

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Clyde Davis, Special Referee

Case No. 2010-CP-29-196

RECEIVED
MAY 24 2012
SC Court of Appeals

Wells Fargo Bank, National Association, successor in interest
by merger to Wachovia Bank, National Association.....Respondent,

v.

EGIS 521, LLC, Peter James Menkhaus, Stephanie L. Menkhaus,
Nancy T. Jenkins, Individually and as Trustee of the Don A. Jenkins
T/U/W and as Personal Representative of the Estate of Don A. Jenkins,
Bellsouth Carolina PCS, LP, n/k/a Bellsouth Mobility DCS, LP,
Commercial Products, Mark A. Ciminelli, Mark E. Carpenter, Ronald C. Mariello

of whom:

EGIS 521, LLC, Mark A. Ciminelli, Mark E. Carpenter and
Ronald C. Mariello are the..... Appellants.

RECORD ON APPEAL

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MAY 24 2012

SC Court of Appeals

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Lancaster, South Carolina 29720
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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER) SIXTH JUDICIAL CIRCUIT

Wachovia Bank, National Association,) Civil Action No. 2010-CP-29-196
)

Plaintiff,)
)

vs.)

CONSENT ORDER RESOLVING
WACHOVIA BANK'S MOTION TO
STRIKE JURY DEMAND AND
MOTION TO DISMISS
COUNTERCLAIMS

EGIS 521, LLC, Peter James)
Menkhaus, Stephanie L. Menkhaus,)
Nancy T. Jenkins, Individually and as)
Trustee of the Don A. Jenkins T/U/W)
and as Personal Representative of the)
Estate of Don A. Jenkins, Bellsouth)
Carolina PCS, LP, n/k/a Bellsouth)
Mobility DCS, LP, Commercial)
Products, Mark A. Ciminelli, Mark E.)
Carpenter, Ronald C. Mariello,)

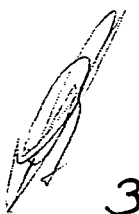
Defendants.)
)

MOTION FEE PAID

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LANCASTER COUNTY, SC

This matter came before the Court upon Plaintiff Wachovia Bank, National Association's ("Plaintiff" or "Wachovia"), Motion to Dismiss Defendants EGIS 521, LLC ("EGIS"), Mark A. Ciminelli, Mark E. Carpenter, Ronald C. Mariello, Peter James Menkhaus, and Stephanie Menkhaus' (collectively the "Defendants") counterclaims pursuant to S.C. R. Civ. P. 12(b)(6) and Plaintiff's Motion to Strike Jury Demand. A hearing on this Motion was held before this Court on July 22, 2010. After negotiation, counsel for Plaintiff and Defendants have reached a resolution of the pending Motions, which the Court hereby approves as follows:

1. The Defendants EGIS 521, LLC, Mark A. Ciminelli, Mark E. Carpenter, Ronald C. Mariello, Peter James Menkhaus, and Stephanie Menkhaus agree



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to strike their demand for jury trial and hereby waive any right to a jury trial in this matter.

2. The Defendants agree to consent to reference in this case to a Special Referee, with a trial to be scheduled no later than October 1, 2010, or as agreed by the parties.

3. The Defendants agree to dismiss their counterclaims against the Plaintiff for Negligent Misrepresentation and Breach of Fiduciary Duty and those claims are hereby dismissed WITH PREJUDICE.

4. The Defendants' claim for negligence shall not be dismissed at this time and that claim shall go forward.

IT IS SO ORDERED THIS 10 DAY OF August, 2010.



The Honorable Brooks P. Goldsmith
Judge for the Sixth Judicial Circuit

[Consent Signatures on Following Page]

WE SO CONSENT:

BY: /s/ F. Craig Wilkerson, Jr. (by B. Keith Poston, with express consent)
F. Craig Wilkerson, Jr.
242 Oakland Avenue
Rock Hill, SC 29730
Tel: 803.324.7200

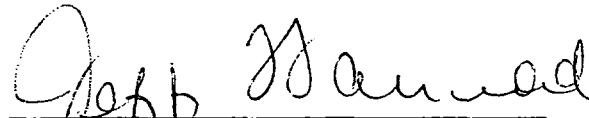
Attorney for Defendants EGIS 521, LLC, Peter James Menkhaus,
Stephanie L. Menkhaus, Mark A. Ciminelli, Mark E. Carpenter,
Ronald C. Mariello

NELSON MULLINS RILEY & SCARBOROUGH, LLP

BY: /s/ Betsy Johnson Burn (by B. Keith Poston, with express consent)
Betsy Johnson Burn
PO Box 11070
Columbia, SC 29211
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Attorneys for Plaintiff Wachovia Bank, N.A.

issues involving possession and/or removal of property and appraisal proceedings under Section 29-3-360, et. seq. of the South Carolina Code. Pursuant to Rule 53(b) SCRCRCP, any appeal from the final judgment entered by the Master In Equity shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

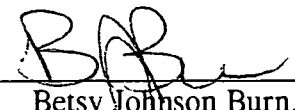

Lancaster County, Clerk of Court

3-10, 2010

Lancaster, South Carolina

WE SO MOVE:

NELSON MULLINS, RILEY & SCARBOROUGH, LLP

By: 
Betsy Johnson Burn, Attorney for Plaintiff

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER) SIXTH JUDICIAL CIRCUIT

Wells Fargo Bank, National) Civil Action No. 2010-CP-29-196
Association, successor in interest by)
merger to Wachovia Bank, National)
Association,)

Plaintiff,)

vs.)

EGIS 521, LLC, Peter James)
Menkhaus, Stephanie L. Menkhaus,)
Nancy T. Jenkins, Individually and as)
Trustee of the Don A. Jenkins T/U/W)
and as Personal Representative of the)
Estate of Don A. Jenkins, Bellsouth)
Carolina PCS, LP, n/k/a Bellsouth)
Mobility DCS, LP, Commercial)
Products, Mark A. Ciminelli, Mark E.)
Carpenter, Ronald C. Mariello,)

Defendants.

ORDER GRANTING (1) MOTION
TO WITHDRAW AS COUNSEL
AND (2) PLAINTIFF'S MOTION TO
COMPEL AS TO DEFENDANTS
EGIS 521, LLC, PETER JAMES
MENKHAUS, STEPHANIE
MENKHAUS, MARK A.
CIMINELLI, MARK E.
CARPENTER, AND RONALD C.

MARIELLO

FILED
OFFICE OF CLERK
OF COURT

APR 21 PM 4:06
LANCASTER COUNTY SC

THIS MATTER is before the Court upon F. Craig Wilkerson's Motion to Withdraw as Counsel and Plaintiff Wachovia Bank, National Association's Motion to Compel as to Defendants EGIS 521, LLC, Peter James Menkhaus, Stephanie L. Menkhaus, Mark A. Ciminelli, Mark E. Carpenter, and Ronald C. Mariello. A duly noticed hearing was held on April 7, 2011, attended by counsel for Plaintiff and F. Craig Wilkerson, counsel for Defendants EGIS 521, LLC, Peter James Menkhaus, Stephanie L. Menkhaus, Mark A. Ciminelli, Mark E. Carpenter, and Ronald C. Mariello.

Based upon the pleadings filed of record and the arguments of counsel

CND

during the hearing, the Court hereby finds as follows, and it is hereby ORDERED, ADJUDGED AND DECREED that:

1. Due to an actual conflict of interest that has developed, cause exists to permit F. Craig Wilkerson to withdraw as counsel for Defendants EGIS 521, LLC, Peter James Menkhaus, Stephanie L. Menkhaus, Mark A. Ciminelli, Mark E. Carpenter, and Ronald C. Mariello, and he is relieved as counsel in this matter upon entry of this Order.

2. Upon entry of this Order, the Defendants EGIS 521, LLC, Peter James Menkhaus, Stephanie L. Menkhaus, Mark A. Ciminelli, Mark E. Carpenter and Ronald C. Mariello shall have fifteen (15) days to secure new counsel and instruct said counsel to file a Notice of Appearance in this action.

3. If any of the above-named Defendants fail to secure new counsel within fifteen (15) days of entry of this Order, said Defendant shall be considered to be a *pro se* Defendant going forward.

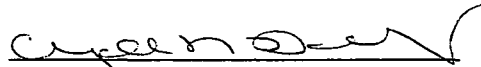
4. Counsel F. Craig Wilkerson confirmed on the record that Defendants Mark E. Carpenter and Mark A. Ciminelli have withdrawn and hereby waive any counterclaims against Plaintiff in the above-captioned action.

5. Plaintiff's original discovery requests were served upon Defendants' counsel on or about September 22, 2010. The original responses were due on or about October 22, 2010. The Defendants have yet to respond to the requests as of April 8, 2011. Given the length of time that has passed since the responses were due, the Court hereby finds that the Defendants shall respond to the Plaintiff's discovery requests within thirty (30) days of entry of this Order.

CND

6. The Court further finds upon the passing of the discovery production deadline, this matter will be ripe for trial. Thus, the Court hereby sets the foreclosure hearing for June 23, 2011 at 11:00 a.m., at a location in Lancaster County to be determined at a subsequent date.

AND IT IS SO ORDERED.


The Honorable Clyde Davis
Special Referee

April 16, 2011
Lancaster, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER) SIXTH JUDICIAL CIRCUIT

Wells Fargo Bank, National) Civil Action No. 2010-CP-29-196
Association, successor in interest by)
merger to Wachovia Bank, National)
Association,)

Plaintiff,) **ORDER DENYING DEFENDANTS'**
) **DEMAND FOR ARBITRATION**

vs.)

EGIS 521, LLC, Peter James)
Menkhaus, Stephanie L. Menkhaus,)
Nancy T. Jenkins, Individually and as)
Trustee of the Don A. Jenkins T/U/W)
and as Personal Representative of the)
Estate of Don A. Jenkins, Bellsouth)
Carolina PCS, LP, n/k/a Bellsouth)
Mobility DCS, LP, Commercial)
Products, Mark A. Ciminelli, Mark E.)
Carpenter, Ronald C. Mariello,)

Defendants.

THIS MATTER is before the Court upon the Demand for Arbitration served by counsel for Defendants EGIS 521, LLC, Mark A. Ciminelli, Mark E. Carpenter and Ronald C. Mariello (the "Defendants") on May 27, 2011 (the "Demand"). By agreement of counsel for Plaintiff and Defendants and the Honorable Clyde Davis via a telephone status conference on June 1, 2011, the parties agreed to waive notice and hear the Demand and Plaintiff's Objection thereto prior to the previously scheduled hearing on the Motion for Summary Judgment, which had been noticed by the Plaintiff for June 2, 2011 at 11:30 A.M. The Plaintiff forwarded its Objection to the Demand via email by 3:30 p.m. on Wednesday, June 1, 2011, as

agreed by the parties and the Court. A hearing was held on the Demand on June 2, 2011 at 11:30 a.m., attended by counsel for Plaintiff and Defendants.

Based upon the pleadings filed of record and the arguments of counsel during the hearing, the Court hereby finds as follows, and it is hereby ORDERED, ADJUDGED AND DECREED that:

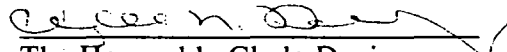
1. Defendants Mark Carpenter and Mark Ciminelli have both previously waived any counterclaims as to Plaintiff.
2. The Defendants, EGIS 521, LLC, Mark Carpenter, Mark Ciminelli, and Mr. Mariello, have waived any right to demand binding arbitration under the Arbitration Provision, under the standards set forth in South Carolina case law.
3. The Court finds that the above commercial foreclosure and collection action on guaranty has been pending for sixteen months prior to the Defendants' Demand. During those sixteen months the Defendants, through counsel, have been actively engaged in the foreclosure litigation through several hearings before the Court and have received the benefit of the discovery process through the production by Plaintiff of two CDs of information and written responses to Defendants' discovery requests.
4. The Court also finds that the Defendants have simultaneously failed to comply with the Rules of Civil Procedure in failing to respond to the Plaintiff's discovery requests, failing to file any type of protective motion under Rule 26 of the South Carolina Rules of Civil Procedure, and failing to comply with this Court's Order Granting Motion to Compel which was entered on April 21, 2011, resulting in actual prejudice to the Plaintiff.

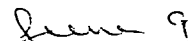
5. The Court further finds that a hearing on Plaintiff's Motion for Summary Judgment as to Defendants' EGIS 521, LLC and Ronald Mariello's counterclaims was previously scheduled for June 2, 2011, and the final foreclosure hearing was previously scheduled for June 23, 2011, as set forth in the April 21, 2011 Order.

6. Those facts, coupled with the length of time this matter has been pending and the actual prejudice to the Plaintiff if the Demand were to be granted, supports a finding by this Court that waiver by the Defendants has been established by the Plaintiff.

7. The Court hereby DENIES the Demand for Arbitration and Grants the Plaintiff's Objection thereto.

AND IT IS SO ORDERED.


The Honorable Clyde Davis
Special Referee

, 2011
Lancaster, South Carolina

3. Upon information and belief, the Defendant EGIS 521, LLC, is a limited liability company organized and existing under and pursuant to the laws of the State of North Carolina.

4. Upon information and belief the Defendant Nancy T. Jenkins, individually and as Trustee of the Don A. Jenkins T/U/W and as Personal Representative of the Estate of Don A. Jenkins is a citizen and resident of the County of Lancaster, State of South Carolina.

5. Upon information and belief, the Defendant Bellsouth Mobility DCS, LP, is a limited partnership organized and existing under and pursuant to the laws of the State of Delaware.

6. Upon information and belief, the Defendant Commercial Products, is a corporation organized and existing under and pursuant to the laws of the State of North Carolina.

7. Upon information and belief, the Defendants Mark A. Ciminelli, Mark E. Carpenter and Ronald C. Mariello are citizens and residents of the County of Mecklenburg, State of North Carolina.

8. Any defendant described herein as a judgment creditor has, by filing the judgment, designated the attorney entering the judgment as its agent for service of process pursuant to the provisions of Section 15-35-840 of the S.C. Code of Law (1976) as amended.

9. This Court has jurisdiction over the above captioned matter.

10. The real property which is the subject of the within mortgage foreclosure action is located in Lancaster County, South Carolina.

11. Pursuant to the South Carolina Supreme Court's Administrative Order filed on May 22, 2009, the mortgage loan identified herein is a commercial loan which is not owned, securitized or guaranteed by Fannie Mae or Freddie Mac nor is any servicer of the loan participating in the Home Affordable Modification Program (HMP), as referenced in the above Administrative Order. As such, the Administrative Order is not applicable to the loan and mortgage identified herein.

FOR A FIRST CAUSE OF ACTION
(Foreclosure)

12. Each and every allegation in the above-numbered paragraphs are repeated herein by reference as if stated verbatim.

13. Heretofore, on or about May 17, 2007, the Defendant EGIS 521, LLC for value received, executed and delivered to Wachovia a promissory note and loan agreement in the principal sum of \$4,549,320.00. The said note was amended and restated by that certain note ("Note") dated December 19, 2008 and forbearance agreement ("Forbearance Agreement", collectively with the Note and all prior loan documents, the "Loan Documents"), executed by Defendant EGIS 521, LLC and delivered to Wachovia. Said Note being in the principal amount of Four Million Six Hundred Forty Six Thousand Six Hundred Sixty Three and 35/100 (\$4,646,663.35) Dollars, with interest thereon, the terms of which Note are more fully explained by reference thereto. A copy of said Note is attached hereto as Exhibit A and incorporated herein by reference.

14. Simultaneously with the execution of the above referred to Note, and in order to secure the payment thereof, the Defendants EGIS 521, LLC, Peter James Menkhaus and Stephanie L. Menkhaus executed and delivered to Plaintiff that certain mortgage,

assignment of rents and security agreement ("Mortgage") dated May 17, 2007, and recorded in the Office of the Register Of Deeds for Lancaster County on May 17, 2007, in Mortgage Book 1722 at Page 229, wherein and whereby said Defendants mortgaged to Wachovia the real property and personal property (collectively "Property") more fully described herein as follows:

All that certain piece, parcel or lot of land lying, being and situate in Lancaster County, South Carolina, being shown and designated as 42.463 acres, more or less, on Boundary Survey entitled "JENKINS PROPERTY" dated November 16, 2006, prepared by Stephen S. Dyer of The Isaacs Group, and being more particularly described according to said plat as follows: POINT AND PLACE OF BEGINNING, commence at an existing 1" pipe on the southern edge of the right-of-way for Shelly Mullis Road Highway(66' Public R/W), common corner with property now or formerly of Belair Methodist Church (Deed Book R-8, Page 134); thence along the common boundary line with property of Belair Methodist Church the following five (5) courses and distances: (1) S.21-36-50 E. 146.06 feet to an angle iron; (2) S. 18-44-57 E. 141.99 feet to an angle iron; (3) S. 18-44-57 E. 67.95 feet to an iron pin set; (4) N. 48-28-38 E. 176.26 feet to an 1-1/2" pipe; (5) N. 48-28-38 E. 474.89 feet to an 1/2" pipe, a point in the western boundary line of property now or formerly of Patricia Rodgers Murphy (Deed Book A-6, Page 4302); thence S. 45-14-50 E. 816.31 feet to a #5 rebar, a common corner with property now or formerly of Jerry Lee Murphy (Deed Book B-6, Page 3872); thence S. 45-18-23 E. 448.96 feet to an iron pin set, a common corner with property now or formerly of James E. Harris & Janie Lucille Wilson Harris Trust (Deed Book 225, Page 182); thence along the common boundary line with said property the following two (2) courses and distances: (1) S. 46-30-28 W. 1080.77 feet to an 1" pipe; (2) N. 45-13-34 W. 60.01 feet to an aluminum disk, a common corner with property now or formerly of South Carolina Bank and Trust of the Piedmont, N.A. (Deed Book 321, Page 142); thence with the said property the following two (2) courses and distances: (1) N. 46-13-00 W. 310.35 feet to an aluminum disk (2) S. 52-01-45 W. 267.51 feet to an aluminum disk on the eastern edge of the right-of-way for U.S. Highway 521 (Public R/W Varies); thence running along the eastern edge of the right-of-way for U.S. Highway 521 N. 40-27-10 W. a total distance of 1295.39 feet to an iron pin set, (passing an iron pin set at a distance of 1068.92 feet); a point on the southern edge of the right-of-way for Shelly Mullis Road Highway; thence running along the southern edge the following two (2) courses and distances; (1) N. 52-16-30 E. 223.85 feet to an iron pin set; (2) N. 52-20-11 E. 527.25 feet to an existing 1" pipe being the POINT AND PLACE OF BEGINNING.

Derivation: This being the same property by deed from Don A. Jenkins and Nancy T. Jenkins to EGIS 521, LLC, a 97.08% undivided tenant-in-common interest; Peter James Menkhaus and Stephanie L. Menkhaus, a 2.92% undivided tenant-in-common interest dated 5/16/07, recorded 5/17/07 at Deed Book 399/120; Quit claim Deed from Don A. Jenkins and Nancy T. Jenkins to EGIS 521, LLC, a 97.08% undivided tenant-in-common interest; Peter James

Menkhaus and Stephanie L. Menkhaus, a 2.92% undivided tenant-in-common interest dated 5/16/07, recorded 5/17/07 at Deed Book 399/125 in the Office of the ROD for Lancaster County, South Carolina.

TMS NUMBER: 0013-00-051.00

A copy of said Mortgage is attached hereto as Exhibit B and incorporated herein by reference.

15. The Plaintiff is the owner and holder of the Loan Documents and Mortgage referenced hereinabove.

16. The Loan Documents matured on May 30, 2009.

17. The Defendant EGIS 521, LLC has defaulted in the payment of the Loan Documents and Mortgage given to Plaintiff by failing to pay Plaintiff upon maturity of the Loan Documents, on demand, the principal and interest due under said documents, and all interest due thereon. Said Loan Documents and Mortgage are therefore in default and plaintiff has declared the entire balance of principal and interest to be immediately due and payable.

18. The Mortgage is a valid first lien on the Property.

19. There is due and unpaid on the Loan Documents and Mortgage, as of January 4, 2010, the principal sum of Four Million Six Hundred Twenty Six Thousand Six Hundred Sixty Three and 35/100 (\$4,626,663.35) Dollars, plus interest in the amount of One Hundred Fifty Two Thousand Two Hundred Sixty Eight and 61/100 (\$152,268.61) Dollars, and late fees in the amount of Two Thousand Seven Hundred Seven and 59/100 (\$2,707.59) Dollars. Demand has been made upon the Defendant EGIS 521, LLC to pay said amounts but said Defendant has refused to pay the same, or any part thereof, and said refusal is continuing, all to Plaintiff's injury and damage in the sum of Four Million Seven Hundred Eighty One

Thousand Six Hundred Thirty Nine and 55/100 (\$4,781,639.55) Dollars, plus interest thereon, plus reasonable attorney's fees and the costs and expenses of this action.

20. The following named party may claim a lien on, or interest in the Property by virtue of instruments filed of record in the Office of the Register of Deeds for Lancaster County or the Office of the Clerk of Court for the above-named County, but, if such lien exists, it is junior and subordinate to that of Plaintiff herein:

SECOND MORTGAGE

Mortgagor: EGIS 521, LLC, Peter J. Menkhaus and Stephanie L. Menkhaus

Mortgagee: Don A. Jenkins and Nancy T. Jenkins

Dated: 5/17/07 Filed: 5/17/07 Bk/Pg: 1722/243

Assigned to Nancy T. Jenkins, Trustee of the Don A. Jenkins T/U/W filed

On 12/9/09 at Book 2191 at page 64

LEASES

Memorandum and Amendment of Lease

Landlord: Don A. Jenkins and Nancy T. Jenkins

Tenant: Bellsouth Carolinas PCS, LP

Filed: 1/15/99 Bk/Pg: 33/176

Memorandum of Lease

Lessor: Don A. Jenkins and Nancy T. Jenkins

Lessee: Commercial Products

Filed: 6/10/98 Bk/Pg: 12/122

21. The Plaintiff expressly reserves its right to enter a deficiency judgment against the Defendant EGIS 521, LLC after the sale of the mortgaged Property.

FOR A SECOND CAUSE OF ACTION
(Collection on Guarantys)

22. Each and every allegation in the above-numbered paragraphs is repeated and incorporated herein as if stated verbatim.

23. In consideration of the above referenced Loan Documents the Defendants Mark A. Ciminelli, Mark E. Carpenter and Ronald C. Mariello (hereinafter "Guarantors") executed a Guaranty dated December 19, 2008, hereinafter ("Guarantys") whereby they individually, jointly and severally, absolutely and unconditionally guaranteed the payment of the Note and Mortgage to Plaintiff and all extensions and renewals thereof. A copy of the Guarantys is attached hereto as Exhibit C and is incorporated herein by reference.

24. As further consideration for the Loan Documents, Defendant Guarantors agreed to pay all costs of collection, including reasonable attorney's fees.

25. Plaintiff has declared the entire balance of the Loan Documents and Guarantys due and payable and hereby demands payment of the same, but said Defendant Guarantors have refused to pay, and therefore are in default under the terms of the Guarantys.

26. There is due and unpaid on the Loan Documents and Guarantys, as of January 4, 2010, the principal sum of Four Million Six Hundred Twenty Six Thousand Six Hundred Sixty Three and 35/100 (\$4,626,663.35) Dollars, plus interest in the amount of One Hundred Fifty Two Thousand Two Hundred Sixty Eight and 61/100 (\$152,268.61) Dollars, and late fees in the amount of Two Thousand Seven Hundred Seven and 59/100 (\$2,707.59) Dollars. Demand has been made upon the Defendant Guarantors to pay said amounts but said

Defendant Guarantors have refused to pay the same, or any part thereof, and said refusal is continuing, all to plaintiff's injury and damage in the sum of Four Million Seven Hundred Eighty One Thousand Six Hundred Thirty Nine and 55/100 (\$4,781,639.55) Dollars, plus interest thereon, plus reasonable attorney's fees and the costs and expenses of this act.

27. The Plaintiff expressly reserves its right to enter a deficiency judgment against the Defendants Mark A. Ciminelli, Mark E. Carpenter and Ronald C. Mariello after the sale of the mortgaged Property.

FOR A THIRD CAUSE OF ACTION
(Receiver)

28. Each of the allegations in the above numbered paragraphs are repeated and incorporated herein as if stated verbatim.

29. By virtue of the default, Plaintiff seeks the appointment of a receiver to protect and preserve the Property and to do all acts necessary or required in connection with the administration and management of the Property, including but not limited to the processing and administering of proceeds as to the Real Property.

WHEREFORE, the Plaintiff prays as follows:

1. That a Receiver be appointed for the Property.
2. That the amount due Plaintiff on the above-referred to Loan Documents and Mortgage to be ascertained and determined under the direction of this Court, together with attorney's fees and the costs of this action.
3. That Plaintiff recover judgment against the Defendants EGIS 521, LLC, Mark A. Ciminelli, Mark E. Carpenter and Ronald C. Mariello in the amount found to be due, together with attorney's fees and the costs of this action.

4. That the court ascertain which lien or liens, if any, are prior to that of plaintiff.

5. That Plaintiff's Mortgage be declared to be a valid lien against the above referred to Property, with the appropriate priority, and that the Plaintiff have judgment of foreclosure against the Defendants subject to the liens of any mortgages found to be prior to the Mortgage held by Plaintiff, for the amount found to be due, together with attorney's fees and costs of this action.

6. That Plaintiff's Mortgage upon the above referred to real Property be foreclosed, subject to the lien of any mortgages found to be superior to that of Plaintiff, the equity of redemption barred, and the property sold under the direction of this Court.

7. That the proceeds of the sale be applied as follows:

- a. to the costs, disbursements, and expenses of this action, including a reasonable attorney's fee for the plaintiff's attorney;
- b. to the amount due Plaintiff; and
- c. the surplus, if any, be held subject to the further order of this Court.

8. That the Plaintiff be granted, if necessary, a deficiency judgment against the Defendants EGIS 521, LLC, Mark A. Ciminelli, Mark E. Carpenter and Ronald C. Mariello for any deficiency which exists after the sale of said real Property.

9. For such other and further relief as the Court may deem just and proper.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Betsy Johnson Burn

SC Bar No. 16680

E-Mail: betsy.burn@nelsonmullins.com

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Attorneys for Wachovia Bank, National Association

Columbia, South Carolina

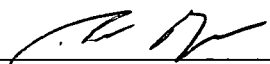
2/1, 2010

STATE OF NORTH CAROLINA)
)
COUNTY OF MECKLENBERG) VERIFICATION

Re: EGIS 521, LLC

PERSONALLY appeared before me the undersigned, who, being first duly sworn, deposes and says: That s/he is the authorized representative for Wachovia Bank, National Association, and as such is authorized to verify the foregoing Complaint and the matters and things therein stated are true to his/her own knowledge, except those matter and things therein stated on information and belief, and those s/he believes to be true.

WACHOVIA BANK, National Association

By: 

Its: Vice President

SWORN to and subscribed before me

this 22nd day of January, 2010⁰⁵

Cheryl W. Schubert (L.S.)
Notary Public for North Carolina

My Commission Expires: 3 August 2013



STATE OF SOUTH CAROLINA)

COUNTY OF LANCASTER)

Wachovia Bank, N.A.,)

Plaintiff,)

vs.)

EGIS, LLC, Peter James Menkhaus,)
Stephanie L. Menkhaus, Nancy T.)
Jenkins, individually and as Trustee of)
the Don A. Jenkins T/U/W and as)
Personal Representative of the Estate)
of Don A. Jenkins, Bellsouth Carolina)
PCS, LP, n/k/a Bellsouth Mobility)
DCS, LP, Commercial Products,)
Mark A. Ciminelli, Mark E. Carpenter,)
Ronald C. Mariello,)

Defendants.)

Defendants.)

IN THE COURT OF COMMON PLEAS

Civil Action Number: 2010-CP-29-196

**ANSWER AND COUNTERCLAIM
AND THIRD-PARTY CLAIM
(JURY TRIAL REQUESTED)**

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CLERK OF COURT
LANCASTER COUNTY, SC

TO: THE PLAINTIFF and THEIR ATTORNEY:

The Defendant, EGIS 521, LLC, Mark A. Ciminelli, Mark E. Carpenter, Ronald C. Mariello, Peter James Menkhous and Stephanie L. Menkhaus, (hereafter collectively referred to as EGIS) answering the Complaint of the Plaintiff, would respectfully show unto the court and allege:

FOR A FIRST DEFENSE

1. That all matters and things alleged in the Complaint not hereinafter specifically admitted are denied.
2. That the Defendant admits the allegations contained in Paragraphs 1, 2, 3, 6, 7, and 10, of the Complaint.

3. That the Defendant has requested verification of the account, but has not received same, and hereby requests same and asserts that the real estate is raw land, with a cell tower not operated by EGIS and, therefore, a receiver is unnecessary.

FURTHER RESPONDING AND
AS A FIRST AFFIRMATIVE DEFENSE

4. That Plaintiff's claims are barred by the doctrine of unclean hands in that Plaintiff, and its agents, have misrepresented terms to EGIS and breached their fiduciary duties to EGIS in failing to report the appraisal results and provide copies of those appraisal reports to EGIS and as such the Plaintiff's equitable claims would be barred by the doctrine of unclean hands and/or alternatively set-off in the amounts of the counterclaims.

AS A SECOND AFFIRMATIVE DEFENSE

5. That in the event of a deficiency judgement or guarantee action against EGIS, EGIS petitions for an appraisal to determine the properties "fair value" as of the date of the foreclosure

AS A THIRD AFFIRMATIVE DEFENSE

6. That no discovery has been conducted and no accounting rendered, EGIS asserts that it has third party claims against unknown appraisers which should be joined with this action and will seek a joinder of those parties once the information is available in discovery and reserves the right to amend.

BY WAY OF COUNTERCLAIM and THIRD PARTY CLAIM

EGIS above named, complaining of the Plaintiff's herein, allege and states as follows:

FIRST: EGIS is the record owner of the hereinafter described real property located in Lancaster County, South Carolina.

SECOND: On information and belief, Wachovia, is a corporation organized and existing under the laws of a State other than South Carolina, but conducting business in the state of South Carolina, with a business location and employees in Lancaster County, South Carolina, and none of the Defendants is/are in the military services of the United States of America.

THIRD: That on or about May of 2007, the Defendant entered into a contract with the Plaintiff, through its agents, for a commercial loan of approximately \$4,650,000.00.

FOURTH: That the property appraised for the Plaintiff at one time for a value of \$9,000,000.00 within the last few years.

FIFTH: That the on information and belief the property recently appraised for the Plaintiff for a value of \$1,800,000.00.

SIXTH: That at no time did the Plaintiff provide EGIS with copies of the appraisals so that EGIS could make informed decisions on the value of the property, as well marketing decisions on the property.

SEVENTH: That the Defendant admits that all payments have not been made in this matter, but disputes that they are in default under the terms of the agreement.

EIGHTH: That EGIS had a valid contract with the Plaintiff; however the Plaintiff, through its agents, has failed to honor the terms of the contract.

NINTH: That the Plaintiff knew or should have know that EGIS would be unable to meet the payments under the current loan, and knew or should have known that the property was diminishing in value far quicker than surrounding properties which were also depreciating with the recent down turn in the economy and that EGIS would also be unable to convert the loan, and had no reasonable hope of being able to afford or refinance the loan given the appraisals; that the Plaintiff should have known that EGIS could not pay the loan, and that the subsequent foreclosure would have a devastating effect on EGIS, to include, but not limited to, being sued, incurring attorney fees, and adverse credit reporting.

TENTH: That the Plaintiff had a series of appraisals on the subject property, on which EGIS relied, and upon which specifically the Menkhous' relied in joining the venture, and that the appraisals were relied upon in determining the real estate price, as well as the loan amount and the second mortgage, and that on information and belief these appraisals were greatly inflated.

FIRST CAUSE OF ACTION

(Negligent Misrepresentation)

11. That the Plaintiff negligently deceived, and did deceive EGIS via fraud in the inducement and misinformation as to its ability to permanently finance the property, that the Plaintiff's appraisers grossly overvalued the property, and induced EGIS to sign the contract, note, and mortgage by materially misrepresenting the situation, which

statement(s) was untrue, as such the Plaintiff(s) made false representations, or statements they should have known were false, to EGIS.

12. That EGIS relied on false representations of the Plaintiff and was induced to enter into said contract, note and mortgage and that the Plaintiff knew the representations were false, or should have known the representations were false, and intended to cause EGIS to rely on said representations.

13. That EGIS relied on such representations and that these representations were made by the Plaintiff with the intent that they be acted upon by EGIS.

14. That said representations were material in causing EGIS to sign the contract, note and mortgage and subsequently induced the Menhkaus' to join the venture.

15. That as a result of these representations, EGIS has consequently and proximately suffered actual and foreseeable actual and consequential damages and is therefore entitled to an award of damages against the Plaintiff.

16. That these fraudulent misrepresentations justify an award of punitive damages against EGIS and the note and mortgage should be set aside and the property should be titled in EGIS' name with all improvements thereto and the Plaintiff should receive no consideration for any improvements made to EGIS' real property.

SECOND CAUSE OF ACTION

(Breach of Fiduciary Duty)

17. By reference, EGIS incorporates each and every allegation contained in Paragraphs 1 through 16 of this counterclaim.

18. That the Plaintiff owed fiduciary duties to EGIS.

19. That EGIS relied upon the expertise of Plaintiff, and other agents of the Plaintiff, in preparing the loan agreement and in providing advice on loans and property values.

20. That at no time did Plaintiff advise EGIS that the loan may be beyond its ability to pay, that it could not sell the property promptly, and other relevant details, and that Plaintiff did not act to further advise or to protect the rights of the EGIS, although they owed them a duty to do so, especially once Menkhaus had joined the venture and the value of the property appeared to plummet.

21. As a direct and proximate result of Plaintiff's acts and omissions, EGIS has been actually damaged, and that these actions justify an award of actual and punitive damages against Plaintiff in an amount to be determined by the jury.

THIRD CAUSE OF ACTION

(NEGLIGENCE)

22. By reference, EGIS incorporates each and every allegation contained in Paragraphs 1 through 21 of this Counterclaim.

45. That EGIS's injuries were due to and proximately caused by the negligence and recklessness of the Plaintiff in the following particulars:

- a) In failing to warn the Plaintiff of its debt ratio;
- b) In failing to properly hire and/or supervise the agents and appraisers who evaluated the property;
- c) In failing to properly supervise and train its agents and employees;
- d) In such other particulars as the evidence may establish.

46. By reason and in consequence of the acts of the Plaintiff, EGIS has suffered serious financial hardship, been foreclosed, and suffered other actual damages; it has purchased property that it was advised was worth between \$6,000,000.00 and \$9,000,000.00, only to learn that the property is worth less than \$2,000,000.00, and it has incurred substantial legal expenses, pain and suffering, and loss of income all to their actual and punitive damages in an amount to be determined by the jury.

WHEREFORE, EGIS prays that the Complaint of Plaintiff be dismissed; for a Declaratory Judgement that the note and mortgage is void and unenforceable against EGIS, or alternatively for a constructive trust in favor of EGIS; a jury trial in this matter; for judgment against the Plaintiff in an amount of actual damages and for punitive damages in an appropriate amount, treble damages, for the costs of this action, including reasonable attorney fees, and for such other and further relief as this Court might deem just and proper.

April 16, 2010



By: F. Craig Wilkerson, Jr.
242 Oakland Avenue
Rock Hill, S.C. 29730
(803) 324-7200
ATTORNEY FOR EGIS

STATE OF SOUTH CAROLINA)
)
COUNTY OF LANCASTER)

IN THE COURT OF COMMON PLEAS

Wachovia Bank, National Association,)
)
Plaintiff,)

Civil Action No. 2010-CP-29-196

vs.)

PLAINTIFF WACHOVIA BANK,

NATIONAL ASSOCIATION'S

MOTION TO DISMISS

DEFENDANTS EGIS 521, LLC,

MARK A. CIMINELLI, MARK E.

CARPENTER, RONALD C.

MARIELLO, PETER JAMES

MENKHAUS, AND STEPHANIE L.

MENKHAUS' COUNTERCLAIMS

EGIS, LLC, Peter James Menkhaus,)
Stephanie L. Menkhaus, Nancy T.)
Jenkins, Individually and as Trustee of)
the Don A. Jenkins T/U/W and as)
Personal Representative of the Estate of)
Don A. Jenkins, Bellsouth Carolina)
PCS, LP, n/k/a Bellsouth Mobility)
DCS, LP, Commercial Products, Mark)
A. Ciminelli, Mark E. Carpenter,)
Ronald C. Mariello,)

Defendants.)

TION FEE :

The plaintiff, Wachovia Bank, National Association, ("Plaintiff" or "Wachovia"), by and through its undersigned counsel, hereby moves this Court for an Order dismissing defendants EGIS, LLC, Mark A. Ciminelli, Mark E. Carpenter, Ronald C. Mariello, Peter James Menkhaus, and Stephanie Menkhaus' (hereafter the "Defendants") counterclaims for negligent misrepresentation, breach of fiduciary duty, and negligence. The basis for this Motion is that Defendants have failed to allege facts sufficient to constitute a cause of action against Plaintiff as to all three counterclaims.

This Motion will be further supported by the South Carolina Rules of Civil Procedure, applicable case law, affidavits, testimony, a Memorandum of Law and/or any other matters permitted under the Rules, as necessary.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Betsy Johnson Burn

SC Bar No. 16680

E-Mail: betsy.burn@nelsonmullins.com

Maggie Parham Murdock

SC Bar No. 78060

E-Mail: maggie.murdock@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Wachovia Bank, National Association

Columbia, South Carolina

6-14, 2010.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF LANCASTER) SIXTH JUDICIAL CIRCUIT

Wachovia Bank, National Association,) Civil Action No. 2010-CP-29-196
)

Plaintiff,)

MOTION FEE PAID

vs.)

PLAINTIFF WACHOVIA BANK,
NATIONAL ASSOCIATION'S
MOTION TO COMPEL AS TO
DEFENDANTS EGIS 521, LLC,
PETER JAMES MENKHAUS,
STEPHANIE L. MENKHAUS,
MARK A. CIMINELLI, MARK E.
CARPENTER AND RONALD C.

EGIS 521, LLC, Peter James)
 Menkhaus, Stephanie L. Menkhaus,)
 Nancy T. Jenkins, Individually and as)
 Trustee of the Don A. Jenkins T/U/W)
 and as Personal Representative of the)
 Estate of Don A. Jenkins, Bellsouth)
 Carolina PCS, LP, n/k/a Bellsouth)
 Mobility DCS, LP, Commercial)
 Products, Mark A. Ciminelli, Mark E.)
 Carpenter, Ronald C. Mariello,)

Defendants.)

MARIELLO

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CLERK OF COURT
LANCASTER, SC

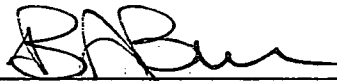
YOU WILL PLEASE TAKE NOTICE that in ten days, or as soon thereafter as counsel may be heard, the Plaintiff, Wells Fargo Bank, National Association, Successor by Merger to Wachovia Bank, National Association ("Plaintiff"), will move before the Presiding Judge of the Sixth Judicial Circuit, or the Special Referee, as applicable, pursuant to Rules 33, 34, and 37 of the South Carolina Rules of Civil Procedure, for an order compelling Defendants EGIS 521, LLC, Peter James Menkhaus, Stephanie L. Menkhaus, Mark A. Ciminielli, Mark E. Carpenter, and Ronald C. Mariello to respond to interrogatories and requests for production of documents. The interrogatories, attached as Exhibit A and the request for production of documents, attached as Exhibit B, were served upon the Defendants' counsel on September 22, 2010. Their responses were originally due on or about October 22, 2010. As of March 8, 2011, no responses

have been received. Plaintiff's counsel has contacted the Defendants' counsel by letter, telephone, and email several times requesting an update on the status of the discovery responses (see last letter dated March 7, 2011, attached hereto as Exhibit C, which was emailed to opposing counsel on March 4, 2011 and a hard copy mailed on March 7, 2011). In November 2010, counsel for Plaintiff agreed to give the Defendants an informal extension to produce the overdue discovery responses. Since that time, counsel for Plaintiff has conversed with opposing counsel numerous times and have requested the production by various dates. As of today's date, the undersigned has not received the discovery responses from the Defendants. The parties have agreed to re-notice previously scheduled depositions of certain of the Defendants. Those depositions have been scheduled for March 30, 2011. Thus, it is imperative that the undersigned receive the requested discovery prior to the scheduled depositions in order to prepare adequately.

WHEREFORE, Plaintiff respectfully requests the Court to enter an order:

- A. Compelling Defendants EGIS 521, LLC, Peter James Menkhaus, Stephanie L. Menkhaus, Mark A. Ciminelli, Mark E. Carpenter and Ronald C. Mariello to respond to Plaintiff's First Set of Interrogatories and First Request for Production of Documents within ten (10) days of the date of the Court's order; and
- B. Awarding Plaintiff costs and attorney's fees in bringing this Motion to Compel, to be set forth in a subsequent affidavit to be filed with the Court.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Betsy Johnson Burn

SC Bar No. 16680

E-Mail: betsy.burn@nelsonmullins.com

Rachel M. Flynn

SC Bar No. 78685

E-Mail: rachel.flynn@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Plaintiff

Columbia, South Carolina

March 8, 2011.

EXHIBIT A

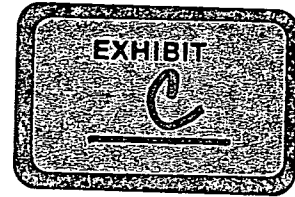
(Interrogatories from Respondent to Appellants dated
September 22, 2010 omitted but included in Record on Appeal)

EXHIBIT B

(Requests to Produce from Respondent to Appellants dated
September 22, 2010 omitted but included in Record on Appeal)

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.256.7500
www.nelsonmullins.com



Betsy Johnson Burn
Certified Specialist in Bankruptcy/
Debtor-Creditor Law by the
South Carolina Supreme Court
Tel: 803.255.9261
betsy.burn@nelsonmullins.com

March 7, 2011

Via Electronic Mail and Regular U.S. Mail

F. Craig Wilkerson, Jr.
1050 College Avenue Extension
Rock Hill, S.C. 29732

Re: Wachovia, N.A. v. EGIS 521, LLC, *et al.*
Civil Action No. 09-CP-
Our File No. 01832.01592

Dear Craig:

You and I have discussed this matter multiple times via email and telephone, however I wanted to notify you in writing that I will be filing a motion to compel discovery responses by Tuesday, March 8, 2011. As you are aware, our office served discovery requests on your office on or about September 22, 2010. As of today's date we have not received any responses from your clients to the below listed requests:

- Plaintiff's First Set of Interrogatories to EGIS 521, LLC
- Plaintiff's First Set of Interrogatories to Mr. Ciminelli, Mr. Carpenter and Mr. Mariello
- Plaintiff's First Set of Interrogatories to Mr. and Mrs. Menkhaus
- Plaintiff's First Request for Production to EGIS 521, LLC
- Plaintiff's First Request for Production to Mr. Ciminelli, Mr. Carpenter, and Mr. Mariello
- Plaintiff's First Request for Production to Mr. and Mrs. Menkhaus

I understand you have followed up with your clients several times. However, I am now forced to file a motion to compel your clients' responses as I need to move this matter forward. As I stated above, I will be filing a motion to compel by March 8, 2011 unless we receive your clients' responses by Monday, March 7, 2011 by 5:00 p.m. Thank you for your attention to this matter.

F. Craig Wilkerson, Jr.
March 7, 2011
Page 2

Very truly yours,

/s/ Betsy Johnson Burn

Betsy Johnson Burn

A handwritten signature in black ink, appearing to read 'Betsy Johnson Burn', with a large, stylized initial 'B'.

BJB:bb2

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

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IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
2011 MAR 25 PM 4:03

Wachovia Bank, National Assoc,)
Plaintiff,)
vs.)
EGIS 521, LLC et al,)
Defendant.)

CLERK OF COURT
LANCASTER, SC
NOTICE OF MOTION AND MOTION
TO CONTINUE AND REQUEST TO
BE RELIEVED
Case No.: 10-CP-29-196

To the Honorable Clyde Davis, Special Referee:

YOU WILL PLEASE TAKE NOTICE that undersigned attorney will move before the Presiding Judge/Special Referee of the Sixth Judicial Circuit, Lancaster, South Carolina, on a date and time convenient to the Court and the parties, for an Order as set forth here below.

