THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No. 2011-CP-04-2728
Appellate Case No. 2013-002341

LNV Corporation,..... Respondent,

v.

Affordable Hospitality Group-Anderson, LLC; Diversified Capital Investment Group, LLC; Jay Berlye; Anderson County, South Carolina; and the State of South Carolina, ... Defendants.

Of Whom Affordable Hospitality Group-Anderson, LLC; Diversified Capital Investment Group, LLC, and Jay Berlye are, ... Appellants.

FINAL BRIEF OF RESPONDENT LNV CORPORATION

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Counter-Statement of the Case

Appellant AHG defaulted on its construction loan obligations. (Compl. ¶ 26; Am. Answer & Countercl. ¶ 34; R. 38; 190.) As a result, on September 13, 2011, Respondent LNV Corporation ("LNV") filed a foreclosure complaint against the borrower, AHG, and the guarantors, Diversified Capital Investment Group, LLC and Jay Berlye (collectively "Appellants") in Anderson County, South Carolina. (Compl. and Exs.; R. 31.) LNV's foreclosure action arises out of a construction loan it acquired from the Federal Deposit Insurance Corporation ("FDIC"). (Compl. ¶ 24; R. 37.) The loan was made in connection with Appellants' construction of the Microtel Hotel in Anderson, South Carolina. (Compl.; R. 31.)

On May 15, 2008, Appellant AHG entered into a note and construction loan agreement with Haven Trust Bank ("Haven Trust") in the original principal sum of $3,411,782.00. (Compl. ¶ 11; Am. Answer & Countercl. at ¶ 12; R. 33; 192.) The note and construction loan agreement were guaranteed by Diversified Capital Investment Group, LLC and by its manager Jay Berlye. (Compl. ¶¶ 12-13, and Exs. B & C; Am. Answer & Countercl. ¶¶ 14, 16; R. 33, 56, 63; 193, 194.) The loan was secured by a

mortgage on the property that is the subject of this action (the "Subject Property"). (Compl. at ¶ 14, Ex. D; Am. Answer & Countercl. ¶¶ 18-19; R. 33, 86, 194.)

On December 12, 2008, Haven Trust was closed and placed into receivership with the FDIC. (Compl. ¶¶ 20-21; Am. Answer & Countercl. ¶¶ 28-29 R. 36, 196.) LNV subsequently acquired the note and construction loan from the FDIC. (Compl. ¶ 24; R. 37.) The mortgage assignment was executed on April 30, 2009 and Appellants were notified of the assignment on May 1, 2009. (*See* Assignment Documents, attached to Compl. as Exs. J-O; *see also* Am. Answer & Countercl. ¶ 226; R 168-188.)

Appellants breached the terms of their respective obligations when they failed to pay the loan as agreed. (Compl., ¶ 26; Am. Answer & Countercl. ¶ 34; R. 38, 197.) Appellants also allowed various tax liens to attach to the Subject Property for failure to pay taxes to the State of South Carolina and the County of Anderson (Compl. at ¶ 29; R. 39.) As of the date of the filing of the foreclosure complaint, LNV was owed $4,125,598.66 (with interest accruing at $834.55 *per diem*). (Compl. at ¶ 28; R. 38.)

In response to LNV's foreclosure complaint, Appellants filed a series of counterclaims in their Amended Answer and Counterclaim dated November 28, 2011. (Am. Answer & Countercl. at ¶¶ 200 to ¶ beginning WHEREFORE; R. 221-231.) Appellants asserted counterclaims for: (1) breach of contract, (2) breach of the duty of good faith and fair dealing, (3) breach of contract with fraudulent intent, (4) violation of the South Carolina Unfair Trade Practices Act, and (5) tortious interference. (*Id.*) All of Appellants' counterclaims are premised upon their claim that LNV did not abide by a loan commitment letter that Appellants allege obligated LNV to "grant [a] permanent

loan and assist [Appellants] in obtaining [a] SBA 504 Interim Loan." (Am. Answer & Countercl. at ¶ 227; R. 225.)

LNV moved to dismiss Appellants' counterclaims pursuant to Rule 12(b)(6), SCRCP, for failure to state a claim for which relief could be granted. (LNV Mot. to Dismiss; R. 284.) LNV moved the court on the grounds that: 1) Appellants released all the counterclaims they sought to prosecute in response to the foreclosure complaint via modification agreements executed by and between Appellants and LNV; 2) the loan commitment letter could not have created an enforceable contract because certain conditions were admittedly not satisfied by Appellants; 3) LNV could not guarantee permanent financing—such decisions were within the sole purview of the governmental agency known as the United States Small Business Administration ("SBA"); and 4) Appellants' claims arising under the South Carolina Unfair Trade Practices Act ("SCUPTA") were barred by the language of S.C. Code Ann. §§ 36-3-203(b) and 36-3-302(c). (LNV's Mot. to Dismiss; LNV's Mem. in Supp of its Mot. to Dismiss; LNV's Reply in Supp. of its Mot. to Dismiss; R. 284, 436, 512.)

Appellants opposed the motion. (Appellants' Mem. in Opp. to LNV's Mot. to Dismiss; Appellants' Suppl. Mem. in Opp. to LNV's Mot. to Dismiss; R. 418, 454.)

The trial court granted LNV's motion to dismiss. (November 14, 2012, Order; R. 13). In response to the trial court's order dismissing their counterclaims, Appellants moved to alter or amend the trial court's dismissal order and also moved to amend their counterclaims. (Appellants' November 26, 2012 Rule 59(e) Mot.; Appellants' Mot. to

Amend; R. 286, 300.) Subsequently,[1] the trial court denied Appellants' motions. (September 23, 2013 Order; R. 5.)

This appeal followed.

Standard of Review

In reviewing an order granting a Rule 12(b)(6) motion to dismiss, the appellate court will apply the same standard as the trial court. *See Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 746 S.E.2d 329 (2013) (holding that an appellate court reviews the grant of dismissal according to the same standard applied by the trial court.)

