

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

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S.C. Supreme Court

Op. No. 2014-UP-306 (S.C. Ct. App. filed Jul. 30, 2014)

Yadkin Valley Bank & Trust, ... Respondent,

v.

Oaktree Homes, Inc., Dawne M. Ras and
Thomas C. Ras, Daniel Simpson, Above All
Services, Inc., Carter Lumber Company, Efficient
Painting Contractors, Inc., Creative Concepts, and
Solid As A Rock, Inc., ... Defendants,

Of whom

Oaktree Homes, Inc., is the Petitioner.

APPENDIX

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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v.

Oaktree Homes, Inc., Dawne M. Ras and Thomas C. Ras,
Daniel Simpson, Above All Services, Inc., Carter
Lumber Company, Efficient Painting Contractors, Inc.,
Creative Concepts, and Solid As a Rock, Inc.,
Defendants,

Of whom Oaktree Homes, Inc., is the Appellant.

Appellate Case No. 2011-197970

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Unpublished Opinion No. 2014-UP-306
Heard September 12, 2013 – Filed July 30, 2014

AFFIRMED

John S. Nichols and Blake Alexander Hewitt, both of
Bluestein Nichols Thompson & Delgado, LLC, of
Columbia, and Chad Alan McGowan and William Angus
McKinnon, both of McGowan Hood & Felder, LLC, of
Rock Hill, for Appellant.

James W. Sheedy and Susan Elizabeth Driscoll, both of
Driscoll Sheedy, P.A., of Charlotte, N.C., for
Respondent.

PER CURIAM: Oaktree Homes, Inc. (Oaktree) appeals the trial court's order granting summary judgment to Yadkin Valley Bank & Trust (Yadkin Valley) on Oaktree's counterclaims for breach of contract, negligent misrepresentation, and breach of contract accompanied by a fraudulent act. Oaktree also argues the trial court erred in holding it waived its right to a jury trial on the counterclaims.

1. We find the trial court did not err in holding Oaktree's counterclaims against Yadkin Valley failed as a matter of law because it was unable to produce a written loan agreement. The lender statute of frauds precludes certain actions regarding loans for money where there is no writing evidencing the alleged promise or agreement. *See* S.C. Code Ann. § 37-10-107(1) (2002) (providing that no person may maintain an action or defense based upon a failure to perform an alleged commitment or agreement to lend or borrow money in excess of fifty thousand dollars unless that person "has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing"). Jurisdictions that allow a party to submit parol or extrinsic evidence to establish proof of a lost memorandum in order to "avoid" the requirements set forth in the general statute of frauds require that evidence to be clear and convincing. *See Weinsier v. Soffer*, 358 So. 2d 61, 63 (Fla. Dist. Ct. App. 1978) (stating proof of a lost document must be clear, strong and unequivocal); *Mossman v. Hawaiian Trust Co.*, 361 P.2d 374, 379 (Haw. 1961) (stating the proof to establish a lost memorandum must be clear and convincing); *Zander v. Ogihara Corp.*, 540 N.W.2d 702, 705 (Mich. Ct. App. 1995) (holding that extrinsic or parol evidence of alleged signature on a contract must be "clear, strong, and unequivocal," i.e., clear and convincing"); *Chakur v. Zena*, 233 S.W.2d 200, 202 (Tex. Civ. App. 1950) (stating proof of a lost memorandum must be clear and convincing); 72 Am. Jur. 2d *Statute of Frauds* § 194 (2012) ("Proof to establish the lost memorandum of a contract must be clear and convincing. The memorandum itself is, of course, the best evidence of its contents, and if its loss or destruction is not proved, secondary evidence is not admissible."). We hold that even if this court were to accept the lost memorandum exception to the general statute of frauds applied to the lender statute of frauds, Oaktree failed to provide the required clear and convincing evidence. *See Satcher v. Satcher*, 351 S.C. 477, 483, 570

S.E.2d 535, 538 (Ct. App. 2002) (defining clear and convincing evidence as the degree of proof that provides the fact finder with a "firm belief as to the allegations sought to be established"); *id.* ("Such measure of proof is intermediate, more than a mere preponderance, but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal."); *see also Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009) ("[I]n cases requiring a heightened burden of proof or in cases applying federal law, we hold that the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment."). The evidence Oaktree submitted concerning the existence and terms of the loan commitment letter was self-serving and contradictory. *See Weinsier*, 358 So. 2d at 63 ("The very purpose of the [s]tatute of [f]rauds is defeated where the sole proof of the existence and contents of a document relied upon to avoid the [s]tatute is the testimony of the plaintiff."); *Zander*, 540 N.W.2d at 704, 706 (reversing the trial court's denial of defendant's motions for directed verdict and JNOV, and explaining it would not "permit plaintiffs to defeat the purpose and intent of this statute solely on the basis of their own self-serving testimony").

2. We need not address Oaktree's remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

AFFIRMED.

HUFF, GEATHERS, and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-1673

Yadkin Valley Bank & Trust, ... Respondent,

v.

Oaktree Homes, Inc., Dawne M. Ras and
Thomas C. Ras, Daniel Simpson, Above All
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Painting Contractors, Inc., Creative Concepts, and
Solid As A Rock, Inc., ... Defendants,

Of whom

Oaktree Homes, Inc., is the Appellant.

PETITION FOR REHEARING

This petition is filed pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules. Rule 221 governs rehearing. Rule 240 governs motions and petitions generally.

This Court issued its decision in this matter on July 30, 2014. See Op. No. 2014-UP-306. This petition is therefore timely. See Rule 221(a), SCACR (providing that the petition for rehearing must be received within 15 days of the court's decision).

The appellant understands that this Court has deliberated on this matter and issued its opinion. The appellant nevertheless respectfully believes that the opinion should be withdrawn and reversed. The following is a list of specific points which the Court may have overlooked or misapprehended. The appellant also wishes to incorporate all of its arguments from briefing in order to preserve those arguments for later review.

- I. The Court may have overlooked that its decision is based on an argument that the Bank did not raise to the circuit court.

The issue that the parties presented to the circuit court was whether a party may satisfy the Lender Statute of Frauds by offering oral testimony that a written contract exists.

This Court's decision is based on a different issue. It affirms the circuit court because it believes that *if* oral testimony is admissible to prove a writing's existence, the appellant has not presented "clear and convincing evidence" on that point.

This was an expansion of the question presented. As the party requesting summary judgment, the Bank had the burden to affirmatively demonstrate that it was entitled to win as a matter of law. The Bank chose to take an uncompromising position—it argued that the Lender Statute of Frauds required Oaktree to physically produce a writing—and the Bank succeeded in convincing the circuit court to agree. That is the ruling the circuit court entered, and that is the posture in which the case comes to this Court for review.

The appellant was tasked with defeating *this* position—a thesis about the *type* of admissible evidence—to defeat summary judgment. The standard of proof was not the issue. See (R.pp.115-128; 132-142) (the bank's memos). Nobody argued that question, nobody gathered evidence to answer that question, and nobody built a record to inform that question.

- II. The Court may have overlooked that there is a specific rule of evidence that has direct application, that this is not a “lost contract” case, and that the cases that are cited in the Court’s decision actually counsel against the decision to affirm.

The circuit court’s ruling was not equivocal. It held that the Lender Statute of Frauds required the appellant to produce a written agreement and that the appellant could not satisfy the statute by offering oral testimony. (R.pp.13-14). It reasoned that oral testimony was categorically inadmissible—the writing *had* to be produced—and that this applied even if the defense involved the “regular” Statute of Frauds and not the Lender Statute of Frauds.

With the utmost respect for the circuit court, this view was obviously not correct. In pertinent part, Rule 1008 of the South Carolina Rules of Evidence provides that when an issue is raised about whether a writing existed, “the issue is for the trier of fact to determine as in the case of other issues of fact.” There are no cases interpreting this provision of the rule, but the rule does not leave much room for ambiguity. Not only is “other evidence” (meaning oral evidence) admissible, but the rule provides that the issue is for the fact-finder.

This Court’s decision does not reference Rule 1008. Instead, it references four (4) decisions from other jurisdictions as well as *American Jurisprudence*, a secondary authority.

There are two points about these authorities that should be instructive.

The first is that these authorities describe a rule that relates to “lost contract” cases. The rule is more nuanced than the label suggests; by its terms, it pertains to a specific type of dispute—a dispute about the *contents* of a lost writing. See *Zander v. Ogihara Corp.*, 540 N.W.2d 702 (Mich. Ct. App. 1995) (quoting *Weinsier v. Soffer*, 358 So. 2d 61 (Fla. Dist. Ct. App. 1978) (failing to produce a document does not bar proof of the document’s contents).

In the present case, the parties are not arguing about a writing's contents. They are disputing whether the writing was ever in existence. This is both a credibility dispute and a question of fact. The terms of the lost contract rule suggest that the rule does not apply.

The second point about these authorities is a point of posture. The present case was dismissed on summary judgment, but two of the cases cited in the Court's decision—*Weinsier* and *Zander*—came after the parties had been through a trial. *Zander*, 540 N.W.2d at 703 (noting that the appeal followed a jury trial); *Weinsier*, 358 So. 2d at 61 (appeal followed a bench trial). The third case, *Mossman v. Hawaiian Trust Co.*, 361 P.2d 374 (Haw. 1961), actually affirmed an order that *denied* a motion for summary judgment based on the statute of frauds. *Mossman* acknowledges that when the parties disagree on the existence of a writing, that disagreement creates a dispute of fact. 361 P.2d at 380.

The final case from another jurisdiction, *Chakur v. Zena*, 233 S.W.2d 200 (Tex. Civ. App. 1950), reversed an order for following the same faulty reasoning that the circuit court followed here. Oral testimony *is* admissible. The circuit court's holding was wrong.

It may be true that "clear and convincing evidence" will be the ultimate standard of proof at trial, but that cannot be the standard for defeating summary judgment. Deciding whether the proof has been clear will be judged by the trial record. These foreign cases do not support the circuit court's holding. If anything, they support reversal.

- III. The Court may have overlooked that a premise of its decision is factually inaccurate. There is more evidence of this writing than self-interested testimony from the appellant's principals.

The Court's decision takes the view that the appellant's evidence concerning the written loan commitment was self-serving and contradictory.

Bill Hargrove is not a party to this case. He is also not a principal or an employee of the Oaktree Homes, the appellant. He testified in his deposition that he knew a commitment to lend existed because Derek Franklin, a vice president of the Bank “told me it existed[.]” (R.pp.309-310). This testimony is not contradictory, and while Mr. Hargrove *did* have a stake in the underlying deal to develop this subdivision, he has no stake in this lawsuit.

There is a material difference between summary judgment evidence and trial evidence. Summary judgment motions are often based on depositions and affidavits, and both of these tools generally involve questions and statements that have been meticulously crafted in order to tease the testimony towards one party’s theory of the case. They present a picture of the evidence, but the picture is limited—it is only a snapshot. Testimony that appears to be inconsistent may turn out to be cogent and complimentary once a live witness has an opportunity to explain his or her answers, and live testimony also affords the factfinder the opportunity to assess a witness’s credibility. This last point can be particularly important in a case like the present one, where somebody’s story has to be false.

As this Court has previously (and correctly) observed, “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]” *Anderson v. Augusta Chronicle*, 355 S.C. 461, 475, 585 S.E.2d 506, 513 (Ct. App. 2003) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). This principle applies even when the case requires a heightened evidentiary showing to survive summary judgment. *Anderson* was a suit for libel against a newspaper, and in such a case, a public figure plaintiff must prove actual malice by clear and convincing evidence. 355 S.C. at 473, 585 S.E.2d at 512. Here is the point: at this stage, we must view

the evidence and draw all inferences from the evidence in the appellant's favor. If there was any way to read the evidence that Oaktree submitted as being consistent, both this Court and the circuit court were bound to apply that reading. And we cannot dismiss Oaktree's evidence as self-serving. That is a credibility determination which would only be appropriate after a trial. See, e.g., *Weinsier*, 358 So. 2d at 63 (finding the trial testimony insufficient).

IV. The Court may have overlooked the fact that the appellant's request for sanctions directly impacts the basis of the Court's decision.

As part of its argument against summary judgment, the appellant contended that the Bank had not honored its obligation to preserve relevant information during discovery. The Bank destroyed several of its computers (including Derek Franklin's computer) months after the Bank filed this lawsuit, and the Bank did not institute a "litigation hold"—an instruction for its employees to preserve relevant information—until over a year later. This issue was covered in the appellant's briefs. It is discussed from pages 11 through 14 of the principal filing and pages 8 through 10 of the reply.

Nobody likes pressing an issue that deals with sanctions, but the destruction of information that occurred in this case was real, and the Court's opinion does not address the argument that the circuit court's analysis was incorrect and that under these circumstances, summary judgment was either improper or premature. It is possible to avoid deciding this issue, but the only way to do so is to agree with the appellant's previous arguments and reverse the circuit court because its view of admissible evidence was mistaken.

As the merits briefs describe, the law establishes that in deciding whether and what sanctions to impose, the circuit court should weigh the nature of the violation, the discovery

posture of the case, willfulness, and the degree of prejudice. *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 217 (Ct. App. 1997) (describing the test for discovery sanctions in the context of a party's failure to disclose evidence). The circuit court did not engage in this analysis. Instead, the circuit court reasoned that it would not sanction the Bank because Oaktree could not prove that the written loan commitment had actually existed. (R.p.20). The court also stated (without further explanation) that there was no evidence of the Bank's willful disobedience. *Id.*

This analysis was both circular and summary. The circuit court never described that the bank was obligated to retain information as soon as litigation was reasonably foreseeable, and the circuit court paid no attention to the fact that two days before the hearing on the bank's motion for summary judgment, the bank produced copies of electronically stored information that had *never been previously produced*. This was four months after the scheduling order called for discovery in this case to end. The court might have ultimately elected not to sanction the Bank, but the court was obligated to ask the right questions and perform the correct analysis.

By not performing the appropriate analysis, the circuit court abused its discretion. This is the same flaw that was present in *Samples*. See 329 S.C. at 114, 495 S.E.2d at 218. *If* the Court reaches this issue, it should reverse the circuit court and remand with instructions that the court decide the request for sanctions via the use of the appropriate test.

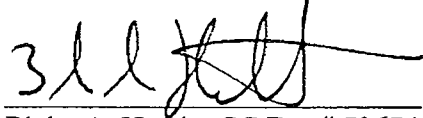
CONCLUSION

It may be instructive to recall the version of the facts that we must take as true for the purposes of summary judgment. According to the appellant, not only did representatives of

American Community Bank repeatedly tell the appellant's representatives and other individuals (including attorneys and other bankers) that this transaction would close, but the parties executed a written agreement that detailed the terms of the loan. Then, a bank vice president took custody of that writing and destroyed it. The circuit court held that the Lender Statute of Frauds barred a suit for this sort of conduct, but this Court should reject that reasoning. This case contains a factual dispute, and that dispute should be remanded for trial. Financial institutions are not perfect. As with any other business, it is possible for a bank to act unscrupulously. This Court should reverse.

August 11, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Blake A. Hewitt', with a long horizontal stroke extending to the right.

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All Services, Inc.; Carter Lumber Company;
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Of Which

Oaktree Homes, Inc. is the Appellant.

RETURN TO PETITION FOR REHEARING

This Return is filed pursuant to Rule 240(e) of the South Carolina Appellate Court Rules. Because a return has not been requested by this Court, the Return is not mandatory. The Return is submitted as a precatory filing under the Rule. Appellant served Respondent with a copy of the Petition for Rehearing on August 11, 2014; therefore, this Return is timely filed.

Rule 1008, SCRE, was not argued or raised by Appellant in the trial court. Appellant

did not brief the issue in the trial court, nor did Appellant argue Rule 1008 at summary judgment. The trial court did not enter a decision on Rule 1008. Appellant made no Rule 59(e) motion. Under South Carolina law, an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Rule 1008 was not preserved by Appellant for appellate review and, therefore, cannot be raised for the first time now.

Even if it had been, Rule 1008 is “identical to the federal rule”. (Rule 1008, SCRE, Note.) The Notes of Advisory Committee on Proposed Rules state, “The decision is not one for uncontrolled discretion of the jury but is subject to the control exercised generally by the judge over jury determinations.” (Fed. R. Evid. 1008, Notes of Advisory Committee on Proposed Rules.) The Notes then cite to Fed. R. Evid. 104(b) (identical to the corresponding South Carolina Rule), which grants *the court* control over what evidence is admissible. Rule 104(b) requires evidence that is “sufficient to support a finding that the fact does exist.”

In determining whether evidence exists, the same standard applicable at trial (clear and convincing evidence) is applicable at summary judgment. *See George v. Fabri*, 345 S.C. 440, 453, 548 S.E.2d 868, 875 (2001) (“Rule 56(c) requires that summary judgment be granted where there is no *genuine issue of material* fact and the moving party is entitled to judgment *as a matter of law*. In our opinion, the trial court would only be able to make this evaluation if it considered the substantive evidentiary standard applicable at a trial on the merits.”) (Emphasis in original.). Appellant’s assertion that the trial standard should not be used at summary judgment is incorrect and contrary to established South Carolina law.

Even if Appellant could scale the obstacle of the requirement that a writing must be produced to defeat the lender statute of frauds, Appellant would then just run into the brick wall of the clear and convincing evidentiary standard. Appellant only has the self-serving and conflicting testimony of its principal and Appellant's seller of real property, Har-Lee (Bill Hargrove), both of whom stood to gain at the time of their testimony from suggesting a lost loan commitment letter. This Court was correct in its decision that the evidentiary standard for a lost memorandum had not been met.

"The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001), *quoting* Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina*, 309 (1999). Through the Petition, Appellants are rehashing points already offered by them which the Court has declined to find persuasive in its issued opinion (Opinion). The Court did not overlook or misapprehend the arguments of Appellant.

Appellant contends this Court based its ruling solely on the grounds that Appellant failed to present clear and convincing evidence of the existence of a writing. (Petition, p.2.) Appellant has misread the Opinion. The Opinion states the trial court was correct in dismissing Appellant's counterclaims because "it was unable to produce a written loan agreement." (Unpublished Opinion No. 2014-UP-306, p.1 (2014).) This Court agreed with the trial court that the "lender statute of frauds precludes certain actions regarding loans for money where there is no writing evidencing the alleged promise or agreement." (*Id.*)

Appellant's failure to produce a writing is the basis upon which this Court ruled.

The Court then explained that, "*even if this court were to accept the lost memorandum exception,*" which is not tantamount to the Court saying it had, Appellant failed to meet the requisite evidentiary burden of clear and convincing evidence. (*Id.*, p.2 (Emphasis added.)) The Court did not rule that the lost memorandum exception applicable to the *general* statute of frauds *in other jurisdictions* was applicable to the lender statute of frauds in South Carolina. The words "even if" were used not to adopt this exception, but to point out the overreaching of Appellant's position, i.e., they had to produce a writing, but *even if* they were not required to do so, they failed to present the requisite level of evidence to fall within the exception.

Even construing the evidence in favor of Appellant, there is nothing clear and convincing in the record that shows a final, signed loan commitment from Respondent was ever delivered to and received by Appellant. Whatever Appellant allegedly saw it admittedly rejected. Appellant and Respondent agreed the alleged draft letter would have to be re-typed and re-signed. These are Appellant's assertions. (R. pp. 328, 330, 341.) Bill Hargrove could not testify that he ever saw or received the loan commitment Appellant alleges existed. (R. pp.309-310.) The Opinion says Appellant had to produce a writing and based on the evidence, the Court was not inclined to find a lost memorandum exception to the lender statute of frauds..

As a last ditch effort, Appellant seeks to buttress its absence of clear and convincing testimony by accusing Respondent of intentionally destroying the loan commitment. During appellate review of a motion for sanctions, a "trial court's rulings on discovery matters will

not be reversed on appeal absent a clear abuse of discretion.” *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 220, 493 S.E.2d 826, 836 (1997) (Citations omitted.). The abuse of discretion standard does not allow the trial court’s decision on whether to award sanctions to be “disturbed on appeal unless the decision is controlled by an error of law or is based on unsupported factual conclusions.” *Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC*, 394 S.C. 97, 104, 713 S.E.2d 650, 654 (Ct. App. 2011) (Finding no abuse of discretion in trial court’s refusal to award sanctions.) Appellant does not allege an error of law, but seeks reversal on the grounds of unsupported factual conclusions.

The basis for Appellant’s motion for sanctions is the allegation that Respondent may have destroyed the alleged draft loan commitment. The trial court’s decision *not* to award sanctions was rooted in the facts presented at the hearing. Despite Appellant’s attempts to twist the testimony of Walter Joyce, Respondent’s current IT director, related to the destruction of outdated equipment, Appellant cannot change what Joyce actually said. He testified that “I haven’t found any evidence to lead me to believe that any data had been deleted.” (R. p. 313.) He went on to say that the reason he knew nothing had been deleted is “we don’t delete anything in that archive,” referring to the e-mail archive of Respondent. (R. p. 314.) In fact “everything that’s been put in that [e-mail] archive is still in that archive.” (R. p. 315.)

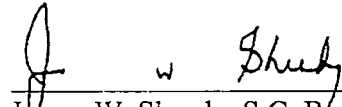
The only evidence in the record is that no data was deleted during the destruction of Respondent’s outdated computer equipment. The only evidence presented was the *lack of evidence* of any destruction of data by Respondent. Likewise, there was no evidence of any intentional wrongdoing by Respondent. There was no abuse of discretion on the part of the

trial court. Appellant cannot transform its self-serving and conflicting testimony on a lost loan commitment into clear and convincing evidence by misconstruing Respondent's IT director's testimony. Lack of evidence added to self-serving and conflicting testimony does not equal clear and convincing.

The Petition should be denied. Appellant cannot raise new arguments on a petition for reconsideration. This Court did not overlook or misapprehend the arguments of Appellant.

Respectfully submitted,

Date: 8/21/14



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-1673

Yadkin Valley Bank & Trust, ... Respondent,

v.

Oaktree Homes, Inc., Dawne M. Ras and
Thomas C. Ras, Daniel Simpson, Above All
Services, Inc., Carter Lumber Company, Efficient
Painting Contractors, Inc., Creative Concepts, and
Solid As A Rock, Inc., ... Defendants,

Of whom

Oaktree Homes, Inc., is the Appellant.

REPLY SUPPORTING REHEARING

This reply is filed pursuant to 240(f) of the South Carolina Appellate Court Rules.
Rule 240 governs motions and petitions generally.

This reply is timely. The bank served its return on August 21, 2014.

The following are brief responses to the arguments that are contained in the return.
Despite the bank's suggestion to the contrary, the appellant respectfully believes that this
Court should grant rehearing and change its decision.

I. There is no error preservation problem. The appellant is arguing the same issue that was argued throughout the proceedings below and throughout the briefs.

As this Court is well-aware, the concept of “error preservation” relates to the requirement that a party present all of his or her issues and arguments to a lower court before raising them on appeal. This is a rule of fairness that is meant to help a lower court make the proper ruling and to create a better record for appellate review. See, e.g., *Elam v. South Carolina Dep’t of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004) (explaining these principles).

Oaktree is not making any “new” arguments on appeal. The summary judgment arguments centered around the Lender Statute of Frauds and whether Oaktree could prove that it had received a written agreement that complied with the statute. Oaktree is not arguing any additional issues. This is the same friction the parties have been experiencing since the beginning.

Yes, Oaktree did not cite to Rule 1008 in the proceedings below, but a party need not cite to a doctrine or use its proper name in order to preserve an argument about that doctrine for appellate review. *State v. Gamble*, 405 S.C. 409, 416 n.3, 747 S.E.2d 784, 787 n.3 (2013) (noting this principle). There were several sides to the arguments that Oaktree made below, and nobody could plausibly deny that one of those was the argument that the oral testimony tended to establish that a written contract *did indeed* exist. The bank referenced Rule 1008, but it argued (wrongly) that this oral testimony was categorically inadmissible. (R.p.212, lines 2-4). This is the same argument the parties have been having. Nothing is new.

The court system does not hold parties to a standard of perfection. No court has held that a party may not cite an authority on appeal unless the authority was cited below.

Also, the timing of this preservation argument is suspect. For the most part, Oaktree's petition for rehearing did nothing more than repeat the arguments from its briefs. But even though Oaktree's arguments are mostly a re-hash, this is the first time the bank has taken the view that these arguments are not preserved. Citations to Rule 1008 were littered throughout Oaktree's previous filings, but the bank never suggested that these citations were improper. The bank also did not reference the rule or argue about the rule's application in *its own* brief. The return offers no explanation for this recent shift in strategy.

The reality is that the bank prevailed on summary judgment because it sold the circuit court on a view of the law that was false. The bank argued that oral testimony was categorically inadmissible, and we know that this is not true. Rule 1008 acknowledges that this testimony *is* admissible. The argument that the bank made (and the ruling that the circuit court entered) was wrong.

II. If the bank is right and the admission of this oral testimony involves a question of conditional relevance, the circuit court *still* erred because it did not perform the correct analysis.

The bank cites the Federal version of Rule 1008 and says that the question of whether oral evidence has proved the existence of a contract is not *always* a question for the jury.

This is true. Oaktree will concede the point. The Federal rule is the same as the State rule, and the notes to the rule indicate that a judge retains the ability under Rule 104 to withdraw the issue from the jury's consideration if the evidence that has been introduced is not sufficient to allow the jury to make a finding of fact. This is (effectively) what happened in *Weinsier v. Soffer*, 358 So.2d 61 (Fla. Dist. Ct. App. 1978) and *Zander v. Ogihara Corp.*, 540 N.W.2d 702 (Mich. Ct. App. 1995) — two of the four foreign cases that this Court cited

in its decision. The parties tried these cases to a jury, and when the verdicts were appealed, the appellate courts held that the trial judges should have withdrawn the questions from consideration because the trial evidence was too thin.

But notice what the bank is doing here. The argument that it gave to the circuit court was that this testimony was not *admissible*. Now, the bank is changing course and saying that even though the testimony *is* admissible, the question of whether the issue goes to the jury is subject to the judge's supervision. This is a bait and switch.

The rules allow this Court to affirm based on any ground in the record, but the parties did not litigate this question below. If they had, there would be evidence on the point. The bank sought summary judgment on specific grounds, but the bank now believes that anything is fair game and that there is no difference between summary judgment and trial.

This Court should say that the bank is wrong. Summary judgment is not the same thing as a trial. When the law gives the trial judge the discretion to make a ruling and the judge mistakenly believes that he has no discretion, the judge's misunderstanding constitutes an *abuse* of discretion. See, e.g., *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 155, 399 S.E.2d 439, 441 (1990). By mis-believing that this testimony was inadmissible, the circuit court committed a reversible error. The court was bound to apply the proper test, and this case should be remanded so that the court can do so.

III. Oaktree does not need to prove its case by clear and convincing evidence in order to defeat summary judgment.

The bank says that the summary judgment standard is the same standard that applies at trial. This is not true. The trial standard is relevant, but it is not identical.

Consider a case that involves the preponderance of the evidence standard. A plaintiff in such a case does not need to have the greater weight of the evidence in order to defeat summary judgment. Instead, the plaintiff need only provide a “scintilla” of evidence in order to advance to trial. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). The task of weighing evidence is generally for the fact-finder.

The standards are also different if a case involves a higher burden of proof. *George v. Fabri* — the same case that the bank cites in its return — involved a defamation suit where the clear and convincing evidence standard applied. The Supreme Court’s decision articulates the summary judgment standard, and despite the bank’s suggestion to the contrary, the decision *does not* say that the summary judgment standard is identical to the standard that will apply at trial. A plaintiff is not required to prove his claim by clear and convincing evidence in order to survive. Instead, the question is whether a reasonable jury could look at the evidence, resolve any disputes in the evidence, and find that the plaintiff’s evidence meets this standard. See 345 S.C. 440, 453, 548 S.E.2d 868, 875 (2001). Why would it be impermissible for a jury to determine that Tom Ras, Dawne Ras, and Bill Hargrove are telling the truth? They may offer compelling testimony, and the jury may decide that it is Derek Franklin, and not Oaktree’s witnesses, who is lying.

The bank is asking the court to do things that a court cannot do. The bank wants the court decide credibility issues, and the bank also wants this Court to grant summary judgment based on an argument that the bank did not make below and that it did not make on appeal. This is demonstrably unfair. If the bank had raised these arguments below, the parties would have built the record differently.

IV. The sanctions issue *does* involve both a legal error *and* a factual error. Failing to conduct the appropriate analysis amounts to an error of law, and this Court can judge for itself whether Oaktree is describing the relevant testimony in an honest fashion.

The return says that the argument on sanctions does not allege a legal error. This is not true.

Oaktree has consistently argued — in its merits briefs and in the rehearing petition — that the circuit court’s analysis on sanctions was circular. Instead of examining the claim for sanctions in any detail, the circuit court summarily held that it could not sanction the bank for something that Oaktree could not prove had existed. By hitching the request for sanctions to Oaktree’s ability to prove the contract, the circuit court was requiring Oaktree to prove its case on the merits. It is difficult to see how a reasonable person could disagree.

This is the same sort of error that was present in *Samples v. Mitchell*, where the circuit court did not weigh the required factors. 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997). The reasoning on sanctions in the present case is not lengthy. See (R.p.20). It never discussed the duty to preserve relevant information, the type of misconduct that allegedly occurred, or the posture of the case.

Finally, the return accuses Oaktree of dishonestly twisting the testimony.

This Court is perfectly capable of deciding which party is the party that is distorting the record. The bank’s information technology director explained that while he has the ability to retrieve e-mails between Derek Franklin and any of the eight accounts that the bank retained after its merger, he does not have the ability to retrieve any of Mr. Franklin’s e-mails that do not involve one of those accounts. He agreed that such e-mails were irretrievably

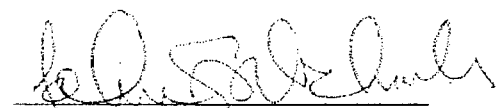
gone. (Supp.R.p.6, line 24 - p.7, line 6). Yes, the bank has an e-mail “archive,” but that archive contains e-mails that were written *after* the bank installed the archive. (R.p.316, lines 2-17); (Supp.R.p.4, line 2 - p.7, line 6). This did not happen until after the merger and after this lawsuit began. *Id.* Oaktree is not twisting testimony. This is just repeating what the gentleman said.

CONCLUSION

It is certainly possible that a jury might disagree with Oaktree’s evidence and return a verdict in the bank’s favor, and it is also possible that a judge might hear Oaktree’s evidence and decide that the proof is too thin, but this much should be certain — a party *is* allowed to offer oral testimony that a contract exists. The circuit court’s reasoning was wrong. This case contains a factual dispute, and that dispute should be remanded for trial. This Court should reverse.

August 28, 2014

Respectfully submitted,



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Yadkin Valley Bank & Trust, Respondent,

v.

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Creative Concepts, and Solid As a Rock, Inc.,
Defendants,

Of whom Oaktree Homes, Inc., is the Appellant.

Appellate Case No. 2011-197970

ORDER

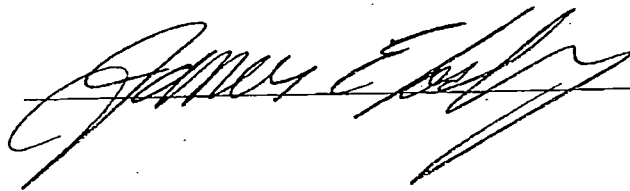
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

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FILED

September 18, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-1673

RECEIVED
MAR 04 2013
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Oaktree Homes, Inc., is the Appellant.

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STATEMENT OF ISSUES ON APPEAL

- I. Whether a Party May Satisfy the Requirements of Section 37-10-170 of the South Carolina Code — Commonly Referred to as the Lender Statute of Frauds — by Offering Oral Testimony That the Lender Executed a Written Commitment to Lend.
- II. Whether the Circuit Court Erred in Granting Summary Judgment on the Grounds That a Subsequent Loan Constituted a Novation, That the Parties Did Not Have a “Final” Loan Agreement, and That a Bank Does Not Owe a Potential Borrower any Duty of Care.
- III. Whether a Counterclaim Alleging Breach of a Promise to Lend Money Is a Compulsory Counterclaim in an Action to Foreclose on a Different Loan, from the Same Bank, and the Loans Are Related.

STATEMENT OF THE CASE

This is an appeal in an action to foreclose on several commercial loans. Although the borrowers ultimately did not contest the foreclosure, they pressed for a trial on several counterclaims related to a potential loan that the bank investigated but declined to fund. The circuit court granted the bank summary judgment on the counterclaims, relying primarily on the fact that the borrowers could not produce a written agreement related to the potential loan. The issues in this appeal are whether the circuit court erred in that decision and whether those counterclaims should be tried to a jury instead of a judge. The summary judgment issue involves section 37-10-107 of the South Carolina Code; commonly referred to as the Lender Statute of Frauds.

American Community Bank initiated this suit by filing a complaint on April 16, 2009. (R.p.29) (the complaint). The complaint sought to foreclose on four mortgages.

Oaktree Homes was the borrower in each transaction. Dawne Ras (the company president) and Tom Ras personally guaranteed each loan. The complaint named Oaktree and

the Rases as defendants. The other named defendants were included in the suit because they had judgments or liens against some of the relevant properties. See (R.p.30, ¶¶4-7).

Oaktree and the Rases answered, defending the foreclosure by claiming that the bank's suit was barred by the doctrine of unclean hands. (R.p.54) (the answer). They also brought three counterclaims against the bank, claiming that the bank had committed and then backed-out of a loan and that this had caused Oaktree to lose approximately \$2.5 million in profit. The counterclaims were breach of contract, breach of contract accompanied by a fraudulent act, and negligent misrepresentation. See (R.p.54). In an amended answer, Oaktree and the Rases added counterclaims for fraud, interference with contract, and a violation of the South Carolina Unfair Trade Practices Act. (R.p.84).

In February of 2010, the circuit court substituted Yadkin Valley Bank & Trust as the plaintiff. Yadkin had purchased American Community Bank. See (R.p.101).

A scheduling order set March 15, 2011, as the deadline for filing dispositive motions, and the parties filed five (5) motions on that deadline. Four of these motions were filed by the bank. The bank sought (1) summary judgment on its claims; (2) summary judgment on the breach of contract counterclaim; (3) summary judgment on the rest of the counterclaims; and (4) an order denying Oaktree a jury trial on the counterclaims. The only motion filed by Oaktree and the Rases was a motion for sanctions which alleged that the bank had not honored its discovery obligations.

The circuit court heard the motions on May 18, 2011. Oaktree and the Rases did not oppose summary judgment in favor of the bank on the bank's foreclosure claims, see (R.p.173, lines 3-17), and they also did not oppose summary judgment in favor of the bank

on the counterclaims for fraud, interference with contract, and a violation of the South Carolina Unfair Trade Practices Act. (R.p.262, lines 18-24) (transcript); (R.p.25) (the circuit court's order). The only remaining issues were the request for sanctions, the bank's request for summary judgment on the counterclaims for breach of contract, negligent misrepresentation, and breach of contract accompanied by a fraudulent act, and whether Oaktree had the right to a jury trial on those counterclaims.

In an order filed July 20, 2011, the circuit court granted the bank's motions and denied the request for sanctions. (R.p.1). On August 18, 2011, Oaktree served notice of this appeal.

STATEMENT OF FACTS

This case began as an action to foreclose on four commercial loans. The record refers to those loans as Palm Tree Cove Phase I, Palm Tree Cove Phase II, Trinity Ridge, and the Glynnns. See, e.g. (R.p.2).

The counterclaims in this case relate to Palm Tree Cove Phase II, which is part of a residential subdivision on Lake Wylie in York County, South Carolina. In general, the alleged factual basis for Oaktree's counterclaims is that the bank backed out of funding a large loan for Palm Tree Cove Phase II "at the 11th hour" and that this led to a substantial loss of profits and, ultimately, the failure of Oaktree's business.

Tom Ras had been working in the construction business for several years by the time he and his wife formed Oaktree in or around 2004. Oaktree's original business model was building single family residential homes in York County. (R.p.323). Oaktree targeted York County because of its proximity to Charlotte, North Carolina, (R.pp.324-325), and its

business grew steadily between 2004 and 2007. For example, Oaktree had \$2 million in revenue in 2006 and over \$5 million in revenue in 2007. (R.pp.326-327).

At some point, Oaktree began investigating a much larger project, specifically, the purchase, resale, and development of 51 residential lots in the Palm Tree Cove Phase II subdivision. Grier Sandifer, a commercial loan officer at the Bank of York, indicated that he learned of Tom Ras's interest in this project "sometime before September of 2007." (R.pp.344-345). The project unfolded in this way: in December of 2007, Oaktree entered into a contract to purchase 51 lots in Palm Tree Cove Phase II from a real estate development company, Har-Lee LLC, for roughly \$4.4 million. (R.p.361). The contract contained different payment options, and the exact purchase price depended on which option Oaktree selected. (R.p.361, ¶1A). The contract was not contingent on Oaktree obtaining financing, which meant that by its terms, the contract obligated Oaktree to complete the purchase or (presumably) be liable for breach of contract. Based on the strength of this contract, Har-Lee was able to obtain a loan to fund the development of the property into a subdivision of "buildable lots" with the necessary utilities and the desired amenities. (R.pp.303-307). Har-Lee was responsible for financing and running this stage of the development, but the contract also specified that Oaktree would be hired to do some of the work. See (R.p.363) and (R.p.308, lines 18-21). The contract specified that the closing was set to occur no later than February 28, 2008.

The purchase did not close in February of 2008, and Oaktree continued to pursue the transaction in the months that followed. In May of 2008, Oaktree executed a contract to sell the 51 lots to another corporation, Palmetto Investment Holdings Group, for what the

contract describes as an “estimated” price of roughly \$6.7 million. (R.p.373). This meant that if Oaktree could obtain the property from Har-Lee, it could then sell that property for a substantial profit in relatively short order. That profit was not guaranteed — the contract called for Oaktree to “buy back” several individual lots if the Palmetto Group did not meet its own sales goal for the neighborhood, see (R.pp.288-289) — but with this contract in place, Oaktree had assembled the skeleton of a two-transaction project with a fairly high potential for profit. What held Oaktree back was the roughly \$4.4 million it needed to purchase the 51 lots from Har-Lee.

According to Oaktree, American Community Bank agreed to fund \$3.8 million of the loan plus the closing costs, and the Bank of York agreed to cover the rest. (R.p.332, lines 20-22; Supp.R.p.11, lines 1-11). Oaktree alleged American Community Bank obligated itself to the transaction through a commitment letter executed by Derek Franklin, a loan officer at the bank. Specifically, Oaktree alleged that Franklin brought the commitment letter to Oaktree’s offices, that the parties made written alterations to the letter and initialed the changes, that the parties executed the commitment letter, and that Franklin took the executed letter with him so he could develop a “clean” copy to execute at closing. Oaktree alleged this happened some time in May of 2008, but the bank denied such a letter ever existed.

A closing on the 51-lot purchase was scheduled for June 6, 2008, but that closing did not take place, see (R.pp.320-321), and American Community Bank ultimately declined to fund the 51-lot transaction. Instead, it funded Oaktree’s purchase of 11 of Har-Lee’s 51 lots in Palm Tree Cove Phase II. This purchase closed in July of 2008. See (R.p.347) (the note). Oaktree defaulted on this loan, the bank initiated this lawsuit seeking foreclosure, and

Oaktree brought its counterclaims related to the bank's failure to fund the 51-lot transaction.

The first issue the circuit court's summary judgment order addressed was whether Oaktree had a right to a jury trial on its counterclaims. The circuit court noted that breach of contract, negligent misrepresentation, and breach of contract accompanied by a fraudulent act were all "legal" claims, and the court held that Oaktree waived its right to a jury trial because those counterclaims were permissive and had been brought in response to an action for foreclosure, which sounds in equity. (R.pp.5-8).

The second issue the circuit court addressed was Oaktree's breach of contract claim. The circuit court held that the Lender Statute of Frauds required Oaktree to produce a written loan agreement and held that Oaktree could not "circumvent" this requirement by offering oral testimony that such a writing had existed. The court also held that an integration clause in the papers for the July loan (for 11 lots in Palm Tree Cove Phase II) barred the counterclaims because it indicated "that the loan documents constituted the entire understanding" between the parties, and that Franklin's having taken the alleged commitment letter with him to re-type and re-execute meant that the letter was not a "final" commitment. (R.pp.8-17).

As for the negligent misrepresentation and breach of contract accompanied by fraud claims, the circuit court held that both failed because Oaktree could not produce a written commitment to lend. (R.pp.17-19). The circuit court also held that there was no evidence of a fraudulent act accompanying the breach of any contract and that the bank did not owe Oaktree any duty outside of the alleged contractual relationship. (R.pp.17-19).

Oaktree's motion for sanctions arose out of the fact that the bank had physically destroyed some of its computers during this litigation and that the bank had not instituted a "litigation hold" — an instruction that the bank not destroy any relevant documents or information — until late in 2010, over a year and a half after this suit began. Oaktree argued that this conduct made it inequitable to allow the bank to use the lack of a written commitment to lend as a basis for summary judgment, but the circuit court denied this motion, observing that Oaktree did not have any physical proof that a commitment letter ever existed. The court opined that it could not sanction the bank for something Oaktree allegedly lost, and that there was no evidence of "willful disobedience." (R.p.20).

ARGUMENT

Oaktree is not separately appealing the grant of summary judgment with respect to its counterclaim for breach of contract accompanied by a fraudulent act. Breach of contract and breach of contract accompanied by a fraudulent act are not separate causes of action. See *Smith v. Canal Ins. Co.*, 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980).

The central issue in this case is whether a party may satisfy a statute of frauds by offering oral testimony that a written contract existed. The circuit court incorrectly held that a party may not. When one party alleges that a written contract existed and the other party denies it, the existence of the contract is a dispute for the fact-finder. For this reason, the circuit court erred in basing its ruling on Oaktree's failure to present written evidence of the bank's commitment to lend.

The alternative bases for the circuit court's summary judgment rulings were also controlled by errors. In order to find that the July loan acted as a novation between Oaktree

and the Bank, the circuit court had to find facts; specifically, a mutual intention to substitute a new obligation for an existing one. It also had to find facts in order to conclude that Derek Franklin's taking the commitment letter with him meant that the letter was not a "final" contract. As for the conclusion that the bank did not owe Oaktree any duty of care "outside" of the alleged contract, that is inconsistent with South Carolina's law on negligent misrepresentation. That law instructs that a party has a duty to exercise reasonable care in sharing information about a transaction when the party has a pecuniary interest in the transaction.

Finally, the circuit court erred in concluding that Oaktree's counterclaims were permissive. A counterclaim is compulsory when it has a logical relationship to the claim in the complaint, and although the 11-lot loan was a "separate" loan from the 51-lot loan, there was a relationship between those transactions.

I. The Circuit Court Erred In Basing Its Grant of Summary Judgment on Oaktree's Failure to Produce A Written Loan Commitment From the Bank.

The Lender Statute of Frauds is codified in section 37-10-107 of the South Carolina Code (2002), and it "precludes certain actions regarding loans for money where there is no writing evidencing the alleged promise or agreement." *Sea Cove Dev., LLC v. Harbourside Cmty. Bank*, 387 S.C. 95, 102, 691 S.E.2d 158, 161 (2010).

Although the Supreme Court has described this statute as "essentially a statute of frauds," *id.* at 105, 691 S.E.2d at 163, the Lender Statute of Frauds is more than that. "Part performance" and "equitable estoppel" are exceptions to the statute of frauds that were created by courts of equity because the court "[would] not permit a statute designed to

prevent frauds to be used as an instrument to effect a fraud.” *Aust v. Beard*, 230 S.C. 515, 522-23, 96 S.E.2d 558, 562 (1957) (describing part performance). The Lender Statute of Frauds does not allow these exceptions; it prevents *all* claims — “for legal or equitable relief,” section 37-10-107(1) — and it specifically lists equitable estoppel and part performance as being barred unless the statute’s writing requirement is satisfied. See § 37-10-107(2)(b) & (c). In pertinent part, the statute instructs that the party seeking to maintain the action or defense based on a promise to lend money must have received a writing. This writing must contain the material terms and conditions of the promise, and the lender or its agent must have signed the writing. § 37-10-107(1)(c).

The circuit court held that Oaktree could not meet this statute through offering oral testimony that such a writing had existed. That ruling is not correct.

A. When the Opposing Party Claims That a Contract Never Existed, the Law Allows a Party Claiming a Contract to Offer Oral Evidence of That Contract.

The question whether a party may admit oral evidence related to a contract depends on the nature of the disagreement. For example, when a party relies on a series of documents (instead of a single document) to satisfy the “writing” requirement of the statute of frauds, the terms of the agreement must appear in the four corners of the documents; a party cannot use oral evidence to prove the contract. See *Young v. Independent Pub. Co.*, 273 S.C. 107, 111, 254 S.E.2d 681, 683 (1979). Rule 1002 of the South Carolina Rules of Evidence, better known as the “best evidence rule,” generally requires that a party produce the original writing in order to prove the writing’s contents, but Rule 1004 instructs that the original is not required if it has been lost, cannot be obtained, or was last in the possession of the offering

party's opponent. Rule 1008 provides that questions like whether the original has been lost or cannot be obtained are for the court to determine in the same way it determines other questions of preliminary admissibility, but the rule also provides that "when an issue is raised [] whether the asserted writing even existed . . . the issue is for the trier of fact to determine as in the case of other issues of fact." Put differently, the rule says that when the plaintiff claims that a written contract existed and the defendant claims that it did not, this creates a question of fact for the fact finder.

The notes to Rule 1008 indicate that "[t]here are no cases discussing the role of the trier of fact in this area," but they also instruct that the rule is identical to Rule 1008 of the Federal Rules of Evidence. In explaining why the question of whether a writing has been lost is treated differently from the question of whether a writing ever existed, the 1972 Advisory Committee Notes instruct that some questions "go beyond the mere administration of the rule preferring the original and into the merits of the controversy." The notes give the example of a plaintiff who offers oral evidence of a contract and a defendant who denies that the contract existed; and the notes explain "[i]f the judge decides that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue." The notes explain that this provision of the federal rule "is designed to ensure treatment of these situations as raising jury questions."

Wright and Gold's treatise on Federal Practice and Procedure offers a similar justification. It explains that the question of whether a contract ever existed is the type of question that the jury "usually is both willing and able to decide," and that "withdrawing from the jury the power to decide these facts may significantly undermine the right to jury

trial because these facts often are intertwined with the central issues in the case.” 31 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 8062 (2000).

This Court should hold that the circuit court’s recitation on this point of law is not correct. The circuit court’s order cited one case in which the claim was that the original had been lost and two cases where the claims related to the execution of the contract, but the bank’s claim in this case was that the Rases were lying and that no written agreement ever existed.¹ In “lost” contract cases, the trial court has the discretion to admit oral evidence of the contract, see *Windham*, 253 S.C. at 572-73, 172 S.E.2d at 119, and if the opposing party claims that a contract never existed, Rule 1008 instructs that the dispute generally goes to the fact-finder. The circuit court accordingly erred when it based its grant of summary judgment on Oaktree’s failure to produce a written loan commitment from the bank.

**B. The Circumstances Surrounding Oaktree’s
Request for Sanctions Suggest That Summary
Judgment Was Premature.**

“The decision of what kind and whether to impose discovery sanctions is left to the sound discretion of the circuit court.” *Fields v. Reg’l Med. Ctr. Orangeburg*, 354 S.C. 445, 457-58, 581 S.E.2d 489, 495 (Ct. App. 2003), *aff’d in part and rev’d in part*, 363 S.C. 19, 609 S.E.2d 506 (2005). This Court has instructed that “[i]n deciding what sanction to impose, the circuit court should weigh the nature of the interrogatories, the discovery posture

¹*Windham v. Lloyd* is a “lost” contract case. 253 S.C. 568, 172 S.E.2d 117 (1970). *Pee Dee Production Credit Ass’n v. Joye* involved a question whether the signature on the contract was genuine. 284 S.C. 371, 326 S.E.2d 650 (1984). *Woodruff Oil & Fertilizer Co. v. Portsmouth Cotton Oil Refining Corp.* involved a question whether a signer of the contract had authority to bind his employer. 246 F. 375 (4th Cir. 1917). These are the relevant decisions cited in the circuit court’s order. See (R.pp.13-14).

of the case, willfulness, and the degree of prejudice[.]" and also that "[a] circuit court's failure to exercise discretion is itself an abuse of discretion." *Id.* at 458, 581 S.E.2d at 495. A circuit court abuses its discretion when its ruling is based on an error of law or when its factual conclusions are without evidentiary support. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

The first part of the circuit court's ruling on the request for sanctions is based on circular analysis; it reasons that it "cannot" sanction the bank because Oaktree cannot prove that a loan commitment existed. (R.p.20). The existence of a contract was one of the central issues — if not *the* central issue — of Oaktree's claims. By hitching the request for sanctions to Oaktree's ability to prove that the contract existed, the circuit court was requiring Oaktree to prove its case on the merits.

And the fact of the matter is that Oaktree did offer evidence that tended to show *some* relevant information had been destroyed during the life of this litigation. The bank employee in charge of technology infrastructure explained that Derek Franklin's e-mails were not retained after American Community Bank merged with Yadkin. (Supp.R.4, line 2 - p.6, line 17). Yadkin closed on the purchase of American Community Bank the day after the complaint in this lawsuit was filed. (R.pp.101-102). This employee testified that as far as he knew, there was no way to retrieve any e-mails that did not appear in the message archive. (Supp.R.p.6, line 24 - p.7, line 6).² This employee also testified that the bank had replaced "a large number of American Community Bank" computers and that the hard drives for the

²This employee explained that the bank retained the e-mail archives of 8 employees after the merger. The only retained e-mails of Franklin's would be e-mails appearing in the archives for these other accounts. (Supp.R.p.5, line 3 - p.7, line 4).

replaced computers had been physically destroyed. (Supp.R.p.2, line 3 - p.3, line 2). This computer replacement occurred in the “middle” of 2009, see (Supp.R.p.2, lines 3-4), and the Court will recall that Oaktree brought its counterclaims in June of 2009 and served its first discovery requests in July of 2009. Franklin was still working for the bank when the bank brought this suit, Franklin’s first meeting with the bank’s lawyer occurred within 3 months of the bank filing suit, and yet the bank employee in charge of technology infrastructure testified that he had not been notified of a litigation hold until the end of 2010. (R.p.296, line 6 - p.297, line 25; p.312, lines 14-15). This employee also testified that he had not been asked to locate the computer Franklin used while working at the bank. (R.p.12, lines 1-5).

To be fair, correspondence from the bank’s lawyers showed that in January of 2011, the bank was making an effort to locate Franklin’s computer. See (R.p.385). Also, at the May 2011 hearing, the bank produced a copy of Franklin’s electronic calendar. See (R.p.388). But while it is fair to give the bank credit for those particular activities, two things the bank *did* with those activities was *unfair*. First, the bank suggested that producing Franklin’s calendar meant that no information had been destroyed. (R.p.109, ¶4). This was directly contrary to the IT officer’s testimony that Franklin’s e-mails are irretrievably gone. Second, the bank suggested that Franklin’s computer might still exist and spoke of discovery being an obligation that it would continue to fulfill, but in the next breath, the bank asked the circuit court to toss all of Oaktree’s claims on summary judgment. (R.p.214, line 20 - p.215, line 5; p.218, lines 1-25). This line of argument should not have been persuasive. If the search for relevant documents and information was ongoing, summary judgment was premature. See *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543-

44 (1991) (implying that summary judgment is premature when discovery is incomplete). And if Oaktree's claims were resolved on summary judgment, there would not be much "continuing" of any discovery obligation.

The Court should hold that the circuit court erred in conditioning sanctions on Oaktree's ability to produce the contract and that summary judgment was premature.

II. The Circuit Court's Alternative Bases for Summary Judgment Were Also Controlled by Errors.

Although Oaktree's failure to produce a written loan commitment was the primary ground for the circuit court's rulings, the circuit court's order also offered alternative bases for granting summary judgment. On the breach of contract claim, the circuit court held that an integration clause in the papers for the July 2008 loan barred the claim because it indicated that the loan documents constituted the entire understanding between the parties. (R.pp.15-16). The circuit court also held that Franklin's having taken the alleged commitment letter with him to re-type meant that the letter was not a "final" commitment. (R.p.14). As to the negligent misrepresentation counterclaim, the circuit court held that the bank did not owe Oaktree any duty outside of the alleged contractual relationship. (R.p.19). These rulings were not correct.

A. The Question Whether the July Loan Was Intended to Release the Bank's Liability for the 51-lot Loan Is a Question of Fact.

A "novation" is a defense to a breach of contract claim. This Court has defined a novation as "an agreement between all parties concerned for the substitution of a new obligation between the parties with the intent to extinguish the old obligation." *Moore v.*

Weinberg, 373 S.C. 209, 217-18, 644 S.E.2d 740, 744 (Ct. App. 2007). “The party asserting a novation has the burden of proving it[,]” and both parties “must consent that the new agreement is to replace the old one and their consent must be apparent.” *Id.* at 218, 644 S.E.2d at 744.

In order to find that the July loan acted as a novation between Oaktree and the Bank, the circuit court had to find facts; specifically, a mutual intention to substitute a new obligation for an existing one. In the posture of a summary judgment motion, this was not proper. For one thing, the bank denied any obligation ever existed with respect to the 51-lot transaction. Thus, under the bank’s theory of the case, there was no existing obligation for which the July 2008 loan would have substituted. Dawne Ras also indicated that the July transaction was an attempt to mitigate Oaktree’s damages. See (R.p.382). This is not the same thing as indicating that Oaktree intended to substitute the second transaction and discharge the bank’s alleged obligation with respect to the potential loan that fell apart. The relevant language from the July mortgage provides that the mortgage “constitutes the entire understanding and agreement . . . as to the matters set forth in this mortgage.” (R.p.356). That language does not indicate that the July mortgage is being substituted for a valid existing obligation.

B. The Question Whether the Parties Had a Binding Agreement Is a Question of Fact.

Whether a contract exists is a question of fact. *Rhode v. Tuten*, 34 S.C. 496, 500, 13 S.E. 676, 677 (1891). To have a valid contract, “there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.” *Player*

v. *Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (emphasis removed from original). There is no contract so long as the parties envision that “something remains to be done to establish contract relations.” *Hughes v. Edwards*, 265 S.C. 529, 536, 220 S.E.2d 231, 234 (1975).

Like its ruling on novation, the circuit court had to find facts in order to conclude that Derek Franklin’s taking the commitment letter with him meant that the letter was not a “final” contract. When considered in the light most favorable to Oaktree, the testimony indicates that the Rasas thought they had a binding commitment from the bank. Tom Ras testified that he signed a commitment letter in May of 2008. (R.p.328, lines 15-22). He explained that the commitment letter contained several errors, that the parties made changes to the commitment letter, that the parties made the decision to sign the letter, and that Franklin said that the terms of that letter “[would] hold.” (R.p.328- p.330, line 10). The bank and the circuit court focused on the fact that Tom testified Franklin took the executed letter in order to bring a “clean” letter to the closing, but the fact that the parties contemplated re-executing the contract does not mean that they intended the signing of the first contract to be a meaningless exercise. This was another dispute of fact, which the circuit court should not have resolved on summary judgment.

**C. The Conclusion That the Bank Did Not Owe
Oaktree Any Duty of Care Is Inconsistent with the
Law of Negligent Misrepresentation.**

As for the conclusion that the bank did not owe Oaktree any duty of care “outside” of the alleged contract, that is inconsistent with South Carolina’s law on negligent misrepresentation. In *Evans v. Rite Aid Corp.*, the Supreme Court recited:

In South Carolina, one may bring an action sounding in tort for negligent misrepresentation. A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction. The recovery of damages may be predicated upon a negligently made false statement where a party suffers either injury or loss as a consequence of relying upon the misrepresentation. These general rules have been applied ... to support the recognition of a negligent misrepresentation claim where the misrepresented fact(s) induced the plaintiff to enter a contract or business transaction.

324 S.C. 269, 274, 478 S.E.2d 846, 848 (1996) (citations and quotation marks omitted); see also *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 266-67, 536 S.E.2d 399, 405-06 (Ct. App. 2000). Because South Carolina law instructs that a party has a duty to use reasonable care in giving information about a transaction when that party has a financial interest in the transaction, the Court should reverse the circuit court's conclusion that the bank did not owe Oaktree any duty of care.

III. The Circuit Court Erred in Holding That Oaktree's Counterclaims Were Permissive and That Oaktree Waived its Right to a Jury Trial.

The circuit court held that Oaktree waived its right to a jury trial on the counterclaims because those claims were permissive and had been brought in response to an action which sounds in equity. (R.pp.6-9). This Court should reverse that conclusion. Although the circuit court correctly recited the relevant test, it did not apply that test correctly.

A defendant waives his or her right to a jury trial on any legal counterclaims when those counterclaims are permissive and are asserted in response to a complaint that sounds in equity. *C & S Real Estate Services, Inc. v. Massengale*, 290 S.C. 299, 300-01, 350 S.E.2d 191, 193 (1986). Rule 13(a), SCRPC, gives a definition of a compulsory counterclaim, and the test for whether the counterclaim is compulsory "is whether there is a 'logical

relationship' between the claim and the counterclaim." *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 61, 566 S.E.2d 863, 865 (Ct. App. 2002) (citing *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995)).

The term "logical relationship" does not appear to have been strictly defined. One federal court described the test for a logical relationship as whether "the essential facts of the claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *Adam v. Jacobs*, 950 F.2d 89, 92 (2d Cir. 1991). The rule describes compulsory counterclaims as arising out of the same "transaction" as the claim in the complaint. Rule 13(a), SCRPC. This rule is identical to the Federal Rule, and one federal court has observed that "transaction" is "a word of flexible meaning" that describes a "series of occurrences depending not so much on the immediateness of their connection as upon their logical relationship." *Sue & Sam Mfg. Co. v. B-L-S Const. Co.*, 538 F.2d 1048, 1051 (4th Cir. 1976). That court observed "that the rule should be given a broad realistic interpretation to avoid a multiplicity of suits." *Id.*

Case law in South Carolina contains a similar instruction. This Court has recited that the purpose of having compulsory counterclaims "is 'to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters.'" *Beach Co.*, 351 S.C. at 62, 566 S.E.2d at 865 (quoting *S. Constr. Co. v. Pickard*, 371 U.S. 57, 60 (1962)).

The question presented here is whether there is a logical relationship between the bank's foreclosure claim on Palm Tree Cove Phase II and Oaktree's counterclaims. The Court should answer that question "yes." Oaktree's counterclaims all arise out of the 51-lot

transaction for Palm Tree Cove Phase II, and Oaktree claimed that the later loan, which was the subject of the foreclosure claim, was an attempt to mitigate damages from the 51-lot transaction. (R.p.382). Although Oaktree's victory on a counterclaim would not absolve it of responsibility for the mortgage, the mortgage was part of the "series of occurrences" with respect to Oaktree's attempt to develop Palm Tree Cove Phase II.

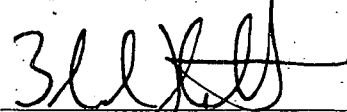
The bank's treatment of the loan in the foreclosure claim also tells the story of a logical relationship. The bank argued that the 11-lot transaction — the subject of one of the foreclosure claims — acted as a novation with respect to the alleged 51-lot transaction. (R.p.123). Here again, Oaktree's counterclaims would not necessarily affect the validity of the foreclosure claim, but a counterclaim need not extinguish liability on the principal claim in order to be compulsory; the test is whether the claim and counterclaim have a "logical relationship." To put the point simply, saying that one loan acted as a discharge of a previous agreement does nothing if not acknowledge that there is a relationship between the transactions. While this is not a case where the bank will necessarily have to prove facts that relate to any of Oaktree's counterclaims in the course of proving its foreclosure claim, the same cannot be said of the converse. Oaktree's damages claim involves the subject of the foreclosure claim, and at least one of the bank's defenses to the counterclaim for breach of contract relies on the paperwork for one of the bank's foreclosure claims. The Rases' testimony that the 51-lot transaction and the 11-lot transaction transactions were "separate" should not have controlled the analysis. See (R.p.338). The record describes a logical connection between them.

CONCLUSION

When one party alleges that a written contract existed and the other party denies it, the existence of the contract is a dispute for the fact-finder. In order to find that the July loan acted as a novation between Oaktree and the Bank, and in order to find that Derek Franklin's taking the commitment letter with him meant that the letter was not a "final" contract, the circuit court had to find facts. The conclusion that the bank did not owe Oaktree any duty of care "outside" of the alleged contract is inconsistent with South Carolina's law on negligent misrepresentation, and although the 11-lot loan was a "separate" loan from the 51-lot loan, there was a relationship between those transactions. This Court should accordingly reverse the grant of summary judgment in favor of Yadkin Valley Bank & Trust on Oaktree's counterclaims for breach of contract and negligent misrepresentation, and it should also reverse the grant of Yadkin's motion to deny Oaktree a jury trial on those counterclaims.

March 1, 2013

Respectfully submitted,



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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-1673

Yadkin Valley Bank & Trust, ... Respondent,

v.

Oaktree Homes, Inc.; Dawne M. Ras and
Thomas C. Ras; Daniel Simpson; Above
All Services, Inc.; Carter Lumber Company;
Efficient Painting Contractors, Inc.; Creative
Concepts; and Solid As A Rock, Inc., ... Defendants,

Of Which

Oaktree Homes, Inc. is the Appellant.

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SC Court of Appeals

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STATEMENT OF THE FACTS

In Respondent's foreclosure action, Appellant counterclaimed¹ that it had an alleged commitment from Respondent to finance the acquisition of fifty-one lots from Har-Lee, LLC. (Answer to Amended Complaint and Counterclaim, R. pp. 87-89, ¶¶ 45-79.) Appellant entered into a contract to purchase fifty-one lots in the Palm Tree Cove subdivision from Har-Lee, LLC for \$4.44 million. (R. pp. 333-35.) The contract did not contain any financing contingencies and required Appellant to close on the purchase of the lots regardless of whether or not it had secured financing. (R. pp. 334-35.) Appellant then entered into a second contract to sell the same fifty-one lots to Palmetto Investment Holdings, LLC (PIH) for \$6.697 million. (R. p. 336.)

After signing both contracts, Appellant approached Respondent to finance a portion of the initial purchase price of the fifty-one lots. (R. p. 88, ¶ 64.) Appellant says that it saw a written loan commitment for the fifty-one lot transaction signed by it and Respondent, which contained handwritten changes, that was taken by Respondent to be re-typed and signed by Appellant and Respondent at closing. (R. pp. 330-31, 340-41.) Appellant never saw the written loan commitment again. (R. pp. 330, 340.) Appellant's principal, Tom Ras, testified that he kept a copy of the marked-up commitment which he forwarded to Bill Hargrove (Har-Lee), and either Tom or Bill lost the alleged commitment. (R. p. 330.) Appellant has not produced, nor can it locate, a signed copy of this alleged commitment letter. (R. pp. 328, 341.) Respondent denies that any loan commitment for the fifty-one lot transaction was ever

¹ Although Appellant lodged six counterclaims against Respondent, Appellant is only appealing the dismissal of two of those counterclaims, breach of contract and negligent misrepresentation.

prepared, much less signed, by it. (R. pp. 273-74, 277-78, 279, 281.)

Nor can Appellant produce a loan commitment for the remainder of the initial purchase price of the fifty-one lots. Even if Respondent had agreed to fund \$3.8 million as alleged, Appellant still needed about \$600,000 in order to close on its acquisition from Har-Lee. (R. p. 337.) There is no question Appellant sought a bridge loan from Bank of York to cover the difference, but did not have a signed loan commitment. (R. p. 337, 343.) Without an additional \$600,000 in financing over and above the loan sought from Respondent, Appellant could not close on its purchase of the fifty-one lots.

Assuming, *arguendo*, Appellant had two enforceable commitments for the entire amount of the purchase price for the fifty-one lots, of which there is no evidence, Appellant suffered no damages because its purchaser, PIH, did not have \$6,697,000 to buy the fifty-one lots from Appellant. (R. pp. 283-87, 290.) The evidence shows that in May 2008, PIH did not have \$6.697 million and could not fund its purchase of the fifty-one lots from Appellant. (R. pp. 283-87, 290.)

After Respondent declined the opportunity to finance a portion of the acquisition of the fifty-one lots in Palm Tree Cove Phase II from Har-Lee, Appellant applied for and received a loan commitment dated July 22, 2008 from Respondent for eleven of the fifty-one lots. This July 22, 2008 loan commitment did not contain any promise or agreement to loan any other sums for acquisition of more lots in Palm Tree Cove Phase II. Har-Lee apparently consented to the transfer of the eleven lots to Appellant.

Appellant executed the note and mortgage addressed in the July 22, 2008 loan commitment. The mortgage states: "This Mortgage, together with any Related Documents,

constitutes the **entire** understanding and agreement of the parties as to the matters set forth in this Mortgage.” The term “Related Documents” is defined in the mortgage to be the note pursuant to which Respondent loaned funds to Appellant for the acquisition of the eleven lots in Phase 2. Appellant admitted the terms of the mortgage. (R. p. 85, ¶9).

When Appellant could no longer fund its payment obligations to Respondent on four loan transactions (including the July 22, 2008 loan), Respondent brought a foreclosure action, seeking to enforce its rights under the various loan documents. In response, Appellant lodged its counterclaims over the separate fifty-one lot transaction.

ARGUMENT

Standard of Review

This appeal is from the Order Granting Summary Judgment on the Counterclaims filed July 20, 2011. “An appellate court reviews a grant of summary judgment under the same standard required of the circuit court under Rule 56(c), SCRPC.” *Bass v. Gopal, Inc.*, 395 S.C. 129,133, 716 S.E.2d 910, 912 (2011) (Upholding grant of summary judgment after applying scintilla of evidence test in *Hancock v. Mid-South Mgmt Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).). “[S]ummary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Sides v. Greenville Hospital System*, 362 S.C. 250, 254, 607 S.E.2d 362, 364 (Ct. App. 2004).

I. The trial court was correct in its holding that there was no enforceable loan commitment to fund the purchase of the fifty-one lots.

S.C. Code Ann. § 37-10-107(1)(c) (1991) (the “Lender Statute of Frauds”) requires that “the party seeking to maintain the action or defense [must] have received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.” It is indisputable that Appellant does not have a writing signed by Respondent. All of Appellant’s arguments hinge on why it should not have to produce a writing, and on why it is sufficient to just allegedly see a draft of a writing. These arguments ignore the plain language of the Statute imposing requirements in addition to those existing under the common law and the general Statute of Frauds.

In *Sea Cove Development, LLC v. Harbourside Community Bank*, 387 S.C. 95, 691 S.E.2d 158 (2010), our Supreme Court considered whether loan pre-qualification letters satisfied the writing requirement of § 37-10-107 and concluded such letters did not. The loan applicants asserted all of the letters from the lender constituted a signed writing in satisfaction of the Statute or, at the very least, created a jury question. The trial and appellate courts ruled that applicants did not have final loan approval. By Appellant's own testimony, it had at most a marked-up loan commitment to be re-typed and signed at closing. This is not a final loan commitment. Testimony about the purported former possession of a rejected commitment still being negotiated does not satisfy the Statute.

Appellant wishes to go to a jury without any signed writing and just testimony that at one time it at least saw a signed writing. In granting summary judgment, Judge Hayes set forth four compelling reasons why Appellant cannot circumvent the Best Evidence Rule (Rule 1002, SCRE) and offer secondary evidence (Rule 1004, SCRE) consisting of testimony from its principals that a draft of the proposed loan commitment once existed; and, therefore, an inference can be drawn that if no one has the letter, it must have been lost or destroyed. First, there are no cases under the Lender Statute of Frauds upholding that the requirement of a writing may be circumvented through testimony, which is the very reason for the Statute in the first place, *viz.*, to avoid unwritten loans. Without the requirement of a writing, anyone could swear they had a loan, its payment terms, interest rate, maturity date and other terms favorable to the swearing party.

Second, Appellant has no South Carolina law to support its position under the general Statute of Frauds (S.C. Code Ann. § 32-3-10 (1962)) either. Under South Carolina law,

"[e]very essential element of a contract falling under the statute of frauds must be proved by writing." *Woodruff Oil & Fertilizer Co. v. Portsmouth Cotton Oil Refining Corp.*, 246 F. 375, 377 (4th Cir. 1917). "The statute of frauds, intended to prevent imposition by one man imputing to another a sale on parol testimony, would be nullified by mere circuitry if a party materially interested in making a purchase were allowed to prove by parol [evidence] that he was authorized to sign the name of the seller, and that the seller knew of his adverse interest." *Id.* The requirement of a signed writing, for example, to hold a guarantor liable for another's debt, cannot be avoided by oral testimony to the effect that there was once a written guaranty. "The Statute of Frauds was not enacted to . . . supply a cloak of immunity to hedging litigants lacking integrity," but it "was intended to guard against the perils of perjury and error in the spoken word." 10 Williston on Contracts § 29:4 (4th ed.). For Appellant to obligate Respondent to make a loan for \$3.8 million, Appellant has to produce the writing signed by Respondent to which it should be held responsible.

Third, South Carolina decisional law allowing for secondary evidence (Rule 1002, SCRE) does not suggest the statutory requirement of a writing may be displaced by oral testimony that the writing has been lost. Instead, the cases allow secondary evidence such as copies of a writing or a writing produced from review of other records, or testimony to interpret the writing that has been offered into evidence. E.g., *Pee Dee Prod. Credit Ass'n. v. Love*, 284 S.C. 371, 326 S.E.2d 650 (1984) (issue was whether signature on note was authentic). Where secondary evidence has been offered as to a lost writing, our Supreme Court rejected testimony that "I had this in my possession one time and turned it over to a lawyer and I don't know what he did with it." *Windham v. Lloyd*, 253 S.C. 568, 572, 172

S.E.2d 117, 119 (1970).² It is unavailing to Appellant that Tom or Bill lost the alleged commitment.

Fourth, the Lender Statute of Frauds says, “the party seeking to maintain the action or defense [must] have received a writing from the party to be charged.” South Carolina Code § 37-10-107(1)(c). Appellant interprets this language to mean that so long as its principal once saw the alleged draft commitment letter, Appellant received a writing sufficient to meet the Statute’s requirements. Through the testimony of its principals, Appellant admitted the letter was taken back by the loan officer to be re-typed. (R. pp. 330-31, 340-41.) Under the Statute, the language “received a writing” is a delivery requirement “intended to preclude lawsuits based on personal notes, confidential memoranda, or drafts, all of which have been signed by the party to be charged and which may come to light as a result of the discovery process.” See John L. Culhane, Jr., *Lender Liability Limitation Amendments to State Statutes of Frauds*, 45 Bus. Law 1779, 1795 (1990), *cited with approval* in *Harbourside* at 691 S.E.2d at 163. Appellant never received a document intended as a final commitment.

Construing the evidence in favor of Appellant (for Respondent denies the self-serving allegations of Appellant), Respondent emphasizes that Appellant did not have a final loan commitment delivered to it. Whatever Appellant allegedly saw it admittedly rejected. Appellant and Respondent agreed the alleged draft letter would have to be re-typed and re-signed. These are Appellant’s assertions. Appellant never received a final loan commitment

² In *Windham*, our Supreme Court ruled there was no abuse of discretion on the part of the trial court in excluding the secondary evidence based on “the very meager information offered by the appellant as to the whereabouts” of the original document. *Windham*, 253 S.C. at 573, 172 S.E.2d at 119. Appellant’s information as to the location of the alleged commitment letter is just as weak. As in *Windham*, the trial court was correct in refusing to consider secondary evidence of the phantom document.

signed by Respondent. There is no basis under South Carolina law for displacing this requirement.

II. The trial court was correct in its holding that even if there were an enforceable loan commitment to fund the purchase of the fifty-one lots, Respondent's subsequent financing of the purchase of eleven of those lots operated to extinguish any prior agreement between Appellant and Respondent.

"Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." *Midland Mutual Life Insurance Company v. Harrell*, 331 S.C. 394, 503 S.E.2d 189 (Ct. App. 1999). In *Midland*, the Court upheld summary judgment in favor of the lender on the grounds that the parties' signatures on loan documents superceded any prior oral agreements related to the loan transaction.

Here, Appellants cannot produce a written commitment to lend \$3.8 million for the purchase of the fifty-one lots. They allege there were discussions about a written commitment with an employee of Respondent, but they cannot produce a copy of the final or even draft document. This Court can only consider the outward expressions of Appellant and Respondent. Those outward expressions were set forth in the \$1.305 million loan transaction that funded Appellant's purchase of eleven of the fifty-one lots in Palm Tree Court, Phase II. Appellant accepted funding for eleven lots to be sold to individual buyers, not PIH. Har-Lee apparently consented to Appellant buying eleven instead of fifty-one lots. Appellant's acceptance of this funding eliminated its ability to purchase and sell all fifty-one lots to PIH as alleged in the Counterclaim.³ Appellant's acceptance of this funding also eliminated its

³ In its brief, Appellant claims this was an attempt to "mitigate its damages". (Initial Brief of Appellant, p. 15.) Appellant risked such damages to Har-Lee when it signed this contract without a financing contingency and before it had any loan commitment. Even if Appellant was lessening Har-Lee's claim

need to borrow \$4.44 million, \$3.8 million from Respondent and \$600,000 from the Bank of York. This is plainly evident on the face of the \$1.305 million transaction. Further, Appellant signed a mortgage reciting that the loan documents for the \$1.305 million transaction constituted the entire agreement between Appellant and Respondent.⁴

Upon Appellant's execution of the \$1.305 million loan documents, Har-Lee, Appellant and PIH could no longer perform pursuant to the contracts for the sale of the fifty-one lots. The fifty-one lot deal *could not close*. Whatever rights or interests Appellant may have had in or to a \$3.8 million loan from Respondent to fund *part* of the acquisition of fifty-one lots from Har-Lee were extinguished at the closing of the \$1.305 million loan. The trial court's ruling that the \$1.305 million loan superceded any alleged obligation on the part of Respondent to fund a \$3.8 million loan to Appellant should be upheld.

III. The trial court was correct in its holding that Appellant's sole remedy for Respondent's failure to honor the alleged loan commitment was through an action for breach of contract, and did not sound in tort.

When a party performs "in such a way that he violates a contractual duty *only*, then his liability is only contractual." *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C.

against Appellant; it did nothing to reserve any claims against Respondent. Appellant entered into a novation substituting the \$1.305 million loan documents in the place of any alleged \$3.8 million commitment. Further, it is apparent Har-Lee consented to sell eleven lots and did not hold Appellant to purchasing fifty-one lots. As for PIH, it did not have the money to fund its purchase of the fifty-one lots. PIH has never lodged any claim against Appellant.

⁴ Resort to extrinsic evidence of the intent of the parties is appropriate where an ambiguity exists on the face of the document. Under contract law, "[t]o ascertain the intention of an instrument resort is first to be had to its language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument." *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973), *cited in Super Duper Inc. v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 385 S.C. 201, 683 S.E.2d 792 (2009). The \$1.305 million loan, the Har-Lee and PIH contracts are not ambiguous. It is not as Appellant suggests a jury question whether the fifty-one lot transaction could be consummated after the \$1.305 million loan closed.

335, 345, 384 S.E.2d 730, 737 (1989). Thus, “[a] breach of duty which arises under the provisions of a contract between the parties *must be redressed under contract, and a tort action will not lie.*” *Koontz v. Thomas*, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999) (emphasis added), *quoting Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54-55, 463 S.E.2d 85, 88 (1995). *See also Foxfire Village, Inc. v. Black & Veatch, Inc.*, 304 S.C. 366, 404 S.E.2d 912, 917 (Ct. App. 1991) (“Where the cause of action is predicated on an alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie.”). This “rule maintains the dividing line between tort and contract. . . .” *Tommy L. Griffin*, 320 S.C. at 54, 463 S.E.2d at 88. “Contract law seeks to protect the expectancy interests of the parties. Tort law, on the other hand, seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property.” *Sapp v. Ford Motor Co.*, 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009).

All evidence in this case relates solely to the alleged prospective lending relationship, with no evidence of any other duty⁵ on the part of Respondent. As a result, any such alleged duty arises in contract and cannot also form the basis for a tort. Respondent had no duty to Appellant that arose outside of the alleged loan commitment. If Appellant proves such an

⁵ Appellant tries to distract the Court by citing *Evans v. Rite Aid Corp.*, 324 S.C. 269, 478 S.E.2d 846 (1996). Rather than support Appellant’s counterclaim for negligent misrepresentation, *Evans* is directly contrary. In *Evans*, the court ruled there was no reliance on the part of Evans. The same is true in this case. The contract with Har-Lee was executed by Appellant without any financing contingency and Appellant approached Respondent for financing after execution of the contract. (R. pp. 294-95, 333-35.) In signing the contract, Appellant could not have relied on any representations from Respondent, because the contract was signed prior to Appellant seeking financing. Further, Respondent did not have a financial or pecuniary interest in the contract between Har-Lee and Appellant. Respondent would not profit from that contract in any way.

alleged valid commitment exists (which it cannot do), it could proceed with its counterclaim for breach of contract. But, Appellant cannot pursue any tort claims against Respondent because there is no tort duty. The trial court correctly dismissed Appellant's counterclaim for negligent misrepresentation.

IV. The trial court was correct in its ruling that by asserting permissive counterclaims in an equitable action, Appellant waived its right to a trial by jury.

In *C & S Real Estate Srvs., Inc. v. Massengale*, 290 S.C. 299, 301, 350 S.E.2d 191, 193 (1986), our Supreme Court “summarize[d] the proper analysis for determining the trial of issues raised by counterclaim and [] set out the procedure to be followed when issues are to be tried before a jury.” Under the holding in *C&S*, “[i]f the complaint is equitable and the counterclaim legal and permissive, the defendant waives his right to a jury trial.” *Id.* at 302, 350 S.E.2d at 193. When a defendant brings a legal and permissive counterclaim in an equitable action, that defendant loses its right to a jury trial on those permissive counterclaims. Under Rule 13(b), SCRCP, a permissive counterclaim is defined as a claim “not arising out of the transaction or occurrence that is the subject matter of the opposing party’s claim.”

“By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party’s claim.” *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 61, 566 S.E.2d 863, 865 (Ct. App. 2002). “The test for determining if a counterclaim is compulsory is whether there is a ‘logical relationship’ between the claim and the counterclaim.” *Id.* Applying this test in the foreclosure context in *North Carolina Federal Sav. and Loan Ass’n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903 (1989), our Supreme

Court ruled that a logical relationship did not exist between the enforceability of the note at issue in the foreclosure and a counterclaim based on an alleged agreement that NC Federal “would purchase DAV’s interest in the joint venture.” DAV’s counterclaim did not “affect the enforceability of the note” and, as a result, was held to be permissive. *Id.*

This Court applied the same reasoning in *Wells Fargo Bank, N.A. v. Smith*, 398 S.C. 487, 730 S.E.2d 382 (Ct. App. 2012). In *Smith*, this Court held that the borrower’s counterclaim was permissive “because a violation of the Attorney preference statute would not affect the enforceability of the Note and Mortgage.” *Id.* at 498, 730 S.E.2d at 334. Review of the statute in question “demonstrate[d] Smith’s counterclaim has no ‘logical relationship’ to the enforceability of the Note and Mortgage.” *Id.* at 499, 730 S.E.2d at 334. Even more importantly, the preference statute only allowed for the recovery of actual damages and a possible penalty against Wells Fargo, but it did “not permit rescission of the Note and Mortgage.” *Id.* As a result, the counterclaim was permissive and “Smith waived his right to a jury trial by asserting it in the foreclosure action.” *Id.*

The factual basis for Appellant’s counterclaims is an agreement wholly separate and distinct from and extrinsic to the loan transactions at issue in the foreclosure action. The principals of Appellant admitted the same in deposition testimony and through affidavits.