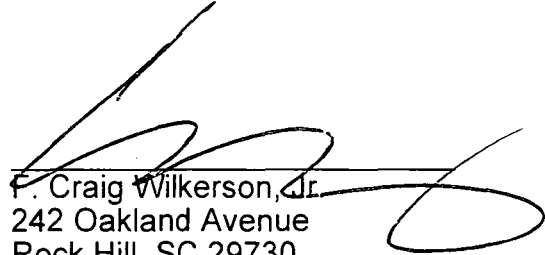
IT APPEARING that the above referenced matter is scheduled for depositions on March 30, 2011, and that Plaintiff has a pending Motion To Compel. F. Craig Wilkerson, Jr., attorney of record for the Defendants EGIS 521, LLC, P.J. Menkhaus, Stephanie Menkhaus, M.A. Ciminelle, M. E. Carpenter, and R.C. Mariello respectfully moves this Court for a continuance of the hearing on the grounds that he is filing a Motion To Be Relieved in this matter, as he is informed and believes that it is in the best interests of all parties that he be relieved, and F. Craig Wilkerson, Jr., hereby seeks to be relived of counsel in this matter as it appears a conflict has arisen.

Furthermore, on behalf of the Defendants, a request of the Court is made for a stay of the proceedings to allow EGIS 521, LLC, M.A. Ciminelle, M. E. Carpenter, and R.C. Mariello, to seek replacement counsel and to allow EGIS 521, LLC, M.A.

4
Ciminelle, M. E. Carpenter, and R.C. Mariello, to seek to enforce the arbitration provisions of the note/contract between the Plaintiff and EGIS 521, LLC (attached hereto). It appearing that the Defendants P.J. Menkhaus, Stephanie Menkhaus shall proceed Pro Se.

Rock Hill, South Carolina

March 25, 2011


F. Craig Wilkerson, Jr.
242 Oakland Avenue
Rock Hill, SC 29730
Attorney for Defendants
EGIS 521, LLC, P.J. Menkhaus,
Stephanie Menkhaus, M.A. Ciminelle,
M. E. Carpenter, and R.C. Mariello

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

Wells Fargo Bank, National)
Association, successor in interest by)
merger to Wachovia Bank, National)
Association,)

Plaintiff,)

vs.)

EGIS 521, LLC, Peter James)
Menkhaus, Stephanie L. Menkhaus,)
Nancy T. Jenkins, Individually and)
as Trustee of the Don A. Jenkins)
T/U/W and as Personal Representative)
of the Estate of Don A. Jenkins,)
Bellsouth Carolina PCS, LP, n/k/a)
Bellsouth Mobility DCS, LP,)
Commercial Products, Mark A.)
Ciminelli, Mark E. Carpenter, Ronald)
C. Mariello,)

Defendants.)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
CASE NO: 2010-CP-29-198

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CLERK OF COURT
LANCASTER, SC

NOTICE OF APPEARANCE

TO: BETSY JOHNSON BURN, ATTORNEY FOR PLAINTIFF

This notice is to advise the Court and opposing counsel of my representation of the Defendants Mark E. Carpenter, Mark A. Ciminelli, Ronald C. Mariello and EGIS 521, LLC in this action.


Philip E. Wright
408 North Main Street
Lancaster, SC 29720
(803) 286-4343

ATTORNEY FOR DEFENDANTS MARK E.
CARPENTER, MARK A. CIMINELLI, RONALD
C. MARIELLO AND EGIS 521, LLC

May 11, 2011
Lancaster, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

Wells Fargo Bank, National
Association, successor in interest by
merger to Wachovia Bank, National
Association,

Plaintiff,

vs.

EGIS 521, LLC, Peter James
Menkhaus, Stephanie L. Menkhaus,
Nancy T. Jenkins, Individually and as
Trustee of the Don A. Jenkins T/U/W
and as Personal Representative of the
Estate of Don A. Jenkins, Bellsouth
Carolina PCS, LP, n/k/a Bellsouth
Mobility DCS, LP, Commercial
Products, Mark A. Ciminelli, Mark E.
Carpenter, Ronald C. Mariello,

Defendants.

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2011 MAY 20 PM 2:12
IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

CLERK OF COURT

LANCASTER, SC Civil Action No. 2010-CP-29-196

**PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

Plaintiff/Counter-Defendant Wells Fargo Bank, National Association, successor in interest by merger to Wachovia Bank, National Association ("Plaintiff") hereby moves pursuant to S.C. R. Civ. P. 56 for an order dismissing the Counterclaim of Defendants Ronald C. Mariello ("Mariello") and EGIS 521, LLC ("EGIS") (collectively "Defendants"). The grounds for this Motion are that Defendants waived and/or released all claims against Plaintiff in the Forbearance Agreement. Moreover, Defendants' tort claim is barred by the economic loss rule. Further, no genuine issue of material fact exists as to Defendants' Counterclaim for negligence.

This Motion will be further supported by the South Carolina Rules of Civil Procedure, applicable case law, affidavits, testimony, a Memorandum of Law and/or any other matters permitted under the Rules, as necessary.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
Betsy Johnson Burn
SC Bar No. 16680
E-Mail: betsy.burn@nelsonmullins.com
Rachel M. Flynn
SC Bar No. 78685
E-Mail: rachel.flynn@nelsonmullins.com
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Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Plaintiff

Columbia, South Carolina

5-18, 2011.

FILED
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OF COURT

STATE OF SOUTH CAROLINA)

COUNTY OF LANCASTER)

Wells Fargo Bank, National
Association, successor in interest by
merger to Wachovia Bank, National
Association,

Plaintiff,)

vs.)

EGIS 521, LLC, Peter James
Menkhaus, Stephanie L. Menkhaus,
Nancy T. Jenkins, Individually and as
Trustee of the Don A. Jenkins T/U/W
and as Personal Representative of the
Estate of Don A. Jenkins, Bellsouth
Carolina PCS, LP, n/k/a Bellsouth
Mobility DCS, LP, Commercial
Products, Mark A. Ciminelli, Mark E.
Carpenter, Ronald C. Mariello,

Defendants.)

2011 MAY 21 PM 1:22
IN THE COURT OF COMMON PLEAS

SIXTH JUDICIAL CIRCUIT

CLERK OF COURT
LANCASTER, SC

Civil Action No. 2010-CP-29-196

PLAINTIFF'S MEMORANDUM IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT

Plaintiff/Counter-Defendant Wells Fargo Bank, National Association, successor in interest by merger to Wachovia Bank, National Association ("Plaintiff" or "Wells Fargo"), by and through the undersigned counsel and pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, respectfully submits this Memorandum of in Support of its Motion for Summary Judgment for an order dismissing the affirmative defenses and negligence counterclaim of Defendants/Counter-Plaintiffs Ronald C. Mariello ("Mariello") and EGIS 521, LLC ("EGIS") (collectively "Defendants").

STATEMENT OF THE FACTS

This action arises out of a commercial loan evidenced by a loan agreement (the “Loan Agreement”) entered into between Plaintiff and EGIS for the purpose of EGIS obtaining a loan in the principal sum of Four Million Five Hundred Forty Nine Thousand and Three Hundred Twenty and 00/100 (\$4,549,320.00) Dollars from Wells Fargo to purchase certain real property in May 2007. On December 19, 2008, as a result of Defendants’ default under the initial loan documents, Wells Fargo and Defendants executed a Forbearance Agreement, attached hereto as **Exhibit A**. In conjunction with the Loan Agreement and Forbearance Agreement, EGIS and Wells Fargo entered into an amended promissory note (the “Note”) for the principal sum of the loan amount. (See Note, attached to Complaint as Exh. A).

Also simultaneously with the execution of the Loan Agreement and Note, and in order to secure the payment thereof, EGIS, Peter James Menkhaus and Stephanie L. Menkhaus (the “Menkhauses”) executed and delivered to Wells Fargo a Mortgage dated May 17, 2007, wherein EGIS and the Menkhauses mortgaged to Wells Fargo certain real property located in Lancaster County, South Carolina. (See Mortgage, attached to Complaint as Exh. B). In further consideration of the above-referenced Note and Loan Agreement, Defendants Mark A. Ciminelli, Mark E. Carpenter, and Mariello (collectively “Guarantors”) executed a guaranty agreement dated December 19, 2008 whereby they individually, jointly and severally, absolutely and unconditionally guaranteed the payment of the Note and Mortgage, including all extensions and renewals thereof. (See Guarantees, attached to Complaint as Exh. C).¹

¹ The Note, Loan Agreement, Mortgage, Forbearance Agreement, and Guarantees are hereinafter referred to as the “Loan Documents.”

Despite these contractual commitments, EGIS and the Guarantors defaulted once again. Accordingly, Plaintiff filed a Complaint for foreclosure and collection on the guarantees on February 1, 2010. Although initially various Defendants asserted counterclaims for negligent misrepresentation, breach of fiduciary duty, and negligence, the only counterclaim not resolved by a Consent Order on August 11, 2010 or subsequent negotiations is Defendant EGIS and Mariello's claim for negligence. (Ans. & Countercl., ¶¶ 22-46 [sic]).²

More specifically, Defendants allege in their Answer and Counterclaim that Wells Fargo was negligent in (1) "failing to warn the Plaintiff of its debt ratio;" (2) "failing to properly hire and/or supervise the agents and appraisers who evaluated the property;" (3) "failing to properly supervise and train its agents and employees;" and (4) "such other particulars as the evidence may establish." (Ans. & Countercl. ¶ 45). The rest of Defendants' factual allegations revolve around Plaintiff's alleged failure to report appraisal results, which were allegedly "greatly inflated." (Ans. & Countercl. ¶¶ 1-21). Defendants contend these actions caused them to purchase property worth less than they thought, resulting in financial hardship, foreclosure, and actual damages. (Ans. & Countercl. ¶ 46).

However, Defendants released any such claim in the Forbearance Agreement. Moreover, under settled South Carolina law, this tort claim arises from the parties' contractual agreements, and is therefore barred by the economic loss rule. Furthermore, Plaintiff owes no duty to Defendants in this case. Consequently, Defendants fail to state a cause of action for negligence as a matter of law, and this counterclaim should be dismissed with prejudice.

² Also pursuant to the Consent Order, all Defendants withdrew their request for a jury demand and consented to reference to the Special Master. Pursuant to subsequent Order dated April 16, 2011, the Court also granted Plaintiff's Motion to Compel and Craig Wilkerson's Motion to Withdraw as counsel, giving Defendants EGIS, Mariello, the Menkhauses, Mark A. Ciminielli, and Mark Carpenter fifteen days to locate new counsel, and thirty days to respond to discovery. Since then, all Defendants except the Menkhauses have retained new counsel. Plaintiff has still not been served with discovery responses.

SUMMARY JUDGMENT STANDARD

“Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001) (citing Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991)). The purpose of summary judgment is to expedite disposition of cases that do not require the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). The Court must view the facts in the light most favorable to the non-moving party. Id. Under S.C. R. Civ. P. 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 821 (Ct. App. 2004). Where the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party’s case. Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361-362, 563 S.E.2d 331, 363 (2002). Once the party moving for summary judgment meets this initial burden, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Ellis, at 518, 595 S.E.2d at 821. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Id. at 518-519, 595 S.E.2d at 821.

ARGUMENT

I. Defendants’ Negligence Claim Fails As a Matter of Law Because Defendants Released It in the Forbearance Agreement.

Defendants first cannot establish any cause of action for negligence as a matter of law because they released any such claim in the Forbearance Agreement attached as **Exhibit A**. Specifically, following the first of two times Defendants would default on their over four and a

half million dollar loan from Plaintiff, they executed the Forbearance Agreement attached as **Exhibit A**, wherein they released Wells Fargo from any claims related in any way to the Loan Documents in exchange for Wells Fargo's agreement to refrain from exercising its rights to foreclose and collect on the Note and Guarantees at that time. This dispositive Release provides, in its entirety, as follows:

7.6 Release.

(a) In consideration of the agreements of Bank contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Obligors, on behalf of themselves and their successors, assigns, and other legal representatives hereby absolutely, unconditionally and irrevocably release, remise and forever discharge Bank, and its successors and assigns, and its present and former shareholders, affiliates, subsidiaries, divisions, predecessors, directors, officers, attorneys, employees, agents and other representatives (Bank and all such other Persons being hereinafter referred to collectively as the "Releasees" and individually as a "Releasee"), of and from all demands, actions, causes of action, suits, controversies, damages and any and all other claims, counterclaims, defenses, rights of set-off, demands and liabilities whatsoever (individually, a "Claim" and collectively, "Claims") of every name and nature, known or unknown, suspected or unsuspected, both at law and in equity, which Obligors or any of their successors, assigns, or other legal representatives may now or hereafter own, hold, have or claim to have against the Releasees or any of them for, upon, or by reason of any circumstance, action, cause or thing whatsoever which arose or has arisen at any time on or prior to the day and date of this Agreement, for or on account of, or in relation to, or in any way in connection with any of the Loan Documents or this Agreement or transactions thereunder or related thereto.

(b) Obligors understand, acknowledge and agree that the release set forth above may be pleaded as a full and complete defense and may be used as a basis for an injunction against any action, suit or other proceeding which may be instituted, prosecuted or attempted in breach of the provisions of such release.

(c) Obligors agree that no fact, event, circumstance, evidence or transaction which could now be asserted or which may hereafter be discovered shall affect in any manner the final, absolute and unconditional nature of the release set forth above.

Forbearance Agreement, Exh. A, Section 7.6 (emphasis added).

This Release could not be stated more clearly as a release by Defendants of the very sort of claim they seek to maintain here. Because the negligence allegations relate to the Loan Documents, they were released via the agreement attached as **Exhibit A**. Therefore, Defendants fail to state a claim for negligence as a matter of law and this counterclaim should be dismissed with prejudice.

II. Defendants' Negligence Claim is Barred by the Economic Loss Rule.

Even if Defendants had not released this claim in consideration of Plaintiff's forbearance, it would still fail as a matter of law. Nonetheless, recognizing Plaintiff has done everything it was *contractually* obligated to do here, Defendants attempt to dress up a garden-variety contract claim to one sounding in tort. However, this attempt falls flat based on the economic loss rule, which precludes recovery in tort for purely economic losses arising out of a breach of contract.

It is well-established in South Carolina that "[a] breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie." See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 54-55, 463 S.E.2d 85, 88 (1995). In that regard, South Carolina courts have consistently held that "allegations of negligence cannot have the effect of changing the essential features of the transaction so as to convert a mere breach of contract into a tort." Farmers' Union Mercantile Co. v. Anderson, 108 S.C. 66, ___, 93 S.E. 422, 424 (1917), and that "the nature of the action as ex contractu is not affected or changed by the fact that there are also allegations in regard to tortious conduct on the part of the defendant." Dixon v. Texas

Co., 222 S.C. 385, 390, 72 S.E.2d 897, 899 (1952) (citing Shaw v. Great Atl. & Pacific Tea Co., 189 S.C. 437, 440, 1 S.E.2d 499, 500 (1939)); see also Koontz v. Thomas, 333 S.C. 702, 712, 511 S.E.2d 407, 412 (Ct. App. 1999) (finding that plaintiff's "allegations are merely veiled breach of contract claims" and the "tort allegations of professional negligence cannot be maintained as a separate cause of action"); see also Bishop Logging Co. v. John Deere Indus. Equip. Co., 317 S.C. 520, 530-31, 455 S.E.2d 183, 189 (Ct. App. 1995) (finding a negligent misrepresentation claim barred by the economic loss rule).

In the present case, the only duties owed to Defendants by Plaintiff arose from Plaintiff's contractual agreement to loan money to Defendants. Moreover, the evidence does not support an allegation, and Defendants have not alleged—nor have they presented any facts or evidence to the effect—that a special relationship existed between Wells Fargo and Defendants as borrower/purchaser and guarantor. Furthermore, Defendants' asserted injuries are purely economic. Accordingly, Defendants' claim for negligence is barred by the economic loss rule, and should be dismissed with prejudice. See Tommy L. Griffin, 320 S.C. at 55, 463 S.E.2d at 88 (noting that a plaintiff may recover purely economic losses in tort only if the defendant has breached a duty "arising independently of any contract duties between the parties").

III. Defendants' Negligence Claim Fails Because Plaintiff Owed No Duty of Care to Defendants.

It is hornbook law that negligence is the breach of a duty of care owed to the plaintiff by the defendant. Regions Bank v. Schmauch, 354 S.C. 648, 668, 582 S.E.2d 432, 443 (Ct. App. 2003) (internal citations omitted). "It is essential to liability for negligence that the parties have some relationship recognized by law to support the duty owed by the tortfeasor."

Andrade v. Johnson, 356 S.C. 238, 245, 588 S.E.2d 588, 592 (2003). However, in their Answer and Counterclaim, Defendants attempt to base a claim in negligence against Wells Fargo solely on the grounds that Wells Fargo owed a duty to ensure the accuracy of—or to otherwise disclose the results of—appraisals, and to ensure Defendants’ investment was sound. However, under South Carolina law, a bank generally owes no such special duties to its customers. See Schmauch, 354 S.C. at 671, 582 S.E.2d 432, 444 (Ct. App. 2003) (“[T]he normal relationship between the bank and its customer is one of creditor-debtor and not fiduciary in nature”).

Furthermore, numerous courts have expressly held that banks acting in the conventional role of lender generally have no duty to ensure the accuracy of appraisals, to disclose information related to appraisals or underwriting processes, or to guarantee the soundness of the investment. See, e.g., Ballance v. Rinehart, 412 S.E.2d 106, 109 (N.C. Ct. App. 1992) (affirming dismissal of fraud claim based on appraisal because plaintiff failed to show that the appraisal was intended for her benefit instead of solely for the bank’s benefit); see also Hughes v. Holt, 435 A.2d 687, 688 (Vt. 1981) (“Although there are cases where a bank goes beyond its role as mortgagee and gets involved in a capacity beyond that of a mere lending agency so that a duty relationship analogous to that of a seller or broker may come into being, . . . this is not such a case.”) (internal citations omitted); see also United Jersey Bank v. Kensey, 704 A.2d 38, 48 (N.J. Super. Ct. App. Div. 1997) (stating that appraisals are done for the bank’s benefit, not the benefit of the borrower, and thus “a bank generally owes no duty to disclose an internal appraisal to a prospective borrower”); see also N. Trust Co. v. VIII South Michigan Assocs., 657 N.E.2d 1095, 1102 (Ill. Ct. App. 1995) (“[T]he law imposes no duty on banks to disclose to the borrower the manner in which the lender internally analyzes and underwrites a

loan.”); see also Nymark v. Heart Fed. Savings & Loan Assn., 231 Cal. App. 3d 1089, 1096 (1991) (“[A] lender has no duty to disclose its knowledge that the borrower’s intended use of the loan proceeds represents an unsafe investment.”).

In Nymark, for instance, the defendant bank represented that the plaintiff’s residence was of “A + quality” and that the roof, foundation, plumbing, mechanical, electrical appeared satisfactory. Nymark, 231 Cal. App. 3d at 1093. Thereafter, the plaintiff’s home was declared unsafe for habitation. Id. The plaintiff sued the bank in negligence, alleging that the representations in the appraisal were untrue, and that the plaintiff relied upon these representations in agreeing to enter into the loan transaction. Id. In affirming the trial court’s grant of summary judgment because the bank owed plaintiff no duty of care, the Nymark court aptly stated the following:

[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money. *Thus, for example, a lender has no duty to disclose its knowledge that the borrower’s intended use of the loan proceeds represents an unsafe investment. The success of the [borrower’s] investment is not a benefit of the loan agreement which the [lender] is under a duty to protect.* Liability to a borrower for negligence arises only when the lender “actively participates” in the financed enterprise “beyond the domain of the usual money lender.”

Nymark, 231 Cal. App. 3d at 1096 (internal citations omitted) (emphasis added).

As the Nymark court further explained, there are several reasons for this rule, the most obvious of which is that the lender generally obtains the appraisal solely to satisfy itself—not the borrower—that its security is adequate. Id. at 1096-1100. Additionally, a borrower has equally, if not more, valuable means to assess the property’s value and condition, including

comparable sales, realtor advice, independent appraisals, and inspections. Id. at 1099. Further, “a strong public policy exists, if our financial institutions are to remain solvent, to prevent a conventional money lender from having to insure the success of every investment.” Id. at 1099-1100.

Applying these principles to the case at bar, Plaintiff owed no duty of care to Defendants. There are no allegations that the bank induced Defendants to enter the loan documents, or engaged in any conduct outside the traditional domain of a money lender evidencing a “special relationship.” Moreover, Plaintiff is not the insurer of Defendants’ investment. Thus, the negligence claim fails as a matter of law.

IV. Defendants’ Negligence Claim Fails as Defendants Have Produced No Evidence To Support the Claim

Even if this Court were to find that the negligence claim was not barred as set forth above, the Court should grant summary judgment to Plaintiff on this counterclaim, as the Defendants have failed to demonstrate that there is any material issue of fact regarding this claim. This Court’s Order entered April 16, 2011 granted Plaintiff’s Motion to Compel discovery responses from the Defendants. The Defendants were granted thirty (30) days from entry of the Order to comply with Plaintiff’s discovery requests. The Defendants, despite retaining new counsel, have failed to comply with the Order and have come forward with no evidence to support this claim. The original discovery requests were served upon opposing counsel in September 2010. Defendants have had ample time to produce any evidence they have to support their claims. They have failed to do so. The Defendants cannot withstand the grant of summary judgment based on mere allegations contained in their counterclaim. See Ellis, at 518, 595 S.E.2d at 821. The nonmoving party must come forward with specific facts

showing there is a genuine issue for trial. Id. at 518-519, 595 S.E.2d at 821. The Defendants have failed to come forward with ANY facts, much less specific facts. Therefore, due to their failure to produce any evidence, and their willful failure to comply with this Court's Order compelling them to respond, Plaintiff is entitled to summary judgment on all claims by the Defendants, including any affirmative defenses remaining.

CONCLUSION

As set forth above, Defendants' negligence counterclaim fails for several reasons. At the outset, Defendants fail to establish a cause of action for negligence because they released such claims in the December 19, 2008 Forbearance Agreement. Moreover, even if Defendants had not already released this claim, it would nevertheless be equally unsupportable based on the economic loss rule. Further, Defendants simply cannot maintain a negligence claim against Wells Fargo because Defendants cannot establish that Wells Fargo undertook any special duty in this case. Finally, due to the Defendants' failure to comply with this Court's Order and the failure to produce even a scintilla of evidence, the Defendants' negligence claim, and any remaining affirmative defenses should be stricken. Therefore, Defendants' remaining counterclaim for negligence should be dismissed with prejudice and the affirmative defenses dismissed and stricken.

< Signature Page to Follow >

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Association, successor in interest by merger to Wachovia
Bank, National Association

Columbia, South Carolina

5-27, 2011.

FORBEARANCE AGREEMENT

FORBEARANCE AGREEMENT (the "Agreement") dated as of December 19, 2008, by and between EGIS 521, LLC, a North Carolina corporation ("Borrower"), Mark E. Carpenter of 100 North Tryon Street, 4700 Charlotte, North Carolina 28202, Mark A. Ciminelli of 117176 Smart Lane, Charlotte North Carolina 28277, and Ronald C. Mariello, 14820 Ballentyne Country Club Drive, Charlotte, North Carolina 28277 ("Guarantors"), and Wachovia Bank, National Association, a national banking association ("Bank"). The Borrower and Guarantors are referred to herein as the "Obligors," and the Bank and the Obligors are referred to as the "Parties."

RECITALS

A. Borrower is indebted to Bank pursuant to (i) that certain Promissory Note in the original principal amount of \$4,549,320.00 dated May 17, 2007 (as amended, modified, supplemented, extended, renewed, restated or replaced, the "Note") (ii) that certain Loan Agreement between Borrower and Bank dated May 17, 2007 (the "Loan Agreement"), that Mortgage, Assignment of Rents and Security Agreement dated May 17, 2007 (the "Mortgage") recorded in Lancaster County, South Carolina at Book 1722, Page 229-242, and related documents reflecting the authority of the Borrower borrow and secure the Note. Furthermore, each of the Guarantors executed an Unconditional Guaranty dated May, 17, 2007 (the "Guaranties")

B. The documents described in Paragraph A, as the foregoing have been modified and amended from time to time are collectively referred to as the "Existing Loan Documents." The Existing Loan Documents, together with this Agreement and any documents executed pursuant to this Agreement are collectively referred to as the "Loan Documents." The collateral secured by the Mortgage is referred to as the "Collateral." All indebtedness, whether now existing or hereafter arising, that is due and owing by Obligors to the Bank under the Loan Documents are collectively referred to as the "Obligations."

C. As of the date hereof, Borrower and Guarantors are in default under the Existing Loan Documents and Guaranties, and Notices of Default were sent on November 10, 2008 to the Obligors indicating that the balance due on the Note was not paid on September 28, 2008, the maturity date (the "Existing Default"). As of November 6, 2008 the balance due on the Note, not including attorneys fees, was \$4,612,114.45.

D. The Borrower and Guarantors have requested that Bank forbear from exercising its rights in order to provide them the opportunity to pay in full all outstanding Obligations through a combination of sales, refinance and/or recapitalization of the Borrower.

E. Bank is willing to agree to forbear from exercising its rights and remedies and to provide certain financial accommodations to the Obligors for the period and on the terms and conditions specified herein.



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NOW, THEREFORE, in consideration of the foregoing, and the respective agreements, warranties and covenants contained herein, the Parties hereto agree, covenant and warrant as follows:

SECTION 1. DEFINITIONS

1.1 Interpretation. All capitalized terms used herein (including the recitals hereto) shall have the respective meanings assigned thereto in the Loan Documents (as hereafter defined) unless otherwise defined herein.

1.2 Closing. This term shall mean December 19, 2008.

SECTION 2. ACKNOWLEDGMENTS

2.1 Acknowledgment of Obligations. Obligor hereby acknowledges, confirms and agrees that, as of December 31, 2008, Obligors will be indebted to Bank in respect of the Note in the principal amount of \$4,549,320, plus accrued, interest totaling \$91,515.36, late fees of \$2,077.99 and reasonable attorneys fees of \$3,750. The Note, together with interest accrued and accruing thereon, and all other Obligations, fees, costs, expenses and other charges now or hereafter payable by Obligors to Bank, in accordance with the Loan Documents (including this Agreement), are unconditionally owing by Obligors to Bank without offset, defense or counterclaim of any kind, nature or description whatsoever.

2.2 Acknowledgment of Security Interests. Obligors hereby acknowledge, confirms and agrees that Bank has and shall continue to have a valid, enforceable and perfected mortgage and lien on the Collateral heretofore granted to Bank pursuant to the Loan Documents or otherwise granted to or held by Bank.

2.3 Binding Effect of Documents. Obligor hereby acknowledges, confirms and agrees that: (a) each of the Existing Loan Documents to which it is a party has been duly executed and delivered, and each is in full force and effect as of the date hereof, (b) the agreements and obligations of Obligors contained in the Loan Document constitute the legal, valid and binding Obligations of Obligors, enforceable in accordance with their respective terms, and Obligors have no valid defense to the enforcement of such Obligations, and (c) Bank and Obligor shall be entitled to the rights, remedies and benefits provided for in the Loan Documents and applicable law.

2.4 No Breaches or Suits. There are no pending, nor to the best knowledge of Obligors, threatened actions, litigation, disputes, alleged defaults for breaches, suits or proceedings against or in any way relating adversely to the Borrower or its properties before any court, arbitrator or governmental or administrative body or agency.

SECTION 3. FORBEARANCE IN RESPECT OF CERTAIN EVENTS OF DEFAULT

3.1 Acknowledgment of Default. Obligors hereby acknowledge and agree that the Existing Default has occurred and is continuing, and constitutes an Event of Default under the Existing Loan Documents which entitles Bank to exercise its rights and remedies under the

Existing Loan Documents, applicable law or otherwise. Obligors further represent and warrant that as of the date hereof no other Defaults or Events of Default under the Loan Documents exist. Bank has not waived, presently does not intend to waive and may never waive such Existing Defaults and nothing contained herein or the transactions contemplated hereby shall be deemed to constitute any such waiver. Obligors hereby acknowledges that Bank has declared the Obligations to be immediately due and payable under the terms of the Existing Loan Documents.

3.2 Forbearance. The Bank shall forbear in consideration of the following:

(a) In reliance upon the representations, warranties and covenants of Obligors contained in this Agreement, and subject to the terms and conditions of this Agreement and any documents or instruments executed in connection herewith, Bank agrees to forbear from exercising its rights and remedies under the Existing Loan Documents, including the Guaranties, or applicable law in respect of or arising out of the Existing Defaults, subject to the execution of an Amended and Restated Promissory Note (the "Amended Note") in the amount of \$4,464,663.35, said Amended Note reflecting a capitalization of interest, late charges and attorneys fees due and owing on the Note through December 31, 2008. Interest will be due monthly beginning January 31, 2009 and thereafter pending a maturity date of May 30, 2009 (the "Maturity Date") at which time the forbearance period (the "Forbearance Period") will end.

The execution of the Amended Note constitutes a modification of the Note and is not a novation. Obligors stipulate and agree that the liens and security interests granted under the Existing Loan Documents continue to secure payment of the Amended Note in accordance with existing original priorities.

(b) For the duration of the Forbearance Period, interest shall accrue under the Amended Note at Bank's Prime Rate plus 1%. "Bank's Prime Rate" means that rate announced by Bank from time to time as its prime rate and is one of several interest rate bases used by Bank. Bank lends at rates both above and below Bank's Prime Rate, and Borrower acknowledges that Bank's Prime Rate is not represented or intended to be the lowest or most favorable rate of interest offered by Bank.

(c) A deposit of \$20,000 will be due from the Obligors no later than December 22, 2008 and will be applied to the January 30, 2009 interest payment, with any excess amount to be applied to the next due monthly payment of interest.

(d) The Borrower shall pay to the Bank a forbearance fee (the "Forebearance Fee") in the amount of \$7,500 which forbearance fee shall be fully earned as of the date hereof and payable at Maturity or upon full payment of the Amended Note. The Forbearance Fee is in addition to all other fees, interest, costs and expenses payable in connection with the Loan Documents and may be charged by Bank to any account of Borrower maintained by Bank. The Forbearance Fee shall be fully earned by Bank upon execution of this Agreement by the Obligors and by Bank notwithstanding any failure by Obligors to comply with any other term of this Agreement.

(e) New guarantees must be executed by the Guarantors.

(f) Resolutions adopted by the Manager of Borrower authorizing the execution, delivery and performance of this Agreement and other required Loan Documents.

(g) The foregoing notwithstanding, the Forbearance Period shall end upon the occurrence or existence of any Default or Event of Default under the Loan Documents or this Agreement unless cured within 5 days after notice from Bank.

(h) Upon the termination of the Forbearance Period, the agreement of Bank to forbear shall automatically and without further action terminate and be of no force and effect, it being expressly agreed that the effect of such termination will be to permit Bank to exercise such rights and remedies immediately, including, but not limited to, the acceleration of all of the Obligations without any further notice, passage of time or forbearance of any kind.

3.3 Limited Consent; No Other Waivers; Reservation of Rights.

(a) Bank has not waived, are not by this Agreement waiving, and has no intention of waiving, any Default or Event of Default under the Loan Documents which may be continuing on the date hereof or any Default or Event of Default under the Loan Documents which may occur after the date hereof (whether the same or similar to the Existing Defaults or otherwise), and Bank has not agreed to forbear with respect to any of the rights or remedies concerning any Default or Event of Default under the Loan Documents (other than, during the Forbearance Period, for the Existing Defaults to the extent expressly set forth herein), which may have occurred or are continuing as of the date hereof or which may occur after the date hereof.

(b) Subject to Section 3.2 above (solely with respect to the Existing Defaults), Bank reserves the right, in its discretion, to exercise any or all of its rights and remedies under the Loan Documents and applicable law as a result of any Defaults or Events of Default which may be continuing on the date hereof or any Default or Event of Default which may occur after the date hereof, and Bank has not waived any of such rights or remedies, and nothing in this Agreement, and no delay on its part in exercising any such rights or remedies, should be construed as a waiver of any such rights or remedies.

(c) Without limiting the generality of the foregoing, Obligors will not claim that any prior action or course of conduct by Bank constitutes an agreement or obligation to continue such action or course of conduct in the future. Obligors acknowledges that Bank has made no commitment as to how or whether the Existing Defaults will be resolved upon or following the termination of the Forbearance Period.

(d) The Existing Loan Documents are in full force and effect, and shall remain in full force and effect unless and until Loan Documents are executed and delivered by the applicable parties, and then only to the extent the Loan Documents actually modify the Existing Loan Documents.

SECTION 4. REPRESENTATIONS, WARRANTIES AND COVENANTS

Obligors hereby represent, warrant and covenant with and to Bank as follows:

4.1 **Representations in Loan Documents.** Each of the representations and warranties made by or on behalf of Obligor to Bank in any of the Loan Documents is true and correct when made and in all material respects is, except for the representation and warranty set forth in the Loan Documents relating to the non-existence of a Default or Event of Default under the Loan Documents with respect to the Existing Defaults, true and correct on and as of the date of this Agreement with the same full force and effect as if each of such representations and warranties had been made by Borrower on the date hereof and in this Agreement.

4.2 **Binding Effect of Documents.** This Agreement and the other Loan Documents have been duly executed and delivered to Bank by Borrower and Guarantors and are in full force and effect, as modified hereby.

4.3 **No Conflict, Etc.** The execution and delivery and performance of this Agreement by Obligors will not violate or conflict with any applicable law, the articles of incorporation, by-laws or other organizational documents of Borrower or contractual obligation of Borrower and will not, except as expressly provided herein, result in, or require, the creation or imposition of any Lien on any of its properties or revenues.

4.4 **Reporting.** During the Forbearance Period, Obligors covenant, and agree that they will provide Bank with the following, as applicable: on or before January 5, 2009 a current financial statement for Guarantors; current appraisal to be ordered by Bank at Borrower's expense, payable May 30, 2009; annual financial statement of Borrower due thirty (30) days after fiscal year end; analysis of infrastructure costs to prepare Borrower's land for construction, plus future monthly rent rolls, said reports to be provided no later than the 15th day of the month following the month reported upon; commencing January 15, 2009 monthly reports on efforts to refinance the Amended Note, including copies of any letters of intent and commitment letters, plus other standard reports as required by the Loan Documents. All reports shall be delivered as follows:

Wachovia Bank, National Association
Special Assets Management
Attention: David Maynard, Senior Vice President
301 South Tryon Street, M-10
NC-0659
Charlotte, North Carolina 28288

SECTION 5. CONDITIONS PRECEDENT TO CLOSING AND EFFECTIVENESS OF THIS AGREEMENT. The effectiveness of the terms and provisions of Section 3.2 of this Agreement shall be subject to the receipt by Bank of each of the following, in form and substance satisfactory to Bank:

(a) an original of this Agreement, duly authorized, executed and delivered by Borrower;

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- (b) an original of newly executed Guarantees by the Guarantors;
- (c) executed Amended and Restated Note.
- (d) payment of \$20,000 by December 22, 2008 as referenced in Section 4.2.

(e) A certificate from a duly authorized representative of Borrower certifying, among other things, that attached are true and correct copies of: (i) certificate of the existence of Borrower, issued by the Secretary of State of the jurisdiction of organization, and each other jurisdiction where such Borrower is required to qualify to transact business, (ii) the Operating Agreement of Borrower, and (iii) resolutions adopted by the Manager of Borrower authorizing the execution, delivery and performance of this Agreement, and the other documents and certificates to be delivered in connection herewith.

SECTION 6. ADDITIONAL EVENTS OF DEFAULT

6.1 Additional Events of Default. The parties hereto acknowledge, confirm and agree that any misrepresentation by Borrower, or any failure of Borrower to comply with the covenants, conditions and agreements contained in (i) the Loan Documents (other than the Existing Defaults) or (ii) this Agreement shall constitute an Event of Default under this Agreement and under the Loan Documents if not cured within 5 days of notice from Bank.

SECTION 7. PROVISIONS OF GENERAL APPLICATION

7.1 Effect of this Agreement. No other changes or modifications to the Loan Documents are intended or implied by this Agreement and in all other respects the Loan Documents are hereby specifically ratified, restated and confirmed by all parties hereto as of the effective date hereof. To the extent of conflict between the terms of this Agreement and the other Loan Documents, the terms of this Agreement shall control. The Loan Agreement and this Agreement shall be read and construed as one agreement.

7.2 Costs and Expenses. Obligor agrees that all of the Bank's closing costs related to this Agreement, including attorneys' fees and the cost of an appraisal, shall be due at Maturity of the Amended. However, the Obligor absolutely and unconditionally agrees to pay to Bank in full within ten (10) days of request for payment all costs and expenses incurred after the closing of this Agreement. If after signing of this Agreement, the Borrower does not proceed to closing for then it shall be obligated for all costs and expenses incurred in the preparation of this Agreement and the Loan Documents.

7.3 Appraisals; Environmental Assessments. Bank may, at Borrower's expense, order such appraisals or environmental assessments of Borrower's real property as Bank deems appropriate and reasonable.

7.4 Binding Effect. This Agreement shall be binding upon and inure to the benefit of each of the parties hereto and their respective successors and assigns.

7.5 **Survival of Representations and Warranties.** All representations and warranties made in this Agreement or any other document furnished in connection with this Agreement shall survive the execution and delivery of this Agreement and the other documents, and no investigation by Bank or any closing shall affect the representations and warranties or the right of Bank to rely upon them.

7.6 **Release.**

(a) In consideration of the agreements of Bank contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Obligors, on behalf of themselves and their successors, assigns, and other legal representatives hereby absolutely, unconditionally and irrevocably release, remise and forever discharge Bank, and its successors and assigns, and its present and former shareholders, affiliates, subsidiaries, divisions, predecessors, directors, officers, attorneys, employees, agents and other representatives (Bank and all such other Persons being hereinafter referred to collectively as the "Releasees" and individually as a "Releasee"), of and from all demands, actions, causes of action, suits, controversies, damages and any and all other claims, counterclaims, defenses, rights of set-off, demands and liabilities whatsoever (individually, a "Claim" and collectively, "Claims") of every name and nature, known or unknown, suspected or unsuspected, both at law and in equity, which Obligors or any of their successors, assigns, or other legal representatives may now or hereafter own, hold, have or claim to have against the Releasees or any of them for, upon, or by reason of any circumstance, action, cause or thing whatsoever which arose or has arisen at any time on or prior to the day and date of this Agreement, for or on account of, or in relation to, or in any way in connection with any of the Loan Documents or this Agreement or transactions thereunder or related thereto.

(b) Obligors understand, acknowledge and agree that the release set forth above may be pleaded as a full and complete defense and may be used as a basis for an injunction against any action, suit or other proceeding which may be instituted, prosecuted or attempted in breach of the provisions of such release.

(c) Obligors agree that no fact, event, circumstance, evidence or transaction which could now be asserted or which may hereafter be discovered shall affect in any manner the final, absolute and unconditional nature of the release set forth above.

7.7 **Covenant Not to Sue.** Obligors, on behalf of themselves and their successors, assigns, and other legal representatives, hereby absolutely, unconditionally and irrevocably, covenant and agree with and in favor of each Releasee that they will not sue (at law, in equity, in any regulatory proceeding or otherwise) any Releasee on the basis of any Claim released, remised and discharged by Borrower pursuant to Section 8.6 above. If any Obligor or any of their successors, assigns or other legal representatives violates the foregoing covenant, said Obligors for themselves and their successors, assigns and legal representatives, agrees to pay, in addition to such other damages as any Releasee may sustain as a result of such violation, all attorneys' fees and costs incurred by any Releasee as a result of such violation.

7.8 **Severability.** Any provision of this Agreement held by a court of competent jurisdiction to be invalid or unenforceable shall not impair or invalidate the remainder of this Agreement.

7.9 **Time of Essence.** Time is of the essence with respect to the obligations of the Borrower and Guarantor obligations under this Agreement.

7.10 **Reviewed by Attorneys.** Obligors represents and warrants to Bank that they (a) understand fully the terms of this Agreement and the consequences of the execution and delivery of this Agreement, (b) have been afforded an opportunity to have this Agreement reviewed by, and to discuss this Agreement and document executed in connection herewith with, such attorneys and other persons as Borrower and Guarantors may wish, and (c) have entered into this Agreement and executed and delivered all documents in connection herewith of their own free will and accord and without threat, duress or other coercion of any kind by any Person. The parties hereto acknowledge and agree that neither this Agreement nor the other documents executed pursuant hereto shall be construed more favorably in favor of one than the other based upon which party drafted the same, it being acknowledged that all parties hereto contributed substantially to the negotiation and preparation of this Agreement and the other documents executed pursuant hereto or in connection herewith.

7.11 **Governing Law.** This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of North Carolina, without reference to the conflicts or choice of law principles thereof.

7.12 **Consent to Jurisdiction.** Obligors hereby irrevocably consents to the personal jurisdiction of the state and federal courts located in North Carolina, in any action, claim or other proceeding arising out of any dispute in connection with this Agreement, any rights or obligations hereunder or the performance of such rights and obligations. Obligors hereby irrevocably consents to the service of a summons and complaint and other process in any action, claim or proceeding brought by Bank in connection with this Agreement, any rights or obligations hereunder or the performance of such rights and obligations, on behalf of itself or its property, in the manner specified in the Notes. Nothing in this Section 7.12 shall affect the right of Bank to serve legal process in any other manner permitted by applicable law or affect the right of Bank to bring any action or proceeding against the Obligors in the courts of any other jurisdictions.

7.13 **WAIVER OF JURY TRIAL. BANK AND BORROWER AND GUARANTORS HEREBY ACKNOWLEDGE THAT, TO THE EXTENT PERMITTED BY LAW, EACH HAVE IRREVOCABLY WAIVED ITS RESPECTIVE RIGHTS TO A JURY TRIAL WITH RESPECT TO ANY ACTION, CLAIM OR OTHER PROCEEDING ARISING OUT OF ANY DISPUTE IN CONNECTION WITH THIS AGREEMENT, ANY RIGHTS OR OBLIGATIONS HEREUNDER, OR THE PERFORMANCE OF SUCH RIGHTS AND OBLIGATIONS.**

7.14 **Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same agreement, and the signature pages from any counterpart may be appended to any other counterpart to

assemble fully-executed counterparts. Counterparts of this Agreement may be exchanged via electronic means, and a facsimile of any party's signature shall be deemed to be an original signature for all purposes.

7.15 **Notices.** All notices required to be made under this Agreement or the Loan Documents shall be made in the manner and to the addresses noted in Notes; provided, however, that in addition to the provision in Notes, a copy of any notice or document required to be made under this Agreement or the Loan Agreement shall also be delivered to Nelson Mullins Riley & Scarborough, 4140 Parklake Avenue, Raleigh, North Carolina 27612 Attn: Terri L. Gardner. Furthermore, notice shall be provided to David Maynard of Wachovia as set forth herein. The refusal of any party to accept delivery or the inability to deliver because of changed address of which no notice was given shall be deemed the equivalent of receipt.

7.16 **Successors and Assigns.** This Agreement shall be binding on and inure to the benefit of the parties and its heirs, beneficiaries, successors and assigns.

7.17 **Amendments.** No change, addition to, amendment or modification of the terms of this Agreement shall be effective unless reduced to writing and executed by all the parties hereto.

7.18 **Entire Agreement.** This Agreement is the entire agreement, and supersedes any prior agreements and contemporaneous oral agreements, of the parties concerning its subject matter.

7.19 **Further Assurances.** The parties hereto shall execute and deliver such additional documents and take such additional action as may be necessary or desirable to effectuate the provisions and purposes of this Agreement.

[SIGNATURE PAGES FOLLOW]

03008F433011

IN WITNESS WHEREOF, this Agreement is executed and delivered as of the day and year first above written.

BORROWER:

EGIS 521, LLC

By:EGIS Southeast Realty Capital, LLC, Manager

By: *Ronald C. Mariello*
Ronald C. Mariello, Manager

Attest: _____

Title: _____

[CORPORATE SEAL]

GUARANTORS:

Mark Ciminelli
Mark Ciminelli

Ronald C. Mariello
Ronald C. Mariello

Mark E. Carpenter
Mark E. Carpenter

BANK:

WACHOVIA BANK, NATIONAL
ASSOCIATION, as Bank

By: _____

David Maynard, Senior Vice President

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

Wells Fargo Bank, National)
Association, successor in interest by)
merger to Wachovia Bank, National)
Association,)

Plaintiff,)

vs.)

EGIS 521, LLC, Peter James)
Menkhaus, Stephanie L. Menkhaus,)
Nancy T. Jenkins, Individually and)
as Trustee of the Don A. Jenkins)
T/U/W and as Personal Representative)
of the Estate of Don A. Jenkins,)
Bellsouth Carolina PCS, LP, n/k/a)
Bellsouth Mobility DCS, LP,)
Commercial Products, Mark A.)
Ciminelli, Mark E. Carpenter, Ronald)
C. Mariello,)

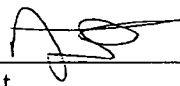
Defendants.)