"In considering a motion to dismiss under Rule 12(b)(6), the circuit court must base its ruling solely on the allegations set forth in the [pleading]." *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 148, 714 S.E.2d 537, 539 (2011); *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007). But when documents are "attached and incorporated by reference into the [pleading]," the "trial court [may] consider [the] documents" when deciding a motion to dismiss pursuant to Rule 12(b)(6). *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009).[2] If the party seeking relief fails "to state facts sufficient to

[1] The trial court originally denied Appellants' Rule 59(e) motion but vacated that order upon learning that Appellants had also moved to amend their counterclaims.

[2] Appellants devote an entire section of their appellate brief to an argument contending that the trial court violated the 12(b)(6) standard and "went beyond the pleadings." As the trial court's orders demonstrate, the trial court considered only the allegations of Appellants' Amended Answer and Counterclaims, the documents Appellants incorporated by reference therein, and/or the exhibits attached thereto. (November 14, 2012 Order at pp. 5-9; September 23, 2013, Order at p. 2; R. 17-21, 6.) As the South Carolina Supreme Court has recognized "allowing a trial court to consider documents that are incorporated by reference in the complaint . . . prevents a [claimant] . . . from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based." *Brazell v. Windsor*, 384 S.C. at 516, 682 S.E.2d at 826.

constitute a cause of action" in the pleading, the circuit court should dismiss the claims. *Flateau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003).

South Carolina Law Controls this Action

In their brief, Appellants, without citation to support the contention, argue that Georgia law controls this foreclosure action. This contention is expressly refuted by the operative loan documents governing the construction loan upon which LNV based its foreclosure complaint. The Note, Guaranty, Construction Loan Agreement, Mortgage, and Security Agreement all contain provisions that provide that South Carolina law governs the "enforcement of LNV's rights and remedies against the property and the guarantors, secured by the Mortgage and Security Agreement." (*See* Note, Ex. A to Compl. 2; Guaranty, Ex. B to Compl. 5-6; Construction Loan Agreement, Ex. C to Compl. art. VII ¶ 12, p. 20; Mortgage, Ex. D to Compl. at ¶ B.7, p. 15; Security Agreement, Ex. E to Compl. ¶ 7(b), p. 9; R. 53, 58-59, 83, 101.) These contractual provisions concerning real property secured by mortgage instruments are consistent with South Carolina law. *Savannah Bank and Trust of Savannah v. Shuman*, 250 S.C. 344, 157 S.E. 2d 864 (1967) (noting mortgages of real property are governed by South Carolina law); *see also* S.C. Code Ann. § 29-3-10, *et. seq.* (setting forth the South Carolina foreclosure regime).

Argument

As detailed herein, the trial court's ruling should be upheld for a number of reasons appearing in the record—any one of which will necessitate affirmance of the trial court's orders dismissing this action. *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419-20, 526 S.E.2d 716, 723 (2000) (holding that the appellate court may affirm for

any ground appearing in the record because "a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court").

Appellants' case is based entirely upon a single document—the November 6, 2007, loan commitment letter. Appellants ask this Court to hold that this loan commitment letter obligated LNV to unconditionally provide permanent financing for Appellants and the operation of the Microtel Hotel in Anderson, South Carolina. Appellants ignore the actual loan documents, Appellants' admission that they have defaulted on the construction loan, and the plain language of the very loan commitment letter upon which Appellants' claims are founded. As determined by the trial court, the loan commitment letter does not provide Appellants any basis for relief whatsoever.

First, the trial court correctly concluded that the Appellants released all of the counterclaims they now seek to prosecute in this action. In the course of dealings between LNV and Appellants, Appellants modified the terms of their construction loan obligations with LNV. In doing so, Appellants released all claims that they had or later may have had against LNV. The trial court correctly concluded that Appellants are bound by the modification agreements and that they have released the counterclaims asserted in response to the foreclosure complaint.

Second, the trial court correctly determined that the loan commitment letter was not a valid or enforceable contractual obligation. The loan commitment letter required that "the loan close with[in] ninety (90) days" of the commitment. This did not occur. Hence, the trial court properly dismissed Appellants' counterclaims on the additional

ground that no valid obligation existed between the parties as it pertained to Appellants' claimed entitlement to permanent financing. Further; as the record establishes, the loan commitment letter was not an unconditional promise for permanent lending based on the conditions contained in the commitment letter and LNV does not make SBA lending decisions.

For these reasons, as further detailed herein, the Court should affirm the dismissal of Appellants' counterclaims. This action should proceed to foreclosure before the master-in-equity.

I. The trial court properly concluded that Appellants released the counterclaims they raised in this action.

Appellants unequivocally released their counterclaims. The trial court correctly made this determination at the motion to dismiss stage based upon the allegations of the counterclaims and the documents relied upon therein.

Under South Carolina law, "[a] release is a contract and contract principles of law should be used to determine what the parties intended." *Ecclesiastes Production Ministries v. Outparcel Assoc., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007). Where a "[r]elease unambiguously sets forth the contracting parties' intent, [the court is] bound by that clearly expressed intent." *Bowers v. Dept. of Transp.*, 360 S.C. 149, 153, 600 S.E.2d 543, 545 (Ct. App. 2004). Releases like those executed by Appellants are regularly recognized under South Carolina law and are enforced accordingly. *See Id.* at 156, 600 S.E.2d at 546; *see also Gecy v. Prudential Ins. Co. of America*, 273 S.C. 437, 442, 257 S.E.2d 709, 712 (1979); *Gardner v. City of Columbia Police Dept.*, 216 S.C. 219, 225, 57 S.E.2d 308, 310 (1950); *Lowery v. Callahan*, 210 S.C. 300, 305, 42 S.E.2d 457, 459 (1947).

