

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable William H. Seals, Jr., Circuit Court Judge

Case No. 2014-CP-26-08348
Appellate Case No. 2016-000174

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FEB 12 2016

SC Court of Appeals

TD Bank, N.A., Appellant,

v.

Cypress Camping Resort, LLC, and South Carolina
Department of Motor Vehicles, Defendants,

Of whom Cypress Camping Resort, LLC, is the, Respondent.

**MEMORANDUM REGARDING APPEAL FROM AN ORDER DENYING THE
PROPER MODE OF TRIAL**

On February 3, 2016, this Court requested that each party file a memorandum on the issue of whether the order on appeal is immediately appealable based on the Clerk's "preliminary review of the order(s) challenged on appeal." The circuit court's Orders are immediately appealable as they deprive TD Bank, N.A. ("TD Bank") of the proper mode of trial, a substantial right under South Carolina.

Introduction

The Form 4 Orders the Clerk's office preliminarily reviewed reveal nothing about the nature of this appeal. Thus, it is understandable that this memorandum is necessary at this stage of the proceeding to ensure the appeal is properly before the Court. The Court and this Clerk's office can have every positive assurance the Order is immediately appealable as this is an appeal from an Order denying TD Bank its right to a bench trial.

Therefore, the appeal is one that affects the proper mode of trial and is appealable under S.C. Code Ann. § 14-3-330(2).

A review of TD Bank's motion seeking to have the circuit court strike the jury demand and compel this matter to bench trial reveals the nature of the appeal. This Court should not and cannot dismiss this appeal. Should it do so, the Bank will be required to seek rehearing and then certiorari review wasting valuable court time and the parties' resources. As the cited authorities establish, because the appeal affects the substantial right of the proper mode of trial, were TD Bank to have elected *not* to immediately appeal, it would have forever waived its right to the proper mode of trial—a bench trial in this instance.

Authority on Propriety of the Appeal

TD Bank properly appealed from the trial court's ruling it was not entitled to a bench trial. The proper mode of trial is a substantial right. *Frampton v. S. Carolina Dep't of Transp.*, 406 S.C. 377, 385, 752 S.E.2d 269, 274 (Ct. App. 2013).

A. Mode of trial issues must be immediately appealed.

There is no question under South Carolina law that mode of trial issues are immediately appealable. In *Frampton*, this Court unequivocally held that when the circuit court denies a party's request for a matter to be tried by bench trial, the party must **immediately** appeal or forever waive the right to that mode of trial. 406 S.C. at 385, 752 S.E.2d at 274. Specifically, this Court held "[o]rders affecting the mode of trial affect a substantial right as defined in section 14-3-330(2) of the South Carolina Code (1976)." *Id.* This Court reasoned that the issue had to be immediately appealed prior to trial because the circuit court's denial of the request for a bench trial "could not be overturned

by the trial judge who eventually tried the case.” *Id.* at 386, 752 S.E.2d at 274 (citing *Cook v. Taylor*, 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979) (one circuit judge does not have the power to reverse an order of another circuit judge regarding the proper mode of trial); *Cobb v. S.C. Dep’t of Transp.*, 365 S.C. 360, 363, 618 S.E.2d 299, 300 (2005) (“If an order deprives a party of a mode of trial to which that party is entitled as a matter of right, the order is immediately appealable and failure to do so forever bars appellate review.”)). The same is true here, had TD Bank not appealed, the issue could never be reviewed thereby making it immediately reviewable under section 14-3-330(2).

Frampton is of course in line with numerous authorities from the South Carolina Supreme Court, many of which are cited in the *Frampton* decision. All cases of record in South Carolina reach the conclusion that the denial of the proper mode of trial is an order that is immediately appealable and, in fact, must be appealed prior to trial or else the issue will not be preserved. *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) (“[O]rders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14-3-330(2) (1977) and must, therefore, be appealed immediately.”); *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 103, 431 S.E.2d 587, 590 (1993) (“Issues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable.”); *Pelfrey v. Bank of Greer*, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978) (holding that denial of a bench trial “affects the mode of trial” and is, therefore, immediately appealable).

Issues concerning mode of trial are of such import, many of the cases are at the infant stages of the proceeding when on appeal demonstrating the need for immediate review. See *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 292, 778 S.E.2d 106,

108 (2015), *reh'g granted* (Apr. 9, 2015), *reh'g dismissed* (Nov. 6, 2015) (deciding the appeal of an order affecting the mode of trial prior to trial); *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 333, 755 S.E.2d 437, 443 (2014), *reh'g denied* (Apr. 2, 2014) (deciding the appeal of an order affecting the mode of trial prior to trial).

“Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue.” *Lester* at 266, 491 S.E.2d at 241; *see also Frampton*, 406 S.C. 377, 752 S.E.2d 269. Accordingly, TD Bank is required by South Carolina law to appeal the mode of trial issue, and this Court should find that these orders are immediately appealable in accordance with the well-settled law of South Carolina.

B. The orders here concern mode of trial.

The orders appealed from are the trial court’s rulings on TD Bank’s Motion to Strike Respondent’s Jury Demand seeking for the circuit court to set the case for bench trial and TD Bank’s Motion for Reconsideration of the trial court’s ruling on the motion seeking to have the matter tried by bench trial. A copy of the motion on appeal is attached hereto as **Exhibit A**. In the motion, TD Bank argued it is entitled to a bench trial because Respondent has waived its right to a jury trial in this matter by contract. (See Exhibit A at p. 1; *see also* TD Bank’s memorandum in support of the motion, attached hereto as **Exhibit B**.)

As shown by the arguments in the briefing to the circuit court, TD Bank moved the court to strike Respondent’s jury demand and argued that “[Respondent] has waived its right to a jury in this matter and TD Bank is entitled to a bench trial.” (Exhibit A at p. 1.) TD Bank filed its demand for a bench trial pursuant to Rule 39, SCRPC. (*Id.*) TD Bank properly argued that the circuit court should enforce the written jury trial waiver

and strike the Respondent's demand for a jury trial. (Exhibit B at p. 4.) The circuit court, however, disagreed and denied the relief sought—to have this matter tried by bench trial and the Respondent's jury demand stricken.

In this appeal, TD Bank will show that it is entitled to a bench trial in this matter. First, Respondent waived its right to a jury trial by executing a Construction Loan Agreement containing a jury waiver provision encompassing the claims in this matter. (See Exhibit A at p. 1 and Exhibit B at pp. 2-4.) Respondent also waived its right to a jury trial by asserting counterclaims which are not legal and compulsory in this equitable foreclosure action. (See Exhibit A at p. 2 and Exhibit B at pp. 4-7.) In denying the Bank's request for the matter to be tried by bench trial, the circuit court deprived TD Bank to the proper mode of trial to which it is entitled. The appeal is therefore properly filed and TD Bank looks forward to arguing the merits of the issue to the Court.¹

Conclusion

This Court should retain this appeal based on the above and allow the parties to properly perfect the appeal under the Rules. Should the Court determine that these orders are not immediately appealable, TD Bank will be required to seek certiorari as the mode of trial issue must be decided prior to the trial of this matter or else both parties risk extreme prejudice. See *Frampton*, 406 S.C. 377, 752 S.E.2d 269.

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¹ TD Bank does not waive any of its arguments on appeal by not addressing each ground for appeal or argument as to why the circuit court erred herein. This memorandum only serves to address the inquiry on appealability.

Respectfully submitted,

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Attorneys for Appellant TD Bank, N.A.

Columbia, South Carolina
February 12, 2016.

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Department of Motor Vehicles, Defendants,

Of whom Cypress Camping Resort, LLC, is the Respondent.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for TD Bank, N.A., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

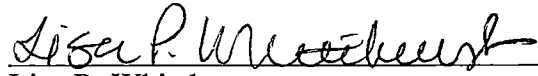
Pleadings:

Memorandum Regarding Appeal From an Order Denying
the Proper Mode of Trial

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Lisa P. Whitehurst
Administrative Assistant

February 12, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

TD Bank, N.A.,)
)
Plaintiff,)

Civil Action No. 2014-CP-26-8348

vs.)

MOTION TO STRIKE
DEFENDANT'S JURY DEMAND

Cypress Camping Resort, LLC, and)
South Carolina Department of Motor)
Vehicles,)
)
Defendants.)

HORRY COUNTY
2015 MAY 13 PM 12:46
KELLY M. HIGDON-PAW
CLERK OF COURT

**TO: RICHARD R. GLEISSNER, ESQUIRE, ATTORNEY FOR DEFENDANT
CYPRESS CAMPING RESORT, LLC:**

YOU WILL PLEASE TAKE NOTICE that Plaintiff TD Bank, N.A. ("TD Bank"), hereby moves pursuant to Rule 39 of the South Carolina Rules of Civil Procedure to strike the jury demand of Defendant Cypress Camping Resort, LLC ("Defendant").

This is a foreclosure action on a construction loan to Defendant. Defendant filed counterclaims in this action and has demanded a jury trial. However, Defendant waived its right to a jury trial in this matter in the Construction Loan Agreement it executed on December 20, 2011 ("Agreement"). A copy of this Agreement is attached hereto as Exhibit A and is incorporated herein. More specifically, Defendant waived "any right to a trial by jury in any action arising from or related to" the Agreement. Ex. A ¶ 8.14. The loan which is the subject of this action was made pursuant to this Agreement and, therefore, this action arises from or relates to the Agreement. As such, Defendant has waived its right to a jury in this matter and TD Bank is entitled to a bench trial.

EXHIBIT
A

Additionally, Defendant is not entitled to a jury trial on Plaintiff's equitable foreclosure action, and Defendant's counterclaims are not legal and compulsory. Therefore, Defendant waived any right to a jury trial on those counterclaims by asserting them in this equitable foreclosure action.

For both of these reasons, Defendant's demand for a jury trial in this matter should be stricken.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Attorneys for Plaintiff TD Bank, N.A.

Columbia, South Carolina

May 12, 2015

CONSTRUCTION LOAN AGREEMENT

THIS CONSTRUCTION LOAN AGREEMENT (the "Agreement") is made and entered into this 20th day of December, 2011, by and among Cypress Camping Resort, LLC, (the "Borrower"), Kenneth A. Hucks and Kenlar Investments, LLC (collectively, whether one or more, the "Guarantor") and TD BANK, N.A. (the "Lender").

WITNESSETH:

The Borrower has applied to the Lender for certain financing more particularly described hereinafter and the Lender is willing to extend such financing to the Borrower upon compliance by the Borrower with the terms and provisions hereof. Therefore, in consideration of the mutual covenants, terms, provisions and conditions set forth hereinafter and of the financing identified hereinafter to be provided by the Lender to the Borrower and for other good and valuable consideration, the receipt and sufficiency of all of which are hereby acknowledged, the Borrower, the Guarantor and the Lender hereby agree as follows:

ARTICLE ONE DEFINITIONS

As used in this Agreement, the following terms shall have the following meanings:

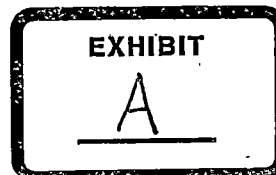
1.1 ADVANCES. All advances of Loan proceeds hereunder made by the Lender to or for the benefit of the Borrower to enable the Improvements to be constructed and/or renovated (as the case may be) and which may consist of Direct Costs and Indirect Costs, less any retainages and Inspecting Agent fees provided hereinafter.

1.2 ARCHITECT. The Architect(s), whether one or more, that shall be engaged by the Borrower to design all or portions of the Improvements, to prepare all or portions of the Plans, and to render other architectural services related thereto.

1.3 ARCHITECT'S CONTRACT. The Agreement(s), whether one or more, between Borrower and the Architect for the development of the Plans and for other architectural services related to the design and construction and/or renovation (as the case may be) of the Improvements.

1.4 ASSIGNMENT. The Assignment of Contracts, Contract Rights, Deposits, Leases, Rents and Revenues executed by the Borrower to the Lender herewith as security for the Obligations.

1.5 BUDGET. The Development Cost Analysis attached hereto and incorporated herein as Exhibit "C".



1.6 CLOSING. The date of the execution and delivery hereof by the Obligors and the Lender.

1.7 CONSTRUCTION ASSIGNMENT. The Assignment of Construction Documents now or hereafter executed by and among the Borrower, the Contractor, the Architect, and the Engineer and delivered to the Lender as security for the Obligations.

1.8 CONSTRUCTION CONTRACT. The Agreement(s), whether one or more, between Borrower and the Contractor for the construction and/or renovation (as the case may be) of the Improvements and for other construction services related thereto.

1.9 CONSTRUCTION COSTS. All costs to be incurred by the Borrower in the construction and/or renovation (as the case may be) of the Improvements consisting, collectively, of the Direct Costs and the Indirect Costs.

