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THE STATE OF SOUTH CAROLINA
In the Supreme Court

MAY 26 2015

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Joe M. Crosby, Master-In-Equity

Case No. 2011-CP-22-00180
Appellate Case No. 2015-001125

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

v.

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

J. Mars Sapp is the Petitioner.

APPENDIX - VOLUME TWO

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INDEX

Volume Two Pages 505 - 962

Record on Appeal	1
Final Brief of Appellant.....	817
Final Brief of Respondents Kennedy Funding, Inc. and BNP Paribas.....	852
Final Brief of Respondents Pawleys Island North, LLC, Will Darwin Wheeler and Peggy Wheeler-Cribb.....	887
Final Reply Brief of Appellant.....	906
Decision of Court of Appeals.....	936
Appellant’s Petition for Rehearing	945
Order Denying Petition for Rehearing.....	962

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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SC Court of Appeals

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

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

v.

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

J. Mars Sapp is the Appellant.

RECORD ON APPEAL VOLUME II

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INDEX

Volume I
Pages 1-500

Index	i

Orders/Judgments/Decrees/Decisions

Order and Judgment (June 7, 2013)	1
Order of Reference (March 22, 2012)	18
Order Granting Plaintiff's Motion for Summary Judgment as to Defendant J. Mars Sapp (March 5, 2012)	22

Pleadings

Complaint	24
Answer of J. Mars Sapp	60
Amended Complaint	63
Answer to Amended Complaint and Crossclaim of J. Mars Sapp	101
Answer of Will D. Wheeler and Peggy Wheeler-Cribb to Amended Complaint	108
Answer of Defendant Pawleys Island North, LLC to Amended Complaint	114
Plaintiff's Reply to Sapp's Cross-claim	118
Answer of Pawleys Island North, LLC, Will D. Wheeler, and Peggy Wheeler- Cribb to Sapp's Cross-claim	123
Notice of Appeal	128
Amended Notice of Appeal	130

Transcripts

Summary Judgment Hearing (January 17, 2012)	135
Deposition of Kevin Wolfer (January 12, 2012) (including exhibits which are Plaintiff's Trial Exhibits 1-6) ("Wolfer Deposition 1")	166

Volume II
Pages 501-808

Deposition of Kevin Wolfer (September 12, 2012) (including exhibits which are Plaintiff's Trial Exhibits 7 and 8) ("Wolfer Deposition 2")	626
Trial Transcript (February 11, 2013)	688

Exhibits and Other Materials or Documents

Exhibits

Plaintiff's Trial Exhibits:

1. Closing Binder bearing Bates Numbers KENNEDY 01135 – 01418. This Exhibit is printed as part of Wolfer Deposition 1 at page 225.	741
2. March 2, 2009 Letter with attachments from Kennedy Funding to Peggy Wheeler-Cribb, bearing Bates Numbers KENNEDY 00497 – 00504. This Exhibit is printed as part of Wolfer Deposition 1 at page 511.	742
3. March 11, 2009 – March 12 E-mail chain regarding loan documents and preliminary closing checklist bearing Bates Numbers KENNEDY 00472 – 00475. This Exhibit is printed as part of Wolfer Deposition 1 at page 520.	743
4. April 28, 2009 E-mail forwarding preliminary closing checklist bearing Bates Numbers KENNEDY 01113 – 01125. This Exhibit is printed as part of Wolfer Deposition 1 at page 525	744
5. April 29, 2009 E-mail regarding status of loan documents bearing Bates Number KENNEDY 01053. This Exhibit is printed as part of Wolfer Deposition 1 at page 539.	745
6. April 30, 2009 E-mail forwarding draft Loan and Security Agreement documents bearing Bates Numbers KENNEDY 00950 – 01033. This Exhibit is printed as part of Wolfer Deposition 1 at page 542	746
7. August 1, 2012 Notice of 30(b)(6) Deposition of Kennedy Funding, Inc. This Exhibit is printed as part of Wolfer Deposition 2 at page 674	747
8. November 29, 2011 Assignment of Mortgage, Assignment of Leases and Rents and Loan Documents bearing Bates Number KENNEDY 1126-01134 This Exhibit is printed as part of Wolfer Deposition 2 at page 679	748
9. Pawleys Claims Tables	749

Defendant's Sapp's Trial Exhibits

1. Quitclaim Deed from Wheeler to Pawleys Island North, LLC	750
2. Summons and Complaint in 2008-CP-22-1345 ("the Sapp/Wheeler Litigation") (September 30, 2008)	756
3. Amended Summons & Complaint in the Sapp/Wheeler Litigation (October 6, 2009)	761
4. Judgment/Verdict in Case No. 2008-CP-22-1345 (June 4, 2010)	769
5. Judgment and Order on Sapp's Post Trial Matters Presented to the Court in the Sapp/Wheeler Litigation (March 10, 2011)	774
6. Execution as to Defendant and Judgment Debtor Will D. Wheeler in the Sapp/Wheeler Litigation with Nulla Bona return (March 22, 2011)	786

Motions and Miscellaneous Filings

Plaintiff's Motion for Summary Judgment as to Defendant J. Mars Sapp	788
Defendant J. Mars Sapp's Rule 59 Motion to Alter or Amend Judgment.....	791
Defendant J. Mars Sapp's Motion to Stay Sale	800
Master's Report on Final Sale, Order of Disbursement Pursuant to Rule 71 (Public Sale), Order Confirming Sale and Order Closing Case	803
Master's Foreclosure Deed	805
Certificate of Counsel	808

MEMORANDUM

TO: Jon Hornik
Evan Bell

FROM: Dorothy Mello Laguzza

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

DATE: April 27, 2009

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

CLIENT/MATTER NO: 31392-0569

I. Introduction

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

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

II. Review of Phase I Environmental Site Assessment

A. Site Description

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

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B. On-Site Concerns

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

C. Off-Site Concerns

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

D. Environmental Development Concerns

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

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

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

A. Federal Law

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

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

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

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

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

B. State Law

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

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

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

IV. Conclusion

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

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

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

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4

31392/0569-5534870v1

KENNEDY_01413

MEMORANDUM

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

CLIENT/MATTER NO: 31392.0569

The following search results have been received:

Pawleys Island North, LLC

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

Peggy Wheeler-Cribb

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

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KENNEDY_01414

Will Darwin Wheeler

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

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

OFAC Search - Clear through 4/3/09

COLL. SCHOTT, MOSOL, FOSMAN & LEONARD, P.A.
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2

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KENNEDY_01415

NOTICE OF WAIVER OF APPRAISAL RIGHTS

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

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

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

[SIGNATURES APPEAR ON THE FOLLOWING PAGE]

31392/0000-5401498 v1

KENNEDY_01416

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

ACKNOWLEDGMENT

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

Robert H. Gwin, III
NOTARY PUBLIC

Print Name: ROBERT H. GWIN, III

My Commission Expires: 8/8/2012

[SEAL]

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

ACKNOWLEDGMENT

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

(a) made the attached instrument; and

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

Robert H. Gwin, III
NOTARY PUBLIC

Print Name: ROBERT H. GWIN, III

My Commission Expires: 8/8/2012

[SEAL]

313920000-5405899v3

KENNEDY_01417

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

ACKNOWLEDGMENT

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

Robert H. Gwin
NOTARY PUBLIC

Print Name: ROBERT H. GWIN, III

My Commission Expires: 8/8/2012

[SEAL]

313920000-5408 898 v1

KENNEDY_01418

EXHIBIT 2

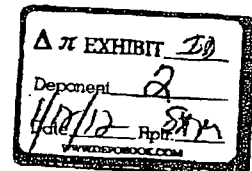
Donna Horn

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

Yours truly,
Sue Gold

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

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- THIS E-MAIL MESSAGE IS FOR THE SOLE USE OF THE INTENDED RECIPIENT(S) AND MAY CONTAIN CONFIDENTIAL AND PRIVILEGED INFORMATION. ANY UNAUTHORIZED REVIEW, USE, DISCLOSURE OR DISTRIBUTION IS PROHIBITED. IF YOU ARE NOT THE INTENDED RECIPIENT, PLEASE CONTACT THE SENDER BY REPLY E-MAIL AND DESTROY ALL COPIES OF THE ORIGINAL MESSAGE.



KENNEDY_00497



KENNEDY FUNDING, INC.

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

March 2, 2009

VIA EMAIL: wheelercribb@aol.com

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

Re: Loan Offer

Dear Ms. Wheeler-Cribb:

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

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

We look forward to closing as soon as possible.

Very truly yours,


Kevin Wolfer
Co-Chief Loan Officer

KW:sg

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

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

KENNEDY_00498

Volpe Real Estate Advisors, Inc

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

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

27 February 2009

South Causeway, LLC Georgetown, South Carolina

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



DESCRIPTION OF COLLATERAL

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

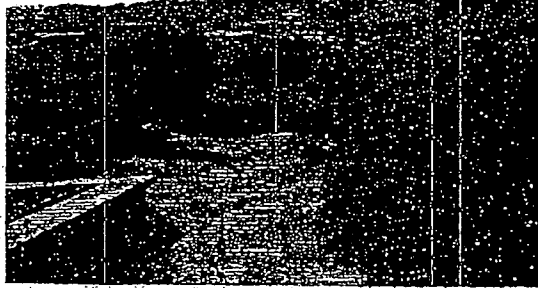
The ocean frontage totaled 150.68 feet. The depth varied from 840.41 on the south to 949.7 feet on the north. The frontage along the channel in the salt marsh measured approximately 185 feet. Myrtle Avenue is at the western end running diagonally through the parcel approximately 175 feet east off the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



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

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On a subdivision plan done by Earthworks Group of Murrell's Inlet dated July 9, 2006, the original parcel is subdivided into the four lots. Lot 1 (42-0167-042-01-00) is the northern most and spans from the western side of the Myrtle Avenue to the Atlantic Ocean where there is approximately 48.74 feet of beach frontage. In its center its width narrows to only 10 feet, which is basically access from Myrtle Avenue to the units.



Lot 2 (42-0167-042-02-00) is the next southern. It spans the entire length of the original parcel, encompassing approximately 60 percent of the salt marsh west of Myrtle Avenue, then narrows to approximately 10 feet, then widens and doglegs to the south, then opens up to the southern

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

Lot 3 (42-0167-042-03-00) encompasses the remainder of the salt marsh section, spans across Myrtle Avenue narrows to approximately 10 feet, then right angles and widens to the southern boundary of the original parcel. The east and west boundaries are perpendicular to the southern boundary at a distance of 93.56 feet apart. The Lot's total area is 29,566 square feet (0.68 Acres) with 13,337 square feet (0.31 Acres) attributed to salt marsh. The area where the new construction would be sited is approximately 9,360 gross square feet from which the area of the wetlands needs to be deducted. It does not have beach frontage as the building site is behind the existing construction, although since the swimming pool and pool house for the main house is on its south there is visibility to the ocean.

Lot 4 (42-0167-042-04-00) is a 22,264 square foot (0.51 Acre) five sided polygon with its northern and southern boundaries parallel and its western boundary, which is adjacent to Lot 3, square to them. The western side crosses Myrtle Avenue and doglegs to the south providing direct access from Myrtle Avenue if the wetlands were not there. There is no beach frontage as it is located "behind" Lot 3. The building area is reduced by the wetlands by Myrtle Avenue and along the southern boundary. Two clusters of live oaks are on the northern side of this lot.

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

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



KENNEDY_00500

neighborhood.

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

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

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

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

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

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

ZONING

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



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

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

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

The setbacks from the property lines are:

Front yard - 20 feet
Side yard - 10 feet

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Rear yard – 15 feet

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

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

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

ENVIRONMENTAL STATUS

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

PRESENT DEVELOPMENT STATUS

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

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

MARKET AND MARKET VALUES

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

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

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

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

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

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

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

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

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

\$1,920,000

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CONCERNS AND RECOMMENDATIONS

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

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EXHIBIT 3

Donna Horn

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

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

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

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

Why are the loan documents prepared in the wrong name?

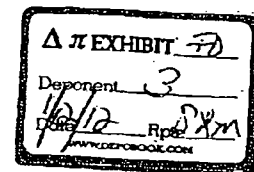
Douglas L Hinds
HINDS, COWAN, STRANGE & GEER
843-527-2441
843-527-0065 (FAX)
dlh@sc.rr.com

— Original Message —

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

I have the articles of organization

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



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201.970-9887 cell phone
mleighton@coleschotz.com
www.coleschotz.com
Legal Secretary: Veronica Marshman 201.489-3000 ext. 5095

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

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

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

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

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

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

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

Mr. Hinds:

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

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

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

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

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

2

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Thank you,
Roger Iorio

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

* * * * *

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Thank you.

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EXHIBIT 4

Donna Horn

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

Bob:

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

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

Thanks
Roger

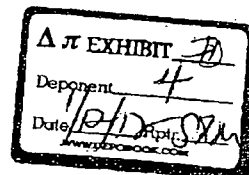
COLE SCHOTZ

Roger M. Iorio

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

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PRELIMINARY CLOSING CHECKLIST

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

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT 5

Donna Horn

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

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

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

Thank you
Roger

COLE SCHOTZ

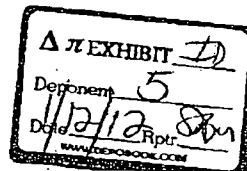
Roger M. Iorio

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

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APPX00548

EXHIBIT 6

Donna Horn

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

Bob:

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

Thanks
Roger

CS COLE SCHOTZ

Roger M. Iorio

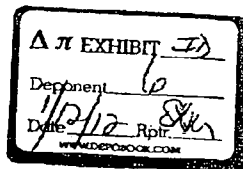
Cole, Schotz, Meisel, Forman & Leonard, P.A. | www.coleschotz.com
25 Main Street | Hackensack, New Jersey | 07601
Direct 201.525.6312 | Firm 201.489.3000 | Fax 201.678.6312 | riorio@coleschotz.com
New Jersey | New York | Delaware | Maryland
Legal Secretary: Christine Perna
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*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

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

LOAN AND SECURITY AGREEMENT

Between

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

AND

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

Date: as of April 30, 2009

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TABLE OF CONTENTS

	<u>Page</u>
1. Definitions.....	1
2. The Loan	4
3. The Note.....	6
4. Grant of Security Interest	6
5. Conditions Precedent to Lender's Obligations	8
6. Representations and Warranties of Borrower	10
7. Survival of Representations and Warranties	15
8. Affirmative Covenants.....	15
9. Negative Covenants of Borrower.....	18
10. Events of Default	20
11. Remedies.....	22
12. Payment of Expenses.....	24
13. Lender's Right to Assign	24
14. Default Interest Rate	24
15. Usury Savings	23
16. Notices	24
17. No Waiver	26
18. Failure to Exercise Rights.....	26
19. Prohibition Against Exercise of Rights Applicable Only to Individual Lenders.....	26
20. Miscellaneous.....	26
21. Successors and Assigns.....	29
22. Waiver of Jury Trial.....	29
23. Releases of Collateral.....	30

Schedules

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

31392/0000-5408836v4

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LOAN AND SECURITY AGREEMENT

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

WITNESSETH

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

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

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

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

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

1. Definitions. As used herein:

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

31392/0000-5408836v4

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The Loan.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. **Grant of Security Interest.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Will Darwin Wheeler	99%
Peggy Wheeler-Cribb	1%

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(r) Change the nature of its business.

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

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

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

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

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

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

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

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

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

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

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

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

11. Remedies.

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

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

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

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

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

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

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

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

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

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

12. Payment of Expenses.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20. **Miscellaneous.**

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

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

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

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

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

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

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

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

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

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

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

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

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

21. Successors and Assigns.

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

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

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

23. Releases of Collateral.

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

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

24. Publicity.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Remainder of this page intentionally left blank.]

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

WITNESS:

Print Name:

WITNESS:

Name:

LENDER:

KENNEDY FUNDING, INC., as Agent

By: _____

Name:

Title:

BORROWER:

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

By: _____

Name: Peggy Wheeler-Cribb

Title: Manager

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KENNEDY_00987

STATE OF NEW JERSEY)

) ss.:

COUNTY OF BERGEN)

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

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

NOTARY PUBLIC

STATE OF)

): ss.:

COUNTY OF)

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

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

NOTARY PUBLIC

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2

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APPX00588

SCHEDULE A

DESCRIPTION OF THE COLLATERAL

31392/0000-5402336v4

A-1

KENNEDY_00989

581

ADP201504
APPX00589

SCHEDULE B

PRINCIPAL LOAN DOCUMENTS

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

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B-1

KENNEDY_00990

SCHEDULE C

INTENTIONALLY OMITTED

31392/0000-5408836v4

C-1

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APPX00591

SCHEDULE D

LENDERS

31392/0000-5408836v4

F-1

KENNEDY_00992

584

APPX00592

LOAN AND SECURITY AGREEMENT

Between

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

AND

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

Date: as of April 30, 2009

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TABLE OF CONTENTS

		<u>Page</u>
1.	Definitions.....	1
2.	The Loan.....	4
3.	The Note.....	56
4.	Grant of Security Interest.....	6
5.	Conditions Precedent to Lender's Obligations.....	7
6.	Representations and Warranties of Borrower.....	10
7.	Survival of Representations and Warranties.....	14
8.	Affirmative Covenants.....	145
9.	Negative Covenants of Borrower.....	18
10.	Events of Default.....	20
11.	Remedies.....	22
12.	Payment of Expenses.....	23
13.	Lender's Right to Assign.....	24
14.	Default Interest Rate.....	24
15.	Usury Savings.....	23
16.	Notices.....	24
17.	No Waiver.....	25
18.	Failure to Exercise Rights.....	25
19.	Prohibition Against Exercise of Rights Applicable Only to Individual Lenders.....	26
20.	Miscellaneous.....	26
21.	Successors and Assigns.....	28
22.	Waiver of Jury Trial.....	289
23.	Releases of Collateral.....	29

Schedules

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

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i

KENNEDY_00994

LOAN AND SECURITY AGREEMENT

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

WITNESSETH

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

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

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

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

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

I. Definitions. As used herein:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The Loan.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Grant of Security Interest.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Will Darwin Wheeler	99%
Peggy Wheeler-Cribb	1%

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11. Remedies.

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

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

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

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

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

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

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

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

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

12. Payment of Expenses.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20. **Miscellaneous.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21. Successors and Assigns.

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

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

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

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

23. Releases of Collateral.

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

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

24. Publicity.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Remainder of this page intentionally left blank.]

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

WITNESS:

LENDER:

KENNEDY FUNDING, INC., as Agent

Print Name: _____

By: _____

Name: _____

Title: _____

WITNESS:

BORROWER:

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

Name: _____

By: _____

Name: Peggy Wheeler-Cribb

Title: Manager

31392/0000-5408836v34

KENNEDY_01028

STATE OF NEW JERSEY)
) ss.:
COUNTY OF BERGEN)

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

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

NOTARY PUBLIC

STATE OF)
) ss.:
COUNTY OF)

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

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

NOTARY PUBLIC

31392/0000-540836v34

SCHEDULE A
DESCRIPTION OF THE COLLATERAL

31392/0000-5408836v34

A-1

KENNEDY_01030

SCHEDULE B

PRINCIPAL LOAN DOCUMENTS

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

31392/0000-540836v34

B-1

KENNEDY_01031

SCHEDULE C
INTENTIONALLY OMITTED

31392/0000-5408836v34

C-1

KENNEDY_01032

624

A 400635 APPX00632

SCHEDULE D

LENDERS

31392/0000-5408836v24

F-1

KENNEDY_01033

625

APPX00633

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

KENNEDY FUNDING, INC., as :
 the predecessor-in-interest, :
 and BNP PARIBAS, :
 Plaintiffs, :

v. :
 :

PAWLEYS ISLAND NORTH, LLC, :
 WILL DARWIN WHEELER, PEGGY :
 WHEELER-CRIBB and J. MARS :
 SAPP, :
 Defendants. :

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

HUDSON REPORTING & VIDEO, INC.
 124 West 30th Street, 2nd Fl.
 New York, New York 10001

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

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 Pennsylvania

1 APPEARANCES:

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23 A L S O P R E S E N T:

24

25 JORDAN B. DeFLORA, ESQ.

KENNEDY FUNDING, INC.

NELSON MULLINS RILEY & SCARBOROUGH, LLP

BY: ROBERT H. JORDAN, ESQ.

151 Meeting Street, Sixth Floor

PO Box 1806 (29402-1806)

Charleston, South Carolina 29401-2239

(843) 534-4221

Robert.jordan@nelsonmullins.com

Counsel for the Plaintiffs Kennedy Funding,
Inc., as the predecessor-in-interest and BNP

Paribas

(VIA TELEPHONE)

ROBINSON McFADDEN & MOORE, P.C.

BY: THOMAS W. BUNCH, II, ESQ.

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Counsel for Defendant J. Mars Sapp

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Crgwinn@sc.rr.com

Counsel for Defendants Will Darwin Wheeler
and Peggy Wheeler-Cribb

(VIA TELEPHONE)

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I N D E X

1		
2	WITNESS: KEVIN WOLFER	PAGE
3	EXAMINATION BY MR. JORDAN	6/38
	EXAMINATION BY MR. GWINN	27/39
4	EXAMINATION BY MR. BUNCH	29

E X H I B I T S

7	PLAINTIFF'S	DESCRIPTION	ID	EV
8	1	Notice of 30(b)(6) Deposition of Kennedy Funding, Inc.	8	40
9	2	Assignment of Mortgage Assignment of Leases and Rents and Loan Documents Kennedy 01126 to 01134	23	40
10				

EXHIBITS PREVIOUSLY MARKED

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

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1 - - -

2 DEPOSITION SUPPORT INDEX

3 - - -

4

5 Direction to Witness Not to Answer

6 Page Line Page Line Page Line Page Line

7 None

8

9

10 Request for Production of Documents

11 Page Line Page Line Page Line Page Line

12 None

13

14

15 Stipulations

16 Page Line Page Line Page Line Page Line

17 6 16 6 24

18

19

20 Question Marked

21 Page Line Page Line Page Line Page Line

22 None

23

24

25

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

2 Kennedy Funding, Inc., 930 Sylvan Avenue,
3 Suite 110, Englewood Cliffs, New Jersey
4 07632, after having been duly sworn, was
5 examined and testified as follows:

6 MR. JORDAN: Has the witness been
7 sworn in?

8 THE STENOGRAPHER: Yes.

9 MR. BUNCH: I'm sorry. I didn't
10 catch the person's name who was there with
11 Mr. Wolfer. This is Tommy Bunch.

12 MR. DeFLORA: My name is Jordan
13 DeFlora and I am local counsel for Kennedy Funding.

14 MR. BUNCH: Okay.

15 MR. JORDAN: All right. Is everybody
16 ready?

17 MR. BUNCH: Yes.

18 MR. JORDAN: Okay. This is Robert
19 Jordan. I represent the Plaintiffs, Kennedy Funding
20 and BNP Paribas. We're here today to take a
21 30(b)(6) deposition of Kennedy Funding.

22 For the benefit of all, counsel and the
23 court reporter, Mr. Wolfer will be the designee for
24 Kennedy Funding and he was previously deposed in
25 January of this year. We are going to use the same

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

4 EXAMINATION BY MR. JORDAN:

5 Q. Is that correct Mr. Wolfer?

6 A. Yes.

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

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

19 (There is a discussion off the record.)

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

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

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

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

4 Is that agreeable to all counsel?

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

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

9 BY MR. JORDAN:

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

12 A. Kevin Wolfer.

13 Q. And who do you work for?

14 A. Kennedy Funding.

15 Q. And what is your title?

16 A. President and CEO.

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

20 A. Yes.

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

23 A. Yes.

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

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1 correct?

2 A. Yes.

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

6 A. Yes.

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

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

14 (There is a discussion off the record.)

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

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

20 A. Yes.

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

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

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1 A. Yes.

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

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

7 A. Yes.

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

10 A. Yes.

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

13 A. Yes.

14 Q. And what is that?

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

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

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

23 MR. DeFLORA: Go to the last page.

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

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1 Objections?

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

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

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

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

10 A. Yes.

11 Q. And what is that document?

12 A. Loan and Security Agreement.

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

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

17 MR. JORDAN: It's 01141.

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

21 A. April 30th, 2009.

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

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

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

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1 A. Pawleys Island North, LLC.
2 Q. And what was the amount of the loan?
3 A. \$960,000.
4 Q. And was there collateral pledged for
5 the loan?
6 A. Yes.
7 Q. What was the collateral?
8 A. Two lots in Pawleys Island.
9 Q. And I believe if you turn to Kennedy
10 001181 --
11 A. Yes.
12 Q. -- okay, is that the physical
13 description of the two lots?
14 A. Yes.
15 Q. Do you recall at the time the loan
16 was made the value of those lots?
17 A. It was, approximately, a million
18 900,000 dollars, approximately.
19 Q. Okay. And at the time the Loan and
20 Security Agreement was signed, I believe, a
21 promissory note was also signed; is that correct?
22 A. Yes.
23 Q. If you turn to 01185.
24 A. (The witness complies.)
25 Q. Is that the promissory note signed in

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

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

4 A. Yes.

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

6 A. Yes.

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

9 A. Yes.

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

13 A. Yes.

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

16 A. Okay.

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

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

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

23 A. Yes.

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

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1 A. The Assignment of Leases and Rent?

2 Q. Right?

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

7 A. Yes.

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

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

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

18 A. Yes.

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

22 A. Okay, UCC Financing Statement.

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

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1 A. Yes.

2 Q. Okay. Prior to closing this loan,

3 did Kennedy Funding have a title search performed?

4 A. Yes.

5 Q. Did the search reflect any existing

6 liens by J. Mars Sapp or any entity related to J.

7 Mars Sapp?

8 A. I leave that up to our attorneys,

9 both our outside attorneys and in-house attorneys.

10 So -- but, no, there were no, obviously, superior

11 liens or liens that I was made aware of, or they

12 would have made me aware of that.

13 Q. So when it comes to obtaining --

14 doing the title work and, I guess, ultimately,

15 obtaining title insurance, you rely on the advice of

16 counsel; is that correct?

17 A. Yes.

18 Q. Okay. Would you turn to Document No.

19 1366, please.

20 A. Yes.

21 Q. And this is a Proforma Loan Policy of

22 Title Insurance issued by Chicago Title and I

23 believe it's for the title which is the subject of

24 this loan; is that your understanding?

25 A. Yes.

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

4 A. Absolutely, yes.

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

7 A. Okay.

8 Q. Actually, back up to 1394.

9 A. (The witness complies.)

10 Q. Are you there?

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

12 Q. Okay.

13 A. Yes, I have it.

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

16 And do you know what this letter is?

17 A. Yes.

18 Q. What is it?

19 A. It's an opinion letter.

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

23 A. Yes.

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

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1 borrowers affirming certain facts about the loan?

2 A. Yes.

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

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

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

9 MR. JORDAN: That's okay.

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

12 MR. JORDAN: I understand.

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

15 A. Yes.

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

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

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

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

16 Q. Thank you.

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

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

22 A. No.

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

25 A. No.

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

3 Did the loan ultimately go into default?

4 A. Yes.

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

7 A. Failure to make monthly interest
8 payments.

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

11 A. Yes.

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

15 A. Yes.

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

19 A. No.

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

24 A. That is clear.

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

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

3 A. No.

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

6 A. Yes.

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

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

11 A. No.

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

17 A. No.

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

20 A. No.

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

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

25 Did Kennedy Funding authorize my law firm to

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

3 A. Yes.

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

7 A. Yes, correct.

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

11 A. Yes.

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

15 A. No.

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

19 A. Yes.

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

24 A. Yes.

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

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

4 A. Yes.

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

7 A. No.

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

11 Do you have that in front of you?

12 A. Just give us a moment; 01126.

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

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

18 (There is a discussion off the record.)

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

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

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

24 MR. DeFLORA: Okay.

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

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

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

10 A. Correct.

11 Q. Was this loan assigned?

12 A. Yes.

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

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

18 A. Yes.

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

21 A. Yes, November 10th, 2011.

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

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1 properly assigned to BNP Paribas?

2 A. Yes.

3 Q. I want to go back, if you could --
4 this was marked as Exhibit 2 in your original
5 deposition and it starts at Kennedy 00497.

6 A. I have it in front of me.

7 Q. Okay. If you flip to the next page,
8 00498, you'll see a letter there that you wrote; is
9 that your signature?

10 A. Yes.

11 Q. And you've written it to Miss Peggy
12 Wheeler-Cribb; is that correct?

13 A. Yes.

14 Q. I believe following that letter or
15 probably it was attached to it was the appraisal
16 done in conjunction with this loan; is that correct?

17 A. Yes.

18 Q. And now looking at this letter and
19 seeing the appraisal, is it your recollection that
20 the two lots appraised prior to the closing at
21 \$1,920,000?

22 A. Yes.

23 Q. And you, obviously, loaned \$960,000;
24 is that correct?

25 A. Yes.

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

3 I believe that's exactly 50 percent --

4 A. Exactly.

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

6 A. Yes.

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

9 A. Yes.

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

12 A. It should not be.

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

15 A. Yes.

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

19 A. Yes. ,

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

22 A. Yes.

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

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1 A. Yes.

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

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

7 A. Yes.

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

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

12 A. Yes.

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

17 A. No.

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

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

22 A. Okay.

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

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

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1 want me to go first?

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

4 EXAMINATION BY MR. GWINN:

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

8 How are you doing this morning?

9 A. Fine. How are you?

10 Q. Fine.

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

14 A. Yes.

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

18 A. Yes.

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

21 A. I do not mind at all.

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

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

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

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

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

13 A. Yes.

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

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

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

23 A. No.

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

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1 and 2 in that same subdivision?

2 A. I don't recall.

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

5 A. I believe so, yes.

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

9 A. I do not recall.

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

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

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

17 EXAMINATION BY MR. BUNCH:

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

21 A. Yes.

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

24 A. Yes.

25 Q. Let me refer you back to the document

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

4 A. I have it in front of me.

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

8 A. Yes.

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

13 A. Yes, correct.

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

17 A. Yes.

18 Q. Did they receive anything else?

19 A. Not that I'm aware of.

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

24 A. Okay, wait. I'm sorry, one second.
25 Exhibit 1?

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

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

5 A. Okay. Give me one second.

6 I have it in front of me, yes.

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

9 A. Yes.

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

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

15 Q. Okay.

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

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

23 A. Correct.

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

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1 A. Yes.

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

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

8 You can answer.

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

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

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

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

19 A. Yes.

20 MR. JORDAN: Object to form.

21 You can answer.

22 THE WITNESS: Sorry.

23 A. I believe so, yes.

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

1 on the title policy; is that right?

2 MR. JORDAN: Same objection.

3 A. Yes, we may.

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

7 A. Yes.

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

12 A. Yes.

13 MR. JORDAN: Same objection.

14 THE WITNESS: Oh, sorry.

15 A. Yes.

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

17 A. Yes.

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

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

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

23 A. Okay.

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

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

4 A. Yes.

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

9 A. Yes.

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

14 A. Yes.

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

18 A. Yes.

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

20 A. Yes.

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

23 A. Yes.

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

25 A. Yes.

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

3 A. Yes.

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

8 A. Yes.

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

13 A. It appears so, yes.

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

17 A. Yes.

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

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

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

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

4 Q. Where does your attorney say
5 everything was clear and clean to go to close?

6 A. I don't know where it stated it in an
7 e-mail. But I know each and every loan closing, we
8 do not close unless our attorney gives us the green
9 light that everything is clean and clear.

10 Q. And you got a title insurance policy?

11 A. Correct.

12 Q. So you don't know what response was
13 received, if any, as to the status of the litigation
14 pending against Mr. Wheeler?

15 A. I do not.

16 Q. You just know that, in fact, the
17 company knew about it ahead of time and went ahead
18 with the closing?

19 A. Again, our attorneys would handle it.
20 So our attorneys must have gotten comfortable with
21 whatever was received or discussed or whatever.
22 But, again, I didn't deal with that.

23 Q. Okay. But you knew prior to closing
24 that litigation was pending and you closed the loan
25 with that knowledge?

1 A. Again, our attorneys make that
2 decision as to whether or not that's an issue and I
3 don't know what response they received. All I know
4 is that they informed us that we're clear to close.

5 Q. Okay. I'm not asking when you made
6 the decision.

7 I'm just seeking to confirm what I think
8 you've already testified to, that you and your
9 attorneys knew of the pending litigation and elected
10 to proceed with closing; is that right?

11 A. Correct. But, again, I don't know if
12 that litigation was resolved or not. I have no
13 idea.

14 Q. Right. Do you know that it went to a
15 jury verdict against Mr. Sapp -- I mean, I'm sorry,
16 against Mr. Wheeler, don't you?

17 A. No.

18 Q. Okay. Well, the public records would
19 show that.

20 No further questions.

21 MR. JORDAN: Bob, this is Rob. Do
22 you have any questions?

23 MR. GWINN: I have no follow-up.

24 MR. JORDAN: I'm sorry?

25 MR. GWINN: No, sir, I have no

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1 questions.

2 MR. JORDAN: I've got two or three.

3 This is Mr. Jordan.

4 EXAMINATION BY MR. JORDAN:

5 Q. Mr. Wolfer, you've just been asked
6 questions about what I'll call the Sapp litigation,
7 which is Mr. Bunch's client in a suit that he had
8 against Mr. Wheeler and an unrelated LLC. Do you
9 understand that?

10 A. Yes.

11 Q. And, prior to closing, did the
12 Wheeler's ever discuss with you or, to your
13 knowledge, anyone at Kennedy Funding concern that
14 the Sapp litigation might render the Wheeler's
15 personally insolvent?

16 MR. BUNCH: Objection to the form.

17 A. No, not at all.

18 Q. Did the Wheeler's discuss with you or
19 anyone at Kennedy Funding that the Sapp litigation
20 may impact their ability to pay back this loan?

21 A. Not at all.

22 MR. BUNCH: Objection to form.

23 Q. Did the Wheeler's discuss with you or
24 anyone at Kennedy Funding what I would call a scheme
25 to hide assets from Mr. Sapp or any other creditor?

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1 A. Not at all.

2 MR. BUNCH: Object to form.

3 I'm going to continue to object to leading
4 questions along those lines.

5 A. Not at all.

6 Q. All right. That's all the questions
7 I have.

8 MR. JORDAN: Anybody else?

9 MR. BUNCH: Not for Mr. Sapp.

10 EXAMINATION BY MR. GWINN:

11 Q. Mr. Wolfer, on those same lines, did
12 you have any discussions with either of the
13 Wheeler's or anyone on behalf of Pawleys Island
14 North that making this loan would have rendered them
15 insolvent?

16 MR. BUNCH: Object to the form.

17 A. Would you repeat the question,
18 please?

19 Q. Did you have any discussions with
20 Mr. Wheeler, Miss Wheeler-Cribb or anyone on behalf
21 of Pawleys Island North that either the transfer of
22 the properties to Pawleys Island North or the
23 mortgage made by Kennedy Funding would render
24 Pawleys Island North or any of the guarantors
25 insolvent?

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1 A. No, not at all.

2 MR. BUNCH: Object to the form.

3 Q. Did you have any discussions with
4 anyone on behalf of Pawleys Island North or any of
5 the guarantors that this -- the making of this loan
6 would be or impair their ability to pay any
7 prospective judgment in the Mars Sapp litigation?

8 MR. BUNCH: Object to the form.

9 A. No, not at all.

10 Q. And that's all the questions I have.

11 MR. JORDAN: Nothing further for
12 Mr. Jordan.

13 MR. BUNCH: Nothing further from me
14 on behalf of Mr. Sapp.

15 MR. JORDAN: Okay. I believe that we
16 are finished then.

17 (There is a discussion off the record.)

18 MR. JORDAN: I moved Exhibit 1 from
19 the first deposition.

20 I'd also like to move Plaintiff's 1 and
21 Plaintiff's 2, which I introduced into evidence.
22 without objection, I believe; is that correct,
23 counsel?

24 (Plaintiff's Exhibit 1 and Plaintiff's
25 Exhibit 2 are moved into evidence.)

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1 MR. BUNCH: I thought all exhibits
2 from the prior deposition were into evidence based
3 on your statement earlier.

4 MR. GWINN: And that's what my
5 understanding was, that all of them would be.

6 MR. JORDAN: That's fine. I knew one
7 of them I actually said it.

8 But, on behalf of the Plaintiff's, we agree
9 that all exhibits from the first deposition and the
10 second deposition taken today are admitted into
11 evidence without objection.

12 (Exhibits previously marked Plaintiff's 2
13 through Plaintiff's 6 are moved into evidence.)

14 (There is a discussion off the record.)

15 MR. JORDAN: This is Mr. Jordan. I
16 would like to order a copy of the transcript,
17 please, with exhibits.

18 MR. GWINN: This is Mr. Gwinn. I
19 would like to order a copy of the transcript, also.

20 MR. BUNCH: And this is Tommy Bunch.
21 I would like an electronic version of the
22 transcript. I don't think I need the exhibits.

23 THE STENOGRAPHER: Thank you.

24 MR. JORDAN: For counsel, on the
25 record, typically, in South Carolina, we -- the

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1 party taking the deposition receives the original.

2 Madam Court Reporter, would you send me the
3 original, or do you keep the original in New York?

4 THE STENOGRAPHER: No, I will send it
5 to you.

6 MR. JORDAN: Okay. So I will receive
7 the original.

8 And we currently have a trial date of
9 September 24th. Do you anticipate a problem getting
10 the deposition to us by next Wednesday or Thursday?

11 THE STENOGRAPHER: No, that shouldn't
12 be a problem.

13 MR. JORDAN: Okay, thank you.

14 (Time noted: 11:02 a.m.)

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C E R T I F I C A T E

I, SILVIA P. WAGE, a Certified Court Reporter, Certified Realtime Reporter, Registered Professional Reporter and Notary Public do hereby certify that, pursuant to notice, the deposition of KEVIN WOLFER, was duly taken at the offices of KENNEDY FUNDING, INC., 930 Sylvan Avenue, Suite 110, Englewood Cliffs, New Jersey, on Wednesday, September 12, 2012, commencing at 10:15 a.m. before me.

Said witness was first duly sworn by me according to law to tell the truth, the whole truth and nothing but the truth and thereupon did testify as set forth in the above transcript of testimony. The testimony was taken down stenographically by me.

I do further certify that the above deposition is full, complete and a true record of all the testimony given by the said witness.

SILVIA P. WAGE, a Certified Court Reporter, Certified Realtime Reporter, Registered Professional Reporter and Notary Public
Dated: September 13, 2012

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INSTRUCTIONS TO WITNESS

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Please read your deposition over carefully
and make any necessary corrections. You should
state the reason in the appropriate space on the
errata sheet for any corrections that are made.

After doing so, please sign the errata sheet
and date it.

You are signing same subject to the changes
you have noted on the errata sheet, which will be
attached to your deposition.

It is imperative that you return the
original errata sheet to the deposing attorney
within thirty (30) days of receipt of the deposition
transcript by you. If you fail to do so, the
deposition transcript may be deemed to be accurate
and may be used in court.

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Connecticut

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New Jersey
Pennsylvania

ACKNOWLEDGMENT OF DEPONENT

I, _____, do hereby
certify that I have read the foregoing pages, 1 - 42
PGS, and that the same is a correct transcription of
the answers given by me to the questions therein
propounded, except for the corrections or changes in
form or substance, if any, noted in the attached
Errata Sheet.

KEVIN WOLFER DATE

Subscribed and sworn
to before me this
_____ day of _____, 20____.

My commission expires: _____

Notary Public

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Connecticut

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Nationwide 1-800-310-1769

New Jersey
Pennsylvania

1 ERRATA SHEET FOR THE TRANSCRIPT OF:

2 Case Name: KENNEDY FUNDING, et al., v. PAWLEYS
3 ISLAND NORTH, LLC, et als.

4 Dep. Date: SEPTEMBER 12, 2012

5 Deponent: KEVIN WOLFER

6

7 PAGE LINE CHANGE

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9 REASON:

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11 REASON:

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13 REASON:

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23 REASON:

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25 REASON:

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Exhibits

Page 1

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

KENNEDY FUNDING, INC., as :
the predecessor-in-interest, :
and BNP PARIBAS, :
Plaintiffs, :

v. :

PAWLEYS ISLAND NORTH, LLC, :
WILL DARWIN WHEELER, PEGGY :
WHEELER-CRIBB and J. MARS :
SAPP, :
Defendants. :

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

HUDSON REPORTING & VIDEO, INC.

124 West 30th Street, 2nd Fl.

New York, New York 10001

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

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New Jersey
Pennsylvania

EXHIBIT 1

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN) Civil Action No. 2011-CP-22-00180

Kennedy Funding, Inc.,

Plaintiff,

vs.

Pawleys Island North, LLC, Will
Darwin Wheeler, Peggy Wheeler-Cribb
and J. Mars Sapp,

Defendants.

**NOTICE OF 30(b)(6) DEPOSITION
OF KENNEDY FUNDING, INC.**

TO: THOMAS W. BUNCH, II, ESQ. AND ROBERT H. GWIN, III

Please take notice that, pursuant to Rule 30(b)(6) of the South Carolina Rules of Civil Procedure, the undersigned attorneys, on behalf of plaintiff Kennedy Funding, Inc. will take the oral deposition of a representative of Kennedy Funding, Inc. from among the officers, directors, managing agents, or such other persons who consent to testify on its behalf regarding the topics identified in Exhibit A, attached hereto. The deposition shall take place via telephone on Wednesday, September 12, 2012, beginning at 10:00 a.m., at the offices Kennedy Funding, Inc., 930 Sylvan Avenue, Suite 110, Englewood Cliffs, New Jersey.

The deposition will be taken before a certified court reporter by stenographic means and shall continue from day to day until adjourned.

You are invited to attend as is fit and proper.

[SIGNATURE BLOCK ON FOLLOWING PAGE]



NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Robert H. Jordan
SC Bar No. 13612
E-Mail: robert.jordan@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Plaintiff

Charleston, South Carolina

8/31, 2012

EXHIBIT A

1. All matters related to the underwriting, servicing, and account history of the mortgage and note at issue in this case from Kennedy Funding to Pawley's Island North, LLC (and any previous applicant offering any property for security owned by Pawley's Island North or any other Defendant), including, but not limited to, Borrowers' default under the terms of the mortgage and note and all amounts owed pursuant to the default.
2. All matters related to the personal guarantees given by Will Darwin Wheeler and Peggy Wheeler-Cribb, in connection with the mortgage and note.
3. All communications between any Defendant and all of their agent and representatives, and Kennedy Funding and all of its agents and representatives related to the matters at issue in the case.
4. The holder of the Note and Mortgage at issue in this case, any conveyance or assignment thereof, and all communications regarding the conveyance by and between Kennedy Funding and the transferee or assignee

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for BNP Paribas, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by sending a copy of the same by electronic mail and United States Mail, postage prepaid, to the following address(es):

Pleadings:

NOTICE OF 30(b)(6) DEPOSITION OF KENNEDY FUNDING, INC.

Counsel Served:

Thomas W. Bunch, II, Esq.
Robinson, McFadden & Moore, P.C.
PO Box 944
Columbia, SC 29201

Robert H. Gwinn, III, Esq.
Gwinn Law Office, LLC
4701-A Oleander Drive
Myrtle Beach, SC 29577


Administrative Assistant

Aug 31, 2012

EXHIBIT 2



This Instrument prepared by
and after recording return to:

Richard Favata
Hughes Hubbard & Reed LLP
1 Battery Park Plaza
New York, NY 10004

COPY

201100011899
Filed for Record in
GEORGETOWN SC
WANDA PREVATTE, REGISTER OF DEEDS
11-29-2011 At 11:21:11 AM.
ASSIGNMENT 14.00
Book 1794 Page 184 - 192

**ASSIGNMENT OF MORTGAGE, ASSIGNMENT OF LEASES AND RENTS AND
LOAN DOCUMENTS**

Pursuant to this Assignment of Mortgage, Assignment of Leases and Rents and Loan Documents (this "Assignment") the undersigned, KENNEDY FUNDING, INC. a New Jersey corporation (the "Agent"), for good and valuable consideration, the receipt of which is hereby acknowledged, does hereby ASSIGN, REMISE, RELEASE, CONVEY, GRANT, TRANSFER AND DELIVER unto BNP PARIBAS, as agent on behalf of certain co-lenders, with an address at 787 Seventh Avenue, New York, New York (Attn: Harry Nullet) ("Assignee"), all the right, title, interest, claim or demand whatsoever of Agent in, through or by that certain Mortgage and Security Agreement, dated April 28, 2009 and recorded in the land records of Georgetown County, South Carolina in Book 1225, Page 109 (the "Mortgage") Assignment of Leases and Rents, dated April 28, 2009 and recorded in the land records of Georgetown County, South Carolina in Book 1225, Page 161 (the "ALR"), the Loan Documents (as defined in the Mortgage), the Co-Lenders Agreement, dated as of April 30, 2009, by and among and the Agent and the lenders party to the Loan Documents, and any amendments, restatements, supplements, subordinations to or of, or other modifications to any of the foregoing or related to the premises more particularly described on Exhibit A.

TO HAVE AND TO HOLD the same together with all right, title, interest, privileges, claims, demands and equities existing and to exist in connection therewith whatsoever, unto Assignee, its successors and assigns forever.

The Agent expressly waives and releases in favor of Assignee any and all rights that it may now have or hereafter have to establish or enforce any lien or security interest, if any, securing payment of the indebtedness arising pursuant to the Mortgage, the ALR and the Loan Documents. The Agent directs that all payments hereafter due under the Mortgage, the ALR and the Loan Documents or any other document, instrument or agreement evidencing, creating or securing the loans described in the Mortgage, the ALR and the Loan Documents be made directly to Assignee.

The Agent hereby represents and warrants to Assignee as follows: (i) the Agent is the secured party, on behalf of the lenders, under the Mortgage, the ALR and the Loan Documents and has not previously assigned, transferred, pledged or conveyed its rights and duties as the agent thereunder; (ii) the Agent has the full right and authority to assign the same to Assignee; (iii) the person executing this Assignment on behalf of the Agent has the power and authority to do so and (iv) no other party's consent is required in connection with this Assignment.

Assignment (Agent) - Pawleys Island

KENNEDY_01126

Assignee expressly acknowledges and agrees that except as set forth herein, the Assignment is made by the Agent without any recourse, representation or warranty, express or implied, of any type, kind, character or nature.

This Assignment shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

[signature page to follow]

Assignment (Agent) - Pawleys Island

KENNEDY_01127

IN WITNESS WHEREOF, this Assignment has been executed as of this 10th day of November, 2011.

KENNEDY FUNDING, INC.

By: Kevin Woon
Name: Kevin Woon
Title: CO-CEO

WITNESS #1

Ray Minicini
Name: Ray Minicini

WITNESS #2

Jeffrey Silver
Name: Jeffrey Silver

BNP PARIBAS

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

WITNESS #1

Name: _____

WITNESS #2

Name: _____

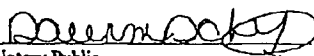
Assignment of Agent - Pawloys Island

KENNEDY_01128

STATE OF New Jersey)
COUNTY OF Bergen)

I, Dawn M. Doherty, a Notary Public in and for said County, in the State
aforesaid, do hereby certify that Kenneth, a Co-CEO of Kennedy Funding, Inc.,
personally known to me to be the same person whose name is subscribed to the foregoing instrument,
appeared before me this day in person and acknowledged that he/she signed, and delivered said
instrument as his/her own free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 4th day of November, 2011.


Notary Public

DAWN M. DOHERTY
Notary Public of New Jersey
I.D. NO. 2297487
My Commission Expires 03/5/2013

STATE OF _____)
COUNTY OF _____)

I, _____, a Notary Public in and for said County, in the State
aforesaid, do hereby certify that _____, a _____ of BNP Paribas, personally
known to me to be the same person whose name is subscribed to the foregoing instrument, appeared
before me this day in person and acknowledged that he/she signed, and delivered said instrument as
his/her own free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this _____ day of November, 2011.

Notary Public

STATE OF _____)
COUNTY OF _____)

I, _____, a Notary Public in and for said County, in the State
aforesaid, do hereby certify that _____, a _____ of BNP Paribas, personally
known to me to be the same person whose name is subscribed to the foregoing instrument, appeared
before me this day in person and acknowledged that he/she signed, and delivered said instrument as
his/her own free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this _____ day of November, 2011.

Notary Public

Assignment (Agent) - Pawleys Island

KENNEDY_01129

IN WITNESS WHEREOF, this Assignment has been executed as of this 10th day of November, 2011.

KENNEDY FUNDING, INC.

By: _____
Name: _____
Title: _____

WITNESS #1

Name: _____

WITNESS #2

Name: _____

BNP PARIBAS

By: Harry T. Nullet
Name: **Harry T. Nullet**
Title: **Managing Director**

By: Govind Gupta
Name: **Govind Gupta**
Title: **Vice President**

WITNESS #1
Aracelis Valentin
Name: **Aracelis Valentin**

WITNESS #2

Jonathan Cope
Name: **JONATHAN COPE**

Assignment of Agent - Pawleys Island

KENNEDY_01130

STATE OF _____)
COUNTY OF _____)

I, _____, a Notary Public in and for said County, in the State
aforesaid, do hereby certify that _____, a _____ of Kennedy Funding, Inc.,
personally known to me to be the same person whose name is subscribed to the foregoing instrument,
appeared before me this day in person and acknowledged that he/she signed, and delivered said
instrument as his/her own free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this _____ day of November, 2011.

Notary Public

STATE OF _____)
COUNTY OF _____)

I, R. Sonny Sampayan-Sampayan, a Notary Public in and for said County, in the State
aforesaid, do hereby certify that Harvey Kuller, a Managing Director of BNP Paribas, personally
known to me to be the same person whose name is subscribed to the foregoing instrument, appeared
before me this day in person and acknowledged that he/she signed, and delivered said instrument as
his/her own free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this _____ day of November, 2011.

STATE OF _____)
COUNTY OF _____)

Notary Public R. SONNY SAMPAYAN-SAMPAYAN
Notary Public, State of New York
No. 01SA8217385
Qualified in Queens County
Certificate Filed in New York County
Commission Expires Feb. 28, 2014

I, R. Sonny Sampayan-Sampayan, a Notary Public in and for said County, in the State
aforesaid, do hereby certify that Gerard Gupta, a Vice President of BNP Paribas, personally
known to me to be the same person whose name is subscribed to the foregoing instrument, appeared
before me this day in person and acknowledged that he/she signed, and delivered said instrument as
his/her own free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this _____ day of November, 2011.