A. The plain language of the loan modification agreements establish that Appellants' counterclaims have been released.

In their Amended Answer and Counterclaim, Appellants admit that the Note, Mortgage, Guaranty, and other instruments attached to the Complaint speak for themselves. (Am. Answer & Countercl. at ¶¶ 12, 14, 16, 18; R. 192, 193, 194.) The Note states that the borrower's failure to make payments when due, or any default, will result in the balance being due and payable immediately at the option of the holder of the Note. (Note, Complaint at Ex. A, p. 2; R. 54.) The Guaranty states that the guarantor "***unconditionally*** guarantees the full and prompt payment, observance, and performance" of the obligations of Appellants, and that the guarantor remains obligated even if the bank opts to "extend (including extensions beyond the original term)," or "modify" the underlying obligations, or "stop lending money or extending other credit to Obligor." (Guaranty, Complaint at Ex. B, ¶¶ 1, 10; R. 57, 59 (emphasis added).) Appellants further admit that they failed to pay the Note and Mortgage and pursuant to the Guaranty. (Am. Answer & Countercl. ¶¶ 34, 91, 116 (Berlye's refusal to pay Pursuant to the Guaranty; R. 197, 205, 209.)

Appellants also admit that they executed the "Loan Modification Agreement[s]" and these agreements were relied upon and attached to Appellants' Amended Answer and Counterclaim. (Am. Answer & Countercl. ¶¶ 12, 14, 16, 18; *see also* Exs. B & C to Am. Answer & Countercl.; R. 192, 193, 194, 248, 258.) The two Loan Modification Agreements the borrowers executed with LNV are dated June 1, 2009, and November 10, 2009. (*See* Exs. B & C to Am. Answer & Countercl.; R. 248, 258.) In each of these documents, in consideration of the LNV's modification of the construction loan

agreement to extend the term, Appellants granted a release that expressly includes the very claims that they raised as defenses and counterclaims in this foreclosure action.

Both of the modifications contain the following language:

> AS A MATERIAL INDUCEMENT TO LENDER [LNV] TO ENTER INTO THIS AGREEMENT, BORROWER AND GUARANTORS [APPELLANTS] ... HEREBY FULLY, FINALLY AND COMPLETELY **RELEASE AND FOREVER DISCHARGE** ORIGINAL LENDER [HAVEN TRUST BANK], THE FEDERAL DEPOSIT INSURANCE CORPORATION ... [AND] **LENDER** [LNV] **OF AND FROM ANY AND ALL CLAIMS, CONTROVERSIES, DISPUTES, LIABILITIES, OBLIGATIONS, DEMANDS, DAMAGES, EXPENSES ... DEBTS, LIENS, ACTIONS AND CAUSES OF ACTION OF ANY AND EVERY NATURE WHATSOEVER, INCLUDING, WITHOUT LIMITATION, ANY THEREOF RELATING TO THE LOAN, AND WAIVE AND RELEASE ANY DEFENSE, RIGHT OF COUNTERCLAIM**, RIGHT OF SET-OFF OR DEDUCTION TO THE PAYMENT OF THE INDEBTEDNESS EVIDENCED BY THE NOTE AND/OR THE MORTGAGE OR ANY OTHER LOAN DOCUMENT **WHICH OBLIGORS, ET AL. NOW HAVE OR MAY CLAIM TO HAVE AGAINST LENDER**, ET AL., OR ANY THEREOF, **ARISING OUT OF, CONNECTED WITH OR RELATING TO ANY AND ALL ACTS, OMISSIONS OR EVENTS OCCURRING PRIOR TO THE EXECUTION OF THIS AGREEMENT**.

(*Id.* at ¶ 3; R. 249.) (emphasis added).

The Loan Modification Agreement also contained the borrower's reaffirmation of its obligations and the Lender's right to enforce the Note and Mortgage:

> Borrower hereby affirms, confirms, ratifies, renews and extends the debts, duties, obligations, liabilities, rights, titles, security interests, liens, powers and privileges created or arising by virtue of the Loan Documents, as amended hereby, until all of the indebtedness and obligations relating to the Loan have been paid or performed in full.

(*Id.* at ¶ 6; R. 250.) The guarantor expressly disclaimed any offsets or claims against the bank in the Loan Modification Agreement:

> Guarantor has executed this Agreement to evidence his consent. . . and to acknowledge, reaffirm and restate the continuing effect of the Guaranty and the obligations contained therein. Guarantor hereby represents that it has no offset or claims against Lender arising under, related to or connected with the Loans or any of the Loan Documents or otherwise.

(*Id.* at ¶ 7; R. 251.)

The Appellants admit that the Loan Modifications agreements are unambiguous. (*See* September 12, 2013, hearing transcript; R. 382.) Thus, the trial court properly determined that "the parties' intention must, in the first instance, be derived from the language of the contract." *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); *C.A.N. Enters., Inc. v. S.C. Health & Human Services Fin. Comm'n.*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) ("In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the parties."); *Jacobs v. Service Merch. Co.*, 297 S.C. 123, 375 S.E.2d 1 (Ct. App. 1988); *see also Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973) (holding that "[t]o discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect.").

This Court should affirm the decision of the trial court based on the plain language of the release contained the modification agreements.

B. The trial court correctly determined, based on the allegations of the counterclaims, that all of Appellants' claims arose prior to November 10, 2009, and that Appellants released those claims.

Appellants allege that the obligation to grant the SBA loan arose in May 2009. (Am. Answer & Countercl., ¶ 225; R. 225). After this alleged obligation arose, AHG entered into the loan modification agreements with Plaintiff quoted above, on or about June 1, 2009, and November 10, 2009. (*Id.* at 230, 233; R. 226.)

Despite the release of (a) all claims and causes of action relating to the note, mortgage "or any other loan document which obligors, et al., now have or may claim to have against lender. . . ;" (b) all claims and causes of action "arising out of any and all acts . . . occurring prior to the execution" of the loan modification agreement; and (c) all defenses to repayment of the indebtedness, Appellants asserted claims and defenses arising from an alleged agreement to secure a proposed future loan that ***predated*** the execution of the releases. Having entered into the loan modification agreements and having released these claims without reservation, Appellants are barred from asserting these claims and defenses.

