant JDBD, LLC. He controls the actions of JDBD, LLC and has check writing authority for it.

20. On information and belief, Altman also acted as agent for Resort Properties South, Inc.

21. Altman is a Certified Public Accountant who acted as an agent for Defendants Will D. Wheeler and P.I. Leasing and Management, Inc. including making payments and being involved in making payments to the Plaintiff under the Lease Agreement.

22. On or about June 1, 2007, Defendant Altman entered an unauthorized lease agreement on behalf of Defendant JBDB, LLC, as landlord, with Plantation Resort Properties, Inc., as tenant, for some or all of the Leased Premises. At the

time of the agreement, Defendant Wheeler and P.I. Leasing and Management, Inc. continued to be obligated to Plaintiff Sapp under the Lease Agreement and the Assignment thereof.

23. Defendants Altman and JDBD, LLC did not disclose to Plaintiff and hid from Plaintiff that the property had been leased by JDBD, LLC to Plantation Resort Properties, Inc. Plaintiff learned of the unauthorized lease in or about April, 2008.
24. Defendants Altman and JBDB, LLC received rental payments under the separate, unauthorized lease agreement with Plantation Resort Properties, Inc. and wrongfully withheld payments due to Plaintiff for the use of the property.
25. Plaintiff Sapp instituted an eviction action in the Horry County Magistrate's Court against P.I. Leasing & Management, Inc., Kenneth Altman, Kenneth Altman II, LLC, JDBD, LLC and Plantation Resort Properties, Inc. The Magistrate Court issued a Writ of Ejectment on June 12, 2008 against the defendants and all occupants of the Leased Premises.
26. Plaintiff last received payment under the original Lease Agreement for September 2007.
27. Pursuant to SC Code Ann. § 27-35-60, Plaintiff is entitled to all rents collected by Altman and JBDB, LLC from Plantation Resort Properties, Inc. for October 2007 through the date of their eviction on June 12, 2008.

FOR A THIRD CAUSE OF ACTION
(As to Defendants Kenneth D. Altman, II and JDBD, LLC)
(Unjust Enrichment)

28. To the extent not inconsistent herewith, Plaintiff incorporates by reference the foregoing allegations of this Complaint

29. At all relevant times, Plaintiff has held at least partial ownership of and the right to lease the Leased Premises.
30. Defendants Altman and JBDB, LLC have never had any right and/or authorization to enter a Lease Agreement as a lessor or sublessor of the property.
31. Defendants Altman and JBDB, LLC were unjustly enriched by receiving rental payments which were rightfully due to Plaintiff, but withheld by Defendants Altman and JBDB, LLC.
32. Plaintiff is entitled to full restitution of all monies paid to Defendants Altman and JBDB, LLC and withheld from Plaintiff for the use of the Leased Premises.

FOR A FOURTH CAUSE OF ACTION
(As to Defendants Kenneth D. Altman, II and JBDB, LLC)
(Constructive Trust)

33. To the extent not inconsistent herewith, Plaintiff incorporates by reference the foregoing allegations of this Complaint.
34. Defendants Altman and JBDB, LLC wrongfully acquired monies under terms of an unauthorized lease agreement for the property.
35. Defendants Altman and JBDB, LLC wrongfully withheld the acquired monies from the Plaintiff, and unjust enrichment would result from these Defendants' continual possession of such payments.
36. Plaintiff is entitled to all rent collected by Altman and JBDB, LLC from Plantation Resort Properties, Inc. which should be deemed to be held in trust by Defendants for the benefit of Plaintiff.

FOR A FIFTH CAUSE OF ACTION
(As to Defendants Kenneth D. Altman, II and JBDB, LLC)
(Unfair Trade Practices)

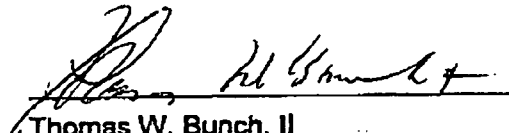
37. To the extent not inconsistent herewith, Plaintiff incorporates by reference the foregoing allegations of this Complaint.
38. The above described willful, wanton, unlawful, and unjustified acts of the Defendants Altman and JBDB, LLC of entering into a Lease Agreement and withholding rental payments for premises which they neither owned nor had lawful possession to constitutes unfair and deceptive practices in the conduct of trade or business, such acts are capable of repetition and are injurious to the public as the Defendants are capable of continuing such acts, and the Plaintiff, as a result of Defendants' unfair trade practices, has suffered damages.
39. The Plaintiff is entitled to judgment for unfair trade practices against the Defendants Altman and JBDB, LLC in an amount to be determined by this Court, jointly and severally, together with prejudgment interest, treble damages, and attorney's fees.

FOR A SIXTH CAUSE OF ACTION
(As to Defendants Kenneth D. Altman, II and JBDB, LLC)
(Conversion)

40. To the extent not inconsistent herewith, Plaintiff incorporates by reference the foregoing allegations of this Complaint.
41. The Defendants Altman and JBDB willfully and wrongfully converted to their use Plaintiff's property and rental payments.
42. As a result of their willful and wrongful conversion, Plaintiff has been damaged and is entitled to actual and punitive damages.

WHEREFORE, Plaintiff prays for judgment against Defendants for all actual damages occasioned by the default under the Lease and Guaranty and all actual damages occasioned by the unauthorized sublease agreement, including incidental and

consequential damages, treble damages as appropriate, punitive damages as appropriate, legal fees as appropriate, the costs of this action, and for such other and further relief as the Court deems just and proper.


Thomas W. Bunch, II
Paul H. Hoefer
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

October 2, 2009

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2008CP2201345

J Mars Sapp vs. Will D Wheeler

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:

IT IS ORDERED AND ADJUDGED:

☐ See attached order;

☒ Statement of Judgment by the Court:

Jury verdict

Dated at Georgetown, South Carolina, this 3rd day of June, 2010.

Court Reporter: *Grace Hurley*

Thomas W. Cooper
PRESIDING JUDGE - Thomas W. Cooper

This judgment was entered on the 3rd day of June, 2010, and a copy mailed first class this 3rd day of June, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Thomas Whatley Bunch II Robinson
McFadden & Moore, PC P.O. Box 944
Columbia, SC 29202

James Mixon Griffin The Law Offices of James
Mixon Griffin P.O. Box 999 Columbia, SC
29202
G. Turner Perrow Jr. Tidelands Law, LLC 606
Front Street Georgetown, SC 29440

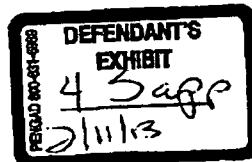
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRCP APP-24/FORM 4

Alma Y. White
Alma Y. White - Clerk of Court

CPFORM4M



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

JUDGMENT IN A CIVIL CASE
CASE NO: 2008CP2201345

J Mars Sapp vs. Will D Wheeler

CHECK ONE:

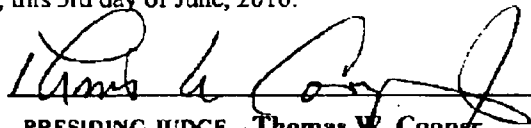
- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK 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: _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order, ☒ Statement of Judgment by the Court:

Jury verdict

Dated at Georgetown, South Carolina, this 3rd day of June, 2010.

