

79237

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Fourteenth Judicial Circuit

Marvin H. Dukes, III, Master in Equity/Special Circuit Court Judge

RECEIVED

APR 12 2016

Appellate Case No. 2016-000537

SC Court of Appeals

TD Bank N.A., Successor by Merger
to Carolina First Bank.....Plaintiff/Respondent,

v.

Black Diamond, LLC; J. Christopher
Lindgren; David A. Brosman;
Julie H. King; and The Greenery, Inc.....Defendants,

Of Whom

Black Diamond, LLC; J. Christopher
Lindgren; David A. Brosman are.....Appellants.

TD BANK, N.A.'S MOTION TO DISMISS APPEAL

Michael J. Bogle (S.C. Bar No. 71125)

Email: mbogle@wcsr.com

Clayton M. Custer (S.C. Bar No. 68495)

Email: ccuster@wcsr.com

Catherine Wrenn (S.C. Bar No. 76042)

Email: cwrenn@wcsr.com

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

550 South Main Street

Suite 400

Greenville, SC 29601

Telephone: (864) 255-5400

*Attorneys for Respondent TD Bank N.A.,
Successor by Merger to Carolina First Bank*

TD Bank N.A., Successor by Merger to Carolina First Bank, (“**TD Bank**”) respectfully moves the Court, pursuant to South Carolina Appellate Court Rule 240, to dismiss Black Diamond, LLC, J. Christopher Lindgren and David A. Brosman’s (“**Appellants**”) appeal of the Orders in question because the Orders are not immediately appealable. In support of this Motion, TD Bank submits the following memorandum.

BACKGROUND FACTS

This is a commercial foreclosure action involving two loans totaling \$5.5 million made by TD Bank for the benefit of Black Diamond, LLC (“**Black Diamond**”), secured by two parcels of property located in Beaufort County, South Carolina. (The underlying Complaint is attached hereto as **Exhibit 1.**) The first loan was in the original principal amount of \$3,500,000.00, as evidenced by a January 25, 2008 promissory note (the “**\$3,500,000 Note**”, attached to the Complaint as Exhibit B), mortgage (the “**\$3,500,000 Mortgage**”, attached to the Complaint as Exhibit J) and assignment of leases and rents (the “**\$3,500,000 Assignment of Leases and Rents**”, attached to the Complaint as Exhibit L). The second loan was in the original principal amount of \$2,000,000.00, as evidenced by a July 25, 2008 promissory note (the “**\$2,000,000 Note**”, attached to the Complaint as Exhibit D), December 9, 2003 mortgage (the “**\$2,000,000 Mortgage**”, attached to the Complaint as Exhibit K) and May 21, 2007 assignment of leases and rents (the “**\$2,000,000 Assignment of Leases and Rents**”, attached to the Complaint as Exhibit M). Both the \$3,500,000 Note and the \$2,000,000 Note (collectively, the “**Notes**”) were originally secured by personal guaranty agreements executed by J. Christopher Lindgren (“**Lindgren**”) and Herb G. King (“**King**”). (Lindgren Guaranty Agreement corresponding to the \$2,000,000 Note (the “**Lindgren \$2,000,000 Guaranty**”), attached to the Complaint as Exhibit F; Lindgren Guaranty Agreement

corresponding to the \$3,500,000 Note (the “**Lindgren \$3,500,000 Guaranty**”), attached to the Complaint as Exhibit G.) Following the death of King, David A. Brosman (“**Brosman**”) was substituted as the second guarantor of the two loans. (Brosman Guaranty Agreement corresponding to the \$2,000,000 Note (the “**Brosman \$2,000,000 Guaranty**”), attached to the Complaint as Exhibit I; Brosman Guaranty Agreement corresponding to the \$3,500,000 Note (the “**Brosman 3,500,000 Guaranty**”), attached to the Complaint as Exhibit H.)

As of July 2010, both Notes were in default due to payment defaults and the death of one of the guarantors (King). As such, two forbearance agreements were entered into by the parties on July 28, 2010 (the “**3,500,000 Forbearance Agreement**”, attached to the Complaint as Exhibit C, and the “**2,000,000 Forbearance Agreement**”, attached to the Complaint as Exhibit E; collectively the “**Forbearance Agreements**”), whereby TD Bank agreed to, among other things: (1) forbear from exercising its default rights and remedies under the loan documents; (2) release the Estate of King from the personal guaranty agreements executed by King; and (3) accept certain modifications of the Notes, including the transfer of King’s membership interest in Black Diamond to Lindgren and the subsequent transfer of a fifty percent membership interest in Black Diamond from Lindgren to Brosman. (Forbearance Agreements, p. 1.¹) In return, Black Diamond and both guarantors agreed to, among other things: (1) maintain a payment reserve account equal to two months of principal and interest payments; (2) enter into a management

¹ As the terms of the \$3,500,000 Forbearance Agreement and \$2,000,000 Forbearance Agreement are almost identical, citations to the “Forbearance Agreements” will refer to that page or paragraph of both the Forbearance Agreements.

agreement whereby the management of Black Diamond shall be turned over to a manager to be designated by TD Bank and shall have all rights and responsibilities of a court-appointed receiver, including without limitation the collection of rents, the payment to TD Bank of all debt service requirements, and the day-to-day management of Black Diamond and the property encumbered by the \$3,500,000 Mortgage and \$2,000,000 Mortgage (collectively, the “**Mortgages**”); and (3) a representation that they have no claims, defenses, counterclaims or rights of setoff or recoupment against TD Bank related to the loans. (*Id.*, pp. 4-5.) Black Diamond was represented by counsel, The McNair Law Firm, in the negotiation of the Forbearance Agreements.

The \$2,000,000 Note matured on July 25, 2011 and demand for payment was made by letter dated August 10, 2011 (attached to the Complaint as Exhibit R). The failure of Black Diamond to pay its obligations under the \$2,000,000 Note constitutes an event of default under the Notes. (See \$2,000,000 Note, ¶ 10.) Notice of default and demand for payment of the \$3,500,000 Note was made by letter dated September 13, 2011 (attached to the Complaint as Exhibit S). Black Diamond has failed to make payment to TD Bank in accordance with the terms of both Notes.

TD Bank filed the present action on or about March 2, 2012, seeking to foreclose on the subject property and a deficiency claim against Appellants. On April 23, 2012, Black Diamond and Lindgren filed an Answer and Counterclaim, asserting claims against TD Bank for breach of covenant of good faith and fair dealing; breach of contract, breach of fiduciary duty, negligent misrepresentation, duress, interference with prospective economic relations, and unfair trade practices (the “**Black Diamond/Lindgren Answer**”, attached hereto as **Exhibit 2**). On May 18, 2012,

Brosman filed an Answer and Counterclaim, identical in substance to that filed by Black Diamond and Lindgren (the “**Brosman Answer**”, attached hereto as **Exhibit 3**).

On November 15, 2013, TD Bank filed a Motion to Strike Defendants’ Jury Trial Demand (attached hereto, together with a memorandum in support thereof, hereto as **Exhibit 4**). On February 21, 2014, TD Bank filed a Motion for Summary Judgment as to those counterclaims and affirmative defenses asserted by Appellants (attached hereto, together with a memorandum in support thereof, as **Exhibit 5**). The court held a hearing on March 24, 2015 on both motions. On June 10, 2015, the court issued an Order granting TD Bank’s Motion to Strike Defendants’ Jury Trial Demand (attached hereto as **Exhibit 6**). On September 11, 2015, the court issued an Order granting, in part, TD Bank’s Motion for Summary Judgment as to four of Appellants’ seven counterclaims (attached hereto as **Exhibit 7**). Appellants filed Motions for Reconsideration of both motions, which were denied by the court by Order dated February 11, 2016 (attached hereto as **Exhibit 8**). Importantly, the court did not certify a final judgment pursuant to Rule 54(d), as the case will continue to trial on Appellants’ remaining counterclaims.

ARGUMENT

I. THE COURT SHOULD DISMISS APPELLANTS’ APPEAL OF THE ORDER GRANTING TD BANK’S MOTION TO STRIKE DEFENDANTS’ JURY TRIAL DEMAND BECAUSE IT IS NOT IMMEDIATELY APPEALABLE AS IT DOES NOT DENY APPELLANTS A MODE OF TRIAL TO WHICH THEY ARE ENTITLED AS A MATTER OF RIGHT

The Order granting TD Bank’s Motion to Strike Defendants’ Jury Trial Demand (and the subsequent Order denying Appellants’ Motion for Reconsideration of the same) is not immediately appealable because Appellants are not entitled to a jury trial as a matter of right. Thus, the Court should dismiss the appeal. As the South Carolina Supreme Court has held, “[a]n order denying a party a jury trial is not immediately

appealable *unless it deprives him of a mode of trial to which he is entitled as a matter of right.*” C&S Real Estate Servs., Inc. v. Massengale, 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986) (emphasis added). In C&S, a mortgage foreclosure case, the Court dismissed an appeal of an order that denied the appellant a jury trial on her counterclaims because the order was not immediately appealable. The Court held that the order was not immediately appealable because it denied the appellant a jury trial in an equitable action and on counterclaims that were equitable and/or permissive in nature, and, therefore, did not entitle the appellant to a jury trial as a matter of right. Id., at 300-01, 350 S.E.2d at 192-93 (finding that an equitable counterclaim and a permissive, legal counterclaim, which is asserted in an equitable action, do not entitle the party to a jury trial). Thus, because “[t]he order under appeal did not deprive [the] appellant of a mode of trial to which she was entitled as a matter of right,” the Supreme Court dismissed the appeal. Id. Similarly, in this instance, the Order in question is not immediately appealable because it does not deny Appellants a “mode of trial to which [they are] entitled as a matter of right.” Id.

A. APPELLANTS ARE NOT ENTITLED TO A JURY TRIAL ON TD BANK’S EQUITABLE FORECLOSURE AND DEFICIENCY CLAIMS AGAINST THEM

Foreclosure actions, like this one, are equitable, and, as a result, parties to such an action are “not entitled, as a matter of right, to a jury trial.” Carolina First Bank v. BADD, LLC, 414 S.C. 289, 293, 778 S.E.2d 106, 108 (2015), reh’g granted (Apr. 9, 2015), reh’g dismissed (Nov. 6, 2015); see also S.C. R. Civ. P. Rule 71(a) (“Actions to foreclose liens or obtain partition of real property *shall be tried by the court*, and shall ordinarily be referred to a master pursuant to Rule 53”) (emphasis added). In BADD, the South Carolina Supreme Court confirmed that guarantors, who are parties to a

foreclosure action “for the purpose of collecting a deficiency,” are not entitled to a jury trial on that claim because deficiency judgments are “incidental to the relief sought in a foreclosure action.” Id., at 294, 778 S.E.2d at 108 (internal citations omitted). In so holding, the BADD court relied on S.C.Code Ann. § 29-3-660, which specifically permits *a court* to award a deficiency judgment against a guarantor in a foreclosure action.

Section 29-3-660 provides:

In actions to foreclose mortgages[,] . . . if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and *the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.*

S.C.Code Ann. § 29-3-660 (1976) (emphasis added).

As noted above, this lawsuit is a *foreclosure* action, which is equitable in nature and in which TD Bank seeks to: (1) foreclose on the mortgages that Black Diamond executed in its favor and (2) recover any deficiency after the foreclosure sale from the guarantors, Lindgren and Brosman. As a result, Black Diamond is not entitled to a jury trial on TD Bank’s foreclosure action against it, and the guarantors, whom “the Bank included . . . as [parties] to its foreclosure action only for the purpose of collecting a deficiency should one be adjudged,” are not entitled to a jury trial on TD Bank’s claim against them because “a party does not have a right to a jury trial” on a deficiency claim. BADD, at 294, 778 S.E.2d at 108.

B. IN THIS EQUITABLE ACTION, APPELLANTS ARE NOT ENTITLED TO A JURY TRIAL ON THEIR PERMISSIVE COUNTERCLAIMS AGAINST TD BANK.

A defendant is “entitled to a jury trial on his counterclaims in an equitable action,” like this one, “only if the counterclaims are legal and compulsory.” Id., at 295,

778 S.E.2d at 109. “A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party’s claim. In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, *when there is a ‘logical relationship’ between the counterclaim and the enforceability of the guaranty agreement.*” Id. (emphasis added). As a result, in BADD, a foreclosure action in which the bank sought a deficiency against a guarantor, the South Carolina Supreme Court held that a guarantor who asserted counterclaims that lacked a logical relationship with the guaranty agreement’s enforceability was not entitled to a jury trial on those claims.

The BADD guarantor asserted breach of contract and civil conspiracy legal counterclaims against the bank. In analyzing whether the counterclaims were compulsory or permissive, the BADD court found that “*the execution of the guaranty agreements*” was the ‘transaction or occurrence’ that gave rise to [the guarantor’s] inclusion in the Bank’s foreclosure complaint.” Id. (emphasis added). Thus, in order to be compulsory, the guarantor’s counterclaims had to have a logical relationship with the guaranty agreement’s execution or enforceability. The BADD court found that the guarantor’s counterclaims were based on “an alleged conspiracy between the Bank” and a third party to “*induce [the debtor’s] default*” on the underlying notes and the Bank’s alleged breach of the covenant of good faith and fair dealing, which was “implied in the note, mortgage, and guaranty agreements,” by virtue of the “purported conspiracy.” Id., at 295-96, 778 S.E.2d at 109-10. The Court held that the counterclaims did not have a “logical relationship to either the *execution or enforceability of the guaranty agreements*,” and it noted that the claims instead “presume[d] the enforceability of the guaranty agreements because the allegations, if true, would not render the guarantees

unenforceable.” Id., at 295, 778 S.E.2d at 109. As a result, the counterclaims were permissive and did not entitle the guarantor to a jury trial.

Like the BADD guarantor’s counterclaims, Lindgren and Brosman’s legal counterclaims are permissive in nature and do not entitle them to a jury trial because they bear no “logical relationship” with the transaction that gave rise to TD Bank’s foreclosure and deficiency action against them — the execution of the notes, mortgages, and guaranty agreements. Lindgren and Brosman have asserted the following counterclaims against TD Bank: breach of the covenant of good faith and fair dealing, breach of contract, breach of fiduciary duty, duress, interference with prospective economic relations and unfair trade practices. As with the BADD counterclaims, none of these legal counterclaims “affect the execution or enforceability” of the loan documents. Instead, they are premised on events that occurred *after* the execution of those documents, such as the TD Bank’s refusal to accept a short sale of one of the mortgaged commercial properties. (See, e.g., Brosman Answer, ¶ 27; Black Diamond/Lindgren Answer, ¶ 27.) Importantly, Lindgren and Brosman, in their Memorandum in Opposition to TD Bank’s Motion for Summary Judgment, confirmed that their counterclaims are based on alleged events that occurred “*subsequent*” to the execution of the parties’ loan documents. (See, e.g., Memorandum in Opposition, pp. 4-5 (alleging that the purported breach of contract was “subsequent to” and “after” the execution of the forbearance agreements), attached hereto as Exhibit 9.) Consequently, Appellants’ legal counterclaims against TD Bank are permissive and do not entitle Appellants to a jury trial.

C. APPELLANTS FURTHER CONTRACTUALLY WAIVED THEIR RIGHT TO A JURY TRIAL.

Furthermore, Appellants contractually waived any right to a jury trial when they executed the loan documents at issue in the case. Under South Carolina law, “[a] party may waive the right to a jury trial by contract.” Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct.App.2002). Here, the \$3,500,000 Note, in capital letters conspicuously located directly above the signature line, unambiguously states that Black Diamond:

WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, THE RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM, WHETHER IN CONTRACT, TORT OR OTHERWISE, RELATING DIRECTLY OR INDIRECTLY TO THE LOAN EVIDENCED BY THIS NOTE, . . . THE SECURITY INSTRUMENT, THE LOAN AGREEMENT OR THE OTHER SECURITY DOCUMENTS OR *ANY ACTS OR OMISSIONS OF LENDER OR BORROWER.*

(\$3,500,000 Note, p. 2 (emphasis added).) As discussed herein, the claims and counterclaims at issue in this action relate directly to certain alleged “acts or omissions” of TD Bank and Appellants. Therefore, pursuant the plain, ordinary meaning of the \$3,500,000 Note’s language, Black Diamond waived any right to a jury trial in this lawsuit.

Like Black Diamond, Lindgren and Brosman similarly contractually waived any right to a jury trial in this case, as the subject guaranty agreements clearly, and in conspicuous, capitalized language directly above or near the signature lines, provide that the guarantors unequivocally waived such a right. For example, the Lindgren Guaranty Agreement corresponding to the \$3,500,000 Note states:

TO THE EXTENT NOW OR HEREAFTER PERMITTED BY LAW, THE GUARANTOR AND ANY OTHER

GUARANTOR WAIVES TRIAL BY JURY. WITH RESPECT TO ANY ACTION, CLAIM, SUIT OR PROCEEDING ON OR ARISING OUT OF THE LOANS, THE OBLIGATIONS, THE CONDUCT OF THE RELATIONSHIP BETWEEN THE LENDER AND THE BORROWER, AND/OR THE CONDUCT OF THE RELATIONSHIP BETWEEN THE LENDER AND ANY GUARANTOR.

(Lindgren \$3,500,000 Guaranty, ¶ 21 (emphasis added); see, e.g., Brosman \$2,000,000 Guaranty, ¶ 17; Brosman \$3,500,000 Guaranty, ¶ 17.²) Pursuant to the simple construction of the guaranty agreements' language, Lindgren and Brosman waived any right to a jury trial in this matter, which indisputably "arise[s] out of the loans, the obligations, the conduct [or] the relationship between [TD Bank and Black Diamond] and/or [Black Diamond and the guarantors]."

Accordingly, because Appellants are not entitled to a jury trial as a matter of right, the Order granting TD Bank's Motion to Strike Defendants' Jury Trial Demand (and the subsequent Order denying Appellants' Motion for Reconsideration of the same) is not immediately appealable and this appeal should be dismissed, and the case remanded back to the lower court for final disposition.

II. THE COURT SHOULD DISMISS APPELLANTS' APPEAL OF THE ORDER GRANTING, IN PART, TD BANK'S MOTION FOR SUMMARY JUDGMENT BECAUSE IT IS NOT IMMEDIATELY APPEALABLE AS IT IS NOT A FINAL JUDGMENT SUCH THAT THIS COURT HAS JURISDICTION PRIOR TO FINAL ADJUDICATION OF ALL CLAIMS IN THE ACTION

The Order granting, in part, TD Bank's Motion for Summary Judgment (and the subsequent Order denying Appellants' Motion for Reconsideration of the same) is not

² Lindgren's Guaranty Agreement corresponding to the \$2,000,000 Note further provides that Lindgren consents to "any waiver" of Black Diamond, which as noted above, includes a waiver of a jury trial in this matter. Lindgren \$2,000,000 Guaranty, ¶ 9.

immediately appealable because it is not a final judgment – nor was it certified by the lower court as such pursuant to Rule 54(b) of the South Carolina Rules of Civil Procedure – such that this Court has jurisdiction prior to final adjudication of all claims in the action. Rule 54(b) states, in part:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Rule 54(b), SCRCP. As stated by this Court, “[t]he rule does not require certification and if the trial court chooses to certify the judgment, it must do so in a definite, unmistakable manner. . . . An appeal following a Rule 54(b) certification is the exception rather than the rule.” Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 351 S.C. 459, 466, 570 S.E.2d 197, 200 (Ct.App.2002) (citing 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure at § 2654 (3d ed. 1998)).

In Tommy L. Griffin Plumbing, the lower court was argued to have certified a grant of partial summary judgment dismissing seven of nine claims at issue in the lawsuit. The defendant waited to appeal the summary judgment ruling until the remaining claims were resolved, several months later. The plaintiff contended that the appeal was untimely in that the defendant should have immediately appealed the lower court’s order as a final judgment. Noting that the state Rule 54(b) is “virtually identical” to its federal counterpart, this Court looked to federal law, which requires that three prerequisites be satisfied for an appellate court to obtain jurisdiction prior to adjudication

of all claims in an action: (1) “[t]here must be multiple claims for relief or multiple parties;” (2) “the judgment entered on the certified claim must be a final judgment;” and (3) “the district court must expressly determine that there is no just reason for delay.” Id. (citing Wright, Miller & Kane, Federal Practice and Procedure at § 2656). Regarding the first prerequisite:

The federal courts define multiple claims as separate claims with a view to avoiding double appellate review of the same issues. Fed. Deposit Ins. Corp. v. Elefant, 790 F.2d 661, 664 (7th Cir.1986). In determining whether a claim is separate, the court must consider whether separate recovery is possible on the claims; mere variations of legal theories do not constitute separate claims. [Stearns v. Consol. Mgmt., Inc., 747 F.2d 1105, 1108-09 (7th Cir.1984).] Where there is a substantial factual overlap between the claim adjudged and the remaining claims, to take jurisdiction would vitiate “the most important purpose behind Rule 54(b)’s limitations to spare the court of appeals from relearning the facts of a case on successive appeals.” Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 702 (7th Cir.1984). Because the adjudged claim must be separate and unrelated to the remaining claims, Rule 54(b) does not represent a departure from the fundamental principle limiting piecemeal appeals. Wright, Miller & Kane, Federal Practice and Procedure at § 2654. . . . If a judgment leaves some further act to be done by the court before the rights of the parties are determined, the judgment is not final. Mid-State Distribs. v. Century Importers, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993).

Id., at 466-67, 570 S.E.2d at 200-01.

This Court went on to find that the lower court improperly certified the partial summary judgment order, finding “substantial factual overlap between the two remaining claims and the seven adjudicated claims.” Id., at 469, 570 S.E.2d at 202. Accordingly, “the adjudicated claims were not sufficiently separate to warrant certification under Rule 54(b).” Id.

Here, Appellants brought seven counterclaims against TD Bank: breach of covenant of good faith and fair dealing; breach of contract, breach of fiduciary duty, negligent misrepresentation, duress, interference with prospective economic relations, and unfair trade practices. The lower court granted TD Bank's Motion for Summary Judgment, in whole, as to three of those claims (breach of fiduciary duty, duress and unfair trade practices), and, in part, as to two of those claims (breach of contract and of the covenant of good faith and fair dealing) to the extent they are based on the cross-collateralization of the loans and TD Bank's decision not to agree to a proposed short sale of the subject property. Summary judgment was denied as to Appellants' counterclaims for negligent misrepresentation and interference with prospective economic relations, as well as to the counterclaims for breach of contract and of the covenant of good faith and fair dealing to the extent they are based on facts other than the cross-collateralization of the loans and TD Bank's decision not to agree to a proposed short sale of the subject property.

In support of their breach of covenant of good faith and fair dealing counterclaim, Appellants allege that:

[TD Bank] has engaged in a pattern and course of conduct with the purpose and effect of injuring and damaging [Appellants] and improperly enriching itself. Among other things, [TD Bank] has employed its superior bargaining and economic position to coerce [Appellants] into cross-collateralization agreements, to improperly take advantage of the death of a member of [Black Diamond], to coerce [Appellants] into contracting with a property manager, to thereafter interfere with the contract entered into with the property manager and to direct him in his performance to the benefit of [TD Bank] and the detriment of [Appellants], to refuse to timely respond to requests for approval of sales of property which resulted in the loss of a sale and corresponding injury and damage to [Appellants], to

interfere with tenants, causing a loss of rentals and corresponding damages in property values, and to otherwise interfere with [Appellants'] ability to realize value on the subject properties and thereby repay [TD Bank].

Black Diamond/Lindgren Answer, ¶ 27; Brosman Answer, ¶ 27 (collectively, “Answers”). The *identical allegations are pled by incorporation only* in support of the remaining counterclaims for breach of contract (Answers, ¶¶ 29-30), Breach of Fiduciary Duty (Answers, ¶¶ 31-32), negligent misrepresentation (Answers, ¶¶ 33-34), duress (Answers, ¶¶ 35-36), interference with prospective economic relations (Answers, ¶¶ 37-38), and unfair trade practices (Answers, ¶¶ 39-40). Thus, a review of Appellants’ Answers reveals that, like the pleading at issue in Tommy L. Griffin Plumbing, there is a “substantial factual overlap” between the adjudged claims and the remaining claims, such that the causes of action are “mere variations of legal theories” rather than separate, distinct claims capable of separate recoveries. Tommy L. Griffin Plumbing, at 469, 570 S.E.2d at 202. Certainly, to allow appellate review at this intermediate stage would result in successive appeals to this Court, each based on the same facts and substantive claims.

Furthermore, there was no indication from the lower court that either the Order granting, in part, TD Bank’s Motion for Summary Judgment or the subsequent Order denying Appellants’ Motion for Reconsideration of the same are final judgments pursuant to Rule 54(b) of the South Carolina Rules of Civil Procedure, nor was there any “express determin[ation]” that the court’s ruling was final for appellate review such that “there is no just reason for delay.” Id., at 466, 570 S.E.2d at 200.

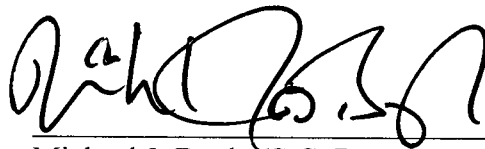
Accordingly, because Appellants are not entitled to a jury trial as a matter of right, the Order granting, in part, TD Bank’s Motion for Summary Judgment (and the subsequent Order denying Appellants’ Motion for Reconsideration of the same) is not

immediately appealable and this appeal should be dismissed, and the case remanded back to the lower court for final disposition.

CONCLUSION

The Court should dismiss Appellants' appeal of the subject Orders because they are not immediately appealable. Specifically, the Order granting TD Bank's Motion to Strike Defendants' Jury Trial Demand (and the subsequent Order denying Appellants' Motion for Reconsideration of the same) is not immediately appealable because Appellants are not entitled to a jury trial as a matter of right in this equitable foreclosure action; and the Order granting, in part, TD Bank's Motion for Summary Judgment (and the subsequent Order denying Appellants' Motion for Reconsideration of the same) is not immediately appealable because it is not a final judgment pursuant to Rule 54(b) of the South Carolina Rules of Civil Procedure such that this Court has jurisdiction prior to final adjudication of all claims in the action.

This 8th day of April 2016
Greenville, South Carolina



Michael J. Bogle (S.C. Bar No. 71125)

Email: mbogle@wcsr.com

Clayton M. Custer (S.C. Bar No. 68495)

Email: csuster@wcsr.com

Catherine Wrenn (S.C. Bar No. 76042)

Email: cwrenn@wcsr.com

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

550 South Main Street

Suite 400

Greenville, SC 29601

Telephone: (864) 255-5400

*Attorneys for Respondent TD Bank N.A.,
Successor by Merger to Carolina First Bank*

INDEX TO EXHIBITS

- 1 Complaint
- 2 Black Diamond/Lindgreen Answer
- 3 Brosman Answer
- 4 TD Bank's Motion to Strike Defendants' Jury Trial Demand with supporting memorandum
- 5 TD Bank's Motion for Summary Judgment with supporting memorandum
- 6 Order granting TD Bank's Motion to Strike Defendants' Jury Trial Demand (dated 6/10/15)
- 7 Order granting, in part, TD Bank's Motion for Summary Judgment as to four of Appellants' seven counterclaims (dated 9/11/15)
- 8 Order denying Appellants' Motions for Reconsideration (dated 2/11/16)
- 9 Appellants' Motion in Opposition to TD Bank's Motion for Summary Judgment

EXHIBIT 1

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

TD BANK, N.A., SUCCESSOR BY
MERGER TO CAROLINA FIRST BANK,

Case No. 2012-CP-07- 0944

Plaintiff,

COMPLAINT

**(Foreclosure, Non-Jury, Deficiency
Demanded)**

vs.

BLACK DIAMOND, LLC, J.
CHRISTOPHER LINDGREN, DAVID A.
BROSMAN, JULIE H. KING and THE
GREENERY, INC.

Defendants.

2012 MAR -6 PM12:17
ROSEMEAD
COUNTY, S.C.
CLERK OF COURT

COMPLAINT

(Foreclosure, Non-Jury, Deficiency Demanded)

NOW COMES, Plaintiff TD Bank, N.A., successor in interest by merger to Carolina First Bank, complaining of the Defendants herein, alleging as follows:

HAMP

1. Upon information and belief, the real property which is the subject of this action is commercial, and the Home Affordable Modification Program is inapplicable. Upon information and belief, the Administrative Order of the Supreme Court of South Carolina dated May 2, 2011 (2011-05-02-01) does not apply in this case because the real property which is the subject of this action is not an "owner occupied dwelling" as defined in the Administrative Order.

Jurisdiction

2. TD Bank, N.A. ("**Plaintiff**") is a national banking association organized under the laws of the United States of America with its primary office in the State of Delaware, and is the successor by merger to Carolina First Bank, a South Carolina banking corporation, pursuant to Articles of Merger filed with the South Carolina Secretary of State on September 30, 2010, a copy of which is attached hereto as **Exhibit "A"**.

3. Upon information and belief, defendant Black Diamond, LLC is a limited liability company organized and existing under the laws of the State of South Carolina, and as such is subject to the jurisdiction of this Court.

4. Upon information and belief, defendant J. Christopher Lindgren is a resident of the State of South Carolina, and as such is subject to the jurisdiction of this Court.

5. Upon information and belief, defendant David A. Brosman is a resident of the State of South Carolina, and as such is subject to the jurisdiction of this Court.

6. Upon information and belief, defendant Julie H. King has an interest in the real property that is the subject of this action, and as such is subject to the jurisdiction of the Court.

7. Upon information and belief, defendant The Greenery, Inc. is a corporation incorporated and existing under the laws of the State of South Carolina, and as such is subject to the jurisdiction of this Court.

8. The real property which is the subject of this action is located in Beaufort County, South Carolina, and as such, pursuant to South Carolina Code § 15-7-10, venue is proper in this county. The Court has jurisdiction over the parties and the matters which are the subject of this action.

The Loans

9. Plaintiff extended certain financing to defendant Black Diamond, LLC in the original principal amount of \$3,500,000.00, which financing is evidenced by that certain Promissory Note, dated January 25, 2008, in the original maximum principal amount of \$3,500,000.00 (together with all predecessor notes, extensions, renewals and/or modifications, the "\$3,500,000 Note"), a copy of which \$3,500,000 Note is attached hereto and incorporated herein as **Exhibit "B"**.

10. The terms of the \$3,500,000 Note were modified by that certain Forbearance Agreement, dated on or about July 28, 2010, entered into among Black Diamond, LLC, the Estate of Herb G. King, Defendant J. Christopher Lindgren and Plaintiff (the "\$3,500,000 Forbearance Agreement"). A copy of the \$3,500,000 Forbearance Agreement is attached hereto and incorporated herein as **Exhibit "C"**.

11. Plaintiff extended certain financing to defendant Black Diamond, LLC in the original principal amount of \$2,000,000.00, which financing is evidenced by that certain Promissory Note, dated July 25, 2008, in the original maximum principal amount of \$2,000,000.00 (together with all predecessor notes, extensions, renewals and/or modifications, the "\$2,000,000 Note"), a copy of which \$2,000,000 Note is attached hereto and incorporated herein as **Exhibit "D"**.

12. The terms of the \$2,000,000 Note were modified by that certain Forbearance Agreement, dated on or about July 28, 2010, entered into among Black Diamond, LLC, the Estate of Herb G. King, Defendant J. Christopher Lindgren and Plaintiff (the "\$2,000,000 Forbearance Agreement"). A copy of the \$2,000,000 Forbearance Agreement is attached hereto and incorporated herein as **Exhibit "E"**.

13. The \$3,500,000 Note and the \$2,000,000 Note are referred to herein collectively as the "Notes".

The Guaranties

14. Defendant J. Christopher Lindgren gave to Plaintiff his Guaranty, dated July 25, 2008, in which he unconditionally guaranteed to Plaintiff the punctual payment and performance of all obligations of defendant Black Diamond, LLC to Plaintiff, including without limitation the \$2,000,000 Note, and all extensions, renewals and modifications thereof. A copy of the guaranty is attached hereto and incorporated herein as **Exhibit "F"**.

15. Defendant J. Christopher Lindgren gave to Plaintiff his Guaranty, dated on or about January 25, 2008, in which he unconditionally guaranteed to Plaintiff the punctual payment and performance of the \$3,500,000 Note, and all extensions, renewals and modifications thereof. A copy of the guaranty is attached hereto and incorporated herein as **Exhibit "G"**.

16. Defendant David A. Brosman gave to Plaintiff his Unconditional Guaranty Agreement, dated on or about July 30, 2010, in which he unconditionally guaranteed to Plaintiff the punctual payment and performance of the \$3,500,000 Note, and all extensions, renewals and modifications thereof. A copy of the guaranty is attached hereto and incorporated herein as **Exhibit "H"**.

17. Defendant David A. Brosman gave to Plaintiff his Unconditional Guaranty Agreement, dated on or about July 30, 2010, in which he unconditionally guaranteed to Plaintiff the punctual payment and performance of the \$2,000,000 Note, and all extensions, renewals and modifications thereof. A copy of the guaranty is attached hereto and incorporated herein as **Exhibit "I"**.

18. Pursuant to the guaranty agreements identified above, Defendants J. Christopher Lindgren and David A. Brosman are liable to Plaintiff, as primary obligors, jointly and severally, for all obligations of Black Diamond, LLC to Plaintiff evidenced by the Notes.

The Mortgages

19. Plaintiff is the owner and holder of that certain First Mortgage and Security Agreement of Defendant Black Diamond, LLC in favor of Plaintiff, dated as of January 25, 2008 and recorded on January 30, 2008 in Book 02677 at Page 655 in the Office of the Register of Deeds for Beaufort County, South Carolina, as amended from time to time including without limitation that certain mortgage amendment recorded on August 12, 2008 in Book 2764 at Page 2297 in the Office of the Register of Deeds for Beaufort County, South Carolina (as amended, the "**\$3,500,000 Mortgage**"). A copy of the \$3,500,000 Mortgage is attached hereto and incorporated herein as **Exhibit "J-1"**. The property encumbered by such mortgage is identified on **Exhibit "J-2"** attached hereto and incorporated herein. The \$3,500,000 Mortgage secures the \$3,500,000 Note and the \$2,000,000 Note.

20. Plaintiff is the owner and holder of that certain Mortgage of Defendant Black Diamond, LLC in favor of Plaintiff, dated as of December 9, 2003 and recorded on December 12, 2003 in Book 01884 at Page 642 in the Office of the Register of Deeds for Beaufort County, South Carolina, as amended from time to time including without limitation the mortgage modification recorded on August 12, 2008 in Book 2764 at Page 2301 in the Office of the Register of Deeds for Beaufort County, South Carolina (as amended, the "**\$2,000,000 Mortgage**"). A copy of the \$2,000,000 Mortgage is attached hereto and incorporated herein as **Exhibit "K-1"**. The property encumbered by such mortgage is identified on **Exhibit "K-2"** attached hereto and incorporated herein. The \$2,000,000 Mortgage secures the \$2,000,000 Note

and all other debt of Defendant Black Diamond, LLC to Plaintiff, including without limitation the \$3,500,000 Note.

21. The \$3,500,000 Mortgage and the \$2,000,000 Mortgage are referred to herein collectively as the "**Mortgages**".

22. The property encumbered by the Mortgages is referred to herein collectively as the "**Property**".

Assignments of Leases and Rents

23. Plaintiff is the owner and holder of that certain Assignment of Leases of Black Diamond, LLC in favor of Plaintiff, dated as of January 25, 2008 and recorded on January 30, 2008 in Book 2677 at Page 668 in the Office of the Register of Deeds for Beaufort County, South Carolina (the "**\$3,500,000 Assignment of Leases and Rents**"). A copy of the \$3,500,000 Assignment of Leases is attached hereto and incorporated herein as **Exhibit "L"**. The property encumbered by such assignment is the same property encumbered by the \$3,500,000 Mortgage and is identified on **Exhibit "J-2"** attached hereto.

24. Plaintiff is the owner and holder of that certain Assignment of Leases and Rents of Black Diamond, LLC in favor of Plaintiff, dated as of May 21, 2007 and recorded on August 5, 2007 in Book 2579 at Page 1079 in the Office of the Register of Deeds for Beaufort County, South Carolina (the "**\$2,000,000 Assignment of Leases and Rents**"). A copy of the \$2,000,000 Assignment of Leases and Rents is attached hereto and incorporated herein as **Exhibit "M"**. The property encumbered by such assignment is the same property encumbered by the \$2,000,000 Mortgage and is identified on **Exhibit "K-2"** attached hereto.

25. The \$3,500,000 Assignment of Leases and Rents and the \$2,000,000 Assignment of Leases and Rents are referred to herein collectively as the "Assignments of Leases and Rents".

26. The security interest of Plaintiff was perfected by filing a UCC Financing Statement on December 12, 2003 (Book 3 at Page 223), as renewed by UCC Financing Statement Amendment filed on October 23, 2008 (Book 6 at Page 1927), with the Office of the Register of Deeds for Beaufort County, South Carolina. Copies of such UCC filings are attached hereto and incorporated herein as **Exhibit "N"**. The property encumbered by such financing statement is identified on **Exhibit "K-2"** attached hereto.

Released Property

27. A portion of the property encumbered by the \$2,000,000 Mortgage and the \$2,000,000 Assignment of Leases and Rents was released from the lien of such documents pursuant to a release instrument dated May 16, 2005 and recorded on May 18, 2005 in Book 2151 at Page 258 in the Office of the Register of Deeds for Beaufort County, South Carolina. A copy of such release instrument is attached hereto and incorporated herein as **Exhibit "O"**. The released property is identified on **Exhibit "P"** attached hereto and incorporated herein.

Other Liens or Interests

28. A portion of the property is subject to that certain Notice of Filing, Condemnation Notice and Tender of Payment filed as Case Number 10-CP-07-4634 on September 16, 2010 in the Office of the Clerk of Court for Beaufort County, South Carolina, referencing (i) the County of Beaufort as Condemnor, (ii) Black Diamond, LLC f/k/a The Plunge, LLC as Landowner/Condemnee and (iii) Carolina First Bank (now known as Plaintiff TD Bank, N.A.), as Mortgagor, and Hilton Head Automotive, LLC as Other Condemnees. Such case was settled

and dismissed pursuant to Order of Dismissal dated January 18, 2012 and filed on February 3, 2012 in the Office of the Clerk of Court for Beaufort County, South Carolina.

29. On August 4, 2010, Defendant Black Diamond, LLC granted to Julie H. King that certain Mortgage in the amount of Two Hundred Seventy-One Thousand Four Hundred Fifty and 3/100 (\$271,450.03) Dollars, which Mortgage was recorded on August 18, 2010 in Book 2982 at Page 2246 in the Office of the Register of Deeds for Beaufort County, South Carolina ("Julie King Mortgage"). A copy of the Julie King Mortgage is attached hereto and incorporated herein as **Exhibit "Q"**. The Julie King Mortgage is junior and subordinate to the lien of the \$3,500,000 Mortgage and the \$2,000,000 Mortgage.

Maturity and Default

30. The \$2,000,000 Note matured as of July 25, 2011, and demand for payment thereof was made by letter dated August 10, 2011. A copy of such demand letter is attached hereto and incorporated herein as **Exhibit "R"**.

31. Defendant Black Diamond, LLC failed to pay the \$2,000,000 Note in accordance with its terms and in accordance with the foregoing demand letter. The failure of Defendant Black Diamond, LLC to pay the \$2,000,000 when due constitutes an event of default under the \$2,000,000 Note and the \$3,500,000 Note.

32. Notice of default and demand for payment of the \$3,500,000 Note was made by letter dated September 13, 2011. A copy of such letter is attached hereto and incorporated herein as **Exhibit "S"**.

33. As of January 20, 2012, Plaintiff is due from Defendant Black Diamond, LLC upon the \$3,500,000 Note the outstanding principal balance of \$2,959,014.83, plus accrued interest in the amount of \$45,105.72 (which interest continues to accrue), plus late charges in the

amount of \$6,574.76, plus fees in the amount of \$6,907.48, together with advances made heretofore or hereafter by Plaintiff under the \$3,500,000 Note and related loan documents, and all expenses associated with or incurred in connection with this action, including without limitation reasonable attorneys' fees and costs.

34. As of the date of this Complaint, Plaintiff is due from Defendant Black Diamond, LLC upon the \$2,000,000 Note the outstanding principal balance of \$1,774,207.39, plus accrued interest in the amount of \$61,270.72 (which interest continues to accrue), plus fees in the amount of \$3,330.50, together with advances made heretofore or hereafter by Plaintiff under the \$2,000,000 Note and related loan documents, and all expenses associated with or incurred in connection with this action, including without limitation reasonable attorneys' fees and costs.

FOR A FIRST CAUSE OF ACTION
(FORECLOSURE OF MORTGAGE)

35. Plaintiff incorporates the allegations of paragraphs 1 through 32 as if fully set forth herein.

36. As a result of the above-described defaults pursuant to the terms of the Notes, Plaintiff is entitled to foreclose upon the \$3,500,000 Mortgage.

37. Plaintiff is seeking and is entitled to have an order entered foreclosing the \$3,500,000 Mortgage and selling the property described in such mortgage at public sale in accordance with law, free and clear of all subordinate liens.

38. Plaintiff is seeking and is entitled to a judgment, jointly and severally, against Defendants Black Diamond, LLC, J. Christopher Lindgren and David A. Brosman in the amount of any deficiency remaining after the sale of the Property.

FOR A SECOND CAUSE OF ACTION
(FORECLOSURE OF MORTGAGE)

39. Plaintiff incorporates the allegations of paragraphs 1 through 38 as if fully set forth herein.

40. As a result of the above-described defaults pursuant to the terms of the Notes, Plaintiff is entitled to foreclose upon the \$2,000,000 Mortgage.

41. Plaintiff is seeking and is entitled to have an order entered foreclosing the \$2,000,000 Mortgage and selling the property described in such mortgage at public sale in accordance with law, free and clear of all subordinate liens.

42. Plaintiff is seeking and is entitled to a judgment, jointly and severally, against Defendants Black Diamond, LLC, J. Christopher Lindgren and David A. Brosman in the amount of any deficiency remaining after the sale of the Property.

43. Plaintiff seeks foreclosure of the \$3,500,000 Mortgage and the \$2,000,000 Mortgage and seeks a deficiency judgment, jointly and severally, against Defendants Black Diamond, LLC, J. Christopher Lindgren and David A. Brosman.

FOR A THIRD CAUSE OF ACTION
(REFORMATION OF DEED AND MORTGAGE)

44. Plaintiff incorporates the allegations of paragraphs 1 through 43 as if fully set forth herein.

45. A property encumbered by the \$2,000,000 Mortgage was conveyed to defendant Black Diamond, LLC by deed recorded on December 12, 2003 in Book 1884 at Page 639 in the Office of the Register of Deeds for Beaufort County, South Carolina (the "**Black Diamond Deed**"). A copy of such deed is attached hereto and incorporated herein as **Exhibit "T"**.

46. The legal description of the property set forth in the deed is described as follows:

"ALL that certain piece, parcel or tract of land lying and being in Bluffton Township, Beaufort County, South Carolina, containing 4.51 acres, more or less, as shown on survey for W. Barry Edwards as prepared by Coastal Surveying

dated February 8, 1994, and being described by metes and bounds as follows: beginning at the eastern boundary of the intersection of U.S. Highway 278 and Burnt Church Road and proceeding thence S 67°19'20" E a distance of 947 feet to a point which marks the point of beginning; proceeding thence S 67°19'20" E a distance of 253.21 feet to a point; proceeding thence S 26°31'25" W a distance of 882.26 feet; proceeding thence S 26°31'25" W a distance of 248.59 feet to a point; proceeding thence N 26°14'52" E a distance of 858.58 feet to a point which marks the point of beginning.

This being the same property described as 4.88 acres in that certain plat entitled "Division of Lot 2, Bluffton Township, according to a plat by R.D. Trogdon, Jr. as recorded in the Office of the Clerk of Court for Beaufort County, South Carolina, in Deed Book 220 at Page 1302" prepared by R.D. Trogdon, Jr., R.L.S. 2712 and recorded in the Office of the Beaufort County Clerk of Court in Book 31 at Page 181."

47. The first paragraph of such legal description contains a typographical error, to wit, the phrase "*proceeding thence S 26°31'25" W a distance of 248.59 feet to a point*" should have read "*proceeding thence N 61°34'21" W a distance of 248.59 feet to a point*". Such error was typographical in nature, was the result of a mutual mistake of the parties to such deed, consists of an error in the material element affecting the subject matter of the deed, and is inconsistent with the agreement of the parties to the deed.

48. The second paragraph of such legal description contains a typographical error, to wit, the phrase "*this being the same property described as 4.88 acres in that certain plat*" should have read "*this being the same property described as 5.0 acres in that certain plat...*" Such error was typographical in nature, was the result of a mutual mistake of the parties to such deed, consists of an error in the material element affecting the subject matter of the deed, and is inconsistent with the agreement of the parties to the deed.

49. The plat referenced in the second paragraph of such legal description was recorded in Book 31 at Page 181 in the Office of the Clerk of Court for Beaufort County, South Carolina, a copy of which is attached hereto and incorporated herein as **Exhibit "U"**.

50. The foregoing legal description set forth in the Black Diamond Deed was replicated in the \$2,000,000 Mortgage and contains the same errors set forth in paragraphs 47 and 48 hereof. Such errors were typographical in nature, were the result of mutual mistakes of the parties to the \$2,000,000 Mortgage, consist of errors in a material element affecting the subject matter of the \$2,000,000 Mortgage, and are inconsistent with the agreement of the parties to the \$2,000,000 Mortgage.

51. Plaintiff is seeking and is entitled to have the Black Diamond Deed reformed as set forth in paragraphs 47 and 48 hereof.

52. Plaintiff is seeking and is entitled to have the \$2,000,000 Mortgage reformed as set forth in paragraphs 47, 48 and 49 hereof.

Wherefore, Plaintiff Prays

A. That the legal description of the property set forth in the Black Diamond Deed and the \$2,000,000 Mortgage be reformed as set forth on Exhibit "K-2" hereto.

B. That the amounts due pursuant to the Notes and all other loan documents, including without limitation all interest, principal, fees and costs advanced, be ascertained and determined under the direction of the Court, together with attorneys' fees and costs of this action.

C. That each of the \$3,500,000 Mortgage and the \$2,000,000 Mortgage be declared a first lien mortgage upon the respective Property encumbered thereby and that each such mortgage secures the promissory notes identified herein and all other obligations of Defendants Black Diamond, LLC, J. Christopher Lindgren and David A. Brosman to Plaintiff.

D. That Plaintiff have judgment of foreclosure for the amounts to be found to be due and owing pursuant to the Notes and the other loan documents, together with any taxes or insurance premiums which may be due or which may have been paid by Plaintiff.

E. (i) That the Property encumbered by the \$3,500,000 Mortgage and the \$2,000,000 Mortgage be sold according to law and the practice of the Court, free and clear of any liens and claims of others, subject only to any unpaid Beaufort County taxes; (ii) that the equity of redemption be barred; and (iii) that the proceeds of sale be applied as follows:

- (a) First, to the costs and expenses of this action and such sale;
- (b) Second, to the payment and discharge of all amounts due Plaintiff pursuant to the Notes and the other loan documents, together with any taxes or insurance premiums which may be due or which may be or have been paid by Plaintiff and with Plaintiff's costs and attorneys' fees; and
- (c) Third, the surplus, if any, be distributed according to law.

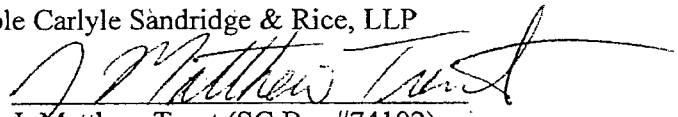
F. That Plaintiff be granted judgment, jointly and severally, against Defendants Black Diamond, LLC, J. Christopher Lindgren and David A. Brosman in the amount of any deficiency remaining after such sale of the Property.

G. For such other relief as may be just and proper.

March 2, 2012

Womble Carlyle Sandridge & Rice, LLP

By:


J. Matthew Trent (SC Bar #74192)

Brian J. Fisher (SC Bar 78196)

550 South Main Street, Suite 400

Greenville, South Carolina 29601

Phone: (864) 255-5400

Fax: (864) 255-5440

Email: mtrent@wcsr.com

Attorneys for Plaintiff

LIST OF EXHIBITS

- Exhibit A: Articles of Merger
- Exhibit B: \$3,500,000 Note
- Exhibit C: \$3,500,000 Forbearance Agreement
- Exhibit D: \$2,000,000 Note
- Exhibit E: \$2,000,000 Forbearance Agreement
- Exhibit F: Guaranty
- Exhibit G: Guaranty
- Exhibit H: Guaranty
- Exhibit I: Guaranty
- Exhibit J-1: \$3,500,000 Mortgage
- Exhibit J-2: \$3,500,000 Real Property
- Exhibit K-1: \$2,000,000 Mortgage
- Exhibit K-2: \$2,000,000 Real Property
- Exhibit L: \$3,500,000 Assignment of Leases and Rents
- Exhibit M: \$2,000,000 Assignment of Leases and Rents
- Exhibit N: UCC Financing Statement
- Exhibit O: Partial Release
- Exhibit P: Released Property
- Exhibit Q: Julie King Mortgage
- Exhibit R: Demand Letter
- Exhibit S: Demand Letter
- Exhibit T: Black Diamon Deed
- Exhibit U: Plat

EXHIBIT "A"

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

SEP 30 2010

ARTICLES OF MERGER
Corporation - Domestic
Filing Fee - \$110.00

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

TYPE OR PRINT CLEARLY IN BLACK INK

Pursuant to S.C. Code of Laws §33-11-105, the undersigned, as the surviving corporation in a merger, hereby submits the following information:

1. The name of the surviving or acquiring corporation is TD Bank, National Association
2. Attached hereto and made a part hereof is a copy of the plan of merger (see S.C. Code of Laws, Title 33, Ch. 11). Duplicate copies of the plan of merger must be attached in order for this form to be filed.
3. Complete the following information to the extent it is relevant with respect to each corporation which is a party to the transaction:

(a) Name of the corporation: TD Bank, National Association

Complete either (1) or (2), whichever is applicable.

- (1) ☐ Shareholder approval of the plan of merger was not required (See S.C. Code of Laws §33-11-103(h)).
- (2) ☒ The plan of merger was duly approved by shareholders of the corporation as follows:

Voting Group	Number of Outstanding Shares	Number of Votes Entitled to be Cast	Number of Votes Represented at the Meeting	Total Number of Votes Cast		
				For	or	Against*
Common stock	237.4	237.4	237.4	237.4		0

*NOTE: Pursuant to S.C. Code of Laws §33-11-105(a)(3)(ii), the corporation can alternatively state the total number of undisputed shares cast for the plan of merger separately by each voting group together with a statement that the number cast for the plan by each voting group was sufficient for approval by that voting group.

(b) Name of the corporation: Carolina First Bank

Complete either (1) or (2), whichever is applicable.

- (1) ☒ Shareholder approval of the plan of merger was not required (See S.C. Code of Laws §33-11-103(h)).
- (2) ☐ The plan of merger was duly approved by shareholders of the corporation as follows:

Voting Group	Number of Outstanding Shares	Number of Votes Entitled to be Cast	Number of Votes Represented at the Meeting	Total Number of Votes Cast		
				For	or	Against*
Common stock	1,572,000	1,572,000	1,572,000	1,572,000		0

*NOTE: Pursuant to S.C. Code of Laws §33-11-105(a)(3)(ii), the corporation can alternatively state the total number of undisputed shares cast for the plan of merger separately by each voting group together with a statement that the number cast for the plan by each voting group was sufficient for approval by that voting group.

4. Unless a delayed date is specified, the effective date of this document shall be the date it is accepted for filing by the Secretary of State (See S.C. Code of Laws §33-1-230(b)).
Effective at 5:59 p.m. Eastern Time on September 30, 2010

100930-0074 FILED: 09/30/2010
CAROLINA FIRST BANK

Filing Fee: \$110.00 ORIG



Mark Hammond

South Carolina Secretary of State

Name of Corporation TD Bank, National Association

Date: September 30, 2010

TD Bank, National Association

Name of the Surviving Corporation

Signature and Office

Bharat B. Masrani, President and CEO

Type or Print Name and Office

Filing Checklist

- Articles of Merger (filed in duplicate)
- Attach a copy of the Plan of Merger
- \$110.00 made payable to the South Carolina Secretary of State
- Self-Addressed, Stamped Return Envelope
- Make sure the proper individual has signed the form (Please see S.C. Code of Laws §33-1-200(f))
 - Corporate forms filed with the Secretary of State should be signed by:
 - (1) the Chairman of the Board of Directors, president or another of its officers
 - (2) if directors have not been selected or the corporation has not been formed, by incorporators or
 - (3) if the corporation is in the hands of a receiver, trustee or other court appointed fiduciary, by that fiduciary
- Return all documents to:
 - Secretary of State
 - Attn: Corporate Filings
 - P.O. Box 11350
 - Columbia, SC 29211

EXECUTION COPY

AGREEMENT AND PLAN OF MERGER

Agreement and Plan of Merger, dated as of August 26, 2010, between Carolina First Bank (the "Bank") and TD Bank, National Association ("TD Bank, N.A.").

WITNESSETH:

WHEREAS, TD Bank, N.A. is a national bank and an indirect wholly-owned subsidiary of The Toronto-Dominion Bank ("TD");

WHEREAS, the Bank is a South Carolina-chartered nonmember bank and a wholly-owned subsidiary of The South Financial Group, Inc. (the "Company");

WHEREAS, the Company, TD and Hunt Merger Sub, Inc., a wholly-owned subsidiary of TD, have entered into an Agreement and Plan of Merger, dated as of May 16, 2010 (the "Purchase Merger Agreement"), which sets forth the terms and conditions under which Hunt Merger Sub, Inc. will merge with and into the Company, with the Company surviving the merger as a wholly-owned subsidiary of TD (the "Purchase Merger");

WHEREAS, immediately following the Purchase Merger, the then-outstanding equity interests of the Company shall be contributed by TD to TD US P&C Holdings ULC, a wholly-owned bank holding company subsidiary of TD, in exchange for shares of TD US P&C Holdings ULC, and which shall immediately contribute such equity interests to its wholly-owned bank holding company subsidiary, TD Bank US Holding Company in exchange for shares of TD Bank US Holding Company (the "Contributions");

WHEREAS, immediately prior to the Merger (as defined below), the Company shall merge with and into TD Bank US Holding Company (the "Parent Merger") under the laws of the States of Delaware and South Carolina, the separate corporate existence of the Company shall cease to exist and TD Bank US Holding Company shall survive and continue to exist as a corporation incorporated under the laws of the State of Delaware; and

WHEREAS, TD Bank, N.A. and the Bank desire to merge on the terms and conditions set forth herein as soon as practicable following the effective time of the Purchase Merger, the Contributions and the Parent Merger, and such merger has been approved by the Board of Directors of each of TD Bank, N.A. and the Bank.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements herein contained, the parties hereto, intending to be legally bound hereby, agree as follows:

1. **The Merger.** Subject to the terms and conditions of this Agreement and Plan of Merger, at the Effective Time (as defined in Section 2 hereof), the Bank shall merge with and into TD Bank, N.A. (the "Merger") under the laws of the United States and the State of South Carolina, the separate corporate existence of the Bank shall cease and TD Bank, N.A. shall survive and continue to exist as a corporation incorporated under the laws of the United States (TD Bank, N.A., as the surviving corporation in the Merger, sometimes being referred to herein as the "Surviving Bank").

