

RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George E. Brown, Circuit Court Judge

Civil Action No. 2011-CP-40-01980
Appellate Case No. 2013-002673

Robert S. Jones.....Plaintiff/Appellant,
v.
Builders Investment Group, LLC,
Brian D. Boone and Arden Homebuilders, LLC.....Defendants,

Of Whom
Builders Investment Group, LLC
and Brian D. Boone are.....Respondents.

RECORD ON APPEAL – VOLUME I

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SC Court of Appeals

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FORM 4

1212-12

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 -CP-40- 1980

Robert S. Jones

Builders Investment Group
Brian D. Boone & Arden
Homebuilders, 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), 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:

Dated at _____, South Carolina, this _____ day of _____, 20____.

[Signature]
PRESIDING JUDGE

This judgment was entered on the 12 day of Dec, 2012, and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

R. Williams

T. Sowell

D. Dick

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

[Signature]
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

NO. 2012-CP-40-1980

Robert S. Jones,
Plaintiff

vs

Builders Investment Group, LLC,
Brian D. Boone, and Arden
Homebuilders, LLC,

Defendants.

VERDICT FORM

Breach of Contract

2012 DEC 12 AM 9:12

WE THE JURY, BY UNANIMOUS CONSENT, FIND FOR THE

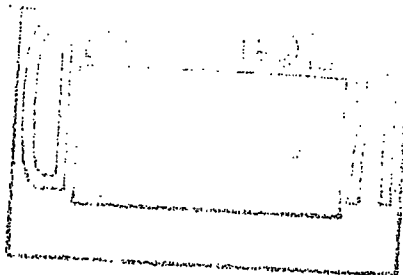
X PLAINTIFF

 DEFENDANTS

Terry S. Johnson
FOREPERSON

Terry S. Johnson

12/12/12
DATE



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

CASE NUMBER: **2011CP4001980**

Robert S Jones

Builders Investment Group LLC

Brian D Boone

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Non suit); ☐ 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:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____

Judge Code _____

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 21st day of May, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

D. Reece Williams, III

ATTORNEY(S) FOR THE PLAINTIFF(S)

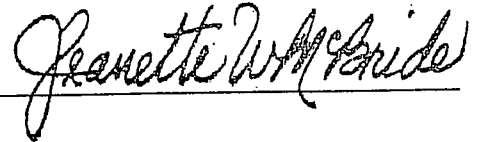
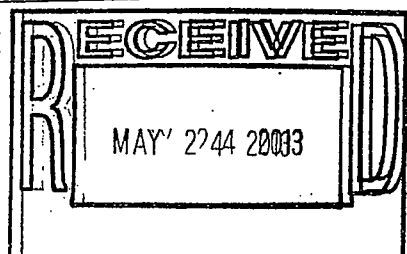
David Cochran Dick, Jr.

Thornwell F. Sowell, III

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS
)
) FIFTH JUDICIAL CIRCUIT

Robert S. Jones,

Plaintiff,

vs.

Builders Investment Group, LLC,
Brian D. Boone and Arden
Homebuilders, LLC,

Defendants.

Civil Action No. 2011-CP-40-1980

ORDER GRANTING DEFENDANTS
BUILDERS INVESTMENT GROUP
LLC AND BRIAN D. BOONE'S
MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT

RICHLAND COUNTY
FILED
2013 MAR 15 AM 10:03
JEANETTE L. RIDE

This matter came to be heard before me on April 11, 2013, upon motion of the Defendants Builders Investment Group, LLC and Brian D. Boone filed December 21, 2012, pursuant to Rule 50(b), SCRCPP, for an order granting a judgment notwithstanding the verdict or, in the alternative, a new trial, following a jury trial which resulted in a verdict for the Plaintiff. Kathleen McDaniel of Callison Tighe & Robinson, LLC appeared on behalf of the Plaintiff Robert S. Jones, and Thornwell F. Sowell of Sowell Gray Stepp & Laffitte, LLC appeared on behalf of the Defendants Builders Investment Group, LLC ("BIG") and Brian D. Boone ("Boone"). Based upon arguments of counsel and the applicable laws of South Carolina, I find and conclude that Defendants BIG and Boone are entitled to judgment notwithstanding the verdict.

FACTS

This dispute arises out of the alleged failure to contribute to the debts of a failed limited liability company. Holt Family Homes, LLC was formed in 2005 to develop, build, and sell

residential homes. At its inception, Holt Family Homes had four initial Class A members: Robert S. Jones ("Jones"), Robert A. Keisler ("Keisler"), Carl Edward Buck ("Buck"), and Wetzel Ray Holt ("Holt"). These Class A members also served as the managers of Holt Family Homes. Holt Family Homes also had five Class B members including BIG. Boone had no ownership interest in Holt Family Homes.

On January 26, 2007, the managers of Holt Family Homes decided to obtain a loan from Southern First Bank (formerly known as Greenville First Bank, N.A.). The loan was for \$300,500 and was signed for Jones, Keisler, and Buck. Jones, Keisler, and Buck were also the only personal guarantors on the loan from Southern First Bank.

On April 25, 2007, the managers of Holt Family Homes decided to obtain a second loan from Southern First Bank. The loan was for \$199,250 and was signed once again by Jones, Keisler, and Buck. Jones, Keisler, and Buck were also the only personal guarantors on this loan. Neither BIG nor Boone was a Class A member or manager of Holt Family Homes at the time the loans from Southern First Bank were made.

In mid-2007, BIG and Boone agreed to make additional capital contributions and investments in Holt Family Homes. On July 31, 2007, the Holt Family Homes operating agreement was amended to reflect these investments. As part of the changes to the Operating Agreement, the name of the LLC was changed from Holt Family Homes to Arden Homebuilders, LLC ("Arden"). BIG contributed additional capital of \$625,000 and Boone contributed \$125,000. No other members contributed additional capital. In return, BIG and Boone were made Class A members and managers of Arden.

On September 25, 2007, Jones, Keisler, and Buck consolidated the two loans at Southern First Bank into one new loan in Arden's name ("Arden Loan"). Again, only Jones, Keisler, and Buck signed the note from Southern First Bank and only Jones, Keisler, and Buck signed personal guarantees on the loan.

On September 24, 2008, the Arden Loan was modified to remove Buck as a personal guarantor. Only Jones and Keisler signed the new note and only Jones and Keisler signed personal guarantees. Neither BIG nor Boone was ever asked to vote on the release of Buck as a personal guarantor on the Arden Loan, and neither BIG nor Boone ever personally guaranteed the Arden Loan from Southern First Bank.

On December 8, 2009, Jones took out a personal loan with Southern First Bank to satisfy the Arden Loan. Southern First Bank marked the Arden Loan as satisfied on the books and transferred the balance to the personal loan of Jones. Southern First Bank then wrote-off the personal loan of Jones. On November 8, 2012, Jones gave Southern First Bank a confession of judgment regarding his personal loan. Jones testified that he has not made any actual payments on his personal loan or the confession of judgment.

Nevertheless, Jones sought contribution from BIG and Boone for their alleged proportionate share of funds he claims to have paid, but were actually written-off. A jury trial was held before the undersigned beginning December 10, 2012. Defendants BIG and Boone properly moved for a directed verdict at the close of the evidence. On December 12, 2012, the jury returned a verdict in favor of the Plaintiff. On December 21, 2012, Defendants BIG and Boone filed a motion for a judgment notwithstanding the verdict, or, in the alternative, a new trial based on the same grounds as the motion for a directed verdict.

LAW / ANALYSIS

Standard of Review

"A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict." Rule 50(b), SCRCP. "In reviewing a motion for judgment notwithstanding the verdict, the trial court must view the evidence and its inferences in the light most favorable to the non-moving party." *Sorin Equip. Co., Inc. v. The Firm, Inc.*, 323 S.C. 359, 365, 474 S.E.2d 819, 823 (Ct. App. 1996) (citing *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994)).

Analysis

Jones brought suit against BIG and Boone for breach of contract and breach of fiduciary duty.¹ The breach of contract claim is premised on the allegation that the Arden Homebuilders, LLC Operating Agreement ("Arden Operating Agreement") requires BIG and Boone to contribute to the Arden Loan from Southern First Bank. The Court finds that Jones has not paid more than his proportionate share of the Arden Loan as required by the Operating Agreement and thus is not entitled to contribution from BIG or Boone as a matter of law.

The alleged breach of the Arden Operating Agreement is in connection with Section 2.3, which states:

Guaranty of Loans to Company. Each of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") for so long as any guaranty of such loan is required by the lender. Notwithstanding any other provisions of this Agreement or any provisions of the Guaranteed Loan documents, as between the Members, each Class A member shall be responsible for paying such Class A Member's proportionate share of any Guaranteed Loan ("Guaranty Percentage").

¹ Plaintiff's cause of action for breach of fiduciary was dismissed by this Court's Form 4 Order filed April 26, 2012.

The "proportionate share" of a Class A Member shall equal such Class A Member's Percentage Interest divided by the aggregate Percentage Interests of all of the Class A Members. **Any Class A Member who pays more than such Class A Member's Guaranty Percentage of the Guaranteed Loan to the Lender shall be entitled to contribution from the other Class A Members.** Any Class A Member who is required to institute legal action to enforce such right of contribution shall be entitled to recover from the other Class A Members all costs and reasonable attorneys fee.

(emphasis added). Plaintiff and Defendants BIG and Boone are all Class A Members of Arden Homebuilders, LLC.

"Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) (citing *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)). "It is a question of law for the court whether the language of a contract is ambiguous." *Id.* (citing *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001)). "When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense." *C.A.N. Enters., Inc. v. S. Carolina Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988).

I find that the language in Section 2.3 of the Arden Operating Agreement regarding contribution is clear and unambiguous. A plain and unambiguous reading of Section 2.3 of the Arden Operating Agreement makes it clear that a member must actually pay more than his share to recover from the other members. Section 2.3 does not provide any other situation for recovery; it explicitly requires payment. Because Jones has not paid more than his proportionate share of the Arden Loan, he is not entitled to contribution as a matter of law.

It is undisputed from the evidence presented at trial that Jones signed a personal promissory note, also with Southern First Bank, which was used to satisfy the Arden Loan. It is also undisputed that Jones has not made any payments on this personal promissory note or on his confession of judgment to Southern First Bank. Because there are no factual disputes regarding payment, the only issue before this Court is whether a promissory note or confession of judgment constitutes payment under the Arden Operating Agreement.

Jones admitted in his testimony that he signed a personal promissory note which was used to satisfy the Arden Loan on the books of Southern First Bank. He also testified that he did not actually make any payments to Southern First Bank totaling more than his proportionate share. A promissory note is only a promise to pay, not payment.

The South Carolina Uniform Commercial Code provides that a promissory note is simply a promise to pay and does not mean a bank has received any sum of money or funds. S.C. Code Ann. § 36-9-102 (1976) ("Promissory note" means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds."). By signing a personal promissory note, Jones simply incurred a liability on behalf of Arden. Jones has not made payment as required by the plain language of the Arden Operating Agreement, and has thus suffered no actual damages, and is not entitled to contribution.

South Carolina case law regarding contracts for indemnity supports the plain reading of the Arden Operating Agreement which requires a member to pay more than his proportionate share before he can recover from another member. Because Jones simply incurred a liability

related to the Arden Loan and did not make actual payment, he is not entitled to contribution from BIG or Boone.

Section 2.3 of the Arden Operating Agreement is a contract of indemnity under South Carolina law because it regulates the liability of one Class A member to another when one member incurs damage to a third party. *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003) (“South Carolina courts have consistently defined indemnity as ‘that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party.’”).

South Carolina courts recognize two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. *Piper v. Am. Fid. & Cas. Co. et al.*, 154 S.C. 106, 108 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred. *Id.* By contrast, in a contract for indemnity against loss, “liability does not attach until loss has been suffered, that is when the [indemnitee] has paid the damages.” *Id.* (emphasis added).

Whether a contract for indemnity is one for liability or for loss “depends on the intention of the parties as shown by the phraseology of the agreement contained in the policy.” *Shealey v. Am. Health Ins. Corp.*, 220 S.C. 79, 82-83, 66 S.E.2d 461, 462 (1951). “In construing contracts of this character, the courts generally have held that if the indemnity is clearly one against loss or damage, no action will lie in favor of the [indemnitee] until some loss or damage has been sustained by him, either by payment of the whole or some part of the claim.” *Id.* (emphasis added).

Here, Section 2.3 of the Arden Operating Agreement is a contract for indemnity against loss because the Agreement specifically requires a member to “pay” more than his proportionate share. Jones has not paid more than his proportionate share of the Arden Loan. At most, Jones has incurred only a liability with regard to the Arden Loan by taking out a personal promissory note. As discussed above, a promissory note is merely a promise to pay. It is not payment. Accordingly, I find that Jones did not make payment on the Arden Loan as required by the Arden Operating Agreement, and he is not entitled to contribution from BIG or Boone as a matter of law.

This finding is supported by the case of *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000). In *Kuznik*, the South Carolina Court of Appeals held that actual payment is not necessary for indemnification when a “partnership agreement allowed indemnity for a ‘threat of loss.’” *Id.*, 342 S.C. at 607, 538 S.E.2d at 29. The court in *Kuznik* reasoned that because the partnership agreement in question contained the phrase “threat of loss,” it allowed the plaintiff to recover even though he had not yet made payment. In this case, the Arden Operating Agreement has no such provision. The Arden Operating Agreement does not mention “liability” or “threat of loss.” The Arden Operating agreement allows only for contribution in one situation: payment.

In the alternative, BIG and Boone are entitled to a judgment notwithstanding the verdict because the only reasonable inference that can be drawn from the evidence is that BIG and Boone were never required to guaranty the Arden Loan. Section 6.6(a) of the Operating Agreement specifically states:

No Member shall be liable for the debts or any other obligations or liabilities of the Company, whether arising in contract, tort or otherwise **unless a Member guarantees any debt or obligation as required under Article 2.3.**

(emphasis added). It is undisputed that BIG and Boone never guaranteed the Arden Loan from Southern First Bank. The only argument raised by Jones at trial was that Section 2.3 of the Arden Operating Agreement required BIG and Boone to guaranty the Loan, and thus contribute to it.

Section 2.3 of the Operating Agreement provides in pertinent part:

2.3 Guaranty of Loans to Company. Each of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") for so long as any guaranty of such loan is required by the lender.

(emphasis added). A plain and unambiguous reading of Section 2.3 provides that a Class A member is required only to guaranty a loan "for so long as any guaranty of such loan is required by the lender."

The Southern First Bank President and loan officer on all of the loans, Justin Strickland, repeatedly testified at trial that neither BIG nor Boone was required to guaranty the Arden Loan. It is also undisputed that BIG and Boone never guaranteed the Arden Loan from Southern First Bank.

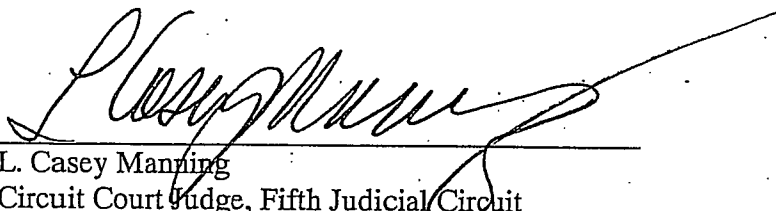
Further, the Arden Loan was entered into before BIG and Boone became Class A members of Arden. All of the documents presented at trial demonstrate that the Arden Loan from Southern First Bank was treated differently than all other loans to Arden, and that the details of that Southern First Loan were kept from BIG and Boone. Additionally, Section 4.2 of the Arden Operating Agreement specifically provides that the Southern First Loan was guaranteed by "Jones, Keisler, and Buck." Lastly, it is undisputed that neither BIG nor Boone

was ever asked by anyone to vote on the release of Buck as a personal guarantor on the Arden Loan.

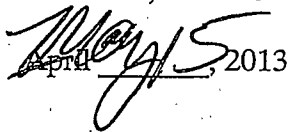
Section 6.6 of the Operating Agreement plainly states that a Member is not responsible for any debt of Arden "unless a Member guarantees any debt or obligation as required under Article 2.3." Because BIG and Boone were not required by Southern First Bank to guaranty the Arden Loan and did not guaranty the Loan, they cannot be liable for any portion of the Loan as a matter of law. The only reasonable inference to be drawn from all the evidence presented at trial is that neither BIG nor Boone was ever required guaranty the Arden Loan from Southern First, and therefore BIG and Boone are entitled to a judgment notwithstanding the verdict.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants BIG and Boone's motion for judgment notwithstanding the verdict is granted, and judgment shall be entered for the Defendants.

IT IS SO ORDERED.


L. Casey Manning
Circuit Court Judge, Fifth Judicial Circuit

Columbia, South Carolina


May 15, 2013

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2011CP4001980

Robert S Jones

Builders Investment Group LLC

Brian D Boone

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (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.
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☐ 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:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 18th day of Nov., 2013 to attorneys of record or to parties (when appearing pro se) as follows:

D. Reece Williams, III

ATTORNEY(S) FOR THE PLAINTIFF(S)

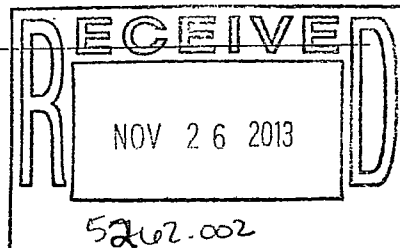
David Cochran Dick, Jr.

Thornwell F. Sewell, III

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____



STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS

) FIFTH JUDICIAL CIRCUIT

Robert S. Jones,

Plaintiff,

vs.

Builders Investment Group, LLC,
Brian D. Boone and Arden
Homebuilders, LLC,

Defendants.

Civil Action No. 2011-CP-40-198

ORDER DENYING PLAINTIFF'S
MOTION TO ALTER OR AMEND
ORDER PURSUANT TO RULE 59(e),
SCRCP

2013 NOV 18 PM 3:25
JEANETTE W. HARRIS
C.C.P. & J.D.
DE

RICHLAND COUNTY
FILED

This matter came to be heard before me on October 17, 2013, upon motion of the Plaintiff, Robert S. Jones ("Jones"), pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for an order altering or amending this Court's Order, dated and filed May 15, 2013, which granted Defendants Builders Investment Group, LLC ("BIG") and Brian D. Boone's ("Boone") motion for judgment notwithstanding the verdict. Kathleen McDaniel of Callison Tighe & Robinson, LLC appeared on behalf of the Plaintiff Robert S. Jones, and Thornwell F. Sowell of Sowell Gray Stepp & Laffitte, LLC appeared on behalf of the Defendants BIG and Boone. Based upon arguments of counsel and the applicable laws of South Carolina, I find and conclude that Plaintiff's Motion to Alter or Amend Order Pursuant to Rule 59(e), SCRCP, should be denied.

FACTS

This dispute arises out of the alleged failure to contribute to the debts of a failed limited liability company. Holt Family Homes, LLC was formed in 2005 to develop, build, and sell

residential homes. At its inception, Holt Family Homes had four initial Class A members: Robert S. Jones ("Jones"), Robert A. Keisler ("Keisler"), Carl Edward Buck ("Buck"), and Wetzel Ray Holt ("Holt"). These Class A members also served as the managers of Holt Family Homes. Holt Family Homes also had five Class B members including BIG. Boone had no ownership interest in Holt Family Homes.

On January 26, 2007, the managers of Holt Family Homes decided to obtain a loan from Southern First Bank (formerly known as Greenville First Bank, N.A.). The loan was for \$300,500 and was signed for by Jones, Keisler, and Buck. Jones, Keisler, and Buck were also the only personal guarantors on the loan from Southern First Bank.

On April 25, 2007, the managers of Holt Family Homes decided to obtain a second loan from Southern First Bank. The loan was for \$199,250 and was signed once again by Jones, Keisler, and Buck. Jones, Keisler, and Buck were also the only personal guarantors on this loan. Neither BIG nor Boone was a Class A member or manager of Holt Family Homes at the time the loans from Southern First Bank were made.

In mid-2007, BIG and Boone agreed to make additional capital contributions and investments in Holt Family Homes. On July 31, 2007, the Holt Family Homes operating agreement was amended to reflect these investments. As part of the changes to the Operating Agreement, the name of the LLC was changed from Holt Family Homes to Arden Homebuilders, LLC ("Arden"). BIG contributed additional capital of \$625,000 and Boone contributed \$125,000. No other members contributed additional capital. In return, BIG and Boone were made Class A members and managers of Arden.

On September 25, 2007, Jones, Keisler, and Buck consolidated the two loans at Southern First Bank into one new loan in Arden's name ("Arden Loan"). Again, only Jones, Keisler, and Buck signed the note from Southern First Bank and only Jones, Keisler, and Buck signed personal guarantees on the loan.

On September 24, 2008, the Arden Loan was modified to remove Buck as a personal guarantor. Only Jones and Keisler signed the new note and only Jones and Keisler signed personal guarantees. Neither BIG nor Boone was ever asked to vote on the release of Buck as a personal guarantor on the Arden Loan, and neither BIG nor Boone ever personally guaranteed the Arden Loan from Southern First Bank.

On December 8, 2009, Jones took out a personal loan with Southern First Bank to satisfy the Arden Loan. Southern First Bank marked the Arden Loan as satisfied on the books and transferred the balance to the personal loan of Jones. Southern First Bank then wrote-off the personal loan of Jones. On November 8, 2012, Jones gave Southern First Bank a confession of judgment regarding his personal loan. Jones testified that he has not made any actual payments on his personal loan or the confession of judgment.

Nevertheless, Jones sought contribution from BIG and Boone for their alleged proportionate share of funds he claims to have paid, but were actually written-off. A jury trial was held before the undersigned beginning December 10, 2012. On December 12, 2012, the jury returned a verdict in favor of the Plaintiff. On December 21, 2012, Defendants BIG and Boone filed a motion for a judgment notwithstanding the verdict, or, in the alternative, a new trial.

On May 15, 2013, this Court granted Defendants BIG and Boone's motion for judgment notwithstanding the verdict based on the reasons set forth in that Order. On May 24, 2013,

Plaintiff moved, pursuant to Rule 59(e) of the South Carolina Rules of Civil procedure, for an order altering or amending this Court's Order. On October 17, 2013, this Court heard arguments from both sides regarding the motion to alter or amend the Order. Additionally, both sides provided written memorandum on their arguments.

LAW / ANALYSIS

Standard of Review

"A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict." Rule 50(b), SCRPC. "In reviewing a motion for judgment notwithstanding the verdict, the trial court must view the evidence and its inferences in the light most favorable to the non-moving party." *Sorin Equip. Co., Inc. v. The Firm, Inc.*, 323 S.C. 359, 365, 474 S.E.2d 819, 823 (Ct. App. 1996) (citing *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994)).

Analysis

"A party may wish to file [a 59(e)] motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Elam v. S. Carolina Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). In his motion, the Plaintiff makes the same two arguments previously raised before this Court during the arguments over Defendants' motion for a judgment notwithstanding the verdict. Specifically, the Plaintiff argues that Jones did pay the Arden Loan from Southern First Bank, and that BIG and Boone were required to guaranty the loan. This Court has already fully considered both of these issues and ruled upon them. Further,

the Court is not persuaded by Plaintiff's additional arguments on these points. Accordingly, the Plaintiff's Motion to Alter or Amend Order Pursuant to Rule 59(e), SCRCP, is denied.

I. Payment

Plaintiff first argues that because Southern First Bank used Jones' personal promissory note to mark the Arden Loan as satisfied on its books, Jones has paid more than his proportionate share. Plaintiff cites to the American Jurisprudence, Second Edition, and a Kansas appellate court case to support the proposition that contribution allows for satisfaction by promissory note. However, these authorities are misplaced for several reasons.

The authorities cited by the Plaintiff deal generally with the concept of contribution. They discuss the rights and remedies between co-guarantors when two or more individuals have guaranteed a single loan and there is no written agreement. However, in this case, the rights and remedies between the parties is specifically governed by contract. The Kansas case cited by the Plaintiff specifically states "a cause of action for contribution is based on an implied agreement not in writing." *Kee v. Lofton*, 12 Kan. App. 2d 155, 160, 737 P.2d 55, 59 (1987) (emphasis added). As this Court previously ruled, the language in Section 2.3 of the Arden Operating Agreement regarding contribution is clear and unambiguous. A plain and unambiguous reading of Section 2.3 of the Arden Operating Agreement makes it clear that a member must actually pay more than his share to recover from the other members.

Additionally, the facts of this case are substantially different than the authorities cited by Plaintiff. The authorities cited by Plaintiff rely on the premise that all parties guaranteed the loan. However, in this case it is undisputed that BIG and Boone never guaranteed the Arden Loan. Further, there is substantial South Carolina law, cited previously by this Court in its Order

of May 15, which deals with issues raised in this case. Accordingly, there is no need to look to secondary sources or other jurisdictions for case law.

The Plaintiff also argued that the Court confused the concepts of contribution and indemnity in its Order of May 15. The Plaintiff argues that indemnification only involves shifting the entire loss whereas contribution involves shifting a proportionate loss, thus the concept of contribution should apply and not indemnity. However, as discussed above, the concept of contribution arises when there is no written contract and thus is not applicable in this case.

Regardless, the concept of indemnification was used by the Court to highlight the definition of payment in the Arden Operating Agreement and the distinction between a contract protecting against loss versus a contract protecting against liability. As this Court previously held, Section 2.3 of the Arden Operating Agreement is a contract protecting against loss because the Agreement specifically requires a member to "pay" more than his proportionate share. Jones has not paid more than his proportionate share of the Arden Loan.¹ At most, Jones has incurred only a liability with regard to the Arden Loan by taking out a personal promissory note. Accordingly, he has not met the requirements of the contract and is not entitled to any payment by the Defendants as a matter of law.

¹ At the hearing on the Rule 59(e) motion, Plaintiff handed up supplemental answers to Defendants' Interrogatories and Requests to Produce. These documents were not presented at trial and only provided after this Court's May 15 Order granting judgment notwithstanding the verdict. Accordingly, this new information is not properly before the Court and this Court refuses to consider it. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.").

II. Requirement to Guaranty

Plaintiff argues that the Defendants were required to guaranty the Arden Loan based on the terms of the Operating Agreement. Plaintiff relies on the Section 2.3 of the Arden Operating Agreement which provides in part: "Each of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") **for so long as any guaranty of such loan is required by the lender.**" (emphasis added).

The Southern First Bank President and loan officer on all of the loans, Justin Strickland, repeatedly testified at trial that neither BIG nor Boone was required to guaranty the Arden Loan. It is also undisputed that BIG and Boone never guaranteed the Arden Loan from Southern First Bank. In fact, Section 4.2 of the Arden Operating Agreement specifically provides that the Southern First Loan was guaranteed by "Jones, Keisler, and Buck." The Arden Operating Agreement specifically sets forth who is to guaranty the Southern First Loan.

Further, Plaintiff ignores Section 6.6(a) of the Operating Agreement which states:

No Member shall be liable for the debts or any other obligations or liabilities of the Company, whether arising in contract, tort or otherwise **unless a Member guarantees any debt or obligation as required under Article 2.3.**

(emphasis added). Because BIG and Boone were not required to guaranty the Southern First Loan, they cannot be responsible for it per the terms of the Arden Operating Agreement.

The actions of the members of Arden also make it clear that BIG and Boone were not responsible for the Arden Loan. Importantly, the Arden Loan was entered into before BIG and Boone became Class A members of Arden. All of the documents presented at trial demonstrate

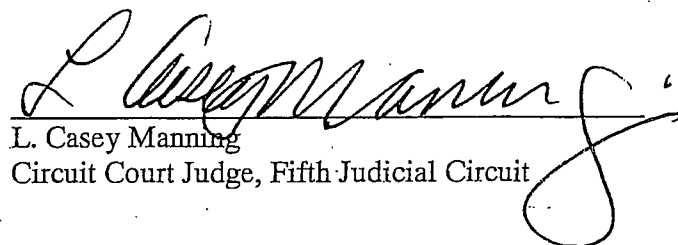
that the Arden Loan from Southern First Bank was treated differently than all other loans to Arden, and that the details of that Southern First Loan were kept from BIG and Boone.

Lastly, it is undisputed that neither BIG nor Boone was ever asked by anyone to vote on the release of Buck as a personal guarantor on the Arden Loan. Jones, Keisler, and Buck unilaterally made decisions regarding the Southern First Loan without input from BIG or Boone.

Because BIG and Boone were not required by Southern First Bank to guaranty the Arden Loan and did not guaranty the Loan, they cannot be liable for any portion of the Loan as a matter of law. The only reasonable inference to be drawn from all the evidence presented at trial is that neither BIG nor Boone was ever required to guaranty the Arden Loan from Southern First and BIG and Boone were never intended to be responsible for any portion of the Southern First Loan.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff Jones' motion to alter or amend the Order pursuant to Rule 59(e), SCRCP, is DENIED.

IT IS SO ORDERED.


L. Casey Manning
Circuit Court Judge, Fifth Judicial Circuit

Columbia, South Carolina

October 29, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Robert S. Jones,)
Plaintiff,)

v.)

Builders Investment Group, LLC,)
Brian D. Boone and Arden)
Homebuilders, LLC,)
Defendants.)

COMPLAINT
(Jury Trial Demanded)

JEANETTE W. McBRIDE
C.C.P. & G.S.

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The Plaintiff, Robert S. Jones, alleges:

JURISDICTION AND VENUE

1. This action arises from the relationship as Members of Defendant, Arden Homebuilders, LLC (Arden), and from its Operating Agreement, among the Plaintiff, Robert S. Jones (Jones), Defendant Builders Investment Group, LLC (BIG), and Defendant, Brian D. Boone (Boone).

2. Arden is a South Carolina limited liability company having one of its places of business at the time the claim or claims arose in Richland County, South Carolina, where the most substantial part of the alleged acts or omissions giving rise to the claim or claims stated herein occurred. Arden is made a party because it might have an interest in the subject matter of this action.

3. Jones the Plaintiff, is a citizen and resident of Richland County, South Carolina, where he resided at the time or times the claim or claims arose. Jones is a Class A Member and a Manager of Arden.

4. BIG is a South Carolina limited liability company having its principal place of business at the time or times the claim or claims arose in Richland County, South Carolina, where the most substantial part of the alleged acts or omissions giving rise to the claim or claims occurred. BIG is a Class A Member of Arden.
5. Boone is believed to be a resident of North Carolina. He is subject to the jurisdiction of this court because he is a Class A Member and Manager of Arden and was a Class A Member and Manager during the time or times the alleged acts or omissions giving rise to the claim or claims occurred in South Carolina. The most substantial part of the alleged acts or omissions against Boone occurred in Richland County, South Carolina.
6. This court has jurisdiction of the parties and subject matter of this action and venue is proper in Richland County.

ALLEGATIONS APPLICABLE TO ALL CLAIMS

7. The Operating Agreement of Arden states:

2.3 Guaranty of Loans to Company. Each of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") for so long as any guaranty of such loan is required by the lender. Notwithstanding any other provision of this Agreement or any provision of the Guaranteed Loan documents, as between the Members, each Class A Member shall be responsible for paying such Class A Member's proportionate share of any Guaranteed Loan ("Guaranty Percentage"). The "proportionate share" of a Class A Member shall equal such Class A Member's Percentage Interest divided by the aggregate Percentage Interests of all of the Class A Members. Any Class A Member who pays more than such Class A Member's Guaranty Percentage of the Guaranteed Loan to the Lender shall be entitled to contribution from the other Class A Members. Any Class A Member who is required to institute legal action to enforce such right of contribution shall be entitled to recover from the other Class A Members all costs and reasonable attorneys fee.

Page 2
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8. On or about September 25, 2007, Arden borrowed from South First Bank, N.A., in Columbia, South Carolina, the sum of approximately \$498,000.00, with interest at a variable rate.
9. Jones guaranteed the loan as required by the lender. When the loan became due, Arden defaulted and Jones paid the loan in full.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

10. The allegations of paragraphs 1 through 9 are restated.
11. The Arden Operating Agreement was a binding, valid contract among the parties.
12. Pursuant to the terms and conditions of the Operating Agreement, BIG and Boone were required to guaranty the loan to Arden, which they failed to do.
13. Further, BIG and Boone were responsible under the Operating Agreement for paying their proportionate share of the loan which they failed and refused to do, thereby, breaching the Operating Agreement.
14. Jones paid more than his percentage of the loan, BIG and Boone having paid none.
15. Jones is entitled to contribution from BIG and Boone for the full amount of the loan, plus interest, plus costs and reasonable attorneys fee.

FOR A SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty)

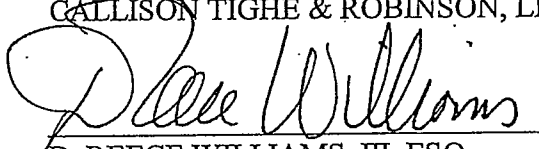
16. As members and managers of Arden, BIG and Boone were in a fiduciary relationship with Jones.
17. Boone and BIG owed to Jones an obligation of good faith and fair dealing.
18. Boone and BIG violated their fiduciary duties to Jones by failing to guarantee the subject loan and by refusing to contribute to the payment of the loan, leaving Jones alone to pay.

19. Jones is entitled to recover the full amount of the loan paid by him from either BIG or Boone, or both, plus interest, costs and reasonable attorneys fee.

WHEREFORE, Robert S. Jones prays:

- A. On the first cause of action, that he be granted judgment against Brian D. Boone and Builders Investment Group, LLC, jointly and severally for the full amount found to be due and owing to Jones plus interest, costs and attorneys fees.
- B. On the second cause of action, that he be granted judgment against Brian D. Boone and Builders Investment Group, LLC, jointly and severally for the full amount found to be due and owing to Jones plus interest, costs and attorneys fees.
- C. That Jones be allowed to enforce the judgment in any sequence or simultaneously in whole or in part against any Defendant.
- D. For such other and further relief as may be just and proper.

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS

) FIFTH JUDICIAL CIRCUIT

Robert S. Jones,

Plaintiff,

vs.

Builders Investment Group, LLC,
Brian D. Boone and Arden
Homebuilders, LLC,

Defendants.

) Civil Action No. 2011-CP-40-1980

)
) **DEFENDANTS BUILDERS**
) **INVESTMENT GROUP, LLC'S AND**
) **BRIAN D. BOONE'S MOTION FOR A**
) **JUDGMENT NOTWITHSTANDING**
) **THE VERDICT OR, IN THE**
) **ALTERNATIVE, A NEW TRIAL**

Defendants Builders Investment Group, LLC ("BIG") and Brian D. Boone ("Boone") move pursuant to Rule 50(b), SCRPC, for an order granting a judgment notwithstanding the verdict. In the alternative, BIG and Boone move pursuant to Rule 59, SCRPC, for a new trial. In the second alternative, BIG and Boone move for a new trial and/or relief from judgment under Rules 59 & 60, SCRPC.

INTRODUCTION

The Complaint contains two causes of action against BIG and Boone: breach of contract and breach of fiduciary duty. The second cause of action for breach of fiduciary duty was dismissed by the court on a motion for summary judgment. See Order attached hereto as Exhibit 1. The only cause of action remaining against BIG and Boone is for breach of contract.

The breach of contract claim is based on the Arden Homebuilders, LLC Operating Agreement ("Arden Operating Agreement"). The alleged breach of the Arden Operating Agreement is in connection with Section 2.3, which states:

Guaranty of Loans to Company. Each of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") for so long as any guaranty of such loan is required by the lender. Notwithstanding any other provisions of this Agreement or any provisions of the Guaranteed Loan documents, as between the Members, each Class A member shall be responsible for paying such class A Member's proportionate share of any Guaranteed Loan ("Guaranty Percentage"). The "proportionate share" of a Class A Member shall equal such Class A Member's Percentage Interest divided by the aggregate Percentage Interests of all of the Class A Members. **Any Class A Member who pays more than such Class A Member's Guaranty Percentage of the Guaranteed Loan to the Lender shall be entitled to contribution from the other Class A Members.** Any Class A Member who is required to institute legal action to enforce such right of contribution shall be entitled to recover from the other Class A Members all costs and reasonable attorneys fee.

Compl. ¶ 7 (emphasis added). Plaintiff, BIG, and Boone are all Class A Members of Arden Homebuilders, LLC. Compl. ¶¶ 3-5.

The entire case of Robert S. Jones ("Jones") centers around a loan from Southern First Bank to Arden in the amount of \$498,000.00 ("Arden Loan"). Jones is seeking contribution from BIG and Boone for amounts Jones claims he paid on behalf of Arden Homebuilders, LLC ("Arden") under the Arden Operating Agreement.

Section 2.3 of the Arden Operating Agreement requires two steps before any Class A Member can recover from another Member: (1) the Class A Member from whom contribution is sought must be required to guaranty the loan, and (2) the Member seeking contribution must pay more than his proportionate share of the loan. Because Jones has not paid more than his proportionate share of the Arden Loan and because BIG and Boone were never required to guaranty the Arden Loan, Jones is not entitled to contribution as a matter of law.

I. JONES IS NOT ENTITLED TO RECOVER UNDER THE ARDEN OPERATING AGREEMENT AS A MATTER OF LAW.

a. JONES IS DID NOT PAY MORE THAN HIS PROPORTIONATE SHARE.

A plain and unambiguous reading of Section 2.3 of the Arden Operating Agreement makes it clear that a member must actually pay more than his share to recover from the other members. Because Jones has not paid more than his proportionate share of the Arden Loan he is not entitled to contribution.

Section 2.3 of the Arden Operating agreement provides in pertinent part:

Any Class A Member who pays more than such Class A Member's Guaranty Percentage of the Guaranteed Loan to the Lender shall be entitled to contribution from the other Class A Members.

"When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense." *C.A.N. Enterprises, Inc. v. S. Carolina Health & Human Services Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). A plain and unambiguous reading of Section 2.3 requires a Class A Member to actually pay more than his share to recover from the other members. Section 2.3 does not provide any other situation for recovery, it explicitly requires payment.

It is undisputed from the evidence presented at trial that Jones signed a personal promissory note, also with Southern First Bank, which was used to satisfy the Arden Loan. It is also undisputed that Jones has not made any payments on this personal promissory note. Southern First Compl. ¶ 5; attached hereto as **Exhibit 2**; Jones Third-Party Ans. & Compl. ¶ 2, attached hereto as **Exhibit 3**; Confession of Judgment, attached hereto as **Exhibit 4**.

The evidence presented at trial showed that Jones paid only \$7,423.67 on the Arden Loan. See statement of liquidation of assets from Southern First Bank, attached hereto as Exhibit 5. Nonetheless, Jones testified that he has made payments totaling \$48,673.67. Even assuming Jones' testimony of payment is true, he has still not paid more than his percentage of the Arden Loan, and thus he is not entitled to contribution from BIG or Boone.¹

Jones admitted in his testimony that he signed a personal promissory note which was used to satisfy the Arden Loan on the books of Southern First Bank. He did not actually make any payments to Southern First Bank totaling more than his proportionate share. As the Southern First Bank president, Justin Strickland, testified at trial, a promissory note is only a promise to pay, not payment.

Strickland's testimony is supported by the South Carolina Uniform Commercial Code, which provides that a promissory note is simply a promise to pay and does not mean a bank has received any sum of money or funds: S.C. Code Ann. § 36-9-102 ("Promissory note" means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds."); By signing a personal promissory note, Jones has simply incurred a liability on behalf of Arden. Jones has not made payment as required by the plain language of the operating agreement, and has thus suffered no actual damages.

¹ Guaranty Percentage of the Guaranteed Loan is calculated by multiplying the Class A member's percentage ownership in the company's Class A shares by the amount of the Loan. In this case, Jones owned 29.17 percent of the Class A shares. The Arden Loan from Southern First Bank was \$498,000. Thus, Jones' Guaranty Percentage of the Guaranteed Loan is \$145,250 (.2917 x 498,000). In order for Jones to be entitled to contribution, he must have paid more than \$145,250 to Southern First Bank. The undisputed evidence in this case is that he did not even come close to paying this amount.

Because Plaintiff has not paid more than his Guaranty Percentage, based on his own testimony, the testimony of Strickland, and the UCC, the Plaintiff is not entitled to contribution from BIG and Boone according to the plain terms of the Arden Operating Agreement. Accordingly, BIG and Boone are entitled to a judgment notwithstanding the verdict.

b. JONES DID NOT MAKE ACTUAL PAYMENT.

South Carolina case law supports the plain reading of the Arden Operating Agreement which requires a member to pay more than his proportionate share before he can recover from another member. Because Jones simply incurred a liability related to the Arden Loan and did not make actual payment, he is not entitled to contribution from BIG or Boone.

Section 2.3 of the Arden Operating Agreement is a contract of indemnity under South Carolina law. *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003) ("South Carolina courts have consistently defined indemnity as 'that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party.'").

South Carolina courts recognize two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. *Piper v. Am. Fid. & Cas. Co. et al.*, 154 S.C. 106, 108 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred. *Id.* By contrast, in a contract for indemnity against loss, "liability does not attach until loss has been suffered, **that is when the [indemnatee] has paid the damages.**" *Id.* (emphasis added).

Whether a contract for indemnity is one for liability or for loss "depends on the intention of the parties as shown by the phraseology of the agreement contained in the policy." *Shealey v.*

Am. Health Ins. Corp., 220 S.C. 79, 82-83, 66 S.E.2d 461, 462 (1951). "In construing contracts of this character, the courts generally have held that if the indemnity is clearly one against loss or damage, no action will lie in favor of the insured until some loss or damage has been sustained by him, either by payment of the whole or some part of the claim." *Id.* (emphasis added).

Here, Section 2.3 of the Arden Operating Agreement is a contract for indemnity against loss because the Agreement specifically requires a member to "pay" more than his proportionate share. Jones has not paid more than his proportionate share of the Arden Loan. In fact, it is clear that Jones has incurred only a liability with regard to the Arden Loan by taking out a personal promissory note.

Jones' personal promissory note was used to satisfy the Arden Loan on the books of Southern First Bank. As discussed above, a promissory note is merely a promise to pay. It is not payment. In fact, a promissory note is the quintessential liability, listed on every financial statement under liabilities. While Jones incurred a liability on behalf of Arden when he signed the personal promissory note, he did not incur actual damage by way of payment.

This is the exact distinction that the South Carolina case law seeks to make. If the Arden Operating Agreement requires payment for contribution, then the mere incurrence of a liability is insufficient to satisfy the contract requirements for contribution. The Arden Operating agreement does not say, "Any Class A Member who incurs a *liability* more than his share is entitled to contribution." The Arden Operating Agreement specifically requires payment. Accordingly, the mere incurrence of a liability by Jones is insufficient to entitle him to contribution from the BIG and Boone.

By way of contrast, the South Carolina Court of Appeals has held that actual payment is not necessary for indemnification when a "partnership agreement allowed indemnity for a 'threat of loss.'" *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 607, 538 S.E.2d 15, 29 (Ct. App. 2000). The court in *Kuznik* reasoned that because the partnership agreement in question contained the phrase "threat of loss," it allowed the plaintiff to recover even though he had not yet made payment. In this case, the Arden Operating Agreement has no such provision. The Arden Operating Agreement does not mention "liability" or "threat of loss." The Arden Operating agreement allows only for contribution in one situation: payment.

Accordingly, BIG and Boone are entitled to judgment notwithstanding the verdict on the breach of contract cause of action because the Plaintiff has not suffered a loss or damage and thus cannot recover from BIG or Boone.

II. JONES IS NOT ENTITLED TO RECOVERY AS A MATTER OF LAW BECAUSE BIG AND BOONE WERE NOT REQUIRED TO GUARANTY THE LOAN, AND IN FACT DID NOT GAURANTY THE LOAN.

BIG and Boone are entitled to a judgment notwithstanding the verdict because Jones has failed to present any evidence showing that BIG and Boone were ever required to guaranty the Arden Loan. All of the testimony and evidence at trial demonstrates that neither BIG nor Boone was ever required by Southern First Bank, or anyone else, to guaranty the Arden Loan.

Section 6.6(a) of the Operating Agreement specifically states:

No Member shall be liable for the debts or any other obligations or liabilities of the Company, whether arising in contract, tort or otherwise **unless a Member guarantees any debt or obligation as required under Article 2.3.**

See **Exhibit 6**, attached hereto, Section 6.6(a) (emphasis added).

It is undisputed that BIG and Boone never guaranteed the Arden Loan from Southern First Bank. The only argument raised by Jones at trial was that Section 2.3 of the Arden Operating Agreement required BIG and Boone to guaranty the Loan, and thus contribute to it.

Section 2.3 of the Operating Agreement provides in pertinent part:

2.3 Guaranty of Loans to Company. Each of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") for so long as any guaranty of such loan is required by the lender.

Exhibit 6, Section 2.3 (emphasis added). It is clear from Section 2.3 that a class A member is required only to guaranty a loan "for so long as any guaranty of such loan is required by the lender."

The Southern First Bank President and loan officer on all of the loans, Justin Strickland, repeatedly testified at trial that neither BIG nor Boone was required to guaranty the Arden Loan. It is also undisputed that BIG and Boone never guaranteed the Arden Loan from Southern First Bank. Jones provided no documents or evidence at trial which demonstrated a requirement by Southern First Bank for BIG and Boone to guaranty the Arden Loan. All of the evidence supports Defendants' position that BIG and Boone were never required by anyone to guaranty the Arden Loan.

Section 6.6 of the Operating Agreement plainly states that a Member is not responsible for any debt of Arden "unless a Member guarantees any debt or obligation as required under Article 2.3." Because BIG and Boone were not required by Southern First Bank to guaranty the Arden Loan and did not guaranty the Loan, they cannot be liable for any portion of the Loan as a matter of law. Because Jones has failed to provide any evidence that anyone has ever required

BIG or Boone to guaranty the Arden Loan from Southern First, BIG and Boone are entitled to a judgment notwithstanding the verdict.

III. IN THE ALTERNATIVE, BIG AND BOONE ARE ENTITLED TO A NEW TRIAL.

If the Court finds that a judgment notwithstanding the verdict is not warranted, BIG and Boone request a new trial pursuant to Rule 59, SCRCP. The Court, sitting as a thirteenth juror, should conclude that the evidence and facts do not justify the verdict in this case and should grant a new trial absolute. Further, the verdict is not supported by the greater weight or preponderance of the evidence.

"The grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). "There can be no question but that the trial judge has the authority and traditionally has in this State granted new trials outright when he, sitting as the thirteenth juror charged with the duty of seeing that justice is done, is convinced that a new trial is necessitated on the basis of the facts in the case." *Graham v. Whitaker*, 282 S.C. 393, 401, 321 S.E.2d 40, 45 (1984).

The Arden Loan was acquired by Jones before the BIG or Boone became class A members of Arden. There is no evidence that Brian Boone or BIG knew that they were responsible for the Arden Loan prior to investing in Arden. All of the documents presented at trial demonstrate that the Arden Loan from Southern First Bank was treated differently than all other loans to Arden, and that the details of that Southern First Loan were kept from Brian Boone and BIG. Additionally, the Arden Operating Agreement specifically provides that the Southern

First Loan would be guaranteed by Jones, Keisler, and Buck. **Exhibit 6**, Section 4.7. Based on this, it is unjust to hold Brian Boone and BIG responsible for the Arden Loan from Southern First Bank.

The only evidence presented by Jones at trial regarding the requirement of BIG and Boone to guaranty the Arden Loan from Southern First Bank was his testimony and the testimony of Robert Keisler. On the contrary, the Defendants provided the testimony of Brian Boone and Kathy Boone who testified that they were not required to guaranty the Arden Loan. Additionally, the Defendants provided numerous documents which supported the testimony of Brian and Kathy Boone.

Further, as discussed above, there is no evidence to support the contention that Jones has paid the Arden Loan or that anyone ever required Brian Boone or BIG to guaranty the Arden Loan. The verdict was not supported by the greater weight or preponderance of the evidence. Thus, the Court, sitting as a thirteenth juror, should conclude that the evidence and facts do not justify the verdict in this case and should grant a new trial absolute.

IV. IN THE SECOND ALTERNATIVE, BIG AND BOONE SHOULD BE RELIEVED OF THE FINAL JUDGEMENT OR GRANTED A NEW TRIAL DUE TO NEWLY DISCOVERY EVIDENCE.

Since the trial, BIG and Boone have discovery new evidence regarding the payment of funds to Southern First Bank by Jones. This new evidence entitles BIG and Boone to an order relieving them of the judgment pursuant to Rule 60, SCRCPP, or in the alternative, to a new trial under Rules 59 & 60, SCRCPP.

Rule 60, SCRCPP, provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud, misrepresentation, or other misconduct of an adverse party;

BIG and Boone have recently discovered that Jones received money from the sale of a condominium and has not paid it to Southern First Bank. This evidence makes it clear that Southern First Bank has no intention of collecting on the personal promissory note of Jones.

As part of his obligations as a guarantor on the Arden Loan to Southern First Bank, Jones provided a list of his financial assets to Southern First Bank. See Affidavit of Thornwell F. Sowell III, ¶ 4, attached hereto as **Exhibit 7**. This included two condominiums at Paradise Pointe. *Id.* Both of these condominiums were transferred to Jones wife, Martha Jones, on May 22, 2008. *Id.* at ¶ 9. This was eight months after Jones signed the personal guarantee with Southern First Bank. This was a fraudulent transfer because Jones was attempting to avoid his obligations on the loans with Southern First Bank, Wachovia, Carolina Bank, and Bank of America by transferring his assets to his wife.

On November 29, 2011, Southern First Bank loaned Martha Jones \$150,000 and received a mortgage on one of the condominiums. *Id.* at ¶ 15. Recently, on September 28, 2012, Martha Jones sold the condominium for \$264,000. *Id.* at ¶ 16. After the repayment of the mortgage to Southern First Bank, Martha and Robert Jones made \$114,000 in profit. None of this money was paid to Southern First Bank on the personal promissory note of Jones.

Southern First Bank was aware of the sale of the condominium as the mortgagor, yet has not demanded payment of the personal promissory note to Jones. This supports the conclusion that Southern First Bank has no intention of collecting on the personal promissory note to Jones

and Jones has no intention of paying on the note. This is consistent with the fact that Southern First Bank wrote-off half of the personal promissory note of Jones just five days after the note was issued. See **Exhibit 8** attached hereto. At trial, Jones relied on the proposition that he had paid the Arden Loan because he was solely responsible for his personal debt. However, it is clear from this new evidence that Southern First Bank has no intention of collecting any money from Jones, and thus he has not been damaged in any way.

Based on this newly discovery evidence, Southern First Bank and Jones have perpetrated a fraudulent scheme upon BIG and Boone to fabricate a fake paper trail in order to hold them accountable for the Arden Loan which was never the intention of the parties. This new evidence entitles BIG and Boone to an order reliving them of the judgment pursuant to Rule 60, SCRCP, or in the alternative, to a new trial under Rule 59 & 60, SCRCP.

Respectfully submitted,

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

Thornwell F. Sowell
David C. Dick
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Builders Investment Group, LLC
and Brian D. Boone

Columbia, South Carolina
December 21, 2012

EXHIBIT 1

FORM 4

JUDGMENT IN A CIVIL CASE

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

CASE NUMBER: 2011CP401980

Robert S. Jones

Builders Investment Group, LLC

Brian D. Boone and Arden Home

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow); ☐ Statement of Judgment by the Court;

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: Defendant's Motion for Summary Judgment is granted as to Plaintiff's breach of fiduciary duty claim and denied as to Plaintiff's breach of contract claims

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code 2161

Date 04/20/2012

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 24 day of April, 2012 to attorneys of record or to parties (when appearing pro se) as follows:

David C. Dick

Thornwell F Sowell III

D. Reece Williams III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter Karen Ambroziak

Clerk of Court

EXHIBIT 2

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Southern First Bank, N.A.,

PLAINTIFF,

v.

Robert S. Jones,

DEFENDANT.

IN THE COURT OF COMMON PLEAS

Civil Action No: 2012-CP-40-

VERIFIED COMPLAINT

(Collection on a Note)
(Non-Jury)

JEANETTE W. McBRIDE
CLERK
S.C.P. & G.S.

2012 JUL 26 PM 4:35

RICHLAND COUNTY
FILED

Plaintiff, complaining of Defendant, alleges that:

1. The Plaintiff is a nationally chartered bank that has offices in Richland County and does business in South Carolina.
2. The Defendant, Robert S. Jones ("Defendant") is, upon information and belief, a citizen and resident of Richland County, South Carolina.
3. The Court has jurisdiction over these parties, and venue is proper in Richland County.
4. On or about December 8, 2009, Defendant made, executed and delivered to Plaintiff, in writing, a certain Commercial Promissory Note ("Note") whereby he promised to pay to the Plaintiff the principal sum of Four Hundred Forty-Nine Thousand Three Hundred Twenty-Six and 33/100 (\$449,326.33) Dollars, together with interest thereon as stated in the Note, payable pursuant to the terms and conditions stated in the Note. A Copy of the Note is attached hereto and incorporated by reference as "Exhibit A".
5. The Defendant has not made payment pursuant to the terms of the Note and is in

default, pursuant to the terms and conditions of the Note, as described herein. The Plaintiff has exercised its rights under the Note as described herein; and has declared the entire indebtedness due and immediately payable.

6. As of July 18, 2012, there is now due and owing to the Plaintiff on the Note as described herein, the principal balance of Four Hundred Forty-Nine Thousand Three Hundred Twenty-Six and 33/100 (\$449,326.33) Dollars, with interest thereon as stated in the Note from December 8, 2010, including late fees and other charges that may become due pursuant to the Note.

FOR A FIRST CAUSE OF ACTION
(Collection on a Note)

7. Plaintiff herein incorporates each and every allegation set forth above as if set forth herein verbatim.

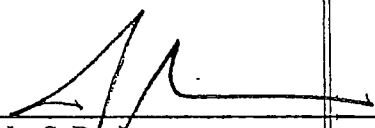
8. Defendant is in default on his obligations under the Note as set forth herein for failure to make payments as required by same.

9. Plaintiff is entitled to its judgment as against the Defendant as obligated under the Note.

10. Plaintiff is entitled to an award of its reasonable attorneys' fees and costs in bringing this action and collecting these debts.

WHEREFORE, Plaintiff prays:

- (a) That the amount due on the Note be ascertained and determined under the direction of this court and that judgment be entered immediately against the Defendant for that amount;
- (b) That Plaintiff be awarded a judgment against the Defendant; and
- (c) For such other and further relief as may be just and proper.



Jake S. Barker
ATTORNEY FOR PLAINTIFF
ELLIS, LAWHORNE & SIMS, P.A.
1501 Main Street - 5th Floor
Post Office Box 2285 (29202)
Columbia, South Carolina 29201
(803) 254-4190
jbarker@ellislawhorne.com

July 26, 2012

COMMERCIAL PROMISSORY NOTE

Southern First Bank, N.A.
190 Knox Abbott Dr.
Cayce, South Carolina 29033
(803)223-6400

ORIGI

EXHIBIT

A

401096900	December 8, 2009	\$449,326.33	December 8, 2010
LOAN PURPOSE: Payoff commercial loan			

BORROWER INFORMATION

ROBERT S JONES
6009 MARTHAS GLEN RD
COLUMBIA, SC 29209

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

LENDER. "Lender" means Southern First Bank, N.A. whose address is 190 Knox Abbott Dr., Cayce, South Carolina 29033, its successors and assigns.

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

PROMISE TO PAY. For value received, receipt of which is hereby acknowledged, on or before the Maturity Date, the Borrower promises to pay the principal amount of Four Hundred Forty-nine Thousand Three Hundred Twenty-six and 33/100 Dollars (\$449,326.33) and all interest and any other charges, including service charges, to the order of Lender at its office at the address noted above or at such other place as Lender may designate in writing. The Borrower will make all payments in lawful money of the United States of America.

PAYMENT SCHEDULE. All unpaid principal, accrued and unpaid interest and any outstanding charges shall be due in a single payment on the Maturity Date.

INTEREST RATE AND SCHEDULED PAYMENT CHANGES. The initial variable interest rate on this Note will be 5.500% per annum. This interest rate may change on December 9, 2009, and every day thereafter. Each date on which the interest rate may change is called the "Change Date." Beginning with the first Change Date, Lender will calculate the new interest rate based on Southern First Prime Rate in effect on the Change Date (the "Index"). If the Index is not available at that time, Lender will choose a new Index which is based on comparable information. The Index is used solely to establish a base from which the actual rate of interest payable under this Note will be calculated, and is not a reference to any actual rate of interest charged by any lender to any particular borrower. The interest rate will never be less than 5.500%.

Nothing contained herein shall be construed as to require the Borrower to pay interest at a greater rate than the maximum allowed by law. If, however, from any circumstances, Borrower pays interest at a greater rate than the maximum allowed by law, the obligation to be fulfilled will be reduced to an amount computed at the highest rate of interest permissible under applicable law and if, for any reason whatsoever, Lender ever receives interest in an amount which would be deemed unlawful under applicable law, such interest shall be automatically applied to amounts owed, in Lender's sole discretion, or as otherwise allowed by applicable law. An increase in the interest rates may result in a larger final payment amount. Interest on this Note is calculated on a 365/360 day basis.

LATE PAYMENT CHARGE. If any required payment is more than 20 days late, then at Lender's option, Lender will assess a late payment charge of 5.000% of the amount of the regularly scheduled payment then past due, subject to a minimum charge of \$15.00.

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

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

- Security Agreement dated December 8, 2009, evidencing security interest in Certificate Number 008, 1000 Shares of Class A stock Issued by Palmetto Builders Concrete, LLC.

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

DISHONORED ITEM FEE. If Borrower makes a payment on the loan with a check or preauthorized charge which is later dishonored, a fee in the amount of \$35.00 will be charged.

DEFAULT. Upon the occurrence of any one of the following events (each, an "Event of Default" or "default" or "event of default"), Lender's obligations, if any, to make any advances will, at Lender's option, immediately terminate and Lender, at its option, may declare all indebtedness of Borrower to Lender under this Note to be immediately due and payable without further notice of any kind, notwithstanding anything to the contrary in this Note or any other agreement (and Borrower shall make any payment on time or in the amount due as a result of default by Borrower under the terms of this Note or any other agreement, security agreement executed in connection with this Note (including a Loan



ORIGINAL

Document" and collectively, the "Loan Documents"); (e) any default by Borrower under the terms of any other note, loan agreement, security agreement, mortgage or other document in favor of Lender; (d) the death, dissolution, or termination of existence of Borrower or any guarantor; (c) Borrower is not paying Borrower's debts as such debts become due; (f) the commencement of any proceeding under bankruptcy or insolvency laws by or against Borrower or any guarantor or the appointment of a receiver; (g) any default under the terms of any other indebtedness of Borrower to any other creditor; (h) any writ of attachment, garnishment, execution, tax lien or similar instrument is issued against any collateral securing the loan, if any, or any of Borrower's property or any judgment is entered against Borrower or any guarantor; (i) any part of Borrower's business is sold to or merged with any other business, individual, or entity; (j) any representation or warranty made by Borrower to Lender in any of the Loan Documents or any financial statement delivered to Lender proves to have been false in any material respect as of the time when made or given; (k) if any guarantor, or any other party to any agreement or instrument with or in favor of Lender entered into or delivered in connection with the Loan terminates, attempts to terminate or defaults under any such agreement or instrument; (l) Lender has deemed itself insecure or there has been a material adverse change of condition of the financial prospects of Borrower or any collateral securing the obligations owing to Lender by Borrower. Upon the occurrence of an event of default, Lender may pursue any remedy available under any Related Document, at law or in equity.

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

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

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

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

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

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

ORAL AGREEMENTS DISCLAIMER. This Note represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

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

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

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

ADDITIONAL PROVISIONS. THIS LOAN WILL ALSO BE SECURED BY 1300-#090217-1017512 FORMERLY HELD AS COMMERCIAL LOAN #400938500

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

ROBERT S. JONES
Individually

Date

12/11/2009

LENDER: Southern First Bank, N.A.

By: Justin Strickland
Its President

Date

12/11/2009



EXHIBIT 3

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Southern First Bank, N.A.,)

Plaintiff,)

v.)

Robert S. Jones,)

Defendant.)

Robert S. Jones,)

Third-Party Plaintiff,)

v.)

Builders Investment Group, LLC,)

Brian D. Boone and Arden)

Homebuilders, LLC,)

Third-Party Defendant,)

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Case No: 2012-CP-40-5120

ANSWER AND THIRD-PARTY
COMPLAINT

RICHLAND COUNTY
FILED
2012 SEP -7 AM 11:29
JEANETTE W. McBRIDE
C.C.P. & G.S.

Robert S. Jones (Jones), answering the Complaint herein, would respectfully show:

1. He denies the allegations of the Complaint unadmitted herein.
2. He admits the allegations of paragraphs 1, 2, 3, 4, 5, 6 and 7.
3. As to paragraphs 7, 8, 9, and 10, he refers to the allegations hereinafter relating to his claims against the Third Party Defendants for payment of the said Note.

ALLEGATIONS OF THIRD-PARTY COMPLAINT
(Jurisdiction and Venue)

4. This action arises from the relationship as Members of Arden Homebuilders, LLC (Arden), and from its Operating Agreement, among Robert S. Jones (Jones), Builders Investment Group, LLC (BIG), and Brian D. Boone (Boone).
5. Arden is a South Carolina limited liability company having one of its places of business at the time the claim or claims arose in Richland County, South Carolina, where the most substantial part of the alleged acts or omissions giving rise to the claim or claims stated herein occurred. Arden is made a party because it might have an interest in the subject matter of this action.
6. Jones is a citizen and resident of Richland County, South Carolina, where he resided at the time or times the claim or claims arose. Jones is a Class A Member and a Manager of Arden.
7. BIG is a South Carolina limited liability company having its principal place of business at the time or times the claim or claims arose in Richland County, South Carolina, where the most substantial part of the alleged acts or omissions giving rise to the claim or claims occurred. BIG is a Class A Member of Arden.
8. Boone is believed to be a resident of North Carolina. He is subject to the jurisdiction of this court because he is a Class A Member and Manager of Arden and was a Class A Member and Manager during the time or times the alleged acts or omissions giving rise to the claim or claims occurred in South Carolina. The most substantial part of the alleged acts or omissions against Boone occurred in Richland County, South Carolina.

9. This court has jurisdiction of the parties and subject matter of this action and venue is proper in Richland County.

ALLEGATIONS APPLICABLE TO ALL CLAIMS

10. The Operating Agreement of Arden states:

2.3 Guaranty of Loans to Company. Each of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") for so long as any guaranty of such loan is required by the lender. Notwithstanding any other provision of this Agreement or any provision of the Guaranteed Loan documents, as between the Members, each Class A Member shall be responsible for paying such Class A Member's proportionate share of any Guaranteed Loan ("Guaranty Percentage"). The "proportionate share" of a Class A Member shall equal such Class A Member's Percentage Interest divided by the aggregate Percentage Interests of all of the Class A Members. Any Class A Member who pays more than such Class A Member's Guaranty Percentage of the Guaranteed Loan to the Lender shall be entitled to contribution from the other Class A Members. Any Class A Member who is required to institute legal action to enforce such right of contribution shall be entitled to recover from the other Class A Members all costs and reasonable attorneys fee.

11. On or about September 25, 2007, Arden borrowed from Southern First Bank, N.A., in Columbia, South Carolina, the sum of approximately \$498,000.00, with interest at a variable rate.
12. Jones guaranteed the loan as required by the lender. When the loan became due, Arden defaulted and Jones paid the loan in full.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

13. The allegations of paragraphs 1 through 9 are restated.
14. The Arden Operating Agreement was a binding, valid contract among the parties.

15. Pursuant to the terms and conditions of the Operating Agreement, BIG and Boone were required to guarantee the loan to Arden, which they failed to do.
16. Further, BIG and Boone were responsible under the Operating Agreement for paying their proportionate share of the loan which they failed and refused to do, thereby, breaching the Operating Agreement.
17. Jones paid more than his percentage of the loan, BIG and Boone having paid none.
18. Jones is entitled to contribution from BIG and Boone for the full amount of the loan, plus interest, plus costs and reasonable attorneys fee.

Page 4
RW

FOR A SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty)

19. As members and managers of Arden, BIG and Boone were in a fiduciary relationship with Jones.
20. Boone and BIG owed to Jones an obligation of good faith and fair dealing.
21. Boone and BIG violated their fiduciary duties to Jones by failing to guarantee the subject loan and by refusing to contribute to the payment of the loan, leaving Jones alone to pay.
22. Jones is entitled to recover the full amount of the loan paid by him from either BIG or Boone, or both, plus interest, costs and reasonable attorneys fee.

WHEREFORE, Robert S. Jones prays:

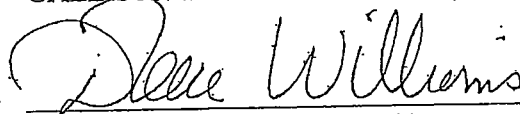
- A. On the first cause of action, that he be granted judgment against Brian D. Boone and Builders Investment Group, LLC, jointly and severally for the full amount found to be due and owing to Southern First Bank plus interest, costs and attorneys fees.

- B. On the second cause of action, that he be granted judgment against Brian D. Boone and Builders Investment Group, LLC, jointly and severally for the full amount found to be due and owing to Southern First Bank plus interest, costs and attorneys fees.
- C. That Jones be allowed to enforce the judgment in any sequence or simultaneously in whole or in part against any Third Party Defendant.
- D. For such other and further relief as may be just and proper.

Page 5

CALLISON TIGHE & ROBINSON, LLC

By:



D. REECE WILLIAMS, III, ESQ.

1812 Lincoln St., Second Fl.

PO Box 1390 (29202-1390)

Columbia SC 29201

(803) 404-6900

(803) 404-6902 (f)

E-mail: reecewilliams@callisontighe.com

September 7, 2012
Columbia, South Carolina

G:\000\5262.0\2\Pleadings - Southern First, Plaintiff\Answer & Third Party Complaint.wpd

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the foregoing document in this action, dated September 7, 2012, on opposing counsel by:

- ☐ delivering it to him/her personally; or,
- ☒ mailing it to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Attorney for Plaintiff:

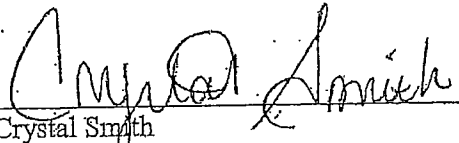
Jake S. Barker, Esq.
Ellis, Lawhorne & Sims, P.A.
1501 Main St., 5th Fl.
PO Box 2285
Columbia SC 29201

*Attorney for Defendants, Builders Investment Group, LLC,
and Brian D. Boone:*

David C. Dick, Jr., Esq.
Thornwell F. Sowell, III, Esq.
Sowell Gray Stepp & Laffitte, LLC
PO Box 11449
Columbia SC 29211

Member and Designated Liquidator of Arden Homebuilders, LLC:

Mr. Robert Keisler
116 Walnut Ln.
Columbia SC 29212


Crystal Smith

September 7, 2012
Columbia, SC

G:\5000\5262.002\Pleadings - Southern First, Plaintiff\Answer & Third Party Complaint.wpd

RICHLAND COUNTY
FILED
2012 SEP -7 AM 11:29
JEANETTE W. MCBRIDE
C.C.P. & G.S.

EXHIBIT 4

COPY

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Southern First Bank, N.A.,

PLAINTIFF,

v.

Robert S. Jones,

DEFENDANT.

IN THE COURT OF COMMON PLEAS

Civil Action No: 2012-CP-40-5120

CONFESSION OF
JUDGMENT

JEANETTE W. HARRIDE
CLERK OF COURT

2012 NOV 14 PM 3:29

FILED

WHEREAS, Robert S. Jones ("Defendant"), on or about December 8, 2009, made, executed and delivered to Southern First Bank, N.A. ("Plaintiff") a certain Commercial Promissory Note ("Note") whereby Defendant promised to pay to Plaintiff the principal sum of Four Hundred Forty-Nine Thousand Three Hundred Twenty-Six and 33/100 (\$449,326.33) Dollars, together with interest thereon as stated in the Note, payable pursuant to the terms and conditions stated in the Note; and

WHEREAS, Defendant has not made payment pursuant to the terms of the Note and is in default, pursuant to the terms and conditions of the Note; and

WHEREAS, Plaintiff has exercised its rights under the Note and has filed suit against Defendant in the above captioned action for nonpayment pursuant to the terms of the Note and Plaintiff has declared the entire indebtedness due and immediately payable; and

WHEREAS, as of July 18, 2012, there is now due and owing to the Plaintiff on the Note the principal balance of Four Hundred Forty-Nine Thousand Three Hundred Twenty-Six and 33/100 (\$449,326.33) Dollars, with interest thereon as stated in the Note from December 8, 2010, including late fees and other charges that may become due pursuant to the Note; and

NOW, THEREFORE, pursuant to South Carolina Code Ann. §15-35-350 et. seq., the undersigned does hereby confess judgment in favor of Plaintiff for the sum of Four Hundred Forty-Nine Thousand Three Hundred Twenty-Six and 33/100 (\$449,326.33) Dollars, together with interest thereon as stated in the Note, all expenses of collection and reasonable attorneys' fees, and authorizes judgment to be entered therefore against Defendant and does make oath and swear as follows:

This Confession of Judgment is for money justly and lawfully due Plaintiff.

 PAGE 1

Defendant desires to enter into this Confession of Judgment as evidence of amounts duly owed pursuant to the Note.

The amount set forth above is justly due and does not exceed the liability of Defendant.

Defendant has had the opportunity to seek legal advice from an attorney of his own choosing regarding this Confession of Judgment and cannot later claim that he failed to understand or comprehend this Confession of Judgment if he did not seek such independent legal advice. As such, Defendant has had the full opportunity to read this Confession of Judgment and obtain whatever legal advice that he desires prior to signing this Confession of Judgment.

RG PAGE 2

IN WITNESS WHEREOF, the undersigned has set his hand and seal as of the 8 day of November, 2012.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

WITNESSES:

Deese Williams
Crystal Amick

DEFENDANT:

Robert S. Jones
Robert S. Jones

STATE OF SOUTH CAROLINA)

COUNTY OF Richland)

ACKNOWLEDGMENT

THE FOREGOING instrument was acknowledged before this 8th day of November, 2012, by Robert S. Jones.

Deese Williams
Notary Public for South Carolina
My Commission Expires: 2/15/13

EXHIBIT 5



October 23, 2009

Mr. Robert S. Jones
6009 Martha's Glenn Road
Columbia, SC 29209

Dear Bob:

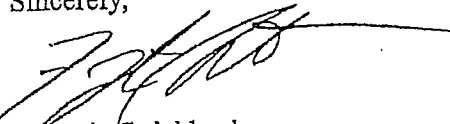
You have requested Southern First Bank, N.A. to liquidate the following stock being held as collateral on the loan to Arden Homebuilders, LLC (#400938500), according to the terms in the Stock Pledge Agreements, dated September 24, 2008 between Robert S. Jones and Southern First Bank, N.A.:

2,500 shares of Congaree Bancshares, Inc. (certificate number CB 1130)
2,216 shares of First National Bancshares, Inc. (certificate number FN 5136)
25,000 shares of SCCB Financial Corporation (certificate number 0067)

All net proceeds will immediately be applied to the loan balance. Please consult your tax advisor about any tax consequences that may arise. By signing below, you agree to and authorize Southern First Bank, N. A. to liquidate the above collateral.

Should you have any questions, please do not hesitate to give me a call.

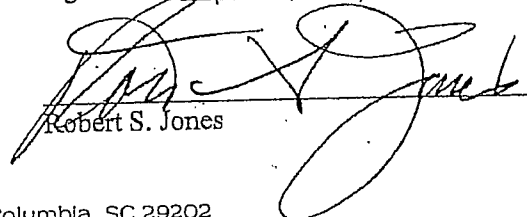
Sincerely,



F. Justin Strickland
President

FJE/re

Agreed this 26 day of October 2009



Robert S. Jones

P.O. Box 7908 • Columbia, SC 29202
(803) 223-6400 • Fax (803) 223-6499
www.southernfirst.com

SFB 0097



48,087

DATED 11/27/09

Account Number 2880-2288
YOUR FINANCIAL ADVISOR
DISCOUNT BROKERAGE

800-328-4494
800-859-9297

014843 01 60



WACHOVIA BANK NA
COMMON SALES ACCOUNT
ATTN CAROL FERNANDEZ
NC1167
401 S TRYON ST 9TH FL
CHARLOTTE NC 28288-1167

IF YOU WOULD LIKE TO ENROLL IN OUR ACCESS ONLINE SERVICE OR SIGN UP TO RECEIVE THIS
CONFIRMATION ELECTRONICALLY, VISIT US AT WWW.WACHOVIA.COM.

SOLD	QUANTITY	PRICE	PRINCIPAL
FIRST NATL BANCSHARES	1,638	0.83000	1,367.88
INC, S & C	580	0.90000	522.00
	2,218	0.84832 average price	1,879.88
SYMBOL	FNSO	ACCOUNT TYPE	CASH
SECURITY NUMBER	1284-231	TRADE DATE	11/27/09
CUSIP	32111B-10-4	SETTLEMENT DATE	12/02/09
UNSOLICITED		OTHER FEE*	0.08
		TRANSACTION FEE	3.00
		NET AMOUNT	\$1,876.82
			*SEE ITEM 15 ON PAGE 2

MARKET OVER THE COUNTER
ORDER ENTRY NOTE: *CREDIT SELLOUT

SOLD	QUANTITY	PRICE	PRINCIPAL
CONGAREE BANCSHARES INC	1,600	2.00000	3,200.00
	1,000	2.55000	2,550.00
	2,600	2.22000 average price	5,550.00
SYMBOL	ONRB	ACCOUNT TYPE	CASH
SECURITY NUMBER	1692-568	TRADE DATE	11/27/09
CUSIP	20716N-10-2	SETTLEMENT DATE	12/02/09
UNSOLICITED		OTHER FEE*	0.16
		TRANSACTION FEE	3.00
		NET AMOUNT	\$5,546.84
			*SEE ITEM 15 ON PAGE 2

MARKET OVER THE COUNTER
ORDER ENTRY NOTE: *CREDIT SELLOUT

SRB 0098

Wells Fargo Advisors, LLC, member NYSE/SIPC is a registered broker-dealer and a separate non-bank affiliate of Wells Fargo & Company. Accounts carried by First Clearing, LLC, member NYSE/SIPC. Investments and insurance products are:
Not Insured by FDIC or Any Federal Government Agency May Lose Value Not a Deposit of or Guaranteed by a Bank or Any Bank Affiliate

For Address Correction And Payment Due Instructions Please Refer To Contact Information On Page 2 Of This Confirmation
PG013001 014843 33112720213 NNNNN NNNNN NNNNNN 000001 Page 1 of 2 020 Q1 Q1YY

EXHIBIT 6

THIS AGREEMENT IS SUBJECT TO ARBITRATION
PURSUANT TO THE SOUTH CAROLINA ARBITRATION ACT
TO THE EXTENT PROVIDED IN SECTION 12.6

REVISED AND RESTATED
OPERATING AGREEMENT

OF

ARDEN HOMEBUILDERS, LLC
F/K/A HOLT FAMILY HOMES, LLC

THIS OPERATING AGREEMENT is entered into to be effective as of July 31st, 2007, by and between Builders Investment Group, LLC, a South Carolina limited liability company ("BIG"), Robert S. Jones ("Jones"), Robert A. Kelsler ("Kelsler"), Carl Edward Buck ("Buck"), Alton W. Burnett, Jr. ("Burnett"), James L. Padgett ("Padgett"), Keith Wayne Berry ("Berry"), Thomas Keith Harris ("Harris") and Brian D. Boone ("Boone") (collectively, the "Members").

WITNESSETH:

WHEREAS, the Company was formed by the filing of Articles of Organization with the Secretary of State of the State of South Carolina ("Secretary of State") on July 1, 2006;

WHEREAS, the Members met on October 26, 2006 to consider and act upon Motions to amend this Operating Agreement; and

WHEREAS, the Members (except Boone) met on July 16, 2007 to consider and act upon Motions to amend this Operating Agreement and authorize substantial additional capital contributions/investments by BIG and Boone as set forth herein.

NOW, THEREFORE, the Members agree as follows:

ARTICLE 1
THE COMPANY

1.1 **Formation.** The Company is a manager-managed limited liability company. Notwithstanding any other provision hereof, the provisions of this Agreement, where inconsistent with the Act, shall govern the relations among the Members and the Company to the fullest extent permitted by law. Furthermore, without in any way limiting the preceding sentence, the following provisions of the Act shall not apply in any way to the Members or the Company: Act §§ 33-44-701, and 33-44-702, unless the price to be paid for an interest is not addressed in this Agreement.

1.2 **Name.** The name of the Company shall be Arden Homebuilders, LLC and all business of the Company shall be conducted in such name or such other names that comply with applicable law as the Managers may select from time to time upon notice to the Members.

1.3 **Purpose.** The purpose of the Company is to conduct the Business and to conduct all such activities as are reasonably necessary to effect the foregoing purpose. The Company has the power to do any and all acts necessary, appropriate, proper, advisable, incidental or convenient to or in furtherance of the purpose of the Company. The Company shall have no other purpose.

EXHIBIT

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1.4 Principal Place of Business. The principal place of business of the Company shall be at 7301 Carmel Executive Park, Suite 214, Charlotte, North Carolina 28226 or at such other place as may be approved by the Managers upon notice to the Members.

1.5 Term. The term of the Company commenced on the date the Articles of Organization of the Company (the "Articles") were filed in the office of the Secretary of State of the State of South Carolina and shall continue until the winding up and liquidation of the Company and its business is completed following a Dissolution Event, as provided in Article 10, or until December 31, 2035, whichever date is earlier.

1.6 Filings; Agent for Service of Process.

(a) The registered agent for service of process on the Company in the State of South Carolina shall be the person so appointed in the Articles or any successor as appointed by the Managers in accordance with the Act.

(b) Upon the dissolution of the Company in accordance with Article 10, the Managers shall promptly execute and cause to be filed articles of dissolution in accordance with the Act.

(c) The Managers are authorized to take all such actions as may be necessary to cause the Company to obtain a certificate of authority to transact business in any other state in which the Company conducts business; to file annual reports and take all such other actions as may be necessary to maintain such authority; and to amend or withdraw the same.

1.7 Title to Property. All Property owned by the Company shall be owned by the Company as an entity and no Member shall have any ownership interest in such Property in his or its individual name, and each Member's interest in the Company shall be personal property for all purposes. At all times after the Effective Date, the Company shall hold title to all of its Property in the name of the Company and not in the name of any Member.

1.8 Payments of Individual Obligations. The Company's credit and assets shall be used solely for the benefit of the Company, and no asset of the Company shall be transferred or encumbered for, or in payment of, any individual obligation of any Member.

1.9 Definitions. Capitalized words and phrases used in this Agreement have the following meanings:

"Act" means the South Carolina Limited Liability Company Act, Chapter 44 of Title 33 of the South Carolina Code of Laws, as amended from time to time (or any corresponding provisions of succeeding law).

"Adjusted Capital Account Deficit" means, with respect to any Member, the deficit balance, if any, in such Member's Capital Account as of the end of the relevant Fiscal Year, after giving effect to the following adjustments:

(i) Credit to such Capital Account (A) any amounts that such Member is obligated to restore pursuant to any provision of this Agreement or pursuant to Regulations §

1.704-1(b)(2)(ii)(a) or (ii)(h) or any other pertinent provision of the Regulations; (B) the Member's share of Company Minimum Gain; and (C) the Member's share of Member Minimum Gain.

(ii) Debit to such Capital Account the items described in Regulations §§ 1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(6) and 1.704-1(b)(2)(ii)(d)(8).

The foregoing definition of Adjusted Capital Account Deficit is intended to comply with the provisions of Regulations § 1.704-1(b)(2)(ii)(d) and shall be interpreted consistently therewith.

"Agreement" means this Operating Agreement of *Arden Homebuilders, LLC*, as amended from time to time.

"Amortization" means, for each Fiscal Year, an amount equal to the amortization, or other cost recovery deduction allowable with respect to an asset for such Fiscal Year, except that if the Gross Asset Value of an asset differs from its adjusted basis for federal income tax purposes at the beginning of such Fiscal Year, Amortization shall be determined in the manner prescribed in Treasury Regulations Section 1.704-1(b)(2)(iv)(g)(3) or 1.704-3(d)(2), as applicable. If the adjusted basis for federal income tax purposes of an asset at the beginning of such Fiscal Year is zero, Amortization shall be determined with reference to such beginning Gross Asset Value using any reasonable method selected by the Members.

"Articles" means the Articles of Organization filed with the Secretary of State pursuant to the Act to form the Company, as originally executed and amended, modified, supplemented or restated from time to time, as the context requires.

"Assignee" means a transferee of Shares in the Company who has not been admitted as a substituted Member in the Company. An Assignee shall have only those rights set forth in Section 9.6.

"Business" means the business of constructing and selling single-family residences.

"Business Plan" means the business plan for the Company, as such business plan may be modified from time to time by the Members. The Initial Business Plan is attached hereto as Exhibit B, which is by this reference incorporated herein.

"Capital Account" means, with respect to any Member, the Capital Account maintained for such Member in accordance with the following provisions:

(i) To each Member's Capital Account there shall be credited (A) such Member's Capital Contributions, (B) such Member's distributive share of Profits and any items in the nature of income or gain that are specially allocated to such Member pursuant to Section 3.3 or Section 3.4, and (C) the amount of any Company liabilities that are assumed by such Member or secured by any Property distributed to such Member;

(ii) To each Member's Capital Account there shall be debited (A) the amount of money and the Gross Asset Value of any Property distributed to such Member pursuant to any provision of this Agreement, (B) such Member's distributive share of Losses and any items in the nature of expenses or losses that are specially allocated to such Member pursuant to Section 3.3 or Section 3.4, and (C) the amount of any liabilities of such Member that are assumed by the Company or secured by any Property contributed by such Member to the Company; and

(iii) If Shares are transferred in accordance with the terms of this Agreement, the transferee shall succeed to the Capital Account of the transferor to the extent it relates to the Transferred Shares.

The foregoing provisions and the other provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with Regulations § 1.704-1(b) and shall be interpreted and applied in a manner consistent with such Regulations. The Managers shall (i) make any adjustments that are necessary or appropriate to maintain equality between the Capital Accounts of the Members and the amount of capital reflected on the Company's balance sheet, as computed for book purposes, in accordance with Regulations § 1.704-1(b)(2)(iv)(q), and (ii) make any appropriate modifications in the event unanticipated events might otherwise cause this Agreement not to comply with Regulations § 1.704-1(b).

"Capital Contributions" means, with respect to any Member, the amount of money and the Initial Gross Asset Value of any Property (other than money) contributed to the Company with respect to the Shares in the Company held or purchased by such Member.

"Class A Member" means a Person who has acquired ownership of Class A Shares by original issuance or Transfer in accordance with this Agreement, who has been admitted to the Company as a Class A Member and who has not ceased to be a Class A Member.

"Class A Shares" means Shares denominated as Class A Shares upon issuance by the Company and having those rights and obligations ascribed to Class A Shares in this Agreement.

"Class B Member" means a Person who has acquired ownership of Class B Shares by original issuance or Transfer in accordance with this Agreement, who has been admitted to the Company as a Class B Member and who has not ceased to be a Class B Member.

"Class B Shares" means Shares denominated as Class B Shares upon issuance by the Company and having those rights and obligations ascribed to Class B Shares in this Agreement.

"Code" means the United States Internal Revenue Code of 1986, as amended from time to time, and the corresponding provisions of any successor United States tax code.

"Company" means the limited liability company formed pursuant to this Agreement and the Articles and the limited liability company continuing the business of the Company in the event of dissolution of the Company as herein provided.

"Company Minimum Gain" has the meaning ascribed to the term "partnership minimum gain" in Regulations §§ 1.704-2(b) and 1.704-2(d).

"Competing Business" means any Person, other than the Company, that is engaged in conducting a Business similar to the Company's Business, in the geographic area consisting of Mecklenburg County, North Carolina and York County, South Carolina.

"Depreciation" means, for each Fiscal Year, an amount equal to the depreciation, amortization, or other cost recovery deduction allowable with respect to an asset for such Fiscal Year, except that if the Gross Asset Value of an asset differs from its adjusted basis for federal

Income tax purposes at the beginning of such Fiscal Year, Depreciation shall be determined in the manner prescribed in Treasury Regulations Section 1.704-1(b)(2)(iv)(g)(3) or 1.704-3(d)(2), as applicable. If the adjusted basis for federal income tax purposes of an asset at the beginning of such Fiscal Year is zero, Depreciation shall be determined with reference to such beginning Gross Asset Value using any reasonable method selected by the Members.

"Earnings" shall mean the Net Income of the Company calculated based on Generally Accepted Accounting Principles generally accepted in the United States

"EBIDTA" means Earnings before Interest, Depreciation, Income Taxes and Amortization for the twelve months immediately preceding the month in which an event of Dissolution occurs.

"Effective Date" means the date hereof.

"Fiscal Year" means (i) the period commencing on the Effective Date and ending on December 31, 2005, (ii) any subsequent twelve month period commencing on January 1 and ending on December 31, and (iii) the period commencing on the immediately preceding January 1 and ending on the date on which all Property is distributed to the Members pursuant to Article 10.

"Gross Asset Value" means with respect to any asset, the asset's adjusted basis for federal income tax purposes, except as follows:

(i) The Initial Gross Asset Value of any asset contributed by a Member to the Company shall be the gross fair market value of such asset, as agreed to by the Members provided that the Initial Gross Asset Values of the assets contributed to the Company pursuant to Section 2.1 shall be as set forth in such section;

(ii) The Gross Asset Values of all Company assets shall be adjusted to equal their respective gross fair market values (taking Code § 7701(g) into account), as of the following times: (A) the acquisition of additional Shares in the Company by any new or existing Member in exchange for more than a *de minimis* Capital Contribution; (B) the distribution by the Company to a Member of more than a *de minimis* amount of Company property as consideration for Shares in the Company; and (C) the liquidation of the Company within the meaning of Regulations § 1.704-1(b)(2)(ii)(g); provided that an adjustment described in clauses (A) and (B) of this paragraph shall be made only if the Members determine that such adjustment is necessary to reflect the relative economic interests of the Members in the Company;

(iii) The Gross Asset Value of any Company asset distributed to any Member shall be adjusted to equal the gross fair market value (taking Code § 7701(g) into account) of such asset on the date of distribution as agreed to by the Members.

If the Gross Asset Value of an asset has been determined or adjusted pursuant to subparagraph (i) or (ii), such Gross Asset Value shall thereafter be adjusted by the Depreciation taken into account with respect to such asset, for purposes of computing Profits and Losses.

"Income Taxes" means any income taxes paid directly by the Company that result in an expense to the Company under generally accepted accounting principles generally accepted in the United States. Income Taxes do not include tax distributions to the Members nor any income taxes paid on a Member's behalf.

"Interest" shall mean any Interest Expense not allocated as construction period interest to the direct cost of construction as required under generally accepted accounting principles generally accepted in the United States.

"Managers" shall mean collectively, Brian D. Boone, Robert A. Boozer, Robert S. Jones, Robert A. Kelsler and Carl Edward Buck, or any Person designated pursuant to this Agreement as a successor Manager but excluding any person who has ceased serving as a Manager. The Managers are treated as Members for all purposes under this Agreement.

"Member" means any Person (i) who is referred by name in the first paragraph of this Agreement or who has become a Member pursuant to the terms of this Agreement, and (ii) who has not ceased to be a Member.

"Membership Interest" has the same meaning as "Percentage Interest".

"Member Nonrecourse Debt" has the same meaning as the term "partner nonrecourse debt" in Regulations § 1.704-2(b)(4).

"Member Nonrecourse Debt Minimum Gain" means an amount, with respect to each Member Nonrecourse Debt, equal to the Company Minimum Gain that would result if such Member Nonrecourse Debt were treated as a Nonrecourse Liability, determined in accordance with Regulations § 1.704-2(i)(3).

"Member Nonrecourse Deductions" has the same meaning as the term "partner nonrecourse deductions" in Regulations §§ 1.704-2(i)(1) and 1.704-2(i)(2).

"Net Cash Flow" means (on the cash receipts and disbursements basis of accounting) the net receipts (i.e., the excess, if any, of revenues over expenses (including the compensation payable under Section 1.10(a)) and repayment of loans) of the Company, (a) including cash from operations or investments and proceeds from the sale, exchange, or other disposition of any Property; but (b) excluding Capital Contributions of the Members; proceeds of any loans made to the Company; funds that the Members elect to reinvest on behalf of the Company; and reserves deemed reasonably sufficient by the Members, for (i) the working capital needs of the Company, (ii) the payment of liabilities incurred (including any loans made by any Members) or arising in the reasonably foreseeable future in connection with the operations of the Company, and (iii) capital expenditures or contributions incurred or arising in the reasonably foreseeable future. Net Cash Flow shall not be reduced by depreciation, amortization, cost recovery deductions or similar allowances.