Court Reporter: **Grace Hurley**


PRESIDING JUDGE - Thomas W. Cooper

This judgment was entered on the 3rd day of June, 2010, and a copy mailed first class this 3rd day of June, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

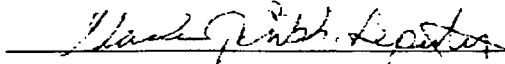
Thomas Whatley Bunch II Robinson
McFadden & Moore, PC P.O. Box 944
Columbia, SC 29202

James Mixon Griffin The Law Offices of James
Mixon Griffin P.O. Box 999 Columbia, SC
29202
G. Turner Perrow Jr. Tideland Law, LLC 606
Front Street Georgetown, SC 29440

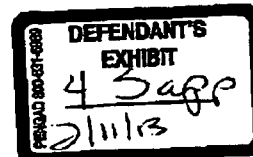
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRCP APP-24/FORM 4


Alma Y. White - Clerk of Court

CPFORM4M



STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

J. Mars Sapp,

Case No.: 2008-CP-22-1345

Plaintiff,

VERDICT

v.

Will D. Wheeler, P.I. Leasing and
Management, Inc. Kenneth D. Altman II
and JDBD LLC

Defendant.

2010 JUN -4 AM 9:13
CLERK OF COURT

1. Mars Sapp Plaintiff versus Will D. Wheeler Defendant (Select One Below)

- a. We the jury unanimously find for the Defendant Will D. Wheeler _____
- b. We the jury unanimously find for the Plaintiff Mars Sapp and award actual damages to him against the Defendant Wheeler in the amount of

\$ 252,798.00

2. Mars Sapp Plaintiff versus P.I. Leasing Defendant (Select One Below)

- a. We the jury unanimously find for the Defendant P.I. Leasing and Management, Inc. _____
- b. We the jury unanimously find for the Plaintiff Mars Sapp and award actual damages to him against the Defendant P.I. Leasing and Management, Inc. in the amount of

\$ 7,300.00

3. Mars Sapp Plaintiff versus Kenneth D. Altman II Under the South Carolina

Unfair Trade Practices Act (Complete Below)

- a. We the jury unanimously find for the Defendant Kenneth D. Altman II.

- b. We the jury unanimously find for the Plaintiff Mars Sapp ☒
- c. If you checked (b) above, did you find that the violations of the Act by the Defendant were willful? Yes ☒ or No _____

• 4. Mars Sapp Plaintiff versus JDBD LLC Under the South Carolina Unfair Trade

Practices Act (Complete Below)

- a. We the jury unanimously find for the Defendant JDBD LLC. _____
- b. We the jury unanimously find for the Plaintiff Mars Sapp ☒
- c. If you checked (b) above, did you find that the violations of the Act by the Defendant were willful? Yes ☒ or No _____

5. Mars Sapp Plaintiff versus Kenneth D. Altman II Defendant On the Conversion

Cause of Action (Complete Below)

- a. We the jury unanimously find for the Defendant Kenneth D. Altman II.

- b. We the jury unanimously find for the Plaintiff Mars Sapp ☒
- c. If you checked (b) above, do you find by clear and convincing evidence that the Plaintiff is entitled to punitive damages? Yes ☒ or No _____
- d. If you found yes above, what amount of punitive damages do you award?
\$ 19,500.00

Carleen Hansen
JURY FOREPERSON

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2008-CP-22-1345

J. Mars Sapp

Will D. Wheeler, P.I. Lesaing & Management, Inc.,
Winston Kenneth Altman, II, and JDBD, LLC

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, 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:

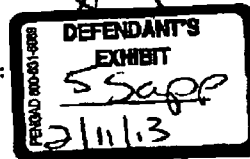
This case was tried before a jury during the June 1, 2010 term. The verdict form and Form 4 were entered into the record at the conclusion of trial. Post-trial motions by both sides were submitted in writing following the trial. The Plaintiff Sapp's post-trial issues are addressed in a formal order filed with this Form 4. The Defendants' motions are dealt with in part in the formal order as well. The Defendant's remaining motions for JNOV, To Alter or Amend and/or New Trial are DENIED. The Court addressed the arguments of the Defendants during the trial and reasserts its prior rulings herein.

And it is SO ORDERED.

Dated at Manning, South Carolina, this 3rd day of March, 2011.

[Signature]
PRESIDING JUDGE

This judgment was entered on the 10th day of March 2011, and a copy mailed first class this 10th day of March 2011 to attorneys of record or to parties (when appearing pro se) as follows:



ATTORNEY(S) FOR PLAINTIFF

ATTORNEY(S) FOR DEFENDANT

SCCA SCRPC Form 4 Revised 06/2008

Lucinda L. Sane, Deputy
CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

)
) IN THE COURT OF COMMON PLEAS
)

J. Mars Sapp,

) Case No.: 2008-CP-22-1345
)

Plaintiff,

) Order on
)

v.

) Plaintiff Sapp's Post Trial Matters
) Presented to the Court
)

Will D. Wheeler, P.I. Leasing &
Management, Inc., Winston Kenneth
Altman, II, and JDBD, LLC,

) Defendants.
)

FILED
GEORGETOWN COUNTY, S.C.
2011 MAR 10 A 10:39
CLERK OF COURT

This matter was before the Court on post trial issue presented by the Plaintiff, J. Mars Sapp. The Court has reviewed Plaintiff's post trial matters and issues the following order:

I. NAME OF DEFENDANT ALTMAN

At the conclusion of the trial, Plaintiff Sapp moved that the Court allow an amendment of the pleadings to indicate the correct name of the Defendant Altman. The Court ruled that the Defendant Altman should henceforth be referred to as Winston Kenneth Altman, II and memorializes its bench order herein.

IT IS SO ORDERED, and the Clerk of Court shall update the Court's records including the judgment roll and party indexes to reflect this Defendant's correct name.

II. UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST

At the conclusion of the case, the Plaintiff moved that the Court enter judgment against the Defendants Altman and JDBD, LLC under the causes of action for unjust enrichment and constructive trust. The Court granted this motion and memorializes its bench order herein.

TWO

IT IS SO ORDERED and the Clerk of Court shall update the Court's records to reflect this judgment.

III. ALLEGED INCONSISTENT VERDICT

The Defendants requested and received from the Court ten days within which to make their post-trial motions; however, the Defendant Wheeler - after the jury was discharged - moved that the verdict against him be reversed on the basis that the jury damages' awards against the Defendant P.I. Leasing and Management, Inc. and against Defendant Wheeler were inconsistent. It is unnecessary for the Court to entertain this motion as Wheeler is barred from making this motion after the jury was discharged.