2. **Effective Time.** The Merger shall become effective upon the issuance of a certification of merger by the Office of the Comptroller of the Currency ("OCC"). The time that the Merger shall become effective is hereinafter referred to as the "Effective Time."

3. **Articles of Association; Bylaws.** The Articles of Association and Bylaws of the Surviving Bank shall be the Articles of Association and Bylaws of TD Bank, N.A., until altered, amended or repealed in accordance with their terms and applicable law.

4. **Name; Offices.** The name of the Surviving Bank shall be "TD Bank, National Association." The main office of the Surviving Bank shall be the branch office of the Bank located at 2035 Limestone Road, Wilmington, Delaware, pursuant to 12 U.S.C. § 1831u(d)(1). The main office of the Bank and TD Bank, N.A. and all branch offices of the Bank and TD Bank, N.A. that are in lawful operation immediately prior to the Effective Time shall be the branch offices of the Surviving Bank upon consummation of the Merger, subject to the opening or closing of any offices of TD Bank, N.A. that may be authorized by TD Bank, N.A. and applicable regulatory authorities after the date hereof.

5. **Directors and Executive Officers.** Upon consummation of the Merger, the directors and executive officers of the Surviving Bank shall be the persons serving as directors and executive officers of TD Bank, N.A. immediately prior to the Effective Time. Directors and officers of the Surviving Bank shall serve for such terms as are specified in the Articles of Association and Bylaws of the Surviving Bank.

6. **Representations and Warranties.** Each of the Bank and TD Bank, N.A. represents and warrants that this Agreement and Plan of Merger has been duly authorized, executed and delivered by such party and constitutes a legal, valid and binding obligation of such party, enforceable against it in accordance with the terms hereof.

7. **Effects of the Merger.**

(a) Upon consummation of the Merger, and in addition to the effects under applicable law, including without limitation 12 U.S.C. § 215a,

(i) all rights, franchises and interests of the Bank in and to every type of property (real, personal and mixed), tangible and intangible, and choses in action shall be transferred to and vested in the Surviving Bank by virtue of the Merger without any deed or other transfer, and the Surviving Bank, without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises and interests, including appointments, designations and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver and committee of estates of lunatics, and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises and interests were held or enjoyed by the Bank immediately prior to the Effective Time; and

(ii) the Surviving Bank shall be liable for all liabilities of the Bank, fixed or contingent, including all deposits, accounts, debts, obligations and contracts thereof, matured or

unmatured, whether accrued, absolute, contingent or otherwise, and whether or not reflected or reserved against on balance sheets, books of account or records thereof, and all rights of creditors or obligees and all liens on property of the Bank shall be preserved unimpaired.

(b) At the Effective Time, the Surviving Bank shall have (i) as provided in its Articles of Association, the authority to issue 5,000,000 shares of common stock, par value \$1.00 per share, and 500,000 shares of preferred stock, par value \$1.00 per share, and (ii) shareholders' equity equal to the combined shareholders' equity of TD Bank, N.A. and the Bank, which amounted to \$24.7 billion and \$781.7 million as of June 30, 2010, respectively, subject to adjustment for the results of operations of these entities between June 30, 2010 and the Effective Time and adjustments which may be required in connection with the Surviving Bank's recording of the Merger under accounting principles generally accepted in the United States.

8. Effect on Shares of Stock.

(a) Each share of TD Bank, N.A. common stock issued and outstanding immediately prior to the Effective Time shall be unchanged and shall remain issued and outstanding.

(b) At the Effective Time, each share of Bank common stock issued and outstanding immediately prior thereto shall, by virtue of the Merger and without any action on the part of the holder thereof, be converted into two (2) shares of TD Bank, N.A. common stock. Any shares of Bank common stock held in the treasury of the Bank immediately prior to the Effective Time shall be retired and cancelled.

9. Tax Treatment. It is intended that for United States federal income tax purposes (i) the Merger will qualify as a "reorganization" within the meaning of Section 368(a)(1) of the Internal Revenue Code of 1986, as amended (the "Code"), and (ii) this Agreement and Plan of Merger will constitute a plan of reorganization within the meaning of Treasury Regulation Section 1.368-2(g). Neither the Bank nor TD Bank, N.A. will take any action inconsistent with the treatment of the Merger as a reorganization within the meaning of Section 368(a)(1) of the Code.

10. Additional Actions. If, at any time after the Effective Time, the Surviving Bank shall consider that any further assignments or assurances in law or any other acts are necessary or desirable to (i) vest, perfect or confirm, of record or otherwise, in the Surviving Bank its rights, title or interest in, to or under any of the rights, properties or assets of the Bank acquired or to be acquired by the Surviving Bank as a result of, or in connection with, the Merger, or (ii) otherwise carry out the purposes of this Agreement and Plan of Merger, the Bank and its proper officers and trustees shall be deemed to have granted to the Surviving Bank an irrevocable power of attorney to execute and deliver all such proper deeds, assignments and assurances in law and to do all acts necessary or proper to vest, perfect or confirm title to and possession of such rights, properties or assets in the Surviving Bank and otherwise to carry out the purposes of this Agreement and Plan of Merger; and the proper officers and directors of the Surviving Bank are fully authorized in the name of the Bank or otherwise to take any and all such action.

11. **Counterparts.** This Agreement and Plan of Merger may be executed in one or more counterparts, each of which shall be deemed to be an original but all of which together shall constitute one agreement.

12. **Governing Law.** This Agreement and Plan of Merger shall be governed in all respects, including, but not limited to, validity, interpretation, effect and performance, by the laws of the State of Delaware, except as otherwise provided by the laws of the United States.

13. **Amendment.** This Agreement and Plan of Merger may be amended, modified or supplemented only by written agreement of TD Bank, N.A. and the Bank at any time prior to the Effective Time.

14. **Waiver.** Subject to applicable law, any of the terms or conditions of this Agreement and Plan of Merger may be waived at any time by whichever of the parties hereto is, or the shareholders of which are, entitled to the benefit thereof by action taken by the board of directors of such party.

15. **Successors and Assigns.** This Agreement and Plan of Merger may not be assigned by any party hereto without the prior written consent of the other party. Subject to the foregoing, this Agreement and Plan of Merger shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns.

16. **Termination.** This Agreement and Plan of Merger shall terminate upon the termination of the Purchase Merger Agreement in accordance with its terms. This Agreement and Plan of Merger also may be terminated at any time prior to the Effective Time by mutual consent of TD Bank, N.A. and the Bank in a written instrument, if and to the extent authorized by the respective Boards of Directors of TD Bank, N.A. and the Bank. In the event of the termination of this Agreement and Plan of Merger as provided in this Section 16, this Agreement and Plan of Merger shall forthwith become null and void and of no further force or effect and there shall be no liability or obligation under this Agreement and Plan of Merger on the part of any of the parties hereto or any of their respective directors, officers or affiliates.

17. **Procurement of Approvals.** This Agreement and Plan of Merger shall be subject to the approval of the sole shareholder of each of TD Bank, N.A. and the Bank at meetings to be called and held by their respective Board of Directors in accordance with the applicable provisions of law and their respective organizational documents (or a consent or consents in lieu thereof). TD Bank, N.A. and the Bank shall proceed expeditiously and cooperate fully in the procurement of any other consents and approvals and in the taking of any other action, and the satisfaction of all other requirements prescribed by law or otherwise necessary for consummation of the Merger on the terms provided herein, including without limitation the preparation and submission of such applications, notices or other filings relating to the Merger to the OCC and any other applicable regulatory authority as may be required by applicable laws and regulations.

18. **Conditions Precedent.** The obligations of the parties under this Agreement and Plan of Merger to consummate the Merger shall be subject to: (i) the approval of this Agreement and Plan of Merger by the affirmative vote of the sole shareholder of each of TD Bank, N.A. and

the Bank at meetings of shareholders duly called and held (or by consent or consents in lieu thereof); (ii) receipt of approval of the Merger from all governmental and banking authorities whose approval is required; (iii) receipt of any necessary regulatory approval to operate the main office of the Bank and the branch offices of the Bank and TD Bank, N.A. as branch offices of the Surviving Bank; (iv) there being in effect no temporary restraining order, preliminary or permanent injunction or other order issued by any court of competent jurisdiction or other legal restraint or prohibition preventing the consummation of the Merger and there being no action taken, nor any statute, rule, regulation or order enacted, entered, enforced or deemed applicable to the Merger, which makes the consummation of the Merger illegal; and (v) the consummation of the Purchase Merger pursuant to the Purchase Merger Agreement on or before the Effective Time.

19. **Covenants.** During the period from the date of this Agreement and Plan of Merger and continuing until the Effective Time, each of the parties hereto agrees to use all reasonable efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper or advisable under applicable laws and regulations to consummate and make effective the transactions contemplated by this Agreement and Plan of Merger, subject to and in accordance with the applicable provisions of the Purchase Merger Agreement.

20. **Entire Agreement.** Except for the Purchase Merger Agreement, this Agreement and Plan of Merger (including the documents and the instruments referred to herein) constitutes the entire agreement and supersedes all prior agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof.

[Signature page follows]

IN WITNESS WHEREOF, each of TD Bank, N.A. and the Bank has caused this Agreement and Plan of Merger to be executed on its behalf by its duly authorized officers as of the date first above written.

Attest:

By: [Signature]
Name: Geoffrey W. Ryan
Title: Senior Vice President + Asst. Secretary

TD BANK, NATIONAL ASSOCIATION

By: [Signature]
Name: Shant M. Mirmiran
Title: President + CEO

Attest:

By: _____
Name: _____
Title: _____

CAROLINA FIRST BANK

By: _____
Name: _____
Title: _____

IN WITNESS WHEREOF, each of TD Bank, N.A. and the Bank has caused this Agreement and Plan of Merger to be executed on its behalf by its duly authorized officers as of the date first above written.

Attest:

TD BANK, NATIONAL ASSOCIATION

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

Attest:

CAROLINA FIRST BANK

By: Ruth Ann Brown
Name: RUTH ANN BROWN
Title: Exec. Assistant

By: William P. Crawford, Jr.
Name: WILLIAM P. CRAWFORD, JR.
Title: EVP + Gen. Counsel

Unanimous Written Consent of Sole Shareholder of Carolina First Bank

The undersigned, a duly authorized executive officer of The South Financial Group, Inc. (the sole shareholder of Carolina First Bank), hereby approves the Agreement and Plan of Merger in all respects.

THE SOUTH FINANCIAL GROUP, INC.

By: _____

Name: *WILLIAM P. CRAWFORD, JR*

Title: *EVP and Gen. Counsel*

Unanimous Written Consent of Sole Shareholder of TD Bank, National Association

The undersigned, a duly authorized executive officer of TD Bank US Holding Company (the sole shareholder of TD Bank, National Association), hereby approves the Agreement and Plan of Merger in all respects.

TD BANK US HOLDING COMPANY

By: _____

Name: _____

Title: _____

Unanimous Written Consent of Sole Shareholder of Carolina First Bank

The undersigned, a duly authorized executive officer of The South Financial Group, Inc. (the sole shareholder of Carolina First Bank), hereby approves the Agreement and Plan of Merger in all respects.

THE SOUTH FINANCIAL GROUP, INC.

By: _____
Name:
Title:

Unanimous Written Consent of Sole Shareholder of TD Bank, National Association

The undersigned, a duly authorized executive officer of TD Bank US Holding Company (the sole shareholder of TD Bank, National Association), hereby approves the Agreement and Plan of Merger in all respects.

TD BANK US HOLDING COMPANY

By: _____
Name: *Blair W. [unclear]*
Title: *President & CEO*

EXHIBIT "B"

\$3,500,000.00

PROMISSORY NOTE

January 25, 2008

FOR VALUE RECEIVED, BLACK DIAMOND, LLC ("Borrower") promises to pay to CAROLINA FIRST BANK ("Lender" or "Holder") at the address of 62 New Orleans Road, Hilton Head Island, South Carolina 29928 or at such other place as the Holder may from time to time designate in writing, the principal sum of THREE MILLION FIVE HUNDRED THOUSAND AND NO/100 (\$3,500,000.00) DOLLARS, with interest thereon as set forth hereinbelow in lawful money of the United States of America as follows:

The principal outstanding shall bear interest from the date of funding of funds by Holder equal to the Index established daily during the term of this Note plus 1.95 percentage points. The "Index" shall be the average of the 30 day interbank offered rates for U.S. dollar-denominated deposits in the London Market ("LIBOR"), as published in the Wall Street Journal. The Index may adjust daily. If the Index is no longer available, the Holder shall choose a new index that is based upon comparable information. Borrower shall pay principal and interest payments monthly based upon a 20-year amortization, said payments in the amount of \$28,195.76, with the first payment commencing on February 25, 2008 and continuing thereafter on the 25th day of each consecutive month until January 25, 2013. All outstanding principal and all accrued interest to be due and payable in full in a single balloon payment on January 25, 2013 ("Maturity Date").

Lender reserves the right to require payments to be made by certified or cashiers checks. All payments made hereunder shall be applied first to default and late charges, if any, then to accrued and unpaid interest and the balance thereof to principal. All payments of principal and interest are payable in lawful money of the United States of America. This Note is secured by the First Mortgage and Security Agreement of even date ("Mortgage") and the other Loan Documents referred to in the Loan Agreement. This Note is the Note referred to in the Loan Agreement. Terms used herein which are defined in the Loan Agreement shall have their defined meanings when used herein.

If any payment required in this Note is not paid (a) on or prior to the twentieth (20th) day after a Payment Date, (b) on the Maturity Date, or (c) on the happening of any other default, after the expiration of any applicable notice and grace periods, herein or under the terms of the Mortgage, or any other of the Loan Documents (collectively, an "Event of Default"), at the option of the Lender (i) the whole of the principal sum of this Note, (ii) interest, default interest, late charges and other sums, as provided in this Note, the Mortgage, or the Loan Documents, (iii) all other monies agreed or proved to be paid by Borrower in this Note, the Mortgage, or the Loan Documents, (iv) all sums advanced pursuant to the Mortgage to protect and preserve the Property and the lien and the security interest created thereby, and (v) all sums advanced and costs and expenses incurred by Lender in connection with the Loan or any part thereof, any renewal, extension, or change of or substitution for the Debt or any part hereof, or the acquisition or perfection of the security therefore, whether made or incurred at the request of Borrower or Lender (all the sums referred to in (i) through (v) above shall collectively be referred to as the "Loan") shall without notice become immediately due and payable.

In the event that this Note is not paid when due or is placed in the hands of an attorney for collection after the same shall become due for any reason, or if collected by legal proceedings, or through probate or bankruptcy courts, the Borrower agrees to pay all costs and expenses of Lender in the collection of this Note, including attorney's fees and court costs. In the event of default, the Lender may proceed directly against the Borrower and any and all persons or entities liable under this Note waive presentment, demand, notice of dishonor and non-payment of protest of this Note and all defenses on the ground of any extension of time or renewal or the release, sale, exchange, substitution or impairment of any collateral securing the obligations with or without consideration.

In the event the Lender has not received the full amount of any monthly payment by the end of twenty (20) calendar days after the date it is due, the Borrower hereby agrees to pay a late charge in the amount of five (5%) percent of the payment due. From and after the maturity of this Note either according to its terms or as a result of declaration of maturity, the entire principal remaining unpaid hereunder shall bear interest at the rate of the greater of the Note rate stated above or the rate eighteen (18%) percent per annum, but in no event greater than the highest applicable lawful rate; provided that there shall be no automatic reduction to the highest lawful rate as to any maker hereof barred by law from availing itself in any action or proceeding of the defense of usury, or any matter barred or exempted from the operation of any law limiting the amount of interest that may be paid for the Loan or use of

money, or in the event this transaction, because of its amount or purpose or for any reason is exempt from the operation of any statute limiting the amount of interest that may be paid for the loan or use of money. Failure to exercise said option or any other rights the Holder may in the event of any such default be entitled to, shall not constitute a waiver of the right to exercise said option or any other rights in the event of any subsequent default, whether of the same or different nature. Borrower agrees that the late charge provided for above is fair and reasonable compensation to Lender for the additional administrative time and effort incurred in collecting and processing delinquent payments. Borrower further agrees that the default rate is a fair and reasonable rate of interest to be charged after maturity or acceleration of this Note in light of increased risks to the Lender inherent in a past due loan and the administrative time and effort incurred in collecting a past due loan.

Should Lender accept any part payment hereunder after the full amount has become immediately due and payable or otherwise grant indulgence to any party hereto, this shall not alter or offset Lender's rights hereunder with respect to any subsequent payment or default. The remedies provided for herein shall be cumulative and Lender may select its remedies and specifically assert its remedies against the collateral and/or the Borrower as Lender, at its option, sees fit. The Lender is not obligated to resolve any claim or dispute arising under this Note or any of the terms and conditions hereto or relating to the Note by mediation or arbitration prior to commencing legal action.

Borrower and the guarantor and all parties liable or to become liable on this Note waive, set off, counterclaims, presentment, protest and demand, notice of protest, demand and dishonor, all defenses with respect to any and all instruments and all notices and demands of any description with respect to this Note, and the pleading of any statute of limitations as a defense to any demand under any Loan Documents, and current to any and all renewals and extensions of the time of payment hereof, and agree, further, that any time and from time to time without notice, the terms of payment herein may be modified on the security described in part, or increased, changed or exchanged by agreement between Lender and any owner of property affected by said loan document without in anywise affecting the liability of any party to this instrument or any person liable with respect to any indebtedness evidenced hereby. Borrower hereby agrees that the provisions of the Loan Agreement relating to waivers, rights and remedies of the parties shall apply to this Note. Lender is not required to rely on any collateral for the payment of the Note, but may proceed directly against the Borrower and any guarantors or endorser in such manner as it deems desirable. None of the rights and remedies of Lender hereunder is to be waived or affected by failure or delay to exercise them.

The Note shall be governed as to validity, interpretation, construction, effect and in all other respects by the laws and decisions of the State of South Carolina. Borrower submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Borrower further agrees to comply with all requirements necessary to give such court in personam jurisdiction and agrees that service of process may be accomplished by, in addition to any other lawful means, certified mail, return receipt requested.

BORROWER, BY ACCEPTANCE OF THIS NOTE, HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, THE RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM, WHETHER IN CONTRACT, TORT OR OTHERWISE, RELATING DIRECTLY OR INDIRECTLY TO THE LOAN EVIDENCED BY THIS NOTE, THIS NOTE, THE SECURITY INSTRUMENT, THE LOAN AGREEMENT OR THE OTHER SECURITY DOCUMENTS OR ANY ACTS OR OMISSIONS OF LENDER OR BORROWER.

IN WITNESS WHEREOF, the Borrower has duly executed this Promissory Note as of the date first above written.

WITNESSES:

Dee Heaton
Red Hook LLC

BORROWER: BLACK DIAMOND, LLC

By: Red Hook LLC, Member

J. Chris Lindgren
By: J. Chris Lindgren, Manager

EXHIBIT "C"

FORBEARANCE AGREEMENT

Black Diamond, LLC - Loan No.: 5121066531

THIS FORBEARANCE AGREEMENT (the "**Agreement**") is made and entered into as of July 28, 2010 among BLACK DIAMOND, LLC, a South Carolina limited liability company ("**Borrower**"), THE ESTATE OF HERB G. KING (the "**Estate**"), J. CHRISTOPHER LINDGREN ("**Mr. Lindgren**"), and CAROLINA FIRST BANK, a South Carolina banking corporation ("**Lender**").

RECITALS:

WHEREAS, on or about January 25, 2008, Borrower and Lender entered into that certain Loan Agreement (the "**Loan Agreement**"), whereby Lender made certain financing available to Borrower in the original principal amount of \$3,500,000.00 (the "**Loan**"), which Loan is evidenced by that certain Promissory Note of Borrower to the order of Lender, dated as of January 25, 2008, in the original maximum principal amount of \$3,500,000.00 (the "**Note**");

WHEREAS, the Loan is secured by, *inter alia*, (i) that certain First Mortgage and Security Agreement of Borrower in favor of Lender, dated as of January 25, 2008 and recorded on January 30, 2008 in Book 02677 at Page 655 in the Office of the Register of Deeds for Beaufort County, South Carolina (the "**Mortgage**"), and (ii) that certain Assignment of Leases from Borrower to Lender, dated as of January 25, 2008 and recorded on January 30, 2008 in Book 02677 at Page 0668 in the Office of the Register of Deeds for Beaufort County, South Carolina (the "**Assignment**");

WHEREAS, the Loan is guaranteed by (i) that certain Unconditional Guaranty of Herb G. King ("**Mr. King**") in favor of Lender, dated as of January 25, 2008 (the "**King Guaranty**") and (ii) that certain Unconditional Guaranty of Mr. Lindgren in favor of Lender, dated as of January 25, 2008 (the "**Lindgren Guaranty**");

WHEREAS, the Loan Agreement, the Note, the Mortgage, the Assignment, the King Guaranty, the Lindgren Guaranty and all other documents or instruments securing, guaranteeing and/or executed in connection with or relating to the Loan are referred to herein as the "**Loan Documents**";

WHEREAS, the Loan is presently in default pursuant to the terms of the Loan Documents as a result of (i) the death of Mr. King, and (ii) certain payment defaults;

WHEREAS, Borrower, the Estate and Mr. Lindgren have requested that Lender (i) forbear from exercising its rights and remedies under the Loan Documents, (ii) release its claim against the Estate relating to the King Guaranty, and (iii) accept certain modifications to the Loan, including (a) the transfer of all membership interests of the Estate in Borrower to Mr. Lindgren, and (b) the subsequent transfer of a fifty (50%) percent membership interest in Borrower from Mr. Lindgren to a new investor; and

WHEREAS, Lender has agreed to the foregoing requests, subject to the fulfillment of all conditions precedent set forth herein and the compliance by the parties with all terms, provisions, conditions and agreements set forth herein.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Status and Enforceability of Obligations. Borrower, the Estate and Mr. Lindgren acknowledge and agree that (i) certain events of default have occurred under the Loan Documents as a result of (a) the death of Mr. King, and (b) certain payment defaults; (ii) as a result of such defaults, Lender has the right to accelerate the Loan and to declare the entire principal balance of the Loan, together with interest thereon and any other charges set forth therein, to be immediately due and payable, and to exercise any and all other rights and/or remedies of Lender set forth in the Loan Documents or available to Lender at law or in equity; and (iii) the Loan Documents are fully enforceable by Lender in accordance with their respective terms.

2. Outstanding Amount of Loan. Borrower, the Estate and Mr. Lindgren acknowledge and agree that the outstanding principal and interest due under the Loan, as of July 28, 2010, is as follows:

Principal:	\$3,101,516.51	
Interest:	\$43,778.00	Per diem: \$465.227476
Total:	\$3,145,294.51	

3. Request to Forbear. Borrower, the Estate and Mr. Lindgren each request and consent to the terms of this Agreement and the forbearance described herein and each agree that such forbearance and the other modifications to the Loan set forth in this Agreement have not and do not constitute a novation, waiver or release under the Loan Documents or any other agreement or document and do not constitute a forbearance, waiver or release with respect to any events of default now or hereafter existing under the Loan Documents except as expressly set forth herein. Borrower, the Estate and Mr. Lindgren further agree that Lender shall be under no obligation to grant or agree to any additional or future forbearances or modifications, whether of the same or a different nature.

4. Representations and Warranties. In order to induce Lender to enter into this Agreement, Borrower, the Estate and Mr. Lindgren each represent and warrant to Lender that (i) each has the right, power and authority to enter into this Agreement and to perform its respective obligations set forth herein, and (ii) each and every Loan Document is the valid, legal and binding obligation of Borrower, the Estate and/or Mr. Lindgren, as applicable, and such Loan Documents are fully enforceable in accordance with their respective terms.

5. Forbearance, Release of Claims, and Loan Modification. Subject to compliance by Borrower, the Estate and Mr. Lindgren with all terms, conditions and agreements set forth herein, and subject to fulfillment with all conditions precedent set forth herein, Lender hereby agrees as follows:

A. Forbearance. Lender agrees to forbear from exercising the rights and remedies available to it under the Loan Documents resulting from the death of Mr. King and the existing payment defaults.

B. Release of Claims. Lender hereby agrees to release its claim against the Estate relating to the King Guaranty.

C. Loan Modifications.

(i) Transfer of Membership Interest. Lender consents to the transfer to Mr. Lindgren of the membership interest of the Estate in and to Borrower in accordance with that certain Limited Liability Company Interest Swap Agreement, dated on or about the date hereof, among Mr. Lindgren, Red Rocks, LLC, the Estate and Julie H. King (the "LLC Swap Agreement"); provided, however, that such consent is contingent upon the subsequent transfer of a 50% membership interest in Borrower from Mr. Lindgren to a new party (the "Substitute Guarantor") to be approved by Lender, which Substitute Guarantor shall execute and deliver to Lender an unconditional guaranty of all debt of Borrower to Lender on terms substantially similar to those set forth in the Lindgren Guaranty.

(ii) Interest Rate. Notwithstanding the terms of the Note, from the date hereof until the maturity of the Loan, interest shall accrue on the outstanding principal balance of the Loan at a rate equal to the greater of (x) five and one half (5.50%) percent or (y) LIBOR plus one hundred ninety-five basis points. "LIBOR" means the thirty (30) day LIBOR as reported by the British Banker's Association (for the purpose of displaying London Interbank Offered Rates for United States Dollar deposits) determined as of 11:00 a.m. (London time), two (2) Business Days prior to the first business day of each calendar month.

(iii) Reserve Accounts. Borrower shall maintain for the remainder of the term of the Loan the restricted payment reserve account described in Section 6.D below with at least two (2) months of principal and interest referred to above. In the event that a payment due under the Loan is not made within twenty (20) days of the due date thereof, Lender shall have the option and authority to draft such payment from the restricted payment reserve account to make such outstanding loan payment, and in such event, Borrower shall replenish such amount to the account within five (5) business days. Such reserve account shall be subject to Lender's standard restricted reserve account deposit agreement.

6. Conditions Precedent. Lender's obligation to forbear from exercising its rights and remedies set forth in the Loan Documents, to release its claim against the Estate, to consent to the transfer of membership interest as set forth above, and to accept the Substitute Guarantor is subject to fulfillment of each of the following conditions and requirements:

A. Defaults. All loans from Lender guaranteed by Mr. King or made to entities owned or controlled by Mr. King must be made current and any payment defaults or other events of default with respect thereto (if any) must be cured, including without limitation all loans to Borrower, Riva Ridge, LLC and Sheridan Place, LLC.

B. Related Documents. Lender shall have received, reviewed and approved in its sole discretion the LLC Swap Agreement.

- C. Guaranty Agreements of Substitute Guarantor. The Substitute Guarantor shall execute and deliver to Lender his unconditional guaranty of the Loan, which guaranty shall be in form and content acceptable to Lender in its sole discretion.
- D. Payment Reserve. Borrower shall fund with Lender a restricted payment reserve account with a minimum balance equivalent to two (2) months of principal and interest payments due under the Loan.
- E. Appraisal. Lender shall obtain, at the sole cost and expense of Borrower, a written current MAI appraisal of the value of the real property securing the Loan, inclusive of all improvements thereon, to be prepared by a qualified Member, Appraisal Institute acceptable to Lender, conforming in form and content to all requirements established by Lender and setting forth a value of the property which shall support a loan-to-value ratio no greater than seventy (70.0%) percent.
- F. Management Agreement. Lender, Borrower, Mr. Lindgren and the Substitute Guarantor shall enter into a management agreement whereby the management of Borrower shall be turned over to a manager to be designated by Lender, and which manager shall have all rights and responsibilities of a court-appointed receiver, including without limitation the collection of rents, the payment to Lender of all debt service requirements, and the day-to-day management of Borrower and the property encumbered by the Mortgage (the "Management Agreement"). The Management Agreement shall be subject to the approval of Lender as to both form and substance, and any default by Borrower, Mr. Lindgren, the Substitute Guarantor or any other party with respect to such Management Agreement shall be a default under the Loan Documents and shall entitle Lender to pursue all rights and remedies of Lender set forth therein. All fees and expenses of such manager shall be paid by Borrower.
- G. Legal Opinion. Borrower shall deliver to Lender the written opinion of legal counsel to Borrower, which opinion shall be acceptable to Lender as to form and content, and shall contain such opinions as Lender shall require in its sole discretion, including without limitation the enforceability of this Agreement.
- H. Other Modification Documents. Borrower, the Estate, Mr. Lindgren and the Substitute Guarantor (as applicable) shall execute and deliver to Lender such other documents or instruments as Lender shall reasonably require in connection with this Agreement, including without limitation amendments to or restatements of the Note and reaffirmations of the Lindgren Guaranty.
- I. Fees. Borrower shall pay all costs and fees charged by Lender or incurred by Lender in connection with this Agreement and the forbearance and loan modifications set forth herein, including without limitation Lender's attorneys' fees.
7. Reaffirmation and Waiver. Borrower, the Estate and Mr. Lindgren confirm, reaffirm and ratify their respective obligations set forth in the Loan Documents, (ii) represent that their respective obligations set forth in the Loan Documents consist of business (and not consumer) obligations, and (iii) represent that they have no claims, defenses, counterclaims or rights of

setoff or recoupment against Lender under the Loan Documents or otherwise and hereby waive any such claims, defenses, counterclaims or rights of setoff or recoupment.

8. Default. In the event that any party to this Agreement fails to comply with any applicable condition precedent, agreement or covenant set forth in this Agreement, or in the event that any representation or warranty set forth herein shall be determined to have been false at the time it was made, then Borrower, the Estate and Mr. Lindgren shall be in default under this Agreement, and Lender shall have the right to exercise any and all rights and remedies available to Lender under the Loan Documents, at law or in equity; provided, however, that Lender's rights and remedies with respect to the Estate shall be limited solely to rights and remedies arising from defaults resulting from the falsity of a representation or warranty of the Estate set forth herein.

9. Relief from Stay. In consideration of this Agreement and the corresponding forbearance of Lender, in the event that Borrower, Mr. Lindgren and/or the Substitute Guarantor shall (i) file with any bankruptcy court of competent jurisdiction or be the subject of any petition filed under title 11 of the United States Code (the "Bankruptcy Code"); (ii) be the subject of any order or relief issued under the Bankruptcy Code; (iii) file or be the subject of any petition seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, rehabilitation or similar relief under any present or future federal or state act or law relating to bankruptcy, insolvency, or other relief for debtors; (iv) have sought or consented or acquiesced in the appointment of any trustee, receiver, conservator, rehabilitator or liquidator; or (v) be the subject to any order, judgment, or decree entered by any court of competent jurisdiction approving a petition filed against such party for any reorganization, arrangement, composition, readjustment, liquidation, dissolution, rehabilitation or similar relief under any present or future federal or state act or law relating to bankruptcy, insolvency or other relief for debtors, then, subject to court approval, Lender shall thereupon be entitled, and Borrower and Mr. Lindgren each irrevocably consent, to relief from any automatic stay or injunction imposed by the Bankruptcy Code, including, but not necessarily limited to, that imposed by section 362 or section 105 of the Bankruptcy Code, or otherwise, on or against the exercise of the collection remedies available to Lender pursuant to the Loan Documents, and as otherwise provided by law, and Borrower and Mr. Lindgren each hereby irrevocably waive its right to object to or oppose any such relief from stay or other act taken by Lender in pursuit of its collection remedies as set forth in the Loan Documents. Nothing contained in this Agreement, however, shall be deemed to prevent any creditor or other party in interest (other than Borrower, Mr. Lindgren and the Substitute Guarantor) from objecting to relief from stay.

10. Rights and Remedies. This Agreement shall not prejudice any right or remedy of Lender and shall not be deemed a waiver of any right or remedy, except as expressly set forth herein. Lender expressly reserves all of its rights and remedies with respect to any other present or future default or event of default arising under the Loan Documents or under any other obligation of Borrower or Guarantors to Lender, subject only to the limitation on Lender's remedies with respect to the Estate set forth in Section 8 hereof. This Agreement shall be binding on, and inure to the benefit of, the parties and their respective successors and assigns.

11. Confidentiality. Borrower, the Estate and Mr. Lindgren each agree to retain in confidence, and (as applicable) to require its directors, members, managers, officers, employees, consultants, professional representatives and agents to retain in confidence, all of the terms of this Agreement. Notwithstanding anything to the contrary in the foregoing provisions, such

information may be disclosed (i) to a party's counsel or accountants or such employees as are reasonably required to know such information for that party; (ii) when requested by any regulatory authority or governmental agency; (iii) if it is required by court order, decree or applicable law; (iv) if it is requested by what appears to be a facially valid process; or (v) if it is ascertainable or obtained from public or published information. If Borrower, the Estate or Mr. Lindgren shall believe that he/it is required to make disclosure of any such information pursuant to subparts (ii) or (iv), then such party shall give Lender reasonable prior notice of such belief and shall use all reasonable efforts to afford Lender an opportunity to contest the making of such disclosure.

12. Miscellaneous. Except as expressly amended by this Agreement, the Loan Documents and the obligations evidenced thereby shall continue, unmodified and unchanged. This Agreement constitutes the entire agreement of the parties concerning the matters set forth herein and supersedes all prior and contemporaneous agreements, written or oral, concerning such matters. This Agreement may not be modified orally, and any modification must be in writing, signed by the party to be bound. The captions are inserted only for the convenience of the reader and shall not be construed to interpret or modify the terms of this Agreement. This Agreement shall be governed by the laws of the State of South Carolina and may be executed in counterparts. The parties acknowledge that they have read and understood this Agreement in its entirety prior to signing.

[SIGNATURE PAGE TO FOLLOW]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

BORROWER:

BLACK DIAMOND, LLC

By: Ch. L.f

Name: J. Chris Lindgren

Title: manager

THE ESTATE OF HERB G. KING

By: Julie H. King P.R. for Estate of Herb King

Name: Julie H. King

Title: Personal Representative of the Estate of Herb G. King

Ch. L.f
J. Christopher Lindgren, individually

LENDER:

CAROLINA FIRST BANK

By: _____

Name: Michael R. Renault

Title: Senior Vice President

EXHIBIT "D"

LOAN NUMBER	LOAN NAME	ACCT. NUMBER	NOTE DATE	INITIALS
5120783855	BLACK DIAMOND, LLC		07/25/08	
NOTE AMOUNT	INDEX (w/Margin)	RATE	MATURITY DATE	LOAN PURPOSE
\$2,000,000.00	CAROLINA FIRST BANK PRIME	5.0%	07/25/11	Commercial

Creditor Use Only

PROMISSORY NOTE

(Commercial - Single Advance)

RENEWAL NOTE

DATE AND PARTIES. The date of this Promissory Note (Note) is July 25, 2008. The parties and their addresses are:

LENDER:

CAROLINA FIRST BANK
104 South Main Street
Greenville, South Carolina 29601
Telephone: (800) 476-6400

BORROWER:

BLACK DIAMOND, LLC
a South Carolina Limited Liability Company
5 DUNMORE COURT
HILTON HEAD ISLAND, South Carolina 29928

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

- A. **Pronouns.** The pronouns "I," "me," and "my" refer to each Borrower signing this Note, individually and together. "You" and "Your" refer to the Lender.
- B. **Note.** Note refers to this document, and any extensions, renewals, modifications and substitutions of this Note.
- C. **Loan.** Loan refers to this transaction generally, including obligations and duties arising from the terms of all documents prepared or submitted for this transaction such as applications, security agreements, disclosures or notes, and this Note.
- D. **Loan Documents.** Loan Documents refer to all the documents executed as a part of or in connection with the Loan.
- E. **Property.** Property is any property, real, personal or intangible, that secures my performance of the obligations of this Loan.
- F. **Percent.** Rates and rate change limitations are expressed as annualized percentages.

2. RENEWAL. This Note is a renewal of the following described note:

Note Date	Note Number	Note Amount
December 17, 2007	# 5120783855	\$2,000,000.00

I have requested that the note listed in the table above be renewed. The remaining balance of the note listed in the table above is \$2,000,000.00.

3. PROMISE TO PAY. For value received, I promise to pay you or your order, at your address, or at such other location as you may designate, the principal sum of \$2,000,000.00 (Principal) plus interest from July 26, 2008 on the unpaid Principal balance until this Note matures or this obligation is accelerated.

4. INTEREST. Interest will accrue on the unpaid Principal balance of this Note at the rate of 5.0 percent (Interest Rate) until July 26, 2008, after which time it may change as described in the Variable Rate subsection.

A. **Interest After Default.** If you declare a default under the terms of the Loan, including for failure to pay in full at maturity, you may increase the Interest Rate otherwise payable as described in this section. In such event, interest will accrue on the unpaid Principal balance of this Note at a rate equal to the rate in effect prior to default, plus 4.000 percent, until paid in full.

B. **Maximum Interest Amount.** Any amount assessed or collected as interest under the terms of this Note will be limited to the maximum lawful amount of interest allowed by state or federal law, whichever is greater. Amounts collected in excess of the maximum lawful amount will be applied first to the unpaid Principal balance. Any remainder will be refunded to me.

C. **Statutory Authority.** The amount assessed or collected on this Note is authorized by the South Carolina usury laws under S.C. Code Ann. §§ 37-3-605, 37-3-105 and 37-10-101 et. seq.

D. **Accrual.** Interest accrues using an Actual/360 days counting method.

E. **Variable Rate.** The Interest Rate may change during the term of this transaction.

(1) **Index.** Beginning with the first Change Date, the Interest Rate will be based on the following index: For the purposes of this note, the term "Prime Rate" shall mean the interest rate announced, from time to time, by Carolina First Bank, at its principal office in Greenville, SC, or by its corporate successor, as the Prime Rate (which rate is only a benchmark, is purely discretionary, and is not necessarily the best or lowest rate charged borrowing customers of Carolina First Bank).

The Current Index is the most recent index figure available on each Change Date. You do not guaranty by selecting this Index, or the margin, that the Interest Rate on this Note will be the same rate you charge on any other loans or class of loans you make to me or other borrowers. If this Index is no longer available, you will substitute a similar index. You will give me notice of your choice.

(2) **Change Date.** Each date on which the Interest Rate may change is called a Change Date. The Interest Rate may change July 26, 2008 and daily thereafter.

(3) **Calculation Of Change.** On each Change Date you will calculate the Interest Rate, which will be the Current Index. The result of this calculation will be rounded to the nearest .001 percent. Subject to any limitations, this will be the Interest Rate until the next Change Date. The new Interest Rate will become effective on each Change Date. The Interest Rate and other charges on this Note will never exceed the highest rate or charge allowed by law for this Note.

(4) **Effect Of Variable Rate.** A change in the Interest Rate will have the following effect on the payments: The amount of scheduled payments will change.

5. **ADDITIONAL CHARGES.** As additional consideration, I agree to pay, or have paid, these additional fees and charges.

A. **Nonrefundable Fees and Charges.** The following fees are earned when collected and will not be refunded if I prepay this Note before the scheduled maturity date.

Loan Origination. A(n) Loan Origination fee of \$1,500.00 payable from separate funds on or before today's date.

Flood Determination. A(n) Flood Determination fee of \$8.00 payable from separate funds on or before today's date.

6. **REMEDIAL CHARGES.** In addition to interest or other finance charges, I agree that I will pay these additional fees based on my method and pattern of payment. Additional remedial charges may be described elsewhere in this Note.

A. **Late Charge.** If a payment is more than 20 days late, I will be charged 5.000 percent of the Unpaid Portion of Payment or \$25.00, whichever is greater. I will pay this late charge promptly but only once for each late payment.

B. **Returned Check Charge.** I agree to pay a fee not to exceed \$25.00 for each check, negotiable order of withdrawal or draft I issue in connection with the Loan that is returned because it has been dishonored.

7. **PAYMENT.** I agree to pay this Note as follows: I agree to pay this note in 36 payments. I will make 35 payments of principal and interest in the amount of \$15,505.98 beginning August 15, 2008 and on the 15th day of each month thereafter. A single, final payment of the entire unpaid balance of principal and accrued interest will be due on July 25, 2011

Payments will be rounded to the nearest \$.01. With the final payment I also agree to pay any additional fees or charges owing and the amount of any advances you have made to others on my behalf. Payments scheduled to be paid on the 29th, 30th or 31st day of a month that contains no such day will, instead, be made on the last day of such month.

Each payment I make on this Note will be applied first to interest that is due then to principal that is due, and finally to any charges that I owe other than principal and interest. If you and I agree to a different application of payments, we will describe our agreement on this Note. You may change how payments are applied in your sole discretion without notice to me. The actual amount of my final payment will depend on my payment record.

8. **PREPAYMENT.** I may prepay this Loan under the following terms and conditions. I may prepay principal on this Note in whole or in part at any time under the following terms and conditions. If paid during the first year from the date of the Note, a prepayment fee equal to 3% of the amount prepaid shall be due; if paid during the second year from the date of the Note, a prepayment fee equal to 2% of the amount prepaid shall be due; and if paid after the second year from the date of the Note, a prepayment fee equal to 1% of the amount prepaid shall be due. Notwithstanding the foregoing, a prepayment fee shall be due only if the prepayment exceeds the lesser of: (i) 25% of the outstanding principal balance on the Note; or (ii) \$50,000. Any partial prepayment will not excuse any later scheduled payments until I pay in full.

9. **LOAN PURPOSE.** The purpose of this Loan is FOR RENEWAL FOR COMMERCIAL REAL ESTATE LOAN.

10. **ADDITIONAL TERMS:** THIS LOAN IS CROSS COLLATERALIZED AND CROSS DEFAULTED WITH LOAN #5121086531 IN THE NAME OF BLACK DIAMOND LLC IN THE AMOUNT OF \$3,500,000.00 DATED JANUARY 25, 2008 SECURED BY REAL ESTATE MORTGAGE

11. **SECURITY.** The Loan is secured by previously executed, separate security instruments, including the following: REAL ESTATE MORTGAGE DATED DECEMBER 9, 2003 IN THE ORIGINAL AMOUNT OF \$1,460,000.00 COVERING PROPERTY & IMPROVEMENTS FORMERLY KNOWN AS 4.51 ACRES THE GREENERY TRACT ON HWY 278, HILTON HEAD ISLAND NOW 1188 FORDING ISLAND RD, BLUFFTON, SC, SAID MORTGAGE RECORDED DECEMBER 12, 2003 IN BEAUFORT COUNTY, SC IN BOOK 01884 PAGES 0642-0649

ASSIGNMENT OF LEASES AND RENTS DATED MAY 21, 2007 RECORDED JUNE 5, 2007 IN BEAUFORT COUNTY, SC IN BOOK

12. DEFAULT. I will be in default if any of the following occur:

- A. **Payments.** I fail to make a payment in full when due.
- B. **Insolvency or Bankruptcy.** The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me or any co-signer, endorser, surety or guarantor of this Note or any other obligations I have with you.
- C. **Business Termination.** I merge, dissolve, reorganize, and my business or existence, or a partner or majority owner dies or is declared legally incompetent.
- D. **Failure to Perform.** I fail to perform any condition or to keep any promise or covenant of this Note.
- E. **Other Documents.** A default occurs under the terms of any other Loan Document.
- F. **Other Agreements.** I am in default on any other debt or agreement I have with you.
- G. **Misrepresentation.** I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.
- H. **Judgment.** I fail to satisfy or appeal any judgment against me.
- I. **Forfeiture.** The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.
- J. **Name Change.** I change my name or assume an additional name without notifying you before making such a change.
- K. **Property Transfer.** I transfer all or a substantial part of my money or property.
- L. **Property Value.** You determine in good faith that the value of the Property has declined or is impaired.
- M. **Material Change.** Without first notifying you, there is a material change in my business, including ownership, management, and financial conditions.
- N. **Insecurity.** You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Note or that the prospect for payment or performance of the Loan is impaired for any reason.

13. DUE ON SALE OR ENCUMBRANCE. You may, at your option, declare the entire balance of this Note to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of all or any part of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable.

14. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. **Additional Waivers By Borrower.** In addition, I, and any party to this Note and Loan, to the extent permitted by law, consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to this Note.

- (1) You may renew or extend payments on this Note, regardless of the number of such renewals or extensions.
- (2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.
- (3) You may release, substitute or impair any Property securing this Note.
- (4) You, or any institution participating in this Note, may invoke your right of set-off.
- (5) You may enter into any sales, repurchases or participations of this Note to any person in any amounts and I waive notice of such sales, repurchases or participations.
- (6) I agree that any of us signing this Note as a Borrower is authorized to modify the terms of this Note or any instrument securing, guarantying or relating to this Note.
- (7) I agree that you may inform any party who guarantees this Loan of any Loan accommodations, renewals, extensions, modifications, substitutions or future advances.

B. **No Waiver By Lender.** Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in this Note, or any other Loan Document, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

15. REMEDIES. After I default, you may at your option do any one or more of the following.

- A. **Acceleration.** You may make all or any part of the amount owing by the terms of this Note immediately due.
- B. **Sources.** You may use any and all remedies you have under state or federal law or in any Loan Document.
- C. **Insurance Benefits.** You may make a claim for any and all insurance benefits or refunds that may be available on my default.
- D. **Payments Made On My Behalf.** Amounts advanced on my behalf will be immediately due and may be added to the balance owing under the terms of this Note, and accrue interest at the highest post-maturity interest rate.
- E. **Set-Off.** You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Note against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit

obligation. "Any amount due and payable under the terms of this Note" means the total amount to which you are entitled to demand payment under the terms of this Note at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay this Note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

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

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

16. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Note or any other Loan Document. Expenses include, but are not limited to, attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of this Note. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

17. COMMISSIONS. I understand and agree that you (or your affiliate) will earn commissions or fees on any insurance products, and may earn such fees on other services that I buy through you or your affiliate.

18. WARRANTIES AND REPRESENTATIONS. I make to you the following warranties and representations which will continue as long as this Note is in effect:

A. Power. I am duly organized, and validly existing and in good standing in all jurisdictions in which I operate. I have the power and authority to enter into this transaction and to carry on my business or activity as it is now being conducted and, as applicable, am qualified to do so in each jurisdiction in which I operate.

B. Authority. The execution, delivery and performance of this Note and the obligation evidenced by this Note are within my powers, have been duly authorized, have received all necessary governmental approval, will not violate any provision of law, or order of court or governmental agency, and will not violate any agreement to which I am a party or to which I am or any of my Property is subject.

C. Name and Place of Business. Other than previously disclosed in writing to you I have not changed my name or principal place of business within the last 10 years and have not used any other trade or fictitious name. Without your prior written consent, I do not and will not use any other name and will preserve my existing name, trade names and franchises.

19. INSURANCE. I agree to obtain the insurance described in this Loan Agreement.

A. Property Insurance. I will insure or retain insurance coverage on the Property and abide by the insurance requirements of any security instrument securing the Loan.

B. Flood Insurance. Flood insurance is not required at this time. It may be required in the future should the property be included in an updated flood plain map. If required in the future, I may obtain flood insurance from anyone I want that is reasonably acceptable to you.

C. Insurance Warranties. I agree to purchase any insurance coverages that are required, in the amounts you require, as described in this or any other documents I sign for the Loan. I will provide you with continuing proof of coverage. I will buy or provide insurance from a firm licensed to do business in the State where the Property is located. If I buy or provide the insurance from someone other than you, the firm will be reasonably acceptable to you. I will have the insurance company name you as loss payee on any insurance policy. You will apply the insurance proceeds toward what I owe you on the outstanding balance. I agree that if the insurance proceeds do not cover the amounts I still owe you, I will pay the difference. I will keep the insurance until all debts secured by this agreement are paid. If I want to buy the insurance from you, I have signed a separate statement agreeing to this purchase.

20. APPLICABLE LAW. This Note is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

21. JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS. My obligation to pay the Loan is independent of the obligation of any other person who has also agreed to pay it. You may sue me alone, or anyone else who is obligated on the Loan, or any number of us together, to collect the Loan. Extending the Loan or new obligations under the Loan, will not affect my duty under the Loan and I will still be obligated to pay the Loan. This Note shall inure to the benefit of and be enforceable by you and your successors and assigns and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

22. AMENDMENT, INTEGRATION AND SEVERABILITY. This Note may not be amended or modified by oral agreement. No amendment or modification of this Note is effective unless made in writing and executed by you and me. This Note and the other Loan Documents are the complete and final expression of the agreement. If any provision of this Note is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

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

24. **NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Borrower will be deemed to be notice to all Borrowers. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Loan and to confirm your lien status on any Property. Time is of the essence.

25. **CREDIT INFORMATION.** I agree to supply you with whatever information you reasonably request. You will make requests for this information without undue frequency, and will give me reasonable time in which to supply the information.

26. **ERRORS AND OMISSIONS.** I agree, if requested by you, to fully cooperate in the correction, if necessary, in the reasonable discretion of you of any and all loan closing documents so that all documents accurately describe the loan between you and me. I agree to assume all costs including by way of illustration and not limitation, actual expenses, legal fees and marketing losses for failing to reasonably comply with your requests within thirty (30) days.

27. **SIGNATURES.** By signing under seal, I agree to the terms contained in this Note. I also acknowledge receipt of a copy of this Note.

BORROWER:

BLACK DIAMOND, LLC

By RED ROCKS, LLC, MANAGER

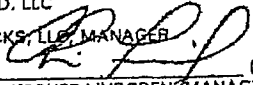
By  (Seal)
J. CHRISTOPHER LINDGREN, MANAGER

EXHIBIT "E"

FORBEARANCE AGREEMENT
Black Diamond, LLC - Loan No.: 5120783655

THIS FORBEARANCE AGREEMENT (the "Agreement") is made and entered into as of July 28, 2010 among BLACK DIAMOND, LLC, a South Carolina limited liability company ("Borrower"), THE ESTATE OF HERB G. KING (the "Estate"), J. CHRISTOPHER LINDGREN ("Mr. Lindgren"), and CAROLINA FIRST BANK, a South Carolina banking corporation ("Lender").

RECITALS:

WHEREAS, Lender made certain financing available to Borrower in the original principal amount of \$2,000,000.00 (the "Loan"), which Loan is evidenced by that certain Promissory Note (Commercial – Single Advance) Renewal Note of Borrower to the order of Lender, dated as of July 25, 2008, in the original maximum principal amount of \$2,000,000.00 (the "Note");

WHEREAS, the Loan is secured by, *inter alia*, that certain Mortgage of Borrower in favor of Lender, dated as of December 9, 2003 and recorded on December 12, 2003 in Book 01884 at Page 642 in the Office of the Register of Deeds for Beaufort County, South Carolina, as amended from time to time (the "Mortgage");

WHEREAS, the Loan is guaranteed by (i) that certain Guaranty (Continuing Debt – Unlimited) of Herb G. King ("Mr. King") in favor of Lender, dated as of July 25, 2008 (the "King Guaranty") and (ii) that Guaranty (Continuing Debt – Unlimited) of Mr. Lindgren in favor of Lender, dated as of July 25, 2008 (the "Lindgren Guaranty");

WHEREAS, the Note, the Mortgage, the King Guaranty, the Lindgren Guaranty and all other documents or instruments securing, guaranteeing and/or executed in connection with or relating to the Loan are referred to herein as the "Loan Documents";

WHEREAS, the Loan is presently in default pursuant to the terms of the Loan Documents as a result of (i) the death of Mr. King, and (ii) certain payment defaults;

WHEREAS, Borrower, the Estate and Mr. Lindgren have requested that Lender (i) forbear from exercising its rights and remedies under the Loan Documents, (ii) release its claim against the Estate relating to the King Guaranty, and (iii) accept certain modifications to the Loan, including (a) the transfer of all membership interests of the Estate in Borrower to Mr. Lindgren, and (b) the subsequent transfer of a fifty (50%) percent membership interest in Borrower from Mr. Lindgren to a new investor; and

WHEREAS, Lender has agreed to the foregoing requests, subject to the fulfillment of all conditions precedent set forth herein and the compliance by the parties with all terms, provisions, conditions and agreements set forth herein.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Status and Enforceability of Obligations. Borrower, the Estate and Mr. Lindgren each acknowledge and agree that (i) certain events of default have occurred under the Loan Documents as a result of (a) the death of Mr. King, and (b) certain payment defaults; (ii) as a result of such defaults, Lender has the right to accelerate the Loan and to declare the entire principal balance of the Loan, together with interest thereon and any other charges set forth therein, to be immediately due and payable, and to exercise any and all other rights and/or remedies of Lender set forth in the Loan Documents or available to Lender at law or in equity; and (iii) the Loan Documents are fully enforceable by Lender in accordance with their respective terms.

2. Outstanding Amount of Loan. Borrower, the Estate and Mr. Lindgren each acknowledge and agree that the outstanding principal and interest due under the Loan, as of July 28, 2010 is as follows:

Principal:	\$1,836,643.05	
Interest:	\$20,419.96	Per diem: \$275.496457
Total:	\$1,857,063.01	

3. Request to Forbear. Borrower, the Estate and Mr. Lindgren each request and consent to the terms of this Agreement and the forbearance described herein, and each agree that such forbearance and the other modifications to the Loan set forth in this Agreement have not and do not constitute a novation, waiver or release under the Loan Documents or any other agreement or document and do not constitute a forbearance, waiver or release with respect to any events of default now or hereafter existing under the Loan Documents except as expressly set forth herein. Borrower, the Estate and Mr. Lindgren each further agree that Lender shall be under no obligation to grant or agree to any additional or future forbearances or modifications, whether of the same or a different nature.