"Nonrecourse Deductions" has the meaning set forth in Regulations § 1.704-2(b)(1).

"Nonrecourse Liability" has the meaning set forth in Regulations § 1.704-2(b)(3).

"Percentage Interest" means, with respect to any Member as of any date, the ratio (expressed as a percentage) of the number of Shares held by such Member on such date to the aggregate Shares held by all Members on such date. The Percentage Interest of each Member immediately after the Effective Date is set forth in Section 2.1.

"Person" means any individual or any foreign or domestic partnership (whether general or limited), limited liability company, corporation, business trust, trust, estate, association, joint

venture, government, governmental subdivision, agency or instrumentality or other entity.

"Profits" and "Losses" mean, for each Fiscal Year, an amount equal to the Company's taxable income or loss for such Fiscal Year, determined in accordance with Code § 703(a) (for this purpose, all items of income, gain, loss, or deduction required to be stated separately pursuant to Code § 703(a)(1) shall be included in taxable income or loss), with the following adjustments (without duplication):

(i) Any income of the Company that is exempt from federal income tax and not otherwise taken into account in computing Profits or Losses pursuant to this definition of "Profits" and "Losses" shall be added to such taxable income or loss;

(ii) Any expenditures of the Company described in Code § 705(a)(2)(B) or treated as Code § 705(a)(2)(B) expenditures pursuant to Regulations § 1.704-1(b)(2)(iv)(i), and not otherwise taken into account in computing Profits or Losses pursuant to this definition of "Profits" and "Losses" shall be subtracted from such taxable income or loss;

(iii) If the Gross Asset Value of any Company asset is adjusted pursuant to subparagraphs (ii) or (iii) of the definition of Gross Asset Value, the amount of such adjustment shall be treated as an item of gain (if the adjustment increases the Gross Asset Value of the asset) or an item of loss (if the adjustment decreases the Gross Asset Value of the asset) from the disposition of such asset and shall be taken into account for purposes of computing Profits or Losses;

(iv) Gain or loss resulting from any disposition of Property with respect to which gain or loss is recognized for federal income tax purposes shall be computed by reference to the Gross Asset Value of the Property disposed of, notwithstanding that the adjusted tax basis of such Property differs from its Gross Asset Value;

(v) In lieu of the depreciation, amortization, and other cost recovery deductions taken into account in computing such taxable income or loss, there shall be taken into account Depreciation for such Fiscal Year;

(vi) To the extent an adjustment to the adjusted tax basis of any Company asset pursuant to Code § 734(b) is required pursuant to Regulations § 1.704-1(b)(2)(iv)(m)(4) to be taken into account in determining Capital Accounts as a result of a distribution other than in liquidation of a Member's interest in the Company, the amount of such adjustment shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis) from the disposition of such asset and shall be taken into account for purposes of computing Profits or Losses; and

(vii) Notwithstanding any other provision of this definition, any items that are specially allocated pursuant to Section 3.3 or Section 3.4 shall not be taken into account in computing Profits or Losses.

The amounts of the items of Company income, gain, loss or deduction available to be specially allocated pursuant to Sections 3.3 and 3.4 shall be determined by applying rules analogous to those set forth in subparagraphs (i) through (vi) above.

"Property" means all real and personal property acquired by the Company, including both

tangible and intangible property.

"Regulations" means the Income Tax Regulations, including Temporary Regulations, promulgated under the Code, as such regulations are amended from time to time.

"Share" means an ownership interest in the Company including any and all benefits to which the holder of such Share may be entitled as provided in this Agreement, together with all obligations of such Person to comply with the terms and provisions of this Agreement; provided that an Assignee shall have only the rights specified in Section 9.6. A reference to "Share" or "Shares" includes both Class A Shares and Class B Shares unless the context clearly requires otherwise.

"Transfer" means the act of selling, exchanging, giving, assigning or otherwise transferring or disposing of (including by placing in trust (voting or otherwise) and by pledging, hypothecating or otherwise transferring as security), whether made voluntarily or involuntarily by operation of law and whether with or without consideration. Without limiting the generality of the foregoing:

(I) Any transfer or other disposition upon foreclosure or other exercise or remedies of a secured creditor after an event of default or otherwise under or with respect to a pledge, hypothecation or other transfer as security also shall constitute a "Transfer," and

(II) The sale, exchange or other transfer of at least fifty percent (50%) of the voting stock of a Member, if a Member is a corporation, or the transfer of an interest or interests of at least fifty percent (50%) in the capital or profits of a Member (whether accomplished by the sale or exchange of interests or by the admission of a new partner or member), if a Member is a partnership or limited liability company, or the cumulative transfer of such interests in a Member that effectively equal the foregoing (including transfers of interests followed by the incorporation of a Member and subsequent stock transfers, or transfers of stock followed by the liquidation of a Member and subsequent transfers of interests) will be deemed to constitute a "Transfer" of the Shares held by that Member.

"Unreturned Capital" of any Member on any date shall be equal to the excess (if any) of (a) the aggregate Required Class A Contribution or Required Class B Contribution of such Member pursuant to Section 2.1 or 2.2, over (b) the aggregate distributions to such Member pursuant to (I) in the case of a Class A Member, Section 4.2(b) or (II) in the case of a Class B Member, Section 4.2(a), as of such date.

"Voting Rights" shall mean a Member may cast votes equal to his Percentage Interest in the Company.

1.10 Fees to Members and Managers.

Without the consent of the Members as provided in Section 6.1 or 6.5, as applicable, no fee or other compensation shall be paid to any Member or Manager other than as expressly described in this Agreement.

1.11 Interpretation. Each definition in this Agreement includes the singular and the plural, and reference to the neuter gender includes the masculine and feminine where appropriate. References to any statute or Regulations mean such statute or regulations as

amended at the time and include any successor legislation or regulations. The headings to the Articles and Sections are for convenience of reference and shall not affect the meaning or interpretation of this Agreement. Except as otherwise stated, (i) references to Articles and Sections mean the Articles and Sections of this Agreement, (ii) reference to a particular Article or Section includes the Sections, subsections and paragraphs subsidiary thereto and (iii) references to "including" means "including without limitation."

ARTICLE 2 ADMISSION OF MEMBERS

2.1 Class A Members. Schedule 2.1 sets forth the name, Initial Capital Contribution ("Required Class A Contribution"), Initial Capital Account, number of Class A Shares, and Percentage Interest of each Class A Member. Each Person named on Schedule 2.1 shall make or has made its Required Class A Contribution to the Company in cash upon (or prior to) executing this Agreement. Upon BIG and Boone executing this Agreement and making its Required Class A Contribution, such Person shall be admitted to the Company as a Class A Member.

2.2 Class B Member. Schedule 2.2 sets forth the name, Capital Contribution ("Required Class B Contribution"), Capital Account, number of Class B Shares, and Percentage Interest of each Class B Member. Each Person named on Schedule 2.2 has made its Required Class B Contribution to the Company in cash upon (or prior to) executing this Agreement.

2.3 Guaranty of Loans to Company. Each of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") for so long as any guaranty of such loan is required by the lender. Notwithstanding any other provision of this Agreement or any provision of the Guaranteed Loan documents, as between the Members, each Class A Member shall be responsible for paying such Class A Member's proportionate share of any Guaranteed Loan ("Guaranty Percentage"). The "proportionate share" of a Class A Member shall equal such Class A Member's Percentage Interest divided by the aggregate Percentage Interests of all of the Class A Members. Any Class A Member who pays more than such Class A Member's Guaranty Percentage of the Guaranteed Loan to the Lender shall be entitled to contribution from the other Class A Members. Any Class A Member who is required to institute legal action to enforce such right of contribution shall be entitled to recover from the other Class A Members all costs and reasonable attorneys fee. Pursuant to the Company's Settlement Agreement with W. Ray Holt dated September 27, 2006 ("Settlement Agreement"), the provisions of this Section shall not apply to W. Ray Holt and the Company agrees to indemnify and hold W. Ray Holt harmless from any liability related thereto or to any guarantees which W. Ray Holt gave to any vendor for the sole benefit of the Company.

2.4 Additional Capital Contributions.

(a) No Class B Member shall be required to make any Capital Contributions other than as required by Section 2.2.

(b) No Class A Member shall be required to make any Capital Contributions other than as required by Sections 2.1 and 2.4 (c).

(c) If the Class A Members unanimously determine that the Company needs

additional equity capital in addition to that provided for in Sections 2.1, then the Company shall send to each Class A Member an Additional Capital Contribution Notice, which shall set forth the total amount (the "Capital Contribution Amount") of equity capital that the Company needs to raise. Each Class A Member shall be entitled to contribute an amount up to (but not in excess of) that percentage of the Capital Contribution Amount equal to the Class A Member's Percentage Interest ("Proportionate Share"). A Class A Member desiring to contribute a portion of the Capital Contribution Amount shall notify the Company in writing of such Class A Member's agreement to make a Capital Contribution (and the amount of such Capital Contribution), within the time limit prescribed by the Class A Members. If some, but not all, of the Class A Members subscribe for their Proportionate Share (so that less than the entire Capital Contribution Amount is raised), then the Company shall repeat the foregoing procedure, but only with respect to those Class A Members who subscribed for their Proportionate Share. Any Capital Contribution made pursuant to this subsection may be referred to as an "Additional Capital Contribution." A Class A Member must pay the Additional Capital Contribution for which such Class A Member has agreed to pay within the time limits set by the Class A Members in cash (U.S. Dollars). If the Class A Member fails to pay in accordance with the preceding sentence, such Class A Member shall forfeit such Class A Member's right to make the additional Capital Contribution. If the Company receives an Additional Capital Contribution from some but not all of the Class A Members pursuant to an Additional Capital Contribution Notice, then the Percentage Interests of the Class A Members (and the number of Class A Shares) shall be adjusted accordingly, and shall be redetermined as follows:

(i) The Company Asset Value shall be determined as of the date immediately prior to that contribution pursuant to Section 9.12(a) (as if the date of the contribution were the date of the Event of Dissolution);

(ii) The Asset Value shall be multiplied by the aggregate Percentage Interests attributable to all outstanding Class A Shares (the result of which calculation shall be referred to as the "Class A Asset Value");

(iii) A ratio ("Ratio") shall be calculated for each Class A Member, (A) the numerator of which is the sum of (i) the product of the Class A Asset Value multiplied by such Class A Member's Percentage Interest immediately prior to such Additional Capital Contribution and (ii) the Additional Capital Contribution (if any) made by such Class A Member pursuant to such Additional Capital Contribution Notice; and (B) the denominator of which is the sum of the Class A Asset Value and all Additional Capital Contributions made by the Class A Members pursuant to such Additional Capital Contribution Notice;

(iv) Each Class A Member's Percentage Interest shall equal (A) such Member's Ratio multiplied by (B) the aggregate Percentage Interests attributable to all outstanding Class A Shares immediately prior to the Additional Capital Contribution. The number of Class A Shares of such Class A Member shall be adjusted in a similar manner.

No adjustment shall be made to the Percentage Interests of the Class B Members.

Notwithstanding the above, neither the Members nor the Management Committee may vote to amend Section 2.4(o) to require W. Ray Holt (if he is or becomes a Class A Member) to make an additional Capital Contribution to the Company or reduce his Percentage Interest prior to W. Ray Holt being paid the full redemption price for his Class A Shares, in the Company, pursuant to the Buy Out and Settlement Proposal by and between W. Ray Holt and the Company dated

September 27, 2006, which Proposal was approved by the Members on October 26, 2006.

ARTICLE 3 ALLOCATIONS

3.1 Profits. After giving effect to the special allocations set forth in Sections 3.3 and 3.4, Profits for any Fiscal Year shall be allocated to the Members in the following order and priority:

(a) First, to the extent of distributions required under Article 4 hereof, in excess of the Member's Capital Account Balance at the time of the distribution;

(b) Then, to each of the Members (in proportion to the Losses allocated to such Member pursuant to Section 3.5 and not previously charged back pursuant to this Section 3.1(a)) until the cumulative Profits allocated to such Member pursuant to this Section 3.1(a) equal the cumulative Losses allocated to such Member pursuant to Section 3.5 for all prior Fiscal Years;

(c) Finally, among the Members in proportion to their respective Percentage Interests.

3.2 Losses. After giving effect to the special allocations set forth in Sections 3.3 and 3.4, and subject to Section 3.5, Losses for any Fiscal Year shall be allocated among the Members in proportion to their respective Percentage Interests.

3.3 Special Allocations. The following special allocations shall be made in the following order:

(a) Except as otherwise provided in Regulations § 1.704-2(f), notwithstanding any other provision of this Article 3, if there is a net decrease in Company Minimum Gain during any Fiscal Year, each Member shall be specially allocated items of Company income and gain for such Fiscal Year (and, if necessary, subsequent Fiscal Years) in an amount equal to such Member's share of the net decrease in Company Minimum Gain, determined in accordance with Regulations § 1.704-2(g). This Section 3.3(a) is intended to comply with the minimum gain chargeback requirement in Regulations § 1.704-2(f) and shall be interpreted consistently therewith.

(b) Except as otherwise provided in Regulations § 1.704-2(l)(4), notwithstanding any other provision of this Article 3, if there is a net decrease in Member Nonrecourse Debt Minimum Gain attributable to a Member Nonrecourse Debt during any Fiscal Year, each Member who has a share of the Member Nonrecourse Debt Minimum Gain attributable to such Member Nonrecourse Debt, determined in accordance with Regulations § 1.704-2(l)(5), shall be specially allocated items of Company income and gain for such Fiscal Year (and, if necessary, subsequent Fiscal Years) in an amount equal to such Member's share of the net decrease in Member Nonrecourse Debt, determined in accordance with Regulations § 1.704-2(l)(4). This Section 3.3(b) is intended to comply with the minimum gain chargeback requirement in Regulations § 1.704-2(l)(4) and shall be interpreted consistently therewith.

(c) If any Member unexpectedly receives any adjustments, allocations, or distributions described in Regulations §§ 1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(5), or 1.704-

1(b)(2)(ii)(d)(6), Items of Company Income and gain shall be specially allocated to such Member in an amount and manner sufficient to eliminate, to the extent required by the Regulations, the Adjusted Capital Account Deficit of the Member as quickly as possible, provided that an allocation pursuant to this Section 3.3(c) shall be made only if and to the extent that the Member would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article 3 have been tentatively made as if this Section 3.3(c) were not in the Agreement.

(d) If any Member would otherwise have an Adjusted Capital Account Deficit at the end of any Fiscal Year, each such Member shall be specially allocated Items of Company Income and gain in the amount of such excess as quickly as possible, provided that an allocation pursuant to this Section 3.3(d) shall be made only if and to the extent that such Member would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article 3 have been made as if Section 3.3(c) and this Section 3.3(d) were not in the Agreement.

(e) Nonrecourse Deductions for any Fiscal Year shall be specially allocated to the Members in proportion to their respective Percentage Interests.

(f) Any Member Nonrecourse Deductions for any Fiscal Year shall be specially allocated to the Member who bears the economic risk of loss with respect to the Member Nonrecourse Debt to which such Member Nonrecourse Deductions are attributable in accordance with Regulations § 1.704-2(i)(1).

(g) To the extent an adjustment to the adjusted tax basis of any Company asset, pursuant to Code § 734(b) or Code § 743(b) is required, pursuant to Regulations § 1.704-1(b)(2)(iv)(m)(2) or 1.704-1(b)(2)(iv)(m)(4), to be taken into account in determining Capital Accounts as the result of a distribution to a Member in complete liquidation of such Member's interest in the Company, the amount of such adjustment to Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis) and such gain or loss shall be specially allocated to the Members in accordance with their interests in the Company if Regulations § 1.704-1(b)(2)(iv)(m)(2) applies, or to the Member to whom such distribution was made if Regulations § 1.704-1(b)(2)(iv)(m)(4) applies.

3.4 Curative Allocations. The allocations set forth in Sections 3.3 and 3.5 (the "Regulatory Allocations") are intended to comply with certain requirements of the Regulations. It is the intent of the Members that, to the extent possible, all Regulatory Allocations shall be offset either with other Regulatory Allocations or with special allocations of other Items of Company Income, gain, loss or deduction pursuant to this Section. Therefore, notwithstanding any other provision of this Article 3 (other than the Regulatory Allocations), the Members shall make such offsetting special allocations of Company Income, gain, loss or deduction in whatever manner the Members determine appropriate so that, after such offsetting allocations are made, each Member's Capital Account balance is, to the extent possible, equal to the Capital Account balance such Member would have had if the Regulatory Allocations were not part of the Agreement and all Company Items were allocated pursuant to Sections 3.1 and 3.2.

3.5 Loss Limitation. Losses allocated pursuant to Section 3.2 shall not exceed the maximum amount of Losses that can be allocated without causing any Member to have an Adjusted Capital Account Deficit at the end of any Fiscal Year. If some but not all of the Members would have Adjusted Capital Account Deficits as a consequence of an allocation of Losses pursuant to Section 3.2, the limitation set forth in this Section 3.5 shall be applied on a

Member-by-Member basis and Losses not allocable to any Member as a result of such limitation shall be allocated to the other Members in accordance with the positive balances in such Member's Capital Accounts so as to allocate the maximum permissible Losses to each Member under Regulations § 1.704-1(b)(2)(ii)(d).

3.6 Other Allocation Rules.

(a) For purposes of determining the Profits, Losses or any other Items allocable to any period, Profits, Losses and any such other Items shall be determined on a daily, monthly or other basis, as determined by the Members using any permissible method under Code § 706 and the Treasury Regulations thereunder.

(b) The Members are aware of the income tax consequences of the allocations made by this Article 3 and hereby expressly agree to be bound by the provisions of this Article 3 in reporting their shares of Company income and loss for income tax purposes.

(c) Solely for purposes of determining a Member's proportionate share of the "excess nonrecourse liabilities" of the Company within the meaning of Treasury Regulations § 1.752-3(a)(3), the Members' interests in Company profits are in proportion to their Percentage Interests.

(d) Tax credits and any other items other than Profits and Losses that are not otherwise expressly provided for herein shall be allocated to the Members in accordance with their Percentage Interests.

(e) To the extent permitted by Regulations § 1.704-2(h)(3), the Members shall endeavor to treat distributions of Company cash or other assets as having been made from the proceeds of a Nonrecourse Liability or a Member Nonrecourse Debt only to the extent that such distributions would cause or increase an Adjusted Capital Account Deficit for any Member.

3.7 Tax Allocations.

(a) Except as provided in Section 3.7(b), Items of taxable income, gain, loss, deduction and credit shall be allocated among the Members for income tax purposes on the same basis as their respective book items.

(b) In accordance with Code § 704(c) and the Regulations thereunder, income, gain, loss, and deduction with respect to any Property contributed to the capital of the Company shall, solely for tax purposes, be allocated among the Members so as to take account of any variation between the adjusted basis of such Property to the Company for federal income tax purposes and its Initial Gross Asset Value (computed in accordance with the definition of Gross Asset Value) using an allocation method permitted by the Regulations and selected by the Members. If the Gross Asset Value of any Company asset is adjusted pursuant to subparagraph (ii) of the definition of Gross Asset Value, subsequent allocations of income, gain, loss, and deduction with respect to such asset shall take account of any variation between the adjusted basis of such asset for federal income tax purposes and its Gross Asset Value in the same manner as under Code § 704(c) and the Regulations thereunder. Any elections or other decisions relating to such allocations shall be made by the Members in any manner that reasonably reflects the purpose and intention of this Agreement. Allocations pursuant to this

Section 3.7 are solely for purposes of federal, state, and local taxes and shall not affect, or in any way be taken into account in computing, any Member's Capital Account or share of Profits, Losses, other items, or distributions pursuant to any provision of this Agreement.

ARTICLE 4 DISTRIBUTIONS

4.1 **Tax Distributions.** Prior to making other distributions, the Company shall, no later than three (3) days prior to the dates listed in Section 6654(c) of the Code as due dates for the installment payments of estimated taxes (each date, a "Tax Distribution Date") make a distribution (a "Tax Distribution") to each Member equal to the sum of (a) such Member's allocable share of the net taxable income for the period beginning with the first date of the taxable year to which the estimated tax payment relates and ending with the last day of the taxable month to which the estimated tax payment relates with respect to which such estimated tax payment is due, multiplied by (b) the sum of the highest federal income tax rate then applicable to individuals and the higher of the South Carolina or North Carolina income tax rate then applicable to individuals; provided, however, that the amount of any Tax Distribution made to such Member pursuant to this Section shall be (c) reduced by the sum of the Tax Distributions previously made to such Member with respect to such current taxable year, and (d) increased by the amount of all Tax Distributions required to be paid in prior taxable years but not paid because of insufficient cash flow. Tax Distributions made to a Member pursuant to this Section shall not also be treated as distributions made to such Member pursuant to Section 4.2(a) or (b).

4.2 **Interim Distributions.** Except as otherwise provided in Section 4.1 or Section 10.2 hereof, the Managers shall distribute the Net Cash Flow at such times as the Managers shall determine in the following order and priority:

(a) First, to repay a Two Hundred Fifty Thousand (\$250,000.00) Dollar loan from Robert S. Jones dated July __, 2007, plus all accrued interest thereon;

(b) Second, to repay Five Hundred Thousand (\$500,000.00) Dollar loans from Southern First Bank which are guaranteed by Jones, Kelsler and Buok, plus all accrued interest thereon;

(c) Third, up to Three Hundred Thousand (\$300,000.00) Dollars shall be distributed to BIG to purchase the Class B Shares of any Class B Member (other than BIG) who desires to have his Membership Interest or Class B Shares, in the Company, purchased for a price equal to his original Capital Contribution. However, if no Class B Member elects to have his Class B Shares purchased, within thirty (30) days of an offer to purchase being made by BIG, the next Six Hundred Thousand (\$600,000.00) Dollars of Net Cash Flow ("Class B Priority Distribution") shall be distributed to the Class B Members, on a pro rata basis, based upon their Percentage Interest of the outstanding Class B Shares with no effect on their ownership of Class B Shares or their Percentage Interest in the Company. To the extent one or more Class B Members (other than BIG) elect to timely sell their Class B Shares, pursuant to this Section 4.2(c), the Class B Priority Distribution shall be reduced by the amount distributed to BIG to purchase the Class B Shares with the balance of the Class B Priority Distribution paid to the remaining Class B Members, (including BIG) on a pro rata basis, based upon their revised Percentage Interest in the outstanding Class B Shares;

(d) Fourth, the next Seven Hundred Thousand (\$700,000.00) Dollars of Net Cash Flow shall be distributed, on a pro rata basis, to Jones, Kelsler and Buck in the amount equal to their respective Capital Contributions to the Company. Upon payment and the release by each lender of any and all personal guarantees of Jones, Kelsler & Buck for any and all loans to the Company, the Class A shares of Jones, Kelsler and Buck shall be converted to Class B Shares;

(e) Fifth, the next Seven Hundred Fifty Thousand (\$750,000.00) Dollars of Net Cash Flow shall be distributed to BIG and Boone, on a pro rata basis, based upon their Capital Contributions for Class A Shares in the Company with no effect on their ownership of Class A Shares or their Percentage Interest in the Company;

(f) Sixth, to all of the Members in proportion to their Percentage Interest.

The Members acknowledge and agree that, pursuant to Section 1.10, certain payments may be authorized by the Company to be made to the Members for services rendered in furtherance of the Company's business. Payments to any such Members for services rendered shall not represent distributions subject to the provisions of this Article 4, but instead shall be considered to be expense payments in the computation of Profits and Losses.

4.3 Amounts Withheld. All amounts withheld pursuant to the Code or any provision of any state, local or foreign tax law with respect to any payment, distribution or allocation to the Members shall be treated as amounts paid or distributed, as the case may be, to the Members with respect to which such amount was withheld pursuant to this Section for all purposes under this Agreement. The Company is authorized to withhold from payments and distributions, or with respect to allocations to the Members, and to pay over to any federal, state and local government or any foreign government, any amounts required to be so withheld pursuant to the Code or any provisions of any other federal, state or local law or any foreign law, and shall allocate any such amounts to the Members with respect to which such amount was withheld.

4.4 Limitations on Distributions. Anything in this Article 4 to the contrary notwithstanding, no distribution shall be made to any Member if, and to the extent that, such distribution (a) would create or increase an Adjusted Capital Account Deficit for such Member or (II) would not be permitted under the Act or under agreements by which the Company is bound. Each Member, by becoming a Member, consents to the making or omission of any such distribution hereafter to the Members in accordance with this Section.

ARTICLE V MANAGEMENT AND CONTROL

5.1 General Authority. Except as otherwise expressly provided by this Agreement or required by any nonwaivable provisions of applicable law, the business and affairs of the Company shall be managed by the Management Committee. The Management Committee shall be comprised of all Managers. The Management Committee shall have full and complete authority, power and discretion to manage and control the business, affairs and properties of the Company, to make all decisions regarding those matters and to perform any and all other acts or activities customary or incident to the management of the Company's business. Without limiting the generality of the foregoing, the Management Committee shall have the power and authority on behalf of the Company to:

- (a) Acquire property, real, personal, tangible and intangible;
- (b) Borrow money for the Company from banks, other lending institutions, and other persons on such terms as the Company deems appropriate and to hypothecate, encumber and grant security interests in the assets of the Company to secure payment of the borrowed sums;
- (c) Purchase liability and other insurance to protect the Company Property and business;
- (d) Hold and own any property, real, personal, tangible and intangible, in the name of the Company, including, but not limited to, deeds, mortgages, leasehold interests, interests in general partnerships, limited partnerships, limited liability companies, common trust funds, mutual funds, stocks, options, warrants, rights, puts, calls, contracts, futures, bonds, debentures, securities (public and private), and other debt and equity interests of any kind or nature;
- (e) Invest and reinvest any Company funds in time deposits, short-term governmental obligations, commercial paper or other investments including real estate, stocks, options, general and limited partnerships, limited liability companies, common trust funds, mutual funds, futures, rights, warrants, puts, calls, contracts, public and private bonds, debentures, securities, and other debt and equity interests and to actively trade, speculate on and manage the same;
- (f) Enter into, make, and perform contracts, agreements, and other undertakings binding on the Company that may be necessary, appropriate, or advisable in furtherance of the purposes of the Company and make all decisions and waivers thereunder;
- (g) Employ accountants, legal counsel, managing agents, money managers, property managers, investment advisors and other advisors to perform services for the Company and to compensate them from Company funds;
- (h) Screen, interview, hire and fire and personnel to be employed by the Company;
- (i) Open and maintain bank and investment accounts and arrangements, draw checks, letters of credit, and other orders for payment of money and designate individuals with authority to sign or give instructions with respect to those accounts and arrangements;
- (j) Maintain the assets of the Company in good order;
- (k) Collect sums due the Company;
- (l) Pay debts and obligations of the Company to the extent that Company funds are available;
- (m) Sell, purchase, lease, loan, borrow, rent, repair, partition, mortgage, pledge, encumber, develop, improve, subdivide, or otherwise deal with any property, including Company Property;
- (n) Bring suit on the Company's behalf or defend the Company in any such action, and compromise, settle, collect, and otherwise represent, prosecute and defend the legal rights and interests of the Company;

(o) File on behalf of the Company a voluntary petition for bankruptcy, or to bring an action on behalf of the Company for receivership, insolvency or other similar relief in any court of competent jurisdiction, and to defend, answer, respond and otherwise represent the Company in any such action or proceeding;

(p) Invest and reinvest in any kind of property, real, personal, tangible and intangible, including, but not limited to, common trust funds, stocks, bonds, notes, mortgages, general or limited partnerships, limited liability companies, savings accounts and certificates of deposit, mutual funds, and real estate; and

(q) Perform all other acts as may be necessary or appropriate to the conduct of the Company's business, and to execute, acknowledge, verify and deliver any or all instruments desirable to effectuate any of the foregoing.

5.2 Members' Approval Required for Certain Major Decisions. Notwithstanding anything herein to the contrary, the following major decisions shall require approval of the Members in the percentages designated:

(a) INTENTIONALLY DELETED.

(b) The Company shall not compromise, settle, waive or limit the obligation of any Member to make a Capital Contribution to the Company without the consent of all Disinterested Members.

(c) The Company shall not sell, or contract to sell, or otherwise dispose of substantially all of the Company Property outside of transactions in the normal course of business without the approval of those Members who own more than Eighty Percent (80%) of the Voting Rights in the Company.

(d) The Company shall not enter into any merger, or any profit sharing, joint venture, or other such arrangement without the approval of all Members.

(e) The Company shall not hire anyone who is a member of a Member's or Manager's Family on a full time basis without the approval of those Members who own more than Eighty Percent (80%) of the Voting Rights in the Company.

5.3 Liability for Certain Acts. A Manager who performs his duties in good faith and in a manner he reasonably believes to be in the best interests of the Company shall not have any liability solely by reason of being or having been a Manager of the Company. A Manager shall not be liable to the Company or to any Member for any loss or damage sustained by the Company or any Member, unless the loss or damage shall have been the result of such Manager's fraud, deceit, gross negligence, willful misconduct, breach of this Agreement or a knowing violation of the law.

5.4 Management Committee Meetings - Place, Time and Notice. All meetings of the Management Committee shall be held at the Company's principal office, or at such other place as shall be agreed upon by Eighty Percent (80%) of the number of Managers then serving the Company. Meetings of the Management Committee may be called at any time by any Manager of the Company, by delivering to the other Managers a written notice at least two (2) days in advance of the proposed meeting date. The notice shall contain the time, date and place of the

meeting. Each Manager shall be entitled to one (1) vote. Fifty Percent (50%) of the Managers constitutes a quorum. Except as provided in SECTION 5.7, in order for any vote of the Managers to be valid and constitute an action of the Management Committee, a quorum must be represented at the meeting either in person or by proxy. Once a quorum is established, the affirmative vote of more than Fifty Percent (50%) of the Managers present at the meeting shall constitute a valid decision of the Management Committee. Managers may vote by proxy appointed by an instrument in writing. In the event of deadlock, any Manager may call a meeting of the Members, pursuant to ARTICLE IV, who shall decide the issue.

5.5 Waiver of Notice. A Manager may waive notice of any meeting by a signed writing. In addition, a Manager who attends a meeting waives his right to assert any lack of notice, or defect in notice, of the meeting unless he states such objection at the outset of the meeting.

5.6 Action without Meeting. The Management Committee may take action without notice and a meeting if all of the Managers consent to such action by signing a Consent of the Managers which sets forth the action to be taken and contains the signature of each Manager.

5.7 Managers: Number, Election, Tenure and Qualifications.

(a) The Company shall have Five (5) Managers who shall compose the Management Committee of the Company. The Managers are Brian D. Boone, Robert A. Boozer, Robert S. Jones, Robert A. Kelsler and Carl Edward Buck.

(b) Each Manager shall agree to be bound by the provisions of this Agreement as they relate to Managers. The number of Managers on the Management Committee may be changed from time to time by the affirmative vote of all Members. Each Manager shall be elected by the affirmative vote of those Members who own Eighty Percent (80%) of the Voting Rights in the Company. Following his election, each Manager will serve until (a) his removal, (b) his resignation, or (c) the election of a successor, whichever occurs first.

(c) Upon the repayment of the repayment of the Two Hundred Fifty Thousand (\$250,000.00) Loan from Jones; the Company's Five Hundred Thousand (\$500,000.00) Dollar loan(s) from Southern First Bank; the payment of Seven Hundred Thousand (\$700,000.00) Dollars to Jones, Kelsler & Buck (pursuant to Section 4.2(d)) and the release by each lender of any and all personal guarantees of Jones, Kelsler & Buck for any and all loans to the Company, the Management Committee will be changed so as to be deemed to have Three (3) Managers with Boone having Two (2) votes and Jones, Kelsler & Buck resigning from the Management Committee.

5.8 Removal of Managers. A Manager may be removed at any time, with or without cause, by those Members who own more than Eighty Percent (80%) of the voting rights in the Company.

5.9 Resignation of Managers. Any Manager may resign at any time by giving written notice to all Members. The resignation shall be effective upon receipt of such written notice by any Member. The resignation of a Manager who is also a Member shall not affect the Manager's rights as a Member and shall not constitute a withdrawal from the Company by the Member.

5.10 No Authority of Members. Except as otherwise provided in this Agreement, or as authorized by the Management Committee, no Member is an agent of the Company or has the

authority to make any contracts, enter into any transactions, or make any commitments on behalf of the Company.

5.11 Ratification. The Management Committee may ratify and adopt any and all acts of a Member or Manager done on behalf of the Company.

5.12 Delegation of Powers. From time to time, the Management Committee may authorize, or delegate any of its authority to a subcommittee of Persons, or a single Person, whom it shall name, to act on its behalf regarding any matter over which the Management Committee has authority.

ARTICLE 6 MEMBERS

6.1 Actions by Members.

(a) With respect to any matter for which this Agreement calls for the vote, approval or decision of "the Members" (as opposed to matters left to the decision of the Managers or matters left to the decision of the Class A Members or some other subset of the Members), such matter shall be decided by those Members holding the Specified Percentage of all of the outstanding Shares held by Members (with all of the Class A Members and the Class B Members voting as a single class, not as two separate classes). With respect to any matter for which this Agreement calls for the vote, approval or decision of some subset of the Members, such matter shall be decided by those Members (who are part of such subset) holding the Specified Percentage of all of the outstanding Shares held by that subset of Members. The "Specified Percentage" shall be that percentage specified in this Agreement for approval of such matter. For any decision of all of the Members for which no percentage is otherwise specified in this Agreement, the Specified Percentage shall be a majority of all of the outstanding Shares held by the Members. Each Member shall be entitled to a number of votes equal to the number of Shares held by such Member. The provisions of Act § 33-44-404(c) shall not apply with respect to this Agreement or this Company.

(b) A meeting of the Members, for any proper purpose or purposes, may be called at any time by the Managers or by any Member(s) holding at least 20% of the Shares then outstanding by written notice given to a Manager, which notice shall specify the purpose or purposes for which the meeting is being called.

(c) All in-person meetings of Members shall be held at the principal office of the Company, or at such other place within the State of South Carolina as may be designated by the Member(s) calling the meeting. At any meeting of the Members, any Member(s) may participate by means of conference telephone or similar communications equipment so long as all Persons participating in the meeting can hear each other.

(d) Written notice of meetings of the Members, if any, stating the place, day and hour of the meeting and the purpose or purposes for which the meeting is called, shall be delivered by the Company not less than five (5) nor more than sixty (60) days before the meeting to each Member entitled to vote at that meeting.

(e) Attendance of a Member at a meeting shall constitute a waiver of notice of the meeting, except where such Member attends for the express purpose of objecting to the

transaction of any business on the ground that the meeting is not lawfully called or convened. Notice of a meeting may also be waived in writing. Attendance at a meeting or participation in a meeting is not a waiver of any right to object to the consideration of matters required to be included in the notice of the meeting but not so included, if the objection is expressly made at the meeting.

(f) The presence, either in person or by proxy, of Members holding a majority of the Shares then held by the Members is required to constitute a quorum at any meeting of the Members. Participation in a meeting by means of conference telephone shall constitute presence in person at such meeting.

(g) The Managers shall designate a Person (including the Manager) to serve as chairperson of any meeting (who shall decide all points of order) and shall further designate a Person (including the Manager) to take minutes of any meeting. The chairperson of the meeting shall have the power to adjourn the meeting from time to time, without notice, other than announcement of the time and place of the adjourned meeting. Upon the resumption of such adjourned meeting, any business may be transacted that might have been transacted at the meeting as originally called.

(h) Any action that may be taken at a meeting of the Members may be taken without a meeting if a consent in writing, setting forth the action to be taken, shall be signed and dated by Members holding the percentage of Shares required to approve such action under the Act, the Articles or this Agreement. Such consent shall have the same force and effect as a vote of the signing Members at a meeting duly called and held pursuant to this Article. No prior notice from the signing Members to the Company or other Members shall be required in connection with the use of a written consent pursuant to this Section. Notification of any action taken by means of a written consent of Members shall, however, be sent within a reasonable time after the date of the consent by the Company to all Members who did not sign the written consent.

(i) A Member may vote either in person or by proxy executed in writing by the Member. A facsimile, telegram, telex, cablegram or similar transmission by the Member or a photographic, photostatic, facsimile or similar reproduction of a writing executed by the Member shall be treated as an execution in writing for purposes of this Section. Proxies for use at any meeting of Members or in connection with the taking of any action by written consent shall be filed with the Company before or at the time of the meeting or execution of the written consent, as the case may be. No proxy shall be valid after 11 months from the date of such proxy's execution unless otherwise provided in the proxy. A proxy shall be revocable unless the proxy form conspicuously states that the proxy is irrevocable and the proxy is coupled with an interest.

6.2 Admission of Members. After the formation of this Company, a Person becomes a new Member:

(a) In the case of a Person acquiring Shares in the Company directly from the Company, upon compliance with the provisions of Section 8.3; and

(b) In the case of an assignee or transferee of Shares, upon compliance with the provisions of Section 9.7.

6.3 New Members. Additional Persons may be admitted to the Company and Shares may be issued to those Persons on such terms and conditions as are approved by those Members holding eighty percent (80%) of the outstanding Shares held by the Members. Any such admission is effective when the Person has executed and delivered to the Company a written document including the Person's notice address, his or her agreement to be bound by this Agreement and such other matters as the Members may require.

6.4 Waiver of Partition. While the Company remains in effect or is continued, each Member agrees and waives such Member's rights to have any Company Property partitioned, or to file a complaint or to institute any suit, action or proceeding at law or in equity to have any Company Property partitioned, and each Member, on behalf of such Member and such Member's heirs, successors and assigns, hereby waives any such right.

6.5 Transactions Between a Member and the Company. No Member shall receive any interest, salary or drawing with respect to such Member's Capital Contributions or such Member's Capital Account or for services rendered on behalf of the Company, or otherwise, in such Member's capacity as a Member; provided, however, that this provision shall not prohibit the Company from

(a) undertaking the relationships and paying the fees set forth in Section 1.10;
or

(b) upon obtaining the consent required of those Members (excluding the Member who is (or whose affiliate is) proposing to enter such transaction) holding a majority of the outstanding Shares held by the Members (excluding the Member who is (or whose affiliate is) proposing to enter such transaction), entering into any transaction or dealing with a Member (or affiliate of a Member) on terms and conditions that, in the aggregate, are not less favorable to the Company than those the Company could obtain from an unrelated third party, and derive and retain profits therefrom.

6.6 Liability of Members; Indemnification.

(a) No Member shall be liable for the debts or any other obligations or liabilities of the Company, whether arising in contract, tort or otherwise unless a Member guarantees any debt or obligation as required under Article 2.3. A Member shall be liable only to make such Member's Capital Contributions as set forth in Sections 2.1, 2.2 and 2.4 and shall not be required to restore a deficit balance in such Member's Capital Account or to lend any funds to the Company or, after such Member's Capital Contributions have been made, to make any additional Capital Contributions, assessments or payments to the Company, provided that a Member may be required to repay distributions made to such Member as provided in Act § 33-44-407. No Member shall have any personal liability for the repayment of any Capital Contributions or Capital Account of any other Member.

(b) Each Member (including each Manager) has a duty to the Company and the other Members to perform such Member's duties and responsibilities hereunder in good faith, in a manner such Member reasonably believes to be in the best interests of the Company, and with such care as an ordinarily prudent person in a like position would use under similar circumstances. In accordance with the business judgment rule, a Member who conducts itself in accordance with the standard set forth in this paragraph (b) in carrying out a duty or

responsibility under this Agreement shall have no liability to the Company or any other Member as a result thereof.

(c) To the fullest extent permitted by law, the Company shall indemnify a Member (and each of the Member's partners, employees, agents and affiliates (where acting for or as agent of the Company)) (any of the foregoing Persons being hereinafter an "Indemnified Person") and save and hold them and each of them harmless from and in respect of (I) all fees, costs and expenses, including attorneys' fees, incurred in connection with, or resulting from, any claim, action or demand against any such Indemnified Person or the Company which arise out of, or in any way relate to, the Company, its properties, business or affairs, and (II) all such claims, actions and demands and any losses, liabilities or damages resulting therefrom, including amounts paid by such Indemnified Person with the prior written consent of the Company in settlement or compromise of any such claim, action or demand; provided, however, that this indemnity shall not extend to any such Indemnified Person to the extent that its acts and omissions shall have been adjudged to constitute a breach of the standard set forth in Section 6.6(b).

6.7 Other Business of Members.

(a) Any Member, who shall be an employee of *Arden Homebuilders, LLC*, shall devote substantially all of his time, effort and skill to the operation of the Company. Other Individual Class A Members shall be required to devote whatever time, effort and skill as is reasonably appropriate to accomplish such Class A Member's obligations under this agreement. No Class A Member, employed by the Company, shall, while a Member of the Company and for a period of six months after such Class A Member's dissociation from the Company, invest in, be employed by or provide personal services to a Competing Business except *Boozer Lumber Company* or *Boozer Lumber, LLC* or their affiliates.

(b) Each Class B Member shall only be required to devote whatever time, effort and skill as is reasonably appropriate to accomplish such Class B Member's obligations under this Agreement. No Class B Member shall, while a Member of the Company and for a period of six months after such Class B Member's dissociation from the Company, invest in be employed by or provide personal services to a Competing Business except *Boozer Lumber Company* or *Boozer Lumber, LLC* or their affiliates.

(c) Any Member who is employed as an officer by *Boozer Lumber Company* or *Boozer Lumber, LLC*, or an affiliate of either company, or who is a shareholder or member of such company shall be obligated and required to seek or otherwise transfer his Shares in the Company to the Company or to other Members of the Company, as provided for herein, in the event his employment as an officer of *Boozer Lumber Company*, *Boozer Lumber, LLC*, or in any affiliated company terminates for any reason (other than retirement where the Member does not become gainfully employed by or under contract with a Company which is engaged in a business similar to *Boozer Lumber Company*) or in the event a shareholder shall sell all of his shares or ownership interest in *Boozer Lumber Company*, *Boozer Lumber Company, LLC*, or an affiliated company.

(d) *Arden Homebuilders, LLC* and its Managers are expressly authorized to obtain goods and/or services from any affiliate of the managers or from *Boozer Lumber Company*, *Boozer Lumber Company, LLC*, or affiliates of either Company, provided that the terms of and such arrangements are not less favorable to the Company than those which would be arrived at

between unaffiliated parties doing business at arm's length.

ARTICLE 7 ACCOUNTING, BOOKS, RECORDS, REPORTS, AND TAX MATTERS

7.1 **Bank Accounts.** Company funds shall be deposited in the name of the Company in such bank accounts of the Company as may be designated by the Management Committee. The Members shall make disbursement from those accounts solely for the Company's business or for distributions to the Members in accordance with the Agreement.

7.2 **Maintenance of Books.** The Managers shall maintain and keep at the principal office (or upon notice to the Members, another office selected by the Managers) of the Company complete and accurate books of account, in which shall be entered fully and accurately each and every transaction of the Company, and the records required to be maintained by the Company pursuant to the Act. The books and records shall be kept on the basis of accounting used for federal income tax purposes, reflect all Company transactions and shall be otherwise appropriate and adequate for the conduct of the Company's business. Each Member shall at all times have full access to all records and information of the Company and the right to inspect and copy all such records and information either directly or through a person designated by such Member and to discuss the Company's affairs, finances and accounts with the Company's Members, officers and its accountants at all reasonable times and upon reasonable notice. Each Member shall have the right to engage an accountant to audit the financial records of the Company at the expense of such Member.

7.3 **Financial Reporting.** Within a reasonably practicable time after the end of each Fiscal Year, the Company shall prepare and submit to each Member an annual unaudited report of the Company for such Fiscal Year. The annual report shall include the balance sheet of the Company as of the last day of such Fiscal Year and statements of profit or loss and cash flows of the Company for such Fiscal Year. The report shall be accompanied by a supplementary schedule showing the entries to the Members' (separately and in the aggregate) Capital Accounts in respect of such Fiscal Year, together with the appropriate Internal Revenue Service forms showing entries required to be made on each such Member's federal income tax return with respect to the Company's profits or losses. The Company shall be permitted to have the Company's accountants prepare audited financial statements and other financial reports not herein described to the extent required by any Lender.

7.4 **Tax Elections.** The Managers shall, without any further consent of the Members being required (except as specifically required herein), make any and all elections for federal, state, local, and foreign tax purposes including, without limitation, any election, if permitted by applicable law: (i) to adjust the basis of Property pursuant to Code §§ 754, 734(b) and 743(b), or comparable provisions of state, local or foreign law, in connection with Transfers of Shares and Company distributions; and (ii) with the consent of all of the Members, to extend the statute of limitations for assessment of tax deficiencies against the Members with respect to adjustments to the Company's federal, state, local or foreign tax returns. Robert A. Kelsier is specifically authorized to act as the "Tax Matters Partner" under the Code and in any similar capacity under state or local law. To the extent provided in Code §§ 6221 through 6231 and similar provisions of federal, state, local, or foreign law, the Tax Matters Partner shall represent the Company and the Members before taxing authorities or courts of competent jurisdiction in tax matters affecting the Company or the Members in their capacities as Members, and file any tax returns and execute any agreements or other documents relating to or affecting such tax

matters, including agreements or other documents that bind the Members with respect to such tax matters or otherwise affect the rights of the Company and the Members. The Managers shall cause to be prepared and timely filed each year the federal, state and local tax returns of the Company.

ARTICLE 8 AMENDMENTS

8.1 **Amendments to Agreement.** Amendments to this Agreement may be proposed by any Member by written notice to all of the Members. Following such proposal, the Managers shall submit to the Members a verbatim statement of any proposed amendment. If counsel for the Company shall have approved of the same in writing as to form. The Managers shall seek the written vote of the Members on the proposed amendment or shall call a meeting to vote thereon and to transact any other business that it may deem appropriate. A proposed amendment shall be adopted and be effective as an amendment hereto if it receives the affirmative vote of Eighty Percent (80%) of the outstanding Shares.

8.2 **Amendments to Articles.** The Managers may amend, upon notice to the Members but without the consent of the Members, the provisions of the Articles (and the corresponding provisions of this Agreement) concerning the name of the Company, the designated office and the agent for service of process. All other provisions of the Articles may be amended only in accordance with Section 8.1.

ARTICLE 9 TRANSFERS OF SHARES

9.1 **Restrictions on Transfers.** Except as otherwise permitted by this Agreement, no Member (or Assignee) shall Transfer any Shares.

9.2 **Permitted Transfers.** Subject to the conditions and restrictions set forth in Section 9.3, a Member may at any time Transfer such Member's Shares to (a) any other Member, (b) subject to Sections 9.11 and 9.12, the transferor Member's administrator or trustee to whom such Shares are transferred involuntarily by operation of law, (c) upon such Member's death and subject to Sections 9.11 and 9.12, such Member's spouse or lineal descendants (or trusts for the benefit of any of them) and such Member's personal representatives and testamentary trustees, or (d) any purchaser in accordance with Section 9.4 (any such Transfer being referred to in this Agreement as a "Permitted Transfer"). After the consummation of Transfer of any Shares, the Shares so Transferred shall continue to be subject to the terms and provisions of this Agreement and any further Transfer shall be required to comply with all terms and provisions of this Agreement.

9.3 **Conditions to Permitted Transfers.** A Transfer shall not be treated as a Permitted Transfer under Section 9.2 unless and until the following conditions are satisfied:

(a) Except in the case of a Transfer involuntarily by operation of law, the transferor and transferee shall execute and deliver to the Company such documents and instruments of conveyance as may be appropriate in the opinion of counsel to the Company to effect such transfer. In the case of a Transfer of Shares involuntarily by operation of law, the Transfer shall be confirmed by presentation to the Company of legal evidence of such Transfer, in form and substance satisfactory to counsel to the Company. In all cases, the Company shall be

reimbursed by the transferor and/or transferee for all costs and expenses that the Company reasonably incurs in connection with such Transfer.

(b) The transferor and transferee shall furnish the Company with the transferee's taxpayer identification number, sufficient information to determine the transferee's initial tax basis in the Shares Transferred, and any other information reasonably necessary to permit the Company to file all required federal and state tax returns and other legally required information statements or returns.

(c) Except in the case of a Transfer of Shares involuntarily by operation of law, either (i) such Shares shall be registered under any applicable federal and state securities laws or (ii) the transferor shall provide an opinion of counsel, which opinion and counsel shall be reasonably satisfactory to the Members, to the effect that such Transfer is exempt from all applicable registration requirements and that such Transfer will not violate any applicable laws regulating the transfer of securities.

The Members may waive any of such requirements in writing but only after determining that such requirement is not needed to protect the Company's interests.

9.4 **Right of First Refusal.** In addition to the other limitations and restrictions set forth in this Article 9, except as expressly permitted by Section 9.2, no Member shall Transfer all or any portion of such Member's Shares (the "Offered Shares") unless such Member (the "Seller") first offers to sell the Offered Shares pursuant to the terms of this Section 9.4.

(a) No Transfer may be made under this Section 9.4 unless the Seller has received a bona fide written offer (the "Purchase Offer") from a Person (the "Purchaser") to purchase the Offered Shares for a purchase price (the "Offer Price") payable in United States dollars at closing or according to specified terms, with or without interest, which offer shall be in writing, signed by the Purchaser and shall be irrevocable for a period ending no sooner than the business day following the end of the Offer Period (as hereinafter defined).

(b) Prior to making any Transfer that is subject to the terms of this Section 9.4, the Seller shall give to the Company and each other Member written notice (the "Offer Notice") which shall include a copy of the Purchase Offer and an offer (the "Firm Offer") to sell the Offered Shares to the other Members (the "Offerees") for the lesser of (i) the Offer Price or the Dissolution Value (as defined in Section 9.12), payable in either case according to the same terms as those contained in the Purchase Offer.

(c) The Firm Offer shall be irrevocable for a period (the "Offer Period") ending on the thirtieth (30th) day following the day of the Offer Notice.

(d) At any time during the Offer Period, any Offeree may accept the Firm Offer by giving written notice of such acceptance to the Seller. If more than one Member accepts the Firm Offer, then such Members who do accept the Firm Offer shall be entitled to purchase the Offered Shares in proportion to their relative Percentage Interests.

(e) If the Firm Offer is accepted, the closing of the sale of the Offered Shares shall take place within thirty days after the Firm Offer is accepted or, if later, the date set forth in the Purchase Offer. The Seller and all accepting Offerees shall execute such documents as may be appropriate to effect the sale of the Offered Shares pursuant to the terms of the Firm Offer and

this Article 9. The accepting Offerees shall, individually, have the right to pay the Seller in accordance with those payment terms specified in Section 9.12.(b).

(f) If the Firm Offer is not accepted in the manner hereinabove provided, the Seller may sell the Offered Shares to the Purchaser at any time within sixty days after the last day of the Offer Period, provided that such sale shall be made in terms no more favorable to the Purchaser than the terms contained in the Purchase Offer and provided further that such sale complies with other terms, conditions and restrictions of this Agreement. If the Offered Shares are not sold in accordance with the terms of the preceding sentence, the Seller may not Transfer the Offered Shares pursuant to the Purchase Offer, and the Seller must again comply with all of the provisions of this Section in order to Transfer any of the Seller's Shares pursuant to Section 9.2(d).

(g) Any Shares Transferred by any means shall remain subject to the restrictions of this Article 9 in the hands of the transferee.

9.5 Prohibited Transfers. Any purported Transfer of Shares that is not a Permitted Transfer shall be null and void and of no force or effect whatever; provided that, if the Company is required to recognize a transfer that is not a Permitted Transfer, the transferee shall be treated as the transferee of a distributional interest within the meaning of the Act, shall be entitled only to the transferor's rights to allocations and distributions as provided by this Agreement with respect to the Transferred Shares, which allocations and distributions may be applied to satisfy any debts, obligations or liabilities for damages that the transferor or transferee of such Shares may have to the Company. In the case of a transfer or attempted transfer of Shares that is not a Permitted Transfer, the parties engaging in such transfer shall be liable to indemnify the Company and the other Members from all costs, liability and damage that any of such Indemnified Members may incur as a result of such transfer or attempted transfer and efforts to enforce the indemnity granted hereby.

9.6 Rights of Unadmitted Assignees. A Person who acquires Shares but who is not admitted as a substituted Member pursuant to Section 9.7 (an "Assignee") shall be entitled only to allocations and distributions with respect to such Shares in accordance with this Agreement and shall have no right to any information or accounting of the affairs of the Company, shall not be entitled to inspect the books or records of the Company, shall have no right to vote or participate in management and shall not have any of the rights of a Member under the Act or this Agreement.

9.7 Admission of Substituted Members. Subject to the other provisions of this Article 9, an Assignee of Shares may be admitted to the Company as a substituted Member only upon satisfaction of the conditions set forth in this Section 9.7:

(a) Those Members holding not less than eighty percent (80%) of the outstanding Shares held by Members consent to such admission;

(b) The Shares with respect to which the Assignee is being admitted were acquired by means of a Permitted Transfer;

(c) The Assignee, by written instrument in form and substance reasonably satisfactory to the Members, (i) adopts the terms and provisions of this Agreement and (ii) assumes the obligations of the transferor Member under this Agreement with respect to the Transferred Shares;

(d) The Assignee pays the Company for all reasonable legal, filing and publication costs that the Company incurs in connection with the admission of the Assignee as a Member with respect to the Transferred Shares.

A transferee who becomes a Member has, to the extent assigned, the rights and powers and is subject to the restrictions and liabilities of a Member under this Agreement and the Act. Unless otherwise provided by this Agreement, a transferee who becomes a Member also is liable for the obligations of the transferor to make Capital Contributions and for obligations under Act § 33-44-407 to return unlawful distributions, but is not obligated for liabilities that are unknown to this transferee at the time the transferee becomes a Member and that could not be ascertained from this Agreement. Whether or not a transferee of Shares becomes a Member, the transferor is not released from the transferor's liability to the Company under this Agreement or the Act.

9.8 Events Causing Member's Dissociation. A Member (the "Dissociated Member") shall be deemed to be dissociated from the Company upon the occurrence of any of the following events (an "Event of Dissociation");

- (a) A purported Transfer of Shares that is not a Permitted Transfer;
- (b) A Transfer of all of the Member's Shares by means of a Permitted Transfer;
- (c) A determination by arbitration pursuant to Section 12.6 that the Member has engaged in conduct that is grounds for expulsion of the Member by judicial determination under Act § 33-44-601(6)(i), (ii) or (iii);
- (d) The Member's (i) becoming a debtor in bankruptcy; (ii) executing an assignment for the benefit of creditors; (iii) seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the Member's property; or (iv) failing, within ninety days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the member's property obtained without the Member's consent or acquiescence, or failing within ninety days after the expiration of a stay to have the appointment vacated;
- (e) The death of a Member;
- (f) The appointment of a guardian or a general conservator for the Member or a judicial determination that the Member has otherwise become incapable of performing the Member's duties under the Agreement;
- (g) In the case of a Member that is a trust, the distribution of the trust's entire right to receive distributions from the Company;
- (h) In the case of a Member that is an estate, the distribution of the estate's entire right to receive distributions from the Company;
- (i) Termination of the existence of a Member if the Member is not an individual, estate or trust.

9.9 No Resignation or Withdrawal. A Member has no power to resign or withdraw from the Company or to demand a return of any of such Member's Capital Account. Any action in violation of this Section shall be null and void as against the Company and the other Members.

9.10 No Dissolution. The occurrence of an Event of Dissociation shall not cause the dissolution or the winding up of the Company.

9.11 Purchase Option. Upon the occurrence of an Event of Dissociation (other than the a Transfer of all of the Member's Shares by means of a Permitted Transfer), the remaining Members shall have an option to purchase the Shares of the Dissociated Member; provided that one or more Members must agree to purchase all of the Shares of the Dissociated Member. The Member(s) who exercise the option shall be referred to as the "Purchasing Member(s)". A Member may exercise his purchase option by giving written notice of such exercise ("Exercise Notice") to the Dissociated Member (or his legal representative) within sixty days of receipt by such Member of written notice of the Event of Dissociation ("Exercise Period"), with such Exercise Notice indicating the maximum number of Shares the offering Member is willing to purchase. If the remaining Members oversubscribe for the Shares of the Dissociated Member, the Shares will be allocated in proportion to the relative Percentage Interests of the Members exercising the option. If the purchase option is not exercised as to all of the Shares of the Dissociated Member, then the Dissociated Member (or the Assignee of the Dissociated Member, as the case may be) shall continue as an Assignee. If the Dissociated Member's Assignee is permitted to continue as an Assignee or as a substitute Member (upon satisfaction of the conditions set forth in Section 9.7), then the Dissociated Member and the Assignee shall be liable for all of the Dissociated Member's obligations arising under this Agreement and the Act except as expressly provided otherwise in this Agreement.

9.12 Terms of Purchase.

(a) If the purchase option is exercised, the price of the Dissociated Member's Shares (the "Dissociation Value") shall be an amount equal to the amount of cash that the Dissociated Member would have received if

(i) the assets of the Company were sold for an amount equal to the Company's earnings before interest, income taxes, depreciation and amortization for its most recently completed Fiscal Year ("EBIDTA"), multiplied by a multiple ("EBIDTA Multiple") (the product of such multiplication being referred to as the "Company Asset Value");

(ii) the proceeds of such deemed sale were distributed (following the allocation of the Profits and Losses pursuant to Article 3) pursuant to Section 10.2; and

(iii) the amount of such deemed distribution to the Dissociated Member were multiplied by 75% (the "Discount Percentage");

provided, however, that in no event shall the Dissociation Value be less than the Unreturned Capital of the Dissociated Member. The initial EBIDTA Multiple shall be four (4). Those Members holding not less than eighty percent (80%) of the Shares held by the Members may revise the EBIDTA Multiple and the Discount Percentage from time to time; provided that no such revision may reduce the Dissociation Value with respect to an Event of Dissociation that occurred prior to

such revision. The closing of the purchase shall occur within thirty days of the determination of the value of assets of the Company. If there is more than one Purchasing Member, the decisions of the Purchasing Members shall be determined by a vote of those Members holding a majority of the Shares held by the Purchasing Members. EBITDA shall be determined by the Company's accountants and the determination of such accountants shall be conclusive on all parties.

(b) Unless the parties mutually agree otherwise, the purchase price shall be paid to the Dissociated Member (or his legal representative) in twenty (20) equal and consecutive quarterly installments of principal and interest beginning ninety (90) days after the determination of the purchase price has been made. The purchase price shall be evidenced by a promissory note made by the Purchasing Member(s) to the order of the Dissociated Member and shall bear interest at the prime rate for large commercial banks as published in *The Wall Street Journal* at the date of the sale. Payments may be prepaid, in whole or in part, at any time and from time to time, without penalty. The note shall provide that upon default of any payment of interest or principal, the note shall become due and payable immediately, at the option of the holder of the note. Upon delivery of a note in payment of the purchase price, the Dissociated Member's Shares (or any portion thereof) shall be conveyed to the Purchasing Member(s) who shall be entitled to all distributions and allocations therefrom. Until the purchase price is paid in full, the Dissociated Member's Shares shall be held by the seller as collateral security for payment of the note, but in no case may the seller have any of the rights of a Member as long as the note is not in default.

9.13 **Statement of Dissociation:** A Dissociated Member or the Company may file a statement of dissociation in accordance with Act § 33-44-704.

9.14 **W. Ray Holt.** To the extent the provisions hereof restrict or prohibit the ability of W. Ray Holt to withdraw as a Class A Member or prohibit the Company from redeeming his Class A Shares, said provisions are hereby waived as to W. Ray Holt.

ARTICLE 10 DISSOLUTION AND WINDING UP

10.1 **Dissolution Events.** The Company shall dissolve and shall commence winding up and liquidating upon the first to occur of any of the following (each a "Dissolution Event"):

(a) The determination of those Members holding not less than eighty percent (80%) of the outstanding Shares to dissolve, wind up and liquidate the Company;

(b) The expiration of the term of the Company on December 31, 2035;

(c) The entry of a decree of judicial dissolution under Act § 33-44-801(b)(5) or administrative dissolution pursuant to Act §§ 33-44-809 and 33-44-810, unless the Company is reinstated pursuant to Act § 33-44-811.

10.2 **Winding Up.** Upon the occurrence of a Dissolution Event, the Company shall continue solely for the purposes of winding up its affairs in an orderly manner, liquidating its assets, and satisfying the claims of its creditors and Members, and no Member shall take any action that is inconsistent with, or not necessary to or appropriate for, the winding up of the Company's Business and affairs, provided that all covenants contained in this Agreement and obligations provided for in this Agreement shall continue to be fully binding upon the Members

until such time as the Property has been distributed pursuant to this Section. The Liquidator shall be responsible for overseeing the winding up and dissolution of the Company, using the powers granted by Act § 33-44-803(c) and such other powers granted by this Agreement as may be appropriate for winding up the Company. The Liquidator shall have the power to delegate duties in connection with the liquidation to Class A Members. The Liquidator shall notify known claimants pursuant to Act § 33-44-807 and shall publish the notice described in Act § 33-44-808 and take such other actions with respect to claimants as the Liquidator may deem appropriate. The Liquidator shall take full account of the Company's liabilities and Property and shall cause the Property or the proceeds from the sale thereof (as determined pursuant to Section 10.6), to the extent sufficient therefor, to be applied and distributed, to the maximum extent permitted by law, in the following order:

(a) First, to creditors (including Members who are creditors, to the extent otherwise permitted by law) in satisfaction of all of the Company's debts and other liabilities (whether by payment or the making of reasonable provision for payment thereof), other than liabilities for which reasonable provision for payment has been made and liabilities for distributions to Members under Act § 33-44-405(c);

(b) Second, to Members of the Company in satisfaction of liabilities for distributions under Act § 33-44-405(c);

(c) Third, to the Class B Members until each Class B Member has received cumulative distributions pursuant to Section 4.2(a) and this Section 10.2(c) equal to the Class B Member's Required Class B Contribution in proportion to each Class B Member's Unreturned Capital; *provided, however*, that no distribution shall be made pursuant to this Section 10.2(c) that creates or increases an Adjusted Capital Account Deficit for the Class B Member, determined as follows: A Distribution shall first be determined tentatively pursuant to this Section 10.2(c) without regard to the Members' Capital Accounts, and then the allocation provisions of Article III (and other provisions of this Agreement concerning adjustments to Capital Accounts, including for distributions made pursuant to the foregoing provisions of this Section 10.2) shall be applied tentatively as if such tentative distribution had been made. If an Adjusted Capital Account Deficit would thereby be created or increased for the Class B Member ("Tentative Deficit Amount"), the actual distribution to the Class B Member pursuant to this Section 10.2(c) shall be reduced (or not made at all) so that the actual distribution equals the excess (if any) of (i) the tentative distribution to the Class B Member over (ii) the Tentative Deficit Amount of the Class B Member;

(d) Fourth, to the Class A Members until each Class A Member has received cumulative distributions pursuant to Section 4.2(b) and this Section 10.2(d) equal to the Class A Member's Required Class A Contribution in proportion to each Class A Member's Unreturned Capital; *provided, however*, that no distribution shall be made pursuant to this Section 10.2(d) that creates or increases an Adjusted Capital Account Deficit for the Class A Member, determined as follows: A Distribution shall first be determined tentatively pursuant to this Section 10.2(d) without regard to the Members' Capital Accounts, and then the allocation provisions of Article III (and other provisions of this Agreement concerning adjustments to Capital Accounts, including for distributions made pursuant to the foregoing provisions of this Section 10.2) shall be applied tentatively as if such tentative distribution had been made. If an Adjusted Capital Account Deficit would thereby be created or increased for the Class A Member ("Tentative Deficit Amount"), the actual distribution to the Class A Member pursuant to this Section 10.2(d) shall be reduced (or not made at all) so that the actual distribution equals the

excess (if any) of (i) the tentative distribution to the Class A Member over (ii) the Tentative Deficit Amount of the Class A Member;

(f) Finally, the balance, if any, to the Members in accordance with the positive balances in their Capital Accounts, after giving effect to all contributions, distributions and allocations for all periods.

If any Member has a deficit balance in his Capital Account, the Member shall have no obligation to contribute capital to the Company with respect to such deficit. In the discretion of the Liquidator, a pro rata portion of the distributions that would otherwise be made to the Members pursuant to this Article 10 may be:

(a) distributed to a trust established for the benefit of the Members for the purposes of liquidating Company assets, collecting amounts owed to the Company, and paying any contingent or unforeseen liabilities or obligations of the Company. The assets of any such trust shall be distributed to the Members from time to time, in the reasonable discretion of the Liquidator, in the same proportions as the amount distributed to such trust by the Company would otherwise have been distributed to the Members pursuant to Section 10.2 hereof; or

(b) withheld to provide a reasonable reserve for Company liabilities (contingent or otherwise) and to reflect the unrealized portion of any installment obligations owed to the Company, provided that such withheld amounts shall be distributed to the Members as soon as practicable.

10.3 Rights of Members. Except as otherwise provided in this Agreement, each Member shall look solely to the Property of the Company for the return of such Member's Capital Contribution and has no right or power to demand or receive Property other than cash from the Company. If the assets of the Company remaining after payment or discharge of the debts or liabilities of the Company are insufficient to return such Capital Contribution, the Members shall have no recourse against the Company or any other Member.

10.4 The Liquidator. The "Liquidator" shall mean the Person designated by the Members to carry out the duties set forth in Section 10.2. The Company is authorized to pay reasonable compensation to the Liquidator for services performed pursuant to this Article 10 and to reimburse the Liquidator for its reasonable costs and expenses incurred in performing these services.

10.5 Form of Liquidating Distributions. For purposes of making distributions required by Section 10.2, the Liquidator may determine whether to distribute all or any portion of the Property in-kind or to sell all or any portion of the Property and distribute the proceeds therefrom.

10.6 Articles of Termination. Upon completion of the winding up of the Company, the Liquidator shall file Articles of Termination with the Secretary of State.

ARTICLE 11 MEMBER REPRESENTATIONS

Each Member hereby represents and warrants to the Company and to each other Member as follows:

(a) This Agreement has been duly authorized, executed and delivered by such Member and is a valid and binding obligation of such Member, enforceable against such Member in accordance with this Agreement's terms.

(b) There are no sale agreements, pledges, proxies, voting trusts, powers of attorney or other agreements or instruments binding upon such Member with respect to beneficial or record ownership of, or voting rights with respect to, such Member's Shares, except for this Agreement.

ARTICLE 12 MISCELLANEOUS

12.1 Notices.

(a) Except as provided in paragraph (b), any notice, payment, demand, consent or communication required or permitted to be given by this Agreement shall be in writing and shall be deemed to have been sufficiently given or served for all purposes if delivered either personally, by facsimile, or by overnight mail or by regular mail, first class postage prepaid, addressed as follows:

If to Company:

Arden Homebuilders, LLC
7301 Carmel Executive Park, Suite 214
Charlotte, North Carolina 28226

If to a Member:

To the address provided by such Member on the signature page of this Agreement for such Member

Any notice hereunder shall be deemed to be given on the date on which it was delivered, either personally, by facsimile, or by overnight mail, or three days after it was deposited in a regularly maintained receptacle for the deposit of United States mail addressed as set forth above. Any person may change his address for purposes of this agreement by giving notice to the Company and the Members in accordance with the foregoing provisions of this Article.

(b) Routine progress reports by Members and similar routine information may be sent in accordance with paragraph (a) or may be delivered by e-mail or other means that are reasonably designed to afford the Members adequate notice of such matters.

12.2 Binding Effect. Except as otherwise provided in this Agreement, every covenant, term, and provision of this Agreement shall be binding upon and inure to the benefit of the Members and their respective successors, transferees, heirs and assigns.

12.3 Severability. Except as otherwise provided in the succeeding sentence, every provision of this Agreement is intended to be severable, and, if any term or provision of this Agreement is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity or legality of the remainder of this Agreement. The preceding sentence of this Section shall be of no force or effect if the consequence of enforcing the remainder of this Agreement without such illegal or invalid term or provision would be to cause any Member to lose the material benefit of its economic bargain.

12.4 Governing Law. The laws of the State of South Carolina shall govern the validity of this Agreement, the construction of its terms, and the interpretation of the rights and duties arising hereunder.

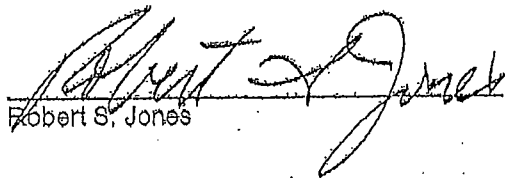
12.5 Partnership for Tax Purposes. Each Member intends that the Company will be treated as a partnership for federal, state and local tax purposes, but that the Company shall not be deemed a partnership for any other purpose and no Member shall be deemed a partner or co-venturer of any other Member. This Agreement shall be construed in all respects so as to effect the intention stated in this Section.

12.6 Arbitration. Any dispute among any of the parties to this Agreement that arises in connection with this Agreement shall be resolved by binding arbitration by a single arbitrator held in Columbia, South Carolina, pursuant to the South Carolina Uniform Arbitration Act (or if the South Carolina Uniform Arbitration Act is deemed not to apply, the Federal Arbitration Act) and applying the Commercial Arbitration Rules of the American Arbitration Association in effect on the date demand for arbitration is made.

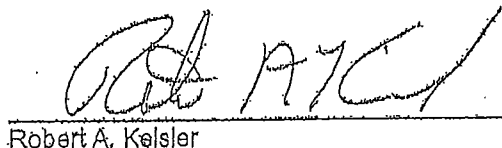
12.7 Representation. Each Member acknowledges that Richardson, Flowden, Carpenter & Robinson, P.A. (the "Firm") represented the interests of Builders Investment Group, LLC, Robert S. Jones, and Robert A. Kelsier in connection with the initial formation of the Company and the preparation of the original Operating Agreement. In regards to the preparation and amendment of this Amended and Restated Agreement, the Firm has represented only the Company. All Members have or must obtain separate legal counsel in regards to the review and approval of this Amended and Restated Operating Agreement.

IN WITNESS WHEREOF, the parties have executed and entered into this Operating Agreement of the Company as of the day and year first above written.

CLASS A MEMBERS:

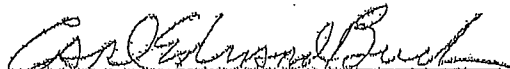

Robert S. Jones

Notice Address for Jones:
6009 Martha's Glen Road
Columbia, South Carolina 29209
Facsimile: 803-776-1326
E-mail: bjones@beezelumberger.com
MI HOME @ SC. RR. COM


Robert A. Kelsier

Notice Address for Kelsier:
116 Walnut Lane
Columbia, South Carolina 29212
Facsimile: 803-749-9890
E-mail: rakopa1@aol.com

Notice Address for Buck:

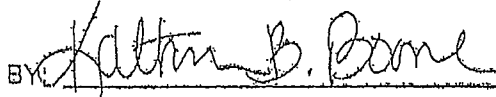

Carl Edward Buok

39 Country Club Drive
Greenville, South Carolina 29605
Facsimile: 864-232-7608
E-mail: edbuok@charter.net
Edward Buok @ BellSouth.net


Brian David Boone

Notice Address for Boone:
427 Fenton Place
Charlotte, NC 29207
Facsimile: 704-540-7040
E-mail: bdavidboone@earthlink.net

Builders Investment Group, LLC.

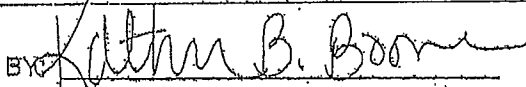
BY: 

Notice Address for BIG:
427 Fenton Place
Charlotte, NC 29207
Facsimile: 704-540-7140
E-mail: boozerk@earthlink.net

Its: Authorized Agent

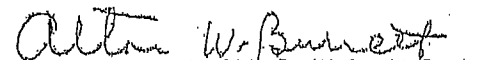
CLASS B MEMBERS:

Builders Investment Group, LLC

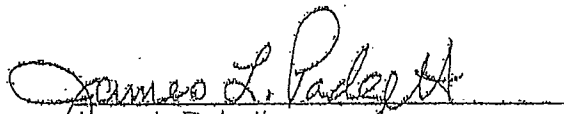
BY: 

Notice Address for BIG:
427 Fenton Place
Charlotte, NC 29207
Facsimile: 704-540-7040
E-mail: boozerk@earthlink.net

Its: Authorized Agent


Alton W. Burnett, Jr.

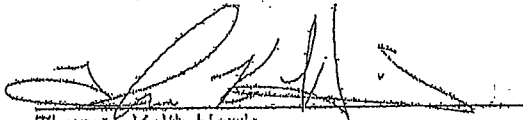
Notice Address for Burnett:
109 Ragin Drive
Hopkins, South Carolina 29081
Facsimile:
E-mail: ABURNETTE@earthlink.net


James L. Padgett

Notice Address for Padgett:
141 Olivia Way
Lexington, South Carolina 29072
Facsimile:
E-mail: JPadgett@Boozerk.com


Keith Wayne Berry

Notice Address for Berry:
106 Wood Ridge Lane
Columbia, South Carolina 29209
Facsimile:
E-mail: kwberry@earthlink.net


Thomas Keith Harris

Notice Address for Harris:
P.O. Box 485 380 Annapolis Road
Olar, South Carolina 29843 Lexington SC 29072
Facsimile:
E-mail: kharris@mozakinter.com

Schedule 2.1

Class A Members

<u>Class A Member</u>	<u>Initial Capital Contribution</u>	<u>Initial Capital Account</u>	<u>Class A Shares</u>	<u>LLC Percentage</u>	<u>Class A Percentage</u>
Jones	\$350,000.00	\$350,000.00	350,000	20.001%	24.138%
Kelsler	\$100,000.00	\$100,000.00	100,000	5.714%	6.897%
Buck	\$250,000.00	\$250,000.00	250,000	14.286%	17.241%
BIG	\$625,000.00	\$625,000.00	625,000	35.716%	43.095%
Boone	\$125,000.00	\$125,000.00	125,000	7.143%	8.829%
TOTAL	\$1,450,000.00	\$1,450,000.00	—	82.860%	100.0%

Schedule 2.2

Class B Members

<u>Class B Member</u>	<u>Initial Capital Contribution</u>	<u>Initial Capital Account</u>	<u>Class B Shares</u>	<u>Percentage LLC</u>	<u>Class B Percentage</u>
BIG	\$300,000.00	\$300,000.00	300,000	8.670%	50.000%
Burnett	\$100,000.00	\$100,000.00	100,000	2.857%	16.667%
Padgett	\$100,000.00	\$100,000.00	100,000	2.857%	16.667%
Berry	\$50,000.00	\$50,000.00	50,000	1.428%	8.333%
Harris	\$50,000.00	\$50,000.00	50,000	1.428%	8.333%
TOTAL	\$600,000.00	\$600,000.00		17.140%	100.00%

Exhibit A
Business Plan

See attached

EXHIBIT 7

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS

) FIFTH JUDICIAL CIRCUIT

Robert S. Jones,

) Plaintiff,

vs.

Builders Investment Group, LLC,
Brian D. Boone and Arden
Homebuilders, LLC,

) Defendants.

) Civil Action No. 2011-CP-40-1980

) AFFIDAVIT OF
) THORNWELL F. SOWELL III

PERSONALLY APPEARED BEFORE ME Thornwell F. Sowell III, who being duly sworn, deposes and says:

1. He is counsel for Defendants Builders Investment Group, LLC and Brian Boone and competent to make this affidavit upon his personal knowledge. This affidavit is submitted in support of Defendants Builders Investment Group, LLC's and Brian D. Boone's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, a New Trial.

2. The Plaintiff in this matter is Robert S. Jones ("Plaintiff").

3. Upon information and belief, Plaintiff resides in Columbia, South Carolina, with his wife, Martha Jones ("Plaintiff's Wife").

4. According to documents received from Southern First Bank, N.A. ("Southern First") pursuant to Subpoena, Plaintiff's Statement of Financial Position as of June 30, 2006 included the following assets:

Beach Condo – 4A Sunrise Point \$362,500.00

("Beach Condo – 4A")

Beach Condo – 5B Paradise Point \$312,500.00

(“Beach Condo – 5B”) (collectively, “Beach Condos”). *See Exhibit A* attached hereto.

5. Plaintiff was a member of an entity known as Holt Family Homes, LLC.

6. According to documents received from Southern First pursuant to subpoena, Plaintiff’s Statement of Financial Position as of June 30, 2007, provided to Southern First in Plaintiff’s application for credit, included the Beach Condo – 4A and the Beach Condo- 5B as assets, now with values diminished to \$287,500.00 and \$250,000.00 respectively. *See Exhibit B* attached hereto.

7. On or about July 31, 2007, Holt Family Homes, LLC became Arden Homebuilders, LLC.

8. On September 25, 2007, Southern First extended a Four Hundred Ninety-Eight Thousand and 00/100 Dollars (\$498,000) loan, #400938500, to Arden Homebuilders, LLC, formerly Holt Family Homes, LLC, to consolidate existing debt due to Southern First from Holt Family Homes, LLC, now Arden Homebuilders, LLC. (“Arden Loan”). On information and belief, the Arden Loan was made in reliance upon Plaintiff’s Statement of Financial Position as of June 30, 2007, and therefore ownership of the Beach Condos was known to Southern First.

9. Upon information and belief, in or about May, 2008, Plaintiff deeded both Beach Condos to Plaintiff’s Wife. *See Exhibit C* attached hereto.

10. According to documents received from Southern First Bank, N.A. (“Southern First”) pursuant to subpoena, Plaintiff’s Statement of Financial Position As of September 10, 2008, does not include the Beach Condos. *See Exhibit D* attached hereto.

11. On September 24, 2008, Southern First renewed the Four Hundred Ninety-Eight Thousand and 00/100 Dollars (\$498,000) Arden Loan. Contemporaneously with and in consideration for Southern First's renewal of the Arden Loan, Plaintiff executed a Guaranty pursuant to which Plaintiff guaranteed repayment of the loan. Previously noted **Exhibit D** (Statement of Financial Position As of September 10, 2008) was presumably reviewed in conjunction with that loan renewal.

12. On or about December 8, 2009, the Arden Loan was written off after execution of a personal Promissory Note by the Plaintiff. Plaintiff relinquished some assets to Southern First and promised to pay to Southern First Bank, N.A. the difference between the \$498,000.00 and the relinquished assets resulting in a principal debt of Four Hundred Forty-Nine Thousand Three Hundred Twenty-Six and 33/100 Dollars (\$449,326.33).

13. Incrementally, between December 29, 2009 and December 20, 2010, Southern First charged off the entire amount of \$449,326.33 owed by Plaintiff pursuant to Commercial Promissory Note #401096900.

14. No payment has been made on the personal Promissory Note of Plaintiff, Note #401096900.

15. In November, 2011, Southern First provided a Mortgage to Plaintiff's Wife on the Beach Condo - 5B in the amount of One Hundred Fifty Thousand and 00/100 Dollars (\$150,000.00). See **Exhibit E** attached hereto.

16. Upon information and belief, on or about September 28, 2012, Martha Jones sold one of the Beach Condos, Beach Condo - 5B, for Two Hundred Sixty-Four Thousand and 00/100 Dollars (\$264,000.00). See **Exhibit F** attached hereto.

17. Upon information and belief, Southern First was aware of the sale of the Beach Condo -- 5B in September, 2012 which resulted in a repayment of the \$150,000 mortgage to Southern First plus a profit of One Hundred and Fourteen Thousand and 00/100 Dollars (\$114,000.00). None of the proceeds from this sale were applied to loan #401096900 which Southern First and its President Justin Strickland testified was due and owing at the time of this transaction and which they testified is still due and owing and on which no payments have been made as of December 11, 2012. In fact, there was a Judgment filed November 14, 2012 with respect to that loan; however, Southern First sanctioned a profitable transaction for Plaintiff's Wife with no consideration for or application to the debts due and owing by Plaintiff on Commercial Promissory Note #401096900.

18. On information and belief the transfer of the Beach Condos from Plaintiff to Plaintiff's Wife were fraudulent transfers, and Southern First was fully aware of the fraudulent transfers.



Thornwell F. Sowell III

SWORN TO AND SUBSCRIBED BEFORE ME
This 21st day of December, 2012

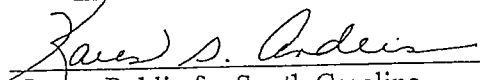
 (L.S.)
Notary Public for South Carolina
My Commission Expires: 02-24-2014

EXHIBIT A

ROBERT S. JONES
STATEMENT OF FINANCIAL POSITION
AS OF JUNE 30, 2006

ASSETS:

Non-Cash:	
Personal Residence	\$ -
Furniture and Possessions	50,000.00
2004 Mercedes-Benz SL 500	-
1961 TR3-Classic Sports Car	50,000.00
Beach Condo - 4A Sunrise Point	362,500.00
Beach Condo - 5B Paradise Point	312,500.00
Total Non-Cash Assets	<u>775,000.00</u>
Cash and Securities:	
Checking Account	7,500.00
Deferred Compensation - MML Bay State Life	465,452.00
Oppenheimer Funds - 3/31/06	45,234.00
Wachovia Securities - 3/31/06	-
MFS 401K Retirement Plan - 6/30/06	298,574.00
SC Community Bank Stock - 25,000 Shares	50,000.00
Carolina National Bank Stock - 2,500 Shares	44,000.00
Northwestern - Cash Value Life Insurance	41,994.00
Pierview Investors, LLC	-
Holt Family Homes, LLC	350,000.00
Total Cash and Securities	<u>1,302,754.00</u>
TOTAL ASSETS	<u>\$ 2,077,754.00</u>

LIABILITIES AND NET WORTH:

Liabilities:	
Carolina National Bank - Credit Line	-
Regions Bank (Pierview Equity Loan)	100,000.00
Carolina First Bank (Holt Family Homes Equity Loan)	350,000.00
Total Liabilities	<u>450,000.00</u>
Net Worth	<u>1,627,754.00</u>
TOTAL LIABILITIES AND NET WORTH	<u>\$ 2,077,754.00</u>

ROBERT S. JONES

DATE

EXHIBIT B

OCT 09 2007

172358

ROBERT S. JONES
STATEMENT OF FINANCIAL POSITION
AS OF JUNE 30, 2007ML
10-5-07

ASSETS:

Non-Cash:

Personal Residence	\$ -
Furniture and Possessions	50,000.00
2004 Mercedes-Benz SL 500	-
1961 TR3-Classic Sports Car	40,000.00
Beach Condo - 4A Sunrise Point	287,500.00
Beach Condo - 5B Paradise Point	250,000.00

Total Non-Cash Assets

627,500.00

Cash and Securities:

Checking Account	12,500.00
Deferred Compensation - MML Bay State Life	511,964.00
Oppenheimer Funds - 3/31/06	49,921.00
Wachovia Securities - 3/31/06	-
MFS 401K Retirement Plan - 6/30/06	383,493.00
SC Community Bank Stock - 25,000 Shares	125,000.00
Carolina National Bank Stock - 2,500 Shares	45,000.00
Northwestern - Cash Value Life Insurance	69,655.00
Pierview Investors, LLC	-
Holt Family Homes, LLC	350,000.00
Palmetto Builders Concete, LLC - 1,000 Shares	50,000.00
Congaree State Bank	25,000.00
Personal Loan to Arden Homebuilders, LLC	250,000.00

Total Cash and Securities

1,872,533.00

TOTAL ASSETS

\$ 2,500,033.00

LIABILITIES AND NET WORTH:

Liabilities:

Carolina National Bank - Credit Line	210,000.00
Regions Bank (Pierview Equity Loan)	100,000.00
Carolina First Bank (Holt Family Homes Equity Loan)	350,000.00

Total Liabilities

660,000.00

Net Worth

1,840,033.00

TOTAL LIABILITIES AND NET WORTH

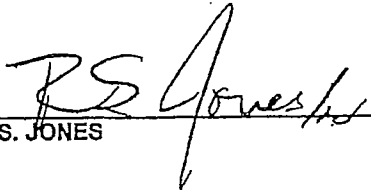
\$ 2,500,033.00
ROBERT S. JONES

EXHIBIT C

Result Row:

Instrument # ◀Prev 2008000065638 Next▶

Document Navigation by Pages:

◀Previous Document - Next Document▶

Booktype: Deed ▼

Book: 3336 Page: 1619 Jump To

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GRANTEE:	JONES MARTHA I (5/22/2008 10:18:13 AM)
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# of Pages:	4
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Legal:	HPR SUNRISE POINTE U/APT/CONDO 4-A
Case Number:	1450301346

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Document Navigation by Pages:

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Booktype:

Book: 3336 Page: 1615 [Jump To](#)

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Legal:	HPR PARADISE POINTE U/APT/CONDO 5-B
Case Number:	1450301425

Note: Empty fields are not shown
[Direct External Link to this Document](#)

EXHIBIT D

11144 OCT 24 2008

ml
10/20/08

ROBERT S. JONES
STATEMENT OF FINANCIAL POSITION
As of September 10, 2008

ASSETS:

Non-Cash:

Furniture and Possessions
1961 TR3-Classic Sports Car

50,000.00

25,000.00

75,000.00

Total Non-Cash Assets

Cash and Securities:

Checking Account
Deferred Compensation - Boozer Lumber Company
Oppenheimer Funds - 3/31/08

10,000.00

322,115.00

46,952.00

347,647.00

125,000.00

19,656.00

MFS 401K Retirement Plan - 9/10/08
SC Community Bank Stock - 25,000 Shares
Carolina National Bank Stock - 2,216 Shares @ \$8.87

400,000.00

50,000.00

25,000.00

250,000.00

Arden Homes, LLC - Initial Capital Contribution
Palmetto Builders Concrete, LLC - 1,000 Shares
Congaree State Bank - 2500 shares
Personal Loan to Arden Homebuilders, LLC

1,596,370.00

Total Cash and Securities

\$ 1,671,370.00

TOTAL ASSETS

LIABILITIES AND NET WORTH:

Liabilities:

First National Bank - Credit Line
Regions Bank (Pierview Equity Loan)
Carolina First Bank (Arden Homes Equity Loan)

298,872.00

87,518.00

348,500.00

SFB 0001

EXHIBIT F

Result Row:

Instrument # ◀Prev 2012000112472 Next▶

Document Navigation by Pages:

◀Previous Document - Next Document▶

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Book: 3610 Page: 1674 [Jump To](#)To buy/reprint images - [Click Here!](#)

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GRANTEE:	PICKETT ALFRED THOMAS (9/28/2012 2:54:16 PM)
Book Type:	D
Book / Page:	3610 / 1674
# of Pages:	5
Consideration:	264,000.00
MEMO	HPR PARADISE POINTE U/APT/CONDO 5 B
Legal:	HPR PARADISE POINTE U/APT/CONDO 5 B
Case Number:	1450301425

Note: Empty fields are not shown
[Direct External Link to this Document](#)

CERTIFICATE OF SERVICE

I, the undersigned Paralegal, of the law offices of Sowell Gray Stepp & Laffitte, L.L.C., attorneys for *defendants Builders Investment Group, LLC and Brian D. Boone*, 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):

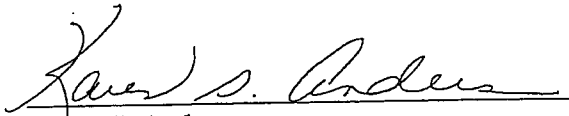
Pleadings: Affidavit of Thornwell F. Sowell III

Counsel Served:

D. Reece Williams, III, Esquire
Callison Tighe & Robinson, LLC
1812 Lincoln St., Second Floor
Post Office Box 1390 (29202-1390)
Columbia, SC 29201
Telephone: (803) 404-6900
Attorneys for Plaintiffs

Others Served:

Robert Keisler
116 Walnut Lane
Columbia, South Carolina 29212


Karen S. Anders

December 21, 2012

EXHIBIT 8

Transactions

CSR: jfloyd

ROBERT S JONES
6009 MARTHAS GLEN RD
COLUMBIA, SC 29209

SOUTHERN FIRST BANK, N.A.