Notary Public
R. SONNY SAMPAYAN-SAMPAYAN
Notary Public, State of New York
No. 01SA8217385
Qualified in Queens County
Certificate Filed in New York County
Commission Expires Feb. 28, 2014

Assignment (Agent) - Pawleys Island

KENNEDY_01131

Exhibit A
Legal Description

KENNEDY_01132

LOT 3

ALL THAT CERTAIN piece, parcel or lot of land lying, being and situate on Pawleys Island, Georgetown County, State of South Carolina, being that certain lot of land designated as LOT 3 on a plat prepared by The Earthworks Group, dated July 9, 2006 and recorded in the Office of the Clerk of the Court for Georgetown County, South Carolina in Plat Slide 625 at page 10.

LOT 4

ALL THAT CERTAIN piece, parcel or lot of land lying, being and situate on Pawleys Island, Georgetown County, State of South Carolina, being that certain lot of land designated as LOT 4 on a plat prepared by The Earthworks Group, dated July 9, 2006 and recorded in the Office of the Clerk of the Court for Georgetown County, South Carolina in Plat Slide 625 at page 10.

Legal Description - Pawleys Island

KENNEDY_01133

ALLONGE

To Promissory Note, dated April 30, 2009, made by Pawleys Island North, LLC, in favor of Kennedy Funding, Inc., as agent for the lenders, in the original principal amount of \$960,000.

Pay to the order of BNP Paribas, as agent for the lenders, with an office at 787 Seventh Avenue, New York, New York 10019.

KENNEDY FUNDING, INC.

By: [Signature]
Name: GREGG WOLFER
Title: CO-CEO

STATE OF NEW JERSEY
COUNTY OF BERGEN

I, JORDAN H. DEFLOREN, a Notary Public in and for said County, in the State aforesaid, do hereby certify that GREGG WOLFER, a CO-CEO of Kennedy Funding, Inc., personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he/she signed, and delivered said instrument as his/her own free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 10th day of Sept, 2011.

[Signature]
Notary Public

Ordinary at Law
State of New Jersey

Allonge - Pawleys Island

KENNEDY_01134

- February 11, 2013

Page 1

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN) CASE NO. 2011-CP-22-180
Kennedy Funding, Inc.,)
as)
predecessor-in-)
interest, and BNP)
Paribas,)
Plaintiff,)
vs.)
Pawleys Island North,)
LLC, Will Darwin)
Wheeler, Peggy)
Wheeler-Cribb and J.)
Mars Sapp,)
Defendants.)

* * * * *
PROCEEDINGS HELD HONORABLE JOE M. CROSBY
BEFORE:
DATE TAKEN: February 11, 2013
TIME: 1:05 P.M.
PLACE: Georgetown County Courthouse
401 Cleland Street
Georgetown, SC
REPORTED BY: DENISE LAUDER
Registered Professional
Reporter and Notary Public

* * * * *

POST OFFICE BOX 21784
CHARLESTON, SOUTH CAROLINA 29413-1784

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688

APPX00696
APPX00696

- February 11, 2013

Page 2

A P P E A R A N C E S

REPRESENTING THE PLAINTIFF:

ROBERT H. JORDAN, ESQUIRE
Nelson Mullins Riley & Scarborough, LLP
151 Meeting Street
Sixth Floor
Charleston, SC 29401
(843) 853-5200

REPRESENTING THE DEFENDANT:

THOMAS W. BUNCH, ESQUIRE
Robinson McFadden & Moore, PC
P. O. Box 944
Columbia, SC 29201

ROBERT H. GWINN, III, ESQUIRE
Gwinn Law Office, LLC
4701-A Oleander Drive
Myrtle Beach, SC 29577

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- February 11, 2013

Page 3

1	I N D E X	
2		Page
3	WITNESS/EXAMINATION	
4	HARRY NULLET	15
5	DIRECT EXAMINATION	15
6	BY MR. JORDAN	
7	CROSS-EXAMINATION	21
8	BY MR. BUNCH	
9	J. MARS SAPP	26
10	DIRECT EXAMINATION	26
11	BY MR. BUNCH	
12	CROSS-EXAMINATION	34
13	BY MR. JORDAN	
14	CROSS-EXAMINATION	37
15	BY MR. GWINN	
16	CERTIFICATE OF REPORTER	53

17		
18		
19	E X H I B I T S	
20		Page/Line
21	PLF. EXH. 9, Copy of Pawleys Claims	17 18
22	Tables, marked for identification	
23	DFT. EXH. 1, Copy of Quitclaim Deed,	23 24
24	marked for identification	
25	DFT. EXH. 2, Copy of Lawsuit, marked for	25 16

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- February 11, 2013

Page 4

1	identification		
2	DFT. EXH. 3, Copy of Amended Lawsuit,	25	18
3	marked for identification		
4	DFT. EXH. 4, Copy of Judgment, marked for	25	20
5	identification		
6	DFT. EXH. 5, Copy of Judgment, marked for	25	22
7	identification		
8	DFT. EXH. 6, Copy of Execution, marked	25	24
9	for identification		
10	PLF. EXH. 1 - 8, deposition exhibits	14	24
11	attached to Kevin Wolfer's transcript in		
12	evidence		
13	PLF. EXH. 9 in evidence	18	21
14	DFT. EXH. 1 in evidence	24	1
15	DFT. EXH. 2 in evidence	28	19
16	DFT. EXH. 3 in evidence	28	20
17	DFT. EXH. 4 in evidence	29	13
18	DFT. EXH. 5 in evidence	31	12
19	DFT. EXH. 6 in evidence	31	13
20	(Plaintiff's Exhibit Numbers 1 - 8 previously		
21	marked for identification)		
22			
23			
24			
25			

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Electronically signed by Denise Lauder (301-268-293-2697)

637a4278-1669-413f-bcc7-670efa6936af

1 (The following proceedings were had.

2 THE COURT: When you're ready.

3 MR. JORDAN: If it please the Court.

4 Your Honor, I'm Robert Jordan. I
5 representative the Plaintiffs in this foreclosure
6 action. Kennedy Funding, Inc. originated the loan
7 as predecessor-in-interest to BNP Paribas, so I
8 would refer to those as the lender. BNP via
9 assignment now has the mortgage and the note.

10 Maybe by way of housekeeping I can
11 update the Court on where we are and that may make
12 this a lot more efficient.

13 THE COURT: Sure.

14 MR. JORDAN: So in this instance, Your
15 Honor, we've got a commercial loan on raw land on
16 Pawleys Island. We've appeared before Your Honor
17 twice on my Motion for Summary Motion Judgment and
18 a Motion to Reconsider. And that involved a
19 dispute between the lienholders. Again, I
20 represent the originator of the mortgage.
21 Mr. Bunch represents Mr. Sapp who is an alleged
22 judgment creditor. And I argued a Summary Judgment
23 Motion in front of you a while back that you
24 granted, declaring that, to the extent Mr. Sapp had
25 a lien, he was junior to us.

- February 11, 2013

Page 6

1 Mr. Bunch challenged that in
2 reconsideration. We argued that back at -- I think
3 at the end of the summer in front of you. That
4 remains under advisement, and so that issue is one
5 that potentially dictates how this trial goes.

6 Regarding the trial itself, Your Honor,
7 we took two depositions of Kennedy Funding, the
8 originator. And this loan was assigned during the
9 course of this litigation. Mr. Bunch Noticed a
10 30(b)(6) Kennedy Funding, took that. This witness
11 was out of state. I then took a trial deposition a
12 couple of months ago. I'm going to present via
13 deposition what I would call my liability case,
14 establishing the loan documents, breach of the loan
15 documents, and the assignment to BNP.

16 In those depositions, Counsel -- I need
17 to note, Mr. Gwinn represents the borrowers. In
18 those depositions we I believe agreed that all of
19 the exhibits would be admitted without objection.
20 Mr. Bunch has identified a couple of extra exhibits
21 that were produced during discovery. And I believe
22 that all the parties have agreed to their
23 admissibility.

24 So we have testimony to present to you
25 in the form of a deposition. I also brought a

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537a4278-1669-413f-bcc7-670efa6935a9

- February 11, 2013

Page 7

1 representative from BNP, Mr. Harry Nullet, who will
2 primarily simply testify to the statement of
3 accounts. And that's our case. The remaining
4 issues you might want to hear from other counsel at
5 this point on, obviously the lien issue between the
6 two creditors. That's my summary of where I am and
7 so I'll have a pretty short case, Your Honor.

8 THE COURT: Yes, sir.

9 MR. BUNCH: Thank you, Your Honor. My
10 name is Tommy Bunch. I represent Mars Sapp. In
11 2008, Mr. Sapp filed a lawsuit against Mr. Will
12 Wheeler, who is one of the Defendants in the case.
13 He claimed that Mr. Wheeler was a guarantor under a
14 lease agreement, commercial lease agreement, and
15 that Mr. Wheeler had defaulted and owed him money.
16 That -- that lawsuit ultimately went to trial in
17 2010.

18 In the meantime, Mr. Wheeler had among
19 his holdings out there, which I believe he's lost
20 all of or most of all of now, he had an
21 unencumbered lot on Pawleys Island, which is
22 referred to during the course of this case probably
23 as Lot 3. While that suit was pending and before
24 it went to a verdict, Mr. Wheeler conveyed that
25 property to Pawleys Island North, LLC for \$5 and no

CAROLINA REPORTING
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- February 11, 2013

Page 8

1 other consideration.

2 So that's -- the genesis of our case
3 and why we're here now is that Mr. Sapp succeeded
4 in getting a judgment against Mr. Wheeler for
5 approximately \$300,000, just north of \$300,000. We
6 would contend that the conveyance to Pawleys Island
7 North, LLC was a fraudulent conveyance. We would
8 contend that the lender, Kennedy Funding, knew of
9 the fraudulent conveyance, knew of the pending
10 litigation, and that they come to this court with
11 unclean hands as well as having participated in the
12 -- in the lending of the money.

13 We would also contend that they loaned
14 36 percent of the value of the property, which is
15 grossly inadequate consideration. That's why we're
16 here today, Your Honor. We would believe -- and
17 this ties back into the Summary Judgment Motion
18 which you granted in favor of Kennedy Funding, we
19 would contend that in fact Mr. Sapp should have a
20 priority lien in this matter. I believe you have
21 ruled otherwise and that motion -- that Motion to
22 Reconsider remains under advisement, as Mr. Jordan
23 indicated.

24 THE COURT: All right. Anything else,
25 Counsel?

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Electronically signed by Denise Lauder (301-268-293-2597)

537a4278-1669-413f-bcc7-670efa6935a9

- February 11, 2013

Page 9

1 MR. GWINN: No, Your Honor, with the
2 exception that the borrower of the guarantors deny
3 there has been any fraudulent conveyance in
4 connection with the transaction.

5 THE COURT: And certainly, Mr. Bunch,
6 with the previous arguments and, again, the
7 opportunity to just go over what you just went over
8 again, there aren't any new or other issues that
9 weren't considered by the Court in your prior
10 order. As such, I'm going to deny that Motion to
11 Reconsider. And I'm going to issue an order at
12 this point denying your previous order -- I'm
13 sorry, on your previous Motion to Reconsider.
14 Okay.

15 MR. BUNCH: Okay. Are you -- have you
16 -- just for clarification, have you gone into any
17 detail or interest in issuing a Form 4 denying the
18 motion?

19 THE COURT: I will go into some more
20 detail when I draft the order denying the motion.
21 At this point, it's going to be very similar to the
22 previous order.

23 MR. BUNCH: Okay.

24 THE COURT: Is that sufficient?

25 MR. BUNCH: Yeah. I just wanted to

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Electronically signed by Denise Lauder (301-268-293-2697)

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1 know where we stood. Actually, I did think there
2 were some matters in the record that the Court did
3 not cover in the first order and that would, you
4 know, make that order subject to review, I believe.

5 THE COURT: Okay.

6 MR. BUNCH: I just wanted to clarify
7 where we might be in that regard.

8 THE COURT: Anything else?

9 MR. JORDAN: Your Honor, one thing I
10 would add, and Mr. Bunch and I discussed this, that
11 the judgment that Mr. Sapp has has been on appeal.
12 We noted that in our prior arguments.

13 THE COURT: Right.

14 MR. JORDAN: I was informed by Mr.
15 Bunch that that appeal was argued in the Court of
16 Appeals in November. Is that correct?

17 MR. BUNCH: Correct.

18 MR. JORDAN: And so --

19 THE COURT: The validity of the
20 judgment.

21 MR. JORDAN: The validity of the
22 judgment, and so you know it certainly -- it --
23 well, it could go any way. I just want the Court
24 to know that generally I think the Court of Appeals
25 is under like a three- or four-month rolling

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- February 11, 2013

Page 11

1 process, so we may have a decision that meets their
2 entire case and maybe not, but I raise that for the
3 Court's --

4 THE COURT: Okay.

5 MR. JORDAN: With that, if the Court
6 will permit me, I will call my first witness, which
7 will be via deposition. I'm certainly happy to
8 have you publish, but if the Court is willing and
9 the other parties consent, I will just submit these
10 depositions to the Court.

11 THE COURT: Counsel? Mr. Bunch?

12 MR. GWINN: I have no objection.

13 MR. BUNCH: No objection to the
14 publication of either deposition that's been taken
15 in the case, as well as the entry of the exhibits
16 from those depositions by Mr. Sapp.

17 THE COURT: Thank you.

18 MR. JORDAN: And, Judge, good news;
19 these are both very brief. One is 40 pages and the
20 other is 50 pages, so you can review them pretty
21 quickly. I have the originals and I have copies
22 that I can distribute, and the copies have the
23 exhibits attached. I would propose a copy would be
24 easier for Your Honor.

25 MR. BUNCH: That's fine.

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1 THE COURT: If Counsel has had a
2 chance to take a look at that copy and they're
3 happy with it, I'm certainly happy to take that.

4 MR. JORDAN: For the record, Your
5 Honor, our first witness is Kevin Wolfer. He was
6 a 30(b)(6) designee of Kennedy Funding, the
7 original lender on the loan. He was deposed
8 September 12th, 2012. All counsel of record here
9 today participated in that deposition. He was then
10 deposed again on January 12, 2012. And, again, all
11 counsel were present for that deposition and
12 participated.

13 Attached to these depositions are
14 exhibits which we're going to move into evidence.
15 From a housekeeping perspective, Counsel, do you
16 want me to separately move these in or do you want
17 me to identify them in the deposition? It doesn't
18 matter to me.

19 MR. BUNCH: I'm sorry?

20 MR. JORDAN: Seven of the exhibits that
21 we are admitting are attached to the depositions.
22 Do you want me to move them that way or do you want
23 me to separate them out?

24 MR. BUNCH: You mean enter them
25 collectively or --

- February 11, 2013

Page 13

1 MR. JORDAN: No. I'll identify them,
2 but I'm just saying, they're attached to the
3 deposition.

4 MR. BUNCH: I'm sorry, I'm not sure
5 exactly what you're asking, but I don't have a -- I
6 don't think it matters to me how you do it.

7 MR. JORDAN: I have separate copies. I
8 can do it that way. It's just more paper for the
9 Court.

10 THE COURT: Separate copies of what?

11 MR. JORDAN: For example, Judge, the
12 first exhibit is the loan closing document. It's
13 over 100 pages. It's going to be my Exhibit 1. I
14 can identify it in the deposition or I can
15 separately pass up a copy and have the Court
16 Reporter mark it.

17 THE COURT: I think I would prefer that
18 it be attached to the deposition.

19 MR. BUNCH: That's fine with me. I
20 wasn't sure what he was asking.

21 MR. GWINN: That's fine, Your Honor.

22 MR. JORDAN: For the record, the
23 January 12, 2012 deposition of Kevin Wolfer
24 contains six exhibits. Without objection, I will
25 move all of these into evidence. And then the

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- February 11, 2013

Page 14

1 September 12, 2012 deposition contains two exhibits
2 which I will likewise move into evidence without
3 objection.

4 MR. BUNCH: The only question I have, I
5 was under the impression that the September 12,
6 2012 deposition, the second deposition, included
7 all of the exhibits from the first deposition.

8 MR. JORDAN: It did by reference.

9 MR. BUNCH: And so they're also part of
10 the second deposition, they're just not part of
11 this document itself?

12 MR. JORDAN: Yes.

13 MR. BUNCH: Okay.

14 THE COURT: Thank you for clarifying.

15 MR. JORDAN: May I approach, Your
16 Honor?

17 THE COURT: Yes, sir.

18 MR. JORDAN: So I would suggest that we
19 label these Plaintiff's 1 through 6 and 7 and 8.

20 THE COURT: Without objection?

21 MR. BUNCH: Without objection.

22 MR. GWINN: Without
23 objection.

24 (PLF. EXH. 1 - 8, deposition exhibits
25 attached to Kevin Wolfer's transcript, moved into

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- February 11, 2013

Page 15

1 evidence.)

2 MR. JORDAN: Your Honor, the
3 deposition, specifically the second one, as I
4 stated in my opening, establishes that Kennedy
5 Funding entered into a loan security agreement, a
6 promissory note, a mortgage agreement, and a
7 guaranty agreement with the borrowers. The
8 borrower was Pawleys Island North, LLC. The
9 personal guarantors were Peggy Wheeler-Cribb and
10 Will Darwin Wheeler. So we submit those to the
11 Court. They establish our liability case. And I
12 would now call Mr. Harry Nullet to establish our
13 damages case.

14 THE COURT: Okay. Sir, if you will
15 come around. Place your left hand on the Bible and
16 raise your right, the Court Reporter will swear you
17 in.

18 HARRY NULLET,
19 being first duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. JORDAN:

22 Q. Mr. Nullet, would you please state your
23 name for the record?

24 A. Harry T. Nullet.

25 Q. And who is your employer?

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- February 11, 2013

Page 16

1 A. BNP Paribas.

2 Q. And what is your title?

3 A. I'm managing director.

4 Q. What are your basic job
5 responsibilities in terms of handling mortgage
6 loans?

7 A. I'm a team leader in the work-out group
8 for BNP Paribas, and my job is -- I'm obligated to
9 attempt to recover the maximum value for problem
10 defaulted loans and assets.

11 Q. Are you familiar with the loan at issue
12 in this case that was made to Pawleys Island North,
13 LLC?

14 A. Yes.

15 Q. And is BNP now the lender on that loan?

16 A. As agent, yes.

17 Q. And how did you become agent for the
18 lenders?

19 A. We took assignment from Kennedy
20 Funding, which was the former agent, via settlement
21 agreement -- global settlement.

22 Q. Let me show you a document here that's
23 already been admitted into evidence. This would be
24 Exhibit 2 to the second deposition. I believe
25 that's going to be Plaintiff's Number 7.

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- February 11, 2013

Page 17

1 Do you recognize that document, Mr.

2 Nullet?

3 A. Yes.

4 Q. And what is it?

5 A. It is the Assignment of Mortgage, the
6 Assignment of Leases, and Rents and Loan Documents.

7 Q. Is that the document you just
8 referenced in your testimony, the transfer of the
9 lender's rights from Kennedy Funding to BNP Paribas
10 as agent?

11 A. Yes.

12 Q. Mr. Nullet, are the borrowers in
13 default under the loan?

14 A. Yes.

15 Q. And have you run a statement of account
16 reflecting the amounts owed under the loan?

17 A. Yes.

18 (PLF. EXH. 9, Copy of Pawleys Claims
19 Tables, was marked for identification.)

20 BY MR. JORDAN:

21 Q. Let me show you a document that's
22 marked as Plaintiff's Exhibit Number 9, which
23 states, Pawleys Claims Table, at the top. Are you
24 familiar with this document?

25 A. Yes.

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- February 11, 2013

Page 18

1 Q. What is it?

2 A. It's the statement of claims on this
3 loan, both the Kennedy Funding claim as well as the
4 BNP claims since we took assignment.

5 Q. And was this drafted under your
6 direction?

7 A. Yes.

8 Q. Is it a true and accurate copy of the
9 amounts owed --

10 A. Yes.

11 Q. -- under the loan documents?

12 A. Yes.

13 MR. JORDAN: Your Honor, this was not a
14 deposition exhibit so at this moment I would like
15 to move it into evidence as Plaintiff's Exhibit
16 Number 9.

17 MR. BUNCH: No objection.

18 MR. GWINN: No objection, Your Honor.

19 THE COURT: Entered without
20 objection.

21 (PLF. EXH. 9 in evidence.)

22 BY MR. JORDAN:

23 Q. Mr. Nullet, just briefly, does this
24 reflect that the principal amount of the loan was
25 \$960,000?

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- February 11, 2013

Page 19

1 A. It does.

2 Q. And how was the interest calculated on
3 this statement?

4 A. It was calculated on this statement
5 from the period 11/10/11, which is the date of
6 assignment to BNP Paribas, Agent, to 1/31/13, at an
7 interest rate of 25 percent per annum on a 30 over
8 360-day basis.

9 Q. And that interest rate is a default
10 interest rate?

11 A. It is.

12 Q. So if I'm reading this correctly, the
13 subtotal of the claim is \$1,619,334.80; is that
14 correct?

15 A. That's correct.

16 Q. And then additionally I see some costs
17 here. You have three interest for real estate
18 taxes. Can you explain that to me?

19 A. They were past due real estate taxes
20 due on the properties, and the bank paid them in
21 order not to lose the property.

22 Q. And you've paid that for 2010, 2011,
23 and 2012; is that correct?

24 A. On the dates shown, that's correct.

25 Q. And the total of those taxes paid is

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1 \$55,266.94?

2 A. That's correct.

3 Q. And your final amount owed under this
4 loan is \$1,674,601.74?

5 A. It is.

6 Q. Are you here today on behalf of BNP
7 asking this Court to foreclose on this mortgage?

8 A. BNP Paribas, as Agent, yes.

9 Q. And in that same capacity, are you
10 asking the Court to enforce the promissory note
11 that was entered into with the borrowers?

12 A. Yes.

13 Q. And, finally, are you asking the Court
14 to enforce the guaranty given by the two
15 guarantors?

16 A. Yes.

17 Q. Additionally, are you asking the Court
18 to award fees and costs pursuant to the notes?

19 A. Yes.

20 MR. JORDAN: I have no further
21 questions at this time, Your Honor.

22 THE COURT: Okay.

23 MR. GWINN: With the Court's indulgence
24 for just a moment.

25 Your Honor, we have no questions of

- February 11, 2013

Page 21

1 this witness.

2 THE COURT: Mr. Bunch.

3 CROSS-EXAMINATION

4 BY MR. BUNCH:

5 Q. Just a couple of questions.

6 Sir, I did not catch your last name.

7 A. Nullet, N-U-L-L-E-T.

8 Q. Okay. Mr. Nullet, you're familiar with
9 the loan at issue in this matter?

10 A. Yes.

11 Q. And are you familiar with the fact --
12 well, what does the lender have security -- on what
13 property does the lender have security?

14 A. Two parcels of real estate in Pawleys
15 Island, which I believe my Counsel has already
16 mentioned.

17 Q. And those might be known as Lots 3 and
18 4 for the property description?

19 A. I don't have the specific property
20 description in front of me. If you want, I can
21 refer to it.

22 Q. Okay. Let me show you this document.
23 This is the Quitclaim Deed from Mr. Will Wheeler of
24 Pawleys Island North. Do you recognize that as
25 being the title of the document and that the

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- February 11, 2013

Page 22

1 grantor is Will Wheeler and the grantee is Pawleys
2 Island North, LLC?

3 A. That's what this document says, yes.

4 Q. Okay. And that's granting the mortgage
5 on Lots 3 and 4?

6 A. That's what it does, yes.

7 Q. And those are lots on which you are
8 foreclosing today, your company is?

9 A. I would like to see a copy of the --
10 copy of the -- of the -- the Kennedy Funding
11 document that has that as a reference. This is a
12 Quitclaim Deed and I don't recognize where it goes
13 to.

14 Q. I'm going to show you the loan and
15 security agreement for Kennedy Funding. And the
16 property description contained in that loan and
17 security agreement.

18 A. They are the same descriptions, yes.

19 Q. So the description in the Quitclaim
20 Deed is the same property on which Kennedy Funding
21 took a mortgage back in 2009?

22 A. Yes.

23 Q. Okay. And at the time that Kennedy
24 Funding took a mortgage on those lots, it paid off
25 a \$300,000 loan to a bank in South Carolina that

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1 was encumbered on Lot 4?

2 A. I'm not personally familiar with that.

3 Q. You don't know anything about that?

4 A. I'm not personally familiar with it.

5 Q. Did you study those documents before
6 coming today?

7 A. No.

8 Q. All you know about it is what amount
9 you claim is owed the bank in this matter?

10 A. I know what the bank claims in this
11 matter, I had it prepared and I've seen the
12 documents before at the time we took assignment.

13 MR. BUNCH: Your Honor, it was my
14 understanding from Counsel earlier we were
15 stipulating to all exhibits in the matter. So, if
16 so, I would like to move this Quitclaim Deed into
17 evidence.

18 MR. JORDAN: No objection.

19 MR. GWINN: No objection, Your Honor.

20 THE COURT: Make sure it's identified
21 for the record.

22 MR. BUNCH: I need to get an exhibit
23 sticker on it.

24 (DFT. EXH. 1, Copy of Quitclaim Deed,
25 was marked for identification.)

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1 (DFT. EXH. 1, in evidence.)

2 BY MR. BUNCH:

3 Q. So other than picking up this loan in a
4 work-out situation, you're not familiar with how
5 the loan came about or any of the background
6 dealing with the loan?

7 A. No, sir.

8 Q. Okay. You're charging 25 percent
9 interest on the loan?

10 A. Yes.

11 Q. Do you know whether an income statement
12 was ever taken from Mr. Wheeler or
13 Mrs. Wheeler-Cribb as to repayment of the loan?

14 A. We didn't get one at BNP Paribas. I
15 wouldn't know what Kennedy Funding did.

16 MR. BUNCH: Okay. All right. Nothing
17 further.

18 THE COURT: Thank you. Anything else?

19 MR. JORDAN: Nothing further.

20 THE COURT: Thank you, sir. You may
21 step down.

22 THE WITNESS: Yes, sir.

23 MR. JORDAN: Judge, we have no further
24 witnesses at this time. We would rest our case
25 with the right to recall Mr. Nullet, if necessary.

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- February 11, 2013

Page 25

1 THE COURT: Okay.

2 Yes, sir.

3 MR. GWINN: Your Honor, Pawleys Island
4 North, Mr. Wheeler and Mrs. Wheeler-Cribb do not
5 wish to present any testimony in opposition to the
6 Plaintiff's case.

7 THE COURT: Mr. Bunch?

8 MR. BUNCH: I would call Mr. Sapp, Your
9 Honor.

10 THE COURT: Sure. Mr. Sapp, if you
11 would come around. Place your left hand on the
12 Bible and raise your right.

13 MR. BUNCH: Tell you what, if we could
14 beg the Court's indulgence to get these exhibits
15 marked.

16 (DFT. EXH. 2, Copy of Lawsuit, was
17 marked for identification.)

18 (DFT. EXH. 3, Copy of Amended Lawsuit,
19 was marked for identification.)

20 (DFT. EXH. 4, Copy of Judgment, was
21 marked for identification.)

22 (DFT. EXH. 5, Copy of Judgment, was
23 marked for identification.)

24 (DFT. EXH. 6, Copy of Execution, was
25 marked for identification.)

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- February 11, 2013

Page 26

1 J. MARS SAPP,
2 being first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. BUNCH:

5 Q. Mr. Sapp, go ahead and identify
6 yourself, please, for the record.

7 A. My name is John Mars Sapp.

8 Q. And you are from Columbia?

9 A. That's correct.

10 Q. Do you own a building in Surfside
11 Beach, in the local area here?

12 A. Yes, I do.

13 Q. And what is that building used for?

14 A. It's used for retail and different
15 things.

16 Q. Okay. Is it a commercial property?

17 A. Yes, commercial property.

18 Q. And you rent it out?

19 A. Yes.

20 Q. All right. And several years prior to
21 this, many years prior to this, maybe in the 1980s,
22 you rented that -- or maybe the 1990s, you rented
23 that property out to a company owned by Mr. Will
24 Wheeler?

25 A. Yes. I believe it was around 1994.

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- February 11, 2013

Page 27

1 Q. All right. And Mr. Wheeler personally
2 guaranteed that lease?

3 A. Yes. We had a surety signed that --
4 everything was documented.

5 Q. Okay. And going on into the 2007/2008
6 timeframe, did that lease go into default?

7 A. Yes.

8 Q. Did Mr. Wheeler pay on the guaranty for
9 the lease?

10 A. He paid nothing.

11 Q. Ultimately, did you file suit in
12 Georgetown County against Mr. Wheeler and the
13 company PI Leasing Management?

14 A. That's correct, yes.

15 Q. And PI Leasing Management was the
16 original tenant in the building?

17 A. Yes.

18 Q. And is this a copy of that suit that
19 we've premarked as Exhibit 2?

20 A. Yes.

21 Q. All right. And I will note that
22 lawsuit was filed September 30th, 2008; is that
23 right?

24 A. Yes.

25 Q. All right. That's noted on the

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1 document?

2 A. Yes, September 30th, 2008.

3 Q. Okay. And then did you later amend the
4 pleadings in that case, amend the Complaint to add
5 two other Defendants, named Kenneth Altman and
6 JDBD, LLC?

7 A. That's correct.

8 Q. When was that Amended Complaint filed?

9 A. October 6, 2009.

10 Q. Okay. Your Honor, the original suit
11 we've marked as Exhibit -- Defendant's Exhibit for
12 Sapp Number 2 and the amended pleadings we've
13 marked as Sapp Defendant's Exhibit 3.

14 THE COURT: Thank you. Those are
15 entered without objection?

16 MR. JORDAN: Without objection.

17 MR. GWINN: I -- without objection,
18 Your Honor.

19 (DFT. EXH. 2 in evidence.)

20 (DFT. EXH. 3 in evidence.)

21 BY MR. BUNCH:

22 Q. Did you ultimately go to trial over the
23 case with Mr. Wheeler?

24 A. Yes.

25 Q. And is this a copy of the Judgment that

- February 11, 2013

Page 29

1 was entered in the court?

2 A. Yes, it was.

3 Q. Okay. And what date does it show?

4 MR. BUNCH: Your Honor, this is

5 Defendant's Exhibit 4, Sapp Exhibit 4.

6 THE WITNESS: It was June 10th --

7 June 4, 2010, excuse me.

8 MR. BUNCH: June 4, 2010. Your Honor,

9 we would admit that into evidence.

10 THE COURT: Entered without objection,

11 correct?

12 MR. JORDAN: Without objection.

13 (DFT. EXH. 4 in evidence.)

14 BY MR. BUNCH:

15 Q. And if you will look on the second page

16 of Sapp Defendant's Exhibit 4, what is the total

17 amount of the judgment against Mr. Wheeler?

18 A. \$252,000, and then --

19 Q. 252,000 and how much?

20 A. 798.

21 Q. 798?

22 A. 252,798.

23 Q. You obtained a judgment affective

24 June 4, 2010, for \$252,798?

25 A. That's correct.

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- February 11, 2013

Page 30

1 Q. All right. And then later on there
2 were some post trial motions filed in the case,
3 including one by me on your behalf for the award of
4 attorney's fees in the case?

5 A. Yes.

6 Q. All right. And I would ask if this is
7 an order that addresses in part the award of
8 attorney's fees; it would be labeled Sapp
9 Exhibit 5?

10 A. Yes.

11 Q. All right. And you will -- that order
12 was entered on what date, Mr. Sapp?

13 A. March 10, 2011.

14 Q. All right. And against Mr. Wheeler,
15 what was the award of attorney's fees that was
16 awarded by Judge Thomas W. Cooper, Junior?

17 A. \$48,929.

18 Q. Okay. So you got a total judgment
19 against Mr. Wheeler just north of \$300,000?

20 A. That's correct.

21 Q. All right. And then did you later
22 cause an execution to be issued by the Clerk of
23 Court and delivered to the Georgetown County
24 Sheriff's Department?

25 A. Yes.

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- February 11, 2013

Page 31

1 Q. Okay. And let me show you what is
2 Exhibit 6. This would be the execution?

3 A. Yes, that's correct.

4 Q. Okay. And when you -- when that was
5 done on page 2 of Exhibit 6 --

6 MR. BUNCH: Which we also move, I
7 think, in case we haven't already, 5 and 6 into
8 evidence, Your Honor.

9 THE COURT: Correct. Entered without
10 objection.

11 MR. BUNCH: Thank you, Your Honor.

12 (DFT. EXH. 5 in evidence.)

13 (DFT. EXH. 6 in evidence.)

14 BY MR. BUNCH:

15 Q. What happened when this was sent to the
16 Sheriff, if you will just read the second page of
17 Defendant's Exhibit Number 6?

18 A. Okay. Dated 4/11/2011, This is to
19 clarify (sic) that I am unable to find personal or
20 real property to satisfy the within execution. I
21 hereby Nulla Bona this execution, A. Lane Cribb,
22 Sheriff of Georgetown County.

23 Q. And it's not clarify, it's actually to
24 certify?

25 A. Certify, yes, sir.

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- February 11, 2013

Page 32

1 Q. Okay. Before you started this lawsuit
2 against -- or maybe around the time you started the
3 lawsuit in 2008 against Mr. Wheeler, did you have
4 occasion to cause to have his assets searched, his
5 holdings, his property holdings?

6 A. Yes.

7 Q. And at that time did he own what has
8 been referred to earlier as Lots 3 and 4 on Pawleys
9 Island?

10 A. That's correct.

11 Q. Okay. And what did you learn about Lot
12 Number 3?

13 A. Three had no loans on it.

14 Q. There was no mortgage on Lot 3?

15 A. It was free and clear, I guess would be
16 the best way to say.

17 Q. And you did this before -- you did this
18 about the time you filed suit, but certainly well
19 before trial?

20 A. Exactly.

21 Q. Okay. And then what did you find out
22 after the verdict had been rendered and you had a
23 judgment for approximately \$300,000 against
24 Mr. Wheeler?

25 A. That he had approached and gotten a --

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1 leveraged the property, gotten a loan.

2 Q. First, did you learn that he had
3 conveyed it to Pawleys Island North?

4 A. Yes, that's what I understood.

5 Q. And for \$5 and no other consideration?

6 A. Yes, which I found kind of fishy
7 because I sued him for \$300,000 and then he
8 conveyed it to someone, to avoid my suit, for \$5.

9 MR. GWINN: Objection; calls for a
10 conclusion by the witness. Speculation.

11 THE COURT: Proceed, Mr. Bunch.
12 BY MR. BUNCH:

13 Q. Nevertheless you learned, as the deed
14 recited, you have it right there in front of you,
15 that the property had been conveyed for \$5 and no
16 other consideration; is that right?

17 A. That's correct.

18 Q. Okay. And you also learned at the time
19 that he granted a mortgage to Kennedy Funding, as
20 recorded in the records of Georgetown County?

21 A. Yes.

22 Q. Okay. Now, have you discovered any
23 other assets that you've been able -- in the course
24 of your discovery, have you discovered any other
25 assets available to satisfy the judgment that's

1 been entered against Mr. Wheeler?

2 A. No.

3 MR. BUNCH: Nothing further.

4 THE COURT: Yes, sir.

5 MR. JORDAN: Briefly, Your Honor.

6 CROSS-EXAMINATION

7 BY MR. JORDAN:

8 Q. Mr. Sapp, you understand that you did
9 not obtain your judgment until 14 months after this
10 mortgage closed; is that correct?

11 A. I don't have the date in front of me.

12 Q. You understand it's more than a year?

13 A. What are the dates on there?

14 Q. On the date of your judgment and the
15 date the mortgage closed? If you would look at --
16 I believe it's going to be -- Exhibit Number 5, is
17 that in front of you? Do you see the stamp on
18 there that says, -- this is the judgment you
19 received against Will Wheeler, dated June 4, 2010;
20 do you see that?

21 A. Yes.

22 Q. And we've already admitted the note and
23 mortgage which were dated -- between Kennedy
24 Funding and Pawleys Island North on April 30th,
25 2009. By my calculation that's 14 months. You

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1 don't dispute that?

2 A. Yes.

3 Q. Prior to obtaining the judgment, you
4 did not file a lis pendens on this property, did
5 you?

6 A. You have to explain that.

7 Q. Did you file a lis pendens on the two
8 lots, Lots 3 and 4, that have been identified by
9 your Counsel, prior to obtaining that judgment?

10 A. I'd have to ask my attorney on that.

11 Q. You're not aware whether one was filed
12 or not?

13 A. Not exactly, no, because my attorneys
14 handled it.

15 Q. Okay. Do you have any evidence for the
16 Court that Kennedy Funding and Pawleys Island North
17 or the Wheelers had any pre-existing relationship
18 prior to this loan agreement?

19 A. No.

20 Q. Did your discovery in your other
21 lawsuit turn up that Kennedy Funding had previously
22 loaned money to Will Wheeler or Pawleys Island
23 North?

24 A. Not to my knowledge.

25 Q. In the --

1 MR. BUNCH: Your Honor, he didn't -- I
2 object. He didn't have any knowledge of the matter
3 until after he got his judgment, so how can the
4 discovery even disclose such information?

5 THE COURT: He can answer the
6 question. I think he said, not that I know of.

7 THE WITNESS: It's kind of like I
8 didn't know what they were doing, living in
9 Columbia. I filed a suit and then I win the suit,
10 and the next thing I know, Kennedy Funding is
11 trying to get in front of me. That's about as
12 simplistic of terms I can put in laymen's words. I
13 don't know what went on with Kennedy Funding or
14 Wheeler or -- but I know I put in for a suit on the
15 8th and won it. And then I find out that Kennedy
16 Funding's shopping for us, and I'm here now.

17 BY MR. JORDAN:

18 Q. I appreciate your answer. Back to my
19 question, though, in your lawsuit against the
20 Wheelers, I assume you had the opportunity to
21 conduct discovery. You may not know what discovery
22 is, but that's the lawyers asking questions of each
23 other, correct? Do you understand that?

24 A. I guess.

25 Q. Okay. Did you attend any depositions

1 of the Wheelers in your lawsuit?

2 A. I don't think so.

3 Q. Do you know if they were deposed?

4 A. Not to my knowledge.

5 Q. Okay. Do you recall whether or not
6 your Counsel requested any of the financial records
7 in your lawsuit?

8 A. Whose financial?

9 Q. The Wheelers' financial records in your
10 lawsuit?

11 A. No, I'm not sure.

12 Q. Do you have any proof that there was
13 any pre-existing relationship between Kennedy
14 Funding and the Wheelers before this loan that
15 we're here about today?

16 A. No.

17 MR. JORDAN: That's all the questions I
18 have, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. GWINN:

21 Q. Mr. Sapp, you indicated that prior to
22 your lawsuit you had assets searched -- an asset
23 search conducted on Mr. Wheeler?

24 A. Yes.

25 Q. And in addition to Lots 3 and 4 that

- February 11, 2013

Page 38

1 you mentioned, weren't you also -- discovered Lots
2 1 and 2 in that same subdivision?

3 A. I don't believe that they were free and
4 clear.

5 Q. You believe lots 1 and 2 were free and
6 clear?

7 A. Were not.

8 Q. Were not. Did you check the tax
9 notices? Did you know that there were houses on
10 Lots 1 and 2?

11 A. Yes.

12 Q. Okay. Did you do anything to check
13 whether or not Mr. Wheeler had any equity in those
14 Lots 1 and 2?

15 A. I think my attorney did.

16 Q. Okay. Do you know what your attorney
17 determined in checking whether or not he had equity
18 in Lots 1 and 2?

19 A. You would have to ask him on that.

20 Q. Okay. Did -- you mentioned that Lot 4
21 had a mortgage on it also?

22 A. I believe so.

23 Q. Okay. Did you check to see whether or
24 not there was any equity in Lot 4?

25 A. I'm not sure.

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1 Q. Did your asset search determine any
2 other real estate owned by Mr. Wheeler in
3 Georgetown County?

4 A. According to the Sheriff, there were no
5 others.

6 Q. In your asset search conducted before
7 the lawsuit, did you determine whether or not there
8 was any real estate owned by Mr. Wheeler in
9 Georgetown County?

10 A. Say that again.

11 Q. In the asset search conducted prior to
12 your lawsuit, did you determine whether or not
13 there was any other real estate owned by
14 Mr. Wheeler in Georgetown County?

15 A. No.

16 Q. Did your asset search check any
17 properties in Horry County?

18 A. Not to my knowledge.

19 Q. Okay. And are you aware that
20 Mr. Wheeler is a 99 percent owner, member of
21 Pawleys Island North, LLC?

22 A. I wouldn't know the percentage that he
23 would own.

24 Q. And I believe the judgment that you are
25 presently testifying about is still on appeal with

- February 11, 2013

Page 40

1 the South Carolina Court of Appeals?

2 A. Yes.

3 MR. GWINN: With the Court's indulgence
4 for just a moment. That's all the questions I have
5 of Mr. Sapp.

6 MR. BUNCH: Nothing further, Your
7 Honor.

8 THE COURT: You can sit down, sir.
9 Thank you, Mr. Sapp.

10 MR. BUNCH: The exhibits are all up
11 there.

12 THE COURT: He's going to bring them
13 down here.

14 MR. BUNCH: Your Honor, I don't have
15 any further questions. I would note in response to
16 the questions asked of Mr. Sapp about Mr. Wheeler
17 being a 99 percent owner of that LLC, that is in
18 the record. It's in the exhibits from the
19 Plaintiff's case.

20 THE COURT: Yes. Yes, it is.
21 Anything else?

22 MR. JORDAN: Judge, nothing further.
23 from the Plaintiff. We would rest our case and I'm
24 happy to now state the relief we're seeking.

25 THE COURT: Proceed.

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- February 11, 2013

Page 41

1 MR. JORDAN: We're seeking that the
2 Court -- you have in front of you the entire loan
3 package, which includes the loan and security
4 agreement, the promissory note to the LLC, the
5 mortgage agreement and the guaranty with the two
6 Wheelers; we're asking that all of those be
7 enforced, that the note be enforced as written and
8 that the mortgage be foreclosed upon; and,
9 additionally, that the guaranty be enforced.

10 I have not brought a proposed order
11 simply because I didn't know what was going to
12 happen, obviously, with your ruling, but also
13 vis-a-vis the Sapp lien, but we would ask that we
14 be declared the first lien on the collateral. And
15 I would be happy to submit a proposed order to the
16 Court. I have additionally withheld submission of
17 attorney's fees at this time pending the Court's
18 ruling.

19 THE COURT: Mr. Bunch, anything?

20 MR. BUNCH: Your Honor, I would simply
21 say that I don't know that his attorney's fees in
22 fighting the Sapp part of this litigation would be
23 recoverable under the note that Mr. Wheeler entered
24 into and that's probably 90-plus percent of their
25 legal fees, but other than that, I don't have

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- February 11, 2013

Page 42

1 anything to say.

2 THE COURT: Okay.

3 MR. GWINN: Nothing from the
4 Defendants, Your Honor.

5 THE COURT: Okay.

6 MR. BUNCH: Can I just ask for
7 clarification on something? When Mr. Gwinn said,
8 nothing for the Defendants, were -- was -- I'm not
9 sure if the question was asked in reference to
10 moving forward with the case or whether he intended
11 to put up any witnesses.

12 THE COURT: Do you have any witness
13 you wish to call?

14 MR. GWINN: Your Honor, I can confer
15 with my client, but I -- Your Honor, we have no
16 witnesses.

17 THE COURT: Okay. Thank you.

18 And just so we're clear, everyone has
19 presented the evidence, testimony, exhibits that
20 they wish to submit for today's hearing; is that
21 correct? Mr. Gwinn?

22 MR. GWINN: That's correct, Your Honor.

23 THE COURT: Mr. Bunch?

24 MR. BUNCH: That is correct, although I
25 do have a very brief argument, Your Honor, on the

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1 cross-claim.

2 THE COURT: Mr. Jordan?

3 MR. JORDAN: That's correct, Your
4 Honor.

5 THE COURT: Yes, sir, Mr. Bunch.

6 MR. BUNCH: Your Honor, the evidence
7 before this Court is that Lot 3 -- and you have to
8 go into the -- a lot of the exhibits, you know, are
9 like that thick (Indicating), but it was clear that
10 Lot 3 was free and clear of any liens during the
11 course of the Sapp litigation until a year after he
12 filed -- or ten months or so after he filed the
13 suit, at which time Mr. Wheeler conveyed that
14 property. When he was indebted to Mr. Sapp, he
15 conveyed that property, and as such, when he
16 conveyed it for \$5 and no other valuable
17 consideration to a family-owned LLC, I believe that
18 that would satisfy the conditions of being a
19 fraudulent conveyance.

20 And I would cite the Court specifically
21 to the Albertson v. Robinson case, decided in 2006
22 by our Court of Appeals. There is other legal
23 precedent upon which that relied, which says, you
24 don't have to have a judgment in order for there to
25 be a fraudulent conveyance. As long as the money

1 was owed, and we contend at that time that the
2 money was owed, and there are pleadings in the
3 record that there was a \$500,000 claim which the
4 jury ultimately determined to be about 250, and
5 when he conveyed it for \$5 and no other valuable
6 consideration to a family-owned partnership, that
7 that established a fraudulent conveyance.

8 And when it is conveyed inner family
9 like that, among family members or, you know, to a
10 family-owned partnership, the law is clear, Gardner
11 versus Kirbin, that the burden is on the
12 transferee. Here the burden is on Pawleys Island
13 North, LLC to establish valuable consideration and
14 the bona fides of the transaction by clear and
15 convincing evidence.

16 And there's been no testimony from
17 Pawleys Island North or from Mr. Wheeler as to the
18 consideration or the bona fides of the transaction.
19 So we would think we would be entitled to a
20 directed verdict on the issue of the fraudulent
21 conveyance.

22 MR. JORDAN: Briefly, Your Honor.
23 We've argued this twice before, Your Honor, on
24 Summary Judgment and in our Motion to Reconsider.
25 I refer the Court to our briefings on both of those

1 motions, which we submitted, as well as the
2 arguments made on those dates.

3 The heart of the matter, Your Honor,
4 this would -- the relief that Mr. Sapp is seeking
5 -- the term lien law upside down in South Carolina.
6 The idea that a -- in an arms-length transaction, a
7 lender can loan \$960,000 at a time when the
8 property has no liens on it, except for one that
9 was paid off in the closing, there's no lis pendens
10 filed, the title work is clean, and 14 months later
11 a judgment is obtained for significantly less than
12 the equity that was left in the property -- I mean,
13 you're paying a judgment for \$250,000; at the time
14 Kennedy Funding loaned the money, we're still
15 \$960,000 into equity in the property. And that's
16 in the record.

17 The appraisal is before Your Honor. It
18 appraised for 1.9 at the time 960 was loaned. So
19 to say that 14 months later you can undo an
20 arms-length transaction for -- with now
21 consideration. Mr. Bunch focuses on this transfer
22 from the individual LLC, which is simply a
23 pass-through for the mortgage to be obtained with
24 Kennedy Funding. Had Kennedy Funding loaned that
25 money directly to Mr. Wheeler, he would have no

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1 argument. It should be no different, because it
2 was a pass-through to an LLC.

3 The consideration here is \$960,000.
4 And so when you have consideration, under the law
5 that we previously cited, he has to prove that we
6 actually participated. And I say, we, the lender,
7 Kennedy Funding participated in a scheme to defraud
8 a creditor. There's no proof. There's not even a
9 claim made against Kennedy Funding via cross and
10 counterclaim that we even participated in any
11 fraud. So absent that proof, we should be a first
12 lien mortgage holder and our loan should not be
13 undone based on the evidence presented.

14 THE COURT: Yes, sir.

15 MR. GWINN: Yes, Your Honor. I would
16 simply take the position that the Court's previous
17 ruling on the Summary Judgment Motion is res
18 judicata as to this, since to deem the transfer
19 from Pawleys Island North to -- or transfer from
20 Mr. Wheeler to Pawleys Island North would be
21 derivative of invalidating the mortgage from
22 Pawleys Island North to Kennedy Funding. That's
23 already been ruled upon or, at a minimum, Mr. Sapp
24 is barred from -- collaterally estopped from
25 arguing this point.

1 We would also point out, as indicated,
2 that Pawleys Island North is -- Mr. Wheeler is a
3 99 percent owner of Pawleys Island North;
4 therefore, his membership interest in Pawleys
5 Island North would be subject to levy and
6 attachment by Mr. Sapp in the event of the
7 collection. So there was no action taken which was
8 in order to defraud Mr. Sapp. As Mr. Jordan said,
9 it was a pass-through transaction to a family-owned
10 LLC that Mr. Wheeler had a 99 percent interest in.

11 THE COURT: Okay.

12 Yes, sir.

13 MR. BUNCH: That's, you know, good we
14 can levy on his membership interest. His
15 membership interest in which the LLC owns two
16 pieces of property that are now here under
17 foreclosure. I mean, that does us really no good.
18 I hadn't even argued our position as to Kennedy
19 Funding, figuring that those were gone based on
20 your Summary Judgment ruling. The only thing I was
21 arguing was that based on our cross-claim against
22 Pawleys Island North and Mr. Wheeler, that that was
23 a fraudulent conveyance and should be set aside.

24 Now, because of the consequences that
25 flow from that, as you can see in the records, and,

1 you know, this is probably an issue for appeal, but
2 since they raised it, the consequences that flow
3 from that, if you look at the documents presented
4 by -- in their -- in their case, the Wheelers --
5 Pawleys Island North, gave away by mortgage
6 100 percent of their two pieces of property. In
7 exchange they got about 36 percent in value, which
8 is wholly inadequate consideration under the laws
9 of your cases.

10 I think there was one case -- I can't
11 remember if -- it's the Coleman v. Daniel case, I
12 believe it was, where over 50 percent was deemed
13 inadequate consideration.

14 THE COURT: I think you mentioned
15 58 percent.

16 MR. BUNCH: 58 percent I believe it
17 was.

18 THE COURT: And I guess the question I
19 would have, is that a sale or is that a mortgage?
20 A mortgage at least would imply that you generally
21 have an obligation to make a payment or you suffer
22 a penalty of losing the property, versus an
23 absolute conveyance.

24 MR. BUNCH: Right. And so the question
25 then becomes, what position does the mortgage

- February 11, 2013

Page 49

1 holder hold? And the mortgage holder, if he knows
2 about the conveyance, has no standing to pursue a
3 foreclosure action. I guess he has standing, but
4 their mortgage can be subordinated. And I would
5 point to the -- by the way, the Articles of
6 Incorporation are here at -- Kennedy Funding 1305
7 is the Bates number, showing the 99 percent
8 interest in the Articles of Organization.