In *Camden v. Hilton*, 360 S.C. 164, 600 S.E.2d 88 (Ct. App. 2004), the South Carolina Court of Appeals held that the trial court erred in entertaining a post-trial motion regarding an inconsistent verdict because it was not presented to the Court prior to the jury being discharged. In its analysis, the Court noted that this rule has been followed since at least 1920. More specifically, in the case of *Dykema v. Carolina Emergency Physicians, P.C.*, the South Carolina Supreme Court stated:

This Court has repeatedly held that a party should not be permitted to sit idly by while a verdict erroneous in form is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence.

348 S.C. 549, 554, 560 S.E.2d 894,896 (2002)

Because Defendant Wheeler waited until after discharge of the jury before raising an issue regarding consistency of the verdict, Wheeler is deemed to have acquiesced in the verdict and he may not raise this issue.


A handwritten signature, possibly 'R', with the number '2' and an asterisk below it.

IT IS ORDERED that Wheeler's motion is denied.

ELECTION OF REMEDIES

a. The election

At the conclusion of the trial and the announcement of the jury verdict, the undersigned instructed the Plaintiff Sapp to elect remedies among various causes of action Mr. Sapp had filed against the Defendants Altman and JDBD, LLC. Plaintiff Sapp objected to an election of remedies, but subject to that objection conditionally elected the remedy of judgment on the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §39-5-10 *et seq.* ("SCUTPA"). Plaintiff's conditional election of this remedy was based upon the following assumptions and events to transpire: (1) the Court would not grant any post-trial relief to Altman and JDBD, LLC on the verdict for violation of the SCUTPA and the finding of a willful violation of the Act; and (2) the Court would treble the damages against both Defendants and award attorney's fees to the Plaintiff Sapp under the SCUTPA. As discussed below, the Court awards Plaintiff treble damages and attorney's fees.

b. Treble damages and fees under the UTPA

The Court directed a verdict against Defendant JDBD, LLC in the amount of \$19,500 on the second cause of action, Sapp's claim that JDBD had violated S. C. Code Ann. § 27-35-60. Through counsel, the parties then agreed that Plaintiff's actual damages on the conversion and SCUTPA causes of action would be \$19,500, thus removing from the jury's consideration the question of actual damages against the Defendants Altman and JDBD, LLC. Liability on the SCUTPA claim was submitted to the jury, and also submitted was the question of whether Altman and JDBD committed a



willful violation of the SCUTPA. The jury found Altman and JDBD liable for violating the SCUTPA and that each of them willfully violated the SCUTPA.

After entry of the verdict, Plaintiff moved that the actual damages under the Unfair Trade Practices Act cause of action be trebled and that the Plaintiff be awarded attorney's fees. The court took the motion under advisement. The relevant statutory and legal analysis follows:

If the Court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of §39-5-20, the Court shall award three times the actual damages sustained and may provide other relief as it deems necessary and proper. Upon the finding by the Court of a violation of this article, the Court shall award the person bringing such action under this section reasonable attorney's fees and costs. (Emphasis added)

S.C. Code Ann. § 39-5-140 (1976).

As an initial matter, no finding of willfulness is required to award attorney's fees and costs. The statute simply requires a finding by the Court of a violation of the statute. The statute states "the Court shall award the person bringing such action under this section reasonable attorney's fees." The jury found that both Defendants violated the Unfair Trade Practices Act, and Plaintiff Sapp is entitled to an award of reasonable attorney's fees.

Turning to the treble damages award, the statute provides that if the Court finds a willful or knowing violation of the act, that "the Court shall award three times the actual damages sustained...." (emphasis added).

The awarding of fees and treble damages is made mandatory based on the statute and its common construction. The use of the word "shall" for treble damages

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and attorney's fees indicates the legislature's intent that the awarding of treble damages and attorney's fees is mandatory. See, e.g., *Bradley v. Doe*, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007). The damages should be trebled to an award of \$58,500.00 against Defendants Altman and JDBD, LLC jointly and severally and attorney's fees should be awarded in the amount of \$23,400.00. See section V below.

IT IS SO ORDERED and the Clerk of Court shall update the judgment roll and all other relevant records.

V. ATTORNEY'S FEES

The Plaintiff is entitled to an award of reasonable attorney's fees against the Defendants Altman and JDBD, LLC under the SCUTPA (see IV above), and the Plaintiff is entitled to an award of reasonable attorney's fees against the Defendants Wheeler and P.I. Leasing & Management, Inc. under the terms of the Lease Agreement and guaranty.

Turning first to the Defendants Wheeler and P.I. Leasing & Management, Inc., attorney's fees are required under the Lease Agreement. Section 9.02 of the Lease states:

Owner may, at any time terminate this Lease for any breach; in addition to any other remedies Owner may have Owner recover from Tenant all damages Owner may incur by reason of such breach, including the cost of recovering the Leased Premises, reasonable attorney's fees, and, ...

Further, at section 11.08, the Lease Agreement states:

.... in the event of any litigation between Owner and Tenant over any matters whatsoever arising out of, or in any way connected with this Lease, and/or any claims or injury or damage involving the Leased Premises or property thereon, if Owner, wholly or partially prevails, Owner shall be entitled to reasonable attorneys' fees and other costs of litigation.

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The defendant Wheeler executed his personal and individual guaranty as follows:

The undersigned personally and individually guarantees the performance by Tenant of the obligations, including rent, set forth in the above Lease.

The Tenant's obligations include the payment of attorney's fees. Thus, by contract, Plaintiff is entitled to collection of its reasonable legal fees against Tenant and Guarantor. As stated in section IV above, Plaintiff is also entitled to and the Court has awarded attorney's fees against the Defendants Altman and JDBD, LLC. The reasonable attorney's fee awards are based on the analysis which follows.

Attorney's fees are recoverable when they are authorized by contract or statute. *Blumberg v. NealCo, Inc.* 310 S.C. 492, 427 S.E.2d 659 (1993). There are six factors to consider in determining an award of attorney's fees: (1) the nature, extent and difficulty of legal services rendered; (2) the time and labor devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar services; and (6) the beneficial results obtained. *Id.*

Plaintiff's counsel has filed an affidavit of attorney's fees which discusses at length the six factors, and the Court reviews those factors.

1. The Nature, Extent, and Difficulty of the Case

This case involved a commercial business transaction. Initially, the Plaintiff retained Robinson McFadden & Moore, P.C. to pursue a past due amount under a lease agreement. The Tenant's (P.I. Leasing) and Guarantor's (Wheeler)

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representative and agent (Altman)¹ refused to cooperate and refused to account for lease payments he was collecting. Altman stated his only responsibility was to defendant Wheeler. Altman refused to cooperate in contacting Wheeler or providing Wheeler's contact information. Altman refused Sapp access to his property by withholding the keys. Sapp ultimately had a locksmith change the locks to the premises so he could have access to the property he owned. Altman refused to provide an accounting of collected rent. Altman refused to provide the identity of a prospective tenant. The undersigned then discovered that Altman through JDBD, LLC had entered into an unauthorized fraudulent lease of the premises with a third party in June 2007. Testimony created the inference, if not the direct testimony, that a third party (Plantation Resort) had been leasing through Altman for some time prior to execution of the unauthorized lease.