4. Representations and Warranties. In order to induce Lender to enter into this Agreement, Borrower, the Estate and Mr. Lindgren each represent and warrant to Lender that (i) each has the right, power and authority to enter into this Agreement and to perform its respective obligations set forth herein, and (ii) each and every Loan Document is the valid, legal and binding obligation of Borrower, the Estate and/or Mr. Lindgren, as applicable, and such Loan Documents are fully enforceable in accordance with their respective terms.

5. Forbearance, Release of Claims, and Loan Modification. Subject to compliance by Borrower, the Estate and Mr. Lindgren with all terms, conditions and agreements set forth herein, and subject to fulfillment with all conditions precedent set forth herein, Lender hereby agrees as follows:

A. Forbearance. Lender hereby agrees to forbear from exercising the rights and remedies available to it under the Loan Documents resulting from the death of Mr. King and the existing payment defaults.

B. Release of Claims. Lender hereby agrees to release its claim against the Estate relating to the King Guaranty.

C. Loan Modifications.

(i) Transfer of Membership Interest. Lender consents to the transfer to Mr. Lindgren of the membership interest of the Estate in and to Borrower in accordance with that certain Limited Liability Company Interest Swap Agreement, dated on or about the date hereof, among Mr. Lindgren, Red Rocks, LLC, the Estate and Julie H. King (the "LLC Swap Agreement"); provided, however, that such consent is contingent upon the subsequent transfer of a 50% membership interest in Borrower from Mr. Lindgren to a new party (the "Substitute Guarantor") to be approved by Lender, which Substitute Guarantor shall execute and deliver to Lender an unconditional guaranty of all debt of Borrower to Lender on terms substantially similar to those set forth in the Lindgren Guaranty.

(ii) Interest Rate. Notwithstanding the terms of the Note, from the date hereof until the maturity of the Loan, interest shall accrue on the outstanding principal balance of the Loan at a rate equal to the greater of (x) five and one half (5.50%) percent or (y) LIBOR. "LIBOR" means the thirty (30) day LIBOR as reported by the British Banker's Association (for the purpose of displaying London Interbank Offered Rates for United States Dollar deposits) determined as of 11:00 a.m. (London time), two (2) Business Days prior to the first business day of each calendar month.

(iii) Reserve Accounts. Borrower shall maintain for the remainder of the term of the Loan the restricted payment reserve account described in Section 6.D below with at least two (2) months of principal and interest referred to above. In the event that a payment due under the Loan is not made within twenty (20) days of the due date thereof, Lender shall have the option and authority to draft such payment from the restricted payment reserve account to make such outstanding loan payment, and in such event, Borrower shall replenish such amount to the account within five (5) business days. Such reserve account shall be subject to Lender's standard restricted reserve account deposit agreement.

6. Conditions Precedent. Lender's obligation to forbear from exercising its rights and remedies set forth in the Loan Documents, to release its claim against the Estate, and to accept the Substitute Guarantor is subject to fulfillment of each of the following conditions and requirements:

A. Defaults. All loans from Lender guaranteed by Mr. King or made to entities owned or controlled by Mr. King must be made current and any payment defaults or other events of default with respect thereto (if any) must be cured, including without limitation all loans to Borrower, Riva Ridge, LLC and Sheridan Place, LLC.

B. Related Documents. Lender shall have received, reviewed and approved in its sole discretion the LLC Swap Agreement.

C. Guaranty Agreements of Substitute Guarantor. The Substitute Guarantor shall execute and deliver to Lender his unconditional guaranty of the Loan, which guaranty shall be in form and content acceptable to Lender in its sole discretion.

D. Payment Reserve. Borrower shall fund with Lender a restricted payment reserve account with a minimum balance equivalent to two (2) months of principal and interest payments due under the Loan.

E. Appraisal. Lender shall obtain, at the sole cost and expense of Borrower, a written current MAI appraisal of the value of the real property securing the Loan, inclusive of all improvements thereon, to be prepared by a qualified Member, Appraisal Institute acceptable to Lender, conforming in form and content to all requirements established by Lender and setting forth a value of the property which shall support a loan-to-value ratio no greater than seventy (70.0%) percent.

F. Management Agreement. Lender, Borrower, Mr. Lindgren and the Substitute Guarantor shall enter into a management agreement whereby the management of Borrower shall be turned over to a manager to be designated by Lender, and which manager shall have all rights and responsibilities of a court-appointed receiver, including without limitation the collection of rents, the payment to Lender of all debt service requirements, and the day-to-day management of Borrower and the property encumbered by the Mortgage (the "Management Agreement"). The Management Agreement shall be subject to the approval of Lender as to both form and substance, and any default by Borrower, Mr. Lindgren, the Substitute Guarantor or any other party with respect to such Management Agreement shall be a default under the Loan Documents and shall entitle Lender to pursue all rights and remedies of Lender set forth therein. All fees and expenses of such manager shall be paid by Borrower.

G. Legal Opinion. Borrower shall deliver to Lender the written opinion of legal counsel to Borrower, which opinion shall be acceptable to Lender as to form and content, and shall contain such opinions as Lender shall require in its sole discretion, including without limitation the enforceability of this Agreement.

H. Other Modification Documents. Borrower, the Estate, Mr. Lindgren and the Substitute Guarantor (as applicable) shall execute and deliver to Lender such other documents or instruments as Lender shall reasonably require in connection with this Agreement, including without limitation amendments to or restatements of the Note and reaffirmations of the Lindgren Guaranty.

I. Fees. Borrower shall pay all costs and fees charged by Lender or incurred by Lender in connection with this Agreement and the forbearance and loan modifications set forth herein, including without limitation Lender's attorneys' fees.

7. Reaffirmation and Waiver. Borrower and Mr. Lindgren confirm, reaffirm and ratify their respective obligations set forth in the Loan Documents, (ii) represent that their respective obligations set forth in the Loan Documents consist of business (and not consumer) obligations, and (iii) represent that they have no claims, defenses, counterclaims or rights of setoff or

recoupment against Lender under the Loan Documents or otherwise and hereby waive any such claims, defenses, counterclaims or rights of setoff or recoupment.

8. Default. In the event that any party to this Agreement fails to comply with any applicable condition precedent, agreement or covenant set forth in this Agreement, or in the event that any representation or warranty set forth herein shall be determined to have been false at the time it was made, then Borrower, the Estate and Mr. Lindgren shall be in default under this Agreement, and Lender shall have the right to exercise any and all rights and remedies available to Lender under the Loan Documents, at law or in equity; provided, however, that Lender's rights and remedies with respect to the Estate shall be limited solely to rights and remedies arising from defaults resulting from the falsity of a representation or warranty of the Estate set forth herein.

9. Relief from Stay. In consideration of this Agreement and the corresponding forbearance of Lender, in the event that Borrower, Mr. Lindgren and/or the Substitute Guarantor shall (i) file with any bankruptcy court of competent jurisdiction or be the subject of any petition filed under title 11 of the United States Code (the "Bankruptcy Code"); (ii) be the subject of any order or relief issued under the Bankruptcy Code; (iii) file or be the subject of any petition seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, rehabilitation or similar relief under any present or future federal or state act or law relating to bankruptcy, insolvency, or other relief for debtors; (iv) have sought or consented or acquiesced in the appointment of any trustee, receiver, conservator, rehabilitator or liquidator; or (v) be the subject to any order, judgment, or decree entered by any court of competent jurisdiction approving a petition filed against such party for any reorganization, arrangement, composition, readjustment, liquidation, dissolution, rehabilitation or similar relief under any present or future federal or state act or law relating to bankruptcy, insolvency or other relief for debtors, then, subject to court approval, Lender shall thereupon be entitled, and Borrower and Mr. Lindgren each irrevocably consents, to relief from any automatic stay or injunction imposed by the Bankruptcy Code, including, but not necessarily limited to, that imposed by section 362 or section 105 of the Bankruptcy Code, or otherwise, on or against the exercise of the collection remedies available to Lender pursuant to the Loan Documents, and as otherwise provided by law, and Borrower and Mr. Lindgren each hereby irrevocably waives its right to object to or oppose any such relief from stay or other act taken by Lender in pursuit of its collection remedies as set forth in the Loan Documents. Nothing contained in this Agreement, however, shall be deemed to prevent any creditor or other party in interest (other than Borrower, Mr. Lindgren and the Substitute Guarantor) from objecting to relief from stay.

10. Rights and Remedies. This Agreement shall not prejudice any right or remedy of Lender and shall not be deemed a waiver of any right or remedy, except as expressly set forth herein. Lender expressly reserves all of its rights and remedies with respect to any other present or future default or event of default arising under the Loan Documents or under any other obligation of Borrower or Guarantors to Lender, subject only to the limitation on Lender's remedies with respect to the Estate set forth in Section 8 hereof. This Agreement shall be binding on, and inure to the benefit of, the parties and their respective successors and assigns.

11. Confidentiality. Borrower, the Estate and Mr. Lindgren each agree to retain in confidence, and (as applicable) to require its directors, members, managers, officers, employees, consultants, professional representatives and agents to retain in confidence, all of the terms of this Agreement. Notwithstanding anything to the contrary in the foregoing provisions, such

information may be disclosed (i) to a party's counsel or accountants or such employees as are reasonably required to know such information for that party; (ii) when requested by any regulatory authority or governmental agency; (iii) if it is required by court order, decree or applicable law; (iv) if it is requested by what appears to be a facially valid process; or (v) if it is ascertainable or obtained from public or published information. If Borrower, the Estate or Mr. Lindgren shall believe that he/it is required to make disclosure of any such information pursuant to subparts (ii) or (iv), then such party shall give Lender reasonable prior notice of such belief and shall use all reasonable efforts to afford Lender an opportunity to contest the making of such disclosure.

12. Miscellaneous. Except as expressly amended by this Agreement, the Loan Documents and the obligations evidenced thereby shall continue, unmodified and unchanged. This Agreement constitutes the entire agreement of the parties concerning the matters set forth herein and supersedes all prior and contemporaneous agreements, written or oral, concerning such matters. This Agreement may not be modified orally, and any modification must be in writing, signed by the party to be bound. The captions are inserted only for the convenience of the reader and shall not be construed to interpret or modify the terms of this Agreement. This Agreement shall be governed by the laws of the State of South Carolina and may be executed in counterparts. The parties acknowledge that they have read and understood this Agreement in its entirety prior to signing.

[SIGNATURE PAGE TO FOLLOW]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

BORROWER:

BLACK DIAMOND, LLC

By: Ch. Lindgren

Name: J. Chris Lindgren

Title: manager

THE ESTATE OF HERB G. KING

By: Julie H. King

Name: Julie H. King

Title: Personal Representative of the Estate of Herb G. King

Ch. Lindgren
J. Christopher Lindgren, individually.

LENDER:

CAROLINA FIRST BANK

By: _____

Name: Michael R. Renault

Title: Senior Vice President

EXHIBIT "F"

GUARANTY
(Continuing Debt - Unlimited)

DATE AND PARTIES: The date of this Guaranty is July 25, 2008. The parties and their addresses are:

LENDER:

CAROLINA FIRST BANK
104 South Main Street
Greenville, South Carolina 29801
Telephone: (800) 476-6400

BORROWER:

BLACK DIAMOND, LLC
a South Carolina Limited Liability Company
5 DUNMORE COURT
HILTON HEAD ISLAND, South Carolina 29926

GUARANTOR:

J. CHRISTOPHER LINDGREN
32 WIDEWATER ROAD
HILTON HEAD ISLAND, South Carolina 29926

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

A. **Pronouns.** The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.

B. **Note.** "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.

C. **Property.** "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

2. SPECIFIC AND FUTURE DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce your forbearance with respect to any Debt, or to induce you to extend and/or maintain credit, or grant any other financial accommodation, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, No. 5120783655, dated July 25, 2008, from BLACK DIAMOND, LLC (Borrower) to you, in the amount of \$2,000,000.00.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guarantees, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of these debts) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

A. **Future Advances.** I waive notice of and consent to any and all future advances made to the Borrower by you.

4. UNCONDITIONAL LIABILITY. I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you.

J. CHRISTOPHER LINDGREN
South Carolina Guaranty
SC/4jer1379200022000005848013072409Y

pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

6. REVOCATION. I agree that this is an absolute and unconditional Guaranty. I agree that this Guaranty will remain binding on me, whether or not there are any Debts outstanding, until you have actually received written notice of my revocation or written notice of my death or incompetence. Notice of revocation or notice of my death or incompetence will not affect my obligations under this Guaranty with respect to any Debts incurred by or for which you have made a commitment to Borrower before you actually receive such notice, and all renewals, extensions, refinancings, and modifications of such Debts. I agree that if any other person signing this Guaranty provides a notice of revocation to you, I will still be obligated under this Guaranty until I provide such a notice of revocation to you. If any other person signing this Guaranty dies or is declared incompetent, such fact will not affect my obligations under this Guaranty.

7. PROPERTY. I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me of my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

8. DEFAULT. I will be in default if any of the following occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-signer, endorser, surety or guarantor of this Guaranty or any Debt.

C. Death or Incompetency. I die or am declared legally incompetent.

D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Guaranty.

E. Other Documents. A default occurs under the terms of any other document relating to the Debt.

F. Other Agreements. I am in default on any other debt or agreement I have with you.

G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. I fail to satisfy or appeal any judgment against me.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. I change my name or assume an additional name without notifying you before making such a change.

K. Property Transfer. I transfer all or a substantial part of my money or property.

L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.

M. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

9. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or

other person in control or a close relative of any of these other persons.) Any Guarantor who is not an insider makes these waivers until all Debt is fully repaid.

B. **No Waiver By Lender.** Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. **Waiver of Claims.** I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. REMEDIES. After the Borrower or I default, you may at your option do any one or more of the following.

A. **Acceleration.** You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. **Sources.** You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. **Insurance Benefits.** You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. **Payments Made on the Borrower's Behalf.** Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. **Set-Off.** You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

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

F. **Waiver.** Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

12. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

13. RELIANCE. I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and that I have signed this Guaranty to induce you to forbear from exercising your remedies against the Borrower, extend credit to the Borrower, maintain the Borrower's credit, or grant any other financial accommodation. I represent and warrant to you that I have a direct and substantial economic interest in the Borrower and expect to derive substantial benefits from the continued existence of the Debt guaranteed hereby, and from any loan and/or financial accommodations resulting in the creation of other Debt guaranteed hereby. I agree to rely exclusively on the right to revoke this Guaranty prospectively as to future transactions in the manner as previously described in this Guaranty if at any time, in my opinion, the benefits then being received by me in connection with this Guaranty are not sufficient to warrant the continuance of this Guaranty. You may rely conclusively on a continuing warranty that I continue to be benefited by this Guaranty and you will have no duty to inquire into or confirm the receipt of any such benefits, and this Guaranty will be effective and enforceable by you without regard to the receipt, nature or value of any such benefits.

14. APPLICABLE LAW. This Guaranty is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

15. AMENDMENT, INTEGRATION AND SEVERABILITY. This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty is the complete and final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

16. ASSIGNMENT. If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

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

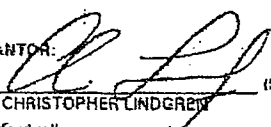
18. **NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

19. **CREDIT INFORMATION.** I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others.

20. **ADDITIONAL TERMS.** THIS GUARANTOR'S SOCIAL SECURITY NUMBER IS 523-80-2104. THIS GUARANTOR'S DATE OF BIRTH IS 09/13/1958

21. **SIGNATURES.** By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

GUARANTOR:


J. CHRISTOPHER LINDGREN

(Seal)

Individually

EXHIBIT "G"

UNCONDITIONAL GUARANTY

WHEREAS, **BLACK DIAMOND, LLC**, a South Carolina limited liability company with an address of P. O. Box 23164, Hilton Head Island, South Carolina 29925 ("Borrower") has borrowed or shall borrow the sum of **THREE MILLION FIVE HUNDRED THOUSAND AND NO/100 (\$3,500,000.00) DOLLARS** ("Loan") to be secured by a mortgage on the real property owned by Borrower described in Exhibit "A" ("Property") from **CAROLINA FIRST BANK** ("Bank") whose address is 62 New Orleans Road, Hilton Head Island, South Carolina 29928 ("Lender") pursuant to a Promissory Note from Borrower to Lender dated January 25, 2008 ("Note"); and

WHEREAS, Lender is unwilling to make the loan to Borrower evidenced by the Note unless it receives an unconditional and continuing guaranty from **J. CHRISTOPHER LINDGREN** ("Guarantor") covering all "Obligations of Borrower" as hereinafter defined.

NOW, THEREFORE, in consideration of the premises and of other good and valuable consideration, and in order to induce Lender to lend money to Borrower as evidenced by the Note, Guarantor hereby agrees as follows:

Guarantor hereby absolutely and unconditionally guarantees to Lender and its successors and assigns the due and punctual payment of all principal, interest and any other amounts due or to become due, whether by acceleration or otherwise, under the Note and the Mortgage securing the Note, and including all renewals, extensions and/or modifications thereof, plus all interest, costs and reasonable attorneys' fees of Lender (all of such liabilities and obligations of Borrower to Lender being hereinafter collectively termed "Obligations of Borrower"). Further, whether or not suit is brought by Lender to acquire possession of collateral or to enforce collection of any unpaid balance hereunder, Guarantor expressly hereby agrees to pay all legal expenses and the reasonable attorneys' fees (including those relative to appellate proceedings, if any) incurred by Lender with respect to this Guaranty.

To implement the foregoing and as additional inducements to Lender, Guarantor further covenants and agrees as follows:

1. This Guaranty is and shall remain an unconditional and continuing guaranty of payment and not of collection. Guarantor hereby expressly waives any right to require Lender to bring any action against Borrower or any other person or to require that resort be had to any security or to any balance of any deposit or other account or debt or credits on the books of Lender in favor of Borrower or any other person. Guarantor acknowledges that Guarantor's liabilities and obligations hereunder are primary rather than secondary. Without limiting the generality of the foregoing, Guarantor expressly waives any rights Guarantor otherwise might have under provisions of South Carolina or other applicable law to require Lender to attempt to recover against Borrower and/or to realize upon any securities or collateral security which Lender holds for the obligation evidenced or secured hereby.
2. Time is of the essence in the performance of all obligations hereunder.
3. No waivers or modifications shall be valid unless they are reduced to writing, duly executed by the party to be charged thereby, and expressly approved in writing by an officer of Lender actually involved in the transactions being guaranteed hereby.
4. If any process is issued or ordered to be served upon Lender, Borrower or Guarantor, seeking to seize Borrower's and/or Guarantor's rights and/or interests in any bank account maintained with Lender, the balance in any such account shall immediately be deemed to have been and shall be set-off against any and all Obligations of Borrower and/or all obligations and liabilities of Guarantor hereunder, as of the time of the issuance of any such writ or process, whether or not Borrower, Guarantor and/or Lender shall then have been served therewith.
5. All moneys available to and/or received by Lender for application toward payment of (or reduction of) the Obligations of Borrower may be applied by Lender to such obligations of Borrower in such manner, and apportioned in such amounts and at such times, as Lender, in its sole discretion, may deem suitable or desirable.
6. As security for any and all liabilities of Guarantor hereunder, now existing or hereafter arising, Guarantor hereby grants Lender the right to retain a security interest in any and all moneys or other property (i.e., goods and merchandise, as well as all documents relative thereto; also, funds, securities, choses in action and any and all other forms of property, whether real, personal or mixed and any right, title or interest of Guarantor therein or thereto) and/or the proceeds thereof, which have been or may hereafter be deposited or left with Lender (or with any agent or other third party acting on Lender's behalf) by or for the account or credit of Guarantor, including without limitation any property in which Guarantor may have any interest. Further, where any money is due Lender hereunder, Lender is herewith authorized to exercise its right of setoff or "bank lien" as to any moneys deposited in demand, checking,

time, savings, or other accounts of any nature maintained in and with it by any of the undersigned, without advance notice. Said right of set-off shall also be applicable and exercised by Lender, in its sole discretion, where Lender is indebted to any Guarantor by reason of any certificate of deposit, bond, note or otherwise.

7. Guarantor agrees that Guarantor's liability hereunder shall not be diminished by any failure on the part of Lender to perfect (by filing, recording or otherwise) any security interest it may have in any property securing this Unconditional Guaranty Agreement and/or the obligations of Borrower secured hereby and hereunder.

8. Guarantor further hereby consents and agrees that Lender may at any time, or from time to time, in its sole discretion: (i) extend or change the time of payment, and/or the manner, place or terms of payment of any or all of the obligations of Borrower; (ii) exchange, release and/or surrender all or any of any collateral security, or any part thereof, by whomsoever deposited, which is or may hereafter be held by it in connection with all or any of the Obligations of Borrower and/or any liabilities or obligations of Guarantor hereunder; (iii) release any other guarantor, endorser or co-obligor of the obligations of Borrower with or without consideration and without notice to and further consent from any Guarantor and such release shall not in any way affect the liability of the undersigned; (iv) sell or otherwise dispose of and/or purchase all or any of any such collateral at public or private sale, and after deducting all costs and expenses of every kind for collection, preparation for sale, sale or delivery, the net proceeds of any such sale or other disposition may be applied by Lender upon all or any of the Obligations of Borrower; (v) settle or compromise with Borrower, any insurance carrier and/or any other person liable thereon, any and all of the obligations of Borrower (including, but not limited to any insurance applicable to the Obligations of Borrower), and/or subordinate the payment of all or any part of same, to the payment of any other debts or claims, which may at any time be due or owing to Lender and/or any other person; or (vi) alter, extend, change, modify, release, waive or cancel any covenant, agreement, condition, obligation or provision contained in any or all loan documents; all in such manner and upon such terms as Lender may deem proper and/or desirable, and without notice to or further assent from Guarantor, it being agreed that Guarantor shall be and remain bound upon this Unconditional Guaranty Agreement, irrespective of the existence, value or condition of any collateral, and notwithstanding any such change, exchange, settlement, compromise, surrender, release, foreclosure, sale or other disposition, application, renewal or extension and notwithstanding also that the Obligations of Borrower may at any time exceed the aggregate principal sum of the Note. Further, this Guaranty shall not be construed to impose any obligation on Lender to extend or continue to extend credit or otherwise to deal with Borrower at any time.

9. In consideration of Lender's extension of credit to Borrower, Guarantor hereby agrees:

a. To subordinate, and by this Agreement does subordinate, all debts now or hereafter owed by Borrower to Guarantor to any and all debts of Borrower to Lender now or hereafter existing while this Agreement is in effect.

b. Guarantor further agrees that it will not assert any right to which it may be or become entitled, whether by subrogation, contribution or otherwise against Borrower or any of the other guarantors or any of their respective properties, by reason of the performance of the undersigned of his obligations under this Guaranty, except after payment in full of all amounts (including costs and expenses) which may become payable in respect of or under the obligations of Borrower.

c. Guarantor hereby indemnifies and holds Lender harmless from and against any and all damages, penalties, fines, claims, liens, suits, liabilities, costs (including cleanup costs), judgments and expenses (including attorneys', consultants, or experts, fees and expenses) of every kind and nature, suffered by or asserted against Lender under any law, regulation or ordinance, local, state or federal concerning any hazardous materials, substances, wastes or other environmentally regulated substances now or hereafter located on the property of Borrower or Guarantor.

10. This Unconditional Guaranty Agreement shall be binding upon Guarantor, and the heirs, executors, administrators, successors and assigns of Guarantor; and it shall inure to the benefit of, and be enforceable by, Lender and its successors, transferees and assigns. It further shall be deemed to have been made under and shall be governed by the Laws of the State of South Carolina in all respects, including matters of construction, validity and performance.

11. No waiver by Lender of any default by Guarantor or Borrower shall operate as a waiver of any other default or of the same default on a future occasion. The liability of Guarantor hereunder shall also be joint and several with that of any person or entity executing a separate guaranty in favor of Lender.

12. Guarantor hereby waives: (i) notice of acceptance of this Guaranty; (ii) notice of extensions, continuations or modifications of the Note; (iii) notice of entering into and engaging in business transactions and/or contractual relationships and any other dealings between Lender and Borrower; (iv) presentment and/or demand for payment of any of the Obligations of Borrower and/or for payment under this Guaranty; (v) protest or notice of dishonor or default to Guarantor or to any other person with respect to any of the Obligations of Borrower; (vi) the benefit of any homestead or other exemptions; and (vii) to the extent such waiver may be enforceable at the time of foreclosure, any right to have any mortgaged property securing the Obligations of Borrower appraised after

foreclosure for the purpose of reducing a deficiency judgment against Borrower, Guarantor or any other guarantor or other party.

13. Anything contained herein to the contrary notwithstanding, if for any reason the effective rate of interest on any of the Obligations of Borrower should exceed the maximum lawful rate, the effective rate of such obligation shall be deemed reduced to and shall be such maximum lawful rate, and any sums of interest which have been collected in excess of such maximum lawful rate shall be applied as a credit against the unpaid principal balance due.

14. Guarantor shall be in default under this Guaranty Agreement upon the happening of any of the following events, circumstances or conditions:

a. Failure of Guarantor to pay its obligations hereunder immediately upon demand after a default by Borrower in the payment of the Obligations of Borrower; or

b. Any warranty, representation or statement made or furnished to Lender by or on behalf of Guarantor in connection with this Guaranty Agreement or to induce Lender to extend credit or otherwise deal with either Borrower or Guarantor proving to have been false in any material respect when made or furnished; or

c. Death (unless Lender, in its discretion, accepts a substitute guarantor), dissolution, termination of existence, insolvency, business failure, appointment of a receiver for any part of the property of, assignment for the benefit of creditors by, or the commencement of any proceeding under any State or Federal Bankruptcy or Insolvency Laws by or against any Guarantor; or

d. Material adverse change in the financial position of Guarantor.

15. Remedies upon Default. Upon the occurrence of any of the foregoing events, circumstances, or conditions of default, all of the obligations evidenced herein or guaranteed hereby shall immediately be due and payable without notice. Further, Lender shall then have all of the rights and remedies granted hereunder, and all of the rights and remedies of a secured party and/or holder in due course under the South Carolina Uniform Commercial Code and/or under other Laws of South Carolina.

16. Any provision hereof to the contrary notwithstanding, to the extent Guarantor is determined to be an "insider" as such term is used in the United States Bankruptcy Code or cases thereunder, Guarantor waives any right (whether established by contract or statute or otherwise available at law or in equity) to reimbursement, indemnity, subrogation, contribution or other such claim against Lender, Borrower or any other guarantor or any other person primarily or secondarily liable for any obligations of Borrower with respect to any disbursement or payment made by Guarantor under or in connection with this Guaranty or otherwise.

17. In the event any payment made by Guarantor to Lender is determined to be a preferential transfer under any bankruptcy or similar law and Lender is required to return such payment to a trustee in bankruptcy, to a receiver, to Guarantor, or to another person or entity, Guarantor's obligations under this Guaranty shall not be discharged with respect to such preferential payment notwithstanding any satisfaction of the Note guaranteed hereby or the return of this Guaranty. Furthermore, Guarantor shall be jointly and severally liable to Lender for the amount of any such preferential payment and any interest expenses or other expenses, including but not limited to attorneys' fees, incurred by Lender related in any way to such preferential payment, and Guarantor agrees to reinstate any collateral given to Lender as security for the obligations under this Guaranty notwithstanding the fact that such collateral may have been released or returned by Lender.

18. Guarantor acknowledges that Guarantor has previously submitted financial statements to Lender for the purpose of inducing Lender to extend credit to Borrower. Guarantor agrees to update such financial statements from time to time as reasonably by Lender. Guarantor further agrees to immediately notify Lender in writing of any material adverse change in the financial position of Guarantor. Guarantor covenants and warrants that such financial statements, as updated or supplemented from time to time by Guarantor, shall remain a true and accurate statement of Guarantor's financial position for so long as the Obligations of Borrower remain outstanding, and Lender shall be entitled to continue to rely on the truth and accuracy of such statements. Guarantor agrees not to transfer assets for less than fair value or take any other action which could reasonably be expected to reduce the net worth of Guarantor or diminish Guarantor's ability to perform Guarantor's obligations hereunder.

19. Guarantor's liability hereunder shall not be diminished or reduced by (i) any payment of any of the obligations of Borrower by any other guarantor, endorser, co-obligator or any other person liable or to become liable for the payment of the Obligations of Borrower, or (ii) any reduction of the Obligations of Borrower by realization of any collateral or security or by any other source.

20. Guarantor submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Guarantor further agrees to comply with all requirements necessary to give such court in personam jurisdiction and agrees that service of process may be accomplished by, in addition to any other lawful means,

certified mail, return receipt requested, to Guarantor at Guarantor's address set forth below or any new address of which Lender has been notified by Guarantor in writing.

21. WAIVER OF JURY TRIAL. TO THE EXTENT NOW OR HEREAFTER PERMITTED BY LAW, THE BORROWER AND ANY OTHER GUARANTOR WAIVES TRIAL BY JURY WITH RESPECT TO ANY ACTION, CLAIM, SUIT OR PROCEEDING ON OR ARISING OUT OF THE LOANS, THE OBLIGATIONS, THE CONDUCT OF THE RELATIONSHIP BETWEEN THE LENDER AND THE BORROWER, AND/OR THE CONDUCT OF THE RELATIONSHIP BETWEEN THE LENDER AND ANY GUARANTOR.

WITNESS the Hand and Seal of the undersigned, this Unconditional Guaranty being executed and delivered on the date first above written.

Dundreshead

[Signature]
By: J. CHRISTOPHER KINDGREN

[Signature]

EXHIBIT "H"

UNCONDITIONAL GUARANTY AGREEMENT

THIS UNCONDITIONAL GUARANTY AGREEMENT is made and granted by the undersigned DAVID A. BROSMAN ("Guarantor") in order to induce CAROLINA FIRST BANK ("Lender"), whose address is 104 South Main Street, Greenville, South Carolina 29601, to extend, amend, modify or forbear from exercising certain remedies with respect to certain credit to or for the benefit of BLACK DIAMOND, LLC, a South Carolina limited liability company ("Borrower"), and is given in consideration of the benefits flowing to Guarantor therefrom (which Guarantor hereby acknowledges and agrees constitute fair and adequate consideration for this Guaranty). In consideration of the foregoing, the receipt and sufficiency of which is hereby acknowledged, Guarantor hereby covenants and agrees as follows:

1. GUARANTY OF OBLIGATIONS. Guarantor hereby irrevocably, unconditionally and absolutely guarantees to Lender, its successors and assigns, the punctual payment and performance as and when due of the following-described indebtedness, liabilities, obligations and duties (collectively, the "Obligations"):

a. All monies now or hereafter owed to Lender that are evidenced by that certain Promissory Note of Borrower to the order of Lender, dated as of January 25, 2008, in the original maximum principal amount of \$3,500,000.00 (the "Note"), including without limitation, all principal, interest, late charges, prepayment fees, other charges, reasonable attorneys' fees, costs and expenses whatsoever becoming due to Lender pursuant to the Note and any renewals, extensions, modifications, forbearances and rearrangements of, and any and all substitutes and replacements for, the Note and any other indebtedness, liabilities, duties and obligations whatsoever now or hereafter evidenced by or pursuant to the Note, whether direct, indirect or contingent.

b. All other monies now or hereafter owed to Lender and all performance under and/or compliance with all terms, conditions, covenants, representations, warranties and provisions set forth in (i) the Note and (ii) all loan documents pertaining to or executed in connection with the Note, including without limitation that certain Forbearance Agreement dated as of July 30, 2010 among Lender, Borrower and certain other parties (collectively "Loan Documents") to be performed by or complied with on the part of Borrower or any other guarantors thereof or parties thereto, including without limitation, any renewals, extensions, modifications, and rearrangements of, and any and all substitutes and replacements for any of the foregoing.

c. All obligations of Borrower incurred pursuant to and in accordance with all "hedging agreements", if any, now or hereafter entered into by Borrower with Lender, which term shall include without limitation any interest rate swap, cap or collar agreements, interest rate future or option contracts, currency swap agreements, currency future or option contracts, commodity agreements, and other similar agreements or arrangements designed to protect against fluctuations in interest rates, currency values or commodity values, and all amendments, modifications, substitutions, replacements, and additions thereto.

d. All costs or expenses incurred, or advances made, by Lender, including without limitation court costs and reasonable attorneys' fees, (i) to preserve the priority, validity or amount of the Note and/or any collateral now or hereafter existing as security for the Note and (ii) to enforce the collection of all sums due to Lender pursuant to the Note and any other Loan Documents, (iii) to enforce the performance of all terms and provisions of the Loan Documents and (iv) to realize the benefit of any collateral for the obligations of Borrower owed to Lender pursuant to the Loan Documents.

e. All monies now or hereafter owed to Lender pursuant to and all performance under and/or compliance with this Guaranty, and the terms, provisions, covenants and warranties contained herein, and any renewals, extensions, modifications and rearrangements of, and any and all substitutes for, this Guaranty including without limitation all costs, expenses and reasonable attorneys' fees incurred by Lender in the enforcement of this Guaranty and the preservation of Lender's rights hereunder.

2. NATURE OF GUARANTY. This Guaranty constitutes an irrevocable, unconditional, absolute, present and continuing guaranty of payment and performance and not a guaranty of collection. Guarantor, without limitation on its obligations hereunder, agrees that it is jointly and severally liable for payment of the Obligations as a primary obligor of Borrower. The obligations of Guarantor hereunder shall not be subject to any counterclaim, setoff, deduction or other defense existing or claimed now or hereafter by or on behalf of Borrower, any other guarantor or any other person or entity whomsoever, whether such setoff, counterclaim, deduction or defense arises in connection with the Obligations, the transactions creating the Obligations, or otherwise, nor, except as otherwise expressly provided herein, shall this Guaranty be reduced, released, discharged, diminished, impaired, or adversely affected, in whole or in part, by any of the foregoing. Guarantor may not revoke this Guaranty and this Guaranty shall remain in full force and effect after any attempted revocation by Guarantor, and shall remain in full force and effect until all of the Obligations shall have been paid, performed and satisfied in full.

3. CONSENTS. Guarantor consents to and agrees that its Obligations hereunder shall not, except as otherwise expressly stated herein, be released, discharged, impaired, diminished, reduced, or otherwise affected by any act, event, happening, occurrence, circumstance, condition, matter or thing whatsoever, including without limitation all such items as are set forth hereinafter (whether occurring before, during or after the occurrence of any event of default under the Note or any Loan Document, and whether or not Guarantor shall have any knowledge or notice thereof or have given its consent thereto). Guarantor further waives any and all rights (including without limitation rights to notice) which it might otherwise have arising out of or as a result of, (a) all renewals, extensions, continuations, modifications, supplements, amendments, exchanges, alterations, rearrangements, waivers, compromises, terminations, releases or surrenders of any or all of the Obligations, any or all of the Loan Documents, whether in whole or in part; (b) all adjustments, indulgences, postponements, forbearances and compromises granted or given by Lender to Borrower or any other person; (c) the death, insolvency, bankruptcy, liquidation, disability, reorganization, dissolution, or lack of power of any person, including, without limitation, Borrower and Guarantor; (d) the invalidity, illegality or unenforceability of all or any part of the Obligations and/or the Loan Documents for any reason whatsoever, including without limitation claims of ultra vires acts, claims relating to the authority of signers, claims relating to usury, claims relating to unenforceability, impossibility, or uncollectibility, and claims relating to forgery or irregularity; (e) any full or partial release of Borrower or any other persons, from liability for payment or performance of any Obligations; (f) the taking or accepting of any other security, collateral or guaranty, or other assurance of payment, for any of the Obligations; (g) any release, surrender, exchange, subordination, disposition, deterioration, waste, loss or impairment of any collateral, property or security, at any time existing in connection with, or securing payment of, any Obligations; (h) failure by Lender or any other person to exercise diligence, commercial reasonableness or reasonable care in the preservation, protection, enforcement, sale or other handling or treatment of all or any part of such collateral, property or security; (i) Lender's failure to obtain or perfect any security interest, lien or other guaranty agreement; (j) the determination or adjudication that any payment on any of the Obligations constitutes a preference under bankruptcy laws, or the requirement for any reason that Lender must refund or relinquish such payment; (k) any lack of disclosure to Guarantor of any information; (l) any sale, assignment, transfer, endorsement or granting by Lender of any interest in the Note and/or any of the Loan Documents; (m) any failure of consideration or failure of Guarantor to receive or realize any or all of the benefits expected or contemplated by virtue of this Guaranty; and (n) any other action or omission with respect to all or any

part of the Obligations, or the security and collateral therefor, whether or not such action or omission prejudices Guarantor or increases the likelihood that Guarantor will be required to pay all or any part of the Obligations; it being the unambiguous and unequivocal intention of Guarantor that Guarantor be obligated to pay and perform the Obligations if Borrower shall not punctually pay and perform such Obligations when due, notwithstanding any occurrence, circumstance, event, action, or omission whatsoever, whether or not contemplated, and whether or not specifically described herein. Notwithstanding the foregoing, Guarantor does not waive or release (expressly or impliedly) any rights of subrogation, reimbursement or contribution which it may have, after payment in full of the Obligations, against others liable on the Obligations; provided, that Guarantor's rights of subrogation and reimbursement shall be and at all times remain subordinate to Lender's rights and claims pursuant to Section 5 of this Guaranty.

4. WAIVERS. Guarantor hereby absolutely, unconditionally and irrevocably waives, to the fullest extent permitted by law, (a) any requirement that prior to making demand for payment or seeking to enforce any right or remedy under this Guaranty, Lender first make demand upon, make claim against or take any action with respect to Borrower or any other persons, or resort to or seek to exhaust any collateral, or seek to enforce any other right or remedy in any of the Loan Documents or resort to any other means available by law or in equity for obtaining payment of the Obligations; (b) diligence, presentment, demand, protest, notice of acceptance, notice of dishonor, notice of protest and any other notice of any other kind; (c) any right of subrogation to any right of Borrower and any other right to reimbursement, indemnity or other recourse against Borrower or any other person; (d) any right or benefit (whether directly or through Borrower or any other persons) under any appraisal, valuation, stay, extension or redemption laws; and (e) any right to require marshalling of any collateral.

5. SUBORDINATION OF GUARANTOR CLAIMS. Until the Obligations are paid in full and Guarantor's liability hereunder has been released and discharged, Guarantor covenants and agrees that it shall not claim, seek, sue for, receive or collect, directly or indirectly, from Borrower or any other person any other material obligations, indebtedness, liabilities or duties owed or claimed to be owed by Borrower or such other person to Guarantor (the "Guarantor Claims"), regardless of how arising, in what capacity claimed, or how evidenced, all of which Guarantor Claims shall be inferior and subordinate to all liens, security interests and other encumbrances upon the assets of Borrower or such other person which shall secure the payment of the Obligations, regardless of whether such encumbrances arise in favor of Guarantor or Lender and whether presently existing and hereafter arising. Guarantor covenants and agrees that it shall not exercise and enforce any creditor's rights it may have against Borrower or such other party, or foreclose or repossess, claim, or otherwise institute any actions or proceedings (whether judicial administrative, or otherwise) to enforce any liens, security interests or other encumbrances on any of the assets of Borrower or such other person so long as the Obligations remain outstanding. Guarantor further covenants and agrees that Lender may prove its claim for outstanding Obligations in any receivership, bankruptcy, reorganization, rearrangement, debtor relief or other insolvency proceeding in which Borrower or such other party is a debtor so as to establish its rights hereunder and receive directly from the receiver, trustee or other court custodian, dividends and payments which would otherwise be payable upon the Guarantor Claims, and in this connection Guarantor hereby assigns to the extent of the outstanding Obligations such dividends and payments to Lender and agrees that, with respect to the remainder of the Guarantor Claims, Guarantor's rights shall be subordinate to Lender's rights and claims. If Lender receives, for application upon the Obligations, any such dividends or payments which, as between Borrower and Guarantor, constitute payments on the Guarantor Claims, then upon full payment of the Obligations to Lender, Guarantor shall be subrogated to the rights of Lender to the extent that payments to Lender on the Guarantor Claims have contributed to satisfaction of the Obligations; and such subrogation shall be in respect to that portion of the Obligations which would have been unpaid if Lender had not received dividends or payments upon the Guarantor Claims.

6. REPRESENTATIONS AND WARRANTIES. Guarantor hereby represents and warrants to Lender that (a) as of the execution hereof, nothing exists to impair the effectiveness of this Guaranty or its immediate and continuing effectiveness; (b) Guarantor has received, or will receive, direct or indirect benefit and fair consideration in making this Guaranty; (c) to the extent desired by Guarantor, Guarantor is familiar with the books and records regarding Borrower's financial condition, the project which the Loan will finance, and the value of all collateral intended as security for payment of any of the Obligations; however, Guarantor is not relying on such financial condition or collateral in making this Guaranty; (d) no person has made any representation, warranty or statement to Guarantor to induce Guarantor to make this Guaranty; and (e) this Guaranty is the legal and binding obligation of Guarantor, enforceable against Guarantor in accordance with its terms.

7. EFFECT OF BANKRUPTCY. If, pursuant to any bankruptcy, insolvency or other debtor relief, laws or rules, or any judgment or order or decision thereunder, any payment received by Lender shall be adjudicated as a voidable preference or Lender must otherwise rescind or restore any amount taken, credited or received by Lender in payment or satisfaction by any of the Obligations, any prior release or discharge by the terms of this Guaranty given by Lender shall be without effect and this Guaranty shall remain in full force and effect. Guarantor's Obligations hereunder shall not be discharged except by Guarantor's performance of those Obligations and then only to the extent of such performance.

8. DEFAULT. The term "Event of Default", whenever used hereinafter, shall mean any one or more of the following events: (a) occurrence of an Event of Default set forth or defined in the Note or in any of the Loan Documents, including a breach of any of the terms or conditions of this Guaranty, which is not cured within any applicable grace period, if any, set forth herein or therein; (b) the entry of any judgment against Guarantor, or the attachment, levy or garnishment against any property of Guarantor which in the reasonable judgment of Lender would materially and adversely affect Guarantor's ability to perform his Obligations under this Guaranty and which remains unsatisfied for a period of sixty (60) days after the filing or issuance of the same, or the occurrence of any other substantial change in the financial condition of Guarantor which, in the reasonable judgment of Lender, would materially and adversely affect Guarantor's ability to perform his Obligations under this Guaranty; (c) except as permitted in the Loan Documents, any transfer, sale, conveyance, disposition or assignment of the membership, partnership, stock or other ownership interest or management rights of Guarantor in Borrower, whether voluntary, involuntary, or by operation of law, without the express prior written consent of Lender; and (d) the death, bankruptcy, liquidation, disability, or lack of power of Guarantor.

9. REMEDIES. Upon occurrence of any Event of Default, Lender may take any or all of the following actions without any requirement of demand for payment or performance on the part of Borrower or any other persons whomsoever and without requirement of resort to any collateral for any of the Obligations or to any other means of obtaining payment or performance of any of the Obligations, as follows: (a) Lender may declare all of Borrower's Obligations under the Loan Documents, regardless of their terms and including Guarantor's Obligations hereunder, immediately due and payable and that performance thereof is immediately required; (b) Lender may accelerate all or any part of the Obligations and require full payment and performance thereof by Guarantor; (c) Lender shall have the right of setoff against, a lien upon and a continuing security interest in all instruments, documents, securities, cash or other property, and all proceeds of the foregoing, which may now or hereafter be owned by Guarantor which may become in possession or control of Lender or any other party acting on Lender's behalf, directly or indirectly, regardless of the capacity in which Lender may receive, hold or control the same; and (d) Lender shall have all of the rights and remedies afforded to it under the Note and the Loan Documents or otherwise existing at law or in equity.

10. NATURE OF REMEDIES. The remedies provided herein, in the Note, and in all other Loan Documents shall be cumulative and none is exclusive and such remedies shall be exercised concurrently

or consecutively at the option of Lender. Any waiver, failure, or delay by Lender in exercising any remedy provided herein, in the Note or in any Loan Document upon occurrence of any Event of Default, shall not constitute a waiver of such right or remedy or preclude its future exercise or that of any other right of remedy in the event of any subsequent default, whether of the same or different nature. No notice to or demand on Guarantor by Lender shall be deemed to be a waiver of Lender's right to take other or further action and in no event shall any waiver or right, power or remedy of Lender hereunder be effective unless the same is in writing and signed by Lender.

11. SEVERABILITY. The invalidity, illegality or unenforceability of any provision of this Guaranty or in the Note or any of the Loan Documents shall not render invalid, illegal or unenforceable any other provision hereof.

12. SURVIVAL. All covenants, agreement, representations, and warranties of Guarantor contained herein and in any document or item delivered pursuant hereto shall survive the execution hereof and continue and remain in full force and effect until the Obligations have been paid, performed and satisfied in full.

13. ENTIRE AGREEMENT. This Guaranty contains the entire agreement and understanding between Guarantor and Lender with respect to the subject matter hereof, and supersedes all prior agreements and understandings, whether oral or written.

14. GOVERNING LAW. This Guaranty shall be governed and construed in accordance with the internal laws of the State of South Carolina, without regard to any choice of law or conflict of law provisions which might apply the law of another jurisdiction.

15. CONSENT TO JURISDICTION. Any action or proceeding which Lender may initiate with respect to this Guaranty shall, at Lender's sole option, be brought in and subject to the jurisdiction of the any state or federal court of competent jurisdiction of the State of South Carolina, to which jurisdiction Guarantor hereby irrevocably consents. Notwithstanding the foregoing, however, Guarantor additionally acknowledges and agrees that Lender may initiate any action upon or for the enforcement of this Guaranty in any state or federal court of competent jurisdiction in any other State in which Guarantor may at any time reside or possess material assets, to which jurisdictions Guarantor hereby further irrevocably consents. Guarantor irrevocably waives any objection, including without limitation any objection to the laying of venue based on the grounds of forum non conveniens, which she may now or hereafter have to the bringing of any such action or proceeding in any such jurisdiction. Nothing herein shall affect the right of Lender to serve process in any manner permitted by law nor shall limit the right of Lender to bring proceedings against another party to any of the Loan Documents in the courts of any other jurisdiction.

16. NOTICE. All notices made or required hereunder shall be in writing. The effective date of any notice shall be the date upon which such notice shall have been personally delivered (including personal delivery by Federal Express or other nationally recognized overnight private courier service) or the date of postmark when deposited in the United States Mail, registered or certified, postage prepaid, return receipt requested, addressed in any such event, to Lender or Guarantor at the address set forth after Guarantor's signature hereinafter, or at such other addresses as may hereafter be designated in writing.

17. WAIVER OF JURY TRIAL. GUARANTOR, TO THE MAXIMUM EXTENT PERMITTED BY LAW, WAIVES ANY RIGHT TO A TRIAL BY JURY IN ANY ACTION ARISING FROM OR RELATED TO THIS GUARANTY.

Executed this 30th day of July, 2010.

IN THE PRESENCE OF:

[Signature]
(Witness 1)

[Signature]
(Witness 2)

GUARANTOR:

[Signature]
Print Name: David A. Brosman

~~Social Security No.:~~ [Redacted]

NOTICE ADDRESS:

Po Box 22120

N. Hwy 144nd St. SC

29925

EXHIBIT "T"

6-1992

UNCONDITIONAL GUARANTY AGREEMENT

THIS UNCONDITIONAL GUARANTY AGREEMENT is made and granted by the undersigned DAVID A. BROSMAN ("Guarantor") in order to induce CAROLINA FIRST BANK ("Lender"), whose address is 104 South Main Street, Greenville, South Carolina 29601, to extend, amend, modify or forbear from exercising certain remedies with respect to certain credit to or for the benefit of BLACK DIAMOND, LLC, a South Carolina limited liability company ("Borrower"), and is given in consideration of the benefits flowing to Guarantor therefrom (which Guarantor hereby acknowledges and agrees constitute fair and adequate consideration for this Guaranty). In consideration of the foregoing, the receipt and sufficiency of which is hereby acknowledged, Guarantor hereby covenants and agrees as follows:

1. GUARANTY OF OBLIGATIONS. Guarantor hereby irrevocably, unconditionally and absolutely guarantees to Lender, its successors and assigns, the punctual payment and performance as and when due of the following-described indebtedness, liabilities, obligations and duties (collectively, the "Obligations"):

a. All monies now or hereafter owed to Lender that are evidenced by that certain Promissory Note (Commercial – Single Advance) Renewal Note of Borrower to the order of Lender, dated as of July 25, 2008, in the original maximum principal amount of \$2,000,000.00 (the "Note"), including without limitation, all principal, interest, late charges, prepayment fees, other charges, reasonable attorneys' fees, costs and expenses whatsoever becoming due to Lender pursuant to the Note and any renewals, extensions, modifications, forbearances and rearrangements of, and any and all substitutes and replacements for, the Note and any other indebtedness, liabilities, duties and obligations whatsoever now or hereafter evidenced by or pursuant to the Note, whether direct, indirect or contingent.

b. All other monies now or hereafter owed to Lender and all performance under and/or compliance with all terms, conditions, covenants, representations, warranties and provisions set forth in (i) the Note and (ii) all loan documents pertaining to or executed in connection with the Note, including without limitation that certain Forbearance Agreement dated as of July 30, 2010 among Lender, Borrower and certain other parties (collectively "Loan Documents") to be performed by or complied with on the part of Borrower or any other guarantors thereof or parties thereto, including without limitation, any renewals, extensions, modifications, and rearrangements of, and any and all substitutes and replacements for any of the foregoing.

c. All obligations of Borrower incurred pursuant to and in accordance with all "hedging agreements", if any, now or hereafter entered into by Borrower with Lender, which term shall include without limitation any interest rate swap, cap or collar agreements, interest rate future or option contracts, currency swap agreements, currency future or option contracts, commodity agreements, and other similar agreements or arrangements designed to protect against fluctuations in interest rates, currency values or commodity values, and all amendments, modifications, substitutions, replacements, and additions thereto.

d. All costs or expenses incurred, or advances made, by Lender, including without limitation court costs and reasonable attorneys' fees, (i) to preserve the priority, validity or amount of the Note and/or any collateral now or hereafter existing as security for the Note and (ii) to enforce the collection of all sums due to Lender pursuant to the Note and any other Loan Documents, (iii) to enforce the performance of all terms and provisions of the Loan Documents and (iv) to realize the benefit of any collateral for the obligations of Borrower owed to Lender pursuant to the Loan Documents.

e. All monies now or hereafter owed to Lender pursuant to and all performance under and/or compliance with this Guaranty, and the terms, provisions, covenants and warranties contained herein, and any renewals, extensions, modifications and rearrangements of, and any and all substitutes for, this Guaranty including without limitation all costs, expenses and reasonable attorneys' fees incurred by Lender in the enforcement of this Guaranty and the preservation of Lender's rights hereunder.

2. **NATURE OF GUARANTY.** This Guaranty constitutes an irrevocable, unconditional, absolute, present and continuing guaranty of payment and performance and not a guaranty of collection. Guarantor, without limitation on its obligations hereunder, agrees that it is jointly and severally liable for payment of the Obligations as a primary obligor of Borrower. The obligations of Guarantor hereunder shall not be subject to any counterclaim, setoff, deduction or other defense existing or claimed now or hereafter by or on behalf of Borrower, any other guarantor or any other person or entity whomsoever, whether such setoff, counterclaim, deduction or defense arises in connection with the Obligations, the transactions creating the Obligations, or otherwise, nor, except as otherwise expressly provided herein, shall this Guaranty be reduced, released, discharged, diminished, impaired, or adversely affected, in whole or in part, by any of the foregoing. Guarantor may not revoke this Guaranty and this Guaranty shall remain in full force and effect after any attempted revocation by Guarantor, and shall remain in full force and effect until all of the Obligations shall have been paid, performed and satisfied in full.

3. **CONSENTS.** Guarantor consents to and agrees that its Obligations hereunder shall not, except as otherwise expressly stated herein, be released, discharged, impaired, diminished, reduced, or otherwise affected by any act, event, happening, occurrence, circumstance, condition, matter or thing whatsoever, including without limitation all such items as are set forth hereinafter (whether occurring before, during or after the occurrence of any event of default under the Note or any Loan Document, and whether or not Guarantor shall have any knowledge or notice thereof or have given its consent thereto). Guarantor further waives any and all rights (including without limitation rights to notice) which it might otherwise have arising out of or as a result of, (a) all renewals, extensions, continuations, modifications, supplements, amendments, exchanges, alterations, rearrangements, waivers, compromises, terminations, releases or surrenders of any or all of the Obligations, any or all of the Loan Documents, whether in whole or in part; (b) all adjustments, indulgences, postponements, forbearances and compromises granted or given by Lender to Borrower or any other person; (c) the death, insolvency, bankruptcy, liquidation, disability, reorganization, dissolution, or lack of power of any person, including, without limitation, Borrower and Guarantor; (d) the invalidity, illegality or unenforceability of all or any part of the Obligations and/or the Loan Documents for any reason whatsoever, including without limitation claims of ultra vires acts, claims relating to the authority of signers, claims relating to usury, claims relating to unenforceability, impossibility, or uncollectibility, and claims relating to forgery or irregularity; (e) any full or partial release of Borrower or any other persons, from liability for payment or performance of any Obligations; (f) the taking or accepting of any other security, collateral or guaranty, or other assurance of payment, for any of the Obligations; (g) any release, surrender, exchange, subordination, disposition, deterioration, waste, loss or impairment of any collateral, property or security, at any time existing in connection with, or securing payment of, any Obligations; (h) failure by Lender or any other person to exercise diligence, commercial reasonableness or reasonable care in the preservation, protection, enforcement, sale or other handling or treatment of all or any part of such collateral, property or security; (i) Lender's failure to obtain or perfect any security interest, lien or other guaranty agreement; (j) the determination or adjudication that any payment on any of the Obligations constitutes a preference under bankruptcy laws, or the requirement for any reason that Lender must refund or relinquish such payment; (k) any lack of disclosure to Guarantor of any information; (l) any sale, assignment, transfer, endorsement or granting by Lender of any interest in the Note and/or any of the Loan Documents; (m) any failure of consideration or failure of Guarantor to receive or realize any or all of the benefits expected or contemplated by virtue of this Guaranty; and (n) any other action or omission with respect to all or any

part of the Obligations, or the security and collateral therefor, whether or not such action or omission prejudices Guarantor or increases the likelihood that Guarantor will be required to pay all or any part of the Obligations; it being the unambiguous and unequivocal intention of Guarantor that Guarantor be obligated to pay and perform the Obligations if Borrower shall not punctually pay and perform such Obligations when due, notwithstanding any occurrence, circumstance, event, action, or omission whatsoever, whether or not contemplated, and whether or not specifically described herein. Notwithstanding the foregoing, Guarantor does not waive or release (expressly or impliedly) any rights of subrogation, reimbursement or contribution which it may have, after payment in full of the Obligations, against others liable on the Obligations; provided, that Guarantor's rights of subrogation and reimbursement shall be and at all times remain subordinate to Lender's rights and claims pursuant to Section 5 of this Guaranty.