9 Here we have in what I believe is going
10 to be Plaintiff's Exhibit 3, in March of 2009,
11 March 11, 2009, which is 50 days prior to closing
12 approximately, an e-mail to the attorney for
13 Kennedy Funding, saying that the property is now
14 owned by Will Wheeler and will be conveyed to
15 Pawleys Island North, LLC. We've got that. In the
16 same e-mail they prepared the opinion letter for
17 Counsel for Mr. Wheeler and Pawleys Island North.

18 In the closing statement, two days
19 before closing, Your Honor, in Exhibit 4, the
20 closing checklist, the attorney for Kennedy Funding
21 says -- he sent him the closing checklist and the
22 closing checklist had a statement in there that
23 said, litigation pending against Wheeler needed --
24 needed -- need an explanation from borrower's
25 Counsel. And that's attached as part of

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1 Plaintiff's Exhibit 4. It's Bates label Kennedy
2 1119.

3 The next day -- they didn't get an
4 answer to that e-mail, so the next day, again,
5 Counsel for Kennedy Funding writes Mr. Gwinn here
6 and says, can you please advise the status of the
7 following, the e-mail regarding the status of the
8 litigation against Mr. Wheeler.

9 The point I'm making, Your Honor, is
10 buyer beware. Kennedy Funding entered into this
11 transaction with full knowledge that Mr. Wheeler
12 was being sued, and knowing he was conveying this
13 property for virtually no consideration, \$5 and no
14 other consideration. And so then they know they
15 are entering into this transaction under a buyer
16 beware type of standard, and, yet, they go ahead
17 and go forward with the transaction.

18 And that's essentially -- and then I
19 cited the Court I believe at the last hearing to
20 that Texas case, which is Rilling v. Schultze,
21 where a bank in Texas went ahead and took a
22 mortgage on a piece of property that was subject to
23 an existing -- that was subject to a debt and --
24 and the judgment creditor took priority over that
25 mortgage, even though the -- you know, the timing

1 of the transaction was such that the judgment
2 creditor should not have taken priority, but given
3 the fact that the bank knew about the -- knew about
4 the judgment creditor's -- the obligation of the
5 judgment debtor to the judgment creditor, the Court
6 said the judgment creditor is going to take
7 priority. I have a copy of that case if the Court
8 would like it.

9 I kind of felt like that all of this
10 was foreclosed upon based on your order, but just
11 to protect the record, I'm going to go ahead and
12 repeat it since -- or bring it up since that's
13 where Mr. Jordan.

14 THE COURT: Okay.

15 MR. BUNCH: And I would be glad to hand
16 up this Rilling case if the Court would like it.

17 THE COURT: I don't have an issue with
18 you putting it on the record, but I agree I have
19 already ruled on that. All right.

20 Anything further, Mr. Jordan?

21 MR. JORDAN: Nothing further at this
22 time, Your Honor.

23 THE COURT: Okay. Obviously, I'm
24 going to need a little bit of time to review these.
25 Please contact my office in about a week for a

- February 11, 2013

Page 52

1 decision. Okay.
2 MR. BUNCH: All right.
3 THE COURT: Thank you very much.
4 Sorry for the delay.
5 (These proceedings were concluded at
6 2:04 p.m.)
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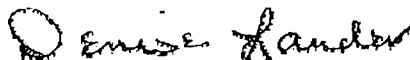
Page 53

CERTIFICATE OF REPORTER

I, Carol Denise Lauder, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 5th day of June, 2013 at Charleston, Charleston County, South Carolina.


Carol Denise Lauder
Registered Professional
Reporter, CP
My Commission expires
August 2, 2017



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PLAINTIFF'S EXHIBIT 1

Closing Binder Bearing Bates Numbers KENNEDY 01135-01418

This Exhibit is Exhibit 1 to Wolfer Deposition 1, R. pp. 225

PLAINTIFF'S EXHIBIT 2

March 2, 2009 Letter with attachments from Kennedy Funding to
Peggy Wheeler-Cribb, bearing Bates Numbers
KENNEDY 00497 – 00504.

This Exhibit is Exhibit 2 to Wolfer Deposition 1, R. pp. 511

PLAINTIFF'S EXHIBIT 3

March 11, 2009 – March 12 E-mail chain regarding loan documents and preliminary closing checklist bearing Bates Numbers KENNEDY 00472 - 00475

This Exhibit is Exhibit 3 to Wolfer Deposition 1, R. pp. 520

PLAINTIFF'S EXHIBIT 4

April 28, 2009 E-mail forwarding preliminary closing checklist
bearing Bates Numbers KENNEDY 01113 – 01125

This Exhibit is Exhibit 4 to Wolfer Deposition 1, R. pp. 525

PLAINTIFF'S EXHIBIT 5

April 29, 2009 E-mail regarding status of loan documents bearing
Bates Number KENNEDY 01053

This Exhibit is Exhibit 5 to Wolfer Deposition 1, R. pp. 539

PLAINTIFF'S EXHIBIT 6

April 30, 2009 E-mail forwarding draft Loan and Security
Agreement documents bearing Bates Numbers
KENNEDY 00950 – 01033

This Exhibit is Exhibit 6 to Wolfer Deposition 1, R. pp. 542

PLAINTIFF'S EXHIBIT 7

August 1, 2012 Notice of 30(b)(6) Deposition
of Kennedy Funding, Inc

This Exhibit is Exhibit 1 to Wolfer Deposition 2, R. pp. 674

PLAINTIFF'S EXHIBIT 8

November 29, 2011 Assignment of Mortgage, Assignment of
Leases and Rents and Loan Documents bearing
Bates Number KENNEDY 1126-01134

This Exhibit is Exhibit 2 to Wolfer Deposition 2, R. pp. 679

Pawley's Claims Tables

Interest Due Post Agency Settlement as of 01.31.2013

From	To	Days*	Principal	Int. rate	Int. Per diem	Interest Due Balance
11/10/11	11/30/11	20	960,000.00	25%	666.67	\$ 13,333.40
11/30/11	12/31/11	30	960,000.00	25%	666.67	20,000.10
12/31/11	01/31/12	30	960,000.00	25%	666.67	20,000.10
01/31/12	02/29/12	30	960,000.00	25%	666.67	20,000.10
02/29/12	03/31/12	30	960,000.00	25%	666.67	20,000.10
03/31/12	04/30/12	30	960,000.00	25%	666.67	20,000.10
04/30/12	05/31/12	30	960,000.00	25%	666.67	20,000.10
05/31/12	06/30/12	30	960,000.00	25%	666.67	20,000.10
06/30/12	07/31/12	30	960,000.00	25%	666.67	20,000.10
07/31/12	08/31/12	30	960,000.00	25%	666.67	20,000.10
08/31/12	09/30/12	30	960,000.00	25%	666.67	20,000.10
09/30/12	10/31/12	30	960,000.00	25%	666.67	20,000.10
10/31/12	11/30/12	30	960,000.00	25%	666.67	20,000.10
11/30/12	12/31/12	30	960,000.00	25%	666.67	20,000.10
12/31/12	01/31/13	30	960,000.00	25%	666.67	20,000.10
Total Int.						299,334.80

* Day basis are 30/360

Past due interest at Agency Settlement 11.10.2011 366,080.00

Total accrued and unpaid interest 659,334.80

Global principal balance due as of 01.31.2013 960,000.00

Subtotal Claim (Principal + Interest) 1,619,334.80

Protective Advances paid on behalf of the co-lender group

Type	Payment date	Amount
Real estate taxes 2010	11/23/2011	17,848.52
Real estate taxes 2011	10/4/2012	19,589.90
Real estate taxes 2012	1/14/2013	17,848.52
Total Protective Advances		55,286.94

Total Claim (Principal + Interest + Protective Advances) \$ 1,674,601.74



KENNEDY_01504

STATE TAX .00
COUNTY TAX .00
Book 1225 Page 103 - 108

(Please do not write above this line - Reserved for Register of Deeds Office)

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

QUITCLAIM DEED

KNOW ALL MEN BY THESE PRESENTS, that Will D. Wheeler (hereinafter called "Grantor"), for and in consideration of the sum of FIVE AND NO/100 DOLLARS (\$5.00) and no other consideration to the Grantor in hand paid at and before the sealing of these presents by Pawleys Island North, LLC, (the receipt whereof is hereby acknowledged, subject to the matters set forth below has remised, released and forever quit-claimed, and by these presents does remise, release and forever quit-claim unto the said Pawleys Island North, LLC its successors and assigns forever, the following described property, to wit:

LOT 3

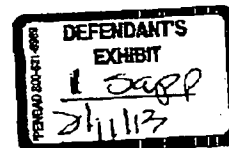
ALL THAT CERTAIN piece, parcel or lot of land lying, being and situate on Pawleys Island, Georgetown County, State of South Carolina, being that certain lot of land designated as LOT 3 on a plat prepared by The Earthworks Group, dated July 9, 2006 and recorded in the Office of the Clerk of Court for Georgetown County, South Carolina in Plat Slide 625 at page 10.

Being the same lands and premises as were conveyed to Will D. Wheeler by Deed from Porter B. Rose, John I. Rose, III, Bennett S. Rose and Patricia R. Gilmore dated March 11, 2003, recorded in the office of the Register of Deeds for Georgetown County, South Carolina in Slide 625 at page 10.

LOT 4

ALL THAT CERTAIN, piece, parcel or lot of land lying, being and situate on Pawleys Island, Georgetown County, State of South Carolina, being that certain lot of land designated as LOT 4 on a plat prepared by The Earthworks Group Dated July 9, 2006 and recorded in the Office of the Clerk of court for Georgetown County, South Carolina in Plat Slide 625 at page 10.

Being the same lands and premises as were conveyed to Will D. Wheeler by Deed from Porter B. Rose, John I. Rose, III, Bennett S. Rose and Patricia R. Gilmore dated March 11, 2003, recorded in the office of the Register of Deeds for Georgetown County, South Carolina in Slide 625 at page 10.



Tax Map #: 42-167-0420300 & 42-167-040200

Property Address: 334 Myrtle Avenue, Pawleys Island, SC 29585

Grantee(s) Address: 334 Myrtle Ave., Pawleys Island, SC 29585

THIS CONVEYANCE IS MADE SUBJECT TO easements and restrictions of record and otherwise affecting the property.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the said premises before mentioned unto the said Pawleys Island North, LLC, its successors and assigns, forever — so that neither he, the said Will D. Wheeler nor his heirs and assigns, nor any other person or persons, claiming under him, shall at any time hereafter, by any way or means, have, claim or demand any right or title to the aforesaid premises or appurtenances, or any part or parcel thereof, forever.

[Signature]
1st Witness
[Signature]
2nd Witness

Will D. Wheeler [L.S.]
Will D. Wheeler

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that (s)he was present and saw the within Grantor sign, seal, and as act and deed, deliver the within Warranty Deed; that deponent with the other witness whose name is subscribed above, witnessed the execution thereof.

SWORN to before me this
April 21, 2009.

[Signature]
Notary Public for
My Commission Expires: 12/01/2013

[Signature]
Witness

(SEAL)

File # 09-RE-150

1. I have read the information on this affidavit and I understand such information.

2. The property being transferred is located at 334 Myrtle Ave., bearing County Tax Map Number 42-167-042830 & 42-167-042830, was transferred by Will D. Wheeler to Pawleys Island North, LLC on April 28, 2009.

3. Check one of the following: The Deed is

- a. ☐ subject to the Deed recording fee as a transfer for consideration paid or to be paid in money or money's worth
- b. ☐ subject to the Deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary
- c. ☒ exempt from the Deed recording fee because (See information section of affidavit: #8)
(If exempt, please skip items 4-7, and go to item 8 of this affidavit)

If exempt under exemption #14 as described in the information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty?

Check Yes ☐ No ☐

4. Check one of the following if either item 3(a) or item 3(b) above has been checked (See information section of this affidavit).

- (a) ☐ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of _____
- (b) ☐ The fee is computed on the fair market value of the realty which is _____
- (c) ☐ The fee is computed on the fair market value of the realty as established for property tax purposes which is _____

5. Check Yes ☐ or No ☐ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "Yes," the amount of the outstanding balance of this lien or encumbrance is: _____

6. The Deed recording is computed as follows:

- (a) Place the amount listed in item 4 above here: _____
- (b) Place the amount listed in item 5 above here: _____
(If no amount is listed, place zero here)
- (c) Subtract Line 6(b) from Line 6(a) and place result here: _____

7. The Deed recording fee due is based on the amount listed on Line 6(c) above and the Deed recording fee due is: _____

8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as SELLER.

9. I further understand that a person required to furnish this Affidavit who willfully furnishes a false or fraudulent Affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than One Thousand and no/100 Dollars (\$1,000.00) or imprisoned not more than one year, or both.

Will D. Wheeler
Purchaser, Seller, Legal Representative of the Purchaser or other Responsible Person Connected with this Transaction

SWORN to before me this
28 day of April, 2009.

Paul H. G.
Notary Public for SC
My Commission Expires: 12/8/2012

also, who are surrendering of any right. The fair market value of the consideration must be used in calculating the consideration paid in money's worth. Taxpayers may elect to use the fair market value of the realty being transferred in determining fair market value of the consideration. In the case of realty transferred to a trust or as a distribution to a trust beneficiary, "value" means the realty's fair market value. A deduction from value is allowed for the amount of any lien or encumbrance existing on the land, tenement, or realty before the transfer and remaining on the land, tenement, or realty after the transfer. Taxpayers may elect to use the fair market value for property tax purposes in determining fair market value under the provisions of the law.

Exempted from the fee are Deeds:

1. transferring realty in which the value of the realty, as defined in Code Section 12-24-30, is equal to or less than one hundred dollars;
2. transferring realty to the federal government or to a state, its agencies and departments, and its political subdivisions, including school districts;
3. that are otherwise exempted under the laws and Constitution of this State or of the United States;
4. transferring realty in which no gain or loss is recognized by reason of Section 1041 of the Internal Revenue Code as defined in Section 12-6-40(A);
5. transferring realty in order to partition realty as long as no consideration is paid for the transfer other than the interests in the realty that are being exchanged in order to partition the realty;
6. transferring an individual grave space at a cemetery owned by a cemetery company licensed under Chapter 55 of Title 39;
7. that constitute a contract for sale of timber to be cut;
8. transferring realty to a corporation, a partnership, or a trust in order to become, or as, a stockholder, partner, or trust beneficiary of the entity provided no consideration is paid for the transfer other than stock in the corporation, interest in the partnership, beneficiary interest in the trust, or the increase in value in such stock or interest held by the grantor. However, the transfer of realty from a corporation, a partnership, or a trust to a stockholder, partner, or trust beneficiary of the entity is subject to the fee even if the realty is transferred to another corporation, a partnership, or trust;
9. transferring realty from a family partnership to a partner or from a family trust to a beneficiary, provided no consideration is paid for the transfer other than a reduction in the grantee's interest in the partnership or trust. A "family partnership" is a partnership whose partners are all members of the same family. A "family trust" is a trust, in which the beneficiaries are all members of the same family. The beneficiaries of a family trust may also include charitable entities. "Family" means the grantor and the grantor's spouse, parents, grandparents, sisters, brothers, children, stepchildren, grandchildren, and the spouses and lineal descendants of any of the above. A "charitable entity" means an entity which may receive deductible contributions under Section 170 of the Internal Revenue Code as defined in Section 12-6-40(A);
10. transferring realty in a statutory merger or consolidation from a constituent corporation to the continuing or new corporation;
11. transferring realty in a merger or consolidation from a constituent partnership to the continuing or new partnership; and,
12. that constitute a Corrective Deed or a Quitclaim Deed used to confirm title already vested in the grantee, provided that no consideration of any kind is paid or is to be paid under the Corrective or Quitclaim Deed;
13. transferring realty subject to a Mortgage to the Mortgagee whether by a Deed in Lieu of Foreclosure executed by the Mortgagor or Deed pursuant to Foreclosure proceedings;
14. transferring realty from an agent to the agent's principal in which the realty was purchased with funds of the principal, provided that a notarized document is also filed with the Deed that establishes the fact that the agent and principal relationship existed at the time of the original purchase as well as for the purpose of purchasing the realty;
15. transferring title to facilities for transmitting electricity that is transferred, sold, or exchanged by electrical utilities, municipalities, electric cooperatives, or political subdivisions to a limited liability company which is subject to regulation under the Federal Power Act (16 U.S.C. Section 791(a)) and which is formed to operate or to take functional control of electric transmission assets as defined in the Federal Power Act.

Instrument 200900072014 Book Page 1725 108

84001 Gulvin

200900072014
Filed for Record in
GEORGETOWN SC
WANDA PREVAILITE EXEMPT
05-05-2009 At 11:54 AM
DEED 12.00
STATE TAX .00
COUNTY TAX .00
Book 1225 Page 103 - 108
Wanda S. Prevailite

RECORD THIS DATE
[Signature]
AUDITOR GEORGETOWN CO.
LINDA S. MOORE

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

J. Mars Sapp

Plaintiff(s)

v.

Will D. Wheeler and P.L. Leasing &
Management, Inc.

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2008 CP 221345

2008-CP-22-

(Please Print)

Submitted By: Thomas W. Bunch, II

Address: Robinson, McFadden & Moore, P.C.

Post Office Box 944

Columbia, SC 29202

SC Bar #: 1011

Telephone #: (803) 779-8900

Fax #: (803) 771-9411

Other:

E-mail: tbunch@RobinsonLaw.com

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

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

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

NATURE OF ACTION

(Check One Box Below)

Contracts	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
☐ Construction (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Label (300)	☐ Claim & Delivery (400)
☒ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	☐ Notice/File Med Mal (230)	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☐ Breach of Contract (140)	☐ Other (299)	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)		☐ Personal Injury (350)	☐ Possession (450)
		☐ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☐ Other (499)
Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
☐ PCR (500)	☐ Death Settlement (700)	☐ Reinstate Driver's License (800)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Foreign Judgment (710)	☐ Judicial Review (810)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Magistrate's Judgment (720)	☐ Relief (820)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Minor Settlement (730)	☐ Permanent Injunction (830)	☐ Municipal (930)
	☐ Transcript Judgment (740)	☐ Forfeiture - Petition (840)	☐ Probate Court (940)
	☐ Lis Pendens (750)	☐ Forfeiture - Consent Order (850)	☐ SCDOT (950)
	☐ Other (799)	☐ Other (899)	☐ Worker's Comp (960)
Special/Complex/Other			☐ Zoning Board (970)
☐ Environmental (600)	☐ Pharmaceuticals (630)		☐ Administrative Law Judge (980)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)		☐ Public Service Commission (990)
☐ Medical (620)	☐ Out-of-State Depositions (650)		☐ Employment Security Comm (991)
☐ Other (699)	☐ Sexual Predator (640)		☐ Other (999)

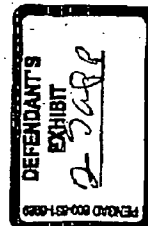
Submitting Party Signature: Thomas W. Bunch, II

Date: September 26, 2008

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

SCCA / 234 (4/08)

Page 1 of 2



FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

**SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN
ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.**

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS

J. Mars Sapp,

Case No.: 2008-CP-22-

Plaintiff,

2008CP221345

v.

SUMMONS
(Collection)
(Non-Jury)

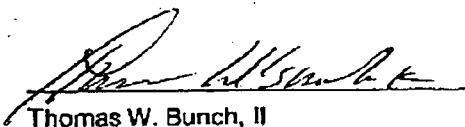
Will D. Wheeler and P.I. Leasing &
Management, Inc.,

Defendant.

FILED
GEORGETOWN COUNTY, S.C.
2008 SEP 30 AM 8:45
ALMA Y. WHITE
CLERK OF COURT

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this
action, a copy of which is herewith served upon you, and to serve a copy of your
Answer on the subscribers at Post Office Box 944, Columbia, South Carolina 29202,
within thirty (30) days of the date of service, exclusive of such day. In the event you fail
to answer within the stated time, judgment by default will be rendered against you for
the relief demanded in the Complaint.


Thomas W. Bunch, II
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

September 26, 2008

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

) IN THE COURT OF COMMON PLEAS

J. Mars Sapp,

) Case No.: 2008-CP-22-

) Plaintiff,

) **2008CP221345**

) v.

) Will D. Wheeler,

) **Complaint**
) **(Collection)**
) **(Non-Jury)**

) Defendant.

FILED
GEORGETOWN COUNTY, S.C.
2008 SEP 30 AM 8:43
ALMA Y. WHITE
CLERK OF COURT

Plaintiff alleges:

1. Plaintiff J. Mars Sapp is a citizen and resident of Richland County, South Carolina.
2. On information and belief, the Defendant Will D. Wheeler ("Guarantor") is a citizen and resident of Georgetown County, South Carolina.
3. On information and belief P.I. Leasing & Management, Inc. ("Tenant") was a corporation organized and existing under the laws of the State of South Carolina. On further information and belief, it is no longer in business and it was dissolved as of July 30, 2007 with the South Carolina Secretary of State's office.
4. On or about September 27, 1994, Tenant entered into a Lease Agreement with J. Mars Sapp by which Tenant leased premises located at 1918 Highway 17 North, Surfside Beach, South Carolina. The term of Tenant's Lease expires October 1, 2014.
5. The Defendant Will D. Wheeler personally guaranteed performance by P.I. Leasing & Management, Inc. of the lease obligations including payment of rent.
6. Tenant defaulted in payment of its lease obligations and was evicted by the Magistrate's Court of Horry County, South Carolina.

7. Despite demand for payment, neither Tenant nor Guarantor has paid their lease obligations.

8. Plaintiff has sustained damages by Guarantor's failure to perform and pay rent. These damages include, but are not limited to, loss of rental income, brokerage fees, legal fees, utility expenses, upfit costs, and other incidental and consequential damages to be proved.

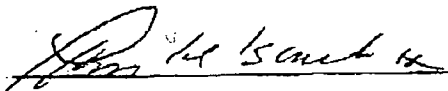
9. Through September 2008 Plaintiff has incurred damages in the amount of \$80,319.00

10. Plaintiff elected to and does hereby accelerate the balance due under the Lease for all rent due.

11. Plaintiff has re-leased a portion of the leased premises for a three year term ending in March 2011. Discounting accelerated rent and damages for the amount to be received from the current tenant, Plaintiff has sustained damages of \$465,780.00 through the term of Tenant's lease

12. Plaintiff is entitled to all damages occasioned by Tenant and Guarantor's default under the Lease including reasonable legal fees as provided for in the Lease.

WHEREFORE, Plaintiff prays for judgment against Defendant in the liquidated amount of \$556,099.00, plus legal fees and costs, and for such other and further relief as the Court deems just and proper.


Thomas W. Bunch, II
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

September 26, 2008

IN THE COURT OF COMMON PLEAS

Case No.: 2008-CP-22-1345

AMENDED SUMMONS

v.

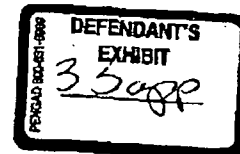
FILED
GEORGETOWN COUNTY, S.C.
2009 OCT -6 AM 10:13
ALAN Y. WHITE
CLERK OF COURT

Defendant.

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer on the subscribers at Post Office Box 944, Columbia, South Carolina 29202, within thirty (30) days of the date of service, exclusive of such day. In the event you fail to answer within the stated time, judgment by default will be rendered against you for the relief demanded in the Complaint.


Thomas W. Bunch, II
ROBINSON, McFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

October 2, 2009:



STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

) IN THE COURT OF COMMON PLEAS

J. Mars Sapp,

Case No.: 2008-CP-22-

Plaintiff,

v.

First Amended Complaint
(Collection)
(Non-Jury)

Will D. Wheeler, P.I. Leasing &
Management, Inc., Kenneth D. Altman,
II, and JBDB, LLC

Defendants.

FILED
GEORGETOWN COUNTY, S.C.
2008 OCT -6 AM 10:13
ALMA Y. WHITE
CLERK OF COURT

Plaintiff alleges:

JURISDICTION

1. Plaintiff, J. Mars Sapp, is a citizen and resident of Richland County, South Carolina.
2. On information and belief, the Defendant Will D. Wheeler ("Guarantor") is a citizen and resident of Georgetown County, South Carolina.
3. On information and belief, P.I. Leasing & Management, Inc. ("Tenant") was a corporation organized and existing under the laws of the State of South Carolina. On further information and belief, it is no longer in business and it was dissolved as of July 30, 2007 with the South Carolina Secretary of State's office.
4. On information and belief, Kenneth D. Altman, II is a citizen and resident of Georgetown County, South Carolina.
5. On information and belief, JBDB, LLC is a limited liability company organized and existing under the laws of the State of South Carolina with its principal place of business in Georgetown County.

6. The facts giving rise to the claims asserted herein occurred in Georgetown County.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract / Collection on Guaranty)

7. To the extent not inconsistent herewith, Plaintiff incorporates by reference the foregoing allegations of this Complaint

8. On or about September 27, 1994, Tenant entered into a Lease Agreement with J. Mars Sapp by which Tenant leased premises located at 1918 Highway 17 North, Surfside Beach, South Carolina (hereinafter "Leased Premises"). The term of Tenant's Lease expires October 1, 2014.

9. The Defendant Will D. Wheeler personally guaranteed performance by P.I. Leasing & Management, Inc. of the lease obligations including payment of rent.

10. On or about April 24, 1998, Plaintiff Sapp consented to Tenant assigning the Lease Agreement to Resort Properties South, Inc. with the provisos that the Tenant remained liable under the Lease Agreement after its assignment, and that Defendant Wheeler's guaranty remained in full force and effect.

11. Tenant defaulted in payment of its lease obligations and was evicted by the Magistrate's Court of Horry County, South Carolina.

12. Despite demand for payment, neither Tenant nor Guarantor has paid their lease obligations.

13. Plaintiff has sustained damages by Guarantor's failure to perform and pay rent. These damages include, but are not limited to, loss of rental income, brokerage fees, legal fees, utility expenses, upfit costs, and other incidental and consequential damages to be proved.

14. Through June 2009 Plaintiff has incurred damages in the amount of \$108,784.29.

15. Plaintiff elected to and does hereby accelerate the balance due under the Lease for all rent due.

16. Plaintiff is entitled to all damages occasioned by Tenant and Guarantor's default under the Lease including reasonable legal fees as provided for in the Lease.

FOR A SECOND CAUSE OF ACTION
(As to Defendants Kenneth D. Altman, II and JDBD, LLC)
(SC Code Ann. § 27-35-60)

17. To the extent not inconsistent herewith, Plaintiff incorporates all previous allegations contained in this Complaint.
18. Defendant Kenneth D. Altman, II (hereinafter "Altman") is the Registered Agent of P.I. Leasing and Management, Inc.
19. On information and belief Altman is a member and managing member of Defendant JDBD, LLC. He controls the actions of JDBD, LLC and has check writing authority for it.
20. On information and belief, Altman also acted as agent for Resort Properties South, Inc.
21. Altman is a Certified Public Accountant who acted as an agent for Defendants Will D. Wheeler and P.I. Leasing and Management, Inc. including making payments and being involved in making payments to the Plaintiff under the Lease Agreement.
22. On or about June 1, 2007, Defendant Altman entered an unauthorized lease agreement on behalf of Defendant JBDB, LLC, as landlord, with Plantation Resort Properties, Inc., as tenant, for some or all of the Leased Premises. At the

time of the agreement, Defendant Wheeler and P.I. Leasing and Management, Inc. continued to be obligated to Plaintiff Sapp under the Lease Agreement and the Assignment thereof.

23. Defendants Altman and JDBD, LLC did not disclose to Plaintiff and hid from Plaintiff that the property had been leased by JDBD, LLC to Plantation Resort Properties, Inc. Plaintiff learned of the unauthorized lease in or about April, 2008.
24. Defendants Altman and JBDB, LLC received rental payments under the separate, unauthorized lease agreement with Plantation Resort Properties, Inc. and wrongfully withheld payments due to Plaintiff for the use of the property.
25. Plaintiff Sapp instituted an eviction action in the Horry County Magistrate's Court against P.I. Leasing & Management, Inc., Kenneth Altman, Kenneth Altman II, LLC, JDBD, LLC and Plantation Resort Properties, Inc. The Magistrate Court issued a Writ of Ejectment on June 12, 2008 against the defendants and all occupants of the Leased Premises.
26. Plaintiff last received payment under the original Lease Agreement for September 2007.
27. Pursuant to SC Code Ann. § 27-35-60, Plaintiff is entitled to all rents collected by Altman and JBDB, LLC from Plantation Resort Properties, Inc. for October 2007 through the date of their eviction on June 12, 2008.

FOR A THIRD CAUSE OF ACTION
(As to Defendants Kenneth D. Altman, II and JDBD, LLC)
(Unjust Enrichment)

28. To the extent not inconsistent herewith, Plaintiff incorporates by reference the foregoing allegations of this Complaint.

29. At all relevant times, Plaintiff has held at least partial ownership of and the right to lease the Leased Premises.
30. Defendants Altman and JBDB, LLC have never had any right and/or authorization to enter a Lease Agreement as a lessor or sublessor of the property.
31. Defendants Altman and JBDB, LLC were unjustly enriched by receiving rental payments which were rightfully due to Plaintiff, but withheld by Defendants Altman and JBDB, LLC.
32. Plaintiff is entitled to full restitution of all monies paid to Defendants Altman and JBDB, LLC and withheld from Plaintiff for the use of the Leased Premises.

FOR A FOURTH CAUSE OF ACTION
(As to Defendants Kenneth D. Altman, II and JBDB, LLC)
(Constructive Trust)

33. To the extent not inconsistent herewith, Plaintiff incorporates by reference the foregoing allegations of this Complaint.
34. Defendants Altman and JBDB, LLC wrongfully acquired monies under terms of an unauthorized lease agreement for the property.
35. Defendants Altman and JBDB, LLC wrongfully withheld the acquired monies from the Plaintiff, and unjust enrichment would result from these Defendants' continual possession of such payments.
36. Plaintiff is entitled to all rent collected by Altman and JBDB, LLC from Plantation Resort Properties, Inc. which should be deemed to be held in trust by Defendants for the benefit of Plaintiff.

FOR A FIFTH CAUSE OF ACTION
(As to Defendants Kenneth D. Altman, II and JBDB, LLC)
(Unfair Trade Practices)

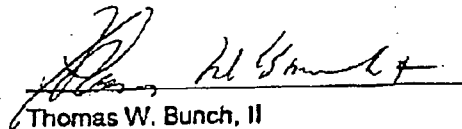
37. To the extent not inconsistent herewith, Plaintiff incorporates by reference the foregoing allegations of this Complaint.
38. The above described willful, wanton, unlawful, and unjustified acts of the Defendants Altman and JBDB, LLC of entering into a Lease Agreement and withholding rental payments for premises which they neither owned nor had lawful possession to constitutes unfair and deceptive practices in the conduct of trade or business, such acts are capable of repetition and are injurious to the public as the Defendants are capable of continuing such acts, and the Plaintiff, as a result of Defendants' unfair trade practices, has suffered damages.
39. The Plaintiff is entitled to judgment for unfair trade practices against the Defendants Altman and JBDB, LLC in an amount to be determined by this Court, jointly and severally, together with prejudgment interest, treble damages, and attorney's fees.

FOR A SIXTH CAUSE OF ACTION
(As to Defendants Kenneth D. Altman, II and JBDB, LLC)
(Conversion)

40. To the extent not inconsistent herewith, Plaintiff incorporates by reference the foregoing allegations of this Complaint.
41. The Defendants Altman and JBDB willfully and wrongfully converted to their use Plaintiff's property and rental payments.
42. As a result of their willful and wrongful conversion, Plaintiff has been damaged and is entitled to actual and punitive damages.

WHEREFORE, Plaintiff prays for judgment against Defendants for all actual damages occasioned by the default under the Lease and Guaranty and all actual damages occasioned by the unauthorized sublease agreement, including incidental and

consequential damages, treble damages as appropriate, punitive damages as appropriate, legal fees as appropriate, the costs of this action, and for such other and further relief as the Court deems just and proper.


Thomas W. Bunch, II
Paul H. Hoefer
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

October 2, 2009

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2008CP2201345

J Mars Sapp vs. Will D Wheeler

CHECK ONE:

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

IT IS ORDERED AND ADJUDGED:

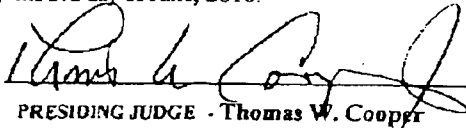
☐ See attached order;

☒ Statement of Judgment by the Court:

Jury verdict

Dated at Georgetown, South Carolina, this 3rd day of June, 2010.

Court Reporter: Grace Hurley


PRESIDING JUDGE - Thomas W. Cooper

This judgment was entered on the 3rd day of June, 2010, and a copy mailed first class this 3rd day of June, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

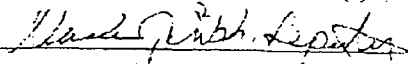
Thomas Whatley Bunch II Robinson
McFadden & Moore, PC P.O. Box 944
Columbia, SC 29202

James Mixon Griffin The Law Offices of James
Mixon Griffin P.O. Box 999 Columbia, SC
29202
G. Turner Perrow Jr. Tidclands Law, LLC 606
Front Street Georgetown, SC 29440

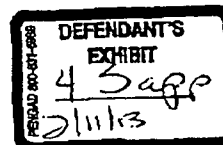
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24/FORM 4


Alma Y. White - Clerk of Court

CPFORM4M



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

JUDGMENT IN A CIVIL CASE
CASE NO: 2008CP2201345

J Mars Sapp vs. Will D Wheeler

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

IT IS ORDERED AND ADJUDGED:

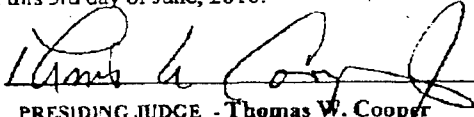
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This judgment was entered on the 3rd day of June, 2010, and a copy mailed first class this 3rd day of June, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Thomas Whitley Bunch II Robinson
McFadden & Moore, PC P.O. Box 944
Columbia, SC 29202

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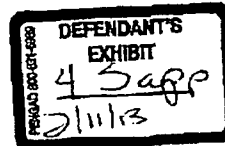
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRCP APP-24/FORM 4


Alma Y. White - Clerk of Court

CPFORM4M



STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

J. Mars Sapp,

Plaintiff,

v.

Will D. Wheeler, P.I. Leasing and
Management, Inc. Kenneth D. Altman II
and JDBD LLC

Defendant.

Case No.: 2008-CP-22-1345

VERDICT

CLERK OF COURT

2010 JUN -4 AM 9:13

1. Mars Sapp Plaintiff versus Will D. Wheeler Defendant (Select One Below)

- a. We the jury unanimously find for the Defendant Will D. Wheeler _____
- b. We the jury unanimously find for the Plaintiff Mars Sapp and award actual damages to him against the Defendant Wheeler in the amount of

\$ 252,798.00

2. Mars Sapp Plaintiff versus P.I. Leasing Defendant (Select One Below)

- a. We the jury unanimously find for the Defendant P.I. Leasing and Management, Inc. _____
- b. We the jury unanimously find for the Plaintiff Mars Sapp and award actual damages to him against the Defendant P.I. Leasing and Management, Inc. in the amount of

\$ 7,300.00

3. Mars Sapp Plaintiff versus Kenneth D. Altman II Under the South Carolina

Unfair Trade Practices Act (Complete Below)

a. We the jury unanimously find for the Defendant Kenneth D. Altman II.

b. We the jury unanimously find for the Plaintiff Mars Sapp ☒

c. If you checked (b) above, did you find that the violations of the Act by the Defendant were willful? Yes ☒ or No _____

4. Mars Sapp Plaintiff versus JDBD LLC Under the South Carolina Unfair Trade

Practices Act (Complete Below)

a. We the jury unanimously find for the Defendant JDBD LLC. _____

b. We the jury unanimously find for the Plaintiff Mars Sapp ☒

c. If you checked (b) above, did you find that the violations of the Act by the Defendant were willful? Yes ☒ or No _____

5. Mars Sapp Plaintiff versus Kenneth D. Altman II Defendant On the Conversion

Cause of Action (Complete Below)

a. We the jury unanimously find for the Defendant Kenneth D. Altman II.

b. We the jury unanimously find for the Plaintiff Mars Sapp ☒

c. If you checked (b) above, do you find by clear and convincing evidence that the Plaintiff is entitled to punitive damages? Yes ☒ or No _____

d. If you found yes above, what amount of punitive damages do you award?

\$ 19,500.00

Carleen Hansen
JURY FOREPERSON

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2008-CP-22-1345

J. Mars Sapp

Will D. Wheeler, P.I. Lesaing & Management, Inc.,
 Winston Kenneth Altman, II, and JDBD, LLC

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

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

IT IS ORDERED AND ADJUDGED:

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

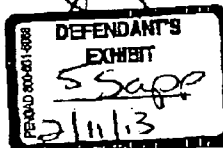
This case was tried before a jury during the June 1, 2010 term. The verdict form and Form 4 were entered into the record at the conclusion of trial. Post-trial motions by both sides were submitted in writing following the trial. The Plaintiff Sapp's post-trial issues are addressed in a formal order filed with this Form 4. The Defendants' motions are dealt with in part in the formal order as well. The Defendant's remaining motions for JNOV, To Alter or Amend and/or New Trial are DENIED. The Court addressed the arguments of the Defendants during the trial and reasserts its prior rulings herein.

And it is SO ORDERED.

Dated at Manning, South Carolina, this 3rd day of March, 2011.

[Signature]
 PRESIDING JUDGE

This judgment was entered on the 10th day of March 2011, and a copy mailed first class this 10th day of March 2011 to attorneys of record or to parties (when appearing pro se) as follows:



ATTORNEY(S) FOR PLAINTIFF

ATTORNEY(S) FOR DEFENDANT

SCCA SCRPC Form 4 Revised 06/2008

[Signature]
 CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

)
) IN THE COURT OF COMMON PLEAS
)

J. Mars Sapp,

Case No.: 2008-CP-22-1345

Plaintiff,

v.

Order on
Plaintiff Sapp's Post Trial Matters
Presented to the Court

Will D. Wheeler, P.I. Leasing &
Management, Inc., Winston Kenneth
Altman, II, and JDBD, LLC,

Defendants.

FILED
GEORGETOWN COUNTY, S.C.
2011 MAR 10 A 10:39
ALAN WHITE
CLERK OF COURT

This matter was before the Court on post trial issue presented by the Plaintiff, J. Mars Sapp. The Court has reviewed Plaintiff's post trial matters and issues the following order:

I. NAME OF DEFENDANT ALTMAN

At the conclusion of the trial, Plaintiff Sapp moved that the Court allow an amendment of the pleadings to indicate the correct name of the Defendant Altman. The Court ruled that the Defendant Altman should henceforth be referred to as Winston Kenneth Altman, II and memorializes its bench order herein.

IT IS SO ORDERED, and the Clerk of Court shall update the Court's records including the judgment roll and party indexes to reflect this Defendant's correct name.

II. UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST

At the conclusion of the case, the Plaintiff moved that the Court enter judgment against the Defendants Altman and JDBD, LLC under the causes of action for unjust enrichment and constructive trust. The Court granted this motion and memorializes its bench order herein.

IT IS SO ORDERED and the Clerk of Court shall update the Court's records to reflect this judgment.

III. ALLEGED INCONSISTENT VERDICT

The Defendants requested and received from the Court ten days within which to make their post-trial motions; however, the Defendant Wheeler - after the jury was discharged - moved that the verdict against him be reversed on the basis that the jury damages' awards against the Defendant P.I. Leasing and Management, Inc. and against Defendant Wheeler were inconsistent. It is unnecessary for the Court to entertain this motion as Wheeler is barred from making this motion after the jury was discharged.

In *Camden v. Hilton*, 360 S.C. 164, 600 S.E.2d 88 (Ct. App. 2004), the South Carolina Court of Appeals held that the trial court erred in entertaining a post-trial motion regarding an inconsistent verdict because it was not presented to the Court prior to the jury being discharged. In its analysis, the Court noted that this rule has been followed since at least 1920. More specifically, in the case of *Dykema v. Carolina Emergency Physicians, P.C.*, the South Carolina Supreme Court stated:

This Court has repeatedly held that a party should not be permitted to sit idly by while a verdict erroneous in form is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence.

348 S.C. 549, 554, 560 S.E.2d 894,896 (2002)

Because Defendant Wheeler waited until after discharge of the jury before raising an issue regarding consistency of the verdict, Wheeler is deemed to have acquiesced in the verdict and he may not raise this issue.

A handwritten signature or set of initials, possibly "JP" or "JP2", with a small star or asterisk below it.

IT IS ORDERED that Wheeler's motion is denied.

ELECTION OF REMEDIES

a. The election

At the conclusion of the trial and the announcement of the jury verdict, the undersigned instructed the Plaintiff Sapp to elect remedies among various causes of action Mr. Sapp had filed against the Defendants Altman and JDBD, LLC. Plaintiff Sapp objected to an election of remedies, but subject to that objection conditionally elected the remedy of judgment on the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §39-5-10 *et seq.* ("SCUTPA"). Plaintiff's conditional election of this remedy was based upon the following assumptions and events to transpire: (1) the Court would not grant any post-trial relief to Altman and JDBD, LLC on the verdict for violation of the SCUTPA and the finding of a willful violation of the Act; and (2) the Court would treble the damages against both Defendants and award attorney's fees to the Plaintiff Sapp under the SCUTPA. As discussed below, the Court awards Plaintiff treble damages and attorney's fees.

b. Treble damages and fees under the UTPA

The Court directed a verdict against Defendant JDBD, LLC in the amount of \$19,500 on the second cause of action, Sapp's claim that JDBD had violated S. C. Code Ann. § 27-35-60. Through counsel, the parties then agreed that Plaintiff's actual damages on the conversion and SCUTPA causes of action would be \$19,500, thus removing from the jury's consideration the question of actual damages against the Defendants Altman and JDBD, LLC. Liability on the SCUTPA claim was submitted to the jury, and also submitted was the question of whether Altman and JDBD committed a

[Handwritten signature]

willful violation of the SCUTPA. The jury found Altman and JDBD liable for violating the SCUTPA and that each of them willfully violated the SCUTPA.

After entry of the verdict, Plaintiff moved that the actual damages under the Unfair Trade Practices Act cause of action be trebled and that the Plaintiff be awarded attorney's fees. The court took the motion under advisement. The relevant statutory and legal analysis follows:

If the Court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of §39-5-20, the Court shall award three times the actual damages sustained and may provide other relief as it deems necessary and proper. Upon the finding by the Court of a violation of this article, the Court shall award the person bringing such action under this section reasonable attorney's fees and costs. (Emphasis added)

S.C. Code Ann. § 39-5-140 (1976).

As an initial matter, no finding of willfulness is required to award attorney's fees and costs. The statute simply requires a finding by the Court of a violation of the statute. The statute states "the Court shall award the person bringing such action under this section reasonable attorney's fees." The jury found that both Defendants violated the Unfair Trade Practices Act, and Plaintiff Sapp is entitled to an award of reasonable attorney's fees.

Turning to the treble damages award, the statute provides that if the Court finds a willful or knowing violation of the act, that "the Court shall award three times the actual damages sustained...." (emphasis added).

The awarding of fees and treble damages is made mandatory based on the statute and its common construction. The use of the word "shall" for treble damages

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and attorney's fees indicates the legislature's intent that the awarding of treble damages and attorney's fees is mandatory. See, e.g., *Bradley v. Doe*, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007). The damages should be trebled to an award of \$58,500.00 against Defendants Altman and JDBD, LLC jointly and severally and attorney's fees should be awarded in the amount of \$23,400.00. See section V below.

IT IS SO ORDERED and the Clerk of Court shall update the judgment roll and all other relevant records.

V. ATTORNEY'S FEES

The Plaintiff is entitled to an award of reasonable attorney's fees against the Defendants Altman and JDBD, LLC under the SCUTPA (see IV above), and the Plaintiff is entitled to an award of reasonable attorney's fees against the Defendants Wheeler and P.I. Leasing & Management, Inc. under the terms of the Lease Agreement and guaranty.

Turning first to the Defendants Wheeler and P.I. Leasing & Management, Inc., attorney's fees are required under the Lease Agreement. Section 9.02 of the Lease states:

Owner may, at any time terminate this Lease for any breach; in addition to any other remedies Owner may have Owner recover from Tenant all damages Owner may incur by reason of such breach, including the cost of recovering the Leased Premises, reasonable attorney's fees, and, ...

Further, at section 11.08, the Lease Agreement states:

.... in the event of any litigation between Owner and Tenant over any matters whatsoever arising out of, or in any way connected with this Lease, and/or any claims or injury or damage involving the Leased Premises or property thereon, if Owner, wholly or partially prevails, Owner shall be entitled to reasonable attorneys' fees and other costs of litigation.

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The defendant Wheeler executed his personal and individual guaranty as follows:

The undersigned personally and individually guarantees the performance by Tenant of the obligations, including rent, set forth in the above Lease.

The Tenant's obligations include the payment of attorney's fees. Thus, by contract, Plaintiff is entitled to collection of its reasonable legal fees against Tenant and Guarantor. As stated in section IV above, Plaintiff is also entitled to and the Court has awarded attorney's fees against the Defendants Altman and JDBD, LLC. The reasonable attorney's fee awards are based on the analysis which follows.

Attorney's fees are recoverable when they are authorized by contract or statute. *Blumberg v. NealCo, Inc.* 310 S.C. 492, 427 S.E.2d 659 (1993). There are six factors to consider in determining an award of attorney's fees: (1) the nature, extent and difficulty of legal services rendered; (2) the time and labor devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar services; and (6) the beneficial results obtained. *Id.*

Plaintiff's counsel has filed an affidavit of attorney's fees which discusses at length the six factors, and the Court reviews those factors.

1. The Nature, Extent, and Difficulty of the Case

This case involved a commercial business transaction. Initially, the Plaintiff retained Robinson McFadden & Moore, P.C. to pursue a past due amount under a lease agreement. The Tenant's (P.I. Leasing) and Guarantor's (Wheeler)

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representative and agent (Altman)¹ refused to cooperate and refused to account for lease payments he was collecting. Altman stated his only responsibility was to defendant Wheeler. Altman refused to cooperate in contacting Wheeler or providing Wheeler's contact information. Altman refused Sapp access to his property by withholding the keys. Sapp ultimately had a locksmith change the locks to the premises so he could have access to the property he owned. Altman refused to provide an accounting of collected rent. Altman refused to provide the identity of a prospective tenant. The undersigned then discovered that Altman through JDBD, LLC had entered into an unauthorized fraudulent lease of the premises with a third party in June 2007. Testimony created the inference, if not the direct testimony, that a third party (Plantation Resort) had been leasing through Altman for some time prior to execution of the unauthorized lease.

Upon Altman's refusal to account for collected rent and the discovery of the unauthorized lease agreement, the Plaintiff Sapp commenced eviction proceedings in the Magistrate's Court of Horry County against all parties who had possession of the premises or who may claim an interest in the premises (except Resort Properties South, Inc. which could not be located). The eviction case resulted in a Writ of Ejectment and a final Order confirming the actions taken in the case.

Plaintiff Sapp then instructed his attorneys to commence legal action against P.I. Leasing & Management for its default of its lease obligations and against the guarantor, Will D. Wheeler. During the course of the case, Plaintiff's Sapp's attorneys issued subpoenas to Altman for relevant records and information. Altman ignored the

¹ The testimony was that Mr. Wheeler had designated Mr. Altman to handle Wheeler's affairs regarding the leased premises.



subpoenas. Altman and JDBD, LLC were then added as parties to the suit. Approximately two weeks prior to trial the parties met for a settlement conference. At no time did any Defendant offer to settle any claim. The Defendants forced Plaintiffs to try this complex commercial case which resulted in a full three day trial. The case was difficult because it included multiple claims against multiple parties. Liability and damages were fully contested by all defendants.

Plaintiff is already defending post trial motions. Substantial amounts of attorneys' time will be required to defend these matters, defend appeals, and collect the judgments entered against Defendants. The Court finds that Plaintiff's counsel's estimate of additional fees for post trial matters, appeals, and collection of the judgments is reasonable. The collection process is cumbersome and fraught with peril. An appeal of the case with multiple legal issues will also require significant legal resources.

2. Time Necessarily Devoted to the Case

In this case, the undersigned counsel for Mr. Sapp and other attorneys, law clerks, and paralegals devoted 271.50 hours to this case through June 11, 2010. Based on my years of experience as a practicing attorney, and my years as a Circuit Court Judge, the time devoted to the case was appropriate. The recorded time was probably conservative as counsel was not as diligent in recording time since much of the case was handled on a contingency fee arrangement. The actual fee arrangement and contingency of compensation are discussed in subparagraph 4 below. The value of the 271.50 hours based on the hourly rates at which the case was being billed results in a blended rate of approximately \$225.00 per hour. Sapp engaged Robinson, McFadden & Moore in late 2007 or early 2008. Robinson McFadden's lead attorney initially billed



this file at the rate of \$275.00 per hour and time is now being recorded at the rate of \$290.00 per hour. Mr. Hoefer has billed this matter at rates ranging between \$150.00 and \$175.00 per hour. The Court finds these hourly rates to be reasonable.

3. The Professional Standing of Counsel

Plaintiff's lead counsel is in his 27th year of practicing law having graduated from University of South Carolina School of Law in January 1984 and having been admitted to the Bar May 16, 1984. Mr. Hoefer graduated from University of South Carolina School of Law in May 2008 and began working as an attorney at Robinson McFadden & Moore, P.C. upon taking the Bar exam in the summer of 2008. Mr. Hoefer is in his second full year of practice. Lead counsel has the distinction of being rated "av", by Martindale Hubbell, the highest rating reported by that service. Given the nature, extent, and difficulty of the case and the professional standing of counsel, the hourly rates billed to the file are reasonable and appropriate.