Upon Altman's refusal to account for collected rent and the discovery of the unauthorized lease agreement, the Plaintiff Sapp commenced eviction proceedings in the Magistrate's Court of Horry County against all parties who had possession of the premises or who may claim an interest in the premises (except Resort Properties South, Inc. which could not be located). The eviction case resulted in a Writ of Ejectment and a final Order confirming the actions taken in the case.

Plaintiff Sapp then instructed his attorneys to commence legal action against P.I. Leasing & Management for its default of its lease obligations and against the guarantor, Will D. Wheeler. During the course of the case, Plaintiff's Sapp's attorneys issued subpoenas to Altman for relevant records and information. Altman ignored the

¹ The testimony was that Mr. Wheeler had designated Mr. Altman to handle Wheeler's affairs regarding the leased premises.



subpoenas. Altman and JDBD, LLC were then added as parties to the suit. Approximately two weeks prior to trial the parties met for a settlement conference. At no time did any Defendant offer to settle any claim. The Defendants forced Plaintiffs to try this complex commercial case which resulted in a full three day trial. The case was difficult because it included multiple claims against multiple parties. Liability and damages were fully contested by all defendants.

Plaintiff is already defending post trial motions. Substantial amounts of attorneys' time will be required to defend these matters, defend appeals, and collect the judgments entered against Defendants. The Court finds that Plaintiff's counsel's estimate of additional fees for post trial matters, appeals, and collection of the judgments is reasonable. The collection process is cumbersome and fraught with peril. An appeal of the case with multiple legal issues will also require significant legal resources.

2. Time Necessarily Devoted to the Case

In this case, the undersigned counsel for Mr. Sapp and other attorneys, law clerks, and paralegals devoted 271.50 hours to this case through June 11, 2010. Based on my years of experience as a practicing attorney, and my years as a Circuit Court Judge, the time devoted to the case was appropriate. The recorded time was probably conservative as counsel was not as diligent in recording time since much of the case was handled on a contingency fee arrangement. The actual fee arrangement and contingency of compensation are discussed in subparagraph 4 below. The value of the 271.50 hours based on the hourly rates at which the case was being billed results in a blended rate of approximately \$225.00 per hour. Sapp engaged Robinson, McFadden & Moore in late 2007 or early 2008. Robinson McFadden's lead attorney initially billed



this file at the rate of \$275.00 per hour and time is now being recorded at the rate of \$290.00 per hour. Mr. Hoefer has billed this matter at rates ranging between \$150.00 and \$175.00 per hour. The Court finds these hourly rates to be reasonable.

3. The Professional Standing of Counsel

Plaintiff's lead counsel is in his 27th year of practicing law having graduated from University of South Carolina School of Law in January 1984 and having been admitted to the Bar May 16, 1984. Mr. Hoefer graduated from University of South Carolina School of Law in May 2008 and began working as an attorney at Robinson McFadden & Moore, P.C. upon taking the Bar exam in the summer of 2008. Mr. Hoefer is in his second full year of practice. Lead counsel has the distinction of being rated "av", by Martindale Hubbell, the highest rating reported by that service. Given the nature, extent, and difficulty of the case and the professional standing of counsel, the hourly rates billed to the file are reasonable and appropriate.

~~4. The Contingency of Compensation~~

~~Mr. Sapp initially engaged Robinson McFadden & Moore to handle his disputes arising out of the leased premises on an hourly fee basis. On an hourly fee basis, he was billed and paid Robinson McFadden & Moore \$6,040.25 in legal fees for time billed through March 31, 2009. The fees recorded total \$7,640.25, but as a courtesy to the client, the undersigned wrote off \$1,600.00 netting the amount owed and paid by Sapp to \$6,040.25. After March 31, 2009, the undersigned and Mr. Sapp agreed that the litigation would proceed on a contingency fee basis. Mr. Sapp was then responsible for payment of the law firm's out of pocket costs, and the law firm would be paid a contingency fee of 40% of the recovery if the case went to trial.~~

THA

THA

Ref
~~The undersigned is informed and believes that contingency fee arrangements are regularly used in complex commercial cases and that the range for such fees is generally between one third to one half of the recovery. Further, the undersigned is well aware that the courts of South Carolina have often awarded attorney's fees in excess of the amount recovered by successful plaintiffs under the Unfair Trade Practices Act. See *Global Protection Corp. v. Halbersberg*, 332 S.C. 149, 562 S.E.2d 483 (1998) (awarding a contingency fee of one third of the treble damages under the UPTA); *Taylor v. Medenica, supra* (awarding \$500,000.00 in fees on \$108,726.00 in damages); and *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1980) (awarding \$26,000.00 in fees on a judgment of \$16,151.00).~~

~~The contingency of compensation and a full award of fees are significant to Plaintiff and his counsel. The Plaintiff will be required to recover by going through the steps of execution and sale of property, all of which are quite speculative and there is no guaranty that he will recover the first dime of the jury's verdict. Plaintiff's counsel accepted significant risk in pursuing this case which was vigorously contested as to liability and damages.~~

5. The Beneficial Results Obtained

As a result of the Defendants' failure to compromise and resolve the case prior to trial, Sapp proceeded to trial and obtained a favorable result on all claims against all Defendants. The jury verdict vindicated his rights to proceed against all Defendants on all claims and the ultimate jury awards were favorable including an award of punitive damages against the Defendant Altman and a finding of willfulness against the Defendant Altman under the Unfair Trade Practices Act. In addition, the jury awarded

TS

Sapp over \$250,000.00 on his claim against the guarantor who had denied any liability whatsoever.

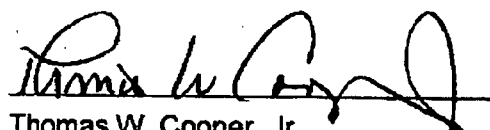
6. Customary Fees for Similar Services

TS
The hourly rates billed in this matter and two pieces of litigation (eviction and the instant case) are customary and appropriate given the complexity of the case and the standing of Plaintiff's counsel. Further, ~~cases of this nature are regularly taken on a contingency fee basis.~~ The undersigned is appreciative of the fact that Mr. Sapp may have obtained counsel who charged less money, but at the same time the undersigned is well aware that Sapp could have obtained counsel who charged quite a bit more for their services in this case. In short, both the hourly fee arrangement and the contingency fee arrangement ^{was} ~~were~~ appropriate in this case.

TS
IT IS ORDERED that attorneys' fees be awarded against the Defendant Wheeler and P.I. Leasing & Management, Inc in the amount of ~~\$104,420.00~~ ^{\$48,929.00} and against Defendants Altman and JDBD, LLC in the amount of ~~\$23,400.00~~ ^{\$11,325.00}.

AND IT IS SO ORDERED.

March 7, 2011
June 11, 2010


Thomas W. Cooper, Jr.
Circuit Court Judge

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS

J. Mars Sapp,

Plaintiff,

v.

Will D. Wheeler, P.I. Leasing &
Management, Inc., Winston Kenneth
Altman, II, and JDBD, LLC.,

Defendant.