Posting date Effective date	Transaction	Amount	Balance	Principal amount Interest amount	Block/Batch/Seqn Description
9/28/10	698 Partial chgoff pri credit	\$50,000.00	\$91,150.00	\$50,000.00 \$0.00	9007/907/4 - BancTx by jfloyd
6/28/10	698 Partial chgoff pri credit	\$50,000.00	\$141,150.00	\$50,000.00 \$0.00	9007/907/8 - BancTx by jfloyd
3/29/10	698 Partial chgoff pri credit	\$50,000.00	\$191,150.00	\$50,000.00 \$0.00	9007/907/9 - BancTx by jfloyd
12/29/09	698 Partial chgoff pri credit	\$208,176.33	\$241,150.00	\$208,176.33 \$0.00	9007/907/2 Partial Charge Off - BancTx by jfloyd ...
12/24/09	31	\$449,326.33	\$449,326.33	\$449,326.33	60/300/9998
12/08/09	Principal Disbursement			\$0.00	N/L principal disbursement/TY14 by pharris ...
12/08/09	Rate changed to 5.50%		\$0.00		0/0/1760 - System

12/20/10 - \$91,150 Final Charge Off

Jan F. Lloyd
Vice President

CERTIFICATE OF SERVICE

I, the undersigned Paralegal, of the law offices of Sowell Gray Stepp & Laffitte, L.L.C., attorneys for *defendants Builders Investment Group, LLC and Brian D. Boone*, 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:

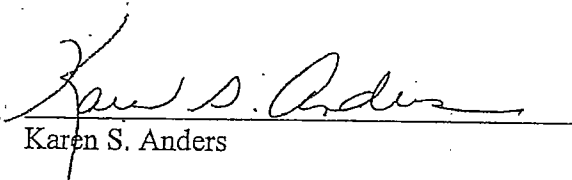
**DEFENDANTS BUILDERS INVESTMENT GROUP, LLC'S AND
BRIAN D. BOONE'S MOTION FOR A JUDGMENT
NOTWITHSTANDING THE VERDICT OR, IN THE
ALTERNATIVE, A NEW TRIAL**

Counsel Served:

D. Reece Williams, III, Esquire
Callison Tighe & Robinson, LLC
1812 Lincoln St., Second Floor
Post Office Box 1390 (29202-1390)
Columbia, SC 29201
Telephone: (803) 404-6900
Attorneys for Plaintiffs

Others Served:

Robert Keisler
116 Walnut Lane
Columbia, South Carolina 29212


Karen S. Anders

December 21, 2012

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Robert S. Jones,

☒ Plaintiff

v.

Builders Investment Group, LLC, Et Al.

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2011-CP-40-1980

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
D. Reece Williams, Iii, Bar No. 06120
Address:
Callison Tighe & Robinson LLC
1812 Lincoln St., Ste. 200 (PO Box 1390)
Columbia SC 29202-1390
phone: 803-404-6900 fax: 803-404-6902
e-mail: reecewilliams@callisontighe.com other:

Defendant's Attorney:
David C. Dick, Bar No.
Address:
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden St., PO Box 11449
Columbia SC 29211
phone: fax:
e-mail: 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 Alter or Amend

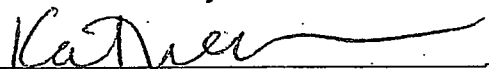
Estimated Time Needed: 15 Minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☒ Plaintiff / ☐ Defendant

May 24, 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

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND)

FOR THE FIFTH JUDICIAL CIRCUIT

Robert S. Jones,)

Case No: 2011-CP-40-1980

Plaintiff,)

v.)

NOTICE OF MOTION AND PLAINTIFF'S
MOTION TO ALTER OR AMEND ORDER
PURSUANT TO RULE 59(e), SC

Builders Investment Group, LLC,)

Brian D. Boone and Arden)

Homebuilders, LLC,)

Defendants.)

**TO: THORNWELL F. SOWELL AND DAVID C. DICK, ESQUIRE, ATTORNEYS
FOR DEFENDANTS BUILDERS INVESTMENT GROUP, LLC AND BRIAN D.
BOONE:**

YOU WILL PLEASE TAKE NOTICE that ten days after the service hereof, or as soon thereafter as counsel may be heard, Plaintiff, Robert S. Jones ("Jones"), will move pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for an order from this Honorable Court to alter or amend this Court's Order, dated and filed May 15, 2013, which Order granted Defendants, Builders Investment Group, LLC ("BIG") and Brian D. Boone's ("Boone"), motion for judgment notwithstanding the verdict.

This matter came before this Court on April 11, 2013, for a hearing on Defendants, BIG and Boone's, Motion for a Judgment Notwithstanding the Verdict, or in the Alternative, a New Trial. This Court issued its Order Granting Defendants Builders Investment Group, LLC and Brian D. Boone's Motions for Judgment Notwithstanding the Verdict ("Order Granting JNOV") on May 15, 2013. Jones requests that this Court reconsider its grant of BIG and Boone's motion for judgment notwithstanding the verdict and alter or amend its Order Granting JNOV so as to deny BIG and Boone's motion.

STANDARD

“The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. RFT Mgmt. Co. v. Tinsley & Adams, L.L.P., 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012). Moreover, a JNOV motion may be granted only if no reasonable juror could have reached the challenged verdict. Id. This Court will reverse the trial judge's ruling only when there is no evidence to support the ruling or it is controlled by an error of law. Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 163, 714 S.E.2d 869, 873 (2011).” Town of Hollywood v. Floyd, 27252, 2013 WL 2066246 (2013). Further, in considering a motion for judgment notwithstanding the verdict, the trial court does not weigh the evidence but only considers its existence. Curcio v. Caterpillar, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003). Putting it most succinctly, the Supreme Court held, “The jury’s verdict must be upheld unless no evidence reasonably supports the jury’s findings.” Id.

ARGUMENT

The trial of this case presented two questions of fact:

1. Did Jones pay more than his proportionate share to discharge the Arden loan to Southern First?
2. Are BIG and Boone required to guaranty the Arden loan?

This Court properly sent these matters to the jury for determination. That jury’s verdict in favor of Jones should not be disturbed because there is evidence that reasonably supports the jury’s findings.

1. Jones paid more than his proportionate share.

BIG and Boone are contractually obligated to pay Jones their proportionate share of the loan under Section 2.3 of the Operating Agreement which states in pertinent part, “[a]ny Class A

Member who pays more than such Class A Member's Guaranty Percentage of the Guaranteed Loan to the Lender shall be entitled to contribution from the other Class A Members."

"Contribution involves the partial reimbursement of one who has discharged a common liability. Discharge is defined as any method by which a legal duty is extinguished; esp., the payment of a debt or satisfaction of some other obligation." Small v. Rogers, 938 N.E.2d 18, 22 (Ill. App. Ct. 2010) (internal citations and quotations omitted).

The Order analyzes whether Jones has made "actual payment," and the Court determined that Jones had not made "actual payment" of the Arden loan because he has not yet paid off his personal loan. This analysis misplaces the focus of payment. It is the Arden loan, not Jones' personal loan that is the basis for the common obligation and that should be the focus of this Court's analysis.

As articulated by the Small case, any method by which a legal duty is extinguished can give rise to contribution. The fact that Jones chose the method of taking out another loan does not prevent Jones from a right of contribution. The Arden loan has been paid in full by Jones; the source of funds used to pay the Arden Loan is irrelevant. Jones has paid more than his proportionate share of the common obligation, the Arden loan.

Jones presented evidence at trial that he satisfied the entire Arden loan through a personal loan in 2009. Evidence was further presented at trial that Southern First has now brought an action against Jones on the personal loan, and Jones has confessed judgment in the amount of \$449,326.33. This evidence reasonably supports the jury's findings that Jones has discharged Arden's entire liability—in excess of his proportionate liability, and Jones is entitled to contribution from BIG and Boone in their proportionate share.

The Court goes on to further analyze Section 2.3 of the Operating Agreement as a contract for indemnity against liability. The cases cited by the Court in support of this position are inapposite because they address the issue of indemnification rather than contribution. The two concepts are often used interchangeably but there is a significant difference.

Indemnification shifts the entire burden of loss from one party to another; contribution only requires a party to pay its portion of the loss to discharge a common liability. See, 41 Am. Jur. 2d Indemnity § 3. In this case, BIG and Boone are only required to pay their ratable share; thus, an analysis of indemnification doctrine is misplaced.

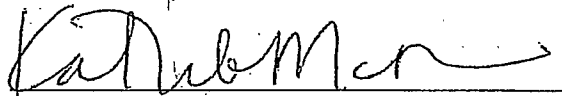
2. BIG and Boone are contractually obligated to guaranty the Loan.

The Order Granting JNOV also errs in holding that BIG and Boone were not required to guaranty the Arden loan. The express terms of the Operating Agreement state that, “[e]ach of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company (“Guaranteed Loan”) for so long as any guaranty of such loan is required by the lender.” BIG and Boone were Class A Members of Arden, and Southern First Bank required the Arden loan to be personally guaranteed. Therefore, pursuant to the express terms of the Operating Agreement, BIG and Boone were required to personally guaranty the Arden loan. The fact that they did not want to guaranty the Arden loan and did not do so does not mean that they were not contractually required by the Operating Agreement to give the guaranty.

At the trial of this matter, Jones presented not only the plain language of the Operating Agreement but also his own testimony and that of Robert Keisler regarding the requirement that BIG and Boone guaranty the Arden loan. Accordingly, there is evidence in the record that reasonably supports the jury’s verdict in favor of Jones.

CONCLUSION

Based upon the foregoing, Jones respectfully requests that this Court alter or amend its Order Granting JNOV to deny BIG and Boone's motion for judgment notwithstanding the verdict.



D. Reece Williams, III

Kathleen M. McDaniel

CALLISON TIGHE & ROBINSON, LLC

1812 Lincoln St., 1st and 2nd Fls.

PO Box 1390

Columbia SC 29202

Telephone: 803-404-6900

Fax: 803-404-6901

ATTORNEYS FOR ROBERT S. JONES

May 24, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

Robert S. Jones,)
Plaintiff,)

v.)

Builders Investment Group, LLC,)
Brian D. Boone and Arden)
Homebuilders, LLC,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No: 2011-CP-40-1980

NOTICE OF MOTION AND PLAINTIFF'S
MOTION TO ALTER OR AMEND ORDER
PURSUANT TO RULE 59(e), SCRPC

FILED
MAY 28 AM 11:22
RICHLAND COUNTY

**TO: THORNWELL F. SOWELL AND DAVID C. DICK, ESQUIRE, ATTORNEYS
FOR DEFENDANTS BUILDERS INVESTMENT GROUP, LLC AND BRIAN D.
BOONE:**

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As articulated by the Small case, any method by which a legal duty is extinguished can give rise to contribution. The fact that Jones chose the method of taking out another loan does not prevent Jones from a right of contribution. The Arden loan has been paid in full by Jones; the source of funds used to pay the Arden Loan is irrelevant. Jones has paid more than his proportionate share of the common obligation, the Arden loan.

Jones presented evidence at trial that he satisfied the entire Arden loan through a personal loan in 2009. Evidence was further presented at trial that Southern First has now brought an action against Jones on the personal loan, and Jones has confessed judgment in the amount of \$449,326.33. This evidence reasonably supports the jury's findings that Jones has discharged Arden's entire liability—in excess of his proportionate liability, and Jones is entitled to contribution from BIG and Boone in their proportionate share.

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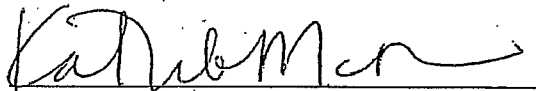
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The Order Granting JNOV also errs in holding that BIG and Boone were not required to guaranty the Arden loan. The express terms of the Operating Agreement state that, "[e]ach of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") for so long as any guaranty of such loan is required by the lender." BIG and Boone were Class A Members of Arden, and Southern First Bank required the Arden loan to be personally guaranteed. Therefore, pursuant to the express terms of the Operating Agreement, BIG and Boone were required to personally guaranty the Arden loan. The fact that they did not want to guaranty the Arden loan and did not do so does not mean that they were not contractually required by the Operating Agreement to give the guaranty.

At the trial of this matter, Jones presented not only the plain language of the Operating Agreement but also his own testimony and that of Robert Keisler regarding the requirement that BIG and Boone guaranty the Arden loan. Accordingly, there is evidence in the record that reasonably supports the jury's verdict in favor of Jones.

CONCLUSION

Based upon the foregoing, Jones respectfully requests that this Court alter or amend its Order Granting JNOV to deny BIG and Boone's motion for judgment notwithstanding the verdict.



D. Reece Williams, III
Kathleen M. McDaniel
CALLISON TIGHE & ROBINSON, LLC
1812 Lincoln St., 1st and 2nd Fls.
PO Box 1390
Columbia SC 29202
Telephone: 803-404-6900
Fax: 803-404-6901

ATTORNEYS FOR ROBERT S. JONES

May 24, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the foregoing document in this action, dated May 24, 2013, on counsel for Defendants by:

- ☐ delivering it to him/her personally; or,
- ☒ mailing it to him at his last known address, by depositing it in the U.S. Mail in an envelope with sufficient postage affixed, addressed as follows:

David C. Dick, Esq.
Thornwell F. Sowell, Esq.
Sowell Gray Stepp & Laffitte, L.L.C.
1310 Gadsden St.
PO Box 11449
Columbia SC 29211


Crystal Smith

May 24, 2013
Columbia, South Carolina

RECEIVED
FILED
MAY 28 AM 11:22
CLERK OF COURT
CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS
)
) FIFTH JUDICIAL CIRCUIT

Robert S. Jones,

)
)
) Plaintiff,
)
)

vs.

Builders Investment Group, LLC,
Brian D. Boone and Arden
Homebuilders, LLC,

)
)
) Defendants.
)
)
)

Civil Action No. 2011-CP-40-1980

**DEFENDANTS BUILDERS
INVESTMENT GROUP, LLC'S AND
BRIAN D. BOONE'S MEMORANDUM
IN OPPOSITION TO PLAINTIFF'S
MOTION TO ALTER OR AMEND
ORDER PURSUANT TO RULE 59(e)
SCRPC**

2013 OCT 16 PM 4:38
JAMES E. MCENRIDE
CLERK, S.C.
RICHLAND COUNTY
FILED

Defendants Builders Investment Group, LLC ("BIG") and Brian D. Boone ("Boone") hereby submit the following material and authorities in opposition to the Plaintiff's Motion to Alter or Amend Order Pursuant to Rule 59(e), SCRPC. The Plaintiff moves pursuant to Rule 59(e) of the South Carolina Rules of Civil procedure for an order altering or amending this Court's Order, dated and filed May 15, 2013, which granted Defendants BIG and Boone's motion for judgment notwithstanding the verdict. Because the Plaintiff has failed to point to any issues not considered or ruled upon, this motion should be denied.

ARGUMENT

"A party may wish to file [a 59(e)] motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Elam v. S. Carolina Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). In his motion, the Plaintiff fails to raise any argument that has not been ruled on or fully considered. In fact, the Plaintiff makes the same two

arguments that have been argued at length by the parties and ruled on by this Court. Specifically, the Plaintiff argues that Robert S. Jones ("Jones") did pay the loan from Southern First, and that BIG and Boone were required to guaranty the loan. This Court has already fully considered both of these issues and ruled upon them. Accordingly, the Plaintiff's Motion to Alter or Amend the Order should be denied.

The specific arguments as previously considered and ruled upon by this Court are as follows:

I. JONES IS NOT ENTITLED TO RECOVER UNDER THE ARDEN OPERATING AGREEMENT AS A MATTER OF LAW.

a. JONES DID NOT PAY MORE THAN HIS PROPORTIONATE SHARE.

A plain and unambiguous reading of Section 2.3 of the Arden Operating Agreement makes it clear that a member must actually pay more than his share to recover from the other members. Because Jones has not paid more than his proportionate share of the Arden Loan he is not entitled to contribution.

Section 2.3 of the Arden Operating agreement provides in pertinent part:

Any Class A Member who pays more than such Class A Member's Guaranty Percentage of the Guaranteed Loan to the Lender shall be entitled to contribution from the other Class A Members.

"When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense." *C.A.N. Enterprises, Inc. v. S. Carolina Health & Human Services Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). A plain and unambiguous reading of Section 2.3 requires a Class A Member to actually pay more than his share to recover from the other members. Section 2.3 does not provide any other situation for recovery, it explicitly requires payment.

It is undisputed from the evidence presented at trial that Jones signed a personal promissory note, also with Southern First Bank, which was used to satisfy the Arden Loan. It is also undisputed that Jones has not made any payments on this personal promissory note. Southern First Compl. ¶ 5, attached hereto as Exhibit 1; Jones Third-Party Ans. & Compl. ¶ 2, attached hereto as Exhibit 2; Confession of Judgment, attached hereto as Exhibit 3.

The evidence presented at trial showed that Jones paid only \$7,423.67 on the Arden Loan. See statement of liquidation of assets from Southern First Bank, attached hereto as Exhibit 4. Nonetheless, Jones testified that he has made payments totaling \$48,673.67. Even assuming Jones' testimony of payment is true, he has still not paid more than his percentage of the Arden Loan, and thus he is not entitled to contribution from BIG or Boone.¹

Jones admitted in his testimony that he signed a personal promissory note which was used to satisfy the Arden Loan on the books of Southern First Bank. He did not actually make any payments to Southern First Bank totaling more than his proportionate share. As the Southern First Bank president, Justin Strickland, testified at trial, a promissory note is only a promise to pay, not payment.

Strickland's testimony is supported by the South Carolina Uniform Commercial Code, which provides that a promissory note is simply a promise to pay and does not mean a bank has received any sum of money or funds. S.C. Code Ann. § 36-9-102 ("Promissory note" means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to

¹ Guaranty Percentage of the Guaranteed Loan is calculated by multiplying the Class A member's percentage ownership in the company's Class A shares by the amount of the Loan. In this case, Jones owned 29.17 percent of the Class A shares. The Arden Loan from Southern First Bank was \$498,000. Thus, Jones' Guaranty Percentage of the Guaranteed Loan is \$145,250 (.2917 x 498,000). In order for Jones to be entitled to contribution, he must have paid more than \$145,250 to Southern First Bank. The undisputed evidence in this case is that he did not even come close to paying this amount.

pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.”). By signing a personal promissory note, Jones has simply incurred a liability on behalf of Arden. Jones has not made payment as required by the plain language of the operating agreement, and has thus suffered no actual damages.

Because Plaintiff has not paid more than his Guaranty Percentage, based on his own testimony, the testimony of Strickland, and the UCC, the Plaintiff is not entitled to contribution from BIG and Boone according to the plain terms of the Arden Operating Agreement. Accordingly, this Court properly granted BIG and Boone’s motion for a judgment notwithstanding the verdict.

b. JONES DID NOT MAKE ACTUAL PAYMENT.

South Carolina case law supports the plain reading of the Arden Operating Agreement which requires a member to pay more than his proportionate share before he can recover from another member.² Because Jones simply incurred a liability related to the Arden Loan and did not make actual payment, he is not entitled to contribution from BIG or Boone.

Section 2.3 of the Arden Operating Agreement is a contract of indemnity under South Carolina law. *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003) (“South Carolina courts have consistently defined indemnity as ‘that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party.’”).

South Carolina courts recognize two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. *Piper v. Am. Fid. & Cas.*

² In his Motion to Alter or Amend the Order, Plaintiff relies heavily on the Illinois case of *Small v. Rogers*, 938 N.E.2d 18, 22 (Ill. App. Ct. 2010). Because South Carolina case law already sufficiently addresses all of the issues raised regarding contribution and payment, the Plaintiff’s use of an Illinois case is misplaced and provides no precedent or weight to this Court’s determination.

Co. et al., 154 S.C. 106, 108 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred. *Id.* By contrast, in a contract for indemnity against loss, "liability does not attach until loss has been suffered, **that is when the [indemnitee] has paid the damages.**" *Id.* (emphasis added).

Whether a contract for indemnity is one for liability or for loss "depends on the intention of the parties as shown by the phraseology of the agreement contained in the policy." *Shealey v. Am. Health Ins. Corp.*, 220 S.C. 79, 82-83, 66 S.E.2d 461, 462 (1951). "In construing contracts of this character, the courts generally have held that if the indemnity is clearly one against loss or damage, **no action will lie in favor of the insured until some loss or damage has been sustained by him, either by payment of the whole or some part of the claim.**" *Id.* (emphasis added).

Here, Section 2.3 of the Arden Operating Agreement is a contract for indemnity against loss because the Agreement specifically requires a member to "pay" more than his proportionate share. Jones has not paid more than his proportionate share of the Arden Loan. In fact, it is clear that Jones has incurred only a liability with regard to the Arden Loan by taking out a personal promissory note.

Jones' personal promissory note was used to satisfy the Arden Loan on the books of Southern First Bank. As discussed above, a promissory note is merely a promise to pay. It is not payment. In fact, a promissory note is the quintessential liability, listed on every financial statement under liabilities. While Jones incurred a liability on behalf of Arden when he signed the personal promissory note, he did not incur actual damage by way of payment.

This is the exact distinction that the South Carolina case law seeks to make. If the Arden Operating Agreement requires payment for contribution, then the mere incurrence of a liability is insufficient to satisfy the contract requirements for contribution. The Arden Operating agreement does not say, "Any Class A Member who incurs a *liability* more than his share is entitled to contribution." The Arden Operating Agreement specifically requires payment. Accordingly, the mere incurrence of a liability by Jones is insufficient to entitle him to contribution from the BIG and Boone.

By way of contrast, the South Carolina Court of Appeals has held that actual payment is not necessary for indemnification when a "partnership agreement allowed indemnity for a 'threat of loss.'" *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 607, 538 S.E.2d 15, 29 (Ct. App. 2000). The court in *Kuznik* reasoned that because the partnership agreement in question contained the phrase "threat of loss," it allowed the plaintiff to recover even though he had not yet made payment. In this case, the Arden Operating Agreement has no such provision. The Arden Operating Agreement does not mention "liability" or "threat of loss." The Arden Operating agreement allows only for contribution in one situation: payment.

Accordingly, this Court properly granted BIG and Boone's motion for a judgment notwithstanding the verdict because the Plaintiff has not suffered a loss or damage and thus cannot recover from BIG or Boone.

II. JONES IS NOT ENTITLED TO RECOVERY AS A MATTER OF LAW BECAUSE BIG AND BOONE WERE NOT REQUIRED TO GUARANTY THE LOAN, AND IN FACT DID NOT GUARANTY THE LOAN.

BIG and Boone are entitled to a judgment notwithstanding the verdict because Jones has failed to present any evidence showing that BIG and Boone were ever required to guaranty the

Arden Loan. All of the testimony and evidence at trial demonstrates that neither BIG nor Boone was ever required by Southern First Bank, or anyone else, to guaranty the Arden Loan.

Section 6.6(a) of the Operating Agreement specifically states:

No Member shall be liable for the debts or any other obligations or liabilities of the Company, whether arising in contract, tort or otherwise **unless a Member guarantees any debt or obligation as required under Article 2.3.**

See Exhibit 5, attached hereto, Section 6.6(a) (emphasis added).

It is undisputed that BIG and Boone never guaranteed the Arden Loan from Southern First Bank. The only argument raised by Jones at trial was that Section 2.3 of the Arden Operating Agreement required BIG and Boone to guaranty the Loan, and thus contribute to it.

Section 2.3 of the Operating Agreement provides in pertinent part:

2.3 Guaranty of Loans to Company. Each of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") for so long as any guaranty of such loan is required by the lender.

Exhibit 5, Section 2.3 (emphasis added). It is clear from Section 2.3 that a class A member is required only to guaranty a loan "for so long as any guaranty of such loan is required by the lender."

The Southern First Bank President and loan officer on all of the loans, Justin Strickland, repeatedly testified at trial that neither BIG nor Boone was required to guaranty the Arden Loan. It is also undisputed that BIG and Boone never guaranteed the Arden Loan from Southern First Bank. Jones provided no documents or evidence at trial which demonstrated a requirement by Southern First Bank for BIG and Boone to guaranty the Arden Loan. All of the evidence supports Defendants' position that BIG and Boone were never required by anyone to guaranty the Arden Loan.

Further, the Arden Loan was entered into before BIG and Boone became Class A members of Arden. All of the documents presented at trial demonstrate that the Arden Loan from Southern First Bank was treated differently than all other loans to Arden, and that the details of that Southern First Loan were kept from BIG and Boone. Additionally, Section 4.2 of the Arden Operating Agreement specifically provides that the Southern First Loan was guaranteed by "Jones, Keisler, and Buck." Lastly, it is undisputed that neither BIG nor Boone was ever asked by anyone to vote on the release of Buck as a personal guarantor on the Arden Loan.

Section 6.6 of the Operating Agreement plainly states that a Member is not responsible for any debt of Arden "unless a Member guarantees any debt or obligation as required under Article 2.3." Because BIG and Boone were not required by Southern First Bank to guaranty the Arden Loan and did not guaranty the Loan, they cannot be liable for any portion of the Loan as a matter of law. Because Jones has failed to provide any evidence that anyone has ever required BIG or Boone to guaranty the Arden Loan from Southern First, this Court properly granted BIG and Boone's motion for a judgment notwithstanding the verdict.

CONCLUSION

Plaintiff's Motion to Alter or Amend the Order simply restates the same arguments that were made in opposition to the Defendant's Motion for Judgment Notwithstanding the Verdict. The Court has already heard exhaustive oral arguments on these issues, and received substantial briefing. Further, the Court has already ruled specifically that Jones did not make payment on the Arden Loan and that Defendants BIG and Boone were not required to guaranty the Arden

Loan. Because the Plaintiff has failed to raise any issues not considered or ruled upon by this Court in its previous order, this motion should be denied.

Respectfully submitted,

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Columbia, South Carolina
October 16, 2013

CERTIFICATE OF SERVICE

I, the undersigned Paralegal, of the law offices of Sowell Gray Stepp & Laffitte, L.L.C., attorneys for *defendants Builders Investment Group, LLC and Brian D. Boone*, 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 via email, to the following address(es):

Pleadings: **DEFENDANTS BUILDERS INVESTMENT GROUP, LLC'S AND BRIAN D. BOONE'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO ALTER OR AMEND ORDER PURSUANT TO RULE 59(e), SCRCF**

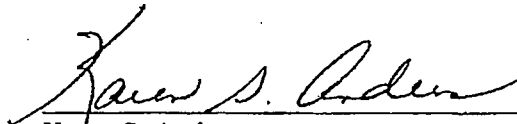
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Karen S. Anders

October 16, 2013

1 STATE OF SOUTH CAROLINA) IN COMMON PLEAS
 2 COUNTY OF RICHLAND) COURT
 3)
 4 ROBERT S. JONES,)
 5) TRANSCRIPT
 6 -V-) OF
 7) RECORD
 8 BUILDERS INVESTMENT GROUP, LLC,)
 9 ET AL.,) 2011-CP-40-01980
 10 DEFENDANT.)

11

12 DECEMBER 10, 11 AND 12, 2012

13 RICHLAND, SOUTH CAROLINA

14

15 B-E-F-O-R-E:

16 HONORABLE CASEY L. MANNING, JUDGE; AND JURY

17

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

19 FOR THE PLAINTIFF:

20 D. REECE WILLIAMS, ESQ.

21

22 FOR THE DEFENDANT:

23 THORNWELL SOWELL, III, ESQ.

24 DAVID C. DICK, JR., ESQ.

25

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1 (The following proceedings were
2 held on December 10, 2012.)

3 THE COURT: Is everybody?

4 THE BAILIFF: Yes.

5 THE COURT: All right. Bring the jury up please.

6 BAILIFF: Juror panel's all present, Your Honor.

7 THE COURT: Thank you, sir.

8 Good morning, ladies and gentlemen, how y'all
9 doing?

10 (Response from jurors,
11 "Morning.")

12 THE COURT: All right. Maybe, I should be caution
13 saying y'all don't look to happy to be here.

14 (Laughter.)

15 THE COURT: It's really not that bad of a case,
16 ladies and gentlemen. I'm sure y'all will be happy to
17 participate in the resolution of this matter.

18 I take the opportunity and I think Judge Benjamin
19 welcomed y'all this morning, qualified you. I hate to
20 confess but I will. Judge Benjamin was my law clerk 14
21 years ago or something. So when I first got this job I
22 didn't need glasses and I didn't have gray hair. I've done
23 it a long time. But I take the opportunity once again to
24 welcome each and every one of y'all once again.

25 Members of the panel, we're about ready to select

1 a jury in the case of Robert S. Jones, plaintiff versus
2 Builders Investment Group LLC, limited liability
3 cooperation, Brian B. Boone and Arden Home Builders LLC,
4 defendants.

5 Now, this dispute arises out of an alleged
6 failure to contribute to consider the debts of a failed
7 limited liability company.

8 Have I said everything correctly so far,
9 gentleman?

10 MR. SOWELL: Yes, sir.

11 THE COURT: All right. And I think Mr. Jones when
12 and borrowed some money to keep the corporation afloat and
13 he alleges that Builders Investment Group, Brian B. Boone
14 and Arden Home Builders, owes him some of the money that he
15 borrowed.

16 Is that fair enough so far?

17 MR. SOWELL: (Mr. Williams nodded head.)

18 THE COURT: All right. That is sort of generally
19 what this dispute is about.

20 You will hear a lot more details as we get -- go
21 into this case.

22 Now, of course, the defendants claim that they
23 don't owe any money to Mr. Jones. Let's start with that.
24 This is a dispute.

25 Let's see, I'm going to -- well, first of all, let

1 me introduce you to -- Mr. Jones is not here. Robert S.

2 Jones is not here this morning, is he?

3 MR. WILLIAMS: He's not here, Judge.

4 THE COURT: Tell us a little bit about Mr. Jones.

5 He lives in Columbia?

6 MR. WILLIAMS: Yes, sir, he lives here in
7 Columbia. Was formally employed by Boozer Lumber Company
8 and Arden Home Builders was a company that was affiliated
9 with that.

10 THE COURT: Okay.

11 MR. WILLIAMS: He lives out on Martha's Gleen.

12 THE COURT: Martha's Gleen -- South Carolina.

13 MR. WILLIAMS: Yes, sir.

14 THE COURT: All right. And from Builders
15 Investment Group we have Brian B. Boone who's from
16 Charlotte?

17 MS. BOONE: Well, actually I'm with Builders
18 Investment Group.

19 THE COURT: Oh, you're with Builders?

20 MS. BOONE: Right.

21 THE COURT: One of the parties.

22 MS. BOONE: Cathy Boozer Boone.

23 THE COURT: And this is Mr. Boone.

24 MS. BOONE: I'm David Boone.

25 THE COURT: And they're husband and wife. They're

1 from Charlotte.

2 Y'all are the defendants, right?

3 MR. BOOZER: Yes, sir.

4 MS. BOONE: I grew up here in Columbia.

5 THE COURT: All right. You grew up here?

6 MS. BOONE: Yes.

7 THE COURT: So Mr. Jones is not here. He's the
8 plaintiff. You met the Boones they are the defendants in
9 this is case.

10 Now, the question I need to ask you about
11 Mr. Jones, is the plaintiff, as well as the Boones is this,
12 members of the jury panel, are you related by blood or
13 marriage or connected by employment or are you a close
14 personal acquaintance of either Robert S. Jones, the
15 plaintiff, in this case or Kathy Boone or Brian Boone, if
16 so, please stand. Do y'all know Mr. Jones or do y'all know
17 the Boones and all, if so please stand.

18 (There was no response.)

19 THE COURT: Now, other potential witnesses in this
20 case, members of the jury, will be Justin Stricklen. He
21 worked with Southern First Bank Shares Incorporation. He
22 lives here in Columbia and Mr. Robert Kessler who lives here
23 in Columbia and Mr. Norman Teasdale also living here in
24 Columbia. So Stricklen, Kessler and Teasdale are potential
25 witnesses along with a Mr. Dale Boozer.

1 Is that boozer? Who will be testifying on behalf
2 of the defense.

3 Mr. Boozer, would you stand up?

4 This is Mr. Dale Boozer.

5 Mr. Boozer, you're from right here in Columbia?

6 MR. BOOZER: Yes, sir.

7 THE COURT: All right. Thank you, sir. So, in
8 regards to that on the plaintiff and the defendants or the
9 individuals I just named the Boones and Jones -- Mr. Jones
10 it goes for Justin Stricklen, Robert Kessler, Norman
11 Teasdale, the Boones once again and Dale Boozer, you are
12 related by blood or marriage oh connected by employment or
13 are you a close personal acquaintance of any of those names
14 I just called out, they will be potential witnesses in this
15 case, do you know them; do you go to church with them; live
16 by them, same neighborhood, do you know them at all, if you
17 think you do, please stand.

18 (Juror stands.)

19 THE COURT: Yes, sir, your name and juror number?

20 PROSPECTIVE JUROR: Juror number 278, I'm David
21 Vandewater.

22 THE COURT: Mr. Vandewater, who do you know?

23 PROSPECTIVE JUROR: I know Justin Stricklen and I
24 know Robert Kessler and you just can't help it. I've been
25 in business here in Columbia for 30 years and.

1 THE COURT: All right.

2 PROSPECTIVE JUROR: So I happen to know them.

3 Don't go to church with them. Don't see them on a regular
4 basis.

5 THE COURT: How long have you known them, the last
6 20, 30 years? You do business with them?

7 PROSPECTIVE JUROR: I haven't personally but I --
8 I'm -- especially Justin I just happen to know him better
9 than the others.

10 THE COURT: Okay. The fact that you know these
11 individuals, would that or could that effect your ability to
12 be a fair and impartial juror in the trial of this case?

13 PROSPECTIVE JUROR: I don't think do. I believe I
14 could see beyond.

15 THE COURT: You think you could be a fair juror in
16 other words?

17 PROSPECTIVE JUROR: Yes, sir.

18 THE COURT: Okay. Thank you, sir.

19 PROSPECTIVE JUROR: Uh-huh.

20 THE COURT: Now, members of the jury panel, you
21 know a little bit about what this case is about. I need to
22 ask you this question, are you sensible or aware of any bias
23 or prejudice with respect to either party. The parties
24 would be Mr. Robert Jones and the Boones as well as Builders
25 Investment Group and Arden Home Builders. Do you know -- do

1 you know of any reason why do cannot give both parties to
2 this action a fair and impartial trial basis on law and the
3 evidence if so please stand.

4 (There was on response.)

5 THE COURT: Any reason you fell you couldn't be a
6 fair juror in a business dispute, please stand.

7 (There was no response.)

8 THE COURT: All right. Now, members of the panel,
9 the plaintiff, Mr. Jones, is being represented by Mr. Reece
10 Williams.

11 Mr. Williams, will you please be kind enough to
12 stand up and face the jury panel?

13 MR. WILLIAMS: Yes, Your Honor.

14 THE COURT: And he's a partner at Callison Tighe &
15 Robinson. And his associate this morning is Mr -- stand up,
16 son.

17 MR. LYSELL: Brian Lysell. Brian Lysell.

18 THE COURT: Brian Lysell. Thank you, gentleman.

19 MR. LYSELL: Yes, Your Honor.

20 THE COURT: Now, my question to you is this,
21 members of the jury, what I need to ask you first of all,
22 have you or a member of your family ever been represented by
23 Mr. Reece Williams or Mr. Lysell, if so please stand.

24 (There was on response.)

25 THE COURT: They work for the firm of Callison

1 Tighe & Robinson and I'm going to call out the names of the
2 members of the lawyers in that firm. Listen carefully and
3 see whether or not you or a member of your family have been
4 represented by anyone in the law firm of Callison Tighe &
5 Robinson and the members are Melissa Barnette, Richard
6 Detwiler, Andrew English, Gorge Harland, Demetri Koutrakos,
7 Louis Lang, Ian Mcvey, Ralph Robinson -- Nekki Shutt,
8 Michael Tie, Reece Williams; of counsel will be David L.
9 Ewing, James Meggs and associates of are Brian Lysell,
10 Kathleen McDaniel, Jennifer Stoney, Joyce Taylor. Do y'all
11 know any of those names, those lawyers, lawyers if so please
12 stand.

13 (There was no response.)

14 THE COURT: Have you ever been represented by
15 anybody in the firm of Callison Tighe & Robinson, if so
16 please stand.

17 You look like you need to stand up.

18 PROSPECTIVE JUROR: No, sir. I - I --

19 THE COURT: You just know the people?

20 PROSPECTIVE JUROR: I'm sorry. I know Michael
21 Tighe because I -- I grew up two doors from him.

22 THE COURT: All right. The fact that you grew up
23 two doors from him --

24 PROSPECTIVE JUROR: No, that doesn't have -- you
25 just asked me if I knew him, so.

1 THE COURT: Would that or could effect your
2 ability to be a fair juror?

3 PROSPECTIVE JUROR: No, sir.

4 THE COURT: All right. Thank you. What's your
5 number again please sir.

6 PROSPECTIVE JUROR: 278.

7 Now, members of the jury panel, Builders
8 Investment Group LLC, Brian Boone and Kathy Boone as well as
9 Arden Home Builders is be represented by Sowell, Gray, Stepp
10 and Laffitte. And Mr. Biff Sowell heads up that firm and
11 his associate this morning is --

12 Help me out again, Mr. Sowell.

13 MR. DICK: David dick.

14 THE COURT: David Dick?

15 MR. DICK: Dick, yep. D-I-C-K.

16 THE COURT: All right. Thank you, gentleman.

17 Now, the question is, have you or any member of
18 your immediate family ever been represented by Mr. Sowell or
19 Mr. Dick? And what I'm going to do is call out names of the
20 members of that firm. Listen carefully and see whether or
21 not you recognize anybody. Mr. Biff Sowell whom you just
22 met. Ms. Betsy Gray, Mr. Bobby Stepp, Ms. Becky Faffitte,
23 Monty Todd, Grady Beard, Cal Watson, Tina Cundari, did I say
24 that correct?

25 MR. SOWELL: Cundari.

1 THE COURT: Cundari. Rob Tyson, David Dick whom
2 you just met. Alexis Lindsay, Roland Franklin, Bess Durant,
3 Amy Hill, Will Jordan, Gibbs Leaphart, Alex Davis, Nick
4 Haigler, Tiffany Hendricks, Bob Horner, Michael Montgomery.
5 Have y'all heard any of those names? Do you know anybody
6 from that list I just called out? These are lawyer from the
7 firm of Sowell Gray Stepp and Laffitte.

8 PROSPECTIVE JUROR: I'm sorry, sir. I apologize
9 but I know Biff Sowell and I know --

10 THE COURT: You didn't grow up next door, did you?

11 (Laughter.)

12 PROSPECTIVE JUROR: I didn't grow up next door to
13 him and I know Becky Laffitte. I severed on board with her
14 before but that will not impact my ability to be a fair
15 juror.

16 THE COURT: What's your juror number again?

17 PROSPECTIVE JUROR: 278.

18 THE COURT: 278. Thank you, sir. So and the
19 question is, the fact that you might know some of the
20 lawyers involved this case, would that in anyway effect your
21 ability to be a fair juror, if so would you please stand.

22 (There was on response.)

23 THE COURT: All right. I have a few more
24 questions, members of the jury, we'll get on with selecting
25 a jury.

1 Probably I covered number one, is any member of
2 the jury panel, Reece Williams or anyone affiliated with the
3 law firm of Callison Tighe & Robinson, if so --

4 Any member of the jury panel, acquainted with
5 Robert Jones, Robert Kessler, Justin Stricklen? I think
6 I've covered that.

7 Does any member of the jury panel, have a
8 relationship with Southern first Bank? Anybody bank with
9 Southern First Bank, if so please. Do you know anybody that
10 works there, please stand.

11 (There was no response.)

12 THE COURT: All right. I think I covered
13 everything y'all asked. Anything further, Mr. Williams?

14 MR. WILLIAMS: Nothing, Your Honor.

15 THE COURT: Mr. Sowell, from you?

16 MR. SOWELL: No thank, Your Honor.

17 THE COURT: All right. Very well, gentleman, the
18 strikes will be four and four with the plaintiff going
19 first. Please strike the number to the left of the name.

20 Mr. Williams, you may proceed.

21 MR. WILLIAMS: Plaintiff strikes number 11.

22 THE CLERK: Plaintiff strikes 11.

23 MR. SOWELL: Defendant strikes number 14.

24 THE CLERK: Defendant strikes 14.

25 MR. WILLIAMS: Plaintiff strikes 18.

1 THE CLERK: Plaintiff strikes 18.
2 MR. SOWELL: Defendant strikes number 17.
3 THE COURT: Seventeen?
4 MR. SOWELL: Yes, sir.
5 THE CLERK: Defendant strikes 17.
6 MR. WILLIAMS: Plaintiff strikes number 20.
7 THE CLERK: Plaintiff strikes 20.
8 MR. SOWELL: Defendant strikes number two.
9 THE CLERK: Defendant strikes two.
10 MR. WILLIAMS: Plaintiff strikes number five.
11 THE CLERK: Plaintiff strikes five.
12 MR. SOWELL: And defendant strikes number eight.
13 THE CLERK: Defendant strikes number eight.
14 THE COURT: All right. Gentleman, select the
15 alternate. The alternate will come from jurors 21 through
16 23.
17 Mr. Will limbs.
18 MR. WILLIAMS: I'm sorry, sir, number 30?
19 THE COURT: 21 through 23.
20 MR. WILLIAMS: 21 through 23. I beg your pardon,
21 sir.
22 THE COURT: Yes, sir.
23 THE PLAINTIFF: We strike number 24.
24 THE COURT: 21 through 23. I know you're from
25 Lancaster, so.

1 (Laughter.)

2 MR. WILLIAMS: That's exactly the problem.

3 THE COURT: All right.

4 MR. WILLIAMS: Number 22, sir.

5 THE COURT: 22, all right.

6 THE CLERK: Plaintiff strikes 22.

7 MR. SOWELL: The defendants, Your Honor, strike

8 21.

9 THE COURT: 21, all right.

10 THE CLERK: The defendant strikes 21. Gentleman,

11 please allow me to review your strikes. For the plaintiff I

12 have 11, 18, 20, five and 22.

13 MR. WILLIAMS: Yes, ma'am.

14 THE CLERK: Thank you.

15 For the defendant I have 14, 17, two, eight and

16 21.

17 MR. SOWELL: That is correct. Thank you.

18 THE CLERK: Thank you.

19 Ready?

20 THE COURT: Yeah.

21 THE CLERK: Ladies and gentlemen of the call, when

22 I call your name please come up and have a seat in the jury

23 box. Bring your -- all of your belongs with you. Number

24 12, Barba Barlow (white female), number 178 Kelley McDonald

25 (white male), 144 Terry Johnson (white male), number 203

1 Dennis OConor (white male), number 199 Peggy Nahrwold (white
2 female), number 92 Elizabeth Gossett (white female), number
3 32 Nancy Brown (white female), number 175 Sabrina Martin
4 (white female), number 204 Austin Oelhafen (white male),
5 number 155 Dorcas Land (black female), number 311 Roger
6 Lampkin (white male), number 82 Gary Fowler (white male),
7 number 118 Mindy Hope (white female).

8 THE COURT: Any matters that need to be taken up
9 at this time in connection with the selection of this jury?

10 MR. WILLIAMS: Not from the plaintiff, Your Honor.

11 THE COURT: Mr. Sowell?

12 MR. SOWELL: None from the defendant.

13 THE COURT: Thank you both.

14 Now, to the remaining members of this panel, I
15 take the opportunity to thank each and every one of you for
16 participating in this patriotic process. A government of
17 the people, by the people and for the people cannot exist
18 without the people. That means the participation of each
19 and every one of you from Richland County. So I thank you
20 behalf of everybody involved here, the lawyers, the
21 litigants and everybody else. I wish and hope you have a
22 pleasant rest of the week. You're free to go back
23 downstairs to the jury assembly room to await further
24 instructions. Good luck to each and every one of you.

25 (The remaining members of the

1 jury panel retires from the
2 courtroom.)

3 THE COURT: Y'all look a little bit better now
4 that you know what's going to happen.

5 Ladies and gentlemen, this shouldn't be a very
6 long trial. We will not start it today. I plan to start it
7 tomorrow morning at 10 o'clock.

8 What I'm going to do now is one or two preliminary
9 matters I need to take up with the attorneys involved. I'm
10 going to ask the bailiffs to show you to the jury room that
11 you will use throughout the course of this trial. I'm going
12 to ask now and you will here me repeat this through the
13 course of this trial, please don't talk about this case in
14 anyway shape or from the time to do so will be at the very
15 end. Once you've heard all of the evidence. The evidence
16 from the plaintiff's side, the defense's side, the arguments
17 from the lawyers and the law that applies to this case as I
18 tell it to you. So until the very end you shouldn't -- you
19 should have an open mind and don't discuss it in anyway
20 shape or form. It will be unfair for either party for you
21 to do so. But for right now go to the jury room. Relax for
22 a few moments. This is the room you will use during the
23 course of this trial. And when you come back tomorrow
24 morning, and I will bring you back out briefly, when you
25 come back tomorrow morning don't come through the courtroom.

1 They will show you how to navigate the hallways and get back
2 to your jury room. So please go to the jury room for a few
3 moments and just don't talk about this case. The time to do
4 so will be at the very end. Thank you all so very much.

5 (The jury retires from the
6 courtroom.)

7 THE COURT: And, gentleman, always without saying,
8 any exceptions or additions if I don't say it for the record
9 I always mean that after any comments I make.

10 (There was no response.)

11 What I would like to do while it's on my mind,
12 tomorrow morning when your witnesses get here, the
13 plaintiff, let's reintroduce everybody to the jury make sure
14 nobody knows anyone. That's out of an abundance of caution.
15 I won't swear them until after that point.

16 Now, are there any matters we need to take up? I
17 think y'all provided the -- I would say the exhibit book.
18 Have y'all all agreed on those exhibits?

19 They should have already been marked, Crystal, I
20 think.

21 COURT REPORTER: Okay.

22 THE COURT: Do y'all just want to go ahead and
23 mark them now?

24 MR. SOWELL: I've got them marked, Your Honor.

25 THE COURT: Have you seen them, Mr. Williams?

1 MR. WILLIAMS: Yes, Your Honor.

2 THE COURT: Any objection to them?

3 MR. WILLIAMS: No. No objection.

4 THE COURT: All right. Well, let's just mark the
5 entire thing. And if there's any problems we'll take them
6 up as we come to them. And it's 1 through what?

7 MR. LYSELL: 29. We're going to make you an
8 exhibit book.

9 THE COURT: All right. Anything further y'all can
10 think about? Ten o'clock in the morning. Like I said, I
11 got a couple of things but by ten we can start then.

12 All right. Anything further?

13 MR. SOWELL: No, Your Honor.

14 THE COURT: All right. Well, I'm going to bring
15 the jury back out and send them home. See if they've gone
16 to the bathroom or whatever.

17 (Defendant's Exhibits 1 through
18 25 into evidence.)

19 (The jury returned to the
20 courtroom at 12:45 p.m.)

21 THE BAILIFF: The jury's all present, Your Honor.

22 THE COURT: Thank you, ma'am.

23 Welcome back. I just want to thank you on behalf
24 ha everybody involved. I'm going to send you home now. You
25 need to be back at 10 o'clock in the morning and once again

1 don't talk about this case. It should be a fairly short
2 case as cases go but we'll see how it unfolds. I thank you
3 once again on behalf of everybody involved. Don't talk
4 about the case. Be back in the jury room tomorrow morning
5 at 10 o'clock and hopefully we'll finish most things by
6 tomorrow afternoon and probably conclude this case on
7 Wednesday morning the way look it's looking right now.
8 Maybe, a little bit longer or shorter but somewhere in that
9 range.

10 So, typically we start -- we start at about 9:30
11 but we're going to start at ten in the morning and we'll go
12 to about 5:30, maybe, something like. If you have some
13 issues with children or daycare or something please let me
14 know and we can accommodate you in some fashion or form. So
15 I hope you have a pleasant and restful evening. Be back
16 tomorrow morning at ten a.m. We'll see you all then. Thank
17 you so much, ladies and gentlemen.

18 (The jury retires from the
19 courtroom at 12:46 p.m.)

20 THE COURT: Well, if there's nothing further.
21 Y'all have a good evening and I'll see y'all at ten o'clock
22 in the morning. Thank you.

23 (The proceedings were concluded
24 for December 10, 2012.)

25 (The following proceedings were

1 held on December 11, 2012.)

2 THE COURT: Ready?

3 MR. WILLIAMS: Judge, Mr. Lysell is complying with
4 the Rule 403 trial experience. That's why he's here.

5 THE COURT: Beg your pardon?

6 MR. LYSELL: I am -- I'm trying -- I'm moving for
7 a 403 credit for trial experience.

8 THE COURT: Yes, sir.

9 MR. LYSELL: So that's my purpose for being here
10 today.

11 THE COURT: I guess that's a lawful purpose.

12 All right. Okay. That's fine.

13 MR. LYSELL: All right.

14 THE COURT: Bring the jury in.

15 (The jury returned to the
16 courtroom at 10:06 a.m.)

17 BAILIFF: All jurors seated, Your Honor.

18 THE COURT: Thank you, ma'am.

19 Good morning, and welcome back, Mr. Foreman and
20 members of the jury.

21 You may swear them.

22 THE CLERK: Mr. Foreman, ladies and gentlemen of
23 the jury, would you please stand and would you raise your
24 right hands to be sworn..

25 (Jury was duly sworn.)

1 THE CLERK: Thank you.

2 THE COURT: Now, Mr. Foreman, members of the jury
3 before the case begins, I would like to tell you a little
4 bit about how matters will proceed.

5 The first thing that will happen in this case is
6 that the attorney for the Plaintiff -- and the Plaintiff is
7 Robert S. Jones, he brought this lawsuit. Mr. Reece
8 Williams, who represents the Plaintiff will make what is
9 known as a opening statement, which will be followed by a
10 similar statement, I assume, by Mr. Sowell on behalf of
11 Builders Investment Group, Brian Boone and Arden Home
12 Builders.

13 Now, members of the jury, these opening statements
14 are not arguments. The arguments will come at the
15 conclusion of this case. The purpose of opening statements
16 is for each party to outline his or her claims and the
17 evidence which they intend to present in support of these
18 claims.

19 Following the opening statements, each side will
20 present its evidence once again with the Plaintiff going
21 first.

22 Now, members of the jury, evidence may take many
23 forms. It may be testimonial. People will get on the
24 witness stand and swear to what they recall or documents,
25 photographs or other similar pieces of evidence. You should

1 pay close attention to all of the evidence which is
2 presented by each party.

3 You, the jury, are the sole finders of facts in
4 this case and no one else will be permitted to weigh the
5 evidence and to render a verdict based upon the evidence.

6 Now, after all of the evidence has been presented,
7 the attorneys will make their closing arguments. Now,
8 unlike the opening statements, these final remarks will be
9 true arguments, that is, each side will emphasize certain
10 portions of the evidence and try to persuade you to agree
11 with their version of the facts.

12 Now, after the arguments are finished, I will
13 explain the law to you that applies to this case. You will
14 then retire to the jury room, consider the facts and the law
15 and render a verdict in favor of one side or the other.

16 Ladies and gentlemen, although I'm the only one
17 who can tell you what the law is in this case, you are the
18 only ones who can determine what the facts are.

19 Now, I don't have the right to indicate to you how
20 I may feel about the testimony and the evidence presented.
21 And throughout this trial my intentions are to be fair and
22 impartial toward both of the parties involved.

23 From time-to-time, one side or the other will
24 object to some bit of testimony or evidence the other side
25 is seeking to introduce. You know, you can imagine like in

1 any structured activity, like a courtroom or a business,
2 sports, there are certain rules that everyone must obey in
3 the presentation of evidence. These rules have a definite
4 purpose. They ensure that the information you receive is
5 the most trustworthy and reliable and favorable.

6 An objection is the procedure we use for one of
7 the parties to bring a possible violation of the rules of
8 presenting evidence to my attention. And for this reason,
9 you should not hold an objection against either side or
10 either party, either lawyer nor you should conclude how I
11 rule on an objection that I favor one side or the other.

12 Now, members of the jury, my interest in this case
13 is that I have no interest in this case except to try to
14 ensure that both sides receive a fair trial, which is the
15 exact same interest that you all have, to be fair and
16 impartial jurors.

17 From time-to-time, it may be necessary for me to
18 invite Mr. Williams and Mr. Sowell up and we may engage in
19 some whispering up here at the bench. I guess you all know
20 they call those sidebars now. It's not an effort to hide
21 anything from you, but to ensure that what you hear is what
22 you should hear under the rules. Sometimes it may be
23 necessary for me to send you back into the jury room where I
24 will have to entertain more lengthy arguments on law. The
25 only way I can hear legal arguments is in your absence.

1 Either I bring the lawyers up here (indicating) not within
2 your purview or I will have to send you to the jury room.
3 Take no special note if I do that a couple of times. It's
4 likely to happen during the course of this trial. And once
5 again, don't hold an objection against anyone. If I have to
6 send you out, it's not that we're trying to hide anything
7 from you, but to make sure under the rules you hear what you
8 should hear.

9 Now, I would ask that you pay close attention to
10 the evidence presented, the arguments of the lawyers. I
11 would ask that you not take notes. I don't think you will
12 need to. It's sort of been a time-honored tradition in this
13 state that jurors not take notes. I don't think it will be
14 necessary in this case. The reason for that is that if you
15 were to write down a mistake or an error, it might be more
16 detrimental rather than helpful to you during the course of
17 your deliberation.

18 The time-honored system is for you to listen
19 collectively and individually and if you do that, I think
20 you will be able to render a fair and impartial verdict on
21 behalf of one side or the other.

22 So with that in mind, I invite your keen attention
23 to the opening statements from the lawyers. We'll first
24 hear from Mr. William on behalf of the Plaintiff, followed
25 by Mr. Sowell on behalf of the Defendants.

1 Mr. Williams.

2 MR. WILLIAMS: May it please the Court?

3 THE COURT: Yes, sir.

4 MR. WILLIAMS: Ladies and gentlemen of the jury,
5 my name is Reece Williams. I think I was introduced to you
6 yesterday.

7 My client is Bob Jones (indicating).

8 Bob, would you stand?

9 He's seated right here at the counsel table with
10 me.

11 Another witness that I'll have is Mr. Robert
12 Kessler.

13 Robert, please stand. Thank you.

14 Those will be my two witnesses in this case.

15 Seated at the counsel table with me is Brian
16 Lysell. He's a brand new lawyer. He just got out of law
17 school. And he is required by the rules of the supreme
18 court to attend certain trials before he can be fully
19 prepared to practice law. So he's here to observe and
20 comply with that rule. He's also working in my office. I'm
21 glad to have him here.

22 This case is a breach of contract case and I think
23 it's fairly straight forward. The principle exhibit in this
24 case is Exhibit No. 1, which I'm holding here in my hand,
25 which is the operating agreement of Arden Home Builders,

1 Inc. Arden Home Builders Inc. is the name of the enterprise
2 that forms the basis and the fact for the claim -- for the
3 claims in this case.

4 An operating agreement, in case you're not
5 entirely familiar with it, and I'm sure many of you are, is
6 the document containing the rules and regulations, the
7 standards whereby an enterprise like this is conducted. The
8 operating agreement is provided for by statute for a limited
9 liability company. Not a corporation. Not a partnership,
10 but a limited liability company, which there are a number of
11 forms whereby one can do business in South Carolina and
12 other places. So when a limited liability company is
13 formed, there are members, not shareholders. Although, they
14 own a percentage interest just as a shareholder would, but
15 they are categorized as members instead of shareholders.

16 So in this instance, the members of this operating
17 -- of this LLC and provided for in this operating agreement
18 were Robert S. Jones, Robert Kessler, Carl Buck, Brian David
19 Boone, who's a party in this lawsuit, and Builders
20 Investment Group, also, a party in this lawsuit. So really
21 there are two members of this LLC which are parties to this
22 lawsuit here in the courtroom and you will hear from their
23 lawyer in just a minute.

24 So once an operating agreement is entered into,
25 then it's expected that everybody would be bound by the

1 terms and conditions of the operating agreement.

2 Now, you will, of course, have a copy of this
3 later on. It's already been agreed to be admitted into
4 evidence. And as I said, this will be your Exhibit No. 1.
5 And you will be free to read through it and decide what the
6 contested provisions in this might mean.

7 Now, let me get to that point right now, because I
8 believe that it will be pretty clear from the evidence
9 that's presented that there's one main provision in this
10 agreement, which is the focus of this lawsuit. And I have
11 made a copy of it and had it enlarged so that you can see it
12 right now.

13 Now, this is paragraph 2.3 of the operating
14 agreement. And I've just made a copy of it and had it
15 enlarged. That is guarantee of -- excuse me, let me get a
16 little drink here. Of course, you can read. You don't need
17 somebody to read it to you. Can everybody see this? But
18 the main point of this that is relevant to the case that I
19 present in this case -- in this trial, is that each of the
20 Class A members, those are the ones that I just read to you.
21 There's Class A and Class B. Each of the Class A members
22 shall in its individual capacity jointly and severally
23 guarantee any loan to the company. We think that's what is
24 required. That what we're going to present to you. Well,
25 that's simple. It just says that, a Class A member required

1 guarantee any loans to the company.

2 Now, the evidence will show that there were
3 several loans to the company, to Arden Home Builders. And
4 the evidence will show that there was a loan to the company
5 on September 25th of 2007 of \$498,000. That note will be in
6 evidence and you'll receive it, it's already been agreed
7 upon. The evidence will further show that on September
8 24th, 2008, the original loan, \$498,000, was not paid, but
9 it was renewed and that will be in evidence. Now, those
10 loans were guaranteed by Mr. Jones. They were not
11 guaranteed by the Defendants in this case. And that's a big
12 issue in the case is whether or not they should have been or
13 whether or not in your opinion, they should be required to
14 guarantee those.

15 Now, ultimately, in 2011, Mr. Jones, who had
16 guaranteed the loan, paid it. He borrowed most of the money
17 to pay it off, but he also had some personal assets, which
18 he liquidated and paid it in full.

19 So as a result of that, Mr. Jones wound up with an
20 obligation to this bank, which, candidly, he was not able to
21 pay. The bank sued him for the balance that was due on that
22 loan and there is now a judgment against him for the amount
23 that the bank is owed. So we're contending that \$498,000 is
24 to be paid according to the interest of the members of this
25 LLC, that's what the agreement provides for. Not that one

1 person to pay everything, even though the agreement does say
2 jointly and severally, though. So that's the amount of
3 money that they were taking about that Mr. Jones has either
4 paid or has a judgment against him for.

5 The questions in this case and, in summary, are
6 whether or not this operating agreement requires that
7 Mr. Boone guaranteed -- it did require them to guarantee the
8 loan to Southern First Bank, whether or not Mr. Jones is
9 entitled to contributions from BIG, Builders Investment
10 Group, and Mr. Boone for their share, whether or not Mr.
11 Boone and BIG breached the terms of the operating agreement
12 by failing to execute personal guarantees. All of these
13 things are mixed up into one. And whether or not they have
14 breached their statutory duty. And the Judge will charge
15 you at the end of the case about this, that the law requires
16 that all of these members deal with each other in good faith
17 and fair dealing. So I would at the end of the case think
18 that that's the standard by which it ought to be decided.

19 And, folks, I've been, obviously, practicing law a
20 long time. I wish I didn't look it, but it's been a long
21 time and I do enjoy what I do. I want you to know that I
22 consider this to be a very serious case, but from
23 time-to-time, you're going to notice that I'm enjoying
24 myself. It has nothing whatsoever to do with my view of the
25 facts. It's just that I can't help it. I do enjoy it. So

1 I would appreciate your close attention and we're going to
2 be very brief with our case and we might have something in
3 reply. So I thank you very much for your kind attention.

4 THE COURT: All right, Mr. Sowell.

5 MR. SOWELL: May it please the Court?

6 THE COURT: Yes, sir.

7 MR. SOWELL: Good morning. I'm going to give you
8 a few preliminaries just to sort of get us all acquainted
9 because we're going to be here together a couple of days.

10 My clients are, essentially, Kathy Boozer Boone.

11 And if you stand up, Kathy.

12 Who was the managing member of Builders Investment
13 Group, and Brian Boone, her husband, who was also one of the
14 Class A members of Arden Home Builders. And behind them is
15 Kathy's father, Dale Boozer, who participated in Builders
16 Investment Group, also, as an investor.

17 With me is my associate, David Dick, and our legal
18 assistant, Ms. Karen Anders.

19 So those are most of the players on our side. We
20 may call another witness, but those will be our primary
21 witnesses.

22 Now, Mr. Williams is partially correct about what
23 the evidence will show in the case. It will show some of
24 the things he said it will show. It will not show some of
25 the things he said it will show. It will also show some

1 other things. For instance, with respect to paragraph 2.3,
2 there is a reference in there that Mr. Williams relied on
3 that these as Class A members shall in its individual
4 capacity jointly and severally guarantee any loan on the
5 company. What Mr. Williams left out that is also in
6 paragraph 2.3 is the phrase for so long as any guarantee of
7 such loan is required by the lender.

8 Now, this loan was originally made in two pieces
9 in 2007. It was made in January of 2007 and April of 2007
10 to Holt Family Homes. Now, Holt Family Homes had been
11 started in 2005 by Mr. Jones, Mr. Kessler and a gentleman
12 named Ed Buck, who lives in Greenville. Well, at the time,
13 they were the Class A members. Builders Investment Group
14 was a Class B member, which is, essentially, a passive
15 member as were some other employees, Boozer Lumber Company.
16 The only Class A members when Holt Family Homes was started
17 were Mr. Jones, the Plaintiff, Mr. Kessler, who sits on the
18 front row there, and Mr. Carl Edward Buck, who lives in
19 Greenville.

20 Now, at the time, the loan in question, which it
21 eventually become the \$498,000 that Mr. Williams referred to
22 earlier. It was made in January of 2007 and in April of
23 2007. Now, that was before Builders Investment Group,
24 represented by Kathy Boone, and before Brian Boone, her
25 husband, became Class A members of Arden Home Builders. So

1 keep in mind that this loan was originally made to Holt
2 Family Homes, the Class A members of whom were Mr. Jones,
3 Mr. Kessler and Mr. Buck. Therefore, the only people who
4 guaranteed those loans were Mr. Jones, Mr. Kessler and Mr.
5 Buck. They were the guarantors of the loan. And remember
6 as you go through the evidence and testimony that paragraph
7 2.3 says that each of the Class A members guarantee these
8 loans for so long as you can guarantee if such loan is
9 required by the lender.

10 Now, we know, importantly, and the evidence will
11 show, that neither Builders Investment Group nor Brian Boone
12 was required to guarantee the Southern First loans when they
13 were made in January and April of 2007.

14 Now, at some point after that, in approximately
15 July, I think it was, actually, July 31, 2007, Builders
16 Investment Group and Brian Boone invested together \$750,000
17 to become Class A members of Arden Home Builders. It was
18 \$625,000 by Builders Investment Group and it was \$125,000 by
19 Brian Boone.

20 Now, importantly, you will see when you read the
21 operating agreement that it has more provisions than just
22 paragraph 2.3. And I'm going to ask you to pay attention to
23 the other provisions of this operating agreement, which as
24 Mr. Williams said, it is, essentially, a contract between
25 members of a limited liability company. It's the agreement,

1 just like a shareholder's agreement, essentially, but this
2 is a limited liability company instead of a corporation.

3 The evidence will show -- because this will be
4 in -- Mr. Williams referred to it as Exhibit 1. It is a
5 primary exhibit. It think it's, actually, Exhibit 6 in the
6 evidence, but it is the operating agreement. This is
7 paragraph 4.2, which I apologize, it's not quite as
8 discernable as the first one.

9 Paragraph 4.2 relates to interim distributions as
10 a member. The evidence will show that in paragraph 2 --
11 4.2, it states that except as otherwise provided in sections
12 4.1 or 10.2, the managers shall distribute the net cash flow
13 at such times as the manager shall determine in the
14 following order and priority: First, the repay of
15 250,000-dollar loan to Robert Jones dated July of 2007, plus
16 all accrued interest thereon. But, most importantly,
17 second, to repay 500,000-dollar -- a 500,000-dollar loan --
18 actually, it says loans because it was two loans and it was
19 really \$498,000, so that's a round number. Second, to repay
20 a 500,000-dollar loan to Southern First Bank, which was
21 guaranteed by Jones, Kessler and Buck, plus all accrued
22 interest thereon.

23 Now, what's important about that is when the
24 operating agreement was signed, it was as clear as a bell
25 that the Southern First loan would be guaranteed by Robert

1 Jones, the Plaintiff, Robert Kessler, who sits on the front
2 row, and Carl Edward Buck, who now lives in Greenville and
3 is no longer a member of the limited liability company.

4 Now, in contrast, there were other loans that were
5 made to Arden Home Builders that were personally guaranteed
6 by Builders Investment Group and Brian Boone. There was a
7 loan from Bank of America that they personally guaranteed.
8 There was a loan from Carolina First Bank that they
9 personally guaranteed. And there was a loan from Wachovia
10 Bank that they personally guaranteed. But, importantly, and
11 it stands out like a red ticket, they never personally
12 guaranteed the Southern First loan. And because it was
13 personally guaranteed by Mr. Jones and Mr. Kessler and Mr.
14 Buck, it was negotiated between the parties that they were
15 going to get priority of repayment of that loan anytime
16 there was a distribution -- before there was any
17 distributions made to Builders Investment Group or to Brian
18 Boone, they were going to get a priority distribution to pay
19 off that loan, which it says expressly in paragraph 4.2 is
20 guaranteed by Jones, Kessler and Buck. Now, if it were to
21 be guaranteed by Builders Investment Group or Brian Boone,
22 it would have been easy to write that in paragraph 4.2.

23 This is a third provision of this operating
24 agreement that we think was important. All right. This is
25 paragraph 6.6, also, in the operating agreement, no member

1 shall be liable for the debts or any other obligations or
2 liabilities of the company whether arising in contracts or
3 otherwise unless a member guarantees any debt or obligation
4 that's required under article 2.3. We never guaranteed the
5 loan for Southern First Bank. My clients guaranteed loans
6 from Bank of America, Carolina First Bank, Wachovia Bank,
7 but as is clear from paragraph 4.2, which is over here now
8 (indicating), they never guaranteed a loan that was made by
9 Southern First Bank.

10 Now, one other point with respect to paragraph
11 2.3, it says right here (indicating), if you start reading
12 right here (indicating), that any Class A member who pays
13 more than such Class A member's guarantee percentage of the
14 guaranteed loan to the lender shall be entitled to
15 contribution from the other Class A members. That's where
16 it ends right there (indicating). It says any Class A
17 member who pays more.

18 Now, the evidence will show that the only thing
19 that Mr. Jones has paid is about \$7,000 on the loan. He did
20 contribute some stock that he owned in a couple of
21 companies. It was liquidated by the bank and they reduced
22 the loan by about \$7,000. He then took out another loan, a
23 personal loan, but he never paid it. There's a judgment
24 against him now with respect to that loan because he's never
25 paid it.

1 Now, what paragraph 2.3 says is any Class A
2 member -- any Class A member who pays more than such Class A
3 member's guaranteed percentage of the guaranteed loan to the
4 lender shall be entitled to contribution. It's got to be
5 paid. And we know from looking at the Wachovia loan, the
6 Bank of America loan, the Carolina First loan that the
7 people who were guarantors on this loan, typically, they
8 will negotiate some sort of reduced payment when things go
9 bad. And remember, this all happened because of the real
10 estate bobble and the recession that started at about the
11 beginning of 2008. But they will negotiate some payment.
12 And in this case, there's no question what Mr. Jones
13 executed a note for about \$450,000 to Southern First Bank,
14 but he never paid it. In fact, they sued him because he
15 never paid it. He's still not paid it. They've got a
16 judgment against him, but he's never paid it.

17 Now, by the clear provisions of paragraph 2.3 that
18 we both rely upon, you must -- any Class A member who pays
19 more than his percentage. Well, Mr. Jones's percentage, you
20 will see this in the operating agreement because there is an
21 appendage to it that lays out the Class A members'
22 percentages. His percentage was about 25 percent, which is
23 about \$125,000. So pursuant to paragraph 2.3, the only way
24 Mr. Jones is entitled to -- even if he could prove that we
25 were supposed to guarantee the Southern First loan, if he

1 got past that hurdle, the only way he would be entitled to a
2 recovery is if he proves that he's paid more than his
3 percentage, which I say is in round numbers is about
4 \$125,000. He can't prove that because he's not paid that.

5 As a result of that, we think the evidence will
6 show that we've operated in extremely good faith. That if
7 there's any bad faith, it would be in the bringing of this
8 lawsuit against my client. And that you will understand and
9 believe at the end of the day, when you read all of the
10 provisions of the operating agreement 2.3, 4.2, which gives
11 a priority of payment with respect to the loan guaranteed by
12 Jones, Kessler and Buck, and 6.6 related to liability to
13 members and indemnification that BIG and Boone don't have
14 any responsibility under the operating agreement.

15 Now, keep in mind -- excuse me, if you would just
16 a second. This is the last little bit and I'll be through,
17 but keep in mind that the evidence will show that this loan
18 was originally made to Holt Family Homes, something that
19 Builders Investment Group and Brian Boone had nothing to do
20 with as Class A members. That as Mr. Jones, Mr. Kessler and
21 Mr. Buck. So it was made in January and April of '07. It
22 was renewed in September of '07. After this operating
23 agreement was executed on July 31st of 2007, it was renewed
24 again and the only guarantors were Mr. Jones, Mr. Kessler
25 and Mr. Buck. It was renewed again in September of 2008

1 and, again, the only guarantors were Mr. Jones, and in this
2 case, Mr. Kessler, because they had let Mr. Buck out of the
3 limited liability company and released him from his personal
4 guarantee.

5 So the evidence will show that there were four
6 different loans. There was the loan from Southern First
7 that was made before this limited liability company
8 agreement was amended and restated in July of 2007. There
9 were loans to Wachovia -- from Wachovia, from Carolina First
10 and from Bank of America that Builders Investment Group and
11 Brian Boone guaranteed the other three. They never
12 guaranteed the Southern First loan. They were never
13 intended to guarantee the Southern First loan. And as shown
14 by paragraph 4.2(b), it's clear they were never intended to
15 guarantee the Southern First loan because there was a
16 priority payment to satisfy that loan backing Mr. Jones out
17 of the distributions.

18 We all appreciate your attention to the case. We
19 look forward to working with you. And we'll proceed with
20 the case. Thank you.

21 THE COURT: All right. Mr. Williams.

22 MR. WILLIAMS: May it please the Court?

23 We call Mr. Robert Jones.

24 THE COURT: Come around, Mr. Jones.

25 THEREUPON,

1 ROBERT SMITH JONES,
2 after having been duly sworn, testified as follows:

3 THE CLERK: Thank you. Have a seat in the witness
4 stand, please. State your name for the record.

5 THE WITNESS: Robert Smith Jones.

6 DIRECT EXAMINATION

7 BY MR. WILLIAMS:

8 Q Mr. Jones, you're the Plaintiff in this case, I
9 believe?

10 A Yes, sir.

11 Q And where do you reside, sir?

12 A Columbia, South Carolina.

13 Q What's your address, sir?

14 A 6009 Martha's Way Road in Columbia.

15 Q Mr. Jones, let me start off by handing you what has
16 been identified as the operating agreement of Arden
17 Home Builders.

18 MR. WILLIAMS: I believe we've all ready agreed,
19 Your Honor, that these exhibits are in evidence.

20 THE COURT: Yes, sir. I think there was a
21 stipulation yesterday.

22 MR. SOWELL: Yes, Your Honor.

23 MR. WILLIAMS: So this has been designated as
24 Exhibit 6, I believe. Is that correct?

25 THE COURT: Is that correct, Crystal?

1 COURT REPORTER: Yes.

2 THE COURT: Okay.

3 BY MR. WILLIAMS:

4 Q Regardless, what is that, sir?

5 A It's the restated and revised operating agreement of
6 Arden Home Builders, LLC, formally known as Holt Family
7 Homes, LLC.

8 Q And who were the members of that LLC -- are the -- or
9 were the members of that LLC?

10 A The members of the LLC are Builders Investment Group,
11 Robert S. Jones, Robert A. Kessler, Carl Edward Buck,
12 Outten Burnett, James Padgett, Keith Wayne Berry,
13 Thomas Keith Harris and Brian D. Boone.

14 Q And the Class A members?

15 A Class A members are, looks like Class A members Robert
16 S. Jones, Robert Kessler, Carl Edward Buck, Brian David
17 Boone and Builders Investment Group.

18 Q And what is the date that that operating agreement
19 became effective, sir?

20 A July 31st, 2007.

21 Q 2007. Would you tell the jury just, in a summary way,
22 what was the business purpose of Arden?

23 A Well, Arden was a home builder in Charlotte, North
24 Carolina. And its purpose was to provide sales in
25 homes and purchases from Boozer Lumber Company.

1 Q And tell us about Boozer Lumber Company.

2 A Boozer Lumber Company was a family owned lumber
3 business. At that time, I was the CEO of that
4 business. And we were trying to penetrate the
5 Charlotte market and we were having a tough time. And
6 we decided that it would make some real sense to
7 vertically integrate. And we had an opportunity to buy
8 into a building business and that's what we did.

9 Q What was --

10 A At --

11 Q Excuse me, go ahead.

12 A At this particular time, the reason that Brian Boone
13 and Kathy Boozer Boone, his wife, and another member of
14 the Boozer family, Robert Boozer, joined the company to
15 take it over at -- so that they had their own business.
16 There was some issue between the family and they were
17 attempting to get another business started for these
18 family members up in Charlotte that was close enough to
19 Columbia that it would be a nice easy commute and to --
20 to really make the family business better. That was --
21 the real purpose for it was to support Boozer Lumber
22 Company and Dale Boozer's vision of the future for his
23 company and his family.

24 Q Dale Boozer is here in the courtroom, who was
25 identified earlier?

- 1 A He is.
- 2 Q What was his role in Boozer Lumber Company?
- 3 A At that time?
- 4 Q Yes, sir.
- 5 A He was chairman of the board.
- 6 Q Chairman of the board. And you were the chief
- 7 operating officer?
- 8 A I was.
- 9 Q Now, the operating agreement says that Arden, formerly
- 10 known as Holt Family Homes?
- 11 A Holt Family Homes, yes.
- 12 Q Tell jury about that, sir. How did you change it from
- 13 Holt to Arden?
- 14 A Well, we had -- Holt -- Ray Holt was the guy who
- 15 originally started the business or had the business,
- 16 made the business proposition to us to buy into. He
- 17 became a partner of ours when we established the
- 18 business back in 2005. And, unfortunately, we found
- 19 out pretty quickly that he was a very good salesman,
- 20 but he wasn't very effective at running a business.
- 21 And we decided it was to our best financial advantage
- 22 to replace him.
- 23 At the time we decided to replace Holt, the three
- 24 Class A members at the time were Robert Kessler, myself
- 25 and Ed Buck. And this was in the summer of 2006, and

1 we had already started to feel the impending recession
2 that was about to happen in housing. We could feel it
3 was coming. And because I needed -- Robert, myself and
4 Ed really needed to concentrate our attentions on
5 Boozer Lumber Company to make it through the recession,
6 we decided it was to our best advantage to just go
7 ahead and liquidate the assets that we had in
8 Charlotte. And there were lots. We had lots and some
9 houses and some unfinished houses. So we decided it
10 was to our best advantage to just go ahead and finish
11 it out and finish out the houses and then sell the
12 lots. And I had contacts within the industry that
13 would have made it very easy for us to go ahead and
14 just liquidate the lots, sell it to another builder who
15 was established already. Because this company was only
16 about a year old.

17 And at that point in time when Robert Kessler and
18 I approached Dale Boozer and said, Look, Dale, sorry,
19 this doesn't look like it's going to work out. We need
20 to just go ahead and sell the assets of the company now
21 because we could pay off all bank debt, we can pay back
22 all the Class B members, of which he was a -- Builders
23 Investment Group was a Class B member and probably Ed,
24 Robert and I, Class A members, we would just lose our
25 original investment. But we thought at that point in

1 time that was probably the smartest move. And Dale
2 said, Oh, I don't want you do that. No, I want to be
3 in the home building business in Charlotte. I think
4 it's a good strategic move for the company and I want
5 Brian Boone and Kathy to move back from Orlando to the
6 area and take over this company.

7 And that was somewhere in the summer of 2006. And
8 we -- at that time, I was employed by Boozer Lumber
9 Company. Robert Kessler was Boozer Lumber Company's
10 chief financial officer and Ed Buck was in charge of
11 our strategic projects. So we were all employees that
12 our boss said, Hey, look, let's keep this thing going
13 and -- I want you to keep it going and I will make sure
14 that if you sustain any loss relative to keeping this
15 business going that I will pay you back out of the
16 assets of Boozer Lumber Company.

17 Q All right. So what became of Boozer Lumber Company?

18 A Boozer Lumber Company ended up closing in -- sometime
19 in 2008.

20 Q 2008?

21 A I believe that was it.

22 Q Did it go into bankruptcy?

23 A I don't believe so.

24 Q All right.

25 A I was gone at that point in time.

- 1 Q All right. So it just stopped doing business?
- 2 A You would have to ask them.
- 3 Q All right. So did Arden Home Builders acquire Holt
- 4 Family Homes? Was there some of merger? How did that
- 5 work?
- 6 A We just changed the name.
- 7 Q Just changed the name?
- 8 A It was a name change.
- 9 Q And Mr. Holt was no longer a member at some point?
- 10 A Yes, that is correct.
- 11 Q And so in the summer of 2000 -- what year was it that
- 12 Ms. Boone -- I mean, Mr. Boone and Kathy Boone became
- 13 involved?
- 14 A Well, they, actually, became involved on July 31st,
- 15 2007, from an official capacity.
- 16 Q Right.
- 17 A And we had started this process in the summer of 2006.
- 18 And that entire year that it took to get them on board
- 19 so that Dale could execute his plan, the economy just
- 20 got worse and worse. And in Charlotte, it turned
- 21 bleak.
- 22 Q Let me see if I can keep up with these exhibit numbers.
- 23 I show you the note of Arden Home Builders to Southern
- 24 First Bank of September 28, 2007. Looks like it's
- 25 Exhibit No. 8.

1 MR. WILLIAMS: But I'm not sure about these
2 exhibit numbers, Judge.

3 MR. SOWELL: I think they're marked properly.

4 BY MR. WILLIAMS:

5 Q I'm just going to refer to it as the note of
6 September 28th, 2007. Is that what it is?

7 A It's September 25th, 2007.

8 Q All right. It's my glasses. I can't see very well.
9 Tell us, what does -- how much was that note?

10 A 498,000.

11 Q And that was a note that was entered into after the
12 operating agreement?

13 A Well, it was a consolidation of the two notes that Mr.
14 Sowell had presented earlier into evidence.

15 Q Right.

16 A And whose amount combined came up to \$498,000.

17 Q But the operating agreement that we've referred to was
18 dated July 31st, 2007?

19 A That is correct.

20 Q And what's the date on that note again?

21 A This date is September 25th, 2007.

22 Q All right. So that note was entered into after the
23 operating agreement was signed?

24 A Yes.

25 Q All right. Now, who guaranteed that note, sir?

- 1 A This note was guaranteed by Robert Jones, Robert
2 Kessler, Carl Edward Buck.
- 3 Q All right. Was anybody else requested to guarantee
4 that note?
- 5 A Yes.
- 6 Q Who?
- 7 A Builders Investment Group and Brian D. Boone.
- 8 Q They did not guarantee it?
- 9 A They refused to guarantee it.
- 10 Q All right. Did they give you a reason why they
11 refused?
- 12 A They did not give me a reason. Robert Kessler had,
13 actually, handled that discussion and transaction.
- 14 Q All right. So he's here, we'll ask him.
- 15 A Yes.
- 16 Q All right, sir. Now, what was the -- you said that
17 note was a consolidation of two previous notes?
- 18 A Yes.
- 19 Q What was that loan -- what was the purpose of that
20 loan?
- 21 A Well, that was operating capital for Arden Homes that
22 we had to invest in the company to keep it going until
23 Kathy Boozer Boone and Brian Boone and Robert Boozer
24 were able to make their way to Charlotte to take the
25 company over. So we, in fact, kept the company going,

1 kept it alive so that they could take it over.

2 Q Now, that note was for one year; right?

3 A Yes, sir.

4 Q This is a note dated September 24th, 2008; is that

5 right?

6 A Yes, sir.

7 Q And that was for what purpose, sir?

8 A It was to renew this note (indicating):

9 Q So one year later, that note renewed the earlier note?

10 A That is correct.

11 Q And who guaranteed that note?

12 A Robert Jones and Robert Kessler.

13 Q So the two of you guaranteed that note and not Mr. Buck

14 at that point?

15 A That is correct.

16 Q And Mr. Buck, what is his status with the company now?

17 A Well, earlier that year, he had disassociated with the

18 LLC.

19 Q So he was no longer a member?

20 A He was no longer a member.

21 Q All right. Now, what's the due date of that loan?

22 A September 24th, 2009.

23 Q All right. I'm going to hand you a note that's dated

24 December 8th, 2011; correct? Is that the right date on

25 that?

- 1 A December 8th, 2009, yes.
- 2 Q Now, who's the debtor on that note? Who borrowed that
- 3 money?
- 4 A I did, Robert Jones.
- 5 Q You borrowed it personally?
- 6 A I borrowed it personally.
- 7 Q Why did you borrow that money?
- 8 A I borrowed that money to pay off this note
- 9 (indicating), the Arden debt to Southern First Bank.
- 10 Q And why did you do that, sir?
- 11 A Well, I signed a personal guarantee and I felt
- 12 compelled to do it. The bank had been very
- 13 accommodating to me over the years as a business
- 14 person, had loaned Boozer Lumber money when it was in
- 15 desperate need of it. The banker and I had a good
- 16 business relationship. He had done this, kept
- 17 extending these notes for us so that we had the
- 18 opportunity to try to figure out how to work our way
- 19 out of this nightmare that I found myself in, and I
- 20 just felt compelled to pay the note off. And at the
- 21 time that this note (indicating), the last note that
- 22 Arden had with Southern First, which matured on
- 23 September 24th, 2009, Ed Buck had refused to -- he was
- 24 already gone from the company, and so, he wouldn't
- 25 renew any guarantee to the bank, and so, I had to deal

- 1 with it. We were finally at the point where I had to
2 go in and sit down with the banker and say, Look,
3 we've -- this company is out of business. It doesn't
4 have any ability to pay you back. I promised to pay,
5 so I'm going to do what I said I was going to do. I
6 will give you whatever assets I have left because I got
7 drained in this whole process. And --
- 8 Q So, the amount that you borrowed in this note was how
9 much?
- 10 A \$449,226.33.
- 11 Q Is it 226 or 326?
- 12 A 326, excuse me.
- 13 Q Okay. So you borrowed \$449,326.33 at that point. How
14 did you pay the difference between that and the
15 498,000?
- 16 A Well, they were the assets that I had placed in the
17 security vault earlier. As soon as it became obvious
18 that we were going to be having an argument over this
19 amongst the LLC, I gave them every asset that I had
20 that he could liquidate.
- 21 Q All right.
- 22 A So that's the difference of the two.
- 23 Q So, as to the loan -- to the bank loan to Arden?
- 24 A Yes.
- 25 Q The debt that Arden owed to the bank?

- 1 A Yes.
- 2 Q Did you pay that?
- 3 A I did.
- 4 Q You paid it all?
- 5 A I paid that note off.
- 6 Q And you paid it by taking out another loan?
- 7 A I did.
- 8 Q And paying the difference between 498 and 449?
- 9 A I did.
- 10 Q Yourself personally?
- 11 A I did.
- 12 Q So the balance that was owed on your personal loan at
- 13 the point was 449?
- 14 A Correct.
- 15 Q Roughly, according to that?
- 16 A Yes.
- 17 Q Now, counsel in his opening statement, he said that you
- 18 have not paid that debt. The Arden debt, you did pay;
- 19 correct?
- 20 A I did pay the Arden debt.
- 21 MR. SOWELL: Your Honor, I'm going to object. I
- 22 think that's a question for the Court, really, whether it's
- 23 been paid or not. It's a legal question, so I object to
- 24 that.
- 25 THE COURT: Basis -- I mean, he said did he pay

1 off a debt or not. Right now, it's overruled.

2 MR. SOWELL: Well, he's saying he signed a
3 promissory note we say that he didn't pay.

4 THE COURT: You just ask on cross and we'll see
5 where it goes from there.

6 MR. SOWELL: Thank you.

7 THE COURT: Go ahead, Mr. Williams.

8 MR. WILLIAMS: Thank you, Your Honor.

9 BY MR. WILLIAMS:

10 Q With regard to that, sir, you said you didn't pay your
11 personal date, you didn't pay that back when it was
12 due; right?

13 A Well, it's still owe and durning -- it's still owing.

14 Q All right.

15 A And due.

16 Q Let me ask you this, did the bank sue you?

17 A They did.

18 Q Does the bank have a judgment against you?

19 A They do.

20 Q Is that a copy of the judgment?

21 A This is a copy of the judgment.

22 Q And how much is the amount of that judgment?

23 A 449,326.33.

24 Q All right.

25 MR. WILLIAMS: Judge, we offer this into evidence.

1 MR. SOWELL: No objection.

2 THE COURT: Without objection.

3 (WHEREUPON, Plaintiff's Exhibit

4 No. 1 was admitted into

5 evidence.)

6 BY MR. WILLIAMS:

7 Q Mr. Jones, have you called on Mr. Boone and BIG to pay
8 their share of this loan that's owed?

9 A Yes.

10 Q And what's the answer?

11 A The answer was by Mr. Boone that he would never pay a
12 nickel of the Arden debt to Southern First Bank unless
13 a judge made him.

14 Q All right. What was the reply from BIG?

15 A Well, at that point, I felt like he was probably
16 speaking on both of their behalf, but neither BIG nor
17 Brian Boone has ever offered to pay anything.

18 MR. WILLIAMS: Judge, I think that's all I have,
19 if you give me just --

20 THE COURT: All right.

21 Mr. Sowell, you can cross-examine after we give
22 the jury a break.

23 Please don't talk this case, ladies and gentlemen.

24 I give you an opportunity to refresh yourselves. Go to the
25 jury room and we'll bring you back momentarily. Thank you

1 all.

2 (The jury retires from the
3 courtroom at 11:00 a.m.)

4 THE COURT: All right. Any exceptions or
5 additions?

6 MR. SOWELL: No.

7 THE COURT: All right. Take a short break.
8 You may step down, just don't talk to your lawyer
9 about your testimony, Mr. Jones.

10 (Whereupon, a short recess was
11 held.)

12 THE COURT: Are we all ready?
13 You may bring the jury in.

14 (The jury returned to the
15 courtroom 11:08 a.m.)

16 BAILIFF: The jurors are all seated, Your Honor.

17 THE COURT: All right. Thank you, ma'am.

18 Welcome back, Mr. Foreman and members of the jury.

19 If y'all need anything, please don't hesitate to ask. We
20 will more than happy to accommodate you. I hope the heat is
21 going up a little bit. It was a little chilly.

22 With those remarks, I'm going to invite Mr. Sowell
23 to conduct his cross-examination of Mr. Jones.

24 MR. SOWELL: May it please the Court?

25 THE COURT: Yes, sir.

1 CROSS-EXAMINATION

2 BY MR. SOWELL:

3 Q Mr. Jones, I'm going to hand you Exhibit 2, which we've
4 put up here on the screen for the jury to take a look
5 at. Now, is that a copy of the original promissory
6 note that was made in the amount of \$300,000 by Holt
7 Family Homes, LLC, on January, looks like, 26th, 2007,
8 to what was then Greenville First Bank?

9 A It looks like it, yes.

10 Q And Greenville First Bank became Southern First Bank?

11 A Yes.

12 Q Now, is that the original note that comprises the
13 \$498,000 that we've been talking about so far today?

14 A Yes.

15 Q \$300,000 of the 498,000?

16 A Well, it was, actually, \$300,500.

17 Q I see. Okay. Good. Well, that's good.

18 Now, let's look down at the bottom -- the bottom
19 paragraph under the word original. Now, what was the
20 purpose of the loan?

21 A It says the purpose of the loan is to establish working
22 capital.

23 Q All right. Line of credit, is that right? LLC line of
24 credit?

25 (There was no response.)

- 1 Q It doesn't matter.
- 2 A Yeah.
- 3 Q Who are the signatures on that loan?
- 4 A Robert Jones, Robert Kessler, Carl Edward Buck.
- 5 Q All right. And who were the guarantors of that loan?
- 6 A The three of us.
- 7 Q All right. And nobody else?
- 8 A No.
- 9 Q Okay.
- 10 A We were the only Class A members of the company at that
- 11 time.
- 12 Q Okay. I'm going to ask you to look at Exhibit 3. And,
- 13 actually, there's three pages to Exhibit 3, so I'll
- 14 give you all three of them.
- 15 A Okay.
- 16 Q Now, can you identify Exhibit 3 of one of the
- 17 guarantees with respect to that loan?
- 18 A That's my guarantee, Robert Jones.
- 19 MR. SOWELL: Just go up to the top there so the
- 20 jury can see what it is. The part about which one
- 21 guarantees the 300,500-dollar loan.
- 22 BY MR. SOWELL:
- 23 Q So this is the guarantee for the loan and the
- 24 promissory note in the amount of \$300,500 made on
- 25 January 26th, 2007?