1.10 CONSTRUCTION DOCUMENTS. Collectively, the Construction Contract, the Architect's Contract, the Engineer's Contract, the Plans, and any construction bonds and all other documents enumerated in Section 3.6 hereinafter.

1.11 CONTRACTOR. The licensed general contractor(s), whether one or more, that shall be engaged by the Borrower to construct all or portions of the Improvements and to render other construction services related thereto.

1.12 DIRECT COSTS. All expenditures, excluding Indirect Costs, incurred or to be incurred by and/or chargeable to the Borrower for, as applicable, site preparation, installation of utilities, infrastructure and landscaping at the Property, and for the furnishing of labor and materials pursuant to the Construction Contract in connection with the construction and/or renovation (as the case may be) of the Improvements.

1.13 ENGINEER. The Engineer(s), whether one or more, that shall be engaged by the Borrower to design all or portions of the sitework and infrastructure for the Property and all or pertinent portions of the Improvements, to prepare all or portions of the Plans, and to render other engineering services related thereto.

1.14 ENGINEER'S CONTRACT. The Agreement(s), whether one or more, between Borrower and the Engineer for the development of all or pertinent portions of the Plans and for other engineering services related to the design and construction and/or renovation (as the case may be) of the Improvements.

1.15 GOVERNMENTAL AUTHORITIES. Any federal, state or local governmental, quasi-governmental or regulatory authority, agency, department, commission, board, bureau, instrumentality or subdivision, including courts, tribunals and arbitrators.

1.16 GOVERNMENTAL REQUIREMENTS. All laws, ordinances, orders, rules or regulations of all Governmental Authorities, including without limitation zoning ordinances,

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subdivision regulations, building codes, environmental regulations, public health regulations, fire protection codes, and all other laws, ordinances, orders, rules or regulations imposed by applicable Governmental Authorities.

1.17 GUARANTY AGREEMENT. Collectively (if more than one), the Guaranty Agreement(s) of even date from the Guarantor to the Lender securing the Obligations.

1.18 HAZARDOUS MATERIALS. Any substance (i) which is or becomes defined as a "hazardous waste", "hazardous substance", pollutant or contaminant under any Governmental Requirement relating to the protection of human health or the environment including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. Section 9601, et. seq.), and the Resource Conservation and Recovery Act (42 U.S.C. Section 6903, et. seq.), (ii) the presence of which requires investigation or remediation under any Governmental Requirement relating to the protection of human health or the environment; (iii) which is toxic, explosive, corrosive, flammable, infectious, radioactive, carcinogenic, mutagenic, or otherwise hazardous and is or may become regulated by any Governmental Authorities; (iv) the presence of which on the Property causes or threatens to cause a nuisance upon the Property or to adjacent properties, or poses or threatens to pose a hazard to the health or safety of persons on or about the Property or adjacent properties; (v) the presence of which on adjacent properties could constitute a trespass thereon by the Borrower; or (vi) which contains gasoline, diesel fuel, other petroleum hydrocarbons, asbestos, asbestos-containing materials, formaldehyde, or polychlorinated biphenyls.

1.19 IMPROVEMENTS. A campground to be constructed and/or renovated (as the case may be) upon the Property, and (as applicable) related infrastructure, utility lines and appurtenance, landscaping and on-site improvements.

1.20 INDIRECT COSTS. All expenditures incurred or to be incurred by the Borrower in connection with or incidental to the closing and administration of the Loan and the construction and operation of the Improvements set forth in the Budget, other than Direct Costs, including without limitation a loan commitment fee of \$ None, recording fees, documentary stamps, title insurance premiums, surveyors' charges, architectural fees, engineering fees, insurance premiums, bond premiums, appraisal fees, environmental assessment charges, soils tests, inspection fees, attorneys' fees, taxes, utility charges, and (if applicable) project administration fees, marketing fees, interest carry reserves, and/or contingency reserves.

1.21 INSPECTING AGENT. Such inspecting contractor/architect/engineer who shall be designated or employed by the Lender at the expense of the Borrower to review and approve the Plans, to review and inspect the Improvements during the course of construction and/or renovation (as the case may be), to review and approve all Draw Requests, to certify to the Lender during construction the extent to which construction and/or renovation of the Improvements has been completed and that the Improvements are being constructed and/or renovated in accordance with the Plans, and to render such other services in connection with the inspection and supervision of the construction and/or renovation of the Improvements as the Lender shall deem necessary or desirable.

1.22 LEASES. Collectively, whether one or more, all lease agreements, including, together with all guarantees of payment or performance thereof, now or hereafter entered into by the Borrower, as landlord, and tenants of the Property or of space to be constructed and/or renovated within the Improvements.

1.23 LOAN COMMITMENT. The Loan Commitment Letter from the Lender to the Borrower (if any) dated September 8, 2011 and accepted by the Obligors on September 15, 2011, a copy of which is attached hereto and incorporated herein as Exhibit "B".

1.24 LOAN DOCUMENTS. This Agreement, the Note, the Mortgage, the Assignment, the Construction Assignment, the Guaranty Agreement, any UCC financing statements from the Borrower to the Lender herewith, and any and all other Loan Documents, instruments and certificates, required to be executed and/or delivered to the Lender in connection with the Loan as required under any of the terms of this Agreement.

1.25 LOAN. The loan financing in the original maximum principal sum of Three Million Two Hundred Seventy-Five Thousand and No/100 Dollars (\$3,275,000.00) is being made available to the Borrower by the Lender herewith pursuant to this Agreement, as evidenced by the Note, inclusive of all of the Obligations, collateral and Loan Documents respecting the same.

1.26 MORTGAGE. The Mortgage, Security Agreement, and Fixture Financing Statement of even date executed by the Borrower to the Lender, as security for the Obligations and covering the Property, including the Improvements.

1.27 NOTE. The Promissory Note of even date from the Borrower to the Lender evidencing the Borrower's obligation to repay to the Lender the Loan, with interest, in accordance with the terms set forth therein.

1.28 OBLIGATIONS. All indebtedness, liabilities and obligations to be paid, performed and/or observed by the Obligors in connection with the Loan which are secured by the Mortgage and the Loan Documents and which are defined more fully therein.

1.29 OBLIGORS. Collectively, the Borrower and the Guarantor.

1.30 PLANS. All sets of final plans and specifications, including site plans, whether one or more, for construction of all or portions of the Improvements, which shall be prepared by the Architect and/or the Engineer, which shall be initialed for identification purposes by the Borrower and the Contractor and delivered to the Lender prior to disbursement of any Advances for Direct Costs, and which shall include all working and shop drawings prepared for use in connection therewith, or as may be hereafter altered by change orders approved in writing by the Lender as provided hereinafter.

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1.31 PROPERTY. That certain parcel of land, located at or along 5790 Dick Pond Road, Myrtle Beach, South Carolina 29588 in the County of Horry, State of South Carolina, being more fully described on Exhibit "A" attached hereto and incorporated herein.

1.32 SNDAs. Collectively, whether one or more, the Subordination Non-Disturbance and Attornment Agreements now or hereafter entered into by and among the Borrower, the Lender, and the tenants of such Leases as the Lender shall specify, upon forms promulgated by the Lender or otherwise satisfactory to the Lender.

1.33 SALE CONTRACTS. Collectively, whether one or more, all sales contracts, reservation agreements, pre-sale agreements, option contracts, exchange agreements, and other agreements and contracts of every nature and kind now existing or hereafter entered into by the Borrower with purchasers thereof pertaining to sales of all or portions of the Property, or any interval ownership or other interests therein, together with all modifications, extensions, renewals, revisions or guarantees of payment and performance thereof.

1.34 TITLE INSURER. Old Republic National Title Insurance Company.

1.35 TITLE COMMITMENT. The lender's title insurance commitment number Cypress 11-10-22496 issued by the Title Insurer, effective October 26, 2011 in the amount of Three Million Seven Hundred Twenty-Five Thousand and No/100 Dollars (\$3,725,000.00).

ARTICLE TWO THE LOAN TRANSACTION

2.1 FINANCING. This Agreement is executed by and among the parties hereto for the purpose of setting forth all terms and conditions with respect to the Loan and is intended to include all covenants, conditions, representations and warranties made in connection with the Loan. This Agreement shall be deemed to incorporate by reference all of the terms of the Loan Commitment, together with all of the terms set forth in all of the Loan Documents. Should any conflict arise between any terms of this Agreement and any terms of the Loan Commitment or any Loan Document, the terms of this Agreement shall prevail; except that the terms of the Note respecting the repayment obligations of the Borrower shall prevail over any inconsistent provision of this Agreement, the Loan Commitment, or any Loan Document.

2.2 EVIDENCE OF INDEBTEDNESS. Subject to and upon the terms and conditions of this Agreement, the Lender agrees to lend and to make available to the Borrower and the Borrower agrees to accept and borrow from the Lender up to a maximum principal sum of the Loan, which indebtedness shall be evidenced by the Note executed and delivered by the Borrower this date to the Lender.

2.3 COLLATERAL. The Note and all other Obligations shall be secured by the Mortgage, the Assignment, the Construction Assignment, the Guaranty Agreement, and any other collateral

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required by the Loan Commitment to be granted, pledged, assigned, hypothecated, and/or delivered to the Lender, all in accordance with the terms and provisions of this Agreement.

2.4 PURPOSES AND USES. The proceeds of the Loan shall be used only for the purposes specifically set forth in the Loan Commitment, and for no purposes other than those identified in the Loan Commitment.

ARTICLE THREE CONDITIONS PRECEDENT

The obligation of the Lender to make the Loan available to the Borrower is subject to the Borrower's obligation to execute and/or deliver to the Lender, or the waiver by the Lender of the Borrower's obligation to execute and/or deliver to the Lender, at or prior to the Closing, the following instruments and documents, all of which shall first be reviewed by and must be reasonably acceptable to the Lender and its legal counsel as to both form and substance:

3.1 LOAN DOCUMENTS. The Note, the Mortgage, the Assignment, the Construction Assignment, appropriate UCC-1 Financing Statements, the Guaranty Agreement, and the written opinion of legal counsel to the Borrower and the Guarantor with respect to various matters stipulated by the Lender, including without limitation, the validity and enforceability of the Loan Documents. At or immediately upon Closing, the Mortgage, the Assignment, the UCC-1 Financing Statements, the SNDAs, and any other Loan Documents which the Lender shall require to be recorded or filed shall be recorded and filed in the appropriate recording offices.

3.2 TITLE INSURANCE AND DOCUMENTS. The Borrower has heretofore delivered to the Lender the Title Commitment from the Title Insurer, whereby the Title Insurer shall insure the Mortgage as of the date and time of its recordation as a good and valid first priority mortgage upon the Property without exception other than as set forth in the Title Commitment, subject only to the review and approval by the Lender of all exceptions set forth therein and subject to fulfillment of the requirements precedent to the issuance of the final mortgagee title insurance policy and endorsements as are set forth in the Title Commitment. The Borrower covenants and agrees to provide to the Lender prior to Closing, for review and approval, copies of all exceptions to title listed in Schedule B-2 of the Title Commitment, and appropriate owner's and contractor's affidavit and lien waiver forms. Immediately upon recordation of the Mortgage, the Borrower shall cause the Title Insurer to issue and deliver to the Lender the final mortgagee title insurance policy insuring the Mortgage as a good and valid first mortgage upon the Property as of the date and time of recording thereof, in conformity with the Title Commitment and without exception other than previously set forth in the Title Commitment and thereafter approved by the Lender.

3.3 SURVEY. The Borrower shall submit to the Lender an ALTA/ACSM survey of the Property prepared by a registered South Carolina land surveyor acceptable to the Lender, certified to the Lender and the Title Insurer, completed no more than sixty (60) days prior to the date hereof. The survey shall set forth, at a minimum, the following items pertaining to the Property: (1) the courses and measured distances of all exterior property lines, building set-back lines and easements; (2) the total area within the exterior boundaries expressed in square footage

[Handwritten initials]

and/or acreage; (3) all curb cuts and means of ingress and egress; (4) the location and dimensions of all encroachments by or onto the Property; (5) the location and the dimensions of all existing Improvements upon the Property; (6) a certification or other evidence satisfactory to the Lender that all abutting streets and other means of ingress and egress abutting the Property have been completed, dedicated and accepted for public maintenance and public use and that all sanitary sewer lines, water lines, and other utility lines servicing the Property enter the Property from such abutting public streets; (7) a certification that no portion of the Improvements are situated within a flood hazard area, as defined in the Flood Disaster Protection Act of 1973, as amended from time to time; (8) a certification that there are no other easements, rights-of-way, party walls, encroachments, or improvements located on, crossing or affecting the Property that are visible, recorded or known to the surveyor which are not shown on the survey; (9) the current zoning classification and tax map reference number(s) of the Property; (10) the location, by reference to the Title Commitment, of all easements and encumbrances upon, crossing or affecting the Property; and (11) such other information as the Lender may require.

