

221601

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Marvin H. Dukes, III, Special Circuit Court Judge

Appellate Case No. 2015-000035
Lower Case No. 2013-CP-07-00610

RECEIVED
OCT 13 2015
SC Court of Appeals

First South Bank Respondent,

v.

John E. Rosenberg and Phillip J. Brust..... Defendants,

Of Whom The Estate of Phillip J. Brust is.....Appellant.

RECORD ON APPEAL – VOLUME I OF II

Robert E. Sumner, IV, SC Bar #71728
E. Brandon Gaskins, SC Bar #73274
Moore & Van Allen, PLLC
78 Wentworth Street
Post Office Box 22828
Charleston, SC 29413-2828
Telephone: (843) 579-7000

*Attorneys for Appellant
The Estate of Phillip J. Brust*

Jeffrey L. Silver, Esquire
Tyler, Cassell, Jackson, Peace & Silver, LLC
1331 Elmwood Avenue, Suite 300
P.O. Box 11656
Columbia, SC 29211
(803) 779-4997

Attorneys for Respondent

Taylor A. Peace, Esquire

INDEX

Record Volume I of II

ORDERS

Order of Judge Dukes Denying Motion to Dismiss dated August 22, 2013.....	1
Order Granting Plaintiff's Motion for Summary Judgment Against Defendant Rosenberg dated October 2, 2013	4
Protective Order dated March 18, 2014.....	9
Order of Judge Dukes Granting Plaintiff's Motion for Summary Judgment Against Defendant Brust dated August 5, 2014.....	15
Order of Judge Dukes Denying Brust's Motion to Amend filed December 10, 2014.....	29
Order of Judge Dukes Denying Brust's Motion for Reconsideration dated December 18, 2014	36

PLEADINGS

Complaint dated March 8, 2013.....	38
Defendant Brust's Motion to Dismiss dated April 17, 2013	64
Defendant Brust's Memorandum in Support of Motion to Dismiss dated June 24, 2013	66
Defendant Brust's Supplemental Memorandum in Support of Motion to Dismiss dated July 31, 2013	75
Defendant Brust's Answer filed September 9, 2013	82
Plaintiff's Motion for Summary Judgment against Defendant Brust dated October 23, 2013.....	96
Defendant Brust's Motion to Compel dated January 28, 2014	103
Defendant Brust's Motion to Amend Answer and Cross-claims against Defendant Rosenberg dated May 30, 2014.....	144
Defendant Brust's Memorandum in Response to Plaintiff's Supplemental Memorandum in Support of Motion for Summary Judgment dated July 7, 2014.....	167
Defendant Brust's Supplemental Memorandum in Opposition to Motion for Summary Judgment dated July 28, 2014	200

Defendant Brust's Motion for Reconsideration of the Summary Judgment Order dated August 18, 2014	204
First South Bank's Opposition to Motion to Amend dated September 11, 2014	237
Defendant Brust's Supplemental Memorandum in Support of Motion for Reconsideration dated October 15, 2014	245
Plaintiff's Reply to Defendants' Supplemental Memorandum in Support of Motion for Reconsideration dated November 3, 2014.....	270
Notice of Appeal dated January 9, 2015	336
<u>HEARING TRANSCRIPT</u>	
Transcript of Summary Judgment Hearing dated June 3, 2014.....	364
<u>DEPOSITION TRANSCRIPTS</u>	
Deposition of Terry Finger	425
<u>Record Volume II of II</u>	
<u>DEPOSITION TRANSCRIPTS</u>	
Deposition of Patrick Wright	474
<u>DISCOVERY</u>	
Defendant Brust's First Set of Interrogatories and Requests for Production to Plaintiff dated October 9, 2013	659
Plaintiff's First Set of Requests to Admit to Defendant Philip J. Brust (dated October 3, 2013)	673
Defendant Philip J. Brust's Responses to Plaintiff's First Set of Requests to Admit (dated December 9, 2013).....	702
Plaintiff's Responses to Discovery Requests dated December 20, 2013	709
Plaintiff's First Supplemental Responses to Discovery Requests dated April 2, 2014	725
Defendant Philip J. Brust's Supplemental Responses to Plaintiff's First Set of Requests to Admit (dated April 28, 2014).....	735
Plaintiff's Second Supplemental Responses to Discovery Requests dated May 1, 2014	738

AFFIDAVITS

Affidavit of William C. Barksdale.....743

Exhibits

Deposition of Terry Finger Exhibit 1 (2001 Power of Attorney) 749

Deposition of Patrick Wright Exhibits

Exhibit 2 (First South Bank policies) 751

Exhibit 4 (January 9, 2006 Commitment Letter) 909

Exhibit 5 (January 18, 2006 instruction letter).....912

Exhibit 7 (Credit Narrative Ecological Investments, LLC) 915

Exhibit 8 (Guaranty).....920

Exhibit 9 (2006 Power of Attorney).....922

Plaintiff's Exhibit 1 (Brust PFS 2005-2010).....924

Certificate of Counsel.....940

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-07-00610

FIRST SOUTH BANK

PHILIP J. BRUST AND JOHN E. ROSENBERG

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

THIS CAME BEFORE ME ON DEFENDANT PHILIP J. BRUST'S MOTION TO DISMISS,
FILED APRIL 17, 2013. AFTER HEARING FROM ALL PARTIES AND REVIEWING THE
FILE I HEREBY DENY THE MOTION TO DISMISS PHILIP J. BRUST.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

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

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

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NO.: 2013-CP-07-610

John E. Rosenberg and Philip J. Brust,

First South Bank,

PLAINTIFF,

Submitted by: TYLER, CASSELL, JACKSON PEACE & SILVER, LLC Jeffrey L. Silver 1331 Elmwood Avenue, Suite 300 (29201) Post Office Box 11656 Columbia, South Carolina 29211	Attorney for: ☒ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE):

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial/hearing before the court. The issues have been tried or heard and decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(f), SCRCP; ☐ Bankruptcy; ☐ Binding Arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE COURT RULING IN THIS APPEAL.

2013 OCT -2 PM 3:29
BEAUFORT COUNTY, S.C.
CLERK OF COURT

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
 Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
First South Bank	John E. Rosenberg	Judgment in the sum of \$1,671,292.34 Attorney Fees and Costs in the sum of \$10,394.29
If applicable, describe the property, including tax map information and address, referenced in the order:		

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

[Signature] 2160 10.2.2013
 Judge, 14th Judicial Circuit

For Clerk of Court Office Use Only

CLERK OF COURT

2

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
C/A NO.: 2013-CP-07-610

First South Bank,

Plaintiff,

vs.

John E. Rosenberg, and Philip J. Brust,

Defendants,

**CONSENT ORDER ON
MOTION FOR SUMMARY
JUDGMENT**

BEAUFORT COUNTY, S.C.
CLERK OF COURT

2013 OCT -2 PM 3:29

This matter came before the Court on October 2, 2013, on Motion of the Plaintiff for summary judgment against Defendant John E. Rosenberg. Present at the hearing was Jeffrey L. Silver, Esquire, attorney for the Plaintiff and Robert Michael Drose, Esquire, attorney for Defendant John E. Rosenberg.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Summons and Complaint were filed on March 8, 2013, with the Beaufort County Clerk of Court, and same was designated 2013-CP-07-610.
2. Service was made upon the Defendant John E. Rosenberg as is shown by the Proof of Service filed herein.
3. Defendant John E. Rosenberg filed a Motion to Dismiss, a copy of which is filed herein.
4. The Consent Order Denying Defendant John E. Rosenberg's Motion to Dismiss was entered on June 24, 2013, a copy of which is filed herein.
5. Thereafter, Defendant John E. Rosenberg timely filed an Answer, a copy of which is filed herein.

DCB
8.1.13

6. Thereafter, Plaintiff filed its Motion for Summary Judgment as to Defendant John E. Rosenberg and submitted the Affidavit of Patrick Wright in support thereof.
7. The Defendants were notified of the time, date and place of hearing in this matter, a copy of said notice is filed in this action.
8. On or about February 2, 2006, Ecological Investments, LLC ("Ecological"), made, executed and delivered to First South Bank, a Universal Note and Security Agreement in the original principal sum of \$2,600,000.00, which was subsequently renewed and/or modified by that certain Commercial Debt Modification Agreements dated January 14, 2008, and January 21, 2010, Renewal Universal Note and Security Agreements dated May 27, 2008, August 26, 2008, October 15, 2008, and November 30, 2010 (collectively "Note") copies of which are attached to Plaintiff's Complaint and incorporated herein by reference.
9. In order to induce First South Bank to make the loan or extend other accommodations to Ecological, on February 2, 2006, John E. Rosenberg executed and delivered to First South Bank, an Unlimited Guaranty (the "Guaranty"), a copy of which is attached to Plaintiff's Complaint and incorporated herein by reference.
10. The Guaranty provides that Defendant John E. Rosenberg unconditionally guaranteed payment and performance, without limit, as to the Note and Defendant John E. Rosenberg unconditionally guaranteed payment and performance, without limit, as to all future extensions of credit or other accommodations provided to Ecological by First South Bank.

PCB
p. 2 of 5

11. The Note matured on November 30, 2012, and although First South Bank has demanded payment in full of the Note, Ecological and Defendant John E. Rosenberg have failed to pay the outstanding balances due on the Note and Guaranty. As a result, First South Bank deems Ecological and Defendant John E. Rosenberg to be in default according to the terms of the Note and Guaranty.
12. Pursuant to the terms of the Note and Guaranty, Defendant John E. Rosenberg is obligated to First South Bank for its reasonable attorney's fees plus court costs.
13. There is now due and owing on the Note and Guaranty as of July 9, 2013, the principal sum of \$1,608,000.00, plus accrued interest through July 9, 2013, in the sum of \$59,112.67, plus accrued late fees in the sum of \$2,348.49, plus advanced appraisal fees of \$1,450.00, plus advanced 2012 real property taxes in the sum of \$381.18 for a total outstanding balance of \$1,671,292.34 plus interim interest from July 9, 2013, at the per diem rate of \$234.50.

-
14. The Plaintiff has incurred the actual sum of \$9,182.50 in attorney's fees and the sum of \$1,211.79 in court costs for a total of \$10,394.29 which is a fair and reasonable award for the attorney fees and court costs given (1) the nature of these proceedings, (2) the time actually devoted to the matter; (3) the professional standing of attorney who regularly represents clients in matters of this type as a partner in an AV rated firm; and (4) for the beneficial results that client has received

Pursuant to Rule 56, SCRCF the Court finds and concludes there is no genuine issue of material fact after reviewing all inferences in the light most favorable to Defendant John E. Rosenberg; that further Defendant John E. Rosenberg has failed to provide by way of affidavit or

PCB
p. 387 S

otherwise any genuine issue for trial, Klippel v. Mid-Carolina Oil, Inc. 303 S.C. 127, 399 S.E.2d 163 (CT. App 1990) Milligan v. Liberty Life Ins. Co. 313 S.C. 478, 443 S.E.2d 381 (1994).

Based upon the foregoing, I find and conclude that there are no material facts in issue, and granting Plaintiff's Motion for Summary Judgment is proper.

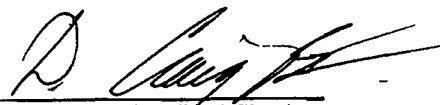
ACCORDINGLY, IT IS ORDERED that Plaintiff shall have judgment against Defendant John E. Rosenberg on the Note and Guaranty in the sum of \$1,671,292.34, plus interim interest from July 9, 2013, at the per diem rate of \$234.50, plus post judgment interest at the maximum statutory rate.

IT IS ORDERED that Plaintiff shall have judgment against Defendant John E. Rosenberg for attorneys fees and court costs in the sum of \$10,394.29 which is a fair and reasonable award for the attorney fees and court costs given (1) the nature of these proceedings, (2) the time actually devoted to the matter; (3) the professional standing of attorney who regularly represents clients in matters of this type as a partner in an AV rated firm; and (4) for the beneficial results that client has received.

[Intentionally Left Blank]

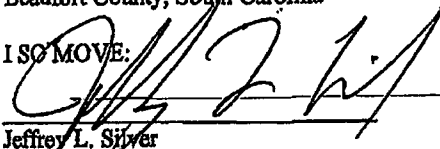
PCB
p-475

IT IS SO ORDERED


Judge, Fourteenth Judicial Circuit

10-2, 2013
Beaufort County, South Carolina

I SO MOVE:



Jeffrey L. Silver
TYLER, CASSELL, JACKSON
PEACE & SILVER, LLC
1331 Elmwood Avenue, Suite 300
Post Office Box 11656
Columbia, South Carolina 29211
(803) 252-7689
Attorney for Plaintiff

I CONSENT:


Robert Michael Drose, Esq.,
3955 Faber Place Drive, Suite 103
North Charleston, South Carolina 29405
Attorney for John E. Rosenberg

DCB
1-507.5

RECORD 0008

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

FIRST SOUTH BANK,

Plaintiff,

vs.

JOHN E. ROSENBERG and PHILIP J.
BRUST,

Defendants.

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO.: 2013-CP-07-00610

) **CONSENT PROTECTIVE ORDER**

FILED
CLERK OF COURT
14 MAR 18 PM 3:06
COUNTY S.C.

Pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure, and it appearing that discovery and other exchanges and offers of information in the above-captioned action (the "Litigation") are likely to involve the disclosure of confidential information, and good cause appearing, it is hereby ORDERED that:

1. **Scope.** All documents produced in the course of discovery, all responses to discovery requests, all deposition testimony and deposition exhibits, any other materials which may be subject to discovery, and any documents which may be filed with or submitted to the Court (hereinafter collectively "documents") shall be subject to this Protective Order concerning confidential information as set forth below.
2. **Documents Which May be Designated Confidential.** Any Party may designate documents as "CONFIDENTIAL" but only after review of the documents by an attorney who has, in good faith, determined that such documents meet the definition of Confidential Material set forth in this Paragraph 2 of the Protective Order. For the purpose of this Protective Order, "Confidential Material" means any document that contains information protected from disclosure by statute, sensitive personal information, trade secrets, or confidential research, development, commercial, or proprietary information. Confidential Material shall not include information or material that (a) was, is, or becomes public in a manner other than by violation of this Protective Order, another Protective Order, or other legal obligation of a Party or agent of a Party to protect the information or material; (b) is acquired by the nondesignating Party from a nonparty having the right to disclose such information or material; or (c) was lawfully possessed by the nondesignating Party.
3. **Form and Timing of Designation.** Confidential Material 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. Confidential Material shall be designated prior to, or contemporaneously with, the production or disclosure of the documents. Except as provided in Paragraph 6 of this Protective Order, no designation shall be effective unless there is placed or affixed on such material a "CONFIDENTIAL" designation. Inadvertent or unintentional

production of documents without prior designation as "CONFIDENTIAL" shall not be deemed a waiver, in whole or in part, of the right to designate documents as Confidential Material as otherwise allowed by this Protective Order.

4. **Depositions.** Testimony given at a deposition or hearing and the resulting transcript, or portion thereof, may be designated as Confidential Material by (i) a statement on the record, by counsel, at the time of such disclosure, or (ii) written notice, sent by counsel to all Parties within ten (10) business days after receipt of the transcript of the deposition to all counsel of record for the Parties. All transcripts shall be considered Confidential Material and subject to this Protective Order until expiration of such ten-day period described below. The court reporter shall be instructed to mark each designated page as "CONFIDENTIAL", and the cover page of any transcript containing Confidential Material shall indicate that the transcript contains such Confidential Material. Provided, however, that the Parties shall have ten (10) business days from the later of (i) the date of this Protective Order or (ii) the date of receipt of the transcript to designate by written notice portions of the depositions already taken in this Litigation as Confidential Material. Subject to the provisions of this Protective Order, the Parties agree that certain deposition testimony may be transmitted via a live webcast or other technology to persons authorized to review such testimony if adequate procedures are utilized to protect against the unauthorized disclosure or receipt of such testimony and to protect any Confidential Material, which procedures have been agreed upon by the Parties and the applicable witnesses. The Parties further agree that no one may attend or review the transcripts of the portions of any depositions at which Confidential Material is shown or discussed, other than those persons authorized to have access to Confidential Material as described in this Protective Order.

5. **Protection of Confidential Material.**

- a. **General Protections.** Confidential Material and the information contained therein under this Protective Order shall not be used or disclosed by the Parties or counsel for the Parties other than as specifically provided herein.
- b. **Limited Disclosures.** The Parties and counsel for the Parties shall not disclose or permit the disclosure of any Confidential Material under the terms of this Protective Order to any other person or entity except as set forth in subparagraphs (1)-(9) below:
 - (1) Counsel and employees of counsel for the Parties who have responsibility for the preparation and trial of the Litigation. As used herein, "counsel" shall mean attorneys for the respective firms who have entered appearances on behalf of the Parties in this Litigation;
 - (2) The Parties who have agreed to this Protective Order;
 - (3) The officers, directors, or employees of any Party or any subsidiaries or affiliates thereof, who are working with counsel in the conduct of the Litigation and need to review the material to provide assistance to counsel in the Litigation;

- (4) Any person authorized to act on behalf of a Party with regards to the Litigation, including any attorney-in-fact acting pursuant to a power-of-attorney;
- (5) Any person scheduled to testify at a deposition where the deposition may include questions regarding Confidential Material, who has agreed to be bound by and comply with this Protective Order and who has executed the Statement of Confidentiality attached as Exhibit A;
- (6) The Court and its officers, court stenographers, and outside copy services whose function requires them to have access to Confidential Material;
- (7) Consultants, investigators, or experts employed by the Parties or counsel for the Parties to assist in the preparation and trial of the Litigation who have agreed to be bound by and comply with this Protective Order and who have executed the Statement of Confidentiality attached as Exhibit A;
- (8) A Party's insurer; and
- (9) Personnel of third party vendors engaged by a Party or by counsel for a Party to assist in (i) the coding, imaging, or other management of material in this Litigation; (ii) the preparation of demonstrative exhibits or other visual aids for presentation at a hearing or trial; or (iii) jury research and analysis, provided that such personnel of third party vendors shall not be employees, independent contractors (other than their engagement by counsel or a Party to assist in the Litigation), or consultants (other than their engagement by counsel or a Party to assist in the Litigation) of a Party or of a competitor of a Party and provided such personnel of third party vendors execute the Statement of Confidentiality attached as Exhibit A before getting access to Confidential Material.

c. Other Disclosure: If a Party desires for a person who does not fall within the categories contained in Paragraph 5(b) of this Protective Order to review Confidential Material designated by another Party, then the Party shall so notify the designating Party in writing and give the designating Party seven (7) business days after receipt of the notice to object. If the designating Party objects to the requesting Party's desired disclosure of the designating Party's Confidential Material to such person, then the requesting Party must obtain permission from the Court before disclosing such Confidential Material. Nothing herein shall require a Party to seek permission from the Court if the Party is required by law, subpoena, or order of another judicial or administrative body to disclose the Confidential Material. Each recipient of Confidential Material under this Paragraph 5(c) is required to execute the Statement of Confidentiality attached as Exhibit A.

d. Control of Documents. Counsel for the Parties shall take reasonable efforts to prevent unauthorized disclosure of Confidential Materials pursuant to the terms of this Protective Order. Counsel shall maintain a record of those persons, including

employees of counsel, who have reviewed or been given access to the documents along with the executed originals of the Statement of Confidentiality attached as Exhibit A.

- e. **Copies.** All copies, duplicates, extracts, summaries or descriptions (hereinafter referred to collectively as "copies") of Confidential Material under this Protective Order, shall be immediately affixed with the designation "CONFIDENTIAL" if such designations do not already appear on the copy. All such copies shall be afforded the full protection of this Protective Order.

6. **Inadvertent Disclosure:** Confidential Material may be designated subsequent to production or testimony when the producing Party failed to make such designation at the time of production or during the testimony through inadvertence or error and the designation is corrected within fourteen (14) days after discovery of the inadvertence or error. If Confidential Material is designated subsequent to production or testimony, the receiving Party promptly shall collect any copies that have been provided to individuals other than those authorized in Paragraph 5 of this Protective Order. Any inadvertent production of documents without the designation as "CONFIDENTIAL" shall not be deemed a waiver in whole or in part of that Party's claim of confidentiality, either as to the specific information disclosed or as to any other information relating thereto or on the same or related subject matter that the Party has designated Confidential Material under this Protective Order.

7. **Objections.** Any Party may object to the designation of any documents or testimony as Confidential Material by giving written notice to the designating Party that it objects to the designation. After providing written notice of its objection, the objecting Party and the designating Party shall confer in an attempt to resolve the dispute. If, after the Parties have conferred and the dispute cannot be resolved, the designating Party wishes to continue to assert its claim of confidentiality, the designating Party is obligated to file a motion requesting the Court to confirm the confidential status of the documents or testimony within twenty-one (21) days from the date that the objecting Party has served written notice on the designating Party that the dispute cannot be resolved. Until the Court rules on the motion, the documents shall be treated as Confidential Material, as originally designated. No Party shall be obligated to challenge the propriety of a confidentiality designation at the time made, and a failure to do so shall not constitute an admission by the receiving Party that the information is Confidential Material or preclude a subsequent challenge to such designation.

8. **Documents Submitted to Court.** Should any Party deem it necessary or appropriate to submit Confidential Material to the Court or present such Confidential Material at trial or hearing, the Parties shall first confer to determine if an agreement can be reached that the Confidential Material can be submitted in a redacted format. If an agreement to redact cannot be reached, then the Parties shall jointly file a consent motion to file the document under seal pursuant to Rule 41.1 of the South Carolina Rules of Civil Procedure or submit the dispute to the Court for resolution.

9. Designation of Confidential Material by Non-Parties. A person who is not a party to the Litigation ("Non-Party") may designate material produced in response to a subpoena issued by a Party or testimony given by the Non-Party during a deposition as Confidential Material, pursuant to Paragraphs 2-4 of this Protective Order. Confidential Material designated by a Non-Party shall be subject to the limitations, rights, and obligations set forth in this Protective Order. In addition, if any Party intends to file any Confidential Material designated by a Non-Party as an exhibit or present such Confidential Material at trial or hearing, the Party intending to file or present such Confidential Material shall first confer with the Non-Party to determine if an agreement can be reached that the Confidential Material can be filed or presented in a redacted format. If an agreement to redact cannot be reached, then the Parties and the Non-Party shall jointly file a consent motion to file the document under seal pursuant to Rule 41.1 of the South Carolina Rules of Civil Procedure or submit the dispute to the Court for resolution. If the Confidential Material designated by the Non-Party is to be unsealed in Court, the Party intending to file or present such Confidential Material shall inform the Non-Party and provide the Non-Party with the opportunity to present any objections thereto to the Court.

10. Treatment on Conclusion of Litigation.

- a. Protective Order Remains in Effect.** All provisions of this Protective Order restricting the use of Confidential Materials shall continue to be binding after the conclusion of the litigation unless otherwise agreed or ordered.
- b. Return of Confidential Documents.** Within thirty (30) days after the conclusion of the Litigation, including conclusion of any appeal, all Confidential Materials under this Protective Order, including copies as defined above in Paragraph 5(e), shall be returned to the designating Party unless: (1) the document has been entered as evidence or filed with the Court (unless introduced or filed under seal); (2) the Parties stipulate to destruction in lieu of return; or (3) as to documents containing the notations, summations, or other mental impressions of the receiving Party, that Party elects destruction. Notwithstanding the above requirements to return or destroy documents, counsel may retain attorney work product including an index which refers or relates to Confidential Material so long as that work product does not duplicate verbatim substantial portions of the text of confidential documents. This work product continues to be Confidential under the terms of this Protective Order.

11. Persons Bound. This Protective Order shall take effect when executed and shall be binding upon: (1) counsel who signed below and their respective law firms; (2) their respective clients; and (3) all persons executing the Statement of Confidentiality attached as Exhibit A under this Protective Order.

IT IS SO ORDERED, this 13 day of march, 2014.

s/ c. mollen
The Honorable carmen T. mollen
Judge Presiding

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NO.: 2013-CP-07-610

John E. Rosenberg and Philip J. Brust,

First South Bank.

PLAINTIFF,

Submitted by: TYLER, CASSELL, JACKSON PEACE & SILVER, LLC Jeffrey L. Silver 1331 Elmwood Avenue, Suite 300 (29201) Post Office Box 11656 Columbia, South Carolina 29211	Attorney for: ☒ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE):

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

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
 Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
First South Bank	Philip J. Brust	\$1,746,260.73, plus pre-judgment interest from May 23, 2014, through the entrance of the judgment at the per diem rate of \$234.50 Attorney Fees and Costs in the sum of \$47,388.73
If applicable, describe the property, including tax map information and address, referenced in the order:		

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

Marvin H. Dukes, Jr., 14th Judicial Circuit

2017

FORM 4**For Clerk of Court Office Use Only**

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

TYLER, CASSELL, JACKSON PEACE & SILVER, LLC Jeffrey L. Silver 1331 Elmwood Avenue, Suite 300 (29201) Post Office Box 11656 Columbia, South Carolina 29211 ATTORNEY(S) FOR THE PLAINTIFF(S)	John E. Rosenberg c/o Robert Michael Drose, Esq., 3955 Faber Place Drive, Suite 103 North Charleston, South Carolina 29405 Philip J. Brust c/o Robert E. Sumner, IV, Esq., Moore & Van Allen, PLLC, 78 Wentworth Street (29401) Charleston, South Carolina 29401 ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There is no text or other markings on the paper.

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
First South Bank,)
)
Plaintiff,)
)
vs.)
)
John E. Rosenberg, and Philip J. Brust,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2013-CP-07-0610

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AS TO DEFENDANT
PHILIP J. BRUST**

FILED
MAY -5 PM 12:23
CLERK OF COURT
JAMES H. HARRIS, JR.
CLERK

THIS MATTER came before the Court on Plaintiff's Motion for Summary Judgment as to Defendant Philip J. Brust ("Motion"). A hearing was held on May 23, 2014, before the Honorable Marvin H. Dukes, III, Special Circuit Court Judge and Master-in-Equity for the County of Beaufort, State of South Carolina. Present at the hearing were Jeffrey L. Silver, Esq., counsel for Plaintiff, and Robert E. Sumner, IV, Esq. and E. Brandon Gaskins, Esq., counsel for Defendant Philip J. Brust. Based upon the pleadings, affidavits filed of record, discovery, applicable law, and such other argument of counsel, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Summons and Complaint ("Complaint") were filed on March 8, 2013, and same were properly served on Defendants John E. Rosenberg ("Rosenberg") and Philip J. Brust ("Brust").
2. Brust filed a Motion to Dismiss for lack of personal jurisdiction which was denied by the Court on August 22, 2013.
3. Soon thereafter, Brust answered the allegations contained in Plaintiff's Complaint and alleged various Crossclaims against Rosenberg ("Answer").
4. In his Answer, Brust denied the material allegations of Plaintiff's Complaint and alleged, among other things, that (i) Rosenberg did not have actual or apparent authority to sign the

10/12/2014

below described Unlimited Guaranty ("Guranty"), (ii) Plaintiff was negligent in failing to follow its own policies and/or procedures, (iii) Plaintiff breached its duty of good faith and fair dealing, and (iv) Plaintiff modified the Loan and consequently, Brust is not liable under the Guaranty and/or his liability under same should be reduced or discharged.

5. Plaintiff has already obtained judgment against Rosenberg by virtue of a Consent Order on Plaintiff's Motion for Summary Judgment filed October 2, 2013.

6. Plaintiff filed the present Motion and Affidavit in Support of the Motion of Patrick Wright on October 28, 2013.

7. Brust has also filed a Notice of Motion and Motion to Amend Answer and Crossclaims ("Motion to Amend") on June 2, 2014 which had attached to it the proposed Defendant Philip J. Brust's Amended Answer to Plaintiff's Complaint, Crossclaims against Defendant John E. Rosenberg and Counterclaims against First South Bank ("Amended Answer").

8. The counterclaims in the Amended Answer contain the same material allegations as those set forth as defenses in Brust's Answer.

9. Brust is a member of Ecological Investments, LLC ("Ecological"), a limited liability company organized under and existing pursuant to the laws of the State of South Carolina.

10. In or around late 2005, Ecological entered into negotiations with Plaintiff for the purpose of obtaining a loan in the amount of Two Million Six Hundred Thousand and No/100 (\$2,600,000.00) Dollars ("Loan").

11. In connection therewith, Plaintiff issued a commitment letter to Ecological, Brust, and Rosenberg ("Commitment Letter"), said Commitment Letter being dated January 9, 2006.

12. The Commitment Letter informed Brust that he would be required to personally guaranty the Loan, that his personal guaranty of the Loan would be condition to Ecological receiving

2/12 ~

same and that he would provide copies of his personal financial information in connection therewith during the Loan's repayment period.

13. The Commitment Letter also informed Brust that the Loan documents and the terms thereof would prevail over the terms of the Commitment Letter.

14. Brust acknowledged and accepted the terms of the Commitment Letter by signing same.

15. In connection with the Loan, Brust executed a Specific Limited Power of Attorney ("Power of Attorney") wherein he appointed Rosenberg as his true and lawful attorney and vested him with authority to execute, as his act and deed, any document, instrument, contract, note, mortgage, agreement, affidavit, disclosure, etc., and to pay on his account or to execute any such documents as may be necessary to close the Loan.

16. The Power of Attorney also declared that any act or deed lawfully performed by Rosenberg pursuant to the Power of Attorney would be binding upon Brust.

17. The Power of Attorney was filed in the Office of the Register of Deeds for Jasper County, South Carolina, on February 2, 2006, in Book 339 at Page 218.

18. On February 2, 2006, Ecological made, executed, and delivered to Plaintiff a Universal Note and Security Agreement ("Note") in the original principal sum of Two Million Six Hundred Thousand and No/100 (\$2,600,000.00) Dollars.

19. To secure the Note, Rosenberg, as Brust's attorney-in-fact, executed the Guaranty in which Brust absolutely and unconditionally guaranteed payment and performance of any and all debts, liabilities, and obligations which Ecological owed Plaintiff.

20. Plaintiff accepted the Guaranty based on the representations in the Power of Attorney and relied on same.

30912 ~

21. According to its terms, the Guaranty is continuing and shall continue to be enforced and binding upon Brust until it is revoked by written notice actually received by Plaintiff, and such revocation shall not be effective as to indebtedness existing or committed for at the time of actual receipt of such notice by Plaintiff or as to any renewal, extension, or refinancing thereof.

22. Under the Guaranty, Brust agreed to pay or reimburse Plaintiff for all costs and expenses, including reasonable attorney's fees and legal expenses incurred by Plaintiff in connection with the protection, defense, or enforcement of the Guaranty and any litigation, bankruptcy, or insolvency proceeding.

23. Subsequently thereafter, and from time to time, Plaintiff and Ecological renewed and/or modified the Note by certain Commercial Debt Modification Agreements dated January 14, 2008 and January 21, 2010, and Renewal Universal Note and Security Agreements dated May 27, 2008, August 26, 2008, October 15, 2008, and November 30, 2008 (collectively "Renewals").

24. The Note, Renewals, and Guaranty directly relate to the Loan and any and all amounts due and owing thereunder represent the only indebtedness Ecological and Brust owe Plaintiff.

25. From 2005 through 2010, Brust voluntarily provided Plaintiff, to support his personal obligations, with his personal financial information in compliance with Plaintiff's request and the terms of the Commitment Letter.

25. During the Loan's repayment, Brust did not revoke or repudiate the Guaranty nor did he dispute Rosenberg's execution of same.

26. Brust has not revoked the Power of Attorney.

27. The Note matured on November 30, 2012.

28. Plaintiff made demand upon Ecological for payment of the Note in full and Ecological has failed and refused to deliver same.

40112 2

29. Plaintiff made demand upon Brust for payment of the Guaranty in full, and he has failed and refused to deliver same.

30. As of May 23, 2014, there is due and owing under the terms of the Guaranty, the principal sum of \$1,608,000.00, plus pre-judgment interest through May 23, 2014, in the sum of \$133,683.67, plus accrued late charges in the sum of \$2,348.49, plus advanced real property taxes in the sum of \$713.07, plus advanced appraisal fees in the sum of \$1,450.00, plus advanced costs in the sum of \$65.50 for a total outstanding balance of \$1,746,260.73, plus pre-judgment interest from May 23, 2014, at the per diem rate of \$234.50.

31. As documented by the Affidavit of Jeffrey L. Silver, Esq., Plaintiff has incurred the actual sum of \$43,843.00 in attorney's fees and the sum of \$3,545.73 in court costs for a total of \$47,388.73 which is a fair and reasonable award for the attorney fees and court costs given (1) the nature of these proceedings, (2) the time actually devoted to the matter; (3) the professional standing of attorney who regularly represents clients in matters of this type as a partner in an AV rated firm; and (4) for the beneficial results that client has received.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Court hereby concludes as follows:

1. This Court has subject matter and personal jurisdiction over the parties, and this matter is properly before the Court.

2. An "agent" is one appointed by a principal as his representative and to whom the principal confides the management of some business to be transacted in the principal's name or on his account and who brings about or effects legal relationships between the principal and third parties".

Collection County Taxpayers Ass'n v. School Dist. of Colleton County, 638 S.E.2d 685, 693, 371 S.C. 224, 239 (2006) (citing Thompson v. Ford Motor Co., 21 S.E.2d 34, 43, 200 S.C. 393, 414 (1942)).

5/12

3. An agent's authority is composed of his actual authority, whether express or implied, together with the apparent authority which the principal, by his or her conduct, is precluded from denying. Roberson v. Southern Finance of South Carolina, Inc., 615 S.E.2d 112, 115, 365 S.C. 6, 10 (2005).

4. The doctrine of apparent authority focuses on the principal's manifestation to a third party, and the proper focus is on the relationship between the principal and the third party. Charleston, S.C. Registry for Golf & Tourism v. Young, Clement Rivers & Tisdale, LLP, 598 S.E.2d 717, 721, 359 S.C. 635, 642-3 (S.C. Ct. App. 2004) (citing R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth., 450 S.E.2d 113, 343 S.C. 433 (S.C. Ct. App. 2000).

5. Apparent agency is proved by the purported principal consciously or impliedly representing another to be his agent, by a third party's reliance upon the representation, and a change of position by the principal to the relying party's detriment. Cowburn v. Leventis, 619 S.E.2d 437, 448, 366 S.C. 20, 39 (S.C. Ct. App. 2005).

6. When a principal, by such acts or conduct, knowingly has caused or permitted another to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith, and in the exercise of reasonable prudence, dealt with the agent on the faith of such appearances. R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth., 450 S.E. 2d 118, 343 S.C. 424 (S.C. Ct. App. 2000).

7. When a principal's manifestation of an agent's authority is stated in a power of attorney, it is subject to the contractual rules of interpretation, including the principle that a single provision of the instrument should be read in the context of the entire instrument. Restatement (Third) of Agency §3.01 rpt's. note b. (2006) (citing Schmitz v. Firststar Bank, 658 N.W. 2d 442, 448-9 (Wisc. 2003)).

6y12

8. Also, the cardinal rule of contract interpretation is to ascertain and give effect to the parties' intentions as determined by the contract language. Middleton v. Eubank, 694 S.E.2d 31, 34, 388 S.C. 8, 14 (S.C. Ct. App. 2010) (citing McGill v. Moore, 672 S.E.2d 571, 574, 381 S.C. 179, 185 (2009)).

9. Additionally, "[w]here a written instrument's language is clear and unambiguous, the language alone determines its force and effect..." and the Court is without authority to alter an unambiguous contract or to make new contracts for the parties. Davis v. KB Home of South Carolina, Inc., 713 S.E.2d 799, 805, 394 S.C. 119, 127 (S.C. Ct. App. 2011); U.S. Bank Trust Nat. Ass'n v. Bell, 684 S.E.2d 199, 385 S.C. 364 (S.C. Ct. App. 2009).

10. Furthermore, a principal can ratify the unauthorized acts of an agent by acceptance by the putative principal of the benefit of the acts by the putative agent, full knowledge of the fact by the putative principal, and circumstances or an affirmative election demonstrating the putative principal's intent to accept the unauthorized actions. Nationwide Mut. Ins. Co. v. Powell, 292 F. 3d 201 (4th Cir. 2002).

11. The principal will be held to have ratified the unauthorized acts of his agent unless his disaffirms same within a reasonable time. Foxworth v. Murchison Nat. Bank, 134 S.E. 428, 136 S.C. 458 (1928).

12. The Power of Attorney is clear and unambiguous as it is susceptible to only one meaning and represents Brust's intention, namely, to give Rosenberg the authority to execute, on his behalf, any and all documents and to perform any act related to the closing of the Loan, including the execution of the Guaranty, and to be bound by same.

13. As such, Rosenberg had actual authority to execute the Guaranty and Brust is bound by the terms of same.

14. Rosenberg had apparent authority to execute the Guaranty on Brust's behalf as Brust represented to Plaintiff that Rosenberg had authority to execute the Guaranty pursuant to the Power of

7/12

Attorney, Plaintiff relied on same in the consummation of the Loan and execution of the Note and Renewals, and Plaintiff, in good faith, relied on Brust's representations when it closed the Loan.

15. As such, Brust is estopped from denying Rosenberg's apparent authority.

16. Brust also ratified the execution of the Guaranty as he enjoyed the benefits of the Loan as a member of Ecological, had full knowledge of the facts as he provided his personal financial information from 2005 through 2010 and signed the Commitment Letter, and he affirmatively elected an intention to adopt Rosenberg's acts by making no written repudiation or revocation of the Guaranty during the term of repayment of the Note and Renewals.

17. As Brust did not revoke or repudiate the Guaranty or complain of same until the institution of this action, he did not disaffirm Rosenberg's actions within a reasonable period of time.

18. Additionally, it is the law of this State that a normal bank/depositor arrangement creates a creditor/debtor relationship rather than a fiduciary one absent showing otherwise. Burwell v. South Carolina Nat. Bank, 340 S.E.2d 786, 288 S.C. 34 (1986).

19. Relatedly, the South Carolina Supreme Court has squarely rejected the contention that a bank's policy manual creates a duty by the bank to a borrower. See Citizens and Southern National Bank of South Carolina v. Lanford, 540 S.E.2d 549, 313 S.C. 443 (S.C. 1994).

20. As no fiduciary duty has been alleged, a creditor/debtor relationship exists between Plaintiff and Brust and Plaintiff's policy manual creates no duty between Plaintiff and Brust.

21. As such, any alleged failure by Plaintiff to follow its own policies and procedures, which is denied by Plaintiff, does not constitute a breach of any duty Plaintiff owed Brust and does not relieve Brust of liabilities under the Guaranty.

22. Also, the law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document. Regions Bank v. Schmauch, 582 S.E.2d 432, 440, 354 S.C.

8 of 12

648, 664 (S.C. Ct. App. 2003) (citing Citizens v. N. Nat'l Bank of South Carolina v. Lanford, 443 S.E. 2d 549, 551, 313 S.C. 540, 545 (1994)).

23. Further, a person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it and he owes a duty to the other party to the contract and to the public to learn the contents of a document before he reads it. Id.

24. In other words, one who signs a written instrument has the duty to exercise reasonable care to protect himself. Id.

25. As Brust, through Rosenberg, had the affirmative duty to read the Guaranty and Plaintiff had no duty to him other than those set forth in the Guaranty, Plaintiff did not breach any duty of good faith and fair dealing to Brust.

26. The Renewals also do not relieve Brust of his liability under the Guaranty as same relate to the Loan, and he agreed to repay same under the clear and unambiguous terms of the Guaranty. See Davis v. KB Home of South Carolina, Inc., 713 S.E.2d 799, 394 S.C. 119 (S.C. Ct. App. 2011); U.S. Bank Trust Nat. Ass'n v. Bell, 684 S.E.2d 199, 385 S.C. 364 (S.C. Ct. App. 2009).

27. As to Brust's Motion to Amend, "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation." S.C. R. CIV. P. 8(c).

28. The counterclaims set forth in the Amended Answer contain the same material allegations as the defenses set forth in the Answer.

29. Accordingly, the counterclaims contained in the Amended Answer are and shall be treated as the defenses contained in the Answer and disposed of herein.

30. Brust's failure to pay any and all sums due under the Guaranty constitutes a default under the terms thereof and is a material breach of same.

09/12

L

31. As of May 23, 2014, there is due and owing under the terms of the Guaranty, the principal sum of \$1,608,000.00, plus pre-judgment interest through May 23, 2014, in the sum of \$133,683.67, plus accrued late charges in the sum of \$2,348.49, plus advanced real property taxes in the sum of \$713.07, plus advanced appraisal fees in the sum of \$1,450.00, plus advanced costs in the sum of \$65.50 for a total outstanding balance of \$1,746,260.73, plus pre-judgment interest from May 23, 2014, at the per diem rate of \$234.50.

32. The Plaintiff has incurred the actual sum of \$43,843.00 in attorney's fees and the sum of \$3,545.73 in court costs for a total of \$47,388.73 which is a fair and reasonable award for the attorney fees and court costs given (1) the nature of these proceedings, (2) the time actually devoted to the matter; (3) the professional standing of attorney who regularly represents clients in matters of this type as a partner in an AV rated firm; and (4) for the beneficial results that client has received. 2

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Legette v. Piggly Wiggly, Inc., 629 S.E. 2d 375, 368 S.C. 576 (S.C. Ct. App. 2006). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing a genuine issue for trial. Singleton v. Sherer, 659 S.E. 2d 196, 377 S.C. 185 (S.C. Ct. App. 2008). Likewise, when a motion for summary judgment is made and supported by affidavit, the adverse party may not rest on the mere allegations or denials of the pleadings, but his response by affidavit as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. Klippel v. Mid-Carolina Oil, Inc., 399 S.E.2d 163, 303 S.C. 127 (S.C. Ct. App. 1990).

ORDER

10/12

Based upon the foregoing Findings of Fact and Conclusions of Law, Plaintiff's Motion for Summary Judgment is hereby granted. Based on the above, Rosenberg had actual and apparent to execute the Guaranty on Brust's behalf pursuant to the Power of Attorney. Also, Brust through his actions or lack thereof, ratified Rosenberg's actions with respect to the Guaranty. Accordingly, Brust is liable under the terms of the Guaranty.

Additionally, a debtor/creditor relationship existed between Plaintiff and Brust. As such, Plaintiff was under no duty to Brust to follow its policies and procedures with regard to the Loan and it was under no duty to explain the terms of the Guaranty to Rosenberg on behalf of Brust. Accordingly, Plaintiff did not breach any alleged duty to Brust. Also, under the clear unambiguous terms of the Guaranty, Brust agreed to repay the Renewals which directly relate to the Loan. Furthermore, the counterclaims contained in Brust's Amended Answer are the same as the defenses set forth in the Answer. As such, they, like Brust's defenses, are lack merit. Finally, Brust's failure to provide payment of all sums due and owing under the Guaranty constitute a material breach of same, and Plaintiff is entitled to judgment in an amount due and owing thereunder. It is therefore,

ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion for Summary Judgment is hereby granted, it is further,

ORDERED, ADJUDGED, and DECREED that Plaintiff shall have judgment against Brust on the Unlimited Guaranty in the sum of \$1,746,260.73, plus pre-judgment interest from May 23, 2014, through the entrance of the judgment at the per diem rate of \$234.50, plus post-judgment interest at the maximum statutory rate, and it is further,

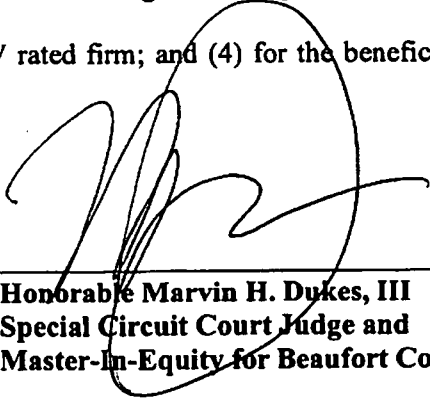
ORDERED, ADJUDGED, and DECREED that Plaintiff shall have judgment against Brust ✓ on the Unlimited Guaranty for attorney's fees and costs in the amount of \$47,388.73 which is a fair and reasonable award for the attorney fees and court costs given (1) the nature of these proceedings, (2) the

11/9/12 ✓

time actually devoted to the matter; (3) the professional standing of attorney who regularly represents clients in matters of this type as a partner in an AV rated firm; and (4) for the beneficial results that client has received.

IT IS SO ORDERED.

Dated: 7/31, 2014
Beaufort, South Carolina



Honorable Marvin H. Dukes, III
Special Circuit Court Judge and
Master-In-Equity for Beaufort County

F:\Data-JLS\First South (1862) Ecological Investments, LLC (25827) Guaranty Action\Pleadings\order granting plf's mto for summary judgment against trust - 7-14-2014.docx

12/9/12 ~~~~~

RECORD 0028

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)

2014 DEC 10 AM 3:00

CIVIL ACTION NO.: 2013-CP-07-0610

First South Bank,

Plaintiff,

vs.

John E. Rosenberg, and Philip J. Brust,

Defendants.

CLERK OF COURT
COUNTY OF BEAUFORT
SOUTH CAROLINA

**ORDER DENYING DEFENDANT PHILIP J.
BRUST'S MOTION TO AMEND ANSWER
AND CROSSCLAIMS AGAINST
DEFENDANT JOHN E ROSENBERG**

THIS MATTER came before the Court on Defendant Philip J. Brust's Motion to Amend Answer and Crossclaims Against Defendant John E. Rosenberg ("Motion"). A hearing was held on August 13, 2014, before the Honorable Marvin H. Dukes, III, Special Circuit Court Judge and Master-in-Equity for the County of Beaufort, State of South Carolina. Present at the hearing were Jeffrey L. Silver, Esq., counsel for Plaintiff, and Robert E. Sumer, IV, Esq. and E. Brandon Gaskins, Esq., counsel for Defendant Philip J. Brust ("Brust"). Based upon a review of the pleadings, affidavits filed of record, discovery, and applicable law, and hearing arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Summons and Complaint ("Complaint") were filed on March 8, 2013, and properly served on Defendants John E. Rosenberg ("Rosenberg") and Philip J. Brust ("Brust").

2. On September 9, 2013, Brust filed his Answer to Plaintiff's Complaint and Crossclaims against Rosenberg ("Answer").

3. In his Answer, Brust asserted a defense which alleged that Plaintiff's claims are barred in whole or in part, because Plaintiff's alleged losses were the result of Plaintiff's failure to follow its own

policies and procedures and negligence in the underwriting, approval and administration of the loan in question ("Loan") ("Seventh Defense").

4. The Answer also includes a defense which alleges Brust should be released from any obligations under the Unlimited Guaranty which is the subject of this action ("Guaranty") to the extent that Plaintiff breached its duty of good faith and fair dealing to Brust ("Tenth Defense").

5. On October 28, 2013, Plaintiff filed its Motion for Summary Judgment as to Brust which was supported by the Affidavit of Patrick Wright ("Wright").

6. Brust took the deposition of Wright, Plaintiff's Rule 30(b)(6) representative, on May 23, 2014.

7. Brust filed the present Motion on June 2, 2014, and attached thereto was his proposed Amended Answer to Plaintiff's Complaint, Crossclaims against Defendant John E. Rosenberg and Counterclaims against First South Bank ("Amended Answer").

8. The Motion states that the proposed Amended Answer arises out of the same disputed facts as the original Answer and does not raise novel legal issues that are not related to the issues already contained in the pleadings.

9. The Motion also states that the only change made to the Answer was the addition of counterclaims against Plaintiff allegedly uncovered during Wright's deposition.

10. With regard to the Amended Answer, it contains a proposed counterclaim that alleges Plaintiff owed Brust a duty to act reasonably and to comply with standard banking practices in the underwriting, closing, and administration of the Loan, that Plaintiff breached said duty, and that Brust suffered considerable financial injury as a result ("First Counterclaim").

11. The Amended Answer also contains a second proposed counterclaim which alleges that Plaintiff owed Brust a duty of good faith and fair dealing with regard to the Loan and Guaranty, that

Plaintiff breached same, and that Brust suffered considered financial injury as a result ("Second Counterclaim").

12. A hearing was held on Plaintiff's Motion for Summary Judgment on June 3, 2014, and the Court heard arguments concerning (i) Rosenberg's authority to execute the Guaranty on Brust's behalf, (ii) Plaintiff's alleged failure to follow its own policies and procedures with regard to the execution of the Guaranty, the closing of the Loan, and the administration of same, and (iii) Plaintiff's alleged breach of its duty of good faith and fair and fair dealing.

13. On July 31, 2014, the Court issued an Order Granting Plaintiff's Motion for Summary Judgment as to Defendant Philip J. Brust ("Order") wherein it found, among other things, that Plaintiff was not negligent for its alleged failure to follow its own policies and procedures and that Plaintiff did not breach its alleged duty of good faith and fair dealing to Brust.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Court hereby concludes as follows:

1. This Court has subject matter and personal jurisdiction over the parties, and this matter is properly before the Court.

2. "A pleading which sets forth a cause of action, whether an original claim, counterclaim, cross-claim or third-party claim shall contain (1) a short and plain statement of the grounds including facts and statute upon which the Court's jurisdiction rests, unless the Court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief and, (3) a prayer or demand for judgment for the relief which he deems himself entitled." Rule 8(a), SCRCP.

3. Pursuant to Rule 8(c), SCRCP, "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation" Rule 8(c), SCRCP.

4. As set forth in the Order, the Court determined it had jurisdiction to hear arguments related to the Seventh Defense and Tenth Defense.

5. Also, the Seventh Defense and Tenth contain a short and plain statements of facts showing that Brust is entitled to relief, said statements being that Plaintiff failed to follow its own policies and procedures and was negligent in the underwriting, approval and administration of the Loan and that Plaintiff allegedly breach a duty of good faith and fair dealing to Brust.

6. The Seventh Defense and Tenth also contain prayers or demands for judgment or relief in the form of set-offs, as same state that Plaintiff's claims are barred in whole or in part or that Brust is entitled to a release from his obligations under the Guaranty.

7. Therefore, the Seventh Defense is the same as the First Counterclaim as both allege that Plaintiff owed a duty to Brust, that Plaintiff breached its duty when it allegedly failed to follow its own policies and procedures and standard banking practices for the underwriting, closing and administration of the Loan and Guaranty, and that Brust sustained considerable financial injury and is entitled to damages in the form of a set-off as a result.

8. In like manner, the Tenth Defense is the same as the Second Counterclaim as both allege that Plaintiff allegedly breached and alleged duty of good faith and fair dealing to Brust with regard to the execution of the Guaranty, the closing of the Loan and the administration of same.

9. *Res Judicata* is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privy, and it ends litigation, promotes judicial economy, and avoids the harassment of re-litigation of the same issues. Pharmacists Mut. Ins. Co. v. Cincinnati Ins. Co., 658 F. Supp. 2d 745 (D.S.C. 2009).

10. *Res Judicata* requires proof of three elements: 1) a final, valid judgment was entered on the merits; 2) the parties to both suits are the same; and 3) the subsequent action involves matters properly included in the first action. Judy v. Judy, 383 S.C. 1, 677 S.E. 2d 213 (S.C. Ct. App. 2009).

11. It bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between the parties. Plott v. Justin Enterprises, 374 S.C. 504, 511, 649 S.E. 2d, 92, 96 (S.C. Ct. App. 2007).

12. A different remedy does not alter the fact that the claims are identical. Id.

13. A party may not evade a final judgment dismissing his claim by dressing up the same claim in different legal terms or recasting it according to a new legal theory. McMahan v. International Ass'n. of Bridge, Structural & Ornamental Iron Workers, 858 F. Supp. 529 (D.S.C. 1994).

14. Also, summary judgment is considered final and on the merits for purposes of *res judicata*. Id.

15. As to the first element, the Court's Order constitutes a final judgment on the merits as to the First Counterclaim and Second Counterclaim as they are merely a repackaging and recasting of the Seventh Defense and Tenth Defense.

16. As to the second element, the parties are identical as Plaintiff and Brust are parties to both actions.

17. As to the third element, the subject matter of the First Counterclaim and Second Counterclaim was properly included and disposed of by the Court's Order as the Seventh Defense and Tenth Defense and First Counterclaim and Second Counterclaim arise out of the execution of the Guaranty, the closing of the Loan, and the administration of same.

18. Therefore, *res judicata* bars the First Counterclaim and Second Counterclaim as Plaintiff would suffer prejudice as a result of having to re-litigate the matters alleged in same.

STANDARD OF REVIEW

Pursuant to Rule 15(a), SCRCP "A party may amend his pleadings by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice the other party." "It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice..." City of N. Myrtle Beach v. Lewis-Davis, 360 SC 225, 233, 559 S.E. 2d 462 (S.C. Ct. App. 2004). Relatedly, "[w]hile this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court..." Id. (internal citations omitted) (emphasis added).

ORDER

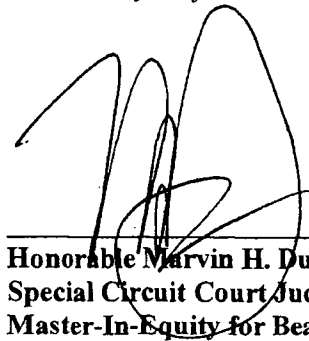
Based upon the foregoing Findings of Fact and Conclusions of Law, Brust's Motion to Amend is hereby denied.

In its Order, the Court found it had jurisdiction to hear arguments concerning the Seventh Defense and Tenth Defense and decide the merits of same. Also, the Seventh Defense and Tenth Defense each contain short plain statements of facts alleging that Brust is entitled to relief, said statements being that Plaintiff was allegedly negligent and breached its duty of good faith and fair dealing with regard Brust, the execution of the Guaranty, the closing of the Loan, and the administration of same. Furthermore, the Seventh Defense and Tenth Defense contain prayers or demands for judgment or relief in the form of a set-off as they state that Plaintiff's claim is barred in whole or in part and that Brust should be relieved of his liability under the Guaranty. Therefore, the Seventh Defense and the First Counterclaim are the same, and, in like manner, the Tenth Defense and Second Counterclaim are the same.

Accordingly, the First Counterclaim and Second Counterclaim are barred under *res judicata* as they were previously denied in the Order by virtue of the Court's denial of the Seventh Defense and Tenth Defense. As to the first element of *res judicata*, a final judgment on the matter has been entered in the form of the Order. As to the second element, the identities of the parties are identical. As to the third element, the matters alleged in the First Counterclaim and Second Counterclaim were properly included and disposed of in the Order by virtue Court's denial of the Seventh Defense and Tenth Defense as same arose out of the same transaction or occurrence. Accordingly, the proposed First and Second Counterclaims are barred by *res judicata*. It is therefore,

ORDERED ADJUDGED, AND DECREED, that Brust's Motion to Amend is hereby denied as allowance of the Amended Answer and included First Counterclaim and Second Counterclaim would prejudice Plaintiff and force same to re-litigate matters barred by *res judicata*.

IT IS SO ORDERED.



Honorable Marvin H. Dukes, III
Special Circuit Court Judge and
Master-In-Equity for Beaufort County

Dated: 11/2, 2014
Beaufort, South Carolina

F:\Data-JLS\First South (1862)\Ecological Investments, LLC (25827)\Guaranty Action\Pleadings\order Brust's motion to amend

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-07-00610

FIRST SOUTH BANK

JOHN E. ROSENBERG, ET AL.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

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

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other

☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

THIS CAME BEFORE ME 11/10/2014 ON DEFENDANT'S MOTION TO RECONSIDER MY ORDER DATED 7/31/2014. AFTER HEARING FROM THE PARTIES AND FURTHER REVIEW OF THE FILE I HEREBY DENY THE MOTION.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

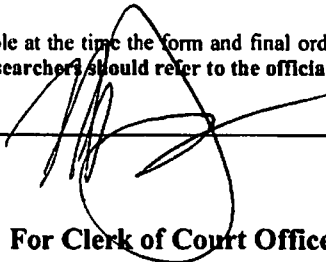
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

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

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

3069

Judge Code

12/12/14
Date

For Clerk of Court Office Use Only

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

JEFFREY L. SILVER

ATTORNEY(S) FOR THE PLAINTIFF(S)

AMY M. JOWERS

ROBERT M. DROSE

ROBERT E. SUMNER, IV

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: N/A

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

First South Bank

Plaintiff,

vs.

John E. Rosenberg and Philip J. Brust,

Defendants,

IN THE COURT OF COMMON PLEAS

C/A NO.: 2013-CP-07-

COMPLAINT
(Non-Jury Collection)

2013 APR -8 AM 10:24
CLERK OF COURT
JOHN E. ROSENBERG
COUNTY, S.C.

The Plaintiff herein, complaining of the Defendants, alleges as follows:

1. That the Plaintiff is a financial institution chartered and existing under the laws of the State of South Carolina.
2. Upon information and belief, Defendant Philip J. Brust is a citizen and resident of the State of North Carolina and by virtue of Section 36-2-803, as amended, of the S.C. Code of Laws (the South Carolina Long Arm Statute), this Court has personal jurisdiction over Defendant John E. Rosenberg.
3. Upon information and belief, Defendant John E. Rosenberg is a citizen and resident of the County of Beaufort, State of South Carolina.
4. Defendants John E. Rosenberg and Philip J. Brust are hereinafter collectively referred to as "Defendants."
5. The Plaintiff reserves its rights to subsequently bring a foreclosure action against Ecological Investments, LLC of that certain mortgage given by Ecological Investments, LLC to Plaintiff dated February 2, 2006 and recorded February 6, 2006 in the Office of the ROD for Jasper County in Volume 401 at Page 20 to further secure the Note, as defined hereinbelow.

6. On or about February 2, 2006, Ecological Investments, LLC ("Ecological"), made, executed and delivered to First South Bank, a Universal Note and Security Agreement in the original principal sum of \$2,600,000.00, which was subsequently renewed and/or modified by that certain Commercial Debt Modification Agreements dated January 14, 2008, and January 21, 2010, Renewal Universal Note and Security Agreements dated May 27, 2008, August 26, 2008, October 15, 2008, and November 30, 2010 (collectively "Note") copies of which are attached hereto as Exhibit "A" and incorporated herein by reference.

7. In order to induce First South Bank to make the loan or extend other accommodations to Ecological, on February 2, 2006, Defendants each executed and delivered to First South Bank, an Unlimited Guaranty (hereinafter individually and collectively "Guaranty"), copies of which are attached hereto as Exhibit "B" and incorporated herein by reference.

8. The Guaranty provides that Defendants, jointly and severally, unconditionally guaranteed payment and performance, without limit, as to the Note and that Defendants, jointly and severally unconditionally guaranteed payment and performance, without limit, as to all future extensions of credit or other accommodations provided to Ecological by First South Bank.

9. The Note matured on November 30, 2012, and although First South Bank has demanded payment in full of the Note, Ecological and Defendants have failed to pay the outstanding balances due on the Note and Guaranty. As a result, First South Bank deems Ecological and Defendants to be in default according to the terms of the Note and Guaranty attached hereto.

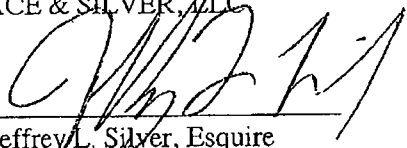
10. That further, Defendants are obligated to First South Bank for its reasonable attorney's fees plus court costs pursuant to the terms of the Note and Guaranty.

11. There is now due and owing on the Note and Guaranty as of February 22, 2013, the principal sum of \$1,608,000.00, plus accrued interest in the sum of \$26,986.17, plus accrued late

fees in the sum of \$2,348.49, plus advanced appraisal fee of \$1,450.00, for a total outstanding balance of \$1,638,784.66 plus interim interest from February 22, 2013, at the per diem rate of \$234.50.

WHEREFORE, First South Bank prays for judgment against the Defendants, jointly and severally, on the Guaranty as to the Note in the sum of \$1,638,784.66 together with pre judgment interest from February 22, 2013, at the per diem rate of \$234.50; reasonable attorney fees and court costs for the bringing of this action; post judgment interest against Defendants at the maximum statutory rate; and such other and further relief as the Court may deem just and proper.

TYLER, CASSELL, JACKSON,
PEACE & SILVER, LLC

By 

Jeffrey L. Silver, Esquire
South Carolina Bar No. 5104
1331 Elmwood Avenue, Suite 300
Post Office Box 11656
Columbia, South Carolina 29211
(803) 252-7689
ATTORNEYS FOR PLAINTIFF

2/25, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

VERIFICATION

PERSONALLY appeared before me, W. C. Lyerly, III, who being duly sworn, deposes and says: that he is the President for First South Bank with offices located in the State of South Carolina; that he has knowledge of the facts set forth in this foregoing Complaint and is duly authorized to make this Affidavit; that he has read the within Complaint and the facts stated therein are true of his own knowledge, except those matters and things therein alleged on information and belief, and as for those he believes them to be true; that there is now due from said Defendants, the sum of \$1,638,784.66 together with pre judgment interest from February 22, 2013, at the per diem rate of \$234.50 all just and lawful offsets, payments and credits have been allowed.

By: W. C. Lyerly, III
W. C. Lyerly, III, President
For First South Bank

SWORN to before me this 25th
day of February, 2013.

[Signature] (SEAL)
Notary Public for South Carolina
My Commission Expires: 6-16-2016

ECOLOGICAL INVESTMENTS, LLC 110 BULL POINT DRIVE SEABROOK, SC 29840	FIRST SOUTH BANK - BLUFFTON 7 ARLEY WAY, SUITE 100 BLUFFTON, SC 29910	Loan Number <u>8033303</u> Date <u>02-02-2008</u> Maturity Date <u>02-02-2008</u> Loan Amount \$ <u>2,600,000.00</u> Renewal Of _____
BORROWER'S NAME AND ADDRESS "I" includes each borrower above, jointly and severally.		LENDER'S NAME AND ADDRESS "You" means the lender, its successors and assigns.

For value received, I promise to pay to you, or your order, at your address listed above the PRINCIPAL sum of TWO MILLION SIX HUNDRED THOUSAND AND NO/100 Dollars \$ 2,600,000.00

☐ Single Advance: I will receive all of this principal sum on _____. No additional advances are contemplated under this note.

☒ Multiple Advance: The principal sum shown above is the maximum amount of principal I can borrow under this note. On _____ I will receive the amount of \$ _____ and future principal advances are contemplated.

Conditions: The conditions for future advances are _____

☒ Open End Credit: You and I agree that I may borrow up to the maximum principal sum more than one time. This feature is subject to all other conditions and expires on 02-02-2008.

☐ Closed End Credit: You and I agree that I may borrow (subject to all other conditions) up to the maximum principal sum only one time.

INTEREST: I agree to pay interest on the outstanding principal balance from 02-02-2008 at the rate of 7.000% per year until 02-02-2008.

☐ Variable Rate: This rate may then change as stated below.

☐ Index Rate: The future rate will be _____ the following index rate: _____

☐ No Index: The future rate will not be subject to any internal or external index. It will be entirely in your control.

☐ Frequency and Timing: The rate on this note may change as often as _____
A change in the interest rate will take effect _____ % or less than

☐ Limitations: During the term of this loan, the applicable annual interest rate will not be more than _____ % each _____ %.

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

☐ The amount of each scheduled payment will change. ☐ The amount of the final payment will change.

☐ _____ basis.

ACCRUAL METHOD: Interest will be calculated on a ACTUAL/360 basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

☐ on the same fixed or variable rate basis in effect before maturity (as indicated above).

☒ at a rate equal to 10%

☒ LATE CHARGE: If a payment is not made within 10 days after it is due, I agree to pay a late charge of 4.000% OF THE LATE AMOUNT WITH A MIN OF \$10.00

☒ ADDITIONAL CHARGES: In addition to interest, I agree to pay the following charges which ☐ are ☒ are not included in the principal amount above: LOAN FEE \$5,000.00

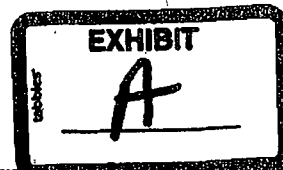
PAYMENTS: I agree to pay this note as follows:

MONTHLY PAYMENTS OF ACCRUED INTEREST CALCULATED ON THE AMOUNT OF CREDIT OUTSTANDING BEGINNING ON 03-04-2006 AND PRINCIPAL DUE ON 02-02-2008.

PURPOSE: The purpose of this loan is TO PAYOFF EXISTING DEBT WITH ADDITIONAL FUNDS FOR INTERST CARRY OVER 24 MONTHS AND OTHER NOMINAL PROP

SECURITY: You have certain rights that may affect my property as explained on page 2. In addition to these rights, this agreement is separately secured by a ☐ preexisting ☐ contemporaneous agreement described as _____

ADDITIONAL TERMS:



SECURITY

SECURITY INTEREST: I give you a security interest in all of the Property described below that I own or have sufficient rights in which to transfer an interest, now or in the future, wherever the Property is or will be located, and all proceeds and products of the Property. "Property" includes all peris, accessories, repairs, replacements, improvements, and accessions to the Property; any original evidence of title or ownership; and all obligations that support the payment or performance of the Property. "Proceeds" includes anything acquired upon the sale, lease, license, exchange, or other disposition of the Property; any rights and claims arising from the Property; and any collections and distributions on account of the Property.

- ☐ **Accounts and Other Rights to Payment:** All rights to payment, whether or not earned by performance, including, but not limited to, payment for property or services sold, leased, rented, licensed, or assigned. This includes any rights and interests (including all liens) which I have by law or agreement against any account debtor or obligor.
- ☐ **Inventory:** All inventory held for ultimate sale or lease, or which has been or will be supplied under contracts of service, or which are raw materials, work in process, or materials used or consumed in my business.
- ☐ **Equipment:** All equipment including, but not limited to, machinery, vehicles, furniture, fixtures, manufacturing equipment, farm machinery and equipment, shop equipment, office and record keeping equipment, parts, and tools. The Property includes any equipment described in a list or schedule I give to you, but such a list is not necessary to create a valid security interest in all of my equipment.
- ☐ **Instruments and Chattel Paper:** All instruments, including negotiable instruments and promissory notes and any other writings or records that evidence the right to payment of a monetary obligation, and tangible and electronic chattel paper.
- ☐ **General Intangibles:** All general intangibles including, but not limited to, tax refunds, patents and applications for patents, copyrights, trademarks, trade secrets, goodwill, trade names, customer lists, permits and franchises, payment intangibles, computer programs and all supporting information provided in connection with a transaction relating to computer programs, and the right to use my name.
- ☐ **Documents:** All documents of title including, but not limited to, bills of lading, dock warrants and receipts, and warehouse receipts.
- ☐ **Farm Products and Supplies:** All farm products including, but not limited to, all poultry and livestock and their young, along with their produce, products, and replacements; all crops, annual or perennial, and all products of the crops; and all feed, seed, fertilizer, medicines, and other supplies used or produced in my farming operations.
- ☐ **Government Payments and Programs:** All payments, accounts, general intangibles, and benefits including, but not limited to, payments in kind, deficiency payments, letters of entitlement, warehouse receipts, storage payments, emergency assistance and diversion payments, production flexibility contracts, and conservation reserve payments under any preexisting, current, or future federal or state government program.
- ☐ **Investment Property:** All investment property including, but not limited to, certificated securities, uncertificated securities, securities entitlements, securities accounts, commodity contracts, commodity accounts, and financial assets.
- ☐ **Deposit Accounts:** All deposit accounts including, but not limited to, demand, time, savings, passbook, and similar accounts.
- ☒ **Specific Property Description:** The Property includes, but is not limited by, the following:

FREM ON 82.88 +/- ACRES IN JASPER COUNTY, SC; PARCEL 042-00-05-042 ALSO KNOWN AS THE BUTTERFLY KINGDOM PUD LOCATED AT THE END OF RED DAM ROAD IN HARDEEVILLE, SC.

ASSIGNMENT OF LEASES, RENTS AND PROFITS

If applicable, enter real estate description and record owner information: _____

The Property will be used for a ☐ personal ☒ business ☐ agricultural ☐ _____ purpose.
Borrower/Owner State of organization/registration (if applicable) SC _____

ADDITIONAL TERMS OF THE SECURITY AGREEMENT

GENERALLY - This agreement secures this note and any other debt I have with you, now or later. However, it will not secure other debts if you fail with respect to such other debts, to make any required disclosure about this security agreement or if you fail to give any required notice of the right of rescission. If property described in this agreement is located in another state, this agreement may also, in some circumstances, be governed by the law of the state in which the Property is located.

NAME AND LOCATION - My name indicated on page 1 is my exact legal name. If I am an individual, my address is my principal residence. If I am not an individual, my address is the location of my chief executive offices or sole place of business. If I am an entity organized and registered under state law, my address is located in the state in which I am registered, unless otherwise indicated on page 2. I will provide verification of registration and location upon your request. I will provide you with at least 30 days notice prior to any change in my name, address, or state of organization or registration.

OWNERSHIP AND DUTIES TOWARD PROPERTY - I represent that I own all of the Property, or to the extent this is a purchase money security interest I will acquire ownership of the Property with the proceeds of the loan. I will defend it against any other claim. Your claim to the Property is ahead of the claims of any other creditor. I agree to do whatever you require to protect your security interest and to keep your claim in the Property ahead of the claims of other creditors. I will not do anything to harm your position. I will not use the Property for a purpose that will violate any laws or subject the Property to forfeiture or seizure.

I will keep books, records and accounts about the Property and my business in general. I will let you examine these records at any reasonable time. I will prepare any report or accounting you request, which deals with the Property.

I will keep the Property in my possession and will keep it in good repair and use it only for the purpose(s) described on page 1 of this agreement. I will not change this specified use without your express written permission. I represent that I am the original owner of the Property and, if I am not, that I have provided you with a list of prior owners of the Property.

I will keep the Property at my address listed on page 1 of this agreement, unless we agree I may keep it at another location. If the Property is to be used in another state, I will give you a list of those states. I will not try to sell the Property unless it is inventory or I receive your written permission to do so. If I sell the Property I will have the payment made payable to the order of you and me.

You may demand immediate payment of the debt(s) if the debtor is not a natural person and without your prior written consent: (1) a beneficial interest in the debtor is sold or transferred, or (2) there is a change in either the identity or number of members of a partnership, or (3) there is a change in ownership of more than 25 percent of the voting stock of a corporation.

I will pay all taxes and charges on the Property as they become due. You have the right of reasonable access in order to inspect the Property. I will immediately inform you of any loss or damage to the Property.

If I fail to perform any of my duties under this security agreement, or any mortgage, deed of trust, lien or other security interest, you may without notice to me perform the duties or cause them to be performed. Your right to perform for me shall not create an obligation to perform and

your failure to perform will not preclude you from exercising any of your other rights under the law or this security agreement.

PURCHASE MONEY SECURITY INTEREST - For the sole purpose of determining the extent of a purchase money security interest arising under this security agreement: (a) payments on any nonpurchase money loan also secured by this agreement will not be deemed to apply to the Purchase Money Loan, and (b) payments on the Purchase Money Loan will be deemed to apply first to the nonpurchase money portion of the loan, if any, and then to the purchase money obligations in the order which the items of collateral were acquired or if acquired at the same time, in the order selected by you. No security interest will be terminated by application of this formula. "Purchase Money Loan" means any loan the proceeds of which, in whole or in part, are used to acquire any collateral securing the loan and all extensions, renewals, consolidations and refinancing of such loan.

PAYMENTS BY LENDER - You are authorized to pay, on my behalf, charges I am or may become obligated to pay to preserve or protect the secured property (such as property insurance premiums). You may treat those payments as advances and add them to the unpaid principal under the note secured by this agreement or you may demand immediate payment of the amount advanced.

INSURANCE - I agree to buy insurance on the Property against the risks and for the amounts you require and to furnish you continuing proof of coverage. I will have the insurance company name you as loss payee on any such policy. You may require added security if you agree that insurance proceeds may be used to repair or replace the Property. I will buy insurance from a firm licensed to do business in the state where you are located. The firm will be reasonably acceptable to you. The insurance will last until the Property is released from this agreement. If I fail to buy or maintain the insurance (or fail to name you as loss payee) you may purchase it yourself.

WARRANTIES AND REPRESENTATIONS - If this agreement includes accounts, I will not settle any account for less than its full value without your written permission. I will collect all accounts until you tell me otherwise. I will keep the proceeds from all the accounts and any goods which are returned to me or which I take back in trust for you. I will not mix them with any other property of mine. I will deliver them to you at your request. If you ask me to pay you the full price on any returned items or items retaken by myself, I will do so. You may exercise my rights with respect to obligations of any account debtors, or other persons obligated on the Property, to pay or perform, and you may enforce any security interest that secures such obligations.

Any person who signs within this box does so to give you a security interest in the Property described on this page. This person does not promise to pay the note. "I" as used in this security agreement will include the borrower and any person who signs within this box.

Date _____

Signed _____

(page 2 of 3)

If this agreement covers inventory, I will not dispose of it except in my ordinary course of business at the fair market value for the Property, or at a minimum price established between you and me.

If this agreement covers farm products I will provide you, at your request, a written list of the buyers, commission merchants or selling agents to or through whom I may sell my farm products. In addition to those parties named on this written list, I authorize you to notify at your sole discretion any additional parties regarding your security interest in my farm products. I remain subject to all applicable penalties for selling my farm products in violation of my agreement with you and the Food Security Act. In this paragraph the terms farm products, buyers, commission merchants and selling agents have the meanings given to them in the Federal Food Security Act of 1985.

If this agreement covers chattel paper or instruments, either as original collateral or proceeds of the Property, I will note your interest on the face of the chattel paper or instruments.

REMEDIES - I will be in default on this security agreement if I am in default on any note this agreement secures or if I fail to keep any promise contained in the terms of this agreement. If I default, you have all of the rights and remedies provided in the note and under the Uniform Commercial Code. You may require me to make the secured property available to you at a place which is reasonably convenient. You may take possession of the secured property and sell it as provided by law. The proceeds will be applied first to your expenses and then to the debt. I agree that 10 days written notice sent to my last known address by first class mail will be reasonable notice under the Uniform Commercial Code. My current address is on page 1.

PERFECTING OF SECURITY INTEREST - I authorize you to file a financing statement covering the Property. I will comply with, facilitate, and otherwise assist you in connection with obtaining possession of or control over the Property for purposes of perfecting your security interest under the Uniform Commercial Code.

ADDITIONAL TERMS OF THE NOTE

DEFINITIONS - As used on pages 1 and 2, "I" means the terms that apply to this loan. "I," "me" or "my" means each Borrower who signs this note and each other person or legal entity (including guarantors, endorsers, and sureties) who agrees to pay this note (together referred to as "us"). "You" or "your" means the Lender and its successors and assigns.

APPLICABLE LAW - The law of the state of South Carolina in which you are located will govern this agreement. Any term of this agreement which is contrary to applicable law will not be effective, unless the law permits you and me to agree to such a variation. If any provision of this agreement cannot be enforced according to its terms, this fact will not affect the enforceability of the remainder of this agreement. No modification of this agreement may be made without your express written consent. Time is of the essence in this agreement.

PAYMENTS - Each payment I make on this note will first reduce the amount I owe you for charges which are neither interest nor principal. The remainder of each payment will then reduce accrued unpaid interest, and then unpaid principal. If you and I agree to a different application of payments, we will describe our agreement on this note. I may prepay a part of, or the entire balance of this loan without penalty, unless we specify to the contrary on this note. Any partial prepayment will not excuse or reduce any later scheduled payment until this note is paid in full (unless, when I make the prepayment, you and I agree in writing to the contrary).

INTEREST - Interest accrues on the principal remaining unpaid from time to time, until paid in full. If I receive the principal in more than one advance, each advance will start to earn interest only when I receive the advance. The interest rate in effect on this note at any given time will apply to the entire principal sum outstanding at that time. Notwithstanding anything to the contrary, I do not agree to pay and you do not intend to charge any rate of interest that is higher than the maximum rate of interest you could charge under applicable law for the extension of credit that is agreed to in this note (either before or after maturity). If any notice of interest accrual is sent and is in error, we mutually agree to correct it, and if you actually collect more interest than allowed by law and this agreement, you agree to refund it to me.

INDEX RATE - The index will serve only as a device for setting the interest rate on this note. You do not guarantee by selecting this index, or the margin, that the interest rate on this note will be the same rate you charge on any other loans or class of loans you make to me or other borrowers.

POST MATURITY RATE - For purposes of deciding when the "Post Maturity Rate" (shown on page 1) applies, the term "maturity" means the date of the last scheduled payment indicated on page 1 of this note or the date you accelerate payment on the note, whichever is earlier.

SINGLE ADVANCE LOANS - If this is a single advance loan, you and I expect that you will make only one advance of principal. However, you may add other amounts to the principal if you make any payments described in the "PAYMENTS BY LENDER" paragraph on page 2.

MULTIPLE ADVANCE LOANS - If this is a multiple advance loan, you and I expect that you will make more than one advance of principal. If this is closed and credit, repaying a part of the principal will not entitle me to additional credit.

SET-OFF - I agree that you may set off any amount due and payable under this note against any right I have to receive money from you.

"Right to receive money from you" means:

- (1) any deposit account balance I have with you;
- (2) any money owed to me on an item presented to you or in your possession for collection or exchange; and
- (3) any repurchase agreement or other nondeposit obligation.

Any amount due and payable under this note means the total amount of which you are entitled to demand payment under the terms of this note at the time you set off. This total includes any balance the due date for which you properly accelerate under this note.

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGES 1 AND 2). I have received a copy on today's date.

ECOLOGICAL INVESTMENTS, LLC

JOHN E. ROSENBERG, MANAGER/MEMBER

If my right to receive money from you is also owned by someone who has not agreed to pay this note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement. Your right of set-off does not apply to an account or other obligation where my rights are only as a representative. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set off this debt against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right to set-off.

SECURITY - References to agreements securing this loan on page 1 shall not be considered an exclusive list of all such agreements. Other agreements you and I have executed or execute in the future which are not referenced on page 1 may secure this loan.

DEFAULT - I will be in default if any one or more of the following occur: (1) I fail to make a payment on time or in the amount due; (2) I fail to keep the Property insured, if required; (3) I fail to pay, or keep any promise, on any debt or agreement I have with you; (4) any other creditor of mine attempts to collect any debt I owe him through court proceedings; (5) I die, am declared incompetent, make an assignment for the benefit of creditors, or become insolvent (either because my liabilities exceed my assets or I am unable to pay my debts as they become due); (6) I make any written statement or provide any financial information that is untrue or inaccurate at the time it was provided; (7) I do or fail to do something which causes you to believe you will have difficulty collecting the amount I owe you; (8) any collateral securing this note is used in a manner or for a purpose which threatens confiscation by a legal authority; (9) I change my name or assume an additional name without first notifying you before making such a change; (10) I fail to plant, cultivate and harvest crops in due season; (11) any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1940, Subpart G, Exhibit M.

REMEDIES - If I am in default on this note you have, but are not limited to, the following remedies:

- (1) You may demand immediate payment of all I owe you under this note (principal, accrued unpaid interest and other accrued unpaid charges).
- (2) You may set off this debt against any right I have to the payment of money from you, subject to the terms of the "SET-OFF" paragraph herein.
- (3) You may demand security, additional security, or additional parties to be obligated to pay this note as a condition for not using any other remedy.
- (4) You may refuse to make advances to me or allow purchases on credit by me.
- (5) You may use any remedy you have under state or federal law.
- (6) You may make use of any remedy given to you in any agreement securing this note.

By selecting any one or more of these remedies you do not give up your right to use later any other remedy. By waiving your right to declare an event to be a default, you do not waive your right to consider later the event a default if it continues or happens again.

COLLECTION COSTS AND ATTORNEY'S FEES - I agree to pay all costs of collection, replevin or any other or similar type of cost if I am in default. In addition, if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs (except where prohibited by law). To the extent permitted by the United States Bankruptcy Code, I also agree to pay the reasonable attorney's fees and costs you incur to collect this debt as awarded by any court exercising jurisdiction under the Bankruptcy Code.

WAIVER - I give up my rights to require you to do certain things. I will not require you to:

- (1) demand payment of amounts due (presentment);
- (2) obtain official certification of nonpayment (protest); or
- (3) give notice that amounts due have not been paid (notice of dishonor).

I waive any defenses I have based on suretyship or impairment of collateral.

OBLIGATIONS INDEPENDENT - I understand that I must pay this note even if someone else has also agreed to pay it (by, for example, signing this form or a separate guarantee or endorsement). You may sue me alone, or anyone else who is obligated on this note, or any number of us together, to collect this note. You may without notice release any party to this agreement without releasing any other party. If you give up any of your rights, with or without notice, it will not affect my duty to pay this note. Any extension of new credit to any of us, or renewal of this note by all or less than all of us will not release me from my duty to pay it. Of course, you are entitled to only one payment in full. I agree that you may at your option extend this note or the debt represented by this note, or any portion of the note or debt, from time to time without limit or notice and for any term without affecting my liability for payment of the note. I will not assign my obligation under this agreement without your prior written approval. You may, without notice, fail to perfect your security interest in, impair, or release any security and I will still be obligated to pay this loan.

FINANCIAL INFORMATION - I agree to provide you, upon request, any financial statement or information you may deem necessary. I warrant that the financial statements and information I provide to you are or will be accurate, correct and complete.

WAIVER OF HEARING PRIOR TO IMMEDIATE POSSESSION: If this loan is for a business purpose I agree to waive the right to five days' notice and a pre-seizure hearing prior to seizure of any personal property which may secure this transaction.

SIGNATURE FOR LENDER: PATRICK WRIGHT, SENIOR VICE PRESIDENT, AREA EXECUTIVE

BORROWER NAME AND ADDRESS

ECOLOGICAL INVESTMENTS, LLC
119 BULL POINT DRIVE
SEABROOK, SC 29940

LENDER NAME AND ADDRESS

FIRST SOUTH BANK - BLUFFTON
7 ARLEY WAY, SUITE 100
BLUFFTON, SC 29910

LOAN DESCRIPTION

Number 8033303

Amount \$ 2,600,000.00

Date 02-02-2006

☐ Refer to the attached Signature Addendum, incorporated herein, for additional Borrowers and their signatures.

COMMERCIAL DEBT MODIFICATION AGREEMENT

DATE AND PARTIES. The date of this Debt Modification Agreement (Modification) is 01-14-2008

DEFINITIONS. As used in this Modification, the terms have the following meanings:

Pronouns. The pronouns "I," "me," and "my" refer to each Borrower signing this Modification, individually and together with their heirs, executors, administrators, successors, and assigns. "You" and "your" refer to the Lender, with its participants or syndicators, successors and assigns, or any person or entity that acquires an interest in this Modification or Prior Obligation.

Prior Obligation. "Prior Obligation" refers to my previous agreement governing my promise to pay you money, including any loan agreement, note, or document that evidences my indebtedness, and any extensions, renewals, modifications, and substitutions.

BACKGROUND. You and I have entered into a Prior Obligation which is evidenced by PROMISSORY NOTE

dated 02-02-2006 ☐ in the original principal amount of / ☒ with a maximum possible principal amount of \$ 2,600,000.00

☐ payable on demand, / ☐ payable on demand but if no demand is made, by the maturity date of 02-02-2008 / ☒ with a maturity date of 02-02-2008

As of the date of this Modification, the ☐ amount remaining due is / ☒ current amount outstanding on the Prior Obligation is \$ 2,600,000.00

principal (Principal) plus \$ 20,727.77 accrued interest, for a total of \$ 2,620,727.77

MODIFICATION. For value received, you and I agree to modify the Prior Obligation as follows.

☐ INTEREST RATE MODIFICATION.

☐ INTEREST RATE.

Maximum Interest Amount. Any amount assessed or collected as interest will be limited to the maximum lawful amount of interest allowed by state or federal law. Amounts collected in excess of the maximum lawful amount will be applied first to the unpaid principal balance. Any remainder will be refunded to the.

☐ Post-Maturity/Default Interest Rate.

☐ Compounding. This Modification provides for the compounding of interest.

☒ PAYMENT MODIFICATION.

MODIFYING MATURITY DATE TO APRIL 30, 2008. THE PAYMENT SHALL BE AS FOLLOWS: 3 INTEREST ONLY PAYMENTS ON THE OUTSTANDING PRINCIPAL BALANCE BEGINNING 1/31/2008. THE 4TH AND FINAL PAYMENT CONSISTING OF ANY AND ALL REMAINING PRINCIPAL AND ACCRUED INTEREST WILL BE DUE AT MATURITY ON APRIL 30, 2008.

☐ DRAW PERIOD MODIFICATION.

☐ FEES AND CHARGES MODIFICATION.

ADDITIONAL TERMS.

CONTINUATION OF TERMS. Except as specifically amended in this Modification, all terms of the Prior Obligation remain in effect.

INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Modification.

NOTICE TO BORROWER: THIS IS A DEMAND NOTE AND SO MAY BE COLLECTED BY THE LENDER AT ANY TIME. A NEW NOTE MUTUALLY AGREED UPON AND SUBSEQUENTLY ISSUED MAY CARRY A HIGHER OR LOWER RATE OF INTEREST.

ORAL AGREEMENTS OR COMMITMENTS TO LOAN MONEY, EXTEND CREDIT OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT INCLUDING PROMISES TO EXTEND OR RENEW SUCH DEBT ARE NOT ENFORCEABLE, REGARDLESS OF THE LEGAL THEORY UPON WHICH IT IS BASED THAT IS IN ANY WAY RELATED TO THE CREDIT AGREEMENT. TO PROTECT YOU (BORROWER/DEBTOR) AND US (LENDER/SECURED PARTY) FROM MISUNDERSTANDING OR DISAPPOINTMENT, ANY AGREEMENTS WE REACH COVERING SUCH MATTERS ARE CONTAINED IN THIS WRITING, WHICH IS THE COMPLETE AND EXCLUSIVE STATEMENT OF THE AGREEMENT BETWEEN US, EXCEPT AS WE MAY LATER AGREE IN WRITING TO MODIFY IT. BY SIGNING THIS MODIFICATION, THE PARTIES AFFIRM THAT NO UNWRITTEN ORAL AGREEMENT EXISTS BETWEEN THEM.

SIGNATURES. By signing under seal, Borrower agrees to the terms contained in this Note. Borrower also acknowledges receipt of a copy of this Note.

BORROWER:

ECOLOGICAL INVESTMENTS, LLC

Entity Name

Signature JOHN E. ROSENBERG, MANAGER/MEMBER Date 1/14/08 (Seal)

Signature _____ Date _____ (Seal)

LENDER:

FIRST SOUTH BANK - BLUFFTON

Entity Name

Signature PATRICIA WRIGHT, SENIOR VICE PRESIDENT, AREA EXECUTIVE Date _____ (Seal)

Signature _____ Date _____ (Seal)

Signature _____ Date _____ (Seal)

Signature _____ Date _____ (Seal)

NOT TO BE USED FOR LOANS SUBJECT TO CONSUMER LENDING LAWS

(page 1 of 1)

RECORD 0045

ECOLOGICAL INVESTMENTS, LLC 119 BULL POINT DRIVE SEABROOK, SC 29940	FIRST SOUTH BANK - BLUFFTON 7 ARLEY WAY, SUITE 100 BLUFFTON, SC 29910	Loan Number <u>8033303</u> Date <u>05-27-2008</u> Maturity Date <u>08-02-2008</u> Loan Amount \$ <u>2,600,000.00</u> Renewal Of <u>8033303</u>
BORROWER'S NAME AND ADDRESS "I" includes each borrower above, jointly and severally.	LENDER'S NAME AND ADDRESS "You" means the lender, its successors and assigns.	

For value received, I promise to pay to you, or your order, at your address listed above the PRINCIPAL sum of TWO MILLION SIX HUNDRED THOUSAND AND NO/100 Dollars \$ 2,600,000.00

☒ Single Advance: I will receive all of this principal sum on 05-27-2008. No additional advances are contemplated under this note.

☐ Multiple Advance: The principal sum shown above is the maximum amount of principal I can borrow under this note. On _____ I will receive the amount of \$ _____ and future principal advances are contemplated.

Conditions: The conditions for future advances are _____

☐ Open End Credit: You and I agree that I may borrow up to the maximum principal sum more than one time. This feature is subject to all other conditions and expires on _____

☐ Closed End Credit: You and I agree that I may borrow (subject to all other conditions) up to the maximum principal sum only one time.

INTEREST: I agree to pay interest on the outstanding principal balance from 05-27-2008 at the rate of 7.000% per year until 08-02-2008.

☐ Variable Rate: This rate may then change as stated below.

☐ Index Rate: The future rate will be _____ the following index rate: _____

☐ No Index: The future rate will not be subject to any internal or external index. It will be entirely in your control.

☐ Frequency and Timing: The rate on this note may change as often as _____
A change in the interest rate will take effect _____

☐ Limitations: During the term of this loan, the applicable annual interest rate will not be more than _____ % or less than _____ % each _____

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

☐ The amount of each scheduled payment will change ☐ The amount of the final payment will change.

☐ _____

ACCUAL METHOD: Interest will be calculated on a ACTUAL/360 basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

☐ on the same fixed or variable rate basis in effect before maturity (as indicated above).

☒ at a rate equal to 10%

☒ LATE CHARGE: If a payment is not made within 10 days after it is due, I agree to pay a late charge of 4.000% OF THE LATE AMOUNT WITH A MIN OF \$10.00

☒ ADDITIONAL CHARGES: In addition to interest, I agree to pay the following charges which ☐ are ☒ are not included in the principal amount above: RENEWAL FEE \$1,250.00

PAYMENTS: I agree to pay this note as follows:

2 MONTHLY INTEREST PAYMENTS OF \$15166.67 BEGINNING 06-26-2008 AND 1 PAYMENT OF \$2,603,538.88 ON 08-02-2008.

PURPOSE: The purpose of this loan is SHORT TERM RENEWAL TO ALLOW BORROWER TIME TO SEEK AND CLOSE ON OTHER FINANCING

SECURITY: You have certain rights that may affect my property as explained on page 2. In addition to those rights, this agreement is separately secured by a ☐ preexisting ☐ contemporaneous agreement described as _____

ADDITIONAL TERMS:

SECURITY

SECURITY INTEREST: I give you a security interest in all of the Property described below that I own or have sufficient rights in which to transfer an interest, now or in the future, wherever the Property is or will be located, and all proceeds and products of the Property. "Property" includes all parts, accessories, repairs, replacements, improvements, and acccessions to the Property; any original evidence of title or ownership; and all obligations that support the payment or performance of the Property. "Proceeds" includes anything acquired upon the sale, lease, license, exchange, or other disposition of the Property; any rights and claims arising from the Property; and any collections and distributions on account of the Property.

- ☐ Accounts and Other Rights to Payment: All rights to payment, whether or not earned by performance, including, but not limited to, payment for property or services sold, leased, rented, licensed, or assigned. This includes any rights and interests (including all liens) which I have by law or agreement against any account debtor or obligor.
- ☐ Inventory: All inventory held for ultimate sale or lease, or which has been or will be supplied under contracts of service, or which are raw materials, work in process, or materials used or consumed in my business.
- ☐ Equipment: All equipment including, but not limited to, machinery, vehicles, furniture, fixtures, manufacturing equipment, farm machinery and equipment, shop equipment, office and record keeping equipment, parts, and tools. The Property includes any equipment described in a list or schedule I give to you, but such a list is not necessary to create a valid security interest in all of my equipment.
- ☐ Instruments and Chattel Paper: All instruments, including negotiable instruments and promissory notes and any other writings or records that evidence the right to payment of a monetary obligation, and tangible and electronic chattel paper.
- ☐ General Intangibles: All general intangibles including, but not limited to, tax refunds, patents and applications for patents, copyrights, trademarks, trade secrets, goodwill, trade names, customer lists, permits and franchises, payment intangibles, computer programs and all supporting information provided in connection with a transaction relating to computer programs, and the right to use my name.
- ☐ Documents: All documents of title including, but not limited to, bills of lading, dock warrants and receipts, and warehouse receipts.
- ☐ Farm Products and Supplies: All farm products including, but not limited to, all poultry and livestock and their young, along with their produce, products, and replacements, all crops, annual or perennial, and all products of the crops; and all feed, seed, fertilizer, medicines, and other supplies used or produced in my farming operations.
- ☐ Government Payments and Programs: All payments, accounts, general intangibles, and benefits including, but not limited to, payments in kind, deficiency payments, letters of entitlement, warehouse receipts, storage payments, emergency assistance and diversion payments, production flexibility contracts, and conservation reserve payments under any preexisting, current, or future federal or state government program.
- ☐ Investment Property: All investment property including, but not limited to, certificated securities, uncerificated securities, securities entitlements, securities accounts, commodity contracts, commodity accounts, and financial assets.
- ☐ Deposit Accounts: All deposit accounts including, but not limited to, demand, time, savings, passbook, and similar accounts.
- ☒ Specific Property Description: The Property includes, but is not limited by, the following:

FROM ON 82.88 +/- ACRES IN JASPER COUNTY, SC; PARCEL 042-00-05-042 ALSO KNOWN AS THE BUTTERFLY KINGDOM PUU LOCATED AT THE END OF RED DAM ROAD IN HARDEEVILLE, SC. AS FURTHER DESCRIBED IN A CERTAIN MORTGAGE DATED 02/02/2006 AND RECORDED 02/06/2006 IN VOLUME 401 PAGES 20-24 IN JASPER COUNTY, SOUTH CAROLINA.

ASSIGNMENT OF LEASES, RENTS AND PROFITS DATED 02/02/2006

If applicable, enter real estate description and record owner information:

The Property will be used for a ☐ personal ☒ business ☐ agricultural ☐ purpose.
Borrower/Owner State of organization/registration (if applicable) SC

ADDITIONAL TERMS OF THE SECURITY AGREEMENT

GENERALLY - This agreement secures this note and any other debt I have with you, now or later. However, it will not secure other debts I have with respect to such other debts, to make any required disclosure about this security agreement or if you fail to give any required notice of the right of rescission. If property described in this agreement is located in another state, this agreement may also, in some circumstances, be governed by the law of the state in which the Property is located.

NAME AND LOCATION - My name indicated on page 1 is my exact legal name. If I am an individual, my address is my principal residence. If I am not an individual, my address is the location of my chief executive offices or sole place of business. If I am an entity organized and registered under state law, my address is located in the state in which I am registered, unless otherwise indicated on page 2. I will provide verification of registration and location upon your request. I will provide you with at least 30 days notice prior to any change in my name, address, or state of organization or registration.

OWNERSHIP AND DUTIES TOWARD PROPERTY - I represent that I own all of the Property, or to the extent this is a purchase money security interest I will acquire ownership of the Property with the proceeds of the loan. I will defend it against any other claim. Your claim to the Property is ahead of the claims of any other creditor. I agree to do whatever you require to protect your security interest and to keep your claim in the Property ahead of the claims of other creditors. I will not do anything to harm your position. I will not use the Property for a purpose that will violate any laws or subject the Property to forfeiture or seizure.

I will keep books, records and accounts about the Property and my business in general. I will let you examine these records at any reasonable time. I will prepare any report or accounting you request, which deals with the Property.

I will keep the Property in my possession and will keep it in good repair and use it only for the purpose(s) described on page 1 of this agreement. I will not change this specified use without your express written permission. I represent that I am the original owner of the Property and, if I am not, that I have provided you with a list of prior owners of the Property.

I will keep the Property at my address listed on page 1 of this agreement, unless we agree I may keep it at another location. If the Property is to be used in another state, I will give you a list of those states. I will not try to sell the Property unless it is inventory or I receive your written permission to do so. If I sell the Property I will have the payment made payable to the order of you and me.