The trial court properly based its rulings on the allegations of Appellants' Amended Answer and Counterclaim. Throughout the Amended Answer and Counterclaim, Appellants allege LNV's "prior and contemporaneous breaches of the Basic Contract"[3] as the basis for their defenses and counterclaims. (Am. Answer & Countercl. at ¶ 40; R. 198.) Appellants describe LNV's alleged obligations and breaches—all of which took place prior to November 10, 2009—as follows:

- Haven Trust Bank issued a Loan Commitment on November 6, 2007. (Am. Answer & Countercl. ¶ 214; R. 223);

[3] Throughout this proceeding, Appellants have referred to the November 6, 2007, loan commitment letter as the "Basic Contract." As determined by the trial court, this document was no contract at all.

- The Loan Commitment allegedly obligated Haven Trust (and its successors) to make a construction loan, followed by a permanent loan and an SBA loan. (*Id.* at ¶¶ 214-216; R. 223);

- "At all times relevant, Plaintiff has been and remains bound by the written commitment of Haven Trust Bank . . . to fund a permanent mortgage and to assist Defendants in obtaining SBA financing." (*Id.* at ¶ 44; R. 199);

- As of May 2009, Haven Trust Bank would have been required to grant the permanent loan and assist Defendants in obtaining SBA financing pursuant to the Loan Commitment. (*Id.* at ¶ 214; R. 223);

- On May 1, 2009, the FDIC informed Defendants that LNV had acquired the rights to the loan. (*Id.* at ¶ 226; R. 225);

- When Plaintiff acquired the Note, it should have known that "it was required to grant the permanent loan and assist Defendants in obtaining the SBA 504 Interim Loan." (*Id.* at ¶ 227; R. 225);

- Defendants "began immediately to negotiate with Plaintiff for future performance of their respective duties under the Basic Contract." (Am. Answer & Countercl. at ¶ 229; R. 225);

- After entering into a loan modification agreement in June 2009, Plaintiff sent Defendants a draft commitment letter in August 2009. (*Id.* at ¶¶ 230-231; R. 226);

- "Prior to August 2009, Plaintiff had never originated a loan of the type contemplated by the Basic Contract nor participated in a loan transaction that involved SBA financing" and "[a]t all times relevant, Plaintiff knew or should have known that it lacked knowledge and experience to assist Defendants in obtaining the SBA 504 Interim Loan." (*Id.* at ¶¶ 232, 236; R. 226);

- Plaintiff allegedly never took steps to qualify as a lender under SBA rules, despite Defendants' repeated requests. (*Id.* at ¶ 238; R. 227);

- "Commencing in June 2009, Defendants proposed various avenues to qualify Plaintiff for SBA purposes, but their efforts produced no action by Plaintiff, and for periods of time Plaintiff did not communicate at all with Defendants, even though Defendants tried repeatedly to learn Plaintiff's intentions and "repeatedly sought compliance by Plaintiff with the Basic Contract, and/or in the alternative repeatedly sought to negotiate a modification of the Basic Contract," but their communications "elicited no meaningful response." (*Id.* ¶¶ 239-43; R. 227);

- Plaintiff allegedly breached the "Basic Contract" by failing to provide permanent financing and by failing to assist Defendants in obtaining permanent financing. (*Id.* at ¶ 244; R. 227);

- Plaintiff's allegedly fraudulent breach of contract is supposedly evidenced by the August 2009 proposed commitment and by the negotiations leading up to the loan modifications. (*Id.* at ¶¶ 254-56; R. 229); and

- Plaintiff's alleged violation of the UTPA arises from its purchase of the loan. (*Id.* at ¶ 259; R. 230).

In considering the above allegations, the trial court determined Appellants' claims for the alleged breach of the loan commitment letter existed before Appellants executed the release on November 10, 2009. The Court did so based on the pleadings and documents relied upon therein because all establish that the alleged contract existed, the alleged breach existed, and Appellants sought in vain to secure LNV's compliance—all prior to November 10, 2009. Thus, according to their own allegations, Appellants "***repeatedly sought compliance by Plaintiff with the Basic Contract***" and—perhaps most interestingly—"in the alternative ***repeatedly sought to negotiate a modification of the Basic Contract***." (*Id.*) Appellants' allegations paint a clear picture: from the time that LNV acquired the loan in May 2009, Appellants have contended that LNV is required to make a permanent loan and assist with SBA financing pursuant to the Haven Trust loan commitment letter, and they have sought to secure LNV's compliance—always unsuccessfully. But when Appellants released all claims, causes of action, and defenses to the debt in the June 2009 and November 2009 Loan Modifications, Appellants did not preserve these claims. Instead, Appellants released all claims, demands, and causes of action, and they simultaneously reaffirmed their respective obligations under the Note and Guaranty.

C. The trial court properly rejected Appellants' attempts to save their claims from dismissal.

The facts alleged by Appellants and relied upon by the trial court in dismissing the counterclaims are so compelling that even Appellants' briefing to the trial court included admissions establishing that the counterclaims existed prior to the release Defendants executed on November 10, 2009. For example:

- "the enforceability of the Loan Commitment Letter was established long before the hotel was completed" (Appellants' Supp. Mem. in Opp. to LNV's Mot. to Dismiss 9; R. 462);
- "Two federal agencies determined that the Basic Contract was valid and enforceable." (*Id.* at 11; R. 464)
- "[U]pon acquisition of Defendants' account, LNV had an obligation to provide SBA with a new commitment letter showing that it was stepping into Haven Trust's shoes. LNV failed to issue such a letter, and as a consequence, SBA was never presented with a final application to approve or deny. This is a legally cognizable injury." (*Id.* at 12; R. 465)
- "LNV's failure to do so [send the new commitment letter to SBA] prevented Defendants from receiving SBA financing and the performance to which they were entitled." (*Id.* at 14; R. 467)

Further, Appellants' argument that their claims are somehow saved by the August 2009 *proposed draft* commitment letter from LNV defies common sense. (*Id.* at 15; R. 468.) If anything, this draft commitment letter from LNV demonstrates that by August 2009, if not earlier, Appellants knew that LNV did not intend to abide by the Haven Trust loan commitment letter (assuming, *arguendo*, that it constituted a contract). (*See* Draft LNV Loan Commitment Letter dated August 2009, at Ex. A to LNV's Reply in Supp. of its Mot. to Dismiss and referenced by Appellants in their Suppl. Mem. in Opp. to LNV's Mot. to Dismiss.) By August 2009, LNV was drafting its own loan commitment letter. Had the parties been operating under the belief that LNV would abide by the Haven Trust

loan commitment letter, there would be no purpose for this new "Draft Loan Commitment Letter from LNV." Thus, the trial court correctly determined the counterclaims Appellants seek to raise in this action arose prior to November 10, 2009.