3.4 ORGANIZATIONAL DOCUMENTS. The Borrower shall submit to the Lender its written and executed Certificate, to which shall be attached true copies of its Articles of Organization, its Operating Agreement, and all amendments thereto, a current Certificate of Existence issued by the Secretary of State of the state of its organization, a current Certificate of Authority (if applicable) issued by the Secretary of State for the State of South Carolina, and appropriate resolutions authorizing the transactions contemplated herein and designating its authorized signatories who shall have the power and authority to execute and deliver all Loan Documents on its behalf. The Borrower shall cause its partners, members or managers to likewise submit to the Lender written and executed Certificates, to which shall be attached true copies of their respective organizational and governance documents, current Certificates of Existence and/or Authority, and appropriate resolutions authorizing the execution and delivery of such documents in their capacities as the partners, members or managers of the Borrower as shall be necessary or desirable in order to consummate the transactions contemplated herein.

3.5 INSURANCE AND BOND DOCUMENTS. Policies of insurance, with receipts indicating payment in full of all premiums thereon, in full compliance with all Insurance Requirements set forth hereinafter, shall be delivered to the Lender at or prior to Closing with respect to the following:

- A. Builder's Risk Insurance. Completed value builder's risk insurance covering the Improvements under construction and all building materials, supplies and components delivered to or stored upon the Property against loss or damage due to fire or other casualty, including all risk (with special extended coverage endorsement, if appropriate) insurance in an amount of not less than the full replacement cost of the Improvements, which coverage shall remain in full force and effect until completion of the Improvements and delivery at such time or at any earlier time of full replacement value fire and hazard insurance coverage with respect to the completed Improvements.

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B. Contractor's General Liability Insurance. Contractor's general liability insurance in a minimum amount of not less than Two Million and No/100 (\$2,000,000.00) Dollars single limits coverage and Two Million and No/100 (\$2,000,000.00) Dollars aggregate coverage.

C. Owner's Public Liability Insurance. Public Liability Insurance in a minimum amount of not less than Two Million and No/100 (\$2,000,000.00) Dollars single limits coverage and Two Million and No/100 (\$2,000,000.00) aggregate coverage, covering the Borrower and identifying the Lender as an Additional Insured.

D. Flood Insurance. Flood hazard insurance, if any part of the Improvements shall be located within a federally-identified 100-year flood plain, covering the Borrower and the Lender in the lesser amount of (1) the maximum insurable amount allowed under current federal flood insurance regulations or (2) the full maximum principal amount of the Loan.

E. Construction Bonds. Dual-obligee payment-and-performance and labor-and-materials Bonds, which shall designate the Lender and the Borrower, as obligees, issued by a satisfactory surety, to bond the performance of the Contractor constructing and/or renovating the Improvements pursuant to the Construction Contract (if required pursuant to the Loan Commitment).

3.6 CONSTRUCTION DOCUMENTS. The Borrower shall submit to the Lender such of the following construction documents as have been received or executed by the Borrower at or prior to Closing, all of which shall also be subject to the review and approval of the Inspecting Agent prior to Closing:

A. The Plans, including a complete final site plan of the Property.

B. The Architect's Contract.

C. The Construction Contract.

D. The Engineer's Contract.

E. Phase I Environmental Evaluation Report. A Phase I environmental evaluation report, conducted by a qualified environmental engineering and testing service acceptable to the Lender, addressed to the Lender, dated within six (6) months prior to Closing; and performed pursuant to the current ASTM-E1527-05 standards and in compliance with all current applicable Governmental Requirements, and which establishes that no Hazardous Materials are known or suspected to be on or beneath the Property, or, if any such Hazardous Materials shall be found to be present, that measures have been taken by the Borrower or its predecessors in title to fully and adequately remove the same from the Property or otherwise comply with all applicable Governmental Requirements and to fully cure and correct all consequences upon the Property of the presence of such Hazardous Materials thereon prior to their removal.

F. The Budget. The Development Cost Analysis, attached hereto as Exhibit "C".

G. Public Utility Service and Availability. Letters or other written evidence satisfactory to the Lender that public utility service, including without limitation, water, sanitary sewer, storm sewer, electricity, and telephone is presently available to or will be brought to the boundaries of the Property in the course of the construction and/or renovation of the Improvements in sufficient size and quantity to accommodate all construction and contemplated uses thereat and that no moratoriums or other limitations are known or contemplated which might in any way limit the availability or capacity of such service to the Improvements existing or to be constructed on the Property.

H. Governmental Requirements. Evidence of compliance with all applicable Governmental Requirements, including without limitation zoning certificates, building permits, storm drainage system approvals, erosion control and environmental protection permits, curb cuts and encroachment permits, and occupancy permits.

I. Soil Analysis Report. A geotechnical soils and subsurface report, conducted by a geotechnical engineering and testing service acceptable to the Lender, addressed to the Lender, dated within six (6) months prior to Closing, which establishes that there are no unacceptable soils or subsurface conditions on or beneath the Property which would bring into questions the ability of the Property to adequately support the Improvements thereon, or, if any such unacceptable condition shall be found to be present, that measures have been taken by the Borrower to fully and adequately remediate or correct the same.

3.7 OTHER DOCUMENTS.

A. Purchase Contracts. The Borrower shall submit to the Lender fully executed copies of all contracts, agreements, and amendments thereto, including all exhibits and schedules, entered into by the Borrower with the owners of the Property that entitle the Borrower to purchase the Property at Closing in accordance with the terms and provisions thereof.

B. Appraisal, Intentionally Omitted.

C. Lease Documents. The Borrower shall submit to the Lender (1) fully executed copies of all fully executed Leases, including leasing letters of intent, for all or portions of the Property or space to be constructed or renovated within the Property that have been entered into by the Borrower with tenants at or prior to Closing, (2) original fully executed SNDAs, in form and content promulgated by or satisfactory to the Lender, with the tenants of such Leases as the Lender shall specify, and (3) the form of lease agreement that the Borrower intends to utilize for the future leasing of portions of or space within the Property.

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D. Sale Contracts. The Borrower shall submit to the Lender copies of all fully executed Sale Contracts entered into by the Borrower with purchasers of designated portions of the Property, ownership intervals, other ownership interests, or condominium units, as the case may be, following completion of construction of the Improvements in accordance with the provisions of this Loan Agreement. Such Sale Contracts shall meet or exceed such aggregate sales prices as shall be set forth in the Loan Commitment (if any) and shall contain such minimum average sales price per lot, interval, interest, or unit (as the case may be) as shall be set forth in the Loan Commitment. The Sale Contracts shall be approved and pre-qualified for financing by the Lender or another acceptable financing source and shall reflect the receipt by the Borrower of earnest money deposits of not less than the minimum amounts or percentages as shall be set forth in the Loan Commitment. All earnest monies received by the Borrower in connection with such Sale Contracts shall be deposited into an escrow account maintained by the Borrower with the Lender, and shall be credited by the Borrower to the purchase prices for such lots, intervals, interests or units at the eventual closings thereof. Should any one or more Sale Contracts submitted to the Lender be terminated at any time during the term of the Loan, with the result that the aggregate lot, interval, interest or unit sales prices for the remaining lots, intervals, interests or units under contract, upon closing and payment to the Lender of the release prices required herein, shall not exceed the amount necessary to pay off and discharge the Loan in full, then and in such event the Lender shall have the right to require the Borrower and/or the Guarantor to pay or submit to the Lender cash or other acceptable liquid collateral necessary to fully cover such resulting shortfall. Any Sale Contracts with the Guarantor or any affiliates of the Borrower or the Guarantor shall be excluded from calculations of such foregoing aggregate sales prices for such purposes.

E. Borrower's Equity. The Borrower shall submit to the Lender evidence that all cash equity required pursuant to the Loan Commitment has been or will be injected into the Property at or prior to any request for any Advance for Direct Costs.

F. Closing Disbursement. A closing statement which shall evidence the payment by the Borrower at Closing of all expenses of or connected with the acquisition of the Property (if applicable) and the closing of the Loan, including without limitation the full loan commitment fees, all recording fees, documentary stamps, title insurance premiums, title examination fees, bond and insurance premiums, surveyors' charges, appraisal fees, inspection fees, environmental assessments and analyses, soils reports, due diligence expenses; and attorneys' fees for the Lender's and the Borrower's attorneys, any other applicable reasonable costs and expenses associated or connected with the closing of the Loan, and any Indirect Costs for which reimbursement is sought from the Initial Advance.

ARTICLE FOUR CONSTRUCTION PROVISIONS

Advances shall be made by the Lender pursuant to the following provisions upon compliance by the Borrower with the following procedures and requirements:

4.1 INITIAL ADVANCE. The Lender shall make an initial advance of Loan proceeds at Closing of up to One Million Six Thousand One Hundred Ninety-Eight and 72/100 (\$1,006,198.72) Dollars to or for the benefit of the Borrower, in an exact amount to be determined by the Lender, to enable the Borrower to purchase the Property and to pay closing costs incurred in connection with the Loan and other Indirect Costs incurred by the Borrower prior to Closing and approved by the Lender for disbursement at Closing in accordance with the Budget, provided that the Borrower shall have fulfilled all Conditions Precedent as set forth in Article Three hereof.

4.2 CONSTRUCTION COVENANTS AND REQUIREMENTS. The Borrower covenants and agrees to comply with the following provisions and requirements during the construction of the Improvements.

A. Use. Except for the Initial Advance, Advances hereunder shall be used in accordance with the Budget for the sole purpose of paying the Direct Costs and Indirect Costs approved by the Lender in accordance with the Budget and incurred in the construction of the Improvements on the Property pursuant to the Construction Documents, which Construction Documents shall not be materially amended without the prior written approval by the Lender.

B. Standards. The Borrower shall cause all construction of the Improvements to be performed diligently, continuously and strictly in accordance with all applicable Governmental Requirements, including without limitation, the Americans with Disabilities Act, building codes, zoning ordinances and environmental regulations, and in accordance with all requirements set forth in the Construction Documents and (as applicable) the Leases or the Sale Contracts.

C. Assurance of Completion. Within ten (10) days following written notification to the Borrower from the Lender, the Borrower shall deposit with the Lender collected funds which, in the Lender's reasonable judgment, shall be sufficient, when added to any undisbursed portion of the Loan, to assure completion of construction of the Improvements and payment in full of all Construction Costs, in accordance with the Plans, as modified by any Change Orders approved by Lender in accordance with Section 4.2I of this Agreement. All funds deposited with the Lender shall be disbursed by the Lender in accordance with the terms of this Agreement.

D. Inspection. The Lender and the Inspecting Agent shall have the right, at any time during the construction of the Improvements, to enter upon and inspect the Property and the construction of the Improvements thereon. The Lender shall have the right to require that all work and materials materially failing to conform to the Construction Documents, or any applicable Governmental Requirement, or any Leases, or any Sale Contracts in the reasonable judgment of the Lender or the Inspecting Agent, be corrected or replaced so as to fully and completely conform thereto. Neither the existence nor the exercise of the inspection and approval rights contained herein shall impose upon the Lender or the Inspecting Agent any duty or obligation to grant such approval nor shall the same impose

upon the Lender any liability to the Borrower or any other party whatsoever, it being acknowledged that such rights, the exercise thereof, and the employment of the Inspecting Agent are for the sole benefit of the Lender, and that the Lender and the Inspecting Agent make no representations and assume no obligations or liabilities to the Borrower or any other party with respect to the quality of construction of the Improvements or the absence of defects therefrom.

E. Materials. All materials incorporated in the construction of the Improvements shall be free and clear of any lien or security interest as of (a) the time of delivery thereof to the Property, or (b) upon disbursement of the Advance from which the cost of such materials are to be funded. The Borrower shall, upon request of the Lender, produce such contracts, receipts, or other proof of the foregoing.

F. Corrections. The Borrower shall notify the Lender in writing of any material departure from the Plans and shall, without demand from the Lender, correct any structural defects in the Improvements or material departures from any of the Construction Documents, any Lease requirements, any Sale Contract requirements, or any applicable Governmental Requirements promptly following discovery of the same. The disbursement of any Advance by the Lender shall not constitute a waiver of the Lender's right to require strict compliance with the foregoing covenant, whether or not such defects or departures from the Plans shall have theretofore been discovered or called to the attention of the Lender.

G. Acts of the Lender. The Borrower hereby agrees, with respect to all Advances, that the Lender shall not be deemed the agent or trustee for the Borrower and will not be held accountable in any fashion for any Advance made in good faith.

H. Subcontractors and Suppliers. The Borrower shall not execute any material contract other than the Construction Documents or otherwise become a party to any arrangement for the performance or rendering of labor, services or work, or the supplying or furnishing of materials in the construction of the Improvements, except as shall be first disclosed to and approved by the Lender and only with persons or entities thereafter approved by the Lender in its reasonable discretion.