You may demand immediate payment of the debt(s) if the debtor is not a natural person and without your prior written consent, (1) a beneficial interest in the debtor is sold or transferred, or (2) there is a change in either the identity or number of members of a partnership, or (3) there is a change in ownership of more than 25 percent of the voting stock of a corporation.

I will pay all taxes and charges on the Property as they become due. You have the right of reasonable access in order to inspect the Property. I will immediately inform you of any loss or damage to the Property.

If I fail to perform any of my duties under this security agreement, or any mortgage, deed of trust, lien or other security interest, you may without notice to me perform the duties or cause them to be performed. Your right to perform for me shall not create an obligation to perform and

your failure to perform will not preclude you from exercising any of your other rights under the law or this security agreement.

PURCHASE MONEY SECURITY INTEREST - For the sole purpose of determining the extent of a purchase money security interest arising under this security agreement: (a) payments on any nonpurchase money loan also secured by this agreement will not be deemed to apply to the Purchase Money Loan, and (b) payments on the Purchase Money Loan will be deemed to apply first to the nonpurchase money portion of the loan, if any, and then to the purchase money obligations in the order which the items of collateral were acquired or if acquired at the same time, in the order selected by you. No security interest will be terminated by application of this formula. "Purchase Money Loan" means any loan the proceeds of which, in whole or in part, are used to acquire any collateral securing the loan and all extensions, renewals, consolidations and refinancing of such loan.

PAYMENTS BY LENDER - You are authorized to pay, on my behalf, charges I am or may become obligated to pay to preserve or protect the secured property (such as property insurance premiums). You may treat those payments as advances and add them to the unpaid principal under the note secured by this agreement or you may demand immediate payment of the amount advanced.

INSURANCE - I agree to buy insurance on the Property against the risks and for the amounts you require and to furnish you continuing proof of coverage. I will have the insurance company name you as loss payee on any such policy. You may require added security if you agree that insurance proceeds may be used to repair or replace the Property. I will buy insurance from a firm licensed to do business in the state where you are located. The firm will be reasonably acceptable to you. The insurance will last until the Property is released from this agreement. If I fail to buy or maintain the insurance (or fail to name you as loss payee) you may purchase it yourself.

WARRANTIES AND REPRESENTATIONS - If this agreement includes accounts, I will not settle any account for less than its full value without your written permission. I will collect all accounts until you tell me otherwise. I will keep the proceeds from all the accounts and any goods which are returned to me or which I take back in trust for you. I will not mix them with any other property of mine. I will deliver them to you at your request. If you ask me to pay you the full price on any returned items or items retaken by myself, I will do so. You may exercise my rights with respect to obligations of any account debtors, or other persons obligated on the Property, to pay or perform, and you may enforce any security interest that secures such obligations.

Any person who signs within this box does so to give you a security interest in the Property described on this page. This person does not promise to pay the note. "I" as used in this security agreement will include the borrower and any person who signs within this box.

Date _____

Signed _____

If this agreement covers inventory, I will not dispose of it except in my ordinary course of business at the fair market value for the Property, or at a minimum price established between you and me.

If this agreement covers farm products I will provide you, at your request, a written list of the buyers, commission merchants or selling agents to or through whom I may sell my farm products. In addition to those parties named on this written list, I authorize you to notify at your sole discretion any additional parties regarding your security interest in my farm products. I remain subject to all applicable penalties for selling my farm products in violation of my agreement with you and the Food Security Act. In this paragraph the terms farm products, buyers, commission merchants and selling agents have the meanings given to them in the Federal Food Security Act of 1985.

If this agreement covers chattel paper or instruments, either as original collateral or proceeds of the Property, I will note your interest on the face of the chattel paper or instruments.

REMEDIES - I will be in default on this security agreement if I am in default on any note this agreement secures or if I fail to keep any promise contained in the terms of this agreement. If I default, you have all of the rights and remedies provided in the note and under the Uniform Commercial Code. You may require me to make the secured property available to you at a place which is reasonably convenient. You may take possession of the secured property and sell it as provided by law. The proceeds will be applied first to your expenses and then to the debt. I agree that 10 days written notice sent to my last known address by first class mail will be reasonable notice under the Uniform Commercial Code. My current address is on page 1.

PERFECTION OF SECURITY INTEREST - I authorize you to file a financing statement covering the Property. I will comply with, facilitate, and otherwise assist you in connection with obtaining possession of or control over the Property for purposes of perfecting your security interest under the Uniform Commercial Code.

ADDITIONAL TERMS OF THE NOTE

DEFINITIONS - As used on pages 1 and 2, "(X)" means the terms that apply to this loan. "I," "me" or "my" means each Borrower who signs this note and each other person or legal entity (including guarantors, orderers, and sureties) who agrees to pay this note (together referred to as "us"). "You" or "your" means the Lender and its successors and assigns.

APPLICABLE LAW - The law of the state of South Carolina in which you are located will govern this agreement. Any term of this agreement which is contrary to applicable law will not be effective, unless the law permits you and me to agree to such a variation. If any provision of this agreement cannot be enforced according to its terms, this fact will not affect the enforceability of the remainder of this agreement. No modification of this agreement may be made without your express written consent. Time is of the essence in this agreement.

PAYMENTS - Each payment I make on this note will first reduce the amount I owe you for charges which are neither interest nor principal. The remainder of each payment will then reduce accrued unpaid interest, and then unpaid principal. If you and I agree to a different application of payments, we will describe our agreement on this note. I may prepay a part of, or the entire balance of this loan without penalty, unless we specify to the contrary on this note. Any partial prepayment will not excuse or reduce any later scheduled payment until this note is paid in full (unless, when I make the prepayment, you and I agree in writing to the contrary).

INTEREST - Interest accrues on the principal remaining unpaid from time to time, until paid in full. If I receive the principal in more than one advance, each advance will start to earn interest only when I receive the advance. The interest rate in effect on this note at any given time will apply to the entire principal sum outstanding at that time. Notwithstanding anything to the contrary, I do not agree to pay and you do not intend to charge any rate of interest that is higher than the maximum rate of interest you could charge under applicable law for the extension of credit that is agreed to in this note (either before or after maturity). If any notice of interest accrual is sent and is in error, we mutually agree to correct it, and if you actually collect more interest than allowed by law and this agreement, you agree to refund it to me.

INDEX RATE - The index will serve only as a device for setting the interest rate on this note. You do not guarantee by selecting this index, or the margin, that the interest rate on this note will be the same rate you charge on any other loans or class of loans you make to me or other borrowers.

POST MATURITY RATE - For purposes of deciding when the "Post Maturity Rate" (shown on page 1) applies, the term "maturity" means the date of the last scheduled payment indicated on page 1 of this note or the date you accelerate payment on the note, whichever is earlier.

SINGLE ADVANCE LOANS - If this is a single advance loan, you and I expect that you will make only one advance of principal. However, you may add other amounts to the principal if you make any payments described in the "PAYMENTS BY LENDER" paragraph on page 2.

MULTIPLE ADVANCE LOANS - If this is a multiple advance loan, you and I expect that you will make more than one advance of principal. If this is closed end credit, repaying a part of the principal will not entitle me to additional credit.

SET-OFF - I agree that you may set off any amount due and payable under this note against any right I have to receive money from you.

"Right to receive money from you" means:

(1) any deposit account balance I have with you;

(2) any money owed to me on an item presented to you or in your possession for collection or exchange; and

(3) any repurchase agreement or other nondeposit obligation.

"Any amount due and payable under this note" means the total amount of which you are entitled to demand payment under the terms of this note at the time you set off. This total includes any balance the due date for which you properly accelerate under this note.

If my right to receive money from you is also owned by someone who has not agreed to pay this note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement. Your right of set-off does not apply to an account or other obligation where my rights are only as a representative. It also does not apply to any individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set off this debt against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right to set-off.

SECURITY - References to agreements securing this loan on page 1 shall not be considered an exclusive list of all such agreements. Other agreements you and I have executed or execute in the future which are not referenced on page 1 may secure this loan.

DEFAULT - I will be in default if any one or more of the following occur:

(1) I fail to make a payment on time or in the amount due; (2) I fail to keep the Property insured, if required; (3) I fail to pay, or keep any promise, on any debt or agreement I have with you; (4) any other creditor of mine attempts to collect any debt I owe him through court proceedings; (5) I die, am declared incompetent, make an assignment for the benefit of creditors, or become insolvent (either because my liabilities exceed my assets or I am unable to pay my debts as they become due); (6) I make any written statement or provide any financial information that is untrue or inaccurate at the time it was provided; (7) I do or fail to do something which causes you to believe you will have difficulty collecting the amount I owe you; (8) any collateral securing this note is used in a manner or for a purpose which threatens confiscation by a legal authority; (9) I change my name or assume an additional name without first notifying you before making such a change; (10) I fail to plant, cultivate and harvest crops in due season; (11) any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1840, Subpart G, Exhibit M.

REMEDIES - If I am in default on this note you have, but are not limited to, the following remedies:

(1) You may demand immediate payment of all I owe you under this note (principal, accrued unpaid interest and other accrued unpaid charges);
(2) You may set off this debt against any right I have to the payment of money from you, subject to the terms of the "SET-OFF" paragraph herein;
(3) You may demand security, additional security, or additional parties to be obligated to pay this note as a condition for not using any other remedy;
(4) You may refuse to make advances to me or allow purchases on credit by me;
(5) You may use any remedy you have under state or federal law;
(6) You may make use of any remedy given to you in any agreement securing this note.

By selecting any one or more of these remedies you do not give up your right to use later any other remedy. By waiving your right to declare an event to be a default, you do not waive your right to consider later the event a default if it continues or happens again.

COLLECTION COSTS AND ATTORNEY'S FEES - I agree to pay all costs of collection, replevin or any other or similar type of cost if I am in default. In addition, if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs (except where prohibited by law). To the extent permitted by the United States Bankruptcy Code, I also agree to pay the reasonable attorney's fees and costs you incur to collect this debt as awarded by any court exercising jurisdiction under the Bankruptcy Code.

WAIVER - I give up my rights to require you to do certain things. I will not require you to:

(1) demand payment of amounts due (presentment);
(2) obtain official certification of nonpayment (protest); or
(3) give notice that amounts due have not been paid (notice of dishonor).

I waive any defenses I have based on suretyship or impairment of collateral.

OBLIGATIONS INDEPENDENT - I understand that I must pay this note even if someone else has also agreed to pay it (by, for example, signing this form or a separate guarantee or endorsement). You may sue me alone, or anyone else who is obligated on this note, or any number of us together, to collect this note. You may without notice release any party to this agreement without releasing any other party. If you give up any of your rights, with or without notice, it will not affect my duty to pay this note. Any extension of new credit to any of us, or renewal of this note by all or less than all of us will not release me from my duty to pay it. Of course, you are entitled to only one payment in full. I agree that you may, at your option extend this note or the debt represented by this note, or any portion of the note or debt, from time to time without limit or notice and for any term without affecting my liability for payment of the note. I will not assign my obligation under this agreement without your prior written approval. You may, without notice, fail to perfect your security interest in, impair, or release any security and I will still be obligated to pay this loan.

FINANCIAL INFORMATION - I agree to provide you, upon request, any financial statement or information you may deem necessary. I warrant that the financial statements and information I provide to you are or will be accurate, correct and complete.

WAIVER OF HEARING PRIOR TO IMMEDIATE POSSESSION: If this loan is for a business purpose I agree to waive the right to five days' notice and a preforeclosure hearing prior to seizure of any personal property which may secure this transaction.

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGES 1 AND 2). I have received a copy on today's date.

ECOLOGICAL INVESTMENTS, LLC

JOHN E. ROSENBERG, MANAGER/MEMBER

SIGNATURE FOR LENDER: PATRICK WRIGHT, SENIOR VICE PRESIDENT, AREA EXECUTIVE

ECOLOGICAL INVESTMENTS, LLC 119 BULL POINT DRIVE SEABROOK, SC 29940	FIRST SOUTH BANK - BLUFFTON 7 ARLEY WAY, SUITE 100 BLUFFTON, SC 29910	Loan Number <u>8033303</u> Date <u>08-26-2008</u> Maturity Date <u>09-26-2008</u> Loan Amount \$ <u>2,600,000.00</u> Renewal Of <u>8033303</u>
BORROWER'S NAME AND ADDRESS "I" includes each borrower above, jointly and severally.	LENDER'S NAME AND ADDRESS "You" means the lender, its successors and assigns.	

For value received, I promise to pay to you, or your order, at your address listed above the PRINCIPAL sum of TWO MILLION SIX HUNDRED THOUSAND AND NO/100 Dollars \$ 2,600,000.00

- ☒ Single Advance: I will receive all of this principal sum on 08-26-2008. No additional advances are contemplated under this note.
- ☐ Multiple Advance: The principal sum shown above is the maximum amount of principal I can borrow under this note. On _____ I will receive the amount of \$ _____ and future principal advances are contemplated.
- Conditions: The conditions for future advances are _____

- ☐ Open End Credit: You and I agree that I may borrow up to the maximum principal sum more than one time. This feature is subject to all other conditions and expires on _____.
- ☐ Closed End Credit: You and I agree that I may borrow (subject to all other conditions) up to the maximum principal sum only one time.

INTEREST: I agree to pay interest on the outstanding principal balance from 08-26-2008 at the rate of 7.000% per year until 09-26-2008.

- ☐ Variable Rate: This rate may then change as stated below.

☐ Index Rate: The future rate will be _____ the following index rate: _____

- ☐ No Index: The future rate will not be subject to any internal or external index. It will be entirely in your control.
- ☐ Frequency and Timing: The rate on this note may change as often as _____.
- A change in the interest rate will take effect _____.
- ☐ Limitations: During the term of this loan, the applicable annual interest rate will not be more than _____ % or less than _____ %.
- The rate may not change more than _____ % each _____.

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

- ☐ The amount of each scheduled payment will change. ☐ The amount of the final payment will change.

☐ _____

ACCRUAL METHOD: Interest will be calculated on a ACTUAL/360 basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

- ☐ on the same fixed or variable rate basis in effect before maturity (as indicated above).

☒ at a rate equal to 10%

☒ LATE CHARGE: If a payment is not made within 10 days after it is due, I agree to pay a late charge of \$1,000% OF THE LATE AMOUNT WITH A MIN OF \$10.00.

☐ ADDITIONAL CHARGES: In addition to interest, I agree to pay the following charges which ☐ are ☐ are not included in the principal amount above: _____

PAYMENTS: I agree to pay this note as follows:

1 PAYMENT OF \$2,615,672.22 ON 09-26-2008.

PURPOSE: The purpose of this loan is SHORT TERM RENEWAL TO ALLOW CUSTOMER TIME TO CLOSE ON NEW LOAN.

SECURITY: You have certain rights that may affect my property as explained on page 2. In addition to those rights, this agreement is separately secured by a ☐ preexisting ☐ contemporaneous agreement described as _____.

ADDITIONAL TERMS:

SECURITY

SECURITY INTEREST: I give you a security interest in all of the Property described below that I own or have sufficient rights in which to transfer an interest, now or in the future, wherever the Property is or will be located, and all proceeds and products of the Property. "Property" includes all parts, accessories, repairs, replacements, improvements, and accretions to the Property; any original evidence of title or ownership; and all obligations that support the payment or performance of the Property. "Proceeds" includes anything acquired upon the sale, lease, license, exchange, or other disposition of the Property; any rights and claims arising from the Property; and any collections and distributions on account of the Property.

- ☐ **Accounts and Other Rights to Payment:** All rights to payment, whether or not earned by performance, including, but not limited to, payment for property or services sold, leased, rented, licensed, or assigned. This includes any rights and interests (including all liens) which I have by law or agreement against any account debtor or obligor.
- ☐ **Inventory:** All inventory held for ultimate sale or lease, or which has been or will be supplied under contracts of service, or which are raw materials, work in process, or materials used or consumed in my business.
- ☐ **Equipment:** All equipment including, but not limited to, machinery, vehicles, furniture, fixtures, manufacturing equipment, farm machinery and equipment, shop equipment, office and record keeping equipment, parts, and tools. The Property includes any equipment described in a list or schedule I give to you, but such a list is not necessary to create a valid security interest in all of my equipment.
- ☐ **Instruments and Chattel Paper:** All instruments, including negotiable instruments and promissory notes and any other writings or records that evidence the right to payment of a monetary obligation, and tangible and electronic chattel paper.
- ☐ **General Intangibles:** All general intangibles including, but not limited to, tax refunds, patents and applications for patents, copyrights, trademarks, trade secrets, goodwill, trade names, customer lists, permits and franchises, payment intangibles, computer programs and all supporting information provided in connection with a transaction relating to computer programs, and the right to use my name.
- ☐ **Documents:** All documents of title including, but not limited to, bills of lading, dock warrants and receipts, and warehouse receipts.
- ☐ **Farm Products and Supplies:** All farm products including, but not limited to, all poultry and livestock and their young, along with their produce, products, and replacements; all crops, annual or perennial, and all products of the crops; and all feed, seed, fertilizer, medicines, and other supplies used or produced in my farming operations.
- ☐ **Government Payments and Programs:** All payments, accounts, general intangibles, and benefits including, but not limited to, payments in kind, deficiency payments, letters of entitlement, warehouse receipts, storage payments, emergency assistance and diversion payments, production flexibility contracts, and conservation reserve payments under any preexisting, current, or future federal or state government program.
- ☐ **Investment Property:** All investment property including, but not limited to, certificated securities, uncertificated securities, securities entitlements, securities accounts, commodity contracts, commodity accounts, and financial assets.
- ☐ **Deposit Accounts:** All deposit accounts including, but not limited to, demand, time, savings, passbook, and similar accounts.
- ☒ **Specific Property Description:** The Property includes, but is not limited by, the following:
 FROM ON 82.68 +/- ACRES IN JASPER COUNTY, SC; PARCEL 042-00-05-042 ALSO KNOWN AS THE BUTTERFLY KINGDOM PUO LOCATED AT THE END OF RED DAM ROAD IN HARDEEVILLE, SC. AS FURTHER DESCRIBED IN A CERTAIN MORTGAGE DATED 02/02/2006 AND RECORDED 02/05/2006 IN VOLUME 401 ON PAGES 20-24 IN JASPER COUNTY, SC

ASSIGNMENT OF LEASES, RENTS AND PROFITS DATED 02/02/2006

If applicable, enter real estate description and record owner information:

The Property will be used for a ☐ personal ☒ business ☐ agricultural ☐ purpose.
 Borrower/Owner State of organization/registration (if applicable) SC

ADDITIONAL TERMS OF THE SECURITY AGREEMENT

GENERALLY - This agreement secures this note and any other debt I have with you, now or later. However, it will not secure other debts if you fail with respect to such other debts, to make any required disclosure about this security agreement or if you fail to give any required notice of the right of rescission. If property described in this agreement is located in another state, this agreement may also, in some circumstances, be governed by the law of the state in which the Property is located.

NAME AND LOCATION - My name indicated on page 1 is my exact legal name. If I am an individual, my address is my principal residence. If I am not an individual, my address is the location of my chief executive offices or sole place of business. If I am an entity organized and registered under state law, my address is located in the state in which I am registered, unless otherwise indicated on page 2. I will provide verification of registration and location upon your request. I will provide you with at least 30 days notice prior to any change in my name, address, or state of organization or registration.

OWNERSHIP AND DUTIES TOWARD PROPERTY - I represent that I own all of the Property, or to the extent this is a purchase money security interest I will acquire ownership of the Property with the proceeds of the loan. I will defend it against any other creditor. I agree to do whatever you require to protect your security interest and to keep your claim in the Property ahead of the claims of other creditors. I will not do anything to harm your position. I will not use the Property for a purpose that will violate any laws or subject the Property to forfeiture or seizure.

I will keep books, records and accounts about the Property and my business in general. I will let you examine these records at any reasonable time. I will prepare any report or accounting you request, which deals with the Property.

I will keep the Property in my possession and will keep it in good repair and use it only for the purpose(s) described on page 1 of this agreement. I will not change this specified use without your express written permission. I represent that I am the original owner of the Property and, if I am not, that I have provided you with a list of prior owners of the Property.

I will keep the Property at my address listed on page 1 of this agreement, unless we agree I may keep it at another location. If the Property is to be used in another state, I will give you a list of those states. I will not try to sell the Property unless it is inventory or I receive your written permission to do so. If I sell the Property I will have the payment made payable to the order of you and me.

You may demand immediate payment of the debt(s) if the debtor is not a natural person and without your prior written consent: (1) a beneficial interest in the debtor is sold or transferred, or (2) there is a change in either the identity or number of members of a partnership, or (3) there is a change in ownership of more than 25 percent of the voting stock of a corporation.

I will pay all taxes and charges on the Property as they become due. You have the right of reasonable access in order to inspect the Property. I will immediately inform you of any loss or damage to the Property.

If I fail to perform any of my duties under this security agreement, or any mortgage, deed of trust, lien or other security interest, you may without notice to me perform the duties or cause them to be performed. Your right to perform for me shall not create an obligation to perform and

your failure to perform will not preclude you from exercising any of your other rights under the law or this security agreement.

PURCHASE MONEY SECURITY INTEREST - For the sole purpose of determining the extent of a purchase money security interest arising under this security agreement: (a) payments on any nonpurchase money loan also secured by this agreement will not be deemed to apply to the Purchase Money Loan, and (b) payments on the Purchase Money Loan will be deemed to apply first to the nonpurchase money portion of the loan, if any, and then to the purchase money obligations in the order which the items of collateral were acquired or if acquired at the same time, in the order selected by you. No security interest will be terminated by application of this formula. "Purchase Money Loan" means any loan the proceeds of which, in whole or in part, are used to acquire any collateral securing the loan and all extensions, renewals, consolidations and refinancing of such loan.

PAYMENTS BY LENDER - You are authorized to pay, on my behalf, charges I am or may become obligated to pay to preserve or protect the secured property (such as property insurance premiums). You may treat those payments as advances and add them to the unpaid principal under the note secured by this agreement or you may demand immediate payment of the amount advanced.

INSURANCE - I agree to buy insurance on the Property against the risks and for the amounts you require and to furnish you continuing proof of coverage. I will have the insurance company name you as loss payee on any such policy. You may require added security if you agree that insurance proceeds may be used to repair or replace the Property. I will buy insurance from a firm licensed to do business in the state where you are located. The firm will be reasonably acceptable to you. The insurance will last until the Property is released from this agreement. If I fail to buy or maintain the insurance (or fail to name you as loss payee) you may purchase it yourself.

WARRANTIES AND REPRESENTATIONS - If this agreement includes accounts, I will not settle any account for less than its full value without your written permission. I will collect all accounts until you tell me otherwise. I will keep the proceeds from all the accounts and any goods which are returned to me or which I take back in trust for you. I will not mix them with any other property of mine. I will deliver them to you at your request. If you ask me to pay you the full price on any returned items or items retaken by myself, I will do so. You may exercise my rights with respect to obligations of any account debtor, or other persons obligated on the Property, to pay or perform, and you may enforce any security interest that secures such obligations.

Any person who signs within this box does so to give you a security interest in the Property described on this page. This person does not promise to pay the note. "I" as used in this security agreement will include the borrower and any person who signs within this box.

Date _____

Signed _____

(page 2 of 3)

If this agreement covers inventory, I will not dispose of it except in my ordinary course of business at the fair market value for the Property, or at a minimum price established between you and me.

If this agreement covers farm products I will provide you, at your request, a written list of the buyers, commission merchants or selling agents to or through whom I may sell my farm products. In addition to those parties named on this written list, I authorize you to notify at your sole discretion any additional parties regarding your security interest in my farm products. I remain subject to all applicable penalties for selling my farm products in violation of my agreement with you and the Food Security Act. In this paragraph the terms farm products, buyers, commission merchants and selling agents have the meanings given to them in the Federal Food Security Act of 1985.

If this agreement covers chattel paper or instruments, either as original collateral or proceeds of the Property, I will note your interest on the face of the chattel paper or instruments.

REMEDIES - I will be in default on this security agreement if I am in default on any note this agreement secures or if I fail to keep any promise contained in the terms of this agreement. If I default, you have all of the rights and remedies provided in the note and under the Uniform Commercial Code. You may require me to make the secured property available to you at a place which is reasonably convenient. You may take possession of the secured property and sell it as provided by law. The proceeds will be applied first to your expenses and then to the debt. I agree that 10 days written notice sent to my last known address by first class mail will be reasonable notice under the Uniform Commercial Code. My current address is on page 1.

PERFECTION OF SECURITY INTEREST - I authorize you to file a financing statement covering the Property. I will comply with, facilitate, and otherwise assist you in connection with obtaining possession of or control over the Property for purposes of perfecting your security interest under the Uniform Commercial Code.

ADDITIONAL TERMS OF THE NOTE

DEFINITIONS - As used on pages 1 and 2, "I," "me" or "my" means the terms that apply to this loan. "L," "me" or "my" means each Borrower who signs this note and each other person or legal entity (including guarantors, endorsers, and sureties) who agrees to pay this note (together referred to as "us"). "You" or "your" means the Lender and its successors and assigns.

APPLICABLE LAW - The law of the state of South Carolina in which you are located will govern this agreement. Any term of this agreement which is contrary to applicable law will not be effective, unless the law permits you and me to agree to such a variation. If any provision of this agreement cannot be enforced according to its terms, this fact will not affect the enforceability of the remainder of this agreement. No modification of this agreement may be made without your express written consent. Time is of the essence in this agreement.

PAYMENTS - Each payment I make on this note will first reduce the amount I owe you for charges which are neither interest nor principal. The remainder of each payment will then reduce accrued unpaid interest, and then unpaid principal. If you and I agree to a different application of payments, we will describe our agreement on this note. I may prepay a part of, or the entire balance of this loan without penalty, unless we specify to the contrary on this note. Any partial prepayment will not excuse or reduce any later scheduled payment until this note is paid in full. Unless, when I make the prepayment, you and I agree in writing to the contrary.

INTEREST - Interest accrues on the principal remaining unpaid from time to time, until paid in full. If I receive the principal in more than one advance, each advance will start to earn interest only when I receive the advance. The interest rate in effect on this note at any given time will apply to the entire principal sum outstanding at that time. Notwithstanding anything to the contrary, I do not agree to pay and you do not intend to charge any rate of interest that is higher than the maximum rate of interest you could charge under applicable law for the extension of credit that is agreed to in this note (either before or after maturity). If any notice of interest accrual is sent and is in error, we mutually agree to correct it, and if you actually collect more interest than allowed by law and this agreement, you agree to refund it to me.

INDEX RATE - The index will serve only as a device for setting the interest rate on this note. You do not guarantee by selecting this index, or the margin, that the interest rate on this note will be the same rate you charge on any other loans or class of loans you make to me or other borrowers.

POST MATURITY RATE - For purposes of deciding when the "Post Maturity Rate" (shown on page 1) applies, the term "maturity" means the date of the last scheduled payment indicated on page 1 of this note or the date you accelerate payment on the note, whichever is earlier.

SINGLE ADVANCE LOANS - If this is a single advance loan, you and I expect that you will make only one advance of principal. However, you may add other amounts to the principal if you make any payments described in the "PAYMENTS BY LENDER" paragraph on page 2.

MULTIPLE ADVANCE LOANS - If this is a multiple advance loan, you and I expect that you will make more than one advance of principal. If this is closed end credit, repaying a part of the principal will not entitle me to additional credit.

SET-OFF - I agree that you may set off any amount due and payable under this note against any right I have to receive money from you.

"Right to receive money from you" means:

(1) any deposit account balance I have with you;

(2) any money owed to me on an item presented to you or in your possession for collection or exchange; and

(3) any repurchase agreement or other nondeposit obligation.

"Any amount due and payable under this note" means the total amount of which you are entitled to demand payment under the terms of this note at the time you set off. This total includes any balance the due date for which you properly accelerate under this note.

If my right to receive money from you is also owned by someone who has not agreed to pay this note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement. Your right of set-off does not apply to an account or other obligation where my rights are only as a representative. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set off this debt against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right to set-off.

SECURITY - References to agreements securing this loan on page 1 shall not be considered an exclusive list of all such agreements. Other agreements you and I have executed or execute in the future which are not referenced on page 1 may secure this loan.

DEFAULT - I will be in default if any one or more of the following occur:

(1) I fail to make a payment on time or in the amount due; (2) I fail to keep the Property insured, if required; (3) I fail to pay, or keep any promise, on any debt or agreement I have with you; (4) any other creditor of mine attempts to collect any debt I owe him through court proceedings; (5) I die, am declared incompetent, make an assignment for the benefit of creditors, or become insolvent (either because my liabilities exceed my assets or I am unable to pay my debts as they become due); (6) I make any written statement or provide any financial information that is untrue or inaccurate at the time it was provided; (7) I do or fail to do something which causes you to believe you will have difficulty collecting the amount I owe you; (8) any collateral securing this note is used in a manner or for a purpose which threatens confiscation by a legal authority; (9) I change my name or assume an additional name without first notifying you before making such a change; (10) I fail to plant, cultivate and harvest crops in due season; (11) any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1940, Subpart G, Exhibit M.

REMEDIES - If I am in default on this note you have, but are not limited to, the following remedies:

(1) You may demand immediate payment of all I owe you under this note (principal, accrued unpaid interest and other accrued unpaid charges).

(2) You may set off this debt against any right I have to the payment of money from you, subject to the terms of the "SET-OFF" paragraph herein.

(3) You may demand security, additional security, or additional parties to be obligated to pay this note as a condition for not using any other remedy.

(4) You may refuse to make advances to me or allow purchases on credit by me.

(5) You may use any remedy you have under state or federal law.

(6) You may make use of any remedy given to you in any agreement securing this note.

By selecting any one or more of these remedies you do not give up your right to use later any other remedy. By waiving your right to declare an event to be a default, you do not waive your right to consider later the event a default if it continues or happens again.

COLLECTION COSTS AND ATTORNEY'S FEES - I agree to pay all costs of collection, repossession or any other or similar type of cost if I am in default. In addition, if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs (except where prohibited by law). To the extent permitted by the United States Bankruptcy Code, I also agree to pay the reasonable attorney's fees and costs you incur to collect this debt as awarded by any court exercising jurisdiction under the Bankruptcy Code.

WAIVER - I give up my rights to require you to do certain things. I will not require you to:

(1) demand payment of amounts due (presentment);

(2) obtain official certification of nonpayment (protest); or

(3) give notice that amounts due have not been paid (notice of dishonor).

I waive any defenses I have based on suretyship or impairment of collateral.

OBLIGATIONS INDEPENDENT - I understand that I must pay this note even if someone else has also agreed to pay it (by, for example, signing this form or a separate guarantee or endorsement). You may sue me alone, or anyone else who is obligated on this note, or any number of us together, to collect this note. You may without notice release any party to this agreement without releasing any other party. If you give up any of your rights, with or without notice, it will not affect my duty to pay this note. Any extension of new credit to any of us, or renewal of this note by all or less than all of us will not release me from my duty to pay it. Of course, you are entitled to only one payment in full. I agree that you may at your option extend this note or the debt represented by this note, or any portion of the note or debt, from time to time without limit or notice and for any term without affecting my liability for payment of the note. I will not assign my obligation under this agreement without your prior written approval. You may, without notice, fail to perfect your security interest in, impair, or release any security and I will still be obligated to pay this loan.

FINANCIAL INFORMATION - I agree to provide you, upon request, any financial statement or information you may deem necessary. I warrant that the financial statements and information I provide to you are or will be accurate, correct and complete.

WAIVER OF HEARING PRIOR TO IMMEDIATE POSSESSION: If this loan is for a business purpose I agree to waive the right to five days' notice and a pre-seizure hearing prior to seizure of any personal property which may secure this transaction.

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGES 1 AND 2). I have received a copy on today's date.

ECOLOGICAL INVESTMENTS, LLC

JOHN E. ROSENBERG, MANAGER/MEMBER

SIGNATURE FOR LENDER: PATRICK WRIGHT, SENIOR VICE PRESIDENT, AREA EXECUTIVE

ECOLOGICAL INVESTMENTS, LLC 119 BULL POINT DRIVE SEABROOK, SC 29940	FIRST SOUTH BANK - BLUFFTON 7 ARLEY WAY, SUITE 100 BLUFFTON, SC 29910	Loan Number <u>8033303</u> Date <u>10-15-2008</u> Maturity Date <u>10-14-2010</u> Loan Amount \$ <u>2,500,000.00</u> Renewal Of <u>8033303</u>
BORROWER'S NAME AND ADDRESS "I" includes each borrower above, jointly and severally.	LENDER'S NAME AND ADDRESS "You" means the lender, its successors and assigns.	

For value received, I promise to pay to you, or your order, at your address listed above the PRINCIPAL sum of TWO MILLION SIX HUNDRED THOUSAND AND NO/100 Dollars \$ 2,600,000.00

☒ **Single Advance:** I will receive all of this principal sum on 10-15-2008. No additional advances are contemplated under this note.

☐ **Multiple Advance:** The principal sum shown above is the maximum amount of principal I can borrow under this note. On _____ I will receive the amount of \$ _____ and future principal advances are contemplated.

Conditions: The conditions for future advances are _____

☐ **Open End Credit:** You and I agree that I may borrow up to the maximum principal sum more than one time. This feature is subject to all other conditions and expires on _____

☐ **Closed End Credit:** You and I agree that I may borrow (subject to all other conditions) up to the maximum principal sum only one time.

INTEREST. I agree to pay interest on the outstanding principal balance from 10-15-2008 at the rate of 6.000% per year until 10-16-2008

☒ **Variable Rate:** This rate may then change as stated below.

☒ **Index Rate:** The future rate will be 1.000 PERCENT ABOVE the following index rate: THE HIGHEST PRIME RATE PUBLISHED IN MONEY SECTION OF THE WALL STREET JOURNAL

☐ **No Index:** The future rate will not be subject to any internal or external index. It will be entirely in your control.

☒ **Frequency and Timing:** The rate on this note may change as often as EVERY DAY BEGINNING 10-16-2008

A change in the interest rate will take effect ON THE SAME DAY

☐ **Limitations:** During the term of this loan, the applicable annual interest rate will not be more than _____ % or less than _____ %.

The rate may not change more than _____ % each _____

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

☒ The amount of each scheduled payment will change. ☒ The amount of the final payment will change.

☐ _____

ACCURAL METHOD: Interest will be calculated on a ACTUAL/360 basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

☐ on the same fixed or variable rate basis in effect before maturity (as indicated above).

☒ at a rate equal to 10%

☒ **LATE CHARGE:** If a payment is not made within 10 days after it is due, I agree to pay a late charge of 4.000% OF THE LATE AMOUNT WITH A MIN OF \$10.00

☐ **ADDITIONAL CHARGES:** In addition to interest, I agree to pay the following charges which ☐ are ☐ are not included in the principal amount above: _____

PAYMENTS: I agree to pay this note as follows:

23 MONTHLY PAYMENTS OF \$22,058.30 BEGINNING 11-14-2008 AND 1 BALLOON PAYMENT OF \$2,395,805.78 ON 10-14-2010. THIS IS A VARIABLE RATE LOAN AND THE PAYMENT AMOUNTS MAY CHANGE AFTER THE 1ST PAYMENT AND EVERY PAYMENT THEREAFTER. THE FINAL PAYMENT MAY ALSO CHANGE.

PURPOSE: The purpose of this loan is TERM OUT EXISTING LOAN

SECURITY: You have certain rights that may affect my property as explained on page 2. In addition to these rights, this agreement is superlatively secured by a ☐ preexisting ☐ contemporaneous agreement described as _____

ADDITIONAL TERMS: _____



SECURITY

SECURITY INTEREST: I give you a security interest in all of the Property described below that I own or have sufficient rights in which to transfer an interest, now or in the future, wherever the Property is or will be located, and all proceeds and products of the Property. "Property" includes all parts, accessories, repairs, replacements, improvements, and accessions to the Property; any original evidence of title or ownership; and all obligations that support the payment or performance of the Property. "Proceeds" includes anything acquired upon the sale, lease, license, exchange, or other disposition of the Property; any rights and claims arising from the Property; and any collections and distributions on account of the Property.

- ☐ **Accounts and Other Rights to Payment:** All rights to payment, whether or not earned by performance, including, but not limited to, payment for property or services sold, leased, rented, licensed, or assigned. This includes any rights and interests (including all liens) which I have by law or agreement against any account debtor or obligor.
- ☐ **Inventory:** All inventory held for ultimate sale or lease, or which has been or will be supplied under contracts of service, or which are raw materials, work in process, or materials used or consumed in my business.
- ☐ **Equipment:** All equipment including, but not limited to, machinery, vehicles, furniture, fixtures, manufacturing equipment, farm machinery and equipment, shop equipment, office and record keeping equipment, parts, and tools. The Property includes any equipment described in a list or schedule I give to you, but such a list is not necessary to create a valid security interest in all of my equipment.
- ☐ **Instruments and Chattel Paper:** All instruments, including negotiable instruments and promissory notes and any other writings or records that evidence the right to payment of a monetary obligation, and tangible and electronic chattel paper.
- ☐ **General Intangibles:** All general intangibles including, but not limited to, tax refunds, patents and applications for patents, copyrights, trademarks, trade secrets, goodwill, trade names, customer lists, permits and franchises, payment intangibles, computer programs and all supporting information provided in connection with a transaction relating to computer programs, and the right to use my name.
- ☐ **Documents:** All documents of title including, but not limited to, bills of lading, dock warrants and receipts, and warehouse receipts.
- ☐ **Farm Products and Supplies:** All farm products including, but not limited to, all poultry and livestock and their young, along with their produce, products, and replacements; all crops, annual or perennial, and all products of the crops; and all food, seed, fertilizer, medicines, and other supplies used or produced in my farming operations.
- ☐ **Government Payments and Programs:** All payments, accounts, general intangibles, and benefits including, but not limited to, payments in kind, deficiency payments, letters of entitlement, warehouse receipts, storage payments, emergency assistance and diversion payments, production flexibility contracts, and conservation reserve payments under any preexisting, current, or future federal or state government program.
- ☐ **Investment Property:** All investment property including, but not limited to, certificated securities, uncertificated securities, securities entitlements, securities accounts, commodity contracts, commodity accounts, and financial assets.
- ☐ **Deposit Accounts:** All deposit accounts including, but not limited to, demand, time, savings, passbook, and similar accounts.
- ☒ **Specific Property Description:** The Property includes, but is not limited by, the following:
 PREM ON B2.68 +/- ACRES IN JASPER COUNTY, SC; PARCEL 042-00-05-042 ALSO KNOWN AS THE BUTTERFLY KINGDOM PUO LOCATED AT THE END OF RED DAM ROAD IN HARDEEVILLE, SC. AS FURTHER DESCRIBED IN A CERTAIN MORTGAGE DATED 02/02/2006 AND RECORDED 02/08/2006 IN VOLUME 401 ON PAGES 20-24 IN JASPER COUNTY, SC

ASSIGNMENT OF LEASES, RENTS AND PROFITS DATED 02/02/2006 and Recorded 2/6/06 in Vol 20 Pg 110 Jasper County, SC.
 If applicable, enter real estate description and record owner information:

JER by
 SMC

The Property will be used for a ☐ personal ☒ business ☐ agricultural ☐ purpose.
 Borrower/Owner State of organization/registration (if applicable) SC

ADDITIONAL TERMS OF THE SECURITY AGREEMENT

GENERALLY - This agreement secures this note and any other debt I have with you, now or later. However, it will not secure other debts if you fail with respect to such other debts, to make any required disclosure about this security agreement or if you fail to give any required notice of the right of repossession. If property described in this agreement is located in another state, this agreement may also, in some circumstances, be governed by the law of the state in which the Property is located.

NAME AND LOCATION - My name indicated on page 1 is my exact legal name. If I am an individual, my address is my principal residence. If I am not an individual, my address is the location of my chief executive office or sole place of business. If I am an entity organized and registered under state law, my address is located in the state in which I am registered, unless otherwise indicated on page 2. I will provide verification of registration and location upon your request. I will provide you with at least 30 days notice prior to any change in my name, address, or state of organization or registration.

OWNERSHIP AND DUTIES TOWARD PROPERTY - I represent that I own all of the Property, or to the extent this is a purchase money security interest I will acquire ownership of the Property with the proceeds of the loan. I will defend it against any other claim. Your claim to the Property is ahead of the claims of any other creditor. I agree to do whatever you require to protect your security interest and to keep your claim in the Property ahead of the claims of other creditors. I will not do anything to harm your position. I will not use the Property for a purpose that will violate any laws or subject the Property to forfeiture or seizure.

I will keep books, records and accounts about the Property and my business in general. I will let you examine these records at any reasonable time. I will prepare any report or accounting you request, which deals with the Property.

I will keep the Property in my possession and will keep it in good repair and use it only for the purpose(s) described on page 1 of this agreement. I will not change this specified use without your express written permission. I represent that I am the original owner of the Property and, if I am not, that I have provided you with a list of prior owners of the Property.

I will keep the Property at my address listed on page 1 of this agreement, unless we agree I may keep it at another location. If the Property is to be used in another state, I will give you a list of those states. I will not try to sell the Property unless it is inventory or I receive your written permission to do so. If I sell the Property I will have the payment made payable to the order of you and me.

You may demand immediate payment of the debt(s) if the debtor is not a natural person and without your prior written consent: (1) a beneficial interest in the debtor is sold or transferred, or (2) there is a change in either the identity or number of members of a partnership, or (3) there is a change in ownership of more than 25 percent of the voting stock of a corporation.

I will pay all taxes and charges on the Property as they become due. You have the right of reasonable access in order to inspect the Property. I will immediately inform you of any loss or damage to the Property.

If I fail to perform any of my duties under this security agreement, or any mortgage, deed of trust, lien or other security interest, you may without notice to me perform the duties or cause them to be performed. Your right to perform for me shall not create an obligation to perform and

your failure to perform will not preclude you from exercising any of your other rights under the law or this security agreement.

PURCHASE MONEY SECURITY INTEREST - For the sole purpose of determining the extent of a purchase money security interest arising under this security agreement: (a) payments on any nonpurchase money loan also secured by this agreement will not be deemed to apply to the Purchase Money Loan, and (b) payments on the Purchase Money Loan will be deemed to apply first to the nonpurchase money portion of the loan, if any, and then to the purchase money obligations in the order which the items of collateral were acquired or if acquired at the same time, in the order selected by you. No security interest will be terminated by application of this formula. "Purchase Money Loan" means any loan the proceeds of which, in whole or in part, are used to acquire any collateral securing the loan and all extensions, renewals, consolidations and refinancing of such loan.

PAYMENTS BY LENDER - You are authorized to pay, on my behalf, charges I am or may become obligated to pay to preserve or protect the secured property (such as property insurance premiums). You may treat those payments as advances and add them to the unpaid principal under the note secured by this agreement or you may demand immediate payment of the amount advanced.

INSURANCE - I agree to buy insurance on the Property against the risks and for the amounts you require and to furnish you continuing proof of coverage. I will have the insurance company name, you as loss payee on any such policy. You may require added security if you agree that insurance proceeds may be used to repair or replace the Property. I will buy insurance from a firm licensed to do business in the state where you are located. The firm will be reasonably acceptable to you. The insurance will last until the Property is released from this agreement. If I fail to buy or maintain the insurance for fail to name you as loss payee you may purchase it yourself.

WARRANTIES AND REPRESENTATIONS - If this agreement includes accounts, I will not settle any account for less than its full value without your written permission. I will collect all accounts until you tell me otherwise. I will keep the proceeds from all the accounts and any goods which are returned to me or which I take back in trust for you. I will not mix them with any other property of mine. I will deliver them to you at your request. If you ask me to pay you the full price on any returned items or items retaken by myself, I will do so. You may exercise my rights with respect to obligations of any account debtors, or other persons obligated on the Property, to pay or perform, and you may enforce any security interest that secures such obligations.

Any person who signs within this box does so to give you a security interest in the Property described on this page. This person does not promise to pay the note. "I" as used in this security agreement will include the borrower and any person who signs within this box.

Date _____
 Signed _____

Page 2 of 31

SECURITY

SECURITY INTEREST: I give you a security interest in all of the Property described below that I own or have sufficient rights in which to transfer an interest, now or in the future, wherever the Property is or will be located, and all proceeds and products of the Property. "Property" includes all parts, accessories, repairs, replacement, improvements, and accessions to the Property; any original evidence of title or ownership; and all obligations that support the payment or performance of the Property. "Proceeds" includes anything acquired upon the sale, lease, license, exchange, or other disposition of the Property; any rights and claims arising from the Property; and any collections and distributions on account of the Property.

- ☐ **Accounts and Other Rights to Payment:** All rights to payment, whether or not earned by performance, including, but not limited to, payment for property or services sold, leased, rented, licensed, or assigned. This includes any rights and interests (including all liens) which I have by law or agreement against any account debtor or obligor.
- ☐ **Inventory:** All inventory held for ultimate sale or lease, or which has been or will be supplied under contracts of service, or which are raw materials, work in process, or materials used or consumed in my business.
- ☐ **Equipment:** All equipment including, but not limited to, machinery, vehicles, furniture, fixtures, manufacturing equipment, farm machinery and equipment, shop equipment, office and record keeping equipment, parts, and tools. The Property includes any equipment described in a list or schedule I give to you, but such a list is not necessary to create a valid security interest in all of my equipment.
- ☐ **Instruments and Chattel Paper:** All instruments, including negotiable instruments and promissory notes and any other writings or records that evidence the right to payment of a monetary obligation, and tangible and electronic chattel paper.
- ☐ **General Intangibles:** All general intangibles including, but not limited to, tax refunds, patents and applications for patents, copyrights, trademarks, trade secrets, goodwill, trade names, customer lists, permits and franchises, payment intangibles, computer programs and all supporting information provided in connection with a transaction relating to computer programs, and the right to use my name.
- ☐ **Documents:** All documents of title including, but not limited to, bills of lading, dock warrants and receipts, and warehouse receipts.
- ☐ **Farm Products and Supplies:** All farm products including, but not limited to, all poultry and livestock and their young, along with their products, products, and replacements; all crops, annual or perennial, and all products of the crops; and all seed, fertilizer, medicines, and other supplies used or produced in my farming operations.
- ☐ **Government Payments and Programs:** All payments, accounts, general intangibles, and benefits including, but not limited to, payments in kind, deficiency payments, letters of entitlement, warehouse receipts, storage payments, emergency assistance and diversion payments, production flexibility contracts, and conservation reserve payments under any preexisting, current, or future federal or state government program.
- ☐ **Investment Property:** All investment property including, but not limited to, certificated securities, uncertificated securities, securities entitlements, securities accounts, commodity contracts, commodity accounts, and financial assets.
- ☐ **Deposit Accounts:** All deposit accounts including, but not limited to, demand, time, savings, passbook, and similar accounts.
- ☒ **Specific Property Description:** The Property includes, but is not limited by, the following:
FREM ON 82.68 +/- ACRES IN JASPER COUNTY, SC; PARCEL 042-00-05-042 ALSO KNOWN AS THE BUTTERFLY KINGDOM PUD LOCATED AT THE END OF RED DAM ROAD IN HARDEEVILLE, SC. AS FURTHER DESCRIBED IN A CERTAIN MORTGAGE DATED 02/02/2006 AND RECORDED 02/08/2006 IN VOLUME 401 ON PAGES 20-24 IN JASPER COUNTY, SC

ASSIGNMENT OF LEASES, RENTS AND PROFITS DATED 02/02/2006

If applicable, enter real estate description and record owner information: _____

The Property will be used for a ☐ personal ☒ business ☐ agricultural ☐ _____ purpose.
 Borrower/Owner State of organization/registration (if applicable) **SC**

ADDITIONAL TERMS OF THE SECURITY AGREEMENT

GENERALLY - This agreement secures this note and any other debt I have with you, now or later. However, it will not secure other debts if you fail with respect to such other debts, to make any required disclosure about this security agreement or if you fail to give any required notice of the right of rescission. If property described in this agreement is located in another state, this agreement may also, in some circumstances, be governed by the law of the state in which the Property is located.

NAME AND LOCATION - My name indicated on page 1 is my exact legal name. If I am an individual, my address is my principal residence. If I am not an individual, my address is the location of my chief executive offices or sole place of business. If I am an entity organized and registered under state law, my address is located in the state in which I am registered, unless otherwise indicated on page 2. I will provide verification of registration and location upon your request. I will provide you with at least 30 days notice prior to any change in my name, address, or state of organization or registration.

OWNERSHIP AND DUTIES TOWARD PROPERTY - I represent that I own all of the Property, or to the extent this is a purchase money security interest I will acquire ownership of the Property with the proceeds of the loan. I will defend it against any other claim. Your claim to the Property is ahead of the claims of any other creditor. I agree to do whatever you require to protect your security interest and to keep your claim in the Property ahead of the claims of other creditors. I will not do anything to harm your position. I will not use the Property for a purpose that will violate any laws or subject the Property to forfeiture or seizure.

I will keep books, records and accounts about the Property and my business in general. I will let you examine these records at any reasonable time. I will prepare any report or accounting you request, which deals with the Property.

I will keep the Property in my possession and will keep it in good repair and use it only for the purpose(s) described on page 1 of this agreement. I will not change this specified use without your express written permission. I represent that I am the original owner of the Property and, if I am not, that I have provided you with a list of prior owners of the Property.

I will keep the Property at my address listed on page 1 of this agreement, unless we agree I may keep it at another location. If the Property is to be used in another state, I will give you a list of those states. I will not try to sell the Property unless it is inventory or I receive your written permission to do so. If I sell the Property I will have the payment made payable to the order of you and me.

You may demand immediate payment of the debt(s) if the debtor is not a natural person and without your prior written consent: (1) a beneficial interest in the debtor is sold or transferred, or (2) there is a change in either the identity or number of members of a partnership, or (3) there is a change in ownership of more than 25 percent of the voting stock of a corporation.

I will pay all taxes and charges on the Property as they become due. You have the right of reasonable access in order to inspect the Property. I will immediately inform you of any loss or damage to the Property.

If I fail to perform any of my duties under this security agreement, or any mortgage, deed of trust, lien or other security interest, you may without notice to me perform the duties or cause them to be performed. Your right to perform for me shall not create an obligation to perform and

your failure to perform will not preclude you from exercising any of your other rights under the law or this security agreement.

PURCHASE MONEY SECURITY INTEREST - For the sole purpose of determining the extent of a purchase money security interest arising under this security agreement: (a) payments on any nonpurchase money loan also secured by this agreement will not be deemed to apply to the Purchase Money Loan, and (b) payments on the Purchase Money Loan will be deemed to apply first to the nonpurchase money portion of the loan, if any, and then to the purchase money obligations in the order which the items of collateral were acquired or if acquired at the same time, in the order selected by you. No security interest will be terminated by application of this formula. "Purchase Money Loan" means any loan the proceeds of which, in whole or in part, are used to acquire any collateral securing the loan and all extensions, renewals, consolidations and refinancing of such loan.

PAYMENTS BY LENDER - You are authorized to pay, on my behalf, charges I am or may become obligated to pay to preserve or protect the secured property (such as property insurance premiums). You may treat those payments as advances and add them to the unpaid principal under the note secured by this agreement or you may demand immediate payment of the amount advanced.

INSURANCE - I agree to buy insurance on the Property against the risks and for the amounts you require and to furnish you continuing proof of coverage. I will have the insurance company name you as loss payee on any such policy. You may require added security if you agree that insurance proceeds may be used to repair or replace the Property. I will buy insurance from a firm licensed to do business in the state where you are located. The firm will be reasonably acceptable to you. The insurance will last until the Property is released from this agreement. If I fail to buy or maintain the insurance (or fail to name you as loss payee) you may purchase it yourself.

WARRANTIES AND REPRESENTATIONS - If this agreement includes accounts, I will not settle any account for less than its full value without your written permission. I will collect all accounts until you tell me otherwise. I will keep the proceeds from all the accounts and any goods which are returned to me or which I take back in trust for you. I will not mix them with any other property of mine. I will deliver them to you at your request. If you ask me to pay you the full price on any returned items or items retaken by myself, I will do so. You may exercise my rights with respect to obligations of any account debtors, or other persons obligated on the Property, to pay or perform, and you may enforce any security interest that secures such obligations.

Any person who signs within this box does so to give you a security interest in the Property described on this page. This person does not promise to pay the note. "I" as used in this security agreement will include the borrower and any person who signs within this box.

Date _____

Signed _____

(page 2 of 3)

If this agreement covers inventory, I will not dispose of it except in my ordinary course of business at the fair market value for the Property, or at a minimum price established between you and me.

If this agreement covers farm products I will provide you, at your request, a written list of the buyers, commission merchants or selling agents to or through whom I may sell my farm products. In addition to those parties named on this written list, I authorize you to notify at your sole discretion any additional parties regarding your security interest in my farm products. I remain subject to all applicable penalties for selling my farm products in violation of my agreement with you and the Food Security Act. In this paragraph the terms farm products, buyers, commission merchants and selling agents have the meanings given to them in the Federal Food Security Act of 1985.

If this agreement covers chattel paper or instruments, either as original collateral or proceeds of the Property, I will note your interest on the face of the chattel paper or instruments.

REMEDIES - I will be in default on this security agreement if I am in default on any note this agreement secures or if I fail to keep any promise contained in the terms of this agreement. If I default, you have all of the rights and remedies provided in the note and under the Uniform Commercial Code. You may require me to make the secured property available to you at a place which is reasonably convenient. You may take possession of the secured property and sell it as provided by law. The proceeds will be applied first to your expenses and then to the debt. I agree that 10 days written notice sent to my last known address by first class mail will be reasonable notice under the Uniform Commercial Code. My current address is on page 1.

PERFECTION OF SECURITY INTEREST - I authorize you to file a financing statement covering the Property. I will comply with, facilitate, and otherwise assist you in connection with obtaining possession of or control over the Property for purposes of perfecting your security interest under the Uniform Commercial Code.

ADDITIONAL TERMS OF THE NOTE

DEFINITIONS - As used on pages 1 and 2, "I," "me" or "my" means the terms that apply to this loan. "L," "me" or "my" means each Borrower who signs this note and each other person or legal entity including guarantors, endorsers, and sureties who agrees to pay this note (together referred to as "us"). "You" or "your" means the lender and its successors and assigns.

APPLICABLE LAW - The law of the state of South Carolina in which you are located will govern this agreement. Any term of this agreement which is contrary to applicable law will not be effective, unless the law permits you and me to agree to such a variation. If any provision of this agreement cannot be enforced according to its terms, this fact will not affect the enforceability of the remainder of this agreement. No modification of this agreement may be made without your express written consent. Time is of the essence in this agreement.

PAYMENTS - Each payment I make on this note will first reduce the amount I owe you for charges which are neither interest nor principal. The remainder of each payment will then reduce accrued unpaid interest, and then unpaid principal. If you and I agree to a different application of payments, we will describe our agreement on this note. I may prepay a part of, or the entire balance of this loan without penalty, unless we specify to the contrary on this note. Any partial prepayment will not excuse or reduce any later scheduled payment until this note is paid in full unless, when I make the prepayment, you and I agree in writing to the contrary.

INTEREST - Interest accrues on the principal remaining unpaid from time to time, until paid in full. If I receive the principal in more than one advance, each advance will start to earn interest only when I receive the advance. The interest rate in effect on this note at any given time will apply to the entire principal sum outstanding at that time. Notwithstanding anything to the contrary, I do not agree to pay and you do not intend to charge any rate of interest that is higher than the maximum rate of interest you could charge under applicable law for the extension of credit that is agreed to in this note (either before or after maturity). If any notice of interest accrual is sent and is in error, we mutually agree to correct it, and if you actually collect more interest than allowed by law and this agreement, you agree to refund it to me.

INDEX RATE - The index will serve only as a device for setting the interest rate on this note. You do not guarantee by selecting this index, or the margin, that the interest rate on this note will be the same rate you charge on any other loans or class of loans you make to me or other borrowers.

POST MATURITY RATE - For purposes of deciding when the "Post Maturity Rate" (shown on page 1) applies, the term "maturity" means the date of the last scheduled payment indicated on page 1 of this note or the date you accelerate payment on the note, whichever is earlier.

SINGLE ADVANCE LOANS - If this is a single advance loan, you and I expect that you will make only one advance of principal. However, you may add other amounts to the principal if you make any payments described in the "PAYMENTS BY LENDER" paragraph on page 2.

MULTIPLE ADVANCE LOANS - If this is a multiple advance loan, you and I expect that you will make more than one advance of principal. If this is closed end credit, repaying a part of the principal will not entitle me to additional credit.

SET-OFF - I agree that you may set off any amount due and payable under this note against any right I have to receive money from you.

"Right to receive money from you" means:

- (1) any deposit account balance I have with you;
- (2) any money owed to me on an item presented to you or in your possession for collection or exchange; and
- (3) any repurchase agreement or other nondeposit obligation.

"Any amount due and payable under this note" means the total amount of which you are entitled to demand payment under the terms of this note at the time you set off. This total includes any balance the due date for which you properly accelerate under this note.

If my right to receive money from you is also owned by someone who has not agreed to pay this note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement. Your right of set-off does not apply to an account or other obligation where my rights are only as a representative. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set off this debt against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right to set-off.

SECURITY - References to agreements securing this loan on page 1 shall not be considered an exclusive list of all such agreements. Other agreements you and I have executed or execute in the future which are not referenced on page 1 may secure this loan.

DEFAULT - I will be in default if any one or more of the following occur: (1) I fail to make a payment on time or in the amount due; (2) I fail to keep the Property insured, if required; (3) I fail to pay, or keep any promise, on any debt or agreement I have with you; (4) any other creditor of mine attempts to collect any debt I owe him through court proceedings; (5) I die, am declared incompetent, make an assignment for the benefit of creditors, or become insolvent (either because my liabilities exceed my assets or I am unable to pay my debts as they become due); (6) I make any written statement or provide any financial information that is untrue or inaccurate at the time it was provided; (7) I do or fail to do something which causes you to believe you will have difficulty collecting the amount I owe you; (8) any collateral securing this note is used in a manner or for a purpose which threatens confiscation by a legal authority; (9) I change my name or assume an additional name without first notifying you before making such a change; (10) I fail to plant, cultivate and harvest crops in due season; (11) any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1940, Subpart G, Exhibit M.

REMEDIES - If I am in default on this note you have, but are not limited to, the following remedies:

- (1) You may demand immediate payment of all I owe you under this note (principal, accrued unpaid interest and other accrued unpaid charges).
- (2) You may set off this debt against any right I have to the payment of money from you, subject to the terms of the "SET-OFF" paragraph herein.
- (3) You may demand security, additional security, or additional parties to be obligated to pay this note as a condition for not using any other remedy.
- (4) You may refuse to make advances to me or allow purchases on credit by me.
- (5) You may use any remedy you have under state or federal law.
- (6) You may make use of any remedy given to you in any agreement securing this note.

By selecting any one or more of these remedies you do not give up your right to use later any other remedy. By waiving your right to declare an event to be a default, you do not waive your right to consider later the event a default if it continues or happens again.

COLLECTION COSTS AND ATTORNEY'S FEES - I agree to pay all costs of collection, replevin or any other or similar type of cost if I am in default. In addition, if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs (except where prohibited by law). To the extent permitted by the United States Bankruptcy Code, I also agree to pay the reasonable attorney's fees and costs you incur to collect this debt as awarded by any court exercising jurisdiction under the Bankruptcy Code.

WAIVER - I give up my rights to require you to do certain things. I will not require you to:

- (1) demand payment of amounts due (presentment);
- (2) obtain official certification of nonpayment (protest); or
- (3) give notice that amounts due have not been paid (notice of dishonor).

I waive any defenses I have based on suretyship or impairment of collateral.

OBLIGATIONS INDEPENDENT - I understand that I must pay this note even if someone else has also agreed to pay it (by, for example, signing this form or a separate guarantee or endorsement). You may sue me alone, or anyone else who is obligated on this note, or any number of us together, to collect this note. You may without notice release any party to this agreement without releasing any other party. If you give up any of your rights, with or without notice, it will not affect my duty to pay this note. Any extension of new credit to any of us, or renewal of this note by all or less than all of us will not release me from my duty to pay it. Of course, you are entitled to only one payment in full. I agree that you may at your option extend this note or the debt represented by this note, or any portion of the note or debt, from time to time without limit or notice and for any term without affecting my liability for payment of the note. I will not assign my obligation under this agreement without your prior written approval. You may, without notice, fail to perfect your security interest in, impair, or release any security and I will still be obligated to pay this loan.

FINANCIAL INFORMATION - I agree to provide you, upon request, any financial statement or information you may deem necessary. I warrant that the financial statements and information I provide to you are or will be accurate, correct and complete.

WAIVER OF HEARING PRIOR TO IMMEDIATE POSSESSION: If this loan is for a business purpose I agree to waive the right to five days' notice and a pre-seizure hearing prior to seizure of any personal property which may secure this transaction.

SIGNATURES - I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGES 1 AND 2). I have received a copy on today's date.

ECOLOGICAL INVESTMENTS, LLC

JOHN E. ROSENBERG, MANAGER/MEMBER

SIGNATURE FOR LENDER: PATRICK WRIGHT, SENIOR VICE PRESIDENT, AREA EXECUTIVE

EX-1084 1991 Bankers Systems, Inc., St. Cloud, MN Form UNS-A2-5C 2/8/2001

(page 3 of 3)

RECORD 0055

BORROWER NAME AND ADDRESS

ECOLOGICAL INVESTMENTS, LLC
119 BULL POINT DRIVE
SEABROOK, SC 29940

LENDER NAME AND ADDRESS

FIRST SOUTH BANK - BLUFFTON
7 ARLEY WAY, SUITE 100
BLUFFTON, SC 29910

LOAN DESCRIPTION

Number 8033303

Amount \$ 2,800,000.00

Date 10-15-2008

☐ Refer to the attached Signature Addendum, incorporated herein, for additional Borrowers and their signatures.

COMMERCIAL DEBT MODIFICATION AGREEMENT

DATE AND PARTIES. The date of this Debt Modification Agreement (Modification) is 01-21-2010

DEFINITIONS. As used in this Modification, the terms have the following meanings:

Proprietary. The pronouns "I," "me," and "my" refer to each Borrower signing this Modification, individually and together with their heirs, executors, administrators, successors, and assigns. "You" and "your" refer to the Lender, with its participants or syndicators, successors and assigns, or any person or entity that acquires an interest in this Modification or Prior Obligation.

Prior Obligation. "Prior Obligation" refers to my previous agreement governing my promise to pay you money, including any loan agreement, note, or document that evidences my indebtedness, and any extensions, renewals, modifications, and substitutions.

BACKGROUND. You and I have entered into a Prior Obligation which is evidenced by PROMISSORY NOTE

dated 10-15-2008 ☒ in the original principal amount of / ☐ with a maximum possible principal amount of \$ 2,800,000.00

☐ payable on demand, / ☐ payable on demand but if no demand is made, by the maturity date of 10-14-2010 / ☒ with a maturity date of 10-14-2010

As of the date of this Modification, the ☒ amount remaining due is / ☐ current amount outstanding on the Prior Obligation is \$ 1,824,560.54

principal (Principal) plus \$ 1,516.94 accrued interest, for a total of \$ 1,826,077.48

MODIFICATION. For value received, you and I agree to modify the Prior Obligation as follows.

☐ INTEREST RATE MODIFICATION.

☐ INTEREST RATE.

Maximum Interest Amount. Any amount assessed or collected as interest will be limited to the maximum lawful amount of interest allowed by state or federal law. Amounts collected in excess of the maximum lawful amount will be applied first to the unpaid principal balance. Any remainder will be refunded to me.

☐ Post-Maturity/Default Interest Rate.

☐ Compounding. This Modification provides for the compounding of interest.

☒ PAYMENT MODIFICATION.

AS OF 1/21/2010 WE ARE MODIFYING THE MONTHLY PAYMENTS TO INTEREST ONLY. THERE WILL BE 8 MONTHLY INTEREST ONLY PAYMENTS BEGINNING ON 2/14/2010 AND 1 PAYMENT OF 1,831,022.53 DUE ON 10/14/2010. THIS IS A VARIABLE RATE LOAN AND THE PAYMENT AMOUNTS MAY CHANGE. THE FINAL PAYMENT MAY ALSO CHANGE.

☐ DRAW PERIOD MODIFICATION.

☐ FEES AND CHARGES MODIFICATION.

ADDITIONAL TERMS.

CONTINUATION OF TERMS. Except as specifically amended in this Modification, all terms of the Prior Obligation remain in effect. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Modification.

VT only ☐ NOTICE TO BORROWER: THIS IS A DEMAND NOTE AND SO MAY BE COLLECTED BY THE LENDER AT ANY TIME. A NEW NOTE MUTUALLY AGREED UPON AND SUBSEQUENTLY ISSUED MAY CARRY A HIGHER OR LOWER RATE OF INTEREST.

☒ ORAL AGREEMENTS OR COMMITMENTS TO LOAN MONEY, EXTEND CREDIT OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT INCLUDING PROMISES TO EXTEND OR RENEW SUCH DEBT ARE NOT ENFORCEABLE, REGARDLESS OF THE LEGAL THEORY UPON WHICH IT IS BASED THAT IS IN ANY WAY RELATED TO THE CREDIT AGREEMENT. TO PROTECT YOU (BORROWER/DEBTOR) AND US (LENDER/SECURED PARTY) FROM MISUNDERSTANDING OR DISAPPOINTMENT, ANY AGREEMENTS WE REACH COVERING SUCH MATTERS ARE CONTAINED IN THIS WRITING, WHICH IS THE COMPLETE AND EXCLUSIVE STATEMENT OF THE AGREEMENT BETWEEN US, EXCEPT AS WE MAY LATER AGREE IN WRITING TO MODIFY IT. BY SIGNING THIS MODIFICATION, THE PARTIES AFFIRM THAT NO UNWRITTEN ORAL AGREEMENT EXISTS BETWEEN THEM.

SIGNATURES. By signing under seal, Borrower agrees to the terms contained in this Note. Borrower also acknowledges receipt of a copy of this Note.

BORROWER:

ECOLOGICAL INVESTMENTS, LLC

Entity Name

Signature JOAN E. ROSENBERG, MANAGER/MEMBER Date 1/21/2010 (Seal)

Signature _____ Date _____ (Seal)

Signature _____ Date _____ (Seal)

LENDER:

FIRST SOUTH BANK - BLUFFTON

Entity Name

Signature PATRICK WRIGHT, SENIOR VICE PRESIDENT, AREA EXECUTIVE Date _____ (Seal)

Signature _____ Date _____ (Seal)

Signature _____ Date _____ (Seal)

Signature _____ Date _____ (Seal)

Signature _____ Date _____ (Seal)

Signature _____ Date _____ (Seal)

Signature _____ Date _____ (Seal)

Signature _____ Date _____ (Seal)

Signature _____ Date _____ (Seal)

Signature _____ Date _____ (Seal)

Signature _____ Date _____ (Seal)

Signature _____ Date _____ (Seal)

Signature _____ Date _____ (Seal)

Signature _____ Date _____ (Seal)

RECORD 0056

ECOLOGICAL INVESTMENTS, LLC 119 BULL POINT DRIVE SEABROOK, SC 29940	FIRST SOUTH BANK - BLUFFTON 7 ARLEY WAY, SUITE 100 BLUFFTON, SC 29910	Loan Number <u>8033303</u> Date <u>11-30-2010</u> Maturity Date <u>11-30-2012</u> Loan Amount \$ <u>1,700,000.00</u> Renewal Of <u>8033303</u>
BORROWER'S NAME AND ADDRESS "I" includes each borrower above, jointly and severally.		LENDER'S NAME AND ADDRESS "You" means the lender, its successors and assigns.

For value received, I promise to pay to you, or your order, at your address listed above the PRINCIPAL sum of ONE MILLION SEVEN HUNDRED THOUSAND AND NO/100 Dollars \$ 1,700,000.00

☒ **Single Advance:** I will receive all of this principal sum on 11-30-2010. No additional advances are contemplated under this note.

☐ **Multiple Advance:** The principal sum shown above is the maximum amount of principal I can borrow under this note. On _____ I will receive the amount of \$ _____ and future principal advances are contemplated.

Conditions. The conditions for future advances are _____

☐ **Open End Credit:** You and I agree that I may borrow up to the maximum principal sum more than one time. This feature is subject to all other conditions and expires on _____.

☐ **Closed End Credit:** You and I agree that I may borrow (subject to all other conditions) up to the maximum principal sum only one time.

INTEREST: I agree to pay interest on the outstanding principal balance from 11-30-2010 at the rate of 5.250% per year until 11-30-2012.

☐ **Variable Rate:** This rate may then change as stated below.

☐ **Index Rate:** The future rate will be _____ the following index rate: _____

☐ **No Index:** The future rate will not be subject to any internal or external index. It will be entirely in your control.

☐ **Frequency and Timing:** The rate on this note may change as often as _____
A change in the interest rate will take effect _____.

☐ **Limitations:** During the term of this loan, the applicable annual interest rate will not be more than _____ % or less than _____ %.

The rate may not change more than _____ % each _____.

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

☐ The amount of each scheduled payment will change. ☐ The amount of the final payment will change.

☐ _____

ACCRUAL METHOD: Interest will be calculated on a ACTUAL/360 basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

☐ on the same fixed or variable rate basis in effect before maturity (as indicated above).

☒ at a rate equal to 10%.

☒ **LATE CHARGE:** If a payment is not made within 10 days after it is due, I agree to pay a late charge of 4.000% OF THE LATE AMOUNT WITH A MIN. OF \$10.00.

☐ **ADDITIONAL CHARGES:** In addition to interest, I agree to pay the following charges which ☐ are ☐ are not included in the principal amount above: _____

PAYMENTS: I agree to pay this note as follows:
23 MONTHLY INTEREST PAYMENTS RANGING FROM \$7052.50 TO \$7667.33 BEGINNING 12-30-2010 AND 23 MONTHLY PRINCIPAL PAYMENTS OF \$4,000.00 BEGINNING 12-30-2010 AND 1 PAYMENT OF \$1,615,269.50 ON 11-30-2012.

PURPOSE: The purpose of this loan is RENEWAL OF EXISTING LOAN FOR AN ADDITIONAL 24 MONTHS.

SECURITY: You have certain rights that may affect my property as explained on page 2. In addition to these rights, this agreement is separately secured by a ☐ preexisting ☐ contemporaneous agreement described as _____.

ADDITIONAL TERMS: _____

SECURITY

SECURITY INTEREST: I give you a security interest in all of the Property described below that I own or have sufficient rights in which to transfer an interest, now or in the future, wherever the Property is or will be located, and all proceeds and products of the Property. "Property" includes all parts, accessories, repairs, replacements, improvements, and accessions to the Property; any original evidence of title or ownership; and all obligations that support the payment or performance of the Property. "Proceeds" includes anything acquired upon the sale, lease, license, exchange, or other disposition of the Property; any rights and claims arising from the Property; and any collections and distributions on account of the Property.

- ☐ **Accounts and Other Rights to Payment:** All rights to payment, whether or not earned by performance, including, but not limited to, payment for property or services sold, leased, rented, licensed, or assigned. This includes any rights and interests (including all liens) which I have by law or agreement against any account debtor or obligor.
- ☐ **Inventory:** All inventory held for ultimate sale or lease, or which has been or will be supplied under contracts of service, or which are raw materials, work in process, or materials used or consumed in my business.
- ☐ **Equipment:** All equipment including, but not limited to, machinery, vehicles, furniture, fixtures, manufacturing equipment, farm machinery and equipment, shop equipment, office and record keeping equipment, parts, and tools. The Property includes any equipment described in a list or schedule I give to you, but such a list is not necessary to create a valid security interest in all of my equipment.
- ☐ **Instruments and Chattel Paper:** All instruments, including negotiable instruments and promissory notes and any other writings or records that evidence the right to payment of a monetary obligation, and tangible and electronic chattel paper.
- ☐ **General Intangibles:** All general intangibles including, but not limited to, tax refunds, patents and applications for patents, copyrights, trademarks, trade secrets, goodwill, trade names, customer lists, permits and franchises, payment intangibles, computer programs and all supporting information provided in connection with a transaction relating to computer programs, and the right to use my name.
- ☐ **Documents:** All documents of title including, but not limited to, bills of lading, dock warrants and receipts, and warehouse receipts.
- ☐ **Farm Products and Supplies:** All farm products including, but not limited to, all poultry and livestock and their young, along with their produce, products, and replacements; all crops, annual or perennial, and all products of the crops; and all feed, seed, fertilizer, medicines, and other supplies used or produced in my farming operations.
- ☐ **Government Payments and Programs:** All payments, accounts, general intangibles, and benefits including, but not limited to, payments in kind, deficiency payments, letters of entitlement, warehouse receipts, storage payments, emergency assistance and diversion payments, production flexibility contracts, and conservation reserve payments under any preexisting, current, or future federal or state government program.
- ☐ **Investment Property:** All investment property including, but not limited to, certificated securities, uncertificated securities, securities entitlements, securities accounts, commodity contracts, commodity accounts, and financial assets.
- ☐ **Deposit Accounts:** All deposit accounts including, but not limited to, demand, time, savings, passbook, and similar accounts.
- ☒ **Specific Property Description:** The Property includes, but is not limited by, the following:
FREM ON 82.6B +/- ACRES IN JASPER COUNTY, SC. PARCEL 042-00 05-042 ALSO KNOWN AS THE BUTTERFLY KINGDOM PUD LOCATED AT THE END OF RED DAM ROAD IN HARDEEVILLE, SC. AS FURTHER DESCRIBED IN A CERTAIN MORTGAGE DATED 02/02/2006 AND RECORDED 02/06/2006 IN VOLUME 401 ON PAGES 20-24 IN JASPER COUNTY, SC

ASSIGNMENT OF LEASES, RENTS AND PROFITS DATED 02/02/2006 AND RECORDED 02/06/2006 IN VOLUME 20 ON PAGES 110-113 IN JASPER COUNTY, SC

If applicable, enter real estate description and record owner information:

The Property will be used for a ☐ personal ☒ business ☐ agricultural ☐ purpose.
 Borrower/Owner State of organization/registration (if applicable) SC

ADDITIONAL TERMS OF THE SECURITY AGREEMENT

GENERALLY - This agreement secures this note and any other debt I have with you, now or later. However, it will not secure other debts if you fail with respect to such other debts, to make any required disclosure about this security agreement or if you fail to give any required notice of the right of rescission. If property described in this agreement is located in another state, this agreement may also, in some circumstances, be governed by the law of the state in which the Property is located.

NAME AND LOCATION - My name indicated on page 1 is my exact legal name. If I am an individual, my address is my principal residence. If I am not an individual, my address is the location of my chief executive offices or sole place of business. If I am an entity organized and registered under state law, my address is located in the state in which I am registered, unless otherwise indicated on page 2. I will provide verification of registration and location upon your request. I will provide you with at least 30 days notice prior to any change in my name, address, or state of organization or registration.

OWNERSHIP AND DUTIES TOWARD PROPERTY - I represent that I own all of the Property, or to the extent this is a purchase money security interest I will acquire ownership of the Property with the proceeds of the loan I will defend it against any other claim. Your claim to the Property is ahead of the claims of any other creditor. I agree to do whatever you require to protect your security interest and to keep your claim in the Property ahead of the claims of other creditors. I will not do anything to harm your position. I will not use the Property for a purpose that will violate any laws or subject the Property to forfeiture or seizure.

I will keep books, records and accounts about the Property and my business in general. I will let you examine these records at any reasonable time. I will prepare any report or accounting you request, which deals with the Property.

I will keep the Property in my possession and will keep it in good repair and use it only for the purpose(s) described on page 1 of this agreement. I will not change this specified use without your express written permission. I represent that I am the original owner of the Property and, if I am not, that I have provided you with a list of prior owners of the Property.

I will keep the Property at my address listed on page 1 of this agreement, unless we agree I may keep it at another location. If the Property is to be used in another state, I will give you a list of those states. I will not try to sell the Property unless it is inventory or I receive your written permission to do so. If I sell the Property I will have the payment made payable to the order of you and me.

You may demand immediate payment of the debt(s) if the debtor is not a natural person and without your prior written consent: (1) a beneficial interest in the debtor is sold or transferred, or (2) there is a change in either the identity or number of members of a partnership, or (3) there is a change in ownership of more than 25 percent of the voting stock of a corporation.

I will pay all taxes and charges on the Property as they become due. You have the right of reasonable access in order to inspect the Property. I will immediately inform you of any loss or damage to the Property.

If I fail to perform any of my duties under this security agreement, or any mortgage, deed of trust, lien or other security interest, you may without notice to me perform the duties or cause them to be performed. Your right to perform for me shall not create an obligation to perform and

your failure to perform will not preclude you from exercising any of your other rights under the law or this security agreement.

PURCHASE MONEY SECURITY INTEREST - For the sole purpose of determining the extent of a purchase money security interest arising under this security agreement: (a) payments on any nonpurchase money loan also secured by this agreement will not be deemed to apply to the Purchase Money Loan, and (b) payments on the Purchase Money Loan will be deemed to apply first to the nonpurchase money portion of the loan, if any, and then to the purchase money obligations in the order which the items of collateral were acquired or if acquired at the same time, in the order selected by you. No security interest will be terminated by application of this formula. "Purchase Money Loan" means any loan the proceeds of which, in whole or in part, are used to acquire any collateral securing the loan and all extensions, renewals, consolidations and refinancing of such loan.

PAYMENTS BY LENDER - You are authorized to pay, on my behalf, charges I am or may become obligated to pay to preserve or protect the secured property (such as property insurance premiums). You may treat those payments as advances and add them to the unpaid principal under the note secured by this agreement or you may demand immediate payment of the amount advanced.

INSURANCE - I agree to buy insurance on the Property against the risks and for the amounts you require and to furnish you continuing proof of coverage. I will have the insurance company name you as loss payee on any such policy. You may require added security if you agree that insurance proceeds may be used to repair or replace the Property. I will buy insurance from a firm licensed to do business in the state where you are located. The firm will be reasonably acceptable to you. The insurance will last until the Property is released from this agreement. If I fail to buy or maintain the insurance (or fail to name you as loss payee) you may purchase it yourself.

WARRANTIES AND REPRESENTATIONS - If this agreement includes accounts, I will not settle any account for less than its full value without your written permission. I will collect all accounts until you tell me otherwise. I will keep the proceeds from all the accounts and any goods which are returned to me or which I take back in trust for you. I will not mix them with any other property of mine. I will deliver them to you at your request. If you ask me to pay you the full price on any returned items or items retaken by myself, I will do so. You may exercise my rights with respect to obligations of any account debtors, or other persons obligated on the Property, to pay or perform, and you may enforce any security interest that secures such obligations.

Any person who signs within this box does so to give you a security interest in the Property described on this page. This person does not promise to pay the note. "I" as used in this security agreement will include the borrower and any person who signs within this box.

Date _____

Signed _____

(page 2 of 3)

If this agreement covers inventory, I will not dispose of it except in my ordinary course of business at the fair market value for the Property, or at a minimum price established between you and me.

If this agreement covers farm products I will provide you, at your request, a written list of the buyers, commission merchants or selling agents to or through whom I may sell my farm products. In addition to those parties named on this written list, I authorize you to notify at your sole discretion any additional parties regarding your security interest in my farm products. I remain subject to all applicable penalties for selling my farm products in violation of my agreement with you and the Food Security Act. In this paragraph the terms farm products, buyers, commission merchants and selling agents have the meanings given to them in the Federal Food Security Act of 1985.

If this agreement covers chattel paper or instruments, either as original collateral or proceeds of the Property, I will note your interest on the face of the chattel paper or instruments.

REMEDIES - I will be in default on this security agreement if I am in default on any note this agreement secures or if I fail to keep any promise contained in the terms of this agreement. If I default, you have all of the rights and remedies provided in the note and under the Uniform Commercial Code. You may require me to make the secured property available to you at a place which is reasonably convenient. You may take possession of the secured property and sell it as provided by law. The proceeds will be applied first to your expenses and then to the debt. I agree that 10 days written notice sent to my last known address by first class mail will be reasonable notice under the Uniform Commercial Code. My current address is on page 1.

PERFECTION OF SECURITY INTEREST - I authorize you to file a financing statement covering the Property. I will comply with, facilitate, and otherwise assist you in connection with obtaining possession of or control over the Property for purposes of perfecting your security interest under the Uniform Commercial Code.

ADDITIONAL TERMS OF THE NOTE

DEFINITIONS - As used on pages 1 and 2, "I" means the terms that apply to this loan. "I," "me" or "my" means each Borrower who signs this note and each other person or legal entity (including guarantors, endorser, and sureties) who agrees to pay this note (together referred to as "Us"). "You" or "your" means the Lender and its successors and assigns.

APPLICABLE LAW - The law of the state of South Carolina in which you are located will govern this agreement. Any term of this agreement which is contrary to applicable law will not be effective, unless the law permits you and me to agree to such a variation. If any provision of this agreement cannot be enforced according to its terms, this fact will not affect the enforceability of the remainder of this agreement. No modification of this agreement may be made without your express written consent. Time is of the essence in this agreement.

PAYMENTS - Each payment I make on this note will first reduce the amount I owe you for charges which are neither interest nor principal. The remainder of each payment will then reduce accrued unpaid interest, and then unpaid principal. If you and I agree to a different application of payments, we will describe our agreement on this note. I may prepay a part of, or the entire balance of this loan without penalty, unless we specify to the contrary on this note. Any partial prepayment will not excuse or reduce any later scheduled payment until this note is paid in full (unless, when I make the prepayment, you and I agree in writing to the contrary).

INTEREST - Interest accrues on the principal remaining unpaid from time to time, until paid in full. If I receive the principal in more than one advance, each advance will start to earn interest only when I receive the advance. The interest rate in effect on this note at any given time will apply to the entire principal sum outstanding at that time. Notwithstanding anything to the contrary, I do not agree to pay and you do not intend to charge any rate of interest that is higher than the maximum rate of interest you could charge under applicable law for the extension of credit that is agreed to in this note (either before or after maturity). If any notice of interest accrual is sent and is in error, we mutually agree to correct it, and if you actually collect more interest than allowed by law and this agreement, you agree to refund it to me.

INDEX RATE - The index will serve only as a device for setting the interest rate on this note. You do not guarantee by selecting this index, or the margin, that the interest rate on this note will be the same rate you charge on any other loans or class of loans you make to me or other borrowers.

POST MATURITY RATE - For purposes of deciding when the "Post Maturity Rate" (shown on page 1) applies, the term "maturity" means the date of the last scheduled payment indicated on page 1 of this note or the date you accelerate payment on the note, whichever is earlier.

SINGLE ADVANCE LOANS - If this is a single advance loan, you and I expect that you will make only one advance of principal. However, you may add other amounts to the principal if you make any payments described in the "PAYMENTS BY LENDER" paragraph on page 2.

MULTIPLE ADVANCE LOANS - If this is a multiple advance loan, you and I expect that you will make more than one advance of principal. If this is closed end credit, repaying a part of the principal will not entitle me to additional credit.

SET-OFF - I agree that you may set off any amount due and payable under this note against any right I have to receive money from you.

"Right to receive money from you" means:

- (1) any deposit account balance I have with you;
- (2) any money owed to me on an item presented to you or in your possession for collection or exchange, and
- (3) any repurchase agreement or other nondeposit obligation.

"Any amount due and payable under this note" means the total amount of which you are entitled to demand payment under the terms of this note at the time you set off. This total includes any balance the due date for which you properly accelerate under this note.

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGES 1 AND 2). I have received a copy on today's date.

ECOLOGICAL INVESTMENTS, LLC

JOHN A. ROSENBERG, MANAGER/MEMBER

If my right to receive money from you is also owned by someone who has not agreed to pay this note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement. Your right of set-off does not apply to an account or other obligation where my rights are only as a representative. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set off this debt against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right to set-off.

SECURITY - References to agreements securing this loan on page 1 shall not be considered an exclusive list of all such agreements. Other agreements you and I have executed or execute in the future which are not referenced on page 1 may secure this loan.

DEFAULT - I will be in default if any one or more of the following occur: (1) I fail to make a payment on time or in the amount due; (2) I fail to keep the Property insured, if required; (3) I fail to pay, or keep any promise, on any debt or agreement I have with you; (4) any other creditor of mine attempts to collect any debt I owe him through court proceedings; (5) I die, am declared incompetent, make an assignment for the benefit of creditors, or become insolvent (either because my liabilities exceed my assets or I am unable to pay my debts as they become due); (6) I make any written statement or provide any financial information that is untrue or inaccurate at the time it was provided; (7) I do or fail to do something which causes you to believe you will have difficulty collecting the amount I owe you; (8) any collateral securing this note is used in a manner or for a purpose which threatens confiscation by a legal authority; (9) I change my name or assume an additional name without first notifying you before making such a change; (10) I fail to plant, cultivate and harvest crops in due season; (11) any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1840, Subpart G, Exhibit M.

REMEDIES - If I am in default on this note you have, but are not limited to, the following remedies:

- (1) You may demand immediate payment of all I owe you under this note (principal, accrued unpaid interest and other accrued unpaid charges).
- (2) You may set off this debt against any right I have to the payment of money from you, subject to the terms of the "SET-OFF" paragraph herein.
- (3) You may demand security, additional security, or additional parties to be obligated to pay this note as a condition for not using any other remedy.
- (4) You may refuse to make advances to me or allow purchases on credit by me.
- (5) You may use any remedy you have under state or federal law.
- (6) You may make use of any remedy given to you in any agreement securing this note.

By selecting any one or more of these remedies you do not give up your right to use later any other remedy. By waiving your right to declare an event to be a default, you do not waive your right to consider later the event a default if it continues or happens again.

COLLECTION COSTS AND ATTORNEY'S FEES - I agree to pay all costs of collection, replevin or any other or similar type of cost if I am in default. In addition, if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs (except where prohibited by law). To the extent permitted by the United States Bankruptcy Code, I also agree to pay the reasonable attorney's fees and costs you incur to collect this debt as awarded by any court exercising jurisdiction under the Bankruptcy Code.

WAIVER - I give up my rights to require you to do certain things. I will not require you to:

- (1) demand payment of amounts due (presentment);
- (2) obtain official certification of nonpayment (protest); or
- (3) give notice that amounts due have not been paid (notice of dishonor).

I waive any defenses I have based on suretyship or impairment of collateral.

OBLIGATIONS INDEPENDENT - I understand that I must pay this note even if someone else has also agreed to pay it (by, for example, signing this form or a separate guarantee or endorsement). You may sue me alone, or anyone else who is obligated on this note, or any number of us together, to collect this note. You may without notice release any party to this agreement without releasing any other party. If you give up any of your rights, with or without notice, it will not affect my duty to pay this note. Any extension of new credit to any of us, or renewal of this note by all or less than all of us, will not release me from my duty to pay it. (Of course, you are entitled to only one payment in full.) I agree that you may at your option extend this note or the debt represented by this note, or any portion of the note or debt, from time to time without limit or notice and for any term without affecting my liability for payment of the note. I will not assign my obligation under this agreement without your prior written approval. You may, without notice, fail to perfect your security interest in, impair, or release any security and I will still be obligated to pay this loan.

FINANCIAL INFORMATION - I agree to provide you, upon request, any financial statement or information you may deem necessary. I warrant that the financial statements and information I provide to you are or will be accurate, correct and complete.

WAIVER OF HEARING PRIOR TO IMMEDIATE POSSESSION: If this loan is for a business purpose I agree to waive the right to five days' notice and a pressurized hearing prior to seizure of any personal property which may secure this transaction.

SIGNATURE FOR LENDER: PATRICK WRIGHT, SENIOR VICE PRESIDENT, AREA EXECUTIVE

GUARANTY

BLUFFTON
(City)

SOUTH CAROLINA
(State)

FEBRUARY 02, 2006

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and to induce FIRST SOUTH BANK, BLUFFTON (herein, with its participants, successors and assigns, called "Lender"), at its option, at any time or from time to time to make loans or extend other accommodations to or for the account of ECOLOGICAL INVESTMENTS, LLC

(herein called "Borrower") or to engage in any other transactions with Borrower, the Undersigned hereby absolutely and unconditionally guarantees to Lender the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of the debts, liabilities and obligations described as follows:

A. If this ☐ is checked, the Undersigned guarantees to Lender the payment and performance of the debt, liability or obligation of Borrower to Lender evidenced by or arising out of the following: _____ and any extensions,

renewals or replacements thereof (hereinafter referred to as the "Indebtedness").

B. If this ☒ is checked, the Undersigned guarantees to Lender the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several; all such debts, liabilities and obligations being hereinafter collectively referred to as the "Indebtedness"). Without limitation, this guaranty includes the following described debt(s): _____

The Undersigned further acknowledges and agrees with Lender that:

1. No act or thing need occur to establish the liability of the Undersigned hereunder, and no act or thing, except full payment and discharge of all indebtedness, shall in any way exonerate the Undersigned or modify, reduce, limit or release the liability of the Undersigned hereunder.

2. This is an absolute, unconditional and continuing guaranty of payment of the indebtedness and shall continue to be in force and be binding upon the Undersigned, whether or not all Indebtedness is paid in full, until this guaranty is revoked by written notice actually received by the Lender, and such revocation shall not be effective as to Indebtedness existing or committed for at the time of actual receipt of such notice by the Lender, or as to any renewals, extensions and refinancings thereof. If there be more than one Undersigned, such revocation shall be effective only as to the one so revoking. The death or incompetence of the Undersigned shall not revoke this guaranty, except upon actual receipt of written notice thereof by Lender and then only as to the decedent or the incompetent and only prospectively, as to future transactions, as herein set forth.

3. If the Undersigned shall be dissolved, shall die, or shall be or become insolvent (however defined) or revoke this guaranty, then the Lender shall have the right to declare immediately due and payable, and the Undersigned will forthwith pay to the Lender, the full amount of all Indebtedness, whether due and payable or unmatured. If the Undersigned voluntarily commences or there is commenced involuntarily against the Undersigned a case under the United States Bankruptcy Code, the full amount of all Indebtedness, whether due and payable or unmatured, shall be immediately due and payable without demand or notice thereof.

4. The liability of the Undersigned hereunder shall be limited to a principal amount of \$ UNLIMITED

(if unlimited or if no amount is stated, the Undersigned shall be liable for all Indebtedness, without any limitation as to amount), plus accrued interest thereon and all attorneys' fees, collection costs and enforcement expenses referable thereto. Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the Undersigned hereunder. The Lender may apply any sums received by or available to Lender on account of the Indebtedness from Borrower or any other person (except the Undersigned), from their properties, out of any collateral security or from any other source to payment of the excess. Such application of receipts shall not reduce, affect or impair the liability of the Undersigned hereunder. If the liability of the Undersigned is limited to a stated amount pursuant to this paragraph 4, any payment made by the Undersigned under this guaranty shall be effective to reduce or discharge such liability only if accompanied by a written transmittal document, received by the Lender, advising the Lender that such payment is made under this guaranty for such purpose.

5. The Undersigned will pay or reimburse Lender for all costs and expenses (including reasonable attorneys' fees and legal expenses) incurred by Lender in connection with the protection, defense or enforcement of this guaranty in any litigation or bankruptcy or insolvency proceedings.

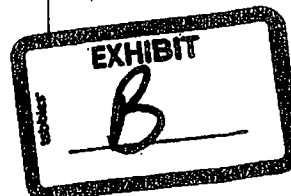
This guaranty includes the additional provisions on page 2, all of which are made a part hereof.

This guaranty is ☒ unsecured; ☐ secured by a mortgage or security agreement dated _____
☐ secured by _____

IN WITNESS WHEREOF, this guaranty has been duly executed by the Undersigned the day and year first above written.

JOHN E. ROSENBERG

"Undersigned" shall refer to all persons who sign this guaranty, severally and jointly.



RECORD 0060

ADDITIONAL PROVISIONS

6. Whether or not any existing relationship between the Undersigned and Borrower has been changed or ended and whether or not this guaranty has been revoked, Lender may, but shall not be obligated to, enter into transactions resulting in the creation or continuance of Indebtedness, without any consent or approval by the Undersigned and without any notice to the Undersigned. The liability of the Undersigned shall not be affected or impaired by any of the following acts or things (which Lender is expressly authorized to do, omit or suffer from time to time, both before and after revocation of this guaranty, without notice to or approval by the Undersigned): (i) any acceptance of collateral security, guarantors, accommodation parties or sureties for any or all Indebtedness; (ii) any one or more extensions or renewals of Indebtedness (whether or not for longer than the original period) or any modification of the interest rates, maturities or other contractual terms applicable to any Indebtedness; (iii) any waiver, adjustment, forbearance, compromise or indulgence granted to Borrower, any delay or lack of diligence in the enforcement of Indebtedness, or any failure to institute proceedings, file a claim, give any required notices or otherwise protect any Indebtedness; (iv) any full or partial release of, settlement with, or agreement not to sue, Borrower or any other guarantor or other person liable in respect of any Indebtedness; (v) any discharge of any evidence of Indebtedness or the acceptance of any instrument in renewal thereof or substitution therefor; (vi) any failure to obtain collateral security (including rights of setoff) for Indebtedness, or to see to the proper or sufficient creation and perfection thereof, or to establish the priority thereof, or to protect, insure, or enforce any collateral security; or any release, modification, substitution, discharge, impairment, deterioration, waste, or loss of any collateral security; (vii) any foreclosure or enforcement of any collateral security; (viii) any transfer of any Indebtedness or any evidence thereof; (ix) any order of application of any payments or credits upon Indebtedness; (x) any election by the Lender under § 1111(b)(2) of the United States Bankruptcy Code.

7. The Undersigned waives any and all defenses, claims and discharges of Borrower, or any other obligor, pertaining to Indebtedness, except the defense of discharge by payment in full. Without limiting the generality of the foregoing, the Undersigned will not assert, plead or enforce against Lender any defense of waiver, release, statute of limitations, res judicata, statute of frauds, fraud, incapacity, minority, usury, illegality or unenforceability which may be available to Borrower or any other person liable in respect of any Indebtedness, or any setoff available against Lender to Borrower or any such other person, whether or not on account of a related transaction. The Undersigned expressly agrees that the Undersigned shall be and remain liable, to the fullest extent permitted by applicable law, for any deficiency remaining after foreclosure of any mortgage or security interest securing Indebtedness, whether or not the liability of Borrower or any other obligor for such deficiency is discharged pursuant to statute or judicial decision. The undersigned shall remain obligated, to the fullest extent permitted by law, to pay such amounts as though the Borrower's obligations had not been discharged.

8. The Undersigned further agrees that the Undersigned shall be and remain obligated to pay Indebtedness even though any other person obligated to pay Indebtedness, including Borrower, has such obligation discharged in bankruptcy or otherwise discharged by law. "Indebtedness" shall include post-bankruptcy petition interest and attorneys' fees and any other amounts which Borrower is discharged from paying or which do not otherwise accrue to Indebtedness due to Borrower's discharge, and the Undersigned shall remain obligated to pay such amounts as though Borrower's obligations had not been discharged.

9. If any payment applied by Lender to Indebtedness is thereafter set aside, recovered, rescinded or required to be returned for any reason (including, without limitation, the bankruptcy, insolvency or reorganization of Borrower or any other obligor), the Indebtedness to which such payment was applied shall for the purposes of this guaranty be deemed to have continued in existence, notwithstanding such application, and this guaranty shall be enforceable as to such Indebtedness as fully as if such application had never been made.

10. The Undersigned waives any claim, remedy or other right which the Undersigned may now have or hereafter acquire against Borrower or any other person obligated to pay Indebtedness arising out of the creation or performance of the Undersigned's obligation under this guaranty, including, without limitation, any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any right to participate in any claim or remedy the Undersigned may have against the Borrower, collateral, or other party obligated for Borrower's debts, whether or not such claim, remedy or right arises in equity, or under contract, statute or common law.