Case No.: 2008-CP-22-1345

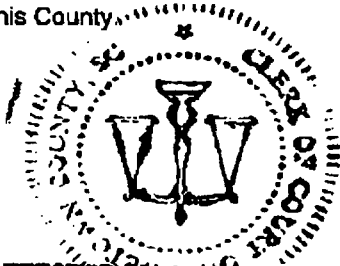
**EXECUTION AS TO DEFENDANT
AND JUDGMENT DEBTOR
WILL D. WHEELER**

Filed: June 4, 2010 and March 10, 2011
Number: 2008-CP-22-1345
Amount: \$252,798.00
Attorney Fee: \$48,929.00
Total: \$301,727.00 plus interest according to law

TO THE SHERIFF OF THE ABOVE NAMED COUNTY:

WHEREAS, judgment was rendered in the above-captioned action between the Plaintiff and the Defendant Will D. Wheeler in favor of the said Plaintiff for the above amount, as appears by the Judgment Roll, filed in the Office of the Clerk of Court for the above named County.

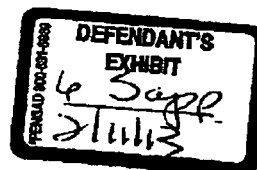
THEREFORE, we request that you satisfy said judgment out of the personal property of the said judgment debtor within your County, or if sufficient personal property cannot be found, then out of the real property in your County belonging to such judgment debtors on the day when said judgment was so docketed in your County or any time thereafter in whose hands soever the same may be, and duly return this Execution according to law to the Clerk of Court of this County.



ATTESTED BY
Jennifer Lawrence, Deputy
CLERK OF COURT FOR GEORGETOWN COUNTY

This 22nd day of March, 2011.

Thomas W. Bunch, II
Thomas W. Bunch, II
Robinson, McFadden & Moore, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

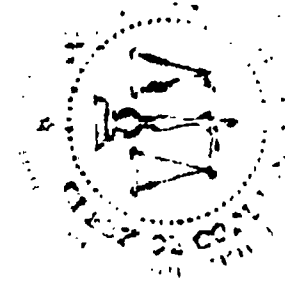


Date: 4/11/11

This is to certify that I am unable to
find personal or real property to satisfy
the within execution. I hereby Nulla
Bona this execution.

A. Lane Cribb

A. Lane Cribb, Sheriff
Georgetown County, SC



STATE OF SOUTH CAROLINA)

COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

Kennedy Funding, Inc.,)

Civil Action No. 2011-CP-22-00180

Plaintiff,)

vs.)

Pawleys Island North, LLC, Will
Darwin Wheeler, Peggy Wheeler-Cribb
and J. Mars Sapp,)

Plaintiff's Motion for Summary
Judgment as to Defendant J. Mars
Sapp

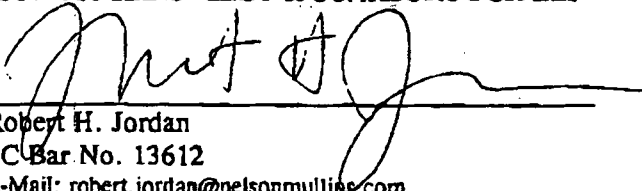
Defendants.)

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, plaintiff Kennedy Funding, Inc. hereby moves this Court for an order dismissing defendant J. Mars Sapp's claim of a lien interest superior to the plaintiff's lien interest in the property which forms the basis of this foreclosure action. In the alternative, plaintiff moves this Court for an order declaring J. Marr's Sapp's lien junior and subordinate to plaintiff's lien. This motion is based on the ground that plaintiff's duly recorded mortgage lien interest in the subject property pre-dates defendant Sapp's alleged lien interest by thirteen months and is a superior, first lien. This motion is further based on the pleadings on file with the Court, discovery conducted in the litigation, applicable common and statutory law, the attached memorandum of law in support of plaintiff's motion and such further proof as may hereafter be offered.

-SIGNATURE ON FOLLOWING PAGE-

FILED
GEORGETOWN COUNTY, S.C.
2011 OCT -3 AM 9:50
ALMA Y. WHITE
CLERK OF COURT

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Robert H. Jordan

SC Bar No. 13612

E-Mail: robert.jordan@nelsonmullins.com

Merritt G. Abney

SC Bar No. 71893

E-Mail: merritt.abney@nelsonmullins.com

151 Meeting Street / Sixth Floor

Post Office Box 1806 (29402-1806)

Charleston, SC 29401-2239

(843) 853-5200

Attorneys for Plaintiff Kennedy Funding, Inc.

September 26, 2011
Charleston, South Carolina

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Kennedy Funding, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

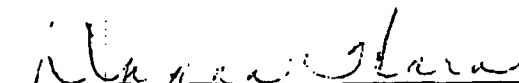
Pleadings:

Plaintiff's Motion for summary Judgment as to Defendant J. Mars Sapp

Counsel Served:

Thomas W. Bunch, II, Esq.
Robinson, McFadden & Moore, P.C.
PO Box 944
Columbia, SC 29201

Robert H. Gwinn, III, Esq.
Gwinn Law Office, LLC
4701-A Oleander Drive
Myrtle Beach, SC 29577



Donna Horn
Administrative Assistant

Sept 26, 2011

FILED
GEORGETOWN COUNTY, S.C.
2011 OCT -3 AM 9:50
ALMA Y. WHITE
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Kennedy Funding, Inc.

☐ Plaintiff

v.

Pawleys Island North, LLC, Will Darwin Wheeler,

Peggy Wheeler-Cribb and J. Mars Sapp

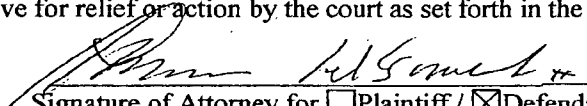
☒ Defendant SAPP.

IN THE COURT OF COMMON PLEAS

CASE NO.

2011-CP-22-00180

MOTION AND ORDER INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney: Robert H. Jordan, Bar No. 13612 Address: 151 Meeting Street, 6th Floor, Post Office Box 1806 (29402) Charleston, SC 29401 phone: (843) 853-520 fax: e-mail: robert.jordan@nelsonmullins.com other:		Defendant Sapp's Attorney: Thomas W. Bunch, II, Bar No. 1011 Address: PO Box 944 Columbia, SC 29202 phone: (803) 779-8900 fax: (803) 771-9411 e-mail: tbunch@RobinsonLaw.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 Reconsider Estimated Time Needed: 20 minutes Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion 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 2012 MAR -8 PM 12:56 ALPHA CLERK OF COURT March 8, 2012 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, SCRCP) ☐ 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:  ☐ MOTION FEE COLLECTED: <u>25.00</u> ☐ CONTESTED - AMOUNT DUE: _____ Date Filed: <u>3/8/2012</u>			

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Kennedy Funding, Inc. ,
Plaintiff,

v.