I. Change Orders. The Borrower shall deliver to the Lender an original and one counterpart of all proposed material change orders to or affecting the Construction Documents or the construction of the Improvements prior to the execution or approval of any such change order by the Borrower, together with the written approval of the applicable tenant (if required under the terms of a Lease). No material change order shall become effective until it has been approved in writing by the Lender. Notwithstanding the foregoing, change orders not exceeding Ten Thousand and no/100 (\$10,000.00) Dollars per single order or Fifty Thousand and no/100 (\$50,000.00) Dollars in the aggregate shall not require the Lender's approval.

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J. Consultants. The Lender shall have the right to select and retain additional outside professional consultants, in addition to the Inspecting Agent, at the sole reasonable cost and expense of the Borrower if the Lender determines that the employment of such consultants is necessary or desirable to investigate any actual or potential concerns relating to the design and/or the construction of the Improvements.

K. Copies of Contracts. The Borrower shall cause the Contractor to deliver to the Lender, promptly upon request, copies of all contracts, subcontracts, purchase orders and invoices pertaining to the work to be performed or materials to be installed pursuant to the Construction Contract and the Plans, and copies of any contracts, bills of sale, statements, receipted vouchers or agreements under which the Borrower holds or claims title to any materials, fixtures or other articles incorporated or to be incorporated into the Improvements.

4.3 CONDITIONS PRECEDENT TO ADVANCES. The obligation of the Lender to disburse any Advance hereunder is subject to the compliance by the Borrower with the following requirements at the time of each such advance:

A. Representations and Warranties. All representations and warranties of the Obligor contained in this Agreement and all Loan Documents shall remain true and correct in all material respects.

B. Other Conditions. All Conditions Precedent set forth in Article Three of this Agreement shall have been and shall remain fulfilled in all material respects.

C. Performance. The Borrower shall have fully performed all duties and obligations required to be performed hereunder as of or prior to the date of such requested Advance.

D. Construction Documents and Construction Bonds. The Lender shall have received and reviewed the Construction Contract, the Architect's Contract, the Engineer's Contract, the Plans, and the Construction Bonds for any portion of the Improvements for which an Advance is sought, with the same to have been approved, to the extent that approvals are required, by all applicable Governmental Authorities, by all tenants of Leases whose approvals are required thereunder, and by all affected beneficiaries of any applicable private restrictive covenants, as the case may be, and shall be in compliance with all applicable Governmental Requirements, including without limitation the Americans with Disabilities Act, and with all requirements of all applicable Leases.

E. Construction in Place. The construction of the Improvements in place as of the date of the requested Advance shall have been made substantially in accordance with all applicable Leases or all applicable Sale Contracts (as the case may be), the Construction Contract, the Plans, as modified by any change orders approved by the Lender, and (if applicable) any tenants whose approval is required pursuant to any Leases. All prior Advances shall have been used solely for the purposes permitted under this Agreement.

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F. No Defaults. The Borrower shall not be in breach or default in the performance or observance of any other terms and provisions of this Agreement or of any other Loan Document, or any applicable Lease, and there shall have been no material adverse change in the financial condition of the Borrower or the Guarantor subsequent to the day of execution of this Agreement, except as shall have been reported in writing to the Lender and approved or waived in writing by the Lender.

G. Damage. The Improvements in place shall not have been materially damaged or injured by fire or other casualty or condemned or threatened by condemnation; or if so damaged or condemned, provisions in compliance with any applicable Leases or Sale Contracts (as the case may be) and otherwise satisfactory to the Lender shall have been agreed upon in writing and duly executed by the Borrower, the Contractor, the Architect, the Engineer, the applicable tenant(s), and the Lender for repair or restoration thereof in accordance with this Agreement and the Mortgage.

H. Payment of Construction Costs. The Borrower shall have paid all outstanding suits then due and owing for Direct Costs and approved Indirect Costs, if any, incurred in the construction of the Improvements, except for such Costs as will be paid from the proceeds of the Advance requested by the Borrower.

I. No Modifications. No changes, modifications, supplements, alterations or amendments to or of the Plans or the Construction Contract shall have been made in any material respect without the prior written approval of any applicable tenant(s), the Architect and/or the Engineer, the Contractor, and the Lender.

J. Compliance with Advance Procedures. The Borrower shall fully comply as to each Advance with all Procedures for Advances set forth hereinafter.

4.4 PROCEDURES FOR ADVANCES. The following procedures and requirements shall be followed and adhered to in connection with all requests for, approvals of, and disbursements of Advances hereunder:

A. Frequency. Following the Initial Advance hereunder, the Borrower shall be entitled to request Advances no more frequently than monthly.

B. Requests For Advances. The Borrower shall request Advances by submitting to the Lender, at least five (5) business days in advance of the date upon which the Borrower requests that the Advance be disbursed, duplicate copies of a "Draw Request", with one copy to be submitted to the Lender and one copy to the Inspecting Agent, Each "Draw Request" shall consist of a standard AIA Form Request for progress payment, AIA documents G702 and G703, duly executed and certified by or on behalf of the Borrower. The copy of the Draw Request submitted to the Lender shall further be accompanied by the written certificate of the Borrower, the Architect and/or the Engineer, in form and content satisfactory to the Lender, certifying as of the date of the Draw Request that the Borrower is in full compliance with all terms and conditions of this Agreement and the

applicable Lease(s) and containing an estimate by the Borrower of the remaining costs of completing the construction of the Improvements following disbursement of the requested Advance, together with copies of invoices and such other supporting details and documentation with respect to any of the foregoing as the Lender shall require from time to time.

C. Inspection Report. Upon receipt of a Draw Request, and prior to the date of the requested Advance, the Inspecting Agent shall review the Draw Request and shall physically inspect the progress of construction of the Improvements to date and, at the option of the Inspecting Agent, all construction records with respect thereto maintained by the Borrower, the Contractor, the Architect and/or the Engineer, whereupon the Inspecting Agent shall deliver to the Lender its written report that the Draw Request is acceptable or unacceptable, in which latter event the Inspecting Agent shall specify the defects in the Draw Request and any specific items with respect thereto which it recommends to be disallowed or devalued.

D. Foundation Survey. At such time as the foundations of any building to be constructed on the Property have been completed, the Borrower shall furnish to the Lender, with the Draw Request for the next Advance immediately following the completion of such foundation, a current foundation survey of the Property which shall fully comply with all survey requirements set forth herein with respect to the Improvements then in place on the Property.

E. Amount of Advances. Following its receipt of each Draw Request and Inspection Report complying with the foregoing requirements, the Lender shall determine the amount of each Advance upon the basis of the actual costs of the construction of the Improvements to date less amounts previously advanced, subject to any matters set forth in the Inspection Report and any limitations which the Lender may reasonably determine to exist pursuant to subsection (G) hereinafter, from which amount as is determined by the Lender shall be deducted such retainage as shall be set forth hereinafter.

F. Retainage. The Lender shall withhold from the approved amount of any Advance any fees due to the Inspecting Agent, together with a retainage in the amount, at the Lender's option, of either (i) the amount set forth in the Construction Contract, or (ii) ten (10%) percent of the amount of the approved Advance. All inspection fees shall be disbursed by the Lender and all retainage withheld by the Lender shall be pledged as additional collateral for the Loan and held until the time of disbursement of the Final Advance as set forth hereinafter.

G. Rights of Lender. Notwithstanding any other provisions hereof, the Lender shall not be obligated to make any Advance in the event that the Lender or the Inspecting Agent determines that there are any uncorrected structural defects in any of the Improvements or any material departures from the terms of the Plans; or any uncorrected violations of any applicable Governmental Requirements or any applicable Lease(s); or that there are insufficient undisbursed funds remaining under the Loan to complete the

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Improvements in accordance with the Plans and/or the Budget; or that any interest payments due under the Note shall not be paid fully current. No waiver by the Lender of any Condition Precedent, Construction Requirement, Procedure for Advance, Representation, Warranty or Covenant herein in connection with any Advance hereunder shall be construed as a waiver of the Lender's right to require strict compliance with the same or any other Condition Precedent, Construction Requirement, Procedure for Advance, Representation, Warranty or Covenant in connection with any subsequent Advance hereunder.

H. Method of Disbursement. Upon compliance with all of the foregoing Procedures for Advances, the Lender will cause the amount of the approved Advance to be remitted on or prior to the date for which such Advance was requested, to the Borrower, unless any Event of Default has occurred and is then continuing, in which event the Lender shall have the absolute right at its sole discretion to remit such Advance through the Title Insurer, directly to the Borrower, directly to the Contractor, to any subcontractors, materialmen or laborers directly, or jointly to the Borrower and any combination of any of the foregoing parties.

4.5 FINAL ADVANCE. The obligation of the Lender to make the final Advance (including disbursement of retainages previously held back by the Lender) shall be subject to compliance by the Borrower with the following additional requirements; in addition to those hereinabove set forth:

A. Final Draw Request. The Borrower's final Draw Request shall be submitted to the Lender at least ten (10) business days prior to the requested disbursement date of the Final Advance, and shall be accompanied by the following additional items.

B. Borrower's Certificate. The Borrower shall provide its written certificate, in form and content satisfactory to the Lender, certifying to the completion of construction of such Improvements in accordance with the Plans, all applicable Governmental Requirements, and all applicable Leases or Sale Contracts.

C. Completion Affidavits. The Borrower shall provide sworn affidavits of the Borrower and the Contractor stating that all Advances have been used by the Contractor solely to pay for labor and services performed and rendered, or materials supplied or furnished in connection with, the construction of the Improvements; that the Construction Costs have been paid in full or, upon funding of the final Advance will be paid in full; and that all construction of the Improvements has been completed in accordance with the Construction Contract, the Plans, all applicable Leases or Sale Contracts, and all applicable Governmental Requirements.

D. Certificate of Substantial Completion. The Borrower shall furnish to the Lender a Certificate of Substantial Completion, AIA Document G704, executed by the Borrower, the Contractor, and the Architect and/or the Engineer.

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- E. Lien Waivers. The Borrower shall deliver to the Lender complete and final notarized mechanic's lien waivers from the Contractor, and any subcontractors or materialmen reasonably required by the Lender or the Title Insurer, in form and content acceptable to the Lender and the Title Insurer.
- F. Compliance with Governmental Requirements. The Borrower shall deliver to the Lender certified copies of any certificates of approval, acceptance or compliance required or reasonably determined to be necessary by the Lender or by any applicable Governmental Authority for the use and occupancy of the Property.
- G. Final Inspection Report. The Borrower shall deliver to the Lender the final written certificate of the Inspecting Agent in form and content reasonably satisfactory to the Lender, stating that all work to be performed pursuant to the Construction Contract with respect to such Improvements has been fully completed substantially in compliance therewith and with the Plans.
- H. As-Built Survey. The Borrower shall deliver to the Lender a final current as-built survey of such Improvements, complying with all other survey requirements set forth herein and in any applicable Leases.
- I. Compliance with Lease Requirements. If applicable, the Borrower shall deliver to the Lender copies of any certificates, estoppel certificates, rent commencement date agreements, or other evidences of the approval, acceptance or compliance of the Improvements so constructed or by the applicable tenant(s) in accordance with the applicable Lease(s).
- J. Compliance with Sale Requirements. If applicable, the Borrower shall deliver to the Lender copies of any certificates, estoppel certificates, acceptances, or other evidences of the approval, acceptance or compliance of the Improvements so constructed or by the applicable purchaser(s) in accordance with the applicable Sale Contract(s).
- K. Permanent Fire and Casualty Insurance. The Borrower shall provide to the Lender full replacement value fire and extended coverage insurance policy or policies in an amount of not less than the full disbursed principal amount of the Loan, in an amount reasonably acceptable to the Lender, with paid receipts for all premiums therefor, written through insurance companies and agents acceptable to the Lender, identifying the Lender as the mortgagee or Loss Payee, and conforming to all Insurance Requirements set forth hereinafter.
- L. Estoppel Certificates. If applicable, the Borrower shall deliver an Estoppel Certificate from each tenant in form and content contemplated in the applicable Lease or otherwise satisfactory to Lender which shall confirm such tenant's acceptance of its leasehold premises, the fulfillment or waiver by such tenant of all conditions or conditions precedent to its acceptance of occupancy pursuant to the terms of such Lease,

the continued validity of its Lease, the absence of any defaults thereunder, and such other matters as the Lender shall reasonably specify.

M. Confirmation of Lease Term Agreements. If applicable, the Borrower shall deliver duplicate originals of the instruments executed by each applicable tenant and the Borrower confirming the Rent Commencement Dates (or similarly denominated dates as defined or determined in the applicable Leases) and other dates set forth therein, in form and content contemplated in the applicable Leases or otherwise satisfactory to the Lender.