FILED
OFFICE OF CLERK
IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
CASE NO. 2010-CP-18-186
MAY 27 AM 10:56

CLERK OF COURT
LANCASTER, SC

DEMAND FOR BINDING ARBITRATION

The Defendants EGIS 521, LLC, Mark A. Ciminelli, Mark E. Carpenter and Ronald C. Mariello, by their undersigned counsel, hereby invoke the Arbitration provisions of the Note in this matter and demand that the issues between the parties be resolved by binding arbitration.


Philip E. Wright
408 North Main Street
Lancaster, SC 29720
(803) 286-4343

ATTORNEY FOR DEFENDANTS EGIS 521, LLC,
MARK A. CIMINELLI, MARK E. CARPENTER
AND RONALD C. MARIELLO

May 27, 2011
Lancaster, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

)
) IN THE COURT OF COMMON PLEAS
) SIXTH JUDICIAL CIRCUIT
) CLERK OF COURT

Wells Fargo Bank, National
Association, successor in interest by
merger to Wachovia Bank, National
Association,

Plaintiff,

vs.

EGIS 521, LLC, Peter James
Menkhaus, Stephanie L. Menkhaus,
Nancy T. Jenkins, Individually and as
Trustee of the Don A. Jenkins T/U/W
and as Personal Representative of the
Estate of Don A. Jenkins, Bellsouth
Carolina PCS, LP, n/k/a Bellsouth
Mobility DCS, LP, Commercial
Products, Mark A. Ciminelli, Mark E.
Carpenter, Ronald C. Mariello,

Defendants.

) Civil Action No. 2010-CP-29-196
) JUN - 2 A 10 49

) CLERK OF COURT
) LANCASTER, SC

) PLAINTIFF WELLS FARGO BANK,
) NATIONAL ASSOCIATION'S
) OBJECTION TO DEFENDANTS'
) DEMAND FOR BINDING
) ARBITRATION

Plaintiff Wells Fargo Bank, National Association ("Plaintiff" or "Wells Fargo"),
by and through its undersigned counsel, hereby objects (the "Objection") to the
Defendants' Demand for Binding Arbitration (the "Demand"), which was received via
U.S. Mail on Tuesday, May 31, 2011. In support of its Objection, Wells Fargo
respectfully states as follows:

FACTUAL AND PROCEDURAL BACKGROUND

1. This action arises out of a commercial loan entered into between EGIS 521,
LLC as borrower, and Plaintiff as lender on or about May 17, 2007, in the amount of
\$4,549,320.00. Due to the borrower's default under the original note, the parties

entered into a Forbearance Agreement and an Amended and Restated Promissory Note (as these terms are defined in the Complaint) dated December 19, 2008 in the amount of \$4,646,773.25 (collectively, the "Note").

2. The Note was secured by a mortgage on certain undeveloped land in Lancaster County, as described in the Complaint (the "Mortgage"), which is the subject of this foreclosure action.

3. In addition, defendants Mr. Mariello, Mr. Carpenter and Mr. Ciminelli executed a Guaranty dated December 19, 2008 (the "Guarantys"), whereby they jointly and severally, absolutely and unconditionally guaranteed the payment of the Note and Mortgage to Plaintiff and all extensions and renewals thereof. Copies of all pertinent loan documents have been previously provided to the Court as exhibits to the Complaint.

4. The Defendants subsequently defaulted again on the Note and Mortgage and the Plaintiff filed the within action on February 1, 2010.

5. The Defendants, through counsel, filed an Answer and Counterclaim on April 16, 2010. The Plaintiff moved to dismiss Defendants' counterclaims and moved to strike the Defendants' jury trial request by motions dated June 16, 2010.

6. A hearing was scheduled for July 19, 2010 and then rescheduled to July 22, 2010. On August 11, 2010, a Consent Order Resolving Plaintiff's Motion to Strike Jury Demand and Motion to Dismiss Counterclaims was entered, whereby the Defendants, through counsel, waived any right to a jury trial and agreed to dismiss all counterclaims except the negligence counterclaim.

7. The parties engaged in discovery, with the Defendants serving out discovery requests to Plaintiff on or about July 22, 2010, and a 30(b)(6) notice to Plaintiff. Plaintiff served discovery requests on Defendants on or about September 21, 2010.

8. Plaintiff responded to Defendants' discovery requests in writing and by production of 2 CDs of information. Defendants' continually failed to respond to Plaintiff's discovery requests. During this interval, Plaintiff noticed the depositions of defendants twice (on February 8, 2011 for depositions on March 1 & 2, and again on March 15, 2011 for depositions on March 30, 2011), only to have both sets of depositions rescheduled and/or continued by Defendants' requests.

9. On March 10, 2011, the Order of Reference was entered by the Court.

10. On March 11, 2011, Plaintiff filed a Motion to Compel as to Defendants EGIS 521, LLC, Mr. Carpenter, Mr. Ciminelli, Mr. and Mrs. Menkhaus, and Mr. Mariello. A Notice of Hearing on the Motion to Compel, set for April 8, 2011, was served on March 28, 2011.

11. The Defendants' counsel filed a Motion to Withdraw on March 25, 2011, which was also scheduled to be heard on April 8, 2011.

12. At the hearing held on April 8, 2011, the Court granted the Motion to Compel and Motion to Withdraw, by Order entered April 21, 2011 and served on April 26, 2011. The Order required the Defendants to secure new counsel within 15 days from entry of the Order and to comply with the Motion to Compel within 30 days of entry of the Order. The Order also set the final foreclosure hearing for June 23, 2011.

13. Counsel for Defendants confirmed on the record at the April 8, 2011 hearing that both Mr. Carpenter and Mr. Ciminelli have withdrawn and waived any

counterclaims against the Plaintiff. The only parties with remaining counterclaims are EGIS 521, LLC and Mr. Mariello.

14. On May 11, 2011, Defendants' new counsel filed a Notice of Appearance on behalf of EGIS 521, LLC, Mr. Mariello, Mr. Carpenter, and Mr. Ciminelli, which Plaintiff received on May 12, 2011. Mr. and Mrs. Menkhaus¹ have not retained new counsel in this action.

15. On May 20, 2011, Plaintiff filed and served its Motion for Summary Judgment and Notice of Hearing, which was served on the Defendants that same day.

16. On May 27, 2011, Defendants' counsel mailed the Demand, which was received by Plaintiff on Tuesday, May 31, 2011, two days prior to the scheduled hearing on the Motion for Summary Judgment.

17. The Defendants have failed to comply with the Order by failing to respond to the discovery requests from September 22, 2010.

ARGUMENT

Defendants' Demand should be denied by this Court for several reasons. The applicable portions of the arbitration provision of the Note and Guarantys is as follows:

Upon demand of any party thereto, whether made before or after institution of any judicial proceeding, any claim or controversy arising out of or relating to the Loan Documents between the parties hereto (a "Dispute") shall be resolved by binding arbitration conducted under and governed by the Commercial Financial Disputes Arbitration Rules (the "Arbitration Rules") of the American Arbitration Association (the "AAA") and the Federal Arbitration Act. Disputes may include, without limitation, tort claims, counterclaims, a dispute as to whether a matter is subject to arbitration, or claims arising from documents executed in the future,

¹ Mr. and Mrs. Menkhaus are not guarantors or parties to the Note; however, they are partial owners of the property and are Mortgagors.

but shall specifically exclude claims brought as or converted to class action. ... **Preservation and Limitation of Remedies.** Notwithstanding the preceding binding to arbitration provisions, *the parties agree to preserve, without diminution, certain remedies that any party may exercise before or after an arbitration proceeding is brought. The parties shall have the right to proceed in any court of proper jurisdiction or by self-help to exercise or prosecute the following remedies, as applicable (i) all rights to foreclose against any, real or personal property or other security by exercising a power of sale under applicable law by judicial foreclosure* including a proceeding to confirm a sale; (ii) all rights of self-help including peaceful occupation of real property and collection of rents, set-offs, and peaceful possession of personal property; (iii) obtaining provisional or ancillary remedies including injunctive relief, sequestration, garnishment, attachment, appointment of receiver and filing an involuntary bankruptcy proceeding; and (iv) when applicable, a judgment by confession of judgment. Any claim or controversy with regard to any party's entitlement to such remedies is a Dispute. ... (emphasis added) (the "Arbitration Provision")

Amended and Restated Promissory Note dated 12/19/08 at Pg. 6-7, Guarantys at P. 7-8 (emphasis added).

As an initial matter, Plaintiff would point out that the Demand was made by counsel on behalf of Mr. Carpenter, Mr. Ciminelli, Mr. Mariello, and EGIS 521, LLC. As noted above and on the record, both Mr. Carpenter and Mr. Ciminelli have waived any and all counterclaims against the Plaintiff. The arbitration provision of the Guaranty specifically states that Plaintiff maintains its right to seek judicial foreclosure. Because Defendants Carpenter and Ciminelli have waived and withdrawn all counterclaims, and because the Arbitration Provision clearly permits the Plaintiff to seek a judicial foreclosure notwithstanding the presence of the Provision, there is no appropriate Dispute to refer to arbitration as to Defendants Carpenter and Ciminelli, and the Demand should be denied as inapplicable to those two Defendants.

However, even if the Court were to find that Mr. Carpenter and Mr. Ciminelli still have some type of Dispute as defined by the Arbitration Provision that is suitable for binding arbitration, Plaintiff asserts that all Defendants have waived any and all right to seek binding arbitration under the Arbitration Provision. There is established case law in South Carolina for the proposition that a party may waive its rights to enforce an arbitration clause. *See Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003); *Liberty Builders Inc. v. Triple E. Sales and Surplus, Inc.*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999). In order to establish that a party seeking to enforce an arbitration clause has waived its rights to do so, the party opposing the arbitration must show prejudice through an undue burden caused by the delay in demanding arbitration. *See Liberty Builders* 336 S.C. at 665.

South Carolina courts look to three related, non-exclusive factors to determine whether a party has waived its right to compel arbitration, including (1) whether a substantial length of time transpired between the commencement of the litigation and the demand; (2) whether the party requesting arbitration engaged in discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007) (finding waiver of right to demand arbitration where party delayed for 10 months, both parties engaged in extensive discovery, and case was pending on trial roster). Courts have stressed that this is a fact-specific inquiry and all cases won't fit neatly into these three factors. *See Id.*

In the present case, all factors weigh toward a finding of waiver by the Defendants. The Complaint was filed on February 1, 2010, sixteen months prior to the

Defendants' Demand, which was received by the undersigned a mere two days prior to its hearing on a Motion for Summary Judgment, and less than one month prior to the scheduled nonjury trial. This matter has been actively litigated for sixteen months, with numerous court filings and several hearings having been held, including a Motion to Dismiss Counterclaims and Motion to Strike Jury Demand (resolved by Consent Order), a Motion to Substitute Plaintiff, and a Motion to Compel Production. Additionally, the Defendants have availed themselves of the Court numerous times, by opposing both the Motion to Strike and the Motion to Dismiss, as well as conducting discovery, but have failed to respond appropriately to discovery requests.

As set forth above, the Defendants engaged in written discovery, and noticed the 30(b)(6) deposition of the Plaintiff, which the Plaintiffs have responded to in writing and by producing two CDs of information, as well as entering into a Confidentiality Order with the Defendants' counsel regarding the production of the appraisals. All these factors are evidence of the Defendants' active litigation in this matter, as well as the lengthy amount of time and great effort that has already been expended in this matter. These facts warrant a finding of waiver. In *Liberty Builders*, 336 S.C. at 667-68, the Court of Appeals found that the contractor seeking arbitration had pursued active litigation for over two years and availed itself of the court's assistance on numerous occasions. The Court found, in part, that the contractor's participation in discovery and procedural maneuvering for over two years was sufficient to support a finding of waiver. Similarly, in *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544 at 575, the Court of Appeals found that in a case where the moving party waited almost 19 months and availed itself of the discovery tools that are unavailable in

arbitration, the nonmoving party was prejudiced and the facts warranted a finding of waiver.

Similar to *Evans*, in the present case, the Defendants have availed themselves of the judicial process for sixteen months, and have also selectively engaged in discovery during that time, receiving information from the Plaintiff that they may not be entitled to in arbitration. However, to the clear and blatant detriment of the Plaintiff, the Defendants waited sixteen months until the eve of a scheduled summary judgment hearing, and less than one month before the final hearing on this matter, and also failed to comply with the Order Granting Motion to Compel, prior to issuing the Demand. Thus, not only has the Plaintiff been prejudiced by the substantial delay and attorneys' fees incurred in the state court litigation over the past 16 months, it has been prejudiced by its compliance with the rules of discovery, while the Defendants have failed to respond to discovery requests which were served on September 22, 2010, failed to request any protection from same as provided by Rule 26 of the South Carolina Rules of Civil Procedure, and furthermore, failed to comply with this Court's Order Granting Motion to Compel, and sought a continuance of both sets of scheduled depositions. At this point, the Plaintiff has been unable to obtain one piece of information from the Defendants to support their remaining counterclaim, and yet at this late hour, the Defendants want to further delay this matter by requesting arbitration.

The facts of this case demonstrate more than just mere inconvenience to the Plaintiff in receiving this late Demand. Rather, it demonstrates clear prejudice to the Plaintiff, sufficient to warrant a finding of waiver by the Defendants. *See Rhodes* 374 S.C. at 122 (stating that if the moving party has conducted discovery and taken

advantage of the judicial system, prejudice to the nonmoving party will likely exist and the law will disfavor arbitration.). As noted above, a finding of waiver is fact-specific to each individual case. The facts of this particular situation involve sophisticated business parties that negotiated a complex transaction of over four million dollars. As a result of the borrower's default the Plaintiff has sought to enforce its legal rights under the Note, Mortgage and Guaranty. Over the last 16 months the Defendants have been represented by able counsel, participated in the judicial process, and received the benefit (through that participation and production of information from Plaintiff) of that participation. Yet during that same time the Defendants have failed to answer discovery, have sought to continue two sets of depositions, have failed to comply with the Order Granting Motion to Compel, and now seek, at the eleventh hour to further delay this matter through the Demand.

These are sophisticated borrowers and guarantors, who have had sixteen months in which to move to compel arbitration. Although their counsel is recent to the case, the Notice of Appearance was filed on May 11, 2011, yet the Demand was not mailed out until May 27, 2011, a Friday before a holiday weekend, thus being received a mere two days prior to a scheduled hearing, and less than one month before the scheduled hearing on the merits in this matter. The Demand is simply a delay tactic by the Defendants to further prevent the Plaintiff from exercising its rights under the Note, Mortgage and Guaranty to seek the foreclosure of the collateral and a personal judgment for any deficiency as to the borrower and the Guarantors. Due to the length of time this matter has been actively litigated, the Defendants' repeated use of the litigation process, and due to their failure to comply with the Rules of Civil Procedure

and this Court's Order Granting Motion to Compel, the Court should find ample facts in this particular situation to support a waiver of their right to arbitrate this matter and should deny the Defendants' Demand and permit the previously scheduled Motion for Summary Judgment to go forward.

WHEREFORE, Plaintiff requests that the Court find that the Defendants Ciminelli and Carpenter have no claims suitable for arbitration, that Defendants EGIS 521, LLC, Mr. Ciminelli, Mr. Carpenter, and Mr. Mariello have waived any rights to seek arbitration under the Arbitration Provisions, and deny the Demand for Arbitration, and for such other and further relief as may be just and proper.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
Betsy Johnson Burn
SC Bar No. 16680
E-Mail: betsy.burn@nelsonmullins.com
Rachel M. Flynn
SC Bar No. 78685
E-Mail: rachel.flynn@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Plaintiff

Columbia, South Carolina

6-1, 2011.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Clyde Davis, Special Referee

Case No. 2010-CP-29-196

Wells Fargo Bank, National Association, successor in interest
by merger to Wachovia Bank, National Association.....Respondent,

v.

EGIS 521, LLC, Peter James Menkhaus, Stephanie L. Menkhaus,
Nancy T. Jenkins, Individually and as Trustee of the Don A. Jenkins
T/U/W and as Personal Representative of the Estate of Don A. Jenkins,
Bellsouth Carolina PCS, LP, n/k/a Bellsouth Mobility DCS, LP,
Commercial Products, Mark A. Ciminelli, Mark E. Carpenter, Ronald C. Mariello

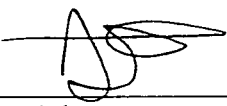
of whom:

EGIS 521, LLC, Mark A. Ciminelli, Mark E. Carpenter and
Ronald C. Mariello are the..... Appellants.

NOTICE OF APPEAL

EGIS 521, LLC, Mark A. Ciminelli, Mark E. Carpenter and Ronald C. Mariello appeal
the Order of the Honorable Clyde Davis, dated June 9, 2011. Appellants received written notice
of the entry of this Order on June 15, 2011.

June 22, 2011



Philip E. Wright
408 North Main Street
Lancaster, SC 29720
(803) 286-4343
Attorney for Appellants

Other Counsel of Record:

Betsy Johnson Burn
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 11070
Columbia, SC 29211
(803) 255-9261
Attorney for Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

IN THE COURT OF COMMON PLEAS
2010-CP-29-196

WELLS FARGO BANK, NATIONAL
ASSOCIATION, SUCCESSORS IN
INTEREST BY MERGER TO
WACHOVIA BANK, NATIONAL
ASSOCIATION

PLAINTIFF,

-VS-

EGIS 521, LLC, ET AL,
DEFENDANTS.

TRANSCRIPT OF PROCEEDINGS

LANCASTER, SOUTH CAROLINA

JUNE 2, 2011

REPORTER - WILLIAM H. WHITE

DALLAS REPORTING
SERVING THE CAROLINAS FOR OVER TWENTY-FIVE YEARS
ROCK HILL, SOUTH CAROLINA
803-328-9640/TOLL FREE 1-877-871-6363

Appearances:

For the Plaintiff -

Betsy J. Burn, Esquire
Nelson, Mullins, Riley & Scarborough
17th Floor
1320 Main Street
Columbia, South Carolina 29201

For the Defendants -

Phillip Wright, Esquire
Attorney at Law
408 North Main Street
Lancaster, South Carolina 29720

1 P R O C E E D I N G S

2 BEFORE - THE HONORABLE CLYDE DAVIS

3 1:24 P.M.

4 * * * * *

5 THE COURT: I guess we will go ahead with your
6 motion to stay, Mr. Wright.

7 MR. WRIGHT: Your Honor, I think the proceeding
8 today is governed by the Uniform Arbitration Act,
9 Chapter 48 Part 15. Section 15-28-20 provides that
10 upon the application of a party showing an
11 agreement described in 15-48-10, which is an
12 arbitration agreement, and the opposing party's
13 refusal to arbitrate, the Court shall order the
14 parties to proceed with arbitration. I think that
15 pretty much answers the question.

16 The bank in this case included an arbitration
17 agreement in the note that was signed by the
18 parties, and in the guarantees that were signed by
19 the parties. The parties have now elected, the
20 Defendants have elected, to invoke that protection
21 and I think that they are entitled to the full
22 protection of the chapter on arbitration, one of
23 which provides that the proceedings will be stayed;
24 and the other of which provides that if the
25 application to proceed with arbitration is denied

1 that that denial is legally appealable.

2 I had the other side of this case before Judge
3 Goldsmith three years ago, and he agreed with me at
4 the trial; however, the Court of Appeals disagreed
5 with him at the Court of Appeals level and reversed
6 it and sent it back. So I think in this case it is
7 pretty clear that the arbitration statutes require
8 the arbitration once demanded, and we simply ask
9 the Court to order arbitration.

10 THE COURT: All right. Ms. Burn?

11 MS. BURN: Thank you, Your Honor. Before I
12 begin, I just would like to clarify on the record
13 that Counsel for the Defendants as well as Your
14 Honor and myself did agree by phone yesterday to
15 hold a hearing on this today, and that we would
16 waive any objection to notice regarding today's
17 hearing, as well as the acceptance by -- of my
18 objection to his demands. Just so that is clear
19 and on the record, Your Honor.

20 MR. WRIGHT: Agreed.

21 THE COURT: All right.

22 MS. BURN: Thank you, Your Honor. Your Honor,
23 we do object to the Defendant's demands to refer
24 this matter to arbitration, and have stepped forth
25 with our objection. South Carolina case law is

1 very clear that notwithstanding a binding
2 arbitration clause in an agreement, that courts can
3 find that parties have waived their right to seek
4 to arbitrate a dispute. And under our case law
5 there is a very fact-specific test, and the courts
6 generally balance the length of the waiting and how
7 much the party demanding arbitration has taken
8 advantage of the judicial system throughout the
9 case, principally during discovery, and also the
10 prejudice to the party opposing the request to
11 arbitrate. And I would refer Your Honor to the
12 case of Weatherby v. Foreman, 336-SC-6-58, the
13 Court of Appeals case from 1999, where the Court
14 said that you must show prejudice and an undue
15 burden caused by the delay in demanding that the
16 matter be referred; but I also referred to 374-SC-
17 122, another Court of Appeals case in 2007.

18 We would agree that the note and guarantee at
19 issue in this matter do include an arbitration
20 clause, and I cited, too, the relevant portions of
21 that clause as identical in the note and guarantees
22 in the objection.

23 My first point would be that, notwithstanding
24 that clause, the arbitration clause specifically
25 provides that foreclosures may go forth. If you

6

1 look at Page 5 of the objection where I cited the
2 two clauses, it is from the amended and restated
3 note dated December 19 of '08, Pages 6 and 7, and
4 the guarantees on Pages 7 and 8. The provision
5 specifically provides that, notwithstanding the
6 preceding binding arbitration provisions, the
7 parties agree to preserve certain remedies that any
8 party may exercise before or after an arbitration
9 proceeding is brought. Parties shall have the
10 right to proceed in any court of proper
11 jurisdiction as applicable, including the right to
12 foreclose against any real or personal collateral
13 by judicial foreclosure.

14 So as an initial matter, I would say that
15 specifically to Defendants Carpenter and Simonelli
16 who, on the record, have waived all counterclaims,
17 any claims against the bank, there is nothing to
18 arbitrate as to those two defendants, specifically
19 to this position, as well, and that even if the
20 Court were to find that EGIS and Mariello have the
21 right to arbitrate there is nothing to arbitrate as
22 to Carpenter and Simonelli. They have waived any
23 and all counterclaims against the bank on the
24 record.

25 THE COURT: Let me ask you this. If I agreed

1 with you on that, we still couldn't go forward with
2 the foreclosure because I ordered arbitration for
3 the other two, could we?

4 MS. BURN: Not as to the sale; but we are
5 also seeking a personal judgement against both of
6 those guarantors as to the note.

7 THE COURT: All right.

8 MS. BURN: Separately, Your Honor, I would
9 argue that all defendants, based on the specific
10 facts of this case, have waived their right to seek
11 arbitration at this point. This case has been
12 pending for 16 months now. It's been litigated
13 actively. We've moved to dismiss counterclaims;
14 we've moved to strike jury demands; we've had
15 hearings on that, leading into a consent order
16 resolving the same; there have been discovery
17 requests on both sides. Defendants issued
18 discovery requests to my client to seek
19 information, as well. My client responded to those
20 requests, and we produced two CDs of information
21 from our files to the defendants, and written
22 responses, as well.

23 Contrast that with we served written requests
24 to Defendants back in September of last year; never
25 received a response. I worked with opposing

8

1 Counsel for several months trying to work out
2 something to resolve this matter, gave them some
3 extra time, finally told him I need responses. He
4 never gave them. I moved to compel, as Your Honor
5 is aware, in March of this year, after consulting
6 for months. We noticed depositions of the
7 Defendants twice, and had to even schedule those,
8 or delay those, based on the defendant's alleged
9 inability to appear because of surgery issues, and
10 once because right after I noticed it their former
11 Counsel moved to withdraw.

12 The order that Your Honor entered on April 21
13 of this year granted my Motion to Compel and gave
14 them 30 days from entering that order to respond.
15 I have not received one line of information, one
16 item, nothing; no correspondence whatsoever
17 regarding Your Honor's Order to Compel. The
18 Defendants have had ample time if they wanted to
19 seek arbitration, to move for some type of
20 protective order from discovery under Rule 26.
21 They have not done that. If they felt that my
22 requests were burdensome, they could have moved on
23 that as well. They have not done that. They have
24 made no responses whatsoever, while they have taken
25 advantage of the discovery process on their own

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side.

 Their new Counsel filed his appearance on May 11; however, when we served the Notice of Hearing for Summary Judgement on May 20, and I communicated with his office about that date on that same day, there was no response to that until we received a mailed demand about Tuesday of this week, which was mailed out on Friday before the holiday, that they are requesting that we now stay everything and move to arbitrate.

 I would say that my clients will, and have been, prejudiced by the delay, the sixteen months of additional costs that my clients have incurred in trying to litigate this matter, as well as the fact of their complete lack of compliance with the Rules of Civil Procedure and with this court's order compelling them to respond to written discovery, should weigh in favor of finding that they have taken advantage of the court system. They have not participated as they are required to has caused burdens and delays for my client, and yet they have gotten access to information that they may not have been entitled to if we had gone straight to arbitration, whereas my client has received absolutely nothing whatsoever from the

1 Defendants.

2 Therefore, I will say, based on the
3 substantial case law in this state, based on the
4 fact that Your Honor has already set the final
5 hearing date for June 23, which is also included in
6 the April order which was served on the Defendants,
7 and based on the fact that the demand was received
8 two days before a hearing on the merits of their
9 counterclaims, that under our state case law there
10 is substantial evidence that the Court could find,
11 and should find, that they have waived the right to
12 demand to arbitrate at this point. This is
13 specifically based on where the courts found that
14 they have participated in discovery, they have
15 participated in hearings, and the Court has found
16 in those specific facts that they demonstrated
17 waiver.

18 THE COURT: All right. Mr. Wright, do you
19 bring any response? I would be interested in
20 hearing what you have to say as to the waiver.

21 MR. WRIGHT: Your Honor, as to the waiver, I
22 have presented the affidavit of two of my clients,
23 Mr. Mariello and --

24 MS. BURN: Your Honor, I am going to object to
25 the admission of these as being untimely. And

1 specifically, to the affidavit of Mariello, in that
 2 it contains a rather extensive summary of
 3 settlement discussions with my client, and I would
 4 object that that's not admissible under Rule 48.

5 MR. WRIGHT: Your Honor, I think at this point
 6 that if the objection of the Plaintiff to
 7 arbitration is that we have in some way been
 8 dilatory or waived our right to that, the affidavit
 9 of Mariello is simply to establish that there have
 10 been ongoing discussions between he and the bank,
 11 he's the primary member of this group, to try and
 12 resolve this matter, and he thought in good faith
 13 that this matter was going to be resolved until
 14 about January of this year, at which time he was
 15 told that, no, we're not going, we're going to set
 16 preconditions on your objections going forward,
 17 which led to the inability to settle the case at
 18 that point --

19 MS. BURN: Your Honor, again I object. I would
 20 ask for a ruling on my objection --

21 THE COURT: I'm going to allow the affidavit
 22 because of the lateness of all of this; but I am
 23 not going to consider anything related to the
 24 settlement negotiations.

25 MR. WRIGHT: Thank you, Your Honor. And that's

1 the only purpose it was submitted, was to show
2 what activity had been going on. I think if you go
3 back to the drafting of the note, and the drafting
4 of the language, and throw in that the parties have
5 agreed that the matter go forward, I think that if
6 the bank had intended to have everybody waive the
7 provisions of Chapter 48, they would have clearly
8 said, all protections of Chapter 48 are waived.
9 They didn't do that. 48 is drafted very broadly;
10 in fact, the very last section of 15-48-20 provides
11 that an order of arbitration shall not be refused
12 on grounds that the claim at issue lacks merit or
13 bona fides, or that there's any fault in the
14 grounds of the claim sought that the arbitrator has
15 not been shown. It's a very broad remedy that is
16 proposed by the bank in their documents. I think
17 my clients have attempted to settle this matter in
18 good faith. I have been on this case 22 days --

19 THE COURT: I understand that.

20 MR. WRIGHT: There were differences between
21 them and their prior counsel. One of the
22 affidavits sets out that one of the disputes was
23 the failure of that counsel to demand arbitration,
24 which they wanted to do. When I got into the case,
25 we were in the discovery period, and they brought

1 up the arbitration issue with me. I saw the
2 language in the note, after we agreed to proceed,
3 researched the statute books, concluded that we
4 still had clearly the right to arbitrate, and
5 advised my clients that instead of responding to
6 the discovery at that point, why don't we just
7 demand the arbitration? They agreed with that; I
8 demanded the arbitration.

9 As for her argument that they've been
10 prejudiced by not having discovery, that we've done
11 discovery before going in, again, I wasn't there;
12 but I have looked at the court order that we
13 respond to her discovery prior to any arbitration
14 is set up, and if you'd give me 10, 15 days to do
15 that, I will do that. It will take that long to
16 pick an arbitrator, so I can get my discovery done.
17 I just didn't proceed with it because I knew we
18 were going to be making this demand, and didn't
19 know where it was going then.

20 So I would contend that my clients did not
21 waive their right to arbitrate. They clearly are
22 entitled to it under the documents drawn by the
23 bank and our statutes.

24 THE COURT: But you don't think that them
25 participating in the court proceedings for well

1 over a year, almost a year and a half, doesn't
2 constitute a waiver on some of these cases?

3 MR. WRIGHT: Your Honor, there is no doubt
4 there is that, but the truth of the matter is that
5 they were attempting to settle this matter with the
6 bank. They were not moving forward earnestly with
7 the case because they really expected the case to
8 be settled. It didn't get settled and now after a
9 year of negotiations, they are back in litigation
10 mode and they are not ready to go. I mean, they
11 want to get this thing arbitrated and over. It's
12 binding; it'll resolve the case. And as
13 represented in their affidavits, we are ready to go
14 right now. If you look at foreclosure, at this
15 point, you know, I'm going to appeal the refusal of
16 the arbitration, and that's going to take us a year
17 and a half. I'd rather just arbitrate it, and
18 we've got 120 days to enter into an arbitration. I
19 don't have any problem complying with that and just
20 moving forward with the arbitration. That will be
21 through by the fall, late fall, and they -
22 depending on the result of the arbitration - they
23 can move forward and sell the property.

24 I think it has to be arbitrated, and I think
25 the case law is pretty clear. I understand the

1 cases she cited. I think that 2008 case is pretty
2 strong precedent for, once there's a demand for
3 arbitration, everything goes to arbitration. They
4 had to decide whether or not we had a contract.
5 The arbitrator, as a matter of fact, decided there
6 was a contract, so we won the arbitration, but lost
7 the war ultimately.

8 THE COURT: But in that case, wasn't the issue
9 whether the arbitration clause was valid?

10 MR. WRIGHT: The issue was actually whether or
11 not there was even a contract, and we argued that
12 that was a threshold issue and Judge Goldman agreed
13 with us, that that threshold issue contract should
14 be decided by him; but the Court of Appeals said
15 even that issue had to be determined by the
16 arbitration, the arbitrator. And the arbitrator
17 did consider that issue and make a determination,
18 and resolved that.

19 THE COURT: All right. You want to respond,
20 Ms. Burn?

21 MS. BURN: Yes, Your Honor, very briefly. I
22 would just reiterate that notwithstanding the
23 binding arbitration clause in the loan note that
24 the case law is very clear that under specific
25 facts that I believe we have shown here the Court

1 can and should find that they have waived their
2 rights to enforce that, based on the specific
3 facts.

4 And, again, I object to the evidence that's
5 been presented regarding the business succession,
6 attempts at settlement between his clients and my
7 clients. I will acknowledge that this case has
8 gone on for quite some time. Notwithstanding their
9 attempt to settle directly with my client, they had
10 a duty as defendants in this action to respond to
11 discovery. They used their attorney, they had an
12 attorney engaged, and they completely failed to
13 comply not just with the Rules of Civil Procedure
14 but with this Court's order. They could or should
15 have made this demand to stay anything prior to the
16 30-day ruling that the court gave them to comply
17 with the Order to Compel. They have blatantly and
18 consistently refused to produce anything, not one
19 word, to me, and this matter has gone on for 16
20 months, which has caused my client, frankly, to
21 incur a tremendous amount of fees that otherwise
22 would not have been spent. I think this is just
23 another attempt to delay this matter.

24 I don't disagree with them that they are
25 trying to come up with a solution to solve it, but

1 my client has rights under the note and mortgage,
2 and we seek to enforce those. We are on the eve of
3 trial; we are on the eve of a hearing on their
4 counterclaims, and arbitration will just further
5 delay the matter.

6 THE COURT: Well, how about just address a
7 couple of things that kind of bother me, here,
8 about this arbitration clause. It says, upon
9 demand of any party, you can go to arbitration
10 arising out of a dispute; and then, it says,
11 disputes may include a dispute as to whether or not
12 they are subject to arbitration. Now, how does
13 that --

14 MS. BURN: Your Honor, I am not alleging -- I
15 am not trying to argue that their counterclaim for
16 negligence isn't something that could be
17 arbitrated. What I am saying is, because of their
18 actions in this case they have waived the right to
19 seek that.

20 THE COURT: All right. Well, I am kind of
21 inclined to agree with you, so I would make the
22 finding that by their behavior over the last 16
23 months in participating in the legal proceedings
24 that they waived their right to binding
25 arbitration. Let's go off the record for just a

1 second.

2 (Off the record)

3 MR. WRIGHT: Your Honor, I just, for the
4 record, before she proceeds with the Summary
5 Judgement, I understand the Court is inclined to
6 grant her motion to enter a finding that my clients
7 have waived their right to arbitrate. I would
8 advise the Court of our intentions to appeal that
9 order immediately. That appeal would stay the
10 proceedings, and as I understand it the Court would
11 like to go ahead and do the Summary Judgement
12 motion now, pending some discussion between
13 Counsel, about these, the suit of the parties, in
14 view of your ruling.

15 THE COURT: All right. Go ahead, Ms. Burn.

16 MS. BURN: Thank you, Your Honor. Your Honor,
17 as the Court is aware, we have waived summary
18 judgement as to the remaining counterclaims held by
19 Egis 521, LLC. The Court is aware the burden is on
20 the Plaintiff moving to demonstrate that there is
21 an issue of fact.

22 As the Court may be aware, just as a matter of
23 very brief background, this matter commenced as a
24 commercial loan done back in about May of '07 for
25 about 43 acres of undeveloped land off of Highway

1 521 here in the county, and the amended, restated
2 note was executed in December of '08 in conjunction
3 with a forbearance agreement. And the Defendant
4 again defaulted when the loan matured in May of
5 '09, and the foreclosure action was filed February
6 1, 2010.

7 All of the other counterclaims that have
8 originally been asserted by the parties have been
9 dismissed by a private consent order and Carpenter
10 and Simonelli have since waived all of their claims
11 on the record.

12 The complaints, the counterclaims essentially
13 alleged that my client was negligent in failing to
14 warn the Plaintiff of his debt ratio and failing to
15 properly hire and/or supervise the agents and
16 appraisers, failing to properly supervise the
17 training of agents and employees and such other
18 signatories as have been established. The rest of
19 their alleged acts revolve around the Plaintiffs'
20 alleged failure to report appraisal results, which
21 were allegedly, quote, greatly inflated, which is
22 one of the counterclaims.

23 Defendants contend that these actions caused
24 them to purchase property which was worth less than
25 they thought, as well as financial hardship to the

1 defendants. The first thing I would argue is that
2 the forbearance agreement which was executed on
3 December 19 of '08 in conjunction with the amended
4 note, Defendant specifically released all claims
5 against the Plaintiff. The release is very broad.
6 It very specifically states that the borrower and
7 guarantors, in consideration of the agreements with
8 the bank contained within the agreement and the
9 note, was specifically releasing the bank and all
10 its successors and assigns, all liens, actions,
11 causes of actions, suits, and any and all claims,
12 counterclaims, of any nature named or unnamed. So
13 we would argue that the defendants clearly and
14 unequivocally released any and all claims
15 potentially arising by their signing of the
16 agreement with counsel on both sides.

17 Because the alleged actions relate to the
18 underlying transaction, we would argue that they
19 have been released via the agreement and that the
20 Plaintiff is entitled to summary judgement on its
21 counterclaims.

22 Even if the Court were to find that that
23 release did not apply, we would still argue that it
24 is well-established in this state that a breach of
25 duty which arises under the under the provisions of

1 a contract between the parties must be addressed
2 solely in the contract and not as a tort. Our
3 courts have consistently held that such allegations
4 do not have the effect of changing essential
5 features of what was purely a contractual
6 relationship into one involving a tort. The only
7 duties that relate to the Defendant by the
8 Plaintiff arose from the Plaintiff's agreement to
9 lend money to the Defendant.

10 The evidence does not support any allegation.
11 In fact, they have not alleged or presented any
12 facts that any kind of special relationship existed
13 between the Plaintiff and the Defendant that would
14 comprise some type of special relationship outside
15 of the contract that could give rise to any
16 negligence claim. Their injuries appear to be
17 economic in nature. In fact, we would argue that
18 the counterclaim is also barred under fairly
19 established case law in our state.

20 And lastly, we would argue that to have any
21 type of a negligence claim, such as they allege,
22 you would have to show some kind of duty of my
23 client to the Defendants, and the Defendants have
24 attempted to base a claim against my client solely
25 on the grounds that the bank somehow owed them a

1 duty to assure the validity or otherwise expose the
2 results of the appraisals that the bank had done
3 for its own benefit, and insure that their
4 investment was sound.

5 Under South Carolina law, the bank has no
6 special duties to its customer. I'll just refer to
7 the Schumacher case, 354-SC-0671, which is a Court
8 of Appeals case. The normal relationship between
9 the bank and its customers is that of debtor to
10 creditor only unless there is some special facts in
11 evidence that show some sort of special
12 relationship to take it out of that creditor-debtor
13 role. Numerous courts have expressly held that
14 banks acting as a potential lender have no duty to
15 insure the validity of an appraisal or to disclose
16 information related to the appraisals or the
17 underlying the process, or guarantee the soundness
18 of the investment. I would refer the Court to
19 Belmont V. Rhinehart, which is a case out of the
20 South Carolina Court of Appeals, where the Court
21 stated that because the Plaintiff failed to show
22 that the appraisal was intended for her benefit
23 rather than the bank's benefit, that they could not
24 rely upon that.

25 Courts have continuously held that the

1 appraisal done by the bank is for the benefit of
2 the bank and that the bank has no duty to disclose
3 it, no duty to share it, no duty to advise the
4 borrower on the soundness of the investment that
5 they are wanting to make. There are no allegations
6 that the bank induced the defendants to enter into
7 this transaction or engaged in conduct outside the
8 traditional domain of a lender and borrower. And
9 therefore, the Plaintiffs are not an insurer of
10 their investments.

11 And lastly, I would submit because of the
12 complete lack of any evidence or facts set forth by
13 the Defendants to support their claims that there
14 has been mismanagement, there has been no
15 demonstration by the defendants of any material
16 fact in the case. They cannot rely solely upon
17 what they have alleged in their answer. They have
18 to come forth with something. They have failed
19 repeatedly to do so; thus, we would argue that
20 their counterclaim should be dismissed.

21 THE COURT: All right. Mr. Wright?

22 MR. WRIGHT: In response, I would simply ask
23 the Court for time to submit an affidavit in
24 opposition. I did not prepare anything at all
25 today, knowing it would be in the arbitration. The

1 Court has granted her motion not to allow
2 arbitration. Pending that appeal, there may be
3 some agreement worked out between the parties; but
4 I would ask the Court to reserve ruling on the
5 summary judgement for a period of five days to give
6 me some opportunity to at least submit an affidavit
7 on behalf of my clients in opposition to the
8 motion. I'm not sure that there's a lot of factual
9 information I can give the Court in that period of
10 time, but I'd like the opportunity.

11 THE COURT: Is there any objection to that?

12 MS. BURN: I would object, but I would leave it
13 to the Court's discretion.

14 THE COURT: well, I would assume -- I think I'm
15 going to have to take this under advisement,
16 anyway. I need to read some of the stuff you were
17 talking about, so I'll give you the five days and
18 then give her a few days after that to respond in
19 writing, if she would like. I don't know exactly -
20 - Let's go off the record again.

21 (Off the record)

22 whereupon - Hearing was concluded at 2:08 P.M.

William H. White
Notary Public/Court Reporter

(Recorded audio retained fifteen days from date of
certification unless otherwise requested)

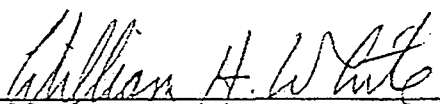
CERTIFICATE OF REPORTER

State of South Carolina)
)
County of York)

I, William H. White, a Notary Public for the State of South Carolina, do hereby certify that I placed under oath the aforesaid deponent; that I reported the foregoing proceedings at the time and place herein designated and that the foregoing pages are a true, accurate and correct transcript of the aforesaid proceedings.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, nor in anyway interested in the event of said cause.

In witness my hand and official seal this the 11th day of, *July* 2011, in the City of Rock Hill, County of York, State of South Carolina.



William H. White
Court Reporter/Notary Public

My Commission Expires:
8-8-2018

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF LANCASTER)

Wachovia Bank, N.A.,)

Plaintiff,)

Civil Action Number: 2010-CP-29-196

vs.)

DEFENDANT, EGIS, LLC'S FIRST
SET OF INTERROGATORIES TO
PLAINTIFF

EGIS, LLC, Peter James Menkhaus,)
Stephanie L. Menkhaus, Nancy T.)
Jenkins, individually and as Trustee of)
the Don A. Jenkins T/U/W and as)
Personal Representative of the Estate)
of Don A. Jenkins, Bellsouth Carolina)
PCS, LP, n/k/a Bellsouth Mobility)
DCS, LP, Commercial Products,)
Mark A. Ciminelli, Mark E. Carpenter,)
Ronald C. Mariello,)

Defendants.)

Defendants.)

TO: THE PLAINTIFF ABOVE NAMED AND THEIR ATTORNEY:

The Defendants, EGIS, LLC, hereinafter EGIS, by and through their attorney, F. Craig Wilkerson, Jr., propound the following Interrogatories to the Plaintiff.

The following general instructions and definitions shall apply to these Requests and any subsequent Requests propounded by Lifestyle:

GENERAL INSTRUCTIONS

1. You are requested to answer these Requests in writing and serve a copy of your response upon the undersigned in accordance with the South Carolina Rules of Civil Procedure.

2. The Requests contained herein require Wachovia Bank, N.A. to produce documents under its control, including all responsive documents in the possession of its consultants, attorneys, auditors, insurers, or agents.

3. If any of the Requests calls for information that is not in your possession or subject to your control or ascertainable by you, your attorneys, or others on your behalf upon reasonable inquiry, then, if known, please identify the custodian or possessor of such information. If a request seeks information or documents from one of the parties, and that information is known to be or is in the possession of another party, please so state.

4. If you refuse to respond to any of these Requests, please describe the factual basis for your refusal to respond in sufficient detail to permit the court to adjudicate the validity of your refusal.

5. If you claim that the attorney-client privilege or any other privilege or immunity is applicable to any document, the production of which is sought by these Requests, please provide the following for each document:

- (a) State the kind of privilege or immunity you contend applies and the basis for your assertion of the privilege;
- (b) State the date and nature of the document;
- (c) Identify each and every author of the document;
- (d) Identify each and every preparer of the document;
- (e) Identify each and every person who received the document;
- (f) Identify each and every person from whom the document was received;
- (g) State the present location of the document and all copies thereof;
- (h) Identify each and every person who has or ever had possession, custody, or control of the document or any copy thereof; and
- (i) Provide all other information concerning the document and the circumstances upon which the claim of privilege or immunity is asserted.

GENERAL REFERENCES AND DEFINITIONS

1. Unless otherwise noted or indicated by the context, any reference to a pleading means the pleadings filed or served in this case.

2. Any reference to a corporation, company, organization or other entity includes its employees, agents, officers, directors, representatives, (whether current or former), predecessors and successors.

3. "Person(s)" include natural persons and all private or governmental organizations and their representatives.
4. "And" and "or" as used herein are both conjunctive and disjunctive.
5. The term "including" means "including, but not limited to."
6. "Communication" includes without limitation, any contact, transmission, or oral or written exchange of work, thoughts, ideas or documents between persons or entities by any means, including, but not limited to, any conversation or discussion, whether by chance or pre-arranged, formal or informal, face-to-face, or by telephone, telegraph, telex, telecopier, electronic mail, or other media.
7. "Documents" means every original (and every draft, copy of any original, or copy which differs in any way from any original) of all written, printed, typed, recorded, transcribed, electronic, digital, photostatic or graphic matter, however produced or reproduced, and other data compilations from which information can be obtained or translated, if necessary, through detection devices into reasonably useable form, including, but not limited to, access to all hard drives, zip drives, discs, tapes or punch cards on which any documents, data, or information may be stored or located.
8. Information or documents "referring to", "concerning", "relate to", or "regarding" a given subject matter means any information or Document that directly or indirectly constitutes, contains, supports, embodies, evidences, comprises, reflects, identifies, states, refers to, deals with, comments on, responds to, describes, relates to, mentions, names, analyzes or is any way pertinent to or connected with that subject matter.
9. "You," "Your," or "Plaintiff" refers to Wachovia Bank, N.A., and anyone acting on their behalf, now or in the past.
10. "Plaintiff," shall mean Plaintiff and anyone acting on its behalf, collectively or individually, now or in the past.
11. The "Note" shall mean the Note referenced in the Complaint.