- 1 A Correct.
- 2 Q And you've, actually, got three guarantees there, one
- 3 by you, one by Mr. Kessler and one by Mr. Buck?
- 4 A I do.
- 5 MR. SOWELL: Just look at the signature line there
- 6 real quick, David, on the first one.
- 7 BY MR. SOWELL:
- 8 Q So that's your signature guaranteeing that first loan?
- 9 A No, sir.
- 10 Q Mr. Kessler's signature guaranteeing that first loan;
- 11 correct?
- 12 A Well, what I'm looking at or what you're showing?
- 13 Q What, you're looking at the one that's your guarantee?
- 14 A I am.
- 15 Q So it's got your signature?
- 16 A It does.
- 17 Q Then there are two more, one from Kessler and one from
- 18 Buck?
- 19 A (The witness nodded head.) That's mine that you just
- 20 put up there. That's not my social security number.
- 21 Q But that's your signature?
- 22 A That's my signature.
- 23 Q Okay. Thank you.
- 24 A Sure.
- 25

- 1 BY MR. SOWELL:
- 2 Q Now, I'm going to hand you what is marked as Exhibit 4.
- 3 Now, is Exhibit 4 the second loan that was made to Holt
- 4 Family Homes?
- 5 A It is.
- 6 Q On April, looks like, what, 26th, 2007?
- 7 A It's hard for me to read this, but I think so,
- 8 something like that.
- 9 Q And the loan amount is 199,000, what, \$250?
- 10 A Yes.
- 11 Q So that makes up the \$498,000 that was loaned to Holt
- 12 Family Homes?
- 13 A Yes.
- 14 Q All right. Now, who guaranteed that loan?
- 15 A Robert Jones, Robert Kessler, Carl Edward Buck.
- 16 Q All right. Did anybody else guarantee that loan?
- 17 A The only guarantors were the three Class A members of
- 18 Holt Family Homes at that time as required by the
- 19 operating agreement.
- 20 Q Okay. Now, we know, I think, from the opening
- 21 statements. I could show it to you if I need to.
- 22 Maybe we should. This -- and I think it's Exhibit 6,
- 23 actually, in the exhibits, but this is the revised and
- 24 restated operating agreement?
- 25 A It is.

- 1 Q And it was dated, I think, July the 31st, 2007?
- 2 A It was.
- 3 Q All right. I'm going to ask you to look at Exhibit 7.
- 4 Is Exhibit 7 a renewal of that loan amount, \$498,000,
- 5 by Southern First Bank now made to Arden Home Builders;
- 6 LLC?
- 7 A It is.
- 8 Q All right. The date on that September 25, 2007?
- 9 A September 25, 2007, yes.
- 10 Q All right. So that would have been, let's see, August,
- 11 September, about two months after the revised and
- 12 restated operating agreement was signed?
- 13 A Yes.
- 14 Q Okay. Who were the guarantors on that note?
- 15 A The guarantors on this particular piece of paper --
- 16 Q Yes.
- 17 A -- are Robert Jones, Robert Kessler and Carl Edward
- 18 Buck.
- 19 Q I show you Exhibit 9. All right. Now, Exhibit 9, is
- 20 that yet another renewal of that same loan for
- 21 \$498,000?
- 22 A It is.
- 23 Q And that renewal was on September 24th, 2009?
- 24 A Correct.
- 25 Q So far, we've got the original loans, two loans, the

1 500 and the one in January and April of 2007. We've
2 got the consolidation in September of 2007. We've got
3 the renewal in September of 2008, and we have this
4 renewal in September of 2009?

5 A No. This says -- this is date on this is
6 September 24th, 2008.

7 Q I'm sorry. Okay. My eyes are worse than Mr. Williams.
8 Okay. That's the last renewal of this note,
9 September 2008; correct?

10 A Yes.

11 Q So we've got the January the 8th of 2007, and we've got
12 the renewal in September of '07, and then the renewal
13 in September of '08?

14 A Yes.

15 Q Okay. By this time, this loan is being executed and
16 guaranteed only by yourself and Mr. Kessler; is that
17 correct?

18 A Yes.

19 Q And that is because you have released Mr. Carl Edward
20 Buck from his responsibility for guaranteeing this
21 loan?

22 A Well, he was no longer a member of the LLC.

23 Q Listen, I understand your explanation. I accept it.
24 But he was no longer a guarantor on this loan?

25 A He was not.

1 Q Because you had allowed him not to be a guarantor?

2 A That's correct.

3 Q And he had been --

4 A Well, actually, that's not correct. Let's step back.

5 He refused to sign it. The reason he refused to sign

6 it is because Brian Boone refused to sign on the

7 Southern note on September 25th, 2007, when he became

8 the managing member of the LLC. That's what this whole

9 issue is about. That's when --

10 Q You allowed him off the guarantee. You, actually, gave

11 him the release; did you not?

12 A I did.

13 Q All right. And you also voted and allowed him to be

14 disassociated on the LLC, despite the votes to the

15 contrary from Builders Investment Group and Brian

16 Boone?

17 A They agreed. They signed the resolution.

18 Q They voted against letting him disassociating from the

19 LLC; did they not?

20 THE COURT: Excuse me, this is how it works. This

21 is cross-examination. He's entitled to a yes or no

22 answer --

23 THE WITNESS: Sorry.

24 THE COURT: -- to the question, then you can

25 explain it if you need to.

1 THE WITNESS: Okay.

2 BY MR. SOWELL:

3 Q They voted against allowing him to disassociate from
4 the limited liability company?

5 A They did.

6 Q Thank you. I'm going to ask you to look at Exhibit 11.

7 It's not stapled, so just be careful. So what is
8 Exhibit 11?

9 A It's a commercial promissory note from Southern First
10 Bank to Robert S. Jones.

11 Q So this is the note you were talking about in your
12 direct examination in the amount of \$449,326.33, which
13 is, actually, on that chart behind those boards there;
14 correct?

15 A Yes, this is the note that I took out to pay off the
16 Arden debt.

17 Q Now, let's go back for a minute and look at the
18 operating agreement. You've got one here that
19 Mr. Williams gave you. It's, actually, Exhibit 6.
20 Now, something we've talked about to a great degree and
21 we will continue to talk about, I'm sure, as this case
22 goes along is paragraph 2.3. So if you'll take a look
23 at that paragraph 2.3. Now, do you see there where it
24 says each of the Class A members shall in its
25 individual capacity jointly and severally guarantee

- 1 loan to the company for so long as any guarantee of
2 such loan is required by the lender? Do you see that?
- 3 A I do.
- 4 Q All right. Now, it also says in the next sentence,
5 Notwithstanding any other provision of this agreement
6 or any provision of the guaranteed loan documents as
7 between the members, each Class A member shall be
8 responsible for paying such Class A member's
9 proportionate share of any guaranteed loan, the
10 guaranteed percentage. Do you see that?
- 11 A I do.
- 12 Q All right. And that was the agreement; was it not?
- 13 A Oh, yes.
- 14 Q If you would, look back at schedule 2.1 to this
15 agreement. It's the third from the last page. Do you
16 see that?
- 17 A Are you looking at page 36?
- 18 Q Yes.
- 19 A Yes.
- 20 Q I'm sorry. I had my thumb over the page number. So,
21 on Page 36 of Exhibit 6, which is in evidence. The
22 jury will see it when they go to the jury room. What
23 is your Class A percentage?
- 24 A 24.138 percent.
- 25 Q All right. And in this particular case, if everybody

1 guaranteed the 498,000-dollar loan, what would be your
2 24.136 percent?

3 A 24.138 percent of \$498,000?

4 Q Do you know what that is?

5 A No.

6 Q It's about \$125,000; is it not?

7 A Okay.

8 Q All right. Now, have you ever -- well, let me ask you
9 this first. You keep on looking at paragraph 2.3. If
10 you would, look at the sentence that starts -- it's
11 right there in the very middle, Any Class A member who
12 pays more?

13 A Yes.

14 Q All right.

15 MR. SOWELL: David, can you pull that out. It's
16 right in the middle here.

17 BY MR. SOWELL:

18 Q So it says any Class A member who pays more than such
19 Class A member's guaranteed percentage of the
20 guaranteed loan to the lender shall be entitled to
21 contribution from the other Class A members.

22 Now, you're seeking that contribution today;
23 correct?

24 A Yes.

25 Q All right. Now, other than the signing of the

1 promissory note and this confession of judgment that
2 you executed at the bank, have you ever paid the bank
3 the \$125,000?

4 A Not yet.

5 Q And paragraph 2.3 requires you to do that, does it not,
6 before you can seek contribution?

7 A I don't know whether it does or not. I think that's
8 what this case might be about.

9 Q You know, I took the liberty of calculating 24.138
10 percent of the \$498,000, and if the calculator was
11 operating right and the operator was operating it
12 properly, that number is \$120,207. Does that sound
13 correct to you?

14 A Yes.

15 Q And you've never paid Southern First Bank in terms of
16 stroking them a check or giving them any assets or
17 giving them any money \$120,207; have you?

18 A No, I paid them back \$498,000.

19 Q Well, that -- you signed a note for about \$450,000;
20 correct?

21 A That's correct.

22 Q And recently, I think, in November -- actually, it's
23 filed November 14, 2012 -- and we don't have this to
24 put up on the screen, but the jury will have it. This
25 is the existing confession of judgment that you

1 executed on the 8th day of November, 2012?

2 A It is.

3 Q If you would, look at paragraph 2 --

4 THE COURT: I'm sorry, Mr. Sowell, has this been
5 marked?

6 MR. SOWELL: I think it's Plaintiff's Exhibit 1,
7 Your Honor.

8 THE COURT: Okay.

9 MR. SOWELL: Here's a copy.

10 BY MR. SOWELL:

11 Q If you would, just read paragraph 2 to the jury.

12 A Whereas, Defendant has not made payment pursuant in
13 terms of the note and is in default pursuant to the
14 terms and conditions of the note.

15 Q And what it says is Defendant has not made payment
16 pursuant to the notes of the note; correct?

17 A Yes.

18 Q And that was 450,000-dollar note that we've been
19 referring to?

20 A Yes.

21 Q Now, if you would, publish to the jury the third
22 paragraph that start with whereas.

23 A Whereas, Plaintiff has exercised its right under the
24 note and has filed a suit against Defendant in the
25 above-captioned action for nonpayment pursuant to the

1 terms of the note and Plaintiff has declared the entire
2 indebtedness due and immediately payable.

3 Q So Southern First Bank, according to this confession of
4 judgment states -- and you do, too, you agree you have
5 not made payment pursuant to the terms of the note and
6 they sued you for nonpayment of the note?

7 A Correct.

8 Q And you've still not paid the note?

9 A Correct.

10 Q And that's Plaintiff's Exhibit 1. All right. I'm
11 going to ask you to look at Exhibit 20. You have a
12 copy there, Mr. Jones, of Exhibit 20?

13 A I do.

14 Q All right. And this is an e-mail that leads -- the
15 ending of it is an e-mail from you to Ed Buck with a
16 copy to Mr. Kessler?

17 A It is.

18 Q All right. And down below --

19 MR. SOWELL: If you would, David, just pull out
20 that first paragraph so that the jury can see what we're
21 talking about.

22 BY MR. SOWELL:

23 Q So Mr. Kessler had drafted a release to memorialize the
24 release of Ed Buck from his personal guarantee on the
25 Southern First loan; is that correct?

- 1 A It is.
- 2 Q All right. Well, let's look at Mr. Kessler's e-mail,
3 which is down below. Now, this is from Robert Kessler
4 to Bob Jones; is it not?
- 5 A Yes.
- 6 Q Attaching the mutual release?
- 7 A It is.
- 8 Q That releases Mr. Buck from his personal guarantee with
9 Arden Home Builders?
- 10 A It is.
- 11 Q Is that correct?
- 12 A It is, as it's read, yes.
- 13 Q But, eventually, that release was executed?
- 14 A It never was executed.
- 15 Q Well, how did he get off the loan?
- 16 A I asked Justin Strickland, the president of Southern
17 First, to release him.
- 18 Q All right. Okay. Well, let's look at the mutual
19 release, like you said, it was a draft. We don't have
20 an executed copy.
- 21 A Well, there is no written agreement.
- 22 Q Right, no executed copy?
- 23 A Correct.
- 24 Q Okay. I understand. All right. But that is -- that's
25 the mutual release. And the release there --

1 MR. SOWELL: If you would, David, just pull out.
2 the paragraph at the top of Page 2. It's the top of Page 2
3 of 3 -- actually, it's the third page, I'm sorry, of the
4 document.

5 BY MR. SOWELL:

6 Q The idea behind the release was to have Jones, Kessler
7 and Arden release Buck from his personal guarantee of
8 the promissory note between Arden and Southern First
9 Bank?

10 A It is. It is.

11 Q Okay. And if you look at the last page that has the
12 signatures on there.

13 MR. SOWELL: Let's pull up Page 3 of the drafted
14 release.

15 BY MR. SOWELL:

16 Q The people who were contemplating to execute the
17 release was Mr. Buck, yourself, Mr. Kessler and Arden
18 Home Builders by Mr. Kessler; is that correct?

19 A Yes, that's correct.

20 Q Okay. And this is the Southern First loan in the
21 amount of \$498,000 we've been talking about?

22 A It is.

23 Q All right. And there's no place -- there's no
24 signature line on there for either Brian Boone or
25 anybody on behalf of Builders Investment Group?

- 1 A Well, they never --
- 2 Q Well, let me ask you first. I don't care if you
3 explain.
- 4 A Okay.
- 5 Q But my question first is are there any signature blocks
6 for either Builders Investment Group or Brian Boone?
- 7 A No.
- 8 Q And we know they had voted against the disassociation
9 and we know that they were never asked as members of
10 the limited liability company having any say-so about
11 letting Mr. Buck off of this personal guarantee?
- 12 A No, they were not consulted.
- 13 Q All right. I'm going to ask you to look at Exhibit 15.
14 All right. Does Exhibit 15 start out -- it's an e-mail
15 from you to -- actually, to yourself at home, I think,
16 just to preserve it?
- 17 A Yes.
- 18 Q All right. And if you would, it is an e-mail from
19 Robert Kessler, dated March 18th, 2008, to you and,
20 also, to Ed Buck regarding an update?
- 21 A Well, let me read it then.
22 (pause)
- 23 A Okay. I've read it.
- 24 Q Now, if you look at that first paragraph, did
25 Mr. Kessler tell you in that first paragraph that Brian

- 1 Boone and BIG did not feel they were responsible for
2 the Southern First loan?
- 3 A That's what it says.
- 4 Q All right. All right. Let's look at Exhibit 16. I'm
5 going to hand you Exhibit 16. Now, is this an e-mail
6 in middle that -- I guess, we ought to start at the top
7 so the jury can see it. This e-mail starts, it's from
8 Mr. Kessler to you, I think, regards your promissory
9 note?
- 10 A Yes.
- 11 Q All right. But down in the middle, is there an e-mail
12 of July 1st, 2008, from you to Brian Boone?
- 13 A Yes.
- 14 Q All right. And what does it say?
- 15 A It says, Thanks for the quick response and clarifying
16 your position for the record on my note and the
17 Southern First note. I will have Robert Kessler sign
18 the renewal of my note as you have directed.
- 19 Q Now, by July the 1st, 2008, you're no longer employed
20 with Boozer Lumber Company; are you?
- 21 A No.
- 22 Q Because your contract ended on December 31, 2007?
- 23 A That is correct.
- 24 Q All right. I'm going to ask you to look at Exhibit 29.
25 Now, is Exhibit 29 an update from Robert Kessler, who

- 1 is now the liquidating member of Arden Homes?
- 2 A It appears to be. I haven't read it yet.
- 3 (pause)
- 4 A That looks like a complete update.
- 5 Q All right. So it says there in the first paragraph --
- 6 let me ask you this, Robert Kessler, he's is now a
- 7 managing member now for liquidating Arden Homes?
- 8 A Correct.
- 9 Q All right. So on September 30, 2009, he's sending the
- 10 members an update, including yourself?
- 11 A Yes.
- 12 Q So he says in the first paragraph that he's been
- 13 dealing with the various banks as his main focus
- 14 involving Arden Builders for the past -- I'm sorry, the
- 15 past few months and his update will center around what
- 16 is happening with each bank?
- 17 A Yes.
- 18 Q Then he discusses the Wachovia loan, the Carolina First
- 19 loan, the Bank of America loan and the Southern First
- 20 loan?
- 21 A He does.
- 22 Q With respect to the Bank of the America loan, if you'll
- 23 look at the last page -- maybe we ought to -- let's
- 24 look at the second page under the Bank of America loan,
- 25 in the second paragraph -- well, we better start with

- 1 the first paragraph. I hate to do it, but we better.
- 2 Let's look at the first paragraph related to Bank of
- 3 America. You see where it says a forbearance agreement
- 4 was presented by Bank of America?
- 5 A Yes.
- 6 Q If you will look at the next page, does it say the
- 7 forbearance requires approximately \$12,000 from Arden
- 8 Home Builders to pay property taxes for 2008 and fees
- 9 incurred by Bank of America?
- 10 A Yes.
- 11 Q Does it say that Arden does not have the funds to meet
- 12 this requirement?
- 13 A It does.
- 14 Q Does it say that Brian Boone and Robert Boozer have
- 15 agreed to fund the total \$8000?
- 16 A It does.
- 17 Q Does it say that he spoke to you yesterday on this
- 18 matter and you did not have any funds to contribute
- 19 toward the forbearance agreement and neither did he?
- 20 A Yes.
- 21 Q So Brian Boone and Builders Investment Group, by way of
- 22 Robert Boozer, were going to contribute \$8000 on the
- 23 Wachovia loan; is that correct?
- 24 A No. You just said Ban of America.
- 25 Q I'm sorry. Bank of America loan, you're right. On the

1 Bank of America loan?

2 A They were.

3 Q Now, let's go down to the paragraph -- we know that
4 this document, without belaboring it, it starts with a
5 loan paragraph about Wachovia. It has a paragraph
6 about Carolina First. It has a Bank of America
7 paragraph we just looked at. And, lastly, it has a
8 paragraph related to Southern First. Do you see that?

9 A I do.

10 Q And does it say at the end of that paragraph, The loan
11 balance is \$500,000, plus interest of around \$20,000
12 and the loan is unsecured and guaranteed by Bob Jones
13 and myself?

14 A It does.

15 MR. SOWELL: Your Honor, could we take about five
16 minutes and then I'll study --

17 THE COURT: We'll take a break. I was about to
18 tell the members of the jury I needed one myself.

19 Go to the jury room, just don't talk about the
20 case. And when you're ready -- when you finish what you
21 need to do, then let us know, we'll be happy to bring you
22 back in here. Thank you all.

23 (The jury retires from the
24 courtroom at one 1:53 a.m.)

25 THE COURT: All right. We'll be at ease. It's

1 probably going to be 10 or 15 minutes by the time they go to
2 the bathroom.

3 (Whereupon, a short recess was
4 held.)

5 THE COURT: We got everybody? Who are we missing?

6 (There was no response.)

7 THE COURT: Is everybody ready?

8 MR. SOWELL: Yes, Your Honor.

9 MR. WILLIAMS: Yes, Your Honor.

10 THE COURT: Okay. Bring the jury back in.

11 (The jury returned to the
12 courtroom at 12:06 p.m.)

13 BAILIFF: All jury panel is seated, Your Honor.

14 THE COURT: Thank you, ma'am.

15 Mr. Sowell, you may resume your cross-examination.

16 MR. SOWELL: Thank you, Your Honor.

17 BY MR. SOWELL:

18 Q Mr. Jones, one more question. We've looked at a lot of
19 documents. Have you seen any documents here in where
20 you asked either Builders Investment Group or Brian
21 Boone to guarantee the Southern First loan?

22 A You have not presented any such document at this point
23 to the best of my knowledge. Of course, I didn't read
24 all of them either. You presented a lot of stuff.
25 I'll be happy to take a look at them.

1 Q Thank you.

2 THE COURT: All right. Anything on redirect?

3 MR. WILLIAMS: Yes, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. WILLIAMS:

6 Q Mr. Jones, I just have a couple of questions by way of
7 clarification. It won't take but a second, sir.

8 What was the date of the operating agreement?

9 A Which one, the restated operating agreement?

10 Q Yes, sir.

11 A The date of the restated operating agreement was
12 July 31st, 2007.

13 Q And what was date of the renewed loan that was made
14 subsequent to that \$498,000?

15 A The renewed Southern First loan was dated
16 September 25th, 2007.

17 Q And then the next renewed was what?

18 A September 24th, 2008.

19 Q And what was the date of your personal loan?

20 A Well, that -- those Arden loans that you just mentioned
21 were paid off by me personally on December 8th, 2009.

22 Q December 8th?

23 A December 8th, 2009.

24 Q Now, on September -- the December 8th, 2009 loan was
25 how much, sir?

- 1 A It was \$449,326.33.
- 2 Q 449,326.33.
- 3 A Yes, sir.
- 4 Q That was to pay off the Arden debt of 498?
- 5 A Yes, that combined with the assets that the bank had
- 6 liquidated that I had provided to them, yes, sir.
- 7 Q All right. Now, your personal debt, counsel asked you
- 8 several times had you paid that debt. You paid the
- 9 Arden debt; correct?
- 10 A I paid the Arden debt.
- 11 Q But have you paid your debt back?
- 12 A I have not yet begun to pay that back.
- 13 Q And that is the judgment that's against you for that
- 14 amount?
- 15 A It is.
- 16 Q For the loan that you owe?
- 17 A Yes.
- 18 Q But not -- Arden don't owe any money to the bank?
- 19 A Arden has been paid off by me personally, yes. Arden
- 20 owes no money to Southern First Bank.
- 21 Q Okay. To Southern First Bank. Now, sir, the \$498,000
- 22 that you paid to the bank, does that include your share
- 23 of the obligation that you were supposed to pay?
- 24 A Well, it includes way more than my share. It includes
- 25 paying off the entire amount.

1 Q I understand that, but counsel asked you about the
2 amount of your share?

3 A Oh, yes, it, certainly, includes my share.

4 Q So you paid your share?

5 A I have paid way more than my share.

6 Q All right. Thank you, sir.

7 MR. WILLIAMS: No further questions.

8 THE COURT: Mr. Sowell.

9 RECROSS-EXAMINATION

10 BY MR. SOWELL:

11 Q But you agree with me that the confession of judgment
12 to the bank says you have not made payment pursuant to
13 the terms of the note?

14 A On my personal debt to the bank, that would be accurate
15 according to that document.

16 Q All right. And they sued you and you confessed to
17 judgment?

18 A That was -- yes.

19 Q Because they sued you for nonpayment pursuant to the
20 terms of the note?

21 A Yes.

22 Q You have never given them a check, a cashier's check,
23 cash money or assets in excess of the 125 some odd
24 thousand dollars, which would be your Class A percent?

25 A Well, again, because of all the legal -- the answer to

1 your question is yes. Would you like me to explain?

2 Q I would like for you to show me the check or a
3 cashier's check or the assets that you turned over to
4 them that equal \$125,000?

5 A Well, I don't have anything other than these
6 documents -- I've only got a couple of things here in
7 front of me.

8 Q So you don't have anything more than what we've looked
9 at?

10 A I have the promissory note to them.

11 Q Thank you.

12 MR. SOWELL: Thank you, Your Honor.

13 THE COURT: All right. Anything further of this
14 witness?

15 MR. WILLIAMS: Nothing from the Plaintiff.

16 THE COURT: You may step down, Mr. Jones.

17 MR. WILLIAMS: We have one more short witness I
18 believe, Your Honor.

19 THE COURT: Members of the jury, we're probably
20 going to stop about 1:00 for lunch if we don't finish before
21 then. Is that good enough for everybody?

22 (All answered in the
23 affirmative).

24 THE COURT: Thank you for being so gracious.
25 Call your next witness, Mr. Williams.

1 MR. WILLIAMS: We call Robert Kessler.

2 THEREUPON,

3 ROBERT KESSLER,

4 after having been duly sworn, testified as follows:

5 THE CLERK: Have a seat in the witness stand,
6 please. State your name for the record.

7 THE WITNESS: Robert Allen Kessler.

8 DIRECT EXAMINATION

9 BY MR. WILLIAMS:

10 Q Mr. Kessler, give us your address, please, sir.

11 A 116 Walnut Lane, Columbia, South Carolina.

12 Q And tell us your occupation, sir.

13 A I'm a certified public accountant.

14 Q How long have you been a CPA?

15 A Since 1976, so 30 some odd years.

16 Q Are you independently engaged or do you work for a
17 company?

18 A I'm my own -- I'm my own boss.

19 Q And at one time, I believe you work with Boozer Lumber
20 Company?

21 A That's correct.

22 Q Were you an employee there or?

23 A I was an independent contractor. They were about 90,
24 95 percent of what I billed. For all practical
25 purposes, they were my employer.

- 1 Q Yes, sir. How long did your work with Boozer?
- 2 A In that capacity, probably somewhere in early 2000s to
- 3 November of 2007.
- 4 Q And what happened in 2007?
- 5 A The bank that Boozer Lumber Company was dealing with
- 6 was sending in, basically, a guy to take over the
- 7 operations. Around Thanksgiving, we had a meeting,
- 8 figured they didn't need my payroll, so I just kind of
- 9 resigned from that position.
- 10 Q Tell us again now, what did the bank do?
- 11 A Like everything else, the economy was tanking. Boozer
- 12 Lumber Company was not able to make payments back on
- 13 the note as the bank required and they were sending in
- 14 a conservator or gentleman to kind of oversee the
- 15 operations.
- 16 Q So, the bank was taking control of the operations of
- 17 Boozer Lumber Company?
- 18 A They were going to. They hadn't when I left, but they
- 19 were getting ready to, yeah.
- 20 Q And that was in?
- 21 A November of 2007.
- 22 Q 2007?
- 23 A 2007, I believe.
- 24 Q 2007. All right. Up until that time, what -- did you
- 25 have an official role at Boozer, a title?

- 1 A They called me the CFO.
- 2 Q What does that mean?
- 3 A Certified financial officer -- well, not certified, but
- 4 corporate financial officer.
- 5 Q Chief financial officer?
- 6 A Chief officer.
- 7 Q And in that role, what were your responsibilities?
- 8 A There was a wide range, to kind of oversee the
- 9 accounting department, dealt with banks, dealt with
- 10 large vendors, customers and, in some capacity, helped
- 11 the family with their matters on occasion.
- 12 Q Did you foresee that the company was going to have
- 13 financial difficulties?
- 14 A Early on in 2007, yes.
- 15 Q Early in 2007?
- 16 A Uh-huh.
- 17 Q Okay. All right. Let me turn now to Arden Home
- 18 Builders?
- 19 A Yes, sir.
- 20 Q And tell me, when did you first become aware of Arden
- 21 Home Builders or a business plan that lead to the
- 22 creation of Arden Home Builders?
- 23 A I believe it was the spring of 2005, we were presented
- 24 with the opportunity to make an investment in Charlotte
- 25 in home building by a gentleman by the name of Ray

1 Holt. He was looking to take over the operations of a
2 home builder that was retracting from the Charlotte
3 market back to Atlanta. I can't remember the name
4 right now. But he came to us, we took a look at it.
5 From the standpoint of investment, it seemed pretty
6 good. We needed to raise substantial capital to do it.

7 Q When you say we, he approached who?

8 A I think Bob Jones was approached, myself was brought in
9 pretty early. We talked with Mr. Boozer, Dale Boozer,
10 about did we want to this and he gave us the go ahead
11 to investigate it, which we did. And the whole
12 purpose -- once we got involved, the whole purpose of
13 the operation was to provide an outlet for Boozer
14 Lumber in the home building business so they could sell
15 its product.

16 Q So let's go back, now, we you said we were approached,
17 would that include you all acting through Boozer Lumber
18 Company?

19 A Yes.

20 Q All right. So the proposal was really to Boozer Lumber
21 Company?

22 MR. SOWELL: Your Honor, I object to the form of
23 the question on the ground that it's too leading.

24 BY MR. WILLIAMS:

25 Q All right. Tell us what the sense of the proposal was

- 1 as far as Boozer Lumber Company was concerned.
- 2 A The proposal was that we wanted get into the home
3 building business, wanted to convert to the integrated,
4 meaning that we controlled the whole process, including
5 the product we sell. We did not want to get into the
6 South Carolina market area because we were selling to
7 people in South Carolina. We also wanted -- did not
8 want anybody to trace it back to Boozer Lumber because
9 they felt like we were being competed against because
10 we did have customers we were selling to in Charlotte.
11 So long story short, we looked at the opportunity. We
12 decided to make the investment. The investment was
13 made by the officers of Boozer Lumber Company, by the
14 Boozer family and Builders Investment Group. We chose
15 the name Holt Family Homes for the gentleman that ran
16 it, Ray Holt, and started building homes. And we were
17 the sole source provider for the home building
18 products.
- 19 Q Boozer Lumber Company?
- 20 A Yes.
- 21 Q Was providing the products that were used to build the
22 homes?
- 23 A That's correct.
- 24 Q And that was the purpose of it?
- 25 A That was the purpose.

1 Q All right. And tell us what happened when the
2 operating agreement was restated. The one there in
3 front of you, the restated operating agreement that was
4 dated July 31st, 2007. What led to that, sir?

5 A It kind of started back in the summer of '06. We had
6 gotten up and running as Holt Family Homes. We realized
7 we were going to lose some money at first because we
8 converted from one product to the style of product we
9 were using. But during the late summer -- late spring,
10 early summer, I started looking at financials and was
11 like, we should be making money. What's going on? So
12 I went to Charlotte to speak to Mr. Holt about it and
13 discuss it with him. And at that time, I realized he
14 was not a businessman running it from a business
15 standpoint. I came back and discussed it with Bob,
16 talked it over with Ed. We had to, at that time, make
17 a decision what we wanted to do. Consulted with Mr.
18 Boozer, told him we were going to fire Mr. Holt, which
19 we did subsequently. After we fired him, which I
20 believe was in September, October time frame of 2006.
21 His last day was the first of December of 2006. We
22 went back to Mr. Boozer and said we're shutting down.
23 We don't see the opportunity there. You know, it would
24 take some of us to go up there and run it. It's going
25 to need more cash. And among ourselves, we looked at

1 the numbers and ran it through a liquidation scenario,
2 all the banks will be paid, all the debt will be paid,
3 all the Class B's will be paid, and if we were lucky,
4 we, the Class A members at the time, which were Bob
5 Jones, Ed Buck and myself might get some money, may
6 not.

7 Q All right.

8 A So once that occurred -- that was our scenario. Mr.
9 Dale Boozer said, I really want my family to get to
10 come back to this area. They were having some need for
11 the family to come back. And he asked us to do what it
12 takes to get it going. I believe we went down to
13 Orlando sometime in that time frame, I can't remember
14 when, discussed it with Brian Boone and Kathy Boone
15 about the possibility. I think Dale had previously
16 mentioned it to them over Thanksgiving of 2006. We had
17 a couple meetings. But in the meantime, you know, we
18 borrowed money to keep it going and, subsequently, they
19 agreed to step in and take it over and make additional
20 investments, which was required to keep it going.

21 Q That would be Kathy Boozer Boone through BIG?

22 A Yes, Kathy Booze Boone through BIG and Brian Boone.

23 Q What kind of work was Kathy Boozer Boone doing at that
24 time?

25 A I believe she was a bank officer with SunTrust. I

- 1 think that's the case.
- 2 Q SunTrust Bank office?
- 3 A In Orlando.
- 4 Q Did she have an opportunity to review the business
- 5 records and the plan of Arden?
- 6 A Yes.
- 7 Q Did you deal with that?
- 8 A In part of the process, we were putting together a
- 9 budget going forward, where the money would be spent
- 10 and what was going on. I believe I drafted an initial
- 11 document, forwarded it to her to really complete the
- 12 budget because they were going to be the ones running
- 13 in. Then I believe she also did write a paper for the
- 14 Boozer family she presented to them to make an
- 15 investment.
- 16 Q But when you say we, again, you're taking about Kathy
- 17 Boozer Boone and Brian Boone?
- 18 A I initially drafted a rough outline of what the
- 19 business plan was going to look like.
- 20 Q Uh-huh.
- 21 A I sent it to Kathy Boozer Boone, said here it is, you
- 22 take it and run the numbers. It had different
- 23 projections on the sales volume of the houses, the
- 24 good, bad and ugly type scenario.
- 25 Q All right. Now, when -- let me ask you this, Builders

1 Investment Group, we have referred to as BIG, who are
2 the members of that vestment?

3 A Member of Builder Investment Group were Robert Boozer,
4 Billy Boozer, William Boozer and Kathy Boozer -- or
5 Kathy Boozer Boone, Ms. Boozer, Dale's wife, and Dale
6 Boozer.

7 Q The Boozer family?

8 A The Boozer family.

9 Q And when this operating agreement -- restated operating
10 agreement was entered into July 31, 2007, did Ms. Kathy
11 Boozer Boone have all of the information that she had
12 been --

13 A As to my recollection, yes.

14 Q She had full complete and information about the
15 business?

16 A She knew all the notes. She knew all of what was owed,
17 cash flow of the business. They knew the situation of
18 the business. Basically, it was -- you know, for lack
19 of a better term, it was going to be a crap shoot
20 whether it made it or not.

21 Q Uh-huh. And the note that was owed -- let's turn to
22 that, to the bank at that time, which was renewed in
23 September of 2007, a couple mouths after the operating
24 agreement was signed?

25 A Right. I'm assuming you're talking the Southern First?

- 1 Q Right.
- 2 A Okay.
- 3 Q Is it still up there on your table? If not, I'll give
4 you another one. September 25th, '07?
- 5 A Yes, sir.
- 6 Q You're familiar with that one?
- 7 A Yes, sir.
- 8 Q And we've already heard about who guaranteed it. You
9 were one of the guarantors; right?
- 10 A That's correct.
- 11 Q Did you ask anybody else to guarantee it?
- 12 A Yes, I did.
- 13 Q Who did you ask?
- 14 A Brian Boone and Builders Investment Group or Robert
15 Boozer for Builders Investment Group.
- 16 Q All right. What kind of response did you get?
- 17 A Not a satisfactory response.
- 18 Q Well, tell us what that means. Was the answer yes or
19 no?
- 20 A No.
- 21 Q And that was on behalf of -- who said no?
- 22 A Who said that?
- 23 Q Who said no?
- 24 A Brian Boone.
- 25 Q What about Kathy Boozer Boone on behalf of BIG?

- 1 A I figured once he said no, there's in reason to ask
2 them.
- 3 Q So you did go forward then and guaranteed that loan?
- 4 A That's correct.
- 5 Q Shortly after that, you left Boozer Lumber Company?
- 6 A That's correct.
- 7 Q In November. Then that loan came up for renewal --
8 well, it came up to be paid the following September,
9 right, 2008?
- 10 A That's correct.
- 11 Q And had you had any further contacts with Mr. Boone or
12 Kathy Boone about this loan?
- 13 A I believe there was a meeting in -- I want to say March
14 of '08, actually, at my office where we were discussing
15 the going forward plans because things were not
16 proceeding in Charlotte. We discussed about what
17 certain things take place, whether we wanted to
18 continue on in business or not. And if those didn't
19 occur by, roughly, August, September time frame, we
20 would liquidate the company. After that, the subject
21 of the note came up and that's when I believe Mr. Boone
22 pretty much got up very upset and said, No, I am not
23 going to pay this note unless -- my portion unless the
24 judge orders me to.
- 25 Q All right. Let me show you an e-mail and ask you if

1 you can identify that?

2 A This is an a-mail from myself to Brian Boone with a
3 copy to Bob Jones and Ed Buck dated March 18th, 2008.

4 Q That's exhibit what?

5 A That's exhibit --

6 MR. WILLIAMS: No.

7 MR. SOWELL: Eighteen.

8 MR. WILLIAMS: All right.

9 BY THE PLAINTIFF:

10 Q All right. So tell me, what is this? This is an
11 e-mail from you to?

12 A Brian Boone with blind copies to Ed Buck and Bob Jones.

13 Q All right. About reading that to us. It will be in
14 evidence for the jury to read.

15 A It starts off, Brian, let me be clear about something
16 you mentioned in our comments on the tax returns that
17 concerned me. Operating agreement section 2.3
18 obligates all Class A members to share in their
19 responsibility for any loan that requires a guarantee
20 whether or not they signed the guarantee. Southern
21 First Bank loan will fall into the second. If you have
22 a problem with this, I need to know as I expect BIG,
23 Builders Investment Group, and Boones to be responsible
24 along with other Class A members for the respective
25 share of all guaranteed debt. Signed Robert.

1 Q All right. And did Mr. Boone ever respond to that
2 message?

3 A I can't remember. I don't have a response here.

4 Q But he never did agree to help with repayment of that
5 loan; did he?

6 A Not to my knowledge, no.

7 Q Okay. So that loan came up for renewal again in
8 September of '08?

9 A Yes, sir.

10 Q And you have a copy of that there, too?

11 A I do.

12 Q Did you guarantee that one again?

13 A Yes, sir.

14 Q All right. Then how was that loan paid to the best of
15 your knowledge?

16 A It was paid by Bob Jones taking out a note to pay it.

17 Q Bob Jones personally paid it?

18 A Yes.

19 Q All right.

20 MR. WILLIAMS: I have no further questions, Your
21 Honor.

22 THE COURT: Mr. Dick.

23 CROSS-EXAMINATION

24 BY MR. DICK:

25 Q Mr. Kessler, my name is Dave Dick. We've, actually,

- 1 met before at your deposition. And I'm going to ask
2 you a few followup questions. I'm not going to go back
3 through all the loan documents. We did that with
4 Mr. Jones. But were you, also, I guess, a guarantor on
5 all of the loan documents that we saw during
6 Mr. Jones's --
- 7 A Yes.
- 8 Q -- cross-examination?
- 9 A Yes.
- 10 Q Okay. In the beginning, when -- was it Ray Holt came
11 to you all --
- 12 A I believe I was.
- 13 Q -- to discuss the investment opportunity?
- 14 A (The witness nodded head.)
- 15 Q Okay. And he came to Mr. Jones?
- 16 A I believe that's correct.
- 17 Q And, ultimately, you, Mr. Jones and Mr. Buck invested
18 in that company; correct?
- 19 A That's correct.
- 20 Q Okay. And you three, along with Mr. Holt, were the
21 only Class A members then?
- 22 A That's correct.
- 23 Q So Builders Investment Group or Boozer Lumber was not a
24 Class A member then?
- 25 A Not at that time.

- 1 Q The money that you invested as a Class A member, was
2 that your personal funds?
- 3 A Yes.
- 4 Q So none of that money come from Boozer Lumber or the
5 Boozer family?
- 6 A That's correct. At least for myself. I can only speak
7 for myself.
- 8 Q Okay. Do you know if Mr. Jones got money from Boozer
9 Lumber?
- 10 A I'm not aware of anybody else getting any money, no.
- 11 Q Okay. The original loans, we looked at them earlier,
12 there were two of them from Southern First Bank or
13 Greenville First to Holt Family Homes. Those loan were
14 not guaranteed by BIG or by -- when I say BIG, I mean
15 Builders Investment Group, or Brian Boone; were they?
- 16 A They were not.
- 17 Q Did you ever ask them to guarantee those loans?
- 18 A They were not members at time, Class A, no, I did not.
- 19 Q And then in, I guess, July 31st of 2007, Builders
20 Investment Group and Brian Boone invested, roughly,
21 \$750,000 and became Class A members of what is now
22 called Arden Home Builders?
- 23 A That's correct.
- 24 Q Let's look at Exhibit 7 here. So Exhibit 7 is the
25 consolidation and renewal of these loans to Southern

- 1 First Bank; correct?
- 2 A That's correct.
- 3 Q That was done after the operating agreement was signed
- 4 by you and by Builders Investment Group and Brian
- 5 Boone; correct?
- 6 A That's correct.
- 7 Q Okay. Before this loan was signed, did you ever ask
- 8 Brian Boone or Builders Investment Group to guarantee
- 9 that loan?
- 10 A Yes.
- 11 Q And when was that?
- 12 A Shortly before the renewal date.
- 13 Q And do you have --
- 14 A Would have been in September of -- probably about a
- 15 week before the loan was due.
- 16 Q How would you have contacted him about that?
- 17 A My recollection is I sent an e-mail to Brian or made a
- 18 phone call to Brian Boone and said I'm forwarding you
- 19 the loan documents for your signature and for Robert to
- 20 sign.
- 21 Q Okay. Do you have that e-mail?
- 22 A I do not.
- 23 Q Okay. Let look at Exhibit 18. Now, Exhibit 18, that's
- 24 an e-mail from you to Brian Boone; correct?
- 25 A That's correct.

- 1 Q I guess, a copy to Bob Jones and Ed Buck; correct?
- 2 A That's correct.
- 3 Q Now, in that e-mail, you asked him to let you know if
- 4 they don't think they're responsible for the Southern
- 5 First loan; right?
- 6 A Yeah, I asked him if he had a problem with it, let me
- 7 know.
- 8 Q But if you had talked to Mr. Boone before this e-mail,
- 9 wouldn't you have already known that they weren't going
- 10 to guarantee the Southern First loan?
- 11 A When I talked to him before and presented the original
- 12 note document, which had a place for them to sign, he
- 13 refused. I reminded again the obligation of 2.3 that
- 14 if we had to pay the note that he would have the
- 15 obligation for his fair share.
- 16 Q But here you're asking him where or not he's going be
- 17 responsible for the Southern First loan for the first
- 18 time?
- 19 A Again, I don't believe this was the first time. I
- 20 think this is a followup -- in essence, this is was
- 21 ongoing issue after the refusal the first time of
- 22 signing it.
- 23 Q So why are you asking him if he is going to be
- 24 responsible for the Southern First loan if you already
- 25 knew the answer to that?

- 1 A I wanted to reiterate it.
- 2 Q Okay. Did you -- I think you already answered this,
3 but did get a response from Mr. Boone to this e-mail?
- 4 A Not to my knowledge.
- 5 Q Okay. You don't recall a phone call with Mr. Boone
6 right after this e-mail?
- 7 A Not in regards to this e-mail, no.
- 8 Q Okay. Well, let's look at Exhibit 8 -- or 15, then.
9 Well, keep that one out for right now. Now, first, if
10 you would, tell me what's the date and time on Exhibit
11 No. 18. Eighteen?
- 12 A Oh, 18. March 18th at 7:05 a.m.
- 13 Q So at 7:05 a.m. you sent that Exhibit No. 18 to
14 Mr. Boone at 7:00 in the morning; correct?
- 15 A That's correct.
- 16 Q All right. Now, Exhibit 15; is this an e-mail from you
17 to Mr. Jones and Mr. Buck?
- 18 A That's correct.
- 19 Q And what is the date and time on that e-mail?
- 20 A March 18th at 8:44 a.m.
- 21 Q I think if you look down further, I think it's,
22 actually -- did you say 8:04 or --
- 23 A Oh, the one I sent to Bob and Ed is 8:04.
- 24 Q So that e-mail was sent an hour after the e-mail sent
25 in Exhibit 18; correct?

- 1 A That's correct.
- 2 Q Okay. And if you could, just read that first paragraph
- 3 to me?
- 4 A Just got off the phone with Brian on my last e-mail. I
- 5 was right, he and BIG do not feel they are responsible
- 6 for the Southern First loan. I told him tough, and I
- 7 expected him to live up to the loan. He was upset, so
- 8 was I. Bob and he, at least -- he was upset, so was I.
- 9 Bob, he, at least, acknowledged your loan.
- 10 Q So do you recall now that, in fact, you did have a
- 11 phone conversation Brian Boone --
- 12 A I did.
- 13 Q -- after Exhibit 18?
- 14 A That's correct.
- 15 Q Okay. And in this e-mail, you're confirming your
- 16 suspicion that Southern First -- that Brian Boone and
- 17 Builders Investment Group don't believe their
- 18 responsible for the Southern First loan; correct?
- 19 A Correct.
- 20 Q But, I guess, then until that point on March 18th,
- 21 there was only a suspicion that they wouldn't guarantee
- 22 that loan; correct?
- 23 A From the e-mail, yes.
- 24 Q The original loans from Southern First to Holt Family
- 25 Homes, you were the primary contact on those loans;

- 1 correct?
- 2 A Yes.
- 3 Q And all of the statements from the bank would come to
4 you at Boozer Lumber; correct?
- 5 A Yes, I believe that's correct.
- 6 Q Okay. And did it remain that way throughout the loan?
- 7 A At some point, I believe, we may have forwarded them on
8 to -- when Brian and Kathy came over, they have
9 forwarded them on up to Charlotte.
- 10 Q Okay. During --
- 11 A I don't remember.
- 12 Q During the tenure of Brian Boone as managing partner of
13 Arden, you still received the Southern First financial
14 statements to your address in Columbia; correct?
- 15 A Southern First financial statement for the first loan.
- 16 Q The loan financial statements. Would any loan
17 correspondence --
- 18 A I got --
- 19 Q Any copy -- let me finish. Any of copy of any
20 correspondence with Southern First was sent to you in
21 Columbia, correct?
- 22 A That is correct.
- 23 Q Okay. Now, there were four loans from banks to Arden;
24 correct?
- 25 A That's correct.

- 1 Q There was one from Southern First. There was one from
2 Wachovia. There was one from Bank of America and there
3 was one from Carolina First?
- 4 A That's correct.
- 5 Q Where did the financial statements go on the Wachovia,
6 Bank of America and Carolina First loans after Mr.
7 Boone and Builders Investment Group became members in
8 Arden?
- 9 A To my knowledge, went to Charlotte.
- 10 Q So after Mr. Boone became managing member of Arden, he
11 became the primary contact on the Wachovia loan, the
12 Bank of America loan and on the Carolina First loan?
- 13 A I believe that's correct.
- 14 Q And you remained as the primary contact on the Southern
15 First loan; correct?
- 16 A As far as I know, yes.
- 17 Q We talked earlier about the fact that Ed Buck was
18 eventually released from the Southern First loan;
19 correct?
- 20 A Correct.
- 21 Q And who made the decision to release Mr. Buck from that
22 loan?
- 23 A Mr. Jones.
- 24 Q Were you involved in that decision?
- 25 A From outside discussions standpoint, yes.

- 1 Q So it was only you and Mr. Jones that discussed the
2 releasing of Mr. Buck from that Southern First
3 guarantee; correct?
- 4 A That would be correct.
- 5 Q Why was Mr. Buck released from the guarantee?
- 6 A He was, for lack of a better term, emotionally
7 traumatized by all of this.
- 8 Q So out of your concern for him, you decided to allow
9 him off the note?
- 10 A Bob asked me -- he didn't give me all of the details,
11 but told must Mr. Buck -- Ed was having some issues.
12 His wife wasn't really happy about it. He said let
13 him -- it would be a great help if we would let him
14 off, so I did.
- 15 Q Did you ever consult with Brian Boone or any one at
16 Builders Investment Group about letting Mr. Buck off
17 the Southern First note?
- 18 A No.
- 19 Q Now, by letting Mr. Buck off the Southern First note,
20 you increased your exposure on that note; correct?
- 21 A That's correct.
- 22 Q Because you had three people splitting it at first,
23 then by letting him off, you only had two people
24 splitting it; correct?
- 25 A That was from a guarantee standpoint. From the

- 1 operating agreement standpoint, you had other people
2 splitting it, but from the guarantee standpoint, yes.
- 3 Q Okay. So then by letting off Mr. Buck, you would,
4 also, be increasing the exposure of Builders Investment
5 Group and Brian Boone; correct?
- 6 A Not necessarily, their exposure was limited by the
7 operating agreement.
- 8 Q To their proportionate share?
- 9 A That's correct.
- 10 Q Okay. But now, when Mr. Buck's let off the note, he's
11 not obligated on it any more; correct?
- 12 A Mr. Buck had already been disassociated as a member at
13 that point.
- 14 Q And as we said earlier, Brian Boone and Builders
15 Investment Group voted not to disassociate him?
- 16 A I disagree with that.
- 17 Q You disagree with that?
- 18 A Yes.
- 19 Q Let's look then at Exhibit 28. You recognize Exhibit
20 28?
- 21 A Give me a few minutes to read it and I'll tell you.
- 22 Q Take your time.
- 23 A Okay.
- 24 Q Are those the e-mails related to the vote on whether to
25 allow Ed Buck to disassociate?

- 1 A Yes.
- 2 Q Okay. And the first page is your e-mail to the other
- 3 Class A members saying you vote in favor of signing the
- 4 note, which is the note to disassociate Ed Buck;
- 5 correct?
- 6 A That's correct.
- 7 Q Okay. Let's look at Page 2. And Page 2 is Bob Jones's
- 8 vote to allow Ed Buck to disassociate; correct?
- 9 A That's correct.
- 10 Q All right. Go to Page 3. Now, that's from Robert
- 11 Boozer as representative for Builders Investment Group;
- 12 correct?
- 13 A That's correct.
- 14 Q And he votes against signing the note?
- 15 A That's correct?
- 16 Q So he has voted not to disassociate Mr. Buck; correct?
- 17 A That's correct.
- 18 Q Go to Page 4. That's Ed Buck, so Ed Buck votes on his
- 19 own disassociation and, obviously, votes for it?
- 20 A That's correct.
- 21 Q Did y'all ever discuss whether or not Ed Buck was
- 22 allowed to vote in his own disassociation?
- 23 A That didn't come up.

24 MR. DICK: And blow up that first paragraph there.

25

1 BY MR. DICK:

2 Q And this is the e-mail from Brian Boone to the Class A
3 members; correct?

4 A That's correct.

5 Q Okay.

6 MR. DICK: And just blow up the first paragraph of
7 that e-mail.

8 BY MR. DICK:

9 Q So he says I appreciate the prompt responses. As
10 expected, the majority is in favor of signing
11 promissory note. As is consistent with our previous
12 discussions, I am against signing the note. The
13 company is not in a financial position to pay the
14 interest or principle on this note. So, in fact, Brian
15 Boone did vote to not disassociate Ed Buck; correct?

16 A That is correct.

17 Q So your previous recollection was incorrect then?

18 A As far as voting against it, yes, that recollection
19 would be correct -- that would be correct.

20 Q Let's look at Exhibit 19. Do you recognize Exhibit 19.
21 And take a second to read it if you need to.

22 A Yep. Yes, I do.

23 Q What is Exhibit 19?

24 A It's an E-mail from Mr. Robert Clinepaste to myself.
25 We were attempting to -- at that point, it was pretty

1 much that Arden Home Builders was not going to continue
2 on and we were trying to liquidate and bring somebody
3 else in.

4 Q So this is late in the game and you were attempting to
5 find someone to purchase Arden Homes?

6 A That is correct.

7 Q Okay. If you would, turn to Page 3 of that document.

8 Now, in that document there's an e-mail from Bob Jones.

9 I guess this is the last e-mail.

10 MR. DICK: Why don't you scroll back to -- it's a
11 little bit confusing there. And just in the middle of the
12 page blow up where it says on Wednesday, August 6th.

13 BY MR. DICK:

14 Q So this is, actually, an e-mail from Robert Clinepaste
15 to you asking some questions about Arden Homes;
16 correct?

17 A I believe that's correct, yes.

18 Q Okay. If you look, it's a little bit hard to tell in
19 black and white here, but if you notice, some of the
20 writing is lighter and it appears to be where you have
21 answered this question. For example, number two there,
22 he says, How many total units are there? And you
23 respond, There are 72 residential lots, 28 of which
24 Arden owns, five houses on them.

25 A Right.

- 1 Q So you answered his questions here with regard to these
2 questions about Arden Homes; correct?
- 3 A That's correct.
- 4 Q Okay, now let's turn to Page 3. Now, if you would,
5 just read C and D there -- if you would, read C to me.
- 6 A Who is the senior lender? I believe this is my
7 response, Wachovia and Parkway. What is the size of
8 the loan? 1.85 million dollars relating to Parkway.
9 There's another 500,000 to Southern First that I'm on
10 the hook for. There are other personal guarantees on
11 the loan for us.
- 12 Q So you are telling him that you and Bob are on the hook
13 for the \$500,000 to Southern First; correct?
- 14 A That's correct.
- 15 Q And if you would, read E for me as well.
- 16 A What's the overall capital structure? Class A shares,
17 guaranteed bank loans, Class B, cash only. How much
18 cash invested? Two million, 500 by Bob and myself.
19 I'm not worried about this as much as I am concerned
20 about the unsecured debt Bob and I are on.
- 21 Q So the unsecured debt that Bob and you are on is the
22 Southern First loan; correct?
- 23 A That's correct.
- 24 Q Let's look at Exhibit 29 now. Is this an e-mail from
25 you to all of the members of Arden Homes updating them

- 1 on the bank situations with Arden?
- 2 A That's correct.
- 3 Q And then if we scroll through, we have the Wachovia
- 4 loan, the Carolina First loan, Bank of America loan
- 5 and, finally, talk about the Southern First loan;
- 6 correct?
- 7 A That's correct.
- 8 Q If you would, just read me what the last sentence of
- 9 that section says.
- 10 A The last sentence?
- 11 Q Yes.
- 12 A The loan balance is 500,000, plus interest, around
- 13 20,000. The loan is unsecured and guaranteed by Bob
- 14 Jones and myself.
- 15 Q Do you have any documents that show that you asked
- 16 Builders Investment Group or Brian Boone to guarantee
- 17 the loan to Southern First Bank?
- 18 A Other than what I introduced earlier in the e-mail.
- 19 Q So other than that one e-mail, do you have any other
- 20 documents where you required Builders Investment Group
- 21 or Brian Boone to guarantee the loan at Southern First
- 22 Bank?
- 23 A I don't have any documents, no.
- 24 MR. DICK: That's all I have.
- 25 THE COURT: Anything on redirect?

1 MR. WILLIAMS: Briefly, Your Honor. May I have
2 just a second?

3 THE COURT: Yes, sir.

4 REDIRECT EXAMINATION

5 BY MR. WILLIAMS:

6 Q Mr. Kessler, counsel asked you if you had anything in
7 writing and you said other than that e-mail asking
8 Brian Boone and Kathy Boozer Boone to guarantee these
9 loans. Did you ask them other than in writing?

10 A Yes.

11 Q On more than one occasion?

12 A I would say so, yes.

13 Q And I believe you mentioned one occasion when Mr. Boone
14 said that he would not?

15 A That's correct.

16 Q And what was his exact statement to you?

17 A I don't remember the exact statement, but something to
18 the effect of hell, no, I'm not signing the note.

19 Q Unless a judge orders him to?

20 A To do it (The witness nodded head.)

21 MR. WILLIAMS: Anything recross, Mr. Dick?

22 CROSS-EXAMINATION

23 BY MR. DICK:

24 Q You say you asked them, I guess, to guarantee the loan
25 on several occasions. One of those occasions, was that

1 the meeting that took place at your office?

2 A Yeah.

3 Q And that was a heated meeting and you said you thought
4 that took place in March?

5 A I want to say March. I think you have the e-mail.

6 Q Yeah. I hand you Exhibit you're 7. Is that the e-mail
7 regarding the scheduling of that meeting?

8 A Yeah.

9 Q So that meeting was, actually, in June?

10 A That's correct.

11 Q Okay.

12 A June 2008.

13 Q And that was nine months after the loan was signed to
14 Southern First; correct?

15 A That's correct.

16 Q Okay.

17 MR. DICK: That's all I have.

18 THE COURT: All right.

19 Mr. Kessler, you may step down.

20 No further questions of this witness; is that
21 correct?

22 MR. DICK: No.

23 THE COURT: All right. You may step down, sir.

24 Y'all can go to lunch now. It's 1:00. I don't

25 need to remind you, but don't talk about the case. There

1 are many places near the courthouse to wind down. I hope
2 you find one that will be pleasant. Be back in the jury
3 room at 2:30. Gives you an hour and a half, 2:30. Give you
4 a chance to go eat, stretch yourselves or go shopping if you
5 want to. Thank you all so very much.

6 (The jury retires from the
7 courtroom at 1:00 p.m.)

8 MR. WILLIAMS: May we excuse Mr. Kessler?

9 THE COURT: Sure.

10 MR. SOWELL: No objection.

11 MR. WILLIAMS: Thank you, Judge.

12 THE COURT: All right. Anything we need to take
13 up now, gentlemen? You can do your motions after lunch if
14 you want to.

15 MR. SOWELL: Okay.

16 MR. WILLIAMS: Well, I may have one more, Judge.

17 THE COURT: Okay. You said you might have three.
18 You listed three. I don't know.

19 Well, y'all can discuss this in private. See
20 y'all at 2:30.

21 (Whereupon, a short recess was
22 held.)

23 THE COURT: Anything we need to take up before the
24 jury comes in?

25 MR. WILLIAMS: May it please the Court? I

1 understand that counsel for the Defense plans to call Mr.
2 Strickland. Based on that representation, I won't call him
3 as a witness at this time.

4 THE COURT: You will not call him?

5 MR. WILLIAMS: Well, not at this time, but I may
6 call him --

7 THE COURT: Okay. So you tentatively rest?

8 MR. WILLIAMS: I rest, reserving reply.

9 THE COURT: Okay.

10 Yes, sir, Mr. Sowell?

11 MR. SOWELL: Your Honor, may it the Court? Both
12 Defendants move for directed verdict or judgment as a matter
13 of law on the ground that -- or grounds that, first of all,
14 for the Plaintiff to recover in this case based upon the
15 operating agreement, the revised and restated operating
16 agreement, which is Exhibit 6, in evidence, he got to have
17 paid more than his membership share before he's entitled to
18 any contribution from our client. And the only reasonable
19 inference to be drawn from the testimony is that he has not
20 paid more than his membership share, which is about
21 \$121,000.

22 Now, at some point, we can pass up the memorandum,
23 but just to elaborate a little bit, with respect to
24 contribution and indemnity, there are two kinds. One is
25 with respect to liability and the other one is with respect

1 to payment. Sometimes, you've got a contribution provision
2 that applies with respect to liability, which could
3 conceivably apply to somebody who signs a promissory note or
4 confess to judgment. And there's the other kind that is
5 applicable only to a person who has paid.

6 In this case, it is clear and the only reasonable
7 inference to be drawn from the evidence is that Mr. Jones
8 has not paid more than his membership share and, therefore,
9 he is not entitled to contribution under paragraph 2.3 or
10 otherwise.

11 And, again, without beating a horse, the Arden
12 operating agreement, Exhibit 6, is a contract for indemnity
13 or contribution from damage or payment, not with respect to
14 liability. And the law makes that a clear distinction
15 between the two. I'll leave the motion for directed verdict
16 or judgment as a matter of law at that for now.

17 THE COURT: All right. Thank you, sir.

18 MR. SOWELL: Thank you.

19 THE COURT: Mr. Williams, any response, sir?

20 MR. WILLIAMS: May it please the Court? I've had
21 difficulty comprehending the logic of the argument that my
22 client has not paid the loan that Arden owed because all the
23 evidence shows that he did pay the loan. He did, in fact,
24 borrow the money to pay that loan, or paid part of it and
25 has not yet been able to pay that loan back. So the

1 semantics escape me. I think it is perfectly clear that he
2 did pay the loan which was owed by Arden in harmony with the
3 operating agreement, which required him to do so. If the
4 Court sees it otherwise.

5 THE COURT: All right. Thank you, Mr. Williams.

6 Mr. Sowell, your points are well taken, but
7 considering the evidence and all the reasonable inference
8 derived therefrom in the light most favorable to the
9 nonmoving party, I'm going to respectfully deny your motion.
10 We can revisit it later on if we have to, but I think based
11 on the testimony from the Plaintiff, he said he had paid it.
12 Whether or not the jury believes he paid it or not, whether
13 the confession of judgment paid it or not, I think I should
14 wisely leave it in the hands of a jury to resolve.

15 MR. SOWELL: Thank you.

16 THE COURT: Anything further?

17 MR. WILLIAMS: Nothing.

18 THE COURT: All right. We're all ready then?

19 MR. SOWELL: Yes.

20 THE COURT: All right. Bring the jury in.

21 (The jury returned to the
22 courtroom at 2:40 p.m.)

23 BAILIFF: All jurors are present, Judge.

24 THE COURT: Thank you, ma'am.

25 Welcome back, and good afternoon, Mr. Foreman and

1 members of the jury. I probably shouldn't say this, but I
2 will anyway. I know it's only been a brief period of time,
3 but I'm beginning to really like you guys.

4 (Laughter.)

5 THE COURT: You're a very good jury.

6 PROSPECTIVE JUROR: We like you, too.

7 THE COURT: I appreciate your courteous attention.

8 Now, the Plaintiff, Mr. Jones, has rested. We
9 might hear back from him with some additional testimony
10 later on, but now, we'll hear from Mr. Sowell and the
11 presentation of the evidence on behalf of the Defendants.

12 MR. SOWELL: May it please the Court, Your Honor?

13 THE COURT: Yes.

14 MR. SOWELL: The Defendants calls Kathy Boozer
15 Boone.

16 THEREUPON,

17 KATHY BOOZER BOONE,

18 after having been duly sworn, testified as follows:

19 THE CLERK: Thank you. Have a seat in the witness
20 stand, please. State your name for the record.

21 THE WITNESS: Katherine Boozer Boone.

22 THE COURT: Yes, sir.

23 DIRECT EXAMINATION

24 BY MR. SOWELL:

25 Q Ms. Boone, where do you live?

- 1 A Charlotte, north Carolina.
- 2 Q And are you married?
- 3 A I am.
- 4 Q Are you married to Brian Boone?
- 5 A Yes (indicating).
- 6 Q When were you married to Brian Boone?
- 7 A November of 2004.
- 8 Q And do you have any children?
- 9 A We have two.
- 10 Q How old are they?
- 11 A Five and three.
- 12 Q Are those girls or boys?
- 13 A Two girls.
- 14 Q Okay.
- 15 A Lindsey and Lilly.
- 16 Q Thank you. Now, before this revised and restated
- 17 operating agreement that we looked at in Exhibit 6 --
- 18 A Uh-huh.
- 19 Q -- which is dated July 31st, 2007, where did you live?
- 20 A Before this, I lived in Orlando, Florida.
- 21 Q All right. And what were you doing there?
- 22 A I was a commercial -- not commercial, I was a
- 23 vice-president of corporate investment banking for
- 24 SunTrust Bank.
- 25 Q Now, were you prompted sometime in 2006, 2007 to move

- 1 to Charlotte?
- 2 A Yes.
- 3 Q And what primarily prompted you to move to Charlotte?
- 4 A Well, we were approached by Mr. Jones and Mr. Kessler
- 5 about coming up and working for Arden Homes. At the
- 6 time, it was Holt Family Homes. They informed us that
- 7 Ray Holt had been relieved as his duties as the
- 8 operator of that entity. My family, as has been
- 9 mentioned before, had a 300,000-dollar investment in
- 10 that company. They saw Brian as someone who had
- 11 leadership ability. I had some financial ability. But
- 12 we were contemplating the family and I was kind of
- 13 contemplating retiring to take care of the family. So,
- 14 they approached us to come up and talk to them about
- 15 having Brian be an employee of Holt Family Homes.
- 16 Q All right. Now, were you interested in getting back to
- 17 Charlotte for other reasons?
- 18 A Yes.
- 19 Q What were the other reasons?
- 20 (pause)
- 21 A I'm sorry. My mother had ovarian cancer -- sorry. And
- 22 she was very sick.
- 23 Q All right.
- 24 A She was getting sick.
- 25 Q All right. So you moved to Charlotte for all of those

1 reasons?

2 A Right. We wanted to be close to home because my mom
3 was sick and we were having our first child and that
4 was their only grandchild. Sorry.

5 Q All right. Now --

6 A Okay.

7 Q Tell me if you would, what was your involvement with
8 respect to Builders Investment Group?

9 A I -- my involvement was more in title. My family asked
10 me to be the managing member. There was really nothing
11 to do in that capacity. I -- you know, I guess I held
12 the LLC meetings we had amongst our family members.
13 And, really, that was about it.

14 Q Now, did you grow up in Columbia?

15 A I did.

16 Q As the daughter of Dale Boozer?

17 A Right.

18 Q And Nancy Boozer, who has since been deceased?

19 A Right.

20 Q All right. And you continue to live in Charlotte with
21 Brian and your two children?

22 A I do. I do.

23 Q All right.

24 MR. SOWELL: David, let's pull up Exhibit 6, which
25 is the operating agreement for Arden Family Homes.

1 BY MR. SOWELL:

2 Q Now, with respect to Exhibit 6, which is the operating
3 agreement for Arden Family Homes, were you directly
4 involved with the negotiation of the document?

5 A Yes, I was.

6 Q On behalf of Builders Investment Group?

7 A Yes, sir.

8 Q If you would, just tell the jury how that process went
9 along. And we can refer to the document whenever you
10 want to.

11 A Sure. Sure. And I have it right here if that's okay.

12 Q Yes.

13 A And sorry for my emotions. In -- let's see here, when
14 it was decided that -- the decision was made that we
15 were leaving Orlando. Brian was going to run Arden
16 Homes. I was going to come up and help out if I could.
17 We needed to contemplate that in the operating
18 agreement. Originally, I mentioned that they ask us to
19 come and just be an employee of the business, but over
20 time, they decided that -- I don't know how the
21 decision was made, that the Boozer family should make
22 an investment in the business along with Brian Boone.
23 And that's when we discussed the fact that we made
24 together a -- Builders Investment Group made a
25 625,000-dollar equity investment into the business and

1 Brian Boone made a 125,000-dollar equity investment
2 into this business.

3 Q Let me interrupt you for a brief second. That was a
4 new investment?

5 A That was a new investment, that's in addition to the
6 300,000 that Builders Investment Group had as a B
7 shareholder. I think on the screen earlier, you showed
8 the A shareholders and the B shareholders. So Builders
9 Investment Group at that point had a 925,000-dollar
10 investment and Boone 125.

11 So back to the operating agreement, we needed to
12 contemplate that new equity in the business that
13 changed up the ownership structure and contemplate
14 anything we needed to address specifically as it
15 related to bringing on new managing members and so on
16 and so forth. And I directly met at the law firm of
17 Richardson Plowden and negotiated the change.
18 Basically, we took the old Holt operating agreement and
19 changed it to reflect the new things we needed to
20 reflect in the Arden operating agreement.

21 Q Let's look at paragraph 2.3 of revised and restated
22 Arden operating agreement, Exhibit 6.

23 MR. SOWELL: David, pull out the first sentence
24 there, please.

25

1 BY MR. SOWELL:

2 Q You see paragraph 2.3?

3 A I do.

4 Q Which says each of the Class A members, but none of the
5 Class B members shall in its individual capacity
6 jointly and severally guarantee any loan to the company
7 for so long as any guarantee of such loan is required
8 by the lender. Do you see that?

9 A Yes, sir.

10 Q Now, with respect to the Southern First loan, which
11 we've talked about to some degree already today, did
12 Southern First ever ask you on behalf of BIG or Brian
13 Boone, as far as you know, to guarantee that loan?

14 A Absolutely not.

15 Q Did you ever guarantee that loan?

16 A No.

17 Q Now, were there other loans that were made -- and we've
18 talked about Bank of America, Wachovia and Carolina
19 First, were there other loans made to Arden Family
20 Homes?

21 A In addition to those three banks?

22 Q No, just those three banks?

23 A Those three banks, yes, there were three loans to those
24 banks?

25 Q And did BIG and Brian Boone guarantee those loans?

1 A They did. My brother, Robert Boozer, signed the
2 personal guarantees on behalf of Builders Investment
3 Group.

4 Q And Brian Boone did what?

5 A Brian Boone signed individually, yes, sir.

6 Q Now, why did you not personally guarantee the Southern
7 First loan?

8 A Well, that was specifically discussed when we
9 negotiated the operating agreement, and I think we
10 should refer to section 4.2. I -- this loan came up --
11 we found out about the loan. We knew there were loans
12 with Bank of America and Wachovia and, I guess,
13 Carolina First as well, but then in the course of -- as
14 we talked about the time line, January and April of
15 '07, the three A shareholders went out and took out two
16 here different loans, that's why it says loans, from
17 Southern First Bank.

18 So this kind of came up late in the game a little
19 bit and at the time, we said -- they agree they said we
20 guarantee these loans, but if we're going to keep
21 guaranteeing these loans, we want to make sure it gets
22 paid back fast. And I said, That's totally
23 understandable. We are happy to break it out. So we
24 broke it out very specific here, 4.2(b), that that is
25 the loan guaranteed by Jones, Kessler and Buck. That

1 was exactly why it was done that way.

2 We, actually, then, also, said in section -- I
3 believe it's 5.7, it comes up again. This loan is
4 specifically broken out another time in 5.7 because we
5 were taking a controlling percentage ownership of the A
6 shareholders, but those three gentlemen did not want to
7 give us full control of the entity because they were
8 still guaranteeing this loan and they wanted their loan
9 paid back before they gave up control of the management
10 committee.

11 So here it is again, as David has pulled up for
12 me, that there specifically mentions that 500,000-loan
13 to Southern First Bank. And then these guys get paid
14 back their equity investment. And the last person to
15 get paid back was the \$750,000 that the BIG group and
16 Boone put in. As new fresh equity in the company, we
17 were the last people to get our money back and they
18 were the first people to get their money back. And we
19 agreed to that so long as they continued as they said
20 they would to keep that loan, but get it paid back as
21 fast as possible. And that's what we agreed to do.

22 Q So this is 5.7(c); correct?

23 A That's right.

24 Q 5.7(c) says, Upon the repayment -- actually, it's got
25 it in there twice. Upon the repayment of the

1 250,000-dollar loan to Jones, the company's
2 500,000-dollar loan from Southern First Bank, the
3 payment of the \$700,000 from Jones, Kessler and Buck
4 and released by the lender of any and all personal
5 guarantees of Jones, Kessler and Buck, all loans to the
6 company management committee will be changed. So as to
7 be deemed, we would have three managers, with Boone
8 having two votes and Jones, Kessler and Buck resigning
9 from the management committee; correct?

10 A That's right.

11 Q So upon the repayment of the 500,000-dollar loan to
12 Southern First Bank, the control of Arden was going to
13 change?

14 A That's right.

15 Q All right. Let's go back to paragraph 4.2 for a
16 minute. Now, is there any reference in paragraph
17 4.2 -- and you can look at the whole thing and we've
18 got subparagraphs A and B up there, but is there any
19 reference in paragraph 4.2 to either the Bank of
20 America loan, the Wachovia loan or the Carolina First
21 loan?

22 A No.

23 Q All right. And those were the loans that both Builders
24 Investment Group and Brian Boone agreed to guarantee?

25 A That's correct.

1 Q Is that the reason they are not referenced in paragraph
2 4.2 or paragraph 5.7(c)?

3 A Correct.

4 Q Now, did Builders Investment Group or Brian Boone ever
5 intend to be responsible for the Southern First loan
6 under this operating agreement?

7 A No, sir.

8 Q Prior to the execution of this operating agreement,
9 before the execution of it on July 31, 2007, did
10 anybody, whether it be Southern First Bank or Mr. Jones
11 or Mr. Kessler or Mr. Buck ask either Builders
12 Investment Group or Brian Boone to personally guarantee
13 that Southern First loan?

14 A I can speak directly to Builders Investment Group as a
15 managing member that I was never asked or approached to
16 sign any guarantee on the Southern First loan or the
17 note or a guarantee.

18 Q Now, before the execution of the revised and restated
19 operating agreement, did you even have a copy of the
20 Southern First loan?

21 A Not that I'm aware of. I looked back through my files.
22 I believe I never saw a copy of it.

23 Q All right. After July 31, 2007, where did the papers,
24 the communications and the correspondence with the
25 banks, Bank of America, Wachovia and Carolina First go?

1 A I just step back and say I didn't, actually, work for
2 Arden Home Builders. I did go into the office one or
3 two days a week to help out with paperwork and get the
4 checks available to sign and Mr. Kessler executed the
5 checks. We mailed them to him and he would sign them.
6 So I would see paper and mail and maybe I'd go to the
7 PO Box on occasion, so that's my capacity of knowing
8 where the correspondence went. And the correspondence
9 for Carolina First, Bank of America and Wachovia all
10 came to our offices in Charlotte.

11 Q Which is where Brian Boone was as the managing member
12 of Builders Investment Group?

13 A That's correct.

14 Q Where did the correspondence with respect to the
15 Southern First loan go?

16 A Well, until we subpoenaed these documents and I was
17 able to see them, because I did not have copies of
18 them, I see that correspondence was going to a PO Box
19 in Columbia, South Carolina, not to Business Executive
20 Park, which was our address in Charlotte.

21 Q When was the first time you understood that anybody at
22 Arden Home Builders believed that you for Builders
23 Investment Group or Brian Boone, personally, were
24 responsible in any way for the Southern First loan?

25 A Well, no one ever contacted me directly about this. I

1 have seen now since referenced here this March e-mail
2 and conversation and I do recall that Brian had a
3 conversation with Kessler that they hung up on each
4 other. But other than that, no one contacted me about
5 it whatsoever. That would be the first I heard they
6 thought we were responsible for it, you know, using
7 Brian as a means, I guess, to communicate with me for
8 Builders Investment Group.

9 Q Did you ever believe from the beginning, which would be
10 the execution of the operating agreement July 31, 2007,
11 or up until this time we just discussed, did either
12 Builders Investment Group or Brian Boone was
13 responsible for the Southern First loan?

14 A Absolutely not. I mean, that's exactly why we broke it
15 out in the operating agreement. That's why the loan is
16 broken out. It was discussed. It specifically stated
17 the dollar amount and who guarantees it. I mean, it
18 was discussed. So no, I never assumed any
19 responsibility for it. I never -- that was not -- no.

20 Q Now, we've talked about earlier and you've been here
21 while the discussions were going on about the release
22 of Ed Buck from the Southern First loan, was anybody at
23 Builders Investment Group ever consulted about
24 releasing Mr. Buck from the Southern First loan?

25 A No.

- 1 Q Did Builders Investment Group ever agree to the
2 disassociation of Ed Buck from Arden Home Builders,
3 LLC?
- 4 A Robert Boozer voted on behalf of Builders Investment
5 Group and that vote was no.
- 6 Q Now, did Builders Investment Group participate in the
7 settlement of the loans from Charleston First and Bank
8 of America as indicated in one of those e-mails? I
9 think it was Exhibit 29 earlier today.
- 10 A Yes, we did. Brian Boone personally contributed
11 \$10,000 to Carolina First. Robert Boozer and Builders
12 Investment paid, so, basically, the members of Builders
13 Investment Group each paid Robert and Robert paid
14 Carolina First \$10,000. And then they each
15 contributed -- I think it was highlighted in one of
16 those other e-mails -- to the Bank of America, I
17 believe it was for the payment of the property taxes so
18 they could close out that loan. So there were
19 contributions to those loans, yes.
- 20 Q And those were loans that Brian Boone and Builders
21 Investment Group personally guaranteed?
- 22 A That is right.
- 23 Q All right. Now, did anybody at Builders Investment
24 Group to your knowledge ever have any contact with
25 Southern First regarding the Arden loan?

1 A They did not.

2 Q The 500,000-dollar loan?

3 A That's correct.

4 MR. SOWELL: That's all I have. Please answer any
5 questions Mr. Williams has.

6 THE COURT: Mr. Williams.

7 MR. WILLIAMS: May it please the Court? Your
8 Honor, I have the sealed deposition of Ms. Boone.

9 THE COURT: Mr. Foreman, members of the jury,
10 y'all might know what a deposition is, but I'll give you a
11 brief explanation. It's the examination of a witness out of
12 court under oath and in the presence of a court reporter,
13 both sides were there, either Mr. Williams or Mr. Sowell or
14 Mr. Dick. And you must view and accept deposition testimony
15 with the same force and effect that you would testimony
16 coming from a live witness. Essentially, the same thing.
17 That make sense?

18 (All answered in the affirmative.)

19 Any exceptions or additions?

20 MR. SOWELL: No, Your Honor.

21 THE COURT: Mr. Williams, you may proceed, sir.

22 MR. WILLIAMS: Thank you, sir.

23 CROSS-EXAMINATION

24 BY MR. WILLIAMS:

25 Q Ms. Boone, we've met briefly?

- 1 A Good to see you.
- 2 Q This is a copy of your deposition. Do you remember
3 when we did that?
- 4 A I do.
- 5 Q I asked you those questions and you answered them under
6 oath and there was a court reporter present?
- 7 A Yes.
- 8 Q And that was taken down and you've had a chance to
9 review that; haven't you?
- 10 A Yes, I did receive a copy of this, yes, sir.
- 11 Q And you found it to be an accurate transcript of what
12 you had to say?
- 13 A Yes, sir, I did.
- 14 Q Is that right?
- 15 A Yeah.
- 16 Q Ma'am, let me ask you this, you said that Mr. Jones
17 contacted you about coming back to Columbia to help
18 with Arden Home Builders?
- 19 A Yes, he did. He contacted me and Brian and he,
20 actually came down and met with us.
- 21 Q Do you think your daddy had anything to do with that?
- 22 A Well, I believe that they had the discussion about it,
23 but if you know, Mr. Jones was an A shareholder of Holt
24 Family Homes --
- 25 Q Sure.

- 1 A -- and had controlling interest there.
- 2 Q I didn't really ask you that, I asked you if -- was it
- 3 the case that Mr. Jones was working for your daddy at
- 4 that time?
- 5 A He did, but he was the CEO and president of the
- 6 company.
- 7 Q Yes, ma'am, he worked for your father at Boozer Lumber
- 8 Company. Your father was chairman of the board; right?
- 9 A Yes, he was.
- 10 Q And Mr. Jones worked for him?
- 11 A Yes, he did.
- 12 Q Mr. Kessler worked for him?
- 13 A Mr. Kessler was the contract CEO as we discussed
- 14 earlier.
- 15 Q Yes. But you've heard the testimony, they were both
- 16 working for your daddy?
- 17 A Yeah.
- 18 Q And Arden Home Builders was your daddy's idea; wasn't
- 19 it?
- 20 A Not that I'm aware of.
- 21 Q Oh, it's not. Okay. So you don't agree that he wanted
- 22 to have a vertical integration to build houses in
- 23 Charlotte?
- 24 A Well, you know, I really can't speak for my dad, but as
- 25 the testimony said it seems like Bob Jones was the one

- 1 that formulated the idea.
- 2 Q So you disagree that your daddy had the idea that you
3 could sell outside of the territory where he was
4 normally doing business without offending anybody?
- 5 A Well, I'm sure that that was a prudent business
6 decision. He thought it was a good idea, sure.
- 7 Q Okay. So he agreed with that idea?
- 8 A Well, I didn't have anything do with the idea, but I
9 agree that if my dad thought it was a good idea, then
10 he thought it was a good idea.
- 11 Q Well, Ms. Boone, it's true, isn't it, that your daddy
12 wanted you to come home?
- 13 A No.
- 14 Q It's not?
- 15 A No.
- 16 Q All right. But you mentioned that your mom was sick?
- 17 A Yes.
- 18 Q And you don't think that that had anything to do with
19 him asking you --
- 20 A I would say my dad respected my career decision. And
21 my career decisions took me to Atlanta and then to
22 Orlando. And he never once said Kathy, we want you to
23 move back to Columbia. That was a personal choice that
24 we made.
- 25 Q So would you agree with me that Arden Home Builders

1 was, at least, in part, an enterprise that was designed
2 to get you back home to have a business for you and
3 your husband?

4 A I believe that the Holt Family Homes -- you know, buy
5 the Holt Family Homes was Mr. Jones, Mr. Kessler and
6 Mr. Buck's way of getting some equity in an interest
7 because they did not own equity in Boozer Lumber
8 Company.

9 Q What kind of work did your husband do in Florida?

10 A He was the director of the development of a private
11 school.

12 Q Worked for a school?

13 A Yes, sir.

14 Q But, on the other hand, had a job with SunTrust in
15 Atlanta?

16 A I worked nine years with SunTrust in Atlanta, yes, sir.

17 Q And I'm looking at Page 6 of your deposition. You want
18 to look at that?

19 A Okay.

20 Q Line 12?

21 A Yes.

22 Q You see that?

23 A Yes.

24 Q And what do you say about what you do for SunTrust
25 there?

- 1 A You want me to read it?
- 2 Q Would you?
- 3 A Sure. After I took the job at SunTrust Bank in Atlanta
- 4 in the commercial banking training program, I spent 12
- 5 years with the bank, most of which was in the corporate
- 6 and investment banking area and I dealt with middle
- 7 market leverage transactions for private equity firms
- 8 for buying middle market size companies all over the
- 9 country. I went and did diligence and made decisions
- 10 as to whether or not banks should make loans to those
- 11 companies in those particular cases. I did that for
- 12 five or six years in Atlanta, worked in our mergers and
- 13 acquisitions group for a while. And then I moved to
- 14 Atlanta because I was engaged to Brian and he had an
- 15 opportunity down there. I stayed with the bank and
- 16 worked in a large corporate lending area, where I
- 17 managed relationships with companies as large as
- 18 Carnival Cruise Lines, Office Depot, et cetera. That's
- 19 my background.
- 20 Q All right. So this was pretty much right out of
- 21 school; wasn't it?
- 22 A Yeah, that was the first job I took out of school.
- 23 Q So tell us then what is a middle market leverage
- 24 transaction?
- 25 A What I'm describing there is when these -- I think the

1 term private equity firm is more readily used in the
2 present than it was back then, but these were large
3 companies that raised equity capital from --
4 individuals and maybe pension plans. It's sort of like
5 a mutual fund that goes out and makes investments in
6 businesses instead of other publically-traded stocks.
7 Does that make sense?

8 Q Well, I don't know anything about that, ma'am, but I'm
9 sure it does. Let me ask you this, you went on to say
10 that you did due diligence and made decisions as to
11 whether or not banks should make loans to those
12 companies?

13 A I did.

14 Q Now, tell us what is due diligence?

15 A Due diligence. I think I described later on exactly
16 what we did, but in these cases, these private equity
17 firms would say hey, I want to buy X, Y, Z zipper
18 company. And they would hire a team of accountants, go
19 in and analyze the financial statements. They would
20 prepare financial statements. They would prepare
21 projections and decide whether or not it was a good
22 investment for them to make and how much equity they'd
23 put in and how much debt they would need to put in said
24 acquisition. So what my role was I was on the due
25 diligence team -- well, really, I took all that

1 information they got, we reviewed it and decided
2 whether or not we thought they had the ability to pay
3 back the loans based off their projections.

4 Q So you would make inquiry into the condition of a
5 company?

6 A Well, I didn't specifically, I just received
7 information from those private equity firms from their
8 due diligence teams. And I just read them and tried to
9 make a case for whether or not I thought it was a good
10 idea for our bank to lend money in those transactions.

11 Q Now, you said you made decisions whether or not the
12 bank should make loans?

13 A I did say I made decisions, but later, I corrected it.
14 I did not mean to say -- I was not the decision maker.
15 I was on the line. I did not make credit decisions for
16 the bank. I would propose them to somebody in a higher
17 up position who would analyze the detail that we wrote
18 up. We would right, basically, like a term paper on
19 these businesses and they would decide whether or not
20 we were going to make the loan. And I think I
21 corrected myself later. I don't recall exactly saying
22 I made the decisions because I did not, that was
23 incorrect. I didn't make decisions.

24 Q But you participated in the decision --

25 A I participated in the presentation of the information

- 1 to the people that made the decisions.
- 2 Q And in the course of your work on these leverage
3 transactions, did you ever make a recommendation when
4 you felt you didn't have enough information to make a
5 recommendation?
- 6 A No.
- 7 Q Did not?
- 8 A I don't think I would have.
- 9 Q Well, I hope not, but I'm asking you, professionally,
10 you would always be assured you had enough information?
- 11 A And, you know, this was a big bank and we had a process
12 and there was a team of people involved and I was one
13 person on the team.
- 14 Q For example, you mentioned that you managed
15 relationships with companies as large as Carnival
16 Cruise Lines?
- 17 A Right, that was not leverage finance transactions, that
18 was when I moved to Orlando. I would be the primary
19 contact. Those companies have hundreds of banks.
20 Carnival Cruise Lines had hundreds of banks and all of
21 them had a little slice of that company. We all had a
22 loan agreement that we all participated in.
- 23 Q So let's turn over to Page 14. And there at Line 16 --
- 24 A Uh-huh.
- 25 Q I asked you this question, During your years with the

1 bank in Orlando, I believe you said one of your roles
2 was to consider the intricacies, is that a good word,
3 of various corporations that might involved in
4 borrowing money or going through mergers and
5 acquisitions and so forth.

6 MR. SOWELL: Mr. Williams, excuse my interruption,
7 what page are you on?

8 MR. WILLIAMS: Page 13, Line 16.

9 THE WITNESS: Excuse me, you said Page 14.

10 MR. WILLIAMS: I'm having trouble seeing.

11 MR. SOWELL: Me, too.

12 THE COURT: We're all on the same page now.

13 (Laughter.)

14 THE COURT: You want to back up a little bit, Mr.
15 Williams.

16 BY MR. WILLIAMS:

17 Q Page 13, Line --

18 A Yes, this is your question to me, yes, sir.

19 Q Yes. And you said on Line 21 what?

20 A Correct, I helped underwrite loan transactions.

21 Q And then I asked you to what extent did you feel that
22 due diligence required you to look into the internal
23 affairs of the companies that you were considering?
24 How much information did you want about those
25 companies? And you answered on Line 5 what?

- 1 A Generally, in those situations, we engaged an
2 accounting firm that had a due diligence team and they
3 would go in and scrub, it was a term we used -- it says
4 scrud, but it's meant to say scrub.
- 5 Q It should have been scrub?
- 6 A It should have been scrub.
- 7 Q All right.
- 8 A You analyze, you scrub those books to really understand
9 really what the financial position was because they
10 were mostly in those days privately held companies so
11 they could be doing all sorts of things with their
12 books. So that we would engage a team of specialists
13 to go in and analyze the businesses and we would,
14 essentially, piggy back off that information. I'm
15 referring back to those private equity firms that were
16 going to make the investment, they would hire a team --
- 17 Q Right.
- 18 A -- to analyze the business.
- 19 Q You would piggy back off that information and?
- 20 A Oh, sorry. And say okay.
- 21 Q Okay. That meant you looked at the information and
22 were satisfied it was reliable?
- 23 A Right.
- 24 Q All right. Go ahead.
- 25 A We had to assume the numbers were correct and then make

1 our decision based off our assumptions those numbers
2 were correct.

3 Q And then I asked you, You did that for many years?

4 A That's correct.

5 Q And you said?

6 A Twelve.

7 Q Twelve years. Over those 12 years, give me a guess of
8 how many companies did you review and make inquiry
9 about? And you said?

10 A I said I have no idea, a lot, a hundred.

11 Q A hundred?

12 A I don't know.

13 Q Well, you want to change that now?

14 A No, no. I don't know. I just said I have no idea. I
15 just said a lot.

16 Q Well, tell us, do you think it was more than a hundred
17 or less than a hundred?

18 A I don't know. I still don't know. I mean, I didn't
19 add them up.

20 Q Yeah.

21 A These companies look at a lot of things and --

22 Q Sure.

23 A And we didn't always say yes either, we, collectively.

24 Q Right. But, ma'am, it's true that you have a lot of
25 experience?

- 1 A Oh, yes, yes.
- 2 Q And I asked you this question, I would assume from that
3 that you knew what you were doing?
- 4 A I said, I wouldn't say that every decision was the
5 right decision, but I wasn't the decision maker.
- 6 Q Right.
- 7 A I just help present the information to the decision
8 maker.
- 9 Q And then I said, Would it be safe to say that you got
10 all of the information that you needed, that you felt
11 you needed in order to make a decision?
- 12 A We tried to, yes.
- 13 Q I asked you, Line 10, Many of these -- many of those
14 were privately-held companies?
- 15 A They were.
- 16 Q You have a copy of the operating agreement there, don't
17 you, ma'am?
- 18 A Yes.
- 19 Q And I believe you said you helped -- or, at least, you
20 participated in some extent in drafting that?
- 21 A I did.
- 22 Q Based on your testimony just now, I would ask you if
23 you felt that you had the sufficient background and
24 expertise to participate in that?
- 25 A In the drafting of the operating agreement?