ARTICLE FIVE REPRESENTATIONS AND WARRANTIES

In order to induce the Lender to enter into and execute this Agreement and to make the Loan to the Borrower, the Borrower and the Guarantor make the following representations and warranties to the Lender, each of which shall survive the execution of this Agreement and remain in full force and effect until complete payment and discharge of the Obligations:

5.1 EXISTENCE. The Borrower is duly organized, validly existing and in good standing under the laws of the state of its organization, duly qualified (if applicable) to transact business in the State of South Carolina, with full power and authority to enter into the Loan, to execute and deliver the Loan Documents and to perform in accordance with the terms thereof.

5.2 AUTHORITY. The Borrower has full power and authority to purchase and own the Property and to execute, deliver and perform the Borrower's Obligations under the Loan Documents. The Borrower has taken all appropriate action to authorize the execution and delivery of this Agreement and the Loan Documents by all necessary persons on behalf of the Borrower. The execution, delivery and performance by the Borrower of the Loan Documents does not and will not require the consent of any other parties or any Governmental Authorities not previously obtained and delivered to the Lender (except as to such future performance, if any, contemplated hereunder as may require subsequent approvals or consents of applicable Governmental Authorities), nor will the same contravene the governing documents of the Borrower, or any applicable Governmental Requirements presently in effect, nor will the same result in any breach of or constitute a default under any agreement or instrument to which the Borrower is a party or by which the Property is affected.

5.3 LEGALLY ENFORCEABLE AGREEMENT. This Agreement and each of the Loan Documents are duly and properly executed and delivered by the Obligors for value received and constitute the valid Obligations of the Obligors, legally binding upon and enforceable against the Obligors in accordance with their respective terms, not subject to any defense based upon usury, capacity of the Obligors or, to the best of the Obligors' knowledge, other defense, except as may be subsequently limited by bankruptcy, insolvency, reorganization, moratorium and other similar laws affecting the enforcement of creditors' rights generally.

5.4 DOCUMENTATION. The Obligors, as applicable, have delivered to the Lender all documents, financial statements, certificates, licenses, permits, authorizations, consents,

exemptions, approvals, and contracts required to be submitted to the Lender hereunder or required by any applicable Governmental Authority, all of which are material conditions precedent to the funding of the Loan by the Lender and all of which are, to the best of the Obligors' knowledge, true, accurate and complete in all material respects as of the date hereof.

5.5 FINANCIAL STATEMENTS. All financial statements heretofore furnished to the Lender are complete and correct in all material respects and fairly present the financial condition of the Obligors as of the dates thereof and the results of their operations for the periods covered by such statements. All such financial statements have been prepared in accordance with generally accepted accounting principles consistently applied and no material adverse change has occurred in the financial condition or operations of the Obligors reflected therein since the dates thereof.

5.6 LITIGATION. No actions, suits or proceedings are pending or, to the best of the Obligors' knowledge, threatened before any Court, Governmental Authority or arbitrator (a) involving the validity, priority or enforceability of this Agreement, the Note, the Mortgage, any Loan Documents, any Construction Documents, any Leases, any Sale Contracts, or the Borrower's title to and the Lender's Mortgage upon the Property, or (b) against or affecting any Obligor which may, in any one case or in the aggregate, materially adversely affect the financial conditions, affairs, properties or business operations of the Obligors or the ability of the Obligors to perform any of the Obligations, whether singly or in the aggregate.

5.7 NO DEFAULTS. To the best of the Obligors' knowledge, the Obligors are not presently in default under any of the terms or conditions of this Agreement, the Note, the Mortgage, any of the Loan Documents, any Construction Documents, any Leases, any Sale Contracts, or any order, injunction, judgment, award, or decree of any applicable judicial or Governmental Authority; or, in any material respect, any other mortgage, lease, bank loan, credit agreement or other instrument to which the Obligors, or any of them, are a party or by which the Obligors, or any of them, may be bound or affected.

5.8 OPERATIONS. The execution, delivery and performance of the Obligations by the Obligors do not and will not violate or contravene any provisions of any instrument creating or governing the operations of any of the Obligors and will not result in a breach of or constitute a

exemptions, approvals, and contracts required to be submitted to the Lender hereunder or required by any applicable Governmental Authority, all of which are material conditions precedent to the funding of the Loan by the Lender and all of which are, to the best of the Obligors' knowledge, true, accurate and complete in all material respects as of the date hereof.

5.5 FINANCIAL STATEMENTS. All financial statements heretofore furnished to the Lender are complete and correct in all material respects and fairly present the financial condition of the Obligors as of the dates thereof and the results of their operations for the periods covered by such statements. All such financial statements have been prepared in accordance with generally accepted accounting principles consistently applied and no material adverse change has occurred in the financial condition or operations of the Obligors reflected therein since the dates thereof.

5.6 LITIGATION. No actions, suits or proceedings are pending or, to the best of the Obligors' knowledge, threatened before any Court, Governmental Authority or arbitrator (a) involving the validity, priority or enforceability of this Agreement, the Note, the Mortgage, any Loan Documents, any Construction Documents, any Leases, any Sale Contracts, or the Borrower's title to and the Lender's Mortgage upon the Property, or (b) against or affecting any Obligor which may, in any one case or in the aggregate, materially adversely affect the financial conditions, affairs, properties or business operations of the Obligors or the ability of the Obligors to perform any of the Obligations, whether singly or in the aggregate.

5.7 NO DEFAULTS. To the best of the Obligors' knowledge, the Obligors are not presently in default under any of the terms or conditions of this Agreement, the Note, the Mortgage, any of the Loan Documents, any Construction Documents, any Leases, any Sale Contracts, or any order, injunction, judgment, award, or decree of any applicable judicial or Governmental Authority; or, in any material respect, any other mortgage, lease, bank loan, credit agreement or other instrument to which the Obligors, or any of them, are a party or by which the Obligors, or any of them, may be bound or affected.

5.8 OPERATIONS. The execution, delivery and performance of the Obligations by the Obligors do not and will not violate or contravene any provisions of any instrument creating or governing the operations of any of the Obligors, and will not result in a breach of or constitute a default under any other mortgage, bank loan, credit agreement or other instrument to which any Obligor is a party or by which any Obligor may be bound or affected.

5.9 DISCLOSURE. To the best of the Obligors' knowledge, no representation or warranty of the Obligors contained in this Agreement, any other Loan Documents, any Construction Documents, any Leases, or any Sale Contracts, and no statement contained in any certificate, schedule, list, financial statement or instrument now or hereafter to be furnished to the Lender by or on behalf of the Obligors contains or will contain any untrue statement or omission of any material fact.

5.10 SOLVENCY. There is not pending or, to the best of the Obligors' knowledge, threatened by or against any of the Obligors, nor is there contemplated any petition in bankruptcy, order for

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relief (whether voluntary, involuntary or by operation of law), any assignment for the benefit of creditors, any petition seeking reorganization or arrangement under the bankruptcy laws of the United States of America or any state thereof, any liquidation of all or the greater portion of the property of any of the Obligors or any other action brought under the aforesaid bankruptcy laws or other similar laws involving any of the Obligors.

5.11 COMPLIANCE WITH GOVERNMENTAL REQUIREMENTS. To the best of its knowledge, the Borrower is in full material compliance with all applicable Governmental Requirements pertaining to the Borrower, the Property, the Leases, the Sale Contracts, the Construction Documents, and the construction of the Improvements.

5.12 COMPLIANCE WITH LEASES. To the best of its knowledge, the Borrower is in full material compliance with all terms and provisions of the Leases, if applicable, as of the date hereof.

5.13 COMPLIANCE WITH SALE CONTRACTS. To the best of its knowledge, the Borrower is in full material compliance with all terms and provisions of the Sale Contracts, if applicable, as of the date hereof.

5.14 UTILITIES. All public utility service, including without limitation water, power, sanitary sewer, storm sewer and drainage, gas, telephone, and cable television which may be necessary for the construction and operation of the Improvements for their intended purpose are available to the boundaries of the Property or (if not currently available) will be extended to the boundaries of the Property, are or will be unencumbered, are or will be located in a publicly dedicated and accepted right-of-way, and are or will be in sufficient size, quantity, capacity and pressure to accommodate all intended construction, uses and operations at the Property.

5.15 INGRESS AND EGRESS. All streets and roads necessary for ingress and egress to the Property and for the full use and operation of the Improvements for their intended purposes have been completed and dedicated for public use and accepted for maintenance by the appropriate Governmental Authorities, except as to such private means of ingress and egress for which recorded permanent easements exist and which have been approved in writing by the Lender herewith.

5.16 TAXES. The Obligors have filed all federal, state and other tax returns required to be filed and has fully paid all taxes required under such returns. No Obligors have received any notice from the Internal Revenue Service or any other Governmental Authority asserting that any additional assessments or taxes are or may be due.

5.17 ENVIRONMENTAL MATTERS. To the best of the Obligors' knowledge, (a) the Property is free from Hazardous Materials in violation of any Governmental Requirement and does not constitute an environmental hazard of any type under any applicable Governmental Requirement; (b) there has been no production, disposal, storage, release, discharge, spill, leak, dumping, or emission on the Property of any Hazardous Materials or any activity thereon which could have produced Hazardous Materials or toxic effects on humans, flora, or fauna; (c) there are no surface

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impoundments, lagoons, waste piles, land fills, injection wells, underground storage areas, or other manmade facilities thereat which have contained or accommodated Hazardous Materials; (d) neither the Borrower nor any third parties have developed, discharged, buried, released or otherwise placed Hazardous Materials on the Property, including the soil, surface water or ground water thereof; (e) there are no buried, partially buried, above ground or other tanks, storage vessels, drums or containers located on the Property; (f) there is no evidence of the release, discharge, leaking, dumping, emission, or seepage, by accident or otherwise, of Hazardous Materials onto or into the Property; (g) there has been no treatment, storage, disposal, discharge or other type of release of Hazardous Materials onto property adjacent to or near to the Property which may constitute a risk of contamination of the Property or of surface or ground water flowing to or through the Property; and (h) the proposed operations on the Property, including construction of the Improvements thereon and materials to be generated therewith, do not and will not generate Hazardous Materials. The Borrower has conducted or commissioned a complete environmental assessment of the Property as aforesaid to determine the presence of any Hazardous Materials thereat; and, to the best of the Borrower's knowledge, no other inspections, audits, or investigations have been commissioned or conducted with respect thereto by any prior owner, third party or Governmental Authority. The Borrower has received no warning, notice of violation, administrative complaint, judicial complaint or other formal or informal notice with respect to any Hazardous Materials on the Property and is not aware of any current or previous owner thereof receiving any such notices or complaints from any Governmental Authority with respect thereto. All environmental permits and licenses required pursuant to any applicable Governmental Requirements with respect to the Property and the conditions thereon have been obtained and are currently valid, or would not normally be required at this time and may be obtained in the ordinary course of business, including without limitation licenses and permits with respect to storage, treatment, and disposal of all waste products. To the best of the Borrower's knowledge, the construction and operation of the Improvements will not violate any applicable Governmental Requirements for environmental protection, including without limitation the Federal Clean Air Act, the Federal Clean Water Act, the Federal Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, the National Environmental Policy Act, and any other Federal, state or local statute of like tenor and effect.

5.18 THE PLANS. The Plans are satisfactory to the Borrower and have been approved, to the extent that approvals are required, by all applicable Governmental Authorities, by all tenants of applicable Leases, and by all affected beneficiaries of any applicable properly recorded and indexed private restrictive covenants, as the case may be, and are in compliance with all applicable Governmental Requirements, including without limitation the Americans with Disabilities Act.

5.19 CERTAIN LEGAL MATTERS. No Obligor has been convicted of any federal, state or local felony crimes whatsoever, nor has any Obligor been subject to any civil judgment or any regulatory order or finding involving fraud, securities violations or other matters relating to financial responsibility or business integrity, or been the subject of any bankruptcy, insolvency, receivership, assignment for benefit of creditors or similar proceedings.

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5.20 ASSET OWNERSHIP. Each Obligor has good and marketable title to all of the properties and assets reflected on its financial statements submitted to the Lender in connection with the Loan, and all such properties and assets are free and clear of any deeds of trust, mortgages, liens, security interests, pledges and other encumbrances, except as otherwise reflected in said financial statements.

ARTICLE SIX
COVENANTS

The Borrower hereby covenants with the Lender for the duration of the Loan as follows:

6.1 INSPECTIONS. Upon reasonable advance notice, the Borrower shall permit the Lender, the Inspecting Agent, and any other persons designated by the Lender to enter upon and inspect the Property during normal business hours, and all materials to be used in the construction of the Improvements, and to examine the Plans and all related plans and shop drawings which may be maintained at the Property, and to discuss the progress of construction or any of the foregoing with the Contractor, the Architect, the Engineer, any tenants of Leases, any purchasers pursuant to Sale Contracts, and the Borrower. The Borrower shall make available for audit, inspection and copying all property, equipment, books, contracts, records, leases, rent rolls and other papers and information related to the Borrower, the Leases, the Sale Contracts, the Construction Documents, the construction or the operation of the Improvements, or the Property. The Borrower agrees to comply with all reasonable requirements and recommendations of the Lender with respect to any matters revealed by any of the foregoing inspections.