4. WAIVERS. Guarantor hereby absolutely, unconditionally and irrevocably waives, to the fullest extent permitted by law, (a) any requirement that prior to making demand for payment or seeking to enforce any right or remedy under this Guaranty, Lender first make demand upon, make claim against or take any action with respect to Borrower or any other persons, or resort to or seek to exhaust any collateral, or seek to enforce any other right or remedy in any of the Loan Documents or resort to any other means available by law or in equity for obtaining payment of the Obligations; (b) diligence, presentment, demand, protest, notice of acceptance, notice of dishonor, notice of protest and any other notice of any other kind; (c) any right of subrogation to any right of Borrower and any other right to reimbursement, indemnity or other recourse against Borrower or any other person; (d) any right or benefit (whether directly or through Borrower or any other persons) under any appraisal, valuation, stay, extension or redemption laws; and (e) any right to require marshalling of any collateral.

5. SUBORDINATION OF GUARANTOR CLAIMS. Until the Obligations are paid in full and Guarantor's liability hereunder has been released and discharged, Guarantor covenants and agrees that it shall not claim, seek, sue for, receive or collect, directly or indirectly, from Borrower or any other person any other material obligations, indebtedness, liabilities or duties owed or claimed to be owed by Borrower or such other person to Guarantor (the "Guarantor Claims"), regardless of how arising, in what capacity claimed, or how evidenced, all of which Guarantor Claims shall be inferior and subordinate to all liens, security interests and other encumbrances upon the assets of Borrower or such other person which shall secure the payment of the Obligations, regardless of whether such encumbrances arise in favor of Guarantor or Lender and whether presently existing and hereafter arising. Guarantor covenants and agrees that it shall not exercise and enforce any creditor's rights it may have against Borrower or such other party, or foreclose or repossess, claim, or otherwise institute any actions or proceedings (whether judicial administrative, or otherwise) to enforce any liens, security interests or other encumbrances on any of the assets of Borrower or such other person so long as the Obligations remain outstanding. Guarantor further covenants and agrees that Lender may prove its claim for outstanding Obligations in any receivership, bankruptcy, reorganization, rearrangement, debtor relief or other insolvency proceeding in which Borrower or such other party is a debtor so as to establish its rights hereunder and receive directly from the receiver, trustee or other court custodian, dividends and payments which would otherwise be payable upon the Guarantor Claims, and in this connection Guarantor hereby assigns to the extent of the outstanding Obligations such dividends and payments to Lender and agrees that, with respect to the remainder of the Guarantor Claims, Guarantor's rights shall be subordinate to Lender's rights and claims. If Lender receives, for application upon the Obligations, any such dividends or payments which, as between Borrower and Guarantor, constitute payments on the Guarantor Claims, then upon full payment of the Obligations to Lender, Guarantor shall be subrogated to the rights of Lender to the extent that payments to Lender on the Guarantor Claims have contributed to satisfaction of the Obligations; and such subrogation shall be in respect to that portion of the Obligations which would have been unpaid if Lender had not received dividends or payments upon the Guarantor Claims.

6. REPRESENTATIONS AND WARRANTIES. Guarantor hereby represents and warrants to Lender that (a) as of the execution hereof, nothing exists to impair the effectiveness of this Guaranty or its immediate and continuing effectiveness; (b) Guarantor has received, or will receive, direct or indirect benefit and fair consideration in making this Guaranty; (c) to the extent desired by Guarantor, Guarantor is familiar with the books and records regarding Borrower's financial condition, the project which the Loan will finance, and the value of all collateral intended as security for payment of any of the Obligations; however, Guarantor is not relying on such financial condition or collateral in making this Guaranty; (d) no person has made any representation, warranty or statement to Guarantor to induce Guarantor to make this Guaranty; and (e) this Guaranty is the legal and binding obligation of Guarantor, enforceable against Guarantor in accordance with its terms.

7. EFFECT OF BANKRUPTCY. If, pursuant to any bankruptcy, insolvency or other debtor relief, laws or rules, or any judgment or order or decision thereunder, any payment received by Lender shall be adjudicated as a voidable preference or Lender must otherwise rescind or restore any amount taken, credited or received by Lender in payment or satisfaction by any of the Obligations, any prior release or discharge by the terms of this Guaranty given by Lender shall be without effect and this Guaranty shall remain in full force and effect. Guarantor's Obligations hereunder shall not be discharged except by Guarantor's performance of those Obligations and then only to the extent of such performance.

8. DEFAULT. The term "Event of Default", whenever used hereinafter, shall mean any one or more of the following events: (a) occurrence of an Event of Default set forth or defined in the Note or in any of the Loan Documents, including a breach of any of the terms or conditions of this Guaranty, which is not cured within any applicable grace period, if any, set forth herein or therein; (b) the entry of any judgment against Guarantor, or the attachment, levy or garnishment against any property of Guarantor which in the reasonable judgment of Lender would materially and adversely affect Guarantor's ability to perform his Obligations under this Guaranty and which remains unsatisfied for a period of sixty (60) days after the filing or issuance of the same, or the occurrence of any other substantial change in the financial condition of Guarantor which, in the reasonable judgment of Lender, would materially and adversely affect Guarantor's ability to perform his Obligations under this Guaranty; (c) except as permitted in the Loan Documents, any transfer, sale, conveyance, disposition or assignment of the membership, partnership, stock or other ownership interest or management rights of Guarantor in Borrower, whether voluntary, involuntary, or by operation of law, without the express prior written consent of Lender; and (d) the death, bankruptcy, liquidation, disability, or lack of power of Guarantor.

9. REMEDIES. Upon occurrence of any Event of Default, Lender may take any or all of the following actions without any requirement of demand for payment or performance on the part of Borrower or any other persons whomsoever and without requirement of resort to any collateral for any of the Obligations or to any other means of obtaining payment or performance of any of the Obligations, as follows: (a) Lender may declare all of Borrower's Obligations under the Loan Documents, regardless of their terms and including Guarantor's Obligations hereunder, immediately due and payable and that performance thereof is immediately required; (b) Lender may accelerate all or any part of the Obligations and require full payment and performance thereof by Guarantor; (c) Lender shall have the right of setoff against, a lien upon and a continuing security interest in all instruments, documents, securities, cash or other property, and all proceeds of the foregoing, which may now or hereafter be owned by Guarantor which may become in possession or control of Lender or any other party acting on Lender's behalf, directly or indirectly, regardless of the capacity in which Lender may receive, hold or control the same; and (d) Lender shall have all of the rights and remedies afforded to it under the Note and the Loan Documents or otherwise existing at law or in equity.

10. NATURE OF REMEDIES. The remedies provided herein, in the Note, and in all other Loan Documents shall be cumulative and none is exclusive and such remedies shall be exercised concurrently

or consecutively at the option of Lender. Any waiver, failure, or delay by Lender in exercising any remedy provided herein, in the Note or in any Loan Document upon occurrence of any Event of Default, shall not constitute a waiver of such right or remedy or preclude its future exercise or that of any other right of remedy in the event of any subsequent default, whether of the same or different nature. No notice to or demand on Guarantor by Lender shall be deemed to be a waiver of Lender's right to take other or further action and in no event shall any waiver or right, power or remedy of Lender hereunder be effective unless the same is in writing and signed by Lender.

11. SEVERABILITY. The invalidity, illegality or unenforceability of any provision of this Guaranty or in the Note or any of the Loan Documents shall not render invalid, illegal or unenforceable any other provision hereof.

12. SURVIVAL. All covenants, agreement, representations, and warranties of Guarantor contained herein and in any document or item delivered pursuant hereto shall survive the execution hereof and continue and remain in full force and effect until the Obligations have been paid, performed and satisfied in full.

13. ENTIRE AGREEMENT. This Guaranty contains the entire agreement and understanding between Guarantor and Lender with respect to the subject matter hereof, and supersedes all prior agreements and understandings, whether oral or written.

14. GOVERNING LAW. This Guaranty shall be governed and construed in accordance with the internal laws of the State of South Carolina, without regard to any choice of law or conflict of law provisions which might apply the law of another jurisdiction.

15. CONSENT TO JURISDICTION. Any action or proceeding which Lender may initiate with respect to this Guaranty shall, at Lender's sole option, be brought in and subject to the jurisdiction of the any state or federal court of competent jurisdiction of the State of South Carolina, to which jurisdiction Guarantor hereby irrevocably consents. Notwithstanding the foregoing, however, Guarantor additionally acknowledges and agrees that Lender may initiate any action upon or for the enforcement of this Guaranty in any state or federal court of competent jurisdiction in any other State in which Guarantor may at any time reside or possess material assets, to which jurisdictions Guarantor hereby further irrevocably consents. Guarantor irrevocably waives any objection, including without limitation any objection to the laying of venue based on the grounds of forum non conveniens, which she may now or hereafter have to the bringing of any such action or proceeding in any such jurisdiction. Nothing herein shall affect the right of Lender to serve process in any manner permitted by law nor shall limit the right of Lender to bring proceedings against another party to any of the Loan Documents in the courts of any other jurisdiction.

16. NOTICE. All notices made or required hereunder shall be in writing. The effective date of any notice shall be the date upon which such notice shall have been personally delivered (including personal delivery by Federal Express or other nationally recognized overnight private courier service) or the date of postmark when deposited in the United States Mail, registered or certified, postage prepaid, return receipt requested, addressed in any such event, to Lender or Guarantor at the address set forth after Guarantor's signature hereinafter, or at such other addresses as may hereafter be designated in writing.

17. WAIVER OF JURY TRIAL. GUARANTOR, TO THE MAXIMUM EXTENT PERMITTED BY LAW, WAIVES ANY RIGHT TO A TRIAL BY JURY IN ANY ACTION ARISING FROM OR RELATED TO THIS GUARANTY.

Executed this 3rd day of July, 2010.

IN THE PRESENCE OF:

[Signature]
(Witness 1)

[Signature]
(Witness 2)

GUARANTOR:

[Signature]

Print Name: David A. Brosman

Social Security No.: [REDACTED]

NOTICE ADDRESS:

PD Box 22120
Hilton Head Is
SC 29925

EXHIBIT "J-1"

1301
JAN
MAY 19 2008

BEAUFORT COUNTY SC - ROD
BK 02877 PGS 0655-0667
FILE NUM 2008005943
01/30/2008 11:44:35 AM
REC'D BY S SMITH RCPT# 528405
RECORDING FEES 18.00

STATE OF SOUTH CAROLINA)
)
)
)
COUNTY OF BEAUFORT)
)
)
)

FIRST MORTGAGE
AND SECURITY AGREEMENT

THIS FIRST MORTGAGE AND SECURITY AGREEMENT (the "Mortgage") is made and entered into on January 25, 2008, by BLACK DIAMOND, LLC (the "Borrower") and CAROLINA FIRST BANK, a national banking association organized and existing under the laws of the United States, address (the "Bank").

WHEREAS, Borrower is indebted to Bank in the principal sum of Three Million Five Hundred Thousand and No/Hundred Dollars (\$3,500,000.00) together with interest thereon, as evidenced by that certain promissory note of even date herewith, executed by Borrower and delivered to Bank (the "Note"), which by reference is made a part hereof to the same extent as though set out in full herein said Note maturity date being January 25, 2013;

NOW, THEREFORE, (a) to secure the performance and observance by Borrower of all covenants and conditions contained in the Note, in any renewal, extension or modification thereof, in this First Mortgage and Security Agreement and in all other instruments securing the Note; and (b) also to secure in accordance with Section 29-3-50, Code of Laws of South Carolina, 1976, as amended: (i) all future advances and readvances that may subsequently be made to Borrower by the Bank, evidenced by the aforesaid Note, or any other promissory notes; and all renewals and extensions thereof; provided, however, that nothing contained herein shall create an obligation on the part of Bank to make future advances or readvances to Borrower and (ii) all other indebtedness of Borrower to Bank, now or hereafter existing, whether direct or indirect, the maximum amount of all indebtedness outstanding at any one time secured hereby not to exceed twice the face amount of the Note, plus interest thereon, all charges and expenses of collection incurred by Bank, including court costs, and reasonable attorneys' fees; and (c) also in order to charge the properties, interests and rights hereinafter described with such payment, performance and observance; and (d) for and in consideration of the sum of One and No/100 (\$1.00) Dollar paid by Bank to Borrower this date, and for other valuable consideration, the receipt of which is acknowledged, Borrower does hereby grant, bargain, sell, alien, remise, release, convey, assign, transfer, mortgage, hypothecate, pledge, deliver, set over, warrant and confirm unto Bank, its successors and assigns forever, all right, title and interest of Borrower in and to:

1. THE MORTGAGED PROPERTY

a. The Land. All that tract or parcel of land and other real property interests on Hilton Head Island, Beaufort County, South Carolina more particularly described in Exhibit A attached hereto and made a part hereof (the "Land"); and

b. The Improvements and Tangible Personalty. Together with all buildings and improvements of every kind and description now or hereafter erected or placed on the aforesaid Land (the "Improvements") and all materials intended for construction, reconstruction, alteration and repair of such improvements now or

HILTONHEAD-4669579-v1
199999.00600

hereafter erected thereon, all of which materials shall be deemed to be included within the premises hereby conveyed immediately upon the delivery thereof to the aforesaid Land, and all fixtures and articles of personal property now or hereafter owned by the Borrower and attached to or contained in and used in connection with the aforesaid Land and Improvements or any part thereof or derived from or acquired by any proceeds of the Land or Improvements or any part thereof, including, but not limited to, all goods, docks, furniture, appliances, furnishings, apparatus, machinery, equipment, motors, elevators, fittings, radiators, ranges, refrigerators, awnings, shades, screens, blinds, carpeting, office equipment and other furnishings and all plumbing, heating, lighting, cooking, laundry, ventilating, refrigerating, incinerating, air conditioning and sprinkler equipment, telephone systems, televisions and television systems, computer systems and fixtures and appurtenances thereto and all renewals or replacements thereof or articles in substitution thereof, whether or not the same are or shall be attached to the Land and Improvements in any manner (the "Tangible Personalty");

c. Easements or Other Interests. Together with all easements, rights of way, gores of land, streets, ways, alleys, passages, sewer rights, waters, water courses, water rights and powers, and all estates, rights, titles, interests, privileges, liberties, tenements, hereditaments and appurtenances whatsoever, in any way belonging, relating or appertaining to any of the property hereinabove described, or which hereafter shall in any way belong, relate or be appurtenant thereto, whether now owned or hereafter acquired by Borrower, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, possession, claim and demand whatsoever, at law as well as in equity, of Borrower of, in and to the same, including but not limited to all judgments, awards of damages and settlements hereafter made resulting from condemnation proceedings or the taking of the property described in Paragraphs (a), (b) and (c) hereof or any part thereof under the power of eminent domain, or for any damage (whether caused by such taking or otherwise) to the property described in Paragraphs (a), (b) and (c) hereof or any part thereof, or to any rights appurtenant thereto (together the "Easements and Other Interests");

d. Proceeds. All proceeds of any sales or other dispositions of the property described in Paragraphs (a), (b) and (c) hereof or any part thereof, including cash proceeds, noncash proceeds, insurance proceeds, products, replacements, additions, substitutions, renewals and accessions of any of the foregoing ("Proceeds"). Some of the items of property described herein are goods that are or are to become fixtures related to the real estate described herein, and it is intended that, as to those goods, this Mortgage shall be effective as a financing statement filed as a fixture filing from the date of its filing for record in the real estate records of the county in which the Land is located. Information concerning the security interest created by this instrument may be obtained from the Bank, as Secured Party, or the Borrower, as Debtor, at the addresses shown hereinbelow.

e. Everything referred to in Paragraphs (a), (b), (c) and (d) hereof, including the Land, Improvements, Tangible Personalty, Easement and Other Interests and Proceeds and any additional property hereafter acquired by Borrower and secured by this Mortgage and subject to the lien of the Mortgage or intended to be so is referred to as the "Premises".

f. TO HAVE AND HOLD the Premises, together with all privileges, hereditaments, easements and appurtenances thereunto belonging, to the Bank and the Bank's successors and assigns to secure the indebtedness herein recited and should the indebtedness secured hereby be paid according to the tenor and effect thereof when the same shall be due and payable and should the Borrower timely and fully discharge its obligations hereunder, then the Premises hereby granted, conveyed and assigned shall cease and be void, but shall otherwise remain in full force and effect.

g. And, as additional security for said indebtedness, the Borrower hereby conditionally assigns to the Bank all the security deposits, rents, issues, profits, revenues, accounts, accounts receivable, contract rights, rights to payments for goods sold or leased or services rendered, checks, notes, drafts, acceptances, instruments, deposit accounts, chattel paper, documents, securities, rentals receivables, installment payment obligations, book debts, actions, choses in action, judgments, awards, money, general intangibles, other forms of obligations and receivables, all monies due or to become due and all returned or repossessed goods now or hereafter pertaining to or resulting from the Premises or any part thereof or constituting or derived from or acquired by any proceeds of the Premises or any part thereof (the "Rents and Profits") reserving only the right to the Borrower to collect the same as long as there shall exist no Event of Default as defined in below.

h. As additional collateral and further security for the indebtedness, the Borrower does hereby assign to the Bank and grants to the Bank a security interest in all of the right, title and the interest of the

HILTONHEAD-4669579-v1
199999.00600

Borrower in and to any and all leases (including equipment leases), rental agreements, management contracts, franchise agreements, construction contracts, architect's contracts, technical services agreements, licenses and permits now or hereafter affecting the Premises (the "Intangible Personalty") or any part thereof, and the Borrower agrees to execute and deliver to the Bank such additional instruments, in form and substance satisfactory to the Bank, as may hereafter be requested by the Bank to evidence and confirm said assignment; provided, however, that acceptance of any such assignment shall not be construed as a consent by the Bank to any lease, rental agreement, management contract, franchise agreement, construction contract, technical services agreement or other contract, license or permit, or to impose upon the Bank any obligation with respect thereto.

i. Together with all proceeds, including cash proceeds, noncash proceeds, insurance proceeds, products, replacements, additions, substitutions, renewals and accessions of the Rents and Profits and the Intangible Personalty or any part thereof, and all replacements, modifications, renewals and substitutions thereof or therefrom.

j. All the Tangible Personalty which comprise a part of the Premises shall, as far as permitted by law, be deemed to be affixed to the aforesaid land and conveyed therewith. As to the balance of the Tangible Personalty and the Intangible Personalty, this Mortgage shall be considered to be a security agreement which creates a security interest in such items for the benefit of the Bank. In that regard, the Borrower grants to the Bank all of the rights and remedies of a secured party under the South Carolina Uniform Commercial Code.

2. THE LOAN

a. Loan. The indebtedness secured by this Mortgage is the result of a loan of money in the principal amount of Three Million Five Hundred Thousand and No/100 Dollars (\$3,500,000.00) together within interest thereon (the "Loan") disbursed by the Bank to the Borrower.

b. Note. The Loan is evidenced by the Note as referenced above executed by the Borrower of even date herewith, payable to the order of the Bank.

c. Payment of Note. Payment by the Borrower of principal and interest on the Loan will be in accordance with the Note.

3. BORROWER'S COVENANTS, REPRESENTATIONS AND AGREEMENTS

a. Title to Property. The Borrower represents and warrants that it is seized of the Land and Improvements (and any fixtures) in fee (and has title to any appurtenant easements) and has the right to convey, mortgage and encumber the same, that title to such property is free and clear of all monetary encumbrances, and that it will warrant and defend the title to such property against the claims of all persons or parties. As to the balance of the Premises, the Rents and Profits and the Intangible Personalty, the Borrower represents and warrants that it has good and absolute title to such property, that it has the right to convey, mortgage and encumber such property and that it will warrant and defend such property against the claims of all persons or parties.

b. Performance of Loan Documents. Borrower shall perform, observe and comply with all provisions hereof, of the Note and of every other instrument securing the Note, and will promptly pay to Bank the principal with interest thereon and all other sums required to be paid by Borrower under the Note, this Mortgage, and of every other instrument securing the Note when payment shall become due.

c. Taxes and Fees.

i. Borrower will pay as they become due all taxes, general and special assessments, insurance premiums, permit fees, inspection fees, license fees, all water and sewer charges, franchise fees, equipment rents and all encumbrances of every kind against it or the Premises, and any charge which, if unpaid would become a lien or charge against the Premises before they become delinquent and before any interest attaches or penalty is incurred and the Borrower, upon request of the Bank, will submit to the Bank receipts evidencing said payments.

ii. Borrower shall not permit or suffer more than fifteen (15) days any mechanics', laborers', materialmen's, statutory or other lien upon any of the Premises.

d. Borrower shall not claim, demand or be entitled to receive any credit or credits on the principal or interest payable under the terms of the Note or on any other sums secured hereby, for so much of the taxes, assessments or similar impositions assessed against the Premises or any part thereof as are applicable to the indebtedness secured hereby or to Bank's interest in the Premises. No deduction shall be claimed from the taxable value of the Premises or any part thereof by reason of the Note, this Mortgage or any other instrument securing the Note.

4. **REIMBURSEMENT.** The Borrower agrees that if it shall fail to pay when due any tax, assessment or charge levied or assessed against the Premises or any utility charge, whether public or private, or any insurance premium or if it shall fail to procure the insurance coverage and the delivery of the insurance certificates required hereunder, or if it shall fail to pay any other charge or fee described herein, then the Bank, at its option, may pay or procure the same. The Borrower will reimburse the Bank upon demand for any sums of money paid by the Bank pursuant to this Section, together with interest on each such payment at the rate set forth in the Note and all sums and interest thereon shall be secured hereby.

5. **ADDITIONAL DOCUMENTS.** The Borrower agrees to execute and deliver to the Bank, concurrently with the execution of this Mortgage and upon the request of the Bank from time to time hereafter, all financing statements and other documents reasonably required to perfect and maintain the security interest created hereby. The Borrower hereby irrevocably (as long as the Loan remains unpaid) makes, constitutes and appoints the Bank as the true and lawful attorney of the Borrower to sign the name of the Borrower (after the Borrower has failed or refused to timely execute such documents upon request of the Bank) on any financing statement, continuation of financing statement or similar document required to perfect or continue such security interests.

6. **TRANSFER OF PROPERTY.** Borrower shall not sell, convey, transfer, lease or further encumber any interest in or any part of the Premises, the Rents and Profits and the Intangible Personalty, except to incorporate Tangible Personalty into the Improvements or to replace such with goods of quality and value at least equal to that replaced, without the prior written consent of Bank; providing, however, that leases executed by Borrower in the ordinary course of business are allowable. If any person should obtain any interest in all or any part of the Premises pursuant to the execution or enforcement of any lien, security interest or other right, whether superior, equal or subordinate to this Mortgage or the lien hereof, such event shall be deemed to be a transfer by Borrower. Borrower shall not, without the prior written consent of Bank, further assign the rents from the Premises, nor enter into any agreement or do any act to amend, modify, extend, terminate or cancel, accept the surrender, subordinate, accelerate the payment of rent, or change the terms of any renewal option of any lease now or hereafter covering such property or any part thereof.

7. **FEES AND EXPENSES.** The Borrower will pay or reimburse the Bank for all reasonable attorneys' fees, costs and expenses incurred by the Bank in any action, legal proceeding or dispute of any kind which affects the Loan, the interest created herein, the Premises, the Rents and Profits or the Intangible Personalty including but not limited to, any foreclosure of this Mortgage, enforcement of payment of the Note, any condemnation action involving the Premises or any action to protect the security hereof. Any such amounts paid by the Bank shall be due and payable upon demand and shall be secured hereby.

8. **PERFORMANCE UNDER LEASES AND OTHER AGREEMENTS.** The Borrower shall keep and perform all covenants to be performed by the lessor under any and all leases of the Premises or any part thereof and shall at all times do all things necessary and appropriate to compel performance by each other party to the instruments listed hereinbelow of all obligations, covenants and agreements of such other party, and shall not, without the written consent of the Bank, cancel, surrender or modify or permit the cancellation of any lease (including any equipment lease), rental agreement, management contract, franchise agreement, construction contract, technical services agreement or other contract, license or permit now or hereafter affecting the Premises, or accept or permit to be made any prepayment of any installment of rent or fees thereunder. Upon demand the Borrower will furnish the Bank with copies of any lease of the Premises or any

HILTONHEAD-#669379-V1
199999.00600

part thereof. Prepayment of Rent. The Borrower will not accept any prepayment of rent or installments of rent for more than two months in advance without the prior written consent of the Bank.

9. **MAINTENANCE OF PREMISES.** The Borrower will abstain from and will not permit the commission of waste in or about the Premises and will maintain the Premises in good condition and repair, reasonable wear and tear excepted. Borrower shall not remove, demolish, materially alter or materially change the use of any building, structure or other improvement presently or hereafter on the Premises without the prior written consent of the Bank.

10. **IDENTITY OF BORROWER.** The Borrower hereby acknowledges to the Bank that (i) the identity of the Borrower and the expertise available to the Borrower were and continue to be material circumstances upon which the Bank has relied in connection with, and which constitute valuable consideration to the Bank for, the extending to the Borrower of the indebtedness evidenced by the Note and (ii) any change in such identity or expertise could materially impair or jeopardize the security for the payment of the Note granted to the Bank by this Mortgage. The Borrower therefore covenants and agrees with the Bank that the Borrower shall not sell, transfer, convey, mortgage, encumber, lease (except tenant leases in the ordinary course of business) or otherwise dispose of the Premises, the Rents and Profits or the Intangible Personality or any part thereof or any interest therein or engage in subordinate financing with respect thereto during the term of this Mortgage without the prior written consent of the Bank. In addition, during the term of this Mortgage, except as provided in Section 3 hereof, there shall not be any change in the ownership, membership or control of the Borrower unless the Bank in its sole discretion has given its approval.

11. **COMPLIANCE WITH LAW.** The Borrower will do, or cause to be done, all such things as may be required by law in order fully to protect the security and all rights of the Bank under this Mortgage. The Borrower shall not cause or permit the lien of this Mortgage to be impaired in any way.

12. **INSPECTION.** The Borrower will permit the Bank, or its agents, at all reasonable times to enter and pass through or over the Premises for the purpose of inspecting same.

13. **RELEASES AND WAIVERS.** The Borrower agrees that no release by the Bank of any of the Borrower's successors in title from liability on the Loan, no release by the Bank of any portion of the Premises, the Rents and Profits nor the Intangible Personality, no subordination of lien, no forbearance on the part of the Bank to collect on the Loan, or any part thereof, no waiver of any right granted or remedy available to the Bank and no action taken or not taken by the Bank shall in any way diminish the Borrower's obligation to the Bank or have the effect of releasing the Borrower, or any successor to the Borrower, from full responsibility to the Bank for the complete discharge of each and every of the Borrower's obligations hereunder or under the Note, or any other Loan document.

14. **AFTER ACQUIRED PROPERTY.** The lien of this Mortgage will automatically attach, without further act, to all after acquired property located in or on, or attached to, or used or intended to be used in connection with or with the operation of, the Premises or any part thereof.

15. **INSURANCE.**

a. **Liability:** The Borrower covenants to maintain or cause to be maintained, by the Borrower, general accident and public liability insurance against all claims for bodily injury, death or property damage occurring upon, in or about any part of the Premises. The policies must be from companies and in amounts satisfactory to the Bank.

b. **General Risk:** An "all-risk" permanent insurance policy must be submitted to the Bank. The policy must be from a company satisfactory to the Bank, must be in an amount satisfactory to the Bank, can only include co-insurance provisions satisfactory to the Bank, must include provisions for a minimum 30-day advance written notice to the Bank of any intended policy cancellation or non-renewal, and must designate the Bank as mortgagee and loss payee in a standard mortgagee endorsement, as its interest may appear.

HILTONHEAD-#669579-v1
199999.D0600

c. Flood: A flood insurance policy naming the Bank as mortgagee must be submitted to the Bank. The policy must be from a company and in an amount satisfactory to the Bank.

d. Delivery of Policies and Renewals: The Borrower agrees to deliver to the Bank, as additional security hereto, the original policies of such insurance as is required by the Bank pursuant to this Section and any additional insurance which shall be taken out upon the Premises while any part of the Loan shall remain unpaid. Renewals of such policies shall be so delivered at least thirty (30) days before any such insurance shall expire. In the event the Borrower fails to maintain insurance as required hereunder the Bank has the right to procure such insurance whether or not the Borrower's failure to maintain such insurance constitutes an Event of Default or an event or condition which, upon the giving of notice or the passage of time, or both, would constitute an Event of Default. Any amounts paid by the Bank for insurance shall be due and payable to the Bank upon demand and shall be secured by this Mortgage.

e. Proof of Loss; Claims Settlement: In the event of loss, the Borrower shall give prompt notice thereof to the insurance carrier and the Bank, and the Bank may make proof of loss if not made promptly by Borrower. The Bank is hereby authorized, in its sole discretion, to adjust, compromise and collect the proceeds of any insurance claims.

f. Use of Proceeds: The Borrower hereby assigns the proceeds of any such insurance policies to the Bank and hereby directs and authorizes each insurance company to make payment for such loss directly to the Bank. The proceeds of any insurance or any part thereof are to be applied by the Bank to restoration or repair of the property damaged provided the following conditions are met:

- i. there exists no Event of Default or any event or condition which, upon the giving of notice or the passage of time, or both, would constitute an Event of Default;
- ii. the Borrower presents sufficient evidence to the Bank that there are sufficient funds from the insurance proceeds and from equity funds, if needed, to completely restore or repair the damaged property as well as to maintain relevant debt service coverages and other operating expenses;
- iii. all parties having existing or expected possessory interests in the Premises (excluding resident apartment tenants) agree in a manner satisfactory to the Bank that they will continue or extend their interests and arrangements for the contract terms then in effect following the restoration or repair;
- iv. all parties having operating, management or franchise interests in, and arrangements concerning, the Premises agree that they will continue their interests and arrangements for the contract terms then in effect following the restoration or repair;
- v. all parties having commitments to provide financing with respect to the Premises, to purchase Borrower's interest in full or in part in the Premises or to purchase the Loan agree in a manner satisfactory to the Bank that their commitments will continue in full force and effect and, if necessary, the expiration of such commitments will be extended by the time necessary to complete the restoration or repair;
- vi. the Borrower presents sufficient evidence to the Bank that the damaged property will be restored prior to the maturity date of the Loan;
- vii. the Bank will not incur any liability to any other person as a result of such use or release of insurance proceeds;
- viii. the insurance proceeds shall be held by the Bank and disbursed substantially in accordance with the disbursement procedures under the Loan Agreement as if such proceeds were Loan proceeds as repair or restoration progresses.

16. **EMINENT DOMAIN.** Borrower shall promptly notify the Bank of any actual or threatened initiation of any eminent domain proceeding as to any part of the Premises and shall deliver to the Bank copies of any and all papers served or received in connection with such proceedings, and the Bank shall have the right, at its option, to participate in such proceedings at the expense of Borrower (including, without limitation, the Bank's attorneys' fees) and Borrower will execute such documents and take such other steps as required to permit such participation. The Bank is hereby authorized to adjust, compromise and collect any eminent domain award or settle a claim for damages and to apply the same to the outstanding balance of the Loan. The Borrower assigns to the Bank any proceeds or awards which may become due by reason of any condemnation

HILTONHEAD-#669579-v1
199999.00600

or other taking for public use of the whole or any part of the Premises or any rights appurtenant thereto. The proceeds of any such condemnation award or proceeds or any part thereof may be applied by the Bank to the outstanding balance of the Loan; provided that, such funds may be applied to restoration of the property taken if the following conditions are met:

- a. there exists no Event of Default or any event or condition which, upon the giving of notice or the passage of time, or both, would constitute an Event of Default;
- b. the Borrower presents sufficient evidence to the Bank that (A) there are sufficient funds from the condemnation award or proceeds and from equity funds, if needed, to completely restore the Premises to an architectural whole as well as to maintain relevant debt service coverages and other operating expenses, and (B) the loss of the property taken will not materially diminish the value of the Premises
- c. all parties having existing or expected possessory interests in the Premises (excluding resident apartment tenants) agree in a manner satisfactory to the Bank that they will continue their interests and arrangements for the contract terms then in effect following the restoration or repair;
- d. all parties having operating, management or franchise interests in, and arrangements concerning the Premises, agree that they will continue their interests and arrangements for the contract terms then in effect following the restoration or repair.

17. **FURTHER ASSIGNMENTS; ACCELERATION.** The Borrower agrees to execute such further assignments and agreements as may be reasonably required by the Bank to assure the effectiveness of this Section. In the event any governmental agency or authority shall require or commence any proceedings for the demolition of any buildings or structures comprising a part of the Premises, or shall commence any proceedings to condemn or otherwise take pursuant to the power of eminent domain a material portion of the Premises, the Bank may, at its option, declare the Loan to be immediately due and payable in full and apply any condemnation awards or proceeds to the outstanding balance of the Loan.

18. **EVENTS OF DEFAULT.** An "Event of Default" shall be the occurrence or existence of any of the events or conditions described in the subsequent sections of this Section and the continuance thereof for either:

- a. the specific period of time, if any, herein specified with respect to such event or condition;
- b. a period of five (5) days after written notice thereof to the Borrower from the Bank if no period is specified and the event or condition is a failure to pay money to the Bank as and when due;
- c. a period of thirty (30) days after written notice thereof to Borrower if no period is specified and the event or condition is not a failure to pay money; provided, however, that there shall be no obligation of the Bank to give notice and no right of Borrower to cure if the event or condition is either the institution of a voluntary bankruptcy, insolvency or receivership action, the giving of any material false or fraudulent representation to the Bank, the failure to keep the Premises, Rents and Profits and Intangible Personalty free and clear of consensual liens not approved in writing in advance by the Bank or the death or legal incompetency of any Guarantor of the Loan.
- d. Failure to pay when due any installment of principal or interest due on the Note or any of the other Loan Documents or any other amounts that become due and owing to the Bank under the Loan Documents.
- e. A default or failure to comply with any of the terms of this Mortgage or any of the other loan documents.
- f. The invalidity or inaccuracy of any material representation or opinion or the breach, withdrawal, cancellation, rescission, termination or alteration of any material agreement, approval, opinion or waiver submitted to the Bank.
- g. Any suit, or combination of suits, shall be filed against Borrower or the Guarantors of the Loan, which in the reasonable judgment of the Bank has a substantial likelihood of being determined adversely, and which if adversely determined could reasonably be expected substantially to impair the ability of Borrower or the Guarantor of the Loan, to perform each of their respective obligations under and by virtue of the Loan Documents.
- h. Any representation or warranty submitted to the Bank concerning the financial condition or credit standing of the Borrower proves to be false or misleading or, in the Bank's reasonable opinion, there is a

HILTONHEAD-#669579-v1
199909.00600

threat to its security for the Loan by reason of a material adverse change in the financial condition or credit standing of the Borrower or the Guarantor of the Loan.

i. The Borrower fails to keep the Premises free and clear of all encumbrances, liens, security interests and subordinate financing, except as may be approved in writing by the Bank in its sole discretion in advance.

j. Any change in the ownership, membership or control of the Borrower, or any sale, transfer or conveyance, whether voluntary or involuntary, of the Premises or Rents and Profits or Intangible Personalty or any portion thereof.

k. A voluntary petition is filed by the Borrower or the Guarantor of the Loan seeking the protection of the bankruptcy court under any chapter or section of the Bankruptcy Code, as amended.

l. The Borrower or the Guarantor of the Loan has an involuntary petition filed against it under any chapter or section of the Bankruptcy Code, as amended, and such petition is not dismissed within forty-five (45) days of its filing.

m. By the order of a court of competent jurisdiction, a trustee or receiver of the Premises or any part thereof or of the Borrower shall be appointed and such order shall not be discharged or dismissed within forty-five (45) days.

n. The death or legal incompetency of the Guarantor of the Loan and Borrower fails to provide a substitute guarantor or substitute collateral acceptable to the Bank within sixty (60) days of the date of death. Pending receipt of substitute collateral or the providing of a substituted guarantor, the claim shall be preserved against the estate of the Guarantor in a matter satisfactory to the Bank.

o. Any material adverse change (including without limitation a decrease of twenty-five (25%) percent or more of the Guarantor's net worth from the amount thereof as the date hereof) in the Guarantor's financial condition or creditworthiness.

19. FORECLOSURE

a. Acceleration of Loan; Foreclosure. Upon the occurrence of an Event of Default the entire balance of the Loan, including all accrued interest, shall, at the option of the Bank, become immediately due and payable. Upon failure to pay the Loan in full at any stated or accelerated maturity, the Bank may foreclose the lien of this Mortgage and take such other actions as provided by law or in the Loan Documents or by judicial proceeding.

b. Bank's Power of Enforcement. If an Event of Default shall have occurred, Bank may, either with or without entry or taking possession as hereinabove provided or otherwise, proceed by suit or suits at law or in equity or by any other appropriate proceeding or remedy: (a) to enforce payment of the Note or the performance of any term hereof or any other right; (b) to foreclose this Mortgage and to sell, as an entirety or in separate lots or parcels, the Premises, under the judgment or decree of a court or courts of competent jurisdiction; and (c) to pursue any other remedy available to it. Bank shall take action either by such proceedings or by the exercise of its powers with respect to entry or taking possession, or both, as the Bank may determine.

c. Bank's Right to Enter and Take Possession, Operate and Apply Income.

i. If an Event of Default shall have occurred, Borrower, upon demand of Bank, shall forthwith surrender to Bank the actual possession, and if and to the extent permitted by law, Bank itself, or by such officers or agents as it may appoint, may enter and take possession of all the Premises, and may exclude Borrower and its agents and employees wholly therefrom, and may have joint access with Borrower to the books, papers and accounts of Borrower.

ii. If Borrower shall for any reason fail to surrender or deliver the Premises or any part thereof after Bank's demand, Bank may obtain a judgment or decree conferring on Bank the right to immediate possession or requiring Borrower to deliver immediate possession of all or part of the Premises to Bank along with all books, papers and accounts of Borrower, the entry of which judgment or decree Borrower hereby specifically consents.

iii. Borrower shall pay to Bank, upon demand, all reasonable costs and expenses of obtaining such judgment or decree and reasonable compensation to Bank, its attorneys and agents, and all such costs, expenses and compensation shall, until paid, be secured by the lien of this Mortgage.

HILTONHEAD-#566579-vj
199999.00600

iv. Upon every such entering upon or taking of possession, Bank may hold, store, use, operate, manage and control the Premises and conduct the business thereof, and, from time to time:

- (1) make all necessary and proper maintenance, repairs, renewals, replacements, additions, betterments and improvements thereto and thereon and purchase or otherwise acquire additional fixtures, personalty and other property;
- (2) insure or keep the Premises insured;
- (3) manage and operate the Premises and exercise all the rights and powers of Borrower in its name or otherwise, with respect to the same;
- (4) enter into agreements with others to exercise the powers herein granted

Bank:

v. all above in this Subsection as Bank in its reasonable judgment from time to time may determine; and Bank may collect and receive all the income, revenues, rents, issues and profits of the same, including those past due as well as those accruing thereafter; and shall apply the monies so received by Bank in such priority as Bank may determine to (1) the reasonable compensation, expenses and disbursements of the agents and attorneys; (2) the cost of insurance, taxes, assessments and other proper charges upon the Premises or any part thereof; (3) the deposits for taxes and assessments and insurance premiums due; and (4) the payment of accrued interest on the Note.

vi. Bank shall surrender possession of the Premises to Borrower only when all that is due upon such interest, tax and insurance deposits and principal installments, and under any of the terms of this Mortgage, shall have been paid and all defaults made good. The same right of taking possession, however, shall exist if any subsequent Event of Default shall occur and be continuing.

vii. Leases. Bank, at its option, is authorized to foreclose this Mortgage subject to the rights of any tenants of the Premises, and the failure to make any such tenants parties defendant to any such foreclosure proceedings and to foreclose their rights will not be, nor be asserted by Borrower to be, a defense to any proceedings instituted by Bank to collect the sums secured hereby or to collect any deficiency remaining unpaid after the foreclosure sale of the Premises.

viii. Purchase by Bank. Upon any such foreclosure sale, Bank may bid for and purchase the Premises and, upon compliance with the terms of sale, may hold, retain and possess and dispose of such property in its own absolute right without further accountability.

ix. Application of Indebtedness Toward Purchase Price. Upon any such foreclosure sale, Bank may, if permitted by law, after allowing for the proportion of the total purchase price required to be paid in cash and for the costs and expenses of the sale, compensation and other charges, in paying the purchase price apply any portion of or all sums due to Bank under the Note, this Mortgage or any other instrument securing the Note, in lieu of cash, to the amount which shall, upon distribution of the net proceeds of such sale, be payable thereon.

x. Waiver of Appraisalment, Valuation, Stay, Extension, and Redemption Laws. Borrower agrees to the full extent permitted by law that in case of an Event of Default on its part hereunder, neither Borrower nor anyone claiming through or under it shall or will set up, claim or seek to take advantage of any appraisalment, valuation, stay, extension or redemption laws now or hereafter in force, in order to prevent or hinder the enforcement or foreclosure of this Mortgage, or the absolute sale of the Premises or the final and absolute putting into possession thereof, immediately after such sale, of the purchasers thereat, and Borrower, for itself and all who may at any time claim through or under it, hereby waives, to the full extent that it may lawfully so do, the benefit of all such laws, and any and all right to have the assets comprising the Mortgaged Property marshalled upon any foreclosure of the lien hereof and agrees that Bank or any court having jurisdiction to foreclose such lien may sell the Premises in part or as an entirety.

xi. Receiver. If an Event of Default shall have occurred, Bank, to the extent permitted by law and without regard to the value or occupancy of the security, shall be entitled as a matter of right if it so elects to the appointment of a receiver to enter upon and take possession of the Premises and to collect all rents, revenues, issues, income, products and profits thereof and apply the same as the court may direct. The receiver shall have all rights and powers permitted under the laws of the state where the Land is located and such other powers as the court making such appointment shall

HILTONHEAD-#649579-v1
109999.00600

confer. The expenses, including receiver's fees, attorney's fees, costs and agent's compensation, incurred pursuant to the powers herein contained shall be secured by this Mortgage. The right to enter and take possession of and to manage and operate the Premises, and to collect the rents, issues and profits thereof, whether by a receiver or otherwise, shall be cumulative to any other right or remedy hereunder or afforded by law, and may be exercised concurrently therewith or independently thereof. Bank shall be liable to account only for such rents, issues and profits actually received by Bank, whether received pursuant to this Section or any other Section of this Mortgage. Notwithstanding the appointment of any receiver or other custodian, Bank shall be entitled as secured party hereunder to the possession and control of any cash, deposits, or instruments at the time held by, or payable or deliverable under the terms of this Mortgage to, Bank.

xii. Suits to Protect the Premises. Bank shall have the power and authority to institute and maintain any suits and proceedings as Bank may deem advisable (a) to prevent any impairment of the Premises by any acts which may be unlawful or any violation of this Mortgage, (b) to preserve or protect its interest in the Premises, and (c) to restrain the enforcement of or compliance with any legislation or other governmental enactment, rule or order that may be unconstitutional or otherwise invalid, if the enforcement of or compliance with such enactment, rule or order might impair the security hereunder or be prejudicial to Bank's interest.

xiii. Proofs of Claim. In the case of any receivership, insolvency, bankruptcy, reorganization, arrangement, adjustment, composition or other judicial proceedings affecting Borrower, any person, partnership or corporation guaranteeing or endorsing any of Borrower's obligations, its creditors or its property, Bank, to the extent permitted by law, shall be entitled to file such proofs of claim and other documents as may be necessary or advisable in order to have its claims allowed in such proceedings for the entire amount due and payable by Borrower under the Note, this Mortgage and any other instrument securing the Note, at the date of the institution of such proceedings, and for any additional amounts which may become due and payable by Borrower after such date.

20. BORROWER TO PAY THE NOTE ON ANY DEFAULT IN PAYMENT; APPLICATION OF MONIES BY BANK.

If default shall be made in the payment of any amount due under the Note, this Mortgage or any other instrument securing the Note, then, upon Bank's demand, Borrower will pay to Bank the whole amount due and payable under the Note and all other sums secured hereby; and if Borrower shall fail to pay the same forthwith upon such demand, Bank shall be entitled to sue for and to recover judgment for the whole amount so due and unpaid together with costs and expenses including the reasonable compensation, expenses and disbursements of Bank's agents and attorneys incurred in connection with such suit and any appeal in connection therewith. Bank shall be entitled to sue and recover judgment as aforesaid either before, after or during the pendency of any proceedings for the enforcement of this Mortgage, and the right of Bank to recover such judgment shall not be affected by any taking, possession or foreclosure sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the terms of this Mortgage, or the foreclosure of the lien hereof.

a. In case of a foreclosure sale of all or any part of the Premises and of the application of the proceeds of sale to the payment of the sums secured hereby, Bank shall be entitled to enforce payment of and to receive all amounts then remaining due and unpaid and to recover judgment for any portion thereof remaining unpaid, with interest.

b. Borrower hereby agrees, to the extent permitted by law, that no recovery of any such judgment by Bank and no attachment or levy of any execution upon any of the Premises or any other property shall in any way affect the lien of this Mortgage upon the Premises or any part thereof or any lien, rights, powers or remedies of Bank hereunder; but such lien, rights, powers and remedies shall continue unimpaired as before.

c. Any monies collected or received by Bank under this Section 20 shall be applied as follows:

i. First, to the payment of reasonable compensation, expenses and disbursements of the agents and attorneys; and

MILTONHEAD-669579--1
199999.00600

ii. Second, to payment of amounts due and unpaid under the Note, this Mortgage and all other instruments securing the Note.

21. DELAY OR OMISSION NO WAIVER. No delay or omission of Bank or of any holder of the Note to exercise any right, power or remedy accruing upon any Event of Default shall exhaust or impair any such right, power or remedy or shall be construed to waive any such Event of Default or to constitute acquiescence therein. Every right, power and remedy given to Bank may be exercised from time to time and as often as may be deemed expedient by Bank.

22. NO WAIVER OF ONE DEFAULT TO AFFECT ANOTHER. No waiver of any Event of Default hereunder shall extend to or affect any subsequent or any other Event of Default then existing, or impair any rights, powers or remedies consequent thereon. If Bank (d) grants forbearance or an extension of time for the payment of any sums secured hereby; (e) takes other or additional security for the payment thereof; (f) waives or does not exercise any right granted in the Note, this Mortgage or any other instrument securing the Note; (g) releases any part of the Premises from the lien of this Mortgage or any other instrument securing the Note; (h) consents to the filing of any map, plat or replat of the Land; (i) consents to the granting of any easement on the Land; or (j) makes or consents to any agreement changing the terms of this Mortgage or subordinating the lien or any charge hereof, no such act or omission shall release, discharge, modify, change or affect the original liability under the Note, this Mortgage or otherwise of Borrower, or any subsequent purchaser of the Premises or any part thereof or any maker, cosigner, endorser, surety or guarantor. No such act or omission shall preclude Bank from exercising any right, power or privilege herein granted or intended to be granted in case of any Event of Default then existing or of any subsequent Event of Default nor, except as otherwise expressly provided in an instrument or instruments executed by Bank, shall the lien of this Mortgage be altered thereby. In the event of the sale or transfer by operation of law or otherwise of all or any part of the Premises, Bank, without notice to any person, firm or corporation, is hereby authorized and empowered to deal with any such vendee or transferee with reference to the Premises or the indebtedness secured hereby, or with reference to any of the terms or conditions hereof, as fully and to the same extent as it might deal with the original parties hereto and without in any way releasing or discharging any of the liabilities or undertakings hereunder.

23. DISCONTINUANCE OF PROCEEDINGS; POSITION OF PARTIES RESTORED. If Bank shall have proceeded to enforce any right or remedy under this Mortgage by foreclosure, entry or otherwise, and such proceedings shall have been discontinued or abandoned for any reason, or shall have been determined adversely to Bank, then and in every such case Borrower and Bank shall be restored to their former positions and rights hereunder, and all rights, powers and remedies of Bank shall continue as if no such proceeding had occurred or had been taken.

24. REMEDIES CUMULATIVE. No right, power or remedy conferred upon or reserved to Bank by the Note, this Mortgage or any other instrument securing the Note is exclusive of any other right, power or remedy, but each and every such right, power and remedy shall be cumulative and concurrent and shall be in addition to any other right, power and remedy given hereunder or under the Note or any other instrument securing the Note, or now or hereafter existing at law, in equity or by statute.

25. GENERAL CONDITIONS.

a. Terms. The singular used herein shall be deemed to include the plural; the masculine deemed to include the feminine and neuter; and the named parties deemed to include their heirs, successors and assigns. The term "Bank" shall include any payee of the indebtedness hereby secured or any transferee thereof whether by operation of law or otherwise.

b. Notices. All notices required to be given hereunder shall be in writing and shall be deemed served at the earlier of (i) receipt or (ii) seventy-two (72) hours after deposit in registered, certified or first-class United States mail, postage prepaid, or dispatched by commercial courier service such as Federal Express, UPS, etc., and addressed to the parties at their addresses as may from time to time be designated by written notice.

HILTONHEAD-#669579-1
19999.00600

c. The parties hereto agree that any notice sent to the Borrower at its address designated in accordance with this Section shall be deemed notice to the Guarantor. Personal delivery to a party or to any officer, partner, agent or employee of such party at its address herein shall constitute receipt. Rejection or other refusal to accept or inability to deliver because of changed address of which no notice has been received shall also constitute receipt. Notwithstanding the foregoing, no notice of change of address shall be effective until the date of receipt thereof.

d. Imposition of Tax. In the event of the passage of any state, federal, municipal or other governmental law, order, rule or regulation, in any manner changing or modifying the laws now in force governing the taxation of debts secured by mortgages or the manner of collecting taxes so as to affect adversely the Bank, the Borrower will promptly pay any such tax on or before the due date thereof; and if the Borrower fails to make such prompt payment or if any such state, federal, municipal or other governmental law, order, rule or regulation prohibits Borrower from making such payment or would penalize Bank if Borrower makes such payment, then the entire balance of the Loan shall become due and payable upon demand at the option of the Bank.

e. Invalidation of Provisions. Invalidation of any one or more of the provisions of this Mortgage shall in no way affect any of the other provisions hereof, which shall remain in full force and effect.

f. Headings. The captions and headings herein are inserted only as a matter of convenience and for reference and in no way define, limit, or describe the scope of this Mortgage nor the intent of any provision hereof.

g. Changes, etc. Neither this Mortgage nor any term hereof may be changed, waived, discharged or terminated orally, or by any action or inaction, but only by an instrument in writing signed by the party against which enforcement of the change, waiver, discharge or termination is sought. Any agreement hereafter made by Borrower and Bank relating to this Mortgage shall be superior to the rights of the holder of any intervening lien or encumbrance.

IN WITNESS WHEREOF, the undersigned has executed this Mortgage under seal as of the above written date.

BLACK DIAMOND, LLC
By: Red Rocks, LLC, Member

By: J. Chris Lindgren
Its Manager

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

ACKNOWLEDGMENT

I, the undersigned Notary Public do certify that J. Chris Lindgren, Manager of Red Rocks, LLC, Member of BLACK DIAMOND, LLC, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my official seal this the 25th day of January, 2011.

Deirdre Head (SEAL)
Notary Public for South Carolina
My Commission Expires: 9-5-2011

DELTONEAD-616979-1
11999.00400

EXHIBIT "A"

ALL those certain pieces, parcels or lots of land, situate, lying and being in Bluffton Township, Beaufort County, South Carolina, consisting of 3.005 acres and 6.94 acres, more or less, as shown on a plat entitled "Plat Prepared for Low Country Guild" prepared by Sea Island Engineering, Inc., Benjamin Wilson, R.L.S. #5424, dated May 14, 1982, last revised May 30, 1982, and recorded in the Office of the Register of Deeds for Beaufort County in Plat Book 31 at Page 71.

EXCEPTING THEREFROM that certain piece, parcel or lot of land, situate, lying and being in Bluffton Township, Beaufort County, South Carolina consisting of 0.498 acres, more or less as shown and described on that certain plat of survey entitled "Plat of boundary survey prepared for G. Stewart Smith prepared by Benjamin Wilson, R.L.S. #5426, Sea Island Engineering, Inc., dated September 24, 1986 and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Plat Book 34 at Page 68.

For a more detailed description as to the courses and distances, metes and bounds of the above tracts, references had to the aforementioned recorded plats.

TOGETHER WITH a non-exclusive easement of ingress and egress over adjacent property owned by Peter J. Bachelor as reserved in that certain Deed from G. Stewart Smith to Peter J. Bachelor recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Deed Book 462 at Page 1257.

The property intended to be mortgaged herein is the same property conveyed to the within Mortgagor by Deed recorded in Book 1377 Page 779 Beaufort County Records.

This Mortgage was prepared in the Law Offices of McNair Law Firm, P.A., Post Office Drawer 3, Hilton Head Island, South Carolina 29938, by Cary S. Griffin.

4
9 RW
McNair
1646

2754 p 2297

(Reference Document Book 2677, Page 655)

BEAUFORT COUNTY SC - ROD
BK 02754 PGS 2297-2300
FILE NUM 2008050888
08/12/2008 11:33:08 AM
REC'D BY R WEBB RCPT# 558188
RECORDING FEES 9.00

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

MORTGAGE MODIFICATION AGREEMENT
("Agreement")

THIS MORTGAGE MODIFICATION AGREEMENT, dated and made effective as of the 25th day of July, 2008, by and between CAROLINA FIRST BANK (the "Lender"), whose address is 104 South Main Street, Greenville, SC 29601, and BLACK DIAMOND, LLC (the "Borrower"), whose address is P.O. Box 23164, Hilton Head Island, South Carolina 29925.