- 1 Q Yes, ma'am.
- 2 A I would not say that my bank experience had me drafting
3 operating agreements.
- 4 Q I didn't ask you that. I ask you if it gave you
5 background for participating in that process?
- 6 A I mean, I had some business background. I, certainly,
7 was used to --
- 8 Q All right.
- 9 A -- financial statements, but I know that it gave me
10 the -- made me an expert.
- 11 Q Well, in reviewing those however many companies,
12 hundred, more or less, companies didn't you take a look
13 at the governing documents of those companies?
- 14 A Actually, I didn't.
- 15 Q You did not?
- 16 A No.
- 17 Q So you wouldn't look to see who the shareholders were
18 and what the By-Laws were?
- 19 A No, somebody else would have done that.
- 20 Q Somebody else would do that?
- 21 A I did the financials analysis.
- 22 Q I see. So in this case, how did you come to
23 participate in the drafting of that agreement if you
24 didn't have the background?
- 25 A Robert Kessler and I were the two people that were

1 decided that would go in and talk about it. And we met
2 with our attorneys, which was Richardson Plowden, and
3 they both represented -- the firm represented all of
4 the shareholders and the company. And I took -- you
5 know, they're the ones that drafted it. We just came
6 up with the business points that were --

7 Q: Uh-huh.

8 A -- appropriate for the transaction. I wouldn't say I
9 know how to draft it, no.

10 Q In retrospect, would you say you were unqualified to do
11 what you did?

12 A I wouldn't say I was unqualified.

13 Q Right.

14 A That's why you seek legal counsel.

15 Q Yeah, I understand that, but --

16 A I'm sorry.

17 Q -- your participation?

18 A Yeah. Well, I think as far as the group of people
19 here, I had -- I think that's who was chose to do it.
20 I mean, I hope that I knew what I was doing.

21 Q Who else in BIG -- you had brothers in BIG; right?

22 A Uh-huh. Uh-huh.

23 Q And your daddy was in BIG?

24 A Right.

25 Q So they, apparently, allowed you to do that?

- 1 A They did.
- 2 Q They must have had some confidence in you?
- 3 A I guess. That would be my assumption.
- 4 Q Well, don't you think it was because of your background
5 and experience that they would leave that up to you?
- 6 A I can't -- like I said, I can't tell you what my family
7 was thinking.
- 8 Q All right. Now, taking a look at that document and
9 based on your background and experience, you understand
10 that's a contract?
- 11 A I do.
- 12 Q And take a look at the signature page and tell me
13 whether or not you signed it?
- 14 A I signed it twice, once as a BIG A shareholder and once
15 as a BIG B shareholder.
- 16 Q All right. So you knew when you signed that in July,
17 July 31, 2007, that were signing a contract?
- 18 A That is correct.
- 19 Q And you appreciate the fact that contracts are legally
20 binding?
- 21 A I do.
- 22 Q And so you were familiar with paragraph 2.3 about
23 guarantee of loans?
- 24 A Yes, sir.
- 25 Q At that time?

- 1 A Uh-huh.
- 2 Q And that's something that you just talked about; right?
- 3 A That's right.
- 4 Q 2.3. And as we've heard several times, it says here,
- 5 Each of the Class A members shall in its individual
- 6 capacity jointly and severally guarantee any loan to
- 7 the company; right?
- 8 A It goes on to say for so long as any guarantee of such
- 9 loan is required by the lender.
- 10 Q Then what does it say, notwithstanding?
- 11 A That's what it says -- oh, I'm sorry, you want me to
- 12 keep reading?
- 13 Q Notwithstanding any other provision of this agreement?
- 14 A Uh-huh.
- 15 Q Any other provision of this agreement, what?
- 16 A Or any provision of the guaranteed loan documents as
- 17 between the members, each Class A member shall be
- 18 responsible for paying Class A member proportionate
- 19 share of any guaranteed loan.
- 20 Q Right. Whether or not it's signed?
- 21 A It don't say whether or not it's signed.
- 22 Q I understand that. It just silent. If a member
- 23 guarantees a loan, the other members have to pay the
- 24 proportionate share; right?
- 25 A That's not what I read.

- 1 Q That's not what you think?
- 2 A No.
- 3 Q All right. That's good. That's why we're here.
- 4 Now, your husband had intended to take over the
- 5 management of Arden; correct?
- 6 A He was voted on by the other A shareholders to be the
- 7 managing member and handle day-to-day operations?
- 8 Q Is that a yes?
- 9 A I'm not sure. You just said --
- 10 Q I just asked you if he was to be the manager of Arden
- 11 Home Builders?
- 12 A I believe, yes.
- 13 Q Yes.
- 14 A That would be yes.
- 15 Q And what kind of qualifications did he have to manage a
- 16 home building company in Charlotte?
- 17 A Well, you'll have to ask him, but he had some various
- 18 leadership positions. He did not have direct
- 19 experience at all in the home building business.
- 20 Q All right.
- 21 A I do know that.
- 22 Q All right. So he didn't have any qualifications?
- 23 A He didn't have any qualifications as it relates to a
- 24 home building business, but, specifically, he had
- 25 management experience and sales experience and I

1 believe that's what made him attractive to the other
2 three A shareholders that asked him to come in and be
3 the manager, voted on him to come and be the manager.
4 It was a decision made by the other -- actually, I
5 think every owner of the company voted for him to
6 become the manager. So it wasn't a decision that he
7 made or I made, it was a decision made by all the
8 owners of the company.

9 Q And when did you -- I take it you don't want to speak
10 for when he learned anything, as you just said, when
11 did you become aware of the fact that Arden was having
12 some financial difficulties?

13 A That would be tough to say. I mean, it wasn't good,
14 really, from the get-go. I think Robert Kessler said
15 it very correctly in his testimony, that it was a crap
16 shoot whether or not it was going to work. But we put
17 together projections that showed if we sold a certain
18 number of houses, we could cover our overhead and,
19 perhaps, produce a profit. So that was really -- we
20 were really looking at the projected home sales, that
21 is really what you do as a home builder. And he had a
22 model for that and he and I discussed it. And like he
23 said, you could make different assumptions of how many
24 you sold and how much you made off each house. And we
25 kind of took a leap of faith saying we think we can

1 make this happen and we all collectively tried to do
2 that. Unfortunately, the economy was bad. And as you
3 heard, our family's business had to close down that was
4 providing materials for this type of company. This
5 company never made any money while we were there.

6 Q This operating agreement that was signed in July of
7 '07, did you have information to that effect before you
8 entered into that operating agreement?

9 A No.

10 Q You did not?

11 A I -- oh, did I know that the company was failing at
12 that point?

13 Q That it was approaching financial difficulties?

14 A Well, I knew -- yes. I correct myself. Yes, I knew
15 that there was financial difficulty and that was why we
16 required some additional capital into the business.

17 Q Well, for example, this loan that is the issue of this
18 case --

19 A Uh-huh.

20 Q -- that loan was for the benefit of Arden Home
21 Builders; wasn't it?

22 A That was a loan taken out with those three shareholders
23 before we got there. Like I said, during our due
24 diligence process, which I think is consistent with my
25 deposition, that we didn't know about that loan the

1 whole time. We know there were operating loans to the
2 company for the lots and for construction loans and
3 those got paid off when we sold a house. So this one
4 was different and distinct and as such, was broken out
5 in the operating agreement as we discussed.

6 Q Let me ask it again. That loan was for the benefit of
7 Arden Home Builders; wasn't it?

8 A Yes -- well, no, sorry, it was for the benefit of Holt
9 Family Homes.

10 Q All right. Holt Family Homes that became Arden Homes?

11 A That is correct.

12 Q You're right. So, you don't contend that the proceeds
13 of that loan went to any individual's benefit?

14 A No, no, I -- well, it went to the individual
15 ownership's benefit because it kept the company afloat
16 for a certain period of time, I believe, but --

17 Q Right.

18 A -- I don't believe anybody took that money personally,
19 no. I believe the money did go into the company.

20 Q So when you were doing your due diligence as you had
21 done a hundred times or so or more --

22 A Uh-huh.

23 Q -- for big companies and small companies,
24 privately-held, publically-held, you're doing that due
25 diligence before you signed this management agreement

1 you had all -- sorry, this operating agreement --

2 A Uh-huh.

3 Q -- you had all the information you required; didn't
4 you?

5 A I did.

6 Q You saw that?

7 A I did not review the loan documents, if that's what
8 you're saying. No, I reviewed financial information.
9 And I believe you'll see that Bob Jones put in a
10 250,000-dollar loan to the company. During our due
11 diligence, we realized there was a very big accounts
12 payable number for the company and we weren't willing
13 to put our capital in unless that money was paid. And
14 he agreed to make another loan to company. So we knew
15 the company was not sitting there flushed with cash,
16 which is why we were making our equity investment.

17 Q The question I ask you, ma'am, was based on your
18 experience, what you've testified to about your past
19 experience in reviewing companies that were applying
20 for loans or buy-outs or mergers or acquisitions,
21 whatever, a hundred or more?

22 A Uh-huh.

23 Q Based on that background and experience and in
24 reviewing the same elements for consideration for you
25 investing in this company or BIG, you had all of the

1 information you felt you needed to make that decision?

2 A I assume I did.

3 Q You assume you did, ma'am?

4 A I mean, I made the investment, so. I did review lots
5 of information and, like I said, we really based it off
6 the projections going forward and we weren't able to
7 achieve those projections.

8 Q Well, let me ask it this way, ma'am, are you going to
9 say now that you did not have all the information that
10 you needed?

11 A No, I'm not going to say I didn't have all the
12 information. No, I'm not.

13 MR. WILLIAMS: No further questions. Thank you.

14 THE COURT: Anything on redirect?

15 MR. SOWELL: No.

16 THE COURT: All right. You may step down.

17 THEREUPON,

18 BRIAN D. BOONE,

19 after having been duly sworn, testified as follows:

20 THE CLERK: Thank you. Have a seat in the witness
21 stand, please. Seat your name for the record.

22 THE WITNESS: Brian David Boone.

23 DIRECT EXAMINATION

24 BY MR. DICK:

25 Q Mr. Boone, would you give us a brief history of your

1 educational background?

2 A Sure. I went to Rollins College in Winter Park,
3 Florida, studied international relations, they called
4 it Latin American studies, with a business minor. I
5 later got an MBA while I worked for a foreign exchange
6 company.

7 Q Okay. Walk me through your work history, if you would,
8 after college?

9 A Sure. I graduated from Rollins in 1989, continued my
10 education with graduate studies. I went to work for a
11 foreign exchange company, rapidly progressed through
12 that company to lead a division. Along the way, I
13 turned around an operation that was in the bottom five
14 percent of offices to the top five percent of offices.
15 After that, I was asked to lead an area of the company
16 that was failing and was able to turn that around to a
17 successful enterprise. And then took over a division
18 to operate and help to write the strategic plan for
19 operations with 20 -- excuse me, 19 other people in the
20 world and London, and then came back and helped to
21 write the strategic plan for North American operations
22 for that company.

23 One of the strategic items was to discontinue my
24 division because the European currency unit was coming
25 and traveler's checks and that whole market was

1 changing foreign exchange, meaning currency, not
2 foreign exchange like a student exchange. And they
3 offered me a position in Toronto, and I didn't want to
4 take it, so I took the severance package and had eight
5 or nine months to determine what I wanted to do.

6 And I looked into what is my family business,
7 which is education, and where I would most be valuable
8 and looked into admissions business and development
9 work, which is fund raising and strategic growth. And
10 decided to take an opportunity at Darlington School in
11 Rome, Georgia, and worked as Alumni director and helped
12 raise money and helped raise money and helped create
13 more Alumni in that process. I worked there for six
14 years. And went to work in Winter Park, Florida -- and
15 went to work for Trinity Prep, which is probably one of
16 the top five schools in Florida for 6 through 12
17 education. Raised more money there in one year than
18 had been raised in previous five and went on to raise
19 more money there in my four years than had been
20 expected in a decade or more and was able to really
21 change the way that school was run for current students
22 and future students as well.

23 Q Okay.

24 A So much so that they asked to keep me on board, but
25 because of the decision that we made, that Kathy and I

1 made -- and, really, I made, to be honest with you, to
2 move back to -- or to move to Charlotte. I made that
3 decision because I didn't want -- I didn't want my
4 daughter -- I didn't know if it was a daughter or son
5 at the time, but I didn't want my daughter to not know
6 their -- her grandmother or have Kathy had the
7 opportunity not to spend that time with her mom because
8 I lost my brother at 34 and he never got to meet one of
9 his children. My nephew was four when he passed away,
10 my niece was two. And I didn't want that -- I never
11 wanted to not have that opportunity, so I was ready to
12 go and try something new. But the school wanted to
13 continue to have my services even from afar if I could.

14 Q And that's what eventually led to you all making the
15 decision or part of the reason for making the decision
16 to come up to Charlotte and help run Arden Home
17 Builders; correct?

18 A Correct.

19 Q And along your way, I guess, in your work history, you
20 said somewhere you did get an MBA; is that correct?

21 A I did. A foreign exchange company helped pay for my
22 MBA while I worked for them.

23 Q Okay. Now, prior to becoming an A shareholder, Class
24 shareholder of Arden on July 31, 2007, did you have any
25 official role with Holt Family Homes?

- 1 A No official role.
- 2 Q Okay. Before that operating agreement was signed, what
3 was your contact with Holt Family Homes?
- 4 A Kathy and I went to Charlotte at Thanksgiving in 2006
5 to look at the -- one of the subdivisions of Holt
6 Family Homes and to look at the potential subdivision
7 for Holt Family Homes.
- 8 Q And then at some point, you all decided to invest the
9 money and to move to Charlotte and begin you employment
10 with Arden Homes; correct?
- 11 A Yes, I would say that in February, it was really moving
12 that way because as Kathy alluded to, Nancy Boozer had
13 a reoccurrence of ovarian cancer at that point.
- 14 Q Okay. And after the operating agreement was signed,
15 you became the, I guess, managing member of Arden Home
16 Builders; correct?
- 17 A That is correct. All members that are A shareholders
18 have a similar power and authority. According to the
19 operation agreement; there is no -- but I was voted to
20 be the managing member and acted in such capacity.
- 21 Q And all of the members of Arden Home Builders voted you
22 as a managing member?
- 23 A I believe so, but the management committee, in
24 particular, which was Meredith Jones, Kessler, Buck,
25 Robert Boozer, on behalf of BIG, they voted on my

1 employment agreement and there was, actually, a
2 document written up for my employment agreement that
3 they all participated in and signed off on.

4 Q And prior to signing the final operating agreement, how
5 much involvement did you have in the negotiation of
6 that Arden operating agreement?

7 A Very little. As Kathy mentioned earlier, I trusted
8 Kathy and Robert Kessler, who was a long time valued
9 employer of Boozer Lumber or consultant for Boozer
10 Lumber, acting as CFO. I trusted those two individuals
11 to iron out the details of that. And Fred Crawford was
12 the trusted respected legal adviser, so I figured that
13 they would have the best interest of all parties.

14 Q But, eventually, you did sign the operating agreement,
15 correct?

16 A I did.

17 Q Now, when you signed the operating agreement, what was
18 your understanding of your responsibility as it related
19 to the Southern First loan?

20 A As section 4.2 notes quite clearly -- I'm not sure what
21 page it's on, I apologize.

22 Q I think it's on Page 14.

23 A It singles out two loans for priority payment here in
24 4.2(b), second repay of 500,000-dollar loan for
25 Southern First Bank, guaranteed by Jones, Kessler and

1 Buck, plus all accrued interest thereon. I read my
2 responsibility as being that I was responsible for the
3 loans to Bank of America, to Carolina First and to
4 Wachovia, which I did personally guarantee. And as Mr.
5 Kessler said in his testimony, it was a crap shoot.
6 And the reality is, we put in \$750,000 into a crap
7 shoot. Why would I possibly put in liability on
8 another \$750,000 on a crap shoot, which is now 1.5
9 million? It's just inconceivable to me to think that I
10 would have been responsible for that.

11 Q So, it's fair to say that when you signed that
12 agreement, you did not believe that you were
13 responsible for the Southern First loan?

14 A In no way, shape or form.

15 Q And you did guarantee the loans from Wachovia, Bank of
16 America and Carolina First; correct?

17 A Yes.

18 Q And then after the operating agreement was signed, did
19 you become the main contact for those three banks?

20 A Yes.

21 Q And so any banking issues or financial statements or
22 any issues with Wachovia, Bank of America or Carolina
23 First, they would come to you; correct?

24 A Yes, they all came and visited me. We had good work
25 relationships. I would say, in certain cases, Wachovia

1 and Bank of America, I was on the phone with them, at
2 least, twice a month.

3 Q And did you ever have any contact with anyone at
4 Southern First Bank?

5 A Never.

6 Q So, the responsibility of that loan was never
7 transferred to you?

8 A No.

9 Q Do you know who it remained with?

10 A In seeing the documents for the first time in the
11 spring of 2008, I noted a Columbia address. But it
12 really wasn't until this litigation that I was fully
13 aware they were being sent to a PO Box -- or all the
14 communications were being sent to a PO Box in Columbia.

15 Q Okay. Let's look at Exhibit 7?

16 THE COURT: Mr. Dicks, how much longer you think
17 you're going to be? Just a -- I'm taking a break.

18 Members of the jury, I'm going to give y'all a
19 break. I need a break. That's why we're stopping, okay.
20 Just go to the jury room, don't talk about this case. If
21 you need any refreshments, the bailiff will be more than
22 happy to comply with your request.

23 (The jury retires from the
24 courtroom at 3:34 p.m.)

25 (Whereupon, a short recess was

1 held.)

2 THE COURT: Everybody ready?

3 MR. WILLIAMS: Yes.

4 MR. DICK: Yes, sir.

5 THE COURT: All right. You may bring them in.

6 (The jury returned to the

7 courtroom at 3:45 p.m.)

8 BAILIFF: All jurors are seated, Your Honor.

9 THE COURT: Thank you, ma'am.

10 Welcome back, Mr. Foreman and members of the jury.

11 Mr. Dick, you may continue your direct examination

12 of Mr. Boone.

13 MR. DICK: Thank you, Your Honor.

14 BY MR. DICK:

15 Q Before the break, I ask you to look at Exhibit 7. And
16 this is the September 25th, 2007 loan from Southern
17 First to Arden Home Builders. When was the first time
18 that you saw this document, Exhibit 7?

19 A I want to say spring or summer, in that time frame of
20 2008.

21 Q Did any one ever ask you or any one at Builders
22 Investment Group to sign that document?

23 A No.

24 Q Did Mr. Kessler ever send you an e-mail forwarding you
25 this document asking you to sign it?

- 1 A No.
- 2 Q In fact, when was the first time that you ever
- 3 discovered that any one thought you were responsible
- 4 for the Southern First loan?
- 5 A March -- I believe March 18th, 2008.
- 6 Q Okay.
- 7 A There was an exhibit earlier.
- 8 Q All right. Let's look at that, it's Exhibit 18 here.
- 9 I'll take that one back. 18's missing. Do you see it
- 10 in that stack? Yeah, that's it right there. Well --
- 11 A Yes, I think this is probably Exhibit 18.
- 12 Q Okay. So can you identify Exhibit 18 for us?
- 13 A Yes, it's an e-mail from Robert Kessler to -- you can
- 14 see it's a blind copy to Bob and Ed. And it's in
- 15 response to a statement that I made regarding the tax
- 16 returns. The tax returns came back and I had some
- 17 concerns about how Southern First was related to it on
- 18 that. And that is a -- I guess, a response from Robert
- 19 to me on that subject.
- 20 Q Was this the first time -- this Exhibit 18, was this
- 21 the first time that anybody had ever told you they
- 22 thought you were responsible for the Southern First
- 23 debt?
- 24 A Yes.
- 25 Q And what happened after this e-mail?

- 1 A I picked up the phone and called Robert Kessler.
- 2 Q And what did y'all take about during that phone call?
- 3 A Exactly what you see and what you hear in section 4.2,
4 which is I never saw the Southern First loan as my
5 responsibility because it was highlighted out separate
6 from all the other loans, that it was guaranteed by
7 Jones, Kessler and Buck and I was never intended per
8 the operating agreement to sign that or guarantee it.
- 9 Q And is that the phone call that Mr. Kessler hung up on
10 you?
- 11 A He did.
- 12 Q And that was because it was, I guess, a heated debate
13 between the two of y'all?
- 14 A It was. And it prompted another exhibit that you see
15 where he communicated back to the other A -- to Robert
16 Jones and Ed Buck about his findings and how he took it
17 to me, which I would imagine was a discussion they had
18 prior to his sending that e-mail.
- 19 Q But prior to this e-mail in Exhibit 18 on March 18th,
20 you had never spoken with Mr. Kessler about your
21 alleged responsibility on the Southern First loan?
- 22 A Never.
- 23 Q Has -- prior to this litigation, have you ever talked
24 to any one at Southern First about this loan?
- 25 A No. As a matter of fact, in -- I believe it was in

1 April when we were here --

2 Q This year?

3 A Of this year, to discuss this matter before Judge

4 Barber was the first time that I ever saw Justin

5 Strickland and the first time that I ever met Justin

6 Strickland.

7 Q And Mr. Strickland is the president of Southern First
8 Bank?

9 A Based on the information that I provided, yes, he is
10 the president of Southern First Bank.

11 Q And the loan officer on this loan?

12 A That is my understanding, yes.

13 Q So, prior to this litigation then, has anyone at
14 Southern First, including Mr. Strickland, ever
15 contacted you?

16 A No. And if you look at the time that the loan was --
17 you know, the previous Exhibit 17, I guess, with that
18 loan, at that time, in September of 2007, Robert
19 Boozer, on behalf of BIG, and myself were signing loans
20 with Carolina First, with Bank of America and with
21 Wachovia guaranteeing -- our guarantees as well as the
22 loans. There was never a call. There was never a
23 request. There was never a document shared with me
24 because they knew, based on the intent and the written
25 documentation in 4.2, that we were not responsible for

1 that loan.

2 Q So around the same time, September of 2007, you
3 guaranteed the other loans to Arden Home Builders?

4 A Yes.

5 Q But nothing was ever presented to you regarding the
6 Southern First loan?

7 A That is correct.

8 Q Let's look at Exhibit 16. And my understanding was
9 there was a -- was there a meeting some time in June of
10 2008 at Mr. Kessler's office to discuss Arden Home
11 Builders?

12 A Yes, there was. It was to discuss the plans for the
13 next few months as well as the potential of a wind down
14 and --

15 Q And did you discuss the Southern First loan?

16 A We did. And as it had been before, it was a
17 disagreement on the understanding and intent of the
18 operating agreement. I reiterated section 4.2 and they
19 had a different interpretation of it. And I -- since I
20 had never been involved in any negotiations with
21 Southern First and had been involved in the other
22 banks, the way that I see it is the way they dealt with
23 this loan, it was very different. The statements were
24 being sent somewhere else. It is documented in 4.2. I
25 never received any requests. I never met with Justin.

1 Strickland. I met with every other banker. I was the
2 lead principle point for all the other relationships.

3 Not once did I hear about Southern First, period.

4 Q And if you look at Exhibit 16 that I just handed you
5 there, it appears to be an e-mail from July 1st, 2008.

6 Did the -- the meeting at Mr. Kessler's office, that
7 was in late June?

8 A I believe so, yes.

9 Q Okay. And then there's some e-mails here in Exhibit 16
10 on July 1st of 2008. Flip to the second page there.

11 Do you recognize -- is that an e-mail from you to
12 Mr. Jones?

13 A It is.

14 Q So these three paragraphs here is the e-mail from you
15 to Mr. Jones?

16 A Correct.

17 Q Okay.

18 MR. DICK: Pull up the second paragraph there.

19 Q Would you read us the last line of that paragraph
20 there, starting with the second priority?

21 A The second prior for payment before any distribution to
22 members is the note with Southern First that I
23 understand you, Robert and Ed personally guaranteed
24 according to the operating agreement before the
25 conversion from Holt Family Homes to Arden. I do not

1 know any details of that note as we did not have a copy
2 in our files.

3 Q So this is your e-mail to Mr. Jones depicting your
4 understanding of the Southern First loan that you just
5 described to us?

6 A That's correct.

7 Q And read --

8 MR. DICK: And if we could, bring up the third
9 paragraph there.

10 BY MR. DICK:

11 Q If you would just read us the last line of that
12 paragraph?

13 A I have personal guarantees on the lots at Parkway and
14 Seven Oaks with B of A, Carolina First and Wachovia,
15 which is what I read as my responsibility.

16 Q Okay. Now, flip over to the first page. And look in
17 the middle of the page, there appears to be an e-mail
18 on Tuesday, July 1, 2008, from Bob Jones back to you.

19 A That's correct. The first line says thanks for the
20 quick response in clarifying your position for the
21 record on my note and for the Southern First note.

22 Q Okay. Is there any objection to your position that you
23 clarify there?

24 A No.

25 Q And this Mr. Jones's response to your e-mail; correct?

1 A That is correct.

2 Q We've discussed Ed Buck some in the past. I want to
3 make sure I'm clear. What was your vote related to the
4 disassociation of Mr. Buck from Arden?

5 A I voted against it at the advice of our legal counsel,
6 Fred Crawford, who looked at it. It put us in a bad
7 financial position -- I should say even worse financial
8 position by having that. So it wasn't a fiduciary
9 responsibility of mine as an A member, Class A member
10 to diminish our operating capital further.

11 Q Did anyone ever consult you about whether or not Ed
12 Buck should be let off the guarantee related to the
13 Southern First loan?

14 A No, which was consistent with our they handled the
15 Southern First loan from the beginning, which, again,
16 is outlined in 4.2.

17 MR. DICK: That's all I've got.

18 THE COURT: All right, Mr. Williams.

19 MR. WILLIAMS: May it please the Court?

20 THE COURT: Yes, sir.

21 CROSS-EXAMINATION

22 BY MR. WILLIAMS:

23 Q Mr. Boone, have we spoke -- we've met before?

24 A Yes, sir.

25 Q I took your deposition, you remember?

1 A I do.

2 Q Sir, the operating agreement has your signature; right?

3 A Yes, sir.

4 Q All right, sir. So when you signed it, you knew it was
5 a contract; correct?

6 A Yes, sir.

7 Q When did you take over operational control of Arden
8 Home Builders?

9 A Day-to-day operations, I was responsible for when this
10 operating agreement was signed and executed.

11 Q Starting then, so in July of '07?

12 A August, July 31st.

13 Q All right, sir. When did you stop operating Arden
14 Homes?

15 A I, with the other members, the A members, voted to
16 liquidate the company and wind down. And I want to say
17 in late August of 2008, we appointed Robert Kessler as
18 liquidator.

19 Q So for about a year?

20 A Yes, sir.

21 Q Operating it for about a year?

22 A Uh-huh.

23 MR. WILLIAMS: No further questions. Thank you.

24 THE COURT: Any redirect, Mr. Dick?

25 MR. DICK: No, Your Honor.

1 THE COURT: You may step down, Mr. Boone.

2 THEREUPON,

3 JUSTIN STRICKLAND,

4 after having been duly sworn, testified as follows:

5 THE CLERK: Thank you. State your name for the

6 record, please, after you have a seat in the witness stand.

7 THE WITNESS: Okay. Justin Strickland.

8 DIRECT EXAMINATION

9 BY MR. SOWELL:

10 Q Good afternoon.

11 A Good afternoon.

12 Q Mr. Strickland, you are the president of Southern First
13 Bank?

14 A Yes, sir.

15 Q Residing now in Columbia?

16 A Correct.

17 Q And you were the person who made the 498,000-dollar
18 loan to Holt Family Homes back in January and
19 April 2007?

20 A That's correct.

21 Q And you are the person who renewed that loan in
22 September of 2007?

23 A Yes.

24 Q And you are also the person who renewed that loan in
25 September of 2008?

1 A Yes.

2 Q Okay. I'm going to show you Exhibits 9 and 10, which
3 are already in evidence, and just ask you if would
4 you --

5 MR. SOWELL: Pull those up. Let's just look at
6 the top of it so we'll get the context.

7 BY MR. SOWELL:

8 Q Now, that is the -- this is Exhibit 9. That is the
9 September 24, 2008, renewal of the loan, now, the Arden
10 Home Builders; correct?

11 A Yes.

12 Q Now, that loan, it was never guaranteed by Builders
13 Investment Group or Brian Boone; was it?

14 A That's correct.

15 Q Okay. Now, let's look at the guarantees that are in
16 Exhibit 10. That's the first personal guarantee that's
17 dated September 24th, 2008. Is that executed by Mr.
18 Jones?

19 A Yes.

20 Q And there's one behind it, the same document, same
21 date, I think, is that executed by Mr. Kessler?

22 A It is.

23 Q Those were the only two guarantees that were received
24 in September of 2008 at the last renewal?

25 A Yes, sir.

1 Q I'm going to ask you, if would you, to look at Exhibit
2 25.

3 MR. SOWELL: All right. Let's go down to the
4 bottom paragraph.

5 BY MR. SOWELL:

6 Q Now, this is dated -- I know it's obvious, but just to
7 sort of carry this along, this is dated Tuesday,
8 September 2nd, 2008; correct?

9 A Yes, sir.

10 Q Which is in advance of that renewal we just looked at
11 on September 24, 2008?

12 A That's correct.

13 Q All right. And that paragraph down at the bottom
14 that's from you -- it's an e-mail from you to Bob Jones
15 and Robert Kessler?

16 A Yes.

17 Q Regarding -- I'm sort of leading you along. I can do
18 otherwise if somebody wanted me to. But that's the
19 Arden renewal of 2008?

20 A Yes, sir.

21 Q All right. And it says, The loan for Arden -- it says,
22 Bob and Robert, the loan for Arden matures this month,
23 so we need to take a minute and determine how long you
24 guys need it renewed. Also, I need updated personal
25 financials on the two of you as well as Ed Buck. You

- 1 see that?
- 2 A Yes, sir.
- 3 Q Did you ever get any personal financials from Ed Buck?
- 4 A I don't recall.
- 5 Q But you did get them from Mr. Kessler and Mr. Jones?
- 6 A I would assume so.
- 7 Q But you didn't request any from Brian Boone or Builders
8 Investment Group?
- 9 A No, sir.
- 10 Q Okay. And that 2008 loan from Southern First never
11 required anybody except Mr. Jones and Mr. Kessler as
12 indicated in those guarantees, never required anybody
13 else to guarantee that loan?
- 14 A That's correct.
- 15 Q You never spoke with Brian Boone or received any
16 personal guarantees from Brian Boone or Builders
17 Investment Group?
- 18 A Did not.
- 19 Q All right. Now, am I correct that the Arden Home
20 builders note, which was the one we just looked at, it
21 was to mature in September 2009?
- 22 A Yes.
- 23 Q When it matured, did Mr. Jones give the bank some stock
24 that belonged to him?
- 25 A There was a point -- and I'm not sure if this is it,

- 1 that Mr. Jones did offer some personal collateral to
2 secure his guarantee.
- 3 Q All right. I'm going to show you Exhibit 12.
- 4 A Okay.
- 5 Q Now, is that a bank transaction sheet with respect to
6 the Arden Home Builders loan?
- 7 A Yes, sir.
- 8 Q Do you see the December 4, 2009, principle reduction in
9 the amount of \$7,423.67?
- 10 A Yes.
- 11 Q Does that reflect the sale of those shares that Mr.
12 Jones gave the bank?
- 13 A It does.
- 14 Q All right. Now, that, actually, the only payment
15 Mr. Jones has ever made to the bank; is it not?
- 16 A On principle reduction, we received this payment from
17 the liquidation of collateral. There were some other
18 things, such as -- I don't recall how we got to 449
19 because we were at 498.
- 20 Q Right. But I can -- I have to tell you, I cannot
21 explain that either.
- 22 A There was other collateral he pledged in addition to
23 what you see there that was liquidated as well to serve
24 as payment toward the note.
- 25 Q Was it ever liquidated or was the \$7,423.67 the only

1 proceeds from the liquidation?

2 A That was probably the only proceeds that we were
3 involved with liquidation. He may have liquidated and
4 brought proceed to the bank for the other.

5 Q Is there any indication of that here on the transaction
6 sheet?

7 A There's no way to document that. It would just simply
8 show as a reduction in principal.

9 Q Is it correct for me to say that he's never paid the
10 Arden Home Builders loan down to the tune of \$120,000
11 or anything in that neighborhood?

12 A He has not paid it down to that level with any personal
13 assets, correct.

14 Q Or any cash?

15 A Or cash.

16 Q All right. Okay. I'm going to show you Exhibit 13,
17 which is already in evidence. Now, there's been
18 testimony that the bank made a loan to Bob Jones
19 personally. Is this the transaction sheet with respect
20 to that loan?

21 A This is the residual balance of the Arden loan that we
22 made a loan to Bob Jones to honor his personal
23 guarantee.

24 Q So on or about December 8th, 2009, that loan was the
25 subject of a principle disbursement on paper of

- 1 \$449,326.33?
- 2 A Yes.
- 3 Q You didn't, actually, give him that money?
- 4 A No, we used it to pay off the Arden loan.
- 5 Q All right. Now, does it show that there was a charge
- 6 off of that credit or that loan about five days later,
- 7 on December 29th, 2009, in the amount of \$208,176.33?
- 8 A It does.
- 9 Q Does it show that there was an additional 50,000-dollar
- 10 charge off March 29th, 2010?
- 11 A It does.
- 12 Q Does it show that there was an additional 50,000-dollar
- 13 charge off on June 28th, 2010?
- 14 A It does.
- 15 Q And does it show that there was an additional charge
- 16 off on September 28, 2010, 50,000?
- 17 A Yes.
- 18 Q That left the principle balance of \$91,150 as of
- 19 September the 28th, 2010?
- 20 A Yes.
- 21 Q And was that amount, the 91,150 finally charged off by
- 22 Gene Floyd, vice-president of Southern First Bank, on
- 23 December the 20th, 2010?
- 24 A Yes, it was.
- 25 Q Now, there was a point at which I believe, as testified

- 1 in your deposition, that the entire -- well, we know
2 the Jones's personal loan was written off and charged
3 off, but there was a point at which the bank stopped
4 collection of monies related to that loan?
- 5 A We were having conversations with Mr. Jones. We did
6 not pursue legal action immediately.
- 7 Q But, eventually, you did?
- 8 A Yes.
- 9 Q And you sued him on that promissory note?
- 10 A We did.
- 11 Q All right. I'm going to show a copy of Plaintiff's
12 Exhibit 1, which is the confession of judgment that's
13 in evidence. Now, do you recognize that as the
14 confession of judgment Mr. Jones signed on the 8th day
15 of November, 2012?
- 16 A Yes, sir.
- 17 Q In connection with his personal loan?
- 18 A Yes, sir.
- 19 Q Look at paragraph 2, which is Plaintiff's Exhibit 1.
20 We don't have a copy of it for the screen. Does
21 paragraph 2 say, Whereas Defendant has not made payment
22 pursuant to the terms of the note?
- 23 A It does.
- 24 Q All right. And does paragraph 3 says that the
25 Plaintiff has exercised rights under the note and has

1 filed suit against the Defendant in the above-captioned
2 action for nonpayment?

3 A Yes, sir.

4 Q All right. So is it fair to say -- correct to say that
5 Mr. Jones never made any payments on this note?

6 A He didn't pay it off. He made some -- oh, on this
7 note, no, sir. No, sir.

8 Q Yes, this note?

9 A No, sir.

10 Q Never made any payments on this note?

11 A No, sir.

12 Q And has still not made any payments on this note?

13 A No, sir.

14 Q Has not made any payments in response to his confession
15 of judgment?

16 A No, sir.

17 Q Thank you.

18 THE COURT: Thank you.

19 Members of the jury, there's a personal matter I
20 need to take up right now, so I need to give y'all a short
21 break. I don't want to leave you in the courtroom while I'm
22 gone. So go to the jury room. It shouldn't be that much
23 longer.

24 Are there any more witnesses after this witness?

25 MR. WILLIAMS: None from me, sir.

1 THE COURT: Okay. So we just have a little short
2 way to go. Go the jury room. Don't talk about this case.
3 We'll bring you back out and we'll hear Mr. Williams's
4 cross-examination of Mr. Strickland.

5 (The jury retires from the
6 courtroom at 4:12 p.m.)
7 (Whereupon, a short recess was
8 held.)

9 THE COURT: All right. You may bring the jury in.
10 (The jury returned to the
11 courtroom at 4:20 p.m.)

12 BAILIFF: All the jurors are seated, Your Honor.

13 THE COURT: Thank you, ma'am.

14 Welcome back, Mr. Foreman, members of the jury.

15 On behalf of everybody in this trial, thank you all for your
16 patience and attention.

17 Mr. Williams, you may cross-examine.

18 MR. WILLIAMS: May it please the Court?

19 CROSS-EXAMINATION

20 BY MR. WILLIAMS:

21 Q Mr. Strickland, do you remember giving me an affidavit?

22 A I do.

23 Q Do you have a copy up there.

24 A I left it in my seat.

25 Q This is an affidavit that you gave me at my request

1 concerning the guarantees on a loan in 2007; correct?

2 A Yes, sir.

3 Q How about reading that to me, sir.

4 MR. SOWELL: That's not appropriate. If he's got
5 some testimony, he can give that.

6 THE COURT: Best evidence rule. Ask him first.
7 He might need to refresh his recollection or something like,
8 but don't send him to the deposition without questioning him
9 about it first.

10 MR. WILLIAMS: It's an affidavit, Your Honor.
11 It's not a deposition.

12 MR. SOWELL: Do you have another copy of it?

13 MR. WILLIAMS: It's attached to my pretrial brief.

14 THE COURT: Is this a matter I need to take up
15 with you gentlemen before we go forward?

16 MR. SOWELL: Probably.

17 THE COURT: Out of an abundance of caution. Just
18 relax.

19 Members of the jury, I told you at the beginning,
20 there are some matters I can only handle in your absence.
21 This is one of them. Please don't talk about this case.
22 I'll bring you right back out.

23 (The jury retires from the
24 courtroom at 4:22 p.m.)

25 MR. SOWELL: Which exhibit is it to your brief?

1 MR. WILLIAMS: Exhibit D.

2 MR. SOWELL: Your Honor, my position is that
3 Mr. Williams doesn't get to come in and hand an affidavit
4 over to the witness and get him to read it. If he wants him
5 to answer some direct questions, then that's what he should
6 do.

7 THE COURT: I think my ruling was best evidence
8 and the best evidence would be his testimony.

9 MR. SOWELL: Right.

10 THE COURT: He might be able to refresh his
11 recollection, perhaps, but let's ask the questions first.

12 MR. SOWELL: I don't know whether his recollection
13 is --

14 THE COURT: Go ahead. Let's do it in-camera.

15 MR. WILLIAMS: I'll do it the way he said, Your
16 Honor.

17 THE COURT: Beg your pardon?

18 MR. SOWELL: He said he would do it the way we
19 want him to.

20 THE COURT: This is kind of innocuous at the end.

21 MR. SOWELL: Okay. I have to tell you, I had
22 forgotten all about it.

23 THE COURT: That's fine. That's why I sent the
24 jury out. The only thing I see is, quote, expectations,
25 whatever that is.

1 MR. WILLIAMS: We'll do it the way you rule,
2 Judge.

3 THE COURT: All right. Well, you know, the best
4 evidence rule would be you ask him first, then let him
5 refresh his recollection. I read the deposition -- the
6 affidavit. It seems fairly innocuous to me.

7 Anything further, gentlemen, on this point?

8 MR. SOWELL: No.

9 THE COURT: Just don't want anybody to be caught
10 by surprise.

11 MR. SOWELL: Mr. Dick has got something, Your
12 Honor, I'm not sure what it is.

13 MR. DICK: No, I don't, not about that issue.

14 THE COURT: Okay. Bring the jury back in.

15 (The jury returned to the
16 courtroom at 4:24 p.m.)

17 BAILIFF: Jurors are all seated, Judge.

18 THE COURT: Thank you, ma'am.

19 Welcome back, members of the jury.

20 You may proceed.

21 BY MR. WILLIAMS:

22 Q Mr. Strickland, I understand you're the president of
23 Southern First Bank?

24 A Yes, sir.

25 Q As representative of the bank, were you involved in any

- 1 loan transactions between the bank and Arden Home
2 Builders, LLC?
- 3 A Yes, I was.
- 4 Q Did that include the loan to Arden Home Builders, LLC,
5 on September 25th, 2007 for \$498,000?
- 6 A Yes, sir.
- 7 Q In the course of those negotiations, did the bank have
8 any standard operating procedures for guarantees?
- 9 A Typically, we require all members of an entity to
10 guarantee.
- 11 Q So that would be guarantees of the Class A members of
12 Arden Home Builders pursuant to this operating
13 agreement?
- 14 A Yes, sir.
- 15 Q Sir, was it your expectation that all the Class A
16 members of Arden would guarantee loan?
- 17 A Yes, sir.
- 18 Q Did they guarantee it?
- 19 A They did not.
- 20 Q It was guaranteed by whom, please, sir?
- 21 A Bob Jones, Robert Kessler and Mr. Buck.
- 22 Q Now, why did you accept their guarantees instead of all
23 five grantees?
- 24 A Conversations and negotiations have always been with
25 Mr. Jones. I been a relationship bank with Mr. Jones

1 and Mr. Boozer for a number of years and always dealt
2 with them, in any negotiation for a credit instrument.

3 And when we discussed this particular transaction --
4 Bob Jones and I discussed it, we decided to move
5 forward for the sake of time and go ahead and transact
6 the document with the guarantors we had present.

7 Q All right, sir. Now, in terms of credit worthiness, if
8 you had five people who were potential guarantors and
9 one of them was John D. Rockefeller, would his
10 guarantee be enough for you to go forward without the
11 other four?

12 A John D. Rockefeller's would do it.

13 Q Yes, sir. All right. So you were happy to go forward
14 with these three and not the other two at that time?

15 A I was.

16 Q Now, the second point I want to ask you about, sir, is
17 to try to get something straight and I'm not sure I
18 understand yet. This loan in 2007 was for \$498,000?

19 A Yes, sir.

20 Q And then it was renewed in 2008?

21 A Yes, sir.

22 Q Right. When that loan became due in September of
23 2009 -- the loans are there on your table. If you
24 would look --

25 A I got to shuffle them around.

1 Q Okay. And find the one that was due in 2008.

2 A You looking for the maturity of the 2008 note or the
3 advanced --

4 Q The note itself.

5 A I had one in the name of Arden Home Builders dated
6 September 25th, 2007 with a maturity date of September
7 24th, 2008?

8 Q Due September 2008?

9 A Uh-huh, yes, sir.

10 Q That was a loan owed by Arden; right?

11 A Yes, sir.

12 Q No other principle borrower on it, it was Arden?

13 A That's correct.

14 Q It was guaranteed, however, by Mr. Jones and Mr.
15 Kessler; right?

16 A And Mr. Buck.

17 Q And Mr. Buck. All right. When this note became due --
18 when this loan to Arden became due; was it paid?

19 A No, sir, it was renewed.

20 Q All right. Now, I'm asking you about the last one that
21 was paid by Mr. Jones?

22 A Which --

23 Q I know this is confusing.

24 MR. SOWELL: Your Honor, like we discussed, that's
25 the issue in the case. We say it wasn't paid. So I object

1 to the leading nature.

2 THE COURT: Sustained for leading.

3 MR. WILLIAMS: Sir?

4 THE COURT: Sustained for leading. The objection
5 was leading.

6 MR. WILLIAMS: Oh, all right. Thank you.

7 THE COURT: All right. Thank you.

8 BY MR. WILLIAMS:

9 Q I want you to find the note that was paid by Mr. Jones?

10 A We made a loan to Mr. Jones in the amount of \$449,000
11 to pay off the Arden loan.

12 Q All right. So which Arden loan was that?

13 A It was one that was -- looks like it was renewed
14 September 24th, 2008, with a maturity of
15 September 24th, 2009.

16 Q All right. So the note that was -- when it was due,
17 was it paid?

18 A We made a loan to Mr. Jones of \$449,000 on
19 December 8th, 2009 to pay the Arden note. So Mr. Jones
20 incurred the indebtedness personally to do that.

21 Q All right. So the Arden loan was paid?

22 MR. SOWELL: Your Honor, I object again on the
23 same grounds. He's testified about what happened factually,
24 but the ultimate conclusion about this belongs to either the
25 Court or the jury, whether it was paid or not. Because

1 that's the whole debate in the case.

2 THE COURT: Do y'all want to be heard on this?

3 I'll be happy to let you argue.

4 MR. WILLIAMS: Sir?

5 THE COURT: The question was paid was it paid --

6 MR. WILLIAMS: Yes, sir.

7 THE COURT: -- he said yes and you objected.

8 MR. SOWELL: Yes.

9 MR. WILLIAMS: That's my question, was the Arden
10 note paid and the answer was yes.

11 THE COURT: I think the answer was no. Ask the
12 question again.

13 BY MR. WILLIAMS:

14 Q All right. Let me see that Arden note.

15 THE COURT: It might have been yes. Ask it again.
16 I'm confused.

17 (Laughter.)

18 BY MR. WILLIAMS:

19 Q All right, sir. I want to hand you the note dated
20 September 24th, 2008, which had a maturity date
21 September 2009?

22 A Yes, sir.

23 Q That's the Arden Home Builders note?

24 A Yes, sir.

25 Q Was that paid?

1 A It was paid --

2 Q All right.

3 A -- with the loan --

4 Q Yes, it was paid?

5 MR. SOWELL: No, Your Honor, he doesn't get to
6 direct the witness how to answer.

7 MR. WILLIAMS: I thought that's what the Court
8 wanted me to do.

9 MR. SOWELL: He was getting ready to say with the
10 loan. That's the whole issue in the case. With all due
11 respect to Mr. Williams, he doesn't get to direct the
12 witness how to answer.

13 THE COURT: Go the jury room, ladies and
14 gentlemen, don't talk about the case.

15 MR. WILLIAMS: Judge, I will be glad to --

16 THE COURT: Go to the jury room and don't talk
17 about this case.

18 (The jury retires from the
19 courtroom at 4:22 p.m.)

20 THE COURT: Now, let me back up a little bit and
21 make sure I understood everything. There was a loan to
22 Arden that Jones borrowed money for and that loan was
23 assumed in the borrowing of that money? Is that how it was
24 paid? That's the point you're trying to make, I guess?

25 MR. WILLIAMS: Essentially, Judge, there was a

1 loan of \$498,000 that was owed by Arden. Mr. Jones borrowed
2 449,000 odd dollars from the bank and added to that certain
3 money he had otherwise and paid that loan off. So the Arden
4 loan was paid. The Arden loan was paid.

5 THE COURT: All right, Mr. Sowell.

6 MR. SOWELL: Your Honor, that was -- the whole
7 point of my two or three minutes of making a motion for a
8 directed verdict was that is not payment. Now, it is taking
9 out a loan. It's taking out a loan --

10 THE COURT: None of the \$490,000 has ever been
11 paid to the bank; right?

12 MR. SOWELL: Right.

13 THE COURT: Okay.

14 MR. SOWELL: Never been paid.

15 THE COURT: Okay. Relax. That's why we have
16 cross-examination. I'm going to let the question stand.
17 You've got cross.

18 MR. SOWELL: Thank you.

19 THE COURT: It's a matter of -- we've already been
20 down this road before.

21 MR. WILLIAMS: Judge, I think there's a
22 misunderstanding here. In fact, the bank was paid back the
23 money that --

24 THE COURT: That's something for y'all to argue to
25 the jury, not with me.

1 MR. WILLIAMS: I thought he was saying the money
2 was never paid.

3 THE COURT: You got your answer. He said yes.
4 He's going to get to cross.

5 MR. SOWELL: The reason I objected is because
6 Mr. Strickland was saying, in fact, he got part of it out,
7 that Mr. Jones had assumed the loan or taken out a loan or
8 whatever and Mr. Williams cut him off because Mr. Williams
9 wants him to say it was paid. I don't think he can do that.
10 I think if he's going to ask the question, he's got to take
11 the answer and all of it.

12 MR. WILLIAMS: That's not what I was going to ask
13 him, Judge. I appreciate the precedence of counsel, but
14 what I was going to ask him next was -- I was going to ask
15 him if the Arden loan was paid, and he said yes. Then I was
16 going to say --

17 THE COURT: How was it paid?

18 MR. WILLIAMS: That's right. I was going to say
19 how was it paid and I hope, I presume he would say it was
20 paid because Mr. Jones --

21 THE COURT: It's not whether or not it was paid,
22 who was obligated on the note?

23 MR. WILLIAMS: I beg your pardon?

24 THE COURT: Who guaranteed the note?

25 MR. WILLIAMS: Mr. Jones.

1 MR. SOWELL: The obligator was Mr. Jones.

2 THE COURT: All right.

3 MR. WILLIAMS: So that was my last question, how
4 did he pay it.

5 THE COURT: Anything further?

6 MR. SOWELL: Nothing.

7 THE COURT: All right.

8 MR. WILLIAMS: May I ask that question?

9 THE COURT: Yeah, you can ask the question. He's
10 going to get to cross-examine him. The jury will figure
11 this out. They're a smart jury.

12 Bring them back in.

13 (The jury returned to the
14 courtroom at 4:35 p.m.)

15 BAILIFF: All the jurors are seated, Judge.

16 THE COURT: I just want to make sure y'all get
17 enough exercise today. Thank you all so very much.

18 (Laughter.)

19 THE COURT: You may proceed, Mr. Williams.

20 BY MR. WILLIAMS:

21 Q My last question was, was the Arden loan paid and you
22 said yes?

23 A Yes.

24 Q All right. How was it paid?

25 A From a loan made to Mr. Jones.

1 Q All right. So Mr. Jones borrowed money to pay the
2 Arden loan?

3 A Yes, sir.

4 Q All right. Now, he has not paid that money back; has
5 he?

6 A He has not.

7 Q The bank sued him for it; right?

8 A Yes, we have.

9 Q And the bank has a judgment against him for that money?

10 A Yes, we do.

11 Q That's in evidence. All right.

12 MR. WILLIAMS: Thank you, Your Honor.

13 THE COURT: All right. You're welcome, Mr.

14 Williams.

15 REDIRECT EXAMINATION

16 BY MR. SOWELL:

17 Q I will to be brief on this point so we can get through.

18 Essentially, what you -- Southern First had an
19 obligation from Arden Home Builders; correct?

20 A That's correct.

21 Q A promise to pay?

22 A Yes.

23 Q That's what a promissory note is?

24 A That's correct.

25 Q It's not payment?

1 A That's correct.

2 Q It's a promise to pay?

3 A Yes, sir.

4 Q And what you substituted was another promise to pay
5 from Mr. Jones, which was another promissory note?

6 A Yes.

7 Q Which was not payment?

8 A We satisfied the Arden note.

9 Q I understand on the books of Southern First Bank, you
10 satisfied it because he gave you a substituted promise
11 to pay?

12 A That's correct.

13 Q Which is the definition of a promissory note?

14 A That is correct.

15 Q And that is Exhibit 11; is it not?

16 A Yes, sir.

17 Q Now, that is a denominated commercial promissory note?

18 MR. WILLIAMS: May it please the Court? This is
19 his witness. I was cross-examining him. I believe he's
20 cross-examining him.

21 MR. SOWELL: I'll withdraw it.

22 THE COURT: This is redirect. I'll let him go
23 into what you brought out on cross.

24 You may continue, Mr. Sowell.

25 MR. SOWELL: Thank you.

1 BY MR. SOWELL:

2 Q So by definition, we know -- I know you know under the
3 uniform commercial code, we don't need to get into
4 that, but a promissory note is a promise to pay?

5 A Yes, sir.

6 Q It's not payment?

7 A Correct.

8 Q And, lastly, am I correct that with respect to the 2007
9 loan that you never got with or interfaced with anybody
10 other than Jones, Kessler and Buck to guarantee that
11 loan?

12 A Correct.

13 Q You never spoke with Brian Boone?

14 A I did not.

15 Q And none of the Southern First loans were guaranteed by
16 Boone or Builders Investment?

17 A That's correct.

18 Q Thank you.

19 THE COURT: Anything further of this witness?

20 MR. WILLIAMS: Nothing further, Your Honor.

21 THE COURT: All right.

22 Mr. Strickland, you may step down, sir.

23 Anything further this afternoon, gentlemen?

24 MR. WILLIAMS: Nothing from the Plaintiff, sir.

25 THE COURT: All right.

1 It appears, members of the jury, that you have
2 received all the evidence you will hear in this case. I'm
3 not absolutely sure, but I think -- I'm probably close to
4 being sure. So it becomes even more important that you not
5 discuss this matter in any way, shape or form. The time to
6 do so will be once we come back tomorrow, you will hear the
7 arguments from the lawyers, I tell you the law that applies
8 to this case and you will go to the jury room, that's the
9 time to begin talking about this case.

10 I trust and hope you all have a pleasant and
11 restful evening. I would say be back tomorrow morning at
12 10:00, 10:00 again.

13 Is that going to give everybody enough time to get
14 ready?

15 MR. SOWELL: Yes.

16 THE COURT: Okay. So 10:00 in the morning, be in
17 the jury room. Stay warm and dry if you can. Good luck to
18 you.

19 (The jury retires from the
20 courtroom at 4:40 p.m.)

21 THE COURT: Well, you want to do motions now or in
22 the morning? I don't care.

23 MR. SOWELL: Either one.

24 THE DEFENDANT: We've got a written motion.

25 THE COURT: Okay.

1 MR. SOWELL: We've got written motions. So if we
2 could hand it up and we could get it marked.

3 THE COURT: That will be fine.

4 Any objection, Mr. Williams?

5 MR. WILLIAMS: No, sir.

6 MR. SOWELL: Why don't we let you make that a part
7 of the record, let him look at it and we'll do formal
8 arguments in the morning about 9:30. And who knows how long
9 it's going to take the jury to decide anything, but,
10 typically, what I will do is order them lunch. We will
11 probably start the arguments around 10:15, order them lunch,
12 who knows, and get the lunch here by 12:00. That will be
13 the idea.

14 There's one more lady I mentioned who has her
15 four-year-old daughter's dance recital tomorrow at 5:00. I
16 think we'll be through by then, but if in some crazy strange
17 way, we're not, does anybody have an objection to letting
18 her go and --

19 Putting the alternate in?

20 THE COURT: Well, this is the problem. When they
21 start deliberating, I've got to take the alternate out.
22 And, let's say, for some unforeseen reason, it takes them
23 four or five hours to deliberate -- anyway, think about it
24 overnight. I doubt we'll get to that point, but
25 anticipating a mother going to her four-year-old daughter's

1 first dance recital, I can take them off in the morning and
2 guarantee it or we can finish the arguments and charge and
3 see how it looks. I'll leave it up to y'all. I just wanted
4 to bring that to your attention.

5 MR. SOWELL: Thank you.

6 THE COURT: You don't want to deprive a mother of
7 the right to do that. We have an alternate we can
8 substitute. Her number is 92, Juror No. 92, Ms. Gossett.

9 MR. WILLIAMS: No objection.

10 MR. SOWELL: Thank you.

11 THE COURT: Y'all just think about it.

12 I assume the generic charge, general charge and
13 charge on contracts. Y'all have any special requests?

14 MR. SOWELL: Do we have copies of request to
15 charge?

16 THE COURT: I think we'll have time to revisit
17 this in the morning.

18 MR. SOWELL: I could e-mail it. I think it's at
19 the office.

20 THE COURT: It's just general charge, contract,
21 little bit of that. Some special requests y'all might have,
22 we'll talk about it in the morning.

23 Thank you all. Be here at 9:30.

24 (The proceedings were concluded
25 for December 11, 2012.)

1 (The following proceedings were
2 held on December 12, 2012.)

3 THE COURT: I just told the jury it's going to be
4 a little while just relax.

5 And before I hear your motions the young lady that
6 has the four-year-old with a dance recital or something at
7 five, I said, look, I'm inclined -- I said I got to talk to
8 the layers lawyers and mentioned to them yesterday. I'm
9 inclined to take you off and substitute her with the
10 alternate. That's what I think I'm going to do.

11 MR. SOWELL: That's fine.

12 THE COURT: I'm going to let her stay and hear
13 everything. But I'm inclined to do that but, I mean, I have
14 no idea, none of us do, whether it's going to be short,
15 long, or in between. And if I had a four-year-old daughter
16 at her first recital, I wouldn't want this hanging over my
17 head. So that's -- that's my feelings about it. Anybody
18 object if we take her off at the end, substitute the
19 alternate?

20 MR. SOWELL: (The defense shakes head.)

21 THE COURT: Then we can take our time. I'm going
22 to take my time.

23 MR. SOWELL: Okay.

24 THE COURT: Any further evidence I need to hear or
25 we need to hear?

1 THE PLAINTIFF: Nothing further.

2 THE COURT: All right. Let me hear your best
3 shot, Mr. Sowell, and then your best response, Mr. Williams.

4 Yes, sir.

5 MR. SOWELL: Your Honor, with respect to our
6 motion for directed verdict, it's based upon three grounds.
7 First of all, that paragraph 2.3 of the operating agreement
8 is plain, clear; that in order to seek contribution, Mr.
9 Jones must pay more than his membership share, which is
10 either -- you know, depending upon how you calculate it,
11 it's either \$120,000 in round numbers or \$145,000 in round
12 numbers.

13 In any respect, it's been admitted, stipulated or
14 whatever, that he's not paid that amount. There's some
15 dispute about what he's paid, whether it's \$7,000 or I think
16 maybe \$44,000. But in any event, it is not more than 120-
17 or \$145,000. And therefore, we believe as a matter of law
18 that the plaintiff's case cannot be carried forward because
19 we're entitled to judgment as a matter of law with respect
20 to that division of paragraph 2.3 in the operating
21 agreement.

22 The two enhance that argument. The law recognizes
23 the distinction between contracts for indemnity against
24 liability and those for indemnity against the loss. A
25 contract for indemnity against liability, for instance,

1 might address this promissory note argument that
2 Mr. Williams and Mr. Jones had advanced. It would not
3 address a specific provision in the contract like 2.3 that
4 specifically requires that Mr. Jones pay more than his
5 proportionate share. And the reason is is because this is a
6 contract of indemnity or contribution against payment or
7 loss. He has not sustained a sufficient loss; that is,
8 anything in excess of --

9 THE COURT: 120.

10 MR. SOWELL: -- Class A percentage. So as a
11 result of that, he's not entitled to any recovery against
12 the defendants, either one of them in this case, under
13 section 2.3.

14 The third argument is that the operating agreement
15 requires contribution only for members who guaranteed the
16 loan as a matter of law. Paragraph 2.3 does provide for a
17 guarantee of a loan for so long as any such -- for so long
18 as any guarantee of such loan is required by the lender.
19 Now, it is also beyond question in this case that the lender
20 never required either Builders Investment Group or Brian
21 Boone to guarantee this loan.

22 And when you read section 2.3 -- you can read it
23 alone or read it in conjunction with paragraphs 4.2 and 6.6
24 of the operating agreement -- it is clear that this
25 particular loan was never guaranteed by our clients and,

1 therefore, they are not required to contribute with respect
2 to any payment on that loan.

3 Section 6.6 of the operating agreement states that
4 a member is not responsible for any debt, unless the member
5 guarantees any debt or obligation as required under
6 article 2.3. They did not guarantee any debt or obligation.
7 And for that reason, we believe they're entitled to a
8 directed verdict.

9 THE COURT: Well, you mentioned Builders
10 Investment. How about Arden Home Builders?

11 MR. SOWELL: They're really a nominal party.
12 Don't you agree with that?

13 MR. WILLIAMS: Yes, Your Honor.

14 MR. SOWELL: I mean, they were just made a nominal
15 party because they're the limited liability company about
16 which this all --

17 THE COURT: All right.

18 MR. SOWELL: From which this all evolved. We
19 don't really represent them. I don't think anybody does.

20 They were made a nominal party because they are the LLC --

21 THE COURT: All right.

22 MR. SOWELL: -- that has the operating agreement
23 out of which this dispute arose.

24 THE COURT: So the motion is as to Builders
25 Investment and the Boones?

1 MR. SOWELL: Yes.

2 THE COURT: All right.

3 MR. SOWELL: Thank you.

4 THE COURT: Thank you, sir.

5 Mr. Williams.

6 MR. WILLIAMS: May it please the Court?

7 THE COURT: Yes, sir.

8 THE PLAINTIFF: Judge, as I've said a couple of
9 times during this trial, I've had a difficult time
10 comprehending this argument about whether or not Mr. Jones
11 has paid the Arden loan. I know there's been a good deal of
12 confusion about this in the course of this trial, and I hope
13 the Court understands that it's our position, and the facts
14 are not disputed about this, that Mr. Jones paid the Arden
15 loan.

16 THE COURT: All right.

17 MR. WILLIAMS: Yes, sir. The president of the
18 bank from the witness stand yesterday afternoon, when I
19 asked him --

20 THE COURT: Well, let me ask you your definition
21 of "payment," Mr. Williams. What does payment really mean?

22 MR. WILLIAMS: Payment means --

23 THE COURT: Does it mean large money on top of
24 money to cover a debt or a loss, or does it mean I take a
25 dollar out of my pocket and put it in your hand?

1 MR. WILLIAMS: Well, the question then you would
2 ask, sir, is where'd the money come from? If I owe you a
3 hundred dollars and I show up and pay you, I don't think you
4 would inquire as to whether or not I borrowed the money to
5 pay you back.

6 THE COURT: I wouldn't, but if you owe me a
7 hundred dollars and you execute a promise to pay me \$200
8 without paying me the first hundred dollars, where does that
9 leave me?

10 MR. WILLIAMS: Well, I understand, but that's
11 between us. That's between Mr. Jones and the bank.

12 THE COURT: All right.

13 MR. WILLIAMS: So the bank has been paid in full
14 as far as the Arden loan is concerned. There's no doubt
15 about that. It is correct that Mr. Jones borrowed the money
16 from the same bank and hasn't paid that money back and as a
17 result has a judgment against him. But I just don't
18 comprehend that it matters where he got the money to pay.

19 THE COURT: All right. That's not a big issue for
20 me. The bigger issue is why should the Boones be held
21 personally liable on this note -- or why should Builders be
22 held responsible?

23 MR. WILLIAMS: All right, Judge. Well, in looking
24 at the operating agreement --

25 THE COURT: Uh-huh.

1 THE PLAINTIFF: -- again, which we contend to be a
2 contact, the operating agreement says, among other things
3 notwithstanding the selections that counsel has made to show
4 why they shouldn't be held responsible, the operating
5 agreement says, "Notwithstanding any other provision of this
6 agreement or any provision of the guaranteed loan documents
7 as between the members, each Class A member shall be
8 responsible for paying such Class A member's proportionate
9 share of any guaranteed loan."

10 So, as far as I'm concerned, that's all there is
11 to it, that the Class A members are responsible for paying
12 loans --

13 THE COURT: Well, how about the facts that have
14 been deduced that suggest that the Boones didn't know
15 anything about this loan, the loan documents, bills or
16 whatever, were mailed to the P.O. box here in Columbia,
17 South Carolina. They said they had no knowledge of it,
18 didn't see it, didn't hear anything about it. Jones, nobody,
19 else mentioned it to them. So if I'm responsible for
20 something like the Boones, you're trying to make them
21 responsible, why wouldn't somebody tell me that I owe them?
22 Why wouldn't I know about it?

23 MR. WILLIAMS: Well, Judge.

24 THE COURT: Well, of course --

25 MR. WILLIAMS: Judge, you might remember an e-mail

1 that was put into evidence from Mr. Keesler to Brian Boone
2 in which he says let me be clear about something you
3 mentioned in your comments.

4 THE COURT: Well, this is like eight months later,
5 a year later?

6 MR. WILLIAMS: 2008, before the last loan was
7 guaranteed by Mr. Jones. I mean, this was a series of
8 transactions. Of course, the testimony from the witness
9 stand of Ms. Cathy Boone seemed to me to be revelatory as to
10 what information she had before they signed the operating
11 agreement. And she was certainly sophisticated and had an
12 opportunity to look into all the books and records of the
13 company and would have known --

14 THE COURT: So you're saying because she was smart
15 and an astute businesswoman, she should be held responsible
16 for writing herself out of being obligated on this loan?

17 MR. WILLIAMS: She certainly knew when she entered
18 into this operating agreement that the company owed
19 \$498,000. There's no doubt about that.

20 THE COURT: And?

21 MR. WILLIAMS: At that time, the debts of the
22 company didn't reflect on her or her husband because they
23 weren't members of the LLC, but when they became members in
24 July of '07, at that time, then they certainly assumed a
25 position as a member of the company and became

1 responsible --

2 THE COURT: So should they be responsible for debt
3 that's created before they became members and continued
4 after they became members?

5 MR. WILLIAMS: Yes, sir.

6 THE COURT: That's your position?

7 MR. WILLIAMS: I think just as if I became a
8 partner in a partnership, I would take a look at the records
9 of the --

10 THE COURT: But they didn't buy the company. They
11 had a limited -- go ahead. I'm sorry.

12 MR. WILLIAMS: They invested in the company. They
13 became members. Yes, sir.

14 THE COURT: Did they specifically agree to take on
15 all debts and liabilities of the company before they entered
16 this agreement?

17 MR. WILLIAMS: That's our position, yes, sir.
18 When they became members --

19 THE COURT: Well, point to me in the contract
20 where that's stated. Help me out.

21 MR. WILLIAMS: I don't think it is stated.

22 THE COURT: Okay.

23 MR. WILLIAMS: It's -- explicitly, Your Honor,
24 It's not said in so many words.

25 THE COURT: All right. Anything further?

1 MR. WILLIAMS: Oh, yes, sir, I have something
2 further.

3 THE COURT: Go ahead.

4 MR. WILLIAMS: Judge, I would also make this
5 presentation as part of my motion for directed verdict --

6 THE COURT: All right.

7 MR. WILLIAMS: -- because I take the position,
8 based on the evidence in the case and the contract here,
9 that there's only one conclusion that one could reach, and
10 that is that all of these partners, all these members are
11 jointly and severally liable for the debts of the
12 enterprise. And, Judge, in the answer, there are 14
13 defenses. I move to dismiss these defenses because there's
14 no evidence to support them, and I would ask for a -- that
15 they be --

16 THE COURT: What is the 15th?

17 MR. WILLIAMS: Sir?

18 THE COURT: You said you move to strike the 15th
19 defense.

20 MR. WILLIAMS: No, sir. All of them. The first,
21 the second -- well, the first defense, of course, is the
22 general denial, and if the Court finds that there are facts
23 sufficient to go to the jury, then I would not leave out --
24 prevail on that one. But the second defense is fails to
25 state facts sufficient to constitute a cause of action. The

1 third defense is that the damages resulted from the
2 plaintiffs' own conduct, which I -- which it says
3 comparative fault. I don't believe that's the contract
4 defense. The fourth defense is exception of the risk.
5 That's not a contract defense. That the plaintiff has
6 failed to mitigate damages. There's no evidence about
7 whether or not he did anything to fail to mitigate damages.

8 Waiver and estoppel is the sixth defense. The
9 doctrine of laches is the seventh. Statute of limitations,
10 there's no evidence about that. That's the eighth. The
11 ninth is recruitment or set-off. I don't think there's
12 anything in the case about that. Tenth defense is economic
13 loss. That is completely inaccurate to the facts in this
14 case. 11th is accord and satisfaction. No evidence about
15 that. And 12th is course or performance as a complete bar
16 to the complaint. I don't think there's any evidence about
17 that.

18 And the 13th is that the plaintiff has breached
19 his fiduciary duty to the defendants. And then the 14th is
20 that the plaintiff has breached the operating agreement.
21 There's nothing specific about either one of those two. So
22 we would move to dismiss everything except for one, the
23 general denial defense.

24 THE COURT: All right.

25 MR. WILLIAMS: And then we would ask for a

1 directed verdict on those. I'm just trying to protect
2 myself, Judge. I'm so confused about what you need me to
3 do.

4 THE COURT: That's all right. That's fine.

5 MR. WILLIAMS: So we're asking for a directed
6 verdict so we can move for JNOV later and --

7 THE COURT: All right, sir.

8 MR. WILLIAMS: -- maybe, not be held responsible
9 for failing to ask the right question, you know -- cases.

10 THE COURT: Yes, sir, Mr. Sowell.

11 MR. SOWELL: Your Honor, we agreed to strike 15 --
12 no, I'm sorry -- 30 things: Paragraph 15, the fifth
13 defense, paragraph 17; the sixth defense, paragraph -- well,
14 no, no, no, I'm sorry. I'm going backwards. Let me start
15 over.

16 THE COURT: Take your time.

17 MR. SOWELL: We agreed to strike the third
18 defense, paragraph 15; the fourth defense, paragraph 16; the
19 seventh defense, paragraph 19; the eighth defense, paragraph
20 20; the ninth defense, paragraph 21; the tenth defense,
21 paragraph 22; the 11th defense, paragraph 23. Which means
22 that we reserve -- let's make sure I got this straight --

23 THE COURT: Yes, sir.

24 MR. SOWELL: -- because I was goofing it up. We
25 reserve the fifth defense, paragraph 17; the sixth defense,

1 paragraph 18; the 12th defense, paragraph 24; the 13th
2 defense, paragraph 25; and the 14th defense, paragraph 26.

3 THE COURT: All right. Any response to that,
4 Mr. Williams or?

5 MR. WILLIAMS: Let me see.

6 THE COURT: Take your time.

7 MR. WILLIAMS: So, the second defense, fails to
8 state facts, all right, I see that. Mitigation of damages
9 is the fifth defense. I don't believe there's any evidence
10 in the case about damages mitigation.

11 And 12th -- you reserve the 12th defense; is that
12 right?

13 MR. SOWELL: Reserve the second, the fifth, the
14 sixth, the 12th, the 13th, and the 14th defenses.

15 MR. WILLIAMS: I understand.

16 THE COURT: All right.

17 MR. WILLIAMS: Thank you, Judge.

18 MR. SOWELL: Your Honor, may I say one more
19 thing --

20 THE COURT: Yes, sir.

21 MR. SOWELL: -- in response to Mr. Williams'
22 argument.

23 Something that I think really makes this case
24 clear is the second argument we make in our written motion.
25 It cites this case. It's an old case. It's Piper versus

1 American Fidelity Casualty Company, 1930 South Carolina
2 case. But it says, and this is -- this is the general rule
3 everywhere, quote, "a distinction is made between contracts
4 for indemnity against liability."

5 Now, I was told to call that, in the context of
6 this case, promise to pay.

7 THE COURT: Uh-huh.

8 MR. SOWELL: A promissory note. And those with
9 indemnity against loss, which I will call in this case
10 payment. All right. So there's a distinction between --
11 clearly Mr. Justin Strickland, the president of the bank,
12 the last thing he said -- he had to say it. He can't deny
13 the Uniform Commercial Code. You have a promissory note,
14 which is by definition a promise to pay, not payment.
15 That's the whole thing about in God we trust all others, pay
16 cash.

17 But this case says, in the former case, which
18 would be the contract for indemnity against liability, the
19 obligation becomes fixed when liability attaches to the
20 indemnity. In the latter case, the indemnitor's liability
21 does not attach until loss has been suffered; that is, when
22 the indemnity has paid the damages.

23 In this case, Mr. Jones has never paid more than
24 his proportionate share. We don't know that he ever will.
25 I mean, if we look at these documents, and we know that the

1 personal guarantors of the Bank of America, the Wachovia and
2 the Carolina First loans negotiated pennies on the dollar to
3 settle those loans. It is certainly conceivable that
4 Mr. Jones at some point will negotiate his promissory note
5 conceivably down to nothing. But he could certainly could
6 negotiate it down to, maybe, 10 cents on the dollar. He
7 goes on particularly in these days, unfortunate days of a
8 recession. So until he pays the money, and that's the way
9 it's written in paragraph 2.3, our clients can't have any
10 responsibility because the -- the law says so and it also
11 makes perfectly good sense. Thank you.

12 THE COURT: All right. Thank you, sir. Anything
13 further, Mr. Williams?

14 MR. WILLIAMS: Nothing further, Your Honor.

15 THE COURT: All right. I'm going to think about
16 these for about ten minutes. In the meantime, let's have a
17 charge conference. Just come on back into chambers, we will
18 have a charge conference. I've already warned the jury it's
19 going to be a while, so -- and I'm not going to rush anybody
20 today, but we'll have a charge conference. I'll sift
21 through these motions, make a decision, and we'll try to get
22 started sometime in the next 30 minutes or something. Just
23 take a little break.

24 MR. SOWELL: Okay.

25 THE COURT: It's been a hectic morning.

1 (Whereupon, a short recess was
2 held.)

3 THE COURT: There were motions made for directed
4 verdict from both parties and denied.

5 MR. SOWELL: Thank you.

6 THE COURT: The motions for directed verdict by
7 both parties. Using the cross-argument from both parties to
8 keep everybody in this case.

9 Mr. Sowell, Mr. Williams presented me with a
10 request for charge. Where's it at? Now, I think you object
11 to the request is the distinction between liability -- let
12 me read it. "A distinction is made between contractual
13 indemnity against liability and others of indemnity against
14 loss. In the former case, the indemnitor's obligation
15 becomes fixed when liability attaches to the indemnity. In
16 the -- case, the indemnitor's liability does not attach
17 until loss has been suffered. That is when the indemnity
18 has paid the damages." And I think, according to
19 Mr. Sowell, Mr. Williams, you object to this request.

20 MR. WILLIAMS: Yes, Your Honor.

21 THE COURT: All right. Give me a reason.

22 MR. WILLIAMS: Well, first of all, it's
23 incomprehensible.

24 THE COURT: Incomprehensible?

25 MR. WILLIAMS: Yes, sir.

1 THE COURT: By whom?

2 MR. WILLIAMS: Whoever wrote it.

3 THE COURT: All right. Go ahead.

4 MR. WILLIAMS: I don't think the jury would get
5 the slightest notion of what that means. Secondly --

6 THE COURT: Well, now, it's kind of hard to decide
7 what the jury might thinking. That's what you just
8 suggested with your argument.

9 MR. WILLIAMS: I'm just saying, Judge, if I can't
10 understand it, surely nobody else can.

11 THE COURT: Okay. Go ahead.

12 MR. WILLIAMS: The second part is that it's
13 charging on the facts, Judge.

14 THE COURT: How is it a charge -- don't sit down
15 yet. How is it a charge on the facts?

16 MR. WILLIAMS: Judge, I think it's -- from the
17 context, it's obvious that it's an attempt to persuade the
18 jury.

19 THE COURT: Well, your position is that Mr. Jones
20 has paid --

21 MR. WILLIAMS: He did.

22 THE COURT: -- right? And it's his position he
23 has not paid. So how is this going to be -- facts --

24 MR. WILLIAMS: Because it seems to suggest that
25 there's a way to determine that he has not paid it based on

1 that theory of indemnification. I just don't think that's
2 relevant to the case.

3 THE COURT: Well, let me put you on the spot. Do
4 you have any authority to support your position?

5 MR. WILLIAMS: I have -- no, sir, I don't have any
6 authority.

7 THE COURT: Okay.

8 MR. WILLIAMS: I just heard about this five
9 minutes ago. I'll be happy to -- if you want to give me an
10 hour or so.

11 THE COURT: Okay. That's all right.

12 Mr. Sowell, why should I charge this?

13 MR. SOWELL: Well, because it's the law, and it
14 says down at the end of it does it not -- that it's up to
15 the jury, the fact finder, to decide, which it is, whether
16 it's a contract for indemnity against liability or a
17 contract for indemnity against loss.

18 THE COURT: So you want me to charge this as
19 paragraph?

20 MR. SOWELL: Yes, that --

21 THE COURT: What I read?

22 MR. SOWELL: Yeah. I think it says down at the
23 bottom.

24 THE COURT: Well, if it is the -- one or the other
25 depends on the intention of the parties --

1 MR. SOWELL: Right.

2 THE COURT: -- as shown by the phraseology of the
3 agreement contained in the policy.

4 MR. SOWELL: That's right.

5 THE COURT: All right.

6 MR. SOWELL: That's the part. And I mean, that
7 whole paragraph, that part down there, makes it clear
8 that --

9 THE COURT: I'm not saying it one way or the
10 other. This is a rule that you can use to judge these facts
11 on.

12 MR. SOWELL: Yes. Exactly.

13 THE COURT: Anything further, Mr. Williams,
14 because I'm inclined to charge it. Talk me out of it. Your
15 last chance. All right. Your exception is noted. I'm going
16 to charge it, okay.

17 Anything else? The verdict form I didn't show it
18 to you but it simply has plaintiff and defendants. Very
19 simple. Take a look at both sides. And I'm inclined to say
20 what a breach of contract is, construction contract defined.
21 I gave y'all copies of that general charge. I don't need to
22 say anything about damages at all. We'd all agree?

23 THE PLAINTIFF: Yes, Your Honor.

24 MR. SOWELL: Right.

25 THE COURT: All right. And let's see, what else

1 is there. Or mitigation of damages. Let's see.

2 MR. WILLIAMS: No objection to the verdict form.

3 THE COURT: Okay.

4 MR. SOWELL: No objection, Your Honor.

5 THE COURT: All right. So this makes it a little

6 bit easier, breach of contract, general charge. And I think

7 I'm going to charge -- hand me their -- I'm going to charge

8 all that y'all gave to me with the explanation that I might

9 repeat some things for the reasons -- not for emphasis of

10 any particular part. I just might. If I think if I charge

11 everything, I might repeat myself a couple of times. Is

12 that all right with everybody?

13 MR. WILLIAMS: Yes, Your Honor.

14 THE COURT: That way I can be all-inclusive. And

15 I need to read the -- those two requests together. Let's

16 see. Section 33-44-409. Where's -- I can tell y'all this

17 much. I hope you 403s are having fun and my law clerk. I

18 can't say that I am.

19 But in regards to section 33-44-409, y'all want me

20 to read in both parts? That's what I need --

21 MR.: Yes, yes, Your Honor. I think -- actually,

22 I think Reese's is part D of that and ours is part E. So

23 they're just --

24 THE COURT: Is that as you understand,

25 Mr. Williams? Pretty much?

1 MR. WILLIAMS: Yes, Your Honor.

2 THE COURT: I'm going to read the whole thing.

3 MR.: Your Honor, I've got copies of the statute.

4 THE COURT: You got the whole statute?

5 MR.: Yeah.

6 THE COURT: It's always nice when either party
7 went gives you part of it.

8 MR.: Yeah --

9 THE COURT: -- of the statute. I'll read the
10 whole thing.

11 MR.: I'll just hand you two copies.

12 Reese, you want a copy of the statute?

13 MR. WILLIAMS: No, sir.

14 THE COURT: Well, what part?

15 MR.: D and E are what the charges is.

16 THE COURT: D and E?

17 MR.: Yeah.

18 THE COURT: So read D and E together. Member
19 shall discharge a duty to a member of managed company and
20 its other members under this chapter or under the operating
21 agreement and exercise any rights. D and E?

22 MR.: Yes. I think both Reese and I changed them
23 slightly just to make it more clear.

24 THE COURT: Does it, Mr. Williams, in your
25 opinion?

1 MR. WILLIAMS: I have no objection to whatever you
2 want to say, Judge. It suits me fine.

3 THE COURT: Okay. I'll charge D and E, read them
4 together.

5 MR. WILLIAMS: Thank you.

6 THE COURT: Doesn't matter to me. D and E read
7 together, right?

8 MR.: Yeah.

9 THE COURT: What I'm inclined to do, gentleman is
10 this. After y'all argue, I'll give them a bathroom break
11 before I charge them. Give them a chance a exercise. They
12 asked how long I think y'all were going to argue I said
13 about 30 minutes a piece. It doesn't matter. Take as much
14 time as y'all want.

15 Do we need to clear up anything else before I
16 bring the jury in?

17 MR. WILLIAMS: Judge, I would like to open fully
18 and just reserve the right to respond, if I need, to
19 counsel's argument.

20 MR. SOWELL: That's fine.

21 THE COURT: Okay.

22 MR. WILLIAMS: I don't except to.

23 THE COURT: Well, I'm going to say something,
24 like, the plaintiff has the burden of proof. You get the
25 first shot, he replies, and since you have the burden, you

1 have an opportunity to respond.

2 MR. WILLIAMS: Thank you, Judge.

3 THE COURT: All right. Mr. Bowen, I think I'm
4 ready. See if the jury wants to come in.

5 BAILIFF: All right.

6 (The jury returned to the
7 courtroom at 10:59 a.m.)

8 BAILIFF: Jurors all present, Your Honor.

9 THE COURT: Thank you, Mr. Bowen.

10 Now, Mr. Foreman, members of the jury, we're at
11 the point in this trial when you're going to hear the final
12 and closing arguments on behalf of the parties.

13 The plaintiff, and I'll explain that to you later.
14 on during my instructions. The plaintiff has the burden of
15 proof. And since the plaintiff has the burden of proof,
16 under our system, we'll first hear from Mr. Williams,
17 followed by Mr. Sowell. And since the plaintiff has the
18 burden of proof, under our system Mr. Williams will have an
19 opportunity to reply or respond to Mr. Sowell's arguments.
20 So we'll hear from Mr. Williams, Mr. Sowell, then
21 Mr. Williams has an opportunity to respond if he so decides.

22 I invite you to have an open mind about anything,
23 as I did all along. Listen carefully, inventively, and make
24 your decision as fair and as just as you possibly can.

25 So with that in mind, Mr. Williams, you may

1 proceed with arguments.

2 MR. WILLIAMS: May it please the Court?

3 THE COURT: Yes, sir.

4 MR. WILLIAMS: Like I said when we started this
5 case, before we got over here, I thought this was going to
6 be a very simple case. Well, it's turning out to be
7 somewhat more complicated than I thought it was going to be.
8 There's some interesting defenses. I'm not going to dwell
9 on the defenses. I'm just going to present to you a summary
10 of the evidence that we presented in our case that supports
11 my client's claim in this case. And I want to start off
12 with something that I mentioned in my opening statement
13 which I think is paramount, and that is good faith and fair
14 dealing.

15 And when the judge charges you the law that's
16 applicable in this case, that among other things will be
17 something that he'll mention to you, that these parties,
18 both sides, have an obligation to treat each other fairly
19 and in good faith. So, in interpreting the various contract
20 provisions that are going to be mentioned to you, I would
21 ask that you just keep that as a veil before you, between
22 you and the arguments that are being made and decide what
23 you think is fair and in good faith here.

24 So, I've been using this flip chart from the
25 beginning, and I started out telling you that there was an

1 obligation to Arden Home Builders and to the bank of
2 \$498,000. And the evidence, I believe, has shown is our
3 position has shown that Mr. Jones, Mr. Bob Jones, paid that.
4 He paid it by borrowing the money to pay it. So, it's our
5 position that that was as good as any other way to pay it.
6 He did, in fact, borrow the money. He wound up paying part
7 of it out of pocket with money that he had and assets that
8 he had and reduced the amount that was owed by himself to
9 the 449,000-odd dollars. And if I get these numbers little
10 bit off, forgive me for that because I'm giving you
11 approximate. So, at the end of the day, Arden owed nothing.
12 Mr. Jones owed 449-odd dollars.

13 And you remember we went through the dates, and
14 it's very confusing. And it will probably will continue to
15 be, that the ultimate debt that Mr. Jones paid to the bank
16 was based on a series of notes that was signed and renewed.
17 So that the last one that was renewed and guaranteed by
18 Mr. Jones and others at the company was September 2008. And
19 when that loan became due, that's when Mr. Jones took out a
20 partial loan and paid off the Arden loan December 2009.

21 Now, you will have exhibits all which are in
22 evidence. You'll have copies of these notes and all the
23 other records, and I've forgotten how many exhibits there
24 are. This is a list of exhibits. About 29, 29 exhibits. I
25 don't suggest that you need to look at all of them, but

1 you'll have them all. The ones that are important to my
2 case, the important exhibits are the note that was owed to
3 the bank by Arden and then the note that Mr. Jones owes the
4 bank which he took out to pay off the Arden loan.

5 Now, you remember the story that was told -- it's
6 kind of brief -- is that Mr. Jones and Mr. Keesler and
7 others were working for Boozer Lumber Company. Mr. Dale
8 Boozer has been in the courtroom the whole time, sitting
9 back there toward the back (indicating). It was his
10 company. It was started by his father, and it's a
11 family-owned enterprise, now out of business. But Mr. Jones
12 was the CEO, chief officer, and Mr. Boozer was the chairman
13 of the board.

14 So somebody had the idea that Boozer Lumber
15 Company -- it seems kind of cold in here, I'm going to --
16 Boozer Lumber Company ought to get into the home-building
17 business. What Boozer had been doing was supplying building
18 materials to builders. So a person who wanted to build
19 houses can go up to Boozer and buy everything they needed,
20 from, you know, bricks and mortar to appliances. So, Boozer
21 decided they wanted to get into the business to build homes,
22 but they didn't want to do it here in Columbia, in this
23 area, because they'd be competing with their customers. And
24 that was the vertical integration idea that you heard
25 mentioned.

1 So that this opportunity came to move into the
2 market in Charlotte, and by going up to Charlotte, they
3 could do the same kind of home-building business, but they
4 wouldn't be competing with their local customers. So the
5 opportunity was also very attractive for Mr. Boozer's
6 daughter and son-in-law moving back to Columbia and have an
7 enterprise such as this home-building business that they
8 could operate and be close to home again. And you heard Ms.
9 Boone give the reason, among other things, that she wanted
10 to come back. A very talented, experienced businessperson,
11 somebody who would have far more business acumen than I
12 would have. I would not be able to look into the
13 interworkings of a company such that she could do and make
14 the decision about whether or not it was a worthy enterprise
15 or worthy investment.

16 So it's our contention that there was plenty of
17 opportunity for Ms. Boone and others with Investment Group,
18 the Boozer family enterprise, to look into this whole family
19 homes idea and decide whether or not it was a worthy
20 investment for them to make. And it's our contention that's
21 exactly what they did; that the opportunity was taken and
22 then the date of the operating agreement -- you'll have a
23 copy of the operating agreement with you as an exhibit.
24 July 31, 2007. And at that time, the records of the company
25 would show what the debts of the liabilities and assets of

1 Hope Family Homes were. They changed the name of it, of
2 course, to Arden on this date, the new operating agreement.
3 You'll see that it's entitled the restated Arden, which was
4 Hope, now called Arden. At that time, there was debts that
5 were owed. Certainly \$498,000 is one of them.

6 So shortly after entering into the operating
7 agreement, the first \$498,000 loan renewal came about. That
8 was September of 2007. Now, that brings us to a specific
9 provision in the operating agreement, and disagree about
10 this one, but, of course, we have you to make this decision.
11 You see this several times during the course of the trial,
12 and you'll have this incorporated in the management
13 agreement. And this is what we contend. This is our
14 contention. This says that the Class A members, and that
15 includes Builders Investment Group and Mr. Boone, shall
16 jointly and severally guarantee.

17 Now, when you read this from beginning to end, I
18 don't think there's much doubt about what the intent was.
19 The intent was that everybody would be equally responsible
20 for the debts of the company. No one member would be left
21 out to dry. But when you get into the specifics here, of
22 course, it possible to have interpretations about what this
23 really means. I go back to good faith and fair dealing.
24 But among other things, this sentence right here says
25 "notwithstanding any other provision of this agreement."

1 Now -- in this whole agreement anywhere, notwithstanding any
2 other provision in this agreement or any provision of
3 guaranteed loan documents; that is, whatever the loan
4 documents themselves might say about who's responsible. As
5 between the members, each Class A member shall be
6 responsible for paying such Class A member's proportionate
7 share of any guaranteed loan. Now, if there wasn't anything
8 else in this agreement, I don't think we'd even be here.

9 But of course there other comments in here, and the question
10 of whether or not a Class A member who pays more than such
11 Class A member's share and so forth, those are things you're
12 going to hear about.

13 But I'll limit my argument to you by saying I
14 think this means what it says and it says what it means. I
15 don't suggest to you that there would be any other
16 interpretation which would be fair. That is, I don't
17 believe that these folks entered into this agreement
18 excepting a very refined reading of this in order to allow
19 one person to avoid responsibility.

20 So the argument which I find to be most
21 bewildering for me personally, I just have a tough time
22 understanding this, is that Mr. Jones did not pay the Arden
23 loans. Now, you heard the president of the bank yesterday
24 afternoon on the witness stand. He was the last witness,
25 and I think it was about the last thing he said. I asked

1 him if the Arden loan had been paid in full. The answer was
2 yes. Arden does not owe any money to the bank. Arden owes
3 no money.

4 And then I asked him if Mr. Jones had paid back
5 the money that he borrowed to pay the Arden debt. Jones
6 owes to the bank -- pay the defendant. You might say it's
7 498 because he came off -- let's say Jones owes 449. Now, I
8 ask you this: Does it seem fair to you that Arden Homes
9 should have gotten the benefit of owing no money and
10 Mr. Jones ended up owing \$449,000? That he would walk away
11 from this owing that kind of debt.

12 There's one more exhibit that you're going to
13 have. That's this right here. This is a judgment entered
14 against Mr. Jones, recorded here in the courthouse in
15 Richland County. It's a lien against his worldly goods,
16 \$449,326.33. Now, that's the judgment against Mr. Jones
17 that's going to be satisfied, if at all, out of his personal
18 assets: His house, his car, any other assets that he might
19 have that the bank can attach and use to satisfy this debt.

20 So my request to you is that you don't let
21 Mr. Jones walk out of this courthouse owing all that money
22 when Arden Home Builders got the benefit of it. So I'm
23 asking you to return a verdict in favor of Mr. Jones, who's
24 the plaintiff. And the verdict form is just going to say I
25 find for the plaintiff or I find for the defendant. And

1 then the judge will be able to allocate among the various
2 members, being Mr. Boone, and according to their percentage
3 interest, the other members. According to their percentage
4 interest for the amount of money that they'll now have to
5 pay. Now, you will see that at the end of the operating
6 agreement, each member has a percentage assigned to their
7 ownership.