6.2 COMPLIANCE WITH GOVERNMENTAL REQUIREMENTS. The Borrower shall cause the construction and operation of the Improvements to comply with all applicable Governmental Requirements, including without limitation the Americans with Disabilities Act, and with all recorded restrictive covenants and easements affecting the Property.

6.3 COMPLIANCE WITH LEASE REQUIREMENTS. The Borrower shall at all times perform in accordance with and cause the construction and operation of the Improvements to comply with all applicable requirements contained in the Leases.

6.4 COMPLIANCE WITH SALE CONTRACT REQUIREMENTS. The Borrower shall at all times perform in accordance with and cause the construction and operation of the Improvements to comply with all applicable requirements contained in the Sale Contracts.

6.5 TAXES AND ASSESSMENTS. The Borrower shall promptly pay and discharge or cause the tenants under the Leases to pay and discharge in accordance with the terms of the Leases (or contest, provided the Borrower or the tenants, as the case may be, shall comply with the applicable provisions of the Mortgage) all taxes, assessments and other charges and levies imposed upon the Property or upon the Borrower or upon any of the income or other property of the Borrower, as well as all claims of any kind which, if unpaid, might become a lien or charge upon or against the Property.

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6.6 COSTS AND EXPENSES. The Borrower shall promptly pay when due all reasonable charges, fees and expenses required to satisfy the terms and conditions of this Agreement, including without limitation all taxes and recording expenses, all reasonable legal fees and expenses of the Lender's and the Borrower's legal counsel, all fees and expenses of the Inspecting Agent, and all other costs and expenses of any nature incurred pursuant to the terms of this Agreement.

6.7 FURTHER ASSURANCES. The Borrower shall execute and deliver, or cause to be executed and delivered, to the Lender such further documents, instruments, certificates, assurances and other items, and shall do all such additional and further acts and deeds which the Lender shall deem reasonably necessary or desirable to comply with the terms and conditions of, or to effectuate the intent of, this Agreement or to preserve or protect the collateral or security for any of the Obligations.

6.8 BOOKS AND RECORDS. The Borrower shall keep and maintain full and accurate accounts and records with respect to the construction and operation of the Improvements, in accordance with generally accepted accounting principles consistently applied.

6.9 INDEMNITY. The Obligors shall indemnify, defend and hold harmless the Lender from and against all third-party liens, claims, demands, actions, causes of action, assessments, losses, damages, liability, costs and expenses, including without limitation, interest, reasonable attorneys' fees and penalties, arising out of, affecting or in connection with the Loan, the Property, the Leases, the Construction Documents, the construction and the operation of the Improvements, the quality, condition or value of the Improvements, the execution and performance of this Agreement or any other Loan Documents, any acts or omissions of the Obligors, any breach of this Agreement or any of the Loan Documents, the disbursement of Advances by the Lender, or any lien or claim of lien filed for record against the Property or the Borrower. The provisions of this Section 6.9 shall survive the payment and discharge of the Note and shall remain in full force and effect for so long as the possibility of any such liabilities, damages, losses, costs and expenses shall exist. This indemnity shall not apply with respect to conditions or occurrences first arising after title to the Property is transferred by foreclosure or deed in lieu of foreclosure or with the consent of the Lender; provided, however, the foregoing indemnity shall continue to apply to conditions or occurrences in existence before title to the Property is transferred by foreclosure or deed in lieu of foreclosure or with the consent of Lender which are not discovered until after the transfer of such Property.

6.10 FINANCIAL STATEMENTS. The Borrower shall furnish to the Lender annual updated financial statements consisting of statements of income and expenses, profits and losses, and balance sheets related to the Property and all construction and operations thereon, within one hundred twenty (120) days following the end of the Borrower's fiscal or calendar year, together with annual signed financial statements and tax returns as to the Borrower, annual signed financial statements and copies of filed tax returns (including attached schedules) as to the Guarantor, and such other financial information or statements which the Lender may reasonably request by not less than thirty (30) days prior written notice from time to time, all to be in form and content satisfactory to the Lender.

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6.11 NOTICE OF DEFAULT. The Borrower shall promptly furnish written notice to the Lender of the occurrence of any Event of Default under this Agreement, any of the Loan Documents, any of the Construction Documents, or any Leases, or of any event which would become an Event of Default hereunder or thereunder upon lapse of any time specified in herein or therein.

6.12 NOTICE OF LITIGATION. The Borrower shall furnish to the Lender immediately upon receipt thereof, copies of any pleadings in litigation, notices of bankruptcy, notices of default, or notices of any proceedings before any Governmental Authority which involve the Property; any Lease; the construction or operation of the Improvements; any licenses, permits or approvals pertaining thereto; the Borrower; and/or the Guarantor, and which in any instance, alone or in the aggregate with other actions or proceedings, if determined adversely to the Borrower or the Guarantor, could have a material adverse effect on the financial condition, affairs, properties or operations of the Borrower or the Guarantor or their ability to perform under the Loan Documents.

6.13 ALTERATION OF IMPROVEMENTS OR PROPERTY. Following the completion of construction of the Improvements, the Borrower shall not materially alter or change the Improvements or the Property except in accordance with the Plans, the Leases, and this Agreement, nor shall the Borrower engage in any other businesses or activities at the Property other than that which has been presented to the Lender, without the express prior written consent of the Lender.

6.14 INSURANCE REQUIREMENTS. The Borrower shall maintain and furnish to the Lender copies of all insurance policies and renewals thereof required of the Borrower pursuant to this Agreement and the Loan Documents in full force and effect throughout the term of the Loan with a Best's Insurance Reports Policyholder's Rating of A or A+ or better and a financial size category of Class X to XV or better, with such terms and deductibles as shall be acceptable to the Lender. Such policies and renewals thereof shall be held by the Lender, shall contain a non-contributory endorsement making losses payable to the Lender only, and shall provide that the same shall not be canceled or materially modified except upon thirty (30) days prior written notice to the Lender. At least fifteen (15) days prior to the expiration date of all such policies or renewals thereof, renewals of such policies satisfactory to the Lender shall be delivered to the Lender marked "Premium Paid" or accompanied by other evidence of premium payments satisfactory to the Lender. All such policies shall designate the Lender as the mortgagee or Loss Payee.

6.15 LICENSES AND PERMITS. Throughout the term hereof, the Borrower shall maintain in full force and effect all certificates, licenses, permits, authorizations, consents and approvals from applicable Governmental Authorities relating to the construction and/or operation of the Improvements; and the Borrower shall obtain all certificates, licenses, permits, authorizations, consents and approvals required for the full use, occupancy and operation of the Improvements following construction thereof from all applicable Governmental Authorities and shall deliver copies of the same to the Lender upon request.

6.16 SIGNS AND PUBLICITY. If requested by the Lender, the Borrower shall erect on the Property one or more signs to be provided by the Lender stating that the Lender is providing construction financing for the Improvements, which shall be placed and maintained in a prominent location on the Property satisfactory to the Lender. The Borrower further grants permission to the Lender to otherwise publicize the financing of the Improvements.

6.17 PERFORMANCE PURSUANT TO LOAN DOCUMENTS. The Obligors shall at all times perform in accordance with and comply with all terms, conditions, covenants, requirements, representations and warranties set forth herein, in the Note, the Mortgage and all of the Loan Documents.

6.18 PERFORMANCE PURSUANT TO CONSTRUCTION DOCUMENTS. The Obligors shall at all times perform in accordance with and comply with all terms, conditions, covenants, requirements, representations and warranties set forth in the Construction Documents.

6.19 ENVIRONMENTAL COMPLIANCE. Neither the Borrower nor the Borrower's agents, employees or tenants shall generate, manufacture, refine, transport, treat, store, handle, dispose of, release, discharge, produce or process any Hazardous Materials at or upon the Property in violation of any applicable Governmental Requirements. The Borrower, and its agents, employees and tenants shall comply with all Governmental Requirements regarding environmental protection, shall keep the Property free and clear of any liens imposed pursuant to any applicable Governmental Requirements respecting environmental protection, and shall conduct and complete all investigations, studies, sampling and testing, and all remedial, removal and other actions necessary to clean up and remove any Hazardous Materials on, from or affecting the Property pursuant to any applicable Governmental Requirements. The Borrower shall indemnify, defend and hold harmless the Lender from and against all liens, claims, damages, actions, causes of action, losses, damages, liabilities, costs, and expenses whatsoever, including without limitation, penalties and reasonable attorney's fees, incurred or suffered by or asserted against the Lender, for, with respect to, or as a direct or indirect result of the presence on or under, or the escape, seepage, leakage, spillage, discharge, emission or release upon or from the Property of any Hazardous Materials, regardless of whether the same may be caused by or within the control of the Borrower, whether intentional or unintentional, or due to the violation of any applicable Governmental Requirements regarding environmental protection or of any covenant or representation contained herein with respect thereto by the Borrower. The foregoing covenants, provisions and indemnities shall survive any foreclosure or other realization by the Lender on the Mortgage which may result in acquisition by the Lender or conveyance by the Lender of fee title, or any other lesser right, title and interest, in or to the Property. This indemnity shall not apply with respect to conditions or occurrences first arising after title to the Property is transferred by foreclosure or deed in lieu of foreclosure or with the consent of the Lender; provided, however, the foregoing indemnity shall continue to apply to conditions or occurrences in existence before title to the Property is transferred by foreclosure or deed in lieu of foreclosure or with the consent of the Lender which are not discovered until after the transfer of such Property.

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6.20 SUBORDINATION OF FEES. The Borrower shall not enter into any agreement of any nature with any affiliated or unaffiliated persons, funds or entities with respect to the development of the project or the sales, leasing or management of the operation of the Property, unless such agreement(s) shall provide that the same shall not survive any foreclosure of the Property or other realization on the Mortgage by the Lender and that no management, development, sales, leasing or similar fees will be paid by the Borrower with respect to the management, sales, leasing or development of the Property unless and until all monthly debt service requirements set forth herein shall have been met and fully paid by the Borrower.

6.21 PRESERVATION OF EXISTENCE. The Borrower shall preserve and maintain its existence in good standing throughout the term of the Loan, without material modification.

6.22 MAINTENANCE OF DEBT SERVICE COVERAGE RATIO. For purposes of this Section 6.22, the term Debt Service Coverage Ratio, or "DSCR", shall mean and refer to EBITDA divided by all scheduled payments of principal and interest due upon the Note for the period measured, together with any other long term debt and/or capitalized lease payment obligations attributable to the period measured, and any capital reserve obligations upon and pertaining to the Property required to be paid or set aside during the period measured. Borrower shall not permit any distributions to Borrower's owners until DSCR for any period measured shall be equal to or greater than 1.2 to 1 for at least two fiscal years following commencement of Borrower's business operations. Furthermore, Borrower shall maintain a One Hundred Thousand and No/100 Dollar (\$100,000.00) operating capital reserve account with TD Bank, N.A. in the name of Cypress Camping Resort ("Operating Capital Reserve Account"). Lender shall release the Operating Capital Reserve Account if: (a) DSCR for any period measured shall be equal to or greater than 1.2 to 1 for at least two fiscal years following commencement of Borrower's business operations or upon Lender's sole discretion and (b) Borrower is not in default of any monetary covenants under the Loan Documents. The Lender shall calculate DSCR at the end of each reporting period for which the Lender requires financial statements from the Borrower, using the results of the twelve-month period ending with that reporting period.