~~4. The Contingency of Compensation~~

~~Mr. Sapp initially engaged Robinson McFadden & Moore to handle his disputes arising out of the leased premises on an hourly fee basis. On an hourly fee basis, he was billed and paid Robinson McFadden & Moore \$6,040.25 in legal fees for time billed through March 31, 2000. The fees recorded total \$7,640.25, but as a courtesy to the client, the undersigned wrote off \$1,600.00 netting the amount owed and paid by Sapp to \$6,040.25. After March 31, 2000, the undersigned and Mr. Sapp agreed that the litigation would proceed on a contingency fee basis. Mr. Sapp was then responsible for payment of the law firm's out of pocket costs, and the law firm would be paid a contingency fee of 40% of the recovery if the case went to trial.~~

Ref
~~The undersigned is informed and believes that contingency fee arrangements are regularly used in complex commercial cases and that the range for such fees is generally between one third to one half of the recovery. Further, the undersigned is well aware that the courts of South Carolina have often awarded attorney's fees in excess of the amount recovered by successful plaintiffs under the Unfair Trade Practices Act. See *Global Protection Corp. v. Halbersberg*, 332 S.C. 149, 502 S.E.2d 483 (1998) (awarding a contingency fee of one third of the treble damages under the UPTA); *Taylor v. Modenica*, supra (awarding \$500,000.00 in fees on \$108,726.00 in damages); and *Baron Data Systems, Inc. v. Loter*, 207 S.C. 382, 377 S.E.2d 296 (1989) (awarding \$26,000.00 in fees on a judgment of \$16,151.00).~~

~~The contingency of compensation and a full award of fees are significant to Plaintiff and his counsel. The Plaintiff will be required to recover by going through the steps of execution and sale of property, all of which are quite speculative and there is no guaranty that he will recover the first dime of the jury's verdict. Plaintiff's counsel accepted significant risk in pursuing this case which was vigorously contested as to liability and damages.~~

5. The Beneficial Results Obtained

As a result of the Defendants' failure to compromise and resolve the case prior to trial, Sapp proceeded to trial and obtained a favorable result on all claims against all Defendants. The jury verdict vindicated his rights to proceed against all Defendants on all claims and the ultimate jury awards were favorable including an award of punitive damages against the Defendant Altman and a finding of willfulness against the Defendant Altman under the Unfair Trade Practices Act. In addition, the jury awarded

TS
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Sapp over \$250,000.00 on his claim against the guarantor who had denied any liability whatsoever.

6. Customary Fees for Similar Services

TS
The hourly rates billed in this matter and two pieces of litigation (eviction and the instant case) are customary and appropriate given the complexity of the case and the standing of Plaintiff's counsel. ~~Further, cases of this nature are regularly taken on a contingency fee basis.~~ The undersigned is appreciative of the fact that Mr. Sapp may have obtained counsel who charged less money, but at the same time the undersigned is well aware that Sapp could have obtained counsel who charged quite a bit more for their services in this case. ~~In short, both the hourly fee arrangement and the contingency fee arrangement were appropriate in this case.~~ *WAS*

TS
IT IS ORDERED that attorneys' fees be awarded against the Defendant Wheeler and P.I. Leasing & Management, Inc in the amount of ~~\$104,420.00~~ ^{\$48,929.00} and against Defendants Altman and JDBD, LLC in the amount of ~~\$23,400.00~~ ^{\$11,325.00}.

AND IT IS SO ORDERED.

Marcit 7, 2011
June 11, 2010

Thomas W. Cooper, Jr.
Thomas W. Cooper, Jr.
Circuit Court Judge

STATE OF SOUTH CAROLINA)

COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

J. Mars Sapp,

Case No.: 2008-CP-22-1345

Plaintiff,

v.

EXECUTION AS TO DEFENDANT
AND JUDGMENT DEBTOR
WILL D. WHEELER

Will D. Wheeler, P.I. Leasing &
Management, Inc., Winston Kenneth
Altman, II, and JDBD, LLC.,

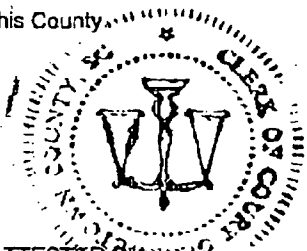
Defendant.

Filed: June 4, 2010 and March 10, 2011
Number: 2008-CP-22-1345
Amount: \$252,798.00
Attorney Fee: \$48,929.00
Total: \$301,727.00 plus interest according to law

TO THE SHERIFF OF THE ABOVE NAMED COUNTY:

WHEREAS, judgment was rendered in the above-captioned action between the Plaintiff and the Defendant Will D. Wheeler in favor of the said Plaintiff for the above amount, as appears by the Judgment Roll, filed in the Office of the Clerk of Court for the above named County.

THEREFORE, we request that you satisfy said judgment out of the personal property of the said judgment debtor within your County, or if sufficient personal property cannot be found, then out of the real property in your County belonging to such judgment debtors on the day when said judgment was so docketed in your County or any time thereafter in whose hands soever the same may be, and duly return this Execution according to law to the Clerk of Court of this County.

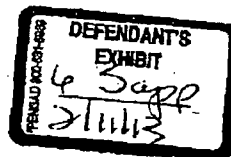


ATTESTED BY

Jennifer Lawrence, Deputy
CLERK OF COURT FOR GEORGETOWN COUNTY

This 22nd day of March, 2011.

Thomas W. Bunch, II
Thomas W. Bunch, II
Robinson, McFadden & Moore, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900





Date: 4/11/11
This is to certify that I am unable to
find personal or real property to satisfy
the within execution. I hereby Nulla
Bona this execution.
[Signature]
A. Lane Cribb, Sheriff
Georgetown County, SC

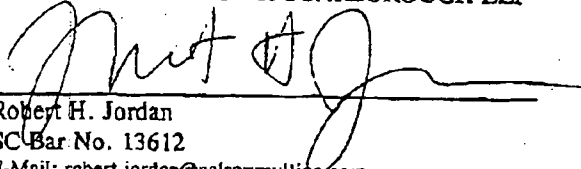
STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	
Kennedy Funding, Inc.,	)	Civil Action No. 2011-CP-22-00180
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Pawleys Island North, LLC, Will	)	<u>Plaintiff's Motion for Summary</u>
Darwin Wheeler, Peggy Wheeler-Cribb	)	<u>Judgment as to Defendant J. Mars</u>
and J. Mars Sapp,	)	<u>Sapp</u>
	)	
Defendants.	)	

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, plaintiff Kennedy Funding, Inc. hereby moves this Court for an order dismissing defendant J. Mars Sapp's claim of a lien interest superior to the plaintiff's lien interest in the property which forms the basis of this foreclosure action. In the alternative, plaintiff moves this Court for an order declaring J. Mars Sapp's lien junior and subordinate to plaintiff's lien. This motion is based on the ground that plaintiff's duly recorded mortgage lien interest in the subject property pre-dates defendant Sapp's alleged lien interest by thirteen months and is a superior, first lien. This motion is further based on the pleadings on file with the Court, discovery conducted in the litigation, applicable common and statutory law, the attached memorandum of law in support of plaintiff's motion and such further proof as may hereafter be offered.

-SIGNATURE ON FOLLOWING PAGE-

FILED
GEORGETOWN COUNTY, S.C.
2011 OCT -3 AM 9:50
ALMA Y WHITE
CLERK OF COURT

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Robert H. Jordan

SC Bar No. 13612

E-Mail: robert.jordan@nelsonmullins.com

Merritt G. Abney

SC Bar No. 71893

E-Mail: merritt.abney@nelsonmullins.com

151 Meeting Street / Sixth Floor

Post Office Box 1806 (29402-1806)

Charleston, SC 29401-2239

(843) 853-5200

Attorneys for Plaintiff Kennedy Funding, Inc.

September 16, 2011
Charleston, South Carolina

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Kennedy Funding, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

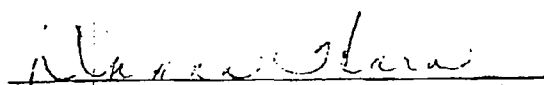
Pleadings:

Plaintiff's Motion for summary Judgment as to Defendant J. Mars Sapp

Counsel Served:

Thomas W. Bunch, II, Esq.
Robinson, McFadden & Moore, P.C.
PO Box 944
Columbia, SC 29201

Robert H. Gwinn, III, Esq.
Gwinn Law Office, LLC
4701-A Oleander Drive
Myrtle Beach, SC 29577


Donna Horn
Administrative Assistant

Sept 26, 2011

FILED
GEORGETOWN COUNTY, S.C.
2011 OCT -3 AM 9:50
ALMA Y. WHITE
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Kennedy Funding, Inc.

☐ Plaintiff

v.

Pawleys Island North, LLC, Will Darwin Wheeler,
Peggy Wheeler-Cribb and J. Mars Sapp

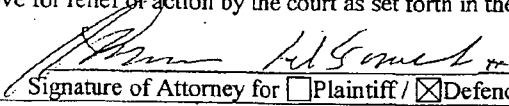
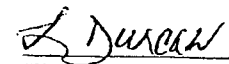
☒ Defendant SAPP.

IN THE COURT OF COMMON PLEAS

CASE NO.

2011-CP-22-00180

MOTION AND ORDER INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney: Robert H. Jordan, Bar No. 13612 Address: 151 Meeting Street, 6th Floor, Post Office Box 1806 (29402) Charleston, SC 29401 phone: (843) 853-520 fax: e-mail: robert.jordan@nelsonmullins.com other:		Defendant Sapp's Attorney: Thomas W. Bunch, II, Bar No. 1011 Address: PO Box 944 Columbia, SC 29202 phone: (803) 779-8900 fax: (803) 771-9411 e-mail: tbunch@RobinsonLaw.com other:	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: Motion to Reconsider Estimated Time Needed: 20 minutes Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion Type ☒ Written motion attached ☐ Form Motion/Order - I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for ☐ Plaintiff / ☒ Defendant			
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE _____ CODE: _____ Date: _____	
CLERK'S VERIFICATION Collected by:  ☐ MOTION FEE COLLECTED: <u>25.00</u> ☐ CONTESTED - AMOUNT DUE: _____ Date Filed: <u>3/8/2012</u>			

FILED
GEORGETOWN COUNTY, S.C.
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CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

)
) IN THE COURT OF COMMON PLEAS
)

Kennedy Funding, Inc. ,

Case No.: 2011-CP-22-00180

Plaintiff,

v.

Defendant J. Mars Sapp's Rule 59
Motion to Alter or Amend Judgment

Pawleys Island North, LLC; Will Darwin
Wheeler; Peggy Wheeler-Cribb; and J.
Mars Sapp,

Defendants

FILED
GEORGETOWN COUNTY, S.C.
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CLERK OF COURT

Introduction

Pursuant to Rule 59, SCRCP, Defendant J. Mars Sapp Moves for an Order of this Court to Alter or Amend the Order Granting Plaintiff's Motion for Summary Judgment as to Defendant J. Mars Sapp ("the Summary Judgment Order"). The Summary Judgment Order was served by mail on the undersigned on February 27, 2012, and received by the undersigned on February 29, 2012.

This case involves the foreclosure of a mortgage by Kennedy Funding, Inc. and against a purported borrower, Pawley's Island North, LLC. Defendant Sapp holds a judgment lien against Defendant Wheeler which was entered about 13 months after the purported mortgage was recorded. Sapp contends that Wheeler fraudulently conveyed the real property against which the foreclosure case is proceeding to Defendant Pawley's Island North.

In the Summary Judgment Order the Court ruled:

Specifically, the Court rules that Sapp's claim to possess a lien superior to that of Kennedy Funding is dismissed and Sapp's lien, if any, is declared junior and subordinate to Kennedy Funding's lien. The Court does not make any finding as to the legitimacy of Sapp's lien and limits its ruling

only to find that if such lien does exist, it is junior to Kennedy Funding's lien.

The grounds for this motion follow:

1. The Court failed to address the fraudulent conveyance argument presented by Sapp and its impact on Kennedy Funding's alleged mortgage.
2. The Court failed to address Kennedy Funding's participation in the fraudulent conveyance by Sapp and the impact of the participation on Kennedy Funding's alleged mortgage.
3. The Court failed to address the equitable doctrine that Kennedy Funding should not be allowed to look for satisfaction of its claim on the parcel of property that was unencumbered prior to Kennedy Funding's alleged mortgage.
4. The Court erred in dismissing Sapp's claim of priority when there were material issues of fact in dispute.
5. The Court erred in dismissing Sapp's claim of priority when there was a scintilla of evidence that Kennedy Funding's alleged mortgage was void.
6. The Court erred in finding Sapp's lien subordinate and junior to the alleged lien of Kennedy Funding when there were material issues of fact in dispute.
7. The Court erred in finding Sapp's lien subordinate and junior to the alleged lien of Kennedy Funding when there was a scintilla of evidence that Kennedy Funding's mortgage was void.

Legal Standard

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable

issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

Hancock v. Mid-S. Mgmt. Co., Inc., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).

... in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.

Id., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Facts

The evidence presented at the hearing on Kennedy Funding's summary judgment motion showed that:

- a. Defendant Sapp sued Defendant Wheeler in September 2008 alleging over \$500,000 in damages.
- b. In September 2008, Wheeler owned two parcels of property on Pawley's Island, lots 3 and 4 which are the subject of Kennedy Funding's alleged mortgage and foreclosure action. Lot 3 was unencumbered prior to the alleged Kennedy Funding mortgage. Lot 4 was mortgaged to First South Bank.
- c. According to an Appraisal performed for Kennedy Funding, as of February 2009, Lot 3 had an "As Is' Market Value" value of \$1,040,000 and Lot 4 had a value of \$880,000.
- d. On May 5, 2009, while Sapp's litigation against Wheeler was pending, Wheeler conveyed the lots to Pawley's Island North, LLC by quitclaim deed for "\$5.00 and no other consideration." Wheeler had a 99% interest in Pawley's Island North LLC and his mother had the remaining 1%.

- e. Kennedy Funding knew of the Sapp litigation. It knew that Wheeler owned the property in his name. It agreed or urged Wheeler to convey the property to the LLC. It failed to secure any explanation of the pending litigation filed by Sapp. It knew that Wheeler was a 99% owner of the LLC. It knew that Wheeler was quitclaiming the property for no consideration. It did not care about a fraudulent conveyance as long as it obtained a title opinion on the lots and title insurance. It participated in the fraudulent conveyance.
- f. Contemporaneous with the recording of the quitclaim deed for Lots 3 and 4, Kennedy Funding recorded a mortgage in on both lots. It knew that the end result would be to put the property beyond the reach of Wheeler's bona fide creditors.
- g. The amount of the purported loan was \$960,000 or 50% of the estimated value of Lots 3 and 4; however, an examination of the closing documents shows that Kennedy Funding advanced substantially less than \$960,000. Kennedy Funding retained \$185,200 of the loan proceeds for a commitment fee (\$70,000) and prepaid interest (\$115,200; no payments were required for the first year of the loan). Thus, the amount advanced was only 40% of the property's value. Pawley Island North, 99% owned by Wheeler, took \$397,438.50 cash from closing.
- h. The Circuit Court entered a judgment in Sapp's favor based on a jury verdict against Wheeler in June 2010 for almost \$249,000. Attorneys' fees of almost \$52,000 were later added to the judgment. The amount of cash distributed to Wheeler's LLC at closing was more than sufficient to pay this judgment.

- i. In April 2011, The Georgetown County Sherriff returned a *nulla bona* execution on Sapp's judgment against Wheeler.

Argument

The facts, and all reasonable inferences taken from them, show that the conveyances of Lots 3 and 4 by Wheeler are void and of no effect. See, S.C. Code Ann. 27-23-10(A) (1976). Because the transfer is void, the property would not have been owned by Pawley's Island North; therefore it had no property on which to grant a mortgage. The mortgage to Kennedy Funding is of no effect and invalid.

Even if Pawley's Island North could grant a mortgage, the mortgage itself would be a fraudulent conveyance under the facts of this case. As stated in *Corpus Juris Secundum*, a mortgage "is invalid where the debt of the creditor with notice of the fraud is created contemporaneous with or subsequent to, the fraudulent conveyance." 37 C.J.S. *Fraudulent Conveyances* § 190. See also, Rilling v. Schultze, 95 Tex. 352, 67 S.W. 401 (1902). Further, "When a mortgage to secure a note is executed in fraud of the mortgagor's creditors, the creation of the mortgage is a fraudulent conveyance and courts will not enforce the note". 27 S.C. Jur. *Mortgages* § 92 (discussing validity of mortgages).

In essence, Kennedy Funding comes to this court with unclean hands. South Carolina has shown an increasing willingness not to permit creditors to seek equity and foreclose when they come to the Court with unclean hands. See, e.g., Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (2010). By seeking the equity of this court in regard to Mars Sapp, it must do equity. The facts, and all reasonable inferences taken from the facts, show that Kennedy Funding has not done equity.

In Coleman v. Daniel, 261 S.C. 198, 199 S.E.2d 74 (1973), the judgment debtor conveyed property valued at an estimated \$85,000. The consideration given by the transferee was \$49,000 (58% of the property's value). The judgment creditor alleged the conveyance to be fraudulent and the South Carolina Supreme Court agreed. Not only did it agree, but it found the consideration to be grossly inadequate at 58% of the property's value. The South Carolina Supreme Court granted the relief sought by Coleman (the judgment creditor) including sale of the property. Here, Kennedy loaned less than 50% of the combined value of the lots. The consideration was grossly inadequate and Kennedy Funding's mortgage should be found invalid.

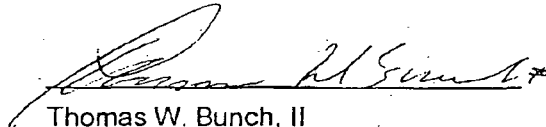
Even if the Court were to find that Kennedy's mortgage was taken for adequate consideration (and this is a material issue of fact which cannot be decided on summary judgment), Kennedy Funding's lien is void or subordinate to Sapp's judgment lien because there is evidence that Kennedy Funding participated in the fraud. SCNB v. Halter, 293 S.C. 121, 134, 359 S.E.2d 74, 80 (Ct. App. 1987).

Finally, despite all of the material issues of fact which should have precluded the Court from granting summary judgment, the Court, as a matter of equity should not have granted Kennedy Funding's motion. Where a court may find a partial insufficiency of consideration, the conveyance may be impeached as being voluntary or fraudulent to a partial extent, and the conveyance will be upheld only to the extent of the partial consideration. Coleman v. Daniel, 261 S.C. at 213, 199 S.E.2d. at 81, citing 37 C.J.S. Fraudulent Conveyances § 158 (omitting citations to multiple South Carolina cases). The Court should determine the sufficiency, if any, of the consideration for the mortgage. Here, there was sufficient value in Lot 4 to support the advances made by

Kennedy Funding. The Court should allow Sapp to satisfy his claims out of Lot 3, and allow Kennedy Funding to participate only if there are excess proceeds as to Lot 3.

Conclusion

Material issues of fact exist. Not only is there a scintilla of evidence, but there is clear and convincing evidence that Kennedy Funding's mortgage is totally or partially invalid. This Court should reconsider the Summary Judgment Order and deny Kennedy Funding's summary judgment motion.



Thomas W. Bunch, II
Paul H. Hoefer
ROBINSON, McFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

March 7th, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Kennedy Funding, Inc. ,

Plaintiff,

v.

Pawleys Island North, LLC, Will
Darwin Wheeler, Peggy Wheeler-
Cribb and J. Mars Sapp,

Defendant.

)
) IN THE COURT OF COMMON PLEAS
)

Case No.: 2011-CP-22-00180

CERTIFICATE OF SERVICE

This is to certify that I, Amy E. Lovette, a paralegal with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below the **Defendant J. Mars Sapp's Rule 59 Motion to Alter or Amend Judgment** in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

Robert H. Jordan, Esquire
Nelson Mullins Riley & Scarborough, LLC
151 Meeting Street, 6th Floor
Post Office Box 1806 (29402)
Charleston, SC 29401

Dated at Columbia, South Carolina this 24th day of March, 2012.

FILED
GEORGETOWN COUNTY, S.C.
2012 MAR -8 PM 12:56
ALMA Y. WHITE
CLERK OF COURT


Amy E. Lovette

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

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

☐ Plaintiff

v.

Pawleys Island North, LLC, Will Darwin Wheeler,
Peggy Wheeler-Cribb and J. Mars Sapp

☒ Defendant SAPP.

IN THE COURT OF COMMON PLEAS

CASE NO.

2011-CP-22-00180

MOTION AND ORDER INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney: Robert H. Jordan, Bar No. 13612 Address: 151 Meeting Street, 6th Floor, Post Office Box 1806 (29402) Charleston, SC 29401 phone: (843) 853-520 fax: e-mail: robert.jordan@nelsonmullins.com other:		Defendant Sapp's Attorney: Thomas W. Bunch, II, Bar No. 1011 Address: PO Box 944 Columbia, SC 29202 phone: (803) 779-8900 fax: (803) 771-9411 e-mail: tbunch@RobinsonLaw.com other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion to Stay Sale Estimated Time Needed: Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion Type			
☒ Written motion attached ☐ Form Motion/Order -- I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☐ Plaintiff / ☒ Defendant Sapp		June 28, 2013 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE _____ CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: <u>Lucinda Green</u> ☒ MOTION FEE COLLECTED: \$25.00 ☐ CONTESTED - AMOUNT DUE: _____		Date Filed: <u>7/1/13</u>	

SC 7A/251 (11-03)

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

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

Plaintiff,

v.

Pawleys Island North, LLC, Will Darwin
Wheeler, Peggy Wheeler-Cribb and J.
Mars Sapp,

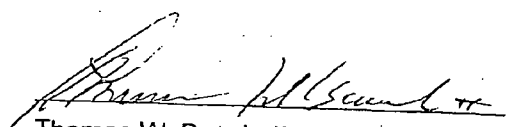
Defendants.

IN THE COURT OF COMMON PLEAS

Case No.: 2011-CP-22-00180

Motion to Stay Sale

Defendant J. Mars Sapp has appealed the Order and Judgment of the Honorable Joe M. Crosby dated May 15, 2013 and filed June 7, 2013, and he now moves for an Order of this Court to stay the sale of the property. Sapp requests a hearing of the Court as soon as practical to determine whether a bond is required and, if so, the terms of the bond.


Thomas W. Bunch, II
ROBINSON, McFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

June 28, 2013

FILED
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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	
Kennedy Funding, Inc., as predecessor-	)	
in-interest, and BNP Paribas,	)	Civil Action No. 2011-CP-22-00180
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	<u>MASTER'S REPORT ON SALE,</u>
Pawleys Island North, LLC, Will	)	<u>ORDER OF DISBURSEMENT</u>
Darwin Wheeler, Peggy Wheeler-	)	<u>PURSUANT TO RULE 71 (PUBLIC</u>
Cribb, and J. Mars Sapp,	)	<u>SALE), ORDER CONFIRMING</u>
	)	<u>SALE AND ORDER CLOSING</u>
	)	<u>CASE</u>
Defendants.	)	

TO: THE PRESIDING JUDGE OF THE COURT OF COMMON PLEAS:

1. Pursuant to the Order of the Court and after due notice and advertisement, I sold the subject property to Plaintiff BNP Paribas, as agent for undisclosed principals, for the sum of One Million Five Hundred Thousand and 00/100 (\$1,500,000.00) Dollars, that amount being the highest bid made on the sales day, August 5, 2013. A deficiency judgment being entered, the bidding remained open for thirty (30) days after the sales day and no additional bids were made. The Plaintiff would have to pay only the costs as provided in said Order and became the Grantee of the subject property.
2. I have executed and delivered to said Grantee a good and sufficient Deed of conveyance of said property.
3. That I have paid out and disbursed the proceeds of said sale as set forth below showing the amounts expended by me and for which I hold receipts or cancelled checks:

12

Amount of Plaintiff's Bid \$1,500,000.00

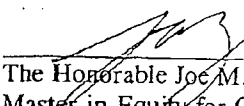
Disbursements

The Georgetown Times \$327.60

Commission on Sale \$2,500.00

TOTAL DISBURSED \$2,827.60

4. All of the funds having been disbursed, I hereby ORDER the file closed and the case ended.


The Honorable Joe M. Crosby
Master-in-Equity for Georgetown County

Georgetown, South Carolina

24 September, 2013

Prepared By: Nelson Mullins, LLP Attn: Robert H. Jordan
PO Box 1806, Charleston, SC 29402

STATE OF SOUTH CAROLINA)
) MASTER'S DEED
COUNTY OF GEORGETOWN)

TO ALL WHOM THESE PRESENT SHALL CONCERN:

I, Joe M. Crosby, as Master in Equity for Georgetown County, the said State, send greetings:

WHEREAS, in an action in the Court of Common Pleas in Georgetown County between Kennedy Funding, Inc., as predecessor-in-interest, and BNP Paribas, as plaintiff(s) and Pawleys Island North, LLC, Will Darwin Wheeler, Peggy Wheeler-Cribb, and J. Mars Sapp, as defendant(s), by an Order filed June 6, 2013, it was decreed that the property hereinafter described should be sold by the Master in Equity for Georgetown County on the terms and for the purposes mentioned in the Order(s) granted in the case. (see Judgment Roll No. 2011-CP-22-00180) A MORTGAGE FORECLOSURE ACTION-TRANSFERRING REALTY

NOW THEREFORE KNOW ALL MEN, That I, the undersigned, as Master in Equity for Georgetown County, pursuant to the foregoing and in consideration of One Million Five Hundred Thousand and 00/100 (\$1,500,000.00) Dollars, as paid by or on behalf of the hereinafter named grantee, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant and release the following property unto 334 Myrtle Ave. SC Property Associates, LLC (Grantee):

ALL THAT CERTAIN piece, parcel or lot of land lying, being and situate on Pawleys Island, Georgetown County, State of South Carolina, being that certain lot of land designated as LOT 3 on a plat prepared by The Earthworks Group, dated July 9, 2006 and recorded in the Office of the Clerk of Court for Georgetown County, South Carolina in Plat Slide 625 at page 10.

AND ALSO

ALL THAT CERTAIN piece, parcel or lot of land lying, being and situate on Pawleys Island, Georgetown County, State of South Carolina, being that certain lot of land designated as LOT 4 on a plat prepared by the Earthworks Group, dated July 9, 2006 and recorded in the Office of the Clerk of the Court for Georgetown County, South Carolina in Plat Slide 625 at page 10.

This being the property conveyed to Pawleys Island North, LLC by deed of Will D. Wheeler dated April 28, 2007, and recorded in the Register of Deeds Office for Georgetown County in Record Book 1225 at Page 193.

TMS No. 42-0167-042-02-00 and 42-0167-042-03-00



Property Address: 334 Myrtle Avenue, Pawleys Island SC 29585

Grantee: 334 Myrtle Ave. SC Property Associates, LLC

Grantee's Address: c/o BNP Paribas - Value Preservation Group, LLC
787 Seventh Avenue
New York, NY 10019

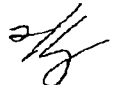
Grantors: Joe M. Crosby, Master in Equity, Georgetown County
Pawleys Island North, LLC

This property was sold subject to assessments, South Carolina Department of Revenue taxes, Georgetown County taxes, existing easements and restrictions of record and other senior encumbrances.

TOGETHER with all and singular the hereditaments, rights, members and appurtenances whatsoever to the said property belonging or in any wise incident or appertaining, and the reversions and remainders, rents, issues, and profits thereof, and also any estate, right, title, interest, dower, possession, benefit, claim or demand therein whatsoever of all parties to the said suit and of all other person who might rightfully claim the same or any part thereof, by, from, or under them, or either of them;

TO HAVE AND TO HOLD the said property, with its hereditaments, privileges and appurtenances, unto the said Grantee, its successors and assigns for their own use, benefit, and behalf, forever.

Remainder of this page intentionally left blank.



IN WITNESS WHEREOF, I, the undersigned, as Master in Equity for Georgetown County, under and by virtue of the said Order(s), has hereunto set my Hand and Seal the 7th day of October, 2013.

SIGNED, SEALED AND DELIVERED
IN THE Presence of:

Justice M. Pugh
Dana D. Gray

By: Joe M. Crosby
Master In Equity for Georgetown County

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

I, Dana D. Gray, do hereby certify that Joe M. Crosby, as Master in Equity for Georgetown County, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Sworn To and Subscribed Before Me

This 7th day of October, 2013.

Dana D. Gray (L.S.)
My Commission Expires: 02/23/22
Notary Public of South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

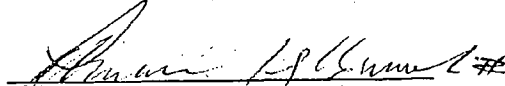
v.

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

J. Mars Sapp is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.


Thomas W. Bunch, II
Paul H. Hoefler
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
Attorneys for Appellant

December 2nd, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

RECEIVED
DEC 13 2013
SC Court of Appeals

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

v.

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

J. Mars Sapp is the Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities	iii
Statement of Issues on Appeal	1
Statement of the Case	2
Statement of Facts	4
Standard of Review	7
Argument	8

A. The transfer of property valued at \$1,920,000.00 for “the sum of FIVE AND NO/100 DOLLARS (\$5.00) and no other consideration” to a limited liability company (Pawleys) in which the grantor (Wheeler) held a 99% membership interest, must be set aside as a fraudulent conveyance where the grantor was indebted to the creditor (Sapp) at the time of the transfer, the conveyance was voluntary, and the grantor failed to retain sufficient property to pay his indebtedness to the creditor.

- 1. Even if there was no actual intent to defraud Sapp, the conveyance by Wheeler to Pawleys was fraudulent when it was without consideration.**
- 2. If the consideration for the transfer is deemed grossly inadequate, instead of being completely without consideration, Wheeler failed to overcome the rebuttable presumption of fraud arising from a transfer made for grossly inadequate consideration when he failed to offer any testimony as to the *bona fides* of the transfer.**
- 3. Even if there was consideration for the transfer by Wheeler, the conveyance was fraudulent where it was made by him with actual intent to defraud Sapp and the intent is imputable to the grantee in which he held a 99% membership interest.**

B. Where a mortgage is given on property by a fraudulent grantee (Pawleys) to a subsequent creditor (Kennedy) who has notice of the fraud, the mortgage is void as to an existing creditor (Sapp) of the fraudulent grantor (Wheeler).

C. Where a fraudulent grantee creates new debt and gives a lender a mortgage for inadequate consideration when compared to the value of property, and the lender is on notice of the fraudulent conveyance, the mortgage shall be set aside as a fraudulent conveyance, or declared subordinate to a creditor of the fraudulent grantor.

Conclusion.....27

TABLE OF AUTHORITIES

Cases

<i>Brunson v. Sports</i> , 239 S.C. 58, 121 S.E.2d 294 (1961).....	23
<i>Coleman v. Daniel</i> , 261 S.C. 198, 199 S.E.2d 74 (1973).....	9, 10, 11, 12, 13, 15, 16, 18, 22, 23
<i>Dinkins v. Robbins</i> , 200 S.C. 475, 21 S.E.2d 10 (1942).....	11, 17
<i>Future Grp., II v. Nationsbank</i> , 324 S.C. 89, 478 S.E.2d 45 (1996).....	14
<i>Gardner v. Kirven</i> , 184 S.C. 37, 191 S.E. 814 (1937).....	15
<i>Independence National Bank v. Buncombe Professional Park, LLC</i> , 402 S.C. 514, 741 S.E.2d 572 (Ct. App. 2013).....	7
<i>James v. Martin</i> , 150 S.C. 75, 147 S.E. 752 (1929)	17
<i>Jeffords v. Berry</i> , 247 S.C. 347, 147 S.E.2d 415 (1966)	13
<i>Lenhardt v. Ponder</i> , 64 S.C. 354, 42 S.E. 169 (1902).....	26, 27
<i>Magovern v. Richard</i> , 27 S.C. 272, 3 S.E. 340 (1887).....	26, 27
<i>McGhee v. Wells</i> , 57 S.C. 280, 35 S.E. 529 (1900).....	17
<i>Messervy v. Barelli</i> , 11 S.C. Eq. (2 Hill Eq.) 576 (1837).....	23
<i>Oskin v. Johnson</i> , 400 S.C. 390, 735 S.E.2d 459 (2012).....	8
<i>Rilling v. Schulze</i> , 95 Tex. 352, 67 S.W. 401 (1902)	20, 21, 26
<i>Royal Z Lanes, Inc. v. Collins Holding Corp.</i> , 337 S.C. 592, 524 S.E.2d 621 (1999).....	16
<i>Sapp v. Wheeler</i> , 402 S.C. 502, 741 S.E.2d 565 (Ct. App. 2013)	2, 5
<i>South Carolina National Bank v. Halter</i> , 293 S.C. 121, 359 S.E.2d 74 (Ct. App. 1987) .	25, 26, 27
<i>Windsor Properties v. Dolphin Head Const. Co., Inc.</i> , 331 S.C. 466, 498 S.E.2d 858 (1998).....	16

Statutes

S.C. Code Ann. § 27-23-10(A) (2007) 3, 8

Other Authority

Rule 30(b)(6), SCRCP 4, 19, 24

Rule 59, SCRCP 3

I. STATEMENT OF ISSUES ON APPEAL

A. Should the transfer of property valued at \$1,920,000.00 for "the sum of FIVE AND NO/100 DOLLARS (\$5.00) and no other consideration" to a limited liability company in which the grantor held a 99% membership interest, be set aside as a fraudulent conveyance where the grantor was indebted to a creditor at the time of the transfer, the conveyance was voluntary, and the grantor failed to retain sufficient property to pay his indebtedness to the creditor?

1. Even if there was no actual intent to defraud the creditor, was the conveyance fraudulent when it was without consideration?
2. If the consideration for the transfer is deemed grossly inadequate, instead of being completely without consideration, did the grantor overcome the rebuttable presumption of fraud arising from the transfer when he failed to offer any testimony as to the *bona fides* of the transfer?
3. Even if there was consideration for the transfer, was the conveyance fraudulent where it was made by the grantor with actual intent to defraud the creditor and the intent is imputable to the grantee in which the grantor held a 99% membership interest?

B. Where a mortgage is given on property by a fraudulent grantee to a subsequent creditor who has notice of the fraud, should the mortgage be void as to an existing creditor of the fraudulent grantor?

C. Where a fraudulent grantee creates new debt and gives a lender a mortgage for inadequate consideration when compared to the value of the property, and the lender is on notice of the fraudulent conveyance, should the mortgage be set aside as a fraudulent conveyance, or declared subordinate to a creditor of the fraudulent grantor?

II. STATEMENT OF THE CASE

This case was commenced by Respondent Kennedy Funding, Inc. ("Kennedy") on February 9, 2011 by the filing of a Summons and Complaint in Georgetown County. Kennedy sought to foreclose a mortgage given by Respondent Pawleys Island North, LLC ("Pawleys") on two parcels of property (Lots 3 and 4) (collectively "the Property"); sought to collect on loan guarantees given by Respondents Will Darwin Wheeler ("Wheeler") and Peggy Wheeler-Cribb ("Wheeler-Cribb") (collectively "Guarantors"); and sought a determination whether Appellant J. Mars Sapp's ("Sapp") judgment lien against Wheeler was prior to the mortgage lien of Kennedy¹ (Complaint, R. pp. 24-30). Sapp answered the Complaint and alleged that he claimed an interest in the property subject to the foreclosure action and that his judgment lien and interest in the Property was superior to Kennedy's mortgage lien (Answer, R. pp. 60-62).

By Order filed March 22, 2012, the case was referred to the Honorable Joe M. Cosby, Master-in-Equity for Georgetown County ("the Master"), with finality and any appeal to be taken to the South Carolina Supreme Court or Court of Appeals, as appropriate (Order of Reference, R. pp. 18-21).

By motion filed October 3, 2011, Kennedy moved for summary judgment seeking to dismiss Sapp's claim of an interest in the Property or to declare Sapp's lien junior and subordinate to Kennedy's lien (Plaintiff's Motion for Summary Judgment, R. pp. 788-790). By agreement of the parties, the Master heard the motion on January 17, 2012. He granted, in part, Kennedy's motion by Order filed March 5, 2012 when he declared Sapp's lien, if any, junior and subordinate to Kennedy's lien (Order Granting Plaintiff's Motion for Summary Judgment as to

¹ In a separate civil action, Sapp had sued Wheeler in 2008 and secured a verdict on June 4, 2010 in the amount of \$252,798.00 to which the trial judge added \$48,929.00 in legal fees for a total judgment in the principal amount of \$301,727.00. On appeal by Wheeler, the South Carolina Court of Appeals affirmed. *Sapp v. Wheeler*, 402 S.C. 502, 741 S.E.2d 565 (Ct. App. 2013).

Defendant J. Mars Sapp, R. pp. 22-23). On March 8, 2012, Sapp moved for the Master to reconsider the order granting Kennedy Funding summary judgment as to Sapp (Defendant Sapp's Rule 59 Motion to Alter or Amend Judgment, R. pp. 791-799). The Master heard oral argument on Sapp's motion on August 13, 2012, but issued no ruling until he denied the motion from the bench at the trial of the case on February 11, 2013, with the denial to be reduced to a detailed order to be issued by the court (Trial Tr., R. p. 695, line 13-p. 697, line 7).

On September 5, 2012, Kennedy filed an Amended Summons and Complaint adding BNP Paribas ("BNP") as a Plaintiff alleging that Kennedy assigned its rights to BNP (R. pp. 63-69). Sapp answered the Amended Complaint on September 20, 2013. Sapp continued to deny Plaintiffs' alleged priority as the court had not ruled on his Motion to Alter or Amend Judgment, and he alleged that Plaintiffs had unclean hands. Sapp further asserted by way of cross-claim that the conveyance of the Property by Wheeler to Pawleys was a fraudulent conveyance under the Statute of Elizabeth (S.C. Code Ann. § 27-23-10(A) (2007)), that Plaintiffs, Pawleys, and the Guarantors condoned and participated in the transfer of the Property, that the conveyance to Pawleys was void, and that if the conveyance of the Property was not completely void, it was void as to Lot 3 which was unencumbered at the time of the transfer from Wheeler to Pawleys (Answer to Amended Complaint and Crossclaim of J. Mars Sapp, R. pp. 101-107). Plaintiffs replied to the Cross-claim and the remaining Respondents answered the Cross-claim, all denying that the conveyance of the Property was fraudulent and setting up various affirmative defenses (Plaintiffs' Reply, R. pp. 118-122; Answer of Pawleys Island North, LLC, Will D. Wheeler, and Peggy Wheeler-Cribb, R. pp. 123-127).

On February 11, 2013 the Master conducted a non-jury trial. Once the Master denied Sapp's Rule 59 Motion to Alter or Amend Judgment, the only issues remaining for trial were for

Kennedy to establish its allegations for foreclosure of the mortgage, and for Sapp to prove his Cross-claim against Pawleys, Wheeler and Wheeler-Cribb. Kennedy presented one witness who testified as to Kennedy's damages. By agreement of the parties, Kennedy also presented two deposition transcripts with exhibits. These were SCRCR Rule 30(b)(6) depositions of Kennedy's CEO and President. Sapp also testified. Pawleys, Wheeler, and Wheeler-Cribb elected not to testify, not to call any witnesses and not to present any evidence. At the close of the testimony by Plaintiffs and Sapp, Sapp moved for a directed verdict. By Order filed June 7, 2013, the Master found the Plaintiffs' mortgage to be first lien on the Property, ordered that the Property be sold at a judicial sale, and ordered that the Plaintiffs were owed \$1,825,935.33 as of April 10, 2012. The Master further found that the conveyance of the Property by Wheeler to Pawleys was not fraudulent (Order and Judgment, R. pp. 1-17).

Counsel for Sapp received the filed June 7 Order and Judgment sometime after June 10, 2013, and filed Sapp's Notice of Appeal on June 27, 2013 appealing the Order Granting Summary Judgment dated February 14, 2012 and the Order and Judgment entered June 7, 2013. He also filed an Amended Notice of Appeal on July 10, 2013 clarifying that Pawleys, Wheeler and Wheeler-Cribb were also respondents in the appeal (Notice of Appeal, R. pp. 128,129; Amended Notice of Appeal, R. pp. 130-134).

III. STATEMENT OF FACTS

a. Wheeler's Transfer of the Property during Litigation.

Appellant Sapp sued Respondent Wheeler in September 2008 alleging over \$500,000 in damages for breach of a commercial lease guaranty (the "Sapp/Wheeler Litigation"). At that time, Wheeler was the sole owner in fee simple of two parcels of property on Pawley's Island, known as lots 3 and 4 (previously referred to collectively as the "Property"), which are the

subject of Kennedy's foreclosure action. Lot 3 was unencumbered. Lot 4 was subject to a \$300,000.00 mortgage to First South Bank.² While the Sapp/Wheeler Litigation was pending, by quitclaim deed dated April 28, 2009, Wheeler transferred lots 3 and 4 to Pawleys for "FIVE AND 00/100 DOLLARS (\$5.00) and no other consideration." Wheeler had a 99% interest in Pawleys and his mother (Wheeler-Cribb) had the remaining 1% interest. The Sapp/Wheeler Litigation was tried before a jury in June, 2010 in Georgetown County resulting in a verdict in favor of Sapp and against Wheeler in the amount of \$252,798.00 to which the trial judge added \$48,929.00 in legal fees for a total judgment of \$301,727.00. The South Carolina Court of Appeals affirmed the verdict and judgment. *Sapp v. Wheeler*, 402 S.C. 502, 741 S.E.2d 565 (Ct. App. 2013).

b. Kennedy's Knowledge and Participation.

Two days after the conveyance of lots 3 and 4 "for FIVE AND 00/100 DOLLARS (\$5.00) and no other consideration," Kennedy made a loan to Pawleys and took a mortgage on lots 3 and 4 (Quitclaim Deed dated April 28, 2009, Sapp Trial Ex. 1, (R. pp. 750-755); Promissory Note dated April 30, 2009, Kennedy's Ex. 1, (R. pp. 275-282); and Mortgage and Security Agreement dated April 30, 2009, (R. pp. 283-336)). Prior to this loan, Kennedy had no lending relationship with Pawleys, Wheeler or Wheeler-Cribb (Wolfer Deposition 1, R. p. 179, lines 5-10). At the time of Kennedy's loan to Pawleys, the unencumbered lot 3 had an "As Is Market Value" value of \$1,040,000.00 and lot 4, encumbered only with a \$300,000.00 mortgage, had an "As Is Market Value" of \$880,000.00 (Kennedy Trial Ex. 2, R. pp. 511-518). Prior to the conveyance of the Property and prior to closing the loan, Kennedy knew of Sapp's pending suit against Wheeler (Wolfer Deposition 1; R. p. 196, line 21-p. 203, line 20; Kennedy's Trial Exs.

² Wheeler also owned lots 1 and 2 in the same "subdivision" and these lots were subject to another mortgage. (Trial Tr., R. p. 724, line 21-p. 725, line 7.)

1, 4, and 5, (R. pp. 505, 506, 525-537, and 539). Kennedy knew that Wheeler owned the Property solely in his name (Wolfer Deposition 1, R. p. 193, line 15-p. 196, line 17; and Kennedy Trial Ex. 2, R. p. 521). Kennedy knew that Wheeler was a 99% owner of Pawleys (Wolfer Deposition 1, R. p. 187, line. 6-p. 189, line 9); Kennedy Trial Ex. 1, R. pp. 396-399, 436, 243). Kennedy took its mortgage on the Property which appraised for \$1,920,000.00, and was quitclaimed by Wheeler to Pawleys "for FIVE AND 00/100 DOLLARS (5.00) and no other consideration." Kennedy knew that Wheeler had no income with which to repay the loan, and it was solely looking to the value of the Property for payment of the loan (Wolfer Deposition 1, R. p. 192, lines 17-24). However, worried about the litigation and its impact on the loan, twice Kennedy's counsel asked Wheeler's counsel for an explanation of the litigation - which never came (Wolfer deposition 1, R. p. 203, lines. 9-20). Regardless of Kennedy's failure to secure a response, Kennedy was on notice of Wheeler's existing indebtedness to Sapp which resulted in Sapp's judgment lien. Ultimately, Kennedy decided a possible fraudulent conveyance did not matter as long as it obtained a title opinion on the lots and title insurance (Wolfer Deposition 1, R. p. 200, lines 5-13, p. 215, line 19-p. 216, line 5). Kennedy was a knowing participant in the fraudulent conveyance. It was complicit in the transaction.

c. The Kennedy Loan.

The amount of the purported loan from Kennedy to Pawleys was \$960,000.00, which was 50% of the estimated value of lots 3 and 4; however, an examination of the closing statement shows that Kennedy Funding advanced substantially less than \$960,000.00 to Pawleys. Kennedy retained \$185,200.00 of the loan proceeds for a commitment fee (\$70,000.00) and prepaid interest (\$115,200.00; no payments were required for the first year of the loan) (R. pp. 228, 229). Thus, of the purported \$960,000.00 loan, Kennedy loaned only \$774,800.00, or 40% of the value

of the lots quitclaimed by Wheeler. Further, significant amounts were paid to Kennedy's counsel, borrower's counsel, appraisers, etc. After the accounting entry to pay itself, and after paying associated closing costs, the borrower (Pawleys) netted \$397,438.50 and it repaid the \$300,000.00 First South loan (*Id.*). Wheeler and Wheeler-Cribb unconditionally guaranteed the Kennedy loan as "a primary obligation" (R. p. 358, para. 2). As a result, Wheeler obtained no benefit for the transfer; he incurred additional liability over and above his existing \$300,000.00 debt; and he mortgaged both lots including the unencumbered lot 3 which had a value of \$1,040,000.00. Kennedy's loan is accruing interest at 25% per annum, and the Master awarded Kennedy attorney's fees of \$100,000.00 against Pawleys and the guarantors even though they did not contest the foreclosure and even though Kennedy presented no evidence of its legal fees. Thus, from a \$774,800.00 loan funded in May, 2009, Kennedy asserted, and the Master ordered that Kennedy was owed \$1,825,935.33 as of April 10, 2012, plus interest at 25% per annum thereafter (R. p. 4).

d. The *Nulla Bona* Return.

In April 2011, The Georgetown County Sherriff returned a *nulla bona* execution on Sapp's judgment against Wheeler (R. pp. 786, 787). Sapp testified that as a result of Wheeler's transfer to Pawleys, he was unable to find any assets held by Wheeler from which his judgment could be satisfied (R. p. 719, line 1-p. 721, line 2).

IV. STANDARD OF REVIEW

An action to establish lien priorities regarding property that is subject to a mortgage is an action in equity, as is an action to foreclose a mortgage. The appellate court's standard of review in equitable matters is its own view of the preponderance of the evidence. *Independence National Bank v. Buncombe Professional Park, LLC*, 402 S.C. 514, 741 S.E.2d 572 (Ct. App.

2013). Likewise, an action to set aside a conveyance under the Statute of Elizabeth is an equitable action, and a *de novo* standard of review applies. *Oskin v. Johnson*, 400 S.C. 390, 735 S.E.2d 459 (2012). “[T]he appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence.” *Id.*, 400 S.C. at 397, 735 S.E.2d at 463. *Oskin* further states the oft-cited principle that an appellate court is not required to disregard the findings of the trial Court who is in a better position to assess the credibility of the witnesses. However, in the case before this court, the only witnesses who testified before the Master were Kennedy’s damages’ witness and Sapp, and the Master made no credibility judgments as to either.

V. ARGUMENT

A. The transfer of property valued at \$1,920,000.00 for “the sum of FIVE AND NO/100 DOLLARS and no other consideration” to a limited liability company (Pawleys) in which the grantor Wheeler held a 99% membership interest, must be set aside as a fraudulent conveyance where the grantor Wheeler was indebted to the creditor Sapp at the time of the transfer, the conveyance was voluntary, and Wheeler failed to retain sufficient property to pay his indebtedness to Sapp.

The Statute of Elizabeth declares:

Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, and execution which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, covinous, or fraudulent devices and practices are, must, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

S.C. Code Ann. § 27-23-10(A) (2007).

Conveyances shall be set aside as fraudulent under the Statute of Elizabeth under two conditions:

First, where the transfer is made with the actual intent of defrauding his creditors where the intent is imputable to the grantee, even though there is a valuable consideration; and, second, where a transfer is made without actual intent to defraud the grantor's creditors, but without consideration.

Coleman v. Daniel, 261 S.C. 198, 208, 199 S.E.2d 74, 79 (1973).

Wheeler's transfer of the Property to Pawleys fails under both conditions. This transfer is void and the Property is subject to Sapp's judgment against Wheeler.

In *Coleman*, the South Carolina Supreme Court reversed a referee and circuit court judge who had found that a transfer of property was not fraudulent and, therefore, refused to order the sale of property in satisfaction of a judgment creditor's liens. The facts of *Coleman* are almost exactly the same as the facts in this appeal with one striking difference which makes Wheeler's conveyance even more fraudulent. The facts of *Coleman* are compared with the case before this court in the table below:

<i>Coleman</i> Facts:	Sapp Facts:
1. Sometime prior to October 26, 1964 (the date of the conveyance under attack), Linzie Rogers executed notes in favor of Coleman and became indebted to Coleman.	Sometime prior to May 5, 2009 (the date of the conveyance under attack), Wheeler guaranteed the real property lease payments of a business to Sapp and became indebted to Sapp.
2. On October 26, 1964, Rogers made an intra-family transfer of property to his daughter Annie Daniel and her husband (the Daniels).	On May 5, 2009 Wheeler made an intra-family transfer of the Property to Pawleys, a limited liability company in which he and his mother held 100% of the membership interest.
3. The deed recited consideration of "\$5, love and affection, and subject to the lien of a mortgage held by Lake City Building & Loan Association" which was \$29,000.	The deed recited consideration as "the sum of FIVE AND NO/100 DOLLARS (\$5.00) and no other consideration to the Grantor." At the time of the transfer, lot 4 of the Property was subject to a \$300,000.00 mortgage in favor of First South Bank. Lot 3 was unencumbered.
4. The Daniels contended there was an additional \$20,000 in consideration for the transfer. The Court concluded that the	Wheeler did not testify at trial and has never contended that he received any consideration, much less additional consideration for the

maximum consideration was \$49,000 (the \$29,000 mortgage plus the \$20,000 alleged additional consideration).	transfer.
5. Daniels did not assume payment of the Lake City mortgage; however, they secured a loan from another financial institution for \$32,000 and paid the Lake City Building & Loan mortgage.	Pawleys did not assume payment of the First South Bank mortgage; however, it secured a loan from Kennedy receiving \$697,438.50 of which it paid \$300,000.00 to First South Bank.
6. The Daniels were solely liable for the payment of the Lake City Building & Loan debt. Rogers had no liability.	Notably different from the <i>Coleman</i> case is that Wheeler executed a personal guaranty of the Kennedy loan to Pawleys. The guaranty describes Wheeler's obligation as "a primary obligation" and as "a continuing inexhaustible guaranty." Thus, Wheeler remained fully liable for the First South debt and mortgage on lot 4, and received no benefit (consideration) as his liability was simply transferred to Kennedy. (Kennedy Exhibit 1, R. pp. 358-368).
7. The transferred property appraised between \$85,000 and \$100,000.00.	The undisputed appraisal for the property was \$1,920,000.00; \$1,040,000.00 for lot 3, and \$880,000.00 for lot 4.
8. The supreme court found a discrepancy in the consideration received by the grantor compared to the property's value. The discrepancy was between \$36,000 and \$51,000 (\$49,000 (the maximum consideration received based on the grantor's testimony) as compared to the appraised value range of \$85,000 to \$100,000). The supreme court held that an exact determination of the actual consideration received by the grantor was irrelevant because even assuming the highest possible consideration and lowest value, the consideration was grossly inadequate.	There was a discrepancy in the consideration received by the grantor Wheeler compared to the Property's value. The discrepancy was \$1,919,995.00 pursuant to the recited consideration in the deed (\$5.00), and even if one were to include the First South payoff, there was a discrepancy of \$1,619,995. ³
9. Under the supreme court's analysis, the consideration for the transfer was somewhere between 49% (\$49,000 ÷ \$100,000) and 58%	The consideration the grantor Wheeler received for the transfer was 0% (\$5.00 ÷ \$1,920,000.00).