Likewise, Appellants' contention that the Loan Modification Agreements themselves somehow save their claims from dismissal contradicts the language of those agreements. LNV could have sued earlier to enforce the Note, Mortgage, and Guaranty, but instead, in June 2009 and November 2009, it opted to extend the term of the loan. At that time, for the express purpose of inducing LNV's agreement to grant the extension, Appellants granted the release of all claims and causes of action, including, but not limited to, defenses and counterclaims arising prior to the time of execution of the agreement. One of the reasons that banks insist on such releases in loan modification agreements is to avoid litigation about the enforceability of the underlying loan obligation. *See, e.g.*, *Crawford v. Central Mortgage Co.*, 404 S.C. 39, 744 S.E.2d 538 (2013) (recognizing that "[a] loan modification is an adjustment to an existing loan to accommodate borrowers who have defaulted"); *see also Klutts Resort Realty, Inc.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977) (noting that "[i]n ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered"). A borrower cannot simultaneously release and retain such claims as Appellants now desire to do. *See Abu-Shawareb v. S.C. State Univ.*, 364 S.C. 358, 613 S.E.2d 757 (Ct. App. 2005) (disallowing subsequent suit in light of prior release of claims); *Smothers v. Richland Mem. Hosp.*, 328 S.C. 566, 493 S.E.2d 107 (Ct. App. 1997) (same).

Finally, Appellants' contention that they did not ***really*** intend to release the claims does not withstand scrutiny under South Carolina law. The terms of the release are judged by their plain language, not by one party's *ex post facto* attempt to explain away that meaning. *See Ecclesiastes Production Ministries v. Outparcel Assoc., LLC*, 374 S.C. 483, 497-98, 649 S.E.2d 494, 501-02 (Ct. App. 2007) ("[I]f the language [of a release] is perfectly plain and capable of legal construction, it alone determines the document's force and effect. [The p]arties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." (internal citations omitted). Where a "[r]elease unambiguously sets forth the contracting parties' intent, [the court is] bound by that clearly expressed intent." *Bowers v. Dept. of Transp.*, 360 S.C. 149, 153, 600 S.E.2d 543, 545 (Ct. App. 2004). Appellants chose to enter into the releases and use the language contained in those releases. Moreover, Appellants were represented by counsel at the time they negotiated and executed the releases.[4]

Accordingly, even based on Appellants' arguments aimed at salvaging their counterclaims, Appellants do not dispute that by August 2009, if not earlier, both LNV and Appellants understood that LNV did not intend to follow the Haven Trust loan commitment letter. Appellants may have sought to enforce the November 6, 2007, loan commitment letter but any claims that LNV breached the "Basic Contract" arose on or before August 2009, and in any event well before Appellants executed the November 10, 2009, release of those claims.

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[4] *See* Proposed Second Amended Answer and Counterclaims at ¶¶ 236-240; R. 340 (identifying Reid Harbin as counsel to AHG at the time of the execution of the November 10, 2009 Loan Modification Agreement containing the second release at issue in this matter).

This Court should affirm the decision of the trial court dismissing the counterclaims on the basis that all of Appellants' counterclaims arose prior to November 10, 2009, and Appellants released those claims based on the express language of the Loan Modification Agreements.

II. The trial court properly determined that the loan commitment letter was not an enforceable contractual obligation between the parties and the record contains grounds establishing that the loan commitment letter was not a guarantee of a permanent loan.

While the Appellants' release is dispositive of their counterclaims (and defenses) arising from the November 6, 2007, loan commitment letter,[5] the record contains additional grounds supporting the trial court's orders granting LNV's motion to dismiss. Any of these additional grounds support the trial court's dismissal of the counterclaims.[6]

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[5] *See Futch v. McAllister Towing of Greenville, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (recognizing that appellate courts need not address remaining issues when determination of one issue is dispositive).

[6] Should this Court decline to address the effect of the releases as detailed in Section I, Appellants' counterclaims still fail as a matter of law. The claims for breach of contract, breach of the duty of good faith and fair dealing, breach of contract with fraudulent intent, and tortious interference with contractual relations all depend on the existence of a contract which: 1) Appellants failed to raise arguments opposing the trial court's finding that no valid obligation existed (*see* Section II. A.1., infra) and 2) the loan commitment was subject to numerous conditions Appellants admit they did not meet (*see, e.g.*, Am. Answer & Countercl. at ¶ 34; R. 197.) Further Appellants' SCUTPA theory is barred by South Carolina law because a holder in due course is entitled to enforce the terms of a note. *See* S.C. Code Ann. §§ 36-3-203(b) and 36-3-302(c); *see also Northwestern Bank v. Neal*, 271 S.C. 544, 248 S.E.2d 585 (1978). Such permitted action is not "unfair or deceptive" as a matter of law.

A. The trial court held that the loan commitment letter was not valid because the construction loan closed more than ninety (90) days from the date of acceptance of the loan commitment letter.

1. Appellants failed to challenge the trial court's ruling on this point.

By their own admission, Appellants failed to preserve any challenge to the trial court's determination that the loan commitment letter was not a "valid enforceable obligation . . . between the parties" because the "loan [was] not closed within ninety (90) days from the date of acceptance." (September 23, 2013 Order denying Appellants' Mots. for Reconsideration and Rule 15 to Amend their Pleadings at 2; R. 6.) "It is axiomatic that an issue cannot be raised for the first time on appeal." *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (internal citations and quotations omitted).