INTERROGATORIES

1. State the name, current business address and employment title of each person providing answers to these Requests.

2. State the name, current business address and employment title of all persons, currently or formerly employed by you, who have knowledge of matters alleged in the Complaint and Counterclaim.

3. For each person listed in Interrogatory 2, state the matters known to that person. If you have a recorded statement (written or oral) of any person identified, please describe it with sufficient particularity that it can be requested for inspection or production.

4. Identify or describe all correspondence or other written documents, notes, notes, memoranda and information stored in a computer, or otherwise, which in any way relate to the matters alleged in the Complaint and Counterclaim.

5. Describe with particularity Wachovia Bank, N.A.'s standard operating procedures for the extension of loans such as the one evidenced by the Note, which is the subject of this action.

6. Identify the Wachovia Bank, N.A. employee who is/was responsible for supervision, oversight and/or administration the Note.

7. Give the names and addresses of persons known to you to be witnesses concerning the facts of the case; indicate whether or not written or recorded statements have been taken from the witnesses; indicate who has possession of such statements; and, if you will do so without a request to produce, provide a copy of said statements with your answer.

8. Set forth a list of photographs, plats, sketches or other prepared documents in your possession that relate to the claim or the defense in the case; and, if you will do so without a request to produce, provide a copy of said statements with your answers.

9. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

10. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by Wachovia Bank, N.A.

11. List the names and addresses of any expert witnesses whom you propose to use as a witness at the trial of the case.

12. For each person known to you to be a witness concerning the facts of the case, set forth either a summary sufficient to inform EGIS of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

13. Set forth EGIS' Debt Ratio calculations for any and all loans with Wachovia Bank, N.A. to include the construction loan and the conventional loan applications, and identify all documents used to compute the debt ratio.

14. Set forth the internal procedures for Wachovia Bank, N.A. for approving loans, identifying any written instructions for same.

15. Identify any and all appraisers who performed appraisals on the property which is the subject of this action and set forth whether those appraisers were agents of the bank.

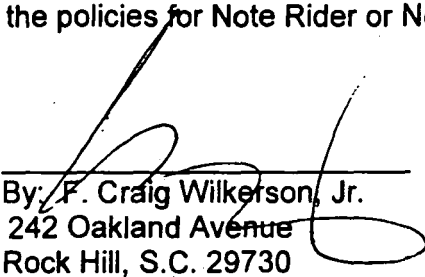
16. Set forth any loan officer bank officer, employee, agent, or independent contractor, to include previous employees of Wachovia Bank, N.A., that worked on the EGIS file through the application process.

17. Set forth all internal review processes for consumer loans (including construction loans) with Wachovia Bank, N.A.

18. Identify and provide all financial records pertaining to the EGIS applications (s) for loans on the subject property.

19. Identify and set forth Wachovia Bank, N.A.'s policies for issuing construction loans, and the process for converting a construction loan into a conventional fixed loan as well as the policies for Note Rider or Note Amendments.

July 22, 2010


By: F. Craig Wilkerson, Jr.
242 Oakland Avenue
Rock Hill, S.C. 29730
(803) 324-7200
ATTORNEY FOR EGIS, LLC

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF LANCASTER)

Wachovia Bank, N.A.,)

Plaintiff,)

Civil Action Number: 2010-CP-29-196

vs.)

DEFENDANT, EGIS, LLC'S
REQUEST TO PRODUCE TO
PLAINTIFF

EGIS, LLC, Peter James Menkhaus,)
Stephanie L. Menkhaus, Nancy T.)
Jenkins, individually and as Trustee of)
the Don A. Jenkins T/U/W and as)
Personal Representative of the Estate)
of Don A. Jenkins, Bellsouth Carolina)
PCS, LP, n/k/a Bellsouth Mobility)
DCS, LP, Commercial Products,)
Mark A. Ciminelli, Mark E. Carpenter,)
Ronald C. Mariello,)

Defendants.)

Defendants.)

TO: THE PLAINTIFF ABOVE NAMED AND THEIR ATTORNEY:

PLEASE TAKE NOTICE that Defendant, EGIS, LLC, by and through their undersigned attorney, F. Craig Wilkerson, Jr., pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, requests that the Plaintiff produce and permit Defendant, or Defendant's attorney, or someone acting in their behalf, to inspect and copy the following enumerated documents in Plaintiff's possession, custody or control:

Any and all documents or things identified by the Plaintiff in Plaintiff's Interrogatories. "Document" means any tangible item in your possession, custody or control, including, but not limited to, correspondence, memoranda, notes, papers, film, microfilm, computer discs or hard drive memory, or any other item which contains any

writing, lettering or other graphical or pictorial representation thereon. Any documents bearing on any sheet or side thereof any marks, including, but not limited to, initials, stamped indicia, comments or notations of any character, which are not part of the original text, or any other reproduction thereof, is to be considered a separate document for purposes of this definition.

1. Any and all documents, records, bills, contracts, correspondence, reports of any type, invoices, books, canceled checks, statements, memoranda, notations, photographs, moving pictures, drawings, maps, diagrams, plats, models or other materials or documentation pertaining to the events which are the subject matter of this action.

2. Any and all documents, records, bills, contracts, correspondence, reports of any type, invoices, books, canceled checks, statements, memoranda, notations, photographs, moving pictures, drawings, maps, diagrams, plats, models or other materials or documentation which the Plaintiff intends to rely upon to support the allegations of the within case and/or which the Plaintiff intends to offer into evidence as exhibits at the time of the trial.

3. Any and all documents, records, bills, contracts, correspondence, reports of any type, invoices, books, canceled checks, statements, memoranda, notations, photographs, moving pictures, drawings, maps, diagrams, plats, models or other materials or documentation which the Plaintiff used as a basis in establishing the claim and in calculating the damages sought in the Plaintiff's claim.

4. Any and all documents, records, bills, contracts, correspondence, reports of any type, invoices, books, canceled checks, statements, memoranda, notations,

photographs, moving pictures, drawings, maps, diagrams, plats, models or other materials or documentation which are within the possession of the Plaintiff or Plaintiff's attorney.

5. Each document identified in Plaintiff's responses to Defendant, EGIS, LLC's Interrogatories.

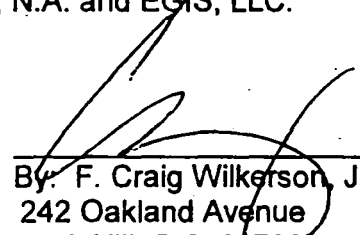
6. Produce the entire EGIS, LLC Loan Packages, including, but not limited to:

- a.) The Attorney preference letter
- b.) Code 37-23-70 D Notice
- c.) Legible Sales Contract with all Addendums
- d.) Online or written submission forms and/or lock confirmations
- e.) PMI disclosure (Private Mortgage Insurance)
- f.) All appraisals done on subject property
- g.) All financial docents provided on behalf of EGIS, LLC.
- h.) Uniform Residential Loan Applications for EGIS, LLC.
- i.) Explanation letters
- j.) Wachovia Bank, N.A. loan procedure written manuals or policies regarding the issuance of construction loans, including training materials.
- k.) All documents containing any warnings that would be applicable to EGIS.

7. Produce a copy of all visual and written training materials utilized in the Training of Wachovia Bank, N.A. Personnel or Agents involved in loan origination or applications.

8. Copies of any correspondence, (including but not limited to written, faxed, email,) between Wachovia Bank, N.A. and EGIS, LLC.

July 22, 2010



By: F. Craig Wilkerson, Jr.
242 Oakland Avenue
Rock Hill, S.C. 29730
(803) 324-7200
ATTORNEY FOR EGIS, LLC

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER) SIXTH JUDICIAL CIRCUIT

Wachovia Bank, National Association,) Civil Action No. 2010-CP-29-196
)

Plaintiff,)
)

vs.)

PLAINTIFF WACHOVIA BANK,
NATIONAL ASSOCIATION'S
FIRST SET OF
INTERROGATORIES TO
DEFENDANT EGIS, LLC

EGIS 521, LLC, Peter James)
Menkhaus, Stephanie L. Menkhaus,)
Nancy T. Jenkins, Individually and as)
Trustee of the Don A. Jenkins T/U/W)
and as Personal Representative of the)
Estate of Don A. Jenkins, Bellsouth)
Carolina PCS, LP, n/k/a Bellsouth)
Mobility DCS, LP, Commercial)
Products, Mark A. Ciminelli, Mark E.)
Carpenter, Ronald C. Mariello,)
)

Defendants.)
)

TO: F. CRAIG WILKERSON, JR., ATTORNEY FOR DEFENDANT:

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, Wachovia Bank, National Association ("Plaintiff/Counter-Defendant" or "Wachovia"), hereby serves the following Interrogatories upon EGIS 521, LLC ("Defendant/Counter-Plaintiff" or "EGIS").

DEFINITIONS

1. A "document" whether singular or plural shall mean any and all original copies by whatever means, written, printed, typed, recorded or other graphic matter of any kind or nature and all mechanical or electrical sound recordings and any copies and transcriptions thereof, and all computer data files in the possession, custody and/or control of you or your counsel or known by them to exist.



2. "Identify" when used with reference to an individual shall mean to state his or her full name, present or last known address, present or last known position in a business affiliation, and employer, title, and position of the time in question.

3. "Identify" when used with reference to a document means to state the date, author, type of document (e.g. letter, memorandum, telegram, chart, note, application, etc.) or other means of identification, and its present location and custodian. If any such document is no longer in your possession or subject to their control, state what disposition was made of the document.

4. "Person" or "individual" whether singular or plural, shall include natural persons, corporations, firms, partnerships, proprietorships, associations, and/or organizations and entities.

5. "You" or "your" shall mean Defendants.

INSTRUCTIONS

6. These Interrogatories are continuing in nature. Should you acquire additional information responsive to these Interrogatories after serving answers hereto, the answers shall be supplemented so as to provide such additional information.

7. If a privilege not to answer is claimed, identify each matter as to which the privilege is claimed, the nature of the privilege and the legal and factual basis for such claim.

8. If a refusal to answer an Interrogatory is stated on the grounds of burdensomeness, identify the number and nature of the documents needed to be served, the location of the documents and the number of person hours and amount of cost required to conduct the search.

9. Answer each Interrogatory on the basis of the entire knowledge of you, including without limitation information in the possession of your consultants, investigators, representatives, agents and attorneys.

10. If an Interrogatory cannot be answered in full, answer to the fullest extent possible and specify all reasons for the inability to answer in full.

11. Each Interrogatory should be answered separately and in writing and your responses should correspond with the numbered Interrogatory provided below.

INTERROGATORIES

12. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses, and indicate who has possession of such statements. This should also include parties, individuals, businesses, attorneys and others that were/are involved in any litigation regarding any subject related to the Complaint and other pleadings filed in this case. For each person identified herein, set forth either a summary sufficient to inform the other party of the important facts know to or observed by such witness, or provide a copy of any written or recorded statements taken from such witness.

13. Set forth a list of photographs, plats, sketches, video imagery (whether digital, videotape, analog or other format), reports, inspections, contracts, bids, financial records, correspondence, charts, diagrams or any other prepared documents or tangible things in possession of the party that relate to the claim or defense in the case.

14. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party. Do not provide general allegations of

damages as this Interrogatory seeks a specific amount of any and all damages sought against Plaintiff/Counter-Defendant in the case at bar.

15. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of the case as well as all subject(s) or area(s) of expertise that each such witness will be tendered as an expert.

16. Describe with specificity each and every instance that you claim in Paragraph 45, subpart a) of your Answer and Counterclaim that Plaintiff/Counter-Defendant allegedly acted with "negligence and recklessness . . . In failing to warn the Plaintiff of its debt ratio[.]"

17. State the legal and factual bases for your claim that EGIS's alleged injuries are due to and proximately caused by the alleged actions of Plaintiff/Counter-Defendant set forth in Paragraph 45, subpart a) of your Answer and Counterclaim.

18. Describe with specificity each and every instance that you claim in Paragraph 45, subpart b) of your Answer and Counterclaim that Plaintiff/Counter-Defendant allegedly acted with "negligence and recklessness . . . In failing to properly hire and/or supervise the agents and appraisers who evaluated the property[.]"

19. State the legal and factual bases for your claim that EGIS's alleged injuries are due to and proximately caused by the alleged actions of Plaintiff/Counter-Defendant set forth in Paragraph 45, subpart b) of your Answer and Counterclaim.

20. Describe with specificity each and every instance that you claim in Paragraph 45, subpart c) of your Answer and Counterclaim that Plaintiff/Counter-Defendant allegedly acted with "negligence and recklessness . . . In failing to properly supervise and train its agents and employees[.]"

21. State the legal and factual bases for your claim that EGIS's alleged injuries are due to and proximately caused by the alleged actions of Plaintiff/Counter-Defendant set forth in Paragraph 45, subpart c) of your Answer and Counterclaim.

22. State the legal and factual basis for your claim that you are entitled to treble damages, attorney's fees, and costs, as stated in the WHEREFORE clause of your Complaint.

23. Describe with specificity each and every instance that you claim in Paragraph 3 of your Answer and Counterclaim that "Defendant has requested verification of the account, but has not received same[.]"

24. Identify the alleged misrepresentations referenced in your Answer and Counterclaim at Paragraph 4.

25. State the legal and factual bases for your claim in Paragraph 4 of your Answer and Counterclaim that Plaintiff/Counter-Defendant and its agents allegedly have a duty to "to report the appraisal results and provide copies of those appraisal reports to EGIS[.]"

26. State the legal and factual bases for your claim in Paragraph 4 of your Answer and Counterclaim that Plaintiff/Counter-Defendant and its agents have allegedly "breached their fiduciary duties to EGIS in failing to report the appraisal results and provide copies of those appraisal reports to EGIS[.]"

27. State the legal and factual bases for your claim in Paragraph 9 of your Answer and Counterclaim that Plaintiff/Counter-Defendant allegedly "knew or should have know[n] that that EGIS would be unable to meet the payments under the current loan, and knew or should have known that the property was diminishing in value far quicker than surrounding properties[.]"

28. State the legal and factual bases for your claim in Paragraph 9 of your Answer and Counterclaim that Plaintiff/Counter-Defendant allegedly "knew or should have known . . . that EGIS would be unable to convert the loan, and had no reasonable hope of being able to afford or refinance the loan given the appraisals[.]"

29. Describe with specificity each and every instance that you claim in Paragraph 10 of your Answer and Counterclaim that EGIS or the Menkhauses relied on "a series of appraisals" which Plaintiff/Counter-Defendant allegedly had on the subject property.

30. State the legal and factual bases for your claim in Paragraph 10 of your Answer and Counterclaim that "these appraisals were greatly inflated."

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Betsy Johnson Burn

SC Bar No. 16680

E-Mail: betsy.burn@nelsonmullins.com

Rachel M. Flynn

SC Bar No. 78685

E-Mail: rachel.flynn@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Wachovia Bank, National Association

Columbia, South Carolina

9-22, 2010.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	SIXTH JUDICIAL CIRCUIT
Wachovia Bank, National Association,	)	Civil Action No. 2010-CP-29-196
	)	
Plaintiff,	)	
	)	
vs.	)	<u>PLAINTIFF WACHOVIA BANK,</u>
	)	<u>NATIONAL ASSOCIATION'S</u>
EGIS 521, LLC, Peter James	)	<u>FIRST SET OF</u>
Menkhaus, Stephanie L. Menkhaus,	)	<u>INTERROGATORIES TO</u>
Nancy T. Jenkins, Individually and as	)	<u>DEFENDANTS MARK A.</u>
Trustee of the Don A. Jenkins T/U/W	)	<u>CIMINELLI, MARK E.</u>
and as Personal Representative of the	)	<u>CARPENTER, AND RONALD C.</u>
Estate of Don A. Jenkins, Bellsouth	)	<u>MARIELLO</u>
Carolina PCS, LP, n/k/a Bellsouth	)	
Mobility DCS, LP, Commercial	)	
Products, Mark A. Ciminelli, Mark E.	)	
Carpenter, Ronald C. Mariello,	)	
	)	
Defendants.	)	

TO: F. CRAIG WILKERSON, JR., ATTORNEY FOR DEFENDANT:

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, Wachovia Bank, National Association ("Plaintiff/Counter-Defendant" or "Wachovia"), hereby serves the following Interrogatories upon Mark A. Ciminelli, Mark E. Carpenter, and Ronald C. Mariello (collectively "Defendants/Counter-Plaintiffs" or the "Guarantors").

DEFINITIONS

1. A "document" whether singular or plural shall mean any and all original copies by whatever means, written, printed, typed, recorded or other graphic matter of any kind or nature and all mechanical or electrical sound recordings and any copies and transcriptions thereof, and all computer data files in the possession, custody and/or control of you or your counsel or known by them to exist.

2. "Identify" when used with reference to an individual shall mean to state his or her full name, present or last known address, present or last known position in a business affiliation, and employer, title, and position of the time in question.

3. "Identify" when used with reference to a document means to state the date, author, type of document (e.g. letter, memorandum, telegram, chart, note, application, etc.) or other means of identification, and its present location and custodian. If any such document is no longer in your possession or subject to their control, state what disposition was made of the document.

4. "Person" or "individual" whether singular or plural, shall include natural persons, corporations, firms, partnerships, proprietorships, associations, and/or organizations and entities.

5. "You" or "your" shall mean Defendants.

INSTRUCTIONS

6. These Interrogatories are continuing in nature. Should you acquire additional information responsive to these Interrogatories after serving answers hereto, the answers shall be supplemented so as to provide such additional information.

7. If a privilege not to answer is claimed, identify each matter as to which the privilege is claimed, the nature of the privilege and the legal and factual basis for such claim.

8. If a refusal to answer an Interrogatory is stated on the grounds of burdensomeness, identify the number and nature of the documents needed to be served, the location of the documents and the number of person hours and amount of cost required to conduct the search.

9. Answer each Interrogatory on the basis of the entire knowledge of you, including without limitation information in the possession of your consultants, investigators, representatives, agents and attorneys.

10. If an Interrogatory cannot be answered in full, answer to the fullest extent possible and specify all reasons for the inability to answer in full.

11. Each Interrogatory should be answered separately and in writing and your responses should correspond with the numbered Interrogatory provided below.

INTERROGATORIES

12. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses, and indicate who has possession of such statements. This should also include parties, individuals, businesses, attorneys and others that were/are involved in any litigation regarding any subject related to the Complaint and other pleadings filed in this case. For each person identified herein, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witness.

13. Set forth a list of photographs, plats, sketches, video imagery (whether digital, videotape, analog or other format), reports, inspections, contracts, bids, financial records, correspondence, charts, diagrams or any other prepared documents or tangible things in possession of the party that relate to the claim or defense in the case.

14. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party. Do not provide general allegations of

damages as this Interrogatory seeks a specific amount of any and all damages sought against Plaintiff/Counter-Defendant in the case at bar.

15. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of the case as well as all subject(s) or area(s) of expertise that each such witness will be tendered as an expert.

16. Describe with specificity each and every instance that you claim in Paragraph 45, subpart a) of your Answer and Counterclaim that Plaintiff/Counter-Defendant allegedly acted with "negligence and recklessness . . . In failing to warn the Plaintiff of its debt ratio[.]"

17. State the legal and factual bases for your claim that the Guarantors' alleged injuries are due to and proximately caused by the alleged actions of Plaintiff/Counter-Defendant set forth in Paragraph 45, subpart a) of your Answer and Counterclaim.

18. Describe with specificity each and every instance that you claim in Paragraph 45, subpart b) of your Answer and Counterclaim that Plaintiff/Counter-Defendant allegedly acted with "negligence and recklessness . . . In failing to properly hire and/or supervise the agents and appraisers who evaluated the property[.]"

19. State the legal and factual bases for your claim that the Guarantors' alleged injuries are due to and proximately caused by the alleged actions of Plaintiff/Counter-Defendant set forth in Paragraph 45, subpart b) of your Answer and Counterclaim.

20. Describe with specificity each and every instance that you claim in Paragraph 45, subpart c) of your Answer and Counterclaim that Plaintiff/Counter-Defendant allegedly acted with "negligence and recklessness . . . In failing to properly supervise and train its agents and employees[.]"

21. State the legal and factual bases for your claim that the Guarantors' alleged injuries are due to and proximately caused by the alleged actions of Plaintiff/Counter-Defendant set forth in Paragraph 45, subpart c) of your Answer and Counterclaim.

22. State the legal and factual basis for your claim that you are entitled to treble damages, attorney's fees, and costs, as stated in the WHEREFORE clause of your Complaint.

23. Describe with specificity each and every instance that you claim in Paragraph 3 of your Answer and Counterclaim that "Defendant has requested verification of the account, but has not received same[.]"

24. Identify the alleged misrepresentations referenced in your Answer and Counterclaim at Paragraph 4.

25. State the legal and factual bases for your claim in Paragraph 4 of your Answer and Counterclaim that Plaintiff/Counter-Defendant and its agents allegedly have a duty to "to report the appraisal results and provide copies of those appraisal reports to EGIS[.]"

26. State the legal and factual bases for your claim in Paragraph 4 of your Answer and Counterclaim that Plaintiff/Counter-Defendant and its agents have allegedly "breached their fiduciary duties to EGIS in failing to report the appraisal results and provide copies of those appraisal reports to EGIS[.]"

27. State the legal and factual bases for your claim in Paragraph 9 of your Answer and Counterclaim that Plaintiff/Counter-Defendant allegedly "knew or should have know[n] that that EGIS would be unable to meet the payments under the current loan, and knew or should have known that the property was diminishing in value far quicker than surrounding properties[.]"

28. State the legal and factual bases for your claim in Paragraph 9 of your Answer and Counterclaim that Plaintiff/Counter-Defendant allegedly "knew or should have known . . . that EGIS would be unable to convert the loan, and had no reasonable hope of being able to afford or refinance the loan given the appraisals[.]"

29. Describe with specificity each and every instance that you claim in Paragraph 10 of your Answer and Counterclaim that EGIS or the Menkhauses relied on "a series of appraisals" which Plaintiff/Counter-Defendant allegedly had on the subject property.

30. State the legal and factual bases for your claim in Paragraph 10 of your Answer and Counterclaim that "these appraisals were greatly inflated."

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Betsy Johnson Burn

SC Bar No. 16680

E-Mail: betsy.burn@nelsonmullins.com

Rachel M. Flynn

SC Bar No. 78685

E-Mail: rachel.flynn@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Wachovia Bank, National Association

Columbia, South Carolina

9-22, 2010.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER) SIXTH JUDICIAL CIRCUIT

Wachovia Bank, National Association,) Civil Action No. 2010-CP-29-196
)

Plaintiff,)
)

vs.)

**PLAINTIFF WACHOVIA BANK,
NATIONAL ASSOCIATION'S
FIRST REQUESTS TO PRODUCE
TO DEFENDANT EGIS, LLC**

EGIS 521, LLC, Peter James)
Menkhaus, Stephanie L. Menkhaus,)
Nancy T. Jenkins, Individually and as)
Trustee of the Don A. Jenkins T/U/W)
and as Personal Representative of the)
Estate of Don A. Jenkins, Bellsouth)
Carolina PCS, LP, n/k/a Bellsouth)
Mobility DCS, LP, Commercial)
Products, Mark A. Ciminelli, Mark E.)
Carpenter, Ronald C. Mariello,)
)

Defendants.)
)

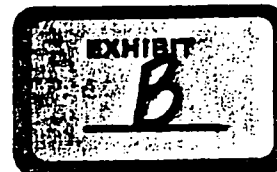
TO: F. CRAIG WILKERSON, JR., ATTORNEY FOR DEFENDANT:

Pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, Wachovia Bank, National Association ("Plaintiff/Counter-Defendant" or "Wachovia"), hereby requests that EGIS 521, LLC ("Defendant/Counter-Plaintiff" or "EGIS") produce and permit the inspection, copying and/or photographing of:

DEFINITIONS AND INSTRUCTIONS

As used herein, the following terms shall have the meanings set forth below:

1. The terms "you" and "your" mean the party or parties to which these requests for production are addressed, including its agents, attorneys, and all other persons acting or purporting to act on its behalf. If that party is a limited liability company, the terms "you" and "your" also include the party's members, affiliates, predecessors, present or former officers,



directors, owners, agents, attorneys, and accountants as well as each partnership in which it is a partner, and includes any other person, acting or purporting to act on its behalf.

2. The term "person" or "persons" means any natural person, individual, proprietorship, partnership, corporation, association, organization, joint venture, firm, other business enterprise, governmental body, group of natural persons or other entity and includes any other person acting on behalf of a person.

3. The terms "document" or "documents" mean and include any written or graphic matter or other means of preserving thought or expression and all tangible things from which information can be processed or transcribed, including the originals and native forms of electronic documents, and any draft and all non-identical copies regardless of origin or location, whether different from the original by reason of any notation made on such copy or otherwise, including, but not limited to, correspondence, memoranda, handwritten notes, instructions, messages (including, but not limited to, reports of telephone conversations or conferences), letters, telegrams, teletype, telefax, bulletins, papers, meetings or other communications, interoffice and intraoffice telephone calls, diaries, chronological data, indices, minutes, books, reports, records, studies, summaries, analyses, pamphlets, booklets, circulars, bulletins, printed matter, charts, tables, graphs, ledgers, working papers, invoices, worksheets, receipts, returns, computer printouts, prospectuses, financial statements, schedules, affidavits, contracts, cancelled checks, statements, transcripts, statistics, surveys, magazine or newspaper articles, periodicals, releases (and any and all drafts, alterations and modifications, changes and amendments of any of the foregoing), graphic or aural records or representations of any kind (including without limitation photographs, microfiche, microfilm, videotape, tape recording, wire recording, transcript of recordings, records and motion

pictures) and electronic, mechanical or electric records or representations of any kind (including without limitation tapes, cassettes, discs, records, data sheets and data processing cards) and any other compilations from which information can be obtained and translated if necessary, or any written, recorded, transcribed, punched, taped, filed or graphic matter, however produced or reproduced, to which you have or had access.

4. The term "all documents" means every document or group of documents as above defined that are known to you or that can be located or discovered by reasonably diligent efforts.

5. The term "communication" means any oral or written statement, dialogue, colloquy, discussion, conversation, agreement, or expression of any kind.

6. When producing the documents, please keep all documents segregated by the file in which the documents are contained and indicate the name of the file in which the documents are contained and the name of the documents being produced.

7. In the event such file(s) or document(s) has (have) been removed for the purposes of this action or for some other purpose, please state the name and address of the person who removed the file, the title of the file and each subfile, if any, maintained within the file, and the present location of the file.

8. If a privilege not to produce is claimed, identify each matter as to which the privilege is claimed, the nature of the privilege and the legal and factual basis for such claim.

9. If a refusal to produce a document is stated on the grounds of burdensomeness, identify the number and nature of the documents needed to be searched, the location of the documents, and the number of person hours and amount of cost required to conduct the search.

10. If any of the documents requested herein have been lost or destroyed since their creation, identify each of the missing documents, state when, where, how and by whom the documents were lost or destroyed and identify, by name and address, the person who last had custody of the missing documents.

11. As used herein, the singular shall include the plural, the plural shall include the singular, and the masculine, feminine, and neuter shall include each of the other genders.

12. The words "and" as well as "or" shall be construed disjunctively as well as conjunctively. The word "all" means "any and all." The word "each" means "each and every," and the word "every" means "each and every."

13. These Requests for Production of documents are continuing in nature. Should you acquire additional information responsive to these Requests for Production after serving their answers hereto, the documents shall be supplemented so as to provide such additional information.

14. Answer each request to produce on the basis of the entire knowledge of you, including without limitation, information in the possession of your consultants, investigators, representatives, agent, and attorneys.

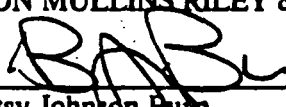
15. If a request to produce cannot be performed in full, produce to the fullest extent possible and specify all reasons for the inability to produce in full.

16. In addition to production of the information requested, written responses to these requests must be provided within the time specified by Rule 34 of the South Carolina Rules of Civil Procedure.

REQUESTS FOR PRODUCTION

17. Produce any and all documents related to the claims or defenses set forth in your Answer and Counterclaim, including but not limited to any and all documents or materials identified in response to Interrogatories.
18. Produce any other documents or materials which you intend to introduce in the trial of this case.
19. Produce all documents and tangible things in your possession related in any way to the loans and/or property at issue in this matter.
20. Produce all documents or tangible things sent to you or from you to any other party in this matter, their agents, representatives, or attorneys.
21. Produce all financial records, including but not limited to bank statements, balance sheets, general ledgers and tax returns of EGIS 521, LLC.
22. Produce all corporate governance documents of EGIS 521, LLC.
23. Produce all contracts or other written agreements between you and any other defendant in this case.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Betsy Johnson Burn

SC Bar No. 16680

E-Mail: betsy.burn@nelsonmullins.com

Rachel M. Flynn

SC Bar No. 78685

E-Mail: rachel.flynn@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Wachovia Bank, National Association

Columbia, South Carolina

9-22, 2010

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER) SIXTH JUDICIAL CIRCUIT

Wachovia Bank, National Association,) Civil Action No. 2010-CP-29-196
)

Plaintiff,)
)

vs.)

EGIS 521, LLC, Peter James)
Menkhaus, Stephanie L. Menkhaus,)
Nancy T. Jenkins, Individually and as)
Trustee of the Don A. Jenkins T/U/W)
and as Personal Representative of the)
Estate of Don A. Jenkins, Bellsouth)
Carolina PCS, LP, n/k/a Bellsouth)
Mobility DCS, LP, Commercial)
Products, Mark A. Ciminelli, Mark E.)
Carpenter, Ronald C. Mariello,)

Defendants.)
)

PLAINTIFF WACHOVIA BANK,
NATIONAL ASSOCIATION'S
FIRST REQUESTS TO PRODUCE
TO DEFENDANTS MARK A.
CIMINELLI, MARK E.
CARPENTER, AND RONALD C.
MARIELLO

TO: F. CRAIG WILKERSON, JR., ATTORNEY FOR DEFENDANT:

Pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, Wachovia Bank, National Association ("Plaintiff/Counter-Defendant" or "Wachovia"), hereby requests that Mark A. Ciminelli, Mark E. Carpenter, and Ronald C. Mariello (collectively "Defendants/Counter-Plaintiffs" or the "Guarantors") produce and permit the inspection, copying and/or photographing of:

DEFINITIONS AND INSTRUCTIONS

As used herein, the following terms shall have the meanings set forth below:

1. The terms "you" and "your" mean the party or parties to which these requests for production are addressed, including its agents, attorneys, and all other persons acting or purporting to act on its behalf. If that party is a limited liability company, the terms "you" and

"your" also include the party's members, affiliates, predecessors, present or former officers, directors, owners, agents, attorneys, and accountants as well as each partnership in which it is a partner, and includes any other person, acting or purporting to act on its behalf.

2. The term "person" or "persons" means any natural person, individual, proprietorship, partnership, corporation, association, organization, joint venture, firm, other business enterprise, governmental body, group of natural persons or other entity and includes any other person acting on behalf of a person.

3. The terms "document" or "documents" mean and include any written or graphic matter or other means of preserving thought or expression and all tangible things from which information can be processed or transcribed, including the originals and native forms of electronic documents, and any draft and all non-identical copies regardless of origin or location, whether different from the original by reason of any notation made on such copy or otherwise, including, but not limited to, correspondence, memoranda, handwritten notes, instructions, messages (including, but not limited to, reports of telephone conversations or conferences), letters, telegrams, teletype, telefax, bulletins, papers, meetings or other communications, interoffice and intraoffice telephone calls, diaries, chronological data, indices, minutes, books, reports, records, studies, summaries, analyses, pamphlets, booklets, circulars, bulletins, printed matter, charts, tables, graphs, ledgers, working papers, invoices, worksheets, receipts, returns, computer printouts, prospectuses, financial statements, schedules, affidavits, contracts, cancelled checks, statements, transcripts, statistics, surveys, magazine or newspaper articles, periodicals, releases (and any and all drafts, alterations and modifications, changes and amendments of any of the foregoing), graphic or aural records or representations of any kind (including without limitation photographs, microfiche, microfilm,

videotape, tape recording, wire recording, transcript of recordings, records and motion pictures) and electronic, mechanical or electric records or representations of any kind (including without limitation tapes, cassettes, discs, records, data sheets and data processing cards) and any other compilations from which information can be obtained and translated if necessary, or any written, recorded, transcribed, punched, taped, filed or graphic matter, however produced or reproduced, to which you have or had access.

4. The term "all documents" means every document or group of documents as above defined that are known to you or that can be located or discovered by reasonably diligent efforts.

5. The term "communication" means any oral or written statement, dialogue, colloquy, discussion, conversation, agreement, or expression of any kind.

6. When producing the documents, please keep all documents segregated by the file in which the documents are contained and indicate the name of the file in which the documents are contained and the name of the documents being produced.

7. In the event such file(s) or document(s) has (have) been removed for the purposes of this action or for some other purpose, please state the name and address of the person who removed the file, the title of the file and each subfile, if any, maintained within the file, and the present location of the file.

8. If a privilege not to produce is claimed, identify each matter as to which the privilege is claimed, the nature of the privilege and the legal and factual basis for such claim.

9. If a refusal to produce a document is stated on the grounds of burdensomeness, identify the number and nature of the documents needed to be searched, the location of the documents, and the number of person hours and amount of cost required to conduct the search.

10. If any of the documents requested herein have been lost or destroyed since their creation, identify each of the missing documents, state when, where, how and by whom the documents were lost or destroyed and identify, by name and address, the person who last had custody of the missing documents.

11. As used herein, the singular shall include the plural, the plural shall include the singular, and the masculine, feminine, and neuter shall include each of the other genders.

12. The words "and" as well as "or" shall be construed disjunctively as well as conjunctively. The word "all" means "any and all." The word "each" means "each and every," and the word "every" means "each and every."

13. These Requests for Production of documents are continuing in nature. Should you acquire additional information responsive to these Requests for Production after serving their answers hereto, the documents shall be supplemented so as to provide such additional information.

14. Answer each request to produce on the basis of the entire knowledge of you, including without limitation, information in the possession of your consultants, investigators, representatives, agent, and attorneys.

15. If a request to produce cannot be performed in full, produce to the fullest extent possible and specify all reasons for the inability to produce in full.

16. In addition to production of the information requested, written responses to these requests must be provided within the time specified by Rule 34 of the South Carolina Rules of Civil Procedure

REQUESTS FOR PRODUCTION

17. Produce any and all documents related to the claims or defenses set forth in your Answer and Counterclaim, including but not limited to any and all documents or materials identified in response to Interrogatories.

18. Produce any other documents or materials which you intend to introduce in the trial of this case.

19. Produce all documents and tangible things in your possession related in any way to the loans and/or property at issue in this matter.

20. Produce all documents or tangible things sent to you or from you to any other party in this matter, their agents, representatives, or attorneys.

21. Produce all contracts or other written agreements between you and any other defendant in this case.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Attorneys for Wachovia Bank, National Association

Columbia, South Carolina

9-22, 2010.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER) SIXTH JUDICIAL CIRCUIT

Wachovia Bank, National Association,) Civil Action No. 2010-CP-29-196
)

Plaintiff,)
)

vs.)

PLAINTIFF WACHOVIA BANK,
NATIONAL ASSOCIATION'S
RESPONSES TO
DEFENDANT EGIS, LLC'S
FIRST INTERROGATORIES

EGIS 521, LLC, Peter James)
Menkhaus, Stephanie L. Menkhaus,)
Nancy T. Jenkins, Individually and as)
Trustee of the Don A. Jenkins T/U/W)
and as Personal Representative of the)
Estate of Don A. Jenkins, Bellsouth)
Carolina PCS, LP, n/k/a Bellsouth)
Mobility DCS, LP, Commercial)
Products, Mark A. Ciminelli, Mark E.)
Carpenter, Ronald C. Mariello,)
)

Defendants.)
)

Plaintiff Wachovia Bank, National Association ("Plaintiff/Counter-Defendant" or "Wachovia") responds to the Interrogatories of Defendant/Counter-Plaintiff EGIS 521, LLC ("Defendant/Counter-Plaintiff" or "EGIS") as follows:

GENERAL OBJECTIONS

1. Plaintiff/Counter-Defendant objects to each Interrogatory to the extent that it seeks information that constitutes, evidences, or reflects communications between Plaintiff/Counter-Defendant and its attorneys on the grounds that such communication is privileged and not subject to discovery.

2. Plaintiff/Counter-Defendant objects to each Interrogatory to the extent that it seeks information that constitutes, evidences, or reflects trial preparation materials or work product of Wachovia or its representatives, agents, or attorneys on

the grounds that such materials are immune from discovery.

3. Plaintiff/Counter-Defendant objects to each Interrogatory to the extent it exceeds the scope of Rules 26 and 33 of the South Carolina Rules of Civil Procedure.

4. Plaintiff/Counter-Defendant objects to disclosing any confidential or proprietary information in response to these Interrogatories except in strict accordance with an appropriate Protective Order.

5. Plaintiff/Counter-Defendant objects to each Interrogatory to the extent that it seeks information already available or equally available to Defendant/Counter-Plaintiff.

6. Plaintiff/Counter-Defendant objects to each Interrogatory to the extent that it seeks to obtain information regarding the identity or communications with consulting experts who are not expected to testify at trial.

7. Plaintiff/Counter-Defendant objects to each Interrogatory to the extent that it seeks electronic discovery, specifically including but not limited to any request for native documents or metadata.

8. Plaintiff/Counter-Defendant objects to each Interrogatory to the extent that it seeks information without limitation as to scope, including limitation on time period. Unless otherwise stated or indicated in responses hereunder, Plaintiff/Counter-Defendant construes the relevant time period for these responses to be through the date on which Defendant/Counter-Plaintiff's lawsuit was filed.

9. Plaintiff/Counter-Defendant's objections and answers are premised upon information and facts presently known to Plaintiff/Counter-Defendant. Further case

investigation and discovery in this matter may yield further information affecting these responses. Plaintiff/Counter-Defendant will supplement its responses only as required by the South Carolina Rules of Civil Procedure.

ANSWERS AND SPECIFIC OBJECTIONS

1. State the name, current business address and employment title of each person providing answers to these Requests.

Answer: Plaintiff/Counter-Defendant objects to this Interrogatory because it seeks attorney-client privileged and work product protected information. Subject to the foregoing objection, Plaintiff/Counter-Defendant responds by stating that information used to answer these Interrogatories has been derived from the documents in Defendant/Counter-Plaintiff's loan file produced in response to Defendant/Counter-Plaintiff's First Request for Production and the Pleadings.

2. State the name, current business address and employment title of all persons, currently or formerly employed by you, who have knowledge of matters alleged in the Complaint and Counterclaim.

Answer: Plaintiff/Counter-Defendant is not aware of persons currently or formerly employed by Plaintiff/Counter-Defendant who have knowledge of matters alleged in the Complaint and Counterclaim other than Plaintiff/Counter-Defendant or those identified in the documents produced in response to Defendant/Counter-Plaintiff's First Request to Produce.

3. For each person listed in Interrogatory 2, state the matters known to that person. If you have a recorded statement (written or oral) of any person identified,

please describe it with sufficient particularity that it can be requested for inspection or production.

Answer: See Response to Interrogatory 2. Plaintiff/Counter-Defendant is not aware of any written or recorded statements.

4. Identify or describe all correspondence or other written documents, notes, memoranda and information stored in a computer, or otherwise, which in any way relate to the matters alleged in the Complaint and Counterclaim.

Answer: Plaintiff/Counter-Defendant refers Defendant/Counter-Plaintiff to the loan file available for inspection and copying in response to Defendant/Counter-Plaintiff's First Requests to Produce, subject to the terms of the Protective Order entered into between the parties. To the extent this Interrogatory seeks additional information, Plaintiff/Counter-Defendant objects on the grounds that it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff/Counter-Defendant also objects to the extent that it seeks confidential, attorney-client privileged, or work product protected information.

5. Describe with particularity Wachovia Bank, N.A.'s standard operating procedures for the extension of loans such as the one evidenced by the Note, which is the subject of this action.

Answer: Plaintiff/Counter-Defendant objects to this Request as overly vague, overly broad, unduly burdensome, and outside the scope of Rule 26 in that it is unlikely to lead to the discovery of admissible evidence. Plaintiff/Counter-Defendant also objects to the extent that it seeks confidential, attorney-client privileged, or work product protected information.

6. Identify the Wachovia Bank, N.A. employee who is/was responsible for supervision, oversight and/or administration of the Note.

Answer: David Maynard and James Gragnolati c/o Betsy Johnson Burn, Nelson Mullins, PO Box 11070, Columbia, SC 29211, are the two bank employees that have been principally assigned to this lending relationship.

7. Give the names and addresses of persons known to you to be witnesses concerning the facts of the case; indicate whether or not recorded statements have been taken from the witnesses; indicate who has possession of such statements; and, if you will do so without a request to produce, provide a copy of said statements with your answer.

Answer: Plaintiff/Counter-Defendant is aware of no other witnesses to the facts of the case other than the parties and the two bank employees stated above, and is aware of no written or recorded statements.

8. Set forth a list of photographs, plats, sketches or other prepared documents in your possession that relate to the claim or the defense in the case; and, if you will do so without a request to produce, provide a copy of said statements with your answers.

Answer: See Responses to Defendant/Counter-Plaintiff's Requests to Produce.

9. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

Answer: None known at this time.

10. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by Wachovia Bank, N.A.

Answer: See Foreclosure Complaint for statement of itemized damages known at this time, plus accruing interest, attorneys' fees and costs.

11. List the names and addresses of any expert witnesses whom you propose to use as a witness at the trial of the case.

Answer: None known at this time. Plaintiff/Counter-Defendant reserves the right to supplement.

12. For each person known to you to be a witness concerning the facts of the case, set forth either a summary sufficient to inform EGIS of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

Answer: The witnesses, who are the parties to this matter, are aware of the facts and circumstances related to the loan transactions at issue in this case.

13. Set forth EGIS' Debt Ratio calculations for any and all loans with Wachovia, Bank, N.A. to include the construction loan and the conventional loan applications, and identify all documents used to compute the debt ratio.

Answer: Plaintiff/Counter-Defendant objects to this Interrogatory because the term "Debt Ratio calculations" is not defined in Defendant/Counter-Plaintiff's Interrogatories, and is therefore overly vague. Plaintiff/Counter-Defendant further objects to this Interrogatory because it is overly broad, unduly burdensome, and outside the scope of Rule 26 in that it is not reasonably calculated to lead to the discovery of

admissible evidence. Plaintiff/Counter-Defendant also objects to this Interrogatory to the extent it seeks information that is attorney-client privileged, or protected by the work product doctrine.

14. Set forth the internal procedures for Wachovia Bank, N.A. for approving loans, identifying any written instructions for same.

Answer: Plaintiff/Counter-Defendant objects to this Request as overly vague, overly broad, unduly burdensome, and outside the scope of Rule 26 in that it is unlikely to lead to the discovery of admissible evidence. Plaintiff/Counter-Defendant also objects to the extent that it seeks confidential, attorney-client privileged, or work product protected information.

15. Identify any and all appraisers who performed appraisals on the property which is the subject of this action and set forth whether those appraisers were agents of the bank.

Answer: Plaintiff/Counter-Defendant objects to this Request as outside the scope of Rule 26 in that it is unlikely to lead to the discovery of admissible evidence. Subject to the foregoing objections, Plaintiff/Counter-Defendant responds that any such appraisers were not agents of the bank. Subject to these objections and pursuant to the terms of the Protective Order entered into between the parties, Plaintiff/Counter-Defendant is producing copies of the appraisals, which lists the name of each applicable appraiser.

16. Set forth any loan officer bank officer, employee, agent, or independent contractor, to include previous employees of Wachovia Bank, N.A., that worked on the EGIS file through the application process.

Answer: Plaintiff/Counter-Defendant is not aware of persons currently or formerly employed by Plaintiff/Counter-Defendant who worked on the EGIS file through the application process other than Plaintiff/Counter-Defendant or those identified in the documents produced in response to Defendant/Counter-Plaintiff's First Request to Produce.