8 Now, folks, that's about all I can say about this
9 case. That's what I thought the case was all about when we
10 came over here, and I continue to believe that's what it's
11 all about. I'm going to refer now to Mr. Sowell, and I
12 don't think I'll have anything else to say unless he comes
13 up with something that I feel like I need to at least
14 answer. So let me close by saying thank you very much for
15 your patience and your time here. I'm a great believer in
16 trial by jury. I've been doing this a long time, and I'm
17 sure that you all will come up with the right decision,
18 whether it's for my client or against him. Thank you very
19 much.

20 THE COURT: Mr. Williams, you want to move your?

21 MR. WILLIAMS: You want to move it?

22 THE COURT: Do you want to move it, Mr. Sowell?

23 MR. SOWELL: You can leave that tripod up.

24 MR. WILLIAMS: Okay.

25 THE COURT: All right. Just wanted to double

1 check.

2 You ready, Mr. Sowell?

3 MR. SOWELL: Yes, sir.

4 THE COURT: You may proceed, sir.

5 MR. SOWELL: Good morning to all of you and thank
6 you for your patience.

7 The first thing I want to say is you have been
8 real patient with us which we appreciate. And, you know,
9 probably the most often-repeated criticism of lawyers is
10 that, you know, they repeat things. They do the Chinese
11 water torture sort of approach by going over documents and
12 testimonies repeatedly. And most of the jurors, if you saw
13 them in the juror room, they say, well, why do they keep
14 repeating all that? We understood that the first time.

15 Well, the real answer to that is is most lawyers
16 are overprepared and not under. You know, we have a big
17 responsibility to our clients. Mr. Williams to his and me
18 to Cathy Boozer-Boone and to Brian Boone and to Builders
19 Investment Group. We have responsibilities to them. We
20 take them seriously, and as a result of that, sometimes we
21 beat the horse down until he's flat. But I'm going to try
22 to be brief.

23 Now, Mr. Williams has talked about the obligation
24 of good faith and fair dealing. There's no question of
25 what. In South Carolina, every contract has an obligation

1 of good faith and fair dealing. That's something that all
2 lawyers know. The judge will charge you about it. He will
3 also charge you, I think, that that does not supercede the
4 contract. In other words, if all the party is doing in the
5 case is relying upon his or her rights under a contract,
6 that does not breach the implied covenant of good faith and
7 fair dealings.

8 This is a case about a breach of contract. You
9 know, you really can't make it into anything else. It is
10 the classic -- it's really a classic sort of law school exam
11 case about whether Builders Investment Group, Brian Boone
12 have breached their contract, which in this case is this
13 operating agreement, the revised and restated operating
14 agreement, again which is Exhibit 6. And you will have it
15 in the jury room. I brought this other tripod in here this
16 morning hoping I could work it, but the one yesterday was
17 too technologically advanced to me.

18 But if you look again at paragraph 2.3, it has
19 some ambiguities in it. But one thing that it says, and we
20 relied upon it, is that we are responsible for the guarantee
21 of loan to the company only for so long as any guarantee,
22 starts right here, of such loan is required by the lender.
23 Well, we know one thing we know for sure beyond any doubt is
24 that Southern First never required either Builders
25 Investment Group or Brian Boone to guarantee this loan.

1 Now, that's important because when this operating
2 agreement was signed, I'll show you in a minute paragraph
3 4.2, which is essentially what lawyers would call a
4 carve-out -- the Southern First loan is carved out and given
5 special treatment. And when you look at Exhibit 29, which
6 is the September 30, I believe, 2009 e-mail from
7 Mr. Keesler, it gives a summary of all of these loans. He
8 details the loans from top to bottom. I think he starts
9 with Wachovia, then he goes to Carolina First, then he goes
10 to Bank of America, then lastly he goes to the Southern
11 First loan.

12 Our clients, as they were obligated to do, they
13 guaranteed the loans from Bank of America, Wachovia, and
14 Carolina First. They did not guarantee the loan from
15 Southern First. And, you know, we talk about the documents.
16 They're actually 30 exhibits. They're the 29 that the
17 defendant put in, and there was the one exhibit which is
18 that confession of judgment that Mr. Williams showed you.

19 What -- what is as important in a case like this
20 as the documents is the documents you don't see. What you
21 don't see is any document whatsoever up until March of 2008
22 that says anything about either Builders Investment Group or
23 Brian Boone's operating as a guarantor on the Souther First
24 loan. So they sign this operating agreement on July 31,
25 2007. They guarantee the Bank of America loan, the Carolina

1 First loan, the Wachovia loan. They do not guarantee the
2 Southern First loan.

3 And as the testimony shows, that loan was made in
4 two parts in January and April of 2007 to Hope Family Homes,
5 which neither Builders Investment Group nor Brian Boone was
6 a part of. They didn't come along until July 31, 2007.

7 Then that loan, it was renewed September of 2007, as were
8 the Bank of America, Carolina First, and Wachovia loans.

9 Our clients guaranteed those loans. They were never asked
10 to guarantee the Southern First loan by either Mr. Jones or
11 by Southern First president, Justin Strickland, who made the
12 loan. That loan was renewed again in September of 2008, and
13 it was not guaranteed by either Builders Investment Group or
14 by Brian Boone, and the reason is is because they were never
15 intended to be guarantors of that loan.

16 Now, I want to show paragraph 4.2. A little bit
17 smaller, and I'm sorry for that, but I'll read it.

18 Paragraph 4.2 -- and you'll have to read the contract as a
19 whole document. You don't really take any one provision and
20 segregate it out and make it the be all and the end all.

21 You read the whole contract as an integrated document to
22 ascertain the intent of the parties to the contract.

23 Paragraph 4.2. Now, in a limited liability company, just
24 like in a corporation or a partnership, sometimes there are
25 distributions if the limited liability company makes any

1 money. Because that's what you want, really, from a limited
2 liability company. If you're a lawyer or doctor or an
3 Indian chief, what you want is some distributions, orderly
4 distributions or yearly distributions, distributions at the
5 end of the year, if there are any profits. Regrettably, if
6 there weren't any with respect to Arden Home Builders
7 because -- primarily because of the recession. But what's
8 so important in this case is that this loan to Southern
9 First Bank is treated specially. It is treated entirely
10 differently from the Wachovia loan that my clients
11 guaranteed, the Carolina First loan that my clients
12 guaranteed, and the Bank of America loan that my clients
13 guaranteed. It is carved out to give Mr. Jones,
14 Mr. Keesler, and Mr. Buck a first priority of payment. That
15 assumes you know that Arden is going to make some money.
16 But it is carved out to get them their money back first.
17 Actually, second. Mr. Jones first gets a repayment of his
18 \$250,000 loan to the company, which was capital -- well, it
19 was like a capital distribution.

20 Secondly, the company has to repay \$500,000 in
21 loans. That's those two loans in April -- January and April
22 of 2007 from Southern First Bank, importantly which are
23 guaranteed by Jones, Keesler, and Buck. They are the only
24 people who ever guaranteed that loan. Now, you know, you
25 could stop -- you could stop right here and say that's the

1 end of the case. But there's more evidence that is helpful
2 to our side of the case. And those are the evidence of how
3 the people dealt with each other. That's called course of
4 dealing. You can look at how people who are parties to a
5 contract -- in this case, an operating agreement which
6 governs the limited liability company -- and you can
7 discern, determine from how they have treated each other and
8 so on what they intended when they executed that document.

9 Now, I'm going to ask David Dick if he would --
10 and I hate to do all this, but I got to show you a couple of
11 documents -- to pull up very quickly Exhibit 4.

12 Now, this is the original second loan from
13 Southern First. It was Greenville First Bank at the time.
14 But you can see it's 199,000, I think, \$250. There'd
15 already been a loan for \$300,500. That loan goes to
16 Mr. Keesler at that P.O. box in Columbia.

17 Now, July the 31st comes along, and this operating
18 agreement right here, the restated and revised operating
19 agreement is executed. All the other loans are sent to
20 Brian Boone, who becomes the managing member and lives in
21 Charlotte. If you recall, the Boones, they didn't move to
22 Columbia; they moved to Charlotte, where Cathy had a baby
23 and went to work and Brian Boone became the managing member
24 because, as you recall, Mr. Jones testified they were going
25 to build these houses in North Carolina. So they were

1 building them up in the Charlotte area. The Wachovia --
2 this -- this evidence is beyond dispute. The Wachovia loan
3 papers were all sent to Mr. Boone, who's the managing member
4 of Arden Home Builders. The Bank of America loan papers,
5 notices were all sent to Mr. Boone, who was the manager of
6 Builders Investment Group. The Carolina First loan papers
7 were all sent to Mr. Boone, who was the manager of Arden
8 Home Builders. And none of the Southern First documents
9 were sent to Mr. Boone. They were sent to Mr. Keesler, who
10 was one of the guarantors, along with Mr. Jones and
11 Mr. Buck. That's one piece of course of dealing that
12 indicates what parties thought about who was responsible for
13 this loan.

14 Now, a second piece is Exhibit 20. Now,
15 Exhibit 20, this is the e-mail that Mr. Jones sent to
16 Mr. Buck when Mr. Jones and Mr. Keesler decided to let Ed
17 Buck off of the personal guarantee at Southern First. Now,
18 what's important about this document is that you will not
19 see any reference on it anywhere to either Builders
20 Investment Group or to Brian Boone. It is a mutual release.
21 And Mr. Jones says it was never executed, but this is
22 evidence of what they intended. It is a mutual release
23 between Mr. Buck, who was a guarantor of the Southern First
24 loan, Mr. Jones, and Mr. Keesler.

25 Now, if you would, David, go down to the signature

1 line. We won't look at the whole document, but let's look
2 at -- look at paragraph 2 on page 2 of 3, just to sort of
3 lay the groundwork. You see it says Jones, Keesler, and
4 Arden releases Buck from all obligations required in the
5 agreements referenced above, including Buck's personal
6 guarantee of the Southern First promissory note.

7 Now, up in the e-mail -- if you would, David, just
8 go back up to the first page, second big paragraph, where it
9 says "please have Ed print." It's on down -- there you go.
10 Right there.

11 All right. This is from Mr. Keesler. He says
12 please have Ed print two copies. I will sign on behalf of
13 Arden and get with you to sign the document. So the
14 document --

15 And if you -- go back to the signatures, David, if
16 you would, on the last page, and I will be through with this
17 document.

18 So this release where they're going to release
19 Mr. Buck from his personal guarantee on the Southern First
20 loan is to be executed by those people who are the
21 guarantors of that as well as Mr. Keesler for Arden Home
22 Builders. Not one place does it have any requirement or any
23 place to get the consent of either Builders Investment Group
24 or Brian Boone. That is as clear a piece of evidence as I
25 can think of that they never intended for either Builders

1 Investment Group or Brian Boone to be guarantors of this
2 loan.

3 Now, David, if you would, put up Exhibit 29. This
4 is -- you'll have it in the jury room, but this is the Arden
5 Home Builders, LLC, update that was done by Robert Keesler
6 that was done on September 30, 2009. By this time you
7 probably remember Mr. Keesler was the liquidating member of
8 Arden Home Builders. So he had taken appoint from Brian
9 Boone, who had resigned that responsibility.

10 So he says dealing with the various banks has been
11 my main focus, my update will center around what is
12 happening with each bank.

13 David, if you would, get the third page where
14 they're talking about the Bank of America loan, top
15 paragraph.

16 And it says the forbearance agreement, which
17 Mr. Keesler was negotiating with Bank of America, that's
18 essentially -- of what people would owe on the loan that
19 requires approximately \$12,000 from Arden Home Builders.
20 Arden does not have the funds to meet this requirement.
21 Brian Boone, (indicating) sitting over here, and Robert
22 Boozer, on behalf of Builders Investment Group, have agreed
23 to fund the total at \$8,000. I spoke to Bob Jones yesterday
24 on this matter. He does not have any funds to contribute
25 towards the forbearance agreement. Also, I do not have any

1 funds to contribute to the forbearance agreement.

2 Now, the importance of this document with respect
3 to this course of dealing is what it shows is that Brian
4 Boone of Builders Investment Group through Robert Boozer
5 were contributing to the loans that they agreed to
6 guarantee: Bank of America, Wachovia, and Carolina First.
7 What they never agreed to contribute to, because they never
8 agreed to guarantee the loan, is the Southern First loan.

9 Now, David, if you would, pull up Exhibit 13.
10 Another issue in the case. The first issue is due to Boone,
11 Brian Boone sitting over here or Builders Investment Group
12 have the responsibility under the operating agreement to
13 contribute to Mr. Jones' liability as a personal guarantor,
14 and we also rely upon this paragraph 6.6 that says, "No
15 member shall be reliable for debts or any other obligations
16 or liabilities of the company unless the member guarantees
17 any debt or obligation as required under article 2.3."
18 Well, we take the position, and I know you understand this
19 by now, but we never guaranteed any loan to Southern First
20 under article 2.3, and therefore, we're not responsible for
21 that debt or obligation under paragraph 6.6, which is also
22 to be read in conjunction with 2.3, 4.2, 6.6. 4.2 carves
23 out the Southern First loan to give Mr. Jones, Mr. Keesler,
24 and Mr. Buck a priority for repayment.

25 All right. Now, one of the -- one of the big

1 questions in the case, and Mr. Williams alluded to it in his
2 argument, was this question of payment. We say that
3 Mr. Jones has never paid what he is required to pay in order
4 to enforce paragraph 2.3. Because the other part of 2.3
5 that's important is that any Class A member who pays -- if I
6 have y'all marker and Mr. Williams would let me, I'd put it
7 around "pays" -- any Class A member who pays --

8 MR. WILLIAMS: Here you go.

9 (Laughter.)

10 MR. SOWELL: Thank you.

11 All right. That's one of the biggest disputes in
12 the case.

13 Thank you.

14 MR. WILLIAMS: Yes, sir.

15 MR. SOWELL: Is has Mr. Jones paid more than his
16 proportionate share. Now, to us it's clear he has not.

17 If you look at -- if you look at Exhibit 29, for
18 instance, and Mr. Keesler is talking about negotiating all
19 of these loans with Wachovia and Bank of America and
20 Carolina First. Typically, the loans get negotiated down to
21 sometimes pennies on the dollar. They're not enforced in
22 full by the banks, so we don't know if this particular note,
23 the one that Mr. Jones took out, subsequently will ever be
24 enforced by Carolina First. We know they did not try to
25 enforce it for a very, very, long time, actually till very,

1 very, recently. And if you would, look at this Exhibit 13.

2 I think this is the most dangerous exhibit I've ever been
3 around.

4 (Laughter.)

5 MR. SOWELL: Hoping I never have to handle an
6 alligator.

7 This is the transaction sheet that was identified
8 with respect to the Southern -- well, no, the Robert Jones
9 loan that he took out. Now, Mr. Jones and Mr. Williams
10 claim that this is payment of the loan. Well, really all it
11 is -- a promissory note is just that. It is a promise to
12 pay. It's not payment. And, again, it goes back to the old
13 thing about in God we trust, all others pay cash. Well,
14 it's not the payment of cash. People want cash. The bank,
15 any banker will tell you he would like to have the cash, not
16 a promissory note.

17 Mr. Strickland had a promissory note from Arden
18 Home Builders, guaranteed by Mr. Jones, Mr. Keesler, and
19 Mr. Buck. All he got from Mr. Jones was the substituted
20 promissory note, another promise to pay. Which is what a
21 promissory note -- think about this for a minute. A
22 promissory note by definition is promise to pay. It's not
23 payment. And Mr. Jones has conceded he hasn't paid Southern
24 First, and Southern First has conceded that he hasn't paid
25 Southern First.

1 Now, but in connection with this note, it is --
2 the principal disbursement is on December the 24th, 2009.
3 On December the 29th, 2009, five days later, the banks
4 writes off \$208,000 of the loan. Then on March the 29th,
5 they write off 50,000. Then on June the 28th, they write
6 off another 50. On September the 28th, they write off
7 another 50. And then down at the bottom -- if you'd bring
8 that up, David -- this is the final write-off. In fact,
9 that's what it says, final charge-off by Gene Floyd, which
10 Mr. Strickland testified to. They write off the final
11 amount so that the balance is zero on this loan on December
12 the 20th, 2010.

13 Now, Mr. Williams -- and we don't have this to
14 show you, but you will see it in the jury room -- he has
15 shown you the confession of judgment. Well, just look at it
16 like Mr. Strickland did yesterday. It says that the
17 defendant promised to pay the \$449,000. In the second
18 paragraph, it says the defendant has not made payment. Now,
19 remember paragraph 2.3. It says any Class A member who pays
20 more than such Class A member's guaranteed percentage of the
21 guaranteed loan to the lender shall be entitled to
22 contribution from the other Class A members. I mean, it is
23 beyond dispute in my mind. Now, of course, this is for you
24 to decide. And Mr. Williams has said it's beyond dispute in
25 his mind that taking out of the promissory note is payment.

1 And I say, because I think I'm right, that it's beyond
2 dispute in my mind that there's been no payment. He's not
3 paid more than his guaranteed percentage. And we know --
4 whatever he might have paid incidentally was not more than
5 the \$120,000 that would be his guarantee percentage. He
6 admitted to that.

7 All -- all he's done is -- if you will pull up
8 Exhibit 11, David.

9 Up at the top right there. Mr. Jones -- and I'm
10 not saying he's a bad person. I'm just saying he's not
11 entitled to recover in this case. He signed another
12 commercial promissory note, which by definition is a promise
13 to pay. It is not payment of his percentage. He's never
14 paid his percentage. We don't know if he will ever pay his
15 percentage. And the really unfortunate outcome here if he
16 were to win the case is that he might get the money. He
17 would get the money from our clients and might have never
18 pay his percentage.

19 In fact, that's the reason that paragraph 2.3 is
20 written the way it is. You've got to -- you've got to show
21 your bona fides, so to speak. You've got to show that
22 you've paid more than your guaranteed percentage before
23 you're entitled to any contribution under paragraph 2.3.

24 My clients, Brian Boone and Builders Investment
25 Group, appreciate your attention to this case, and -- and I

1 appreciate your attention to this case, and we ask you to do
2 what we think is appropriate, which is to return a verdict
3 for the defendants. Thank you.

4 MR. WILLIAMS: Very briefly, Judge. I feel
5 compelled to respond to a couple things.

6 THE COURT: Yes, sir.

7 MR. WILLIAMS: Counsel mentioned that the bank has
8 done nothing to enforce the note that Mr. Jones signed to
9 borrow the money to pay off the Arden loan. And, of course,
10 what the bank has done is entered a judgment against
11 Mr. Jones. Now, lawyers certainly all understand that a
12 judgment is filed in a courthouse. It immediately
13 constitutes a lien against any real estate that a person
14 might own. That would be Mr. Jones's home, any other
15 property that he may have. It would also be a lien that
16 would be enforceable against any other assets that he might
17 have that the bank can find.

18 So far the bank has not taken any action to
19 foreclose on his house or to examine him about what other
20 assets he might own, if any. Of course, you might wonder if
21 he had more than about \$50,000 in the bank when he took out
22 that loan. So the bank has enforced its rights. There's
23 nothing else the bank can do but sue on it and what's owed.
24 And that's the judgment.

25 As I said, I've had trouble with the logic of that

1 argument. If Mr. Sowell and I, let's say we borrow a truck
2 together and we used it in some commercial enterprise. It
3 was a 50/50 deal, and we were making payments on it by the
4 month, \$300 a month in payments. And each month I pay 150,
5 he'd pay 150. One month came along, and I didn't have \$150.
6 And I said, Mr. Sowell, how about you make that payment for
7 me this month. And then the next month and then finally
8 about three or four months when I couldn't make my share of
9 the payments.

10 Mr. Sowell would come to me and say, look I paid
11 \$450 now. And I said, well, how did you get the money to
12 make my share of payments?

13 He said, I borrowed it from my mother.

14 I said, well, you don't owe you the money. You
15 borrowed that money, and you haven't paid it back yet. And
16 you might never pay your mother back because she's not going
17 to sue you for the money, so I don't owe you. How do you
18 think he'd react to that? I think he would react to it
19 rather violently.

20 He would say, we had a deal. You know, we were
21 50/50 partners here. You were supposed to be contributing
22 to the payments on this truck, and now you're telling me
23 you're not going to pay? I said, well, I'll pay you when
24 you pay your mother back. In fact, I got it mixed up. I
25 would say that when you pay your mother back, that's when

1 the debt would -- well, that's what he's saying is because
2 Mr. Jones has not been able to pay the bank back, he doesn't
3 owe the money, his client don't owe the money.

4 Now, the net effect of this -- I don't care about
5 all the rest of this. You can put it all aside -- you know
6 what the parties intended when they entered into this
7 agreement. Everybody understands that. The niceties about
8 this contract, we can go on for days talking about why they
9 shouldn't have to contribute toward this. But the net
10 effect of it is Arden owes nothing. Jones owes \$449,000.

11 Now, I don't believe that we should walk out of
12 this courtroom leaving Mr. Jones hanging out there on the
13 debt. Thank you very much.

14 THE COURT: Now, Madame Forelady, it's probably
15 going to take 20 minutes or so to tell you what the law is.
16 Y'all want a short break before I do that? Could be 30, 20,
17 30 minutes. You want a break or not?

18 (The witness shakes head.)

19 THE COURT: All right. Would you move these out,
20 please, sir?

21 Now, Foreman, members of the jury, under our
22 constitution and code of laws, you and I have separate and
23 distinct duties. Only you, the jury, can make the findings
24 of fact in this case. I am not permitted to indicate to you
25 how I may feel about the testimony and the evidence

1 presented. Throughout the trial, I've attempted to be fair
2 and impartial toward all the parties involved.

3 Now, members of the jury, to determine the facts
4 in this case, you will have to evaluate the credibility,
5 which means the believability of each witness. And
6 considering whether to believe a witness's testimony about a
7 particular matter, you may consider what was the manner and
8 appearance of the witness who testified. Was he or she
9 straightforward or hesitant in answering. Was the testimony
10 of the witness consistent or inconsistent. How did the
11 witness come to know the facts that he or she testified to
12 or what was his or her ability to know these facts. Is
13 there some reason a witness would want to give testimony
14 which would help or hurt one side or the other; in other
15 words, was the witness biased or prejudiced. And was the
16 testimony of the witness strengthened or weakened by other
17 testimony or evidence.

18 Now, members of the jury, you can believe as much
19 or as little of each witness's testimony as you think
20 proper. You may believe the testimony of a single witness
21 against that of many witnesses or just the opposite. Of
22 course, you do not determine the truth merely by counting
23 the number of witnesses presented by each side. Throughout
24 this process, you have but one objective: To seek the truth
25 regardless of its source.

1 Now, members of the jury, the same constitution
2 and laws that designate you the finders of fact also make me
3 the instructor of the law. You must accept the law as I
4 give it to you. If I'm wrong, there's another place and
5 time for that error to be corrected. In this case, you must
6 apply the law as I give it to you. This means that you
7 should not be concerned with what you may think the law
8 should be, and either am I for that matter. And we can only
9 be concerned with what the law is, that is, as I give it to
10 you.

11 Now, as has been explained earlier, members of the
12 jury, this is a contract action. The plaintiff is seeking
13 to have a determination made as to whether or not the
14 defendants breached the contract. And -- and there's no
15 compensation involved to an extent that you will not be
16 required to answer questions about damages or anything. The
17 lawyers both have indicated that the court will take that up
18 at a later time. So what you've been asked to do is to find
19 for the plaintiff or for the defendants in this case.

20 In order for the defendant -- I mean, in order for
21 the plaintiff to receive any compensation in this case, he
22 must prove his claim by the greater weight, the greater
23 weight, or the preponderance of the evidence. Now, what we
24 mean by the greater weight of the evidence can be
25 illustrated by imagining a traditional set of scales. I

1 remember as a little kid growing up in Dillon County me and
2 my father used to go the butcher shop. The same sort of
3 scales we see on the statue of justice. Now, when the case
4 begins, the scales are even. After all the evidence has
5 been presented, if the scales should remain even or if they
6 should tip even slightly in favor of the defendant, then the
7 plaintiff will have failed to meet his burden of proof and
8 your verdict will be for the defendant. If, on the other
9 hand, the scales should tip even slightly in favor of the
10 plaintiff, then he would have met his burden of proof and
11 your verdict would be for the plaintiff.

12 Of course, there's no way to weigh evidence except
13 through the exercise of your good common sense and judgment.
14 It is entirely a mental process. And the evidence to which
15 you're to give the most weight is that which convinces you
16 of its truth regardless of from whom or what source it
17 comes.

18 There's two types of evidence in the case, members
19 of the jury. There's circumstantial evidence -- direct
20 evidence and circumstantial evidence. Now, there are two
21 types of evidence that are recognized by our laws. Evidence
22 may either be direct or circumstantial. These two kinds of
23 evidence apply to the parties alike, the plaintiff and the
24 defendant. And both are equally good in the law if they
25 meet the test of the law. On a particular factual point,

1 you may have direct evidence, circumstantial evidence, or a
2 combination of these kinds of evidence. Direct evidence
3 proves a fact without an inference and if true conclusively
4 establishes that fact.

5 Direct evidence is testimony of a person who has
6 perceived certain facts by means of its senses and comes in
7 to testify what he perceived. If you the jury believe the
8 evidence to which he testifies, the evidence will
9 conclusively establish a particular fact.

10 Circumstantial evidence proves a fact from which
11 an inference of the existence of another fact may be drawn.

12 An inference is a deduction of fact that may
13 logically and reasonably draw from another fact or a group
14 of facts. In other words, you may infer that a particular
15 event occurred based on proof of circumstances warranting
16 such an inference. The proof as to circumstantial evidence
17 is sufficient if shown by the preponderance of the evidence
18 or the greater weight of the evidence. The conclusions
19 reached in the minds of you, the jury, must be the most
20 probable and reasonable one. In similar cases as this,
21 every other reasonable conclusion need not be excluded if
22 there are several reasonable inferences that may be drawn
23 from all the circumstantial -- circumstances in evidence.
24 It is for you the jury to say which is established by the
25 greater weight of the evidence. Facts at issue may be

1 proven either by direct evidence or by indirect evidence,
2 otherwise called circumstantial evidence. By direct
3 evidence is meant the statements of persons who have
4 perceived this existence by means of their senses or
5 production of the thing itself before the court. By
6 indirect evidence is meant the proof of some other fact or
7 facts from which taken either singly or collectively, the
8 existence of the particular fact in question may be inferred
9 as a necessary or probable consequence. Circumstantial
10 evidence is evidence which without going directly to prove
11 the existence of a fact gives rise to a logical inference
12 that such fact does exist.

13 When the requirements of law as to circumstantial
14 evidence are present, circumstantial evidence is just as
15 good as direct evidence. That's clear to you all so far, is
16 it not?

17 (The jurors nodded head.)

18 THE COURT: I can see that you understand.

19 Now, members of the jury, as I said, this is a
20 breach of contract case. You've heard from both sides.
21 Everybody has testified. The word "breach" as it applies to
22 contracts is defined as a failure without legal excuse to
23 perform any promise that forms a whole or a part of a
24 contract, including the refusal of a party to recognize the
25 existence of the contract or the doing of something

1 inconsistent with its existence. In other words, a party
2 breaches a contract when he does not perform as he agreed to
3 perform under the contract. A breach occurs when one party
4 to a contract fails to carry out a term, promise, or
5 condition of the contract. The plaintiff is entitled to
6 recover only if you find that he has proved by the
7 preponderance of the evidence that the defendants did, in
8 fact, breach the contract between the parties.

9 In order for the plaintiff to recover from breach
10 of contract, the plaintiff must prove two things: One, a
11 binding contract entered into by the parties. Two, breach
12 or unjustifiable failure to perform the contract -- three
13 things, actually -- and three, damages -- damage suffered by
14 the party as a direct and proximate result of the breach.
15 And in this case, you're not asked to find damages. Just
16 whether or not the defendants breached the contract. All
17 right?

18 Now, members of the jury, in construing a
19 contract, you shall use the following rules of construction.
20 In the construction or interpretation of a contract, common
21 sense and good faith are the leading touchstones of the
22 inquiry. All contracts should receive a sensible and
23 reasonable construction and not such a construction as would
24 lead to an absurd consequence. An interpretation which
25 involves the more reasonable and probable contract should be

1 adopted. When one construction makes the provision unusual
2 or extraordinary and another construction which is equally
3 consistent with the the language employed would make it
4 reasonable, fair, and just, the latter construction must
5 prevail. The rights of the parties must be measured by the
6 contract which the parties themselves made, regardless of
7 its wisdom, reasonableness, or failure of the parties to
8 guard their rights carefully. A contract should be
9 construed as to give, if possible, full force and effect to
10 every part of it.

11 When a provision is ambiguous, the intent of the
12 parties' control, the intent of the parties in question of
13 fact resolved by you the jury when the contract is
14 ambiguous. In attempting to ascertain the parties'
15 intention, the situation of the parties as well as their
16 purposes at the time the contract was entered must be
17 determined. I said damages must be susceptible or
18 ascertained within a reasonable degree of certainty and
19 uncertainty, contention, or speculative damage cannot be
20 recovered. And you don't have to be concerned about damages
21 in this case, members of the jury.

22 Now, the existence -- there exists in every
23 contract an implied covenant of good faith and fair dealing;
24 however, there is no breach of an implied covenant of good
25 faith where a party to contract has done what provisions of

1 the contract expressly give him the right to do.

2 Further, members of the jury, I need to charge you
3 a part of code section 33-44-409. It says, General status
4 of members and managers' conduct, and this applies to the
5 situation at hand. I'll read you subsection D and E of
6 Title 34 -- 33-44-409. It reads as follows: "A member
7 shall discharge the duties to a member managed company and
8 its other members under this chapter or under their
9 operating agreement and exercise any rights consistently
10 with the obligation of good faith and fair dealing. And
11 subsection E says, "A member of a member-managed company
12 does not violate a duty or obligation under this chapter or
13 under the operating agreement merely because the member's
14 conduct furthers the member's own interest."

15 Now, members of the jury, I further charge you
16 that -- and if I repeat myself regarding the breach or
17 something, it's not to bring in undue emphasis to it. I
18 just happen to repeat it, okay. A breach of contract is an
19 unjustified failure to perform any promise, expressed or
20 implied, that is part of the contract or a violation or
21 nonfulfillment of the obligations, agreement, or --
22 agreements or duties imposed by the contract or the
23 commission or omission of some act that violates the
24 expressed or implied undertakings contained in a contract.
25 A breach may occur when a party without legal excuse fails

1 to perform any promise that is all or part of the contract
2 or knowingly prevents hinders or makes more costly the other
3 parties performance or in advance of the due date of his
4 performance repudiates his perform his promise to perform;
5 that is, repudiates or renounces the contract.

6 I further charge you, members of the jury, that a
7 distinction is made between contracts for indemnity against
8 liability and those of indemnity against loss. In the
9 former case, the indemnitor's obligation becomes fixed when
10 liability attaches to the indemnity. In the latter case,
11 the indemnitor's liability does not attach until loss has
12 been suffered; that is, when the indemnity has paid the
13 damages. Whether it is the one or the other depends on the
14 intention of the parties as shown by the phraseology of the
15 agreement contained in the policy. That makes sense to
16 everybody?

17 (The jurors nodded head.)

18 THE COURT: Okay. Now, members of the jury,
19 whatever your verdict in the case, it must be unanimous.
20 All 12 of you must agree. And the aids from what I prepared
21 is what we call a verdict from. I hold it in my left hand.
22 It's says, State of South Carolina County, Robert S. Jones
23 versus Builders Investment Group, LLC. Is that good enough?
24 Because it covers everybody.

25 (Counsel nodded heads.)

1 THE COURT: All right. And it says "verdict from
2 in the court of common pleas." We the jury by unanimous
3 consent find for the -- I had to write one before the other
4 take no special note of which one I listed first. We the
5 jury by unanimous consent find for the plaintiff, it says
6 plaintiff first. Then it says below plaintiff, says for the
7 defendants. So, the plaintiff must have proved to you by
8 the greater weight of preponderance of the evidence that the
9 defendants breached a contract, okay. And if that's been
10 proven in your satisfaction by the greater weight of the
11 evidence, you would find for the plaintiff. If he's failed
12 to prove that; that is, that the defendants breached the
13 contract by greater weight or preponderance of the evidence,
14 then your verdict should be for the plaintiff -- for the
15 defendants. That makes sense? I confused that a little
16 bit.

17 (The jurors nodded head.)

18 THE COURT: In any event, this is the verdict
19 form. Once you've agreed on the verdict, Mr. Foreman, you
20 need to sign your name above the line that says foreperson
21 and date this verdict from. That should conclude your work
22 on this case.

23 Whatever your verdict is --

24 MR. SOWELL: Your Honor, Brian Boone is still a
25 defendant?

1 THE COURT: Yeah, yeah. All right. It just
2 wasn't listed on -- I can write it. You want me to write
3 it?

4 MR. SOWELL: Please.

5 THE COURT: All right.

6 MR. SOWELL: Brian D. Boone.

7 THE COURT: Let me do this. Somehow --

8 MR. WILLIAMS: We can stipulate to that, Judge.

9 THE COURT: That's okay. Let's -- Mr. Boone was
10 left off the verdict form. He shouldn't have been. It was
11 brought to my attention by both sides. I'm going to retype
12 that.

13 But whatever your verdict in this case, it cannot
14 be based on passion, sympathy, or emotion or something not
15 found in the evidence. You must base your decision on what
16 you've heard here in court. That makes sense, does it not?

17 (The jurors nodded head.)

18 THE COURT: Now, I'm going to ask you to go to the
19 jury room. I'm going to straighten out this verdict form
20 real quick. Do not discuss this case. Don't begin your
21 deliberations until the bailiffs have brought you the
22 verdict form along with all of the exhibits that have been
23 introduced. That will be your signals to begin your
24 deliberations. Until then, don't talk about this case at
25 all. Go to the jury room. I need to have a discussion with

1 the lawyers. There may be something else I need to tell
2 you. So don't begin any deliberations until the bailiffs
3 bring you the verdict from along with all of the exhibits
4 that have been introduced. All right. Thank you all so
5 very much.

6 (The jury retires from the
7 courtroom at 12:01 p.m.)

8 THE COURT: All right. Just out of an abundance
9 of caution, I need the to go ahead and have the verdict form
10 the way it's been reflected with all -- everybody on it.
11 I'll go do that. And I know you take exception to my charge
12 about the distinction between indemnity and liability?

13 MR. WILLIAMS: Well, Judge, based on recent
14 appellate court opinions, I think I'm suppose to make a 59E
15 motion for you to reconsider.

16 THE COURT: Okay. Denied.

17 MR. WILLIAMS: Doesn't that seem ridiculous to
18 you? It does to me.

19 THE COURT: Well, I mean --

20 MR. SOWELL: But I did it anyway.

21 THE COURT: Okay, okay. And it's denied.

22 Check all of the exhibits. Let me just
23 straightened out this verdict form and make sure everything
24 is right.

25 So, y'all look at the exhibits in the mean time.

1 After y'all do that if there are anymore exception or
2 addition I'll take it up with you, but make sure everything
3 is in should be in.

4 THE COURT: Bring them back? I'll just tell hem
5 that.

6 BAILIFF: Jurors seated, Your Honor.

7 THE COURT: Thank you. There's two things. The
8 first one is that both lawyers, both Mr. Williams as well as
9 Mr --

10 MR. SOWELL: Sowell.

11 THE COURT: Who? Sowell, yeah. It's been such a
12 long time. They both agree that Arden Builders, LLC, is not
13 a party to this action. You don't need to consider them.
14 They're listed on the pleadings and I've so listed them, but
15 they have no involvement in this case.

16 Is that fair enough, gentlemen?

17 MR. SOWELL: True.

18 MR. WILLIAMS: Yes, Your Honor.

19 THE COURT: All right. So just forget that
20 have -- that they're a defendant at all, Arden Home
21 Builders. They were listed in all the pleadings and
22 everything. I just did the verdict form based on the
23 pleadings. So -- but they both wanted me to tell you all
24 that Arden Home Builders really are not involved in this
25 case at all, okay?

1 The second thing is this. Ms. Gossett?

2 JUROR: Yes.

3 THE COURT: Pursuant to our earlier conversations
4 and I've talked with Mr. Williams, Mr. Sowell about this,
5 and everybody's in agreement that we want you to go home and
6 make sure that you make your daughter's recital today. So
7 I'm going to excuse you.

8 And then Ms. Hope, you will be a member of this
9 jury. Okay?

10 JUROR: (Nodding.)

11 THE COURT: Okay. Now, go back and decide. And
12 when they bring the exhibits and everything, Ms. Gossett,
13 that's when I want you to come out, but not until then,
14 okay?

15 JUROR: Okay.

16 THE COURT: So y'all go back in. Don't begin any
17 discussions until the bailiff brings the verdict form along
18 with the exhibits that have been introduced. Thank you all
19 so very much.

20 (The jury retires from the
21 courtroom 12:08 p.m.)

22 THE COURT: Now, any exceptions or additions to
23 any of those comments?

24 MR. WILLIAMS: No, Your Honor.

25 MR. SOWELL: No, Your Honor.

1 THE COURT: Well, once again, it's -- I guess once
2 for the first time, pleasure to work with you again,
3 Mr. Williams and Mr. Sowell.

4 I think this is your first trial in front of me,
5 although you've been around forever and I've been around
6 forever. I think this is the first actual trial other than
7 motions or something.

8 MR. SOWELL: (Counsel nodded head.)

9 THE COURT: And for a guy that went to Clemson
10 he's not that bad considering everything.

11 MR. WILLIAMS: Judge, you might remember that when
12 you were thinking about moving up to one of the appellate
13 courts, that I opposed that so that you would stay here.

14 THE COURT: I appreciate your -- I appreciate
15 that. Yeah, yeah. Sure. Thank you all.

16 (Whereupon, a short recess was
17 held.)

18 THE COURT: All right. My experience has been
19 like after a verdict, I mean, you can make your motion. I
20 can give you ten days. Y'all want the ten days? It's
21 always better in my opinion. So whatever it is I'm going to
22 give you ten days.

23 All right. Bring the jury in please.

24 (The jury returned to the
25 courtroom at 1:30 p.m.)

1 BAILIFF: Jurors present, Your Honor.

2 THE COURT: Thank you, sir.

3 Welcome back, Mr. Foreman, members of the jury.

4 THE CLERK: Mr. Foreman, have you reached a
5 verdict?

6 JUROR: Yes, Your Honor, we have a unanimous
7 decision.

8 THE COURT: All right.

9 THE CLERK: Please hand it to the bailiff.

10 THE COURT: You're not from New York, are you?

11 JUROR: Originally, yes, sir.

12 (Laughter.)

13 THE COURT: You sound like you're from New York.

14 JUROR: Not the city, though.

15 THE COURT: All right. You may publish it.

16 THE CLERK: The State of South Carolina, County of
17 Richland, in the court of common pleas, Case Number
18 2012-CP-40-1980, in the matter of Robert S. Jones versus
19 Builders Investment Group, LLC, Brian E. Boone, defendants,
20 we the jury by unanimous consent find for the plaintiff,
21 signed by Terry S. Johnson, foreperson. Dated 12/12/12.

22 Mr. Foreman, is this your verdict and the verdict
23 of the entire jury?

24 JUROR: Yes.

25 THE COURT: Anything further from the jury on

1 behalf of the plaintiff?

2 MR. WILLIAMS: No.

3 THE COURT: The defendants?

4 MR. SOWELL: No, Your Honor.

5 THE COURT: All right. The ten days stand.

6 MR. SOWELL: Thank you.

7 THE COURT: Mr. Foreman, members of the jury, one
8 of two comments I -- you read about trials in the newspaper,
9 you see them on TV, but you never know how difficult it is
10 to sit in judge of your fellow citizens until you're
11 actually on a jury. I see some of you nodding your heads.
12 It's not as easy as you think. Something plain and simple
13 become becomes not necessarily easy. So I know you tried
14 very hard, and no one has any reason to be upset about your
15 verdict. You're very conscientious. You're very attentive.
16 So I want to thank you for your service as patriotic
17 citizens on this particular case.

18 The good news is that this case is over with. The
19 good news, better, is that you don't have to come back the
20 rest of the week, if I'm not mistaken. So as a result of
21 your service this week, you will not be invited to come back
22 again at least for three years, but if you in the future
23 receive an invitation to come and serve your country again
24 as jurors, I hope you will accept it. So I thank you all so
25 very much. There's nothing further from anyone, from the

1 jury?

2 MR. SOWELL: No.

3 THE COURT: You need to go to the jury room for a
4 few moments. They'll give you instructions. Thank you all
5 so very much and good luck to each and every one of you.
6 Happy holidays.

7 (The jury retires from the
8 courtroom at 1:32 p.m.)

9 THE COURT: So, I'll give you at least ten days.
10 There's a whole lot of things to sort through. Take your
11 time. I'll copy Mr. Williams and then I'll set a date for
12 us to flesh all this out. Thank you all so very much.

13 MR. SOWELL: Thank you.

14 THE COURT: Yes, sir.

15 MR. SOWELL: Judge, at that time, could we also
16 consider having an attorney's fee hearing?

17 THE COURT: I'm going to hear everything that I
18 need to hear.

19 MR. SOWELL: Thank you, Judge.

20 THE COURT: Will be all-inclusive. Give him a
21 chance to sort through everything, you sort through
22 everything.

23 MR. SOWELL: Yes, sir.

24 THE COURT: Exchange your arguments with
25 Mr. Williams, and we'll set a time that's convenient for

1 everybody.

2 MR. SOWELL: Thank you.

3 THE COURT: And we'll go through agency and do
4 everything we need to do. Thank you all so very much.

5 MR. SOWELL: Thank you.

6 END OF PROCEEDINGS

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1 COUNTY OF RICHLAND)

2 CERTIFICATE OF REPORTER

3 I, Crystal Holmes, hereby certify that I reported
4 the preceding case entitled Robert S. Jones Vs. Builders
5 Investment Group, LLC., et al Case Number, 2011-CP-40-01980,
6 at the Richland County Courthouse, December 10, 2012.

7 I FURTHER CERTIFY that the foregoing pages 1
8 through 265 constitute a true, accurate and full transcript
9 of said hearing.

10 I FURTHER CERTIFY that I am not employed by any of
11 the parties hereto and I have no financial interest in the
12 outcome of said case.

13 IN WITNESS WHEREOF, I have heretofore set my hand
14 and seal at Richland County on this 10th day of April, 2012.

15

16 _____
17 Crystal Holmes, Court Reporter
18 and Notary Public for the
19 State of South Carolina my
20 Commission Expires:
21 April 21 2014
22
23
24
25

State of South Carolina)
) In the Court of Common Pleas
County of Richland)

Robert S. Jones,) C/A No: 2011-CP-40-1980
)
)
Plaintiff(s),)
)
) Deposition
vs.)
)
Builders Investments) of
Group, LLC, Brian D.)
Boone, and Arden) F. JUSTIN STRICKLAND
Homebuilders,)
)
Defendant(s),)
)
)

Deposition of F. JUSTIN STRICKLAND, taken before
Jennifer L. Thompson, CVR, Nationally Certified Verbatim
Court Reporter and Notary Public in and for the State of
South Carolina, scheduled for 2:00 p.m. and commencing
at the hour of 2:08 p.m., Wednesday, December 7, 2011,
at the office of Sowell Gray Stepp & Laffitte, LLC,
Columbia, South Carolina.

Reported by:

Jennifer L. Thompson, CVR

1 we're here today about, are there any other loans
2 that Mr. Jones has with Southern First?

3 A That he has with us?

4 Q Yeah.

5 A No.

6 Q Okay. Except, of course, I guess, now the Arden --
7 the Arden loan has been converted to a -- kind of a
8 personal loan in his name, correct?

9 A When Arden failed, Mr. Jones stepped up and was
10 willing to sign a personal note and attempt to
11 liquidate personal assets to pay us.

12 Q Okay. So aside from that note there aren't any
13 other loans?

14 A And that loan's been charged off.

15 Q Okay. The -- his personal loan has been charged
16 off?

17 A It has.

18 Q Okay. So right now Mr. Jones does not owe Southern
19 First any money?

20 A He does not.

21 Q Regardless of that, is it still your understanding
22 though that Mr. Jones is attempting to pay Southern
23 First some money on this loan?

24 A Yes.

25 Q Okay. But he technically does not owe the bank

THIS AGREEMENT IS SUBJECT TO ARBITRATION
PURSUANT TO THE SOUTH CAROLINA ARBITRATION ACT
TO THE EXTENT PROVIDED IN SECTION 12.6

**OPERATING AGREEMENT
OF
HOLT FAMILY HOMES LLC**

THIS OPERATING AGREEMENT is entered into on this 28th day of July, 2005, by and between Wetzel Ray Holt ("Holt"), Builders Investment Group, LLC, a South Carolina limited liability company ("BIG"), Robert S. Jones ("Jones"), Robert A. Keisler ("Keisler"), Carl Edward Buck ("Buck"), Alton W. Burnett, Jr. ("Burnett"), James L. Padgett ("Padgett"), Keith Wayne Berry ("Berry") and Thomas Keith Harris ("Harris") (collectively, the "Members").

WITNESSETH:

WHEREAS, the Company was formed by the filing of Articles of Organization with the Secretary of State of the State of South Carolina ("Secretary of State") on July 1, 2005;

NOW, THEREFORE, the Members agree as follows:

**ARTICLE 1
THE COMPANY**

1.1 Formation. The Company is a manager-managed limited liability company. Notwithstanding any other provision hereof, the provisions of this Agreement, where inconsistent with the Act, shall govern the relations among the Members and the Company to the fullest extent permitted by law. Furthermore, without in any way limiting the preceding sentence, the following provisions of the Act shall not apply in any way to the Members or the Company: Act §§ 33-44-701, and 33-44-702, unless the price to be paid for an interest is not addressed in this Agreement.

1.2 Name. The name of the Company shall be Holt Family Homes LLC and all business of the Company shall be conducted in such name or such other names that comply with applicable law as the Managers may select from time to time upon notice to the Members.

1.3 Purpose. The purpose of the Company is to conduct the Business and to conduct all such activities as are reasonably necessary to effect the foregoing purpose. The Company has the power to do any and all acts necessary, appropriate, proper, advisable, incidental or convenient to or in furtherance of the purpose of the Company. The Company shall have no other purpose.

1.4 Principal Place of Business. The principal place of business of the Company shall be at 7301 Carmel Executive Park, Suite 214, Charlotte, North Carolina 28226 or at such other place as may be approved by the Managers upon notice to the Members.

1.5 Term. The term of the Company shall commence on the date the Articles of Organization of the Company (the "Articles") were filed in the office of the Secretary of State of the State of South Carolina and shall continue until the winding up and liquidation of the Company and its business is completed following a Dissolution Event, as provided in Article 10, or until December 31, 2035, whichever date is earlier.

1.6 Filings; Agent for Service of Process.

(a) The registered agent for service of process on the Company in the State of South Carolina shall be the person so appointed in the Articles or any successor as appointed by the Managers in accordance with the Act.

(b) Upon the dissolution of the Company in accordance with Article 10, the Managers shall promptly execute and cause to be filed articles of dissolution in accordance with the Act.

(c) The Managers are authorized to take all such actions as may be necessary to cause the Company to obtain a certificate of authority to transact business in any other state in which the Company conducts business; to file annual reports and take all such other actions as may be necessary to maintain such authority; and to amend or withdraw the same.

1.7 Title to Property. All Property owned by the Company shall be owned by the Company as an entity and no Member shall have any ownership interest in such Property in his or its individual name, and each Member's interest in the Company shall be personal property for all purposes. At all times after the Effective Date, the Company shall hold title to all of its Property in the name of the Company and not in the name of any Member.

1.8 Payments of Individual Obligations. The Company's credit and assets shall be used solely for the benefit of the Company, and no asset of the Company shall be Transferred or encumbered for, or in payment of, any individual obligation of any Member.

1.9 Definitions. Capitalized words and phrases used in this Agreement have the following meanings:

"Act" means the South Carolina Limited Liability Company Act, Chapter 44 of Title 33 of the South Carolina Code of Laws, as amended from time to time (or any corresponding provisions of succeeding law).

"Adjusted Capital Account Deficit" means, with respect to any Member, the deficit balance, if any, in such Member's Capital Account as of the end of the relevant Fiscal Year, after giving effect to the following adjustments:

(i) Credit to such Capital Account (A) any amounts that such Member is obligated to restore pursuant to any provision of this Agreement or pursuant to Regulations § 1.704-1(b)(2)(ii)(c) or (ii)(h) or any other pertinent provision of the Regulations; (B) the Member's share of Company Minimum Gain; and (C) the Member's share of Member Minimum Gain.

(ii) Debit to such Capital Account the items described in Regulations §§ 1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(6) and 1.704-1(b)(2)(ii)(d)(6).

The foregoing definition of Adjusted Capital Account Deficit is intended to comply with the provisions of Regulations § 1.704-1(b)(2)(ii)(d) and shall be interpreted consistently therewith.

"Agreement" means this Operating Agreement of *Holt Family Homes, LLC*, as amended from time to time.

"Amortization" means, for each Fiscal Year, an amount equal to the amortization, or other cost recovery deduction allowable with respect to an asset for such Fiscal Year, except that if the Gross Asset Value of an asset differs from its adjusted basis for federal income tax purposes at the beginning of such Fiscal Year, Amortization shall be determined in the manner prescribed in Treasury Regulations Section 1.704-1(b)(2)(iv)(g)(3) or 1.704-3(d)(2), as applicable. If the adjusted basis for federal income tax purposes of an asset at the beginning of such Fiscal Year is zero, Amortization shall be determined with reference to such beginning Gross Asset Value using any reasonable method selected by the Members.

"Articles" means the Articles of Organization filed with the Secretary of State pursuant to the Act to form the Company, as originally executed and amended, modified, supplemented or restated from time to time, as the context requires.

"Assignee" means a transferee of Shares in the Company who has not been admitted as a substituted Member in the Company. An Assignee shall have only those rights set forth in Section 9.6.

"Business" means the business of constructing and selling single-family residences.

"Business Plan" means the business plan for the Company, as such business plan may be modified from time to time by the Members. The initial Business Plan is attached hereto as Exhibit B, which is by this reference incorporated herein.

"Capital Account" means, with respect to any Member, the Capital Account maintained for such Member in accordance with the following provisions:

(i) To each Member's Capital Account there shall be credited (A) such Member's Capital Contributions, (B) such Member's distributive share of Profits and any items in the nature of income or gain that are specially allocated to such Member pursuant to Section 3.3 or Section 3.4, and (C) the amount of any Company liabilities that are assumed by such Member or secured by any Property distributed to such Member;

(ii) To each Member's Capital Account there shall be debited (A) the amount of money and the Gross Asset Value of any Property distributed to such Member pursuant to any provision of this Agreement, (B) such Member's distributive share of Losses and any items in the nature of expenses or losses that are specially allocated to such Member pursuant to Section 3.3 or Section 3.4, and (C) the amount of any liabilities of such Member that are assumed by the Company or secured by any Property contributed by such Member to the Company; and

(iii) If Shares are transferred in accordance with the terms of this Agreement, the transferee shall succeed to the Capital Account of the transferor to the extent it relates to the Transferred Shares.

The foregoing provisions and the other provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with Regulations § 1.704-1(b) and shall be interpreted and applied in a manner consistent with such Regulations. The Managers shall (i) make any adjustments that are necessary or appropriate to maintain equality between the Capital Accounts of the Members and the amount of capital reflected on the Company's balance sheet, as computed for book purposes, in accordance with Regulations § 1.704-1(b)(2)(iv)(q), and (ii) make any appropriate modifications in the event unanticipated events might otherwise cause this Agreement not to comply with Regulations § 1.704-1(b).

"Capital Contributions" means, with respect to any Member, the amount of money and the Initial Gross Asset Value of any Property (other than money) contributed to the Company with respect to the Shares in the Company held or purchased by such Member.

"Class A Member" means a Person who has acquired ownership of Class A Shares by original issuance or Transfer in accordance with this Agreement, who has been admitted to the Company as a Class A Member and who has not ceased to be a Class A Member.

"Class A Shares" means Shares denominated as Class A Shares upon issuance by the Company and having those rights and obligations ascribed to Class A Shares in this Agreement.

"Class B Member" means a Person who has acquired ownership of Class B Shares by original issuance or Transfer in accordance with this Agreement, who has been admitted to the Company as a Class B Member and who has not ceased to be a Class B Member.

"Class B Shares" means Shares denominated as Class B Shares upon issuance by the Company and having those rights and obligations ascribed to Class B Shares in this Agreement.

"Code" means the United States Internal Revenue Code of 1986, as amended from time to time, and the corresponding provisions of any successor United States tax code.

"Company" means the limited liability company formed pursuant to this Agreement and the Articles and the limited liability company continuing the business of the Company in the event of dissolution of the Company as herein provided.

"Company Minimum Gain" has the meaning ascribed to the term "partnership minimum gain" in Regulations §§ 1.704-2(b) and 1.704-2(d).

"Competing Business" means any Person, other than the Company, that is engaged in conducting a Business similar to the Company's Business, in the geographic area consisting of Mecklenburg County, North Carolina and York County, South Carolina.

"Depreciation" means, for each Fiscal Year, an amount equal to the depreciation, amortization, or other cost recovery deduction allowable with respect to an asset for such Fiscal Year, except that if the Gross Asset Value of an asset differs from its adjusted basis for federal income tax purposes at the beginning of such Fiscal Year, Depreciation shall be determined in the manner prescribed in Treasury Regulations Section 1.704-1(b)(2)(iv)(g)(3) or 1.704-3(d)(2), as applicable. If the adjusted basis for federal income tax purposes of an asset at the beginning of such Fiscal Year is zero, Depreciation shall be determined with reference to such beginning

Gross Asset Value using any reasonable method selected by the Members.

"Earnings" shall mean the Net Income of the Company calculated based on Generally Accepted Accounting Principles generally accepted in the United States

"EBIDTA" means Earnings before Interest, Depreciation, Income Taxes and Amortization for the twelve months immediately preceding the month in which an event of Dissociation occurs.

"Effective Date" means the date hereof.

"Fiscal Year" means (i) the period commencing on the Effective Date and ending on December 31, 2005, (ii) any subsequent twelve month period commencing on January 1 and ending on December 31, and (iii) the period commencing on the immediately preceding January 1 and ending on the date on which all Property is distributed to the Members pursuant to Article 10.

"Gross Asset Value" means with respect to any asset, the asset's adjusted basis for federal income tax purposes, except as follows:

(i) The Initial Gross Asset Value of any asset contributed by a Member to the Company shall be the gross fair market value of such asset, as agreed to by the Members provided that the initial Gross Asset Values of the assets contributed to the Company pursuant to Section 2.1 shall be as set forth in such section;

(ii) The Gross Asset Values of all Company assets shall be adjusted to equal their respective gross fair market values (taking Code § 7701(g) into account), as of the following times: (A) the acquisition of additional Shares in the Company by any new or existing Member in exchange for more than a *de minimis* Capital Contribution; (B) the distribution by the Company to a Member of more than a *de minimis* amount of Company property as consideration for Shares in the Company; and (C) the liquidation of the Company within the meaning of Regulations § 1.704-1(b)(2)(ii)(g); provided that an adjustment described in clauses (A) and (B) of this paragraph shall be made only if the Members determine that such adjustment is necessary to reflect the relative economic interests of the Members in the Company;

(iii) The Gross Asset Value of any Company asset distributed to any Member shall be adjusted to equal the gross fair market value (taking Code § 7701(g) into account) of such asset on the date of distribution as agreed to by the Members.

If the Gross Asset Value of an asset has been determined or adjusted pursuant to subparagraph (i) or (ii), such Gross Asset Value shall thereafter be adjusted by the Depreciation taken into account with respect to such asset, for purposes of computing Profits and Losses.

"Income Taxes" means any income taxes paid directly by the Company that result in an expense to the Company under generally accepted accounting principles generally accepted in the United States. Income Taxes do not include tax distributions to the Members nor any income taxes paid on a Member's behalf.

"Interest" shall mean any Interest Expense not allocated as construction period interest to the direct cost of construction as required under generally accepted accounting principles generally accepted in the United States.

"Managers" shall mean collectively, **Wetzel Ray Holt, Robert S. Jones, Robert A. Keisler and Carl Edward Buck**, or any Person designated pursuant to this Agreement as a successor Manager but excluding any person who has ceased serving as a Manager. The Managers are treated as Members for all purposes under this Agreement.

"Member" means any Person (i) who is referred by name in the first paragraph of this Agreement or who has become a Member pursuant to the terms of this Agreement, and (ii) who has not ceased to be a Member.

"Member Nonrecourse Debt" has the same meaning as the term "partner nonrecourse debt" in Regulations § 1.704-2(b)(4).

"Member Nonrecourse Debt Minimum Gain" means an amount, with respect to each Member Nonrecourse Debt, equal to the Company Minimum Gain that would result if such Member Nonrecourse Debt were treated as a Nonrecourse Liability, determined in accordance with Regulations § 1.704-2(i)(3).

"Member Nonrecourse Deductions" has the same meaning as the term "partner nonrecourse deductions" in Regulations §§ 1.704-2(i)(1) and 1.704-2(i)(2).

"Net Cash Flow" means (on the cash receipts and disbursements basis of accounting) the net receipts (i.e., the excess, if any, of revenues over expenses (including the compensation payable under Section 1.10(a)) and repayment of loans) of the Company, (a) including cash from operations or investments and proceeds from the sale, exchange, or other disposition of any Property; but (b) excluding Capital Contributions of the Members; proceeds of any loans made to the Company; funds that the Members elect to reinvest on behalf of the Company; and reserves deemed reasonably sufficient by the Members, for (i) the working capital needs of the Company, (ii) the payment of liabilities incurred (including any loans made by any Members) or arising in the reasonably foreseeable future in connection with the operations of the Company, and (iii) capital expenditures or contributions incurred or arising in the reasonably foreseeable future. Net Cash Flow shall not be reduced by depreciation, amortization, cost recovery deductions or similar allowances.

"Nonrecourse Deductions" has the meaning set forth in Regulations § 1.704-2(b)(1).

"Nonrecourse Liability" has the meaning set forth in Regulations § 1.704-2(b)(3).

"Percentage Interest" means, with respect to any Member as of any date, the ratio (expressed as a percentage) of the number of Shares held by such Member on such date to the aggregate Shares held by all Members on such date. The Percentage Interest of each Member immediately after the Effective Date is set forth in Section 2.1.

"Person" means any individual or any foreign or domestic partnership (whether general or limited), limited liability company, corporation, business trust, trust, estate, association, joint venture, government, governmental subdivision, agency or instrumentality or other entity.

"Profits" and "Losses" mean, for each Fiscal Year, an amount equal to the Company's taxable income or loss for such Fiscal Year, determined in accordance with Code § 703(a) (for this purpose, all items of income, gain, loss, or deduction required to be stated separately

pursuant to Code § 703(a)(1) shall be included in taxable income or loss), with the following adjustments (without duplication):

(i) Any income of the Company that is exempt from federal income tax and not otherwise taken into account in computing Profits or Losses pursuant to this definition of "Profits" and "Losses" shall be added to such taxable income or loss;

(ii) Any expenditures of the Company described in Code § 705(a)(2)(B) or treated as Code § 705(a)(2)(B) expenditures pursuant to Regulations § 1.704-1(b)(2)(iv)(i), and not otherwise taken into account in computing Profits or Losses pursuant to this definition of "Profits" and "Losses" shall be subtracted from such taxable income or loss;

(iii) If the Gross Asset Value of any Company asset is adjusted pursuant to subparagraphs (ii) or (iii) of the definition of Gross Asset Value, the amount of such adjustment shall be treated as an item of gain (if the adjustment increases the Gross Asset Value of the asset) or an item of loss (if the adjustment decreases the Gross Asset Value of the asset) from the disposition of such asset and shall be taken into account for purposes of computing Profits or Losses;

(iv) Gain or loss resulting from any disposition of Property with respect to which gain or loss is recognized for federal income tax purposes shall be computed by reference to the Gross Asset Value of the Property disposed of, notwithstanding that the adjusted tax basis of such Property differs from its Gross Asset Value;

(v) In lieu of the depreciation, amortization, and other cost recovery deductions taken into account in computing such taxable income or loss, there shall be taken into account Depreciation for such Fiscal Year;

(vi) To the extent an adjustment to the adjusted tax basis of any Company asset pursuant to Code § 734(b) is required pursuant to Regulations § 1.704-1(b)(2)(iv)(m)(4) to be taken into account in determining Capital Accounts as a result of a distribution other than in liquidation of a Member's interest in the Company, the amount of such adjustment shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis) from the disposition of such asset and shall be taken into account for purposes of computing Profits or Losses; and

(vii) Notwithstanding any other provision of this definition, any items that are specially allocated pursuant to Section 3.3 or Section 3.4 shall not be taken into account in computing Profits or Losses.

The amounts of the items of Company income, gain, loss or deduction available to be specially allocated pursuant to Sections 3.3 and 3.4 shall be determined by applying rules analogous to those set forth in subparagraphs (i) through (vi) above.

"Property" means all real and personal property acquired by the Company, including both tangible and intangible property.

"Regulations" means the Income Tax Regulations, including Temporary Regulations, promulgated under the Code, as such regulations are amended from time to time.

"Share" means an ownership interest in the Company including any and all benefits to which the holder of such Share may be entitled as provided in this Agreement, together with all obligations of such Person to comply with the terms and provisions of this Agreement; provided that an Assignee shall have only the rights specified in Section 9.6. A reference to "Share" or "Shares" includes both Class A Shares and Class B Shares unless the context clearly requires otherwise.

"Transfer" means the act of selling, exchanging, giving, assigning or otherwise transferring or disposing of (including by placing in trust (voting or otherwise) and by pledging, hypothecating or otherwise transferring as security), whether made voluntarily or involuntarily by operation of law and whether with or without consideration. Without limiting the generality of the foregoing:

(i) Any transfer or other disposition upon foreclosure or other exercise or remedies of a secured creditor after an event of default or otherwise under or with respect to a pledge, hypothecation or other transfer as security also shall constitute a "Transfer," and

(ii) The sale, exchange or other transfer of at least fifty percent (50%) of the voting stock of a Member, if a Member is a corporation, or the transfer of an interest or interests of at least fifty percent (50%) in the capital or profits of a Member (whether accomplished by the sale or exchange of interests or by the admission of a new partner or member), if a Member is a partnership or limited liability company, or the cumulative transfer of such interests in a Member that effectively equal the foregoing (including transfers of interests followed by the incorporation of a Member and subsequent stock transfers, or transfers of stock followed by the liquidation of a Member and subsequent transfers of interests) will be deemed to constitute a "Transfer" of the Shares held by that Member.

"Unreturned Capital" of any Member on any date shall be equal to the excess (if any) of (a) the aggregate Required Class A Contribution or Required Class B Contribution of such Member pursuant to Section 2.1 or 2.2, over (b) the aggregate distributions to such Member pursuant to (i) in the case of a Class A Member, Section 4.2(b) or (ii) in the case of a Class B Member, Section 4.2(a), as of such date.

1.10 Fees to Members and Affiliates.

(a) The Company shall pay compensation to **Wetzel Ray Holt** as provided for in the Employment Agreement attached hereto as Exhibit B.

(b) Without the consent of the Members, no fee or other compensation shall be paid to any Member other than as expressly described in this Agreement.

1.11 Interpretation. Each definition in this Agreement includes the singular and the plural, and reference to the neuter gender includes the masculine and feminine where appropriate. References to any statute or Regulations mean such statute or regulations as amended at the time and include any successor legislation or regulations. The headings to the Articles and Sections are for convenience of reference and shall not affect the meaning or interpretation of this Agreement. Except as otherwise stated, (i) references to Articles and Sections mean the Articles and Sections of this Agreement, (ii) reference to a particular Article or Section includes the Sections, subsections and paragraphs subsidiary thereto and (iii)

references to "including" means "including without limitation."

ARTICLE 2 ADMISSION OF MEMBERS

2.1 Initial Class A Members. Schedule 2.1 sets forth the name, Initial Capital Contribution ("Required Class A Contribution"), Initial Capital Account, number of Class A Shares, and Percentage Interest of each initial Class A Member. Each Person named on Schedule 2.1 shall make its Required Class A Contribution to the Company in cash upon (or prior to) executing this Agreement. Upon executing this Agreement and making its Required Class A Contribution, such Person shall be admitted to the Company as a Class A Member.

2.2 Initial Class B Member. Schedule 2.2 sets forth the name, initial Capital Contribution ("Required Class B Contribution"), initial Capital Account, number of Class B Shares, and Percentage Interest of each initial Class B Member. Each Person named on Schedule 2.2 shall make its Required Class B Contribution to the Company in cash upon (or prior to) executing this Agreement. ~~Upon executing this Agreement and making its Required Class B Contribution,~~ such Person shall be admitted to the Company as a Class B Member.

2.3 Guaranty of Loans to Company. Each of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") for so long as any guaranty of such loan is required by the lender. Notwithstanding any other provision of this Agreement or any provision of the Guaranteed Loan documents, as between the Members, each Class A Member shall be responsible for paying such Class A Member's proportionate share of any Guaranteed Loan ("Guaranty Percentage"). The "proportionate share" of a Class A Member shall equal such Class A Member's Percentage Interest divided by the aggregate Percentage Interests of all of the Class A Members. Any Class A Member who pays more than such Class A Member's Guaranty Percentage of the Guaranteed Loan to the Lender shall be entitled to contribution from the other Class A Members. Any Class A Member who is required to institute legal action to enforce such right of contribution shall be entitled to recover from the other Class A Members all costs and reasonable attorneys fee.

2.4 Additional Capital Contributions.

(a) No Class B Member shall be required to make any Capital Contributions other than as required by Section 2.2.

(b) No Class A Member shall be required to make any Capital Contributions other than as required by Sections 2.1 and 2.4 (c).

(c) If the Class A Members unanimously determine that the Company needs additional equity capital in addition to that provided for in Sections 2.1, then the Company shall send to each Class A Member an Additional Capital Contribution Notice, which shall set forth the total amount (the "Capital Contribution Amount") of equity capital that the Company needs to raise. Each Class A Member shall be entitled to contribute an amount up to (but not in excess of) that percentage of the Capital Contribution Amount equal to the Class A Member's Percentage Interest ("Proportionate Share"). A Class A Member desiring to contribute a portion of the Capital Contribution Amount shall notify the Company in writing of such Class A Member's agreement to

make a Capital Contribution (and the amount of such Capital Contribution), within the time limit prescribed by the Class A Members. If some, but not all, of the Class A Members subscribe for their Proportionate Share (so that less than the entire Capital Contribution Amount is raised), then the Company shall repeat the foregoing procedure, but only with respect to those Class A Members who subscribed for their Proportionate Share. Any Capital Contribution made Pursuant to this subsection may be referred to as an "Additional Capital Contribution." A Class A Member must pay the Additional Capital Contribution for which such Class A Member has agreed to pay within the time limits set by the Class A Members in cash (U.S. Dollars). If the Class A Member fails to pay in accordance with the preceding sentence, such Class A Member shall forfeit such Class A Member's right to make the additional Capital Contribution. If the Company receives an Additional Capital Contribution from some but not all of the Class A Members pursuant to an Additional Capital Contribution Notice, then the Percentage Interests of the Class A Members (and the number of Class A Shares) shall be adjusted accordingly, and shall be redetermined as follows:

(i) The Company Asset Value shall be determined as of the date immediately prior to that contribution pursuant to Section 9.12(a) (as if the date of the contribution were the date of the Event of Dissociation);

(ii) The Asset Value shall be multiplied by the aggregate Percentage Interests attributable to all outstanding Class A Shares (the result of which calculation shall be referred to as the "Class A Asset Value");

(iii) A ratio ("Ratio") shall be calculated for each Class A Member, (A) the numerator of which is the sum of (I) the product of the Class A Asset Value multiplied by such Class A Member's Percentage Interest immediately prior to such Additional Capital Contribution and (II) the Additional Capital Contribution (if any) made by such Class A Member pursuant to such Additional Capital Contribution Notice; and (B) the denominator of which is the sum of the Class A Asset Value and all Additional Capital Contributions made by the Class A Members pursuant to such Additional Capital Contribution Notice;

(iv) Each Class A Member's Percentage Interest shall equal (A) such Member's Ratio multiplied by (B) the aggregate Percentage Interests attributable to all outstanding Class A Shares immediately prior to the Additional Capital Contribution. The number of Class A Shares of such Class A Member shall be adjusted in a similar manner.

No adjustment shall be made to the Percentage Interests of the Class B Members.

ARTICLE 3 ALLOCATIONS

3.1 Profits. After giving effect to the special allocations set forth in Sections 3.3 and 3.4, Profits for any Fiscal Year shall be allocated to the Members in the following order and priority:

(a) First, to each of the Members (in proportion to the Losses allocated to such Member pursuant to Section 3.5 and not previously charged back pursuant to this Section 3.1(a)) until the cumulative Profits allocated to such Member pursuant to this Section 3.1(a) equal the cumulative Losses allocated to such Member pursuant to Section 3.5 for all prior

Fiscal Years;

(b) Finally, among the Members in proportion to their respective Percentage Interests.

3.2 Losses. After giving effect to the special allocations set forth in Sections 3.3 and 3.4, and subject to Section 3.5, Losses for any Fiscal Year shall be allocated among the Members in proportion to their respective Percentage Interests.

3.3 Special Allocations. The following special allocations shall be made in the following order:

(a) Except as otherwise provided in Regulations § 1.704-2(f), notwithstanding any other provision of this Article 3, if there is a net decrease in Company Minimum Gain during any Fiscal Year, each Member shall be specially allocated items of Company income and gain for such Fiscal Year (and, if necessary, subsequent Fiscal Years) in an amount equal to such Member's share of the net decrease in Company Minimum Gain, determined in accordance with Regulations § 1.704-2(g). This Section 3.3(a) is intended to comply with the minimum gain chargeback requirement in Regulations § 1.704-2(f) and shall be interpreted consistently therewith.

(b) Except as otherwise provided in Regulations § 1.704-2(i)(4), notwithstanding any other provision of this Article 3, if there is a net decrease in Member Nonrecourse Debt Minimum Gain attributable to a Member Nonrecourse Debt during any Fiscal Year, each Member who has a share of the Member Nonrecourse Debt Minimum Gain attributable to such Member Nonrecourse Debt, determined in accordance with Regulations § 1.704-2(i)(5), shall be specially allocated items of Company income and gain for such Fiscal Year (and, if necessary, subsequent Fiscal Years) in an amount equal to such Member's share of the net decrease in Member Nonrecourse Debt, determined in accordance with Regulations § 1.704-2(i)(4). This Section 3.3(b) is intended to comply with the minimum gain chargeback requirement in Regulations § 1.704-2(i)(4) and shall be interpreted consistently therewith.

(c) If any Member unexpectedly receives any adjustments, allocations, or distributions described in Regulations §§ 1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(5), or 1.704-1(b)(2)(ii)(d)(6), items of Company income and gain shall be specially allocated to such Member in an amount and manner sufficient to eliminate, to the extent required by the Regulations, the Adjusted Capital Account Deficit of the Member as quickly as possible, provided that an allocation pursuant to this Section 3.3(c) shall be made only if and to the extent that the Member would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article 3 have been tentatively made as if this Section 3.3(c) were not in the Agreement.

(d) If any Member would otherwise have an Adjusted Capital Account Deficit at the end of any Fiscal Year, each such Member shall be specially allocated items of Company income and gain in the amount of such excess as quickly as possible, provided that an allocation pursuant to this Section 3.3(d) shall be made only if and to the extent that such Member would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article 3 have been made as if Section 3.3(c) and this Section 3.3(d) were not in the Agreement.

(e) Nonrecourse Deductions for any Fiscal Year shall be specially allocated to the Members in proportion to their respective Percentage Interests.

(f) Any Member Nonrecourse Deductions for any Fiscal Year shall be specially allocated to the Member who bears the economic risk of loss with respect to the Member Nonrecourse Debt to which such Member Nonrecourse Deductions are attributable in accordance with Regulations § 1.704-2(i)(1).

(g) To the extent an adjustment to the adjusted tax basis of any Company asset, pursuant to Code § 734(b) or Code § 743(b) is required, pursuant to Regulations § 1.704-1(b)(2)(iv)(m)(2) or 1.704-1(b)(2)(iv)(m)(4), to be taken into account in determining Capital Accounts as the result of a distribution to a Member in complete liquidation of such Member's interest in the Company, the amount of such adjustment to Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis) and such gain or loss shall be specially allocated to the Members in accordance with their interests in the Company if Regulations § 1.704-1(b)(2)(iv)(m)(2) applies, or to the Member to whom such distribution was made if Regulations § 1.704-1(b)(2)(iv)(m)(4) applies.

3.4 Curative Allocations. The allocations set forth in Sections 3.3 and 3.5 (the "Regulatory Allocations") are intended to comply with certain requirements of the Regulations. It is the intent of the Members that, to the extent possible, all Regulatory Allocations shall be offset either with other Regulatory Allocations or with special allocations of other items of Company income, gain, loss or deduction pursuant to this Section. Therefore, notwithstanding any other provision of this Article 3 (other than the Regulatory Allocations), the Members shall make such offsetting special allocations of Company income, gain, loss or deduction in whatever manner the Members determine appropriate so that, after such offsetting allocations are made, each Member's Capital Account balance is, to the extent possible, equal to the Capital Account balance such Member would have had if the Regulatory Allocations were not part of the Agreement and all Company items were allocated pursuant to Sections 3.1 and 3.2.

3.5 Loss Limitation. Losses allocated pursuant to Section 3.2 shall not exceed the maximum amount of Losses that can be allocated without causing any Member to have an Adjusted Capital Account Deficit at the end of any Fiscal Year. If some but not all of the Members would have Adjusted Capital Account Deficits as a consequence of an allocation of Losses pursuant to Section 3.2, the limitation set forth in this Section 3.5 shall be applied on a Member-by-Member basis and Losses not allocable to any Member as a result of such limitation shall be allocated to the other Members in accordance with the positive balances in such Member's Capital Accounts so as to allocate the maximum permissible Losses to each Member under Regulations § 1.704-1(b)(2)(ii)(d).

3.6 Other Allocation Rules.

(a) For purposes of determining the Profits, Losses or any other items allocable to any period, Profits, Losses and any such other items shall be determined on a daily, monthly or other basis, as determined by the Members using any permissible method under Code § 706 and the Treasury Regulations thereunder.

(b) The Members are aware of the income tax consequences of the allocations made by this Article 3 and hereby expressly agree to be bound by the provisions of this Article 3 in reporting their shares of Company income and loss for income tax purposes.

(c) Solely for purposes of determining a Member's proportionate share of the "excess nonrecourse liabilities" of the Company within the meaning of Treasury Regulations § 1.752-3(a)(3), the Members' interests in Company profits are in proportion to their Percentage Interests.

(d) Tax credits and any other items other than Profits and Losses that are not otherwise expressly provided for herein shall be allocated to the Members in accordance with their Percentage Interests.

(e) To the extent permitted by Regulations § 1.704-2(h)(3), the Members shall endeavor to treat distributions of Company cash or other assets as having been made from the proceeds of a Nonrecourse Liability or a Member Nonrecourse Debt only to the extent that such distributions would cause or increase an Adjusted Capital Account Deficit for any Member.

3.7 Tax Allocations.

(a) Except as provided in Section 3.7(b), items of taxable income, gain, loss, deduction and credit shall be allocated among the Members for income tax purposes on the same basis as their respective book items.

(b) In accordance with Code § 704(c) and the Regulations thereunder, income, gain, loss, and deduction with respect to any Property contributed to the capital of the Company shall, solely for tax purposes, be allocated among the Members so as to take account of any variation between the adjusted basis of such Property to the Company for federal income tax purposes and its initial Gross Asset Value (computed in accordance with the definition of Gross Asset Value) using an allocation method permitted by the Regulations and selected by the Members. If the Gross Asset Value of any Company asset is adjusted pursuant to subparagraph (ii) of the definition of Gross Asset Value, subsequent allocations of income, gain, loss, and deduction with respect to such asset shall take account of any variation between the adjusted basis of such asset for federal income tax purposes and its Gross Asset Value in the same manner as under Code § 704(c) and the Regulations thereunder. Any elections or other decisions relating to such allocations shall be made by the Members in any manner that reasonably reflects the purpose and intention of this Agreement. Allocations pursuant to this Section 3.7 are solely for purposes of federal, state, and local taxes and shall not affect, or in any way be taken into account in computing, any Member's Capital Account or share of Profits, Losses, other items, or distributions pursuant to any provision of this Agreement.

ARTICLE 4 DISTRIBUTIONS

4.1 Tax Distributions. Prior to making other distributions, the Company shall, no later than three (3) days prior to the dates listed in Section 6654(c) of the Code as due dates for the installment payments of estimated taxes (each date, a "Tax Distribution Date") make a distribution (a "Tax Distribution") to each Member equal to the sum of (a) such Member's

allocable share of the net taxable income for the period beginning with the first date of the taxable year to which the estimated tax payment relates and ending with the last day of the taxable month to which the estimated tax payment relates with respect to which such estimated tax payment is due, multiplied by (b) the sum of the highest federal income tax rate then applicable to individuals and the higher of the South Carolina or North Carolina income tax rate then applicable to individuals; provided, however, that the amount of any Tax Distribution made to such Member pursuant to this Section shall be (c) reduced by the sum of the Tax Distributions previously made to such Member with respect to such current taxable year, and (d) increased by the amount of all Tax Distributions required to be paid in prior taxable years but not paid because of insufficient cash flow. Tax Distributions made to a Member pursuant to this Section shall not also be treated as distributions made to such Member pursuant to Section 4.2(a) or (b).

4.2 Interim Distributions. Except as otherwise provided in Section 4.1 or Section 10.2 hereof, the Managers shall distribute the Net Cash Flow at such times as the Managers shall determine in the following order and priority:

(a) First, to the Class B Members until each Class B Member has received cumulative distributions pursuant to this Section 4.2(a) and Section 10.2(c) equal to such Class B Member's Required Class B Contribution (in proportion to each Class B Member's Unreturned Capital);

(b) Second, to the Class A Members until each Class A Member has received cumulative distributions pursuant to this Section 4.2(b) and Section 10.2(d) equal to such Class A Member's Required Class A Contribution (in proportion to each Class A Member's Unreturned Capital);

(c) Finally, to all of the Members in proportion to their Percentage Interests.

The Members acknowledge and agree that certain payments may be authorized by the Company to be made to the Members for services rendered in furtherance of the Company's business. Payments to any such Members for services rendered shall not represent distributions subject to the provisions of this Article 4, but instead shall be considered to be expense payments in the computation of Profits and Losses.

4.3 Amounts Withheld. All amounts withheld pursuant to the Code or any provision of any state, local or foreign tax law with respect to any payment, distribution or allocation to the Members shall be treated as amounts paid or distributed, as the case may be, to the Members with respect to which such amount was withheld pursuant to this Section for all purposes under this Agreement. The Company is authorized to withhold from payments and distributions, or with respect to allocations to the Members, and to pay over to any federal, state and local government or any foreign government, any amounts required to be so withheld pursuant to the Code or any provisions of any other federal, state or local law or any foreign law, and shall allocate any such amounts to the Members with respect to which such amount was withheld.

4.4 Limitations on Distributions. Anything in this Article 4 to the contrary notwithstanding, no distribution shall be made to any Member if, and to the extent that, such distribution (a) would create or increase an Adjusted Capital Account Deficit for such Member or (ii) would not be permitted under the Act or under agreements by which the Company is bound.

Each Member, by becoming a Member, consents to the making or omission of any such distribution hereafter to the Members in accordance with this Section.

ARTICLE V MANAGEMENT AND CONTROL

5.1 General Authority. Except as otherwise expressly provided by this Agreement or required by any nonwaivable provisions of applicable law, the business and affairs of the Company shall be managed by the Management Committee. The Management Committee shall be comprised of all Managers. The Management Committee shall have full and complete authority, power and discretion to manage and control the business, affairs and properties of the Company, to make all decisions regarding those matters and to perform any and all other acts or activities customary or incident to the management of the Company's business. Without limiting the generality of the foregoing, the Management Committee shall have the power and authority on behalf of the Company to:

- (a) ~~Acquire property, real, personal, tangible and intangible;~~
- (b) Borrow money for the Company from banks, other lending institutions, and other persons on such terms as the Company deems appropriate and to hypothecate, encumber and grant security interests in the assets of the Company to secure payment of the borrowed sums;
- (c) Purchase liability and other insurance to protect the Company Property and business;
- (d) Hold and own any property, real, personal, tangible and intangible, in the name of the Company, including, but not limited to, deeds, mortgages, leasehold interests, interests in general partnerships, limited partnerships, limited liability companies, common trust funds, mutual funds, stocks, options, warrants, rights, puts, calls, contracts, futures, bonds, debentures, securities (public and private), and other debt and equity interests of any kind or nature;
- (e) Invest and reinvest any Company funds in time deposits, short-term governmental obligations, commercial paper or other investments including real estate, stocks, options, general and limited partnerships, limited liability companies, common trust funds, mutual funds, futures, rights, warrants, puts, calls, contracts, public and private bonds, debentures, securities, and other debt and equity interests and to actively trade, speculate on and manage the same;
- (f) Enter into, make, and perform contracts, agreements, and other undertakings binding on the Company that may be necessary, appropriate, or advisable in furtherance of the purposes of the Company and make all decisions and waivers thereunder;
- (g) Employ accountants, legal counsel, managing agents, money managers, property managers, investment advisors and other advisors to perform services for the Company and to compensate them from Company funds;
- (h) Screen, interview, hire and fire and personnel to be employed by the Company;
- (i) Open and maintain bank and investment accounts and arrangements, draw checks, letters of credit, and other orders for payment of money and designate individuals with authority to sign or give instructions with respect to those accounts and arrangements;

- (j) Maintain the assets of the Company in good order;
- (k) Collect sums due the Company;
- (l) Pay debts and obligations of the Company to the extent that Company funds are available;
- (m) Sell, purchase, lease, loan, borrow, rent, repair, partition, mortgage, pledge, encumber, develop, improve, subdivide, or otherwise deal with any property, including Company Property;
- (n) Bring suit on the Company's behalf or defend the Company in any such action, and compromise, settle, collect, and otherwise represent, prosecute and defend the legal rights and interests of the Company;
- (o) File on behalf of the Company a voluntary petition for bankruptcy, or to bring an action on behalf of the Company for receivership, insolvency or other similar relief in any court of competent jurisdiction, and to defend, answer, respond and otherwise represent the Company in any such action or proceeding;
- (p) Invest and reinvest in any kind of property, real, personal, tangible and intangible, including, but not limited to, common trust funds, stocks, bonds, notes, mortgages, general or limited partnerships, limited liability companies, savings accounts and certificates of deposit, mutual funds, and real estate; and
- (q) Perform all other acts as may be necessary or appropriate to the conduct of the Company's business, and to execute, acknowledge, verify and deliver any or all instruments desirable to effectuate any of the foregoing.

5.2 Members' Approval Required for Certain Major Decisions. Notwithstanding anything herein to the contrary, the following major decisions shall require approval of the Members in the percentages designated:

- (a) Any amendment to this Agreement or the Articles of Organization shall require the approval of all Members, except as provided in Section 8.2 hereof.
- (b) The Company shall not compromise, settle, waive or limit the obligation of any Member to make a Capital Contribution to the Company without the consent of all Disinterested Members.
- (c) The Company shall not sell, or contract to sell, or otherwise dispose of substantially all of the Company Property outside of transactions in the normal course of business without the approval of those Members who own more than Eighty Percent (80%) of the voting rights in the Company.
- (d) The Company shall not enter into any merger, or any profit sharing, joint venture, or other such arrangement without the approval of all Members.

(e) The Company shall not hire anyone who is a member of a Member's or Manager's Family on a full time basis without the approval of those Members who own more than Eighty Percent (80%) of the voting rights in the Company.

5.3 Liability for Certain Acts. A Manager who performs his duties in good faith and in a manner he reasonably believes to be in the best interests of the Company shall not have any liability solely by reason of being or having been a Manager of the Company. A Manager shall not be liable to the Company or to any Member for any loss or damage sustained by the Company or any Member, unless the loss or damage shall have been the result of such Manager's fraud, deceit, gross negligence, willful misconduct, breach of this Agreement or a knowing violation of the law.

5.4 Management Committee Meetings - Place, Time and Notice. All meetings of the Management Committee shall be held at the offices of Boozer Lumber Company at 1400 Atlas Road in Columbia, South Carolina, or at such other place as shall be agreed upon by more than Eighty Percent (80%) of the number of Managers then serving the Company. Meetings of the Management Committee may be called at any time by any Manager of the Company, by delivering to the other Managers a written notice at least two (2) days in advance of the proposed meeting date. The notice shall contain the time, date and place of the meeting. Each Manager shall be entitled to one (1) vote. Fifty Percent (50%) of the Managers constitutes a quorum. Except as provided in SECTION 5.7, in order for any vote of the Managers to be valid and constitute an action of the Management Committee, a quorum must be represented at the meeting either in person or by proxy. Once a quorum is established, the affirmative vote of more than Fifty Percent (50%) of the Managers shall constitute a valid decision of the Management Committee. Managers may vote by proxy appointed by an instrument in writing. In the event of deadlock, any Manager may call a meeting of the Members, pursuant to ARTICLE IV, who shall decide the issue.

5.5 Waiver of Notice. A Manager may waive notice of any meeting by a signed writing. In addition, a Manager who attends a meeting waives his right to assert any lack of notice, or defect in notice, of the meeting unless he states such objection at the outset of the meeting.

5.6 Action without Meeting. The Management Committee may take action without notice and a meeting if all of the Managers consent to such action by signing a Consent of the Managers which sets forth the action to be taken and contains the signature of each Manager.

5.7 Managers: Number, Election, Tenure and Qualifications. The Company shall have Four (4) Managers who shall compose the Management Committee of the Company. The Managers shall be Class A Members of the Company. The initial Managers are **Wetzel Ray Holt, Robert S. Jones, Robert A. Keisler and Carl Edward Buck**. Each Manager shall agree to be bound by the provisions of this Agreement as they relate to Managers. The number of Managers on the Management Committee may be changed from time to time by the affirmative vote of all Members. Each Manager shall be elected by the affirmative vote of those Members who own more than Eighty Percent (80%) of the voting rights in the Company. Following his election, each Manager will serve until (a) his removal, (b) his resignation, or (c) the election of a successor, whichever occurs first.

5.8 Removal of Managers. A Manager may be removed at any time, with or without cause, by those Members who own more than Eighty Percent (80%) of the voting rights in the Company.

5.9 Resignation of Managers. Any Manager may resign at any time by giving written notice to all Members. The resignation shall be effective upon receipt of such written notice by any Member. The resignation of a Manager who is also a Member shall not affect the Manager's rights as a Member and shall not constitute a withdrawal from the Company by the Member.

5.10 No Authority of Members. Except as otherwise provided in this Agreement, or as authorized by the Management Committee, no Member is an agent of the Company or has the authority to make any contracts, enter into any transactions, or make any commitments on behalf of the Company.

5.11 Ratification. The Management Committee may ratify and adopt any and all acts of a Member or Manager done on behalf of the Company.

5.12 Delegation of Powers. From time to time, the Management Committee may authorize, or delegate any of its authority to a subcommittee of Persons, or a single Person, whom it shall name, to act on its behalf regarding any matter over which the Management Committee has authority. The Members authorize and direct the Management Committee to delegate all of the authority specified in Section 5.1 to **Wetzel Ray Holt** pursuant to the terms and subject to the provisions of Mr. Holt's Employment Agreement of even date herewith.

ARTICLE 6 MEMBERS

6.1 Actions by Members.

(a) With respect to any matter for which this Agreement calls for the vote, approval or decision of "the Members" (as opposed to matters left to the decision of the Managers or matters left to the decision of the Class A Members or some other subset of the Members), such matter shall be decided by those Members holding the Specified Percentage of all of the outstanding Shares held by Members (with all of the Class A Members and the Class B Members voting as a single class, not as two separate classes). With respect to any matter for which this Agreement calls for the vote, approval or decision of some subset of the Members, such matter shall be decided by those Members (who are part of such subset) holding the Specified Percentage of all of the outstanding Shares held by that subset of Members. The "Specified Percentage" shall be that percentage specified in this Agreement for approval of such matter. For any decision of all of the Members for which no percentage is otherwise specified in this Agreement, the Specified Percentage shall be a majority of all of the outstanding Shares held by the Members. Each Member shall be entitled to a number of votes equal to the number of Shares held by such Member. The provisions of Act § 33-44-404(c) shall not apply with respect to this Agreement or this Company.