Q: There are certain loans that OakTree has at American Community Bank which are in default and the subject of foreclosure?

A: That is correct.

Q: The commitment that you described in May had nothing to do with those loans?

A: No.

Q: It was completely separate as financing?

A: Correct.

(R. p. 338.) The May 16, 2011 Affidavit of Dawne Ras also states that the alleged loan commitment was a separate transaction and had nothing to do with the other four loans. (R. p. 382, ¶4.)

Nothing that Respondent did or did not do in relation to this request for financing on a wholly separate transaction would have any impact on the enforceability of the notes and mortgages at issue in the foreclosure action. Appellant did not seek to rescind any of these notes, nor did it appeal the order allowing the foreclosure to go forward. Appellant would only be entitled to damages set off against the \$1.5 million foreclosure deficiency in the event it succeeds on its counterclaims, not rescission of any of the notes or mortgages.⁶ The trial court's ruling that Appellant waived its right to a jury trial by asserting permissive counterclaims in the foreclosure action should be upheld.

V. The trial court was correct in its denial of Appellant's motion for sanctions.

The longstanding South Carolina jurisprudence regarding the appellate review of a motion for sanctions is that a "trial court's rulings on discovery matters will not be reversed on appeal absent a clear abuse of discretion." *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 220, 493 S.E.2d 826, 836 (1997) (Citations omitted.). The abuse of discretion standard does not allow the trial court's decision on whether to award sanctions to be "disturbed on

⁶ Appellant's constant repetition of the phrase "logical relationship" overlooks the rulings in both *DAV* and *Smith*. To show a logical relationship in the lending context, there has to be an impact on the notes and mortgages at issue in the foreclosure. Appellants cannot demonstrate any such impact.

appeal unless the decision is controlled by an error of law⁷ or is based on unsupported factual conclusions.” *Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC*, 394 S.C. 97, 104, 713 S.E.2d 650, 654 (Ct. App. 2011) (Finding no abuse of discretion in trial court’s refusal to award sanctions.)

The basis for Appellant’s motion for sanctions is the allegation that Respondent may have destroyed the alleged draft loan commitment. The trial court’s decision *not* to award sanctions was rooted in the facts presented at the hearing. It is undisputed that Appellant, not Respondent, lost or destroyed a copy of the alleged draft. (R. p. 330.) There is no evidence in the record that Respondent ever had a final or draft loan commitment, much less destroyed it. Walter Joyce, Respondent’s current IT director, testified that “I haven’t found any evidence to lead me to believe that any data had been deleted.” (R. p. 313.) He went on to say that the reason he knew nothing had been deleted is “we don’t delete anything in that archive,” referring to the e-mail archive of Respondent. (R. p. 314.) In fact “everything that’s been put in that [e-mail] archive is still in that archive.” (R. p. 315.)⁸

Appellant has no facts to support that Respondent, first, had a letter and then destroyed it. The purported draft could not have been deleted, because it never existed. All of Respondent’s employees testified that no such loan commitment existed. (R. p. 275-78, 281, 292-93.) Appellant cannot produce anything to suggest the existence of such a draft

⁷ Appellant does not allege an error of law, but seeks reversal only on the grounds of unsupported factual conclusions.

⁸ Mr. Joyce came to Respondent on November 2, 2009, seven months after this litigation began. (R. p. 317.) He testified that he had no “knowledge about anything that happened in American Community Bank’s environment” or Yadkin Valley Bank and Trust prior to November 2, 2009 “because [he] wasn’t there”. (R. p. 318.) Despite being provided with the name of Mr. Joyce’s predecessor and others in the IT department of Respondent, Appellant did not seek to depose any of them. The only evidence in the record comes from Mr. Joyce and he testified explicitly that he did not see any evidence of *any* data being deleted.

commitment. (R. p. 330.) The only evidence presented was the lack of evidence of any destruction of data by Respondent. Likewise, there was no evidence of any wrongdoing by Respondent. There was no abuse of discretion on the part of the trial court. As a result, the denial of Appellant's motion for sanctions should be upheld.⁹

CONCLUSION

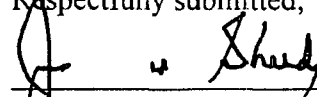
Appellant never received a final loan commitment signed by Respondent. Thus, Appellant's breach of contract and negligent misrepresentation claims are barred by the Lender Statute of Frauds. Even if there were an enforceable loan commitment to fund the purchase of the fifty-one lots (which there was not), Respondent's subsequent financing of the purchase of eleven of those lots operated to supercede any prior agreement between Appellant and Respondent. Appellant and Respondent just had a lending relationship. Appellant's only duty to Respondent sounded in contract. Appellant's sole remedy for Respondent's failure to honor an alleged loan commitment was through an action for breach of contract, not for any tort such as negligent misrepresentation. Appellant's counterclaims related to a separate alleged loan commitment, so they were permissive. Appellant had no right to a jury trial. There was no abuse of discretion by the trial court in denying Appellant's motion for sanctions. The factual basis for the denial was well supported by the evidence. By its own testimony, Appellant (not Respondent) lost the alleged draft loan commitment. Any information of Respondent was backed up on its servers. There is no evidence that Respondent destroyed the alleged draft loan commitment. Respondent's inability to produce

⁹ If Appellant thought summary judgment was premature, at the hearing Appellant should have availed itself of Rule 56(f), SCRCP, which it did not do. Appellant could have also sought to extend the dispositive motions deadline in the scheduling order, which Appellant did not do.

the alleged loan commitment supposedly signed by it was because such commitment did not exist.

Date: 3/7/13

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-1673

RECEIVED

MAR 04 2013

SC COURT OF APPEALS

Yadkin Valley Bank & Trust, ... Respondent,

v.

Oaktree Homes, Inc., Dawne M. Ras and
Thomas C. Ras, Daniel Simpson, Above All
Services, Inc., Carter Lumber Company, Efficient
Painting Contractors, Inc., Creative Concepts, and
Solid As A Rock, Inc., ... Defendants,

Of whom

Oaktree Homes, Inc., is the Appellant.

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ARGUMENT

When an appellate court reviews a grant of summary judgment, the court views all of the evidence and the inferences to be drawn from the evidence in the light most favorable to the non-moving party. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 329, 673 S.E.2d 801, 802 (2009). So long as there is a scintilla of evidence to support it, this standard asks the court to assume that Oaktree's version of events is true.

According to that version of events, not only did representatives of American Community Bank repeatedly tell Oaktree's representatives and other individuals (like attorneys and bankers) that Oaktree's 51-lot loan would close, but a representative of the bank and a representative of Oaktree executed a written agreement detailing the terms of the loan. Then, a bank vice president took custody of that writing and destroyed it. This may not be how these events happened, but there is *some* evidence that they unfolded this way.

According to the bank's view of the law, this sort of conduct is perfectly acceptable. Thus, statutes and court rules designed to prevent fraud would be used to do nothing other than perpetuate dishonesty. The Court should reject such reasoning, and it should reject the bank's invitations to view disputed facts and inferences in the bank's favor.

I. When a Party Denies That a Written Contract Ever Existed, the Law Allows Oral Evidence of the Alleged Contract.

If a plaintiff brings a claim based on a bank's promise to lend money, the Lender Statute of Frauds requires the plaintiff to have received a written agreement containing the terms of the loan. According to the bank, a plaintiff may not use oral testimony to prove the requirements of this statute because "there are no cases" saying that a party may do so.

Oaktree could only locate one published decision from a South Carolina appellate court addressing the Lender Statute of Frauds. See *Sea Cove Dev., LLC v. Harbourside Cmty. Bank*, 387 S.C. 95, 691 S.E.2d 158 (2010). That decision has nothing to say about whether a party may use oral evidence to satisfy the statute. The questions presented in that case were whether the statute violated the single-subject requirement of the South Carolina Constitution and whether the documents produced in that case satisfied the requirements of the statute. And the absence of case law does not prove anything — Oaktree could employ the same reasoning and argue that there are no cases holding that it is impermissible for a party to use oral testimony to meet the requirements of this statute.

The statute is silent on any distinction between oral evidence and written evidence. It describes only that a party must “ha[ve] received a writing from the [other party].” See S.C. Code Ann. § 37-10-107(1)(c) (2002). The statute never describes how the party claiming a commitment to lend must prove the receipt of that writing.

As Oaktree’s principle brief described, Rule 1008 of the South Carolina Rules of Evidence speaks to this question. Although there are no published cases explaining this feature of the rules, Rule 1008 says that when an issue is raised as to whether a claimed writing ever existed, that dispute is a dispute of fact for the fact-finder. This rule is identical to the federal rule, and as the notes to the federal rule explain, the rationale for treating this as a dispute for the fact-finder is that “[i]f the judge decides that the contract was never executed and excludes the [oral] evidence, the case is at an end without ever going to the jury on a central issue.” FED. R. EVID. 1008, Advisory Committee Notes, 1972 Proposed Rules. At no point does the bank’s brief address this rule or the rationale behind it.

The bank quotes a Fourth Circuit decision and offers that the statute of frauds requires “every element” of a contract to be proved by a writing. See *Woodruff Oil & Fertilizer Co. v. Portsmouth Cotton Oil Ref. Corp.*, 246 F. 375 (4th Cir. 1917). But this decision predates the South Carolina Rules of Evidence. See Rule 1103, SCRE (rules effective in 1995). The citation therefore takes a principle and applies it out of context. *Woodruff Oil* also did not involve a dispute about whether a written contract had ever been in existence. Instead, the case concerned whether the signer of the written contract possessed the authority to bind his employer. And if the statement quoted by the bank was an accurate statement of the law, oral testimony would *never* be admissible to prove the contents of a writing. This is not so. See Rule 1004, SCRE (allowing “other evidence” of contents); Rule 1007, SCRE (discussing testimony that can prove contents); *Wynn v. Coney*, 232 S.C. 346, 102 S.E.2d 209 (1958) (secondary evidence includes oral testimony).

When a party denies the existence of a written contract, the denial creates a factual dispute. Allowing the fact-finder to hear testimony and settle the dispute serves the same sense of fairness that drove courts to create exceptions to the statute of frauds — courts “[would] not permit a statute designed to prevent frauds to be used as an instrument to effect a fraud.” *Aust v. Beard*, 230 S.C. 515, 522-23, 96 S.E.2d 558, 562 (1957). This is a dispute for trial, and the notion that oral evidence is categorically inadmissible is not correct.

II. To Find That Oaktree and the Bank Never Had an Enforceable Agreement, the Court Had to Make Findings on Disputed Facts.

The existence of a contract is a question of fact, *Rhode v. Tuten*, 34 S.C. 496, 500, 13 S.E. 676, 677 (1891), and to have a valid contract, all that is required is “a meeting of the

minds” on all essential and material terms of the agreement. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989).

There is some evidence that Oaktree’s representative and the bank’s representative intended for the disputed commitment letter to be a binding agreement. Tom Ras testified that he physically signed a commitment letter in May of 2008. (R.p.328, lines 15-22). Tom explained that the typed letter contained several errors, that the parties made handwritten changes to the letter, that *both* parties — Tom for Oaktree and Derek Franklin as a vice president of the bank — made the decision to sign the letter, and that Derek Franklin said that the terms of that letter “[would] hold.” (R.p.328- p.330, line 10).

A fact-finder might view this evidence in a number of ways, but it would not be unreasonable for a fact-finder to conclude that although the parties contemplated re-typing and re-executing the agreement at closing, the fact that the parties executed the original document indicates that the parties possessed the mutual intent to be bound to the agreement. The fact-finder could also interpret Mr. Franklin’s statement that the letter would “hold” to mean that Mr. Franklin intended to inform Tom Ras that their agreement was firm.

While it is true that parties sometimes execute written documents that are unenforceable “agreements to agree,” the evidence does not compel that conclusion here. See, e.g., *Fici v. Koon*, 372 S.C. 341, 347, 642 S.E.2d 602, 604-05 (2007) (written agreement unenforceable because it called for the parties to agree to some of the terms later). The intentions of the parties is a question of fact, and because summary judgment asks the court not to find disputed facts, the Court should reject the bank’s argument that as a matter of law, there was no enforceable contract.

III. In Order to Find That the 11-lot Loan Released the Bank from Any Obligation on the 51-lot Loan, the Court Had to Find Facts.

The 51-lot transaction fell apart in June of 2008, and about a month after that, American Community Bank loaned Oaktree the money to purchase 11 of the 51 lots. The bank argues (and the circuit court agreed) that one of the clauses in the mortgage for this loan released the bank from any obligation it might have had on the 51-lot transaction. That clause is a “miscellaneous provision” on the fourth page of the mortgage and reads:

Amendments. This Mortgage, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Mortgage. No alteration of or amendment to this Mortgage shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

(R.p.356).

This is a “merger” clause. It signifies that the mortgage and the related documents contain all of the terms that are relevant to this mortgage, and it also describes the formalities necessary to execute an amendment to this mortgage.

This is not the same thing as a “novation.” A novation is a mutual agreement to substitute a new obligation in place of an old one. *Moore v. Weinberg*, 373 S.C. 209, 217-18, 644 S.E.2d 740, 744 (Ct. App. 2007). This clause does not reference prior agreements on other loans — it signals that within the confines of this particular loan, the terms of this loan and mortgage are contained in the corners of the mortgage and the related documents.

The party asserting a novation has the burden of proving it, both parties must consent that the new agreement is to replace the old one, and the consent of both parties must be apparent. *Id.* at 218, 644 S.E.2d at 744.

It is difficult to see how the bank can claim that there was a novation when it adamantly denies that there was ever any original obligation with respect to the 51-lot loan. If there was no original obligation, there was no existing obligation for the second loan to discharge. See *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 262, 199 S.E.2d 719, 722 (1973) (the circumstances attending the alleged novation must show an intent to substitute a new obligation in place of an existing one). To rule in favor of the bank, the court would have to find first that the bank was obligated on the 51-lot loan (which the bank disputes), and then find that the parties intended the 11-lot loan to be a substitute for the original agreement (which Oaktree disputes). Here again, because summary judgment asks the court not to settle factual disputes, the Court should reject the bank's argument.

IV. The Term "Compulsory Counterclaim" Includes More than Claims That Defeat the Allegations of the Complaint, and Because Oaktree's Counterclaims Are Logically Related to the Bank's Foreclosure Claims, the Counterclaims Are Compulsory.

The bank says the only compulsory counterclaims in a foreclosure action are counterclaims that "impact" the notes and the mortgage at issue in the foreclosure. To support this, the bank cites the Supreme Court's decision *North Carolina Federal Savings and Loan Association v. DAV Corp.* and this Court's decision in *Wells Fargo Bank v. Smith*.

If the bank is right about this principle of law — if a counterclaim must defeat the plaintiff's claim in order to be compulsory — this Court should affirm the decision denying Oaktree's request for a jury trial. To be fair, some of the language in this Court's *Smith* decision is supportive of the bank's argument. See *Smith*, Op. No. 4988 (S.C. Ct. App. re-filed Aug. 8, 2012) (Shearouse Adv. Sh. No. 46 at 33, 38).

But the Court should hold that the bank is not right about this principle of law. The test for a compulsory counterclaim is broader than the *Smith* decision suggests. The definition of a compulsory counterclaim is not limited to only those counterclaims that defeat the plaintiff's claims. A compulsory counterclaim is any claim that "arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim." Rule 13(a), SCRPC. South Carolina's definition of compulsory is identical to the federal definition, and in describing this standard, the Fourth Circuit has used phrases like "flexible meaning" and "realistic interpretation." *Sue & Sam Mfg. Co. v. B-L-S Const. Co.*, 538 F.2d 1048, 1051 (4th Cir. 1976). The Fourth Circuit has also described that the purpose of the rule is to force into one lawsuit all of the claims that, in fairness and in the interest of judicial economy, ought to be resolved in one lawsuit. *Id.*

It is true that a court would not have to adjudicate Oaktree's counterclaims in order to decide the claims in the bank's complaint, but it's equally true there is a logical relationship between the bank's foreclosure counterclaims and Oaktree's counterclaims. These claims have a factual and sequential connection to one another. Everyone acknowledges that although the 11-lot transaction was its own loan and mortgage, this loan happened only because the 51-lot transaction fell apart. These were separate loans, but there was a continuous course of dealing.

What is more, the bank's defenses to the counterclaims rely on the existence of a relationship between these transactions. The bank is claiming that a clause in one of the mortgages was a novation in which both the bank and Oaktree agreed to substitute a foreclosure loan for the loan discussed in the counterclaims. It is hard to see how the bank

can claim that these transactions are completely separate, but then use one of the transactions from the complaint to defeat the counterclaims.

The compulsory counterclaim rule is not a rigid rule that traps parties into relinquishing the right to a jury trial if they read the word “transaction” too broadly. Instead, it is a flexible rule that is based in judicial economy. It is more economical to adjudicate the issues between these parties in one case as opposed to two — this is a web of related disputes. Oaktree’s answer to the complaint included the defense of unclean hands, see (R.p.54), and because unclean hands would be based on the parties’ course of dealing, the factual basis for that defense would include facts that support Oaktree’s counterclaims. The Court should hold that the circuit court erred when it held that there was no relationship between the complaint and the counterclaims. The test is broader than the bank says.

V. Arguing That There Is No Evidence of Electronic Data Being Destroyed Does Not Describe the Record Accurately.

Walter Joyce, the bank’s director of information systems, explained in a deposition that when American Community Bank merged with Yadkin Valley Bank and Trust, there were only eight employees whose e-mails were retained. (Supp.R.p.5, lines 3-15). Derek Franklin was not one of those employees. (R.p.317). Mr. Joyce explained that while he has the ability to retrieve e-mails between Mr. Franklin and any of the eight retained accounts, he does not have the ability to retrieve any of Mr. Franklin’s e-mails that do not involve one of those accounts. Mr. Joyce agreed that such e-mails were irretrievably gone. (Supp.R.p.6, line 24 - p.7, line 6). And while the bank has an e-mail “archive,” that archive only contains e-mails generated after the bank installed the archive. (R.p.316, lines 2-17).

Here is how this played out: after the 51-lot loan fell apart in June of 2008 and after American Community Bank filed a complaint seeking to foreclose the 11-lot loan in April of 2009, American Community merged with Yadkin, fired Derek Franklin, and physically destroyed the hard-drives of most of its computers. The bank purged all e-mail accounts except for those of 8 individuals, and the bank installed an archive that would store all e-mails, but only from that moment forward. During this same general period of time, the parties were arguing over the sufficiency of the bank's discovery responses, including the bank's obligation to produce electronically stored information. Oaktree had to file a motion to compel, and the circuit court did not decide that motion until May of 2010. (R.p.23). It is difficult to see how it is possible to read this narrative and conclude that no electronic information was destroyed.

The bank's conduct may have a perfectly reasonable explanation, but at the same time, it is certainly possible that this conduct had a nefarious motivation. This Court's decision is not tied to determining the bank's motives. South Carolina does not have a well-developed body of law regarding discovery sanctions, but persuasive authority explains that the authority to police discovery conduct comes both from the court's procedural rules and from the "inherent power to regulate litigation, preserve and protect the integrity of the proceedings [], and sanction parties for abusive practices." *Shamis v. Ambassador Factors Corp.*, 34 F.Supp.2d 879, 888 (S.D.N.Y. 1999). A proper consideration of a request for sanctions would be guided by these standards and would depend on the relief requested. See *Fields v. Reg'l Med. Ctr. Orangeburg*, 354 S.C. 445, 457-58, 581 S.E.2d 489, 495 (Ct. App. 2003), *aff'd in part and rev'd in part*, 363 S.C. 19, 609 S.E.2d 506 (2005).

The circuit court did not perform this sort of inquiry. It never described that the bank was obligated to retain information as soon as litigation was reasonably foreseeable, and it never recited that although the bank filed this suit in 2009, the bank destroyed e-mails and computers later that year and did not institute a litigation hold until the end of 2010. (R.p.312, lines 14-15).¹ The circuit court paid no attention to the fact that two days before the hearing on the bank's motion for summary judgment, the bank produced copies of electronically stored information that had never been previously produced and argued that the production of those documents meant that no information had been destroyed. This was four months after the scheduling order called for discovery in this case to end. Instead of inquiring about how this conduct affected the integrity of this litigation and why the bank was waiting until May to produce documents it printed in March, the court wrote that it could not sanction the bank because Oaktree could not prove that a written loan commitment ever existed. As Oaktree's principal brief described, this is circular reasoning.

VI. The Circuit Court's Decision on Negligent Misrepresentation Was Controlled by Incorrect Interpretations of the Law.

The circuit court gave two reasons for granting the bank summary judgment on Oaktree's claim for negligent misrepresentation. The first was that Oaktree could not produce a written commitment to lend. The second was that the bank did not owe Oaktree any duty outside the alleged contract.

¹As with discovery sanctions, South Carolina does not have a well-developed body of law describing parties' discovery obligations and when those obligations commence. There is, however, a large body of federal law recognizing that the duty to preserve evidence begins once litigation is reasonably foreseeable. See, e.g., *Micron Technology, Inc. v. Rambus Inc.*, 645 F.3d 1311, 1319-20 (Fed. Cir. 2011) (citing *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)).

The first part of the circuit court's ruling will be controlled by the Court's analysis on the Lender Statute of Frauds. That statute forbids a party from maintaining a negligent entrustment claim unless the party has received a writing that satisfies the statute. See § 37-10-107(2)(d). At trial, Oaktree might offer several pieces of testimony to satisfy that statute. Tom Ras might testify as to the details of the writing, see (Supp.R.p.9, line 1 - p.10, line 25), and other individuals may testify as to the writing's existence. For example, Bill Hargrove, the owner of the 51-lots, testified in a deposition "I know a commitment existed because Derek [Franklin] told me it existed[.]" (R.pp.309-310).

The second part of the circuit court's decision should be controlled by the Supreme Court's decision in *Evans v. Rite Aid Corp.*, which explains that a party has a duty to exercise reasonable care in giving information when the party has a pecuniary interest in the transaction. 324 S.C. 269, 274, 478 S.E.2d 846, 848 (1996).

In defending the grant of summary judgment, the bank says that Oaktree did not come to the bank until after it had signed the contract to buy the 51-lot subdivision. Thus, the bank says, any misrepresentation it made did not induce Oaktree to do anything. To support this, the bank cites a portion of Derek Franklin's deposition testimony. In that testimony, Franklin says he does not recall seeing Oaktree's contract to buy the lots prior to the contract having been signed. (Brief of Respondent, p.10 n.5) citing (R.p.394, lines 9-23).

As the party seeking summary judgment, the bank had the obligation of establishing that the material facts were not in dispute and that the bank was entitled to judgment as a matter of law. Rule 56(c), SCRPC. Derek Franklin's deposition testimony establishes nothing other than what his testimony at trial would be. It says nothing of Oaktree's version

of events and does not establish a timeline for the point at which Tom Ras says he began receiving formal or informal assurances that the bank would fund this loan. The Court should reject the argument that Derek Franklin's qualified denials form an independent basis for granting summary judgment on negligent misrepresentation. It should not be a surprise that Derek Franklin's version of events is favorable to the bank.

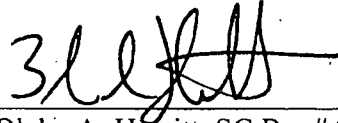
CONCLUSION

This Court should reverse the grant of summary judgment to Yadkin Valley Bank & Trust on Oaktree's counterclaims for breach of contract and negligent misrepresentation. This result does no violence to the letter or the purpose of the Lender Statute of Frauds. Instead, it honors the principle that disputes of material facts go to the fact-finder.

The Court should also reverse the grant of Yadkin's motion to deny Oaktree a jury trial on those counterclaims. There was a relationship between the loan outlined in the complaint and the loan outlined in the counterclaims.

March 1, 2013

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-1673

Yadkin Valley Bank & Trust, ... Respondent,

v.

Oaktree Homes, Inc., Dawne M. Ras and
Thomas C. Ras, Daniel Simpson, Above All
Services, Inc., Carter Lumber Company, Efficient
Painting Contractors, Inc., Creative Concepts, and
Solid As A Rock, Inc., ... Defendants,

Of whom

Oaktree Homes, Inc., is the Appellant.

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STATE OF SOUTH CAROLINA
COUNTY OF YORK

)
) IN THE COURT OF COMMON PLEAS

Yadkin Valley Bank & Trust,

Plaintiff.

vs.

Oaktree Homes, Inc.; Dawne M. Ras and Thomas
C. Ras; Daniel Simpson; Above All Services, Inc.;
Carter Lumber Company; Efficient Painting
Contractors, Inc.; Creative Concepts; and Solid As
A Rock, Inc.,

Defendants.

C.A. No.: 09-CP-46-1673

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YORK COUNTY, SC

**ORDER GRANTING SUMMARY
JUDGMENT ON THE COUNTERCLAIMS**

THIS MATTER came before me on the motions of Plaintiff seeking denial of any jury trial right on the counterclaims and for summary judgment in its favor on the contract and non-contract counterclaims, as well as a motion for sanctions against Plaintiff. Plaintiff filed memoranda in support of its motions and a response to the motion for sanctions. Defendants Oaktree Homes, Inc., Dawne M. Ras and Thomas C. Ras (Counterclaimants) submitted just one memorandum in opposition to the motions of Plaintiff. Present for Plaintiff were James W. Sheedy and Susan E. Driscoll; and for Counterclaimants, Chad A. McGowan. Defendant Thomas C. Ras was also present at the hearing and did not comment or object to anything said by his lawyer. All answering parties received notice of the hearing.

The evidence filed with the Court by Plaintiff relating to the four motions consisted of the transcripts from the depositions of John Beard, Chris Brislin, John Car, Matthew Cox, Jeff Cramer, Mark DeMarcus, Derek Franklin, Bill Hargrove, Harry Lee, Matthew Randall, Dawne Ras, Tom Ras and Grier Sandifer; the loan status letter dated May 9, 2008 signed by Franklin

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(The Loan Status Letter); the contract of sale between Oaktree Homes, Inc. (Oaktree) and Har-Lee, LLC (Har-Lee) dated December 13, 2007; amended response dated December 10, 2010, to Plaintiff's request for admissions; letter from counsel for Plaintiff to counsel for Counterclaimants dated November 22, 2010; and letter from counsel for Plaintiff to counsel for Counterclaimants dated January 18, 2011.

In addition to some of the same evidence submitted by Plaintiff, Counterclaimants filed the Affidavit of Dawne Ras; the purchase and sale agreement between Oaktree and Palmetto Investment Holding Group, LLC (PIH) dated May 7, 2008; the transcript of the deposition of Walter Joyce; and the loan commitment of Bank of York dated September 4, 2007.

I. Background

Oaktree was a builder that obtained acquisition and/or development loans from Plaintiff, among others. Plaintiff filed a mortgage foreclosure action on four commercial loan transactions known as Phases I (1 lot) and II (10 lots), Palm Tree Cove; Trinity Ridge; and the Glynns. The foreclosure seeks entry of judgments against Oaktree as borrower and Dawne M. Ras and Thomas C. Ras (the "Rases") as guarantors, and for judicial sale of the real property collateral described in the four mortgages.

In response to the foreclosure complaint, Counterclaimants alleged that Oaktree as buyer contracted with Har-Lee as seller to purchase 51 lots for \$4,440,000 (51-lot deal); Oaktree as seller contracted with PIH as buyer to sell the same lots for \$6,697,070; and Plaintiff assured Oaktree that Plaintiff would provide financing to Oaktree for its acquisition of the 51 lots. (Answer to Amended Complaint and Counterclaim, p.6, ¶¶ 66, 67 and 71). Oaktree and Har-Lee scheduled a closing for May 23, 2008; Oaktree and PIH scheduled a closing for May 26, 2008;

and neither closing occurred because Plaintiff did not provide any funding. (Id. ¶¶72, 73 and 75).

Oaktree sued Plaintiff for breach of contract, breach of contract accompanied by a fraudulent act, fraud, negligent misrepresentation and interference with contract. Oaktree and the Rases, together, asserted a cause of action under the Unfair Trade Practices Act (UTPA). Counterclaimants demanded a jury trial. Counterclaimants sought damages from Plaintiff for failure to provide financing for the 51-lot deal. (Id. ¶¶ 84, 97-98, 111-112, 119-120, 126-127, and 136). Counterclaimants did not seek any legal or equitable relief with respect to the four commercial loan transactions in Plaintiff's complaint.

At the hearing, counsel for Counterclaimants represented that they would not oppose entry of summary judgment in favor of Plaintiff on their claims for fraud, interference with contract and UTPA. Because Plaintiff's motion for summary judgment as to fraud, interference with contract and UTPA is well-supported and there are no genuine issues of material fact as applied to the controlling law, in response to which Oaktree and the Rases have not offered any facts, law or argument to the contrary, the Court grants summary judgment against Counterclaimants on those three causes of action. That leaves breach of contract, breach of contract accompanied by a fraudulent act and negligent misrepresentation in dispute.

II. Findings of Fact

Based on the motions, memoranda, response, evidence and the arguments of counsel given at the hearing, the Court hereby makes the following Findings of Fact germane to the motions before it.

1. Plaintiff did not fund Oaktree's request for a loan on the 51-lot deal. (Depos. Tr. J. Cramer, pp. 21-22, 24-25; Depos. Tr. M. DeMarcus, pp. 9-12, 44-48.) The reason was that

Plaintiff was uncomfortable with the 51-lot deal, including PIH's ability to pay Oaktree the necessary funds to payoff the requested loan. (Depos. Tr. J. Cramer, pp. 25-26, 29; Depos. Tr. M. DeMarcus, pp. 14-16, 18-19.)

2. There is no physical evidence of any written commitment letter signed by Plaintiff containing the material terms of a promise to provide any funding for the 51-lot deal. (Depos. Tr. T. Ras, pp. 117, 119; Depos. Tr. H. Lee, p. 62; Depos. Tr. Randall, pp. 30-32; Depos. Tr. Cox, pp. 30-34; Depos. Tr. Brislin, p. 15; Depos. Tr. Sandifer, p. 30; Depos. Tr. J. Cramer, pp. 43-44; Depos. Tr. M. DeMarcus, p. 50; Depos. Tr. D. Ras, p. 64.)

3. The Loan Status Letter does not state an interest rate, maturity date, payment terms or any other underwriting conditions for a loan on the 51-lot deal. This Letter only says Plaintiff is in the process of increasing a \$2.5 million builder line of credit to \$3.8 million.

4. Plaintiff denies that any loan commitment for the 51-lot deal was ever prepared, much less signed, by it. (Depos. Tr. D. Franklin, p. 7; Depos. Tr. M. DeMarcus, p. 50; Depos. Tr. J. Cramer, pp. 43-44; 139-40, 142.)

5. The Rasces say that they saw a written loan commitment for the 51-lot deal signed by Plaintiff and them, which contained handwritten changes, that was taken by Plaintiff to be retyped and signed by them and Plaintiff at closing. (Depos. Tr. T. Ras, pp. 119, 122; Depos. Tr. D. Ras, pp. 63-64.) They never saw the written loan commitment again. (Depos. Tr. T. Ras, p. 119; Depos. Tr. D. Ras, p. 63.)

6. Tom Ras testified that he kept a copy of the marked-up commitment which he forwarded to Bill Hargrove (Har-Lee), and either Tom or Bill lost the alleged commitment. (Depos. Tr. T. Ras, p. 119).

7. The July 22, 2008 loan commitment for \$1,305,000 between Plaintiff and Oaktree was for 11 of the 51 lots in Palm Tree Cove Phase II, and made no mention of Plaintiff extending a loan for 51 lots. (Depos. Tr. M. DeMarcus, pp. 64-65.)

8. The July 22nd loan commitment expressly provided that it did not extend or renew the existing \$2.5 million builder line of credit of Oaktree. (Depos. Tr. M. DeMarcus, pp. 65-66.)

9. The mortgage against the 11 lots stated that it and the Related Documents (promissory note) constituted the entire understanding and agreement of the parties as to the matters set forth therein. (Phase 2 Mortgage, p.4).

10. The alleged loan commitment by Plaintiff for the 51-lot deal was a separate financing from the four loan transactions in Plaintiff's complaint. (Depos. Tr. T. Ras, p. 153; Affidavit of Dawne Ras, p.1, ¶4.)

11. Oaktree defaulted on the Phase II loan (10 lots¹) on December 28, 2008; the Phase I loan, February 5, 2009; the Trinity Ridge loan, January 5, 2009; and the Glynn's loan, October 5, 2008. (Depos. Tr. T. Ras, pp. 163-64; Depos. Tr. D. Ras, p. 51.) Defaults on all four loans occurred at least four months after Plaintiff allegedly failed in May 2008 to provide any funding for the 51-lot deal.

III. Discussion

A. Waiver of Right to Jury Trial

1. **Equitable Complaint.** Foreclosure is an equitable claim, triable by the court without a jury. "Actions to foreclose liens or obtain partition of real property shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53." Rule 71(a), SCRPC; *Mortgage Recovery Fund-Riverbend, Ltd. v. Heritage Clipper Riverbend Trust*, 327

¹ Although the Phase II loan was originally secured by eleven lots, one of the lots was sold prior to the initiation of the foreclosure action.

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S.C. 491, 493, 489 S.E.2d 655, 656 (Ct. App. 1997) ("An action to foreclose a real estate mortgage comes within the equitable jurisdiction of the court."); *Gardner v. Travis*, 316 S.C. 315, 317, 450 S.E.2d 54, 56 (Ct. App. 1994), citing *C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 350 S.E.2d 191 (1986), modified, and *Johnson v. South Carolina Nat'l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987) ("Because a foreclosure action is an action in equity, a party has no right to a jury trial of the issues raised in a foreclosure action."). Plaintiff's complaint is just for foreclosure of four mortgages and entry of deficiency judgments against Counterclaimants. Plaintiff has not asserted any legal claims. Thus, the complaint is entirely equitable, so the complaint itself does not entitle Counterclaimants to a jury trial.

2. **Legal Counterclaims in an Equitable Case.** The question here is whether the legal counterclaims for breach of contract, breach of contract accompanied by a fraudulent act and negligent misrepresentation entitle Oaktree to a jury trial on those counterclaims.² In *Massengale*, 290 S.C. at 301, 350 S.E.2d at 193, the South Carolina Supreme Court "summarize[d] the proper analysis for determining the trial of issues raised by counterclaim and [] set out the procedure to be followed when issues are to be tried before a jury." Under the holding in *Massengale*, "[i]f the complaint is equitable and the counterclaim legal and permissive, the defendant waives his right to a jury trial." *Id.* at 302, 350 S.E.2d at 193. When a defendant brings a legal and permissive counterclaim in an equitable action, that defendant loses its right to a jury trial on those counterclaims.

Under Rule 13(b), SCRCP, a permissive counterclaim is defined as a claim "not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." "By definition, a counterclaim is compulsory only if it arises out of the same transaction or

²The one counterclaim lodged by the Rases, UTPA, has been dismissed without opposition. The prior existence of a UTPA claim does not form the basis for a jury trial on the remaining claims.

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occurrence as the opposing party's claim." *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 61, 566 S.E.2d 863, 865 (Ct. App. 2002). "The test for determining if a counterclaim is compulsory is whether there is a 'logical relationship' between the claim and the counterclaim." *Id.*

3. **Application of the Test.** The South Carolina Supreme Court applied this test in the foreclosure context in *North Carolina Federal Sav. and Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989). In *DAV*, two counterclaims in particular were analyzed: first, an allegation of a subsequent loan from lender to payoff the loan in default, and second, an allegation that lender would buy equity in a joint venture of the borrower. The Supreme Court found the first counterclaim to be compulsory in that it arose out of the same transaction as the plaintiff's equitable claim, the claim and counterclaim were logically related, and the counterclaim pertained to the enforceability of the note. The Supreme Court ruled that a logical relationship did not exist between the enforceability of the note which was the subject of the foreclosure and the counterclaim relating to an alleged agreement that NC Federal "would purchase DAV's interest in the joint venture" which did not "affect the enforceability of the note" and, as a result, was held to be permissive. *Id.* at 519.

Applying South Carolina law, the Fourth Circuit used the *DAV* test in *Central States Underwater Contracting, Inc. v. R. L. Morrison & Sons, Inc.*, 45 F.3d 425 (4th Cir. 1995), in which Judges Williams and Wilkins (along with an 8th Cir. judge sitting by designation) found a counterclaim to be permissive because its facts and issues were wholly different from the claim by the plaintiff. The plaintiff sued for destruction of its underwater trenching system by the defendant. The defendant counterclaimed for the plaintiff's failure to pay on a lease of a barge and tugboat.

4. **Oaktree Waived Jury Trial.** Oaktree and the Rasas admitted under oath that their alleged loan commitment for the 51-lot deal was extrinsic to the four loan transactions in Plaintiff's complaint.³ Further, the alleged loan commitment did not emanate from and was unrelated to any of the four loans in the complaint. If proven, the commitment would have no impact on the validity or enforceability of the four loans. Unlike in *DAV*, there was no evidence that the alleged commitment was for the purpose of curing defaults on any of the four loans. The four loans were not in default at the time the commitment was allegedly made. Oaktree prayed for damages, not for relief from any of the four loans. When Oaktree asserted legal and permissive counterclaims in this mortgage foreclosure, Oaktree waived any right to a jury trial on those counterclaims.⁴ The counterclaims, therefore, are to be heard, if at all, nonjury.

B. No Actionable Contract Claim

For Oaktree to be able to sue Plaintiff for breach of contract, there must be a valid, enforceable contract between them. Oaktree alleged that it and Plaintiff "made a contract whereby ACB would lend money to finance Oaktree's Palm Tree Cove II deal." (Answer to Amended Complaint and Counterclaim, p.6, ¶ 81.). There is no question that Oaktree does not

³ Tom Ras testified as follows:

- Q: There are certain loans that OakTree has at American Community Bank which are in default and the subject of foreclosure?
A: That is correct.
Q: The commitment that you described in May had nothing to do with those loans?
A: No.
Q: It was completely separate as financing?
A: Correct.

(Depos. Tr. T. Ras, p. 153.) The Affidavit of Dawne Ras also states that the alleged loan commitment was a separate transaction and had nothing to do with the other four loans. (Affidavit of Dawne Ras, p.1, ¶4.).

⁴At the hearing, counsel for Oaktree did not argue that its counterclaims were compulsory. Rather, his contention was, by Oaktree not opposing the relief requested in Plaintiff's complaint, this case could be re-aligned so that Oaktree became the plaintiff demanding a jury trial on legal claims. However, Oaktree's waiver of its right to a jury trial on its counterclaims occurred when such counterclaims were lodged in this foreclosure.

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have in its possession (or anyone else's, for that matter) a written contract signed by Plaintiff to lend money on the 51-lot deal. At trial Oaktree wishes to offer the oral testimony of its principals, the Rases, that a typewritten loan commitment signed by it and Plaintiff, bearing handwritten, initialed changes, once existed but has now been lost or destroyed, and was to be re-typed and re-executed at loan closing.

1. **Lender Statute of Frauds.** S.C. Code Ann. § 37-10-107 (the "Lender Statute of Frauds") is titled: "Certain legal or equitable actions prohibited." The Lender Statute of Frauds begins: "No person may maintain an action . . ." S.C. Code Ann. § 37-10-107 (1). The title and the introductory language make clear the Statute is prohibitory and prevents certain actions from being maintained.

The prohibition extends to "legal or equitable relief or a defense . . ." *Id.* So, defenses and counterclaims are expressly prohibited. The relief or defense cannot be "based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement . . ." *Id.* The promise, undertaking, accepted offer, commitment, or agreement cannot be "(a) to lend or borrow money; . . . (c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, . . ." S.C. Code Ann. § 37-10-107 (1)(a), (c).

To escape the prohibition, "the party seeking to maintain the action or defense [must] have received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party

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to be charged, or its duly authorized agent, has signed the writing.”⁵ S.C. Code Ann. § 37-10-107 (1)(c).

2. **South Carolina Cases Under Lender Statute of Frauds.** “The purpose of South Carolina Code § 37-10-107 is to prevent claims or defenses to actions on loans that are not supported by a writing.” *Carolina First Bank v. Lucas*, Order, p.3, 03-CP-10-1907 (S.C. Ct. Cm. Pl. 06/14/04) (Judge Thomas L. Houghston). See also *Lands Inn, Inc. v. Branch Banking and Trust Company of South Carolina*, Order, p.5, C.A. No 2:98-158-23 (D.S.C. Charleston Div. 04/12/99) (Judge Patrick Michael Duffy) (Plaintiff’s claims did not satisfy S.C. Code Ann. § 37-10-107, because plaintiff never “received a single writing signed by defendant that memorialized the terms of the loan.”); *Robertson v. First Union National Bank*, Order, p.4, 99-CP-10-288 (S.C. Ct. Cm. Pl. 08/08/00) (Judge R. Markley Dennis, Jr.) (“[C]ause of action barred because there is no writing, signed by the party to be charged, outlining the terms and specifications of the agreement.”). South Carolina decisional law is quite clear that the Statute’s reference to no action or defense truly means no action or defense, regardless of whether such actions or defenses are legal or equitable. See *Derrick v. Branch Banking and Trust Company of South Carolina*, 96-CP-42-2095 (S.C. Ct. Cm. Pl. 09/08/98) (Dismissing plaintiff’s fraud claim for lack of a writing signed by the party to be charged.). Without a writing, signed by the party to be charged that contains the material terms of the commitment to lend, no action can be brought,

⁵ The exception, section (3)(d), is inapplicable here because Oaktree is not asserting that its defenses and counterclaims are based on a promissory note, real estate mortgage, security agreement, guaranty, surety agreement or letter of credit. Here, there was no promissory note or mortgage in the amount of \$3.8 million given by Oaktree to Plaintiff. These types of documents would be signed by a borrower rather than a lender. Furthermore, the exception was “to prevent creditors from seeking to recover on notes or mortgages for which they had never loaned money, and to prevent them from refusing to loan money for which they had obtained a note or mortgage from the debtor” *Berlinksy v. Palmetto Federal Savings Bank of South Carolina*, Order, p.4, 00-CP 10 2375 (S.C. Ct. Cm. Pl. 12/06/01) (Judge Gerald C. Smoak, Sr.)

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nor can a defense be maintained against any lender based upon its failure to perform an alleged promise.

Recently, our Supreme Court in *Sea Cove Development, LLC v. Harbourside Community Bank*, 387 S.C. 95, 691 S.E.2d 158 (2010), considered whether loan pre-qualification letters satisfied the writing requirement of § 37-10-107 and concluded such letters did not. The lender wrote to each loan applicant advising them that they were pre-qualified, that pre-qualification would expire on a certain date and their interest rate would float until they signed a rate lock agreement. The pre-qualification was subject to lender's receipt of verification of documentation submitted by the applicants, satisfactory appraisal and clear title, as well as such other information as lender might require. Lender thereafter sent the applicants a needs-list, and the applicants signed an application disclosure acknowledging certain fees. The day before the scheduled closing date, the applicants learned their loan requests had been denied. Applicants sued lender for breach of a loan commitment. Applicants asserted all of the letters from the lender constituted a signed writing in satisfaction of the Statute or, at the very least, created a jury question. The trial and appellate courts did not find applicants arguments persuasive and each ruled that applicants did not have final loan approval.

3. **The Loan Status Letter.** The only writing signed by Plaintiff that Oaktree has is dated May 9, 2008, The Loan Status Letter. Although The Loan Status Letter is signed by a former loan officer of Plaintiff, the Letter does not contain the material terms of a commitment to lend.⁶ It does not state an interest rate, a maturity date, payment terms, or

⁶ Oaktree initially contended that The Loan Status Letter was a modification to the \$2.5 million builder line. This, of course, ignores that the Letter plainly says "in the process of." This also ignores that the fully executed July 2008 loan commitment for the 10-lot deal acknowledges that the Phase I builder line had expired and was not renewed. Oaktree retreated from this position when it also became apparent that the Phase I builder line commitment contained numerous unmodified terms incapable of fulfillment by Oaktree in order to obtain funding

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underwriting conditions (e.g., loan to value, environmental condition). So The Loan Status Letter does not satisfy the requirements of the Statute. Further, The Loan Status Letter says "in the process of," showing Plaintiff had not given final loan approval. As in *Lands Inn* and *Harbourside*, Oaktree never received a writing signed by Plaintiff that set forth the material terms of the commitment. Without such a writing, Plaintiff cannot maintain an action against Plaintiff on the grounds of the alleged loan commitment.

4. **The Phantom Letter.** Oaktree expects to move forward on the basis of a "phantom" commitment letter, i.e., something apparently seen, heard or sensed, but having no physical reality. *American Heritage College Dictionary*, 4th Ed., p. 1043. Oaktree submits that it has met the requirements of the Lender Statute of Frauds if its principals can testify that at one time they at least saw a signed writing. Oaktree contends it can circumvent the Best Evidence Rule (Rule 1002, SCRF) and offer secondary evidence (Rule 1004, SCRE) consisting of testimony from its principals that the proposed loan commitment once existed. From the purported existence of a commitment, Oaktree argues an inference could be drawn that if no one has the phantom letter, it must have been lost or destroyed.

All of the witnesses for Plaintiff aver that a commitment never existed. Derek Franklin, Plaintiff's loan officer to Oaktree, denies that any commitment for the 51-lot deal was ever prepared by him. (Depos. Tr. D. Franklin, p. 7.) So the testimony of Plaintiff provides no support for the notion that a commitment even existed, much less that it was lost or destroyed. Tom Ras testified that he kept a copy of the marked-up commitment which he forwarded to Bill Hargrove (Har-Lee), and one of them lost it. (Depos. Tr. T. Ras, p.119). Tom Ras's testimony is the only evidence that the phantom letter was lost. Even if he says Hargrove or he lost the letter,

for the 51-lot deal. Oaktree no longer bases its contract claim on The Loan Status Letter. Oaktree now concedes that it cannot produce a signed writing.

he cannot testify as to and prove its material terms or conditions. (Depos. Tr. T. Ras, pp. 124-125.)

First, there are no cases under the Lender Statute of Frauds upholding that the requirement of a writing may be circumvented through testimony, which is the very reason for the Statute in the first place, viz., to avoid unwritten loans. The problem here is obvious. Anyone can swear they had a loan, its payment terms, interest rate, maturity date and other terms favorable to the swearing party.

Second, Oaktree has no South Carolina law to support its position under the general Statute of Frauds either. S.C. Code Ann. § 32-3-10. Under South Carolina law, "[e]very essential element of a contract falling under the statute of frauds must be proved by writing." *Woodruff Oil & Fertilizer Co. v. Portsmouth Cotton Oil Refining Corp.*, 246 F. 375, 377 (4th Cir. 1917). "The statute of frauds, intended to prevent imposition by one man imputing to another a sale on parol testimony, would be nullified by mere circuitry if a party materially interested in making a purchase were allowed to prove by parol [evidence] that he was authorized to sign the name of the seller, and that the seller knew of his adverse interest." *Id.* The requirement of a signed writing, for example, to hold a guarantor liable for another's debt, cannot be avoided by oral testimony to the effect that there was once a written guaranty. "The Statute of Frauds was not enacted to . . . supply a cloak of immunity to hedging litigants lacking integrity," but it "was intended to guard against the perils of perjury and error in the spoken word." 10 Williston on Contracts § 29:4 (4th ed.). Certain obligations under the general Statute of Frauds like loan commitments require that the writing actually be produced in order to hold the other party responsible. *Roberston v. First Union National Bank*, Order, p.4, 99-CP-10-288 (S.C. Ct. Cm. Pl. 08/08/00).

Third, South Carolina decisional law allowing for secondary evidence (Rule 1002, SCRE) does not suggest the statutory requirement of a writing may be displaced by oral testimony that the writing has been lost. Instead, the cases allow secondary evidence such as copies of a writing or a writing produced from review of other records, or testimony to interpret the writing that has been offered into evidence. E.g., *Pee Dee Prod. Credit Ass'n. v. Love*, 284 S.C. 371, 326 S.E.2d 650 (1984) (issue was whether signature on note was authentic). Where secondary evidence has been offered as to a lost writing, the court rejected "I had this in my possession one time and turned it over to a lawyer and I don't know what he did with it." *Windham v. Lloyd*, 253 S.C. 568, 572, 172 S.E.2d 117, 119 (1970). Oaktree through the Rases cannot circumvent the statutory requirement of a writing by saying at one time they saw a signed writing.

Fourth, the Statute says, "the party seeking to maintain the action or defense [must] have received a writing from the party to be charged." South Carolina Code § 37-10-107(1)(c). Oaktree interprets this language to mean that so long as the Rases once saw the alleged commitment letter, they received a writing sufficient to meet the Statute's requirements. By their own testimony, the Rases admitted the letter was taken back by the loan officer to be re-typed. (Depos. Tr. T. Ras, pp. 119, 122; Depos. Tr. D. Ras, pp. 63-64.) Under the Statute, the language "received a writing" is a delivery requirement "intended to preclude lawsuits based on personal notes, confidential memoranda, or drafts, all of which have been signed by the party to be charged and which may come to light as a result of the discovery process." See John L. Culhane, Jr., *Lender Liability Limitation Amendments to State Statutes of Frauds*, 45 Bus. Law 1779, 1795 (1990) cited with approval in *Harbourside* at 691 S.E.2d at 163. Oaktree never received a document intended as a final commitment.

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Under the common law (irrespective of the Statute), if the Rases' testimony were accepted for argument's sake, the loan officer clearly retracted and, therefore, revoked the so-called offer of a loan commitment, which the Rases expressly rejected anyway by insisting on revisions to such commitment. See *Weisz Graphics Div. of Fred B. Johnson Co., Inc. v. Peck Industries*, 304 S.C. 101, 106, 403 S.E.2d 146, 149 (Ct. App. 1991) ("At common law, no contract is formed if the acceptance varies the terms of the offer. Instead, an acceptance which adds different or additional terms is treated as a counteroffer, which may be accepted or rejected by the other party."). It is incontrovertible that the Rases did not have a final loan commitment delivered to them, and whatever they allegedly saw they rejected and they and Plaintiff agreed it would be re-typed and re-signed.

Fifth, Oaktree subsequently borrowed \$1,305,000 to build single family residences on 10 of the 51 lots. There was no mention in this subsequent loan of any other lots within Phase II being financed by Plaintiff for Oaktree. This subsequent loan specifically recited that it did not extend or renew the existing \$2.5 million line of credit. The mortgage against the 10-lots contained a complete integration clause that the loan documents constituted the entire understanding between Oaktree and Plaintiff.

In *Midland Mutual Life Insurance Company v. Harrell*, 331 S.C. 394, 503 S.E.2d 189 (Ct.App. 1998), a *per curiam* decision, the court did not reach whether a 1992 oral agreement between borrower and lender to renegotiate the payment terms if the shopping center's cash flow proved to be insufficient to service the debt, satisfied the Lender Statute of Frauds. The court did not have to analyze the Lender Statute of Frauds because two years later in 1994, borrower and lender agreed in writing that if borrower failed to pay, lender could pursue any available remedy.

The court found "the 1994 documents refute any contention the 1992 oral agreement was still in effect ..." *Id.* 503 S.E.2d at 190.

Obviously, Oaktree was willing to accept funding for 10 out of the 51 lots to be sold to individual buyers as represented to Plaintiff in the form of signed contracts of sale, but not for resale to PIH as alleged in the Counterclaim. The July 22, 2008 loan commitment stated on its face that the existing line of credit was not renewed, so any process of extending the line of credit as suggested in The Loan Status Letter was over by agreement as of July 22nd. Oaktree then signed a mortgage reciting that the entire agreement was the 10 lots. Whether the Phase 2 loan for 10 lots was a modification of the \$2.5 million builder line or a novation of the phantom loan commitment for 51 lots, the result is the same: Har-Lee, Oaktree, Plaintiff and PIH could no longer perform as alleged by Oaktree and the Rases. The 51-lot deal was effectively extinguished by agreement when the closing occurred on the 10 lots. Whatever rights or interests Counterclaimants thought they had to a \$3.8 million loan from Plaintiff to fund part of the acquisition of 51 lots from Har-Lee were gone.

The mortgage on the 10 lots was a final, complete, fully integrated expression of Oaktree's and Plaintiff's intentions to fund only 10 out of the 51 lots. It was their entire understanding and agreement. Oaktree signed the mortgage thereby acknowledging there was no other understanding or agreement. "The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument." *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) citing *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459.

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471, 581 S.E.2d 496, 502 (Cl. App. 2003). The parol evidence of a phantom commitment letter contradicting the mortgage is inadmissible by Counterclaimants.

Oaktree cannot show under South Carolina law from the evidence before this Court that a final written commitment letter signed by Plaintiff ever existed, was delivered to Oaktree and then subsequently lost by it. Even if Oaktree could show this, South Carolina statutory law superimposes an additional requirement, that the signed writing be produced, which even Oaktree has conceded it cannot meet. The July 22nd financing for 11 lots further demonstrates there was no valid or enforceable loan commitment for 51 lots after the July financing closed.

C. No Actionable Counterclaims for Breach of Contract Accompanied by a Fraudulent Act or Negligent Misrepresentation, Nor Any Basis for Recovery Under Either Theory

1. **Breach Accompanied by Fraudulent Act.** "In order to recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish: (1) a breach of contract; (2) that the breach was accomplished with a fraudulent intention; and (3) that the breach was accompanied by a fraudulent act." *Minter v. GOCT, Inc.*, 322 S.C. 525, 529-30, 473 S.E.2d 67, 70 (Cl. App. 1996). There must be "an independent fraudulent act which accompanied the breach." *Id.*

Oaktree's counterclaim for breach of contract accompanied by a fraudulent act necessarily presupposes that a contract existed between it and Plaintiff. For the reasons given above, no such valid or enforceable contract between Oaktree and Plaintiff for it to provide funding for the 51-lot deal is actionable under the Lender Statute of Frauds.

Oaktree alleges Plaintiff was in merger discussions, the acquiring bank directed that no more commercial loans be closed and a decision was made not to lend to Oaktree for the 51-lot deal; yet Plaintiff continued to assure Oaktree that Plaintiff would provide funding for the 51-lot

deal and then, ultimately, refused to honor its alleged commitment. (Answer to Amended Complaint and Counterclaim, p.7, ¶¶ 87-95.). Oaktree's deposition testimony consisted of the alleged loan commitment and the alleged breach by Plaintiff. (Depos. Tr. T. Ras, pp. 116-126; Depos. Tr. D. Ras, pp. 50-64.) Oaktree's evidence did not offer any support for the idea that Plaintiff refused to lend on the 51-lot deal because of a decision not to make any more commercial loans. Plaintiff's witnesses did not say that either. Plaintiff's witnesses said they were uncomfortable with the deal itself, including PIH's ability to pay Oaktree so it could payoff Plaintiff's alleged loan. (Depos. Tr. J. Cramer, pp. 25-26, 29; Depos. Tr. M. DeMarcus, pp. 14-16, 18-19.) At the hearing, counsel for Oaktree said the fraudulent act was Plaintiff's subsequent destruction of the letter. Such an act is obviously not concurrent with the alleged breach. There is no evidence of any fraudulent intent (or dishonest design), or fraudulent act by Plaintiff concurrent with its purported breach.

Oaktree has not shown any genuine issue of material fact with respect to its ability to meet the three elements of a claim for breach of contract accompanied by a fraudulent act.

2. Negligent Misrepresentation. Plaintiff's alleged negligent misrepresentation was that it "would honor its commitment to lend Oaktree money, when at that time the representation was false." (Answer to Amended Complaint and Counterclaim, p.8, ¶ 114.). Oaktree is claiming a misrepresentation after the commitment to lend was made, not a misrepresentation preceding the alleged commitment. The purported misrepresentation has to do with whether Plaintiff will perform under an alleged contract.

As is true for breach of contract accompanied by a fraudulent act, the tort of negligent misrepresentation based on a commitment to lend is prohibited by the Lender Statute of Frauds. Such legal relief for failure to lend money requires a writing signed by the party to be charged,

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containing the material terms and conditions. Oaktree does not have such a writing. Hence, negligent misrepresentation fails for that reason.

In addition, "[a]s a general rule, a claim arising out of the provisions of a contract must find remedy under contract law." *White v. Holiday Kamper & Boats*, 2008 WL 4155663, *5 (D.S.C. 2008) (Holding negligent misrepresentation was not applicable as a matter of law to an action for solely economic losses.). When a party performs "in such a way that he violates a contractual duty *only*, then his liability is only contractual." *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 345, 384 S.E.2d 730, 737 (1989). Thus, "[a] breach of duty which arises under the provisions of a contract between the parties *must be redressed under contract, and a tort action will not lie*." *Koontz v. Thomas*, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999) (emphasis added), quoting *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54-55, 463 S.E.2d 85, 88 (1995). See also *Foxfire Village, Inc. v. Black & Veatch, Inc.*, 304 S.C. 366, 404 S.E.2d 912, 917 (Ct. App. 1991) ("Where the cause of action is predicated on an alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie."). This "rule maintains the dividing line between tort and contract. . . ." *Tommy L. Griffin*, 320 S.C. at 54, 463 S.E.2d at 88.

Oaktree's remedy for Plaintiff's failure to honor an alleged loan commitment is redressable in contract, not tort, if Oaktree were able to satisfy the Lender Statute of Frauds, which it cannot do. No duty exists on the part of Plaintiff to Oaktree outside of the alleged contractual relationship. Oaktree has no basis for relief on a theory of negligent misrepresentation.

D. Sanctions Are Unwarranted

In their motion for sanctions, Counterclaimants presume that a written loan commitment signed by Plaintiff existed, was in its possession and was destroyed. Counterclaimants have not demonstrated any of these three things. Counterclaimants want to sanction Plaintiff for destroying something that they have no proof Plaintiff had and which Plaintiff swears never existed in the first place. Counterclaimants have no physical proof that a commitment ever existed.

Tom Ras testified. "Q: Did you keep a copy of it? A: We did, and a copy was forwarded to Bill Hargrove at one point to satisfy his bank. Where that copy is between Bill and myself, I couldn't tell you at this point now." (Depos. Tr. T. Ras, p.119). If the phantom letter existed and cannot now be found, Counterclaimants have admitted that they had possession and lost it. The Court cannot penalize Plaintiff for the Rases' losing something, which Plaintiff avers never existed and can find no physical evidence otherwise.

Rule 37(b)(2), SCRCP, is an extreme remedy inappropriate in a case, such as this, wholly lacking in any evidence of willful disobedience. See *Fields v. Regional Medical Center Orangeburg*, 363 S.C. 19, 609 S.E.2d 506 (2005) (Sanction of excluding certain evidence improper, because there was no evidence of a willful failure to disclose.); *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996) ("[W]here the effect will be the same as granting judgment by default or dismissal, a preclusion order may be made only if there is some showing of willful disobedience or gross indifference to the rights of the adverse party."). There is nothing in the record to show that a commitment ever existed, was in the possession of Plaintiff and was destroyed by Plaintiff. The motion for sanctions filed by Oaktree and the Rases is denied.

III. Conclusion

If a motion for summary judgment is supported as provided in the Rule, summary judgment will be granted, unless the adverse party presents evidence showing that there is a genuine issue of fact for trial. Rule 56(e), SCRPC. A nonmoving party has to demonstrate at least a scintilla of evidence to defeat a motion for summary judgment, where as here the burden is preponderance of the evidence. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009); and *Shirley's Iron Works, Inc. v. City of Union*, 2010 WL 530195 (S.C. Ct. App. 2010). The scintilla, however, must be of probative value. *Bass v. Gopal, Inc.*, 384 S.C. 238, 680 S.E.2d 917 (Ct.App. 2009); *Larier Construction Co., Inc. v. Bailey & Yobs, Inc.*, 384 S.C. 275, 681 S.E.2d 909 (Ct.App. 2009); and, *Carolina Renewal, Inc. v. South Carolina Dept. Transp.*, 385 S.C. 550, 684 S.E.2d 779 (Ct.App. 2009). Where as here there is no genuine issue of material fact, the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC.

Oaktree waived its right to a jury trial on the remaining permissive counterclaims when it asserted those counterclaims in this equitable mortgage foreclosure. The counterclaim for breach of contract is prohibited under the Lender Statute of Frauds because, there is no final writing signed by Plaintiff that sets forth the material terms of the commitment, and a phantom letter to be re-typed and re-executed is equally unavailing. Oaktree has not offered any evidence to create a material factual dispute on the three elements of a claim for breach of contract accompanied by a fraudulent act. Oaktree's negligent misrepresentation is anchored by an alleged loan commitment; thus, the cause of action is redressable in contract, not tort, if Oaktree were able to satisfy the Lender Statute of Frauds, which it cannot do. Counterclaimants have no evidence that the purported phantom commitment letter was in the possession of Plaintiff and

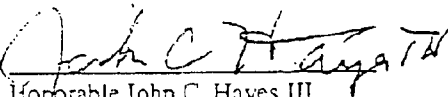
destroyed. On the other hand, Counterclaimants admit Tom Ras lost the phantom letter that they contend existed. So they were prejudiced by their own hand, not that of Plaintiff's. There is no evidence of any willful disobedience or even gross indifference by Plaintiff.

NOW, THEREFORE, it is hereby

ORDERED that the motions of Plaintiff seeking denial of any jury trial right on the counterclaims and for summary judgment in its favor on the contract and non-contract counterclaims are granted, and the motion for sanctions against Plaintiff made by Counterclaimants is denied.

AND IT IS SO ORDERED.

Date: 6/29/11


Honorable John C. Hayes III,
Chief Administrative Judge,
16th Judicial Circuit

H 22

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE CIRCUIT COURT

Yadkin Valley Bank & Trust,

Plaintiff,

vs.

Oaktree Homes, Inc.; Dawne M. Ras and
Thomas C. Ras; Daniel Simpson; Above All
Services, Inc.; Carter Lumber Company;
Efficient Painting Contractors, Inc.; Creative
Concepts; and Solid As A Rock, Inc.,

Defendants.

Civil Action No. 2009-CP-46-1673

ORDER

FILED-RECEIVED
2010 MAY -4 AM 11:18
DAVID HAMILTON
C.C.P. & CS
YORK COUNTY, SC

This is a mortgage foreclosure action. American Community Bank sued Oaktree Homes and Dawne and Thomas Ras, to collect a debt allegedly due and to foreclose mortgages securing the debt. Shortly after filing the case, American Community Bank merged into Yadkin Valley Bank and Trust. By prior order Yadkin Valley was substituted as plaintiff. Oaktree and the Rasas answered and claimed plaintiff breached a written commitment to lend money. In their counterclaim they allege, among other things, that American Community Bank withdrew its commitment as a condition of the merger. Yadkin Valley denies those allegations.

The matter is before me on defendants' motion to compel plaintiff to respond to discovery. The discovery dispute can be distilled to three general areas. First, defendants seek information about the merger transaction with American Community Bank. Second, they ask that Yadkin Valley make clear which of its so-called "general objections" expressed in its original responses apply to which interrogatories and requests. Third, they want to make certain that

Yadkin Valley's claim of no "tangible documents" is not a veiled refusal to produce email messages that would otherwise be responsive to their requests. Fourth, they demand a privilege log listing any documents Yadkin Valley withholds from production because of a claim of privilege. Finally, they ask that Yadkin Valley identify which of its employees discussed the Oaktree loan, and, if applicable, who outside the bank participated in those discussions.¹

Yadkin Valley objected to producing documents and answering interrogatories about its merger with American Community Bank. It provided the affidavit of Mark DeMarcus, signed the morning of the hearing. In it, Mr. DeMarcus avers that formal negotiations between the banks did not begin until several weeks following American Community Bank's refusal to fund the Oaktree loan. ~~Law sure~~ ^{5-10-09 JLB} ^{can felt} Defendants will depose Mr. DeMarcus and explore his knowledge about when merger discussions began. Until they can establish that the banks were in contact before the failed loan closing, though, I agree with Yadkin Valley that it should not be forced to disclose the substance of those negotiations.

Yadkin Valley prefaced its responses to defendants' interrogatories with a laundry list of twelve numbered "General Objections." They include claims of attorney-client and work product privilege, of overbreadth and burdensomeness, and lack of relevancy. The thirteenth numbered General Objection states

All of the foregoing General Objections are incorporated into and apply to each answer below to a specific interrogatory. Each answer to a specific interrogatory is made subject to and without waiving these General Objections, whether or not specifically reiterated in the answers themselves.

The bank's response to defendants' request to produce include virtually identical objections, down to the thirteen numbered paragraphs. Defendants complain they cannot determine which

¹ Yadkin Valley had also objected to the production of confidential documents, such as loan underwriting policies, defendants requested. The Court has entered an order memorializing a confidentiality stipulation among the parties which should treat this objection.

objection relates to which interrogatory or request, and thus are unable to determine whether to accept Yadkin Valley's responses or to move to compel further answers. They also point out that the first twelve of their interrogatories are prescribed by Rule 33, SCRCF, or by Rule 26, FRCP.

Rule 33, SCRCF, requires that "the reasons for objection [to an interrogatory] shall be stated in lieu of an answer." Rule 34 is somewhat more demanding:

The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated.

(emphasis supplied). The rules must require that a party responding to discovery object specifically. Otherwise, the propounding party must guess which objections apply to which of his requests. The use of "general objections," boilerplate objections and responding "subject to and without waiving" unspecified objections has become widely rebuked by the federal courts.²

While I am not bound by decisions interpreting the federal rules, our courts have always considered these cases as persuasive authority in the absence of applicable South Carolina decisions. *Unisun Ins. Co. v. Hawkins*, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000). I agree

² See, e.g., *Fisher v. Baltimore Life Ins. Co.*, 235 F.R.D. 617, 622 (N.D. W. Va. 2006) ("Mere recitation of familiar litany that interrogatory is 'overly broad, burdensome, oppressive, and irrelevant' does not suffice as specific objection.") (quoting *Momah, v. Albert Einstein Medical Center*, 164 F.R.D. 412, 417, (E.D. Pa. 1996)); *Pleasant v. Alibaugh*, 208 F.R.D. 7, 12 (D. D.C. 2002) ("I will not consider 'boilerplate' objections . . . [T]he party opposing discovery must make a specific showing, supported by declaration as to the why the production would be unduly burdensome.") (collecting cases); *St. Paul Reinsurance Co. Ltd. v. Commercial Financial Corp.*, 198 F.R.D. 508, 514 (N.D. Iowa 2000) (collecting cases); *Kooima v. Zacklift International, Inc.*, 209 F.R.D. 444, 446 (D. S.D. 2002) ("[B]oilerplate objections are unacceptable."); *Allianz Ins. Co. v. Surface Specialties, Inc.*, 2005 WL 44534 (D. Kan. 2005) ("The familiar litany of general objections including overly broad, burdensome, or oppressive, will not alone constitute a successful objection to an interrogatory, nor will a general objection fulfill the objecting party's burden to explain its objections.") (citations omitted); *EEOC v. Safeway Store, Inc.*, 2002 WL 31947153 (N.D. Cal. 2002) ("Where . . . the responding party provides a boilerplate or generalized objection, said objections 'are inadequate and tantamount to not making any objection at all.'") (quoting *Walker v. Lakewood Condominium Owners Association*, 186 F.R.D. 584, 587 (C.D. Cal. 1999) and citing *Ritacca v. Abbott Laboratories*, 203 F.R.D. 332, 335 n.4 (N.D. Ill. 2001) ("As courts have repeatedly pointed out, blanket objections are patently improper, . . . [and] we treat [the] general objections as if they were never made." (internal citation omitted)); *Miner v. Kendall*, 1997 WL 695587 (D. Kan. 1997) (Exh. H); *Obiajulu v. City of Rochester*, 16 F.R.D. 293, 295 (W.D.N.Y. 1996) ("[P]at, generic, nonspecific objections, intoning the same boilerplate language, are inconsistent with both the letter and the spirit of the Federal Rules of Civil Procedure."); *Flynn v. Goldman Sachs*, 1991 WL 238186 (S.D.N.Y. 1991) ("The ritual use of language such as 'overly broad and burdensome' in boilerplate 'general objections' to document requests raises no meaningful issue, and affords no legally sufficient basis for refusing to produce documents within the scope of the request.")

with defendants that plaintiff must make specific objections to specific interrogatories and requests.

At the hearing counsel for Yadkin Valley assured the Court that the reference to "anything tangible" in the discovery responses was not intended to exempt email messages or other electronically stored information from disclosure. She represented that any such materials otherwise responsive to discovery would be produced. Counsel also expressed her belief that Yadkin Valley was not currently claiming privilege as a reason to withhold from production any otherwise discoverable documents. Rule 26(b)(5), SCRCR, requires that a party claiming privilege

... shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

The customary practice for compliance with Rule 26(b)(5) is to produce a privilege log. If Yadkin Valley subsequently finds material otherwise responsive to defendants' discovery requests, and claims a privilege not to disclose that material, it shall produce a privilege log or equivalent index complying with Rule 26(b)(5).

Finally, defendants ask the Court to require an answer to their Interrogatory No. 14. The interrogatory and Yadkin Valley's response are reproduced below:

14. Set forth all statements by anyone employed by ACB with any other person regarding the loan or transaction for the 51 lots. This is specifically intended to include any conversations and statements among ACB employees (for instance, Mr. Franklin and anyone with ACB or Yadkin), as well as any ACB employee and the Ras's, any accountants, attorneys, or counterparties to the 51 lot transaction.

Answer: Banks object specifically to this interrogatory on the grounds it is overly broad and burdensome. It is impossible for Banks to detail every conversation any employee of ACB had with any other person regarding the alleged transaction for the 51 lots. Oaktree and Ras can seek this information through less intrusive means such as depositions.

Yadkin Valley has identified two witnesses with knowledge of the Oaktree transaction. Presumably they have already been vetted for their knowledge of the Oaktree/Ras account. It should not be burdensome for counsel to ~~interview~~ ^{JEH} them, if necessary, to ascertain with whom they may have discussed the Oaktree/Ras account. Defendants are entitled to this information as it may lead to the identification of other witnesses.

Accordingly it is hereby ordered:

1. Yadkin Valley shall not be required to disclose the substance of negotiations and discussions leading to the merger with American Community Bank, unless and until defendants Oaktree and the Rases can establish a genuine issue of fact that the banks were in contact before the failed loan closing.

2. Yadkin Valley shall restate its objections to individual interrogatories and requests to produce, so that defendants can determine which objection is made to which question or request.

3. Defendants' request for documents includes electronically stored information such as email messages, and Yadkin Valley should include such materials, otherwise discoverable, in their response.

4. If Yadkin Valley claims that any otherwise responsive information or documents are protected from disclosure by a privilege, they shall identify the information or material in a privilege log or equivalent index compliant with Rule 26(b)(5), SCRPC.

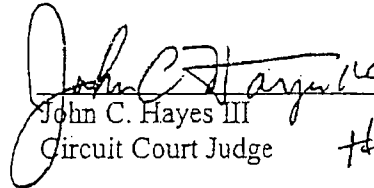
5. Yadkin Valley shall provide information responsive to defendants' Interrogatory No. 14, consisting of the identity of those persons with whom the Oaktree/Ras account was discussed and, to the extent Messrs. Derek Franklin, Jeff Cramer, or Mark DeMarcus recall, the general substance of those conversations.

6. Yadkin Valley shall make its documents available for inspection and copying by defendants no later than Monday, May 24, 2010.

SO ORDERED.

Dated April 29th, 2010

York, South Carolina


John C. Hayes III
Circuit Court Judge #6

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STATE OF SOUTH CAROLINA
COUNTY OF YORK

DAVID HAMILTON
C.C.C.P. & G.S. IN THE COURT OF COMMON PLEAS
YORK COUNTY, SC

American Community Bank,

Plaintiff,

v.

Oaktree Homes, Inc.; Dawne M. Ras and Thomas
C. Ras; Daniel Simpson; Above All Services, Inc.;
Carter Lumber Company; and Efficient Painting
Contractors, Inc.,

Defendants.

COMPLAINT

C.A. No.: 09-CP-46-1673

Plaintiff, complaining against Defendants, respectfully alleges:

Jurisdictional Allegations

1. Plaintiff (Bank) is a state chartered bank organized pursuant to the laws of the state of North Carolina authorized to do business in the state of South Carolina, including York County.
2. Defendant Oaktree Homes, Inc. (Borrower) is a corporation organized pursuant to the laws of the state of South Carolina and is made a party to this action because it signed certain promissory notes, secured by liens against real property in York County, South Carolina, as more particularly described below.
3. Defendants Dawne M. Ras and Thomas C. Ras (collectively, Guarantors) are citizens and residents of York County, South Carolina and are made parties to this action because they signed commercial guaranties, as more particularly described below.

4. Upon information and belief, defendant Daniel Simpson (Simpson) is a citizen and resident of York County, South Carolina and is made a party to this action because he holds a judgment against real property located in York County, as more particularly described below.

5. Upon information and belief, defendant Above All Services, Inc. (Above All) is a corporation organized pursuant to the laws of the state of South Carolina and is made a party to this action because it holds a judgment against real property located in York County, as more particularly described below.

6. Upon information and belief, defendant Carter Lumber Company (Carter Lumber) is a corporation organized pursuant to the laws of the state of Ohio, authorized to do business in the state of South Carolina and is made a party to this action as a result of a mechanic's lien recorded against Lot 29, Palm Tree Cove, Phase 1, located in York County, as more particularly described below.

7. Upon information and belief, defendant Efficient Painting Contractors, Inc. (Efficient Painting) is a corporation organized pursuant to the laws of the state of South Carolina and is made a party to this action as a result of a mechanic's lien recorded against Lot 29, Palm Tree Cove, Phase 1, located in York County, as more particularly described below.

For a First Cause of Action

8. Bank hereby reiterates all of the foregoing allegations as fully as if set forth verbatim herein.

9. On or about July 28, 2008, Borrower signed a promissory note in favor of Bank in the amount of \$1,305,000.00, as modified by the Modification and Extension Agreement dated

November 21, 2008 (collectively, Phase 2 Note). A copy of the Phase 2 Note is attached hereto and marked as **Exhibit A**.

10. The Phase 2 Note, as modified, obligates Borrower to make one payment of principal and interest at Note maturity on December 28, 2008.

11. Under the terms of the Phase 2 Note, interest will be paid at a variable rate of interest known as the Contract Rate, which is defined in the Note as Bank's Prime Rate plus one-half percent (0.5%).

12. If a payment is ten (10) days or more late, Borrower will be charged five percent (5%) of the unpaid portion of the regularly scheduled payment or \$5.80, whichever is greater.

13. The Phase 2 Note allows for payments to be applied first to any accrued unpaid interest, then to principal, then to any late charges and then to any unpaid collection costs.

14. The Phase 2 Note defines default to include, among other things, Borrower's failure to make any payment when due under the Note and Borrower's failure to comply with or to perform any other term, obligation, covenant or condition contained in any other agreement between Bank and Borrower.

15. Upon default by Borrower, the Phase 2 Note authorizes Bank to declare the entire unpaid principal balance under the Note and all accrued unpaid interest immediately due and payable.

16. In the event Bank hires an attorney to help collect the Phase 2 Note, Borrower agrees to pay Bank for the expenses incurred by Bank, including attorneys' fees in an amount not less than fifteen percent (15%) of the amount owing on the Note, expenses for bankruptcy

proceedings (including efforts to modify or vacate any automatic stay or injunction) and appeals, as well as any court costs.

17. The Phase 2 Note is to be governed by the laws of the state of South Carolina, without regard to any conflicts of laws provisions.

18. Borrower further agreed it would be liable for all sums advanced in accordance with the instructions of an authorized person as well as those sums credited to any of Borrower's accounts with Bank.

19. Borrower also agreed that the terms of the Phase 2 Note shall be binding on Borrower, its personal representatives, successors and assigns and shall inure to the benefit of Bank and its successors and assigns.

20. By signing the Phase 2 Note, Borrower waived its right to presentment, demand for payment and notice of dishonor.

21. Borrower further agreed that Bank had the right to renew, or extend (repeatedly and for any length of time) the Phase 2 Note and take any other action deemed necessary by Bank without the consent of or notice to anyone.

22. Bank had the right to modify the Phase 2 Note without the consent of or notice to anyone other than the party with whom the modification is made.

23. By signing the Phase 2 Note, Borrower waived and relinquished its statutory appraisal rights, which means that the high bid at the judicial foreclosure sale of any collateral will be applied to the debt.

24. As security for the Phase 2 Note, Borrower executed a mortgage (Phase 2 Mortgage) dated July 28, 2008, recorded July 30, 2008, in Book 10212 at Page 196, in the Office of the Clerk of Court, York County, South Carolina, encumbering all right, title and interest in real property, together with all existing or subsequently erected or affixed buildings, improvements, fixtures, easements, appurtenances and all other rights, royalties and profits relating to the real property more particularly described as follows (Phase 2 Lots):

All that piece, parcel or lot of land lying, being and situate in Ebenezer Township, York County, State of South Carolina, being identified as that Lot 11, 12, 19, 20, 21, 22, 23, 24, 25, 28 and 40 as shown on that map or plat of "Palm Tree Cove 2A" drawn by David L. Ferguson, SCPLS # 16493, dated February 18, 2008, recorded in Plat Book D-305, Page 4 and revised in Plat Book D-310, Page 2 and shown and depicted on that map or plat of the Premises plat entitled "Plat Prepared for Har-Lee" drawn by David L. Ferguson, SCPLS # 16493, dated March 20, 2008, recorded in Plat book D-308, Page 4 in the Office of the Clerk of Court for York County, South Carolina reference to which is hereby made for a more particular description.

Derivation: Being the identical property conveyed to Mortgagor by deed of Har-Lee, LLC dated July 28, 2008 and recorded on July 30, 2008 in Book 10212 at Page 192 in the Office of the Clerk of Court for York County, South Carolina.

LESS AND EXCEPT all that piece parcel or lot of land lying, being and situate in Ebenezer Township, York County, State of South Carolina, being identified as that Lot 11 as shown on that map of "Palm Tree Cove 2A" drawn by David L. Ferguson, SCPLS # 16493, dated February 18, 2008, recorded in Plat Book D-305, Page 4 and revised in Plat Book D-310, Page 2 and shown and depicted on that map or plat of the Premises plat entitled "Plat Prepared for Har-Lee" drawn by David L. Ferguson, SCPLS # 16493, dated March 20, 2008, recorded in Plat book D-308, Page 4 in the Office of the Clerk of Court for York County, South Carolina reference to which is hereby made for a more particular description.

A portion of Tax Map Nos.: 550-00-00-173 and 550-00-00-174

A copy of the Phase 2 Mortgage is attached hereto and marked as **Exhibit B.**

25. Bank released its lien against Lot 11 through the execution and recording of a Partial Release of Mortgage on file with the York County Clerk of Court.

26. In the Phase 2 Mortgage, Borrower agreed to maintain the Phase 2 Lots in tenantable condition and promptly perform all repairs, replacements and maintenance necessary to preserve their value.

27. Borrower further agreed that Bank or its agents and representatives had the right to enter upon the Phase 2 Lots at all reasonable times to attend to Bank's interests and to inspect the Phase 2 Lots for purposes of Borrower's compliance with the terms and conditions of the Phase 2 Mortgage.

28. Borrower agreed to neither abandon nor leave the Phase 2 Lots unattended and also agreed to do all other acts that are reasonably necessary to protect and preserve the Phase 2 Lots.

29. Borrower agreed to pay when due all taxes, payroll taxes, special taxes and assessments, water charges and sewer service charges levied against or on account of the Phase 2 Lots and to pay when due all claims for work done on or for services rendered or material furnished to the Phase 2 Lots.