³ The mortgage payoff by Pawleys was not consideration to Wheeler for the transfer. Since Wheeler offered no testimony at trial, to find that the mortgage payoff by Pawleys was consideration for the transfer of the Property by Wheeler would require both this court and the trial court to speculate beyond the evidence in the record ("FIVE AND NO/100 DOLLARS (\$5.00) and no other consideration"). Further, as the guarantor of Pawleys debt to Kennedy, Wheeler received no benefit since he remained obligated for the full amount of the mortgage payoff.

(\$49,000 ÷ \$85,000) of the property's value.	
10. The referee and circuit court judge erred in dismissing the judgment creditor's Complaint, failing to find the transfer fraudulent, and failing to order the sale of the property in satisfaction of Coleman's judgment liens.	Subject to this court reversing the Master's orders, the Master erred in dismissing Sapp's fraudulent conveyance claim and in failing to rule that his lien on the property superseded any interest that Kennedy might hold.

Under facts more favorable to the grantor in *Coleman* than the facts favorable to Wheeler, the Supreme Court held that the deed by Rogers to the Daniels was void and that the deeded property was subject to Coleman's judgments. On its *de novo* review of the evidence, the court found the circumstantial evidence sufficient to overcome Coleman's (the grantor's) testimony that the transfer was not fraudulent. In this case there was no testimony by Wheeler and the circumstantial evidence points only to a fraudulent transfer.

In analyzing the circumstantial evidence, the court stated, "Fraud is seldom proved by direct evidence. More often, it is proved by circumstantial evidence." *Coleman*, 261 S.C. at 207, 199 S.E.2d at 78. Quoting from *Dinkins v. Robbins*, 200 S.C. 475, 21 S.E.2d 10 (1942), the court further stated:

Fraudulent intent in such instances can usually be shown only by a consideration of the attendant facts and circumstances, a resort to which must usually be had in order to distinguish between transactions which are bona fide, and those which are not. The Courts frequently must resort to evidence or circumstances which are not properly explained, when such circumstances lead to the belief that a fraudulent intent was present.

Coleman, 261 S.C. at 209, 199 S.E.2d at 79.

In the case before this court, the circumstances of Wheeler's transfer to Pawleys were never explained, much less "properly explained" by either of them.

The *Coleman* court further stated:

Certain circumstances so frequently attend conveyances to defraud creditors that they are recognized and referred to as 'badges of fraud'. The badges tend to excite suspicions as to the Bona fides of a challenged conveyance. Unexplained,

they may warrant an inference of fraud. Whether the inference is warranted depends in large measure on whether a satisfactory explanation is presented.

The facts which are recognized indicia of fraud are numerous, and no court could pretend to anticipate or catalog them all. Among the generally recognized badges of fraud are the insolvency or indebtedness of the transferor, lack of consideration for the conveyance, relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment, departure from the usual method of business, the transfer of the debtor's entire estate, the reservation of benefit to the transferor, and the retention by the debtor of possession of the property.

Although it has been said that a single badge of fraud may stamp a transaction as fraudulent, it is more generally held that while one circumstance recognized as a badge of fraud may not alone prove fraud, where there is a concurrence of several such badges of fraud an inference of fraud may be warranted.

Practically all of the indicia of fraud enumerated above are present in this case, and we think the lower court erred in concluding factually that the conveyance was Bona fide on the part of Linzie Rogers.

Coleman, 261 S.C. at 209 – 210, 199 S.E.2d at 79 – 80.

In the case before this court, the enumerated badges of fraud are present and unexplained given Wheeler's and Pawley's silence.

- ✓ Wheeler was indebted to Sapp at the time of the transfer.⁴
- ✓ There was no consideration for the transfer, or at best, the consideration received by Wheeler was grossly inadequate.
- ✓ The transferor (Wheeler) conveyed the Property to a family owned limited liability company solely owned by him and his mother. As to Sapp, the effect of this transfer was to remove the Property, and in particular the unencumbered lot 3 worth over one million

⁴ It makes no difference that Sapp's suit had not been reduced to judgment at the time of the conveyance. The Statute of Elizabeth applies even where a debt has not been reduced to a judgment. *Albertson v. Robinson*, 371 S.C. 311, 638 S.E.2d (Ct. App. 2006), holding that a creditor's claim only needs to be in existence, not reduced to judgment, at the time of the transfer. Wheeler's debt to Sapp was in existence at the time of transfer as Sapp had brought suit on it and he later reduced the debt to a judgment. *See also, Lebovitz v. Mudd*, 293 S.C. 49, 358 S.E.2d 698 (1987).

dollars, from Sapp's ability to execute on it since Sapp had no claim or judgment against Pawleys Island North, LLC.

- ✓ Litigation was pending.
- ✓ The transfer was carried out in secret without Sapp's knowledge (Trial Tr., R. p. 719, line 1-p. 720, line 21).
- ✓ Wheeler had owned the property in fee simple for years and departed from his normal course of business by conveying it to the LLC.
- ✓ The transfer rendered Wheeler insolvent as he never paid anything on the debt, the Sapp execution was returned *nulla bona*, and he had no other unencumbered property on which to execute. (Trial Tr., R. p. 719, line 1-p. 721, line 2).
- ✓ Wheeler, through the LLC he owned, reserved the use, possession and development of the lots.

There is not just a single badge of fraud; Wheeler's transfer of the Property is rife with fraud.. The trial judge erred in finding that the transfer by Wheeler to Pawleys was not a fraudulent conveyance in violation of the Statute of Elizabeth. Turning the conditions under which conveyances have been deemed fraudulent, Sapp makes the following specific arguments:

- 1. Even if there was no actual intent to defraud Sapp, the conveyance by Wheeler to Pawleys was fraudulent when it was without consideration.**

A transfer of property shall be set aside as fraudulent under the Statute of Elizabeth where it is made without actual intent to defraud the grantor's creditors, but without consideration. *Coleman v. Daniel*, 261 S.C. 198, 208, 199 S.E.2d 74, 79 (1973) citing *Jeffords v. Berry*, 247 S.C. 347, 147 S.E.2d 415 (1966). In the case before this court, the transfer was

without consideration to the grantor. Therefore, it is void even if the Master could have correctly determined that Wheeler had no fraudulent intent in transferring the property to Pawleys.⁵

[A] transfer made without valuable consideration will be set aside as a fraudulent conveyance if the grantor was indebted to the plaintiff at the time of the transfer and the grantor failed to retain sufficient property to pay his debt to plaintiff, not merely at the time of transfer, but at the time plaintiff seeks to collect.

Future Grp., II v. Nationsbank, 324 S.C. 89, 96, 478 S.E.2d 45, 48 (1996).

Here, the transfer was without consideration, Wheeler was indebted to Sapp at the time of the transfer, and Wheeler failed to retain sufficient property to pay Sapp as evidenced by the *nulla bona* return and Sapp's testimony (R. p. 719, line 1–p. 721, line 2; R. pp. 786, 787).

The only consideration the Master could find for Wheeler to support the transfer to Pawleys was simply incorrect. The Master erred when he concluded that the transfer by Wheeler to Pawleys was supported by valuable consideration. At paragraph 32 of the Master's order (R. pp. 11, 12), the Master found that Wheeler increased the value of his membership interest in Pawleys by over \$1,900,000.00 by the conveyance and that this was valuable consideration to support the transfer. Actually, Wheeler lost \$1,920,000.00 by the transfer, the full value of the Property. Had the Master completed his analysis, he would have realized that, the transfer, in fact, was a net loss for Wheeler. At best, had Wheeler been a 100% owner of the limited liability company, the transfer would have been a "wash" in benefit for Wheeler. Wheeler, however, had only a 99% membership interest in Pawleys. Wheeler actually diluted his holdings by the transfer and received no benefit; therefore, the transfer was not supported by any consideration. Further, even if the value of the membership increased, it was more than offset by the liability which Wheeler incurred by guaranteeing Pawleys' debt to Kennedy, another fact which the Master simply overlooked.

⁵ The issue of Wheeler's fraudulent intent is developed in Argument A.3., *infra*.

2. If the consideration for the transfer is deemed grossly inadequate, instead of being completely without consideration, Wheeler failed to overcome the rebuttable presumption of fraud arising from a transfer made for grossly inadequate consideration when he failed to offer any testimony as to the *bona fides* of the transfer.

Assuming *arguendo* that on *de novo* review this court finds that the conveyance by Wheeler to Pawley's was supported by consideration, at best it could only be inadequate consideration. For example, despite Wheeler's continuing liability to Kennedy for paying off the First South debt, perhaps the court could find a \$300,000.00 consideration.⁶ This court could consider the possible payment of \$5.00 to be actual consideration. Under either scenario, the consideration would be deemed grossly inadequate.

In *Coleman*, the Supreme Court found that the maximum consideration for the transfer of property was 58% of the value of the property conveyed (\$49,000 received ÷ \$85,000 property value). It found this consideration to be grossly inadequate. Assuming Wheeler received \$300,000.00 on property valued at \$1,920,000.00, or 15% consideration, it would follow under *Coleman* that such consideration is grossly inadequate. After determining that the transfer was for grossly inadequate consideration, the *Coleman* court placed the burden on the transferee (here Pawleys) to prove the *bona fides* of the transaction by clear and convincing testimony. *Coleman*, 261 S.C. 208, 211, 199 S.E.2d 79, 80. *Coleman* and other courts have followed this analytical framework in situations involving family members following the case of *Gardner v. Kirven*, 184 S.C. 37, 191 S.E. 814 (1937):

Where transfers to members of the family are attacked either upon the ground of actual fraud or on account of their voluntary character, the law imposes the burden on the transferee to establish both a valuable consideration and the *bona fides* of the transaction by clear and convincing testimony.

⁶ Appellant Sapp does not concede this to be valuable consideration and it is simply set forth here to foreclose any argument which Kennedy may make.

Coleman v. Daniel, 261 S.C. 198, 208, 199 S.E.2d 74, 79 (1973).

The case before this court involves an intra-family transfer where Wheeler conveyed the property to the limited liability company owned by him and his mother. The fact that one of the parties is a limited liability company makes no difference. In *Windsor Properties v. Dolphin Head Const. Co., Inc.*, 331 S.C. 466, 498 S.E.2d 858 (1998), Dolphin Head Construction, Inc. was a corporation wholly owned by Ralph Liscio. Dolphin Head transferred property to Ralph's wife, Linda. A creditor successfully attacked the conveyance under the Statute of Elizabeth despite the Liscios' argument that Linda had advanced thousands of dollars to purchase and renovate the property. The Supreme Court determined the conveyance from the corporation to the wife to be a transfer to a family member ("this was in reality an intra-family transfer"). It followed *Kirven* and stated that Linda (the transferee) had the burden of proving by clear and convincing testimony that there was consideration and that the transaction was *bona fide*. *Windsor Properties*, 331 S.C. at 471, 498 S.E.2d 861.

As Pawleys failed to offer any evidence, Pawleys failed to prove by any standard of proof, much less a clear and convincing standard, that it gave consideration for the transfer and that the transfer was *bona fide*. In fact, in the witnessed and notarized deed, Pawleys' 99% member Wheeler said the only consideration was \$5.00 "and no other consideration." Thus, even if there was grossly inadequate consideration for the transfer, the Master erred by finding there was no fraudulent transfer since the grantee failed to offer any evidence of the *bona fides* of the transfer.

3. Even if there was consideration for the transfer by Wheeler, the conveyance was fraudulent where it was made by Wheeler with actual intent to defraud Sapp and the intent is imputable to the grantee in which he held a 99% membership interest.

In *Royal Z Lanes, Inc. v. Collins Holding Corp.*, the Supreme Court stated:

In answering the certified question now before us, we are asked to consider whether a grossly inadequate consideration (here less than 20% of the property's value) is sufficient to set aside the conveyance as fraudulent. As noted above, grossly inadequate consideration is treated as a "badge of fraud" under this Court's precedent. *See also McGhee v. Wells*, 57 S.C. 280, 35 S.E. 529, 531 (1900) (defining grossly inadequate consideration as "a consideration so far short of the value of the property as to arouse a presumption in the mind that the person who takes that property takes it under some kind of secret trust."). A badge of fraud creates a rebuttable presumption of intent to defraud. *Dinkins v. Robbins*, 200 S.C. 475, 21 S.E.2d 10 (1942); *James v. Martin*, 150 S.C. 75, 147 S.E. 752 (1929).

337 S.C. 592, 596, 524 S.E.2d 621, 623 (1999).

The transfer by Wheeler to Pawleys was either without consideration or for grossly inadequate consideration. Further, there were other badges of fraud associated with the transfer. For example, Wheeler was indebted to Sapp at the time of transfer; Wheeler retained possession and control of the Property; and the transfer was intra-family. Given these and other badges of fraud, the Master erred by finding that the conveyance was not fraudulent because there was an un-rebutted presumption of fraud which arose from the transaction.

The Master erred at paragraph 32 of the Order (R. pp. 11, 12) where he declared that there was no fraudulent intent in the transfer from Wheeler to Pawleys because there was no proof presented on the issue. The badges of fraud furnish the fraudulent intention, and it became Wheeler's obligation to rebut the proof. In *Dinkins v. Robbins*, the court stated:

Quoting further from the language of Justice John Belton O'Neill in the case of *Smith v. Henry*, supra, we find on page 122 of 2 Bailey, on page 122 of 18 S.C.L.: "Applicable to this case, we have some general and well defined rules, by which it can be tested. Two of the most usual badges or evidences of a fraudulent sale are, first, the vendor's retaining possession, after an absolute sale; second, the pendency of suits against him, at the time of a sale or transfer of the most valuable part of his property. *** Where, after an absolute sale, the vendor still retains possession, I have always thought that it was a fraud per se, in other words that it was a legal fraud; and, if I have been in error in this respect, I have the consolation of knowing, that I am in company with the late venerable and distinguished Judge Nott, and with Chancellor Kent."

In the syllabus to that case we find the following on page 119 of 2 Bailey, on page 119 of 18 S.C.L.: "The idea of a badge of fraud is, that it furnishes a legal presumption of a fraudulent intention, which supersedes inquiry into the actual intention; and every badge of fraud is therefore evidence of a legal fraud, or fraud per se. It does not change the essential character of the presumption, that sometimes it may be rebutted, and sometimes not; for, until it is rebutted, the presumption remains, and whether rebutted or not, presents a question for the determination of the court, and not of the jury."

200 S.C. 475, 21 S.E.2d 10, 16 (1942) (emphasis added).

As Pawleys and Wheeler failed to offer any evidence, Pawleys and Wheeler failed to rebut the presumption of fraud for the transfer between them ("for until it is rebutted, the presumption remains"), and the Master erred in finding that the transfer was not fraudulent.

Under the conditions outlined in many South Carolina cases, including the *Coleman* case, the conveyance by Wheeler to Pawleys is fraudulent as to Appellant Sapp. The conveyance should not survive under any analytical framework as shown in the preceding three arguments, A.1, A.2, and A.3.

B. Where a mortgage is given on property by a fraudulent grantee (Pawleys) to a subsequent creditor (Kennedy) who has notice of the fraud, the mortgage is void as to an existing creditor (Sapp) of the fraudulent grantor (Wheeler).

Before Kennedy loaned money to Pawleys (the fraudulent grantee) at the April 30, 2009 closing, Kennedy had actual knowledge by email dated March 11, 2009 that the Property was personally owned by Wheeler, and that Wheeler planned to transfer it to Pawleys (Wolfer Deposition 1, R. p. 193, line 15–p. 196, line 17; Kennedy's Ex. 3, R. p. 521). Kennedy also had actual knowledge that litigation was pending against Wheeler, that Wheeler owed a debt to Sapp, and that Sapp was seeking damages for Wheeler's failure to perform under a lease guaranty. In a memorandum to Kennedy dated April 9, 2009, three weeks before the loan closing, its legal counsel advised Kennedy that the Sapp/Wheeler Litigation was pending with an amount demanded of \$556,099 (Kennedy's Ex. 1, R. pp. 505, 506).

Two days prior to closing, Kennedy's counsel provided Kennedy's CEO and President, Kevin Wolfer, with a closing checklist which stated that the borrower was to provide a status update on the Sapp/Wheeler Litigation (Wolfer Deposition 1, R. p. 204, line 9–p. 205, line 24; and Kennedy's Ex. 4, R. pp. 525, 531). On April 29, the day before the closing, Kennedy's counsel sent an email to Wheeler's, Wheeler-Cribb's and Pawleys' counsel (Robert Gwin) requesting the status of an email that Gwin was supposed to send Kennedy's counsel regarding the Sapp/Wheeler Litigation. Despite not getting a response from Mr. Gwin, Kennedy elected to proceed with the loan as long as it had title insurance and there were no encumbrances on the property. Wolfer, Kennedy's SCRPC Rule 30(b)(6) witness, testified that he could not recall if any evaluation of a possible fraudulent conveyance was made for Kennedy (Wolfer Deposition 1, R. p. 202, line 9–p. 204, line 7; Kennedy's Ex. 5, R. p. 539). In short, Kennedy made the loan and assumed the known risk, or at least was willing to transfer the risk to borrower's counsel and a title insurance company.

In addition to the actual knowledge which Kennedy had of the Sapp/Wheeler Litigation, Wheeler transferred the Property to Pawleys by quitclaim deed. In testimony completely lacking in credulity, Wolfer, someone who is familiar with property and lending transactions as the CEO and President of Kennedy, testified that a quitclaim transfer did not raise any concern or red flag⁷ (Wolfer Deposition 1, R. p. 214, line 17–p. 216, line 12; Sapp Ex. 1, R. pp. 750–755).

⁷ Wolfer also incredulously testified that he would not know if the transfer by Wheeler to Pawley's of unencumbered lot 3 would make it more difficult for Wheeler's creditors to satisfy claims against Wheeler from that lot. Likewise, the witness testified that he did not know if the placing of a mortgage on lot 3 would make it more difficult for a creditor to satisfy a claim out of lot 3. The witness was simply being dishonest as the conveyance and the attempt to secure a first lien on the property were solely designed to ensure that Kennedy would take priority over other creditors.

Because Kennedy had notice that the conveyance to Pawleys was fraudulent, Pawleys could not give Kennedy a valid mortgage as to an existing creditor.

In *Rilling v. Schultze*, 95 Tex. 352, 67 S.W. 401 (1902), the Texas Supreme Court held a mortgage executed by a fraudulent grantee was invalid as to creditors of the fraudulent grantor existing at the time of the fraudulent conveyance when the mortgagee had notice of the fraud.

In *Rilling*, Caroline Schultze divorced from Schultze, Jr. She was a creditor of Schultze, Jr. arising from a judgment entered in the divorce proceeding in 1896 in which she was given custody of their child and \$12.50 per month child support with payments beginning July 1, 1896. This divorce judgment, however, did not give Caroline a lien on any of Schultze, Jr.'s property. At the time of the divorce Schultze, Jr. owed Rilling \$500.00 which was determined to be Schultze, Jr.'s debt. In the divorce decree, Schultze, Jr. was awarded various parcels of property, one of which (Presa Street) was already subject to a mortgage to Rilling for Schultze, Jr.'s \$500.00 debt.

After the divorce decree and later in 1896, Schultze, Jr. conveyed all of the property (including Presa Street and 16 lots in San Antonio) he was awarded in the divorce decree to his father, Schultze, Sr., "for a pretended consideration" according to the *Rilling* opinion. On March 1, 1900 Schultze, Sr. supposedly conveyed Presa Street and 16 lots in San Antonio to Rilling for the recited consideration of \$1,500.00. In connection with this transaction, Schultze, Jr. agreed to pay all property taxes and upkeep on the conveyed property, and Rilling agreed to deed the property to Schultze, Jr. after full payment of \$1,500.00 and interest on debt which Schultze, Jr. owed Rilling, part of which was the \$500.00 debt existing at the time of the divorce, the other \$1,000.00 having arisen after the divorce. The court found the conveyance to Rilling from Schultze, Sr. was actually a mortgage in Rilling's favor, and was not a deed transferring

ownership. Like the case before this court and the transfer from Wheeler to Pawleys, Rilling took the mortgage with full knowledge of the facts that existed regarding the conveyance by Schultze, Jr. to his father. *Rilling*, 95 Tex at 354, 67 S.W. 402.

Schultze, Jr. did not pay the child support after January 1897, and in September 1900, Caroline Schultze sued and prayed for (1) cancellation of the deeds to Rilling and the appointment of a receiver to collect rents and pay the child support, or (2) annulment of the deeds and sale of the property to satisfy her claims. The trial court held the judgment awarded Caroline had priority in payment as to the property mortgaged by Schultze, Sr., except as to \$400.00 and interest, that being the balance due upon the \$500.00 debt originally secured by a lien in favor of Rilling which was on record at the time of the divorce.

The Texas Supreme Court affirmed. It held that because Rilling had notice of the fraud in the conveyance from Schultze, Jr. to his father, that Rilling was not a bona fide purchaser from the fraudulent grantee (Sr.). The Texas Supreme Court determined that the debt owed to Rilling consisted largely of debt which arose subsequent to the indebtedness owed by Schultze, Jr. to Caroline arose. Likewise, the debt owed to Kennedy in this case arose after Wheeler was indebted to Sapp. The Texas Supreme Court found Rilling's mortgage to be invalid as to all indebtedness created at the time the mortgage was executed:

The grantee can no more give a lien to a subsequent creditor who has notice of the fraud than he can sell to a purchaser with such notice. Very clearly the mortgage is not valid as to the debts created at the time the mortgage was executed; and since Rilling has failed to show that his judgment was for a debt which existed at the time of the execution of the fraudulent conveyance, the mortgage as to that debt must also be held void as to Caroline Schultze.

Rilling, 95 Tex. at 358, 67 S.W.2d 404.

Rilling is very close factually to the case before this court; however, the *Rilling* court found the lien of Rilling which existed at the inception of the debt coming due to Caroline

Schultze to have priority. Mortgagees with no preexisting debt, such as Kennedy in this case, who advance money after the debt is incurred by the fraudulent grantee, are not accorded such favorable treatment in South Carolina.

In *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973), after acquiring the property at issue, the fraudulent grantees (the Daniels) borrowed \$32,000 from a financial institution. This financial institution is not identified in the opinion, but will be referred to as "New Lender." New Lender paid off an existing \$29,000 mortgage on the fraudulently conveyed property, and recorded a new mortgage executed by the fraudulent grantees.⁸ The Supreme Court held that the conveyance was void as to the creditor (Coleman), that the property was subject to Coleman's judgments and that Coleman could seek an order of the lower court for sale of the property in satisfaction of his judgments. Justice Bussey authored a lone dissent. He stated that Coleman should only be paid to the extent that the sales price exceeds the consideration actually paid or assumed by the fraudulent grantees. The four justice majority refused to adopt this analysis.

In *Coleman*, there was no finding that New Lender was on notice of the fraudulent conveyance. Nevertheless, the Supreme Court did not provide for payment of New Lender's debt from the sale of the property. By finding the transfer void as to Coleman, the Supreme Court effectively negated New Lender's mortgage as to Coleman.

In the case before this court, the Master found that Kennedy was a good faith purchaser for value; therefore, Kennedy did not participate in a plan to defraud Sapp. These findings are erroneous at best, and most likely irrelevant under *Coleman*. For hundreds of years in South Carolina, the term good faith purchaser for value includes the concept of lack of notice. *See*,

⁸ The opinion does not state why there was a \$3,000.00 difference in the new loan and the existing mortgage. Presumably closing costs, legal fees, or a cash-out to the borrower account for the difference.

e.g., *Messervy v. Barelli*, 11 S.C. Eq. (2 Hill Eq.) 576 (1837) and *Brunson v. Sports*, 239 S.C. 58, 121 S.E.2d 294 (1961). In *Messervy*, a mortgage was deemed subordinate to the rights of the grantee's wards where the mortgagee took the mortgage with notice of the wards' claims against the mortgagor. Similarly, in *Brunson*, Dukes took a deed to property from West. The property was subject to an unrecorded trust. Dukes had notice of the unrecorded trust. The Supreme Court stated, "The law is well settled that actual notice of an outstanding equity will cut off the defense of bona fide purchaser." 239 S.C. at 68, 121 S.E.2d at 299. The court further stated that even if Dukes secured from reputable counsel an opinion that his paper title was good, that the property was impressed with a trust in favor of the respondents.

Kennedy knew that Sapp was subject to a pending legal action asserting a claim of over \$500,000.00. It stopped investigating the fraudulent nature of the transaction because it secured an attorney's opinion and title insurance. Based on Kennedy's notice of Sapp's claim, and even with an opinion of counsel, Kennedy cannot be a bona fide purchaser.

Even if Kennedy could be determined to be a good faith purchaser for value without notice, it is irrelevant under *Coleman*. In *Coleman*, there was no examination of the New Lender's good faith. The court did not delve into the lender's bona fides. The Supreme Court held that the transfer was void and that the property could be sold to satisfy Coleman's liens, not New Lender's mortgage. The dissent would have given priority to New Lender, but that was not the court's holding.

The mortgage given by the fraudulent grantee (Pawleys) to Kennedy, a creditor subsequent in time to Wheeler's debt owed to Sapp, is void as to Sapp regardless of Kennedy's knowledge of the fraudulent conveyance, but even more particularly in this case since Kennedy was on notice of the fraud.

C. Where a fraudulent grantee creates new debt and gives a lender a mortgage for inadequate consideration when compared to the value of property, and the lender is on notice of the fraudulent conveyance, the mortgage shall be set aside as a fraudulent conveyance, or declared subordinate to a creditor of the fraudulent grantor.

Before Kennedy loaned money to Pawleys (the fraudulent grantee) at the April 30, 2009 closing, Kennedy had actual knowledge by email dated March 11, 2009 that the Property was personally owned by Wheeler, and that Wheeler planned to transfer it to Pawleys (Wolfer Deposition 1, R. p. 193, line 15–p. 196, line 17; and Kennedy's Ex. 3, R. p. 521). Kennedy also had actual knowledge that litigation was pending against Wheeler, and that Sapp was seeking damages for Wheeler's failure to perform under a lease guaranty. In a memorandum to Kennedy dated April 9, 2009, three weeks before closing, its legal counsel advised Kennedy that the Sapp/Wheeler Litigation was pending with an amount demanded of \$556,099 (Kennedy's Ex. 1, R. pp. 505, 506).

Two days prior to closing, Kennedy's counsel provided Kennedy's CEO and President, Kevin Wolfer, with a closing checklist which stated that the borrower was to provide a status update on the Sapp/Wheeler Litigation (Wolfer Deposition 1, R. p. 204, line 9–p. 205, line 24; and Kennedy's Ex. 4, R. pp. 525, 531). On April 29, 2009, the day before the closing, Kennedy's counsel sent an email to counsel for Wheeler, Wheeler-Cribb and Pawleys requesting the status of an email that borrowers' counsel was supposed to send Kennedy's counsel regarding the status of the Sapp/Wheeler Litigation. Despite not getting a response from borrowers' counsel, Kennedy elected to proceed with the loan as long as it had title insurance and there were no encumbrances on the property. Wolfer, Kennedy's SCRCF Rule 30(b)(6) witness, testified that he could not recall if any evaluation of a possible fraudulent conveyance was made for Kennedy (Wolfer Deposition 1, R. p. 202, line 9–p. 204, line 7; and Kennedy's Ex. 5, R. p. 539).

In addition to the actual knowledge which Kennedy had of the Sapp/Wheeler Litigation, Wheeler transferred the Property to Pawleys by quitclaim deed. In testimony completely lacking in credulity, Wolfer, someone who is familiar with property and lending transactions as the CEO and President of Kennedy, testified that a quitclaim transfer did not raise any concern or red flag⁹ (Wolfer Deposition 1, R. p. 214, line 17–p. 216, line 12; Sapp Ex. 1, R. pp. 750–755).

Despite Kennedy's knowledge that (1) the Property was being transferred by quitclaim deed; (2) Wheeler was the sole owner of the Property; (3) Wheeler was transferring the property for no consideration to Pawleys; (4) Pawleys was a family owned limited liability company in which Wheeler held a 99% membership interest; and (5) that Wheeler was indebted to an existing creditor, Kennedy loaned less than 50% of the Property's value to Pawleys and took a mortgage on the Property. Kennedy participated in Wheeler's and Pawleys' fraudulent scheme. The finding by the Master that Kennedy did not participate (Order, para. 31, R. pp. 10, 11) cannot be supported by this court's *de novo* review of the evidence as a whole. The Master's finding goes against the preponderance of the evidence. Because Kennedy was complicit in the fraud, Pawleys could not give Kennedy a valid mortgage as to an existing creditor.

In *South Carolina National Bank v. Halter*, 293 S.C. 121, 359 S.E.2d 74 (Ct. App. 1987), the court held that a mortgage could be set aside as a fraudulent conveyance where it was not supported by valuable consideration or the lender participated in the fraud. This court examined a transaction in which the lender secured a mortgage based on valuable consideration of an

⁹ Wolfer also incredulously testified that he would not know if the transfer by Wheeler to Pawley's of unencumbered lot 3 would make it more difficult for Wheeler's creditors to satisfy claims against Wheeler from that lot. Likewise, the witness testified that he did not know if the placing of a mortgage on lot 3 would make it more difficult for a creditor to satisfy a claim out of lot 3. The witness was simply being dishonest as the conveyance and the attempt to secure a first lien on the property were solely designed to ensure that Kennedy would take priority over other creditors.

existing debt owed to Halter; therefore, this court held that the judgment creditor needed to prove that the judgment debtor intended to hinder, delay or defraud his creditors, and that the mortgagor participated in the fraud. In its analysis, the court relied upon *Lenhardt v. Ponder*, 64 S.C. 354, 42 S.E. 169 (1902).

Lenhardt refused to set aside a deed as a fraudulent conveyance under the Statute of Elizabeth, but its holdings are instructive as to how the Master erred in this case. *Lenhardt* quoted with approval from the case of *Magovern v. Richard*, 27 S.C. 272, 3 S.E. 340 (1887). It set forth a two step analysis when examining a mortgage that was attacked as a fraudulent conveyance: first, was the mortgage supported by an existing debt such that there is consideration for the mortgage; and, second, did the mortgagor participate in the fraud?

In each of the three cases mentioned (*South Carolina Nat'l. Bank*; *Lenhardt*; and *Magovern*) each mortgagor was already indebted to and owed money to each mortgagee at the time the mortgage was given. The mortgages were given to secure preexisting debt. Based on the existing debts owed by the mortgagors, each court found the mortgage conveyance to be supported by valuable consideration. In the case before this court there was no debt owed to Kennedy until the loan closed. Thus, the Kennedy loan fails the first test of these three cases. It is of no moment that Kennedy may have loaned new money under the analysis of *South Carolina Nat'l. Bank*, *Lenhardt*, and *Magovern*. In essence, it appears that the South Carolina courts would follow the *Rilling* case, *supra*, which declared void a mortgage on new debt incurred by the fraudulent grantor.

Even if this court were to determine that Kennedy's loan was supported by consideration, the consideration would be grossly inadequate, and a court of equity should not uphold such a fraudulent mortgage. *Lenhardt* specifically stated that "a bona fide creditor has the right to

obtain a transfer of property from an insolvent debtor, at a fair price, for the sole purpose of securing or paying the debt." (emphasis added) Here, the mortgage of an unencumbered lot and the entire Property which was valued at \$1,920,000 for a \$774,000 loan was not a fair price. The consideration was grossly inadequate as lot 4 alone, with a value of \$880,000, supported the value of the loan, especially considering that Kennedy also secured the personal guarantees of Wheeler and Wheeler-Cribb.

Not only does Kennedy fail the first test of lack of consideration articulated in *South Carolina Nat'l. Bank, Lenhardt, and Magovern*, but it also follows that Kennedy's participation in the fraud would make the mortgage invalid, *i.e.*, Kennedy was not a bona fide creditor. If Kennedy did not know that there was a fraudulent conveyance by which Wheeler had conveyed the Property to Pawleys, it certainly had notice thereof. Further its loan of \$774,800 secured by the mortgage on lot 4 with a value of \$880,000.00 and lot 3 with a value of \$1,040,000.00 clearly put the property out of reach of Wheeler's legitimate creditors including Sapp. It cannot be contended that with all the documentation produced and legal fees paid by Kennedy that one intended consequence of Kennedy was not to put Wheeler's Property beyond the reach of Sapp and any other of Wheeler's existing creditors.

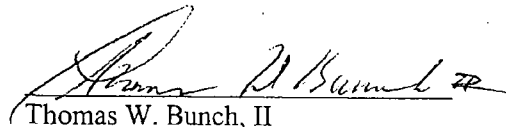
Since Pawley's debt did not exist prior to the execution of the mortgage to Kennedy, since the debt was for 40% of the Property's total value, and since Kennedy was on notice (or knew) of the fraudulent conveyance and participated in the fraud, the mortgage should be set aside as a fraudulent conveyance, or declared subordinate to Sapp's lien on the Property.

V. CONCLUSION

This court should reverse the Master's Order on Summary Judgment and the final Order and Judgment. Based on a *de novo* review of the record, it is clear and convincing that Wheeler

fraudulently conveyed the Property to Pawleys, that the mortgage given by Pawleys to Kennedy is not valid as to Sapp, and that the Property should be sold in satisfaction of Wheeler's debt owed to Sapp. Alternatively, the mortgage of the previously unencumbered lot 3 should be set aside and that lot should be sold in satisfaction Sapp's claim.

Respectfully submitted,



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December 13th, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

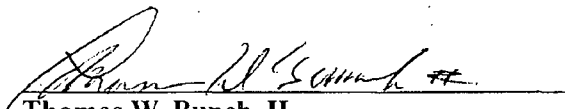
v.

Pawleys Island North, LLC, Will Darwin Wheeler, Peggy Wheeler-Cribb, and J. Mars
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of whom Pawleys Island North, LLC, Will Darwin Wheeler and Peggy Wheeler-Cribb
are Respondents and

J. Mars Sapp is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Appellant complies with Rule
211(b), SCACR.



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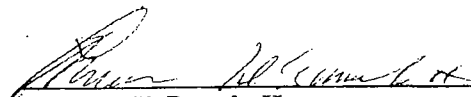
I certify that I have served Appellant's Final Brief on opposing counsel by depositing a
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Joe M. Crosby, Master-In-Equity

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

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

v.

Pawleys Island North, LLC, Will Darwin Wheeler,
Peggy Wheeler-Cribb, and J. Mars Sapp, Defendants,

Of Whom Pawleys Island North, LLC, Will Darwin
Wheeler and Peggy Wheeler-Cribb are Respondents, and

J. Mars Sapp is the Appellant.

FINAL BRIEF OF RESPONDENTS

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Table Of Contents

Table Of Authorities.....	iii
STATEMENT OF ISSUES ON APPEAL	1
I. Did the Master Err in its Determination that the Mortgage Transaction between Pawleys and Kennedy was not Fraudulent?	1
II. Did the Master Err in its Determination that the Conveyance of the Property from Wheeler to Pawleys was not Fraudulent?.....	1
III. Do Equity and the South Carolina Recording Statute Dictate that Kennedy's Lien is Superior to Sapp's Lien?	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
I. BNP Lien	4
II. Sapp's Alleged Lien	6
III. Wheeler's Alleged Insolvency	6
IV. Kennedy's Due Diligence	7
V. Transfer from Wheeler to Pawleys.....	9
STANDARD OF REVIEW	10
ARGUMENT	11
I. THE KENNEDY MORTGAGE TRANSACTION DID NOT VIOLATE THE STATUTE OF ELIZABETH	11
A. The Mortgage was Given to Kennedy in Exchange for Valuable Consideration.....	11
B. Kennedy Had No Notice of Any Fraudulent Activity	15
II. THE TRANSFER FROM WHEELER TO PAWLEYS WAS NOT A FRAUDULENT CONVEYANCE.....	17

A.	The Transfer from Wheeler to Pawleys was not an Intra-Family Transfer, and the Burden of Proof Remains on Appellant to Prove by Clear and Convincing Evidence that the Conveyance was Fraudulent.....	18
B.	Wheeler Did not Transfer the Property to Pawleys with the Actual Intent to Defraud Sapp.....	19
C.	The Transfer of the Property to Pawleys was Supported by Valuable Consideration	21
1.	If the Court finds no consideration, Sapp has failed to prove Wheeler was insolvent or lacked resources to pay the debt at the time of judgment	24

III.	EQUITY AND THE RECORDING STATUTE DICTATE RESPONDENT'S LIEN IS SUPERIOR.....	25

Table Of Authorities

CASES

<i>Albertson v. Robinson</i> , 371 S.C. 311, 638 S.E.2d 81 (2006)	24
<i>Atlas Supply Co. v. Davis</i> , 273 S.C. 392, 256 S.E.2d 859 (1979).....	25, 26
<i>Beckham v. Short</i> , 294 S.C. 415, 365 S.E.2d 42 (1988).....	22
<i>Brunson v. Sports</i> , 239 S.C. 58, 121 S.E.2d 294 (1961).....	17
<i>Coleman v. Daniel</i> , 261 S.C. 198 (1973)	12, 13, 18, 19, 21, 24
<i>Dinkins v. Robbins</i> , 200 S.C. 475, 21 S.E.2d 10 (1942).....	21
<i>Durham v. Blackard</i> , 313 S.C. 432, 438 S.E.2d 259 (Ct.App.1993)	19
<i>Epps v. McCallum Realty Co.</i> , 129 S.C. 481, 138 S.E. 297 (1927).....	25
<i>Fibkins v Fibkins</i> , 303 S.C. 112, 399 S.E.2d 158 (Ct.App. 1990)	25
<i>Future Group, II</i> , 324 S.C. at 97 n. 6, 478 S.E.2d at 49 n. 6; S.C. Const. art. V, § 510, 11, 21	
<i>Hursey v. Hursey</i> , 284 S.C. 323, 327, 326 S.E.2d 178, 180 (Ct. App. 1985)	26
<i>Jefords</i> , 247 S.C. at 352, 147 S.E.2d at 418).....	23
<i>McDaniel v. Allen</i> , 265 S.C. 237, 242–43, 217 S.E.2d 773, 775–76 (1975)	11
<i>Messervy v. Barelli</i> , 11 S.C. Eq.. (2 Hill Eq.) 576 (1837).....	17
<i>Oskin v. Johnson</i> , 400 S.C. 390, 735 S.E.2d 459 (2012).....	10, 22, 23, 26
<i>Rilling v. Texas</i> , 95 Tex. 352, 67 S.W. 401 (1902).....	16
<i>Royal Z Lanes, Inc. v. Collins Holding Corp.</i> , 337 S.C. 592, 524 S.E.2d 621 (1999)	23
<i>Sapp v. Wheeler</i> , 402 S.C. 502, 741 S.E.2d 565 (Ct. App. 2013).....	6
<i>Scott v. Wiggins</i> , 113 S.C. 88, 101 S.E. 113 (1919).....	22
<i>South Carolina National Bank v. Halter</i> , 293 S.C. 121 (Ct. App. 1987)	13, 14, 15, 20
<i>Univ. v. Waller</i> , 124 S.C. 68, 74, 117 S.E. 356, 358 (1923)	22

<i>Windsor Props., Inc. v. Dolphin Head Constr. Co.</i> , 331 S.C. 466, 498 S.E.2d 858 (1998).....	10, 11, 18, 21

STATUTES

261 S.C. at 203	13
261 S.C. at 209	20
261 S.C. at 211	13
293 S.C. at 131-32	14
293 S.C. at 132	14
293 S.C. at 133	14
293 S.C. at 134	15
331 S.C. 466, at FN 4.....	19
S.C. Code § 33-44-501	18
S.C. Code §27-23-10(A)	3
S.C. Code Ann. § 27-23-10(A) (2007).....	10
S.C. Code Ann. § 30-7-10	25

STATEMENT OF ISSUES ON APPEAL

- I. Did the Master Err in its Determination that the Mortgage Transaction between Pawleys and Kennedy was not Fraudulent?
- II. Did the Master Err in its Determination that the Conveyance of the Property from Wheeler to Pawleys was not Fraudulent?
- III. Do Equity and the South Carolina Recording Statute Dictate that Kennedy's Lien is Superior to Sapp's Lien?

STATEMENT OF THE CASE

This appeal arises out of a commercial mortgage foreclosure action and involves a dispute between alleged lien holders over the existence and priority of liens. Respondent Kennedy Funding, Inc. (hereinafter "Kennedy") instituted this action by filing a Summons and Complaint on February 9, 2011, and the First Amended Complaint was filed by Respondent BNP Paribas, a successor-in-interest to Kennedy ("BNP") on September 5, 2012. The Complaint sought to foreclose on a mortgage given by Respondent Pawleys Island North, LLC ("Pawleys") on two parcels of raw land located on Pawley's Island, South Carolina, (the "Property") and collect on a promissory note given by Pawleys to secure the mortgage. The suit additionally sought to collect on personal guarantees given by Respondents Will Darwin Wheeler ("Wheeler") and Peggy Wheeler-Cribb ("Wheeler-Cribb")(collectively "Guarantors").

The Amended Complaint alleged Appellant J. Mars Sapp ("Sapp") may hold a lien arising out of a judgment he obtained against Wheeler but, if such a lien existed, it was junior to BNP's lien.

Sapp's original Answer did not assert any cross-claims or counter-claims but did request the Court find Sapp's lien to be a first lien and interest in the property. Based on this assertion of lien priority, BNP filed a motion for summary judgment requesting its lien be declared superior to Sapp's lien, if any. By Order dated March 5, 2012, Georgetown County Master-in-Equity Joe Crosby ("the Master") granted BNP's motion for summary judgment, ruling that to the extent Sapp held a lien which attached to the Property, his lien was inferior to BNP's lien. The Court's ruling did not address the merits of Sapp's alleged lien. Sapp filed a motion to reconsider and the Court held a hearing on the motion to

reconsider on August 13, 2012. The Court denied Sapp's motion to reconsider from the bench at the trial of the case on February 11, 2013.

After summary judgment was granted in BNP's favor and while Sapp's motion to reconsider was pending, Sapp responded to Plaintiff's First Amended Complaint by filing an Answer and Cross-Claim against Wheeler. Sapp asserted a lone cross-claim against Wheeler for violation of the Statute of Elizabeth, codified at S.C. Code §27-23-10(A), in which he contended that Wheeler's transfer of the Property to Pawleys constituted a fraudulent conveyance and that it and all subsequent transfers, including the mortgage given to BNP, should be voided. Sapp did not assert any counterclaim against BNP. On October 10, 2012, Pawleys, Wheeler and Wheeler-Cribb filed an Answer to Sapp's cross-claim in which they denied all material allegations set forth in Sapp's cross-claim. On October 10, 2012, BNP filed a reply to Sapp's cross-claim asserting the Court's summary judgment Order barred Sapp from re-litigating the lien priority issue and additionally asserted several affirmative defenses.

On February 11, 2013, the Master conducted a non-jury trial. The Master denied from the bench Sapp's outstanding motion to reconsider the Master's summary judgment Order. By agreement, the parties admitted in to evidence all the trial exhibits contained in the record. BNP presented testimony from Harry Nullet, a BNP Managing Director, and Kevin Wolfer, Kennedy's CEO. Sapp testified on his own behalf but did not call any other witnesses. Pawleys, Wheeler and Wheeler-Cribb did not present any witnesses but did cross-examine Sapp. The Master took the matter under advisement and issued his Order and Judgment on June 7, 2013. In his Order and Judgment, the Master found Pawleys to be in default under the terms of the Mortgage and Promissory Note, found Wheeler and

Wheeler-Cribb in default under the terms of the Guaranty, found BNP's mortgage to be a first lien on the Property, ordered the Property to be sold at a judicial sale, and ordered BNP was owed \$1,825,935.53, with interest continuing to accrue, pursuant to the terms of the Promissory Note and Guaranty. The Court denied Sapp's cross-claim finding that no fraudulent conveyance occurred and Sapp, therefore, had no lien interest in the Property.

Sapp filed a Notice of Appeal on June 27, 2013, appealing the Master's February 14, 2012 Summary Judgment Order and his June 7, 2013 Order and Judgment. Sapp filed an Amended Notice of Appeal confirming Pawleys, Wheeler and Wheeler-Cribb were also Respondents in the appeal. Judicial sale of the Property was scheduled for August 5, 2013. Prior to the sale, Sapp filed a motion to stay the sale on June 28 based on his notice of appeal being filed. The Court conducted a hearing on Sapp's motion to stay the sale and ruled that the sale would only be stayed if Sapp filed a bond in the full amount of BNP's judgment. Sapp did not file a bond and BNP was the high bidder at the sale with a bid of \$1,500,000. Subsequently, the Master entered a Final Judgment on BNP's deficiency claim against Wheeler and Wheeler-Cribb for \$382,790.61.

STATEMENT OF FACTS

I. BNP Lien

Pawleys entered into a Loan and Security Agreement with Kennedy dated April 30, 2009 (the "Loan Agreement"), evidenced by a separately executed Promissory Note dated April 30, 2009 (the "Note"), in the principal sum of Nine Hundred Sixty Thousand and 00/100 (\$960,000.00) Dollars, with interest thereon. (Compl. ¶ 10; R. p. 25). Simultaneously with the execution of the above-referenced Note, and in order to secure the payment thereof, Pawleys executed and delivered to Kennedy a Mortgage and Security

Agreement dated April 28, 2009, and recorded on May 5, 2009, in the Office of the Register of Deeds for Georgetown County, in Mortgage Book 1225 at Page 109 (the "Mortgage"), wherein and whereby Pawleys mortgaged the Property to Kennedy. (Compl. ¶ 11; R. pp. 25-26). After filing this suit, Kennedy assigned to BNP all rights, title, interests and obligations under the Note, the Mortgage and the other Loan Documents. BNP is, therefore, entitled to pursue foreclosure and the other relief stated in its Amended Complaint. (Am. Compl. ¶ 15; R. p. 66). The Property is raw land and was part of a larger tract of land previously subdivided into four parcels. During the litigation, the parties commonly referred to the Property as Lots 3 and 4. Prior to closing, an appraisal valued Lot 3 at \$1,040,000 and Lot 4 at \$880,000 for a total value of \$1,920,000. (Plaintiff's Trial Exhibit No. 2, 03.02.2009 Letter and attachment bearing Bates stamps Kennedy_00497-503; R. p. 511). Kennedy, therefore, was providing Pawleys with a cash-out loan for 50% of the value of the Property, (Kevin Wolfer Depo. Tr. 27:4-7; R. p. 192, lines 4-7), less \$300,000 to pay off a mortgage on lot 4 held by First South Bank and loan commissions and fees. (Kevin Wolfer Depo. Tr. 26:7-9; R. p. 191, lines 7-9). Pawleys retained 50% equity in the land or \$960,000. (Kevin Wolfer Depo. Tr. 27:4-16; R. p. 192, lines 4-16).

In addition to the above-referenced Loan Documents, Defendants Wheeler and Wheeler-Cribb signed a guaranty agreement dated April 30, 2009 (the "Guaranty"), whereby they individually, jointly and severally, absolutely and unconditionally guaranteed repayment under the Loan Documents to Kennedy. (Compl. ¶ 19; R. p. 28). At the trial of this case, BNP presented testimony and evidence that Pawleys had defaulted under the terms of the Mortgage and Note and that Wheeler and Wheeler-Cribb had defaulted under the terms of the Guaranty. (Trial Tr. Pages 17-20; R. p. 704, line 1-p.101,

line 25). No party contested or presented rebuttal evidence regarding these defaults. (See generally Trial Transcript; R. pp. 688-740).

II. Sapp's Alleged Lien

In preparing to file suit, Kennedy updated its title work on the Property and discovered Appellant J. Mars Sapp ("Sapp") was attempting to collect a civil judgment against Wheeler by executing against the Property. Previously on September 30, 2008, Sapp, as landlord, had filed a civil suit against a tenant corporation for breach of a commercial lease and against Wheeler for breach of a lease guaranty. (Answer to Am. Complaint and Crossclaim of Sapp. ¶ 23; R. p. 103). Fourteen months after Pawleys recorded its loan with Kennedy, Sapp obtained a verdict against Wheeler on June 4, 2010, in the amount of \$257,789.00 plus \$48,929.00 in attorney's fees. (Answer to Am. Complaint and Crossclaim of Sapp. ¶ 24; R. pp. 103-104). Wheeler appealed the verdict which was affirmed by the Court of Appeals on February 20, 2013. (See Sapp v. Wheeler, 402 S.C. 502, 741 S.E.2d 565 (Ct. App. 2013). As noted above, in his cross-claim, Sapp contends the transfer of the Property from Wheeler to Pawleys on April 28, 2009, was a fraudulent conveyance. (Answer to Am. Complaint and Crossclaim of Sapp. ¶ 30; R. p. 105).