11. The Undersigned waives presentment, demand for payment, notice of dishonor or nonpayment, and protest of any instrument evidencing Indebtedness. Lender shall not be required first to resort for payment of the Indebtedness to Borrower or other persons or their properties, or first to enforce, realize upon or exhaust any collateral security for Indebtedness, before enforcing this guaranty.

12. The liability of the Undersigned under this guaranty is in addition to and shall be cumulative with all other liabilities of the Undersigned to Lender as guarantor or otherwise, without any limitation as to amount, unless the instrument or agreement evidencing or creating such other liability specifically provides to the contrary.

13. This guaranty shall be enforceable against each person signing this guaranty, even if only one person signs and regardless of any failure of other persons to sign this guaranty. If there be more than one signer, all agreements and promises herein shall be construed to be, and are hereby declared to be, joint and several in each of every particular and shall be fully binding upon and enforceable against either, any or all the Undersigned. This guaranty shall be effective upon delivery to Lender, without further act, condition or acceptance by Lender, shall be binding upon the Undersigned and the heirs, representatives, successors and assigns of the Undersigned and shall inure to the benefit of Lender and its participants, successors and assigns. Any invalidity or unenforceability of any provision or application of this guaranty shall not affect other lawful provisions and application hereof, and to this end the provisions of this guaranty are declared to be severable. Except as authorized by the terms herein, this guaranty may not be waived, modified, amended, terminated, released or otherwise changed except by a writing signed by the Undersigned and Lender. This guaranty shall be governed by the laws of the State in which it is executed. The Undersigned waives notice of Lender's acceptance hereof.

GUARANTY

BLUFFTON
(City)

SOUTH CAROLINA
(State)

FEBRUARY 02, 2006

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and to induce FIRST SOUTH BANK, BLUFFTON (herein, with its participants, successors and assigns, called "Lender"), at its option, at any time or from time to time to make loans or extend other accommodations to or for the account of ECOLOGICAL INVESTMENTS, LLC

(herein called "Borrower") or to engage in any other transactions with Borrower, the Undersigned hereby absolutely and unconditionally guarantees to Lender the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of the debts, liabilities and obligations described as follows:

A. If this ☐ is checked, the Undersigned guarantees to Lender the payment and performance of the debt, liability or obligation of Borrower to Lender evidenced by or arising out of the following: _____ and any extensions,

renewals or replacements thereof (hereinafter referred to as the "Indebtedness").

B. If this ☒ is checked, the Undersigned guarantees to Lender the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several; all such debts, liabilities and obligations being hereinafter collectively referred to as the "Indebtedness"). Without limitation, this guaranty includes the following described debt(s): _____

The Undersigned further acknowledges and agrees with Lender that:

1. No act or thing need occur to establish the liability of the Undersigned hereunder, and no act or thing, except full payment and discharge of all indebtedness, shall in any way exonerate the Undersigned or modify, reduce, limit or release the liability of the Undersigned hereunder.

2. This is an absolute, unconditional and continuing guaranty of payment of the Indebtedness and shall continue to be in force and be binding upon the Undersigned, whether or not all Indebtedness is paid in full, until this guaranty is revoked by written notice actually received by the Lender, and such revocation shall not be effective as to Indebtedness existing or committed for at the time of actual receipt of such notice by the Lender, or as to any renewals, extensions and refinancings thereof. If there be more than one Undersigned, such revocation shall be effective only as to the one so revoking. The death or incompetence of the Undersigned shall not revoke this guaranty, except upon actual receipt of written notice thereof by Lender and then only as to the decedent or the incompetent and only prospectively, as to future transactions, as herein set forth.

3. If the Undersigned shall be dissolved, shall die, or shall be or become insolvent (however defined) or revoke this guaranty, then the Lender shall have the right to declare immediately due and payable, and the Undersigned will forthwith pay to the Lender, the full amount of all Indebtedness, whether due and payable or unmatured. If the Undersigned voluntarily commences or there is commenced involuntarily against the Undersigned a case under the United States Bankruptcy Code, the full amount of all Indebtedness, whether due and payable or unmatured, shall be immediately due and payable without demand or notice thereof.

4. The liability of the Undersigned hereunder shall be limited to a principal amount of \$ UNLIMITED

(if unlimited or if no amount is stated, the Undersigned shall be liable for all Indebtedness, without any limitation as to amount), plus accrued interest thereon and all attorneys' fees, collection costs and enforcement expenses referable thereto. Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the Undersigned hereunder. The Lender may apply any sums received by or available to Lender on account of the Indebtedness from Borrower or any other person (except the Undersigned), from their properties, out of any collateral security or from any other source to payment of the excess. Such application of receipts shall not reduce, affect or impair the liability of the Undersigned hereunder. If the liability of the Undersigned is limited to a stated amount pursuant to this paragraph 4, any payment made by the Undersigned under this guaranty shall be effective to reduce or discharge such liability only if accompanied by a written transmittal document, received by the Lender, advising the Lender that such payment is made under this guaranty for such purpose.

5. The Undersigned will pay or reimburse Lender for all costs and expenses (including reasonable attorneys' fees and legal expenses) incurred by Lender in connection with the protection, defense or enforcement of this guaranty in any litigation or bankruptcy or insolvency proceedings.

This guaranty includes the additional provisions on page 2, all of which are made a part hereof.

This guaranty is ☒ unsecured; ☐ secured by a mortgage or security agreement dated _____; ☐ secured by _____

IN WITNESS WHEREOF, this guaranty has been duly executed by the Undersigned the day and year first above written.

Philip J. Brust by John E. Rosenberg, Attorney
PHILIP J. BRUST by John E. Rosenberg, Attorney
in Fact

"Undersigned" shall refer to all persons who sign this guaranty, severally and jointly

ADDITIONAL PROVISIONS

6. Whether or not any existing relationship between the Undersigned and Borrower has been changed or ended and whether or not this guaranty has been revoked, Lender may, but shall not be obligated to, enter into transactions resulting in the creation or continuance of Indebtedness, without any consent or approval by the Undersigned and without any notice to the Undersigned. The liability of the Undersigned shall not be affected or impaired by any of the following acts or things (which Lender is expressly authorized to do, omit or suffer from time to time, both before and after revocation of this guaranty, without notice to or approval by the Undersigned): (i) any acceptance of collateral security, guarantors, accommodation parties or sureties for any or all Indebtedness; (ii) any one or more extensions or renewals of Indebtedness (whether or not for longer than the original period) or any modification of the interest rates, maturities or other contractual terms applicable to any Indebtedness; (iii) any waiver, adjustment, forbearance, compromise or indulgence granted to Borrower, any delay or lack of diligence in the enforcement of Indebtedness, or any failure to institute proceedings, file a claim, give any required notices or otherwise protect any Indebtedness; (iv) any full or partial release of, settlement with, or agreement not to sue, Borrower or any other guarantor or other person liable in respect of any Indebtedness; (v) any discharge of any evidence of Indebtedness or the acceptance of any instrument in renewal thereof or substitution therefor; (vi) any failure to obtain collateral security (including rights of setoff) for Indebtedness, or to see to the proper or sufficient creation and perfection thereof, or to establish the priority thereof, or to protect, insure, or enforce any collateral security; or any release, modification, substitution, discharge, impairment, deterioration, waste, or loss of any collateral security; (vii) any foreclosure or enforcement of any collateral security; (viii) any transfer of any Indebtedness or any evidence thereof; (ix) any order of application of any payments or credits upon Indebtedness; (x) any election by the Lender under §1111(b)(2) of the United States Bankruptcy Code.

7. The Undersigned waives any and all defenses, claims and discharges of Borrower, or any other obligor, pertaining to Indebtedness, except the defense of discharge by payment in full. Without limiting the generality of the foregoing, the Undersigned will not assert, plead or enforce against Lender any defense of waiver, release, statute of limitations, res judicata, statute of frauds, fraud, incapacity, minority, usury, illegality or unenforceability which may be available to Borrower or any other person liable in respect of any Indebtedness, or any setoff available against Lender to Borrower or any such other person, whether or not on account of a related transaction. The Undersigned expressly agrees that the Undersigned shall be and remain liable, to the fullest extent permitted by applicable law, for any deficiency remaining after foreclosure of any mortgage or security interest securing Indebtedness, whether or not the liability of Borrower or any other obligor for such deficiency is discharged pursuant to statute or judicial decision. The Undersigned shall remain obligated, to the fullest extent permitted by law, to pay such amounts as though the Borrower's obligations had not been discharged.

8. The Undersigned further agrees that the Undersigned shall be and remain obligated to pay Indebtedness even though any other person obligated to pay Indebtedness, including Borrower, has such obligation discharged in bankruptcy or otherwise discharged by law. "Indebtedness" shall include post-bankruptcy petition interest and attorneys' fees and any other amounts which Borrower is discharged from paying or which do not otherwise accrue to Indebtedness due to Borrower's discharge, and the Undersigned shall remain obligated to pay such amounts as though Borrower's obligations had not been discharged.

9. If any payment applied by Lender to Indebtedness is thereafter set aside, recovered, rescinded or required to be returned for any reason (including, without limitation, the bankruptcy, insolvency or reorganization of Borrower or any other obligor), the Indebtedness to which such payment was applied shall for the purposes of this guaranty be deemed to have continued in existence, notwithstanding such application, and this guaranty shall be enforceable as to such Indebtedness as fully as if such application had never been made.

10. The Undersigned waives any claim, remedy or other right which the Undersigned may now have or hereafter acquire against Borrower or any other person obligated to pay Indebtedness arising out of the creation or performance of the Undersigned's obligation under this guaranty, including, without limitation, any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any right to participate in any claim or remedy the Undersigned may have against the Borrower, collateral, or other party obligated for Borrower's debts, whether or not such claim, remedy or right arises in equity, or under contract, statute or common law.

11. The Undersigned waives presentment, demand for payment, notice of dishonor or nonpayment, and protest of any instrument evidencing Indebtedness. Lender shall not be required first to resort for payment of the Indebtedness to Borrower or other persons or their properties, or first to enforce, realize upon or exhaust any collateral security for Indebtedness, before enforcing this guaranty.

12. The liability of the Undersigned under this guaranty is in addition to and shall be cumulative with all other liabilities of the Undersigned to Lender as guarantor or otherwise, without any limitation as to amount, unless the instrument or agreement evidencing or creating such other liability specifically provides to the contrary.

13. This guaranty shall be enforceable against each person signing this guaranty, even if only one person signs and regardless of any failure of other persons to sign this guaranty. If there be more than one signer, all agreements and promises herein shall be construed to be, and are hereby declared to be, joint and several in each of every particular and shall be fully binding upon and enforceable against either, any or all the Undersigned. This guaranty shall be effective upon delivery to Lender, without further act, condition or acceptance by Lender, shall be binding upon the Undersigned and the heirs, representatives, successors and assigns of the Undersigned and shall inure to the benefit of Lender and its participants, successors and assigns. Any invalidity or unenforceability of any provision or application of this guaranty shall not affect other lawful provisions and application hereof, and to this end the provisions of this guaranty are declared to be severable. Except as authorized by the terms herein, this guaranty may not be waived, modified, amended, terminated, released or otherwise changed except by a writing signed by the Undersigned and Lender. This guaranty shall be governed by the laws of the State in which it is executed. The Undersigned waives notice of Lender's acceptance hereof.

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO.: 2013-CP-07-00610

)

)

)

)

)

)

)

st

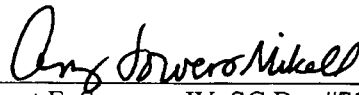
i.

This Court lacks personal jurisdiction over Brust. The Court lacks general personal jurisdiction because Brust does not have sufficient minimum contacts with South Carolina. Brust is a resident of Mecklenburg County, North Carolina and does not regularly conduct business in South Carolina. The Court lacks specific personal jurisdiction over Brust because Brust did not transact any business in South Carolina related specifically to the Guaranty.

Plaintiff has not alleged conduct in the Complaint sufficient to satisfy the requirements of personal jurisdiction, and there is no evidence that demonstrates that Brust's activities in South Carolina satisfy the requirements for personal jurisdiction.

Based on the foregoing, Brust moves this Court for an Order dismissing all of Plaintiff's causes of action against Brust and for such other relief as this Court deems appropriate.

A memorandum of law in support of this Motion shall be filed in a timely manner pursuant to the South Carolina Rules of Civil Procedure.



Robert E. Sumner, IV, SC Bar #71728
Amy Jowers Mikell, SC Bar #77432
Moore & Van Allen, PLLC
78 Wentworth Street
Post Office Box 22828
Charleston, SC 29413-2828
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
robertsumner@mvalaw.com
amyjowers@mvalaw.com

CHARLESTON, SC
April 16, 2013

ATTORNEYS FOR DEFENDANT PHILIP J. BRUST

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 2013-CP-07-00610
	)	
FIRST SOUTH BANK,	)	
	)	
Plaintiff,	)	
	)	DEFENDANT PHILIP J. BRUST'S
vs.	)	MEMORANDUM IN SUPPORT OF
	)	MOTION TO DISMISS AND IN
JOHN E. ROSENBERG and PHILIP J.	)	REPLY TO PLAINTIFF'S RESPONSE
BRUST,	)	TO MOTION TO DISMISS
	)	
Defendants.	)	

INTRODUCTION

Defendant Phillip J. Brust moves to dismiss Plaintiff First South Bank's Complaint pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure for lack of personal jurisdiction. Plaintiff's Complaint, which seeks recovery from the Defendants under a guaranty of a promissory note, attempts to assert personal jurisdiction over Brust, a resident of North Carolina, based on a single event that occurred over seven years ago. Plaintiff has failed to plead general personal jurisdiction over Brust and has not made a prima facie showing of an enduring relationship between him and South Carolina for purposes of establishing general personal jurisdiction. Furthermore, Plaintiff has failed to allege sufficient minimum contacts to satisfy the due process requirements for the Court's specific personal jurisdiction. Accordingly, Plaintiff's Complaint against Brust should be dismissed.

FACTS

Plaintiff's only cause of action against Brust seeks damages related to his alleged breach of the Guaranty. According to the Complaint, the Note matured, due demand was made, and Rosenberg and Brust are in default under the terms of the Note and Guaranty. (Compl. ¶ 9.)

Plaintiff alleges that in February 2006 Brust executed an Unlimited Guaranty (“Guaranty”) of a promissory note made by Ecological Investments, LLC in favor of Plaintiff on February 2, 2006 in the original principal amount of \$2,600,000.00 (“Note”). (Compl. ¶¶ 6-8.) The Guaranty indicates, however, that Defendant John E. Rosenberg signed the Guaranty on Brust’s behalf as his attorney-in-fact. (Compl. Ex. B.) Regarding the Court’s jurisdiction over Brust, the Complaint merely alleges that Brust “is a citizen and resident of the State of North Carolina” and that the Court has personal jurisdiction over Brust by virtue of S.C. Code Ann. § 36-2-803, which governs specific personal jurisdiction. (Compl. ¶ 2.)

On April 14, 2013, Brust filed a motion to dismiss Plaintiff’s claim on the grounds that the Court lacks personal jurisdiction over him as a North Carolina resident. Plaintiff thereafter submitted its Response to Brust’s Motion to Dismiss (“Response”), which refers to various events and documents that purport to establish Brust’s alleged activities in South Carolina. Plaintiff did *not* include any affidavits or certifications with its Response.

STANDARD OF REVIEW & APPLICABLE LAW

Under Rule 8(a)(1) of the South Carolina Rules of Civil Procedure, a complaint must contain “a short and plain statement of the grounds including *facts and statutes* upon which the court’s jurisdiction depends.” (Emphasis added.) The party invoking the court’s personal jurisdiction over a nonresident defendant bears the burden of proving the existence of personal jurisdiction. *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 150, 723 S.E.2d 835, 839 (Ct.App. 2011). “At the pretrial stage, the burden of proving jurisdiction over a nonresident is met by a *prima facie* showing of jurisdiction either in the complaint or in the affidavits.” *Id.* Plaintiff has failed to meet its burden of proof.

In South Carolina, personal jurisdiction is conferred through either “general jurisdiction” or “specific jurisdiction.” *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). General jurisdiction, which is governed by S.C. Code Ann. § 36-2-802, is the state’s right to exercise personal jurisdiction over the defendant even if the suit does not relate to the defendant’s contacts with the forum state. *Id.*, (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n. 15 (1985)). Section 36-2-802 provides that a South Carolina “court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this state as to any cause of action.” General jurisdiction over a defendant applies if the defendant has an “enduring relationship” with the forum state. *Cockrell v. Hillerick & Bradsby & Co.*, 363 S.C. 485, 495, 611 S.E.2d 505, 510 (2005) (citing S.C. Code Ann. § 36-2-802). An “enduring relationship is indicated by contacts that are substantial, continuous, and systematic.” *Coggeshall*, 376 S.C. at 17, 655 S.E.2d at 479.

Specific jurisdiction is governed by the state’s long-arm statute, S.C. Code Ann. § 36-2-803. To determine whether it has specific jurisdiction over a defendant, the trial court must determine (1) whether the long-arm statute applies and (2) whether the non-resident’s contacts in South Carolina are sufficient to satisfy due process. *Sullivan*, 397 S.C. at 150, 723 S.E.2d at 839. South Carolina’s long-arm statute has been interpreted to reach the outer bounds permitted by the Due Process Clause. *Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256, 423 S.E.2d 128, 130 (S.C. 1992). Therefore, the inquiry in this state turns on the due process analysis. Due process requires that a defendant have minimum contacts with the forum state such that the maintenance of a lawsuit against the defendant does not offend traditional notions of fair play and substantial justice. *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. For a

defendant to have minimum contacts with the forum state, the court must find (1) that he has “the requisite minimum contacts with the forum, without which, the court does not have the ‘power’ to adjudicate the action” and (2) that the “exercise of jurisdiction is reasonable and fair.” *Power Prods. and Servs. Co., Inc. v. Kozma*, 379 S.C. 423, 432, 665 S.E.2d 660, 665 (Ct.App. 2008).

LEGAL ANALYSIS

I. The Court should not consider any materials, documents, or statements outside of the Complaint in considering Brust’s Motion to Dismiss.

The Court should disregard the allegations and documents outside of the pleadings because they are not supported by affidavits, as required by South Carolina law. *See Sullivan*, 397 S.C. at 150, 723 S.E.2d at 839 (“[T]he burden of proving jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in *the complaint or in the affidavits.*”) (emphasis added). Here, Plaintiff has not submitted any affidavits for the Court to consider. Therefore, the Court should limit its review to Plaintiff’s Complaint and the documents incorporated therein.

Plaintiff’s Complaint consists of only eleven paragraphs and the incorporated Note and Guaranties. Although Plaintiff has not submitted any affidavits in response to Brust’s Motion to Dismiss, it has filed a Response that contains several new allegations and documents that are neither contained in the Complaint nor certified by affidavit. Plaintiff provides no factual support for the new allegations and fails to certify that the attached documents are complete and accurate.

Since the allegations are not supported by affidavits, they are inadmissible hearsay under Rules 801 and 802 of the South Carolina Rules of Evidence. Furthermore the allegations are not based on personal knowledge, as required under Rule 56(e) of the South Carolina Rules of Civil Procedure if submitted in an affidavit. Therefore, these allegations and related documents are

not admissible and should not be considered with this Motion to Dismiss.¹ See *Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 153, 268 S.E.2d 42, 43 (1980) (holding that affidavits prepared by counsel should have been excluded from motion challenging personal jurisdiction because they were “conclusory in nature and based almost entirely on hearsay”); *United Tech. Corp. v. Mazer*, 556 F.3d 1260, 1278 (11th Cir. 2009) (ruling that trial court properly disregarded inadmissible hearsay evidence in ruling on motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2)).

II. The Court lacks general personal jurisdiction over Brust under S.C. Code Ann. § 36-2-802 because Plaintiff has failed to plead general personal jurisdiction and to allege sufficient facts of an “enduring relationship” between Brust and South Carolina necessary to confer such jurisdiction.

As explained above, Rule 8(a)(1) requires that a complaint contain a statement of the grounds for the Court’s personal jurisdiction over the defendant, including the statute upon which jurisdiction depends. In this case, Plaintiff’s Complaint contains only one conclusory allegation regarding the Court’s jurisdiction over Brust:

Upon information and belief, Defendant Philip J. Brust is a citizen and resident of the State of North Carolina and by virtue of Section 36-2-803, as amended of the S.C. Code of Laws (the South Carolina Long Arm Statute), this Court has personal jurisdiction over Defendant John E. Rosenberg [sic].²

(Compl. ¶ 2.) Significantly, the Complaint does not allege that the Court has general jurisdiction over Brust under S.C. Code Ann. § 36-2-802. Therefore, Plaintiff’s Complaint fails to allege

¹ To the extent that Plaintiff may argue that the documents attached to the Response and the information contained therein are exceptions to hearsay under Rule 803(8) and (14), SCRE, as public records or records of documents affecting an interest in property, the documents are nevertheless inadmissible because they have not been properly authenticated under Rule 901, SCRE. See *State v. Rich*, 293 S.C. 172, 173, 359 S.E.2d 281 (1987) (stating that public records exception to hearsay rule “does not, however, absolve the offering party from the usual requirements of authentication”).

² Defendant Brust assumes that the reference to Defendant Rosenberg in Paragraph 2 of the Complaint is an inadvertent mistake and was intended to refer to Brust. The Complaint contains no other allegations regarding the Court’s purported jurisdiction over Brust.

general jurisdiction as required under Rule 8(a)(1), and any attempt to establish personal jurisdiction under § 36-2-802 necessarily fails.

Assuming *arguendo* that Plaintiff properly pleaded general jurisdiction, the factual allegations in this case are insufficient to confer general jurisdiction over Brust because he does not have an “enduring relationship” with South Carolina. Nothing in the Complaint indicates that Brust had “substantial, continuous, and systematic” contacts with the State. Rather, the Complaint merely alleges that Brust executed the Guaranty on February 2, 2006, thereby guaranteeing payment and performance on the Note. Importantly, the Guaranty indicates that Rosenberg, as Brust’s Attorney-In-Fact, signed on behalf of Brust. Thus, the Complaint merely contains *one* allegation that Brust, acting indirectly through an agent with limited authority, executed *one* document in South Carolina on *one* date over seven years ago.

Plaintiff has not alleged that Brust had any contacts with South Carolina prior to or after February 2, 2006. The single instance of contact alleged in the Complaint does not constitute an “enduring relationship” through “substantial, continuous, and systematic” contacts with the state. *See Coggeshall*, 376 S.C. at 19-20, 665 S.E.2d at 479-80 (rejecting plaintiff’s contention that medical provider did business in South Carolina and was subject to court’s general jurisdiction despite the fact it performed services for nearly 3,000 South Carolina residents and earned over \$2 million in income from South Carolina patients over a four-year period).

Even if the Court considers the evidence offered by Plaintiff outside of the Complaint, that Brust owns or has owned property in Beaufort County³, the mere ownership of property in

³ The allegations and documents relating to Brust’s alleged ownership of property in Beaufort County can only be considered for the purpose of determining if general jurisdiction exists. These allegations and documents cannot be considered in the specific jurisdiction analysis because the lawsuit does not arise from Brust’s acts relating to the other property he allegedly owned or owns. *See* S.C. Code Ann. § 36-2-803(B) (“When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted (continued on next page)”).

the state is not an activity enumerated in § 36-2-802 that will establish general jurisdiction over a non-resident. For § 36-2-802 to apply to Brust's alleged property ownership, his ownership must constitute "doing business" in the state. Plaintiff has made no such allegations. Instead, Plaintiff asserts that Brust "vacationed in Beaufort County." (Pl.'s Resp. p. 5.) The real estate documents submitted by Plaintiff are consistent with that position, but vacationing does not constitute "doing business" in South Carolina and cannot establish general jurisdiction over Brust. *See Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1526 (9th Cir. 1985) ("[B]usiness and vacation trips to California, amounting to an average of about three weeks a year, did not constitute 'conducting business' in California to support a finding of general jurisdiction."). Therefore, the allegations in the Complaint do not establish a prima facie showing of the Court's general jurisdiction over Brust.

III. The Court lacks specific personal jurisdiction over Brust under S.C. Code Ann. § 36-2-803 because Brust's alleged execution of Guaranty was a single, attenuated action that did not establish minimum contacts with South Carolina.

In the Response, Plaintiff argues that the Court has specific jurisdiction under the long-arm statute because Brust's execution of the Guaranty through Rosenberg constitutes transacting business in South Carolina and/or entering into a contract that is to be performed in whole or in part in South Carolina. (Pl.'s Resp. p. 5.) Assuming that the long-arm statute covers such actions, Plaintiff must still prove that jurisdiction comports with the due process requirements by showing that Brust had minimum contacts with the state and that the exercise of jurisdiction is reasonable and fair. *See Power Prods. and Servs. Co.*, 379 S.C. at 432, 665 S.E.2d at 665.

(continued from previous page)

against him."); *Coggeshall*, 376 S.C. at 20 (stating that jurisdiction under long-arm statute "is limited to a cause of action arising from a specific activity within this State").

Plaintiff has not established that Brust has sufficient minimum contacts with the state to satisfy due process. The Complaint does not allege that Brust personally engaged in any activity in South Carolina beyond the Guaranty. Even if Rosenberg's signing of the Guaranty on Brust's behalf can be attributed to Brust, this single act is not significant enough to create a "substantial connection" with South Carolina. See *Burger King*, 471 U.S. at 475 n. 18 (noting that there must be a "substantial connection" with the forum state to support jurisdiction and that single act may not be sufficient if it creates "only an 'attenuated' affiliation with the forum"). As the South Carolina Supreme Court stated in *Aviation Assocs. and Consultants, Inc. v. Jet Time, Inc.*, "it is well established that an individual's contract with an out-of-state party alone cannot automatically establish sufficient minimum contacts in the other party's home forum." 303 S.C. 502, 508, 402 S.E.2d 177 (1999) (citing *Burger King*, 471 U.S. at 478). Therefore, Plaintiff's Complaint against Brust should be dismissed for lack of specific personal jurisdiction.

CONCLUSION

Plaintiff has failed to make a prima facie showing that the Court has general or specific personal jurisdiction over Brust. The single jurisdictional allegation in the Complaint fails to show that Brust had either an "enduring relationship" or sufficient minimum contacts with South Carolina necessary to establish jurisdiction. Accordingly, the Court should dismiss Plaintiff's Complaint for lack of personal jurisdiction.

Respectfully submitted,



Robert E. Sumner, IV, SC Bar #71728
E. Brandon Gaskins, SC Bar #73274
Moore & Van Allen, PLLC
78 Wentworth Street

Post Office Box 22828
Charleston, SC 29413-2828
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
robertsumner@mvalaw.com
brandongaskins@mvalaw.com

CHARLESTON, SC
June ~~24~~ 2013

ATTORNEYS FOR DEFENDANT PHILIP J. BRUST

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 2013-CP-07-00610
	)	
FIRST SOUTH BANK,	)	
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JOHN E. ROSENBERG and PHILIP J.	)	
BRUST,	)	
	)	
Defendants.	)	

JERAMIN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

**DEFENDANT PHILIP J. BRUST'S
SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF MOTION TO
DISMISS AND IN REPLY TO
PLAINTIFF'S RESPONSE TO
MOTION TO DISMISS**

INTRODUCTION

On April 14, 2013, Defendant Phillip J. Brust ("Brust") moved to dismiss Plaintiff First South Bank's Complaint pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure for lack of personal jurisdiction. Plaintiff submitted its Response to the Motion to Dismiss on June 5, 2013 (the "Memorandum in Opposition"). The Court scheduled a hearing on the Motion to Dismiss for June 24, 2013, and Brust submitted a Memorandum in Support of Motion to Dismiss and in Reply to Plaintiff's Response to Motion to Dismiss (the "Memorandum in Support") on that same day. In the Memorandum in Support, Brust argued that Plaintiff's Complaint and Response to the Motion to Dismiss contained multiple deficiencies, including the failure to plead general personal jurisdiction and the failure to provide affidavits, certified copies of certain land records, and other admissible evidence that would support personal jurisdiction over Brust.

At the hearing on June 24, 2013, Plaintiff's counsel informed the court that his associate was supposed to attach an affidavit to the Memorandum in Opposition, which he did not, and

requested the Court's permission to fix this oversight and supplement its response with an affidavit.¹ The Court granted Plaintiff's request and the hearing was rescheduled to permit Plaintiff to provide an affidavit and for Brust to respond. Plaintiff then submitted the Affidavit of Patrick Wright (the "Affidavit") in response to the Motion to Dismiss on June 27, 2013, which raises multiple new issues and facts not included in the original memorandum. Brust submits this Supplemental Memorandum in reply to the Affidavit.

FACTS

Brust reasserts the facts outlined in the Memorandum in Support. In addition, Brust acknowledges that Patrick Wright is a Senior Vice President who works at Plaintiff's branch in Bluffton, South Carolina. (Wright Aff. ¶ 2.) Wright alleges that Plaintiff required Brust to individually guarantee repayment of the loan from Plaintiff to Ecological Investments, LLC, which is the subject of this lawsuit. (*Id.* at ¶ 7.) In support of this allegation, Wright claims that Brust signed a commitment letter indicating his acceptance of the guarantee term of the loan. (*Id.* at ¶¶ 8-9.) Wright provides no details of the circumstances of Brust's alleged signature, date of signature, place where the document was signed, or when the signed commitment letter was received.

Wright also alleges that Brust executed a Specific Limited Power of Attorney, which authorized Defendant John E. Rosenberg to execute certain documents relating to the loan on Brust's behalf. (Wright Aff. ¶¶ 10-11.) The Power of Attorney allegedly executed by Brust bears a seal indicating that it was notarized by a Notary Public of North Carolina. (*Id.* at Ex. C.) The power of attorney specifically identifies several documents which Rosenberg was authorized

¹ Brust notes, however, that Plaintiff's counsel (*not an associate*) signed the Memorandum that was filed on June 5, 2013.

to execute on behalf of Brust, but a guaranty was not a document specifically identified in the power of attorney. (*Id.*)

According to Wright, Brust travelled to Plaintiff's branch in Bluffton to deliver personal financial information, made a single payment on the loan at the branch, and discussed the business activities of Ecological Investments, LLC at the branch. (*Id.* at ¶¶ 15-16.) Wright provides no details of the circumstances of these alleged activities, including when Brust travelled to Bluffton, who Brust met with, the purpose of the alleged trips, or the duration of the alleged trips.

Wright also attached certain land records purporting to establish that Brust bought, sold, and owns real estate in Beaufort County, South Carolina. (*Id.* at ¶ 17.) Wright does not allege that these real estate transactions are connected to this lawsuit.

Brust cannot confirm or deny the allegations made by Wright because he is unable to communicate effectively due to a stroke he suffered in 2012.

LEGAL ANALYSIS

- I. The Court lacks general personal jurisdiction over Brust under S.C. Code Ann. § 36-2-802 because Plaintiff has failed to plead general personal jurisdiction and because Plaintiff failed to allege sufficient facts of an "enduring relationship" between Brust and South Carolina that is necessary to confer such jurisdiction.**

As argued in the Memorandum in Support, Plaintiff's Complaint fails to allege general jurisdiction as required under Rule 8(a)(1) of the South Carolina Rules of Civil Procedure. As a result, any attempt to establish personal jurisdiction under § 36-2-802 necessarily fails. Although Plaintiff has submitted an affidavit to cure some of the noted deficiencies in its opposition to the Motion to Dismiss, it has failed to address the Complaint's failure to plead general jurisdiction. Furthermore, Plaintiff has not adequately shown that Brust's ownership of property is sufficiently "substantial, continuous, and systematic" to establish that Brust has an

“enduring relationship” with South Carolina. For these reasons and those cited in the Memorandum in Support, Plaintiff has failed to make a prima facie showing of the Court’s general jurisdiction over Brust.

II. The Court lacks specific personal jurisdiction over Brust under S.C. Code Ann. § 36-2-803 because Brust’s alleged actions related to the loan do not establish the requisite minimum contacts with South Carolina.

Plaintiff has failed to prove that specific personal jurisdiction in this case comports with due process requirements. Specifically, Plaintiff cannot establish that Brust had minimum contacts with the state or that the exercise of jurisdiction is reasonable and fair. *See Power Prods. and Servs. Co. v. Kozma*, 379 S.C. 423, 432, 665 S.E.2d 660, 665 (Ct. App. 2008).

As explained in the Memorandum in Support, Brust’s alleged actions relating to the loan are not significant enough to create a “substantial connection” with South Carolina. *See Burger King, Corp v. Rudzewicz*, 471 U.S. at 462 n. 18 (noting that there must be a “substantial connection” with the forum state to support jurisdiction and that a single act may not be sufficient if it creates “only an ‘attenuated’ affiliation with the forum”). Though Plaintiff attempts to bolster Brust’s connection to South Carolina through Wright’s testimony, these limited alleged activities do not create a substantial connection.

Plaintiff made the loan to Ecological Investments over seven years ago, and the loan has been modified several times. Nevertheless, Plaintiff can identify at most three isolated and limited instances in which Brust had any contact, whatsoever, with South Carolina. The alleged contacts by Brust are, as follows: (1) Brust executed a commitment letter; (2) Brust travelled to South Carolina to deliver his personal financial information; and (3) Brust travelled to South Carolina to make a payment on the Note and discuss business activities. The allegations of South Carolina contacts are noticeably devoid of important details such as date, times, and

places. Additionally, Wright fails to include basic information about who Brust allegedly met with in South Carolina, the primary purpose of the trips to South Carolina and whether any “business activities” discussed in South Carolina were related to the loan at issue.

The Affidavit is overly simplistic, relies on generalizations, and remains ambiguous on the critical facts upon which Plaintiff relies for establishing jurisdiction. In fact, the Affidavit raises more questions than answers. The limited and sporadic contacts alleged in the Affidavit fail to establish that Brust has substantial connections with South Carolina such that specific personal jurisdiction over him comports with the requirements of due process.

III. If the Court finds that Plaintiff has made a prima facie showing of personal jurisdiction over Brust, the Court should permit jurisdictional discovery to determine whether Brust’s limited contacts with South Carolina are sufficient to establish specific personal jurisdiction.

When “discovery is necessary in order to meet defendant’s challenge to jurisdiction, a court should ordinarily permit discovery on that issue unless plaintiff’s claim appears to be clearly frivolous.” *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 152, 723 S.E.2d 835, 839 (Ct. App. 2011). Courts routinely permit discovery on jurisdictional issues where the plaintiff makes a threshold showing of jurisdiction and establishes that its position is not frivolous. *See* 5B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1351 fn. 38 (3rd Ed. 2004); *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 64 (4th Cir. 1993) (stating that limited discovery may be warranted to explore jurisdictional facts); *Hubbell, Inc. v. DMF, Inc.*, C/A No. 6:11-794-TMC, 2012 U.S. Dist. LEXIS 43575, (D.S.C. March 29, 2012) (allowing parties to engage in limited jurisdictional discovery as to whether court has personal jurisdiction over the defendant).

Brust refutes Plaintiff’s contention that South Carolina courts have personal jurisdiction over Brust. Plaintiff’s allegations, at best, make only a prima facie showing of personal

jurisdiction. *Supra*. As stated above, the three allegations of contact with South Carolina fail to include sufficient details to permit the parties or the Court to make an informed determination on personal jurisdiction. If the Court finds that Plaintiff made a threshold showing of personal jurisdiction, it would be improper to deny Brust's motion because questions remain about the extent and details of Brust's contacts with the forum state. At the very least, the Court should permit the parties to engage in discovery to determine if the Court, in fact, has personal jurisdiction over Brust.

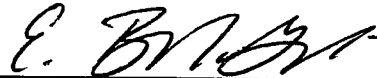
Jurisdictional discovery is particularly called for in this case because Brust suffered a stroke, which limits his ability to communicate about the activities that Plaintiff alleges to establish jurisdiction. Since Brust cannot confirm or deny the allegations made by Wright in an affidavit, Brust's counsel should be permitted to conduct written discovery regarding his alleged transactions with Plaintiff and cross-examine Wright on the allegations contained in his affidavit. *See Graham Law Firm, PA v. Makawi*, 396 S.C. 290, 299-300, 721 S.E.2d 430, 435 (2012) (citing *Sullivan* in holding that trial court erred in refusing to grant party's request for discovery and cross-examination on jurisdictional issue). For the reasons stated above, if the Court finds that Plaintiff made a prima facie case of personal jurisdiction, Brust respectfully requests that the Court order the parties to conduct jurisdictional discovery to determine whether Brust's contacts with South Carolina are sufficient to establish personal jurisdiction.

CONCLUSION

Plaintiff has failed to make a prima facie showing that the Court has personal jurisdiction over Brust. The allegations in the Complaint and Affidavit fail to demonstrate that Brust had either an "enduring relationship" or sufficient minimum contacts with South Carolina necessary to establish personal jurisdiction. Accordingly, the Court should dismiss Plaintiff's Complaint

for lack of personal jurisdiction. If, however, the Court finds that Plaintiff has raised a prima facie case of personal jurisdiction, Brust requests that the parties be permitted to conduct jurisdictional discovery.

Respectfully submitted,



Robert E. Sumner, IV, SC Bar #71728

E. Brandon Gaskins, SC Bar #73274

Moore & Van Allen, PLLC

78 Wentworth Street

Post Office Box 22828

Charleston, SC 29413-2828

Telephone: (843) 579-7000

Facsimile: (843) 579-7099

robertsumner@mvalaw.com

brandongaskins@mvalaw.com

CHARLESTON, SC

July 22, 2013

ATTORNEYS FOR DEFENDANT PHILIP J. BRUST

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO.: 2013-CP-07-00610

)

;

)

)

)

)

)

)

)

)

)

da

5. Paragraph 5 of the Complaint asserts a reservation of rights to which no response from Defendant Brust is required. To the extent that a response is required, Defendant Brust craves reference to the mortgage referenced in Paragraph 5 of the Complaint and denies all allegations inconsistent therewith.

6. Defendant Brust admits that Ecological Invesements executed a promissory note to First South Bank on or around February 2, 2006, which was later renewed and/or modified. Defendant Brust craves reference to the documents referenced in Paragraph 6 of the Complaint and denies all allegations inconsistent therewith.

7. Defendant Brust denies that he executed and delivered to Plaintiff an unlimited guaranty. Upon information and belief, Defendant Brust admits that Defendant Rosenberg executed and delivered an unlimited guaranty and delivered it to Plaintiff. Defendant Brust denies the remaining allegations in Paragraph 7 of the Complaint.

8. Defendant Brust denies that he unconditionally guaranteed payment and performance, without limit, as to the Note and all future extensions of credit or other accommodations provided to Ecological Investments, LLC ("Ecological Investments"). In further response to Paragraph 8 of the Complaint, Defendant Brust craves reference to the Guaranty and denies all allegations inconsistent therewith.

9. Defendant Brust admits that the Note matured on November 30, 2012, and that Ecological Investments has not paid the outstanding balance due on the Note. Defendant Brust denies that he is in default according to the terms of the Note and Guaranty. In further response to Paragraph 9 of the Complaints, Defendant Brust craves reference to the Guaranty and Note and denies all allegations inconsistent therewith.

10. Defendant Brust denies that he is obligated to Plaintiff for its reasonable attorneys' fees plus court costs pursuant to the terms of the Note and Guaranty. In further response to Paragraph 10 of the Complaint, Defendant Brust craves reference to the Guaranty and Note and denies all allegations inconsistent therewith.

11. Defendant Brust denies that he owes any principal, interest, late fees, appraisal fees, or other amounts pursuant to the Note and Guaranty. In further response to Paragraph 11 of the Complaints, Defendant Brust craves reference to the Guaranty and Note and denies all allegations inconsistent therewith.

12. Defendant Brust denies that Plaintiff is entitled to a judgment or other relief against him, either jointly or severally, for any amount under the Note and Guaranty.

13. Defendant Brust denies any allegations in the Complaint not specifically admitted herein.

FOR A FIRST DEFENSE

14. Plaintiff's claim against Defendant Brust is barred pursuant to Rule 12(b)(6) because Plaintiff has failed to state a claim for which relief can be granted.

FOR A SECOND DEFENSE

15. To the extent that Plaintiff's claim arises from or relates to any action allegedly taken by Defendant Rosenberg on behalf of Defendant Brust with regards to the Guaranty pursuant to a power of attorney, Defendant Rosenberg did not have the actual or apparent authority to sign the Guaranty or any guaranty agreement on behalf of Defendant Brust and exceeded the scope of his agency under the power of attorney. Therefore, the Guaranty is invalid and unenforceable against Defendant Brust.

FOR A THIRD DEFENSE

16. Plaintiff's claim is barred to the extent that Plaintiff failed to mitigate its damages.

FOR A FOURTH DEFENSE

17. Plaintiff's claim is barred to by the doctrines of estoppel, waiver, laches, and/or unclean hands.

FOR A FIFTH DEFENSE

18. Any recovery by Plaintiff should be offset by all amounts collected by Plaintiff and by the amount of any collateral securing the alleged indebtedness of Ecological Investments.

FOR A SIXTH DEFENSE

19. Defendant Brust is entitled to a rescission of the power of attorney, Guaranty, and/or any guaranty agreement from which Plaintiff's claim against Defendant Brust arises.

FOR A SEVENTH DEFENSE

20. Plaintiff's claim is barred, in whole or in part, because Plaintiff's alleged losses are the result of Plaintiff's failure to follow its own policies and procedures and negligence in the underwriting, approval and administration of the loan in question.

FOR AN EIGHTH DEFENSE

21. Defendant Brust is entitled to a set-off or credit for any amount collected by Plaintiff from Defendant Rosenberg and/or Ecological Investments, as well as the value of the collateral securing the alleged indebtedness of Ecological Investments.

FOR A NINTH DEFENSE

22. Defendant Brust should be released from any obligations under the Guaranty or any obligations of Ecological Investments under the loan from Plaintiff because Plaintiff has materially modified or altered the original obligations of the loan for which the Guaranty was

sought. Furthermore, the modifications, renewal, and extensions of the loan by Plaintiff and Plaintiff's creation of second loan with Ecological Investments discharge any obligations of Defendant Brust under the Guaranty to the extent that such modifications, renewals, and extensions of the loan and the creation of the second loan will cause a loss to Defendant Brust.

FOR A TENTH DEFENSE

23. Defendant Brust should be released from any obligations under the Guaranty or any obligations of Ecological Investments under the loan from Plaintiff to the extent that Plaintiff breached its duty of good faith and fair dealing to Defendant Brust and to the extent that Plaintiff had knowledge or should have known that Defendant Brust was being deceived by Defendant Rosenberg regarding the loan and collateral or that Defendant Brust had been induced to enter into the Guaranty in ignorance of facts that materially increased his risks under the Guaranty.

**RESERVATION TO ADD ADDITIONAL
AFFIRMATIVE DEFENSES**

24. Defendant Brust reserves the right to assert all proper affirmative defenses, including those which may be disclosed or discovered at a later time.

**BY WAY OF CROSS-CLAIM AGAINST
DEFENDANT JOHN E. ROSENBERG**

25. Defendant Brust realleges each answer, allegation, and affirmative defense set forth above.

26. Ecological Investments is a limited liability company organized under the laws of the State of South Carolina. Defendants Brust and Rosenberg, among others, are members of Ecological Investments. The members of Ecological Investments executed and entered into the Operating Agreement of Ecological Investments, LLC ("Operating Agreement"), effective on or about November 4, 1998, to govern the operations and management of Ecological Investments.

27. Pursuant to the Operating Agreement, Rosenberg is designated as the sole managing member, and he has served continuously throughout the existence of Ecological Investments, and continues to serve, as its sole managing member.

28. As the managing member of Ecological Investments, Defendant Rosenberg owed Ecological Investments and its members, including Defendant Brust, the duty (a) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the members in its conduct; (b) to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law; and (c) to discharge his duties under the operating agreement and in good faith and with fair dealing.

29. Ecological Investments was organized, purportedly, for the purpose of developing a butterfly-themed tourist attraction, which was to include a butterfly conservatory and natural science education center and was to be located in the Hilton Head Island, South Carolina, area ("Butterfly Kingdom"). According to Defendant Rosenberg, initially he sought to locate Butterfly Kingdom on Hilton Head Island. However, despite his initial efforts, Defendant Rosenberg informed the members of Ecological Investments that the Hilton Head property did not work out and that Ecological Investments had lost an option on 10 acres at the 278 and 170 intersection, losing \$125,000 of Ecological Investments' funds which was, purportedly, nonrefundable.

30. In reporting to the members of Ecological Investments the loss of the option and \$125,000, Defendant Rosenberg informed the members that he had negotiated the acquisition of a new site in Jasper County, South Carolina, for the Butterfly Kingdom. In or around February 2001, Ecological Investments closed on the acquisition of 82.68 acres in Jasper County for \$330,720 (\$4,000 per acre) (the "Butterfly Kingdom Property").

31. Later, Defendant Rosenberg, on behalf of Ecological Investments, entered into a loan from Lighthouse in the principal sum of \$1,400,000. By July 2003, the loan had an outstanding balance of \$1,275,000, and Ecological Investments was in need of additional funding for expected costs for an access road and sewer and water for the Butterfly Kingdom Property, which Lighthouse was willing to loan to Ecological Investments. Consequently, the Lighthouse loan to Ecological Investments was modified in or around October 2003, increasing the principal amount of the loan to \$2,000,000. Lighthouse was subsequently merged with and into SunTrust Bank, and SunTrust Bank became the successor-in-interest to the Ecological Investments' loan.

32. In February 2006, with an outstanding balance of the SunTrust Bank loan (as successor-in-interest) at approximately \$2,200,000, Defendant Rosenberg, on behalf of Ecological Investments, as its managing member, obtained a two year, term, interest only (with a balloon at maturity), refinancing loan from Plaintiff in the principal amount of \$2,600,000 ("Plaintiff's First Loan"). Plaintiff's First Loan is the source of Plaintiff's claims in this Proceeding.

33. In connection with Plaintiff's First Loan, Defendant Rosenberg executed, and Plaintiff accepted, the unconditional, unlimited Guaranty attached to Plaintiff's Complaint as Exhibit "B" (the "Unconditional Unlimited Guaranty"). Upon information and belief, Defendant Rosenberg executed and delivered, and Plaintiff accepted, the Unconditional Unlimited Guaranty, solely based upon the Specific Limited Power of Attorney attached as Exhibit "C" (the "Specific Limited Power of Attorney") to the Affidavit of Patrick Wright In Opposition To Defendant Brust's Motion to Dismiss, previously filed by Plaintiff in this Proceeding.

34. The Specific Limited Power of Attorney was void of any authority for Defendant Rosenberg to execute and deliver, or Plaintiff to accept, the Unconditional Unlimited Guaranty. Defendant Rosenberg lacked the power or authority to execute and deliver the Unconditional Unlimited Guaranty, which serves as the sole basis for Plaintiff's claims against Defendant Brust in this Proceeding. Additionally, Plaintiff should not have accepted the Unconditional Unlimited Guaranty based on the Specific Limited Power of Attorney because Defendant Rosenberg lacked actual or apparent authority to execute or deliver the Unconditional Unlimited Guaranty.

35. Plaintiff's First Loan was to mature in February 2008; however, the loan was either renewed or the maturity date extended from time to time throughout 2008, upon information and belief, at Defendant Rosenberg's discretion without full disclosure to members of Ecological Investments, including Defendant Brust.

36. On or about October 15, 2008, Defendant Rosenberg, on behalf of Ecological Investments, as its managing member, obtained a separate, second loan from Plaintiff, in the principal amount of \$275,000 ("Plaintiff's Second Loan"). In connection with Plaintiff's Second Loan, Defendant Rosenberg, on behalf of Ecological Investments, granted an additional Mortgage against the Butterfly Kingdom Property. At that time, Defendant Rosenberg, on behalf of Ecological Investments, also executed a two year renewal of Plaintiff's First Loan and also modified Plaintiff's First Loan to provide for the payment of principal and interest based upon a 30-year amortization for the term of the loan.

37. Defendant Brust's capital contributions to Ecological Investments total \$731,400, in addition to over \$230,000 principal loan amounts to Ecological Investments. Presently, Defendant Brust's capital contributions constitute over 25% of the total capital contributions of \$2,701,357.47 made to Ecological Investments, and the total principal and interest owed to

Defendant Brust, in excess of \$541,000 equates to approximately 41% of the nearly \$1,300,000 owed to the members of Ecological Investments for their respective loans to the company.

38. Despite the substantial investment in Ecological Investments made by Defendant Brust and its other members, the loans incurred by Ecological Investments, and considerable amounts of additional funding received by the Ecological Investments, Defendant Rosenberg failed to develop Butterfly Kingdom and the Butterfly Kingdom Property remains undeveloped.

39. Upon information and belief, Defendant Rosenberg has intentionally misappropriated the capital invested in Ecological Investments by Defendant Brust and other members and has failed to allocate such capital to Ecological Investments' legitimate business expenses, including its debts and obligations to Plaintiff.

40. Defendant Rosenberg has failed to properly account to Defendant Brust and the other members of Ecological Investment regarding Ecological Investments' business, finances, condition, property, funds, and expenses, including those related to its debts and obligations to Plaintiff.

41. Defendant Rosenberg has been grossly negligent and/or reckless in his management of Ecological Investments, including those related to its debts and obligations to Plaintiff.

42. As a result of Defendant Rosenberg's intentional misappropriation of Ecological Investments' funds and grossly negligent and/or reckless management of Ecological Investments, Defendant Brust has suffered considerable financial injury.

FOR A FIRST CROSSCLAIM AGAINST DEFENDANT ROSENBERG
(Breach of Fiduciary Duty)

43. Defendant Brust realleges each answer, allegation, and affirmative defense set forth above.

44. As Ecological Investments' managing member, Defendant Rosenberg owed Defendant Brust and other members of Ecological Investments a fiduciary duty to exercise good faith and maintain the highest integrity in his dealings with them.

45. To the extent that Defendant Rosenberg acted as Defendant Brust's attorney-in-fact under the power of attorney, Defendant Rosenberg also owed Defendant Brust a fiduciary duty to exercise good faith and maintain the highest integrity in his dealings with Defendant Brust and to not exceed the authority entrusted in him by Defendant Brust.

46. Defendant Rosenberg breached his fiduciary duty to Defendant Brust by executing the Guaranty without authorization and exceeding the scope of his agency and authorization under the power of attorney.

47. Defendant Rosenberg further breached his fiduciary duty to Defendant Brust by intentionally misappropriating funds from Ecological Investments; failing to properly account for Ecological Investments' business, finances, condition, property, funds, and expenses; and managing Ecological Investments in a grossly negligent and/or reckless manner.

48. As a result of Defendant Rosenberg's breach of fiduciary duties to Defendant Brust, Defendant Brust has suffered considerable financial injury.

FOR A SECOND CROSSCLAIM AGAINST DEFENDANT ROSENBERG
(Violation of South Carolina Uniform Limited Liability Act)

49. Defendant Brust realleges each answer, allegation, and affirmative defense set forth above.

50. Under S.C. Code Ann. § 33-44-409, Defendant Rosenberg, as managing member of Ecological Investments, owed Defendant Brust the duty (a) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the members in its conduct; (b) to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law; and (c) to discharge his duties under the operating agreement and in good faith and with fair dealing.

51. Defendant Brust violated S.C. Code Ann. § 33-44-409 by intentionally misappropriating funds from Ecological Investments; failing to properly account for Ecological Investments' business, finances, condition, property, funds, and expenses; and managing Ecological Investments in a grossly negligent and/or reckless manner.

52. As a result of Defendant Rosenberg's violation of S.C. Code Ann. § 33-44-409, Defendant Brust has suffered considerable financial injury.

53. Pursuant to S.C. Code Ann. § 33-44-410, Defendant Brust may maintain an action against Defendant Rosenberg, as managing member of Ecological Investments, for legal and equitable relief arising from Defendant Rosenberg's violation of S.C. Code Ann. § 33-44-409.

FOR A THIRD CROSSCLAIM AGAINST DEFENDANT ROSENBERG
(Equitable Indemnity/Contribution)

54. Defendant Brust realleges each answer, allegation, and affirmative defense set forth above.

55. A special relationship existed between Defendants Brust and Rosenberg because of the fiduciary duties owed to Defendant Brust by Defendant Rosenberg arising from his capacity as managing member of Ecological Investments.

56. To the extent that Ecological Investments is found liable for defaulting under the terms of the loan from Plaintiff, Defendant Brust was not responsible for Ecological

Investments' default. Rather, Defendant Rosenberg, as Ecological Investments' managing member, would be the responsible party because of his grossly negligent and/or reckless mismanagement of Ecological Investments.

57. To the extent that Defendant Brust is held liable for performance of and payment of Ecological Investments' obligations under the loan from Plaintiff, then Defendant Brust will suffer damages as a result of Defendant Rosenberg's grossly negligent and/or reckless management of Ecological Investments.

58. Defendant Brust is entitled to equitable indemnification and/or contribution from Defendant Rosenberg for any liability attributed to Defendant Brust under Ecological Investments' loan from Plaintiff and the Guaranty.

FOR A FOURTH CROSSCLAIM AGAINST DEFENDANT ROSENBERG
(Accounting)

59. Defendant Brust realleges each answer, allegation, and affirmative defense set forth above.

60. Defendant Brust, as a member of Ecological Investments, has a right to be informed about the business and affairs of Ecological Investments.

61. Defendant Rosenberg has failed to provide Defendant Brust and other members of Ecological Investments with an accounting of Ecological Investments' business, finances, condition, property, funds, and expenses and to otherwise keep them informed regarding Ecological Investments' business, finances, condition, property, funds, and expenses.

62. Upon information and belief, Defendant Rosenberg's failure to properly account for Ecological Investments' business, finances, condition, property, funds, and expenses is to conceal his intentional misappropriation of funds and grossly negligent and/or reckless management of Ecological Investments.

63. Under S.C. Code Ann. § 33-44-410(a), Defendant Brust, as a member of Ecological Investments, may bring an action against Defendant Rosenberg, as the managing member of Ecological Investments, to provide an accounting of Ecological Investments' business, finances, condition, property, funds, and expenses.

64. Defendant Brust is entitled to an accounting of Ecological Investments' business, finances, condition, property, funds, and expenses from Defendant Rosenberg.

WHEREFORE, Defendant Brust prays the Court to:

1. Dismiss Plaintiff's claims against Defendant Brust;
2. Enter judgment in favor of Defendant Brust on Plaintiff's claims;
3. Enter judgment in favor of Defendant Brust on his crossclaims against Defendant Rosenberg;
4. Award Defendant Brust all actual, compensable, and punitive damages in an amount to be determined at trial on his crossclaims against Defendant Rosenberg;
5. Demand Defendant Rosenberg to provide an accounting of the business of Ecological Investments' business, finances, condition, property, funds, and expenses;
6. Order Defendant Rosenberg to indemnify Defendant Brust against any damages awarded to Plaintiff from Defendant Brust;
7. Award Defendant Brust all costs and expenses, including attorneys' fees, in defending and prosecuting this action; and
8. Grant such other and further relief as may seem just and proper to the Court.

MOORE & VAN ALLEN PLLC

By:

E. B. B. B.

Robert E. Sumner, IV

E. Brandon Gaskins

78 Wentworth Street

P.O. Box 22828

Charleston, SC 29413-2828

Telephone (843) 579-7000

Facsimile (843) 579-7099

brandongaskins@mvalaw.com

robertsumner@mvalaw.com

ATTORNEYS FOR DEFENDANT
PHILIP J. BRUST

CHARLESTON, SC

September 6, 2013

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
C/A NO.: 2013-CP-07-610

First South Bank

Plaintiff,

vs.

John E. Rosenberg and Philip J. Brust,

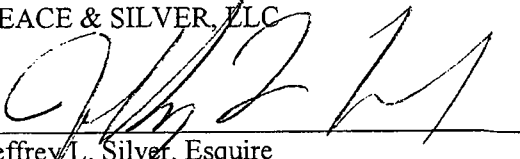
Defendants,

**NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT AS TO
DEFENDANT PHILIP J. BRUST**

PLEASE TAKE NOTICE that Plaintiff will move before the Court on the tenth (10th) day after service hereof or soon thereafter as counsel may be heard for an Order granting it Summary Judgment as to the allegations of its Complaint and any defenses related to same pursuant to Rule 56 of the South Carolina Rules of Civil Procedure on the basis there is no genuine issue as to any material fact and Plaintiff is entitled to a judgment as a matter of law.

This Motion is based upon the pleading in this action, such Affidavits as may be served and filed of record, and on such other and further law as may be appropriate.

TYLER, CASSELL, JACKSON,
PEACE & SILVER, LLC

BY: 

Jeffrey L. Silver, Esquire
Post Office Box 11656

Columbia, South Carolina 29211
(803)779-4997

ATTORNEYS FOR PLAINTIFF

10-23, 2013
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
C/A NO.: 2013-CP-07-610

First South Bank

Plaintiff,

vs.

John E. Rosenberg and Philip J. Brust,

Defendants,

**AFFIDAVIT OF PATRICK WRIGHT
IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AS TO DEFENDANT
PHILIP J. BRUST**

PERSONALLY APPEARED before me, Patrick Wright, who, upon being duly sworn, deposes and states:

1. Deponent is over the age of eighteen (18) years and has personal knowledge of the facts set forth herein.
2. Deponent is and was at all times relevant herein employed by Plaintiff as Senior Vice President who performed the duties and responsibilities associated therewith at Plaintiff's branch in the town of Bluffton, State of South Carolina.
3. Plaintiff, on or about January 9, 2006, issued to Ecological Investments, LLC ("Ecological"), Defendant John E. Rosenberg ("Rosenberg"), and Defendant Philip J. Brust ("Brust") a letter wherein Plaintiff outlined the terms and conditions under which Plaintiff would issue a loan to Ecological in the amount of \$2,600,000.00 ("Commitment Letter").
4. The Commitment Letter informed Brust that Ecological's receipt of the loan was conditioned upon Brust's agreement to unconditionally guaranty repayment and performance of the loan, and Brust accepted and agreed to same. A true and correct copy of the Commitment Letter is attached hereto as **Exhibit A**.
5. In preparation for the execution of the loan documents, Brust provided Plaintiff his personal financial information and executed a Specific Limited Power of Attorney ("Power of Attorney") that was filed in the Office of the Register of Deeds for the County of Jasper, State of South Carolina in Book 339 at Page 218
6. Pursuant to the Power of Attorney, Brust granted Rosenberg the power to execute any and all documents, and to perform any lawful act or to execute or amend any

document, instrument or thing necessary to close the loan with Plaintiff in the original principal sum of \$2,600,000.00.

7. The Power of Attorney declared that any act or deed lawfully performed by Rosenberg pursuant to the Power of Attorney would be binding upon Brust, his heirs, legal and personal representatives, and assigns.
8. On or about February 2, 2006, Ecological made, executed, and delivered to First South Bank, a Universal Note and Security Agreement in original principal sum of \$2,600,000.00, which was subsequently renewed and/or modified by those certain Commercial Debt Modification Agreements dated January 14, 2008, and January 21, 2010, and those Renewal Universal Note and Security Agreements dated May 27, 2008, August 26, 2008, October 15, 2008, and November 30, 2010 (collectively "Note"), copies of which are attached to Plaintiff's Complaint and incorporated herein by reference.
9. Contemporaneously with the execution of the Note, Brust, by and through his agent under the Power of Attorney, John E. Rosenberg, executed an Unlimited Guaranty ("Brust Guaranty"), a copy of which is attached to Plaintiff's Complaint and incorporated herein by reference.
10. In connection with the execution of the Guaranty, Plaintiff relied on the authority given Rosenberg under the Power of Attorney and the representations contained therein.
11. Plaintiff was without information and belief to doubt and suspect Rosenberg's inability to execute the Guaranty on Brust's behalf.
12. Without the representations contained in the Power of Attorney and without the representations made by Brust, Plaintiff would not have made the loan to Ecological.
13. Likewise Plaintiff did not receive any communication from Brust regarding the alleged improper execution of the Guaranty by Rosenberg pursuant to the Power of Attorney.
14. During Plaintiff's administration of the loan and prior to the maturity of the Note, Brust provided to Plaintiff his personal financial information related to the Note and Guaranty for years 2005, 2007, 2008, 2009, and 2010.
15. At all times relevant herein, Deponent complied with its internal policies and procedures related to the underwriting, approval, and administration of the loan.

16. The Note matured on November 30, 2012 and although First South Bank has demanded payment in full of the Note and the Guaranty, Ecological and Brust have failed to pay the outstanding balances due under same. As a result, First South Bank deems Ecological and Brust to be in default according to the terms of the Note and Guaranty.
17. Pursuant to the terms of the Note and Guaranty, Brust is obligated to Plaintiff for its reasonable attorneys' fees plus court costs.
18. There is now due and owing on the Note and Guaranty as of July 9, 2013, the principal sum of \$1,608,000.00, plus accrued interest through July 9, 2013, in the sum of \$59,112.67, plus accrued late fees in the sum of \$2,348.49, plus advanced appraisal fees of \$1,450.00, plus advanced 2012 real property taxes in the sum of \$381.18 for a total outstanding balance of \$1,671,292.34 plus interest from July 9, 2013, at a per diem rate of \$234.50.
19. Deponent is informed and believes Plaintiff is entitled to judgment against Defendant Philip J. Brust for the full amount found to be due and owing on the Note and Guaranty.

Further, Deponent sayeth not.

Patrick Wright

Patrick Wright,
Senior Vice President for First South Bank

SWORN to before me this 7TH
day of October, 2013.

Shanna C. King (SEAL)
Notary Public for South Carolina

My Commission Expires: June 27, 2015



January 9, 2006

Mr. John E. Rosenberg
Mr. Philip J. Brust
Ecological Investments, LLC
Hilton Head Island, South Carolina

Dear Mr. Rosenberg and Mr. Brust:

First South Bank (hereinafter referred to as "Bank"), is pleased to commit to Ecological Investments, LLC (hereinafter referred to as the "Borrower") a loan commitment (hereinafter referred to as the "Loan"), subject to the following terms and conditions:

Borrower: Ecological Investments, LLC

Principal Amount: Up to \$2,600,000. This is a revolving commitment. Principal may be advanced, re-paid, and re-advanced, until the maturity date stated below, provided that (a) aggregate outstandings at any one time do not exceed the principal amount stated above, (b) Borrower has complied with advance procedures of any loan agreement or other loan document, and (c) no event of default exists

Purpose: Proceeds shall be used as follows: (1) refinance existing debt of approximately \$2,200,000; (2) provide additional funds for interest payments over the 24-month term of the Loan of up to \$350,000; and (3) fund up to \$50,000 in expenses such as property taxes and other nominal expenses.

Fee, Rate and Terms:

Borrower may choose one of the following two interest rate options:

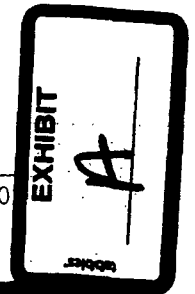
1. The interest rate shall be fixed at 7.00% for the term of the Loan, and interest will accrue and will be due and payable on any outstanding principal balance and be due and payable on a monthly basis.
2. Interest will accrue and will be due and payable on any outstanding principal balance at the Prime Rate (as published in the Wall Street Journal), as that rate may change from time to time with said changes being made as and when the Prime Rate changes, and with all accrued but unpaid interest being due and payable on a monthly basis.

The legal maturity shall be twenty-four (24) months from the date of closing, at which time all outstanding principal plus any accrued but unpaid interest, fees, and other charges, shall be due and payable.

A one-time origination fee of \$5,000 shall be payable upon the closing of the Loan.

Primary Collateral: The Loan shall be secured by a title insured, first mortgage security interest in the real property known as 82.68 acres located near Exit 8 on Interstate 95 and U.S. Highway 278 in Jasper County, South Carolina, also known as the Butterfly Kingdom PUD, all of which shall be more fully described in collateral documents between Bank and Borrower. The Loan shall be further secured by an assignment of leases, rents and profits.

P. O. Box 6508 ■ Hilton Head Island, South Carolina 29938 ■ (843) 706-3900 ■ Fax (843) 706-3900



The Bank's lien shall be primary and ahead of the lien held by the members of the LLC, which lien shall not be more than \$350,000 during the term of this Loan

Guarantor: Payment of the Loan shall be unconditionally guaranteed, jointly and severally, by John E. Rosenberg and Philip J. Brust, hereinafter the "Guarantors."

Insurance: Borrower shall provide to Bank satisfactory evidence of insurance coverage on all collateral pledged, to Bank's satisfaction and with Bank named mortgagee or loss payee, which may include but not be limited to requirements for casualty, flood, liability, business interruption, and title insurance, throughout the life of the Loan.

Appraisals: Bank shall order and pay for appraisals on all collateral pledged prior to closing of the Loan, and may order and pay for any reappraisals it deems necessary throughout the life of the Loan, and Borrower agrees to prepay Bank or to reimburse Bank for any such payments at closing or within 20 (twenty) days of written notice by Bank. This commitment is contingent upon receipt of an appraisal ordered by, addressed to and satisfactory to the Bank indicating an "as-is" market value of the collateral property of no less than \$4,200,000.

Environmental Compliance: The Borrower warrants and represents, to the best of its knowledge, that no portion of the Collateral is contaminated with hazardous or toxic materials or has ever been used as a disposal site for the same. Upon request by Bank, Borrower shall complete an environmental questionnaire provided by Bank, and/or obtain from a firm approved by Bank an environmental site assessment. Bank reserves the right to cancel this commitment if not satisfied in its sole discretion with the environmental condition of the property.

Deposit Relationship: Borrower and Guarantors agree to maintain a primary deposit relationship with Bank throughout the life of the Loan.

Conditions Precedent to Closing: Receipt and satisfactory review of current personal financial statements, copies of recent statements of Guarantors' liquid investment accounts, and Federal Tax Returns for the Guarantors listed above as well as the 2004 federal tax return or other satisfactory financial information on the Borrower.

Financial Information and Requirements: Borrower and Guarantors agree, as a condition of the Loan and until the Loan has been fully repaid, to:

1. Furnish to Bank copies of signed Federal tax returns of Borrower within 30 days of filing.
2. Furnish to Bank annually personal balance sheet and income information, on Bank's standard personal financial statement form completed in its entirety, and complete personal income tax returns, on the Guarantors.

Prepayment: Borrower may prepay all or any portion of the Loan at any time.

Assignability: Borrower cannot assign the commitment without Bank's prior written approval, nor shall any third party rely hereon or be deemed a party beneficiary hereby.

Material Adverse Change: This commitment is conditioned upon there having occurred no act, omission or undertaking which would, singly or in aggregate, have a materially adverse effect upon the business, assets, liabilities, financial condition, results of operations or business prospects of the Borrowers, or of any guarantor, or of any collateral, or upon the ability of the Borrower to perform any material obligations arising under the Loan Documents.

Further, this commitment is contingent upon receipt and verification of certain financial statement and income information on the Guarantors in form and content satisfactory to the Bank.

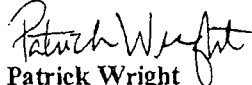
Closing Requirements: Closing requirements for a loan of this nature shall apply, to be determined at the discretion of Bank and its counsel, and can be furnished to you or your attorney upon acceptance of this commitment. All fees and expenses of Bank in connection with the negotiation and closing of the Loan, including but not limited to attorney fees, appraisal fees, environmental assessment fees, and other direct fees shall be paid by Borrower. In connection with the closing, Borrower's counsel shall provide an opinion letter to Bank as to the validity and enforceability of the Loan documents and such other matters as Bank may reasonably require.

You may indicate your acceptance of the terms and conditions offered by signing below and returning the original copy of this letter to Bank. If not accepted by January 12, 2006, and if a resulting loan is not closed by January 31, 2006, then this commitment will expire and neither Bank nor Borrower will be obligated hereunder.

Should you accept this commitment, then it is hereby agreed between Bank and Borrower that it shall survive the closing, that it shall become an integral part of the Loan documents, and that its terms, conditions, and agreements shall become terms, conditions, and agreements of the Loan. Should there be any inconsistencies between any term of the Note, security documents, or Loan Agreement and any term of this commitment letter, then the term of the Note, security documents, or Loan Agreement shall prevail; remaining terms, conditions, and agreements shall not be affected.

It is a pleasure to extend this financing offer. We look forward to hearing from you and having the opportunity to continue to provide you with the financial services of First South Bank.

Sincerely,

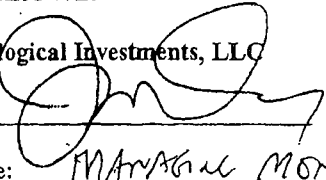


Patrick Wright
Senior Vice President

Accepted and Agreed to:

BORROWER

Ecological Investments, LLC

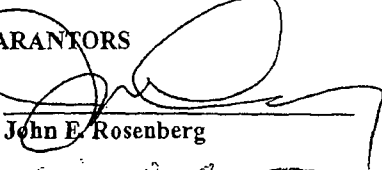
By: 

Title: Margaret Morlock

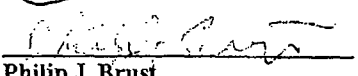
Attested: _____

Title: _____

GUARANTORS

By: 

John E. Rosenberg

By: 

Philip J. Brust

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO.: 2013-CP-07-00610

)

—

22

)

—

)

)

,

7. On October 23, 2013, Plaintiff filed a Motion for Summary Judgment against Defendant.

8. On December 11, 2013, before even providing discovery responses, which were past due, Plaintiff served Defendant with a Notice of Hearing on Plaintiff's Motion for Summary Judgment, scheduling the hearing date for February 11, 2014.

9. On December 20, 2013, over 30 days past due, Plaintiff served Defendant with responses to Defendant's First Set of Interrogatories and Request for Production of Documents, a copy of which is attached hereto as Exhibit B.

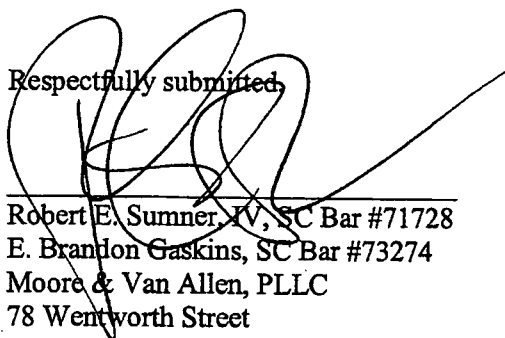
10. On January 7, 2014, Defendant sent a letter to Plaintiff's counsel setting forth the deficiencies in Plaintiff's discovery responses, a copy of which is attached hereto as Exhibit C.

11. Plaintiff has not provided supplemental responses to Defendant's First Set of Interrogatories and Request for Production of Documents.

12. Defendant's counsel has conferred with Plaintiff's counsel prior to filing this motion, but the Parties have been unable to come to an agreement over the issues raised herein.

WHEREFORE, for the reasons set forth in this motion and the letter attached hereto as Exhibit C, Defendant hereby requests an order compelling Plaintiff to provide complete discovery responses to Defendant.

Respectfully submitted,


Robert E. Sumner, IV, SC Bar #71728

E. Brandon Gaskins, SC Bar #73274

Moore & Van Allen, PLLC

78 Wentworth Street

Post Office Box 22828

Charleston, SC 29413-2828

Telephone: (843) 579-7000

Facsimile: (843) 579-7099

robertsumner@mvalaw.com

brandongaskins@mvalaw.com

ATTORNEYS FOR DEFENDANT PHILIP J. BRUST

CHARLESTON, SC
January 2014

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

FIRST SOUTH BANK,

Plaintiff,

vs.

JOHN E. ROSENBERG and PHILIP J.
BRUST,

Defendants.

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO.: 2013-CP-07-00610

CERTIFICATE OF SERVICE

14 JAN 28 PM 1:11
CLERK OF COURT
JOHN E. ROSENBERG
BEAUFORT COUNTY, S.C.

This is to certify that I have this date served a true and correct copy of *Defendant Philip J. Brust's Motion to Compel* on the parties identified below by U.S. Mail with proper postage affixed thereto and addressed to the following:

Jeffrey L. Silver, Esquire
1331 Elmwood Avenue, Suite 300
P.O. Box 11656
Columbia, SC 29211

Attorney for Plaintiff

John E. Rosenberg, *Pro Se*
5085 Rivedro Street
Las Vegas, NV 89135

Heather Morin
Heather Morin

CHARLESTON, SC

January 24, 2014

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	
FIRST SOUTH BANK,	)	
	)	
Plaintiff,	)	
vs.	)	DEFENDANT PHILIP J. BRUST'S
	)	FIRST SET OF REQUESTS FOR
JOHN E. ROSENBERG and PHILIP J.	)	PRODUCTION TO PLAINTIFF
BRUST,	)	
	)	
Defendants.	)	

TO: JEFFREY L. SILVER, ESQUIRE, Attorney for Plaintiff:

Pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, Defendant Philip J. Brust ("Defendant Brust"), requires Plaintiff First South Bank ("Plaintiff") to produce and/or make available for inspection, review, and/or copying at the offices of Moore & Van Allen, PLLC, located at 78 Wentworth Street, Charleston, South Carolina 29401, within thirty (30) days after the service, those documents described herein that are in possession, custody, and/or control of Plaintiff or its counsel.

GENERAL INSTRUCTIONS AND DEFINITIONS

(a) These Requests are continuing in character and require you to supplement your responses if you obtain further or different material within the scope of these Requests.

(b) "Persons" shall mean any natural persons, proprietorships, partnerships, firms, corporations, joint ventures, independent establishments, government agencies, corporations, or any of their divisions or subsidiaries, and any other group or combination acting as an entity.

(c) "Document" shall mean and include the original, each nonidentical copy (whether different from the original by means of notes made on such copy or otherwise) and if the original is not in existence or subject to your control, each copy of any handwritten, typewritten, printed,

recorded, transcribed, punched, taped, photocopied, photo static, "telexed," filmed, microfilmed, electronically or otherwise prepared or stored matter, however produced or reproduced, which is in your possession, custody, or control, including but not limited to all letters, correspondence, memoranda, records, telegrams, telexes, cables, e-mails, memoranda or minutes of meetings or conversations (in person or telephonic), reports, notes, legal documents, and writings of every description.

(d) "Communication" means any transmission, conveyance, or exchange of information whether by written, oral, or other means.

(e) "Loan" shall mean, collectively, the Universal Note and Security Agreement executed and delivered by Ecological Investments, LLC to you on or about February 2, 2006; the Commercial Debt Modification Agreement dated January 14, 2008 and January 21, 2010; the Renewal Universal Note and Security Agreement dated May 27, 2008, August 26, 2008, October 15, 2008, and November 30, 2010; and all other loans, extensions, renewals, and/or loan modifications related to such notes, agreements, and/or modifications, including the loan to Ecological Investments, LLC in the amount of or about Two Hundred Seventy-Five Thousand and 00/100 Dollars (\$275,000.00) made in or around January 2009.

(f) Unless otherwise indicated, these Requests refer to the time, place, and circumstances of the allegations contained in the pleadings.

(g) If you refuse to provide any of the requested material on the grounds that it contains communications or documents protected by the attorney-client or work product privilege, identify and list specifically each communication or document embodying the allegedly privileged information and provide sufficient information about the content of the communication or document to permit objective verification of the claim of privilege, including

but not limited to the identity of the persons who produced, sent, or received the documents and the identity of the person in possession of the document at the time of the Request.

(h) Whenever appropriate in these Requests, the singular form shall be interpreted as plural and vice versa, the male gender shall be interpreted as the male, female, or neutral gender, and "and" or "or" shall be construed either disjunctively or conjunctively to bring within the scope of these Requests any information that might otherwise be construed to be outside their scope.

(i) If a Request is objected to in part, a complete Response to all portions of that Request not objected to should be provided.

(j) Where materials responsive to these Requests have previously been produced in this litigation, please specifically so state and provide the date on which such materials were previously produced.

DOCUMENTS REQUESTED

1. All documents reviewed, referenced, consulted, or otherwise used in responding to the Defendant Brust's First Set of Interrogatories to Plaintiff.

2. All documents that support or concern your claim for damages.

3. All documents that concern, show, reflect, or otherwise evidence any contributions to the Loan from other lenders, or any sales, assignments, syndications, or other transfers of any interest or participation in the Loan or any document, guaranty, or instrument related thereto.

4. All manuals, guidelines, policies, practice memoranda, or other instructional materials of yours that relate to real estate or commercial loan underwriting.

5. All manuals, guidelines, policies, practice memoranda, or other instructional materials of yours that relate to real estate or commercial loan closing standards or requirements.
6. All manuals, guidelines, policies, practice memoranda, or other instructional materials of yours that relate to powers of attorney.
7. All manuals, guidelines, policies, practice memoranda, or other instructional materials of yours that relate to loan commitment letters.
8. All manuals, guidelines, policies, practice memoranda, or other instructional materials of yours that relate to the personal guaranty of loans to an entity.
9. All manuals, guidelines, policies, practice memoranda, or other instruction materials of yours that relate to document retention and/or destruction.
10. All manuals, guidelines, policies, practice memoranda, or other instruction materials of yours that relate to commercial loan modifications, extensions, renewals, and/or loss mitigation.
11. All records of any loan write-downs or write-offs established by you for any anticipated loss from the Loan.
12. All documents that concern, show, reflect, or otherwise evidence the value of any collateral that secures the Loan.
13. All documents that concern, show, reflect, or otherwise evidence any mortgage on, or any security interest in, any collateral that secures the Loan.
14. All documents that concern, show, reflect, or otherwise evidence the net worth, assets, liabilities, finances, or financial condition of any person or entity that you contend is liable for the Loan, including without limitation, Defendants Brust and Rosenberg.

15. All documents that concern, show, reflect, or otherwise evidence any communications (written, oral, electronic, or otherwise) between you or your employees, agents, officers, representatives, or anyone acting on your behalf and any person or entity (or any employee, agent, officer, or representative thereof) that you contend is liable for the Loan, including without limitation, Defendants Brust and Rosenberg.

16. All documents that concern, show, reflect, or otherwise evidence any communications (written, oral, electronic, or otherwise) between or among your employees, agents, officers, representatives, or anyone acting on your behalf relating to the Loan or Ecological Investments, LLC.

17. All documents that concern, show, reflect, or otherwise evidence any communications (written, oral, electronic, or otherwise) sent or received by you or your employees, agents, officers, representatives, or anyone acting on your behalf and any other person relating to the Loan or Ecological Investments, LLC.

18. All documents that concern, show, reflect, or otherwise evidence your intent to lend money to Ecological Investments, LLC or to require any person to personally guarantee any loan made by you to Ecological Investments.

19. All documents that concern, show, reflect, or otherwise evidence Ecological Investment's intent to borrow money from you or any person's intent to guaranty any loan made by you to Ecological Investments.

20. All documents relating to the Loan, including without limitation, the loan file, emails, correspondence, financial statements, bank statements, closing documents, appraisals, property records, notices, loan officer notes and/or comments, internal memoranda, and personal financial statements and tax returns of guarantors.

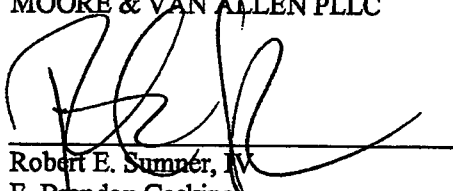
21. A complete and itemized statement from the date of the origination of the Loan to the present of all payments, fees, penalties, interest, or other charges received by you for the Loan.

22. All collection notes, reports, memos, statements, entries, data records, computer records, daily records, calendar reports, default reports, collection contacts, collection reports, or other documents generated in connection with the Loan.

23. All documents relating to all accounts that Ecological Investments, LLC currently has or previously had with you, including but without limitation, bank statements, account balances, transaction logs, invoices, receipts, checks, deposit slips, and ledgers.

24. All documents relating to any business transactions or dealings between you and Defendant Rosenberg and any entity in which he has a financial or ownership interest or affiliation, including but not limited to Ecological Investments, LLC, Ecological Education Center, Inc., Butterly Kingdom Emporium, LLC, Efficient Energy Advisors, LLC, and AirPro Cooling & Heating, LLC, including any correspondence, emails, bank statements, loan applications, contracts, agreements, promissory notes, guaranties, and mortgages.

MOORE & VAN ALLEN PLLC

By: 

Robert E. Sumner, IV
E. Brandon Gaskins
78 Wentworth Street
P.O. Box 22828
Charleston, SC 29413-2828
Telephone (843) 579-7000
Facsimile (843) 579-7099
brandongaskins@mvalaw.com
robertsumner@mvalaw.com

ATTORNEYS FOR DEFENDANT
PHILIP J. BRUST

CHARLESTON, SC

October 9th, 2013

CHARLESTON647880v3

RECORD 0114

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO.: 2013-CP-07-00610

5

i

)

)

;

)

25

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 2013-CP-07-00610
	)	
FIRST SOUTH BANK,	)	
	)	
Plaintiff,	)	
	)	DEFENDANT PHILIP J. BRUST'S
vs.	)	FIRST SET OF INTERROGATORIES
	)	TO PLAINTIFF
JOHN E. ROSENBERG and PHILIP J.	)	
BRUST,	)	
	)	
Defendants.	)	

TO: JEFFREY L. SILVER, ESQUIRE, Attorney for Plaintiff:

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, Defendant Philip J. Brust ("Defendant Brust") requires Plaintiff First South Bank ("Plaintiff") to answer each of the interrogatories set forth below in writing and under oath within thirty (30) days after service. Further, Defendant Brust requests that such answers be given in accordance with the definitions and instructions set out below.

DEFINITIONS AND INSTRUCTIONS

1. "Plaintiff" or "you" shall mean Plaintiff First South Bank and shall include its respective representatives, directors, officers, employees, agents, and others acting on its behalf.
2. References to a party shall include such party's respective representatives, agents, attorneys, and others acting on its behalf.
3. "Document" refers to all items subject to discovery under Rule 34 of the South Carolina Rules of Civil Procedure, including but not limited to any written or recorded material of any kind, including the originals and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise; notations of any sort of conversations, telephone calls, meetings, or other communications; all graphic or oral records or

CHARLESTON547884v1

representations of any kind; and mechanical or electronic records or representations of any kind including tapes, cassettes, disks, records, electronic mail messages, and electronic files stored on hard drives or other computer storage.

4. "Loan" shall mean, collectively, the Universal Note and Security Agreement executed and delivered by Ecological Investments, LLC to you on or about February 2, 2006; the Commercial Debt Modification Agreement dated January 14, 2008 and January 21, 2010; the Renewal Universal Note and Security Agreement dated May 27, 2008, August 26, 2008, October 15, 2008, and November 30, 2010; and all other loans, extensions, renewals, and/or loan modifications related to such notes, agreements, and/or modifications, including the loan to Ecological Investments, LLC in the amount of or about Two Hundred Seventy-Five Thousand and 00/100 Dollars (\$275,000.00) made in or around January 2009.

5. "Identify" shall mean:

a. In the case of a person, to state the person's full name, present or last-known home and business address, and present or last-known employer and job title;

b. In the case of a business concern, to state its name, its present or last-known address, and the nature of such business concern (*e.g.*, partnership, corporation, etc.);

c. In the case of a document, to state its date, its author, its recipient, or the person for whom it was prepared, the type of document (*e.g.*, letter, memorandum, chart, or other category), its present location or custodian, a summary of its contents, and any other information necessary to render the document distinguishable from all others and subject to ready location. In lieu of identifying a document, a copy of the document may be supplied.

d. In the case of a communication or act, to identify the person(s) present when the communication or act occurred, the date and location of such communication or act,

the substance of such communication or act, and all documents which record, refer to, or otherwise concern such communication or act.

5. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the request all responses that might otherwise be construed to be outside of their scope. The use of the singular form of any word includes the plural and vice versa.

6. If an interrogatory definition or instruction is objected to in whole or in part, specify all grounds on which objection rests. Respond to all portions of each such interrogatory to which no objection is asserted. In addition, state whether any responsive information has been omitted from an interrogatory response and whether and in what way the search for responsive information has been delimited or circumscribed on the basis of any such objection.

INTERROGATORIES

1. Identify every person who has assisted in the preparation of responses to these Interrogatories and Defendant Brust's First Set of Requests for Production.

2. Identify the full name, address, job title and telephone number of each person known to you or your counsel to have knowledge of any of the facts, events, circumstances, claims, or allegations surrounding this lawsuit and indicate whether or not written or recorded statements have been taken from each person and, if so, indicate who has possession of such statements and, if not, set forth a specific summary sufficient to inform Defendant Brust of the important facts known to or observed by each person.

3. Set forth a list of all records, statements, photographs, sketches, reports, drawings, maps, models, exhibits, or other documents or tangible objects, whether in written, electronic, or computerized form, in your possession or control and/or the possession or control of your

counsel that relate to your claims in this case and/or that you may seek to introduce, whether as evidence or otherwise, at any deposition, hearing, or trial of this action.

4. Set forth a list of all your personnel, employees or agents involved in any way with the Loan, including the name, address, and telephone number of each individual involved. For each employee or agent listed, please describe in detail the purpose of the employee's or agent's involvement and each decision made by the employee or agent with regard to the Loan.

5. List the names and addresses of any expert witnesses whom you propose to use as a witness at the trial of the case, and for each please state:

- a. the field in which you claim he/she is an expert;
- b. the subject matter on which the expert is expected to testify;
- c. the substance of the facts and opinions to which the expert is expected to testify;
- d. a summary of the grounds for each opinion; and
- e. identify all articles or publications written by the expert, including name and date of publication.

6. Describe with specificity your corporate structure.

7. Explain and describe in full and complete detail the type of damages you claim to be entitled to recover from the named Defendants. This response should include, but is not limited to, the outstanding principal amount on the Loan, an accounting of all payments made on the Loan, an accounting of any and all fees charged as to the Loan, an accounting of all penalties charged as to the Loan and an accounting of all interest charged on the Loan. With regard to each interest charge, state the percentage rate, the nature of the interest rate (such as stated rate, default rate, etc.) for each interest charge, the time period covered by the interest charge, the principal balance or balances used in computing the interest charge, and the calculation of the interest charge.

8. Identify all collateral that secures the Loan, including the current value of the collateral.

9. Set forth a detailed narrative of the history of the contribution of funds to, and the ownership of, the Loan and all documents, guaranties, and instruments related thereto. This narrative should include, but not be limited to, any contributions of Loan funds from another lender, as well as any sales, assignments, syndications, or other transfers of any interest or participation in the Loan or any document, guaranty, or instrument related thereto. If any other lender has contributed funds for the Loan, or any part of, or participation in, the Loan or any document, guaranty, or instrument related thereto has been sold, assigned, syndicated, or transferred in any way, identify all transactions related to such contribution, sale, assignment, syndication, or transfer in accordance with the above definitions.

10. Identify all communications between Defendant Brust and you and any of your employees or agents regarding the Loan, Ecological Investments, LLC, the Butterfly Kingdom, Ecological Education Center, Inc., and Butterfly Kingdom Emporium, LLC.

11. Describe in detail all efforts by you to perform due diligence, research, and investigation regarding the Loan, collateral securing the Loan, Ecological Investments, LLC, and any guarantors of the Loan.

12. Identify all communications between Defendant John Rosenberg and you and any of your employees regarding the Loan, Ecological Investments, LLC, the Butterfly Kingdom, Ecological Education Center, Inc., and Butterfly Kingdom Emporium, LLC.

13. Identify all communications between any other person, including any appraisers, and you and any of your employees or agents regarding the Loan, collateral securing the Loan, Ecological Investments, LLC, and any guarantors of the Loan.

14. Explain specifically each reason you made the Loan to Ecological Investments, LLC, including the rationale, basis, and any documents relied upon for each decision to make, renew, modify, or extend the Loan, including those renewal, modifications, and/or extensions effected on January 14, 2008; May 27, 2008; August 26, 2008; October 15, 2008; January 21, 2010; and November 30, 2010, and the loan in January 2009 in the amount of or about Two Hundred Seventy-Five Thousand and 0/100 Dollars (\$275,000.00).

15. Identify all transactions and/or dealings between you and Defendant Rosenberg and any entity in which he has a financial or ownership interest or affiliation, including but not limited to Ecological Education Center, Inc., Butterly Kingdom Emporium, LLC, Efficient Energy Advisors, LLC, and AirPro Cooling & Heating, LLC, regardless of whether such transactions and/or dealings were of a personal nature or related to Ecological Investments, LLC. In answering this interrogatory, include the identity of the persons involved in the transaction, the date of the transaction, the nature of the transaction, and whether the transaction or the obligations thereunder are currently effective.

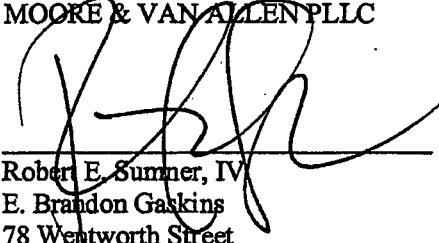
16. Describe in detail your knowledge regarding the proposed development or sale of all or portion of the property acquired by Ecological Investments, LLC in Jasper County, South Carolina, including but not limited to the development of the Butterfly Kingdom; the sale of such property to Quad Development, LLC; the sale of timber from the property; or the leasing or sale of rights to the property for advertising, cellular tower, or other commercial uses.

17. To the extent that documents that are responsive to Defendant Brust's First Set of Requests for Production of Documents are or once were in existence but are not in your possession or control, identify those documents. In the events that emails or other electronic documents have been destroyed, please include the date of destruction, a description of the

subject matter of any destroyed documents and a description of any document retention/destruction policies maintained by you for the applicable timeframe.

MOORE & VAN ALLEN PLLC

By:



Robert E. Sumner, IV
E. Brandon Gaskins
78 Wentworth Street
P.O. Box 22828
Charleston, SC 29413-2828
Telephone (843) 579-7000
Facsimile (843) 579-7099
robertsumner@mvalaw.com
brandongaskins@mvalaw.com

ATTORNEYS FOR DEFENDANT
PHILIP J. BRUST

CHARLESTON, SC

October 9th 2013

CHARLESTON\547884v1

RECORD 0122

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO.: 2013-CP-07-00610

)

)

)

)

)

)

)

22

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
C/A NO.: 2013-CP-07-0610

First South Bank,

vs.

John E. Rosenberg and Philip J. Brust,

Defendants,

Plaintiff,

**PLAINTIFF'S RESPONSES TO
DEFENDANT PHILIP J. BRUST'S FIRST
SET OF INTERROGATORIES**

**TO: DEFENDANT PHILIP J. BRUST AND HIS ATTORNEY OF RECORD, ROBERT E.
SUMNER, IV, ESQUIRE**

Plaintiff herein answers Defendant's First Set of Interrogatories pursuant to Rule 33 of the
South Carolina Rules of Civil Procedure, as follows:

GENERAL OBJECTIONS

Plaintiff objects to Defendant's Interrogatories to the extent they: (1) seek to expand the
limits of discovery allowed under the South Carolina Rules of Civil Procedure; and (2) seek
information protected by the attorney/client privilege, the work product doctrine, or any other
applicable privilege or doctrine. Subject to the above general objections, the following is
provided.

ANSWERS TO INTERROGATORIES

1. Identify every person who has assisted in the preparation of responses to these
Interrogatories and Defendant Brust's First Set of Requests for Production.

ANSWER:

Patrick Wright, Vice President
First South Bank
7 Arley Way, Suite 100
Bluffton, South Carolina 29910

2. Identify the full name, address, job, title, and telephone number of each person
known to you or your counsel to have knowledge of any of the facts, events, circumstances,
claims, or allegations surrounding this lawsuit and indicate whether or not written or recorded
statements have been taken from each person and, if so, indicate who has possession of such

statements and, if not, set forth a specific summary sufficient to inform Defendant Brust of the important facts known to or observed by each person.

ANSWER:

Patrick Wright, Senior Vice President
First South Bank
7 Arley Way, Suite 100
Bluffton, South Carolina 29910
No written or recorded statements have been taken.

Patrick Wright is and at all times relevant was a Senior Vice President at Plaintiff's branch in Bluffton, South Carolina and performed the duties and responsibilities associated therewith. Mr. Wright was and continues to be the representative of Plaintiff who was responsible for the lending relationship with Ecological Investments, LLC. Mr. Wright has knowledge and information related to his communications, written or otherwise, with Mr. Brust and Mr. Rosenberg related to Ecological Investments, LLC, the Property, and the Guaranties which serve as collateral for the Loan. He has knowledge and information related to Plaintiff's underwriting procedures and process as well as the process and procedures Plaintiff followed during the origination, approval, and extensions of the Loan. Likewise, Mr. Wright has knowledge and information related the financial position of Mr. Brust, Mr. Rosenberg, and Ecological Investments prior to and during the administration of the Loan based upon financial documents provided by them to Plaintiff.

Frank Callison, Chief Credit Officer
First South Bank
1450 John B. White Sr. Blvd.
Spartanburg, SC 29306
No written or recorded statements have been taken.

Frank Callison is the current Chief Credit Officer and has knowledge concerning the procedures of Plaintiff in reviewing credit extension and renewal requests, as well as, the approval standards for same.

W. C. Lyerly, President
First South Bank
1333 Main Street, Suite 220
Columbia, SC 29201
No written or recorded statements have been taken.

W. C. Lyerly, III is the President of Plaintiff and has knowledge concerning the policies and procedures of Plaintiff relating to credit extension and renewal requests, the status of the Loan which is the subject of this action, and

J. Allen Billig, Senior Vice President
Senior Credit Officer
First South Bank
1068 N. Church Street
Greenville, SC 29601

No written or recorded statements have been taken.

J. Allen Billig is the current Senior Credit Officer and has knowledge concerning the procedures of Plaintiff in reviewing credit extension and renewal requests, as well as, the approval standards for same.

Philip J. Brust
20348 Christople Drive
Cornelius, North Carolina 28031

No written or recorded statements have been taken.

Philip J. Brust is and at all times relevant was a member of Ecological Investments, LLC. Mr. Brust has knowledge and information regarding all facts in dispute including, but not limited to, his communications, written or otherwise, with Mr. Rosenberg, Mr. Wright, other members of Ecological Investments regarding the Guaranty of the Loan, and other third parties regarding same. His knowledge and information also includes the events surrounding the execution of the Specific Limited Power of Attorney filed in the Office of the Register of Deeds for the County of Jasper, State of South Carolina in Book 339 at Page 218 and the authority granted therein. Mr. Brust's knowledge and information further extends to and includes the events surrounding his submission of his personal financial information and personal payments he made on the Loan in issue.

John E. Rosenberg
5085 Rivedro Street
Las Vegas, Nevada 81935

No written or recorded statements have been taken.

John E. Rosenberg is and at all times relevant was the managing member of Ecological Investments, LLC. Mr. Rosenberg has knowledge and information regarding all facts in dispute including, but not limited to, his communications, written or otherwise, with Mr. Brust, Mr. Wright, other members of Ecological Investments regarding the Property, the Loan, and the Guaranty of the Loan, and other third parties regarding same. His knowledge and information also includes the events surrounding the execution of the Specific Limited Power of Attorney filed in the Office of the Register of Deeds for the County of Jasper, State of South Carolina in Book 339 at Page 218 and the authority granted therein. Mr. Rosenberg's knowledge and information further extends to and includes the events surrounding his submission of personal financial information to Plaintiff related to the Guaranty. His knowledge and information further extends to the events surrounding the closing of the Loan.

Terry A. Finger, Esq.
35 Hospital Center Commons, Suite 200
PO Box 24005
Hilton Head, Island, South Carolina 29926
No written or recorded statements have been taken.