30. Borrower agreed to maintain the Phase 2 Lots free of any liens having priority over or equal to the interests of Bank under the Phase 2 Mortgage, except for those liens to which Bank specifically agreed in writing.

31. Borrower agreed to procure and maintain fire and comprehensive general liability insurance on the Phase 2 Lots, in such coverage amounts as Bank may require, listing Bank as an additional insured.

32. Borrower also agreed that in the event Borrower failed to comply with any provision in the Phase 2 Mortgage, Bank had the right, but not the obligation, to take any action Bank deemed appropriate, including, but not limited to, discharging or paying all taxes, liens, security interests, encumbrances and other claims, at any time levied or placed on the Phase 2 Lots and paying all costs for insuring, maintaining and preserving the Phase 2 Lots, which costs would then be added to the Phase 2 Note and accrue interest at the rate set forth in such Note.

33. All amounts paid by Bank in accordance with the above paragraph, at Bank's option, will (A) be payable on demand; (B) be added to the balance of the Phase 2 Note and be apportioned among and be payable with any installment payments; or (C) be treated as a balloon payment which will be due and payable at the Phase 2 Note's maturity.

34. The Phase 2 Mortgage defines an Event of Default to include, but not be limited to, Borrower's failure to make payment when due under the terms of the Phase 2 Note.

35. Upon the occurrence of an Event of Default under the terms of the Phase 2 Mortgage, Bank has the right to declare all amounts due and owing on the Phase 2 Note immediately due and payable and to foreclose the Phase 2 Mortgage.

36. Under the terms of the Phase 2 Mortgage, Borrower agreed that, whether or not any court action is involved, all reasonable expenses Bank incurs that in Bank's opinion are necessary at any time for the protection of its interest or the enforcement of its rights (which shall include attorneys' fees of fifteen percent (15%) of the amount owing on the Phase 2 Note (whether or not there is a lawsuit), expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals and any anticipated post-judgment collection services, the cost

of searching records, obtaining title reports (including foreclosure reports), surveyor's reports, and appraisal fees and title insurance, as well as court costs) shall become a part of the debt evidenced by the Phase 2 Note, shall bear interest at the Phase 2 Note rate from the date of the expenditures until paid and shall be payable on demand.

37. The Phase 2 Note matured on December 28, 2008 and Borrower failed to pay the Note in full.

38. By letter dated February 6, 2009, Bank sent to Borrower notice of default and demand for payment in full on the Phase 2 Note within ten (10) days from the date thereof, in response to which Borrower failed to pay the Phase 2 Note in full. A copy of the demand letter is attached hereto as Exhibit C.

39. As of March 24, 2009, there was due and owing on the Phase 2 Note the sum of \$1,240,804.35, plus per diem interest of \$127.08 from that date to the date of payment in full, as well as costs of collection, including, but not limited to, attorneys' fees, and Bank is entitled to entry of judgment against Borrower for that amount.

40. The Phase 2 Mortgage is legally owned and held by Bank; the conditions of it have been breached; the amount due and owing has not been paid by Borrower after demand having been duly made upon it; and the Phase 2 Mortgage constitutes a valid lien upon the Phase 2 Lots, and should be foreclosed to provide for payment of monies due under the Phase 2 Note.

41. Bank seeks a deficiency judgment against Borrower to the extent the proceeds from the judicial sale of the Phase 2 Lots as described in the Phase 2 Mortgage are not sufficient to satisfy in full the debt owed by Borrower to Bank arising under the Phase 2 Note.

42. Simpson is made a party to this action as a result of his judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-00038, which is junior and inferior to the liens of Bank against the Phase 2 Lots.

43. Above All is made a party to this action as a result of its judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-00477, which is junior and inferior to the liens of Bank against the Phase 2 Lots.

For a Second Cause of Action

44. Bank hereby reiterates all of the foregoing allegations as fully as if set forth verbatim herein.

45. On or about July 27, 2007, Borrower signed a promissory note in the amount of \$426,400.00, as modified by the Modification and Extension Agreement dated September 30, 2008 (collectively, the Phase 1 Note), in favor of Bank. A copy of the Phase 1 Note is attached hereto and marked as Exhibit D.

46. The Phase 1 Note, as modified, obligates Borrower to make monthly payments of interest commencing on November 5, 2008 and continuing on the same day of each calendar period thereafter, with one final payment of all remaining principal and interest due on February 5, 2009.

47. Under the terms of the Phase 1 Note, interest will be paid at a variable rate of interest known as the Contract Rate, which is defined in the First Note as Bank's Prime Rate plus one-half percent (0.5%).

48. The Phase 1 Note allows for payments to be applied first to any accrued unpaid interest, then to principal, then to any late charges and then to any unpaid collection costs.

49. Under the terms of the Phase 1 Note, if a payment is ten (10) days or more late, Borrower will be charged 5.00% of the unpaid portion of the regularly scheduled payment or \$5.80, whichever is greater.

50. The remaining terms and conditions of the Phase 1 Note are identical to those set forth in the Phase 2 Note.

51. As security for the Phase 1 Note, Borrower executed a construction mortgage (Phase 1 Mortgage) dated July 27, 2007, recorded July 31, 2007, in Book 09304 at Page 00158, in the Office of the Clerk of Court, York County, South Carolina, encumbering all right, title and interest in real property, together with all existing or subsequently erected or affixed buildings, improvements, fixtures, easements, appurtenances and all other rights, royalties and profits relating to the real property more particularly described as follows (Lot 29):

All that certain piece, parcel or tract of land lying, being and situate in Catawba Township, County of York, State of South Carolina, and being designated as Lot 29 as shown on plat entitled, "Final Plat of Palm Tree Cove" drawn by David E. Ferguson, PLS, dated June 7, 2006 and last revised October 12, 2006 and recorded in Plat Book D-149, Page 10 in the Office of the Clerk of Court for York County, South Carolina, which reference is hereby made for a more particular description.

Derivation: Being a portion of the same property conveyed to Mortgagor by Deed from Har-Lee, LLC recorded in Book 8798, Page 157 in the Office of the Clerk of Court for York County, South Carolina.

Tax Map No.: 550-00-00-144

A copy of the Phase 1 Mortgage is attached hereto and marked as **Exhibit E**.

52. The remaining terms and conditions of the Phase 1 Mortgage are identical to those set forth in the Phase 2 Mortgage.

53. The Phase 1 Note matured February 5, 2009 and Borrower failed to pay such Note in full, which is a default.

54. By letter dated February 6, 2009, Bank sent to Borrower notice of default and demand for payment in full on the Phase 1 Note within ten (10) days from the date thereof, in response to which Borrower failed to pay such Note in full. A copy of the demand letter is attached hereto and marked as Exhibit F.

55. As of March 24, 2009, there was due and owing on the Phase 1 Note the sum of \$438,827.95, plus per diem interest of \$44.42 from that date to the date of payment in full, as well as costs of collection, including, but not limited to, attorneys' fees; and Bank is entitled to judgment against Borrower for that amount.

56. The Phase 1 Mortgage is legally owned and held by Bank; the conditions of it have been breached; the amount due and owing has not been paid by Borrower after demand having been duly made upon it; and the Phase 1 Mortgage constitutes a valid lien upon Lot 29; and should be foreclosed to provide for payment of monies due under the Phase 1 Note.

57. Bank seeks a deficiency judgment against Borrower to the extent the proceeds from the judicial sale of Lot 29 as described in the Phase 1 Mortgage are not sufficient to satisfy in full the debt owed by Borrower to Bank arising under the Phase 1 Note.

58. Simpson is made a party to this action as a result of his judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-00038, which is junior and inferior to the lien of Bank against Lot 29.

59. Above All is made a party to this action as a result of its judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-00477, which is junior and inferior to the liens of Bank against Lot 29.

60. Carter Lumber is made a party to this action because of its mechanic's lien recorded against Lot 29 in Book 56 at page 5, in the Office of the Clerk of Court, York County, South Carolina, which is junior and inferior to the lien of Bank against Lot 29.

61. Efficient Painting is made a party to this action because of its mechanic's lien recorded against Lot 29 in Book 68 at page 113, in the Office of the Clerk of Court, York County, South Carolina, which is junior and inferior to the lien of Bank against Lot 29.

For a Third Cause of Action

62. Bank hereby reiterates all of the foregoing allegations as fully as if set forth verbatim herein.

63. On or about October 29, 2007, Borrower signed a promissory note in the amount of \$418,840.89, as modified by the Modification and Extension Agreement dated November 5, 2008, (collectively, Trinity Ridge Note) in favor of Bank. A copy of the Trinity Ridge Note is attached hereto and marked as **Exhibit G**.

64. The Trinity Ridge Note, as modified, obligates Borrower to make one payment of principal and interest on such Note at its maturity on January 5, 2009.

65. Under the terms of the Trinity Ridge Note, interest will be paid at a variable rate of interest known as the Contract Rate, which is defined in such Note as Bank's Prime Rate plus one-half percent (0.5%).

66. If a payment is ten (10) days or more late, Borrower will be charged five percent (5%) of the unpaid portion of the regularly scheduled payment or \$5.80, whichever is greater.

67. The remaining terms and conditions of the Trinity Ridge Note are identical to those set forth in the Phase 1 and Phase 2 Notes.

68. As security for the Trinity Ridge Note, Borrower executed a mortgage (Trinity Ridge Mortgage) dated October 29, 2007, recorded November 6, 2007, in Book 9574 at Page 60, in the Office of the Clerk of Court, York County, South Carolina, encumbering all right, title and interest in real property, together with all existing or subsequently erected or affixed buildings, improvements, fixtures, easements, appurtenances and all other rights, royalties and profits relating to the real property more particularly described as follows (Trinity Ridge Lots):

All that certain piece, parcel or lot of land with any and all improvements located thereon lying and being in the Town of Fort Mill, State of South Carolina, County of York designated as Lots 39 & 41 of Trinity Ridge Subdivision, Phase II and being more particularly shown on Plat of property drawn by Pittman Professional Land Surveying, dated March 30, 2007 and recorded April 5, 2007 in Plat Book D-204 at page 8, in the Office of the Clerk of Court for York County. For a more complete and accurate description as to metes and bounds reference is hereby made to the above referenced property and record thereof.

Derivation: Being a portion of the same property conveyed to Mortgagor by Deed from Penton II, LLC recorded 11/6/07 in Book 9574, Page 58 in the Office of the Clerk of Court for York County, South Carolina.

Tax Map Nos.: 778-01-01-043 and 778-01-01-045

A copy of the Trinity Ridge Mortgage is attached hereto and marked as **Exhibit H**.

69. The remaining terms and conditions of the Trinity Ridge Mortgage are identical to those set forth in the Phase 2 Mortgage.

70. The Trinity Ridge Note matured on January 5, 2009 and Borrower failed to pay such Note in full.

71. By letter dated February 6, 2009, Bank sent to Borrower notice of default and demand for payment in full on the Trinity Ridge Note within ten (10) days from the date thereof, in response to which Borrower failed to pay such Note in full. A copy of the demand letter is attached hereto as Exhibit I.

72. As of March 24, 2009, there was due and owing on the Trinity Ridge Note the sum of \$427,834.37, plus per diem interest of \$43.63 from that date to the date of payment in full, as well as costs of collection, including, but not limited to, attorneys' fees; and Bank is entitled to judgment against Borrower for that amount.

73. The Trinity Ridge Mortgage is legally owned and held by Bank; the conditions of it have been breached; the amount due and owing has not been paid by Borrower after demand having been duly made upon it; and the Trinity Ridge Mortgage constitutes a valid lien upon the Trinity Ridge Lots, and should be foreclosed to provide for payment of monies due under the Trinity Ridge Note.

74. Bank seeks a deficiency judgment against Borrower to the extent the proceeds from the judicial sale of the Trinity Ridge Lots as described in the Trinity Ridge Mortgage are not sufficient to satisfy in full the debt owed by Borrower to Bank arising under the Trinity Ridge Note.

75. Simpson is made a party to this action as a result of his judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-00038, which is junior and inferior to the lien of Bank against the Trinity Ridge Lots.

76. Above All is made a party to this action as a result of its judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-00477, which is junior and inferior to the liens of Bank against the Trinity Ridge Lots.

For a Fourth Cause of Action

77. Bank hereby reiterates all of the foregoing allegations as fully as if set forth verbatim herein.

78. On or about September 27, 2007, Borrower signed a promissory note in the amount of \$149,337.10 in favor of Bank (Glynns Note). A copy of the Glynns Note is attached hereto and marked as Exhibit J.

79. The Glynns Note obligates Borrower to make regular monthly payments of accrued unpaid interest due as of each payment date beginning November 5, 2007, with all subsequent interest payments to be due on the same day of each month thereafter and a balloon payment due on October 5, 2008 of all principal and accrued interest not yet paid.

80. Under the terms of the Glynns Note, interest will be paid at a variable rate of one-half percentage point (.05%) over the Index, as defined therein.

81. If a payment is ten (10) days or more late, Borrower will be charged five percent (5%) of the unpaid portion of the regularly scheduled payment or \$5.80, whichever is greater.

82. The remaining terms and conditions of the Glynns Note are identical to those set forth in the Phase 1 and Phase 2 Notes.

83. As security for the Glynns Note, Borrower executed a mortgage (Glynns Mortgage) dated September 27, 2007, recorded October 5, 2007, in Book 9494 at Page 84, in the Office of the

Clerk of Court, York County, South Carolina, encumbering all right, title and interest in real property, together with all existing or subsequently erected or affixed buildings, improvements, fixtures, easements, appurtenances and all other rights, royalties and profits relating to the real property more particularly described as follows (Lot 52):

All that certain piece, parcel or lot of land lying, being and situate in York Township, York County, South Carolina and being more particularly shown and designated as Lots No. 52 and 57 on Final Subdivision Plat of the Glynns at Carolina Crossing, drawn by James Jetter Pittman, PLS, dated August 1, 2005, revised September 29, 2005, November 9, 2005, December 6, 2005, February 13, 2006 and recorded February 14, 2006 in Plat Book D-73 at Page 6 in the Office of the Clerk of Court for York County, South Carolina, reference to said plat being hereby made for a more complete and accurate description, be all measurements a little more or less.

LESS AND EXCEPT: All that certain piece, parcel or lot of land lying, being and situate in York Township, York County, South Carolina, and being more particularly shown and designated as Lot No. 57 on final subdivision plat of The Glynns at Carolina Crossing, drawn by James Jetter Pittman, PLS, dated August 1, 2005, revised September 29, 2005, November 9, 2005, December 6, 2005, February 13, 2006 and recorded February 14, 2006 in Plat Book D-73, Page 6 in the Office of the Clerk of Court for York County, South Carolina.

DERIVATION: This being the same property conveyed to Mortgagor by deed from Penton II, LLC recorded May 15, 2006 in Book 8032 at Page 86, in the Office of the Clerk of Court for York County, South Carolina, and

This being the same property conveyed to Mortgagor by deed from Penton II, LLC recorded May 22, 2006 in Book 8050 at Page 260 in the Office of the Clerk of Court for York County, South Carolina.

Tax Map No.: 448-00-00-134

A copy of the Glynns Mortgage is attached hereto and marked as **Exhibit K**.

84. On November 19, 2007, recorded December 3, 2007, in Book 9632 at Page 299, in the Office of the Clerk of Court for York County, South Carolina, a Partial Release of Mortgage was given by Bank releasing the lien of the Mortgage from Lot 57.

85. The remaining terms and conditions of the Glynns Mortgage are identical to those set forth in the Phase 2 and Trinity Ridge Mortgages.

86. The Glynns Note matured on October 5, 2008 and Borrower failed to pay such Note in full.

87. By letter dated February 6, 2009, Bank sent to Borrower notice of default and demand for payment in full on the Glynns Note within ten (10) days from the date thereof, in response to which Borrower failed to pay such Note in full. A copy of the demand letter is attached hereto as Exhibit L.

88. As of March 24, 2009, there was due and owing on the Glynns Note the sum of \$74,718.19, plus per diem interest of \$7.65 from that date to the date of payment in full, as well as costs of collection, including, but not limited to, attorneys' fees; and Bank is entitled to judgment against Borrower for that amount.

89. The Glynns Mortgage is legally owned and held by Bank; the conditions of it have been breached; the amount due and owing has not been paid by Borrower after demand having been duly made upon it; and the Glynns Mortgage constitutes a valid lien upon Lot 52, and should be foreclosed to provide for payment of monies due under the Glynns Note.

90. Bank seeks a deficiency judgment against Borrower to the extent the proceeds from the judicial sale of Lot 52 as described in the Glynns Mortgage are not sufficient to satisfy in full the debt owed by Borrower to Bank arising under the Glynns Note.

91. Simpson is made a party to this action as a result of his judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-00038, which is junior and inferior to the lien of Bank against Lot 52.

92. Above All is made a party to this action as a result of its judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-00477, which is junior and inferior to the liens of Bank against Lot 52.

For a Fifth Cause of Action

93. Bank hereby reiterates all of the foregoing allegations as fully as if set forth verbatim herein.

94. On July 27, 2007 and October 29, 2007, respectively, Guarantors each executed a Commercial Guaranty (collectively, Guaranties) absolutely and unconditionally guaranteeing the full and punctual payment and satisfaction of the Indebtedness of Borrower to Bank. Copies of the four Guaranties are attached hereto and marked as **Exhibit M**.

95. The Guaranties define "Indebtedness" to include all of the principal amount outstanding from time to time and at any one or more times, accrued unpaid interest thereon and all collection costs, legal expenses and attorneys' fees related thereto permitted by law, arising from any and all debts, liabilities and obligations of every nature or form, now existing or hereafter arising or acquired, that Borrower individually or collectively or interchangeably with others, owes or will owe Bank, including, without limitation, loans, advances, debts, overdraft indebtedness, credit card indebtedness, lease obligations, liabilities and other obligations and liabilities of Borrower, and any present or future judgments against Borrower, future advances, loans or transactions that renew,

extend, modify, refinance, consolidate or substitute these debts, liabilities and obligations whether voluntarily or involuntarily incurred; due or to become due by their terms or acceleration; absolute or contingent; liquidated or unliquidated; determined or undetermined; direct or indirect; primary or secondary in nature or arising from a guaranty or surety; secured or unsecured; joint or several or joint and several; evidenced by a negotiable or non-negotiable instrument in writing; originated by Bank or another or others; barred or unenforceable against Borrower for any reason whatsoever; for any transactions that may be voidable for any reason (such as infancy, insanity, ultra vires or otherwise); and originated then reduced or extinguished and then afterwards increased or reinstated.

96. The Guaranties are guaranties of payment and performance and not of collection, so Bank can enforce the Guaranties against Guarantors even when Bank has not exhausted its remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness.

97. Under the terms of the Guaranties, in the event Bank holds one or more guaranties from Guarantors, Bank's rights under all guaranties shall be cumulative and each Guarantor's liability under any such other guaranties shall be Guarantor's aggregate liability under the terms of the Guaranty and such other guaranties.

98. Under the terms of the Guaranties, any payments made on the Indebtedness will not discharge or diminish Guarantors' obligations and liability under the Guaranties for any remaining and succeeding Indebtedness even when all or part of the outstanding Indebtedness may be a zero balance from time to time.

99. The Guaranties remain in full force and effect until all the Indebtedness incurred or contracted before receipt by Bank of any notice of revocation shall have been fully and finally paid and satisfied and all of Guarantors' other obligations under the Guaranties shall have been performed in full.

100. Guarantors may only revoke the Guaranties in writing, delivered via certified mail to Bank at its address set forth in the Guaranties or such other place as Bank may designate in writing.

101. Any revocation by either Guarantor will apply only to new Indebtedness created after actual receipt by Bank of that Guarantor's written revocation, which shall not include the Indebtedness which at the time of notice of revocation is contingent, unliquidated, undetermined or not due and which later becomes absolute, liquidated, determined or due.

102. Under the terms of the Guaranties, Guarantors waived their rights to require Bank to resort for payment or to proceed directly or at once against any person, including Borrower, or to proceed directly against or exhaust any collateral held by Bank from Borrower, any other guarantor or any other person.

103. Guarantors waived and agreed not to assert or claim at any time any deductions to the amount guaranteed under the Guaranties for any claim of setoff, counterclaim, counter demand, recoupment or similar right, whether such claim, demand or right may be asserted by Borrower, Guarantors or both.

104. Guarantors further agreed that the Indebtedness, whether now existing or hereafter created, shall be superior to any claim that Guarantors may now have or hereafter acquire against Borrower, whether or not Borrower becomes insolvent.

105. Guarantors agreed to pay upon demand all of Bank's costs and expenses, including Bank's attorneys' fees and legal expenses, incurred in connection with the enforcement of the Guaranties, which shall include attorneys' fees and legal expenses whether or not there is a lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services, as well as all court costs.

106. By signing the Guaranties, Guarantors waived and relinquished their statutory appraisal rights, which means that the high bid at the judicial foreclosure sale of any collateral will be applied to the Indebtedness in order to determine any deficiency against Guarantors.

107. By letters dated February 6, 2009, Bank made demand upon each Guarantor for payment in full of the total amount then due and owing on the Phase 1, Phase 2, Trinity Ridge and Glynns Notes, within ten (10) days from the date thereof, in response to which Guarantors failed to provide payment in full. Copies of the demand letters are attached hereto as Exhibit N.

108. Bank is entitled to entry of judgment, joint and several, against Guarantors in the total amount due and owing on the Phase 1, Phase 2, Trinity Ridge and Glynns Notes, with credit for any sums recovered by Bank through judicial sale of the Phase 1 Lot, Phase 2 Lots, Trinity Ridge Lot and Lot 52.

WHEREFORE, Bank prays:

1. On the First Cause of Action,

(a) for an order granting Bank a judgment against Borrower in the amount set forth in Paragraph 39 above, less any sums which Bank may recover from the foreclosure sale of the Phase 2 Lots;

(b) for an order requiring that the Mortgage be foreclosed, free and clear of all liens, interests, restrictions and/or encumbrances; the equity of redemption of Borrower be forever barred; the Phase 2 Lots be sold under order of this Court; the bidding at such sale be complete and final within 30 days after the date of initial sale; a deficiency judgment be awarded to Bank against Borrower in the event the proceeds from the foreclosure sale of the Phase 2 Lots are insufficient to satisfy in full the entire indebtedness due to Bank under the terms of the First Note; and the successful bidder be put into possession of the Phase 2 Lots immediately upon presentation of the deed;

(c) for an order requiring that the proceeds of the foreclosure sale be applied first to payment of the costs of protection, preservation and maintenance of the Phase 2 Lots, along with taxes, insurance, other applicable assessments and expenses of sale, plus costs of collection, including, but not limited to, attorneys' fees and costs, and any appraisal expenses; next, to the indebtedness due to Bank and then other lienors, in order of priority; and finally, such other sums found properly due or outstanding by the Court;

(d) for an order that, in the event the successful bidder shall be other than Borrower, the Sheriff of York County be directed and empowered to eject and remove from the Phase 2 Lots any occupant or occupants thereon, together with all personal property located thereon; to put the successful bidder or assigns in the full, quiet and peaceful possession of the Phase 2 Lots without delay; and to keep the successful bidder or assigns in such possession;

2. On the Second Cause of Action,

(a) for an order granting Bank a judgment against Borrower in the amount set forth in Paragraph 55 above, less any sums which Bank may recover from the foreclosure sale of Lot 29;

(b) for an order requiring that the Phase 1 Mortgage be foreclosed, free and clear of all liens, interests, restrictions and/or encumbrances; the equity of redemption of Borrower be forever barred; the Lot 29 be sold under order of this Court; the bidding at such sale be complete and final within 30 days after the date of initial sale; a

deficiency judgment be awarded to Bank against Borrower in the event the proceeds from the foreclosure sale of Lot 29 are insufficient to satisfy in full the entire indebtedness due to Bank under the terms of the Phase 1 Note; and the successful bidder be put into possession of Lot 29 immediately upon presentation of the deed;

(c) for an order requiring that the proceeds of the foreclosure sale be applied first to payment of the costs of protection, preservation and maintenance of Lot 29, along with taxes, insurance, other applicable assessments and expenses of sale, plus costs of collection, including, but not limited to, attorneys' fees and costs, and any appraisal expenses; next, to the indebtedness due to Bank and then other lienors, in order of priority; and finally, such other sums found properly due or outstanding by the Court;

(d) for an order that, in the event the successful bidder shall be other than Borrower, the Sheriff of York County be directed and empowered to eject and remove from the Phase 1 Lot any occupant or occupants thereon, together with all personal property located thereon; to put the successful bidder or assigns in the full, quiet and peaceful possession of the Phase 1 Lots without delay; and to keep the successful bidder or assigns in such possession;

3. On the Third Cause of Action,

(a) for an order granting Bank a judgment against Borrower in the amount set forth in Paragraph 72 above, less any sums which Bank may recover from the foreclosure sale of the Trinity Ridge Lots;

(b) for an order requiring that the Trinity Ridge Mortgage be foreclosed, free and clear of all liens, interests, restrictions and/or encumbrances; the equity of redemption of Borrower be forever barred; the Trinity Ridge Lots be sold under order of this Court; the bidding at such sale be complete and final within 30 days after the date of initial sale; a deficiency judgment be awarded to Bank against Borrower in the event the proceeds from the foreclosure sale of the Trinity Ridge Lots are insufficient to satisfy in full the entire indebtedness due to Bank under the terms of the Trinity Ridge Note; and the successful bidder be put into possession of the Trinity Ridge Lots immediately upon presentation of the deed;

(c) for an order requiring that the proceeds of the foreclosure sale be applied first to payment of the costs of protection, preservation and maintenance of the Trinity Ridge Lots, along with taxes, insurance, other applicable assessments and expenses of sale, plus costs of collection, including, but not limited to, attorneys' fees and costs, and any appraisal expenses; next, to the indebtedness due to Bank and then other lienors, in order of priority; and finally, such other sums found properly due or outstanding by the Court;

(d) for an order that, in the event the successful bidder shall be other than Borrower, the Sheriff of York County be directed and empowered to eject and remove from the Trinity Ridge Lots any occupant or occupants thereon, together with all personal property located thereon; to put the successful bidder or assigns in the full, quiet and peaceful possession of the Trinity Ridge Lots without delay; and to keep the successful bidder or assigns in such possession;

4. On the Fourth Cause of Action,

(a) for an order granting Bank a judgment against Borrower in the amount set forth in Paragraph 88 above, less any sums which Bank may recover from the foreclosure sale of Lot 52;

(b) for an order requiring that the Glynns Mortgage be foreclosed, free and clear of all liens, interests, restrictions and/or encumbrances; the equity of redemption of Borrower be forever barred; Lot 52 be sold under order of this Court; the bidding at such sale be complete and final within 30 days after the date of initial sale; a deficiency judgment be awarded to Bank against Borrower in the event the proceeds from the foreclosure sale of Lot 52 are insufficient to satisfy in full the entire indebtedness due to Bank under the terms of the Glynns Note; and the successful bidder be put into possession of Lot 52 immediately upon presentation of the deed;

(c) for an order requiring that the proceeds of the foreclosure sale be applied first to payment of the costs of protection, preservation and maintenance of Lot 52, along with taxes, insurance, other applicable assessments and expenses of sale, plus costs of collection, including, but not limited to, attorneys' fees and costs, and any appraisal expenses; next, to the indebtedness due to Bank and then other lienors, in order of priority; and finally, such other sums found properly due or outstanding by the Court;

(d) for an order that, in the event the successful bidder shall be other than Borrower, the Sheriff of York County be directed and empowered to eject and remove from Lot 52 any occupant or occupants thereon, together with all personal property located thereon; to put the successful bidder or assigns in the full, quiet and peaceful possession of Lot 52 without delay; and to keep the successful bidder or assigns in such possession;

5. On the Fifth Cause of Action

(a) for an order granting Bank a judgment, joint and several, against Guarantors in the total amount due and owing on the Phase 1, Phase 2, Trinity Ridge and Glynns

Notes, with credit for any sums recovered by Bank through judicial sale of the Phase 1 Lot, Phase 2 Lots, Trinity Ridge Lot and Lot 52.; and

6. For the granting of such other and further relief as appears to the Court to be just and proper.

Charlotte, NC

Date: 4/15/09

DRISCOLL SHEEDY, P.A.

By: James W. Sheedy

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ATTORNEYS FOR BANK

STATE OF SOUTH CAROLINA)
YORK COUNTY)

COURT OF COMMON PLEAS
CA 09-CP-46-1673

American Community Bank,)
Plaintiff,)

Vs.)

Oaktree Homes, Inc. et al)
Defendants.)

ANSWER AND COUNTERCLAIMS
OF OAKTREE HOMES, INC.,
DAWNE RAS and THOMAS RAS

JURY TRIAL DEMANDED

GENERAL DENIAL

- 1) Plaintiffs deny every allegation in the complaint paragraphs 1-108 as well as any claims to relief in the Plaintiff's complaint. Due to the press of time, a paragraph by paragraph denial or admission will be made by way of amendment.

AFFIRMATIVE DEFENSES

- 2) Defendants plead the doctrine of unclean hands a complete bar to any recovery or relief by Plaintiff.
- 3) Defendant plead set off as an affirmative defense to any recovery or relief by Plaintiff.

COUNTERCLAIMS

General Facts relating to Counterclaims

- 4) Defendants and Plaintiff had a deal whereby Plaintiff committed and contracted to provide financing for a certain piece of real property located in York County.
- 5) Plaintiff knew that Defendants had arranged and contracted for the resale of the property at a substantial profit to Defendants.
- 6) Plaintiff refused to fulfill its obligation to Defendants by refusing to fund the committed loan less than 24 hours before closing.
- 7) Plaintiff's refusal to honor its obligations caused substantial losses to Defendants by way of the lost profits (in excess of \$2.5 Million) as well as other expenses and losses such as attorney's fees, interest and the like.

Breach of Contract

- 8) The aforementioned allegations constitute a breach of contract by Plaintiff such that caused special and consequential damages to Defendant including lost profits, legal fees, loss of use of money, and other damages. Plaintiff is liable to Defendant for such losses in an amount to be determined by a jury.

Breach of Contract with Fraudulent Intent.

- 9) Plaintiff by and through its agents repeatedly made false statements to Defendants which led to reasonably believe that Plaintiff would go through with its promises and obligations. Plaintiff did not fulfill its obligations and therefore its actions constitute a breach of contract with fraudulent intent.
- 10) Defendants are entitled to judgment against Plaintiff for the damages complained of herein as well as an additional sum for punitive and exemplary damages.

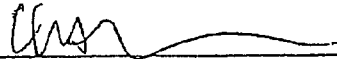
Negligent Misrepresentation / Negligence

- 11) Plaintiff had a duty to be truthful and forthright with Defendants in connection with the financing of the land purchase.
- 12) Until the last 24 hours before closing, Plaintiff repeatedly assured Defendants that it would honor its obligations.
- 13) Defendants relied on these representations to their detriment.
- 14) Plaintiff made false representations to Defendants regarding their intent and willingness to fulfill their end of the bargain.
- 15) As a result, Defendants were damaged in the form of lost profits, legal fees, and other special and consequential damages.
- 16) Defendants are entitled to recovery of Plaintiff a sum of money in an amount determined by a jury for their losses, including an award of exemplary damages for Plaintiff's misconduct.

WHEREFORE,

Defendants pray and demand that:

- 1) Plaintiff take nothing on its claims;
- 2) Defendants recover under one or of its counterclaims for special, consequential, and punitive damages, as well as any other damages allowed by law;
- 3) Defendants be granted a jury trial on all issues so triable; and
- 4) Defendants get all further relief under law.



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Rock Hill, SC
June 5, 2009

STATE OF SOUTH CAROLINA
COUNTY OF YORK

)
) IN THE COURT OF COMMON PLEAS

American Community Bank,

Plaintiff,

vs.

AMENDED COMPLAINT

Oaktree Homes, Inc.; Dawne M. Ras and Thomas
C. Ras; Daniel Simpson; Above All Services, Inc.;
Carter Lumber Company; Efficient Painting
Contractors, Inc.; Creative Concepts; and Solid As
A Rock, Inc.,

Defendants.

C.A. No.: 09-CP-46-1673

Oaktree Homes, Inc., Dawne M. Ras, and Thomas
C. Ras,

Third-Party Plaintiffs,

vs.

Yadkin Valley Bank & Trust, successor by merger
to American Community Bank,

Third-Party Defendant.

Plaintiff, complaining against Defendants, respectfully alleges:

Jurisdictional Allegations

1. Plaintiff (Bank) is a state chartered bank organized pursuant to the laws of the state of North Carolina authorized to do business in the state of South Carolina, including York County.

2. Defendant Oaktree Homes, Inc. (Borrower) is a corporation organized pursuant to the laws of the state of South Carolina and is made a party to this action because it signed certain

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promissory notes, secured by liens against real property in York County, South Carolina, as more particularly described below.

3. Defendants Dawne M. Ras and Thomas C. Ras (collectively, Guarantors) are citizens and residents of York County, South Carolina and are made parties to this action because they signed commercial guaranties, as more particularly described below.

4. Upon information and belief, defendant Daniel Simpson (Simpson) is a citizen and resident of York County, South Carolina and is made a party to this action because he holds a judgment against real property located in York County, as more particularly described below.

5. Upon information and belief, defendant Above All Services, Inc. (Above All) is a corporation organized pursuant to the laws of the state of South Carolina and is made a party to this action because it holds a judgment against real property located in York County, as more particularly described below.

6. Upon information and belief, defendant Carter Lumber Company (Carter Lumber) is a corporation organized pursuant to the laws of the state of Ohio, authorized to do business in the state of South Carolina and is made a party to this action as a result of a mechanic's lien recorded against Lot 29, Palm Tree Cove, Phase 1, located in York County, as more particularly described below.

7. Upon information and belief, defendant Efficient Painting Contractors, Inc. (Efficient Painting) is a corporation organized pursuant to the laws of the state of South Carolina and is made a party to this action as a result of a mechanic's lien recorded against Lot 29, Palm Tree Cove, Phase 1, located in York County, as more particularly described below.

8. Defendant Creative Concepts (Creative) is a sole proprietorship operating in Charlotte, North Carolina and is made a party to this action as a result of certain judgments recorded against real property located in York County, South Carolina, as more particularly described below.

9. Defendant Solid As a Rock, Inc. (Rock) is a corporation organized pursuant to the laws of the state of North Carolina and is made a party to this action as a result of a certain judgment recorded against real property located in York County, South Carolina, as more particularly described below.

10. This action involves the foreclosure of commercial loans and is not subject to the Home Affordable Modification Program (HMP) for residential loans owned, securitized or guaranteed by the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac) or any other section of the Making Home Affordable Program.

For a First Cause of Action

11. Bank hereby reiterates all of the foregoing allegations as fully as if set forth verbatim herein.

12. On or about July 28, 2008, Borrower signed a promissory note in favor of Bank in the amount of \$1,305,000.00, as modified by the Modification and Extension Agreement dated November 21, 2008 (collectively, Phase 2 Note). A copy of the Phase 2 Note is attached hereto and marked as Exhibit A.

13. The Phase 2 Note, as modified, obligates Borrower to make one payment of principal and interest at Note maturity on December 28, 2008.

14. Under the terms of the Phase 2 Note, interest will be paid at a variable rate of interest known as the Contract Rate, which is defined in the Note as Bank's Prime Rate plus one-half percent (0.5%).

15. If a payment is ten (10) days or more late, Borrower will be charged five percent (5%) of the unpaid portion of the regularly scheduled payment or \$5.80, whichever is greater.

16. The Phase 2 Note allows for payments to be applied first to any accrued unpaid interest, then to principal, then to any late charges and then to any unpaid collection costs.

17. The Phase 2 Note defines default to include, among other things, Borrower's failure to make any payment when due under the Note and Borrower's failure to comply with or to perform any other term, obligation, covenant or condition contained in any other agreement between Bank and Borrower.

18. Upon default by Borrower, the Phase 2 Note authorizes Bank to declare the entire unpaid principal balance under the Note and all accrued unpaid interest immediately due and payable.

19. In the event Bank hires an attorney to help collect the Phase 2 Note, Borrower agrees to pay Bank for the expenses incurred by Bank, including attorneys' fees in an amount not less than fifteen percent (15%) of the amount owing on the Note, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction) and appeals, as well as any court costs.

20. The Phase 2 Note is to be governed by the laws of the state of South Carolina, without regard to any conflicts of laws provisions.

21. Borrower further agreed it would be liable for all sums advanced in accordance with the instructions of an authorized person as well as those sums credited to any of Borrower's accounts with Bank.

22. Borrower also agreed that the terms of the Phase 2 Note shall be binding on Borrower, its personal representatives, successors and assigns and shall inure to the benefit of Bank and its successors and assigns.

23. By signing the Phase 2 Note, Borrower waived its right to presentment, demand for payment and notice of dishonor.

24. Borrower further agreed that Bank had the right to renew, or extend (repeatedly and for any length of time) the Phase 2 Note and take any other action deemed necessary by Bank without the consent of or notice to anyone.

25. Bank had the right to modify the Phase 2 Note without the consent of or notice to anyone other than the party with whom the modification is made.

26. By signing the Phase 2 Note, Borrower waived and relinquished its statutory appraisal rights, which means that the high bid at the judicial foreclosure sale of any collateral will be applied to the debt.

27. As security for the Phase 2 Note, Borrower executed a mortgage (Phase 2 Mortgage) dated July 28, 2008, recorded July 30, 2008, in Book 10212 at Page 196, in the Office of the Clerk of Court, York County, South Carolina, encumbering all right, title and interest in real property, together with all existing or subsequently erected or affixed buildings, improvements, fixtures,

easements, appurtenances and all other rights, royalties and profits relating to the real property more particularly described as follows (Phase 2 Lots):

All that piece, parcel or lot of land lying, being and situate in Ebenezer Township, York County, State of South Carolina, being identified as that Lot 11, 12, 19, 20, 21, 22, 23, 24, 25, 28 and 40 as shown on that map of plat of "Palm Tree Cove 2A" drawn by David L. Ferguson, SCPLS # 16493, dated February 18, 2008, recorded in Plat Book D-305, Page 4 and revised in Plat Book D-310, Page 2 and shown and depicted on that map or plat of the Premises plat entitled "Plat Prepared for Har-Lee" drawn by David L. Ferguson, SCPLS # 16493, dated March 20, 2008, recorded in Plat book D-308, Page 4 in the Office of the Clerk of Court for York County, South Carolina reference to which is hereby made for a more particular description.

Derivation: Being the identical property conveyed to Mortgagor by deed of Har-Lee, LLC dated July 28, 2008 and recorded on July 30, 2008 in Book 10212 at Page 192 in the Office of the Clerk of Court for York County, South Carolina.

LESS AND EXCEPT all that piece parcel or lot of land lying, being and situate in Ebenezer Township, York County, State of South Carolina, being identified as that Lot 11 as shown on that map of "Palm Tree Cove 2A" drawn by David L. Ferguson, SCPLS # 16493, dated February 18, 2008, recorded in Plat Book D-305, Page 4 and revised in Plat Book D-310, Page 2 and shown and depicted on that map or plat of the Premises plat entitled "Plat Prepared for Har-Lee" drawn by David L. Ferguson, SCPLS # 16493, dated March 20, 2008, recorded in Plat book D-308, Page 4 in the Office of the Clerk of Court for York County, South Carolina reference to which is hereby made for a more particular description.

A portion of Tax Map Nos.: 550-00-00-173 and 550-00-00-174.

A copy of the Phase 2 Mortgage is attached hereto and marked as **Exhibit B**.

28. Bank released its lien against Lot 11 through the execution and recording of a Partial Release of Mortgage on file with the York County Clerk of Court.

29. In the Phase 2 Mortgage, Borrower agreed to maintain the Phase 2 Lots in tenantable condition and promptly perform all repairs, replacements and maintenance necessary to preserve their value.

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30. Borrower further agreed that Bank or its agents and representatives had the right to enter upon the Phase 2 Lots at all reasonable times to attend to Bank's interests and to inspect the Phase 2 Lots for purposes of Borrower's compliance with the terms and conditions of the Phase 2 Mortgage.

31. Borrower agreed to neither abandon nor leave the Phase 2 Lots unattended and also agreed to do all other acts that are reasonably necessary to protect and preserve the Phase 2 Lots.

32. Borrower agreed to pay when due all taxes, payroll taxes, special taxes and assessments, water charges and sewer service charges levied against or on account of the Phase 2 Lots and to pay when due all claims for work done on or for services rendered or material furnished to the Phase 2 Lots.

33. Borrower agreed to maintain the Phase 2 Lots free of any liens having priority over or equal to the interests of Bank under the Phase 2 Mortgage, except for those liens to which Bank specifically agreed in writing.

34. Borrower agreed to procure and maintain fire and comprehensive general liability insurance on the Phase 2 Lots, in such coverage amounts as Bank may require, listing Bank as an additional insured.

35. Borrower also agreed that in the event Borrower failed to comply with any provision in the Phase 2 Mortgage, Bank had the right, but not the obligation, to take any action Bank deemed appropriate, including, but not limited to, discharging or paying all taxes, liens, security interests, encumbrances and other claims, at any time levied or placed on the Phase 2 Lots and paying all costs

for insuring, maintaining and preserving the Phase 2 Lots, which costs would then be added to the Phase 2 Note and accrue interest at the rate set forth in such Note.

36. All amounts paid by Bank in accordance with the above paragraph, at Bank's option, will (A) be payable on demand; (B) be added to the balance of the Phase 2 Note and be apportioned among and be payable with any installment payments; or (C) be treated as a balloon payment which will be due and payable at the Phase 2 Note's maturity.

37. The Phase 2 Mortgage defines an Event of Default to include, but not be limited to, Borrower's failure to make payment when due under the terms of the Phase 2 Note.

38. Upon the occurrence of an Event of Default under the terms of the Phase 2 Mortgage, Bank has the right to declare all amounts due and owing on the Phase 2 Note immediately due and payable and to foreclose the Phase 2 Mortgage.

39. Under the terms of the Phase 2 Mortgage, Borrower agreed that, whether or not any court action is involved, all reasonable expenses Bank incurs that in Bank's opinion are necessary at any time for the protection of its interest or the enforcement of its rights (which shall include attorneys' fees of fifteen percent (15%) of the amount owing on the Phase 2 Note (whether or not there is a lawsuit), expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals and any anticipated post-judgment collection services, the cost of searching records, obtaining title reports (including foreclosure reports), surveyor's reports, and appraisal fees and title insurance, as well as court costs) shall become a part of the debt evidenced by the Phase 2 Note, shall bear interest at the Phase 2 Note rate from the date of the expenditures until paid and shall be payable on demand.

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40. The Phase 2 Note matured on December 28, 2008 and Borrower failed to pay the Note in full.

41. By letter dated February 6, 2009, Bank sent to Borrower notice of default and demand for payment in full on the Phase 2 Note within ten (10) days from the date thereof, in response to which Borrower failed to pay the Phase 2 Note in full. A copy of the demand letter is attached hereto as Exhibit C.

42. As of March 24, 2009, there was due and owing on the Phase 2 Note the sum of \$1,240,804.35, plus per diem interest of \$127.08 from that date to the date of payment in full, as well as costs of collection, including, but not limited to, attorneys' fees; and Bank is entitled to entry of judgment against Borrower for that amount.

43. The Phase 2 Mortgage is legally owned and held by Bank; the conditions of it have been breached; the amount due and owing has not been paid by Borrower after demand having been duly made upon it; and the Phase 2 Mortgage constitutes a valid lien upon the Phase 2 Lots, and should be foreclosed to provide for payment of monies due under the Phase 2 Note.

44. Bank seeks a deficiency judgment against Borrower to the extent the proceeds from the judicial sale of the Phase 2 Lots as described in the Phase 2 Mortgage are not sufficient to satisfy in full the debt owed by Borrower to Bank arising under the Phase 2 Note.

45. Simpson is made a party to this action as a result of his judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-00038, which is junior and inferior to the liens of Bank against the Phase 2 Lots.

46. Above All is made a party to this action as a result of its judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-00477, which is junior and inferior to the liens of Bank against the Phase 2 Lots.

47. Creative is made a party to this action as a result of its judgments recorded against Borrower at Judgment Roll No. 2009-CP-46-1247 and 2009-CP-46-1248, which are junior and inferior to the liens of Bank against the Phase 2 Lots.

48. Rock is made a party to this action as a result of its judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-0212, which is junior and inferior to the liens of Bank against the Phase 2 Lots.

For a Second Cause of Action

49. Bank hereby reiterates all of the foregoing allegations as fully as if set forth verbatim herein.

50. On or about July 27, 2007, Borrower signed a promissory note in the amount of \$426,400.00, as modified by the Modification and Extension Agreement dated September 30, 2008 (collectively, the Phase 1 Note), in favor of Bank. A copy of the Phase 1 Note is attached hereto and marked as **Exhibit D**.

51. The Phase 1 Note, as modified, obligates Borrower to make monthly payments of interest commencing on November 5, 2008 and continuing on the same day of each calendar period thereafter, with one final payment of all remaining principal and interest due on February 5, 2009.

52. Under the terms of the Phase 1 Note, interest will be paid at a variable rate of interest known as the Contract Rate, which is defined in the First Note as Bank's Prime Rate plus one-half percent (0.5%).

53. The Phase 1 Note allows for payments to be applied first to any accrued unpaid interest, then to principal, then to any late charges and then to any unpaid collection costs.

54. Under the terms of the Phase 1 Note, if a payment is ten (10) days or more late, Borrower will be charged 5.00% of the unpaid portion of the regularly scheduled payment or \$5.80, whichever is greater.

55. The remaining terms and conditions of the Phase 1 Note are identical to those set forth in the Phase 2 Note.

56. As security for the Phase 1 Note, Borrower executed a construction mortgage (Phase 1 Mortgage) dated July 27, 2007, recorded July 31, 2007, in Book 09304 at Page 00158, in the Office of the Clerk of Court, York County, South Carolina, encumbering all right, title and interest in real property, together with all existing or subsequently erected or affixed buildings, improvements, fixtures, easements, appurtenances and all other rights, royalties and profits relating to the real property more particularly described as follows (Lot 29):

All that certain piece, parcel or tract of land lying, being and situate in Catawba Township, County of York, State of South Carolina, and being designated as Lot 29 as shown on plat entitled, "Final Plat of Palm Tree Cove" drawn by David L. Ferguson, PLS, dated June 7, 2006 and last revised October 12, 2006 and recorded in Plat Book D-149, Page 10 in the Office of the Clerk of Court for York County, South Carolina, which reference is hereby made for a more particular description.

Derivation: Being a portion of the same property conveyed to Mortgagor by Deed from Har-Lee, LLC recorded in Book 8798, Page 157 in the Office of the Clerk of Court for York County, South Carolina.

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Tax Map No.: 550-00-00-144

A copy of the Phase 1 Mortgage is attached hereto and marked as **Exhibit E**.

57. The remaining terms and conditions of the Phase 1 Mortgage are identical to those set forth in the Phase 2 Mortgage.

58. The Phase 1 Note matured February 5, 2009 and Borrower failed to pay such Note in full, which is a default.

59. By letter dated February 6, 2009, Bank sent to Borrower notice of default and demand for payment in full on the Phase 1 Note within ten (10) days from the date thereof, in response to which Borrower failed to pay such Note in full. A copy of the demand letter is attached hereto and marked as **Exhibit F**.

60. As of March 24, 2009, there was due and owing on the Phase 1 Note the sum of \$438,827.95, plus per diem interest of \$44.42 from that date to the date of payment in full, as well as costs of collection, including, but not limited to, attorneys' fees; and Bank is entitled to judgment against Borrower for that amount.

61. The Phase 1 Mortgage is legally owned and held by Bank; the conditions of it have been breached; the amount due and owing has not been paid by Borrower after demand having been duly made upon it; and the Phase 1 Mortgage constitutes a valid lien upon Lot 29, and should be foreclosed to provide for payment of monies due under the Phase 1 Note.

62. Bank seeks a deficiency judgment against Borrower to the extent the proceeds from the judicial sale of Lot 29 as described in the Phase 1 Mortgage are not sufficient to satisfy in full the debt owed by Borrower to Bank arising under the Phase 1 Note.

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63. Simpson is made a party to this action as a result of his judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-00038, which is junior and inferior to the lien of Bank against Lot 29.

64. Above All is made a party to this action as a result of its judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-00477, which is junior and inferior to the liens of Bank against Lot 29.

65. Carter Lumber is made a party to this action because of its mechanic's lien recorded against Lot 29 in Book 56 at page 5, in the Office of the Clerk of Court, York County, South Carolina, which is junior and inferior to the lien of Bank against Lot 29.

66. Efficient Painting is made a party to this action because of its mechanic's lien recorded against Lot 29 in Book 68 at page 113, in the Office of the Clerk of Court, York County, South Carolina, which is junior and inferior to the lien of Bank against Lot 29.

67. Creative is made a party to this action as a result of its judgments recorded against Borrower at Judgment Roll No. 2009-CP-46-1247 and 2009-CP-46-1248, which are junior and inferior to the liens of Bank against Lot 29.

68. Rock is made a party to this action as a result of its judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-0212, which is junior and inferior to the liens of Bank against Lot 29.

For a Third Cause of Action

69. Bank hereby reiterates all of the foregoing allegations as fully as if set forth verbatim herein.

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70. On or about October 29, 2007, Borrower signed a promissory note in the amount of \$418,840.89, as modified by the Modification and Extension Agreement dated November 5, 2008, (collectively, Trinity Ridge Note) in favor of Bank. A copy of the Trinity Ridge Note is attached hereto and marked as **Exhibit G**.

71. The Trinity Ridge Note, as modified, obligates Borrower to make one payment of principal and interest on such Note at its maturity on January 5, 2009.

72. Under the terms of the Trinity Ridge Note, interest will be paid at a variable rate of interest known as the Contract Rate, which is defined in such Note as Bank's Prime Rate plus one-half percent (0.5%).

73. If a payment is ten (10) days or more late, Borrower will be charged five percent (5%) of the unpaid portion of the regularly scheduled payment or \$5.80, whichever is greater.

74. The remaining terms and conditions of the Trinity Ridge Note are identical to those set forth in the Phase 1 and Phase 2 Notes.

75. As security for the Trinity Ridge Note, Borrower executed a mortgage (Trinity Ridge Mortgage) dated October 29, 2007, recorded November 6, 2007, in Book 9574 at Page 60, in the Office of the Clerk of Court, York County, South Carolina, encumbering all right, title and interest in real property, together with all existing or subsequently erected or affixed buildings, improvements, fixtures, easements, appurtenances and all other rights, royalties and profits relating to the real property more particularly described as follows (Trinity Ridge Lots):

All that certain piece, parcel or lot of land with any and all improvements located thereon lying and being in the Town of Fort Mill, State of South Carolina, County of York designated as Lots 39 & 41 of Trinity Ridge Subdivision, Phase II and being more particularly shown on Plat of property drawn by Pittman Professional Land

Surveying, dated March 30, 2007 and recorded April 5, 2007 in Plat Book D-204 at page 8, in the Office of the Clerk of Court for York County. For a more complete and accurate description as to metes and bounds reference is hereby made to the above referenced property and record thereof.

Derivation: Being a portion of the same property conveyed to Mortgagor by Deed from Penton II, LLC recorded 11/6/07 in Book 9574; Page 58 in the Office of the Clerk of Court for York County, South Carolina.

Tax Map Nos.: 778-01-01-043 and 778-01-01-045

A copy of the Trinity Ridge Mortgage is attached hereto and marked as **Exhibit H**.

76. The remaining terms and conditions of the Trinity Ridge Mortgage are identical to those set forth in the Phase 2 Mortgage.

77. The Trinity Ridge Note matured on January 5, 2009 and Borrower failed to pay such Note in full.

78. By letter dated February 6, 2009, Bank sent to Borrower notice of default and demand for payment in full on the Trinity Ridge Note within ten (10) days from the date thereof, in response to which Borrower failed to pay such Note in full. A copy of the demand letter is attached hereto as **Exhibit I**.

79. As of March 24, 2009, there was due and owing on the Trinity Ridge Note the sum of \$427,834.37, plus per diem interest of \$43.63 from that date to the date of payment in full, as well as costs of collection, including, but not limited to, attorneys' fees; and Bank is entitled to judgment against Borrower for that amount.

80. The Trinity Ridge Mortgage is legally owned and held by Bank; the conditions of it have been breached; the amount due and owing has not been paid by Borrower after demand having been duly made upon it; and the Trinity Ridge Mortgage constitutes a valid lien upon the Trinity

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Ridge Lots, and should be foreclosed to provide for payment of monies due under the Trinity Ridge Note.

81. Bank seeks a deficiency judgment against Borrower to the extent the proceeds from the judicial sale of the Trinity Ridge Lots as described in the Trinity Ridge Mortgage are not sufficient to satisfy in full the debt owed by Borrower to Bank arising under the Trinity Ridge Note.

82. Simpson is made a party to this action as a result of his judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-00038, which is junior and inferior to the lien of Bank against the Trinity Ridge Lots.

83. Above All is made a party to this action as a result of its judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-00477, which is junior and inferior to the liens of Bank against the Trinity Ridge Lots.

84. Creative is made a party to this action as a result of its judgments recorded against Borrower at Judgment Roll No. 2009-CP-46-1247 and 2009-CP-46-1248, which are junior and inferior to the liens of Bank against the Trinity Ridge Lots.

85. Rock is made a party to this action as a result of its judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-0212, which is junior and inferior to the liens of Bank against the Trinity Ridge Lots.

For a Fourth Cause of Action

86. Bank hereby reiterates all of the foregoing allegations as fully as if set forth verbatim herein.

87. On or about September 27, 2007, Borrower signed a promissory note in the amount of \$149,337.10 in favor of Bank (Glynns Note). A copy of the Glynns Note is attached hereto and marked as **Exhibit J**.

88. The Glynns Note obligates Borrower to make regular monthly payments of accrued unpaid interest due as of each payment date beginning November 5, 2007, with all subsequent interest payments to be due on the same day of each month thereafter and a balloon payment due on October 5, 2008 of all principal and accrued interest not yet paid.

89. Under the terms of the Glynns Note, interest will be paid at a variable rate of one-half percentage point (.05%) over the Index, as defined therein.

90. If a payment is ten (10) days or more late, Borrower will be charged five percent (5%) of the unpaid portion of the regularly scheduled payment or \$5.80, whichever is greater.

91. The remaining terms and conditions of the Glynns Note are identical to those set forth in the Phase 1 and Phase 2 Notes.

92. As security for the Glynns Note, Borrower executed a mortgage (Glynns Mortgage) dated September 27, 2007, recorded October 5, 2007, in Book 9494 at Page 84, in the Office of the Clerk of Court, York County, South Carolina, encumbering all right, title and interest in real property, together with all existing or subsequently erected or affixed buildings, improvements, fixtures, easements, appurtenances and all other rights, royalties and profits relating to the real property more particularly described as follows (Lot 52):

All that certain piece, parcel or lot of land lying, being and situate in York Township, York County, South Carolina and being more particularly shown and designated as Lots No. 52 and 57 on Final Subdivision Plat of the Glynns at Carolina Crossing, drawn by James Jetter Pittman, PLS, dated August 1, 2005, revised September 29,

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2005, November 9, 2005, December 6, 2005, February 13, 2006 and recorded February 14, 2006 in Plat Book D-73 at Page 6 in the Office of the Clerk of Court for York County, South Carolina, reference to said plat being hereby made for a more complete and accurate description, be all measurements a little more or less.

LESS AND EXCEPT: All that certain piece, parcel or lot of land lying, being and situate in York Township, York County, South Carolina, and being more particularly shown and designated as Lot No. 57 on final subdivision plat of The Glynnns at Carolina Crossing, drawn by James Jetter Pittman, PLS, dated August 1, 2005, revised September 29, 2005, November 9, 2005, December 6, 2005, February 13, 2006 and recorded February 14, 2006 in Plat Book D-73, Page 6 in the Office of the Clerk of Court for York County, South Carolina.

DERIVATION: This being the same property conveyed to Mortgagor by deed from Penton II, LLC recorded May 15, 2006 in Book 8032 at Page 86, in the Office of the Clerk of Court for York County, South Carolina, and

This being the same property conveyed to Mortgagor by deed from Penton II, LLC recorded May 22, 2006 in Book 8050 at Page 260 in the Office of the Clerk of Court for York County, South Carolina.

Tax Map No.: 448-00-00-134

A copy of the Glynnns Mortgage is attached hereto and marked as Exhibit K.

93. On November 19, 2007, recorded December 3, 2007, in Book 9632 at Page 299, in the Office of the Clerk of Court for York County, South Carolina, a Partial Release of Mortgage was given by Bank releasing the lien of the Mortgage from Lot 57.

94. The remaining terms and conditions of the Glynnns Mortgage are identical to those set forth in the Phase 2 and Trinity Ridge Mortgages.

95. The Glynnns Note matured on October 5, 2008 and Borrower failed to pay such Note in full.

96. By letter dated February 6, 2009, Bank sent to Borrower notice of default and demand for payment in full on the Glynnns Note within ten (10) days from the date thereof, in response to

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which Borrower failed to pay such Note in full. A copy of the demand letter is attached hereto as Exhibit L.

97. As of March 24, 2009, there was due and owing on the Glynn's Note the sum of \$74,718.19, plus per diem interest of \$7.65 from that date to the date of payment in full, as well as costs of collection, including, but not limited to, attorneys' fees; and Bank is entitled to judgment against Borrower for that amount.

98. The Glynn's Mortgage is legally owned and held by Bank; the conditions of it have been breached; the amount due and owing has not been paid by Borrower after demand having been duly made upon it; and the Glynn's Mortgage constitutes a valid lien upon Lot 52, and should be foreclosed to provide for payment of monies due under the Glynn's Note.

99. Bank seeks a deficiency judgment against Borrower to the extent the proceeds from the judicial sale of Lot 52 as described in the Glynn's Mortgage are not sufficient to satisfy in full the debt owed by Borrower to Bank arising under the Glynn's Note.

100. Simpson is made a party to this action as a result of his judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-00038, which is junior and inferior to the lien of Bank against Lot 52.

101. Above All is made a party to this action as a result of its judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-00477, which is junior and inferior to the liens of Bank against Lot 52.

102. Creative is made a party to this action as a result of its judgments recorded against Borrower at Judgment Roll No. 2009-CP-46-1247 and 2009-CP-46-1248, which are junior and inferior to the liens of Bank against Lot 52.

103. Rock is made a party to this action as a result of its judgment recorded against Borrower at Judgment Roll No. 2009-CP-46-0212, which is junior and inferior to the liens of Bank against Lot 52.

For a Fifth Cause of Action

104. Bank hereby reiterates all of the foregoing allegations as fully as if set forth verbatim herein.

105. On July 27, 2007 and October 29, 2007, respectively, Guarantors each executed a Commercial Guaranty (collectively, Guaranties) absolutely and unconditionally guaranteeing the full and punctual payment and satisfaction of the Indebtedness of Borrower to Bank. Copies of the four Guaranties are attached hereto and marked as Exhibit M.

106. The Guaranties define "Indebtedness" to include all of the principal amount outstanding from time to time and at any one or more times, accrued unpaid interest thereon and all collection costs, legal expenses and attorneys' fees related thereto permitted by law, arising from any and all debts, liabilities and obligations of every nature or form, now existing or hereafter arising or acquired, that Borrower individually or collectively or interchangeably with others, owes or will owe Bank, including, without limitation, loans, advances, debts, overdraft indebtedness, credit card indebtedness, lease obligations, liabilities and other obligations and liabilities of Borrower, and any present or future judgments against Borrower, future advances, loans or transactions that renew,

extend, modify, refinance, consolidate or substitute these debts, liabilities and obligations whether voluntarily or involuntarily incurred; due or to become due by their terms or acceleration; absolute or contingent; liquidated or unliquidated; determined or undetermined; direct or indirect; primary or secondary in nature or arising from a guaranty or surety; secured or unsecured; joint or several or joint and several; evidenced by a negotiable or non-negotiable instrument in writing; originated by Bank or another or others; barred or unenforceable against Borrower for any reason whatsoever; for any transactions that may be voidable for any reason (such as infancy, insanity, ultra vires or otherwise); and originated then reduced or extinguished and then afterwards increased or reinstated.

107. The Guaranties are guaranties of payment and performance and not of collection, so Bank can enforce the Guaranties against Guarantors even when Bank has not exhausted its remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness.

108. Under the terms of the Guaranties, in the event Bank holds one or more guaranties from Guarantors, Bank's rights under all guaranties shall be cumulative and each Guarantor's liability under any such other guaranties shall be Guarantor's aggregate liability under the terms of the Guaranty and such other guaranties.

109. Under the terms of the Guaranties, any payments made on the Indebtedness will not discharge or diminish Guarantors' obligations and liability under the Guaranties for any remaining and succeeding Indebtedness even when all or part of the outstanding Indebtedness may be a zero balance from time to time.

110. The Guaranties remain in full force and effect until all the Indebtedness incurred or contracted before receipt by Bank of any notice of revocation shall have been fully and finally paid and satisfied and all of Guarantors' other obligations under the Guaranties shall have been performed in full.

111. Guarantors may only revoke the Guaranties in writing, delivered via certified mail to Bank at its address set forth in the Guaranties or such other place as Bank may designate in writing.

112. Any revocation by either Guarantor will apply only to new Indebtedness created after actual receipt by Bank of that Guarantor's written revocation, which shall not include the Indebtedness which at the time of notice of revocation is contingent, unliquidated, undetermined or not due and which later becomes absolute, liquidated, determined or due.

113. Under the terms of the Guaranties, Guarantors waived their rights to require Bank to resort for payment or to proceed directly or at once against any person, including Borrower, or to proceed directly against or exhaust any collateral held by Bank from Borrower, any other guarantor or any other person.

114. Guarantors waived and agreed not to assert or claim at any time any deductions to the amount guaranteed under the Guaranties for any claim of setoff, counterclaim, counter demand, recoupment or similar right, whether such claim, demand or right may be asserted by Borrower, Guarantors or both.

115. Guarantors further agreed that the Indebtedness, whether now existing or hereafter created, shall be superior to any claim that Guarantors may now have or hereafter acquire against Borrower, whether or not Borrower becomes insolvent.

116. Guarantors agreed to pay upon demand all of Bank's costs and expenses, including Bank's attorneys' fees and legal expenses, incurred in connection with the enforcement of the Guaranties, which shall include attorneys' fees and legal expenses whether or not there is a lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services, as well as all court costs.

117. By signing the Guaranties, Guarantors waived and relinquished their statutory appraisal rights, which means that the high bid at the judicial foreclosure sale of any collateral will be applied to the Indebtedness in order to determine any deficiency against Guarantors.

118. By letters dated February 6, 2009, Bank made demand upon each Guarantor for payment in full of the total amount then due and owing on the Phase 1, Phase 2, Trinity Ridge and Glynns Notes, within ten (10) days from the date thereof, in response to which Guarantors failed to provide payment in full. Copies of the demand letters are attached hereto as Exhibit N.

119. Bank is entitled to entry of judgment, joint and several, against Guarantors in the total amount due and owing on the Phase 1, Phase 2, Trinity Ridge and Glynns Notes, with credit for any sums recovered by Bank through judicial sale of the Phase 1 Lot, Phase 2 Lots, Trinity Ridge Lot and Lot 52.

WHEREFORE, Bank prays:

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1. On the First Cause of Action,

(a) for an order granting Bank a judgment against Borrower in the amount set forth in Paragraph 42 above, less any sums which Bank may recover from the foreclosure sale of the Phase 2 Lots;

(b) for an order requiring that the Mortgage be foreclosed, free and clear of all liens, interests, restrictions and/or encumbrances; the equity of redemption of Borrower be forever barred; the Phase 2 Lots be sold under order of this Court; the bidding at such sale be complete and final within 30 days after the date of initial sale; a deficiency judgment be awarded to Bank against Borrower in the event the proceeds from the foreclosure sale of the Phase 2 Lots are insufficient to satisfy in full the entire indebtedness due to Bank under the terms of the First Note; and the successful bidder be put into possession of the Phase 2 Lots immediately upon presentation of the deed;

(c) for an order requiring that the proceeds of the foreclosure sale be applied first to payment of the costs of protection, preservation and maintenance of the Phase 2 Lots, along with taxes, insurance, other applicable assessments and expenses of sale, plus costs of collection, including, but not limited to, attorneys' fees and costs, and any appraisal expenses; next, to the indebtedness due to Bank and then other lienors, in order of priority; and finally, such other sums found properly due or outstanding by the Court;

(d) for an order that, in the event the successful bidder shall be other than Borrower, the Sheriff of York County be directed and empowered to eject and remove from the Phase 2 Lots any occupant or occupants thereon, together with all personal property located thereon; to put the successful bidder or assigns in the full, quiet and peaceful possession of the Phase 2 Lots without delay; and to keep the successful bidder or assigns in such possession;

2. On the Second Cause of Action,

(a) for an order granting Bank a judgment against Borrower in the amount set forth in Paragraph 60 above, less any sums which Bank may recover from the foreclosure sale of Lot 29;

(b) for an order requiring that the Phase 1 Mortgage be foreclosed, free and clear of all liens, interests, restrictions and/or encumbrances; the equity of redemption of Borrower be forever barred; the Lot 29 be sold under order of this Court; the bidding at such sale be complete and final within 30 days after the date of initial sale; a deficiency judgment be awarded to Bank against Borrower in the event the proceeds from the foreclosure sale of Lot 29 are insufficient to satisfy in full the entire

indebtedness due to Bank under the terms of the Phase 1 Note; and the successful bidder be put into possession of Lot 29 immediately upon presentation of the deed;

(c) for an order requiring that the proceeds of the foreclosure sale be applied first to payment of the costs of protection, preservation and maintenance of Lot 29, along with taxes, insurance, other applicable assessments and expenses of sale, plus costs of collection, including, but not limited to, attorneys' fees and costs, and any appraisal expenses; next, to the indebtedness due to Bank and then other lienors, in order of priority; and finally, such other sums found properly due or outstanding by the Court;

(d) for an order that, in the event the successful bidder shall be other than Borrower, the Sheriff of York County be directed and empowered to eject and remove from the Phase 1 Lot any occupant or occupants thereon, together with all personal property located thereon; to put the successful bidder or assigns in the full, quiet and peaceful possession of the Phase 1 Lots without delay; and to keep the successful bidder or assigns in such possession;

3. On the Third Cause of Action,

(a) for an order granting Bank a judgment against Borrower in the amount set forth in Paragraph 79 above, less any sums which Bank may recover from the foreclosure sale of the Trinity Ridge Lots;

(b) for an order requiring that the Trinity Ridge Mortgage be foreclosed, free and clear of all liens, interests, restrictions and/or encumbrances; the equity of redemption of Borrower be forever barred; the Trinity Ridge Lots be sold under order of this Court; the bidding at such sale be complete and final within 30 days after the date of initial sale; a deficiency judgment be awarded to Bank against Borrower in the event the proceeds from the foreclosure sale of the Trinity Ridge Lots are insufficient to satisfy in full the entire indebtedness due to Bank under the terms of the Trinity Ridge Note; and the successful bidder be put into possession of the Trinity Ridge Lots immediately upon presentation of the deed;

(c) for an order requiring that the proceeds of the foreclosure sale be applied first to payment of the costs of protection, preservation and maintenance of the Trinity Ridge Lots, along with taxes, insurance, other applicable assessments and expenses of sale, plus costs of collection, including, but not limited to, attorneys' fees and costs, and any appraisal expenses; next, to the indebtedness due to Bank and then other lienors, in order of priority; and finally, such other sums found properly due or outstanding by the Court;

(d) for an order that, in the event the successful bidder shall be other than Borrower, the Sheriff of York County be directed and empowered to eject and remove from the Trinity Ridge Lots any occupant or occupants thereon, together with all personal property located thereon; to put the successful bidder or assigns in the full, quiet and peaceful possession of the Trinity Ridge Lots without delay; and to keep the successful bidder or assigns in such possession;

4. On the Fourth Cause of Action,

(a) for an order granting Bank a judgment against Borrower in the amount set forth in Paragraph 97 above, less any sums which Bank may recover from the foreclosure sale of Lot 52;

(b) for an order requiring that the Glynn's Mortgage be foreclosed, free and clear of all liens, interests, restrictions and/or encumbrances; the equity of redemption of Borrower be forever barred; Lot 52 be sold under order of this Court; the bidding at such sale be complete and final within 30 days after the date of initial sale; a deficiency judgment be awarded to Bank against Borrower in the event the proceeds from the foreclosure sale of Lot 52 are insufficient to satisfy in full the entire indebtedness due to Bank under the terms of the Glynn's Note; and the successful bidder be put into possession of Lot 52 immediately upon presentation of the deed;

(c) for an order requiring that the proceeds of the foreclosure sale be applied first to payment of the costs of protection, preservation and maintenance of Lot 52, along with taxes, insurance, other applicable assessments and expenses of sale, plus costs of collection, including, but not limited to, attorneys' fees and costs, and any appraisal expenses; next, to the indebtedness due to Bank and then other lienors, in order of priority; and finally, such other sums found properly due or outstanding by the Court;

(d) for an order that, in the event the successful bidder shall be other than Borrower, the Sheriff of York County be directed and empowered to eject and remove from Lot 52 any occupant or occupants thereon, together with all personal property located thereon; to put the successful bidder or assigns in the full, quiet and peaceful possession of Lot 52 without delay; and to keep the successful bidder or assigns in such possession;

5. On the Fifth Cause of Action,

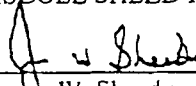
(a) for an order granting Bank a judgment, joint and several, against Guarantors in the total amount due and owing on the Phase 1, Phase 2, Trinity Ridge and Glynn's Notes, with credit for any sums recovered by Bank through judicial sale of the Phase 1 Lot, Phase 2 Lots, Trinity Ridge Lot and Lot 52.; and

6. For the granting of such other and further relief as appears to the Court to be just and proper.

Charlotte, NC

Date: 6/5/09

DRISCOLL SHEEDY, P.A.

By: 

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ATTORNEYS FOR BANK

STATE OF SOUTH CAROLINA
COUNTY OF YORK

FILED RECEIVED
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IN THE CIRCUIT COURT

Yadkin Valley Bank & Trust, substituted
American Community Bank,

DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

Civil Action No. 2009-CP-46-1673

Plaintiff,

vs.

Oaktree Homes, Inc.; Dawne M. Ras and
Thomas C. Ras; Daniel Simpson; Above All
Services, Inc.; Darter Lumber Company; and
Efficient Painting Contractors, Inc.,

Defendants.

**ANSWER TO AMENDED COMPLAINT
AND COUNTERCLAIM**
Jury Trial Demanded

NOW COME Defendants Oaktree Homes, Inc. ("Oaktree") and Dawne M. Ras and Thomas C. Ras ("Ras"), by and through counsel, answering the amended complaint and counterclaiming against plaintiff, state as follows:

AS A FIRST DEFENSE

1. Each and every allegation of the amended complaint not herein admitted, qualified or explained is denied.

2. Responding to the allegations of paragraph 1 of the amended complaint, these defendants are informed and believe that plaintiff merged into an entity known as Yadkin Valley Bank & Trust Company. Plaintiff did not survive the merger. Defendants deny any allegations of paragraph 1 inconsistent with the foregoing.

3. Defendants admit the allegations of Paragraphs 2 and 3 of the amended complaint.

4. Defendants lack sufficient information upon which to base a belief as to the truth or falsity of paragraphs 4, 5, 6, 7, 8 and 9 of the amended complaint and therefore deny the same.

5. The allegations of paragraph 10 of the amended complaint state a legal conclusion and requires no response from these defendants. To the extent a response is deemed to be required, these defendants admit that the transactions described in the pleadings are commercial loans.

6. Responding to the allegations of paragraph 11 of the amended complaint, defendants incorporate their foregoing responses as if set forth here verbatim.

7. Defendants admit the allegations of paragraph 12 of the amended complaint.
8. Responding to the allegations of paragraphs 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26 of the amended complaint, defendants crave reference to the promissory note and modification and extension agreement for their terms, and deny any parts of those paragraphs which purport to vary, delete from, or add to those express terms.
9. Responding to the allegations of paragraph 27 of the amended complaint, defendants admit that Oaktree signed the mortgage described in that paragraph. Defendants crave reference to the Mortgage for its terms, and deny any part of paragraph 24 which purports to vary, delete from, or add to those express terms.
10. Defendants admit the allegations of paragraph 28 of the amended complaint.
11. Responding to the allegations of paragraphs 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, and 39 of the amended complaint, defendants crave reference to the mortgage for its terms, and deny any parts of those paragraphs which purport to vary, delete from, or add to those express terms.
12. Defendants admit the allegations of paragraphs 40 and 41 of the amended complaint.
13. Defendants deny the allegations of paragraphs 42, 43, and 44 of the amended complaint and affirmatively allege they owe plaintiff nothing.
14. Defendants lack sufficient information upon which to base a belief as to the truth or falsity of the allegations of paragraphs 45, 46, 47 and 48 of the amended complaint and therefore deny the same.
15. Responding to the allegations of paragraph 49 of the amended complaint, defendants incorporate their foregoing responses as if set forth here verbatim.
16. Defendants admit the allegations of paragraph 45 of the complaint.
17. Responding to the allegations of paragraphs 50, 51, 52, 53, 54, and 55 of the amended complaint, defendants crave reference to the promissory note and modification and extension agreement for their terms, and deny any parts of those paragraphs which purport to vary, delete from, or add to those express terms.
18. Responding to the allegations of paragraphs 56 and 57 of the amended complaint, defendants admit that Oaktree signed the mortgage described in paragraph 56. Defendants crave reference to the Mortgage for its terms, and deny any parts of those paragraphs which purport to vary, delete from, or add to those express terms.
19. Defendants admit the allegations of paragraphs 58 and 59 of the amended complaint.

20. Defendants deny the allegations of paragraphs 60, 61, and 62 of the amended complaint and affirmatively allege they owe plaintiff nothing.

21. Defendants lack sufficient information upon which to base a belief as to the truth or falsity of the allegations of paragraphs 63, 64, 65, 66, 67, and 68 of the amended complaint and therefore deny the same.

22. Responding to the allegations of paragraph 69 of the amended complaint, defendants incorporate their foregoing responses as if set forth here verbatim.

23. Defendants admit the allegations of paragraph 70 of the amended complaint.

24. Responding to the allegations of paragraphs 71, 72, 73, and 74 of the amended complaint, defendants crave reference to the promissory note and modification and extension agreement for their terms, and deny any parts of those paragraphs which purport to vary, delete from, or add to those express terms.

25. Responding to the allegations of paragraphs 75 and 76 of the amended complaint, defendants admit that Oaktree signed the mortgage described in paragraph 75. Defendants crave reference to the mortgage for its terms, and deny any parts of those paragraphs which purport to vary, delete from, or add to those express terms.

26. Defendants admit the allegations of paragraphs 77 and 78 of the amended complaint.

27. Defendants deny the allegations of paragraphs 79, 80, and 81 of the amended complaint and affirmatively allege they owe plaintiff nothing.

28. Defendants lack sufficient information upon which to base a belief as to the truth or falsity of the allegations of paragraphs 82, 83, 84, and 85 of the amended complaint and therefore deny the same.

29. Responding to the allegations of paragraph 86 of the amended complaint, defendants incorporate their foregoing responses as if set forth here verbatim.

30. Defendants admit the allegations of paragraph 87 of the amended complaint.

31. Responding to the allegations of paragraphs 88, 89, 90, and 91 of the amended complaint, defendants crave reference to the promissory note and modification and extension agreement for their terms, and deny any parts of those paragraphs which purport to vary, delete from, or add to those express terms.

32. Responding to the allegations of paragraph 92 of the amended complaint, defendants admit that Oaktree signed the mortgage described in that paragraph and crave reference to the mortgage for its terms. Defendants deny any part of paragraph 92 which purports to vary, delete from, or add to those express terms.

33. Defendants admit the allegations of paragraph 93 of the amended complaint.

34. Responding to the allegations of paragraph 94 of the complaint, defendants crave reference to the mortgage for its terms, and deny any part of that paragraph which purports to vary, delete from, or add to those express terms.

35. Defendants admit the allegations of paragraphs 95 and 96 of the amended complaint.

36. Defendants deny the allegations of paragraphs 97, 98, and 99 of the amended complaint and affirmatively allege they owe plaintiff nothing.

37. Defendants lack sufficient information upon which to base a belief as to the truth or falsity of the allegations of paragraphs 100, 101, 102, and 103 of the amended complaint and therefore deny the same.

38. Responding to the allegations of paragraph 104 of the amended complaint, defendants incorporate their foregoing responses as if set forth here verbatim.

39. Responding to the allegations of paragraphs 105, 106, 107, 108, 109, 100, 110, 111, 112, 113, 114, 115, 116, and 117 of the amended complaint, defendants admit Dawne and Thomas Ras signed the guarantees described in paragraph 105. Defendants crave reference to the guarantees for their terms, and deny any parts of those paragraphs which purport to vary, delete from, or add to those express terms.

40. Defendants admit the allegations of paragraph 118 of the amended complaint.

41. Defendants deny the allegations of paragraph 119 of the amended complaint.

AS A SECOND DEFENSE

42. Plaintiff is barred from recovery by the doctrines of laches, waiver, and/or estoppel.

AS A THIRD DEFENSE

43. Plaintiff is barred from recovery by the doctrine of unclean hands.

AS A FOURTH DEFENSE

44. Provisions of the Guarantees are unconscionable and cannot be enforced against Dawne Ras or Thomas Ras.

AS ADDITIONAL DEFENSES AND BY WAY OF COUNTERCLAIMS

45. These defendants reallege their foregoing responses as if set forth here verbatim.

46. Yadkin Valley Bank and Trust Company ("Yadkin") is a state chartered bank in the state of North Carolina.

47. Before April 2009, American Community Bank ("ACB") was also a North Carolina state chartered bank.

48. During the events described in this counterclaim and third-party complaint, ACB had a branch bank in Tega Cay.

49. In April 2009, ACB and Yadkin merged.

50. Yadkin was the surviving entity of the merger.

51. After the merger, ACB had no separate legal status apart from Yadkin.

52. Defendants are informed and believe that Yadkin is responsible for ACB's liabilities, including the claims alleged in this counterclaim and third-party complaint.

53. Har-Lee, LLC ("Har-Lee") is a South Carolina housing developer.

54. Har-Lee owns fifty-one building lots at Lake Wylie, York County, South Carolina, in the subdivision of Palm Tree Cove II.

55. Har-Lee wanted to sell the lots to Oaktree.

56. Palmetto Investment Holding Company LLC ("PIH") is a North Carolina housing developer.

57. PIH wanted to buy the lots from Oaktree once Oaktree closed its deal with Har-Lee.

58. Derek H. Franklin was Vice President of ACB.

59. As an officer of the bank, Franklin could make promises on ACB's behalf.

60. Oaktree had worked with Franklin for several years for their credit needs.

61. Franklin had written Oaktree on June 29, 2007, and promised to lend Oaktree up to \$2,500,000.

62. In May 2008 the ACB line of credit was in good standing and all accounts had been handled as agreed.

63. Oaktree told Franklin about both contracts for Palm Tree Cove II.

64. Oaktree asked Franklin if ACB would lend it more money to finance part of the purchase price.

65. Franklin told Oaktree that ACB would lend enough money so that Oaktree could buy the lots.

66. In April 2008, Oaktree contracted with Har-Lee to purchase the Palm Tree Cove II lots for approximately \$4,250,000.

67. In May 2008, Oaktree contracted with PIH to sell the same lots for \$6,697,070.

68. On May 9, 2008, Franklin promised Oaktree in writing to increase the line of credit to \$3,800,000.

69. The sale to PIH was contingent on Oaktree closing on the purchase from Har-Lee.

70. Franklin and ACB knew that Oaktree needed ACB to increase its line of credit to close its contract with Har-Lee.

71. During April and up until May 22, 2008, Franklin assured Oaktree that ACB would provide financing for the deal.

72. Oaktree and Har-Lee scheduled the closing for their contract on May 23, 2008.

73. Oaktree and PIH scheduled the closing for their contract on May 26, 2008.

74. Franklin came to Oaktree's office after business hours in the evening of May 22, 2008.

75. Franklin told Oaktree that ACB would not provide funding for the next day's closing.

76. Over the next several months, Franklin and other officers at ACB demanded that Oaktree provide more paperwork to get the loan.