III. Wheeler's Alleged Insolvency

The only evidence Sapp presented at trial regarding his efforts to collect the judgment against Wheeler was a *nulla bono* return from the Georgetown County Sheriff. (Trial Tr. 39:11-18; R. p. 726, lines 11-18). Sapp testified that he did not know if collection efforts were made in neighboring Horry County. *Id.* During litigation, Sapp did not conduct any discovery seeking to determine Wheeler's ability to satisfy a judgment at

the time Pawleys closed its loan with Kennedy or at any other time. (Trial Tr. 37:3-11; R. p. 724, lines 3-11). Sapp did not depose Wheeler or call him as a witness at trial. (Trial Tr. 36:25, 37:1-4; R. p. 723, line 25-p. 724, line 4). Further, Sapp presented no evidence that he had (i) instituted supplemental proceedings against Wheeler, (ii) instituted a suit to pierce Pawleys' corporate veil, (iii) attempted to obtain a lien on Wheeler's distributional share in Pawleys as permitted under the Limited Liability Company Act, (iv) attempted to collect on any of Wheeler's assets outside of Georgetown County, or (v) subpoenaed Wheeler's financial records or accounts to determine Wheeler's ability to pay the judgment from sources other than Lots 3 and 4. Finally, Sapp presented no evidence that Wheeler had transferred other assets out of his personal name to other entities or persons during the pendency of the litigation.

IV. Kennedy's Due Diligence

Prior to closing the loan with Pawleys, Kennedy conducted due diligence to determine Pawleys' suitability to obtain the loan and Wheeler and Wheeler-Cribb's ability to guaranty that loan. (Kevin Wolfer Depo. Tr. 34:3-5; R. p. 199, lines 3-5). Kennedy conducted a title search that revealed a \$300,000 mortgage lien held by First South Bank on Lot 3. (Kevin Wolfer Depo. Tr. 26:7-9; R. p. 191, lines 7-9). Kennedy arranged to have that lien paid at closing. (See Plaintiff's Trial Exhibit No. 1, Loan Closing Statement at Kennedy_01138-1140; R. p. 228-229). No other lien appeared on the title search and no *lis pendens* attached to the property. *Id.* Kennedy paid for an appraisal which determined the value of the property to be \$1,920,000. (Kevin Wolfer Depo. Tr. 27:1-2; R. p. 192, lines 1-2). Kennedy ultimately decided to only loan Pawleys \$960,000, of which \$300,000 was used to pay off the First South mortgage, thus leaving Pawleys with \$960,000 in

equity. (Kevin Wolfer Depo. Tr. 26:7-9, 27:4-16; R. p. 191, lines 7-9, p. 192, lines 4-16). In a pre-closing search, Kennedy's counsel found the Sapp litigation against Wheeler which alleged Wheeler was liable as a lease guarantor for \$556,099. (Kevin Wolfer Depo. Tr. 34:15-19; R. p. 199, lines 15-19). Kennedy's counsel sent a pre-closing check list to Pawleys' counsel and requested an update on the Sapp litigation in an email. (Kevin Wolfer Depo. Tr. 34:20-25; R. p. 199, lines 20-25). Sapp did not depose or call as a witness at trial Wheeler, Wheeler-Cribb, their counsel, or Kennedy's counsel to ask whether or not oral updates were given on the Sapp litigation. (Trial Tr. 25:3-6; R. p. 712, lines 3-6). Sapp contends Kennedy never got a response to its email inquiry, yet counsel for Pawleys, Wheeler and Wheeler-Cribb wrote a lengthy letter prior to closing addressing the borrower and guarantors' ability to close on the mortgage, note and guaranty. (Plaintiff's Trial Exhibit No. 1 at Kennedy_01394-1398; R. pp. 485-489). In his letter, guarantors' counsel stated:

There is no action, suit, proceeding or investigation at law or in equity by or before any court, governmental instrumentality or other agency now pending or, to the best of our knowledge, threatened against the Borrower or the Guarantors or any of the Borrower's or the Guarantors' properties or rights which, if determined adversely to the Borrower or the Guarantors, would impair or materially affect (i) such entity's right to carry on its business substantially as now conducted, (ii) the value of the collateral securing the Loan Documents, (iii) such entity's ability to carry out its obligations under the Loan Documents to which it is a party, or (iv) the validity or enforceability of each of the Loan Documents executed by the Borrower or the Guarantors. Neither Borrower nor Guarantors are in default with respect to any order, judgment, writ, injunction, decree or demand of any court or governmental authority. *Id.*

Kevin Wolfer, Kennedy's CEO, testified that Kennedy would not have closed on the loan without this representation. (Kevin Wolfer Depo. Tr. 38:21-24; R. p. 203, lines 21-24). Additionally, Wheeler confirmed the following in his Guaranty Agreement:

There is no material action, suit, proceeding, inquiry or investigation, at law or in equity, or before any court, governmental instrumentality, public board or arbitrator pending or threatened against or affecting the Guarantor or any of his properties or rights, wherein an unfavorable decision, ruling or finding would (i) to the extent not covered by insurance as to which the insurer has not disclaimed coverage, result in any material adverse change in the financial condition, business, properties or operations of the guarantor; (ii) materially or adversely effect the Guaranty; or (iii) adversely effect the validity or enforceability of the Guaranty Documents.

Borrower is a pre-existing entity actively engaged in the operation of its business and has not been created as a vehicle to obtain the Loan. The proceeds of the Loan will be used by Borrower solely to (a) discharge or release liens upon the real property encumbered by the Mortgage (the "Property") or for other business purposes directly related to the Property, and (b) pay fees and other amounts related thereto or to the making of the Loan.

On the date hereof, (i) the assets of the Guarantor exceed his liabilities, and (ii) the Guarantor is paying his debts as they become due. (Plaintiff's Trial Exhibit No. 1, Guaranty at KENNEDY_01267-1277; R. pp. 358-368).

Kennedy, therefore, did obtain a thorough response from Wheeler and his counsel confirming the Sapp litigation was not a material action which would impair the Borrower or Guarantor's financial condition, ability to perform under the Note and Guaranty, or adversely impact the Property.¹ (Plaintiff's Trial Exhibit No. 1, April 30, 2009 Letter at Kennedy_01394-01398; R. pp. 485-489).

V. Transfer from Wheeler to Pawleys

The Quitclaim Deed Wheeler gave to Pawleys for "\$5 and no other consideration" included an affidavit from Wheeler stating that the Deed was exempt from recording fees because the Property was being transferred to the LLC in order for Wheeler to increase the value of his stock or interest held in the LLC. (Defendant's Trial Exhibit No. 1, Quit Claim

¹ Appellant misquotes or misconstrues the testimony of Kennedy Funding on the due diligence issue. Appellant contends Kevin Wolfer, Kennedy's CEO, testified that Kennedy knew Wheeler did not have the income to pay back the loan and Kennedy decided a possible fraudulent conveyance did not matter if it obtained a title opinion and title insurance (Appl. Brief at p. 6). Respondent submits no such testimony can be found in Wolfer's deposition.

Deed and Affidavit; R. pp. 750-755). In addition to the appraisal on the Property for \$1,920,000, the parties also admitted in to evidence Pawleys' *Amended Articles of Organization* which state in Section 9.0 that the purpose of the business was to "own, hold, sell, assign, transfer, operate, improve, lease, mortgage, pledge and otherwise deal with certain real property pledged to Kennedy Funding, Inc. as collateral pursuant to that certain Mortgage and Security Agreement" which is identified above. (Plaintiff's Trial Exhibit no. 1, Kennedy_1305-1360, First Am. To the Art. of Org of Pawleys Island North, LLC. § 9.0(a); R. pp. 396-451).

STANDARD OF REVIEW

In South Carolina, a clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth.² See, *Oskin v. Johnson*, 400 S.C. 390 (S.C. 2012) (citing, *Windsor Props., Inc. v. Dolphin Head Constr. Co.*, 331 S.C. 466, 471, 498 S.E.2d 858, 860 (1998) (citations omitted)). Additionally, an action to set aside a conveyance under the Statute of Elizabeth is an equitable action. *Id.*, (citing, *Future Group, II*, 324 S.C. at 97 n. 6, 478 S.E.2d at 49 n. 6; S.C. Const. art. V, § 5.)

The Statute of Elizabeth provides:

Every gift, grant, alienation, bargain, transfer, and conveyance of lands . . . for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties and forfeitures must be deemed and taken ... to be clearly and utterly void....

S.C. Code Ann. § 27-23-10(A) (2007). In interpreting this statute, our Courts hold conveyances shall be set aside under two conditions: First, where there was valuable consideration and the transfer is made by the grantor with the actual intent to defraud; or,

² Appellant erroneously contends in his initial brief that a preponderance of the evidence standard applies to fraudulent conveyance claims. In *Oskin v. Johnson*, the Supreme Court unequivocally established a clear and convincing evidence standard applies to a fraudulent conveyance claim. 400 S.C. 390, at FN4, (S.C. 2012).

second, where a transfer is made without actual intent to defraud but without valuable consideration. *Id.* (citing, *Future Group, II*, 324 S.C. at 96, 478 S.E.2d at 48-49; *McDaniel v. Allen*, 265 S.C. 237, 242-43, 217 S.E.2d 773, 775-76 (1975). Even where it is shown that the grantor has fraudulent intent, to "annul for fraud a deed based upon a valuable consideration [under the Statute of Elizabeth], it must not only be shown that the grantor intended thereby to hinder, delay or defraud creditors, but it must also appear that the **grantee participated in such fraudulent purpose.**" *McDaniel*, 265 S.C. at 242-43, 217 S.E.2d at 775-76 (emphasis added); *Windsor Props.*, 331 S.C. at 471, 498 S.E.2d at 860.

ARGUMENT

I. THE KENNEDY MORTGAGE TRANSACTION DID NOT VIOLATE THE STATUTE OF ELIZABETH

Appellant asserts that the mortgage transaction between Pawleys and Kennedy should be set aside because the transaction was not supported by valid consideration or, even if there was valid consideration, that Pawleys and Kennedy intended to defraud Appellant. (Appellant's Initial Brief, p. 8). First, the mortgage was supported by a \$960,000 loan to Pawleys, which is valid consideration under any construction of the transaction. Second, Appellant failed to present any evidence, much less clear and convincing evidence, that Kennedy knowingly participated in a fraudulent act.

A. The Mortgage was Given to Kennedy in Exchange for Valuable Consideration

Appellant attempts to attack the mortgage transaction between Pawleys and Kennedy on the grounds of grossly inadequate consideration. (Appellant's Initial Brief, p. 14). In doing so, Appellant bases his argument on the assumption that the mortgage was actually a conveyance of the Property from Pawleys to Kennedy for 50% of the Property's

value and was, therefore, inadequate. *Id.* It is undisputed, however, that Pawleys did not sell and convey the land to Kennedy; rather it simply borrowed money from Kennedy collateralized by the Property. This transaction cannot be set aside under the Statute of Elizabeth because no conveyance occurred. The conveyance that transferred the Property was an October 7, 2013 non-voluntary conveyance from the Master to the winning bidder after judicial sale.³ (Master's Report on Sale, Order of Disbursement Pursuant to Rule 71 (Public Sale), Order Confirming Closing Case, October 7, 2013 and Master's Foreclosure Deed; R. pp. 803-807). This conveyance from the Master via foreclosure deed is not fraudulent. Kennedy did not buy the Property for 50% of its value, it loaned \$960,000 and has not been repaid. (Kevin Wolfer Depo. Tr. 27:1-7; R. p. 192, lines 1-7). There is clearly consideration to support this mortgage transaction.

Appellant relies on *Coleman v. Daniel*, 261 S.C. 198 (1973), for the apparent proposition that anything below a 58% loan to value ratio is *per se* inadequate consideration to support a mortgage. This is a ludicrous reading of *Coleman* as such an interpretation would wipe out a significant percentage of the mortgages in South Carolina. By conflating a mortgage transaction with a sales transaction, Appellant presents an absurd argument that would eliminate cash-out, home equity, second mortgage and most primary mortgage lending in South Carolina, because no prudent lender ever loans 100% of the value of the collateral.

In *Coleman*, the debtor was proven to be insolvent when he transferred virtually his entire estate to his daughter and son-in-law for roughly 58% of the appraised value.⁴ 261 S.C. at 204. The transfer included the property where the debtor had lived his entire life

³ The Master signed a Master's Deed on October 7, 2013 but the deed has not yet been recorded.

⁴ There is considerable discussion in the opinion about the true value of the property and consideration actually paid as the daughter and son-in-law cited past and future support of their father as consideration.

and a separate agreement the debtor made with his daughter to continue living on the property rent free. 261 S.C. at 203. The property was, in essence, being held in the daughter and son-in-law's name for their father's perpetual use. Under these facts, the Court found the daughter and son-in-law's failure to inquire as to their father's indebtedness to plaintiff Coleman resulted in the knowledge of the debt imputed to them and voided the transfer as a fraudulent conveyance. 261 S.C. at 211.

This case does not involve any of the key facts which supported a fraudulent conveyance finding in *Coleman*. First, this was an arms-length loan transaction between a lender based in New Jersey and a South Carolina limited liability company with no prior relationship. (Kevin Wolfer Depo. Tr. 13:22-25, 14:1-10; R. p. 178, line 22-p.179, line 10). Second, no property was sold or transferred to Kennedy. Third, the borrower was not insolvent when the loan was executed but retained over \$1.3 million in cash and equity from this transaction alone. Fourth, the borrower was not living on the Property when the transaction closed. (Plaintiff's Trial Exhibit No. 1, R. p. 225). Finally, the borrower did not retain, via secret agreement, perpetual use of the Property rent free. The only reasonable conclusion to draw from the amount Kennedy loaned is that it was a conservative and prudent lender. Sapp's argument that a 50% loan to value ratio was grossly inadequate is not supported by *Coleman* or any other South Carolina case.

Sapp also relies on *South Carolina National Bank v. Halter*, 293 S.C. 121 (Ct. App. 1987), in support of his argument that Kennedy participated in a fraud. Like in *Coleman*, *Halter* involved a fraudulent conveyance among family members. 293 S.C. at 123. In *Halter*, Caine, the debtor, deceased at the time the case was decided, transferred certain rental properties to an alimony trust that was managed by his son-in-law, Halter, as trustee.

293 S.C. at 131-32. However, the trust was never operated separately and distinctly from Caine's other business affairs and Halter routinely failed to make the alimony payments the trust was established to make. 293 S.C. at 132. Finally, upon the death of Caine's ex-wife, the rental properties were to be transferred to a company owned by Halter and his wife, who was Caine's daughter. 293 S.C. at 131-32. The court found that the only reason to make the company the residuary beneficiary was Caine's desire to bestow upon his daughter and son-in-law an invaluable residual asset. 293 S.C. at 132. Under these facts, which clearly evidenced the debtor's intent to shelter property from his creditors, the Court voided the transfer from Caine to the trustee. 293 S.C. at 133.

More applicable to this case than the trust issue, however, was the issue in *Halter* involving a separate transaction the Court called the "Franklin Hotel Mortgage" transaction. This transaction involved Halter loaning or advancing \$35,000 to his father-in-law, Caine, in exchange for a note and mortgage on a hotel property. *Id.* Halter wore the hat of "mortgagee" in this transaction which the Court noted in stating

[t]o annul the instant mortgage, which is supported by valuable consideration, it must be shown not only that Caine intended to hinder, delay or defraud his creditors, but also that **Halter [mortgagee] participated in the fraud.**

Id. (emphasis added). The Court upheld this mortgage transaction, in part, because the Plaintiff failed to plead or prove fraud against Halter as mortgagee. See, *Halter*, 293 S.C. at 133, fn. 5 ("Technically, we need go no further since [the creditor] failed to plead actual fraud on [grantor]'s part and participation in the fraud by [grantee]"). Sapp likewise failed to plead or prove a fraud or a fraudulent conveyance claim against Kennedy or BNP which is an independent ground to affirm the Master's Order. The Court further upheld the mortgage because it found \$35,000 was valid consideration to support the mortgage and

there was not sufficient proof that Halter had participated in a fraud even though he was loaning money to his father-in-law and obtaining a lien position senior to other creditors. 293 S.C. at 134. The Kennedy mortgage should be affirmed under the *Halter* holding because \$960,000 is inarguably valid consideration to support a mortgage interest for the same amount and Sapp has not presented any evidence that Kennedy participated in a fraud. There is no evidence that the Kennedy loan and mortgage were a sham or anything other than a bona fide arms length transaction.

B. Kennedy Had No Notice of Any Fraudulent Activity

Sapp argues in his brief that Kennedy had notice of fraudulent activity on the part of Wheeler and Pawleys, and, as a result, contends that the mortgage transaction between Pawleys and Kennedy should be set aside. (Appellant's Initial Brief, p. 23-24). In support of his argument, Sapp points to a pre-closing lawsuit search in which the Sapp litigation was found and one email from Kennedy's counsel to Pawleys' counsel inquiring about the Sapp litigation. (Appellant's Initial Brief, p. 24). Sapp has presented no other evidence to support his argument that Kennedy knowingly participated in a fraud.

Sapp fails to mention that, as a condition to closing, Kennedy required Wheeler and his counsel to affirm in writing that (1) there were no suits pending or threatened against Wheeler which would impair his ability to perform under the Guaranty or other obligations; (2) no suits which would adversely impact the Property and (3) Wheeler was paying all his debt obligations as they became due. (Plaintiff's Trial Exhibit No. 1, April 30, 2009 Letter at Kennedy_01394-01398 and Guaranty at Kennedy_01267-1277; R. pp 485-489 and pp. 358-368). In addition to this evidence, the only testimony presented on the issue of Kennedy's knowledge of Wheeler's intention, or fraud for that matter, was

Kevin Wolfer's testimony that Kennedy never had any discussion with Wheeler, Wheeler-Cribb or anyone on behalf of Pawleys indicating that the transfer of the Property to Pawleys would render Wheeler insolvent or impair his ability to satisfy a Sapp judgment in the future. (Appellant's Initial Brief, p. 24). In sum, Kennedy acted reasonably and prudently in making the Pawleys loan and there is no evidence it knowingly participated in a fraud or had knowledge of a fraud.

Assuming, *arguendo*, that Kennedy had a duty to investigate the Sapp litigation beyond everything it did as recited herein, and assuming Kennedy had predicted the future and determined the Sapp litigation would result in a verdict against Wheeler for \$301,727; at the time of closing, Kennedy knew Pawleys, and Wheeler through his 99% interest, would receive \$397,438.50 in cash at closing and retain \$960,000 in equity in the Property for a total amount of \$1,357,438.50 from the Property alone. (Plaintiff's Trial Exhibit No. 1, Loan Closing Statement at Kennedy_1138-1140; R. p. 228-230). Nothing about this transaction would cause a reasonable lender to be concerned that Wheeler could not satisfy a \$304,727 verdict or was engaging in fraud. Moreover, and as set forth below in Section III, Kennedy had no reason to participate in or condone a fraud because its lien position, whether it loaned to Pawleys or Wheeler, would always be superior to Sapp's later-filed judgment lien.

All of the cases Sapp cites in support of his contention that Kennedy had notice of the fraud are easily distinguishable. Although *Rilling v. Texas* is a 1902 Texas case and not binding precedent on this Court, that case involved a father and son conspiring to keep property out of the hands of the son's ex-wife by transferring it to an individual who knew the circumstances of the divorce. 95 Tex. 352, 67 S.W. 401 (1902). Similarly, *Messervy v.*

Barelli, involved a conveyance from a mother to a man supposedly engaged to her daughter and with whom the mother was on "intimate terms of friendship."⁵ 11 S.C. Eq. (2 Hill Eq.) 576 (1837). In those cases, there was undoubtedly a close personal relationship between the parties prior to the mortgage. *Brunson v. Sports* is not applicable here because it entailed the creation of a resulting trust in favor of a decedent's heirs where the administrator of an estate took property in her own name as payment for a debt that was owed to the estate. 239 S.C. 58, 121 S.E.2d 294 (1961). *Brunson* was actually decided on trust law and adverse possession grounds, not the Statute of Elizabeth, and is plainly not applicable to this case.

Ultimately, Sapp would have this Court treat the conveyance of a mortgage interest in the Property from Pawleys to Kennedy as a sham transaction similar to a conveyance between close personal friends or family to avoid a creditor. There was simply nothing about Wheeler's transfer of the Property to a limited liability company which would have put a prudent lender on notice that Wheeler was engaging in a fraud given that Wheeler's interest in the limited liability company alone was sufficient to satisfy Sapp's claim.

II. THE TRANSFER FROM WHEELER TO PAWLEYS WAS NOT A FRAUDULENT CONVEYANCE

Appellant asserts that an intra-family transfer of the Property from Wheeler to Pawleys shifts the burden of proof to Pawleys to prove the *bona fides* of the transaction. (Appellant's Initial Brief, p. 15). The transfer, however, was not "intra-family" and the burden remains on Appellant to prove by clear and convincing evidence that a fraudulent conveyance occurred. Regarding the actual conveyance, it was supported by valuable

⁵ "To [mortgagor's] mother...he familiarly applied the epithet of 'mother,' to her sisters, that of 'sister,' and to her aunts, that of 'aunt;' and was a constant visitor at the house, and took all liberties he would have done if he had been a member of the family..."

consideration, and Appellant has failed to prove Wheeler intended to defraud him and that Kennedy participated in the fraud.

A. The Transfer from Wheeler to Pawleys was not an Intra-Family Transfer, and the Burden of Proof Remains on Appellant to Prove by Clear and Convincing Evidence that the Conveyance was Fraudulent

Appellant claims that the transfer between Wheeler and Pawleys was an intra-family transfer, shifting the burden of proof from the Appellant to the Respondent. (Appellant's Initial Brief, p. 15).⁶ "Intra-family" is not a defined term under South Carolina case law. Cases do, however, provide an illustration of how South Carolina courts have applied the term. See *Coleman* (transfer of property from father to daughter and son-in-law, *Halter* (transfer of property to son), *Messervy* (transfer of property to an intimate family friend). The transfer at issue here, however, is a transfer from an individual (Wheeler) to a corporation (Pawleys). The South Carolina Limited Liability Company Act provides "[a] member is not a co-owner of, and has no transferable interest in, property of a limited liability company." S.C. Code § 33-44-501. Sapp seems to contend that Wheeler transferred the Property to Wheeler-Cribb, his mother, because she had a 1% membership interest in Pawleys. This argument fails under § 33-44-501 because Wheeler-Cribb obtained no transferable interest in the Property.

Perhaps knowing he could not prove a transfer from Wheeler to Wheeler-Cribb, Sapp next argues under *Windsor Properties, Inc.* that the corporate entity can be disregarded. (Appellant's Initial Brief, p. 15). In *Windsor*, the Court found a transfer from a corporation wholly-owned by a husband to a wife was "intra-family" citing the wife's

⁶ See, *Coleman*, 261 S.C. at 208 ("Where transfers to members of the family are attacked either upon the ground of actual fraud or on account of their voluntary character, the law imposes the burden on the transferee to establish both a valuable consideration and the bona fides of the transaction by clear and convincing evidence.").

testimony that the corporation and husband to her "were one in the same." 331 S.C. 466, at FN 4. If Pawleys' corporate veil is to be disregarded in this case – even though Sapp did not plead or prove veil piercing at trial – the Wheeler transfer to Pawleys was nothing more than a transfer from Wheeler to himself as he owned 99% of the company. By any definition, this cannot amount to an "intra-family" transfer and the burden remains on Sapp to prove by clear and convincing evidence that either of two situations occurred – either Wheeler intended to defraud Sapp or the conveyance was not supported by consideration.

B. Wheeler Did not Transfer the Property to Pawleys with the Actual Intent to Defraud Sapp

In order to set aside a conveyance on the basis that the grantor intended to defraud its creditor, the creditor must prove that, "(1) the transfer was made by the grantor with the actual intent of defrauding his creditors; (2) the grantor was indebted at the time of the transfer; and (3) the grantor's intent is imputable to the grantee." *Durham v. Blackard*, 313 S.C. 432, 437–38, 438 S.E.2d 259, 262 (Ct.App.1993) (citing *Coleman*, 261 S.C. at 208, 199 S.E.2d at 79).

Sapp did not depose Wheeler, call him as a witness or present any direct evidence that Wheeler intended to defraud Sapp. (Trial Tr. 25:3-6; R. p. 712, lines 3-6). The only evidence before the Court as to Wheeler's intent was his Answer to Sapp's cross-claim in which Wheeler denied intending to defraud Sapp. (Answer of Pawleys, Wheeler, and Wheeler-Crib's Cross-Claim of Sapp, ¶ 5; R. p. 124). Sapp must, therefore, rely on circumstantial evidence to overcome Wheeler's direct denial.

In determining whether the intent to defraud exists, our Courts have studied whether "badges of fraud" are present which would support a finding of fraud. In *Coleman*, the Court stated:

Among the generally recognized badges of fraud are the insolvency or indebtedness of the transferor, lack of consideration for the conveyance, relationship between the transferor and transferee, the pendency or threat of litigation, secrecy or concealment, departure from the usual method of business, the transfer of the debtor's entire estate, the reservation of benefit to the transferor, and the retention by the debtor of possession of the property.

261 S.C. at 209.

Other than a *nulla bona* return from the Georgetown County Sheriff, Sapp presented no evidence indicating fraud.⁷ It is undisputed Wheeler retained a 99% ownership interest in Pawleys which owned Property valued at \$1,920,000. (Plaintiff's Trial Exhibit No. 1, Loan Closing Statement at Kennedy_01138-1140; R. p. 228-230). It is also undisputed that \$397,438.50 was distributed to Pawleys at closing. *Id.* Wheeler's distributional interest in the amount distributed at closing alone was sufficient to satisfy the Sapp debt. The existence of pending litigation would be of no concern to a reasonable lender when it knew the Borrower or Guarantor had sufficient assets in the Property or in cash from closing to satisfy the other debt. Additionally, Sapp did not conduct any discovery or present any evidence of Wheeler's financial condition at the time he obtained his judgment against Wheeler. (Trial Tr. 25:3-6; R. p. 712, lines 3-6). Sapp also admitted at trial he did not know if his counsel had attempted a search of Wheeler's assets in Horry County or undertaken any other efforts to collect the judgment other than to attempt to attach to the Property. *Id.* Sapp presented no evidence that he had taken Wheeler through supplemental proceedings or pursued other collection avenues. Though Sapp alleged in his cross-claim that Wheeler did not retain sufficient assets to satisfy the judgment, Wheeler denied the allegation and Sapp did not challenge the denial. Additionally, Sapp presented

⁷ A *nulla bona* return is "probative" of insolvency. *S. Carolina Nat. Bank v. Halter*, 293 S.C. 121, 127, 359 S.E.2d 74, 77 (Ct. App. 1987).

no evidence Wheeler attempted to conceal the transfer in any way, departed from his normal business practices, or transferred his entire estate. Finally, there is no proof that Wheeler ever lived on or profited from the Property in any way after it was transferred to Pawleys. The badges of fraud are simply nonexistent.

Stepping back and considering the transaction in its entirety, the conveyance from Wheeler to Pawleys and subsequent mortgage to Kennedy is not the kind of "relationship" our Courts have found indicative fraud. In the cases that Sapp relies on in his brief, the grantor remained on the property and lived there despite transferring ownership to another party. See *Coleman* (grantor continued to live on property after conveyance to daughter and son-in-law), *Windsor*. (wife/grantee lived on property with husband who wholly owned corporation/grantor), *Dinkins v. Robbins*, 200 S.C. 475, 21 S.E.2d 10 (1942) (husband conveyed property and all machinery thereon to wife and continued to use car and machinery as his own). Here, there is no proof that Kennedy ever intended to enter into a sham mortgage to allow Wheeler to defraud Sapp or retain use of the Property without timely paying on the Note. To the contrary, Kennedy's foreclosure suit and the Court's foreclosure order conclusively prove Kennedy intended to enforce its mortgage agreement and recoup all it was due under the Note, Mortgage, and Guaranty.

C. The Transfer of the Property to Pawleys was Supported by Valuable Consideration

Sapp also argues that, even if Wheeler did not intend to fraudulently convey the Property to Pawleys, the transfer should be set aside as fraudulent because it was without consideration. (Appellant's Initial Brief, p. 13). In support of this, Sapp cites *Future Grp., II v. Nationsbank*, which held that conveyances made without consideration should be set aside where "the grantor was indebted to the plaintiff at the time of the transfer and the

grantor failed to retain sufficient property to pay his debt to plaintiff, not merely at the time of transfer, but at the time plaintiff seeks to collect." 324 S.C. 89, 96, 478 S.E.2d 45, 48 (1996). "[V]aluable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit, accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." *Univ. v. Waller*, 124 S.C. 68, 74, 117 S.E. 356, 358 (1923).

Sapp contends there was no consideration because the Quitclaim Deed from Wheeler to Pawleys was for "\$5 and no other consideration." (Appellant's Initial Brief, p. 14-15). However, Respondents contend that this was not the only consideration Wheeler received, and that this Court may look outside of the deed for evidence of further consideration. "Since 1834, and before, it has been uniformly held that, notwithstanding the circumstances that a deed may recite consideration, it is competent to prove by parol testimony what the real consideration was." *Beckham v. Short*, 294 S.C. 415, 418, 365 S.E.2d 42, 44 (1988) (citing *Scott v. Wiggins*, 113 S.C. 88, 90, 101 S.E. 113, 114 (1919)). In *Beckham v. Short*, the South Carolina Supreme Court held that parol evidence may be admissible to show further consideration from what is stated in the deed, stating that "only the essential elements of the contract ever need protecting. Varying the consideration of a written instrument does not ordinarily affect the instrument's validity." 294 S.C. at 419, 365 S.E.2d at 44.

Wheeler received a benefit for his transfer to Pawleys in the form of an almost \$1.92 million increase in the value of his membership interest in the Pawleys and the payoff of a \$300,000 mortgage to First South Bank. Further, Wheeler benefitted from the transfer to Pawleys by protecting his financial interest in the property. In *Oskin v.*

Johnson), the Supreme Court recently held that the creation of an LLC by the wife of a part-owner of property for the purpose of securing a loan to protect that part-owner's interest was not fraudulent. 400 S.C. 390, 735 S.E.2d 459 (2012). The Supreme Court stated, "[a]s with any other wise consumers or investors, they are free to utilize a legal mechanism to protect their own financial interests." 400 S.C. at 401. The court went on to decide that no inequity of fraud had occurred because voiding the subject transfer would not have changed lien priorities. *Id.* As set forth in Section III below, the same result is dictated here. Additionally, Sapp presented no evidence that Wheeler had any intent in transferring the Property other than for the purpose of protecting his financial interests and carrying out his business. Other than the Articles of Organization which state Pawleys' business purpose, the only other evidence of Wheeler's intent is a direct denial in his Answer to Sapp's cross-claim and an affidavit Wheeler signed confirming that the transfer to Pawleys was done to increase his interest or stock ownership in the company. (Answer of Wheeler to Sapp's Cross-claim, October 10, 2012; R. pp. 123-127, and Defendant's Trial Exhibit No. 1, Quit Claim Deed and Affidavit; R. pp. 750-755).

Sapp alternatively argues that even if the transfer was supported by valuable consideration, it was grossly inadequate consideration. (Appellant's Initial Brief, p. 14). As set forth above, however, even if this Court finds that Five Dollars (\$5.00) and the benefits Wheeler received in exchange for the conveyance amounted to grossly inadequate consideration, Sapp has failed to prove by clear and convincing evidence that Wheeler intended to defraud Sapp in transferring the property to Pawleys and that Kennedy participated in the fraud. See, *Royal Z Lanes, Inc. v. Collins Holding Corp.*, 337 S.C. 592, 595, 524 S.E.2d 621, 622 (1999) (citing *Jefords*, 247 S.C. at 352, 147 S.E.2d at 418).

([W]here there is gross inadequacy of consideration, an actual intent to defraud must still be shown to set aside the conveyance as fraudulent").

1. If the Court finds no consideration, Sapp has failed to prove Wheeler was insolvent or lacked resources to pay the debt at the time of judgment

If the Court finds that no consideration supported the transfer to Pawleys, Sapp has still failed to meet his proof burden. Sapp has failed to prove by clear and convincing evidence that Wheeler "failed to retain sufficient property to pay his debt" to Sapp. See, *Albertson v. Robinson*, 371 S.C. 311, 317, 638 S.E.2d 81, 84 (2006) (Court held that, in addition to a lack of valuable consideration, the creditor must also establish that "(1) the grantor was indebted to the creditor at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay his indebtedness to the creditor in full..."). Appellant once again compares the instant case to *Coleman*; however, the two are distinguishable. The grantor in *Coleman* was completely insolvent at the time that he made the transfer, which the court considered to be circumstantial evidence that the conveyance was fraudulent. *Coleman*, 261 S.C. at 210. In fact, at trial, the grantor of the property admitted that he was insolvent and unable to pay his debts at the time he transferred the property to his daughter and son-in-law. 261 S.C. at 206.

Unlike *Coleman*, Wheeler was not insolvent at the time the transfer was made as it is undisputed that his 99% interest in Pawleys was worth at least \$1,620,000. (Plaintiff's Trial Exhibit No. 1, Loan Closing Statement at Kennedy_01138-1140; R. pp. 228-230). At the time the Sapp judgment was entered, Sapp only produced a *nulla bono* return from Georgetown County. Absent any evidence that Wheeler did not have attachable assets in other jurisdictions, a lone *null bono* return in one county cannot rise to the level of clear

and convincing evidence of insolvency. Wheeler retained counsel to appeal the Sapp judgment through final judgment and retained counsel to defend this action through appeal, indicating that Wheeler clearly has some assets. Whether Wheeler's assets are sufficient to satisfy Sapp's judgment remains an unanswered question as Sapp has made no effort to discover Wheeler's assets or collect his judgment beyond mailing it to the Georgetown County Sherriff.

III. EQUITY AND THE RECORDING STATUTE DICTATE RESPONDENT'S LIEN IS SUPERIOR

An action to establish lien priorities is an action in equity. *Fibkins v Fibkins*, 303 S.C. 112, 399 S.E.2d 158 (Ct.App. 1990). An action to foreclose a mortgage is also an action in equity. *Id.* Pursuant to the South Carolina Recording Statute,

all...instruments...encumbering [property]...are valid so as to affect the rights of subsequent creditors...only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated.

S.C. Code Ann. § 30-7-10. The purpose of South Carolina's recording statute is to protect subsequent creditors for value and without notice. *Epps v. McCallum Realty Co.*, 129 S.C. 481, 138 S.E. 297 (1927). Kennedy filed its mortgage fourteen months before Sapp obtained his judgment and indisputably has a superior lien. This inescapable fact reveals the folly in Sapp's entire appeal – Kennedy obtained no advantage in lending to Pawleys versus lending to Wheeler directly. If Kennedy had loaned to Wheeler, its lien would have still been superior to Sapp's judgment lien by fourteen months, thus evidencing no fraud or inequity occurred.

In *Atlas Supply Co. v. Davis*, the South Carolina Supreme Court held that a judgment lien awarded on the basis of a debt that was antecedent to the execution of a

mortgage, was not within the protection of the recording statute. 273 S.C. 392, 256 S.E.2d 859 (1979). In *Atlas*, the judgment creditor actually recorded its lien two hours before the mortgage was recorded. *Id.* However, the Court granted priority to the mortgage on the basis that the statute awards protection to subsequent creditors who extend credit in reliance on the property being unencumbered, stating

a creditor who between the date of the execution of the mortgage and the date of its record entered judgment against the mortgagor on an obligation that had been created prior to the date of the mortgage was not within the protection of the statute because his extension of credit to the mortgagor was antecedent, not subsequent, to the execution of the mortgage.

273 S.C. 392, 393, 256 S.E.2d 859, 860. There is no set of facts Sapp can argue, much less prove, which would allow his lien to pre-date Kennedy's lien. Sapp acknowledges as much as to Lot 3 to which Kennedy obtained a purchase money mortgage by paying off the First South mortgage,⁸ but the analysis is no different on Lot 4 as Sapp had no lien interest in Lot 4 when Kennedy recorded its mortgage.

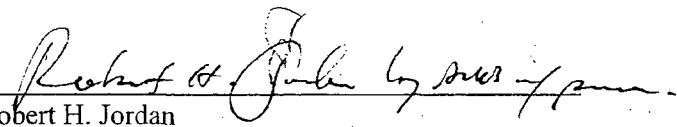
In *Oskin v. Johnson*, Justice Hearn commented that in cases alleging a fraudulent conveyance, the Court should look beyond the mere intent of the grantor and "review the transaction as a whole for whether it was designed to defraud another." 400 S.C. at 404. This broader view of the transaction, Respondent would suggest, is consistent with the Court's role in deciding any equitable claim. In this context, it is undisputed Kennedy loaned almost \$1 million in an arms-length mortgage transaction and has incurred more than \$1.8 million in damages from this transaction.⁹ It performed a proper title search,

⁸ A purchase money mortgage is given priority over all other claims or liens arising through the mortgagor although they are prior in time to the execution of the purchase money mortgage. *Hursey v. Hursey*, 284 S.C. 323, 327, 326 S.E.2d 178, 180 (Ct. App. 1985)

⁹ Not only did Kennedy not benefit from this transaction neither did Wheeler. Wheeler lost his property in foreclosure and now has a \$382,790 deficiency judgment entered against him, more than the Sapp judgment.

paid off the one recorded lien at closing, and properly filed its mortgage with the Georgetown County RMC's office. Ultimately, Kennedy conducted and executed a legal mortgage transaction under South Carolina law and its lien should be honored. To void Kennedy's mortgage under the evidence presented would not only be an unprecedented result under South Carolina law but it would be fundamentally unjust.

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Charleston, South Carolina
January 6, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Joe M. Crosby, Master-In-Equity

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

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

v.

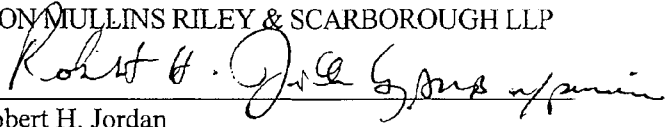
Pawleys Island North, LLC, Will Darwin Wheeler,
Peggy Wheeler-Cribb, and J. Mars Sapp, Defendants,
Of Whom Pawleys Island North, LLC, Will Darwin
Wheeler and Peggy Wheeler-Cribb are Respondents, and

J. Mars Sapp is the..... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondents complies
with Rule 211(b), SCACR.

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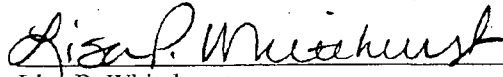
J. Mars Sapp is the..... Appellant.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the **FINAL BRIEF OF
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January 6, 2014

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Respondents,

v.

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

J. Mars Sapp is the

Appellant.

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TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of Issues on Appeal.....	1
Statement of the Case.....	1
Statement of Facts.....	4
Standard of Review.....	5
Argument.....	6
A. The transfer of property valued at \$1,920,000.00 by Wheeler to a limited liability company in which the grantor (Wheeler) held a 99% membership interest is a conveyance supported by valuable consideration.	6
1. There is sufficient consideration to support the transfer of The Property to Pawleys.	7
2. The consideration given for the transfer should not be deemed inadequate.	7
3. The transfer from Wheeler to Pawleys was not an intra-family transfer.	8
4. Wheeler did not transfer the Property to Pawleys with the actual intent to defraud Sapp.	9
5. There is no evidence that Wheeler failed to retain Sufficient property to pay the debt at the time of closing.	10
B. There is no evidence which would support a conclusion that the Kennedy Loan transaction should be invalidated.	12
C. The Kennedy Loan transaction should not be set aside as a fraudulent conveyance, or deemed subordinate to the Sapp judgment lien.	13
Conclusion	14

TABLE OF AUTHORITIES

Cases

<u>Albertson v. Robinson</u> , 371 S.C. 311, 628 S.E.2d 8 (Ct. App. 2006).....	7
<u>Future Group, II v. Nationsbank</u> , 324 S.C. 89, 478 S.E.2d 45 (1996).....	7,11
<u>Mathis v. Burton</u> , 319 S.C. 261, 460 S.E.2d 406 (Ct. App. 1995).....	9
<u>McDaniel v. Allen</u> , 265 S.C. 237, 242-43, 217 S.E.2d 773, 775-76 (1975).....	7
<u>McGhee v. Wells</u> , 57 S.C. 280, 35 S.C. 529 (1900).....	8
<u>Oskin v. Johnson</u> , 400 S.C. 390, 735 S.E.2d 469 (2012).....	5,6
<u>Royal Z Lanes, Inc. v. Collins Holding Corporation</u> , 337 S.C. 592, 524 S.E.2d 621 (1999).....	7
<u>Sapp v. Wheeler</u> , 402 S.C. 502, 741 S.E.2d 621 (2013).....	4
<u>South Carolina National Bank v. Halter</u> , 293 S.C. 121, 359 S.E.2d 74 (Ct. App. 1987).....	13

Statutes

S.C. Code §12-24-10 (1976, as amended).....	5
S.C. Code §12-24-70 (1976, as amended).....	5
S.C. Code §27-23-10 (1976, as amended).....	6
S.C. Code §33-44-504 (1976, as amended).....	12

I. STATEMENT OF ISSUES ON APPEAL

A. Should the transfer of property valued at \$1,920,000.00 for "the sum of FIVE AND NO/100 DOLLARS (\$5.00) and no other consideration to the Grantor" to a limited liability company in which the Grantor held a 99% membership interest, be set aside as a fraudulent conveyance where the Grantor was indebted to the creditor at the time of the transfer, the conveyance was voluntary, and the Grantor failed to retain sufficient property to pay his indebtedness to the creditor?

1. Even if there was no actual intent to defraud the creditor, was the conveyance fraudulent when it was without consideration?
2. If the consideration for the transfer is deemed grossly inadequate, instead of being completely without consideration, did the Grantor overcome the rebuttable presumption of fraud arising from the transfer when he failed to offer any testimony as to the *bona fides* of the transfer?
3. Even if there was consideration for the transfer, was the conveyance fraudulent where it was made by the Grantor with actual intent to defraud the creditor and the intent is imputable to the Grantee in which the Grantor held a 99% membership interest?

B. Where a mortgage is given on property by a fraudulent Grantee to a subsequent creditor who has notice of the fraud, should the mortgage be void as to an existing creditor of the fraudulent Grantor?

C. Where a fraudulent Grantee creates new debt and gives a lender a mortgage for inadequate consideration when compared to the value of property, and the lender is on notice of the fraudulent conveyance, should the mortgage be set aside as a fraudulent conveyance, or declared subordinate to a creditor of the fraudulent Grantor?

II. STATEMENT OF THE CASE

This case involves foreclosure and guaranty collection claims brought by Respondent Kennedy Funding, Inc. (herein "Kennedy") by the filing of a

Summons and Complaint in Georgetown County on February 9, 2011. Kennedy sought to foreclose a mortgage given by Respondent Pawleys Island North, LLC (herein "Pawleys") on two (2) parcels of property (Lots 3 and 4) (collectively, "the Property"), sought to collect on loan guaranty agreements given by Respondents Will Darwin Wheeler (herein "Wheeler") and Peggy Wheeler-Cribb (herein "Wheeler-Cribb"), and sought a determination whether Appellant J. Mars Sapp's judgment lien against Wheeler was prior to the mortgage lien of Kennedy. Sapp answered the Complaint asserting that he was a judgment lien holder and requested that his lien be declared senior to Kennedy's lien. The Respondents Pawleys, Wheeler and Wheeler-Cribb likewise filed an Answer to the Complaint.

By Order filed March 22, 2012, the case was referred to the Honorable Joe M. Crosby, Master-In-Equity for Georgetown County ("The Master") with finality and any appeal to be taken to the South Carolina Supreme Court or Court of Appeals is appropriate (Order of Reference).

By Motion filed October 3, 2011, Kennedy moved for Summary Judgment seeking to dismiss Sapp's claim of an interest in the Property or to declare Sapp's lien junior and subordinate to Kennedy's lien (Motion for Summary Judgment). By agreement of the parties, the Master heard the Motion on January 17, 2012 and the Master granted, in part, Kennedy's Motion by Order filed March 5, 2012 when he declared Sapp's lien, if any, junior and subordinate to Kennedy's lien (Order Granting Plaintiff's Motion for Summary

Judgment as to Defendant J. Mars Sapp).

On March 8, 2012, Sapp moved for the Master to reconsider the Order Granting Plaintiff's Motion for Summary Judgment as to Sapp (Defendant Sapp's Rule 59 Motion to Alter or Amend Judgment). The Master heard oral argument on Sapp's Motion on August 13, 2012, but issued no ruling at that time. The Master issued a ruling from the bench at the trial of the case on February 11, 2013.

On September 5, 2012, Kennedy filed an Amended Summons and Complaint, adding BNP Paribas ("BNP") as a Plaintiff, alleging that Kennedy assigned its rights to BNP (Amended Complaint). Sapp answered the Amended Complaint on September 20, 2012. Sapp further asserted by way of cross-claim that the conveyance of the Property by Wheeler to Pawleys was a fraudulent conveyance under the Statute of Elizabeth, that Plaintiffs, Pawleys and the guarantors condoned and participated in the transfer of the Property, that the conveyance to Pawleys was void and that if the conveyance of the Property was not completely void, it was void as to Lot 3 which was unencumbered at the time of the transfer from Wheeler to Pawleys. Likewise, the Respondents Pawleys, Wheeler and Wheeler-Cribb filed Answers to the Amended Summons and Complaint of the Plaintiffs and filed responsive pleadings to the Cross-Claim of the Appellant.

On February 11, 2013, the Master conducted a non-jury trial. At the close of the testimony by Plaintiffs and Sapp, Sapp moved for a directed

verdict. By Order filed June 7, 2013, the Master found that the Plaintiffs mortgage to be a first lien on the Property and ordered that the Property be sold at a judicial sale and ordered that the Plaintiffs were owed \$1,825,935.33 as of April 10, 2012. The Master further found that the conveyance of the Property by Wheeler to Pawleys was not fraudulent.

Sapp filed a Notice of Appeal on June 27, 2013, appealing the Master's February 14, 2012 Summary Judgment Order and his June 7, 2013 Order and Judgment. Sapp filed an Amended Notice of Appeal confirming Pawleys, Wheeler and Wheeler-Cribb were also Respondents in the appeal.

III. STATEMENT OF FACTS

Appellant Sapp, in a separate civil action, sued Respondent Wheeler in 2008, seeking damages for the alleged breach of a Commercial Lease Guaranty. On June 4, 2010, Sapp obtained a verdict against Wheeler in the amount of \$257,789.00 and \$48,929.00 in attorney's fees. Wheeler appealed the verdict which was affirmed by the Court of Appeals on February 20, 2013. Sapp v. Wheeler, 402 S.C. 502, 741 S.E.2d 621 (2013). At the time of the commencement of the Sapp/Wheeler litigation, Wheeler was the sole owner in fee simple of two (2) parcels of property on Pawleys Island known as Lots 3 and 4 (previously referenced as the "Property"). Wheeler also owned Lots 1 and 2 in the same subdivision. (R. p. 724, line 21-p. 725, line 7). The Property is the subject of Kennedy's foreclosure action.

By Quitclaim Deed dated April 29, 2009, Wheeler transferred Lots 3 and 4 to Pawleys (Sapp Trial Exhibit 1; R. pp. 750-755). The Quitclaim Deed recited \$5.00 and no other consideration. The Quitclaim Deed further included the Affidavit required by S.C. Code §12-24-70 (1976, as amended), which set forth that the conveyance was exempt from the recording fee required by S.C. Code §12-24-10 because it was a transfer from a shareholder, partner, etc. to a corporation, partnership, etc. as a stockholder, partner, or trust beneficiary of the entity or so as to become a stockholder, partner, or trust beneficiary and no consideration was paid for the transfer other than stock in the corporation, interest in the partnership, etc., or the increase in the value of the stock or interest held by the Grantor (Sapp Trial Exhibit 1; R. pp. 750-755). Wheeler had a 99% membership interest in Pawleys and his mother Wheeler-Cribb had the remaining 1% membership interest.

On April 30, 2009, Kennedy made a loan to Pawleys and took a mortgage in the principal amount of \$960,000.00 on the Property. At the time of Kennedy's loan to Pawleys, Lot 3 of the Property had a market value of \$1,040,000.00 and Lot 4 had a fair market value of \$880,000.00 (Kennedy Trial Exhibit 1; R. pp. 511-518).

IV. STANDARD OF REVIEW

A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth. Oskin v. Johnson,

400 S.C. 390, 735 S.E.2d 469 (2012).

An action to establish lien priorities regarding property that is subject to a mortgage is an action in equity, as is an action to foreclose a mortgage. Likewise, an action to set aside a conveyance under the Statute of Elizabeth is an equitable action, and a *de novo* standard of review applies. Oskin v. Johnson, 400 S.C. 390, 735 S.E.2d 469 (2012). Oskin further states the oft-cited principle that an appellate court is not required to disregard the findings of the trial court because the trial court is in a better position to assess the credibility of the witnesses.

V. ARGUMENT

A. The transfer of the Property valued at \$1,920,000.00 by Wheeler to a limited liability company in which the Grantor (Wheeler) held a 99% membership interest is a conveyance supported by valuable consideration.

The Statute of Elizabeth, as codified in §27-23-10 of the South Carolina Code (Supp. 2005), governs fraudulent conveyances and provides in relevant part:

Every...conveyance of lands...which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful...debts...must be deemed and taken...to be, clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing use, or any other matter or thing to the contrary notwithstanding.

South Carolina courts have held that under the Statute of Elizabeth Conveyances may be set aside under two conditions: first, where the transfer is made by the Grantor with the actual intent of defrauding his creditors where that intent is imputable to the Grantee, even though there is a valuable consideration; and, second, where a transfer is made without actual intent to defraud the Grantor's creditors, but

without valuable consideration. McDaniel v. Allen, 265 S.C. 237, 242-43, 217 S.E.2d 773, 775-76 (1975).

Albertson v. Robinson, 371 S.C. 311, 628 S.E.2d 81 (Ct. App. 2006).

The challenge by Sapp to the transfer of Property to Pawleys fails under either condition.

1. There is sufficient consideration to support the transfer of the Property to Pawleys.

It is conceded that the Grantor Wheeler had a 99% membership interest in the Respondent Pawleys Island North, LLC (Appellant's Brief, p. 8). Therefore, Wheeler received consideration because his membership interest in Respondent Pawleys was increased by 99% of the value of the Property at the time of the transfer. In other words, under the evidence presented, there is evidence of a benefit received by Wheeler in the transfer. He possessed a 99% membership interest in Pawleys which, at the time of the transfer, received real estate which had a value of \$1,920,000.00. The record supports but one reasonable inference- the Respondent Wheeler as Grantor was provided a valuable consideration because of the increase of the value of membership interest in the limited liability company and such constitutes a benefit received by him. Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996).