WITNESSETH:

WHEREAS, the Borrower has executed and delivered to Lender a Promissory Note dated January 25, 2008, in the original principal amount of \$3,500,000 in connection with the Borrower's ownership of certain commercial property know as 1204 Fording Island Road, Bluffton, SC (the "\$3.5M Note");

WHEREAS, to secure the \$3.5M Note owing to the Lender, the Borrower executed and delivered certain First Mortgage and Security Agreement recorded in the Beaufort County Records in Book 2677, at Page 655, on January 30, 2008, made a part hereof by this reference as fully as if set out herein verbatim (such document, as same may have been heretofore amended, being herein referred to as the "Mortgage"); and

WHEREAS, Borrower has executed and delivered to Lender a Promissory Note ("Renewal Note") dated of even date herewith in the original principal amount of \$2,000,000 in connection with Borrower's ownership and development of certain commercial property in Beaufort County, South Carolina, known as the Future Phase - 1188 Centre HPR (the "\$2M Note"); which \$2M Note is a renewal of an original Note of December 9, 2003, as previously amended and modified by Renewal Note dated December 17, 2007; and

WHEREAS, the Lender, as holder and owner of the Mortgage, and the Borrower mutually desire to modify and amend the provisions of the same to secure the obligations of Borrower under the \$2M Note, it being specifically understood that except as herein modified and amended, the terms and provisions of the Mortgage shall remain unchanged and continue in full force and effect as therein written; and

NOW, THEREFORE, the Lender and the Borrower, in consideration of the sum of One Dollar (\$1.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and the mutual covenants herein do hereby agree that the Mortgage should be, and the same hereby is modified and amended as follows:

- I. The Mortgage shall secure all obligations of Borrower under the \$2M Note and the Borrower hereby grants, bargains, sells, aliens, remises, releases, conveys, assigns, transfers, mortgages, hypothecates, pledges, delivers, sets over, warrants and confirms unto Lender all collateral subject to the Mortgage as security for the \$2M Note.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Louise Zimmerman
(Witness)

Janique Atkins
(Witness)

MORTGAGOR /BORROWER:

BLACK DIAMOND, LLC

By: RED ROCKS, LLC, MANAGER

By: J. Chris Lindgren, Manager (SEAL)

(Corporate Seal)

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

The foregoing instrument was acknowledged before me this 25 day of July, 2008, by J. Chris Lindgren, the Manager of Red Rocks, LLC, the Manager of Black Diamond, LLC, on behalf of said entity.

Cherry B. Brown
Notary Public for South Carolina
My Commission Expires: June 13, 2017

[SEAL]

EXHIBIT J-2

ALL those certain pieces, parcels or lots of land, situate, lying and being in Bluffton Township, Beaufort County, South Carolina, consisting of 3.005 acres and 6.94 acres, more or less, as shown on a plat entitled "Plat Prepared for Low Country Guild" prepared by Sea Island Engineering, Inc., Benjamin Wilson, R.L.S. #5424, dated May 14, 1982, last revised May 30, 1982, and recorded in the Office of the Register of Deeds for Beaufort County in Plat Book 31 at Page 71.

EXCEPTING THEREFROM that certain piece, parcel or lot of land, situate, lying and being in Bluffton Township, Beaufort County, South Carolina consisting of 0.498 acres, more or less as shown and described on that certain plat of survey entitled "Plat of boundary survey prepared for G. Stewart Smith" prepared by Benjamin Wilson, R.L.S. #5426, Sea Island Engineering, Inc., dated September 24, 1986 and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Plat Book 34 at Page 68.

For a more detailed description as to the courses and distances, metes and bounds of the above tracts, references had to the aforementioned recorded plats.

TOGETHER WITH a non-exclusive easement of ingress and egress over adjacent property owned by Peter J. Batchelor as reserved in that certain Deed from G. Stewart Smith to Peter J. Batchelor recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Deed Book 462 at Page 1257.

The property intended to be mortgaged herein is the same property conveyed to the within Mortgagor by Deed recorded in Book 1377 Page 779 Beaufort County Records.

EXHIBIT "K-1"

156-PP-PLP
1103-00019

14
38576
38576

5120783655
51-1110469

BEAUFORT COUNTY SC - ROD
BK 01884 PGS 0842-0848
FILE NUM 2003087505
12/12/2003 11:58:23 AM
REC'D BY C SEABROOK RCPT# 205648
RECORDING FEES 14.00

Am

Space Above This Line For Recording Data

This document was prepared by REMBRANDT SERVICES - COASTAL, CAROLINA FIRST BANK, PO BOX 7317, HILTON HEAD ISLAND, South Carolina 29938

MORTGAGE

(With Future Advance Clause)

DATE AND PARTIES. The date of this Mortgage (Security Instrument) is DECEMBER 9, 2003. The parties and their addresses are:

MORTGAGOR:

BLACK DIAMOND LLC
A South Carolina Limited Liability Company
117 WILLIAM HILTON PARKWAY
HILTON HEAD ISLAND, South Carolina 29926

LENDER:

CAROLINA FIRST BANK
Organized and existing under the laws of South Carolina
62 New Orleans Rd,
PO Box 7317
Hilton Head Island, South Carolina 29938
57-0833566

1. CONVEYANCE. For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debts and Mortgagor's performance under this Security Instrument, Mortgagor grants, bargains, conveys and mortgages to Lender, the following described property:

4.51 ACRES THE GREENERY TRACT ON HWY 278 HILTON HEAD ISLAND SC AS FURTHER DESCRIBED IN ATTACH ED EXHIBIT 'A' WHICH IS ATTACHED HERETO AND MADE A PART HEREOF

The property is located in BEAUFORT County at 4.51 ACRES THE GREENERY TRACT ON HWY 278, HILTON HEAD ISLAND, South Carolina 29926.

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, crops, timber, all diversion payments or third party payments made to crop producers and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described (all referred to as Property). This Security Instrument will remain in effect until the Secured Debts and all underlying agreements have been terminated in writing by Lender.

BLACK DIAMOND LLC
South Carolina Mortgage
SC/XXXXdrcdh0062390003874045112603Y

©1998 Bankers Systems, Inc., St. Cloud, MN **SPUR**

Includes **PL**
Page 1

2. MAXIMUM OBLIGATION LIMIT. The total principal amount secured by this Security Instrument at any one time will not exceed \$1,460,000.00. This limitation of amount does not include interest and other fees and charges validly made pursuant to this Security Instrument. Also, this limitation does not apply to advances made under the terms of this Security Instrument to protect Lender's security and to perform any of the covenants contained in this Security Instrument. Interest under the Note will be deferred, accrued or capitalized; however, Lender will not be required to defer, accrue or capitalize any interest except as provided in the Note.

3. SECURED DEBTS. This Security Instrument will secure the following Secured Debts:

A. Specific Debts. The following debts and all extensions, renewals, refinancings, modifications and replacements. A promissory note, dated December 9, 2003, from Mortgagor to Lender, with a loan amount of \$1,460,000.00 and maturing on December 9, 2004. One or more of the debts secured by this Security Instrument contains a future advance provision.

B. Sums Advanced. All sums advanced and expenses incurred by Lender under the terms of this Security Instrument.

4. PAYMENTS. Mortgagor agrees that all payments under the Secured Debts will be paid when due and in accordance with the terms of the Secured Debts and this Security Instrument.

5. WARRANTY OF TITLE. Mortgagor warrants that Mortgagor is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to grant, bargain, convey, sell and mortgage the Property. Mortgagor also warrants that the Property is unencumbered, except for encumbrances of record.

6. PRIOR SECURITY INTERESTS. With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property, Mortgagor agrees:

A. To make all payments when due and to perform or comply with all covenants.

B. To promptly deliver to Lender any notices that Mortgagor receives from the holder.

C. Not to allow any modification or extension of, nor to request any future advances under any note or agreement secured by the lien document without Lender's prior written consent.

7. CLAIMS AGAINST TITLE. Mortgagor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Mortgagor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Mortgagor's payment. Mortgagor will defend title to the Property against any claims that would impair the lien of this Security Instrument. Mortgagor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses Mortgagor may have against parties who supply labor or materials to maintain or improve the Property.

8. DUE ON SALE. Lender may, at its option, declare the entire balance of the Secured Debts to be immediately due and payable upon the creation of, or contract for the creation of, a transfer or sale of the Property. This right is subject to the restrictions imposed by federal law governing the preemption of state due-on-sale laws, as applicable.

9. TRANSFER OF AN INTEREST IN THE MORTGAGOR. If Mortgagor is an entity other than a natural person (such as a corporation or other organization), Lender may demand immediate payment if:

A. A beneficial interest in Mortgagor is sold or transferred.

B. There is a change in either the identity or number of members of a partnership or similar entity.

C. There is a change in ownership of more than 25 percent of the voting stock of a corporation or similar entity.

However, Lender may not demand payment in the above situations if it is prohibited by law as of the date of this Security Instrument.

10. WARRANTIES AND REPRESENTATIONS. Mortgagor makes to Lender the following warranties and representations which will continue as long as this Security Instrument is in effect:

A. Power. Mortgagor is duly organized, and validly existing and in good standing in all jurisdictions in which Mortgagor operates. Mortgagor has the power and authority to enter into this transaction and to carry on Mortgagor's business or activity as it is now being conducted and, as applicable, is qualified to do so in each jurisdiction in which Mortgagor operates.

B. Authority. The execution, delivery and performance of this Security Instrument and the obligation evidenced by this Security Instrument are within Mortgagor's powers, have been duly authorized, have received all necessary governmental approval, will not violate any provision of law, or order of court or governmental

agency, and will not violate any agreement to which Mortgagor is a party or to which Mortgagor is or any of Mortgagor's property is subject.

C. Name and Place of Business. Other than previously disclosed in writing to Lender, Mortgagor has not changed Mortgagor's name or principal place of business within the last 10 years and has not used any other trade or fictitious name. Without Lender's prior written consent, Mortgagor does not and will not use any other name and will preserve Mortgagor's existing name, trade names and franchises.

11. PROPERTY CONDITION, ALTERATIONS AND INSPECTION. Mortgagor will keep the Property in good condition and make all repairs that are reasonably necessary. Mortgagor will not commit or allow any waste, impairment, or deterioration of the Property. Mortgagor will keep the Property free of noxious weeds and grasses. Mortgagor agrees that the nature of the occupancy and use will not substantially change without Lender's prior written consent. Mortgagor will not permit any change in any license, restrictive covenant or easement without Lender's prior written consent. Mortgagor will notify Lender of all demands, proceedings, claims, and actions against Mortgagor, and of any loss or damage to the Property.

No portion of the Property will be removed, demolished or materially altered without Lender's prior written consent except that Mortgagor has the right to remove items of personal property comprising a part of the Property that become worn or obsolete, provided that such personal property is replaced with other personal property at least equal in value to the replaced personal property, free from any title retention device, security agreement or other encumbrance. Such replacement of personal property will be deemed subject to the security interest created by this Security Instrument. Mortgagor will not partition or subdivide the Property without Lender's prior written consent.

Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Lender will give Mortgagor notice at the time of or before an inspection specifying a reasonable purpose for the inspection. Any inspection of the Property will be entirely for Lender's benefit and Mortgagor will in no way rely on Lender's inspection.

12. AUTHORITY TO PERFORM. If Mortgagor fails to perform any duty or any of the covenants contained in this Security Instrument, Lender may, without notice, perform or cause them to be performed. Mortgagor appoints Lender as attorney in fact to sign Mortgagor's name or pay any amount necessary for performance. Lender's right to perform for Mortgagor will not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Security Instrument. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may take all steps necessary to protect Lender's security interest in the Property, including completion of the construction.

13. ASSIGNMENT OF LEASES AND RENTS. Mortgagor assigns, grants, bargains, conveys and mortgages to Lender as additional security all the right, title and interest in the following (all referred to as Property).

A. Existing or future leases, subleases, licenses, guaranties and any other written or verbal agreements for the use and occupancy of the Property, including any extensions, renewals, modifications or replacements (all referred to as Leases).

B. Rents, issues and profits (all referred to as Rents), including but not limited to security deposits, minimum rent, percentage rent, additional rent, common area maintenance charges, parking charges, real estate taxes, other applicable taxes, insurance premium contributions, liquidated damages following default, cancellation premiums, "loss of rents" insurance, guest receipts, revenues, royalties, proceeds, bonuses, accounts, contract rights, general intangibles, and all rights and claims which Assignor may have that in any way pertain to or are on account of the use or occupancy of the whole or any part of the Property.

In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement. Mortgagor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed. Mortgagor may collect, receive, enjoy and use the Rents so long as Mortgagor is not in default. Mortgagor will not collect in advance any Rents due in future lease periods, unless Mortgagor first obtains Lender's written consent. Upon default, Mortgagor will receive any Rents in trust for Lender and Mortgagor will not commingle the Rents with any other funds. When Lender so directs, Mortgagor will endorse and deliver any payments of Rents from the Property to Lender. Amounts collected will be applied at Lender's discretion to the Secured Debts, the costs of managing, protecting and preserving the Property, and other necessary expenses. Mortgagor agrees that this Security Instrument is immediately effective between Mortgagor and Lender and effective as to third parties on the recording of this Assignment. As long as this Assignment is in effect, Mortgagor warrants and represents that no default exists under the Leases, and the parties subject to the

Leases have not violated any applicable law on leases, licenses and landlords and tenants. Mortgagor, at its sole cost and expense, will keep, observe and perform, and require all other parties to the Leases to comply with the Leases and any applicable law. If Mortgagor or any party to the Lease defaults or fails to observe any applicable law, Mortgagor will promptly notify Lender. If Mortgagor neglects or refuses to enforce compliance with the terms of the Leases, then Lender may, at Lender's option, enforce compliance. Mortgagor will not sublet, modify, extend, cancel, or otherwise alter the Leases, or accept the surrender of the Property covered by the Leases (unless the Leases so required) without Lender's consent. Mortgagor will not assign, compromise, subordinate or encumber the Leases and Rents without Lender's prior written consent. Lender does not assume or become liable for the Property's maintenance, depreciation, or other losses or damages when Lender acts to manage, protect or preserve the Property, except for losses and damages due to Lender's gross negligence or intentional torts. Otherwise, Mortgagor will indemnify Lender and hold Lender harmless for all liability, loss or damage that Lender may incur when Lender opts to exercise any of its remedies against any party obligated under the Leases.

14. DEFAULT. Mortgagor will be in default if any of the following occur:

- A. Payments.** Mortgagor fails to make a payment in full when due.
- B. Insolvency or Bankruptcy.** Any legal entity obligated on the Secured Debts makes an assignment for the benefit of creditors or become insolvent, either because its liabilities exceed its assets or it is unable to pay its debts as they become due; or it petitions for protection under federal, state or local bankruptcy, insolvency or debtor relief laws, or is the subject of a petition or action under such laws and fails to have the petition or action dismissed within a reasonable period of time not to exceed 60 days.
- C. Business Termination.** Mortgagor merges, dissolves, reorganizes, ends its business or existence, or a partner or majority owner dies or is declared legally incompetent.
- D. Failure to Perform.** Mortgagor fails to perform any condition or to keep any promise or covenant of this Security Instrument.
- E. Other Documents.** A default occurs under the terms of any other transaction document.
- F. Other Agreements.** Mortgagor is in default on any other debt or agreement Mortgagor has with Lender.
- G. Misrepresentation.** Mortgagor makes any verbal or written statement or provides any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.
- H. Judgment.** Mortgagor fails to satisfy or appeal any judgment against Mortgagor.
- I. Forfeiture.** The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.
- J. Name Change.** Mortgagor changes Mortgagor's name or assumes an additional name without notifying Lender before making such a change.
- K. Property Transfer.** Mortgagor transfers all or a substantial part of Mortgagor's money or property. This condition of default, as it relates to the transfer of the Property, is subject to the restrictions contained in the DUE ON SALE section.
- L. Property Value.** The value of the Property declines or is impaired.
- M. Material Change.** Without first notifying Lender, there is a material change in Mortgagor's business, including ownership, management, and financial conditions.
- N. Insecurity.** Lender reasonably believes that Lender is insecure.

15. REMEDIES. Lender may use any and all remedies Lender has under state or federal law or in any instrument evidencing or pertaining to the Secured Debts. Any amounts advanced on Mortgagor's behalf will be immediately due and may be added to the balance owing under the Secured Debts. Lender may make a claim for any and all insurance benefits or refunds that may be available on Mortgagor's default.

Subject to any right to cure, required time schedules or any other notice rights Mortgagor may have under federal and state law, Lender may make all or any part of the amount owing by the terms of the Secured Debts immediately due and foreclose this Security Instrument in a manner provided by law upon the occurrence of a default or anytime thereafter.

All remedies are distinct, cumulative and not exclusive, and the Lender is entitled to all remedies provided at law or equity, whether or not expressly set forth. The acceptance by Lender of any sum in payment or partial payment on the Secured Debts after the balance is due or is accelerated or after foreclosure proceedings are filed will not constitute a waiver of Lender's right to require full and complete cure of any existing default. By not exercising any remedy, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.

16. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after Default, to the extent permitted by law, Mortgagor agrees to pay all expenses of collection, enforcement or protection of Lender's rights and remedies under this Security Instrument. Mortgagor agrees to pay expenses for Lender to inspect and preserve the Property and for any recordation costs of releasing the Property from this Security Instrument. Expenses include, but are not limited to, attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of the Secured Debts. To the extent permitted by the United States Bankruptcy Code, Mortgagor agrees to pay the reasonable attorneys' fees Lender incurs to collect the Secured Debts as awarded by any court exercising jurisdiction under the Bankruptcy Code.

17. ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES. As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substance," "hazardous waste," "hazardous substance," or "regulated substance" under any Environmental Law.

Mortgagor represents, warrants and agrees that:

A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.

B. Except as previously disclosed and acknowledged in writing to Lender, Mortgagor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.

C. Mortgagor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Mortgagor will take all necessary remedial action in accordance with Environmental Law.

D. Except as previously disclosed and acknowledged in writing to Lender, Mortgagor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Mortgagor or any tenant of any Environmental Law. Mortgagor will immediately notify Lender in writing as soon as Mortgagor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.

E. Except as previously disclosed and acknowledged in writing to Lender, Mortgagor and every tenant have been, are and will remain in full compliance with any applicable Environmental Law.

F. Except as previously disclosed and acknowledged in writing to Lender, there are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.

G. Mortgagor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.

H. Mortgagor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Mortgagor and any tenant are in compliance with applicable Environmental Law.

I. Upon Lender's request and at any time, Mortgagor agrees, at Mortgagor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.

J. Lender has the right, but not the obligation, to perform any of Mortgagor's obligations under this section at Mortgagor's expense.

K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Mortgagor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Security Instrument and in return Mortgagor will provide Lender with collateral of at least equal value to the Property secured by this Security Instrument without prejudice to any of Lender's rights under this Security Instrument.

L. Notwithstanding any of the language contained in this Security Instrument to the contrary, the terms of this section will survive any foreclosure or satisfaction of this Security Instrument regardless of any passage of title to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.

18. CONDEMNATION. Mortgagor will give Lender prompt notice of any pending or threatened action by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Mortgagor authorizes Lender to intervene in Mortgagor's name in any of the above described actions or claims. Mortgagor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds will be considered payments and will be applied as provided in this Security Instrument. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

19. ESCROW FOR TAXES AND INSURANCE. Mortgagor will not be required to pay to Lender funds for taxes and insurance in escrow.

20. CO-SIGNERS. If Mortgagor signs this Security Instrument but does not sign the Secured Debts, Mortgagor does so only to mortgage Mortgagor's interest in the Property to secure payment of the Secured Debts and Mortgagor does not agree to be personally liable on the Secured Debts. If this Security Instrument secures a guaranty between Lender and Mortgagor, Mortgagor agrees to waive any rights that may prevent Lender from bringing any action or claim against Mortgagor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws.

21. WAIVERS. Except to the extent prohibited by law, Mortgagor waives all homestead exemption rights relating to the Property.

22. OTHER TERMS. The following are applicable to this Security Instrument:

A. Additional Terms. Notwithstanding the foregoing maximum obligation limit of \$1,460,000.00 specified in paragraph 2 above, pursuant to the provisions of Section 29-3-50 et seq. of the South Carolina Code of Laws, as amended, this Mortgage shall secure payment of all future advances and/or extensions of credit that may subsequently be made to Mortgagor by Lender, when evidenced by promissory notes specifically referring to this Mortgage and all extensions and renewals thereof, the maximum principal amount of all existing indebtedness, future advances, extensions of credit and all other indebtedness outstanding at any one time and to be secured by this Mortgage not to exceed TWO MILLION ONE HUNDRED NINETY THOUSAND AND NO/100 dollars (\$2,190,000.00), plus interest thereon, attorneys' fees and court costs, and any advances necessary for the protection of the security or title thereto, including, but not limited to, advances for taxes and insurance premiums and all other payments or liabilities otherwise provided for in this Mortgage. This Mortgage may secure interest which is deferred, accrued or capitalized as provided in the aforesaid statute.

23. APPLICABLE LAW. This Security Instrument is governed by the laws of South Carolina, except to the extent otherwise required by the laws of the jurisdiction where the Property is located, and the United States of America.

24. JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS. Each Mortgagor's obligations under this Security Instrument are independent of the obligations of any other Mortgagor. Lender may sue each Mortgagor individually or together with any other Mortgagor. Lender may release any part of the Property and Mortgagor will still be obligated under this Security Instrument for the remaining Property. The duties and benefits of this Security Instrument will bind and benefit the successors and assigns of Lender and Mortgagor.

25. AMENDMENT, INTEGRATION AND SEVERABILITY. This Security Instrument may not be amended or modified by oral agreement. No amendment or modification of this Security Instrument is effective unless made in writing and executed by Mortgagor and Lender. This Security Instrument is the complete and final expression of the

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

27. NOTICE, FINANCIAL REPORTS, AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one party will be deemed to be notice to all parties. Mortgagor will inform Lender in writing of any change in Mortgagor's name, address or other application information. Mortgagor will provide Lender any financial statements or information Lender requests. All financial statements and information Mortgagor gives Lender will be correct and complete. Mortgagor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Mortgagor's obligations under this Security Instrument and to confirm Lender's lien status on any Property. Time is of the essence.

SIGNATURES. By signing under seal, Mortgagor agrees to the terms and covenants contained in this Security Instrument. Mortgagor also acknowledges receipt of a copy of this Security Instrument.

MORTGAGOR:

BLACK DIAMOND 

By [Signature] (Seal)

BY RED ROCKS LLC, J CHRISTOPHER LINDGREN ITS MANAGER

(Witness)

(Witness)

PROBATE.

(Business or Entity)

State OF SC, County OF Beaufort SS.

Personally appeared before me the undersigned witness who, being duly sworn, deposed and said that he/she saw the within named, sign, seal and deliver the foregoing instrument and that he/she, together with the other witness whose name appears as a witness, witnessed the execution thereof.

Sworn to and subscribed before me this 9th day of December 2003

Notary Public for South Carolina

Witness

My commission expires:

Sept. 5, 2011

EXHIBIT "A"

ALL that certain piece, parcel or tract of land lying and being in Bluffton Township, Beaufort County, South Carolina, containing 4.51 acres, more or less, as shown on survey for W. Barry Edwards as prepared by Coastal Surveying dated February 8, 1994, and being described by metes and bounds as follows: beginning at the eastern boundary of the intersection of U.S. Highway 278 and Burnt Church Road and proceeding thence S 67°19'20" E a distance of 947 feet to a point which marks the point of beginning; proceeding thence S 67°19'20" E a distance of 253.21 feet to a point, proceeding thence S 26°31'25" W a distance of 882.26 feet, proceeding thence S 26°31'25" W a distance of 248.59 feet to a point, proceeding thence N 26°14'52" E a distance of 858.58 feet to a point which marks the point of beginning

This being the same property described as 4.88 acres in that certain plat entitled "Division of Lot 2, Bluffton Township, according to a plat by R.D. Trogdon, Jr. as recorded in the Office of the Clerk of Court for Beaufort County, South Carolina, in Deed Book 220 at Page 1302" prepared by R.D. Trogdon, Jr., R.L.S. 2712 and recorded in the Office of the Beaufort County Clerk of Court in Book 31 at Page 181

The property intended to be mortgaged herein is the same property conveyed to the within Mortgagor by Deed recorded in Book 1884 at Page 639, Beaufort County Records.

This Mortgage was prepared in the Law Offices of Bethca, Jordan & Griffin, P.A., Post Office Drawer 3, Hilton Head Island, South Carolina 29938, by Cary S. Griffin.

4
9
McNair

BEAUFORT COUNTY SC - ROD
BK 02764 PGS 2301-2304
FILE NUM 2008060866
08/12/2008 11:33:06 AM
REC'D BY R WEBB RCPT# 556198
RECORDING FEES 9.00

2754 p 2301

Space Above This Line For Recording Data

This document was prepared by Loan Preparation Department, Carolina First Bank, Post Office Box 1029, Greenville, South Carolina 29602

MODIFICATION OF MORTGAGE

DATE AND PARTIES. The date of this Real Estate Modification (Modification) is July 25, 2008. The parties and their addresses are:

MORTGAGOR:

BLACK DIAMOND, LLC
A South Carolina Limited Liability Company
5 DUNMORE COURT
HILTON HEAD ISLAND, South Carolina 29926

LENDER:

CAROLINA FIRST BANK
Organized and existing under the laws of South Carolina
104 South Main Street
Greenville, South Carolina 29601

1. BACKGROUND. Mortgagor and Lender entered into a security instrument dated DECEMBER 9, 2003 and recorded on DECEMBER 12, 2003 (Security Instrument). The Security Instrument was recorded in the records of BEAUFORT County, South Carolina at BOOK 01884, PAGES 0642-0649 and covered the following described Property:

AS FURTHER DESCRIBED IN EXHIBIT 'A' WHICH IS ATTACHED HERETO AND MADE A PART HEREOF

The property is located in BEAUFORT County at 1188 FORDING ISLAND RD, BLUFFTON, South Carolina 29910.

2. MODIFICATION. For value received, Mortgagor and Lender agree to modify the Security Instrument as provided for in this Modification.

The Security Instrument is modified as follows:

A. Secured Debt. The secured debt provision of the Security Instrument is modified to read:

(1) Secured Debts. The term "Secured Debts" includes and this Security Instrument will secure each of the following:

(a) **Specific Debts.** The following debts and all extensions, renewals, refinancings, modifications and replacements. A renewal note or other agreement, No. 5120783665, dated July 25, 2008, from Mortgagor to Lender, with a loan amount of \$2,000,000.00 and maturing on July 25, 2011.

(b) **All Debts.** All present and future debts from Mortgagor to Lender, even if this Security Instrument is not specifically referenced, or if the future debt is unrelated to or of a different type than this debt. If more than one person signs this Security Instrument, each agrees that it will secure debts incurred either individually or with others who may not sign this Security Instrument. Nothing in this Security Instrument constitutes a commitment to make additional or future loans or advances. Any such commitment must be in writing. In the event that Lender fails to provide any required notice of the right of rescission, Lender waives any subsequent security interest in the Mortgagor's principal dwelling that is created by this Security Instrument. This Security Instrument will not secure any debt for which a non-possessory, non-purchase money security interest is created in "household goods" in connection with a "consumer loan," as those terms are defined by federal law governing unfair and deceptive credit practices. This Security Instrument will not secure any debt for which a security interest is created in "margin stock" and Lender does not obtain a "statement of purpose," as defined and required by federal law governing securities.

(c) **Sums Advanced.** All sums advanced and expenses incurred by Lender under the terms of this Security Instrument.

3. WARRANTY OF TITLE. Mortgagor warrants that Mortgagor continues to be lawfully seized of the estate conveyed by the Security Instrument and has the right to grant, bargain, convey, sell and mortgage the Property. Mortgagor also warrants that the Property is unencumbered, except for encumbrances of record.

4. CONTINUATION OF TERMS. Except as specifically amended in this Modification, all of the terms of the Security Instrument shall remain in full force and effect.

5. ADDITIONAL TERMS. THIS LOAN IS CROSS COLLATERALIZED AND CROSS DEFAULTED WITH LOAN #5121066531 IN THE NAME OF BLACK DIAMOND LLC IN THE AMOUNT OF \$3,500,000.00 DATED JANUARY 25, 2008 SECURED BY REAL ESTATE MORTGAGE

SIGNATURES. By signing under seal, Mortgagor agrees to the terms and covenants contained in this Modification. Mortgagor also acknowledges receipt of a copy of this Modification.

MORTGAGOR:

BLACK DIAMOND, LLC

By RED ROCKS, LLC, MANAGER

By [Signature] (Seal)
J. CHRISTOPHER LINDGREN, MANAGER

Louise Zimmerman
(Witness)
J. Atkins
(Witness)

LENDER:

Carolina First Bank

By [Signature] (Seal)
Carolina First Bank Lending Officer

Louise Zimmerman
(Witness)
J. Atkins
(Witness)

STATE OF SC

COUNTY OF BEAUFORT

)

)

)

ACKNOWLEDGMENT

under SC Code §30-5-30(C)

I, Marjorie A. Lippmann, do hereby certify that Mortgagor by Red Rocks, LLC, Manager by J. Christopher Lindgren, Manager and Lender, by its authorized officer personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the 25th day of July, 2008.

Marjorie A. Lippmann
Notary Public for SC
My Commission Expires: ~~MY COMMISSION EXPIRES JULY 23, 2010~~

Received at: 1:56PM, 8/8/2008

2008-08-08 13:46 Carolina First Pope

843-341-4535 >> IR LAW FIRM, P.A P 2/2

EXHIBIT "A"

ALL that certain piece, parcel or tract of land lying and being in Bluffton Township, Beaufort County, South Carolina, containing 4.51 acres, more or less, as shown on survey for W. Barry Edwards as prepared by Coastal Surveying dated February 8, 1994, and being described by metes and bounds as follows: beginning at the eastern boundary of the intersection of U.S. Highway 278 and Burnt Church Road and proceeding thence S 67°19'20" E a distance of 947 feet to a point which marks the point of beginning; proceeding thence S 67°19'20" E a distance of 253.21 feet to a point, proceeding thence S 26°31'25" W a distance of 882.26 feet, proceeding thence S 26°31'25" W a distance of 248.59 feet to a point, proceeding thence N 26°14'52" E a distance of 858.58 feet to a point which marks the point of beginning

This being the same property described as 4.88 acres in that certain plat entitled "Division of Lot 2, Bluffton Township, according to a plat by R.D. Trogdon, Jr. as recorded in the Office of the Clerk of Court for Beaufort County, South Carolina, in Deed Book 220 at Page 1302" prepared by R.D. Trogdon, Jr., R.L.S. 2712 and recorded in the Office of the Beaufort County Clerk of Court in Book 31 at Page 181

The property intended to be mortgaged herein is the same property conveyed to the within Mortgagor by Deed recorded in Book 1884 at Page 639, Beaufort County Records.

This Mortgage was prepared in the Law Offices of Bothea, Jordan & Griffin, P.A., Post Office Drawer 3, Hilton Head Island, South Carolina 29938, by Cary S. Griffin.

EXHIBIT "K-2"

Legal description from mortgage:

ALL that certain piece, parcel or tract of land lying and being in Bluffton Township, Beaufort County, South Carolina, containing 4.51 acres, more or less, as shown on survey for W. Barry Edwards as prepared by Coastal Surveying dated February 8, 1994, and being described by metes and bounds as follows: beginning at the eastern boundary of the intersection of U.S. Highway 278 and Burnt Church Road and proceeding thence S 67°19'20" E a distance of 947 feet to a point which marks the point of beginning; proceeding thence S 67°19'20" E a distance of 253.21 feet to a point; proceeding thence S 26°31'25" W a distance of 882.26 feet; proceeding thence S 26°31'25" W a distance of 248.59 feet to a point; proceeding thence N 26°14'52" E a distance of 858.58 feet to a point which marks the point of beginning.

This being the same property described as 4.88 acres in that certain plat entitled "Division of Lot 2, Bluffton Township, according to a plat by R.D. Trogdon, Jr. as recorded in the Office of the Clerk of Court for Beaufort County, South Carolina, in Deed Book 220 at Page 1302" prepared by R.D. Trogdon, Jr., R.L.S. 2712 and recorded in the Office of the Beaufort County Clerk of Court in Book 31 at Page 181.

The property intended to be mortgaged herein is the same property conveyed to the within Mortgagor by Deed recorded in Book 1884 at Page 639, Beaufort County Records.

LESS and EXCEPT:

All that certain Unit, lying and being in Bluffton Township, Beaufort County, South Carolina and being known as **Unit T** of The 1188 Centre Horizontal Property Regime, and being more particularly shown as described by reference to the Master Deed of Black Diamond, LLC establishing said Horizontal Property Regime, said Master Deed being dated May 26, 2004 and recorded on May 27, 2004, in the Beaufort County Records in Book 1962 at Page 1516, and Second Amendment to Master Deed recorded in Book 2112 at Page 2059, and Plat Book 105 at 85, and all further amendments thereto.

Also, all of the rights, privileges and common elements appertaining to the above Unit, and as set forth in the Master Deed and By-Laws of The 1188 Centre Horizontal Property Regime and all further amendments thereto.

Also, a temporary easement of ingress and egress to the aforementioned Unit T from US Highway 278 over certain property shown on the aforesaid mentioned plat as Unit R, said easement to remain in effect until Unit R is made a part of The 1188 Centre Horizontal Property Regime by virtue of an Amendment to the Master Deed.

ALSO, LESS and EXCEPT:

All that certain Unit, lying and being in Bluffton Township, Beaufort County, South Carolina and being known as **Unit R** of The 1188 Centre Horizontal

Property Regime, and being more particularly shown as described by reference to the Master Deed of Black Diamond, LLC establishing said Horizontal Property Regime, said Master Deed being dated May 26, 2004 and recorded on May 27, 2004, in the Beaufort County Records in Book 1962 at Page 1516, and Second Amendment to Master Deed recorded in Book 2112 at Page 2059, and Plat Book 105 at 85, and all further amendments thereto.

Also, all of the rights, privileges and common elements appertaining to the above Unit, and as set forth in the Master Deed and By-Laws of The 1188 Centre Horizontal Property Regime and all further amendments thereto.

ALSO, LESS and EXCEPT:

ALL that certain piece, parcel or tract of land lying and being in Bluffton Township, Beaufort County, South Carolina, containing 0.176 acre (7,669 square feet) as further described in that certain Title to Real Estate from Black Diamond, LLC to the County of Beaufort, South Carolina dated April 22, 2009 and recorded in the Beaufort County Records in Book 2850 at Page 2295 on July 27, 2009.

ALL that certain piece, parcel or tract of land lying and being in Bluffton Township, Beaufort County, South Carolina, containing 0.217 acre (9,473 square feet) as further described in that certain Title to Real Estate from Black Diamond, LLC to the County of Beaufort, South Carolina dated April 22, 2009 and recorded in the Beaufort County Records in Book 2850 at Page 2292 on July 27, 2009.

Proposed reformed legal description:

ALL that certain piece, parcel or tract of land lying and being in Bluffton Township, Beaufort County, South Carolina, containing 4.51 acres, more or less, as shown on survey for W. Barry Edwards as prepared by Coastal Surveying dated February 8, 1994, and being described by metes and bounds as follows: beginning at the eastern boundary of the intersection of U.S. Highway 278 and Burnt Church Road and proceeding thence S 67°19'20" E a distance of 947 feet to a point which marks the point of beginning; proceeding thence S 67°19'20" E a distance of 253.21 feet to a point; proceeding thence S 26°31'25" W a distance of 882.26 feet; proceeding thence ~~S 26°31'25" W~~ N 61°34'21" W a distance of 248.59 feet to a point; proceeding thence N 26°14'52" E a distance of 858.58 feet to a point which marks the point of beginning.

This being the same property described as ~~4.88 acres~~ 5.0 acres in that certain plat entitled "Division of Lot 2, Bluffton Township, according to a plat by R.D. Trogdon, Jr. as recorded in the Office of the Clerk of Court for Beaufort County, South Carolina, in Deed Book 220 at Page 1302" prepared by R.D. Trogdon, Jr., R.L.S. 2712 and recorded in the Office of the Beaufort County Clerk of Court in Book 31 at Page 181.

The property intended to be mortgaged herein is the same property conveyed to the within Mortgagor by Deed recorded in Book 1884 at Page 639, Beaufort County Records.

LESS and EXCEPT:

All that certain Unit, lying and being in Bluffton Township, Beaufort County, South Carolina and being known as Unit T of The 1188 Centre Horizontal Property Regime, and being more particularly shown as described by reference to the Master Deed of Black Diamond, LLC establishing said Horizontal Property Regime, said Master Deed being dated May 26, 2004 and recorded on May 27, 2004, in the Beaufort County Records in Book 1962 at Page 1516, and Second Amendment to Master Deed recorded in Book 2112 at Page 2059, and Plat Book 105 at 85, and all further amendments thereto.

Also, all of the rights, privileges and common elements appertaining to the above Unit, and as set forth in the Master Deed and By-Laws of The 1188 Centre Horizontal Property Regime and all further amendments thereto.

Also, a temporary easement of ingress and egress to the aforementioned Unit T from US Highway 278 over certain property shown on the aforesaid mentioned plat as Unit R, said easement to remain in effect until Unit R is made a part of The 1188 Centre Horizontal Property Regime by virtue of an Amendment to the Master Deed.

ALSO, LESS and EXCEPT:

All that certain Unit, lying and being in Bluffton Township, Beaufort County, South Carolina and being known as Unit R of The 1188 Centre Horizontal Property Regime, and being more particularly shown as described by reference to the Master Deed of Black Diamond, LLC establishing said Horizontal Property Regime, said Master Deed being dated May 26, 2004 and recorded on May 27, 2004, in the Beaufort County Records in Book 1962 at Page 1516, and Second Amendment to Master Deed recorded in Book 2112 at Page 2059, and Plat Book 105 at 85, and all further amendments thereto.

Also, all of the rights, privileges and common elements appertaining to the above Unit, and as set forth in the Master Deed and By-Laws of The 1188 Centre Horizontal Property Regime and all further amendments thereto.

ALSO, LESS and EXCEPT:

ALL that certain piece, parcel or tract of land lying and being in Bluffton Township, Beaufort County, South Carolina, containing 0.176 acre (7,669 square feet) as further described in that certain Title to Real Estate from Black Diamond, LLC to the County of Beaufort, South Carolina dated April 22, 2009 and recorded in the Beaufort County Records in Book 2850 at Page 2295 on July 27, 2009.

ALL that certain piece, parcel or tract of land lying and being in Bluffton Township, Beaufort County, South Carolina, containing 0.217 acre (9,473 square feet) as further described in that certain Title to Real Estate from Black Diamond, LLC to the County of Beaufort, South Carolina dated April 22, 2009 and recorded in the Beaufort County Records in Book 2850 at Page 2292 on July 27, 2009.

EXHIBIT "L"

1. The following information was obtained from the records of the
2. Department of the Interior, Bureau of Land Management, regarding the
3. land owned by the United States in the State of California, and
4. the amount of land owned by the United States in the State of California,
5. and the amount of land owned by the United States in the State of California,
6. and the amount of land owned by the United States in the State of California,<
7. and the amount of land owned by the United States in the State of California,<
8. and the amount of land owned by the United States in the State of California,<
9. and the amount of land owned by the United States in the State of California,<
10. and the amount of land owned by the United States in the State of California,

11
12
13

5-24
TO
McNair
929

2677 p 668

BEAUFORT COUNTY SC - ROD
BK 02877 PGS 088-0872
FILE NUM 2008005044
01/30/2008 11:44:35 AM
REC'D BY S SMITH RCPT# 528405
ASSIGNMENT RECORDING FEES 10.00

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

THIS ASSIGNMENT OF LEASES ("Assignment") is made January 25, 2008 by BLACK DIAMOND, LLC, a South Carolina limited liability company with an address of Post Office Box 23164, Hilton Head Island, South Carolina 29925 ("Assignor") in favor of CAROLINA FIRST BANK whose address is 62 New Orleans Road, Hilton Head Island, South Carolina 29928 ("Lender").

WHEREAS, the Assignor has borrowed or shall borrow the sum of THREE MILLION FIVE HUNDRED THOUSAND AND NO/100 (\$3,500,000.00) DOLLARS ("Loan") to be secured by a Mortgage on the real property owned by Borrower described in Exhibit "A" ("Property") from Lender pursuant to a Promissory Note from Assignor to Lender of even date herewith ("Note"); and

WHEREAS, this Assignment is a condition of the Loan, and is given by the Assignor to the Lender in order to more fully secure the payment by the Assignor of the Loan to the Lender;

NOW, THEREFORE, for and in consideration of Ten and 00/100 Dollars (\$10.00), the Loan, and of other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereto agree as follows, to wit:

1. **ASSIGNMENT.** For value received and as security for the Loan, the Assignor hereby sells, transfers and assigns unto the Lender all of the right, title and interest of the Assignor in and to the rents, issues, profits, revenues, royalties, rights and benefits from and of the Property, along with all leases and the proceeds of all rentals of, upon or concerning the Property now made, whether written or verbal, or to be hereafter made, whether written or verbal, so long as the Loan remains unpaid (the "Leases"). This instrument is a present Assignment of Assignor rights in the Leases. This assignment by the Assignor in favor of the Lender is absolute and unconditional, and is effective regardless of to whom the rents, revenues and lease payments of the Property are payable. The Assignor hereby authorizes the Lender or its agents to collect all rents, revenues and lease payments, and hereby authorizes and directs any tenant to pay such rent directly to the Lender. Prior to written notice given by the Lender to the Assignor of any default in connection with the Loan, the Assignor may collect and receive all rents, revenues and lease payments as trustee for the benefit of the Lender. However, after notice of default, all rents, revenues and lease payments shall be due and payable solely to the Lender. Lender shall also have the right, power, and privilege (but shall be under no duty) to take possession of the Property and have, hold, manage, lease and operate the same on such terms and for such period with time as Lender may deem proper and Lender may apply any rents and other sums of money received hereunder to the payment in such order as Lender may determine of (a) all expenses of managing the Property, including without being limited thereto, the salaries, fees and wages of a managing agent and such other employees as Lender may deem necessary or desirable and all expenses of operating and maintaining the Property, including without being limited thereto, all taxes, assessments, charges, claims, utility costs, and premiums for insurance, and the cost of all alterations, renovations, repairs or replacements, and all expenses incident to taking and retaining possessions of the Property and/or collecting the rents and other sums of money due and payable under the leases; and (b) the Note secured by the Mortgage in such order as the Lender in its sole discretion may determine. A written demand by Lender with each lessee for the payment of rents and other sums of money that become due under the Leases shall be sufficient to warrant such lessee to make all future payment of such rents and other sums of money directly to Lender without the necessity of further consent by the Assignor. Each said Lessee shall be entitled to rely upon a written demand by Lender for such payment and shall be fully protected from any claims by Assignor for all payments made to Lender after receipt of such written demand.

2. **TERM OF ASSIGNMENT.** The term of this Assignment shall be in full force and effect until the Loan is fully paid and satisfied. Upon satisfaction and recorded cancellation of the Mortgage encumbering the Property from the Assignor to the Lender securing the Loan, then, in that event, this Assignment shall be

HILTONHEAD-0606571-v1
199999 00600

deemed cancelled, ended, and of no force or effect without further action; provided, however, that the Lender hereby agrees to file any reasonably requested Assignment cancellation documentation in order to remove the within document and its lien from the appropriate public records. It is to be understood that the Mortgage is a first priority lien on the Property.

3. WARRANTIES AND REPRESENTATIONS OF THE ASSIGNOR.

- a. The Assignor hereby warrants, represents and covenants that it owns the Property in fee simple, and that so long as this Assignment remains in force and effect, the Assignor will collect no rent or lease payments in excess of thirty (30) days in advance. No tenant shall be privileged to pay any rent in advance. Assignor further warrants, represent and covenants that Assignor is the sole owner of the entire lessor's interest in the Leases; that Assignor has not executed any prior assignment of the Leases or the rents and other sums of money that become due and payable thereunder except in connection with another loan from Lender to Assignor; that no rent reserved in the Leases or any of them has been assigned or anticipated and, except as provided in the Leases, no rent for any period subsequent to the date of this Assignment has been collected in advance of the time when the same become due under the terms of the applicable Lease; that Assignor has performed no act or executed any other instrument which might prevent Lender from enjoying and exercising any of its rights and privileges evidenced hereby; that Assignor has not executed or granted any modifications to any existing leases and all existing leases are valid and in full force and effect; that there exists no defense, counterclaim or set off for the payment of the rent under the Leases and that there are no defaults now existing under the Leases and no event has occurred which with the passage of time of the giving of notice, or both, would constitute a default.
- b. Assignor and Lender intend that the Assignment of all of the Assignor's right, title, and interest in and to the Leases shall be a present, absolute and unconditional assignment, it being specifically understood and agreed that the Lender shall not exercise any rights granted hereunder unless and until an Event of Default shall have occurred under the Loan Agreement or any of the Loan Documents executed this day between Assignor and Lender.
- c. Assignor agrees that, so long as the indebtedness evidenced by the Note or any part thereof shall remain unpaid, Borrower will make no assignment, pledge or disposition of the leases or the rents and other sums of money that become due and payable thereunder; nor will Assignor subordinate any of the Leases to any mortgage or any other encumbrance of any kind except the Mortgage or permit, consent or agree to such subordination; nor will Borrower reduce the rent or other sums of money payable under any of the Leases, modify, alter or amend the Leases or give any consent, concession or waiver or exercise any option required or permitted by the terms of any of the Leases; nor will Assignor cancel or terminate any of the Leases, accept a surrender thereof or convey or transfer or suffer or permit a conveyance or transfer of the premises demised thereby or of any interest therein so as to effect directly or indirectly, proximately or remotely, a merger of the estates and rights of, or a termination or diminution of the obligations of lessee thereunder; nor will Borrower except to the extent required by the terms of any of the Leases, consent to an assignment or sublease of the interest and estate of the lessees under any of the Leases; nor will Assignor modify or change the terms of any guaranty of any of the Leases or cancel or terminate such guaranty.
- d. Assignor covenants with Lender to observe and perform all the obligations imposed upon the lessor under the leases and not to do or permit to be done anything to impair the security thereof; to exercise any option or election contained in or relating to any of the Leases which shall, require, at Lender's request, to assign and transfer to Lender by specific assignment of Leases, in the form of this Assignment, any and all subsequent Leases upon all or any part of the Property (it being understood and agreed that no such specific assignment shall be required for such subsequent Leases to be covered by and included within this Assignment of Leases as provided herein); and to execute and deliver at the request of Lender all such further assurances and assignments in the premises covered by the Leases as Assignor shall from time to time require.
- e. Lender shall not be liable for any loss sustained by resulting from Lender's failure to let the Property or any part thereof, or from any other act or omission of Lender in managing the Property unless such loss is caused by the willful misconduct and bad faith of Lender, nor shall Lender be obligated to perform or discharge any obligation, duty or liability under said Leases or under or by reason of this instrument or the exercise of rights or remedies hereunder. Assignor shall and does hereby agree to indemnify Lender, and to hold Lender harmless from, any and all liability, loss or damage which may or might be incurred under the

Leases or under or by reason of this instrument or the exercise of rights or remedies hereunder and from any and all claims and demands whatsoever which may be asserted against Lender by reason of any alleged obligations or undertakings on its part to perform or discharge any of the terms, covenants or agreements contained in the Leases. Should Lender incur any such liability under the Leases or under or by reason of this instrument or the exercise of rights or remedies hereunder or in defense of any such claims or demands, the amount thereof, including costs, expenses and reasonable attorneys' fees, shall be secured hereby and Assignor shall reimburse Lender therefor immediately upon demand, failing which Lender may, at its option, declare all indebtedness secured hereby and by the Mortgage to be immediately due and payable. This Assignment of Leases shall not operate to place responsibility upon Lender for the control, care, management or repair of the Property, nor for the carrying out of any of the terms and conditions of the Leases; nor shall it operate to make Assignor responsible or liable for any waste committed on the Property by the tenants or by any other parties or for any dangerous or defective condition of the Property, or for any negligence in the management, upkeep, repair or control of the Property resulting in loss or injury or death to any tenant, licensee, employee or stranger.

4. **MISCELLANEOUS.**

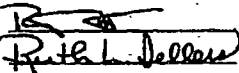
- a. The covenants and obligations herein undertaken by the parties shall be binding upon and inure to the benefit of the respective heirs, successors and assigns of the parties.
- b. This Assignment may be amended only in writing signed by the parties.
- c. This Assignment shall be interpreted and construed in accordance with the laws of the State of South Carolina.
- d. Nothing contained herein and no act done or omitted by Lender pursuant to the powers and rights granted it hereunder shall be deemed to be a waiver by Lender of its rights and remedies under the Note, the Mortgage or any other Loan Document.
- e. If the Note is paid in full and if all of the covenants, warranties, undertakings and agreements made in the Mortgage and in this Assignment of Leases are kept and performed, this Assignment of Leases shall become null and void and of no further force and effect.
- f. Borrower hereby authorizes and directs the lessees named in the Leases or any other or future lessee or occupant of the premises described therein or of the Property or any part thereon upon receipt from Lender of written notice to the effect that is then the holder of the Note and Mortgage, to pay over to Lender all rents and other sums of money arising or accruing under any of the Leases or from the premises described therein or any other portion of the Property and to continue so to do until otherwise notified by Lender.
- g. Lender may take or release other security for the payment of the Note and other indebtedness secured by the Mortgage, may release any party primarily or secondarily liable therefor and may apply any other security held by it to the satisfaction of the Note and such other indebtedness without prejudice to any of its rights under this Assignment of Leases.
- h. A determination that any provision of this Assignment of Leases is unenforceable or invalid shall not affect the enforceability or validity of any other provision. Any determination that the application of any provision of this Assignment of Leases to any person or circumstance is illegal or unenforceable shall not affect the enforceability or validity of such provision as it may apply to any other persons or circumstances.
- i. Notwithstanding the conveyance or transfer of title to any or all of the property to any lessee under any of the Leases, the lessee's leasehold estate under such lease shall not merge into the fee estate and the lessee shall remain obligated under such Lease as assigned by this Assignment of Leases.
- j. The terms, provisions, representations and warranties herein contained shall be binding upon Assignor and the successors and assigns of the Assignor and shall inure to the benefit of the Lender its successor and Assigns. All references in this Assignment of Leases to Assignor or Lender shall be deemed to include all such successors and assigns of such respective party.
- k. Assignor submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Assignor further agrees to comply with all requirements necessary to give such court in personam jurisdiction and agrees that service of process may be accomplished by, in addition to any other lawful means, certified mail, return receipt requested.
- l. **JURY TRIAL WAIVER.** ASSIGNOR HEREBY EXPRESSLY WAIVES ANY RIGHT TO TRIAL BY JURY OR ANY CLAIM OR CAUSE OF ACTION ARISING HEREUNDER OR UNDER ANY OTHER

HILTONHEAD-669473-1
100000 00600

LOAN DOCUMENT OR IN ANY WAY CONNECTED WITH OR INCIDENTAL TO THE DEALINGS OF THE PARTIES WITH RESPECT TO THIS MORTGAGE OR THE OTHER LOAN DOCUMENTS OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY, WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE. ASSIGNOR AGREES AND CONSENTS THAT ANY SUCH CLAIM OR CAUSE OF ACTION SHALL BE DECIDED BY COURT TRIAL WITHOUT A JURY, AND THAT LENDER MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENTS OF THE PARTIES TO THE WAIVER OF THEIR RESPECTIVE RIGHTS TO TRIAL BY JURY.

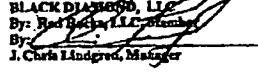
IN WITNESS WHEREOF, the Assignor has executed this Assignment of the date first above written.

WITNESSES:


J. Chris Lindgren

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

ASSIGNOR:

BLACK DIAMOND, LLC
By: 
J. Chris Lindgren, Manager

ACKNOWLEDGMENT

I, the undersigned Notary Public, hereby certify that J. Chris Lindgren, Manager of Red Rocks, LLC Member of Black Diamond, LLC, personally appeared before me this day and duly acknowledged the execution of the foregoing instrument.

Witness my hand and official seal this 25th day of January, 2008


Devincho D. Head
Notary Public for South Carolina
My Commission Expires 4-5-2011

NOTARY SEAL-4449175-4
19990812440

EXHIBIT "A"

ALL those certain pieces, parcels or lots of land, situate, lying and being in Bluffton Township, Beaufort County, South Carolina, consisting of 3.005 acres and 6.94 acres, more or less, as shown on a plat entitled "Plat Prepared for Low Country Guild" prepared by Sea Island Engineering, Inc., Benjamin Wilson, R.L.S. #5424, dated May 14, 1982, last revised May 30, 1982, and recorded in the Office of the Register of Deeds for Beaufort County in Plat Book 31 at Page 71.

EXCEPTING THEREFROM that certain piece, parcel or lot of land, situate, lying and being in Bluffton Township, Beaufort County, South Carolina consisting of 0.498 acres, more or less as shown and described on that certain plat of survey entitled "Plat of boundary survey prepared for G. Stewart Smith prepared by Benjamin Wilson, R.L.S. #5426, Sea Island Engineering, Inc., dated September 24, 1986 and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Plat Book 34 at Page 68.

For a more detailed description as to the courses and distances, metes and bounds of the above tracts, references had to the aforementioned recorded plats.

TOGETHER WITH a non-exclusive easement of ingress and egress over adjacent property owned by Peter J. Bachelor as reserved in that certain Deed from G. Stewart Smith to Peter J. Bachelor recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Deed Book 462 at Page 1257.

EXHIBIT "M"

BEAUFORT COUNTY SC - ROD
BK D2579 PGS 1079-1087
FILE NUM 2007043322
06/05/2007 02:31:10 PM
REC'D BY J COORE RCPT# 402568
RECORDING FEES 14.00

2579 p 1079

Space Above This Line For Recording Data

This document was prepared by Loan Operations - Document Preparation, Carolina First Bank, Post Office Box 1029, Greenville, South Carolina 29602

ASSIGNMENT OF LEASES AND RENTS

DATE AND PARTIES. The date of this Assignment of Leases and Rents (Assignment) is May 21, 2007. The parties and their addresses are:

ASSIGNOR:

BLACK DIAMOND, LLC
A South Carolina Limited Liability Company
5 DUNMORE COURT
HILTON HEAD ISLAND, South Carolina 29926

LENDER:

CAROLINA FIRST BANK
Organized and existing under the laws of South Carolina
104 South Main Street
Greenville, South Carolina 29601

1. MAXIMUM OBLIGATION LIMIT. The total principal amount secured by this Assignment at any one time will not exceed \$2,000,000.00. This limitation of amount does not include interest and other fees and charges validly made pursuant to this Assignment. Also, this limitation does not apply to advances made under the terms of this Assignment to protect Lender's security and to perform any of the covenants contained in this Assignment. Interest under the Note will be deferred, accrued or capitalized; however, Lender will not be required to defer, accrue or capitalize any interest except as provided in the Note.