In their initial brief, Appellants state they "were denied any opportunity to respond to this new proposition which seems to have controlled the Denial Order" (*i.e.*, the September 23, 2013 Order denying Appellants Rule 59(e) motion; R. 5). (Appellants' Initial Brief at p. 33.) In order to challenge this admittedly new ground for dismissal, Appellants should have filed a second Rule 59(e) motion to alter or amend. *See Collins Music Co. v. Igt*, 353 S.C. 559, 564, 579 S.E.2d 524, 526 (Ct. App. 2002) (holding that a second Rule 59(e) motion is necessary in order to call to the trial court's attention to "issues coming to light as a result of an order following an initial post-trial motion").

Here, Appellants contend that the trial court's determination that the loan commitment letter had expired and was therefore invalid came to light only after the court's ruling on the motion to alter or amend. Appellants failed to challenge the trial

court's ruling on this point below. Appellants are barred from doing so now before this Court.

2. The construction loan was not closed within 90 days of the loan commitment letter.

Should the Court determine that Appellants have preserved a challenge to the trial court's finding that the loan commitment letter was not a valid, enforceable obligation, Appellants argument on this point still fails. The loan commitment letter by its own terms expires if the transaction is not closed within ninety (90) days of the execution of the commitment. The loan commitment letter provides that "if this loan is not closed with[in] ninety (90) days from the date of acceptance, this Commitment will expire." (Am. Answer & Countercl. at Ex. A ¶ 25, p. 8; R. 242.) Appellants executed the loan commitment letter with Haven Trust on November 6, 2007. (*Id.* at p. 1; R. 235.) Appellants admit the construction loan was not closed until May 15, 2008. (*Id.* at ¶ 12; R. 192.) In order for the loan commitment to avoid expiration, the loan must have been closed on or before February 8, 2008 (*i.e.*, within 90 days of November 6, 2007). As admitted by Appellants, this did not occur.

This Court has previously noted the significance of compliance with time requirements in a loan commitment letter. *See Fender & Latham, Inc. v. First Union Nat'l Bank*, 316 S.C. 48, 50, 446 S.E.2d 448, 449-450 (Ct. App. 1994) (finding that conditions required under a loan commitment letter were not timely met and concluding the loan commitment letter was not a binding contract). In the present action, the trial court correctly determined that the loan commitment letter was no longer valid and relied upon *Fender & Latham* as a basis for its decision. Accordingly, this Court should affirm.

B. The plain language of the loan commitment letter further demonstrates it was not a guarantee for a permanent loan.

The document that serves as the basis for Appellant's counterclaims is the November 6, 2007, loan commitment letter from Haven Trust. In addition to the time requirements contained in the commitment letter, it also does not guarantee a permanent loan or constitute a binding obligation upon LNV. The loan commitment, by its express terms, was subject to numerous additional conditions.

As noted above and recognized by the trial court, this Court has previously considered the conditional nature of loan commitment letters. *See Fender & Latham,* 316 S.C. at 50, 446 S.E.2d at 449-450 (noting that the loan commitment letter was subject to other conditions necessary to be fulfilled and the commitment letter did not represent a binding contract between the parties). In *Fender & Latham*, this Court affirmed the trial court's finding that the loan commitment letter was not a binding contract because it required several conditions to be met prior to the funding of the loan. *Id.* Moreover, if an alleged contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to perform arises. *See Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994). The same is true in this case.

The loan commitment letter Appellants rely upon contains the following language:

> This commitment is subject to satisfactory completion of credit investigations and analysis, satisfactory documentation and such other terms and conditions as are determined by Bank and SBA.

(Am. Answer & Countercl., Ex. A—Loan Commitment Letter at p. 1; R. 235.) The loan commitment letter also provides that:

> **THIS COMMITMENT IN NO WAY IS TO BE CONSTRUED AS FINAL APPROVAL BY HAVEN TRUST BANK OR ITS ASSIGNS.**

(*Id.* at p. 9; R. 243) (emphasis in original). The commitment letter contains other conditional language:

- "***Proposed*** permanent loan will be for a period of twenty (20) years . . . ." (*Id.* at ¶ 4.a., p. 2; R. 236) (emphasis added);
- The interest rate ***"would be*** 9.0%." (*Id.* at ¶ 5.a., p. 2; R. 236) (emphasis added);
- "This Commitment is subject to receipt and review of an Appraisal satisfactory to the Bank, reporting a minimum appraisal value of....$4,230,000 or maximum 80% loan to value." (*Id.* at ¶ 15.a., p. 4; R. 238); and
- "Should the Borrower for any reason not close the loan as approved by SBA with Bank. . . ." (*Id.* at ¶ 25, p. 8; R. 242.)

Appellants misconstrue the nature of the loan commitment letter and the SBA 504 lending process in an effort to create claims where none exist. The loan commitment letter obligated Haven Trust to provide non-SBA backed construction financing. Haven Trust provided the construction loan. (*See* Exs. A, B, C, D, and E to Compl., R. 52-127.) The FDIC and LNV similarly provided this construction financing through their ownership of the construction loan after the failure of Haven Trust. No agreement in the alleged course of dealings between the parties, however, obligated Haven Trust, the FDIC, or LNV to obtain for Appellants a permanent SBA 504 loan. Nonetheless, under Appellants' theory of the case, LNV "[c]ommitted to providing financing for the construction . . . and upon completion, to replace [Appellants'] construction loan with

permanent financing . . . ." (Appellants' Suppl. Mem. in Opp. to LNV's Mot. to Dismiss at p. 8; R. 461.) As shown above, this theory fails based on the language of the very document Appellants rely upon.