17. Set forth all internal review processes for consumer loans (including construction loans) with Wachovia Bank, N.A.

Answer: Plaintiff/Counter-Defendant objects to this Request as overly vague, overly broad, unduly burdensome, and outside the scope of Rule 26 in that it is unlikely to lead to the discovery of admissible evidence. Plaintiff/Counter-Defendant also objects to the extent that it seeks confidential, attorney-client privileged, or work product protected information.

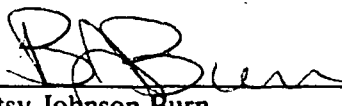
18. Identify and provide all financial records pertaining to the EGIS applications (s) with Wachovia Bank, N.A.

Answer: See Responses to First Requests to Produce.

19. Identify and set forth Wachovia Bank, N.A.'s policies for issuing construction loans, and the process for converting a construction loan into a conventional fixed loan as well as the policies for Note Rider or Note Amendments.

Answer: Plaintiff/Counter-Defendant objects to this Request as overly vague, overly broad, unduly burdensome, and outside the scope of Rule 26 in that it is unlikely to lead to the discovery of admissible evidence. Plaintiff/Counter-Defendant also objects to the extent that it seeks confidential, attorney-client privileged, or work product protected information.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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Attorneys for Wachovia Bank, National Association

Columbia, South Carolina

10-11, 2010.

STATE OF SOUTH CAROLINA)
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Wachovia Bank, National Association,) Civil Action No. 2010-CP-29-196
)

Plaintiff,)
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vs.)

PLAINTIFF WACHOVIA BANK,
NATIONAL ASSOCIATION'S
RESPONSES TO
DEFENDANT EGIS, LLC'S
REQUESTS TO PRODUCE

EGIS 521, LLC, Peter James)
Menkhaus, Stephanie L. Menkhaus,)
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Trustee of the Don A. Jenkins T/U/W)
and as Personal Representative of the)
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Mobility DCS, LP, Commercial)
Products, Mark A. Ciminelli, Mark E.)
Carpenter, Ronald C. Mariello,)
)

Defendants.)
)

TO: F. CRAIG WILKERSON, JR., ATTORNEY FOR DEFENDANT:

Comes now Wachovia Bank, National Association ("Plaintiff/Counter-Defendant" or "Wachovia"), Plaintiff and Counter-Defendant in the above-captioned matter and in time required by law, serves and files its Responses to Defendant/Counter-Plaintiff's First Requests to Produce and says:

GENERAL OBJECTIONS

A. All responses to Defendant/Counter/Plaintiff's First Requests for Production to Plaintiff/Counter-Defendant are subject to Plaintiff/Counter-Defendant's General Objections as set forth herein.

B. Plaintiff/Counter-Defendant objects to each Request for Production to the extent it seeks information pertaining to communications between Plaintiff/Counter-

Defendant and their legal counsel because such communications are privileged and are not subject to discovery. Plaintiff/Counter-Defendant further objects to each request to the extent it seeks information concerning or resulting from preparation for litigation or for trial.

C. Plaintiff/Counter-Defendant objects to each Request for Production to the extent it purports to require Plaintiff/Counter-Defendant to provide any information other than that which is properly discoverable under the South Carolina Rules of Civil Procedure.

D. Plaintiff/Counter-Defendant objects to producing any confidential information in response to these Requests for Production except in strict accordance with an appropriate Protective Order.

E. Unless otherwise noted, Plaintiff/Counter-Defendant objects to responding to Requests for Production seeking information or documents which do not specify an operative date or time period or which request information of documents before the alleged incidents at issue in this litigation.

F. Plaintiff/Counter-Defendant objects to any request that documents be produced in a particular format, order, place, or time.

G. Plaintiff/Counter-Defendant's objections and responses are premised upon information and facts presently known to Plaintiff/Counter-Defendant. Discovery and case investigation in this matter may yield further information affecting these responses. Plaintiff/Counter-Defendant will supplement these responses as required by the South Carolina Rules of Civil Procedure.

RESPONSES AND SPECIFIC OBJECTIONS

1. Any and all documents, records, bills, contracts, correspondence, reports of any type, invoices, books, canceled checks, statements, memoranda, notations, photographs, moving pictures, drawings, maps, diagrams, plats, models or other materials or documentation pertaining to the events which are the subject matter of this action.

RESPONSE: Plaintiff/Counter-Defendant objects to this Request to the extent that it seeks confidential, attorney-client privileged, or work product protected information. Subject to the foregoing and general objections, Plaintiff/Counter-Defendant will make its loan file available for inspection at a mutually convenient place and time.

2. Any and all documents, records, bills, contracts, correspondence, reports of any type, invoices, books, canceled checks, statements, memoranda, notations, photographs, moving pictures, drawings, maps, diagrams, plats, models or other materials or documentation which the Plaintiff intends to rely upon to support the allegations of the within case and/or which the Plaintiff intends to offer into evidence as exhibits at the time of the trial.

RESPONSE: See Response to Request Number 1. Discovery is ongoing and Plaintiff/Counter-Defendant will supplement this Response as required by the South Carolina Rules of Civil Procedure.

3. Any and all documents, records, bills, contracts, correspondence, reports of any type, invoices, books, canceled checks, statements, memoranda, notations, photographs, moving pictures, drawings, maps, diagrams, plats, models or other

materials or documentation which the Plaintiff used as a basis in establishing the claim and in calculating the damages sought in the Plaintiff's claim.

RESPONSE: See Response to Request Number 1.

4. Any and all documents, records, bills, contracts, correspondence, reports of any type, invoices, books, canceled checks, statements, memoranda, notations, photographs, moving pictures, drawings, maps, diagrams, plats, models or other materials or documentation which are within the possession of the Plaintiff or Plaintiff's attorney.

RESPONSE: See Response to Request Number 1.

5. Each document identified in Plaintiff's responses to Defendant, EGIS, LLC's Interrogatories.

RESPONSE: Plaintiff/Counter-Defendant objects to this Request to the extent that it seeks confidential, attorney-client privileged, or work product protected information. Subject to the foregoing and general objections, however, Plaintiff/Counter-Defendant will make its loan file available for inspection at a mutually convenient place and time.

6. Produce the entire EGIS, LLC Loan Packages, including, but not limited to:

- a.) The Attorney preference letter
- b.) Code 37-23-70 D Notice
- c.) Legible Sales Contract with all Addendums
- d.) Online or written submission forms and/or lock confirmations
- e.) PMI disclosure (Private Mortgage Insurance)
- f.) All appraisals done on subject property

- g.) All financial [sic] docents provided on behalf of EGIS, LLC.
- h.) Uniform Residential Loan Applications for EGIS, LLC.
- I.) Explanation letters
- j.) Wachovia Bank, N.A. loan procedure written manuals or policies regarding the issuance of construction loans, including training materials.
- k.) All documents containing any warnings that would be applicable to EGIS.

RESPONSE: Plaintiff/Counter-Defendant objects to this Request as overly vague, overly broad and unduly burdensome. Plaintiff/Counter-Defendant further objects to the extent that this Request seeks information in Defendant/Counter-Plaintiff's possession, or irrelevant information that is inapplicable in the commercial loan context. To the extent that this Request seeks appraisals done on the subject property paid for by the bank for its own benefit, bank policies, or procedures for handling loans, Plaintiff/Counter-Defendant also objects to this Request as outside the Scope of Rule 26 in that it is unlikely to lead to the discovery of admissible evidence. Plaintiff/Counter-Defendant also objects to the extent that it seeks confidential, attorney-client privileged, or work product protected information. Subject to the foregoing and general objections, however, Plaintiff/Counter-Defendant will make its loan file available for inspection at a mutually convenient place and time, see Response to Request Number 1. Subject to the foregoing objections and produced under the Protective Order entered into between the parties, Plaintiff/Counter-Defendant is enclosing copies of each appraisal, marked "confidential".

7. Produce a copy of all visual and written training materials utilized in the Training of Wachovia Bank, N.A. Personnel or Agents involved in loan origination or applications.

RESPONSE: Plaintiff/Counter-Defendant objects to this Request as unlimited in time or scope, unlimited as to the type of loan, overly vague, overly broad, unduly burdensome, and outside the scope of Rule 26 in that it is unlikely to lead to the discovery of admissible evidence. Plaintiff/Counter-Defendant also objects to the extent that it seeks confidential, attorney-client privileged, or work product protected information.

8. Copies of any correspondence, (including but not limited to written, faxed, email,) between Wachovia Bank, N.A. and EGIS, LLC.

RESPONSE: Plaintiff/Counter-Defendant objects to this Request as unlimited in time or scope, overly vague, unduly burdensome, and outside the scope of Rule 26 in that it seeks information that it not likely to lead to the discovery of admissible evidence. Plaintiff/Counter-Defendant further objects to the extent that this Request seeks information in Defendant/Counter-Plaintiff's possession. Subject to the foregoing and general objections, however, Plaintiff/Counter-Defendant will make its loan file available for inspection at a mutually convenient place and time.

< Signature Page to Follow >

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Betsy Johnson Burn

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Attorneys for Wachovia Bank, National Association

Columbia, South Carolina

10-11, 2010.

STATE OF SOUTH CAROLINA)
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Wachovia Bank, National Association,) Civil Action No. 2010-CP-29-196
)

Plaintiff,)
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vs.)
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**NOTICE OF 30(B)(6) DEPOSITION
OF EGIS 521, LLC**

EGIS 521, LLC, Peter James)
Menkhaus, Stephanie L. Menkhaus,)
Nancy T. Jenkins, Individually and as)
Trustee of the Don A. Jenkins T/U/W)
and as Personal Representative of the)
Estate of Don A. Jenkins, Bellsouth)
Carolina PCS, LP, n/k/a Bellsouth)
Mobility DCS, LP, Commercial)
Products, Mark A. Ciminelli, Mark E.)
Carpenter, Ronald C. Mariello,)
)
Defendants.)
)

TO: ATTORNEYS FOR DEFENDANTS

PLEASE TAKE NOTICE that, pursuant to Rule 30(b)(6) of the South Carolina Rules of Civil Procedure, Wells Fargo Bank, National Association, successor by merger to Wachovia Bank, National Association ("Plaintiff"), by and through its counsel, will take the oral deposition of one or more representatives of EGIS 521, LLC in the above-captioned matter on Wednesday, March 2, 2011 at 9:00 a.m. at the offices of Nelson Mullins Riley & Scarborough, LLP, Bank of America Corporate Center, 42nd Floor, 100 North Tryon Street, Charlotte, NC 28202, upon oral examination before a Notary Public or other official authorized by law to take depositions. This deposition is being taken for pretrial discovery, for use at trial,

and for such other purposes as may be permitted by law. You are invited to attend and participate.

Pursuant to Rule 30(b)(6), EGIS 521, LLC shall designate one or more officers, agents or other persons who can testify on their behalf and who are most knowledgeable on the topics listed in Exhibit A attached hereto.

The Defendant's Rule 30(b)(6) designee(s) is further required to have present at the deposition all documents and other tangible items that relate to the Areas of Testimony and the Defendant's knowledge of those areas.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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(803) 799-2000

Attorneys for Plaintiff

Columbia, South Carolina

2/8, 2011.

EXHIBIT A

1. Facts and circumstances related to the purchase by EGIS 521, LLC of the property which is the subject of the above-captioned foreclosure action, including:
 - a. When EGIS entered into a contract to purchase the property.
 - b. How EGIS identified this property for purchase.
 - c. Any and all negotiations with the seller regarding the purchase price of the property.
 - d. When and how EGIS approached Wachovia regarding a loan for the property.
 - e. Any other sources of financing which were explored by EGIS.
2. Facts and circumstances related to the assertion by EGIS 521, LLC in its Answer and Counterclaim that Plaintiff "misrepresented terms to EGIS" and breached its alleged fiduciary duty to EGIS.
3. Payment history of EGIS on the subject loan.
4. Facts and circumstances which support EGIS' assertion that it is not in "default under the terms of the agreement". *Answer and Counterclaim* at ¶ 7 (Counterclaim).
5. Facts and circumstances relating to EGIS' assertion that the note and mortgage are void.
6. Facts and circumstances relating to any alleged damages claimed by EGIS.
7. Facts and circumstances relating to the following allegations made by EGIS in its Answer and Counterclaim at Paragraph 45:
 - a. In "failing to warn Plaintiff of its debt ratio...;
 - b. In "failing to properly supervise and train its agents and employees
8. Facts and circumstances relating to any appraisals or property reviews obtained by EGIS, either before, during, or after the purchase of the property.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER) SIXTH JUDICIAL CIRCUIT

NOTICE OF DEPOSITION OF MARK E. CARPENTER

PLEASE TAKE NOTICE that Wells Fargo Bank, National Association, successor by merger to Wachovia Bank, National Association ("Plaintiff"), by and through its counsel, will take the oral deposition of Mark E. Carpenter, on Tuesday, March 1, 2011 at 9:00 a.m. at the offices of Nelson Mullins Riley & Scarborough, LLP, Bank of America Corporate Center, 42nd Floor, 100 North Tryon Street, Charlotte, NC 28202, upon oral examination before a Notary Public or other official authorized by law to take depositions. This deposition is being taken for pretrial discovery, for use at trial, and for such other purposes as may be permitted by law. You are invited to attend and participate.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Rachel M. Flynn

Betsy Johnson Burn

SC Bar No. 16680

E-Mail: betsy.burn@nelsonmullins.com

Rachel M. Flynn

SC Bar No. 78685

E-Mail: rachel.flynn@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Plaintiff

Columbia, South Carolina

2/8, 2011.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER) SIXTH JUDICIAL CIRCUIT

Wachovia Bank, National Association,) Civil Action No. 2010-CP-29-196
)

Plaintiff,)
)

vs.)
)

EGIS 521, LLC, Peter James)
Menkhaus, Stephanie L. Menkhaus,)
Nancy T. Jenkins, Individually and as)
Trustee of the Don A. Jenkins T/U/W)
and as Personal Representative of the)
Estate of Don A. Jenkins, Bellsouth)
Carolina PCS, LP, n/k/a Bellsouth)
Mobility DCS, LP, Commercial)
Products, Mark A. Ciminelli, Mark E.)
Carpenter, Ronald C. Mariello,)

Defendants.)
)

NOTICE OF DEPOSITION OF RONALD C. MARIELLO

TO: ATTORNEYS FOR DEFENDANTS

PLEASE TAKE NOTICE that Wells Fargo Bank, National Association, successor by merger to Wachovia Bank, National Association ("Plaintiff"), by and through its counsel, will take the oral deposition of Ronald C. Mariello on Wednesday, March 2, 2011 at 12:00 p.m. at the offices of Nelson Mullins Riley & Scarborough, LLP, Bank of America Corporate Center, 42nd Floor, 100 North Tryon Street, Charlotte, NC 28202, upon oral examination before a Notary Public or other official authorized by law to take depositions. This deposition is being taken for pretrial discovery, for use at trial, and for such other purposes as may be permitted by law. You are invited to attend and participate.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: *Betsy Johnson Burn*
Betsy Johnson Burn
SC Bar No. 16680
E-Mail: betsy.burn@nelsonmullins.com
Rachel M. Flynn
SC Bar No. 78685
E-Mail: rachel.flynn@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Plaintiff

Columbia, South Carolina

2/8, 2011.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER) SIXTH JUDICIAL CIRCUIT

NOTICE OF DEPOSITION OF MARK A. CIMINELLI

PLEASE TAKE NOTICE that Wells Fargo Bank, National Association, successor by merger to Wachovia Bank, National Association ("Plaintiff"), by and through its counsel, will take the oral deposition of Mark A. Ciminelli on Tuesday, March 1, 2011 at 1:00 p.m. at the offices of Nelson Mullins Riley & Scarborough, LLP, Bank of America Corporate Center, 42nd Floor, 100 North Tryon Street, Charlotte, NC 28202, upon oral examination before a Notary Public or other official authorized by law to take depositions. This deposition is being taken for pretrial discovery, for use at trial, and for such other purposes as may be permitted by law. You are invited to attend and participate.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: *Betsy Johnson Burn*
Betsy Johnson Burn
SC Bar No. 16680
E-Mail: betsy.burn@nelsonmullins.com
Rachel M. Flynn
SC Bar No. 78685
E-Mail: rachel.flynn@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Plaintiff

Columbia, South Carolina

2/8, 2011.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER) SIXTH JUDICIAL CIRCUIT

Wachovia Bank, National Association,) Civil Action No. 2010-CP-29-196
)

Plaintiff,)
)

vs.)
)

**NOTICE OF 30(B)(6) DEPOSITION
OF EGIS 521, LLC**

EGIS 521, LLC, Peter James)
Menkhaus, Stephanie L. Menkhaus,)
Nancy T. Jenkins, Individually and as)
Trustee of the Don A. Jenkins T/U/W)
and as Personal Representative of the)
Estate of Don A. Jenkins, Bellsouth)
Carolina PCS, LP, n/k/a Bellsouth)
Mobility DCS, LP, Commercial)
Products, Mark A. Ciminelli, Mark E.)
Carpenter, Ronald C. Mariello,)
)

Defendants.)
)
_____)

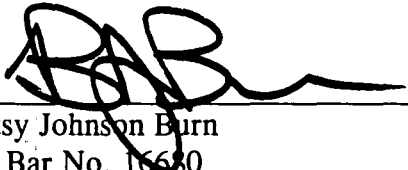
TO: ATTORNEYS FOR DEFENDANTS

PLEASE TAKE NOTICE that, pursuant to Rule 30(b)(6) of the South Carolina Rules of Civil Procedure, Wells Fargo Bank, National Association, successor by merger to Wachovia Bank, National Association ("Plaintiff"), by and through its counsel, will take the oral deposition of one or more representatives of EGIS 521, LLC in the above-captioned matter on **MARCH 30, 2011** at 10:00 a.m. at the offices of F. Craig Wilkerson, 1050 College Avenue Extension, Rock Hill, South Carolina, upon oral examination before a Notary Public or other official authorized by law to take depositions. This deposition is being taken for pretrial discovery, for use at trial, and for such other purposes as may be permitted by law. You are invited to attend and participate.

Pursuant to Rule 30(b)(6), EGIS 521, LLC shall designate one or more officers, agents or other persons who can testify on their behalf and who are most knowledgeable on the topics listed in Exhibit A attached hereto.

The Defendant's Rule 30(b)(6) designee(s) is further required to have present at the deposition all documents and other tangible items that relate to the Areas of Testimony and the Defendant's knowledge of those areas.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Betsy Johnson Burn

SC Bar No. 16680

E-Mail: betsy.burn@nelsonmullins.com

Rachel M. Flynn

SC Bar No. 78685

E-Mail: rachel.flynn@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Plaintiff

Columbia, South Carolina

3-15, 2011.

EXHIBIT A

1. Facts and circumstances related to the purchase by EGIS 521, LLC of the property which is the subject of the above-captioned foreclosure action, including:
 - a. When EGIS entered into a contract to purchase the property.
 - b. How EGIS identified this property for purchase.
 - c. Any and all negotiations with the seller regarding the purchase price of the property.
 - d. When and how EGIS approached Wachovia regarding a loan for the property.
 - e. Any other sources of financing which were explored by EGIS.
2. Facts and circumstances related to the assertion by EGIS 521, LLC in its Answer and Counterclaim that Plaintiff "misrepresented terms to EGIS" and breached its alleged fiduciary duty to EGIS.
3. Payment history of EGIS on the subject loan.
4. Facts and circumstances which support EGIS' assertion that it is not in "default under the terms of the agreement". *Answer and Counterclaim at ¶ 7 (Counterclaim).*
5. Facts and circumstances relating to EGIS' assertion that the note and mortgage are void.
6. Facts and circumstances relating to any alleged damages claimed by EGIS.
7. Facts and circumstances relating to the following allegations made by EGIS in its Answer and Counterclaim at Paragraph 45:
 - a. In "failing to warn Plaintiff of its debt ratio...;
 - b. In "failing to properly supervise and train its agents and employees
8. Facts and circumstances relating to any appraisals or property reviews obtained by EGIS, either before, during, or after the purchase of the property.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER) SIXTH JUDICIAL CIRCUIT

Wachovia Bank, National Association,) Civil Action No. 2010-CP-29-196
)

Plaintiff,)
)

vs.)
)

EGIS 521, LLC, Peter James)
Menkhaus, Stephanie L. Menkhaus,)
Nancy T. Jenkins, Individually and as)
Trustee of the Don A. Jenkins T/U/W)
and as Personal Representative of the)
Estate of Don A. Jenkins, Bellsouth)
Carolina PCS, LP, n/k/a Bellsouth)
Mobility DCS, LP, Commercial)
Products, Mark A. Ciminelli, Mark E.)
Carpenter, Ronald C. Mariello,)
)

Defendants.)
)

NOTICE OF DEPOSITION OF RONALD C. MARIELLO

TO: ATTORNEYS FOR DEFENDANTS

PLEASE TAKE NOTICE that Wells Fargo Bank, National Association, successor by merger to Wachovia Bank, National Association ("Plaintiff"), by and through its counsel, will take the oral deposition of Ronald C. Mariello on **MARCH 30, 2011 AT 2:00 p.m.** at the offices of at the offices of F. Craig Wilkerson, 1050 College Avenue Extension, Rock Hill, South Carolina, upon oral examination before a Notary Public or other official authorized by law to take depositions. This deposition is being taken for pretrial discovery, for use at trial, and for such other purposes as may be permitted by law. You are invited to attend and participate.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Betsy Johnson Burn

SC Bar No. 16680

E-Mail: betsy.burn@nelsonmullins.com

Rachel M. Flynn

SC Bar No. 78685

E-Mail: rachel.flynn@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Plaintiff

Columbia, South Carolina

3-15

, 2011.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER)

Wachovia Bank, National Association,) Civil Action No. 2010-CP-29-196
)

Plaintiff,)
)

NOTICE OF HEARING

vs.)
)

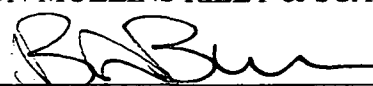
EGIS 521, LLC, Peter James)
Menkhaus, Stephanie L. Menkhaus,)
Nancy T. Jenkins, Individually and as)
Trustee of the Don A. Jenkins T/U/W)
and as Personal Representative of the)
Estate of Don A. Jenkins, Bellsouth)
Carolina PCS, LP, n/k/a Bellsouth)
Mobility DCS, LP, Commercial)
Products, Mark A. Ciminelli, Mark E.)
Carpenter, Ronald C. Mariello,)

Defendants.)

FILED
OFFICE OF CLERK
OF COURT
2011 MAR 29 PM 2:03
CLERK OF COURT
LANCASTER, SC

This is to advise that a hearing on the Plaintiff Wachovia Bank, National Association's Motion To Substitute Plaintiff and the Plaintiff's Motion to Compel Discovery Responses from EGIS 521, LLC, Mark A. Ciminelli, Mark E. Carpenter, Ronald C. Mariello, Peter James Menkhaus, and Stephanie Menkhaus in the above captioned matter, which were previously filed with the Court, is set before the Honorable Clyde Davis, Special Referee, at the offices of F. Craig Wilkerson, 105 S. Catawba Street, Lancaster, South Carolina on **April 8, 2011 at 11:00 a.m.**

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: 

Betsy Johnson Burn
SC Bar No. 16680
E-Mail: betsy.burn@nelsonmullins.com
1320 Main Street / 17th Floor
Columbia, SC 29201
(803) 799-2000

Attorneys for Wachovia Bank, N.A.

Columbia, South Carolina
March 28, 2011

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)
Wells Fargo Bank, National Association)
successor in interest by merger to)
Wachovia Bank, National Association)
Plaintiff,)
vs.)
EGIS, LLC, Peter James Menkhaus,)
Stephanie L. Menkhaus, Nancy T.)
Jenkins, individually and as Trustee of)
the Don A. Jenkins T/U/W and as)
Personal Representative of the Estate)
of Don A. Jenkins, Bellsouth Carolina)
PCS, LP, n/k/a Bellsouth Mobility)
DCS, LP, Commercial Products,)
Mark A. Ciminelli, Mark E. Carpenter,)
Ronald C. Mariello,)
Defendants.)
Defendants.)

IN THE COURT OF COMMON PLEAS
Sixth Judicial Circuit

Civil Action Number: 2010-CP-29-196

AFFIDAVIT OF RONALD C. MARIELLO

DEFENDANT Ronald C. Mariello, duly sworn and deposing as follows:

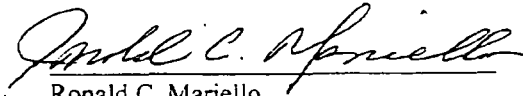
1. I am a defendant in these matters.
2. I am represented by counsel in these matters
3. I have participated directly with representatives of plaintiff (or "bank") from approximately January 2009 through January 2011 in efforts to resolve the matters.
4. The plaintiff's representatives I dealt with during this period were David Maynard and James Gragnolati.

5. During the period from January 2009 through early 2011 I attempted in good faith to obtain a workout with the plaintiff. During this time of negotiations Egis 521, LLC paid to plaintiff approximately \$69,000.
6. During this time I sent numerous emails to the plaintiff's representative indicating that we were prepared to engage in serious fundraising activities to secure the necessary funds to purchase the note and mortgage from the plaintiff.
7. The plaintiff consistently expressed a serious interest in proceeding with a settlement along the lines I had proposed.
8. I explained to the plaintiff on several occasions that in order for us/Egis 521, LLC ("Egis") to begin fund raising activities, it first required a *firm* commitment from plaintiff on the amount plaintiff would ^{accept} ~~except~~ for the purchase of its note and mortgage and its agreement that for some period of time (six months was consistently proposed and considered) plaintiff would not foreclose on the property.
9. On several occasions both by phone and by emails I emphasized to the plaintiff's representative that the foregoing was required to be in place before fundraising could begin. I explained that neither us or any outside fundraiser would invest time and money into a raise without having certainty that the price was firm and that the property (the proposed investment) would not be otherwise disposed (i.e.: be foreclosed) before a reasonable time was allowed to raise the funds. Without these terms in place a raise of capital would simply not be possible.
10. The plaintiff's representative agreed in principle to these concepts and expressed his understanding of our requirements.
11. On or about July 2010 the plaintiff's representative and I agreed that the bank would propose a written agreement that would contain these fixed terms.

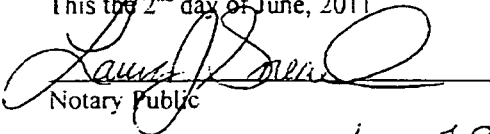
12. On numerous occasions I requested of the bank the need to receive their written agreement as discussed and stressed with the bank that time was of the essence and that if the bank did not reply soon Egis could loose opportunities to raise the funds.
13. Finally after many requests, the plaintiff delivered a written agreement on August 23, 2010. It completely ignored all the main tenants described above – completely opposite to the terms required, as discussed by me with plaintiff many times before. In fact, the bank's proposed agreement *emphasized* that it was not a binding agreement at all. After significant time and effort by me, the plaintiff's proposed agreement was of virtually no commercial value whatsoever.
14. The next day, on August 24, 2010 I emailed plaintiff's representative and noted the deficiencies in the plaintiff's proposal and proposed changes that would work.
15. During September and December 2010 and through Early 2011, I continued to make requests as to the status of a revised workable agreement more fitting to the circumstances.
16. The bank continued to delay but continued to confirm that it had a continuing interest to proceed with a workout.
17. Ultimately and suddenly, in early 2011 the plaintiff's representative contacted me to tell me that the bank only had an interest in proceeding if Egis put up a non-refundable deposit of approximately \$200,000, an amount the bank would clearly have known neither Egis or its principals had.
18. Following this message, I was then informed that plaintiff's legal counsel relayed her opinion or that of plaintiff that all Egis ever did was to delay and that plaintiff had no confidence Egis could ever raise any money whatsoever.

19. Such claims are totally contrary to the facts. Egis was unable to undertake a capital raise in this case because of the plaintiff's refusal to agree to terms that would allow any undertaking, notwithstanding plaintiff's continued expressions of interest to proceed and an understanding of the requirements.
20. The files are replete with evidence that plaintiff was the only source of continual delays against numerous urgings from me for the need to move forward. It has been plaintiff that has consistently delayed progress and frustrated a likely and positive conclusion to the matters at hand. Further, defendant Mariello has a long and verifiable history over many years of successfully raising many million of dollars of investment capital; and remains ready to do so here under the terms that have been discussed many months ago with plaintiff.
21. I have worked in good faith with plaintiff to find a resolution to this matter. I never proposed anything, I did not believe I had a reasonable chance to accomplish and have done before.
22. In all instances that I can recall, I have cooperated fully with plaintiff to deliver the information it requested in timely and complete manner.

FURTHER THIS AFFIANT SAYETH NOT.


Ronald C. Mariello

Sworn to and Subscribed before me
This the 2nd day of June, 2011


Notary Public

Printed Name of Notary: Laura J Sneed

My Commission Expires:

MY COMMISSION EXPIRES
SEPTEMBER 25, 2015

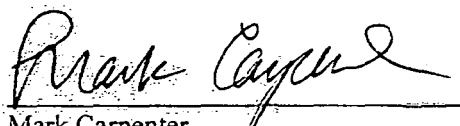
LAURA J. SNEAD
NOTARY PUBLIC
MECKLENBURG COUNTY, NC

AFFIDAVIT OF MARK CARPENTER

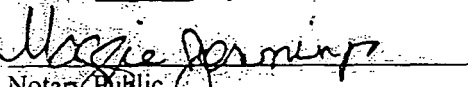
Mark Carpenter, duly sworn and deposing as follows:

1. I am a defendant in the lawsuit styled Wells Fargo Bank v. Egis 521, LLC, et. al. (the "Matter").
2. I am represented by Phil Wright in the Matter.
3. I was previously represented by Craig Wilkerson in the Matter.
4. Craig Wilkerson was instructed by me to request arbitration as to me with respect to his responsive pleadings in the Matter, but despite such request inadvertently included me generally in his responsive pleadings.
5. I have just recently learned that Mr. Wilkerson apparently continued to include me in his other filings/pleadings even though I had alerted him to this mistake.
6. I had again in March 2011 requested that Mr. Wilkerson make a motion on my behalf to remove this Matter as it relates to me to arbitration but he thought that was better left to Mr. Wright as new counsel.
7. Since the filing of the Matter, it is my understanding that Ron Mariello has been in discussions with the lender and has had numerous conversations regarding the purchase by a new entity of the promissory note evidencing the loan from lender to Egis 521, LLC which is the subject of the Matter. It is further my understanding that Mr. Mariello has been very diligent in his attempts to communicate with the lender in his efforts to reach an agreement to allow him and/or Egis 521, LLC to raise funds to purchase the note. It is further my understanding that at times Mr. Mariello has had slow responses to his communications with lender but continues to attempt to structure an arrangement that will allow a period of time for the raising of funds and subsequent purchase of the subject note.

FURTHER THIS AFFIANT SAYETH NOT.

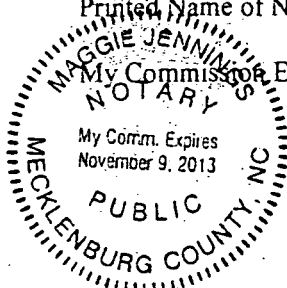

Mark Carpenter

Sworn to and Subscribed before me
this the 2 day of June, 2011


Notary Public

Printed Name of Notary: Maggie Jennings

My Commission Expires: NOV 9, 2013



PROMISSORY NOTE

\$4,549,320.00

May 17, 2007

07152P313201

EGIS 521, LLC
14820 Ballantyne Country Club Drive
Charlotte, North Carolina 28277
(Hereinafter referred to as "Borrower")

Wachovia Bank, National Association
Charlotte, North Carolina 28202
(Hereinafter referred to as "Bank")

Borrower promises to pay to the order of Bank, in lawful money of the United States of America, at its office indicated above or wherever else Bank may specify, the sum of Four Million, Five Hundred Forty-Nine Thousand, Three Hundred Twenty and No/100 Dollars (\$4,549,320.00) or such sum as may be advanced and outstanding from time to time, with interest on the unpaid principal balance at the rate and on the terms provided in this Promissory Note (including all renewals, extensions or modifications hereof, this "Note").

LOAN AGREEMENT. This Note is subject to the provisions of that certain Loan Agreement between Bank and Borrower of even date herewith, as modified from time to time.

USE OF PROCEEDS. Borrower shall use the proceeds of the loan(s) evidenced by this Note for the commercial purposes of Borrower, as follows: To finance the acquisition of 42 acre of land on Highway 521 at Shelly Mullis Road in Indian Land Township, Lancaster County, South Carolina.

SECURITY. EGIS 521, LLC, Peter James Menkhaus and Stephanie L. Menkhaus has granted Bank a security interest in the collateral described in the Loan Documents, including, but not limited to, real and personal property collateral described in that certain security instrument of even date herewith.

INTEREST RATE. Interest shall accrue on the unpaid principal balance of this Note during each Interest Period from the date hereof at a rate per annum equal to 1-month LIBOR plus 2.0% ("Interest Rate"). Interest for each Interest Period shall accrue each day during such Interest Period, commencing on and including the first day to but excluding the last day. "Interest Period" means each period commencing on the last day of the immediately preceding Interest Period and ending on the same day of the month that interest is due 1 month thereafter, provided (i) the first Interest Period shall commence on the date hereof and end on the first day thereafter that interest is due, (ii) any Interest Period that ends in a month for which there is no day which numerically corresponds to the last day of the immediately preceding Interest Period shall end on the last day of the month and (iii) any Interest Period that would otherwise extend past the maturity date of this Note shall end on the maturity date of this Note. "LIBOR" means, with respect to each Interest Period, the rate for U.S. dollar deposits with a maturity equal to the number of months specified above, as reported on Telerate page 3750 as of 11:00 a.m., London time, on the second London business day before such Interest Period begins (or if not so reported, then as determined by the Bank from another recognized source or interbank quotation).

INDEMNIFICATION. Borrower shall indemnify Bank against Bank's loss or expense as a consequence of (a) Borrower's failure to make any payment when due under this Note, (b) any payment, prepayment or conversion of any loan on a day other than the last day of the Interest Period, or (c) any failure to make a borrowing or conversion after giving notice thereof ("Indemnified Loss or Expense"). The amount of such Indemnified Loss or Expense shall be determined by Bank based upon the assumption that Bank funded 100% of that portion of the loan in the London interbank market.



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CNOTE

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Note doc



07152P313201

DEFAULT RATE. In addition to all other rights contained in this Note, if a Default (as defined herein) occurs and as long as a Default continues, all outstanding Obligations, other than Obligations under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) between Borrower and Bank or its affiliates, shall bear interest at the Interest Rate plus 3% ("Default Rate"), except if the Note is governed by the laws of the State of North Carolina and the original principal amount is less than or equal to \$300,000.00. The Default Rate shall also apply from acceleration until the Obligations or any judgment thereon is paid in full.

INTEREST AND FEE(S) COMPUTATION (ACTUAL/360). Interest and fees, if any, shall be computed on the basis of a 360-day year for the actual number of days in the applicable period ("Actual/360 Computation"). The Actual/360 Computation determines the annual effective yield by taking the stated (nominal) rate for a year's period and then dividing said rate by 360 to determine the daily periodic rate to be applied for each day in the applicable period. Application of the Actual/360 Computation produces an annualized effective interest rate exceeding the nominal rate.

REPAYMENT TERMS. This Note shall be due and payable in consecutive monthly payments of accrued interest only, commencing on May 31, 2007, and continuing on the last day of each month thereafter until fully paid. In any event, all principal and accrued interest shall be due and payable on June 30, 2008.

AUTOMATIC DEBIT OF CHECKING ACCOUNT FOR LOAN PAYMENT. Borrower authorizes Bank to debit demand deposit account number 2000017645568 or any other account with Bank (routing number 053000219) designated in writing by Borrower, beginning May 31, 2007 for any payments due under this Note. Borrower further certifies that Borrower holds legitimate ownership of this account and preauthorizes this periodic debit as part of its right under said ownership.

APPLICATION OF PAYMENTS. Monies received by Bank from any source for application toward payment of the Obligations shall be applied to accrued interest and then to principal. If a Default occurs, monies may be applied to the Obligations in any manner or order deemed appropriate by Bank.

If any payment received by Bank under this Note or other Loan Documents is rescinded, avoided or for any reason returned by Bank because of any adverse claim or threatened action, the returned payment shall remain payable as an obligation of all persons liable under this Note or other Loan Documents as though such payment had not been made.

DEFINITIONS. Loan Documents. The term "Loan Documents", as used in this Note and the other Loan Documents, refers to all documents executed in connection with or related to the loan evidenced by this Note and any prior notes which evidence all or any portion of the loan evidenced by this Note, and any letters of credit issued pursuant to any loan agreement to which this Note is subject, any applications for such letters of credit and any other documents executed in connection therewith or related thereto, and may include, without limitation, a commitment letter that survives closing, a loan agreement, this Note, guaranty agreements, security agreements, security instruments, financing statements, mortgage instruments, any renewals or modifications, whenever any of the foregoing are executed, but does not include swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time). **Obligations.** The term "Obligations", as used in this Note and the other Loan Documents, refers to any and all indebtedness and other obligations under this Note, all other obligations under any other Loan Document(s), and all obligations under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) between Borrower and Bank, or its affiliates, whenever executed. **Certain Other Terms.** All terms that are used but not otherwise defined in any of the Loan Documents shall have the definitions provided in the Uniform Commercial Code.

LATE CHARGE. If any payments are not timely made, Borrower shall also pay to Bank a late charge equal to 4% of each payment past due for 15 or more days. This late charge shall not apply to payments due at maturity or by acceleration hereof, unless such late payment is in an amount not greater than the highest periodic payment due hereunder.

07152P313201

Acceptance by Bank of any late payment without an accompanying late charge shall not be deemed a waiver of Bank's right to collect such late charge or to collect a late charge for any subsequent late payment received.

If this Note is secured by owner-occupied residential real property located outside the state in which the office of Bank first shown above is located, the late charge laws of the state where the real property is located shall apply to this Note and the late charge shall be the highest amount allowable under such laws. If no amount is stated thereunder, the late charge shall be 5% of each payment past due for 10 or more days.

ATTORNEYS' FEES AND OTHER COLLECTION COSTS. Borrower shall pay all of Bank's reasonable expenses actually incurred to enforce or collect any of the Obligations including, without limitation, reasonable arbitration, paralegals', attorneys' and experts' fees and expenses, whether incurred without the commencement of a suit, in any trial, arbitration, or administrative proceeding, or in any appellate or bankruptcy proceeding.

USURY. If at any time the effective interest rate under this Note would, but for this paragraph, exceed the maximum lawful rate, the effective interest rate under this Note shall be the maximum lawful rate, and any amount received by Bank in excess of such rate shall be applied to principal and then to fees and expenses, or, if no such amounts are owing, returned to Borrower.

GRACE/CURE PERIOD. **Grace Period.** The failure of timely payment of the Obligations shall not be a Default until 10 days after such payment is due. **Cure Period.** Except as provided below, any Default, other than non-payment, may be cured within 30 days after written notice thereof is mailed to Borrower by Bank. Borrower's right to cure shall be applicable only to curable defaults and shall not apply, without limitation, to Defaults based upon False Warranty or Cessation; Bankruptcy. Borrower shall have the right to cure a Default only once during any 12 month period. Bank shall not exercise its remedies to collect the Obligations except as Bank reasonably deems necessary to protect its interest in collateral securing the Obligations during a cure period.

DEFAULT. If any of the following occurs and is not cured within the applicable Cure Period, a default ("Default") under this Note shall exist: **Nonpayment; Nonperformance.** The failure of timely payment or performance of the Obligations or Default under this Note or any other Loan Documents. **False Warranty.** A warranty or representation made or deemed made in the Loan Documents or furnished Bank in connection with the loan evidenced by this Note proves materially false, or if of a continuing nature, becomes materially false at the time made. **Cross Default.** At Bank's option, any default in payment or performance of any obligation under any other loans, contracts or agreements of Borrower. **Cessation; Bankruptcy.** The death of, appointment of a guardian for, dissolution of, termination of existence of, loss of good standing status by, appointment of a receiver for, assignment for the benefit of creditors of, or commencement of any bankruptcy or insolvency proceeding by or against Borrower, its Subsidiaries or Affiliates, if any, or any general partner of or the holder(s) of the majority ownership interests of Borrower, or any party to the Loan Documents. **Material Capital Structure or Business Alteration.** Without prior written consent of Bank, (i) a material alteration in the kind or type of Borrower's business or that of Borrower's Subsidiaries or Affiliates, if any; (ii) the sale of substantially all of the business or assets of Borrower, any of Borrower's Subsidiaries or Affiliates or any guarantor, or a material portion (10% or more) of such business or assets if such a sale is outside the ordinary course of business of Borrower, or any of Borrower's Subsidiaries or Affiliates or any guarantor, or more than 50% of the outstanding stock or voting power of or in any such entity in a single transaction or a series of transactions; (iii) the acquisition of substantially all of the business or assets or more than 50% of the outstanding stock or voting power of any other entity; or (iv) should any Borrower or any of Borrower's Subsidiaries or Affiliates or any guarantor enter into any merger or consolidation. **Material Adverse Change.** Bank determines in good faith, in its sole discretion, that the prospects for payment or performance of the Obligations are impaired or there has occurred a material adverse change in the business or prospects of Borrower, financial or otherwise.

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REMEDIES UPON DEFAULT. If a Default occurs under this Note or any Loan Documents, Bank may at any time thereafter, take the following actions: **Bank Lien.** Foreclose its security interest or lien against Borrower's deposit accounts and investment property without notice. **Acceleration Upon Default.** Accelerate the maturity of this Note and, at Bank's option, any or all other Obligations, other than Obligations under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) between Borrower and Bank, or its affiliates, which shall be due in accordance with and governed by the provisions of said swap agreements; whereupon this Note and the accelerated Obligations shall be immediately due and payable; provided, however, if the Default is based upon a bankruptcy or insolvency proceeding commenced by or against Borrower or any guarantor or endorser of this Note, all Obligations (other than Obligations under any swap agreement as referenced above) shall automatically and immediately be due and payable. **Cumulative.** Exercise any rights and remedies as provided under the Note and other Loan Documents, or as provided by law or equity.

FINANCIAL AND OTHER INFORMATION. Borrower shall deliver to Bank such information as Bank may reasonably request from time to time, including without limitation, financial statements and information pertaining to Borrower's financial condition. Such information shall be true, complete, and accurate.

WAIVERS AND AMENDMENTS. No waivers, amendments or modifications of this Note and other Loan Documents shall be valid unless in writing and signed by an officer of Bank. No waiver by Bank of any Default shall operate as a waiver of any other Default or the same Default on a future occasion. Neither the failure nor any delay on the part of Bank in exercising any right, power, or remedy under this Note and other Loan Documents shall operate as a waiver thereof, nor shall a single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

Except to the extent otherwise provided by the Loan Documents or prohibited by law, each Borrower and each other person liable under this Note waives presentment, protest, notice of dishonor, demand for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, notice of sale and all other notices of any kind. Further, each agrees that Bank may (i) extend, modify or renew this Note or make a novation of the loan evidenced by this Note, and/or (ii) grant releases, compromises or indulgences with respect to any collateral securing this Note, or with respect to any Borrower or other person liable under this Note or any other Loan Documents, all without notice to or consent of each Borrower and other such person, and without affecting the liability of each Borrower and other such person; provided, Bank may not extend, modify or renew this Note or make a novation of the loan evidenced by this Note without the consent of the Borrower, or if there is more than one Borrower, without the consent of at least one Borrower; and further provided, if there is more than one Borrower, Bank may not enter into a modification of this Note which increases the burdens of a Borrower without the consent of that Borrower.