2. SECURED DEBTS. The term "Secured Debts" includes and this Assignment will secure each of the following:

A. Specific Debts. The following debts and all extensions, renewals, refinancings, modifications and replacements. A promissory note or other agreement, No. 5120783655, dated May 21, 2007, from Assignor to Lender, with a loan amount of \$2,000,000.00 and maturing on November 15, 2007. One or more of the debts secured by this Assignment contains a future advance provision.

B. All Debts. All present and future debts from Assignor to Lender, even if this Assignment is not specifically referenced, or if the future debt is unrelated to or of a different type than this debt. If more than one person signs this Assignment, each agrees that it will secure debts incurred either individually or with others who may not sign this Assignment. Nothing in this Assignment constitutes a commitment to make additional or future loans or advances. Any such commitment must be in writing. In the event that Lender fails to provide any required notice of the right of rescission, Lender waives any subsequent security interest in the Assignor's principal dwelling that is created by this Assignment. This Assignment will not secure any debt for which a

BLACK DIAMOND, LLC
South Carolina Assignment of Leases and Rents
SC:4dpc1698100985400005451017052307Y

©1995 Bankers Systems, Inc., St. Cloud, MN **EMERSON**

Page 1

non-possessory, non-purchase money security interest is created in "household goods" in connection with a "consumer loan," as those terms are defined by federal law governing unfair and deceptive credit practices. This Assignment will not secure any debt for which a security interest is created in "margin stock" and Lender does not obtain a "statement of purpose," as defined and required by federal law governing securities.

C. Sums Advanced. All sums advanced and expenses incurred by Lender under the terms of this Assignment.

3. ASSIGNMENT OF LEASES AND RENTS. For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debts and Assignor's performance under this Assignment, Assignor assigns, grants, bargains, conveys and mortgages to Lender as additional security all the right, title and interest in the following (Property).

A. Existing or future leases, subleases, licenses, guaranties and any other written or verbal agreements for the use and occupancy of the Property, including but not limited to any extensions, renewals, modifications or replacements (Leases).

B. Rents, issues and profits, including but not limited to security deposits, minimum rents, percentage rent, additional rents, common area maintenance charges, parking charges, real estate taxes, other applicable taxes, insurance premium contributions, liquidated damages following default, cancellation premiums, "loss of rents" insurance, guest receipts, revenues, royalties, proceeds, bonuses, accounts, contract rights, general intangibles, and all rights and claims which Assignor may have regarding the Property (Rents).

C. The term Property as used in this Assignment shall include the following described real property

AS FURTHER DESCRIBED IN EXHIBIT 'A' WHICH IS ATTACHED HERETO AND MADE A PART HEREOF

The property is located in BEAUFORT County at 4.51 ACRES THE GREENERY TRACT ON HWY 278 HILTON HEAD ISLAND, HILTON HEAD ISLAND, South Carolina 29926.

In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement.

4. PAYMENTS. Assignor agrees that all payments under the Secured Debts will be paid when due and in accordance with the terms of the Secured Debts and this Assignment.

5. COLLECTION OF RENTS. Assignor may collect, receive, enjoy and use the Rents so long as Assignor is not in default. Assignor will not collect in advance any Rents due in future lease periods, unless Assignor first obtains Lender's written consent.

Upon default, Assignor will receive any Rents in trust for Lender and Assignor will not commingle the Rents with any other funds. When Lender so directs, Assignor will endorse and deliver any payments of Rents from the Property to Lender. Amounts collected will be applied at Lender's discretion to the Secured Debts, the costs of managing, protecting and preserving the Property, and other necessary expenses.

Assignor agrees that this Assignment is immediately effective between Assignor and Lender and effective as to third parties on the recording of this Assignment.

6. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after Default, to the extent permitted by law, Assignor agrees to pay all expenses of collection, enforcement or protection of Lender's rights and remedies under this Assignment or any other document relating to the Secured Debts. Assignor agrees to pay expenses for Lender to inspect and preserve the Property and for any recordation costs of releasing the Property from this Assignment. Expenses include, but are not limited to, attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of the Secured Debts. In addition, to the extent permitted by the United States Bankruptcy Code, Assignor agrees to pay the reasonable attorneys' fees incurred by Lender to protect Lender's rights and interests in connection with any bankruptcy proceedings initiated by or against Assignor.

7. ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES. As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public.

health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substance," "hazardous waste," "hazardous substance," or "regulated substance" under any Environmental Law.

Assignor represents, warrants and agrees that:

- A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.
 - B. Except as previously disclosed and acknowledged in writing to Lender, Assignor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.
 - C. Assignor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Assignor will take all necessary remedial action in accordance with Environmental Law.
 - D. Except as previously disclosed and acknowledged in writing to Lender, Assignor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Assignor or any tenant of any Environmental Law. Assignor will immediately notify Lender in writing as soon as Assignor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.
 - E. Except as previously disclosed and acknowledged in writing to Lender, Assignor and every tenant have been, are and will remain in full compliance with any applicable Environmental Law.
 - F. Except as previously disclosed and acknowledged in writing to Lender, there are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.
 - G. Assignor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.
 - H. Assignor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Assignor and any tenant are in compliance with applicable Environmental Law.
 - I. Upon Lender's request and at any time, Assignor agrees, at Assignor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.
 - J. Lender has the right, but not the obligation, to perform any of Assignor's obligations under this section at Assignor's expense.
 - K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Assignor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses, including without limitation all costs of litigation and attorneys' fees, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Assignment and in return Assignor will provide Lender with collateral of at least equal value to the Property without prejudice to any of Lender's rights under this Assignment.
 - L. Notwithstanding any of the language contained in this Assignment to the contrary, the terms of this section will survive any foreclosure or satisfaction of this Assignment regardless of any passage of title to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.
8. **CONDEMNATION.** Assignor will give Lender prompt notice of any pending or threatened action by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Assignor authorizes Lender to intervene in Assignor's name in any of the above described actions or claims. Assignor assigns to Lender the proceeds of any award or claim for damages connected with a

condemnation or other taking of all or any part of the Property. Such proceeds will be considered payment and will be applied as provided in this Assignment. This assignment of proceeds is subject to the terms of any mortgage, deed of trust, security agreement or other lien document.

9. APPOINTMENT OF A RECEIVER. On or after an Assignor's default, Assignor agrees to Lender making an application to the court for an appointment of a receiver for the benefit of Lender to take possession of the Property and the Leases, with the power to receive, collect and apply the Rents. Any Rents collected will be applied as the court authorizes to pay taxes, to provide insurance, to make repairs and to pay costs or any other expenses relating to the Property, the Leases and Rents, and any remaining sums shall be applied to the Secured Debts. Assignor agrees that this appointment of a receiver may be without giving bond, without reference to the then-existing value of the Property, and without regard to the insolvency of any person liable for any of the Secured Debts.

10. DUE ON SALE OR ENCUMBRANCE. Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of all or any part of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable.

11. TRANSFER OF AN INTEREST IN THE ASSIGNOR. If Assignor is an entity other than a natural person (such as a corporation or other organization), Lender may demand immediate payment if:

A. A beneficial interest in Assignor is sold or transferred.

B. There is a change in either the identity or number of members of a partnership or similar entity.

C. There is a change in ownership of more than 25 percent of the voting stock of a corporation or similar entity.

However, Lender may not demand payment in the above situations if it is prohibited by law as of the date of the Assignment.

12. WARRANTIES AND REPRESENTATIONS. Assignor makes to Lender the following warranties and representations which will continue as long as this Assignment is in effect:

A. **Power.** Assignor is duly organized, and validly existing and in good standing in all jurisdictions in which Assignor operates. Assignor has the power and authority to enter into this transaction and to carry on Assignor's business or activity as it is now being conducted and, as applicable, is qualified to do so in each jurisdiction in which Assignor operates.

B. **Authority.** The execution, delivery and performance of this Assignment and the obligation evidenced by this Assignment are within Assignor's powers, have been duly authorized, have received all necessary governmental approval, will not violate any provision of law, or order of court or governmental agency, and will not violate any agreement to which Assignor is a party or to which Assignor is or any of Assignor's property is subject.

C. **Name and Place of Business.** Other than previously disclosed in writing to Lender, Assignor has not changed Assignor's name or principal place of business within the last 10 years and has not used any other trade or fictitious name. Without Lender's prior written consent, Assignor does not and will not use any other name and will preserve Assignor's existing name, trade names and franchises.

D. **Title.** Assignor has good title to the Leases, Rents and Property and the right to assign, grant, bargain, convey and mortgage to Lender as additional security the Leases and Rents, and no other person has any right in the Leases and Rents.

E. **Recordation.** Assignor has recorded the Leases as required by law or as otherwise prudent for the type and use of the Property.

F. **Default.** No default exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses and landlords and tenants. Assignor, at its sole cost and expense, will keep, observe and perform, and require all other parties to the Leases to comply with the Leases and any applicable law. If Assignor or any party to the Lease defaults or fails to observe any applicable law, Assignor will promptly notify Lender.

G. **Lease Modification.** Assignor has not sublet, modified, extended, canceled, or otherwise altered the Leases, or accepted the surrender of the Property covered by the Leases (unless the Leases so require)

H. **Encumbrance.** Assignor has not assigned, compromised, subordinated or encumbered the Leases and Rents.

13. COVENANTS. Assignor agrees to the following covenants:

A. Rent Abatement and Insurance. When any Lease provides for an abatement of Rents due to fire, flood or other casualty, Assignor will insure against this risk of loss with a policy satisfactory to Lender. Assignor may choose the insurance company, subject to Lender's approval, which will not be unreasonably withheld.

B. Copies of Leases. Assignor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed.

C. Right To Rents. Immediately after the execution of this Assignment, Assignor will notify all current and future tenants and others obligated under the Leases of Lender's rights to the Leases and Rents, and will request that they immediately pay all future Rents directly to Lender when Assignor or Lender asks them to do so.

D. Accounting. When Lender requests, Assignor will provide to Lender an accounting of Rents, prepared in a form acceptable to Lender, subject to generally accepted accounting principles and certified by Assignor or Assignor's accountant to be current, accurate and complete as of the date requested by Lender.

E. Lease Modification. Assignor will not sublet, modify, extend, cancel, or otherwise alter the Leases, or accept the surrender of the Property covered by the Leases (unless the Leases so require) without Lender's written consent.

F. Encumbrance. Assignor will not assign, compromise, subordinate or encumber the Leases and Rents without Lender's prior written consent.

G. Future Leases. Assignor will not enter into any future Leases without prior written consent from Lender. Assignor will execute and deliver such further assurances and assignments as to these future Leases as Lender requires from time to time.

H. Personal Property. Assignor will not sell or remove any personal property on the Property, unless Assignor replaces this personal property with like kind for the same or better value.

I. Prosecution and Defense of Claims. Assignor will appear in and prosecute its claims or defend its title to the Leases and Rents against any claims that would impair Assignor's interest under this Assignment and, on Lender's request, Assignor will also appear in any action or proceeding on behalf of Lender. Assignor agrees to assign to Lender, as requested by Lender, any right, claims or defenses which Assignor may have against parties who supply labor or materials to improve or maintain the leaseholds subject to the Leases and/or the Property.

J. Liability and Indemnification. Lender does not assume or become liable for the Property's maintenance, depreciation, or other losses or damages when Lender acts to manage, protect or preserve the Property, except for losses or damages due to Lender's gross negligence or intentional torts. Otherwise, Assignor will indemnify Lender and hold Lender harmless for all liability, loss or damage that Lender may incur when Lender opts to exercise any of its remedies against any party obligated under the Leases.

K. Leasehold Estate. Assignor will not cause or permit the leasehold estate under the Leases to merge with Assignor's reversionary interest, and agrees that the Leases shall remain in full force and effect regardless of any merger of the Assignor's interests and of any merger of the interests of Assignor and any party obligated under the Leases.

L. Insolvency. Lender will be the creditor of each tenant and of anyone else obligated under the Leases who is subject to an assignment for the benefit of creditors, an insolvency, a dissolution or a receivership proceeding, or a bankruptcy.

14. DEFAULT. Assignor will be in default if any of the following occur:

A. Payments. Assignor fails to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against Assignor, Borrower, or any co-signer, endorser, surety or guarantor of this Assignment or any other obligations Borrower has with Lender.

C. Business Termination. Assignor merges, dissolves, reorganizes, ends its business or existence, or a partner or majority owner dies or is declared legally incompetent.

- D. Failure to Perform.** Assignor fails to perform any condition or to keep any promise or covenant in this Assignment.
- E. Other Documents.** A default occurs under the terms of any other document relating to the Secured Debt.
- F. Other Agreements.** Assignor is in default on any other debt or agreement Assignor has with Lender.
- G. Misrepresentation.** Assignor makes any verbal or written statement or provides any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.
- H. Judgment.** Assignor fails to satisfy or appeal any judgment against Assignor.
- I. Forfeiture.** The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.
- J. Name Change.** Assignor changes Assignor's name or assumes an additional name without notifying Lender before making such a change.
- K. Property Transfer.** Assignor transfers all or a substantial part of Assignor's money or property. The condition of default, as it relates to the transfer of the Property, is subject to the restrictions contained in the DUE ON SALE section.
- L. Property Value.** Lender determines in good faith that the value of the Property has declined or is impaired.
- M. Material Change.** Without first notifying Lender, there is a material change in Assignor's business, including ownership, management, and financial conditions.
- N. Insecurity.** Lender determines in good faith that a material adverse change has occurred in Assignor's financial condition from the conditions set forth in Assignor's most recent financial statement before the date of this Assignment or that the prospect for payment or performance of the Secured Debts is impaired for any reason.
- 15. REMEDIES.** After Assignor defaults, and after Lender gives any legally required notice and opportunity to cure the default, Lender may at Lender's option do any one or more of the following.
- A. Acceleration.** Lender may make all or any part of the amount owing by the terms of the Secured Debts immediately due.
- B. Additional Security.** Lender may demand additional security or additional parties to be obligated to pay the Secured Debts.
- C. Sources.** Lender may use any and all remedies Lender has under South Carolina or federal law or in any document relating to the Secured Debts.
- D. Insurance Benefits.** Lender may make a claim for any and all insurance benefits or refunds that may be available on Assignor's default.
- E. Payments Made On Assignor's Behalf.** Amounts advanced on Assignor's behalf will be immediately due and may be added to the Secured Debts.
- F. Rents.** Lender may terminate Assignor's right to collect Rents and directly collect and retain Rents in Lender's name without taking possession of the Property and to demand, collect, receive, and sue for the Rents, giving proper receipts and releases. In addition, after deducting all reasonable expenses of collection from any collected and retained Rents, Lender may apply the balance as provided for by the Secured Debts.
- G. Entry.** Lender may enter, take possession, manage and operate all or any part of the Property; make, modify, enforce or cancel or accept the surrender of any Leases; obtain or evict any tenants or licensees; increase or reduce Rents; decorate, clean and make repairs or do any other act or incur any other cost Lender deems proper to protect the Property as fully as Assignor could do. Any funds collected from the operation of the Property may be applied in such order as Lender may deem proper, including, but not limited to, payment of the following: operating expenses, management, brokerage, attorneys' and accountants' fees, the Secured Debts, and toward the maintenance of reserves for repair or replacement. Lender may take such action without regard to the adequacy of the security, with or without any action or proceeding, through any person or agent, or receiver to be appointed by a court, and irrespective of Assignor's possession.
- The collection and application of the Rents or the entry upon and taking possession of the Property as set out in this section shall not cure or waive any notice of default under the Secured Debts, this Assignment, or invalidate any act pursuant to such notice. The enforcement of such remedy by Lender, once exercised, shall continue for so long as Lender shall elect, notwithstanding that such collection and application of Rents may have cured the original default.
- H. Waiver.** Except as otherwise required by law, by choosing any one or more of these remedies Lender does not give up any other remedy. Lender does not waive a default if Lender chooses not to use a remedy. BA

electing not to use any remedy, Lender does not waive Lender's right to later consider the event a default and to use any remedies if the default continues or occurs again:

16. TERM. This Assignment will remain in full force and effect until the Secured Debts are paid or otherwise discharged and Lender is no longer obligated to advance funds under any loan or credit agreement which is a part of the Secured Debts. If any or all payments of the Secured Debts are subsequently invalidated, declared void or voidable, or set aside and are required to be repaid to a trustee, custodian, receiver or any other party under any bankruptcy act or other state or federal law, then the Secured Debts will be revived and will continue in full force and effect as if this payment had not been made.

17. CO-SIGNERS. If Assignor signs this Assignment but is not otherwise obligated to pay the Secured Debts, Assignor does so only to assign Assignor's interest in the Property to secure payment of the Secured Debts and Assignor does not agree by signing this Assignment to be personally liable on the Secured Debts. If this Assignment secures a guaranty between Lender and Assignor, Assignor agrees to waive any rights that may prevent Lender from bringing any action or claim against Assignor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws.

18. WAIVERS. Except to the extent prohibited by law, Assignor waives all homestead exemption rights relating to the Property.

19. OTHER TERMS. The following are applicable to this Assignment:

A. Additional Terms. This Agreement (along with all deposit accounts, mortgages, security agreements, pledge agreements and any and all other security instruments and items of collateral that I have at any time in the past given to you or that I may at any time in the future give to you) shall secure any and all of the obligations that I currently owe you or that I may at any time in the future owe you.

20. APPLICABLE LAW. This Assignment is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

21. JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS. Each Assignor's obligations under this Assignment are independent of the obligations of any other Assignor. Lender may sue each Assignor individually or together with any other Assignor. Lender may release any part of the Property and Assignor will still be obligated under this Assignment for the remaining Property. If this Assignment secures a guaranty between Lender and Assignor, Assignor agrees to waive any rights that may prevent Lender from bringing any action or claim against Assignor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or one-action laws. Assignor agrees that Lender and any party to this Assignment may extend, modify or make any change in the terms of this Assignment or any evidence of debt without Assignor's consent. Such a change will not release Assignor from the terms of this Assignment. Lender may assign all or part of Lender's rights under this Assignment without Assignor's consent. If Lender assigns this Assignment, all of Assignor's covenants, agreements, representations and warranties contained in this Assignment will benefit Lender's successors and assigns. The duties of this Assignment will bind the successors and assigns of Assignor.

22. AMENDMENT, INTEGRATION AND SEVERABILITY. This Assignment may not be amended or modified by oral agreement. No amendment or modification of this Assignment is effective unless made in writing and executed by Assignor and Lender. This Assignment and any other documents relating to the Secured Debts are the complete and final expression of the agreement. If any provision of this Assignment is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

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

24. NOTICE, FINANCIAL REPORTS, ADDITIONAL DOCUMENTS AND RECORDING TAXES. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Assignor will be deemed to be notice to all Assignors. Assignor will inform Lender in writing of any change in Assignor's name, address or other application information. Assignor will provide Lender any financial statements or information Lender requests. All financial statements and information Assignor gives Lender will be correct and complete. Assignor agrees to pay all expenses, charges and taxes in connection with the preparation and recording of this Assignment. Assignor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Assignor's obligations under this

Assignment and to confirm Lender's lien status on any Property, and Assignor agrees to pay all expenses, charges and taxes in connection with the preparation and recording thereof. Time is of the essence.

SIGNATURES. By signing under seal, Assignor agrees to the terms and covenants contained in this Assignment. Assignor also acknowledges receipt of a copy of this Assignment.

ASSIGNOR:

BLACK DIAMOND, LLC

By RED ROCKS, LLC

By J. Christopher Lindgren (Seal)
J. CHRISTOPHER LINDGREN, MANAGER

(Witness)

(Witness)

ACKNOWLEDGMENT.

(Business or Entity)

State of South Carolina County of Beaufort ss.

I, MARJORIE A. LIPPMAN a notary public for South Carolina hereby certify that J. CHRISTOPHER LINDGREN, MANAGER of RED ROCKS, LLC a Limited Liability Company, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 31st day of May, 2007.

Marjorie A. Lippman
Signature of Notary Public

My commission expires: COMMISSION EXPIRES JULY 27, 2010

EXHIBIT "A"

ALL that certain piece, parcel or tract of land lying and being in Bluffton Township, Beaufort County, South Carolina, containing 4.51 acres, more or less, as shown on survey for W. Barry Edwards as prepared by Coastal Surveying dated February 8, 1994, and being described by metes and bounds as follows: beginning at the eastern boundary of the intersection of U.S. Highway 278 and Burnt Church Road and proceeding thence S 67°19'20" E a distance of 947 feet to a point which marks the point of beginning; proceeding thence S 67°19'20" E a distance of 253.21 feet to a point; proceeding thence S 26°31'25" W a distance of 882.26 feet; proceeding thence S 26°31'25" W a distance of 248.59 feet to a point; proceeding thence N 26°14'52" E a distance of 858.58 feet to a point which marks the point of beginning.

The property intended to be mortgaged herein is the same property conveyed to the within Mortgagor by Deed recorded in Book 1884 at Page 677, Beaufort County Records.

This Assignment was prepared in the Law Offices of Bethea, Jordan & Griffin, P.A., Post Office Drawer 3, Hilton Head Island, South Carolina 29938, by Cary S. Griffin.

EXHIBIT "N"

156-PP-PLA 15703-010

BEAUFORT COUNTY SC - ROD
BK 00003 PGS 0223-0224
FILE NUM 2003007596
12/12/2003 11:59:23 AM
REC'D BY C SEABROOK RCPT# 205640
RECORDING FEES 8.00

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]	
MAHESH THAKAR -	- BR#390
B. SEND ACKNOWLEDGMENT TO: (Name and Address)	
Carolina First Bank PO Box 7317	

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME			
BLACK DIAMOND LLC			
OR	1b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME SUFFIX
1c. MAILING ADDRESS		CITY	STATE POSTAL CODE COUNTRY
117		HILTON HEAD ISLAND	SC 7317 USA
1d. TAX ID #: SSN OR EIN	ADD'L INFO RE ORGANIZATION DEBTOR	1e. TYPE OF ORGANIZATION Limited Liability Company	1f. JURISDICTION OF ORGANIZATION South Carolina
57-1110469			1g. ORGANIZATIONAL ID #, if any ☒ NONE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME			
OR	2b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME SUFFIX
2c. MAILING ADDRESS		CITY	STATE POSTAL CODE COUNTRY
2d. TAX ID #: SSN OR EIN	ADD'L INFO RE ORGANIZATION DEBTOR	2e. TYPE OF ORGANIZATION	2f. JURISDICTION OF ORGANIZATION
			2g. ORGANIZATIONAL ID #, if any ☐ NONE

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) - insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME			
CAROLINA FIRST BANK			
OR	3b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME SUFFIX
3c. MAILING ADDRESS		CITY	STATE POSTAL CODE COUNTRY
7317		HILTON HEAD ISLAND	SC 7317 USA

4. This FINANCING STATEMENT covers the following collateral: ASSIGNMENT OF LEASES, INCOME, SALES CONTRACTS, DEVELOPMENT AND BUILDING CONTRACTS, PERMITS

5. ALTERNATIVE DESIGNATION (if applicable): ☐ LESSEE/LESSOR ☐ CONSIGNEE/CONSIGNOR ☐ BAILEE/BAILOR ☐ SELLER/BUYER ☐ AG. LIEN ☐ NON-UCC FILING			
6. This FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS. Attach Addendum		7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) [optional] ☐ All Debtors ☐ Debtor 1 ☐ Debtor 2	
8. OPTIONAL FILER REFERENCE DATA			

EXHIBIT 'A'

ALL that certain piece, parcel or tract of land lying and being in Bluffton Township, Beaufort County, South Carolina, containing 4.51 acres, more or less, as shown on survey for W. Barry Edwards as prepared by Coastal Surveying dated February 8, 1994, and being described by metes and bounds as follows: beginning at the eastern boundary of the intersection of U.S. Highway 278 and Burnt Church Road and proceeding thence S 67°19'20" E a distance of 947 feet to a point which marks the point of beginning; proceeding thence S 67°19'20" E a distance of 253.21 feet to a point; proceeding thence S 26°31'25" W a distance of 882.26 feet; proceeding thence S 26°31'25" W a distance of 248.59 feet to a point; proceeding thence N 26°14'52" E a distance of 858.58 feet to a point which marks the point of beginning.

This being the same property described as 4.88 acres in that certain plat entitled "Division of Lot 2, Bluffton Township, according to a plat by R.D. Trogon, Jr. as recorded in the Office of the Clerk of Court for Beaufort County, South Carolina, in Deed Book 220 at Page 1302" prepared by R.D. Trogon, Jr., R.L.S. 2712 and recorded in the Office of the Beaufort County Clerk of Court in Book 31 at Page 181.

1/8/08
Carolina 1st
S&P

BEAUFORT COUNTY SC - ROD
BK 00008 PG 1827
FILE NUM 2008068078
10/23/2008 11:23:01 AM
REC'D BY R WEBB RCPT# 566183
RECORDING FEES 8.00

UCC FINANCING STATEMENT AMENDMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER (optional) LAUREN M BERTSCHE 864-255-8903	
B. SEND ACKNOWLEDGMENT TO: (Name and Address) CAROLINA FIRST BANK ATTN: LAUREN BERTSCHE, SC 971-63 PO BOX 1029 GREENVILLE, SC 29602	

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1a. INITIAL FINANCING STATEMENT FILE # 2003097596 FILED 12/12/03 BK 00003 PG 0223 BEAUFORT CO		1b. This FINANCING STATEMENT AMENDMENT is to be filed (for record) (or recorded) in the ☒ REAL ESTATE RECORDS		
2. TERMINATION: Effectiveness of the Financing Statement identified above is terminated with respect to security interest(s) of the Secured Party authorizing this Termination Statement.				
3. ☒ CONTINUATION: Effectiveness of the Financing Statement identified above with respect to security interest(s) of the Secured Party authorizing this Continuation Statement is continued for the additional period provided by applicable law.				
4. ☐ ASSIGNMENT (out or partial): Give name of assignee in item 7a or 7b and address of assignee in item 7c; and also give name of assignor in item 8.				
5. AMENDMENT (PARTY INFORMATION): This Amendment affects ☐ Debtor or ☐ Secured Party of record. Check only one of these two boxes. Also check one of the following three boxes and provide appropriate information in items 6 and/or 7. ☐ CHANGE name and/or address: Please refer to the detailed instructions in regards to changing the name and address of a party. ☐ DELETE name: Give record name to be deleted in item 6a or 6b. ☐ ADD name: Complete item 7a or 7b, and also item 7c; also complete item 7d-7g (if applicable).				
6. CURRENT RECORD INFORMATION				
6a. ORGANIZATION'S NAME OR BLACK DIAMOND LLC				
6b. INDIVIDUAL'S LAST NAME		FIRST NAME	MIDDLE NAME	SUFFIX
7. CHANGED (NEW) OR ADDED INFORMATION:				
7a. ORGANIZATION'S NAME				
7b. INDIVIDUAL'S LAST NAME		FIRST NAME	MIDDLE NAME	SUFFIX
7c. MAILING ADDRESS 117 WILLIAM HILTON PARKWAY		CITY HILTON HEAD ISLAND	STATE SC	POSTAL CODE 29926
7d. SEE INSTRUCTIONS ADDL INFO RE ORGANIZATION DEBTOR LLC		7f. JURISDICTION OF ORGANIZATION SOUTH CAROLINA		7g. ORGANIZATIONAL ID #: if any ☒ NONE
8. AMENDMENT (COLLATERAL CHANGE): check only one box. Describe collateral: ☐ deleted or ☐ added, or give entire ☐ restated collateral description, or describe collateral ☐ assigned.				

CONTINUE THE SAME AS ORIGINAL UCC-1

9. NAME OF SECURED PARTY OF RECORD AUTHORIZING THIS AMENDMENT (name of assignor, if this is an Assignment; if this is an Amendment authorized by a Debtor which adds collateral or adds the authorizing Debtor, or if this is a Termination authorized by a Debtor, check here ☐ and enter name of DEBTOR authorizing this Amendment.				
9a. ORGANIZATION'S NAME OR CAROLINA FIRST BANK				
9b. INDIVIDUAL'S LAST NAME		FIRST NAME	MIDDLE NAME	SUFFIX
10. OPTIONAL FILER REFERENCE DATA 5121066531/5120783655/5990783481/947MLD 10/17/08				

FILING OFFICE COPY — UCC FINANCING STATEMENT AMENDMENT (FORM UCC3) (REV. 05/22/02)

EXHIBIT "O"

McNair - PP-PUL

115703-00904-03

(Black Diamond)

3
18 AW
BIC
455

Prepared by:

McNair Law Firm, P.A.
Shelter Cove Executive Park, Suite 400
23-B Shelter Cove Lane
Post Office Drawer 3
Hilton Head Island, SC 29938
(843) 785-2171

BEAUFORT COUNTY SC - ROD
BK 02151 PGS 0258-0260
FILE NUM 2005038222
05/18/2005 02:06:57 PM
REC'D BY R WEBB RCPT# 331648
RECORDING FEES 8.00

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

PARTIAL RELEASE OF MORTGAGE & UCC
(Ref: Bk 1884, Page 642 & UCC Book 3, Page 223)

WHEREAS, on or about the 9th day of December, 2003, Black Diamond, LLC (Mortgagor) caused to be executed and delivered a certain Note in the original principal amount of \$1,460,000.00 in favor of Carolina First Bank (hereinafter "Lender"), which said Note is secured by a Mortgage recorded on December 12, 2003, in the Office of the Register of Deeds for Beaufort County, South Carolina, in Book 1884 at Page 642, further secured by a UCC-1 Financing Statement recorded on December 12, 2003, in UCC Book 3 at Page 223.

KNOW ALL MEN BY THESE PRESENTS, that Lender for valuable consideration in hand paid, the receipt and sufficiency whereof is hereby acknowledged, does hereby release and fully discharge from the lien of the above described Mortgage the property described in Exhibit "A" attached hereto and incorporated herein.

This Partial Release of Mortgage shall not in any way affect or impair the right of Lender to retain under said Mortgage as security for the sum remaining due thereon, or any sum subsequently advanced, all the premises therein conveyed and not hereby released.

IN WITNESS WHEREOF, the undersigned has caused this Partial Release of Mortgage to be executed and effective this 16th day of May, 2005.

WITNESSES:

CAROLINA FIRST BANK (SEAL)

Mahesh Thakur
(Witness #1)

Margaret A. Lippmann
(Witness #2/Notary)

BY: Bryan Lawson
Name & Title Bryan Lawson scf
its authorized officer

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

ACKNOWLEDGEMENT

I, MARTORIE A. LIPPMANN, do hereby certify that
W. RUEZY LARSON, an authorized officer of Carolina First Bank, on behalf
of the Bank, personally appeared before me this day and acknowledged the due execution of the
foregoing instrument.

Witness my hand and official seal this 16th day of May, 2005.

Mayriel Lippmann (SEAL)
Notary Public for South Carolina
My Commission Expires: MY COMMISSION EXPIRES JULY 23, 2009

EXHIBIT "A"

PARCEL ONE:

ALL that certain Unit, lying and being in Bluffton Township, Beaufort County, South Carolina and being known as Unit T of The 1188 Centre Horizontal Property Regime, and being more particularly shown and described by reference to the Master Deed of Black Diamond, LLC establishing said Horizontal Property Regime, said Master Deed being dated May 26, 2004, and recorded on May 27, 2004, in the Beaufort County Records in Book 1962 at Page 1627, et seq., and Plat Book 98 at Page 43, and First Amendment to Master Deed recorded in Book 2074 at Page 1516, and Second Amendment to Master Deed recorded in Book 2112 at Page 2059, and Plat Book 105 at Page 85, and all further amendments thereto.

ALSO, all of the rights, privileges and common elements appertaining to the above described Unit, as set forth in the Master Deed and By-Laws of The 1188 Centre Horizontal Property Regime and all further amendments thereto.

ALSO, a temporary easement of ingress and egress to the aforementioned Unit T from U.S. Highway 278 over certain real property shown on the aforementioned plat as Unit R, said easement to remain in effect until Unit R is made a part of The 1188 Centre Horizontal Property Regime by virtue of an Amendment to the Master Deed.

PARCEL TWO:

ALL that certain Unit, lying and being in Bluffton Township, Beaufort County, South Carolina and being known as Unit R of The 1188 Centre Horizontal Property Regime, and being more particularly shown and described by reference to the Master Deed of Black Diamond, LLC establishing said Horizontal Property Regime, said Master Deed being dated May 26, 2004, and recorded on May 27, 2004, in the Beaufort County Records in Book 1962 at Page 1627, et seq., and Plat Book 98 at Page 43, and First Amendment to Master Deed recorded in Book 2074 at Page 1516, and Second Amendment to Master Deed recorded in Book 2112 at Page 2059, and Plat Book 105 at Page 85, and Third Amendment to Master Deed recorded in Book 2112 at Page 2073, and all further amendments thereto.

ALSO, all of the rights, privileges and common elements appertaining to the above described Unit, as set forth in the Master Deed and By-Laws of The 1188 Centre Horizontal Property Regime and all further amendments thereto.

EXHIBIT "P"

All that certain Unit, lying and being in Bluffton Township, Beaufort County, South Carolina and being known as Unit T of The 1188 Centre Horizontal Property Regime, and being more particularly shown as described by reference to the Master Deed of Black Diamond, LLC establishing said Horizontal Property Regime, said Master Deed being dated May 26, 2004 and recorded on May 27, 2004, in the Beaufort County Records in Book 1962 at Page 1516, and Second Amendment to Master Deed recorded in Book 2112 at Page 2059, and Plat Book 105 at 85, and all further amendments thereto.

Also, all of the rights, privileges and common elements appertaining to the above Unit, and as set forth in the Master Deed and By-Laws of The 1188 Centre Horizontal Property Regime and all further amendments thereto.

Also, a temporary easement of ingress and egress to the aforementioned Unit T from US Highway 278 over certain property shown on the aforesaid mentioned plat as Unit R, said easement to remain in effect until Unit R is made a part of The 1188 Centre Horizontal Property Regime by virtue of an Amendment to the Master Deed.

ALSO, LESS and EXCEPT:

All that certain Unit, lying and being in Bluffton Township, Beaufort County, South Carolina and being known as Unit R of The 1188 Centre Horizontal Property Regime, and being more particularly shown as described by reference to the Master Deed of Black Diamond, LLC establishing said Horizontal Property Regime, said Master Deed being dated May 26, 2004 and recorded on May 27, 2004, in the Beaufort County Records in Book 1962 at Page 1516, and Second Amendment to Master Deed recorded in Book 2112 at Page 2059, and Plat Book 105 at 85, and all further amendments thereto.

Also, all of the rights, privileges and common elements appertaining to the above Unit, and as set forth in the Master Deed and By-Laws of The 1188 Centre Horizontal Property Regime and all further amendments thereto.

EXHIBIT "Q"

12 DB
Mankin
14901

2982 p 2246

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

MORTGAGE

THIS MORTGAGE IS MADE THIS 4th day of August, 2010, between the Mortgagor, Black Diamond, LLC (herein "Borrower") and the Mortgagee, Julie H. King, whose address is c/o Principal Developers, Inc., 117 William Hilton Parkway, Suite H, Hilton Head, South Carolina 29926 (herein "Lender").

WHEREAS, Borrower is indebted to Lender in the principal sum of \$271,450.03, which indebtedness is evidenced by Borrower's note dated effective July 30, 2010, (herein "Note"), providing for monthly installments of interest, with the balance of the indebtedness, if not sooner paid, due and payable on July 30, 2015

NOW, KNOW ALL MEN, that in consideration of the above described indebtedness and sum of money and, in order to secure Lender: (a) the repayment of the indebtedness evidenced by the Note, with interest thereon; (b) the payment of all other sums, with interest thereon, advanced in accordance herewith to protect the security of this Mortgage; and (c) the performance of the covenants and agreements of Borrower herein contained, Borrower has granted, bargained, sold, mortgaged and released and by these presents does grant, bargain, sell, mortgage and release to Lender and Lender's successors and assigns the following described property:

PARCEL 1:

ALL those certain pieces, parcels or lots of land, situate, lying and being in Bluffton Township, Beaufort County, South Carolina, consisting of 3.005 acres and 6.94 acres, more or less, as shown on a plat entitled "Plat Prepared for Low Country Guild" prepared by Sea Island Engineering, Inc., Benjamin Wilson, R.L.S. #5424, dated May 14, 1982, last revised May 30, 1982, and recorded in the Office of the Register of Deeds for Beaufort County in Plat Book 31 at Page 71.

EXCEPTING THEREFROM that certain piece, parcel or lot of land, situate, lying and being in Bluffton Township, Beaufort County, South Carolina consisting of 0.498 acres, more or less as shown and described on that certain plat of survey entitled "Plat of boundary survey prepared for G. Stewart Smith" prepared by Benjamin Wilson, R.L.S. #5426, Sea Island Engineering, Inc., dated September 24, 1986 and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Plat Book 34 at Page 68.

For a more detailed description as to the courses and distances, metes and bounds of the above tracts, references had to the aforementioned recorded plats.

TOGETHER WITH a non-exclusive easement of ingress and egress over adjacent property owned by Peter J. Bachelor as reserved in that certain Deed from G. Stewart Smith to Peter J. Bachelor recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Deed Book 462 at Page 1257.

The property intended to be mortgaged herein is the same property conveyed to the within Mortgagor by deed recorded in Book 1377, at Page 779, Beaufort County Records.

ALSO, PARCEL 2:

Also, ALL those certain pieces, parcels, or lots of land situated, lying, and being in Bluffton Township, Beaufort County, South Carolina consisting of 129,584 square feet and 71,305 square feet, respectively, more or less, and being shown and described as "Future Phase Property N/F The Greenery, Inc. Tax Parcel 600-40-42; 129,584 square feet" and "Future Phase Property 71,305 square feet" on a Plat entitled "A Plat of the 1188 Centre Horizontal Property Regime Phase 1 and 3" said Plat prepared by Ward Edwards, Inc. Said Plat

BEAUFORT COUNTY SC-ROD
BK 02982 PGS 2246-2251
DATE: 08/18/2010 12:22:53 PM
INST # 2010043153 RCPT# 625691

original dated November 6, 2003 at last revised February 14, 2005 and recorded in the Beaufort County records in Plat Book 105 at Page 85.

The property described above is a portion of the property conveyed to Black Diamond, LLC by deed of The Greenery, Inc. dated November 17, 2003, and recorded in the Beaufort County records in Book 1884 at Page 641.

The within Mortgage was prepared by the McNair Law Firm, P.A., Post Office Drawer 3, Hilton Head Island, South Carolina 29938, by Cary S. Griffin.

TO HAVE AND TO HOLD unto Lender and Lender's heirs, successors and assigns, forever, together with all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances, rents, royalties, mineral, oil and gas rights and profits, water rights, and water stock, and all fixtures now or hereafter attached to the property, all of which, including replacements and additions thereto, shall be deemed to be and remain a part of the property covered by this Mortgage; and all of the foregoing, together with said property (or the leasehold estate if this Mortgage is on a leasehold) is herein referred to as the "Property."

Borrower covenants that Borrower is lawfully seized of the estate hereby conveyed and has the right to mortgage, grant and convey the Property, that the Property is unencumbered, and that Borrower will warrant and defend generally the title to the Property against all claims and demands, subject to any declarations, easements or restrictions listed in a schedule of exceptions to coverage in any title insurance policy or certificate of title insuring Lender's interest in the Property.

GENERAL COVENANTS: Borrower and Lender covenant and agree as follows:

1. **Payment of Principal and Interest.** Borrower shall promptly pay when due the principal of and interest on the indebtedness evidenced by the Note, prepayment and late charges as provided in the Note, and the principal of and interest on any Future Advances secured by this Mortgage.

2. **Application of Payments.** Unless applicable law provides otherwise, all payments received by Lender under the Note and paragraph shall be applied by Lender first to interest payable on the Note, then to the principal of the Note.

3. **Charges; Liens.** Borrower shall pay prior to delinquency all taxes, assessments and other charges, fines and impositions attributable to the Property which may attain a priority over this Mortgage, and leasehold payments or ground rents, if any. Borrower shall promptly furnish to Lender all notices of amounts due under this paragraph, and in the event Borrower shall make payment directly, Borrower shall promptly furnish to Lender upon request receipts evidencing such payments. Except for the Senior Mortgages identified below, Borrower shall promptly discharge any lien which has priority over this Mortgage; provided, the Borrower shall not be required to discharge any such lien so long as Borrower shall agree in writing to the payment of the obligation secured by such lien in a manner acceptable to Lender, or shall in good faith contest such lien by, or defend enforcement of such lien in, legal proceedings which operate to prevent the enforcement of the lien or forfeiture of the property or any part thereof.

4. **Hazard Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, flood, hazards included within the term "extended coverage," and such other hazards as Lender may require and in such amounts and for such periods as Lender may require; provided, that Lender shall not require that the amount of such coverage exceed that amount of coverage required to pay the sums secured by this Mortgage. All premiums on insurance policies shall be paid by Borrower, when due, directly to the insurance carrier. All insurance policies and renewals thereof shall be in form acceptable to Lender and shall include a standard mortgagee clause in favor of and in form acceptable to Lender. Lender shall have the right to hold the policies and renewals thereof, and Borrower shall promptly furnish to Lender all renewal notices and all receipts of paid premiums. In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower.

Subject to the terms of the Senior Mortgages identified below, unless Lender and Borrower otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged, provided such restoration or repair is economically feasible and the security of this Mortgage is not thereby impaired. If such restoration or repair is not economically feasible or if the security of this Mortgage would be impaired, the insurance proceeds shall be applied to the sums secured by this Mortgage, with the excess, if any, paid to Borrower. If the Property is abandoned by Borrower, or if Borrower fails to respond to Lender within 30 days from the date notice is mailed by Lender to Borrower that the insurance carrier offers to settle a claim for insurance benefits, Lender is authorized to collect and apply the insurance proceeds at Lender's option either to restoration or repair of the Property or to the sums secured by this Mortgage.

Unless Lender and Borrower otherwise agree in writing, any such application of proceeds to principal shall not extend or postpone the due date of the monthly installments referred to in Paragraph 1 hereof or change the amount of such installments. If under Paragraph 10 hereof the Property is acquired by Lender, all right, title and interest of Borrower in and to any insurance policies and in and to the proceeds thereof resulting from

damage to the Property prior to the sale or acquisition shall pass to Lender to the extent of the sums secured by this Mortgage immediately prior to such sale or acquisition.

5. **Preservation and Maintenance of Property.** Borrower shall keep the Property in good repair and shall not commit waste or permit impairment or deterioration of the Property

6. **Protection of Lender's Security.** If Borrower fails to perform the covenants and agreements contained in this Mortgage, or if any action or proceeding is commenced which materially affects Lender's interest in the Property, including, but not limited to, eminent domain, insolvency, code enforcement, or arrangements or proceedings involving a bankrupt or decedent, then Lender at Lender's option, upon notice to Borrower, may make such appearances, disburse such sums and take such action as is necessary to protect Lender's interest, including, but not limited to, disbursement of reasonable attorney's fees and entry upon the Property to make repairs.

Any amounts disbursed by Lender pursuant to this Paragraph 6, with interest thereon, shall become additional indebtedness of Borrower secured by this Mortgage. Unless Borrower and Lender agree to other terms of payment, such amounts shall be payable upon notice from Lender to Borrower requesting payment thereof, and shall bear interest from the date of disbursement at the rate payable from time to time on outstanding principal under the Note unless payment of interest at such rate would be contrary to applicable law, in which event such amounts shall bear interest at the highest rate permissible under applicable law. Nothing contained in this Paragraph 6 shall require Lender to incur any expense or take any action hereunder.

7. **Inspection.** Lender may make or cause to be made reasonable entries upon and inspections of the Property, provided that Lender shall give Borrower notice prior to any such inspection specifying reasonable cause therefor related to Lender's interest in the Property.

8. **Condemnation.** Subject to the terms of the Senior Mortgages identified below, the proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of the property, or in part thereof, or for conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender.

In the event of a total taking of the Property, the proceeds shall be applied to the sums secured by this Mortgage, with the excess, if any, paid to Borrower. In the event of a partial taking of the Property, unless Borrower and Lender otherwise agree in writing, there shall be applied to the sums secured by this Mortgage such proportion of the proceeds as is equal to that proportion which the amount of the sums secured by this Mortgage immediately prior to the taking bears to the fair market value of the Property immediately prior to the date of taking, with the balance of the proceeds paid to Borrower.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the condemnor offers to make an award or settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date such notice is mailed, Lender is authorized to collect and apply the proceeds, at Lender's option, either to restoration or repair of the Property or to the sums secured by this Mortgage.

Unless Lender and Borrower otherwise agree in writing, any such application of proceeds to principal shall not extend or postpone the due date of the monthly installments referred to in Paragraph 1 hereof or change the amount of such installments.

9. **Transfer of the Property.** If all or any part of the Property or an interest therein is sold or transferred by Borrower or if possession is given to the Property by Borrower to a third party via a land contract, or agreement for deed or other similar instrument, without Lender's prior written consent, excluding: (a) the creation of a lien or encumbrance subordinate to this Mortgage, (b) a transfer by devise, descent or by operation of law upon the death of a joint tenant; or (c) the grant of any lease in the ordinary course of business, Lender may, at Lender's option, declare all sums secured by this Mortgage to be immediately due and payable.

10. **Acceleration; Remedies.** Upon Borrower's breach of any covenant or agreement of Borrower in this Mortgage, including the covenants to pay when due any sums secured by this Mortgage, Lender prior to acceleration shall mail notice to Borrower as provided in Paragraph 14 hereof specifying: (a) the breach; (b) the action required to cure such breach; (c) a date, not less than 30 days from the date the notice is mailed to Borrower, by which such breach must be cured; and (d) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the sums secured by this Mortgage, foreclosure by judicial proceeding and sale of the property. If the breach is not cured on or before the date specified in the notice, Lender at Lender's option may declare all of the sums secured by this Mortgage to be immediately due and payable without further demand and may foreclose this Mortgage by judicial proceeding. Lender shall be entitled to collect in such proceeding all expenses of foreclosure, including, but not limited to, reasonable attorneys fees, and costs of documentary evidence, abstracts and title reports, all of which shall be additional sums secured by this Mortgage.

11. **Assignment of Rents; Appointment of Receiver.** As additional security hereunder, Borrower hereby assigns to Lender the rents of the Property, provided that Borrower shall, prior to acceleration under Paragraph 10 hereof or abandonment of the Property, have the right to collect and retain such rents as they become due and payable.

Upon acceleration under Paragraph 10 hereof or abandonment of the Property, Lender shall be entitled to have a receiver appointed by a court to enter upon, take possession of and manage the Property and to collect the rents of the Property, including those past due. All rents collected by the receiver shall be applied first to

payment of the costs of management of the Property and collection of rents, including, but not limited to, receiver's fees, premiums on receiver's bonds and reasonable attorney's fees, and then to the sums secured by this Mortgage. The receiver shall be liable to account only for those rents actually received.

12. **Release.** Upon payment of all sums secured by this Mortgage, this Mortgage shall become null and void, and Lender shall release this Mortgage without charge to Borrower. Borrower shall pay all costs of recordation, if any. In addition, in the event that there is a sale of a portion of the Property, it is understood that the holder of the Senior Mortgages referenced below will likely receive the available net proceeds from such sale. Borrower shall be entitled to receive a partial release of this mortgage from Lender for no additional consideration so long as this mortgage is not in default.

13. **Senior Mortgages.** This mortgage is junior in priority to that first mortgage in favor of Carolina First Bank in the original principal amount of \$3,500,000, said mortgage dated January 25, 2008, and recorded in Mortgage Book 2677, at Page 655, as modified and/or amended from time to time, including that Mortgage Modification Agreement recorded in Book 2754, at Page 2297, and to a mortgage in favor of Carolina First Bank in the principal amount of \$2,000,000 as recorded in Book 1884, at Page 642, as modified and/or amended from time to time, including that Modification of Mortgage recorded in Book 2754, at Page 2301 (collectively, the "Senior Mortgages"). This mortgage shall be subordinate in all respects to the Senior Mortgages, and, unless approved by Carolina First Bank as holder of the Senior Mortgages, Lender shall not be entitled to enforce any rights and remedies available to Lender with respect to this mortgage until the obligations secured by the Senior Mortgages have been paid and/or performed in full and the Senior Mortgages have been satisfied.

14. **Miscellaneous Provisions.**

14.01 Any extension of the time for payment or modification of amortization of the sums secured by this Mortgage granted by Lender to Borrower or any successor in interest of Borrower shall not operate to release, in any manner, the liability of the original Borrower and Borrower's successors in interest. Lender shall not be required to commence proceedings against such successor or refuse to extend time for payment or otherwise modify amortization of the sums secured by this Mortgage by reason of any demand made by the original Borrower and Borrower's successors in interest.

14.02 Any forbearance by Lender in exercising any right or remedy hereunder, or otherwise afforded by applicable law shall not be a waiver of or preclude the exercise of any such right or remedy. The procurement of insurance or the payment of taxes or other liens or charges by Lender shall not be a waiver of Lender's right to accelerate the maturity of the indebtedness secured by this Mortgage.

14.03 All remedies provided in this Mortgage are distinct and cumulative to any other right or remedy under this Mortgage or afforded by law or equity, and may be exercised concurrently, independently or successively.

14.04 The covenants and agreements herein contained shall bind, and the rights hereunder shall inure to, the respective successors and assigns of Lender and Borrower. All covenants and agreements of Borrower shall be joint and several. The captions and headings of the paragraphs of this Mortgage are for convenience only and are not to be used to interpret or define the provisions hereof.

14.05 Except for any notice required under applicable law to be given in another manner, (a) any notice to Borrower provided for in this Mortgage shall be given by mailing such notice by certified mail addressed to Borrower at the address of Borrower as provided herein, and (b) any notice to Lender shall be given by certified mail, return receipt requested, to Lender's address stated herein or to such other address as Lender may designate by notice to Borrower as provided herein. Any notice provided for in this Mortgage shall be deemed to have been given to Borrower or Lender when given in the manner designated herein.

14.06 This Mortgage shall be governed by the laws of South Carolina. In the event that any provision or clause of this Mortgage or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Mortgage or the Note which can be given effect without the conflicting provision, and to this end the provisions of the Mortgage and the Note are declared to be severable.

14.07 Borrower shall be furnished a copy of the Note and of this Mortgage at the time of execution or after recordation hereof.

14.08 This Mortgage was prepared in the Office of McNair Law Firm, P.A., P.O. Drawer 3, Hilton Head Island, SC 29938.

IN WITNESS WHEREOF, Borrower has executed this Mortgage, effective the month, day and year first above written.

Signed, sealed and delivered in the presence of:

BLACK DIAMOND, LLC

By: RED ROCKS, LLC

By: J. Chris Lindgren
J. Chris Lindgren,

Carter B. Griffin
STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

ACKNOWLEDGMENT

I, the undersigned Notary Public, do hereby certify that Black Diamond, LLC by Red Rocks, LLC by J. Chris Lindgren personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the 4th day of August, 2010.

Cary S. Griffin (SEAL)
NOTARY PUBLIC FOR SOUTH CAROLINA

My commission expires: _____

Cary S. Griffin
Notary Public of South Carolina
My Commission Expires
December 28, 2014

JOINDER/CONSENT

The undersigned Carolina First Bank, as the holder of the Senior Mortgages referenced herein, joins in and consents to the granting of this mortgage by Borrower to Lender, and for no other reason.

WITNESSES:

[Signature]
[Signature]

CAROLINA FIRST BANK

By: *[Signature]*

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

ACKNOWLEDGMENT

I, the undersigned Notary Public, do hereby certify that Carolina First Bank by William M. Smoot Jr., its VICE PRESIDENT personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the 13th day of August, 2010.

[Signature] (SEAL)
NOTARY PUBLIC FOR SOUTH CAROLINA

My commission expires: 09/27/2012

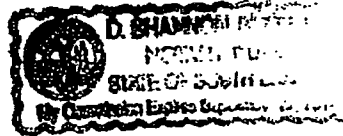


EXHIBIT "R"

WOMBLE
CARLYLE
SANDRIDGE
& RICE
A PROFESSIONAL LIMITED
LIABILITY COMPANY

550 South Main Street, Suite 400
Greenville, SC 29601

Mailing Address:
Post Office Box 10208
Greenville, SC 29603-0208
Telephone: (864) 255-5400
Fax: (864) 255-5440
www.wcsr.com

J. Matthew Trent
Direct Dial: (864) 255-5411
Direct Fax: (864) 239-5861
E-mail: mtrent@wcsr.com

August 10, 2011

VIA U.S. MAIL

Black Diamond, LLC
P.O. Box 23164
Hilton Head Island, South Carolina 29925

Mr. Christopher Lindgren
P.O. Box 21345
Hilton Head Island, South Carolina 29925

Mr. David A. Brosman
P.O. Box 22120
Hilton Head Island, South Carolina 29925

Re: **DEMAND FOR PAYMENT; Loan No. 5120783655 in the original principal amount of \$2,000,000.00 (the "Loan")**

Dear Sirs:

This firm represents Carolina First Bank with respect to the above referenced Loan. Reference is hereby made to the Promissory Note (Commercial – Single Advance) Renewal Note of Black Diamond, LLC ("Borrower") to the order of Carolina First Bank ("Lender"), dated as of July 25, 2008, in the original maximum principal amount of \$2,000,000.00 (the "Note"), that certain Forbearance Agreement, dated as of July 28, 2010 (the "Forbearance Agreement") and all loan documents evidencing, securing, guaranteeing or executed in connection with the Loan (collectively with the Note and the Forbearance Agreement, the "Loan Documents").

Reference is hereby made to the Unconditional Guaranty Agreement of David A. Brosman, dated as of July 28, 2010, in favor of Lender in connection with the Loan.

Reference is hereby made to the Unconditional Guaranty of J. Christopher Lindgren, dated as of January 25, 2008, in favor of Lender in connection with the Loan.