Pawleys Island North, LLC; Will Darwin
Wheeler; Peggy Wheeler-Cribb; and J.
Mars Sapp,
Defendants

IN THE COURT OF COMMON PLEAS

Case No.: 2011-CP-22-00180

Defendant J. Mars Sapp's Rule 59
Motion to Alter or Amend Judgment

FILED
GEORGETOWN COUNTY, S.C.
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ALMA Y WHITE
CLERK OF COURT

Introduction

Pursuant to Rule 59, SCRCP, Defendant J. Mars Sapp Moves for an Order of this Court to Alter or Amend the Order Granting Plaintiff's Motion for Summary Judgment as to Defendant J. Mars Sapp ("the Summary Judgment Order"). The Summary Judgment Order was served by mail on the undersigned on February 27, 2012, and received by the undersigned on February 29, 2012.

This case involves the foreclosure of a mortgage by Kennedy Funding, Inc. and against a purported borrower, Pawley's Island North, LLC. Defendant Sapp holds a judgment lien against Defendant Wheeler which was entered about 13 months after the purported mortgage was recorded. Sapp contends that Wheeler fraudulently conveyed the real property against which the foreclosure case is proceeding to Defendant Pawley's Island North.

In the Summary Judgment Order the Court ruled:

Specifically, the Court rules that Sapp's claim to possess a lien superior to that of Kennedy Funding is dismissed and Sapp's lien, if any, is declared junior and subordinate to Kennedy Funding's lien. The Court does not make any finding as to the legitimacy of Sapp's lien and limits its ruling

only to find that if such lien does exist, it is junior to Kennedy Funding's lien.

The grounds for this motion follow:

1. The Court failed to address the fraudulent conveyance argument presented by Sapp and its impact on Kennedy Funding's alleged mortgage.
2. The Court failed to address Kennedy Funding's participation in the fraudulent conveyance by Sapp and the impact of the participation on Kennedy Funding's alleged mortgage.
3. The Court failed to address the equitable doctrine that Kennedy Funding should not be allowed to look for satisfaction of its claim on the parcel of property that was unencumbered prior to Kennedy Funding's alleged mortgage.
4. The Court erred in dismissing Sapp's claim of priority when there were material issues of fact in dispute.
5. The Court erred in dismissing Sapp's claim of priority when there was a scintilla of evidence that Kennedy Funding's alleged mortgage was void.
6. The Court erred in finding Sapp's lien subordinate and junior to the alleged lien of Kennedy Funding when there were material issues of fact in dispute.
7. The Court erred in finding Sapp's lien subordinate and junior to the alleged lien of Kennedy Funding when there was a scintilla of evidence that Kennedy Funding's mortgage was void.

Legal Standard

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable

issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

Hancock v. Mid-S. Mgmt. Co., Inc., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).

. . . in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.

Id., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Facts

The evidence presented at the hearing on Kennedy Funding's summary judgment motion showed that:

- a. Defendant Sapp sued Defendant Wheeler in September 2008 alleging over \$500,000 in damages.
- b. In September 2008, Wheeler owned two parcels of property on Pawley's Island, lots 3 and 4 which are the subject of Kennedy Funding's alleged mortgage and foreclosure action. Lot 3 was unencumbered prior to the alleged Kennedy Funding mortgage. Lot 4 was mortgaged to First South Bank.
- c. According to an Appraisal performed for Kennedy Funding, as of February 2009, Lot 3 had an "As Is' Market Value" value of \$1,040,000 and Lot 4 had a value of \$880,000.
- d. On May 5, 2009, while Sapp's litigation against Wheeler was pending, Wheeler conveyed the lots to Pawley's Island North, LLC by quitclaim deed for "\$5.00 and no other consideration." Wheeler had a 99% interest in Pawley's Island North LLC and his mother had the remaining 1%.

- e. Kennedy Funding knew of the Sapp litigation. It knew that Wheeler owned the property in his name. It agreed or urged Wheeler to convey the property to the LLC. It failed to secure any explanation of the pending litigation filed by Sapp. It knew that Wheeler was a 99% owner of the LLC. It knew that Wheeler was quitclaiming the property for no consideration. It did not care about a fraudulent conveyance as long as it obtained a title opinion on the lots and title insurance. It participated in the fraudulent conveyance.
- f. Contemporaneous with the recording of the quitclaim deed for Lots 3 and 4, Kennedy Funding recorded a mortgage in on both lots. It knew that the end result would be to put the property beyond the reach of Wheeler's bona fide creditors.
- g. The amount of the purported loan was \$960,000 or 50% of the estimated value of Lots 3 and 4; however, an examination of the closing documents shows that Kennedy Funding advance substantially less than \$960,000. Kennedy Funding retained \$185,200 of the loan proceeds for a commitment fee (\$70,000) and prepaid interest (\$115,200; no payments were required for the first year of the loan). Thus, the amount advanced was only 40% of the property's value. Pawley Island North, 99% owned by Wheeler, took \$397,438.50 cash from closing.
- h. The Circuit Court entered a judgment in Sapp's favor based on a jury verdict against Wheeler in June 2010 for almost \$249,000. Attorneys' fees of almost \$52,000 were later added to the judgment. The amount of cash distributed to Wheeler's LLC at closing was more than sufficient to pay this judgment.

- i. In April 2011, The Georgetown County Sherriff returned a *nulla bona* execution on Sapp's judgment against Wheeler.

Argument

The facts, and all reasonable inferences taken from them, show that the conveyances of Lots 3 and 4 by Wheeler are void and of no effect. See, S.C. Code Ann. 27-23-10(A) (1976). Because the transfer is void, the property would not have been owned by Pawley's Island North; therefore it had no property on which to grant a mortgage. The mortgage to Kennedy Funding is of no effect and invalid.

Even if Pawley's Island North could grant a mortgage, the mortgage itself would be a fraudulent conveyance under the facts of this case. As stated in *Corpus Juris Secundum*, a mortgage "is invalid where the debt of the creditor with notice of the fraud is created contemporaneous with or subsequent to, the fraudulent conveyance." 37 C.J.S. *Fraudulent Conveyances* § 190. See also, Rilling v. Schultze, 95 Tex. 352, 67 S.W. 401 (1902). Further, "When a mortgage to secure a note is executed in fraud of the mortgagor's creditors, the creation of the mortgage is a fraudulent conveyance and courts will not enforce the note". 27 S.C. Jur. *Mortgages* § 92 (discussing validity of mortgages).

In essence, Kennedy Funding comes to this court with unclean hands. South Carolina has shown an increasing willingness not to permit creditors to seek equity and foreclose when they come to the Court with unclean hands. See, e.g., Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (2010). By seeking the equity of this court in regard to Mars Sapp, it must do equity. The facts, and all reasonable inferences taken from the facts, show that Kennedy Funding has not done equity.

In Coleman v. Daniel, 261 S.C. 198, 199 S.E.2d 74 (1973), the judgment debtor conveyed property valued at an estimated \$85,000. The consideration given by the transferee was \$49,000 (58% of the property's value). The judgment creditor alleged the conveyance to be fraudulent and the South Carolina Supreme Court agreed. Not only did it agree, but it found the consideration to be grossly inadequate at 58% of the property's value. The South Carolina Supreme Court granted the relief sought by Coleman (the judgment creditor) including sale of the property. Here, Kennedy loaned less than 50% of the combined value of the lots. The consideration was grossly inadequate and Kennedy Funding's mortgage should be found invalid.