77. The extra requirements had never been part of ACB's promise to lend Oaktree money.

78. Even though Oaktree tried to find other financing for the Palm Tree Cove II deal, it could not.

79. Because Oaktree couldn't close its deal with Har-Lee, it couldn't sell the lots to PIH.

FOR A FIRST CAUSE OF ACTION
(Breach of contract)

80. These defendants reallege their foregoing responses and allegations as if set forth here verbatim.

81. ACB and Oaktree made a contract whereby ACB would lend money to finance Oaktree's Palm Tree Cove II deal.

82. Oaktree did everything ACB required to qualify for the loan.

83. ACB breached the contract when it refused to lend Oaktree the money.

84. As a proximate result of ACB's breach of its contract, Oaktree suffered actual damages exceeding \$2,500,000.

85. Yadkin is liable to Oaktree for ACB's breach of contract.

FOR A SECOND CAUSE OF ACTION
(Breach of contract accompanied by a fraudulent act)

86. These defendants reallege their foregoing responses and allegations as if set forth here verbatim.

87. Between September 2007 and September 2008, Yadkin's bad loans increased nearly five-fold, to \$12,700,000.

88. The largest bad loan was a \$3,800,000 commercial loan.

89. Throughout 2007, Yadkin lost money on loans involving land development, residential construction, and commercial real estate.

90. Defendants are informed and believe that Yadkin decided in late 2007 or early 2008 that it would not make any more commercial loans.

91. Defendants are informed and believe that, by May 2008, Yadkin and ACB were talking about a deal for Yadkin to merge with or buy ACB.

92. Defendants are informed and believe that Yadkin directed or required ACB to stop making commercial loans as a condition of the merger.

93. Defendants are informed and believe that prior to May 22, 2008, ACB and Yadkin agreed that neither would lend money to Oaktree.

94. Despite having determined to breach its contract with Oaktree, ACB continued to assure Oaktree that all conditions for the loan had been met and that ACB would provide financing.

95. ACB's determination to breach its contract and its failure to disclose to Oaktree that it would not honor its commitment evidence fraudulent intent relating to the breach.

96. ACB's false representations to Oaktree were fraudulent acts accompanying its breach.

97. As a proximate result of ACB's breach of its contract, Oaktree has suffered actual damages exceeding \$2,500,000.

98. Because of ACB's fraudulent acts accompanying the breach, Oaktree is entitled to recover punitive damages.

99. Yadkin is liable to Oaktree for ACB's breach of contract.

FOR A THIRD CAUSE OF ACTION
(Fraud)

100. These defendants reallege their foregoing responses and allegations as if set forth here verbatim.

101. ACB continuously represented to Oaktree that it would lend Oaktree money to finance Oaktree's Palm Tree Cove II deal, even up to and including the day prior to the deal's closing.

102. ABC's representations were false.

103. ABC's false representations were material, in that Oaktree could not proceed with the deal without financing.

104. ACB knew its representations were false.

105. Alternatively, ACB acted recklessly and without regard to the truth of falsity of the representations.

106. Alternatively, ACB ought to have known that its representations were false.

107. ACB intended for Oaktree to act on its false representations.

108. Oaktree believed ACB's representations, and did not realize they were false.

109. Oaktree relied on ACB's false representations.

110. Oaktree's reliance on the representations was reasonable and justifiable.

111. As a proximate result of ACB's fraud, Oaktree has suffered actual damages exceeding \$2,500,000.

112. Because of ACB's actual or constructive fraud, Oaktree is entitled to recover punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Negligent misrepresentation)

113. These defendants reallege their foregoing responses and allegations as if set forth here verbatim.

114. ACB represented to Oaktree that it would honor its commitment to lend Oaktree money, when at that time the representation was false.

115. ACB had a pecuniary interest in making the statement in that it was made in the course of its banking business.

116. ACB owed Oaktree a duty to see that it gave Oaktree truthful information.

117. ACB breached its duty by failing to exercise due care in determining the information it gave Oaktree was true.

118. Oaktree justifiably relied on ACB's statements.

119. As a proximate result of ACB's negligent misrepresentation, Oaktree has suffered actual damages exceeding \$2,500,000.

120. Because of ACB's negligent misrepresentation, Oaktree is entitled to recover punitive damages.

FOR A FIFTH CAUSE OF ACTION
(Interference with Contract)

121. These defendants reallege their foregoing responses and allegations as if set forth here verbatim.

122. Oaktree entered into a contract to purchase Palm Tree Cove II, and another contract to sell that property at a profit.

123. ACB knew of both contracts, and knew that, if it failed to finance part of the transaction, both contracts would be breached.

124. Because of ACB's intentional refusal to provide financing, Oaktree breached both contracts.

125. ACB had no legitimate business purpose in causing the contracts to be breached.

126. As a proximate result of ACB's interference with contract, Oaktree has suffered actual damages exceeding \$2,500,000.

127. Because of ACB's interference with contract, Oaktree is entitled to recover punitive damages.

FOR A SIXTH CAUSE OF ACTION
(Unfair trade practices)

128. These defendants reallege their foregoing responses and allegations as if set forth here verbatim.

129. Oaktree, Ras, ACB, and Yadkin are "persons" within the meaning of Section 39-5-10(a), Code of Laws of South Carolina, 1976, as amended.

130. ACB and Yadkin, by making commercial loans and conducting a general lending business, were engaged in commerce within the meaning of Code Section 39-5-10(b).

131. ACB's and Yadkin's actions described hereinabove constitute unfair and deceptive practices within the meaning of Code Section 39-5-20(a).

132. These acts are capable of repetition, and, on information and belief, have been repeated.

133. ACB's and Yadkin's conduct affects the public interest of South Carolina.

134. ACB and Yadkin each knew or reasonably should have known their conduct violated the Unfair Trade Practices Act.

135. As a direct, foreseeable, and proximate result of ACB's and Yadkin's unfair and deceptive practices, these defendants have suffered an ascertainable loss of money and property.

136. These defendants are entitled to recover their actual damages, which amount should be trebled, together with interest and attorney's fees.

WHEREFORE, defendants Oaktree Homes, Inc., Dawne Ras, and Thomas Ras pray this court issue an Order granting the following relief:

- a. Dismissing the complaint with prejudice;
- b. Actual damages in an amount to be proven at trial;
- c. Treble damages under Section 39-5-110, Code of Laws of South Carolina, 1976, as amended;
- d. Punitive damages;
- e. Prejudgment and post judgment interest on their damages;
- f. Attorneys' fees and costs; and
- g. Such other and further relief as this Court deems appropriate.

Dated March 10, 2010
Columbia, South Carolina

Chad McGowan
Bill McKinnon
MCGOWAN HOOD & FELDER, LLC
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STATE OF SOUTH CAROLINA
COUNTY OF YORK

)
) IN THE COURT OF COMMON PLEAS

Yadkin Valley Bank & Trust,

Plaintiff,

vs.

Oaktree Homes, Inc.; Dawne M. Ras and Thomas
C. Ras; Daniel Simpson; Above All Services, Inc.;
Carter Lumber Company; Efficient Painting
Contractors, Inc.; Creative Concepts; and Solid As
A Rock, Inc.,

Defendants.

C.A. No.: 09-CP-46-1673

**REPLY OF PLAINTIFF TO COUNTERCLAIM OF
OAKTREE HOMES AND DAWNE AND THOMAS RAS**

Replying to and answering in full the Answer to Amended Complaint and Counterclaim of Oaktree Homes, Inc., Dawne Ras and Thomas Ras served March 10, 2010 (Counterclaim), Plaintiff respectfully alleges as follows. Except as otherwise defined herein, all capitalized terms shall have the same meanings as set forth in the Amended Complaint.

For a First Defense

1. Each and every allegation of the Counterclaim (including any qualified denials and/or affirmative defenses incorporated therein) not specifically admitted herein is denied.
2. In response to paragraph 45 of the Counterclaim incorporating by reference the prior qualified denials and affirmative defenses contained therein, Plaintiff hereby replies to such denials and defenses by denying all of them to the extent any of them are repugnant or inconsistent with the allegations set forth in the Amended Complaint filed August 5, 2009.

3. The allegations contained in paragraphs 46 through 51, inclusive, are admitted.

4. In response to the allegations contained in paragraph 52, Plaintiff admits that through the merger, Yadkin became responsible for the proven liabilities of ACB. The remaining allegations contained in paragraph 52 are denied.

5. Plaintiff is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 53 through 57, inclusive, and, as a result, such allegations are denied.

6. The allegations of paragraph 58 are admitted.

7. In response to the allegations of paragraph 59, Plaintiff admits that during the period of time Mr. Franklin was employed with ACB, he had the power to sign certain written loan commitments but only after such commitments had been authorized and approved by his superiors. The remaining allegations of paragraph 59 are denied.

8. The allegations of paragraph 60 are admitted.

9. The allegations of paragraphs 61 through 65, inclusive, are denied.

10. Plaintiff is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 66 and 67, and, as a result, such allegations are denied.

11. The allegations in paragraph 68 are denied.

12. Plaintiff is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 69, and, as a result, such allegations are denied.

13. The allegations in paragraphs 70 and 71 are denied.

14. Plaintiff is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 72 and 73, and, as a result, such allegations are denied.

15. The allegations in paragraphs 74 through 77, inclusive, are denied.

16. Plaintiff is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 78 and 79, and, as a result, such allegations are denied.

17. With respect to the allegations in Paragraph 80, Plaintiff hereby reiterates all of its admissions, denials and allegations set forth above in paragraphs 1 through 16, inclusive, as such pertain to numbered paragraphs 1 through 79, inclusive, of the Counterclaim.

18. The allegations contained in paragraphs 81 through 85, inclusive, are denied.

19. With respect to the allegations in paragraph 86, Plaintiff hereby reiterates all of its admissions, denials and allegations set forth above in paragraphs 1 through 18, inclusive, as such pertain to numbered paragraphs 1 through 85, inclusive, of the Counterclaim.

20. The allegations contained in paragraphs 87 through 99, inclusive, are denied and strict proof is demanded thereof.

21. With respect to the allegations in paragraph 100, Plaintiff hereby reiterates all of its admissions, denials and allegations set forth above in paragraphs 1 through 20, inclusive, as such pertain to numbered paragraphs 1 through 99, inclusive, of the Counterclaim.

22. The allegations contained in paragraphs 101 through 112, inclusive, are denied and strict proof is demanded thereof.

23. With respect to the allegations in paragraph 113, Plaintiff hereby reiterates all of its admissions, denials and allegations set forth above in paragraphs 1 through 22, inclusive, as such pertain to numbered paragraphs 1 through 112, inclusive, of the Counterclaim.

24. The allegations contained in paragraphs 114 through 120, inclusive, are denied and strict proof is demanded thereof.

25. With respect to the allegations in paragraph 121, Plaintiff hereby reiterates all of its admissions, denials and allegations set forth above in paragraphs 1 through 24, inclusive, as such pertain to numbered paragraphs 1 through 120, inclusive, of the Counterclaim.

26. Plaintiff is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 122 and, as a result, such allegations are denied.

27. The allegations contained in paragraphs 123 through 127, inclusive, are denied.

28. With respect to the allegations in paragraph 128, Plaintiff hereby reiterates all of its admissions, denials and allegations set forth above in paragraphs 1 through 27, inclusive, as such pertain to numbered paragraphs 1 through 127, inclusive, of the Counterclaim.

29. The allegations contained in paragraph 129 are admitted.

30. The allegations contained in paragraphs 130 through 136, inclusive, are denied.

For a Second Defense

31. Plaintiff hereby reiterates all of the foregoing admissions, allegations and denials as fully as if set forth verbatim herein.

32. The Counterclaim fails to state facts that are sufficient to constitute any cognizable cause of action against Plaintiff.

33. The Counterclaim should be dismissed with prejudice pursuant to Rule 12(b)(6), SCRCP.

For a Third Defense

34. Plaintiff hereby reiterates all of the foregoing admissions, denials and allegations as fully as if set forth verbatim herein.

35. The Counterclaim is based on an alleged promise or commitment from ACB to provide financing in the amount of \$3.8 million for a piece of commercial property located in York County, South Carolina.

36. The Counterclaim states the purpose of the alleged loan was for commercial purposes, rather than personal, family or household purposes.

37. To maintain an action for legal or equitable relief based on a failure to perform an alleged promise or commitment to lend money, the promise or commitment must have been made in writing.

38. The written promise or commitment has to be signed by the party to be charged by such promise or commitment.

39. Neither Borrower nor Guarantors have such a writing signed by ACB.

40. The Counterclaim should, therefore, be dismissed with prejudice.

For a Fourth Defense

41. Plaintiff hereby reiterates all of the foregoing admissions, denials and allegations as fully as if set forth verbatim herein.

42. The above captioned matter is a foreclosure action, which sounds in equity.

43. The Counterclaim does not arise out of the loan transactions that are the subject matter of Plaintiff's claims.

44. By asserting permissive claims in an equitable action, Borrower and Guarantors have waived their right to a jury trial on the Counterclaim.

45. Because Borrower and Guarantors are not entitled to a trial by jury on the Counterclaim, their demand for a jury trial should be stricken.

For a Fifth Defense

46. Plaintiff hereby reiterates all of the foregoing admissions, denials and allegations as fully as if set forth verbatim herein.

47. Borrower's and Guarantors' claims against Plaintiff are a mere private grievance against a bank which is authorized under other applicable laws and regulations comprehensively governing the lending of money, and are not redressable as an unfair and deceptive trade practice.

48. Because such claims are a mere private grievance against a bank excepted from liability, the South Carolina Unfair Trade Practices Act provides no relief to Borrower and Guarantors.

49. The Sixth Cause of Action in the Counterclaim should be dismissed with prejudice.

For a Sixth Defense

50. Plaintiff hereby reiterates all of the foregoing admissions, denials and allegations as fully as if set forth verbatim herein.

51. Even if there was an enforceable loan commitment between Plaintiff and Borrower as alleged in the Counterclaim (which Plaintiff denies), the source of repayment of that loan as well

as loans set forth in the Amended Complaint was wholly dependent upon a simultaneous or nearly simultaneous resale of the property without any improvement thereto by Borrower at a substantial profit to a third party purchaser who had not demonstrated financial ability perform.

52. Plaintiff was thus never legally obligated to fund the flip transaction as Borrower requested.

53. Plaintiff is, therefore, excused from any liability on the grounds of failure of a condition precedent.

WHEREFORE, having replied to the Counterclaim, Plaintiff asks that the Counterclaim against it be dismissed with prejudice, for an award of its costs, and for such other and further relief as appears to the Court to be proper.

Charlotte, NC

Date: 3/22/10

DRISCOLL SHEEDY, P.A.

By: James W. Sheedy

James W. Sheedy

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ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA	)	
COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS
American Community Bank,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Oaktree Homes, Inc.; Dawne M. Ras and Thomas	)	C.A. No.: 09-CP-46-1673
C. Ras; Daniel Simpson; Above All Services, Inc.;	)	
Carter Lumber Company; Efficient Painting	)	
Contractors, Inc.; Creative Concepts; and Solid As	)	
A Rock, Inc.,	)	
	)	
Defendants.	)	

**NOTICE OF AND MOTION TO SUBSTITUTE
YADKIN VALLEY BANK AND TRUST AS PARTY PLAINTIFF**

PLEASE TAKE NOTICE that pursuant to Rule 25(c), SCRCP, American Community Bank as existing plaintiff and Yadkin Valley Bank and Trust as substitute plaintiff (collectively, Banks), through their undersigned counsel, hereby move at such time and place as is convenient to the Court and counsel, but no sooner than ten (10) days from the date of service of this Motion, to substitute Yadkin Valley Bank and Trust (Yadkin) as party plaintiff in the above referenced action. In support of this Motion, Banks respectfully submit the following. Unless otherwise defined herein, all capitalized terms shall have the meanings set forth in the Amended Complaint.

Factual Background

The original complaint in the above captioned action was sent to the Court for filing on April 15, 2009 and was file stamped by the Clerk of Court on April 16, 2009.

Driscoll Sheedy, P.A.
Attorneys at Law

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- 1 -

On April 17, 2009, Yadkin Valley Financial Corporation, the parent company of Yadkin, closed on the purchase of American Community Bancshares, the holding company for American Community Bank. After closing, Yadkin Valley Financial Corporation owned all of the subsidiaries of American Community Bankshares, including American Community Bank. That same day, April 17, 2009, American Community Bank became a division of Yadkin, and no longer operated as an entity or separate bank. See Tab A highlighting start dates for former branches of American Community Bank.

At the time the original complaint was filed, the merger had not yet received shareholder approval and American Community Bank was a separate bank and not a division of Yadkin. American Community Bank had standing to sue in its own right when the Complaint was filed. Because American Community Bank is now a division of Yadkin, Yadkin is the proper party plaintiff.

Discussion

Under Rule 25(c), SCRCF, upon a transfer of interest "the action *may* be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." (emphasis added). Rule 25(c) is applicable "where there is a transfer of interest *during* the pendency of an action, whereas Rule 17 is applicable where there is a transfer of interest *prior* to the commencement of an action."¹

¹ But even under Rule 17, SCRCF, if the action had not been commenced in the name of the real party in interest, the court may not dismiss the action; rather, time is to be allowed to substitute the real party into the action. And the reasonable time to substitute does not commence to run until after a party opponent has objected. The purpose of the Rule is to prevent forfeiture of an action. Goodman v. United States, 298 F.3d 1048, 1053 (9th Cir.2002) (quoting 6A Wright, Miller & Kane, § 1555 at 412); see also U.S. for Use & Benefit of Wulff v. CMA, Inc., 890 F.2d 1070, 1074 (9th Cir.1989). Here, the filing date of the Complaint and closing date on the merger are near in time, the concept of a

Bryant v. Waste Management, Inc., 342 S.C. 159, 164, 536 S.E.2d 380, 382 n.2 (Ct. App. 2000) (emphasis in original). "Rule 25(c) applies to the transfer of interest from one corporation to another with which the first merged." Id., 536 S.E.2d at 383.

At the time this action was filed, the merger between Yadkin Valley Financial Corporation and American Community Bancshares had not closed. As a result, American Community Bank was a legal entity, separate and apart from Yadkin, and the proper party in interest to file suit. Since American Community Bank was not a division of Yadkin until *after* the action was filed, Rule 25(c), SCRCP, applies. Under Rule 25(c), SCRCP, American Community Bank could continue to serve as the named plaintiff in the above captioned action; however, to ensure judgment is recorded in favor of the surviving operating entity, Yadkin seeks to be substituted as party plaintiff. This is the common practice when financial institutions or loans are sold or transferred during the pendency of an action. Otherwise, in the dynamic financial world, in judicial foreclosure states (as opposed to summary proceeding states) it would be difficult to finish a foreclosure given the frequency of sales and transfers of institutions and/or loans. Rule 25(c), SCRCP, is tailored to ensure efficient administration of justice.

WHEREFORE, Banks hereby request that Yadkin Valley Bank and Trust be substituted in the place of American Community Bank as party plaintiff in the above captioned action:

"division" operated under a trade name is relatively new, at least in this geographical area, and no party has objected. All Defendants are in default.

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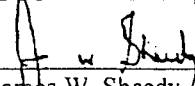
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Charlotte, NC

Date: 11/4/09

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- 4 -

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE CIRCUIT COURT

Yadkin Valley Bank & Trust,

Civil Action No. 2009-CP-46-1673

Plaintiff,

vs.

Oaktree Homes, Inc.; Dawne M. Ras and
Thomas C. Ras; Daniel Simpson; Above All
Services, Inc.; Darter Lumber Company; and
Efficient Painting Contractors, Inc.,

Defendants.

**NOTICE OF MOTION AND MOTION
FOR SANCTIONS**

Pursuant to Rule 36(b)(2), SCRCPP, Defendants Oaktree Homes, Inc., Dawne M. Ras and Thomas C. Ras, by and through their undersigned counsel hereby move, at such time and place as is convenient to the Court and counsel in the matter but no sooner than ten (10) days from the date of filing and service hereof, for entry of an Order imposing sanctions on Plaintiff. Defendants' motion is based on the following facts:

- 1) This matter is a foreclosure action in which Defendants have brought counterclaims based on Plaintiff's failure to honor a loan commitment and which resulted in the failure of Defendant Oak Tree's business and millions of dollars in damages.
- 2) Defendants assert there was a written loan commitment, and Defendant Tom Ras has testified under oath that he saw it. Plaintiff Yadkin Valley denies such a letter existed.

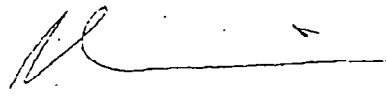
- 3) Defendants transmitted interrogatories and requests to produce to Plaintiff on July 1, 2009. The interrogatories and requests to produce clearly asked for documents related to the loan transaction between the parties, including electronic copies of letters. These discovery requests are attached as Exhibit A.
- 4) According to sworn testimony Plaintiff's director of information systems, Walter Joyce, the computer hard drive of the loan officer handling Defendants' loan, and where Defendants assert the loan commitment was located, was physically destroyed ("drilled" in Mr. Joyce's words) by Plaintiff's agent in the summer of 2010 after this litigation arose and after discovery was served on Plaintiff seeking the electronic files. The deposition of Walter Joyce is attached as Exhibit B.¹
- 5) Plaintiff's conduct also violates the April 29th Order of this Court, in which Plaintiff Bank was instructed to provide responsive electronic records and emails. Further, the Order reflects that at the hearing on Defendants' Motion to Compel, counsel for Plaintiff Bank informed the court that their "discovery response[s] was not intended to exempt email messages or other electronically stored information" and "any such [electronic] materials . . . would be produced." That Order is attached as Exhibit C. Despite the clear Order of this Court, and the statements made by the bank's counsel, the hard drive storing the critical electronic copies of the loan letter in question was physically destroyed after the hearing and after the Order of this Court.
- 6) Defendants seek an Order striking all defenses to their counterclaims and arguments which rely on or presume that there is not a signed or executed loan

¹ The relevant portion of this deposition is pp. 57-60.

commitment in this matter, and such other and further relief as this Court
deems just and proper.

This motion is based on the pleadings and papers in the file of this case, such memoranda
and other papers as may be provided at or before the hearing, and upon the statute and decisional
laws of the State of South Carolina.

Pursuant to Rule 11, SCRCP, Defense counsel has consulted with Plaintiff's counsel in
an unsuccessful attempt to resolve this matter without court intervention.



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Attorneys for Defendants

Columbia, SC

March 14, 2011

STATE OF SOUTH CAROLINA
COUNTY OF YORK

)
) IN THE COURT OF COMMON PLEAS

Yadkin Valley Bank & Trust,

Plaintiff,

vs.

Oaktree Homes, Inc.; Dawne M. Ras and Thomas
C. Ras; Daniel Simpson; Above All Services, Inc.;
Carter Lumber Company; Efficient Painting
Contractors, Inc.; Creative Concepts; and Solid As
A Rock, Inc.,

Defendants.

C.A. No.: 09-CP-46-1673

RESPONSE OF PLAINTIFF TO MOTION FOR SANCTIONS

In opposition to the motion for sanctions dated March 14, 2011, Plaintiff respectfully submits this Response.

1. Oaktree and the Rases presume in their motion that a written loan commitment for \$3.8 million existed. Except for their own self-serving testimony, they have no proof whatsoever that such a commitment ever existed.

2. Oaktree and the Rases also presume in their motion that the so-called loan commitment was destroyed by Plaintiff during the pendency of this action. Walter Joyce, Plaintiff's current IT director, testified that "I haven't found any evidence to lead me to believe that any data had been deleted." (Tr. Depos. Joyce, p.10). No one for Plaintiff has said that the so-called loan commitment existed and was destroyed subsequently. Just because Joyce said, "that to my knowledge, all of the computers of any age that were used at ACB had already been replaced and the

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hard drives drilled," (Tr. Depos. Joyce, p.59), does not mean Joyce knows Derek Franklin's (the alleged author of the so-called commitment) computer was destroyed. Regardless of whether or not the computer was destroyed, the information contained thereon remains available on the servers of Plaintiff. Destruction of a computer does not equal destruction of the information, when such information is backed up on the system server.

3. On November 22, 2010, prior to the deposition of Mr. Joyce, counsel for Plaintiff informed counsel for Oaktree and the Rases that if they would pay the cost of imaging the non-privileged, discoverable information contained on Plaintiff's systems, media and devices, Plaintiff would discuss such imaging. Oaktree and the Rases never responded to Plaintiff's offer of imaging. A copy of the November 22, 2010 letter is attached hereto as Exhibit A. On January 18, 2011 (after the deposition of Joyce), Plaintiff provided the electronic versions of the eighteen documents Oaktree and the Rases requested. Hard copies of the documents had already been provided to counsel for Oaktree and the Rases. A copy of the January 18, 2011 letter is attached hereto as Exhibit B. Obviously, Franklin's information is still retrievable.

4. During the course of this case, Plaintiff at its counsel's request searched exhaustively for all possibly relevant documents or anything that may lead to discovery of admissible information. That process is never-ending. Recently, Plaintiff found Franklin's electronic calendar. Here are his notations of meetings with the Rases in May and June 2008, which were already of record through deposition testimony. Again, obviously, Franklin's information is still retrievable.

5. The so-called commitment letter which Oaktree and the Rases desperately seek is unavailing or of no benefit to them on the merits of this case anyway. The Rases plainly swore under

oath that Franklin took the alleged, so-called commitment letter with him to have it re-typed (and, therefore, re-signed). Thus, by their own testimony, the Rases concede the so-called commitment was not a final document and no final document had been delivered to them. Oaktree and the Rases lose even if the so-called commitment letter existed, which it does not. So their not having the so-called commitment letter is without any prejudice to them in this case.

6. Oaktree and the Rases have made a motion pursuant to Rule 36(b)(2), SCRCP, which deals with the effect of an admission, and does not provide any support for the requested relief.

7. Rule 37(b)(2), SCRCP, is an extreme remedy inappropriate in a case, such as this, wholly lacking in any evidence of willful disobedience. See Fields v. Regional Medical Center Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005) (Sanction of excluding certain evidence improper, because there was no evidence of a willful failure to disclose.); Orlando v. Boyd, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996) ("[W]here the effect will be the same as granting judgment by default or dismissal, a preclusion order may be made only if there is some showing of willful disobedience or gross indifference to the rights of the adverse party.");

WHEREFORE, Plaintiff seeks entry of an order denying the motion for sanctions.

Date: 5/16/11

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STATE OF SOUTH CAROLINA
COUNTY OF YORK

)
) IN THE COURT OF COMMON PLEAS

Yadkin Valley Bank & Trust,

Plaintiff,

vs.

Oaktree Homes, Inc.; Dawne M. Ras and Thomas
C. Ras; Daniel Simpson; Above All Services, Inc.;
Carter Lumber Company; Efficient Painting
Contractors, Inc.; Creative Concepts; and Solid As
A Rock, Inc.,

Defendants.

C.A. No.: 09-CP-46-1673

**NOTICE OF AND MOTION FOR SUMMARY JUDGMENT
ON COUNTERCLAIM FOR BREACH OF CONTRACT**

To: Defendants Oaktree Homes, Inc., Dawne M. Ras and Thomas C. Ras (collectively,
Counterclaimants) and their attorneys, Chad A. McGowan, Esq. and William A.
McKinnon, Esq.

PLEASE TAKE NOTICE that Plaintiff, through its undersigned counsel, hereby moves,
pursuant to Rule 56(b) and (c), SCRCP, at such time and place as is convenient to the Court and
counsel, but no sooner than ten (10) days from the date of service of this Motion, for entry of an
order granting it summary judgment against Counterclaimants on their counterclaim for breach of
contract.

The counterclaim for breach of contract is barred because Counterclaimants cannot produce
a commitment letter signed by Plaintiff as the party to be charged. Nor can they show by clear and
convincing evidence that such a commitment letter ever existed which was subsequently lost or
destroyed. Additionally, any such commitment letter was superseded or extinguished by the

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subsequent Palm Tree Cove Phase II loan for 10 lots, in which there was no promise or agreement to loan any other sums for acquisition of more lots in Palm Tree Cove Phase II, there was an agreement that the existing line of credit had expired, and there was a covenant that those loan documents constitute the entire understanding. Furthermore, Counterclaimants had to have a bridge loan from another lender in order to be able to buy more lots in Palm Tree Cove Phase II, for which they did not have a commitment signed by any lender as the party to be charged. Equally true is that Counterclaimants were not damaged by their not purchasing 51 lots in Palm Tree Cove Phase II, in that their alleged buyer had no financial ability to close. If the counterclaim for breach of contract goes beyond summary judgment, the Court will be enabling a fact finder to engage in conjecture and then apply the result to new South Carolina law that the Court will have to fashion.

In support of this Motion, Plaintiff hereby provides for filing excerpts from the depositions of Derek Franklin (Tab A), Jeff Cramer (Tab B), Mark DeMarcus (Tab C), Tom Ras (Tab D), Dawne Ras (Tab E), Harry Lee (Tab F), Matthew Cox (Tab G), Matthew Randall (Tab H), Chris Brislin (Tab I), Bill Hargrove (Tab J), Grier Sandifer (Tab K), John Carr (Tab L) and John Beard (Tab M). In reply to any response of Counterclaimants to this Motion, Plaintiff may offer additional evidence and will provide a memorandum in support of this Motion prior to or at the hearing.

WHEREFORE, Plaintiff seeks entry of an order granting it summary judgment against Counterclaimants dismissing with prejudice their counterclaim for breach of contract.

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Date: 3/15/12

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STATE OF SOUTH CAROLINA
COUNTY OF YORK

)
) IN THE COURT OF COMMON PLEAS

Yadkin Valley Bank & Trust,

Plaintiff,

vs.

Oaktree Homes, Inc.; Dawne M. Ras and Thomas
C. Ras; Daniel Simpson; Above All Services, Inc.;
Carter Lumber Company; Efficient Painting
Contractors, Inc.; Creative Concepts; and Solid As
A Rock, Inc.,

Defendants.

C.A. No.: 09-CP-46-1673

**MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT ON COUNTERCLAIM FOR BREACH OF CONTRACT**

In support of the motion for summary judgment against Oaktree Homes, Inc. (Oaktree) on its counterclaim for breach of contract, Plaintiff respectfully submits the following Memorandum.

I. Introduction

The First Cause of Action in the Answer to Amended Complaint and Counterclaim dated March 10, 2010 (Counterclaim) depends on the existence of a contract between Plaintiff and Oaktree. (Counterclaim, ¶ 81). The First Cause of Action also requires Oaktree to show that there were damages resulting from a breach of that contract by Plaintiff. (*Id.* at ¶ 84).

There are five (5) reasons why the First Cause of Action must fail. 1. Oaktree cannot produce a commitment letter signed by Plaintiff as the party to be charged. 2. Oaktree cannot show from the facts in evidence that such a commitment letter ever existed, was received by Oaktree and then subsequently lost or destroyed. 3. Any such commitment letter was superseded or extinguished by

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the subsequent Palm Tree Cove Phase II loan for 11 lots¹, in which there was no promise or agreement to loan any other sums for acquisition of more lots in Palm Tree Cove Phase II, there was an agreement that the existing line of credit had expired, and there was a covenant that those loan documents constitute the entire understanding. 4. Oaktree had to have a commitment for a bridge loan from another lender in order to be able to buy more lots in Palm Tree Cove Phase II, which it did not have signed by any lender as the party to be charged. 5. Oaktree was not damaged by failing to purchase fifty-one lots in Palm Tree Cove Phase II, in that its purported buyer had no financial ability to close.

Any one of these five (5) reasons is fatal to the First Cause of Action in the Counterclaim. There are no material facts in dispute with respect to any of the five (5) reasons. Before the Court are well-settled matters of law that militate in favor of entry of summary judgment dismissing with prejudice the First Cause of Action.

II. Lender Statute of Frauds

S.C. Code Ann. § 37-10-107 (the "Lender Statute of Frauds") is titled: "Certain legal or equitable **actions prohibited.**" (Emphasis added.) The title makes clear the statute is prohibitory and prevents certain actions from even being filed. The Lender Statute of Frauds begins: "No person may **maintain an action . . .**" (Section (1)) (Emphasis added.).

The prohibition extends to "legal or equitable **relief or a defense . . .**" (*Id.*) (Emphasis added.). So, defenses and counterclaims are expressly prohibited. The relief or defense cannot be "based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or

¹ One of the eleven lots funded by Plaintiff was sold by Oaktree prior to Plaintiff filing this foreclosure action.

agreement . . .” (Id.) The promise, undertaking, accepted offer, commitment, or agreement cannot be “(a) to lend or borrow money; ... (c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, . . .” (Section (1)(a), (c)).

To escape the prohibition, “the party seeking to maintain the action or defense [must] have received a writing from the party to be charged **containing the material terms and conditions** of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.”² (Section (1)(c)). (Emphasis added.)

“The purpose of South Carolina Code § 37-10-107 is to prevent claims or defenses to actions on loans that are not supported by a writing.” Carolina First Bank v. Lucas, Order, p.3, 03-CP-10-1907 (S.C. Ct. Cm. Pl. 06/14/04) (Judge Thomas L. Houghston). See also Lands Inn, Inc. v. Branch Banking and Trust Company of South Carolina, Order, p.5, C.A. No 2:98-1 58-23 (D.S.C. Charleston Div. 04/12/99) (Judge Patrick Michael Duffy) (Plaintiff’s claims did not satisfy S.C. Code Ann. § 37-10-107, because plaintiff never “received a single writing signed by defendant that memorialized **the terms** of the loan.”) (Emphasis added.); Roberston v. First Union National Bank, Order, p.4, 99-CP-10-288 (S.C. Ct. Cm. Pl. 08/08/00) (Judge R. Markley Dennis, Jr.) (“[C]ause of action barred because there is no writing, signed by the party to be charged, outlining the terms and specifications

² The exception, section (3)(d), is inapplicable here because Oaktree is not asserting that its defense and counterclaim are based on a promissory note, real estate mortgage, security agreement, guaranty, surety agreement or letter of credit. Here, there was no promissory note or mortgage in the amount of \$3.8 million given by Oaktree to Plaintiff. These types of documents would be signed by a borrower rather than a lender. Furthermore, the exception was “to prevent creditors from seeking to recover on notes or mortgages for which they had never loaned money, and to prevent them from refusing to loan money for which they had obtained a note or mortgage from the debtor.” Berlinksy v. Palmetto Federal Savings Bank of South Carolina, Order, p.4, 00-CP-10-2375 (S.C. Ct. Cm. Pl. 12/06/01) (Judge Gerald C. Smoak, Sr.).

of the agreement.”) (Emphasis added.). South Carolina decisional law is quite clear that the Statute’s reference to no action or defense truly means **no action or defense**, regardless of whether such actions or defenses are legal or equitable. See Derrick v. Branch Banking and Trust Company of South Carolina, 96-CP-42-2095 (S.C. Ct. Cm. Pl. 09/08/98) (Dismissing plaintiff’s fraud claim for lack of a writing signed by the party to be charged.). Without a writing, signed by the party to be charged that contains the **material terms of the commitment to lend**, no action can be brought, nor can a defense be maintained against any lender based upon its failure to perform an alleged promise.

Recently, our Supreme Court in Sea Cove Development, LLC v. Harbourside Community Bank, 691 S.E.2d 158 (2010), considered whether loan pre-qualification letters satisfied the writing requirement of § 37-10-107 and concluded such letters did not. The lender wrote to each loan applicant advising them that they were pre-qualified, that pre-qualification would expire on a certain date and their interest rate would float until they signed a rate lock agreement. The pre-qualification was subject to lender’s receipt of verification of documentation submitted by the applicants, satisfactory appraisal and clear title, as well as such other information as lender might require. Lender thereafter sent the applicants a needs-list, and the applicants signed an application disclosure acknowledging certain fees. The day before the scheduled closing date, the applicants learned their loan requests had been denied. Applicants sued lender for breach of a loan commitment. Applicants asserted all of the letters from the lender constituted a signed writing in satisfaction of the Statute or, at the very least, created a jury question. The trial and appellate courts disagreed: applicants did not have final loan approval.

The only writing signed by Plaintiff that Oaktree can show the Court is dated May 9, 2008 and attached hereto as **Exhibit A** (the “Letter”). Although the Letter is signed by an employee of 00095765.7

Plaintiff, the Letter does not contain any terms of a commitment to lend.³ Signature alone is not enough. The Letter must contain the material terms and conditions. It does not state an interest rate, a maturity date, payment terms, or underwriting conditions (e.g., loan to value, environmental condition). That is not a commitment. Further, the Letter says "in the process of," showing Plaintiff had not given final loan approval. As in Lands Inn and Harbourside, Oaktree never received a writing signed by Plaintiff that set forth the terms of the loan. Without such a writing, Plaintiff cannot base any defense or lodge any action against Plaintiff.

Oaktree's sole written basis for the defense to the foreclosure and the counterclaim against Plaintiff is the Letter. Because the Letter does not withstand scrutiny under the Lender Statute of Frauds, the defense to the foreclosure is not meritorious and the First Cause of Action fails to satisfy the requirements of the Statute. To the extent the Letter is not the writing, Oaktree has no writing signed by the party to be charged, and its contract claim necessarily fails. Oaktree has not met the statutory pre-requisite of a signed writing essential to maintaining an action on an alleged loan commitment.

III. The So-Called Lost Letter

The Rases have testified that they met with Plaintiff's loan officer on some unknown date in May 2008 prior to the 23rd. (Depos. Tr. T. Ras, pp. 117-18; Depos. Tr. D. Ras, p. 52.) They allege they were presented with a proposed loan commitment letter, at least some material terms of which

³ Oaktree initially contended that the Letter was a modification to the loan commitment for Phase I Palm Tree Cove. This, of course, ignores that the Letter plainly says "in the process of." But, Oaktree later retreated from this position when it also became apparent that the Phase I commitment contained numerous unmodified terms incapable of fulfillment by Oaktree in order to obtain funding for the S1-Lot transaction. Oaktree no longer bases its First Cause of Action on the Letter. Oaktree now concedes that it cannot produce a signed writing. Instead, Oaktree says such a writing once existed and was subsequently retracted by Plaintiff.

were unacceptable to them and were revised in handwriting and initialed on the letter. (Depos. Tr. T. Ras, pp. 118-23.) The letter was then supposedly signed by them and by the officer, but taken by the officer to be re-typed. (Depos. Tr. T. Ras, pp. 119, 122; Depos. Tr. D. Ras, pp. 63-64.) The Rases concede they do not have a copy of this so-called commitment letter. (Depos. Tr. T. Ras, pp. 117; Depos. Tr. D. Ras, p. 64.) The Rases also concede they never saw the so-called commitment again after the meeting. (Depos. Tr. T. Ras, pp. 127.) They were subsequently informed by Plaintiff that their loan had not been approved. The Rases are the only witnesses who can testify that these events ever occurred. Plaintiff emphatically denies any such events.

Oaktree submits that it has met the requirements of the Lender Statute of Frauds if its principals can testify that at one time they at least saw a signed writing. Oaktree contends it can circumvent the Best Evidence Rule (Rule 1002, SCRE) and offer secondary evidence (Rule 1004, SCRE) consisting of their principals self-serving testimony that the proposed commitment once existed. From the purported existence of the letter, the jury would then be asked to infer that if no one has the so-called letter, it must have been lost or destroyed.

First, there are no cases under the Lender Statute of Frauds upholding that the requirement of a writing may be circumvented through testimony, which is the very reason for the Statute in the first place, viz., to avoid unwritten loans. The problem here is obvious. Anyone can swear they had a loan, its payment terms, interest rate, maturity date and other terms favorable to the swearing party. A court is not allowed to draft a contract for parties and then based on that contract find one party in breach.

Second, not only does Oaktree lack any law under the Lender Statute of Frauds, Oaktree has no South Carolina law to support its position under the general Statute of Frauds either, S.C. Code

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Ann. § 32-3-10. Under South Carolina law, "[e]very essential element of a contract falling under the statute of frauds must be proved by writing." Woodruff Oil & Fertilizer Co. v. Portsmouth Cotton Oil Refining Corp., 246 F. 375, 377 (4th Cir. 1917). "The statute of frauds, intended to prevent imposition by one man imputing to another a sale on parol testimony, would be nullified by mere circuitry if a party materially interested in making a purchase were allowed to prove by parol [evidence] that he was authorized to sign the name of the seller, and that the seller knew of his adverse interest." Id. The requirement of a signed writing, for example, to hold a guarantor liable for another's debt or to sell an interest in real estate, cannot be blithely skirted by self-serving testimony to the effect that there was once a written guaranty or a written contract to sell real estate. Certain obligations under the law like loan commitments require that the writing actually be produced in order to hold the other party responsible.

Third, South Carolina decisional law allowing for secondary evidence (Rule 1002, SCRE) predates the enactment of the Lender Statute of Frauds, so the cases do not suggest the requirement of a writing may be displaced by self-serving testimony that the writing has been lost or destroyed. Instead, the cases allow secondary evidence such as copies of a writing or a writing produced from review of other records, or testimony to interpret the writing that has been offered into evidence. E.g., Pee Dee Prod. Credit Ass'n. v. Love, 284 S.C. 371, 326 S.E.2d 650 (1984) (issue was whether signature on note was authentic). Where secondary evidence has been offered as to lost or destroyed, the court rejected "I had this in my possession one time and turned it over to a lawyer and I don't know what he did with it." Windham v. Lloyd, 253 S.C. 568, 572, 172 S.E.2d 117, 119 (1970). Oaktree through the Rases cannot just say at one time they saw a signed writing.

And, *fourth*, Oaktree is attempting to re-write the language in the Lender Statute of Frauds itself. The Statute says, "the party seeking to maintain the action or defense [must] have received a writing from the party to be charged." (Section (1)(c)). (Emphasis added.). Oaktree interprets this language to mean that so long as the Rases once saw the so-called commitment letter, they received a writing sufficient to meet the Statute's requirements. By their own testimony, the Rases admitted the letter was taken back by the loan officer to be re-typed. (Depos. Tr. T. Ras, pp. 119, 122; Depos. Tr. D. Ras, pp. 63-64.) Under the Statute, the language "received a writing" is a delivery requirement "intended to preclude lawsuits based on personal notes, confidential memoranda, or drafts, all of which have been signed by the party to be charged and which may come to light as a result of the discovery process." See John L. Culhane, Jr., Lender Liability Limitation Amendments to State Statutes of Frauds, 45 Bus. Law 1779, 1795 (1990) cited with approval in Harbourside at 691 S.E.2d at 163.

Under the common law (irrespective of the Statute), if the Rases' incredible testimony were believed, the loan officer clearly retracted and, therefore, revoked the so-called offer of a loan commitment, which the Rases expressly rejected anyway by insisting on revisions to such commitment. See Weisz Graphics Div. of Fred B. Johnson Co., Inc. v. Peck Industries, 304 S.C. 101, 403 S.E.2d 146 (Ct. App. 1991) ("At common law, no contract is formed if the acceptance varies the terms of the offer. Instead, an acceptance which adds different or additional terms is treated as a counteroffer, which may be accepted or rejected by the other party."). It is incontrovertible that the Rases did not have a final loan commitment delivered to them, and whatever they allegedly saw they rejected and required that it be revised.

The so-called lost letter should be a lost cause for Oaktree. Oaktree cannot show under existing South Carolina law from the facts in evidence that such a final commitment letter ever existed, was delivered to them and then subsequently lost or destroyed.

IV. Any Commitment Superseded by Subsequent Loan

After Plaintiff did not fund any of Oaktree's acquisition of the 51 lots in Palm Tree Cove Phase II from Har-Lee, Oaktree applied for and received a loan commitment from Plaintiff for 11 of the 51 lots. (See July 22, 2008 loan commitment). This July 22, 2008 loan commitment did not contain any promise or agreement to loan any other sums for acquisition of more lots in Palm Tree Cove Phase II. This July 22, 2008 loan commitment stated on its face that the existing line of credit was not renewed, with which Oaktree and the Rases agreed as evidenced by their signatures on the commitment.

The First Cause of Action in Plaintiff's complaint is for entry of judgment on the Phase 2 Note and for foreclosure of the Phase 2 Mortgage, which were executed by Oaktree pursuant to the July 22, 2008 loan commitment. The Phase 2 Mortgage states: "This Mortgage, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Mortgage." (Phase 2 Mortgage, p.4.). (Emphasis added.). The term "Related Documents" is defined in the Phase 2 Mortgage to be the Phase 2 Note. The Phase 2 Mortgage is attached to the amended complaint. Oaktree and the Rases admitted the terms of the Phase 2 Mortgage. (Counterclaim, p.2, ¶ 9).

In Midland Mutual Life Insurance Company v. Harrell, 331 S.C. 394, 503 S.E.2d 189 (Ct.App. 1998), a *per curiam* decision, the court did not reach whether a 1992 oral agreement between borrower and lender to renegotiate the payment terms if the shopping center's cash flow

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proved to be insufficient to service the debt, satisfied the Lender Statute of Frauds. The court did not have to analyze the Lender Statute of Frauds because two years later in 1994, borrower and lender agreed in writing that if borrower failed to pay, lender could pursue any available remedy. The court found "the 1994 documents refute any contention the 1992 oral agreement was still in effect ..." *Id.*, 503 S.E.2d at 190.

Obviously, Oaktree was willing to accept funding for 11 lots to be sold to individual buyers as represented to Plaintiff in the form of signed contracts of sale, but not for re-sale to PIH as alleged in the Counterclaim. The July 22, 2008 loan commitment stated on its face that the existing line of credit was not renewed, so any process of extending the line of credit as suggested in the Letter was over by agreement as of July 22nd. Oaktree then signed a mortgage reciting that the entire agreement was the 11 lots. Whether the Phase 2 loan for 11 lots was a modification of the 2007 line of credit or a novation of the so-called loan commitment for 51 lots, the result is the same: Har-Lee, Oaktree, Plaintiff and PIH could no longer perform as alleged by Oaktree and the Rases. The fifty-one lot deal was no longer capable of closing. Whatever rights or interests Oaktree and the Rases thought they had to a \$3.8 million loan from Plaintiff to fund part of the acquisition of 51 lots from Har-Lee was extinguished when they signed and subsequently closed pursuant to the July 22nd commitment.

The Phase 2 Mortgage was a final, complete, fully integrated expression of Oaktree's and Plaintiff's intentions to fund only 11 lots in Palm Tree Cove Phase II. It was their **entire** understanding and agreement. Oaktree signed the Phase 2 Mortgage thereby acknowledging there was no other understanding or agreement. "The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the

written instrument.” Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) *citing* Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 471, 581 S.E.2d 496, 502 (Ct. App. 2003). That is exactly what Oaktree and the Rases wish to do here. They want a jury to hear about their so-called May 2008 loan commitment to fund part of their acquisition of 51 lots as if the July 2008 loan signed by them for 11 of the 51 lots never happened. Their parol evidence is inadmissible.

V. Oaktree Had No Bridge Loan

Oaktree has stated it contracted to buy 51 lots for \$4.25 million. (Counterclaim, ¶ 66). The actual purchase price was about \$4.4 million. (See Exhibit B.). Either way, if Plaintiff was to furnish \$3.8 million as alleged by Oaktree, Oaktree still needed additional funds in order to close on its acquisition from Har-Lee. (Depos. Tr. T. Ras, p. 137.) There is no question Oaktree was looking for a bridge loan to cover the difference. Oaktree expected to receive its bridge loan from Bank of York. (Depos. Tr. T. Ras, p. 137.)

Oaktree did not have a signed commitment for a bridge loan. (Depos. Tr. T. Ras, p. 137; Depos. Tr. G. Sandifer, p. 25.) This fact is indisputable. Consequently, Oaktree did not have a valid and enforceable commitment for a bridge loan from Bank of York in accordance with the Lender Statute of Frauds as briefed herein above.⁴ Without its bridge loan, Oaktree could not close on the

⁴ The Affidavit of Dawne Ras, submitted by Oaktree and the Rases, is irrelevant, because an oral promise from Bank of York to lend \$640,000 is unenforceable under the Lender Statute of Frauds. In addition, her affidavit is directly contradictory to her husband's deposition testimony. Tom Ras testified that there was no discussion about any exact amount with Bank of York. (Depos. Tr. T. Ras, p. 138.) Her affidavit also contradicts *her own testimony* at her deposition, where she stated she had never attended any meetings with Grier Sandifer about Bank of York providing any financing. (Depos. Tr. D. Ras, p. 66.) She went on to testify that the only information she had about Bank of York's providing financing for the 51 lot acquisition would have come from her husband, Tom Ras. (Depos. Tr. D. Ras, p. 66.) This affidavit is inconsistent with Grier Sandifer's testimony. At his deposition, he testified that he never heard from Oaktree or the Rases that the financing with Plaintiff was in place and Bank of York needed to fund a specific amount. (Depos. Tr. G. Sandifer, p. 57.) This affidavit is a pure fabrication, completely at odds to the facts already in the record,

purchase of 51 lots. Even if Plaintiff had committed to loan \$3.8 million (which it did not), without additional financing Oaktree lacked the financial ability to buy the 51 lots.

The Rases say Bank of York would have made the bridge loan if Plaintiff had honored its commitment to fund \$3.8 million. But, there is no conditional signed commitment in the record in this case that Bank of York would have funded upon Plaintiff's funding. Oral testimony to that effect is unavailing in the face of the Lender Statute of Frauds. The Rases say they had a written loan commitment from Bank of York for a line of credit on which they could have drawn. Bank of York's line of credit was for takedown of lots to be improved by Oaktree constructing single family residences, and each takedown required Bank of York's approval. (Depos. Tr. G. Sandifer, pp. 16, 21.) There was no contemplation of Oaktree building on the 51 lots; those lots were to be flipped to PIH. (Depos. Tr. T. Ras, p. Bank of York did not give its approval of a draw to be used as a bridge loan on the 51 lot acquisition. (Depos. Tr. G. Sandifer, p. 25.)

Again, the Lender Statute of Frauds operates as a bar to all of the speculative oral testimony which the Rases would like for a jury to hear. Because Oaktree had no bridge loan, Oaktree could not close. Plaintiff was not the cause of Oaktree's failure to close; Oaktree's lack of funding prevented the closing. "In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed." Branche Buildings, Inc. v. Coggins, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009), citing S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co., 303 S.C. 74, 77, 399 S.E.2d 8, 10 (Ct. App. 1990). In this case, even if

Plaintiff had funded \$3.8 million, Oaktree would be in the same place it now occupies: it would not have been able to buy the 51 lots.

VI. Oaktree Was Not Damaged

Oaktree's buyer, PIH, did not have \$6,697,000 to buy the 51 lots from Oaktree if it had purchased the lots from Har-Lee. (Depos. Tr. J. Car, pp. 36-37, 47-48, 62, 75.) If Plaintiff and Bank of York had funded the 51 lot transaction, both would now be foreclosing on those lots, instead of just Plaintiff foreclosing on the remaining 10 lots. It is self-evident that if Oaktree could not sell 10 of the 51, it would not have been able to sell all 51 either. The evidence shows that in May 2008, PIH did not have \$6.697 million and could not pay Oaktree the purchase price for 51 lots. (Depos. Tr. J. Car, pp. 36-37, 47-48, 62, 75.) The burden of proving damages is on the party asserting the counterclaim for breach of contract. Chan v. Thompson, 392 S.C. 285, 395 S.E.2d 731 (Ct. App. 1990). There is no genuine issue of material fact. Oaktree cannot meet its burden.

VII. Conclusion

Plaintiff has given the Court five (5) independent, self-sustaining and compelling reasons why Oaktree's counterclaim for breach of contract fails. Any one of these reasons is sufficient without any other.

WHEREFORE, Plaintiff seeks entry of an order granting it summary judgment against Counterclaimants dismissing with prejudice their counterclaim for breach of contract.

Date: 5/12/11

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ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA
COUNTY OF YORK

)
) IN THE COURT OF COMMON PLEAS

Yadkin Valley Bank & Trust,

Plaintiff,

vs.

Oaktree Homes, Inc.; Dawne M. Ras and Thomas
C. Ras; Daniel Simpson; Above All Services, Inc.;
Carter Lumber Company; Efficient Painting
Contractors, Inc.; Creative Concepts; and Solid As
A Rock, Inc.,

Defendants.

C.A. No.: 09-CP-46-1673

**NOTICE OF AND MOTION FOR SUMMARY JUDGMENT
AS TO ALL COUNTERCLAIMS EXCEPT CONTRACT**

To: Defendants Oaktree Homes, Inc., Dawne M. Ras and Thomas C. Ras (collectively, Counterclaimants) and their attorneys, Chad A. McGowan, Esq. and William A. McKinnon, Esq.

PLEASE TAKE NOTICE that Plaintiff, through its undersigned counsel, hereby moves, pursuant to Rule 56(b) and (c), SCRCP, at such time and place as is convenient to the Court and counsel, but no sooner than ten (10) days from the date of service of this Motion, for entry of an order granting it summary judgment against Counterclaimants on the grounds set forth below for dismissal of all of their counterclaims except for breach of contract.¹

The counterclaims addressed in this Motion are fraud, negligent misrepresentation, interference with contract, UTPA and breach of contract accompanied by a fraudulent act. Of

Driscoll Shedd, P.A.
Attorneys at Law

¹ Plaintiff is seeking summary judgment against the contract counterclaim as well but by separate motion since most of the grounds for that dismissal are different and distinct from the non-contractual claims.

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course, all five of these counterclaims are barred if Counterclaimants cannot produce a commitment letter signed by Plaintiff as the party to be charged. Additionally, there are no facts suggesting a duty apart from the prospective lending relationship; so any duty arises in contract and cannot also form the basis for a tort. Nor are there any facts showing malice, pattern or practice of deception, or dishonest design. Counterclaimants lack the facts to support certain essential elements of each of these five counterclaims.

In support of this Motion, Plaintiff hereby provides for filing excerpts from the depositions of Derek Franklin (Tab A), Jeff Cramer (Tab B), Mark DeMarcus (Tab C), Harry Lee (Tab D), Matthew Cox (Tab E), Matthew Randall (Tab F), Chris Brislin (Tab G), Bill Hargrove (Tab H) and Grier Sandifer (Tab I), in order to set forth the scant evidence in the record of actual communications by Plaintiff about the prospective lending relationship, much less confirming a closing date. In reply to any response of Counterclaimants to this Motion, Plaintiff may offer additional evidence and will provide a memorandum in support of this Motion prior to or at the hearing.

WHEREFORE, Plaintiff seeks entry of an order granting it summary judgment against Counterclaimants dismissing with prejudice their counterclaims for fraud, negligent misrepresentation, interference with contract, UTPA and breach of contract accompanied by a fraudulent act.

Date: 3/15/11

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STATE OF SOUTH CAROLINA
COUNTY OF YORK

)
) IN THE COURT OF COMMON PLEAS

Yadkin Valley Bank & Trust,

Plaintiff,

vs.

Oaktree Homes, Inc.; Dawne M. Ras and Thomas
C. Ras; Daniel Simpson; Above All Services, Inc.;
Carter Lumber Company; Efficient Painting
Contractors, Inc.; Creative Concepts; and Solid As
A Rock, Inc.,

Defendants.

C.A. No.: 09-CP-46-1673

**MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT AS TO ALL COUNTERCLAIMS EXCEPT CONTRACT**

In support of its Motion for Summary Judgment as to all Counterclaims Except Contract (Motion), Plaintiff respectfully submits the following. Unless otherwise defined herein, all capitalized terms shall have the meanings ascribed to them in the Amended Complaint.

Factual Background

The factual basis for all of Borrower's and Guarantors' counterclaims is an alleged commitment from Plaintiff to finance the acquisition of fifty-one lots from Har-Lee, LLC. (Answer to Amended Complaint and Counterclaim, pp. 4-6, ¶¶ 45-79.) Borrower entered into a contract to purchase fifty-one lots in the Palm Tree Cove subdivision from Har-Lee, LLC. (Depos. Tr. T. Ras, pp. 128-29.) The contract obligated Borrower to close regardless of whether or not it had secured financing. (Depos. Tr. T. Ras., pp. 129-30.) Borrower approached Plaintiff to finance a portion of the purchase price of the fifty-one lots. (Answer to Amended Complaint and Counterclaim, p.5, ¶

64.) Borrower entered into a second contract to sell the same fifty-one lots to Palmetto Investment Holdings, LLC (PIH). (Depos. Tr. T. Ras, p. 135.) Borrower alleges Plaintiff provided a commitment letter to finance a portion of the purchase price. (Depos. Tr. T. Ras, p. 117.) Borrower has not produced, nor can it locate a signed copy of the alleged commitment letter. (Depos. Tr. T. Ras, p. 117; Depos. Tr. D. Ras, p. 64.)

Discussion

I. Legal Standard

The standard¹ for granting summary judgment is well-settled and set forth in Rule 56, SCRCF. A party may move with evidence for entry of summary judgment in its favor. *Id.* at (a). If the motion is supported as provided in the rule, summary judgment will be granted unless the adverse party offers into evidence specific facts showing that there is a genuine issue for trial. *Id.* at (e). Where there is no genuine issue as to any material fact, the moving party is entitled to a judgment as a matter of law. *Id.* at (c).

¹ Although in Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009) our Supreme Court held a nonmoving party only has to show a scintilla of evidence to defeat a motion for summary judgment, the cases since Hancock make clear the standard for granting summary judgment has not changed. See Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 701 S.E.2d 742 (2010) (Court upheld grant of summary judgment in favor of law firm when plaintiff relied on deposition testimony which did not support a finding of breach of the standard of care.); Lanier Construction Co., Inc. v. Bailey & Yobs, Inc., 384 S.C. 275, 681 S.E.2d 909 (Ct. App. 2009) (homeowner had no duty to warn a subcontractor of location of septic tank); Bass v. Gopal, Inc., 384 S.C. 238, 680 S.E.2d 917 (Ct. App. 2009) (any scintilla must be probative; motel provided adequate exterior lightning and other exterior safety measures, so guest should have stayed in his room rather than answering the door after which he was shot by a stranger); Weston v. Kim's Dollar Store, 385 S.C. 520, 684 S.E.2d 769 (Ct. App. 2009) (in cases applying federal law, the nonmovant must show more than a mere scintilla); Carolina Renewal, Inc. v. South Carolina Dept. Transp., 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009) (collateral estoppel barred contractor's subsequent breach of contract claim asserting same damages adjudicated by its sole shareholder and officer in a prior slander action); and Shirley's Iron Works, Inc. v. City of Union, 2010 WL 530195 (Ct. App. 2010)(unpublished) (city had no liability to subcontractors and suppliers beyond balance of contract amount; only a scintilla is required if the burden is preponderance of the evidence).

II. An alleged duty imposed under contract cannot also be the basis for a claim in tort.

“As a general rule, a claim arising out of the provisions of a contract must find remedy under contract law.” White v. Holiday Kamper & Boats, 2008 WL 4155663, *5 (D.S.C. 2008) (Holding negligent misrepresentation was not applicable as a matter of law to an action for solely economic losses.). When a party performs “in such a way that he violates a contractual duty *only*, then his liability is only contractual.” Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 345, 384 S.E.2d 730, 737 (1989). Thus, “[a] breach of duty which arises under the provisions of a contract between the parties *must be redressed under contract, and a tort action will not lie.*” Koontz v. Thomas, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999) (emphasis added), *quoting* Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 54-55, 463 S.E.2d 85, 88 (1995). See also Foxfire Village, Inc. v. Black & Veatch, Inc., 304 S.C. 366, 404 S.E.2d 912, 917 (Ct. App. 1991) (“Where the cause of action is predicated on an alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie.”). This “rule maintains the dividing line between tort and contract. . .” Tommy L. Griffin, 320 S.C. at 54, 463 S.E.2d at 88.

All evidence in this case relates solely to the alleged prospective lending relationship, with no evidence of any other duty on the part of Plaintiff. As a result, any alleged duty on the part of Plaintiff arises in contract and cannot also form the basis for a tort. Plaintiff had no duty to Borrower or Guarantors that arose outside of the alleged loan commitment. If Borrower or Guarantors prove

such an alleged commitment exists, they have a right to sue Plaintiff for breach of contract.² They do not have a right to pursue any tort claims against Plaintiff, because no duty exists outside of the alleged contractual relationship. All tort claims should be dismissed.

III. Borrower and Guarantors lack the facts to support certain essential elements of each of the five non-contract counterclaims.

Even if the Court ignores the fact that any alleged duty on the part of Plaintiff arises solely in contract and ignores that the tort claims must be supported by a writing signed by Plaintiff to avoid the Lender Statute of Frauds, the tort counterclaims should still be dismissed. Each of the five counterclaims fail for lack of evidence to support the requisite elements.

A. Fraud

"To establish fraud, a party must prove: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." Robertson v. First Union Nat. Bank, 350 S.C. 339, 348-49, 565 S.E.2d 309, 313-14 (Ct. App. 2002) (Borrower's claim for fraud dismissed because borrower's "lack of reliance is glaringly absent."). A party's "[f]ailure to prove any element of fraud is fatal to the action [and] fraud cannot be presumed; it must be proved by clear, cogent, and convincing evidence." Id.

There is not evidence in the record to support the elements of fraud. For example, Borrower entered the contract with Har-Lee for the purchase of fifty-one lots prior to any alleged

² This assumes, of course, that Borrower and Guarantors can satisfy the Lender Statute of Frauds. Even if there were a duty outside of contract, the tort claims too would have to be supported by a writing signed by Plaintiff, failing which such claims would be barred by the Statute. The Statute prohibits all legal or equitable claims or defenses.

representations from Plaintiff about potential financing. (Depos. Tr. T. Ras, pp. 128-30; Depos. Tr. D. Franklin, pp. 26-27.) Prior to any correspondence with Plaintiff, Borrower was obligated to purchase the fifty-one lots. Borrower did not rely upon any alleged representations from Plaintiff in executing the contract of sale. Without such reliance, there can be no fraud.

Additionally, even if Borrower had relied on Plaintiff, Borrower has not suffered any injury as a result of any alleged representations made by Plaintiff. PIH, the party to whom Borrower was going to sell the fifty-one lots, did not have financing in place to complete the purchase. At no point in time did PIH have the funds available to pay the \$6.697 million purchase price to Borrower. (Depos. Tr. J. Car, pp. 47-48.) Even if Plaintiff had loaned a portion of the purchase price to Borrower, PIH could not honor its obligation to purchase the fifty-one lots from Borrower. If the alleged financing had been approved by Plaintiff, Borrower would have been stuck with fifty-one lots and over three million dollars in debt to Plaintiff. Borrower has no loss related to the fifty-one lots resulting from any representation of Plaintiff. The counterclaim for fraud should be dismissed.

B. Negligent Misrepresentation

In a claim for negligent misrepresentation, a [claimant] must prove that: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

Robertson, 350 S.C. 339, 349, 565 S.E.2d 309, 314 (Ct. App. 2002) (Borrower's claim for negligent misrepresentation against bank dismissed because borrower did not prove reliance.).

The negligent misrepresentation counterclaim against Plaintiff must fail, because as in Robertson, Borrower and Guarantors cannot prove reliance. The contract with Har-Lee was executed by Borrower without any financing contingencies and Borrower approached Plaintiff for financing after execution of the contract. (Depos. Tr. T. Ras, pp. 128-30; Depos. Tr. D. Franklin, pp. 26-27.) In signing the contract, Borrower could not have relied on any representations from Plaintiff, because the contract was signed prior to Borrower seeking financing from Plaintiff. Borrower signed the contract with Har-Lee on Borrower's own accord, without any reliance on any representations from Plaintiff.

In addition, even if Borrower had relied on Plaintiff, any alleged representations made by Plaintiff were not the proximate cause of Borrower's pecuniary loss. As set forth above, PIH did not have \$6.697 million to purchase the fifty-one lots. (Depos. Tr. J. Car, pp. 47-48.) Any alleged representations made by Plaintiff had no bearing on PIH's failure to secure financing to purchase the fifty-one lots. Even if Plaintiff had loaned a portion of the purchase price to Borrower, PIH could not honor its obligations under the contract of sale. Borrower would not have received \$6.697 million, because PIH could not pay \$6.697 million. Borrower's loss is not a proximate result of any alleged representations of Plaintiff.

As the above examples from the record illustrate, the elements of the counterclaim for negligent misrepresentation cannot be satisfied and this counterclaim too should be dismissed.

C. Interference with Contract

"The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its

breach; (4) the absence of justification; and (5) resulting damages." Vortex Sports & Entertainment Inc. v. Ware, 378 S.C. 197, 206, 662 S.E.2d 444, 449 (2008).

Borrower's and Guarantors' counterclaim for interference with contract fails for at least two reasons. First, there is no evidence of Plaintiff's intentional procurement of Borrower's breach of either of the contracts. The deposition transcripts show no evidence of such intent on the part of Plaintiff. (Depos. Tr. M. DeMarcus, pp. 12-16; 18-19; Depos. Tr. J. Cramer, pp. 24-26; 29-30; 196-98; Depos. Tr. D. Franklin, pp. 28-29; 39-40; 56-59.) Borrower and Guarantors have not set forth any evidence showing such an intent on the part of Plaintiff. All the evidence shows is that Plaintiff refused to finance a loan to Borrower for the purchase of fifty-one lots. There is nothing that suggests, as a part of that decision, Plaintiff intentionally procured the breach of either contract.

Second, the contract for the sale of the fifty-one lots to PIH expired prior to PIH securing financing to consummate the transaction. The contract for the sale to PIH had to close on or before May 28, 2008. (Depos. Tr. T. Ras, p. 136-37.) PIH did not have financing in place on or before May 28, 2008. The principal of PIH, John Car, testified in his deposition that there was no funding available for PIH to purchase the lots.

Q: But there was never a time when PIH had \$6.697 million that would enable it to buy the fifty-one lots from Oaktree?

A: No.

(Depos. Tr. J. Car, p. 47.)

Q: Was there ever a time when PIH had \$6.697 million that would enable it to close - --

A: Wish it did.

Q: With OakTree?

A: But, no, it did not.

(Depos. Tr. J. Car, p. 48.) PIH did not have the ability to close on the purchase of the fifty-one lots within the closing deadline set forth in the contract, or any other deadline for that matter. There could be no breach of an expired contract that the purchaser had no ability to fund.

Because there is no evidence of intent on the part of Plaintiff to force a breach of either contract and because PIH had no ability to consummate the second contract prior to its expiration, the counterclaim for tortious interference with contract should also be dismissed.

D. UTPA

To succeed on a cause of action under the South Carolina Unfair Trade Practices Act, a claimant has to prove unfair or deceptive acts or practices in the conduct of trade or commerce, which affect the public interest. See Schnellmann v. Roettger, 368 S.C. 17, 627 S.E.2d 724 (Ct. App. 2006). Such an impact on public interest "may be shown if the acts or practices have the potential for repetition, [w]hich may be shown by proving that the same kind of actions occurred in the past or by showing that the procedures employed by the defendant create a potential for repetition of the deceptive practices." Id. at 23, 627 S.E.2d at 746. See also Regions Bank v. College Ave. Development, L.L.C., 2010 WL 973480, *5 (D.S.C. 2010) (No UTPA cause of action for borrower where it "complained of acts only relating to the individual loan transaction involved in [that] case."). A "simple contract dispute between two parties to a commercial transaction" is not what "the SCUTPA was created to protect against." Id. "The act is not available to redress a private wrong where the public interest is unaffected." Noack Enterprise, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 479, 351 S.E.2d 347, 350 (Ct. App. 1986). "An unfair or

deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace." Id.

The dispute over the alleged failure to finance Borrower's purchase of fifty-one lots is a private grievance that does not affect the public interest. Borrower and Guarantors have not come forward with any evidence that actions of the sort alleged in the counterclaims have occurred before, nor have they demonstrated the procedures employed by Plaintiff create a potential for repetition. The allegations of the counterclaim, along with the testimony of Borrower and Guarantors, deal solely with the financing of the fifty-one lot transaction. There is no mention of prior similar actions on the part of Plaintiff. Nor is there any discussion of Plaintiff's policies and procedures that could lead to the conclusion such procedures create the potential for repetition. The UTPA is unavailable to redress Borrower's and Guarantors' alleged private grievance against Plaintiff.

E. Breach of Contract Accompanied by a Fraudulent Act

"In order to recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish: (1) a breach of contract; (2) that the breach was accomplished with a fraudulent intention; and (3) that the breach was accompanied by a fraudulent act." Minter v. GOCT, Inc., 322 S.C. 525, 529-30, 473 S.E.2d 67, 70 (Ct. App. 1996). There must be "an independent fraudulent act which accompanied the breach." Id.

Borrower and Guarantors cannot satisfy the elements of this cause of action, because there is no evidence of an independent fraudulent act. Nor is there any evidence of a fraudulent intention on the part of Plaintiff. All of the factual allegations stem from Plaintiff's alleged breach of the loan commitment, with no independent fraudulent act. Borrower's and each Guarantor's deposition

testimony centered around the alleged loan commitment and its alleged breach by Plaintiff. (Depos. Tr. T. Ras, pp. 116-126; Depos. Tr. D. Ras, pp. 50-64.) Nowhere in their testimony is there any evidence of a fraudulent intention on the part of Plaintiff or an independent fraudulent act. There is no evidence of dishonest design on the part of Plaintiff. Without such evidence, the cause of action for breach of contract accompanied by a fraudulent act should be dismissed.

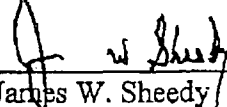
Conclusion

Borrower and Guarantors have presented zero evidence to show a duty apart from the alleged financing commitment; so any duty on the part of Plaintiff would arise solely in contract. Such a contractual duty cannot also form the basis for a tort. In any event, even if there is a separate duty, without a writing signed by Plaintiff the tort claims still fail under the Lender Statute of Frauds. In the even the Court gets past these two major hurdles, Borrower and Guarantors have failed to satisfy key elements of the five counterclaims based in tort. They have not shown the requisite reliance or pecuniary loss caused by Plaintiff to support claims for fraud or negligent misrepresentation. There is no evidence of any intent on the part of Plaintiff to interfere with either the Har-Lee contract or the PIH contract. Nor is there any evidence that the alleged actions of Plaintiff have any effect on the public interest, so the UTPA claim fails. Finally, there is no evidence of a fraudulent act or dishonest design independent of the alleged breach, so the counterclaim for breach of contract accompanied by fraudulent act must also fail. All five non-contract counterclaims should be dismissed.

WHEREFORE, Plaintiff seeks entry of an order granting it summary judgment against Borrower and Guarantors dismissing with prejudice their tort counterclaims.

Date: 5/16/12

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ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA
COUNTY OF YORK

)
) IN THE COURT OF COMMON PLEAS

Yadkin Valley Bank & Trust,

Plaintiff,

vs.

Oaktree Homes, Inc.; Dawne M. Ras and Thomas
C. Ras; Daniel Simpson; Above All Services, Inc.;
Carter Lumber Company; Efficient Painting
Contractors, Inc.; Creative Concepts; and Solid As
A Rock, Inc.,

Defendants.

C.A. No.: 09-CP-46-1673

NOTICE OF AND MOTION TO DENY RIGHT OF TRIAL BY JURY

To: Defendants Oaktree Homes, Inc., Dawne M. Ras and Thomas C. Ras (collectively, Counterclaimants) and their attorneys, Chad A. McGowan, Esq. and William A. McKinnon, Esq.

PLEASE TAKE NOTICE that Plaintiff, through its undersigned counsel, hereby moves, pursuant to Rule 39(a)(2), SCRCP, at such time and place as is convenient to the Court and counsel, but no sooner than ten days from the date of service hereof, for entry of an order denying Counterclaimants any right to a jury trial on any defense or claim in this case.

This is a mortgage foreclosure action. The action sounds in equity and not at law. The defenses (qualified denial, waiver, laches, estoppel, unclean hands and unconscionability) are also based in equity. There are six counterclaims in this case.¹ The counterclaims relate to an alleged

Driscoll Sheedy, P.A.
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¹Breach of contract, breach of contract accompanied by a fraudulent act, fraud, negligent misrepresentation, interference with a contract and UTPA.

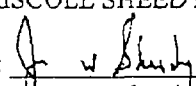
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separate loan commitment. The counterclaims do not pertain to the enforceability of any of the four loans in the foreclosure action. The counterclaims, therefore, are permissive. By bringing these permissive counterclaims in an equitable action, Counterclaimants have waived their right to a jury trial. This case must be tried, if at all, by the Court.

WHEREFORE, Plaintiff asks that the Motion be granted, this case be removed from the jury trial roster and transferred to the nonjury roster.

Date: 2/15/11

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By: 

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C.A. No.: 09-CP-46-1673

**MEMORANDUM IN SUPPORT OF
MOTION TO DENY RIGHT OF TRIAL BY JURY**

In support of its motion that this case should be heard nonjury, Plaintiff respectfully submits the following Memorandum.

I. The Foreclosure

Plaintiff commenced a foreclosure seeking personal judgments against Oaktree as borrower and the Rases as guarantors, and judicial sales involving four loan transactions: 1) July 2008 Phase II note and mortgage, 2) Phase I note and mortgage, 3) Trinity Ridge note and mortgage, and 4) Glynn's note and mortgage. Except for Oaktree, the Rases and Above All Services, all Defendants are in default. Above All Services just asked for its lien priority to be protected in the foreclosure. Oaktree and the Rases asserted affirmative defenses and six counterclaims.

II. The Counterclaims

In response to Plaintiff's foreclosure, Oaktree asserted five counterclaims: breach of contract, breach of contract accompanied by a fraudulent act, fraud, negligent misrepresentation and interference with a contract. Rases and Oaktree, together, lodged an UTPA claim. All six counterclaims shall be referred to as the "Counterclaims."

The Counterclaims relate to an alleged Palm Tree Cove II deal. (Answer to Amended Complaint and Counterclaim, ¶¶ 81 [breach of contract], 94-95 [breach accompanied by a fraudulent act], 101 [fraud], 114 [negligent misrepresentation], 122 [interference with a contract], and 131 [UTPA]). As alleged, the Palm Tree Cove II deal was for Oaktree to borrow \$3,800,000 from Plaintiff to be used to purchase 51 lots from Har-Lee for \$4.25 million which would be sold 3 days later to PIH for \$6,697,070 on May 26, 2008. (*Id.*, ¶¶ 66-68, 71-72). The Counterclaims are because Plaintiff never provided any funding for the alleged Palm Tree Cove II deal.

In ¶ 68 of the Counterclaims, Oaktree and Rases allege: "On May 9, 2008, Franklin promised Oaktree in writing to increase the line of credit to \$3,800,000." When Oaktree and Rases were asked in Plaintiff's First Set of Requests for Admission if the alleged May 9, 2008 letter was the only written statement by Plaintiff about an increase in the line of credit to \$3,800,000, they responded on July 26, 2010 with "admitted." (See Tab A).

Four and a half months later, on December 10, 2010, Oaktree and Rases amended their response to Plaintiff's First Set of Requests for Admission abandoning their theory that the May 9, 2008 letter was the loan commitment, and introduced instead that they signed a commitment letter

which had a typographical error so Plaintiff took the letter to have it corrected and they never saw the letter again. (See Tab B).

Regardless of which factual theory Oaktree and Rases adopt at the hearing on this Motion, their Counterclaims do not challenge the validity and/or enforceability of any of the four loan transactions in Plaintiff's amended complaint. Their Counterclaims are for monetary relief in connection with a different loan transaction that was never funded. Their Counterclaims did not have to be brought in Plaintiff's foreclosure. Their Counterclaims are permissive and when they asserted them in the foreclosure, they lost their right to have a jury hear them.

III. Applicable Law

Foreclosure is an equitable claim, triable by the court without a jury. *Mortgage Recovery Fund-Riverbend, Ltd. v. Heritage Clipper Riverbend Trust*, 327 S.C. 491, 493, 489 S.E.2d 655, 656 (Ct. App. 1997) ("An action to foreclose a real estate mortgage comes within the equitable jurisdiction of the court."); *Gardner v. Travis*, 316 S.C. 315, 317, 450 S.E.2d 54, 56 (Ct. App. 1994) ("Because a foreclosure action is an action in equity, a party has no right to a jury trial of the issues raised in a foreclosure action."). "Actions to foreclose liens or obtain partition of real property shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53." Rule 71(a), SCRPC. Plaintiff's complaint for foreclosure of four mortgages and entry of deficiency judgments against Oaktree and the Rases does not entitle them to a jury trial.

Rather, the question here is whether defendants that assert counterclaims in a foreclosure are entitled to a jury trial on those counterclaims. In *C&S Real Estate Services, Inc. v. Massengale*, 290 S.C. 299, 301, 350 S.E.2d 191, 193 (1986), the South Carolina Supreme Court "summarize[d] the

proper analysis for determining the trial of issues raised by counterclaim and [] set out the procedure to be followed when issues are to be tried before a jury.” Under the holding in *C&S*, “[i]f the complaint is equitable and the counterclaim legal and permissive, the defendant waives his right to a jury trial.” *Id.* at 302, 350 S.E.2d at 193. When a defendant brings a legal and permissive counterclaim in an equitable action, that defendant loses its right to a jury trial on those permissive counterclaims. Under Rule 13(b), SCRC, a permissive counterclaim is defined as a claim “not arising out of the transaction or occurrence that is the subject matter of the opposing party’s claim.”

“By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party’s claim.” *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 61, 566 S.E.2d 863, 865 (Ct. App. 2002). “The test for determining if a counterclaim is compulsory is whether there is a ‘logical relationship’ between the claim and the counterclaim.” *Id.* The South Carolina Supreme Court examined this test in the foreclosure context in *North Carolina Federal Sav. and Loan Ass’n v. DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989). There, the Court ruled that a logical relationship did not exist between the enforceability of the note which was the subject of the foreclosure and the final counterclaim relating to an alleged agreement that NC Federal “would purchase DAV’s interest in the joint venture” which did not “affect the enforceability of the note” and, as a result, was held to be permissive. *Id.* at 519. Applying South Carolina law, the Fourth Circuit also applied the test in *Central States Underwater Contracting, Inc. v. R. L. Morrison & Sons, Inc.*, 45 F.3d 425 (1995), in which Judges Williams and Wilkins (along with an 8th Cir. judge sitting by designation) found a counterclaim to be permissive because its facts and issues were wholly different from the claim by the plaintiff.

IV. Conclusion

The alleged commitment was not a subsequent loan that can be characterized as for the purpose of curing prior defaults on other loans which, if made, would have affected the enforceability of any of the foreclosed loans. The alleged commitment was made prior to the loan maturities on the Phase I note and mortgage, the Trinity Ridge note and mortgage, and the Glynn's note and mortgage. So the alleged commitment could not have been for the purpose of curing defaults that had not yet occurred. Likewise, the alleged commitment pre-dated the July 2008 Phase II note and mortgage; and, therefore, such commitment could not have been for the purpose of curing a default on the Phase II note and mortgage either. The maturities on the four loan transactions were last quarter of 2008 and first quarter of 2009, whereas the alleged commitment was to have resulted in a substantial profit in May 2008.