MISCELLANEOUS PROVISIONS. **Assignment.** This Note and the other Loan Documents shall inure to the benefit of and be binding upon the parties and their respective heirs, legal representatives, successors and assigns. Bank's interests in and rights under this Note and the other Loan Documents are freely assignable, in whole or in part, by Bank. In addition, nothing in this Note or any of the other Loan Documents shall prohibit Bank from pledging or assigning this Note or any of the other Loan Documents or any interest therein to any Federal Reserve Bank. Borrower shall not assign its rights and interest hereunder without the prior written consent of Bank, and any attempt by Borrower to assign without Bank's prior written consent is null and void. Any assignment shall not release Borrower from the Obligations. **Applicable Law; Conflict Between Documents.** This Note and, unless otherwise provided in any other Loan Document, the other Loan Documents shall be governed by and interpreted under the laws of the state named in Bank's address on the first page hereof without regard to that state's conflict of laws principles. If the terms of this Note should conflict with the terms of any loan agreement or any commitment letter that survives closing, the terms of this Note shall control. **Borrower's Accounts.** Except as prohibited by law, Borrower grants Bank a security interest in all of Borrower's deposit accounts and investment property with Bank and any of its affiliates. **Swap Agreements.** All swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time), if any, between Borrower and Bank or its affiliates are independent agreements governed by the written provisions of said swap agreements, which will remain in full force and effect, unaffected by any repayment, prepayment, acceleration, reduction,

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increase or change in the terms of this Note, except as otherwise expressly provided in said written swap agreements, and any payoff statement from Bank relating to this Note shall not apply to said swap agreements except as otherwise expressly provided in such payoff statement. **Jurisdiction.** Borrower irrevocably agrees to non-exclusive personal jurisdiction in the state identified as the Jurisdiction above. **Severability.** If any provision of this Note or of the other Loan Documents shall be prohibited or invalid under applicable law, such provision shall be ineffective but only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Note or other such document. **Notices.** Any notices to Borrower shall be sufficiently given, if in writing and mailed or delivered to the Borrower's address shown above or such other address as provided hereunder, and to Bank, if in writing and mailed or delivered to Wachovia Bank, National Association, Mail Code VA7628, P. O. Box 13327, Roanoke, VA 24040 or Wachovia Bank, National Association, Mail Code VA7628, 10 South Jefferson Street, Roanoke, VA 24011 or such other address as Bank may specify in writing from time to time. Notices to Bank must include the mail code. In the event that Borrower changes Borrower's address at any time prior to the date the Obligations are paid in full, Borrower agrees to promptly give written notice of said change of address by registered or certified mail, return receipt requested, all charges prepaid. **Plural; Captions.** All references in the Loan Documents to Borrower, guarantor, person, document or other nouns of reference mean both the singular and plural form, as the case may be, and the term "person" shall mean any individual, person or entity. The captions contained in the Loan Documents are inserted for convenience only and shall not affect the meaning or interpretation of the Loan Documents. **Advances.** Bank may, in its sole discretion, make other advances which shall be deemed to be advances under this Note, even though the stated principal amount of this Note may be exceeded as a result thereof. **Posting of Payments.** All payments received during normal banking hours after 2:00 p.m. local time at the office of Bank first shown above shall be deemed received at the opening of the next banking day. **Joint and Several Obligations.** If there is more than one Borrower, each is jointly and severally obligated together with all other parties obligated for the Obligations. **Fees and Taxes.** Borrower shall promptly pay all documentary, intangible recordation and/or similar taxes on this transaction whether assessed at closing or arising from time to time. **LIMITATION ON LIABILITY; WAIVER OF PUNITIVE DAMAGES.** EACH OF THE PARTIES HERETO, INCLUDING BANK BY ACCEPTANCE HEREOF, AGREES THAT IN ANY JUDICIAL, MEDIATION OR ARBITRATION PROCEEDING OR ANY CLAIM OR CONTROVERSY BETWEEN OR AMONG THEM THAT MAY ARISE OUT OF OR BE IN ANY WAY CONNECTED WITH THIS AGREEMENT, THE LOAN DOCUMENTS OR ANY OTHER AGREEMENT OR DOCUMENT BETWEEN OR AMONG THEM OR THE OBLIGATIONS EVIDENCED HEREBY OR RELATED HERETO, IN NO EVENT SHALL ANY PARTY HAVE A REMEDY OF, OR BE LIABLE TO THE OTHER FOR, (1) INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES OR (2) PUNITIVE OR EXEMPLARY DAMAGES. EACH OF THE PARTIES HEREBY EXPRESSLY WAIVES ANY RIGHT OR CLAIM TO PUNITIVE OR EXEMPLARY DAMAGES THEY MAY HAVE OR WHICH MAY ARISE IN THE FUTURE IN CONNECTION WITH ANY SUCH PROCEEDING, CLAIM OR CONTROVERSY, WHETHER THE SAME IS RESOLVED BY ARBITRATION, MEDIATION, JUDICIALLY OR OTHERWISE. **Patriot Act Notice.** To help fight the funding of terrorism and money laundering activities, Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens an account. For purposes of this section, account shall be understood to include loan accounts. **Final Agreement.** This Note and the other Loan Documents represent the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

ARBITRATION. Upon demand of any party hereto, whether made before or after institution of any judicial proceeding, any claim or controversy arising out of or relating to the Loan Documents between parties hereto (a "Dispute") shall be resolved by binding arbitration conducted under and governed by the Commercial Financial Disputes Arbitration Rules (the "Arbitration Rules") of the American Arbitration Association (the "AAA") and the Federal Arbitration Act. Disputes may include, without limitation, tort claims, counterclaims, a dispute as to whether a matter is subject to arbitration, or claims arising from documents executed in the future, but shall specifically exclude claims brought as or converted to class actions. A judgment upon the award may be entered in any court having jurisdiction. Notwithstanding the foregoing, this arbitration provision does not apply to disputes under or related to swap agreements. **Special Rules.** All arbitration hearings shall be conducted in the city named in the address of Bank first

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stated above. A hearing shall begin within 90 days of demand for arbitration and all hearings shall conclude within 120 days of demand for arbitration. These time limitations may not be extended unless a party shows cause for extension and then for no more than a total of 60 days. The expedited procedures set forth in Rule 51 et seq. of the Arbitration Rules shall be applicable to claims of less than \$1,000,000.00. Arbitrators shall be licensed attorneys selected from the Commercial Financial Dispute Arbitration Panel of the AAA. The parties do not waive applicable Federal or state substantive law except as provided herein. **Preservation and Limitation of Remedies.** Notwithstanding the preceding binding arbitration provisions, the parties agree to preserve, without diminution, certain remedies that any party may exercise before or after an arbitration proceeding is brought. The parties shall have the right to proceed in any court of proper jurisdiction or by self-help to exercise or prosecute the following remedies, as applicable: (i) all rights to foreclose against any real or personal property or other security by exercising a power of sale or under applicable law by judicial foreclosure including a proceeding to confirm the sale; (ii) all rights of self-help including peaceful occupation of real property and collection of rents, set-off, and peaceful possession of personal property; (iii) obtaining provisional or ancillary remedies including injunctive relief, sequestration, garnishment, attachment, appointment of receiver and filing an involuntary bankruptcy proceeding; and (iv) when applicable, a judgment by confession of judgment. Any claim or controversy with regard to any party's entitlement to such remedies is a Dispute. **Waiver of Jury Trial.** THE PARTIES ACKNOWLEDGE THAT BY AGREEING TO BINDING ARBITRATION THEY HAVE IRREVOCABLY WAIVED ANY RIGHT THEY MAY HAVE TO JURY TRIAL WITH REGARD TO A DISPUTE AS TO WHICH BINDING ARBITRATION HAS BEEN DEMANDED.

IN WITNESS WHEREOF, Borrower, on the day and year first above written, has caused this Note to be duly executed under seal.

EGIS 521, LLC

By: EGIS Southeast Realty Capital, LLC, Manager

By:  (SEAL)
Ronald C. Mariello, Manager

Tracking #: 201488
CAT - Deal # 791231 Facility ID 585108

2007007493

MORTGAGE

RECORDING FEES

\$20.00

PRESENTED & RECORDED:

05-17-2007 02:28 PM

JOHN LANE

REGISTER OF DEEDS

LANCASTER COUNTY, SC

By: CANDICE KIRKLEY DEPUTY

BK:MORT 1722

PG:229-242

PREPARED BY: Pam Kessler
 RETURN TO: Collateral Servicing Dept, NC 6038
 Wachovia Bank, National Association
 Collateral Servicing Dept, NC 6038
 P.O. Box 2705
 Winston Salem, NC 27101-2705

MORTGAGE, ASSIGNMENT OF RENTS AND SECURITY AGREEMENT

This MORTGAGE, ASSIGNMENT OF RENTS AND SECURITY AGREEMENT (hereafter referred to as "Mortgage") made May 17, 2007, by and between WACHOVIA BANK, NATIONAL ASSOCIATION, a national banking association, whose address is Charlotte, North Carolina 28202 ("Bank"), and EGIS 521, LLC, whose address is 14820 Ballantyne Country Club Drive, Charlotte, North Carolina 28277 and PETER JAMES MENKHAUS AND STEPHANIE L. MENKHAUS, whose address is 3004 St Andrews Court, Indian Land, South Carolina 29715 (collectively, "Mortgagor"). Bank is the mortgagee hereunder for indexing purposes by the clerk of court.

WITNESSETH:

To secure payment and performance of obligations under a Promissory Note (the "Note") of even date herewith, in the amount of \$4,549,320.00, made by EGIS 521, LLC (the "Borrower") payable to Bank, this Mortgage), any present or future Letters of Credit issued by Bank for the account of Mortgagor, other loan documents as defined in the Note (the "Loan Documents"), and swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time), all other indebtedness of Mortgagor to Bank whenever borrowed or incurred, whether or not reasonably contemplated by the parties hereto as of the date hereof, and any renewals, extensions, novations, or modifications of the foregoing (collectively the "Obligations"), and in consideration of these premises and for other consideration, Mortgagor does mortgage, grant and convey unto Bank (for itself and its affiliates), its successors and assigns all of Mortgagor's right, title and interest now owned or hereafter acquired in and to each of the following (collectively, the "Property"): (i) all those certain tracts of land in the County of Lancaster, State of South Carolina described in EXHIBIT A attached hereto and made part hereof (the "Land"); (ii) all buildings and improvements now or hereafter erected on the Land; (iii) all fixtures, machinery, equipment and other articles of real, personal or mixed property attached to, situated or installed in or upon, or used in the operation or maintenance of, the Land or any buildings or improvements situated thereon, whether or not such real, personal or mixed property is or shall be affixed to the Land; (iv) all building materials, building machinery and building equipment delivered on site to the Land during the course of, or in connection with, any construction, repair or renovation of the buildings and improvements situated or to be situated thereon; (v) all leases, licenses or occupancy agreements of all or any part of the Land and all extensions, renewals, and modifications thereof, and any options, rights of first refusal or guarantees relating thereto; all rents, income, revenues, security deposits, issues, profits, awards and payments of any kind payable under the leases or otherwise arising from the Land; (vi) all contract rights, accounts receivable and general intangibles relating to the Land or the use, occupancy, maintenance, construction, repair or operation thereof; all management agreements, franchise agreements, utility agreements and deposits; all maps, plans, surveys and

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specifications; all warranties and guarantees; all permits, licenses and approvals; and all insurance policies; (vii) all estates, rights, tenements, hereditaments, privileges, easements, and appurtenances of any kind benefiting the Land; all means of access to and from the Land, whether public or private; and all water and mineral rights; and (viii) all "Proceeds" of any of the above-described property, which term shall have the meaning given to it in the Uniform Commercial Code of the jurisdiction where this Mortgage is recorded (the "UCC"), whether cash or non-cash, and including insurance proceeds and condemnation awards; and all replacements, substitutions and accessions thereof.

In the event that Mortgagor is the owner of a leasehold estate with respect to any portion of the Property and Mortgagor obtains a fee estate in such portions of the Property, then, such fee estate shall automatically, and without further action of any kind on the part of the Mortgagor, be and become subject to the security title and lien of this Agreement.

TO HAVE AND TO HOLD the Property and all the estate, right, title and interest, in law and in equity, of Mortgagor's in and to the Property unto Bank, its successors and assigns, forever.

Mortgagor WARRANTS AND REPRESENTS that Mortgagor is lawfully seized of the Property, in fee simple, absolute, that Mortgagor has the legal right to convey and encumber the same, and that the Property is free and clear of all liens and encumbrances other than permitted Liens, including that certain Subordination Agreement of even date herewith by and between Mortgagor, Bank and Don Jenkins and Nancy Jenkins. Mortgagor further warrants and will forever defend all and singular the Property and title thereto to Bank and Bank's successors and assigns, against the lawful claims of all persons whomsoever.

PROVIDED ALWAYS that if (i) all the Obligations (including without limitation, all termination payments and any other amounts due under or in connection with any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) secured hereunder) are paid in full, (ii) each and every representation, warranty, agreement, covenant and condition of this Mortgage, and the other Loan Documents, are complied with and abided by, and (iii) any and all swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) secured hereunder have matured or been terminated, then this Mortgage and the estate hereby created shall cease and be null, void, and canceled of record.

To protect the security of this Mortgage, Mortgagor further represents and agrees with Bank as follows:

Payment of Obligations. That the Obligations shall be timely paid and performed.

Future Advances. This Mortgage is given to secure not only existing Obligations, but also future advances, including obligations under swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) to the same extent as if such future advances and obligations under swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) are made on the date of the execution of this Mortgage. The principal amount (including any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) and future advances) that may be so secured may decrease or increase from time to time, but the total amount so secured at any one time shall not exceed \$8,850,000.00, plus all interest, costs, reimbursements, fees and expenses due under this Mortgage and secured hereby. Mortgagor shall not execute any document that impairs or otherwise impacts the priority of any existing or future Obligations secured by this Mortgage.

Grant of Security Interest in Personal Property. This Mortgage constitutes a security agreement under the UCC and shall be deemed to constitute a fixture financing statement. Mortgagor hereby grants a security interest in any personal property included in the Property. On request of Bank, Mortgagor will execute one or more Financing Statements in form satisfactory to Bank and will pay all costs and expenses of filing the same in all public filing offices, where filing is deemed desirable by Bank. Bank is authorized to file Financing Statements relating to the Property without Mortgagor's signature where permitted by law. Mortgagor appoints Bank as its attorney-in-fact to execute such documents necessary to perfect Bank's security interest on Mortgagor's behalf. The appointment is coupled with an interest and shall be irrevocable as long as any Obligations remain outstanding.

Nothing herein obligates Bank to provide credit in excess of the Obligations.

Leases, Subleases and Easements. Mortgagor shall maintain, enforce and cause to be performed all of the terms and conditions under any lease, sublease or easement which may constitute a portion of the Property. Mortgagor shall not, without the consent of Bank (which consent shall not be unreasonably withheld or delayed), enter into any new lease of all or any portion of the Property, agree to the cancellation or surrender under any lease of all or any portion of the Property, agree to prepayment of rents, issues or profits (other than rent paid at the signing of a lease or sublease), modify any such lease so as to shorten the term, decrease the rent, accelerate the payment of rent, or change the terms of any renewal option; and any such purported new lease, cancellation, surrender, prepayment or modification made without the consent of Bank shall be void as against Bank.

Required Insurance. Mortgagor shall maintain with respect to the Property: (i) during construction of any improvements on the Property, "all-risk" builders risk insurance which must include windstorm, hail damage, fire and vandalism (non-reporting Completed Value with Special Cause of Loss form), in an amount not less than the completed replacement value of the improvements under construction, naming Bank as mortgagee and loss payee; (ii) upon completion of construction, upon occupancy of any improvements, and at all other times, insurance against loss or damage by fire and other casualties and hazards by insurance written on an "all risks" basis, including malicious mischief coverage, in an amount not less than the replacement cost thereof, including coverage for loss of rents or business interruption if applicable, naming Bank as loss payee and mortgagee; (iii) if the Property is required to be insured pursuant to the National Flood Reform Act of 1984, and the regulations promulgated thereunder, flood insurance is required in the amount equal to the lesser of the loan amount or maximum available under the National Flood Insurance Program, but in no event should the amount of coverage be less than the value of the improved structure, naming Bank as mortgagee and loss payee. If, after closing, the Property (or any part thereof) is remapped and if the vertical improvements are determined to be located in a special flood hazard area, Mortgagor must obtain and maintain a flood insurance policy. If, within forty-five (45) days of receipt of notification from Bank that the Property has been reclassified by FEMA as being located in a special flood hazard area, Mortgagor has not provided sufficient evidence of flood insurance, Bank is mandated under federal law to purchase flood insurance on behalf of Mortgagor, and Bank will add the associated costs to the principal balance of the Note. If the land or any portion thereof is located in a special flood hazard area, this Agreement may be terminated by Bank at its sole option; (iv) as applicable, insurance which complies with the workers' compensation and employers' liability laws of all states in which Mortgagor shall be required to maintain such insurance; and (v) liability insurance providing coverage in such amount as Bank may require but in no event less than \$1,000,000.00 combined single limit, naming Bank as an additional insured; and (vi) such other insurance as Bank may reasonably require from time to time.

All property insurance policies shall contain an endorsement or agreement by the insurer in form satisfactory to Bank that any loss shall be payable in accordance with the terms of such policy notwithstanding any act or negligence of Mortgagor and the further agreement (within both the property and liability policies) of the insurer waiving rights of subrogation against Bank, and rights of set-off, counterclaim or deductions against Mortgagor.

All insurance policies shall be in form, provide coverages, be issued by companies and be in amounts reasonably satisfactory to Bank. At least 30 days prior to the expiration of each such policy, Mortgagor shall furnish Bank with evidence satisfactory to Bank that such policy has been renewed or replaced or is no longer required hereunder. All such policies shall provide that the policy will not be canceled or materially amended without at least 30 days prior written notice to Bank. In the event Mortgagor fails to provide, maintain, keep in force, and furnish to Bank the policies of insurance required by this paragraph, Bank may procure such insurance or single-interest insurance in such amounts, at such premium, for such risks and by such means as Bank chooses, at Mortgagor's expense; provided however, Bank shall have no responsibility to obtain any insurance, but if Bank does obtain insurance, Bank shall have no responsibility to assure that the insurance obtained shall be adequate or provide any protection to Mortgagor.

Insurance Proceeds. After occurrence of any loss to any of the Property, Mortgagor shall give prompt written notice thereof to Bank.

In the event of such loss all insurance proceeds, including unearned premiums, shall be payable to Bank, and Mortgagor hereby authorizes and directs any affected insurance company to make payment of such proceeds directly to Bank and not to Bank and Mortgagor jointly. Bank is hereby authorized by Mortgagor to make proof of loss if not promptly made by Mortgagor, settle, adjust or compromise any claims for loss or damage under any policy or policies of insurance and Mortgagor appoints Bank as its attorney-in-fact to receive and endorse any insurance proceeds to Bank, which appointment is coupled with an interest and shall be irrevocable as long as any Obligations remain unsatisfied. Mortgagor shall pay the costs of collection, including attorneys' fees, of insurance proceeds payable on account of such damage or destruction. Mortgagor shall have no claim against the insurance proceeds, or be entitled to any portion thereof, and all rights to the insurance proceeds are hereby assigned to Bank as security for payment of the Obligations.

In the event of any damage to or destruction of the Property, Bank shall have the option of applying or paying all or part of the insurance proceeds to (i) the Obligations in such order as Bank may determine, (ii) restoration, replacement or repair of the Property in accordance with Bank's standard construction loan disbursement conditions and requirements, or (iii) Mortgagor. Nothing herein shall be deemed to excuse Mortgagor from restoring, repairing and maintaining the Property as required herein. Notwithstanding the foregoing, provided that all of the following conditions are fully satisfied by Mortgagor, Bank shall disburse insurance proceeds for repair and restoration of the Property in accordance with Bank's standard construction loan disbursement conditions and requirements: (i) no Default or event which, with the giving of notice or the passage of time, or both, would constitute a Default shall have occurred; (ii) Mortgagor shall have delivered evidence satisfactory to Bank that the Property can be fully repaired and restored prior to the maturity of the Obligations; (iii) no lease of the Property is cancelable or terminable by the tenant or Mortgagor on account of the casualty or, if it is, the tenant or Mortgagor (as applicable) has waived in writing its right to cancel; (iv) the work is performed under a fixed price or guaranteed maximum price contract satisfactory to Bank in accordance with plans and specifications and a budget satisfactory to Bank in accordance with all legal requirements; (v) Mortgagor shall have deposited with Bank for disbursement in the connection with the restoration the greater of: (A) the applicable deductible under the insurance policies covering the loss; or (B) the amount by which the cost of restoration of the Property to substantially the same value, condition and character as existed prior to such damage is estimated by Bank to exceed the net insurance proceeds; (vi) Mortgagor has paid as and when due all of Bank's costs and expenses incurred in connection with the collection and disbursement of insurance proceeds, including without limitation, inspection, monitoring, engineering and legal fees. If not paid on demand, at Bank's option, such costs may be deducted from the disbursements made by Bank or added to the sums secured by this Mortgage; and (vii) such other terms and conditions as Bank may reasonably require.

Impositions; Escrow Deposit. Mortgagor will pay all taxes, levies, assessments and other fees and charges imposed upon or which may become a lien upon the Property under any law or ordinance (all of the foregoing collectively "impositions") before they become delinquent and in any event in the same calendar year in which they first become due. Upon request of Bank, Mortgagor shall add to each periodic payment required under the Note the amount estimated by Bank to be sufficient to enable Bank to pay, as they come due, all Impositions and insurance premiums which Mortgagor is required to pay hereunder. Payments requested under this provision shall be supplemented or adjusted as required by Bank from time to time. Such funds may be commingled with the general funds of Bank and shall not earn interest. Upon the occurrence of a Default, Bank may apply such funds to pay any of the Obligations.

Use of Property. Mortgagor shall use and operate, and require its lessees or licensees to use and operate, the Property in compliance with all applicable laws (including, for example, the Americans with Disabilities Act and the Fair Housing Act) and ordinances, covenants, and restrictions, and with all applicable requirements of any lease or sublease now or hereafter affecting the Property. Mortgagor

shall not permit any unlawful use of the Property or any use that may give rise to a claim of forfeiture of any of the Property. Mortgagor shall not allow changes in the stated use of Property from that disclosed to Bank at the time of execution hereof. Mortgagor shall not initiate or acquiesce to a zoning change of the Property without prior notice to, and written consent of, Bank.

Maintenance, Repairs and Alterations. Mortgagor shall keep and maintain the Property in good condition and repair and fully protected from the elements to the satisfaction of Bank. Mortgagor will not remove, demolish or structurally alter any of the buildings or other improvements on the Property (except such alterations as may be required by laws, ordinances or regulations) without the prior written consent of Bank. Mortgagor shall promptly notify Bank in writing of any material loss, damage or adverse condition affecting the Property.

Eminent Domain. Should the Property or any interest therein be taken or damaged by reason of any public use or improvement or condemnation proceeding ("Condemnation"), or should Mortgagor receive any notice or other information regarding such Condemnation, Mortgagor shall give prompt written notice thereof to Bank. Bank shall be entitled to all compensation, awards and other payments or relief granted in connection with such Condemnation and, at its option, may commence, appear in and prosecute in its own name any action or proceedings relating thereto. Bank shall be entitled to make any compromise or settlement in connection with such taking or damage. All compensation, awards, and damages awarded to Mortgagor related to any Condemnation (the "Proceeds") are hereby assigned to Bank and Mortgagor agrees to execute such further assignments of the Proceeds as Bank may require. Bank shall have the option of applying or paying the Proceeds in the same manner as insurance proceeds as provided herein. Mortgagor appoints Bank as its attorney-in-fact to receive and endorse the Proceeds to Bank, which appointment is coupled with an interest and shall be irrevocable as long as any obligations remain unsatisfied.

Environmental Condition of Property and Indemnity. Mortgagor warrants and represents to Bank, except as reported by Mortgagor to Bank in writing, that: (i) Mortgagor has inspected and is familiar with the environmental condition of the Property; (ii) to the best of Grantor's knowledge after due and appropriate inquiry, the Property and Mortgagor, and any occupants of the Property, are in compliance with and shall continue to be in compliance with all applicable federal, state and local laws and regulations intended to protect the environment and public health and safety as the same may be amended from time to time ("Environmental Laws"); (iii) to the best of Grantor's knowledge after due and appropriate inquiry, the Property is not and has never been used to generate, handle, treat, store or dispose of, in any quantity, oil, petroleum products, hazardous or toxic substances, hazardous waste, regulated substances or hazardous air pollutants ("Hazardous Materials") in violation of any Environmental Laws; (iv) no Hazardous Materials (including asbestos, mold or lead paint in any form) are located on or under the Property or emanate from the Property; (v) to the best of Grantor's knowledge after due and appropriate inquiry, there are no unregistered underground storage tanks on the Property that are subject to any underground storage tank registration laws or regulations; (vi) no notice has been received with regard to any Hazardous Material on the Property; (vii) no action, investigation or proceeding is pending or to Mortgagor's knowledge threatened which seeks to enforce any right of remedy against Mortgagor or the Property under any Environmental Law; and (viii) all licenses, permits and other governmental or regulatory actions necessary for the Property to comply with Environmental Laws shall be obtained and maintained and Mortgagor shall assure compliance therewith.

Further, Mortgagor represents to Bank that no portion of the Property is a protected wetland. Mortgagor agrees to notify Bank immediately upon receipt of any citations, warnings, orders, notices, consent agreements, process or claims alleging or relating to violations of any Environmental Laws or to the environmental condition of the Property and shall conduct and complete all investigations and all cleanup actions necessary to comply with the Environmental Laws and to remove, in accordance with Environmental Laws, any Hazardous Material from the Property.

Mortgagor shall indemnify, hold harmless, and defend Bank from and against any and all damages, penalties, fines, claims, suits, liabilities, costs, judgments and expenses, including attorneys', consultants' or experts' fees of every kind and nature incurred, suffered by or asserted against Bank as a

direct or indirect result of: (i) representations made by Mortgagor in this Section being or becoming untrue in any material respect; (ii) Mortgagor's violation of or failure to meet the requirements of any Environmental Laws; or (iii) Hazardous Materials which, while the Property is subject to this Mortgage, exist on the Property. Bank shall have the right to arrange for or conduct environmental inspections of the Property from time to time (including the taking of soil, water, air or material samples). The cost of such inspections made after Default (as hereinafter defined) or which are required by laws or regulations applicable to Bank shall be borne by Mortgagor. However, Mortgagor's Indemnity shall not apply to any negligent or intentional act of Bank which takes place after foreclosure or satisfaction of this Mortgage. These indemnification obligations are in addition to General Indemnification provisions set forth hereafter. Mortgagor's Obligations under this section shall continue, survive and remain in full force and effect notwithstanding the repayment of the Obligations, a foreclosure of or exercise of power of sale under this instrument, a delivery of a deed in lieu of foreclosure, a cancellation or termination of record of this instrument and the transfer of the Property.

Appraisals. Mortgagor agrees that Bank may obtain an appraisal of the Property when required by the regulations of the Federal Reserve Board or the Office of the Comptroller of the Currency, or any other regulatory agency or at such other times as Bank may reasonably require. Such appraisals shall be performed by an independent third party appraiser selected by Bank. The cost of such appraisals shall be borne by Mortgagor. If requested by Bank, Mortgagor shall execute an engagement letter addressed to the appraiser selected by Bank. Mortgagor's failure or refusal to sign such an engagement letter, however, shall not impair Bank's right to obtain such an appraisal. Mortgagor agrees to pay the cost of such appraisal within 30 days after receiving an invoice for such appraisal.

Inspections. Bank, or its representatives or agents, are authorized to enter at any reasonable time upon any part of the Property for the purpose of inspecting the Property and for the purpose of performing any of the acts it is authorized to perform under the terms of this Mortgage.

Liens and Subrogation. Mortgagor shall pay and promptly discharge all liens, claims and encumbrances upon the Property. Mortgagor shall have the right to contest in good faith the validity of any such lien, claim or encumbrance, provided: (i) such contest suspends the collection thereof or there is no danger of the Property being sold or forfeited while such contest is pending; (ii) Mortgagor first deposits with Bank a bond or other security satisfactory to Bank in such amounts as Bank shall reasonably require; and (iii) Mortgagor thereafter diligently proceeds to cause such lien, claim or encumbrance to be removed and discharged.

Bank shall be subrogated to any liens, claims and encumbrances against Mortgagor or the Property that are paid or discharged through payment by Bank or with loan proceeds, notwithstanding the record cancellation or satisfaction thereof.

Waiver of Mortgagor's Rights. To the fullest extent permitted by law, Mortgagor waives the benefit of all laws now existing or that hereafter may be enacted providing for (i) any appraisal before sale of any portion of the Property, (ii) in any way extending the time for the enforcement of the collection of the Note or the debt evidenced thereby or any of the other Obligations, and any rights to hearing prior to the exercise by Bank of any right, power, or remedy herein provided to Bank.

To the full extent Mortgagor may do so, Mortgagor agrees that Mortgagor will not at any time insist upon, plead, claim or seek to take the benefit or advantage of any law now or hereafter in force providing for any exemption (including homestead exemption), appraisal, valuation, stay, extension or redemption, and Mortgagor for themselves and their respective heirs, devisees, representatives, successors and assigns, and for any and all persons claiming any interest in the Property, to the extent permitted by law, hereby waive and release all rights of valuation, appraisal, redemption, stay of execution, the benefit of all exemption laws, notice of election to mature or declare due the whole of the secured indebtedness and marshalling in the event of foreclosure of the liens hereby created. Mortgagor further waives any and all notices including, without limitation, notice of intention to accelerate and of acceleration of the Obligations.

Payments by Bank. In the event of Default (as hereinafter defined) in the timely payment or performance of any of the Obligations, Bank, at its option and without any duty on its part to determine the validity or necessity thereof, may pay the sums for which Mortgagor is obligated. Further, Bank may pay such sums as Bank deems appropriate for the protection and maintenance of the Property including, without limitation, sums to pay impositions and other levies, assessments or liens, maintain insurance, make repairs, secure the Property, maintain utility service, intervene in any condemnation and pay attorneys' fees and other fees and costs to enforce this Mortgage or protect the lien hereof (including foreclosure) or collect the Obligations, without limitation, including those incurred in any proceeding including bankruptcy or arbitration. Any amounts so paid shall bear interest at the default rate stated in the Note and shall be secured by this Mortgage.

Indemnification. Mortgagor shall protect, indemnify and save harmless Bank from and against all losses, liabilities, obligations, claims, damages, penalties, fines, causes of action, costs and expenses (including, without limitation, reasonable attorneys' fees and expenses) (collectively, "Damages") imposed upon, incurred by or asserted or assessed against Bank on account of or in connection with (i) the Loan Documents or any failure or alleged failure of Mortgagor to comply with any of the terms of, or the inaccuracy or breach of any representation in, the Loan Documents; (ii) the Collateral or any claim of loss or damage to the Property or any injury or claim of injury to, or death of, any person or property that may be occasioned by any cause whatsoever pertaining to the Property or the use, occupancy or operation thereof; (iii) any failure or alleged failure of Mortgagor to comply with any law, rule or regulation applicable to it or to the Property or the use, occupancy or operation of the Property (including, without limitation, the failure to pay any taxes, fees or other charges); (iv) any Damages whatsoever by reason of any alleged action, obligation or undertaking of Bank relating in any way to or any matter contemplated by the Loan Documents; (v) any claim for brokerage fees or such other commissions relating to the Property or any other Obligations; or (vi) any and all liability arising from any leases related to the Property. Nothing contained herein shall require Mortgagor to indemnify Bank for any Damages resulting from Bank's gross negligence or its willful and wrongful acts, and such indemnity shall be effective only to the extent of any Damages that may be sustained by Bank in excess of any net proceeds received by it from any insurance of Mortgagor (other than self-insurance) with respect to such Damages. The indemnity provided for herein shall survive payment of the Obligations and shall extend to the officers, directors, employees and duly authorized agents of Bank. In the event the Bank incurs any Damages arising out of or in any way relating to the transaction contemplated by the Loan Documents (including any of the matters referred to in this section), the amounts of such Damages shall be added to the Obligations, shall bear interest, to the extent permitted by law, at the interest rate borne by the Obligations from the date incurred until paid and shall be payable on demand.

Assignment of Rents. Mortgagor hereby absolutely assigns and transfers to Bank all the leases, rents, issues and profits of the Property (collectively "Rents"). Although this assignment is effective immediately, so long as no Default exists, Bank gives to and confers upon Mortgagor the privilege under a revocable license to collect as they become due, but not prior to accrual, the Rents and to demand, receive and enforce payment, give receipts, releases and satisfactions, and sue in the name of Mortgagor for all such Rents. Mortgagor represents there has been no prior assignment of leases or Rents, and agrees not to further assign such leases or Rents. Upon any occurrence of Default, the license granted to Mortgagor herein shall be automatically revoked without further notice to or demand upon Mortgagor, and Bank shall have the right, in its discretion, without notice, by agent or by a receiver appointed by a court, and without regard to the adequacy of any security for the Obligations, (i) to enter upon and take possession of the Property, (ii) notify tenants, subtenants and any property manager to pay Rents to Bank or its designee, and upon receipt of such notice such persons are authorized and directed to make payment as specified in the notice and disregard any contrary direction or instruction by Mortgagor, and (iii) in its own name, sue for or otherwise collect Rents, including those past due, and apply Rents, less costs and expenses of operation and collection, including attorneys' fees, to the Obligations in such order and manner as Bank may determine or as otherwise provided for herein. Bank's exercise of any one or more of the foregoing rights shall not cure or waive any Default or notice of Default hereunder.

Due on Sale or Further Encumbrance or Transfer of an Interest in Mortgagor. Without the

prior written consent of Bank in each instance, Mortgagor shall not (i) sell, convey, transfer or encumber the Property, or any part thereof or interest therein, whether legal or equitable, (ii) cause or permit any transfer of the Property or any part thereof, whether voluntarily, involuntarily or by operation of law, or (iii) enter into any agreement or transaction to transfer, or accomplish in form or substance a transfer, of the Property. A "transfer" of the Property includes: (a) the direct or indirect sale, transfer or conveyance of the Property or any portion thereof or interest therein; (b) the execution of an installment sale contract or similar instrument affecting all or any portion of the Property; (c) if Mortgagor or any general partner or member of Mortgagor, is a corporation, partnership, limited liability company, trust or other business entity, the transfer, pledge, assignment or encumbrance (whether in one transaction or a series of transactions) of any stock, partnership, limited liability company or other ownership interests in such corporation, partnership, limited liability company or entity including, without limitation, changes in stockholders, partners, members, managers, trustees, beneficiaries, or their respective interests; whether directly or indirectly; (d) if Mortgagor, or any general partner or member of Mortgagor, is a corporation, the creation or issuance of new stock by which an aggregate of more than 10% of such corporation's stock shall be vested in a party or parties who are not now stockholders; and (e) an agreement by Mortgagor leasing all or a substantial part of the Property for other than actual occupancy by a space tenant thereunder or a sale, assignment or other transfer of or the grant of a security interest in and to any Leases.

Bank's consent to any conveyance or encumbrance may be conditioned upon an increase in the interest rate specified in the Note (or other Obligations), an extension or curtailment of the maturity of the Obligations, or other modification of the Note or this instrument. Notwithstanding the foregoing, Mortgagor shall be permitted to do any of the following without triggering any increase in the interest rate, any change in the maturity date or another other modification to the loan documents so long as the same are in the ordinary course of business: (a) encumber a portion of the property with routine utility or other easements without the consent of Bank, (b) lease a portion of the property without the consent of Bank, pursuant to terms hereinabove, or (c) sell a portion of the property, provided, however, that Bank receives a release fee equal to the (i) the then current loan-to-value at the time of the sale multiplied by (ii) the sales price of the portion of the property sold. By way of example only, should the sales price be \$100,000.00 and the then current loan-to-value at the time of the sale is 70%, the release fee shall be \$70,000.00.

Remedies of Bank on Default. Failure of Mortgagor or any other person liable to timely pay or perform any of the Obligations and is not cured within the applicable Cure Period as set forth hereinbelow, is a default ("Default") under this Mortgage. **Grace/Cure Period.** Grace Period. The failure of timely payment of the Obligations shall not be a Default until 10 days after such payment is due. **Cure Period.** Except as provided below, any Default, other than non-payment, may be cured within 30 days after written notice thereof is mailed to Borrower by Bank. Borrower's right to cure shall be applicable only to curable defaults and shall not apply, without limitation, to Defaults based upon False Warranty or Cessation; Bankruptcy. Borrower shall have the right to cure a Default only once during any 12 month period. Bank shall not exercise its remedies to collect the Obligations except as Bank reasonably deems necessary to protect its interest in collateral securing the Obligations during a cure period. Upon the occurrence of Default the following remedies are available, without limitation, to Bank: (i) Bank may exercise any or all of Bank's remedies under this Mortgage or other Loan Documents including, without limitation, acceleration of the maturity of all payments and Obligations, other than Obligations under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) with Bank or any of its affiliates, which shall be due in accordance with and governed by the provisions of said swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time); (ii) Bank may take immediate possession of the Property or any part thereof (which Mortgagor agrees to surrender to Bank) and manage, control or lease the same to such persons and at such rental as it may deem proper and collect and apply Rents to the payment of: (a) the Obligations, together with all costs and attorneys' fees; (b) all impositions and any other levies, assessments or liens which may be prior in lien or payment to the Obligations, and premiums for insurance, with interest on all such items; and (c) the cost of all alterations, repairs, replacements and expenses incident to taking and retaining possession of the Property and the management and operation thereof; all in such order or priority as Bank in its sole discretion may determine. The taking of

possession shall not prevent concurrent or later proceedings for the foreclosure sale of the Property; (iii) Bank may apply to any court of competent jurisdiction for the appointment of a receiver for all purposes including, without limitation, to manage and operate the Property or any part thereof, and to apply the Rents therefrom as hereinabove provided. In the event of such application, Mortgagor consents to the appointment of a receiver, and agrees that a receiver may be appointed without notice to Mortgagor, without regard to whether Mortgagor has committed waste or permitted deterioration of the Property, without regard to the adequacy of any security for the Obligations, and without regard to the solvency of Mortgagor or any other person, firm or corporation who or which may be liable for the payment of the Obligations; (iv) Bank may exercise all the remedies of a mortgagee as provided by law and in equity including, without limitation, foreclosure upon this Mortgage and sale of the Property, or any part of the Property, at public sale conducted according to applicable law (referred to as "Sale") and conduct additional Sales as may be required until all of the Property is sold or the Obligations are satisfied; (v) With respect to any portion of the Property governed by the UCC, Bank shall have all of the rights and remedies of a secured party thereunder. Bank may elect to foreclose upon any Property that is fixtures under law applicable to foreclosure of interests in real estate or law applicable to personal property; (vi) Bank may bid at Sale and may accept; as successful bidder, credit of the bid amount against the Obligations as payment of any portion of the purchase price; and (vii) Bank shall apply the proceeds of Sale, first to any fees or attorney fees permitted Bank by law in connection with Sale, second to expenses of foreclosure, publication, and sale permitted Bank by law in connection with Sale, third to the Obligations, and any remaining proceeds as required by law.

Miscellaneous Provisions. Mortgagor agrees to the following: (i) All remedies available to Bank with respect to this Mortgage or available at law or in equity shall be cumulative and may be pursued concurrently or successively. No delay by Bank in exercising any remedy shall operate as a waiver of that remedy or of any Default. Any payment by Bank or acceptance by Bank of any partial payment shall not constitute a waiver by Bank of any Default; (ii) Mortgagor represents that Mortgagor (a) is (1) an adult individual and is sui juris, or (2) a corporation, general partnership, limited partnership, limited liability company or other legal entity, duly organized, validly existing and in good standing under the laws of its state of organization, and is authorized to do business in each other jurisdiction wherein its ownership of property or conduct of business legally requires such organization (b) has the power and authority to own its properties and assets and to carry on its business as now being conducted and as now contemplated; and (c) has the power and authority to execute, deliver and perform, and by all necessary action has authorized the execution, delivery and performance of, all of its obligations under this Mortgage and any other Loan Document to which it is a party. (iii) The provisions hereof shall be binding upon and inure to the benefit of Mortgagor, its heirs, personal representatives, successors and assigns including, without limitation, subsequent owners of the Property or any part thereof, and shall be binding upon and inure to the benefit of Bank, its successors and assigns and any future holder of the Note or other Obligations; (iv) Any notices, demands or requests shall be sufficiently given Mortgagor if in writing and mailed or delivered to the address of Mortgagor shown above or to another address as provided herein and to Bank if in writing and mailed or delivered to Wachovia Bank, National Association, Mail Code VA7628, P. O. Box 13327, Roanoke, VA 24040 or Wachovia Bank, National Association, Mail Code VA7628, 10 South Jefferson Street, Roanoke, VA 24011, or such other address as Bank may specify from time to time and in the event that Mortgagor changes Mortgagor's address at any time prior to the date the Obligations are paid in full, that party shall promptly give written notice of such change of address by registered or certified mail, return receipt requested, all charges prepaid. Notices to Bank must include the mail code. (v) All payments shall be mailed to Commercial Loan Services, P. O. Box 740502, Atlanta, GA 30374-0502; or such other address as provided by Bank in writing. (vi) This Mortgage may not be changed, terminated or modified orally or in any manner other than by an instrument in writing signed by the parties hereto; (vii) All references to "Bank" shall mean to "Bank (for itself and its affiliate)"; (viii) The captions or headings at the beginning of each paragraph hereof are for the convenience of the parties and are not a part of this Mortgage; (ix) If the lien of this Mortgage is invalid or unenforceable as to any part of the Obligations, the unsecured portion of the Obligations shall be completely paid (and all payments made shall be deemed to have first been applied to payment of the unsecured portion of the Obligations) prior to payment of the secured portion of the Obligations and if any clause, provision or obligation hereunder is determined invalid or unenforceable the remainder of this Mortgage shall be construed and enforced as if such clause, provision or obligation had not been

contained herein; (x) This Mortgage shall be governed by and construed under the laws of the jurisdiction where this Mortgage is recorded; (xi) Mortgagor by execution and Bank by acceptance of this Mortgage agree to be bound by the terms and provisions hereof. Final Agreement. This Agreement and the other Loan Documents represent the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous or subsequent agreements of the parties. There are no unwritten agreements between the parties.

Minimum Standards. In addition to the requirements set forth in the Loan Documents, all surveys, insurance, title policies, construction documents, environmental reports, payment and performance bonds, and any other due diligence or additional documents required in connection with this Loan, shall comply with Bank's minimum standards in place from time to time for such documents, which shall be provided in writing by Bank to Borrower upon request.

IN WITNESS WHEREOF, Mortgagor has duly signed and sealed this instrument as of the day and year first above written.

Mortgagor

EGIS 521, LLC

By: EGIS Southeast Realty Capital, LLC, Manager

Ronald C. Mariello (SEAL)
Ronald C. Mariello, Manager

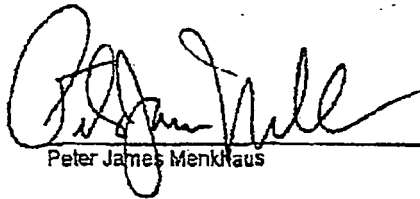
Signed, sealed and delivered in presence of:

Frank E. Caputo

Witness
Suite 4700
100 N. Tryon St., Charlotte, NC 28202
Address

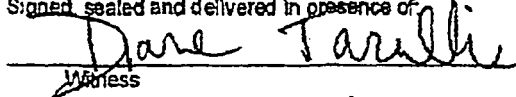
James Scheffer

Witness
100 N. Tryon St. Ste 4700
Charlotte NC 28202
Address

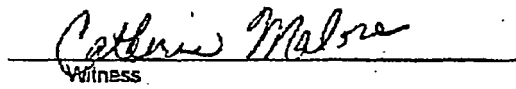

Peter James Menkhous

(SEAL)

Signed, sealed and delivered in presence of:


Witness

1224 Firthorne Club Dr. Waxhaw, NC 28173
Address

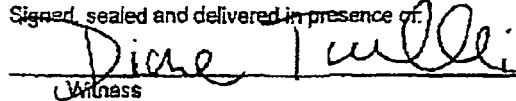

Witness

1020 Seminole Dr., Waxhaw, NC
Address


Stephanie L. Menkhous

(SEAL)

Signed, sealed and delivered in presence of:


Witness

1224 Firthorne Club Dr., Waxhaw, NC 28173
Address


Witness

1020 Seminole Dr., Waxhaw, NC
Address

State of North Carolina
County of Mecklenburg

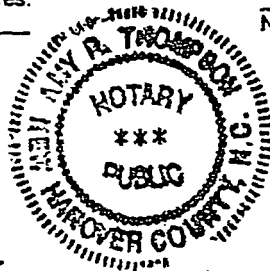
PARTNERSHIP, LIMITED PARTNERSHIP or L.L.C. PROBATE

I, Am R. Thompson, Notary Public, do hereby certify that Ronald C. Mariello, a Manager of EGIS-Southeast Realty Capital, LLC, a limited liability company which is Manager of EGIS 521, LLC, a limited liability company, personally appeared before me this day and acknowledged due execution of the foregoing instrument on behalf of the limited liability company.