Terry Finger, Esquire was the closing attorney on behalf of Ecological Investments who closed the Loan for which the Guaranties are collateral. Mr. Finger has knowledge and information regarding his conversations with Mr. Rosenberg, Mr. Brust, and Mr. Wright regarding the closing of the Loan and his instructions related thereto from Plaintiff. Additionally, Mr. Finger has knowledge and information related to the circumstances surrounding the Specific Limited Power of Attorney filed in the Office of the Register of Deeds for the County of Jasper, State of South Carolina in Book 339 at Page 218 as well as the authority granted therein.

3. Set forth a list of all records, statements, photographs, sketches, reports, drawings, maps, models, exhibits, or other documents or tangible objects, whether in written, electronic, or computerized form, in your possession or control and/or the possession or control of your counsel that relate to your claims in this case and/or that you may seek to introduce, whether as evidence or otherwise, at any deposition, hearing, or trial of this action.

ANSWER: See Plaintiff's Answers to Defendant Philip J. Brust's First Requests for Production of Documents.

4. Set forth a list of all your personnel, employees or agents involved in any way with the Loan, including the name, address, and telephone number of each individual involved. For each employee or agent listed, please describe in detail the purpose of the employee's or agent's involvement and each decision made by the employee or agent with regard to the Loan.

ANSWER: See Plaintiff's response to Interrogatory No. 1.

5. List the names and addresses of any expert witnesses whom you propose to use as a witness at the trial of the case, and for each please state:

- the field in which you claim he/she is an expert;
- the subject matter on which the expert is expected to testify;
- the substance of the facts and opinions to which the expert is expected to testify;
- a summary of the grounds for each opinion; and
- identify all articles or publications written by the expert, including name and date of publication.

ANSWER: Plaintiff objects to this interrogatory to the extent that it seeks information protected by the attorney-client privilege and/or the work product doctrine. Subject to the foregoing objection, Plaintiff has not identified an expert at this time and reserves its rights to identify an expert witness at a later date.

6. Describe with specificity your corporate structure.

ANSWER: Plaintiff is a chartered bank and corporation organized and existing in the State of South Carolina and has branches in Greenville, Spartanburg, Columbia, and Bluffton, South Carolina. Its corporate offices are located in Spartanburg, South Carolina.

7 Explain and describe in full and complete detail the type of damages you claim to be entitled to recover from the named Defendants. This response should include, but is not limited to, the outstanding principal amount on the Loan, an accounting of all payments made on the Loan, an accounting of any and all fees charged as to the Loan, an accounting of all penalties charged as to the Loan and an accounting of all interest charged on the Loan. With regard to each interest charge, state the percentage rate, the nature of the interest rate (such as stated rate, default rate, etc.) for each interest charge, the time period covered by the interest charge, the principal balance or balances used in computing the interest charge, and the calculation of the interest charge.

ANSWER: Plaintiff has suffered damages in the principal sum of \$1,608,000.00, plus accrued interest in the sum of \$26,986.17, plus accrued late fees in the sum of \$2,348.49, plus advanced appraisal fee of \$1,450.00, for a total outstanding balance of \$1,638,784.66, plus interim interest from February 22, 2013, at the per diem rate of \$234.50, the same being set forth in the Complaint and Verification attached thereto, together with the attorney fees and court costs for the bringing of this action. The terms of interest are set forth on the Note attached to the Complaint as Exhibit A which is incorporated herein by reference. Please see Plaintiff's Response to Defendant Philip J. Brust's First Requests for Production of Documents.

8. Identify all collateral that secures the Loan, including the current value of the collateral.

ANSWER: The Loan is secured by a Mortgage on a certain piece of real property located in the County of Jasper, State of South Carolina bearing tax map number 42-0-5-1, said Mortgage being recorded in the Office of the Register of Deeds for the County of Jasper, State of South Carolina in Book 703 at Page 032. The Loan is also secured by those certain Unlimited Guaranties executed by Defendant John E. Rosenberg and Defendant Philip J. Brust, copies of which are attached to the Complaint as Exhibit B and incorporated herein by reference. No current appraisal exists.

9. Set forth a detailed narrative of the history of the contribution of funds to, and the ownership of, the Loan and all documents, guaranties, and instruments related thereto. This narrative should include, but not be limited to, any contributions of Loan funds from another lender, as well as any sales, assignments, syndications, or other transfers of any interest or participation in the Loan or any document, guaranty, or instrument related thereto. If any other lender has contributed funds for the Loan, or any part of, or participation in, the Loan or any document, guaranty, or instrument related thereto has been sold, assigned, syndicated, or transferred in any way, identify all transactions related to such contribution, sale, assignment, syndication, or transfer in accordance with the above definitions.

ANSWER: The Loan issued by Plaintiff to Ecological Investments, LLC was a refinance of a previous debt Ecological Investments owed to a third party lender. At the time of Plaintiff's refinance, the balance of the loan to the third party lender was approximately \$2,600,000.00. At the current date, Plaintiff is the sole owner of the Loan. Likewise, Plaintiff has not sold, assigned, transferred, or syndicated the Loan. Furthermore, no other lender has contributed funds to the Loan or is participating in same.

10. Identify all communications between Defendant Brust and you and any of your employees or agents regarding the Loan, Ecological Investments, LLC, the Butterfly Kingdom, Ecological Education Center, Inc., and Butterfly Kingdom Emporium, LLC.

ANSWER: See Plaintiff's Answers to Defendant Philip J. Brust's First Requests for Production of Documents.

11. Describe in detail all efforts by you to perform due diligence, research, and investigation regarding the Loan, collateral securing the Loan, Ecological Investments, LLC, and any guarantors of the Loan.

ANSWER: See Plaintiff's Answers to Defendant Philip J. Brust's First Requests for Production of Documents, including without limitation, the executed Commitment Letter, financials of Defendant Brust, executed Limited Power of Attorney, Attorney Opinion Letter, and Appraisals.

12. Identify all communications between Defendant John Rosenberg and you and any of your employees regarding the Loan, Ecological Investments, LLC, the Butterfly Kingdom, Ecological Education Center, Inc., and Butterfly Kingdom Emporium, LLC.

ANSWER: See Plaintiff's Answers to Defendant Philip J. Brust's First Requests for Production of Documents.

13. Identify all communications between any other person, including any appraisers, and you and any of your employees or agents regarding the Loan, collateral securing the Loan, Ecological Investments, LLC, and any guarantors of the Loan.

ANSWER: See Plaintiff's Answers to Defendant Philip J. Brust's First Requests for Production of Documents.

14. Explain specifically each reason you made the Loan to Ecological Investments, LLC, including the rationale, basis, and any documents relied upon for each decision to make, renew, modify, or extend the Loan, including those renewal, modifications, and/or extensions effected on January 14, 2008; May 27, 2008; August 26, 2008; October 15, 2008; January 21, 2010; and November 30, 2010, and the loan in January 2009 in the amount of or about Two Hundred Seventy-Five Thousand and No/100 Dollars (\$275,000.00).

ANSWER: See Plaintiff's Answers to Defendant Philip J. Brust's First Requests for Production of Documents.

15. Identify all transactions and/or dealings between you and Defendant Rosenberg and any entity in which he has a financial or ownership interest or affiliation, including but not limited to Ecological Education Center, Inc., Butterfly Kingdom Emporium, LLC, Efficient Energy Advisors, LLC, and AirPro Cooling & Heating, LLC, regardless of whether such transactions and/or dealings were of a personal nature or related to Ecological Investments, LLC. In answering this interrogatory, include the identity of the persons involved in the transaction, the date of the transaction, the nature of the transaction, and whether the transaction or the obligations thereunder are currently effective.

ANSWER: Plaintiff objects to this Interrogatory to the extent that it seeks information not relevant to the issues in this litigation; is not reasonably calculated to lead to discovery of relevant or admissible evidence; seeks information related to matters beyond the scope of the issues raised by this action; are otherwise beyond the scope of discovery provided for by the South Carolina Rules of Civil Procedure, or violates privacy laws. Notwithstanding such objections, Plaintiff will respond upon consent of Defendant Rosenberg or Court Order.

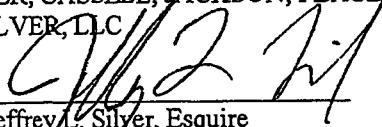
16. Describe in detail your knowledge regarding the proposed development or sale of all or portion of the property acquired by Ecological Investments, LLC in Jasper County, South Carolina, including, but not limited to, the development of the Butterfly Kingdom; the sale of such property to Quad Development, LLC; the sale of timber from the property; or the leasing or sale of rights to the property for advertising, cellular tower, or other commercial uses.

ANSWER: Plaintiff objects to this Interrogatory to the extent that it seeks information already in possession and control of Defendant Brust, is not relevant to the issues in this litigation; is not reasonably calculated to lead to discovery of relevant or admissible evidence; seeks information related to matters beyond the scope of the issues raised by this action; are otherwise beyond the scope of discovery provided for by the South Carolina Rules of Civil Procedure. Notwithstanding such objections, see copy of the Contract of Sale and cancellation thereof produced by Plaintiff in Answer to Defendant Brust's First Requests for Production of Document and the emails between Defendant Rosenberg and the attorney for Ecological Investments, LLC concerning the litigation with Quad Development, LLC.

17. To the extent that documents that are responsive to Defendant Brust's First Set of Requests for Production of Documents are or once were in existence but are not in your possession or control, identify those documents. In the events that emails or other electronic documents have been destroyed, please include the date of destruction, a description of the subject matter of any destroyed documents and a description of any document retention/destruction policies maintained by you for the applicable timeframe.

ANSWER: Plaintiff objects to this Interrogatory to the extent it seeks information that is overly broad and unduly burdensome. Plaintiff has no reasonable likelihood of determining the prior existence or date of destruction of any such documents.

TYLER, CASSELL, JACKSON, PEACE
& SILVER, LLC

By: 

Jeffrey L. Silver, Esquire
Taylor A. Peace, Esquire
1331 Elmwood Avenue, Suite 300
Post Office Box 11656
Columbia, South Carolina 29211
(803) 252-7689
ATTORNEYS FOR PLAINTIFF

12-20-2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
C/A NO.: 2012-CP-07-4597

First South Bank,
Plaintiff,

vs.

John E. Rosenberg and Phillip J. Brust,
Defendants.

**PLAINTIFF'S RESPONSES TO
DEFENDANT PHILLIP J. BRUST'S
FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS**

**TO: PHILLIP J. BRUST AND HIS ATTORNEY OF RECORD ROBERT E. SUMNER,
IV, ESQUIRE**

Plaintiff herein answers Defendant's First Set of Requests to Produce to Plaintiff pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, as follows:

GENERAL OBJECTIONS

1. Plaintiff objects to these Requests for Production to the extent that they seek documents or other materials protected by the attorney client privilege or the Work Product Doctrine. If any document or other material protected by either of these doctrines is inadvertently produced, that is not to be deemed a waiver of the protection afforded to those documents, and Plaintiff requests that the parties return such document and all copies thereof upon request to the undersigned.

2. Plaintiff objects to these Requests for Production to the extent that they seek documents and things that are not relevant to the issues in this litigation; are not reasonably calculated to lead to discovery of relevant or admissible evidence; seek information related to matters beyond the scope of the issue raised by this action; or are otherwise beyond the scope of discovery provided for by the South Carolina Rules of Civil Procedure.

3. Plaintiff objects to these Requests for Production to the extent that they are overly broad and/or unduly burdensome and to the extent that they seek information not within its possession or control.

4. Plaintiff objects to these Requests for Production to the extent that they contain vague and undefined terms that render them unsuitable for response.

5. These responses are made solely for the purpose of responding to discovery requests promulgated in this action and should not be construed as an admission of relevancy, materiality, or admissibility. Plaintiff reserves the right to seek exclusion of any response (or any document produced in connection with any such response) at trial and preserves all evidentiary objections, including but not limited to, objections as to confidence, relevance, materiality, and admissibility and preserves any other objections to exclude any statement contained in a document produced in response to these requests as if such statement had been made by a witness present and testifying in court. All such objections and grounds are reserved and may be interposed at the time of trial.

6. The responses set forth herein are based upon information that has been collected and/or reviewed for the purpose of responding to these requests. Plaintiff reserves the right to supplement its responses in the event it obtains additional information that has been requested.

7. Each of the above general objections is incorporated into all of the responses set forth below and no response is to be deemed a waiver of any of the above general objections whether or not specifically set forth in the response.

RESPONSES TO REQUESTS TO PRODUCE

1. All documents reviewed, referenced, consulted, or otherwise used in responding to the Defendant Brust's First Set of Interrogatories to Plaintiff.

ANSWER: All such documents, to the extent same exist, not otherwise privileged and which are in the possession or control of the Plaintiff contained in the loan files of Plaintiff

concerning Ecological Investments are available for review by Defendant at a mutually agreeable time at the Offices of Plaintiff in Bluffton, South Carolina.

2. All documents that support or concern your claim for damages.

ANSWER: Plaintiff craves reference to the Note and Guaranties attached to the Complaint as Exhibits A and B and incorporated herein by reference. Plaintiff would further crave reference to the Verification attached to the Complaint.

3. All documents that concern, show, reflect, or otherwise evidence any contributions to the Loan from other lenders, or any sales, assignments, syndications, or other transfers of any interest or participation in the Loan or any document, guaranty, or instrument related thereto.

ANSWER: No such documents exist.

4. All manuals, guidelines, policies, practice memoranda, or other instructional materials of yours that relate to real estate or commercial loan underwriting.

ANSWER: Plaintiff objects to these Requests for Production to the extent that they seek documents and things that are not relevant to the issues in this litigation; are not reasonably calculated to lead to discovery of relevant or admissible evidence; seek information related to matters beyond the scope of the issue raised by this action; or are otherwise beyond the scope of discovery provided for by the South Carolina Rules of Civil Procedure. The Loan which is the subject of this action was approved and completed and accordingly this Request for Production is inconsequential. Notwithstanding such objections, to the extent same exist, Plaintiff will produce any such documents upon execution of a non-disclosure and confidentiality agreement. Plaintiff would further state that the manuals, guidelines, policies, practice memoranda, or other instructional materials are constantly being updated and prior versions are destroyed.

5. All manuals, guidelines, policies, practice memoranda, or other instructional materials of yours that relate to real estate or commercial loan closing standards or requirements.

ANSWER: Plaintiff objects to these Requests for Production to the extent that they seek documents and things that are not relevant to the issues in this litigation; are not reasonably calculated to lead to discovery of relevant or admissible evidence; seek information related to matters beyond the scope of the issue raised by this action; or are otherwise beyond the scope of discovery provided for by the South Carolina Rules of Civil Procedure. The Loan which is the subject of this action was approved and completed and accordingly this Request for Production is inconsequential. Notwithstanding such objections, to the extent same exist, Plaintiff will produce any such documents upon execution of a non-disclosure and confidentiality agreement. Plaintiff would further state that the manuals, guidelines, policies, practice memoranda, or other instructional materials are constantly being updated and prior versions are destroyed.

6. All manuals, guidelines, policies, practice memoranda, or other instructional materials of yours that relate to powers of attorney.

ANSWER: Plaintiff objects to these Requests for Production to the extent that they seek documents and things that are not relevant to the issues in this litigation; are not reasonably calculated to lead to discovery of relevant or admissible evidence; seek information related to matters beyond the scope of the issue raised by this action; or are otherwise beyond the scope of discovery provided for by the South Carolina Rules of Civil Procedure. Further, Ecological Investments, LLC, was represented by counsel at the closing. The closing attorney delivered to Plaintiff an Opinion Letter certifying the proper preparation and execution of the Power of Attorney. Notwithstanding such objections, to the extent same exist, Plaintiff will produce any such documents upon execution of a non-disclosure and confidentiality agreement. Plaintiff would further state that the manuals, guidelines, policies, practice memoranda, or other instructional materials are constantly being updated and prior versions are destroyed.

7. All manuals, guidelines, policies, practice memoranda, or other instructional materials of yours that relate to loan commitment letters.

ANSWER: Plaintiff objects to these Requests for Production to the extent that they seek documents and things that are not relevant to the issues in this litigation; are not reasonably calculated to lead to discovery of relevant or admissible evidence; seek information related to matters beyond the scope of the issue raised by this action; or are otherwise beyond the scope of discovery provided for by the South Carolina Rules of Civil Procedure. The Loan which is the subject of this action was approved and completed and accordingly this Request for Production is inconsequential. Notwithstanding such objections, to the extent same exist, Plaintiff will produce any such documents upon execution of a non-disclosure and confidentiality agreement. Plaintiff would further state that the manuals, guidelines, policies, practice memoranda, or other instructional materials are constantly being updated and prior versions are destroyed.

8. All manuals, guidelines, policies, practice memoranda, or other instructional materials of yours that relate to the personal guaranty of loans to an entity.

ANSWER: Plaintiff objects to these Requests for Production to the extent that they seek documents and things that are not relevant to the issues in this litigation; are not reasonably calculated to lead to discovery of relevant or admissible evidence; seek information related to matters beyond the scope of the issue raised by this action; or are otherwise beyond the scope of discovery provided for by the South Carolina Rules of Civil Procedure. The Loan which is the subject of this action was approved and completed and accordingly this Request for Production is inconsequential. Notwithstanding such objections, to the extent same exist, Plaintiff will produce any such documents upon execution of a non-disclosure and confidentiality agreement. Plaintiff would further state that the manuals, guidelines, policies, practice memoranda, or other instructional materials are constantly being updated and prior versions are destroyed.

9. All manuals, guidelines, policies, practice memoranda, or other instruction materials of yours that relate to document retention and/or destruction.

ANSWER: Plaintiff objects to these Requests for Production to the extent that they seek documents and things that are not relevant to the issues in this litigation; are not reasonably calculated to lead to discovery of relevant or admissible evidence; seek information related to matters beyond the scope of the issue raised by this action; or are otherwise beyond the scope of discovery provided for by the South Carolina Rules of Civil Procedure. The Loan which is the subject of this action was approved and completed and accordingly this Request for Production is inconsequential. Notwithstanding such objections, to the extent same exist, Plaintiff will produce any such documents upon execution of a non-disclosure and confidentiality agreement. Plaintiff would further state that the manuals, guidelines, policies, practice memoranda, or other instructional materials are constantly being updated and prior versions are destroyed.

10. All manuals, guidelines, policies, practice memoranda, or other instruction materials of yours that relate to commercial loan modifications, extensions, renewals, and/or loss mitigation.

ANSWER: Plaintiff objects to these Requests for Production to the extent that they seek documents and things that are not relevant to the issues in this litigation; are not reasonably calculated to lead to discovery of relevant or admissible evidence; seek information related to matters beyond the scope of the issue raised by this action; or are otherwise beyond the scope of discovery provided for by the South Carolina Rules of Civil Procedure. The Loan which is the subject of this action was approved and completed and accordingly this Request for Production is inconsequential. Notwithstanding such objections, to the extent same exist, Plaintiff will produce any such documents upon execution of a non-disclosure and confidentiality agreement. Plaintiff would further state that the manuals, guidelines, policies, practice memoranda, or other instructional materials are constantly being updated and prior versions are destroyed.

11. All records of any loan write-downs or write-offs established by you for any anticipated loss from the Loan.

ANSWER: No such documents exist.

12. All documents that concern, show, reflect, or otherwise evidence the value of any collateral that secures the Loan.

ANSWER: All such documents, to the extent same exist, not otherwise privileged and which are in the possession or control of the Plaintiff are attached hereto in electronic format as Bates Numbers FSB/EI – 000001 through FSB/EI – 001316.

13. All documents that concern, show, reflect, or otherwise evidence any mortgage on, or any security interest in, any collateral that secures the Loan.

ANSWER: All such documents, to the extent same exist, not otherwise privileged and which are in the possession or control of the Plaintiff are attached hereto in electronic format as Bates Numbers FSB/EI – 000001 through FSB/EI – 001316.

14. All documents that concern, show, reflect, or otherwise evidence the net worth, assets, liabilities, finances, or financial condition of any person or entity that you contend is liable for the Loan, including without limitation, Defendants Brust and Rosenberg.

ANSWER: Plaintiff objects to this Requests for Production to the extent that it seeks documents and things that are not relevant to the issues in this litigation; are not reasonably calculated to lead to discovery of relevant or admissible evidence; seeks information related to matters beyond the scope of the issues raised by this action; are otherwise beyond the scope of discovery provided for by the South Carolina Rules of Civil Procedure, or violates privacy laws. Notwithstanding such objections, any such documents relating to Defendant Rosenberg, to the extent same exist, will be produced upon the consent of Defendant Rosenberg or Court Order. All such documents relating to Defendant Brust, to the extent same exist, are attached hereto in electronic format as Bates Numbers FSB/EI - 000001 through FSB/EI - 001316.

15. All documents that concern, show, reflect, or otherwise evidence any communications (written, oral, electronic, or otherwise) between you or your employees, agents, officers, representatives, or anyone acting on your behalf and any person or entity (or any employee, agent, officer, or representative thereof) that you contend is liable for the Loan, including without limitation, Defendants Brust and Rosenberg.

ANSWER: Plaintiff objects to this Requests for Production to the extent that it seeks documents and things that are not relevant to the issues in this litigation; are not reasonably calculated to lead to discovery of relevant or admissible evidence; seeks information related to matters beyond the scope of the issues raised by this action; are otherwise beyond the scope of discovery provided for by the South Carolina Rules of Civil Procedure, or violates privacy laws. Notwithstanding such objections, any such documents relating to Defendant Rosenberg, to the extent same exist, will be produced upon the consent of Defendant Rosenberg or Court Order. All such documents relating to Defendant Brust, to the extent same exist, are attached hereto in electronic format as Bates Numbers FSB/EI - 000001 through FSB/EI - 001316.

16. All documents that concern, show, reflect, or otherwise evidence any communications (written, oral, electronic, or otherwise) between or among your employees, agents, officers, representatives, or anyone acting on your behalf relating to the Loan or Ecological Investments, LLC.

ANSWER: All such documents, to the extent same exist, not otherwise privileged and which are in the possession or control of the Plaintiff are attached hereto in electronic format as Bates Numbers FSB/EI - 000001 through FSB/EI - 001316.

17. All documents that concern, show, reflect, or otherwise evidence any communications (written, oral, electronic, or otherwise) sent or received by you or your employees, agents, officers, representatives, or anyone acting on your behalf and any other person relating to the Loan or Ecological Investments, LLC.

ANSWER: See Plaintiff's Answer to Request for Production No. 16.

18. All documents that concern, show, reflect, or otherwise evidence your intent to lend money to Ecological Investments, LLC or to require any person to personally guarantee any loan made by you to Ecological Investments.

ANSWER: Plaintiff craves reference to the Commitment Letter previously produced in this matter. All such documents, to the extent same exist, not otherwise privileged and which are in the possession or control of the Plaintiff are attached hereto in electronic format as Bates Numbers FSB/EI – 000001 through FSB/EI – 001316.

19. All documents that concern, show, reflect, or otherwise evidence Ecological Investment's intent to borrow money from you or any person's intent to guaranty any loan made by you to Ecological Investments.

ANSWER: See the Commitment Letter previously produced. The Loan documents are attached hereto in electronic format as Bates Numbers FSB/EI – 000001 through FSB/EI – 001316.

20. All documents relating to the Loan, including without limitation, the loan file, emails, correspondence, financial statements, bank statements, closing documents, appraisals, property records, notices, loan officer notes and/or comments, internal memoranda, and personal financial statements and tax returns of guarantors.

ANSWER: All documents requested herein, to the extent same exist, not otherwise privileged and which are in the possession or control of the Plaintiff are attached hereto in electronic format as Bates Numbers FSB/EI – 000001 through FSB/EI – 001316.

21. A complete and itemized statement from the date of the origination of the Loan to the present of all payments, fees, penalties, interest, or other charges received by you for the Loan.

ANSWER: All such documents, to the extent same exist, not otherwise privileged and which are in the possession or control of the Plaintiff are attached hereto in electronic format as Bates Numbers FSB/EI – 000001 through FSB/EI – 001316.

22. All collection notes, reports, memos, statements, entries, data records, computer records, daily records, calendar reports, default reports, collection contacts, collection reports, or other documents generated in connection with the Loan.

ANSWER: All such documents, to the extent same exist, not otherwise privileged and which are in the possession or control of the Plaintiff are attached hereto in electronic format as Bates Numbers FSB/EI – 000001 through FSB/EI – 001316.

23. All documents relating to all accounts that Ecological Investments, LLC currently has or previously had with you, including without limitation, bank statements, account balances, transaction logs, invoices, receipts, checks, deposit slips, and ledgers.

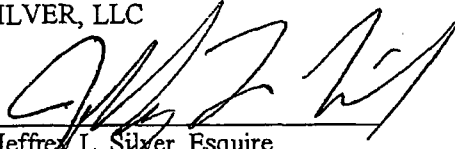
ANSWER: All such documents, to the extent same exist, not otherwise privileged and which are in the possession or control of the Plaintiff are attached hereto in electronic

format as Bates Numbers FSB/EI – 000001 through FSB/EI – 001316 or are available for review at mutually agreeable time and date at the offices of the Plaintiff in Bluffton, South Carolina.

24. All documents relating to any business transactions or dealings between you and Defendant Rosenberg and any entity in which he has a financial or ownership interest or affiliation, including but not limited to Ecological Investments, LLC, Ecological Education Center, Inc., Butterfly Kingdom Emporium, LLC, Efficient Energy Advisors, LLC, and AirPro Cooling & Heating, LLC, including any correspondence, emails, bank statements, loan applications, contracts, agreements, promissory notes, guaranties, and mortgages.

ANSWER: Plaintiff objects to this Requests for Production to the extent that it is unduly burdensome, seeks documents and things that are not relevant to the issues in this litigation; are not reasonably calculated to lead to discovery of relevant or admissible evidence; seeks information related to matters beyond the scope of the issues raised by this action; are otherwise beyond the scope of discovery provided for by the South Carolina Rules of Civil Procedure, or violates privacy laws. Notwithstanding such objections, any such documents relating to Defendant Rosenberg, to the extent same exist, will be produced upon the consent of Defendant Rosenberg or Court Order. All such documents relating to Ecological Investments, LLC, to the extent same exist, not otherwise privileged and which are in the possession or control of the Plaintiff are attached hereto in electronic format as Bates Numbers FSB/EI – 000001 through FSB/EI – 001316.

TYLER, CASSELL, JACKSON, PEACE
& SILVER, LLC

By: 

Jeffrey L. Silver, Esquire
1331 Elmwood Avenue, Suite 300
Post Office Box 11656
Columbia, South Carolina 29211
(803) 252-7689
ATTORNEYS FOR PLAINTIFF

12-20, 2013
Columbia, South Carolina

EXHIBIT C

Moore & Van Allen

January 7, 2014

Jeffrey L. Silver, Esquire
Tyler Cassell Jackson Peace & Silver, LLC
Post Office Box 11656
Columbia, SC 29211

Robert E. Sumner, IV
Attorney at Law
T 843 579 7018
F 843 579 8743
robertsumner@mvalaw.com

Moore & Van Allen PLLC

78 Wentworth St.
Charleston, SC 29401-1428

Mailing Address:
Post Office Box 22828
Charleston, SC 29413-2828

Re: First South Bank v. John E. Rosenberg and Philip J. Brust,
Case No.: 2013-CP-07-00610

Dear Jeff:

We are in receipt of Plaintiff's Answers to Defendant Brust's First Set of Interrogatories and First Requests for Production of Documents, dated December 20, 2013. I am writing to resolve some outstanding issues regarding these responses, which are addressed below:

- **RFP Nos. 4-10:** In response to these requests, you stated that responsive documents would be provided upon execution of a non-disclosure and confidentiality agreement. Please provide us with a proposed non-disclosure and confidentiality agreement so that we can obtain such documents.
- **RFP Nos. 14, 15, 24 and Interrogatory No. 16:** In response to these requests and interrogatory, you stated that certain documents relating to Defendant Rosenberg will be produced upon the consent of Defendant Rosenberg or Court Order. We are aware of no legal basis which would require Defendant Rosenberg's consent for the production of documents responsive to these requests. Accordingly, please supplement these responses with the requested information or state the legal basis which you believe requires his consent.
- **Interrogatory No. 13.** In response to this interrogatory, you refer to Plaintiff's Answers to Defendant Philip J. Brust's Request for Production of Documents. This interrogatory is not, however, limited to written communications. Please supplement this response and identify "all communications..." including those communications that were not written.
- **Interrogatory No. 14.** In response to this interrogatory, you refer to Plaintiff's Answers to Defendant Philip J. Brust's Request for Production of Documents. This interrogatory does not, however, seek any documents or written materials. Please supplement this response and "[e]xplain specifically each reason you made the Loan to Ecological Investments, LLC..."

CHARLESTON\558653v1

Charlotte, NC
Research Triangle Park, NC
Charleston, SC

Jeffrey L. Silver, Esquire
January 6, 2014
Page 2

- **Interrogatory No. 17.** In response to this interrogatory, you state that "Plaintiff has no reasonable likelihood of determining the prior existence or date of destruction of any such documents." In your responses to RFP Nos. 4-10, you represent that the requested materials "are constantly being updated and prior versions are destroyed." With respect to these requested documents, please supplement your response to Interrogatory No. 17 and provide the "date of destruction, a description of the subject matter of any destroyed documents and a description of the document retention/destruction policies maintained." And, in response to RFP No. 1, please produce all applicable document retention/destruction policies in place for the relevant time frame(s).
- **Attorney-Client Privileged Documents:** To the extent that any documents responsive to the Requests for Production are being withheld on the basis of attorney-client privilege, please produce a privilege log.

As you know, a hearing is scheduled on Plaintiff's Motion for Summary Judgment on February 10, 2014. Prior to the hearing, Defendant Brust needs to depose certain witnesses identified by Plaintiff, including Plaintiff's employees and officers. To proceed with these depositions, it is imperative that Plaintiff fully respond to Defendant Brust's discovery requests. Accordingly, we request that you provide the responsive documents, non-disclosure and confidentiality agreement, and privilege log immediately. If we do not resolve these matters in a timely matter, it will be necessary to file a motion to compel.

Thanks for your attention to these matters, and please let me know if you would like to discuss further.

Sincerely,

Moore & Van Allen PLLC

Robert E. Summer, IV

RES/hm

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 2013-CP-07-00610
	)	
FIRST SOUTH BANK,	)	
	)	
Plaintiff,	)	NOTICE OF MOTION AND MOTION
	)	TO AMEND ANSWER AND
vs.	)	CROSSCLAIMS AGAINST
	)	DEFENDANT JOHN E. ROSENBERG
JOHN E. ROSENBERG and PHILIP J.	)	
BRUST,	)	
	)	
Defendants.	)	
	)	

Defendant Philip J. Brust ("Defendant Brust"), by and through undersigned counsel, hereby moves this Court, pursuant to Rule 15(a) of the South Carolina Rules of Civil Procedure, for an Order granting Defendant Brust's Motion to Amend its Answer and Crossclaims Against Defendant John E. Rosenberg (the "Answer") to include counterclaims against Plaintiff First South Bank ("First South").

Defendant Brust seeks to amend the Answer, pursuant to SCRPC Rule 15(a), to assert counterclaims against First South. SCRPC Rule 15(a) provides that "leave shall be freely given when justice so requires and does not prejudice any other party."

The requested relief is necessary to revise and clarify defenses and assert counterclaims in light of the information discovered during the deposition of First South's fact witness and 30(b)(6) representative, Patrick Wright. The deposition of Mr. Wright was taken on Friday, May 23, 2014. Defendant Brust received the deposition transcript on Wednesday, May 28, 2014.

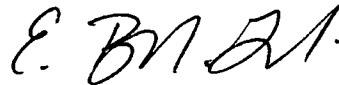
The allegations contained in the proposed Amended Answer, Crossclaims Against Defendant Rosenberg, and Counterclaims Against First South Bank (the "Amended Answer") arise out of the same disputed facts as the original Answer and do not raise novel legal issues, which are not related to the issues already contained in the pleadings. Defendant Brust originally

alleged affirmative defenses based on First South's failure to follow its own policies and procedures and negligence in the underwriting, approval, and administration of the loan in question. See Answer, p. 4, ¶20. Defendant Brust's proposed amendments will not cause prejudice to First South, as discovery is ongoing and no trial date has been set.

A copy of the proposed Amended Answer is attached hereto as Exhibit A. The only changes made were to add the counterclaims against First South. Otherwise, the Answer remains the same.

Counsel for Defendant Brust has made a good faith effort to confer with counsel for First South prior to filing this Motion, but was unable to obtain consent.

Respectfully submitted this 30th day of May 2014.



Robert Sumner (SC Bar No. 71728)
E. Brandon Gaskins (SC Bar No. 73274)
Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, South Carolina 29401
Telephone (843) 579-7018
Facsimile (843) 579-8743
robertsumner@mvalaw.com
brandongaskins@mvalaw.com
ATTORNEYS FOR DEFENDANT PHILIP
J. BRUST

EXHIBIT "A"

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 2013-CP-07-00610
	)	
FIRST SOUTH BANK,	)	
	)	
Plaintiff,	)	
	)	DEFENDANT PHILIP J. BRUST'S
vs.	)	AMENDED ANSWER TO
	)	PLAINTIFF'S COMPLAINT,
JOHN E. ROSENBERG and PHILIP J.	)	CROSSCLAIMS AGAINST
BRUST,	)	DEFENDANT JOHN E. ROSENBERG
	)	AND COUNTERCLAIMS AGAINST
Defendants.	)	FIRST SOUTH BANK
	)	

Defendant Philip J. Brust ("Defendant Brust") hereby Amends its answers to Plaintiff's Complaint and Crossclaims. Defendant Brust denies each allegation of the Complaint not specifically admitted, qualified, or explained below. In response to the numbered allegations in the Complaint, and using the same numbering that appears in the Complaint, Defendant Brust answers those allegations as follows:

1. Upon information and belief, Defendant Brust admits the allegations in Paragraph 1 of the Complaint.
2. Defendant Brust admits that he is a citizen and resident of the State of North Carolina. Defendant Brust denies the remaining allegations in Paragraph 2 of the Complaint.
3. Defendant Brust denies the allegations in Paragraph 3 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained therein.
4. Paragraph 4 of the Complaint contains only a statement regarding the terminology used in the Complaint, to which no response from Defendant Brust is required. To the extent a response is required, Defendant Brust denies the allegations in Paragraph 4.

5. Paragraph 5 of the Complaint asserts a reservation of rights to which no response from Defendant Brust is required. To the extent that a response is required, Defendant Brust craves reference to the mortgage referenced in Paragraph 5 of the Complaint and denies all allegations inconsistent therewith.

6. Defendant Brust admits that Ecological Invesements executed a promissory note to First South Bank on or around February 2, 2006, which was later renewed and/or modified. Defendant Brust craves reference to the documents referenced in Paragraph 6 of the Complaint and denies all allegations inconsistent therewith.

7. Defendant Brust denies that he executed and delivered to Plaintiff an unlimited guaranty. Upon information and belief, Defendant Brust admits that Defendant Rosenberg executed and delivered an unlimited guaranty and delivered it to Plaintiff. Defendant Brust denies the remaining allegations in Paragraph 7 of the Complaint.

8. Defendant Brust denies that he unconditionally guaranteed payment and performance, without limit, as to the Note and all future extensions of credit or other accommodations provided to Ecological Investments, LLC ("Ecological Investments"). In further response to Paragraph 8 of the Complaint, Defendant Brust craves reference to the Guaranty and denies all allegations inconsistent therewith.

9. Defendant Brust admits that the Note matured on November 30, 2012, and that Ecological Investments has not paid the outstanding balance due on the Note. Defendant Brust denies that he is in default according to the terms of the Note and Guaranty. In further response to Paragraph 9 of the Complaints, Defendant Brust craves reference to the Guaranty and Note and denies all allegations inconsistent therewith.

10. Defendant Brust denies that he is obligated to Plaintiff for its reasonable attorneys' fees plus court costs pursuant to the terms of the Note and Guaranty. In further response to Paragraph 10 of the Complaint, Defendant Brust craves reference to the Guaranty and Note and denies all allegations inconsistent therewith.

11. Defendant Brust denies that he owes any principal, interest, late fees, appraisal fees, or other amounts pursuant to the Note and Guaranty. In further response to Paragraph 11 of the Complaints, Defendant Brust craves reference to the Guaranty and Note and denies all allegations inconsistent therewith.

12. Defendant Brust denies that Plaintiff is entitled to a judgment or other relief against him, either jointly or severally, for any amount under the Note and Guaranty.

13. Defendant Brust denies any allegations in the Complaint not specifically admitted herein.

FOR A FIRST DEFENSE

14. Plaintiff's claim against Defendant Brust is barred pursuant to Rule 12(b)(6) because Plaintiff has failed to state a claim for which relief can be granted.

FOR A SECOND DEFENSE

15. To the extent that Plaintiff's claim arises from or relates to any action allegedly taken by Defendant Rosenberg on behalf of Defendant Brust with regards to the Guaranty pursuant to a power of attorney, Defendant Rosenberg did not have the actual or apparent authority to sign the Guaranty or any guaranty agreement on behalf of Defendant Brust and exceeded the scope of his agency under the power of attorney. Therefore, the Guaranty is invalid and unenforceable against Defendant Brust.

FOR A THIRD DEFENSE

16. Plaintiff's claim is barred to the extent that Plaintiff failed to mitigate its damages.

FOR A FOURTH DEFENSE

17. Plaintiff's claim is barred to by the doctrines of estoppel, waiver, laches, and/or unclean hands.

FOR A FIFTH DEFENSE

18. Any recovery by Plaintiff should be offset by all amounts collected by Plaintiff and by the amount of any collateral securing the alleged indebtedness of Ecological Investments.

FOR A SIXTH DEFENSE

19. Defendant Brust is entitled to a rescission of the power of attorney, Guaranty, and/or any guaranty agreement from which Plaintiff's claim against Defendant Brust arises.

FOR A SEVENTH DEFENSE

20. Plaintiff's claim is barred, in whole or in part, because Plaintiff's alleged losses are the result of Plaintiff's failure to follow its own policies and procedures and negligence in the underwriting, approval and administration of the loan in question.

FOR AN EIGHTH DEFENSE

21. Defendant Brust is entitled to a set-off or credit for any amount collected by Plaintiff from Defendant Rosenberg and/or Ecological Investments, as well as the value of the collateral securing the alleged indebtedness of Ecological Investments.

FOR A NINTH DEFENSE

22. Defendant Brust should be released from any obligations under the Guaranty or any obligations of Ecological Investments under the loan from Plaintiff because Plaintiff has materially modified or altered the original obligations of the loan for which the Guaranty was

sought. Furthermore, the modifications, renewal, and extensions of the loan by Plaintiff and Plaintiff's creation of second loan with Ecological Investments discharge any obligations of Defendant Brust under the Guaranty to the extent that such modifications, renewals, and extensions of the loan and the creation of the second loan will cause a loss to Defendant Brust.

FOR A TENTH DEFENSE

23. Defendant Brust should be released from any obligations under the Guaranty or any obligations of Ecological Investments under the loan from Plaintiff to the extent that Plaintiff breached its duty of good faith and fair dealing to Defendant Brust and to the extent that Plaintiff had knowledge or should have known that Defendant Brust was being deceived by Defendant Rosenberg regarding the loan and collateral or that Defendant Brust had been induced to enter into the Guaranty in ignorance of facts that materially increased his risks under the Guaranty.

**RESERVATION TO ADD ADDITIONAL
AFFIRMATIVE DEFENSES**

24. Defendant Brust reserves the right to assert all proper affirmative defenses, including those which may be disclosed or discovered at a later time.

**BY WAY OF CROSS-CLAIM AGAINST
DEFENDANT JOHN E. ROSENBERG**

25. Defendant Brust realleges each answer, allegation, and affirmative defense set forth above.

26. Ecological Investments is a limited liability company organized under the laws of the State of South Carolina. Defendants Brust and Rosenberg, among others, are members of Ecological Investments. The members of Ecological Investments executed and entered into the Operating Agreement of Ecological Investments, LLC ("Operating Agreement"), effective on or about November 4, 1998, to govern the operations and management of Ecological Investments.

27. Pursuant to the Operating Agreement, Rosenberg is designated as the sole managing member, and he has served continuously throughout the existence of Ecological Investments, and continues to serve, as its sole managing member.

28. As the managing member of Ecological Investments, Defendant Rosenberg owed Ecological Investments and its members, including Defendant Brust, the duty (a) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the members in its conduct; (b) to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law; and (c) to discharge his duties under the operating agreement and in good faith and with fair dealing.

29. Ecological Investments was organized, purportedly, for the purpose of developing a butterfly-themed tourist attraction, which was to include a butterfly conservatory and natural science education center and was to be located in the Hilton Head Island, South Carolina, area ("Butterfly Kingdom"). According to Defendant Rosenberg, initially he sought to locate Butterfly Kingdom on Hilton Head Island. However, despite his initial efforts, Defendant Rosenberg informed the members of Ecological Investments that the Hilton Head property did not work out and that Ecological Investments had lost an option on 10 acres at the 278 and 170 intersection, losing \$125,000 of Ecological Investments' funds which was, purportedly, nonrefundable.

30. In reporting to the members of Ecological Investments the loss of the option and \$125,000, Defendant Rosenberg informed the members that he had negotiated the acquisition of a new site in Jasper County, South Carolina, for the Butterfly Kingdom. In or around February 2001, Ecological Investments closed on the acquisition of 82.68 acres in Jasper County for \$330,720 (\$4,000 per acre) (the "Butterfly Kingdom Property").

31. Later, Defendant Rosenberg, on behalf of Ecological Investments, entered into a loan from Lighthouse in the principal sum of \$1,400,000. By July 2003, the loan had an outstanding balance of \$1,275,000, and Ecological Investments was in need of additional funding for expected costs for an access road and sewer and water for the Butterfly Kingdom Property, which Lighthouse was willing to loan to Ecological Investments. Consequently, the Lighthouse loan to Ecological Investments was modified in or around October 2003, increasing the principal amount of the loan to \$2,000,000. Lighthouse was subsequently merged with and into SunTrust Bank, and SunTrust Bank became the successor-in-interest to the Ecological Investments' loan.

32. In February 2006, with an outstanding balance of the SunTrust Bank loan (as successor-in-interest) at approximately \$2,200,000, Defendant Rosenberg, on behalf of Ecological Investments, as its managing member, obtained a two year, term, interest only (with a balloon at maturity), refinancing loan from Plaintiff in the principal amount of \$2,600,000 ("Plaintiff's First Loan"). Plaintiff's First Loan is the source of Plaintiff's claims in this Proceeding.

33. In connection with Plaintiff's First Loan, Defendant Rosenberg executed, and Plaintiff accepted, the unconditional, unlimited Guaranty attached to Plaintiff's Complaint as Exhibit "B" (the "Unconditional Unlimited Guaranty"). Upon information and belief, Defendant Rosenberg executed and delivered, and Plaintiff accepted, the Unconditional Unlimited Guaranty, solely based upon the Specific Limited Power of Attorney attached as Exhibit "C" (the "Specific Limited Power of Attorney") to the Affidavit of Patrick Wright In Opposition To Defendant Brust's Motion to Dismiss, previously filed by Plaintiff in this Proceeding.

34. The Specific Limited Power of Attorney was void of any authority for Defendant Rosenberg to execute and deliver, or Plaintiff to accept, the Unconditional Unlimited Guaranty. Defendant Rosenberg lacked the power or authority to execute and deliver the Unconditional Unlimited Guaranty, which serves as the sole basis for Plaintiff's claims against Defendant Brust in this Proceeding. Additionally, Plaintiff should not have accepted the Unconditional Unlimited Guaranty based on the Specific Limited Power of Attorney because Defendant Rosenberg lacked actual or apparent authority to execute or deliver the Unconditional Unlimited Guaranty.

35. Plaintiff's First Loan was to mature in February 2008; however, the loan was either renewed or the maturity date extended from time to time throughout 2008, upon information and belief, at Defendant Rosenberg's discretion without full disclosure to members of Ecological Investments, including Defendant Brust.

36. On or about October 15, 2008, Defendant Rosenberg, on behalf of Ecological Investments, as its managing member, obtained a separate, second loan from Plaintiff, in the principal amount of \$275,000 ("Plaintiff's Second Loan"). In connection with Plaintiff's Second Loan, Defendant Rosenberg, on behalf of Ecological Investments, granted an additional Mortgage against the Butterfly Kingdom Property. At that time, Defendant Rosenberg, on behalf of Ecological Investments, also executed a two year renewal of Plaintiff's First Loan and also modified Plaintiff's First Loan to provide for the payment of principal and interest based upon a 30-year amortization for the term of the loan.

37. Defendant Brust's capital contributions to Ecological Investments total \$731,400, in addition to over \$230,000 principal loan amounts to Ecological Investments. Presently, Defendant Brust's capital contributions constitute over 25% of the total capital contributions of \$2,701,357.47 made to Ecological Investments, and the total principal and interest owed to

Defendant Brust, in excess of \$541,000 equates to approximately 41% of the nearly \$1,300,000 owed to the members of Ecological Investments for their respective loans to the company.

38. Despite the substantial investment in Ecological Investments made by Defendant Brust and its other members, the loans incurred by Ecological Investments, and considerable amounts of additional funding received by the Ecological Investments, Defendant Rosenberg failed to develop Butterfly Kingdom and the Butterfly Kingdom Property remains undeveloped.

39. Upon information and belief, Defendant Rosenberg has intentionally misappropriated the capital invested in Ecological Investments by Defendant Brust and other members and has failed to allocate such capital to Ecological Investments' legitimate business expenses, including its debts and obligations to Plaintiff.

40. Defendant Rosenberg has failed to properly account to Defendant Brust and the other members of Ecological Investment regarding Ecological Investments' business, finances, condition, property, funds, and expenses, including those related to its debts and obligations to Plaintiff.

41. Defendant Rosenberg has been grossly negligent and/or reckless in his management of Ecological Investments, including those related to its debts and obligations to Plaintiff.

42. As a result of Defendant Rosenberg's intentional misappropriation of Ecological Investments' funds and grossly negligent and/or reckless management of Ecological Investments, Defendant Brust has suffered considerable financial injury.

FOR A FIRST CROSSCLAIM AGAINST DEFENDANT ROSENBERG
(Breach of Fiduciary Duty)

43. Defendant Brust realleges each answer, allegation, and affirmative defense set forth above.

44. As Ecological Investments' managing member, Defendant Rosenberg owed Defendant Brust and other members of Ecological Investments a fiduciary duty to exercise good faith and maintain the highest integrity in his dealings with them.

45. To the extent that Defendant Rosenberg acted as Defendant Brust's attorney-in-fact under the power of attorney, Defendant Rosenberg also owed Defendant Brust a fiduciary duty to exercise good faith and maintain the highest integrity in his dealings with Defendant Brust and to not exceed the authority entrusted in him by Defendant Brust.

46. Defendant Rosenberg breached his fiduciary duty to Defendant Brust by executing the Guaranty without authorization and exceeding the scope of his agency and authorization under the power of attorney.

47. Defendant Rosenberg further breached his fiduciary duty to Defendant Brust by intentionally misappropriating funds from Ecological Investments; failing to properly account for Ecological Investments' business, finances, condition, property, funds, and expenses; and managing Ecological Investments in a grossly negligent and/or reckless manner.

48. As a result of Defendant Rosenberg's breach of fiduciary duties to Defendant Brust, Defendant Brust has suffered considerable financial injury.

FOR A SECOND CROSSCLAIM AGAINST DEFENDANT ROSENBERG
(Violation of South Carolina Uniform Limited Liability Act)

49. Defendant Brust realleges each answer, allegation, and affirmative defense set forth above.

50. Under S.C. Code Ann. § 33-44-409, Defendant Rosenberg, as managing member of Ecological Investments, owed Defendant Brust the duty (a) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the members in its conduct; (b) to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law; and (c) to discharge his duties under the operating agreement and in good faith and with fair dealing.

51. Defendant Brust violated S.C. Code Ann. § 33-44-409 by intentionally misappropriating funds from Ecological Investments; failing to properly account for Ecological Investments' business, finances, condition, property, funds, and expenses; and managing Ecological Investments in a grossly negligent and/or reckless manner.

52. As a result of Defendant Rosenberg's violation of S.C. Code Ann. § 33-44-409, Defendant Brust has suffered considerable financial injury.

53. Pursuant to S.C. Code Ann. § 33-44-410, Defendant Brust may maintain an action against Defendant Rosenberg, as managing member of Ecological Investments, for legal and equitable relief arising from Defendant Rosenberg's violation of S.C. Code Ann. § 33-44-409.

FOR A THIRD CROSSCLAIM AGAINST DEFENDANT ROSENBERG
(Equitable Indemnity/Contribution)

54. Defendant Brust realleges each answer, allegation, and affirmative defense set forth above.

55. A special relationship existed between Defendants Brust and Rosenberg because of the fiduciary duties owed to Defendant Brust by Defendant Rosenberg arising from his capacity as managing member of Ecological Investments.

56. To the extent that Ecological Investments is found liable for defaulting under the terms of the loan from Plaintiff, Defendant Brust was not responsible for Ecological

Investments' default. Rather, Defendant Rosenberg, as Ecological Investments' managing member, would be the responsible party because of his grossly negligent and/or reckless mismanagement of Ecological Investments.

57. To the extent that Defendant Brust is held liable for performance of and payment of Ecological Investments' obligations under the loan from Plaintiff, then Defendant Brust will suffer damages as a result of Defendant Rosenberg's grossly negligent and/or reckless management of Ecological Investments.

58. Defendant Brust is entitled to equitable indemnification and/or contribution from Defendant Rosenberg for any liability attributed to Defendant Brust under Ecological Investments' loan from Plaintiff and the Guaranty.

FOR A FOURTH CROSSCLAIM AGAINST DEFENDANT ROSENBERG
(Accounting)

59. Defendant Brust realleges each answer, allegation, and affirmative defense set forth above.

60. Defendant Brust, as a member of Ecological Investments, has a right to be informed about the business and affairs of Ecological Investments.

61. Defendant Rosenberg has failed to provide Defendant Brust and other members of Ecological Investments with an accounting of Ecological Investments' business, finances, condition, property, funds, and expenses and to otherwise keep them informed regarding Ecological Investments' business, finances, condition, property, funds, and expenses.

62. Upon information and belief, Defendant Rosenberg's failure to properly account for Ecological Investments' business, finances, condition, property, funds, and expenses is to conceal his intentional misappropriation of funds and grossly negligent and/or reckless management of Ecological Investments.

63. Under S.C. Code Ann. § 33-44-410(a), Defendant Brust, as a member of Ecological Investments, may bring an action against Defendant Rosenberg, as the managing member of Ecological Investments, to provide an accounting of Ecological Investments' business, finances, condition, property, funds, and expenses.

64. Defendant Brust is entitled to an accounting of Ecological Investments' business, finances, condition, property, funds, and expenses from Defendant Rosenberg.

**BY WAY OF COUNTERCLAIM AGAINST
PLAINTIFF FIRST SOUTH BANK**

65. Defendant Brust realleges each answer, allegation, and affirmative defense set forth above.

66. The Plaintiff First South Bank ("First South") is a financial institution chartered and existing under the laws of the State of South Carolina.

67. Defendant Brust is a citizen and resident of the State of North Carolina and a member of Ecological Investments, LLC ("Ecological").

68. Ecological obtained a loan, known as Loan Number 8033303, in the amount of \$2.6 Million from First South Bank and executed a promissory note to First South on February 2, 2006. Pursuant to the promissory note, the term of the loan was two years and the maturity date of the loan was February 2, 2008. The loan accrued interest at the rate of seven percent (7%) and payment was structured with monthly interest-only payments followed by a final principal payment on the date of maturity.

69. The purpose of Loan Number 8033303 was to take out an existing loan on the approximately 82.68 acres in Jasper County, SC, TMS # 042-05-042, also known as the Butterfly Kingdom PUD at the end of Red Dam Road ("Property") in the amount of \$2.2 Million, to pay

property taxes on the Property, pay the required interest payments for the interest-only loan, and to provide additional cash in hand to Ecological.

70. In conjunction with the loan, Rosenberg signed a personal guaranty on his own behalf and a separate guaranty on behalf of Defendant Brust.

71. On January 14, 2008, First South and Ecological entered into a Commercial Debt Modification Agreement for Loan Number 8033303 (the "January 14, 2008 Modification"), which extended the loan maturity date to April 30, 2008. All other terms of Loan Number 8033303 remained the same.

72. First South did not obtain a new guaranty from Rosenberg or Defendant Brust in connection with the January 14, 2008 Modification, and Defendant Brust did not sign any documents related to the January 14, 2008 Modification.

73. On May 27, 2008, First South and Ecological entered into a new promissory note for Loan Number 8033303 (the "May 27, 2008 Note"), which again extended the loan maturity date to August 2, 2008. The payment structure required two monthly interest-only payments followed by a final payment of \$2,603,538.89 on or before August 2, 2008. All other terms remained the same.

74. First South did not obtain a new guaranty from Rosenberg or Defendant Brust in connection with the May 27, 2008 Note, and Defendant Brust did not sign any documents related to the May 27, 2008 Note.

75. On August 26, 2008, First South and Ecological entered into a new promissory note for Loan Number 8033303 (the "August 26, 2008 Note"). The August 26, 2008 Note extended the loan maturity date to September 26, 2008, on which date a final payment in the amount of \$2,615,672.22 was due. All other terms remained the same.

76. First South did not obtain a new guaranty from Rosenberg or Defendant Brust in connection with the August 26, 2008 Note, and Defendant Brust did not sign any documents related to the August 26, 2008 Note.

77. On October 15, 2008, First South and Ecological entered into a new promissory note for Loan Number 8033303 (the "October 15, 2008 Note"). Under the October 15, 2008 Note, the new term of the loan was set for two (2) years for the date of execution. The loan was assigned new interest rates as follows: a fixed interest rate of 6% for one day and a variable interest rate equal to 1.00 percent above prime thereafter. Payment was restructured such that principal and interest payments were required monthly followed by a final principal payment in the amount of \$2,395,605.78 by the maturity date of October 14, 2010.

78. First South did not obtain a new guaranty from Rosenberg or Defendant Brust in connection with the October 15, 2008 Note, and Defendant Brust did not sign any documents related to the October 15, 2008 Note.

79. On October 15, 2008, Ecological obtained a new loan from First South in the amount of \$275,000.00 (the "\$275,000.00 Loan") and executed a promissory note for the loan.

80. First South did not obtain a new guaranty from Rosenberg or Defendant Brust in connection with the \$275,000.00 Loan, and Defendant Brust did not sign any documents related to the \$275,000.00 Loan.

81. In January of 2009, Ecological obtained approximately \$500,000.00 in connection with an easement on the Property. Upon information and belief, these proceeds were used to satisfy the \$275,000.00 Loan.

82. Defendant Brust was not made aware of the payment made in January of 2009 to satisfy the \$275,000.00 Loan.

83. On January 21, 2010, First South and Ecological entered into a Commercial Debt Modification Agreement for Loan Number 8033303 (the "January 21, 2010 Modification"). Under the January 21, 2010 Modification, payment was restructured to require interest-only payments on a monthly basis with a final principal payment of \$1,831,022.53 due by the maturity date of October 14, 2012. All other terms remained the same.

84. First South did not obtain a new guaranty from Rosenberg or Defendant Brust in connection with the January 21, 2010 Modification, and Defendant Brust did not sign any documents related to the January 21, 2010 Modification.

85. On November 30, 2010, First South and Ecological entered into a new promissory note for Loan Number 8033303 (the "November 30, 2010 Note"). Under the November 30, 2010 Note, the new term of the loan was two (2) years from the date of execution. The loan was assigned a new interest rate of 5.25%, and payment was restructured such that principal and interest payments were required monthly, followed by a final principal payment in the amount of \$1,615,269.50 by the maturity date of November 30, 2012.

86. First South did not obtain a new guaranty from Rosenberg or Defendant Brust in connection with the November 30, 2010 Note, and Defendant Brust did not sign any documents related to the November 30, 2010 Note.

87. Ecological Investments did not make the balloon payment due by November 30, 2012. Thereafter, First South engaged counsel, and on March 8, 2013, sued Defendant Brust and Rosenberg for collection under the Guaranties signed by Rosenberg on February 2, 2006.

FOR A FIRST COUNTERCLAIM AGAINST PLAINTIFF FIRST SOUTH BANK
(Negligence)

88. Defendant Brust realleges each answer, allegation, and affirmative defense set forth above.

89. First South owed a duty to Defendant Brust to act reasonably and to comply with standard banking practices in the underwriting, closing, and administration of the loans in question.

90. First South breached that duty by failing to adhere to its own policies and procedures, and failing to comply with the standard banking practices for the underwriting, closing and administration of the loans in question. Specifically, First South breached its duty to Defendant Brust in the following ways:

- a. Failing to properly investigate the value of the Property;
- b. Failing to properly investigate the business plan for the Butterfly Kingdom;
- c. Failing to properly communicate with the borrower and alleged guarantors before, during, and after the closing;
- d. Failing to obtain adequate financial records from the borrower and alleged guarantors;
- e. Improperly agreeing to finance the interest payments on the loans in question and taxes owed on the Property;
- f. Improperly making the loan based on inadequate and speculative sources of repayment;
- g. Failing to follow the terms of the Commitment Letter issued by the bank on January 9, 2006;
- h. Failing to obtain an attorney opinion letter or otherwise confirm the proper execution of loan documents from Borrower's counsel;
- i. Failing to properly confirm the signature(s) of Defendant Brust;
- j. Failing to attend the loan closing;
- k. Failing to communicate with Defendant Brust regarding the terms of the Guaranty or provide a copy of the Guaranty to Defendant Brust;
- l. Failing to communicate with Defendant Brust or anyone else regarding the Power of Attorney;
- m. Exceeding the authority granted in the Power of Attorney;

- n. Failing to consult with bank counsel regarding the Power of Attorney;
- o. Improperly modifying, renewing, applying payments, and changing the terms of the loans in question without communicating with Defendant Brust;
- p. Failing to retain proper documentation of the loans and failing to comply with the bank's document retention policy;
- q. Failing to follow bank policies and procedures related to commercial loan underwriting, closing, and administration;
- r. Failing to protect Defendant Brust's private customer banking information and sharing his private customer banking information with third parties without the express authorization from Defendant Brust
- s. Pursuing a frivolous collection claim against Defendant Brust despite its failures to obtain and maintain adequate documentation of the loans in question.

91. As a result of First South's numerous breaches, Defendant Brust has suffered considerable financial injury including but not limited to the overpayment of principal and interest to First South, incurring substantial costs to maintain and market the Property, suffering damage to his reputation and mental anguish, incurring substantial attorney's fees and in other such ways as shall be proved at trial.

ALTERNATIVE CAUSE OF ACTION
FOR A SECOND COUNTERCLAIM AGAINST PLAINTIFF FIRST SOUTH BANK
(Breach of Contract/Breach of Covenant of Good Faith and Fair Dealing)

92. Defendant Brust realleges each answer, allegation, and affirmative defense set forth above.

93. First South alleges in the Complaint that Defendant Brust entered into a valid and binding contractual relationship with First South by and through the execution of the Guaranty, which was executed by Rosenberg.

94. In the event that the Court determines that the Defendant Brust and First South entered into a valid and binding contract and/or that the relationship between Defendant Brust

and First South is contractual in nature, such a contract is subject to the covenant of good faith and fair dealing.

95. First South has breach any contractual obligations that exist pursuant to the Guaranty or otherwise by failing to adhere to the specific contractual obligations set forth in the Guaranty and for breaching the covenant of good faith and fair dealing that is inherent in all contracts in South Carolina.

96. Specifically, First South breached its contractual obligations and its duty of good faith and fair dealing by engaging in the conduct set forth in Paragraphs 65 through 91 herein and in such other ways as shall be proven at trial.

97. As a result of First South's breaches, Defendant Brust has suffered considerable financial injury including but not limited to the overpayment of principal and interest to Plaintiff, incurring substantial costs to maintain and market the Property, suffering damage to his reputation and mental anguish, incurring substantial attorney's fees and in other such ways as shall be proved at trial.

WHEREFORE, Defendant Brust prays the Court to:

1. Dismiss Plaintiff's claims against Defendant Brust;
2. Enter judgment in favor of Defendant Brust on Plaintiff's claims;
3. Enter judgment in favor of Defendant Brust on his crossclaims against Defendant Rosenberg;
4. Award Defendant Brust all actual, compensable, and punitive damages in an amount to be determined at trial on his crossclaims against Defendant Rosenberg;
5. Demand Defendant Rosenberg to provide an accounting of the business of Ecological Investments' business, finances, condition, property, funds, and expenses;

6. Order Defendant Rosenberg to indemnify Defendant Brust against any damages awarded to Plaintiff from Defendant Brust;
7. Enter judgment in favor of Defendant Brust on his counterclaims against First South Bank;
8. Award Defendant Brust all actual, compensable, and punitive damages in an amount to be determined at trial on his counterclaims against First South Bank;
9. Award Defendant Brust all costs and expenses, including attorneys' fees, in defending and prosecuting this action; and
10. Grant such other and further relief as may seem just and proper to the Court.

MOORE & VAN ALLEN PLLC

By:

Robert E. Sumner, IV
E. Brandon Gaskins
78 Wentworth Street
P.O. Box 22828
Charleston, SC 29413-2828
Telephone (843) 579-7000
Facsimile (843) 579-7099
brandongaskins@mvalaw.com
robertsumner@mvalaw.com

ATTORNEYS FOR DEFENDANT
PHILIP J. BRUST

CHARLESTON, SC

_____, 2014

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

FIRST SOUTH BANK,

Plaintiff,

vs.

JOHN E. ROSENBERG and PHILIP J.
BRUST,

Defendants.

) IN THE COURT OF COMMON PLEAS
2014 JUL -9 PM 3:36
) CIVIL ACTION NO.: 2013-CP-07-00610

JEROMANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

)
)
) **DEFENDANT PHILIP J. BRUST'S**
) **MEMORANDUM IN RESPONSE TO**
) **PLAINTIFF'S SUPPLEMENTAL**
) **MEMORANDUM IN SUPPORT OF**
) **MOTION FOR SUMMARY JUDGMENT**
)
)

I. INTRODUCTION

Defendant Philip J. Brust ("Brust") submits this Memorandum in Response to Plaintiff's Supplemental Memorandum in Support of Motion for Summary Judgment to respond to new arguments that Plaintiff failed to raise when its Motion for Summary Judgment was originally heard by the Court on June 3, 2014.¹ Plaintiff's Supplemental Memorandum in Support of Motion for Summary Judgment ("Supplemental Memo") consists largely of conclusory arguments that ignore crucial facts that constitute the scintilla of evidence needed to defeat Plaintiff's Motion for Summary Judgment, as explained in more detail below.

¹ Pursuant to Rule 10(c) of the South Carolina Rules of Civil Procedure, Brust adopts by reference all facts, arguments, definitions, and statements previously submitted to the Court in Defendant Brust's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, which was filed on June 3, 2014.

II. ARGUMENT

A. Apparent or Implied Authority

1. *Plaintiff is not entitled to summary judgment under the theory of apparent authority because Plaintiff admittedly did not rely on the POA in making the Loan to Ecological Investments as it was not aware of the POA until after the Loan closed.*

Plaintiff attempts to establish liability in this case against Brust under the Guaranty based on the theory that Rosenberg possessed apparent or implied authority to execute the Guaranty on Brust's behalf under the POA. Notwithstanding Plaintiff's failure to include allegations of apparent authority in its Complaint or in its Motion for Summary Judgment, Plaintiff cannot prevail on this argument because there are genuine issues of fact as to whether Plaintiff can prove the necessary elements of apparent authority.

To establish that Rosenberg had apparent authority to execute the Guaranty on Brust's behalf, Plaintiff must prove the following three elements: (1) Brust consciously or impliedly represented Rosenberg to be his agent; (2) Plaintiff relied upon the representation; and (3) Plaintiff changed its position to its detriment. *See Charleston Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 643, 598 S.E.2d 717 (Ct. App. 2004) (stating the elements of apparent authority). Plaintiff attempts to prove the second element, reliance, through conclusory statements in the affidavit of Patrick Wright, the bank employee responsible for originating the Loan, in which he claims that "[i]n connection with the execution of the Guaranty, Plaintiff relied on the authority given Rosenberg under the Power of Attorney and the representations contained therein." (Pl.'s Mem. Supp. Mot. Summ. J. – Ex. H, Wright Aff. ¶ 10.)

Despite Wright's claim of reliance, his later deposition testimony reveals that any alleged reliance was impossible because Plaintiff did not know of the POA until after the Loan closed

and the Guaranty had been executed. Wright testified that neither he nor any other employee of Plaintiff attended the closing. (Wright Dep. 81:18-24, 96:12-24.) He was unaware that Brust did not attend the closing, and no one informed him of this fact prior to or at the time of the Loan closing. Thus, he did not know that Rosenberg would be executing the Guaranty on Brust's behalf pursuant to the POA. (Wright Dep. 95:24-96:11.) In fact, Wright did not learn of the POA until after the Loan closed, and there is no contemporaneous copy of the POA maintained in Plaintiff's Loan file. (Wright Dep. 103:9-105:25.) Therefore, Plaintiff could not have relied and did not rely on the POA in making the Loan to Ecological. *See Esslinger's, Inc. v. Murray Bros.*, 195 S.C. 340, 344, 11 S.E.2d 381, 382 (1940) (holding that plaintiff could not establish apparent authority where its own statements proved that it did not rely on alleged apparent authority).

2. *Plaintiff cannot assert apparent authority as a basis for recovery when it failed to exercise reasonable diligence to ascertain the scope of Rosenberg's authority under the POA.*

Even if Plaintiff relied on the POA in accepting the Guaranty, it still cannot prevail under a theory of apparent authority because it did not exercise reasonable diligence to ascertain the scope of Rosenberg's authority under the POA, as explained in Brust's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. Wright admits that Plaintiff did nothing to ascertain the scope of Rosenberg's authority under the POA when he received it after the Loan closed (Wright Dep. 99:24-100:18), and Plaintiff does not dispute this fact. Instead, Plaintiff attempts to excuse its failure to exercise reasonable diligence and ascertain the scope of Rosenberg's authority under the POA by arguing that it did not know or have reason to know that Rosenberg was acting outside the scope of his authority under the POA when he executed the Guaranty on Brust's behalf.

Plaintiff's argument fails because it misstates the law by implying that it only had a duty to ascertain the scope of Rosenberg's authority under the POA if it had reason to know that his acts thereunder exceeded his authority. In making this argument, Plaintiff ignores the principles of law and authority cited in Brust's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, specifically 2A C.J.S. *Agency* §§ 150-151, which holds that it is an unconditional, affirmative duty for a third person to inform himself of the scope of the agency by directing inquiry to the principal. Plaintiff did not comply with this duty, and it cannot assert apparent authority against Brust as a result.

Furthermore, Plaintiff mistates the law by selectively interpreting *Anheuser-Busch, Inc. v. Grovier-Starr Produce Co.*, 128 F.2d 146, 152 (10th Cir. 1942), in which the court held that "[i]f the third party knows, or has good reason for believing, that the acts exceed the agent's powers, or if such reasonable inquiry as he is under duty to make, would result in a discovery of the true state of the powers, and he fails to fulfill that duty, he cannot assert an apparent authority effective against the principal." Plaintiff focuses on the language in *Anheuser-Busch* which states that a party cannot assert apparent authority against a principle if the "party knows, or has good reason for believing, that the acts exceed the agent's powers" but ignores the relevant part which provides apparent authority cannot be asserted "if such reasonable inquiry as he is under duty to make, would result in a discovery of the true state of the powers, and he fails to fulfill that duty." This is an important omission because Plaintiff had a duty to make a reasonable inquiry into the scope of Rosenberg's authority under the POA by contacting Brust. If it would have done so, any issues regarding such authority would have been resolved. Plaintiff, however, failed to take this simple step, and consequently, it cannot rely on apparent authority to bind Brust under the POA.

Assuming *arguendo* that Plaintiff's interpretation is correct and that it had no duty to ascertain the scope of Rosenberg's authority unless it had reason to believe his acts exceeded his authority under the POA, there is a scintilla – if not ample – evidence demonstrating that Plaintiff did have reason to know that Rosenberg did not have authority to execute the unlimited, continuing Guaranty on Brust's behalf under the POA. This evidence includes:

- The POA failed to expressly include a guaranty as one of the documents that Rosenberg was authorized to execute.
- Under the terms of the Commitment Letter, Plaintiff knew or should have known that Rosenberg did not have authority to execute a continuing, unlimited guaranty, which Wright admitted during his deposition. (Wright Dep. 85:13-93:15.)

These facts presented Plaintiff with a reason to doubt Rosenberg's authority to execute an unlimited, continuing Guaranty, and consequently they create genuine issues of fact about whether Plaintiff can establish apparent authority against Brust based on the POA. Therefore, Plaintiff's attempt to obtain summary judgment under this theory fails.

B. Ratification

In its Supplement Memo, Plaintiff advances the theory of ratification for the first time as an alternative means of establishing Brust's liability under the Guaranty. The party asserting ratification must establish the following three elements: (1) acceptance by the principal of the benefits of the agent's acts; (2) the principal's full knowledge of the facts; and (3) circumstances of an affirmative election demonstrating the principal's intent to accept the unauthorized arrangements. *Stiltner v. USAA Cas. Ins. Co.*, 395 S.C. 183, 191, 717 S.E.2d 74, 78 (Ct. App. 2011). However, absent an admission by the principle that he ratified the agent's unauthorized act, "[w]hether or not there has been a ratification of an unauthorized act by acceptance or retention of benefits thereof is usually a question of fact for the jury and not one of law for the court." *Id.* "[M]ere silence or failure of a principal to repudiate the unauthorized act of an agent

does not necessarily constitute a ratification, unless silence or acquiescence in question cannot be explained on any other theory than that of ratification.” *Id.*

As explained below, Plaintiff is not entitled to summary judgment under the theory of ratification because there are material issues of fact as to the final two elements that Plaintiff must prove.

1. *Plaintiff is not entitled to summary judgment under its theory of ratification because there are genuine issues of fact regarding Brust's knowledge of Rosenberg's act of executing the Guaranty as demonstrated by Plaintiff's admission that it is not aware of whether Brust ever reviewed the Guaranty.*

In this case, there are material issues of fact whether Brust had full knowledge regarding Rosenberg's execution of the continuing, unlimited Guaranty pursuant to the POA. In arguing that Brust had full knowledge of Rosenberg's execution of the Guaranty, Plaintiff disregards an abundance of evidence indicating that Brust had little – if any – knowledge about the terms and conditions of the Guaranty. Plaintiff admits that it failed to discuss the Guaranty with Brust or disclose its contents to him prior to its execution. After Rosenberg signed the Guaranty, Plaintiff failed to verify with Brust that Rosenberg was authorized to sign it on his behalf despite the fact that it clearly exceeded the requirements that Plaintiff had previously communicated to him in the Commitment Letter. In fact, Plaintiff admits that it cannot even confirm that Brust has ever seen the Guaranty, as evidenced by its Rule 30(b)(6) deposition testimony provided by Wright:

- Q. You were just reading from the guaranty in paragraph two. You don't know if Mr. Brust ever read that language, do you?
- A. I don't know.
- Q. You never presented it to him?
- A. No.
- Q. So you don't have any idea whether Mr. Brust has ever seen this document or not?

A. No.

Q. So he wouldn't know what to revoke even if he wanted to, would he?

A. I don't know.

(Wright Dep. 183:7-20.)

Thus, Plaintiff's own admissions show that it cannot prove that Brust had any knowledge about the terms and conditions of the Guaranty -- much less full knowledge. Plaintiff's inability to establish that Brust was aware of the Guaranty precludes it from establishing that he was fully aware of its contents. Therefore, Plaintiff cannot prove the second element requiring that the principal have full knowledge of the agent's actions.

Plaintiff ignores these facts and instead relies on only three pieces of evidence in its attempt to establish that Brust had full knowledge of Rosenberg's acts: (1) Brust's execution of the Commitment Letter; (2) Brust's provision of personal financial statements to Plaintiff; and (3) a newsletter in which Rosenberg stated that he and Brust had personally guaranteed the loan in question. (Pl.'s Supplemental Mem. Supp. Mot. Summ. J. p. 7-8.) These examples do not establish that Brust had full knowledge of Rosenberg's acts, but, at best, create genuine issues of fact about the extent of Brust's knowledge regarding such acts.

Brust's execution of the Commitment Letter prior to the Loan closing does not establish that he was fully aware that Rosenberg later signed a continuing, unlimited Guaranty. The Commitment Letter suggests that Plaintiff informed Brust that it considered a guaranty to be a condition of the loan. However, there were other purported "conditions" of the Loan contained in the Commitment Letter that Plaintiff failed to require. As such, Plaintiff's failure to require strict compliance with the terms of the Commitment Letter creates an issue of fact about whether

Brust had full knowledge that Plaintiff required a guaranty or that Rosenberg would be required to execute one on his behalf.

More importantly, the Commitment Letter's terms only required that Brust execute a noncontinuing, limited guaranty; however, Plaintiff exceeded the requirements of the Commitment Letter by preparing the continuing, unlimited Guaranty and presenting it to Rosenberg to sign on behalf of Brust without explaining its continuing and unlimited nature to him. Plaintiff admits that the Guaranty should not have been continuing or unlimited, and it is undisputed that Plaintiff never informed Brust of the terms of the Guaranty. Thus, there are genuine issues of fact about whether Brust had full knowledge that Rosenberg had executed the continuing, unlimited Guaranty on his behalf rather than a noncontinuing, limited guaranty.

Similarly, Brust's provision of personal financial statements during the course of Ecological Investments' relationship with Plaintiff and a newsletter written by Rosenberg does not establish that Brust was fully aware of the continuing, unlimited scope of the Guaranty signed by Rosenberg. In fact, there is no evidence demonstrating that Brust was aware that Rosenberg had attempted to make him personally responsible for every single debt that Plaintiff issued to Ecological Investments. Furthermore, Plaintiff offers no proof that Brust ever read the newsletter on which they rely, much less that he agreed with Rosenberg's statement that he had personally guaranteed the loan.

In sum, there are genuine issues of fact about the extent of Brust's knowledge of Rosenberg's execution of the continuing, unlimited Guaranty. Plaintiff admits that it does not know whether Brust ever reviewed the Guaranty, and the evidence it relies on to argue that Brust did have full knowledge fails to prove that Brust actually knew the full extent of the terms and

conditions of the Guaranty executed on his behalf by Rosenberg. Accordingly, summary judgment is inappropriate under the theory of ratification.

2. *Plaintiff is not entitled to summary judgment under its theory of ratification because there is no evidence suggesting that Brust made an affirmative election of Rosenberg's acts, and Plaintiff improperly relies on Brust's alleged failure to repudiate the Guaranty to establish this element.*

Plaintiff also cannot establish the third element of ratification for the purposes of this motion because there are genuine issues of fact about whether Brust made an affirmative election of Rosenberg's execution of the continuing, unlimited Guaranty. In fact, Plaintiff does not even attempt to establish an affirmative act of Brust to prove this element but instead attempts to prove it by Brust's alleged inaction by making the following argument:

As to the third element, the circumstances show affirmative election by Brust indicating his intentions to adopt Rosenberg's acts. This can be seen in the fact that during the six (6) year repayment period of the Loan, he made no repudiation, written or otherwise, of the Brust Guaranty. He also made no complaint, written or otherwise, regarding Rosenberg's execution of the same. In other words, he did not disaffirm Rosenberg's actions within a reasonable time.

(Pl.'s Supplemental Mem. Supp. Mot. Summ. J. p. 8.) Thus, Plaintiff tries to show an affirmative election by Brust's silence and failure to repudiate the Guaranty. However, as explained above, "mere silence or failure of a principal to repudiate the unauthorized act of an agent does not necessarily constitute a ratification, unless silence or acquiescence in question cannot be explained on any other theory than that of ratification." *Stiltner*, 395 S.C. at 191, 717 S.E.2d at 78.

Furthermore, Plaintiff ignores evidence indicating that Brust did refute obligations he allegedly had as a personal guarantor. For example, Plaintiff cites the newsletter in which Rosenberg cites his and Brust's roles as guarantors for the contention that Brust was aware of

Rosenberg's execution of the Guaranty, but they fail to realize that the statement in the newsletter that Rosenberg and Brust "will not continue to service the debt of the entire Company by ourselves" suggests that Brust did not consider himself to be bound by the Guaranty. As this evidence must be construed in the light most favorable to Brust under this motion, it shows that there are genuine issues of fact about whether Brust made an affirmative election of Rosenberg's execution of the continuing, unlimited Guaranty.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment should be denied.

Respectfully submitted,



Robert E. Sumner, IV, SC Bar #71728

E. Brandon Gaskins, SC Bar #73274

Moore & Van Allen, PLLC

78 Wentworth Street

Post Office Box 22828

Charleston, SC 29413-2828

Telephone: (843) 579-7000

Facsimile: (843) 579-7099

robertsumner@mvalaw.com

brandongaskins@mvalaw.com

ATTORNEYS FOR DEFENDANT PHILIP J. BRUST

CHARLESTON, SC

July 7, 2014

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO.: 2013-CP-07-00617

100

)

1

000

CERTIFICATE OF SERVICE

07-00610
JUL - 9 PM 3:36
CLERK OF COURT
COUNTY, S.C.
ROSENBLAU
VICE

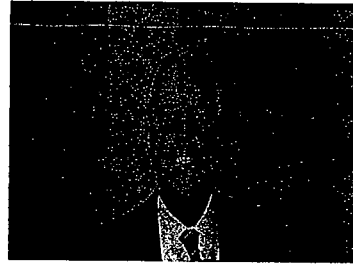
Heather Morin
Heather Morin

July 7, 2014

Deposition Excerpts

In The Matter Of:
First South Bank v.
Rosenberg, et al.

Patrick Wright
May 23, 2014



Janice D. Hayward, RMR
Independent Court Reporter
843.478.6756
JanHayward1@gmail.com

Original File 052314PWright.txt
Min-U-Script® with Word Index

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
2 COUNTY OF BEAUFORT) CASE NO. 2013-CP-07-00610

3
4
5 FIRST SOUTH BANK,) 30(b)(6)
6 Plaintiff,) DEPOSITION OF
7 -versus-) PATRICK WRIGHT
8 JOHN E. ROSENBERG AND PHILIP J.)
9 BRUST,)
Defendants.)

11
12
13
14 DATE: Friday, May 23, 2014

15 TIME: 10:05 a.m.

16 LOCATION: Finger & Fraser, PA
17 35 Hospital Center Commons
18 Suite 200
Hilton Head Island, South Carolina
29926

19 REPORTED BY: Janice D. Hayward, RMR
20 NCRA Registered Merit Reporter
21 101 Dorchester Court
Charleston, South Carolina 29418
22 843.478.6756
JanHayward1@gmail.com
23
24
25

Janice D. Hayward, RMR
843.478.6756

RECORD 0180

1 Any Court, party, or person who has purchased
2 a transcript, may, without paying a further fee
3 to the reporter, reproduce a copy or portion
4 thereof as an exhibit pursuant to Court order
or rule or for internal use, but shall NOT
otherwise provide or sell a copy or copies to
any other party or person.

5

6

APPEARANCES

7

For Plaintiff

Jeffrey L. Silver
Tyler Cassell Jackson Peace &
Silver, LLC
1331 Elmwood Avenue, Suite 300
Post Office Box 11656
Columbia, South Carolina 29211

8

9

10

For Defendant

E. Brandon Gaskins
Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, South Carolina 29401

11

12

13

Also Present

Frank R. Callison

14

15

16

17

18

19

20

21

22

23

24

25

Janice D. Hayward, RMR
843.478.6756

1 Q Did you ever do anything to confirm that
2 his personal financial statement was accurate?

3 A I typically ask for a validation of their
4 liquidity when we get a personal financial
5 statement.

6 Q I understand you may typically do that.
7 Did you do that to verify --

8 A I don't recall. I don't recall with this
9 statement. I had other statements from him he had
10 provided.

11 Q All right. So that was January 31st,
12 2006, right?

13 A Yes.

14 Q Which was the expiration date of the
15 commitment letter, right?

16 A I believe that -- I'd have to look back
17 and see.

18 Q And the loan wasn't closed until
19 February 2nd, 2006, right?

20 A I believe that's right.

21 Q Were you at the closing?

22 A I did not attend the closing.

23 Q Why not?

24 A I don't know.

25 Q In 2006 did you typically go to commercial

Janice D. Hayward, RMR
843.478.6756

1 A No.

2 Q You didn't think you had an obligation to
3 do it?

4 A No.

5 Q Does the bank or did the bank in 2006 have
6 a policy that required you to discuss the guaranty
7 requirements with the guarantors?

8 A I'm not aware of a policy that we had to
9 have that conversation.

10 Q So you don't know if Mr. Brust ever saw
11 the guaranty prior to the closing, do you?

12 A I don't know.

13 (Marked for identification was Defendants'
14 Exhibit 8.)

15 BY MR. GASKINS:

16 Q You've been handed what's been marked as
17 Exhibit 8, and that is the guaranty agreement
18 purportedly between First South Bank and Mr. Brust
19 which is the subject of this lawsuit, correct?

20 A Yes.

21 Q And this is the bank's form that it was
22 using at the time for guaranty agreements?

23 A Yes.

24 Q Did it ever use any others?

25 A This was our standard form. Occasionally

Janice D. Hayward, RMR
843.478.6756

1 attorneys would prepare documents and it had a
2 different guaranty. But this was the form that we
3 used most often.

4 Q There are a lot of blanks in here which I
5 presume are to be filled out by either the bank or
6 the closing attorney, is that right?

7 A Yes.

8 Q Okay. Which one, the bank or the
9 attorney?

10 A The bank would have prepared this
11 document.

12 Q Would you have done that?

13 A My assistant would have done that, my loan
14 assistant.

15 Q And would you have reviewed the document
16 before it went out?

17 A Yes.

18 Q And do you remember reviewing this one?

19 A I don't particularly -- I don't remember
20 the situation, but I assume I reviewed it.

21 Q After you reviewed it what would you have
22 done with this guaranty?

23 A It would have been part of the loan
24 documents that we would have delivered or gotten to
25 the attorney for the loan closing.

Janice D. Hayward, RMR
843.478.6756

1 Q So you would have delivered this and other
2 closing documents to Mr. Finger, is that right?

3 A Yes.

4 Q All right. Let's start at the top. And
5 you see A and B with checkmarks. Explain these two
6 different options.

7 A One appears to be a specific guaranty as
8 it relates to an individual loan. The other is
9 guarantying payment and performance of each and
10 every debt.

11 Q Of the borrower?

12 A Of the borrower.

13 Q In this case the borrower is Ecological
14 Investments, right?

15 A That's correct.

16 Q And Mr. Brust would be the guarantor under
17 this agreement, right?

18 A Yes.

19 Q Who determines which box is checked?

20 A The assistant actually checks the boxes
21 based on the information received from the credit
22 underwriting package that she gets.

23 Q So that -- explain that to me. The credit
24 underwriting package determines which box is
25 checked?

Janice D. Hayward, RMR
843.478.6756

1 A The information in that document or those
2 documents would instruct her as to what type of
3 guaranty to --

4 Q Okay. What type of information is that?

5 A Well, this is part of it. I'm referring
6 to Exhibit 7 and other documents that would come
7 from that. She would use that document as her basis
8 for underwriting.

9 Q All right. What information in there
10 would she use to determine which box to check? And
11 when you're referring to Exhibit 7, what information
12 in Exhibit 7 would indicate to her which box to
13 check?

14 MR. SILVER: You mean Exhibit 8?

15 BY MR. GASKINS:

16 Q I mean what information in Exhibit 7 would
17 she rely on to determine which box to check, A or B,
18 in Exhibit 8? Does that make sense?

19 A Yeah. I'm not sure Exhibit 7 -- this is
20 just one of the documents that would have
21 accompanied that. There would also have been
22 another loan, a setup form that she would have used
23 as well in determining how to complete the guarantor
24 document.

25 Q Well, understanding you don't have that

Janice D. Hayward, RMR
843.478.6756

1 document in front of you, generally what information
2 in there would indicate to her which box to check?

3 A Unless we would have specifically
4 identified something outside of payment and
5 performance of each and every debt, that is
6 traditionally how she would have, or typically how
7 she would have completed that.

8 Q Explain that to me again. I'm not sure I
9 understand.

10 A The information from the loan setup form
11 as well as the other data that I just referred to
12 would have given her an indication of how to
13 complete this particular form.

14 This is a form that is in our
15 loan document software, and she would be accountable
16 for preparing as it relates to the individual loans
17 if, in fact, we had guarantors which in this case we
18 did.

19 Q I understand that. And I'm asking you
20 about what specific information from those sources
21 would she look at to determine whether to check box
22 A or box B?

23 A I'm not sure.

24 Q Why are you not sure?

25 A I'm not sure.

Janice D. Hayward, RMR
843.478.6756

1 Q I mean, this is what you did for seven
2 years at First South. This isn't the only guaranty
3 you've had, right?

4 A No.

5 Q Okay. Well, tell me generally how the
6 bank decides whether to check box A or box B?

7 A Typically we check box B because it
8 guaranties to the lender payments and performance of
9 each and every debt responsible by that borrower.

10 Q So is it fair to say that's the bank's
11 default position, to check box B, unless it has some
12 other indication to check box A?

13 A Yes.

14 Q And who was your assistant who would have
15 filled this out?

16 A Shanna Ethington.

17 Q Does she still work for First South?

18 A As far as I know, yes.

19 Q In the Bluffton branch?

20 A As far as I know, yes.

21 Q So with regards to this guaranty, do you
22 think box B was checked because that was the bank's
23 default position?

24 A I would assume so.

25 Q Okay. Do you have anything in the file,

Janice D. Hayward, RMR
843.478.6756

1 in the commitment letter where Mr. Brust agreed to
2 guaranty the payment and performance of each and
3 every debt, liability, and obligation of every type
4 and description which borrower may now or at any
5 time hereafter owe to the lender?

6 A I don't know if it speaks to that or not.
7 It says payment of the loan.

8 Q The loan is a specific single debt,
9 correct?

10 A Yes.

11 Q Okay. So shouldn't the bank have checked
12 box A here?

13 A It could have been checked in this case.

14 Q Box A could have been checked?

15 A I believe so.

16 Q It should have been checked, shouldn't it?

17 A It could have been checked.

18 Q Based on the commitment letter that says
19 only the loan is going to be guarantied, shouldn't
20 box A have been checked?

21 A Yes.

22 Q All right. Let's go to number four.

23 Well, let me back up. As far as you know, neither
24 you nor Miss Ethington checked with Mr. Brust to see
25 which box to check?

Janice D. Hayward, RMR
843.478.6756

1 A No.

2 Q All right. Let's go to number four. And
3 there's a blank, and it says unlimited. Do you see
4 that?

5 A Yes.

6 Q Okay. What does that indicate?

7 A He's to be liable for all indebtedness
8 without any limitation to amount.

9 Q And did Miss Ethington insert unlimited?

10 A Yes.

11 Q And why would she have inserted unlimited?

12 A 'Cause we typically do unlimited
13 guaranties.

14 Q So that would have been, again, the bank's
15 default position?

16 A Yes.

17 Q Was there anything in the file or the
18 commitment letter where Mr. Brust agreed to
19 guaranty -- to provide an unlimited guaranty?

20 A It doesn't say an unlimited guaranty on
21 the commitment letter.

22 Q But it does say a principal amount of up
23 to \$2.6 million?

24 A Yes.

25 Q So 2.6 should have been entered in this

Janice D. Hayward, RMR
843.478.6756

1 blank in number four, isn't that right?

2 A Not necessarily, because had there been
3 issues with collection, that amount could have been
4 more than 2.6, and it speaks to that.

5 Q Exactly. So you wouldn't need an
6 unlimited because you would have the principal
7 amount of 2.6 plus attorneys' fees, collection costs
8 and accrued interest?

9 A That's correct.

10 Q So that amount should have been 2.6,
11 correct?

12 A It could have been 2.6.

13 Q But it should have been 2.6, do you agree
14 with that?

15 A Yes.

16 Q Okay. Let's go down to the bottom where
17 it says, this guaranty is, and it has boxes for
18 unsecured, secured by mortgage or security agreement
19 dated blank, and another box for secured by blank.
20 And this is checked, unsecured, right?

21 A Yes.

22 Q And Miss Ethington would have inserted
23 that check?

24 A Yes.

25 Q This was not an unsecured loan, was it?

Janice D. Hayward, RMR
843.478.6756

1 Q And that appears to be, maybe a typewriter
2 perhaps?

3 A Perhaps.

4 Q So you believe that would have been done
5 by either Mr. Rosenberg or Mr. Finger or somebody in
6 Mr. Finger's office?

7 A I believe it was done by somebody in
8 Mr. Finger's office.

9 Q So when this guaranty went to the bank it
10 more than likely only had Philip J. Brust in that
11 signature block, is that right?

12 A No. I think Mr. Rosenberg would have
13 signed it at the closing.

14 Q No. I understand that. But I'm saying
15 when it left, when this form left the bank and went
16 to Mr. Finger, don't you think that it only had
17 Philip J. Brust in the signature block?

18 A Yes. I believe that to be true.

19 Q And not the, by John E. Rosenberg?

20 A Yes.

21 Q And based on that, isn't it fair to say
22 that the bank didn't know Mr. Rosenberg would be
23 signing on behalf of Mr. Brust, is that right?

24 A We were not informed that a power of
25 attorney would be used for the closing.

Janice D. Hayward, RMR
843.478.6756

1 Q When did you find out?

2 A When we received the documents back from
3 the closing attorney.

4 Q When would that have occurred? I believe
5 the instruction letter said within 30 days of the
6 closing.

7 A It would have been sooner than that, I
8 think, for documents like this. The recording
9 documents would have taken longer but typically we'd
10 have gotten these back in a few days, few business
11 days.

12 Q Well, at the -- where did the closing
13 occur?

14 A I believe it occurred here.

15 Q Mr. Finger's office?

16 A Yes.

17 Q Was anybody from the bank present at the
18 closing?

19 A No.

20 Q Who was present at the closing, to your
21 knowledge?

22 A To my knowledge, Mr. Finger,
23 Mr. Rosenberg. I'm not sure who else was here for
24 that.

25 Q Did Mr. Rosenberg ever call you and tell

Janice D. Hayward, RMR
843.478.6756

1 regards to using powers of attorney to sign
2 guaranties?

3 A It's not uncommon to have powers of
4 attorney used for closings, certainly not down here,
5 certainly not in this market. Well, based on my
6 experience in this market, they are very common.

7 Q So the bank had a practice of accepting
8 powers of attorney for commercial loans?

9 A It wasn't uncommon to have one done, to
10 receive a package back with a power of attorney.

11 Q Even for large loans over 2.5 million?

12 A I didn't do a whole lot over 2.5 million,
13 but it wasn't uncommon.

14 Q So this was a big loan for you?

15 A Yeah, it was a large loan for the bank,
16 for me.

17 Q And it was largely dependent on the
18 strength of the guarantors, right?

19 A Yes.

20 Q You didn't feel the need to take special
21 precaution to make sure all the i's were dotted and
22 t's were crossed to make sure you had a valid
23 guaranty since this loan was so guarantor dependent?

24 A I reviewed the power of attorney and was
25 comfortable with that document as it relates to the

Janice D. Hayward, RMR
843.478.6756

1 signature on the guaranty.

2 Q Who was this power of attorney presented
3 to you by?

4 A It came back with the loan package.

5 Q And that was sent by somebody in
6 Mr. Finger's office?

7 A I assume so.

8 Q Did you call Mr. Finger and ask did he
9 review this power of attorney to make sure it was
10 valid?

11 A No.

12 Q And you didn't require an opinion letter
13 to see if it was valid --

14 A No.

15 Q -- or enforceable? Is that a no?

16 A No.

17 Q Did you call Mr. Brust?

18 A No.

19 Q Why not?

20 A I didn't see the need to call him.

21 Q You didn't see the need to call him to
22 make sure that somebody hadn't guarantied a
23 \$2.6 million loan on his behalf?

24 A I had a commitment letter and a
25 conversation where he understood he was guarantying

Janice D. Hayward, RMR
843.478.6756

1 Mr. Rosenberg as the attorney in fact?

2 A Yes.

3 Q Give me one second. But you didn't call
4 Mr. Finger to see if he drafted it, did you?

5 A I did not.

6 (Marked for identification was Defendants'
7 Exhibit 10.)

8 BY MR. GASKINS:

9 Q Before we go to that document, let's turn
10 back to the previous Exhibit 9 which is the power of
11 attorney. This isn't the original power of
12 attorney, is it, used for this loan? This is a copy
13 of the original?

14 A I believe it's a copy of the original.

15 Q And what I mean is this wasn't pulled from
16 the bank's file, was it?

17 A I'm not sure.

18 Q Okay. Let's look at the bottom of it.
19 And you see where there's a web address down there?

20 A Um-hum, yes.

21 Q It says 1-23, 2013?

22 A Yes.

23 Q So this would not have been the power of
24 attorney that was kept in the file by the bank, is
25 that right?

Janice D. Hayward, RMR
843.478.6756

1 A I'm not sure.

2 Q Okay. Do you see where it says 1-23,
3 2013?

4 A I see that.

5 Q Doesn't that indicate to you that that's
6 the date that this power of attorney was printed out
7 from the Jasper County website?

8 A Yes.

9 Q And, Mr. Wright, you provided a copy of
10 the power of attorney attached to your affidavit
11 that you submitted awhile back in one of the
12 previous motions. Do you recall that?

13 A Yes.

14 Q Do you remember where you got that power
15 of attorney from? You got that from the Jasper
16 County register of deeds, is that right?

17 A This copy appears to have been printed off
18 there, from the Jasper County website.

19 Q Okay. So that wouldn't be, that wouldn't
20 have been in the bank's file as of --

21 A I don't know.

22 Q -- short --

23 A I don't know the answer to that.

24 Q I mean, it couldn't have been if it was
25 printed out on January 23rd, 2013.

1 A This is a copy that was printed, looks
2 like it was printed from the website, so.

3 Q I understand. But what I'm asking is
4 that's not -- that didn't come from the bank's file,
5 original file of this loan, did it?

6 A It appears to be a copy from the Jasper
7 County website.

8 Q Okay. And Mr. Wright, you may not know
9 this, but I'll submit to you that the bank has
10 provided us with the original, the documents in the
11 file, and there is not a power of attorney in the
12 bank's file. Can you explain that?

13 MR. SILVER: Can I ask for some
14 clarification? Do you mean an original
15 power of attorney or just any?

16 BY MR. GASKINS:

17 Q An original or a copy.

18 A No, I don't know why it wasn't provided.

19 Q But we discussed earlier that the bank had
20 a policy and a requirement to maintain those
21 documents, correct?

22 A Yes.

23 Q So if it was provided to you, it should be
24 in that file, correct?

25 A Yes.

Janice D. Hayward, RMR
843.478.6756

1 receive any rejections, revocations from Mr. Brust
2 of his obligations under this personal guaranty?

3 A No.

4 Q Okay. I have no further questions.

5 EXAMINATION

6 BY MR. GASKINS:

7 Q Won't be long. You were just reading from
8 the guaranty in paragraph two. You don't know if
9 Mr. Brust ever read that language, do you?