As the factual basis for their Counterclaims, Oaktree and the Rases are asserting an agreement wholly different from and extrinsic to the four loan transactions. Tom Ras admitted the same in his deposition testimony.

Q: There are certain loans that OakTree has at American Community Bank which are in default and the subject of foreclosure?

A: That is correct.

Q: The commitment that you described in May had nothing to do with those loans?

A: No.

Q: It was completely separate as financing?

A: Correct.

(Depos. Tr. T. Ras, p. 153.) The Affidavit of Dawne Ras, filed by Oaktree and the Rases on May 16, 2011, also states that the alleged loan commitment was a separate transaction and had nothing to do with the other four loans. (Affidavit of Dawne Ras, p.1, ¶4.)

The alleged extrinsic agreement was for new funding to buy land with no buildings on it, quickly sell the land and make a substantial profit therefrom.¹ The four foreclosed loans were for lot acquisition and building houses on the acquired lots, which Oaktree did and then could not sell. The Counterclaims involve different facts and issues. The alleged commitment is not in any sense dependent or conditioned on the four loan transactions which are the subject of Plaintiff's foreclosure. The Counterclaims do not arise out of the four loan transactions. The four loan transactions which are the subject of Plaintiff's foreclosure are valid and enforceable even if Oaktree and the Rases prevail, in whole or in part, on their Counterclaims (which they should not do). The Counterclaims are permissive, not compulsory. Oaktree and the Rases lost their jury trial rights on their permissive Counterclaims when they chose to assert them in this foreclosure action.

WHEREFORE, for the foregoing reasons which will be presented at oral argument on the Motion, as well as any other reply memoranda that may be submitted in response to any memoranda or arguments of the Counterclaimants, Plaintiff asks that the Motion be granted, this case be removed from the jury trial roster and transferred to the nonjury roster where the foreclosure case belongs.

¹ Just because Plaintiff later in July 2008 agreed to make a loan that closed for the acquisition by Oaktree of 10 out of the 51 lots that were the subject of the alleged prior commitment does not mean such alleged commitment affects the validity or enforceability of the July loan, or that the alleged commitment arises out of the July loan.

Date: 5/11/11

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IN THE CIRCUIT COURT

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Efficient Painting Contractors, Inc.,

Defendants.

Civil Action No. 2009-CP-46-1673

**MEMORANDUM OF LAW IN
OPPOSITION TO PLAINTIFF'S
MOTIONS FOR SUMMARY
JUDGMENT AND TO DENY JURY
TRIAL ON COUNTERCLAIMS**

Defendants submit this Memorandum of Law in Opposition to Plaintiff's Motions for Summary Judgment and to Deny Jury Trial on Counterclaims. This memorandum also supports Defendants' Motion for Sanctions.

FACTS

Plaintiff American Community Bank (now known as Yadkin Valley Bank and Trust), who had been one of Defendants' banks, filed a complaint for foreclosure and deficiency judgments relating to several commercial real estate loan transactions in April 2009. Defendants' filed an answer in June 2009 asserting several affirmative defenses, a counterclaim for breach of contract, and several other counterclaims. Defendants had an executed contract to purchase 51 lots in the Palm Tree Cove IIa subdivision from Har-Lee for approximately \$4.4 million dollars, and another contract with Palmetto Investment Holdings to sell these lots for approximately \$6.697 million (Exhibits A and B, respectively). Defendant Oaktree's profit on this series of transactions would have been in excess of \$2.2 million. The primary funding for the purchase was to have come from plaintiff American Community Bank (ACB), who had provided a written

commitment to loan Defendant Oaktree \$3.8 million. (See D. Ras dep. 53:13-25, Exhibit C; D. Ras Aff. ¶ 2, Exhibit D; T. Ras Dep. 117:4-18, Exhibit E). ACB's agent and loan officer Derek Franklin took the executed loan commitment (which had handwritten modifications) and told Oaktree he would bring a clean original to the June 6 closing. Aff. of D. Ras. Oaktree never saw the commitment again. On June 6, 2008, Oaktree's principals, Matthew Randall the closing attorney, and Bill Hargrove, Har-Lee's principal, all showed up for a closing which did not occur because ACB breached its obligation at the last minute. M. Randall Dep. at 58-59, Exhibit F. The entire transaction fell through as a result of ACB's breach of its loan commitment, resulting in the instant counterclaims by Oaktree and its principals. ACB has filed motions for summary judgment, all of which should be denied for the reasons set forth below.

STANDARD OF REVIEW

To grant a motion for summary judgment, the court must find that "there is no genuine issue as to any material fact." Rule 56(c), SCRCP. The judge is not to weigh the evidence but rather to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). For claims where the preponderance of evidence burden applies, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

In determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the party opposing summary judgment. Sumner v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997); Pye v. Aycock, 325 S.C. 426, 480 S.E. 2d 455 (Ct. App. 1997). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital

Corp, 341 S.C. 372, 534 SE 2d 688 (2000); Moriarity v. Garden Sanctuary Church of God, 534 S.C. 150, 511 S.E.2d 699 (Ct. App.1999). "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999).

ARGUMENT

1. Plaintiff is not entitled to summary judgment on Defendants' Breach of Contract Claim.

a. Spoliation

Plaintiff claims it is entitled to summary judgment on Defendants' breach of contract claim because Defendants have not produced the written contract Plaintiff allegedly breached. Though not cited in Plaintiff's motion, this contention is likely based on South Carolina's lender statute of frauds which states:

No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement to lend or borrow money...unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its authorized agent, has signed the writing.

S.C. Code Ann. § 37-10-107.

Allowing Plaintiff the benefit of this statute would be inequitable since there is evidence that a contract meeting the statutory requirement existed and evidence Plaintiff is responsible for the contract's absence. Oaktree President Dawne Ras testified that she signed a commitment letter presented to her and Tom Ras at Oaktree's office by Plaintiff's agent Derek Franklin. D. Ras Dep. 53:13-25; D. Ras Aff. ¶ 2. Tom Ras, an Oaktree employee, also testified that Derek Franklin presented a commitment letter on Plaintiff's behalf that was signed by both Franklin

and the Rases. T. Ras Dep. 117:4-18. There is also evidence that the commitment letter contained the material terms of an agreement through which Plaintiff agreed to loan Oaktree sufficient funds to purchase 51 lots in Palm Tree Cove. The commitment letter contained the name of the borrower (T. Ras Dep. 120:1-2), the amount of the loan (T. Ras Dep. 120:5-7; D. Ras Aff. ¶ 2), the interest rate (T. Ras. Dep. 120:8-11), the loan origination fee (T. Ras Dep. 121:19-25), and the closing date. (T. Ras Dep. 121:11-12). Further, there is evidence that the commitment letter was last seen in the exclusive possession of Plaintiff's agent Derek Franklin. T. Ras Dep. 118:22-119:1; D. Ras Aff. ¶ 3.

Defendants cannot produce a copy of this commitment letter because it was last seen within the exclusive possession of Plaintiff's agent. Defendant has made repeated efforts to obtain this document through discovery requests. In fact, Plaintiff's refusal to turn over key documents in this case as required by court order is the subject of an outstanding motion for sanctions against Plaintiff and its attorneys. Through deposition testimony, Defendants have also discovered that Plaintiff failed to undertake routine document retention procedures necessary to retain the sources of data most likely to contain the commitment letter in question. According to Plaintiff's director of information technology, no special efforts to retain electronically stored information were instituted by Plaintiff until September or October 2010. W. Joyce Dep. 10:3-15, Exhibit G. Plaintiff's complaint was filed in April 2009 and Defendants' counterclaims specifically referencing the commitment letter in question was filed in July 2009. Mr. Joyce also testified that the computer used by Derek Franklin at all relevant times had been destroyed as part of Plaintiff's systematic computer update in June and July 2010. W. Joyce Dep. 59:14-60:10. The hard drive of the computer was "drilled" and all the data it contained is permanently irretrievable. W. Joyce Dep. 13:22-25; 59:14-25.

Plaintiff's conduct is made all the more egregious by Plaintiff's blatant disregard for this court's discovery order. On April 29, 2010, Judge Hayes issued an order requiring Plaintiff to turn several categories of documents over to Defendants. This order specifically required production of "electronically stored information." Order, April 29, 2010 ¶ 3, Exhibit H. As Plaintiff's information technology manager testified, Franklin's hard drive was drilled in June or July 2010, months after Plaintiffs received an order specifically requiring retention and disclosure of the hard drive's contents.

Plaintiff's failure to retain crucial evidence is a clear example of evidence spoliation, and Plaintiff should not be permitted to profit from its wrongdoing by using the commitment letter's absence as grounds to defeat Defendant's breach of contract counterclaim. Spoliation is the destruction or material alteration of evidence or "the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." Silvestri v. Gen. Motors Corp., 271 F.3d 583 (4th Cir. 2001). A party has a duty to preserve evidence during litigation and before litigation when the party "reasonably should know that the evidence may be relevant to anticipated litigation." Nucor Corp. v. Bell, 251 F.R.D. 191, 194 (D.S.C. 2008)(quoting Silvestri, 271 F.3d at 591). According to Nucor, sanctionable spoliation occurs when (1) the destroyed evidence was relevant to the litigation; (2) party who destroyed the evidence had a duty to retain the information at the time it was destroyed; and (3) destroying party acted with the requisite level of intent. 251 F.R.D. at 194. The destroying party need not act in bad faith for their conduct to be sanctionable. Id. While dismissal of a claim and default judgment are harsh spoliation sanctions often reserved for bad faith actions, bad faith is not required if the evidence destruction "was so prejudicial that it prevents the non-spoliating party from maintaining his case." Id. (quoting Silvestri, 271 F.3d at 583).

South Carolina courts have also sanctioned parties who failed to retain key pieces of evidence within their possession. In Kershaw County Board of Education v. U.S. Gypsum Co., 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990), the court responded to evidence destruction with an adverse inference jury instruction. Under South Carolina law, an adverse inference is also appropriate as a discovery sanction when a party destroys evidence in violation of a court's discovery order. Kershaw County School Bd., 302 S.C. at 395, 396 S.E.2d at 372; see also Rule 37(b)(2)(A), SCRCF (noting "order that the matters regarding which the order was made...shall be taken to be established for the purposes of the action" is permissible sanction for discovery order violation). In sum, South Carolina law clearly does not permit a party to gain a litigation advantage from the party's failure in its duty to retain crucial evidence.

Granting Plaintiff's motion for summary judgment on Defendants' breach of contract claim would award Plaintiff a significant litigation advantage for clearly improper conduct. Plaintiff's conduct is sanctionable under the Nucor test. First, the commitment letter is clearly relevant to Defendants counterclaim since the letter is the contract at the center of the breach of contract claim. Second, Plaintiff had a duty to retain evidence, at the very latest, in April 2009 when this litigation commenced. Third, Plaintiff's conduct is culpable and the lost evidence is prejudicial to Defendants' claims. As discussed above, despite Plaintiff's duty to retain evidence dating back to at least April 2009, Plaintiff permitted the destruction of Derek Franklin's hard drive during the summer of 2010 and did not institute a litigation hold under September or October 2010. Plaintiff "drilled" Franklin's hard drive months after Plaintiff had received discovery requests specifically seeking electronically stored information. The prejudice to Defendants is clear and severe. The lost commitment letter is at the core of Defendants' breach of contract counterclaim. Given the clear mandate of South Carolina's spoliation jurisprudence,

Plaintiff should not be granted summary judgment on Defendant's breach of contract counterclaim. See Silvestri, 271 F.3d at 593 (finding that dismissal of a claim as spoliation sanction proper where loss of evidence denied party "ability to adequately defend its case").

b. Defendants' ability to perform

Plaintiff claims that it is entitled to summary judgment because Defendants were unable to perform the transaction at issue in Defendants' breach of contract counterclaim. Specifically, Plaintiffs allege that Defendants could not close the deal without funding from a second bank (Bank of York) and that Defendants did not have a commitment from Bank of York to receive the funds necessary to complete the transaction. Under South Carolina law, "one who seeks to recover damages for breach of a contract...must show that...he was, at the appropriate time able, ready and willing to perform it." Parks v. Lyons, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951).

There is evidence in the record that Defendants had a written commitment from Bank of York for sufficient funds to complete the transaction. At the time the transaction was being constructed and finalized, Defendants had a \$2.5 million line of credit with the Bank of York and approximately \$1.7 million available on that line of credit. D. Ras Aff. ¶ 5. (Line of Credit, Exhibit I). Oaktree President Dawne Ras is certain that Bank of York committed to provide the funds necessary to complete this transaction. D. Ras. Aff. ¶ 5. Ms. Ras met with Bank of York representative Grant Sandifer and received his approval for a \$640,000 commitment from Bank of York. Id. Ms. Ras later confirmed Bank of York's commitment and the commitment amount during a telephone conversation with Mr. Sandifer. Id.

Bill Hargrove testified that Bank of York was committed to the transaction. Mr. Hargrove testified that he was "sure that there was [sic] commitments there" from Bank of York based on discussions between Grier Sandifer and Plaintiff's representative Derek Franklin.

Hargrove Dep. 51:18-52:2, Exhibit J. Even Mr. Sandifer acknowledged a long history of loans to the Rases and testified that he could not remember a time when the Rases came to Bank of York for a loan and were refused. Sandifer Dep. 67:22-25, Exhibit K. While Plaintiff may dispute these assertions, there is evidence in the record to support Defendants' breach of contract claim insofar as that claim requires proof of Defendants' ability to perform. Disputes over the weight and credibility of the assertions stated above should be resolved by a trier of fact rather than at the summary judgment stage.

c. Damages

Plaintiff argues that Oaktree's breach of contract counterclaim must be dismissed because the buyer Oaktree had under contract, Palmetto Investment Holdings, did not have sufficient funds to purchase the property. This argument is meritless for two reasons.

First, and most importantly, Oaktree does not have to have a buyer under contract for the properties to maintain a claim for breach of contract. All Oaktree must have is evidence of **damages**. In a breach of contract action, the "measure of damages is the loss actually suffered by the contractee as the result of the breach. And profits that have been prevented or lost as the natural consequence of a breach of contract are recoverable as an item of damages in an action for such." Collins Holding Corp. v. Landrum, 360 S.C. 346, 350, 601 S.E.2d 332, 333-34 (2004). Here, Oaktree had a contract to purchase the property from Har-Lee for \$4.4 million, and a contract to sell the property to Palmetto Investment Holdings for \$6.697 million.

Even if Palmetto Investments would have breached their purchase contract, as Plaintiff seems to claim, the contract is **evidence of the fair market value** of the lots, and that is all Oaktree must show. "Fair market value is the amount at which property would change hands between a willing buyer and willing seller." Wells Fargo Bank, NA v. Turner, 378 S.C. 147, 151, 662 S.E.2d 424, 426 (Ct. App. 2008). Oaktree could have sold the lots to another, for the fair

market value, and the difference between the purchase price and the fair market value is the lost profit or damages.

“If the property is resold within a reasonable time after the breach, the amount received is *prima facie* evidence of its market value at the time of the breach.” Benya v. Gamble, 282 S.C. 624, 632, 321 S.E.2d 57, 62 (Ct. App. 1984).¹ This is simple, hornbook law. “Generally, evidence of the price received by the owner at a subsequent sale of the land is admissible, although not necessarily conclusive to prove the value of the land as of the time in dispute” 31A C.J.S. Evidence § 332. The **contract price** is therefore evidence of the fair market value, regardless of whether the resale contract was consummated or whether Palmetto Investment would have breached that contract. See also Holly Hill Lumber Co. v. McCoy, 205 S.C. 60, 30 S.E.2d 856 (1944) (affirming trial court decision that contract price was value of land). The standard is not exacting. “The law does not require absolute certainty of data upon which lost profits are to be estimated, but all that is required is such reasonable certainty that damages may not be based wholly upon speculation or conjecture, and it is sufficient if there is a certain standard or fixed method by which profits sought to be recovered may be estimated and determined with a fair degree of accuracy.” Collins Holding Corp., 360 S.C. at 350, 601 S.E.2d at 334.

Secondly, the managing member of Palmetto Investment Holdings, John Car, testified that the reason Palmetto Investments did not have funding in place was because he **learned of American Community’s breach**. “But like I said, once the - - - Tom's capability of purchasing the properties from the developer never came to fruition, then I advised Danny and anyone else that I knew at the time that, you know, it's not going to happen, and you might as well just, you

¹ See also S.C. Code Ann. § 28-2-340, providing that “evidence of the price and other terms upon any sale” admissible evidence on value in condemnation cases.

know, forget about it.” J. Car Dep. 47-48, Exhibit L. Car never testifies that he would not have been able to get financing to close, merely that he stopped looking once ACB breached its loan commitment and derailed the transaction.

Finally, once again, it must be noted that Oaktree must only present a “scintilla” of evidence to survive summary judgment. The contract with Palmetto Investments clearly is such evidence.

d. Subsequent 10 lot transaction

Plaintiff further claims that any contract between Plaintiff and Defendants related to the 51 lot transaction was superseded or extinguished by the subsequent transaction involving 10 lots in Palm Tree Cove Phase II. However, Defendants only sought and completed this subsequent transaction in an effort to mitigate its damages. See D. Ras Aff. ¶ 4. Parties injured by a contract breach are required to make efforts to mitigate their damages. Cisson Constr. Inc. v. Reynolds & Assoc., 311 S.C. 499, 503, 429 S.E.2d 847, 849 (Ct. App. 1993). Defendants also entered the 10 lot transaction in an effort to limit its liability to third parties with whom Defendants had contracted in reliance on Plaintiff’s commitment to fund the 51 lot transaction. D. Ras Aff. ¶ 4.

2. Plaintiff is not entitled to summary judgment on Defendants’ other counterclaims.

Plaintiff also filed a motion for summary judgment on Defendants’ counterclaims for violation of the South Carolina Unfair Trade Practices Act (“SCUTPA”), breach of contract accompanied by a fraudulent act, negligent misrepresentation, fraud, and tortious interference with contract.² Plaintiff claims Defendants cannot prevail on these claims in the absence of the written commitment letter discussed above. In response to this claim, Defendants refer to the argument in Section 1(a) above. Just as Plaintiff should not be able to profit from its evidence spoliation by a grant of summary judgment on the contract counterclaim, Plaintiff should also

² Defendants do not oppose summary judgment on the tortious interference with contract counterclaim.

not profit from its evidence spoliation through a grant of summary judgment on the non-contract claims.

The record contains the required scintilla of evidence of each element of each counterclaim Defendants have asserted. Defendants assert a claim for a SCUTPA violation. Any person who suffers "any ascertainable loss of money or property" due to another's "unfair methods of competition" may bring an action under SCUTPA. S.C. Code Ann. § 39-5-140(a). An unfair trade practice is "a practice which is offensive to public body or which is immoral, unethical, or oppressive." Wogan v. Kunze, 366 S.C. 583, 606, 623 S.E.2d 107, 120 (Ct. App. 2005). To have a successful SCUTPA claim, a plaintiff must show (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair act. Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006). The "public interest" element can be proven by showing that the unfair practice has the potential for repetition. Potential for repetition may be proven by showing past incidents of similar conduct or by showing that the wrongdoer's policies create a potential for repetition of the unfair acts. Cravy v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998).

There is evidence that Plaintiff engaged in immoral, unethical, and deceptive conduct when Derek Franklin represented Plaintiff's commitment to the transaction in the form of a written commitment letter and oral assurances even after Plaintiff made the decision not to follow through on its commitment. Additionally, Plaintiff acted immorally, unethically, and deceptively by withdrawing its commitment to the transaction one day before the deal was scheduled to close. There is evidence that Plaintiff's deceptive practices affect the public interest because there is the potential for repetition. Deposition testimony reveals that Derek Franklin's

method of processing loan transactions in this instance is the same process he used repeatedly and consistently in Plaintiff's dealings with Defendants. Franklin Dep. 73:18-74:2, Exhibit M. As discussed above, Plaintiff's unfair and deceptive practices resulted in damages to Defendants in the form of lost profits and inability to comply with their contractual obligations to a third party.

Defendants also submitted a claim for breach of contract accompanied by a fraudulent act. This claim requires proof of the following elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; (3) a fraudulent act accompanying its breach. Floyd v. Country Square Mobile Homes, Inc., 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985). The discussion above details the existence of a contract between Plaintiff and Defendants, the contract's material terms, Plaintiff's breach by failing to perform as promised, and Defendants' damages suffered as a result of the breach. The evidence also shows fraudulent behavior by Derek Franklin after Plaintiff decided not to fund Defendants' loan as promised. On the scheduled closing day, the closing attorney and Tom Ras were present and expecting to close. According to the closing attorney Matthew Randall, Derek Franklin never gave indications that the closing would not proceed as planned on the scheduled day. M. Randall Dep. 59:15-60:20. Mr. Randall expected the closing to go forward on that day. M. Randall. Dep. 60:21-24. According to Oaktree attorney Matthew Cox, his last conversation with Derek Franklin gave all indications that Plaintiff was proceeding with its commitment to provide funding. According to Mr. Cox, Franklin told him that the deal was "good to go" during this final conversation. M. Cox Dep. 58:5-18, Exhibit N.

Defendants also have a claim for negligent misrepresentation. A negligent misrepresentation claim requires proof of a false representation made to the claimant by a person

with a duty to communicate truthfully with the claimant resulting in pecuniary loss. Evans v. Rite Aid Corp., 324 S.C. 269, 478 S.E.2d 846 (1996). Here, Plaintiff's agent Derek Franklin represented to Defendants that Plaintiff was committed to the aforementioned loan transaction. T. Ras Dep. 117:4-8. Franklin then presented to Defendants and signed a commitment letter related to that transaction. T. Ras Dep. 117:4-18; D. Ras. Aff. ¶ 2. Franklin's representation was false as Plaintiff failed to complete the transaction as Franklin indicated. Since Plaintiff had a pecuniary interest in this transaction, Plaintiff has a duty to communicate truthfully with Defendants regarding the loan. See Evans, 324 S.C. at 274, 478 S.E.2d at 848. Plaintiff breached this duty with its false representations. Defendants suffered significant pecuniary losses as a result of Plaintiff's conduct. Defendants were unable to honor their contractual commitment to their third party buyer.

Defendants claim Plaintiff is guilty of fraud. A fraud claim requires proof of a material false representation known by the speaker to be false. Brown v. Stewart, 348 S.C. 33, 41, 557 S.E.2d 676, 680 (Ct. App. 2001). The hearer must not know the representation is false, must justifiably rely on the truth of the representation, and must suffer damages proximately caused by the false representation. Id. Here, Franklin represented Plaintiff's commitment to fund the 51 lot transaction to the Rases and Oaktree's attorney. T. Ras Dep. 117:4-18; D. Ras. Aff. ¶ 2; M. Cox Dep. 58:5-18. That representation was false as Plaintiff did not fund the transaction. This representation was material as Plaintiff's commitment was vital to Defendants' ability to fulfill its contractual obligations to two other parties.

There is evidence that Plaintiff knew the representation to be false as Plaintiff continued to give indications of its commitment up to the day of closing. On the scheduled closing day, the closing attorney and Tom Ras were present and expecting to close. M. Randall Dep. 59:15-

60:20. Defendants were unaware Plaintiff was actually unwilling to provide funding. This is evident from Defendants' efforts to proceed with its deals with Bank of York and the other contract parties before and after Defendants' deal with Plaintiff was scheduled to close. Further, the knowledge element of a fraud claim does not require proof of actual knowledge. First State Sav. & Loan v. Phelps, 299 S.C. 441, 385 S.E.2d 821 (1989). This element is satisfied if a party acted with reckless disregard for the truth or falsity of the representation. Id. at 446, 385 S.E.2d at 824. Here, a written commitment letter was presented and signed before Plaintiff actually committed to the transaction. Thus, while Franklin was presenting the commitment letter to Defendants, he was acting with reckless disregard as to whether Plaintiff would actually commit to the transaction. Defendants' reliance on Plaintiff's representations were justified because Franklin directly represented Plaintiff's commitment in a standard written commitment letter and repeated those representations to Defendants' and their attorney up to the day preceding the closing.

3. Defendants are entitled to a jury trial on their counterclaims.

The South Carolina Rules of Civil Procedure preserve a litigant's right to a jury trial for legal claims. See Rule 38(a), SCRPC. A party asserting their jury trial right must make a timely demand for a jury trial. Rule 38(b), SCRPC. South Carolina courts have specifically addressed the jury trial right for counterclaims. "If the complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim." C & S Real Estate Servs., Inc. v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986). Additionally, "a defendant in an equity action, such as a mortgage foreclosure, has a right to a jury trial on a counterclaim that is legal and compulsory in nature." N.C. Fed. Sav. & Loan v. DAV Corp., 294 S.C. 27, 362 S.E.2d 308 (Ct. App. 1987).

In this case, Plaintiff's Complaint contains several claims for foreclosure and deficiency judgments. Defendants' Amended Answer, Counterclaims, and Third Party Complaint contains the following counterclaims: (1) breach of contract; (2) breach of contract accompanied by a fraudulent act; (3) negligent misrepresentation; (4) fraud; (5) tortious interference with contract; and (6) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). The caption of Defendants' Answer and Amended Answer clearly demand a jury trial on all legal claims.

To determine whether Defendants' are entitled to a jury trial on their counterclaims, the court must consider determine whether the counterclaims are (1) compulsory or permissive; and (2) legal or equitable in nature. Mortgage Elec. Sys., Inc. v. White, 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009). A counterclaim is compulsory if it arises out of the same transaction or occurrence as the subject matter of the opposing party's claim. Rule 13(a), SCRCP. Courts employ the "logical relationship test" to determine whether a counterclaim arises from the same transaction or occurrence as the opposing party claim. N.C. Fed. Sav. & Loan Ass'n v. DAV Corp, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). In other words, "the court must determine whether there is "any logical relationship between the claim and the counterclaim." Id.

The first cause of action in Plaintiff's Amended Complaint relates to Defendants' alleged default on a loan secured by lots in Palm Tree Cove Phase II. (Am. Comp. ¶ 11-48). Defendants' counterclaims allege Plaintiff breached a contract, committed fraud, and other tortious acts related to a financial transaction involving lots in Palm Tree Cove Phase II. (Answer ¶ 48-82). Courts have used the logical relation test and found counterclaims to be compulsory under circumstances similar to this case. See N.C. Fed. Sav. & Loan Ass'n, 289 S.C. at 518-19, 381 S.E.2d at 905 (citing Columbia Plaza Corp. v. Security Nat'l Bank, 525 F.2d 620 (D.C. Cir.

1975)(counterclaim on alleged enlargement of original loan subject of plaintiff's suit is compulsory under logical relationship test)).

Second, the court must determine whether the counterclaims are legal or equitable in nature. This determination is based on the remedies sought. Perry v. Heirs at Law & Distributees of Gadsden, 313 S.C. 296, 301, 437 S.E.2d 174, 177 (Ct. App. 1993)(citing O'Shea v. Lesser, 308 S.C. 10, 416 S.E.2d 629 (1992)). Damages are a legal remedy. O'Shea, 308 S.C. at 14, 416 S.E.2d at 631. It is clear that Defendants' counterclaims seek legal remedies. For Plaintiff's breach of contract and breach of contract accompanied by a fraudulent act, Defendants' seek actual, consequential, and punitive damages not the equitable remedies of rescission or specific performance. (Am. Answer ¶ 87, 100-101). Defendants likewise seek monetary damages for their fraud, misrepresentation, and SCUTPA claims. (Am. Answer ¶ 114-15, 122-23, 129-30, 139); see also Kiriakides v. Atlas Food Sys. & Serv., Inc., 338 S.C. 572, 580, 527 S.E.2d 371, 375 (Ct. App. 2000)("Actionable fraud is an action at law unless an equitable remedy is sought"). The Answer's prayer for relief also clearly seeks legal remedies.

Since Defendants' Answer asserts compulsory, legal counterclaims to Plaintiff's equitable claims and Defendants asserted a timely demand, Defendants are entitled to a jury trial on their counterclaims.³

CONCLUSION

Based on the reasons stated above, Defendants request that the court deny Plaintiff's motions for summary judgment and Plaintiff's motion to deny Defendants' right to a jury trial on its counterclaims. Defendants also request that the court impose the proper sanction on Plaintiff

³ Alternatively, if the court finds Plaintiff is entitled to summary judgment on its foreclosure claims, then the only remaining claims are those currently styled as Defendant's counterclaims. Under those circumstances, the White test for determining whether a jury trial for counterclaims is implicated is inapplicable and the general rule reserving jury trials for legal claims applies. Defendants' claims seek monetary damages and other legal remedies and are, therefore, legal claims.

and Plaintiff's counsel for their evidence destruction and flagrant violation of this court's discovery order.

Respectfully submitted,

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May 13, 2011

1 STATE OF SOUTH CAROLINA

2 COUNTY OF YORK

) COURT OF COMMON PLEAS NONJURY

3
4 YADKIN VALLEY BANK & TRUST,)

5 PLAINTIFF,)

6 VS.)

7 OAKTREE HOMES, INC., ET AL,)

8 DEFENDANT.)

TRANSCRIPT

OF

RECORD

2010-CP-46-01673

9
10
11 May 18th, 2011
12 York, South Carolina

13 B E F O R E:

14 THE HONORABLE JOHN C. HAYES, III, Judge.

15
16 A P P E A R A N C E S:

17 JAMES SHEEDY and SUSAN E. DRISCOLL
18 ESQ.

Attorneys for the Plaintiff

19 CHAD MCGOWAN
20 ESQ.

Attorney for the Defendant

21
22
23 JANET RICH
Circuit Court Reporter

24
25 Transcribed by Pamela E. Green, Circuit Court Reporter

I N D E X O F W I T N E S S E S

(There were no exhibits marked or testimony taken
during this hearing.)

1 P R O C E E D I N G S

2
3 THE COURT: This is Yadkin Valley Bank case, and I'll
4 let you know I know nothing about it. I have not had time
5 to read the briefs.

6 Did I get hard copies of your brief?

7 MS. DRISCOLL: Yes, Your Honor, they're submitted to
8 the Clerk's Office. They should be in the file, but we have
9 hard copies if you'd like.

10 THE COURT: All right. This is -- y'all represent
11 Oaktree?

12 MS. DRISCOLL: No, sir, Your Honor, we represent---

13 THE COURT: Oh, okay. Well---

14 MR. SHEEDY: Well, we represent the Bank as you might
15 expect.

16 THE COURT: All right. I'll let my clerk see if he can
17 find those.

18 What, what day, what day were they taken to the Clerk's
19 Office?

20 MS. DRISCOLL: They were, they were filed Monday, Your
21 Honor.

22 THE COURT: Monday. Okay. We'll, we'll figure that
23 out.

24 All right. Who -- this is a motion, five motions,
25 plaintiff's motion for summary judgment, plaintiff's motion

1 to deny trial by jury, the defendant's motion for sanctions.

2 So, Mr. Sheedy, do you want to start?

3 MR. SHEEDY: Well---

4 THE COURT: Tell me a little about the background of
5 the case, and what we got for today.

6 MR. SHEEDY: We would be happy to do that, Your Honor,
7 but, first, in the interest of efficiency, or I guess I
8 should say for the record, Jim Sheedy appearing on behalf of
9 the plaintiff.

10 Let me suggest an order of motions, which seems to me
11 would be logical for hearing this morning. First, the
12 motion to deny jury trial because that's applicable
13 regardless.

14 Second, the sanctions motion. Obviously, if this Court
15 orders, under the, the applicable rule, a striking of any of
16 the defenses, it would have some bearing on whether the
17 Court would need to hear the three summary judgment motions.

18 Third, the motion for summary judgment with respect to
19 the contract claims. The logic behind that, Your Honor, is
20 if Your Honor finds that the Lender Statute of Frauds is
21 applicable, then that finding runs through the next summary
22 judgment motion, which is as to the non-contract
23 counterclaims, and then, last, I would suggest that we hear
24 the motion for summary judgment on the plaintiff's claims,
25 which are the four foreclosure claims in the complaint. I

1 don't know whether Mr. McGowan disagrees with that order or
2 not.

3 MR. MCGOWAN: Naturally I do. We're prepared to punt
4 on the foreclosure claims because they owe the money, they
5 know that, it's a question now of how much that is, and, and
6 we're not contesting the fact that there was a deal. This
7 was a series of two deals. One that didn't go through, and
8 one that did go through, and we say it was part of
9 plaintiff's or defendant's, excuse me, Oaktree's efforts to
10 mitigate and they did, in fact, borrow money and they didn't
11 pay it back, and that foreclosure action, we think, is
12 legitimate on their part, but our damages, we say, are well
13 in excess of what they claim they owe.

14 So, in terms of the plaintiff's motion for summary
15 judgment on the foreclosure, we're prepared to punt on that
16 and say we owe that money, we can do the math, and it is
17 what it is.

18 THE COURT: That's your fifth one?

19 MR. SHEEDY: That is the fifth of the five.

20 MR. MCGOWAN: And also it should satisfy the jury trial
21 question because we were also moving to be realigned as
22 plaintiff in the case, and because these are remedies now,
23 the foreclosure's no longer applicable, and, so, we would
24 move to become the plaintiff, which is more comfortable for
25 me personally, and then we have a right to a jury trial

1 because those are our essential claims against Yadkin Valley
2 Bank. So, we think that, that our, our punting on
3 foreclosure takes care of their motions one and five.

4 THE COURT: All right.

5 MR. SHEEDY: I'm, I'm not sure that was responsive to
6 the order of hearing. Although I am obviously pleased with
7 the motion on plaintiff's claim is a matter to which the
8 obligor or guarantors have consented. I still think the
9 jury trial needs to be heard first, followed by the
10 sanctions, and then the two remaining summary judgment
11 motions, and I'm prepared to go forward on that basis if
12 this suits the Court.

13 THE COURT: We'll go ahead and do it that way.
14 You may proceed, jury trial.

15 MR. SHEEDY: Before the Court, Your Honor, is the
16 plaintiff's notice of and motion for denial of the jury
17 trial right in this case. Mindful that Your Honor invited
18 me just a moment ago to give the Court some background about
19 this case, before I get into the applicable testimony and
20 the applicable law, let me remind the Court with respect to
21 this case. I say remind because Your Honor did hear a
22 motion in this case once before, but I appreciate there's
23 been a lot of water over the dam since then.

24 THE COURT: And I've gotten older.

25 MR. SHEEDY: I understand from Mark Twain that age is a

1 matter of mind, and if you don't mind it doesn't matter.

2 This case began as a foreclosure. There were causes of
3 action for entry of judgments including a foreclosure on
4 four separate loan transactions.

5 First, Phase II Palm Tree Cove, which was secured by 11
6 lots. Subsequently one of those lots was released, Lot
7 Number 11. So, there were ten lots that actually operated
8 as collateral for that loan. That loan was guaranteed by
9 Tom and Dawne Ras. A request was made for entry of judgment
10 against them personally on the guarantees.

11 The second loan transactions involved Palm Tree Cove
12 Phase I of -- the action was for entry of judgment against
13 the obligor, Oaktree, and against the guarantors, Tom and
14 Dawne Ras on that loan transaction, which was secured by
15 property in Palm Tree Cove Phase I.

16 The third loan transaction involved Trinity Ridge, a
17 completely different subdivision from Palm Tree Cove. The
18 action was for entry of judgment against Oaktree and against
19 the guarantors and foreclosure of the lots, and then last
20 there was a cause of action involving a subdivision known as
21 The Glynn's, G-L-Y-N-N-S. That too sought entry of judgment
22 against Oaktree and against the guarantors and foreclosure
23 of the real property collateral securing that note.

24 So, Your Honor, that's the complaint in this case. In
25 response to the complaint in this case, the obligor,

1 oaktree, and the guarantors, Tom and Dawne Ras, brought an
2 action, really four causes of action, breach of contract,
3 breach of contract accompanied by a fraudulent act, fraud,
4 negligent misrepresentation, interference with contract, and
5 unfair trade practices. Obviously that's six.

6 Let me recite for the Court, based upon their
7 pleadings, the underlying factual basis for these
8 counterclaims. I want to be fair. So, I'm just gonna stick
9 to the four corners of what they have pled for purposes of
10 this case. And if Your Honor wants to follow along, I'm
11 looking at their answer to amended complaint and
12 counterclaim beginning on Page 4 where it says as additional
13 defenses and by way of counterclaims.

14 THE COURT: Let me see if we can find it. This is a
15 rather voluminous file. So, I don't know that we can. I'm
16 gonna let my clerk start looking while you go ahead. I'll
17 catch up with you.

18 MR. SHEEDY: Okay. Your Honor, I'm gonna begin at
19 Numbered Paragraph 53. Har Lee is a South Carolina housing
20 developer. Your Honor may remember Bill Hargrove. Har Lee
21 was Bill Hargrove. Har Lee owns 51 building lots at Lake
22 wylie, York County, South Carolina with the subdivision of
23 Palm Tree Cove II. Har Lee wanted to sell the lots to
24 oaktree. Palmetto Investment Holding Company is a North
25 Carolina housing developer. We'll call that PIH for

1 purposes of this morning. PIH wanted to buy the lots from
2 Oaktree once Oaktree closed it's deal with Har Lee.

3 Derek Franklin was vice-president, I'm gonna say, for
4 plaintiff. As an officer of the Bank, Franklin could make
5 promises on the Bank's behalf. Oaktree had worked with
6 Franklin for several years for their credit needs. Franklin
7 had written Oaktree on June 29th, 2007, and promised to lend
8 Oaktree up to 2.5 million dollars.

9 In May 2008, the Bank's line of credit was in good
10 standing and all accounts have been handled as agreed.
11 Oaktree told Franklin about both contracts for Palm Tree
12 Cove II. Oaktree asked Franklin if the Bank would lend it
13 more money to finance part of the purchase price. Franklin
14 told Oaktree that the Bank would lend enough money so that
15 Oaktree could buy the lots.

16 I'm now at the top of Page 6 if Your Honor has the
17 pleading in front of him.

18 THE COURT: Well, I don't know whether I'm getting
19 there or not. I got an answer to amended complaint and
20 counterclaims in March of 2010, but my Paragraph 53 doesn't
21 come close to your Paragraph 53.

22 What was your Paragraph 53?

23 MR. SHEEDY: My Paragraph 53 reads Har Lee, LLC is a
24 South Carolina company.

25 THE COURT: Okay. I've got, I've got it then.

1 MR. SHEEDY: Okay. I'm now on Paragraph 66.

2 THE COURT: Franklin.

3 MR. SHEEDY: In April 2008 Oaktree contracted with Har
4 Lee to purchase the Palm Tree Cove two lots for
5 approximately 4,250,000. In May 2008 Oaktree contracted
6 with PIH to sell the same lots for \$6,697,070. On May 9th,
7 2008, Franklin promised Oaktree in writing to increase the
8 line of credit to 3.8 million. The sale to PIH is
9 contingent on Oaktree closing on the purchase from Har Lee.
10 Franklin and Bank knew that Oaktree needed Bank to increase
11 its line of credit to close its contract with Har Lee.

12 During April, and up until May 22, 2008, Franklin
13 assured Oaktree that Bank would provide financing for the
14 deal. Oaktree and Har Lee scheduled the closing for their
15 contract on May 23, 2008. Oaktree and PIH scheduled the
16 closing for their contract on May 26, 2008, three days
17 later. Franklin came to Oaktree's office after business
18 hours in the evening of May 22, 2008. Franklin told Oaktree
19 that Bank would not provide funding for the next day's
20 closing.

21 Over the next several months Franklin and other
22 officers of the Bank demanded that Oaktree provide more
23 paperwork to get the loan. The extra requirements had never
24 been part of Bank's promise to lend Oaktree money. Even
25 though Oaktree tried to find other financing for the Palm

1 Tree Cove II deal it could not. Because Oaktree couldn't
2 close its deal with Har Lee, it couldn't sell the lots to
3 PIH, and, Your Honor, throughout the six causes of action
4 this is consistently referred to as the Palm Tree Cove II
5 deal in the answer and counterclaim. The Court will see
6 that in Paragraph 81.

7 Again, the references to it in the second cause of
8 action, Paragraph 101 refers to the Palm Tree Cove II deal.
9 References in the fourth cause of action, Paragraph 122 for
10 Palm Tree Cove II deal, and the Unfair Trade Practices Act
11 count is based upon this Palm Tree Cove II deal.

12 So, responsive to the Court's question, that is the
13 background for this case.

14 THE COURT: Let me, let me try to catch up with you.
15 You skipped, I believe, and the fourth cause of action does
16 not refer to Palm Tree or am I missing it?

17 You went to Paragraph 114 and 181.

18 MR. SHEEDY: Yes, in the fourth cause of action, in
19 Paragraph 114, there is a reference to this commitment to
20 lend Oaktree money, and that is the cornerstone to that
21 cause of action as well. It all surrounds this alleged loan
22 commitment that the Bank supposedly did not honor.

23 Now, I'm beginning with the jury trial motion. So, I
24 know Your Honor has heard these kinds of motions before.
25 The complaint in this case is equitable. Foreclosure action

1 sounds in equity. I don't think that can be fairly disputed
2 and is well settled under the decision of law.

3 The question becomes, in foreclosures, when a
4 counterclaim is asserted, does a jury trial right attach.
5 The juris prudence is, again, well settled that a jury trial
6 right could attach if the counterclaims are compulsory
7 rather than permissive. If the counterclaims are
8 permissive, then asserting those permissive counterclaims in
9 that equitable action operates as a waiver of the jury trial
10 right.

11 This body of law started, to the best of my
12 recollection, in the mid to late 80's with the Johnson case,
13 then C&S versus Massengill, culminating in the clear
14 statement of the law in North Carolina Federal Savings &
15 Loan versus DAV. The cases since DAV, the Mortgage
16 Electronic Systems case, there was a Beech versus Pillman I
17 think it was within the last couple of years, are factual
18 examples of the application of this rule in a foreclosure
19 context.

20 So, let me begin by characterizing what Your Honor just
21 heard. Your Honor just heard of an entirely separate loan
22 commitment which forms the basis for six causes of action,
23 none of which are seeking equitable relief, all of which are
24 seeking legal relief in the form of damages, and I think
25 that's consistent with what Mr. McGowan stood and said to

1 Your Honor a few moments ago albeit in a different context.
2 He was talking about the foreclosure claim and a realignment
3 of this case so that the obligor and guarantors would be the
4 plaintiff.

5 Under the DAV line of cases, a counterclaim is only
6 compulsory if it passes the logical relationship test, and
7 I'll read from these cases in just a few minutes. The
8 logical relationship test goes to the idea that the
9 counterclaims have to be connected to in the sense of Rule
10 13-B. They have to arise out of the same transaction or
11 occurrence as the claims in the complaint and challenge the
12 validity or the enforceability of the claims that the
13 plaintiff was asserting in the foreclosure. That's a
14 summary of that line of cases, and I'll read the provisions
15 from those cases to the Court in just a moment, but first
16 let me turn to the facts.

17 In addition to the agreements in the counterclaim,
18 which I read to the Court, we have undisputed, factually for
19 purposes of this case, that the counterclaims involve a
20 separate loan transaction from the four causes of action in
21 the complaint.

22 Now, I don't want to misrepresent the testimony to the
23 Court. So, I will stand and I will read some of it.

24 On Page 153 of the deposition of Tom Ras at Line 2, and
25 I, I understand that these transcript are, are in the

1 record, but it is voluminous. So, I'm gonna try to pinpoint
2 cites in my argument for use of the Court.

3 Q. There are certain loans that Oaktree has at
4 American Community Bank which are in default and are the
5 subject of foreclosure?

6 A. That is correct.

7 Q. The commitment that you described in May had
8 nothing to do with those loans?

9 A. No.

10 Q. It was completely separate as a financing?

11 A. Correct.

12 This is Tom Ras' testimony. His, his wife was
13 consistent. Just this Monday the affidavit of Dawne Ras was
14 submitted to the Court. At Paragraph 3 of that affidavit,
15 she swears and affirms; after we executed the commitment,
16 Mr. Franklin took the document and said he was gonna bring
17 us a clean copy at closing, which we could re-execute, but
18 there were not to be any change in the terms, and Your Honor
19 has that as well.

20 Let's run through the law applicable to this motion.
21 In point of the fact is safe to say the testimony is to the
22 effect that the counterclaim alleging a separate loan
23 commitment doesn't challenge the validity or the
24 enforceability of the ten lot loan, Palm Tree Cove I,
25 Trinity Ridge, or The Glynns, and the fact that Mr. McGowan

1 just consented to the entry of summary judgment on those
2 couldn't have undercut that conclusion.

3 Rule 13-A defines what is a compulsory counterclaim.
4 It says if it arises out of the transaction or occurrence,
5 but it is the subject matter of the opposing party's claim.
6 In DAV, which I previously made reference, there were also
7 six counterclaims. With respect to five of those
8 counterclaims, our Supreme Court found they were compulsory
9 under the logical relationship test because they were
10 alleged subsequent commitments. That is after in time the
11 loans that were being sued in the foreclosure. The purpose
12 of the alleged subsequent commitment conceivably was to cure
13 prior defaults and the Court said that may affect the
14 validity and enforceability of the loans are the subject of
15 the foreclosure, but the sixth counterclaim, which alleged
16 breach of two oral agreements, that North Carolina Federal
17 would purchase an interest, that is an equity piece in the
18 joint venture, which was the underlying dispute in that
19 case, doesn't affect the validity or enforceability of the
20 notes that were the subject of the foreclosure, but under
21 the logical relationship test, the counterclaim is
22 permissive is what the Court said, and that's what we have
23 here is an entirely separate loan commitment for which
24 damages are sought.

25 Here's another example of where a counterclaim was

1 concluded to be compulsory in a mortgage foreclosure. In
2 the recent case of Mortgage Electronic Systems, I call it
3 recent, it's 2009, there was a fraud counterclaim where the
4 relief was rescission. The rescission was to undo a mortgage
5 and declare it void, and it was the very mortgage that was
6 the subject of the foreclosure, and the Court said, under
7 the logical relationship test, that affects the validity and
8 enforceability of one of the loan documents in the
9 plaintiff's claim. One of the things that is somewhat
10 confusing in this area of the law, we are talking about
11 counterclaims. We're not talking about jury trial rights in
12 the context of the plaintiff's claim.

13 Now, I heard Mr. McGowan stand a moment ago and
14 foreshadow that it's his position that because the
15 plaintiff's claims are now consented to entry of summary
16 judgment that that necessarily completely alters the
17 procedural posture of this case, and that he would seek to
18 make some motion presumably to realign or consolidate, and
19 that would have some material effect.

20 Well, this situation does not fall within, for example,
21 Peels v. Pierce, which is a '93 decision, because if the,
22 the borrower or obligor and the guarantors, Your Honor, had
23 chosen to bring these claims as a separate action, and then
24 move to consolidate that separate action, we'd have an
25 entirely different fact pattern. That's not what we have

1 here.

2 The question, under the law, is since they chose to
3 bring the claims in the context of an equitable mortgage
4 foreclosure, when they made that decision to bring those
5 claims in this foreclosure under DAV, or under Johnson,
6 under Massengill, that operates as a waiver of their jury
7 trial rights, and they can't go back and repaint that. They
8 can't be historical revisionist and pretend that they didn't
9 exercise that choice to bring a permissive claim in a
10 compulsory case. I'm sorry. Permissive claim in an
11 equitable foreclosure.

12 Further, I see from the brief which has been filed in
13 this case that, once again, the obligor and the guarantors
14 are flip flopping, with all due respect, on what this set of
15 counterclaims really is. When this case started, it was
16 under as assertion, as Your Honor saw from what I read in
17 the counterclaim, that the May 9, 2008, letter, which does
18 exist by the way, and it says in the process of, so, it was
19 not a commitment letter. They have now gone back and tried
20 to claim what they asserted at the first part of this case,
21 that the allegation of a written commitment letter is just
22 an enlargement of the prior loan.

23 Now, that's different from the sworn testimony, but
24 let's take that in the context of this jury trial motion for
25 just a moment. It doesn't change the fact that they want

1 damages. The claims are legal, not equitable, their
2 counterclaims. It doesn't change the fact that they're not
3 challenging the validity or enforceability of Palm Tree Cove
4 Phase II, Palm Tree Cove Phase I, the Glynnns, Trinity Ridge,
5 and, consequently, whether it's an enlargement or it is, as
6 the sworn testimony supports, a separate loan transaction,
7 the result's the same under the applicable law. It's not
8 compulsory. They chose to bring it in this case, and when
9 they chose to bring it in this case, they lost their rights.

10 One further comment, Your Honor, and then I will rest
11 on the main part of my argument on the jury trial motion.
12 In May of 2008, which is the time period when these alleged
13 events occurred, the four loans that are the subject of the
14 foreclosure were not in default. I don't think there's any
15 question about that. Soon the obligor and the guarantors
16 were wave in front of you a May 9, 2008, letter and you can
17 look at the first paragraph of it and see that the builder
18 line of credit for 2.5 million was in good standing,
19 according to the Bank, on May 9, 2008.

20 Further, Your Honor can read from the complaint as to
21 the four causes of action. They all are matured loans.
22 They're not payment defaults. They're matured loans, and
23 the maturity started in October of 2008. So, in May of 2008
24 the loans weren't in default. The commitment, therefore,
25 purported commitment in May of 2008, which we don't have any

1 copy of, which the Bank steadfastly believes doesn't exist
2 and never existed, but the May, I'm sorry, the purported May
3 2008 commitment was obviously not for the purpose of curing
4 defaults on loans that wouldn't even begin to default for
5 five months.

6 So, under the DAV analysis, this was not a subsequent
7 commitment to cure the prior defaults. In sum, these are
8 permissive counterclaims brought in a mortgage foreclosure
9 action, there was no jury trial right, and all of this
10 really belongs nonjury, even before a special referee, or
11 before whoever's sitting as a circuit court judge, and Your
12 Honor probably notices from the file that Judge Kimball is
13 conflicted in this matter. So, that's where I think we
14 stand, Your Honor.

15 Thank you.

16 THE COURT: All right. Mr. McGowan.

17 MR. MCGOWAN: Here's the deal, judge. There was a long
18 relationship between the Bank and Oaktree. It started with
19 this two and a half million dollar line of credit. Oaktree
20 was a builder. They were a developer, and back in '07, '08,
21 that's the business that was churning at the time, and
22 American Community Bank, which later came in, and Mr.
23 Franklin, in particular, had this relationship with Oaktree
24 and the Ras', who are the owners and guarantors of Oaktree.

25 There were some loans made initially. There was a deal

1 struck, which is, was to be consummated June 6th of 2008,
2 and that is sort of the core transaction that we're
3 complaining about, and that was where Oaktree had a contract
4 to buy all of the lots in this Palm Creek, Palm Tree Cove
5 outfit, all 51. They were gonna buy them for 4.4 million
6 and sell them, they had written contracts on both ends, and
7 sell them three days later for 6.6 million dollars. That's
8 the way market was and that's way things were working back
9 then, and they had written contracts on both ends.

10 Derek Franklin arranged the 3.8 million dollar loan to
11 buy, to buy the property from Mr. Hargrove and Har Lee and
12 then flip it three days later. So, the loan from the back
13 was literally gonna be a three or four day loan, and they'd
14 make some interest and an origination fee and whatnot.
15 There was a letter of commitment, which we're gonna get
16 into, signed by everybody, signed by the Ras' on behalf of
17 Oaktree, and signed by Derek Franklin with some pen and ink
18 changes, pen and ink sort of corrections on it that Derek
19 Franklin took back to the office and said I'm gonna give you
20 a clean copy of this at the closing.

21 Closing was set originally May 23rd, rescheduled for
22 June 6th. Everybody is there. The lawyer is there.
23 Hargrove is there. The Ras' are there, the Bank of York
24 people who were gonna provide the other six hundred
25 something thousand are, are -- everybody's good to go, and

1 then the call's made.

2 Franklin says we're not doing this. We're not funding
3 this loan. Shock to everybody. That then started this next
4 series of transactions where parts of these lots, 11 lots
5 here, a couple lots there, were purchased, some financed by
6 American Community Bank, and those are the ones that we're
7 here about. We said that that was the Oaktree's obligation
8 to help mitigate this damage because they were on the hook
9 to Har Lee for 4.4 million dollars for breaching that
10 contract because they had the contract and they didn't buy
11 it. They then tried to buy some of them, and then sell some
12 of them, and, and that didn't really work out, which is why,
13 on paper, Oaktree owes the Bank 2.2 million dollars,
14 whatever it is.

15 So, the question is, is it logically related to the
16 same transaction or occurrence. That's really the question
17 because that means if it's logically related that means it's
18 compulsory, and if it's compulsory, you get a jury. If it's
19 not logically related, it's permissive, then you don't get a
20 jury.

21 So, we were faced, as a party and as a, as a lawyer,
22 with saying if we don't assert these counterclaims, what are
23 they gonna do. They're gonna say they're compulsory and we
24 didn't, we didn't assert them, and, therefore, we waived
25 them, and that's an unfair decision to have to make under

1 those circumstances. When is the -- all we have to show is
2 it's logically related to the same transaction. That's what
3 the law is.

4 Now, because it had to do with this whole series of,
5 this relationship with American Community Bank, that's why
6 we say they were compulsory and we felt we had to bring them
7 because otherwise if we had sued them separately, they're
8 gonna say those were permissive, those were compulsory
9 counterclaims in the defense of our complaint, and you
10 didn't assert them in your answer to this case. So,
11 therefore, you've waived those claims, and it's
12 fundamentally, the jury trial right is, we think because it
13 has to do with this whole relationship. Even though there
14 were a series of discrete transactions that that means that
15 they are compulsory counterclaims, which means there is no
16 waiver of the jury trial right.

17 THE COURT: Mr. Sheedy.

18 MR. SHEEDY: Yes, Your Honor.

19 Interestingly, I'd point out to the Court, if I heard
20 Mr. McGowan correctly, I don't know that we're really
21 arguing about the ultimate fact that Your Honor will be
22 hearing off and on today. So, let me amplify that quickly
23 for the record. There was -- and my client doesn't agree
24 with this, but I understand we're here on summary judgment.
25 And, so, we'll see what the plaintiff has asserted.

1 An alleged written commitment marked up by both sides,
2 lender takes it back, lender says I'm gonna retype it, I'll
3 have it at closing, and we'll sign it, it never gets signed,
4 and never gets retyped, and nobody can prove the marked up
5 copy exists anywhere.

6 Now, let me switch back for just a moment to the jury
7 trial motion because I don't know that I did this very well
8 to be honest with the Court on the first go around.

9 If Your Honor has Don Ras' affidavit?

10 THE COURT: I don't know that I do. Is it in my hand,
11 no.

12 MR. SHEEDY: Okay. Well, I'll read Paragraph 4 and,
13 and maybe, as I'm reading it, Your Honor will, will be able
14 to look at it.

15 In Paragraph Number 4, and this is the affidavit that
16 was submitted on Monday, Your Honor, the subsequent loan for
17 only ten lots was merely an attempt to limit Oaktree's
18 damages. It was an entirely new transaction and had nothing
19 to do with the previous loan commitment for the 3.8 million.

20 Again, we've got both parties here saying this was a
21 separate loan transaction. Again, on Page 153 of Tom Ras'
22 deposition, it was completely separate as a financing.
23 Correct.

24 MR. MCGOWAN: Judge, I'm just handing up a copy of
25 Dawne's---

1 THE COURT: We found it.

2 MR. MCGOWAN: Okay.

3 THE COURT: We may have a little trouble with Page 153
4 of the deposition.

5 MR. SHEEDY: I'm sorry?

6 THE COURT: We, we found Dawne's, but we're looking
7 through 153 of the deposition.

8 MR. SHEEDY: Oh, I'll be happy to hand it.

9 THE COURT: I think we might have it at this time. We
10 just have to find it.

11 MR. SHEEDY: Your Honor, if I may approach?

12 I've highlighted the language, and just for the record,
13 I've given Mr. McGowan a copy too.

14 THE COURT: Okay. Well, that's the same language you
15 mentioned earlier?

16 MR. SHEEDY: Yes. Yes. Consequently, the action on
17 the 3.8 million, it's just a separate lawsuit for damages.
18 They're not saying that because of that lawsuit for damages
19 there's anything about the four foreclosure actions that
20 can't go forward and are unenforceable and invalid.

21 Thank you, Your Honor.

22 THE COURT: All right. Well, I'll, I'll have to chew
23 on this and take it under advisement. We're gonna take a
24 short break before we get into -- the next one is sanctions?

25 MR. SHEEDY: Yes, sir.

1 MR. MCGOWAN: Yes, sir.

2 THE COURT: And that's based on what, just real quick?

3 MR. MCGOWAN: Discovery misconduct that I'm, that we
4 really need to have addressed by Your Honor. That's it.

5 THE COURT: All right. We'll take a short break. Real
6 short refresher. If y'all want to have some coffee at your
7 table, you're welcome to.

8 MR. SHEEDY: Thank you, Your Honor.

9 (WHEREUPON, a short recess was taken at this time.)

10 THE COURT: All right. Sanctions.

11 MR. MCGOWAN: Let me just start by saying we take this
12 incredibly seriously, and the evidence here is gonna be
13 quite compelling.

14 A big issue in this case is evidence of the existence
15 of the written signed commitment letter between American
16 Community Bank and Oaktree. There is clear unequivocal
17 testimony in the case that this document was signed by both
18 parties. There was some pen and ink changes made by Derek
19 Franklin, but he signed it, he took it home or he took it
20 back to the office, he took it somewhere with him to make
21 the final clean copy, which would be re-executed at closing.

22 After the deal fell through, there was a conversation
23 with a Mr. DeMarcus of the Bank who said well, words to the
24 effect, that if y'all had a copy of the commitment letter,
25 we'll be happy to fund it, and at that time Mr. Ras said

1 Derek Franklin has it, he has it.

2 From that point forward we have endeavored to locate
3 evidence of the existence of this letter of commitment. Not
4 only the signed copy, which would exist only in the files of
5 American Community Bank, but also circumstantial evidence.
6 For instance, the word document from which it was created,
7 the meta data which shows when the document's altered or
8 changed or things of that nature.

9 So, what we did is we sued them. They almost
10 immediately moved to dismiss on the Statute of Frauds
11 question saying there's no signed writing. So, tough luck.
12 Judge Alford I think or maybe denied that saying we need
13 some discovery or there was one and let's find it. We
14 issued discovery in July of 2009, which requested, as you
15 can imagine, all the documents, electronic files, et cetera,
16 et cetera.

17 They responded by saying no tangible documents. We did
18 our meet and confer letter. We filed a motion to compel.
19 Your Honor heard that and issued an order in April of 2010,
20 which said they had to produce all electronic data, April of
21 2010. We have since come to find out that in, later than
22 that in 2010, American Community Bank's I.T. people drilled
23 the hard drive.

24 Now, what does that mean?

25 That means they took Derek Franklin's hard drive, and

1 they took, I guess, a Ryobi cordless drill to it and drilled
2 it so that it could never ever be evidence, ever, after Your
3 Honor had compelled production, after there were discovery
4 responses, and that is the first bit of our motion for
5 sanctions.

6 They should be estopped from claiming Statute of
7 Frauds, and, in fact, they should have their answers to our
8 counterclaims stricken because of this, because if, if there
9 is evidence of this written piece of paper, I think, by
10 their own admission, they're gonna say well, we're up the
11 creek, we owed it, we're done, we're gonna pay. It's that
12 important. We don't think it's -- we think there's more
13 than enough evidence to move forward from this point from
14 our, from our standpoint.

15 But what is most shocking and perhaps most compelling
16 is the last page of their response to our motion for
17 sanctions.

18 Does Your Honor have that up there?

19 This, this is -- I don't think I've ever seen anything
20 quite like this before. It's the last page.

21 THE COURT: Okay. I've got it.

22 MR. MCGOWAN: All right. Here's what's important about
23 this. This is the first time we've ever seen this.

24 what is it?

25 This is a printout of the month-by-month calendar of

1 Derek Franklin from the Bank from May of 2008, and it was
2 printed March 21st, 2011.

3 And why is this important?

4 well, it shows that they've been concealing documents
5 this whole time, and not only that, they've had this in
6 their hands for at least two months and only now give it to
7 us.

8 why is this important?

9 Because it shows here, in very cryptic form, and it's
10 not complete, and I, and I can tell you why it's not
11 complete, but on June 6th, the day of the closing, it's in
12 the lower right hand, three o'clock, meet with Tom Ras.
13 That's when the closing was, the afternoon of June 6th. And
14 this is the first time we have ever seen this document, and
15 it's not complete because uses is using Total Exchange
16 outlook, and you can get full data on those appointments,
17 not just this sort of summary, and the fact that they
18 produced this to us two days ago, somebody had it for at
19 least two months, and this company has had it since May of
20 2008.

21 And, so, there is a pattern and a practice of
22 concealing critical information in this case, and this is,
23 frankly, outrageous. They drilled the hard drives. We're
24 supposed to take their word for it, first of all, in
25 violation of Your Honor's order, in violation of what the

1 rules require, and in violation of the natural tendency that
2 when there's litigation to preserve evidence, and then they
3 suddenly come up with this calendar.

4 why is this so important?

5 Because it shows that what we've been saying all along
6 is true, that Derek Franklin says I don't remember anything,
7 there was no meeting, there was no closing, there's nothing,
8 they just, they just got it all out of proportion, but the
9 fact that this meeting shows up on June 6th, the day of the
10 closing, the afternoon of the closing, is pretty clear
11 evidence of what we're saying all along is been true, but
12 what is more shocking is the fact that this was printed out,
13 according to way over in the right-hand corner, May 21st,
14 2011. They've had it for at least two months, and we got it
15 whenever they served this on us, and this was discoverable
16 information from the beginning.

17 And when they say they don't have stuff, we know that's
18 just not true because they now produced this. There has to
19 be more information behind this appointment and, quite
20 honestly, if, if we had this signed letter of commitment, we
21 would have summary judgment. No problem. And that's why
22 it's so important. That if it's on his hard drive, if it
23 was on his hard drive, we would, we would be moving for
24 summary judgment.

25 Now, let's think about this from the bank's

1 prospective. They have the signed commitment letter. They
2 know it's important. They have one of two choices. This is
3 an inference that we can draw, they have one of two choices.
4 If this thing gets out, they lose.

5 So, what they do is they would then make a choice that
6 we'll drill the hard drive. Well, we'll not give this
7 information. We'll, we'll conceal this calendar until the
8 last minute. We'll not give everything the plaintiff is
9 entitled to under the law. That only gives them advantage
10 and that's why we think their defenses to our counterclaims
11 ought to be struck because there's this pattern.

12 The first thing, there's no tangible documents. They
13 know they got them. So, they're ordered to produce it, they
14 don't, they drill it, and then they come up with this more
15 information. This is just outrageous and it impairs the
16 plaintiff to pray for -- Oaktree is prejudiced because this
17 writing is important. If we had it, this case would be over
18 with.

19 THE COURT: What evidence do you have that they, in
20 fact, drilled the hard drive?

21 MR. MCGOWAN: Their I.T. person, Mr. Joyce, said that
22 he did so in November of 2010.

23 THE COURT: Did he say upon whose, whose instructions?

24 MR. MCGOWAN: He said that his management folks told
25 him to do it, that they were redoing the computers and

1 they recycled or revamped 175 computers and Mr. Franklin's
2 was among them and that he drilled it as a result of that,
3 and nobody told him that he should keep it.

4 THE COURT: All right.

5 MR. MCGOWAN: And that's, that's what we want.

6 How do we cure it?

7 We cure it by striking their defenses to our
8 counterclaims because -- or, or, at minium, by estopping
9 them from claiming the Statute of Frauds.

10 THE COURT: All right. Mr. Sheedy.

11 MR. SHEEDY: Your Honor, I'm going to try to be
12 measured in response, and I apologize to the Court if I
13 fail. As Your Honor can probably imagine, this is a
14 particularly irritating and outrageous set of assertions
15 from my prospective as counsel in this case.

16 Now, having said that, I will make one more point for
17 the record and then really turn to the merits of the motion
18 itself. I met Chad McGowan for the first time today. Never
19 seen him before in my life. He didn't attend a single
20 deposition in this case. I don't have one email from him in
21 this case. I don't have one letter signed by him in this
22 case, and Your Honor knows that he was not here to make the
23 arguments previously on their motion to compel.

24 why do I point that out to the Court?

25 Because I think the Court should keep that in mind in

1 terms of this motion.

2 Now, let me turn first to some testimony that I want to
3 share with the Court. In fairness to Mr. McGowan and his
4 client, they haven't gone very far astray in terms of their
5 allegations of what the basis for their claim is. Now, they
6 haven't connected that next dot, which I'm gonna do in just
7 a second.

8 When we look at Tom Ras' deposition, starting on Page
9 117, he, first of all, says that this closing was or these
10 meetings were to occur, occur between May 1st and the 23rd.
11 He says that this alleged letter -- which day in May did you
12 sign this letter?

13 He doesn't know.

14 Do you know of the days in May when you were physically
15 with Derek Franklin from American Community Bank?

16 No.

17 Do you know what time of day you signed this?

18 No.

19 Do you know who'd present when you signed this?

20 Just me and my wife and Derek Franklin.

21 where did it occur?

22 My office.

23 where is that letter that you signed now?

24 Mr. Franklin took it with him that day.

25 Do you know why he took it with him?

1 Because of the amount of errors that he made on that
2 document.

3 Do you recall what those errors were?

4 I absolutely do. Terms were wrong. Interest rate was
5 wrong. He said we'll redo this. We'll bring another one to
6 the closing.

7 So, at some day in May of 2008 he took this written
8 commitment letter back because of the volume of errors in
9 it?

10 Is that your testimony?

11 Absolutely.

12 Did he ever return the commitment letter to you?

13 No, he did not.

14 And here's what I want the Court to hear.

15 Did you keep a copy of it?

16 We did and the copy was forwarded to Bill Hargrove at
17 one point to satisfy his Bank. Where that copy is between
18 Bill and myself, I couldn't tell you at this point now.

19 So, I want the Court to appreciate, although the
20 existence of this letter is very definitely in question, as
21 Your Honor will hear from the testimony, it is not correct
22 that, based on the testimony, that the only copy of this was
23 in the possession of the Bank. According to Tom Ras'
24 testimony, he lost his own copy of it.

25 Would it be fair to say, Tom, that as you sit here

1 today you don't have this written commitment letter or
2 access to this written commitment letter?

3 That is correct.

4 what was the interest rate?

5 well, that was the point of contention. Extremely
6 exorbitant.

7 Did the two of you have discussions that the interest
8 rate needed to be changed?

9 Yes.

10 At that time?

11 Yes.

12 what was the maturity date?

13 I don't remember.

14 what was the loan fee that was charged?

15 To be exact, normally the origination fee was like half
16 if not zero on our stuff, and on this origination it was
17 like one plus.

18 so, the loan fee was greater than what you were willing
19 to accept?

20 Yeah, I accepted the terms. Mr. Franklin took the
21 letter, said I will bring it back to my people, and anything
22 that we adjust on this thing, it was not uncommon for us on
23 previous documents, like on a commitment letter, they would
24 say he can only do two specs, and I would say no, I want
25 five specs. So, Derek would write in five, come back with

1 the finished thing, and, so, we agreed to those. So, we
2 accepted the five. We pretty much got what we asked for.
3 When we left there that day, any scratch-outs and writings,
4 that would stand. And if we had to resign anything, the
5 letter stated we would resign something prior to the
6 closing.

7 So, one scratch out was the interest rate?

8 Correct.

9 The origination?

10 Correct.

11 Mr. Ras testified generally he would take that back and
12 show it to whoever. He needed it for the purposes of
13 underwriting it is the exact as he left.

14 And was the letter ever returned to you even with the
15 scratch outs on it?

16 No.

17 Was it just the 51 lots?

18 That and personal guarantees.

19 Was there a liquid asset requirement?

20 There was.

21 As you sit here today, do you remember if there was a
22 liquid asset requirement in this commitment?

23 I don't specifically recall.

24 So, the Bank was loaning 3.8 million, plus closing
25 costs, plus closing costs is the allegation, as a part of

1 that deal?

2 Yes.

3 So, you don't remember any date that may of been in
4 that letter?

5 No, sir.

6 And the closing was set for May 23rd. The items that
7 were stricken were interest rate, maturity, and loan fee, is
8 that correct?

9 That I remember, yes.

10 Now, after this letter was taken back by Mr. Franklin
11 with these handwritten and initial changes, you've never
12 seen the letter since, have you?

13 No, sir.

14 And you don't know if anyone has this letter today as
15 you sit here, do you?

16 No.

17 Of your own personal knowledge?

18 No.

19 The depositions transcript from Dawne Ras.

20 How long was the meeting?

21 Thirty minutes.

22 Do you have to speculate because you have no
23 independent recollection of how long it lasted?

24 I don't remember specifically. The meeting was in May.

25 Do you know when?

1 Not specifically, no.

2 was she actually in the meeting?

3 This would be their other employee named Cindy.

4 No.

5 What was your understanding of why you didn't get a
6 copy of that letter?

7 He made changes on it. He was taking it back to type
8 up the final copy and we would receive it at closing.

9 So, you understood that he was gonna have to perform
10 some act and then return this document?

11 Correct.

12 Did you understand that he was gonna have to talk to
13 his superiors about the change in the interest rate and loan
14 fee?

15 I understood that he was gonna make the changes and we
16 would getting a copy at closing.

17 Because the change in the interest rate was a pretty
18 significant change, wasn't it?

19 It was.

20 And the change in the loan fee was a significant
21 change, wasn't it?

22 It was.

23 What do you remember was the loan amount?

24 3.8.

25 And what was the new rate that was asserted, if any?

1 I don't recall.

2 So, you don't know what the interest rate was that was
3 agreed?

4 I don't.

5 That's a fairly important term on a 3.8 million dollar
6 loan, wouldn't you say?

7 Yes.

8 And as you sit here today, you have no recollection of
9 what that rate was, the interest rate?

10 No.

11 Do you know what it had been in the letter?

12 I don't recall.

13 Do you know what it turned out to be after discussions?

14 I don't recall.

15 Do you know what the maturity date on the loan was to
16 be?

17 Not specifically.

18 You would agree, wouldn't you, that the loan fee is an
19 important term in a 3.8 million dollar loan?

20 Yes.

21 And the maturity date is also a fairly important term
22 in a 3.8 million dollar loan, isn't it?

23 Yes.

24 But the Bank approved requirement and the commitment
25 letter was phrased as satisfactory to the Bank as you

1 recall?

2 As I recall.

3 So, it was your understanding that their mortgage loan
4 was against the entire 51 lots?

5 Yes.

6 A first lien?

7 Yes. I misspoke. They were giving us a partial loan.
8 I apologize.

9 So, do you remember which numbered lots in the
10 commitment letter American Community Bank was agreeing to
11 take a first lien?

12 I don't.

13 Do you remember if there was a liquidity requirement in
14 this particular loan?

15 I don't.

16 And as you sit here today, you don't remember if there
17 was a liquidity requirement in this commitment from the Bank
18 or not?

19 I don't recall.

20 Now, after this 30 minute meeting, during which both
21 Tom and you read this commitment letter and there were
22 discussions and certain changes to be made and Mr. Franklin
23 took that commitment letter, is that what happened?

24 Yes.

25 So, when he left, according to your testimony, he was

1 the only one that had possession of that commitment letter?

2 Correct.

3 And it was your understanding that that commitment
4 letter was gonna be changed and at least retyped and
5 returned for signature?

6 Correct.

7 That's what the three of you had discussed and agreed
8 would occur?

9 Correct.

10 But it never came back, did it?

11 I don't recall seeing it. I usually get it at closing.

12 But as you sit here today, you don't have a piece of
13 paper from American Community Bank that's a signed
14 commitment for 3.8 million dollars to finance 51 lots, do
15 you?

16 No.

17 Now, Mr. McGowan just said to you that that testimony
18 is uncontroverted. It's not true. This is not at all what
19 the Bank believes happened, and the only people who can say
20 what Your Honor just heard happened to be the two parties
21 which would benefit from the allegation if such a commitment
22 existed.

23 Matt Cox, a lawyer now in Charlotte, used to be over in
24 Spartanburg, he essentially testified that he saw something,
25 he doesn't know what it was, it was not the May 9, 2008,

1 letter, he doesn't recall what it said, it was in writing,
2 and he discussed something with Tom. He knows that he saw
3 the June 29, 2007, line of credit. That's one of the loans
4 to which, to which the obligor and guarantors have consented
5 as part of the plaintiff's claim in this case.

6 He essentially says he never saw an individual take
7 down a note or any commitment for this 51 lot transaction.
8 That's one their witnesses.

9 Matt Randall, this is Jane Randall's nephew, who was a
10 lawyer in Fort Mill for a time:

11 You never saw any commitment from American Community
12 Bank to provide funding for the 51 lot purchase, did you?

13 I'm not sure. Those two I really don't remember. I'm
14 gonna say specifically I don't remember. It's possible
15 there's a letter of something somewhere. Possible.

16 But one thing is for certain, you don't have it in your
17 care, custody, or control, do you?

18 That's correct.

19 He was gonna be the closing attorney.

20 And if you had, you would have produced it, right?

21 Correct.

22 And are you concerned, as you sit here today, it's
23 possible?

24 That's correct.

25 Because you don't know for certain?

1 That's correct.

2 But you do know for certain that you never saw any loan
3 documents?

4 Correct.

5 The testimony, Your Honor, from the bank's side
6 consists of the loan officer, Derek Franklin, Mark DeMarcus,
7 who would of been Derek's superior, Jeff Cramer, who was the
8 chief credit officer. I'll characterize that testimony, but
9 if pushed, I have the transcript and I can read it.

10 There were meetings, but there was never any
11 commitment. Mr. Franklin says I never got a written
12 commitment when I met with them, went through this stuff,
13 marked up changes, took it back, said that it would be
14 retyped and I'd present it at closing. That's what he says.

15 Here's what needs to be connected for purposes of this
16 sanction motion, and it's, it's somewhat of a two step
17 process. Let's suppose, for the sake of discussion, that
18 what Mr. McGowan has said to the Court has any merit. It
19 doesn't, as Your Honor's gonna hear as I continue with my
20 response, but let's say that it does. If that letter
21 existed, there is no question, based on the testimony, that
22 it was a draft, that the parties understood that
23 Mr. Franklin was gonna show up at closing with another
24 document to be retyped. Consequently, it wasn't a final
25 commitment letter under the Harborside case, under the other

1 lender liability cases that I have cited to Your Honor.

2 If you don't have a final letter signed by the party to
3 be judged, you don't meet the requirement under the Statute
4 of Frauds. So, even if we produce this, which we can't,
5 cause it doesn't exist. Even if Mr. Ras had kept a copy, as
6 he said under oath, if he had one, he gave it to Bill
7 Hargrove, it still wouldn't satisfy the Lender Statute of
8 Frauds. So, when Mr. McGowan stands up and says this goes
9 right to the heart of our case and if we had this we'd be
10 moving for summary judgment, they'd loss because they don't
11 have a final letter, by their own witness' testimony, that
12 was intended to be presented at closing.

13 Now, let's turn to the facts with respect to this
14 sanctions motion as we cover one other somewhat difficult
15 legal point, and I may get these rules of evidence wrong,
16 and I apologize to the Court if I get my numbers wrong. I
17 believe that it's South Carolina Rule of Evidence 1002,
18 which is the Best Evidence Rule. The Best Evidence Rule
19 requires that you have the original document.

20 I think it's South Carolina Rule of Evidence 1004 that
21 provides an exception to the Best Evidence Rule when a
22 document's lost or destroyed. Under that circumstance, you
23 may offer secondary evidence as to, and here's where we need
24 to look at Rule 1008, a distinction is drawn in our juris
25 prudence just like a distinction is drawn in the juris

1 prudence of many other states between secondary evidence of
2 contents and secondary evidence of existence. Okay. You
3 can offer secondary evidence of contents, but I don't think
4 you offer secondary evidence of existence. The cases go off
5 in the direction of the preliminary proof requirement that
6 the trial judge has to decide.

7 Now, all of that, Best Evidence Rule, Rule 1002, 1004
8 dealing with the lost or destroyed exception of the Best
9 Evidence Rule, and 1008 dealing with the difference between
10 who hears what, the sitting judge or the, or the jury who's
11 impaneled, you have superimpose on those rules something
12 else, and that something else is called the Statute of
13 Frauds. The Statute of Frauds is an extra requirement
14 imposed by the Legislature existing in most of the states
15 that says that there are certain kinds of things where you
16 absolutely have to have a writing.

17 You can't show up and say well, I think I saw a
18 contract for the sale of real estate one time and somebody
19 else says that's just not true. You don't get to go to the
20 jury and let the jury decide whether to believe somebody
21 that there's a contract for real estate or not believe them.
22 Another example is a guarantee, promise to pay the debt of
23 another. If you look under the general Statute of Frauds in
24 most states, in order to satisfy an obligation to pay the
25 debt of the other, you got to have a writing, and, in fact,

1 the statute says this is to maintain the action.

2 Now, the Lender Statute of Frauds at Page 7-10-105 is
3 no different. To maintain the action, you have to have a
4 writing.

5 Now, this motion for sanctions makes two huge
6 presumptions, and what I have done so far is to point out to
7 the Court the first of those presumptions. That presumption
8 is that this letter exists. We say it doesn't exist. They
9 say it does. They don't have it. They kept a copy
10 according to Tom Ras, and they lost it. We don't say that
11 we lost it. We say we've gone through every dog gone thing
12 we can imagine in order to find this, and we can't find it
13 because we don't think it every exists. Their motion
14 presumes this things exists. It does not exist.

15 Now, let's go to the next step logically. The next
16 step in their motion, the second presumption, is first it
17 existed. The Bank destroyed it. That's a pretty aggressive
18 assertion particularly, particularly, given what has
19 occurred in this case. Mr. McGowan may not be aware of it
20 because his former partner, Dixie Robinson, was lead counsel
21 on this case, and Bill McKinnon was involved in this case,
22 but when Walter Joyce, the I.T. director for the Bank,
23 testified he was asked, did you delete any data?

24 He said I haven't found any evidence to lead me to
25 believe that any data had been deleted.

1 They hang their hat on Joyce's testimony that, to my
2 knowledge, that all of the computers of that age to be used
3 at ACD and already had been replaced and the hard drive's
4 drilled. I've, I've been racking my brain to think of a
5 clean or a clear way to express to the Court what this
6 means.

7 Suppose I go into Verizon and I bought a used cell
8 phone. When I leave I'm not gonna take my old cell phone
9 with me. There's nothing I can do with my old cell phone.
10 I would probably recycle it or they'd drill it, but that
11 doesn't mean the information in that cell phone is lost.
12 Most of the time people stand right there and they wait
13 while their contacts are put on their new Blackberry while
14 all the information that was on their cell phone is
15 transferred. No one from the Bank has suggested that the
16 information on Derek Franklin's computer was destroyed.

17 Your Honor, if I could hand up Page 10 from Mr. Joyce's
18 deposition. I just quoted this to the Court. I want to
19 make sure that Your Honor has that.

20 So, we have been producing information about this
21 transaction about, about which Mr. Franklin has inputted on
22 his computer during the time he worked at the Bank from the
23 beginning. We didn't violate any order of this Court. We
24 recently, and it's an ongoing process, and we will keep
25 doing it until this case is over, we go back through

1 everything that we can possibly imagine might contain some
2 data, and it is correct we fulfilled our obligation under
3 Rule 26-E, the continuing obligation to produce, and
4 recently figured out a way to get into the Outlook Calendar
5 for Mr. Franklin.