ARTICLE SEVEN DEFAULT AND REMEDIES

7.1 EVENTS OF DEFAULT. The term "Event of Default", whenever used hereinafter, shall mean any one or more of the following events:

A. Failure by the Borrower to pay when due any installment of principal and/or interest under the Note when due or within any grace period set forth therein;

B. Failure by the Borrower or any Obligor to fully, completely and timely perform or observe any other Obligations under this Loan Agreement or to perform, observe, satisfy or comply with any term, covenant, condition, warranty, representation, obligation or agreement set forth in the Note, the Mortgage, this Loan Agreement, or any of the Loan Documents, and which failure is not cured within such grace period with respect thereto

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as may be set forth therein, or, if no grace period is set forth therein as to any such failure, if such default is not cured to the Lender's satisfaction within thirty (30) days following the Effective Date of Notice to the Obligors from the Lender specifying such failure;

C. Falsity in any material respect of any representations or warranties contained herein, or in the Note, the Mortgage, or any of the Loan Documents as of the date made;

D. Discontinuance at any time during the construction of the Improvements for a period of ten (10) or more consecutive days, except for discontinuances due to fire, labor disputes, strikes, acts of God or other causes beyond the control of the Borrower;

E. Entry of an order or decree by any Court of competent jurisdiction enjoining the construction of the Improvements or enjoining or prohibiting the Borrower or the Lender from performing in accordance with this Agreement, which proceedings are not discontinued or which order or decree is not vacated or stayed within thirty (30) days after the entry thereof;

F. The construction of the Improvements, in the sole reasonable judgment of the Lender, shall not be capable of being completed in accordance with the Plans upon disbursement of the remaining undisbursed Loan proceeds, and the Borrower shall have failed to deposit in collected funds with the Lender, within ten (10) days following written notification to the Borrower, such sum as the Lender shall have reasonably determined shall enable construction of the Improvements to be completed in accordance with the Plans;

G. Any of the following actions by, against or involving the Borrower or any Obligor: (1) the death (if a natural person) of the Borrower or any Obligor or the dissolution or termination of existence (if not a natural person) of the Borrower or any Obligor, (2) the filing of a voluntary petition in bankruptcy; (3) the adjudication as a bankrupt or insolvent; (4) the filing of any petition or answer seeking or acquiescing in any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief for itself under any present or future federal, state or other statute, law or regulation relating to bankruptcy, insolvency, or other relief for debtors; (5) any petition for, consent to or acquiescence in the appointment of any trustee, receiver or liquidator for the Borrower, any Obligor, or of all or any part of the Property or of the rents, issues, royalties, income or profits therefrom; (6) the making of any general assignment for the benefit of creditors; (7) the admission in writing of its inability to pay its debts when due; (8) the entry by a court of competent jurisdiction of any order, judgment or decree approving a petition filed against the Borrower or any Obligor seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future federal, state or other statute, law or regulation relating to bankruptcy, insolvency or other relief for debtors, which order, judgment or decree remains unvacated and unstayed for an aggregate of sixty (60) days from the date of entry thereof; or (9) the appointment of any trustee, receiver or liquidator of the Borrower, any Obligor, or of all or any substantial part of the Property, or of any or all of

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the rents, revenues, issues, earnings, profits or income thereof, without the prior written consent of the Lender, which appointment shall remain unvacated or unstayed for an aggregate of sixty (60) days from the date of appointment; or

H. The occurrence of any event of default on the part of the Borrower under an applicable Lease for a material portion of the Property that shall not be cured within any grace period permitted therein in which to cure such default, or the occurrence of any other event which under the terms of a Lease of a material portion of the Property that grants to such tenant the right to terminate such Lease.

I. The occurrence of any event of default on the part of any Obligor under any other loan agreement, loan document, deed of trust, mortgage, security agreement, promissory note, security instrument of any kind, financing arrangement or any other loan or financing arrangement to which the Borrower and the Lender are parties.

7.2 REMEDIES UPON DEFAULT. Upon occurrence of any Event of Default, the Lender shall have the right to immediately exercise any and all of the following rights and remedies without further notice to the Borrower:

A. Remedies in Loan Documents. In addition to all other rights and remedies set forth herein, the Lender shall have the absolute right to assert and exercise any and all rights and remedies set forth in the Note, the Mortgage and all of the Loan Documents.

B. Termination. The Lender may suspend or terminate all obligations of the Lender under this Agreement, including without limitation, the obligation of the Lender to make further Advances, with the further right to apply any retainage or escrows then held by it to the outstanding Obligations.

C. Performance of Work. The Lender through its employees, independent contractors, agents or any receiver appointed for such purposes by any Court of competent jurisdiction, may enter upon the Property, perform or cause to be performed any and all work and labor, and supply and cause to be supplied any and all materials, equipment and improvements necessary to complete the Improvements substantially in accordance with the Plans, to secure and protect the same, to use any undisbursed portion of the Loan in connection with the foregoing, with all such sums so expended (including without limitation reasonable attorneys' fees) to be deemed to have been advanced to or for the benefit of the Borrower hereunder and secured by the Mortgage and the Loan Documents. In pursuance of the foregoing, the Borrower hereby authorizes and grants to the Lender the right to do any of the following:

i. Take possession of the Property, and complete the construction of the Improvements;

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ii. Make such additions, changes and corrections in the Plans which the Lender may deem necessary or desirable in its reasonable discretion to complete the Improvements in substantially the manner contemplated therein;

iii. Employ such contractors, subcontractors, agents, engineers, architects, attorneys-at-law, inspectors, builders, laborers or other personnel to perform or cause to be performed any action desired by the Lender;

iv. Use any funds of the Borrower on deposit with the Lender, all retainages heretofore retained by the Lender hereunder, and any sums then held in escrow, together with any balance of the Loan which has not previously been advanced hereunder, for any purpose consistent with any of the provisions hereof;

v. Pay, settle or compromise all existing or future bills, expenses or claims of any nature which are or may become liens against the Property or may be necessary or desirable as the Lender in its reasonable discretion deems proper, for the completion of the Improvements or for the protection or clearance of the title to the Property, or the Lender's interest therein;

vi. Prosecute, defend, settle or compromise any action or proceeding at law or in equity or before any Governmental Authority involving the Loan, the Property, any Construction Documents, any Leases, any Sale Contracts, and/or the construction of the Improvements;

vii. Execute in its name or, if necessary, in the name of the Borrower as its attorney-in-fact, all applications, certificates or instruments which may be necessary or desirable for the doing of any action which the Lender takes or causes to be taken hereunder;

viii. Take such action and require such performance under any insurance coverage, bond or other obligation and execute, in its own or the Borrower's name, such applications for additional or renewal bonds, policies or other obligations as the Lender may deem advisable;

ix. Do any and all acts which the Borrower might do in connection with the Property, the Construction Documents; the Leases, the Sale Contracts, the construction of the Improvements, and the Loan.

D. Costs and Expenses. All reasonable costs and expenses of every nature and kind incurred by the Lender in the exercise of any of the foregoing remedies, including without limitation reasonable attorneys' fees, shall be and constitute a portion of the Obligations, which shall be secured by the Mortgage and all of the Loan Documents.

E. No Waiver. No delay or failure by the Lender to exercise any right or remedy conferred hereunder, and no making of any additional Advances after occurrence of any

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Event of Default hereunder, shall be deemed a waiver by the Lender of any future right to exercise such right or remedy or of any right to withhold any future Advance or of any other right or remedy provided herein; nor shall any waiver of any Event of Default be deemed to be a waiver of any other Event of Default or of the future occurrence of the same Event of Default.

F. Nature of Remedies. All of the foregoing rights and remedies are cumulative and concurrent; shall be in addition to any other right, power and remedy set forth herein or in any of the Loan Documents, and now or hereafter existing in law at equity, or otherwise; and may be pursued separately, successively or concurrently against all or any of the Obligors and/or the Property at the sole discretion of the Lender.

ARTICLE EIGHT MISCELLANEOUS

8.1 ENTIRE AGREEMENT. This Agreement supersedes all prior discussions between the Obligors and the Lender with respect to the Loan and contains the sole and entire understanding between the parties with respect to the Loan except for such other terms and conditions as may be set forth in the Loan Documents. No amendments, conditions, deletions, modifications or changes to or of this Agreement shall be of any force or effect whatsoever unless reduced to writing and executed by the parties hereto.

8.2 SURVIVAL. All representations, warranties and covenants made herein shall survive the execution and delivery of this Agreement and the disbursement of the Loan, and shall remain in full force and effect until complete payment and discharge of all Obligations.

8.3 SEVERABILITY. Wherever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law, but unenforceability or invalidity for any reason of any provision of this Agreement shall be limited strictly to such provision and shall not limit or impair the operation, validity or enforceability of any other provision of this Agreement.

8.4 COUNTERPARTS. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of such counterparts together shall constitute one and the same Agreement.

8.5 TIME IS OF THE ESSENCE. Time is and shall be of the essence of this Agreement and all performance hereunder.

8.6 RELATIONSHIP OF PARTIES. Neither any provision of this Agreement or any of the Loan Documents nor any acts of the parties to this Agreement or any of the Loan Documents shall be construed to create a partnership or joint venture between the Obligors, the Architect, the Engineer, or the Contractor and the Lender nor to make any party the agent or representative of the other, nor shall any provision hereof nor any acts of the parties hereunder be construed to make the Lender liable to anyone for any labor or services performed or rendered on, or materials

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supplied or furnished to, the Property or for any debts or claims accruing against the Borrower on account thereof. Nothing in this Agreement shall be construed to create any privity of contract or other relationship between the Lender and anyone performing or rendering labor or services on, or supplying or furnishing materials to, the Property or for the construction of the Improvements thereon. In all respects the relationship of the Borrower and the Lender hereunder shall be solely that of debtor and creditor.

8.7 NO THIRD PARTY BENEFICIARIES. All conditions to the obligations of the Lender to make Advances under this Agreement are imposed solely and exclusively for the benefit of the Lender. Neither the Borrower, any tenant(s) under any Lease(s), any purchaser(s) under any Sale Contract(s), the Contractor, nor any other person shall have standing to require satisfaction of any such condition or be entitled to assume that the Lender will make or refuse to make Advances in the absence of strict compliance with any and all provisions hereof, and neither the Borrower, any tenant(s) under any Lease(s), any purchaser under any Sale Contract(s), the Contractor, nor any other person shall, under any other circumstances, be deemed to be a beneficiary of any such conditions, any or all of which may be freely waived in whole or in part by the Lender at any time if in its sole discretion the Lender deems it advisable to do so. The Lender makes no representations or warranties and assumes no obligations or responsibility whatsoever with respect to the quality of the construction of the Improvements or their compliance with any applicable Governmental Requirements or any Lease or Sale Contract requirements.

8.8 NOTICES. All notices, requests, demands and other communications allowed, made or required to be made pursuant to the terms of this Agreement shall be in writing and shall be deemed to be given or made when personally delivered (including personal delivery by Federal Express or other nationally recognized overnight private courier service) or when deposited in the United States mail, registered or certified, postage prepaid, return receipt requested, addressed in any such event to the party to whom such communication is directed at such address as is set forth for such party in the Loan Documents or at such other address as may hereafter be designated in writing by the respective parties hereto.

8.9 GOVERNING LAW. This Agreement and all of the Loan Documents shall be governed and construed under and in accordance with the laws of the State of South Carolina.

8.10 CONSENT TO JURISDICTION. The Obligors, by execution of this Agreement, agree that any legal actions or proceedings with respect to this Agreement and, at the Lender's sole option, any other Loan Documents shall be subject to the jurisdiction of and shall be brought in any state or federal court of competent jurisdiction sitting in the County of the State of South Carolina in which the Property is situate, to which jurisdiction and venue the Obligors hereby irrevocably consent by execution hereof. The Obligors each irrevocably waive any objection, including without limitation any objection to the laying of venue based on the grounds of forum non conveniens, which they or either of them may now or hereafter have to the bringing of any such action or proceeding in such jurisdiction. Nothing herein shall affect the right of the Lender to serve process in any manner permitted by law nor shall limit the right of the Lender to bring proceedings upon any other Loan Documents or against another party to any of the Loan Documents in the courts of any other jurisdiction.

WTA

8.11 HEIRS, SUCCESSORS AND ASSIGNS. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and assigns, provided that the Borrower shall not assign or otherwise transfer voluntarily, involuntarily or by operation of law any rights, responsibilities, liabilities or Obligations hereunder except pursuant to the applicable provisions of the Mortgage and with the express written consent of the Lender as provided thereunder.

8.12 PARTICIPATION. The Obligors hereby acknowledge that the Lender may now or hereafter sell, assign, transfer or grant participation in, or otherwise dispose of all or portions of the Lender's rights, title and interest in and to the Loan, this Agreement and the Loan Documents, none of which shall be construed to alter or waive any Obligations whatsoever of the Obligors hereunder.

8.13 CAPTIONS. The headings and captions in this Agreement are included only as a matter of convenience and for reference, and in no way define, limit, extend or describe the scope of this Agreement or the intent of any other provision hereof.

8.14 WAIVER OF JURY TRIAL. THE OBLIGORS, TO THE MAXIMUM EXTENT PERMITTED BY LAW, WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY ACTION ARISING FROM OR RELATED TO THIS AGREEMENT.

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IN WITNESS WHEREOF, this Loan Agreement has been duly executed by the parties hereto as of the date first written above.

BORROWER:

Signed, Sealed and Delivered
in the Presence of:

Bonnie L. Studley
Jeff R. Dodd

Cypress Camping Resort, LLC

By: Kenneth A. Hucks
Name: Kenneth A. Hucks
Title: Manager

GUARANTOR:

Bonnie L. Studley
Jeff R. Dodd

By: Kenneth A. Hucks
Name: Kenneth A. Hucks

Bonnie L. Studley
Jeff R. Dodd

Kenlar Investments, LLC

By: Kenneth A. Hucks
Name: Kenneth A. Hucks
Title: Manager

TD BANK, N.A.