10 A I don't know.

11 Q You never presented it to him?

12 A No.

13 Q You never read it to him?

14 A No.

15 Q So you don't have any idea whether
16 Mr. Brust has ever seen this document or not?

17 A No.

18 Q So he wouldn't know what to revoke even if
19 he wanted to, would he?

20 A I don't know.

21 MR. GASKINS: That's all I have.

22 MR. SILVER: Okay. You can have a
23 big sigh of relief now.

24 (The deposition was concluded at
25 2:59 p.m.)

Janice D. Hayward, RMR
843.478.6756

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
FIRST SOUTH BANK, BEAUFORT COUNTY, S.C.
CLERK OF COURT

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2013-CP-07-00610

Plaintiff,
vs.
JOHN E. ROSENBERG and PHILIP J.
BRUST,
Defendants.

**DEFENDANT PHILIP J. BRUST'S
SUPPLEMENTAL MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

Defendant Philip J. Brust ("Brust") submits this Second Supplemental Memorandum in
in opposition to Plaintiff's Motion for Summary Judgment

**I. Defendant Rosenberg's admission that he lacked the authority under the Power of
Attorney to sign the Guaranty creates a question of material fact.**

Under Rule 8(d) of the South Carolina Rules of Civil Procedure, "[a]verments in a
pleading to which a responsive pleading is required, other than those as to the amount of damage,
are admitted when not denied in the responsive pleading. Averments in a pleading to which no
responsive pleading is required or permitted shall be taken as denied or avoided." Rule 8(d),
SCRCP (emphasis added). Furthermore, the Note to Rule 8 states unequivocally, "Failure to
deny constitutes admission." *Id.*

Courts applying Rule 8(d) will consider allegations admitted if they are not denied. For
example, in *Motors Ins. Corp. v. Willing & B&W*, 313 S.C. 279, 281, 437 S.E.2d 555, 556-57
(Ct. App. 1993), the South Carolina Court of Appeals ruled that "[a]llegations made in a
complaint that are not denied in the answer are deemed admitted." *Motors Ins. Corp. v. Willing
& B&W*, 313 S.C. 279, 281, 437 SE 2d 555, 556-57 (Ct. App. 1993) (citing SCRCP 8(d) and
Fidelity Trust & Mortgage Co. v. Davis, 158 S.C. 400, 155 S.E. 622 (1930)). Similarly, in

Wilson v. Chandler, which was cited by *Motors Ins.*, the North Carolina Supreme Court explained, “[i]t is elementary that issues arise upon the pleadings, and if a material fact alleged in the complaint is not denied by the answer, such allegation, for the purpose of the action, is taken as true and no issue arises therefrom... The fact alleged stands admitted, and the effect of the admission is as available to the plaintiff as if found by the jury.” 235 N.C. 373, 70 S.E.2d 179, 181 (1952).

In this case, Defendant Philip J. Brust filed the Answer to Complaint and Crossclaims Against Defendant John E. Rosenberg on September 9, 2013. The allegations that constitute the crossclaims against Rosenberg begin with Paragraph 25 and continue through Paragraph 64.

Paragraph 33 states as follows:

In connection with Plaintiff’s First Loan, Defendant Rosenberg executed, and Plaintiff accepted, the unconditional, unlimited Guaranty attached to Plaintiff’s Complaint as Exhibit “B” (the “Unconditional Unlimited Guaranty”). Upon information and belief, **Defendant Rosenberg executed and delivered, and Plaintiff accepted, the Unconditional Unlimited Guaranty, solely based upon the Specific Limited Power of Attorney...**

(Def. Brust’s Ans. & Crossclaims, ¶33) (emphasis added).

Paragraph 34 states as follows:

The Specific Limited Power of Attorney was void of any authority for Defendant Rosenberg to execute and deliver, or Plaintiff to accept, the Unconditional Unlimited Guaranty. **Defendant Rosenberg lacked the power or authority to execute and deliver the Unconditional Unlimited Guaranty**, which serves as the sole basis for Plaintiff’s claims against Defendant Brust in this Proceeding. Additionally, **Plaintiff should not have accepted the Unconditional Unlimited Guaranty based on the Specific Limited Power of Attorney** because Defendant Rosenberg lacked actual or apparent authority to execute or deliver the Unconditional Unlimited Guaranty.

(Def. Brust’s Ans. & Crossclaims, ¶34) (emphasis added). On October 23, 2013, Rosenberg filed the Answer to Crossclaim of Philip J. Brust. Rosenberg failed to admit or deny the allegations contained in Paragraphs 25 through 42.

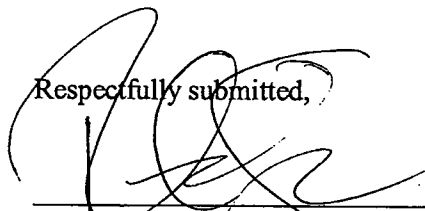
As a result of his failure to deny these allegations, Rosenberg, the agent under the Special Limited Power of Attorney, admitted that he lacked the authority to execute and deliver the Unconditional Unlimited Guaranty on behalf of Brust. Furthermore, Rosenberg admitted that Plaintiff should not have accepted the Unconditional Unlimited Guaranty based on the Special Limited Power of Attorney. Under applicable principles of agency law, an agent's judicial admissions regarding the scope of his agency are relevant, admissible, and operative as to the determination of the existence and scope of agency. *See* Restatement (2d) of Agency § 284, cmt. e ("*Judicial admissions*. A statement made by an agent may not only have operative effect, but it may be of conclusive importance."). Rosenberg's admissions create a question of material fact regarding the scope of the powers granted under the Special Limited Power of Attorney.

Considering Rosenberg's admissions along with the various factual issues raised in Defendant Brust's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Defendant Brust's Memorandum in Responses to Plaintiff's Supplemental Memorandum, there is a "scintilla" of evidence in support of Brust's position that Rosenberg lacked the authority under the Special Limited Power of Attorney to sign the Unconditional Unlimited Guaranty. On this basis, summary judgment would be improper and Plaintiff's Motion should be denied.

CONCLUSION

For the foregoing reasons, Defendant requests that the Court deny Plaintiff's Motion for Summary Judgment.

Respectfully submitted,



Robert E. Sumner, IV, SC Bar #71728

E. Brandon Gaskins, SC Bar #73274

Moore & Van Allen, PLLC

78 Wentworth Street

Post Office Box 22828

Charleston, SC 29413-2828

Telephone: (843) 579-7000

Facsimile: (843) 579-7099

robertsumner@mvalaw.com

brandongaskins@mvalaw.com

ATTORNEYS FOR DEFENDANT PHILIP J. BRUST

CHARLESTON, SC
July 25, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
FIRST SOUTH BANK,)
)
Plaintiff,)
)
vs.)
)
JOHN E. ROSENBERG and PHILIP J.)
BRUST,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2013-CP-07-00610

DEFENDANT PHILIP J. BRUST'S
MOTION FOR RECONSIDERATION

2014 AUG 18 PM 2:48
CLERK OF COURT
S.C.

Defendant Philip J. Brust ("Brust") submits this Motion for Reconsideration of the Court's "Order Granting Plaintiff's Motion for Summary Judgment as to Defendant Phillip J. Brust" of July 31, 2014 (the "Order") pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure ("SCRPC"). As explained more fully below, the Court should reconsider its Order and should deny Plaintiff's Motion for Summary Judgment.

STANDARD OF REVIEW

Under Rule 59, SCRPC, a motion for reconsideration serves the traditional role of asking the trial judge to reconsider any previously raised and decided issue encompassed in the judgment. See James F. Flanagan, *South Carolina Civil Procedure* (2d Ed. 1996), at 474 (citing *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992)). As aptly stated by the South Carolina Supreme Court in *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004):

First, it is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court 'alter or amend the judgment,' but also as a vehicle to seek 'reconsideration' of issues and arguments. A motion under Rule 59(e) long has been viewed as 'motion for reconsideration' despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. There is nothing inherently unfair in allowing a party one final chance not only to call the court's

attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.

Id. at 21-22, 602 S.E.2d at 778-79 (citations omitted); *accord Home Medical Systems v. S.C. Dept. of Revenue*, 382 S.C. 556, 677 S.E.2d 582 (2009).

South Carolina courts have long “emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.” *Elam*, 361 S.C. at 23, 602 S.E. 2d at 779 (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”)). “A party must file such a motion for reconsideration when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” *Id.* at 24, 602 S.E. 2d at 780.

ARGUMENT

I. The trial court should reconsider its ruling on the following issues, findings of fact, and conclusions of law.

A. Damages

The Court’s Order incorrectly determines the amount of Brust’s liability to Plaintiff by failing to consider material evidence and Brust’s affirmative defenses, cross-claims, and pending counterclaims and by relying on inconsistent information presented by Plaintiff. Even if the Court does not reconsider its judgment on the issue of liability, the evidence regarding the amount of damages owed to Plaintiff is in dispute. Therefore, the Court should reconsider its Order, vacate any findings related to the amount of damages, and allow those issues and related evidence to be presented to a jury.

Under South Carolina law, the “amount of damages is a question for the jury.” *Perry v. Green*, 313 S.C. 250, 255, 437 S.E.2d 150, 153 (Ct. App. 1993). Even if the evidence is undisputed and will support summary judgment or a directed verdict, if the evidence “is of such a nature that men might reasonably differ as to the amount of damages, the question of amount must be submitted to the jury.” *Gadsden v. Home Fertilizer & Chemical Co.*, 89 S.C. 483, 489, 72 S.E. 15, 17 (1911).

There are disputed issues of fact about the amount of damages Brust owes under the Guaranty. Specifically, there is disputed evidence whether Brust’s liability should be reduced by the payments made by Ecological that Plaintiff wrongfully allocated to pay down a separate loan of \$275,000 that Plaintiff made to Ecological on October 15, 2008 (the “\$275,000 Loan”). According to Plaintiff’s Rule 30(b)(6) designee and originating loan officer, Plaintiff never informed Brust that it was making the separate \$275,000 Loan and cannot confirm that Brust was ever made aware of it. (Wright Dep. 118:25-120:1.)

In January 2009, Ecological sold an easement on the Property for approximately \$500,000. Plaintiff used the proceeds from the easement sale to satisfy the \$275,000.00 Loan and admits that it did not inform Brust of the payment made in January of 2009 to satisfy the \$275,000.00 Loan or how the proceeds were to be allocated among the different loans. (Wright Dep. 138:20-142:25). In fact, Plaintiff cannot confirm that Brust was aware of the allocation at all. (Wright Dep. 142:21-25.)

Based on these facts, Brust has asserted affirmative defenses, cross-claims against Rosenberg, and pending counterclaims against Plaintiff alleging that Plaintiff wrongfully allocated, with Rosenberg’s approval, the proceeds from the easement sale to satisfy the \$275,000 Loan instead of the original Loan in violation of its own policies and duty of good faith

owed to Brust. (See Am. Answer and Cross-claims ¶¶ 17-18, 20-23, 36, 57; Proposed Am. Answer, Cross-claims, and Counterclaims ¶¶ 79-82, 89-97.) The allocation of the easement sale proceeds between the Loan and the \$275,000 Loan is important because the evidence indicates that Plaintiff wrongfully had Rosenberg sign a continuing, unlimited Guaranty on Brust's behalf, as admitted by Wright, and that Brust's liability, to the extent it exists at all, should have been limited to the Loan. Thus, Brust had an interest in having the easement sale proceeds allocated first to the Loan rather than the \$275,000 Loan.

Brust contends that Plaintiff had a duty to inform him of the allocation and obtain his approval of the allocation prior to satisfying the \$275,000 Loan instead of allocating that portion of the proceeds to the Loan and that Plaintiff breached that duty by failing to so inform him and obtain his approval. Furthermore, Brust contends that Plaintiff's origination of the \$275,000 Loan was negligent and made in bad faith because it admittedly violated its own policies by originating the \$275,000 Loan and failing to obtain a new guaranty from Brust. To support these defenses and counterclaims, Brust has submitted the testimony of Wright who admits that Plaintiff wrongfully required Rosenberg, acting on Brust's behalf, to execute a continuing, unlimited Guaranty instead of a limited guaranty that only applied to the Loan. (Wright Dep. 85:13-93:15.) In addition, Brust has submitted the testimony of Wright and Plaintiff's policies indicating that Plaintiff should not have originated the loans under its policies and that it failed to obtain a new guaranty from Brust. (Wright Dep. 153:15-155:13, 156:4-158:25, 163:15-164:6, 165:17-167:9, and Ex. 2.) Finally, Brust submitted the affidavit of its banking practices expert, William C. Barksdale, who testified that Plaintiff "failed to comply with the standard banking practices" by "[i]mproperly . . . applying payments, and changing the terms of the loan in question without communicating with Brust." (Barksdale Aff. ¶ 5(o).)

Putting aside Brust's affirmative defenses, cross-claims, and counterclaims, there exists a question of fact regarding Plaintiff's calculation of damages. Plaintiff has failed to present any evidence in support of its calculation of damages in the amount of \$1,746,260.73. A simple calculation of the interest payment owed from February 22, 2013 through May 23, 2014, allowing an interest rate of 5% and accrued interest in the amount of \$26,986.17, does not equal \$133,683.67. In the absence of any reliable evidence in support of the damages calculation, it would be in error for the Court to award damages in this case at the summary judgment stage.

The evidence described above shows that there is at least a scintilla of evidence to support Brust's affirmative defenses and pending counterclaims against Plaintiff which would reduce the amount of damages determined by the Court in its Order. Based on this evidence, a reasonable person could conclude that Plaintiff wrongfully required Brust to sign a continuing, unlimited Guaranty and then wrongfully allocated the easement sale proceeds to the Loan rather than the \$275,000 Loan, which increased his liability. As such, Brust's liability should be offset by the amount of the proceeds allocated to the \$275,000 Loan and the increased interest accrued on the Loan as a result of Plaintiff's failure to allocate the proceeds to the Loan. Therefore, summary judgment on the amount of damages is premature, and these issues and related evidence must be submitted to the jury.

B. Findings of Fact

In its Order, the Court makes several findings of fact, discussed in detail below, despite the existence of disputed evidence. Accordingly, the Court must have necessarily weighed the disputed evidence and construed such evidence against Brust, the non-moving party. This was in error as the Court misapplied the standard for summary judgment under Rule 56, SCRCP.

“In ruling on motions for summary judgment, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party.” *Johnston v. Bowen*, 313 S.C. 61, 437 S.E.2d 45 (1993). “Summary judgment is appropriate only when the pleadings, depositions, interrogatory answers, admissions, and affidavits, [if any] show that there is no genuine issue of material fact.” *Shuler v. Tuomey Regional Medical Center, Inc.*, 313 S.C. 225, 227, 437 S.E.2d 128, 130 (Ct. App. 1993). To withstand a motion for summary judgment “in cases applying the preponderance of evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence.” *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). “At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact.” *Lanier Constr. Co. v. Bailey & Yobs, Inc.*, 384 S.C. 275, 681 S.E.2d 909, 911 (Ct. App. 2009).

As discussed below, the Court erroneously weighs the evidence and construes such evidence against Brust on the following findings of fact:

1. Finding of Fact No. 8

In Finding of Fact Number 8, the Court finds that the “counterclaims in the Amended Answer contain the same material allegations as those set forth as defenses in Brust’s Answer” without analyzing the “material allegations” to which the Court refers. This finding of fact cannot be reconciled with any reading of the affirmative defenses and the proposed counterclaims. While there may be some overlap in the allegations and evidence supporting the affirmative defenses and counterclaims, the counterclaims are based on evidence discovered during the Rule 30(b)(6) deposition of Plaintiff, which disclosed several facts which were not previously known, and on the expert opinion offered by Brust’s banking practices expert, William C. Barksdale. The facts supporting the counterclaim allegations are significantly more

detailed than those asserted in support of the affirmative defenses and extend into issues which are not covered by the affirmative defenses. More problematically, the Court made a finding of fact on the proposed counterclaims while the Motion to Amend the Answer to add the counterclaims was pending and prior to any hearing or argument on them. Therefore, Finding of Fact Number 8 is in error, and it and all other findings of fact and conclusions of law based thereon should be stricken from the Order.

2. Finding of Fact No. 20

In Finding of Fact Number 20, the Court finds that "Plaintiff accepted the Guaranty based on the representations in the Power of Attorney and relied on same." This finding of fact directly contradicts the testimony of Wright, who testified that:

- Neither he nor any other employee of Plaintiff attended the closing of the Loan on February 2, 2006.
- Plaintiff was not aware that Brust would not be attending the closing or that Rosenberg would be executing the Guaranty on Brust's behalf pursuant to a power of attorney. (Wright Dep. 81:18-24, 96:12-24.)
- Plaintiff did not discover that Rosenberg signed Brust's Guaranty pursuant to the Power of Attorney until after the closing documents had been returned to Plaintiff after the closing. (Wright Dep. 95:24-96:11.)

This undisputed testimony reveals that it would have been impossible for Plaintiff to accept and rely on the Guaranty based on representations in the Power of Attorney because Plaintiff did not know it existed until after the Loan was closed. Therefore, Finding of Fact Number 20 is in error, and it and all other findings of fact and conclusions of law based thereon should be stricken from the Order.

3. Finding of Fact No. 25

In Finding of Fact Number 25, the Court finds that from "2005 through 2010, Brust voluntarily provided Plaintiff, to support his personal obligations, with his personal financial

information in compliance with Plaintiff's request and the terms of the Commitment Letter." In this finding, the Court considers the commitment letter and concludes that Brust provided his financial statements to support his personal obligations (under the Guaranty). The Court's conclusion ignores the testimony that no one from Plaintiff's bank ever spoke with Brust about the Guaranty. Furthermore, if one construes the evidence in the light most favorable to Brust, it could be that the submitted records to Plaintiff for other reasons, including obtaining a personal loan or attempting to refinance the borrower's loan. As such, this finding is in error.

4. Finding of Fact No. 25¹ [sic]

In Finding of Fact Number 25, the Court finds that "[d]uring the Loan's repayment, Brust did not revoke or repudiate the Guaranty nor did he dispute Rosenberg's execution of same." This finding of fact is overbroad and not supported by evidence in the record. There is no evidence demonstrating that Brust ever received a copy of the Guaranty or knew of its existence or contents. In fact, the only evidence about this fact is Plaintiff's admission that it failed to provide Brust a copy of the Guaranty or discuss with him its terms either before or after the closing, and the closing attorney's testimony that he could not recall whether the Guaranty was provided to Brust. (Wright Dep. 83:24-85:12, 91:22-92:1, 160:15-161:20; Finger Dep. 41:22-25.) Furthermore, there is no evidence in the record that supports the conclusion that Brust failed to dispute Rosenberg's execution of the Guaranty. Although Wright testified that Brust never repudiated the Guaranty to him, he admitted that he rarely talked to Brust and had no knowledge about the communications between Rosenberg and Brust. Accordingly, Finding of Fact Number 25 is erroneous in light of the evidence in the record because it assumes without evidential

¹ The Order contains two Findings of Fact No. 25.

support that Brust had knowledge of the Guaranty and its terms and that Brust never repudiated Rosenberg's action to Rosenberg or others.

5. Finding of Fact No. 30

Finding of Fact Number 30 states that \$1,746,260.73 is due to Plaintiff under the terms of the Guaranty. For the reasons stated in Section II(A), above, and because summary judgment on liability is wrongly issued, as argued herein, this finding of fact as to damages suffered by Plaintiff is in error.

6. Finding of Fact No. 31

Finding of Fact Number 31, consistent with Conclusion of Law Number 32, awards Plaintiff attorneys' fees and court costs in the amount of \$47,388.73. For the reasons argued below, summary judgment on liability and damages is wrongly issued, and an award of attorneys' fees and court costs is premature. Accordingly, if the Court vacates any portion of the Order relating to damages or liability, then it should also vacate the award of attorneys' fees and court costs in Finding of Fact Number 31 and Conclusion of Law Number 32.

C. Conclusions of Law

1. Conclusions of Law Nos. 12 and 13

In Conclusion of Law Number 12, the Court concludes that the "Power of Attorney is clear and unambiguous as it is susceptible to only one meaning and represents Brust's intention, namely, to give Rosenberg the authority to execute, on his behalf, any and all documents and to perform any act related to the closing of the Loan, including the execution of the Guaranty, and to be bound by same." And in Conclusion of Law Number 13, the Court concludes that based on Conclusion of Law Number 12, "Rosenberg had actual authority to execute the Guaranty and Brust is bound by the terms of same." In making these conclusions, the Court misinterprets the

Guaranty and fails to make reasonable inferences regarding the scope of the Guaranty in favor of Brust, the non-moving party, contrary to the governing law providing that questions of agency are for the jury.

In concluding that the Power of Attorney clearly and unambiguously gave Rosenberg the authority to execute the Guaranty, the Court disregards the plain language of the Power of Attorney, which contains no reference to a guaranty. It is undisputed that the Power of Attorney does not expressly include a “guaranty” as a document that Rosenberg was authorized to execute on Brust’s behalf. By concluding that the Power of Attorney clearly and unambiguously authorized Rosenberg to execute the Guaranty on Brust’s behalf, the Court failed to apply the legal principles cited in Brust’s memoranda in opposition to Plaintiff’s Motion for Summary Judgment, which provide that powers of attorney must expressly confer the authority to the agent to make a guaranty on behalf of a principle. *See* 2A C.J.S. *Agency* § 166 (“The power to make a contract of guaranty may be specifically given to an agent, but authority to make such a contract generally exists only if it is expressly conferred.”); *Amcore Bank v. Hahnman-Albrecht, Inc.*, 759 N.E.2d 174 (Ill. Ct. App. 2001) (holding that “a general grant of agency does not carry with it the power to execute guaranties”); *Nevis v. Fidelity New York, F.A.*, 763 P.2d 345, 346 (Nev. 1988) (stating that a power of attorney must contain “specific authorization before finding that an agent has authority to bind his principal in a guaranty agreement”); *Chicago Title Ins. Co. v. Progressive Housing, Inc.*, 453 F. Supp. 1103, 1106 (D. Colo. 1978) (since the “powers of attorney lacked a specific grant of authority to bind his principals to a guaranty agreement, [the agent] lacked actual authority to effectuate the guaranty”).

As the Power of Attorney involved in this case did not expressly grant Rosenberg the authority to execute the Guaranty, any such authority must derive from its catchall provision that

provides Rosenberg with the authority "to execute any such other documents as may be necessary to close the loan with First South Bank in the original principal sum of \$2,600,000.00." Although this catchall provision arguably provides Rosenberg with the authority to execute a guaranty if it was necessary to close the Loan, the Court must look outside the four corners of the Power of Attorney to determine what documents were necessary for the closing of the Loan. Since the Court must look beyond the language in the Power of Attorney to determine if it authorized the execution of the Guaranty, it is not ambiguous and the Court's contrary conclusion is in error.

Given the obvious ambiguity in the Power of Attorney regarding whether it authorized Rosenberg to execute the Guaranty, the Court's determination that he had actual authority to execute it is in error because the Court weighed the evidence regarding actual authority and failed to make reasonable inferences in favor of Brust. First, the Court failed to properly give weight to evidence suggesting that the express authority for Rosenberg to execute a guaranty on Brust's behalf was intentionally omitted from the Power of Attorney. In 2001, Ecological borrowed money in connection with the property that is also the subject of the series of loans obtained from Plaintiff which are the subject of this lawsuit. That power of attorney expressly granted Finger the authority to execute on Brust's behalf "any document, instrument, contract, assignment, affidavit, disclosure, deed, note, mortgage, guarantee, etc." (Finger Dep. Def. Ex. 1) (emphasis added). Thus, the 2001 power of attorney expressly included the power to execute a guaranty agreement in connection with the 2001 loan. In the 2001 transaction, Brust agreed to personally guaranty Ecological's loan. Ecological's attorney, Terry Finger, Esq., drafted that power of attorney, served as Brust's agent thereunder, and executed the 2001 guaranty on Brust's behalf.

The 2006 Power of Attorney is substantially similar to the 2001 power of attorney with a few important exceptions. The most significant difference between the two powers of attorney is that the term “guarantee” is not contained in the 2006 Power of Attorney. This omission is important because it is evidence that Brust wanted the term “guarantee” removed from the Power of Attorney, thereby removing any express authority that Rosenberg could claim to execute the Guaranty. In his deposition, Finger testified that he believed his office prepared the 2006 Power of Attorney, but he could not explain how or why the term “guarantee” was not included. Finger admitted that it was possible that Brust could have modified the 2001 power of attorney for the 2006 Loan by intentionally removing the express authority for his agent to execute a guaranty. In any case, the mere omission of the term “guarantee” from the 2006 Power of Attorney, when it was included in the 2001 power of attorney, presents a scintilla of evidence that Brust did not authorize Rosenberg to execute the Guaranty on his behalf, which is all that he must show to defeat Plaintiff’s Motion for Summary Judgment. The Court should have relied on this evidence to make a reasonable inference that Brust did not authorize Rosenberg to execute the Guaranty, and its failure to do is erroneous.

Second, even if the Power of Attorney could be construed to authorize Rosenberg to execute a limited, noncontinuing guaranty, it should not be construed at the summary judgment stage to authorize the execution of the unlimited, continuing Guaranty because the undisputed evidence reveals that the Guaranty was not necessary for the closing of the Loan. The evidence on this point is clear:

- The Power of Attorney was a “Specific Limited Power of Attorney” and its subject matter was limited to “clos[ing] the loan with First South Bank in the original principal sum of \$2,600,000.00.” (Wright Dep. Ex. 9.) It did not envision any other transactions with Plaintiff. (Wright Dep. 101:10-17.)

- The Commitment Letter defined the Loan and its purposes to be limited to the refinancing of debt on the Property and for certain expenses related thereto for a total of \$2,600,000. (Wright Dep. Ex. 4.) The guaranty requirement as stated in the Commitment Letter was specifically limited to the “[p]ayment of the Loan.” (*Id.*) The Commitment Letter did not require Brust to execute a continuing, unlimited guaranty for all debt incurred by Ecological from Plaintiff. (Wright Dep. 53:4-20.)
- Plaintiff did not provide Brust with a copy of the Guaranty, which included the language stating that it was a continuing, unlimited guaranty obligation. (Wright Dep. 83:24-85:12, 91:22-92:1.)
- Plaintiff did not inform Brust that the nature of the Guaranty was continuing and unlimited prior to or after the closing. (Wright Dep. 83:24-85:12, 91:22-92:1.)
- Brust did not review the Guaranty or have reason to know that Plaintiff required a continuing, unlimited guaranty prior to or after the closing.

Despite the facts that Plaintiff never informed Brust that it required a continuing, unlimited guaranty, that the Commitment Letter specifically provided for guaranty of only the payment of the Loan, and that the Power of Attorney was specifically limited to the Loan, Plaintiff drafted the Guaranty to provide that it was continuing and unlimited. In other words, the Guaranty provided that Brust was not only guaranteeing the Loan for \$2.6 million plus interest and collection costs but that he was also guaranteeing “each and every debt, liability and obligation of every type and description which [Ecological Investments] may now or at any time hereafter owed to [Plaintiff]” for an “UNLIMITED” amount. (Wright Dep. Ex. 8.)

Importantly, Wright testified that the Guaranty signed by Rosenberg on behalf of Brust should not have been continuing or unlimited. The guaranty agreement form used by Plaintiff contains two options: (1) Box A, which indicates that the guaranty is limited to a specific loan and is not continuing; and (2) Box B, which indicates the guaranty is continuing and applies to every debt, liability, and obligation that the borrower may ever owe to Plaintiff. Additionally, it

has a blank for Plaintiff to insert the amount of the principal repayment obligation under the guaranty. In this case, Plaintiff checked Box B and inserted "UNLIMITED" in the principal amount for Brust's Guaranty without ever discussing it with Brust. However, in his deposition, Wright admitted that Box A should have been checked and that the principal repayment amount should have been \$2.6 million instead of "UNLIMITED" based on the information Plaintiff had related to the Loan. (Wright Dep. 85:13-93:15.) Thus, Plaintiff has conceded that the continuing, unlimited Guaranty was not necessary for the Loan and that it only required a specific, limited guaranty. Accordingly, the Guaranty does not fall within the "catchall" provision that authorized Rosenberg to execute "any such other documents as may be necessary to close the loan with First South Bank in the original principal sum of \$2,600,000.00," and Rosenberg exceed his authority by executing the overly broad continuing, unlimited Guaranty. *See Chicago Title Ins. Co.*, 453 F. Supp. at 1106-1107 (agent acting under power of attorney could not bind principals to guaranty of which principals were not aware).

The Court's Conclusions of Law Numbers 12 and 13 are particularly misguided given the high standard that Plaintiff must meet to establish that Rosenberg's authority under the Power of Attorney included the right to execute Guaranty. Under this standard, Plaintiff bears the burden of proving that the existence and scope of the agency relationship between Rosenberg and Brust. *See Paramount Fund, Inc. v. Cusaac*, 282 S.C. 497, 499, 319 S.E.2d 354, 355 (Ct. App. 1984) (stating that "a party asserting agency as a basis of liability must prove the existence of the agency"). "Agency is a question of fact. . . . If there are any facts tending to prove the relationship of agency, it then become a question for the jury." *Gathers v. Harris Teeter Supermarkets, Inc.*, 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984). Furthermore, agency must be "clearly established by the facts." *Paramount Fund*, 282 S.C. at 499, 319 S.E.2d

at 355-56. Questions of agency ordinarily should not be resolved by summary judgment. *Reid v. Kelly & Play Air, Inc.*, 274 S.C. 171, 174, 262 S.E.2d 24 (1980). By deciding this issue on summary judgment, the Court incorrectly takes the question of agency away from the jury.

2. *Conclusions of Law Nos. 14 and 15*

In Conclusion of Law Number 14, the Court concludes that “Rosenberg had apparent authority to execute the Guaranty on Brust’s behalf as Brust represented to Plaintiff that Rosenberg had authority to execute the Guaranty pursuant to the Power of Attorney, Plaintiff relied on the same in the consummation of the Loan and execution of the Note and Renewals, and Plaintiff, in good faith, relied on Brust’s representations when it closed the Loan.” And in Conclusion of Law Number 15, the Court concludes that based on Conclusion of Law Number 14, “Brust is estopped from denying Rosenberg’s apparent authority.” These conclusions are erroneous because they are based on findings of fact that are contradicted by the evidence in the record and an incorrect application of the governing law on apparent authority.

Under South Carolina law, “apparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing.” *Charleston Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 642, 598 S.E.2d 717 (Ct. App. 2004). The doctrine of apparent authority holds that:

the principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption. Thus, the concept of apparent authority depends upon manifestations by the principal to a third party and the reasonable belief by the third party that the agent is authorized to bind the principal.

Id. Based on these principles, South Carolina courts have required the following three elements to prove apparent authority: (1) the principal “consciously or impliedly represented another to be his agent;” (2) “there was reliance upon the representation;” and (3) “there was a change of position to the relying party’s detriment.” *Id.* at 643. “[A] question of implied authority is to be determined from no one fact but from all the facts and circumstances for which the principal is responsible.” *Leaphart v. Selby*, 135 S.C. 1, 9, 133 S.E. 451, 453 (1926).

The Court’s conclusion of law regarding apparent authority is wrong because Plaintiff’s reliance on the Power of Attorney was impossible, as discussed in Section II(B)(2), above. Wright’s deposition testimony proves that Plaintiff did not rely and could not have relied on the Power of Attorney. Wright testified that neither he nor any other employee of Plaintiff attended the closing. (Wright Dep. 81:18-24, 96:12-24.) He was unaware that Brust did not attend the closing, and no one informed him of this fact prior to or at the time of the Loan closing. Thus, he did not know that Rosenberg would be executing the Guaranty on Brust’s behalf pursuant to the Power of Attorney. (Wright Dep. 95:24-96:11.) In fact, Wright did not learn of the Power of Attorney until after the Loan closed, and there is no contemporaneous copy of the Power of Attorney maintained in Plaintiff’s Loan file. (Wright Dep. 103:9-105:25.) Despite Wright’s claims to the contrary in his affidavit, Plaintiff did not rely on the Power of Attorney in making the Loan to Ecological, and therefore, the conclusion that Rosenberg had apparent authority based on Plaintiff’s reliance on the Power of Attorney is incorrect.

The Court’s conclusion as to apparent authority is also incorrect because Plaintiff cannot rely on this theory as a ground for establishing agency between Rosenberg and Brust with regards to the Guaranty because it failed to ascertain the scope of Rosenberg’s authority under the Power of Attorney. The legal principles of apparent authority provide that a third person

dealing with an agent under a power of attorney has a duty to inform himself as to the character and extent of that authority. 2A C.J.S. *Agency* § 150. The duty to ascertain the scope of an agent's authority requires the third party to exercise reasonable diligence to discover the nature and scope of the agent's powers by making an inquiry addressed to the principal. 2A C.J.S. *Agency* §§ 150-151. Here, Wright admits that he did nothing to ascertain the scope of Rosenberg's authority under the Power of Attorney and expressly denies directing any inquiry to Brust about the Power of Attorney. (Wright Dep.99:24-100:18.) Thus, Plaintiff cannot rely on a theory of actual or implied authority when it did nothing to ascertain the scope of Rosenberg's authority under the Power of Attorney. See *Anheuser-Busch, Inc. v. Grovier-Starr Produce Co.*, 128 F.2d 146, 152 (10th Cir. 1942) ("If the third party knows, or has good reason for believing, that the acts exceed the agent's powers, or if such reasonable inquiry as he is under duty to make, would result in a discovery of the true state of the powers, and he fails to fulfill that duty, he cannot assert an apparent authority effective against the principal.") Furthermore, the reasonableness of any purported reliance of the apparent or implied authority of Rosenberg by Plaintiff should be a question of fact where there is evidence that Plaintiff was negligent and failed to follow standard banking practices in closing the Loan. (Wright Dep. 100:2-16, 153:15-155:13, 156:4-158:25, 165:17-167:9; Barksdale Aff. ¶ 5.) Accordingly, the issue of apparent authority is one for the jury under the applicable law, and the Court's Order deciding this is in error.

3. *Conclusions of Law Nos. 16 and 17*

In Conclusion of Law Number 16, the Court concludes that "Brust also ratified the execution of the Guaranty as he enjoyed the benefits of the Loan as a member of Ecological, had full knowledge of the facts as he provided his personal financial information from 2005 through

2010 and signed the Commitment Letter, and he affirmatively elected an intention to adopt Rosenberg's acts by making no written repudiation or revocation of the Guaranty during the term of repayment of the Note and Renewals." And in Conclusion of Law Number 17, the Court concludes that based on Conclusion of Law Number 16, "Brust did not revoke or repudiate the Guaranty or complain of same until the institution of this action, he did not disaffirm Rosenberg's actions within a reasonable period of time." These conclusions are erroneous because they are based on findings of fact that are contradicted by the evidence in the record and an incorrect application of the governing law on ratification.

Under South Carolina law, the party asserting ratification must establish the following three elements: (1) acceptance by the principal of the benefits of the agent's acts; (2) the principal's full knowledge of the facts; and (3) circumstances of an affirmative election demonstrating the principal's intent to accept the unauthorized arrangements. *Stiltner v. USAA Cas. Ins. Co.*, 395 S.C. 183, 191, 717 S.E.2d 74, 78 (Ct. App. 2011). However, absent an admission by the principle that he ratified the agent's unauthorized act, "[w]hether or not there has been a ratification of an unauthorized act by acceptance or retention of benefits thereof is usually a question of fact for the jury and not one of law for the court." *Id.* "[M]ere silence or failure of a principal to repudiate the unauthorized act of an agent does not necessarily constitute a ratification, unless silence or acquiescence in question cannot be explained on any other theory than that of ratification." *Id.*

Under these principles, the Court's conclusions regarding ratification are clearly in error at the summary judgment stage. First, the Court must have necessarily weighed the evidence and made reasonable inferences against Brust regarding whether he had "full knowledge of the facts" relating to the Guaranty. There is an abundance of evidence indicating that Brust had little

knowledge, if any, about the terms and conditions of the Guaranty. Plaintiff admits that it failed to discuss the Guaranty with Brust or disclose its contents to him prior to its execution. After Rosenberg signed the Guaranty, Plaintiff failed to verify with Brust that Rosenberg was authorized to sign it on his behalf despite the fact that it exceeded the requirements that Plaintiff had previously communicated to him in the Commitment Letter. In fact, Plaintiff admits that it cannot confirm that Brust has seen the Guaranty, as evidenced by its Rule 30(b)(6) deposition testimony provided by Wright:

Q. You were just reading from the guaranty in paragraph two. You don't know if Mr. Brust ever read that language, do you?

A. I don't know.

Q. You never presented it to him?

A. No.

Q. So you don't have any idea whether Mr. Brust has ever seen this document or not?

A. No.

Q. So he wouldn't know what to revoke even if he wanted to, would he?

A. I don't know.

(Wright Dep. 183:7-20.)

Thus, Plaintiff's own admissions show that it cannot prove that Brust had any knowledge about the terms and conditions of the Guaranty – much less full knowledge. Plaintiff's inability to establish that Brust was aware of the Guaranty precludes the Court from establishing that he was fully aware of its contents.

The Court's Order ignores these facts and instead relies on only two pieces of evidence to conclude that Brust had full knowledge of Rosenberg's acts: (1) Brust's execution of the

Commitment Letter; and (2) Brust's provision of personal financial statements to Plaintiff. These examples do not establish that Brust had full knowledge of Rosenberg's acts, but at worst, they create genuine issues of fact about the extent of Brust's knowledge regarding such acts.

Brust's execution of the Commitment Letter prior to the Loan closing does not establish that he was fully aware that Rosenberg later signed a continuing, unlimited Guaranty. The Commitment Letter suggests that Plaintiff informed Brust that it considered a guaranty to be a condition of the Loan. However, there were other purported "conditions" of the Loan contained in the Commitment Letter that Plaintiff failed to require. As such, Plaintiff's failure to require strict compliance with the terms of the Commitment Letter creates an issue of fact about whether Brust had full knowledge that Plaintiff required a guaranty or that Rosenberg would be required to execute one on his behalf.

More importantly, the Commitment Letter's terms only required that Brust execute a noncontinuing, limited guaranty; however, Plaintiff exceeded the requirements of the Commitment Letter by preparing the continuing, unlimited Guaranty and presenting it to Rosenberg to sign on behalf of Brust without explaining its continuing and unlimited nature to Brust. Plaintiff admits that the Guaranty should not have been continuing or unlimited, and it is undisputed that Plaintiff never informed Brust of the terms of the Guaranty. Thus, there are genuine issues of fact about whether Brust had full knowledge that Rosenberg had executed the continuing, unlimited Guaranty on his behalf rather than a noncontinuing, limited guaranty.

Similarly, Brust's provision of personal financial statements during the course of Ecological's relationship with Plaintiff does not establish that he was fully aware of the continuing, unlimited scope of the Guaranty signed by Rosenberg. In fact, there is no evidence

demonstrating that Brust was aware that Rosenberg had attempted to make him personally responsible for every single debt that Plaintiff issued to Ecological.

In sum, in finding that Brust had full knowledge of the circumstances regarding the Guaranty, the Court weighs the evidence and determines that he had full knowledge despite the evidence to the contrary. The Court is required to consider this evidence in a light most favorable Brust and make a reasonable inference that he did not have full knowledge. The Court fails to do this, and its conclusions to the contrary are incorrect.

Second, the Court misconstrues the applicable law by holding that Brust's failure to make a written repudiation or revocation of the Guaranty constitutes an affirmative election of an intention to adopt Rosenberg's act. This conclusion of law cannot be reconciled with the applicable legal principle that "mere silence or failure of a principal to repudiate the unauthorized act of an agent does not necessarily constitute a ratification, unless silence or acquiescence in question cannot be explained on any other theory than that of ratification." *Stiltner*, 395 S.C. at 191, 717 S.E.2d at 78. The Court's Order ignores this legal principle of ratification. In this case, Brust's alleged silence can be reasonably explained by the fact that he was not fully aware of the circumstances regarding the Guaranty, as discussed above. Accordingly, the Court's conclusions regarding ratification are not consistent with the evidence in the record or the applicable law.

4. *Conclusion of Law No. 21*

In Conclusion of Law Number 21, the Court concludes that "any alleged failure by Plaintiff to follow its own policies and procedures, which is denied by Plaintiff, does not constitute a breach of any duty Plaintiff owed Brust and does not relieve Brust of liabilities under

the Guaranty.” This conclusion is erroneous because it misstates the applicable law regarding Plaintiff’s duty to Brust and what constitutes a breach.

Under applicable law, Plaintiff did owe certain duties to Brust, even if they were not fiduciary duties as the Court concludes. For example, Plaintiff owed Brust a duty to ascertain the scope of Rosenberg’s authority under the Power of Attorney because a third person dealing with an agent under a power of attorney has a duty to inform himself as to the character and extent of that authority. 2A C.J.S. Agency § 150. The duty to ascertain the scope of an agent’s authority requires the third party to exercise reasonable diligence to discover the nature and scope of the agent’s powers by making an inquiry addressed to the principal. *Id.* at § 151. One dealing with an agent on behalf of a purported principal is under a duty to inquire and ascertain whether such written authority exists and what the limits of authority are, and such a person is guilty of negligence in failing to make such an inquiry. *Nalley v. Whitaker*, 102 Ga. App. 230, 115 S.E.2d 790 (Ct. App. 1960) *see also Gant v. NCNB Nat’l Bank*, 94 N.C. App. 198, 379 S.E.2d 865 (Ct. App. 1989) (recognizing a claim of negligence and breach of good faith and fair dealing based on bank’s failure to make certain disclosures to the guarantor).

Additionally, Plaintiff owed Brust a duty to make disclosures that materially increased his risks as a guarantor. “[A] creditor owes a guarantor a duty of good faith and fair dealing. Although there is no fiduciary relationship between the creditor and guarantor, a duty of disclosure may arise when the creditor knows or has good grounds for believing the guarantor is being deceived or misled or the guarantor has been induced to enter the contract in ignorance of facts materially increasing his risks, of which the creditor has knowledge and the opportunity to disclose prior to the guarantor’s acceptance of the undertaking.” 38A C.J.S. Guaranty § 36. A bank has a duty in the spirit of good faith and fair dealing to inform guarantor of circumstances

which materially increase his risk as a guarantor. *McHenry State Bank v. Y & A Trucking, Inc.*, 117 Ill. App. 3d 629, 634, 454 N.E.2d 345, 349 (Ct. App. 1983); *see also Gant*, 94 N.C. App. 198, 379 S.E.2d 865.

By solely focusing on whether there was a fiduciary relationship between Brust and Plaintiff and whether Plaintiff's internal policies and procedures created a duty, the Court ignored other legal duties that Plaintiff owed to Brust. Consequently, the Court fails to consider the evidence showing that Plaintiff breached those duties and its effect on Brust's alleged liability, including undisputed evidence that Plaintiff did nothing to ascertain the scope of Rosenberg's authority under the Power of Attorney and that Plaintiff required Rosenberg to sign on Brust's behalf the unlimited, continuing Guaranty despite that fact that a limited, noncontinuing guaranty was only required.

In addition, the Court's conclusion that Plaintiff's failure to follow its internal policies and procedures cannot result in a breach of those duties is wrong under clearly decided South Carolina precedent. For example, in *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 31-32, 410 S.E.2d 21, 24 (Ct.App. 1991), the court ruled that when a defendant adopts internal policies or self-imposed rules and thereafter violates those policies or rules, the jury may consider such violations as evidence of negligence if they proximately caused a plaintiff's damages. Similarly, in *Roddey v. Wal-Mart East Stores E., L.P.*, 400 S.C. 59, 732 S.E.2d 635 (Ct. App. 2012), the court ruled that a defendant's violation of its own policies is evidence of negligence. Based on that principle, the *Roddey* court found that the trial court had wrongly directed a verdict on the issue of negligence where there was evidence that the defendant had violated its own policies.

In this case, there is ample evidence that Plaintiff did not comply with its own policies with regards to making certain disclosures to Plaintiff about the terms of the Guaranty that would

support a finding of a breach of the duties discussed above. These breaches also impact the amount of Plaintiff's alleged damages and Brust's liability under his affirmative defenses and pending counterclaims. As such, *Roddey* demonstrates that the Court erred in concluding that Plaintiff's breach of its duties to Brust based on its failure to follow its own procedures cannot relieve Brust of his liabilities under the Guaranty.

5. *Conclusions of Law Nos. 22-25*

In Conclusions of Law Numbers 22 through 25, the Court makes several conclusions regarding Brust's alleged duty to exercise reasonable care to protect himself by reading the Guaranty. These conclusions are premised on false assumptions or findings that Brust had an opportunity to read the Guaranty and that Rosenberg was authorized to execute the Guaranty. While generally a person may have a duty to read a contract, certainly that duty only arises when the person is provided an opportunity to read the contract. As discussed above, it is undisputed that Plaintiff never provided Brust with a copy of the Guaranty or discussed its terms and conditions with him prior to the closing. Accordingly, these principles of law and consequent conclusions are not applicable.

To the extent that Conclusions of Law Numbers 22 through 25 are based on the theory that Brust's duty to read was imputed to Rosenberg acting through the Power of Attorney and that Brust is charged with knowledge of the contents of the Guaranty thereby, that conclusion is similarly in error because a principle is only charged with those acts of his agent which are within the scope of the agency relationship. As discussed above, there are issues of fact regarding the scope of Rosenberg's agency, and any subsequent conclusions arising from a determination of that agency are in error.

6. Conclusion of Law No. 26

In Conclusion of Law Number 26, the Court concludes that the "Renewals also do not relieve Brust of his liability under the Guaranty as same relate to the Loan, and he agreed to repay same under the clear and unambiguous terms of the Guaranty." The Court cites *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011), and *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009), to support this conclusion.

The Court's reliance on *Davis* to support this conclusion is in error because that case does not address whether a guarantor has continuing obligations to guaranty renewals, extensions, or modifications of the principal borrower's debt. Rather, that case involved whether an arbitration agreement between an employer and employee was enforceable under South Carolina law. *Davis* has no application to this case, and the Court mistakenly relies on it to conclude that Brust remained liable under the Guaranty despite the numerous renewals, extensions, and modification of the Loan which were never disclosed to him by Plaintiff.

Similarly, *Bell* does not support Conclusion of Law Number 26, and it is not applicable to this case. While *Bell* does involve a loan between a bank and borrower, it does not involve a guaranty agreement. Furthermore, the issue of continuing obligations under a guaranty where the original loan has been renewed, extended, or modified is not involved in *Bell* in any manner.

Contrary to Conclusion of Law Number 26, the applicable law provides that "a guarantor will be released from his undertaking by any material alteration of the original obligation or duty to which the guaranty relates." 38A C.J.S. *Guaranty* s. 86. Furthermore, "it is a well settled rule that a valid agreement between the parties to the principal obligation, without the consent or subsequent ratification of the guarantor, for an extension of time for payment or performance by the principal obligor, for a definite period, operates to release the guarantor from further liability

under the guaranty.” *Id.* at s. 89. Plaintiff’s policy recognizes this principle of law insofar as it requires Plaintiff “to obtain the signatures of all obligors on renewal notes before the existing note is released. The agreement of all parties to be obtained prior to any extension, change in terms, release, substitution of collateral, et cetera.” (Wright Dep. 163:15-164:6, Ex. 2.) In fact, Plaintiff’s policy states that its failure to comply with this policy and obtain “the signatures of all obligors . . . could release obligors from their liability to” Plaintiff.

In this case, it is undisputed that Plaintiff materially changed the terms of the Loan by extending the time of payment, modifying the payments between installment and balloon payments, and changing the interest rates under the Loan. It is further undisputed that Plaintiff never obtained Brust’s signature or even discussed the renewals, modifications, and extensions, in clear violation of Plaintiff’s policy. Therefore, there is a scintilla of evidence in the record supporting Brust’s position that Plaintiff’s renewal, extension, and modification of the Loan released Brust from any obligations as a guarantor. As a result, Conclusion of Law Number 26 is in error and mistakenly relies on inapplicable law.

7. *Conclusions of Law Nos. 27-29*

In Conclusion of Law Number 27, the Court restates the language in Rule 8(c), SCRC, which provides that “[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper delegation.” In Conclusion of Law Number 28, the Court, consistent with Finding of Fact 8, finds that the “counterclaims in the Amended Answer contain the same material allegations as those set forth as defenses in Brust’s Answer.” In Conclusion of Law Number 29, the Court concludes based on Conclusions of Law Numbers 27 and 28 that “the counterclaims contained in

the Amended Answer are and shall be treated as the defenses in the Answer and disposed of herein.”

As argued above in Section II(B)(1) and for the reasons stated therein, Conclusions of Law Numbers 28 and 29 are incorrectly decided. However, even if the counterclaims contain or are based on the same allegations as those supporting the affirmative defenses, it is inappropriate for the Court to treat Brust’s pending counterclaims as affirmative defenses. Rule 8(c) does not prohibit affirmative defenses and counterclaims from being supported by shared allegations. Rather, it is routine for a defendant to assert affirmative defenses based on certain allegations and rely on those same allegations to support counterclaims. In addition, the Court’s cursory treatment and dismissal of Brust’s counterclaims in the Order prior to any hearing on Brust’s Motion to Amend is inappropriate, especially considering Brust’s counterclaims are viable, as argued in Brust’s Memorandum in Support of Motion to Amend, which is incorporated by reference pursuant to Rule 10(c), SCRCP. Therefore, the Court’s Conclusions of Law 27 through 29 are in error.

8. *Conclusion of Law No. 30*

In Conclusion of Law Number 30, the Court concludes that “Brust’s failure to pay any and all sums due under the Guaranty constitutes a default under the terms thereof and is a material breach of the same.” Conclusion of Law Number 30 is clearly based on the previous findings of fact and conclusions of law regarding Rosenberg’s actual and/or apparent authority to execute the Guaranty and/or Brust’s ratification of Rosenberg’s acts. As argued above, those findings of fact and conclusions of law are incorrect, and consequently, Conclusion of Law Number 30 is similarly made in error.

9. *Conclusion of Law No. 31*

Conclusion of Law Number 31 mirrors Finding of Fact Number 30 regarding the amount of damages. For the reasons stated in Section II(A) and II(B)(4), above, this conclusion of law as to the damages suffered by Plaintiff is in error.

10. *Conclusion of Law No. 32*

In Conclusion of Law Number 32, as in Finding of Fact Number 31, the Court awards Plaintiff attorneys' fees and court costs in the amount of \$47,388.73. For the reasons argued above, summary judgment on liability and damages is wrongly issued, and an award of attorneys' fees and court costs is premature. Accordingly, if the Court vacates any portion of the Order relating to damages or liability, then it should also vacate the award of attorneys' fees and court costs in Finding of Fact Number 31 and Conclusion of Law Number 32.

D. Order

The Court's Order awarding summary judgment to Plaintiff is based on the foregoing findings of fact and conclusions of law. As argued above, these findings of fact and conclusions of law were made in error because they disregard disputed issues of fact, result from an improper weighing of the evidence, and rely on incorrect statements or application of the applicable law. Therefore, the Court should vacate the Order in its entirety and deny Plaintiff's Motion for Summary Judgment.

II. The Court fails to rule on several arguments raised by Brust, which rulings are necessary to preserve issues for appeal.

A. Plaintiff has the burden to prove agency.

Despite the Court's conclusion that Rosenberg had actual and apparent agency to execute the Guaranty, it fails to make a ruling that Plaintiff specifically met its burden of proof on this

issue. Plaintiff bears the burden of proving that the existence and scope of the agency relationship between Rosenberg and Brust. See *Paramount Fund, Inc. v. Cusaac*, 282 S.C. 497, 499, 319 S.E.2d 354, 355 (Ct. App. 1984) (stating that “a party asserting agency as a basis of liability must prove the existence of the agency”). “Agency is a question of fact. . . . If there are any facts tending to prove the relationship of agency, it then become a question for the jury.” *Gathers v. Harris Teeter Supermarkets, Inc.*, 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984). Furthermore, agency must be “clearly established by the facts.” *Paramount Fund*, 282 S.C. at 499, 319 S.E.2d at 355-56. Questions of agency ordinarily should not be resolved by summary judgment. *Reid v. Kelly & Play Air, Inc.*, 274 S.C. 171, 174, 262 S.E.2d 24 (1980).

B. A power of attorney shall be strictly construed.

The Court correctly notes that a power of attorney is subject to the rules of contractual interpretation, but did not acknowledge or rule on Brust’s argument that a power of attorney must be strictly construed. Although powers of attorney are subject to general rules of contractual interpretation, courts are mindful that powers of attorney are of special and limited nature and authority. *Martin v. United States*, 249 F. Supp. 204, 208 (D.S.C. 1966). As such, a “special power of attorney is to be strictly construed . . . so as to sanction only such acts as are clearly within its terms.” *Id.* (citing *Holladay v. Daily*, 86 U.S. 606 (1874); see also, 2A C.J.S. *Agency* § 157 (“Where the authority is contained in a power of attorney, such power is to be strictly construed . . . and does not empower the agent to make contracts of any different sort than that specified in the writing.”))

Consistent with the principle that powers of attorney must be strictly construed, general principles of agency hold that “[w]hen power to lend or borrow money is conferred upon an agent, whether expressly or impliedly, it is to be carefully pursued and exercised only within the

limits prescribed; burdens assumed by the agent, but not authorized by the principal, do not bind or affect the latter.” 2A C.J.S. *Agency* § 176. Moreover, “the authority to give security instruments cannot be inferred from the authority of an agent to borrow.” 2A C.J.S. *Agency* § 177; *see also, Kenneally v. First Nat’l Bank*, 400 F.2d 838, 842 (8th Cir. 1968) (“The authority to give security instruments cannot be inferred from the authority to borrow.”); Restatement 2d of *Agency* § 75, Comment.

C. A third person dealing with the agent has a duty to determine the extent of the agent’s authority.

The Court fails to rule whether Plaintiff had a duty to determine the extent of Rosenberg’s authority and whether Plaintiff complied with that duty. Given the limited nature of a power of attorney, a “third person who has notice or knowledge chargeable with the contents of a power of attorney must construe or interpret the instrument conferring such power at his or her peril.” 2A C.J.S. *Agency* § 135. “[I]n addition to ascertaining the existence of an agent’s authority, a third person dealing with the agent generally has a duty to proceed further and inform himself or herself as to the character and extent of that authority.” 2A C.J.S. *Agency* § 150. The duty to ascertain the scope of an agent’s authority requires the third party to exercise reasonable diligence to discover the nature and scope of the agent’s powers by making an inquiry addressed to the principal. 2A C.J.S. *Agency* §§ 150-151. A total failure to make inquiry is not consistent with the reasonable prudence standard of care imposed upon a third party dealing with an agent under a power of attorney. 2A C.J.S. *Agency* § 151; *see also, Anheuser-Busch, Inc. v. Grovier-Starr Produce Co.*, 128 F.2d 146, 152 (10th Cir. 1942)

A transaction taken by an agent outside his scope of authority granted by a power of attorney cannot bind the principal. 2A C.J.S. *Agency* § 155. The fact that an agent has exceeded his authority is a defense to liability for the principal. *Id.* Here, Wright admits that he did

nothing to ascertain the scope of Rosenberg's authority under the Power of Attorney and expressly denies directing any inquiry to Brust about the Power of Attorney. (Wright Dep.99:24-100:18.) Thus, Plaintiff cannot rely on a theory of actual or implied authority when it did nothing to ascertain the scope of Rosenberg's authority under the Power of Attorney.

D. There is evidence that the authority for Rosenberg to execute a guaranty on Brust's behalf was intentionally omitted from the Power of Attorney.

The Court fails to acknowledge or consider Brust's argument that there is evidence supporting the argument that Brust intentionally omitted the authority to sign a guaranty under the power of attorney. In 2001, Ecological borrowed money in connection with the property that is also the subject of the series of loans that it obtained from Plaintiff which are the subject of this lawsuit. That power of attorney expressly granted Finger the authority to execute on Brust's behalf "any document, instrument, contract, assignment, affidavit, disclosure, deed, note, mortgage, guarantee, etc." (Finger Dep. Def. Ex. 1) (emphasis added).

The 2006 Power of Attorney is substantially similar to the 2001 power of attorney with a few important exceptions. The most significant difference between the two powers of attorney is that the term "guarantee" is not contained in the 2006 Power of Attorney. This omission is important because it is evidence that Brust wanted the term "guarantee" removed from the Power of Attorney, thereby removing any express authority that Rosenberg could claim to execute the Guaranty. The mere omission of the term "guarantee" from the 2006 Power of Attorney, when it was included in the 2001 power of attorney, presents a scintilla of evidence that Brust did not authorize Rosenberg to execute the Guaranty on his behalf, which is all that he must show to defeat Plaintiff's Motion for Summary Judgment.

E. Rosenberg exceeded the scope of authority granted under the power of attorney.

The Court fails to make a finding on the scope of authority granted to Rosenberg under the Power of Attorney and whether Rosenberg exceeded that authority. Rosenberg admitted that he lacked the authority to execute and deliver the Guaranty on behalf of Brust. Furthermore, Rosenberg admitted that Plaintiff should not have accepted the Guaranty based on the Power of Attorney. Under applicable principles of agency law, an agent's judicial admissions regarding the scope of his agency are relevant, admissible, and operative as to the determination of the existence and scope of agency. *See* Restatement (2d) of Agency § 284, cmt. e. Rosenberg's admissions create a question of material fact regarding the scope of the powers granted under the Power of Attorney.

F. Consent to a modification cannot be inferred.

The Court fails to acknowledge the legal precedent or rule on Brust's argument that consent to a loan modification cannot be inferred and under South Carolina law. A "guarantor will be discharged from his obligation to pay the debt of another by contract when any change is made in the contract without his consent, waiving the effect upon him of any such change in the contract." *Yeager v. Rawls*, 41 S.C. 331, 334-35, 19 S.E. 649, 650 (1894). "[C]onsent to modification cannot be inferred from the mere fact that [the guarantor] had knowledge of it, or that he did not dissent therefrom." 39 C.J.S. *Guaranty* § 87.

G. Plaintiff presented no evidence to satisfy the final element of an affirmative election under the ratification analysis.

Plaintiff has attempted to show an affirmative election by Brust's silence and failure to repudiate the Guaranty. However, "mere silence or failure of a principal to repudiate the unauthorized act of an agent does not necessarily constitute a ratification, unless silence or

acquiescence in question cannot be explained on any other theory than that of ratification.”

Stiltner, 395 S.C. at 191, 717 S.E.2d at 78.

CONCLUSION:

For the foregoing reasons, Brust respectfully requests that the Court grant its Motion for Reconsideration in its entirety, vacate the Order, and deny Plaintiff's Motion for Summary Judgment. In the alternative, Brust requests that the Court revise and amend the Order to address the arguments raised herein.

Respectfully submitted,



Robert E. Sumner, IV, SC Bar #71728

E. Brandon Gaskins, SC Bar #73274

Moore & Van Allen, PLLC

78 Wentworth Street

Post Office Box 22828

Charleston, SC 29413-2828

Telephone: (843) 579-7000

Facsimile: (843) 579-7099

robertsumner@mvalaw.com

brandongaskins@mvalaw.com

CHARLESTON, SC

August 15, 2014

ATTORNEYS FOR DEFENDANT PHILIP J. BRUST

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

First South Bank,

Plaintiff,

vs.

John E. Rosenberg and Philip J. Brust,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2013-CP-07-0610

**PLAINTIFF'S RESPONSE TO
DEFENDANT PHILIP J. BRUST'S
MEMORANDUM IN SUPPORT OF
MOTION TO AMEND**

NOW COMES PLAINTIFF First South Bank who, by and through the undersigned counsel, files this Memorandum in reply and opposition to Defendant Philip J. Brust's ("Brust") Motion to Amend Answer and Crossclaims ("Motion").

RELEVANT PROCEDURAL FACTS

On March 8, 2013, Plaintiff filed a Summons and Complaint seeking to collect any all sums due and owing under a Guaranty signed by John E. Rosenberg, as attorney-in-fact for Brust. Subsequent thereto, Brust and Rosenberg each filed separate Motions to Dismiss for lack of personal jurisdiction which were denied by the Court. After the Court denied his Motion to Dismiss, Brust filed an Answer to Plaintiff's Complaint and Crossclaims against Defendant John E. Rosenberg ("Answer") wherein he denied the material allegations of Plaintiff's Complaint and asserted various affirmative defenses against Plaintiff. While many of Brust's affirmative defenses are irrelevant to the present Motion, Brust's Seventh Defense and Tenth Defense are particularly relevant.

With regard to his Seventh Defense, Brust alleges Plaintiff's claim is barred, in whole or in part, because Plaintiff's alleged loses are the result of Plaintiff's failure to follow its own policies and procedures and negligence in underwriting, approval and administration of the Loan. With regard to his Tenth Defense, Brust claims he should be released from any obligations under the Guaranty or any

obligations of Ecological Investments under the Loan from Plaintiff to the extent that Plaintiff breached its duty of good faith and fair dealing to Brust and to the extent that Plaintiff had knowledge or should have known that Brust was being deceived by Rosenberg regarding the Loan and collateral or that Brust had been induced to enter into the Guaranty in ignorance of facts that materially increased his risks under the Guaranty.

Soon after filing its Answer, Brust served Plaintiff with its First Set of Interrogatories and Requests for Production on October 9, 2013. On October 23, 2013, Plaintiff filed its Motion for Summary Judgment and Affidavit of Patrick Wright, the hearing of which was continued several times to allow the parties to conduct and complete written discovery. After completing initial written discovery, Defendant Brust took the deposition of Plaintiff's Rule 30(b)(6) representative, Patrick Wright, who at the time of the closing of the Loan and the administration of same was a senior vice president with Plaintiff.

Subsequent to taking Patrick Wright's deposition and immediately before the hearing on Plaintiff's Motion for Summary Judgment, Plaintiff received the present Motion and Brust's proposed Amended Answer to Plaintiff's Complaint, Cross-Claims against Rosenberg, and Counterclaims against Plaintiff ("Amended Answer") which reasserted Brust's Seventh Defense and Tenth Defense. It also contains Brust's First Counterclaim against Plaintiff in which he alleges that Plaintiff owed him a duty to act reasonably and to comply with standard banking practices in the underwriting, closing, and administration of the loan in question, that Plaintiff breached said duty, and that he had suffered considerable financial injury as a result ("First Counterclaim"). In addition, Brust alleges a Second Counterclaim against Plaintiff in which he alleges that Plaintiff owed him a duty of good faith and fair dealing, that Plaintiff breached same, and he had suffered considerable financial injury as a result ("Second Counterclaim").

Subsequent to the filing of the Motion to Amend, a hearing was held on Plaintiff's Motion for Summary Judgment, and the Court issued its Order for Summary Judgment ("Order") in which it ruled in

Plaintiff's favor with regard to the Seventh Defense and Tenth Defense. In particular, the Court found that Plaintiff owed no duty to Brust other than those duties a creditor owes a debtor, which are not fiduciary in nature. As to damages, Plaintiff was awarded summary judgment in the amount of One Million Seven Hundred Forty Six Thousand, Two Hundred Sixty and 73/100 (\$1,746,260.73) Dollars, plus prejudgment interest from May 23, 2014, through the entry of the judgment at a per diem rate of Two Hundred Thirty Four and 50/100 (\$234.50) Dollars, plus post-judgment interest at the maximum statutory rate. In addition, the Court assessed Plaintiff's attorney's fees and court costs against Brust in the amount of Forty Seven Thousand, Three Hundred Eighty Eight and 73/100 (\$47,388.73) Dollars, which were supported by the Affidavit of Attorney's Fees and Costs executed by Plaintiff's counsel.

STANDARD OF REVIEW

Pursuant to Rule 15(a), SCRCP "A party may amend his pleadings by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice the other party. It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice. "Courts have wide latitude in amending pleadings, and '[w]hile this power should not be used indiscriminately or to prejudice or surprise another party, the decision to not allow an amendment is within the sound discretion of the trial court..." City of N. Myrtle Beach v. Lewis-Davis, 360 SC 225, 233, 559 S.E. 2d 462 (S.C. Ct. App. 2204) (internal citations omitted).

ARGUMENT

Despite Brust's assertions, Plaintiff will suffer prejudice if amendment of Brust's Answer is allowed as his counterclaims have already been asserted and they are barred by *res judicata*.

I. Brust has already asserted his proposed First Counterclaim and Second Counterclaim in the form of his Seventh and Tenth Defense.

Pursuant to Rule 8, SCRCP, Brust has already asserted his proposed First Counterclaim and Second Counterclaim in the form of the Seventh Defense and Tenth Defense.

"When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the Court shall treat the pleading as if there had been a proper designation." Rule 8(c), SCRCP. Pursuant to Rule 8(a), "a pleading which sets forth a cause of action, whether an original claim, counterclaim, crossclaim, or third-party claim shall contain (1) a short and plain statement of the grounds including facts and statute upon which the Court's jurisdiction rests, unless the Court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief which he deems himself entitled." Rule 8(a), SCRCP. When these rules are applied to this particular case, it is evident Brust has already asserted his First and Second Counterclaim in the form of his Seventh and Tenth Defense.

As set forth above, Brust's Seventh Defense asks that the Court bar Plaintiff's claim in whole or in part because Plaintiff failed to follow its policies and procedures regarding the execution of the Guaranty, the closing of the Loan, and the administration of same. In other words, Brust's Seventh Defense asks the Court to set-off any judgment amount given Plaintiff in an amount relative to Plaintiff's alleged negligence. The Court ruled in Plaintiff's favor with regard to the Seventh Defense in its Order. In effect, these are the same material allegations set forth by Brust in his proposed First Counterclaim, in which he alleges that Plaintiff owed him a duty to follow its own policies and procedures and standard banking practices for the underwriting, closing, and administration of the Loan. As a result of Plaintiff's alleged various breaches, Brust claims to have sustained considerable financial injury and entitlement to damages. Presumably, these damages would result in the set-off of any judgment granted Plaintiff. Aside from the inclusion of various factual allegations taken from the Wright's deposition, which were

used to support Brust's Seventh Defense, the facts and law applicable to the proposed First Counterclaim and Seventh Defense are essentially the same.

The same analysis applies for a comparison of the Tenth Defense and Brust's proposed Second Counterclaim. In the Tenth Defense, upon which this Court has already found in Plaintiff's favor, Brust alleges that (i) Plaintiff owed Brust a duty of good faith and fair dealing; (ii) Plaintiff breached its duty of good faith and fair dealing to Brust as Plaintiff knew or should have known that Brust was being deceived by Rosenberg regarding the Loan and collateral; and (iii) that Brust was induced to enter into the Guaranty in ignorance of facts that materially increased his risks under the Guaranty. It further states Brust should be released from any obligations under the Guaranty or any obligations of Ecological Investments to the extent that Plaintiff breached the aforementioned duty of good faith and fair dealing. This would have the practical effect of a set-off. As with the Seventh Defense and proposed First Counterclaim, the proposed Second Counterclaim and Tenth Defense contain the same material allegations. In particular, Brust alleges that Plaintiff owed him a duty of good faith and fair dealing with regard to the execution of the Guaranty, the closing of the Loan, and the administration of same. He alleges Plaintiff breached same and claims entitlement to damages as a result. As such, the facts and law applicable to the Tenth Defense and proposed Second Counterclaim are essentially the same.

II. Brust's proposed counterclaims are barred by *res judicata*.

Plaintiff would suffer prejudice if Brust were allowed to amend his Answer to assert his proposed counterclaims, the laws and facts of which have already been ruled upon by this Court.

As this Court is aware, *res judicata* is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privy and ends litigation, promotes judicial economy, and avoids the harassment of relitigation of the same issues. Pharmacists Mut. Ins. Co. v. Cincinnati Ins. Co., 658 F. Supp. 2d 745 (D.S.C. 2009) It flows from the principle that

public interest requires an end to litigation and no one should be sued twice for the same cause of action. S.C. Pub. Interest Found. V. Greenville County, 401 S.C. 377, 737 S.E. 2d 502 (S.C. Ct. App. 2013). Res judicata requires proof of three elements: 1) a final, valid judgment was entered on the merits; 2) the parties to both suits are the same; and 3) the subsequent action involves matters properly included in the first action. Judy v. Judy, 383 S.C. 1, 677 S.E. 2d 213 (S.C. Ct. App. 2009). In other words, it bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between the parties. A different remedy does not alter the fact that the claims are identical. Id. A party may not evade a final judgment dismissing his claim by dressing up the same claim in different legal terms or recasting it according to a new legal theory. McMahan v. International Ass'n. of Bridge, Structural & Ornamental Iron Workers, 858 F. Supp. 529 (D.S.C. 1994). In this case, it prevents Plaintiff from having to re-litigate counterclaims that were originally identified as defenses.

As to the first element, summary judgment is considered final and on the merits for *res judicata* purposes. Id. A party may not evade a final judgment dismissing his claim by dressing up the same claim in different legal terms or recasting it according to a new legal theory. Id. Accordingly, a final judgment has been entered on Brust's proposed counterclaims as same are merely a repackaging of Brust's Seventh Defense and Tenth Defense as explained above. This is seen in the Court's Order as it ruled in Plaintiff's favor as to Defendant's Seventh and Tenth Defenses. To allow Brust to amend his Answer to assert the proposed First Counterclaim and Second Counterclaim would allow him to bypass the Court's recently entered Order. While Plaintiff is aware that the Court's Order does not end this case in its entirety, it draws the Court's attention to the fact that it would end the matter with regard to Plaintiff and Brust as to his obligations under the Guaranty.

As to the second element, the parties in the first action are identical to the parties in the second action as Plaintiff and Brust are involved in both actions.

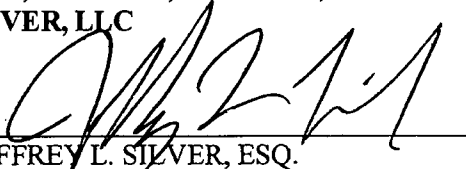
As to the third element of *res judicata*, the subject matter of the proposed First Counterclaim and Second Counterclaim are properly included in the first action and were disposed of by virtue of the Court's ruling in Plaintiff's favor with regard to the Seventh Defense and Tenth Defense. Specifically, Brust's Seventh Defense and Tenth Defense arise out of the execution of the Guaranty, Plaintiff's closing of the Loan, and the administration of same. In support of his Seventh Defense and Tenth Defense, Brust presented the deposition testimony of Patrick Wright and the Affidavit of William Barksdale at the hearing on the Plaintiff's Motion for Summary Judgment. In raising these defenses, Brust attempted to decrease Brust's liability under the terms of the Guaranty. As can be seen from the proposed First Counterclaim and Second Counterclaim, the subject matter is identical and can only be differentiated by the inclusion of additional factual allegations. In particular, the proposed First Counterclaim and Second Counterclaim arise out of the execution of the Guaranty, Plaintiff's closing of the Loan, and the administration of same. Presumably, Brust would rely upon the deposition testimony of Patrick Wright and the Affidavit of William Barksdale in support of his First and Second Counterclaims. Finally, if granted, Brust's request for damages would decrease his liability under the Guaranty in the same manner as a set-off. This is the same remedy requested by the Seventh and Tenth Defense which both allege that Plaintiff's claim is barred in whole or in part to the extent that Plaintiff breach any duty owed Brust. Accordingly, the third element for *res judicata* is satisfied.

Having met the elements of *res judicata*, the proposed First and Second Counterclaims should be barred.

CONCLUSION

Based on the foregoing reasons, Brust's Motion to Amend should be denied as the granting of same would result in prejudice to Plaintiff and the proposed amendments have already been litigated.

**TYLER, CASSELL, JACKSON, PEACE
& SILVER, LLC**

By: 

JEFFREY L. SILVER, ESQ.

TAYLOR A. PEACE, ESQ.

1331 Elmwood Avenue, Suite 300

P.O. Box 11656

Columbia, South Carolina 29211-1656

(803) 779-4997

Attorneys for Plaintiff First South Bank

September 11, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
FIRST SOUTH BANK,)
)
Plaintiff,)
)
vs.)
)
JOHN E. ROSENBERG and PHILIP J.)
BRUST,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2013-CP-07-00610

**DEFENDANT PHILIP J. BRUST'S
SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF MOTION FOR
RECONSIDERATION**

2014 OCT 15 PM 2:41
CLERK OF COURT
JOHN E. ROSENBERG
COUNTY OF BEAUFORT
SOUTH CAROLINA

Defendant Philip J. Brust ("Brust") submits this Supplemental Memorandum in Support of Motion for Reconsideration of the Order Granting Plaintiff's Motion for Summary Judgment as to Defendant Phillip J. Brust of August 5, 2014 (the "Order") pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure ("SCRPC"). As explained more fully below, the Court should reconsider the Order with regards to damages awarded to Plaintiff.

ARGUMENT

In its Order, the Court concluded that Plaintiff was entitled to damages totaling \$1,746,260.73, consisting of a principal sum of \$1,608,000.00, pre-judgment interest through May 23, 2014, in the sum of \$133,683.67, accrued late charges in the sum of \$2,348.49, advanced real property taxes in the sum of \$713.07, advanced appraisal fees in the sum of \$1,450.00, and advanced costs in the sum of \$65.50. (Order, Findings of Fact ¶ 30 and Conclusions of Law ¶ 31.) In addition to the arguments previously presented, Brust also objects to the damages calculation based on the following:

- Plaintiff failed to properly credit Ecological Investments, LLC ("Ecological") for a Loan payment made by Brust to Plaintiff on October 12, 2011, in the amount of \$25,000. (Ex. 1 – Cancelled Check; Ex. 2 – Emails between Rosenberg and Wright, Oct. 12, 2011.) Bank records produced by Plaintiff indicate that Plaintiff only applied \$11,979.32 of the

\$25,000 payment to the Loan. (Ex. 3 – Loan Account Statement, 7/14/10 – 10/31/12.) The remainder of this payment should have been applied to the Loan's principal, and Plaintiff has failed to account for this mistake.

- Ecological sold an easement on the property for \$518,823.53 in January 2009. From those proceeds, Ecological and Plaintiff agreed to allocate \$273,866.63 to payoff the balance of the \$275,000 Loan, \$80,745.35 to pay taxes on the property, and \$25,000 for legal fees. (Ex. 4 – Easement Sale Proceeds Allocation Agreement; Ex. 5 – Debit Statements and Cancelled Checks related to Easement Sale Proceeds Allocation.) Ecological and Plaintiff agreed that the “remaining funds shall be placed on deposit with Bank in Borrower’s existing depository account and shall be held for future debt service on the remaining mortgage note of Borrower or used for other direct expenses as approved by the Bank.” (*Id.*) Thus, \$139,211.55 remained from the easement sale proceeds to be used for future debt service on the property. At the time of easement sale, the interest and principal payments on the Loan were \$19,642.43 per month, which means that the easement sale proceeds provided enough funds for seven months of Loan payments, through July 2009. (Ex. 6 – Loan Account Statement, 1/14/08 – 1/20/10.) However, by the end of May 2009, Ecological’s bank account and the remainder of the easement sale proceeds had been depleted to the point where there were insufficient funds to make future Loan payments. (Ex. 7 – Ecological Bank Statement, May 2009.) Accordingly, there is approximately \$25,000 that Plaintiff has failed to account for which should have been used to pay down principal and interest on the Loan.
- From the origination of the Loan through the present, Plaintiff has calculated interest accruing on the Loan based on a 360 day basis. Brust contends that the interest should have been calculated on an actual basis of a 365 year or 366 day year for leap years. The dispute between Plaintiff and Brust arises from different interpretations of the Loan documents, which state that “[i]nterest will be calculated on a [sic] ACTUAL/360 basis.” (*See, e.g.*, Ex. 8 – Note, Feb. 2, 2006.) The “ACTUAL/360 basis” language is ambiguous because it is not defined or explained in the note. The distinction between an actual basis and a 360 day basis is significant because the accrued interest under an actual basis is lower than under a 360 day basis. In which case, Plaintiff’s application of a 360 day basis results in overpayments of past interest by Ecological, which should be credited against the Loan balance. Also, the application of a 360 day basis results in a miscalculation of the accrued unpaid interest set forth in the Order.
- Plaintiff’s mistakes in applying principal payments described above results in an overpayment of past interest since a higher principal balance was used to calculate the interest payments. The overpayment of past interest should be credited against the Loan balance.

These facts demonstrate that there are genuine disputes about the damages allegedly suffered by Plaintiff in this action. Therefore, the issue of damages should be submitted to a jury for its determination as required under South Carolina law. *See Perry v. Green*, 313 S.C. 250, 255, 437 S.E.2d 150, 153 (Ct. App. 1993) (stating that the “amount of damages is a question for the jury”); *Gadsden v. Home Fertilizer & Chemical Co.*, 89 S.C. 483, 489, 72 S.E. 15, 17 (1911) (declaring that if the evidence “is of such a nature that men might reasonably differ as to the amount of damages, the question of amount must be submitted to the jury”).

CONCLUSION

For the foregoing reasons, Brust respectfully requests that the Court grant its Motion for Reconsideration with regards to the award of damages to Plaintiff.

Respectfully submitted,



Robert E. Sumner, IV, SC Bar #71728

E. Brandon Gaskins, SC Bar #73274

Moore & Van Allen, PLLC

78 Wentworth Street

Post Office Box 22828

Charleston, SC 29413-2828

Telephone: (843) 579-7000

Facsimile: (843) 579-7099

robertsumner@mvalaw.com

brandongaskins@mvalaw.com

ATTORNEYS FOR DEFENDANT PHILIP J. BRUST

CHARLESTON, SC

October 14, 2014

EXHIBIT 1

PHILIP J BRUST
20348 Christoffle Drive
Cornelius, NC 28031

3854
67-778/632
BRANCH 44402

OCT 12 '11
Date

Pay to the
Order of

FIRST SOUTH BANK

\$ 25,000.00

TWO FIVE THOUSAND AND NO/100

Dollars



WACHOVIA

Wachovia Bank, a division of Wells Fargo Bank, N.A.

For

Philip J Brust

DEPOSIT TICKET

Name Ecological Investments

67-228/632

CASH

Account No 0001015932

C
H
B
r
u
s
t

25,000.00

DATE 10-17-11

DEPOSITS MAY NOT BE AVAILABLE FOR IMMEDIATE WITHDRAWAL

CHECKS OR TOTAL
FROM OTHER SIDE

SIGN HERE IF CASH RECEIVED FROM DEPOSIT

SUB TOTAL



First South Bank

Spartanburg, SO 29306

LESS CASH

DO NOT USE DEPOSIT TICKET RECEIVING FOR
AUTOMATIC PAYMENTS. USE VOIDED CHECK

NET
DEPOSIT \$ 25,000.00

009



First South Bank

Member FDIC

Transaction Receipt

RECEIPT
DATE 10/17/11
AMOUNT \$25,000.00
BY Philip J Brust
FOR Ecological Investments

All items are received subject to the terms and conditions of the account agreement.
The date and amount of the deposit are shown above.

FSB/EI-001267

RECORD 0249

EXHIBIT 2

Carrie Sutcliffe

From: jrosenberg321@gmail.com
Sent: Wednesday, October 12, 2011 10:12 AM
Subject: Re: Ecological

Phil said that he had mailed the replacement Sunday for \$25 k. I will call him now and report to you.
Thanks for the warning.

Sent from my Verizon Wireless Phone

----- Reply message -----

From: "Wright, Patrick" <pwright@firstsouthbancorp.com>
Date: Wed, Oct 12, 2011 6:19 am
Subject: Ecological
To: "John Rosenberg (JRosenberg321@gmail.com)" <JRosenberg321@gmail.com>

The payment is now 11 days past due and we have not received a replacement check from Brust. Please take care of this as soon as possible. If a check has been mailed, please let me know.

Patrick Wright
First South Bank
Senior Vice President
7 Arley Way, Suite 100
Bluffton, SC 29910
843.706.8644 office
843.706.3901 fax
843.422.2253 mobile
pwright@firstsouthbancorp.com <<mailto:patrickwright@firstsouthbancorp.com>>

This message is intended only for the persons or entities to which it is addressed. The information transmitted herein may contain proprietary or confidential material. Review, reproduction, retransmission, distribution, disclosure or other use, and any consequent action taken by persons or entities other than intended recipients, are prohibited and may be unlawful. If you are not the intended recipient, please delete this information from your system and contact the sender. The information contained herein is subject to change without notice. Although reasonable precautions have been taken to ensure that no viruses are present, the sender makes no warranty or guaranty with respect thereto, and is not responsible for any loss or damage arising from the receipt or use of this e-mail or attachments hereto.

EXHIBIT 3

First South Bank
1450 John B White Sr Blvd
Spartanburg, SC 29306
PH# (864) 595-0455

Page 2
Date 11/05/13
Account No. 8033303

Ecological Investments LLC
5085 Rivedro Street
Las Vegas NV 89135-3203

7/14/10	Regular Payment	6,461.98	1,824,560.54
7/14/10	Interest Payment Split Out	6,461.98	1,824,560.54
8/16/10	Regular Payment	6,677.38	1,824,560.54
8/16/10	Interest Payment Split Out	6,677.38	1,824,560.54
9/14/10	Regular Payment	6,677.38	1,824,560.54
9/14/10	Interest Payment Split Out	6,677.38	1,824,560.54
10/14/10	Status Change	0.00	1,824,560.54
10/25/10	Late Charge Assessed	1,000.00	1,824,560.54
11/30/10	Interest Rate Change	5.250000%	1,824,560.54
11/30/10	Status Change	0.00	1,824,560.54
	0/00/00 Effective Date		
11/30/10	Interest Payment - Renewal	16,585.76	1,824,560.54
11/30/10	Late Charge Payment	1,785.69	1,824,560.54
11/30/10	Loan Renewal	0.00	1,824,560.54
12/01/10	Effective Date Credit Intere	18.17	1,824,560.54
	11/30/10 Effective Date		
12/01/10	Principal Payment	124,560.54	1,700,000.00
	11/30/10 Effective Date		
12/30/10	Regular Payment	11,437.50	1,700,000.00
12/30/10	Interest Payment Split Out	7,437.50	1,700,000.00
12/30/10	Principal Payment Split Out	4,000.00	1,696,000.00
2/01/11	Regular Payment	11,667.33	1,696,000.00
2/01/11	Interest Payment Split Out	7,667.33	1,696,000.00
2/01/11	Principal Payment Split Out	4,000.00	1,692,000.00
2/28/11	Regular Payment	11,156.92	1,692,000.00
2/28/11	Interest Payment Split Out	7,156.92	1,692,000.00
2/28/11	Principal Payment Split Out	4,000.00	1,688,000.00
3/30/11	Regular Payment	11,385.00	1,688,000.00
3/30/11	Interest Payment Split Out	7,385.00	1,688,000.00
3/30/11	Principal Payment Split Out	4,000.00	1,684,000.00
5/02/11	Regular Payment	11,613.08	1,684,000.00
5/02/11	Interest Payment Split Out	7,613.08	1,684,000.00
5/02/11	Principal Payment Split Out	4,000.00	1,680,000.00
5/31/11	Regular Payment	11,351.17	1,680,000.00
5/31/11	Interest Payment Split Out	7,351.17	1,680,000.00
5/31/11	Principal Payment Split Out	4,000.00	1,676,000.00
6/30/11	Regular Payment	11,577.50	1,676,000.00
6/30/11	Interest Payment Split Out	7,577.50	1,676,000.00
6/30/11	Principal Payment Split Out	4,000.00	1,672,000.00
8/09/11	Late Charge Assessed	452.60	1,672,000.00
8/22/11	Late Charge Payment	452.60	1,672,000.00
8/22/11	Regular Payment	11,315.00	1,672,000.00
8/22/11	Interest Payment Split Out	7,315.00	1,672,000.00
8/22/11	Principal Payment Split Out	4,000.00	1,668,000.00
8/31/11	Regular Payment	11,558.83	1,668,000.00
8/31/11	Interest Payment Split Out	7,558.83	1,668,000.00
8/31/11	Principal Payment Split Out	4,000.00	1,664,000.00

FSB/EI-001311

First South Bank
1450 John B White Sr Blvd
Spartanburg, SC 29306
PH# (864) 595-0455

Page 3
Date 11/05/13
Account No. 8033303

Ecological Investments LLC
5085 Rivedro Street
Las Vegas NV 89135-3203

10/11/11	Late Charge Assessed	460.74	1,664,000.00
10/18/11	Late Charge Payment	460.74	1,664,000.00
10/18/11	Regular Payment	11,518.58	1,664,000.00
10/18/11	Interest Payment Split Out	7,518.58	1,664,000.00
10/18/11	Principal Payment Split Out	4,000.00	1,660,000.00
11/01/11	Regular Payment	11,280.00	1,660,000.00
11/01/11	Interest Payment Split Out	7,280.00	1,660,000.00
11/01/11	Principal Payment Split Out	4,000.00	1,656,000.00
12/12/11	Late Charge Assessed	459.23	1,656,000.00
12/29/11	Regular Payment	23,184.90	1,656,000.00
12/29/11	Interest Payment Split Out	7,480.67	1,656,000.00
12/29/11	Principal Payment Split Out	4,000.00	1,652,000.00
12/29/11	Late Charge Split Out	459.23	1,652,000.00
12/29/11	Interest Payment Split Out	7,245.00	1,652,000.00
12/29/11	Principal Payment Split Out	4,000.00	1,648,000.00
2/09/12	Late Charge Assessed	457.97	1,648,000.00
2/23/12	Regular Payment	11,449.17	1,648,000.00
2/23/12	Interest Payment Split Out	7,449.17	1,648,000.00
2/23/12	Principal Payment Split Out	4,000.00	1,644,000.00
3/01/12	Regular Payment	11,210.00	1,644,000.00
3/01/12	Interest Payment Split Out	7,210.00	1,644,000.00
3/01/12	Principal Payment Split Out	4,000.00	1,640,000.00
4/09/12	Late Charge Assessed	446.88	1,640,000.00
4/13/12	Late Charge Waived	904.85	1,640,000.00
4/18/12	Regular Payment	11,630.05	1,640,000.00
4/18/12	Interest Payment Split Out	7,172.08	1,640,000.00
4/18/12	Principal Payment Split Out	4,000.00	1,636,000.00
4/18/12	Interest Payment Split Out	457.97	1,636,000.00
5/01/12	Regular Payment	10,956.20	1,636,000.00
5/01/12	Interest Payment Split Out	6,956.20	1,636,000.00
5/01/12	Principal Payment Split Out	4,000.00	1,632,000.00
5/31/12	Regular Payment	11,133.58	1,632,000.00
5/31/12	Interest Payment Split Out	7,133.58	1,632,000.00
5/31/12	Principal Payment Split Out	4,000.00	1,628,000.00
7/10/12	Regular Payment	11,360.50	1,628,000.00
7/10/12	Interest Payment Split Out	7,360.50	1,628,000.00
7/10/12	Principal Payment Split Out	4,000.00	1,624,000.00
8/09/12	Regular Payment	11,110.83	1,624,000.00
8/09/12	Interest Payment Split Out	7,110.83	1,624,000.00
8/09/12	Principal Payment Split Out	4,000.00	1,620,000.00
9/10/12	Late Charge Assessed	453.18	1,620,000.00
9/11/12	Regular Payment	11,329.59	1,620,000.00
9/11/12	Interest Payment Split Out	7,329.59	1,620,000.00
9/11/12	Principal Payment Split Out	4,000.00	1,616,000.00
10/10/12	Late Charge Assessed	452.51	1,616,000.00
10/31/12	Regular Payment	11,312.66	1,616,000.00
10/31/12	Interest Payment Split Out	7,312.66	1,616,000.00

FSB/EI-001312

RECORD 0254

EXHIBIT 4

U #2 Part 2 Ecological

January 7, 2009

Loans to Ecological Investments, LLC

This document confirms the understanding between Ecological Investments, LLC (hereinafter the "Borrower") and First South Bank (hereinafter the "Bank") regarding a proposed easement between Ecological Investments, LLC and Central Electric Power Cooperative, Inc.

Borrower has requested that Bank subordinate the Bank's mortgage interests on the 82.68 acre tract of property in Jasper County, SC for a transmission line easement on approximately 4.25 acres of the property by Central Electric Power Cooperative, Inc.

Borrower has confirmed that the easement contract shall be for an amount of \$500,000. Borrower has requested that the proceeds be applied as follows:

- Up to \$275,000 to payoff Borrower's existing second mortgage note to Bank
- Up to \$82,000 to pay the 2008 property taxes on the property to Jasper County
- Up to \$25,000 in attorney's fees related to the easement and other related legal documentation
- The remaining funds shall be placed on deposit with Bank in Borrower's existing depository account and shall be held for future debt service on the remaining first mortgage note of Borrower or used for other direct expenses as approved by the Bank

By its signatures below, Borrower and Bank agree to the terms as outlined in this document, this 7th day of January, 2009.

BORROWER:

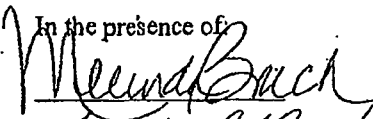
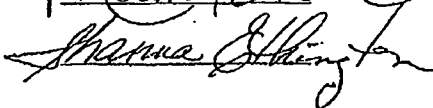
Ecological Investments, LLC

By:

John E. Rosenberg

Its: Manager/Member

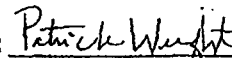
In the presence of:

BANK:

First South Bank

By:


Patrick Wright

Its: Senior Vice President

In the presence of:

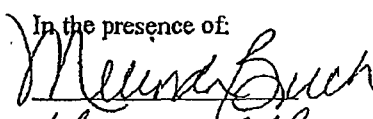
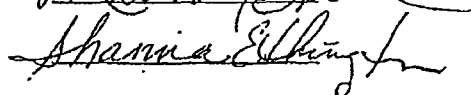



EXHIBIT 5

Amount \$518,823.53 Date 1/15/2009

Amount \$80,745.35 Date 1/15/2009

Amount \$6.00 Date 1/15/2009

Amount \$25,000.00 Date 1/16/2009

Amount \$273,866.63 Date 1/16/2009

Amount \$19,642.43 Date 1/16/2009

PURCHASER'S RECEIPT - RETAIN FOR YOUR RECORDS



First South Bank

Hilton Head-Bluffton, SC 29910

HH-B 4136

REMITTER

ECOLOGICAL INVESTMENTS, LLC

01/16/09

87-220/632

***NORTH & BLACK, P. C. ***
PAYABLE TO

NOT NEGOTIABLE

25,000.00

SEVENTY FIVE THOUSAND and 00/100th US Dollars

CASHIER'S CHECK

MEMORANDUM

FOR

RECORD 0259

PURCHASER'S RECEIPT - RETAIN FOR YOUR RECORDS



First South Bank

Hilton Head-Bluffton, SC 29910

HH-B

4156

REMITTER

ECOLOGICAL INVESTMENT

01/15/07

67-228/632

VERNS L. DARVIN COUNTY TREASURER
PAYABLE TO

NOT NEGOTIABLE

SC, 745.35

SEVENTY THOUSAND SEVEN HUNDRED FORTY FIVE and 35/100 DOLLARS

CASHIER'S CHECK

MEMORANDUM

FOR

[Handwritten signature]

RECORD 0260

EXHIBIT 6

(23) COMM R/E VARI 8033303

FIRST SOUTH BANK

1/31/2010 1:51:06 PM

Printed by: PATRICK WRIGHT

Reporting Institution: 65

Date	Description	Transaction Amount	Principal	Interest	Principal Balance
Jan 14, 2008	Interest Payment	\$20,727.77		\$20,727.77	\$2,600,000.00
Jan 14, 2008	Automatic Late Charge	\$626.88			\$2,600,000.00
Jan 14, 2008	Note Renewal	\$0.00			\$2,600,000.00
Jan 15, 2008	Late Charge Waive (Manual)	\$626.88			\$2,600,000.00
Feb 08, 2008	Payment - Extra To Principal	\$8,594.44	\$0.00	\$8,594.44	\$2,600,000.00
Mar 05, 2008	Payment - Extra To Principal	\$14,661.10	\$0.00	\$14,661.10	\$2,600,000.00
Apr 02, 2008	Payment - Extra To Principal	\$15,672.22	\$0.00	\$15,672.22	\$2,600,000.00
May 12, 2008	Automatic Late Charge	\$999.99			\$2,600,000.00
May 13, 2008	Late Charge Waive (Manual)	\$999.99			\$2,600,000.00
May 27, 2008	Rate Change	Interest Rate:	7.0000%		
May 27, 2008	Note Renewal	\$0.00			\$2,600,000.00
May 30, 2008	Interest Payment	\$28,816.66		\$28,816.66	\$2,600,000.00
Jul 07, 2008	Automatic Late Charge	\$606.66			\$2,600,000.00
Jul 17, 2008	Late Charge Payment	\$606.66			\$2,600,000.00
Jul 17, 2008	Payment - Extra To Principal	\$15,166.66	\$0.00	\$15,166.66	\$2,600,000.00
Aug 05, 2008	Automatic Late Charge	\$606.66			\$2,600,000.00
Aug 06, 2008	Late Charge Waive (Manual)	\$606.66			\$2,600,000.00
Aug 12, 2008	Automatic Late Charge	\$999.99			\$2,600,000.00
Aug 13, 2008	Late Charge Waive (Manual)	\$999.99			\$2,600,000.00
Aug 26, 2008	Rate Change	Interest Rate:	7.0000%		
Aug 26, 2008	Note Renewal	\$0.00			\$2,600,000.00
Oct 06, 2008	Automatic Late Charge	\$999.99			\$2,600,000.00
Oct 15, 2008	Rate Change	Interest Rate:	5.5000%		
Oct 15, 2008	Note Renewal	\$0.00			\$2,600,000.00
Oct 20, 2008	Late Charge Payment	\$999.99			\$2,600,000.00
Oct 20, 2008	Interest Payment	\$56,622.22		\$56,622.22	\$2,600,000.00
Oct 31, 2008	Rate Change	Interest Rate:	5.0000%		
Nov 17, 2008	Payment - Extra To Principal	\$22,058.30	\$10,647.20	\$11,411.10	\$2,589,352.80
Dec 17, 2008	Rate Change	Interest Rate:	4.2500%		
Dec 22, 2008	Payment - Extra To Principal	\$20,647.05	\$10,359.21	\$10,287.84	\$2,578,993.59
Jan 16, 2009	Payment - Extra To Principal	\$19,642.43	\$10,032.42	\$9,610.01	\$2,568,961.17
Feb 11, 2009	Principal Payment	\$611,520.00	\$611,520.00		\$1,957,441.17
Feb 17, 2009	Payment - Extra To Principal	\$19,642.43	\$10,238.38	\$9,404.05	\$1,947,202.79
Mar 16, 2009	Payment - Extra To Principal	\$19,642.43	\$13,418.80	\$6,223.63	\$1,933,783.99
Apr 14, 2009	Payment - Extra To Principal	\$19,642.43	\$12,562.16	\$7,080.27	\$1,921,221.83
May 14, 2009	Payment - Extra To Principal	\$19,642.43	\$12,838.11	\$6,804.32	\$1,908,383.72
Jun 22, 2009	Payment - Extra To Principal	\$19,642.43	\$12,658.28	\$6,984.15	\$1,895,725.44
Jul 14, 2009	Payment - Extra To Principal	\$19,642.43	\$12,916.45	\$6,725.98	\$1,882,808.99
Aug 14, 2009	Payment - Extra To Principal	\$19,642.43	\$12,751.88	\$6,890.55	\$1,870,057.11
Sep 23, 2009	Payment - Extra To Principal	\$19,642.43	\$12,798.55	\$6,843.88	\$1,857,258.56
Oct 14, 2009	Payment - Extra To Principal	\$20,000.00	\$13,408.61	\$6,591.39	\$1,843,849.95
Nov 24, 2009	Automatic Late Charge	\$785.69			\$1,843,849.95
Nov 30, 2009	LOAN LATE FEE WAIVER	\$785.69			\$1,843,849.95
Dec 04, 2009	Payment - Extra To Principal	\$19,642.43	\$6,364.15	\$13,278.28	\$1,837,485.80
Dec 24, 2009	Automatic Late Charge	\$785.69			\$1,837,485.80
Jan 20, 2010	Payment - Extra To Principal	\$19,642.43	\$12,925.26	\$6,717.17	\$1,824,560.54

FSB/EI-001309

http://10.92.29.110/LAS_LAS1151/LAS1151.ASPX?Action=QUICKPRINT&XMLGuid=0CC0306C-79... 1/31/2010

EXHIBIT 7

ACCOUNT: 1015932 PAGE: 1
DOCUMENTS: 05/29/2009 2

ECOLOGICAL INVESTMENTS LLC
119 BULL POINT DRIVE
SEABROOK SC 29940

30-0
0
2

HILTON HEAD / BLUFFTON
7 ARLEY WAY SUITE 100
BLUFFTON SC 29910

TELEPHONE: 843-706-3900

Did you know that First South Bank may have the answers to your tough mortgage questions? The mortgage market is constantly changing and now may be the perfect time for a Mortgage check-up. We offer a variety of programs, products and rates to meet your mortgage needs. Please contact Lori Witnik at 864-573-4431.