2. The consideration given for the transfer should not be deemed grossly inadequate.

Appellant also charges that the consideration given for the transfer should be deemed grossly inadequate (Appellant's Brief, p. 15). In Royal Z

Lanes, Inc. v. Collins Holding Corporation, 337 S.C. 592, 524 S.E.2d 621 (1999), the court cited McGhee v. Wells, 57 S.C. 280, 35 S.C. 529 (1900) as defining grossly inadequate consideration as “a consideration so far short of the value of the property so as to arouse a presumption in the mind that the person who takes that property takes it under some kind of secret trust”. 524 S.E.2d at 623. Clearly, a transfer of property to a limited liability company in which the Grantor has a 99% membership interest is not so far short of the value of the Property as to arouse the presumption set forth in McGhee.

3. The transfer from Wheeler to Pawleys was not an intra-family transfer.

Appellant seeks to characterize the transfer by Wheeler to a limited liability company in which he held a 99% membership interest as an intra family transfer. Such comparison is misguided, however, because Wheeler was not divested of the asset. Appellant concedes that Wheeler retained possession and control of the Property through the limited liability company (Appellant’s Brief, p. 13). From Wheeler’s perspective, the character of the asset was converted from one of real estate to personal property (i.e., membership interest in Respondent Pawleys). The body of South Carolina cases which have addressed the issue of intra-family transfers have considered the term “intra-family” in its plain and obvious meaning—a transfer of property from one family member to another family member.

The transfer of property from a Grantor to a limited liability company, in which he held a 99% membership interest, would not qualify as an intra-family transfer.

4. Wheeler did not transfer the Property to Pawleys with the actual intent to defraud Sapp.

Because the challenged transfer was made for a valuable consideration, the Appellant must establish 1) that the transfer was made by the Grantor with the actual intent of defrauding his creditors; 2) the Grantor was indebted at the time of the transfer; and 3) the Grantors' intent is imputable to the Grantee. Mathis v. Burton, 319 S.C. 261, 460 S.E.2d 406 (Ct. App. 1995). In the present case, the Appellant has failed to meet the burden of proof that the transfer was made by Wheeler with the actual intent of defrauding his creditors.

There is no evidence before the Court that Wheeler acted with the intent of defrauding his creditors. In his Answer to Appellant's Cross-Claim, Wheeler denied any intent to defraud Appellant. As stated earlier, from Wheeler's perspective, only the character of the asset changed. Other than a *nulla bona* return from the Georgetown County Sheriff, Appellant presented no evidence of Wheeler's insolvency or indebtedness at the time of the transfer or any time thereafter (R. p. 726, lines 11-18). It is undisputed that Wheeler retained a 99% membership interest in Pawleys after the transfer to Pawleys, and after the Kennedy transaction, Pawleys had a net worth of \$960,000.00.

Because Wheeler had a 99% membership interest in Pawleys, there was consideration for the conveyance. There was no secrecy or concealment of the transaction and the conveyance from Wheeler to Pawleys did not constitute a transfer of the debtor's entire estate inasmuch as the Appellant concedes that Wheeler owned Lots 1 and 2 of the same subdivision. Appellant did not conduct any discovery or present any evidence of Wheeler's financial condition at the time he obtained his judgment against Wheeler (R. p. 726, lines 11-18). Appellant admitted that he did not know of any asset search conducted on his behalf other than the execution served by the Georgetown County Sheriff (R. p. 726, lines 11-18). Appellant presented no evidence that he had taken Wheeler through Supplemental Proceedings or pursued other collection avenues. Appellant failed to show by clear and convincing evidence that Wheeler was insolvent. In the present case, the badges of fraud simply do not exist.

5. There is no evidence that Wheeler failed to retain sufficient property to pay the debt at the time of closing.

If it is determined that a transfer was not made for valuable consideration, no actual intent to hinder or delay creditors must be proven. Instead, as matter of equity, the transfer may set aside if a creditor shows 1) that the creditor was indebted to the creditor at the time of the transfer; 2) that the conveyance was made without consideration or for mere nominal consideration; and 3) that the Grantor failed to retain sufficient property to pay

his indebtedness to the creditor in full, not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect its debt. Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996). The burden of proof lies with the creditor and such burden is by clear and convincing evidence. In addressing the argument advanced by the Appellant that the transfer was not made on a valuable consideration, this also fails. Again, the evidence fails to show that the conveyance was voluntary (gratuitous). Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996).

The Appellant has failed to establish that the Grantor failed to retain sufficient property to pay the indebtedness to the Appellant in full. Appellant presented no evidence that the Respondent Wheeler was insolvent at the time of the transfer or any time thereafter, other than the *nulla bona* return from the Georgetown County Sheriff at the time of the transfer (R. p. 726, lines 11-18). At the time of the Kennedy mortgage, Pawleys Island North retained equity in the Property in the sum of \$960,000.00 based upon the fair market value of the property at the time of the conveyance. Appellant provided no evidence of Wheeler's financial condition and presented no evidence that supplemental proceedings had been pursued. The Appellant failed to meet its burden by clear and convincing evidence that Wheeler was insolvent. There is no evidence that Wheeler attempted to conceal the transfer in any way or departed from normal business practices. There simply are no badges of fraud present which would shift the burden of proof to either Pawleys Island North, LLC or

Kennedy Funding.

Moreover, the distributional interest of Wheeler in Pawleys could be subject to a charge by the Court upon application by Sapp. See S.C. Code §33-44-504 (1976, as amended). S.C. Code §33-44-504 provides, in pertinent part:

- (a) On application by a judgment creditor of a member of a limited liability company or of a member's transferee, a court having jurisdiction may charge the distributional interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances may require to give effect to the charging order.
- (b) A charging order constitutes a lien on the judgment debtor's Distributional interest. The court may order a foreclosure of a lien on a distributional interest subject to the charging order at any time. A purchaser at the foreclosure sale has the rights of a transferee.

In summary, the conveyance from Wheeler to Pawleys is supported by valuable consideration. In the event the court determines that valuable consideration does not exist, then the Appellant failed to prove by clear and convincing evidence that Wheeler failed to retain sufficient assets with which to pay his indebtedness to Sapp in full.

B. There is no evidence which would support a conclusion that the Kennedy Loan transaction should be invalidated.

Kennedy mortgage was supported by valuable consideration. The mortgage was supported by a \$960,000.00 loan to Pawleys. In exchange for the \$960,000.00 loan, Kennedy received a mortgage against the Property in the amount of \$960,000.00. This would constitute valid consideration. Because

there was valuable consideration, the transfer will only be set aside if the Grantor (Wheeler) had the actual intent to defraud creditors and such intent was imputable to Kennedy. Again, for the reasons earlier cited, Wheeler did not have intent to defraud creditors in his participation in the Kennedy transaction. Even more so, because this was an arm's length transaction, such intent, if it did exist, would not be imputable to Kennedy. Citing South Carolina National Bank v. Halter, 293 S.C. 121, 359 S.E.2d 74 (Ct. App. 1987), where a mortgage transaction is supported by valuable consideration, it must be shown not only that Wheeler intended to hinder, delay or defraud his creditors, but also that Kennedy participated in the fraud. Such proof is not present in this case.

C. The Kennedy Loan transaction should not be set aside as fraudulent conveyance, or deemed subordinate to the Sapp judgment lien.

The Kennedy mortgage should not be set aside as a fraudulent conveyance. For the reasons earlier cited, the Kennedy mortgage transaction did not violate the Statute of Elizabeth and therefore should not be set aside as a fraudulent conveyance or declared subordinate to a creditor of the Grantor.

V. CONCLUSION

This Court should affirm the Master's Order Granting Summary Judgment and the Final Order and Judgment.

Respectfully Submitted.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

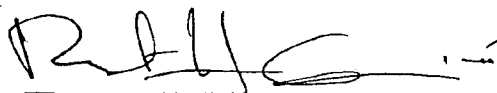
Pawleys Island North, LLC, Will Darwin Wheeler, Peggy Wheeler-Cribb, and
J. Mars Sapp, Defendants,
Of whom Pawleys Island North, LLC, Will Darwin Wheeler and Peggy Wheeler-
Cribb are Respondents and

J. Mars Sapp is the

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of the
Respondents Pawleys Island North, LLC, Will Darwin Wheeler and Peggy
Wheeler-Cribb complies with Rule 211(b), SCACR.



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January 2, 2014

THE STATE OF SOUTH CAROLINA
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J. Mars Sapp is the

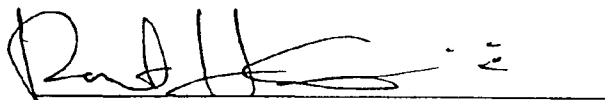
Appellant.

PROOF OF SERVICE

I hereby certify that I have served the Brief of the Respondents Pawleys Island North, LLC, Will Darwin Wheeler and Peggy Wheeler-Cribb by depositing a copy of it in the United States Mail, postage prepaid, on January 2, 2014, on the following Attorney for the Appellant and Respondent:

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THE STATE OF SOUTH CAROLINA
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DEC 18 2013

SC Court of Appeals

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Sapp, Defendants,
of whom Pawleys Island North, LLC, Will Darwin Wheeler and Peggy Wheeler-Cribb
are Respondents and

J. Mars Sapp is the Appellant.

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APPX0000
APPX00906

TABLE OF CONTENTS

Table of Authorities.....	ii
Introduction.....	1
Standard of Review.....	4
Argument.....	4

A. The conveyance of the Property by Wheeler to Pawleys for “the sum of FIVE AND NO/100 DOLLARS (\$5.00) and no other consideration” is a fraudulent conveyance.

1. **Wheeler intended to defraud Sapp.**
2. **The fraudulent intent is imputable to Pawleys.**
3. **Wheeler received no consideration for the transfer.**
 - a. **The Court should have given effect to the deed language.**
 - b. **The transfer did not increase the value of Wheeler’s membership interest in Pawleys.**
 - c. **The transfer did not increase Wheeler’s membership interest in Pawleys.**
4. **The transfer by Wheeler to Pawleys rendered him insolvent.**

B. Respondents fail to distinguish *Coleman v. Daniel*.

C. A mortgage given by a fraudulent grantee and taken for new debt is void as to an existing creditor of a fraudulent grantor under *Coleman v. Daniel* and *Rilling v. Schultz*.

D. The Recording Statute does not assist Kennedy in the face of a void transfer of the Property.

Conclusion.....	25

TABLE OF AUTHORITIES

Cases

<i>Albertson v. Robinson</i> , 371 S.C. 311, 638 S.E.2d 81 (Ct. App. 2006)	18
<i>Atlas Supply Co. v. Davis</i> , 273 S.C. 392, 256 S.E.2d 859 (1979)	18, 20, 21
<i>Bates v. Cobb</i> , 29 S.C. 395, 7 S.E. 743 (1888).....	12
<i>Brunson v. Sports</i> , 239 S.C. 58, 121 S.E.2d 294 (1961).....	20, 21
<i>Citibank v. Will D. Wheeler et al.</i> , 2012-CP-22-321	3
<i>Coleman v. Daniel</i> , 261 SC 198, 208, 199 S.E.2d 74, 79 (1973). 6, 7, 8, 12, 13, 14, 15, 16, 18, 19, 20, 25	
<i>Dinkins v. Robbins</i> , 200 S.C. 475, 21 S.E.2d 10, 16 (1942).....	6
<i>Epps v. McCallum Realty</i> , 129 S.C. 481, 138 S.E. 297 (1927)	20
<i>First Carolinas Joint Stock Land Bank of Columbia v. Ford</i> , 177 S.C. 40, 180 S.E. 562, 565 (1935).....	8, 9
<i>Gardner v. Kirven</i> , 184 S.C. 37, 191 S.E. 814, 816-17 (1937)	11
<i>Independence National Bank v. Buncombe Professional Park, LLC</i> , 402 S.C. 514, 741 S.E.2d 572 (Ct. App. 2013)	4
<i>Leasing Enterprises, Inc. v. Livingston</i> , 363 S.E.2d 410, 294 S.C. 204 (Ct. App. 1987).....	19, 20
<i>Lebovitz v. Mudd</i> , 293 S.C. 49, 358 S.E.2d 698 (1987)	3, 18
<i>Lenhardt v. Ponder</i> , 64 S.C. 354, 42 S.E. 169 (1902).....	24
<i>Magovern v. Richard</i> , 27 S.C. 286, 3 S.E. 340 (1887)	24
<i>McElwee v. Kennedy</i> , 56 S. C. 154, 34 S. E. 86 (1899)	24
<i>Messervy v. Barelli</i> , 2 Hill Eq. 576 (1837).....	20
<i>Oskin v. Johnson</i> , 400 S.C. 390, 735 S.E.2d 459 (2012).....	4, 16, 17, 18
<i>Penning v. Reid et al.</i> , 167 S.C. 263, 283, 284, 166 S.E. 139, 146.....	11
<i>Regions Bank v. Wingard Properties, Inc.</i> , 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011)....	21, 22

Rilling v. Schultz, 95 Tex. 352, 67 S.W. 401 (1902) 13, 15, 16, 18

South Carolina National Bank v. Halter, 293 S.C. 121, 359 S.E.2d 74 (Ct. App. 1987) 23

Windsor Properties v. Dolphin Head Const. Co., Inc., 331 S.C. 466, 498 S.E.2d 858 (1998) 6

Statutes

S.C. Code Ann. § 15-39-80 (1976) 12

S.C. Code Ann. § 18-9-170 (1976) 2

S.C. Code Ann. § 30-7-10 (1976) 18, 19

S.C. Code Ann. § 27-23-10 (1976) 19

I. INTRODUCTION

This Court's Ultimate Decision. In this appeal the court will determine if a judgment creditor should be left with no remedy after his insolvent debtor fraudulently transferred unencumbered property to a fraudulent grantee which gave a mortgage on the property for new indebtedness to a lender who had knowledge of both the judgment creditor's claim, and the facts of the fraudulent transfer.

Appellant Sapp leased a commercial building in Surfside Beach to Wheeler's company in 1994. Wheeler guaranteed the lease. When the lease went into default, Sapp had the occupants evicted in the Magistrate's Court in 2008. On September 30, 2008 Sapp then sued Wheeler's company and Wheeler in the Court of Common Pleas for Georgetown County where Wheeler resides. The case was tried for three days resulting in a jury verdict for Sapp on June 4, 2010 (R. p. 713, line 1-p. 717, line 20; and Sapp's Exs 2-5, R. pp. 756-785).

After the verdict, Sapp sent a judgment execution to the Georgetown County Sheriff (Sapp Ex. 6, R. pp. 786, 787). The Sheriff returned the execution *nulla bona*, stating:

Date: 4/11/11

This is to certify that I am unable to find personal or real property to satisfy the within execution. I hereby Nulla Bona this execution.

/s

A. Lane Cribb

Georgetown County, SC

While Sapp's suit was pending against Wheeler, Kennedy Funding assumed the risk of making a new non-purchase money loan, secured by the unencumbered Lot 3 and a partially encumbered Lot 4, when Kennedy had knowledge of the fraudulent transfer. Every lawyer and party involved in the transaction from Kennedy Funding and its two outside attorney firms and in-house counsel, to Wheeler, Wheeler-Cribb, and Pawleys and their attorney, knew that the Property with a value of \$1,920,000 was being quitclaimed by Wheeler for no consideration,

knew that Wheeler had personally guaranteed a commercial lease which went into default, and knew that Wheeler was being sued by Sapp on the guaranty.

Sapp has taken all necessary and reasonable steps to secure and collect his judgment. He filed suit, his case came to trial in due course, and he secured a jury verdict on which judgment was entered. Despite following all the procedural rules of the court where it took 20 months to get to trial, prevailing on appeal, diligently searching for assets, and executing on his judgment, if the Kennedy mortgage has priority over Sapp's judgment lien, Sapp has no means of collecting his judgment against Wheeler.

Neither the applicable case law nor the equities of this case leave Sapp without a remedy. The fraudulently transferred property should be ordered sold in satisfaction of Sapp's judgment.

Respondents' Briefs and Facts. There are two sets of Respondents in this appeal: the first set includes Respondents Will D. Wheeler, Peggy Wheeler-Cribb, and Pawleys Island North, LLC. The second set of Respondents includes Kennedy Funding, Inc. and BNP Parabis. Each set of Respondents filed a Respondent's brief and this Reply Brief is Appellant Sapp's reply to both briefs.

The facts of this appeal are set forth in the Statement of the Case and Statement of Facts of Appellant Sapp's Brief. This brief introduction clarifies any additional facts included in Respondents' briefs. Defined terms in this brief are set forth in Appellant Sapp's Brief.

As to Sapp's motion to stay the sale of the property (Kennedy's Initial Brief, p. 4), a telephone hearing was conducted where the Master erroneously set the bond required to stay the sale, but the Master never entered a written order.¹ The Master stated he would file a written

¹ The Master set the bond at \$1,825,935.53, the amount of the debt owed Kennedy by Pawleys and the Guarantors. To the extent that a bond was required to stay the sale, it should have been set in accordance with S.C. Code Ann. § 18-9-170 (1976). For unimproved land like that

order on Sapp's motion to stay the sale, and requested a proposed order from Kennedy's counsel which was provided. Kennedy and BNP proceeded with a foreclosure sale on August 5, 2013. Regardless, Sapp could not post a bond of over \$1.8 million and he seeks to protect his interest in the property by the filing of a *lis pendens*. See, *Lebovitz v. Mudd*, 293 S.C. 49, 358 S.E.2d 698 (1987), holding that the filing of a *lis pendens* is proper pending appeal in a fraudulent conveyance case.

Prior to filing suit against Wheeler in September 2008, and prior to executing on his judgment, Sapp conducted a search of Wheeler's assets. He discovered that Wheeler owned four parcels of real property which are contiguous lots at Pawleys Island. Lots 1 and 2 were subject to existing mortgages, and they are in foreclosure. *Citibank v. Will D. Wheeler et al.*, 2012-CP-22-321. Prior to the Sapp/Wheeler Litigation, Lot 3 was not encumbered by any mortgage or judgment lien, and Lot 4 was encumbered by a \$300,000.00 mortgage to First South Bank. While the Sapp/Wheeler Litigation was pending Wheeler fraudulently conveyed by quitclaim deed Lots 3 and 4 (the Property), and the fraudulent grantee Pawleys Island North, LLC ("Pawleys") gave Kennedy a mortgage on the Property. Prior to this loan and mortgage, there was no existing relationship between Wheeler and Pawleys with Kennedy, nor was there any indebtedness owed by Wheeler or Pawleys to Kennedy. Sapp did not locate any other property in his asset search on which to execute in Georgetown County, a fact confirmed by the *nulla bona* return of the execution (R. p. 719, line 1-p. 721, line 2; p. 724, line 21-p. 726, line 15).

To the extent that there might have been equity in the Property immediately after the Kennedy loan and mortgage transaction, there is none now with Kennedy's addition of interest at

involved in this appeal, the statute requires a bond be set in relation to taxes on the property and interest on the debt, not the full amount of the debt.

25% and attorney's fees. In fact, after the foreclosure sale, a deficiency judgment of \$352,790.61 was entered against Pawleys and the Guarantors.

II. STANDARD OF REVIEW

An action to establish lien priorities regarding property that is subject to a mortgage is an action in equity, as is an action to foreclose a mortgage. The appellate court's standard of review in equitable matters is its own view of the preponderance of the evidence. *Independence National Bank v. Buncombe Professional Park, LLC*, 402 S.C. 514, 741 S.E.2d 572 (Ct. App. 2013). Likewise, an action to set aside a conveyance under the Statute of Elizabeth is an equitable action. Sapp's initial burden was to prove a fraudulent conveyance by clear and convincing evidence, and a *de novo* standard of review applies.² *Oskin v. Johnson*, 400 S.C. 390, 735 S.E.2d 459 (2012). "An action to set aside a conveyance under the Statute of Elizabeth is an equitable action, and a *de novo* standard of review applies." *Id.* at 397, 735 S.E.2d at 463.

III. ARGUMENT

Respondents Kennedy and BNP misapprehend Sapp's brief and arguments, make inexplicable legal conclusions³, and even assert the "parade of horrors" that mortgage lending in South Carolina would be eliminated if Sapp's arguments are upheld.

² Respondents Kennedy and BNP incorrectly assert that Sapp contended that a preponderance of the evidence standard applies.

³ For example, at pages 11–12 of their brief, they state that "This transaction [the loan and mortgage between Kennedy and Pawleys] cannot be set aside under the Statute of Elizabeth because no conveyance occurred." The statutory language and the case law make it clear that mortgages are subject to attack under the Statute of Elizabeth. *See, e.g., South Carolina Nat. Bank v. Halter*, 293 S.C. 121, 359 S.E.2d 74 (Ct. App. 1987). At page 26 of its brief, Kennedy incorrectly states that it made a purchase money mortgage to Pawleys. A purchase money mortgage is recognized where a purchaser of land, contemporaneous with the acquisition of the legal title or afterward, but as a part of the same transaction, executes a mortgage to secure the purchase money. *Hursey v. Hursey*, 284 S.C. 323, 327, 326 S.E.2d 178, 180 (Ct. App. 1985). Pawleys did not secure purchase money for the acquisition of the Property or either of the Lots. The property was transferred by quitclaim deed from Wheeler to Pawleys for "the sum of FIVE

A. The conveyance of the Property by Wheeler to Pawleys for “the sum of FIVE AND NO/100 DOLLARS (\$5.00) and no other consideration” is a fraudulent conveyance.

In their Argument I, their lead argument, Kennedy and BNP (collectively “Kennedy” unless noted otherwise) inaccurately assert that Sapp argues that (1) the mortgage given to Kennedy should be set aside as fraudulent because it is not supported by consideration, or (2) there is no evidence Kennedy intended to defraud Sapp (Kennedy’s Initial Brief, p. 11).

Kennedy misapprehends Sapp’s argument so much that Kennedy’s lead argument is really not responsive to Sapp’s argument. Kennedy asserts that Sapp conflates a mortgage and a sales transaction, when, in fact, they are the ones who do just that, most likely to deflect attention from Wheeler’s fraud. Without reference to the Kennedy mortgage transaction whatsoever, other than the fact the mortgage was recorded, Sapp clearly and convincingly sets forth at pages 8–17 of Appellant’s Brief (Argument A), that the conveyance from Wheeler to Pawleys is fraudulent. Wheeler’s fraudulent conveyance cannot stand on its own merit regardless of the Kennedy loan and mortgage transaction. In fact, assuming that the Kennedy mortgage was not on the Property, could anyone seriously argue that the transfer from Wheeler to Pawleys was not fraudulent? The Kennedy loan and mortgage are irrelevant to the fact that Wheeler fraudulently transferred the Property to Pawleys. The effect of that fraudulent conveyance and how Sapp’s claim to the Property takes priority over the Kennedy mortgage are then explored beginning at page 18 in Arguments B and C of Appellant’s Brief.

Examining the Wheeler transfer to Pawleys, it is fraudulent and should be set aside. Conveyances shall be set aside as fraudulent under the Statute of Elizabeth under two conditions:

AND NO/100 DOLLARS (\$5.00) and no other consideration to the Grantor.” Some loan proceeds were applied to pay off the First South mortgage, but the proceeds were not applied to purchase any of the Property from Wheeler. At page 19 of its brief, Kennedy classifies Wheeler’s Answer to the Sapp’s Cross-claim as evidence.

First, where the transfer is made with the actual intent of defrauding his creditors where the intent is imputable to the grantee, even though there is a valuable consideration; and, second, where a transfer is made without actual intent to defraud the grantor's creditors, but without consideration.

Coleman v. Daniel, 261 S.C. 198, 208, 199 S.E.2d 74, 79 (1973).

1. Wheeler intended to defraud Sapp.

The evidence at trial clearly and convincingly established multiple badges of fraud by Wheeler which he failed to rebut.

The idea of a badge of fraud is, that it furnishes a legal presumption of a fraudulent intention, which supersedes inquiry into the actual intention; and every badge of fraud is therefore evidence of a legal fraud, or fraud per se. It does not change the essential character of the presumption, that sometimes it may be rebutted, and sometimes not; for, until it is rebutted, the presumption remains, and whether rebutted or not, presents a question for the determination of the court, and not of the jury.

Dinkins v. Robbins, 200 S.C. 475, 21 S.E.2d 10, 16 (1942).

Some of the un-rebutted badges of fraud include: Wheeler's indebtedness to Sapp at the time of the transfer, the failure or lack of consideration for the transfer⁴, the intra-family transfer (*Windsor Properties v. Dolphin Head Const. Co., Inc.*, 331 S.C. 466, 498 S.E.2d 858 (1998)), the filed and pending Sapp/Wheeler Litigation, the insolvency of Wheeler as a result of the transfer⁵, and despite the formality of the limited liability company, Wheeler's retained use, possession, and development rights to the Property with his 99% interest in the company. These badges of fraud furnish "a legal presumption of fraudulent intention" and unless rebutted, which they were not, should not even create a question of fact. *Dinkins*.

⁴ Discussed more fully at Argument A.3, below.

⁵ Discussed more fully at Argument A.4, below.

2. The fraudulent intent is imputable to Pawleys.

The badges of fraud created a presumption of fraud. It was incumbent then upon Wheeler and Pawleys to rebut that presumption. As a 99% owner of Pawleys, Wheeler's fraudulent intent is mirrored by and imputable to Pawleys. Wheeler's intent is imputable to the company in which he held a 99% interest, a fact never contradicted by Wheeler, Wheeler-Cribb, Pawleys, Kennedy or BNP. In fact, Kennedy acknowledges this legal conclusion in its brief when discussing *Coleman v. Daniel*.

The property was, in essence, being held in the daughter and son-in-law's name for their father's perpetual use. Under these facts, the Court found the daughter and son-in-law's failure to inquire as to their father's indebtedness to plaintiff Coleman resulted in the knowledge of the debt imputed to them and voided the transfer as a fraudulent conveyance.

Kennedy's Initial Brief, pp. 12, 13.

Coleman holds:

Actual knowledge of, or participation in, the debtor's fraudulent intention on the part of the transferee need not be established in order to justify a conclusion that the transaction was illegal. The transaction is subject to attack if at the time of the transfer the transferee had notice of circumstances which would arouse the suspicion of an ordinarily prudent man and cause him to make inquiry as to the purpose for which the transfer was being made, which would disclose the fraudulent intent of the maker.

261 S.C. at 201, 199 S.E.2d at 80.

Here, the Property was being held in Pawleys' name for Wheeler's continued development thereof, and Pawleys had actual knowledge of Wheeler's indebtedness to Sapp from its 99% member, Wheeler. The transferee, Pawleys, not only had notice of circumstances which would arouse suspicion of an ordinarily prudent person and cause it to make inquiry, but every lawyer and party involved in the overall transaction, including the transferee Pawleys, knew that the Property was being quitclaimed, knew that Wheeler was being sued by Sapp, knew

that Wheeler had personally guaranteed a lease which was in default, and knew that property valued at \$1,920,000 was being conveyed for \$5.00 and no other consideration. If ignorance did not save the fraudulent grantees in *Coleman*, certainly Pawleys' knowledge of the facts surrounding the conveyance would arouse suspicion, and requires the same conclusion – that Wheeler's intent is imputable to Pawleys.

3. Wheeler received no consideration for the transfer.

Despite Respondents' contentions to the contrary, Wheeler chose the quitclaim deed language of \$5.00 and "no other consideration." Respondents now wish to unravel Wheeler's intentional use of this specific and unambiguous language, and contrive an argument of so-called consideration by referring to Wheeler's statement used to avoid paying deed stamps. They argue that Wheeler increased his interest in Pawleys by conveying the Property. Respondents' argument fails for at least three reasons.

a. **The Court should have given effect to the deed language.** Respondents argue that the court can ignore the deed and consider extrinsic evidence of consideration. In the absence of testimony from Wheeler or Pawleys, the best evidence of the consideration is the specific and unambiguous statement that there was NO CONSIDERATION other than a nominal \$5.00 for the transfer. The deed did not state that the consideration was for an interest or increased interest in a business. It did not state that consideration was the assumption of any debt (which did not occur anyway). The deed stated the actual consideration, \$5.00 and "no other." "The rule is that the intention of the parties is to be ascertained by considering all the provisions of the deed, as well as the situation of the parties, and then to give effect to such intention, if practicable, when not contrary to law." *First Carolinas Joint Stock Land Bank of*

Columbia v. Ford, 177 S.C. 40, 180 S.E. 562, 565 (1935). The deed reflects no other consideration, is the best evidence, and is conclusive on the subject.

b. **The transfer did not increase the value of Wheeler's membership interest in Pawleys.** Wheeler already had 100% interest in the property at its full value. Respondents' argument misses the point that the membership interest could be worth no more than the interest Wheeler already had so Wheeler received no benefit for the transfer. In fact, Wheeler lost value by the transfer and contemporaneous loan transaction. Respondents' argument fails to address that the Property was mortgaged for all obligations owed to Kennedy which subsequent events have shown those obligations to exceed the value of the property, so there was no increase in value of the membership interest. In short, Wheeler simply gave away the Property in exchange for nothing.

c. **The transfer did not increase Wheeler's membership interest in Pawleys.** The transfer of the Property to Pawleys did not increase Wheeler's membership interest in the limited liability company. Wheeler's interest in Pawleys was established on March 4, two months before he transferred the Property to Pawleys (See Pawley's Island North Operating Agreement, Kennedy Ex. 1, R. pp. 410–437, with Wheeler's interest set forth at p. 436).

4. The transfer by Wheeler to Pawleys rendered him insolvent.

Respondent Kennedy argues that the "borrower [Pawleys] was not insolvent when the loan was executed" (Kennedy's Initial Brief, p. 13), that Pawleys (and Wheeler via his 99% interest in Pawleys) had cash and equity of \$1,357,438.50 when Kennedy made the loan (*Id.*, p. 16), that Wheeler's distributional interest in Pawleys could pay the Sapp debt at the time of closing (*Id.*, p. 20), and that Sapp failed to investigate Wheeler's assets in other jurisdictions.

These arguments are addressed below, and each fails on the clear and convincing facts of the case and the law.

The argument of Pawleys' solvency is irrelevant as Sapp's claim is against Wheeler, and even if it is relevant, Pawleys was not solvent. Further, the test is not whether Wheeler was insolvent at the time of the transfer, but also whether he was insolvent at the time Sapp tried to collect the debt.

Despite arguing that Pawleys is a separate and distinct entity from Wheeler (*Id.*, pp. 18, 19), Kennedy argues that the alleged solvency of Pawleys gives Sapp a remedy even though at the time Kennedy alleges Pawleys was solvent, the time of the Kennedy loan, Sapp's claim had not been reduced to a final judgment. In fact, Kennedy commenced its foreclosure action a month before Judge Cooper issued his order on post trial motions in the Sapp/Wheeler Litigation and two months before the Georgetown Sheriff issued the *nulla bona* return. Kennedy chooses to ignore these facts and fails to set forth how or when Sapp should have collected his judgment from Pawleys when Pawleys had no cash and was in foreclosure when the final trial court order was issued in the Sapp/Wheeler litigation.

Even if Pawleys' solvency is relevant, the Property was mortgaged for all of Pawleys' obligations to Kennedy (Plaintiff's Ex. 1, R. p. 283). As now seen, that mortgage lien was over \$1.8 million dollars plus accruing interest. Thus, upon closing the loan, which was contemporaneous with the quitclaim deed from Wheeler, Pawleys was not solvent. By conveying and encumbering the Property with new debt, Wheeler put the Property beyond the reach of Sapp. Pawleys only business was to develop and sell the Property (Plaintiff's Ex. 1, R. p. 400 at para. 9.0). It had no other means of becoming solvent. It was precluded by Kennedy

from acquiring other property (Plaintiff's Ex. 1, R. pp. 438, 440 at para. 13.5(ii)). Thus, the only way for Pawleys to ever be solvent was to sell Lots 3 and 4, which it never did.

Assuming *arguendo* that Pawleys alleged solvency is relevant and that Pawleys was solvent at the time of closing, Respondents' argument fails because Pawleys was not solvent in the final analysis for Sapp to collect Wheeler's debt in full.

Where a conveyance is made without an actual intent to defraud but without consideration, it is said that the conveyance will stand if the grantor reserves a sufficient amount of property to pay his creditors. *Penning v. Reid et al.*, 167 S.C. 263, 283, 284, 166 S.E. 139, 146.

But this means a sufficient amount of property not merely at the time of the transfer, but an amount from which in the final analysis the creditors are able to collect their indebtedness in full. The court in the *Reid* case said:

"No rule is more clearly imbedded in the law of this state, than that a debtor must be just before he is generous. 'The law will not permit one who is indebted at the time to give his property away, provided such gift proves prejudicial to the interest of existing creditors. The motive which prompts the donor to make the gift is wholly immaterial. If the donor is indebted at the time, and the event proves that it is necessary to resort to the property attempted to be conveyed away by a voluntary deed for the purpose of paying such indebtedness, the voluntary conveyance will be set aside, and the property subjected to the payment of such indebtedness upon the ground that it would otherwise operate as a legal fraud upon the rights of creditors, even though it might be perfectly clear that the transaction was free from any trace of moral fraud. *Citations omitted*.

If in the final event the property of the debtor is not sufficient to pay his debts existing at the time of his voluntary conveyance, then such conveyance is null and void as to such debts." (emphasis added)

Gardner v. Kirven, 184 S.C. 37, 191 S.E. 814, 816-17 (1937).

Respondents further argue that Sapp failed to prove that Wheeler was insolvent. They argue that Sapp did not check assets in Horry County. Sapp performed a reasonable and prudent asset search in Georgetown County where the judgment debtor resided. There is no evidence from any respondent that Wheeler owns any property in other locales from which the debt could be paid. Further executions require the Sheriff to satisfy a judgment out of the judgment debtor's

personal and real property. S.C. Code Ann. § 15-39-80 (1976). In carrying out his statutory duty, the Sheriff could not locate any property to satisfy Sapp's judgment or any part of it.

By itself, the *nulla bona* return by the Sheriff is sufficient evidence of insolvency to set aside a conveyance as a fraud on a judgment creditor. *Bates v. Cobb*, 29 S.C. 395, 7 S.E. 743 (1888). When combined with Sapp's attempt to locate other assets, the instant foreclosure by Kennedy, the pending foreclosure on lots 1 and 2, and Wheeler's failure to offer any evidence of his ability to pay the debt, much less any part of it, clearly and convincingly Wheeler has insufficient property to pay the judgment. Sapp proved Wheeler's insolvency. If Wheeler was solvent, Sapp would not be engaged in this lengthy, costly litigation with Kennedy.

B. Respondents fail to distinguish *Coleman v. Daniel*.

In its lead argument Kennedy makes several specious arguments and confounding factual assertions at pages 12 and 13 of its brief while unsuccessfully trying to distinguish *Coleman v. Daniel*. These arguments and statements are restated, and then examined in light of the actual facts in the record.

Appellant presents an absurd argument that would eliminate cash-out, home equity, second mortgage and most primary mortgage lending in South Carolina, because no prudent lender ever loans 100% of the value of the collateral.

Kennedy's Initial Brief, p. 12.

Kennedy's "Chicken Little" argument does not hold water. Any lender with knowledge of a fraudulent conveyance or with knowledge that his borrower is being sued assumes the risk that the loan transaction could be unwound - that a creditor like Sapp whose claim is known to the lender, could take priority when a mortgage is taken on fraudulently conveyed property. This is exactly what occurred in *Coleman v. Daniel* in 1973, yet mortgage lending has survived in

South Carolina for the last 40 years. This is exactly what happened in *Rilling v. Schultz* over a century ago in Texas, but mortgage lending survives there as well.

Kennedy then states:

This case does not involve any of the key facts which supported a fraudulent conveyance finding in *Coleman*. First, this was an arms-length loan transaction between a lender based in New Jersey and a South Carolina limited liability company with no prior relationship. (Kevin Wolfer Depo. Tr. 13: 22-25, 14:1-10: R. ____). Second, no property was sold or transferred to Kennedy. Third, the borrower was not insolvent when the loan was executed, but retained over 1.3 million in cash and equity from this transaction alone. Fourth, the borrower was not living on the Property when the transaction closed. (Plaintiff's Trial Exhibit No. 1, R. ____). Finally, the borrower did not retain, via secret agreement, perpetual use of the Property rent free. The only reasonable conclusion to draw from the amount Kennedy loaned is that it was a conservative and prudent lender. Sapp's argument that a 50% loan to value ratio was grossly inadequate is not supported by *Coleman* or any other South Carolina case.

Kennedy's Initial Brief, p. 13. Despite Kennedy's attempt to distance Respondents from the facts of *Coleman*, this case involves all of the "key facts" recited by Kennedy in the above quote.

- Kennedy argues it entered into an arm's length transaction with Pawleys, the grantee. There was an arm's length loan transaction by New Lender with the fraudulent grantees in *Coleman*.
- Kennedy argues that no property was sold or transferred to it. No property was sold or transferred to New Lender in *Coleman*.
- Kennedy argues that the borrower was not insolvent when the loan was executed. The borrower in *Coleman*, like the borrower in this case, was the fraudulent grantee. The borrower in *Coleman* also was not insolvent when it borrowed \$32,000.00 from New Lender as the borrower was the owner of record of property worth at least \$85,000.00. Further, Kennedy's argument misses the

point because the fraudulent grantee's solvency is irrelevant. The test is whether Wheeler, the fraudulent grantor, is solvent so he can pay his creditors. In most fraudulent conveyance situations the fraudulent grantee pays nothing to the debtor/fraudulent grantor, and takes unencumbered property, or property with significant equity; therefore, the fraudulent grantee/borrower should be solvent. That's the point of making the fraudulent conveyance – to shield a valuable asset from one's creditors.

- Kennedy argues that the borrower in *Coleman* was not living on the property when the transaction closed. Likewise, Pawleys was not living on the Property. Thus, Kennedy does not distinguish *Coleman* or distance itself from the *Coleman* facts on this argument, either. However, Wheeler, as the fraudulent grantor, did retain a 99% development interest in the raw land he conveyed, just as the fraudulent grantor in *Coleman* retained the ability to use his property.
- Kennedy argues that the borrower did not retain perpetual use of the property in secret rent free. That is exactly what Pawleys did. It secured all rights to the property vis-a-vis its fraudulent grantor, but subject to the claims of the defrauded creditor. Wheeler's transaction is structured no differently than the transaction in *Coleman*. If Kennedy is attempting to argue that the fraudulent grantor in *Coleman* retained use of the property in secret, in fact, Wheeler as a 99% owner of Pawleys, retained use of the property in the company's operating agreement, a non-public document.

No respondent has distinguished the *Coleman* facts from the facts of this case. This Court should follow *Coleman*'s precedent and order the Property be sold in satisfaction of Sapp's judgment against Wheeler.

C. **A mortgage given by a fraudulent grantee and taken for new debt is void as to an existing creditor of a fraudulent grantor under *Coleman v. Daniel* and *Rilling v. Schultz*.**

Rilling v. Schultze, 95 Tex. 352, 67 S.W. 401 (1902), holds that a mortgage executed by a fraudulent grantee is invalid as to creditors of the fraudulent grantor existing at the time of the fraudulent conveyance when the mortgagee had notice of the fraud. Because Rilling (the lender) had notice of the fraud in the conveyance from Schultze, Jr. (the fraudulent grantor) to his father (the fraudulent grantee), Rilling was not a bona fide purchaser from the fraudulent grantee (Sr.). The Texas Supreme Court determined that the debt owed to Rilling (Kennedy) consisted largely of debt which arose subsequent to the indebtedness owed by Schultze, Jr. (Wheeler) to Caroline Schultz (Sapp) arose, and found Rilling's mortgage to be invalid as to Caroline Schultz as to all new debt created when the mortgage was given. Following *Rilling*, this court should find that the Kennedy mortgage is invalid as to Sapp as to all indebtedness created when the Kennedy mortgage was executed.

Kennedy seeks to distinguish *Rilling* at page 16 of its brief by stating that *Rilling* "involved a father and son conspiring to keep property out of the hands of the son's ex-wife by transferring it to an individual who knew the circumstances of the divorce." Note that the *Rilling* court deemed the deed to be a mortgage; therefore, we have the same facts present in this case - a mother and son combining to keep the Property out of Sapp's hands by mortgaging it to Kennedy which knew the circumstances of Wheeler's indebtedness to Sapp. The underlying facts of *Rilling* are legally indistinguishable from the facts of the case before this court.

Likewise, in *Coleman v. Daniel*, the South Carolina Supreme Court held that a conveyance was fraudulent and void as to the creditor (Coleman). It held that the property was subject to Coleman's judgments and that Coleman could seek an order of the lower court for sale of the property in satisfaction of his judgments. Justice Bussey advocated that Coleman should only be paid to the extent that the sales price exceeded the consideration actually paid or assumed by the fraudulent grantees. The four justice majority refused to adopt Justice Bussey's analysis, thus voiding New Lender's mortgage as to Coleman. As discussed above, at Argument B, Kennedy has failed to legally distinguish *Coleman* from the facts of this case.

Kennedy relies heavily on *Oskin v. Johnson*, 400 S.C. 390, 735 S.E.2d (2012). *Oskin* has nothing in common with the facts of this case and is easily distinguishable from *Rilling* and *Coleman*. While suit was pending against him by Oskin for breach of contract, Johnson jointly purchased a beach home with his uncle. Johnson and his uncle co-signed a \$3.5 million note in favor of SCB&T for purchase money financing. SCB&T duly recorded its mortgage on the home. The note had a two year balloon payment. There was also a second mortgage recorded on the home in favor of Ameris Bank for \$500,000. Johnson was unable to pay his share of the SCB&T loan when it came due leaving his uncle with liability for the full SCB&T debt on a home which was then appraised at approximately \$2.5 million. Uncle's wife formed a limited liability company which borrowed money from Wachovia and paid SCB&T \$3.5 million, plus Uncle paid SCB&T another \$44,000 which was due on the note. SCB&T received full consideration for the note, and assigned the note and mortgage to the uncle's wife's limited liability company.

Oskin sued claiming that the assignment of the note and mortgage by SCB&T was a fraudulent conveyance. Neither Johnson nor his uncle had conveyed any interest in the home, as

opposed to Wheeler who quitclaimed his interest in the Property. The South Carolina Supreme Court held that the Statute of Elizabeth is concerned with the intent of a grantor who conveys an interest in land. In *Oskin*, SCB&T assigned a note for valuable consideration. It took what it was due when the purchase money note was paid in full. There was no evidence that SCB&T intended to defraud anyone. It simply received payment for its purchase money loan.

Further, given the value of the property compared to the purchase money mortgage, Oskin would not have been damaged by the assignment. Oskin was the third lien creditor in line behind the \$3.5 million SCB&T mortgage and a \$500,000 mortgage to Ameris Bank. Oskin did not challenge the validity of either mortgage, just the assignment of the mortgage by SCB&T. Even excluding the \$500,000 second mortgage, the value of the home was upside down compared to the SCB&T loan by approximately \$1.0 million more than the property was worth. Had the SCB&T note not been paid, SCB&T could have foreclosed, and Oskin would not have received anything. Comparing *Oskin* to the facts of this case, Lot 4 was encumbered by a note for 34% of its value. Lot 3 had no liens on it and was appraised for \$1,020,000. Although Oskin could not show any damage by the assignment of the SCB&T note, Sapp was clearly damaged by Wheeler making a fraudulent conveyance and by the fraudulent grantee giving a non-purchase money mortgage on the Property to a lender which had full knowledge of the facts.

It is said that equity will not suffer a wrong without a remedy, and that he who seeks equity must do equity. If the Master's order is affirmed: this court will sanction Wheeler's transfer of essentially unencumbered property for no consideration when he was indebted to Sapp; this court will sanction Kennedy's inequitable conduct of making a new loan to a fraudulent grantee secured by a mortgage on fraudulently conveyed property when Kennedy had actual knowledge of the facts; and this court will leave Sapp, an innocent party who has done all

he can to secure a just remedy and result, with no remedy. Following *Coleman* and *Rilling*, and given that *Oskin* has no application to the facts of this case, this Court should order the Property to be sold in satisfaction of Sapp's judgment.

D. The Recording Statute does not assist Kennedy in the face of a void transfer of the Property.

Respondent Kennedy argues that the recording statute, S.C. Code Ann. § 30-7-10 (1976), gives Kennedy a superior lien over Sapp because the mortgage was filed fourteen months before Sapp secured judgment against Wheeler (Kennedy's Initial Brief, p. 25). Although Kennedy cites no case in which the recording act can be used to uphold a fraudulent transfer, Kennedy relies upon *Atlas Supply Co. v. Davis*, 273 S.C. 392, 256 S.E.2d 859 (1979), and speculates that Kennedy obtained no advantage in lending to Pawleys versus lending to Wheeler directly. Kennedy incorrectly argues that it holds a purchase money mortgage (Kennedy's Initial Brief, p. 26).⁶ None of these arguments are persuasive.

The argument that the recording statute and equity "dictate Respondent's lien is superior" would nullify the Statute of Elizabeth and South Carolina precedent. South Carolina Courts recognize that the recording statute is inapplicable when property is fraudulently conveyed. If the recording statute did apply, a creditor who secures his judgment after the conveyance would never have a remedy. Like this case, a fraudulent conveyance often occurs where a debtor conveys his property, a deed is recorded for the conveyance, and a creditor then secures judgment. The creditor then discovers that the debtor has transferred his property for no consideration. See, e.g., *Lebovitz v. Mudd*; *Albertson v. Robinson*, 371 S.C. 311, 638 S.E.2d 81 (Ct. App. 2006); and *Coleman v. Daniel*. If the recording statute applied in these circumstances,

⁶ See footnote 3, *supra*.

the fraudulent grantee could simply argue that the recording of the deed trumps the fraudulent transfer, thus nullifying the Statute of Elizabeth, S.C. Code Ann. § 27-23-10 (1976).

South Carolina precedent does not support Kennedy's argument that the recording statute gives its mortgage priority over Sapp's lien. In *Leasing Enterprises, Inc. v. Livingston*, a judgment creditor ("LEI") brought an action to attack a conveyance of real property from a judgment debtor ("Livingston") to his mother. 294 S.C. 204, 363 S.E.2d 410 (Ct. App. 1987). LEI obtained a money judgment against Livingston in California in November 1981. *Id.* at 206, S.E.2d at 411. In April 1983, Livingston quitclaimed his one-half (1/2) interest in approximately thirty-seven (37) acres of land in Oconee County, South Carolina to his mother Margaret Schlee for the stated consideration of love and affection. *Id.* In December 1984, LEI recorded its domesticated judgment against Livingston in Oconee County. *Id.* LEI filed suit and alleged the quitclaim deed from Livingston to Schlee constituted a fraudulent conveyance and that the deed was not validly recorded under the South Carolina recording statute. *Id.* The Court stated,

Section 30-7-10, Code of Laws of South Carolina, 1976, is the recording statute. If this deed was acceptable for recording, Leasing's judgment would not have priority over Schlee under the current recording statute unless Leasing shows the deed is a fraudulent conveyance.

Id. at 207, S.E.2d at 411. The Court further stated,

Our reading of the current statute indicates the recording act is a race-notice act which will provide protection to the subsequent purchaser or creditor provided he records first. Therefore, even though Leasing had no actual or constructive notice of the deed between Livingston and Schlee when the Lease Purchase agreement was made and was a subsequent creditor of Livingston, it has no protection under the recording statute unless either the deed from Livingston to Schlee was not valid for recording thereby causing Schlee to lose her filing priority or Leasing can demonstrate a fraudulent conveyance.

Id. at 208, S.E.2d at 412. Thus, even if the deed to Schlee could have been validly recorded prior to LEI's domesticated judgment, LEI still had priority under the recording statute if LEI proved the deed to Schlee was a fraudulent conveyance.

In *Coleman v. Daniel*, the recording statute was also inapplicable. In *Coleman*, the debtor/fraudulent grantor executed notes payable to Coleman in 1962 and on October 14, 1964. Twelve days later, on October 26, 1964, the property in question was fraudulently conveyed to the debtor's married daughter and son-in-law (the Daniels). Twenty-three days later, on November 23, 1964, the fraudulent grantees borrowed \$32,000 from New Lender which recorded a mortgage on the fraudulently conveyed property. Eighteen months later, on May 30, 1996, Coleman obtained a judgment against the debtor/fraudulent grantor. Over Justice Bussey's dissent that New Lender should be paid first from the sale of the property, the Supreme Court held that the deed for the fraudulently conveyed property was void as to Coleman and that the property be sold in satisfaction Coleman's judgment.

Under both *Leasing Enterprises* and *Coleman*, the recording act is inapplicable and Kennedy's argument fails.

Kennedy's reliance on *Atlas Supply Co. v. Davis*, 273 S.C. 392, 256 S.E.2d 859 (1979) is also misplaced. First, there was no fraudulent conveyance issue in *Atlas*. Second, Kennedy knew of Sapp's claim, a fact not present in *Atlas*. Kennedy cites *Epps v. McCallum Realty*, 129 S.C. 481, 138 S.E. 297 (1927), for the proposition that the purpose of the recording statute is to protect subsequent creditors without notice. In fact, Kennedy had notice of Sapp's claim, but elected to proceed with its loan transaction regardless. It is this notice which precludes Kennedy from being a bona fide purchaser for value.⁷

⁷ The term good faith purchaser for value includes the concept of lack of notice. See, e.g., *Messervy v. Barelli*, 11 S.C. Eq. (2 Hill Eq.) 576 (1837) and *Brunson v. Sports*, 239 S.C. 58, 121 S.E.2d 294 (1961). In *Messervy*, a mortgage was deemed subordinate to the rights of the grantee's wards where the mortgagee took the mortgage with notice of the wards' claims against the mortgagor. Similarly, in *Brunson*, Dukes took a deed to property from West. The property was subject to an unrecorded trust. Dukes had notice of the unrecorded trust. The Supreme Court stated, "The law is well settled that actual notice of an outstanding equity will cut off the

Even if this court were to find *Atlas Supply* applicable, the equities of this case significantly favor Sapp, and the Kennedy mortgage should be subordinated to Sapp's lien. See *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011). In *Regions*, Regions Bank made a \$7,000,000 construction loan to Wingard secured by a recorded mortgage on three lots, one of which was lot 38. At the time of the loan and mortgage, Regions knew that Covington had given Wingard a \$276,700 down payment for a residential home purchase agreement on lot 38. There was no public recording of the residential home purchase agreement and Covington's interest in lot 38. Relying heavily on Regions' knowledge of the down payment, this court found that Covington's unrecorded interest in the property had priority over Regions' recorded mortgage. This court refused to give Regions priority under the recording statute, but looked to the equities of the case to give Covington priority.