NAJL
8/21
Nautil J. Revis

By: Nautil J. Revis, VP
Name: NAUTIL J. REVIS
Title: Vice President

EXHIBIT 'A'

PARCEL NO. 1: All and singular that certain piece, parcel or tract of land, together with any and all improvements situate thereon, situate, lying and being in **Socastee Township, Horry County, South Carolina, containing 34.52 acres, more or less, as shown upon plat prepared for Hucks Family Partnership, LLC by Culler Land Surveying Co., Inc. dated September 21, 2006, revised June 25, 2007, June 09, 2010 and November 1, 2010, which plat is recorded in the Office of the ROD for Horry County in Plat Book 250 at Page 104, reference to which is craved as forming a part and parcel hereof.**

LESS AND EXCEPTING, HOWEVER, 1.15 acres, more or less, as is shown and depicted upon a plat prepared for Hucks Family Partnership, LLC by Beasley Land Surveying, Inc. dated February 10, 2004, which plat is recorded in the Office of the ROD for Horry County in Plat Book 196 at Page 101.

This being identical property conveyed by Lacy Keith Hucks, Jr. to Cypress Camping Resort, LLC, being filed contemporaneously herewith.

This being the identical property conveyed by Kenneth Hucks to Cypress Camping Resort, LLC, being filed contemporaneously herewith.

TMS# 179-00-04-001

[Handwritten signature]

EXHIBIT 'A' CONTINUED

PARCEL NO. 2: ALL AND SINGULAR, all that certain piece, parcel or lot of land, together with any and all improvements situate thereon, situate, lying and being in **Socastee Township**, Horry County, South Carolina, being shown and designated as **Lot 2, Block J of Rosewood Estates** on a map made by Culler Land Surveying Co., Inc., which plat is recorded in the Office of the ROD for Horry County, in **Plat Book 81 at Page 248**, reference to which is craved as forming a part and parcel hereof.

This conveyance is made subject to restrictions of record.

This being the identical property conveyed to Kenneth A. Hucks by Deed of Lawrence Knox, Jr. and Sarah Jean Knox, recorded June 14, 2005, in the Office of the ROD for Horry County, in Deed Book 2925 at Page 894.

TMS# 179-23-09-002

[Handwritten initials]

EXHIBIT "A"
Legal Description of the Property

[Handwritten initials]

EXHIBIT "B"
Loan Commitment Letter

[To Be Attached]

WAA

EXHIBIT "C"
Development Cost Analysis

[To Be Attached]

WMA

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

TD Bank, N.A.,) Civil Action No. 2014-CP-26-8348
)
Plaintiff,)

vs.) PLAINTIFF'S MEMORANDUM IN
) SUPPORT OF ITS MOTION TO
) STRIKE DEFENDANT'S JURY
) DEMAND

Cypress Camping Resort, LLC and)
South Carolina Department of Motor)
Vehicles,)
)
Defendants.)

Plaintiff TD Bank, N.A. ("Plaintiff"), hereby respectfully submits its Memorandum in Support of its Motion to Strike the Jury Demand of Defendant Cypress Camping Resort, LLC ("Defendant"):

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff initiated this foreclosure action by way of a Complaint filed on December 16, 2014. Plaintiff's action is based on a construction loan made to Defendant on December 20, 2011, in the original principal amount of \$3,275,000.00. See generally Complaint. This loan is secured by the mortgage of real property located in Horry County, South Carolina. Id. The loan is in default, and Plaintiff seeks to foreclose on the mortgage on the subject property. Id.

Defendant filed an Answer and Counterclaim on March 13, 2015, asserting three counterclaims against Plaintiff: (1) fraudulent inducement or negligent misrepresentation; (2)

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CLARENCE J. WARD
CLERK OF COURT
2015 SEP 14 PM 3:43

EXHIBIT
B

breach of contract; and (3) breach of fiduciary duty.¹ See generally Answer and Counterclaim. Defendant demanded a jury trial. Id.

LEGAL ANALYSIS

Plaintiff filed the instant Motion to Strike Defendant's Jury Demand because Defendant is not entitled to a jury trial in this action. There is no right to a jury trial on Plaintiff's equitable foreclosure action. See Mortgage Electronic Systems, Inc. v. White, 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009) (citing Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997)) ("[T]here is no right to trial by jury for equitable actions"); DAV Corp., 298 S.C. at 514, 381 S.E.2d at 904 (referring to foreclosure proceeding as equitable). Moreover, Defendant is not entitled to a jury trial on its counterclaims because it expressly and irrevocably waived any rights it may have had to a jury trial in its Construction Loan Agreement. Alternatively, Defendant has not asserted legal and compulsory counterclaims which would entitle it to a jury trial.

I. Defendant is not entitled to a jury trial on its counterclaims because it expressly and irrevocably waived any rights it may have had to a jury trial in the Construction Loan Agreement.

It is well-established that a party may waive its right to a jury trial by contract. Wachovia Bank, Nat'l Assn. v. Blackburn, 407 S.C. 321, 332-33, 755 S.E.2d 437, 443 (2014); see also Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002); Leasing Service Corp. v. Crane, 804 F.2d 828, 832-33 (4th Cir. 1986). Because the right to a jury trial is a substantial right, jury waiver provisions should be strictly construed. Blackburn, 407 S.C. at 332-33, 755 S.E.2d at 443. Nevertheless, jury waiver

¹ Defendant also asserted a "counterclaim" for interpleading of funds but this claim does not seek any relief from Plaintiff and, instead, simply asks the Court to allow the interpleading of funds in lieu of appointing a receiver in this matter. See Answer and Counterclaim ¶¶ 51-55.

provisions must be given effect according to their "plain, ordinary and popular meaning." Beach Co., 351 S.C. at 64, 566 S.E.2d at 866. Further, the Supreme Court of South Carolina has held that jury waiver provisions in a note and guaranty were valid and enforceable even though the borrowers claimed to be unaware of the waivers until after litigation began. See Blackburn, 407 S.C. at 332-33, 755 S.E.2d at 443. The Court in Blackburn explained that by signing the note and guaranty, the borrowers knowingly and voluntarily executed the jury waiver provisions contained therein. Id.

Defendant has waived its right to a jury trial in this matter. Defendant executed a Construction Loan Agreement when the subject loan was originated on December 20, 2011. See Exhibit A to Motion to Strike Jury Demand. The Construction Loan Agreement contains the following jury trial waiver—in all capital letters with the heading underlined—located immediately before Defendant's signature:

8.14 WAIVER OF JURY TRIAL. THE OBLIGORS,² TO THE MAXIMUM EXTENT PERMITTED BY LAW, WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY ACTION ARISING FROM OR RELATED TO THIS AGREEMENT.

The subject loan was made by Plaintiff to Defendant in reliance on and in consideration of the Defendant's jury trial waiver. See Construction Loan Agreement at § 2.1 ("This Agreement is executed by and among the parties hereto for the purpose of setting forth all terms and conditions with respect to the Loan and is intended to include all covenants, conditions, representations and warranties made in connection with the Loan. . . . Should any conflict arise between any terms of this Agreement and any terms of the Loan Commitment or any

² "Obligors" is defined in the Construction Loan Agreement to include Defendant. Construction Loan Agreement at § 1.29.

Loan Document, the terms of this Agreement shall prevail . . . "); see also Construction Loan Agreement at p. 1 and §§ 1.25 and 2.2.

Accordingly, this Court should enforce the jury trial waiver executed by Defendant. Defendant's counterclaims all relate in some way to the Construction Loan Agreement and the subject loan given in reliance on and in consideration of the Construction Loan Agreement and, therefore, they fall within the scope of this jury trial waiver and Defendant has waived its right to a jury trial on those claims.

II. Defendant is not entitled to a jury trial because it has not asserted legal and compulsory counterclaims for which Defendant would be entitled to a jury trial.

Alternatively, to the extent Defendant's counterclaims do not relate to the Construction Loan Agreement and subject loan, Defendant is not entitled to a jury trial in this equitable foreclosure action because it has not asserted legal and compulsory counterclaims which would entitle it to a jury trial on those claims. "Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." Mortgage Electronic Systems, Inc. v. White, 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009) (citing Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997)). "If the complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim." Id. (citing C & S Real Estate Servs., Inc. v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986)). However, if a defendant asserts a counterclaim which is not legal and compulsory in an equitable action, he waives any right to a jury trial on that counterclaim. See N.C. Federal Savings and Loan Ass'n v. DAV Corp., 298 S.C. 514, 516, 381 S.E.2d 903, 904 (1989); Johnson v. S.C. Nat'l Bank, 292 S.C. 51, 54, 354 S.E.2d 895, 897 (1987) (summarizing the proper analysis for

determining the trial of legal and equitable issues in complaints and counterclaims, holding, “[i]f the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial”).

Because foreclosure proceedings are equitable proceedings in South Carolina, Defendant must assert a counterclaim that is **both** legal and compulsory to be entitled to a jury trial. Under South Carolina law, “a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party’s claim.” See DAV Corp., 298 S.C. at 518, 381 S.E.2d at 905 (citing Rule 13(a), SCRPC). Counterclaims asserted in a foreclosure proceeding are compulsory if they are logically related to the enforceability of the promissory note. Id. (adopting “logical relationship” test to determine whether counterclaims were compulsory or permissive).

Although Defendant’s counterclaims are related to the subject loan as discussed in Section I-above, Defendant’s counterclaims for breach of contract and breach of fiduciary duty are not related to the *enforceability* of the promissory note because they only seek damages as a remedy. Answer and Counterclaim at ¶¶ 43, 50 (seeking damages for funds spent on bankruptcy counsel, damage caused by management deadlock, and costs associated with lack of insurance as remedy for breach of contract counterclaim and an unspecified amount of damages for breach of fiduciary duty counterclaim); see Advance Int’l, Inc. v. N.C. Nat’l Bank of S.C., 316 S.C. 266, 270-71, 449 S.E.2d 580, 582-83 (Ct. App. 1994), aff’d in part, vacated on other grounds, 320 S.C. 532, 466 S.E.2d 367 (1996) (holding claims seeking damages for fraud, negligence, and unfair trade practices would not be compulsory counterclaims in equitable foreclosure action because they did not affect enforceability of the note and mortgage being foreclosed). Therefore, these claims are permissive claims, and

Defendant has waived its right to a jury trial on those claims by asserting them in this equitable foreclosure action.

Defendant's counterclaim for fraudulent inducement or negligent misrepresentation seeks both damages and rescission of the subject loan. Answer and Counterclaim ¶ 29. Again, to the extent this claim seeks damages as a remedy, it cannot be related to the enforceability of the promissory note and, therefore, is a permissive claim. See Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C., 316 S.C. at 270-71, 449 S.E.2d at 582-83. Alternatively, to the extent this counterclaim seeks to rescind the subject note, it seeks equitable relief for which there is no right to a trial by jury. See Mortgage Electronic Systems, Inc. v. White, 384 S.C. 606, 614, 682 S.E.2d 498, 502 (Ct. App. 2009) (finding that where the primary relief sought in a counterclaim was to have a mortgage declared void, the counterclaim was equitable and, therefore, there was no right to a jury trial on the counterclaim). Therefore, this claim is either permissive or equitable, and Defendant is not entitled to a jury trial on this claim under either circumstance.

Plaintiff's position is supported by the recent Blackburn decision. 407 S.C. 321, 755 S.E.2d 437. In Blackburn, the court found that the distinction between compulsory and permissive counterclaims and the distinction between legal and equitable counterclaims made no difference in that matter because the borrowers and guarantors would not be entitled to a jury trial under any circumstance. 407 S.C. at 331-32, 755 S.E.2d at 442-43. If the counterclaims were permissive, the Blackburn defendants waived their right to a jury trial on them by asserting them in an equitable foreclosure action; alternatively, if the claims were compulsory, the Blackburn defendants had waived their right to a jury trial on them in a jury trial waiver in their loan documents. Id. Likewise, the distinction between legal and equitable

made no difference: the Blackburn defendants were not entitled to a jury trial if their counterclaims were equitable, and if their claims were legal, they had waived their right to a jury trial on those claims either in the loan documents or by asserting them in an equitable foreclosure action. Id.

In sum, Defendants have not asserted any claims for which they are entitled to a jury trial in this matter and their request for a jury trial should be stricken.

CONCLUSION

Based on the foregoing, Plaintiff hereby requests that this Honorable Court enter an Order striking Defendant's jury demand in this case.

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September 11, 2015.

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February 12, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

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SC Court of Appeals

RE: TD Bank, N.A. v. Cypress Camping Resort, LLC, et. al.
Appellate Case No. 2016-000174
Our File No. 04387/01860

Dear Ms. Kitchings:

Enclosed please find the original and one copy of a Memorandum Regarding Appeal From an Order Denying the Proper Mode of Trial in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of this memorandum.

Very truly yours,



A. Mattison Bogan

AMB:lpw
Enclosures

cc: Richard R. Gleissner, Esquire
Phillip S. Porter, Esquire