Through their counterclaims, Appellants seek to enforce a commitment letter that expressly contemplates future terms and conditions of future contracts. Such "agreements to agree" are not enforceable as contracts in South Carolina. "It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent . . . to all of the terms of the contract." *Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978). "To be final, the agreement must extend to all of the terms which the parties intend to introduce and material terms cannot be left for future settlement." *McLaurin v. Hamer*, 165 S.C. 411, 420, 164 S.E. 2, 5 (1932). Clearly, the terms of a SBA 504 Loan and a permanent loan promissory note, mortgage, and guarantees are not included in the loan commitment letter. The loan commitment letter expressly states that it is conditional and these future, "proposed" contracts would be executed once Appellants met the qualification criteria and obtained SBA approval.

In dismissing the Appellants' counterclaims, the trial court correctly found that the loan commitment letter was not an enforceable contract between the parties, based in part on the trial court's reliance upon this Court's decision in *Fender & Latham*.[7] The trial court's decision should be affirmed.

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[7] Previously, the trial court determined that the loan commitment letter was an unenforceable "agreement to agree" under South Carolina law. (June 10, 2013, Order denying Appellants' Rule 59(e) motion; R. 9.) The trial court later vacated this order to undertake consideration of Appellants' motion to amend their counterclaims. This ground remains present in the record before this Court and supports the trial court's

C. Appellants admit they cannot qualify for a permanent SBA loan.

The reason a permanent loan was not obtained with respect to this transaction is that Appellants did not meet the conditions necessary for obtaining SBA 504 financing. Appellants admit they cannot qualify.

Appellants' claims are premised upon LNV's purported breach of the Haven Trust loan commitment letter and LNV's failure to provide permanent, SBA 504 financing for Appellants. Appellants admit, however, that they cannot meet the conditions of the SBA financing commitment that they presented to the Court. The following chart compares the strictures of the conditions precedent in the loan commitment letter as opposed to the admission made by Appellants in this action:

Condition Precedent to SBA Funding	Appellants' Admissions
Loan commitment letter ¶ B(2)(c): "Required Certifications Before 504 Loan Closing: Following completion of the Project, [SBA Administrator] must cause Interim Lender to certify the amount of the interim loan disbursed, that the interim loan has been disbursed in reasonable compliance with this Authorization, and that it has no knowledge of any unremedied substantial adverse change in the condition of the Borrower since the date of the loan application . . . ."	As admitted by Appellants, they defaulted on the payments under the loan (Am. Answer & Countercl. at ¶ 34; R. 197); failed to pay taxes to the State of South Carolina and Anderson County (Compl. ¶ 52—public records; R. 45); and allowed liens to attach to the property (*Id.*).
Loan commitment letter ¶ E(7)(a)(1): "Certifications and Agreements: At or prior to 504 Loan Closing, CDC [the certified development company] must require Borrower to certify that. . .	Appellants admit that they did not make the payments under the loan with LNV as required by the loan documents. (Am. Answer & Countercl. ¶ 34; R. 197.)

decision to dismiss Appellants' counterclaims.

No Adverse Change-Since the date of application there has been no unremedied substantial adverse change in the financial condition of Borrower and Operating Company or their ability to repay the Project financing, including the Note. Borrower must also supply to CDC accurate financial statements, current within 120 days of 504 Loan Closing."	
Loan commitment letter ¶ E(7)(a)(2): "Certifications and Agreements: At or prior to 504 Loan Closing, CDC must require Borrower to certify that. . . **Current Taxes**-Borrower is current on all federal, state, and local taxes, including but not limited to income taxes, payroll taxes, real estate taxes, and sales taxes."	As shown in public filings with Anderson County, South Carolina, Appellants failed to pay taxes to the State of South Carolina and Anderson County (Compl. ¶ 52—public records; R. 45.); and allowed tax liens to attach to the property (*Id.*).

Appellants ask this Court to ignore the admitted fact that they could not meet the conditions of the loan commitment for obtaining SBA financing. Thus, it was ***impossible*** for Appellants to close a SBA permanent loan. Nevertheless, through their counterclaims, Appellants seek to have the South Carolina courts hold LNV responsible for Appellants' failures to meet the conditions of the very document they rely upon for their counterclaims.

All of Appellants' claims are based upon a supposed failure of LNV to "obtain" a SBA 504 permanent loan for Appellants. (*See, e.g.*, Am. Answer & Countercl. at ¶¶ 225-227; R. 225.) According the allegations of the Amended Answer and Counterclaim, "[LNV] was required to grant the permanent loan and assist [AHG] in obtaining the SBA 504 Interim Loan." (Am. Answer & Countercl. ¶ 227; R. 225). As noted by the SBA,

however, "[t]he 504 Loan Program provides approved small businesses with long-term, fixed-rate financing used to acquire fixed assets for expansion or modernization. 504 loans are made available through . . . SBA's community based partners for providing 504 Loans." *See*, "What is the 504 Loan Program," *available at* http://www.sba.gov/content/cdc504-loan-program. The loans are not made directly through lenders, like LNV. Rather, the lender provides the financing at SBA's direction, subject to SBA approval. The SBA, in turn, guarantees a portion of the debt for the lender.

As noted by other courts, the SBA loan approval determination is solely made by the SBA. The application process is wholly within the borrower's control. "[Borrowers] were responsible for the SBA loan application process, which they never completed." *Regions Bank v. Lost Cove Cabins and Campgrounds, Inc.*, No. M2009-02389, 2010 WL 4514957 at *1, *6 (Tenn. Ct. App. Nov. 9, 2010) (dismissing the claims asserted by borrowers that Regions Bank had an obligation to convert loan to permanent SBA 504 financing); *Minnwest Bank Central v. Flagship Properties LLC*, 689 N.W.2d 295, 298 (Minn. App. 2004) ("The SBA is the final arbiter for Section 504 loans" and may refuse to fund a permanent loan when there is a "material adverse change" in the borrower's finances); *Fifth Third Bank v. McClure Properties, Inc.*, 724 F. Supp. 2d 598, 605 (S.D.W.Va. 2010) (dismissing claims against bank on theories that bank was required to provide SBA 504 Permanent Loan). The SBA similarly controls all terms of the SBA loan commitment, loan authorization, and permanent lending requirements. (*See* National 504 Authorization Boilerplate, *available at* http://www.sba.gov/content/504-

boilerplate). LNV has no ability to close an SBA loan without SBA approval, nor can it guarantee that a borrower will receive a SBA 504 loan.