PREMIUM MONEY MARKET ACCOUNT 1015932

MINIMUM BALANCE	13,086.36	LAST STATEMENT 04/30/09	42,226.99
AVERAGE BALANCE	25,166.82	1 CREDITS	37.70
		2 DEBITS	29,140.63
		THIS STATEMENT 05/29/09	13,124.06

DESCRIPTION	OTHER CREDITS	DATE	AMOUNT
INTEREST		05/29	37.70

CHECK #	DATE	AMOUNT	CHECK #	DATE	AMOUNT	CHECK #	DATE	AMOUNT
	05/11	9,498.20						

000804900061

DESCRIPTION	OTHER DEBITS	DATE	AMOUNT
LOAN PAYMENT		05/14	19,642.43

000106000019

INTEREST			
AVERAGE LEDGER BALANCE:	25,166.82	INTEREST EARNED:	37.70
AVERAGE AVAILABLE BALANCE:	25,166.82	DAYS IN PERIOD:	29
INTEREST PAID THIS PERIOD:	37.70	ANNUAL PERCENTAGE YIELD EARNED:	1.90%
INTEREST PAID 2009:	205.19		

*** CONTINUED ***

FSB/EI-000548

RECORD 0264

ACCOUNT: 1015932 PAGE: 2
DOCUMENTS: 05/29/2009 .2

ECOLOGICAL INVESTMENTS LLC

=====

PREMIUM MONEY MARKET ACCOUNT 1015932

=====

- - - ITEMIZATION OF NSF PAID AND RETURNED ITEM FEES - - -

	THIS PERIOD	YEAR TO DATE
NSF PAID ITEM FEE:	.00	.00
NSF RETURNED ITEM FEE:	.00	.00
OVERDRAFT FEES:	.00	.00

- - - - - DAILY BALANCE - - - - -					
DATE.....	BALANCE	DATE.....	BALANCE	DATE.....	BALANCE
05/11	32,728.79	05/14	13,086.36	05/29	13,124.06

FSB/EI-000549

RECORD 0265

EXHIBIT 8

ECOLOGICAL INVESTMENTS, LLC
119 BULL POINT DRIVE
SEABROOK, SC 29940

FIRST SOUTH BANK - BLUFFTON
7 ARLEY WAY, SUITE 100
BLUFFTON, SC 29910

Loan Number 8833303
Date 02-02-2006
Maturity Date 02-02-2008
Loan Amount \$ 2,600,000.00
Renewal Of

BORROWER'S NAME AND ADDRESS

"I" includes each borrower above, jointly and severally.

LENDER'S NAME AND ADDRESS

"You" means the lender, its successors and assigns.

For value received, I promise to pay to you, or your order, at your address listed above the PRINCIPAL sum of TWO MILLION SIX HUNDRED THOUSAND AND NO/100 Dollars \$ 2,600,000.00

☐ Single Advance: I will receive all of this principal sum on _____. No additional advances are contemplated under this note.

☒ Multiple Advances: The principal sum shown above is the maximum amount of principal I can borrow under this note. On _____ I will receive the amount of \$ _____ and future principal advances are contemplated.

Conditions: The conditions for future advances are _____

☒ Open End Credit: You and I agree that I may borrow up to the maximum principal sum more than one time. This feature is subject to all other conditions and expires on 02-02-2008.

☐ Closed End Credit: You and I agree that I may borrow (subject to all other conditions) up to the maximum principal sum only one time.

INTEREST: I agree to pay interest on the outstanding principal balance from 02-02-2006 at the rate of 7.000% per year until 02-02-2008.

☐ Variable Rate: This rate may then change as stated below.

☐ Index Rate: The future rate will be _____ the following index rate: _____

☐ No Index: The future rate will not be subject to any internal or external index. It will be entirely in your control.

☐ Frequency and Timing: The rate on this note may change as often as _____
A change in the interest rate will take effect _____

☐ Limitations: During the term of this loan, the applicable annual interest rate will not be more than _____ % or less than _____ %.

The rate may not change more than _____ % each _____.

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

☐ The amount of each scheduled payment will change. ☐ The amount of the final payment will change.

☐

ACCUAL METHOD: Interest will be calculated on a ACTUAL/360 basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

☐ on the same fixed or variable rate basis in effect before maturity (as indicated above).

☒ at a rate equal to 10%.

☒ LATE CHARGE: If a payment is not made within 10 days after it is due, I agree to pay a late charge of 5.000% OF THE LATE AMOUNT WITH A MIN OF \$10.00.

☒ ADDITIONAL CHARGES: In addition to interest, I agree to pay the following charges which ☐ are ☒ are not included in the principal amount above: LOAN FEE \$5,000.00

PAYMENTS: I agree to pay this note as follows:

MONTHLY PAYMENTS OF ACCRUED INTEREST CALCULATED ON THE AMOUNT OF CREDIT OUTSTANDING BEGINNING ON 03-04-2006 AND PRINCIPAL DUE ON 02-02-2008.

PURPOSE: The purpose of this loan is TO PAY OFF EXISTING DEBT WITH ADDITIONAL FUNDS FOR INTEREST CARRY OVER 24 MONTHS AND OTHER NOMINAL PROP
SECURITY: You have certain rights that may affect my property as explained on page 2. In addition to these rights, this agreement is separately secured by a ☐ preexisting ☐ contemporaneous agreement described as _____

ADDITIONAL TERMS: _____



SECURITY

SECURITY INTEREST: I give you a security interest in all of the Property described below that I own or have sufficient rights in which to transfer an interest, now or in the future, wherever the Property is or will be located, and all proceeds and products of the Property. "Property" includes all parts, accessories, repairs, replacements, improvements, and accessions to the Property; any original evidence of title or ownership; and all obligations that support the payment or performance of the Property. "Proceeds" includes anything acquired upon the sale, lease, license, exchange, or other disposition of the Property; any rights and claims arising from the Property; and any collections and distributions on account of the Property.

- ☐ **Accounts and Other Rights to Payment:** All rights to payment, whether or not earned by performance, including, but not limited to, payment for property or services sold, leased, rented, licensed, or assigned. This includes any rights and interests (including all liens) which I have by law or agreement against any account debtor or obligor.
- ☐ **Inventory:** All inventory held for ultimate sale or lease, or which has been or will be supplied under contracts of service, or which are raw materials, work in process, or materials used or consumed in my business.
- ☐ **Equipment:** All equipment including, but not limited to, machinery, vehicles, furniture, fixtures, manufacturing equipment, farm machinery and equipment, shop equipment, office and record keeping equipment, parts, and tools. The Property includes any equipment described in a list or schedule I give to you, but such a list is not necessary to create a valid security interest in all of my equipment.
- ☐ **Instruments and Chattel Paper:** All instruments, including negotiable instruments and promissory notes and any other writings or records that evidence the right to payment of a monetary obligation, and tangible and electronic chattel paper.
- ☐ **General Intangibles:** All general intangibles including, but not limited to, tax refunds, patents and applications for patents, copyrights, trademarks, trade secrets, goodwill, trade names, customer lists, permits and franchises, payment intangibles, computer programs and all supporting information provided in connection with a transaction relating to computer programs, and the right to use my name.
- ☐ **Documents:** All documents of title including, but not limited to, bills of lading, dock warrants and receipts, and warehouse receipts.
- ☐ **Farm Products and Supplies:** All farm products including, but not limited to, all poultry and livestock and their young, along with their produce, products, and replacements; all crops, annual or perennial, and all products of the crops; and all feed, seed, fertilizer, medicines, and other supplies used or produced in my farming operations.
- ☐ **Government Payments and Programs:** All payments, accounts, general intangibles, and benefits including, but not limited to, payments in kind, deficiency payments, letters of entitlement, warehouse receipts, storage payments, emergency assistance and diversion payments, production flexibility contracts, and conservation reserve payments under any preexisting, current, or future federal or state government program.
- ☐ **Investment Property:** All investment property including, but not limited to, certificated securities, uncertificated securities, securities entitlements, securities accounts, commodity contracts, commodity accounts, and financial assets.
- ☐ **Deposit Accounts:** All deposit accounts including, but not limited to, demand, time, savings, passbook, and similar accounts.
- ☒ **Specific Property Description:** The Property includes, but is not limited by, the following:
FROM 82.68 +/- ACRES IN JASPER COUNTY, SC; PARCEL 042-00-05-042 ALSO KNOWN AS THE BUTTERFLY KINGDOM PUD LOCATED AT THE END OF RED OAK ROAD IN HARDEEVILLE, SC.

ASSIGNMENT OF LEASES, RENTS AND PROFITS

If applicable, enter real estate description and record owner information: _____

The Property will be used for a ☐ personal ☒ business ☐ agricultural ☐ _____ purpose.
 Borrower/Owner State of organization/registration (if applicable) SC

ADDITIONAL TERMS OF THE SECURITY AGREEMENT

GENERALLY - This agreement secures this note and any other debt I have with you, now or later. However, it will not secure other debts if you fail with respect to such other debts, to make any required disclosure about this security agreement or if you fail to give any required notice of the right of rescission. If property described in this agreement is located in another state, this agreement may also, in some circumstances, be governed by the law of the state in which the Property is located.

NAME AND LOCATION - My name indicated on page 1 is my exact legal name. If I am an individual, my address is my principal residence. If I am not an individual, my address is the location of my chief executive offices or sole place of business. If I am an entity organized and registered under state law, my address is located in the state in which I am registered, unless otherwise indicated on page 2. I will provide verification of registration and location upon your request. I will provide you with at least 30 days notice prior to any change in my name, address, or state of organization or registration.

OWNERSHIP AND DUTIES TOWARD PROPERTY - I represent that I own all of the Property, or to the extent this is a purchase money security interest I will acquire ownership of the Property with the proceeds of the loan. I will defend it against any other creditor. Your claim to the Property is ahead of the claims of any other creditor. I agree to do whatever you require to protect your security interest and to keep your claim in the Property ahead of the claims of other creditors. I will not do anything to harm your position. I will not use the Property for a purpose that will violate any laws or subject the Property to forfeiture or seizure.

I will keep books, records and accounts about the Property and my business in general. I will let you examine these records at any reasonable time. I will prepare any report or accounting you request, which deals with the Property.

I will keep the Property in my possession and will keep it in good repair and use it only for the purpose(s) described on page 1 of this agreement. I will not change this specified use without your express written permission. I represent that I am the original owner of the Property and, if I am not, that I have provided you with a list of prior owners of the Property.

I will keep the Property at my address listed on page 1 of this agreement, unless we agree I may keep it at another location. If the Property is to be used in another state, I will give you a list of those states. I will not try to sell the Property unless it is inventory or I receive your written permission to do so. If I sell the Property I will have the payment made payable to the order of you and me.

You may demand immediate payment of the debt(s) if the debtor is not a natural person and without your prior written consent: (1) a beneficial interest in the debtor is sold or transferred, or (2) there is a change in either the identity or number of members of a partnership, or (3) there is a change in ownership of more than 25 percent of the voting stock of a corporation.

I will pay all taxes and charges on the Property as they become due. You have the right of reasonable access in order to inspect the Property. I will immediately inform you of any loss or damage to the Property.

If I fail to perform any of my duties under this security agreement, or any mortgage, deed of trust, lien or other security interest, you may without notice to me perform the duties or cause them to be performed. Your right to perform for me shall not create an obligation to perform and

your failure to perform will not preclude you from exercising any of your other rights under the law or this security agreement.

PURCHASE MONEY SECURITY INTEREST - For the sole purpose of determining the extent of a purchase money security interest arising under this security agreement: (a) payments on any nonpurchase money loan also secured by this agreement will not be deemed to apply to the Purchase Money Loan, and (b) payments on the Purchase Money Loan will be deemed to apply first to the nonpurchase money portion of the loan, if any, and then to the purchase money obligations in the order which the liens of collateral were acquired or if acquired at the same time, in the order selected by you. No security interest will be terminated by application of this formula. "Purchase Money Loan" means any loan the proceeds of which, in whole or in part, are used to acquire any collateral securing the loan and all extensions, renewals, consolidations and refinancing of such loan.

PAYMENTS BY LENDER - You are authorized to pay, on my behalf, charges I am or may become obligated to pay to preserve or protect the secured property (such as property insurance premiums). You may treat those payments as advances and add them to the unpaid principal under the note secured by this agreement or you may demand immediate payment of the amount advanced.

INSURANCE - I agree to buy insurance on the Property against the risks and for the amounts you require and to furnish you continuing proof of coverage. I will have the insurance company name you as loss payee on any such policy. You may require added security if you agree that insurance proceeds may be used to repair or replace the Property. I will buy insurance from a firm licensed to do business in the state where you are located. The firm will be reasonably acceptable to you. The insurance will last until the Property is released from this agreement. If I fail to buy or maintain the insurance (or fail to name you as loss payee) you may purchase it yourself.

WARRANTIES AND REPRESENTATIONS - If this agreement includes accounts, I will not settle any account for less than its full value without your written permission. I will collect all accounts until you tell me otherwise. I will keep the proceeds from all the accounts and any goods which are returned to me or which I take back in trust for you. I will not mix them with any other property of mine. I will deliver them to you at your request. If you ask me to pay you the full price on any returned items or items retaken by myself, I will do so. You may exercise my rights with respect to obligations of any account debtors, or other persons obligated on the Property, to pay or perform, and you may enforce any security interest that secures such obligations.

Any person who signs within this box does so to give you a security interest in the Property described on this page. This person does not promise to pay the note. "I" as used in this security agreement will include the borrower and any person who signs within this box.

Date _____

Signed _____

If this agreement covers inventory, I will not dispose of it in my ordinary course of business at the fair market value for the Property, or at a minimum price established between you and me.

If this agreement covers farm products I will provide you, at your request, a written list of the buyers, commission merchants or selling agents to or through whom I may sell my farm products. In addition to those named on this written list, I authorize you to notify at your sole discretion any additional parties regarding your security interest in my farm products. I remain subject to all applicable penalties for selling my farm products in violation of my agreement with you and the Food Security Act. In this paragraph the terms farm products, buyers, commission merchants and selling agents have the meanings given to them in the Federal Food Security Act of 1985.

If this agreement covers chattel paper or instruments, either as original collateral or proceeds of the Property, I will note your interest on the face of the chattel paper or instruments.

REMEDIES - I will be in default on this security agreement if I am in default on any note this agreement secures or if I fail to keep any promise contained in the terms of this agreement. If I default, you have all of the rights and remedies provided in the note and under the Uniform Commercial Code. You may require me to make the secured property available to you at a place which is reasonably convenient. You may take possession of the secured property and sell it as provided by law. The proceeds will be applied first to your expenses and then to the debt. I agree that 10 days written notice sent to my last known address by first class mail will be reasonable notice under the Uniform Commercial Code. My current address is on page 1.

PERFECTION OF SECURITY INTEREST - I authorize you to file a financing statement covering the Property. I will comply with, facilitate, and otherwise assist you in connection with obtaining possession of or control over the Property for purposes of perfecting your security interest under the Uniform Commercial Code.

ADDITIONAL TERMS OF THE NOTE

DEFINITIONS - As used on pages 1 and 2, "I," "me" or "my" means the terms that apply to this loan. "It," "he" or "him" means each Borrower who signs this note and each other person or legal entity including guarantors, endorsers, and sureties who agree to pay this note (together referred to as "us"). "You" or "your" means the lender and its successors and assigns.

APPLICABLE LAW - The law of the state of South Carolina in which you are located governs this agreement. Any term of this agreement which is contrary to applicable law will not be effective, unless the law permits you and me to agree to such a variation. If any provision of this agreement cannot be enforced according to its terms, this fact will not affect the enforceability of the remainder of this agreement. No modification of this agreement may be made without your express written consent. Time is of the essence in this agreement.

PAYMENTS - Each payment I make on this note will first reduce the amount I owe you for charges which are neither interest nor principal. The remainder of each payment will then reduce accrued unpaid interest, and then unpaid principal. If you and I agree to a different application of payments, we will describe our agreement on this note. I may prepay a part of, or the entire balance of this loan without penalty, unless we specify to the contrary on this note. Any partial prepayment will not excuse or reduce any later scheduled payment until this note is paid in full (unless, when I make the prepayment, you and I agree in writing to the contrary).

INTEREST - Interest accrues on the principal remaining unpaid from time to time, until paid in full. If I receive the principal in more than one advance, each advance will start to earn interest only when I receive the advance. The interest rate in effect on this note at any given time will apply to the entire principal sum outstanding at that time. Notwithstanding anything to the contrary, I do not agree to pay and you do not intend to charge any rate of interest that is higher than the maximum rate of interest you could charge under applicable law for the extension of credit that is agreed to in this note (either before or after maturity). If any notice of interest accrual is sent and is in error, we mutually agree to correct it, and if you actually collect more interest than allowed by law and this agreement, you agree to refund it to me.

INDEX RATE - The index will serve only as a device for setting the interest rate on this note. You do not guarantee by selecting this index, or the margin, that the interest rate on this note will be the same rate you charge on any other loans or class of loans you make to me or other borrowers.

POST MATURITY RATE - For purposes of deciding when the "Post Maturity Rate" (shown on page 1) applies, the term "maturity" means the date of the last scheduled payment indicated on page 1 of this note or the date you accelerate payment on the note, whichever is earlier.

SINGLE ADVANCE LOANS - If this is a single advance loan, you and I expect that you will make only one advance of principal. However, you may add other amounts to the principal if you make any payments described in the "PAYMENTS BY BORROWER" paragraph on page 2.

MULTIPLE ADVANCE LOANS - If this is a multiple advance loan, you and I expect that you will make more than one advance of principal. If it is closed end credit, repaying a part of the principal will not entitle me to additional credit.

SET-OFF - I agree that you may set off any amount due and payable under this note against any right I have to receive money from you.

"Right to receive money from you" means:

- (1) any deposit account balance I have with you;
- (2) any money owed to me on an item presented to you or in your possession for collection or exchange; and
- (3) any repurchase agreement or other nondeposit obligation.

Any amount due and payable under this note means the total amount of which you are entitled to demand payment under the terms of this note at the time you set off. This total includes any balance the due date for which you properly accelerate under this note.

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON PAGES 1 AND 2). I have received a copy on today's date.

ECOLOGICAL INVESTMENTS, LLC

JOHN E. ROSENBERG, MANAGER/MEMBER

SIGNATURE FOR LENDER: PATRICK WRIGHT, SENIOR VICE PRESIDENT, AREA EXECUTIVE

Expires: ©1994, 1991 Borders Symptom, Inc., St. Cloud, MN Form UHS-LAZ-SC 2/8/2001

If my right to receive money from you is also owned by someone who has not agreed to pay this note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement. Your right of set-off does not apply to an account or other obligation where my rights are only as a representative. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set off this debt against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right to set-off.

SECURITY - References to agreements securing this loan on page 1 shall not be considered an exclusive list of all such agreements. Other agreements you and I have executed or execute in the future which are not referenced on page 1 may secure this loan.

DEFAULT - I will be in default if any one or more of the following occur:

- (1) I fail to make a payment on time or in the amount due; (2) I fail to keep the Property insured, if required; (3) I fail to pay, or keep any promise, on any debt or agreement I have with you; (4) any other creditor of mine attempts to collect any debt I owe him through court proceedings; (5) I die, am declared incompetent, make an assignment for the benefit of creditors, or become insolvent (either because my liabilities exceed my assets or I am unable to pay my debts as they become due); (6) I make any written statement or provide any financial information that is untrue or inaccurate at the time it was provided; (7) I do or fail to do something which causes you to believe you will have difficulty collecting the amount I owe you; (8) any collateral securing this note is used in a manner or for a purpose which threatens confiscation by a legal authority; (9) I change my name or assume an additional name without first notifying you before making such a change; (10) I fail to plant, cultivate and harvest crops in due season; (11) any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce an agricultural commodity, as further explained in 7 C.F.R. Part 1940, Subpart G, Exhibit M.

REMEDIES - If I am in default on this note you have, but are not limited to, the following remedies:

- (1) You may demand immediate payment of all I owe you under this note (principal, accrued unpaid interest and other accrued unpaid charges).
- (2) You may set off this debt against any right I have to the payment of money from you, subject to the terms of the "SET-OFF" paragraph herein.
- (3) You may demand security, additional security, or additional parties to be obligated to pay this note as a condition for not using any other remedy.
- (4) You may refuse to make advances to me or allow purchases on credit by me.
- (5) You may use any remedy you have under state or federal law.
- (6) You may make use of any remedy given to you in any agreement securing this note.

By selecting any one or more of these remedies you do not give up your right to use later any other remedy. By waiving your right to declare an event to be a default, you do not waive your right to consider later the event a default if it continues or happens again.

COLLECTION COSTS AND ATTORNEY'S FEES - I agree to pay all costs of collection, replevin or any other or similar type of cost if I am in default. In addition, if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs (except where prohibited by law). To the extent permitted by the United States Bankruptcy Code, I also agree to pay the reasonable attorney's fees and costs you incur to collect this debt as awarded by any court exercising jurisdiction under the Bankruptcy Code.

WAIVER - I give up my rights to require you to do certain things. I will not require you to:

- (1) demand payment of amounts due (presentment);
- (2) obtain official certification of nonpayment (protest); or
- (3) give notice that amounts due have not been paid (notice of dishonor).

I waive any defenses I have based on suretyship or impairment of collateral.

OBLIGATIONS INDEPENDENT - I understand that I must pay this note even if someone else has also agreed to pay it (by, for example, signing this form or a separate guarantee or endorsement). You may sue me alone, or anyone else who is obligated on this note, or any number of us together, to collect this note. You may without notice release any party to this agreement without releasing any other party. If you give up any of your rights, with or without notice, it will not affect my duty to pay this note. Any extension of new credit to any of us, or renewal of this note by all or less than all of us will not release me from my duty to pay it. Of course, you are entitled to only one payment in full. I agree that you may at your option extend this note or the debt represented by this note, or any portion of the note or debt, from time to time without limit or notice and for any term without affecting my liability for payment of the note. I will not assign my obligation under this agreement without your prior written approval. You may, without notice, fail to perfect your security interest in, impair, or release any security and I will still be obligated to pay this loan.

FINANCIAL INFORMATION - I agree to provide you, upon request, any financial statement or information you may deem necessary. I warrant that the financial statements and information I provide to you are or will be accurate, correct and complete.

WAIVER OF HEARING PRIOR TO IMMEDIATE POSSESSION: If this loan is for a business purpose I agree to waive the right to five days' notice and a pressurized hearing prior to seizure of any personal property which may secure this transaction.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

First South Bank,

Plaintiff,

vs.

John E. Rosenberg and Philip J. Brust,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2013-CP-07-0610

**PLAINTIFF'S REPLY TO DEFENDANT
PHILIP J. BRUST'S SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF
MOTION FOR RECONSIDERATION**

NOW COMES PLAINTIFF First South Bank ("Plaintiff") who submits this Reply to Defendant Philip J. Brust's ("Brust") Supplemental Memorandum in Support of Motion For Reconsideration ("Supplemental Memorandum"). As more fully set forth below, Brust's request that the Court submit the issue of damages to a jury is improper, and he fails to create a genuine issue of material fact regarding same that would cause the Court to reconsider its award of damages set forth in the Order Granting Plaintiff's Motion for Summary Judgment as to Brust dated August 5, 2014 ("Order").

ARGUMENT

The Defendant has alleged certain inconsistencies in the calculation of the judgment amount as set forth in the Court's Order of August 5, 2014. Plaintiff has attached hereto copies of the applicable monthly statements of the checking account of Ecological with Plaintiff along with a breakdown month by month of the bank statements and a narrative prepared by a representative of Plaintiff.

As to the First Bullet Point.

Defendant alleges that Plaintiff failed to properly apply a deposit by Defendant into the account of Ecological in the sum of Twenty-Five Thousand and No/100 (\$25,000.00) Dollars on October 17, 2011. **Exhibit 1** attached to Defendants' Supplemental Memorandum contains a copy of the check along with the deposit ticket into the account of Ecological. Nowhere on the check does it state how the check was

to be applied to the outstanding loan or to any other liability of Ecological. **Exhibit 2** attached to Defendant's Supplemental Memorandum contains two (2) short emails between John Rosenberg, who was the managing member of Ecological, and Patrick Wright, who was the loan officer with Plaintiff, responsible for the relationship with Ecological.

The emails reference one loan payment which was past due and that Defendant had sent a replacement check. The deposit set forth in **Exhibit 1** above is the referenced check from Defendant and a loan payment of \$11,979.32 was made on October 18, 2011. There is no direction in the emails set forth in **Exhibit 2** that the balance of the deposit should be applied to the outstanding principal balance due on the loan. In fact, the only reference is to the past due loan payment and Plaintiff applied, as directed, a portion of the deposit to same. As a practical matter, the balance of the deposit by Defendant was applied to the loan payment due for the following month on November 1, 2011.

As to the Second Bullet Point.

Defendant alleges that somehow Plaintiff has misapplied the funds from the sale of the easement in the amount of \$518,823.53. The Easement Sale Proceeds Allocation Agreement (**Exhibit 3**) provides for how the funds were to be applied. In addition thereto, Mr. Robsenberg had requested and Defendant had approved the sum of \$22,830.93 being repaid to Rosenberg. The balance of the funds were applied to: outstanding real estate taxes due to Jasper County; attorney fees and costs to the law firm of North & Black, PC; accounting fees to Cherry, Beekart & Holland; and loan payments.

As to the Third Bullet Point.

All of the interest for the promissory notes for the loan between Ecological and Plaintiff were calculated on a 360 day basis. The first Note was dated February 2, 2006, and there were four (4) subsequent loan renewals with new Notes which all provided for accrual of interest on a 360 day basis. At no time during the term of the loan did a representative of Ecological raise the issue referenced by

Defendant or contest the calculation of each loan payment due. Payments were made and applied throughout the years of the loan and each renewal based upon the accrual of interest on a 360 day basis. Defendant has no standing to raise this issue as he is not a party to the Note. In addition, under the express language of his Guaranty, Defendant "waived any and all defenses claims and discharges of Borrower, or any other obligor pertaining to the indebtedness, except the defense of discharge by payment in full." (See **Exhibit A** to Plaintiff's Reply to Defendant Philip J. Brust's Supplemental Memorandum in Support of Motion to Reconsider).

In his Supplemental Memorandum, Brust alleges that there are errors with regard to Plaintiff's damages, and that same should be submitted to a jury. However, Brust's request is improper as Plaintiff's damages under the Unlimited Guaranty ("Guaranty") are liquidated, and he failed to make a timely demand for a jury trial on this issue. A copy of the Guaranty is attached hereto as **Exhibit A**. Furthermore, under the Guaranty, Brust waived his right to allege the issues raised in the Supplemental Memorandum.

I. Plaintiff's damages under the Guaranty are liquidated and therefore submission to a jury is improper

In his Supplemental Memorandum, Brust argues there is a genuine dispute concerning Plaintiff's damages and same should be submitted to a jury. This argument assumes Plaintiff's damages are unliquidated, which is not the case as they can be determined by a standard and mathematical calculation. Accordingly, submitting the issue of Plaintiff's damages to a jury is improper.

"In general, damages are unliquidated when they are an uncertain quantity, depending on no fixed standard, referred to the wise discretion of a jury, and can never be made certain except by accord or verdict" Beckmann Concrete Contractors, Inc. v. United Fire and Cas. Co., 360 S.C. 127, 132, 600 S.E.2d 76, 78 (S.C. Ct. App. 2004) (citing 22 Am. Jur. 2d Damages §48 (2003)). In contrast, "[i]n liquidated-damages cases, the amount is... capable of ascertainment by computation." Id. at 131 (citing Lewis v.

Congress of Racial Equality, 275 S.C. 556, 274 S.E.2d 287 (1981)). "Liquidated damages are damages the amount of which have been made certain and fixed either by the act and agreement of the parties or by operation of law to a sum which cannot be changed by the proof." Id. at 131-2 "They are defined as damages the amount of which have been ascertained by judgment or by the specific agreement of the parties or which are susceptible of being made certain by mathematical calculation from known factors. Id. at 132. As such, damages that can be determined from the parties' agreement or from a mathematical formula are liquidated and not proper for a jury determination. See Id.

Plaintiff's damages for Brust's breach of the Guaranty are liquidated as same can be determined from the terms of the Guaranty. As set forth in the Guaranty, Brust unconditionally guaranteed the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise the payment and performance of each and every debt, liability and obligation of every type and description which Ecological Investments, LLC ("Borrower") owed Plaintiff. (See **Exhibit A.**) Brust also agreed that his liability under the Guaranty shall be "UNLIMITED", and that he would pay accrued interest on any principal amount Borrower owed Plaintiff. (See **Exhibit A.**) He also agreed to pay all attorneys' fees, collection costs, and enforcement expenses referable thereto. (See **Exhibit A.**) Accordingly, Brust's liability under the Guaranty is determined by the indebtedness Borrower owes Plaintiff, and reference must be made to same as a result, said indebtedness being most recently created by an agreement between Plaintiff and Borrower on November 30, 2010 and evidenced by the Universal Note and Security Agreement of even date ("2010 Note"). A copy of the 2010 Note is attached hereto as **Exhibit B.**

Under the 2010 Note, Plaintiff loaned to Borrower One Million Seven Hundred Thousand and 00/100 Dollars (\$1,700,000.00) Dollars and Borrower promised to repay same according to the terms and conditions contained therein. (See **Exhibit B.**) Also, the 2010 Note was to mature and all sums due and owing thereunder were to be repaid on or before November 30, 2012. (See **Exhibit B.**) During the term of

repayment, interest on the principal amount was to accrue at a rate of five (5) and 1/4 (5.25%) percent and calculated on a 360 day basis. (See **Exhibit B.**) As to the 2010 Note's repayment terms, Borrower agreed to pay Plaintiff twenty-three (23) monthly interest-only payments ranging from Seven Thousand Fifty Two and 50/100 (\$7,052.50) Dollars to Seven Thousand Six Hundred Sixty Seven and 33/100 (\$7,667.33) Dollars beginning December 30, 2010. (See **Exhibit B.**) In conjunction with the interest-only payments, Plaintiff was to make twenty-three (23) monthly principal payments of Four Thousand and 00/100 (\$4,000.00) Dollars. (See **Exhibit B.**) Borrower was also required to make one (1) payments of One Million Six Hundred Fifteen Thousand Two Hundred Sixty Nine and 50/100 (\$1,615,269.50) Dollars on or before November 30, 2012. (See **Exhibit B.**) In the event all amounts due and owing were not paid on before November 30, 2012, Borrower agreed that same would accrue interest at a post-maturity interest rate of ten (10%) percent. (See **Exhibit B.**)

The 2010 Note also contains a term by which Plaintiff was to apply Borrower's payments to the owed indebtedness. Under that term, Plaintiff was to first apply Borrower's payments to charges that were neither interest nor principal. (See **Exhibit B.**) After said application, the remainder of each payment, to the extent was a remainder, was then to be applied next to unpaid interest and then to unpaid principal. (See **Exhibit B.**) After Borrower's payments were applied in this manner, the remaining amounts due and owing under the 2010 Note were Borrower's indebtedness under same, and, consequently, Brust's liability under the Guaranty. Accordingly, the 2010 Note and Guaranty contain a mathematical formula and standard by which Plaintiff's damages under the Guaranty are to be calculated, a fact which appears to be admitted by Brust as may of the alleged errors are based on the framework described above.

As such, Plaintiff's damages are liquidated and the determination of same by a jury is improper.

II. Brust has failed to demand a jury trial as to the issue of damages and same would be improper, if so demanded

In the event Plaintiff's damages are unliquidated, which Plaintiff vehemently denies, same should be determined by the Court as Brust has failed to make any demand for a jury trial as to this issue.

Pursuant to Rule 38(a), SCRPC, "[t]he right to a trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Rule 38(a), SCRPC.

"Any party may demand a trial by jury of any issue triable by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ten (10) days after the service of the last pleading directed to such issue." Rule 38(b), SCRPC. The failure of a party serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of a trial by jury. Rule 38(d), SCRPC. Also, "[i]ssues of law and issues not demanded for trial by jury as provided in Rule 38 shall be tried by the Court....." Rule 39(b), SCRPC. Furthermore, a waiver of right to a jury trial occurs even though the failure to make a timely jury demand is done through negligence, and amended or supplemental pleadings do not extend the time for making demand for a jury trial except as to new issues raised by the amended pleadings. Britt v. Knight Pub. Co, 42 F.R.D. 593, 6 A.L.R. Fed. 214 (D.S.C. 1967).

Brust is not entitled to a jury trial as to the issue of damages as he has not demanded same. This is seen in the fact that Plaintiff was served with Defendant Philip J. Brust's Answer to Plaintiff's Complaint and Crossclaims against Defendant John E. Rosenberg ("Answer") on September 6, 2013. In his Answer, Brust does not make any allegation related to a demand for a jury trial. Also, Plaintiff nor its counsel were served with a demand for a jury trial within ten (10) days after the date of service of the Amended Answer and Counterclaim, which was the last pleading that contained allegations related to the issue of damages. Accordingly, as more than ten (10) days have passed since the service of the Amended Answer

and Counterclaim and no other pleadings concerning Plaintiff's damages have been served, Brust has waived his right to a trial by jury as to same.

As a result, he is not entitled to have the issue of damages submitted to a jury.

III. Brust waived his right to raise the issues in the Supplemental Memorandum under the terms of the Guaranty.

In addition to the above, Brust waived his right to raise the issues set forth in the Supplemental Memorandum.

The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Middleton v. Eubank, 388 S.C. 8, 14, 694 S.E.2d 31, 34 (S.C. Ct. App. 2010) (citing McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). In general, if a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, and the terms are to be taken and understood in their plain, ordinary, and popular sense. Ingram v. Kasey's Associates, 340 S.C. 98, 110, 531 S.E.2d 287, 293 (2000). Also, a limited liability company is a separate and distinct entity from its members and the liabilities of the entity are not those of its members. S.C. Code Ann. §33-44-201, -303(a) (1976). Relatedly, a limited liability company is not a co-owner of and has no transferrable interest in the property of a limited liability company; rather, a member only has a distributional interest in same. S.C. Code §33-44-501(a), (b) (1976). When these statements of law are applied to this case, it is clear Brust waived his right to allege the issues set forth in the Supplemental Memorandum.

Brust, under the Guaranty, waived any and all defenses, claims and discharges of Borrower, or any other obligor, pertaining to indebtedness, except the defense of discharge by payment in full. (See Exhibit A.) Additionally, he agreed that he would not assert, plead or enforce against Plaintiff any setoff available against Plaintiff to Borrower or any such other person, whether or not on account of a related transaction. (See Exhibit A.) These are unambiguous terms that state Brust agreed to waive any and all defenses, claims, and discharges that Borrower, a separate and distinct legal entity, may have against Plaintiff, including Borrower's right to any accounting and/or any set-off to which it may be entitled, the existence of which is vehemently

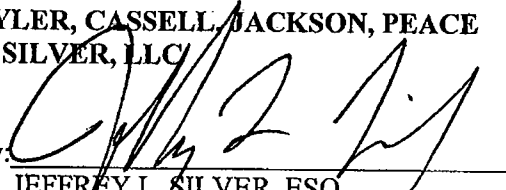
denied. When this term is viewed in conjunction with the facts in the Supplemental Memorandum, it is apparent that Brust has waived his right to raise same as they only relate to Plaintiff's application of payments to the indebtedness owed by Borrower under the 2010 Note

Accordingly, Brust waived his right to allege the issues set for the Supplemental Memorandum under the terms of the Guaranty.

CONCLUSION

Based on the foregoing reasons, Brust's Motion to Reconsider should be denied as Plaintiff's damages are liquidated, and, to the extent they are unliquidated, Brust has failed to request a jury trial and the action requested by Brust is equitable in nature. Also, Brust waived his right to raise the alleged issues in the Supplemental Memorandum under the terms of the Guaranty.

**TYLER, CASSELL, JACKSON, PEACE
& SILVER, LLC**

By: 

JEFFREY L. SILVER, ESQ.

TAYLOR A. PEACE, ESQ.

1331 Elmwood Avenue, Suite 300

P.O. Box 11656

Columbia, South Carolina 29211-1656

(803) 779-4997

Attorneys for Plaintiff First South Bank

November 3, 2014
Columbia, South Carolina

EXHIBIT 1

RECORD 0278

**First South Bank****First South Financial Services***A Division of First South Bank*

jsilver@tcjps.com

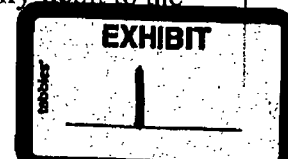
Received: Oct 28, 2014 11:21 AM
Expires: Nov 11, 2014 11:21 AM
From: clyerly@firstsouthbancorp.com
To: jsilver@tcjps.com
Cc: sethington@firstsouthbancorp.com, jcason@firstsouthbancorp.com
Subject: Ecological Investments, LLC

Attachments: Ecological Investments1.xlsx

This message was sent securely using ZixCorp.

Jeff: in response to Defendant Brust Supplemental Memorandum to Reconsider I offer the following explanations:

- A deposit in the amount of \$25,000 was made to the Ecological Investments LLC (DDA#1015932) checking account on September 26, 2011. The maker of the check was Philip Brust. This check was charged back due to NSF on 9/29/11. (See bank statement (9/1/11 – 10-2-11). There were no checks or loan debits for loan payment during this statement period. The beginning balance on the statement was \$2,185.11 and ending balance was \$2,180.70. There was an interest credit of \$1.59 and a charge back fee of \$6.00 for the NSF.
- On the bank statement for the period of 10-3-11 to 10-31-11 there was a “replacement” check sent from Brust in the amount of \$25,000 which was deposited on 10/17/11 (the subject of Defendant’s first bullet point). Activity in the account (\$2,180.70 beginning balance) was the \$25,000 credit and an interest credit for \$3.40. The only debit was for the loan payment on 10/18/11 in the amount of \$11,979.32. The ending balance was \$15,204.78.
- On the statement for the period of 11-1-11 to 11-30-11, the beginning balance was \$15,204.78. There were no deposits made to the account during this period, but the account was credited with \$1.32 in interest. The loan payment of \$11,280.00 was debited on November 1, 2011. The ending balance was \$3,926.10.
- For the bank statement dated 12-1-11 to 12-31-11 the beginning balance was \$3,926.10. There was a \$22,000 check deposited on 12/28/11 (Brust was the maker of the check) and the account earned \$1.33 in interest. There was a debit memo for the loan payment (2 months) in the amount of \$23,184.90 and was the only debit to the account for this period. The ending balance was \$2,742.53.

<https://web1.zixmail.net/s/messageservlet?tz=240>

RECORD 0279

- For the period 1/1/12 through 1/31/12 there were no deposits to the account, but the account was credited with \$.71 interest. The ending balance was \$2,743.24. The balance was insufficient to make a loan payment.

The second bullet point of Defendant's Memorandum pertains to the use of proceeds from the sale of the easement.

- The statement for the period beginning 1/1/09 to 1/31/09 showed a beginning balance of \$200.97. There was a credit in the amount of \$518,823.53 on 1-15-09. There was debits process on 1-15-09 for \$80,745.35 (Jasper County property taxes) and a \$6.00 cashier's check fee. On 1-16-09 the payoff to the second mortgage was processed in the amount of \$273,866.63 and a loan payment (the first mortgage loan) in the amount of \$19,642.43 was debited from the account. Also on 1-16-09 the law firm of North & Black PC was issued a check for \$25,000 for their services pertaining to a lawsuit EI against a former purchaser of the property. John Rosenberg was also issued a check from the account on 1/29/09 in the amount of \$22,830.93. The ending balance on the account on 1-31-09 was \$96,926.66 after a \$6.50 service charge.
- The statement period from 1-30-09 to 2-27-09 showed a beginning balance of \$96,926.66. There was one debit for \$19,642.43 (loan payment) on 2-17-09 and a \$6.50 maintenance fee. The Ending balance was \$77,284.23.
- For the statement of 2-28-09 to 3-31-09 the beginning balance was \$77,284.23. There was one deposit in the amount of \$38,861.68 (check from Jasper County Treasurer which was apparently a refund of a portion of real estate property taxes). The other credit to the account was \$67.12 interest credit on 3-31-09. Debits were \$19,642.43 for a loan payment on 3-16-09, \$15,000.00 check payable to North & Black PC (3-10-09), and \$1,600.00 check payable to Cherry Beckart & Holland, CPA (3-23-09). The ending balance was \$79,920.60.
- For the statement 4-1-09 to 4-30-09 the account had two deposits. One on 4-07-09 \$43,362.96 which was a check from Jasper County Delinquent Taxes payable to John Rosenberg, but endorsed and deposited to the EI account. The second deposit of \$34,926 consisted of three checks from EI "Investors. Interest earned for the month was \$100.37. The three debits for this period were a wire transfer to Jasper County Treasurer (taxes) for \$95,624.51 (plus wire fee of \$16.00) on 4-15-09, \$800.00 to Cherry Beckart & Holland CPAs on 4-20-09, and a loan payment of \$19,642.43 on 4-14-09. The ending balance on the statement was \$42,226.99.
- For the statement from 5-1-09 to 5-29-09 the beginning balance was \$42,226.99. A check in the amount of \$9498.20 payable to North & Black PC cleared on 5-11-09. A loan payment in the amount of \$19,642.43 was processed on 5-14-09. Interest in the

amount of \$37.70 was credited on 5-29-09. There were no deposits to the account during this period which left the ending balance of \$13,124.06.

- For the statement period of 5-30-09 to 6-30-09 the beginning balance was \$13,124.06. There was only one deposit during this period which was for \$39,015.00. This deposit consisted of checks in the amount of \$15,000.00 (EI investor Herms), \$24,000 (EI investor Schultz), and \$15.00 (Jasper County). The account was credit with \$26.89 in interest on 6-30-09. The only debit was the loan payment in the amount of \$19,642.43 which was processed on 6-22-09. The ending balance was \$32,523.52.
- For the statement period 7-1-09 to 7-31-09 the beginning balance was \$32,523.52. There was one deposit during this period for \$15,000.00 which was made on 7-31-09 (EI investor Sprouls). The account was credited with interest earned in the amount of \$29.02 on 7-31-09. There was only one check cleared which was on 7-29-09 in the amount of \$4300.00 and was payable to North & Black PC. A loan payment in the amount of \$19,642.43 was processed on 7-14-09. The ending balance for the period was \$23,610.11.
- For the statement period of 8-1-09 to 8-31-09 the beginning balance was \$23,610.11. There were no deposits for the period. Interest earned was \$15.26 credited to the account on 8-31-09. The loan payment was debited to the account on 8-14-09 in the amount of \$19,642.43. The ending balance was \$3,982.94.
- For the statement period of 9-1-09 to 9-30-09 the beginning balance was \$3,982.94. There were two deposits for the period consisting of \$15,000.00 on 9-16-09 (EI investor Hermes) and \$1,000.00 (EI investor Rosenberg). The account was credited \$7.77 in interest on 9-30-09. The only debit to the account was on 9-23-09 for the loan payment in the amount of \$19,642.43. The ending balance was \$338.28.
- For the statement period 10/01/09 to 10/30/09 the beginning balance was \$338.28. There was one deposit in the amount of \$5,000.00 (EI investor Schultz) on 10/29/09. The account earned \$.75 in interest for the month. The only debit to the account was a \$10.00 service charge. The account had insufficient funds and therefore no payment was made on the loan. The ending balance was \$5,329.03.
- For the period 11/1/09 to 11/30/09 the beginning balance was \$5,329.03. The only credit to the account was \$6.11 in earned interest for the month. There were no debits to the account and there were insufficient funds to make a loan payment. The ending balance was \$5,335.14.
- For the period 12/1/09 to 12/31/09 the beginning balance was \$5,335.14. Two deposits were made during the month. A deposit in the amount of \$22,000.00 was on 12-2-09 (EI investor). The second deposit was made on 12-29-09 in the amount of \$15,000.00 (EI investor Brust). The account was credited \$15.81 in interest on 12/30/09. The only debit to the account was for one loan payment in the amount of \$19,642.43 which occurred on 12-7-09. The ending balance was \$22,708.52.

The Excel spreadsheet attachment reflects the above narrative. You will need to open both tabs at the bottom.

W. C. "Chip" Lyerly III

President

First South Bank

107 Westpark Blvd., Suite 230

Columbia, SC 29210

direct: (803) 806-3103

cell: (803) 546-3370

fax: (803) 343-3445

email: clyerly@firstsouthbancorp.com

This message is intended only for the persons or entities to which it is addressed. The information transmitted herein may contain proprietary or confidential material. Review, reproduction, retransmission, distribution, disclosure or other use, and any consequent action taken by persons or entities other than intended recipients, are prohibited and may be unlawful. If you are not the intended recipient, please delete this information from your system and contact the sender. The information contained herein is subject to change without notice. Although reasonable precautions have been taken to ensure that no viruses are present, the sender makes no warranty or guaranty with respect thereto, and is not responsible for any loss or damage arising from the receipt or use of this e-mail or attachments hereto.

This message was secured by ZixCorp^(R).

Secured by **zixcorp**

EXHIBIT 2

Ecological Investments LLC account # 1015932

Statement Period	Comments
9-1-11 to 10-2-11	\$2,185.11 Beginning balance
	\$25,000.00 check from Philip Brust 9-26-11
	(\$25,000.00) charge back of Brust check NSF
	(\$6.00) NSF fee
	\$1.59 interest credit 10-2-11
	\$2,180.70 Ending balance
10-3-11 to 10-31-11	\$2,180.70 Beginning balance
	25,000.00 "Replacement check from Brust
	(\$11,979.32) loan payment to FSB 10-18-11
	\$3.40 interest credit 10-31-11
	\$15,204.78 Ending balance
11-1-11 to 11-30-11	\$15,204.78 Beginning balance
	(\$11,280.00) Loan payment to FSB on 11-1-11
	\$1.32 interest credit 11-30-11
	\$3,926.10 Ending balance
12-1-11 to 12-31-11	\$3,926.10 Beginning balance
	22,000.00 deposit from Brust 12-28-11
	(\$23,184.90) Loan payment to FSB (2 months)
	\$1.33 interest credit on 12-31-11
	\$2,742.53 Ending balance
1-1-12 to 1-31-12	\$2,742.53 Beginning balance
	\$0 no deposits made during the period
	\$0.71 interest credit on 1-31-12
	\$2,743.24 Ending balance



053000006

07/27/2011

6237751311

THIS IS A LEGAL COPY OF
YOUR CHECK. YOU CAN USE IT
THE SAME WAY YOU WOULD
USE THE ORIGINAL CHECK.

RETURN REASON - 3
REFER TO MAKER

1102/92/60 62822023501
1900000259862824

REFER TO MAKER

PHILIP J. BRIST
20046 Charlotte Dr.
Charlotte, NC 28031

1020

JAN 19 4 10-THREE
CHECK NUMBER

ECOLOGICAL INVESTMENT \$ 25,000⁰⁰

TWENTY-FIVE THOUSAND AND NO/100 DOLLARS



VACHOVIA
Charlotte, NC, NA

HIGH PERFORMANCE MONEY MARKET

Philip J. Brist

400

500

0000

RECORD 0285

*****AUTO**MIXED AADC 076
 1544 0.7110 MB 0.390 7 13 146
 Ecological Investments LLC
 119 Bull Point Drive
 Seabrook SC 29940-2304

Date 9/30/11
 Primary Account
 Enclosures

Page 1
 1015932
 1

CHECKING ACCOUNT

Premium Money Market checking		Number of Enclosures	1
Account Number	1015932	Statement Dates	9/01/11 thru 10/02/11
Previous Balance	2,185.11	Days in the statement period	32
1 Deposits/Credits	25,000.00	Average Ledger	4,528.11
2 Checks/Debits	25,006.00	Average Collected	3,749.98
Service Charge	.00	Interest Earned	1.64
Interest Paid	1.59	Annual Percentage Yield Earned	0.50%
Current Balance	2,180.70	2011 Interest Paid	41.23

Deposits and Additions

Date	Description	Amount
9/26	Deposit	25,000.00
9/30	Interest Deposit	1.59

Checks and Withdrawals

Date	Description	Amount
9/29	Chargeback 1020	25,000.00-
9/29	Chargeback Fee	6.00-

Daily Balance Information					
Date	Balance	Date	Balance	Date	Balance
9/01	2,185.11	9/26	27,185.11	9/29	2,179.11
9/30	2,180.70				

Interest Rate Summary

Date	Rate
8/31	0.410000%
9/27	0.610000%
9/29	0.410000%

DEPOSIT TICKET		AMOUNT	
Name <u>Ecolapies Investments</u>	Account No <u>1015932</u>	CASH	
DATE <u>9-26-11</u>	DEPOSIT ON TOTAL FROM OTHER SCS	LESS NAME	
First South Bank 394 Barbours 50 Miles		AMOUNT \$ <u>25,000.00</u>	009
00831022824			

Amount \$25,000.00 Date 9/26/2011

DEPOSIT TICKET		AMOUNT	
Name <u>Ecolapies Investments</u>	Account No <u>1015932</u>	CASH	
DATE <u>9-26-11</u>	DEPOSIT ON TOTAL FROM OTHER SCS	LESS NAME	
First South Bank 394 Barbours 50 Miles		AMOUNT \$ <u>25,000.00</u>	009
00831022824			

Date 9/26/2011 Back

*****AUTO**MIXED AADC 076
 1367 0.7110 MB 0.390 7 13 144
 Ecological Investments LLC
 119 Bull Point Drive
 Seabrook SC 29940-2304

Date 10/31/11
 Primary Account
 Enclosures

Page 1
 1015932
 2

CHECKING ACCOUNT

Premium Money Market Checking		Number of Enclosures	2
Account Number	1015932	Statement Dates	10/03/11 thru 10/31/11
Previous Balance	2,180.70	Days in the statement period	29
1 Deposits/Credits	25,000.00	Average Ledger	9,328.61
1 Checks/Debits	11,979.32	Average Collected	8,469.99
Service Charge	.00	Interest Earned	3.35
Interest Paid	3.40	Annual Percentage Yield Earned	0.50%
Current Balance	15,204.78	2011 Interest Paid	44.63

Deposits and Additions	
Date	Description
10/17	Deposit
10/31	Interest Deposit

Amount
25,000.00
3.40

Checks and Withdrawals	
Date	Description
10/18	Debit Memo

Amount
11,979.32-

Daily Balance Information					
Date	Balance	Date	Balance	Date	Balance
10/03	2,180.70	10/17	27,180.70	10/18	15,201.38
10/31	15,204.78				

Interest Rate Summary	
Date	Rate
10/02	0.410000%
10/18	0.510000%

Amount \$25,000.00 Date 10/17/2011

Date 10/17/2011 Back

Check 0 Amount \$11,979.32 Date 10/18/2011

*****AUTO**MIXED AADC 076
 1371 0.7110 MB 0.390 7 25 1
 Ecological Investments LLC
 5085 Rivedro Street
 Las Vegas NV 89135-3203

Date 11/30/11
 Primary Account
 Enclosures

Page 1
 1015932
 1

CHECKING ACCOUNT

Premium Money Market Checking		Number of Enclosures	1
Account Number	1015932	Statement Dates	11/01/11 thru 11/30/11
Previous Balance	15,204.78	Days in the statement period	30
Deposits/Credits	.00	Average Ledger	3,924.78
1 Checks/Debits	11,280.00	Average Collected	3,924.78
Service Charge	.00	Interest Earned	1.32
Interest Paid	1.32	Annual Percentage Yield Earned	0.41%
Current Balance	3,926.10	2011 Interest Paid	45.95

Deposits and Additions		Amount
Date	Description	
11/30	Interest Deposit	1.32

Checks and Withdrawals		Amount
Date	Description	
11/01	Debit Memo	11,280.00-

Daily Balance Information			
Date	Balance	Date	Balance
11/01	3,924.78	11/30	3,926.10

Interest Rate Summary	
Date	Rate
10/31	0.510000%
11/01	0.410000%

STATE OF MICHIGAN SAINT JAMES, MI		Prepared by 	Approved by 
MISC. CHECKING DEBIT			
00 - MISC. WFO 01 - Cash Disb. 02 - Miscellaneous Debt 03 - Checking WFO	NAME: <u>Ecological Investments</u> PAYMENT DATE: <u>11-1-11</u>		
AMOUNT NUMBER 00001015932	TOTAL DOLLARS 050	AMOUNT \$11,280.00	
\$\$\$1B=000M			

Check 0 Amount \$11,280.00 Date 11/1/2011

*****AUTO**MIXED AADC 076
 1533 0.7110 MB 0.390 7 25 1
 Ecological Investments LLC
 5085 Rivedro Street
 Las Vegas NV 89135-3203

Date 12/30/11
 Primary Account
 Enclosures

Page 1
 1015932
 2

CHECKING ACCOUNT

Premium Money Market Checking		Number of Enclosures	2
Account Number	1015932	Statement Dates	12/01/11 thru 12/31/11
Previous Balance	3,926.10	Days in the statement period	31
1 Deposits/Credits	22,000.00	Average Ledger	4,521.10
1 Checks/Debits	23,184.90	Average Collected	3,814.65
Service Charge	.00	Interest Earned	1.33
Interest Paid	1.33	Annual Percentage Yield Earned	0.41%
Current Balance	2,742.53	2011 Interest Paid	47.28

Deposits and Additions		
Date	Description	Amount
12/28	Deposit	22,000.00
12/31	Interest Deposit	1.33

Checks and Withdrawals		
Date	Description	Amount
12/29	Debit Memo	23,184.90-

Daily Balance Information					
Date	Balance	Date	Balance	Date	Balance
12/01	3,926.10	12/28	25,926.10	12/29	2,741.20
12/31	2,742.53				

Interest Rate Summary	
Date	Rate
11/30	0.410000%

Amount \$22,000.00 Date 12/28/2011

Date 12/28/2011 Back

Check 0 Amount \$23,184.90 Date 12/29/2011

*****AUTO**MIXED AADC 076
 1374 0.5510 MB 0.404 7 26 1
 Ecological Investments LLC
 5085 Rivedro Street
 Las Vegas NV 89135-3203

Date 1/31/12
 Primary Account
 Enclosures

Page 1
 1015932

CHECKING ACCOUNT

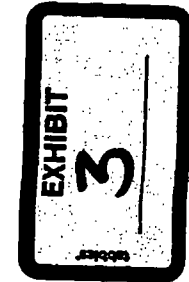
Premium Money Market Checking		Number of Enclosures	0
Account Number	1015932	Statement Dates	1/01/12 thru 1/31/12
Previous Balance	2,742.53	Days in the statement period	31
Deposits/Credits	.00	Average Ledger	2,742.53
Checks/Debits	.00	Average Collected	2,742.53
Service Charge	.00	Interest Earned	.71
Interest Paid	.71	Annual Percentage Yield Earned	0.31%
Current Balance	2,743.24	2012 Interest Paid	.71

Deposits and Additions		Amount
Date	Description	
1/31	Interest Deposit	.71

Daily Balance Information			
Date	Balance	Date	Balance
1/01	2,742.53	1/31	2,743.24

Interest Rate Summary	
Date	Rate
12/31	0.410000%
1/03	0.300000%

EXHIBIT 3



Ecological Investments LLC account #1015932

Statement period	Comments
1-1-09 to 1-30-09	\$200.97 Beginning balance
	\$518,823.53 proceeds from sale of easement 1-15-09
	(\$80,745.35) Jasper County for property taxes 1-15-09
	(\$6.00) CC fee 1-15-09
	(\$273,866.63) payoff FSB Second mortgage 1-16-09
	(\$19,642.43) monthly payment on FSB first mortgage 1-16-09 (due 1-14-09)
	(\$25,000.00) North & Black PC law firm 1-16-09
	(\$22,830.93) John Rosenberg 1-29-09
	(\$6.50) bank service charge 1-30-09
	\$96,926.66 Ending balance
1-31-09 to 2-27-09	\$96,926.66 beginning balance
	(\$19,642.43) FSB loan payment 2-17-09 (due 2-14-09)
	\$77,284.23 Ending balance
2-28-09 to 3-31-09	\$77,284.23 beginning balance
	(\$15,000.00) North & Black PC 3-10-09
	(\$19,642.43) FSB loan payment 3-16-09 (due 3-14-09)
	\$38,811.68 check from Jasper County property tax refund 3-18-09
	(\$1,600.00) Cherry Beckart & Holland CPAs 3-23-09
	\$67.12 interest credit 3-31-09
	\$79,920.60 Ending balance
4-1-09 to 4-30-09	\$79,920.60 beginning balance
	\$43,362.96 check from Jasper Cty Delinquent Tax payable to John Rosenberg (endorsed) 4-7-09
	(\$19,642.43) FSB loan payment 4-14-09 (due 4-14-09)
	(\$95,640.51) Jasper Cty Treasurer includes \$16.00 wire fee 4-15-09
	(\$800.00) Cherry Beckart & Holland 4-20-09
	\$34,926.00 three checks from EI investors in one deposit 4-27-09
	\$100.37 interest credit on 4-30-09
	\$42,226.99 Ending balance

RECORD 0296

5-1-09 to 5-29-09	\$42,226.99 beginning balance (\$9,498.20) North & Black PC 5-11-09 (\$19,642.43) FSB loan payment 5-14-09 (due 5-14-09) \$37.70 interest credit 5-29-09 \$13,124.06 Ending balance
5-30-09 to 6-30-09	\$13,124.06 beginning balance \$39,015.00 three checks from EI investors in one deposit 6-22-09 (\$19,642.43) FSB loan payment 6-22-09 (due 6-14-09) \$26.89 interest credit 6-30-09 \$32,523.52 ending balance
7-1-09 to 7-31-09	\$32,523.52 beginning balance (\$19,642.43) FSB loan payment 7-14-09 (due 7-14-09) (\$4,300.00) North & Black PC 7-29-09 \$15,000.00 EI investor deposit 7-31-09 \$29.02 interest credit 7-31-09 \$23,610.11 Ending balance
8-1-09 to 8-31-09	\$23,610.11 beginning balance (\$19,642.43) FSB loan payment (due 8-14-09) \$15.26 interest credit 8-31-09 \$3,982.94 Ending balance
9-1-09 to 9-30-09	\$3,982.94 beginning balance \$15,000.00 EI investor deposit 9-16-09 \$1,000.00 EI investor deposit 9-23-09 (\$19,642.43) FSB loan payment 9-23-09 (due 9-14-09) \$7.77 interest credit 9-30-09 (\$10.00) service charge 9-30-09 \$338.28 Ending balance

RECORD 0297

10-1-09 to 10-30-09

\$338.28 beginning balance

\$5,000.00 EI investor deposit 10-29-09

\$0.75 interest credit 10-30-09

(\$10.00) service charge 10-30-09

\$5,329.03 Ending balance

Note: A loan payment in the amount of \$20,000.00 was made 10-14-09 by Rosenberg
This payment was not run through EI's DDA (due 10-14-09) *(Copy attached)*

11-1-09 to 11-30-09

\$5,329.03 beginning balance

\$6.11 interest credit 11-30-09

\$5,335.14 ending balance

Note: no loan payment made due to insufficient funds

12-1-09 to 12-31-09

\$5,335.14 beginning balance

\$22,000.00 EI investor deposit 12-2-09

(\$19,642.43) FSB loan payment 12-7-09 (due 11-14-09)

\$15,000.00 EI investor deposit 12-29-09

\$15.81 interest credit 12/31/09

\$22,708.52 Ending balance

RECORD 0298

EFFICIENT ENERGY ADVISORS, LLC. 119 BULL HORN DR. SEABROOK, SO 29940 PH. 843-247-0831		Wachovia Wachovia Bank, N.A. Wachovia.com 67-776/032	1022 10/14/09
PAY TO THE ORDER OF <u>JOHN ROSENBERG</u> <u>THOMAS ADAMS ENERGY</u>		\$ <u>20,000.00</u>	Details on Back
MEMO <u>PARSONS DUNBROS</u>		DOLLARS	Security Features Included
		 AUTHORIZED SIGNATURE	

Check: 1022 Amount: \$20,000.00 Date: 10/14/2009
 Run: 1, Batch: 1, Seq: 804900009

804900009 First South Bank >0532-0228-2< 10/14/2009 15:50

Check: 1022 Amount: \$20,000.00 Date: 10/14/2009
 Run: 1, Batch: 1, Seq: 804900009

FIRST SOUTH BANK		MISCELLANEOUS CREDIT																																																				
ACCOUNT NAME <u>Ecological Investments LLC</u>		DATE <u>10 14 09</u>																																																				
PREPARED BY <u>Oppenheimer</u>																																																						
<table border="0"> <tr> <th>APP</th> <th>TC</th> <th>DESCRIPTION</th> </tr> <tr> <td>COO</td> <td>209</td> <td>NEW/REG. DEPOSIT</td> </tr> <tr> <td>DDL</td> <td>031</td> <td>REG. PAYMENT</td> </tr> <tr> <td>DDL</td> <td>026</td> <td>PRINCIPAL ONLY</td> </tr> <tr> <td>DDL</td> <td>027</td> <td>INTEREST ONLY</td> </tr> <tr> <td>SAV</td> <td>108</td> <td>REOPEN DEPOSIT</td> </tr> <tr> <td>LOAN</td> <td>375</td> <td>REG. PYMT. (CONSUMER)</td> </tr> <tr> <td>LOAN</td> <td>376</td> <td>REG. PYMT. (COMM)</td> </tr> </table>		APP	TC	DESCRIPTION	COO	209	NEW/REG. DEPOSIT	DDL	031	REG. PAYMENT	DDL	026	PRINCIPAL ONLY	DDL	027	INTEREST ONLY	SAV	108	REOPEN DEPOSIT	LOAN	375	REG. PYMT. (CONSUMER)	LOAN	376	REG. PYMT. (COMM)	<table border="0"> <tr> <th>APP</th> <th>TC</th> <th>DESCRIPTION</th> </tr> <tr> <td>LOAN</td> <td>377</td> <td>PRINCIPAL ONLY PYMT</td> </tr> <tr> <td>LOAN</td> <td>378</td> <td>INTEREST ONLY PYMT</td> </tr> <tr> <td>LOAN</td> <td>338</td> <td>LATE CHARGE PYMT</td> </tr> <tr> <td>LOAN</td> <td>380</td> <td>RENEWAL (LOAN OPS ONLY)</td> </tr> <tr> <td>LOAN</td> <td>385</td> <td>PAYOFF (CLOSING COMPLETELY)</td> </tr> <tr> <td>DDA</td> <td>008</td> <td>FORCE RE-OPEN DEP</td> </tr> <tr> <td>DDA</td> <td>009</td> <td>REG DEPOSIT</td> </tr> <tr> <td>DDA</td> <td>021</td> <td>LOAN ADVANCE</td> </tr> </table>		APP	TC	DESCRIPTION	LOAN	377	PRINCIPAL ONLY PYMT	LOAN	378	INTEREST ONLY PYMT	LOAN	338	LATE CHARGE PYMT	LOAN	380	RENEWAL (LOAN OPS ONLY)	LOAN	385	PAYOFF (CLOSING COMPLETELY)	DDA	008	FORCE RE-OPEN DEP	DDA	009	REG DEPOSIT	DDA	021	LOAN ADVANCE
APP	TC	DESCRIPTION																																																				
COO	209	NEW/REG. DEPOSIT																																																				
DDL	031	REG. PAYMENT																																																				
DDL	026	PRINCIPAL ONLY																																																				
DDL	027	INTEREST ONLY																																																				
SAV	108	REOPEN DEPOSIT																																																				
LOAN	375	REG. PYMT. (CONSUMER)																																																				
LOAN	376	REG. PYMT. (COMM)																																																				
APP	TC	DESCRIPTION																																																				
LOAN	377	PRINCIPAL ONLY PYMT																																																				
LOAN	378	INTEREST ONLY PYMT																																																				
LOAN	338	LATE CHARGE PYMT																																																				
LOAN	380	RENEWAL (LOAN OPS ONLY)																																																				
LOAN	385	PAYOFF (CLOSING COMPLETELY)																																																				
DDA	008	FORCE RE-OPEN DEP																																																				
DDA	009	REG DEPOSIT																																																				
DDA	021	LOAN ADVANCE																																																				
DESCRIPTION		AMOUNT <u>20000.00</u> TRAN CODE <u>375</u> ACCOUNT NUMBER <u>8.0333 03</u>																																																				
11: 00: 898																																																						

Check: 0 Amount: \$20,000.00 Date: 10/14/2009
 Run: 1, Batch: 1, Seq: 804900034

804900034 First South Bank >0532-0228-2< 10/14/2009 15:51

Check: 0 Amount: \$20,000.00 Date: 10/14/2009
 Run: 1, Batch: 1, Seq: 804900034

Wright, Patrick

From: John E. Rosenberg [jrosenberg@hargray.com]
Sent: Tuesday, April 14, 2009 11:21 AM
To: Wright, Patrick
Cc: jrosenberg@hargray.com
Subject: Jasper County 2006, 2007 taxes
Contacts: Patrick Wright

Patrick,

As I explained on the phone message, we have settled our tax appeal with Jasper County, they returned the two payments made by EI, and they were deposited in our accounts. Now we have to pay them the increased taxes for those tax years. There was no penalty, and no interest charged to us.

We are sending the money by wire out of the EI account to:
SC Bank & Trust
Routing # 053200983
Account # 870017043

The amount to send, please, is \$95,609.51. This includes the \$15 cost to Jasper County to receive a wire transfer. If you need a fee as well, please take it out of the account.

Thanks for your help on this. When the transfer is completed, please call me at home - 646-4404 - and please let me know that it has occurred. We need to discuss the 2008 taxes as well.

John E. Rosenberg

= Charge a fee

4/15/2009

RECORD 0300

WIRE TRANSFER REQUEST FORM

Execution Date 4-15-2009

Originator Ecological Investments, LLC

Receiver ABA # 053200983

Beneficiary Account # 870017043

Receiving Bank Name South Carolina Bank Trust

Beneficiary Name Jasper County

Receiving Bank Address (if given) _____

Beneficiary Address 224 Second Ave.

207 S. Jacob Smart Blvd

Ridgeland, SC 29936

Ridgeland, SC 29936

Special Instructions _____

Amount \$ 95,624.51

PAYMENT METHOD

☐ Cash

☐ Credit Card Acct # _____

Issuer _____

☐ Check # _____

Drawn On _____

☐ Debit Authorized Account # 1015932

Ref # 1005

AMOUNT CHARGED

Wire transfer Fee \$16.00

If business account, charge through analysis ?

Yes ☐ No ☒

Total Amount Charged Today (wire plus fee amount) \$ 95,640.51

CUSTOMER INFORMATION

Customer's Name Ecological Investments, LLC

Customer's Address 119 Bull Point Drive, Seabrook, SC 29940

Customer's Authorized Signature [Signature]

If no customer signature, is telephone authorization on file? ☐ Yes ☐ No

Information Taken By

Authorization Verified With Bank Records

Shanna Estling
Pete Wright

☒ yes

☐ no

CREDIT**GENERAL LEDGER**INITIALS *SEP*DATE *4/15/09*ACCOUNT NAME *Wire Fee*
DESCRIPTION / REMARKS

EFF DATE

APP BY

*Outgoing Wire**16.00*OFFSET/CONTRA ENTRY: *FROM 1015932**424501*

1:50 20 10001:

400

BGLCR

CREDIT**GENERAL LEDGER**INITIALS *SEP*DATE *4/15/09*ACCOUNT NAME *FRB*
DESCRIPTION / REMARKS

EFF DATE

APP BY

*Outgoing Wire**Ref # 1005**95624.51**FROM 1015932*

OFFSET/CONTRA ENTRY:

103801

1:50 20 10001:

400

FIRST SOUTH BANK**MISCELLANEOUS DEBIT**ACCOUNT NAME *Ecological Investments, LLC*DATE *4/15/09*PREPARED BY *Shanna Elhington***DEBIT TRANSACTIONS**

APP	TC	DESCRIPTION	APP	TC	DESCRIPTION
COD	234	PENALTY FORFEITURE	LOAN	304	NEW NOTE ADVANCE
COD	245	PRINCIPAL W/D	LOAN	305	PRINCIPAL ADVANCE
COD	281	CLOSING W/D-NO PEN.	LOAN	306	EQUITY LINE CK ADVANCE
COD	230	EARLY W/D/CLOSING-W/ PEN.	DDA	044	LOAN PAYMENT
DDL	028	DDL LOAN ADVANCE	DDA	045	PAY FIRST CHECK
SAV	145	WITHDRAWAL	DDA	081	CLOSING WITHDRAWAL
SAV	181	CLOSING WITHDRAWAL	DDA	053	MANUAL S/C

DESCRIPTION

95624.51 Wire + 16.00 Fee
Jasper County

AMOUNT

95640.51

TRAN CODE

045

ACCOUNT NUMBER

1015932

1:54 0 1 20001:

899

Carrie Oppenheimer

From: John Rosenberg <JRosenberg@hargray.com>
Sent: Wednesday, January 21, 2009 11:31 AM
To: Phillip Brust
Cc: Patrick Wright
Subject: FW: EI cash

Phil:

Please email back to Patrick and let him know that repaying me for the last month payment is OK with you.

Many thanks,

John

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

From: Wright, Patrick [mailto:patrickwright@FIRSTSOUTHBANCORP.com]
Sent: Wednesday, January 21, 2009 11:17 AM
To: jrosenberg@hargray.com
Subject: RE: EI cash

John:

I am fine with your plan outlined below. I know you are the manager of the LLC but I would appreciate it if you would have Phil Brust email me with his ok in releasing the EI funds to you. Just a simple note that he agrees with the payment and in rectifying the imbalance you describe as a result of your payments last month. I can place his email in the file to document that all are in agreement.

Thanks,

Patrick

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

From: John Rosenberg [mailto:jrosenberg@hargray.com]
Sent: Tuesday, January 20, 2009 3:29 PM
To: Wright, Patrick
Subject: EI cash

Patrick:

Thanks for accepting the check last week after the utility screwed up.

You saved the day. All taxes were paid on time.

Last month I personally paid \$22,830.93 for the two loans from my own funds. This imbalanced what was paid between Phil Brust and myself. I would like to pay that amount back to myself from the EI funds in the account, and then give it right back to you to lower the AirPro loan balance. Would you have any problem with me doing that?

Thanks for all of your understanding and help.

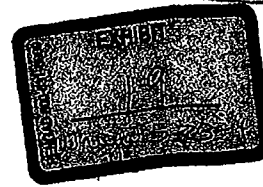
John

via Blackberry

This message is intended only for the persons or entities to which it is addressed. The information transmitted herein may contain proprietary or confidential material. Review, reproduction, retransmission, distribution, disclosure or other use, and any consequent action taken by persons or entities other than intended recipients, are prohibited and may be unlawful.

If you are not the intended recipient, please delete this information from your system and contact the sender. The information contained herein is subject to change without notice. Although reasonable precautions have been taken to ensure that no viruses are present, the sender makes no warranty or guaranty with respect thereto, and is not responsible for any loss or damage arising from the receipt or use of this e-mail or attachments hereto.

From: "Patrick Wright" <pwright@firstsouthbancorp.com>
To: <capfill@yahoo.com>
Sent: Wednesday, January 21, 2009 4:56 PM
Subject: RE: money spent
Thank you for the reply.



Patrick Wright
First South Bank
Senior Vice President
7 Arley Way, Suite 100
Bluffton, SC 29910
843.706.8644 (office)
843.422.2253 (mobile)
843.706.3901 (facsimile)
patrickwright@firstsouthbancorp.com

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

From: Philip Brust [mailto:capfill@yahoo.com]
Sent: Wednesday, January 21, 2009 2:54 PM
To: Wright, Patrick
Subject: money spent

Thr financial transaction that John Rosenberg made from the \$518,000 is OK by me. Philip Brust

FSB/EI-000720
12/5/2013

From: "Patrick Wright" <pwright@firstsouthbancorp.com>
To: <capfill@yahoo.com>
Sent: Wednesday, January 21, 2009 4:56 PM
Subject: RE: money spent
Thank you for the reply.

Patrick Wright
First South Bank
Senior Vice President
7 Arley Way, Suite 100
Bluffton, SC 29910
843.706.8644 (office)
843.422.2253 (mobile)
843.706.3901 (facsimile)
patrickwright@firstsouthbancorp.com

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

From: Philip Brust [mailto:capfill@yahoo.com]
Sent: Wednesday, January 21, 2009 2:54 PM
To: Wright, Patrick
Subject: money spent

The financial transaction that John Rosenberg made from the \$518,000 is OK by me. Philip Brust

FSB/EI-000720
12/5/2013

RECORD 0306

ACCOUNT: 1015932 PAGE: 1
DOCUMENTS: 7

ECOLOGICAL INVESTMENTS LLC 30-0
119 BULL POINT DRIVE 1
SEABROOK SC 29940 6

HILTON HEAD / BLUFFTON TELEPHONE: 843-706-3900
7 ARLEY WAY SUITE 100
BLUFFTON SC 29910

BUSINESS 150 ACCOUNT 1015932

LAST STATEMENT 12/31/08 200.97
MINIMUM BALANCE 200.97 1 CREDITS 518,823.53
AVERAGE BALANCE 73,062.87 7 DEBITS 422,097.84
THIS STATEMENT 01/30/09 96,926.66

DEPOSITS
REF #.....DATE.....AMOUNT REF #.....DATE.....AMOUNT
01/15 518,823.53

000804900004

CHECKS
CHECK #..DATE.....AMOUNT CHECK #..DATE.....AMOUNT CHECK #..DATE.....AMOUNT
*01/15 6.00 *01/16 25,000.00
*01/15 80,745.35 01/29 22,830.93

000804900014 000804900025
000804900013 000804900009

(*) INDICATES A GAP IN CHECK NUMBER SEQUENCE

OTHER DEBITS
DESCRIPTION DATE AMOUNT
LOAN PAYMENT 01/16 19,642.43
LOAN PAYMENT 01/16 273,866.63
SERVICE CHARGE 01/30 6.50

000804900048
000804900046

ITEMIZATION OF SERVICE CHARGE PAID THIS PERIOD

TOTAL CHARGE FOR MAINTENANCE FEE: 6.50

*** CONTINUED ***

PAGE: 1
 ACCOUNT: 1015932 02/27/2009
 DOCUMENTS: 1

ECOLOGICAL INVESTMENTS LLC 30-0
 119 BULL POINT DRIVE 0
 SEABROOK SC 29940 1

=====

HILTON HEAD / BLUFFTON	TELEPHONE:843-706-3900
7 ARLEY WAY SUITE 100	
BLUFFTON SC 29910	

=====

=====

BUSINESS 150 ACCOUNT 1015932

=====

	LAST STATEMENT 01/30/09	96,926.66
MINIMUM BALANCE	77,284.23	CREDITS .00
AVERAGE BALANCE	89,209.99	1 DEBITS 19,642.43
	THIS STATEMENT 02/27/09	77,284.23

----- OTHER DEBITS -----

DESCRIPTION	DATE	AMOUNT	
LOAN PAYMENT	02/17	19,642.43	000804900083

--- ITEMIZATION OF NSF PAID AND RETURNED ITEM FEES ---

	THIS PERIOD	YEAR TO DATE
NSF PAID ITEM FEE:	.00	.00
NSF RETURNED ITEM FEE:	.00	.00
OVERDRAFT FEES:	.00	.00

----- DAILY BALANCE -----

DATE.....BALANCE	DATE.....BALANCE	DATE.....BALANCE
02/17 77,284.23		

ACCOUNT: 1015932 03/31/2009
DOCUMENTS: 4

PAGE: 1

ECOLOGICAL INVESTMENTS LLC 30-0
119 BULL POINT DRIVE 1
SEABROOK SC 29940 3

HILTON HEAD / BLUFFTON TELEPHONE: 843-706-3900
7 ARLEY WAY SUITE 100
BLUFFTON SC 29910

Did you know that First South Bank may have the answers to your tough mortgage questions? The mortgage market is constantly changing and now may be the perfect time for a Mortgage check-up. We offer a variety of programs, products and rates to meet your mortgage needs. Please contact Lori Witnik at 864-573-4431.

PREMIUM MONEY MARKET ACCOUNT 1015932

MINIMUM BALANCE	42,641.80	LAST STATEMENT 02/27/09	77,284.23
AVERAGE BALANCE	77,906.03	2 CREDITS	38,878.80
		3 DEBITS	36,242.43
		THIS STATEMENT 03/31/09	79,920.60

- - - - - DEPOSITS - - - - -			
REF #.....DATE.....AMOUNT	REF #.....DATE.....AMOUNT	REF #.....DATE.....AMOUNT	
03/18 38,811.68			000804900012

- - - - - OTHER CREDITS - - - - -		
DESCRIPTION	DATE	AMOUNT
INTEREST	03/31	67.12

- - - - - CHECKS - - - - -					
CHECK #..DATE.....AMOUNT	CHECK #..DATE.....AMOUNT	CHECK #..DATE.....AMOUNT			
*03/10 15,000.00	03/23 1,600.00		000804900017	000804900017	

(*) INDICATES A GAP IN CHECK NUMBER SEQUENCE

- - - - - OTHER DEBITS - - - - -		
DESCRIPTION	DATE	AMOUNT
LOAN PAYMENT	03/16	19,642.43

*** CONTINUED ***

PAGE: 2
ACCOUNT: 1015932 03/31/2009
DOCUMENTS: 4

ECOLOGICAL INVESTMENTS LLC

PREMIUM MONEY MARKET ACCOUNT 1015932

I N T E R E S T

AVERAGE LEDGER BALANCE: 77,906.03 INTEREST EARNED: 67.12
AVERAGE AVAILABLE BALANCE: 77,906.03 DAYS IN PERIOD: 15
INTEREST PAID THIS PERIOD: 67.12 ANNUAL PERCENTAGE YIELD EARNED: 2.12%
INTEREST PAID 2009: 67.12

ITEMIZATION OF NSF PAID AND RETURNED ITEM FEES

	THIS PERIOD	YEAR TO DATE
NSF PAID ITEM FEE:	.00	.00
NSF RETURNED ITEM FEE:	.00	.00
OVERDRAFT FEES:	.00	.00

DAILY BALANCE

DATE.....	BALANCE	DATE.....	BALANCE	DATE.....	BALANCE
03/10	62,284.23	03/18	81,453.48	03/31	79,920.60
03/16	42,641.80	03/23	79,853.48		

PAGE: 1
ACCOUNT: 1015932 04/30/2009
DOCUMENTS: 5

ECOLOGICAL INVESTMENTS LLC 30-0
119 BULL POINT DRIVE 2
SEABROOK SC 29940 3

HILTON HEAD / BLUFFTON TELEPHONE: 843-706-3900
7 ARLEY WAY SUITE 100
BLUFFTON SC 29910

Did you know that First South Bank may have the answers to your tough mortgage questions? The mortgage market is constantly changing and now may be the perfect time for a Mortgage check-up. We offer a variety of programs, products and rates to meet your mortgage needs. Please contact Lori Witnik at 864-573-4431.

PREMIUM MONEY MARKET ACCOUNT 1015932

MINIMUM BALANCE 7,200.62 LAST STATEMENT 03/31/09 79,920.60
AVERAGE BALANCE 56,835.45 3 CREDITS 78,389.33
3 DEBITS 116,082.94
THIS STATEMENT 04/30/09 42,226.99

DEPOSITS
REF #.....DATE.....AMOUNT REF #.....DATE.....AMOUNT REF #.....DATE.....AMOUNT
04/07 43,362.96 04/27 34,926.00

000804900002 000804900031

OTHER CREDITS
DESCRIPTION DATE AMOUNT
INTEREST 04/30 100.37

CHECKS
CHECK #..DATE.....AMOUNT CHECK #..DATE.....AMOUNT CHECK #..DATE.....AMOUNT
*04/15 95,640.51 04/20 800.00

000804900019 000804900059

(*) INDICATES A GAP IN CHECK NUMBER SEQUENCE

OTHER DEBITS
DESCRIPTION DATE AMOUNT
LOAN PAYMENT 04/14 19,642.43

000804900011

*** CONTINUED ***

ACCOUNT: 1015932 PAGE: 2
DOCUMENTS: 04/30/2009 5

ECOLOGICAL INVESTMENTS LLC

PREMIUM MONEY MARKET ACCOUNT 1015932

- - - I N T E R E S T - - -

AVERAGE LEDGER BALANCE: 56,835.45 INTEREST EARNED: 100.37
AVERAGE AVAILABLE BALANCE: 56,835.45 DAYS IN PERIOD: 30
INTEREST PAID THIS PERIOD: 100.37 ANNUAL PERCENTAGE YIELD EARNED: 2.17%
INTEREST PAID 2009: 167.49

- - - ITEMIZATION OF NSF PAID AND RETURNED ITEM FEES - - -

	THIS PERIOD	YEAR TO DATE
NSF PAID ITEM FEE:	.00	.00
NSF RETURNED ITEM FEE:	.00	.00
OVERDRAFT FEES:	.00	.00

- - - DAILY BALANCE - - -

DATE.....	BALANCE	DATE.....	BALANCE	DATE.....	BALANCE
04/07	123,283.56	04/15	8,000.62	04/27	42,126.62
04/14	103,641.13	04/20	7,200.62	04/30	42,226.99

PAGE: 1
ACCOUNT: 1015932 05/29/2009
DOCUMENTS: 2

ECOLOGICAL INVESTMENTS LLC 30-0
119 BULL POINT DRIVE 0
SEABROOK SC 29940 2

HILTON HEAD / BLUFFTON TELEPHONE: 843-706-3900
7 ARLEY WAY SUITE 100
BLUFFTON SC 29910

Did you know that First South Bank may have the answers to your tough mortgage questions? The mortgage market is constantly changing and now may be the perfect time for a Mortgage check-up. We offer a variety of programs, products and rates to meet your mortgage needs. Please contact Lori Witnik at 864-573-4431.

PREMIUM MONEY MARKET ACCOUNT 1015932

MINIMUM BALANCE 13,086.36 LAST STATEMENT 04/30/09 42,226.99
AVERAGE BALANCE 25,166.82 1 CREDITS 37.70
2 DEBITS 29,140.63
THIS STATEMENT 05/29/09 13,124.06

OTHER CREDITS
DESCRIPTION DATE AMOUNT
INTEREST 05/29 37.70

CHECKS
CHECK #..DATE.....AMOUNT CHECK #..DATE.....AMOUNT CHECK #..DATE.....AMOUNT
05/11 9,498.20 000804900061

OTHER DEBITS
DESCRIPTION DATE AMOUNT
LOAN PAYMENT 05/14 19,642.43 000106000019

INTEREST
AVERAGE LEDGER BALANCE: 25,166.82 INTEREST EARNED: 37.70
AVERAGE AVAILABLE BALANCE: 25,166.82 DAYS IN PERIOD: 29
INTEREST PAID THIS PERIOD: 37.70 ANNUAL PERCENTAGE YIELD EARNED: 1.90%
INTEREST PAID 2009: 205.19

*** CONTINUED ***

ACCOUNT: 1015932 05/29/2009
DOCUMENTS: 2

PAGE: 2

ECOLOGICAL INVESTMENTS LLC

PREMIUM MONEY MARKET ACCOUNT 1015932

ITEMIZATION OF NSF PAID AND RETURNED ITEM FEES

	THIS PERIOD	YEAR TO DATE
NSF PAID ITEM FEE:	.00	.00
NSF RETURNED ITEM FEE:	.00	.00
OVERDRAFT FEES:	.00	.00

DAILY BALANCE

DATE.....	BALANCE	DATE.....	BALANCE	DATE.....	BALANCE
05/11	32,728.79	05/14	13,086.36	05/29	13,124.06

ACCOUNT: 1015932 06/30/2009
DOCUMENTS: 2

PAGE: 1

ECOLOGICAL INVESTMENTS LLC 30-0
119 BULL POINT DRIVE 1
SEABROOK SC 29940 1

HILTON HEAD / BLUFFTON TELEPHONE: 843-706-3900
7 ARLEY WAY SUITE 100
BLUFFTON SC 29910

Effective July 1, 2009 money market transaction restrictions will change as follows. Transfers from a Premium Money Market Investment account to another account or to third parties by preauthorized, automatic or telephone transfer are limited to six per statement cycle, regardless of the type of withdrawal. A per debit activity fee of \$5.00 will be charged for each debit transaction, withdrawal, check paid, automatic transfer or payment out of this account in excess of six. Should you have any questions, please contact your local customer service representative. First South Bank appreciates your business.

PREMIUM MONEY MARKET ACCOUNT 1015932

MINIMUM BALANCE	13,124.06	LAST STATEMENT 05/29/09	13,124.06
AVERAGE BALANCE	18,572.59	2 CREDITS	39,041.89
		1 DEBITS	19,642.43
		THIS STATEMENT 06/30/09	32,523.52

DEPOSITS

REF #	DATE	AMOUNT	REF #	DATE	AMOUNT	REF #	DATE	AMOUNT
	06/22	39,015.00						

000804900022

OTHER CREDITS

DESCRIPTION	DATE	AMOUNT
INTEREST	06/30	26.89

OTHER DEBITS

DESCRIPTION	DATE	AMOUNT
LOAN PAYMENT	06/22	19,642.43

000804900059

*** CONTINUED ***

PAGE: 2
ACCOUNT: 1015932 06/30/2009
DOCUMENTS: 2

ECOLOGICAL INVESTMENTS LLC

PREMIUM MONEY MARKET ACCOUNT 1015932

I N T E R E S T

AVERAGE LEDGER BALANCE: 18,572.59 INTEREST EARNED: 26.89
AVERAGE AVAILABLE BALANCE: 18,572.59 DAYS IN PERIOD: 32
INTEREST PAID THIS PERIOD: 26.89 ANNUAL PERCENTAGE YIELD EARNED: 1.66%
INTEREST PAID 2009: 232.08

ITEMIZATION OF NSF PAID AND RETURNED ITEM FEES

	THIS PERIOD	YEAR TO DATE
NSF PAID ITEM FEE:	.00	.00
NSF RETURNED ITEM FEE:	.00	.00
OVERDRAFT FEES:	.00	.00

DAILY BALANCE

DATE.....	BALANCE	DATE.....	BALANCE	DATE.....	BALANCE
06/22	32,496.63	06/30	32,523.52		

ACCOUNT: 1015932 07/31/2009
DOCUMENTS: 3

PAGE: 1

ECOLOGICAL INVESTMENTS LLC 30-0
119 BULL POINT DRIVE 1
SEABROOK SC 29940 2

HILTON HEAD / BLUFFTON TELEPHONE: 843-706-3900
7 ARLEY WAY SUITE 100
BLUFFTON SC 29910

Effective July 1, 2009 money market transaction restrictions will change as follows. Transfers from a Premium Money Market Investment account to another account or to third parties by preauthorized, automatic or telephone transfer are limited to six per statement cycle, regardless of the type of withdrawal. A per debit activity fee of \$5.00 will be charged for each debit transaction, withdrawal, check paid, automatic transfer or payment out of this account in excess of six. Should you have any questions, please contact your local customer service representative. First South Bank appreciates your business.

PREMIUM MONEY MARKET ACCOUNT 1015932

MINIMUM BALANCE	8,581.09	LAST STATEMENT 06/30/09	32,523.52
AVERAGE BALANCE	21,185.98	2 CREDITS	15,029.02
		2 DEBITS	23,942.43
		THIS STATEMENT 07/31/09	23,610.11

REF #	DATE	AMOUNT	REF #	DATE	AMOUNT	REF #	DATE	AMOUNT
	07/31	15,000.00						

000804900011

DESCRIPTION	DATE	AMOUNT
INTREST	07/31	29.02

CHECK #	DATE	AMOUNT	CHECK #	DATE	AMOUNT	CHECK #	DATE	AMOUNT
	07/29	4,300.00						

000804900011

*** CONTINUED ***

ACCOUNT: 1015932 07/31/2009
DOCUMENTS: 3

PAGE: 2

ECOLOGICAL INVESTMENTS LLC

PREMIUM MONEY MARKET ACCOUNT 1015932

----- OTHER DEBITS -----
DESCRIPTION DATE AMOUNT
LOAN PAYMENT 07/14 19,642.43 000804900043

----- I N T E R E S T -----

AVERAGE LEDGER BALANCE: 21,185.98 INTEREST EARNED: 29.02
AVERAGE AVAILABLE BALANCE: 21,185.98 DAYS IN PERIOD: 31
INTEREST PAID THIS PERIOD: 29.02 ANNUAL PERCENTAGE YIELD EARNED: 1.62%
INTEREST PAID 2009: 261.10

--- ITEMIZATION OF NSF PAID AND RETURNED ITEM FEES ---

	THIS PERIOD	YEAR TO DATE
NSF PAID ITEM FEE:	.00	.00
NSF RETURNED ITEM FEE:	.00	.00
OVERDRAFT FEES:	.00	.00

----- DAILY BALANCE -----

DATE.....	BALANCE	DATE.....	BALANCE	DATE.....	BALANCE
07/14	12,881.09	07/29	8,581.09	07/31	23,610.11

ACCOUNT: 1015932 PAGE: 1
DOCUMENTS: 08/31/2009 1

ECOLOGICAL INVESTMENTS LLC 30-0
119 BULL POINT DRIVE 0
SEABROOK SC 29940 1

=====

HILTON HEAD / BLUFFTON TELEPHONE: 843-706-3900
7 ARLEY WAY SUITE 100
BLUFFTON SC 29910

=====

Effective July 1, 2009 money market transaction restrictions will change as follows. Transfers from a Premium Money Market Investment account to another account or to third parties by preauthorized, automatic or telephone transfer are limited to six per statement cycle, regardless of the type of withdrawal. A per debit activity fee of \$5.00 will be charged for each debit transaction, withdrawal, check paid, automatic transfer or payment out of this account in excess of six. Should you have any questions, please contact your local customer service representative. First South Bank appreciates your business.

=====

PREMIUM MONEY MARKET ACCOUNT 1015932

=====

MINIMUM BALANCE	3,967.68	LAST STATEMENT 07/31/09	23,610.11
AVERAGE BALANCE	12,204.82	1 CREDITS	15.26
		1 DEBITS	19,642.43
		THIS STATEMENT 08/31/09	3,982.94

----- OTHER CREDITS -----

DESCRIPTION	DATE	AMOUNT
INTEREST	08/31	15.26

----- OTHER DEBITS -----

DESCRIPTION	DATE	AMOUNT
LOAN PAYMENT	08/14	19,642.43

000804900041

----- I N T E R E S T -----

AVERAGE LEDGER BALANCE:	12,204.82	INTEREST EARNED:	15.26
AVERAGE AVAILABLE BALANCE:	12,204.82	DAYS IN PERIOD:	31
INTEREST PAID THIS PERIOD:	15.26	ANNUAL PERCENTAGE YIELD EARNED:	1.48%
INTEREST PAID 2009:	276.36		

*** CONTINUED ***

PAGE: 2
ACCOUNT: 1015932 08/31/2009
DOCUMENTS: 1

ECOLOGICAL INVESTMENTS LLC

PREMIUM MONEY MARKET ACCOUNT 1015932

- - - ITEMIZATION OF NSF PAID AND RETURNED ITEM FEES - - -

	THIS PERIOD	YEAR TO DATE
NSF PAID ITEM FEE:	.00	.00
NSF RETURNED ITEM FEE:	.00	.00
OVERDRAFT FEES:	.00	.00

- - - - - DAILY BALANCE - - - - -			
DATE.....	BALANCE	DATE.....	BALANCE
08/14	3,967.68	08/31	3,982.94

PAGE: 1
ACCOUNT: 1015932 09/30/2009
DOCUMENTS: 3

ECOLOGICAL INVESTMENTS LLC 30-0
119 BULL POINT DRIVE 2
SEABROOK SC 29940 1

=====

HILTON HEAD / BLUFFTON TELEPHONE: 843-706-3900
7 ARLEY WAY SUITE 100
BLUFFTON SC 29910

=====

Effective July 1, 2009 money market transaction restrictions will change as follows. Transfers from a Premium Money Market Investment account to another account or to third parties by preauthorized, automatic or telephone transfer are limited to six per statement cycle, regardless of the type of withdrawal. A per debit activity fee of \$5.00 will be charged for each debit transaction, withdrawal, check paid, automatic transfer or payment out of this account in excess of six. Should you have any questions, please contact your local customer service representative. First South Bank appreciates your business.

=====

PREMIUM MONEY MARKET ACCOUNT 1015932

=====

MINIMUM BALANCE	340.51	LAST STATEMENT 08/31/09	3,982.94
AVERAGE BALANCE	6,511.62	3 CREDITS	16,007.77
		2 DEBITS	19,652.43
		THIS STATEMENT 09/30/09	338.28

----- DEPOSITS -----

REF #	DATE	AMOUNT	REF #	DATE	AMOUNT	REF #	DATE	AMOUNT
	09/16	15,000.00		09/23	1,000.00			

000804900002 000804900022

----- OTHER CREDITS -----

DESCRIPTION	DATE	AMOUNT
INTEREST	09/30	7.77

----- OTHER DEBITS -----

DESCRIPTION	DATE	AMOUNT
LOAN PAYMENT	09/23	19,642.43
SERVICE CHARGE	09/30	10.00

000804900021

*** CONTINUED ***

PAGE: 2
ACCOUNT: 1015932 09/30/2009
DOCUMENTS: 3

ECOLOGICAL INVESTMENTS LLC

PREMIUM MONEY MARKET ACCOUNT 1015932

- - - - - I N T E R E S T - - - - -

AVERAGE LEDGER BALANCE: 6,511.62 INTEREST EARNED: 7.77
AVERAGE AVAILABLE BALANCE: 6,511.62 DAYS IN PERIOD: 30
INTEREST PAID THIS PERIOD: 7.77 ANNUAL PERCENTAGE YIELD EARNED: 1.46%
INTEREST PAID 2009: 284.13

- - - ITEMIZATION OF SERVICE CHARGE PAID THIS PERIOD - - -

TOTAL CHARGE FOR SERVICE CHARGE FEE: 10.00

- - - ITEMIZATION OF NSF PAID AND RETURNED ITEM FEES - - -

	THIS PERIOD	YEAR TO DATE
NSF PAID ITEM FEE:	.00	.00
NSF RETURNED ITEM FEE:	.00	.00
OVERDRAFT FEES:	.00	.00

- - - - - DAILY BALANCE - - - - -

DATE.....	BALANCE	DATE.....	BALANCE	DATE.....	BALANCE
09/16	18,982.94	09/23	340.51	09/30	338.28

ACCOUNT: 1015932 10/30/2009
DOCUMENTS: 1

PAGE: 1

ECOLOGICAL INVESTMENTS LLC 30-0
119 BULL POINT DRIVE 1
SEABROOK SC 29940 0

HILTON HEAD / BLUFFTON TELEPHONE: 843-706-3900
7 ANLEY WAY SUITE 100
BLUFFTON SC 29910

Effective July 1, 2009 money market transaction restrictions will change as follows. Transfers from a Premium Money Market Investment account to another account or to third parties by preauthorized, automatic or telephone transfer are limited to six per statement cycle, regardless of the type of withdrawal. A per debit activity fee of \$5.00 will be charged for each debit transaction, withdrawal, check paid, automatic transfer or payment out of this account in excess of six. Should you have any questions, please contact your local customer service representative. First South Bank appreciates your business.