The Note has matured as of July 25, 2011. As of August 11, 2011, the following amounts are outstanding in connection with the Loan:

Principal:	\$1,773,311.39	
Interest:	\$15,477.68	(per diem: \$270.92257)

Total payoff through August 11, 2011: \$1,788,789.07

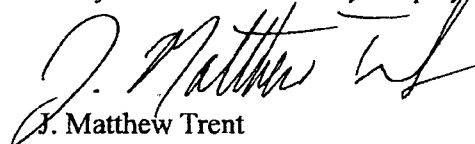
Immediate payment of the foregoing total amount is hereby demanded of Borrower and the above referenced guarantors, jointly and severally, together with accrued interest as and from August 11, 2011.

Lender has not agreed to any modification or extension of the Loan or to any forbearance with respect to the exercise of its rights and remedies under the Loan Documents, except as expressly set forth in the Forbearance Agreement. Please be advised that any prior or future discussions or communications between Lender, Borrower and the guarantors or their respective representatives or counsel regarding the above matters shall not cause a modification or extension of the Loan Documents or an agreement by Lender to forbear in exercising its rights and remedies, establish a custom or practice, or waive, limit or condition Lender's rights and remedies under the Loan Documents. Any agreement by Lender, including any agreement to forbear following an event of default, to modify the Loan Documents or waive any rights or remedies, must be in writing and signed by an authorized representative of Lender. No oral or implied agreement of any kind with respect thereto will be recognized or enforceable.

Lender expressly reserves all of its rights and remedies under the Loan Documents and any other right or remedy available to Lender at law or in equity.

Very truly yours,

WOMBLE CARLYLE SANDRIDGE & RICE
A Professional Limited Liability Company


J. Matthew Trent

cc: Mr. Michael C. Rose (e-mail)

EXHIBIT "S"

→ TD / Black Diamond file

WOMBLE
CARLYLE
SANDRIDGE
& RICE
A PROFESSIONAL LIMITED
LIABILITY COMPANY

550 South Main Street, Suite 400
Greenville, SC 29601

Mailing Address:
Post Office Box 10208
Greenville, SC 29603-0208
Telephone: (864) 255-5400
Fax: (864) 255-5440
WWW.WCST.COM

J. Matthew Trent
Direct Dial: (864) 255-5411
Direct Fax: (864) 239-5861
E-mail: mtrent@wcst.com

September 13, 2011

VIA U.S. MAIL

Black Diamond, LLC
Post Office Box 23164
Hilton Head Island, South Carolina 29925

Mr. Christopher Lindgren
P.O. Box 21345
Hilton Head Island, South Carolina 29925

Mr. David A. Brosman
P.O. Box 22120
Hilton Head Island, South Carolina 29925

Re: DEMAND FOR PAYMENT; NOTICE OF DEFAULT; Original Loan No.
5121066531/Current Loan No. 2827475-9001 in the original principal amount of
\$3,500,000.00 (the "x9001 Loan")

Dear Sirs:

This firm represents TD Bank, N.A., successor by merger to Carolina First Bank ("Lender"), with respect to the above referenced x9001 Loan. Reference is hereby made to the Promissory Note of Black Diamond, LLC ("Borrower") to the order of Lender, dated as of January 25, 2008, in the original maximum principal amount of \$3,500,000.00 (the "Note"), as modified by that certain Forbearance Agreement, dated as of July 28, 2010 (the "Forbearance Agreement"), and all loan documents evidencing, securing, guaranteeing or executed in connection with the x9001 Loan (collectively with the Note and the Forbearance Agreement, the "x9001 Loan Documents").

Reference is hereby made to the Unconditional Guaranty Agreement of David A. Brosman, dated as of July 28, 2010, in favor of Lender in connection with the x9001 Loan.

Reference is hereby made to the Unconditional Guaranty of J. Christopher Lindgren, dated as of January 25, 2008, in favor of Lender in connection with the x9001 Loan.

The x9001 Loan is cross-defaulted with loan no. 2827475-9002 (original loan no. 5120783655) in the original principal amount of \$2,000,000.00 from Lender to Borrower (the "x9002 Loan"). The x9002 Loan matured as of July 25, 2011 and demand for payment thereof was made as of August 11, 2011. As of the date hereof, Borrower has failed to repay the x9002 Loan to Lender. The failure to pay the x9002 Loan within five (5) days of the date of demand for payment constitutes an event of default under the x9001 Loan.

As of the date hereof, the following amounts are due and payable in connection with the x9001 Loan:

Principal:	\$2,984,477.74	
Interest:	\$26,064.11	(per diem: \$455.96187)
Late Charges:	\$1,124.98	
Fees:	\$6,907.48	

Total payoff through September 13, 2011: \$3,018,574.31

Immediate payment of the foregoing total amount is hereby demanded of Borrower and the above referenced guarantors, jointly and severally, together with accrued interest as and from the date hereof.

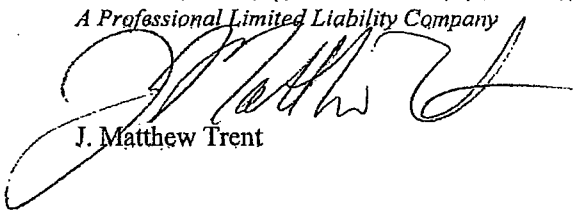
Please be advised that any prior or future discussions or communications between Lender, Borrower and the guarantors or their respective representatives or counsel regarding the above matters shall not cause a modification or extension of the x9001 Loan Documents or an agreement by Lender to forbear in exercising its rights and remedies, establish a custom or practice, or waive, limit or condition Lender's rights and remedies under the x9001 Loan Documents. Any agreement by Lender, including any agreement to forbear following an event of default, to modify the x9001 Loan Documents or waive any rights or remedies, must be in writing and signed by an authorized representative of Lender. No oral or implied agreement of any kind with respect thereto will be recognized or enforceable.

Lender expressly reserves all of its rights and remedies under the x9001 Loan Documents and any other right or remedy available to Lender at law or in equity.

Very truly yours,

WOMBLE CARLYLE SANDRIDGE & RICE

A Professional Limited Liability Company



J. Matthew Trent

cc: Mr. Michael C. Rose (via email)

EXHIBT "T"



THE UNITED STATES OF AMERICA
DISTRICT COURT OF THE DISTRICT OF COLUMBIA

IN RE: [illegible]
[illegible]

[illegible]
[illegible]

Page 42

B56-PP-PLWR

#15703-010

3
B56
3856
360

BEAUFORT COUNTY SC - ROD
BK 01884 PGS 0630-0641
FILE NUM 2003097504
12/12/2003 11:50:23 AM
REC'D BY C SEABROOK RCPT# 205840
RECORDING FEES 10.00
County Tax 1,595.00
State Tax 3,770.00

Tax Map #: R600-040-000-0042-0000

RECORDED
2004 Jan -13 04:46 PM

Shawn Q. Bunn
BEAUFORT COUNTY AUDITOR

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

**TITLE TO REAL ESTATE
DEED OF GENERAL WARRANTY**

KNOW ALL MEN BY THESE PRESENTS, THAT **THE GREENERY, INC., a South Carolina corporation** ("Grantor"), in the State aforesaid for and in consideration of the sum of One Million Four Hundred Fifty Thousand (\$1,450,000.00) Dollars, to it in hand paid at and before the sealing of these presents by **BLACK DIAMOND, L.L.C.**, of Post Office Box 23164, Hilton Head Island, SC 29925 ("Grantee") the receipt whereof is hereby acknowledged, has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release unto **BLACK DIAMOND, L.L.C.**, its Successors and Assigns forever, the following described property, to wit:

ALL that certain piece, parcel or tract of land lying and being in Bluffton Township, Beaufort County, South Carolina, containing 4.51 acres more or less, as shown on survey for W. Berry Edwards as prepared by Coastal Surveying dated February 8, 1994, and being described by metes and bounds as follows: Beginning at the eastern boundary of the intersection of U.S. Highway 278 and Burnt Church Road and proceeding thence South 67°19'20" East a distance of 947 feet to a point which marks the point of beginning; proceeding thence South 67°19'20" East a distance of 253.21 feet to a point; proceeding thence South 26°31'25" West a distance of 882.26 feet; proceeding thence South 26°31'25" West a distance of 248.59 feet to a point; proceeding thence North 26°14'52" East a distance of 858.58 feet to a point which marks the point of beginning.

THIS being the same property described as 4.88 acres in that certain plat entitled "Division of Lot 2, Bluffton Township, according to a plat by R.D. Trogdon, Jr. as recorded in the Office of the Clerk of Court for Beaufort County, South Carolina, in Deed Book 220 at Page 1302" prepared by R.D. Trogdon, Jr., R.L.S. 2712 and recorded in the Office of the Beaufort county Clerk of Court in Book 31 at Page 181.

ADD DMP Record 1/12/2004 11:18:11 AM
BEAUFORT COUNTY TAX MAP REFERENCE
Dist Map SMap Parcel Block Week
R600 040 000 0042 0000 00

THIS being a portion of the property conveyed from Aileen C. Lau n/k/a Aileen C. Dickinson to The Greenery, Inc. by Deed dated February 14, 1994 and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina on February 21, 1994 in Book 685 at Page 2526.

THIS further being the same property conveyed to The Greenery, Inc., a South Carolina corporation, by Deed from The Greenery, Inc., a North Carolina corporation, dated March 7, 2002 and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Book 1553 at page 1968 on March 12, 2002.

TMS #: R600-040-000-0042-0000

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in any wise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto **BLACK DIAMOND, L.L.C.**, its Successors and Assigns forever.

AND Grantor does hereby bind itself, its Successors, Assigns, Executors and Administrators, to warrant and forever defend, all and singular, the said Premises unto Grantee, its Successors and Assigns, against Grantor and Grantor's Heirs, and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

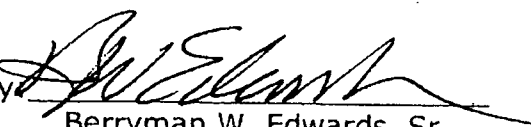
Whenever the context so requires herein to the neuter gender shall include the masculine and/or feminine gender, and the singular number shall include the plural.

WITNESS Grantor's Hand and Seal this 17th day of November, 2003.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

THE GREENERY, INC.,
A South Carolina corporation


Witness

By 
Berryman W. Edwards, Sr.


Notary

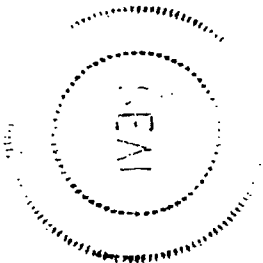
STATE OF SOUTH CAROLINA)

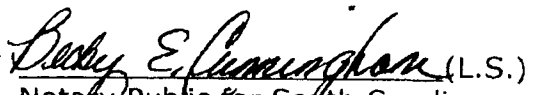
COUNTY OF BEAUFORT)

ACKNOWLEDGMENT

I, the undersigned Notary Public for the State of South Carolina, do hereby certify that The Greenery, Inc., a South Carolina corporation, by Berryman W. Edwards, its Officer, personally appeared before me this day who acknowledged the due execution of the foregoing instrument and represented that (s)he, had full authority to so act.

Witness my hand and official seal on the 17th day of November, 2003.



 (L.S.)
Notary Public for South Carolina
My commission expires: 12-31-09

Prepared without benefit of title examination

This Deed was prepared by the Law Offices of
William M. Bowen, P.A.
P.O. Drawer 6128
Hilton Head Island, South Carolina 29938
843 842 5000

EXHIBIT "U"

31 p 181

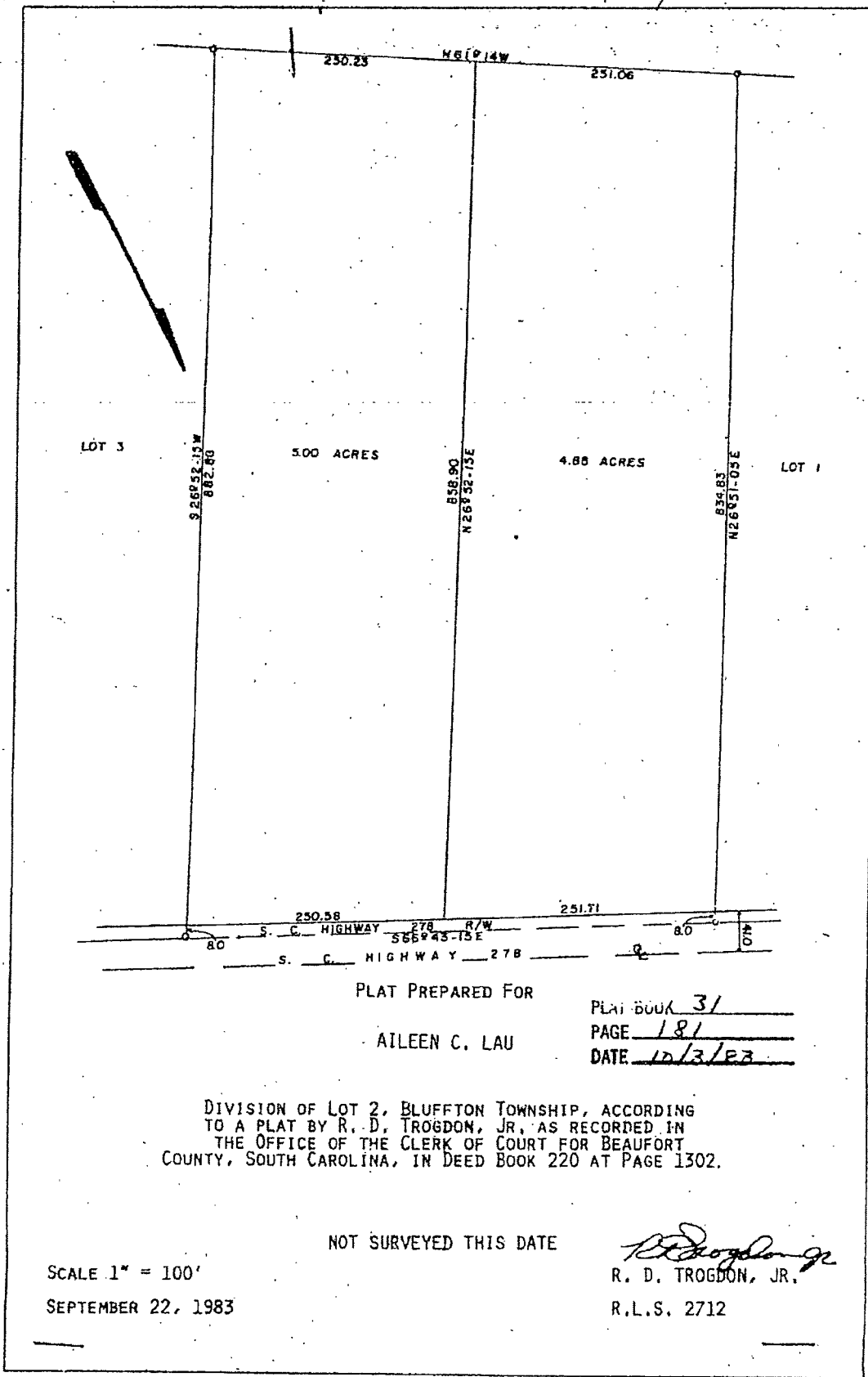


EXHIBIT 2

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CIVIL CASE NO.: 2012-CP-07-0944

TD BANK, N.A., SUCCESSOR BY
MERGER TO CAROLINA FIRST BANK,

**ANSWER AND COUNTERCLAIM
OF BLACK DIAMOND, LLC AND
J. CHRISTOPHER LINDGREN**

Plaintiff,

(Jury Trial Demanded)

vs.

BLACK DIAMOND, LLC, J.
CHRISTOPHER LINDGREN, DAVID A.
BROSMAN, JULIE H. KING, AND THE
GREENERY, INC.,

Defendants.

Black Diamond, LLC and J. Christopher Lindgren answering the complaint of the Plaintiff herein allege and show unto this Honorable Court as follows:

1. They deny every allegation of the Complaint not expressly admitted herein.
2. The allegations of Paragraph 1 set forth conclusions of law to which they make no response except to admit that the subject property is commercial in nature.
3. They lack knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2, therefore, deny the same and demand proof thereof.
4. They admit the allegations of Paragraphs 3, 4, 5 and 6.
5. They admit, upon information and belief, the allegations of Paragraph 7.
6. The allegations of Paragraph 8 set forth conclusions of law to which they make no response except to admit that the subject property is located in Beaufort County.
7. Answering the allegations of Paragraphs 9 through 13, they admit only that two loans

were made and modified, demand production of and crave reference to the original documents concerning said loans, deny any allegations of these paragraphs inconsistent therewith, and deny all other allegations of these paragraphs.

8. Answering the allegations of Paragraphs 14 through 17, they admit only that various guaranty forms were executed, demand production of and crave reference to the original documents concerning same, deny any allegations of these paragraphs inconsistent therewith, and deny all other allegations of these paragraphs.

9. They deny the allegations of Paragraph 18.

10. Answering the allegations of Paragraphs 19 through 22, they admit only that mortgages were given, demand production of and crave reference to the original documents concerning same, deny any allegations of these paragraphs inconsistent therewith, and deny all other allegations of these paragraphs.

11. Answering the allegations of Paragraphs 23 through 26, they admit only that assignments were given, demand production of and crave reference to the original documents concerning same, deny any allegations of these paragraphs inconsistent therewith, and deny all other allegations of these paragraphs.

12. They admit the allegations of Paragraph 27, 28, and 29.

13. Answering the allegations of Paragraphs 30 through 34, they admit only that Plaintiff issued demands for payment and that payment has not been made as demanded, crave reference to the original documents concerning same, deny any allegations of these paragraphs inconsistent therewith, and deny all other allegations of these paragraphs.

AS TO THE FIRST CAUSE OF ACTION

14. Answering the allegations of Paragraph 35 they repeat and incorporate by reference their preceding responses.

15. They deny the allegations of Paragraphs 36, 37, and 38.

AS TO THE SECOND CAUSE OF ACTION

16. Answering the allegations of Paragraph 39 they repeat and incorporate by reference their preceding responses.

17. They deny the allegations of Paragraphs 40, 41, 42, and 43.

AS TO THE THIRD CAUSE OF ACTION

18. Answering the allegations of Paragraph 44 they repeat and incorporate by reference their preceding responses.

19. They lack knowledge or information sufficient to form a belief as to the truth of the factual allegations of Paragraphs 45 through 52, therefore deny the same, and deny that Plaintiff is entitled to the relief sought.

FOR A SECOND DEFENSE

20. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior and subsequent allegations and further allege upon information and belief that Plaintiff has failed to join indispensable parties and/or all real parties in interest.

FOR A THIRD DEFENSE

21. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior and subsequent allegations and further allege upon information and belief that Plaintiff is not the true holder and owner of the subject notes and mortgages.

FOR A FOURTH DEFENSE

22. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior and subsequent allegations and further allege upon information and belief that Plaintiff has failed to meet conditions precedent to maintaining this action.

FOR A FIFTH DEFENSE

23. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior and subsequent allegations and further allege upon information and belief that Plaintiff has failed to mitigate damages and any recovery should be barred or reduced thereby.

FOR A SIXTH DEFENSE

24. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior and subsequent allegations and further allege upon information and belief that Plaintiff's claims are barred by waiver and/or estoppel.

FOR A SEVENTH DEFENSE

25. Further answering the complaint and as and for an affirmative defense thereto Defendants repeat all prior and subsequent allegations and further allege upon information and belief that Plaintiff's claims are barred by the doctrine of unclean hands.

FOR A FIRST COUNTERCLAIM
(Breach of Covenant of Good Faith and Fair Dealing)

26. Defendants repeat and incorporate herein all other allegations of this Answer and Counterclaim.

27. Plaintiff has engaged in a pattern and course of conduct with the purpose and effect of injuring and damaging Defendants and improperly enriching itself. Among other things, Plaintiff

has employed its superior bargaining and economic position to coerce Defendants into cross-collateralization agreements, to improperly take advantage of the death of a member of Black Diamond, LLC, to coerce Defendants into contracting with a property manager, to thereafter interfere with the contract entered into with the property manager and to direct him in his performance to the benefit of the Plaintiff and the detriment of Defendants, to refuse to timely respond to requests for approval of sales of property which resulted in the loss of a sale and corresponding injury and damage to Defendants, to interfere with tenants, causing a loss of rentals and corresponding decrease in property values, and to otherwise interfere with Defendants' ability to realize value on the subject properties and thereby repay the Plaintiff.

28. By virtue of its agreements with Defendants, including those at issue herein, Plaintiff owed a duty to Defendants to deal with them fairly and good faith. The Bank has breached this duty, resulting in foreseeable, actual, substantial damages to Defendants.

FOR A SECOND COUNTERCLAIM
(Breach of Contract)

29. Defendants repeat and incorporate herein all other allegations of this Answer and Counterclaim.

30. Plaintiff has breached the contracts and agreements that were established between the parties resulting in foreseeable, actual, substantial damages to Defendants.

FOR A THIRD COUNTERCLAIM
(Breach of Fiduciary Duty)

31. Defendants repeat and incorporate herein all other allegations of this Answer and Counterclaim.

32. Plaintiff induced Defendants to repose special trust and confidence in it and

Defendants reasonably and justifiably did so. In consequence thereof Plaintiff in equity and good conscience was duty bound to act in good faith and with due regard to the interests of Defendants. Plaintiff has breached this duty, resulting in foreseeable, actual, substantial damages to Defendants.

FOR A FOURTH COUNTERCLAIM
(Negligent Misrepresentation)

33. Defendants repeat and incorporate herein all other allegations of this Answer and Counterclaim.

34. Throughout their relationship the Plaintiff made to Defendants various promises, assurances, and representations, upon which Defendants reasonably relied, which were negligently made in that they were knowingly false and/or Plaintiff, through its agents and employees, failed to exercise care to determine the truth or falsity thereof. As a direct and proximate result of the negligence of Plaintiff the Defendants have suffered actual, substantial damages.

FOR A FIFTH COUNTERCLAIM
(Duress)

35. Defendants repeat and incorporate herein all other allegations of this Answer and Counterclaim.

36. In the course of its dealings with Defendants Plaintiff threatened to and did in fact seek to enforce its legal rights in bad faith, delayed various actions to its advantage and to the detriment of Defendants, and through other actions, committed the tort of duress, as a direct and proximate result of which the Defendants have suffered actual, substantial damages.

FOR A SIXTH CAUSE OF ACTION
(Interference with Prospective Economic Relations)

37. Defendants repeat and incorporate herein all other allegations of this Answer and

Counterclaim.

38. Defendants had an opportunity to sell a portion of the subject property. Plaintiff intentionally interfered with and prevented the sale by improper means and for an improper purpose thereby causing injury and damage to Defendants.

FOR A SEVENTH CAUSE OF ACTION
(Unfair Trade Practices)

39. Defendants repeat and incorporate herein all other allegations of this Answer and Counterclaim.

40. The acts and practices of Plaintiff in its dealings with Defendants constituted wilful or knowing violation of the South Carolina Unfair Trade Practices Act, affect the public in that they are capable of repetition and have in fact been repeated with others, and Defendants are entitled to actual damages, treble damages, and attorneys fees.

WHEREFORE, having fully responded to Plaintiff's Complaint, Defendants Black Diamond, LLC and J. Christopher Lindgren pray for a jury trial on all issues so triable, pray that the complaint be dismissed with prejudice, with costs and fees being awarded to Defendants, that they have judgment on their counterclaim for actual damages, treble damages, and attorneys fees, and for such other and further relief as this Honorable Court may deem just and proper.

Charleston, SC

April 23, 2012



KEATING L. SIMONS, III
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412
843-762-9132

ATTORNEY FOR DEFENDANTS
BLACK DIAMOND, LLC AND
CHRISTOPHER LINDGREN

CERTIFICATE OF SERVICE

I, Debra F. Evans, a paralegal with the Law Offices of Simons & Dean, do hereby certify that I have served counsel in this action with a copy of the foregoing Answer and Counterclaim of Black Diamond, LLC and J. Christopher Lindgren upon the below named by mailing a copy of same via U.S. Mail, postage prepaid, and properly addressed as follows:

James Matthew Trent, Esquire
Womble, Carlyle, Sandridge & Rice, PLLC
PO Box 10208
Greenville, SC 29603

This 23rd day of April, 2012.

SIMONS & DEAN

BY: Debra F. Evans
Debra F. Evans, Paralegal

EXHIBIT 3

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2012-CP-07-0944

TD BANK, N.A., SUCCESSOR BY)
MERGER TO CAROLINA FIRST)
BANK,)

Plaintiff,)

v.)

ANSWER AND COUNTERCLAIM OF
DAVID A. BROSMAN

BLACK DIAMOND, LLC, J.)
CHRISTOPHER LINDGREN, DAVID)
A. BROSMAN, JULIE H. KING)
and THE GREENERY, INC.,)

Defendants.)

(Jury Trial Demanded)

Defendant David A. Brosman ("Brosman") answering the Complaint of the Plaintiff
herein alleges and shows onto this Honorable Court as follows:

1. Brosman denies each and every allegation of the Complaint not expressly admitted herein.
2. The allegations of Paragraph 1 of the Complaint set forth conclusions of law to which Brosman makes no response except to admit that the subject property is commercial in nature.
3. Brosman lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2 of the Complaint and, therefore, denies the same and demands proof thereof.
4. Brosman admits the allegations of Paragraphs 3, 4, 5 and 6 of the Complaint.
5. Brosman admits, upon information and belief, the allegations of Paragraph 7 of the Complaint.
6. The allegations of Paragraph 8 of the Complaint set forth conclusions of law

to which Brosman makes no response except to admit that the subject property is located in Beaufort County.

7. Answering the allegations of Paragraphs 9 through 13 of the Complaint, Brosman admits only that two loans were made and modified, demands production of and craves reference to the original documents concerning said loans, denies any allegations of these paragraphs inconsistent therewith, and denies all other allegations of these paragraphs.

8. Answering the allegations of Paragraphs 14 through 17 of the Complaint, Brosman admits only that various guaranty forms were executed, demands production of and craves reference to the original documents concerning same, denies any allegations of these paragraphs inconsistent therewith, and denies all other allegations of these paragraphs.

9. Brosman denies the allegations of Paragraph 18 of the Complaint.

10. Answering the allegations of Paragraphs 19 through 22 of the Complaint, Brosman admits only that mortgages were given, demands production of and craves reference to the original documents concerning same, denies any allegations of these paragraphs inconsistent therewith, and denies all other allegations of these paragraphs.

11. Answering the allegations of Paragraphs 23 through 26 of the Complaint, Brosman admits only that mortgages were given, demands production of and craves reference to the original documents concerning same, denies any allegations of these paragraphs inconsistent therewith, and denies all other allegations of these paragraphs.

12. Brosman admits the allegations of Paragraph 27, 28 and 29 of the Complaint upon information and belief.

13. Answering the allegations of Paragraphs 30 through 34 of the Complaint, Brosman admits only that Plaintiff issued demands for payment and that payment has not been made as demanded, craves reference to the original documents concerning same,

denies any allegations of these paragraphs inconsistent therewith, and denies all other allegations of these paragraphs.

AS TO THE FIRST CAUSE OF ACTION

14. Answering the allegations of Paragraph 35 of the Complaint, Brosman repeats and incorporates by reference his preceding responses.

15. Brosman denies the allegations of Paragraphs 36, 37 and 38 of the Complaint.

AS TO THE SECOND CAUSE OF ACTION

16. Answering the allegations of Paragraph 39 of the Complaint, Brosman repeats and incorporates by reference his preceding responses.

17. Brosman denies the allegations of Paragraphs 40, 41, 42 and 43 of the Complaint.

AS TO THE SECOND CAUSE OF ACTION

18. Answering the allegations of Paragraph 44 of the Complaint, Brosman repeats and incorporates by reference his preceding responses.

19. Brosman lacks knowledge or information sufficient to form a belief as to the truth of the factual allegations of Paragraphs 45 through 52 of the Complaint and, therefore, denies the same, and denies that Plaintiff is entitled to the relief sought.

FOR A SECOND DEFENSE

20. Further answering the Complaint and as and for an affirmative defense thereto Brosman repeats all prior and subsequent allegations and further alleges upon information and belief that Plaintiff has failed to join indispensable parties and/or all real parties in interest:

FOR A THIRD DEFENSE

21. Further answering the Complaint and as and for an affirmative defense thereto

Brosman repeats all prior and subsequent allegations and further alleges upon information and belief that Plaintiff is not the true holder and owner of the subject notes and mortgages.

FOR A FOURTH DEFENSE

22. Further answering the Complaint and as and for an affirmative defense thereto Brosman repeats all prior and subsequent allegations and further alleges upon information and belief that Plaintiff has failed to meet conditions precedent to maintaining this action.

FOR A FIFTH DEFENSE

23. Further answering the Complaint and as and for an affirmative defense thereto Brosman repeats all prior and subsequent allegations and further alleges upon information and belief that Plaintiff has failed to mitigate damages and any recovery should be barred or reduced thereby.

FOR A SIXTH DEFENSE

24. Further answering the Complaint and as and for an affirmative defense thereto Brosman repeats all prior and subsequent allegations and further alleges upon information and belief that Plaintiff's claims are barred by waiver and/or estoppel.

FOR A SEVENTH DEFENSE

25. Further answering the Complaint and as and for an affirmative defense thereto Brosman repeats all prior and subsequent allegations and further alleges upon information and belief that Plaintiff's claims are barred by the doctrine of unclean hands.

FOR A FIRST COUNTERCLAIM
(Breach of Covenant of Good Faith and Fair Dealing)

26. Brosman repeats and incorporates herein all other allegations of this Answer and Counterclaim.

27. Plaintiff has engaged in a pattern and course of conduct with the purpose and

effect of injuring and damaging the primary Defendants, including Brosman, and improperly enriching itself. Among other things, Plaintiff has employed its superior bargaining and economic position to coerce Defendants into cross-collateralization agreements, to improperly take advantage of the death of a member of Defendant Black Diamond, LLC, to coerce Defendants into contracting with a property manager, to thereafter interfere with the contract entered into with the property manager and to direct him in his performance to the benefit of the Plaintiff and the detriment of Defendants, including Brosman, to refuse to timely respond to requests for approval of sales of property which resulted in the loss of a sale and corresponding injury and damage to Defendants, including Brosman, to interfere with tenants, causing a loss of rentals and corresponding decrease in property values, and to otherwise interfere with Defendants' ability to realize value on the subject properties and thereby repay the Plaintiff.

28. By virtue of its agreements with Defendants, including those at issue herein, Plaintiff owed a duty to Defendants to deal with them fairly and good faith. The Bank has breached this duty, resulting in foreseeable, actual, substantial damages to Defendants, including Brosman.

FOR A SECOND COUNTERCLAIM
(Breach of Contract)

29. Brosman repeat and incorporate herein all other allegations of this Answer and Counterclaim.

30. Plaintiff has breached the contracts and agreements that were established between the parties resulting in foreseeable, actual, substantial damages to Defendants, including Brosman.

FOR A THIRD COUNTERCLAIM
(Breach of Fiduciary Duty)

31. Brosman repeats and incorporates herein all other allegations of this Answer and Counterclaim.

32. Plaintiff induced Defendants to repose special trust and confidence in it and Defendants reasonably and justifiably did so. In consequence thereof Plaintiff in equity and good conscience was duty bound to act in good faith and with due regard to the interests of Defendants. Plaintiff has breached this duty, resulting in foreseeable, actual, substantial damages to Defendants, including Brosman.

33. Brosman repeats and incorporates herein all other allegations of this Answer and Counterclaim.

34. Throughout their relationship the Plaintiff made to Defendants various promises, assurances, and representations, upon which Defendants reasonably relied, which were negligently made in that they were knowingly false and/or Plaintiff, through its agents and employees, failed to exercise care to determine the truth or falsity thereof. As a direct and proximate result of the negligence of Plaintiff, the Defendants, including Brosman, have suffered actual, substantial damages.

FOR A FIFTH COUNTERCLAIM
(Duress)

35. Brosman repeats and incorporates herein all other allegations of this Answer and Counterclaim.

36. In the course of its dealings with Defendants, Plaintiff threatened to and did in fact seek to enforce its legal rights in bad faith, delayed various actions to its advantage and to the detriment of Defendants, and through other actions, committed the tort of duress, as a direct and proximate result of which the Defendants, including Brosman, have suffered

actual, substantial damages.

FOR A SIXTH CAUSE OF ACTION
(Interference with Prospective Economic Relations)

37. Brosman repeats and incorporates herein all other allegations of this Answer and Counterclaim.

38. Defendants had an opportunity to sell a portion of the subject property. Plaintiff intentionally interfered with and prevented the sale by improper means and for an improper purpose thereby causing injury and damages to Defendants, including Brosman.

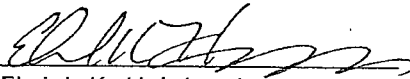
FOR A SEVENTH CAUSE OF ACTION)
(Unfair Trade Practices)

39. Brosman repeats and incorporates herein all other allegations of this Answer and Counterclaim.

40. The acts and practices of Plaintiff in its dealings with the Defendants constituted wilful or knowing violation(s) of the South Carolina Unfair Trade Practices Act, affect the public in that they are capable of repetition and have in fact been repeated with others, and Defendants, including Brosman, are entitled to actual damages, treble damages, and attorneys fees.

WHEREFORE, having fully responded to Plaintiff's Complaint, David A. Brosman prays for a jury trial on all issues so triable, prays that the Complaint be dismissed with prejudice, with costs and fees being awarded to said Defendant, that Brosman have judgment on his counterclaim for actual damages, treble damages, and attorney's fees, and for such other and further relief as this Honorable Court may deem just and proper.

MINOR, HAIGHT & ARUNDELL, P.C.

By: 

Ehrick K. Haight, Jr.

P. O. Drawer 6067

Hilton Head Island, SC 29938

(843) 785-8040

Attorneys for Defendant David A. Brosman

Hilton Head Island, South Carolina
This 18th day of May, 2012.

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

TD BANK, N.A., SUCCESSOR
BY MERGER TO CAROLINA
FIRST BANK,)

Plaintiff,)

v.)

BLACK DIAMOND, LLC, J.)
CHRISTOPHER LINDGREN, DAVID)
A. BROSMAN, JULIE H. KING)
and THE GREENERY, INC.,)

Defendants.)

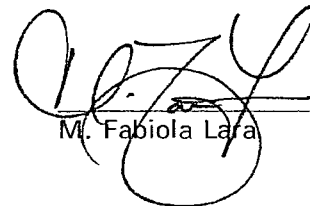
IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2012-CP-07-0944

CERTIFICATE OF MAILING

The undersigned M. Fabiola Lara hereby certifies that on the 18th day of May, 2012 she served a copy of the attached Answer and Counterclaim of Defendant David A. Brosman upon counsel of record by depositing true and accurate copies thereof in the United States mail with sufficient postage prepaid to:

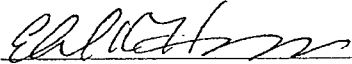
J. Matthew Trent, Esquire
Womble Carlyle Sandridge & Rice, LLP
550 South Main Street, Suite 400
Greenville, SC 29601

Keating L. Simmons, III
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412



M. Fabiola Lara

SWORN TO AND SUBSCRIBED before me
this 18th day of May, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: 7/20/2017

EXHIBIT 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
No.: 2012-CP-07-0944

TD BANK, N.A., Successor by Merger to
Carolina First Bank,

Plaintiff,

v.

Black Diamond, LLC; J. Christopher Lindgren;
David A. Brosman; Julie H. King; and The
Greenery, Inc.,

Defendants.

MOTION TO STRIKE DEFENDANTS'
JURY TRIAL DEMAND

Plaintiff TD Bank, N.A., Successor by Merger to Carolina First Bank, ("**Plaintiff**" or "**the Bank**"), pursuant to Rule 39 of the South Carolina Rules of Civil Procedure, moves the Court to strike the jury trial demand of Defendants Black Diamond, LLC, J. Christopher Lindgren, and David A. Brosman¹ (collectively, "**Defendants**") as Defendants waived any right to a jury trial in this case. In support of this Motion, the Bank submits the following:

1. This lawsuit revolves around Defendants' breach of loan documents executed in favor of the Bank. Specifically, it involves the following loan documents:
 - a. Two promissory notes that Defendant Black Diamond, LLC ("**Black Diamond**") executed in favor of the Bank: (1) a Promissory Note for \$3.5 Million, which is attached as **Exhibit A** ("**the \$3.5 Million Note**"), and (2) a Promissory Note for \$2 Million that is attached as **Exhibit B** ("**the \$2 Million Note**") (collectively, "**the Notes**").

¹ The remaining defendants in this case, Julie H. King and The Greenery, Inc., have not demanded a jury trial.

- b. Guaranty Agreements that Defendants J. Christopher Lindgren and David A. Brosman (collectively, “the Guarantors”) executed in favor of the Bank and which guaranteed Black Diamond’s payment of the Notes.
2. Under South Carolina law, “[a] party may waive the right to a jury trial by contract.” Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct. App. 2002) (also noting that “terms in a contract provision must be construed using their plain, ordinary and popular meaning”).
3. Pursuant to the Notes and the Guaranty Agreements, Black Diamond and the Guarantors expressly, unambiguously and contractually waived any right to a jury trial in this case.

4. **Black Diamond’s Waiver of Jury Trial:**

- a. By executing the \$3.5 Million Note, Black Diamond waived its right to demand a jury trial in this case as that Note, in capital letters conspicuously located directly above the signature line, unambiguously states that Black Diamond:

WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, THE RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM, WHETHER IN CONTRACT, TORT OR OTHERWISE, RELATING DIRECTLY OR INDIRECTLY TO THE LOAN EVIDENCED BY THIS NOTE, . . . THE SECURITY INSTRUMENT, THE LOAN AGREEMENT OR THE OTHER SECURITY DOCUMENTS OR **ANY ACTS OR OMISSIONS OF LENDER OR BORROWER.**

(emphasis added).

- b. Per the plain, ordinary meaning of the above language, Black Diamond waived any right to a jury trial in this lawsuit as the case plainly is based on Black Diamond's action of defaulting under and breaching the Notes.

5. Guarantors' Waiver of Jury Trial:

- a. Like Black Diamond, the Guarantors contractually waived any right to a jury trial in this case.
- b. The Guaranty Agreements that are attached as Exhibits C-E clearly, and in conspicuous, capitalized language directly above or near the signature lines, provide that the Guarantors unequivocally waived such a right.
- c. For example, Lindgren's Guaranty of the \$3.5 Million Note states:

TO THE EXTENT NOW OR HEREAFTER
PERMITTED BY LAW, THE
GUARANTOR AND ANY OTHER
GUARANTOR WAIVES TRIAL BY JURY
WITH RESPECT TO ANY ACTION,
CLAIM, SUIT OR PROCEEDING ON OR
ARISING OUT OF THE LOANS, THE
OBLIGATIONS, THE CONDUCT OF
THE RELATIONSHIP BETWEEN THE
LENDER AND THE BORROWER,
AND/OR THE CONDUCT OF THE
RELATIONSHIP BETWEEN THE
LENDER AND ANY GUARANTOR.

(emphasis added). See, e.g., Ex. C (Lindgren Guaranty of \$3.5 Million Note), at ¶ 21. See also Ex. D (Brosman Guaranty of \$3.5 Million Note), at ¶ 17; Ex. E (Brosman Guaranty of \$2 Million Note), at ¶ 17.²

- d. Pursuant to the simple construction of the Guaranty Agreements' language, the Guarantors waived any right to a jury trial in this matter, which

² Lindgren's Guaranty of the \$2 Million Note, which is attached as Exhibit F, provides that Lindgren consents to "any waiver" of Black Diamond, which as noted above, includes a waiver of a jury trial in this matter. Ex. F, at ¶ 9.

indisputably “arise[s] out of the loans, the obligations, the conduct [or] the relationship between [the Bank and Black Diamond] and/or [Black Diamond and the Guarantors].”

6. Because Black Diamond and the Guarantors unequivocally waived any right to a jury trial in this matter, the Bank respectfully requests that the Court strike their request for a jury trial and that it decide any and all issues of law and fact in this case.

The Bank bases this Motion upon the applicable rules, statutes and case law. Additionally, it supports this Motion with the pleadings filed and the discovery in this case and any additional affidavits or supporting memoranda that it may file with this Court at or before the hearing on this Motion.

This 15th day of November 2013
Greenville, South Carolina



Michael J. Bogle (S.C. Bar No. 71125)

Email: mbogle@wcsr.com

J. Matthew Trent (S.C. Bar No. 74192)

Email: mtrent@wcsr.com

Catherine Wrenn (S.C. Bar No. 76042)

Email: cwrenn@wcsr.com

Womble Carlyle Sandridge & Rice, LLP

Post Office Box 10208

Greenville, SC 29603-0208

Telephone: (864) 255-5421

Fax: (864) 239-5852

*Attorneys for Plaintiff TD Bank, N.A., Successor by
Merger to Carolina First Bank*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 15th day of November, 2013, (s)he mailed a copy of the attached **DEFENDANT'S MOTION TO STRIKE DEFENDANTS' JURY DEMAND** by depositing same in the United States Mail, first-class, proper postage, affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

Keating L. Simmons, III
SIMONS & DEAN
147 Wappoo Creek Drive
Suite 604
Charleston, SC 29412

Ehrick K. Haight, Jr.
P.O. Drawer 6067
Hilton Head Island, SC 29938

Attorney for David A. Brosman

*Attorney for Defendants Black Diamond,
LLC and J. Christopher Lindgren*

15 NOV 19 PM 12:44
U.S. DISTRICT COURT
SOUTH DISTRICT OF SCOTLAND
HILTON HEAD ISLAND, SC

Susan Church

Susan Church
Assistant to Michael J. Bogle

Exhibit A

PROMISSORY NOTE

\$3,500,000.00

January 25, 2008

FOR VALUE RECEIVED, BLACK DIAMOND, LLC ("Borrower") promises to pay to CAROLINA FIRST BANK ("Lender" or "Holder") at the address of 62 New Orleans Road, Hilton Head Island, South Carolina 29928 or at such other place as the Holder may from time to time designate in writing, the principal sum of THREE MILLION FIVE HUNDRED THOUSAND AND NO/100 (\$3,500,000.00) DOLLARS, with interest thereon as set forth hereinbelow in lawful money of the United States of America as follows:

The principal outstanding shall bear interest from the date of funding of funds by Holder equal to the Index established daily during the term of this Note plus 1.95 percentage points. The "Index" shall be the average of the 30 day interbank offered rates for U.S. dollar-denominated deposits in the London Market ("LIBOR"), as published in the Wall Street Journal. The Index may adjust daily. If the Index is no longer available, the Holder shall choose a new index that is based upon comparable information. Borrower shall pay principal and interest payments monthly based upon a 20-year amortization, said payments in the amount of \$28,195.76, with the first payment commencing on February 25, 2008 and continuing thereafter on the 25th day of each consecutive month until January 25, 2013. All outstanding principal and all accrued interest to be due and payable in full in a single balloon payment on January 25, 2013 ("Maturity Date").

Lender reserves the right to require payments to be made by certified or cashiers checks. All payments made hereunder shall be applied first to default and late charges, if any, then to accrued and unpaid interest and the balance thereof to principal. All payments of principal and interest are payable in lawful money of the United States of America. This Note is secured by the First Mortgage and Security Agreement of even date ("Mortgage") and the other Loan Documents referred to in the Loan Agreement. This Note is the Note referred to in the Loan Agreement. Terms used herein which are defined in the Loan Agreement shall have their defined meanings when used herein.

If any payment required in this Note is not paid (a) on or prior to the twentieth (20th) day after a Payment Date, (b) on the Maturity Date, or (c) on the happening of any other default, after the expiration of any applicable notice and grace periods, herein or under the terms of the Mortgage, or any other of the Loan Documents (collectively, an "Event of Default"), at the option of the Lender (i) the whole of the principal sum of this Note, (ii) interest, default interest, late charges and other sums, as provided in this Note, the Mortgage, or the Loan Documents, (iii) all other monies agreed or proved to be paid by Borrower in this Note, the Mortgage, or the Loan Documents, (iv) all sums advanced pursuant to the Mortgage to protect and preserve the Property and the lien and the security interest created thereby, and (v) all sums advanced and costs and expenses incurred by Lender in connection with the Loan or any part thereof, any renewal, extension, or change of or substitution for the Debt or any part hereof, or the acquisition or perfection of the security therefore, whether made or incurred at the request of Borrower or Lender (all the sums referred to in (i) through (v) above shall collectively be referred to as the "Loan") shall without notice become immediately due and payable.

In the event that this Note is not paid when due or is placed in the hands of an attorney for collection after the same shall become due for any reason, or if collected by legal proceedings, or through probate or bankruptcy courts, the Borrower agrees to pay all costs and expenses of Lender in the collection of this Note, including attorney's fees and court costs. In the event of default, the Lender may proceed directly against the Borrower and any and all persons or entities liable under this Note waive presentment, demand, notice of dishonor and non-payment of protest of this Note and all defenses on the ground of any extension of time or renewal or the release, sale, exchange, substitution or impairment of any collateral securing the obligations with or without consideration.

In the event the Lender has not received the full amount of any monthly payment by the end of twenty (20) calendar days after the date it is due, the Borrower hereby agrees to pay a late charge in the amount of five (5%) percent of the payment due. From and after the maturity of this Note either according to its terms or as a result of declaration of maturity, the entire principal remaining unpaid hereunder shall bear interest at the rate of the greater of the Note rate stated above or the rate eighteen (18%) percent per annum, but in no event greater than the highest applicable lawful rate; provided that there shall be no automatic reduction to the highest lawful rate as to any maker hereof barred by law from availing itself in any action or proceeding of the defense of usury, or any matter barred or exempted from the operation of any law limiting the amount of interest that may be paid for the Loan or use of

money, or in the event this transaction, because of its amount or purpose or for any reason is exempt from the operation of any statute limiting the amount of interest that may be paid for the loan or use of money. Failure to exercise said option or any other rights the Holder may in the event of any such default be entitled to, shall not constitute a waiver of the right to exercise said option or any other rights in the event of any subsequent default, whether of the same or different nature. Borrower agrees that the late charge provided for above is fair and reasonable compensation to Lender for the additional administrative time and effort incurred in collecting and processing delinquent payments. Borrower further agrees that the default rate is a fair and reasonable rate of interest to be charged after maturity or acceleration of this Note in light of increased risks to the Lender inherent in a past due loan and the administrative time and effort incurred in collecting a past due loan.

Should Lender accept any part payment hereunder after the full amount has become immediately due and payable or otherwise grant indulgence to any party herein, this shall not alter or affect Lender's rights hereunder with respect to any subsequent payment or default. The remedies provided for herein shall be cumulative and Lender may select its remedies and specifically assert its remedies against the collateral and/or the Borrower as Lender, at its option, sees fit. The Lender is not obligated to resolve any claim or dispute arising under this Note or any of the terms and conditions hereto or relating to the Note by mediation or arbitration prior to commencing legal action.

Borrower and the guarantor and all parties liable or to become liable on this Note waive, set off, counterclaim, presentment, protest and demand, notice of protest, demand and dishonor, all defenses with respect to any and all instruments and all notices and demands of any description with respect to this Note, and the pleading of any statute of limitations as a defense to any demand under any Loan Documents, and current to any and all renewals and extensions of the time of payment hereof, and agree, further, that any time and from time to time without notice, the terms of payment herein may be modified on the security described in part, or increased, changed or exchanged by agreement between Lender and any owner of property affected by said loan document without in anywise affecting the liability of any party to this instrument or any person liable with respect to any indebtedness evidenced hereby. Borrower hereby agrees that the provisions of the Loan Agreement relating to waivers, rights and remedies of the parties shall apply to this Note. Lender is not required to rely on any collateral for the payment of the Note, but may proceed directly against the Borrower and any guarantors or endorser in such manner as it deems desirable. None of the rights and remedies of Lender hereunder is to be waived or affected by failure or delay to exercise them.

The Note shall be governed as to validity, interpretation, construction, effect and in all other respects by the laws and decisions of the State of South Carolina. Borrower submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Borrower further agrees to comply with all requirements necessary to give such court in personam jurisdiction and agrees that service of process may be accomplished by, in addition to any other lawful means, certified mail, return receipt requested.

BORROWER, BY ACCEPTANCE OF THIS NOTE, HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, THE RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM, WHETHER BY CONTRACT, TORT OR OTHERWISE, RELATING DIRECTLY OR INDIRECTLY TO THE LOAN EVIDENCED BY THIS NOTE, THIS NOTE, THE SECURITY INSTRUMENT, THE LOAN AGREEMENT OR THE OTHER SECURITY DOCUMENTS OR ANY ACTS OR OMISSIONS OF LENDER OR BORROWER.

IN WITNESS WHEREOF, the Borrower has duly executed this Promissory Note as of the date first above written.

WITNESSES:

Dee Heater
RE

BORROWER: BLACK DIAMOND, LLC
By: Red Rocks, LLC, Member

[Signature]
By: J. Chris Lindgren, Manager

Exhibit B

LOAN NUMBER	LOAN NAME	ACCT. NUMBER	NOTE DATE	INITIALS
5120783855	BLACK DIAMOND, LLC		07/25/08	
NOTE AMOUNT	INDEX (w/Margin)	RATE	MATURITY DATE	LOAN PURPOSE
\$2,000,000.00	CAROLINA FIRST BANK PRIME	5.0%	07/25/11	Commercial

Creditor Use Only

PROMISSORY NOTE

(Commercial - Single Advance)

RENEWAL NOTE

DATE AND PARTIES. The date of this Promissory Note (Note) is July 25, 2008. The parties and their addresses are:

LENDER:

CAROLINA FIRST BANK
104 South Main Street
Greenville, South Carolina 29601
Telephone: (800) 476-6400

BORROWER:

BLACK DIAMOND, LLC
a South Carolina Limited Liability Company
5 DUNMORE COURT
HILTON HEAD ISLAND, South Carolina 29928

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

- A. **Pronouns.** The pronouns "I," "me," and "my" refer to each Borrower signing this Note, individually and together. "You" and "Your" refer to the Lender.
- B. **Note.** Note refers to this document, and any extensions, renewals, modifications and substitutions of this Note.
- C. **Loan.** Loan refers to this transaction generally, including obligations and duties arising from the terms of all documents prepared or submitted for this transaction such as applications, security agreements, disclosures or notes, and this Note.
- D. **Loan Documents.** Loan Documents refer to all the documents executed as a part of or in connection with the Loan.
- E. **Property.** Property is any property, real, personal or intangible, that secures my performance of the obligations of this Loan.
- F. **Percent.** Rates and rate change limitations are expressed as annualized percentages.

2. RENEWAL. This Note is a renewal of the following described note:

Note Date	Note Number	Note Amount
December 17, 2007	# 5120783855	\$2,000,000.00

I have requested that the note listed in the table above be renewed. The remaining balance of the note listed in the table above is \$2,000,000.00.

3. PROMISE TO PAY. For value received, I promise to pay you or your order, at your address, or at such other location as you may designate, the principal sum of \$2,000,000.00 (Principal) plus interest from July 26, 2008 on the unpaid Principal balance until this Note matures or this obligation is accelerated.

4. INTEREST. Interest will accrue on the unpaid Principal balance of this Note at the rate of 5.0 percent (Interest Rate) until July 26, 2008, after which time it may change as described in the Variable Rate subsection.

A. **Interest After Default.** If you declare a default under the terms of the Loan, including for failure to pay in full at maturity, you may increase the Interest Rate otherwise payable as described in this section. In such event, interest will accrue on the unpaid Principal balance of this Note at a rate equal to the rate in effect prior to default, plus 4.000 percent, until paid in full.

B. **Maximum Interest Amount.** Any amount assessed or collected as interest under the terms of this Note will be limited to the maximum lawful amount of interest allowed by state or federal law, whichever is greater. Amounts collected in excess of the maximum lawful amount will be applied first to the unpaid Principal balance. Any remainder will be refunded to me.

C. **Statutory Authority.** The amount assessed or collected on this Note is authorized by the South Carolina usury laws under S.C. Code Ann. §§ 37-3-805, 37-3-105 and 37-10-101 et. seq.

D. Accrual. Interest accrues using an Actual/360 days counting method.

E. Variable Rate. The Interest Rate may change during the term of this transaction.

(1) Index. Beginning with the first Change Date, the Interest Rate will be based on the following Index: For the purposes of this note, the term "Prime Rate" shall mean the interest rate announced, from time to time, by Carolina First Bank, at its principal office in Greenville, SC, or by its corporate successor, as the Prime Rate (which rate is only a benchmark, is purely discretionary, and is not necessarily the best or lowest rate charged borrowing customers of Carolina First Bank).

The Current Index is the most recent index figure available on each Change Date. You do not guaranty by selecting this Index, or the margin, that the Interest Rate on this Note will be the same rate you charge on any other loans or class of loans you make to me or other borrowers. If this Index is no longer available, you will substitute a similar index. You will give me notice of your choice.

(2) Change Date. Each date on which the Interest Rate may change is called a Change Date. The Interest Rate may change July 26, 2008 and daily thereafter.

(3) Calculation Of Change. On each Change Date you will calculate the Interest Rate, which will be the Current Index. The result of this calculation will be rounded to the nearest .001 percent. Subject to any limitations, this will be the Interest Rate until the next Change Date. The new Interest Rate will become effective on each Change Date. The Interest Rate and other charges on this Note will never exceed the highest rate or charge allowed by law for this Note.

(4) Effect Of Variable Rate. A change in the Interest Rate will have the following effect on the payments: The amount of scheduled payments will change.

6. ADDITIONAL CHARGES. As additional consideration, I agree to pay, or have paid, these additional fees and charges.

A. Nonrefundable Fees and Charges. The following fees are earned when collected and will not be refunded if I prepay this Note before the scheduled maturity date.

Loan Origination. A(n) Loan Origination fee of \$1,500.00 payable from separate funds on or before today's date.

Flood Determination. A(n) Flood Determination fee of \$5.00 payable from separate funds on or before today's date.

6. REMEDIAL CHARGES. In addition to interest or other finance charges, I agree that I will pay these additional fees based on my method and pattern of payment. Additional remedial charges may be described elsewhere in this Note.

A. Late Charge. If a payment is more than 20 days late, I will be charged 5.000 percent of the Unpaid Portion of Payment or \$25.00, whichever is greater. I will pay this late charge promptly but only once for each late payment.

B. Returned Check Charge. I agree to pay a fee not to exceed \$25.00 for each check, negotiable order of withdrawal or draft I issue in connection with the Loan that is returned because it has been dishonored.