D. Appellants' theory is unprecedented.

Appellants ask this Court to ignore the plain language of the documents they rely upon and ignore long-established decisions from this Court and the South Carolina Supreme Court. Appellants also seek for LNV to violate federal law.

LNV, like any lender, would prefer to have its borrowers perform pursuant to the terms of the note and mortgage. Further, LNV would prefer to have the construction loan converted to a permanent SBA 504 loan. Had the above-cited conditions been met by Appellants and the permanent financing obtained, the SBA would absorb 40% of the losses that will be suffered by LNV in this case. As admitted by Appellants, however, they failed to perform pursuant to the terms of the Note, Mortgage, and Construction Loan Agreement thereby making it impossible for them to qualify for a permanent SBA loan—***LNV cannot falsify information to the United States SBA.***

One of the requirements for SBA closing is the Interim Lender's Form 2288. SBA Form 2288, *available at* http://www.sba.gov/content/interim-lender-certification. In it, LNV is required to certify that "Interim Lender has no knowledge of any unremedied substantial adverse change in the condition of Borrower." (SBA Form 2288 ¶ 6). Further, LNV is required to certify that "Borrower is current on its payments to Interim Lender and not otherwise in default on the Interim Loan." (*Id.*) Neither party disputes that AHG was defaulting in its payments, had significant cash-flow problems, and was unable to meet its financial obligations as they came due. (*See* Am. Answer & Countercl. ¶ 34 (admitting that payments were not made when due); Compl. ¶ 29 (tax

liens levied on property); Am. Answer & Countercl. ¶ 17 (admitting to execution of the Construction Loan Agreement describing payment breaches and levying of liens as events of default); R. 197, 39, 194.) LNV cannot certify an inaccurate statement to the United States government. Under the SBA guidelines and certifications, Appellants cannot obtain permanent financing because of their previous defaults and their material change in financial condition.

III. The trial court properly exercised its discretion in denying Appellants' motion to amend their counterclaims.

In a further effort to save their claims from dismissal, following the issuance of the November 14, 2012, Order dismissing their counterclaims, Appellants moved to amend their pleading. (Appellants' November 26, 2012 Mot. to Amend Am. Answer & Countercl.; R. 300.) The trial court properly denied this request. (September 23, 2013 Order; R. 5.)

A motion to amend is within the sound discretion of the trial judge and the opposing party has the burden of establishing prejudice. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 22, 431 S.E.2d 587, 590 (1993). The trial court's decision will not be overturned absent an abuse of that discretion. *Id.*

Inexplicable delay in moving to amend a pleading is grounds for finding prejudice to the party opposing the amendment. *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013). Further, courts should not grant leave to amend when the amendment is motivated by "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment...." *Higgins v. Medical University of South Carolina*, 326

S.C. 592, 604, 486 S.E.2d 269, 275 (Ct. App. 1997) (citing *Foman v. Davis*, 371 U.S. 178 (1962)).

The trial court correctly determined that amendment of the counterclaims was not warranted. Appellants' Motion to Amend only serves to cause undue delay. Appellants had previously amended their Answer and Counterclaims once to try to "cure" the deficiencies in their counterclaims. After the filing of LNV's Motion to Dismiss, after the hearing on the motion, and only after *receiving* this trial court's Order dismissing its claims, did Appellants move to amend for a second time. Appellants waited nearly one and one-half years to seek leave to file an amended counterclaim but only after LNV's grounds for dismissal were raised and ruled upon by the trial court. Such tardy, delay tactics aimed at avoiding dismissal are not permitted and would prejudice LNV. *See Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. at 632, 743 S.E.2d at 813. LNV will be prejudiced by further delay in this case because of the expenses it presently incurs in paying a receiver to operate the hotel. Appellants do not contest that they are in breach of the promissory note and mortgage. (Am. Answer & Countercl. at ¶ 34; R. 197.) The continued operation of the hotel required the appointment of the receiver—at LNV's expense. (Appointment of Receiver; R. 22.) Every month of delay harms LNV by causing it to lose further revenue on the loan in having to pay the costs of the receiver to operate the facility.

Further, an amendment to the counterclaims would be futile. As set forth in Sections I and II herein, there are two critical flaws that cannot be overcome by the Appellants. First, Appellants released the claims they raised in response to LNV's foreclosure complaint. Second, the loan commitment letter upon which Appellants'

claims are founded is not a valid enforceable obligation because the commitment letter was subject to numerous conditions precedent—an issue Appellants have failed to preserve for review by this Court. Thus, any amendment to add additional "information" and retract prior admissions would be futile. *Higgins*, 326 S.C. at 604, 486 S.E.2d at 275.

The trial court properly dismissed the counterclaims and denied the motion to amend. This Court should affirm.

Conclusion

For the reasons detailed above, this Court should affirm the trial court's decision to dismiss Appellants' counterclaims. Appellants released the claims they seek to bring in response to LNV's foreclosure action. Even had the claims not been released, the counterclaims fail because the loan commitment letter is not an enforceable contract for a number of reasons. The Court should direct that the foreclosure action should proceed before the master-in-equity.

[Signature Page Follows]

Respectfully submitted,

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March 27, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAR 27 2014
SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No. 2011-CP-04-2728
Appellate Case No. 2013-002341

LNV Corporation, ... Respondent,

v.

Affordable Hospitality Group-Anderson, LLC; Diversified Capital Investment Group, LLC; Jay Berlye; Anderson County, South Carolina; and the State of South Carolina, ... Defendants.

Of Whom Affordable Hospitality Group-Anderson, LLC; Diversified Capital Investment Group, LLC, and Jay Berlye are, ... Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent LNV Corporation complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, 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):

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