Witness my hand and official seal, this the 15th day of May 2007

My commission expires: 1-5-2008

Am R. Thompson
Notary Public



State of NC.
County of Union

Kathleen Abbott
[Signature]

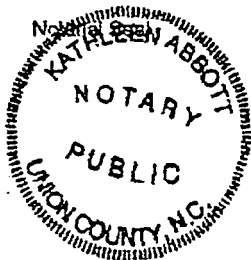
Individual Probate

[Signature], a Notary Public of said County and State, do hereby certify that Peter James Menkhaus personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

WITNESS my hand and official seal, this 14 day of May 2007

Kathleen Abbott
Notary Public

My Commission Expires: 7/12/2011



State of NC
County of Union

Individual Probate

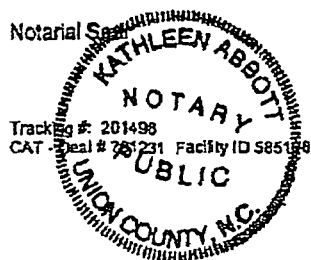
Kathleen Abbott, a Notary Public of said County and State, do hereby certify that
Stephanie L. Menkhaus personally appeared before me this day and acknowledged the due execution of
the foregoing Instrument.

WITNESS my hand and official seal, this 14 day of May, 2007

Kathleen Abbott
Notary Public

My Commission Expires: 7/12/2011

Notarial Seal



Parcel Description

All that certain piece, parcel or lot of land lying, being and situate in Lancaster County, South Carolina, being shown and designated as 42.463 acres, more or less, on Boundary Survey entitled "JENKINS PROPERTY" dated November 16, 2006, prepared by Stephen S. Dyer of The Isaacs Group, and being more particularly described according to said plat as follows: POINT AND PLACE OF BEGINNING, commence at an existing 1" pipe on the southern edge of the right-of-way for Shelly Mullis Road Highway(66' Public R/W), common corner with property now or formerly of Belair Methodist Church (Deed Book R-8, Page 134); thence along the common boundary line with property of Belair Methodist Church the following five (5) courses and distances: (1) S. 21-36-50 E. 146.06 feet to an angle iron; (2) S. 18-44-57 E. 141.99 feet to an angle iron; (3) S. 18-44-57 E. 67.95 feet to an iron pin set; (4) N. 48-28-38 E. 176.26 feet to an 1-1/2" pipe; (5) N. 48-28-38 E. 474.89 feet to an 1/2" pipe, a point in the western boundary line of property now or formerly of Patricia Rodgers Murphy (Deed Book A-6, Page 4302); thence S. 45-14-50 E. 816.31 feet to a #5 rebar, a common corner with property now or formerly of Jerry Lee Murphy (Deed Book B-6, Page 3872); thence S. 45-18-23 E. 448.96 feet to an iron pin set, a common corner with property now or formerly of James E. Harris & Janie Lucille Wilson Harris Trust (Deed Book 225, Page 182); thence along the common boundary line with said property the following two (2) courses and distances: (1) S. 46-30-28 W. 1080.77 feet to an 1" pipe; (2) N. 45-13-34 W. 60.01 feet to an aluminum disk, a common corner with property now or formerly of South Carolina Bank and Trust of the Piedmont, N.A. (Deed Book 321, Page 142); thence with the said property the following two (2) courses and distances: (1) N. 46-13-00 W. 310.35 feet to an aluminum disk; (2) S. 52-01-45 W. 267.51 feet to an aluminum disk on the eastern edge of the right-of-way for U.S. Highway 521 (Public R/W Varies); thence running along the eastern edge of the right-of-way for U.S. Highway 521 N. 40-27-10 W. a total distance of 1295.39 feet to an iron pin set, (passing an iron pin set at a distance of 1068.92 feet); a point on the southern edge of the right-of-way for Shelly Mullis Road Highway; thence running along the southern edge the following two (2) courses and distances: (1) N. 52-16-30 E. 223.85 feet to an iron pin set; (2) N. 52-20-11 E. 527.25 feet to an existing 1" pipe being the POINT AND PLACE OF BEGINNING.

Derivation: The above described tract of property being the same identified property described in Deed from Don A. Jenkins and Nancy T. Jenkins, dated May 16, 2007, recorded May 17, 2007, in Deed Book 399, Page 120; and by Quitclaim Deed from Don A. Jenkins and Nancy T. Jenkins, dated May 16, 2007, recorded May 17, 2007, in Deed Book 399, Page 125, both of the Office of the Clerk of Court for Lancaster County, South Carolina.

TMS NUMBER: 13-00-051.00

AMENDED AND RESTATED PROMISSORY NOTE

\$4,646,663.35

December 19, 2008

EGIS 521, LLC
14820 Ballantyne Country Club Drive
Charlotte, North Carolina 28277
(Hereinafter referred to as "Borrower")

Wachovia Bank, National Association
Charlotte, North Carolina 28202
(Hereinafter referred to as "Bank")

Borrower promises to pay to the order of Bank, in lawful money of the United States of America, at its office indicated above or wherever else Bank may specify, the sum of Four Million, Six Hundred Forty-Six Thousand, Six Hundred Sixty-Three and 35/100 Dollars (\$4,646,663.35) or such sum as may be advanced and outstanding from time to time, with interest on the unpaid principal balance at the rate and on the terms provided in this Promissory Note (including all renewals, extensions or modifications hereof, this "Note").

MODIFICATION: This Note extends, and/or modifies that certain that certain Promissory Note, dated as of May 17, 2007 (as amended and modified), made by Borrower in favor of the Bank in the face amount of \$4,549,320.00. Furthermore, a Forbearance Agreement dated as of December 19, 2008 (the "Forbearance Agreement") and other related documents are being executed in conjunction with this Note.

LOAN/FORBEARANCE AGREEMENT. This Note is subject to the provisions of that certain Loan Agreement dated May 17, 2007 and the Forbearance Agreement, as modified from time to time.

USE OF PROCEEDS. Borrower used the original proceeds of the loan evidenced by this Note for the commercial purposes of Borrower, as follows: to finance the acquisition of 42 acre of land on Highway 521 at Shelly Mullis Road in Indian Land Township, Lancaster County, South Carolina.

SECURITY. Borrower, Peter James Menkhaus and Stephanie L. Menkhaus have granted Bank a security interest in the collateral described in the Loan Documents, including, but not limited to, real and personal property collateral described in that certain Mortgage, Assignment of Rents and Security Agreement dated May 17, 2007.

INTEREST RATE. Wall Street Journal Prime-Based Rate. Interest shall accrue on the unpaid principal balance of this Note from January 1, 2009 at the prime rate as published in The Wall Street Journal ("WSJ") as of the date of this Note ("WSJ Prime Rate") plus 1.0% per annum ("Interest Rate"). The WSJ Rate as of the date hereof is 3.25%. The Interest Rate will change from time to time as the WSJ Prime Rate changes in an amount equal to the change in the WSJ Prime Rate, but will not change more often than once a month, which will occur on the first day of each calendar month and will be based on the WSJ Prime rate published in the WSJ on the 25th day of the prior calendar month. If more than one rate is published, the

highest rate published shall apply; and if the 25th day of the prior calendar month or the date of this Note falls on a day when the WSJ Prime Rate is not published, the WSJ Prime Rate shall be the rate published on the last day prior to the 25th day of the prior calendar month or the date of this Note on which the rate is published. In the event the WSJ discontinues publishing the WSJ Prime Rate, Bank shall select another index and provide prior notice of the name of the new index and in what publication the new index can be found. Borrower acknowledges and agrees that the WSJ Prime Rate is not represented or intended to be the lowest or most favorable rate offered by Bank to any of its borrowers.

DEFAULT RATE. In addition to all other rights contained in this Note, if a Default (as defined herein) occurs and as long as a Default continues, all outstanding Obligations, other than Obligations under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) between Borrower and Bank or its affiliates, shall bear interest at the Interest Rate plus 3% ("Default Rate"), except if the Note is governed by the laws of the State of North Carolina and the original principal amount is less than or equal to \$300,000.00. The Default Rate shall also apply from acceleration until the Obligations or any judgment thereon is paid in full.

INTEREST AND FEE(S) COMPUTATION (ACTUAL/360). Interest and fees, if any, shall be computed on the basis of a 360-day year for the actual number of days in the applicable period ("Actual/360 Computation"). The Actual/360 Computation determines the annual effective yield by taking the stated (nominal) rate for a years period and then dividing said rate by 360 to determine the daily periodic rate to be applied for each day in the applicable period. Application of the Actual/360 Computation produces an annualized effective Interest rate exceeding the nominal rate.

REPAYMENT TERMS. This Note shall be due and payable in consecutive monthly payments of accrued interest only, commencing on January 31, 2009 and continuing on the last day of each month thereafter until the rate is fully paid. In any event, all principal and accrued interest shall be due and payable on May 30, 2009.

APPLICATION OF PAYMENTS. Monies received by Bank from any source for application toward payment of the Obligations shall be applied to accrued interest and then to principal. If a Default occurs, monies may be applied to the Obligations in any manner or order deemed appropriate by Bank.

If any payment received by Bank under this Note or other Loan Documents is rescinded, avoided or for any reason returned by Bank because of any adverse claim or threatened action, the returned payment shall remain payable as an obligation of all persons liable under this Note or other Loan Documents as though such payment had not been made.

DEFINITIONS. Loan Documents. The term "Loan Documents", as used in this Note and the other Loan Documents, refers to all documents executed in connection with or related to the loan evidenced by this Note and any prior notes which evidence all or any portion of the loan evidenced by this Note, and any letters of credit issued pursuant to any loan agreement to which this Note is subject, any applications for such letters of credit and any other documents executed in connection therewith or related thereto, and may include, without limitation, a

commitment letter that survives closing, a loan agreement, this Note, guaranty agreements, security agreements, security instruments, financing statements, mortgage instruments, any renewals or modifications, whenever any of the foregoing are executed, but does not include swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time). **Obligations.** The term "Obligations", as used in this Note and other Loan Documents, refers to any and all indebtedness and other obligations under this Note, all other obligations under any other Loan Document(s), and all obligations under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) between Borrower and Bank, or its affiliates, whenever executed. **Certain Other Terms.** All terms that are used but not otherwise defined in any of the Loan Documents shall have the definitions provided in the Uniform Commercial Code.

ATTORNEYS' FEES AND OTHER COLLECTION COSTS. Borrower shall pay all of Bank's reasonable expenses actually incurred to enforce or collect any of the Obligations including, without limitation, reasonable arbitration, paralegals', attorneys' and experts' fees and expenses, whether incurred without the commencement of a suit, in any trial, arbitration, or administrative proceeding, or in any appellate or bankruptcy proceeding.

USURY. If at any time the effective interest rate under this Note would, but for this paragraph, exceed the maximum lawful rate, the effective interest rate under this Note shall be the maximum lawful rate, and any amount received by Bank in excess of such rate shall be applied to principal and then to fees and expenses, or, if no such amounts are owing, returned to Borrower.

DEFAULT. If any of the following occurs a default ("Default") under this Note shall exist: **Nonpayment; Nonperformance.** The failure of timely payment or performance of the Obligations or Default under this Note or any other Loan Documents. **False Warranty.** A warranty or representation made or deemed made in the Loan Documents or furnished Bank in connection with the loan evidenced by this Note proves materially false, or if of a continuing nature, becomes materially false at the time made. **Cross Default.** At Bank's option, any default in payment or performance of any obligation under any other loans, contracts or agreements of Borrower. **Cessation; Bankruptcy.** The death of, appointment of a guardian for, dissolution of, termination of existence of, loss of good standing status by, appointment of a receiver for, assignment for the benefit of creditors of, or commencement of any bankruptcy or insolvency proceeding by or against Borrower, its Subsidiaries or Affiliates, if any, or any general partner of or the holder(s) of the majority ownership interests of Borrower, or any party to the Loan Documents. **Material Capital Structure or Business Alteration.** Without prior written consent of Bank, (i) a material alteration in the kind or type of Borrower's business or that of Borrowers Subsidiaries or Affiliates, if any; (ii) the sale of substantially all of the business or assets of Borrower, any of Borrower's Subsidiaries or Affiliates or any guarantor, or a material portion (10% or more) of such business or assets if such a sale is outside the ordinary course of business of Borrower, or any of Borrower's Subsidiaries or Affiliates or any guarantor, or more than 50% of the outstanding stock or voting power of or in any such entity in a single transaction or a series of transactions; (iii) the acquisition of substantially all of the business or assets or more than 50% of the outstanding stock or voting power of any other entity; or (iv) should any Borrower or any of Borrowers Subsidiaries or Affiliates or any guarantor enter into any merger or consolidation. **Material Adverse Change.** Bank determines in good faith, in its sole discretion, that the prospects for payment or

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performance of the Obligations are impaired or there has occurred a material adverse change in the business or prospects of Borrower, financial or otherwise.

REMEDIES UPON DEFAULT. If a Default occurs under this Note or any Loan Documents, Bank may at any time thereafter, take the following actions: **Bank Lien.** Foreclose its security interest or lien against Borrower's deposit accounts and investment property without notice. **Cumulative.** Exercise any rights and remedies as provided under the Note and other Loan Documents, or as provided by law or equity.

FINANCIAL AND OTHER INFORMATION. Borrower shall deliver to Bank such information as Bank may reasonably request from time to time, including without limitation, financial statements and information pertaining to Borrowers financial condition. Such information shall be true, complete, and accurate.

WAIVERS AND AMENDMENTS. No waivers, amendments or modifications of this Note and other Loan Documents shall be valid unless in writing and signed by an officer of Bank. No waiver by Bank of any Default shall operate as a waiver of any other Default or the same Default on a future occasion. Neither the failure nor any delay on the part of Bank in exercising any right, power, or remedy under this Note and other Loan Documents shall operate as a waiver thereof, nor shall a single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

Except to the extent otherwise provided by the Loan Documents or prohibited by law, each Borrower and each other person liable under this Note waives presentment, protest, notice of dishonor, demand for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, notice of sale and all other notices of any kind. Further, each agrees that Bank may (i) extend, modify or renew this Note or make a novation of the loan evidenced by this Note, and/or (ii) grant releases, compromises or indulgences with respect to any collateral securing this Note, or with respect to any Borrower or other person liable under this Note or any other Loan Documents, all without notice to or consent of each Borrower and other such person, and without affecting the liability of each Borrower and other such person; provided, Bank may not extend, modify or renew this Note or make a novation of the loan evidenced by this Note without the consent of the Borrower, or if there is more than one Borrower, without the consent of at least one Borrower; and further provided, if there is more than one Borrower, Bank may not enter into a modification of this Note which increases the burdens of a Borrower without the consent of that Borrower.

MISCELLANEOUS PROVISIONS. **Assignment.** This Note and the other Loan Documents shall inure to the benefit of and be binding upon the parties and their respective heirs, legal representatives, successors and assigns. Bank's Interests in and rights under this Note and the other Loan Documents are freely assignable, in whole or in part, by Bank. In addition, nothing in this Note or any of the other Loan Documents shall prohibit Bank from pledging or assigning this Note or any of the other Loan Documents or any Interest therein to any Federal Reserve Bank. Borrower shall not assign its rights and Interest hereunder without the prior written consent of Bank, and any attempt by Borrower to assign without Bank's prior written consent is null and void. Any assignment shall not release Borrower from the Obligations. **Applicable Law; Conflict Between Documents.** This Note and, unless otherwise provided in

any other Loan Document, the other Loan Documents shall be governed by and interpreted under the laws of the state named in Bank's address on the first page hereof without regard to that state's conflict of laws principles. If the terms of this Note should conflict with the terms of any loan agreement or any commitment letter that survives closing, the terms of the Forbearance Agreement dated as of December 19, 2008 shall control. **Borrower's Accounts.** Except as prohibited by law, Borrower grants Bank a security interest in all of Borrower's deposit accounts and Investment property with Bank and any of its affiliates. **Swap Agreements.** All swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time), if any, between Borrower and Bank or its affiliates are independent agreements governed by the written provisions of said swap agreements, which will remain in full force and effect, unaffected by any repayment, prepayment, acceleration, reduction, increase or change in the terms of this Note, except as otherwise expressly provided in said written swap agreements, and any payoff statement from Bank relating to this Note shall not apply to said swap agreements except as otherwise expressly provided in such payoff statement. **Jurisdiction.** Borrower irrevocably agrees to non-exclusive personal jurisdiction in the state identified as the Jurisdiction above. **Severability.** If any provision of this Note or of the other Loan Documents shall be prohibited or invalid under applicable law, such provision shall be ineffective but only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Note or other such document. **Notices.** Any notices to Borrower shall be sufficiently given, if in writing and mailed or delivered to the Borrowers address shown above or such other address as provided hereunder, and to Bank, if in writing and mailed or delivered to Wachovia Bank, National Association, Attention: David Maynard, 301 S. Tryon Street, M-10, NC-0659, Charlotte, North Carolina 28222 or such other address as Bank may specify in writing from time to time. Notices to Bank must include the mail code. In the event that Borrower changes Borrowers address at any time prior to the date the Obligations are paid in full, Borrower agrees to promptly give written notice of said change of address by registered or certified mail, return receipt requested, all charges prepaid. **Plural; Captions.** All references in the Loan Documents to Borrower, guarantor, person, document or other nouns of reference mean both the singular and plural form, as the case may be, and the term "person" shall mean any Individual, person or entity. The captions contained in the Loan Documents are inserted for convenience only and shall not affect the meaning or interpretation of the Loan Documents. **Advances.** Bank may, in its sole discretion, make other advances which shall be deemed to be advances under this Note, even though the stated principal amount of this Note may be exceeded as a result thereof. **Posting of Payments.** All payments received during normal banking hours after 2:00 p.m. local time at the office of Bank first shown above shall be deemed received at the opening of the next banking day. **Joint and Several Obligations.** If there is more than one Borrower, each is jointly and severally obligated together with all other parties obligated for the Obligations. **Fees and Taxes.** Borrower shall promptly pay all documentary, intangible recordation and/or similar taxes on this transaction whether assessed at closing or arising from time to time. **LIMITATION ON LIABILITY; WAIVER OF PUNITIVE DAMAGES.** EACH OF THE PARTIES HERETO, INCLUDING BANK BY ACCEPTANCE HEREOF, AGREES THAT IN ANY JUDICIAL, MEDIATION OR ARBITRATION PROCEEDING OR ANY CLAIM OR CONTROVERSY BETWEEN OR AMONG THEM THAT MAY ARISE OUT OF OR BE IN ANY WAY CONNECTED WITH THIS AGREEMENT, THE LOAN DOCUMENTS OR ANY OTHER AGREEMENT OR DOCUMENT BETWEEN OR

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AGREEING TO BINDING ARBITRATION THEY HAVE IRREVOCABLY WAIVED ANY RIGHT THEY MAY HAVE TO JURY TRIAL WITH REGARD TO A DISPUTE AS TO WHICH BINDING ARBITRATION HAS BEEN DEMANDED.

IN WITNESS WHEREOF, Borrower, on the day and year first above written, has caused this Note to be duly executed under seal.

EGIS 521, LLC

By: EGIS Southeast Realty Capital, LLC, Manager

By: *Ronald C. Mariello* (SEAL)
Ronald C. Mariello, Manager

UNCONDITIONAL GUARANTY

December 19, 2008

EGIS 521, LLC
14820 Ballantyne Country Club Drive
Charlotte, North Carolina 28277
(Hereinafter referred to as "Borrower")

Mark A. Ciminelli
11717 Smart Lane
Charlotte, North Carolina 28277
(Hereinafter referred to as "Guarantor")

Wachovia Bank, National Association
Charlotte, North Carolina 28202
(Hereinafter referred to as "Bank")

To induce Bank to make, extend or renew loans, advances, credit, or other financial accommodations to or for the benefit of Borrower, which are and will be to the direct interest and advantage of the Guarantor, and in consideration of loans, advances, credit, or other financial accommodations made, extended or renewed to or for the benefit of Borrower, which are and will be to the direct interest and advantage of the Guarantor, Guarantor hereby absolutely, irrevocably and unconditionally guarantees to Bank and its successors, assigns and affiliates the timely payment and performance of all liabilities and obligations of Borrower to Bank under that certain Amended and Restated Promissory Note of even date herewith in the original principal amount of \$4,646,663.35, the Loan Documents as defined below, and all obligations of Borrower to Bank or any of its affiliates under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time), and all extensions, modifications and renewals thereof, (collectively, the "Guaranteed Obligations").

Guarantor further covenants and agrees:

GUARANTOR'S LIABILITY. This Guaranty is a continuing and unconditional guaranty of payment and performance and not of collection. The parties to this Guaranty are jointly and severally obligated together with all other parties obligated for the Guaranteed Obligations. This Guaranty does not impose any obligation on Bank to extend or continue to extend credit or otherwise deal with Borrower at any subsequent time. This Guaranty shall continue to be effective or be reinstated, as the case may be, if at any time any payment of the Guaranteed Obligations is rescinded, avoided or for any other reason must be returned by Bank, and the returned payment shall remain payable as part of the Guaranteed Obligations, all as though such payment had not been made. Except to the extent the provisions of this Guaranty give Bank additional rights, this Guaranty shall not be deemed to supersede or replace any other guaranties given to Bank by Guarantor; and the obligations guaranteed hereby shall be in addition to any other obligations guaranteed by Guarantor pursuant to any other agreement of guaranty given to Bank and other guaranties of the Guaranteed Obligations.

TERMINATION OF GUARANTY. Guarantor may terminate this Guaranty only by written notice, delivered personally to or received by certified or registered United States Mail by an authorized officer of Bank at the address for notices provided herein. Such termination shall be effective only with respect to Guaranteed Obligations arising more than 15 days after the date such written notice is received by said Bank officer. Such termination shall not be effective with respect to Guaranteed Obligations (including any subsequent extensions, modifications or compromises of the Guaranteed Obligations) then existing, or Guaranteed Obligations arising subsequent to receipt by Bank of said notice if such Guaranteed Obligations are a result of Bank's obligation to make advances pursuant to a commitment, or are based on Borrower's obligations to make payments pursuant to any swap agreement (as defined in 11 U.S.C. § 101, as in effect from time to time), entered into prior to expiration of the 15 day notice period, or are a result of advances which are necessary for Bank to protect its collateral or otherwise preserve its interests. Termination of this Guaranty by any single Guarantor will not affect the existing and continuing obligations of any other Guarantor hereunder.

CONSENT TO MODIFICATIONS. Guarantor consents and agrees that Bank (and, with respect to swap obligations, its affiliates) may from time to time, in its sole discretion, without affecting, impairing, lessening or releasing the obligations of Guarantor hereunder: (a) extend or modify the time, manner, place or terms of payment or performance and/or otherwise change or modify the credit terms of the Guaranteed Obligations; (b) increase, renew, or enter into a novation of the Guaranteed Obligations; (c) waive or consent to the departure from terms of the Guaranteed Obligations; (d) permit any change in the business or other dealings and relations of Borrower or any other guarantor with Bank; (e) proceed against, exchange, release, realize upon, or otherwise deal with in any manner any collateral that is or may be held by Bank in connection with the Guaranteed Obligations or any liabilities or obligations of Guarantor; and (f) proceed against, settle, release, or compromise with Borrower, any insurance carrier, or any other person or entity liable as to any part of the Guaranteed Obligations, and/or subordinate the payment of any part of the Guaranteed Obligations to the payment of any other obligations, which may at any time be due or owing to Bank; all in such manner and upon such terms as Bank may deem appropriate, and without notice to or further consent from Guarantor. No invalidity, irregularity, discharge or unenforceability of, or action or omission by Bank relating to any part of the Guaranteed Obligations or any security therefor shall affect or impair this Guaranty.

WAIVERS AND ACKNOWLEDGMENTS. To the extent permitted by law, Guarantor waives and releases the following rights, demands, and defenses Guarantor may have with respect to Bank (and, with respect to swap obligations, its affiliates) and collection of the Guaranteed Obligations: (a) promptness and diligence in collection of any of the Guaranteed Obligations from Borrower or any other person liable thereon, and in foreclosure of any security interest and sale of any property serving as collateral for the Guaranteed Obligations; (b) any law or statute that requires that Bank (and, with respect to swap obligations, its affiliates) make demand upon, assert claims against, or collect from Borrower or other persons or entitles, foreclose any security interest, sell collateral, exhaust any remedies, or take any other action against Borrower or other persons or entitles prior to making demand upon, collecting from or taking action against Guarantor with respect to the Guaranteed Obligations, including any such rights Guarantor might otherwise have had under Va. Code §§ 49-25 and

49-26, et seq., N.C.G.S. §§ 26-7, et seq. Tenn. Code Ann. § 47-12-101, O.C.G.A., § 10-7-24, Mississippi Code Ann. Section 87-5-1, California Civil Code Section §§ 2787 to 2855 inclusive, and any successor statute and any other applicable law; (c) any law or statute that requires that Borrower or any other person be joined in, notified of or made part of any action against Guarantor; (d) that Bank or its affiliates preserve, insure or perfect any security interest in collateral or sell or dispose of collateral in a particular manner or at a particular time, provided that Bank's obligation to dispose of Collateral in a commercially reasonable manner is not waived hereby; (e) notice of extensions,, modifications, renewals, or novations of the Guaranteed Obligations, of any new transactions or other relationships between Bank, Borrower and/or any guarantor, and of changes in the financial condition of, ownership of, or business structure of Borrower or any other guarantor; (f) presentment, protest, notice of dishonor, notice of default, demand for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, notice of sale, and all other notices of any kind whatsoever to which Guarantor may be entitled; (g) the right to assert against Bank or its affiliates any defense (legal or equitable), set-off, counterclaim, or claim that Guarantor may have at any time against Borrower or any other party liable to Bank or its affiliates; (h) all defenses relating to invalidity, insufficiency, unenforceability, enforcement, release or impairment of Bank or its affiliates' lien on any collateral, of the Loan Documents, or of any other guaranties held by Bank; (i) any right to which Guarantor is or may become entitled to be subrogated to Bank or its affiliates' rights against Borrower or to seek contribution, reimbursement, indemnification, payment or the like, or participation in any claim, right or remedy of Bank or its affiliates against Borrower or any security which Bank or its affiliates now has or hereafter acquires, until such time as the Guaranteed Obligations have been fully satisfied beyond the expiration of any applicable preference period; (j) any claim or defense that acceleration of maturity of the Guaranteed Obligations is stayed against Guarantor because of the stay of assertion or of acceleration of claims against any other person or entity for any reason including the bankruptcy or insolvency of that person or entity; and (k) the right to marshalling of Borrower's assets or the benefit of any exemption claimed by Guarantor. Guarantor acknowledges and represents that Guarantor has relied upon Guarantor's own due diligence in making an independent appraisal of Borrower, Borrower's business affairs and financial condition, and any collateral; Guarantor will continue to be responsible for making an independent appraisal of such matters; and Guarantor has not relied upon Bank or its affiliates for information regarding Borrower or any collateral.

FINANCIAL CONDITION. Guarantor warrants, represents and covenants to Bank and its affiliates that on and after the date hereof: (a) the fair saleable value of Guarantor's assets exceeds its liabilities, Guarantor is meeting its current liabilities as they mature, and Guarantor is and shall remain solvent; (b) all financial statements of Guarantor furnished to Bank are correct and accurately reflect the financial condition of Guarantor as of the respective dates thereof; (c) since the date of such financial statements, there has not occurred a material adverse change in the financial condition of Guarantor; (d) there are not now pending any court or administrative proceedings or undischarged judgments against Guarantor, no federal or state tax liens have been filed or threatened against Guarantor, and Guarantor is not in default or claimed default under any agreement; and (e) at such reasonable times as Bank requests, Guarantor will furnish Bank and its affiliates with such other financial information as Bank and its affiliates may reasonably request.

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affiliates have been paid in full on or prior to such date, and (ii) no event or condition which constitutes or which with notice or the lapse of time would constitute an event of default with respect to the Guaranteed Obligations shall be continuing on or as of the payment date; (b) Guarantor will either place a legend indicating such subordination on every note, ledger page or other document evidencing any part of the Subordinated Debt or deliver such documents to Bank; and (c) except as permitted by this paragraph, Guarantor will not request or accept payment of or any security for any part of the Subordinated Debt, and any proceeds of the Subordinated Debt paid to Guarantor, through error or otherwise, shall immediately be forwarded to Bank by Guarantor, properly endorsed to the order of Bank, to apply to the Guaranteed Obligations.

MISCELLANEOUS. Assignment. This Guaranty and other Loan Documents shall inure to the benefit of and be binding upon the parties and their respective heirs, legal representatives, successors and assigns. Bank's interests in and rights under this Guaranty and other Loan Documents are freely assignable, in whole or in part, by Bank. Any assignment shall not release Guarantor from the Guaranteed Obligations. **Organization; Powers.** Guarantor (i) is (a) an adult individual and is sui juris, or (b) a corporation, general partnership, limited partnership, limited liability company or other legal entity (as indicated below), duly organized, validly existing and in good standing under the laws of its state of organization, and is authorized to do business in each other jurisdiction wherein its ownership of property or conduct of business legally requires such organization, (ii) has the power and authority to own its properties and assets and to carry on its business as now being conducted and as now contemplated; and (iii) has the power and authority to execute, deliver and perform, and by all necessary action has authorized the execution, delivery and performance of, all of its obligations under this Guaranty and any other Loan Document to which it is a party. **Applicable Law; Conflict Between Documents.** This Guaranty shall be governed by and construed under the laws of the state named in Bank's address shown above without regard to that state's conflict of laws principles. If the terms of this Guaranty should conflict with the terms of any commitment letter that survives closing, the terms of this Guaranty shall control. **Jurisdiction.** Guarantor irrevocably agrees to non-exclusive personal jurisdiction in the state named in Bank's address shown above. **Severability.** If any provision of this Guaranty or of the other Loan Documents shall be prohibited or invalid under applicable law, such provision shall be ineffective but only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Guaranty or other Loan Documents. **Notices.** Any notices to Guarantor shall be sufficiently given if in writing and mailed or delivered to Guarantor's address shown above or such other address as provided hereunder, and to Bank, if in writing and mailed or delivered to Wachovia Bank, National Association, Mail Code VA7628, P.O. Box 13327, Roanoke, VA 24040 or Wachovia Bank, National Association, Mail Code VA7626, 10 South Jefferson Street, Roanoke, VA 24011 or such other address as Bank may specify in writing from time to time. Notices to Bank must include the mail code. In the event that Guarantor changes Guarantor's address at any time prior to the date the Guaranteed Obligations are paid in full, Guarantor agrees to promptly give written notice of said change of address to Bank by registered or certified mail, return receipt requested, all charges prepaid. **Plural; Captions.** All references in the Loan Documents to borrower, guarantor, person, document or other nouns of reference mean both the singular and plural form, as the case may be, and the term "person" shall mean any individual person or entity. The captions contained in the Loan Documents are inserted for convenience only and

shall not affect the meaning or interpretation of the Loan Documents. **Binding Contract.** Guarantor by execution of and Bank by acceptance of this Guaranty agree that each party is bound to all terms and provisions of this Guaranty. **Amendments, Waivers and Remedies.** No waivers, amendments or modifications of this Guaranty and other Loan Documents shall be valid unless in writing and signed by an officer of Bank. No waiver by Bank or its affiliates of any Default shall operate as a waiver of any other Default or the same Default on a future occasion. Neither the failure nor any delay on the part of Bank or its affiliates in exercising any right, power, or privilege granted pursuant to this Guaranty and other Loan Documents shall operate as a waiver thereof, nor shall a single or partial exercise thereof preclude any other or further exercise or the exercise of any other right, power or privilege. All remedies available to Bank or its affiliates with respect to this Guaranty and other Loan Documents and remedies available at law or in equity shall be cumulative and may be pursued concurrently or successively. **Partnerships.** If Guarantor is a partnership, the obligations, liabilities and agreements on the part of Guarantor shall remain in full force and effect and fully applicable notwithstanding any changes in the individuals comprising the partnership. The term "Guarantor" includes any altered or successive partnerships, and predecessor partnership(s) and the partners shall not be released from any obligations or liabilities hereunder. **Loan Documents.** The term "Loan Documents" refers to all documents executed in connection with or related to the Guaranteed Obligations and may include, without limitation, commitment letters that survive closing, loan agreements, other guaranty agreements, security agreements, instruments, financing statements, mortgages, deeds of trust, deeds to secure debt, letters of credit and any amendments or supplements (excluding swap agreements as defined in 11 U.S.C. § 101, as in effect from time to time).

LIMITATION ON LIABILITY; WAIVER OF PUNITIVE DAMAGES. EACH OF THE PARTIES HERETO, INCLUDING BANK BY ACCEPTANCE HEREOF, AGREES THAT IN ANY JUDICIAL, MEDIATION OR ARBITRATION PROCEEDING OR ANY CLAIM OR CONTROVERSY BETWEEN OR AMONG THEM THAT MAY ARISE OUT OF OR BE IN ANY WAY CONNECTED WITH THIS AGREEMENT, THE LOAN DOCUMENTS OR ANY OTHER AGREEMENT OR DOCUMENT BETWEEN OR AMONG THEM OR THE OBLIGATIONS EVIDENCED HEREBY OR RELATED HERETO, IN NO EVENT SHALL ANY PARTY HAVE A REMEDY OF, OR BE LIABLE TO THE OTHER FOR, (1) INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES OR (2) PUNITIVE OR EXEMPLARY DAMAGES. EACH OF THE PARTIES HEREBY EXPRESSLY WAIVES ANY RIGHT OR CLAIM TO PUNITIVE OR EXEMPLARY DAMAGES THEY MAY HAVE OR WHICH MAY ARISE IN THE FUTURE IN CONNECTION WITH ANY SUCH PROCEEDING, CLAIM OR CONTROVERSY, WHETHER THE SAME IS RESOLVED BY ARBITRATION, MEDIATION, JUDICIALLY OR OTHERWISE. **Final Agreement.** This Agreement and the other Loan Documents represent the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

FINANCIAL AND OTHER INFORMATION. Guarantor shall deliver to Bank such information as Bank may reasonably request from time to time, including without limitation, financial statements and information pertaining to Guarantor's financial condition. Such information shall be true, complete, and accurate.

NEGATIVE COVENANTS. Guarantor agrees that from the date hereof and until final payment in full of the Guaranteed Obligations, unless Bank shall otherwise consent in writing, Guarantor will not: **Default on Other Contracts or Obligations.** Default on any material contract with or obligation when due to a third party or default in the performance of any obligation to a third party incurred for money borrowed. **Government Intervention.** Permit the assertion or making of any seizure, vesting or intervention by or under authority of any governmental entity, as a result of which the management of Guarantor or any guarantor is displaced of its authority in the conduct of its respective business or such business is curtailed or materially impaired. **Judgment Entered.** Permit the entry of any monetary judgment or the assessment against, the filing of any tax lien against, or the issuance of any writ of garnishment or attachment against any property of or debts due Guarantor. **Retire or Repurchase Capital Stock.** Retire or otherwise acquire any of its capital stock.

PERSONAL FINANCIAL STATEMENTS. Each Guarantor who is an individual shall deliver to Bank annually, within thirteen months of the previous statement date on file with Bank, Guarantor's financial statement. Said financial statement shall disclose all of Guarantor's assets, liabilities, net worth, income and contingent liabilities, all in reasonable detail and acceptable to Bank and submitted on a form to be provided by Bank or on such other form previously accepted by or acceptable to Bank, signed by Guarantor and certified by Guarantor to Bank to be true, correct and complete.

TAX RETURNS. Guarantor shall deliver to Bank, within 30 days of filing, complete copies of federal and state tax returns, as applicable, together with all schedules thereto, each of which shall be signed and certified by Guarantor to be true and complete copies of such returns. In the event an extension is filed, Guarantor shall deliver a copy of the extension within 30 days of filing.

ARBITRATION. Upon demand of any party hereto, whether made before or after institution of any judicial proceeding, any claim or controversy arising out of or relating to the Loan Documents between parties hereto (a "Dispute") shall be resolved by binding arbitration conducted under and governed by the Commercial Financial Disputes Arbitration Rules (the "Arbitration Rules") of the American Arbitration Association (the "AAA") and the Federal Arbitration Act. Disputes may include, without limitation, tort claims, counterclaims, a dispute as to whether a matter is subject to arbitration, or claims arising from documents executed in the future, but shall specifically exclude claims brought as or converted to class actions. A judgment upon the award may be entered in any court having jurisdiction. Notwithstanding the foregoing, this arbitration provision does not apply to disputes under or related to swap agreements. **Special Rules.** All arbitration hearings shall be conducted in the city named in the address of Bank first stated above. A hearing shall begin within 90 days of demand for arbitration and all hearings shall conclude within 120 days of demand for arbitration. These time limitations may not be extended unless a party shows cause for extension and then for no more than a total of 60 days. The expedited procedures set forth in Rule 51 et seq. of the Arbitration Rules shall be applicable to claims of less than \$1,000,000.00. Arbitrators shall be licensed attorneys selected from the Commercial Financial Dispute Arbitration Panel of the AAA. The parties do not waive applicable Federal or state substantive law except as provided herein. **Preservation and Limitation of Remedies.** Notwithstanding the preceding binding arbitration provisions, the parties agree to preserve, without diminution, certain remedies that

any party may exercise before or after an arbitration proceeding is brought. The parties shall have the right to proceed in any court of proper jurisdiction or by self-help to exercise or prosecute the following remedies, as applicable: (i) all rights to foreclose against any real or personal property or other security by exercising a power of sale or under applicable law by judicial foreclosure including a proceeding to confirm the sale; (ii) all rights of self-help including peaceful occupation of real property and collection of rents, set-off, and peaceful possession of personal property; (iii) obtaining provisional or ancillary remedies including injunctive relief, sequestration, garnishment, attachment, appointment of receiver and filing an involuntary bankruptcy proceeding; and (iv) when applicable, a judgment by confession of judgment. Any claim or controversy with regard to any party's entitlement to such remedies is a Dispute. **Waiver of Jury Trial.** THE PARTIES ACKNOWLEDGE THAT BY AGREEING TO BINDING ARBITRATION THEY HAVE IRREVOCABLY WAIVED ANY RIGHT THEY MAY HAVE TO JURY TRIAL WITH REGARD TO A DISPUTE AS TO WHICH BINDING ARBITRATION HAS BEEN DEMANDED.

IN WITNESS WHEREOF, Guarantor, on the day and year first written above, has caused this Unconditional Guaranty to be duly executed under seal.


_____(SEAL)
Mark A. Ciminelli

UNCONDITIONAL GUARANTY

December 19, 2008

EGIS 521, LLC
14820 Ballantyne Country Club Drive
Charlotte, North Carolina 28277
(Hereinafter referred to as "Borrower")

Mark E. Carpenter
100 North Tryon Street, Suite 4700
Charlotte, North Carolina 28202
(Hereinafter referred to as "Guarantor")

Wachovia Bank, National Association
Charlotte, North Carolina 28202
(Hereinafter referred to as "Bank")

To induce Bank to make, extend or renew loans, advances, credit, or other financial accommodations to or for the benefit of Borrower, which are and will be to the direct interest and advantage of the Guarantor, and in consideration of loans, advances, credit, or other financial accommodations made, extended or renewed to or for the benefit of Borrower, which are and will be to the direct interest and advantage of the Guarantor, Guarantor hereby absolutely, irrevocably and unconditionally guarantees to Bank and its successors, assigns and affiliates the timely payment and performance of all liabilities and obligations of Borrower to Bank under that certain Amended and Restated Promissory Note of even date herewith in the original principal amount of \$4,646,663.35, the Loan Documents as defined below, and all obligations of Borrower to Bank or any of its affiliates under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time), and all extensions, modifications and renewals thereof, (collectively, the "Guaranteed Obligations").

Guarantor further covenants and agrees:

GUARANTOR'S LIABILITY. This Guaranty is a continuing and unconditional guaranty of payment and performance and not of collection. The parties to this Guaranty are jointly and severally obligated together with all other parties obligated for the Guaranteed Obligations. This Guaranty does not impose any obligation on Bank to extend or continue to extend credit or otherwise deal with Borrower at any subsequent time. This Guaranty shall continue to be effective or be reinstated, as the case may be, if at any time any payment of the Guaranteed Obligations is rescinded, avoided or for any other reason must be returned by Bank, and the returned payment shall remain payable as part of the Guaranteed Obligations, all as though such payment had not been made. Except to the extent the provisions of this Guaranty give Bank additional rights, this Guaranty shall not be deemed to supersede or replace any other guaranties given to Bank by Guarantor; and the obligations guaranteed hereby shall be in addition to any other obligations guaranteed by Guarantor pursuant to any other agreement of guaranty given to Bank and other guaranties of the Guaranteed Obligations.

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TERMINATION OF GUARANTY. Guarantor may terminate this Guaranty only by written notice, delivered personally to or received by certified or registered United States Mail by an authorized officer of Bank at the address for notices provided herein. Such termination shall be effective only with respect to Guaranteed Obligations arising more than 15 days after the date such written notice is received by said Bank officer. Such termination shall not be effective with respect to Guaranteed Obligations (including any subsequent extensions, modifications or compromises of the Guaranteed Obligations) then existing, or Guaranteed Obligations arising subsequent to receipt by Bank of said notice if such Guaranteed Obligations are a result of Bank's obligation to make advances pursuant to a commitment, or are based on Borrower's obligations to make payments pursuant to any swap agreement (as defined in 11 U.S.C. § 101, as in effect from time to time), entered into prior to expiration of the 15 day notice period, or are a result of advances which are necessary for Bank to protect its collateral or otherwise preserve its interests. Termination of this Guaranty by any single Guarantor will not affect the existing and continuing obligations of any other Guarantor hereunder.

CONSENT TO MODIFICATIONS. Guarantor consents and agrees that Bank (and, with respect to swap obligations, its affiliates) may from time to time, in its sole discretion, without affecting, impairing, lessening or releasing the obligations of Guarantor hereunder: (a) extend or modify the time, manner, place or terms of payment or performance and/or otherwise change or modify the credit terms of the Guaranteed Obligations; (b) increase, renew, or enter into a novation of the Guaranteed Obligations; (c) waive or consent to the departure from terms of the Guaranteed Obligations; (d) permit any change in the business or other dealings and relations of Borrower or any other guarantor with Bank; (e) proceed against, exchange, release, realize upon, or otherwise deal with in any manner any collateral that is or may be held by Bank in connection with the Guaranteed Obligations or any liabilities or obligations of Guarantor; and (f) proceed against, settle, release, or compromise with Borrower, any insurance carrier, or any other person or entity liable as to any part of the Guaranteed Obligations, and/or subordinate the payment of any part of the Guaranteed Obligations to the payment of any other obligations, which may at any time be due or owing to Bank; all in such manner and upon such terms as Bank may deem appropriate, and without notice to or further consent from Guarantor. No invalidity, irregularity, discharge or unenforceability of, or action or omission by Bank relating to any part of the Guaranteed Obligations or any security therefor shall affect or impair this Guaranty.

WAIVERS AND ACKNOWLEDGMENTS. To the extent permitted by law, Guarantor waives and releases the following rights, demands, and defenses Guarantor may have with respect to Bank (and, with respect to swap obligations, its affiliates) and collection of the Guaranteed Obligations: (a) promptness and diligence in collection of any of the Guaranteed Obligations from Borrower or any other person liable thereon, and in foreclosure of any security interest and sale of any property serving as collateral for the Guaranteed Obligations; (b) any law or statute that requires that Bank (and, with respect to swap obligations, its affiliates) make demand upon, assert claims against, or collect from Borrower or other persons or entitles, foreclose any security interest, sell collateral, exhaust any remedies, or take any other action against Borrower or other persons or entitles prior to making demand upon, collecting from or taking action against Guarantor with respect to the Guaranteed Obligations, including any such rights Guarantor might otherwise have had under Va. Code §§ 49-25 and

49-26, et seq., N.C.G.S. §§ 26-7, et seq. Tenn. Code Ann. § 47-12-101, O.C.G.A. § 10-7-24, Mississippi Code Ann. Section 87-5-1, California Civil Code Section §§ 2787 to 2855 inclusive, and any successor statute and any other applicable law; (c) any law or statute that requires that Borrower or any other person be joined in, notified of or made part of any action against Guarantor; (d) that Bank or its affiliates preserve, insure or perfect any security interest in collateral or sell or dispose of collateral in a particular manner or at a particular time, provided that Bank's obligation to dispose of Collateral in a commercially reasonable manner is not waived hereby; (e) notice of extensions,, modifications, renewals, or novations of the Guaranteed Obligations, of any new transactions or other relationships between Bank, Borrower and/or any guarantor, and of changes in the financial condition of, ownership of, or business structure of Borrower or any other guarantor; (f) presentment, protest, notice of dishonor, notice of default, demand for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, notice of sale, and all other notices of any kind whatsoever to which Guarantor may be entitled; (g) the right to assert against Bank or its affiliates any defense (legal or equitable), set-off, counterclaim, or claim that Guarantor may have at any time against Borrower or any other party liable to Bank or its affiliates; (h) all defenses relating to invalidity, insufficiency, unenforceability, enforcement, release or impairment of Bank or its affiliates' lien on any collateral, of the Loan Documents, or of any other guaranties held by Bank; (i) any right to which Guarantor is or may become entitled to be subrogated to Bank or its affiliates' rights against Borrower or to seek contribution, reimbursement, indemnification, payment or the like, or participation in any claim, right or remedy of Bank or its affiliates against Borrower or any security which Bank or its affiliates now has or hereafter acquires, until such time as the Guaranteed Obligations have been fully satisfied beyond the expiration of any applicable preference period; (j) any claim or defense that acceleration of maturity of the Guaranteed Obligations is stayed against Guarantor because of the stay of assertion or of acceleration of claims against any other person or entity for any reason including the bankruptcy or insolvency of that person or entity; and (k) the right to marshalling of Borrower's assets or the benefit of any exemption claimed by Guarantor. Guarantor acknowledges and represents that Guarantor has relied upon Guarantor's own due diligence in making an independent appraisal of Borrower, Borrower's business affairs and financial condition, and any collateral; Guarantor will continue to be responsible for making an independent appraisal of such matters; and Guarantor has not relied upon Bank or its affiliates for information regarding Borrower or any collateral.