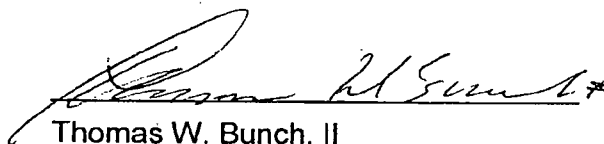
Even if the Court were to find that Kennedy's mortgage was taken for adequate consideration (and this is a material issue of fact which cannot be decided on summary judgment), Kennedy Funding's lien is void or subordinate to Sapp's judgment lien because there is evidence that Kennedy Funding participated in the fraud. SCNB v. Halter, 293 S.C. 121, 134, 359 S.E.2d 74, 80 (Ct. App. 1987).

Finally, despite all of the material issues of fact which should have precluded the Court from granting summary judgment, the Court, as a matter of equity should not have granted Kennedy Funding's motion. Where a court may find a partial insufficiency of consideration, the conveyance may be impeached as being voluntary or fraudulent to a partial extent, and the conveyance will be upheld only to the extent of the partial consideration. Coleman v. Daniel, 261 S.C. at 213, 199 S.E.2d. at 81, citing 37 C.J.S. Fraudulent Conveyances § 158 (omitting citations to multiple South Carolina cases). The Court should determine the sufficiency, if any, of the consideration for the mortgage. Here, there was sufficient value in Lot 4 to support the advances made by

Kennedy Funding. The Court should allow Sapp to satisfy his claims out of Lot 3, and allow Kennedy Funding to participate only if there are excess proceeds as to Lot 3.

Conclusion

Material issues of fact exist. Not only is there a scintilla of evidence, but there is clear and convincing evidence that Kennedy Funding's mortgage is totally or partially invalid. This Court should reconsider the Summary Judgment Order and deny Kennedy Funding's summary judgment motion.



Thomas W. Bunch, II
Paul H. Hoefer
ROBINSON, McFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

March 7th, 2012
Columbia, South Carolina

)
) IN THE COURT OF COMMON PLEAS
)

Case No.: 2011-CP-22-00180

CERTIFICATE OF SERVICE

v.

Defendant.

FILED
GEORGETOWN COUNTY, S.C.
2012 MAR -8 PM 12:56
ALMA Y. WHITE
CLERK OF COURT

Dated at Columbia, South Carolina this 7th day of March, 2012.

Amy E. Lovette

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Kennedy Funding, Inc., as predecessor-in-interest
and BNP Paribas

☐ Plaintiff

v.

Pawleys Island North, LLC, Will Darwin Wheeler,
Peggy Wheeler-Cribb and J. Mars Sapp

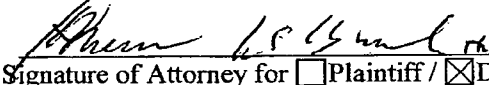
☒ Defendant SAPP.

IN THE COURT OF COMMON PLEAS

CASE NO.

2011-CP-22-00180

MOTION AND ORDER INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney: Robert H. Jordan, Bar No. 13612 Address: 151 Meeting Street, 6th Floor, Post Office Box 1806 (29402) Charleston, SC 29401 phone: (843) 853-520 fax: e-mail: robert.jordan@nelsonmullins.com other:		Defendant Sapp's Attorney: Thomas W. Bunch, II, Bar No. 1011 Address: PO Box 944 Columbia, SC 29202 phone: (803) 779-8900 fax: (803) 771-9411 e-mail: tbunch@RobinsonLaw.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 Stay Sale Estimated Time Needed: Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion 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 Sapp		June 28, 2013 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, SCRCP) ☐ 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: <u>Lucinda Green</u>		Date Filed: <u>7/1/13</u>	
☒ MOTION FEE COLLECTED: <u>\$25.00</u> ☐ CONTESTED - AMOUNT DUE: _____			

COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS

Plaintiff,

Case No.: 2011-CP-22-00180

Motion to Stay Sale

V.

Pawleys Island North, LLC, Will Darwin
Wheeler, Peggy Wheeler-Cribb and J.
Mars Sapp,

Defendants.


Thomas W. Bunch II

Thomas W. Bunch, II
ROBINSON, McFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

June 28, 2013

FILED
HADDONSTOWN COUNTY, N.J.
2013 JUL -1 PM 4:09
ALYSSA J. ROFFICE
CLERK OF COURT

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	
Kennedy Funding, Inc., as	)	Case No.: 2011-CP-22-00180
predecessor-in-interest, and BNP	)	
Paribas ,	)	
	)	
Plaintiff,	)	CERTIFICATE OF SERVICE
	)	
v.	)	
	)	
Pawleys Island North, LLC, Will	)	
Darwin Wheeler, Peggy Wheeler-	)	
Cribb and J. Mars Sapp,	)	
	)	
Defendants.	)	

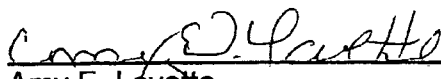
This is to certify that I, Amy E. Lovette, a with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below the **Motion to Stay Sale** in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

Robert H. Jordan, Esquire
Nelson Mullins Riley & Scarborough, LLC
151 Meeting Street , 6th Floor
Post Office Box 1806 (29402)
Charleston, SC 29401

Robert H. Gwinn, III, Esquire
Gwinn Law Office, LLC
4701-A Oleander Drive
Myrtle Beach, SC 29577

FILED
GEORGETOWN COUNTY, S.C.
2013 JUL -1 PM 4:09
ALMA J. WHITE
CLERK OF COURT

Dated at Columbia, South Carolina this 28th day of June, 2013.



Amy E. Lovette

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN)

Kennedy Funding, Inc., as predecessor-) Civil Action No. 2011-CP-22-00180
in-interest, and BNP Paribas,)

Plaintiffs,)

vs.)

Pawleys Island North, LLC, Will
Darwin Wheeler, Peggy Wheeler-
Cribb, and J. Mars Sapp,)

Defendants.)

MASTER'S REPORT ON SALE,
ORDER OF DISBURSEMENT
PURSUANT TO RULE 71 (PUBLIC
SALE), ORDER CONFIRMING
SALE AND ORDER CLOSING
CASE

TO: THE PRESIDING JUDGE OF THE COURT OF COMMON PLEAS:

1. Pursuant to the Order of the Court and after due notice and advertisement, I sold the subject property to Plaintiff BNP Paribas, as agent for undisclosed principals, for the sum of One Million Five Hundred Thousand and 00/100 (\$1,500,000.00) Dollars, that amount being the highest bid made on the sales day, August 5, 2013. A deficiency judgment being entered, the bidding remained open for thirty (30) days after the sales day and no additional bids were made. The Plaintiff would have to pay only the costs as provided in said Order and became the Grantee of the subject property.