6 Now, let's talk about chronology for just a moment.
7 Mr. Franklin doesn't work for the Bank anymore. Your Honor
8 probably figured that out. Well, Your Honor may remember
9 that from the prior motion. He hadn't worked for the Bank
10 for a while.

11 The Bank went through a merger. Your Honor knows that
12 too from the prior motion. And as a part of that merger,
13 systems were integrated. Walter Joyce who testified, he
14 hadn't been to the Bank going back to 2008. He just came
15 recently and took over the I.T. function. There was someone
16 prior who had the I.T. function at American Community Bank,
17 and I'll let Ms. Driscoll share with the Court because she
18 has firsthand knowledge a little bit about that prior person
19 as it relates to this motion.

20 MS. DRISCOLL: Your Honor, Mr. Joyce was hired by the
21 back in November of 2009. Before he was hired, Mrs. Ruth
22 Bayne was the I.T. person. She was identified to counsel
23 for Oaktree and Ras. They indicated, at first, they wanted
24 to depose her as well as Mr. Joyce despite the fact that, at
25 the time, Mrs. Bayne's mother was in the intensive care unit

1 of the hospital, we continued to correspond with her to see
2 when she would be available for deposition.

3 We gave those dates to counsel for Oaktree. We never
4 heard back. They made the choice not to depose Mrs. Bayne.
5 She would have the knowledge about things that went on while
6 Derek Franklin was employed by ACB because he was let go in
7 2008 while she was there. Again, she would have that
8 knowledge. Not Mr. Joyce. And since she was terminated,
9 Mr. Joyce did not have any contact with her. I've spoken
10 with Ruth Bayne, but she and Mr. Joyce didn't interact. But
11 he would have no knowledge as to whatever she took before he
12 came on board.

13 MR. SHEEDY: And, Your Honor, after Your Honor's order,
14 when we first heard from Mr. Robertson that there was this
15 request that we image the Bank's computer, it's not that the
16 Bank came back and said oh, no, we won't let that happen.

17 I sent a letter, on November 22, 2010, it's attached to
18 our response, and it was before Walter Joyce's deposition,
19 (inaudible response), and I said these systems were used by
20 Yadkin personal today and will continue to be used
21 throughout this litigation. If your clients agree to pay
22 the cost of imaging the non-privileged discoverable
23 information contained on the systems media devices, Yadkin
24 is amenable to discussing such imaging. We never heard a
25 word back.

1 On January 18th, 2011, after the deposition of
2 Mr. Joyce, we provided, because they wanted documents in
3 native format, they'd gotten the hard copies that had come
4 from Franklin, they wanted them in native format. So, we
5 gave them a disc with the 18 documents that they've
6 requested that were in native format, and we furnished it to
7 them.

8 What's my point?

9 My point is, there's nothing to suggest that Derek
10 Franklin's information was destroyed. The evidence is the
11 information still exists and we can furnish it to them
12 before and after Joyce's deposition.

13 There is one other portion of this letter that I would
14 like to share with the Court. If Your Honor looks at Page 2
15 of my January 18th, 2011, letter to Mr. Robertson. I don't
16 know if Your Honor has a copy of that letter in front of him
17 or not.

18 THE COURT: Let's see. I've got some letters.

19 January what?

20 MR. SHEEDY: I'll be happy to hand this up. This would
21 be the January 18th---

22 THE COURT: I got it.

23 MR. SHEEDY: Okay. If Your Honor would look at Page 2.
24 Plaintiff responded to your letter, talking to Gibson. I
25 informed you there is no Oaktree Homes folder on the

1 computer now used by Aaron Sims. He's the loan officer at
2 the Tega Cay that took over Derek's portfolio. Nor is there
3 an Oaktree Homes folder on the H drive citing Aaron Sims
4 supported by the (inaudible response).

5 Mr. Sims' computer was not replaced in 2010, but was
6 not assigned previously to Derek Franklin. I now understand
7 from my client that the computer formerly used by Derek
8 Franklin was a laptop. Upon closing of ACD's Rock Hill
9 office, that office, Your Honor, was over in the old
10 Guardian Building, that laptop was retrieved by Ruth Bayne.
11 I've asked my client to determine the location of the laptop
12 or if it is even still in existence.

13 I don't know the answer to the, to the question of
14 whether that physical laptop is still in existence. But it
15 is certainly an, an aggressive assertion that the Bank had
16 something, okay, we're, we're presupposing the existence,
17 destroyed that something, we're presupposing the
18 obstruction, and then we're saying that that something
19 necessarily was all Derek Franklin's information when it's
20 clear from the record, we have Derek Franklin's information,
21 and we've been giving it to them, and we'll continue to give
22 it to them. He's not a brain child of somebody in I.T.
23 thinks of another way to access something, we've got an
24 obligation, under 26-B, to continue to produce and we will
25 fulfill that obligation.

1 The fact of the matter is, as we stand here today, the
2 Bank doesn't believe this letter ever existed, and, and even
3 if we had produced it, it wouldn't matter under the Lender
4 Statute of Frauds because, by their own testimony, it was
5 gonna be retyped and resigned, and, therefore, did not
6 constitute a final commitment within the meaning of the
7 Court of Appeals recent decision in Harborside.

8 We shouldn't be sanctioned in this case. We didn't do
9 anything. We weren't disobedient. We certainly weren't
10 willfully disobedient, and to go so far as to suggest we're
11 just gonna strike all of the Statute of Frauds claims, and
12 let this case go forward with, with secondary evidence of
13 existence, secondary evidence of content, and let the jury
14 decide to ignore the Statute of Frauds, there is no support
15 for that in any of these cases.

16 THE COURT: Mr. McGowan.

17 MR. MCGOWAN: Judge, thank you.

18 We know for a fact that this Bank has concealed and is
19 continuing to conceal information.

20 How do we know that?

21 We know that because of this calendar. This has been
22 on their system since May of '08. It was printed in March,
23 and it clearly supports our version of events because it has
24 the meeting on May 6th. May 9 with the Ras', and it has
25 this closing on June 6th. They had this information at

1 their disposal since our discovery request in July of 2009,
2 and Your Honor specifically required them to produce stuff
3 like this by your April 2010 order. They didn't until
4 Monday.

5 How do you know they're still concealing information?

6 Because the way Outlook works, you can click on these
7 particular appointments and you get more explanation. You
8 get more detail. You get more information about what that
9 means. And, for instance, if you were to click on the
10 appointment on June 6th at 3:00, it says meet with Tom Ras
11 and then there's a paren, which has a half a letter after
12 it. If you click on the actual appointment, there's more
13 information there.

14 This is -- how can they say they're not concealing
15 information when March 21st is when they had this and they
16 gave it to us three days ago?

17 This is the sort of outrageous stuff that shouldn't
18 happen. They got an obligation to produce this two years
19 ago, and we can't take their word for it because we know
20 that this Bank is not capable of complying with discovery
21 because this is what has happened. And if they -- and
22 apparently there's more stuff out there. Otherwise it
23 wouldn't be, the Bank wouldn't be hedging and saying we'll
24 continue to produce information.

25 Listen, fellows, this case is supposed to come to trial

1 last week. The time to produce information was in response
2 to Your Honor's order. Now, if we'd wanted to go take their
3 word on it, but we can't.

4 Now, relevant to the Statute of Frauds claims, we can
5 talk about that, but to say that this information is not
6 critical or not important or not, for lack, it's not
7 prejudicial, I think is, is not right. There's got to be a
8 remedy for this.

9 There's only potential benefit in the Bank having
10 control of this information and saying it doesn't exist.
11 They only have potential benefit from that unless Your Honor
12 holds them accountable for violating your order, and this
13 clear concealment of even more information.

14 One last point on the, on the letter, the commitment
15 letter. Mr. Ras, Mr. Ras did have an unsigned copy of that
16 commitment letter that you gave to Mr. Hargrove and Mr.
17 Hargrove apparently gave it to his banker who then lost it,
18 but this, regardless of what---

19 THE COURT: Has Mr. Hargrove been deposed?

20 MR. MCGOWAN: Yes, sir, and he says he saw it, but it
21 was an unsigned copy because the only, only signed and
22 executed copy, which actually Derek Franklin signed on
23 behalf of the Bank after the pen and ink changes, was in
24 Mr. Franklin's possession.

25 Now, we may or may not see an imaged copy of that

1 signed writing. It may just be in paper, but we would have
2 evidence on their server and on his hard drive, and Derek
3 Franklin testified that he would use his hard drive and do
4 his word documents, that the, that that document existed.
5 And even if it's been deleted, forensic computer people can
6 go back in, find it, and put it back together, and that's
7 why drilling this hard drive was such a big deal, and
8 there's no remedy -- we're not just saying that the Statute
9 of Frauds -- they ought to be -- they, they ought to be,
10 have all of their defenses to the counterclaim struck
11 because this is just, this is litigation misconduct that,
12 that can not be allowed.

13 THE COURT: All right.

14 MR. SHEEDY: If they wanted a forensic accounting at
15 any time during the course of this case, they could move,
16 under Rule, Rule 36, seeking a forensic accounting.

17 Second of all, if the Bank were trying to conceal this
18 calendar, why in the world would we now produce it?

19 we're under no compulsion. We didn't absolutely need
20 it for the purposes of today's argument. The ongoing
21 obligation to find things and produce them exists for a
22 reason under Rule 26-D. Production of documents is not some
23 snapshot in time. Parties are constantly looking for things
24 over the course of the case, and this case has been highly
25 unusual with respect to electronic information.

1 Mr. McGowan says that the Bank violated Your Honor's
2 prior order. Well, I've looked at the order. I'm not sure
3 I can see which provisions of that order has been violated,
4 but the fact of the -- oh, one more correction for the
5 record.

6 Mr. Hargrove can't find this letter. He doesn't have
7 the letter. He indicated that he was gonna talk to his
8 banker to produce that letter if he could find it. Dan
9 D'Agostino represents Mr. Hargrove. I talked to Dan a few
10 times about this. They don't have the letter.

11 Now, it is a bit -- and let me go back and look at this
12 testimony and remind the Court what Mr. Ras said. Mr. Ras
13 didn't say that what he had was an unsigned blank copy of
14 the commitment. He says, and I begin on Page 119 at Line
15 11.

16 So, some day in May of 2008 you took this written
17 commitment letter back because of the volume of errors in
18 it.

19 Is that your testimony?

20 Absolutely.

21 Did he ever return the commitment letter to you?

22 No, he did not.

23 Did you keep a copy of it?

24 We're talking about this signed document that
25 Mr. Franklin took back.

1 We did and a copy was forwarded to Bill Hargrove to
2 help satisfy his Bank.

3 I have nothing further.

4 THE COURT: I'll obviously take this under advisement.
5 I will, I will point out that having had my hands slapped by
6 the Supreme Court in Hanson versus DHL Laboratories, I am
7 not gonna rule on evidentiary issues. I'm, I'm not in a
8 position of, as someone, one of you mentioned earlier,
9 evidentiary issues are for the trial judge. Hansen versus
10 DHL Laboratories has got my attention.

11 All right.

12 MR. SHEEDY: I, I -- may I just say one thing about DHL
13 and I, and I do understand what that case says?

14 THE COURT: It's really in the footnote.

15 MR. SHEEDY: Well, I'll accept, for purposes of today's
16 banter with the Court, that that wasn't dicta because I
17 think the Court is suggesting is wasn't dicta. The best
18 evidence of rule---

19 THE COURT: The Court took it to heart.

20 MR. SHEEDY: Pardon me?

21 THE COURT: I said the Court took it to heart.

22 MR. SHEEDY: Well---

23 THE COURT: And, and, quite frankly, in my defense,
24 we're making a record that may go up, they misinterpreted
25 what I said in my order.

1 MR. SHEEDY: I don't doubt that in the least, Your
2 Honor. But, nevertheless, the best evidence rule is really
3 not an evidentiary rule. It is a rule of substantive law
4 and, and that's kind of a black letter proposition.

5 We don't need to be arguing the Best Evidence Rule, as
6 I said, because there's a gloss superimposed on the Best
7 Evidence Rule called the Statute of Frauds, and, in this
8 case, the Lender's Statute of Frauds.

9 THE COURT: Now we're down to the motion for summary
10 judgment I believe by Yarkin on counterclaims.

11 Is that where we are?

12 MR. SHEEDY: I believe so, Your Honor. If I can have
13 one second to get---

14 THE COURT: All right. Well, why don't we take a real
15 short kind of refresher break.

16 MR. SHEEDY: Okay.

17 THE COURT: We'll take about a five minute break.

18 (WHEREUPON, a short recess was taken at this time.)

19 THE COURT: Mr. Sheedy.

20 MR. SHEEDY: Next, Your Honor, is the Bank's motion for
21 summary judgment on the breach of the contract claim. That
22 is the first cause of action in the counterclaims.

23 As a preview of coming attractions, I would say to the
24 Court there are five independent, self-sustaining, and
25 compelling reasons, any one of which would be sufficient and

1 all of which militate, under Rule 56, that summary judgment
2 be granted for the Bank on the first cause of action for the
3 breach of contract claim.

4 The facts which will be argued in connection with this
5 motion, except as testified by the obligor and the
6 guarantors, it's not that the Bank concedes that those facts
7 are correct. As Your Honor has heard, the Bank believes
8 that this is a fabrication. But Your Honor is not weighing
9 the credibility of the witnesses.

10 For purposes of today's contract motion, it is assumed
11 that what the two, what the obligors and guarantors have
12 said is correct, and the question then will become, given
13 the evidence in the record when applied to the law, is there
14 any relief that can be afforded, and the answer, the Bank
15 respectfully submits, is no.

16 The five reasons, Your Honor, are, first, as you, as
17 Your Honor probably assumed from the argument that we've had
18 on the two prior motions---

19 THE COURT: well, I also had the brief in front of me.

20 MR. SHEEDY: I'm sorry?

21 THE COURT: I said I also had your brief in front of
22 me.

23 MR. SHEEDY: Yes, Oaktree cannot produce a final
24 commitment letter signed by Bank as the party to be judged.

25 Second, Oaktree cannot show a commitment ever existed,

1 was received by Oaktree, and then subsequently lost or
2 destroyed. That is an argument essentially rooted in the
3 Lender Statute of Frauds and the substantive law called
4 Substantive Contract Rule now known as the Best Evidence
5 Rule.

6 Third, that any commitment, and we really haven't
7 discussed this yet today, so I would -- I'll call special
8 attention to the fact that any commitment for the 3.8
9 million dollar loan was subsequently superceded by a loan
10 for 11 lots of the 51. Your Honor may remember earlier
11 today I said that one of those lots was actually sold
12 between the commitment and closing. So, the collateral
13 consisted of ten, but 11 of the 51 lots were not available
14 by the end of July.

15 There was no promise in that subsequent loan to make
16 any other loans or any other sums in Phase II. There was an
17 agreement that the existing line of credit was not removed,
18 that's the 2.5 million dollar builder line, which is the
19 first cause of action in the plaintiff's complaint, and
20 there was a covenant that those loan documents constitute
21 the entire understanding between Oaktree and the Bank. A
22 fairly standard agreement clause in a loan document, which
23 is a complete integration.

24 Oaktree had -- this is the fourth reason. Oaktree had
25 no signed commitment for a bridge loan without which Oaktree

2
1 could not buy the 51 lots from Har Lee, which let's go back
2 and do the second, and do the numbers. Whether the Har Lee
3 purchase was 4.25 million as alleged in the counterclaim or,
4 in reality, the 4.2 million dollar loan, 4.4 million dollar
5 purchase price, which is well settled in the testimony, 3.8
6 million is less than 4.4. Consequently, Oaktree would need
7 additional funding in order to buy the 51 lots. For there
8 to be any loss, Oaktree would of had to have been able to
9 bridge that gap and buy those lots and there'd be no damage
10 from the breach of any alleged loan commitment.

11 Fifth, PIH, remember we alluded to that and used that
12 acronym to stand for Palmetto Investment Holding, PIH, the
13 ultimate purchaser of this elaborate flip, didn't have any
14 money to pay 6.697 million in order to buy the 51 lots if
15 Oaktree had actually purchased them from Har Lee.

16 And then, last, I would say to Your Honor, again, that
17 there are no facts in dispute with respect to these five
18 reasons.

19 Let's start with the Lender Statute of Frauds. The
20 Lender's Statute of Frauds appears at 37-10-105. I think
21 this was a statute enacted after Your Honor had left the
22 Legislature, but it is a stature that's been around for
23 sometime. It's basically a requirement that in order to
24 lodge a claim, to maintain an action against a financial
25 institution, to assert some kind of equitable defense, you

1 have to have a writing signed by the party to be charged.
2 No legal or equitable claims and defenses may be asserted
3 with respect to a promise to renew, extend, modify loan
4 unless you have a writing signed by the party to be charged.

5 The statute applies to loans that are greater than
6 \$50,000 in amount. The statute has a somewhat confusing
7 exception near the end that all of the Courts have
8 interpreted the same way to mean that obviously if you have
9 a promissory note signed by a borrower and a mortgage signed
10 by a borrower, that doesn't have to be signed by the Bank in
11 order to be enforceable.

12 So, that's what the Lender Statute of Frauds says.
13 There are, and I, and I may get this number wrong, but I
14 think I cited every single one of them in our brief, either
15 seven or eight Trial Court decisions under the Lender
16 Statute of Frauds. Judges Hughston, Dennis, Judge Smoak,
17 and that's directly down in Aiken whom I understand is
18 retired, to name a few, have all looked at the Lender
19 Statute of Frauds and rendered opinions. Judge Duffey,
20 sitting on the Federal Bench, has looked at the Lender
21 Statute of Frauds and has rendered an opinion.

22 There are two reported cases under 37-10-105. The
23 first is Harborside, and we'll be talking about Harborside
24 in a few minutes, because Harborside is a prequalification
25 case where the Court said oh, no, a writing signed by the

1 lender that, that indicates you're prequalified doesn't
2 satisfy the requirement of a writing under the Lender
3 Statute of Frauds. And then there's the Midland case where
4 the Court discussed the Lender Statute of Frauds, but found
5 that it didn't need to interpret the Lender Statute of
6 Frauds because it was a subsequent transaction that made it
7 clear that the earlier alleged oral agreement had been
8 extinguished.

9 I have shared with the Court the testimony over the
10 course of the two prior arguments. I don't see a need to go
11 back through reading Tom Ras; testimony. Your Honor's now
12 heard it twice. He essentially said he doesn't have the
13 letter, he did at one time, Hargrove lost it, but, in any
14 event, Ras understood Franklin would show up at the closing
15 with a retyped clean commitment letter that was going to be
16 have to be signed again.

17 We talked about Dawne Ras' testimony from her
18 affidavit. From her deposition, she said, on Page 64, that
19 as you sit here today, you don't have a piece of paper from
20 American Community Bank that's a signed commitment for 3.8
21 million dollars to finance 51 lots, do you?

22 No.

23 I'm going to turn for just a second and let Your Honor
24 hear, for the first time today, the Bank's testimony on this
25 issue. First Derek Franklin, the loan officer, on Page 7 at

1 Line 16 from his transcript, at any time prior to the end of
2 June 2008 did you prepare a commitment letter for a
3 transaction involving 51 lots in Phase II of Palm Tree Cove?

4 I prepared a commitment letter for a builder line of
5 credit and a lot loan for Oaktree Homes. I did not prepare
6 one for, a commitment letter that is, for 51 lots in Palm
7 Tree Cove.

8 Okay. The commitment letter that you did prepare, was
9 it your understanding that loan was gonna fund the purchase
10 of 51 lots in Palm Tree Cove?

11 My understanding of that commitment letter was that it
12 would be used for lots in the building of houses to spec and
13 that the commitment letter was not specific to the 51 lots
14 in Palm Tree Cove.

15 So, would the answer to that question be no?

16 That is correct.

17 Did you, on behalf of American Community Bank, ever
18 agree to lend 3.8 million to Oaktree Homes for the purchase
19 of lots in Palm Tree Cove Phase II?

20 No.

21 I probably should have said earlier that this was Dixon
22 Robinson's examination of Mr. Franklin. Not mine.

23 You wouldn't have had to ask Tom Ras do you have a
24 commitment letter for a 3.8 million dollar transaction?

25 I wouldn't -- you wouldn't have to ask him that

1 question?

2 well, I was the loan officer. I know I didn't prepare
3 a commitment letter.

4 Derek Franklin says he didn't prepare the commitment
5 letter.

6 Jeff Cramer, chief credit officer with the Bank.

7 Did you try to find that credit memo which mentioned in
8 the first sentence (inaudible)?

9 I tried. I pulled every email transaction between
10 Derek and Tom at Oaktree Homes, anything that had, that
11 subject matter in it, to try and figure out if there's any
12 communication between the two of them, and, and, you know,
13 we asked Tom on the phone, you know, Mark asked that look,
14 and this is Mark DeMarcus, look, you know what the Bank
15 formal commitment of this and there's a formal commitment
16 letter. Please provide it and we'll move on to that, and we
17 didn't get anything from Tom Ras.

18 That's on Pages 43 and 44 of Mr. Cramer's testimony.

19 Mark DeMarcus was deposed in this case. Line 17, Page
20 49.

21 Do you recall, during that conversation, asking Mr. Ras
22 if he had a commitment letter from the Bank for the 3.8
23 million?

24 A. I do recall. I do recall Mr. Ras indicating that
25 he believed that Derek Franklin and/or Harry Carlere,

1 that was the prior credit officer, officer, had indicated,
2 at some point in the past, that they would pursue this
3 transaction. Not this specific transaction, but
4 transactions similar to this.

5 Okay. Did he tell you that there was a commitment
6 letter?

7 I'm not sure whether the reference to commitment letter
8 or commitment, and at that time I'm not sure whether it was
9 Mr. Cramer or myself. We said well, we're in the here and
10 now. If you've got a commitment letter, we'd like to see
11 that. Certainly like to review that. But to my knowledge,
12 he's never produced a commitment letter.

13 Q. Well, between you and Mr. Cramer and Mr. Franklin,
14 who else, apart from the three of you, who else at American
15 Community bank, in June of 2008, would of issued a
16 commitment letter to Oaktree for a 3.8 million transaction?

17 A. To my knowledge, there would have known about it in
18 June 2008 and issued a commitment letter for 3.8 million
19 dollars.

20 Q. Okay. So, the only commitment letter that I was
21 aware of was the 2007 commitment letter?

22 That's the builder line of credit that we discussed
23 earlier that forms the part one of the causes of action in
24 plaintiff's complaint.

25 A. From Mr. DeMarcus. I asked if he, Tom Ras, had a

1 commitment, let's see it.

2 Q okay. Have you ever seen a commitment letter that
3 sets out the terms of the 3.8 million dollar transaction
4 between the bank and Oaktree?

5 A. I've not seen a commitment letter.

6 So, I want the Court to appreciate that the Bank
7 believes it never existed in the first place. Earlier I
8 shared with the Court Matt Randall's testimony. He couldn't
9 testify that he'd ever seen it or had it. Matt Cox's
10 testimony, he said it's possible. Couldn't go beyond
11 possible.

12 I did not share with the Court earlier Chris Griffin's
13 testimony. Chris Griffin, a member of the York County Bar,
14 was representing Har Lee in the negotiation over the
15 purchase and sale agreement with Oaktree to buy the 51 lots.
16 Here's what Chris said under oath.

17 You never saw a written commitment letter for financing
18 for the 51, he said acres, but he meant lots, issued by
19 American Community Bank, did you?

20 A. No.

21 Nor did you ever see a written commitment letter issued
22 by the Bank of York for any portion of the purchase price
23 for the 51 lots, did you?

24 No.

25 Bank of York was gonna provide bridge financing though.

1 That is the difference between the 3.8 and the purchase
2 price of 4.2 or 4.4 on the acquisition of the 51 lots from
3 Har Lee.

4 Let's turn to Leo Sandifer's testimony. Leo Sandifer
5 was the loan officer at the Bank of York who was handling
6 Oaktree's lending relationship with the Bank of York.

7 There was no obligation on the part of Bank of York to
8 provide 1.7 million in financing, was there?

9 No.

10 Did you ever have in your possession or in connection
11 with any of these discussions that you may have had with
12 Oaktree or any written commitment letter from American
13 Community Bank that was providing financing for any of the
14 51 lots?

15 A. No, sir.

16 Let's see what the accountant for Oaktree, a Mr. Harry
17 Lee, said under oath.

18 And you have never seen any written commitment letter
19 signed by anybody at American Community Bank to provide
20 financing for the 51 lot transaction, have you?

21 A. No.

22 Do you have a piece of paper from American Community
23 Bank that is a, that is a commitment to provide financing
24 for the 51 lot transaction?

25 A. No, sir.

1 Your Honor, I'm gonna hand up what is previously marked
2 as Defendant's Exhibit 10 to Cramer. This letter is
3 probably in the, in the Court's file in triplicate by now
4 because I think Dixie Robinson furnished it a couple of
5 times when the Rule 12(b) motions were heard by Judge
6 Alford.

7 This is the only writing that exists with respect to
8 the 3.8 million dollar loan transaction. You will see, in
9 Paragraph 2 of that letter, a reference to 3.8 million and
10 what it says is in the process of. It does not meet the
11 Lender Statute of Frauds. It doesn't contain an interest
12 rate. It doesn't have a maturity date. It doesn't contain
13 any financial covenants. It doesn't contain a payment
14 amount. In the process of is not a commitment letter.

15 For that reason, given that this is the only writing
16 which can be produced, the breach of contract cause of
17 action necessarily must fail. You cannot maintain an action
18 under 37-10-105 on a promise to loan unless you have a
19 commitment letter signed by the party to be charged.

20 Let's talk for just a moment about what constitutes a
21 commitment letter because our Court has now looked at that
22 and provided some insight and that insight is found in the
23 Harborside case. Harborside, Your Honor, is discussed in
24 our brief.

25 Here are the facts in Harborside. You have a borrower.

1 The borrower gets a letter from the lender advising them
2 that they were conditionally qualified for the mortgage loan
3 establishing an expiration for the prequalification,
4 indicating the interest rate is gonna float unless they sign
5 a rate lock agreement. Pretty common in the residential
6 area.

7 Subsequently, the Bank advises the borrowers, because
8 there were two in this case, that, that prequalification was
9 subject to receipt of all necessary documentation verifying
10 the information upon which the condition of qualification
11 was based, satisfactory appraisal, and clear title. The
12 Bank said additional information was required before final
13 approval, but these letters were signed by the party to be
14 charged.

15 After those letters, the Bank, in Harborside, sends the
16 borrowers a conventional loan preapproved approving a needs
17 list, and a needs list was a laundry list of documents that
18 the borrowers would need to furnish the lender that the
19 lender described as verification requirements. The
20 borrowers even signed an application disclosure informing
21 them of appraisal and credit reporting fees. According to
22 the borrowers, the day before the closing date for the
23 purchase of the property, the borrower contacted the Bank to
24 determine the status of their loan and were informed that
25 the loan had been denied.

1 Thereafter, they got their denial letter, which, again,
2 is a pretty typical process in the consumer residential
3 area. They brought an action claiming that they had a
4 commitment, and they sued on the writings that I just
5 described.

6 The Court analyzed 37-10-107. There's a lot of
7 discussion in this case about whether 37-10-107 is really
8 constitutional because it appears as part of a UCCC. It's
9 over in Title 37, but it's really not a consumer statute so
10 much as it is a commercial statute.

11 Here's what the Court ultimately said when the Court
12 looked at these letters and applied them under 37, applied
13 them to a statute, 37-10-105. We agree with the Circuit
14 Court that the February 24th, 2006, letters indicated that
15 the loan was not guaranteed, and further, none of the
16 documents submitted to the Circuit Court show that the
17 borrowers had obtained Bank's final approval for the loan.
18 For example, in the February 24th, 2006, letters Bank
19 specifically said the loan was subject to additional
20 verification and had not yet been finally approved.

21 This prequalification, which is based on the
22 information you provided to us subject to receipt of all,
23 and then they ran through what the letter actually said. We
24 hold Secove, which is the borrower, has not shown that the
25 documents satisfying the writing requirement or that they

1 create a general issue of material fact in this regard.

2 why have I so tediously gone through Harborside?

3 It is to make the point this case is not a case about
4 the absence or the non-existence, and it's not based solely
5 on oral testimony. This is a case where the Court had, I
6 won't call it a stack, they have three or four writings and
7 they were called upon to decide whether those writings
8 constituted a final commitment that would meet the
9 requirements of the statute and the Court said no.

10 what we have in this case is substantially less than
11 that. We have one letter that says in the process of and
12 nothing else. We have testimony coming from the obligor and
13 the guarantors to the effect that they signed something
14 clearly extensively revised. It was taken back by the loan
15 officer. They lost their copy. But they all understood
16 they were gonna show up at some subsequent date, get another
17 one, and they were gonna have to sign that, the clean one,
18 which had been retyped.

19 That is an unconverted sworn statement that it was the
20 intent of the obligor and the guarantors that subsequent
21 events were going to take place and that they all agreed
22 that these subsequent events were gonna take place. What
23 they have, at best, if they were able to find it, if it
24 existed, is a draft where they went through, marked through
25 stuff, and anticipated that some, something else was going

1 to be offered, and under Harborside, even if we have that so
2 called letter here today, we -- it won't satisfy the Lender
3 Statute of Frauds.

4 There has been a suggestion that the Lender Statute of
5 Frauds somehow can be satisfied because we'll take the
6 letter that Your Honor has in front of you, the May 9, 2008,
7 letter, we'll go back to the July 2007 commitment on the
8 building line, and we'll say that the May 9 letter
9 constitutes a modification of the earlier letter, and that,
10 therefore, we have all the material terms and conditions and
11 that satisfies the statute.

12 well, here's the problem with that. If Your Honor
13 looks at the earlier commitment letter, and I don't know if
14 Your Honor has a copy of that before you. If you don't,
15 I'll share it with you. It's ACB 1411 through 1415, the
16 July 13, 2007, building loan.

17 THE COURT: I don't think I have it.

18 MR. SHEEDY: Okay.

19 THE COURT: It's not easily accessible.

20 MR. SHEEDY: Okay. I'm not gonna go through that
21 letter. I'm just going to summarize and make my point,
22 which is that's a different loan. It doesn't contemplate 51
23 lots. It contemplates that the borrower is gonna be
24 building homes on lots. This 51 lot transaction Your Honor
25 has heard. We have the borrower that's gonna buy

1 essentially raw land with a little bit of horizontal
2 improvement in it, water, sewer, to some extent, roads, hold
3 it for three days, flip it, and make about 2.2 million
4 dollars. Those are the allegations in the counterclaim.
5 The two, the May 9th letter and the July 2007 letter, are
6 not a commitment either.

7 Now, that takes us to the second of the five grounds
8 for dismissing the first cause of action. The first ground
9 was they just don't meet the statute. Now, they say, they,
10 of course, being Oaktree and the Ras', they say they can
11 meet the statute because, at one time, they received this
12 letter that's been described that was marked up and taken
13 back by the lender, that meets the word receipt that appears
14 in 37-10-105. Says you have to receive something signed by
15 the party to be charged. So, they say that meets received,
16 that they can offer testimony that they believe it once
17 existed, it no longer exists, and here's our recollection of
18 the contents of the document, and that the Lender Statute of
19 Frauds would allow them to do that.

20 The problem or problems with that line of argument are,
21 first, you can't, through such security, eliminate the
22 fundamental policy that there are certain types of
23 transactions where you have to have a writing signed by the
24 party in charge to satisfy the Lender Statute of Frauds.

25 Has our Court ever looked at this before?

1 Yes.

2 Have other Courts looked at this too?

3 Of course they have and I would share that.

4 What has our Sister State done with this kind of an
5 argument?

6 In Tetter v. Alford, which may be found at 493 S.E.2d
7 487, the North Carolina Court is wrestling with the question
8 of what to do about the fact that somebody was claiming they
9 had a deed to convey an easement, but they couldn't produce
10 it. The North Carolina Statute of Frauds says all contracts
11 to sell or convey any lands, tenements, or (inaudible) or
12 any interest in it concerning that shall be void unless such
13 contract or some memorandum or note thereof, kind of a UCC
14 Article II motion, the memorandum or note thereon, be put in
15 writing and signed by the parties in charge. Thus, North
16 Carolina law requires that a contract or deed purporting to
17 convey an easement be in writing and that the contents of
18 that writing be proven only by the writing itself, not as
19 the best, but as the only admissible evidence of its
20 existence.

21 New York, Jur Real Estate, Inc. versus Smiles, 541 New
22 York Subsection Page 515, and I quote, "as a general rule,
23 the adequacy of the writing for the Statute of Frauds
24 purposes must be ascertained from the writing itself.
25 Resort to parole evidence will underline the purpose of the

1 Statute of Fraud. To the extent that the defendant's
2 argument is predicated under parole evidence, we disregard
3 them."

4 Am I asking the Court to apply New York and North
5 Carolina law?

6 No, I'm not.

7 The Court doesn't have to do that. Our Court is in
8 accord with what I've just shared with Your Honor. In
9 Woodruff Oil and Fertilizer Company versus Ports and
10 Property Oil and Refinery, which is a Fourth, Fourth Circuit
11 decision, I think I have a copy of that. This was a case
12 involving a contract for the sale of cotton seed oil and the
13 issue is whether the plaintiff had met the Statute of Frauds
14 requirement. Here's what the Fourth Circuit said in that
15 case..

16 Every essential element of the contract falling under
17 the Statute of Frauds must be proved by writing. When the
18 seller denies the contract, the buyer cannot establish it by
19 proof that he was buying it for himself and that the seller
20 authorized him to sign for both. The Statute of Frauds
21 intended to prevent any position by one man imputing to
22 another a sale on parole testimony would be nullified by the
23 mere security if a party materially interested in making a
24 purchase were allowed to prove, by parole evidence, that he
25 was authorized to sign the name of the seller, and that the

1 seller knew of his adverse interest.

2 If you don't physically have the writing, you can't
3 satisfy 37-10-105.

4 Yeah, 107. That's right. I'm sorry. I apologize it's
5 37-10-107. I've probably been saying 105. Excuse me.

6 Let's look for just a moment about, look at the facts
7 irrespective of the Lender Statute of Frauds. Under
8 traditional contract law, a loan officer arrives, shows a
9 commitment letter to a prospective borrower. We have an
10 offer. The borrower looks at it and says, which Mr. Ras
11 testified and Your Honor heard me read his testimony, oh,
12 the interest rate is wrong, and this is wrong, and that is
13 wrong, and they proceed to go through it, mark through it.

14 what do we have?

15 we don't have an acceptance. We have a counteroffer.

16 Now, this is not an article two analysis because we're
17 talking about a loan. We're not talking about goods. So,
18 we have a counteroffer, which is a rejection.

19 Under traditional contract principles, you wouldn't
20 have a valid and binding commitment if they had initialed
21 and signed -- if the parties had intended that there was
22 going to be a subsequent event creating a clean version that
23 everybody was going to review and sign, that would
24 constitute the meeting of the minds creating an enforceable
25 contract upon which an action could be brought.

1 Oaktree isn't trying to say in this case that a final
2 loan commitment was delivered to it and then subsequent lost
3 or destroyed. Oaktree's trying to say that this draft, that
4 was marked up and initialed and may be signed, should be
5 admitted, and from that it should be allowed for someone to
6 infer that there was a final commitment actionable that
7 would sustain a breach of contract cause of action. I, I
8 submit to Your Honor that's not what is permissible under
9 South Carolina law.

10 Let me move to the third independent self-sustaining
11 grounds for summary judgment.

12 MR. MCGOWAN: Do you want me to get these as he does or
13 do you want me to come back at the end and try to hit them
14 all?

15 THE COURT: Just come on back at the end.

16 MR. MCGOWAN: Yes, sir.

17 MR. SHEEDY: The Ras are persistent borrowers. When
18 the closing didn't occur in May or June 6th of 2008 on the
19 51 lot transaction, they apparently still wanted at least
20 some of those lots. It is without question that in July of
21 2008 the Ras' obtained a loan from the Bank for 1.3 million
22 dollars. It is the first cause of action in the plaintiff's
23 complaint because they didn't repay it. They bought, from
24 Har Lee, 11 of these 51 lots. They signed a commitment
25 letter in July of 2008. At the closing on the subsequent

1 loan, they signed a promissory note and they signed a
2 mortgage.

3 The commitment in July of 2008, July 22nd, 2008, if
4 Your Honor would like I'll hand that commitment letter up.
5 I've highlighted some language in it. There are two
6 paragraphs, one on the first page, one on the second page,
7 that make reference to the fact that the earlier line of
8 credit is not renewed by making that loan. There's no
9 mention anywhere in that commitment letter of loaning
10 anything other than the money necessary to buy 11 lots. Not
11 the 51.

12 Subsequent to that commitment, parties signed a
13 promissory note and mortgage. Those are two different
14 documents by the way, for the record. In the mortgage,
15 there was standard language as follows: Standard
16 contractual language even outside the lending industry.

17 This mortgage, together with any related documents, and
18 that's a term of art cause in the mortgage it's defined to
19 include a note, constitutes the entire understanding and
20 agreement of the parties as to the matters set forth in this
21 mortgage. No alteration or amendment of this mortgage shall
22 be effective unless given in writing or signed by the party
23 or parties sought to be charged or bound by the alteration
24 or amendment.

25 what Oaktree would like to do is suggest that the

1 events in May of 2008, which Your Honor has heard today, may
2 be used to explain the area or contradict this subsequent
3 loan. That language is not a partial integration. It's
4 complete integration. It's not just the Parole Evidence
5 Rule. It's basically as broad as to anything prior or
6 contemporaneous. More substantive rules of contract law.

7 This subsequent loan made it impossible for Oaktree and
8 the Ras to buy 51 lots, sell them to Har Lee, and then -- I
9 mean buy 51 lots from Har Lee and then turn around and sell
10 them to PIH. Oaktree came forward a month later agreed,
11 okay, I want a loan for 11 lots, I'm signing that up, I'm
12 gonna build on these 11 lots. Nobody held a gun to their
13 head.

14 what is the legal significance of those points?

15 Let's look at the Midland case. It's -- it too is a
16 fairly recent case from our Court. It's cited in our brief.
17 It's Midland Mutual Life Insurance versus Harold, a 1999
18 decision. As I've said earlier, the Court, in Midland,
19 chose not to address the Lender Statute of Frauds because
20 the Court felt it didn't need to get into the Lender Statute
21 of Frauds due to subsequent events.

22 Now, in this case, we have a 1992 alleged oral
23 agreement that the lender supposedly breached, which was a
24 promise to renegotiate the note and mortgage in the event of
25 default. Okay. That's the oral agreement. Then, two years

1 later, everybody signs a bunch of documents as a part of the
2 loan work out, and in signing those documents, the borrower
3 basically agrees that any future failure to pay the bank to
4 pursue any remedy provided to the mortgage or other
5 documents or otherwise was preserved in favor of the Bank.

6 So, we have a subsequent agreement contradicting the
7 earlier oral agreement that the Bank renegotiated in event
8 of the default, and the Court said the 1994 documents refute
9 any contention the 1992 oral agreement was still in effect,
10 and thus the trial judge properly granted summary judgment
11 as to the affirmative defenses. It's exactly what we've got
12 here, a subsequent loan to which this borrower and
13 guarantors obviously agreed. They signed the documents.
14 They received the money. They got title to the 11 lots, and
15 now they've consented to that cause of action in the
16 plaintiff's complaint. And in doing all of those things, I
17 don't think the Court needs to get into the question of
18 well, was the July loan a novation, was the July loan a
19 modification.

20 That's really not necessary because there's no question
21 that the borrower consented in July that it, that it wasn't
22 gonna get 51 lots from Har Lee and resell them to PIH. It
23 was going to get 11 lots, and if this borrower had wanted to
24 reserve its rights to continue to sue over the 51 lots
25 transaction, the borrower should have done that. The

1 borrower did not do that. Essentially, it is the Bank's
2 position that the 11 lot loan was final, complete, fully
3 integrated special agreement between Oaktree and the Bank,
4 and prior understandings were extinguished.

5 Now, let's turn to the next basis for dismissing the
6 first cause of action in the counterclaim, the bridge loan.
7 Greer Sandifer at Bank of York was supposedly providing the
8 bridge loan. He testified in his deposition -- and I
9 apologize to the Court if I'm repeating myself, but I don't
10 think that I'm completely -- no take down note was ever
11 issued pursuant to the September 4, 2007, commitment for the
12 1.7 million dollars, was it?

13 No.

14 That's a reference to the fact that the Bank of York
15 already had a written commitment that allowed Oaktree to
16 borrow money to buy lots to build houses on.

17 No take down note was ever issued for purposes of the
18 acquisition of the 51 lots in Palm Tree Cove, was it?

19 No.

20 It is incorrect, isn't it, that Bank of York funded any
21 of the 51 lot acquisitions contemplated from Har Lee?

22 That is correct.

23 Is there ever any discussion about which lots would be
24 financed by Bank of York under a first loan and which lots
25 might be financed by another lender under the first

1 mortgage?

2 When we first started talking, we had a plat.
3 Obviously this is well before we had enough information to
4 commit. We knew that if we were gonna do anything, it
5 obviously was gonna have to be approved outside of the
6 existing commitment loan.

7 You indicated a moment ago that this is something that
8 would of had to have been done outside of the September 4th,
9 2007, commitment.

10 Is that what I heard?

11 Yes. So, it would of been a separate commitment. If
12 we were gonna do it, we were not gonna receive 2.5 to
13 oaktree, but we were looking at this---

14 Okay. This is not your typical little one house or one
15 lot. This is a subdivision. You're buying an entire
16 subdivision. So, we were approaching it as a different type
17 of analysis than we would look at, okay, you've got a house.
18 I mean this is a different deal. That's what Mr. Sandifer
19 said.

20 Did you ever get that far in your analysis of this?

21 No, we didn't.

22 The commitment letter dated September 4th, 2007, is it
23 really a commitment contemplated in it or not, one or two
24 take down notes as opposed to the purchase as you say the
25 entire subdivision.

1 Is that fair?

2 That's correct.

3 So, the 51 lot transaction, in your mind, would of
4 required a whole new commitment letter, wouldn't it?

5 Yes.

6 Again, I don't know if we would of done a commitment
7 letter, but it would of required a new loan. Certainly we
8 were looking at it differently.

9 New paperwork?

10 Yes, new paperwork.

11 And that new paperwork was never issued by the Bank of
12 York to Oaktree, was it?

13 That's correct.

14 That's what he said under oath.

15 Dawne Ras' testimony on this same subject.

16 Did you attend any meetings with Greer Sandifer about
17 Bank of York providing any financing?

18 I did not.

19 So, the only information you have about Bank of York's
20 providing financing for the 51 lot acquisition would have
21 come from your husband, Tom?

22 Correct.

23 Did you ever see any written commitment letter where
24 Bank of York was agreeing to provide any financing for the
25 51 lot acquisition?

1 I did not.

2 Did you ever sign anything with Bank of York?

3 I don't believe so, no.

4 The analysis with respect to the bridge loan is the
5 same analysis under the Lender Statute of Frauds. Bank of
6 York had to sign a writing promising to loan in order to
7 satisfy the requirements of the Lender Statute of Frauds.
8 But for Bank of York issuing that commitment, even if my
9 client had, had done what the Ras' assert that my client
10 did, they wouldn't have been -- the Ras' wouldn't have been
11 able to buy the 51 lots anyway without something else from
12 the Bank of York and that something else cannot consist of
13 testimony from some loan officer or the Ras'.

14 well, could of, should of, might of, would have to
15 satisfy the Lender Statute of Frauds, got to have a writing
16 signed by the party to be charged or there is no enforceable
17 promise to lend.

18 Last, I want to read to the Court John Carr's
19 testimony. John Carr was the principal and CIA for Palmetto
20 Investment Holding. He was the fellow whose company was
21 gonna buy the 51 lots from Oaktree for 6.697 million after
22 Oaktree had bought them from Har Lee for 4.4 million.

23 Q. Because PIH didn't have the 6.69, 6.697 million to
24 close?

25 Not at hand, no.

1 Okay. All right. But to keep the question in mind,
2 the 6.697 million was not money that PIH had either in its
3 bank account or committed loans enabling it to close on the
4 51 lots pursuant to this contract?

5 A. Yes, sir. That's correct. I was looking for
6 financing.

7 And none of them ultimately came through, did they?
8 Well, like I said, we came close.

9 But there was never a time when PIH had 6.697 million
10 that would enable it to buy the 51 lots from Oaktree?

11 No.

12 Was there?

13 Not in finances, no, sir.

14 Was there ever a time when PIH had 6.697 million that
15 enabled it to close?

16 A. Wish it did.

17 With Oaktree?

18 But, no, it didn't.

19 Okay. So, there was never a time when there was
20 financing in place for that acquisition?

21 That's correct. No financing.

22 The point, Your Honor, is the ultimate purchase of PIH
23 didn't have any money. If Oaktree had bought these 51 lots
24 after my Bank had provided financing, my Bank would be here
25 today foreclosing on those 51 lots instead of 11 lots.

1 How is Oaktree damaged by the fact that it couldn't
2 sell these 51 lots as it contracted to do?

3 well, obviously it can't say that it lost 6.697 million
4 dollars because there's nobody standing here to pay. The
5 burden of proof is not on the Bank to show damages. The
6 burden of proof's on Oaktree, and there's nothing in the
7 evidence, in the record to suggest that Oaktree had anybody
8 lined up that had the ability to write the check for 6.69
9 million in the event Oaktree bought this 51 lots.

10 So, in sum, why should the first cause of action be
11 dismissed?

12 There's no commitment letter in writing. The
13 testimony, if it's believed, is for something that was gonna
14 be retyped and it was never resigned. It was never retyped.
15 It was never resigned. It was never filed. We got a
16 subsequent loan to Mr. Wiles and the guarantors agreed for
17 11 lots. That basically shuts down the prior line of credit
18 and says it's the entire agreement.

19 You got no bridge loan that would have enabled this
20 borrower's party, Oaktree, to have bought the 51 lots from
21 Har Lee in the first place, and even if they bought the 51
22 lots, they weren't damaged as they alleged because they
23 didn't have money to buy them. They're, they're, they're
24 the end user. Their end purchaser had no money.

25 Consequently, there is nothing in the record to suggest

1 a genuine issue of material fact that would cut against the
2 grain of summary judgment. The Court can assume, for
3 purposes of this motion, the allegations in the counterclaim
4 that were shared with the Court earlier today, as well as
5 what's been said under oath by these folks, while they may
6 want to move around yet again that this was an enlargement
7 of an earlier commitment to us or, or it's the May 9th
8 letter, plus this other, whatever it is, at the end of the
9 day they don't have it, it wasn't final, superseded by later
10 events, they didn't have a bridge loan, and they weren't
11 damaged because they couldn't resell the lots for the 6.97
12 million anyway.

13 Thank you Your Honor.

14 THE COURT: Mr. McGowan.

15 MR. MCGOWAN: I'm, I'm not gonna belabor much of this,
16 judge. I think we can just, as my football coach use to
17 say, hit and get.

18 On the PIH transaction, it was a signed written valid
19 contract for the resale of those lots for 6.69 million
20 dollars. That's evidence of damages in the case, and, in
21 fact, Mr. Carr, who was with PIH, said that the only reason
22 they didn't get that financing was because American
23 Community breached the deal, which said Tom's capability,
24 that's Oaktree, of purchasing the property from the
25 developer never came to fruition, and I invited Dan, which

1 is somebody on his end, and anyone else that I knew at the
2 time, you know, it's not gonna happen, and as you might as
3 well, you know, just forget about it.

4 They cannot take advantage of the fact that they
5 breached the contract to say that there was no damages.
6 There was a valid and existing contract there. If PIH had
7 not gone through it with, then we may be suing them. The
8 deal probably would of gone through, and there's no safe
9 harbor for the bank right now.

10 The bridge loan, Oaktree had a 1.7 million dollars of
11 room on their line of credit to the Bank of York. A day or
12 two before this closing, the testimony is Mr. Sandifer
13 talked with Mr. Ras and said just call me up and let me know
14 how much money I need to bring to the closing. They didn't
15 bring money to the closing because they learned that
16 American, that ACB, American Community, pulled out of the
17 deal and there would be no deal. They can't take advantage
18 of any -- the fact that Bank of York was there, ready,
19 willing and able to produce and there was this line of
20 credit, that's the way they did business, it's no defense to
21 American Community to come in and say that there was no
22 signed commitment letter by Bank of York. That promise is
23 not trying to be enforced.

24 The third issue was the superceded by a later loan.
25 well, that the -- the terms of that standard mortgage said

1 the subject matter of this loan or the subject matter of
2 this mortgage, which were the 11 lots, not the 51 lots.
3 There was no intent by anybody and there's no really, if you
4 recall the claim, they claim that that later mortgage on the
5 11 lots when my people were trying to mitigate damages got
6 rid of everything that happened before. In fact, the law
7 requires them to mitigate their damages reasonably, their
8 damages reasonably, and that's what they were doing at the
9 time and it never (inaudible).

10 That agreement is confined to that agreement. It's not
11 confined to what happened before it. That's one of the
12 terms of the agreement itself.

13 Now, the Statute of Frauds really has a couple of
14 issues going on there. One is obviously the sanctions
15 business that -- how unfair is it for them to have the only
16 signed writing and then say you don't have a signed writing,
17 and that's just -- that's crazy and that's why they, we say
18 they concealed it, destroyed it, they've gotten rid of it,
19 and that gives them a motivation to do so, provides them
20 with this fraud.

21 More fundamentally though, the statute says the person
22 has received. Now, that's the plain language of the
23 statute, has received. It does not say has it now. It does
24 not say attach it to the complaint. It says has received a
25 signed writing.

1 Now, they did. They fulfilled the straight up terms of
2 that, of the statute because they did. There were pen and
3 ink changes. Everybody agreed to them. That's a valid and
4 existing contract, and the fact that they wanted to execute
5 a clean copy is fine, but it doesn't change the fact that
6 that first pen and ink copy was, in fact, a binding
7 commitment letter that we say was last in the possession of
8 the Bank, and has been lost or destroyed by them. We've
9 never said that we had a signed copy of that because we
10 didn't.

11 That's pretty much our argument. I mean this is --
12 summary judgment, in '09, the Supreme Court came out and
13 said all we have to show is a mere scintilla. If a jury
14 believes what the Ras' have to say, that there was an
15 agreement, and they signed it, it was a writing with Derek
16 Franklin's signature on it, if it existed, then that
17 fulfills the strict language of the Statute of Frauds, and,
18 hence, you can put on top of that the overlay of the
19 destruction of these documents, the destruction of that hard
20 drive, which prevents us from really seeing what was done,
21 and the fact that they are still, we think, concealing
22 evidence in this case gets us around the Statute of Frauds
23 question.

24 Now, it may be that an argument can be made at trial
25 about an expansion of an earlier line of credit or what have

1 you, but that's not what's before you now. Before you now
2 is whether we have received the signed writing, which we
3 did, even as it exists now, with the sanctions and conduct
4 overlay.

5 Really, we have a little bit more detail. We have
6 cites to records and all that sort of stuff in our memo, but
7 that's our argument on, on that part of the motion, judge.

8 THE COURT: Brief reply.

9 MR. SHEEDY: Of course, the testimony speaks for
10 itself, and I've read the testimony, and I trust the Court
11 would compare the testimony that is given under oath to
12 Mr. McGowan's recitation of the testimony. Rather than
13 meticulously point out the differences---

14 THE COURT: I'll having trouble hearing you now. You
15 are fading out.

16 MR. SHEEDY: Did the Court hear what I said about the
17 testimony?

18 THE COURT: Yes, I heard all that.

19 MR. SHEEDY: Okay.

20 THE COURT: But then you faded out.

21 MR. SHEEDY: Two more points. In Harborside, the Court
22 made reference to a very good survey article by a gentlemen
23 by the name of John Cull Haney in business law, and the
24 Court said we, we find this persuasive. If you look at that
25 article, and I'll be happy to give the Court a copy if the

1 Court doesn't have access, that -- the article speaks to
2 this exact question about what the word receipt means.
3 We're talking about the task force that came up with this
4 Lender Statute of Frauds that's enacted in most of the
5 states.

6 The task force also added a requirement that the
7 parties seeking to enforce the agreement have received the
8 written agreement from the other party. This deliberate
9 requirement is intended to preclude lawsuits based on
10 personal notes, confidential memoranda, or drafts, all of
11 which may have been signed by the party to be charged, and
12 which may come to light as a result of that discovery
13 process. That point is completely consistent with the
14 decision in Harborside about how important it is to have
15 something that is intended as a final expression of, of the
16 so called loan.

17 The last comment that I will make, I'm not going to
18 profess to the Court that I've looked at every single
19 possible case anywhere, but I will represent to the Court
20 that I've been fairly thorough in trying to find some law
21 beyond summary judgment that would suggest that what
22 Mr. McGowan wants to do in this case has some basis in law.

23 Can you show up, put your witnesses on the stand, let
24 them give some self-serving testimony, say that we received
25 it, we don't have it now, we claim it's in existence, we say

1 it's lost or destroyed, and let the jury decide?

2 Hu huh. (Negative). I can't find that law. I looked
3 at Banks versus Mitsubishi Motor Credit of America, 435 F3d
4 538, a 2005 decision. I will tell the Court essentially in
5 this case there had to be uncontradicted unimpeached
6 evidence as to existence of the writing before the Court
7 would get into the question about the use of secondary
8 evidence with respect to the contents, and that's the way
9 all of these cases run. Washington versus Clawson, 544 Pac
10 2d 387, a 1976 case out of Kansas. Moskman versus Hawaiian
11 Trust Company, an old case out of Hawaii. Albert Epstein
12 Advertising versus Helberg, another old case, 1958 case, at
13 138 Atl 2d 925, a DC case.

14 In that case, the Court was not going to let an
15 agreement be convinced from looking at the checks as if the
16 checks were a memorandum in contacting together what the
17 terms were with respect to adequacy of the contents of the
18 writing.

19 Chicoa versus Dena, a case out of Texas, 233 S.W.2d
20 200. The Court was not going to allow somebody who's unable
21 to produce the written instrument to prove it by parole
22 evidence.

23 So, the last thing that I will say to the Court is I
24 haven't seen this case that would allow what Mr. McGowan
25 wants to do to take place beyond the summary judgment.

1 Thank you.

2 THE COURT: All right. Well, it's 12:30. We've been
3 at it three hours. We still got more one summary judgment
4 motion, but we're gonna break for lunch before we take that
5 up at two o'clock.

6 MR. MCGOWAN: Two o'clock, Your Honor?

7 THE COURT: Two o'clock.

8 Mr. MCGOWAN: Yes, sir.

9 MR. SHEEDY: May we leave our stuff here?

10 THE COURT: Sure.

11 (WHEREUPON, Court was in recess for the lunch hour.)

12 THE COURT: We're back on the record in Yadkin Valley
13 Bank & Trust. We're down to, I think, the last movement in
14 this operetta, and that is -- yes, sir.

15 MR. MCGOWAN: Can I narrow the issue a bit for Your
16 Honor?

17 THE COURT: I would love it.

18 MR. MCGOWAN: You know how when things started you get
19 a certain set of facts and you try to fit it into certain
20 pigeon hole causes of action, the two that I care about --
21 in other words, I'm not arguing against their motion on any
22 of them other than negligent misrepresentation and breach of
23 contact accompanied by fraudulent act. Those are the only
24 two that I'm seeking to maintain.

25 THE COURT: All right. That, that does narrow it.

1 Ms. Driscoll, you're arguing these?

2 MS. DRISCOLL: Yes, Your Honor. May we -- we would
3 just ask that be put on the record that they've consented to
4 summary judgment as to the causes, the counterclaims for
5 fraud, UTPA, and tortuous inference with a contract.

6 MR. MCGOWAN: I'm not consenting. I'm just saying I'm
7 not arguing against it, which is a little bit different.

8 THE COURT: Well, I'll---

9 MS. DRISCOLL: They are arguing---

10 THE COURT: Well, no argument against it, I'll ask that
11 you prepare an order granting summary judgment---

12 MS. DRISCOLL: Yes, Your Honor, I'll be happy---

13 THE COURT: ---on those.

14 MS. DRISCOLL: Your Honor, I don't see any need to go
15 back over the facts in this case. I think, at this point,
16 you may be painfully familiar with them.

17 This summary judgment motion is based---

18 THE COURT: All right. I'm kind of not commenting on
19 that.

20 MS. DRISCOLL: ---is based on the non-contract
21 counterclaims remaining which would be breach of contract
22 accompanied by fraudulent act, neglect misrepresentation,
23 and we feel that these two remaining causes of action can be
24 dismissed for three different grounds.

25 First, both of these tortuous causes of action are

1 based upon the same duty that they are also alleging in
2 their breach of contract action, and we believe that a duty
3 that arises out of a contract cannot also form the basis of
4 a tort action. All the evidence put forward in this case
5 relates only to this alleged commitment letter, and my
6 client's supposed failure to comply with that letter and
7 fund the loan. Those claims arise just from that contract.
8 So, they must be addressed through the cause of action for
9 breach of contract.

10 we believe that the South Carolina case law is very
11 clear on this point. Kennedy versus Columbia Lumber, Coates
12 versus Thomas, Tommy L. Griffin Plumbing versus Jordan Jones
13 Improving, as well as Foxfire Village versus Black & Beach,
14 all make it very clear that a breach of duty, which arises
15 under the provisions of the contract between the parties,
16 has to be addressed under the contract and a tort action
17 will not lie.

18 So, as a result, because the plaintiff in this case had
19 no duty to Oaktree or the Ras' that arose outside of this
20 alleged commitment to lend, there can be no tort claims
21 against the plaintiff. Their sole remedy would exist in
22 contract.

23 So, both of these remaining causes of action, causes of
24 action sounding in tort, negligent representation, and
25 breach of contract accompanied by fraudulent act, should be

1 dismissed with prejudice.

2 Now, even if this Court does find there's some duty
3 that exists outside the contract, the claims also fail
4 because they still cannot satisfy the Lender Statute of
5 Frauds. That requires a writing to be signed, signed by the
6 party to be charged to allege any equitable claim based on
7 damage to fulfill a promise or lend money or legal claim.
8 It doesn't just have to be a breach of contract claim. It's
9 any claim. So, without being able to come forward and
10 produce a commitment and meet the requirements of the
11 Statute of Fraud, the tort claim should fail on that basis
12 as well.

13 And, finally, if this Court gets over the first two
14 major hurdles, the counterclaims fail on their own accord
15 because they can't meet the various elements. As to
16 negligent misrepresentation, the two main, the two elements
17 which cannot be met by Oaktree and Ras in this case are
18 reliance and injury as a result of some action of the
19 plaintiff.

20 Oaktree entered into the contract to purchase these 51
21 lots with Har Lee in December of 2007 before they even
22 approached my client to obtain financing for the purchase.
23 The contract does not contain a financing contingency and it
24 was, there was no action on the part of that plaintiff to
25 induce Oaktree to enter into this contract. He entered into

1 this contract on his own accord without any reliance or an
2 action by the plaintiff.

3 Secondly, there was no loss as a result of an action by
4 my client. We were not the proximate cause of their loss
5 for two reasons.

6 First, their purchaser, PIH, did not have the funding
7 available at any point in time, during the entire Summer of
8 2008, to purchase these 51 lots from Oaktree. So, even if
9 we had funded the loan, they wouldn't have been able to sell
10 these lots for 6.697 million dollars because PIH didn't have
11 the money.

12 And, secondly, Oaktree did not procure the bridge loan
13 necessary to fund the remaining balance of the purchase
14 price from Har Lee. If you recall, the purchase price of
15 that contract was 4.4 million dollars. They approached my
16 client for 3.8 and the and Bank, Bank of York for the rest.
17 The testimony of Greer Sandifer clearly shows that that
18 money was not gonna be funded under their existing line of
19 credit. There would of had to of been a new commitment
20 issued, a new loan document issued for that bridge loan,
21 which they never did. They never finalized anything with
22 Bank of York. So, even if my client had provided the 3.8,
23 they still would have, they still would have been short a
24 substantial amount of money in order to close on the
25 contract with Har Lee.

1 Finally, Your Honor, the breach of contact accompanied
2 by fraudulent act. Under South Carolina law, to establish
3 this type of, this cause of action, you have to show breach,
4 that the breach was accomplished with a fraudulent
5 intention, and that the breach was accompanied by fraudulent
6 act. Oaktree is missing two key elements here.

7 There's no evidence of fraudulent intent on the part of
8 my client. All the evidence shows is that my client
9 evaluated the loan when it was presented to them by the, by
10 Oaktree and Ras and declined to fund it. There's no
11 fraudulent intent. They examined whether or not this loan
12 could be underwritten, decided that it could not, and
13 communicated that decision to Oaktree and the Ras'.

14 Finally, there's no evidence of a separate fraudulent
15 act by the plaintiff. All the evidence presented by Oaktree
16 and Ras relates directly to the breach of contact. There is
17 no separate fraudulent act. Any allegation that holds, they
18 said they were going fund, we thought they were gonna fund,
19 all of that relates to the funding of this contract, the
20 funding of the loan, which is the breach itself. So,
21 there's no separate fraud act.

22 So, for those reasons, Your Honor, we feel that summary
23 judgment should be entered in favor of the plaintiff.

24 THE COURT: Mr. McGowan.

25 MR. MCGOWAN: Let's talk about the breach of contract

1 accompanied by a fraudulent act. After -- the fraudulent
2 act is the fact that they have withhold and we say destroyed
3 the signed commitment letter that was signed by Derek
4 Franklin and the Ras' for Oaktree, and we, we have evidence
5 that that was, in fact, an intentional act because of a
6 conversation that happened shortly thereafter with
7 Mr. DeMarcus with American Community Bank who said, well,
8 Mr. Ras, do you have a commitment letter? Because if you
9 can show us the commitment letter, we'll fund this
10 transaction.

11 That is enough for a jury to infer scienter in that
12 fact that they withheld, that they had the only copy of this
13 commitment letter, and they had since disposed of it or
14 gotten rid of it or lost it or whatever. But it was last in
15 their possession and control. That's the fraudulent act
16 that we're talking about.

17 Relative to negligent misrepresentation, that kind of
18 goes back to before the Har Lee contract needs to be signed.
19 Mr. Ras said his conversation with the folks at the bank,
20 with Derek Franklin's boss who apparently was later excused
21 from further employment for one reason or another. It
22 said -- and it was informal, but it was here's, here's the
23 deal we have, will you fund this transaction, and then that
24 fellow from the ACB told him, yes, we will, which then got
25 him into signing the contract, which then got him into doing

1 the commitment letter, which then got them to the closing in
2 June where they pulled out at the very last minute.

3 Now, we think that's enough for a jury to find
4 negligent misrepresentation. They had every opportunity
5 to -- they knew there was a pecuniary interest involved. It
6 turned out to be, it wasn't true, it was negligence of the
7 truth. Mr. Ras and Oaktree certainly relied upon it, and we
8 meet all of those elements of negligent misrepresentation.

9 Now, they say that the clear, the record clearly shows
10 this and it clearly show that. Well, if it does, they
11 are -- the facts are clearly, at minimum, in dispute, and
12 all these sort of arguments that we've had for three and a
13 half, four hours now ought to be told to a jury and a trier
14 of fact for this particular case.

15 But the fraudulent act here was the withholding,
16 destroying, the concealing of this commitment letter, and
17 the negligent misrepresentation was not only what happened
18 before the contract was ever signed to purchase the lots,
19 but also after the fact when they started saying that they
20 didn't meet underwriting and all that sort of thing. That's
21 why we think that those claims ought to also go to the jury.

22 Now, as to the same business about PIH not being able
23 to close the deal, I mean those are the same arguments that
24 we're gonna hear over and over again. There is a difference
25 between having a contract, breaching it, and having a

1 contract and doing something dirty involved with it, which
2 is why breach of contract accompanied by a fraudulent act is
3 designed here.

4 So, we think a jury could infer that there was some
5 dirty business going on here by the bank in order to cover
6 up and make up and conceal what they did and that's the
7 fraudulent act we're talking about.

8 MS. DRISCOLL: Your Honor, if I may reply briefly.

9 I would just like to point out, in the testimony of
10 Derek Franklin, on Page 26 when he's being asked by
11 Oaktree's lawyer about the contract for purchase of the 51
12 lots, he's asked and during that time Mr. Ras had showed you
13 the contract where he would of purchased or his company
14 would of purchased 51 lots from Har Lee Developers?

15 Do you remember that?

16 Oh, I don't specifically remember that, but I'm pretty
17 sure he showed me that contract.

18 Do you remember seeing that contract before it was
19 signed?

20 I can't say that I do.

21 The Bank did not see the contract before it was signed.
22 The Bank never made any representations to the borrower
23 prior to them signing the contract, and further the
24 testimony of Mr. DeMarcus was that the Bank did not have a
25 copy of the commitment letter. They do not have it on their

1 system. It's been searched extensively and they do not have
2 it because there never was one. There's no evidence that it
3 was destroyed. It's evidence that there never was one on
4 the Bank's records.

5 Thank you.

6 THE COURT: Mr. McGowan.

7 MR. MCGOWAN: The person, the person that Oaktree
8 talked to originally was Mr. Harry Parnear, who,
9 interestingly, a side note apparently is, was prosecuted for
10 polygamy of all things---

11 MS. DRISCOLL: Your Honor?

12 MR. MCGOWAN: ---and that was before -- that was not
13 involving Mr. Derek Franklin. So, I don't know if that's
14 true or not that, but it's certainly relevant.

15 MS. DRISCOLL: Your Honor, Mr. Parnear was called as a
16 witness. They had the opportunity to, to depose him and
17 they didn't. His testimony is not in evidence and I would
18 object to any consideration of that.

19 THE COURT: All right.

20 (WHEREUPON, an off-the-record discussion was held at
21 this time.)

22 THE COURT: All right. Thank you. I'll take it all
23 under advisement.

24

25 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

**Deposition (excerpts) of Jeff Cramer
(Tab B to Plaintiff's Motions)**

1 credit officer prior, you know, and everything that
2 we could come up with. And what the -- Derek
3 mentioned to us was: "Yeah. There was -- there
4 was a request out there probably prior."

5 I mean, I think I -- I might've saw some
6 e-mails even back in January where they were kind
7 of talking about it a little bit. And -- but as
8 far as a formal -- formal first time I saw this was
9 -- was couple days prior to closing.

10 Q Okay. A few moments ago you mentioned that you had
11 talked to some of your I.T. people about gathering
12 information during discovery.

13 A Uh-huh.

14 Q Did you try to find that credit memo that's
15 mentioned in the first sentence of Exhibit 2?

16 A I tried -- I pulled any e-mail transactions between
17 Derek and -- and Tom or Oaktree Homes, anything
18 that had that -- that subject matter in it, to --
19 to try to figure out if there's any communication
20 between -- between the two of them.

21 And -- any -- you know, we asked Tom on the
22 phone if -- you know, Mark asked that, "Look, you
23 know, if the bank formally committed to this and
24 there's a formal commitment letter, please provide
25 it and -- and, you know, we'll honor that."

1 And -- and we didn't get anything from Tom.

2 Q Okay. Did you look for the credit memorandum that
3 Derek Franklin describes in his June 9, 2008,
4 e-mail?

5 A At the time I didn't ask them to look for that
6 memo.

7 Q Okay. Where is it?

8 A I mean, it -- based on e-mail, Mark may have a copy
9 of it. But I -- I wasn't privy to that.

10 Q Would there --

11 A So --

12 Q -- not be a copy somewhere in the bank's computer
13 system?

14 A I can have -- I can have I.T. go back and -- and,
15 you know, pull this e-mail. What -- what we did do
16 is -- is: I did look and had I.T. go into Derek's
17 -- we have --

18 Q Well, hang --

19 A Go ahead.

20 Q -- hang on. I don't mean to interrupt.

21 A Sure.

22 Q Well, I do mean to interrupt.

23 A Yeah. No.

24 Q I'll ask you about what you did --

25 A Yeah.

1 A -- I -- I -- I think.

2 Q Does that -- do you know if that file still exists
3 on --

4 A It --

5 Q -- the bank's --

6 A I don't --

7 Q -- computer --

8 A -- know.

9 Q -- somewhere?

10 A But, I mean, I can certainly try to find out.

11 Q I have a copy of a June 29, '07, commitment letter.
12 But I -- I -- it didn't come from the bank.

13 A Yeah.

14 Q And it's something that I kind of --

15 A Yeah.

16 Q -- would've expected to find in the bank's files.

17 A Yeah. I think -- I think I remember looking at
18 this commitment letter, because -- and -- and I
19 believe that was the one for the 2.5 million.
20 Because that's what I asked I.T. to look for, you
21 know: any dialogue or anything that pertained to,
22 you know, any e-mail traffic between us. And it --
23 and I was -- we were trying to figure out if there
24 was a commitment letter out there -- formal
25 commitment letter. Because like we -- Mark

1 mentioned to Tom, if there was and we committed to
2 it, we -- you know, we -- we -- certainly, you
3 know, we would've went -- but that's what I was
4 trying to find.

5 And -- and we went into -- you know, I had --
6 I had Aaron look at Derek's physical files, any
7 desk files he would have in the office. He -- he
8 went through all those; we couldn't find any formal
9 commitment letter. And then I had --

10 Q Did you find anything else about the transaction?

11 A I didn't ask him to look for anything beyond the
12 commitment letter.

13 Q Okay. Can you ask him to look for any paper files
14 that have to do with the 51-lot transaction with
15 Oaktree?

16 A To best of my knowledge, what I have -- and what I
17 submitted to -- in discovery was -- was involved,
18 but we can -- we can ask and we -- certainly.

19 Q Okay. Would anyone else have paper versions of
20 these file materials, besides Mr. Franklin?

21 A You know, Aaron would have them now, because --

22 Q I -- I --

23 A Yeah.

24 Q I'm sorry. Back in the -- at the --

25 A At --

1 A The -- there are. I -- I'm -- and -- and I don't
2 know if there's a customer number. I -- I mean, I
3 -- when -- when I search, it's by either TIN
4 number, EIN number, social security number, or
5 account number or name.

6 Q Okay.

7 A If -- if there is a customer number, I'm not aware
8 of it. I don't think we have.

9 Q When you -- when you gathered these documents
10 during discovery earlier this year --

11 A Uh-huh.

12 Q -- which ones of those searches did you -- did you
13 use?

14 A It was probably combination of all of them. I
15 mean, I asked I.T. to look for the e-mail traffic.
16 And then, between myself and -- I -- I believe I
17 asked Brenda to help, you know, for other just -- I
18 looked in -- and we had Aaron help look as well
19 through the physical files. I think Aaron had --
20 had access to the H drives and so forth, so kind of
21 -- we -- we -- we all were looking for anything
22 that pertained to -- really any pertained to
23 communication between our borrower and the bank and
24 Derek or -- or anybody and -- and specifically
25 Derek and -- and then, for commitment letters

1 because we were trying to figure out, you know, if
2 there was a valid commitment. We -- we couldn't
3 find any.

4 Q Well, you couldn't find the credit report from May
5 of '08 either, could you?

6 A Credit memo.

7 Q Right. Credit memo -- I'm sorry -- from May of
8 '08 either, did you?

9 A I -- I don't know -- I mean, I didn't look for
10 that. It wasn't -- and I -- I had my -- the -- my
11 files. I didn't pull a -- I mean, I didn't look
12 for that particular item.

13 Q Well, as we've gone through the deposition,
14 there're obviously some documents that existed at
15 one point or another --

16 A Appears to be.

17 Q -- that I --

18 A Uh-huh.

19 Q -- have -- that -- that have not been produced in
20 the course of discovery.

21 A Yeah. It appears --

22 Q Okay.

23 A -- there are.

24 Q And I suppose it's possible that among those
25 documents might be this missing -- this mysterious

1 Q -- a commitment letter for the 51-lot transaction
2 --

3 A Right.

4 Q -- it would have to exist on the bank's computer,
5 wouldn't it? There's no other place that it could
6 be.

7 A I -- I -- yeah. I mean, I have -- had -- have --
8 would have to agree.

9 Q Then, why would you have to ask Tom Ras if he had a
10 copy?

11 A Because he claimed that we committed to it. And we
12 point blank -- we -- we felt strongly we didn't
13 with the communications through Derek and, you
14 know, up to that point, the -- the due diligence
15 we've done. And so we said if there is -- if
16 there's something that we don't know about and
17 can't find on a computer -- on the bank's computers
18 and Derek was telling us he -- he didn't produce
19 one, you know, please provide it if there's
20 something you have. And that was -- that -- that
21 was not provided to us, so we had no -- we had no
22 reason to believe otherwise.

23 Q Well, you had asked Derek Franklin that question
24 before you asked Tom Ras, hadn't you: "Is there a
25 commitment letter?"

**Deposition (excerpts) of Mark DeMarcus
(Tab C to Plaintiff's Motions)**

1 Q Okay. Did he tell you that there was a
2 commitment letter?

3 A He -- I -- I'm not sure whether he referenced a
4 commitment letter or a commitment. And at that
5 time, I'm not sure whether it was Mr. Cramer or
6 myself. We said, "Well, we're in the here and
7 now. If you've got a commitment letter, we'd
8 like to see that. Certainly like to review
9 that." But to my knowledge, he's never produced
10 a commitment letter.

11 Q Well, between you and Mr. Cramer and
12 Mr. Franklin, who else -- apart from the three of
13 you, who else at American Community Bank in June
14 of 2008 would have issued a commitment letter to
15 Oaktree for a \$3.8 million transaction?

16 A To my knowledge, there would have been nobody in
17 June of 2008 that issued a commitment letter for
18 \$3.8 million.

19 Q Okay. So...

20 A The only commitment letter that I was aware of
21 was the 2007 commitment letter.

22 Q Okay.

23 A And that's the one I had reviewed.

24 Q But why would -- why ask Mr. Ras if he had a
25 commitment letter for the 3.8 million? I mean,

**Deposition (excerpts) of John Car
(Attached in support of multiple motions)**

1 property.

2 Q And that was because PIH Group couldn't purchase
3 the fifty-one lots, wasn't it?

4 A Well, I was, like I said, actively looking for
5 finance, you know, for - - - as PIH Group.

6 Q Yes.

7 A And then, you know, other parties like Danny
8 Phillips, you know, any investors. So, yes, that's
9 correct.

10 Q Because PIH didn't have the 6.697 million to close?

11 A Not at hand, no. But as the credit markets were
12 shrinking and the real estate market imploding, you

13 know, everything started to get really tight.

14 Q Okay. But - - -

15 A So, you know, the banks were pulling back on their
16 credit lines and - - - (No further response)

17 Q Whatever - - -

18 A And causing some real hard - - - you know, hardship
19 in a lot of different builders, contractors,
20 ourselves, and things of that nature. So, yeah, we
21 - - - Then I went to outside third parties, private
22 individuals, to look for financing.

23 Q We'll get to that in just a second.

24 A Okay. All right.

25 Q But to keep the question in mind, the 6.697 million

Deposition of John Car

- 1 was not money that PIH had, either in its bank
2 account or in committed loans, enabling it to close
3 on the fifty-one lots pursuant to this contract?
- 4 A That's correct. I was looking for financing,
5 correct.
- 6 Q Are you aware that in June of 2008, OakTree Homes
7 had sold some of the fifty-one lots to other
8 purchasers?
- 9 A In June of 2008?
- 10 Q Yes, sir.
- 11 A No, I was not aware.
- 12 Q Okay. Well, first, I'm going to show you a
13 contract dated June 23rd between OakTree and Mike
14 Scott for Lot 22.
- 15 A Okay. Okay.
- 16 Q Have you seen that before today?
- 17 A No, I have not.
- 18 Q You agree, don't you, that Lot 22 is - - - And I'm
19 reading upside down.
- 20 A Yeah.
- 21 Q One of the water view lots - - -
- 22 A Yeah.
- 23 Q In Deposition Exhibit 11?
- 24 A I see that. Yes, sir.
- 25 Q So you were not aware that Mike Scott had gone

Deposition of John Car

1 Q And none of them ultimately came through, did they?

2 A Well, like I said, we came close. You know, once
3 Tom - - - I believe when Tom couldn't secure
4 financing for his initial purchase, I believe, you
5 know, through the - - - through his means, things
6 started to fall apart pretty rapidly then after
7 that. So, you know, then people - - - You know,
8 obviously if he couldn't close his commitment,
9 then, you know, how were we to purchase it from
10 him?

11 Q Sure.

12 A So that - - - Like I said, it fell apart pretty
13 quickly.

14 Q But there was never a time when PIH had 6.697
15 million that would enable it to buy the fifty-one
16 lots from OakTree - - -

17 A No.

18 Q Was there?

19 A Not in finance, no, sir.

20 Q Well, not in equity infusion either, right?

21 A But we did have - - -

22 Mr. Robertson - Can you let him finish his
23 answer, please?

24 Mr. Sheedy - Yes.

25 A But we had - - - Like I said, we had other parties

Deposition of John Car

1 such as Danny Phillips and other groups that were
2 interested in it. But like I said, once the - - -
3 Tom's capability of purchasing the properties from
4 the developer never came to fruition, then I
5 advised Danny and anyone else that I knew at the
6 time that, you know, it's not going to happen, and
7 you might as well just, you know, forget about it.

8 Q Well, let's go back to PIH, John, for just a
9 moment.

10 A Sure.

11 Q Was there ever a time when PIH had 6.697 million
12 that would enable it to close - - -

13 A Wish it did.

14 Q With OakTree?

15 A But, no, it did not.

16 Q Okay. So there was never a time when there was
17 financing in place for that acquisition?

18 A That's correct. No financing, correct.

19 Q The BDC commitment - - -

20 A Yes.

21 Q Was never signed by PIH?

22 A That's correct, yes.

23 Q Wachovia never produced a commitment to PIH, did
24 it?

25 A No, it did not.

Deposition of John Car

1 Q Okay. And up to this point in time, up to June 13,
2 2008, there never was a point where PIH had the
3 6.697 million to buy the fifty-one lots, was there?

4 A No.

5 Q It didn't have a loan commitment for the
6 acquisition, did it?

7 A No, it did not have a loan commitment.

8 Q It didn't have the funds on hand for the 6.697
9 million, did it?

10 A That's correct.

11 Q It didn't even have 3.48 million on hand for the
12 acquisition, did it?

13 A That's correct.

14 Q It didn't have a group of investors willing to
15 provide 6.697 million?

16 A We had sev - - - Like I said, and you have the
17 documents - - -

18 Q Yes.

19 A We had them, but again, Tom's end of the - - - You
20 know, him acquiring financing to close those lots
21 never happened. So there was really no further - -
22 - you know, like Danny and the rest - - - you know,
23 to pursue it, so that's - - - But we did have
24 individuals with the net worth and the capability
25 of doing that.

Deposition of John Car

1 A Oh.

2 Q By way of improvement on OakTree's dime?

3 A I had no knowledge of if it was on OakTree's dime
4 or if it was other clients of theirs that they were
5 building for, so - - - (No further response)

6 Q Okay. But I'm talking about the fifty-one lots,
7 just the fifty-one lots.

8 A Again, I had no internal knowledge, you know, if
9 they're building something vertical, who - - - you
10 know, if that was their - - - on their dime, or if
11 it was a client of theirs. So I had no knowledge
12 of that.

13 Q The next step in the transaction then would have
14 been for PIH to have purchased the fifty-one lots
15 for 6.697 million pursuant to its contract with
16 OakTree, right?