FINANCIAL CONDITION. Guarantor warrants, represents and covenants to Bank and its affiliates that on and after the date hereof: (a) the fair saleable value of Guarantor's assets exceeds its liabilities, Guarantor is meeting its current liabilities as they mature, and Guarantor is and shall remain solvent; (b) all financial statements of Guarantor furnished to Bank are correct and accurately reflect the financial condition of Guarantor as of the respective dates thereof; (c) since the date of such financial statements, there has not occurred a material adverse change in the financial condition of Guarantor; (d) there are not now pending any court or administrative proceedings or undischarged judgments against Guarantor, no federal or state tax liens have been filed or threatened against Guarantor, and Guarantor is not in default or claimed default under any agreement; and (e) at such reasonable times as Bank requests, Guarantor will furnish Bank and its affiliates with such other financial information as Bank and its affiliates may reasonably request.

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affiliates have been paid in full on or prior to such date, and (ii) no event or condition which constitutes or which with notice or the lapse of time would constitute an event of default with respect to the Guaranteed Obligations shall be continuing on or as of the payment date; (b) Guarantor will either place a legend indicating such subordination on every note, ledger page or other document evidencing any part of the Subordinated Debt or deliver such documents to Bank; and (c) except as permitted by this paragraph, Guarantor will not request or accept payment of or any security for any part of the Subordinated Debt, and any proceeds of the Subordinated Debt paid to Guarantor, through error or otherwise, shall immediately be forwarded to Bank by Guarantor, properly endorsed to the order of Bank, to apply to the Guaranteed Obligations.

MISCELLANEOUS. Assignment. This Guaranty and other Loan Documents shall inure to the benefit of and be binding upon the parties and their respective heirs, legal representatives, successors and assigns. Bank's interests in and rights under this Guaranty and other Loan Documents are freely assignable, in whole or in part, by Bank. Any assignment shall not release Guarantor from the Guaranteed Obligations. **Organization; Powers.** Guarantor (i) is (a) an adult individual and is sui juris, or (b) a corporation, general partnership, limited partnership, limited liability company or other legal entity (as indicated below), duly organized, validly existing and in good standing under the laws of its state of organization, and is authorized to do business in each other jurisdiction wherein its ownership of property or conduct of business legally requires such organization, (ii) has the power and authority to own its properties and assets and to carry on its business as now being conducted and as now contemplated; and (iii) has the power and authority to execute, deliver and perform, and by all necessary action has authorized the execution, delivery and performance of, all of its obligations under this Guaranty and any other Loan Document to which it is a party. **Applicable Law; Conflict Between Documents.** This Guaranty shall be governed by and construed under the laws of the state named in Bank's address shown above without regard to that state's conflict of laws principles. If the terms of this Guaranty should conflict with the terms of any commitment letter that survives closing, the terms of this Guaranty shall control. **Jurisdiction.** Guarantor irrevocably agrees to non-exclusive personal jurisdiction in the state named in Bank's address shown above. **Severability.** If any provision of this Guaranty or of the other Loan Documents shall be prohibited or invalid under applicable law, such provision shall be ineffective but only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Guaranty or other Loan Documents. **Notices.** Any notices to Guarantor shall be sufficiently given if in writing and mailed or delivered to Guarantor's address shown above or such other address as provided hereunder, and to Bank, if in writing and mailed or delivered to Wachovia Bank, National Association, Mail Code VA7628, P.O. Box 13327, Roanoke, VA 24040 or Wachovia Bank, National Association, Mail Code VA7626, 10 South Jefferson Street, Roanoke, VA 24011 or such other address as Bank may specify in writing from time to time. Notices to Bank must include the mail code. In the event that Guarantor changes Guarantor's address at any time prior to the date the Guaranteed Obligations are paid in full, Guarantor agrees to promptly give written notice of said change of address to Bank by registered or certified mail, return receipt requested, all charges prepaid. **Plural; Captions.** All references in the Loan Documents to borrower, guarantor, person, document or other nouns of reference mean both the singular and plural form, as the case may be, and the term "person" shall mean any individual person or entity. The captions contained in the Loan Documents are inserted for convenience only and

shall not affect the meaning or interpretation of the Loan Documents. **Binding Contract.** Guarantor by execution of and Bank by acceptance of this Guaranty agree that each party is bound to all terms and provisions of this Guaranty. **Amendments, Waivers and Remedies.** No waivers, amendments or modifications of this Guaranty and other Loan Documents shall be valid unless in writing and signed by an officer of Bank. No waiver by Bank or its affiliates of any Default shall operate as a waiver of any other Default or the same Default on a future occasion. Neither the failure nor any delay on the part of Bank or its affiliates in exercising any right, power, or privilege granted pursuant to this Guaranty and other Loan Documents shall operate as a waiver thereof, nor shall a single or partial exercise thereof preclude any other or further exercise or the exercise of any other right, power or privilege. All remedies available to Bank or its affiliates with respect to this Guaranty and other Loan Documents and remedies available at law or in equity shall be cumulative and may be pursued concurrently or successively. **Partnerships.** If Guarantor is a partnership, the obligations, liabilities and agreements on the part of Guarantor shall remain in full force and effect and fully applicable notwithstanding any changes in the individuals comprising the partnership. The term "Guarantor" includes any altered or successive partnerships, and predecessor partnership(s) and the partners shall not be released from any obligations or liabilities hereunder. **Loan Documents.** The term "Loan Documents" refers to all documents executed in connection with or related to the Guaranteed Obligations and may include, without limitation, commitment letters that survive closing, loan agreements, other guaranty agreements, security agreements, instruments, financing statements, mortgages, deeds of trust, deeds to secure debt, letters of credit and any amendments or supplements (excluding swap agreements as defined in 11 U.S.C. § 101, as in effect from time to time).

LIMITATION ON LIABILITY; WAIVER OF PUNITIVE DAMAGES. EACH OF THE PARTIES HERETO, INCLUDING BANK BY ACCEPTANCE HEREOF, AGREES THAT IN ANY JUDICIAL, MEDIATION OR ARBITRATION PROCEEDING OR ANY CLAIM OR CONTROVERSY BETWEEN OR AMONG THEM THAT MAY ARISE OUT OF OR BE IN ANY WAY CONNECTED WITH THIS AGREEMENT, THE LOAN DOCUMENTS OR ANY OTHER AGREEMENT OR DOCUMENT BETWEEN OR AMONG THEM OR THE OBLIGATIONS EVIDENCED HEREBY OR RELATED HERETO, IN NO EVENT SHALL ANY PARTY HAVE A REMEDY OF, OR BE LIABLE TO THE OTHER FOR, (1) INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES OR (2) PUNITIVE OR EXEMPLARY DAMAGES. EACH OF THE PARTIES HEREBY EXPRESSLY WAIVES ANY RIGHT OR CLAIM TO PUNITIVE OR EXEMPLARY DAMAGES THEY MAY HAVE OR WHICH MAY ARISE IN THE FUTURE IN CONNECTION WITH ANY SUCH PROCEEDING, CLAIM OR CONTROVERSY, WHETHER THE SAME IS RESOLVED BY ARBITRATION, MEDIATION, JUDICIALLY OR OTHERWISE. **Final Agreement.** This Agreement and the other Loan Documents represent the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

FINANCIAL AND OTHER INFORMATION. Guarantor shall deliver to Bank such information as Bank may reasonably request from time to time, including without limitation, financial statements and information pertaining to Guarantor's financial condition. Such information shall be true, complete, and accurate.

NEGATIVE COVENANTS. Guarantor agrees that from the date hereof and until final payment in full of the Guaranteed Obligations, unless Bank shall otherwise consent in writing, Guarantor will not: **Default on Other Contracts or Obligations.** Default on any material contract with or obligation when due to a third party or default in the performance of any obligation to a third party incurred for money borrowed. **Government Intervention.** Permit the assertion or making of any seizure, vesting or intervention by or under authority of any governmental entity, as a result of which the management of Guarantor or any guarantor is displaced of its authority in the conduct of its respective business or such business is curtailed or materially impaired. **Judgment Entered.** Permit the entry of any monetary judgment or the assessment against, the filing of any tax lien against, or the issuance of any writ of garnishment or attachment against any property of or debts due Guarantor. **Retire or Repurchase Capital Stock.** Retire or otherwise acquire any of its capital stock.

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TAX RETURNS. Guarantor shall deliver to Bank, within 30 days of filing, complete copies of federal and state tax returns, as applicable, together with all schedules thereto, each of which shall be signed and certified by Guarantor to be true and complete copies of such returns. In the event an extension is filed, Guarantor shall deliver a copy of the extension within 30 days of filing.

ARBITRATION. Upon demand of any party hereto, whether made before or after institution of any judicial proceeding, any claim or controversy arising out of or relating to the Loan Documents between parties hereto (a "Dispute") shall be resolved by binding arbitration conducted under and governed by the Commercial Financial Disputes Arbitration Rules (the "Arbitration Rules") of the American Arbitration Association (the "AAA") and the Federal Arbitration Act. Disputes may include, without limitation, tort claims, counterclaims, a dispute as to whether a matter is subject to arbitration, or claims arising from documents executed in the future, but shall specifically exclude claims brought as or converted to class actions. A judgment upon the award may be entered in any court having jurisdiction. Notwithstanding the foregoing, this arbitration provision does not apply to disputes under or related to swap agreements. **Special Rules.** All arbitration hearings shall be conducted in the city named in the address of Bank first stated above. A hearing shall begin within 90 days of demand for arbitration and all hearings shall conclude within 120 days of demand for arbitration. These time limitations may not be extended unless a party shows cause for extension and then for no more than a total of 60 days. The expedited procedures set forth in Rule 51 et seq. of the Arbitration Rules shall be applicable to claims of less than \$1,000,000.00. Arbitrators shall be licensed attorneys selected from the Commercial Financial Dispute Arbitration Panel of the AAA. The parties do not waive applicable Federal or state substantive law except as provided herein. **Preservation and Limitation of Remedies.** Notwithstanding the preceding binding arbitration provisions, the parties agree to preserve, without diminution, certain remedies that

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Mark E. Carpenter (SEAL)
Mark E. Carpenter

UNCONDITIONAL GUARANTY

December 19, 2008

EGIS 521, LLC
14820 Ballantyne Country Club Drive
Charlotte, North Carolina 28277
(Hereinafter referred to as "Borrower")

Ronald C. Mariello
14820 Ballantyne Country Club Drive
Charlotte, North Carolina 28277
(Hereinafter referred to as "Guarantor")

Wachovia Bank, National Association
Charlotte, North Carolina 28202
(Hereinafter referred to as "Bank")

To induce Bank to make, extend or renew loans, advances, credit, or other financial accommodations to or for the benefit of Borrower, which are and will be to the direct interest and advantage of the Guarantor, and in consideration of loans, advances, credit, or other financial accommodations made, extended or renewed to or for the benefit of Borrower, which are and will be to the direct interest and advantage of the Guarantor, Guarantor hereby absolutely, irrevocably and unconditionally guarantees to Bank and its successors, assigns and affiliates the timely payment and performance of all liabilities and obligations of Borrower to Bank under that certain Amended and Restated Promissory Note of even date herewith in the original principal amount of \$4,646,663.35, the Loan Documents as defined below, and all obligations of Borrower to Bank or any of its affiliates under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time), and all extensions, modifications and renewals thereof, (collectively, the "Guaranteed Obligations").

Guarantor further covenants and agrees:

GUARANTOR'S LIABILITY. This Guaranty is a continuing and unconditional guaranty of payment and performance and not of collection. The parties to this Guaranty are jointly and severally obligated together with all other parties obligated for the Guaranteed Obligations. This Guaranty does not impose any obligation on Bank to extend or continue to extend credit or otherwise deal with Borrower at any subsequent time. This Guaranty shall continue to be effective or be reinstated, as the case may be, if at any time any payment of the Guaranteed Obligations is rescinded, avoided or for any other reason must be returned by Bank, and the returned payment shall remain payable as part of the Guaranteed Obligations, all as though such payment had not been made. Except to the extent the provisions of this Guaranty give Bank additional rights, this Guaranty shall not be deemed to supersede or replace any other guaranties given to Bank by Guarantor; and the obligations guaranteed hereby shall be in addition to any other obligations guaranteed by Guarantor pursuant to any other agreement of guaranty given to Bank and other guaranties of the Guaranteed Obligations.

TERMINATION OF GUARANTY. Guarantor may terminate this Guaranty only by written notice, delivered personally to or received by certified or registered United States Mail by an authorized officer of Bank at the address for notices provided herein. Such termination shall be effective only with respect to Guaranteed Obligations arising more than 15 days after the date such written notice is received by said Bank officer. Such termination shall not be effective with respect to Guaranteed Obligations (including any subsequent extensions, modifications or compromises of the Guaranteed Obligations) then existing, or Guaranteed Obligations arising subsequent to receipt by Bank of said notice if such Guaranteed Obligations are a result of Bank's obligation to make advances pursuant to a commitment, or are based on Borrower's obligations to make payments pursuant to any swap agreement (as defined in 11 U.S.C. § 101, as in effect from time to time), entered into prior to expiration of the 15 day notice period, or are a result of advances which are necessary for Bank to protect its collateral or otherwise preserve its interests. Termination of this Guaranty by any single Guarantor will not affect the existing and continuing obligations of any other Guarantor hereunder.

CONSENT TO MODIFICATIONS. Guarantor consents and agrees that Bank (and, with respect to swap obligations, its affiliates) may from time to time, in its sole discretion, without affecting, impairing, lessening or releasing the obligations of Guarantor hereunder: (a) extend or modify the time, manner, place or terms of payment or performance and/or otherwise change or modify the credit terms of the Guaranteed Obligations; (b) increase, renew, or enter into a novation of the Guaranteed Obligations; (c) waive or consent to the departure from terms of the Guaranteed Obligations; (d) permit any change in the business or other dealings and relations of Borrower or any other guarantor with Bank; (e) proceed against, exchange, release, realize upon, or otherwise deal with in any manner any collateral that is or may be held by Bank in connection with the Guaranteed Obligations or any liabilities or obligations of Guarantor; and (f) proceed against, settle, release, or compromise with Borrower, any insurance carrier, or any other person or entity liable as to any part of the Guaranteed Obligations, and/or subordinate the payment of any part of the Guaranteed Obligations to the payment of any other obligations, which may at any time be due or owing to Bank; all in such manner and upon such terms as Bank may deem appropriate, and without notice to or further consent from Guarantor. No invalidity, irregularity, discharge or unenforceability of, or action or omission by Bank relating to any part of the Guaranteed Obligations or any security therefor shall affect or impair this Guaranty.

WAIVERS AND ACKNOWLEDGMENTS. To the extent permitted by law, Guarantor waives and releases the following rights, demands, and defenses Guarantor may have with respect to Bank (and, with respect to swap obligations, its affiliates) and collection of the Guaranteed Obligations: (a) promptness and diligence in collection of any of the Guaranteed Obligations from Borrower or any other person liable thereon, and in foreclosure of any security interest and sale of any property serving as collateral for the Guaranteed Obligations; (b) any law or statute that requires that Bank (and, with respect to swap obligations, its affiliates) make demand upon, assert claims against, or collect from Borrower or other persons or entitles, foreclose any security interest, sell collateral, exhaust any remedies, or take any other action against Borrower or other persons or entitles prior to making demand upon, collecting from or taking action against Guarantor with respect to the Guaranteed Obligations, including any such rights Guarantor might otherwise have had under Va. Code §§ 49-25 and

STOCKS

49-26, et seq., N.C.G.S. §§ 26-7, et seq. Tenn. Code Ann. § 47-12-101, O.C.G.A. § 10-7-24, Mississippi Code Ann. Section 87-5-1, California Civil Code Section §§ 2787 to 2855 inclusive, and any successor statute and any other applicable law; (c) any law or statute that requires that Borrower or any other person be joined in, notified of or made part of any action against Guarantor; (d) that Bank or its affiliates preserve, insure or perfect any security interest in collateral or sell or dispose of collateral in a particular manner or at a particular time, provided that Bank's obligation to dispose of Collateral in a commercially reasonable manner is not waived hereby; (e) notice of extensions, modifications, renewals, or novations of the Guaranteed Obligations, of any new transactions or other relationships between Bank, Borrower and/or any guarantor, and of changes in the financial condition of, ownership of, or business structure of Borrower or any other guarantor; (f) presentment, protest, notice of dishonor, notice of default, demand for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, notice of sale, and all other notices of any kind whatsoever to which Guarantor may be entitled; (g) the right to assert against Bank or its affiliates any defense (legal or equitable), set-off, counterclaim, or claim that Guarantor may have at any time against Borrower or any other party liable to Bank or its affiliates; (h) all defenses relating to invalidity, insufficiency, unenforceability, enforcement, release or impairment of Bank or its affiliates' lien on any collateral, of the Loan Documents, or of any other guaranties held by Bank; (i) any right to which Guarantor is or may become entitled to be subrogated to Bank or its affiliates' rights against Borrower or to seek contribution, reimbursement, indemnification, payment or the like, or participation in any claim, right or remedy of Bank or its affiliates against Borrower or any security which Bank or its affiliates now has or hereafter acquires, until such time as the Guaranteed Obligations have been fully satisfied beyond the expiration of any applicable preference period; (j) any claim or defense that acceleration of maturity of the Guaranteed Obligations is stayed against Guarantor because of the stay of assertion or of acceleration of claims against any other person or entity for any reason including the bankruptcy or insolvency of that person or entity; and (k) the right to marshalling of Borrower's assets or the benefit of any exemption claimed by Guarantor. Guarantor acknowledges and represents that Guarantor has relied upon Guarantor's own due diligence in making an independent appraisal of Borrower, Borrower's business affairs and financial condition, and any collateral; Guarantor will continue to be responsible for making an independent appraisal of such matters; and Guarantor has not relied upon Bank or its affiliates for information regarding Borrower or any collateral.

FINANCIAL CONDITION. Guarantor warrants, represents and covenants to Bank and its affiliates that on and after the date hereof: (a) the fair saleable value of Guarantor's assets exceeds its liabilities, Guarantor is meeting its current liabilities as they mature, and Guarantor is and shall remain solvent; (b) all financial statements of Guarantor furnished to Bank are correct and accurately reflect the financial condition of Guarantor as of the respective dates thereof; (c) since the date of such financial statements, there has not occurred a material adverse change in the financial condition of Guarantor; (d) there are not now pending any court or administrative proceedings or undischarged judgments against Guarantor, no federal or state tax liens have been filed or threatened against Guarantor, and Guarantor is not in default or claimed default under any agreement; and (e) at such reasonable times as Bank requests, Guarantor will furnish Bank and its affiliates with such other financial information as Bank and its affiliates may reasonably request.

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affiliates have been paid in full on or prior to such date, and (ii) no event or condition which constitutes or which with notice or the lapse of time would constitute an event of default with respect to the Guaranteed Obligations shall be continuing on or as of the payment date; (b) Guarantor will either place a legend indicating such subordination on every note, ledger page or other document evidencing any part of the Subordinated Debt or deliver such documents to Bank; and (c) except as permitted by this paragraph, Guarantor will not request or accept payment of or any security for any part of the Subordinated Debt, and any proceeds of the Subordinated Debt paid to Guarantor, through error or otherwise, shall immediately be forwarded to Bank by Guarantor, properly endorsed to the order of Bank, to apply to the Guaranteed Obligations.

MISCELLANEOUS. Assignment. This Guaranty and other Loan Documents shall inure to the benefit of and be binding upon the parties and their respective heirs, legal representatives, successors and assigns. Bank's interests in and rights under this Guaranty and other Loan Documents are freely assignable, in whole or in part, by Bank. Any assignment shall not release Guarantor from the Guaranteed Obligations. **Organization; Powers.** Guarantor (i) is (a) an adult individual and is sui juris, or (b) a corporation, general partnership, limited partnership, limited liability company or other legal entity (as indicated below), duly organized, validly existing and in good standing under the laws of its state of organization, and is authorized to do business in each other jurisdiction wherein its ownership of property or conduct of business legally requires such organization, (ii) has the power and authority to own its properties and assets and to carry on its business as now being conducted and as now contemplated; and (iii) has the power and authority to execute, deliver and perform, and by all necessary action has authorized the execution, delivery and performance of, all of its obligations under this Guaranty and any other Loan Document to which it is a party. **Applicable Law; Conflict Between Documents.** This Guaranty shall be governed by and construed under the laws of the state named in Bank's address shown above without regard to that state's conflict of laws principles. If the terms of this Guaranty should conflict with the terms of any commitment letter that survives closing, the terms of this Guaranty shall control. **Jurisdiction.** Guarantor irrevocably agrees to non-exclusive personal jurisdiction in the state named in Bank's address shown above. **Severability.** If any provision of this Guaranty or of the other Loan Documents shall be prohibited or invalid under applicable law, such provision shall be ineffective but only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Guaranty or other Loan Documents. **Notices.** Any notices to Guarantor shall be sufficiently given if in writing and mailed or delivered to Guarantor's address shown above or such other address as provided hereunder, and to Bank, if in writing and mailed or delivered to Wachovia Bank, National Association, Mail Code VA7628, P.O. Box 13327, Roanoke, VA 24040 or Wachovia Bank, National Association, Mail Code VA7626, 10 South Jefferson Street, Roanoke, VA 24011 or such other address as Bank may specify in writing from time to time. Notices to Bank must include the mail code. In the event that Guarantor changes Guarantor's address at any time prior to the date the Guaranteed Obligations are paid in full, Guarantor agrees to promptly give written notice of said change of address to Bank by registered or certified mail, return receipt requested, all charges prepaid. **Plural; Captions.** All references in the Loan Documents to borrower, guarantor, person, document or other nouns of reference mean both the singular and plural form, as the case may be, and the term "person" shall mean any individual person or entity. The captions contained in the Loan Documents are inserted for convenience only and

shall not affect the meaning or interpretation of the Loan Documents. **Binding Contract.** Guarantor by execution of and Bank by acceptance of this Guaranty agree that each party is bound to all terms and provisions of this Guaranty. **Amendments, Waivers and Remedies.** No waivers, amendments or modifications of this Guaranty and other Loan Documents shall be valid unless in writing and signed by an officer of Bank. No waiver by Bank or its affiliates of any Default shall operate as a waiver of any other Default or the same Default on a future occasion. Neither the failure nor any delay on the part of Bank or its affiliates in exercising any right, power, or privilege granted pursuant to this Guaranty and other Loan Documents shall operate as a waiver thereof, nor shall a single or partial exercise thereof preclude any other or further exercise or the exercise of any other right, power or privilege. All remedies available to Bank or its affiliates with respect to this Guaranty and other Loan Documents and remedies available at law or in equity shall be cumulative and may be pursued concurrently or successively. **Partnerships.** If Guarantor is a partnership, the obligations, liabilities and agreements on the part of Guarantor shall remain in full force and effect and fully applicable notwithstanding any changes in the individuals comprising the partnership. The term "Guarantor" includes any altered or successive partnerships, and predecessor partnership(s) and the partners shall not be released from any obligations or liabilities hereunder. **Loan Documents.** The term "Loan Documents" refers to all documents executed in connection with or related to the Guaranteed Obligations and may include, without limitation, commitment letters that survive closing, loan agreements, other guaranty agreements, security agreements, instruments, financing statements, mortgages, deeds of trust, deeds to secure debt, letters of credit and any amendments or supplements (excluding swap agreements as defined in 11 U.S.C. § 101, as in effect from time to time).

LIMITATION ON LIABILITY; WAIVER OF PUNITIVE DAMAGES. EACH OF THE PARTIES HERETO, INCLUDING BANK BY ACCEPTANCE HEREOF, AGREES THAT IN ANY JUDICIAL, MEDIATION OR ARBITRATION PROCEEDING OR ANY CLAIM OR CONTROVERSY BETWEEN OR AMONG THEM THAT MAY ARISE OUT OF OR BE IN ANY WAY CONNECTED WITH THIS AGREEMENT, THE LOAN DOCUMENTS OR ANY OTHER AGREEMENT OR DOCUMENT BETWEEN OR AMONG THEM OR THE OBLIGATIONS EVIDENCED HEREBY OR RELATED HERETO, IN NO EVENT SHALL ANY PARTY HAVE A REMEDY OF, OR BE LIABLE TO THE OTHER FOR, (1) INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES OR (2) PUNITIVE OR EXEMPLARY DAMAGES. EACH OF THE PARTIES HEREBY EXPRESSLY WAIVES ANY RIGHT OR CLAIM TO PUNITIVE OR EXEMPLARY DAMAGES THEY MAY HAVE OR WHICH MAY ARISE IN THE FUTURE IN CONNECTION WITH ANY SUCH PROCEEDING, CLAIM OR CONTROVERSY, WHETHER THE SAME IS RESOLVED BY ARBITRATION, MEDIATION, JUDICIALLY OR OTHERWISE. **Final Agreement.** This Agreement and the other Loan Documents represent the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

FINANCIAL AND OTHER INFORMATION. Guarantor shall deliver to Bank such information as Bank may reasonably request from time to time, including without limitation, financial statements and information pertaining to Guarantor's financial condition. Such information shall be true, complete, and accurate.

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NEGATIVE COVENANTS. Guarantor agrees that from the date hereof and until final payment in full of the Guaranteed Obligations, unless Bank shall otherwise consent in writing, Guarantor will not: **Default on Other Contracts or Obligations.** Default on any material contract with or obligation when due to a third party or default in the performance of any obligation to a third party incurred for money borrowed. **Government Intervention.** Permit the assertion or making of any seizure, vesting or intervention by or under authority of any governmental entity, as a result of which the management of Guarantor or any guarantor is displaced of its authority in the conduct of its respective business or such business is curtailed or materially impaired. **Judgment Entered.** Permit the entry of any monetary judgment or the assessment against, the filing of any tax lien against, or the issuance of any writ of garnishment or attachment against any property of or debts due Guarantor. **Retire or Repurchase Capital Stock.** Retire or otherwise acquire any of its capital stock.

PERSONAL FINANCIAL STATEMENTS. Each Guarantor who is an individual shall deliver to Bank annually, within thirteen months of the previous statement date on file with Bank, Guarantor's financial statement. Said financial statement shall disclose all of Guarantor's assets, liabilities, net worth, income and contingent liabilities, all in reasonable detail and acceptable to Bank and submitted on a form to be provided by Bank or on such other form previously accepted by or acceptable to Bank, signed by Guarantor and certified by Guarantor to Bank to be true, correct and complete.

TAX RETURNS. Guarantor shall deliver to Bank, within 30 days of filing, complete copies of federal and state tax returns, as applicable, together with all schedules thereto, each of which shall be signed and certified by Guarantor to be true and complete copies of such returns. In the event an extension is filed, Guarantor shall deliver a copy of the extension within 30 days of filing.

ARBITRATION. Upon demand of any party hereto, whether made before or after institution of any judicial proceeding, any claim or controversy arising out of or relating to the Loan Documents between parties hereto (a "Dispute") shall be resolved by binding arbitration conducted under and governed by the Commercial Financial Disputes Arbitration Rules (the "Arbitration Rules") of the American Arbitration Association (the "AAA") and the Federal Arbitration Act. Disputes may include, without limitation, tort claims, counterclaims, a dispute as to whether a matter is subject to arbitration, or claims arising from documents executed in the future, but shall specifically exclude claims brought as or converted to class actions. A judgment upon the award may be entered in any court having jurisdiction. Notwithstanding the foregoing, this arbitration provision does not apply to disputes under or related to swap agreements. **Special Rules.** All arbitration hearings shall be conducted in the city named in the address of Bank first stated above. A hearing shall begin within 90 days of demand for arbitration and all hearings shall conclude within 120 days of demand for arbitration. These time limitations may not be extended unless a party shows cause for extension and then for no more than a total of 60 days. The expedited procedures set forth in Rule 51 et seq. of the Arbitration Rules shall be applicable to claims of less than \$1,000,000.00. Arbitrators shall be licensed attorneys selected from the Commercial Financial Dispute Arbitration Panel of the AAA. The parties do not waive applicable Federal or state substantive law except as provided herein. **Preservation and Limitation of Remedies.** Notwithstanding the preceding binding arbitration provisions, the parties agree to preserve, without diminution, certain remedies that

ॐ नमो भगवते वासुदेवाय

Ronald C. Mariello (SEAL)
Ronald C. Mariello

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER) SIXTH JUDICIAL CIRCUIT

Wachovia Bank, National Association,) Civil Action No. 2010-CP-29-196
)

Plaintiff,)
)

vs.)

STIPULATED
CONFIDENTIALITY AGREEMENT

EGIS 521, LLC, Peter James)
Menkhaus, Stephanie L. Menkhaus,)
Nancy T. Jenkins, Individually and as)
Trustee of the Don A. Jenkins T/U/W)
and as Personal Representative of the)
Estate of Don A. Jenkins, Bellsouth)
Carolina PCS, LP, n/k/a Bellsouth)
Mobility DCS, LP, Commercial)
Products, Mark A. Ciminelli, Mark E.)
Carpenter, Ronald C. Mariello,)
)

Defendants.)
)

UPON THE AGREEMENT of Plaintiff Wachovia Bank, National Association and Defendant EGIS 521, LLC, Peter James Menkhaus, Stephanie L. Menkhaus, Mark A. Ciminelli, Mark E. Carpenter and Ronald C. Mariello (hereinafter collectively "the Parties"), their respective counsel of record submit the following Stipulation regarding the disclosure of documents and information produced in the case at bar:

1. This Stipulation governs the handling of CONFIDENTIAL designated documents and discovery material to be produced in this case. Such material includes any and all documents and information related to the claims, counterclaims and defenses set forth in the pleadings filed by the parties to the case at bar. This includes, but is not limited to, documents containing financial and other sensitive personal information, documents reflecting internal policies and procedures of the Plaintiff, internal banking

documents containing confidential information and/or any other materials relating to the claims and defenses in the present action.

2. Confidential documents shall be so designated by placing or affixing the word "CONFIDENTIAL" on the document in a manner which will not interfere with the legibility of the document and which will permit complete removal of the Confidential designation. Documents shall be designated CONFIDENTIAL prior to, or contemporaneously with, the production or disclosure of the documents. Any documents previously produced in this case containing the confidential financial information of the Defendants may be designated as CONFIDENTIAL by Defendants following execution and filing of this Stipulated Confidentiality Agreement. Unless designated as CONFIDENTIAL by Defendants, the Parties may use and disclose documents including personal financial information of the members of EGIS in any court pleadings, discovery, or other activities necessary to the prosecution and defense of this case.

3. All documents and information produced in this case and designated CONFIDENTIAL as set forth in Paragraph 1 will be used solely for purposes of this case and will be disclosed only to those Qualified Persons¹ who have a need to have these

¹ "Qualified Person(s)" shall mean and refer to:

- (i) the parties to this action;
- (ii) outside or inside counsel for a party in this case, and employees of such counsel assisting in the conduct of this case;
- (iii) experts or consultants assisting counsel in this litigation;
- (iv) employees of any party who are required to assist counsel in the conduct of this case;
- (v) directors, officers, and employees of parties who are noticed for depositions or designated as trial witnesses and other persons who counsel for a party in good faith believes may be fact or

documents or information in connection with this litigation and who agree to be bound by the terms of this Stipulation. Disclosure of CONFIDENTIAL information will take place only within the presence of counsel for either or both of the parties, upon mutual agreement by counsel for both parties.

4. Before any counsel discloses CONFIDENTIAL documents or information obtained in discovery to the parties, witnesses, consultants, or expert witnesses, counsel shall first advise the individual of the terms of this Stipulation, provide the individual with a copy of this Stipulation and have the individual sign and date a copy of the Stipulation in acknowledgment of his or her agreement to be bound thereby.² By signing a copy of this Stipulation, the individual certifies that he or she will use the CONFIDENTIAL information or documents solely for purposes of this case, will not disclose the information or documents, and consents to the jurisdiction of this Court for purposes of enforcing this Stipulation. Disclosing counsel shall maintain possession of the original of the signed Stipulation during this lawsuit. At the conclusion of this lawsuit and upon written request, disclosing counsel shall give all such signed acknowledgments to counsel for the party producing the document or information.

5. Any party including CONFIDENTIAL documents or information within the scope of this Stipulation in any pleadings, motions, memoranda, affidavits, or other material to be filed with the Court, shall file those pleadings or other material (as

expert witnesses either at deposition or a trial, to the extent deemed necessary by counsel for the witnesses' preparation for testimony;

(vi) deponents, and their counsel, during the course of depositions taken in this action.

² Employees of counsel of record in this case are expressly bound by this order and, therefore, their written agreement to be bound by this order is not necessary.

well as any appropriate attachments) under seal and in accordance with applicable Rules of Civil Procedure and any instructions by the Court.

6. Prior to commencement of trial, the Court shall establish procedures for the use of CONFIDENTIAL information at trial. Nothing in this Stipulation shall constitute a waiver by any party limiting the use of the material protected herein for any purpose at trial pursuant to the governing rules of evidence and substantive law or as otherwise ruled upon by the Court.

7. Within sixty (60) days after the conclusion of this litigation (whether by settlement, dismissal or final judgment) all CONFIDENTIAL documents produced by the parties, along with any summaries of or extracts therefrom in any form whatsoever, whether set down by handwriting, typewriting, email, printing, photostating, photocopying, magnetic impulse, mechanical or electronic recording, or any other form of data compilation, shall, at the discretion of the producing party's counsel, be either returned to the producing party's counsel or destroyed by the receiving party's counsel, with the exception of documents protected by attorney-client privilege or the work product doctrine, provided that such documents are maintained by the originating attorney and not published to other third-parties. In the event counsel for the producing party requests that counsel for the receiving party destroy originals of all such documents and information produced by the parties, along with any summaries of and extracts therefrom, counsel for the receiving party shall certify within said sixty (60) day time period that such destruction has taken place.

8. Any party seeking to challenge another party's designation of discovery material as CONFIDENTIAL shall advise counsel for the opposing party, in

writing, of their objection and identify the document or information with sufficient specificity to permit identification. Within ten (10) days after receiving such a challenge, counsel for the challenging party shall be advised as to whether the designation of the document or item will be changed. If this cannot be resolved between the parties, then the dispute will be presented to the Court by motion or otherwise. During the pendency of any such motion, the designated document or information shall continue to be treated as CONFIDENTIAL Information and subject to the provisions of this Stipulation.

9. Any person may be deposed regarding CONFIDENTIAL information. Only Qualified Persons, including the court reporter and witness, shall be present at such depositions. Transcripts and any other recordings including videotapes of said depositions shall be designated "CONFIDENTIAL" by the concerned party during the deposition and such portions will be treated in accordance with this Stipulation.

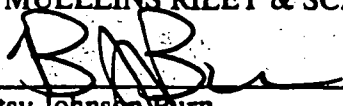
10. All persons to whom CONFIDENTIAL information is disclosed shall be subject to the jurisdiction of this Court for purposes of enforcing this Stipulation. This Stipulation shall continue to be binding after the conclusion of the litigation, and this Court reserves jurisdiction over all persons to whom such information was disclosed for purposes of enforcing it.

11. The Parties further stipulate that by producing CONFIDENTIAL documents and information as defined herein, they do not waive, and expressly reserve, any and all claims of privilege as to any documents produced pursuant to this Stipulation as well as any other documents that may be withheld on the basis of privilege in this or other legal actions.

<Signatures on Following Pages>

WE SO AGREE AND STIPULATE:

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Betsy Johnson Burn

SC Bar No. 16680

E-Mail: betsy.burn@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

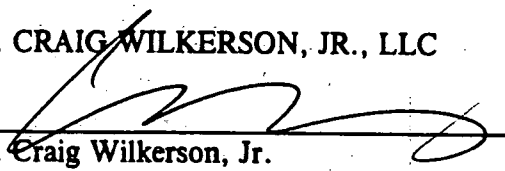
Attorneys for Wachovia Bank, National Association

Columbia, South Carolina

9-22, 2010.

WE SO AGREE AND STIPULATE:

F. CRAIG WILKERSON, JR., LLC


F. Craig Wilkerson, Jr.

242 Oakland Avenue

Rock Hill, SC 29732

Office 803.324.7200

Fax 803.366.0509

Attorney for EGIS 521, LLC, Peter James Menkhaus, Stephanie L. Menkhaus, Mark
A. Ciminelli, Mark E. Carpenter, and Ronald C. Mariello

Rock Hill, South Carolina

Sept 17, 2010.

Michael Anzelmo

From: Betsy Burn
Sent: Thursday, February 24, 2011 10:41 AM
To: 'Fcwilkerson@aol.com'
Cc: Betsy Burn
Subject: RE: EGIS

Okay – based on your representations below, I will agree to postpone the depositions. However, I need those discovery responses before you leave for Vermont or I'll have to move to compel – please email me available depo dates asap - Thanks.

From: Fcwilkerson@aol.com [<mailto:Fcwilkerson@aol.com>]
Sent: Thursday, February 24, 2011 6:21 AM
To: Betsy Burn
Cc: Fcwilkerson@aol.com
Subject: Re: EGIS

Sorry for the delay in getting back to you.

The flu fairy seems to have visited my house and my office.

I had written an email addressing the deposition dates, discovery, and the case heading. I had attached my mediation documents and Ron's Federal Jury as well as the others schedules. I do not know what I did with it, but will check again for it in my documents as it was more detailed than this early morning email.

I know you are up early and moving so I wanted to get you a quick response and I will try to locate if I saved or deleted the other document and send you the exhibits either way.

I have no objection to how you wish to change the caption. I have no problem with simply verbally doing it in front of the Referee on a hearing date.

As Mark Carpenter is out of the Counterclaims, you do not need his deposition. The other witnesses have raised time constraints for March 2. Dr. Ciminelli is a cardiologist and is booked for some time in advance. Ron starts Federal Jury Duty for 3 weeks. Given all that, I have mandatory circuit court mediation in a case, McDonald v. Stewart. This was set for mediation Jan 11, but the snow delayed it. It is now set for March 2, 2011, and I am hopeful it will resolve the case. We are on the Jury Trial Roster for April 4th I believe, so we do not have time to reschedule a second time.

I am going to Vermont with my family the week of March 7-11.

I hope to have two things to you later today or late Friday--

- 1.) Your discovery responses.
- 2.) A Settlement proposal--this will include proposed sales dates.
- 3.) Deposition Dates I will be available.

In a message dated 2/24/2011 5:39:54 A.M. Eastern Standard Time, betsy.burn@nelsonmullins.com writes:

| Craig, I still haven't gotten your email.

LAW OFFICE
PHILIP E. WRIGHT, P.A.
ATTORNEY AT LAW

TELEPHONE: (803) 286-4343

408 NORTH MAIN STREET
LANCASTER, SC 29720
jbarton@pewpa.com

FAX: (803) 286-9996

May 27, 2011

Betsy Johnson Burn, Esq.
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 11070
Columbia, SC 29211

Re: Wells Fargo Bank, National Association vs. EGIS 521, LLC, *et al.*
Case No. 2010-CP-29-196

Dear Ms. Burn:

I am sorry I did not get back to you last week when you left a message at my office. I had some personal business out of town and failed to get some of my calls returned. When I received your Motion for Summary Judgment with the hearing notice for June 2, I better understood the phone message.

Arathi Nobles called me last week to let me know that she had been appearing in the action for Dr. Ciminelli. When I was engaged by the group, I thought I would be representing Mark Ciminelli, Mark Carpenter, Ron Mariello and EGIS 521, LLC. Dr. Ciminelli confirmed today that he does want me to handle his case so I am notifying Ms. Nobles that I will be proceeding for him with the others. I will get out an order substituting me for her in the case.

In reviewing the terms of the note, the parties have the right to demand binding arbitration. I did not find any provisions in any of the other loan documents, including the forbearance agreement, that addressed the arbitration process. I am enclosing my Demand for Binding Arbitration under the terms of the note. This demand stays the foreclosure until we can go through the AAA arbitration process which is set out in the note.

I am furnishing a copy of my Demand for Binding Arbitration to the Referee and my request that he continue the hearing scheduled for June 2 until we can proceed through the arbitration.

Sincerely yours,



Philip E. Wright

PEW:jb

Enclosures

cc/encs: Clyde N. Davis, Esq., Special Referee
Arathi Prabhu Nobles, Esq.
Mr. Mark E. Carpenter
Dr. Mark A. Ciminelli
Mr. Ronald C. Mariello

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Clyde Davis, Special Referee

Case No. 2010-CP-29-196

Wells Fargo Bank, National Association, successor in interest
by merger to Wachovia Bank, National Association.....Respondent,

v.

EGIS 521, LLC, Peter James Menkhaus, Stephanie L. Menkhaus,
Nancy T. Jenkins, Individually and as Trustee of the Don A. Jenkins
T/U/W and as Personal Representative of the Estate of Don A. Jenkins,
Bellsouth Carolina PCS, LP, n/k/a Bellsouth Mobility DCS, LP,
Commercial Products, Mark A. Ciminelli, Mark E. Carpenter, Ronald C. Mariello

of whom:

EGIS 521, LLC, Mark A. Ciminelli, Mark E. Carpenter and
Ronald C. Mariello are the..... Appellants.

CERTIFICATE OF COUNSEL

I certify that this Record on Appeal contains all material proposed to be included by any
of the parties and not any other material.



Philip E. Wright
408 North Main Street
Lancaster, South Carolina 29720
(803) 286-4343

ATTORNEY FOR APPELLANT

May 17, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Clyde Davis, Special Referee

Case No. 2010-CP-29-196

Wells Fargo Bank, National Association, successor in interest
by merger to Wachovia Bank, National Association.....Respondent,

v.

EGIS 521, LLC, Peter James Menkhaus, Stephanie L. Menkhaus,
Nancy T. Jenkins, Individually and as Trustee of the Don A. Jenkins
T/U/W and as Personal Representative of the Estate of Don A. Jenkins,
Bellsouth Carolina PCS, LP, n/k/a Bellsouth Mobility DCS, LP,
Commercial Products, Mark A. Ciminelli, Mark E. Carpenter, Ronald C. Mariello

of whom:

EGIS 521, LLC, Mark A. Ciminelli, Mark E. Carpenter and
Ronald C. Mariello are the..... Appellants.

CERTIFICATE OF SERVICE

I certify that I have served the Record on Appeal on the Respondent by depositing a copy of same in the United States Mail, postage prepaid, on May 22, 2012, addressed to its attorney of record, Michael J. Anzelmo, Esq., Nelson Mullins Riley & Scarborough, LLP, Post Office Box 11070, Columbia, SC 29211.

May 22, 2012



Philip E. Wright
408 North Main Street
Lancaster, SC 29720
(803) 286-4343

ATTORNEY FOR APPELLANTS

LAW OFFICE
PHILIP E. WRIGHT, P.A.
ATTORNEY AT LAW

TELEPHONE: (803) 286-4343

408 NORTH MAIN STREET
LANCASTER, SC 29720
civil@pewpa.com

FAX: (803) 286-9996

May 22, 2012

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Wells Fargo Bank, National Association vs. EGIS 521, LLC, *et al.*
Case No. 2010-CP-29-196
Court of Appeals Tracking No. 2011194326

Dear Ms. Kitchings:

I enclose the original and 14 bound copies of the Record on Appeal, and the Certificate of Service in the above referenced matter.

By copy of this letter, I am serving a copy of the foregoing documents on opposing counsel, Michael J. Anzelmo, Esq.

Please contact my office if you should have any further questions.

With kind regards,



Philip E. Wright

PEW:jb

Enclosures

cc/encs: Michael J. Anzelmo, Esq.
Dr. Mark A. Ciminelli
Mr. Ronald C. Mariello
Mr. Mark E. Carpenter

RECEIVED

MAY 24 2012

SC Court of Appeals