(b) A meeting of for any proper purpose or purposes may be called at any time by the Managers or by any Member(s) holding at least 20% of the Shares then outstanding by written notice given to a Manager, which notice shall specify the purpose or purposes for which the meeting is being called.

(c) All in-person meetings of Members shall be held at the principal office of the Company, or at such other place within the State of South Carolina as may be designated by the Member(s) calling the meeting. At any meeting of the Members, any Member(s) may participate by means of conference telephone or similar communications equipment so long as all Persons participating in the meeting can hear each other.

(d) Written notice of meetings of the Members, if any, stating the place, day and hour of the meeting and the purpose or purposes for which the meeting is called, shall be delivered by the Company not less than five (5) nor more than sixty (60) days before the meeting to each Member entitled to vote at that meeting.

(e) Attendance of a Member at a meeting shall constitute a waiver of notice of the meeting, except where such Member attends for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened. Notice of a meeting may also be waived in writing. Attendance at a meeting or participation in a meeting is not a waiver of any right to object to the consideration of matters required to be included in the notice of the meeting but not so included, if the objection is expressly made at the meeting.

(f) The presence, either in person or by proxy, of Members holding a majority of the Shares then held by the Members is required to constitute a quorum at any meeting of the Members. Participation in a meeting by means of conference telephone shall constitute presence in person at such meeting.

(g) The Managers shall designate a Person (including the Manager) to serve as chairperson of any meeting (who shall decide all points of order) and shall further designate a Person (including the Manager) to take minutes of any meeting. The chairperson of the meeting shall have the power to adjourn the meeting from time to time, without notice, other than announcement of the time and place of the adjourned meeting. Upon the resumption of such adjourned meeting, any business may be transacted that might have been transacted at the meeting as originally called.

(h) Any action that may be taken at a meeting of the Members may be taken without a meeting if a consent in writing, setting forth the action to be taken, shall be signed and dated by Members holding the percentage of Shares required to approve such action under the Act, the Articles or this Agreement. Such consent shall have the same force and effect as a vote of the signing Members at a meeting duly called and held pursuant to this Article. No prior notice from the signing Members to the Company or other Members shall be required in connection with the use of a written consent pursuant to this Section. Notification of any action taken by means of a written consent of Members shall, however, be sent within a reasonable time after the date of the consent by the Company to all Members who did not sign the written consent.

(i) A Member may vote either in person or by proxy executed in writing by the Member. A facsimile, telegram, telex, cablegram or similar transmission by the Member or a photographic, photostatic, facsimile or similar reproduction of a writing executed by the Member shall be treated as an execution in writing for purposes of this Section. Proxies for use at any meeting of Members or in connection with the taking of any action by written consent shall be filed with the Company before or at the time of the meeting or execution of the written consent, as the case may be. No proxy shall be valid after 11 months from the date of such

proxy's execution unless otherwise provided in the proxy. A proxy shall be revocable unless the proxy form conspicuously states that the proxy is irrevocable and the proxy is coupled with an interest.

6.2 Admission of Members. After the formation of this Company, a Person becomes a new Member:

(a) in the case of a Person acquiring Shares in the Company directly from the Company, upon compliance with the provisions of Section 6.3; and

(b) in the case of an assignee or transferee of Shares, upon compliance with the provisions of Section 9.7.

6.3 New Members. Additional Persons may be admitted to the Company and Shares may be issued to those Persons on such terms and conditions as are approved by those Members holding eighty percent (80%) of the outstanding Shares held by the Members. Any such admission is effective when the Person has executed and delivered to the Company a written document including the Person's notice address, his or her agreement to be bound by this Agreement and such other matters as the Members may require.

6.4 Waiver of Partition. While the Company remains in effect or is continued, each Member agrees and waives such Member's rights to have any Company Property partitioned, or to file a complaint or to institute any suit, action or proceeding at law or in equity to have any Company Property partitioned, and each Member, on behalf of such Member and such Member's heirs, successors and assigns, hereby waives any such right.

6.5 Transactions Between a Member and the Company. No Member shall receive any interest, salary or drawing with respect to such Member's Capital Contributions or such Member's Capital Account or for services rendered on behalf of the Company, or otherwise, in such Member's capacity as a Member; *provided, however*, that this provision shall not prohibit the Company from

(a) undertaking the relationships and paying the fees set forth in Section 1.10;
or

(b) upon obtaining the consent required of those Members (excluding the Member who is (or whose affiliate is) proposing to enter such transaction) holding a majority of the outstanding Shares held by the Members (excluding the Member who is (or whose affiliate is) proposing to enter such transaction), entering into any transaction or dealing with a Member (or affiliate of a Member) on terms and conditions that, in the aggregate, are not less favorable to the Company than those the Company could obtain from an unrelated third party, and derive and retain profits therefrom.

6.6 Liability of Members; Indemnification.

(a) No Member shall be liable for the debts or any other obligations or liabilities of the Company, whether arising in contract, tort or otherwise unless a Member guarantees any debt or obligation as required under Article 2.3. A Member shall be liable only to make such Member's Capital Contributions as set forth in Sections 2.1, 2.2 and 2.4 and shall not be required

to restore a deficit balance in such Member's Capital Account or to lend any funds to the Company or, after such Member's Capital Contributions have been made, to make any additional Capital Contributions, assessments or payments to the Company, provided that a Member may be required to repay distributions made to such Member as provided in Act § 33-44-407. No Member shall have any personal liability for the repayment of any Capital Contributions or Capital Account of any other Member.

(b) Each Member (including each Manager) has a duty to the Company and the other Members to perform such Member's duties and responsibilities hereunder in good faith, in a manner such Member reasonably believes to be in the best interests of the Company, and with such care as an ordinarily prudent person in a like position would use under similar circumstances. In accordance with the business judgment rule, a Member who conducts itself in accordance with the standard set forth in this paragraph (b) in carrying out a duty or responsibility under this Agreement shall have no liability to the Company or any other Member as a result thereof.

~~(c) To the fullest extent permitted by law, the Company shall indemnify a~~ Member (and each of the Member's partners, employees, agents and affiliates (where acting for or as agent of the Company)) (any of the foregoing Persons being hereinafter an "Indemnified Person") and save and hold them and each of them harmless from and in respect of (i) all fees, costs and expenses, including attorneys' fees, incurred in connection with, or resulting from, any claim, action or demand against any such Indemnified Person or the Company which arise out of, or in any way relate to, the Company, its properties, business or affairs, and (ii) all such claims, actions and demands and any losses, liabilities or damages resulting therefrom, including amounts paid by such Indemnified Person with the prior written consent of the Company in settlement or compromise of any such claim, action or demand; provided, however, that this indemnity shall not extend to any such Indemnified Person to the extent that its acts and omissions shall have been adjudged to constitute a breach of the standard set forth in Section 6.6(b).

6.7 Other Business of Members.

(a) Holt and any other Member, who shall be an employee of *Holt Family Homes, LLC*, shall devote substantially all of his time, effort and skill to the operation of the Company. Other individual Class A Members shall be required to devote whatever time, effort and skill as is reasonably appropriate to accomplish such Class A Member's obligations under this agreement. No Class A Member, employed by the Company, shall, while a Member of the Company and for a period of six months after such Class A Member's dissociation from the Company, invest in, be employed by or provide personal services to a Competing Business except *Boozer Lumber Company* or *Boozer Lumber, LLC* or their affiliates.

(b) Each Class B Member shall only be required to devote whatever time, effort and skill as is reasonably appropriate to accomplish such Class B Member's obligations under this Agreement. No Class B Member shall, while a Member of the Company and for a period of six months after such Class B Member's dissociation from the Company, invest in a Competing Business.

(c) Any Member who is employed as an officer by *Boozer Lumber Company* or *Boozer Lumber, LLC*, or an affiliate of either company, or who is a shareholder or member of such company shall be obligated and required to seek or otherwise transfer his Shares in the

Company to the Company or to other Members of the Company, as provided for herein, in the event his employment as an officer of *Boozer Lumber Company*, *Boozer Lumber, LLC*, or in any affiliated company terminates for any reason (other than retirement where the Member does not become gainfully employed by or under contract with a Company which is engaged in a business similar to *Boozer Lumber Company*) or in the event a shareholder shall sell all of his shares or ownership interest in *Boozer Lumber Company*, *Boozer Lumber Company, LLC*, or an affiliated company.

(d) In the event of dissociation of Member **Wetzel Ray Holt**, the Company's name shall be amended within one (1) year to remove the name "Holt" from the Company's name.

(e) Holt Family Homes, LLC and its Managers are expressly authorized to obtain goods and/or services from any affiliate of the managers or from *Boozer Lumber Company*, *Boozer Lumber Company, LLC*, or affiliates of either Company, provided that the terms of and such arrangements are not less favorable to the Company than those which would be arrived at between unaffiliated parties doing business at arm's length.

ARTICLE 7

ACCOUNTING, BOOKS, RECORDS, REPORTS, AND TAX MATTERS

7.1 Bank Accounts. Company funds shall be deposited in the name of the Company in such bank accounts of the Company as may be designated by the Management Committee. The Members shall make disbursement from those accounts solely for the Company's business or for distributions to the Members in accordance with the Agreement.

7.2 Maintenance of Books. The Managers shall maintain and keep at the principal office (or upon notice to the Members, another office selected by the Managers) of the Company complete and accurate books of account, in which shall be entered fully and accurately each and every transaction of the Company, and the records required to be maintained by the Company pursuant to the Act. The books and records shall be kept on the basis of accounting used for federal income tax purposes, reflect all Company transactions and shall be otherwise appropriate and adequate for the conduct of the Company's business. Each Member shall at all times have full access to all records and information of the Company and the right to inspect and copy all such records and information either directly or through a person designated by such Member and to discuss the Company's affairs, finances and accounts with the Company's Members, officers and its accountants at all reasonable times and upon reasonable notice. Each Member shall have the right to engage an accountant to audit the financial records of the Company at the expense of such Member.

7.3 Financial Reporting. Within a reasonably practicable time after the end of each Fiscal Year, the Company shall prepare and submit to each Member an annual unaudited report of the Company for such Fiscal Year. The annual report shall include the balance sheet of the Company as of the last day of such Fiscal Year and statements of profit or loss and cash flows of the Company for such Fiscal Year. The report shall be accompanied by a supplementary schedule showing the entries to the Members' (separately and in the aggregate) Capital Accounts in respect of such Fiscal Year, together with the appropriate Internal Revenue Service forms showing entries required to be made on each such Member's federal income tax return with respect to the Company's profits or losses. The Company shall be permitted to

have the Company's accountants prepare audited financial statements and other financial reports not herein described to the extent required by any Lender.

7.4 Tax Elections. The Managers shall, without any further consent of the Members being required (except as specifically required herein), make any and all elections for federal, state, local, and foreign tax purposes including, without limitation, any election, if permitted by applicable law: (i) to adjust the basis of Property pursuant to Code §§ 754, 734(b) and 743(b), or comparable provisions of state, local or foreign law, in connection with Transfers of Shares and Company distributions; and (ii) with the consent of all of the Members, to extend the statute of limitations for assessment of tax deficiencies against the Members with respect to adjustments to the Company's federal, state, local or foreign tax returns. Robert A. Keisler is specifically authorized to act as the "Tax Matters Partner" under the Code and in any similar capacity under state or local law. To the extent provided in Code §§ 6221 through 6231 and similar provisions of federal, state, local, or foreign law, the Tax Matters Partner shall represent the Company and the Members before taxing authorities or courts of competent jurisdiction in tax matters affecting the Company or the Members in their capacities as Members, and file any tax returns and execute any agreements or other documents relating to or affecting such tax matters, including agreements or other documents that bind the Members with respect to such tax matters or otherwise affect the rights of the Company and the Members. The Managers shall cause to be prepared and timely filed each year the federal, state and local tax returns of the Company.

ARTICLE 8 AMENDMENTS

8.1 Amendments to Agreement. Amendments to this Agreement may be proposed by any Member by written notice to all of the Members. Following such proposal, the Managers shall submit to the Members a verbatim statement of any proposed amendment, if counsel for the Company shall have approved of the same in writing as to form. The Managers shall seek the written vote of the Members on the proposed amendment or shall call a meeting to vote thereon and to transact any other business that it may deem appropriate. A proposed amendment shall be adopted and be effective as an amendment hereto if it receives the affirmative vote of Eighty Percent (80%) of the outstanding shares.

8.2 Amendments to Articles. The Managers may amend, upon notice to the Members ~~but without the consent of the Members, the provisions of the Articles (and the corresponding provisions of this Agreement) concerning the name of the Company, the designated office and the agent for service of process.~~ All other provisions of the Articles may be amended only in accordance with Section 8.1.

ARTICLE 9 TRANSFERS OF SHARES

9.1 Restrictions on Transfers. Except as otherwise permitted by this Agreement, no Member (or Assignee) shall Transfer any Shares.

9.2 Permitted Transfers. Subject to the conditions and restrictions set forth in Section 9.3, a Member may at any time Transfer such Member's Shares to (a) any other Member, (b) subject to Sections 9.11 and 9.12, the transferor Member's administrator or trustee to whom

such Shares are transferred involuntarily by operation of law, (c) upon such Member's death and subject to Sections 9.11 and 9.12, such Member's spouse or lineal descendants (or trusts for the benefit of any of them) and such Member's personal representatives and testamentary trustees, or (d) any purchaser in accordance with Section 9.4 (any such Transfer being referred to in this Agreement as a "Permitted Transfer"). After the consummation of Transfer of any Shares, the Shares so Transferred shall continue to be subject to the terms and provisions of this Agreement and any further Transfer shall be required to comply with all terms and provisions of this Agreement.

9.3 Conditions to Permitted Transfers. A Transfer shall not be treated as a Permitted Transfer under Section 9.2 unless and until the following conditions are satisfied:

(a) Except in the case of a Transfer involuntarily by operation of law, the transferor and transferee shall execute and deliver to the Company such documents and instruments of conveyance as may be appropriate in the opinion of counsel to the Company to effect such transfer. In the case of a Transfer of Shares involuntarily by operation of law, the Transfer shall be confirmed by presentation to the Company of legal evidence of such Transfer, in form and substance satisfactory to counsel to the Company. In all cases, the Company shall be reimbursed by the transferor and/or transferee for all costs and expenses that the Company reasonably incurs in connection with such Transfer.

(b) The transferor and transferee shall furnish the Company with the transferee's taxpayer identification number, sufficient information to determine the transferee's initial tax basis in the Shares Transferred, and any other information reasonably necessary to permit the Company to file all required federal and state tax returns and other legally required information statements or returns.

(c) Except in the case of a Transfer of Shares involuntarily by operation of law, either (i) such Shares shall be registered under any applicable federal and state securities laws or (ii) the transferor shall provide an opinion of counsel, which opinion and counsel shall be reasonably satisfactory to the Members, to the effect that such Transfer is exempt from all applicable registration requirements and that such Transfer will not violate any applicable laws regulating the transfer of securities.

The Members may waive any of such requirements in writing but only after determining that such requirement is not needed to protect the Company's interests.

9.4 Right of First Refusal. In addition to the other limitations and restrictions set forth in this Article 9, except as expressly permitted by Section 9.2, no Member shall Transfer all or any portion of such Member's Shares (the "Offered Shares") unless such Member (the "Seller") first offers to sell the Offered Shares pursuant to the terms of this Section 9.4.

(a) No Transfer may be made under this Section 9.4 unless the Seller has received a bona fide written offer (the "Purchase Offer") from a Person (the "Purchaser") to purchase the Offered Shares for a purchase price (the "Offer Price") payable in United States dollars at closing or according to specified terms, with or without interest, which offer shall be in writing, signed by the Purchaser and shall be irrevocable for a period ending no sooner than the business day following the end of the Offer Period (as hereinafter defined).

(b) Prior to making any Transfer that is subject to the terms of this Section 9.4, the Seller shall give to the Company and each other Member written notice (the "Offer Notice") which shall include a copy of the Purchase Offer and an offer (the "Firm Offer") to sell the Offered Shares to the other Members (the "Offerees") for the lesser of (i) the Offer Price or the Dissociation Value (as defined in Section 9.12), payable in either case according to the same terms as those contained in the Purchase Offer.

(c) The Firm Offer shall be Irrevocable for a period (the "Offer Period") ending on the thirtieth (30th) day following the day of the Offer Notice.

(d) At any time during the Offer Period, any Offeree may accept the Firm Offer by giving written notice of such acceptance to the Seller. If more than one Member accepts the Firm Offer, then such Members who do accept the Firm Offer shall be entitled to purchase the Offered Shares in proportion to their relative Percentage Interests.

(e) If the Firm Offer is accepted, the closing of the sale of the Offered Shares shall take place within thirty days after the Firm Offer is accepted or, if later, the date set forth in the Purchase Offer. The Seller and all accepting Offerees shall execute such documents as may be appropriate to effect the sale of the Offered Shares pursuant to the terms of the Firm Offer and this Article 9. The accepting Offerees shall, individually, have the right to pay the Seller in accordance with those payment terms specified in Section 9.12 (b).

(f) If the Firm Offer is not accepted in the manner hereinabove provided, the Seller may sell the Offered Shares to the Purchaser at any time within sixty days after the last day of the Offer Period, provided that such sale shall be made in terms no more favorable to the Purchaser than the terms contained in the Purchase Offer and provided further that such sale complies with other terms, conditions and restrictions of this Agreement. If the Offered Shares are not sold in accordance with the terms of the preceding sentence, the Seller may not Transfer the Offered Shares pursuant to the Purchase Offer, and the Seller must again comply with all of the provisions of this Section in order to Transfer any of the Seller's Shares pursuant to Section 9.2(d).

(g) Any Shares Transferred by any means shall remain subject to the restrictions of this Article 9 in the hands of the transferee.

9.5 Prohibited Transfers. Any purported Transfer of Shares that is not a Permitted Transfer shall be null and void and of no force or effect whatever; provided that, if the Company is required to recognize a transfer that is not a Permitted Transfer, the transferee shall be treated as the transferee of a distributional interest within the meaning of the Act, shall be entitled only to the transferor's rights to allocations and distributions as provided by this Agreement with respect to the Transferred Shares, which allocations and distributions may be applied to satisfy any debts, obligations or liabilities for damages that the transferor or transferee of such Shares may have to the Company. In the case of a transfer or attempted transfer of Shares that is not a Permitted Transfer, the parties engaging in such transfer shall be liable to indemnify the Company and the other Members from all costs, liability and damage that any of such indemnified Members may incur as a result of such transfer or attempted transfer and efforts to enforce the indemnity granted hereby.

9.6 Rights of Unadmitted Assignees. A Person who acquires Shares but who is not admitted as a substituted Member pursuant to Section 9.7 (an "Assignee") shall be entitled only to

allocations and distributions with respect to such Shares in accordance with this Agreement and shall have no right to any information or accounting of the affairs of the Company, shall not be entitled to inspect the books or records of the Company, shall have no right to vote or participate in management and shall not have any of the rights of a Member under the Act or this Agreement.

9.7 Admission of Substituted Members. Subject to the other provisions of this Article 9, an Assignee of Shares may be admitted to the Company as a substituted Member only upon satisfaction of the conditions set forth in this Section 9.7:

(a) Those Members holding not less than eighty percent (80%) of the outstanding Shares held by Members consent to such admission;

(b) The Shares with respect to which the Assignee is being admitted were acquired by means of a Permitted Transfer;

(c) The Assignee, by written instrument in form and substance reasonably satisfactory to the Members, (i) adopts the terms and provisions of this Agreement and (ii) assumes the obligations of the transferor Member under this Agreement with respect to the Transferred Shares;

(d) The Assignee pays the Company for all reasonable legal, filing and publication costs that the Company incurs in connection with the admission of the Assignee as a Member with respect to the Transferred Shares.

A transferee who becomes a Member has, to the extent assigned, the rights and powers and is subject to the restrictions and liabilities of a Member under this Agreement and the Act. Unless otherwise provided by this Agreement, a transferee who becomes a Member also is liable for the obligations of the transferor to make Capital Contributions and for obligations under Act § 33-44-407 to return unlawful distributions, but is not obligated for liabilities that are unknown to this transferee at the time the transferee becomes a Member and that could not be ascertained from this Agreement. Whether or not a transferee of Shares becomes a Member, the transferor is not released from the transferor's liability to the Company under this Agreement or the Act.

9.8 Events Causing Member's Dissociation. A Member (the "Dissociated Member") shall be deemed to be dissociated from the Company upon the occurrence of any of the following events (an "Event of Dissociation"):

(a) A purported Transfer of Shares that is not a Permitted Transfer;

(b) A Transfer of all of the Member's Shares by means of a Permitted Transfer;

(c) A determination by arbitration pursuant to Section 12.6 that the Member has engaged in conduct that is grounds for expulsion of the Member by judicial determination under Act § 33-44-601(6)(i), (ii) or (iii);

(d) The Member's (i) becoming a debtor in bankruptcy; (ii) executing an assignment for the benefit of creditors; (iii) seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the

Member's property; or (iv) failing, within ninety days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the member's property obtained without the Member's consent or acquiescence, or failing within ninety days after the expiration of a stay to have the appointment vacated;

(e) The death of a Member;

(f) The appointment of a guardian or a general conservator for the Member or a judicial determination that the Member has otherwise become incapable of performing the Member's duties under the Agreement;

(g) In the case of a Member that is a trust, the distribution of the trust's entire right to receive distributions from the Company;

(h) In the case of a Member that is an estate, the distribution of the estate's entire right to receive distributions from the Company;

(i) Termination of the existence of a Member if the Member is not an individual, estate or trust.

9.9 No Resignation or Withdrawal. A Member has no power to resign or withdraw from the Company or to demand a return of any of such Member's Capital Account. Any action in violation of this Section shall be null and void as against the Company and the other Members.

9.10 No Dissolution. The occurrence of an Event of Dissociation shall not cause the dissolution or the winding up of the Company.

9.11 Purchase Option. Upon the occurrence of an Event of Dissociation (other than the a Transfer of all of the Member's Shares by means of a Permitted Transfer), the remaining Members shall have an option to purchase the Shares of the Dissociated Member; provided that one or more Members must agree to purchase all of the Shares of the Dissociated Member. The Member(s) who exercise the option shall be referred to as the "Purchasing Member(s)." A Member may exercise his purchase option by giving written notice of such exercise ("Exercise Notice") to the Dissociated Member (or his legal representative) within sixty days of receipt by such Member of written notice of the Event of Dissociation ("Exercise Period"), with such Exercise Notice indicating the maximum number of Shares the offering Member is willing to purchase. If the remaining Members oversubscribe for the Shares of the Dissociated Member, the Shares will be allocated in proportion to the relative Percentage Interests of the Members exercising the option. If the purchase option is not exercised as to all of the Shares of the Dissociated Member, then the Dissociated Member (or the Assignee of the Dissociated Member, as the case may be) shall continue as an Assignee. If the Dissociated Member's Assignee is permitted to continue as an Assignee or as a substitute Member (upon satisfaction of the conditions set forth in Section 9.7), then the Dissociated Member and the Assignee shall be liable for all of the Dissociated Member's obligations arising under this Agreement and the Act except as expressly provided otherwise in this Agreement.

9.12 Terms of Purchase.

(a) If the purchase option is exercised, the price of the Dissociated Member's Shares (the "Dissociation Value") shall be an amount equal to the amount of cash that the Dissociated Member would have received if

(i) the assets of the Company were sold for an amount equal to the Company's earnings before interest, income taxes, depreciation and amortization for its most recently completed Fiscal Year ("EBIDTA") multiplied by a multiple ("EBIDTA Multiple") (the product of such multiplication being referred to as the "Company Asset Value");

(ii) the proceeds of such deemed sale were distributed (following the allocation of the Profits and Losses pursuant to Article 3) pursuant to Section 10.2; and

(iii) the amount of such deemed distribution to the Dissociated Member were multiplied by 75% (the "Discount Percentage");

provided, however, that in no event shall the Dissociation Value be less than the Unreturned Capital of the Dissociated Member. The initial EBIDTA Multiple shall be four (4). Those Members holding not less than eighty percent (80%) of the Shares held by the Members may revise the EBIDTA Multiple and the Discount Percentage from time to time; provided that no such revision may reduce the Dissociation Value with respect to an Event of Dissociation that occurred prior to such revision. The closing of the purchase shall occur within thirty days of the determination of the value of assets of the Company. If there is more than one Purchasing Member, the decisions of the Purchasing Members shall be determined by a vote of those Members holding a majority of the Shares held by the Purchasing Members. EBIDTA shall be determined by the Company's accountants and the determination of such accountants shall be conclusive on all parties.

(b) Unless the parties mutually agree otherwise, the purchase price shall be paid to the Dissociated Member (or his legal representative) in twenty (20) equal and consecutive quarterly installments of principal and interest beginning ninety (90) days after the determination of the purchase price has been made. The purchase price shall be evidenced by a promissory note made by the Purchasing Member(s) to the order of the Dissociated Member and shall bear interest at the prime rate for large commercial banks as published in *The Wall Street Journal* at the date of the sale. Payments may be prepaid, in whole or in part, at any time and from time to time, without penalty. The note shall provide that upon default of any payment of interest or principal, the note shall become due and payable immediately, at the option of the holder of the note. Upon delivery of a note in payment of the purchase price, the Dissociated Member's Shares (or any portion thereof) shall be conveyed to the Purchasing Member(s) who shall be entitled to all distributions and allocations therefrom. Until the purchase price is paid in full, the Dissociated Member's Shares shall be held by the seller as collateral security for payment of the note, but in no case may the seller have any of the rights of a Member as long as the note is not in default.

9.13 Statement of Dissociation. A Dissociated Member or the Company may file a statement of dissociation in accordance with Act § 33-44-704.

ARTICLE 10 DISSOLUTION AND WINDING UP

10.1 Dissolution Events. The Company shall dissolve and shall commence winding up and liquidating upon the first to occur of any of the following (each a "Dissolution Event"):

(a) The determination of those Members holding not less than eighty percent (80%) of the outstanding Shares held by Members to dissolve, wind up and liquidate the Company;

(b) The expiration of the term of the Company on December 31, 2035;

(c) The entry of a decree of judicial dissolution under Act § 33-44-801(b)(5) or administrative dissolution pursuant to Act §§ 33-44-809 and 33-44-810, unless the Company is reinstated pursuant to Act § 33-44-811.

10.2 Winding Up. Upon the occurrence of a Dissolution Event, the Company shall continue solely for the purposes of winding up its affairs in an orderly manner, liquidating its assets, and satisfying the claims of its creditors and Members, and no Member shall take any action that is inconsistent with, or not necessary to or appropriate for, the winding up of the Company's Business and affairs, provided that all covenants contained in this Agreement and obligations provided for in this Agreement shall continue to be fully binding upon the Members until such time as the Property has been distributed pursuant to this Section. The Liquidator shall be responsible for overseeing the winding up and dissolution of the Company, using the powers granted by Act § 33-44-803(c) and such other powers granted by this Agreement as may be appropriate for winding up the Company. The Liquidator shall have the power to delegate duties in connection with the liquidation to Class A Members. The Liquidator shall notify known claimants pursuant to Act § 33-44-807 and shall publish the notice described in Act § 33-44-808 and take such other actions with respect to claimants as the Liquidator may deem appropriate. The Liquidator shall take full account of the Company's liabilities and Property and shall cause the Property or the proceeds from the sale thereof (as determined pursuant to Section 10.6), to the extent sufficient therefor, to be applied and distributed, to the maximum extent permitted by law, in the following order:

(a) First, to creditors (including Members who are creditors, to the extent otherwise permitted by law) in satisfaction of all of the Company's debts and other liabilities (whether by payment or the making of reasonable provision for payment thereof), other than liabilities for which reasonable provision for payment has been made and liabilities for distributions to Members under Act § 33-44-405(c);

(b) Second, to Members of the Company in satisfaction of liabilities for distributions under Act § 33-44-405(c);

(c) Third, to the Class B Members until each Class B Member has received cumulative distributions pursuant to Section 4.2(a) and this Section 10.2(c) equal to the Class B Member's Required Class B Contribution in proportion to each Class B Member's Unreturned Capital; *provided, however*, that no distribution shall be made pursuant to this Section 10.2(c) that creates or increases an Adjusted Capital Account Deficit for the Class B Member, determined as follows: A Distribution shall first be determined tentatively pursuant to this Section 10.2(c) without regard to the Members' Capital Accounts, and then the allocation provisions of Article III (and other provisions of this Agreement concerning adjustments to Capital Accounts, including for distributions made pursuant to the foregoing provisions of this Section 10.2) shall be applied tentatively as if such tentative distribution had been made. If an Adjusted Capital Account Deficit would thereby be created or increased for the Class B Member

("Tentative Deficit Amount"), the actual distribution to the Class B Member pursuant to this Section 10.2(c) shall be reduced (or not made at all) so that the actual distribution equals the excess (if any) of (i) the tentative distribution to the Class B Member over (ii) the Tentative Deficit Amount of the Class B Member;

(e) Fourth, to the Class A Members until each Class A Member has received cumulative distributions pursuant to Section 4.2(b) and this Section 10.2(d) equal to the Class A Member's Required Class A Contribution in proportion to each Class A Member's Unreturned Capital; *provided, however*, that no distribution shall be made pursuant to this Section 10.2(d) that creates or increases an Adjusted Capital Account Deficit for the Class A Member, determined as follows: A Distribution shall first be determined tentatively pursuant to this Section 10.2(d) without regard to the Members' Capital Accounts, and then the allocation provisions of Article III (and other provisions of this Agreement concerning adjustments to Capital Accounts, including for distributions made pursuant to the foregoing provisions of this Section 10.2) shall be applied tentatively as if such tentative distribution had been made. If an Adjusted Capital Account Deficit would thereby be created or increased for the Class A Member ("Tentative Deficit Amount"), the actual distribution to the Class A Member pursuant to this Section 10.2(d) shall be reduced (or not made at all) so that the actual distribution equals the excess (if any) of (i) the tentative distribution to the Class A Member over (ii) the Tentative Deficit Amount of the Class A Member;

(f) Finally, the balance, if any, to the Members in accordance with the positive balances in their Capital Accounts, after giving effect to all contributions, distributions and allocations for all periods.

If any Member has a deficit balance in his Capital Account, the Member shall have no obligation to contribute capital to the Company with respect to such deficit. In the discretion of the Liquidator, a pro rata portion of the distributions that would otherwise be made to the Members pursuant to this Article 10 may be:

(a) distributed to a trust established for the benefit of the Members for the purposes of liquidating Company assets, collecting amounts owed to the Company, and paying any contingent or unforeseen liabilities or obligations of the Company. The assets of any such trust shall be distributed to the Members from time to time, in the reasonable discretion of the Liquidator, in the same proportions as the amount distributed to such trust by the Company would otherwise have been distributed to the Members pursuant to Section 10.2 hereof; or

(b) withheld to provide a reasonable reserve for Company liabilities (contingent or otherwise) and to reflect the unrealized portion of any installment obligations owed to the Company, provided that such withheld amounts shall be distributed to the Members as soon as practicable.

10.3 Rights of Members. Except as otherwise provided in this Agreement, each Member shall look solely to the Property of the Company for the return of such Member's Capital Contribution and has no right or power to demand or receive Property other than cash from the Company. If the assets of the Company remaining after payment or discharge of the debts or liabilities of the Company are insufficient to return such Capital Contribution, the Members shall have no recourse against the Company or any other Member.

10.4 The Liquidator. The "Liquidator" shall mean the a Person designated by the Members. The Company is authorized to pay reasonable compensation to the Liquidator for services performed pursuant to this Article 10 and to reimburse the Liquidator for its reasonable costs and expenses incurred in performing those services.

10.5 Form of Liquidating Distributions. For purposes of making distributions required by Section 10.2, the Liquidator may determine whether to distribute all or any portion of the Property in-kind or to sell all or any portion of the Property and distribute the proceeds therefrom.

10.6 Articles of Termination. Upon completion of the winding up of the Company, the Liquidator shall file Articles of Termination with the Secretary of State.

ARTICLE 11 MEMBER REPRESENTATIONS

Each Member hereby represents and warrants to the Company and to each other Member as follows:

(a) This Agreement has been duly authorized, executed and delivered by such Member and is a valid and binding obligation of such Member, enforceable against such Member in accordance with this Agreement's terms.

(b) There are no sale agreements, pledges, proxies, voting trusts, powers of attorney or other agreements or instruments binding upon such Member with respect to beneficial or record ownership of, or voting rights with respect to, such Member's Shares, except for this Agreement.

ARTICLE 12 MISCELLANEOUS

12.1 Notices.

(a) Except as provided in paragraph (b), any notice, payment, demand, consent or communication required or permitted to be given by this Agreement shall be in writing and shall be deemed to have been sufficiently given or served for all purposes if delivered either personally, by facsimile, or by overnight mail or by regular mail, first class postage prepaid, addressed as follows:

If to Company:	Holt Family Homes, LLC 7301 Carmel Executive Park, Suite 214 Charlotte, North Carolina 28226

If to a Member:	To the address provided by such Member on the signature page of this Agreement for such Member

Any notice hereunder shall be deemed to be given on the date on which it was delivered, either personally, by facsimile, or by overnight mail, or three days after it was deposited in a regularly maintained receptacle for the deposit of United States mail addressed as set forth above. Any person may change his address for purposes of this agreement by giving notice to the Company

and the Members in accordance with the foregoing provisions of this Article.

(b) Routine progress reports by Members and similar routine information may be sent in accordance with paragraph (a) or may be delivered by e-mail or other means that are reasonably designed to afford the Members adequate notice of such matters.

12.2 Binding Effect. Except as otherwise provided in this Agreement, every covenant, term, and provision of this Agreement shall be binding upon and inure to the benefit of the Members and their respective successors, transferees, heirs and assigns.

12.3 Severability. Except as otherwise provided in the succeeding sentence, every provision of this Agreement is intended to be severable, and, if any term or provision of this Agreement is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity or legality of the remainder of this Agreement. The preceding sentence of this Section shall be of no force or effect if the consequence of enforcing the remainder of this Agreement without such illegal or invalid term or provision would be to cause any Member to lose the material benefit of its economic bargain.

12.4 Governing Law. The laws of the State of South Carolina shall govern the validity of this Agreement, the construction of its terms, and the interpretation of the rights and duties arising hereunder.

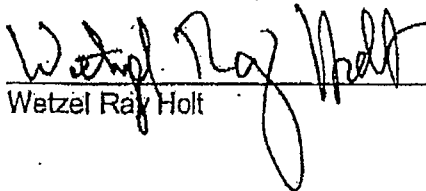
12.5 Partnership for Tax Purposes. Each Member intends that the Company will be treated as a partnership for federal, state and local tax purposes, but that the Company shall not be deemed a partnership for any other purpose and no Member shall be deemed a partner or co-venturer of any other Member. This Agreement shall be construed in all respects so as to effect the intention stated in this Section.

12.6 Arbitration. Any dispute among any of the parties to this Agreement that arises in connection with this Agreement shall be resolved by binding arbitration by a single arbitrator held in Columbia, South Carolina, pursuant to the South Carolina Uniform Arbitration Act (or if the South Carolina Uniform Arbitration Act is deemed not to apply, the Federal Arbitration Act) and applying the Commercial Arbitration Rules of the American Arbitration Association in effect on the date demand for arbitration is made.

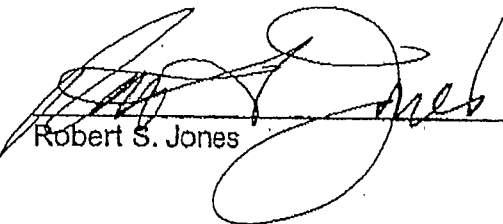
12.7 Representation. Each Member acknowledges that Richardson, Plowden, Carpenter & Robinson, P.A. has represented the interests of Builders Investment Group, LLC, Robert S. Jones, and Robert A. Kelsler in connection with the formation of the Company and the preparation and negotiation of this Agreement and that any other Member must obtain separate legal counsel.

IN WITNESS WHEREOF, the parties have executed and entered into this Operating Agreement of the Company as of the day and year first above written.

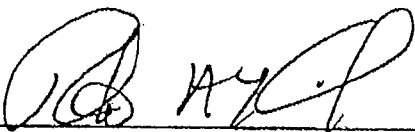
CLASS A MEMBERS:


Wetzel Ray Holt

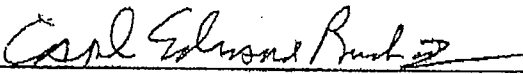
Notice Address for Holt:
4044 Riseley Lane
Charlotte, North Carolina 28270
Facsimile: 704-540-7040
E-mail: wrayholt@yahoo.com


Robert S. Jones

Notice Address for Jones:
6009 Martha's Glen Road
Columbia, South Carolina 29209
Facsimile: 803-776-1326
E-mail: bjones@boozerlumber.com


Robert A. Keisler

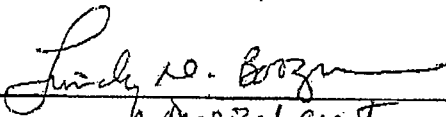
Notice Address for Keisler:
116 Walnut Lane
Columbia, South Carolina 29212
Facsimile: 803-749-9890
E-mail: rakcpa1@aol.com


Carl Edward Buck

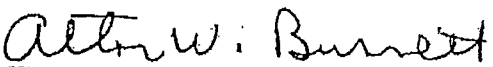
Notice Address for Buck:
39 Country Club Drive
Greenville, South Carolina 29605
Facsimile: 864-232-9720
E-mail: edbuck@charter.net

CLASS B MEMBERS:

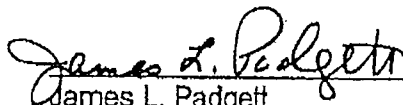
Builders Investment Group, LLC

BY: 
Authorized Agent
Its: Authorized Agent

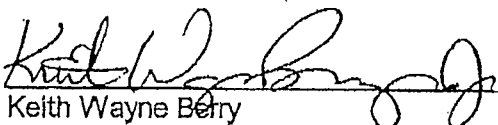
Notice Address for BIG:
627 GALWAY LANE
COLUMBIA, SC 29209
Facsimile: 803-783-3433
E-mail: LINDSEYM@ATLSPRING.com


Alton W. Burnett, Jr.

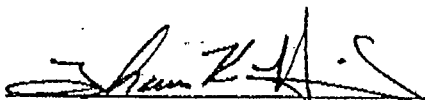
Notice Address for Burnett:
109 Ragin Drive
Hopkins, South Carolina 29061
Facsimile: 803-776-3824
E-mail: ABURNETT@BOOZER.COM


James L. Padgett

Notice Address for Padgett:
141 Olivia Way
Lexington, South Carolina 29072
Facsimile:
E-mail: RSPINUSA@Alltel.net


Keith Wayne Berry

Notice Address for Berry:
106 Wood Ridge Lane
Columbia, South Carolina 29209
Facsimile:


Thomas Keith Harris

Notice Address for Harris:

P O Box 195

Olar, South Carolina 29843

Facsimile:

E-mail: harris@uph.com

Schedule 2.1

Class A Members

<u>Class A Member</u>	<u>Initial Capital Contribution</u>	<u>Initial Capital Account</u>	<u>Class A Shares</u>	<u>Percentage Interest</u>
Holt	\$250,000.00	\$250,000.00	25,000	25.000%
Jones	\$350,000.00	\$350,000.00	26,250	26.250%
Keisler	\$100,000.00	\$100,000.00	7,500	7.500%
Buck	\$250,000.00	\$250,000.00	18,750	18.750%

Schedule 2.2

Class B Members

<u>Class B Member</u>	<u>Initial Capital Contribution</u>	<u>Initial Capital Account</u>	<u>Class B Shares</u>	<u>Percentage Interest</u>
BIG	\$300,000.00	\$300,000.00	11.250	11.250%
Burnett	\$100,000.00	\$100,000.00	3.750	3.750%
Padgett	\$100,000.00	\$100,000.00	3.750	3.750%
Berry	\$50,000.00	\$50,000.00	1.875	1.875%
Harris	\$50,000.00	\$50,000.00	1.875	1.875%

THIS AGREEMENT IS SUBJECT TO ARBITRATION
PURSUANT TO THE SOUTH CAROLINA ARBITRATION ACT
TO THE EXTENT PROVIDED IN SECTION 12.6

REVISED AND RESTATED
OPERATING AGREEMENT
OF
ARDEN HOMEBUILDERS, LLC
F/K/A HOLT FAMILY HOMES, LLC

THIS OPERATING AGREEMENT is entered into to be effective as of July 31st, 2007, by and between Builders Investment Group, LLC, a South Carolina limited liability company ("BIG"), Robert S. Jones ("Jones"), Robert A. Keisler ("Keisler"), Carl Edward Buck ("Buck"), Alton W. Burnett, Jr. ("Burnett"), James L. Padgett ("Padgett"), Keith Wayne Berry ("Berry"), Thomas Keith Harris ("Harris") and Brian D. Boone ("Boone") (collectively, the "Members").

WITNESSETH:

WHEREAS, the Company was formed by the filing of Articles of Organization with the Secretary of State of the State of South Carolina ("Secretary of State") on July 1, 2006;

WHEREAS, the Members met on October 26, 2006 to consider and act upon Motions to amend this Operating Agreement; and

WHEREAS, the Members (except Boone) met on July 16, 2007 to consider and act upon Motions to amend this Operating Agreement and authorize substantial additional capital contributions/investments by BIG and Boone as set forth herein.

NOW, THEREFORE, the Members agree as follows:

ARTICLE 1
THE COMPANY

1.1 **Formation.** The Company is a manager-managed limited liability company. Notwithstanding any other provision hereof, the provisions of this Agreement, where inconsistent with the Act, shall govern the relations among the Members and the Company to the fullest extent permitted by law. Furthermore, without in any way limiting the preceding sentence, the following provisions of the Act shall not apply in any way to the Members or the Company: Act §§ 33-44-701, and 33-44-702, unless the price to be paid for an interest is not addressed in this Agreement.

1.2 **Name.** The name of the Company shall be Arden Homebuilders, LLC and all business of the Company shall be conducted in such name or such other names that comply with applicable law as the Managers may select from time to time upon notice to the Members.

1.3 **Purpose.** The purpose of the Company is to conduct the Business and to conduct all such activities as are reasonably necessary to effect the foregoing purpose. The Company has the power to do any and all acts necessary, appropriate, proper, advisable, incidental or convenient to or in furtherance of the purpose of the Company. The Company shall have no other purpose.

1.4 Principal Place of Business. The principal place of business of the Company shall be at 7301 Carmel Executive Park, Suite 214, Charlotte, North Carolina 28226 or at such other place as may be approved by the Managers upon notice to the Members.

1.5 Term. The term of the Company commenced on the date the Articles of Organization of the Company (the "Articles") were filed in the office of the Secretary of State of the State of South Carolina and shall continue until the winding up and liquidation of the Company and its business is completed following a Dissolution Event, as provided in Article 10, or until December 31, 2035, whichever date is earlier.

1.6 Filings; Agent for Service of Process.

(a) The registered agent for service of process on the Company in the State of South Carolina shall be the person so appointed in the Articles or any successor as appointed by the Managers in accordance with the Act.

(b) Upon the dissolution of the Company in accordance with Article 10, the Managers shall promptly execute and cause to be filed articles of dissolution in accordance with the Act.

(c) The Managers are authorized to take all such actions as may be necessary to cause the Company to obtain a certificate of authority to transact business in any other state in which the Company conducts business; to file annual reports and take all such other actions as may be necessary to maintain such authority; and to amend or withdraw the same.

1.7 Title to Property. All Property owned by the Company shall be owned by the Company as an entity and no Member shall have any ownership interest in such Property in his or its individual name, and each Member's interest in the Company shall be personal property for all purposes. At all times after the Effective Date, the Company shall hold title to all of its Property in the name of the Company and not in the name of any Member.

1.8 Payments of Individual Obligations. The Company's credit and assets shall be used solely for the benefit of the Company, and no asset of the Company shall be transferred or encumbered for, or in payment of, any individual obligation of any Member.

1.9 Definitions. Capitalized words and phrases used in this Agreement have the following meanings:

"Act" means the South Carolina Limited Liability Company Act, Chapter 44 of Title 33 of the South Carolina Code of Laws, as amended from time to time (or any corresponding provisions of succeeding law).

"Adjusted Capital Account Deficit" means, with respect to any Member, the deficit balance, if any, in such Member's Capital Account as of the end of the relevant Fiscal Year, after giving effect to the following adjustments:

(i) Credit to such Capital Account (A) any amounts that such Member is obligated to restore pursuant to any provision of this Agreement or pursuant to Regulations §

1.704-1(b)(2)(ii)(c) or (ii)(h) or any other pertinent provision of the Regulations; (B) the Member's share of Company Minimum Gain; and (C) the Member's share of Member Minimum Gain.

(ii) Debit to such Capital Account the Items described in Regulations §§ 1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(6) and 1.704-1(b)(2)(ii)(d)(6). The foregoing definition of Adjusted Capital Account Deficit is intended to comply with the provisions of Regulations § 1.704-1(b)(2)(ii)(d) and shall be interpreted consistently therewith.

"Agreement" means this Operating Agreement of *Arden Homebuilders, LLC*, as amended from time to time.

"Amortization" means, for each Fiscal Year, an amount equal to the amortization, or other cost recovery deduction allowable with respect to an asset for such Fiscal Year, except that if the Gross Asset Value of an asset differs from its adjusted basis for federal income tax purposes at the beginning of such Fiscal Year, Amortization shall be determined in the manner prescribed in Treasury Regulations Section 1.704-1(b)(2)(iv)(g)(3) or 1.704-3(d)(2), as applicable. If the adjusted basis for federal income tax purposes of an asset at the beginning of such Fiscal Year is zero, Amortization shall be determined with reference to such beginning Gross Asset Value using any reasonable method selected by the Members.

"Articles" means the Articles of Organization filed with the Secretary of State pursuant to the Act to form the Company, as originally executed and amended, modified, supplemented or restated from time to time, as the context requires.

"Assignee" means a transferee of Shares in the Company who has not been admitted as a substituted Member in the Company. An Assignee shall have only those rights set forth in Section 9.6.

"Business" means the business of constructing and selling single-family residences.

"Business Plan" means the business plan for the Company, as such business plan may be modified from time to time by the Members. The Initial Business Plan is attached hereto as Exhibit B, which is by this reference incorporated herein.

"Capital Account" means, with respect to any Member, the Capital Account maintained for such Member in accordance with the following provisions:

(i) To each Member's Capital Account there shall be credited (A) such Member's Capital Contributions, (B) such Member's distributive share of Profits and any Items in the nature of income or gain that are specially allocated to such Member pursuant to Section 3.3 or Section 3.4, and (C) the amount of any Company liabilities that are assumed by such Member or secured by any Property distributed to such Member;

(ii) To each Member's Capital Account there shall be debited (A) the amount of money and the Gross Asset Value of any Property distributed to such Member pursuant to any provision of this Agreement, (B) such Member's distributive share of Losses and any Items in the nature of expenses or losses that are specially allocated to such Member pursuant to Section 3.3 or Section 3.4, and (C) the amount of any liabilities of such Member that are assumed by the Company or secured by any Property contributed by such Member to the Company; and

(iii) If Shares are transferred in accordance with the terms of this Agreement, the transferee shall succeed to the Capital Account of the transferor to the extent it relates to the Transferred Shares.

The foregoing provisions and the other provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with Regulations § 1.704-1(b) and shall be interpreted and applied in a manner consistent with such Regulations. The Managers shall (i) make any adjustments that are necessary or appropriate to maintain equality between the Capital Accounts of the Members and the amount of capital reflected on the Company's balance sheet, as computed for book purposes, in accordance with Regulations § 1.704-1(b)(2)(iv)(q), and (ii) make any appropriate modifications in the event unanticipated events might otherwise cause this Agreement not to comply with Regulations § 1.704-1(b).

"Capital Contributions" means, with respect to any Member, the amount of money and the Initial Gross Asset Value of any Property (other than money) contributed to the Company with respect to the Shares in the Company held or purchased by such Member.

"Class A Member" means a Person who has acquired ownership of Class A Shares by original issuance or Transfer in accordance with this Agreement, who has been admitted to the Company as a Class A Member and who has not ceased to be a Class A Member.

"Class A Shares" means Shares denominated as Class A Shares upon issuance by the Company and having those rights and obligations ascribed to Class A Shares in this Agreement.

"Class B Member" means a Person who has acquired ownership of Class B Shares by original issuance or Transfer in accordance with this Agreement, who has been admitted to the Company as a Class B Member and who has not ceased to be a Class B Member.

"Class B Shares" means Shares denominated as Class B Shares upon issuance by the Company and having those rights and obligations ascribed to Class B Shares in this Agreement.

"Code" means the United States Internal Revenue Code of 1986, as amended from time to time, and the corresponding provisions of any successor United States tax code.

"Company" means the limited liability company formed pursuant to this Agreement and the Articles and the limited liability company continuing the business of the Company in the event of dissolution of the Company as herein provided.

"Company Minimum Gain" has the meaning ascribed to the term "partnership minimum gain" in Regulations §§ 1.704-2(b) and 1.704-2(d).

"Competing Business" means any Person, other than the Company, that is engaged in conducting a Business similar to the Company's Business, in the geographic area consisting of Mecklenburg County, North Carolina and York County, South Carolina.

"Depreciation" means, for each Fiscal Year, an amount equal to the depreciation, amortization, or other cost recovery deduction allowable with respect to an asset for such Fiscal Year, except that if the Gross Asset Value of an asset differs from its adjusted basis for federal

Income tax purposes at the beginning of such Fiscal Year, Depreciation shall be determined in the manner prescribed in Treasury Regulations Section 1.704-1(b)(2)(iv)(g)(3) or 1.704-3(d)(2), as applicable. If the adjusted basis for federal income tax purposes of an asset at the beginning of such Fiscal Year is zero, Depreciation shall be determined with reference to such beginning Gross Asset Value using any reasonable method selected by the Members.

"Earnings" shall mean the Net Income of the Company calculated based on Generally Accepted Accounting Principles generally accepted in the United States

"EBIDTA" means Earnings before Interest, Depreciation, Income Taxes and Amortization for the twelve months immediately preceding the month in which an event of Dissociation occurs.

"Effective Date" means the date hereof.

"Fiscal Year" means (i) the period commencing on the Effective Date and ending on December 31, 2005, (ii) any subsequent twelve month period commencing on January 1 and ending on December 31, and (iii) the period commencing on the immediately preceding January 1 and ending on the date on which all Property is distributed to the Members pursuant to Article 10.

"Gross Asset Value" means with respect to any asset, the asset's adjusted basis for federal income tax purposes, except as follows:

(I) The Initial Gross Asset Value of any asset contributed by a Member to the Company shall be the gross fair market value of such asset, as agreed to by the Members provided that the Initial Gross Asset Values of the assets contributed to the Company pursuant to Section 2.1 shall be as set forth in such section;

(II) The Gross Asset Values of all Company assets shall be adjusted to equal their respective gross fair market values (taking Code § 7701(g) into account), as of the following times: (A) the acquisition of additional Shares in the Company by any new or existing Member in exchange for more than a *de minimis* Capital Contribution; (B) the distribution by the Company to a Member of more than a *de minimis* amount of Company property as consideration for Shares in the Company; and (C) the liquidation of the Company within the meaning of Regulations § 1.704-1(b)(2)(i)(g); provided that an adjustment described in clauses (A) and (B) of this paragraph shall be made only if the Members determine that such adjustment is necessary to reflect the relative economic interests of the Members in the Company;

(III) The Gross Asset Value of any Company asset distributed to any Member shall be adjusted to equal the gross fair market value (taking Code § 7701(g) into account) of such asset on the date of distribution as agreed to by the Members.

If the Gross Asset Value of an asset has been determined or adjusted pursuant to subparagraph (I) or (II), such Gross Asset Value shall thereafter be adjusted by the Depreciation taken into account with respect to such asset, for purposes of computing Profits and Losses.

"Income Taxes" means any income taxes paid directly by the Company that result in an expense to the Company under generally accepted accounting principles generally accepted in the United States. Income Taxes do not include tax distributions to the Members nor any income taxes paid on a Member's behalf.

"Interest" shall mean any Interest Expense not allocated as construction period interest to the direct cost of construction as required under generally accepted accounting principles generally accepted in the United States.

"Managers" shall mean collectively, Brian D. Boone, Robert A. Boozer, Robert S. Jones, Robert A. Kelsler and Carl Edward Buck, or any Person designated pursuant to this Agreement as a successor Manager but excluding any person who has ceased serving as a Manager. The Managers are treated as Members for all purposes under this Agreement.

"Member" means any Person (i) who is referred by name in the first paragraph of this Agreement or who has become a Member pursuant to the terms of this Agreement, and (ii) who has not ceased to be a Member.

"Membership Interest" has the same meaning as "Percentage Interest".

"Member Nonrecourse Debt" has the same meaning as the term "partner nonrecourse debt" in Regulations § 1.704-2(b)(4).

"Member Nonrecourse Debt Minimum Gain" means an amount, with respect to each Member Nonrecourse Debt, equal to the Company Minimum Gain that would result if such Member Nonrecourse Debt were treated as a Nonrecourse Liability, determined in accordance with Regulations § 1.704-2(l)(3).

"Member Nonrecourse Deductions" has the same meaning as the term "partner nonrecourse deductions" in Regulations §§ 1.704-2(i)(1) and 1.704-2(l)(2).

"Net Cash Flow" means (on the cash receipts and disbursements basis of accounting) the net receipts (i.e., the excess, if any, of revenues over expenses (including the compensation payable under Section 1.10(a)) and repayment of loans) of the Company, (a) including cash from operations or investments and proceeds from the sale, exchange, or other disposition of any Property; but (b) excluding Capital Contributions of the Members; proceeds of any loans made to the Company; funds that the Members elect to reinvest on behalf of the Company; and reserves deemed reasonably sufficient by the Members, for (i) the working capital needs of the Company, (ii) the payment of liabilities incurred (including any loans made by any Members) or arising in the reasonably foreseeable future in connection with the operations of the Company, and (iii) capital expenditures or contributions incurred or arising in the reasonably foreseeable future. Net Cash Flow shall not be reduced by depreciation, amortization, cost recovery deductions or similar allowances.

"Nonrecourse Deductions" has the meaning set forth in Regulations § 1.704-2(b)(1).

"Nonrecourse Liability" has the meaning set forth in Regulations § 1.704-2(b)(3).

"Percentage Interest" means, with respect to any Member as of any date, the ratio (expressed as a percentage) of the number of Shares held by such Member on such date to the aggregate Shares held by all Members on such date. The Percentage Interest of each Member immediately after the Effective Date is set forth in Section 2.1.

"Person" means any individual or any foreign or domestic partnership (whether general or limited), limited liability company, corporation, business trust, trust, estate, association, joint

venture, government, governmental subdivision, agency or instrumentality or other entity.

"Profits" and "Losses" mean, for each Fiscal Year, an amount equal to the Company's taxable income or loss for such Fiscal Year, determined in accordance with Code § 703(a) (for this purpose, all items of income, gain, loss, or deduction required to be stated separately pursuant to Code § 703(a)(1) shall be included in taxable income or loss), with the following adjustments (without duplication):

(i) Any income of the Company that is exempt from federal income tax and not otherwise taken into account in computing Profits or Losses pursuant to this definition of "Profits" and "Losses" shall be added to such taxable income or loss;

(ii) Any expenditures of the Company described in Code § 705(a)(2)(B) or treated as Code § 705(a)(2)(B) expenditures pursuant to Regulations § 1.704-1(b)(2)(iv)(i), and not otherwise taken into account in computing Profits or Losses pursuant to this definition of "Profits" and "Losses" shall be subtracted from such taxable income or loss;

(iii) If the Gross Asset Value of any Company asset is adjusted pursuant to subparagraphs (ii) or (iii) of the definition of Gross Asset Value, the amount of such adjustment shall be treated as an item of gain (if the adjustment increases the Gross Asset Value of the asset) or an item of loss (if the adjustment decreases the Gross Asset Value of the asset) from the disposition of such asset and shall be taken into account for purposes of computing Profits or Losses;

(iv) Gain or loss resulting from any disposition of Property with respect to which gain or loss is recognized for federal income tax purposes shall be computed by reference to the Gross Asset Value of the Property disposed of, notwithstanding that the adjusted tax basis of such Property differs from its Gross Asset Value;

(v) In lieu of the depreciation, amortization, and other cost recovery deductions taken into account in computing such taxable income or loss, there shall be taken into account Depreciation for such Fiscal Year;

(vi) To the extent an adjustment to the adjusted tax basis of any Company asset pursuant to Code § 734(b) is required pursuant to Regulations § 1.704-1(b)(2)(iv)(m)(4) to be taken into account in determining Capital Accounts as a result of a distribution other than liquidation of a Member's interest in the Company, the amount of such adjustment shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis) from the disposition of such asset and shall be taken into account for purposes of computing Profits or Losses; and

(vii) Notwithstanding any other provision of this definition, any items that are specially allocated pursuant to Section 3.3 or Section 3.4 shall not be taken into account in computing Profits or Losses.

The amounts of the items of Company income, gain, loss or deduction available to be specially allocated pursuant to Sections 3.3 and 3.4 shall be determined by applying rules analogous to those set forth in subparagraphs (i) through (vi) above.

"Property" means all real and personal property acquired by the Company, including both

tangible and intangible property.

"Regulations" means the Income Tax Regulations, including Temporary Regulations, promulgated under the Code, as such regulations are amended from time to time.

"Share" means an ownership interest in the Company including any and all benefits to which the holder of such Share may be entitled as provided in this Agreement, together with all obligations of such Person to comply with the terms and provisions of this Agreement; provided that an Assignee shall have only the rights specified in Section 9.6. A reference to "Share" or "Shares" includes both Class A Shares and Class B Shares unless the context clearly requires otherwise.

"Transfer" means the act of selling, exchanging, giving, assigning or otherwise transferring or disposing of (including by placing in trust (voting or otherwise) and by pledging, hypothecating or otherwise transferring as security), whether made voluntarily or involuntarily by operation of law and whether with or without consideration. Without limiting the generality of the foregoing:

(i) Any transfer or other disposition upon foreclosure or other exercise or remedies of a secured creditor after an event of default or otherwise under or with respect to a pledge, hypothecation or other transfer as security also shall constitute a "Transfer," and

(ii) The sale, exchange or other transfer of at least fifty percent (50%) of the voting stock of a Member, if a Member is a corporation, or the transfer of an interest or interests of at least fifty percent (50%) in the capital or profits of a Member (whether accomplished by the sale or exchange of interests or by the admission of a new partner or member), if a Member is a partnership or limited liability company, or the cumulative transfer of such interests in a Member that effectively equal the foregoing (including transfers of interests followed by the incorporation of a Member and subsequent stock transfers, or transfers of stock followed by the liquidation of a Member and subsequent transfers of interests) will be deemed to constitute a "Transfer" of the Shares held by that Member.

"Unreturned Capital" of any Member on any date shall be equal to the excess (if any) of (a) the aggregate Required Class A Contribution or Required Class B Contribution of such Member pursuant to Section 2.1 or 2.2, over (b) the aggregate distributions to such Member pursuant to (i) in the case of a Class A Member, Section 4.2(b) or (ii) in the case of a Class B Member, Section 4.2(a), as of such date.

"Voting Rights" shall mean a Member may cast votes equal to his Percentage Interest in the Company.

1.10 Fees to Members and Managers.

Without the consent of the Members as provided in Section 6.1 or 6.5, as applicable, no fee or other compensation shall be paid to any Member or Manager other than as expressly described in this Agreement.

1.11 Interpretation. Each definition in this Agreement includes the singular and the plural, and reference to the neuter gender includes the masculine and feminine where appropriate. References to any statute or Regulations mean such statute or regulations as

amended at the time and include any successor legislation or regulations. The headings to the Articles and Sections are for convenience of reference and shall not affect the meaning or interpretation of this Agreement. Except as otherwise stated, (i) references to Articles and Sections mean the Articles and Sections of this Agreement, (ii) reference to a particular Article or Section includes the Sections, subsections and paragraphs subsidiary thereto and (iii) references to "including" means "including without limitation."

ARTICLE 2 ADMISSION OF MEMBERS

2.1 Class A Members. Schedule 2.1 sets forth the name, Initial Capital Contribution ("Required Class A Contribution"), Initial Capital Account, number of Class A Shares, and Percentage Interest of each Class A Member. Each Person named on Schedule 2.1 shall make or has made its Required Class A Contribution to the Company in cash upon (or prior to) executing this Agreement. Upon BIG and Boone executing this Agreement and making its Required Class A Contribution, such Person shall be admitted to the Company as a Class A Member.

2.2 Class B Member. Schedule 2.2 sets forth the name, Capital Contribution ("Required Class B Contribution"), Capital Account, number of Class B Shares, and Percentage Interest of each Class B Member. Each Person named on Schedule 2.2 has made its Required Class B Contribution to the Company in cash upon (or prior to) executing this Agreement.

2.3 Guaranty of Loans to Company. Each of the Class A Members (but none of the Class B Members) shall, in its individual capacity, jointly and severally guaranty any loan to the Company ("Guaranteed Loan") for so long as any guaranty of such loan is required by the lender. Notwithstanding any other provision of this Agreement or any provision of the Guaranteed Loan documents, as between the Members, each Class A Member shall be responsible for paying such Class A Member's proportionate share of any Guaranteed Loan ("Guaranty Percentage"). The "proportionate share" of a Class A Member shall equal such Class A Member's Percentage Interest divided by the aggregate Percentage Interests of all of the Class A Members. Any Class A Member who pays more than such Class A Member's Guaranty Percentage of the Guaranteed Loan to the Lender shall be entitled to contribution from the other Class A Members. Any Class A Member who is required to institute legal action to enforce such right of contribution shall be entitled to recover from the other Class A Members all costs and reasonable attorneys fee. Pursuant to the Company's Settlement Agreement with W. Ray Holt dated September 27, 2006 ("Settlement Agreement"), the provisions of this Section shall not apply to W. Ray Holt and the Company agrees to indemnify and hold W. Ray Holt harmless from any liability related thereto or to any guarantees which W. Ray Holt gave to any vendor for the sole benefit of the Company.

2.4 Additional Capital Contributions.

(a) No Class B Member shall be required to make any Capital Contributions other than as required by Section 2.2.

(b) No Class A Member shall be required to make any Capital Contributions other than as required by Sections 2.1 and 2.4 (c).

(c) If the Class A Members unanimously determine that the Company needs

additional equity capital in addition to that provided for in Sections 2.1, then the Company shall send to each Class A Member an Additional Capital Contribution Notice, which shall set forth the total amount (the "Capital Contribution Amount") of equity capital that the Company needs to raise. Each Class A Member shall be entitled to contribute an amount up to (but not in excess of) that percentage of the Capital Contribution Amount equal to the Class A Member's Percentage Interest ("Proportionate Share"). A Class A Member desiring to contribute a portion of the Capital Contribution Amount shall notify the Company in writing of such Class A Member's agreement to make a Capital Contribution (and the amount of such Capital Contribution), within the time limit prescribed by the Class A Members. If some, but not all, of the Class A Members subscribe for their Proportionate Share (so that less than the entire Capital Contribution Amount is raised), then the Company shall repeat the foregoing procedure, but only with respect to those Class A Members who subscribed for their Proportionate Share. Any Capital Contribution made pursuant to this subsection may be referred to as an "Additional Capital Contribution." A Class A Member must pay the Additional Capital Contribution for which such Class A Member has agreed to pay within the time limits set by the Class A Members in cash (U.S. Dollars). If the Class A Member fails to pay in accordance with the preceding sentence, such Class A Member shall forfeit such Class A Member's right to make the additional Capital Contribution. If the Company receives an Additional Capital Contribution Notice, then the Percentage Interests of the Class A Members (and the number of Class A Shares) shall be adjusted accordingly, and shall be redetermined as follows:

(i) The Company Asset Value shall be determined as of the date immediately prior to that contribution pursuant to Section 9.12(a) (as if the date of the contribution were the date of the Event of Dissociation);

(ii) The Asset Value shall be multiplied by the aggregate Percentage Interests attributable to all outstanding Class A Shares (the result of which calculation shall be referred to as the "Class A Asset Value");

(iii) A ratio ("Ratio") shall be calculated for each Class A Member, (A) the numerator of which is the sum of (i) the product of the Class A Asset Value multiplied by such Class A Member's Percentage Interest immediately prior to such Additional Capital Contribution and (ii) the Additional Capital Contribution (if any) made by such Class A Member pursuant to such Additional Capital Contribution Notice; and (B) the denominator of which is the sum of the Class A Asset Value and all Additional Capital Contributions made by the Class A Members pursuant to such Additional Capital Contribution Notice;

(iv) Each Class A Member's Percentage Interest shall equal (A) such Member's Ratio multiplied by (B) the aggregate Percentage Interests attributable to all outstanding Class A Shares immediately prior to the Additional Capital Contribution. The number of Class A Shares of such Class A Member shall be adjusted in a similar manner.

No adjustment shall be made to the Percentage Interests of the Class B Members.

Notwithstanding the above, neither the Members nor the Management Committee may vote to amend Section 2.4(c) to require W. Ray Holt (if he is or becomes a Class A Member) to make an additional Capital Contribution to the Company or reduce his Percentage Interest prior to W. Ray Holt being paid the full redemption price for his Class A Shares, in the Company, pursuant to the Buy Out and Settlement Proposal by and between W. Ray Holt and the Company dated

September 27, 2006, which Proposal was approved by the Members on October 26, 2006.

ARTICLE 3 ALLOCATIONS

3.1 Profits. After giving effect to the special allocations set forth in Sections 3.3 and 3.4, Profits for any Fiscal Year shall be allocated to the Members in the following order and priority:

(a) First, to the extent of distributions required under Article 4 hereof, in excess of the Member's Capital Account Balance at the time of the distribution;

(b) Then, to each of the Members (in proportion to the Losses allocated to such Member pursuant to Section 3.5 and not previously charged back pursuant to this Section 3.1(a)) until the cumulative Profits allocated to such Member pursuant to this Section 3.1(a) equal the cumulative Losses allocated to such Member pursuant to Section 3.5 for all prior Fiscal Years;

(c) Finally, among the Members in proportion to their respective Percentage Interests.

3.2 Losses. After giving effect to the special allocations set forth in Sections 3.3 and 3.4, and subject to Section 3.5, Losses for any Fiscal Year shall be allocated among the Members in proportion to their respective Percentage Interests.

3.3 Special Allocations. The following special allocations shall be made in the following order:

(a) Except as otherwise provided in Regulations § 1.704-2(f), notwithstanding any other provision of this Article 3, if there is a net decrease in Company Minimum Gain during any Fiscal Year, each Member shall be specially allocated Items of Company Income and gain for such Fiscal Year (and, if necessary, subsequent Fiscal Years) in an amount equal to such Member's share of the net decrease in Company Minimum Gain, determined in accordance with Regulations § 1.704-2(g). This Section 3.3(a) is intended to comply with the minimum gain chargeback requirement in Regulations § 1.704-2(f) and shall be interpreted consistently therewith.

(b) Except as otherwise provided in Regulations § 1.704-2(l)(4), notwithstanding any other provision of this Article 3, if there is a net decrease in Member Nonrecourse Debt Minimum Gain attributable to a Member Nonrecourse Debt during any Fiscal Year, each Member who has a share of the Member Nonrecourse Debt Minimum Gain attributable to such Member Nonrecourse Debt, determined in accordance with Regulations § 1.704-2(l)(5), shall be specially allocated Items of Company income and gain for such Fiscal Year (and, if necessary, subsequent Fiscal Years) in an amount equal to such Member's share of the net decrease in Member Nonrecourse Debt, determined in accordance with Regulations § 1.704-2(l)(4). This Section 3.3(b) is intended to comply with the minimum gain chargeback requirement in Regulations § 1.704-2(l)(4) and shall be interpreted consistently therewith.

(c) If any Member unexpectedly receives any adjustments, allocations, or distributions described in Regulations §§ 1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(5), or 1.704-

1(b)(2)(ii)(d)(6), items of Company income and gain shall be specially allocated to such Member in an amount and manner sufficient to eliminate, to the extent required by the Regulations, the Adjusted Capital Account Deficit of the Member as quickly as possible, provided that an allocation pursuant to this Section 3.3(c) shall be made only if and to the extent that the Member would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article 3 have been tentatively made as if this Section 3.3(c) were not in the Agreement.

(d) If any Member would otherwise have an Adjusted Capital Account Deficit at the end of any Fiscal Year, each such Member shall be specially allocated items of Company income and gain in the amount of such excess as quickly as possible, provided that an allocation pursuant to this Section 3.3(d) shall be made only if and to the extent that such Member would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article 3 have been made as if Section 3.3(c) and this Section 3.3(d) were not in the Agreement.

(e) Nonrecourse Deductions for any Fiscal Year shall be specially allocated to the Members in proportion to their respective Percentage Interests.

(f) Any Member Nonrecourse Deductions for any Fiscal Year shall be specially allocated to the Member who bears the economic risk of loss with respect to the Member Nonrecourse Debt to which such Member Nonrecourse Deductions are attributable in accordance with Regulations § 1.704-2(i)(1).

(g) To the extent an adjustment to the adjusted tax basis of any Company asset, pursuant to Code § 734(b) or Code § 743(b) is required, pursuant to Regulations § 1.704-1(b)(2)(iv)(m)(2) or 1.704-1(b)(2)(iv)(m)(4), to be taken into account in determining Capital Accounts as the result of a distribution to a Member in complete liquidation of such Member's interest in the Company, the amount of such adjustment to Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis) and such gain or loss shall be specially allocated to the Members in accordance with their interests in the Company if Regulations § 1.704-1(b)(2)(iv)(m)(2) applies, or to the Member to whom such distribution was made if Regulations § 1.704-1(b)(2)(iv)(m)(4) applies.

3.4 Curative Allocations. The allocations set forth in Sections 3.3 and 3.5 (the "Regulatory Allocations") are intended to comply with certain requirements of the Regulations. It is the intent of the Members that, to the extent possible, all Regulatory Allocations shall be offset either with other Regulatory Allocations or with special allocations of other items of Company income, gain, loss or deduction pursuant to this Section. Therefore, notwithstanding any other provision of this Article 3 (other than the Regulatory Allocations), the Members shall make such offsetting special allocations of Company income, gain, loss or deduction in whatever manner the Members determine appropriate so that, after such offsetting allocations are made, each Member's Capital Account balance is, to the extent possible, equal to the Capital Account balance such Member would have had if the Regulatory Allocations were not part of the Agreement and all Company items were allocated pursuant to Sections 3.1 and 3.2.

3.5 Loss Limitation. Losses allocated pursuant to Section 3.2 shall not exceed the maximum amount of Losses that can be allocated without causing any Member to have an Adjusted Capital Account Deficit at the end of any Fiscal Year. If some but not all of the Members would have Adjusted Capital Account Deficits as a consequence of an allocation of Losses pursuant to Section 3.2, the limitation set forth in this Section 3.5 shall be applied on a

Member-by-Member basis and Losses not allocable to any Member as a result of such limitation shall be allocated to the other Members in accordance with the positive balances in such Member's Capital Accounts so as to allocate the maximum permissible Losses to each Member under Regulations § 1.704-1(b)(2)(ii)(d).

3.6 Other Allocation Rules.

(a) For purposes of determining the Profits, Losses or any other Items allocable to any period, Profits, Losses and any such other Items shall be determined on a daily, monthly or other basis, as determined by the Members using any permissible method under Code § 706 and the Treasury Regulations thereunder.

(b) The Members are aware of the income tax consequences of the allocations made by this Article 3 and hereby expressly agree to be bound by the provisions of this Article 3 in reporting their shares of Company Income and loss for income tax purposes.

(c) Solely for purposes of determining a Member's proportionate share of the "excess nonrecourse liabilities" of the Company within the meaning of Treasury Regulations § 1.752-3(a)(3), the Members' interests in Company profits are in proportion to their Percentage Interests.

(d) Tax credits and any other items other than Profits and Losses that are not otherwise expressly provided for herein shall be allocated to the Members in accordance with their Percentage Interests.

(e) To the extent permitted by Regulations § 1.704-2(h)(3), the Members shall endeavor to treat distributions of Company cash or other assets as having been made from the proceeds of a Nonrecourse Liability or a Member Nonrecourse Debt only to the extent that such distributions would cause or increase an Adjusted Capital Account Deficit for any Member.

3.7 Tax Allocations.

(a) Except as provided in Section 3.7(b), items of taxable income, gain, loss, deduction and credit shall be allocated among the Members for income tax purposes on the same basis as their respective book items.

(b) In accordance with Code § 704(c) and the Regulations thereunder, income, gain, loss, and deduction with respect to any Property contributed to the capital of the Company shall, solely for tax purposes, be allocated among the Members so as to take account of any variation between the adjusted basis of such Property to the Company for federal income tax purposes and its Initial Gross Asset Value (computed in accordance with the definition of Gross Asset Value) using an allocation method permitted by the Regulations and selected by the Members. If the Gross Asset Value of any Company asset is adjusted pursuant to subparagraph (ii) of the definition of Gross Asset Value, subsequent allocations of income, gain, loss, and deduction with respect to such asset shall take account of any variation between the adjusted basis of such asset for federal income tax purposes and its Gross Asset Value in the same manner as under Code § 704(c) and the Regulations thereunder. Any elections or other decisions relating to such allocations shall be made by the Members in any manner that reasonably reflects the purpose and intention of this Agreement. Allocations pursuant to this

Section 3.7 are solely for purposes of federal, state, and local taxes and shall not affect, or in any way be taken into account in computing, any Member's Capital Account or share of Profits, Losses, other Items, or distributions pursuant to any provision of this Agreement.

ARTICLE 4 DISTRIBUTIONS

4.1 **Tax Distributions.** Prior to making other distributions, the Company shall, no later than three (3) days prior to the dates listed in Section 6654(c) of the Code as due dates for the installment payments of estimated taxes (each date, a "Tax Distribution Date") make a distribution (a "Tax Distribution") to each Member equal to the sum of (a) such Member's allocable share of the net taxable income for the period beginning with the first date of the taxable year to which the estimated tax payment relates and ending with the last day of the taxable month to which the estimated tax payment relates with respect to which such estimated tax payment is due, multiplied by (b) the sum of the highest federal income tax rate then applicable to individuals and the higher of the South Carolina or North Carolina income tax rate then applicable to individuals; provided, however, that the amount of any Tax Distribution made to such Member pursuant to this Section shall be (c) reduced by the sum of the Tax Distributions previously made to such Member with respect to such current taxable year, and (d) increased by the amount of all Tax Distributions required to be paid in prior taxable years but not paid because of insufficient cash flow. Tax Distributions made to a Member pursuant to this Section shall not also be treated as distributions made to such Member pursuant to Section 4.2(a) or (b).

4.2 **Interim Distributions.** Except as otherwise provided in Section 4.1 or Section 10.2 hereof, the Managers shall distribute the Net Cash Flow at such times as the Managers shall determine in the following order and priority:

(a) First, to repay a Two Hundred Fifty Thousand (\$250,000.00) Dollar loan from Robert S. Jones dated July __, 2007, plus all accrued interest thereon;

(b) Second, to repay Five Hundred Thousand (\$500,000.00) Dollar loans from Southern First Bank which are guaranteed by Jones, Keisler and Buok, plus all accrued interest thereon;

(c) Third, up to Three Hundred Thousand (\$300,000.00) Dollars shall be distributed to BIG to purchase the Class B Shares of any Class B Member (other than BIG) who desires to have his Membership Interest or Class B Shares, in the Company, purchased for a price equal to his original Capital Contribution. However, if no Class B Member elects to have his Class B Shares purchased, within thirty (30) days of an offer to purchase being made by BIG, the next Six Hundred Thousand (\$600,000.00) Dollars of Net Cash Flow ("Class B Priority Distribution") shall be distributed to the Class B Members, on a pro rata basis, based upon their Percentage Interest of the outstanding Class B Shares with no effect on their ownership of Class B Shares or their Percentage Interest in the Company. To the extent one or more Class B Members (other than BIG) elect to timely sell their Class B Shares, pursuant to this Section 4.2(c), the Class B Priority Distribution shall be reduced by the amount distributed to BIG to purchase the Class B Shares with the balance of the Class B Priority Distribution paid to the remaining Class B Members, (including BIG) on a pro rata basis, based upon their revised Percentage Interest in the outstanding Class B Shares;

(d) Fourth, the next Seven Hundred Thousand (\$700,000.00) Dollars of Net Cash Flow shall be distributed, on a pro rata basis, to Jones, Kelsler and Buck in the amount equal to their respective Capital Contributions to the Company. Upon payment and the release by each lender of any and all personal guarantees of Jones, Kelsler & Buck for any and all loans to the Company, the Class A shares of Jones, Kelsler and Buck shall be converted to Class B Shares;

(e) Fifth, the next Seven Hundred Fifty Thousand (\$750,000.00) Dollars of Net Cash Flow shall be distributed to BIG and Boone, on a pro rata basis, based upon their Capital Contributions for Class A Shares in the Company with no effect on their ownership of Class A Shares or their Percentage Interest in the Company;

(f) Sixth, to all of the Members in proportion to their Percentage Interest.

The Members acknowledge and agree that, pursuant to Section 1.10, certain payments may be authorized by the Company to be made to the Members for services rendered in furtherance of the Company's business. Payments to any such Members for services rendered shall not represent distributions subject to the provisions of this Article 4, but instead shall be considered to be expense payments in the computation of Profits and Losses.

4.3 Amounts Withheld. All amounts withheld pursuant to the Code or any provision of any state, local or foreign tax law with respect to any payment, distribution or allocation to the Members shall be treated as amounts paid or distributed, as the case may be, to the Members with respect to which such amount was withheld pursuant to this Section for all purposes under this Agreement. The Company is authorized to withhold from payments and distributions, or with respect to allocations to the Members, and to pay over to any federal, state and local government or any foreign government, any amounts required to be so withheld pursuant to the Code or any provisions of any other federal, state or local law or any foreign law, and shall allocate any such amounts to the Members with respect to which such amount was withheld.

4.4 Limitations on Distributions. Anything in this Article 4 to the contrary notwithstanding, no distribution shall be made to any Member if, and to the extent that, such distribution (a) would create or increase an Adjusted Capital Account Deficit for such Member or (ii) would not be permitted under the Act or under agreements by which the Company is bound. Each Member, by becoming a Member, consents to the making or omission of any such distribution hereafter to the Members in accordance with this Section.

ARTICLE V MANAGEMENT AND CONTROL

5.1 General Authority. Except as otherwise expressly provided by this Agreement or required by any nonwivable provisions of applicable law, the business and affairs of the Company shall be managed by the Management Committee. The Management Committee shall be comprised of all Managers. The Management Committee shall have full and complete authority, power and discretion to manage and control the business, affairs and properties of the Company, to make all decisions regarding those matters and to perform any and all other acts or activities customary or incident to the management of the Company's business. Without limiting the generality of the foregoing, the Management Committee shall have the power and authority on behalf of the Company to:

- (a) Acquire property, real, personal, tangible and intangible;
- (b) Borrow money for the Company from banks, other lending institutions, and other persons on such terms as the Company deems appropriate and to hypothecate, encumber and grant security interests in the assets of the Company to secure payment of the borrowed sums;
- (c) Purchase liability and other insurance to protect the Company Property and business;
- (d) Hold and own any property, real, personal, tangible and intangible, in the name of the Company, including, but not limited to, deeds, mortgages, leasehold interests, interests in general partnerships, limited partnerships, limited liability companies, common trust funds, mutual funds, stocks, options, warrants, rights, puts, calls, contracts, futures, bonds, debentures, securities (public and private), and other debt and equity interests of any kind or nature;
- (e) Invest and reinvest any Company funds in time deposits, short-term governmental obligations, commercial paper or other investments including real estate, stocks, options, general and limited partnerships, limited liability companies, common trust funds, mutual funds, futures, rights, warrants, puts, calls, contracts, public and private bonds, debentures, securities, and other debt and equity interests and to actively trade, speculate on and manage the same;
- (f) Enter into, make, and perform contracts, agreements, and other undertakings binding on the Company that may be necessary, appropriate, or advisable in furtherance of the purposes of the Company and make all decisions and waivers thereunder;
- (g) Employ accountants, legal counsel, managing agents, money managers, property managers, investment advisors and other advisors to perform services for the Company and to compensate them from Company funds;
- (h) Screen, interview, hire and fire and personnel to be employed by the Company;
- (i) Open and maintain bank and investment accounts and arrangements, draw checks, letters of credit, and other orders for payment of money and designate individuals with authority to sign or give instructions with respect to those accounts and arrangements;
- (j) Maintain the assets of the Company in good order;
- (k) Collect sums due the Company;
- (l) Pay debts and obligations of the Company to the extent that Company funds are available;
- (m) Sell, purchase, lease, loan, borrow, rent, repair, partition, mortgage, pledge, encumber, develop, improve, subdivide, or otherwise deal with any property, including Company Property;
- (n) Bring suit on the Company's behalf or defend the Company in any such action, and compromise, settle, collect, and otherwise represent, prosecute and defend the legal rights and interests of the Company;

(o) File on behalf of the Company a voluntary petition for bankruptcy, or to bring an action on behalf of the Company for receivership, insolvency or other similar relief in any court of competent jurisdiction, and to defend, answer, respond and otherwise represent the Company in any such action or proceeding;

(p) Invest and reinvest in any kind of property, real, personal, tangible and intangible, including, but not limited to, common trust funds, stocks, bonds, notes, mortgages, general or limited partnerships, limited liability companies, savings accounts and certificates of deposit, mutual funds, and real estate; and

(q) Perform all other acts as may be necessary or appropriate to the conduct of the Company's business, and to execute, acknowledge, verify and deliver any or all instruments desirable to effectuate any of the foregoing.

5.2 Members' Approval Required for Certain Major Decisions. Notwithstanding anything herein to the contrary, the following major decisions shall require approval of the Members in the percentages designated:

(a) INTENTIONALLY DELETED.

(b) The Company shall not compromise, settle, waive or limit the obligation of any Member to make a Capital Contribution to the Company without the consent of all Disinterested Members.

(c) The Company shall not sell, or contract to sell, or otherwise dispose of substantially all of the Company Property outside of transactions in the normal course of business without the approval of those Members who own more than Eighty Percent (80%) of the Voting Rights in the Company.

(d) The Company shall not enter into any merger, or any profit sharing, joint venture, or other such arrangement without the approval of all Members.

(e) The Company shall not hire anyone who is a member of a Member's or Manager's Family on a full time basis without the approval of those Members who own more than Eighty Percent (80%) of the Voting Rights in the Company.

5.3 Liability for Certain Acts. A Manager who performs his duties in good faith and in a manner he reasonably believes to be in the best interests of the Company shall not have any liability solely by reason of being or having been a Manager of the Company. A Manager shall not be liable to the Company or to any Member for any loss or damage sustained by the Company or any Member, unless the loss or damage shall have been the result of such Manager's fraud, deceit, gross negligence, willful misconduct, breach of this Agreement or a knowing violation of the law.

5.4 Management Committee Meetings - Place, Time and Notice. All meetings of the Management Committee shall be held at the Company's principal office, or at such other place as shall be agreed upon by Eighty Percent (80%) of the number of Managers then serving the Company. Meetings of the Management Committee may be called at any time by any Manager of the Company, by delivering to the other Managers a written notice at least two (2) days in advance of the proposed meeting date. The notice shall contain the time, date and place of the

meeting. Each Manager shall be entitled to one (1) vote. Fifty Percent (50%) of the Managers constitutes a quorum. Except as provided in SECTION 5.7, in order for any vote of the Managers to be valid and constitute an action of the Management Committee, a quorum must be represented at the meeting either in person or by proxy. Once a quorum is established, the affirmative vote of more than Fifty Percent (50%) of the Managers present at the meeting shall constitute a valid decision of the Management Committee. Managers may vote by proxy appointed by an instrument in writing. In the event of deadlock, any Manager may call a meeting of the Members, pursuant to ARTICLE IV, who shall decide the issue.

5.5 Waiver of Notice. A Manager may waive notice of any meeting by a signed writing. In addition, a Manager who attends a meeting waives his right to assert any lack of notice, or defect in notice, of the meeting unless he states such objection at the outset of the meeting.

5.6 Action without Meeting. The Management Committee may take action without notice and a meeting if all of the Managers consent to such action by signing a Consent of the Managers which sets forth the action to be taken and contains the signature of each Manager.

5.7 Managers: Number, Election, Tenure and Qualifications.

(a) The Company shall have Five (5) Managers who shall compose the Management Committee of the Company. The Managers are Brian D. Boone, Robert A. Boozer, Robert S. Jones, Robert A. Kelsler and Carl Edward Buck.

(b) Each Manager shall agree to be bound by the provisions of this Agreement as they relate to Managers. The number of Managers on the Management Committee may be changed from time to time by the affirmative vote of all Members. Each Manager shall be elected by the affirmative vote of those Members who own Eighty Percent (80%) of the Voting Rights in the Company. Following his election, each Manager will serve until (a) his removal, (b) his resignation, or (c) the election of a successor, whichever occurs first.

(c) Upon the repayment of the repayment of the Two Hundred Fifty Thousand (\$250,000.00) Loan from Jones; the Company's Five Hundred Thousand (\$500,000.00) Dollar loan(s) from Southern First Bank; the payment of Seven Hundred Thousand (\$700,000.00) Dollars to Jones, Kelsler & Buck (pursuant to Section 4.2(d)) and the release by each lender of any and all personal guarantees of Jones, Kelsler & Buck for any and all loans to the Company, the Management Committee will be changed so as to be deemed to have Three (3) Managers with Boone having Two (2) votes and Jones, Kelsler & Buck resigning from the Management Committee.

5.8 Removal of Managers. A Manager may be removed at any time, with or without cause, by those Members who own more than Eighty Percent (80%) of the voting rights in the Company.

5.9 Resignation of Managers. Any Manager may resign at any time by giving written notice to all Members. The resignation shall be effective upon receipt of such written notice by any Member. The resignation of a Manager who is also a Member shall not affect the Manager's rights as a Member and shall not constitute a withdrawal from the Company by the Member.

5.10 No Authority of Members. Except as otherwise provided in this Agreement, or as authorized by the Management Committee, no Member is an agent of the Company or has the

authority to make any contracts, enter into any transactions, or make any commitments on behalf of the Company.

5.11 Ratification. The Management Committee may ratify and adopt any and all acts of a Member or Manager done on behalf of the Company.

5.12 Delegation of Powers. From time to time, the Management Committee may authorize, or delegate any of its authority to a subcommittee of Persons, or a single Person, whom it shall name, to act on its behalf regarding any matter over which the Management Committee has authority.

ARTICLE 6 MEMBERS

6.1 Actions by Members.

(a) With respect to any matter for which this Agreement calls for the vote, approval or decision of "the Members" (as opposed to matters left to the decision of the Managers or matters left to the decision of the Class A Members or some other subset of the Members), such matter shall be decided by those Members holding the Specified Percentage of all of the outstanding Shares held by Members (with all of the Class A Members and the Class B Members voting as a single class, not as two separate classes). With respect to any matter for which this Agreement calls for the vote, approval or decision of some subset of the Members, such matter shall be decided by those Members (who are part of such subset) holding the Specified Percentage of all of the outstanding Shares held by that subset of Members. The "Specified Percentage" shall be that percentage specified in this Agreement for approval of such matter. For any decision of all of the Members for which no percentage is otherwise specified in this Agreement, the Specified Percentage shall be a majority of all of the outstanding Shares held by the Members. Each Member shall be entitled to a number of votes equal to the number of Shares held by such Member. The provisions of Act § 33-44-404(c) shall not apply with respect to this Agreement or this Company.

(b) A meeting of the Members, for any proper purpose or purposes, may be called at any time by the Managers or by any Member(s) holding at least 20% of the Shares then outstanding by written notice given to a Manager, which notice shall specify the purpose or purposes for which the meeting is being called.

(c) All in-person meetings of Members shall be held at the principal office of the Company, or at such other place within the State of South Carolina as may be designated by the Member(s) calling the meeting. At any meeting of the Members, any Member(s) may participate by means of conference telephone or similar communications equipment so long as all Persons participating in the meeting can hear each other.

(d) Written notice of meetings of the Members, if any, stating the place, day and hour of the meeting and the purpose or purposes for which the meeting is called, shall be delivered by the Company not less than five (5) nor more than sixty (60) days before the meeting to each Member entitled to vote at that meeting.