PREMIUM MONEY MARKET ACCOUNT 1015932

MINIMUM BALANCE	338.28	LAST STATEMENT 09/30/09	338.28
AVERAGE BALANCE	671.61	2 CREDITS	5,000.75
		1 DEBITS	10.00
		THIS STATEMENT 10/30/09	5,329.03

DEPOSITS

REF #	DATE	AMOUNT	REF #	DATE	AMOUNT	REF #	DATE	AMOUNT
	10/29	5,000.00						

000804900002

OTHER CREDITS

DESCRIPTION	DATE	AMOUNT
INTEREST	10/30	.75

OTHER DEBITS

DESCRIPTION	DATE	AMOUNT
SERVICE CHARGE	10/30	10.00

*** CONTINUED ***

PAGE: 2
ACCOUNT: 1015932 10/30/2009
DOCUMENTS: 1

ECOLOGICAL INVESTMENTS LLC

=====

PREMIUM MONEY MARKET ACCOUNT 1015932

=====

- - - I N T E R E S T - - -

AVERAGE LEDGER BALANCE: 671.61 INTEREST EARNED: .75
AVERAGE AVAILABLE BALANCE: 671.61 DAYS IN PERIOD: 30
INTEREST PAID THIS PERIOD: .75 ANNUAL PERCENTAGE YIELD EARNED: 1.37%
INTEREST PAID 2009: 284.88

- - - ITEMIZATION OF SERVICE CHARGE PAID THIS PERIOD - - -

TOTAL CHARGE FOR SERVICE CHARGE FEE: 10.00

- - - ITEMIZATION OF NSF PAID AND RETURNED ITEM FEES - - -

	THIS PERIOD	YEAR TO DATE
NSF PAID ITEM FEE:	.00	.00
NSF RETURNED ITEM FEE:	.00	.00
OVERDRAFT FEES:	.00	.00

- - - DAILY BALANCE - - -

DATE.....	BALANCE	DATE.....	BALANCE	DATE.....	BALANCE
10/29	5,338.28	10/30	5,329.03		

PAGE: 1
ACCOUNT: 1015932 11/30/2009
DOCUMENT 0

ECOLOGICAL INVESTMENTS LLC 30-0
119 BULL POINT DRIVE 0
SEABROOK SC 29940 0

=====

HILTON HEAD / BLUFFTON TELEPHONE: 843-706-3900
7 ARLEY WAY SUITE 100
BLUFFTON SC 29910

=====

Effective July 1, 2009 money market transaction restrictions will change as follows. Transfers from a Premium Money Market Investment account to another account or to third parties by preauthorized, automatic or telephone transfer are limited to six per statement cycle, regardless of the type of withdrawal. A per debit activity fee of \$5.00 will be charged for each debit transaction, withdrawal, check paid, automatic transfer or payment out of this account in excess of six. Should you have any questions, please contact your local customer service representative. First South Bank appreciates your business.

=====

PREMIUM MONEY MARKET ACCOUNT 1015932

=====

MINIMUM BALANCE	5,329.03	LAST STATEMENT 10/30/09	5,329.03
AVERAGE BALANCE	5,329.03	1 CREDITS	6.11
		DEBITS	.00
		THIS STATEMENT 11/30/09	5,335.14

- - - - - OTHER CREDITS - - - - -

DESCRIPTION	DATE	AMOUNT
INTEREST	11/30	6.11

- - - - - I N T E R E S T - - - - -

AVERAGE LEDGER BALANCE:	5,329.03	INTEREST EARNED:	6.11
AVERAGE AVAILABLE BALANCE:	5,329.03	DAYS IN PERIOD:	31
INTEREST PAID THIS PERIOD:	6.11	ANNUAL PERCENTAGE YIELD EARNED:	1.36%
INTEREST PAID 2009:	290.99		

*** C O N T I N U E D ***

ACCOUNT: 1015932 PAGE: 2
DOCUMENT 11/30/2009 0

ECOLOGICAL INVESTMENTS LLC

=====

PREMIUM MONEY MARKET ACCOUNT 1015932

=====

- - - ITEMIZATION OF NSF PAID AND RETURNED ITEM FEES - - -

	THIS PERIOD	YEAR TO DATE
NSF PAID ITEM FEE:	.00	.00
NSF RETURNED ITEM FEE:	.00	.00
OVERDRAFT FEES:	.00	.00

----- DAILY BALANCE -----

DATE.....	BALANCE	DATE.....	BALANCE	DATE.....	BALANCE
11/30	5,335.14				

ECOLOGICAL INVESTMENTS LLC 30-0
119 BULL POINT DRIVE 2
SEABROOK SC 29940 1

HILTON HEAD / BLUFFTON TELEPHONE: 843-706-3900
7 ARLEY WAY SUITE 100
BLUFFTON SC 29910

Effective July 1, 2009 money market transaction restrictions will change as follows. Transfers from a Premium Money Market Investment account to another account or to third parties by preauthorized, automatic or telephone transfer are limited to six per statement cycle, regardless of the type of withdrawal. A per debit activity fee of \$5.00 will be charged for each debit transaction, withdrawal, check paid, automatic transfer or payment out of this account in excess of six. Should you have any questions, please contact your local customer service representative. First South Bank appreciates your business.

PREMIUM MONEY MARKET ACCOUNT 1015932

MINIMUM BALANCE	5,335.14	LAST STATEMENT 11/30/09	5,335.14
AVERAGE BALANCE	12,236.40	3 CREDITS	37,015.81
		1 DEBITS	19,642.43
		THIS STATEMENT 12/31/09	22,708.52

DEPOSITS			
REF #	DATE	AMOUNT	REF #
12/02	22,000.00		12/29
		15,000.00	

000804900

OTHER CREDITS		
DESCRIPTION	DATE	AMOUNT
INTEREST	12/31	15.81

OTHER DEBITS		
DESCRIPTION	DATE	AMOUNT
LOAN PAYMENT	12/07	19,642.43

000804900

*** CONTINUED ***

ACCOUNT: 1015932 PAGE: 2
DOCUMENT 12/31/2009 3

ECOLOGICAL INVESTMENTS LLC

PREMIUM MONEY MARKET ACCOUNT 1015932

I N T E R E S T

AVERAGE LEDGER BALANCE: 12,236.40 INTEREST EARNED: 15.81
AVERAGE AVAILABLE BALANCE: 12,236.40 DAYS IN PERIOD: 31
INTEREST PAID THIS PERIOD: 15.81 ANNUAL PERCENTAGE YIELD EARNED: 1.53%
INTEREST PAID 2009: 306.80

ITEMIZATION OF OVERDRAFT AND RETURNED ITEM FEES

	TOTAL FOR THIS PERIOD	TOTAL YEAR TO DATE
* TOTAL OVERDRAFT FEES:	.00	.00
* TOTAL RETURNED ITEM FEES:	.00	.00

DAILY BALANCE

DATE.....	BALANCE	DATE.....	BALANCE	DATE.....	BALANCE
12/02	27,335.14	12/29	22,692.71		
12/07	7,692.71	12/31	22,708.52		

EXHIBIT A

GUARANTY

BLUFFTON
(City)

SOUTH CAROLINA
(State)

FEBRUARY 02, 2008

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and to induce FIRST SOUTH BANK - BLUFFTON

(herein, with its participants, successors and assigns, called "Lender"), at its option, at any time or from time to time to make loans or extend other accommodations to or for the account of ECOLOGICAL INVESTMENTS, LLC

(herein called "Borrower") or to engage in any other transactions with Borrower, the Undersigned hereby absolutely and unconditionally guarantees to Lender the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of the debts, liabilities and obligations described as follows:

A. If this ☐ is checked, the Undersigned guarantees to Lender the payment and performance of the debt, liability or obligation of Borrower to Lender evidenced by or arising out of the following:

and any extensions,

renewals or replacements thereof (hereinafter referred to as the "Indebtedness").

B. If this ☒ is checked, the Undersigned guarantees to Lender the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several; all such debts, liabilities and obligations being hereinafter collectively referred to as the "Indebtedness"). Without limitation, this guaranty includes the following described debt(s):

The Undersigned further acknowledges and agrees with Lender that:

1. No act or thing need occur to establish the liability of the Undersigned hereunder, and no act or thing, except full payment and discharge of all indebtedness, shall in any way exonerate the Undersigned or modify, reduce, limit or release the liability of the Undersigned hereunder.

2. This is an absolute, unconditional and continuing guaranty of payment of the Indebtedness and shall continue to be in force and be binding upon the Undersigned, whether or not all Indebtedness is paid in full, until this guaranty is revoked by written notice actually received by the Lender, and such revocation shall not be effective as to Indebtedness existing or committed for at the time of actual receipt of such notice by the Lender, or as to any renewals, extensions and refinancings thereof. If there be more than one Undersigned, such revocation shall be effective only as to the one so revoking. The death or incompetency of the Undersigned shall not revoke this guaranty, except upon actual receipt of written notice thereof by Lender and then only as to the decedent or the incompetent and only prospectively, as to future transactions, as herein set forth.

3. If the Undersigned shall be dissolved, shall die, or shall be or become insolvent (however defined) or revoke this guaranty, then the Lender shall have the right to declare immediately due and payable, and the Undersigned will forthwith pay to the Lender, the full amount of all Indebtedness, whether due and payable or unmatured. If the Undersigned voluntarily commences or there is commenced involuntarily against the Undersigned a case under the United States Bankruptcy Code, the full amount of all Indebtedness, whether due and payable or unmatured, shall be immediately due and payable without demand or notice thereof.

4. The liability of the Undersigned hereunder shall be limited to a principal amount of \$ UNLIMITED

(If unlimited or if no amount is stated, the Undersigned shall be liable for all Indebtedness, without any limitation as to amount), plus accrued interest thereon and all attorneys' fees, collection costs and enforcement expenses referable thereto, Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the Undersigned hereunder. The Lender may apply any sums received by or available to Lender on account of the Indebtedness from Borrower or any other person (except the Undersigned), from their properties, out of any collateral security or from any other source to payment of the excess. Such application of receipts shall not reduce, affect or impair the liability of the Undersigned hereunder. If the liability of the Undersigned is limited to a stated amount pursuant to this paragraph 4, any payment made by the Undersigned under this guaranty shall be effective to reduce or discharge such liability only if accompanied by a written transmittal document, received by the Lender, advising the Lender that such payment is made under this guaranty for such purpose.

5. The Undersigned will pay or reimburse Lender for all costs and expenses (including reasonable attorneys' fees and legal expenses) incurred by Lender in connection with the protection, defense or enforcement of this guaranty in any litigation or bankruptcy or insolvency proceedings.

This guaranty includes the additional provisions on page 2, all of which are made a part hereof.

This guaranty is ☒ unsecured; ☐ secured by a mortgage or security agreement dated _____;
☐ secured by _____

IN WITNESS WHEREOF, this guaranty has been duly executed by the Undersigned this day and year first above written.

Philip J. Brubaker by John E. Rosenberg, Attorney
PHILIP J. BRUBAKER, by John E. Rosenberg, Attorney
in Fact

"Undersigned" shall refer to all persons who sign this guaranty, severally and jointly.

EXHIBIT

A

RECORD 0330

ADDITIONAL PROVISIONS

6. Whether or not any existing relationship between the Undersigned and Borrower has been changed or ended and whether or not this guaranty has been revoked, Lender may, but shall not be obligated to, enter into transactions resulting in the creation or continuance of Indebtedness, without any consent or approval by the Undersigned and without any notice to the Undersigned. The liability of the Undersigned shall not be affected or impaired by any of the following acts or things (which Lender is expressly authorized to do, omit or suffer from time to time, both before and after revocation of this guaranty, without notice to or approval by the Undersigned): (i) any acceptance of collateral security, guarantors, accommodation parties or sureties for any or all Indebtedness; (ii) any one or more extensions or renewals of Indebtedness (whether or not for longer than the original period) or any modification of the interest rates, maturities or other contractual terms applicable to any Indebtedness; (iii) any waiver, adjustment, forbearance, compromise or indulgence granted to Borrower, any delay or lack of diligence in the enforcement of Indebtedness, or any failure to institute proceedings, file a claim, give any required notices or otherwise protect any Indebtedness; (iv) any full or partial release of, settlement with, or agreement not to sue, Borrower or any other guarantor or other person liable in respect of any Indebtedness; (v) any discharge of any evidence of Indebtedness or the acceptance of any instrument in renewal thereof or substitution therefor; (vi) any failure to obtain collateral security (including rights of setoff) for Indebtedness, or to see to the proper or sufficient creation and perfection thereof, or to establish the priority thereof, or to protect, insure, or enforce any collateral security; or any release, modification, substitution, discharge, impairment, deterioration, waste, or loss of any collateral security; (vii) any foreclosure or enforcement of any collateral security; (viii) any transfer of any Indebtedness or any evidence thereof; (ix) any order of application of any payments or credits upon Indebtedness; (x) any election by the Lender under §1111(b)(2) of the United States Bankruptcy Code.

7. The Undersigned waives any and all defenses, claims and discharges of Borrower, or any other obligor, pertaining to Indebtedness, except the defense of discharge by payment in full. Without limiting the generality of the foregoing, the Undersigned will not assert, plead or enforce against Lender any defense of waiver, release, statute of limitations, res judicata, statute of frauds, fraud, incapacity, minority, usury, illegality or unenforceability which may be available to Borrower or any other person liable in respect of any Indebtedness, or any setoff available against Lender to Borrower or any such other person, whether or not on account of a related transaction. The Undersigned expressly agrees that the Undersigned shall be and remain liable, to the fullest extent permitted by applicable law, for any delinquency remaining after foreclosure of any mortgage or security interest securing Indebtedness, whether or not the liability of Borrower or any other obligor for such delinquency is discharged pursuant to statute or judicial decision. The undersigned shall remain obligated, to the fullest extent permitted by law, to pay such amounts as though the Borrower's obligations had not been discharged.

8. The Undersigned further agrees that the Undersigned shall be and remain obligated to pay Indebtedness even though any other person obligated to pay Indebtedness, including Borrower, has such obligation discharged in bankruptcy or otherwise discharged by law. "Indebtedness" shall include post-bankruptcy petition interest and attorneys' fees and any other amounts which Borrower is discharged from paying or which do not otherwise accrue to Indebtedness due to Borrower's discharge, and the Undersigned shall remain obligated to pay such amounts as though Borrower's obligations had not been discharged.

9. If any payment applied by Lender to Indebtedness is thereafter set aside, recovered, rescinded or required to be returned for any reason (including, without limitation, the bankruptcy, insolvency or reorganization of Borrower or any other obligor), the Indebtedness to which such payment was applied shall for the purposes of this guaranty be deemed to have continued in existence, notwithstanding such application, and this guaranty shall be enforceable as to such Indebtedness as fully as if such application had never been made.

10. The Undersigned waives any claim, remedy or other right which the Undersigned may now have or hereafter acquire against Borrower or any other person obligated to pay Indebtedness arising out of the creation or performance of the Undersigned's obligation under this guaranty, including, without limitation, any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any right to participate in any claim or remedy the Undersigned may have against the Borrower, collateral, or other party obligated for Borrower's debts, whether or not such claim, remedy or right arises in equity, or under contract, statute or common law.

11. The Undersigned waives presentment, demand for payment, notice of dishonor or nonpayment, and protest of any instrument evidencing Indebtedness. Lender shall not be required first to resort to payment of the Indebtedness to Borrower or other persons or their properties, or first to enforce, realize upon or exhaust any collateral security for Indebtedness, before enforcing this guaranty.

12. The liability of the Undersigned under this guaranty is in addition to and shall be cumulative with all other liabilities of the Undersigned to Lender as guarantor or otherwise, without any limitation as to amount, unless the instrument or agreement evidencing or creating such other liability specifically provides to the contrary.

13. This guaranty shall be enforceable against each person signing this guaranty, even if only one person signs and regardless of any failure of other persons to sign this guaranty. If there be more than one signer, all agreements and promises herein shall be construed to be, and are hereby declared to be, joint and several in each of every particular and shall be fully binding upon and enforceable against either, any or all the Undersigned. This guaranty shall be effective upon delivery to Lender, without further act, condition or acceptance by Lender, shall be binding upon the Undersigned and the heirs, representatives, successors and assigns of the Undersigned and shall inure to the benefit of Lender and its participants, successors and assigns. Any invalidity or unenforceability of any provision or application of this guaranty shall not affect other lawful provisions and application hereof, and to this end the provisions of this guaranty are declared to be severable. Except as authorized by the terms herein, this guaranty may not be waived, modified, amended, terminated, released or otherwise changed except by a writing signed by the Undersigned and Lender. This guaranty shall be governed by the laws of the State in which it is executed. The Undersigned waives notice of Lender's acceptance hereof.

EXHIBIT B

RECORD 0332

ECOLOGICAL INVESTMENTS, LLC 119 BULL POINT DRIVE SEABROOK, SC 29940	FBI BANK - BLUFFTON 7 ARLEY WAY, SUITE 100 BLUFFTON, SC 29910	Loan Number 8033303 Date 11-30-2010 Maturity Date 11-30-2012 Loan Amount \$ 1,700,000.00 Renewal Of 8033303
BORROWER'S NAME AND ADDRESS "I" includes each borrower above, jointly and severally.	LENDER'S NAME AND ADDRESS "You" means the lender, its successors and assigns.	

For value received, I promise to pay to you, or your order, at your address listed above the PRINCIPAL sum of **ONE MILLION SEVEN HUNDRED THOUSAND AND NO/100** Dollars \$ **1,700,000.00**

- ☒ **Single Advance:** I will receive all of this principal sum on **11-30-2010**. No additional advances are contemplated under this note.
- ☐ **Multiple Advances:** The principal sum shown above is the maximum amount of principal I can borrow under this note. On _____ I will receive the amount of \$ _____ and future principal advances are contemplated.

Conditions: The conditions for future advances are _____

- ☐ **Open End Credit:** You and I agree that I may borrow up to the maximum principal sum more than one time. This feature is subject to all other conditions and expires on: _____

- ☐ **Closed End Credit:** You and I agree that I may borrow (subject to all other conditions) up to the maximum principal sum only one time.

INTEREST: I agree to pay interest on the outstanding principal balance from **11-30-2010** at the rate of **5.25%** per year until **11-30-2012**.

- ☐ **Variable Rate:** This rate may then change as stated below.

- ☐ **Index Rate:** The future rate will be _____ the following index rate: _____

- ☐ **No Index:** The future rate will not be subject to any internal or external index. It will be entirely in your control.

- ☐ **Frequency and Timing:** The rate on this note may change as often as _____ A change in the interest rate will take effect _____

- ☐ **Limitations:** During the term of this loan, the applicable annual interest rate will not be more than _____ % or less than _____ %. The rate may not change more than _____ % each.

Effect of Variable Rate: A change in the interest rate will have the following effect on the payments:

- ☐ The amount of each scheduled payment will change. ☐ The amount of the final payment will change.

☐

ACCRUAL METHOD: Interest will be calculated on a **ACTUAL/360** basis.

POST MATURITY RATE: I agree to pay interest on the unpaid balance of this note owing after maturity, and until paid in full, as stated below:

- ☐ on the same fixed or variable rate basis in effect before maturity (as indicated above).

- ☒ at a rate equal to **10%**

- ☒ **LATE CHARGE:** If a payment is not made within **10** days after it is due, I agree to pay a late charge of **4.000% OF THE LATE AMOUNT WITH A MIN OF \$10.00**

- ☐ **ADDITIONAL CHARGES:** In addition to interest, I agree to pay the following charges which ☐ are ☐ are not included in the principal amount above: _____

PAYMENTS: I agree to pay this note as follows:

23 MONTHLY INTEREST PAYMENTS RANGING FROM \$7052.50 TO \$7667.33 BEGINNING 12-30-2010 AND 23 MONTHLY PRINCIPAL PAYMENTS OF \$4,000.00 BEGINNING 12-30-2010 AND 1 PAYMENT OF \$1,616,268.50 ON 11-30-2012.

PURPOSE: The purpose of this loan is **RENEWAL OF EXISTING LOAN FOR AN ADDITIONAL 24 MONTHS**

SECURITY: You have certain rights that may affect my property as explained on page 2. In addition to these rights, this agreement is separately secured by a ☐ preexisting ☐ contemporaneous agreement described as _____

ADDITIONAL TERMS: _____

[Signature] Page 1 of 31



FSB/EI-001250

RECORD 0333

SECURITY

SECURITY INTEREST: I give you a security interest in the Property described below that I own or have sufficient right to transfer an interest, now or in the future, wherever the Property is or will be located, and all proceeds and products of the Property. "Property" includes all parts, accessories, repairs, replacements, improvements, and accessories to the Property; any original evidence of title or ownership; and all obligations that support the payment or performance of the Property. "Proceeds" includes anything acquired upon the sale, lease, license, exchange, or other disposition of the Property; any rights and claims arising from the Property; and any collections and distributions on account of the Property.

- ☐ **Accounts and Other Rights to Payment:** All rights to payment, whether or not earned by performance, including, but not limited to, payment for property or services sold, leased, rented, licensed, or assigned. This includes any rights and interests (including all liens) which I have by law or agreement against any account debtor or obligor.
- ☐ **Inventory:** All inventory held for ultimate sale or lease, or which has been or will be supplied under contracts of service, or which are raw materials, work in process, or materials used or consumed in my business.
- ☐ **Equipment:** All equipment including, but not limited to, machinery, vehicles, furniture, fixtures, manufacturing equipment, farm machinery and equipment, shop equipment, office and record keeping equipment, parts, and tools. The Property includes any equipment described in a list or schedule I give to you, but such a list is not necessary to create a valid security interest in all of my equipment.
- ☐ **Instrumental and Chattel Paper:** All instruments, including negotiable instruments and promissory notes and any other writings or records that evidence the right to payment of a monetary obligation, and tangible and electronic chattel paper.
- ☐ **General Intangibles:** All general intangibles including, but not limited to, tax refunds, patents and applications for patents, copyrights, trademarks, trade secrets, goodwill, trade names, customer lists, permits and franchises, payment intangibles, computer programs and all supporting information provided in connection with a transaction relating to computer programs, and the right to use my name.
- ☐ **Documents:** All documents of title including, but not limited to, bills of lading, dock warrants and receipts, and warehouse receipts.
- ☐ **Farm Products and Supplies:** All farm products including, but not limited to, all poultry and livestock and their young, along with their produce, products, and replacements; all crops, annual or perennial, and all products of the crops; and all feed, seed, fertilizer, medicines, and other supplies used or produced in my farming operations.
- ☐ **Government Payments and Programs:** All payments, accounts, general intangibles, and benefits including, but not limited to, payments in kind, deficiency payments, letters of entitlement, warehouse receipts, storage payments, emergency assistance and diversion payments, production flexibility contracts, and conservation reserve payments under any preexisting, current, or future federal or state government program.
- ☐ **Investment Property:** All investment property including, but not limited to, certificated securities, uncertificated securities, accounts and interests, securities accounts, commodity contracts, commodity accounts, and financial assets.
- ☐ **Deposit Accounts:** All deposit accounts including, but not limited to, demand, time, savings, passbook, and similar accounts.

- ☒ **Specific Property Description:** The Property includes, but is not limited by, the following:

FROM ON 82.68 +/- ACRES IN JASPER COUNTY, SC PARCEL Q42-00-05-042 ALSO KNOWN AS THE BUTTERFLY KINGDOM FUD LOCATED AT THE END OF RED DAM ROAD IN HARDEVILLE, SC. AS FURTHER DESCRIBED IN A CERTAIN MORTGAGE DATED 02/02/2006 AND RECORDED 02/06/2006 IN VOLUME 401 ON PAGES 20-24 IN JASPER COUNTY, SC

ASSIGNMENT OF LEASES, RENTS AND PROFITS DATED 02/02/2006 AND RECORDED 02/06/2006 IN VOLUME 20 ON PAGES 110-113 IN JASPER COUNTY, SC

If applicable, enter real estate description and record owner information:

The Property will be used for a ☐ personal ☒ business ☐ agricultural ☐ purpose.
Borrower/Owner State of organization/registration (if applicable) SC

ADDITIONAL TERMS OF THE SECURITY AGREEMENT

GENERALLY - This agreement secures the note and any other debt I have with you, now or later. However, I will not secure other debts if you fail with respect to such other debts, to make any required disclosure about this security agreement or if you fail to give any required notice of the right of rescission. If property described in this agreement is located in another state, this agreement may also, in some circumstances, be governed by the law of the state in which the Property is located.

NAME AND LOCATION - My name indicated on page 1 is my exact legal name. If I am an individual, my address is my principal residence. If I am not an individual, my address is the location of my chief executive offices or sole place of business. If I am an entity organized and registered under state law, my address is located in the state in which I am registered, unless otherwise indicated on page 2. I will provide verification of registration and location upon your request. I will provide you with at least 30 days notice prior to any change in my name, address, or state of organization or registration.

OWNERSHIP AND DUTIES TOWARD PROPERTY - I represent that I own all of the Property, or to the extent this is a purchase money security interest I will acquire ownership of the Property with the proceeds of the loan. I will defend it against any other claim. Your claim to the Property is ahead of the claims of any other creditor. I agree to do whatever you require to protect your security interest and to keep your claim in the Property ahead of the claims of other creditors. I will not do anything to harm your position. I will not use the Property for a purpose that will violate any laws or subject the Property to forfeiture or seizure.

I will keep books, records and accounts about the Property and my business in general. I will let you examine these records at any reasonable time. I will prepare any report or accounting you request, which deals with the Property.

I will keep the Property in my possession and will keep it in good repair and use it only for the purpose(s) described on page 1 of this agreement. I will not change this specified use without your express written permission. I represent that I am the original owner of the Property and, if I am not, that I have provided you with a list of prior owners of the Property.

I will keep the Property at my address listed on page 1 of this agreement, unless we agree I may keep it at another location. If the Property is to be used in another state, I will give you a list of those states. I will not try to sell the Property unless it is inventory or I receive your written permission to do so. If I sell the Property I will have the payment made payable to the order of you and me.

You may demand immediate payment of the debt(s) if the debtor is not a natural person and without your prior written consent: (1) a beneficial interest in the debtor is sold or transferred, or (2) there is a change in either the identity or number of members of a partnership, or (3) there is a change in ownership of more than 25 percent of the voting stock of a corporation.

I will pay all taxes and charges on the Property as they become due. You have the right of reasonable access in order to inspect the Property. I will immediately inform you of any loss or damage to the Property.

If I fail to perform any of my duties under this security agreement, or any mortgage, deed of trust, lien or other security interest, you may without notice to me perform the duties or cause them to be performed. Your right to perform for me shall not create an obligation to perform and

your failure to perform will not preclude you from exercising any of your other rights under the law or this security agreement.

PURCHASE MONEY SECURITY INTEREST - For the sole purpose of determining the extent of a purchase money security interest arising under this security agreement: (a) payments on any nonpurchase money loan also secured by this agreement will not be deemed to apply to the Purchase Money Loan, and (b) payments on the Purchase Money Loan will be deemed to apply first to the nonpurchase money portion of the loan, if any, and then to the purchase money obligations in the order which the items of collateral were acquired or if acquired at the same time, in the order selected by you. No security interest will be terminated by application of this formula. "Purchase Money Loan" means any loan the proceeds of which, in whole or in part, are used to acquire any collateral securing the loan and all extensions, renewals, consolidations and refinancing of such loan.

PAYMENTS BY LENDER - You are authorized to pay, on my behalf, charges I am or may become obligated to pay to preserve or protect the secured property (such as property insurance premiums). You may treat those payments as advances and add them to the unpaid principal under the note secured by this agreement or you may demand immediate payment of the amount advanced.

INSURANCE - I agree to buy insurance on the Property against the risks and for the amounts you require and to furnish you continuing proof of coverage. I will have the insurance company name you as loss payee on any such policy. You may require added security if you agree that insurance proceeds may be used to repair or replace the Property. I will buy insurance from a firm licensed to do business in the state where you are located. The firm will be reasonably acceptable to you. The insurance will last until the Property is released from this agreement. If I fail to buy or maintain the insurance for fail to name you as loss payee you may purchase it yourself.

WARRANTIES AND REPRESENTATIONS - If this agreement includes accounts, I will not settle any account for less than its full value without your written permission. I will collect all accounts until you tell me otherwise. I will keep the proceeds from all the accounts and any goods which are returned to me or which I take back in trust for you. I will not mix them with any other property of mine. I will deliver them to you at your request. If you ask me to pay you the full price on any returned items or items retaken by myself, I will do so. You may exercise my rights with respect to obligations of any account debtors, or other persons obligated on the Property, to pay or perform, and you may enforce any security interest that secures such obligations.

Any person who signs within this box does so to give you a security interest in the Property described on this page. This person does not promise to pay the note. "I" as used in this security agreement will include the borrower and any person who signs within this box.

Date _____

Signed _____

 (page 2 of 3)

If this agreement covers inventory, I will not dispose of it in my ordinary course of business at the fair market value for the Property, or at a minimum price established between you and me.

If this agreement covers farm products, I will provide you, at your request, a written list of the buyers, commission merchants or selling agents to or through whom I may sell my farm products. In addition to those parties named on this written list, I authorize you to notify at your sole discretion any additional parties regarding your security interest in my farm products. I remain subject to all applicable penalties for selling my farm products in violation of my agreement with you and the Food Security Act. In this paragraph the terms farm products, buyers, commission merchants and selling agents have the meanings given to them in the Federal Food Security Act of 1985.

If this agreement covers chattel paper or instruments, either as original collateral or proceeds of the Property, I will note your interest on the face of the chattel paper or instruments.

REMEDIES - I will be in default on this security agreement if I am in default on any note this agreement secures or if I fail to keep any promise contained in the terms of this agreement. If I default, you have all of the rights and remedies provided in the note and under the Uniform Commercial Code. You may require me to make the secured property available to you at a place which is reasonably convenient. You may take possession of the secured property and sell it as provided by law. The proceeds will be applied first to your expenses and then to the debt. I agree that 10 days written notice sent to my last known address by first class mail will be reasonable notice under the Uniform Commercial Code. My current address is on page 1.

PERFECTION OF SECURITY INTEREST - I authorize you to file a financing statement covering the Property. I will comply with, facilitate, and otherwise assist you in connection with obtaining possession of or control over the Property for purposes of perfecting your security interest under the Uniform Commercial Code.

ADDITIONAL TERMS OF THE NOTE

DEFINITIONS - As used on pages 1 and 2, "it" means the terms that apply to this loan. "me" or "my" means each borrower who signs this note and each other person or legal entity (including guarantors, endorsers, and sureties) who agrees to pay this note (together referred to as "us"). "You" or "your" means the lender and its successors and assigns.

APPLICABLE LAW - The law of the state of South Carolina in which you are located will govern this agreement. Any term of this agreement which is contrary to applicable law will not be effective, unless the law permits you and me to agree to such a variation. Any provision of this agreement cannot be enforced according to its terms, this fact will not affect the enforceability of the remainder of this agreement. No modification of this agreement may be made without your express written consent. Time is of the essence in this agreement.

PAYMENTS - Each payment I make on this note will first reduce the amount I owe you for charges which are neither interest nor principal. The remainder of each payment will then reduce accrued unpaid interest, and then unpaid principal. If you and I agree to a different application of payments, we will describe our agreement on this note. I may prepay a part of, or the entire balance of this loan without penalty, unless you specify to the contrary on this note. Any partial prepayment will not excuse or reduce any later scheduled payment until this note is paid in full (unless, when I make the prepayment, you and I agree in writing to the contrary).

INTEREST - Interest accrues on the principal remaining unpaid from time to time, until paid in full. If I receive the principal in more than one advance, each advance will start to owe interest only when I receive the advance. The interest rate in effect on this note at any given time will apply to the entire principal sum outstanding at that time. Notwithstanding anything to the contrary, I do not agree to pay and you do not intend to charge any rate of interest that is higher than the maximum rate of interest you could charge under applicable law for the extension of credit that is agreed to in this note (either before or after maturity). If any notice of interest accrual is sent and is in error, we mutually agree to correct it, and if you actually collect more interest than allowed by law and this agreement, you agree to refund it to me.

INDEX RATE - The index will serve only as a device for setting the interest rate on this note. You do not guarantee by selecting this index, or the margin, that the interest rate on this note will be the same rate you charge on any other loans or class of loans you make to me or other borrowers.

POST MATURITY RATE - For purposes of deciding when the "Post Maturity Rate" (shown on page 1) applies, the term "maturity" means the date of the last scheduled payment indicated on page 1 of this note or the date you accelerate payment on the note, whichever is earlier.

SINGLE ADVANCE LOANS - If this is a single advance loan, you and I expect that you will make only one advance of principal. However, you may add other amounts to the principal if you make any payments described in the "PAYMENTS BY LENDER" paragraph on page 2.

MULTIPLE ADVANCE LOANS - If this is a multiple advance loan, you and I expect that you will make more than one advance of principal. If this is closed end credit, repaying a part of the principal will not entitle me to additional credit.

SET-OFF - I agree that you may set off any amount due and payable under this note against any right I have to receive money from you.

"Right to receive money from you" means:

- (1) any deposit account balance I have with you;
- (2) any money owed to me on an item presented to you or in your possession for collection or exchange; and
- (3) any repurchase agreement or other nondeposh obligation.

"Any amount due and payable under this note" means the total amount of which you are entitled to demand payment under the terms of this note at the time you set off. This total includes any balance the due date for which you properly accelerate under this note.

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE INCLUDING THOSE ON PAGES 1 AND 2. I have received a copy on today's date.
ECOLOGICAL INVESTMENTS, LLC

JOHN E. ROSENBERG, MANAGER/MEMBER

SIGNATURE FOR LENDER: PATRICK WRIGHT, SENIOR VICE PRESIDENT, AREA EXECUTIVE

EXP-1 ©1994, 1991 Quark Systems, Inc. St. Cloud, MN Form URM-1A7-9C 2/8/2001

(page 3 of 2)

FSB/EI-001252

RECORD 0335

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JAN 09 2015

APPEAL FROM BEAUFORT COUNTY
Marvin H. Dukes, III, Special Circuit Court Judge

SC Court of Appeals

Case No. 2013-CP-07-00610

First South Bank Respondent,

v.

John E. Rosenberg and Phillip J. Brust..... Defendants,

Of Whom Phillip J. Brust is.....Appellant.

NOTICE OF APPEAL

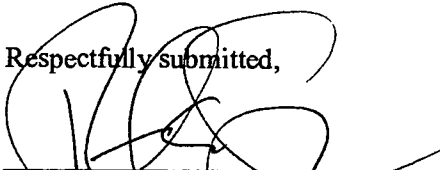
Appellant Phillip J. Brust appeals two separate orders from the trial court. Appellant appeals the Order of the Honorable Marvin H. Dukes, III, Master in Equity sitting as Special Circuit Judge for the Beaufort County Court of Common Pleas, in the above-captioned matter, denying Appellant's Motion to Amend Answer and Cross-claims Against Defendant John E. Rosenberg (the "Motion to Amend"), which was entered on December 2, 2014 and filed on December 10, 2014. (See Order Denying Motion to Amend, attached hereto as Exhibit A). On May 30, 2014, Appellant filed the Motion to Amend. Judge Dukes denied the Motion to Amend pursuant to the Order entered on December 2, 2014 and filed on December 10, 2014. Appellant

received written notice of entry of the Order denying the Motion to Amend on December 10, 2014.

Appellant further appeals the Order of Honorable Marvin H. Dukes, III, Master in Equity sitting as Special Circuit Judge for the Beaufort County Court of Common Pleas, granting Respondent's Motion for Summary Judgment entered July 31, 2014, and filed August 5, 2014 (*See Order Granting Motion for Summary Judgment, attached hereto as Exhibit B*). Judge Dukes granted summary judgment in favor of the Respondent pursuant to the Order entered July 31, 2014, and filed August 5, 2014. On August 18, 2014, Appellant timely filed and served a Motion for Reconsideration. On September 15, 2014, First South Bank filed its Opposition to the Motion for Reconsideration, and on October 15, 2014, Appellant filed a Supplemental Memorandum in Support of Motion for Reconsideration. Judge Dukes entered and filed the Order Denying the Motion for Reconsideration on December 18, 2014. Appellant received written notice of entry of Judge Dukes' Order Denying the Motion for Reconsideration on December 18, 2014.

January 8, 2015

Respectfully submitted,



Robert E. Sumner, IV, SC Bar #71728
E. Brandon Gaskins, SC Bar #73274
Moore & Van Allen, PLLC
78 Wentworth Street
Post Office Box 22828
Charleston, SC 29413-2828
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
robertsumner@mvalaw.com
brandongaskins@mvalaw.com

Attorney for Appellant Phillip J. Brust

Other Counsel of Record:

Jeffrey L. Silver, Esquire
Tyler, Cassell, Jackson, Peace & Silver, LLC
1331 Elmwood Avenue, Suite 300
P.O. Box 11656
Columbia, SC 29211
(803) 779-4997

Attorney for Respondent First South Bank

EXHIBIT A

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

2014 DEC 10 AM 3:00

CIVIL ACTION NO.: 2013-CP-07-0610

First South Bank,

Plaintiff,

vs.

John E. Rosenberg, and Philip J. Brust,

Defendants.

CLERK OF COURT
BEAUFORT COUNTY, SOUTH CAROLINA

**ORDER DENYING DEFENDANT PHILIP J.
BRUST'S MOTION TO AMEND ANSWER
AND CROSSCLAIMS AGAINST
DEFENDANT JOHN E ROSENBERG**

THIS MATTER came before the Court on Defendant Philip J. Brust's Motion to Amend Answer and Crossclaims Against Defendant John E. Rosenberg ("Motion"). A hearing was held on August 13, 2014, before the Honorable Marvin H. Dukes, III, Special Circuit Court Judge and Master-in-Equity for the County of Beaufort, State of South Carolina. Present at the hearing were Jeffrey L. Silver, Esq., counsel for Plaintiff, and Robert E. Sumer, IV, Esq. and E. Brandon Gaskins, Esq., counsel for Defendant Philip J. Brust ("Brust"). Based upon a review of the pleadings, affidavits filed of record, discovery, and applicable law, and hearing arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Summons and Complaint ("Complaint") were filed on March 8, 2013, and properly served on Defendants John E. Rosenberg ("Rosenberg") and Philip J. Brust ("Brust").

2. On September 9, 2013, Brust filed his Answer to Plaintiff's Complaint and Crossclaims against Rosenberg ("Answer").

3. In his Answer, Brust asserted a defense which alleged that Plaintiff's claims are barred in whole or in part, because Plaintiff's alleged losses were the result of Plaintiff's failure to follow its own

policies and procedures and negligence in the underwriting, approval and administration of the loan in question ("Loan") ("Seventh Defense").

4. The Answer also includes a defense which alleges Brust should be released from any obligations under the Unlimited Guaranty which is the subject of this action ("Guaranty") to the extent that Plaintiff breached its duty of good faith and fair dealing to Brust ("Tenth Defense").

5. On October 28, 2013, Plaintiff filed its Motion for Summary Judgment as to Brust which was supported by the Affidavit of Patrick Wright ("Wright").

6. Brust took the deposition of Wright, Plaintiff's Rule 30(b)(6) representative, on May 23, 2014.

7. Brust filed the present Motion on June 2, 2014, and attached thereto was his proposed Amended Answer to Plaintiff's Complaint, Crossclaims against Defendant John E. Rosenberg and Counterclaims against First South Bank ("Amended Answer").

8. The Motion states that the proposed Amended Answer arises out of the same disputed facts as the original Answer and does not raise novel legal issues that are not related to the issues already contained in the pleadings.

9. The Motion also states that the only change made to the Answer was the addition of counterclaims against Plaintiff allegedly uncovered during Wright's deposition.

10. With regard to the Amended Answer, it contains a proposed counterclaim that alleges Plaintiff owed Brust a duty to act reasonably and to comply with standard banking practices in the underwriting, closing, and administration of the Loan, that Plaintiff breached said duty, and that Brust suffered considerable financial injury as a result ("First Counterclaim").

11. The Amended Answer also contains a second proposed counterclaim which alleges that Plaintiff owed Brust a duty of good faith and fair dealing with regard to the Loan and Guaranty, that

Plaintiff breached same, and that Brust suffered considered financial injury as a result ("Second Counterclaim").

12. A hearing was held on Plaintiff's Motion for Summary Judgment on June 3, 2014, and the Court heard arguments concerning (i) Rosenberg's authority to execute the Guaranty on Brust's behalf, (ii) Plaintiff's alleged failure to follow its own policies and procedures with regard to the execution of the Guaranty, the closing of the Loan, and the administration of same, and (iii) Plaintiff's alleged breach of its duty of good faith and fair and fair dealing.

13. On July 31, 2014, the Court issued an Order Granting Plaintiff's Motion for Summary Judgment as to Defendant Philip J. Brust ("Order") wherein it found, among other things, that Plaintiff was not negligent for its alleged failure to follow its own policies and procedures and that Plaintiff did not breach its alleged duty of good faith and fair dealing to Brust.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Court hereby concludes as follows:

1. This Court has subject matter and personal jurisdiction over the parties, and this matter is properly before the Court.

2. "A pleading which sets forth a cause of action, whether an original claim, counterclaim, cross-claim or third-party claim shall contain (1) a short and plain statement of the grounds including facts and statute upon which the Court's jurisdiction rests, unless the Court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief and, (3) a prayer or demand for judgment for the relief which he deems himself entitled." Rule 8(a), SCRCP.

3. Pursuant to Rule 8(c), SCRCP, "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation" Rule 8(c), SCRCP.

4. As set forth in the Order, the Court determined it had jurisdiction to hear arguments related to the Seventh Defense and Tenth Defense.

5. Also, the Seventh Defense and Tenth contain a short and plain statements of facts showing that Brust is entitled to relief, said statements being that Plaintiff failed to follow its own policies and procedures and was negligent in the underwriting, approval and administration of the Loan and that Plaintiff allegedly breach a duty of good faith and fair dealing to Brust.

6. The Seventh Defense and Tenth also contain prayers or demands for judgment or relief in the form of set-offs, as same state that Plaintiff's claims are barred in whole or in part or that Brust is entitled to a release from his obligations under the Guaranty.

7. Therefore, the Seventh Defense is the same as the First Counterclaim as both allege that Plaintiff owed a duty to Brust, that Plaintiff breached its duty when it allegedly failed to follow its own policies and procedures and standard banking practices for the underwriting, closing and administration of the Loan and Guaranty, and that Brust sustained considerable financial injury and is entitled to damages in the form of a set-off as a result.

8. In like manner, the Tenth Defense is the same as the Second Counterclaim as both allege that Plaintiff allegedly breached and alleged duty of good faith and fair dealing to Brust with regard to the execution of the Guaranty, the closing of the Loan and the administration of same.

9. *Res Judicata* is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privy, and it ends litigation, promotes judicial economy, and avoids the harassment of re-litigation of the same issues. Pharmacists Mut. Ins. Co. v.

Cincinnati Ins. Co., 658 F. Supp. 2d 745 (D.S.C. 2009).

10. *Res Judicata* requires proof of three elements: 1) a final, valid judgment was entered on the merits; 2) the parties to both suits are the same; and 3) the subsequent action involves matters properly included in the first action. Judy v. Judy, 383 S.C. 1, 677 S.E. 2d 213 (S.C. Ct. App. 2009).

11. It bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between the parties. Plott v. Justin Enterprises, 374 S.C. 504, 511, 649 S.E. 2d, 92, 96 (S.C. Ct. App. 2007).

12. A different remedy does not alter the fact that the claims are identical. Id.

13. A party may not evade a final judgment dismissing his claim by dressing up the same claim in different legal terms or recasting it according to a new legal theory. McMahan v. International Ass'n. of Bridge, Structural & Ornamental Iron Workers, 858 F. Supp. 529 (D.S.C. 1994).

14. Also, summary judgment is considered final and on the merits for purposes of *res judicata*. Id.

15. As to the first element, the Court's Order constitutes a final judgment on the merits as to the First Counterclaim and Second Counterclaim as they are merely a repackaging and recasting of the Seventh Defense and Tenth Defense.

16. As to the second element, the parties are identical as Plaintiff and Brust are parties to both actions.

17. As to the third element, the subject matter of the First Counterclaim and Second Counterclaim was properly included and disposed of by the Court's Order as the Seventh Defense and ~~Tenth Defense and First Counterclaim and Second Counterclaim~~ arise out of the execution of the Guaranty, the closing of the Loan, and the administration of same.

18. Therefore, *res judicata* bars the First Counterclaim and Second Counterclaim as Plaintiff would suffer prejudice as a result of having to re-litigate the matters alleged in same.

STANDARD OF REVIEW

Pursuant to Rule 15(a), SCRCP "A party may amend his pleadings by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice the other party." "It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice..." City of N. Myrtle Beach v. Lewis-Davis, 360 SC 225, 233, 559 S.E. 2d 462 (S.C. Ct. App. 2004). Relatedly, "[w]hile this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court..." Id. (internal citations omitted) (emphasis added).

ORDER

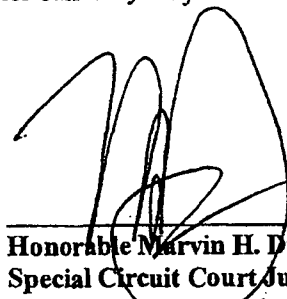
Based upon the foregoing Findings of Fact and Conclusions of Law, Brust's Motion to Amend is hereby denied.

In its Order, the Court found it had jurisdiction to hear arguments concerning the Seventh Defense and Tenth Defense and decide the merits of same. Also, the Seventh Defense and Tenth Defense each contain short plain statements of facts alleging that Brust is entitled to relief, said statements being that Plaintiff was allegedly negligent and breached its duty of good faith and fair dealing with regard Brust, the execution of the Guaranty, the closing of the Loan, and the administration of same. Furthermore, the Seventh Defense and Tenth Defense contain prayers or demands for judgment or relief in the form of a set-off as they state that Plaintiff's claim is barred in whole or in part and that Brust should be relieved of his liability under the Guaranty. Therefore, the Seventh Defense and the First Counterclaim are the same, and, in like manner, the Tenth Defense and Second Counterclaim are the same.

Accordingly, the First Counterclaim and Second Counterclaim are barred under *res judicata* as they were previously denied in the Order by virtue of the Court's denial of the Seventh Defense and Tenth Defense. As to the first element of *res judicata*, a final judgment on the matter has been entered in the form of the Order. As to the second element, the identities of the parties are identical. As to the third element, the matters alleged in the First Counterclaim and Second Counterclaim were properly included and disposed of in the Order by virtue Court's denial of the Seventh Defense and Tenth Defense as same arose out of the same transaction or occurrence. Accordingly, the proposed First and Second Counterclaims are barred by *res judicata*. It is therefore,

ORDERED ADJUDGED, AND DECREED, that Brust's Motion to Amend is hereby denied as allowance of the Amended Answer and included First Counterclaim and Second Counterclaim would prejudice Plaintiff and force same to re-litigate matters barred by *res judicata*.

IT IS SO ORDERED.



Honorable Marvin H. Dukes, III
Special Circuit Court Judge and
Master-In-Equity for Beaufort County

Dated: 12/2, 2014
Beaufort, South Carolina

F:\Data-JLS\First South (1862)\Ecological Investments, LLC (25827)\Guaranty Action\Pleadings\order Brust's motion to amend

EXHIBIT B

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NO.: 2013-CP-07-610

John E. Rosenberg and Philip J. Brust,

First South Bank,

PLAINTIFF,

Submitted by: TYLER, CASSELL, JACKSON PEACE & SILVER, LLC Jeffrey L. Silver 1331 Elmwood Avenue, Suite 300 (29201) Post Office Box 11656 Columbia, South Carolina 29211	Attorney for: ☒ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE):

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

2014 AUG -5 PM 12:23

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
 Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
First South Bank	Philip J. Brust	\$1,746,260.73, plus pre-judgment interest from May 23, 2014, through the entrance of the judgment at the per diem rate of \$234.50 Attorney Fees and Costs in the sum of \$47,388.73

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

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

Marvin H. Dukes, Jr., 14th Judicial Circuit

7 31 20 17

FORM 4**For Clerk of Court Office Use Only**

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

TYLER, CASSELL, JACKSON PEACE & SILVER, LLC Jeffrey L. Silver 1331 Elmwood Avenue, Suite 300 (29201) Post Office Box 11656 Columbia, South Carolina 29211 ATTORNEY(S) FOR THE PLAINTIFF(S)	John E. Rosenberg c/o Robert Michael Drose, Esq., 3955 Faber Place Drive, Suite 103 North Charleston, South Carolina 29405 Philip J. Brust c/o Robert E. Sumner, IV, Esq., Moore & Van Allen, PLLC, 78 Wentworth Street (29401) Charleston, South Carolina 29401 ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There is no handwriting or other markings on the paper.

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

First South Bank,)
)
Plaintiff,)
)
vs.)
)
John E. Rosenberg, and Philip J. Brust,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2013-CP-07-0610

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AS TO DEFENDANT
PHILIP J. BRUST**

FILED
MAY 23 2014
CLERK OF COURT
JULIA M. HARRIS
10/12/23

THIS MATTER came before the Court on Plaintiff's Motion for Summary Judgment as to Defendant Philip J. Brust ("Motion"). A hearing was held on May 23, 2014, before the Honorable Marvin H. Dukes, III, Special Circuit Court Judge and Master-in-Equity for the County of Beaufort, State of South Carolina. Present at the hearing were Jeffrey L. Silver, Esq., counsel for Plaintiff, and Robert E. Sumner, IV, Esq. and E. Brandon Gaskins, Esq., counsel for Defendant Philip J. Brust. Based upon the pleadings, affidavits filed of record, discovery, applicable law, and such other argument of counsel, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Summons and Complaint ("Complaint") were filed on March 8, 2013, and same were properly served on Defendants John E. Rosenberg ("Rosenberg") and Philip J. Brust ("Brust").
2. Brust filed a Motion to Dismiss for lack of personal jurisdiction which was denied by the Court on August 22, 2013.
3. Soon thereafter, Brust answered the allegations contained in Plaintiff's Complaint and alleged various Crossclaims against Rosenberg ("Answer").
4. In his Answer, Brust denied the material allegations of Plaintiff's Complaint and alleged, among other things, that (i) Rosenberg did not have actual or apparent authority to sign the

10/12/23

below described Unlimited Guaranty ("Guranty"), (ii) Plaintiff was negligent in failing to follow its own policies and/or procedures, (iii) Plaintiff breached its duty of good faith and fair dealing, and (iv) Plaintiff modified the Loan and consequently, Brust is not liable under the Guaranty and/or his liability under same should be reduced or discharged.

5. Plaintiff has already obtained judgment against Rosenberg by virtue of a Consent Order on Plaintiff's Motion for Summary Judgment filed October 2, 2013.

6. Plaintiff filed the present Motion and Affidavit in Support of the Motion of Patrick Wright on October 28, 2013.

7. Brust has also filed a Notice of Motion and Motion to Amend Answer and Crossclaims ("Motion to Amend") on June 2, 2014 which had attached to it the proposed Defendant Philip J. Brust's Amended Answer to Plaintiff's Complaint, Crossclaims against Defendant John E. Rosenberg and Counterclaims against First South Bank ("Amended Answer").

8. The counterclaims in the Amended Answer contain the same material allegations as those set forth as defenses in Brust's Answer.

9. Brust is a member of Ecological Investments, LLC ("Ecological"), a limited liability company organized under and existing pursuant to the laws of the State of South Carolina.

10. In or around late 2005, Ecological entered into negotiations with Plaintiff for the purpose of obtaining a loan in the amount of Two Million Six Hundred Thousand and No/100 (\$2,600,000.00) Dollars ("Loan").

11. In connection therewith, Plaintiff issued a commitment letter to Ecological, Brust, and Rosenberg ("Commitment Letter"), said Commitment Letter being dated January 9, 2006.

12. The Commitment Letter informed Brust that he would be required to personally guaranty the Loan, that his personal guaranty of the Loan would be condition to Ecological receiving

2/12 2

same and that he would provide copies of his personal financial information in connection therewith during the Loan's repayment period.

13. The Commitment Letter also informed Brust that the Loan documents and the terms thereof would prevail over the terms of the Commitment Letter.

14. Brust acknowledged and accepted the terms of the Commitment Letter by signing same.

15. In connection with the Loan, Brust executed a Specific Limited Power of Attorney ("Power of Attorney") wherein he appointed Rosenberg as his true and lawful attorney and vested him with authority to execute, as his act and deed, any document, instrument, contract, note, mortgage, agreement, affidavit, disclosure, etc., and to pay on his account or to execute any such documents as may be necessary to close the Loan.

16. The Power of Attorney also declared that any act or deed lawfully performed by Rosenberg pursuant to the Power of Attorney would be binding upon Brust.

17. The Power of Attorney was filed in the Office of the Register of Deeds for Jasper County, South Carolina, on February 2, 2006, in Book 339 at Page 218.

18. On February 2, 2006, Ecological made, executed, and delivered to Plaintiff a Universal Note and Security Agreement ("Note") in the original principal sum of Two Million Six Hundred Thousand and No/100 (\$2,600,000.00) Dollars.

19. To secure the Note, Rosenberg, as Brust's attorney-in-fact, executed the Guaranty in which Brust absolutely and unconditionally guaranteed payment and performance of any and all debts, liabilities, and obligations which Ecological owed Plaintiff.

20. Plaintiff accepted the Guaranty based on the representations in the Power of Attorney and relied on same.

3912

21. According to its terms, the Guaranty is continuing and shall continue to be enforced and binding upon Brust until it is revoked by written notice actually received by Plaintiff, and such revocation shall not be effective as to indebtedness existing or committed for at the time of actual receipt of such notice by Plaintiff or as to any renewal, extension, or refinancing thereof.

22. Under the Guaranty, Brust agreed to pay or reimburse Plaintiff for all costs and expenses, including reasonable attorney's fees and legal expenses incurred by Plaintiff in connection with the protection, defense, or enforcement of the Guaranty and any litigation, bankruptcy, or insolvency proceeding.

23. Subsequently thereafter, and from time to time, Plaintiff and Ecological renewed and/or modified the Note by certain Commercial Debt Modification Agreements dated January 14, 2008 and January 21, 2010, and Renewal Universal Note and Security Agreements dated May 27, 2008, August 26, 2008, October 15, 2008, and November 30, 2008 (collectively "Renewals").

24. The Note, Renewals, and Guaranty directly relate to the Loan and any and all amounts due and owing thereunder represent the only indebtedness Ecological and Brust owe Plaintiff.

25. From 2005 through 2010, Brust voluntarily provided Plaintiff, to support his personal obligations, with his personal financial information in compliance with Plaintiff's request and the terms of the Commitment Letter.

25. During the Loan's repayment, Brust did not revoke or repudiate the Guaranty nor did he dispute Rosenberg's execution of same.

26. Brust has not revoked the Power of Attorney.

27. The Note matured on November 30, 2012.

28. Plaintiff made demand upon Ecological for payment of the Note in full and Ecological has failed and refused to deliver same.

40/12 2

29. Plaintiff made demand upon Brust for payment of the Guaranty in full, and he has failed and refused to deliver same.

30. As of May 23, 2014, there is due and owing under the terms of the Guaranty, the principal sum of \$1,608,000.00, plus pre-judgment interest through May 23, 2014, in the sum of \$133,683.67, plus accrued late charges in the sum of \$2,348.49, plus advanced real property taxes in the sum of \$713.07, plus advanced appraisal fees in the sum of \$1,450.00, plus advanced costs in the sum of \$65.50 for a total outstanding balance of \$1,746,260.73, plus pre-judgment interest from May 23, 2014, at the per diem rate of \$234.50.

31. As documented by the Affidavit of Jeffrey L. Silver, Esq., Plaintiff has incurred the actual sum of \$43,843.00 in attorney's fees and the sum of \$3,545.73 in court costs for a total of \$47,388.73 which is a fair and reasonable award for the attorney fees and court costs given (1) the nature of these proceedings, (2) the time actually devoted to the matter; (3) the professional standing of attorney who regularly represents clients in matters of this type as a partner in an AV rated firm; and (4) for the beneficial results that client has received.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Court hereby concludes as follows:

1. This Court has subject matter and personal jurisdiction over the parties, and this matter is properly before the Court.

2. An "'agent' is one appointed by a principal as his representative and to whom the principal confides the management of some business to be transacted in the principal's name or on his account and who brings about or effects legal relationships between the principal and third parties". Collection County Taxpayers Ass'n v. School Dist. of Colleton County, 638 S.E.2d 685, 693, 371 S.C. 224, 239 (2006) (citing Thompson v. Ford Motor Co., 21 S.E.2d 34, 43, 200 S.C. 393, 414 (1942)).

5/12

3. An agent's authority is composed of his actual authority, whether express or implied, together with the apparent authority which the principal, by his or her conduct, is precluded from denying. Roberson v. Southern Finance of South Carolina, Inc., 615 S.E.2d 112, 115, 365 S.C. 6, 10 (2005).

4. The doctrine of apparent authority focuses on the principal's manifestation to a third party, and the proper focus is on the relationship between the principal and the third party. Charleston, S.C. Registry for Golf & Tourism v. Young, Clement Rivers & Tisdale, LLP, 598 S.E.2d 717, 721, 359 S.C. 635, 642-3 (S.C. Ct. App. 2004) (citing R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth., 450 S.E.2d 113, 343 S.C. 433 (S.C. Ct. App. 2000)).

5. Apparent agency is proved by the purported principal consciously or impliedly representing another to be his agent, by a third party's reliance upon the representation, and a change of position by the principal to the relying party's detriment. Cowburn v. Leventis, 619 S.E.2d 437, 448, 366 S.C. 20, 39 (S.C. Ct. App. 2005).

6. When a principal, by such acts or conduct, knowingly has caused or permitted another to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith, and in the exercise of reasonable prudence, dealt with the agent on the faith of such appearances. R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth., 450 S.E. 2d 118, 343 S.C. 424 (S.C. Ct. App. 2000).

7. When a principal's manifestation of an agent's authority is stated in a power of attorney, it is subject to the contractual rules of interpretation, including the principle that a single provision of the instrument should be read in the context of the entire instrument. Restatement (Third) of Agency §3.01 rpt's. note b. (2006) (citing Schmitz v. Firststar Bank, 658 N.W. 2d 442, 448-9 (Wisc. 2003)).

6y12

8. Also, the cardinal rule of contract interpretation is to ascertain and give effect to the parties' intentions as determined by the contract language. Middleton v. Eubank, 694 S.E.2d 31, 34, 388 S.C. 8, 14 (S.C. Ct. App. 2010) (citing McGill v. Moore, 672 S.E.2d 571, 574, 381 S.C. 179, 185 (2009)).

9. Additionally, "[w]here a written instrument's language is clear and unambiguous, the language alone determines its force and effect..." and the Court is without authority to alter an unambiguous contract or to make new contracts for the parties. Davis v. KB Home of South Carolina, Inc., 713 S.E.2d 799, 805, 394 S.C. 119, 127 (S.C. Ct. App. 2011); U.S. Bank Trust Nat. Ass'n v. Bell, 684 S.E.2d 199, 385 S.C. 364 (S.C. Ct. App. 2009).

10. Furthermore, a principal can ratify the unauthorized acts of an agent by acceptance by the putative principal of the benefit of the acts by the putative agent, full knowledge of the fact by the putative principal, and circumstances or an affirmative election demonstrating the putative principal's intent to accept the unauthorized actions. Nationwide Mut. Ins. Co. v. Powell, 292 F. 3d 201 (4th Cir. 2002).

11. The principal will be held to have ratified the unauthorized acts of his agent unless his disaffirms same within a reasonable time. Foxworth v. Murchison Nat. Bank, 134 S.E. 428, 136 S.C. 458 (1928).

12. The Power of Attorney is clear and unambiguous as it is susceptible to only one meaning and represents Brust's intention, namely, to give Rosenberg the authority to execute, on his behalf, any and all documents and to perform any act related to the closing of the Loan, including the execution of the Guaranty, and to be bound by same.

13. As such, Rosenberg had actual authority to execute the Guaranty and Brust is bound by the terms of same.

14. Rosenberg had apparent authority to execute the Guaranty on Brust's behalf as Brust represented to Plaintiff that Rosenberg had authority to execute the Guaranty pursuant to the Power of

7912

Attorney, Plaintiff relied on same in the consummation of the Loan and execution of the Note and Renewals, and Plaintiff, in good faith, relied on Brust's representations when it closed the Loan.

15. As such, Brust is estopped from denying Rosenberg's apparent authority.

16. Brust also ratified the execution of the Guaranty as he enjoyed the benefits of the Loan as a member of Ecological, had full knowledge of the facts as he provided his personal financial information from 2005 through 2010 and signed the Commitment Letter, and he affirmatively elected an intention to adopt Rosenberg's acts by making no written repudiation or revocation of the Guaranty during the term of repayment of the Note and Renewals.

17. As Brust did not revoke or repudiate the Guaranty or complain of same until the institution of this action, he did not disaffirm Rosenberg's actions within a reasonable period of time.

18. Additionally, it is the law of this State that a normal bank/depositor arrangement creates a creditor/debtor relationship rather than a fiduciary one absent showing otherwise. Burwell v. South Carolina Nat. Bank, 340 S.E.2d 786, 288 S.C. 34 (1986).

19. Relatedly, the South Carolina Supreme Court has squarely rejected the contention that a bank's policy manual creates a duty by the bank to a borrower. See Citizens and Southern National Bank of South Carolina v. Lanford, 540 S.E.2d 549, 313 S.C. 443 (S.C. 1994).

20. As no fiduciary duty has been alleged, a creditor/debtor relationship exists between Plaintiff and Brust and Plaintiff's policy manual creates no duty between Plaintiff and Brust.

21. As such, any alleged failure by Plaintiff to follow its own policies and procedures, which is denied by Plaintiff, does not constitute a breach of any duty Plaintiff owed Brust and does not relieve Brust of liabilities under the Guaranty.

22. Also, the law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document. Regions Bank v. Schmauch, 582 S.E.2d 432, 440, 354 S.C.

8 of 12

648, 664 (S.C. Ct. App. 2003) (citing Citizens v. N. Nat'l Bank of South Carolina v. Lanford, 443 S.E. 2d 549, 551, 313 S.C. 540, 545 (1994)).

23. Further, a person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it and he owes a duty to the other party to the contract and to the public to learn the contents of a document before he reads it. Id.

24. In other words, one who signs a written instrument has the duty to exercise reasonable care to protect himself. Id.

25. As Brust, through Rosenberg, had the affirmative duty to read the Guaranty and Plaintiff had no duty to him other than those set forth in the Guaranty, Plaintiff did not breach any duty of good faith and fair dealing to Brust.

26. The Renewals also do not relieve Brust of his liability under the Guaranty as same relate to the Loan, and he agreed to repay same under the clear and unambiguous terms of the Guaranty. See Davis v. KB Home of South Carolina, Inc., 713 S.E.2d 799, 394 S.C. 119 (S.C. Ct. App. 2011); U.S. Bank Trust Nat. Ass'n v. Bell, 684 S.E.2d 199, 385 S.C. 364 (S.C. Ct. App. 2009).

27. As to Brust's Motion to Amend, "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation." S.C. R. CIV. P. 8(c).

28. The counterclaims set forth in the Amended Answer contain the same material allegations as the defenses set forth in the Answer.

29. Accordingly, the counterclaims contained in the Amended Answer are and shall be treated as the defenses contained in the Answer and disposed of herein.

30. Brust's failure to pay any and all sums due under the Guaranty constitutes a default under the terms thereof and is a material breach of same.

9/12

L

31. As of May 23, 2014, there is due and owing under the terms of the Guaranty, the principal sum of \$1,608,000.00, plus pre-judgment interest through May 23, 2014, in the sum of \$133,683.67, plus accrued late charges in the sum of \$2,348.49, plus advanced real property taxes in the sum of \$713.07, plus advanced appraisal fees in the sum of \$1,450.00, plus advanced costs in the sum of \$65.50 for a total outstanding balance of \$1,746,260.73, plus pre-judgment interest from May 23, 2014, at the per diem rate of \$234.50.

32. The Plaintiff has incurred the actual sum of \$43,843.00 in attorney's fees and the sum of \$3,545.73 in court costs for a total of \$47,388.73 which is a fair and reasonable award for the attorney fees and court costs given (1) the nature of these proceedings, (2) the time actually devoted to the matter; (3) the professional standing of attorney who regularly represents clients in matters of this type as a partner in an AV rated firm; and (4) for the beneficial results that client has received. ✓

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Legette v. Piggly Wiggly, Inc., 629 S.E. 2d 375, 368 S.C. 576 (S.C. Ct. App. 2006). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing a genuine issue for trial. Singleton v. Sherer, 659 S.E. 2d 196, 377 S.C. 185 (S.C. Ct. App. 2008). Likewise, when a motion for summary judgment is made and supported by affidavit, the adverse party may not rest on the mere allegations or denials of the pleadings, but his response by affidavit as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. Klippel v. Mid-Carolina Oil, Inc., 399 S.E.2d 163, 303 S.C. 127 (S.C. Ct. App. 1990).

ORDER

10/12

Based upon the foregoing Findings of Fact and Conclusions of Law, Plaintiff's Motion for Summary Judgment is hereby granted. Based on the above, Rosenberg had actual and apparent to execute the Guaranty on Brust's behalf pursuant to the Power of Attorney. Also, Brust through his actions or lack thereof, ratified Rosenberg's actions with respect to the Guaranty. Accordingly, Brust is liable under the terms of the Guaranty.

Additionally, a debtor/creditor relationship existed between Plaintiff and Brust. As such, Plaintiff was under no duty to Brust to follow its policies and procedures with regard to the Loan and it was under no duty to explain the terms of the Guaranty to Rosenberg on behalf of Brust. Accordingly, Plaintiff did not breach any alleged duty to Brust. Also, under the clear unambiguous terms of the Guaranty, Brust agreed to repay the Renewals which directly relate to the Loan. Furthermore, the counterclaims contained in Brust's Amended Answer are the same as the defenses set forth in the Answer. As such, they, like Brust's defenses, are lack merit. Finally, Brust's failure to provide payment of all sums due and owing under the Guaranty constitute a material breach of same, and Plaintiff is entitled to judgment in an amount due and owing thereunder. It is therefore,

ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion for Summary Judgment is hereby granted, it is further,

ORDERED, ADJUDGED, and DECREED that Plaintiff shall have judgment against Brust on the Unlimited Guaranty in the sum of \$1,746,260.73, plus pre-judgment interest from May 23, 2014, through the entrance of the judgment at the per diem rate of \$234.50, plus post-judgment interest at the maximum statutory rate, and it is further,

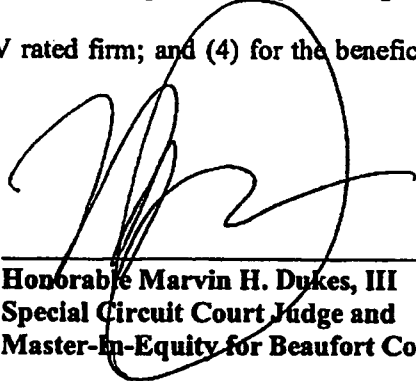
ORDERED, ADJUDGED, and DECREED that Plaintiff shall have judgment against Brust on the Unlimited Guaranty for attorney's fees and costs in the amount of \$47,388.73 which is a fair and reasonable award for the attorney fees and court costs given (1) the nature of these proceedings, (2) the

11/9/12 ✓

time actually devoted to the matter; (3) the professional standing of attorney who regularly represents clients in matters of this type as a partner in an AV rated firm; and (4) for the beneficial results that client has received.

IT IS SO ORDERED.

Dated: 7/31, 2014
Beaufort, South Carolina



Honorable Marvin H. Dukes, III
Special Circuit Court Judge and
Master-in-Equity for Beaufort County

F:\Data\JLS\Firm South (1862)\Ecological Investments, LLC (25827)\Guaranty Action\Pleadings\order granting ph's mtr for summary judgment against trust - 7-14-2014.docx

12/9/12 ~~~~~

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Marvin H. Dukes, III, Special Circuit Court Judge

Case No. 2013-CP-07-00610

RECEIVED
JAN 09 2015
SC Court of Appeals

First South Bank Respondent,

v.

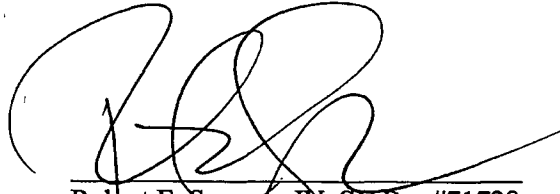
John E. Rosenberg and Phillip J. Brust..... Defendants,

Of Whom Phillip J. Brust is Appellant.

PROOF OF SERVICE OF NOTICE OF APPEAL

This is to certify that I have this day served counsel for the Respondent in the foregoing matter with a copy of the foregoing *Notice of Appeal* by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

Jeffrey L. Silver, Esquire
Tyler, Cassell, Jackson, Peace & Silver, LLC
1331 Elmwood Avenue, Suite 300
P.O. Box 11656
Columbia, SC 29211
(803) 779-4997



Robert E. Sumner, IV, SC Bar #71728

E. Brandon Gaskins, SC Bar #73274

Moore & Van Allen, PLLC

78 Wentworth Street

Post Office Box 22828

Charleston, SC 29413-2828

Telephone: (843) 579-7000

Facsimile: (843) 579-7099

robertsumner@mvalaw.com

brandongaskins@mvalaw.com

Attorney for Appellant Phillip J. Brust

January 8, 2015

Charleston, South Carolina

1 State of South Carolina) Court of Common Pleas
 2 County of Beaufort) 14th Judicial Circuit
 3 No.: 2013-CP-07-00610

4 First South Bank,)
 5 Plaintiff,)
 6 vs.) HEARING
 7 John E. Rosenberg and)
 8 Philip J. Brust,)
 9 Defendants.) June 3, 2013
 10 _____)
 11

12 Hearing reported by Deborah S. Thomas,
 13 Certified Verbatim Reporter and Notary Public in and
 14 for the State of South Carolina; said hearing held
 15 before the Honorable Marvin H. Dukes, III, Beaufort
 16 County Master in Equity and Special Circuit Court
 17 Judge in accordance with the South Carolina Rules of
 18 Civil Procedure, at the Beaufort County Courthouse,
 19 102 Ribaut Road, Room 212, Beaufort, South Carolina,
 20 on June 3, 2013, at the hour of 11:16 a.m.
 21

22 ABACTIS REPORTING SERVICES
 23 15 Pineapple Drive
 24 Bluffton, South Carolina 29909
 25 (803) 206-7390

1 Appearances

2 Representing the Plaintiffs:

3 JEFFREY L. SILVER, ESQUIRE
 4 Tyler Cassell Jackson Peace & Silver, LLC
 P.O. Box 11656
 Columbia, South Carolina 29211-1656

5 6-3-14 ROSENBERG HEARING.txt
jsilver@tcjps.com

6
7 Representing Defendant Philip J. Brust:

8 ROBERT ERNEST SUMNER, IV, ESQUIRE
9 E. BRANDON GASKINS, ESQUIRE
10 Moore & Van Allen, PLLC
11 78 Wentworth Street
12 Charleston, South Carolina 29401
13 robertsummer@mvalaw.com
14 brandongaskins@mvalaw.com
15
16
17
18
19
20
21
22
23
24
25

3

1	CONTENTS	
2	Hearing	
3		Page
4	Exhibit Index	4
5	Certificate of Reporter	74
6	Word Index	

7
8 * * * * *

9

10

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

4

EXHIBIT INDEX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

Exhibits: Marked at Page
(None were proffered.)

* * * * *

17
18
19
20
21
22
23
24
25

5

1 This hearing is taken in accordance
2 with the South Carolina Rules of Civil Procedure.

3 JUDGE DUKES: Good morning then. We
4 are here on Case 13-CP-07-610. This is First South
5 Bank versus Rosenberg and is it Brust or Brust?

6 MR. GASKINS: Brust.

7 JUDGE DUKES: Brust. Okay. And
8 Brust. And this is Plaintiff's Motion for Summary
9 Judgment as to Philip Brust.

10 MR. SILVER: Your Honor, Jeff Silver
11 here on behalf of the Plaintiff. Just for the
12 court's recollection, judgment has already been
13 attained by --

14 COURT REPORTER: Excuse me. Just one
15 second. Can we move that paper? Thank you.

16 MR. SILVER: Oh, my bad. I
17 apologize. Judge, once again, Jeff Silver here on
18 behalf of the Plaintiff. Just for the court's
19 information, you've already issued an order on
20 behalf of First South Bank against Mr. Rosenberg as
21 to his personal guarantee in regards to this loan.
22 So that is why he's not here today.

23 Your Honor, this has to do with a loan.
24 And you are probably somewhat familiar this, that
25 First South Bank made a loan of \$2.6 million to

6

1 Ecological Investments. I'll call it the Butterfly
2 Kingdom, which you are familiar with.

3 And it was 80-some-odd acres out near the
4 interstate. The sole asset to my knowledge of
5 Ecological Investments was this piece of property.
6 There was a prior loan to Lighthouse Community Bank
7 which I think became Sun Trust. I'm not positive,
8 but I think it became Sun Trust.

9 But anyhow, First South Bank was requested
10 by Mr. Rosenberg, who is the managing member of
11 Ecological Investments to enter into a loan with
12 First South for the aforesaid \$2.6 million.

13 A commitment letter was issued, and it's
14 part of the depositions, too, Your Honor. And the
15 affidavit -- I mean the commitment letter is made
16 out to Mr. Rosenberg and to Mr. Brust along with
17 Ecological Investments. And in it it talks about
18 what the terms and conditions would be of the loan
19 which the borrower is Ecological Investments up to
20 \$2.6 million.

21 It also goes on to say at the bottom of
22 the first page the primary collateral is going to be
23 the 82.68 acres which was the Butterfly Kingdom. On
24 the top of the second page, Your Honor, it talks
25 about guarantor. It says, payment of the loan shall

7

1 unconditionally guaranteed jointly and severally by
2 Mr. Rosenberg and Mr. Brust, hereinafter the

Page 5

3 guarantors.

4 It goes on to talk about some other
5 relationships, et cetera, et cetera, about
6 prepayment, assignability, environmental compliance,
7 appraisals which were obtained. And then on the
8 third page, Your Honor, there is the signatures.
9 Signature by Patrick Wright who was a senior vice
10 president of the bank. And it's agreed and accepted
11 to the borrower, Ecological Investments, by Mr.
12 Rosenberg as the managing member.

13 And then also there is a place on the
14 bottom of the third place (sic) for the guarantors
15 to sign; Mr. Rosenberg and Mr. Brust. The bottom of
16 the second -- the third page of this commitment
17 letter also goes on to say in the second to last
18 paragraph, the last four lines, should there be any
19 inconsistencies between any term of the note,
20 security agreements, or loan agreement and any term
21 of this commitment letter, then the term of the
22 note, security documents, or loan agreement shall
23 prevail. Remaining terms, conditions, and
24 agreements shall not be affected.

25 The closing was handled by Terry Finger.

8

1 And the original loan, as I said, was in the amount
2 of \$2.6 million. And I think all the loan documents
3 that are involved here were attached to the summons
4 and complaint of the Plaintiff. There is an
5 original loan. There were some modifications.
6 There were some renewals. And finally I think the
7 last renewal was in 2010, Your Honor.

8 There is also part of the loan as set

9 forth in the commitment letter was a -- the
10 guarantees of Mr. Brust and Mr. Rosenberg. Mr.
11 Brust did not attend the closing. He was unable for
12 some reason to not attend. And a specific limited
13 power of attorney was prepared by Terry Finger's
14 office and executed by Mr. Brust. And testified by
15 Mr. Finger as properly witnessed, executed, and
16 recorded.

17 And, Your Honor, I actually have with
18 me -- I had somebody go by the courthouse and get a
19 certified true copy of the limited power of --
20 specific limited power of attorney that is in issue
21 here.

22 JUDGE DUKES: All right.

23 MR. SILVER: That specific limited
24 power of attorney appoints Terry Finger or John E.
25 Rosenberg as Mr. Brust's true and lawful attorney.

9

1 And I'm going to read, but to appear before me in my
2 name, place, and stead to execute any and all
3 documents and to perform any lawful act or to
4 execute or amend any document, instrument, or thing
5 which may be involved in the financing of real
6 property located in the state and county aforesaid
7 known as 82.68 acres, Sergeant Jasper State Park,
8 Jasper County, South Carolina.

9 And the important part is, including but
10 not necessarily limited to the power to execute as
11 my act and deed any document, instrument, contract,
12 note, mortgage, agreement, assignment, an affidavit,
13 disclosure, et cetera, and to pay sums on my account
14 or to execute any such other documents as may be

Page 7

15 necessary to close the loan with First South Bank in
16 the original principal sum of \$2,600,000.

17 It goes on to say of course in the next
18 paragraph, I hereby vest my attorney-in-fact with
19 all authority as fully as if I might do the same in
20 my own capacity at any time. It's signed by Mr.
21 Brust. I don't think there is any question that Mr.
22 Brust executed this. It was witnessed. And it was
23 filed of record. And you have the true copy from
24 the courthouse.

25 Your Honor, here it is -- I don't know if ¹⁰

1 you need these really, a copy of the personal
2 guarantee that was executed by Mr. Rosenberg on
3 behalf of Mr. Brust pursuant to that specific
4 limited power of attorney. And in that guarantee --
5 and I'll go through later, Your Honor, bits and
6 pieces of the depositions of Mr. Wright and
7 Mr. Finger concerning the guarantee and the other
8 documents.

9 But just going through the documents right
10 now you can see that the loan was actually closed on
11 February 2nd, 2006, between First South Bank and
12 Ecological Investments. And you will see that B is
13 checked. And that is basically an unlimited
14 guarantee. The undersigned guarantees the lender
15 the payment or performance of each and every debt,
16 liability, and obligation of every type and
17 description which borrower may now or any time here
18 after owe to lender whether such debt, liability,
19 obligation now exists or is hereby created or
20 incurred, and whether it is or may be direct or

21 indirect, due or to become due, absolute or
22 contingent, primary, secondary, liquidated or
23 unliquidated or joint or several or joint and
24 several, all such debts included liabilities and
25 obligations be hereinafter collectively referred to

11

1 as the indebtedness.

2 Paragraph 2 -- and I apologize for
3 reading, Your Honor. Paragraph 2 is this is an
4 absolute, unconditional, and continuing guarantee of
5 payment of the indebtedness and shall continue to be
6 in force and be binding upon the undersigned whether
7 or not all indebtedness is paid in full until this
8 guarantee is revoked by written notice actually
9 received by the lender. And such revocation shall
10 not be effective as to indebtedness existing or
11 committed or at the time of actual receipt of such
12 notice by the lender or as to any renewals,
13 extensions, and refinancings thereof.

14 Your Honor, Paragraph 4. The liability of
15 the undersigned hereunder shall be limited to a
16 principal amount of, and it's typed in, unlimited.

17 Your Honor, Number 5 goes on to say, the
18 undersigned will pay or reimburse lender for all
19 costs and expenses including reasonable attorney's
20 fees and legal expenses incurred by lender in
21 connection with protection, defense, or enforcement
22 of this guarantee in any litigation or bankruptcy or
23 insolvency proceedings.

24 Paragraph 6, Your Honor. Whether or not
25 any existing relationship between the undersigned

12

1 and borrower has been changed or ended and whether
2 or not this guarantee has been revoked, lender may
3 but shall not be obligated to enter into
4 transactions resulting in the creation or
5 continuation of indebtedness without any consent or
6 approval by the undersigned and without any notice
7 as to the undersigned.

8 Paragraph 7 talks about all the waivers of
9 the Defendant, that he waives any and all defenses,
10 claims, and discharges of borrower or any other
11 obligor pertaining to the indebtedness. And it goes
12 on to list specific type defenses.

13 Paragraph 11, Your Honor, the undersigned
14 waives presentment, demand for payment, notice of
15 dishonor and non-payment and protest of any
16 instrument evidencing indebtedness.

17 And there is the personal guarantee that
18 was signed by Mr. Rosenberg on behalf of Mr. Brust
19 for this closing, for the \$2,600,000.

20 Your Honor, I also would present to you
21 since it's in the court records as to Mr. Rosenberg,
22 he signed the same exact personal guarantee on his
23 own behalf because he was one of the guarantors in
24 this matter.

25 JUDGE DUKES: Go ahead. I'm sorry.

13

1 MR. SILVER: I'm sorry. Your Honor,
2 also, just to complete the record, here is a copy of
3 the mortgage on the real property, the Butterfly
4 Kingdom property, the 82-some-odd acres. There was
5 also a collateral assignment of rents and leases.

6 And, Your Honor, also, and this is part of
7 Mr. Finger's deposition, here is a copy of the
8 settlement statement wherein Ecological Investments
9 is listed as the borrower, First South Bank as the
10 lender. The settlement agent is Finger, Fraiser,
11 and Andrews. And if you look on Line 202 on the
12 left, principal amount of new loan \$2,600,000.

13 And on the third page it is signed by
14 Terry Finger as the settlement agent and Mr.
15 Rosenberg as the managing member of the L.L.C.

16 JUDGE DUKES: All right.

17 MR. SILVER: Your Honor, these are
18 the original loan documents. As I said, attached to
19 the complaint and put into evidence in Mr. Wright's
20 deposition are all the subsequent renewals and
21 modifications of this loan.

22 Also included -- go through it.

23 MR. SUMNER: And, Jeff, are you
24 handing up a complete copy of Wright's deposition
25 with the exhibits?

14

1 MR. SILVER: Well, that is why I was
2 hoping you had brought the original with you to give
3 to the court. I gave him the original Terry
4 Finger's.

5 MR. SUMNER: Got you. And we don't
6 have it. And I didn't mean -- I don't want to
7 interrupt. We can deal with that after the fact. I
8 just wasn't aware whether you were going to hand it
9 up or not. We are happy to submit it after the fact
10 for you.

11 JUDGE DUKES: Yeah, that is fine if

12 that works for you all.

13 MR. SILVER: Okay. As to Mr.
14 Wright's deposition, Your Honor -- and let me say
15 this. The Motion for Summary Judgment is supported.
16 It's the verified complaint. Also there is an
17 affidavit of Mr. Wright attached to the Motion for
18 Summary Judgment. And to my knowledge there is no
19 countervailing affidavit relating to the execution
20 of the documents and the obligations there on.

21 I did receive on Friday an affidavit from
22 the Defendant's attorneys of a Mr. Barksdale, but
23 I'm not sure whether that relates to their motion to
24 amend to add counterclaims or is it in response to
25 the complaint?

15

1 MR. SUMNER: It was filed in
2 opposition to the summary judgment.

3 MR. SILVER: Okay. And I don't know
4 whether he has that or not.

5 MR. SUMNER: We've got it as
6 attached.

7 MR. SILVER: Okay. Good.

8 MR. SUMNER: I've got extra copies
9 also, Judge.

10 JUDGE DUKES: Okay. Thanks. Anyway,
11 go ahead.

12 MR. SILVER: Okay. In Mr. Wright's
13 deposition, Your Honor, who is the primary
14 relationship --

15 JUDGE DUKES: Now, is this the whole
16 Wright deposition?

17 MR. SUMNER: That's correct.

18 JUDGE DUKES: Okay.
19 MR. GASKINS: But not the exhibits.
20 MR. SUMNER: We only included the
21 exhibits that were cited in the memorandum.
22 JUDGE DUKES: Okay. Thanks. All
23 right.
24 MR. SILVER: Well, you will be
25 getting -- you will submit the full one. Okay.

16

1 Going through Mr. Wright's deposition, and, Your
2 Honor, the whole thing relates to the authority of
3 Mr. Rosenberg to sign the guarantee on behalf of Mr.
4 Brust in this matter and whether it applied to the
5 personal guarantee that he signed.

6 Your Honor, in testimony by Mr. Wright, it
7 says, did you ever talk to him? I did speak with
8 him on the phone. And when he's talking about with
9 him, he's talking about Mr. Brust. And that is on
10 Page 38 of the deposition.

11 Prior to -- when did you speak with him?
12 Prior to the loan closing I did. When was your
13 first communication with Mr. Brust? Sometime in
14 2005, late 2005 after I met with Mr. Rosenberg.

15 Your Honor, the loan actually was closed
16 in February of 2006. So this was beforehand.
17 During the conversation I had with Mr. Rosenberg,
18 Mr. Brust was offered up and was entered into as
19 another member of the L.L.C. of Ecological and as a
20 guarantor, personal guarantor on the loan.

21 So I spoke with him about getting
22 financial information from him to support the loan
23 request that was in the process of being

24 6-3-14 ROSENBERG HEARING.txt
underwritten.

25 If you go on to Page 40, first question -- 17

1 first answer. Mr. Rosenberg had said that with the
2 first structure they had that Mr. Brust was one of
3 the members of the L.L.C. and that he would be
4 willing to guarantee, personally guarantee, the
5 loan. Did Mr. Brust ever tell you that? He did in
6 a conversation we had when I asked for financial
7 statements. What did he say? I just said that as
8 part of your being willing to personally guarantee
9 the loan and he affirmed that he would be providing
10 me financial information and that he understood.

11 And this would have been in -- on Page 42,
12 midway on Line 9. When did you have that
13 conversation? Late 2005, November -- October,
14 November timeframe, something like that. That would
15 have been prior to you issuing a commitment letter?
16 Yes.

17 On Page 44, on Line 18. I mailed the
18 commitment letter to Mr. Brust for his signature to
19 his personal address. And how do you know that? I
20 had that information from his personal financial
21 statement and tax returns.

22 And Page 66, Line 5. Question, would
23 you -- meaning the bank. This is Mr. Wright. Have
24 entered into this loan if Rosenberg and Brust didn't
25 guarantee it? No. Why not? They provided a very 18

1 strong backup repayment source for us with their
2 liquidity.

3 On Page 84, the question was asked on Line
Page 14

4 13 or on Line 10. Question, and you didn't do
5 anything to inform Mr. Brust about what he would be
6 signing and why it was important? Answer on line
7 13. I had the commitment letter where I understood
8 based on our phone conversation and the commitment
9 letter he knew he would be responsible as a personal
10 guarantor on the loan.

11 Your Honor, going on to Page 127 to
12 confirm at that Mr. Brust was well aware he was a
13 personal guarantor on this loan, on Page 127, Line
14 18, did he, meaning Mr. Brust, ever raise any
15 objections to providing information, the financial
16 information? No. Did he ever indicate he was
17 unwilling to pay? No.

18 Then, Your Honor, as exhibits to Mr.
19 Wright's deposition there were introduced numerous
20 financial statements that are exhibits that go from
21 2005, 2007, 2009, 2010. So he was constantly,
22 meeting with Mr. Brust, being asked for updated
23 financials. And the only reason he would be asked
24 for those financials was because of his personal
25 guarantee of the loan.

19

1 Okay. I asked this question on Page 178,
2 line 13. From the date of the closing until the
3 institution of the lawsuit by First South Bank were
4 you ever contacted by Mr. Brust about I'm not a
5 guarantor on this loan? No. Any handwritten
6 letters? No. Any e-mails? No. Any conversations,
7 telephone? No. Any face-to-face? No.

8 Also, Your Honor, I introduced through Mr.
9 Wright the payoff letter which is I think one of the

Page 15

10 last exhibits to this. And he presented it. And
11 the payoff is dated as of May 23rd, 2014, which was
12 the day of the deposition. And the total payoff on
13 that day was \$1,772,886.12 with a per diem of
14 \$234.50.

15 On line -- on Page 181, Line 7, the
16 question was asked, other than his being a personal
17 guarantor, was there any other reason for him to
18 provide the bank that information, meaning the
19 financial statements? No. Was there any reason for
20 the bank to request that information other than he
21 was a personal guarantor? No. Did he ever, meaning
22 Mr. Brust, ever question the fact that Mr. Rosenberg
23 signed the guarantee on his behalf pursuant to the
24 power of attorney? No.

25 Your Honor, I'm moving on to Mr. Finger's 20

1 deposition.

2 JUDGE DUKES: All right.

3 MR. SILVER: And I think you have the
4 original of that.

5 JUDGE DUKES: All right. I'll just
6 look at this copy here.

7 MR. SILVER: All right. On Page 10
8 the question was asked, were there guarantors of
9 this loan? The commitment letter says there shall
10 be two unconditionally guaranteed people, Mr.
11 Rosenberg and Mr. Brust. Mr. Finger was asked on
12 Page 11, Line 23, do you believe you closed the loan
13 in accordance with the terms and conditions of these
14 instructions?

15 And, Your Honor, those instructions are
Page 16

16 exhibits to his deposition. They are Exhibit 1, the
17 January 10th, 2006, letter from the bank to Finger
18 and Andrews, basically an attorney instruction
19 letter. There is also an addendum to it which is
20 Exhibit 3.

21 I asked Mr. Finger once again on line 23
22 of Page 11, do you believe you closed the loan in
23 accordance with the terms and conditions of these
24 instructions? Answer on Page 12, yes, I do believe
25 I did. And the commitment letter? And the

21

1 commitment letter, correct.

2 I asked him on Page 13, Line 4. On Line
3 202, we are talking about the settlement statement
4 or HUD-1, on the left there, what is the principal
5 amount of the new loan? \$2.6 million. Is that in
6 accordance with the terms of the attorney
7 instruction letter and the commitment letter, same
8 amount? Yes.

9 I asked him on Page 15, Mr. Finger, on
10 Line 16, what his obligations were. Part of, I
11 think, a closing attorney's responsibilities are to
12 make sure documents are signed correctly. Line 23,
13 I think my obligation was to -- if it was going to
14 close, it had to be closed in accordance with their
15 instruction letter.

16 And they go on. Page 16, where we start
17 talking about the specific power of attorney that is
18 in question here. I asked him -- which is
19 Exhibit 6, are you familiar with this document?
20 Answer. It's a specific limited power of attorney.
21 Do you know who prepared this document? I believe

Page 17

22 it was prepared by one of our real estate
23 paralegals, I believe. So to your knowledge this
24 document was prepared by your office? I believe
25 that's correct.

22

1 On the bottom of that Page 16, line 25.
2 And did you rely on this specific limited power of
3 attorney for the execution by Mr. Brust of any
4 documents related to that closing? Answer, that is
5 what it was designed for. Line 15, same page. Or
6 to execute any such other documents as may be
7 necessary to close a loan with First South Bank in
8 the original principal sum of \$2.6 million.

9 I then went on to ask on line 21, are you
10 familiar with this document? It's a guarantee. Who
11 would have prepared this document? And that is
12 Exhibit 7 to his deposition. Who would have
13 prepared this document? The bank would have. Okay.
14 Was this part of the Ecological loan that was
15 subject to that commitment letter and attorney
16 instruction letter? Answer, I believe it was. And
17 it's dated the same date as the other loans
18 documents. And it says it was for the account of
19 Ecological Investments. Okay. And who was the
20 obligor? Who was the one that was supposed to be
21 signing the guarantee I asked? Philip Brust. Who
22 signed for Mr. Brust? Answer, Mr. Rosenberg. John
23 Rosenberg. Question, under what authority? On the
24 authority of Exhibit 6 which is the specific limited
25 power of attorney.

23

1 I asked Mr. Finger on Line 18, in your
2 legal opinion is there any question that it's
3 authorized under that power of attorney, Exhibit 6?
4 He answers on Line 25, I believe the specific
5 limited power of attorney authorized Mr. Rosenberg
6 to sign documents that Mr. Brust was supposed to
7 sign in order to implement and effectuate this
8 closing.

9 I asked Mr. Finger on Page 20, going back
10 to Number 6 which is the power of attorney, does it
11 appear in your legal opinion to have been properly
12 witnessed, notarized, and recorded? His response,
13 appears to be. And where was it recorded? In
14 Jasper County.

15 I asked him on Page 23, Mr. Finger, was
16 there any question in your mind that the funding of
17 the First South Bank loan was contingent upon the
18 execution of the guarantee by Mr. Brust? Answer.
19 No, it was a condition of the loan. Question, would
20 you have consummated the First South Bank loan if
21 there was any question as to the legal -- legality
22 of the power of attorney to authorize the Brust
23 personal guarantee by Mr. Rosenberg? Answer. I
24 think that if either the bank or I questioned that I
25 don't think the loan would have closed.

24

1 Your Honor, based on the verified
2 complaint, the affidavit in support of a motion for
3 summary judgment, and we are asking for summary
4 judgment not only in our complaint, but on the
5 defenses raised by the Defendants, that we are
6 entitled to a judgment. I don't believe there is

7 any facts in question by the Defendant that give
8 rise to anything that is judicable or the question
9 of fact.

10 Your Honor, I've also -- and they are also
11 referenced in our memorandum, I've made copies of
12 these cases because some of the defenses that have
13 been raised by the Defendant Mr. Brust is that the
14 bank somehow had an obligation to Mr. Brust to
15 review the guarantee with him.

16 And it's our position that the bank and
17 Mr. Brust were a creditor/borrower relationship.
18 There was no affirmative duty on the bank. And, in
19 fact, if anybody needed to review the documents --
20 the loan documents, in specific the personal
21 guarantee, it would have been Mr. Rosenberg who was
22 in a fiduciary duty responsibility place who
23 basically stepped in the shoes of Mr. Brust and
24 executed the guarantee on behalf of Mr. Brust. So
25 if any duty was there, it was from Mr. Rosenberg to
25

1 Mr. Brust, not the bank.

2 Your Honor, also the personal guarantee,
3 there is some dispute about what parts of it were
4 marked or not marked. The case is Burwell versus
5 South Carolina National Bank. It basically says a
6 party has a duty to read the contract and learn its
7 contents before signing it.

8 It goes on to say no fiduciary
9 relationship exhibits between a bank and a depositor
10 who guarantee a loan made by the bank where there
11 was no evidence that bank officer was aware of any
12 special trust reposed in him, where both were

13 cognizant of the financial position of the
14 prospective debtor.

15 Another one of the facts that the defense
16 has brought up is that somehow the bank shouldn't
17 have made the loan, didn't follow its own guidelines
18 in making this loan. Yet the loan was made and the
19 bank relied on the mortgage on the property and
20 these personal guarantees to make the loan.

21 Your Honor, I am sure the court is very
22 well familiar with all of these cases, so I'll hand
23 it up to you. I don't want to spend more time than
24 I have to, but C&S versus Lanford also adds the law
25 does not impose a duty on a bank to explain to an 26

1 individual guarantor what he can learn from simply
2 reading a document.