2. I have executed and delivered to said Grantee a good and sufficient Deed of conveyance of said property.

3. That I have paid out and disbursed the proceeds of said sale as set forth below showing the amounts expended by me and for which I hold receipts or cancelled checks:

13

Amount of Plaintiff's Bid	\$1,500,000.00

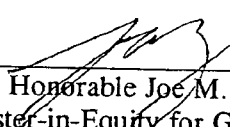
Disbursements

The Georgetown Times	\$327.60

Commission on Sale	\$2,500.00

TOTAL DISBURSED	\$2,827.60

4. All of the funds having been disbursed, I hereby ORDER the file closed and the case ended.



The Honorable Joe M. Crosby
Master-in-Equity for Georgetown County

Georgetown, South Carolina

24 September, 2013

STATE OF SOUTH CAROLINA)
) **MASTER'S DEED**
COUNTY OF GEORGETOWN)

TO ALL WHOM THESE PRESENT SHALL CONCERN:

I, Joe M. Crosby, as Master in Equity for Georgetown County, the said State, send greetings:

WHEREAS, in an action in the Court of Common Pleas in Georgetown County between Kennedy Funding, Inc., as predecessor-in-interest, and BNP Paribas, as plaintiff(s) and Pawleys Island North, LLC, Will Darwin Wheeler, Peggy Wheeler-Cribb, and J. Mars Sapp, as defendant(s), by an Order filed June 6, 2013, it was decreed that the property hereinafter described should be sold by the Master in Equity for Georgetown County on the terms and for the purposes mentioned in the Order(s) granted in the case. (see Judgment Roll No. 2011-CP-22-00180) **A MORTGAGE FORECLOSURE ACTION-TRANSFERRING REALTY**

NOW THEREFORE KNOW ALL MEN, That I, the undersigned, as Master in Equity for Georgetown County, pursuant to the foregoing and in consideration of One Million Five Hundred Thousand and 00/100 (\$1,500,000.00) Dollars, as paid by or on behalf of the hereinafter named grantee, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant and release the following property unto 334 Myrtle Ave. SC Property Associates, LLC (Grantee):

ALL THAT CERTAIN piece, parcel or lot of land lying, being and situate on Pawleys Island, Georgetown County, State of South Carolina, being that certain lot of land designated as LOT 3 on a plat prepared by The Earthworks Group, dated July 9, 2006 and recorded in the Office of the Clerk of Court for Georgetown County, South Carolina in Plat Slide 625 at page 10.

AND ALSO

ALL THAT CERTAIN piece, parcel or lot of land lying, being and situate on Pawleys Island, Georgetown County, State of South Carolina, being that certain lot of land designated as LOT 4 on a plat prepared by the Earthworks Group, dated July 9, 2006 and recorded in the Office of the Clerk of the Court for Georgetown County, South Carolina in Plat Slide 625 at page 10.

This being the property conveyed to Pawleys Island North, LLC by deed of Will D. Wheeler dated April 28, 2007, and recorded in the Register of Deeds Office for Georgetown County in Record Book 1225 at Page 103.

TMS No. 42-0167-042-02-00 and 42-0167-042-03-00



Property Address: 334 Myrtle Avenue, Pawleys Island SC 29585

Grantee: 334 Myrtle Ave. SC Property Associates, LLC

Grantee's Address: c/o BNP Paribas - Value Preservation Group, LLC
787 Seventh Avenue
New York, NY 10019

Grantors: Joe M. Crosby, Master in Equity, Georgetown County
Pawleys Island North, LLC

This property was sold subject to assessments, South Carolina Department of Revenue taxes, Georgetown County taxes, existing easements and restrictions of record and other senior encumbrances.

TOGETHER with all and singular the hereditaments, rights, members and appurtenances whatsoever to the said property belonging or in any wise incident or appertaining, and the reversions and remainders, rents, issues, and profits thereof, and also any estate, right, title, interest, dower, possession, benefit, claim or demand therein whatsoever of all parties to the said suit and of all other person who might rightfully claim the same or any part thereof, by, from, or under them, or either of them;

TO HAVE AND TO HOLD the said property, with its hereditaments, privileges and appurtenances, unto the said Grantee, its successors and assigns for their own use, benefit, and behalf, forever.

Remainder of this page intentionally left blank.



IN WITNESS WHEREOF, I, the undersigned, as Master in Equity for Georgetown County, under and by virtue of the said Order(s), has hereunto set my Hand and Seal the 7th day of October, 2013.

SIGNED, SEALED AND DELIVERED
IN THE Presence of:

Jessica W. Duggan
Donald D. Gray

Joe M. Crosby
By: Joe M. Crosby
Master In Equity for Georgetown County

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

I, Donald D. Gray do hereby certify that Joe M. Crosby, as Master in Equity for Georgetown County, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Sworn To and Subscribed Before Me

This 7th day of October, 2013.

Donald D. Gray (L.S.)
My Commission Expires: 02/23/22
Notary Public of South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
The Honorable Joe M. Crosby, Master-In-Equity

Case No. 2011-CP-22-0180
Appellate Case No. 2013-001447

Kennedy Funding, Inc. as predecessor-in-interest, and BNP
Paribas.....Respondents,

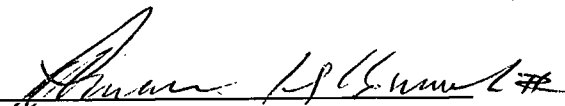
v.

Pawleys Island North, LLC, Will Darwin Wheeler, Peggy Wheeler-Cribb, and J. Mars
Sapp, Defendants,
Of whom Pawleys Island North, LLC, Will Darwin Wheeler and Peggy Wheeler-Cribb are
Respondents and

J. Mars Sapp is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.


Thomas W. Bunch, II
Paul H. Hoefer
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
Attorneys for Appellant

December 2nd, 2013

RECEIVED

DEC 03 2013

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
The Honorable Joe M. Crosby, Master-In-Equity

Case No. 2011-CP-22-0180
Appellate Case No. 2013-001447

Kennedy Funding, Inc. as predecessor-in-interest, and BNP
Paribas.....Respondents,

v.

Pawleys Island North, LLC, Will Darwin Wheeler, Peggy Wheeler-Cribb, and J. Mars
Sapp, Defendants,
Of whom Pawleys Island North, LLC, Will Darwin Wheeler and Peggy Wheeler-Cribb are
Respondents and

J. Mars Sapp is the Appellant.

PROOF OF SERVICE

I certify that I have served the Record on Appeal on opposing counsel by depositing a
copy of it in the United States Mail, postage prepaid, on **December 3, 2013** addressed as
follows:

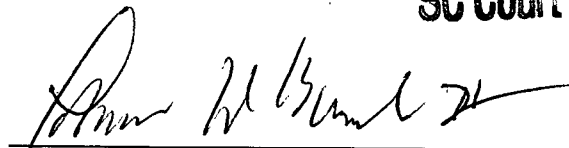
Robert H. Jordan, Esquire
Nelson Mullins Riley & Scarborough, LLC
Post Office Box 1806
Charleston, SC 29401

Robert H. Gwinn, III, Esquire
Gwinn Law Office, LLC
4701-A Oleander Drive
Myrtle Beach, SC 29577

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DEC 05 2013

SC Court of Appeals



Thomas W. Bunch, II
Paul H. Hofer
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Post Office Box 944
Columbia, SC 29202
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Attorneys for Appellant