(e) Attendance of a Member at a meeting shall constitute a waiver of notice of the meeting, except where such Member attends for the express purpose of objecting to the

transaction of any business on the ground that the meeting is not lawfully called or convened. Notice of a meeting may also be waived in writing. Attendance at a meeting or participation in a meeting is not a waiver of any right to object to the consideration of matters required to be included in the notice of the meeting but not so included, if the objection is expressly made at the meeting.

(f) The presence, either in person or by proxy, of Members holding a majority of the Shares then held by the Members is required to constitute a quorum at any meeting of the Members. Participation in a meeting by means of conference telephone shall constitute presence in person at such meeting.

(g) The Managers shall designate a Person (including the Manager) to serve as chairperson of any meeting (who shall decide all points of order) and shall further designate a Person (including the Manager) to take minutes of any meeting. The chairperson of the meeting shall have the power to adjourn the meeting from time to time, without notice, other than announcement of the time and place of the adjourned meeting. Upon the resumption of such adjourned meeting, any business may be transacted that might have been transacted at the meeting as originally called.

(h) Any action that may be taken at a meeting of the Members may be taken without a meeting if a consent in writing, setting forth the action to be taken, shall be signed and dated by Members holding the percentage of Shares required to approve such action under the Act, the Articles or this Agreement. Such consent shall have the same force and effect as a vote of the signing Members at a meeting duly called and held pursuant to this Article. No prior notice from the signing Members to the Company or other Members shall be required in connection with the use of a written consent pursuant to this Section. Notification of any action taken by means of a written consent of Members shall, however, be sent within a reasonable time after the date of the consent by the Company to all Members who did not sign the written consent.

(i) A Member may vote either in person or by proxy executed in writing by the Member. A facsimile, telegram, telex, cablegram or similar transmission by the Member or a photographic, photostatic, facsimile or similar reproduction of a writing executed by the Member shall be treated as an execution in writing for purposes of this Section. Proxies for use at any meeting of Members or in connection with the taking of any action by written consent shall be filed with the Company before or at the time of the meeting or execution of the written consent, as the case may be. No proxy shall be valid after 11 months from the date of such proxy's execution unless otherwise provided in the proxy. A proxy shall be revocable unless the proxy form conspicuously states that the proxy is irrevocable and the proxy is coupled with an interest.

6.2 Admission of Members. After the formation of this Company, a Person becomes a new Member:

(a) In the case of a Person acquiring Shares in the Company directly from the Company, upon compliance with the provisions of Section 6.3; and

(b) In the case of an assignee or transferee of Shares, upon compliance with the provisions of Section 9.7.

6.3 **New Members.** Additional Persons may be admitted to the Company and Shares may be issued to those Persons on such terms and conditions as are approved by those Members holding eighty percent (80%) of the outstanding Shares held by the Members. Any such admission is effective when the Person has executed and delivered to the Company a written document including the Person's notice address, his or her agreement to be bound by this Agreement and such other matters as the Members may require.

6.4 **Waiver of Partition.** While the Company remains in effect or is continued, each Member agrees and waives such Member's rights to have any Company Property partitioned, or to file a complaint or to institute any suit, action or proceeding at law or in equity to have any Company Property partitioned, and each Member, on behalf of such Member and such Member's heirs, successors and assigns, hereby waives any such right.

6.5 **Transactions Between a Member and the Company.** No Member shall receive any interest, salary or drawing with respect to such Member's Capital Contributions or such Member's Capital Account or for services rendered on behalf of the Company, or otherwise, in such Member's capacity as a Member; *provided, however*, that this provision shall not prohibit the Company from

(a) undertaking the relationships and paying the fees set forth in Section 1.10;
or

(b) upon obtaining the consent required of those Members (excluding the Member who is (or whose affiliate is) proposing to enter such transaction) holding a majority of the outstanding Shares held by the Members (excluding the Member who is (or whose affiliate is) proposing to enter such transaction), entering into any transaction or dealing with a Member (or affiliate of a Member) on terms and conditions that, in the aggregate, are not less favorable to the Company than those the Company could obtain from an unrelated third party, and derive and retain profits therefrom.

6.6 **Liability of Members; Indemnification.**

(a) No Member shall be liable for the debts or any other obligations or liabilities of the Company, whether arising in contract, tort or otherwise unless a Member guarantees any debt or obligation as required under Article 2.3. A Member shall be liable only to make such Member's Capital Contributions as set forth in Sections 2.1, 2.2 and 2.4 and shall not be required to restore a deficit balance in such Member's Capital Account or to lend any funds to the Company or, after such Member's Capital Contributions have been made, to make any additional Capital Contributions, assessments or payments to the Company, provided that a Member may be required to repay distributions made to such Member as provided in Act § 33-44-407. No Member shall have any personal liability for the repayment of any Capital Contributions or Capital Account of any other Member.

(b) Each Member (including each Manager) has a duty to the Company and the other Members to perform such Member's duties and responsibilities hereunder in good faith, in a manner such Member reasonably believes to be in the best interests of the Company, and with such care as an ordinarily prudent person in a like position would use under similar circumstances. In accordance with the business judgment rule, a Member who conducts itself in accordance with the standard set forth in this paragraph (b) in carrying out a duty or

responsibility under this Agreement shall have no liability to the Company or any other Member as a result thereof.

(c) To the fullest extent permitted by law, the Company shall indemnify a Member (and each of the Member's partners, employees, agents and affiliates (where acting for or as agent of the Company)) (any of the foregoing Persons being hereinafter an "Indemnified Person") and save and hold them and each of them harmless from and in respect of (i) all fees, costs and expenses, including attorneys' fees, incurred in connection with, or resulting from, any claim, action or demand against any such Indemnified Person or the Company which arise out of, or in any way relate to, the Company, its properties, business or affairs, and (ii) all such claims, actions and demands and any losses, liabilities or damages resulting therefrom, including amounts paid by such Indemnified Person with the prior written consent of the Company in settlement or compromise of any such claim, action or demand; provided, however, that this indemnity shall not extend to any such Indemnified Person to the extent that its acts and omissions shall have been adjudged to constitute a breach of the standard set forth in Section 6.6(b).

6.7 Other Business of Members.

(a) Any Member, who shall be an employee of *Arden Homebuilders, LLC*, shall devote substantially all of his time, effort and skill to the operation of the Company. Other Individual Class A Members shall be required to devote whatever time, effort and skill as is reasonably appropriate to accomplish such Class A Member's obligations under this agreement. No Class A Member, employed by the Company, shall, while a Member of the Company and for a period of six months after such Class A Member's dissociation from the Company, invest in, be employed by or provide personal services to a Competing Business except *Boozer Lumber Company* or *Boozer Lumber, LLC* or their affiliates.

(b) Each Class B Member shall only be required to devote whatever time, effort and skill as is reasonably appropriate to accomplish such Class B Member's obligations under this Agreement. No Class B Member shall, while a Member of the Company and for a period of six months after such Class B Member's dissociation from the Company, invest in, be employed by or provide personal services to a Competing Business except *Boozer Lumber Company* or *Boozer Lumber, LLC* or their affiliates.

(c) Any Member who is employed as an officer by *Boozer Lumber Company* or *Boozer Lumber, LLC*, or an affiliate of either company, or who is a shareholder or member of such company shall be obligated and required to seek or otherwise transfer his Shares in the Company to the Company or to other Members of the Company, as provided for herein, in the event his employment as an officer of *Boozer Lumber Company*, *Boozer Lumber, LLC*, or in any affiliated company terminates for any reason (other than retirement where the Member does not become gainfully employed by or under contract with a Company which is engaged in a business similar to *Boozer Lumber Company*) or in the event a shareholder shall sell all of his shares or ownership interest in *Boozer Lumber Company*, *Boozer Lumber Company, LLC*, or an affiliated company.

(d) *Arden Homebuilders, LLC* and its Managers are expressly authorized to obtain goods and/or services from any affiliate of the managers or from *Boozer Lumber Company*, *Boozer Lumber Company, LLC*, or affiliates of either Company, provided that the terms of and such arrangements are not less favorable to the Company than those which would be arrived at

between unaffiliated parties doing business at arm's length.

ARTICLE 7 ACCOUNTING, BOOKS, RECORDS, REPORTS, AND TAX MATTERS

7.1 Bank Accounts. Company funds shall be deposited in the name of the Company in such bank accounts of the Company as may be designated by the Management Committee. The Members shall make disbursement from those accounts solely for the Company's business or for distributions to the Members in accordance with the Agreement.

7.2 Maintenance of Books. The Managers shall maintain and keep at the principal office (or upon notice to the Members, another office selected by the Managers) of the Company complete and accurate books of account, in which shall be entered fully and accurately each and every transaction of the Company, and the records required to be maintained by the Company pursuant to the Act. The books and records shall be kept on the basis of accounting used for federal income tax purposes, reflect all Company transactions and shall be otherwise appropriate and adequate for the conduct of the Company's business. Each Member shall at all times have full access to all records and information of the Company and the right to inspect and copy all such records and information either directly or through a person designated by such Member and to discuss the Company's affairs, finances and accounts with the Company's Members, officers and its accountants at all reasonable times and upon reasonable notice. Each Member shall have the right to engage an accountant to audit the financial records of the Company at the expense of such Member.

7.3 Financial Reporting. Within a reasonably practicable time after the end of each Fiscal Year, the Company shall prepare and submit to each Member an annual unaudited report of the Company for such Fiscal Year. The annual report shall include the balance sheet of the Company as of the last day of such Fiscal Year and statements of profit or loss and cash flows of the Company for such Fiscal Year. The report shall be accompanied by a supplementary schedule showing the entries to the Members' (separately and in the aggregate) Capital Accounts in respect of such Fiscal Year, together with the appropriate Internal Revenue Service forms showing entries required to be made on each such Member's federal income tax return with respect to the Company's profits or losses. The Company shall be permitted to have the Company's accountants prepare audited financial statements and other financial reports not herein described to the extent required by any Lender.

7.4 Tax Elections. The Managers shall, without any further consent of the Members being required (except as specifically required herein), make any and all elections for federal, state, local, and foreign tax purposes including, without limitation, any election, if permitted by applicable law: (i) to adjust the basis of Property pursuant to Code §§ 754, 734(b) and 743(b), or comparable provisions of state, local or foreign law, in connection with Transfers of Shares and Company distributions; and (ii) with the consent of all of the Members, to extend the statute of limitations for assessment of tax deficiencies against the Members with respect to adjustments to the Company's federal, state, local or foreign tax returns. Robert A. Kelsler is specifically authorized to act as the "Tax Matters Partner" under the Code and in any similar capacity under state or local law. To the extent provided in Code §§ 6221 through 6231 and similar provisions of federal, state, local, or foreign law, the Tax Matters Partner shall represent the Company and the Members before taxing authorities or courts of competent jurisdiction in tax matters affecting the Company or the Members in their capacities as Members, and file any tax returns and execute any agreements or other documents relating to or affecting such tax

matters, including agreements or other documents that bind the Members with respect to such tax matters or otherwise affect the rights of the Company and the Members. The Managers shall cause to be prepared and timely filed each year the federal, state and local tax returns of the Company.

ARTICLE 8 AMENDMENTS

8.1 Amendments to Agreement. Amendments to this Agreement may be proposed by any Member by written notice to all of the Members. Following such proposal, the Managers shall submit to the Members a verbatim statement of any proposed amendment. If counsel for the Company shall have approved of the same in writing as to form. The Managers shall seek the written vote of the Members on the proposed amendment or shall call a meeting to vote thereon and to transact any other business that it may deem appropriate. A proposed amendment shall be adopted and be effective as an amendment hereto if it receives the affirmative vote of Eighty Percent (80%) of the outstanding Shares.

8.2 Amendments to Articles. The Managers may amend, upon notice to the Members but without the consent of the Members, the provisions of the Articles (and the corresponding provisions of this Agreement) concerning the name of the Company, the designated office and the agent for service of process. All other provisions of the Articles may be amended only in accordance with Section 8.1.

ARTICLE 9 TRANSFERS OF SHARES

9.1 Restrictions on Transfers. Except as otherwise permitted by this Agreement, no Member (or Assignee) shall Transfer any Shares.

9.2 Permitted Transfers. Subject to the conditions and restrictions set forth in Section 9.3, a Member may at any time Transfer such Member's Shares to (a) any other Member, (b) subject to Sections 9.11 and 9.12, the transferor Member's administrator or trustee to whom such Shares are transferred involuntarily by operation of law, (c) upon such Member's death and subject to Sections 9.11 and 9.12, such Member's spouse or lineal descendants (or trusts for the benefit of any of them) and such Member's personal representatives and testamentary trustees, or (d) any purchaser in accordance with Section 9.4 (any such Transfer being referred to in this Agreement as a "Permitted Transfer"). After the consummation of Transfer of any Shares, the Shares so Transferred shall continue to be subject to the terms and provisions of this Agreement and any further Transfer shall be required to comply with all terms and provisions of this Agreement.

9.3 Conditions to Permitted Transfers. A Transfer shall not be treated as a Permitted Transfer under Section 9.2 unless and until the following conditions are satisfied:

(a) Except in the case of a Transfer involuntarily by operation of law, the transferor and transferee shall execute and deliver to the Company such documents and instruments of conveyance as may be appropriate in the opinion of counsel to the Company to effect such transfer. In the case of a Transfer of Shares involuntarily by operation of law, the Transfer shall be confirmed by presentation to the Company of legal evidence of such Transfer, in form and substance satisfactory to counsel to the Company. In all cases, the Company shall be

reimbursed by the transferor and/or transferee for all costs and expenses that the Company reasonably incurs in connection with such Transfer.

(b) The transferor and transferee shall furnish the Company with the transferee's taxpayer identification number, sufficient information to determine the transferee's initial tax basis in the Shares Transferred, and any other information reasonably necessary to permit the Company to file all required federal and state tax returns and other legally required information statements or returns.

(c) Except in the case of a Transfer of Shares involuntarily by operation of law, either (i) such Shares shall be registered under any applicable federal and state securities laws or (ii) the transferor shall provide an opinion of counsel, which opinion and counsel shall be reasonably satisfactory to the Members, to the effect that such Transfer is exempt from all applicable registration requirements and that such Transfer will not violate any applicable laws regulating the transfer of securities.

The Members may waive any of such requirements in writing but only after determining that such requirement is not needed to protect the Company's interests.

9.4 Right of First Refusal. In addition to the other limitations and restrictions set forth in this Article 9, except as expressly permitted by Section 9.2, no Member shall Transfer all or any portion of such Member's Shares (the "Offered Shares") unless such Member (the "Seller") first offers to sell the Offered Shares pursuant to the terms of this Section 9.4.

(a) No Transfer may be made under this Section 9.4 unless the Seller has received a bona fide written offer (the "Purchase Offer") from a Person (the "Purchaser") to purchase the Offered Shares for a purchase price (the "Offer Price") payable in United States dollars at closing or according to specified terms, with or without interest, which offer shall be in writing, signed by the Purchaser and shall be irrevocable for a period ending no sooner than the business day following the end of the Offer Period (as hereinafter defined).

(b) Prior to making any Transfer that is subject to the terms of this Section 9.4, the Seller shall give to the Company and each other Member written notice (the "Offer Notice") which shall include a copy of the Purchase Offer and an offer (the "Firm Offer") to sell the Offered Shares to the other Members (the "Offerees") for the lesser of (i) the Offer Price or the Dissociation Value (as defined in Section 9.12), payable in either case according to the same terms as those contained in the Purchase Offer.

(c) The Firm Offer shall be irrevocable for a period (the "Offer Period") ending on the thirtieth (30th) day following the day of the Offer Notice.

(d) At any time during the Offer Period, any Offeree may accept the Firm Offer by giving written notice of such acceptance to the Seller. If more than one Member accepts the Firm Offer, then such Members who do accept the Firm Offer shall be entitled to purchase the Offered Shares in proportion to their relative Percentage Interests.

(e) If the Firm Offer is accepted, the closing of the sale of the Offered Shares shall take place within thirty days after the Firm Offer is accepted or, if later, the date set forth in the Purchase Offer. The Seller and all accepting Offerees shall execute such documents as may be appropriate to effect the sale of the Offered Shares pursuant to the terms of the Firm Offer and

this Article 9. The accepting Offerees shall, individually, have the right to pay the Seller in accordance with those payment terms specified in Section 9.12.(b).

(f) If the Firm Offer is not accepted in the manner hereinabove provided, the Seller may sell the Offered Shares to the Purchaser at any time within sixty days after the last day of the Offer Period, provided that such sale shall be made in terms no more favorable to the Purchaser than the terms contained in the Purchase Offer and provided further that such sale complies with other terms, conditions and restrictions of this Agreement. If the Offered Shares are not sold in accordance with the terms of the preceding sentence, the Seller may not Transfer the Offered Shares pursuant to the Purchase Offer, and the Seller must again comply with all of the provisions of this Section in order to Transfer any of the Seller's Shares pursuant to Section 9.2(d).

(g) Any Shares Transferred by any means shall remain subject to the restrictions of this Article 9 in the hands of the transferee.

9.5 Prohibited Transfers. Any purported Transfer of Shares that is not a Permitted Transfer shall be null and void and of no force or effect whatever; provided that, if the Company is required to recognize a transfer that is not a Permitted Transfer, the transferee shall be treated as the transferee of a distributional interest within the meaning of the Act, shall be entitled only to the transferor's rights to allocations and distributions as provided by this Agreement with respect to the Transferred Shares, which allocations and distributions may be applied to satisfy any debts, obligations or liabilities for damages that the transferor or transferee of such Shares may have to the Company. In the case of a transfer or attempted transfer of Shares that is not a Permitted Transfer, the parties engaging in such transfer shall be liable to indemnify the Company and the other Members from all costs, liability and damage that any of such indemnified Members may incur as a result of such transfer or attempted transfer and efforts to enforce the indemnity granted hereby.

9.6 Rights of Unadmitted Assignees. A Person who acquires Shares but who is not admitted as a substituted Member pursuant to Section 9.7 (an "Assignee") shall be entitled only to allocations and distributions with respect to such Shares in accordance with this Agreement and shall have no right to any information or accounting of the affairs of the Company, shall not be entitled to inspect the books or records of the Company, shall have no right to vote or participate in management and shall not have any of the rights of a Member under the Act or this Agreement.

9.7 Admission of Substituted Members. Subject to the other provisions of this Article 9, an Assignee of Shares may be admitted to the Company as a substituted Member only upon satisfaction of the conditions set forth in this Section 9.7:

(a) Those Members holding not less than eighty percent (80%) of the outstanding Shares held by Members consent to such admission;

(b) The Shares with respect to which the Assignee is being admitted were acquired by means of a Permitted Transfer;

(c) The Assignee, by written instrument in form and substance reasonably satisfactory to the Members, (i) adopts the terms and provisions of this Agreement and (ii) assumes the obligations of the transferor Member under this Agreement with respect to the Transferred Shares;

(d) The Assignee pays the Company for all reasonable legal, filing and publication costs that the Company incurs in connection with the admission of the Assignee as a Member with respect to the Transferred Shares.

A transferee who becomes a Member has, to the extent assigned, the rights and powers and is subject to the restrictions and liabilities of a Member under this Agreement and the Act. Unless otherwise provided by this Agreement, a transferee who becomes a Member also is liable for the obligations of the transferor to make Capital Contributions and for obligations under Act § 33-44-407 to return unlawful distributions, but is not obligated for liabilities that are unknown to this transferee at the time the transferee becomes a Member and that could not be ascertained from this Agreement. Whether or not a transferee of Shares becomes a Member, the transferor is not released from the transferor's liability to the Company under this Agreement or the Act.

9.8 Events Causing Member's Dissociation. A Member (the "Dissociated Member") shall be deemed to be dissociated from the Company upon the occurrence of any of the following events (an "Event of Dissociation"):

- (a) A purported Transfer of Shares that is not a Permitted Transfer;
- (b) A Transfer of all of the Member's Shares by means of a Permitted Transfer;
- (c) A determination by arbitration pursuant to Section 12.6 that the Member has engaged in conduct that is grounds for expulsion of the Member by judicial determination under Act § 33-44-601(6)(i), (ii) or (iii);
- (d) The Member's (i) becoming a debtor in bankruptcy; (ii) executing an assignment for the benefit of creditors; (iii) seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the Member's property; or (iv) failing, within ninety days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the member's property obtained without the Member's consent or acquiescence, or failing within ninety days after the expiration of a stay to have the appointment vacated;
- (e) The death of a Member;
- (f) The appointment of a guardian or a general conservator for the Member or a judicial determination that the Member has otherwise become incapable of performing the Member's duties under the Agreement;
- (g) In the case of a Member that is a trust, the distribution of the trust's entire right to receive distributions from the Company;
- (h) In the case of a Member that is an estate, the distribution of the estate's entire right to receive distributions from the Company;
- (i) Termination of the existence of a Member if the Member is not an individual, estate or trust.

9.9 No Resignation or Withdrawal. A Member has no power to resign or withdraw from the Company or to demand a return of any of such Member's Capital Account. Any action in violation of this Section shall be null and void as against the Company and the other Members.

9.10 No Dissolution. The occurrence of an Event of Dissociation shall not cause the dissolution or the winding up of the Company.

9.11 Purchase Option. Upon the occurrence of an Event of Dissociation (other than the a Transfer of all of the Member's Shares by means of a Permitted Transfer), the remaining Members shall have an option to purchase the Shares of the Dissociated Member; provided that one or more Members must agree to purchase all of the Shares of the Dissociated Member. The Member(s) who exercise the option shall be referred to as the "Purchasing Member(s)." A Member may exercise his purchase option by giving written notice of such exercise ("Exercise Notice") to the Dissociated Member (or his legal representative) within sixty days of receipt by such Member of written notice of the Event of Dissociation ("Exercise Period"), with such Exercise Notice indicating the maximum number of Shares the offering Member is willing to purchase. If the remaining Members oversubscribe for the Shares of the Dissociated Member, the Shares will be allocated in proportion to the relative Percentage Interests of the Members exercising the option. If the purchase option is not exercised as to all of the Shares of the Dissociated Member, then the Dissociated Member (or the Assignee of the Dissociated Member, as the case may be) shall continue as an Assignee. If the Dissociated Member's Assignee is permitted to continue as an Assignee or as a substitute Member (upon satisfaction of the conditions set forth in Section 9.7), then the Dissociated Member and the Assignee shall be liable for all of the Dissociated Member's obligations arising under this Agreement and the Act except as expressly provided otherwise in this Agreement.

9.12 Terms of Purchase.

(a) If the purchase option is exercised, the price of the Dissociated Member's Shares (the "Dissociation Value") shall be an amount equal to the amount of cash that the Dissociated Member would have received if

(i) the assets of the Company were sold for an amount equal to the Company's earnings before interest, income taxes, depreciation and amortization for its most recently completed Fiscal Year ("EBIDTA") multiplied by a multiple ("EBIDTA Multiple") (the product of such multiplication being referred to as the "Company Asset Value");

(ii) the proceeds of such deemed sale were distributed (following the allocation of the Profits and Losses pursuant to Article 3) pursuant to Section 10.2; and

(iii) the amount of such deemed distribution to the Dissociated Member were multiplied by 75% (the "Discount Percentage");

provided, however, that in no event shall the Dissociation Value be less than the Unreturned Capital of the Dissociated Member. The initial EBIDTA Multiple shall be four (4). Those Members holding not less than eighty percent (80%) of the Shares held by the Members may revise the EBIDTA Multiple and the Discount Percentage from time to time; provided that no such revision may reduce the Dissociation Value with respect to an Event of Dissociation that occurred prior to

such revision. The closing of the purchase shall occur within thirty days of the determination of the value of assets of the Company. If there is more than one Purchasing Member, the decisions of the Purchasing Members shall be determined by a vote of those Members holding a majority of the Shares held by the Purchasing Members. EBITDA shall be determined by the Company's accountants and the determination of such accountants shall be conclusive on all parties.

(b) Unless the parties mutually agree otherwise, the purchase price shall be paid to the Dissociated Member (or his legal representative) in twenty (20) equal and consecutive quarterly installments of principal and interest beginning ninety (90) days after the determination of the purchase price has been made. The purchase price shall be evidenced by a promissory note made by the Purchasing Member(s) to the order of the Dissociated Member and shall bear interest at the prime rate for large commercial banks as published in *The Wall Street Journal* at the date of the sale. Payments may be prepaid, in whole or in part, at any time and from time to time, without penalty. The note shall provide that upon default of any payment of interest or principal, the note shall become due and payable immediately, at the option of the holder of the note. Upon delivery of a note in payment of the purchase price, the Dissociated Member's Shares (or any portion thereof) shall be conveyed to the Purchasing Member(s) who shall be entitled to all distributions and allocations therefrom. Until the purchase price is paid in full, the Dissociated Member's Shares shall be held by the seller as collateral security for payment of the note, but in no case may the seller have any of the rights of a Member as long as the note is not in default.

9.13 **Statement of Dissociation.** A Dissociated Member or the Company may file a statement of dissociation in accordance with Act § 33-44-704.

9.14 **W. Ray Holt.** To the extent the provisions hereof restrict or prohibit the ability of W. Ray Holt to withdraw as a Class A Member or prohibit the Company from redeeming his Class A Shares, said provisions are hereby waived as to W. Ray Holt.

ARTICLE 10 DISSOLUTION AND WINDING UP

10.1 **Dissolution Events.** The Company shall dissolve and shall commence winding up and liquidating upon the first to occur of any of the following (each a "Dissolution Event"):

(a) The determination of those Members holding not less than eighty percent (80%) of the outstanding Shares to dissolve, wind up and liquidate the Company;

(b) The expiration of the term of the Company on December 31, 2035;

(c) The entry of a decree of judicial dissolution under Act § 33-44-801(b)(5) or administrative dissolution pursuant to Act §§ 33-44-809 and 33-44-810, unless the Company is reinstated pursuant to Act § 33-44-811.

10.2 **Winding Up.** Upon the occurrence of a Dissolution Event, the Company shall continue solely for the purposes of winding up its affairs in an orderly manner, liquidating its assets, and satisfying the claims of its creditors and Members, and no Member shall take any action that is inconsistent with, or not necessary to or appropriate for, the winding up of the Company's Business and affairs, provided that all covenants contained in this Agreement and obligations provided for in this Agreement shall continue to be fully binding upon the Members

until such time as the Property has been distributed pursuant to this Section. The Liquidator shall be responsible for overseeing the winding up and dissolution of the Company, using the powers granted by Act § 33-44-803(c) and such other powers granted by this Agreement as may be appropriate for winding up the Company. The Liquidator shall have the power to delegate duties in connection with the liquidation to Class A Members. The Liquidator shall notify known claimants pursuant to Act § 33-44-807 and shall publish the notice described in Act § 33-44-808 and take such other actions with respect to claimants as the Liquidator may deem appropriate. The Liquidator shall take full account of the Company's liabilities and Property and shall cause the Property or the proceeds from the sale thereof (as determined pursuant to Section 10.6), to the extent sufficient therefor, to be applied and distributed, to the maximum extent permitted by law, in the following order:

(a) First, to creditors (including Members who are creditors, to the extent otherwise permitted by law) in satisfaction of all of the Company's debts and other liabilities (whether by payment or the making of reasonable provision for payment thereof), other than liabilities for which reasonable provision for payment has been made and liabilities for distributions to Members under Act § 33-44-405(c);

(b) Second, to Members of the Company in satisfaction of liabilities for distributions under Act § 33-44-405(c);

(c) Third, to the Class B Members until each Class B Member has received cumulative distributions pursuant to Section 4.2(a) and this Section 10.2(c) equal to the Class B Member's Required Class B Contribution in proportion to each Class B Member's Unreturned Capital; *provided, however*, that no distribution shall be made pursuant to this Section 10.2(c) that creates or increases an Adjusted Capital Account Deficit for the Class B Member, determined as follows: A Distribution shall first be determined tentatively pursuant to this Section 10.2(c) without regard to the Members' Capital Accounts, and then the allocation provisions of Article III (and other provisions of this Agreement concerning adjustments to Capital Accounts, including for distributions made pursuant to the foregoing provisions of this Section 10.2) shall be applied tentatively as if such tentative distribution had been made. If an Adjusted Capital Account Deficit would thereby be created or increased for the Class B Member ("Tentative Deficit Amount"), the actual distribution to the Class B Member pursuant to this Section 10.2(c) shall be reduced (or not made at all) so that the actual distribution equals the excess (if any) of (i) the tentative distribution to the Class B Member over (ii) the Tentative Deficit Amount of the Class B Member;

(e) Fourth, to the Class A Members until each Class A Member has received cumulative distributions pursuant to Section 4.2(b) and this Section 10.2(d) equal to the Class A Member's Required Class A Contribution in proportion to each Class A Member's Unreturned Capital; *provided, however*, that no distribution shall be made pursuant to this Section 10.2(d) that creates or increases an Adjusted Capital Account Deficit for the Class A Member, determined as follows: A Distribution shall first be determined tentatively pursuant to this Section 10.2(d) without regard to the Members' Capital Accounts, and then the allocation provisions of Article III (and other provisions of this Agreement concerning adjustments to Capital Accounts, including for distributions made pursuant to the foregoing provisions of this Section 10.2) shall be applied tentatively as if such tentative distribution had been made. If an Adjusted Capital Account Deficit would thereby be created or increased for the Class A Member ("Tentative Deficit Amount"), the actual distribution to the Class A Member pursuant to this Section 10.2(d) shall be reduced (or not made at all) so that the actual distribution equals the

excess (if any) of (I) the tentative distribution to the Class A Member over (II) the Tentative Deficit Amount of the Class A Member;

(f) Finally, the balance, if any, to the Members in accordance with the positive balances in their Capital Accounts, after giving effect to all contributions, distributions and allocations for all periods.

If any Member has a deficit balance in his Capital Account, the Member shall have no obligation to contribute capital to the Company with respect to such deficit. In the discretion of the Liquidator, a pro rata portion of the distributions that would otherwise be made to the Members pursuant to this Article 10 may be:

(a) distributed to a trust established for the benefit of the Members for the purposes of liquidating Company assets, collecting amounts owed to the Company, and paying any contingent or unforeseen liabilities or obligations of the Company. The assets of any such trust shall be distributed to the Members from time to time, in the reasonable discretion of the Liquidator, in the same proportions as the amount distributed to such trust by the Company would otherwise have been distributed to the Members pursuant to Section 10.2 hereof; or

(b) withheld to provide a reasonable reserve for Company liabilities (contingent or otherwise) and to reflect the unrealized portion of any installment obligations owed to the Company, provided that such withheld amounts shall be distributed to the Members as soon as practicable.

10.3 Rights of Members. Except as otherwise provided in this Agreement, each Member shall look solely to the Property of the Company for the return of such Member's Capital Contribution and has no right or power to demand or receive Property other than cash from the Company. If the assets of the Company remaining after payment or discharge of the debts or liabilities of the Company are insufficient to return such Capital Contribution, the Members shall have no recourse against the Company or any other Member.

10.4 The Liquidator. The "Liquidator" shall mean the Person designated by the Members to carry out the duties set forth in Section 10.2. The Company is authorized to pay reasonable compensation to the Liquidator for services performed pursuant to this Article 10 and to reimburse the Liquidator for its reasonable costs and expenses incurred in performing those services.

10.5 Form of Liquidating Distributions. For purposes of making distributions required by Section 10.2, the Liquidator may determine whether to distribute all or any portion of the Property in-kind or to sell all or any portion of the Property and distribute the proceeds therefrom.

10.6 Articles of Termination. Upon completion of the winding up of the Company, the Liquidator shall file Articles of Termination with the Secretary of State.

ARTICLE 11 MEMBER REPRESENTATIONS

Each Member hereby represents and warrants to the Company and to each other Member as follows:

(a) This Agreement has been duly authorized, executed and delivered by such Member and is a valid and binding obligation of such Member, enforceable against such Member in accordance with this Agreement's terms.

(b) There are no sale agreements, pledges, proxies, voting trusts, powers of attorney or other agreements or instruments binding upon such Member with respect to beneficial or record ownership of, or voting rights with respect to, such Member's Shares, except for this Agreement.

ARTICLE 12 MISCELLANEOUS

12.1 Notices.

(a) Except as provided in paragraph (b), any notice, payment, demand, consent or communication required or permitted to be given by this Agreement shall be in writing and shall be deemed to have been sufficiently given or served for all purposes if delivered either personally, by facsimile, or by overnight mail or by regular mail, first class postage prepaid, addressed as follows:

If to Company:	Arden Homebuilders, LLC 7301 Carmel Executive Park, Suite 214 Charlotte, North Carolina 28226

If to a Member:	To the address provided by such Member on the signature page of this Agreement for such Member

Any notice hereunder shall be deemed to be given on the date on which it was delivered, either personally, by facsimile, or by overnight mail, or three days after it was deposited in a regularly maintained receptacle for the deposit of United States mail addressed as set forth above. Any person may change his address for purposes of this agreement by giving notice to the Company and the Members in accordance with the foregoing provisions of this Article.

(b) Routine progress reports by Members and similar routine information may be sent in accordance with paragraph (a) or may be delivered by e-mail or other means that are reasonably designed to afford the Members adequate notice of such matters.

12.2 Binding Effect. Except as otherwise provided in this Agreement, every covenant, term, and provision of this Agreement shall be binding upon and inure to the benefit of the Members and their respective successors, transferees, heirs and assigns.

12.3 Severability. Except as otherwise provided in the succeeding sentence, every provision of this Agreement is intended to be severable, and, if any term or provision of this Agreement is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity or legality of the remainder of this Agreement. The preceding sentence of this Section shall be of no force or effect if the consequence of enforcing the remainder of this Agreement without such illegal or invalid term or provision would be to cause any Member to lose the material benefit of its economic bargain.

12.4 **Governing Law.** The laws of the State of South Carolina shall govern the validity of this Agreement, the construction of its terms, and the interpretation of the rights and duties arising hereunder.

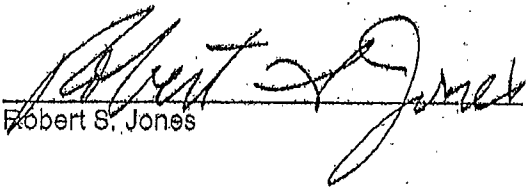
12.5 **Partnership for Tax Purposes.** Each Member intends that the Company will be treated as a partnership for federal, state and local tax purposes, but that the Company shall not be deemed a partnership for any other purpose and no Member shall be deemed a partner or co-venturer of any other Member. This Agreement shall be construed in all respects so as to effect the intention stated in this Section.

12.6 **Arbitration.** Any dispute among any of the parties to this Agreement that arises in connection with this Agreement shall be resolved by binding arbitration by a single arbitrator held in Columbia, South Carolina, pursuant to the South Carolina Uniform Arbitration Act (or if the South Carolina Uniform Arbitration Act is deemed not to apply, the Federal Arbitration Act) and applying the Commercial Arbitration Rules of the American Arbitration Association in effect on the date demand for arbitration is made.

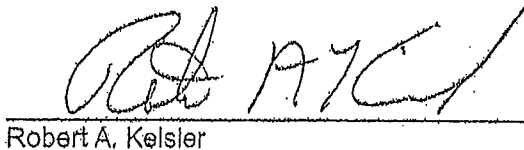
12.7 **Representation.** Each Member acknowledges that Richardson, Plowden, Carpenter & Robinson, P.A. (the "Firm") represented the interests of Builders Investment Group, LLC, Robert S. Jones, and Robert A. Kelsler in connection with the initial formation of the Company and the preparation of the original Operating Agreement. In regards to the preparation and amendment of this Amended and Restated Agreement, the Firm has represented only the Company. All Members have or must obtain separate legal counsel in regards to the review and approval of this Amended and Restated Operating Agreement.

IN WITNESS WHEREOF, the parties have executed and entered into this Operating Agreement of the Company as of the day and year first above written.

CLASS A MEMBERS:

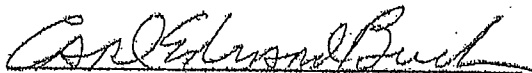

Robert S. Jones

Notice Address for Jones:
6009 Martha's Glen Road
Columbia, South Carolina 29209
Facsimile: 803-776-1326
E-mail: bjones@beezertlumber.com
with Home @ SC. RR. Co

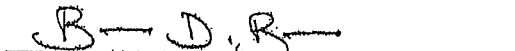

Robert A. Kelsler

Notice Address for Kelsler:
116 Walnut Lane
Columbia, South Carolina 29212
Facsimile: 803-749-9890
E-mail: rakopa1@aol.com

Notice Address for Buck:

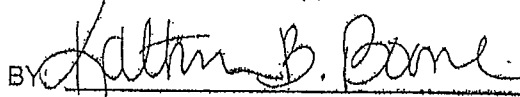

Carl Edward Buck

39 Country Club Drive
Greenville, South Carolina 29605
Facsimile: 864-232-9608
E-mail: edbuck@charter.net
Edward Buck@BellSouth.net


Brian David Boone

Notice Address for Boone:
427 Fenton Place
Charlotte, NC 29207
Facsimile: 704-540-7040
E-mail: bdauidboone@earthlink.net

Builders Investment Group, LLC.

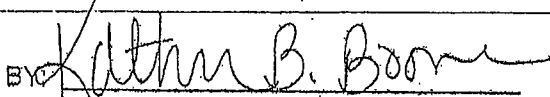
BY: 

Its: Authorized Agent

Notice Address for BIG:
427 Fenton Place
Charlotte, NC 29207
Facsimile: 704-540-7140
E-mail: boozerk@earthlink.net

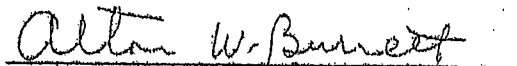
CLASS B MEMBERS;

Builders Investment Group, LLC

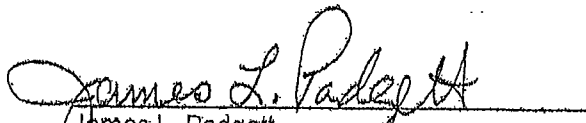
BY: 

Its: Authorized Agent

Notice Address for BIG:
427 Fenton Place
Charlotte, NC 29207
Facsimile: 704-540-7040
E-mail: boozerk@earthlink.net


Alton W. Burnett, Jr.

Notice Address for Burnett:
109 Ragin Drive
Hopkins, South Carolina 29061
Facsimile:
E-mail: ABURNETTE@BOZZERLUMBER.COM


James L. Padgett

Notice Address for Padgett:
141 Olivia Way
Lexington, South Carolina 29072
Facsimile:
E-mail: JPadgett@Bozzelumber.com


Keith Wayne Berry

Notice Address for Berry:
106 Wood Ridge Lane
Columbia, South Carolina 29209
Facsimile:
E-mail: mwberry@bellsouth.net


Thomas Keith Harris

Notice Address for Harris:
P.O. Box 185 380 Annapolis Road
Olar, South Carolina 29843 Lexington SC 29072
Facsimile:
E-mail: KHARRIS@BOZZELYNBONE.COM

Schedule 2.1

Class A Members

<u>Class A Member</u>	<u>Initial Capital Contribution</u>	<u>Initial Capital Account</u>	<u>Class A Shares</u>	<u>LLC Percentage</u>	<u>Class A Percentage</u>
Jones	\$350,000.00	\$350,000.00	350,000	20.001%	24.138%
Kelsler	\$100,000.00	\$100,000.00	100,000	5.714%	6.897%
Buck	\$250,000.00	\$250,000.00	250,000	14.286%	17.241%
BIG	\$625,000.00	\$625,000.00	625,000	35.716%	43.095%
Boone	\$125,000.00	\$125,000.00	125,000	7.143%	8.629%
TOTAL	\$1,450,000.00	\$1,450,000.00	—	82.860%	100.0%

Schedule 2.2

Class B Members

<u>Class B Member</u>	<u>Initial Capital Contribution</u>	<u>Initial Capital Account</u>	<u>Class B Shares</u>	<u>Percentage LLC</u>	<u>Class B Percentage</u>
BIG	\$300,000.00	\$300,000.00	300,000	8.570%	50.000%
Burnett	\$100,000.00	\$100,000.00	100,000	2.857%	16.667%
Padgett	\$100,000.00	\$100,000.00	100,000	2.857%	16.667%
Berry	\$50,000.00	\$50,000.00	50,000	1.428%	8.333%
Harris	\$50,000.00	\$50,000.00	50,000	1.428%	8.333%
TOTAL	\$600,000.00	\$600,000.00		17.140%	100.00%

Exhibit A
Business Plan

See attached

**UNANIMOUS WRITTEN CONSENT OF THE MEMBERS OF
ARDEN HOMEBUILDERS, LLC**

The undersigned, being all the Members of Arden Homebuilders, LLC, a South Carolina limited liability company (the "Company"), in lieu of a special meeting of the Members, the call of which is hereby expressly waived, hereby give their written consent to the adoption of the following resolutions:

WHEREAS, the Company is out of funds to continue operations;

WHEREAS, there is a dispute with regards to the contract with Parkway Crossing Partners, LLC, the developer at Parkway Crossing;

WHEREAS, True Homes, LLC, is in default of the Second Amendment to the Takedown Purchase Contract dated April 28, 2008 after failing to take down 2 lots per month in both July 2008 and August 2008;

WHEREAS, the current Managing Member, Brian D. Boone, has tendered his resignation as Managing Member;

WHEREAS, the undersigned have determined it to be in the best interest of the Company to wind down operations, liquidate the assets to pay the debts, and dissolve the Company;

WHEREAS, the Company needs to appoint a Liquidator per Section 10 of the Operating Agreement,

NOW, THEREFORE, the Members agree as follows:

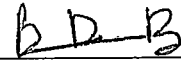
RESOLVED, that the Company accepts the resignation of the current Managing Member, Brian D. Boone effective immediately;

FUTHER RESOLVED, per Article 10.1 of the Company's operating agreement, the Members of the Company have determined it is in the best interest of the Members and the Company to dissolve, wind up and liquidate the Company;

FURTHER RESOLVED, in accordance with Article 10.4 of the Company's operating agreement, the Members designate and appoint, Robert A. Keisler, to serve as Liquidator effective immediately. As Liquidator, Robert A. Keisler will perform the duties as defined in Article 10.2 of Liquidator without compensation except for the reimbursement of reasonable costs and expenses incurred in performing services relating to the dissolution, winding up and liquidating of the Company.

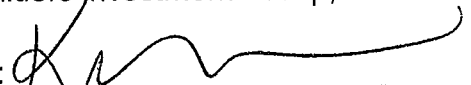
EXECUTED effective as of the 31st day of August, 2008.

CLASS A MEMBERS:

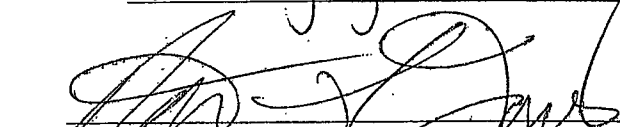


Brian D. Boone

Builders Investment Group, LLC

By: 

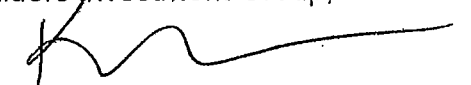
Its: managing member


Robert S. Jones

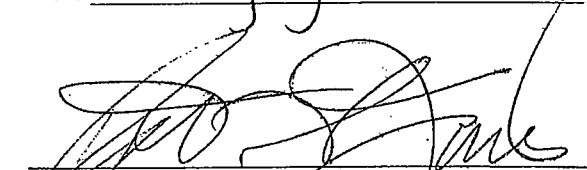

Robert A. Keisler

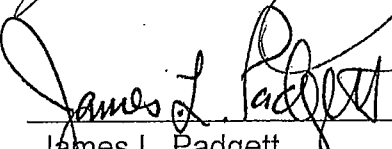
CLASS B MEMBERS:

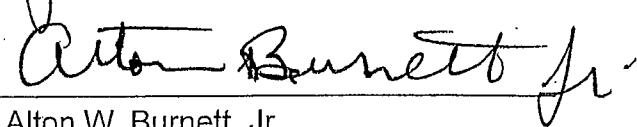
Builders Investment Group, LLC

By: 

Its: managing member


Robert S. Jones


James L. Padgett


Alton W. Burnett, Jr.

BORROWER'S NAME AND ADDRESS HOLT FAMILY HOMES LLC 7101 CHAMPL EXECUTIVE PARK B7E 201 CHARLOTTE, NC 28228	LENDER'S NAME AND ADDRESS Greenville First Bank, N.A. P.O. Box 17465 100 Verdne Blvd. Greenville, SC 29606	30-3116144 Loan Number: 400877200 Date: 01/26/2007 Maturity Date: 01/26/2008 Loan Amount: \$300,500.00 Renewal Of:

For value received, I promise to pay to you, or your order, at your address listed above the PRINCIPAL sum of Three Hundred Thousand Five Hundred Dollars Dollars \$ 300,500.00

☐ Single Advance: I will receive all of this principal sum on _____, No additional advances are contemplated under this note.
☒ Multiple Advance: The principal sum shown above is the maximum amount of principal I can borrow under this note. On: 01/26/2007
 I will receive the amount of \$ 0.00 and future principal advances are contemplated.
 Conditional: The conditions for future advances are at the request of the borrower and the approval of the officer.

☒ Open End Credit: You and I agree that I may borrow up to the maximum amount of principal more than one time. This feature is subject to all other conditions and expires on 03/06/2008.
☐ Closed End Credit: You and I agree that I may borrow up to the maximum only one time (and subject to all other conditions).

INTEREST: I agree to pay interest on the outstanding principal balance from 01/26/2007 at the rate of 8.250 % per year until the rate changes

☒ Variable Rate: This rate may then change as stated below.
☒ Index Rate: The future rate will be equal to the following index rate: Greenville First Bank Prime

☐ No Index: The future rate will not be subject to any internal or external index. It will be entirely in your control.

☒ Frequency and Timing: The rate on this note may change as often as every day beginning 01/27/2007.
 A change in the interest rate will take effect the day the rate changes

☐ Limitations: During the term of this loan, the applicable annual interest rate will not be more than _____ % or less than _____ % The rate may not change more than _____ % each _____

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:
☒ The amount of each scheduled payment will change. ☒ The amount of the final payment will change.

ACCUMUL METHOD: Interest will be calculated on a Annual/365 basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:
☒ on the same fixed or variable rate basis in effect before maturity (as indicated above).
☐ at a rate equal to _____

☒ LATE CHARGE: If a payment is not made within 30 days after it is due, I agree to pay a late charge of 8.000 % of the payment amount with a minimum of \$25.00 and a maximum of \$100.00

☒ ADDITIONAL CHARGES: In addition to interest, I agree to pay the following charges which ☒ are ☐ are not included in the principal amount above: origination fee \$500

PAYMENTS: I agree to pay this note as follows:

☒ Interest: I agree to pay accrued interest in monthly payments of accrued interest on the amount of credit outstanding beginning on 01/26/2007

☒ Principal: I agree to pay the principal on 01/26/2008

☐ Installments: I agree to pay this note in _____ payments. The first payment will be in the amount of \$ _____ and will be due _____ A payment of \$ _____ will be due _____ thereafter. The final payment of the entire

unpaid balance of principal and interest will be due _____

ADDITIONAL NOTES:

PAID

SEP 03 2007

BY: [Signature]

ORIGINAL

☒ SECURITY: This note is separately secured by (describe separate document by type and date):
 Unsecured
 (This statement is for your internal use. Failure to list a separate security instrument does not mean this agreement will not secure this note.)

Signature for Lender
[Signature]
 Justin Strickland
 President

PURPOSE: The purpose of this loan is Reestablish working capital
100

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGE 2). I have received a copy on today's date.
 HOLT FAMILY HOMES LLC

[Signature] Member

[Signature] Member

[Signature] Member

[Signature] Member

GUARANTY

Greenville
(City)

South Carolina
(State)

January 26, 2007

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and to include Greenville First Bank, N.A.

(herein, with its participants, successors and assigns, called "Lender"), at its option, at any time or from time to time to make loans or extend other accommodations to or for the account of HOLT FAMILY HOMES LLC 7301 CARMEL EXECUTIVE PARK STE 203 CHARLOTTE, NC 28228

(herein called "Borrower") or to engage in any other transactions with Borrower, the Undersigned hereby absolutely and unconditionally guarantees to Lender the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of the debts, liabilities and obligations described as follows:

A. If this ☒ is checked, the Undersigned guarantees to Lender the payment and performance of the debt, liability or obligation of Borrower to Lender evidenced by or arising out of the following: Promissory note # 400877200 dated 1/26/2007 and any extensions, renewals or replacements thereof (hereinafter referred to as the "Indebtedness").

B. If this ☐ is checked, the Undersigned guarantees to Lender the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several; all such debts, liabilities and obligations being hereinafter collectively referred to as the "Indebtedness"). Without limitation, this guaranty includes the following described debt(s):

The Undersigned further acknowledges and agrees with Lender that:

1. No act or thing need occur to establish the liability of the Undersigned hereunder, and no act or thing, except full payment and discharge of all indebtedness, shall in any way exonerate the Undersigned or modify, reduce, limit or release the liability of the Undersigned hereunder.

2. This is an absolute, unconditional and continuing guaranty of payment of the Indebtedness and shall continue to be in force and be binding upon the Undersigned, whether or not all Indebtedness is paid in full, until this guaranty is revoked by written notice actually received by the Lender, and such revocation shall not be effective as to Indebtedness existing or committed for at the time of actual receipt of such notice by the Lender, or as to any renewals, extensions and refinancings thereof. If there be more than one Undersigned, such revocation shall be effective only as to the one so revoking. The death or incompetence of the Undersigned shall not revoke this guaranty, except upon actual receipt of written notice thereof by Lender and then only as to the decedent or the incompetent and only prospectively, as to future transactions, as herein set forth.

3. If the Undersigned shall be dissolved, shall die, or shall be or become insolvent (however defined) or revoke this guaranty, then the Lender shall have the right to declare immediately due and payable, and the Undersigned will forthwith pay to the Lender, the full amount of all Indebtedness, whether due and payable or unmatured. If the Undersigned voluntarily commences or there is commenced involuntarily against the Undersigned a case under the United States Bankruptcy Code, the full amount of all Indebtedness, whether due and payable or unmatured, shall be immediately due and payable without demand or notice thereof.

4. The liability of the Undersigned hereunder shall be limited to a principal amount of \$ 300,000.00

(if unlimited or if no amount is stated, the Undersigned shall be liable for all Indebtedness, without any limitation as to amount), plus accrued interest thereon and all other costs, fees, and expenses agreed to be paid under all agreements evidencing the Indebtedness and securing the payment of the Indebtedness, and all attorneys' fees, collection costs and enforcement expenses referable thereto. Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the Undersigned hereunder. The Lender may apply any sums received by or available to Lender on account of the Indebtedness from Borrower or any other person (except the Undersigned), from their properties, out of any collateral security or from any other source to payment of the excess. Such application of receipts shall not reduce, affect or impair the liability of the Undersigned hereunder. If the liability of the Undersigned is limited to a stated amount pursuant to this paragraph 4, any payment made by the Undersigned under this guaranty shall be effective to reduce or discharge such liability only if accompanied by a written transmittal document, received by the Lender, advising the Lender that such payment is made under this guaranty for such purpose.

5. The Undersigned will pay or reimburse Lender for all costs and expenses (including reasonable attorneys' fees and legal expenses) incurred by Lender in connection with the protection, defense or enforcement of this guaranty in any litigation or bankruptcy or insolvency proceedings.

This guaranty includes the additional provisions on page 2, all of which are made a part hereof.

This guaranty is ☒ unsecured; ☐ secured by a mortgage or security agreement dated _____; ☐ secured by _____

IN WITNESS WHEREOF, this guaranty has been duly executed by the Undersigned the day and year first above written.

ORIGINAL

JOSEPH B. JONES

256-92-5779

"Undersigned" shall refer to all persons who sign this guaranty, severally and jointly.

GUARANTY

Greenville
(City)

South Carolina
(State)

January 26, 2007

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and to induce Greenville First Bank, N.A.

(herein, with its participants, successors and assigns, called "Lender"), at its option, at any time or from time to time to make loans or extend other accommodations to or for the account of HOLT FAMILY HOMES LLC 7301 CARMEL EXECUTIVE PARK STE 203 CHARLOTTE, NC 28228

(herein called "Borrower") or to engage in any other transactions with Borrower, the Undersigned hereby absolutely and unconditionally guarantees to Lender the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of the debts, liabilities and obligations described as follows:

A. If this ☒ is checked, the Undersigned guarantees to Lender the payment and performance of the debt, liability or obligation of Borrower to Lender evidenced by or arising out of the following: Promissory note # 400877200 dated 1/26/2007 and any extensions, renewals or replacements thereof (hereinafter referred to as the "Indebtedness").

B. If this ☐ is checked, the Undersigned guarantees to Lender the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several; all such debts, liabilities and obligations being hereinafter collectively referred to as the "Indebtedness"). Without limitation, this guaranty includes the following described debt(s):

The Undersigned further acknowledges and agrees with Lender that:

1. No act or thing need occur to establish the liability of the Undersigned hereunder, and no act or thing, except full payment and discharge of all Indebtedness, shall in any way exonerate the Undersigned or modify, reduce, limit or release the liability of the Undersigned hereunder.

2. This is an absolute, unconditional and continuing guaranty of payment of the Indebtedness and shall continue to be in force and be binding upon the Undersigned, whether or not all Indebtedness is paid in full, until this guaranty is revoked by written notice actually received by the Lender, and such revocation shall not be effective as to Indebtedness existing or committed for at the time of actual receipt of such notice by the Lender, or as to any renewals, extensions and refinancings thereof. If there be more than one Undersigned, such revocation shall be effective only as to the one so revoking. The death or incompetence of the Undersigned shall not revoke this guaranty, except upon actual receipt of written notice thereof by Lender and then only as to the decedent or the incompetent and only prospectively, as to future transactions, as herein set forth.

3. If the Undersigned shall be dissolved, shall die, or shall be or become insolvent (however defined) or revoke this guaranty, then the Lender shall have the right to declare immediately due and payable, and the Undersigned will forthwith pay to the Lender, the full amount of all Indebtedness, whether due and payable or unmatured. If the Undersigned voluntarily commences or there is commenced involuntarily against the Undersigned a case under the United States Bankruptcy Code, the full amount of all Indebtedness, whether due and payable or unmatured, shall be immediately due and payable without demand or notice thereof.

4. The liability of the Undersigned hereunder shall be limited to a principal amount of \$ 300,000.00 (if unlimited or if no amount is stated, the Undersigned shall be liable for all Indebtedness, without any limitation as to amount), plus accrued interest thereon and all other costs, fees, and expenses agreed to be paid under all agreements evidencing the Indebtedness and securing the payment of the Indebtedness, and all attorneys' fees, collection costs and enforcement expenses referable thereto. Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the Undersigned hereunder. The Lender may apply any sums received by or available to Lender on account of the Indebtedness from Borrower or any other person (except the Undersigned), from their properties, out of any collateral security or from any other source to payment of the excess. Such application of receipts shall not reduce, affect or impair the liability of the Undersigned hereunder. If the liability of the Undersigned is limited to a stated amount pursuant to this paragraph 4, any payment made by the Undersigned under this guaranty shall be effective to reduce or discharge such liability only if accompanied by a written transmittal document, received by the Lender, advising the Lender that such payment is made under this guaranty for such purpose.

5. The Undersigned will pay or reimburse Lender for all costs and expenses (including reasonable attorneys' fees and legal expenses) incurred by Lender in connection with the protection, defense or enforcement of this guaranty in any litigation or bankruptcy or insolvency proceedings.

This guaranty includes the additional provisions on page 2, all of which are made a part hereof.

This guaranty is ☒ unsecured; ☐ secured by a mortgage or security agreement dated _____;
☐ secured by _____

IN WITNESS WHEREOF, this guaranty has been duly executed by the Undersigned the day and year first above written.

ORIGINAL

ROBERT A. KEISLER

256-52-5779

"Undersigned" shall refer to all persons who sign this guaranty, severally and jointly

GUARANTY

Greenville
(City)

South Carolina
(State)

January 26, 2007

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and to induce Greenville First Bank, N.A.

(herein, with its participants, successors and assigns, called "Lender"), at its option, at any time or from time to time to make loans or extend other accommodations to or for the account of HOLT FAMILY HOMES LLC 7301

CARMEL EXECUTIVE PARK STE 203 CHARLOTTE, NC 28228

(herein called "Borrower") or to engage in any other transactions with Borrower, the Undersigned hereby absolutely and unconditionally guarantees to Lender the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of the debts, liabilities and obligations described as follows:

A. If this ☒ is checked, the Undersigned guarantees to Lender the payment and performance of the debt, liability or obligation of Borrower to Lender evidenced by or arising out of the following: Promissory note
400877200 dated 1/26/2007 and any extensions,

renewals or replacements thereof (hereinafter referred to as the "Indebtedness").

B. If this ☐ is checked, the Undersigned guarantees to Lender the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several; all such debts, liabilities and obligations being hereinafter collectively referred to as the "Indebtedness"). Without limitation, this guaranty includes the following described debt(s): _____

The Undersigned further acknowledges and agrees with Lender that:

1. No act or thing need occur to establish the liability of the Undersigned hereunder, and no act or thing, except full payment and discharge of all indebtedness, shall in any way exonerate the Undersigned or modify, reduce, limit or release the liability of the Undersigned hereunder.

2. This is an absolute, unconditional and continuing guaranty of payment of the Indebtedness and shall continue to be in force and be binding upon the Undersigned, whether or not all Indebtedness is paid in full, until this guaranty is revoked by written notice actually received by the Lender, and such revocation shall not be effective as to Indebtedness existing or committed for at the time of actual receipt of such notice by the Lender, or as to any renewals, extensions and refinancings thereof. If there be more than one Undersigned, such revocation shall be effective only as to the one so revoking. The death or incompetence of the Undersigned shall not revoke this guaranty, except upon actual receipt of written notice thereof by Lender and then only as to the decedent or the incompetent and only prospectively, as to future transactions, as herein set forth.

3. If the Undersigned shall be dissolved, shall die, or shall be or become insolvent (however defined) or revoke this guaranty, then the Lender shall have the right to declare immediately due and payable, and the Undersigned will forthwith pay to the Lender, the full amount of all Indebtedness, whether due and payable or unmatured. If the Undersigned voluntarily commences or there is commenced involuntarily against the Undersigned a case under the United States Bankruptcy Code, the full amount of all Indebtedness, whether due and payable or unmatured, shall be immediately due and payable without demand or notice thereof.

4. The liability of the Undersigned hereunder shall be limited to a principal amount of \$ 300,000.00

(If unlimited or if no amount is stated, the Undersigned shall be liable for all Indebtedness, without any limitation as to amount), plus accrued interest thereon and all other costs, fees, and expenses agreed to be paid under all agreements evidencing the Indebtedness and securing the payment of the Indebtedness, and all attorneys' fees, collection costs and enforcement expenses referable thereto. Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the Undersigned hereunder. The Lender may apply any sums received by or available to Lender on account of the Indebtedness from Borrower or any other person (except the Undersigned), from their properties, out of any collateral security or from any other source to payment of the excess. Such application of receipts shall not reduce, affect or impair the liability of the Undersigned hereunder. If the liability of the Undersigned is limited to a stated amount pursuant to this paragraph 4, any payment made by the Undersigned under this guaranty shall be effective to reduce or discharge such liability only if accompanied by a written transmittal document, received by the Lender, advising the Lender that such payment is made under this guaranty for such purpose.

5. The Undersigned will pay or reimburse Lender for all costs and expenses (including reasonable attorneys' fees and legal expenses) incurred by Lender in connection with the protection, defense or enforcement of this guaranty in any litigation or bankruptcy or insolvency proceedings.

This guaranty includes the additional provisions on page 2, all of which are made a part hereof.

This guaranty is ☒ unsecured; ☐ secured by a mortgage or security agreement dated _____;
☐ secured by _____

IN WITNESS WHEREOF, this guaranty has been duly executed by the Undersigned the day and year first above written.

ORIGINAL

Carl Edward Buck III
CARL EDWARD BUCK III

248-06-1280

"Undersigned" shall refer to all persons who sign this guaranty, severally and jointly.

BORROWER'S NAME AND ADDRESS HOLZ FAMILY HOMES LLC C/O MR. ROBERT KRISLER POST OFFICE BOX 90679 COLUMBIA, SC 29209	LENDER'S NAME AND ADDRESS Greenville First Bank, N.A. P.O. Box 7908 717 Lady Street, Suite D, Columbia, SC 29202	20-3135144 Loan Number <u>400000700</u> Date <u>04/25/2007</u> Maturity Date <u>09/03/2007</u> Loan Amount \$ <u>229,280.00</u> Renewal Of _____

For value received, I promise to pay to you, or your order, at your address listed above the PRINCIPAL sum of One Hundred Ninety-Nine Thousand Two Hundred Fifty Dollars Dollars \$ 199,250.00

☒ Single Advance: I will receive all of this principal sum on 04/25/2007. No additional advances are contemplated under this note.

☐ Multiple Advance: The principal sum shown above is the maximum amount of principal I can borrow under this note. On _____ I will receive the amount of \$ _____ and future principal advances are contemplated.

Conditions: The conditions for future advances are _____

☐ Open End Credit: You and I agree that I may borrow up to the maximum amount of principal more than one time. This feature is subject to all other conditions and expires on _____

☐ Closed End Credit: You and I agree that I may borrow up to the maximum only one time (and subject to all other conditions).

INTEREST: I agree to pay interest on the outstanding principal balance from 04/25/2007 at the rate of 8.250% per year until the rate changes.

☒ Variable Rate: This rate may then change as stated below.

☒ Index Rate: The future rate will be equal to _____ the following index rate: Greenville First Bank Prime

☐ No Index: The future rate will not be subject to any internal or external index. It will be entirely in your control.

☒ Frequency and Timing: The rate on this note may change as often as every day beginning 04/25/2007. A change in the interest rate will take effect the day the rate changes.

☐ Limitations: During the term of this loan, the applicable annual interest rate will not be more than _____ % or less than _____ %. The rate may not change more than _____ % each.

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

☐ The amount of each scheduled payment will change. ☒ The amount of the final payment will change.

ACCRUAL METHOD: Interest will be calculated on a Actual/365 basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

☒ on the same fixed or variable rate basis in effect before maturity (as indicated above).

☐ at a rate equal to _____

☒ LATE CHARGE: If a payment is not made within 30 days after it is due, I agree to pay a late charge of 3.000% of the payment amount with a minimum of \$15.00.

☐ ADDITIONAL CHARGES: In addition to interest, I agree to pay the following charges which ☐ are ☐ are not included in the principal amount above:

PAYMENTS: I agree to pay this note as follows:

☒ Interest: I agree to pay accrued interest with the principal.

☒ Principal: I agree to pay the principal on 09/03/2007.

☐ Installment: I agree to pay this note in _____ payments. The first payment will be in the amount of \$ _____ and will be due _____ . A payment of \$ _____ will be due _____ .

Unpaid balance of principal and interest will be due _____ thereafter. The final payment of the entire loan is due on _____ .

ADDITIONAL TERMS:

ORIGINAL

PAID

SEP 26 2007

BY BM

☒ SECURITY: This note is separately secured by (describe separate document by type and date) _____

UNSECURED

(This section is for your internal use. Failure to file a separate security document does not mean the agreement will not secure this note.)

Signature for Lender

[Signature]
 Robert A. Kriskler
 President

PURPOSE: The purpose of this loan is BRIDGE LOAN

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGE 2). I have received a copy on today's date.

HOLZ FAMILY HOMES LLC

[Signature] MEMBER

[Signature] MEMBER

[Signature] MEMBER

[Signature] MEMBER

GUARANTY

Columbia
(City)

South Carolina
(State)

April 25, 2007

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and to induce Greenville First Bank, N.A.

(herein, with its participants, successors and assigns, called "Lender"), at its option, at any time or from time to time to make loans or extend other accommodations to or for the account of HOLT FAMILY HOMES LLC C/O MR. ROBERT KEISLER POST OFFICE BOX 90679 COLUMBIA, SC 29209

(herein called "Borrower") or to engage in any other transactions with Borrower, the Undersigned hereby absolutely and unconditionally guarantees to Lender the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of the debts, liabilities and obligations described as follows:

A. If this ☒ is checked, the Undersigned guarantees to Lender the payment and performance of the debt, liability or obligation of Borrower to Lender evidenced by or arising out of the following: NOTE# 400900700 DATED APRIL 25, 2007 and any extensions, renewals or replacements thereof (hereinafter referred to as the "Indebtedness").

B. If this ☐ is checked, the Undersigned guarantees to Lender the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several; all such debts, liabilities and obligations being hereinafter collectively referred to as the "Indebtedness"). Without limitation, this guaranty includes the following described debt(s):

The Undersigned further acknowledges and agrees with Lender that:

1. No act or thing need occur to establish the liability of the Undersigned hereunder, and no act or thing, except full payment and discharge of all indebtedness, shall in any way exonerate the Undersigned or modify, reduce, limit or release the liability of the Undersigned hereunder.

2. This is an absolute, unconditional and continuing guaranty of payment of the Indebtedness and shall continue to be in force and be binding upon the Undersigned, whether or not all Indebtedness is paid in full, until this guaranty is revoked by written notice actually received by the Lender, and such revocation shall not be effective as to Indebtedness existing or committed for at the time of actual receipt of such notice by the Lender, or as to any renewals, extensions and refinancings thereof. If there be more than one Undersigned, such revocation shall be effective only as to the one so revoking. The death or incompetence of the Undersigned shall not revoke this guaranty, except upon actual receipt of written notice thereof by Lender and then only as to the decedent or the incompetent and only prospectively, as to future transactions, as herein set forth.

3. If the Undersigned shall be dissolved, shall die, or shall be or become insolvent (however defined) or revoke this guaranty, then the Lender shall have the right to declare immediately due and payable, and the Undersigned will forthwith pay to the Lender, the full amount of all Indebtedness, whether due and payable or unmatured. If the Undersigned voluntarily commences or there is commenced involuntarily against the Undersigned a case under the United States Bankruptcy Code, the full amount of all Indebtedness, whether due and payable or unmatured, shall be immediately due and payable without demand or notice thereof.

4. The liability of the Undersigned hereunder shall be limited to a principal amount of \$ 199,250.00 (if unlimited or if no amount is stated, the Undersigned shall be liable for all Indebtedness, without any limitation as to amount), plus accrued interest thereon and all other costs, fees, and expenses agreed to be paid under all agreements evidencing the Indebtedness and securing the payment of the Indebtedness, and all attorneys' fees, collection costs and enforcement expenses referable thereto. Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the Undersigned hereunder. The Lender may apply any sums received by or available to Lender on account of the Indebtedness from Borrower or any other person (except the Undersigned), from their properties, out of any collateral security or from any other source to payment of the excess. Such application of receipts shall not reduce, affect or impair the liability of the Undersigned hereunder. If the liability of the Undersigned is limited to a stated amount pursuant to this paragraph 4, any payment made by the Undersigned under this guaranty shall be effective to reduce or discharge such liability only if accompanied by a written transmittal document, received by the Lender, advising the Lender that such payment is made under this guaranty for such purpose.

5. The Undersigned will pay or reimburse Lender for all costs and expenses (including reasonable attorneys' fees and legal expenses) incurred by Lender in connection with the protection, defense or enforcement of this guaranty in any litigation or bankruptcy or insolvency proceedings.

This guaranty includes the additional provisions on page 2, all of which are made a part hereof.

This guaranty is ☒ unsecured; ☐ secured by a mortgage or security agreement dated _____; ☐ secured by _____.

IN WITNESS WHEREOF, this guaranty has been duly executed by the Undersigned the day and year first above written.

ORIGINAL

ROBERT B JONES

256-92-5775

Undersigned shall refer to all persons who sign this guaranty, severally and jointly.

GUARANTY

Columbia
(City)

South Carolina
(State)

April 25, 2007

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and to induce Greenville First Bank, N.A.

(herein, with its participants, successors and assigns, called "Lender"), at its option, at any time or from time to time to make loans or extend other accommodations to or for the account of HOLT FAMILY HOMES LLC C/O MR. ROBERT KRISLER POST OFFICE BOX 90679 COLUMBIA, SC 29209

(herein called "Borrower") or to engage in any other transactions with Borrower, the Undersigned hereby absolutely and unconditionally guarantees to Lender the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of the debts, liabilities and obligations described as follows:

A. If this ☒ is checked, the Undersigned guarantees to Lender the payment and performance of the debt, liability or obligation of Borrower to Lender evidenced by or arising out of the following: NOTE# 400900700 DATED APRIL 25, 2007 and any extensions,

renewals or replacements thereof (hereinafter referred to as the "Indebtedness").

B. If this ☐ is checked, the Undersigned guarantees to Lender the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several; all such debts, liabilities and obligations being hereinafter collectively referred to as the "Indebtedness"). Without limitation, this guaranty includes the following described debt(s): _____

The Undersigned further acknowledges and agrees with Lender that:

1. No act or thing need occur to establish the liability of the Undersigned hereunder, and no act or thing, except full payment and discharge of all indebtedness, shall in any way exonerate the Undersigned or modify, reduce, limit or release the liability of the Undersigned hereunder.

2. This is an absolute, unconditional and continuing guaranty of payment of the Indebtedness and shall continue to be in force and be binding upon the Undersigned, whether or not all Indebtedness is paid in full, until this guaranty is revoked by written notice actually received by the Lender, and such revocation shall not be effective as to Indebtedness existing or committed for at the time of actual receipt of such notice by the Lender, or as to any renewals, extensions and refinancings thereof. If there be more than one Undersigned, such revocation shall be effective only as to the one so revoking. The death or incompetence of the Undersigned shall not revoke this guaranty, except upon actual receipt of written notice thereof by Lender and then only as to the decedent or the incompetent and only prospectively, as to future transactions, as herein set forth.

3. If the Undersigned shall be dissolved, shall die, or shall be or become insolvent (however defined) or revoke this guaranty, then the Lender shall have the right to declare immediately due and payable, and the Undersigned will forthwith pay to the Lender, the full amount of all Indebtedness, whether due and payable or unmatured. If the Undersigned voluntarily commences or there is commenced involuntarily against the Undersigned a case under the United States Bankruptcy Code, the full amount of all Indebtedness, whether due and payable or unmatured, shall be immediately due and payable without demand or notice thereof.

4. The liability of the Undersigned hereunder shall be limited to a principal amount of \$ 199,250.00 (if unlimited or if no amount is stated, the Undersigned shall be liable for all Indebtedness, without any limitation as to amount), plus accrued interest thereon and all other costs, fees, and expenses agreed to be paid under all agreements evidencing the Indebtedness and securing the payment of the Indebtedness, and all attorneys' fees, collection costs and enforcement expenses referable thereto. Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the Undersigned hereunder. The Lender may apply any sums received by or available to Lender on account of the Indebtedness from Borrower or any other person (except the Undersigned), from their properties, out of any collateral security or from any other source to payment of the excess. Such application of receipts shall not reduce, affect or impair the liability of the Undersigned hereunder. If the liability of the Undersigned is limited to a stated amount pursuant to this paragraph 4, any payment made by the Undersigned under this guaranty shall be effective to reduce or discharge such liability only if accompanied by a written transmittal document, received by the Lender, advising the Lender that such payment is made under this guaranty for such purpose.

5. The Undersigned will pay or reimburse Lender for all costs and expenses (including reasonable attorneys' fees and legal expenses) incurred by Lender in connection with the protection, defense or enforcement of this guaranty in any litigation or bankruptcy or insolvency proceedings.

This guaranty includes the additional provisions on page 2, all of which are made a part hereof.

This guaranty is ☒ unsecured; ☐ secured by a mortgage or security agreement dated _____; ☐ secured by _____

IN WITNESS WHEREOF, this guaranty has been duly executed by the Undersigned the day and year first above written.

ORIGINAL

ROBERT A KRISLER

256-92-5779

Undersigned shall refer to all persons who sign this guaranty, severally and jointly.

GUARANTY

Columbia
(City)

South Carolina
(State)

April 25, 2007

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and to induce Greenville First Bank, N.A.

(herein, with its participants, successors and assigns, called "Lender"), at its option, at any time or from time to time to make loans or extend other accommodations to or for the account of HOLT FAMILY HOMES LLC C/O MR.

ROBERT KEISLER POST OFFICE BOX 90679 COLUMBIA, SC 29209

(herein called "Borrower") or to engage in any other transactions with Borrower, the Undersigned hereby absolutely and unconditionally guarantees to Lender the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of the debts, liabilities and obligations described as follows:

A. If this ☒ is checked, the Undersigned guarantees to Lender the payment and performance of the debt, liability or obligation of Borrower to Lender evidenced by or arising out of the following: NOTE# 400900700
DATED APRIL 25, 2007 and any extensions,

renewals or replacements thereof (hereinafter referred to as the "Indebtedness").

B. If this ☐ is checked, the Undersigned guarantees to Lender the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several; all such debts, liabilities and obligations being hereinafter collectively referred to as the "Indebtedness"). Without limitation, this guaranty includes the following described debt(s): _____

The Undersigned further acknowledges and agrees with Lender that:

1. No act or thing need occur to establish the liability of the Undersigned hereunder, and no act or thing, except full payment and discharge of all indebtedness, shall in any way exonerate the Undersigned or modify, reduce, limit or release the liability of the Undersigned hereunder.

2. This is an absolute, unconditional and continuing guaranty of payment of the Indebtedness and shall continue to be in force and be binding upon the Undersigned, whether or not all Indebtedness is paid in full, until this guaranty is revoked by written notice actually received by the Lender, and such revocation shall not be effective as to Indebtedness existing or committed for at the time of actual receipt of such notice by the Lender, or as to any renewals, extensions and refinancings thereof. If there be more than one Undersigned, such revocation shall be effective only as to the one so revoking. The death or incompetence of the Undersigned shall not revoke this guaranty, except upon actual receipt of written notice thereof by Lender and then only as to the decedent or the incompetent and only prospectively, as to future transactions, as herein set forth.

3. If the Undersigned shall be dissolved, shall die, or shall be or become insolvent (however defined) or revoke this guaranty, then the Lender shall have the right to declare immediately due and payable, and the Undersigned will forthwith pay to the Lender, the full amount of all Indebtedness, whether due and payable or unmatured. If the Undersigned voluntarily commences or there is commenced involuntarily against the Undersigned a case under the United States Bankruptcy Code, the full amount of all Indebtedness, whether due and payable or unmatured, shall be immediately due and payable without demand or notice thereof.

4. The liability of the Undersigned hereunder shall be limited to a principal amount of \$ 199,250.00

(if unlimited or if no amount is stated, the Undersigned shall be liable for all Indebtedness, without any limitation as to amount), plus accrued interest thereon and all other costs, fees, and expenses agreed to be paid under all agreements evidencing the Indebtedness and securing the payment of the Indebtedness, and all attorneys' fees, collection costs and enforcement expenses referable thereto. Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the Undersigned hereunder. The Lender may apply any sums received by or available to Lender on account of the Indebtedness from Borrower or any other person (except the Undersigned), from their properties, out of any collateral security or from any other source to payment of the excess. Such application of receipts shall not reduce, affect or impair the liability of the Undersigned hereunder. If the liability of the Undersigned is limited to a stated amount pursuant to this paragraph 4, any payment made by the Undersigned under this guaranty shall be effective to reduce or discharge such liability only if accompanied by a written transmittal document, received by the Lender, advising the Lender that such payment is made under this guaranty for such purpose.

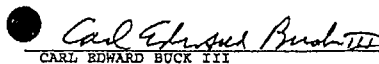
5. The Undersigned will pay or reimburse Lender for all costs and expenses (including reasonable attorneys' fees and legal expenses) incurred by Lender in connection with the protection, defense or enforcement of this guaranty in any litigation or bankruptcy or insolvency proceedings.

This guaranty includes the additional provisions on page 2, all of which are made a part hereof.

This guaranty is ☒ unsecured; ☐ secured by a mortgage or security agreement dated _____;
☐ secured by _____

IN WITNESS WHEREOF, this guaranty has been duly executed by the Undersigned the day and year first above written.

ORIGINAL


CARL EDWARD BUCK III

248-06-1280

Undersigned shall refer to all persons who sign this guaranty, severally and jointly.

BUILDERS INVESTMENT GROUP, LLC 627 GALWAY LANE COLUMBIA, SC 29209-0000	Carolina National Bank and Trust Company 1350 Main Street Columbia, SC 29201-0000	TAX ID NO. 20-2511316 Loan Number 400451000 Date 06/28/2007 Maturity Date 07/02/2008 Loan Amount \$ 200,000.00 Renewal Of
BORROWER'S NAME AND ADDRESS "I" includes each borrower above, jointly and severally.		LENDER'S NAME AND ADDRESS "You" means the lender, its successors and assigns.

For value received, I promise to pay to you, or your order, at your address listed above the PRINCIPAL sum of Two Hundred Thousand and 00/100 Dollars \$ 200,000.00

☐ Single Advance: I will receive all of this principal sum on . No additional advances are contemplated under this note.

☒ Multiple Advance: The principal sum shown above is the maximum amount of principal I can borrow under this note. On 06/28/2007

I will receive the amount of \$ and future principal advances are contemplated.

Conditions: The conditions for future advances are Upon request per account officer approval

☐ Open End Credit: You and I agree that I may borrow up to the maximum amount of principal more than one time. This feature is subject to all other conditions and expires on

☒ Closed End Credit: You and I agree that I may borrow up to the maximum only one time (and subject to all other conditions).

INTEREST: I agree to pay interest on the outstanding principal balance from 05/28/2007 at the rate of 9.250 % per year until the first rate change

☒ Variable Rate: This rate may then change as stated below.

☒ Index Rate: The future rate will be 1% ABOVE the following index rate: Prime Rate as published in the Wall Street Journal

☐ No Index: The future rate will not be subject to any internal or external index. It will be entirely in your control.

☒ Frequency and Timing: The rate on this note may change as often as daily

A change in the interest rate will take effect on the same day

☐ Limitations: During the term of this loan, the applicable annual interest rate will not be more than % or less than %. The rate may not change more than % each

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

☒ The amount of each scheduled payment will change. ☐ The amount of the final payment will change.

ACCRUAL METHOD: Interest will be calculated on a Actual / 360 basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

☒ on the same fixed or variable rate basis in effect before maturity (as indicated above).

at a rate equal to

☒ LATE CHARGE: If a payment is not made within 10 days after it is due, I agree to pay a late charge of 5% of the payment amount, \$5.00 minimum, \$100.00 maximum

☒ ADDITIONAL CHARGES: In addition to interest, I agree to pay the following charges which ☐ are ☒ are not included in the principal amount above: \$1000.00 ORIGINATION FEE

PAYMENTS: I agree to pay this note as follows:

☒ Interest: I agree to pay accrued interest monthly beginning 08/02/2007

☒ Principal: I agree to pay the principal at maturity (07/02/2008)

☐ Installments: I agree to pay this note in payments. The first payment will be in the amount of \$ and will be due . A payment of \$ will be due thereafter. The final payment of the entire unpaid balance of principal and interest will be due

ADDITIONAL TERMS:

☐ SECURITY: This note is separately secured by (describe separate document by type and date):

(This section is for your internal use. Failure to file a separate security document does not mean the agreement will not secure this note.)

Signature for Lender

PURPOSE: The purpose of this loan is TO PROVIDE A WORKING CAPITAL LINE OF CREDIT

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGE 2). I have received a copy on today's date.

BUILDERS INVESTMENT GROUP, LLC

20-2511316

DALE BOOZER, MEMBER

06/28/2007

JON EDGREN

BANKING CENTER MANAGER

As used in this resolution, the term "Manager" means the person or persons designated by the members of the Limited Liability Company in a manager-managed Limited Liability Company to manage the Limited Liability Company as provided in the articles of organization or an operating agreement. The term "Designated Member" means the member or members of the Limited Liability Company authorized to act on behalf of the Limited Liability Company in a member-managed Limited Liability Company. By signing this resolution, Manager or Designated Member represent that they have provided the Financial Institution with true and complete copies of the articles of organization and operating agreements of the Limited Liability Company as amended to the date of this resolution.

The Limited Liability Company named on this resolution resolves that,

- (1) The Financial Institution is designated as a depository for the funds of the Limited Liability Company and to provide other financial accommodations indicated in this resolution.
- (2) This resolution shall continue to have effect until express written notice of its rescission or modification has been received and recorded by the Financial Institution. Any and all prior resolutions adopted by the Managers or Designated Members of the Limited Liability Company and certified to the Financial Institution as governing the operation of this Limited Liability Company's account(s), are in full force and effect, until the Financial Institution receives and acknowledges an express written notice of its revocation, modification or replacement. Any revocation, modification or replacement of a resolution must be accompanied by documentation, satisfactory to the Financial Institution, establishing the authority for the changes.
- (3) The signature of an Agent on this resolution is conclusive evidence of their authority to act on behalf of the Limited Liability Company. Any Agent, so long as they act in a representative capacity as an Agent of the Limited Liability Company, is authorized to make any and all other contracts, agreements, stipulations and orders which they may deem advisable for the effective exercise of the powers indicated on page one, from time to time with the Financial Institution, subject to any restrictions on this resolution or otherwise agreed to in writing.
- (4) All transactions, if any, with respect to any deposits, withdrawals, rediscounts and borrowings by or on behalf of the Limited Liability Company with the Financial Institution prior to the adoption of this resolution are hereby ratified, approved and confirmed.
- (5) The Limited Liability Company agrees to the terms and conditions of any account agreement, properly opened by any Agent of the Limited Liability Company. The Limited Liability Company authorizes the Financial Institution, at any time, to charge the Limited Liability Company for all checks, drafts, or other orders, for the payment of money, that are drawn on the Financial Institution, so long as they contain the required number of signatures for this purpose.
- (6) The Limited Liability Company acknowledges and agrees that the Financial Institution may furnish at its discretion automated access devices to Agents of the Limited Liability Company to facilitate those powers authorized by this resolution or other resolutions in effect at the time of issuance. The term "automated access device" includes, but is not limited to, credit cards, automated teller machines (ATM), and debit cards.
- (7) The Limited Liability Company acknowledges and agrees that the Financial Institution may rely on alternative signature and verification codes issued to or obtained from the Agent named on this resolution. The term "alternative signature and verification codes" includes, but is not limited to, facsimile signatures on file with the Financial Institution, personal identification numbers (PIN), and digital signatures. If a facsimile signature specimen has been provided on this resolution, (or that are filed separately by the Limited Liability Company with the Financial Institution from time to time) the Financial Institution is authorized to treat the facsimile signature as the signature of the Agent(s) regardless of by whom or by what means the facsimile signature may have been affixed so long as it resembles the facsimile signature specimen on file. The Limited Liability Company authorizes each Agent to have custody of the Limited Liability Company's private key used to create a digital signature and to request issuance of a certificate listing the corresponding public key. The Financial Institution shall have no responsibility or liability for unauthorized use of alternative signature and verification codes unless otherwise agreed in writing.

Pennsylvania. The designation of an Agent does not create a power of attorney; therefore, Agents are not subject to the provisions of 20 Pa.C.S.A. Section 5601 et seq. (Chapter 56; Decedents, Estates and Fiduciaries Code) unless the agency was created by a separate power of attorney. Any provision that assigns Financial Institution rights to act on behalf of any person or entity is not subject to the provisions of 20 Pa.C.S.A. Section 5601 et seq. (Chapter 56; Decedents, Estates and Fiduciaries Code).

FOR FINANCIAL INSTITUTION USE ONLY

Acknowledged and received on _____ (date) by _____ (initials) | This resolution is superseded by resolution dated _____.

Comments:

BORROWER'S NAME AND ADDRESS ARDEN HOMEDUTLERS, LLC POST OFFICE BOX 90679 Columbia, SC 29209	LENDER'S NAME AND ADDRESS Southern First Bank, N.A. P.O. Box 7908 717 Lady Street, Suite D, Columbia, SC 29202	20-3118144 Loan Number <u>400938800</u> Date <u>09/28/2007</u> Maturity Date <u>09/24/2008</u> Loan Amount <u>\$ 499,000.00</u> Renewal Of _____

For value received, I promise to pay to you, or your order, at your address listed above the PRINCIPAL sum of Four Hundred Ninety-Eight Thousand Dollars Dollars \$ 499,000.00

☒ Single Advance: I will receive all of this principal sum on 09/28/2007. No additional advances are contemplated under this note.
☐ Multiple Advances: The principal sum shown above is the maximum amount of principal I can borrow under this note. On _____ I will receive the amount of \$ _____ and future principal advances are contemplated.

Conditional: The conditions for future advances are _____

☐ Open End Credit: You and I agree that I may borrow up to the maximum amount of principal more than one time. This feature is subject to all other conditions and expires on _____

☐ Closed End Credit: You and I agree that I may borrow up to the maximum only one time (and subject to all other conditions).

INTEREST: I agree to pay interest on the outstanding principal balance from 09/28/2007 at the rate of 7.750% per year until the rate changes.

☒ Variable Rate: This rate may then change as stated below.

☒ Index Rate: The future rate will be equal to the following index rate: Southern First Bank Prime

☐ No Index: The future rate will not be subject to any internal or external index. It will be entirely in your control.

☒ Frequency and Timing: The rate on this note may change as often as every day beginning 09/26/2007.

A change in the interest rate will take effect the day the rate changes.

☐ Limitations: During the term of this loan, the applicable annual interest rate will not be more than _____ % or less than _____ %.

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

☐ The amount of each scheduled payment will change. ☒ The amount of the final payment will change.

ACCRUAL METHOD: Interest will be calculated on a Actual/365 basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

☒ on the same fixed or variable rate basis in effect before maturity (as indicated above).

☐ at a rate equal to _____

☒ LATE CHARGE: If a payment is not made within 20 days after it is due, I agree to pay a late charge of 3.000% of the payment amount with a minimum of \$15.00.

☐ ADDITIONAL CHARGES: In addition to interest, I agree to pay the following charges which ☐ are ☐ are not included in the principal amount above: _____

PAYMENTS: I agree to pay this note as follows:

☒ Interest: I agree to pay accrued interest with the principal.

☒ Principal: I agree to pay the principal on 09/24/2008.

☐ Installments: I agree to pay this note in _____ payments. The first payment will be in the amount of \$ _____ and will be due _____. A payment of \$ _____ will be due _____ thereafter. The final payment of the entire unpaid balance of principal and interest will be due _____.

ADDITIONAL TERMS: ~~DOCUMENT PREPARATION FEE OF \$500.00~~

☒ SECURITY: This note is separately secured by (describe separate document by type and date):
 UNSECURED

(This section is for your internal use. Failure to list a separate security document does not mean the agreement will not secure this note.)

Signature for Lender

Justin Strickland
 President

PURPOSE: The purpose of this loan is CONSOLIDATION OF OUTSTANDING BUSINESS LOANS.

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGE 2). I have received a copy on today's date,
 ARDEN HOMEDUTLERS, LLC

ROBERT A. JONES MEMBER

ROBERT A. KRISLER MEMBER

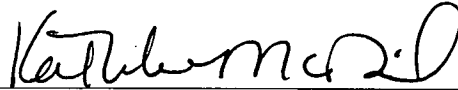
CARL EDWARD BUCK III MEMBER

SFB '0055

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

August 20, 2014



D. Reece Williams, III
Kathleen M. McDaniel
CALLISON TIGHE & ROBINSON, LLC
P.O. Box 1390
Columbia, South Carolina 29202
Tel. (803) 404-6900
Fax. (803) 404-6902
reecewilliams@callisontighe.com
kathleenmcdaniel@callisontighe.com
Attorneys for Appellant

RECEIVED

SEP 09 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Civil Action No. 2011-CP-40-01980

Appellate Case No. 2013-002673

Robert S. Jones.....Plaintiff/Appellant,

v.

Builders Investment Group, LLC,

Brian D. Boone and Arden Homebuilders, LLC.....Defendants,

Of Whom

Builders Investment Group, LLC

and Brian D. Boone are.....Respondents.

PROOF OF SERVICE

I certify that I have served the Record of Appeal of the Appellants on the following parties by causing a copy to be mailed to the parties on August 20, 2014, at the addresses shown below:

Thornwell "Biff" Sowell, Esquire
Sowell Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia SC 29211

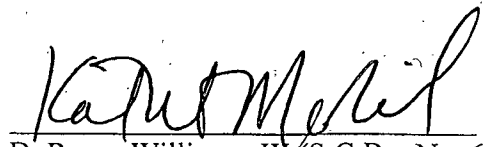
David C. Dick, Jr., Esquire
Law Office of David C. Dick
39 Broad Street, Suite 205
Charleston, SC 29401

Signature on following page

RECEIVED

AUG 21 2014

SC Court of Appeals



D. Reece Williams, III (S.C. Bar No. 6120)
Kathleen M. McDaniel (S.C. Bar No. 74826)
CALLISON TIGHE & ROBINSON, LLC
Post Office Box 1390
Columbia, SC 29202-1390
Telephone: (803) 404-6900
Facsimile: (803) 404-6901

ATTORNEYS FOR APPELLANTS

August 20, 2014
Columbia, South Carolina