3 And, in fact, it goes on to say in
4 Paragraph 9 of the case, we agree with the trial
5 judge that the manual -- there was an underwriting
6 manual and procedural manual of C&S Bank at the
7 time. We agree with the trial judge that the manual
8 here created no duty in the loan officer to ensure
9 Geeger's understanding of the guarantee agreement.
10 The normal bank deposit arrangement creates a
11 creditor/debtor relationship rather than a fiduciary
12 one. Did I give you a copy of that?

13 JUDGE DUKES: No. I've got --

14 MR. SILVER: Okay. Here is -- take
15 that one. Your Honor, also the case of Regents Bank
16 versus Shoemack, 354 South Carolina 648. It's a
17 2003 case. Once again, it goes on to the same
18 items. A person who signs a contract or other

19 written document cannot avoid the effect of the
20 document by claiming he did not read it.

21 One who signs a written document has the
22 duty to exercise reasonable care to protect
23 themselves. The law does not impose a duty on the
24 bank to explain to an individual what he could learn
25 from simply reading the document.

27

1 Also one of the issues that has been
2 raised by the Defendant is somehow the bank was
3 responsible to this guarantor to explain to him the
4 condition of the borrower; Ecological Investments.
5 In the Shoemack case there is a statement, the bank
6 did not have a duty to apprise guarantor of the
7 financial condition of and the renewal of loans to
8 borrower for purposes of guarantor's negligence
9 claim against bank where guarantor had signed an
10 unlimited guarantee for all current and future debts
11 of borrower and agreed to waive all notices to which
12 she, in that case, would have been entitled.

13 And lastly, Your Honor, and I give
14 Mr. Lyerly here credit for finding a case, the
15 Savannah Bank versus Alphonse Stalyard which happens
16 to be a 2012 case that was from you.

17 JUDGE DUKES: Oh good. Affirmed. I
18 can't remember what it was about, but --

19 MR. SUMNER: They are always
20 affirmed, right?

21 MR. SILVER: It was affirmed. And
22 basically this case had to do with a borrower who
23 said he gave incorrect financial information to a
24 bank. The bank failed to verify that information.

25 And somehow that gave him an out of the loan. Of 28

1 course, he waited until he was actually in default
2 to ever raise this issue. The same as here.

3 In our particular case Mr. Brust through
4 his power of attorney through Mr. Rosenberg executed
5 a personal guarantee. For years thereafter, from
6 2006 through 2010 at a minimum provided financial
7 information. Never provided any rejection of the
8 guarantee, ever questioned the guarantee during that
9 time. And not until the time that the lawsuit was
10 brought did an issue come up about it.

11 Also, Your Honor, of course the standard
12 view in a motion for summary judgment is appropriate
13 when there is no genuine of material fact such as
14 the moving party must prevail as a matter of law.
15 In this one once again under the analysis, as an
16 initial matter we must determine whether the bank
17 owed the appellant a duty of care in the process of
18 a loan application.

19 we find bank does not owe appellant a duty
20 of care under these facts, referring back to this
21 C&S Lanford case. This court held that the bank did
22 not owe a duty to the guarantor of a loan, that his
23 liability was for the entire loan amount, talking
24 about the Lanford case.

25 And, Your Honor, if you may remember we 29

1 had a hearing by telephone with you about responses
2 to requests to admit. And the Defendants went back
3 and supplemented their responses. And the questions
4 were prior to -- Number 12. Prior to the maturity

5 of the note, Brust made no communication, written or
6 otherwise, with Plaintiff regarding Rosenberg's lack
7 of authority, actual, apparent, or otherwise to
8 execute the guarantee on his behalf.

9 The supplemental response. Defendant's
10 counsel has reviewed documents currently in their
11 possession related to this matter and admit that
12 such documents do not include any written
13 communications by Defendant with Plaintiff regarding
14 Rosenberg's lack of authority, actual, apparent, or
15 otherwise, to execute the guarantee on his behalf.
16 It goes on to say if they find some other documents,
17 they will submit them.

18 Prior to them -- Number 13. Prior to the
19 maturity of the note, Brust made no communication,
20 written or otherwise, regarding the revocation of
21 the guarantee. Once again, they couldn't find any
22 documents to dispute that in writing.

23 And as the guarantee clearly says, it can
24 only be terminated or revoked in writing, Your
25 Honor. I have nothing further at this time.

30

1 JUDGE DUKES: All right. Thank you
2 very much. Happy to hear from you.

3 MR. SUMNER: Thank you, Your Honor.
4 As has been demonstrated thus far in this hearing,
5 and by my calculation Mr. Silver talked about 30
6 minutes about facts and talked about 10 minutes
7 about the law.

8 Judge, this is a very factually nuanced
9 case. And there are a number of very interesting
10 legal issues at play. You will probably remember

11 we've had a motion to dismiss hearing and a motion
12 to compel hearing. And Brandon and I have the
13 unfortunate circumstance of representing a client
14 who cannot communicate with us. Our client suffered
15 a stroke. And the parties have entered into a
16 stipulation about his inability to testify and
17 incapacity.

18 And so we have been all along through this
19 case hamstrung by inability to go back to our client
20 and ask him, do you know X? Do you know Y? Do you
21 know Z? And so for that matter the documentation in
22 this case is of supreme importance. And that
23 underlies the entire dynamic here today.

24 I do think Mr. Silver fairly outlined the
25 facts of the case. He touched on most of the key 31

1 issues, but as he spent 30 minute reciting the facts
2 for you, he recited the facts in his client's light
3 or in the light most favorable to First South Bank.
4 And there is certainly two sides to that coin.

5 And as we sit here at summary judgment,
6 obviously the question for the court is whether
7 there is a scintilla of evidence that supports
8 Philip Brust's defense. And the court is to look at
9 the evidence not in the light most favorable to the
10 bank, but the light most favorable to Philip Brust.

11 And I would argue that given his
12 incapacity it's even more important that we put the
13 microscope on the facts to make sure that there is
14 not a scintilla that exists. I think after we
15 conclude today it will be obvious to you and
16 everybody in the room that there are a lot of

17 questions of fact that go to the very essential
18 legal issues in this case.

19 And what I've done to try to help you with
20 those facts is just put together a timeline. And
21 this is just to be used for demonstrative purposes
22 and nothing more. But this sets forth the key dates
23 in this case.

24 And if we start from the top you will see
25 that on January the 25th, 2006, Mr. Brust signed

32

1 this specific limited power of attorney. Now, I've
2 got a copy of that for you with a key. And I know
3 you've probable already got a copy in front of you,
4 but this has some of the key lines highlighted for
5 your ease of reference.

6 Now, it is stamped and it was recorded by
7 Terry Finger's office, but I would disagree with the
8 characterization that Terry Finger said conclusively
9 that his office drafted this power of attorney.
10 There is a little question about whether he drafted
11 it.

12 He said it looked a lot like his form, but
13 he couldn't say for sure because there are some
14 discrepancies. So this specific limited power of
15 attorney, you will see it, and in the highlighted
16 language I highlight the operative language, the
17 grant of power. And it is a laundry list of
18 documents specifically related to this \$2.6 million
19 loan.

20 And I don't think that First South Bank
21 would disagree with that, that the intent of the
22 power of attorney was to authorize someone to sign

23 on Philip Brust's behalf, but it is related
24 specifically to this transaction and in particular
25 the \$2.6 million loan.

33

1 And then you can see it's dated and signed
2 and executed. And no one disputes that fact. The
3 operative language in this case in this power of
4 attorney is very interesting because five years
5 earlier, and I'll show you a copy. This is a
6 recorded copy of a power of attorney that was
7 drafted by Terry Finger on behalf of Philip Brust in
8 relation to the original loan to Lighthouse Bank
9 with respect to this piece of property.

10 And you will see that -- and you can track
11 it. We have. The language is almost uniformly the
12 same, but there is one great conspicuous difference,
13 and that is in the 2001 power of attorney Mr. Finger
14 included the word guarantee. That is omitted from
15 the 2006 guarantee. And neither Mr. Finger nor
16 anyone else who has been deposed in this case could
17 offer a plausible explanation for why the change.

18 So on February the 2nd, 2006, Ecological
19 Investments and First South Bank closed on this
20 loan. Now, Patrick Wright testified that
21 \$2.6 million was a big loan for First South Bank as
22 it would be for any bank in this state, honestly,
23 but it's interesting that no one from First South
24 Bank showed up at the closing. Not Patrick Wright.
25 Not some other employee or agent. Not even lender's

34

1 counsel showed up at the closing of this very large

6-3-14 ROSENBERG HEARING.txt
2 \$2.6 million loan.

3 And so on that date they relied on Terry
4 Finger to close the loan, but Terry Finger by his
5 own testimony did not represent the bank. Terry
6 Finger was borrower's counsel. And specifically he
7 only represented Ecological Investments. Terry
8 Finger did not represent the guarantors. He has
9 stated unambiguously in his deposition that he did
10 not represent Philip Brust and he did not represent
11 Mr. Rosenberg in their capacity as guarantors. He
12 represented Ecological, and he closed the loan.

13 Now, it also interesting that for this
14 very large \$2.6 million loan that was a big deal to
15 First South Bank, they required no attorney opinion
16 letter. Now, in their commitment letter they said
17 they were going to require it. And that is standard
18 with every loan I've ever seen, especially
19 commercial loans of this size, but in the
20 instructions which Mr. Silver has handed up to the
21 court there is no requirement for an attorney's
22 opinion letter.

23 And you are quite familiar with these by
24 now I'm sure, but the point of those opinion letters
25 is for the attorney to opine and represent to the 35

1 bank that the documents have been properly executed.
2 There is no opinion letter in this case. We've
3 asked. Terry Finger doesn't have one. First South
4 Bank doesn't have one. The unanimous conclusion is
5 one was never drafted.

6 So they close the loan for \$2.6 million.
7 The interest rate was seven percent. And this is

8 all outlined in my timeline. There was a two-year
9 term with a interest-only payment and a final
10 balloon payment. When Mr. Wright was deposed he was
11 asked about the importance of guarantees, as has
12 been represented to you this morning.

13 And he said that the bank would not have
14 closed on this loan without the guarantees of
15 Rosenberg and Brust. And as you can imagine,
16 Rosenberg did sign a guarantee on his own behalf,
17 but he also signed a guarantee on behalf of Brust.
18 And there has been some discussion about that.

19 The guarantee that is at issue in this
20 case, and I'll hand you a copy again that's been
21 highlighted. States specifically that it was signed
22 by Rosenberg pursuant to the attorney -- the power
23 of attorney.

24 COURT REPORTER: Excuse me. Could
25 you -- thank you.

36

1 MR. SUMNER: And as Mr. Silver
2 indicated earlier, the box that was checked on this
3 guarantee was for an unconditional, unlimited,
4 ongoing guarantee. And I've highlighted the
5 language, the essence -- I'm not going to read it or
6 quote it, but the essence is that any future debts
7 by Ecological Investments shall be guaranteed
8 unconditionally by Philip Brust.

9 Now, if you flip back to the 2006 specific
10 limited power of attorney, there is no mention of
11 any future debts. Mr. Brust authorized an agent to
12 sign documents on his behalf pursuant to a loan of
13 \$2.6 million, but certainly nothing beyond that.

14
15 loan, which was a big loan, this guarantee was
16 signed by Rosenberg on behalf of Philip Brust. And
17 there was no representative of the bank present. No
18 representative of the bank received a power of
19 attorney. No one presented a power of attorney to
20 the bank as far as we know.

21 Patrick Wright testified that he wasn't
22 even aware that Brust missed the closing until he
23 received the recorded loan documents weeks after the
24 closing. But when Mr. Wright did receive these loan
25 documents he testified that he did note that there 37

1 was a power of attorney that was signed pursuant
2 to -- the guarantee was signed pursuant to a power
3 of attorney, but he didn't do anything. He didn't
4 pick up the phone and call Brust. He didn't write a
5 letter. He didn't write an e-mail. He didn't even
6 bother to call Terry Finger or the bank's lawyers
7 for that matter to say, is everything okay? Is the
8 power of attorney sufficient to authorize Rosenberg
9 to sign this very important guarantee that was a
10 condition of the loan. He went on about his
11 business.

12 And this loan knocked along until January
13 of 2008 when the parties entered into the first of
14 many modifications. The January 14, 2008,
15 modification simply extended the maturity date to
16 April the 30th, 2008 to give the borrowers
17 additional time to try to figure out how they were
18 going to make payment for the final balloon payment
19 or sell the property, which always seemed to be at

20 issue. And according to Mr. Wright was really the
21 primary means for paying off the loan.

22 JUDGE DUKES: Are modifications
23 included in the record somewhere?

24 MR. SUMNER: They are.

25 MR. SILVER: Yes, they are.

38

1 MR. SUMNER: They are. They are
2 attached as a part of our memorandum. And they are
3 also attached as exhibits to the complaint.
4 Interestingly, the bank did not require that Philip
5 Brust execute a new guarantee. And they didn't even
6 have any communications with Philip Brust regarding
7 the modification. And certainly Philip Brust signed
8 no documents related to the modification. As far as
9 we know he had no idea it even took place.

10 Moving on to May 27th, 2008. A new
11 promissory note was signed. This wasn't a
12 modification, but a new note. You can look at it as
13 the exhibits, but that extended the maturity date
14 even further to August the 2nd, 2008.

15 Mr. Brust signed no guarantee. There are
16 no written documents signed by Philip Brust and no
17 indication that he knew what was going on. Next, on
18 August the 26th, 2008, they entered into a new
19 promissory note again. Again, not a modification,
20 but a new note extending the maturity date to
21 September the 26th, 2008.

22 Flash forward to October 15th, 2008.
23 Again they entered into a new promissory note for
24 the loan. And this one in particular is interesting
25 because not only did it extend the maturity date,

39

1 but they actually entered into a new two-year term.
2 They entered into a new interest rate which is a
3 variable rate which is the wall Street prime plus
4 one which is fairly standard.

5 And they agreed in that new promissory
6 note that payments would be made on a monthly
7 principal plus interest payment. And then of course
8 the final balloon payment. So there are substantial
9 changes in that October 15th, 2008, new promissory
10 note that was signed.

11 Again, no guarantee signed by Mr. Brust.
12 No documents signed by Mr. Brust. And no evidence
13 in writing that the bank ever even communicated with
14 him regarding this new promissory note.

15 On October 15th, 2008, also the bank made
16 a new loan to Ecological Investments for \$275,000.
17 Now, that new loan Mr. Brust -- there has been no
18 evidence that Mr. Brust was contacted or consulted
19 about this loan. He signed no new guarantee
20 regarding this loan and no documentation.
21 Everything was handled by Ecological Investments.
22 Mr. Rosenberg was the managing partner.

23 Moving forward to January of 2009,
24 Ecological came into some money. And First South
25 Bank applied the funds to pay off that \$275,000 loan

40

1 in January of 2009. Again, there is no evidence --
2 there are some communications regarding the
3 application of some funds at that time, but it's
4 unclear whether Mr. Brust had knowledge that the
5 bank was going to be paying off it's \$275,000 loan

6 or even whether Mr. Brust even knew the \$275,000
7 loan existed.

8 January 21st, 2010, a year later the
9 parties entered into a modification. This
10 modification changed the loan from an interest and
11 principle payment to an interest-only payment. And
12 then once again, a final balloon payment.

13 And then moving forward to November the
14 30th, 2010, again, the parties entered into a new
15 note. And much like the October 15 note, again,
16 they completely changed the deal. There is a new
17 two-year term with a maturity date of November 30th,
18 2012, a new fixed interest rate of five and a
19 quarter. And they are requiring monthly principal
20 and interest payments as well as a final balloon.

21 well, as you can predict, the maturity
22 date came November the 30th, 2012, and Ecological
23 Investments was not able to make that final balloon
24 payment. So in March of 2013 First South Bank sued
25 Mr. Brust and Mr. Rosenberg on the guarantees and in
41

1 October of last year filed this motion for summary
2 judgment.

3 That is the backdrop of the facts. And
4 all of the information that I've represented to you,
5 Judge, is supported by the exhibits we've attached
6 to the summary judgment motion and the memorandum in
7 opposition to the summary judgment motion.

8 with these facts as the background, we
9 have to look at, Number 1, what is the principal
10 issue in this case? And then, Number 2, what is the
11 law that governs?

12 And as Mr. Silver made reference to at the
13 conclusion of his opening, the key question is
14 whether Mr. Rosenberg had the authority to sign the
15 guarantee on behalf of Mr. Brust. And Mr. Silver
16 made reference to a number of cases that deal with
17 guarantees, and the application and the enforcement
18 of guarantees in South Carolina, but he got ahead of
19 the horse because the law we need to be looking at
20 and the questions and standards we need to be
21 applying is how are powers of attorney construed in
22 this state because the question is one of agency.
23 Did Rosenberg have the agency or the
24 authority as an agent of Mr. Brust to sign that
25 guarantee? And so you have to look at the power of

42

1 attorney law in this state. And I've looked -- I
2 just got the memorandum, but I don't believe that
3 there is any power of attorney case law in the
4 bank's memo.

5 The bank is moving straight into the
6 guarantee, enforcement of the guarantee. And these
7 cases that the bank cites to regarding duties
8 between a bank and a borrower, none of them have to
9 do with a case where a guarantor -- where a
10 guarantee was signed pursuant to a power of
11 attorney.

12 So if we look at the other of attorney
13 law, it really comes down to a question of agency.
14 At its real core that is all a power of attorney is.
15 It's just a written document representing agency.
16 And in this state it is beyond question that
17 questions over the scope of an agency relationship

18 are one for the jury to decide.

19 And the cases in this state that have
20 talked about agency questions have unanimously
21 represented that questions of agency should not
22 normally be resolved at summary judgment.

23 Now, a power of attorney is a written
24 document. And according to South Carolina law and
25 laws across this country a power of attorney -- when

43

1 you interpret a power of attorney you apply the
2 standards for contractual interpretation, but given
3 its nature as a contractual representation of
4 agency, powers of attorney are to be strictly
5 construed.

6 In other words, they should be construed
7 so as only to sanction those acts that are clearly
8 within its terms. There is a case from the district
9 of South Carolina from 1966. It may be the only
10 case that deals with this issue, Judge. We've
11 really researched this closely.

12 It's the Martin case. And it speaks of
13 the strict construction and the fact that courts
14 must be vigilant in interpreting the powers that are
15 granted through a power of attorney.

16 There is another case that we cite in our
17 brief, the villanueava case. And also the
18 restatement third of agency. All of them support
19 this same proposition of strict construction in the
20 setting of a power of attorney.

21 Corpus juris secundum, specifically the
22 agency section, talks about that the authority to
23 give security interests, or excuse me, security

24 instruments through a power of attorney cannot be
25 inferred. In other words, a power to make a

44

1 guarantee must be expressly given in a power of
2 attorney.

3 Now, we've cited three separate cases that
4 I would recommend the court at least looking at our
5 descriptions of these cases, if not looking at the
6 cases themselves, regrettably they are not from
7 South Carolina, but given that South Carolina has
8 not spoken to this specific issue we believe that
9 they are -- certainly provide guidance.

10 The first is the Amcore case which is a
11 case out of Illinois.

12 JUDGE DUKES: Do you have a
13 reference?

14 MR. SUMNER: They are all referenced
15 in the memorandum. And in Amcore the Illinois Court
16 of Appeals stated that broad catch-all grants of
17 powers such as the ones in this power of attorney
18 that sort of any and all documents related to is not
19 sufficient to confer power to sign a guarantee.

20 In the Nevis case, which is a case out of
21 Nevada from 1988, the court stated specifically that
22 a power of attorney must contain specific
23 authorization in order to empower an attorney in
24 fact to sign a guarantee on the behalf of the
25 principal.

45

1 And in the Chicago Title case, which is
2 out of the District of Colorado, 1978, the court

3 stated that a lack of a specific grant of authority
4 to sign a guarantee is, in essence, the lack of the
5 authority to so act. That you've got to have a
6 specific grant if an agent is to sign a guarantee on
7 behalf of the principal.

8 Now, the responsibilities and the
9 obligations that exist between the principal, the
10 agent, and the third party that are relying on a
11 power of attorney are somewhat complicated, but the
12 laws state that a third party who is relying on a
13 power of attorney actually is the one that has the
14 duty to ascertain the scope of the authority.

15 In this case -- and this is quoting from
16 C.J.S., the agency sections. In this case the bank
17 had the duty to make sure that the power of attorney
18 conferred the authority for Rosenberg to sign the
19 guarantee. Now, we argue they took no steps.

20 And the record will show, Judge, that
21 Patrick wright didn't make any calls. No one from
22 the bank made any calls to Brust, to Terry Finger,
23 to counsel for the bank or anyone for that matter to
24 ascertain whether or not this power of attorney
25 empowered Rosenberg to sign the guarantee.

46

1 C.J.S. goes on to say that a total failure
2 to make any inquiry about the scope of agency is not
3 within the reasonable practices or not within the
4 realm of reasonable prudence for a third party who
5 relies on the power of attorney.

6 And this is especially true in this case
7 where you've got a bank that admits that this
8 \$2.6 million loan was huge, and this guarantee was

9 evidently very important as a part of this loan
10 deal. With that as the back drop it is amazing that
11 Patrick Wright did not do more to ascertain whether
12 Philip Brust intended Rosenberg to sign this
13 guarantee.

14 First and foremost, Judge, it is our
15 position that where a power of attorney does not
16 expressly include the word guarantee, that power of
17 attorney does not empower an agent to sign a
18 guarantee on behalf of the principal. It is
19 supported by case law. It's supported by these
20 periodicals, corpus juris secundum as well as the
21 third restatement of agency.

22 Now, that is the primary position of Mr.
23 Brust, but even if the Court were to say perhaps Mr.
24 Brust did appear that he wanted to serve as a
25 guarantor, we have questions about the scope of the

47

1 guarantee or the exact details of the guarantee and
2 whether Mr. Brust was even apprised of the details
3 of this guarantee.

4 Mr. Silver handed you some cases that
5 stated a party is required to read documents. And
6 that the court can't -- a party is not excused from
7 their obligations if they don't read the document.
8 Well, those cases are interesting when the documents
9 have been sent to the party that is signing them,
10 but in this case the testimony is unanimous. No one
11 ever sent Mr. Brust a guarantee, not before, not
12 during, not after. Mr. Finger didn't do it. Mr.
13 Wright didn't do it. No one from the bank bothered
14 to send Mr. Brust the guarantee that they wanted him

15 to sign.

16 Now, they rely on the commitment letter,
17 but the commitment letter is not perfect. The
18 commitment letter isn't addressed to Mr. Brust.
19 Now, Mr. Wright testified that he mailed it to him,
20 but he doesn't have any documentation of the fact.
21 He just says that of course I would have mailed it
22 to him. It was addressed to Mr. Rosenberg and Mr.
23 Brust, but it didn't have Mr. Brust's mailing
24 address on it.

25 Furthermore, there are a number of

48

1 requirements stated in that commitment letter, and
2 we've outlined them in the memo, that the bank just
3 simply didn't follow. And finally, Judge, you will
4 recall that we had some questions about the
5 signatures on the commitment letter. When we asked
6 the bank for the original commitment letter, the
7 bank doesn't have it. All the bank has is this poor
8 copy with a signature that purports to be that of
9 Mr. Brust.

10 when you look at the scope of the
11 authority that was granted and the fact that there
12 is no specific grant of authority to sign a
13 guarantee, and when you look at the facts of this
14 case and you look at the guarantee that was actually
15 signed, there are questions that exist about whether
16 the bank exceeded what it may have perceived as
17 being the grant of authority.

18 And if you look at -- we talked about this
19 a little bit. The guarantee -- there are two boxes
20 that could have been checked. And I alluded to this

21 earlier. The first one is a -- is Box A. This is
 22 what the bank checks when there is a sum certain
 23 guarantee. I, Robert Sumner, guarantee the loan to
 24 Jeff Silver in the amount of \$5. And it is limited
 25 to that amount. And at the bottom there beside 49

1 Paragraph 4 you would write the amount of the loan.
 2 That is not what happened here. Here Box
 3 B was checked. And, in essence, Mr. Brust was made
 4 the guarantor for any and all debts going forward
 5 into the future from here and forever after. And
 6 the amount was not limited to 2.6. It was
 7 unlimited.

8 when you go back and look at the power of
 9 attorney, there is no mention in here about future
 10 loans, ongoing commitments, future obligations of
 11 the borrower or Ecological Investments. There is no
 12 word unlimited in this specific power of attorney.
 13 It's limited to the 2.6.

14 And Patrick Wright when he testified in
 15 his deposition admitted, Judge, we signed the wrong
 16 box. We shouldn't have made this Box B, unlimited
 17 guarantee. We should have done Box A. And now when
 18 I look at this power of attorney, I agree with
 19 Philip Brust that we checked the wrong box.

20 Now, I'm certain the bank is going to say
 21 that was just an administrative error and it's
 22 inconsequential, but we beg to differ. Based on
 23 that admission and the documents that are in front
 24 of you there is at least a scintilla of evidence
 25 that the bank has exceeded whatever authority was 50

1 given to Mr. Rosenberg when they took this power and
2 attorney and signed not a limited guarantee, but an
3 unlimited guarantee, forever and ever and ever.

4 Mr. Wright testified -- I think Mr. Silver
5 talked about this a little while ago -- that he did
6 talk to Mr. Brust about a guarantee, but he said it
7 was in 2005. This was before the documents were
8 ever drafted. This is before the commitment letter
9 was ever a glimmer in Mr. Wright's eye. This was
10 right at the onset of the deal when Mr. Wright
11 claims that he asked Mr. Brust if he would agree to
12 serve as a guarantor.

13 There is no documentation of that. The
14 bank can't produce an e-mail or a letter where Mr.
15 Wright and Mr. Brust discussed this. So if you take
16 Mr. Wright's word for it, he may have had this
17 discussion, but what was discussed is beyond the
18 realm of memory. Mr. Wright doesn't know. Mr.
19 Brust can no longer communicate.

20 One thing we do know is this guarantee
21 that was signed by Mr. Rosenberg was never provided
22 to Mr. Brust. Now, we disagree. We believe that
23 the bank does have certain duties in its dealings
24 with borrowers and guarantors. And I'm aware of the
25 cases, the Savannah Bank case and others that deal 51

1 with the banks' duty and banking relationship.

2 And we are not asserting that the bank was
3 a fiduciary or had a fiduciary duty to Mr. Brust,
4 but we do believe that the bank failed to even
5 adhere to normal standard banking practices in the
6 underwriting and the closing and the administration

7 of this loan. And so Mr. Barksdale's affidavit,
8 he's an expert on our behalf, goes to this very
9 point that in this specific scenario the bank
10 completely mishandled the power of attorney. They
11 completely mishandled the execution of the documents
12 at closing and it mishandled events all along the
13 way.

14 And why this is important is because it
15 goes to show that the bank was not reasonable in
16 relying on this power of attorney. The bank did not
17 act reasonably in permitting Rosenberg to sign this
18 guarantee based on that power of attorney. And so
19 we believe that -- and there is a case that speaks
20 to this.

21 Chicago Title, which really couldn't be
22 much more closely on all fours with this case. The
23 court specifically said a bank's failure to follow
24 established practices is material when the court is
25 trying to determine the scope of an agency that is 52

1 bestowed in a power of attorney.

2 And in that Chicago Title case what you
3 had is a number of guarantors for a construction
4 project. They negotiated at length with the bank.
5 They exchanged -- one thing that is different is
6 they exchanged the loan documents ahead of the
7 loan -- ahead of the loan closing, but several of
8 the guarantors could not be at the loan closing so
9 they gave their partner a power of attorney to go
10 sign everything at closing.

11 And arguably that included a guarantee.
12 The problem was at the 11th hour the bank added a

13 new requirement to the loan. The bank added an
14 additional performance guarantee on the construction
15 loan. The bank did not reach out to those four
16 guarantors that could not be at the closing. So
17 when their agent showed up and signed the
18 performance guarantee, that agent was exceeding its
19 power.

20 And the bank said, look, the bank --
21 excuse me. The court said, no, bank, you can't make
22 a change at the 11th hour, not inform the
23 guarantors, and argue that this power of attorney
24 suffices to allow their agent to sign the
25 performance guarantee. And it's just like in this 53

1 case where at the end of the day we don't know when
2 this change was made to this guarantee, but at some
3 point in time it went from being what was expected
4 to be a limited guarantee, and I think when you look
5 at the commitment letter and the other documents, to
6 suddenly it's an ongoing, unlimited, from now and
7 forevermore guarantee.

8 And so just like the Chicago Title case,
9 the fact that the bank did this, the fact that the
10 bank mishandled the power of attorney and mishandled
11 the loan in general, it is relevant to determining
12 what was the scope of the agency that was bestowed?
13 What was the intention of Philip Brust? And what
14 did the bank do to determine what Brust expected?

15 The bank could have called him. There is
16 no evidence that he couldn't speak on the telephone.
17 And he was not incapacitated at that time. The bank
18 could have called him. Terry Finger could have call

19 him. They could have called him before the loan, at
20 the closing, or after. No one took a single step.

21 And they didn't just have one closing.
22 They had 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 -- 9 or 10
23 different modifications depending on how you count
24 it, each time presenting an opportunity for the bank
25 to fix this problem, but they never did so.

54

1 Now, it appears that the bank is relying
2 predominantly on apparent authority or apparent
3 agency as their theory of recovery. Like I said,
4 there is no power of attorney case law in their
5 memorandum from what I can glean from my quick view.
6 It's an apparent authority case.

7 And the elements of apparent authority are
8 three-fold. It requires a principle to consciously
9 or impliedly represent to another to be (inaudible).
10 That there is reliance on this presentation, number
11 2. And then number 3, a change of position on the
12 relying party's detriment.

13 Now, we believe that there are material
14 questions of fact about each of those elements.
15 First it is unclear or disputed whether Philip Brust
16 actually Rosenberg to sign this guarantee at this
17 closing. The word guarantee is not in the power of
18 attorney, and the bank admitted that it changed the
19 deal on him. It checked the wrong box and obligated
20 him to something that was not contemplated
21 previously. So that is on the first element.

22 The second element is with respect to
23 reliance. And this is unusual. I mean, usually in
24 this scenario you've got a banker who is going to

25 testify that I was there, they presented the power 55

1 of attorney of me. I read it. We relied on this
2 power of attorney. And without the power of
3 attorney we never would have allowed this to happen.

4 It didn't happen in this case. In this
5 case no one was present. No banker. No lender's
6 counsel. The bank wasn't even notified. Terry
7 Finger didn't pick up the phone and call the bank.
8 The bank gets the power of attorney weeks later when
9 they get their signed filed copies. So there can be
10 no argument that they relied on this.

11 I mean, sure the bank made the loan. And
12 we know that their position is we wouldn't have made
13 the loan without the guarantee, but let's not get
14 ahead of the horse here. The question is reliances
15 on the power of attorney itself because that is the
16 operative document for agency, not the guarantee.
17 And I think that is where this case -- you've got to
18 keep it on the track.

19 The reliance was not -- that we are
20 talking about is not on the guarantee, but on the
21 power of attorney before you get to the guarantee.

22 With respect to the reliance I will say
23 also one very interesting point in this case. And
24 it's undisputed that the bank did not have a copy of
25 the power of attorney in their file. They produced 56

1 the original bank loan documents. We actually went
2 to Spartanburg and sat down and they were nice
3 enough to allow us to look at them, but when we went

4 and looked through all the original loans documents
5 there is no original power of attorney.

6 And, in fact, the only power of attorney
7 that has been produced in this case by the bank was
8 a copy of the power of attorney that was printed off
9 at the Beaufort County R.M.C.'s website in 2013.

10 Now, Patrick Wright didn't argue that he
11 received and relied on the power of attorney at the
12 closing, but it is interesting and it certainly
13 calls into question whether the bank even knew that
14 the power of attorney existed. And Mr. Wright
15 testified that he saw it, but on a loan of this
16 importance, of this size, of this scope, in a
17 situation where this guarantee was critical
18 according to the bank it's amazing that they didn't
19 have a copy of this power of attorney. They didn't
20 even have a copy of it, let alone the original in
21 their loan file.

22 So for them to now take the position that
23 they relied on the power of attorney strains
24 credibility. Getting back to the Barksdale
25 affidavit, again, when you talk about reliance,

57

1 Judge, in the setting of apparent authority,
2 reliance is not something that happens in a box in a
3 vacuum. Reliance is something that must be
4 reasonable in order for it to be effective.

5 And so in order for the bank's reliance to
6 be reasonable, they have to comply with the
7 reasonable banking standard. And Mr. Barksdale is
8 going to testify in this case that the bank departed
9 from the reasonable banking standards with respect

10 to the handling of the power of attorney, but also
11 in so many other different ways.

12 And so we would argue that Mr. Barksdale's
13 affidavit, along with the rest of the evidence and
14 the admissions made by Mr. Wright in his deposition
15 provide that scintilla of evidence that is necessary
16 to call into question the reasonableness of the
17 reliance. We argue that it's completely
18 unreasonable, but certainly that is a question of
19 fact. And in this state where agency questions are
20 questions for the jury, it would be wholly
21 inappropriate for this court to come in now and
22 argue -- excuse me. And dispose of this issue at a
23 summary level.

24 Now finally, I know that I've been talking
25 too long, the final point I will make is with

58

1 respect to these numerous renewals and
2 modifications.

3 JUDGE DUKES: Before you launch into
4 that point, let me -- do you need a break? Yeah,
5 let's give our court reporter a break.

6 MR. SUMNER: I'm sorry.

7 JUDGE DUKES: That's all right.

8 MR. SUMNER: And I'm just going to be
9 a couple more minutes.

10 JUDGE DUKES: Okay. Well, still
11 let's give her a break.

12 MR. SUMNER: Yeah. I want to give
13 you a break, but I just didn't want you to think --

14 JUDGE DUKES: Off the record.

15 (Recess from 12:30 to 12:36.)

16 JUDGE DUKES: Back on the record.

17 MR. SUMNER: Thank you, Your Honor.

18 I'm try to wrap this up as briefly as possible. The
19 final point I would like to make in reference back
20 to the timeline is that it's our position, Brust's
21 position, that there is at least a question of fact
22 related to whether or not these modifications and
23 renewals, and in particular the new promissory notes
24 that were entered into that substantially changed
25 the terms of the loan, those being on October 15th,

59

1 2008, and on November 30th, 2010, whether those
2 relieved Mr. Brust of his obligations.

3 There is case law in South Carolina --
4 there is a South Carolina case that we cite called
5 the Yager case. And quoting it. It states that a
6 guarantor will be discharged from his obligation to
7 pay the debt of another by contract when any change
8 is made in the contract without his consent waiving
9 the effect upon him of any such change in the
10 contract. And this --

11 JUDGE DUKES: Is that a new case?

12 MR. SUMNER: This is an old one.

13 This is --

14 JUDGE DUKES: I thought a new one
15 came out recently. But anyway, go ahead. Sorry.

16 MR. SUMNER: I'm not familiar with
17 the new case.

18 JUDGE DUKES: Maybe I dreamed it. I
19 thought there was something, but --

20 MR. SUMNER: But there is a case from
21 Missouri that supports that very same position. And

22 it's our position that these material changes where
23 Mr. Brust wasn't even notified or consulted or
24 signed off on them, they do in essence constitute an
25 ovation such that would relieve him of his -- any 60

1 obligations that would exist under the guarantee.

2 And finally I will have to tell you that I
3 stand corrected. The Savannah case -- the Savannah
4 bank case does deal with the power of attorney. I
5 had my bank cases confused. But Brandon was nice
6 enough to point that out to me. I will state that
7 we believe that the Savannah bank case is factually
8 distinguishable for a number of reasons, but most
9 importantly in that case there was evidence that the
10 attorney actually sent the file, including the
11 relevant loan documents, to the guarantor.

12 And I'll say this, Judge. With respect to
13 this case and every case that we have cited in our
14 memorandum, in every single one of those cases the
15 court considered evidence on the question of the
16 scope of agency. I'm not aware of any cases, and
17 Mr. Silver can correct me if he cited one, where the
18 court actually made an agency determination at
19 summary judgment in this type of scenario.

20 And so all of these cases, whether they
21 are factually distinguishable or not, the point is
22 that it takes the court's or the jury's
23 consideration of those very facts to determine what
24 is the scope of the agency. It determines the court
25 to look into, you know, what actions did the bank 61

1 take? who was present at the closing? who

2 presented the power of attorney? The actual
3 language of the power of attorney. And in this case
4 where we argue there is an ambiguous power of
5 attorney, it's going to require the finder of fact
6 in this case to go back and look at the parole
7 evidence to determine what were the communications
8 between Brust and Rosenberg? What were the
9 communications between the bank and Mr. Brust? What
10 were the intentions of the principal with respect to
11 the agency powers that were bestowed upon Mr.
12 Rosenberg?

13 So in this setting at this point in time
14 we argue that there is more than a scintilla of
15 evidence. There is a lot of paper that suggests
16 that Mr. Brust did not intend for Mr. Rosenberg to
17 sign a guarantee or at the very least did not intend
18 for him to sign the guarantee that the bank had
19 executed in this case.

20 And so for that reason and for the other
21 reasons we've cited in our memorandum and with
22 respect to the documents in support of our
23 memorandum we would argue that summary judgment
24 would be inappropriate at this time.

25 JUDGE DUKES: All right. Thanks.

62

1 And just briefly are my eyes failing me or is the
2 guarantee just full of misspellings? Not that it
3 really makes a whole lot of difference, but it just
4 caught my eye.

5 MR. SUMNER: That is not uncommon in
6 those documents.

7 JUDGE DUKES: For a form, it looks
Page 50

8 like in the lower left-hand corner this is some form
9 that at least -- maybe it's the way the copy machine
10 did it or something, but -- anyway.

11 MR. SUMNER: No, you are right. It
12 is a bank form.

13 JUDGE DUKES: Yeah. Again, it
14 doesn't make a lot of difference, it's just
15 something I couldn't avoid looking at, but I guess
16 I'll tell you, Mr. Silver, right off the bat I guess
17 what concerns me is the specific limited power of
18 attorney, and I can't remember what exhibit it is,
19 but it's the one we are all talking about executed
20 January 25th of 2006, it doesn't appear to give Mr.
21 Rosenberg any authority beyond the closing date to
22 do anything. I mean, that is the part that kind of
23 concerns me. And then the --

24 MR. SILVER: I'm not sure what you
25 mean by that, Your Honor.

63

1 JUDGE DUKES: well, again, I haven't
2 examined all of this like I'm going to need to, but
3 if this is --

4 MR. SILVER: The power of attorney
5 referenced the \$2.6 million. The only thing that
6 I'm aware of that Mr. Rosenberg signed was the
7 guarantee which is dated the same date.

8 JUDGE DUKES: well, but -- and I
9 guess I should have also referred to the timeline.
10 Mr. Rosenberg then went on years after the fact and
11 continued to enter into new loans.

12 MR. SILVER: On behalf of the
13 borrower, Your Honor. Remember the guarantee and

14 the loans are totally separate obligations and
15 documents.

16 JUDGE DUKES: But you all are
17 attempting, you all being the Plaintiff, are
18 attempting to use this guarantee for purposes of
19 collecting on the November 30th, 2010, new
20 promissory note.

21 MR. SILVER: Your Honor, and the
22 guarantee clearly says it applies to any renewals,
23 extensions, and refinances there of in Paragraph 2.

24 JUDGE DUKES: I know what the
25 guarantee says, but I guess I'm concerned about the 64

1 power of attorney as it then expands into a
2 guarantee that conceivably goes on to guarantee new
3 loans which I understand --

4 MR. SILVER: Well, they are all the
5 same loan, Your Honor. They are not new loans.
6 They are continuations of the \$2.6 million loan.

7 JUDGE DUKES: Well, it's the same
8 debt.

9 MR. SILVER: Same debt.

10 JUDGE DUKES: Yeah. And obviously if
11 you could roll the clock back things would be done a
12 little bit different. We wouldn't all be sitting
13 here, but it certainly does appear to be an
14 expansion.

15 MR. SILVER: Your Honor, let me just
16 say this if I may that the defense -- Robert has
17 done an excellent job of putting all of this on the
18 bank and Mr. Finger. However, I've heard nothing
19 about Mr. Brust's obligations to protect himself.

20 After the closing there is no documentation he ever
21 asked for a copy of the documents, that he
22 corresponded with the bank about the documents,
23 Mr. Finger about the documents.

24 Both Mr. Wright and Mr. Finger both say
25 they never heard from Mr. Brust concerning this.

65

1 Hey, by the way, can you send me a copy of the
2 documents? Can I see what Mr. Rosenberg signed? We
3 have nothing like that in this -- in these
4 depositions.

5 Mr. Brust continued after the closing
6 basically effectively at every time there was an
7 extension or renewal to provide new financial
8 statements lending the court to believe or should
9 believe that he was aware he was on the guarantee
10 and that that is why they were asking for that
11 information.

12 JUDGE DUKES: The note I guess was
13 executed by the company?

14 MR. SILVER: Yes. And I think the
15 law is fairly clear, Your Honor, that a guarantee is
16 separate and apart from the promissory notes. And
17 his was a general unlimited. And, in fact, in the
18 commitment letter it says unconditional guarantee.
19 And it also goes on to say in that commitment
20 letter, as I pointed out to the court on the last
21 page, that the loan documents, the note, the
22 security agreements of which the guarantee is one,
23 they control over the commitment letter.

24 This guarantee was presented at closing.
25 Mr. Rosenberg signed it on behalf of Mr. Brust. And

Page 53

1 there has never been a dispute -- just like in the
2 Savannah case -- until the debt came due and it was
3 in default.

4 Never did Mr. Brust contact the bank and
5 say, wait a minute. I didn't authorize that.
6 Meanwhile the loan was being renewed, modified,
7 renewed. And he did nothing. The bank had no
8 obligation to him other than to present the
9 document, the guarantee. And his agent executed it.
10 In fact, the agent signed the same guarantee on his
11 own behalf.

12 If it was up to the agent maybe, hey, Mr.
13 Brust, this is what it says. Do you agree with it?
14 There is no testimony about that. A lot of what
15 Robert says is conjecture, smoke up there. Well,
16 you know, why didn't they do this? There is no
17 testimony. There is no affidavits about any of
18 those factual issues other than Barksdale alleging
19 how, well, the loan could have been done this way or
20 that way.

21 The bottom line is the bank made a loan of
22 \$2.6 million. The commitment letter clearly says
23 unconditional guarantee. Mr. Wright in his
24 deposition clearly says he had a conversation with
25 Mr. Brust about that guarantee. The financial

67

1 documents from Mr. Brust came over a course of
2 numerous years to follow up basically with every
3 renewal and they were provided and the loan was
4 renewed.

5 So was there reliance? Yes, by the bank.

6 And at no time did Mr. Brust reject, revoke, that
7 guarantee. All he had to do was call Mr. Rosenberg,
8 Mr. Wright, or Mr. Finger. And Mr. Finger in his
9 deposition says clearly that guarantee was with a
10 gambit or ambit of the power of attorney. And his
11 office prepared the power of attorney.

12 JUDGE DUKES: All right.

13 MR. SUMNER: In brief response?

14 JUDGE DUKES: Sure.

15 MR. SUMNER: Did Mr. Brust have a
16 duty? Did the bank have a duty? What does
17 unconditional mean? What does unlimited mean? What
18 are these all, Judge? They are questions of fact.
19 And Mr. Silver has done an excellent job of
20 presenting to the court precisely why summary
21 judgment is completely improper at this stage.

22 He just for five minutes explained the
23 very questions that are the essence of this case.
24 They are all questions that a jury has to decide.
25 It's not proper now. It's not proper as a matter of 68

1 law. There is a scintilla of evidence that suggests
2 we have a different view of things.

3 And because there is a question of facts,
4 summary judgment is not proper.

5 MR. SILVER: Your Honor, taking that
6 to its natural progression, there would never be a
7 motion for summary judgment approved.

8 JUDGE DUKES: Yeah. I mean, well,
9 let me do this. Let me take a look at it and see.
10 with regard to the -- your counterclaims, we didn't

11 get into that a whole lot, but what were the nature
12 of the counterclaims? Tell me what those were,
13 again.

14 MR. SUMNER: Your Honor, we have
15 cross claims against the Defendant Rosenberg.

16 JUDGE DUKES: Okay.

17 MR. SUMNER: And we have just filed
18 on Friday a motion to amend our answer to assert
19 negligence and alternatively breach of contract
20 counterclaims against the bank. And those deal with
21 the very issues raised by Barksdale's affidavit.

22 JUDGE DUKES: All right. But we
23 don't have any of that today then?

24 MR. SUMNER: That is not before the
25 court.

69

1 JUDGE DUKES: Okay. I'm sorry. I
2 thought we had some --

3 MR. SUMNER: But just so we are
4 clear, we filed Barksdale's affidavit in opposition
5 to the summary judgment. And we've also disclosed
6 him as an expert. And we are relying on his
7 testimony as the basis for our motion to amend the
8 answer. So it serves multiple roles, but I want the
9 court to be clear that his affidavit was timely
10 filed in opposition to summary just for today.

11 JUDGE DUKES: All right. And
12 basically the only thing that I've got before me
13 today though is Plaintiff's motion for summary
14 judgment?

15 MR. SUMNER: Is that correct.?

16 JUDGE DUKES: Okay. I was confused a

17 little bit. We got into what I thought were some
18 existing counterclaims, but don't exist. But you
19 hope to have them exist at some point?

20 MR. SUMNER: That's right. And we
21 did raise however -- I will point out to you, we did
22 raise affirmative defenses with respect to the
23 bank's misconduct. And so we decided to re-style it
24 as a counterclaim, but we certainly raise as
25 affirmative defense that the bank failed to follow

70

1 reasonable banking standards with respect to the
2 handling of the power of attorney, the closing, the
3 administration of the loan. So all of those
4 allegations were pled. They are -- in the case
5 right now they are pled as affirmative defenses. We
6 intend to re-style them as counterclaims as soon as
7 the court can hear us on that.

8 JUDGE DUKES: Just out of curiosity,
9 what would Mr. Brust's argument be if there had been
10 a note executed on his behalf? I mean, that is
11 called for specifically.

12 MR. SUMNER: Well, that is called for
13 specifically so in that case where you have a
14 specific unambiguous grant of power it seems to me
15 that a note would be authorized here.

16 JUDGE DUKES: I mean, he would kind
17 of be in the same boat, wouldn't he?

18 MR. SUMNER: No, because this is
19 serving as a secondary obligor whereas the note he
20 would be the primary obligor. And in this situation
21 the borrower, being Ecological Investments, was
22 undoubtedly provided copies of all the loan

23 documents. They were aware of the deal they were
24 getting into.

25 In this case there is no evidence that Mr.
71

1 Brust was provided any of the loan documents.

2 MR. SILVER: And there is no
3 obligation to have provided them.

4 JUDGE DUKES: What happened? Was the
5 property sold? I don't remember.

6 MR. SILVER: No, it's still
7 sitting out there.

8 MR. SUMNER: They are still trying to
9 sell it.

10 JUDGE DUKES: So it wasn't foreclosed
11 on?

12 MR. SILVER: Not yet, Your Honor.

13 JUDGE DUKES: Maybe the value has
14 probably come back a little bit since this has been
15 going on. This was probably at the bottom of the
16 market when all of this happened. What is the total
17 debt amount today? I think you said it was 1.6 or
18 1.7 or something.

19 MR. SILVER: I want to say it was
20 1.7, Your Honor, plus attorney's fees and --

21 JUDGE DUKES: So, there must have
22 been some payments made if -- okay.

23 MR. SILVER: There was actually a
24 sale of some part of the property if I remember
25 correctly that paid it down plus there might have
72

1 been a call on the --

2 MR. SUMNER: And has any amounts been
Page 58

3 collected from Rosenberg on the judgment that has
4 been obtained? I don't know that.

5 MR. SILVER: No. No.

6 MR. SUMNER: Okay.

7 MR. SILVER: Did I give you -- I
8 can't remember, Your Honor, if I gave --

9 MR. SUMNER: Yeah, you sent me that.
10 You gave that to us.

11 JUDGE DUKES: What is the -- okay.
12 Thanks. So I've basically got everything I would
13 need to think about this.

14 MR. SILVER: Your Honor, and just for
15 information, I believe there is a discussion in our
16 memorandum about the apparent authority if you want
17 us to look at each others memorandums and respond
18 back, be glad to do that.

19 JUDGE DUKES: What I may do is just
20 take a look at it. Would you all do me a favor and
21 let me know, remind me within -- I'm getting
22 ready -- let's do this. Anything else for this
23 record?

24 MR. SILVER: No.

25 MR. SUMNER: No, Your Honor.

73

1 JUDGE DUKES: Okay. That will
2 conclude the record then.

3 (Whereupon, the hearing was concluded
4 at 12:52 p.m.)

5
6
7
8

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

74

1 Certificate of Reporter

2

3 I, Deborah S. Thomas, Certified Verbatim
4 Reporter and Notary Public in and for the State of
5 South Carolina, do hereby certify that I reported
6 the hearing of First South vs. Rosenberg, on the 3th
7 day of June, 2014: and that the foregoing 73 pages
8 constitute a true and correct transcription of the
9 said hearing.

7

8 I further certify that I am neither
9 attorney nor counsel for, nor related to or employed
10 by, any of the parties connected with this action,
11 nor am I financially interested in said cause.

11 I further certify that the original of
12 said transcript shall be hereafter delivered to
13 Robert E. Sumner, IV, Moore & VanAllen, PLLC, Post
14 Office Box 22828, Charleston, South Carolina 29411.

14 In witness whereof I set my hand and seal

Page 60

6-3-14 ROSENBERG HEARING.txt
this 5thth day of March, 2015.

15

16

17

18

My Commission
expires 1/4/18

Deborah S. Thomas, CVRM
and Notary Public for the
State of South Carolina

19

20

21

22

23

24

25

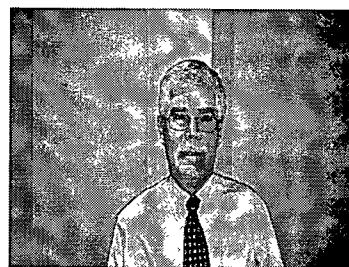
In The Matter Of:

First State Bank v.

Rosenberg, et al.

Terry A. Finger

May 23, 2014



Janice D. Hayward, RMR
Independent Court Reporter

843.478.6756

JanHayward1@gmail.com

Original File 052314TFinger.txt

Min-U-Script® with Word Index

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
2 COUNTY OF BEAUFORT) CASE NO. 2013-CP-07-00610
3
4

5 FIRST SOUTH BANK,) DEPOSITION OF
6 Plaintiff,) TERRY A. FINGER
7 -versus-)
8 JOHN E. ROSENBERG AND PHILIP J.)
9 BRUST,)
10 Defendants.)

11
12
13

14 DATE: Friday, May 23, 2014

15 TIME: 3:15 p.m.

16 LOCATION: Finger & Fraser, PA
17 35 Hospital Center Commons
18 Suite 200
Hilton Head Island, South Carolina
29926

19 REPORTED BY: Janice D. Hayward, RMR
20 NCRA Registered Merit Reporter
21 101 Dorchester Court
Charleston, South Carolina 29418
22 843.478.6756
JanHayward1@gmail.com
23
24
25

Janice D. Hayward, RMR
843.478.6756

RECORD 0426

1 Any Court, party, or person who has purchased
2 a transcript, may, without paying a further fee
3 to the reporter, reproduce a copy or portion
4 thereof as an exhibit pursuant to Court order
5 or rule or for internal use, but shall NOT
6 otherwise provide or sell a copy or copies to
7 any other party or person.

8 APPEARANCES

9 For Plaintiff Jeffrey L. Silver
10 Tyler Cassell Jackson Peace &
11 Silver, LLC
12 1331 Elmwood Avenue, Suite 300
13 Post Office Box 11656
14 Columbia, South Carolina 29211
15 For Defendant E. Brandon Gaskins
16 Moore & Van Allen, PLLC
17 78 Wentworth Street
18 Charleston, South Carolina 29401
19 Also Present Frank R. Callison
20
21
22
23
24
25

Janice D. Hayward, RMR
843.478.6756

RECORD 0427

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX TO EXAMINATIONS

Examination By Mr. Silver:	4
Examination By Mr. Gaskins:	24
Examination By Mr. Silver:	42

INDEX TO EXHIBITS

Plaintiff's Exhibits

Plaintiff's <u>Exhibit 1</u> , 1-10-06 letter	8
Plaintiff's <u>Exhibit 2</u> , 1-9-06 letter	9
Plaintiff's <u>Exhibit 3</u> , 1-18-06 fax	11
Plaintiff's <u>Exhibit 4</u> , closing statement	12
Plaintiff's <u>Exhibit 5</u> , 2-2-06 notes	14
Plaintiff's <u>Exhibit 6</u> , power of attorney	16
Plaintiff's <u>Exhibit 7</u> , guaranty	17
Plaintiff's <u>Exhibit 8</u> , mortgage	20
Plaintiff's <u>Exhibit 9</u> , guaranty agreement	42
Plaintiff's <u>Exhibit 10</u> , assignments	43
Plaintiff's <u>Exhibit 11</u> , restricted account	44
Plaintiff's <u>Exhibit 12</u> , 8-17-01 letter	44
Plaintiff's <u>Exhibit 13</u> , loan agreement	45

Defendants' Exhibits

Defendants' <u>Exhibit 1</u> , power of attorney	30

Janice D. Hayward, RMR
843.478.6756

RECORD 0428

1 (Terry Finger, after being sworn,
2 testified as follows:)

3 EXAMINATION

4 BY MR. SILVER:

5 Q Terry, I'm going to ask you, even though
6 you know -- would it be better if I sat on the other
7 side, do you think? Does it matter to you?

8 A Doesn't matter.

9 Q I know you'll speak loud enough. You can
10 read and review this if you so desire. Do you --

11 A I'll waive that.

12 Q Okay. There you go.

13 MR. SILVER: Have you sworn him in?

14 MS. HAYWARD: I have.

15 MR. SILVER: Good.

16 BY MR. SILVER:

17 Q Terry, are you familiar -- I call you
18 Terry. We're friends.

19 A Yes.

20 Q Are you familiar with the basis of this
21 lawsuit that we're involved in?

22 A My limited understanding is that there's
23 an alleged default by the bank, and the issue is
24 whether Mr. Brust -- or whether a POA binds
25 Mr. Brust to a guaranty.

Janice D. Hayward, RMR
843.478.6756

1 Q And how did you get that information?

2 A From talking to you and talking to Robert.

3 Q Okay.

4 A Robert Sumner.

5 Q All this background stuff you're familiar
6 with. Full name?

7 A Terry Allen (phonetic) Finger.

8 Q Address?

9 A 25 McIntosh Road, M-c-I-n-t-o-s-h, Hilton
10 Head, South Carolina, 29926.

11 Q What is your profession?

12 A Attorney.

13 Q How long?

14 A Since 1979.

15 Q And where are you licensed to practice
16 law?

17 A Just in South Carolina.

18 Q And tell me something about your
19 experience.

20 A Been in the general practice of law pretty
21 much since the beginning.

22 Q How long have you been down in Hilton
23 Head?

24 A Thirty years.

25 Q Is a good portion of your practice real

Janice D. Hayward, RMR
843.478.6756

1 estate?

2 A Probably 15 to 20 percent.

3 Q In your years of experience and practice,
4 you've been involved in a lot of real estate
5 closings?

6 A Yes, I have.

7 Q Okay. Familiar with bank loan documents?

8 A For the most part.

9 Q Okay.

10 A I'm surprised constantly by new ones that
11 banks seem to create, but for the most part.

12 Q How did you come upon Ecological
13 Investments, LLC?

14 A A guy named John Rosenberg who had been
15 here in the community, who had asked me to do some
16 work for him, for that entity.

17 Q Were you involved in the formation of that
18 entity?

19 A I don't remember, Jeff. May have been,
20 but Mr. Rosenberg was a lawyer, and I don't know
21 whether he formed it or whether we did. I just
22 don't recall.

23 Q Other than Mr. Rosenberg, were you aware
24 of the other investors in Ecological?

25 A Probably would recognize some names, but

Janice D. Hayward, RMR
843.478.6756

1 as far as the investment side of Ecological, we were
2 not involved in that.

3 It had some securities
4 overtones, in my view, and he had some other lawyer
5 handle maybe some private placement memorandums or
6 something like that.

7 I was not involved in the
8 corporate aspect very much of Ecological.

9 Q Were you involved in the purchase and loan
10 when they initially purchased this property in
11 issue?

12 A Yes.

13 Q Okay. When I say that, the 82.68 acres
14 located on Exit 8, known as or called the Butterfly
15 Kingdom?

16 A Yes, I was.

17 Q And do you remember who financed that
18 loan, what lender?

19 A I think it was a local bank, Lighthouse I
20 believe, if I recall correctly. At some point in
21 time they had a loan on the property. Whether they
22 were the original lender or thereafter, I don't
23 recall.

24 Q Were you asked to handle the closing or
25 the refinance of the loan, call it the Lighthouse

Janice D. Hayward, RMR
843.478.6756

1 loan, with First South Bank?

2 A I believe our firm was, yes.

3 Q Okay. And were you involved personally in
4 that?

5 A I was.

6 Q Would you consider yourself the lawyer
7 that was involved in it, responsible for it?

8 A Within our office, yes.

9 Q Let me show you this.

10 (Marked for identification was Plaintiff's
11 Exhibit 1.)

12 BY MR. SILVER:

13 Q Are you familiar with this document?

14 A I'm sure I saw it a long time ago.

15 Q Take your time to read it, and when you're
16 ready let me know.

17 A (Witness complied.) Okay. I skimmed it
18 quickly, and I signed it on the last page. That's
19 my signature.

20 Q And right above Patrick Wright's signature
21 it says thank you in advance, but right above that
22 what does it say?

23 A A copy of the commitment letter from First
24 South Bank to Ecological Investment is enclosed for
25 your review.

Janice D. Hayward, RMR
843.478.6756

1 Q Do you have any reason to believe it
2 wasn't enclosed?

3 A No, I have no reason to suspect it wasn't
4 enclosed.

5 (Marked for identification was Plaintiff's
6 Exhibit 2.)

7 BY MR. SILVER:

8 Q Take a minute to read through that if you
9 would.

10 A (Witness complied.) Okay. I've skimmed
11 it.

12 Q And is it signed by Ecological?

13 A Appears to be.

14 Q Do you recognize that signature who signed
15 on behalf of Ecological?

16 A It looks like the same signature as below
17 it for Rosenberg, so I assume it is Rosenberg's.

18 Q Is it also signed by, or appears to be
19 signed by Mr. Brust?

20 A There is -- the copy is a little poor, but
21 it looks like somebody signed it over Mr. Brust's
22 signature, over his name, I mean.

23 Q And the loan is for what amount?

24 A Up to \$2.6 million.

25 Q Okay. And the purpose?

Janice D. Hayward, RMR
843.478.6756

1 A Refinance an existing debt of
2 approximately 2.2 million, additional funds for
3 interest, two years, up to three-fifty, and 50,000
4 for expenses, taxes and nominal expenses.

5 Q Was there any collateral for this loan?

6 A Primary collateral is at the bottom of the
7 first page, 82.68 acres, first mortgage.

8 Q Okay. How about was there any other
9 collateral?

10 A Assignment of leases, rents and profits,
11 and it had to be a first mortgage.

12 Q Okay. Were there guarantors?

13 A The commitment letter says there shall be
14 two unconditionally guaranteed people, Mr. Rosenberg
15 and Mr. Brust.

16 Q Now, in Exhibit Number 1, in the second
17 paragraph, under where it says First South Bank, it
18 begins, should you -- could you go ahead and read
19 that?

20 A Should you accept this request to handle
21 the subject loan outlined herein, First South Bank
22 expects it to be closed according to the
23 instructions and terms specifically outlined herein.
24 Your acceptance of this closing engagement letter is
25 so indicated by your signature which is to be

Janice D. Hayward, RMR
843.478.6756

1 affixed at the end of this letter. Our closing
2 instructions are detailed as follows.

3 (Marked for identification was Plaintiff's
4 Exhibit 3.)

5 BY MR. SILVER:

6 A Okay. I have three in my hand.

7 Q Can you tell me what Number 3 is?

8 A The cover is a fax from Patrick Wright to
9 Jane Mimmicks.

10 Q Was she somebody with your office?

11 A She is a real estate paralegal with our
12 office. It says, revised attorney letter for
13 Ecological Investments.

14 Q What are the changes?

15 A Says there are only two changes. The loan
16 amount is 2.6 versus 2.5. The appraisal fee is 1900
17 versus 1800. All other items remain unchanged.

18 Q Was that signed by you, the revised one?

19 A This Exhibit 3 is not signed by me.

20 Q Okay. Do you have any memory of why it
21 wasn't signed by you?

22 A No, I sure don't.

23 Q Do you believe you closed the loan in
24 accordance with the terms and conditions of these
25 instructions?

Janice D. Hayward, RMR
843.478.6756

1 A Yes, I do believe I did.

2 Q And the commitment letter?

3 A And the commitment letter, correct.

4 I note that Exhibit 1 has a
5 handwritten change in it. It says 2.6.

6 Q Is that your handwriting?

7 A That is -- I do not believe that's my
8 handwriting.

9 Q Okay.

10 (Marked for identification was Plaintiff's
11 Exhibit 4.)

12 BY MR. SILVER:

13 Q Do you recognize this document?

14 A It's a closing statement, Exhibit
15 Number 4.

16 Q And who would have prepared this document?

17 A That would have been prepared in our
18 office.

19 Q Okay. And who is the borrower?

20 A Borrower is Ecological Investments, LLC.

21 Q Who is the lender?

22 A First South Bank.

23 Q What is the property location?

24 A 82.68 acres, Sergeant Jasper Park in
25 Jasper County.

Janice D. Hayward, RMR
843.478.6756

1 Q Was that the property we talked about
2 previously that secured this loan?

3 A It is. It is.

4 Q On line 202 on the left there, what's the
5 principal amount of the new loan?

6 A \$2.6 million.

7 Q Is that in accordance with the terms of
8 the attorney instruction letter and the commitment
9 letter, same amount?

10 A Yes.

11 Q I note on page two of that, which is the
12 Bates stamped 1258 on line 803, the appraisal cost
13 is \$1,900.

14 A Correct.

15 Q Does that coincide with Exhibit Number
16 3 --

17 A It does.

18 Q -- where the changes were referenced?

19 A It does.

20 Q And this settlement statement was prepared
21 by your office and, in fact, signed by you?

22 A Yes, it was.

23 Q And by Mr. Rosenberg on behalf of
24 Ecological, correct?

25 A Correct.

Janice D. Hayward, RMR
843.478.6756

1 Q What's the date of that?

2 A February 2nd, '06.

3 Q All right.

4 (Marked for identification was Plaintiff's
5 Exhibit 5.)

6 BY MR. SILVER:

7 Q What is this document, Number 5?

8 A Appears to be the note.

9 Q What is the date of the note up there on
10 the top right?

11 A February 2nd -- no, I'm sorry. The date
12 is, yeah, February 2nd, 2006.

13 Q And what is the loan amount?

14 A \$2.6 million.

15 Q Same as that's in the commitment letter,
16 with the attorney instruction letter?

17 A Yes. Correct.

18 Q Did you handle the closing?

19 A You have to help me with what you mean by
20 handle.

21 Q I mean, were you present at the closing
22 when these documents were signed?

23 A The ones that have been signed so far,
24 yes. The HUD is the only one, I think that's a
25 closing document. Yes, I was present when that was

Janice D. Hayward, RMR
843.478.6756

1 signed. And --

2 Q How about this promissory note?

3 A Probably.

4 Q Okay.

5 A Can't say definitively, but I would say --

6 Q Any reason to believe you weren't present?

7 A No, no reason to believe at all I wasn't
8 present.

9 Q Did you handle this closing on behalf of
10 the borrower and First South Bank?

11 A I handled it on behalf of the borrower.

12 Q Okay. Let me just go back and -- did that
13 also include making sure that all the loan documents
14 were executed properly on behalf of First South
15 Bank?

16 A Part of, I think, a closing attorney's
17 responsibilities are to make sure documents are
18 signed correctly.

19 Q And just going back to Exhibit Number 1,
20 that second paragraph that we talked about, do you
21 think you had any obligations to First South Bank in
22 regards to this closing?

23 A I think my obligation was to, if it was
24 going to close, it had to be closed in accordance
25 with their instruction letter.

Janice D. Hayward, RMR
843.478.6756

1 (Marked for identification was Plaintiff's
2 Exhibit 6.)

3 BY MR. SILVER:

4 Q Are you familiar with this document?

5 A It's a specific limited power of attorney.

6 Q Do you know who prepared this document?

7 A I believe it was prepared by one of our
8 real estate paralegals, I believe.

9 Q Okay. Up on the top left it has the name
10 of your firm, correct?

11 A Correct.

12 Q Also, it looks like, on the side there?

13 A Correct, it does.

14 Q So to your knowledge this document was
15 prepared by your office?

16 A I believe that's correct.

17 Q What was the intent of this document, or
18 how did this document come about? Let me ask you
19 that.

20 A Typically they come about when somebody
21 who is a signer at a closing is unable to be
22 physically present is when these are typically used.
23 And they allow someone to sign on their behalf with
24 a specific limited power of attorney.

25 Q And did you rely on this specific limited

Janice D. Hayward, RMR
843.478.6756

1 power of attorney for the execution by Mr. Brust of
2 any documents related to that closing?

3 A That's what it was designed for.

4 Q Can you read up above, tell me what
5 documents were included, up there in the first
6 paragraph? And who were appointed? Who were the
7 potential attorneys in fact for this?

8 A It was either me or John Rosenberg.

9 And it says, it says including
10 but not limited to -- necessarily limited to, and
11 then it gives a whole bunch of things; contract,
12 note, mortgage. It speaks for itself.

13 Q Okay. But it goes on to finish up and
14 say -- second to bottom line of that paragraph.

15 A Or to execute any such other documents as
16 may be necessary to close the loan with First South
17 Bank in the original principal sum of \$2.6 million.

18 (Marked for identification was Plaintiff's
19 Exhibit 7.)

20 BY MR. SILVER:

21 Q Are you familiar with this document?

22 A It's a guaranty.

23 Q Who would have prepared this document?

24 A The bank would have.

25 Q Okay. Was this part of the Ecological

Janice D. Hayward, RMR
843.478.6756

1 loan that was subject to that commitment letter and
2 attorney instruction letter?

3 A I believe it was.

4 Q And --

5 A It's dated the same date as the other loan
6 documents.

7 Q And it says it was for the account of?

8 A Ecological Investments.

9 Q Okay. And who was the obligor? Who was
10 the one that was supposed to be signing the
11 guaranty?

12 A Philip J. Brust.

13 Q Who signed for Mr. Brust?

14 A John Rosenberg.

15 Q Under what authority?

16 A Under the authority of Exhibit 6, which is
17 the specific limited power of attorney.

18 Q In your legal opinion is there any
19 question that it's authorized under that power of
20 attorney, Exhibit 6?

21 MR. GASKINS: Object to form.

22 THE WITNESS: I should now go ahead
23 and answer?

24 MR. GASKINS: Yes.

25 A I believe the specific limited power of

Janice D. Hayward, RMR
843.478.6756

1 attorney authorized Mr. Rosenberg to sign documents
2 that Mr. Brust was supposed to sign in order to
3 implement and effectuate this closing.

4 BY MR. SILVER:

5 Q You'll see on the bottom there, Philip
6 Brust is in all caps. And then next to it, it looks
7 like typed in is, by John E. Rosenberg, attorney in
8 fact. Do you know who would have typed that in?

9 A No, I don't. There are times where our
10 office types those things in, and there are times
11 when it comes from the bank that way. So I don't
12 know an answer to that.

13 That's awful small font for any
14 type of computer or typewriter we would be using.
15 But this may have been a larger document that's been
16 shrunk down. I don't really know.

17 Q Did you ever have any conversations with
18 Mr. Brust about this power of attorney?

19 A I don't remember whether I did or did not.

20 Q Is it possible somebody else in your
21 office would have had those conversations?

22 A It's a possibility, but all I can tell
23 you, what my standard practice is, when I sign
24 things for people then I always speak with them to
25 make sure that the note, mortgage -- or the mortgage

Janice D. Hayward, RMR
843.478.6756

1 amount, the interest rate, the term and all that are
2 exactly what he thinks he's obligating himself to.

3 And I don't know whether I
4 talked to Mr. Brust or not on this deal. I recall
5 meeting him in my office a couple times. Whether it
6 was -- I don't know whether it was affiliated with
7 this closing or something else. I don't know.

8 Q Do you know whether Mr. Rosenberg had any
9 conversations with Mr. Brust concerning the
10 execution of the guaranty?

11 A I do not, Jeff.

12 Q Going back to Number 6 which is the power
13 of attorney, does it appear in your legal opinion to
14 have been properly witnessed, notarized, and
15 recorded?

16 MR. GASKINS: Object to form.

17 A Appears to be.

18 BY MR. SILVER:

19 Q And where was it recorded?

20 A It was recorded in Jasper County.

21 (Marked for identification was Plaintiff's
22 Exhibit 8.)

23 BY MR. SILVER:

24 Q Do you recognize this document?

25 A This is a mortgage.

Janice D. Hayward, RMR
843.478.6756

1 Q For what amount?

2 A \$2.6 million.

3 Q Dated?

4 A It says on the front page, February 2nd,
5 2006.

6 Q And who's the mortgage from and to?

7 A The note -- oh, the mortgage is from
8 Ecological to the bank, First South Bank.

9 Q And it's part of the same transaction
10 we've been discussing?

11 A Yes.

12 Q And that was recorded?

13 A In Jasper County, correct.

14 Q And were you a witness to Mr. Rosenberg's
15 signature as the manager member?

16 A I was.

17 Q And did you sign as a witness on the
18 probate?

19 A I did. And just for informational
20 purposes, Jane Ann Sanders is the same as Jane
21 Mimmicks in this Exhibit 3. So those two Janes are
22 the same. She kept her maiden name in her notary.
23 She never changed it from a notary perspective.

24 Q Did you ever, I may be repeating myself,
25 but did you ever have any discussions with Mr. Brust

Janice D. Hayward, RMR
843.478.6756

1 concerning the execution of this specific limited
2 power of attorney and the requirements for its use?

3 A I don't remember, Jeff.

4 Q Did you handle the -- did your firm handle
5 the transfer of the funds relating to this closing?

6 A Yes.

7 Q And you understood that before disbursing
8 those funds, all the loan documents had to be
9 executed?

10 A The typical practice, at least here in
11 this part of Beaufort County, is that once the loan
12 documents are executed, they are then given to the
13 bank either directly or email, by courier, whatever,
14 and then you get authorization from the bank, or
15 they'll wire the money in, and then you get
16 authorization to go ahead and disburse.

17 Q As a closing attorney, was there any
18 question in your opinion, legal opinion, as to the
19 authority of Mr. Rosenberg pursuant to the power of
20 attorney to sign the guaranty on behalf of
21 Mr. Brust?

22 MR. GASKINS: Object to the form.

23 A I believe that the specific limited power
24 of attorney gave Mr. Rosenberg the power to sign his
25 name, but that's probably a legal conclusion that

Janice D. Hayward, RMR
843.478.6756

1 someone above my pay grade will ultimately make.

2 BY MR. SILVER:

3 Q Was there any question in your mind that
4 the funding of the First South Bank loan was
5 contingent upon the execution of the guaranty by
6 Brust?

7 A No. It was a condition of the loan.

8 Q Would you have consummated the First South
9 Bank loan if there was any question as to the
10 legal -- legality of the power of attorney to
11 authorize the Brust personal guaranty by Mr.
12 Rosenberg?

13 A I think that if either the bank or I
14 questioned that, I don't think the loan would have
15 closed.

16 MR. GASKINS: Object to the form of
17 that question.

18 BY MR. SILVER:

19 Q Subsequent to the closing on February 2nd,
20 2006 did you have any conversations or
21 communications with Mr. Brust?

22 A I don't recall.

23 Q Do you recall ever having any
24 conversations with Mr. Brust where he disputed the
25 authority of Mr. Rosenberg to sign that personal

Janice D. Hayward, RMR
843.478.6756

1 guaranty?

2 A I don't have any recollection of any
3 discussions like that.

4 Q Anything in writing from him?

5 A Not that I'm aware of, and you all have my
6 entire file, I believe.

7 MR. SILVER: Okay. I have no further
8 questions.

9 EXAMINATION

10 BY MR. GASKINS:

11 Q Good afternoon, Mr. Finger.

12 A Good afternoon.

13 Q We met earlier.

14 A Yes.

15 Q We've talked on the phone before. I will
16 be brief as well, hopefully.

17 With regards to the loan in
18 question, you did not represent Mr. Brust
19 individually, did you?

20 A Did not.

21 Q So you either represented Ecological
22 Investments or Ecological Investments and First
23 South Bank, is that fair to say?

24 A I represented Ecological.

25 Q Okay. And the reason I ask is looking at

Janice D. Hayward, RMR
843.478.6756

1 the exhibit -- I've got them all confused now, but I
2 believe it was Number 1. It's from the bank, and it
3 says your acceptance of the closing engagement
4 letter, and I didn't know if that language, closing
5 engagement letter, suggested a relationship between
6 you and the bank.

7 A I do not believe it does.

8 Q Okay. Why is that?

9 A I just don't. I represented Ecological.

10 Q Do you know what the bank thought?

11 A I do not. The bank was relying upon our
12 law firm to close the loan in accordance with these
13 instructions.

14 Q And also to draft documents on their
15 behalf, is that fair to say?

16 A I don't believe -- other than the power of
17 attorney, I don't think we drafted any of the
18 documents associated with this loan. I think they
19 were all bank generated.

20 Q Okay. Turn to page two of Exhibit 1.

21 A Yes.

22 Q And if you look at number, I believe
23 that's number six.

24 A Okay. Right.

25 Q It does provide for you to draft some

Janice D. Hayward, RMR
843.478.6756

1 documents. Does that change your conclusion?

2 A I guess legal description, we typically do
3 the legal description. We did not -- says it will
4 require our assistance in drafting or providing the
5 following closing documents. So it could be drafted
6 by us or could be provided by us.

7 Q Okay. There's an assignment of all leases
8 and rents?

9 A Right.

10 Q Did you all draft that?

11 A I don't recall whether there was one or
12 not. I don't recall.

13 Q And I believe there were some
14 subordination agreements as well as to the mortgages
15 of the LLC members. Do you remember if you drafted
16 those documents?

17 A I'm sorry, I don't remember. I remember
18 when I -- when Jeff had me skim these a little while
19 ago, I remember seeing something about some member
20 investment mortgages had to be subordinated. I do
21 recall that.

22 Q Do you remember the closing at all?

23 A No.

24 Q I'm sure you've had hundreds of closings
25 since 2006 at least.

Janice D. Hayward, RMR
843.478.6756

1 A Well, we've had quite a number. I don't
2 know how many we've had. We had a lot more before
3 the recession occurred. That's for certain.

4 Q So you don't remember whether you actually
5 saw the executed power of attorney, which I think is
6 Exhibit 6 on the day of the closing or not, do you?

7 A I don't have any specific recollection of
8 what I did see and didn't see. I do know that our
9 office drafted it.

10 And I know that when we send
11 stuff through our courier to the courthouse, if
12 something has to be recorded before another thing,
13 we'll put down in the bottom for our, whoever is
14 going to manually record them.

15 And this says, has to be
16 recorded first. So I know that that was done by our
17 office.

18 And it said the mortgage,
19 Exhibit 8, was recorded second. So we wanted to be
20 sure that the power of attorney was recorded first.

21 So I did see it on closing
22 because after closing you typically try to rearrange
23 everything and make sure we had everything done.

24 Q Do you remember who asked for the power of
25 attorney?

Janice D. Hayward, RMR
843.478.6756

1 A I'm sorry, I do not. I would -- it would
2 just be an assumption. I do not.

3 Q Let's turn back to Exhibit 1. And I'll
4 ask you to review it, but I don't see anything in
5 there requesting a power of attorney. Do you?

6 A I'll take your word for it.

7 Q Also, there's no instructions in there for
8 you to draft an attorney opinion letter, is there?

9 A Again, I'll take your word for that.

10 Q Why do you think your office drafted this
11 power of attorney?

12 A It would be something that our office
13 routinely does when the situation arises.

14 Q And the reason, one of the reasons I'm
15 asking is you did provide your entire file and
16 noticeably absent from that file is this power of
17 attorney and really anything related to this loan
18 closing itself. Do you know why that is?

19 A No, I sure don't. I thought we gave you
20 everything that I had.

21 Q And you may have. But from my review of
22 it, I see a lot of documents from 2000, 2001, and
23 then some documents from 2008 when I think there was
24 a modification. But I don't remember seeing --
25 except maybe an invoice from 2006.

Janice D. Hayward, RMR
843.478.6756

1 A I don't know whether we missed a file in
2 the warehouse. That's the first I've heard that you
3 all didn't have the closing documents from this
4 specific closing. So I apologize.

5 MR. GASKINS: And we can go off the
6 record for a second.

7 (The deposition went off the record.)

8 BY MR. GASKINS:

9 Q Earlier you were talking about the, I
10 think, 2001 closing?

11 A The original --

12 Q The original, yes.

13 A Yes, we were involved in that.

14 Q And you represented Ecological Investments
15 in that as well?

16 A That's correct.

17 Q Do you remember drafting a power of
18 attorney for Mr. Brust in that closing?

19 A Either Jeff or Robert has indicated that,
20 yes, that there is one. Do I have any specific
21 recollection of it? No, but I'll be happy to give
22 you my -- be happy to look at it if you'd like me
23 to.

24 MR. GASKINS: And you can just keep
25 numbering, Jan, unless he's got an

Janice D. Hayward, RMR
843.478.6756

1 objection to that.

2 (Marked for identification was Defendants'
3 Exhibit 1.)

4 BY MR. GASKINS:

5 Q Mr. Finger, I've handed you what's been
6 marked as Exhibit 1, I guess Defendant's Exhibit 1,
7 which appears to be a power of attorney drafted for
8 Mr. Brust that is very similar to Exhibit 6.

9 A I have it in hand, yes.

10 Q Okay. And if you could look at Exhibit 6,
11 Plaintiff's Exhibit 6 next to Defendant's Exhibit 1
12 and compare them, I would appreciate it.

13 A Okay. I have them side by side.

14 Q Okay. And you would agree they appear
15 very similar?

16 A You know, the specific limited powers of
17 attorney, you know, have a computer shelf life. And
18 when you need one, as I understand it, 'cause I'm
19 not that good at it, a paralegal will go in and find
20 one and change the names and update it, and it will
21 just keep -- they kind of take a life of their own.
22 So there might be a couple different variations that
23 are in the computer system.

24 Q I understand.

25 A Okay.

Janice D. Hayward, RMR
843.478.6756

1 Q But I mean, I guess my question is do you
2 think you prepared the power of attorney in
3 Defendant's Exhibit 1 as well?

4 A I believe our office probably prepared
5 Exhibit 1 also.

6 Q And how would you get this to Mr. Brust?

7 A I don't recall. Sometimes it's faxed.
8 Sometimes it's emailed. Sometimes it's mailed.
9 Sometimes it's taken by somebody else who's
10 affiliated or he comes by and picks it up. I just
11 don't recall.

12 Q You think it's possible you could have
13 emailed it as a Word document?

14 A 2006?

15 Q Well, this would have been 2001.

16 A 2001, I'm just wondering how much email
17 was going on back that long ago. I don't recall.
18 It's possible. I can tell you in 2001 we were
19 probably not using Word. We were probably using
20 WordPerfect.

21 Q Okay.

22 A To the extent that makes any difference.

23 Q Maybe it does.

24 A I don't know.

25 Q And on both Exhibit 1 -- Defendant's

Janice D. Hayward, RMR
843.478.6756

1 Exhibit 1 and Plaintiff's Exhibit 6, there's a stamp
2 up there. The 2001 says Finger & Andrews, and the
3 2006 says Finger, Fraser & Andrews. Is this a stamp
4 you would have put on it prior to recording?

5 A Prior to sending it to the courthouse to
6 record, correct.

7 Q So it wouldn't go to Mr. Brust with that
8 stamp on it?

9 A Probably not.

10 Q That would be something that you would
11 stamp on it after the loan is closed and then take
12 it to record?

13 A Typically, correct.

14 Q All right. I want you to look a little
15 bit more closely at Defendant's Exhibit 1. And you
16 were asked to read in Exhibit 6 what documents this
17 allowed the attorney in fact to sign.

18 And I want you to look at that
19 same language or the similar language in Defendant's
20 Exhibit 1. And do you notice that it specifically
21 mentions guaranty?

22 A Exhibit 1 does have guaranty in it,
23 correct.

24 Q And Exhibit -- Plaintiff's Exhibit 6 does
25 not have guaranty in it, does it?

Janice D. Hayward, RMR
843.478.6756

1 A That's correct.

2 Q And other than the fact that the bank's
3 names have changed and the amount has changed and
4 then the final date just above the signature, it
5 appears to me that these two powers of attorney are
6 nearly identical with the added exception that the
7 2006 power of attorney does not include a guaranty
8 as a document that is specifically authorized to be
9 signed by the attorney in fact. Would you agree
10 with that?

11 A Guaranty is in one. It is not in the
12 other. That is correct. Everything else seems to
13 be fairly close other than Exhibit 1 has justified
14 margins. So whoever did these two, somebody paid a
15 little more attention to Exhibit 1.

16 Q And it looks like, if you look at the top,
17 the power of attorney on the 2006 went over onto the
18 next line which was X'ed out and something was typed
19 in there, whereas it's all on one line in 2006
20 (sic)?

21 A Correct. And then Mr. Cornelius (sic) is
22 living on Hilton Head in Exhibit 1. He's living in
23 North Carolina in Exhibit 2 (sic).

24 Q That's a good point.

25 A And it's got Rosenberg as an alternate

1 signer.

2 Q And Rosenberg?

3 A And Rosenberg. Those appear to be the
4 substantive differences.

5 Q For -- since the guaranty was mentioned,
6 specifically referenced in the 2001 version, doesn't
7 it appear to you that it was intentionally removed
8 in the 2006 version?

9 A I don't believe I could say that with any
10 certainty. It just appears to be, again, a
11 different form. Exhibit 1 does not appear to be the
12 document that was pulled out of the computer when
13 they did Exhibit 6 because of the margins being
14 justified and being different, so.

15 Somebody in our office just went
16 in and grabbed a power of attorney off the --

17 Q Well, it looks like they grabbed the same
18 one.

19 A I'm not sure I agree with that. You have
20 justified margins on Exhibit 1, and you do not on
21 Exhibit 6. I think if you grabbed the same one
22 you'd end up with the same justified margins.

23 Q Okay.

24 A I'm not a computer expert by any means and
25 I'm certainly not a WordPerfect or a Word expert,

Janice D. Hayward, RMR
843.478.6756

1 but my hunch is that whoever drafted Exhibit 6 just
2 went into the system and found a specific power of
3 attorney and edited that one as opposed to taking
4 Exhibit 1 and editing Exhibit 1. May be wrong,
5 don't know.

6 Q And that's all an assumption, right? I
7 mean, really, you don't know who drafted this one?

8 A I don't know who in my office drafted
9 either one.

10 Q Isn't it possible that Mr. Brust could
11 have had a Word version of this document and went
12 into it and modified it and took out guaranty?

13 A I think anything's possible.

14 Q But in any case, there's no requirement or
15 no authorization for the attorney in fact to sign a
16 guaranty expressly in the 2006 power of attorney, is
17 there?

18 A The word guaranty does not appear in
19 Exhibit 6. And again, someone will have to decide
20 whether the other language in Exhibit 6 includes a
21 guaranty. That's not something I can make an
22 ultimate decision on, obviously.

23 Q Do you know if Mr. Brust ever saw the
24 guaranty before it was executed by Mr. Rosenberg on
25 his behalf?

Janice D. Hayward, RMR
843.478.6756

1 A I do not know.

2 Q Who were you dealing with at the bank on
3 this loan? Was it Patrick Wright?

4 A That's who the letter is from, but I don't
5 remember what we dealt with. I'm not sure I
6 remember who we dealt with. Seems like there might
7 have been a local loan officer that we had some
8 dealings with but I don't recall.

9 Q And I believe Mr. Silver asked you about
10 your communications with Mr. Brust regarding the
11 power of attorney and the guaranty. I'm not sure he
12 asked you about any communications you may have had
13 with Mr. Rosenberg. Do you remember discussing
14 either the guaranty or the power of attorney with
15 him?

16 A I don't have any specific recollection. I
17 think Rosenberg was at the closing.

18 Q Was that the first time that you learned
19 that Mr. Brust wouldn't be coming?

20 A We probably knew that or we wouldn't have
21 done the power of attorney.

22 Q That's based on the assumption that your
23 office did the power of attorney?

24 A That's correct.

25 Q Do you have any way of knowing if the --

Janice D. Hayward, RMR
843.478.6756

1 who the power of attorney was delivered to, whether
2 it was you or Mr. Rosenberg?

3 A Talking about the 2006 power of attorney?

4 Q Yeah.

5 A I don't remember whether it was sent
6 directly back to us or was brought to us by
7 Rosenberg. I don't recall.

8 Q As soon as you're appointed the power of
9 attorney -- or not power of attorney, the attorney
10 in fact, would it have been your standard practice
11 to have discussions with the principal about the
12 scope of that power of attorney?

13 A It is my common practice to have
14 conversations with people that I sign for about the
15 entire transaction.

16 Q Since you weren't signing on this
17 transaction, did you have that conversation with
18 Mr. Brust?

19 A I don't recall whether I did or not. I
20 just don't remember.

21 Q This power of attorney says a specific
22 limited. What does that mean to you?

23 A Kind of the opposite of a general durable.
24 So it's typically a one transaction power of
25 attorney.

Janice D. Hayward, RMR
843.478.6756

1 Q So specific usually to one transaction
2 or --

3 A One series of transactions.

4 Q One series of transactions --

5 A Right.

6 Q -- that's been clearly identified?

7 A That's my understanding, yes.

8 Q And limited means it's limited in scope,
9 usually only to that specific transaction or series
10 of transactions? Is that a -- would you agree with
11 that?

12 A I agree with that.

13 Q Okay. Now, I note that Mr. Silver asked
14 you to give your opinion on whether you thought the
15 power of attorney authorized Mr. Rosenberg to sign
16 the guaranty. Did you have a chance to review the
17 guaranty that closely before you gave that opinion?

18 A He asked me to identify it. I did not
19 read it. I'm sorry, the question again is?

20 Q I was just asking if before you answered
21 that question did you have a chance to review that
22 guaranty closely?

23 A No, I didn't review it closely.

24 Q Let's go through it 'cause you probably
25 will not find it surprising that I take a little

Janice D. Hayward, RMR
843.478.6756

1 different view than Mr. Silver.

2 A Okay. Go ahead.

3 Q I want to start with A and B. And knowing
4 that -- you see the sections A and B?

5 A I do.

6 Q And knowing that this is being executed
7 pursuant to a specific limited power of attorney
8 that was drafted expressly for one loan, do you have
9 an opinion, or wouldn't you agree that consistent
10 with the power of attorney in the commitment letter,
11 that box A instead of B should have been checked?

12 A I'll tell you that my experience with
13 banks over the last 15 years is that they will try
14 to, in a guaranty, tie you up for everything
15 forever. So is it surprising that B is checked as
16 opposed to A? It's not surprising to me.

17 Q But I guess my question is -- and no, it
18 doesn't, I don't think it surprises anybody in here.

19 But seeing that it was being
20 executed pursuant to a specific limited power of
21 attorney, wouldn't the better practice have been to
22 check box A instead of B?

23 A I didn't check B.

24 Q And I understand that. I think we've
25 established that the bank did.

Janice D. Hayward, RMR
843.478.6756

1 A Right.

2 Q Okay. And prior to the bank checking
3 anything, do you think they have a duty to confer
4 with the guarantor to determine which box should be
5 checked?

6 A Does the bank have an obligation to confer
7 with the guarantor about which box will be checked?

8 Q Yeah, an obligation or a duty.

9 A I don't have an opinion on that.
10 Guaranties from the banks are always as broad as a
11 bank can make them. Paragraph four says its
12 principal amount is unlimited. Again, that's
13 seemingly at odds with what this guaranty was for.

14 Q Certainly what the power of attorney was
15 for, wouldn't you agree with that?

16 A Well, the power of attorney in my opinion
17 says any documents that are related to this
18 transaction can be signed by Mr. Rosenberg or me.

19 And so I can tell you that in
20 closings in the past, when I go over guaranties and
21 if somebody doesn't like it, we get the banker on
22 the phone, say, wait a minute.

23 I did a loan for a church about
24 three weeks ago and there was an assignment of
25 rents, leases and profits that was in the loan

Janice D. Hayward, RMR
843.478.6756

1 documents that was not in the commitment letter, and
2 called the banker and said, yeah, it shouldn't be
3 there. So it's happened.

4 Have I had guarantors in the
5 past say, wait a minute, this is the wrong box, I'm
6 not giving you an unlimited forever -- yeah, that
7 conversation's been had, usually at the closing
8 table.

9 Q Do you know if the bank -- since Mr. Brust
10 wasn't at the closing table, do you know if the bank
11 afforded him that opportunity to review the
12 documents and raise any objections regarding its
13 scope?

14 A I don't know. I can only assume that the
15 guaranty for Rosenberg was identical, and that would
16 have been something that Rosenberg and I typically
17 would have discussed at a closing, what the terms of
18 the guaranty are.

19 Q Do you know if Mr. Rosenberg discussed it
20 with Mr. Brust?

21 A I do not.

22 Q Do you know if the guaranty itself,
23 whether you provided the guaranty itself to
24 Mr. Brust?

25 A I don't recall. I'll tell you that we

Janice D. Hayward, RMR
843.478.6756

RECORD 0466

1 typically provide copies of all the documentation
2 once they're signed to everybody who has a role in
3 the closing.

4 Q I think that's all I have.

5 THE WITNESS: Another bite at the
6 apple?

7 EXAMINATION

8 BY MR. SILVER:

9 Q I think in Defendant's Exhibit 1, which is
10 the specific limited power of attorney from the
11 Lighthouse loan, and you signed all of the documents
12 relating to that loan on behalf of Mr. Brust,
13 correct, pursuant to that specific power of
14 attorney?

15 A I believe that's correct.

16 Q Okay. I know I've got three sets of these
17 things here.

18 (Marked for identification was Plaintiff's
19 Exhibit 9.)

20 BY MR. SILVER:

21 Q Do you recognize this document,
22 Mr. Finger, Terry?

23 A Looks to be a guaranty agreement.

24 Q And --

25 A August of 2001.

Janice D. Hayward, RMR
843.478.6756

1 Q And what loan does that apply to?

2 A The Lighthouse. It's Rosenberg, Rosenberg
3 and Brust.

4 Q Okay. And I think we've discussed
5 Defendant's Exhibit 1 is the specific limited power
6 of attorney authorizing you on behalf of Mr. Brust
7 to sign certain documents, listed documents,
8 correct?

9 A Correct.

10 Q One of which is this guaranty agreement,
11 correct?

12 A Correct.

13 Q Okay.

14 (Marked for identification was Plaintiff's
15 Exhibit 10.)

16 BY MR. SILVER:

17 Q This is Exhibit 10. What is this document
18 entitled?

19 A Collateral assignments of securities
20 account.

21 Q And who is it between?

22 A Philip Brust and Lighthouse Community
23 Bank.

24 Q And on page 190 who signed as the
25 assignor?

Janice D. Hayward, RMR
843.478.6756

RECORD 0468

1 A I signed it on behalf of Mr. Brust.

2 Q Pursuant to that power of attorney?

3 A Correct.

4 (Marked for identification was Plaintiff's
5 Exhibit 11.)

6 BY MR. SILVER:

7 Q Okay. What is this document?

8 A This is entitled restricted account
9 agreement.

10 Q Between who?

11 A Philip J. Brust, Sterne, Agee & Leach,
12 Inc.

13 Q Okay. And in the third, or the second
14 whereas paragraph, who does it say this document
15 relates to?

16 A Loan to (sic) Lighthouse Community Bank
17 from (sic) Ecological Investments.

18 Q In the amount of --

19 A \$1.4 million.

20 Q And on page 173, who signed as
21 participant?

22 A Again, pursuant to the power, I signed it
23 on behalf of Mr. Brust.

24 Q Okay.

25 (Marked for identification was Plaintiff's

Janice D. Hayward, RMR
843.478.6756

1 Exhibit 12.)

2 BY MR. SILVER:

3 Q Can you enlighten me on what this document
4 is?

5 A It's a letter dated August 17th, 2001 to
6 Ecological Investments. It's referenced, line of
7 credit loan commitment.

8 Q Okay. And your law firm closed this loan,
9 correct?

10 A That's correct.

11 Q If you go to the second to the last
12 page -- I'm sorry -- to the last page which is,
13 looks like it was a faxed sheet. Who signed this on
14 behalf of Mr. Brust?

15 A Again, I did on his behalf pursuant to the
16 power of attorney.

17 Q Okay. Got one more and then I'll stop.

18 (Marked for identification was Plaintiff's
19 Exhibit 13.)

20 BY MR. SILVER:

21 Q Tell me what this document is.

22 A This is a loan agreement between
23 Ecological Investments, John Rosenberg, Rebecca
24 Rosenberg, Philip Brust and Lighthouse Community
25 Bank.

1 Q Dated?

2 A August 23rd, 2001.

3 Q And in paragraph one does it relate to the
4 \$1,400,000?

5 A Yes.

6 Q Same loan we've been talking about?

7 A Yes.

8 Q And if you go to the last page, page 12,
9 or the Bate stamp 188, who signed for Mr. Brust?

10 A I did pursuant to the power.

11 Q Now -- and what number is this one, 13?

12 Now, the documents, is Number 9
13 the guaranty agreement?

14 A It is.

15 Q So Number 9 is specifically referenced in
16 the specific limited power of attorney. It's signed
17 by Mr. Brust, authorizes you as attorney in fact to
18 execute on his behalf, correct?

19 A Correct.

20 Q Okay. Is the collateral assignment of
21 securities account, Number 10, specifically listed?

22 A It is not. Collateral assignment of
23 securities account is not specifically listed.

24 Q How about the commitment letter -- I'm
25 sorry, let me back up. The restricted account

Janice D. Hayward, RMR
843.478.6756

1 letter, which is Number 11?

2 A Same answer.

3 Q How about Number 12 which is the
4 commitment letter?

5 A It is not specifically mentioned.

6 Q How about Number 13, the loan agreement?

7 A It's not specifically listed.

8 Q Okay. Under what authority did you rely
9 on in signing those documents on Mr. Brust's behalf
10 pursuant to that specific limited power of attorney?
11 What language?

12 A The basic language that says perform any
13 act or execute any document which may be involved in
14 the financing, including but not necessarily limited
15 to, lists a number of documents, and it says or to
16 execute any such other documents as may be necessary
17 to close the financing transaction.

18 Q Is that language somewhat similar to the
19 language in the specific limited power of attorney
20 signed by Mr. Brust authorizing you or Mr. Rosenberg
21 to sign as his attorney in fact which is Number 6?

22 A I believe the language is very close if
23 not identical.

24 Q Okay.

25 MR. SILVER: I have no further

Janice D. Hayward, RMR
843.478.6756

1 questions.

2 MR. GASKINS: That's all I have.

3 (The deposition was concluded at

4 4:21 p.m.)

5 ---oOo---

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Janice D. Hayward, RMR
843.478.6756