17 A Correct, yes.

18 Q And then the next step after that would have been
19 for OakTree to have bought up to thirty-four lots
20 for 4.5 million back from PIH - - -

21 A If - - - If - - -

22 Mr. Robertson - Objection.

23 A If - - -

24 Mr. Robertson - You can answer.

25 Mr. Sheedy - Well, let me finish my question.

Deposition of John Car

1 Mr. Robertson - Oh, I'm sorry.

2 Q To the extent that PIH had not already sold the
3 lots. Is that the deal?

4 A No.

5 Q Explain the buyback to me.

6 A The buyback is simply if - - - Like on Phase I, if
7 we could not secure - - - It was like an insurance
8 policy, basically. You know, if we couldn't secure
9 buyers in a specific time period for those
10 properties, then the buyback agreement stated that
11 they would purchase said lots on a schedule, you
12 know, per an addendum to the contract. So that's
13 what that is. That's what that was.

14 Q The buyback provided a source of revenue to PIH,
15 didn't it, for either PIH's financing and/or
16 investors?

17 A No, it wasn't a source of revenue. It was, like I
18 said, a means of protecting PIH Group in case of an
19 economic downturn like what just happened. Okay.
20 Just like we had the same type of agreement on
21 Phase I. Okay. That was just going to be a model
22 - - - You know, what we executed on Phase I, the
23 same model would be executed on Phase II.

24 Q It gave PIH the assurance that it had a buyer for
25 at least some of the fifty-one lots that it was

Deposition of John Car

1 Q And you didn't produce that in your documents - - -

2 A No, no.

3 Q Did you?

4 A No.

5 Q Okay.

6 A But I think, during a meeting, he might have showed
7 me it.

8 Q And while you had a lot of confidence about your
9 ability to secure 6.697 million, in fact, as of May
10 1, 2008, you had not secured in writing, signed,
11 any of that money, had you?

12 A That's correct.

13 Mr. Sheedy - Thank you.

14 A I do have a correction I have to make. On my
15 commodity trading - - -

16 Mr. Sheedy - Yes.

17 A I do trade for friends and family, okay, but I do
18 not advertise to trade for others. So I want to
19 make that correction.

20 Mr. Sheedy - Okay. Thank you, sir.

21 A Thank you.

Deposition of John Car

Deposition (excerpts) of Derek Franklin
(Attached in support of multiple motions)

1 what that document was that we were taking about.

2 Is that fair?

3 A Sure.

4 Q It's not an endurance contest. If you need
5 refreshments, if you need to take a break, let me
6 know. We'll do that. I'm hopeful that we can be
7 done in less than a couple hours, but I don't
8 know. We'll find out. All right, sir?

9 A Sure.

10 Q Do you have any questions before we start?

11 A No.

12 Q All right. Mr. Franklin, you were a loan officer
13 at American Community Bank in June of 2008,
14 correct?

15 A That's correct.

16 Q At any time prior to the end of June of 2008, did
17 you prepare a commitment letter for a transaction
18 involving 51 lots in phase two of Palm Tree Cove?

19 A I prepared a commitment letter for a builder line
20 and lot loan for Oaktree Homes. I did not
21 prepare one for -- a commitment letter, that is,
22 for 51 lots in Palm Tree Cove.

23 Q Okay. The commitment letter that you did
24 prepare, was -- was it your understanding that
25 that loan was going to fund the purchase of 51

1 lots in Palm Tree Cove?

2 A My understanding of that commitment letter was
3 that it would be used for lots and the building
4 of a house or two spec and that that commitment
5 letter was not specific to the 51 lots in Palm
6 Tree Cove.

7 Q So would the answer to my question be no?

8 A That's correct.

9 Q Did you, on behalf of American Community Bank,
10 ever agree to lend \$3.8 million to Oaktree Homes
11 for the purchase of lots in Palm Tree Cove phase
12 two?

13 A No.

14 (Defendant's Exhibit Number 1 was marked:)

15 Q Mr. Franklin, can you take a look at what
16 Ms. Aminah has just marked as Exhibit 1 to your
17 deposition. Have you seen that before?

18 A Yes.

19 Q That's a subpoena that got served on you; is
20 that -- is that correct?

21 A That's correct.

22 Q And part of the subpoena asked you to bring some
23 paper that may be -- may have been in your
24 possession. That was the documents to be
25 produced, this third and fourth pages of that

1 A I don't remember the specific date or time. I
2 know he told me about that.

3 Q Late 2007 sound about right?

4 A I -- I guess that's about -- about right.

5 Q Okay. So by May 9 of 2008, the date on Cramer
6 Exhibit 10, you and Oaktree had been working on
7 this deal for six months?

8 A We'd been working on it for a while.

9 Q Okay. And during that time, Mr. Ras had showed
10 you a contract where he would purchase or where
11 his company would purchase 51 lots from -- I
12 think Har Lee Developers was the name of the
13 company. Do you remember that?

14 A Oh, I don't specifically remember that, but I'm
15 pretty sure he showed me that contract.

16 Q Okay. Do you remember seeing that contract
17 before it was signed?

18 A Can't say that I do.

19 Q Okay. Do you remember having a discussion with
20 Mr. Ras that he should sign the contract because
21 that was the document that you needed to -- to
22 bring to your loan committee?

23 A I don't remember specifically telling Tom that.

24 Q When you were at Provident Bank working with
25 Oaktree, was there a gent named Grier Sandifer

1 there also?

2 A There was.

3 Q Had you worked with Mr. Sandifer before you went
4 to Provident Bank?

5 A No, I did not.

6 Q Did -- how would you describe the relationship
7 between Derek Franklin and Grier Sandifer at
8 Provident Bank?

9 A Well, we were coworkers. We were peers. And we
10 had few things in common. We had a good working
11 relationship.

12 Q Okay. But I mean, you were -- when you say,
13 "peers," neither of you worked for the other; is
14 that right?

15 A That's correct.

16 Q Okay. You did about the same kind of thing?

17 A That's correct.

18 Q Have you worked with Mr. Sandifer since leaving
19 Provident Bank?

20 A No.

21 Q Have you worked on any deals with Mr. Sandifer
22 since leaving Provident Bank?

23 A When American Community Bank was contemplating
24 this 51-lot deal in Palm Tree Cove, it's my
25 understanding that Bank of York, Grier, was

1 privileged. Discussions that he may have
2 had after he was an employee of the bank are
3 not privileged. So I'm going to listen kind
4 of carefully to this, because there is some
5 difference here.

6 Q Tell me when you last were employed -- when was
7 your last day working for American Community
8 Bank?

9 A Sometime in June. June 9 or June 10th,
10 somewhere around there.

11 Q Of this year?

12 A Of 2008.

13 Q Of 2008?

14 A That's correct.

15 Q Was your last day working for American Community
16 Bank?

17 A Well, it was '09. It would have been '09.

18 Q Mr. Franklin, when's the first time you heard
19 that Oaktree Homes was suing American Community
20 Bank and claiming that because American Community
21 Bank had refused to lend money for the 51 lots,
22 that they had suffered some damages? When's the
23 first time you heard about that?

24 A I -- I don't recall the first time I heard about
25 that.

1 Q Okay. Were you still working for the bank?

2 A No.

3 Q So it's fair to say, is it not, that -- well,
4 when is the first time you discussed with
5 Mr. Sheedy claims that Oaktree Homes had made
6 against American Community Bank?

7 A We would have had discussions, I believe,
8 possibly when I was -- when I worked there.

9 Q Well, I thought you just told me that you don't
10 remember hearing anything about Oaktree Homes
11 making a claim against the bank while you were
12 working there. Right?

13 A That's true.

14 Q So how could you have had a discussion with
15 Mr. Sheedy about that while you were still
16 working there if you didn't even know about those
17 claims?

18 A Well, I hadn't heard that there was a -- an
19 actual lawsuit until sometime after I left the
20 bank.

21 Q Okay.

22 A I knew that there was the possibility that
23 something was -- like that would happen --

24 Q Okay.

25 A -- while we were working there.

**Deposition (excerpts) of William Hargrove
(Attached in support of multiple motions)**

1 A Yes.

2 Q And earlier I asked you a question about whether
3 lot 11 was included in the 51 lots. I call you
4 attention to page 2, paragraph 1B-A. Do you see
5 1B-A?

6 A Yes.

7 Q 1B-A does include lot 11, doesn't it?

8 A Yes.

9 Mr. Sheedy - I would ask that this be marked.

10 Whereupon - Deposition Exhibit 4 was marked.

11 Q Bill, how did you determine the sales price of 4.44
12 million for these 51 lots?

13 A Based on current market value. Two of the lots,
14 one was a large water view lot that had actually
15 touched the water, and the other was a waterfront,
16 so we calculated value based on the current market
17 value.

18 Q When you say current market value, who was making
19 the determination of what was current market value
20 on or about December 13, 2007?

21 A It's based on what other lots were selling for in
22 the market at that time.

23 Q Did you make that determination?

24 A Yes, through consultation with realtors and other
25 people in the industry.

Deposition of William Hargrove

1 Q Did you engage in any consultation with any
2 appraisers?

3 A Yes. I did talk to appraisers. I have a
4 relationship where I can actually talk to them
5 verbally without having anything in writing.

6 Q Which appraisers did you discuss the value of these
7 lots with?

8 A I don't recall.

9 Q Who would you normally have such discussions with
10 given your relationships?

11 A I know a good many appraisers in York County based
12 on my history, so it could have been one of 20.

13 Q Did you talk to Dick Odom?

14 A No, not that I recall. I talked to Derrick Sead.
15 It was a good many appraisers that I dealt with at
16 that time.

17 Q Did you talk to Joe Versen?

18 A Joe is one that I talked to from time to time.

19 Q Do you believe that you spoke to him in connection
20 with determining this value of 4.44 million?

21 A I don't recall.

22 Q But you did not get a formal appraisal, formal
23 written appraisal of the 51 lots done by a licensed
24 South Carolina appraiser in order to arrive at a
25 value of 4.44 million. Is that true?

Deposition of William Hargrove

1 A Prior to closing on the property, no.

2 Q Prior to entering into this contract, dated
3 December 13, 2007?

4 A No.

5 Q Now, at the time that this contract was signed by
6 you, Bill, this property, including the 51 lots,
7 was under mortgage to Carolina First, wasn't it?

8 A That's correct.

9 Q Now, did Carolina First provide you with an
10 acquisition loan for this property?

11 A Yes.

12 Q And in connection with that acquisition loan,
13 Carolina First required an appraisal, didn't it?

14 A Yes.

15 Q Do you remember who the appraiser was?

16 A No.

17 Q Do you remember the value set by the appraiser?

18 A No.

19 Q The loan amount was 5.6 million. Correct?

20 A I'm thinking it was 6.5.

21 Q You may be right. I may have transposed the
22 numbers, but whether it was 6.5 or 5.6, as you sit
23 here today, you're confident that the loan amount
24 exceeded the 4.44 million that you were selling 51
25 lots to OakTree for?

Deposition of William Hargrove

1 A That's correct.

2 Q And the mortgage encumbered property in addition to
3 the 51 lots, didn't it?

4 A That's correct.

5 Q Do you remember, as you sit here today, what the
6 loan to value requirement was on your Carolina
7 first loan?

8 A No.

9 Q There was a loan to value requirement, wasn't
10 there?

11 A I'm sure.

12 Q Typically that would be somewhere in the 80 to 90
13 percent range. Does that sound right to you?

14 A Possibly.

15 Q Because we're talking about acquisition, not
16 development, at least for purposes of my question.

17 A The loan that you're talking about was acquisition
18 and development.

19 Q So the development portion of that loan had not
20 been fully disbursed by December 13, 2007. Is that
21 right?

22 A I don't recall.

23 Q Do you have in your possession a draw down schedule
24 or any information about borrowing activity on that
25 development portion of that loan?

Deposition of William Hargrove

1 mortgage on the 51 lots for a sum of money less
2 whatever escrow was required?

3 A Yes.

4 Q Did you ever get a release price from Carolina
5 First?

6 A I'm sure it had to be discussed for these numbers
7 to be put in the contract.

8 Q Does that mean you think, as you sit here today,
9 that a release price was given?

10 A I don't think so.

11 Q Did you get that in writing from Todd or Allen?

12 A I know I discussed it with Allen. I just don't
13 recall if we got it in writing or what the status
14 was, but he was kept abreast of the status of the
15 contract.

16 Q Would it be fair to say, Bill, that this contract
17 envisions that OakTree is purchasing buildable lots
18 from Har-Lee?

19 A Yes.

20 Q And that it was Har-Lee's responsibility to deliver
21 buildable lots to OakTree?

22 A Yes.

23 Q And OakTree might actually be performing some of
24 the improvements necessary to render the lots
25 buildable, but that ultimately that would be on

Deposition of William Hargrove

1 A Yes.

2 Q whatever that number is, there were only two
3 sources, weren't there, for funding the cost of
4 such improvements? One would be a draw down on the
5 development portion of the Carolina First loan to
6 the extent of availability. Is that right?

7 A Yes.

8 Q And the other source would be the sales proceeds
9 pursuant to a closing with OakTree. Right?

10 A Yes.

11 Q There weren't any other sources of funding that
12 Har-Lee had for the completion of these
13 improvements to make the 51 lots buildable, was
14 there?

15 A Yes. We were obligated to put cash up front.

16 Q Obligated to Carolina First?

17 A Yes.

18 Q But by December 13, 2007, you had already closed
19 with Carolina First. Right?

20 A Yes.

21 Q You'd already put that cash in up front, hadn't
22 you?

23 A Yes.

24 Q So, for purposes of completing the improvements
25 contemplated by this purchase and sale agreement,

Deposition of William Hargrove

1 Har-Lee's sources of cash to do that would be the
2 development loan with Carolina First and the 4.44
3 million sales proceeds, wouldn't it?

4 A Yes.

5 Q Now, on December 13, 2007, Bill, how close to drawn
6 down completely was the Carolina First loan?

7 A I don't recall.

8 Q You would have something in your possession though,
9 wouldn't you, that would indicate the availability
10 on that loan in December of 2007. Right?

11 A Yes.

12 Q If you would, please produce that.

13 A Today all the files are related to Carolina First
14 that you're asking me to produce. Right?

15 Q Let me say this. Yes, and files related to the
16 cost of improvements to make these buildable lots.
17 Those may not be with Carolina First. I don't
18 know. Are you saying that they would be with
19 Carolina First?

20 A I'm not sure.

21 Q The other side of the 51 lot transaction was a sale
22 of those same 51 lots to a company called Palmetto
23 Investment Holdings. Were you aware of that?

24 A No.

25 Q Do you know John Car?

Deposition of William Hargrove

1 A Sure.

2 Q And this mortgage was to secure an acquisition and
3 development note, the proceeds of which you used to
4 buy the 51 lots. Right?

5 A Right, plus other land.

6 Q So you actually bought the 51 lots after you had
7 already put them under contract to OakTree. Is
8 that the sequence of events?

9 A Evidently.

10 Q Well, here's where I'm confused. If you had the 51
11 lots under contract to OakTree and then you
12 borrowed the money to do the acquisition - - -

13 A It was the wrong December.

14 Q Pardon me.

15 A It was the wrong December. It was December, 2008.

16 Q What was?

17 A That I've been talking about thinking that the
18 roads were finished.

19 Q You anticipated my question. Thank you. So
20 actually - - -

21 A They weren't complete. As I recall now, we had
22 this as part of the package to submit to show that
23 they were already in the contract to Carolina First
24 to help get the loan.

25 Q Based upon the strength of Defendant's Exhibit 4,

Deposition of William Hargrove

1 the contract to sell the 51 lots to OakTree,
2 Carolina First made a 5.6 million dollar
3 acquisition and development loan to Har-Lee, didn't
4 it?

5 A Yes.

6 Q And the improvements had not been made by Har-Lee
7 because Har-Lee didn't own the property on December
8 13, 2007 when it entered into this contract, did
9 it?

10 A Yes, we owned the property. We just didn't have
11 the A&D on it.

12 Q What did you need the acquisition for if you
13 already had the acquisition?

14 A We acquired the property and then South Carolina
15 Bank and Trust financed the acquisition.

16 Q I see.

17 A And then when we did an acquisition development
18 loan, we took it to Carolina First.

19 Q So Carolina First was the takeout lender for SCBT?

20 A Yes.

21 Q But you now know, as we've been through this
22 sequence here of December, 2007, that the roads
23 were not complete at that time?

24 A Yes.

25 Q And now that we've looked at this and it's

Deposition of William Hargrove

1 million to OakTree, OakTree was going to turn
2 around and sell to someone else for 6.697 million.
3 Is that your testimony?

4 A That's correct.

5 Mr. Sheedy - I would ask that this be marked.
6 whereupon - Deposition Exhibit 6 was marked.

7 Q Now, I asked you earlier, for purposes of the
8 contract between OakTree and Har-Lee how it was
9 that Har-Lee was willing to sell for 4.44 million,
10 and I think you said that that was your
11 determination of fair market value for the 51 lots?

12 A Correct.

13 Q So your determination of the value of the 51 lots
14 as buildable lots - - - Let me back up. When you
15 say your determination of the value of the lots,
16 that is buildable lots. Correct?

17 A Yes.

18 Q Because the obligation to make the improvements
19 fell on Har-Lee under the contract with OakTree.
20 Right?

21 A Right.

22 Q So 6.697 as a value for the 51 lots would tend to
23 suggest that somebody thought they were a whole lot
24 more valuable than you did. Right?

25 A That's true, but understand the way that we do

Deposition of William Hargrove

1 million, plus or minus amount of contract. Do you
2 see that language that you sent?

3 A Yes.

4 Q You did not consider the May 9, 2008 letter to be a
5 commitment, did you?

6 A Not in the form of what I was accustomed to seeing.

7 Q Which is why you also said at 2:24 P.M. the next
8 day, but you do not have in the package an increase
9 in line of credit and the one from American
10 Community Bank is not signed. Do you see that in
11 your email?

12 A Yes.

13 Q You apparently thought as of Friday, June 12, 2009
14 at 2:24 P.M. that OakTree did not have a commitment
15 from American Community Bank. Isn't that right?

16 A All of these emails are after the closing had blown
17 up.

18 Q I understand.

19 A I mean, you're digging for anything you can - - -

20 Q I'm asking you a question. As of June 12, 2009 at
21 2:24 P.M., you would not have said, but you do not
22 have in the package an increase in line of credit
23 and the one from American Community Bank is not
24 signed if you thought that a commitment existed,
25 would you?

Deposition of William Hargrove

- 1 A I know a commitment existed because Derek Franklin
2 told me it existed, and we were supposed to close.
- 3 Q You've never seen a written commitment from
4 American Community Bank, have you?
- 5 A You know, I know we dealt with Derek Franklin in
6 this issue, but we also had a loan with Derek
7 Franklin, so when he tells me that he's got the
8 thing ready to close and the closing was imminent,
9 I have to believe that based on the fact that he's
10 performed on my project.
- 11 Q This letter dated May 9, 2009 in your estimation as
12 evidenced by your emails is not a commitment, is
13 it?
- 14 A I look at it as his ability to buy but not as a
15 formal commitment letter that you get.
- 16 Q And in June of 2009 based upon these email
17 exchanges, you still hadn't seen a written
18 commitment signed obligating American Community
19 Bank, had you?
- 20 A These emails here were out of frustration. We had
21 gone three months without closing.
- 22 Q But you say, you do not have in the package an
23 increased line of credit and the one from American
24 Community Bank is not signed, don't you?
- 25 A That's where I had asked him for documentation that

Deposition of William Hargrove

**Deposition (excerpts) of Walter Joyce
(Attached in support of multiple motions)**

1 suit, I guess.

2 Q As director of information systems, do you have
3 any specific duties with respect to a litigation
4 hold?

5 A If -- if I'm notified of a litigation hold, my
6 job is to make sure that we gather whatever data
7 is asked for.

8 Q Okay. Have you been notified of a litigation
9 hold with respect to this litigation?

10 A Yes.

11 Q When?

12 A Around the same time I was notified of the
13 litigation.

14 Q So within the last two months?

15 A Couple of months, yeah.

16 Q Okay. Are you aware that the litigation between
17 the bank and my folks had been going on -- has
18 been going on now for over a year?

19 A I was aware when I was made aware of the -- of
20 the suit, yes.

21 Q Okay. Were you able -- in performing your duties
22 with respect to the litigation hold that you were
23 advised about within the last couple of months,
24 what were you able to do with respect to data
25 that may have existed over a year ago?

1 A You're going to have to answer -- ask that
2 question again. I'm not sure I understand it.

3 Q Okay. It's fair to say, is it not, that there
4 was no litigation hold in effect until you were
5 told about it within the last couple of months?

6 A No litigation hold that I had anything to do
7 with, no.

8 Q Okay. Do you know of any other litigation hold?

9 A I do not.

10 Q Okay. Which means that any safeguards that you
11 might institute to prevent the destruction of
12 deletion of data had not been done until the last
13 couple of months?

14 A As far as data, when you say, "data," you mean
15 electronically stored data?

16 Q Yes, sir.

17 A Yeah, that's correct.

18 Q Okay. Was there anything that you were able to
19 do in the last couple of months since you were
20 advised of the litigation hold to determine
21 whether any data had been deleted?

22 A I haven't found any evidence to lead me to
23 believe that any data had been deleted.

24 Q Okay. And what did you do to -- to reach that
25 conclusion?

1 A I was asked -- or actually I was given a request
2 to look for certain types of -- or I think it was
3 a -- a e-mail communication between certain
4 parties. And typically when we get those kinds
5 of requests, I turn it over to one of my
6 technicians and she goes through the e-mail
7 archive, which we have, and searches for all of
8 that information. And the reason I know that
9 nothing in that archive is deleted is we don't
10 delete anything in that archive.

11 Q And is that because of some regulatory
12 requirement?

13 A There -- there are regulatory requirements around
14 how long you keep certain types of data. In the
15 case of our e-mail archive, we just haven't gone
16 to the detail of coming up with a data retention
17 program that allows us to delete old data.

18 Q Okay.

19 A So we -- we're probably keeping stuff we don't
20 need to keep, but at this point, it's not been
21 a -- a storage concern, and so everything that's
22 in that archive is -- that's ever been put in
23 that archive is still in that archive.

24 Q Do you know the name Derek Franklin?

25 A I have heard that name, yes.

1 Q Have you -- what attempts -- or have you made any
2 attempts to locate the computer that Derek
3 Franklin used when he was an employee of the
4 bank?

5 A I have not been asked to do that.

6 Q Okay. Do you know where that computer is?

7 A No, I don't.

8 Q Do you even know if that computer is still owned
9 by the bank?

10 A I do not.

11 Q When -- okay. Let -- how about the computer that
12 Mark DeMarcus uses?

13 A Currently?

14 Q Yes.

15 A I know where that one is, yes.

16 Q Okay. Have you done anything to examine that
17 computer?

18 A No, I have not.

19 Q Do you know how long Mr. DeMarcus has been using
20 that computer?

21 A Not off the top of my head, no.

22 Q Has he been using that computer since prior to
23 the merger of American Community Bank and Yadkin
24 Valley?

25 A I couldn't answer that question with certainty,

1 Q Okay.

2 A There are other files that I keep much, much
3 longer. Like electronic messaging e-mail files,
4 I've got every e-mail that was ever written, at
5 least since -- I can say -- I can say since we
6 put the archiver in, which was about a year --
7 actually, it was before I got here. Probably a
8 year and a half ago.

9 Q Which would have been sometime in...

10 A It was after the ACB merger, if that's why
11 you're -- what you're trying to figure out. It
12 was after the -- because we put that archiver in,
13 as I understand it -- I wasn't there then, but
14 from what my folks tell me, they put that
15 archiver in after the merger was completed.
16 After the merger in -- but I -- when I say,
17 "merger," I'm talking about the IT integration.

18 Q Okay. Let's talk about that for a bit, the IT
19 integration between American Community Bank and
20 Yadkin Valley Bank. Did American Community Bank
21 use Exchange server?

22 A To my knowledge, yes.

23 Q Does --

24 A Again, I wasn't here then.

25 Q Okay. Does Yadkin Valley Bank use Exchange

1 November the 2nd, 2009.

2 Q Oh, okay. I'm sorry. And by -- at that time,
3 this was already -- whatever had been done was
4 already done?

5 A Was already done, yeah.

6 Q Where is the list of the eight names?

7 A I have, I think, on my desk a hard copy of the
8 e-mail that the -- that the technician sent me.

9 Q Did --

10 A I didn't bring it with me, but --

11 Q With the eight names on it?

12 A The eight first names, yeah.

13 Q Okay. Do you remember whether Jeff Cramer, Mark
14 DeMarcus, or Derek Franklin --

15 A Again, there were no last names.

16 Q Okay. Mark, Jeff, or Derek?

17 A There was no Derek. I remember that.

18 Q All right.

19 A I really don't -- I -- I don't remember the other
20 two. I'd have to just look at the piece of
21 paper.

22 Q That's --

23 A I'm sorry.

24 Q Fair enough. Since there was no Derek, is it
25 your understanding that whatever e-mails may have

1 me that the witness, who is you, was going to be
2 prepared to testify about Yadkin Valley systems
3 but not necessarily about American Community Bank
4 systems.

5 A That's correct.

6 Q Okay. There's -- there are many parts of those
7 4, 18, 19, 20, 25 --

8 A Uh-huh.

9 Q -- paragraphs which refer specifically to
10 American Community Bank.

11 A Right.

12 Q Do you have knowledge about American Community
13 Bank systems as well?

14 A I don't have any knowledge about anything that
15 happened in American Community Bank's environment
16 prior to merger. And for that matter, I don't
17 know -- I can't -- I can't know specifically what
18 happened to anything that belonged to Yadkin
19 Valley after merger up until November the 2nd
20 because I wasn't there, but --

21 Q Okay. Who was your predecessor?

22 A There wasn't one. Specifically. Nobody held my
23 title. My -- my job is a new job. My -- my
24 boss, Kristie Eller, who is this -- a chief
25 information officer did the functions that I do

**Deposition (excerpts) of Matt Randall
(Attached in support of multiple motions)**



1 Q. This is only partially serious, and somewhat of a
2 tease. You don't have any present intentions to be
3 wandering around the country.

4 A. No.

5 Q. You are staying here in Charlotte for the time
6 being?

7 A. Right.

8 Q. You anticipate for the remainder of 2010 you will
9 be in Charlotte.

10 A. Correct.

11 Mr. Sheedy - Please answer any questions Mr.
12 McKinnon may have.

13 Mr. McKinnon - Just a few.

14 Examination: (By Mr. McKinnon)

15 Q. Real briefly. Do you remember having made multiple
16 calls to Derek Franklin about the closing date
17 right before the June 6th date?

18 A. Yes. Like I said, it was just --- I had spoken
19 with Mr. Franklin in terms of just dealing with him
20 on a basis where I would frequently talk with him
21 about closing.

22 Q. And he eventually picked the date, did he not?
23 After your phone calls, did he select the June 6th
24 date?

25 A. I'd have to go back and look at it. It's possible.

Deposition of Matthew Russell Randall

1 Q. Did anything Derek Franklin said make you think
2 that the closing was contingent, or might not
3 happen, or was still up in the air?

4 A. No.

5 Mr. McKinnon - Thank you. Let me speak with
6 Mr. Ras real quick.

7 whereupon - A recess was taken

8 Q. (By Mr. McKinnon) A couple more questions. On June
9 the 6th, you actually went to the closing, didn't
10 you? Wasn't there a closing meeting with Mr.
11 Hargrove and Mr. Ras?

12 A. I think that's right, yeah.

13 Q. And you did that expecting the closing to occur,
14 isn't that right?

15 A. That's right.

16 Q. So as of June the 6th, despite your multiple phone
17 calls to Derek Franklin, nothing he told you gave
18 you any indication that the closing was not going
19 to happen on June the 6th?

20 A. Right.

21 Q. You were expecting to get the documents from Derek
22 and go forward on June the 6th?

23 A. Right, that's correct.

24 Mr. McKinnon - That's all I have.

25 Further Examination: (By Mr. Sheedy)

Deposition of Matthew Russell Randall

**Deposition (excerpts) of Thomas Ras
(Attached in support of multiple motions)**

1 went to OakTree Homes, Inc.?

2 A. I created it, yes.

3 Q. By that time you had met Dawne?

4 A. Correct.

5 Q. She was in Charlotte, too?

6 A. Not at that time.

7 Q. How did you come to make the decision to create
8 OakTree Homes, Inc.?

9 A. Decided to go into business for myself.

10 Q. Was that decision made in 2003?

11 A. I couldn't actually tell you the actual --- I
12 believe it was, yes.

13 Q. I've seen financial statements on OakTree Homes for
14 2004, 5, 6, 7, maybe 8. I don't think I've seen a
15 financial statement prior to 2004. Do you believe
16 that OakTree Homes, Inc. was in business prior to
17 2004?

18 A. It may have been incorporated but not running. I
19 honestly don't know.

20 Q. What did you decide to go into business to do?

21 A. Single family homes.

22 Q. Where?

23 A. York County.

24 Q. Why not Mecklenburg?

25 A. Because of the price point.

Deposition of Tom Ras

- 1 Q. Was the price point higher in Mecklenburg?
- 2 A. Correct.
- 3 Q. So the entrance into the market was easier in York
- 4 County because the price point was lower; is that
- 5 correct?
- 6 A. Less competitive.
- 7 Q. Less competitive to me means fewer single family
- 8 residential builders; is that what you mean?
- 9 A. Correct.
- 10 Q. Did you also mean that in addition to there being
- 11 fewer single family residential builders that the
- 12 price point for completed homes was lower in York
- 13 County?
- 14 A. Correct.
- 15 Q. So; therefore, financially it would be easier to
- 16 enter that market than it would be in Mecklenburg?
- 17 A. Correct.
- 18 Q. Why did you choose York as opposed to Union,
- 19 Gaston, or Iredell, or any of the other ring
- 20 counties that circle Charlotte?
- 21 A. Because it's South Carolina.
- 22 Q. Tell me about that.
- 23 A. It borders South Charlotte.
- 24 Q. How did that figure into your assessment?
- 25 A. Because at that time my assumption was that York

Deposition of Tom Ras

1 County would eventually become South Charlotte,
2 which has now evolved.

3 Q. So you viewed it as an opportunity to enter into
4 what you anticipated would be a pretty healthy
5 growth market for single family residential
6 construction?

7 A. That's correct.

8 Q. Did you have discussions with anyone in advance of
9 your decision to go into OakTree Homes, Inc.?

10 A. I did.

11 Q. With whom did you discuss that?

12 A. At the time, she was my wife --- my girlfriend,
13 which was Dawne.

14 Q. Did you discuss that with anyone else?

15 A. Barry Mack, who incorporated us.

16 Q. What was Dawne doing at that time?

17 A. Physical therapist.

18 Q. A licensed PT?

19 A. Yes.

20 Q. Was she affiliated with any of the hospitals?

21 A. In New York.

22 Q. In New York. So she was not a PT in the Charlotte
23 area?

24 A. No.

25 Q. Did you and she discuss that you would go into

Deposition of Tom Ras

- 1 A. That and OakTree Homes, yes.
- 2 Q. OakTree Homes is now defunct, right?
- 3 A. Right.
- 4 Q. And Hendon Row has now been sold and there's a
5 deficiency?
- 6 A. Correct.
- 7 Q. Okay. So what we have left would be the cash value
8 of the life insurance policy, based on this
9 financial statement, right?
- 10 A. Correct.
- 11 Q. And have loans been sought from the insurance
12 companies against those life insurance policies?
- 13 A. No.
- 14 Q. How much do you know about those life policies?
- 15 A. Very little.
- 16 Q. So you don't know if they are whole life, whether
17 they are term life, or what they are?
- 18 A. No.
- 19 Q. Between the years 2004 and 2007, Tom, OakTree saw a
20 pretty steady and significant growth in its
21 business, didn't it?
- 22 A. Correct.
- 23 Q. Revenues at OakTree jumped from about \$2 million in
24 2007 to more than \$5 million --- I'm sorry, \$2
25 million in 2006 to over \$5 million in 2007, didn't

Deposition of Tom Ras

1 they?

2 A. That seems right, yes.

3 Q. Almost double growth.

4 A. (Indicating yes)

5 Q. Again, that was a yes?

6 A. Yes.

7 Q. And, Tom, as we discussed earlier, your personal
8 compensation rose dramatically during this period
9 of time as well, didn't it?

10 A. Me personally?

11 Q. Yes.

12 A. I honestly couldn't tell you.

13 Q. Dawne's did, didn't it?

14 A. Yes.

15 Q. Hers went from about \$100,000 a year to over
16 \$200,000 a year during this period, didn't it?

17 A. Okay. Yes.

18 Q. Well, if you know?

19 A. I don't know.

20 Q. You have no reason as you sit here today to believe
21 that that's incorrect though, do you?

22 A. Correct.

23 Q. By the end of 2007, it would be fair to say,
24 wouldn't it, Tom, that OakTree had the greatest
25 inventory of lots and homes that it ever had?

Deposition of Tom Ras

1 this as an endurance contest. If you need to take
2 a break at any time, let me know, and we will
3 adjourn and then reconvene at everyone's
4 convenience. Tom, do you claim for purposes of
5 this case that you had a commitment from American
6 Community Bank to provide financing for the
7 acquisition of 51 lots from Har-Lee?

8 A I did.

9 Q Do you have a copy of that written commitment with
10 you?

11 A I do not.

12 Q Do you have a copy of that written commitment
13 anywhere?

14 A I do not.

15 Q What is the basis for your claim that you have a
16 commitment for financing from American Community
17 Bank?

18 A That I signed a commitment letter.

19 Q When did you sign a commitment letter?

20 A May.

21 Q When in May?

22 A 2008.

23 Q Which day in May in 2008?

24 A It was within the first couple of weeks of May.
25 Between May 1st and the 23rd, somewhere in there.

Continued Deposition of Tom Ras

1 Q I'm going to show you a calendar from May in 2008.
2 With that calendar in front of you, do you know
3 which day in May it was that you signed a
4 commitment letter?

5 A Specifically, no.

6 Q Do you know of any specific days in May when you
7 were physically with Derek Franklin from American
8 Community Bank?

9 A Specifically, no.

10 Q Do you know what time of day you signed a
11 commitment letter?

12 A Specifically, no.

13 Q Do you know who was present when you signed a
14 commitment letter?

15 A My wife, Dawne.

16 Q Was Derek Franklin present?

17 A He was.

18 Q Where did this occur?

19 A At my office.

20 Q And this would have been your old office address?

21 A 1654 Katy Lane.

22 Q Where is that letter that you signed now?

23 A Mr. Franklin took it with him that day.

24 Q Do you know why he took it with him?

25 A Because of the amount of errors that he made on

Continued Deposition of Tom Ras

1 that document.

2 Q Do you recall what those errors were?

3 A I absolutely do.

4 Q Can you state those for the record?

5 A He basically called us up to sign that agreement,
6 and when he brought it in, upon review, terms were
7 wrong, interest rate was wrong. His explanation
8 was, we will make the changes. It will hold.
9 We'll sign it. We'll redo this. We'll bring
10 another one to the closing.

11 Q So at some day in May of 2008, he took this written
12 commitment letter back because of the volume of
13 errors in it. Is that your testimony?

14 A Absolutely.

15 Q Did he ever return the commitment letter to you?

16 A No, he did not.

17 Q Did you keep a copy of it?

18 A We did, and a copy was forwarded to Bill Hargrove
19 at one point to satisfy his bank. Where that copy
20 is between Bill and myself, I couldn't tell you at
21 this point now.

22 Q Would it be fair to say, Tom, that as you sit here
23 today, you don't have this written commitment
24 letter or access to this written commitment letter?

25 A That is correct.

Continued Deposition of Tom Ras

1 Q Then I'm confused. I thought Mr. Franklin took the
2 letter back in order to change certain terms.

3 A Mr. Franklin took the letter, said I will bring it
4 back to my people and anything that we adjust on
5 this thing - - - It was not uncommon for us on
6 previous documents, like on a commitment letter,
7 they would say you could only do two specs, and I
8 would say, no, I want five specs. So Derek would
9 write in five, come back with the finished thing
10 and said we agreed to those, so we'll accept the
11 five. We pretty much got what we asked for.

12 Q And let me ask you about that. When he took the
13 letter back, Tom, what was your understanding of
14 what changes needed to be made to the letter?

15 A When we left there that day, any scratch outs and
16 write ins that that would stand, and if we had to
17 resign anything, that letter stood. We would
18 resign something prior to the closing.

19 Q Let's go through the scratch outs. Where there
20 any?

21 A Absolutely.

22 Q Do you remember what they were?

23 A I just went through them with you.

24 Q So one of the scratch outs was the interest rate?

25 A Correct.

Continued Deposition of Tom Ras

1 personal guarantees were required?

2 A That's correct.

3 Q Were there financial covenants?

4 A I don't recall.

5 Q Because in your past borrowings with American
6 Community Bank, there were liquid asset
7 requirements, weren't there?

8 A There was.

9 Q As you sit here today, do you remember if there was
10 a liquid asset requirement in this commitment?

11 A I don't specifically recall.

12 Q Was there a deposit account requirement?

13 A No, not that I know.

14 Q Did the commitment, as you remember it, address
15 closing costs?

16 A Yes. That was part of the loan origination.

17 Q Who was to bear the expense of closing costs? The
18 borrower or somebody else?

19 A The bank. They would roll it into my loan.

20 Q So the bank was loaning 3.8 million, plus closing
21 costs?

22 A As part of that deal, yes.

23 Q Was there a deadline for an acceptance by both
24 parties of this commitment in the commitment
25 letter?

Continued Deposition of Tom Ras

1 letter?

2 A No.

3 Q When you entered into your contract with Har-Lee,
4 was there a financing contingency in the contract?

5 A With?

6 Q Har-Lee.

7 A Explain.

8 Q I'll be happy to. Are you familiar with the idea
9 that some contracts to purchase land condition the
10 borrower's obligation to close on obtaining
11 suitable financing?

12 A Yes.

13 Q That's not an unusual provision in a real estate
14 contract, is it?

15 A Correct.

16 Q Did you have a written contract with Har-Lee?

17 A I did.

18 Q And in your written contract with Har-Lee was there
19 any financing contingency?

20 A I wouldn't know right this very second.

21 Q I'm going to show you a copy of that contract.
22 This is ACB-465 through 475. Have you seen this
23 before?

24 A I have.

25 Q Is this a copy of the contract that OakTree signed

Continued Deposition of Tom Ras

1 with Har-Lee?

2 A It is.

3 Q And the signature which appears at ACB-474, is that
4 the signature of your wife?

5 A It is, and mine as a witness.

6 Q So you actually saw your wife sign this contract?

7 A I did.

8 Q Take a second, if you would, and review this
9 contract. You are reviewing this for the purpose
10 of determining if there is any financing
11 contingency in this.

12 A I signed this but I didn't see one.

13 Q Is that consistent with your recollection as your
14 sit here today that this contract does not have a
15 financing contingency?

16 A Correct.

17 Q Was it your understanding, Tom, in your deal with
18 Har-Lee that you had an obligation to close
19 regardless of whether you had financing?

20 A I would have never entered into the agreement
21 without the guarantee that I would close this deal.

22 Q I understand. My question, Tom, was, was it your
23 understanding that you had signed a contract with
24 Har-Lee obligating OakTree to close regardless of
25 whether it had financing?

Continued Deposition of Tom Ras

1 A Absolutely.

2 Q Now, let's go through a few provisions in this
3 contract. If you would, I would like for you to
4 turn to paragraph 11, which appears on page 8.

5 A Time is of the essence?

6 Q Yes. Do you understand what that means?

7 A I do.

8 Q What does it mean?

9 A That time is of the essence, to proceed as fast as
10 possible, to close within due time.

11 Q Did you understand that the deadlines in this
12 contract were to be enforced?

13 A Yes.

14 Q Next, if you could flip over to ACB-473, paragraph
15 18, merger and amendments.

16 A Yes.

17 Q Do you see the second sentence under paragraph 18?

18 A Yes, I do.

19 Q Did you understand when you signed this contract
20 that any changes, additions or deletions to this
21 contract had to be in writing and signed by Har-Lee
22 and OakTree?

23 A Yes.

24 Q And by signing this agreement, was it your
25 understanding that OakTree agreed to that?

Continued Deposition of Tom Ras

1 Q You can't speak to your lawyer.

2 Mr. Robertson - Jim, he can when you show him
3 a document for the first time.

4 A I asked him if he had seen it.

5 Q I assume that he had seen that before.

6 A He hasn't seen it.

7 Q Tom, let me show you something I'm pretty sure you
8 are familiar with, which is the purchase and sale
9 Agreement between PIH and OakTree Homes.

10 A Yes.

11 Q Just prior to the contract addendum, there is a
12 signature page, isn't there?

13 A There is.

14 Q Is that your wife's signature on behalf of OakTree
15 Homes?

16 A It is.

17 Q Is this the only written contract signed by both
18 PIH and OakTree Homes?

19 A I believe so.

20 Q Is there any addendum, modification or amendment to
21 this contract of which you are aware signed by PIH
22 and OakTree Homes?

23 A I'm not sure.

24 Q Let's turn our attention first to paragraph 12.
25 What is your understanding of paragraph 12?

Continued Deposition of Tom Ras

1 Q Do you remember that?

2 A I do.

3 Q And paragraph 2 requires the purchaser, which in
4 this case would be PIH, to pay \$53,745?

5 A That's correct.

6 Q Was that sum paid?

7 A I believe so, yes.

8 Q But the closing by OakTree to PIH did not occur on
9 or before May 28, 2008?

10 A That is correct.

11 Mr. Sheedy - I would ask that this be marked
12 as an exhibit.

13 Whereupon - Deposition Exhibit 3 was marked.

14 Q As we discussed a few minutes ago, the purchase
15 price for OakTree to buy from Har-Lee was 4.44
16 million?

17 A Correct.

18 Q Is it true that OakTree planned to obtain that 4.44
19 million in part from the Bank of York?

20 A That is correct.

21 Q Is it also correct that there is no separate
22 specific commitment letter in writing from the Bank
23 of York to provide any funding for the 51 lot
24 transaction?

25 A True.

Continued Deposition of Tom Ras

- 1 A I'm sorry.
- 2 Q Let me rephrase. There are certain loans that
- 3 OakTree has at American Community Bank which are in
- 4 default and are the subject of foreclosure?
- 5 A That is correct.
- 6 Q The commitment that you described in May had
- 7 nothing to do with those loans?
- 8 A No.
- 9 Q It was completely separate as a financing?
- 10 A Correct.
- 11 whereupon - A recess was held.
- 12 Q Earlier, Tom, I asked you some questions about
- 13 indebtedness that OakTree Homes as obligor and your
- 14 wife and you as guarantors have to American
- 15 Community Bank.
- 16 A Correct.
- 17 Q I'm going to run through some documents here.
- 18 First, I want to show you a promissory note in the
- 19 principal amount of roughly 1.3 million.
- 20 A Okay.
- 21 Q Have you seen this document before?
- 22 A I sure have.
- 23 Q Did you sign this note on behalf of OakTree Homes?
- 24 A I did.
- 25 Q Did your wife sign this note on behalf of OakTree

Continued Deposition of Tom Ras

Deposition (excerpts) of Dawne Ras
(Attached in support of multiple motions)

1 A Yes.

2 Q In fact, all of the banks that appear on Deposition
3 Exhibits 1 and 2 imposed some kind of financial
4 covenant, didn't they?

5 A Yes.

6 Q Do you remember what the financial covenants were
7 of each one of these six lenders?

8 A I don't.

9 Q Who was keeping track of that? Harry Lee, or you,
10 or no one?

11 A Harry may have. The banks would call us if they
12 needed anything updated, and Harry would give that
13 to them.

14 Q Now, after this thirty minute meeting during which
15 both Tom and you read this commitment letter, and
16 there were discussions and certain changes to be
17 made, and Mr. Franklin took back the commitment
18 letter. Is that what happened?

19 A Yes.

20 Q So when he left, according to your testimony, he
21 was the only one that had possession of that
22 commitment letter?

23 A Correct.

24 Q And it was your understanding that that commitment
25 letter was going to be changed and at least retyped

1 and returned for signature?

2 A Correct.

3 Q That's what the three of you had discussed and
4 agreed would occur?

5 A Correct.

6 Q But it never came back, did it?

7 A I don't recall seeing it. I usually get it at
8 closing.

9 Q But, as you sit here today, you don't have a piece
10 of paper from American Community Bank that's a
11 signed commitment for 3.8 million dollars to
12 finance 51 lots, do you?

13 A No.

14 Q What role, if any, Dawne, did you have in
15 negotiating the contract with Har-Lee?

16 A None.

17 Q Was that something that Tom alone handled?

18 A Tom would handle with our attorney.

19 Q Did you ever meet with Bill Hargrove about that
20 transaction?

21 A No.

22 Q Were there any meetings in your office about that
23 transaction?

24 A I don't believe so, no.

25 Q So the only information that you had about the

**Deposition (excerpts) of R. Grier Sandifer
(Attached in support of multiple motions)**

1 from Har-Lee?

2 A When you say approach, we had talked about it
3 certainly. Tom and I, I guess early on there - - -
4 When he first brought it to us, I think he first
5 mentioned to us about Bank of York doing the entire
6 debt. We could not do that. It was not - - - It
7 was higher than our bank's limit on doing - - - We
8 have a limit set by the FDIC, a loan limit. It was
9 a four or five million dollar deal or something
10 like that. We couldn't have done it anyway. It
11 was going to require another institution taking a
12 piece of it, a big piece of it.

13 Q So there were no discussions about Bank of York
14 providing all of the financing and then syndicating
15 or participating with another lender?

16 A I told him that he'd have to have somebody else to
17 do it. No, we didn't talk about doing it as a
18 participation. It would have been an option, but I
19 don't think we ever talked about doing it that way.

20 Q Did this ever result in the issuance of a takedown
21 note?

22 A No.

23 Q Did you ever give any written approval that you
24 would loan 1.7 million for the 51 lots?

25 A No.

Deposition of R. Grier Sandifer

1 do you remember were there still conversations from
2 Tom and Dawne about buying Phase II or was that
3 done by then?

4 A Yes, I'm sure there were still conversations. I
5 don't know if it was when the house was done or
6 not. I know there were conversations in the summer
7 or at least well into the summer of '08. And one
8 of the reasons I know that is because we had a
9 customer, a bank customer that was waiting to
10 purchase a lot from OakTree to build a house on,
11 and that wound up as one of the lots that American
12 Community Bank wound up financing. We were waiting
13 on that because our customer was waiting on that.

14 Q My question wasn't very good. I'm trying to figure
15 out when did you first understand that OakTree was
16 trying to buy all 51 lots? When did those
17 conversations begin and when was it apparent to you
18 that that deal wasn't ever going to happen?

19 A It was probably when I was working at my previous
20 employer that I knew that there was interest there
21 in doing that.

22 Q So we've got a starting point sometime before
23 September of '07 that you first heard Tom or Dawne
24 or both of them say we want to buy Phase II Palm
25 Tree Cove?

Deposition of R. Grier Sandifer

1 A I think that's right.

2 Q In your mind, when was the prospect that OakTree
3 was going to purchase all of Bill Hargrove's lots
4 in Phase II, when was it that that just wasn't
5 going to happen?

6 A I knew that things started to kind of deteriorate
7 between Tom and American Community Bank because of
8 all of this, I guess. I knew that American
9 Community Bank - - - Again, because we were waiting
10 on it for one of our customers financing a house in
11 there, I knew that eventually it got back down to
12 10 or 11 lots, whatever it was. Obviously that
13 wasn't what OakTree - - - They wanted all 51 lots.
14 I kind of knew that the deal seemed to be over at
15 that point. I knew there was a lot of heartburn on
16 Tom's part about what was going on.

17 Q You just made a comment that interested me. You
18 said that you knew that the relationship between
19 OakTree and American Community Bank had
20 deteriorated because of all this. Tell me what all
21 this is.

22 A I knew that American Community Bank was going to
23 have to provide the bulk of funding for them to get
24 anything done, and Tom told me - - - It seems like
25 at different points, he told me about their not

Deposition of R. Grier Sandifer

**Exhibit A to Complaint
(Palm Tree Cove Phase II Note)**

21,335,000.00 6/28/2001 10/28/2008 2415000323 7th 1st Account 1st 6th
 Release in the boxes above are for Land's use only and do not limit the applicability of this document to any particular use or item.
 Any item within containing ***** has been omitted due to legal length limitations.

Lender: American Community Bank
Box 148
Two LEX Place, Suite 120
Rock Hill, SC 29733

PROMISE TO PAY. DAKTREE HOMES, INC. ("Daktree") promises to pay to American Community Bank ("AcBank") or order, in lawful money of the United States of America, the principal amount of One Million Three Hundred Five Thousand & 00/100 Dollars (\$1,305,000.00), together with interest on the unpaid principal balance from July 29, 1993, until paid in full.

PAYMENT. Borrower will pay this Note in one principal payment of \$1,382,001.00 due hereinafter on October 28, 2021. This payment due on October 28, 2021, will pay principal and all accrued interest on the Note. Borrower will pay a periodic monthly payment of \$1,382,001.00, which will pay principal and all accrued unpaid interest due on this type of payment due by the 15th day of each month thereafter. The above schedule agreed to (adjusted by applicable law, payments will be broken down into any required number of payments) to preclude the need for any late charges; and then in any event no collection costs. The amount interest rate for this Note has been computed on a 365/360 day basis that is, by applying the rate of the annual interest rate over a year of 362 days, measured by the outstanding principal amount, multiplied by the total number of days the principal balance is outstanding. Borrower will pay this Note at lender's address shown above or at such other place as lender may designate in writing.

[illegible][illegible]

LATE CHARGE: If a payment is 15 days or more late, Borrower will be charged 4.00% of the unpaid portion of the regularly scheduled payment of \$5.00, which will be added to the next scheduled payment.

INTEREST AFTER DEFAULT. Upon default, including failure to pay your first monthly, the total sum per under this Note will continue to accrue interest at the interest rate under this note. However, in no event will the interest rate exceed the maximum interest rate limitations under applicable law.

CSFALV, 2520 of the following was considered an example of a low (5-point or below) under the hotel:

Payment Defects: Borrower fails to make any payment when due under the Note.

Other Districts. Borrower later to comply with or perform any term, covenant, obligation or condition contained in this Note or in any of the related documents or to satisfy with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower.

Full Disclosure. Any warranty, representation or statement made or furnished to Lender by Borrower on an Borrower's behalf under this loan or the related documents is false or misleading in any material respect, either now or at the time made or becomes or becomes false or misleading at any time thereafter.

Incidents. The disposition of disposition of Borrower's estate as a going business, the insolvency of Borrower, the appointment of a receiver for any part of Borrower's property, any liquidation for the benefit of creditors, any type of creditor workout, or the commencement of any proceedings under any bankruptcy or insolvency law or against Borrower.

Guidelines in Fisheries Management. Communication of information on various management, whether by judicial proceedings, methods, regulations or any other method by the members of Government or by any governmental unit against any individual regarding the law. This involves a combination of any of Government agencies, knowledge, personal contacts, relationships. Moreover, this Form of Control shall not merely influence in a good legal steps by Government but also directly or indirectly of the decision-making by the member or members of Government and of the Government officials (under water) in making of the action in Fisheries management and the decision shall be based on the basis of the Government's fisheries management, in the national government by law, to take decisions by being an adequate source of help in the field.

Events Affecting Guarantor. Any of the preceding events occurs with respect to any Guarantor of any of the Indebtedness or any Guarantor dies or becomes incompetent or retires or disposes the validity of, or renounces, any guaranty of the indebtedness covered by this Note.

Change in Ownership. Any change in ownership of twenty-five percent (25%) or more of the common stock of Borrower.

Adverse Change. A material adverse change occurs in Borrower's financial condition, or (unless waived) the prospect of payment or performance of this Note is impaired.

thereby. Gender in good faith belongs to the future.

LEADER'S RIGHTS. Upon demand, I read him the entire verbal protocol, sentence under O's Name and all associated unpaid interest
immediately due, and then discussed with him the situation.

APPROXIMATE FEES: LIFEPLAN. (ALSO MAY BE A POLYMERASE CHAIN REACTION (PCR) TEST IF FINGERPRINTS NOT PAID). BORROWER WILL PAY LOWER RATE AMOUNT. THIS INCLUDES (LIMITS) REASONABLE STRATEGY TO GET TO BORROWER'S HOME THAN OTHERS (15% OF \$200,000) BEING IN THE AREA. AND (LIMITS) REASONABLE AMOUNT OF TIME IN A COURT, INCLUDING REASONABLE ATTORNEY FEES AND LEGAL EXPENSES FOR BORROWER'S PROSECUTOR (FINGERPRINTS) TO VERIFY OR VERIFY ANY SYSTEM FOR USE OF FINGERPRINTS, AND (LIMITS) IF NOT PROVIDED BY SPECIFIC STATE, BORROWER WILL PAY PER COURT COSTS, INCLUDING TO WHAT STATE IS BORROWER OR LIVE.

GOVERNOR JOHN LAVER. This note will be governed by Federal law, whether or not enacted, to the extent not preempted by Federal law, the laws of the State of North Carolina with respect to its conduct of law enforcement. This note has been accepted by Laver in the State of North Carolina.

RIGHT OF SETOFF. To the extent permitted by applicable law, Lender reserves a right of setoff in its Bankover's accounts with Lender for the creation, holding, or payment of accounts. This includes all accounts Bankover holds jointly with someone else and all accounts Bankover may establish in the future. Lender will not be bound by any limitation on the right of setoff.

as in the Article. However, this does not involve any IPA or through accounts, or any other economic or which estate would be prohibited by law. Borrower authorizes Lender, to the extent permitted by applicable law, to accept or receive all sums owing to the Creditors against any and all such accounts, and, at Lender's option, to elect to rely (instead of such accounts) to allow Lender to protect Lender's things and assets (which are provided in this agreement).

COLLATERAL BOTTOMLAND SWAMPY SOFT MUDS ARE BOUND BY LOT NUMBERS 11, 12, 19, 20, 21, 22, 23, 24, 25, 28 AND 40 US PALM TREE COVE II SUBDIVISION CLOVER SC.

AFFIRMATIVE COVENANTS. Borrower covenants and agrees with Lender, that, so long as this Agreement remains in effect, Borrower will provide a true and correct statement, no later than thirty (30) days after the end of each fiscal year, in a section, Borrower will provide a copy of Borrower's tax returns no later than thirty (30) days after the bookable date for the tax reporting period ended.

PROMISSORY NOTE
(Continued)

SUCCESSOR INTERESTS. The terms of this Note shall be binding upon Borrower, and upon Borrower's heirs, personal representatives, successors and assigns, and shall inure to the benefit of Lender and its successors and assigns.

GENERAL PROVISIONS. If any part of this Note cannot be enforced, this fact will not affect the rest of the Note. Lender may delay or forego enforcing any of the rights or remedies under this Note without losing them. Borrower and any other person who signs, guarantees or endorses this Note, to the extent allowed by law, waive presentment, demand for payment, and notice of dishonor. Upon any change in the terms of this Note, and unless otherwise expressly stated in writing, no party who signs this Note, whether as maker, guarantor, accommodation maker or endorser, shall be released from liability. All such parties agree that Lender may renew or extend (repeatedly and for any length of time) this loan or release any party or guarantor or substitute or borrow, (as to either upon or perfect Lender's security interest in the collateral and take any other action deemed necessary by Lender) without the consent of or notice to anyone other than the party with whom the modification is made. The obligations under this Note are joint and several.

PRIOR TO SIGNING THIS NOTE, BORROWER READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS NOTE, INCLUDING THE VARIABLE INTEREST RATE PROVISIONS. BORROWER AGREES TO THE TERMS OF THE NOTE.

BORROWER ACKNOWLEDGES RECEIPT OF A COMPLETED COPY OF THIS PROMISSORY NOTE.

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

BORROWER:

DARTREE HOMES, INC.

BY:

DAVID M. KAY, PRESIDENT OF DARTREE HOMES, INC.

BY: JAMES C. KAY, VICE PRESIDENT OF DARTREE HOMES, INC.

7115000323

AMERICAN COMMUNITY BANK

Account Number: 7115000323

MODIFICATION AND EXTENSION AGREEMENT

STATE OF SOUTH CAROLINA

COUNTY OF: York

Effective Date: October 28, 2008

This Modification and Extension Agreement is made and entered into, this 21st day of November, 2008 by and between AMERICAN COMMUNITY BANK, (hereinafter referred to as "BANK"); Oak Tree Homes, Inc. (hereinafter referred to as maker(s) or co-maker(s) on the Note described below individually and collectively as "BORROWER"); the trustee or successor trustee under the Deed of Trust described below (hereinafter referred to as "TRUSTEE"); and Dawne Ras and Thomas Ras (the guarantor(s), endorser(s), or other obligor(s) (if any) on the Note described below, or the owner(s) other than the BORROWER (if any) of any property pledged to secure performance of BORROWER'S obligation to BANK (hereinafter referred to individually and collectively as "THIRD PARTY").

WITNESSETH:

WHEREAS, BORROWER is indebted to BANK in the original principal sum of: One Million Three Hundred Five Thousand and 00/100 \$1,305,000.00 ✓
which Note has a current principal balance as of:
One Million Two Hundred Twenty Thousand and 00/100 \$1,220,000.00 ✓
as evidenced by a:

☐ Note dated _____, made payable to _____

☐ Note and Security Agreement dated _____, which Note is made payable

to _____

X Note and Deed of Trust dated July 28, 2008, which note is made payable to American Community Bank and which Deed of Trust is recorded in Book _____, Page _____, in the _____ County Registry and relates to the real property described therein;

said Note, Note and Security Agreement, or Note and Deed of Trust, including any renewals, extensions, or modifications thereof, being hereafter referred to as "CONTRACT," and said CONTRACT being incorporated and made a part hereof by reference; and

WHEREAS, BORROWER and BANK mutually desire to modify and amend the provisions of the CONTRACT in the manner hereinafter set forth, it being specifically understood that, except as herein modified and amended, the terms and provisions of the CONTRACT shall remain unchanged and continue in full force as therein written; and

WHEREAS, THIRD PARTY, if different from BORROWER, and TRUSTEE have agreed to the terms of this modification;

NOW, THEREFORE, by mutual agreement of the parties and in mutual consideration of the premises and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto agree that said CONTRACT by modified and amended to provide as follows:

*Inspected
By [Signature]
12/1/08*

Package Reviewed & Booked

[Signature] 11/28/08

NOV 26 2008

INTEREST RATE

☐ Interest will be paid at the rate of _____ per annum. This rate will be effective the date this CONTRACT is executed.

☒ Interest will be paid at a variable rate of interest known as the "Contract Rate." This rate will be effective the date this CONTRACT is executed. BORROWER acknowledges that the Contract Rate may increase or decrease based on changes in the Prime Rate published by BANK.

The Contract Rate will be the BANK'S Prime Rate plus 0.50 Percentage Points (the "Margin"). The initial Contract Rate is 4.50 %. The Minimum Contract Rate shall be _____ %, and the Maximum Contract Rate shall be _____ %, provided that at no time shall the Contract Rate exceed the maximum interest rate allowed by law to be charged by BANK. Increases or decreases in the Contract Rate of interest will:

☒ increase or decrease the amount of each payment due thereafter;

☐ increase or decrease the final payment due.

The Contract Rate will:

☐ be the Prime Rate in effect on the last day of the preceding month, plus the Margin and changes in the Contract Rate during a month will take effect as of the first business day of the following month; OR

☒ change daily assuming there is a change in the Prime Rate; OR

☐ as often as: _____. The BANK'S Prime Rate is not intended or represented to be the lowest or most favorable rate of interest charged or offered by the BANK to its customers.

☐ Other: _____

PRINCIPAL AND INTEREST PAYMENT TERMS:

☐ Principal and Interest is payable in full at maturity on _____

☐ Payable in consecutive _____ installments of ☐ principal, or ☐ principal and interest; commencing on _____ and continuing on the same day of each calendar period thereafter; in _____ equal payments of _____ with one final payment of all remaining principal and interest due on _____

☒ Interest is payable monthly commencing on December 28, 2008, and continuing on the same day of each calendar

period thereafter, with one final payment of all remaining principal and interest on December 28, 2008.

☐ Other: _____

In the event periodic accruals of interest shall exceed any periodic fixed payment amount described above, the fixed payment amount shall be immediately increased, or additional supplemental interest payments required on the same periodic basis as specified above (increased fixed payments or supplemental payments to be determined in the BANK'S sole discretion), in such amounts and at such times as shall be necessary to pay all accruals of interest for the period and all accruals of unpaid interest from previous periods. Such adjustments to the fixed payment amount or supplemental payments shall remain in effect for so long as the interest accruals shall exceed the original fixed payment amount and shall be further adjusted upward or downward to reflect changes in the variable interest rate. In no event shall the fixed payment amount be reduced below the original fixed payment amount specified above.

COLLATERAL:

Unless otherwise provided herein, it is expressly understood and agreed by the parties hereto that any and all collateral given as security to insure faithful performance by BORROWER and any THIRD PARTY of any and all obligations to BANK, however created, whether now existing or hereafter arising, shall remain as security for the previously described CONTRACT as modified hereby.

It is expressly understood and agreed by and between the parties hereto that any security agreement, deed of trust, chattel mortgage, trust receipt, assignment, contract or other writing granting BANK security for performance of any obligation to BANK is, to the extent inconsistent herewith, modified and changed to be consistent with the terms of this Modification and Extension Agreement.

☐ If marked, the aforesaid CONTRACT, as herein modified, and the performance of any loan agreement between the parties shall be additionally secured by collateral hereinafter described, and a new security instrument shall be executed by the BORROWER and/or THIRD PARTY:

Date: _____ Type of Agreement: _____ From: _____

Collateral: _____

Date: _____ Type of Agreement: _____ From: _____

Collateral: _____

☐ If marked, the collateral hereinafter described shall be and hereby is deleted as security for payment of the aforesaid

CONTRACT: _____

However, it is understood and agreed that BANK shall not be required or obligated to take any further steps to release said collateral from any lien or security unless BANK determines, in its sole discretion, that it may do so without consequence to its secured position and relative priority in other collateral, and unless BORROWER bears the reasonable cost of such action.

OTHER Modification Fee ✓

\$0.00

If the CONTRACT being modified by this Agreement is signed by more than one person or entity, the modified CONTRACT shall be the joint and several obligation of all signers, and each provision of the CONTRACT as modified shall apply to each and all of the signers and to the property and liability of each and all of them.

This Modification and Extension Agreement shall bind and inure to the benefit of the successors in interest hereto, and it is expressly understood and agreed that this Agreement is a modification only and not a novation. The original obligation of the BORROWER, as evidenced by the above-described CONTRACT is not extinguished hereby. It is also understood and agreed that, except for the above-indicated modifications, said CONTRACT, and/or any other loan documents or agreements and all singular terms and conditions thereof, shall be and remain in force and effect and that this Modification and Extension Agreement shall not release or affect the liability of any co-makers, guarantors, obligors, or endorser of said CONTRACT. BORROWER specifically consents to the terms of this Modification and Extension Agreement and waives any objection thereto, and further affirms any obligation to BANK previously created. BANK expressly reserves all rights as to any party with right of recourse on the aforesaid CONTRACT.

IN WITNESS WHEREOF, this instrument has been executed by the parties hereto and delivered on the day and year first above written.

Attest:

ASSISTANT SECRETARY

(CORPORATE SEAL)

✓ AMERICAN COMMUNITY BANK

By: _____

Derek H. Franklin VICE PRESIDENT

BORROWER:

BORROWER

(Seal)

BORROWER - INDIVIDUAL

(Seal)

NAME OF CORPORATION OR PARTNERSHIP

Oak Tree Homes, Inc

✓ By: _____

David H. Hox

(Seal)

By: _____

W. P. President

(Seal)

TRUSTEE:

(Seal)

Attest:

SECRETARY
(CORPORATE SEAL)

THIRD PARTY (Guarantor, Endorser, Etc.):

(Seal)

(Seal)

(Seal)

(Seal)

**Exhibit B to Complaint
(Palm Tree Cove Phase II Mortgage)**

7115 000 323

RECORDATION REQUESTED BY:

200800029362
Filed for Record in
YORK COUNTY, SC
DAVID HAMILTON
07-30-2008 At 12:51 pm.
MORTGAGE 13.00
DR Vol 10212 Page 196 - 202

WHEN RECORDED MAIL TO:

American Community Bank
Loan Operations
P.O. Box 8035
Monroe, NC 28111

SPACE ABOVE THIS LINE IS FOR RECORDER'S USE ONLY

MORTGAGE

MAXIMUM LIEN. The amount of indebtedness secured by this Mortgage, including the outstanding amount of the Note and all future advances shall at no time exceed the principal amount of \$1,305,000.00, plus interest, reasonable attorneys' fees, court costs and the expenses to preserve and protect the Property. Interest under the Note will be deferred, accrued or capitalized, but Lender shall not be required to defer, accrue or capitalize any interest except as provided in the Note.

THIS MORTGAGE dated July 29, 2008, is made and executed between OAKTREE HOMES, INC. (referred to below as "Grantor") and American Community Bank, whose address is Two Law Place, Suite 120, Rock Hill, SC 29732 (referred to below as "Lender").

GRANT OF MORTGAGE. For valuable consideration, Grantor mortgages, grants, and conveys to Lender all of Grantor's right, title, and interest in and to the following described real property, together with all existing or subsequently erected or affixed buildings, improvements and fixtures, all easements, rights of way, and appurtenances, of water, water rights, watercourses and ditch rights (including stock in utility with ditch or irrigation rights) and all other rights, interests, and profits relating to the real property, including without limitation all minerals, oil, gas, geothermal and solar matters, (the "Real Property") located in YORK County, State of South Carolina:

SEE ATTACHED EXHIBIT "A" FOR A MORE PARTICULAR DESCRIPTION

The Real Property or its address is commonly known as LOT NUMBERS 11, 12, 19, 20, 21, 22, 23, 24, 25, 28 AND 49 IN PALM TREE COVE II SUBDIVISION, CLOVER, SC 29745.

Grantor presently assigns to Lender all of Grantor's right, title, and interest in and to all present and future leases of the Property and all Rents from the Property. In addition, Grantor grants to Lender a Uniform Commercial Code security interest in the Personal Property and Rents

FUTURE ADVANCES. In addition to the Note, this Mortgage secures all future advances made by Lender to Grantor whether or not the advances are made pursuant to a commitment. Specifically, without limitation, this Mortgage secures, in addition to the amount specified in the Note, all future advances made by Lender to Grantor, together with all interest thereon. This Mortgage shall remain in full force and effect to secure future advances in accordance with Section 29-3-50, as amended, Code of Laws of South Carolina (1977) even in the event of a release or cancellation of the Note. However, upon request of Grantor, Lender will return this Mortgage to be released and cancelled or record upon full payment of all indebtedness then owing, and upon such cancellation of all indebtedness of record, this Mortgage and all documents shall be without charge to Grantor; however, Grantor shall pay all costs of recordation, if any, and all documentary stamps due on the Note evidencing future advances secured by this Mortgage.

THIS MORTGAGE, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS MORTGAGE. THIS MORTGAGE IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS:

PAYMENT AND PERFORMANCE. Except as otherwise provided in this Mortgage, Grantor shall pay to Lender all amounts secured by this Mortgage as they become due and shall strictly perform all of Grantor's obligations under this Mortgage.

POSSESSION AND MAINTENANCE OF THE PROPERTY. Grantor agrees that Grantor's possession and use of the Property shall be governed by the following provisions:

Possession and Use. Until the occurrence of an Event of Default, Grantor may (1) remain in possession and control of the Property; (2) use, occupy or manage the Property; and (3) collect the Rents from the Property.

Duty to Maintain. Grantor shall maintain the Property in habitable condition and promptly perform all repairs, replacements, and maintenance necessary to preserve its value.

Compliance With Environmental Laws. Grantor represents and warrants to Lender that: (1) During the period of Grantor's ownership of the Property, there has been no use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance by any person on, under, about or from the Property; (2) Grantor has no knowledge of, or reason to believe, that there has been, except as previously disclosed to and acknowledged by Lender in writing, (a) any breach or violation of any Environmental Law, (b) any use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance on, under, about or from the Property by any prior owners or occupants of the Property, or (c) any actual or threatened litigation or claims of any kind by any person relating to such matters; and (3) Except as previously disclosed to and acknowledged by Lender in writing, (a) neither Grantor nor any tenant, contractor, agent or other authorized user of the Property shall use, generate, manufacture, store, treat, dispose of or release any Hazardous Substance on, under, about or from the Property; and (b) any such activity shall be conducted in compliance with all applicable federal, state, and local laws, regulations and ordinances, including without limitation all Environmental Laws. Grantor authorizes Lender and its agents to enter upon the Property to make such inspections and tests, at Grantor's expense, as Lender may deem appropriate to determine compliance of the Property with this section of the Mortgage. Any inspections or tests made by Lender shall be for Lender's purposes only and shall not be construed to create any responsibility or liability on the part of Lender to Grantor or to any other person. The representations and warranties contained herein are based on Grantor's due diligence in investigating the Property for Hazardous Substances. Grantor hereby (1) releases and waives any future claims against Lender for indemnity or contribution in the event Grantor becomes liable for cleanup or other costs under any such laws; and (2) agrees to indemnify, defend, and hold harmless Lender against any and all claims, losses, damages, penalties, and expenses which Lender may directly or indirectly sustain or suffer resulting from a breach of this section of the Mortgage or as a consequence of any use, generation, manufacture, storage, disposal, release or threatened release occurring prior to Grantor's ownership or interest in the Property, whether or not the same were or should have been known to Grantor. The provisions of this section of the Mortgage, including the obligation to indemnify and defend, shall survive the payment of the indebtedness and the satisfaction and reconveyance of the Lien of this Mortgage and shall not be affected by Lender's acquisition of any interest in the Property, whether by foreclosure or otherwise.

Nuisance, Waste. Grantor shall not cause, conduct or permit any nuisance nor commit, permit, or suffer any stripping of or waste on or to the Property or any portion of the Property. Without limiting the generality of the foregoing, Grantor will not remove, or grant to any other party the right to remove, any timber, minerals (including oil and gas), coal, clay, scoria, soil, gravel or rock products without Lender's prior written consent.

Removal of Improvements. Grantor shall not demolish or remove any improvements from the Real Property without Lender's prior written consent. As a condition to the removal of any improvements, Lender may require Grantor to make arrangements satisfactory to Lender to replace such improvements with improvements of at least equal value.

Lender's Right to Enter. Lender and Lender's agents and representatives may enter upon the Real Property at all reasonable times to attend to Lender's interests and to inspect the Real Property for purposes of Grantor's compliance with the terms and conditions of this Mortgage.

How 2/07
Furnish flow
Know - KRE.C. Code
2007
Furnish flow and
by Oaktree Ltd.
- 2/1

Amount
Interest due
- Andy Ridge
- CVN customer

Palmetto
gum

Q
OK

BK10212 P00196

Compliance with Governmental Requirements. Grantor shall promptly comply with all laws, ordinances, and regulations, now or hereafter in effect, of all governmental authorities applicable to the use or occupancy of the Property, including without limitation, the Americans With Disabilities Act. Grantor may contest in good faith any such law, ordinance, or regulation and withhold compliance during any proceeding, including appropriate appeals, so long as Grantor has notified Lender in writing prior to doing so and so long as, in Lender's sole opinion, Lender's interests in the Property are not jeopardized. Lender may require Grantor to post adequate security or a surety bond, reasonably satisfactory to Lender, to protect Lender's interest.

Duty to Protect. Grantor agrees neither to abandon or leave unattended the Property. Grantor shall do all other acts, in addition to those acts set forth above in this section, which from the character and use of the Property are reasonably necessary to protect and preserve the Property.

TAXES AND LIENS. The following provisions relating to the taxes and liens on the Property are part of this Mortgage:

Payment. Grantor shall pay when due (and in all events prior to delinquency) all taxes, payroll taxes, special taxes, assessments, water charges and sewer service charges levied against or on account of the Property, and shall pay when due all claims for work done on or for services rendered or material furnished to the Property. Grantor shall maintain the Property free of any liens having priority over or equal to the interest of Lender under this Mortgage, except for those liens specifically agreed to in writing by Lender, and except for the lien of taxes and assessments not due as further specified in the Right to Contest paragraph.

Right to Contest. Grantor may withhold payment of any tax, assessment, or claim in connection with a good faith dispute over the obligation to pay, so long as Lender's interest in the Property is not jeopardized. If a lien arises or is filed as a result of nonpayment, Grantor shall within fifteen (15) days after the lien arises or, if a lien is filed, within fifteen (15) days after Grantor has notice of the filing, secure the discharge of the lien, or if requested by Lender, deposit with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender in an amount sufficient to discharge the lien plus any costs and reasonable attorneys' fees, or other charges that could accrue as a result of a foreclosure or sale under the lien. In any event, Grantor shall defend itself and Lender and shall satisfy any adverse judgment before enforcement against the Property. Grantor shall name Lender as an additional obligee under any surety bond furnished in the contest proceedings.

Evidence of Payment. Grantor shall upon demand furnish to Lender satisfactory evidence of payment of the taxes or assessments and shall authorize the appropriate governmental official to deliver to Lender, at any time a written statement of the taxes and assessments against the Property.

Notice of Construction. Grantor shall notify Lender at least fifteen (15) days before any work is commenced, any services are furnished, or any materials are supplied to the Property. If any mechanic's lien, materialman's lien, or other lien could be asserted on account of the work, services, or materials and the cost exceeds \$5,000.00, Grantor will upon request of Lender furnish to Lender advance assurances satisfactory to Lender that Grantor can and will pay the cost of such improvements.

PROPERTY DAMAGE INSURANCE. The following provisions relating to insuring the Property are a part of this Mortgage:

Maintenance of Insurance. Grantor shall procure and maintain policies of fire insurance with standard extended coverage endorsements on a replacement basis for the full insurable value covering all improvements on the Real Property in an amount sufficient to avoid application of any co-insurance clause, and with a standard mortgagee clause in favor of Lender. Grantor shall also procure and maintain comprehensive general liability insurance in such coverage amounts as Lender may request with Lender being named as additional insureds in such liability insurance policies. Additionally, Grantor shall maintain such other insurance, including but not limited to hazard, business interruption and boiler insurance as Lender may require. Policies shall be written by such insurance companies and in such form as may be reasonably acceptable to Lender. Grantor shall deliver to Lender certificates of coverage from each insurer containing a stipulation that coverage will not be canceled or diminished without a minimum of fourteen (14) days' prior written notice to Lender and not containing any disclaimer of the insurer's liability for failure to give such notice. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Grantor or any other person. Should the Real Property be located in an area designated by the Director of the Federal Emergency Management Agency as a special flood hazard area, Grantor agrees to obtain and maintain Federal Flood Insurance, if available, within 45 days after notice is given by Lender that the Property is located in a special flood hazard area, for the full unpaid principal balance of the loan and any prior liens on the property securing the loan, up to the maximum policy limits set under the National Flood Insurance Program, or as otherwise required by Lender, and to maintain such insurance for the term of the loan.

Application of Proceeds. Grantor shall promptly notify Lender of any loss or damage to the Property if the estimated cost of repair or replacement exceeds \$5,000.00. Lender may make proof of loss if Grantor fails to do so within fifteen (15) days of the casualty. Whether or not Lender's security is limited, Lender may, at Lender's election, receive and retain the proceeds of any insurance and apply the proceeds to the reduction of the indebtedness; payment of any lien affecting the Property, or the restoration and repair of the Property. If Lender elects to apply the proceeds to restoration and repair, Grantor shall repair or replace the damaged or destroyed improvements in a manner satisfactory to Lender. Lender shall, upon satisfactory proof of such expenditures, pay or reimburse Grantor from the proceeds for the reasonable cost of repair or restoration if Grantor is not in default under this Mortgage. Any proceeds which have not been disbursed within 180 days after their receipt and which Lender has not committed to the repair or restoration of the Property shall be used first to pay any amount owing to Lender under this Mortgage, then to pay accrued interest, and the remainder, if any, shall be applied to the principal balance of the indebtedness. If Lender holds any proceeds after payment in full of the indebtedness, such proceeds shall be paid to Grantor as Grantor's interests may appear.

Grantor's Report on Insurance. Upon request of Lender, however not more than once a year, Grantor shall furnish to Lender a report on each existing policy of insurance showing: (1) the name of the insurer; (2) the facts insured; (3) the amount of the policy; (4) the property insured, the then current replacement value of such property, and the manner of determining that value; and (5) the expiration date of the policy. Grantor shall, upon request of Lender, have an independent appraiser satisfactory to Lender determine the cash value replacement cost of the Property.

LENDER'S EXPENDITURES. If any action or proceeding is commenced that would materially affect Lender's interest in the Property or if Grantor fails to comply with any provision of this Mortgage or any Related Documents, including but not limited to Grantor's failure to discharge or pay when due any amounts Grantor is required to discharge or pay under this Mortgage or any Related Documents, Lender on Grantor's behalf may (but shall not be obligated to) take any action that Lender deems appropriate, including but not limited to discharging or paying all taxes, liens, security interests, encumbrances and other claims, at any time levied or placed on the Property and paying all costs for insuring, maintaining and preserving the Property. All such expenditures incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Note from the date incurred or paid by Lender to the date of repayment by Grantor. All such expenses will become a part of the indebtedness and, at Lender's option, will: (A) be payable on demand; (B) be added to the balance of the Note and be apportioned among and be payable with any installment payments to become due during either (1) the term of any applicable insurance policy; or (2) the remaining term of the Note; or (C) be treated as a balloon payment which will be due and payable at the Note's maturity. The Mortgage also will secure payment of these amounts. Such right shall be in addition to all other rights and remedies to which Lender may be entitled upon Default.

WARRANTY; DEFENSE OF TITLE. The following provisions relating to ownership of the Property are a part of this Mortgage:

Title. Grantor warrants that: (a) Grantor holds good and marketable title of record to the Property in fee simple, free and clear of all liens and encumbrances other than those set forth in the Real Property description or in any title insurance policy, title report, or final title opinion issued in favor of, and accepted by, Lender in connection with this Mortgage; and (b) Grantor has the full right, power, and authority to execute and deliver this Mortgage to Lender.

Defense of Title. Subject to the exception in the paragraph above, Grantor warrants and will forever defend the title to the Property against the lawful claims of all persons. In the event any action or proceeding is commenced that questions Grantor's title or the interest of Lender under this Mortgage, Grantor shall defend the action at Grantor's expense. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of Lender's own choice, and Grantor will deliver, or cause to be delivered, to Lender such instruments as Lender may request from time to time to permit such participation.

Compliance With Laws. Grantor warrants that the Property and Grantor's use of the Property complies with all existing applicable laws, ordinances, and regulations of governmental authorities.

Survival of Representations and Warranties. All representations, warranties, and agreements made by Grantor in this Mortgage shall survive the execution and delivery of this Mortgage, shall be continuing in nature, and shall remain in full force and effect until such time as Grantor's indebtedness shall be paid in full.

CONDEMNATION. The following provisions relating to condemnation proceedings are a part of this Mortgage:

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Proceedings. If any proceeding in condemnation is filed, Grantor shall promptly notify Lender in writing; and Grantor shall promptly take such steps as may be necessary to defend the action and obtain the award. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of its own choice, and Grantor will deliver or cause to be delivered to Lender such instruments and documentation as may be requested by Lender from time to time to permit such participation.

Application of Net Proceeds. If all or any part of the Property is condemned by eminent domain proceedings or by any proceeding or purchase in lieu of condemnation, Lender may at its election require that all or any portion of the net proceeds of the award be applied to the indebtedness of the repair or restoration of the Property. The net proceeds of the award shall mean the award after payment of all reasonable costs, expenses, and attorneys' fees incurred by Lender in connection with the condemnation.