Here, Covington's equitable interest is not defeated by Regions Bank's mortgage because Covington entered into his purchase contract before Regions Bank filed its mortgage with the register of deeds and Regions Bank was aware of this interest. See S.C.Code Ann. § 30-7-10 ("[A]ll mortgages ... are valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors), or purchasers for valuable consideration without notice...."). The intervention of equity does not impugn the integrity of the recording statute in this case. See *Crystal Ice Co.*, 273 S.C. at 308, 257 S.E.2d at 497 (finding a first-to-file mortgage holder not entitled to the protection of the recording statute where that mortgage holder had knowledge of the existence of a prior purchase money mortgage). The trial court was presented with the question of whether equity should intervene only as between Regions Bank and Covington, not any other person or creditor potentially impacted by the recording statute. The trial court appropriately looked at the substance of the issue, namely Regions Bank's knowledge of Covington's prior interest, over Covington's failure to ensure that his down payment was received by Wingard prior to closing. In fact, Regions

defense of bona fide purchaser." *Brunson*, 239 S.C. at 68, 121 S.E.2d at 299. The court further stated that even if Dukes secured from reputable counsel an opinion that his paper title was good, that the property was impressed with a trust in favor of the respondents. Kennedy knew that Sapp was subject to a pending legal action asserting a claim of over \$500,000.00. It stopped investigating the fraudulent nature of the transaction because it secured an attorney's opinion and title insurance. Based on Kennedy's notice of Sapp's claim, and even with an opinion of counsel, Kennedy cannot be a bona fide purchaser (Appellant's Brief, pp. 22-23).

Bank would not have given Wingard a construction loan if Wingard had not already sold the lot to a purchaser. Therefore, just as equity was allowed to intervene in *San-A-Bel* and *Crystal Ice*, we conclude the record herein supports the trial court's award to Covington of priority on his equitable lien over Regions Bank's mortgage.

Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 255-56, 715 S.E.2d 348, 356 (Ct. App. 2011).

Thus, even if the recording statute was applicable, Kennedy's loan with full knowledge of the Sapp/Wheeler Litigation and the fraudulent conveyance require that the mortgage at least be subordinated to Sapp's lien under the analysis in *Regions Bank*.

In further support of its argument on the recording statute, Kennedy claims the "folly in Sapp's entire appeal" is that Kennedy obtained no advantage in lending to Pawleys versus lending to Wheeler directly, and if it had loaned to Wheeler, its lien would have been superior to Sapp's judgment. Kennedy's argument is no more credible than its CEO testifying under oath that he would not know if the transfer to Pawleys of the unencumbered Lot 3 and the Kennedy mortgage would make it more difficult for Sapp to satisfy a claim out of Lot 3.

Kennedy argues that it could have made the loan directly to Wheeler, but this is contradicted by Kennedy's testimony. Kennedy required that the loan be made to Pawleys (Wolfer Deposition 2, R. p. 653, lines 4-9). No title insurer would have issued a lender's mortgage policy on a loan to Wheeler without excepting to the Sapp/Wheeler litigation. Kennedy and Wheeler needed the Property transferred to a third party to secure title insurance. Kennedy and Wheeler structured the transaction to insulate the Property from Sapp since Kennedy was not relying on any income from the borrower or guarantors to repay the loan. The sole source of payment was the sale of the Property. In order to make the loan, the Property needed to be taken out of Wheeler's name. There was no other reason to form Pawleys. Wheeler and his mother put the Property into a limited liability company formed by Wheeler-

Cribb, but in which Wheeler held a 99% interest, secretly retaining his interest in the Property. Not only was Kennedy able to secure title insurance by making the loan to Pawleys, but Kennedy gained further advantage by forcing Sapp to pursue a claim for a fraudulent conveyance which he would not need to do if the property remained in Wheeler's name.

The alleged "folly of Sapp's entire appeal" is, also, not based on the facts of this case. Kennedy did not make a loan to Wheeler, did not take a mortgage from Wheeler, and refused to make a loan to Wheeler. Instead, on March 4, 2009, Wheeler-Cribb formed Pawleys, and Wheeler made himself a 99% member. About two months later, while the Sapp/Wheeler Litigation was pending Wheeler transferred the Property to Pawleys for "\$5.00 and no other consideration" and tried to give a mortgage on the Property to a creditor who was fully aware of the nature of the fraudulent conveyance. This appeal should be decided on the facts of this case and not Kennedy's conjecture about a loan that was never made, a loan that could not stand legal scrutiny.

Undercutting Kennedy's argument is that Sapp was named as a defendant by Kennedy in this case. Sapp did not intervene. Kennedy's attorneys understood Sapp's claim against Wheeler and the Property prior to the loan transaction when they three times asked Wheeler's attorney for an explanation of the Sapp/Wheeler Litigation, and Kennedy joined Sapp as a party to this case when they knew Kennedy could not pass clear title after a foreclosure sale if Sapp's interest was not adjudicated. There would be no reason for Kennedy to join Sapp as a party in the foreclosure if he had no interest in the property as Kennedy now argues.

Even if Kennedy had made a loan directly to Wheeler, it would not stand under the law. For such a mortgage to stand, it must be made for existing debt, and the transaction must be bona fide. *See South Carolina National Bank v. Halter*, 293 S.C. 121, 359 S.E.2d 74 (Ct. App. 1987),

Lenhardt v. Ponder, 64 S.C. 354, 42 S.E. 169 (1902), and *Magovern v. Richard*, 27 S.C. 286, 3 S.E. 340 (1887). In these cases mortgages were upheld in the face of a fraudulent conveyance attack but only because the mortgagor was already indebted to the mortgagee when the mortgage was executed. Based on the existing debts owed by the mortgagors, each court found the mortgage conveyance to be supported by valuable consideration. In the case before this court there was no debt owed to Kennedy until the loan closed; therefore, a loan to either Wheeler or Pawleys would be subject to Sapp's judgment.

In addition, the transaction was not bona fide. In, *McElwee v. Kennedy*, 56 S. C. 154, 34 S. E. 86 (1899), the court upheld a conveyance from a husband to a wife based on debts owed by the husband to the wife. The court further addressed the bona fides of the transaction stating:

To annul for fraud a deed based upon a valuable consideration, it must not only be shown that the grantor intended thereby to hinder, delay, or defraud, creditors, but it must also appear that the grantee participated in such fraudulent purpose. Even if we were to assume that there is evidence of mala fides in the grantor, yet if the sole purpose of the grantee was to secure her claims, having no intent to hinder, delay, or defeat other creditors, her title cannot be affected by the mala fides of the grantor. The evidence fails utterly to show any intent on the part of the grantee to defraud her husband's creditors, and merely shows a purpose to secure her own bona fide claims. Conceding the insolvency of the firm of which the grantor was a member, it does not appear that the grantee was aware of it; and, if she was aware of it, that would not show fraud in her, since a bona fide creditor has the right to obtain a transfer of property from an insolvent debtor, at a fair price, for the sole purpose of securing or paying the debt.

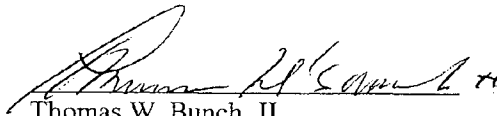
Although *McElwee* involves a deed, the bona fide/mala fide concept remains the same. Here, Wheeler's and Pawley's mala fides are established by the badges of fraud, and their failure to rebut those badges. Kennedy did not seek to "secure her bona fide claims" since no such claims existed. Kennedy "was aware" of the claims against Wheeler and his insolvency since it was only looking to the sale of the Property for payment of the debt. Kennedy did not take its mortgage for a fair price. The mortgage of an unencumbered lot and the entire Property which

was valued at \$1,920,000 for a \$774,000 loan was not a fair price. The consideration was grossly inadequate. By its mala fides and with no existing lending relationship with Wheeler or Pawleys, Kennedy and Pawleys put the Property beyond Sapp's reach when they had actual knowledge of Sapp's claims. Kennedy's argument that it gained no advantage by lending to Pawleys fails, as a loan to Wheeler would also fail because there was no previous obligation to support the loan and Kennedy's mala fides has been proved. Just as in *Coleman v. Daniel*, the Property should be sold to satisfy Sapp's judgment.

V. CONCLUSION

This court should reverse the Master's Order on Summary Judgment and the final Order and Judgment. Based on a *de novo* review of the record, it is clear and convincing that Wheeler fraudulently conveyed the Property to Pawleys, that the mortgage given by Pawleys to Kennedy is not valid as to Sapp, and that the Property should be sold in satisfaction of Wheeler's debt owed to Sapp. Alternatively, the mortgage of the previously unencumbered lot 3 should be set aside and that lot should be sold in satisfaction Sapp's claim.

Respectfully submitted,



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December 13, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

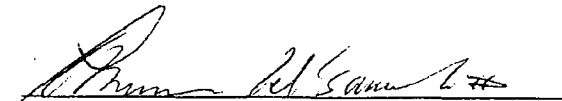
v.

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

J. Mars Sapp is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief of Appellant complies with
Rule 211(b), SCACR.


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December 13th, 2013

**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**

Kennedy Funding, Inc., as predecessor-in-interest, and
BNP Paribas, Respondents,

v.

Pawleys Island North, LLC, Will Darwin Wheeler,
Peggy Wheeler-Cribb, and J. Mars Sapp, Defendants,

Of Whom Pawleys Island North, LLC, Will Darwin
Wheeler, and Peggy Wheeler-Cribb are the Respondents,

And J. Mars Sapp is the Appellant.

Appellate Case No. 2013-001447

Appeal From Georgetown County
Joe M. Crosby, Master-in-Equity

Unpublished Opinion No. 2015-UP-138
Heard October 14, 2014 – Filed March 11, 2015

AFFIRMED IN PART AND REVERSED IN PART

Thomas Whatley Bunch, II, and Paul Hamilton Hoefer,
of Robinson McFadden & Moore, PC, of Columbia for
Appellant.

Robert H. Gwin, III, of Gwin Law Office, LLC, of Myrtle Beach, for Respondents Pawley's Island North, LLC, Will Darwin Wheeler, and Peggy Wheeler-Cribb; and Robert Hope Jordan and Merritt Gordon Abney, of Nelson Mullins Riley & Scarborough, LLP, of Charleston, for Respondents Kennedy Funding, Inc., as predecessor-in-interest, and BNP Paribas.

PER CURIAM: In this action arising from a mortgage foreclosure, J. Mars Sapp appeals, arguing the master erred in (1) not finding the conveyance of the property from Will Darwin Wheeler to Pawleys Island North, LLC (Pawleys) was fraudulent; (2) not finding the mortgage transaction between Pawleys and Kennedy Funding, Inc. (Kennedy) was fraudulent; and (3) not setting aside the mortgage as a fraudulent conveyance or declaring Kennedy's lien is subordinate to Sapp's lien on the property. We affirm in part and reverse in part.

FACTS

This action arises from a mortgage foreclosure initiated by Kennedy, a New Jersey corporation. Kennedy loaned Pawleys, a South Carolina limited liability company, \$960,000 on April 30, 2009. The loan was secured by a mortgage and security agreement that was recorded in the Office of the Registrar of Deeds in Georgetown County. Pawleys mortgaged to Kennedy two parcels of real property (Lots 3 and 4) located on Pawleys Island. Additionally, Wheeler and Peggy Wheeler-Cribb¹ (Guarantors) executed a guaranty whereby they individually, jointly, and severally guaranteed repayment under the loan to Pawleys, including all costs of collection and reasonable attorney's fees. Pawleys defaulted on the loan payments, and Kennedy initiated a foreclosure action on the property on February 9, 2011.²

In the interim, Sapp attempted to collect on a 2010 civil judgment against Wheeler by executing against the property. However, Sapp could not collect on the

¹ Wheeler-Cribb is Wheeler's mother.

² Kennedy filed an Amended Summons and Complaint on September 5, 2012, adding BNP Paribas (BNP), a French corporation, as a plaintiff, alleging that Kennedy assigned its rights to BNP. Although the respondents in this case are "Kennedy Funding, Inc., as predecessor-in-interest, and BNP," we refer to the respondents as "Kennedy."

judgment because the property at issue was conveyed from Wheeler to Pawleys in April 28, 2009, by quitclaim deed for \$5.³ As a result, Kennedy named Sapp as a possible subordinate lien holder with an interest in the mortgaged property. Sapp answered the amended complaint, asserting he was a judgment lien holder and requesting his lien be declared senior to Kennedy's lien. Kennedy filed a motion for summary judgment, requesting an order dismissing Sapp's claim of a lien interest superior to Kennedy's lien, and in the alternative, an order declaring Sapp's lien junior and subordinate to Kennedy's lien. After a hearing on the motion, the trial court granted Kennedy's motion for summary judgment and ruled Sapp's lien, if he had one, was junior and subordinate to Kennedy's lien. Sapp filed a motion to reconsider, which the court denied. Sapp filed a cross-claim against Wheeler for violation of the Statute of Elizabeth, contending Wheeler's transfer of the property to Pawleys constituted a fraudulent conveyance and all subsequent transfers were void. However, he argued if the conveyance of property was not completely void, it was void as to Lot 3, which was unencumbered at the time of the transfer from Wheeler to Pawleys.

In March 2012, the parties agreed by consent order to refer the case to a master-in-equity. The master held a non-jury trial on February 11, 2013. During trial, Sapp contended that even if he were not deemed to have a lien interest superior to Kennedy, he should be deemed to be a junior lien holder against Pawleys based on the alleged fraudulent transfer from Wheeler to Pawleys. Kennedy and Wheeler opposed Sapp's claim to be a junior lien holder on the basis that no fraudulent conveyance occurred. The master filed his order on June 7, 2013, finding (1) the mortgage was an arms-length transaction and no familial or prior business relationship existed between Pawleys and Kennedy; (2) valuable consideration existed to support the mortgage; (3) Sapp failed to prove by clear and convincing evidence that Kennedy participated in a fraudulent scheme; and (4) Kennedy was a good faith purchaser for value when it entered into the mortgage agreement with Pawleys and did not participate in a plan to defraud Sapp. As for Sapp's contention that the first transfer from Wheeler to Pawleys was fraudulent and should be declared void for purposes of establishing a junior lien in his favor, the master found the increase in the value of Wheeler's ownership interest in Pawleys was valuable consideration to support the transfer and no proof was presented that Wheeler intended to defraud Sapp at the time he transferred the property. The

³ Two days later, on April 30, 2009, Kennedy made the loan to Pawleys and took a mortgage on the property.

master concluded Kennedy was entitled to foreclosure of the property and ordered it sold at a public auction.

Sapp filed a notice of appeal, appealing the master's February 14, 2012 summary judgment order and June 7, 2013 order and judgment. He also filed an amended notice of appeal, confirming Pawleys, Wheeler, and Wheeler-Cribb were also respondents in the appeal.

STANDARD OF REVIEW

A clear and convincing evidentiary standard applies to fraudulent conveyance claims brought under the Statute of Elizabeth: *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012). "An action to set aside a conveyance under the Statute of Elizabeth is an equitable action, and a *de novo* standard of review applies." *Id.*

LAW/ANALYSIS

I. Conveyance of Property from Wheeler to Pawleys

Sapp argues the assignment of the note was a fraudulent conveyance in violation of the Statute of Elizabeth. We agree.

The Statute of Elizabeth provides:

Every gift, grant, alienation, bargain, transfer, and conveyance of lands . . . for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties and forfeitures must be deemed and taken . . . to be clearly and utterly void

S.C. Code Ann. § 27-23-10(A) (2007).

"In interpreting this statute, this Court has held conveyances shall be set aside under two conditions: First, where there was valuable consideration and the transfer is made by the grantor with the actual intent to defraud; and, second, where a transfer is made without actual intent to defraud but without valuable consideration." *Oskin*, 400 S.C. at 397, 735 S.E.2d at 463. "To annul for fraud a

deed based upon a valuable consideration, it must not only be shown that the grantor intended thereby to hinder, delay, or defraud creditors, but it must also appear that the grantee participated in such fraudulent purpose." *McDaniel v. Allen*, 265 S.C. 237, 243, 217 S.E.2d 773, 776 (1975) (quoting *McElwee v. Kennedy*, 56 S.C. 154, 170, 34 S.E. 86, 91-92 (1899)). "The Statute of Elizabeth is concerned with the intent of the grantor who conveys an interest in land." *Oskin*, 400 S.C. at 398, 735 S.E.2d at 464.

Sapp argues Wheeler's transfer of the property to Pawleys fails under both of the conditions required to set aside a conveyance. He asserts the transfer was void and the property is subject to Sapp's judgment against Wheeler. Sapp argues this case is factually identical to *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973). In *Coleman*, a judgment creditor brought an action to set aside as fraudulent the transfer of real estate by a judgment debtor to his daughter and son-in-law. *Id.* at 200, 199 S.E.2d at 75. The transfer included the property where the judgment debtor had lived his entire life and the debtor made a separate agreement with his daughter to continue living on the property rent-free. *Id.* at 202-03, 199 S.E.2d at 76. Our supreme court held the evidence showed the judgment debtor was insolvent at the time the transfer was made; he received grossly insufficient consideration for the land transferred; he intended in making the transfer to defraud the judgment creditor; and this intent was imputable to the grantees. *Id.* at 210-11, 199 S.E.2d at 80.

Sapp claims the circumstances of Wheeler's transfer to Pawleys were never explained, Wheeler did not testify, and the circumstantial evidence points only to a fraudulent transfer. Sapp asserts the evidence of fraud includes (1) Wheeler was indebted to Sapp at the time of the transfer; (2) there was no consideration for the transfer, or at best, the consideration received by Wheeler was grossly inadequate; (3) Wheeler conveyed the property to a family-owned limited liability company solely owned by him and his mother; (4) litigation was pending; (5) the transfer was carried out in secret without Sapp's knowledge; (6) Wheeler owned the property in fee simple for years and departed from his normal course of business by conveying it to Pawleys; (7) the transfer rendered Wheeler insolvent as he never paid anything on the debt, the Sapp execution was returned *nulla bona*; and Wheeler had no other unencumbered property on which to execute; and (8) Wheeler, through Pawleys, reserved the use, possession, and development of the property.

The master found the transfer from Wheeler to Pawleys was supported by valuable consideration because Wheeler increased the value of his 99% membership interest in Pawleys by more than \$1.9 million by the conveyance of the property valued at \$1.92 million and this was valuable consideration to support the transfer. However, Sapp argues Wheeler actually lost \$1.92 million, the full value of the property, by the transfer and he diluted his holdings by the transfer and received no benefit. Therefore, Sapp asserts the transfer was not supported by any consideration. In the alternative, he argues if this court finds the conveyance was supported by consideration, at best, it was inadequate consideration.

The property at issue was conveyed from Wheeler to Pawleys, an LLC in which Wheeler held a 99% membership interest, in April 28, 2009, by quitclaim deed for \$5. The quitclaim deed Wheeler gave to Pawleys was for "\$5 and no other consideration" and included an affidavit from Wheeler stating the deed was exempt from recording fees because the property was being transferred to Pawleys to increase the value of Wheeler's stock or interest held in Pawleys. We find this was not a legitimate reason for a transfer. We also find clear and convincing evidence exists to show the transfer from Wheeler to Pawleys was in violation of the Statue of Elizabeth because it was without valuable consideration. We note the transfer was just seven months after Sapp filed his action on September 30, 2008, to collect outstanding rent obligations from Wheeler.

II. Mortgage Transaction Between Pawleys and Kennedy

Sapp argues the mortgage transaction between Pawleys and Kennedy was fraudulent. We disagree.

"To entitle one to take advantage of the plea that he is a purchaser for value without notice, it is necessary for him to show three things: (1) [t]hat the purchase money was actually paid before notice of outstanding incumbrances or equities (giving security for the payment is not sufficient, nor is past indebtedness a sufficient consideration); (2) that he has purchased and acquired the legal title, or the best right to it, before notice of outstanding incumbrances or equities; and (3) that he purchased bona fide without notice." *Kirton v. Howard*, 137 S.C. 11, 36, 134 S.E. 859, 868 (1926).

Sapp asserts that prior to loaning money to Pawleys on April 30, 2009, Kennedy had actual knowledge that litigation was pending against Wheeler, Wheeler owed a debt to Sapp, and Sapp was seeking damages for Wheeler's failure to perform

under a lease guaranty. Additionally, Kennedy knew Wheeler transferred the property to Pawleys by quitclaim deed. Thus, Sapp argues because Kennedy had notice the conveyance to Pawleys was fraudulent, Pawleys could not give Kennedy a valid mortgage as to an existing creditor. Sapp cites to *Rilling v. Schultze*, 67 S.W. 401 (Texas 1902), in support of his assertion. *Rilling* involved a father and son who conspired to keep property out of the hands of the son's ex-wife by transferring it to an individual who knew the circumstances of the divorce. *Id.* at 402-03. Sapp also cites to *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973), and *Messervy v. Barelli*, 11 S.C. Eq. (2 Hill Eq.) 567 (1837). Each of these cases involves transactions between close friends or family. Whereas here, the transfer was between an LLC and a corporation.

Kennedy argues that prior to closing the loan with Pawleys, it conducted a title search that revealed a \$300,000 mortgage lien held by First South Bank on Lot 3, and it arranged to have the lien paid at closing. It asserts no other lien appeared on the title search and no *lis pendens* attached to the property. Kennedy further received a letter from counsel for Pawleys and Wheeler-Cribb, dated April 30, 2009, which stated in part that "[t]here is no action, suit, proceeding or investigation at law or in equity by or before any court, governmental instrumentality or other agency now pending or, to the best of our knowledge, threatened against the Borrower or the Guarantors or any of the Borrower's or Guarantor's properties or rights" Kennedy testified it would not have closed on the loan if any encumbrances were on the property. Kennedy asserts the transaction cannot be set aside under the Statute of Elizabeth because no conveyance occurred. Pawleys did not sell or convey the land to Kennedy. It borrowed money from Kennedy and used the property as collateral. Kennedy states that "[b]y conflating a mortgage transaction with a sales transaction, [Sapp] presents an absurd argument that would eliminate cash-out, home equity, second mortgage and most primary mortgage lending in South Carolina, because no prudent lender ever loans 100% of the value of the collateral." Kennedy asserts this was an arms-length loan transaction between a lender based in New Jersey and a South Carolina limited liability company with no prior relationship; no property was sold or transferred to Kennedy; and Pawleys was not insolvent when the loan was executed, retaining more than \$1.3 million in cash and equity from the transaction alone.

The master determined (1) the mortgage between Kennedy and Pawleys was an arms-length transaction and no familial or prior business relationship existed between Pawleys and Kennedy; (2) valuable consideration existed to support the

mortgage; (3) Sapp failed to prove by clear and convincing evidence that Kennedy participated in a fraudulent scheme; and (4) Kennedy was a good faith purchaser for value when it entered into the mortgage agreement with Pawleys and did not participate in a plan to defraud Sapp. Although the underlying action was brought by Sapp against Wheeler in 2008, the judgment was not rendered until June 4, 2010, fourteen months after Pawleys recorded its loan with Kennedy. Also, Sapp did not file a *lis pendens* on the property, which would have protected his interests. Thus, we find the transfer from Pawleys to Kennedy was not a fraudulent transaction.

III. Voiding of Mortgage

Sapp argues the master should have set aside the mortgage as a fraudulent conveyance or declared Kennedy's lien was subordinate to Sapp's lien on the property. We disagree.

Sapp asserts Kennedy loaned less than 50% of the property's value to Pawleys and took a mortgage on the property, despite its knowledge that (1) the property was being transferred by quitclaim deed; (2) Wheeler was the sole owner of the property; (3) Wheeler was transferring the property for no consideration to Pawleys; (4) Pawleys was a family owned limited liability company in which Wheeler held a 99% membership interest; and (5) Wheeler was indebted to an existing creditor. Therefore, Sapp maintains Kennedy participated in Wheeler and Pawleys' fraudulent scheme and Pawleys could not give Kennedy a valid mortgage as to an existing creditor. Further, Sapp asserts the mortgage of property valued at \$1.92 million for a \$774,000 loan was not a fair price. As a result, Sapp argues the mortgage should be set aside as a fraudulent conveyance or declared subordinate to Sapp's lien on the property.

Kennedy argues it filed its mortgage fourteen months before Sapp obtained his judgment against Wheeler; thus, it has a superior lien. Kennedy asserts it (1) loaned almost \$1 million in an arms-length mortgage transaction; (2) performed a proper title search and paid off the one recorded lien at closing; and (3) properly filed its mortgage in the Office of the Registrar of Deeds in Georgetown County.

In *Atlas Supply Co. v. Davis*, 273 S.C. 392, 392-93, 256 S.E.2d 859, 859 (1979), the appellant held a recorded judgment lien, and the respondent, a bank, held a recorded mortgage lien over real property. The bank's mortgage was filed about two hours after the filing of appellant's judgment. *Id.* at 393, 256 S.E.2d at 859.

The appellant brought the action to determine which lien had priority. *Id.* Our supreme court held that when the debt upon which the judgment was entered was antecedent to the creation of the mortgage obligation, the recorded judgment lien was not within protection of the recording statute, and thus, the mortgage lien had priority over judgment lien. *Id.* at 394-95, 256 S.E.2d at 860. The decision was based on the "basic concept and structure of the recordation statute as protecting subsequent creditors rather than one whose original debt was antecedent in time to the mortgage obligation." *Id.* at 395, 256 S.E.2d at 860.

Thus, because we find Kennedy's mortgage was not a fraudulent conveyance, we find Kennedy's lien had priority over Sapp's lien on the property.

CONCLUSION

Accordingly, the master's order is

AFFIRMED IN PART AND REVERSED IN PART.

HUFF, SHORT, and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

MAR 26 2015

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
The Honorable Joe M. Crosby, Master-In-Equity

SC Court of Appeals

Case No. 2011-CP-22-0180
Appellate Case No. 2013-001447

Kennedy Funding, Inc. as predecessor-in-interest, and
BNP Paribas Respondents,

v.

Pawleys Island North, LLC, Will Darwin Wheeler, Peggy Wheeler-Cribb, and J.
Mars Sapp, Defendants,
of whom Pawleys Island North, LLC, Will Darwin Wheeler and Peggy Wheeler-
Cribb
are Respondents and

J. Mars Sapp is the..... Appellant.

PETITION FOR REHEARING BY APPELLANT

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APPX00945

Introduction

In accordance with Rule 221, SCACR, Appellant J. Mars Sapp respectfully petitions this court for a rehearing and reconsideration of Unpublished Opinion 2015-UP-138, (the "Opinion") filed March 11, 2015, which affirms in part and reverses in part the lower court's orders. The Opinion properly holds that a conveyance of property by Will Darwin Wheeler ("Wheeler") to Pawleys Island North ("Pawleys") was fraudulent, but mistakenly finds that a mortgage then conveyed by Pawleys to Respondent Kennedy Funding, Inc. ("Kennedy"), is superior to the judgment lien of Wheeler's defrauded creditor, Sapp.

Sapp respectfully submits that Parts II and III of the Opinion mistakenly focus on whether the Kennedy loan and mortgage itself was fraudulent (Part II) and the case of *Atlas Supply* which has no application where property is fraudulently conveyed (Part III). Sapp submits that Kennedy had actual notice of the fraudulent transfer from Wheeler to Pawleys; therefore, Kennedy could not be a bona fide purchaser for value without notice.

Kennedy's notice, moreover, is more than just notice. Based on Kennedy's loan file and testimony:

- Kennedy knew that Wheeler was indebted to Sapp. *See, e.g.*, Kennedy Ex.1, R. pp. 506, 507 (memorandum to Kennedy from its attorneys 21 days before the loan closing stating that Wheeler is being sued by Sapp for \$556,099 for non-payment of a lease); Kennedy Ex. 4, R. 531 (Kennedy closing checklist circulated to the closing attorney and Kennedy employees that Pawleys was to provide status of litigation by Sapp against Wheeler).

- Kennedy, required that Wheeler convey the property to the LLC. Wolfer Dep. 2, R. 653, ll. 4 – 9.
- Kennedy knew that the LLC was a family owned company. Kennedy Ex. 1, R. 243, (Loan and Security Agreement between Pawleys and Kennedy at para. 6.(h)).
- Further, the lender knew that there was no consideration for the transfer it required, and that the transfer was by quitclaim deed. Kennedy Ex. 4, R. 530 (Kennedy closing checklist reciting that deed has been received and is under review).

Kennedy was not only on notice that its borrower had taken the property by a fraudulent transfer from Wheeler, but Kennedy had actual knowledge of facts which should have led to further inquiry and due diligence which would have unmistakably shown that its borrower, Pawleys, had acquired the property by fraudulent transfer.

It is under these facts - a transferor of property being sued for breach of a lease guaranty, the transferor's conveyance of the property to a family member (in this case to a family-owned company), the conveyance being for no consideration, and the lender's knowledge thereof – that a lender cannot be deemed a good faith purchaser for value without notice. Coupling these facts with Kennedy's actually requiring the transfer leads to the logical conclusion that Kennedy was on notice that its borrower did not have good title to the property as to Wheeler's creditors, one of whom was Sapp.

A ruling in this case in favor of Sapp and against Kennedy cannot adversely impact lending in South Carolina. The facts herein reflect a *de minimus* number of loan transactions, only those transactions where there is a conveyance of property by a debtor

for no consideration to a family member and the lender has notice of such facts when it records a lien on the property. In other words, it will only impact loans where there is a fraudulent conveyance and the lender has notice.

Argument

In support of the petition, Sapp would respectfully show as follows:

- A. The Opinion misapprehended or overlooked the effect of Kennedy's actual notice of Wheeler's fraudulent conveyance and the unmistakable warnings signs associated with that fraudulent conveyance.**

In focusing on the issue whether the mortgage itself was proven fraudulent, the Opinion overlooked the impact of the lender's actual knowledge of the debt owed by Wheeler to Sapp, and other aspects of the lender's actual knowledge of the fraudulent conveyance from Wheeler to Pawleys. The lender, Kennedy, knew that Wheeler was indebted to Sapp and that suit was pending for enforcement of that obligation. Kennedy knew that the property was being transferred to a family owned limited liability company. Kennedy knew that there was no consideration for the transfer. Kennedy actually required that Wheeler convey the property, out of his name, into the limited liability company, the effect of which would be to shield the property from Wheeler's creditors, one of which was Sapp.

The law is well established in South Carolina that notice of one's unrecorded equity in property will defeat the mortgage priority claim of one who took the mortgage with notice of the unrecorded equity, since one taking with notice cannot be a good faith purchaser without notice. This is an issue separate and apart from whether the mortgage itself was fraudulent, as set forth in the following discussion and the authorities cited herein. However in steering off course to analyze if the mortgage was fraudulent the

Opinion cited *Kirton v. Howard*, 137 S.C. 11, 134 S.E. 859, 868 (1926), apparently for the proposition that Kennedy was purchaser for value without notice.

Kirton starkly contradicts that conclusion. It neither supports nor permits the holding that Kennedy was a purchaser for value without notice. Instead, it clearly sets out the three elements that one must meet in order to be deemed a purchaser for value, *none* of which were met by Kennedy. To qualify as a purchaser for value without notice, Kennedy must: (1) not have had notice of the debt to Sapp and the pending lawsuit before paying the purchase price; (but he did) (2) must not have had notice before acquiring the mortgage; (but he did) and therefore; (3) must have purchased "bona fide without notice." (but he did not).

Each of these elements presupposes some form of "notice." If there be any question as to the degree or sufficiency of Kennedy's notice, under the proof in this case, the following statement from the *Kirton* court is dispositive: "One cannot successfully interpose this defense, where the circumstances are sufficient to put one upon inquiry, or where one might by due diligence have ascertained the facts. One is charged with notice of every fact which such inquiry and such diligence will certainly disclose." *Kirton*, 134 S.E. at 868.

The Respondents did not cite any case to the Court where a court enforced a deed or mortgage over one's equity in property arising from a fraudulent conveyance where the grantee or mortgagee took his interest in the property with notice of the fraudulent conveyance. In contrast, the cases found and cited by Sapp never enforce in equity a mortgage (or deed) where the mortgagee has notice of the fraudulent conveyance.

In *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973), the Supreme Court held that fraudulently conveyed property was subject to sale in satisfaction of a creditor's judgment which had been obtained after the lender's mortgage was recorded.. The Court refused to allow for payment of the lender's mortgage taken from the fraudulent grantees. The public records of which the lender would have had notice showed a family transfer for inadequate consideration. The facts of this case are worse for Kennedy than the facts in *Coleman*. In the case before this Court Kennedy knew that Sapp was being sued for a substantial amount, the conveyance was for no consideration (not just inadequate consideration) and Kennedy even required the conveyance, thus insulating the property from Sapp's soon to be obtained judgment.

In *Messervy v. Barelli*, 11 S.C. Eq. (2 Hill Eq.) 576 (1837), a mortgage was deemed null and void as to the claims of the mortgagor's children. The children themselves were supposed to be protected by a mortgage to their mother which had not been recorded, but the mortgagee, Barelli, took the mortgage with notice of the children's claims against the property securing Barelli's mortgage, even though the mortgage for the children's benefit was not recorded. The lower court found that Barelli had notice of the children's interest in the property mortgaged to him.¹ The lower court held that Barelli's mortgage "be set aside, and vacated, and utterly null and void." 11 S.C. Eq. (2 Hill Eq.) 567, 577-578 (1837). The court ordered a sale of the property in satisfaction of the children's interest-allowing

¹ Respondent and this Court attempted to distinguish *Messervy* by contrasting Barelli's close relations with the Messervy family with the less close relationship between Kennedy and Wheeler/Pawleys. This distinction is of no consequence as the issue is what did Barelli, and in this case Kennedy, have notice of. Barelli's close relations with the Messervy family may have made the finding of notice easier in that case, but the more distant relationship of Kennedy in this case still cannot overcome Kennedy's incontrovertible loan documentation that it knew of Sapp's equity.

the debt owed to Barelli to be paid from any excess proceeds. In effect, the Court recognized that the mother owed a debt to Barelli, but postponed its payment until after the unrecorded children's claims were satisfied from the property.

In a case similar to *Messervy, Rilling v. Schultze*, 95 Tex. 352, 67 S.W. 401 (1902), the court held that a mortgage executed by a fraudulent grantee is invalid as to creditors of the fraudulent grantor when the mortgagee had notice of the fraud. *Rilling* held that where (1) a debt was incurred and a mortgage executed after the fraudulent conveyance (like here) and (2) the mortgagee was on notice of a fraudulent conveyance (like here), that the mortgage was invalid as to the defrauded creditor. Both of these conditions are present in the case before this Court.

The grantee can no more give a lien to a subsequent creditor who has notice of the fraud than he can sell to a purchaser with such notice. Very clearly the mortgage is not valid as to the debts created at the time the mortgage was executed; and since *Rilling* has failed to show that his judgment was for a debt which existed at the time of the execution of the fraudulent conveyance, the mortgage as to that debt must also be held void as to Caroline Schultze.

95 Tex. at 358, 67 S.W. at 404.

In *Brunson v. Sports*, 239 S.C. 58, 121 S.E.2d 294 (1961), the Supreme Court analyzed the notice issue in the context of a deed, holding that the grantee's notice of another's claim defeats the grantee's claim of being a bona fide purchaser. In *Brunson*, Dukes took a deed to property from West. The property was subject to an unrecorded trust of which Dukes had notice. The Supreme Court stated, "The law is well settled that actual notice of an outstanding equity will cut off the defense of bona fide purchaser." *Brunson*, 239 S.C. at 68, 121 S.E.2d at 299. In the case before this Court, Kennedy had actual knowledge of Sapp's pending Complaint for judgment against Wheeler which would

encumber Sapp's property,² and other badges of fraud constituting a fraudulent conveyance.

In *Matthews v. Montgomery*, 193 S.C. 118, 7 S.E.2d 841, 848 (1940), the Supreme Court found in favor of a judgment creditor on a Statute of Elizabeth claim, who secured his judgment after a secondary purchaser obtained and recorded a deed to the property. Like the case before this court, the secondary purchaser was on notice of the judgment creditor's claim even though it had not been reduced to judgment at the time of execution and recording of the his deed.

But it is urged that the appellant was not a judgment creditor at the time of the tax sale nor at the time of the tax deed a year later, and that until entry of her judgment she had no interest in or lien upon the land; that until entry of judgment the debtor had a legal right to deal as she chose with her own property and if she let it be sold for taxes anyone could purchase it from the Forfeited Land Commission unaffected by a judgment subsequently entered. This argument is doubtless sound if the property had been purchased in good faith by an innocent stranger for value and without notice.

7 S.E.2d at 848.

In the Opinion, it appears that the Court thought Kennedy had taken action to protect itself and that Sapp had not. The Court referenced Kennedy's reliance on counsel and the fact that Sapp did not file a *lis pendens* on the property "to protect his interests."

However, as stated in *Brunson*, the law is well settled that an opinion of reputable counsel will not save a party from its actual notice of an outstanding equity of another party. 239

S.C. at 68, 121 S.E.2d at 299. In short, an opinion of counsel will not defeat one's rights established in the law.

² A Horry County Magistrate had already issued an eviction order for non-payment of rent. R. 759.

As to the *lis pendens*, it is an extraordinary right and is not appropriate for an action simply seeking money damages. *Carolina Park Associates, LLC v. Marino*, 400 S.C. 1, 732 S.E.2d 876 (2012). Thus, Sapp could not have filed a *lis pendens* to protect his interests. Moreover, the filing of a *lis pendens*—even in a proper case—is designed to put parties on notice. Here, Kennedy was not only on notice of Sapp’s claim, but also of the many badges of Wheeler’s fraud. The circumstances were sufficient to put Kennedy on inquiry, and Kennedy is charged with knowledge of the facts which such inquiry would disclose. *Kirton*.

B. The Court misapprehended the facts in *Coleman*, further mistakenly focusing on whether the Kennedy mortgage was fraudulent, and as a result overlooked *Coleman*’s binding effect.

Part II of the Opinion begins with the sentence “Sapp argues the mortgage transaction between Pawleys and Kennedy was fraudulent.” Part II then concludes, “Thus, because we find Kennedy’s mortgage was not a fraudulent conveyance, we find Kennedy’s lien had priority over Sapp’s lien on the property.” However, whether the mortgage itself could be classified as “fraudulent” is inconsequential to the Sapp’s contention that his judgment lien has a superior priority to Kennedy’s mortgage taken from the fraudulent grantee, Pawleys, under *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973).

The facts of *Coleman* are effectively identical to the facts before this court. In *Coleman* the fraudulent grantor, Rogers, conveyed the real property at issue to his daughter and son-in-law, the Daniels. Less than a month later the Daniels refinanced an existing debt on the property and granted a new mortgage on the property to a commercial lending

institution. Approximately a year and six months after these transactions, Coleman obtained his judgments against the fraudulent grantor, Rogers.

In the case before this Court the fraudulent grantor, Wheeler, conveyed the property at issue to a limited liability company solely owned by him and his mother. Two days later Pawleys, the fraudulent grantee, refinanced an existing debt on one of the parcels of the property and granted a new mortgage on the property to Kennedy. A year and one month after these transactions Sapp obtained his judgment against the fraudulent grantor, Wheeler.

In analyzing the mortgage transaction as being fraudulent, the Opinion attempts to distinguish the facts of the case before this Court with Coleman. It is unnecessary under *Coleman* to determine that the mortgage was fraudulent, but in seeking to distinguish *Coleman*, the Opinion misapprehends the underlying transaction in this case. The Opinion states:

Sapp also cites *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74 (1973), and *Messervy v. Barelli*, 11 S.C. Eq. (2 Hill Eq.) 567 (1837). Each of these cases involves transactions between close friends or family. Whereas here, the transfer was between an LLC and a corporation.

Legally, the above distinction would be illusory. But, as shown below, it must surely be based on a misapprehension of the facts, as the distinction between an individual mortgagor and legal entity as a mortgagor is of no consequence. Neither could give a mortgage enforceable against a defrauded creditor (or one with an equity interest in the property) to a lender on notice of the fraud (or equity).

In both the case before this court and the *Coleman* case, the fraudulent grantee borrowed money from a commercial lender, and gave that lender a mortgage on the property. Prior to borrowing the money and granting the mortgage, in both cases, the

property in question had been transferred among family - *Coleman* being a father-to-daughter transfer, and this case being a son-to-family-owned limited liability company. The family relationships among the parties to these property transfers are irrelevant to the present issue because, in this case and in *Coleman*, the underlying conveyances were held to have indeed been fraudulent. In this case as in *Coleman*, the Court is faced with deciding the effect of an already determined fraudulent conveyance on a new mortgage given by the fraudulent grantee. Thus the only parties whose interests are now at stake in the case before this Court are *an individual defrauded creditor and a financial institution*. Such was the case in *Coleman*. The material facts in *Coleman* are identical in effect to those at issue here, and *Coleman* properly controls this Court's determination. .

Further, *Coleman* refused to recognize the priority of the loan taken from the fraudulent grantee over the lien of the judgment creditor. In *Coleman*, the Supreme Court refused to allow for payment of the lender's mortgage taken from the fraudulent grantees when it remanded for sale of the property to satisfy the judgment creditor's lien. This issue was squarely before the Supreme Court as discussed in Justice Bussey's dissent. On remand and sale of the property, he would have provided for payment of the financial institution's mortgage debt, but the majority refused to favor the lender who took its mortgage from fraudulent grantees.

We therefore hold that the trial judge erred in dismissing the complaint and in failing to grant the relief sought by *Coleman*. The deed from Linzie Rogers to Annie Margaret Rogers Daniel and James D. Daniel, II, dated October 26, 1964, is void as to *Coleman* and the property described in the deed is therefore subject to the lien of *Coleman*'s judgments. *Coleman* may seek an order of the lower court for sale of the property in satisfaction of his judgments unless the amounts due him be sooner paid.

261 S.C. at 211, 199 S.E.2d at 80.

Coleman held that the judgment creditor was entitled to have the property sold in satisfaction of his judgments, and no provision was made for the payment of the lender's mortgage from the fraudulent grantee. The Opinion inadvertently deviates from and conflicts with *Coleman*.

C. The Opinion misapprehends the impact of a fraudulent conveyance or other unrecorded equity in relying upon the recording statute and *Atlas Supply* to give Kennedy's mortgage priority over Sapp, the defrauded creditor.

The Opinion mistakenly relies on the case of *Atlas Supply Co. v. Davis*, 273 S.C. 392, 256 S.E.2d 859 (1979) which interprets the South Carolina recording statute and prioritizes between a judgment creditor and a mortgage. Reliance upon *Atlas* to control a party's rights where there is a fraudulent conveyance is misplaced. To so apply *Atlas* would nullify the Statute of Elizabeth, and would conflict with this court's decision in *Leasing Enterprises, Inc. v. Livingston*, 294 S.C. 204, 363 S.E.2d 410 (Ct. App. 1987.) If *Atlas* be blindly applied even in fraudulent conveyance cases, a creditor who secures his judgment (which is always based on an antecedent debt) after the fraudulent conveyance would never have a remedy.

To the contrary, South Carolina precedent demonstrates that *Atlas Supply* and the recording statute do not give Kennedy's mortgage priority over Sapp's judgment. In *Leasing Enterprises* a judgment creditor ("LEI") brought an action to attack a conveyance of real property from a judgment debtor ("Livingston") to his mother (Margaret Schlee) for nominal consideration. Based on an antecedent debt, LEI recorded its judgment against Livingston after the transfer of property and recording of the deed. LEI then filed suit and alleged, inter alia, that the deed from Livingston to Schlee constituted a fraudulent conveyance. The Court stated:

Section 30-7-10, Code of Laws of South Carolina, 1976, is the recording statute. If this deed was acceptable for recording, Leasing's judgment would not have priority over Schlee under the current recording statute **unless Leasing shows the deed is a fraudulent conveyance.**

Id. at 207, S.E.2d at 411. (emphasis added)

After a discussion of *Atlas*, the Court further stated:

Our reading of the current statute indicates the recording act is a race-notice act which will provide protection to the subsequent purchaser or creditor provided he records first. Therefore, even though Leasing had no actual or constructive notice of the deed between Livingston and Schlee when the Lease Purchase agreement was made and was a subsequent creditor of Livingston, it has no protection under the recording statute **unless . . . Leasing can demonstrate a fraudulent conveyance.**

Id. at 208, S.E.2d at 412. (emphasis added)

The reason the bare language of *Atlas* is not applicable here is because of Kennedy's knowledge of the facts of the fraudulent conveyance. As a matter of equity Kennedy's lien cannot take priority and it must be subordinated to Sapp's judgment lien. This distinction was elucidated by this Court in an equitable subordination case in *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011). Regions Bank made a construction loan to Wingard secured by a recorded mortgage on three lots. At the time of the loan and mortgage, Regions knew that Covington had given Wingard a \$276,700 down payment to purchase one of the lots. There was no public recording of the purchase agreement showing Covington had any record interest in the lot. Nevertheless, based upon Regions' knowledge of the down payment, this Court found that Covington's unrecorded, but equitable interest in the property had priority over Regions' recorded mortgage.

Sapp's equitable interest in Wheeler's property arose when Wheeler made the fraudulent conveyance. *Matthews v. Montgomery, supra*. Kennedy knew of the facts

giving rise to Sapp's equitable interest when it made the loan to Pawleys. Just like *Leasing Enterprises* and *Wingard*, *Matthews* refused to apply the recording act to an unrecorded equity in the property of a creditor with a pending suit to collect a debt. In *Matthews*, the court held the recording act inapplicable where the person seeking benefit of the act had notice of the unrecorded equity, the later recorded judgment based on an antecedent debt.

The *Coleman* case may also be analyzed as an application of the holdings of *Leasing Enterprises*, *Wingard*, and *Matthews*. In *Coleman*, the lender was on notice of an intra-family transfer for inadequate consideration. As discussed above, the *Coleman* court determined that the property should be sold in satisfaction of an antecedent debt reduced to judgment after new debt was incurred and the lender's mortgage was recorded. It appears from the *Coleman* opinion that the only facts of which the lender had knowledge were the intra-family transfer for inadequate consideration, as opposed to this case in which Kennedy knew of Sapp's pending suit, Kennedy knew the transfer was for no consideration, and Kennedy required the transfer of property. Even in *Coleman*, under less knowledge than Kennedy has in this case, the court would not apply the recording act to give the lender priority.

Atlas Supply does not involve a defrauded judgment creditor. It does not control the priority of a recorded mortgage lender against a defrauded judgment creditor. The cases which apply are those which directly address the priority of judgment creditor whose equity arises upon the fraudulent transfer of property, and that equity will not be cut off by *Atlas Supply* or the recording act where the lender is on notice of facts which should put it on inquiry, including the facts in this case which reasonable inquiry would lead to the inescapable conclusion of a fraudulent conveyance. See, *Kirton v. Howard*, *supra*, refusing

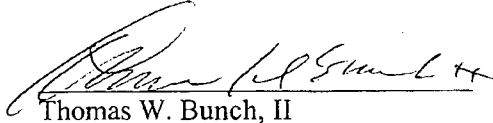
to grant good faith purchaser status where the grantee was on notice of facts of another's interest in the property. "One cannot successfully interpose this defense, where the circumstances are sufficient to put one upon inquiry, or where one might by due diligence have ascertained the facts. One is charged with notice of every fact which such inquiry and such diligence will certainly disclose." *Id.*, p. 868.

Conclusion

In this foreclosure case, a case in equity brought by Kennedy, Kennedy's lien cannot take priority over Sapp. Kennedy's conduct should have barred its claim in equity. Wheeler gave his property away to Pawleys. Kennedy not only knew it, Kennedy required it. Pawleys – whose title is void and of no effect as to Sapp as a result of the fraudulent conveyance - then borrowed money and gave a mortgage on the property to Kennedy when Kennedy was fully knowledgeable of Wheeler's debt to Sapp and of the pending suit for a judgment on that debt. The mortgaged property is the very property upon which Sapp must resort to satisfy Wheeler's debt to him. The law does not permit a debtor to grant a mortgage for a new loan to the detriment of his existing creditors, particularly where the new creditor (Kennedy here) knew of the existing debt and required Wheeler to transfer the property so that Sapp's lien could not attach it. In the face of no contrary authority cited by the Respondents, under the holdings of *Coleman*, *Rilling*, *Messervy*, *Brunson*, *Leasing Enterprises, Inc.*, *Matthews*, and *Wingard*, this Court should rehear this case and issue its decision that the orders of the lower court be reversed in their entirety, and that the case be remanded to the Master-in-Equity to conduct a sale of the property to satisfy first Sapp's judgment against Wheeler, with any excess proceeds payable to Kennedy.

Signature on following page

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Thomas W. Bunch, II", is written over a horizontal line.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
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The Honorable Joe M. Crosby, Master-In-Equity

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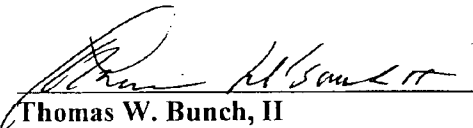
J. Mars Sapp is the Appellant.

PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing on opposing counsel by
depositing a copy of it in the United States Mail, postage prepaid, on **March 26, 2015** addressed
as follows:

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APPX00961

The South Carolina Court of Appeals

Kennedy Funding, Inc., as predecessor-in-interest, and
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v.

Pawleys Island North, LLC, Will Darwin Wheeler,
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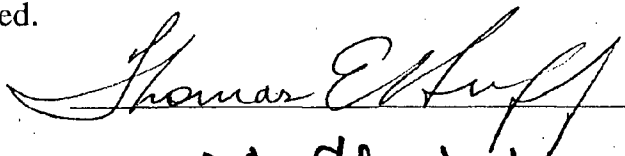
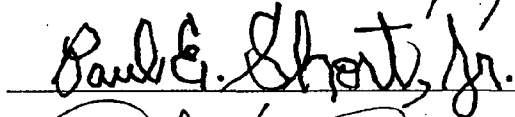
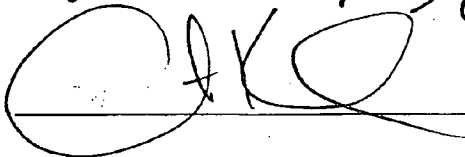
Of Whom Pawleys Island North, LLC, Will Darwin
Wheeler, and Peggy Wheeler-Cribb are the Respondents,

And J. Mars Sapp is the Appellant.

Appellate Case No. 2013-001447

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

FILED

April 24, 2015