IMPOSITION OF TAXES, FEES AND CHARGES BY GOVERNMENTAL AUTHORITIES. The following provisions relating to governmental taxes, fees and charges are a part of this Mortgage:

Current Taxes, Fees and Charges. Upon request by Lender, Grantor shall execute such documents in addition to this Mortgage and take whatever other action is requested by Lender to perfect and continue Lender's lien on the Real Property. Grantor shall reimburse Lender for all taxes, as described below, together with all expenses incurred in recording, perfecting or continuing this Mortgage, including without limitation all taxes, fees, documentary stamps, and other charges for recording or registering this Mortgage.

Taxes. The following shall constitute taxes to which this section applies: (1) a specific tax upon this type of Mortgage or upon all or any part of the indebtedness secured by this Mortgage; (2) a specific tax on Grantor which Grantor is authorized or required to deduct from payments on the indebtedness secured by this type of Mortgage; (3) a tax on this type of Mortgage chargeable against the Lender or the holder of the Note; and (4) a specific tax on all or any portion of the indebtedness or on payments of principal and interest made by Grantor.

Subsequent Taxes. If any tax to which this section applies is enacted subsequent to the date of this Mortgage, this event shall have the same effect as an Event of Default, and Lender may exercise any or all of its available remedies for an Event of Default as provided below unless Grantor either: (1) pays the tax before it becomes delinquent; or (2) consents the tax as provided above in the Taxes and Fees section and deposits with Lender cash or a sufficient corporate security bond or other security satisfactory to Lender.

SECURITY AGREEMENT; FINANCING STATEMENTS. The following provisions relating to this Mortgage as a security agreement are a part of this Mortgage:

Security Agreement. This instrument shall constitute a Security Agreement to the extent any of the Property constitutes fixtures, and Lender shall have all of the rights of a secured party under the Uniform Commercial Code as amended from time to time.

Security Interest. Upon request by Lender, Grantor shall take whatever action is requested by Lender to perfect and continue Lender's security interest in the Real and Personal Property. In addition to recording this Mortgage in the real property records, Lender may, at any time and without further authorization from Grantor, file specified counterparts, copies or reproductions of this Mortgage as a financing statement. Grantor shall reimburse Lender for all expenses incurred in perfecting or continuing this security interest. Upon default, Grantor shall not remove, leave or detach the Personal Property from the Property. Upon default, Grantor shall assemble any Personal Property not affixed to the Property in a manner and at a place reasonably convenient to Grantor and Lender and make it available to Lender within three (3) days after receipt of written demand from Lender to the extent permitted by applicable law.

Addresses. The mailing addresses of Grantor (debtor) and Lender (secured party) from which information concerning the security interest created by this Mortgage may be obtained (such as required by the Uniform Commercial Code) are as stated on the first page of this Mortgage.

FURTHER ASSURANCES; ATTORNEY-IN-FACT. The following provisions relating to further assurances and attorney-in-fact are a part of this Mortgage:

Further Assurances. At any time, and from time to time, upon request of Lender, Grantor will make, execute and deliver, or will cause to be made, executed or delivered, to Lender or to Lender's designees, and when requested by Lender, cause to be filed, recorded, refiled, or re-recorded, as the case may be, at such times and in such offices and places as Lender may deem appropriate, any and all such mortgages, deeds of trust, security deeds, security agreements, financing statements, continuation statements, instruments of further assurance, certificates, and other documents as may, in the sole opinion of Lender, be necessary or desirable in order to effectuate, complete, perfect, continue, or preserve: (1) Grantor's obligations under the Note, this Mortgage, and the Related Documents; and (2) the fees and security interests created by this Mortgage at first and prior time on the Property, whether now owned or hereafter acquired by Grantor. Unless prohibited by law or these terms, Grantor shall reimburse Lender for all costs and expenses incurred in connection with the matters referred to in this paragraph.

Attorney-in-Fact. If Grantor fails to do any of the things referred to in the preceding paragraph, Lender may do so for and in the name of Grantor and at Grantor's expense. For each purpose, Grantor hereby irrevocably appoints Lender as Grantor's attorney-in-fact for the purpose of making, executing, delivering, filing, recording, and doing all other things as may be necessary or desirable, in Lender's sole opinion, to accomplish the matters referred to in the preceding paragraph.

FULL PERFORMANCE. If Grantor pays all the indebtedness, including without limitation all future advances, when due, and otherwise performs all the obligations imposed upon Grantor under this Mortgage, Lender shall execute and deliver to Grantor a suitable satisfaction of this Mortgage and suitable statements of termination of any financing statement on file evidencing Lender's security interest in the Real and the Personal Property. Grantor will pay, if permitted by applicable law, any reasonable termination fee as determined by Lender from time to time.

EVENTS OF DEFAULT. Each of the following, at Lender's option, shall constitute an Event of Default under this Mortgage:

Payment Default. Grantor fails to make any payment when due under the indebtedness.

Default on Other Payments. Failure of Grantor within the time required by this Mortgage to make any payment for taxes or insurance, or any other payment necessary to prevent filing of or to effect discharge of any lien.

Other Defaults. Grantor fails to comply with or to perform any other term, obligation, covenant or condition contained in this Mortgage or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Grantor.

False Statements. Any warranty, representation or statement made or furnished to Lender by Grantor or on Grantor's behalf under this Mortgage or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

Defective Collateralization. This Mortgage or any of the Related Documents ceases to be in full force and effect (including failure of any collateral document to create a valid and perfected security interest or lien) at any time and for any reason.

Insolvency. The dissolution or termination of Grantor's existence as a going business; the insolvency of Grantor, the appointment of a receiver for any part of Grantor's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Grantor.

Creditor or Foreclosure Proceedings. Commencement of foreclosure or foreclosure proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Grantor or by any governmental agency against any property securing the indebtedness. This includes a garnishment of any of Grantor's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Grantor as to the validity or reasonableness of the claim which is the basis of the creditor or foreclosure proceeding and if Grantor gives Lender written notice of the creditor or foreclosure proceeding and deposits with Lender monies or a surety bond for the creditor or foreclosure proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve of bond for the dispute.

Breach of Other Agreement. Any breach by Grantor under the terms of any other agreement between Grantor and Lender that is not remedied within any grace period provided therein, including without limitation any agreement concerning any indebtedness or other obligation of Grantor to Lender, whether existing now or later.

Events Affecting Guarantor. Any of the preceding events occur with respect to any Guarantor of any of the indebtedness or any Guarantor dies or becomes incompetent, or renounces or disputes the validity of, or liability under, any Guaranty of the indebtedness.

Adverse Change. A material adverse change occurs in Grantor's financial condition, or Lender believes the prospect of payment or performance of the indebtedness is impaired.

Insecurity. Lender in good faith believes itself insecure.

RIGHTS AND REMEDIES ON DEFAULT. Upon the occurrence of an Event of Default and at any time thereafter, Lender, at Lender's option, may exercise any one or more of the following rights and remedies, in addition to any other rights or remedies provided by law:

Accelerate Indebtedness. Lender shall have the right at its option without notice to Grantor to declare the entire Indebtedness immediately due and payable, including any prepayment penalty that Grantor would be required to pay.

UCC Remedies. With respect to all or any part of the Personal Property, Lender shall have all the rights and remedies of a secured party under the Uniform Commercial Code.

Collect Rents. Lender shall have the right, without notice to Grantor, to take possession of the Property and, as mortgagee-in-possession, collect the Rents, including amounts past due and unpaid, and apply the net proceeds, over and above Lender's costs, against the Indebtedness. In furtherance of this right, Lender may require any tenant or other user of the Property to make payments of rent or use fees directly to Lender. If the Rents are collected by Lender, then Grantor irrevocably designates Lender as Grantor's attorney-in-fact to endorse instruments received in payment thereof in the name of Grantor and to negotiate the same and collect the proceeds. Payments by tenants or other users to Lender in response to Lender's demand shall satisfy the obligations for which the payments are made, whether or not any proper grounds for the demand existed. Lender may exercise its rights under this subparagraph either in person, by agent, or through a receiver.

Appoint Receiver. Lender shall have the right to have a receiver appointed to take possession of all or any part of the Property, with the power to protect and preserve the Property, to operate the Property preceding foreclosure or sale, and to collect the Rents from the Property and apply the proceeds, over and above the cost of the receivership, against the Indebtedness. The receiver may serve without bond if permitted by law. Lender's right to the appointment of a receiver shall exist whether or not the apparent value of the Property exceeds the Indebtedness by a substantial amount. Employment by Lender shall not disqualify a person from serving as a receiver.

Judicial Foreclosure. Lender may obtain a judicial decree foreclosing Grantor's interest in all or any part of the Property.

Nonjudicial Sale. If permitted by applicable law, Lender may foreclose Grantor's interest in all or in any part of the Personal Property or the Real Property by nonjudicial sale.

Deficiency Judgment. If permitted by applicable law, Lender may obtain a judgment for any deficiency remaining in the Indebtedness due to Lender after application of all amounts received from the exercise of the rights provided in this section.

Appraisement. Grantor hereby waives the right to assert any statute providing appraisal rights which may reduce any deficiency judgment obtained by Lender against Grantor in the event of foreclosure under this Mortgage.

Tenancy at Sufferance. If Grantor remains in possession of the Property after the Property is sold as provided above or Lender otherwise becomes entitled to possession of the Property upon default of Grantor, Grantor shall become a tenant at sufferance of Lender or the purchaser of the Property and shall, at Lender's option, either (1) pay a reasonable rental for the use of the Property, or (2) vacate the Property immediately upon the demand of Lender.

Other Remedies. Lender shall have all other rights and remedies provided in this Mortgage or the Note or available at law or in equity.

Sale of the Property. To the extent permitted by applicable law, Grantor hereby waives any and all right to have the Property marshalled. In exercising its rights and remedies, Lender shall be free to sell all or any part of the Property together or separately, in one sale or by separate sales. Lender shall be entitled to bid at any public sale on all or any portion of the Property.

Notice of Sale. Lender shall give Grantor reasonable notice of the time and place of any public sale of the Personal Property or of the time after which any private sale or other intended disposition of the Personal Property is to be made. Reasonable notice shall mean notice given at least ten (10) days before the time of the sale or disposition. Any sale of the Personal Property may be made in conjunction with any sale of the Real Property.

Election of Remedies. Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of Grantor under this Mortgage, after Grantor's failure to perform, shall not affect Lender's right to declare a default and accelerate its remedies. Nothing under this Mortgage or otherwise shall be construed so as to limit or restrict the rights and remedies available to Lender following an Event of Default, or in any way to limit or restrict the rights and ability of Lender to proceed directly against Grantor and/or against any other co-maker, guarantor, surety or endorser and/or to proceed against any other collateral directly or indirectly securing the Indebtedness.

Attorneys' Fees/Expenses. If Lender institutes any suit or action to enforce any of the terms of this Mortgage, Lender shall be entitled to recover such sum as the court may, in its reasonable discretion, award as attorneys' fees at trial and upon any appeal. Whether or not any court action is involved, and to the extent not prohibited by law, all reasonable expenses Lender incurs that in Lender's opinion are necessary at any time for the protection of its interest or the enforcement of its rights shall become a part of the Indebtedness payable on demand and shall bear interest at the Note rate from the date of the expenditure until repaid. Expenses covered by this paragraph include, without limitation, however subject to any limits under applicable law, Lender's reasonable attorneys' fees in an amount not less than fifteen percent (15%) of the amount owing on the Indebtedness and Lender's legal expenses whether or not there is a lawsuit, including reasonable attorneys' fees and expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated postjudgment collection services, the cost of searching records, obtaining title reports (including foreclosure reports), surveys' reports, and appraisal fees and title insurance, to the extent permitted by applicable law. Grantor also will pay any court costs. In addition to all other sums provided by law.

NOTICES. Any notice required to be given under this Mortgage, including without limitation any notice of default and any notice of sale shall be given in writing, and that be effective when actually delivered, when actually received by teletransmission (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Mortgage. All copies of notices of foreclosure from the holder of any loan which has priority over this Mortgage shall be sent to Lender's address, as shown near the beginning of this Mortgage. Any party may change its address for notices under this Mortgage by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Grantor agrees to keep Lender informed at all times of Grantor's current address. Unless otherwise provided or required by law, if there is more than one Grantor, any notice given by Lender to any Grantor is deemed to be notice given to all Grantors.

NO TRANSFERS. No Transfers. Without the prior written consent of Lender in each instance, Grantor shall not cause or permit any transfer of the Property or any part thereof, whether voluntarily, involuntarily or by operation of law, nor shall Grantor enter into any agreement or transaction to transfer, or accomplish in form or substance a transfer, of the Property. A "transfer" of the Property includes: (a) the direct or indirect sale, transfer or conveyance of the Property or any portion thereof or interest therein; (b) the execution of an installment sale contract or similar instrument affecting all or any portion of the Property; (c) if Grantor, or any general partner or member of Grantor, is a corporation, partnership, limited liability company or other business entity, the transfer (whether in one transaction or a series of transactions) of any stock, partnership, limited liability company or other ownership interests in such corporation, partnership, limited liability company or entity which results in a change in control of Grantor or a change in the majority ownership of Grantor; and (d) an agreement by Grantor leasing all or a substantial part of the Property for other than actual occupancy by a space tenant (hereunder or a sale, assignment or other transfer of or the grant of a security interest in and to any leases affecting the Property).

NO ENCUMBRANCES. No Encumbrances. Except for the permitted encumbrances set forth in any title insurance policy issued in favor of, and accepted by, Lender in connection with this Deed of Trust, Grantor shall not cause or permit to exist any mortgage, deed of trust, pledge, lien, security interest (including, without limitation, a purchase money security interest), encumbrance, attachment, levy, distress or other judicial process on or against the Property or any part thereof (including, without limitation, fixtures and other personalty) whether superior or inferior to the lien of this Deed of Trust, without the prior written consent of Beneficiary. If any lien or encumbrance is filed or entered without Grantor's consent, Grantor shall have it removed of record or have undertaken appropriate action to have the lien removed within sixty (60) days after it is filed or entered, or within such earlier time as necessary to prevent forfeiture of title to the Property.

MISCELLANEOUS PROVISIONS. The following miscellaneous provisions are a part of this Mortgage:

Amendments. This Mortgage, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Mortgage. No alteration of or amendment to this Mortgage shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

Annual Reports. If the Property is used for purposes other than Grantor's residence, Grantor shall furnish to Lender, upon request, a certified statement of net operating income received from the Property during Grantor's previous fiscal year in such form and detail as

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Lender shall require. "Net operating income" shall mean all cash receipts from the Property less all cash expenditures made in connection with the operation of the Property.

Caption Headings. Caption headings in this Mortgage are for convenience purposes only and are not to be used to interpret or define the provisions of this Mortgage.

Governing Law. This Mortgage will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of South Carolina without regard to its conflicts of law provisions. This Mortgage has been accepted by Lender in the State of South Carolina.

No Waiver by Lender. Lender shall not be deemed to have waived any rights under this Mortgage unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right that operates as a waiver of such right or any other right. A waiver by Lender of a provision of this Mortgage shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Mortgage. No prior waiver by Lender, nor any course of dealing between Lender and Grantor, shall constitute a waiver of any of Lender's rights or of any of Grantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Mortgage, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

Severability. If a court of competent jurisdiction finds any provision of this Mortgage to be illegal, invalid, or unenforceable as to any circumstance, that finding shall not make the offending provision illegal, invalid, or unenforceable as to any other circumstance. If feasible, the offending provision shall be considered modified so that it becomes legal, valid and enforceable. If the offending provision cannot be so modified, it shall be considered deleted from this Mortgage. Unless otherwise required by law, the illegality, invalidity, or unenforceability of any provision of this Mortgage shall not affect the legality, validity or enforceability of any other provision of this Mortgage.

Merge. There shall be no merge of the interest or estate created by this Mortgage with any other interest or estate in the Property at any time held by or for the benefit of Lender in any capacity, without the written consent of Lender.

Successors and Assigns. Subject to any limitations stated in this Mortgage on transfer of Grantor's interest, this Mortgage shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the Property becomes vested in a person other than Grantor, Lender, without notice to Grantor, may deal with Grantor's successors with reference to this Mortgage and the indebtedness by way of enforcement or extension without releasing Grantor from the obligations of this Mortgage or liability under the indebtedness.

Time is of the Essence. Time is of the essence in the performance of this Mortgage.

Waiver of Homestead Exemption. Grantor hereby releases and waives all rights and benefits of the homestead exemption laws of the State of South Carolina as to all indebtedness secured by this Mortgage.

DEFINITIONS. The following capitalized words and terms shall have the following meanings when used in this Mortgage. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Mortgage shall have the meanings attributed to such terms in the Uniform Commercial Code:

Borrower. The word "Borrower" means CACTREE HOMES, INC. and includes all co-signers and co-makers signing the Note and all their successors and assigns.

Default. The word "Default" means the Default set forth in this Mortgage in the section titled "Default".

Environmental Laws. The words "Environmental Laws" mean any and all state, federal and local statutes, regulations and ordinances relating to the protection of human health or the environment, including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq. ("CERCLA"), the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. Section 1601, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. Section 9701, et seq., or other applicable state or federal laws, rules, or regulations adopted pursuant thereto.

Event of Default. The words "Event of Default" mean any of the events of default set forth in this Mortgage in the events of default section of this Mortgage.

Grantor. The word "Grantor" means CACTREE HOMES, INC.

Guarantor. The word "Guarantor" means any guarantor, surety, or accommodation party of any or all of the indebtedness.

Guaranty. The word "Guaranty" means the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note.

Hazardous Substances. The words "Hazardous Substances" mean materials that, because of their quantity, concentration or physical, chemical or infectious characteristics, may cause or pose a present or potential hazard to human health or the environment when improperly used, treated, stored, disposed of, generated, manufactured, transported or otherwise handled. The words "Hazardous Substances" are used in their very broadest sense and include without limitation any and all hazardous or toxic substances, materials or wastes as defined by or listed under the Environmental Laws. The term "Hazardous Substances" also includes, without limitation, petroleum and petroleum by-products of any fraction thereof and asbestos.

Improvements. The word "Improvements" means all existing and future improvements, buildings, structures, mobile homes affixed on the Real Property, facilities, additions, replacements and other construction on the Real Property.

Indebtedness. The word "Indebtedness" means all principal, earned interest, and other amounts, costs and expenses payable under the Note or Related Documents, together with all renewals of, extensions of, modifications of, consolidations of and substitutions for the Note or Related Documents and any amounts expended or advanced by Lender to discharge Grantor's obligations or expenses incurred by Lender to enforce Grantor's obligations under this Mortgage, together with interest on such amounts as provided in this Mortgage. Specifically, without limitation, indebtedness includes the future advances set forth in the Future Advances provision of this Mortgage, together with all interest thereon.

Lender. The word "Lender" means American Community Bank, its successors and assigns.

Mortgage. The word "Mortgage" means this Mortgage between Grantor and Lender.

Note. The word "Note" means the promissory note dated July 28, 2008, in the original principal amount of \$1,305,000.00 from Grantor to Lender, together with all renewals of, extensions of, modifications of, refinements of, consolidations of, and substitutions for the promissory note or agreement. The maturity date of this Mortgage is October 28, 2008. NOTICE TO GRANTEE: THE NOTE CONTAINS A VARIABLE INTEREST RATE.

Personal Property. The words "Personal Property" mean all equipment, fixtures, and other articles of personal property now or hereafter owned by Grantor, and now or hereafter attached or affixed to the Real Property, together with all accessories, parts, and additions to, all replacements of, and all substitutions for, any of such property, and together with all proceeds (including without limitation all insurance proceeds and refunds of premiums) from any sale or other disposition of the Property.

Property. The word "Property" means collectively the Real Property and the Personal Property.

Real Property. The words "Real Property" mean the real property, interests and rights, as further described in this Mortgage.

Related Documents. The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guarantees, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the indebtedness.

Rents. The word "Rents" means all present and future rents, revenues, income, issues, royalties, profits, and other benefits derived from the Property.

BK-10212 P80200

GRANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS MORTGAGE AND GRANTOR AGREES TO ITS TERMS.

GRANTOR:

OAKTREE HOMES, INC.

By: [Signature]
DAVID M. RAS, PRESIDENT OF OAKTREE HOMES, INC.

By: [Signature]
THOMAS C. RAY, VICE PRESIDENT OF OAKTREE HOMES, INC.

Signed, acknowledged and delivered in the presence of:

X [Signature]
Witness

X [Signature]
Witness

CORPORATE ACKNOWLEDGMENT

STATE OF SC

COUNTY OF York

PERSONALLY appeared before me and made oath that he or she saw the within-named Grantor(s) sign, read and, as his or her act and deed, deliver the withinwritten Mortgage for the uses and purposes therein mentioned, and that he or she with the other witness subscribed above witnessed the execution thereof.

SWORN to before me this 28th

day of July, A.D. 2008

[Signature]
Notary Public

My Commission expires: May 14, 2008

[Signature]
(Witness)

8K10212 PD0201

EXHIBIT "A"

All that piece, parcel or lot of land lying, being and situate in Ebenezer Township, York County, State of South Carolina, being identified as that Lot 11, 12, 19, 20, 21, 22, 23, 24, 25, 28, and 40 as shown on that map of plat of "Palm Tree Cove 2A" drawn by David L. Ferguson, SCPLS #16493, dated February 18, 2008, recorded in Plat Book D-305, Page 4 and revised in Plat Book D-310, Page 2 and shown and depicted on that map or plat of the Premises plat entitled "Plat Prepared for Har-Lee" drawn by David L. Ferguson, SCPLS #16493, dated March 20, 2008, recorded in Plat book D-308, Page 4 in the Office of the Clerk of Court for York county, South Carolina reference to which is hereby made for a more particular description.

Derivation: Being the identical property conveyed to Oaktree Homes, Inc. by deed of Har-Lee, LLC dated July 28, 2008 and recorded on July 30, 2008 in Book 6212 at Page 192 in the Office of the Clerk of Court for York County, South Carolina.

EX-10212 PG 202

**Exhibit A to Memorandum in Opposition
to Plaintiff's Motions
(Contract between Oaktree and Har-Lee)**

STATE OF SOUTH CAROLINA)
) PURCHASE & SALE AGREEMENT
COUNTY OF YORK)

THIS PURCHASE & SALE AGREEMENT (the "Contract") is entered into this 12th day of December 2007, by and between Har-Lee, LLC, a South Carolina Limited Liability Company ("Seller"), and Oak Tree Homes, Inc., a South Carolina Corporation ("Purchaser").

WHEREAS, Seller is willing to sell to Purchaser and Purchaser is willing to buy from Seller, upon the terms and conditions hereinafter set forth, 51 lots located in the subdivision of Palm Tree Cove II, located on Alison Creek Road in York County at Lake Wylie, South Carolina and shown as Phase IIA on a plat attached hereto as Exhibit "A," which does not include Lot 42, (the "Property").

NOW, THEREFORE, in consideration of the non-refundable earnest money paid in the amount of Fifty Thousand and no/100 Dollars (\$50,000.00) which shall be paid by Purchaser within seven (7) days from the execution of the Contract to the Seller and Purchaser shall deposit One Thousand and no/100 Dollars (\$1,000.00) with Seller within fourteen (14) days from the date of delivery of a deck permit for Lot 29, along with the mutual covenants and agreements and other good and valuable consideration, the receipt and sufficiency which is hereby acknowledged, the Seller agrees to sell and the Purchaser agrees to purchase the Property, as follows:

1a. PURCHASE PRICE. The purchase price for the Property (the "Purchase Price") that Purchaser shall pay to Seller is to be paid in one of the following three options to be elected by Purchaser in writing on or before December 31, 2007:

Option A. Forty-nine (49) lots to be purchased and closed on or before thirty (30) days from the date of delivery to Purchaser of the Final Plat approved by York County, at \$80,000.00 per lot; concurrently with Lot 25 to be purchased and closed on or before thirty (30) days from the date of delivery to Purchaser of the Final Plat approved by York County in the amount of \$170,000.00, concurrently with Lot 39 to be purchased and closed on or before thirty (30) days from the date of delivery to Purchaser of the Final Plat approved by York County in the amount of \$350,000.00. The Purchase of Lot 39 is contingent upon Seller acquiring a deck permit for the same. In the event a deck permit is not acquired by Seller, Purchaser shall not be obligated to purchase Lot 39.

Option B. Twenty Five (25) lots, consisting of twelve (12) low pressure sewer lots, to be purchased and closed on or before thirty (30) days from the date of delivery to Purchaser of the Final Plat approved by York County at \$85,000.00 per lot. Lot 25 shall be purchased with the initial closing in the amount of \$170,000.00. The initial closing shall take place on or before thirty (30) days from the date of delivery to Purchaser of the Final Plat approved by York County. The remaining Twenty Five (25) lots to be purchased and closed on or before ninety (90) days from the initial closing at \$85,000.00 per lot. Lot 29 shall be purchased and closed in the amount of \$350,000.00 on or before ninety (90) days from the initial

DEPOSITION
EXHIBIT

12-8-11
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ACB-465

closing.

1b. LOTS. Seller is offering to Purchaser the following Lots:

- a. Twenty six (26) lots with gravity sewer: Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 24, 25, 26, 27, 28, 46, 47, 48, 49, 50, 51, 52, 53 and 54.
- b. Twenty four (24) lots with low pressure sewer: Lot 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 43, 44 and 45.
- c. Lot 39 will be sold by Seller, contingent upon Seller acquiring a dock permit; and
- d. Lot 42 will be sold to the adjacent property owner Ben Chamberlain.
- e. There is no Lot numbered 40 or 41 on the Plat.

1c. ESCROW.

a. Under Option A:

1. The Earnest Money deposit is to be applied to the Purchase Price at the Closing.

b. Under Option B:

1. The Earnest Money shall remain in Escrow and an additional \$25,000.00 will be placed in Escrow on February 28, 2008.

2. For each subsequent lot purchased after the Initial Closing, with the exception of Lot 39, the Earnest Money shall be applied in an amount of \$2,000.00 of the individual lot purchase price (\$25,000.00) for each lot purchased. The Earnest Money for Lot 39 shall be applied to the purchaser price for that particular lot.

1d. OPTION TO PURCHASE. In addition to the terms set forth herein for the Purchase of the Property, Seller hereby grants the Purchaser a thirty (30) day option for the purchase of any and all 100 foot lots created in Palm Tree Cove II Subdivision, Phases II B and II) being offered for sale by Seller on property shown on Exhibit A (the "Option"). Purchaser shall provide written notice to Seller within 15 days of presentation of preliminary plan with pricing option by Seller to be conducted on March 28, 2008.

2. COMMON AREAS & RESPONSIBILITIES FOR SELLER. Seller shall remain responsible for the completion of the following for the subdivision. The parties acknowledge that Seller has contracted with OakTree Homes for the performance of some of the work below. In the event that monies are placed in escrow as set forth herein below for any of

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the work for which OakFree has contracted. OakFree shall submit request for payment to the escrow agent in accordance with the construction contract.

- a. The homeowner's association shall be formed with the S.C. Secretary of State on or before the initial closing. Should Seller fail to complete this requirement by the stated time, the same shall not be grounds for default as set forth in Section 8 of the Contract, but shall result in the escrow at Closing the amount of \$500.00, equal to the cost to complete this task. Failure to comply with this provision shall be considered a material breach of the Contract and trigger the Purchaser's remedies under Section 8 for Default.
- b. The Declaration of Covenants and Restrictions shall be filed with the York County Register of Deeds office on or before the initial closing. Should Seller fail to complete this requirement by the stated time, the same shall not be grounds for default as set forth in Section 8 of the Contract, but shall result in the escrow at Closing the amount of \$1000.00, equal to the cost to complete this task. Failure to comply with this provision shall be considered a material breach of the Contract and trigger the Purchaser's remedies under Section 8 for Default.
- c. The entrance way signs, lot signs and surrounding landscaping at the entrances to the Palm Tree Cove II subdivision shall be completed on or before the initial closing. Should Seller fail to complete this requirement by the stated time, the same shall not be grounds for default as set forth in Section 8 of the Contract, but shall result in the escrow at Closing the amount of \$40,000.00, equal to the cost to complete this task. Failure to comply with this provision shall be considered a material breach of the Contract and trigger the Purchaser's remedies under Section 8 for Default. The lot signs shall be the same type or design as those located in the Coves at Eastview.
- d. The Kiddie Pool and Junior Olympic Swimming Pool with a 2,000 square foot clubhouse area shall be completed on or before May 31, 2008, or alternatively Seller shall deposit \$242,500.00 in Escrow for the benefit of OakFree Homes, Inc. for the construction and/or completion of this task on or before May 31, 2008. Failure to comply with this provision shall be considered a material breach of the Contract and trigger the Purchaser's remedies under Section 8 for Default. Should Purchaser desire to begin the construction of Kiddie Pool and Junior Olympic Swimming Pool with clubhouse area prior to the initial closing, Purchaser shall provide written notice to the Seller of its desire to begin construction. Upon receipt of the written notice, Seller shall deposit \$242,500.00 in Escrow for the benefit of OakFree Homes, Inc. for the construction of this task upon receipt of written notice from Purchaser.

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- e. The sidewalks are to be completed prior to initial closing in the same design as Palm Tree Cove Subdivision. Should Seller fail to complete this requirement by the stated time, the same shall not be grounds for default as set forth in Section 8 of the Contract, but shall result in the expense of Closing the amount of \$19,000.00 equal to the cost to complete this task. Failure to comply with this provision shall be considered a material breach of the Contract and trigger the Purchaser's remedies under Section 8 for Default.
- f. Evidence of payment of roll back taxes paid by Seller to be provided 7 days before initial closing. Failure to comply with this provision shall be considered a material breach of the Contract and trigger the Purchaser's remedies under Section 8 for Default.
- g. It shall be the responsibility and a condition precedent for Seller to acquire the dock permit for Lot 19, prior to Purchaser purchasing Lot 30. Failure of Seller to acquire the dock permit shall render this Contract as to Lot 30 null and void, but shall not affect the remaining obligations hereunder. Failure to acquire the dock permit shall not be a material breach of the Contract.
- h. Seller shall be responsible all infrastructure and development of roads and culverts. Seller shall also be responsible for insuring that all Lots have necessary utility access for water, sewer, natural gas and electricity prior to Closing. Seller and Purchaser agree to inspect the property prior to the initial closing and make a final punch list to insure that all infrastructure is in place and for the clean up of the overall subdivision to be completed prior to the initial closing. At time is of the essence, the parties agree that Purchaser is relying upon the Lots being ready to close on or before February 28, 2008 (the Closing Date, under option A; or the Initial Closing Date, under option B). Should Seller fail to complete the infrastructure prior to Closing, Purchaser shall incur financial losses which are difficult to compute. Therefore the parties agree that the Closing or Initial Closing shall not occur and that **LIQUIDATED DAMAGES** in the amount of \$1,000.00 a day which shall be credited as an abatement of the Purchase Price until the infrastructure is completed and the lots are ready for purchase for the first thirty (30) days. If the infrastructure is not completed by March 30, 2008, the Liquidated Damages shall increase to \$1,500.00 a day which shall be credited as an abatement of the Purchase Price until the infrastructure is completed and the lots are ready for purchase for the thirty-first - sixtieth (31-60) days. If the infrastructure is not completed by April 29, 2008, the Liquidated Damages shall increase to \$2,000.00 a day which shall be credited as an abatement of the Purchase Price until the infrastructure is completed and the lots are ready for

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purchase for the sixty-first - ninety (61-90) days. If the infrastructure is not completed by May 28, 2008, the same shall be considered a material breach of the Contract and trigger the Purchasers remedies under Section 8 for Default.

- i. All sediment ponds are to be impounded and compacted with fill to be buildable at the Seller's cost, which duty shall remain with Seller and survive closing and shall be memorialized at the initial closing.
- j. Seller shall install street lights as recommended and approved by York Electric and Purchaser, such approval shall not be unreasonably withheld by Purchaser. Should Seller fail to complete this requirement by the stated time, the same shall not be grounds for default as set forth in Section 8 of the Contract, but shall result in the escrow at Closing the amount of \$25,000.00, equal to the cost to complete this task. Failure to comply with this provision shall be considered a material breach of the Contract and trigger the Purchasers remedies under Section 8 for Default.
- k. If by February 25, 2008 or the Initial Closing whichever occurs first, the temporary utilities for electric and natural gas are not installed, Seller shall supply generators for Purchaser's use in connection with construction until temporary power is available. Seller shall only be required to provide generators to Purchaser upon the issuance by York County of a building permit to Seller without power.

2. REQUIREMENTS OF PURCHASER

- a. Purchaser's construction shall be limited to single family residences with a minimum of 2600 square feet which includes roof porches, basements, terraces, patios, decks, screened porches or garage. All residential homes are required to have a minimum two car garage attached. No mobile or mobile homes allowed. Purchaser's plans shall be subject to the approval of the Architectural Review Board of the Homeowner's Association.
- b. Lots 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 30, 31, 32, 33, 34, 35, 36, 37, 38, 43, 44 and 45 are low pressure sewer lots as required by York County to limit number of lift stations for Property. Purchaser shall be required to install grinder pump in connection with the construction of single family residences on these lots.

4. CLOSING. The completion and finalization of this transaction, where the Purchase Price is delivered and the deed is delivered (the "Closing") shall take place in either single or multiple acts, however, the Closing under Option A or Initial Closing under Option B

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shall take place no later than February 28, 2008 (the "Closing Date"). With exception of the initial take down of a bulk amount of lots (the "Initial Closing"), all subsequent lots may be purchased in bulk or by single lot. Each closing act shall take place at the law office of Robert J. Reeves in Fort Mill, South Carolina.

5. DOCUMENTS TO BE DELIVERED AT CLOSING.

- a. Seller shall execute and deliver to Purchaser a special warranty deed, conveying, selling and transferring to Purchaser fee simple, marketable title to the Property, which title is insurable by a national title insurance company (the "Title Company"), free and clear of all liens and encumbrances, except as follows:
 - i. those of recorded restrictive covenants and other conditions applicable to the subdivision of Palm Tree Cove II recorded in Record Book _____ Page _____, in the Office of the Clerk of Court for York County, South Carolina, and as amended from time to time in the future (the "Covenants");
 - ii. any easements, and other covenants and restrictions, if any, of record;
 - iii. zoning, building or land use laws or ordinances, if any;
 - iv. ad valorem taxes for the year in which the Closing occurs;
 - v. any other matters revealed by Survey;
- b. Seller and Purchaser shall execute all documents necessary at Closing to finalize the transaction, including but not limited to a FIRPTA Affidavit executed by Seller, stating that Seller is not a "foreign person" as defined in the Federal Foreign Investment in Real Property Tax Act of 1980 and the 1984 Tax Reform Act and a Seller's Affidavit regarding the South Carolina Withholding Tax.
- c. Purchaser shall pay the Purchase Price to Seller in accordance with the provisions of this Contract and shall obtain, at its sole expense, any commitment for any policy of title insurance from a title company.

6. ACCESS AND INSPECTION. Purchaser shall have continued access to the subdivision to inspect the progress of the Common Areas.

7. ESCROW OF EARNEST MONEY. The Earnest Money or Escrow Deposit

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shall become non-refundable upon execution of this Agreement, subject only to the default provisions provided herein. The Earnest Money shall be applied to the Purchase Price of the take-down of less as provided above. The Earnest Money shall be paid to the Seller within three (3) business days of execution of this Agreement by both parties.

8. REPRESENTATIONS AND WARRANTIES.

- a. Seller represents and warrants to Purchaser that Seller is authorized to enter into this transaction;
- b. Seller represents and warrants to Purchaser that at the Closing, Seller will provide and Purchaser will obtain, good and marketable title to the Property except as otherwise expressly provided herein;
- c. The Purchaser represents and warrants to Seller that it has the right and authority to enter into this Contract and to undertake the obligations of Purchaser hereunder.

To induce Seller to enter into this Agreement, Purchaser covenants that the following representations and warranties are true, and covenants to ensure, to the best of its ability, that they remain true for the duration of this Agreement and through the Final Settlement.

a) Purchaser covenants, represents, and warrants that it has both the capacity and authority to enter into and perform the obligations imposed by this Agreement upon it, and that its performance hereunder will not violate any court or administrative order, state or federal law, agreement with any other party, or any provision of its Articles of Organization or Operating Agreement; and,

b) Purchaser covenants that it is of financially sound condition, and that it is not contemplating filing for relief under the United States Bankruptcy Code or utilizing any state or federal law or program providing debtor relief, and that it has not had, and will not have, a receiver or liquidator appointed to handle its affairs; and,

c) Purchaser covenants, represents, and warrants it knows of no reason that it can not consummate the transaction contemplated hereby; and,

d) Purchaser covenants, represents, and warrants that it is an entity duly formed and organized under the laws of the State of South Carolina, and that it is an entity of good standing in that state.

9. DEFAULT.

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a. In the event Seller defaults or breaches any of the conditions or obligations of Seller under this Contract, or any of Seller's representations and warranties are not true and correct as of the Closing Date, Purchaser shall have the right, at its sole discretion, to terminate this Contract by immediately giving written notice, shall be refunded the escrowed funds it has deposited and may seek any other legal remedies under subsection 8(c), if applicable.

b. In the event Purchaser defaults or breaches any of the conditions or obligations of Purchaser under this Contract, or any of Purchaser's representations and warranties are not true and correct as of the Closing Date and as the date of closing, Seller shall have the right, to terminate this Contract by immediately giving written notice, retain the escrowed funds and be entitled to a refund payment for any monies paid or credited under Section 2, for which the task has not been completed within seven (7) days of receipt of written notice. Further, should purchaser have entered the property and committed waste or otherwise damaged the property, Seller shall have the right to correct such and enter a suit for damages.

c. In the event of termination of the Contract by Default, the non-defaulting party who must engage in legal action to recover damages or seeking specific performance shall be entitled to recover reasonable attorney's fees.

10. **CLOSING COSTS.** Seller shall be responsible for the cost of the preparation of its deed and deed stamps. Purchaser shall be responsible for the cost of recording its deed, any mortgages, security instruments or other security agreements, the cost of its title search, title diligence expenses and the title premium. Each party shall pay its own attorney's fees.

11. **TIME IS OF THE ESSENCE.** Time is of the essence for all requirements under the Contract. Where no time is expressly stated, time shall be deemed reasonable.

12. **NOTICES.** Any notice or other documents to be given or delivered hereunder by any party to any other party shall be in writing and shall be delivered personally or sent by certified mail, postage prepaid return receipt requested to the following addresses:

Seller:

HAR-LEE, LLC
c/o William Hargrove, managing member
249 Blue Heron Drive
Fort Mill, SC

Purchaser:

OakTree Homes, Inc.
c/o Dawae Ruc, President
1692 Kitty Lane
Fort Mill, SC 29709

[Handwritten signature]

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13. **SUCCESSORS AND ASSIGNS.** The rights and duties of the parties hereunder may not be assigned without the express written consent of the other party hereto, which said party may reasonably withhold.

14. **INVALIDITY.** The invalidity or unenforceability of any term or provision of this Contract, or the application of such term or provision to any person or circumstances, shall not impair or affect the remainder of this Contract and its application to other persons and circumstances, and the remaining terms and provisions hereof shall not be invalidated but shall remain in full force and effect.

15. **APPLICABLE LAW.** This Contract shall be governed by and construed in accordance with the laws of South Carolina.

16. **COUNTERPART.** When Purchaser has executed and delivered to Seller a counterpart of this Contract, it shall be binding upon Seller and Purchaser.

17. **CAPTIONS.** The captions in this Contract are for convenience only and shall not be considered a part of or affect the construction or interpretations of any provision of this Contract.

18. **MERGER AND AMENDMENTS.** This Contract is the sole and exclusive agreement between the parties and all prior negotiations, understandings or agreements are merged into this Contract. Any changes, additions or deletions to the Contract shall be in writing signed by both the Seller and the Purchaser to have any force and effect.

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IN WITNESS WHEREOF, this Contract has been executed and delivered as of the day and year first above written.

WITNESSES

SELLER

Har-Lee, LLC

By: _____

Its: _____

PURCHASER

Oak Tree Homes, Inc.

By: _____

Dawn M. Moss

Its: President

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IN WITNESS WHEREOF, this Contract has been executed and delivered as of the day
and year first above written.

WITNESSES:

SELLER:

K. D. Denny
8-2-30

Har-Lee, LLC

By: _____
Its: _____

[Signature]

PURCHASER
Oak Tree Homes, Inc.

By: _____
Dawn M. Ras
Its: President

**Exhibit B to Memorandum in Opposition
to Plaintiff's Motions
(Contract between Oaktree and PIH Group)**



STATE OF SOUTH CAROLINA)
COUNTY OF YORK) PURCHASE & SALE AGREEMENT

THIS PURCHASE & SALE AGREEMENT (the "Contract") is entered into this 7 day of May 2008 (the effective date), by and between OakTree Homes, Inc., a South Carolina Corporation ("Seller"), and Palmetto Investments Holding Group, LLC, a South Carolina Limited Liability Company (hereinafter referred to as PIH Group) and Affiliates ("Purchaser").

WHEREAS, Seller is willing to sell to Purchaser and Purchaser is willing to buy from Seller, upon the terms and conditions hereinafter set forth, 51 lots (as more specifically described herein) located in the subdivision of Palm Tree Cove II, located on Allison Creek Road in York County at Lake Wylie, South Carolina and shown as Phase IIA on a plat attached hereto as Exhibit "A," which does not include Lot 39, 41 & 42. (the "Property").

NOW, THEREFORE, in consideration of the earnest money paid at the time of execution of the Contract in the amount of Ten Thousand and No/100 Dollars (\$10,000.00) to OakTree Homes, Inc., the receipt and sufficiency which is hereby acknowledged, the Seller agrees to sell and the Purchaser agrees to purchase the Property, subject to the satisfactory outcome of the investigation period and all terms and conditions as set forth herein.

1. PURCHASE PRICE

The purchase price for the Property (the "Purchase Price") that Purchaser shall pay to Seller is estimated to be Six Million Six Hundred Ninety-seven Thousand Seventy Dollars and 00/100 (\$6,697,070.00). Purchaser and Seller agree the purchase price listed above is based upon the "market value" of the property. It is understood that the parties further agree as follows:

1a. **INTERIOR LOTS.** Purchaser is purchasing the following Lots which are shown on a Plat attached hereto as Exhibit A, which lots are considered to be INTERIOR LOTS: Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 24, 25, 33, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 54.

1b. **WATER VIEW LOTS:** Purchaser is purchasing the following Lots which are shown on a Plat attached hereto as Exhibit A, which lots are considered to be WATER VIEW LOTS: Lots 14, 15, 16, 17, 18, 19, 20, 21, 22, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 38, and 43.

1c. **WATER FRONT LOTS:** Purchaser is purchasing the following Lot which is shown on a Plat attached hereto as Exhibit A, which lot is considered to be WATER FRONT LOT 40. Lot 40 which has a dock permit granted to Seller by all the proper and necessary authorities (i.e. Duke Power, Lake Wylie, County of York, et al).

1d. **LOW PRESSURE SEWER LOTS:** Purchaser and Seller hereby agree

DEP 11/00/10/11

the following lots are currently determined to be LOW PRESSURE SEWER LOTS: Lots 21, 22, 23, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 43, 44 and 45 (additional lots may be added if same is determined to be a Low Pressure Sewer Lot during the Inspection Period). These low pressure sewer lots as required by York County to have grinder pumps for the Property. Purchaser acknowledges that it has been informed and understands that it or its assigns shall be required to install a grinder pump in connection with the construction of single family residence on each of these lots.

1e. LOT VALUES: Attached hereto as Exhibit B is a pricing list of the Lots which collectively represents the purchase price.

2. ADDITIONAL PAYMENT OF FUNDS

If Purchaser fails to close on or before May 23, 2008, Purchaser hereby agrees to pay the additional sum of Fifty-three Thousand Seven Hundred Forty-five and no/100 Dollars (\$53,745.00) to OakTree Homes, Inc. All of the funds paid to OakTree Homes, Inc., including these additional funds described in this paragraph, shall be applied to the Purchase price at the closing of the Lots by Purchaser. If Purchaser defaults at any time, all funds paid to Seller are not refundable.

3. CONTINGENCY

This Contract is contingent upon Seller closing; taking possession and obtaining clear and marketable title to the herein described Property.

4. CLOSING

The completion and finalization of this transaction shall be occur on before May 23, 2008 (the "Closing Date"). If the Closing fails to occur on or before May 23, 2008, Purchaser shall pay additional funds pursuant to paragraph 2 of this agreement, and in consideration therefore, Purchaser shall purchase and close on Property on or before May 28, 2008.

5. CLOSING COSTS

Seller shall be responsible for the cost of the preparation of its deed and for the payment of deed stamps. Purchaser shall be responsible for the cost of recording its deed, any mortgages, security instruments or other security agreements, the cost of its title search, due diligence expenses and the title insurance premium(s). Seller agrees to concede \$870,617.00 of the purchase price at closing to be held by the Bank or financing organization funding the purchase price, to be indicated on the HUD statement. Each party shall pay its own attorney's fees. Taxes shall be prorated as of the date of closing based upon a calendar year.

Seller agrees to pay Materna Gray an 8% sales commission on the total sales price at closing on the HUD-1 Settlement Statement.



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Purchaser shall pay the Purchase Price to Seller in accordance with the provisions of this Contract and shall obtain, at its sole expense, any commitment for any policy of title insurance from a title company.

6. DOCUMENTS TO BE DELIVERED AT CLOSING

The Seller shall execute and deliver to Purchaser a General Warranty Deed, conveying, selling and transferring to Purchaser fee simple, marketable title to the Property, which title is insurable by a national title insurance company (the "Title Company"), free and clear of all liens and encumbrances, except those of recorded restrictive covenants and other conditions applicable to the subdivision of Palm Tree Cove II recorded in Record Book ___, Page ___, in the Office of the Clerk of Court for York County, South Carolina, and as amended from time to time in the future (the "Covenants").

Seller and Purchaser shall execute all documents necessary at Closing to finalize the transaction, including but not limited to a FIRPTA Affidavit executed by Seller, stating that Seller is not a "foreign person" as defined in the federal Foreign Investment in Real Property Tax Act of 1980 and the 1984 Tax Reform Act and a Seller's Affidavit regarding the South Carolina Withholding Tax.

7. RESPONSIBILITIES OF SELLER AFTER CLOSING

Seller agrees, within the applicable timeframe set herein, to be responsible for the completion of the following enumerated items for the subdivision:

1. The entrance way signs, lot signs, stone columns gates and surrounding landscaping at the entrances to the Palm Tree Cove II Subdivision. These items shall be completed on or before May 30, 2008.
2. The Kiddie Pool and Junior Olympic Swimming Pool with a 3000 plus, square foot clubhouse area shall be completed on or before October 31, 2008.
3. If any environmental issues are unable to be resolved prior to closing, Seller agrees to resolve any and all environmental issues within a reasonable timeframe after closing and escrow funds needed to resolve environmental issues at the time of closing.
4. Should roll back taxes apply or be discovered after final settlement, the Seller will be responsible for payment in full of all unpaid taxes and roll back taxes immediately upon demand.
5. Seller and Purchaser agree to enter into a subsequent agreement wherein Seller, OakTree Homes, Inc. shall agree to purchase twenty (20) lots from Purchaser. Seller and Purchaser shall agree in part to the following: The total of twenty (20) lots will consist of a minimum of at least two (2) Water View Lots and the


PIH.000946

remaining lots may be Interior Lots. Seller agrees to purchase (20) lots 35 days after closing of phase II. Seller agrees to grant the Purchaser the right to purchase the twenty lots at acquisition costs, set forth on Exhibit B. Said document shall be filed of public record in the York County Public Registry; and

8. REQUIREMENTS OF PURCHASER

Pursuant to restrictive covenants, Purchaser's and its assigns, agree construction shall be limited to single family residences with a minimum of 2800 square feet which includes roof porches, basements, terraces, patios, decks, screened porches or garage. All residential homes are required to have a minimum two car garage attached. No modular or mobile homes allowed. Purchaser's plans shall be subject to the approval of the Architectural Review Board of the Homeowner's Association.

9. RIGHTS GRANTED TO PURCHASER

With regard to any properties Seller shall repurchase from Purchaser pursuant to Section 8.6 above, Seller agrees to grant all of its acquired rights and privileges exclusively to PIH Group, until such time as when the subdivision is turned over to the Homeowner's Association, the final say as to the following:

1. Acceptance or rejection of all homes to be constructed in Palm Tree Cove Phase II;
2. Exclusive control over all licensed or unlicensed real estate agents marketing and/or selling any properties in Palm Tree Cove Phase II Subdivision;
3. Acceptance or rejection of all builders, contractors and/or subcontractors whom wish to purchase or build within Palm Tree Cove Phase II Subdivision; and,
4. A Right of First Refusal to purchase back any lot from any future owner of a lot within the herein described property.

10. REPRESENTATIONS AND WARRANTIES.

- Seller represents and warrants to Purchaser that Seller is authorized to enter into this transaction.
- Seller represents and warrants to Purchaser that at the Closing, Seller will provide and Purchaser will obtain, good and marketable title to the Property except as otherwise expressly provided herein.
- The Purchaser represents and warrants to Seller that by and through their affiliates



PIH.000047

it has the right and authority to enter into this Contract and to undertake the obligations of Purchaser hereunder.

- To induce Seller to enter into this Agreement, Purchaser covenants that the following representations and warranties are true, and covenants to ensure, to the best of its ability, that they remain true for the duration of this Agreement and through the Final Settlement.
- Purchaser covenants, represents, and warrants that it has both the capacity and authority to enter into and perform the obligations imposed by this Agreement upon it, and that its performance hereunder will not violate any court or administrative order, state or federal law, agreement with any other party, or any provision of its Articles of Organization or Operating Agreement.
- Purchaser covenants that it is of financially sound condition, and that it is not contemplating filing for relief under the United States Bankruptcy Code or utilizing any state or federal law or program providing debtor relief, and that it has not had, and will not have, a receiver or liquidator appointed to handle its affairs.
- Purchaser covenants, represents, and warrants it knows of no reason that it can not consummate the transaction contemplated hereby.
- Purchaser covenants, represents, and warrants that as of the time of the execution of this Contract that it is an entity duly formed and organized under the laws of the State of South Carolina, and that it is an entity of good standing.

11. DEFAULT

- i. In the event Seller defaults or breaches any of the conditions or obligations of Seller under this Contract, or any of Seller's representations and warranties are not true and correct as of the Closing Date, Purchaser shall have the right, at its sole discretion, to terminate this Contract by immediately giving written notice, shall be refunded the escrowed funds it has deposited and seek any and all legal remedies.
- ii. In the event Purchaser defaults or breaches any of the conditions or obligations of Purchaser under this Contract, or any of Purchaser's representations and warranties are not true and correct as of the Contract Date and as the date of closing, Seller shall have the right, to terminate this Contract by immediately giving written notice, retain the escrowed funds and seek any and all legal remedies.
- iii. In the event of termination of the Contract by Default, the non-defaulting party who must engage in legal action to recover damages or seeking specific performance shall be entitled to recover reasonable attorney's fees.

12. TIME IS OF THE ESSENCE

1111_000019

Time is of the essence for all requirements under the Contract. Where no time is expressly stated, time shall be deemed reasonable.

13. NOTICES

Any notice or other documents to be given or delivered hereunder by any party to any other party shall be in writing and shall be delivered personally or sent by certified mail, postage prepaid return receipt requested to the following addresses:

Seller:

OakTree Homes, Inc.
c/o Dawne Ras, President
1692 Katy Lane
Fort Mill, SC 29708

Purchaser:

PIH Group Builders, LLC
c/o John Carr
1750 Highway 160 West
Suite 101-122
Fort Mill, SC 29708

14. SUCCESSORS AND ASSIGNS

The rights and duties of the parties hereunder may be assigned without the express written consent of the other parties hereto, which said party may reasonably withhold.

15. INVALIDITY

The invalidity or unenforceability of any term or provision of this Contract, or the application of such term or provision to any person or circumstances, shall not impair or affect the remainder of this Contract and its application to other persons and circumstances, and the remaining terms and provisions hereof shall not be invalidated but shall remain in full force and effect.

16. APPLICABLE LAW

This Contract shall be governed by and construed in accordance with the laws of South Carolina.

17. COUNTERPART

When Purchaser has executed and delivered to Seller a counterpart of this Contract, it shall be binding upon Seller and Purchaser.

18. CAPTIONS

The captions in this Contract are for convenience only and shall not be considered a part of or affect the construction or interpretations of any provision of this Contract.

DTU 000040

19. MERGER AND AMENDMENTS

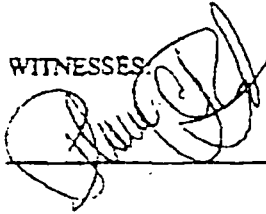
This Contract is the sole and exclusive agreement between the parties and all prior negotiations, understandings or agreements are merged into this Contract. Any changes, additions or deletions to the Contract shall be in writing signed by both the Seller and the Purchaser to have any force and effect.

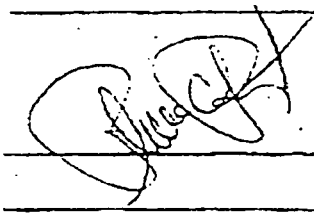
CONTRACT ADDENDUM'S

The parties agree to the following additional provisions as noted on page 8 of this contract.

IN WITNESS WHEREOF, this Contract has been executed and delivered as of the day and year first above written.

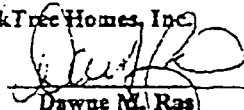
WITNESSES:





SELLER:

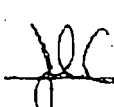
Oak Tree Homes, Inc.

By: 

Dawne M. Ras

Its:

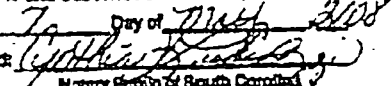
PURCHASER
PIE Group, LLC

By: 

Its: Member/Manager

Sworn to and Subscribed Before Me,

This 7th Day of March, 2017

Signed: 

Notary Public for South Carolina

My Commission Expires March 28, 2017

The parties agree to the following additional provisions:

DTL 000050

Contract Addendum

7. Seller OAK TREE HOMES, INC agrees to repurchase from buyer Palmetto Investments Holding Group, LLC, 34 lots not sold herein designated by Buyer and if Buyer has not sold said lots as of November 15, 2008. The price of said lot designated by buyer shall be the acquisition cost schedule #1 Column G. Oak tree Homes, inc will close said lots by November 31, 2008. Oak Tree homes obligation to purchase 34 lots will be adjusted based on the initial sale of 15 lots in Phase II. Example: OAK TREE HOMES, INC obligation to buy back 34 lots would be decreased accordingly after the initial sale of 15 lots. *If an addition is requested from the new 31,000? deadline, such binding will be agreed upon by both Parties in writing.*

8. OAK TREE HOMES, INC. acknowledges and understands that John Car is a licensed real estate agent for South Carolina, are member (owner) of Palmetto Investments Holding Group, LLC do not represent OAK TREE HOMES, INC. Or its principals in any way, and intends to generate a profit from the purchase and sale of the lots identified here for Palmetto Investments Holding Group, LLC and their investors. *John Car*

9. OAK TREE HOMES, INC agrees and grants permission to Regional Capital to draft a letter of Intent guaranteeing that OAK TREE HOMES, INC has in its gross sum of allotted credit the sum of at least \$4,500,000.00 that will be for the express purpose of purchasing back any or all of the lots previously stated in this agreement for the amount and within the time frames agreed upon. Seller also acknowledges and agrees that if a letter of credit is not produced in the sum of \$4,500,000.00 by May 12, 2008 that this contract is null and void and all Earnest Money to the Buyer within (5) days of receiving written notice terminating the Purchase and Sale Agreement from the Buyer.

10. Palmetto Investments Holding Group, LLC and its investors must approve the Settlement Statement 24 hours prior to closing.

11. OAK TREE HOMES, INC agrees to diligently pursue and use its best efforts to obtain all required authorizations, permits or consents from York County, South Carolina and any other governmental authority necessary to provide suitable fill dirt and grading work to lot in order ensure the existing pond is properly filled and all water removed.

12. Seller acknowledges and agrees that Buyer shall have the right to sell all or any of said lots to one or more builders of Buyer's choosing, with architectural review committee of Palm Tree cove approval, and at a price and profit that Buyer, in its sole discretion determines to be appropriate.

13. Seller represents and warrants that the existing survey of phase 1 (attached hereto as Exhibit A) accurately represents (within a 2% margin of error) the lot lines, physical features, and other items customarily set forth in a South Carolina land survey.

14. Seller acknowledges and agrees that the current letters of Intent for the purchase of 33 lots of phase II that the Seller will provide assistance utilizing Sellers and Buyers agents to pursue and convert current letters of intent to 15 firm contracts with deposits before closing date of May 23, 2008. Seller also acknowledges and agrees that if 15 firm contracts is not produced in the sum by the set closing date that this contract is null and void and all Earnest Money to the Buyer within (5) days of receiving written notice terminating the Purchase and Sale Agreement from the Buyer.

John Car
DLT 000001

**Exhibit D to Memorandum in Opposition
to Plaintiff's Motions
(Affidavit of Dawne Ras)**

)
) IN THE COURT OF COMMON PLEAS

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1. I am a party to this action and President of Oaktree Homes, Inc.. This affidavit is based upon my personal knowledge and I am competent to testify to the matters herein.
2. I met with Derek Franklin and my husband Thomas in May 2008. At that meeting, we executed a commitment letter for American Community Bank to loan Oaktree \$3.8 million for the purchase of 51 lots in Palm Tree Cove IIa. All three of us signed the document, including handwritten changes entered by Mr. Franklin, who signed for the bank.
3. After we executed the commitment, Mr. Franklin took the document and said he was going to bring us a clean copy at closing which we could re-execute, but there were not to be any changes in the terms. We never saw the commitment letter again.
4. The subsequent loan for only ten lots in Palm Tree Cove IIa was merely an attempt to limit Oaktree's damages. It was an entirely new transaction and had nothing to do with the previous loan commitment for the \$3.8 million, beyond that American Community Bank had breached their contract and Oaktree was trying to do anything it could to limit its exposure to Har-Lee.
5. Oaktree had a \$2.5 million line of credit with Bank of York, and at the time of the planned closing, approximately \$1.7 million was available. The procedure used by Bank of York at the time was verbal approvals of

amounts lower than the available line of credit. I met with Grier Sandifer in his office and received his approval for the \$640,000.00 loan from the line of credit and re-confirmed this approval a second time with Mr. Sandifer by phone once I knew the precise amount we needed from Bank of York to fully fund the purchase.

Sworn to and signed before me
this 16th day of May, 2011.

Dawne Ras
Dawne Ras

Annie H. Gray
Notary Public

My Commission expires: Nov. 29, 2016

ANNIE H. GRAY
Notary Public, State of South Carolina
My Commission Expires November 29, 2016

**Exhibit B to Plaintiff's Response
to the Motion for Sanctions
(Letter of 7/18/11)**



A PROFESSIONAL ASSOCIATION | ATTORNEYS AT LAW

James W. Sheedy
Lic. in SC Only
Direct: 704 341 2102
Fax: 704 341 2105
jimsheedy@driscollsheedy.com

Ballantyne: 11520 N. Community House Road
Suite 200 | Charlotte, NC 28277
South Carolina Office: 222 E. Main Street
Suite 204 | Rock Hill, SC 29730
www.driscollsheedy.com

January 18, 2011

Via Federal Express

William Dixon Robertson, III, Esq.
McGowan Hood & Felder, LLC
1517 Hampton Street
Columbia, SC 29201

Re: Yadkin Valley Bank & Trust v. Oak Tree Homes, Inc., et al.
C.A. No.: 09-CP-46-1673

Dear Dixon:

Enclosed please find a CD that contains the electronic versions of the eighteen documents you requested in your January 11, 2011 letter. The documents appear on the CD as follows.

From ACB File Server
IP Address 10.0.2.14

D:\ACB-Data\public

\\Derek\Oak Tree Homes\comltr062907.doc (#1)
\\Derek\Oak Tree Homes\acb credit memo 022708.doc (#3)
\\Derek\Oak Tree Homes\acb credit memo 041607.doc (#4)
\\Derek\Oak Tree Homes\acb credit memo 071508.doc (#5)
\\Derek\Oak Tree Homes\acb credit memo renewal glens and trinity lots 111908.doc (#6)
\\Derek\Oak Tree Homes\acb credit memo renewal palm tree lots 111908.doc (#6)
\\Derek\Oak Tree Homes\acb credit memo renwal lot 29 spec 082108.doc (#7) (misspelling is correct, not a typo)
\\Derek\Oak Tree Homes\comltr061507.doc (#8)
\\Derek\Oak Tree Homes\comltr062907.doc (#9)
\\Derek\Oak Tree Homes\comltr070808.doc (#10)
\\Derek\Oak Tree Homes\comltr072208.doc (#11)
\\Derek\Oak Tree Homes\Financial Spreads - Oak Tree Homes - 02-28-2008.xls (#12)

00094780.5

William Dixon Robertson, III
January 18, 2011
Page 2

\\Derek\\Oak Tree Homes\\Financial Spreads - Oak Tree Homes - 03-21-2008.xls (#13)
\\Derek\\Oak Tree Homes\\Financial Spreads - Oak Tree Homes - 06-30-2008.xls (#14)
\\Derek\\Oak Tree Homes\\Global Cash Flow - Oak Tree Homes, Inc - 08 - 25 - 2008.xls (#15)
\\Derek\\Oak Tree Homes\\Global Cash Flow - Oak Tree Homes, Inc - 02-28-2008.xls (#16)
\\Derek\\Oak Tree Homes\\Memo to File.doc (#17)
\\Derek\\Oak Tree Homes\\Problem Loan report Oak Tree 010809.doc (#18)

From YVBFS File Server
(Saved on CD in a "yvbfs" folder)
(other copies/versions of comltr062907.doc)

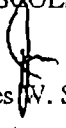
D:\\ACBPublic

\\Derek\\Oak Tree Homes\\comltr062907.doc
\\Derek\\Colton Builders\\comltr062907.doc

Further responding to your letter, I inform you there is no "Oaktree Homes" folder on the computer now used by Aaron Sims, nor is there an "Oaktree Homes" folder in the H: drive assigned to Aaron Sims on the current File Share server supported by Yadkin Valley Bank. Mr. Sims' computer was not replaced in 2010, but was not assigned previously to Derek Franklin. I now understand from my client that the computer formerly used by Derek Franklin was a laptop. Upon the closing of ACB's Rock Hill office, that laptop was retrieved by Marie Spain. I have asked my client to determine the location of the laptop or if it is even still in existence. Once I have a response to that inquiry, I will let you know.

Respectfully,

DRISCOLL SHEEDY, P.A.


James W. Sheedy

cc: Jeff Cramer

00094780.5



FedEx Express
Customer Support Trace
3875 Airways Boulevard
Module H, 4th Floor
Memphis, TN 38116

U.S. Mail: PO Box 727
Memphis, TN 38194-4643
Telephone: 901-369-3600

January 19, 2011

Dear Customer:

The following is the proof-of-delivery for tracking number 796667534909.

Delivery Information:

Status:	Delivered	Delivered to:	Receptionist/Front Desk
Signed for by:	S.LOCHLIER	Delivery location:	1517 HAMPTON ST COLUMBIA, SC 29201
Service type:	Priority Envelope	Delivery date:	Jan 19, 2011 10:06



Shipping Information:

Tracking number:	796667534909	Ship date:	Jan 18, 2011
		Weight:	0.5 lbs/0.2 kg

Recipient:
William Dixon Robertson, III, Esq.
McGowan, Hood & Felder, LLC
1517 HAMPTON ST
COLUMBIA, SC 29201 US

Shipper:
Susan E. Driscoll
Driscoll Shedy, P.A.
11520 North Community House Road
Suite 200
Charlotte, NC 28277 US
Oaktree

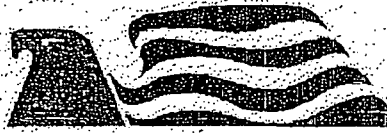
Reference

Thank you for choosing FedEx Express.

FedEx Worldwide Customer Service
1.800.GoFedEx 1.800.463.3339

May 2008						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
Apr 27	28	29	30	May 1 3:30 PM Derek Franklin to Call Mark (H/A) 4:30 PM Meet w/Doe Hanning	2 1:00 PM Meet w/Al Wheeler 4:30 PM Meet w/Doe Hanning	3
4	5 9:00 AM Call Boarding Thomas 10:00 AM Meet w/Mr. Leon	6 12:00 PM Meet w/Scott Hest 3:00 PM Meet w/ Insurance	7	8 8:00 AM Lancaster City / Inlet 10:30 AM Tuttle's (Lulu) 1:30 PM Meet w/Tom Ras 12:30 PM YMCA Advisory Board 4:30 PM Meet Tom Jackson	9	10
11	12 2:30 PM Meet w/Hugh Herring	13	14 10:30 AM Meet w/ Irlander 11:00 AM Meet Gene Williams 11:30 AM Bronto nagusky C	15 4:00 PM Meet w/The Windel	16	17
18	19 9:00 AM Call Kevin Kim	20 4:00 PM Meet w/Bill Denton	21 8:30 AM Crimestoppers Board	22 3:30 PM Meet w/Tom Jackson 4:00 PM LYCO Graduation (S	23	24
25	26	27 5:30 PM Dr. Singh / Mike Scott	28 10:00 AM Call Jay Killen	29	30	31
Jun 1	2 10:30 AM Andy Boyd (ACB T	3 10:30 AM Andy Boyd (ACB T	4 8:00 AM Meet w/Harry and	5 10:00 AM Pick up Mark DeM 10:30 AM Meet w/Thomas 12:00 PM Lunch w/Dz / Scott 2:00 PM Meet w/Dan Ballou	6 11:00 AM Meet w/Charles P 1:00 PM Meet w/Tom Ras (C 4:30 PM Meet w/Wayne Alig	7

**Exhibit 1 to Deposition of Derek Franklin
(Letter of 7/22/08)**



AMERICAN COMMUNITY BANK

franklin @ americancommunitybank.com

July 22, 2008

Oak Tree Homes, Inc.
Mrs. Dawne Ras
1654 Katy Lane West Highway 160
Fort Mill, SC 29708

Re: Addendum / Lot Loan Advance

Dear Mrs. Ras:

American Community Bank (hereinafter to be known as "Bank") is pleased to offer Oak Tree Homes, Inc (hereinafter to be known as "Borrower") this commitment for financing the purchase of single-family residential lots in Palm Tree Cove II subdivision, Clover, SC. As part of the commitment, Bank will allow Borrower to make an advance under the now expired line of credit due to Borrower's request occurring prior to said line of credit's expiration date. Further, advance is evidenced by retail contracts from Borrower's clients with the intent of said clients building homes on the lots purchased by Borrower.

This commitment represents an addendum to the line of credit commitment to Borrower dated July 13, 2007. This commitment does not, in any way, represent a renewal of Borrower's line of credit.

Borrower: Oak Tree Homes, Inc

Amount: \$1,305,000.00

Purpose: To advance funds for the purchase of 11 single-family residential lots in Palm Tree Cove II subdivision, Clover SC.

Interest Rate: A variable rate of the Wall Street Journal Prime Rate plus 0.50% adjusted as often as daily with changes in the Wall Street Journal Prime Rate. As of July 22, 2008 the Wall Street Journal Prime Rate is 5.00%.

Maturity: November 1, 2008

1738 Gold Hill Road
Tega Cay, SC 29708
Telephone 803 802-6770 • Fax 803 802-6777
americancommunitybank.com



RANDALL -2

Repayment: Monthly interest only payments based on loan outstanding balance.
Permanent financing of the lots purchased by Borrower's clients must occur no later than November 1, 2008. Failure of any of Borrower's clients to fulfill their respective lot purchases from Borrower by November 1, 2008 will require Borrower to pay off the loan in full through either other bank refinance or take out from contractor buy-out.

Loan Fee: 0.50% of the amount of the loan will be payable to the Bank at the time of closing.

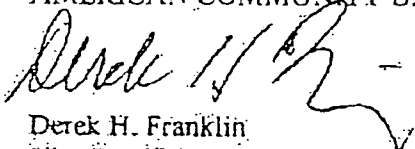
Collateral: Collateral for the loan contemplated by this agreement will be lots 11, 12, 19, 20, 21, 22, 23, 24, 25, 28, 40.

Appraisal: The Bank will require an appraisal of lot 40 at Palm Tree Cove II, Clover, SC only. Appraisal shall be no less than \$350,000.00. The Bank shall lend 100% of the contract price of lots 11, 12, 19, 20, 21, 22, 23, 24, 25, 28, and 40.

Other: All other terms and conditions from the commitment letter dated July 13, 2007 shall remain in force. This commitment in no way obligates Bank to neither renew Borrower's now expired line of credit nor consider renewed Borrower's now expired line of credit.

Thank you for allowing American Community Bank to serve your financing needs. I hope this commitment serves to assist you in reaching your financial goals and objectives.

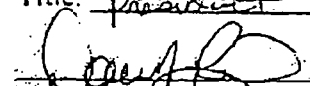
Sincerely,
AMERICAN COMMUNITY BANK


Derek H. Franklin
Vice President

Accepted and agreed to this the 23rd day of July, 2008.

Oak Tree Homes, Inc

By: Dwayne Ras
Title: President


Dwayne Ras, as Personal Guarantor


Thomas Ras, as Personal Guarantor

RANDALL - 3

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-1673

Yadkin Valley Bank & Trust, ... Respondent,

v.

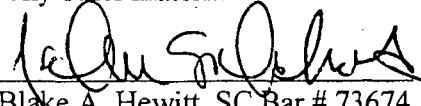
Oaktree Homes, Inc., Dawne M. Ras and
Thomas C. Ras, Daniel Simpson, Above All
Services, Inc., Carter Lumber Company, Efficient
Painting Contractors, Inc., Creative Concepts, and
Solid As A Rock, Inc., ... Defendants,

Of whom

Oaktree Homes, Inc., is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.


Blake A. Hewitt, SC Bar # 73674
John S. Nichols, SC Bar # 4210
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

February 7, 2013

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

MAR 04 2013

APPEAL FROM YORK COUNTY
Court of Common Pleas

SC Court of Appeals

John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-1673

Yadkin Valley Bank & Trust, ... Respondent,

v.

Oaktree Homes, Inc., Dawne M. Ras and
Thomas C. Ras, Daniel Simpson, Above All
Services, Inc., Carter Lumber Company, Efficient
Painting Contractors, Inc., Creative Concepts, and
Solid As A Rock, Inc., ... Defendants,

Of whom

Oaktree Homes, Inc., is the Appellant.

SUPPLEMENTAL RECORD ON APPEAL

Blake A. Hewitt
John S. Nichols
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(803) 779-8995 (facsimile)

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(704) 341-2015 (facsimile)

Attorneys for Respondent

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Transcripts

Deposition (excerpts) of Walter Joyce (Attached in support of multiple motions)	2
Deposition (excerpts) of Thomas Ras (Attached in support of multiple motions)	9

**Deposition (excerpts) of Walter Joyce
(Attached in support of multiple motions)**

1 no.

2 Q Okay. Well, what's your best --

3 A I would bet not. I did a computer refresh last
4 year, about middle of the year. And we
5 refreshed -- we replaced about 175 computers.
6 And I believe Mark DeMarcus's computer was one of
7 those.

8 Q Okay.

9 A I'm not 100 percent sure of that. I'd have to go
10 back to my records to know for sure.

11 Q Okay. How about --

12 A I didn't memorize that list, obviously.

13 Q How about Jeff Cramer?

14 A Again, same -- same is true with -- with Jeff
15 Cramer. I'm not as sure whether or not his was
16 refreshed or not. I know that a large number of
17 American Community Bank computers were refreshed
18 because they had a lot of old computers.

19 Q Okay.

20 A So I would say the chances are his was -- was
21 replaced as well.

22 Q And what happened to the old computers that were
23 replaced?

24 A The hard drives were destroyed, as per policy.
25 We drill them so you can't read them. And the

1 rest of the computers were disassembled and
2 recycled --

3 Q Okay.

4 A -- by a third-party vendor.

5 Q Is it fair to say, then, that if Mr. Cramer's
6 computer is one that was replaced, that there is
7 no way currently to examine the hard drive of --
8 of his old computer?

9 A Absolutely no way.

10 Q Same thing with Mr. DeMarcus?

11 A That's a true statement.

12 Q And you have no idea whether the bank still owns
13 the computer that was used by Derek Franklin when
14 he was employed here?

15 A I do not.

16 Q Okay. Is there any way to find out?

17 A I mean, I could look at -- I know the computers
18 that I currently secure, for various reasons, and
19 I know whose those are. And I don't have one --
20 I don't have his. I don't know where else it
21 would be.

22 Q Okay.

23 A I've tried to clean out all the other places
24 where there are excess equipment.

25 Q There's a -- if I gave you a path to a folder on

1 Q Okay.

2 A There are other files that I keep much, much
3 longer. Like electronic messaging e-mail files,
4 I've got every e-mail that was ever written, at
5 least since -- I can say -- I can say since we
6 put the archiver in, which was about a year --
7 actually, it was before I got here. Probably a
8 year and a half ago.

9 Q Which would have been sometime in...

10 A It was after the ACB merger, if that's why
11 you're -- what you're trying to figure out. It
12 was after the -- because we put that archiver in,
13 as I understand it -- I wasn't there then, but
14 from what my folks tell me, they put that
15 archiver in after the merger was completed.
16 After the merger in -- but I -- when I say,
17 "merger," I'm talking about the IT integration.

18 Q Okay. Let's talk about that for a bit, the IT
19 integration between American Community Bank and
20 Yadkin Valley Bank. Did American Community Bank
21 use Exchange server?

22 A To my knowledge, yes.

23 Q Does --

24 A Again, I wasn't here then.

25 Q Okay. Does Yadkin Valley Bank use Exchange

1 server?

2 A We do.

3 Q Do you know what was done to -- to take the
4 message store from the American Community --
5 well, do you know what happened to the message
6 store that American Community Bank maintained on
7 its Exchange server when the merger was
8 accomplished?

9 A I know what I was told.

10 Q What were you told?

11 A I was told that they saved e-mails from eight
12 people. And I -- don't ask me who those eight
13 people were. The only names I -- I -- I was
14 shown was eight -- eight first names, and that
15 was all my technician knew.

16 Q Do you know who it was that masterminded this
17 saving?

18 A No. I asked that question. I don't -- I don't
19 know.

20 Q Nobody will fess up?

21 A Well, my technician doesn't know. That's as far
22 as I took it at the time.

23 Q And how long after this happened did you come to
24 work for the bank?

25 A As I said, I came to work for the bank

1 November the 2nd, 2009.

2 Q Oh, okay. I'm sorry. And by -- at that time,
3 this was already -- whatever had been done was
4 already done?

5 A Was already done, yeah.

6 Q Where is the list of the eight names?

7 A I have, I think, on my desk a hard copy of the
8 e-mail that the -- that the technician sent me.

9 Q Did --

10 A I didn't bring it with me, but --

11 Q With the eight names on it?

12 A The eight first names, yeah.

13 Q Okay. Do you remember whether Jeff Cramer, Mark
14 DeMarcus, or Derek Franklin --

15 A Again, there were no last names.

16 Q Okay. Mark, Jeff, or Derek?

17 A There was no Derek. I remember that.

18 Q All right.

19 A I really don't -- I -- I don't remember the other
20 two. I'd have to just look at the piece of
21 paper.

22 Q That's --

23 A I'm sorry.

24 Q Fair enough. Since there was no Derek, is it
25 your understanding that whatever e-mails may have

1 been associated with Derek's account that did not
2 appear in the message stores associated with the
3 eight names on your list are gone?

4 A To the best of my knowledge.

5 Q And there's no way to retrieve them?

6 A As far as I know.

7 Q Okay. Now, in the message archive that you --
8 that the bank has now.

9 A Uh-huh.

10 Q If a specific message could be found from this
11 period, let's say in the middle of 2008.

12 A Uh-huh.

13 Q And that message had an attachment.

14 A Uh-huh.

15 Q Would the attachment also be archived?

16 A Yes.

17 Q So I could retrieve the attachment to an e-mail
18 message, assuming that the message itself had
19 been archived?

20 A Yes. The way that works is the attachment is
21 associated with the original e-mail that the
22 attachment was attached to. Pardon me for the
23 redundancy there. If you -- I don't know if
24 you've ever noticed, we call an e-mail string
25 where you go back and forth and back and forth

**Deposition (excerpts) of Thomas Ras
(Attached in support of multiple motions)**

- 1 Q Who was the borrower in that commitment letter?
- 2 A OakTree Homes.
- 3 Q Would that be OakTree Homes, Inc.?
- 4 A Yes, sir.
- 5 Q What was the amount stated in the commitment letter
- 6 as the loan?
- 7 A 3.8 million dollars.
- 8 Q What was the interest rate?
- 9 A That was a point of contention. He had put prime
- 10 plus five, and I remember it because I fought him
- 11 over it.
- 12 Q So when you saw prime plus five, what did you say
- 13 to him?
- 14 A Extremely exorbitant.
- 15 Q Did the two of you have discussions that the
- 16 interest rate needed to change?
- 17 A Yes.
- 18 Q Do you recall the substance of those discussions?
- 19 A I do.
- 20 Q What did you say?
- 21 A That it was an exorbitant amount for this deal.
- 22 Q What did he say?
- 23 A Being a short-term thing, this is what we feel
- 24 comfortable doing.
- 25 Q Did you agree to prime plus five?

Continued Deposition of Tom Ras

1 A At that time, yes.

2 Q Verbally?

3 A On a piece of paper.

4 Q The written commitment letter that you signed
5 contained prime plus five. Is that true?

6 A Correct.

7 Q What was the maturity date?

8 A I don't remember that offhand. I would be
9 guessing, and we've already had that discussion. I
10 don't recall.

11 Q When were the proceeds to be disbursed?

12 A The original closing date was set up for May 23rd.

13 Q So you, therefore, met with Mr. Franklin and your
14 wife at your office prior to May 23rd?

15 A That is correct.

16 Q Would it also be correct that you did not meet with
17 Mr. Franklin on the weekend?

18 A That is correct.

19 Q What was the loan fee that was charged?

20 A To be exact, normally the origination fee was like
21 half, if not zero on our stuff, and on this
22 origination it was like one plus.

23 Q So the loan fee was greater than what you were
24 willing to accept?

25 A No, I accepted the terms.

Continued Deposition of Tom Ras

1 Q Did you have any discussions with Grier Sandifer at
2 Bank of York about the terms that would be in a
3 written commitment letter from the Bank of York if
4 it were to provide funding for the 51 lots?

5 A Absolutely.

6 Q What would the amount of the loan be?

7 A I had existing room on my line. Grier Sandifer on
8 the telephone and in person said whatever the
9 shortfall is between your purchase and ACB, we will
10 cover. We have never denied you before. We won't
11 deny you now.

12 Q So there was not a discussion about an exact
13 amount? It was your understanding that the Bank of
14 York would just provide whatever amount was
15 required to make up the difference in order for
16 OakTree to fund the purchase price?

17 A That's absolutely correct.

18 Q What was the interest rate?

19 A Whatever my existing line was, and you have that
20 document, I believe.

21 Q What was the maturity date?

22 A Whatever that existing line was.

23 Q So the maturity date then was June 30, 2008? Is
24 that consistent with your recollection of your
25 discussion with Grier?

Continued Deposition of Tom Ras