7. PAYMENT. I agree to pay this Note as follows: I agree to pay this note in 36 payments. I will make 36 payments of principal and interest in the amount of \$15,505.98 beginning August 15, 2008 and on the 15th day of each month thereafter. A single, final payment of the entire unpaid balance of principal and accrued interest will be due on July 25, 2011

Payments will be rounded to the nearest \$.01. With the final payment I also agree to pay any additional fees or charges owing and the amount of any advances you have made to others on my behalf. Payments scheduled to be paid on the 29th, 30th or 31st day of a month that contains no such day will, instead, be made on the last day of such month.

Each payment I make on this Note will be applied first to interest that is due then to principal that is due, and finally to any charges that I owe other than principal and interest. If you and I agree to a different application of payments, we will describe our agreement on this Note. You may change how payments are applied in your sole discretion without notice to me. The actual amount of my final payment will depend on my payment record.

8. PREPAYMENT. I may prepay this Loan under the following terms and conditions. I may prepay principal on this Note in whole or in part at any time under the following terms and conditions. If paid during the first year from the date of the Note, a prepayment fee equal to 3% of the amount prepaid shall be due; if paid during the second year from the date of the Note, a prepayment fee equal to 2% of the amount prepaid shall be due; and if paid after the second year from the date of the Note, a prepayment fee equal to 1% of the amount prepaid shall be due. Notwithstanding the foregoing, a prepayment fee shall be due only if the prepayment exceeds the lesser of: (i) 25% of the outstanding principal balance on the Note; or (ii) \$50,000. Any partial prepayment will not excuse any later scheduled payments until I pay in full.

9. LOAN PURPOSE. The purpose of this Loan is FOR RENEWAL FOR COMMERCIAL REAL ESTATE LOAN.

10. ADDITIONAL TERMS. THIS LOAN IS CROSS COLLATERALIZED AND CROSS DEFAULTED WITH LOAN #5121086531 IN THE NAME OF BLACK DIAMOND LLC IN THE AMOUNT OF \$3,500,000.00 DATED JANUARY 25, 2008 SECURED BY REAL ESTATE MORTGAGE

11. SECURITY. The Loan is secured by previously executed, separate security instruments, including the following: REAL ESTATE MORTGAGE DATED DECEMBER 9, 2003 IN THE ORIGINAL AMOUNT OF \$1,460,000.00 COVERING PROPERTY & IMPROVEMENTS FORMERLY KNOWN AS 4.51 ACRES THE GREENERY TRACT ON HWY 27B, HILTON HEAD ISLAND NOW 1188 FORDING ISLAND RD, BLUFFTON, SC, SAID MORTGAGE RECORDED DECEMBER 12, 2003 IN BEAUFORT COUNTY, SC IN BOOK 01884-PAGES 0842-0849

ASSIGNMENT OF LEASES AND RENTS DATED MAY 21, 2007 RECORDED JUNE 5, 2007 IN BEAUFORT COUNTY, SC IN BOOK

12. DEFAULT. I will be in default if any of the following occur:

- A. **Payments.** I fail to make a payment in full when due.
- B. **Insolvency or Bankruptcy.** The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me or any co-signer, endorser, surety or guarantor of this Note or any other obligations I have with you.
- C. **Business Termination.** I merge, dissolve, reorganize, and my business or existence, or a partner or majority owner dies or is declared legally incompetent.
- D. **Failure to Perform.** I fail to perform any condition or to keep any promise or covenant of this Note.
- E. **Other Documents.** A default occurs under the terms of any other Loan Document.
- F. **Other Agreements.** I am in default on any other debt or agreement I have with you.
- G. **Misrepresentation.** I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.
- H. **Judgment.** I fail to satisfy or appeal any judgment against me.
- I. **Forfeiture.** The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.
- J. **Name Change.** I change my name or assume an additional name without notifying you before making such a change.
- K. **Property Transfer.** I transfer all or a substantial part of my money or property.
- L. **Property Value.** You determine in good faith that the value of the Property has declined or is impaired.
- M. **Material Change.** Without first notifying you, there is a material change in my business, including ownership, management, and financial conditions.
- N. **Insecurity.** You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Note or that the prospect for payment or performance of the Loan is impaired for any reason.

13. DUE ON SALE OR ENCUMBRANCE. You may, at your option, declare the entire balance of this Note to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of all or any part of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 601), as applicable.

14. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. **Additional Waivers By Borrower.** In addition, I, and any party to this Note and Loan, to the extent permitted by law, consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to this Note.

- (1) You may renew or extend payments on this Note, regardless of the number of such renewals or extensions.
- (2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.
- (3) You may release, substitute or impair any Property securing this Note.
- (4) You, or any institution participating in this Note, may invoke your right of set-off.
- (5) You may enter into any sales, repurchases or participations of this Note to any person in any amounts and I waive notice of such sales, repurchases or participations.
- (6) I agree that any of us signing this Note as a Borrower is authorized to modify the terms of this Note or any instrument securing, guaranteeing or relating to this Note.
- (7) I agree that you may inform any party who guarantees this Loan of any Loan accommodations, renewals, extensions, modifications, substitutions or future advances.

B. **No Waiver By Lender.** Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in this Note, or any other Loan Document, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

15. REMEDIES. After I default, you may at your option do any one or more of the following.

- A. **Acceleration.** You may make all or any part of the amount owing by the terms of this Note immediately due.
- B. **Sources.** You may use any and all remedies you have under state or federal law or in any Loan Document.
- C. **Insurance Benefits.** You may make a claim for any and all insurance benefits or refunds that may be available on my default.
- D. **Payments Made On My Behalf.** Amounts advanced on my behalf will be immediately due and may be added to the balance owing under the terms of this Note, and accrue interest at the highest post-maturity interest rate.
- E. **Set-Off.** You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Note against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit

obligation. "Any amount due and payable under the terms of this Note" means the total amount to which you are entitled to demand payment under the terms of this Note at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay this Note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

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

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

16. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Note or any other Loan Document. Expenses include, but are not limited to, attorneys' fees, court costs and other legal expenses. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of this Note. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

17. COMMISSIONS. I understand and agree that you (or your affiliate) will earn commissions or fees on any insurance products, and may earn such fees on other services that I buy through you or your affiliate.

18. WARRANTIES AND REPRESENTATIONS. I make to you the following warranties and representations which will continue as long as this Note is in effect:

A. Power. I am duly organized, and validly existing and in good standing in all jurisdictions in which I operate. I have the power and authority to enter into this transaction and to carry on my business or activity as it is now being conducted and, as applicable, am qualified to do so in each jurisdiction in which I operate.

B. Authority. The execution, delivery and performance of this Note and the obligation evidenced by this Note are within my powers, have been duly authorized, have received all necessary governmental approval, will not violate any provision of law, or order of court or governmental agency, and will not violate any agreement to which I am a party or to which I am or any of my Property is subject.

C. Name and Place of Business. Other than previously disclosed in writing to you I have not changed my name or principal place of business within the last 10 years and have not used any other trade or fictitious name. Without your prior written consent, I do not and will not use any other name and will preserve my existing name, trade names and franchises.

19. INSURANCE. I agree to obtain the insurance described in this Loan Agreement.

A. Property Insurance. I will insure or retain insurance coverage on the Property and abide by the insurance requirements of any security instrument securing the Loan.

B. Flood Insurance. Flood insurance is not required at this time. It may be required in the future should the property be included in an updated flood plain map. If required in the future, I may obtain flood insurance from anyone I want that is reasonably acceptable to you.

C. Insurance Warranties. I agree to purchase any insurance coverages that are required, in the amounts you require, as described in this or any other documents I sign for the Loan. I will provide you with continuing proof of coverage. I will buy or provide insurance from a firm licensed to do business in the State where the Property is located. If I buy or provide the insurance from someone other than you, the firm will be reasonably acceptable to you. I will have the insurance company name you as loss payee on any insurance policy. You will apply the insurance proceeds toward what I owe you on the outstanding balance. I agree that if the insurance proceeds do not cover the amounts I still owe you, I will pay the difference. I will keep the insurance until all debts secured by this agreement are paid. If I want to buy the insurance from you, I have signed a separate statement agreeing to this purchase.

20. APPLICABLE LAW. This Note is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

21. JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS. My obligation to pay the Loan is independent of the obligation of any other person who has also agreed to pay it. You may sue me alone, or anyone else who is obligated on the Loan, or any number of us together, to collect the Loan. Extending the Loan or new obligations under the Loan, will not affect my duty under the Loan and I will still be obligated to pay the Loan. This Note shall inure to the benefit of and be enforceable by you and your successors and assigns and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

22. AMENDMENT, INTEGRATION AND SEVERABILITY. This Note may not be amended or modified by oral agreement. No amendment or modification of this Note is effective unless made in writing and executed by you and me. This Note and the other Loan Documents are the complete and final expression of the agreement. If any provision of this Note is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

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

24. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Borrower will be deemed to be notice to all Borrowers. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Loan and to confirm your lien status on any Property. Time is of the essence.

25. CREDIT INFORMATION. I agree to supply you with whatever information you reasonably request. You will make requests for this information without undue frequency, and will give me reasonable time in which to supply the information.

26. ERRORS AND OMISSIONS. I agree, if requested by you, to fully cooperate in the correction, if necessary, in the reasonable discretion of you of any and all loan closing documents so that all documents accurately describe the loan between you and me. I agree to assume all costs including by way of illustration and not limitation, actual expenses, legal fees and marketing losses for failing to reasonably comply with your requests within thirty (30) days.

27. SIGNATURES. By signing under seal, I agree to the terms contained in this Note. I also acknowledge receipt of a copy of this Note.

BORROWER:

BLACK DIAMOND, LLC

By RED ROCKS, LLC, MANAGER

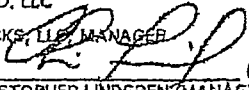
By  (Seal)
J. CHRISTOPHER LINDGREN, MANAGER

Exhibit C

UNCONDITIONAL GUARANTY

WHEREAS, **BLACK DIAMOND, LLC**, a South Carolina limited liability company with an address of P. O. Box 23164, Hilton Head Island, South Carolina 29925 ("Borrower") has borrowed or shall borrow the sum of **THREE MILLION FIVE HUNDRED THOUSAND AND NO/100 (\$3,500,000.00) DOLLARS** ("Loan") to be secured by a mortgage on the real property owned by Borrower described in Exhibit "A" ("Property") from **CAROLINA FIRST BANK** ("Bank") whose address is 62 New Orleans Road, Hilton Head Island, South Carolina 29928 ("Lender") pursuant to a Promissory Note from Borrower to Lender dated January 25, 2008 ("Note"); and

WHEREAS, Lender is unwilling to make the loan to Borrower evidenced by the Note unless it receives an unconditional and continuing guaranty from **J. CHRISTOPHER LINDGREN** ("Guarantor") covering all "Obligations of Borrower" as hereinafter defined.

NOW, THEREFORE, in consideration of the premises and of other good and valuable consideration, and in order to induce Lender to lend money to Borrower as evidenced by the Note, Guarantor hereby agrees as follows:

Guarantor hereby absolutely and unconditionally guarantees to Lender and its successors and assigns the due and punctual payment of all principal, interest and any other amounts due or to become due, whether by acceleration or otherwise, under the Note and the Mortgage securing the Note, and including all renewals, extensions and/or modifications thereof, plus all interest, costs and reasonable attorneys' fees of Lender (all of such liabilities and obligations of Borrower to Lender being hereinafter collectively termed "Obligations of Borrower"). Further, whether or not suit is brought by Lender to acquire possession of collateral or to enforce collection of any unpaid balance hereunder, Guarantor expressly hereby agrees to pay all legal expenses and the reasonable attorneys' fees (including those relative to appellate proceedings, if any) incurred by Lender with respect to this Guaranty.

To implement the foregoing and as additional inducements to Lender, Guarantor further covenants and agrees as follows:

1. This Guaranty is and shall remain an unconditional and continuing guaranty of payment and not of collection. Guarantor hereby expressly waives any right to require Lender to bring any action against Borrower or any other person or to require that resort be had to any security or to any balance of any deposit or other account or debt or credits on the books of Lender in favor of Borrower or any other person. Guarantor acknowledges that Guarantor's liabilities and obligations hereunder are primary rather than secondary. Without limiting the generality of the foregoing, Guarantor expressly waives any rights Guarantor otherwise might have under provisions of South Carolina or other applicable law to require Lender to attempt to recover against Borrower and/or to realize upon any securities or collateral security which Lender holds for the obligation evidenced or secured hereby.

2. Time is of the essence in the performance of all obligations hereunder.

3. No waivers or modifications shall be valid unless they are reduced to writing, duly executed by the party to be charged thereby, and expressly approved in writing by an officer of Lender actually involved in the transactions being guaranteed hereby.

4. If any process is issued or ordered to be served upon Lender, Borrower or Guarantor, seeking to seize Borrower's and/or Guarantor's rights and/or interests in any bank account maintained with Lender, the balance in any such account shall immediately be deemed to have been and shall be set-off against any and all Obligations of Borrower and/or all obligations and liabilities of Guarantor hereunder, as of the time of the issuance of any such writ or process, whether or not Borrower, Guarantor and/or Lender shall then have been served therewith.

5. All moneys available to and/or received by Lender for application toward payment of (or reduction of) the Obligations of Borrower may be applied by Lender to such obligations of Borrower in such manner, and apportioned in such amounts and at such times, as Lender, in its sole discretion, may deem suitable or desirable.

6. As security for any and all liabilities of Guarantor hereunder, now existing or hereafter arising, Guarantor hereby grants Lender the right to retain a security interest in any and all moneys or other property (i.e., goods and merchandise, as well as all documents relative thereto; also, funds, securities, choses in action and any and all other forms of property, whether real, personal or mixed and any right, title or interest of Guarantor therein or thereto) and/or the proceeds thereof, which have been or may hereafter be deposited or left with Lender (or with any agent or other third party acting on Lender's behalf) by or for the account or credit of Guarantor, including without limitation any property in which Guarantor may have any interest. Further, where any money is due Lender hereunder, Lender is herewith authorized to exercise its right of setoff or "bank lien" as to any moneys deposited in demand, checking,

time, savings, or other accounts of any nature maintained in and with it by any of the undersigned, without advance notice. Said right of set-off shall also be applicable and exercised by Lender, in its sole discretion, where Lender is indebted to any Guarantor by reason of any certificate of deposit, bond, note or otherwise.

7. Guarantor agrees that Guarantor's liability hereunder shall not be diminished by any failure on the part of Lender to perfect (by filing, recording or otherwise) any security interest it may have in any property securing this Unconditional Guaranty Agreement and/or the obligations of Borrower secured hereby and hereunder.

8. Guarantor further hereby consents and agrees that Lender may at any time, or from time to time, in its sole discretion: (i) extend or change the time of payment, and/or the manner, place or terms of payment of any or all of the obligations of Borrower; (ii) exchange, release and/or surrender all or any of any collateral security, or any part thereof, by whomsoever deposited, which is or may hereafter be held by it in connection with all or any of the Obligations of Borrower and/or any liabilities or obligations of Guarantor hereunder; (iii) release any other guarantor, endorser or co-obligor of the obligations of Borrower with or without consideration and without notice to and further consent from any Guarantor and such release shall not in any way affect the liability of the undersigned; (iv) sell or otherwise dispose of and/or purchase all or any of any such collateral at public or private sale, and after deducting all costs and expenses of every kind for collection, preparation for sale, sale or delivery, the net proceeds of any such sale or other disposition may be applied by Lender upon all or any of the Obligations of Borrower; (v) settle or compromise with Borrower, any insurance carrier and/or any other person liable thereon, any and all of the obligations of Borrower (including, but not limited to any insurance applicable to the Obligations of Borrower), and/or subordinate the payment of all or any part of same, to the payment of any other debts or claims, which may at any time be due or owing to Lender and/or any other person; or (vi) alter, extend, change, modify, release, waive or cancel any covenant, agreement, condition, obligation or provision contained in any or all loan documents; all in such manner and upon such terms as Lender may deem proper and/or desirable, and without notice to or further assent from Guarantor, it being agreed that Guarantor shall be and remain bound upon this Unconditional Guaranty Agreement, irrespective of the existence, value or condition of any collateral, and notwithstanding any such change, exchange, settlement, compromise, surrender, release, foreclosure, sale or other disposition, application, renewal or extension and notwithstanding also that the Obligations of Borrower may at any time exceed the aggregate principal sum of the Note. Further, this Guaranty shall not be construed to impose any obligation on Lender to extend or continue to extend credit or otherwise to deal with Borrower at any time.

9. In consideration of Lender's extension of credit to Borrower, Guarantor hereby agrees:

a. To subordinate, and by this Agreement does subordinate, all debts now or hereafter owed by Borrower to Guarantor to any and all debts of Borrower to Lender now or hereafter existing while this Agreement is in effect.

b. Guarantor further agrees that it will not assert any right to which it may be or become entitled, whether by subrogation, contribution or otherwise against Borrower or any of the other guarantors or any of their respective properties, by reason of the performance of the undersigned of his obligations under this Guaranty, except after payment in full of all amounts (including costs and expenses) which may become payable in respect of or under the obligations of Borrower.

c. Guarantor hereby indemnifies and holds Lender harmless from and against any and all damages, penalties, fines, claims, liens, suits, liabilities, costs (including cleanup costs), judgments and expenses (including attorneys', consultants, or experts, fees and expenses) of every kind and nature, suffered by or asserted against Lender under any law, regulation or ordinance, local, state or federal concerning any hazardous materials, substances, wastes or other environmentally regulated substances now or hereafter located on the property of Borrower or Guarantor.

10. This Unconditional Guaranty Agreement shall be binding upon Guarantor, and the heirs, executors, administrators, successors and assigns of Guarantor; and it shall inure to the benefit of, and be enforceable by, Lender and its successors, transferees and assigns. It further shall be deemed to have been made under and shall be governed by the Laws of the State of South Carolina in all respects, including matters of construction, validity and performance.

11. No waiver by Lender of any default by Guarantor or Borrower shall operate as a waiver of any other default or of the same default on a future occasion. The liability of Guarantor hereunder shall also be joint and several with that of any person or entity executing a separate guaranty in favor of Lender.

12. Guarantor hereby waives: (i) notice of acceptance of this Guaranty; (ii) notice of extensions, continuations or modifications of the Note; (iii) notice of entering into and engaging in business transactions and/or contractual relationships and any other dealings between Lender and Borrower; (iv) presentment and/or demand for payment of any of the Obligations of Borrower and/or for payment under this Guaranty; (v) protest or notice of dishonor or default to Guarantor or to any other person with respect to any of the Obligations of Borrower; (vi) the benefit of any homestead or other exemptions; and (vii) to the extent such waiver may be enforceable at the time of foreclosure, any right to have any mortgaged property securing the Obligations of Borrower appraised after

foreclosure for the purpose of reducing a deficiency judgment against Borrower, Guarantor or any other guarantor or other party.

13. Anything contained herein to the contrary notwithstanding, if for any reason the effective rate of interest on any of the Obligations of Borrower should exceed the maximum lawful rate, the effective rate of such obligation shall be deemed reduced to and shall be such maximum lawful rate, and any sums of interest which have been collected in excess of such maximum lawful rate shall be applied as a credit against the unpaid principal balance due.

14. Guarantor shall be in default under this Guaranty Agreement upon the happening of any of the following events, circumstances or conditions:

a. Failure of Guarantor to pay its obligations hereunder immediately upon demand after a default by Borrower in the payment of the Obligations of Borrower; or

b. Any warranty, representation or statement made or furnished to Lender by or on behalf of Guarantor in connection with this Guaranty Agreement or to induce Lender to extend credit or otherwise deal with either Borrower or Guarantor proving to have been false in any material respect when made or furnished; or

c. Death (unless Lender, in its discretion, accepts a substitute guarantor), dissolution, termination of existence, insolvency, business failure, appointment of a receiver for any part of the property of, assignment for the benefit of creditors by, or the commencement of any proceeding under any State or Federal Bankruptcy or Insolvency Laws by or against any Guarantor; or

d. Material adverse change in the financial position of Guarantor.

15. Remedies upon Default. Upon the occurrence of any of the foregoing events, circumstances, or conditions of default, all of the obligations evidenced herein or guaranteed hereby shall immediately be due and payable without notice. Further, Lender shall then have all of the rights and remedies granted hereunder, and all of the rights and remedies of a secured party and/or holder in due course under the South Carolina Uniform Commercial Code and/or under other Laws of South Carolina.

16. Any provision hereof to the contrary notwithstanding, to the extent Guarantor is determined to be an "insider" as such term is used in the United States Bankruptcy Code or cases thereunder, Guarantor waives any right (whether established by contract or statute or otherwise available at law or in equity) to reimbursement, indemnity, subrogation, contribution or other such claim against Lender, Borrower or any other guarantor or any other person primarily or secondarily liable for any obligations of Borrower with respect to any disbursement or payment made by Guarantor under or in connection with this Guaranty or otherwise.

17. In the event any payment made by Guarantor to Lender is determined to be a preferential transfer under any bankruptcy or similar law and Lender is required to return such payment to a trustee in bankruptcy, to a receiver, to Guarantor, or to another person or entity, Guarantor's obligations under this Guaranty shall not be discharged with respect to such preferential payment notwithstanding any satisfaction of the Note guaranteed hereby or the return of this Guaranty. Furthermore, Guarantor shall be jointly and severally liable to Lender for the amount of any such preferential payment and any interest expenses or other expenses, including but not limited to attorneys' fees, incurred by Lender related in any way to such preferential payment, and Guarantor agrees to reinstate any collateral given to Lender as security for the obligations under this Guaranty notwithstanding the fact that such collateral may have been released or returned by Lender.

18. Guarantor acknowledges that Guarantor has previously submitted financial statements to Lender for the purpose of inducing Lender to extend credit to Borrower. Guarantor agrees to update such financial statements from time to time as reasonably by Lender. Guarantor further agrees to immediately notify Lender in writing of any material adverse change in the financial position of Guarantor. Guarantor covenants and warrants that such financial statements, as updated or supplemented from time to time by Guarantor, shall remain a true and accurate statement of Guarantor's financial position for so long as the Obligations of Borrower remain outstanding, and Lender shall be entitled to continue to rely on the truth and accuracy of such statements. Guarantor agrees not to transfer assets for less than fair value or take any other action which could reasonably be expected to reduce the net worth of Guarantor or diminish Guarantor's ability to perform Guarantor's obligations hereunder.

19. Guarantor's liability hereunder shall not be diminished or reduced by (i) any payment of any of the obligations of Borrower by any other guarantor, endorser, co-obligator or any other person liable or to become liable for the payment of the Obligations of Borrower, or (ii) any reduction of the Obligations of Borrower by realization of any collateral or security or by any other source.

20. Guarantor submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Guarantor further agrees to comply with all requirements necessary to give such court in personam jurisdiction and agrees that service of process may be accomplished by, in addition to any other lawful means,

certified mail, return receipt requested, to Guarantor at Guarantor's address set forth below or any new address of which Lender has been notified by Guarantor in writing.

21. WAIVER OF JURY TRIAL. TO THE EXTENT NOW OR HEREAFTER PERMITTED BY LAW, THE B PERMITTED BY LAW, THE GUARANTOR AND ANY OTHER GUARANTOR WAIVES TRIAL BY JURY WITH RESPECT TO ANY ACTION, CLAIM, SUIT OR PROCEEDING ON OR ARISING OUT OF THE LOANS, THE OBLIGATIONS, THE CONDUCT OF THE RELATIONSHIP BETWEEN THE LENDER AND THE BORROWER, AND/OR THE CONDUCT OF THE RELATIONSHIP BETWEEN THE LENDER AND ANY GUARANTOR.

WITNESS the Hand and Seal of the undersigned, this Unconditional Guaranty being executed and delivered on the date first above written.

Dundresshead

By: J. CHRISTOPHER LINDGREN

BSN

Exhibit D

UNCONDITIONAL GUARANTY AGREEMENT

THIS UNCONDITIONAL GUARANTY AGREEMENT is made and granted by the undersigned DAVID A. BROSMAN ("Guarantor") in order to induce CAROLINA FIRST BANK ("Lender"), whose address is 104 South Main Street, Greenville, South Carolina 29601, to extend, amend, modify or forbear from exercising certain remedies with respect to certain credit to or for the benefit of BLACK DIAMOND, LLC, a South Carolina limited liability company ("Borrower"), and is given in consideration of the benefits flowing to Guarantor therefrom (which Guarantor hereby acknowledges and agrees constitute fair and adequate consideration for this Guaranty). In consideration of the foregoing, the receipt and sufficiency of which is hereby acknowledged, Guarantor hereby covenants and agrees as follows:

1. GUARANTY OF OBLIGATIONS. Guarantor hereby irrevocably, unconditionally and absolutely guarantees to Lender, its successors and assigns, the punctual payment and performance as and when due of the following-described indebtedness, liabilities, obligations and duties (collectively, the "Obligations"):

a. All monies now or hereafter owed to Lender that are evidenced by that certain Promissory Note of Borrower to the order of Lender, dated as of January 25, 2008, in the original maximum principal amount of \$3,500,000.00 (the "Note"), including without limitation, all principal, interest, late charges, prepayment fees, other charges, reasonable attorneys' fees, costs and expenses whatsoever becoming due to Lender pursuant to the Note and any renewals, extensions, modifications, forbearances and rearrangements of, and any and all substitutes and replacements for, the Note and any other indebtedness, liabilities, duties and obligations whatsoever now or hereafter evidenced by or pursuant to the Note, whether direct, indirect or contingent.

b. All other monies now or hereafter owed to Lender and all performance under and/or compliance with all terms, conditions, covenants, representations, warranties and provisions set forth in (i) the Note and (ii) all loan documents pertaining to or executed in connection with the Note, including without limitation that certain Forbearance Agreement dated as of July 30, 2010 among Lender, Borrower and certain other parties (collectively "Loan Documents") to be performed by or complied with on the part of Borrower or any other guarantors thereof or parties thereto, including without limitation, any renewals, extensions, modifications, and rearrangements of, and any and all substitutes and replacements for any of the foregoing.

c. All obligations of Borrower incurred pursuant to and in accordance with all "hedging agreements", if any, now or hereafter entered into by Borrower with Lender, which term shall include without limitation any interest rate swap, cap or collar agreements, interest rate future or option contracts, currency swap agreements, currency future or option contracts, commodity agreements, and other similar agreements or arrangements designed to protect against fluctuations in interest rates, currency values or commodity values, and all amendments, modifications, substitutions, replacements, and additions thereto.

d. All costs or expenses incurred, or advances made, by Lender, including without limitation court costs and reasonable attorneys' fees, (i) to preserve the priority, validity or amount of the Note and/or any collateral now or hereafter existing as security for the Note and (ii) to enforce the collection of all sums due to Lender pursuant to the Note and any other Loan Documents, (iii) to enforce the performance of all terms and provisions of the Loan Documents and (iv) to realize the benefit of any collateral for the obligations of Borrower owed to Lender pursuant to the Loan Documents.

e. All monies now or hereafter owed to Lender pursuant to and all performance under and/or compliance with this Guaranty, and the terms, provisions, covenants and warranties contained herein, and any renewals, extensions, modifications and rearrangements of, and any and all substitutes for, this Guaranty including without limitation all costs, expenses and reasonable attorneys' fees incurred by Lender in the enforcement of this Guaranty and the preservation of Lender's rights hereunder.

2. NATURE OF GUARANTY. This Guaranty constitutes an irrevocable, unconditional, absolute, present and continuing guaranty of payment and performance and not a guaranty of collection. Guarantor, without limitation on its obligations hereunder, agrees that it is jointly and severally liable for payment of the Obligations as a primary obligor of Borrower. The obligations of Guarantor hereunder shall not be subject to any counterclaim, setoff, deduction or other defense existing or claimed now or hereafter by or on behalf of Borrower, any other guarantor or any other person or entity whomsoever, whether such setoff, counterclaim, deduction or defense arises in connection with the Obligations, the transactions creating the Obligations, or otherwise, nor, except as otherwise expressly provided herein, shall this Guaranty be reduced, released, discharged, diminished, impaired, or adversely affected, in whole or in part, by any of the foregoing. Guarantor may not revoke this Guaranty and this Guaranty shall remain in full force and effect after any attempted revocation by Guarantor, and shall remain in full force and effect until all of the Obligations shall have been paid, performed and satisfied in full.

3. CONSENTS. Guarantor consents to and agrees that its Obligations hereunder shall not, except as otherwise expressly stated herein, be released, discharged, impaired, diminished, reduced, or otherwise affected by any act, event, happening, occurrence, circumstance, condition, matter or thing whatsoever, including without limitation all such items as are set forth hereinafter (whether occurring before, during or after the occurrence of any event of default under the Note or any Loan Document, and whether or not Guarantor shall have any knowledge or notice thereof or have given its consent thereto). Guarantor further waives any and all rights (including without limitation rights to notice) which it might otherwise have arising out of or as a result of, (a) all renewals, extensions, continuations, modifications, supplements, amendments, exchanges, alterations, rearrangements, waivers, compromises, terminations, releases or surrenders of any or all of the Obligations, any or all of the Loan Documents, whether in whole or in part; (b) all adjustments, indulgences, postponements, forbearances and compromises granted or given by Lender to Borrower or any other person; (c) the death, insolvency, bankruptcy, liquidation, disability, reorganization, dissolution, or lack of power of any person, including, without limitation, Borrower and Guarantor; (d) the invalidity, illegality or unenforceability of all or any part of the Obligations and/or the Loan Documents for any reason whatsoever, including without limitation claims of ultra vires acts, claims relating to the authority of signers, claims relating to usury, claims relating to unenforceability, impossibility, or uncollectibility, and claims relating to forgery or irregularity; (e) any full or partial release of Borrower or any other persons, from liability for payment or performance of any Obligations; (f) the taking or accepting of any other security, collateral or guaranty, or other assurance of payment, for any of the Obligations; (g) any release, surrender, exchange, subordination, disposition, deterioration, waste, loss or impairment of any collateral, property or security, at any time existing in connection with, or securing payment of, any Obligations; (h) failure by Lender or any other person to exercise diligence, commercial reasonableness or reasonable care in the preservation, protection, enforcement, sale or other handling or treatment of all or any part of such collateral, property or security; (i) Lender's failure to obtain or perfect any security interest, lien or other guaranty agreement; (j) the determination or adjudication that any payment on any of the Obligations constitutes a preference under bankruptcy laws, or the requirement for any reason that Lender must refund or relinquish such payment; (k) any lack of disclosure to Guarantor of any information; (l) any sale, assignment, transfer, endorsement or granting by Lender of any interest in the Note and/or any of the Loan Documents; (m) any failure of consideration or failure of Guarantor to receive or realize any or all of the benefits expected or contemplated by virtue of this Guaranty; and (n) any other action or omission with respect to all or any

part of the Obligations, or the security and collateral therefor, whether or not such action or omission prejudices Guarantor or increases the likelihood that Guarantor will be required to pay all or any part of the Obligations; it being the unambiguous and unequivocal intention of Guarantor that Guarantor be obligated to pay and perform the Obligations if Borrower shall not punctually pay and perform such Obligations when due, notwithstanding any occurrence, circumstance, event, action, or omission whatsoever, whether or not contemplated, and whether or not specifically described herein. Notwithstanding the foregoing, Guarantor does not waive or release (expressly or impliedly) any rights of subrogation, reimbursement or contribution which it may have, after payment in full of the Obligations, against others liable on the Obligations; provided, that Guarantor's rights of subrogation and reimbursement shall be and at all times remain subordinate to Lender's rights and claims pursuant to Section 5 of this Guaranty.

4. WAIVERS. Guarantor hereby absolutely, unconditionally and irrevocably waives, to the fullest extent permitted by law, (a) any requirement that prior to making demand for payment or seeking to enforce any right or remedy under this Guaranty, Lender first make demand upon, make claim against or take any action with respect to Borrower or any other persons, or resort to or seek to exhaust any collateral, or seek to enforce any other right or remedy in any of the Loan Documents or resort to any other means available by law or in equity for obtaining payment of the Obligations; (b) diligence, presentment, demand, protest, notice of acceptance, notice of dishonor, notice of protest and any other notice of any other kind; (c) any right of subrogation to any right of Borrower and any other right to reimbursement, indemnity or other recourse against Borrower or any other person; (d) any right or benefit (whether directly or through Borrower or any other persons) under any appraisal, valuation, stay, extension or redemption laws; and (e) any right to require marshalling of any collateral.

5. SUBORDINATION OF GUARANTOR CLAIMS. Until the Obligations are paid in full and Guarantor's liability hereunder has been released and discharged, Guarantor covenants and agrees that it shall not claim, seek, sue for, receive or collect, directly or indirectly, from Borrower or any other person any other material obligations, indebtedness, liabilities or duties owed or claimed to be owed by Borrower or such other person to Guarantor (the "Guarantor Claims"), regardless of how arising, in what capacity claimed, or how evidenced, all of which Guarantor Claims shall be inferior and subordinate to all liens, security interests and other encumbrances upon the assets of Borrower or such other person which shall secure the payment of the Obligations, regardless of whether such encumbrances arise in favor of Guarantor or Lender and whether presently existing and hereafter arising. Guarantor covenants and agrees that it shall not exercise and enforce any creditor's rights it may have against Borrower or such other party, or foreclose or repossess, claim, or otherwise institute any actions or proceedings (whether judicial, administrative, or otherwise) to enforce any liens, security interests or other encumbrances on any of the assets of Borrower or such other person so long as the Obligations remain outstanding. Guarantor further covenants and agrees that Lender may prove its claim for outstanding Obligations in any receivership, bankruptcy, reorganization, rearrangement, debtor relief or other insolvency proceeding in which Borrower or such other party is a debtor so as to establish its rights hereunder and receive directly from the receiver, trustee or other court custodian, dividends and payments which would otherwise be payable upon the Guarantor Claims, and in this connection Guarantor hereby assigns to the extent of the outstanding Obligations such dividends and payments to Lender and agrees that, with respect to the remainder of the Guarantor Claims, Guarantor's rights shall be subordinate to Lender's rights and claims. If Lender receives, for application upon the Obligations, any such dividends or payments which, as between Borrower and Guarantor, constitute payments on the Guarantor Claims, then upon full payment of the Obligations to Lender, Guarantor shall be subrogated to the rights of Lender to the extent that payments to Lender on the Guarantor Claims have contributed to satisfaction of the Obligations; and such subrogation shall be in respect to that portion of the Obligations which would have been unpaid if Lender had not received dividends or payments upon the Guarantor Claims.

6. REPRESENTATIONS AND WARRANTIES. Guarantor hereby represents and warrants to Lender that (a) as of the execution hereof, nothing exists to impair the effectiveness of this Guaranty or its immediate and continuing effectiveness; (b) Guarantor has received, or will receive, direct or indirect benefit and fair consideration in making this Guaranty; (c) to the extent desired by Guarantor, Guarantor is familiar with the books and records regarding Borrower's financial condition, the project which the Loan will finance, and the value of all collateral intended as security for payment of any of the Obligations; however, Guarantor is not relying on such financial condition or collateral in making this Guaranty; (d) no person has made any representation, warranty or statement to Guarantor to induce Guarantor to make this Guaranty; and (e) this Guaranty is the legal and binding obligation of Guarantor, enforceable against Guarantor in accordance with its terms.

7. EFFECT OF BANKRUPTCY. If, pursuant to any bankruptcy, insolvency or other debtor relief, laws or rules, or any judgment or order or decision thereunder, any payment received by Lender shall be adjudicated as a voidable preference or Lender must otherwise rescind or restore any amount taken, credited or received by Lender in payment or satisfaction by any of the Obligations, any prior release or discharge by the terms of this Guaranty given by Lender shall be without effect and this Guaranty shall remain in full force and effect. Guarantor's Obligations hereunder shall not be discharged except by Guarantor's performance of those Obligations and then only to the extent of such performance.

8. DEFAULT. The term "Event of Default", whenever used hereinafter, shall mean any one or more of the following events: (a) occurrence of an Event of Default set forth or defined in the Note or in any of the Loan Documents, including a breach of any of the terms or conditions of this Guaranty, which is not cured within any applicable grace period, if any, set forth herein or therein; (b) the entry of any judgment against Guarantor, or the attachment, levy or garnishment against any property of Guarantor which in the reasonable judgment of Lender would materially and adversely affect Guarantor's ability to perform his Obligations under this Guaranty and which remains unsatisfied for a period of sixty (60) days after the filing or issuance of the same, or the occurrence of any other substantial change in the financial condition of Guarantor which, in the reasonable judgment of Lender, would materially and adversely affect Guarantor's ability to perform his Obligations under this Guaranty; (c) except as permitted in the Loan Documents, any transfer, sale, conveyance, disposition or assignment of the membership, partnership, stock or other ownership interest or management rights of Guarantor in Borrower, whether voluntary, involuntary, or by operation of law, without the express prior written consent of Lender; and (d) the death, bankruptcy, liquidation, disability, or lack of power of Guarantor.

9. REMEDIES. Upon occurrence of any Event of Default, Lender may take any or all of the following actions without any requirement of demand for payment or performance on the part of Borrower or any other persons whomsoever and without requirement of resort to any collateral for any of the Obligations or to any other means of obtaining payment or performance of any of the Obligations, as follows: (a) Lender may declare all of Borrower's Obligations under the Loan Documents, regardless of their terms and including Guarantor's Obligations hereunder, immediately due and payable and that performance thereof is immediately required; (b) Lender may accelerate all or any part of the Obligations and require full payment and performance thereof by Guarantor; (c) Lender shall have the right of setoff against a lien upon and a continuing security interest in all instruments, documents, securities, cash or other property, and all proceeds of the foregoing, which may now or hereafter be owned by Guarantor which may become in possession or control of Lender or any other party acting on Lender's behalf, directly or indirectly, regardless of the capacity in which Lender may receive, hold or control the same; and (d) Lender shall have all of the rights and remedies afforded to it under the Note and the Loan Documents or otherwise existing at law or in equity.

10. NATURE OF REMEDIES. The remedies provided herein, in the Note, and in all other Loan Documents shall be cumulative and none is exclusive and such remedies shall be exercised concurrently

or consecutively at the option of Lender. Any waiver, failure, or delay by Lender in exercising any remedy provided herein, in the Note or in any Loan Document upon occurrence of any Event of Default, shall not constitute a waiver of such right or remedy or preclude its future exercise or that of any other right of remedy in the event of any subsequent default, whether of the same or different nature. No notice to or demand on Guarantor by Lender shall be deemed to be a waiver of Lender's right to take other or further action and in no event shall any waiver or right, power or remedy of Lender hereunder be effective unless the same is in writing and signed by Lender.

11. SEVERABILITY. The invalidity, illegality or unenforceability of any provision of this Guaranty or in the Note or any of the Loan Documents shall not render invalid, illegal or unenforceable any other provision hereof.

12. SURVIVAL. All covenants, agreement, representations, and warranties of Guarantor contained herein and in any document or item delivered pursuant hereto shall survive the execution hereof and continue and remain in full force and effect until the Obligations have been paid, performed and satisfied in full.

13. ENTIRE AGREEMENT. This Guaranty contains the entire agreement and understanding between Guarantor and Lender with respect to the subject matter hereof, and supersedes all prior agreements and understandings, whether oral or written.

14. GOVERNING LAW. This Guaranty shall be governed and construed in accordance with the internal laws of the State of South Carolina, without regard to any choice of law or conflict of law provisions which might apply the law of another jurisdiction.

15. CONSENT TO JURISDICTION. Any action or proceeding which Lender may initiate with respect to this Guaranty shall, at Lender's sole option, be brought in and subject to the jurisdiction of the any state or federal court of competent jurisdiction of the State of South Carolina, to which jurisdiction Guarantor hereby irrevocably consents. Notwithstanding the foregoing, however, Guarantor additionally acknowledges and agrees that Lender may initiate any action upon or for the enforcement of this Guaranty in any state or federal court of competent jurisdiction in any other State in which Guarantor may at any time reside or possess material assets, to which jurisdictions Guarantor hereby further irrevocably consents. Guarantor irrevocably waives any objection, including without limitation any objection to the laying of venue based on the grounds of forum non conveniens, which she may now or hereafter have to the bringing of any such action or proceeding in any such jurisdiction. Nothing herein shall affect the right of Lender to serve process in any manner permitted by law nor shall limit the right of Lender to bring proceedings against another party to any of the Loan Documents in the courts of any other jurisdiction.

16. NOTICE. All notices made or required hereunder shall be in writing. The effective date of any notice shall be the date upon which such notice shall have been personally delivered (including personal delivery by Federal Express or other nationally recognized overnight private courier service) or the date of postmark when deposited in the United States Mail, registered or certified, postage prepaid, return receipt requested, addressed in any such event, to Lender or Guarantor at the address set forth after Guarantor's signature hereinafter, or at such other addresses as may hereafter be designated in writing.

17. WAIVER OF JURY TRIAL. GUARANTOR, TO THE MAXIMUM EXTENT PERMITTED BY LAW, WAIVES ANY RIGHT TO A TRIAL BY JURY IN ANY ACTION ARISING FROM OR RELATED TO THIS GUARANTY.

Executed this 30th day of July, 2010.

IN THE PRESENCE OF:

[Signature]
(Witness 1)

[Signature]
(Witness 2)

GUARANTOR:

[Signature]

Print Name: David A. Brosman

Social Security No.:

[Redacted]

NOTICE ADDRESS:

P.O. Box 22120
N. Hwy 1 N. Road 15, SC
29425

Exhibit E

UNCONDITIONAL GUARANTY AGREEMENT

THIS UNCONDITIONAL GUARANTY AGREEMENT is made and granted by the undersigned DAVID A. BROSMAN ("Guarantor") in order to induce CAROLINA FIRST BANK ("Lender"), whose address is 104 South Main Street, Greenville, South Carolina 29601, to extend, amend, modify or forbear from exercising certain remedies with respect to certain credit to or for the benefit of BLACK DIAMOND, LLC, a South Carolina limited liability company ("Borrower"), and is given in consideration of the benefits flowing to Guarantor therefrom (which Guarantor hereby acknowledges and agrees constitute fair and adequate consideration for this Guaranty). In consideration of the foregoing, the receipt and sufficiency of which is hereby acknowledged, Guarantor hereby covenants and agrees as follows:

1. GUARANTY OF OBLIGATIONS. Guarantor hereby irrevocably, unconditionally and absolutely guarantees to Lender, its successors and assigns, the punctual payment and performance as and when due of the following-described indebtedness, liabilities, obligations and duties (collectively, the "Obligations"):

a. All monies now or hereafter owed to Lender that are evidenced by that certain Promissory Note (Commercial – Single Advance) Renewal Note of Borrower to the order of Lender, dated as of July 25, 2008, in the original maximum principal amount of \$2,000,000.00 (the "Note"), including without limitation, all principal, interest, late charges, prepayment fees, other charges, reasonable attorneys' fees, costs and expenses whatsoever becoming due to Lender pursuant to the Note and any renewals, extensions, modifications, forbearances and rearrangements of, and any and all substitutes and replacements for, the Note and any other indebtedness, liabilities, duties and obligations whatsoever now or hereafter evidenced by or pursuant to the Note, whether direct, indirect or contingent.

b. All other monies now or hereafter owed to Lender and all performance under and/or compliance with all terms, conditions, covenants, representations, warranties and provisions set forth in (i) the Note and (ii) all loan documents pertaining to or executed in connection with the Note, including without limitation that certain Forbearance Agreement dated as of July 30, 2010 among Lender, Borrower and certain other parties (collectively "Loan Documents") to be performed by or complied with on the part of Borrower or any other guarantors thereof or parties thereto, including without limitation, any renewals, extensions, modifications, and rearrangements of, and any and all substitutes and replacements for any of the foregoing.

c. All obligations of Borrower incurred pursuant to and in accordance with all "hedging agreements", if any, now or hereafter entered into by Borrower with Lender, which term shall include without limitation any interest rate swap, cap or collar agreements, interest rate future or option contracts, currency swap agreements, currency future or option contracts, commodity agreements, and other similar agreements or arrangements designed to protect against fluctuations in interest rates, currency values or commodity values, and all amendments, modifications, substitutions, replacements, and additions thereto.

d. All costs or expenses incurred, or advances made, by Lender, including without limitation court costs and reasonable attorneys' fees, (i) to preserve the priority, validity or amount of the Note and/or any collateral now or hereafter existing as security for the Note and (ii) to enforce the collection of all sums due to Lender pursuant to the Note and any other Loan Documents, (iii) to enforce the performance of all terms and provisions of the Loan Documents and (iv) to realize the benefit of any collateral for the obligations of Borrower owed to Lender pursuant to the Loan Documents.

e. All monies now or hereafter owed to Lender pursuant to and all performance under and/or compliance with this Guaranty, and the terms, provisions, covenants and warranties contained herein, and any renewals, extensions, modifications and rearrangements of; and any and all substitutes for, this Guaranty including without limitation all costs, expenses and reasonable attorneys' fees incurred by Lender in the enforcement of this Guaranty and the preservation of Lender's rights hereunder.

2. NATURE OF GUARANTY. This Guaranty constitutes an irrevocable, unconditional, absolute, present and continuing guaranty of payment and performance and not a guaranty of collection. Guarantor, without limitation on its obligations hereunder, agrees that it is jointly and severally liable for payment of the Obligations as a primary obligor of Borrower. The obligations of Guarantor hereunder shall not be subject to any counterclaim, setoff, deduction or other defense existing or claimed now or hereafter by or on behalf of Borrower, any other guarantor or any other person or entity, whomsoever, whether such setoff, counterclaim, deduction or defense arises in connection with the Obligations, the transactions creating the Obligations, or otherwise, nor, except as otherwise expressly provided herein, shall this Guaranty be reduced, released, discharged, diminished, impaired, or adversely affected, in whole or in part, by any of the foregoing. Guarantor may not revoke this Guaranty and this Guaranty shall remain in full force and effect after any attempted revocation by Guarantor, and shall remain in full force and effect until all of the Obligations shall have been paid, performed and satisfied in full.

3. CONSENTS. Guarantor consents to and agrees that its Obligations hereunder shall not, except as otherwise expressly stated herein, be released, discharged, impaired, diminished, reduced, or otherwise affected by any act, event, happening, occurrence, circumstance, condition, matter or thing whatsoever, including without limitation all such items as are set forth hereinafter (whether occurring before, during or after the occurrence of any event of default under the Note or any Loan Document, and whether or not Guarantor shall have any knowledge or notice thereof or have given its consent thereto). Guarantor further waives any and all rights (including without limitation rights to notice) which it might otherwise have arising out of or as a result of, (a) all renewals, extensions, continuations, modifications, supplements, amendments, exchanges, alterations, rearrangements, waivers, compromises, terminations, releases or surrenders of any or all of the Obligations, any or all of the Loan Documents, whether in whole or in part; (b) all adjustments, indulgences, postponements, forbearances and compromises granted or given by Lender to Borrower or any other person; (c) the death, insolvency, bankruptcy, liquidation, disability, reorganization, dissolution, or lack of power of any person, including, without limitation, Borrower and Guarantor; (d) the invalidity, illegality or unenforceability of all or any part of the Obligations and/or the Loan Documents for any reason whatsoever, including without limitation claims of ultra vires acts, claims relating to the authority of signers, claims relating to usury, claims relating to unenforceability, impossibility, or uncollectibility, and claims relating to forgery or irregularity; (e) any full or partial release of Borrower or any other persons, from liability for payment or performance of any Obligations; (f) the taking or accepting of any other security, collateral or guaranty, or other assurance of payment, for any of the Obligations; (g) any release, surrender, exchange, subordination, disposition, deterioration, waste, loss or impairment of any collateral, property or security, at any time existing in connection with, or securing payment of, any Obligations; (h) failure by Lender or any other person to exercise diligence, commercial reasonableness or reasonable care in the preservation, protection, enforcement, sale or other handling or treatment of all or any part of such collateral, property or security; (i) Lender's failure to obtain or perfect any security interest, lien or other guaranty agreement; (j) the determination or adjudication that any payment on any of the Obligations constitutes a preference under bankruptcy laws, or the requirement for any reason that Lender must refund or relinquish such payment; (k) any lack of disclosure to Guarantor of any information; (l) any sale, assignment, transfer, endorsement or granting by Lender of any interest in the Note and/or any of the Loan Documents; (m) any failure of consideration or failure of Guarantor to receive or realize any or all of the benefits expected or contemplated by virtue of this Guaranty; and (n) any other action or omission with respect to all or any

part of the Obligations, or the security and collateral therefor, whether or not such action or omission prejudices Guarantor or increases the likelihood that Guarantor will be required to pay all or any part of the Obligations; it being the unambiguous and unequivocal intention of Guarantor that Guarantor be obligated to pay and perform the Obligations if Borrower shall not punctually pay and perform such Obligations when due, notwithstanding any occurrence, circumstance, event, action, or omission whatsoever, whether or not contemplated, and whether or not specifically described herein. Notwithstanding the foregoing, Guarantor does not waive or release (expressly or impliedly) any rights of subrogation, reimbursement or contribution which it may have, after payment in full of the Obligations, against others liable on the Obligations; provided, that Guarantor's rights of subrogation and reimbursement shall be and at all times remain subordinate to Lender's rights and claims pursuant to Section 5 of this Guaranty.

4. WAIVERS. Guarantor hereby absolutely, unconditionally and irrevocably waives, to the fullest extent permitted by law, (a) any requirement that prior to making demand for payment or seeking to enforce any right or remedy under this Guaranty, Lender first make demand upon, make claim against or take any action with respect to Borrower or any other persons, or resort to or seek to exhaust any collateral, or seek to enforce any other right or remedy in any of the Loan Documents or resort to any other means available by law or in equity for obtaining payment of the Obligations; (b) diligence, presentment, demand, protest, notice of acceptance, notice of dishonor, notice of protest and any other notice of any other kind; (c) any right of subrogation to any right of Borrower and any other right to reimbursement, indemnity or other recourse against Borrower or any other person; (d) any right or benefit (whether directly or through Borrower or any other persons) under any appraisal, valuation, stay, extension or redemption laws; and (e) any right to require marshalling of any collateral.

5. SUBORDINATION OF GUARANTOR CLAIMS. Until the Obligations are paid in full and Guarantor's liability hereunder has been released and discharged, Guarantor covenants and agrees that it shall not claim, seek, sue for, receive or collect, directly or indirectly, from Borrower or any other person any other material obligations, indebtedness, liabilities or duties owed or claimed to be owed by Borrower or such other person to Guarantor (the "Guarantor Claims"), regardless of how arising, in what capacity claimed, or how evidenced, all of which Guarantor Claims shall be inferior and subordinate to all liens, security interests and other encumbrances upon the assets of Borrower or such other person which shall secure the payment of the Obligations, regardless of whether such encumbrances arise in favor of Guarantor or Lender and whether presently existing and hereafter arising. Guarantor covenants and agrees that it shall not exercise and enforce any creditor's rights it may have against Borrower or such other party, or foreclose or repossess, claim, or otherwise institute any actions or proceedings (whether judicial administrative, or otherwise) to enforce any liens, security interests or other encumbrances on any of the assets of Borrower or such other person so long as the Obligations remain outstanding. Guarantor further covenants and agrees that Lender may prove its claim for outstanding Obligations in any receivership, bankruptcy, reorganization, rearrangement, debtor relief or other insolvency proceeding in which Borrower or such other party is a debtor so as to establish its rights hereunder and receive directly from the receiver, trustee or other court custodian, dividends and payments which would otherwise be payable upon the Guarantor Claims; and in this connection Guarantor hereby assigns to the extent of the outstanding Obligations such dividends and payments to Lender and agrees that, with respect to the remainder of the Guarantor Claims, Guarantor's rights shall be subordinate to Lender's rights and claims. If Lender receives, for application upon the Obligations, any such dividends or payments which, as between Borrower and Guarantor, constitute payments on the Guarantor Claims, then upon full payment of the Obligations to Lender, Guarantor shall be subrogated to the rights of Lender to the extent that payments to Lender on the Guarantor Claims have contributed to satisfaction of the Obligations; and such subrogation shall be in respect to that portion of the Obligations which would have been unpaid if Lender had not received dividends or payments upon the Guarantor Claims.

6. REPRESENTATIONS AND WARRANTIES. Guarantor hereby represents and warrants to Lender that (a) as of the execution hereof, nothing exists to impair the effectiveness of this Guaranty or its immediate and continuing effectiveness; (b) Guarantor has received, or will receive, direct or indirect benefit and fair consideration in making this Guaranty; (c) to the extent desired by Guarantor, Guarantor is familiar with the books and records regarding Borrower's financial condition, the project which the Loan will finance, and the value of all collateral intended as security for payment of any of the Obligations; however, Guarantor is not relying on such financial condition or collateral in making this Guaranty; (d) no person has made any representation, warranty or statement to Guarantor to induce Guarantor to make this Guaranty; and (e) this Guaranty is the legal and binding obligation of Guarantor, enforceable against Guarantor in accordance with its terms.

7. EFFECT OF BANKRUPTCY. If, pursuant to any bankruptcy, insolvency or other debtor relief laws or rules, or any judgment or order or decision thereunder, any payment received by Lender shall be adjudicated as a voidable preference or Lender must otherwise rescind or restore any amount taken, credited or received by Lender in payment or satisfaction by any of the Obligations, any prior release or discharge by the terms of this Guaranty given by Lender shall be without effect and this Guaranty shall remain in full force and effect. Guarantor's Obligations hereunder shall not be discharged except by Guarantor's performance of those Obligations and then only to the extent of such performance.

8. DEFAULT. The term "Event of Default", whenever used hereinafter, shall mean any one or more of the following events: (a) occurrence of an Event of Default set forth or defined in the Note or in any of the Loan Documents, including a breach of any of the terms or conditions of this Guaranty, which is not cured within any applicable grace period, if any, set forth herein or therein; (b) the entry of any judgment against Guarantor, or the attachment, levy or garnishment against any property of Guarantor which in the reasonable judgment of Lender would materially and adversely affect Guarantor's ability to perform his Obligations under this Guaranty and which remains unsatisfied for a period of sixty (60) days after the filing or issuance of the same, or the occurrence of any other substantial change in the financial condition of Guarantor which, in the reasonable judgment of Lender, would materially and adversely affect Guarantor's ability to perform his Obligations under this Guaranty; (c) except as permitted in the Loan Documents, any transfer, sale, conveyance, disposition or assignment of the membership, partnership, stock or other ownership interest or management rights of Guarantor in Borrower, whether voluntary, involuntary, or by operation of law, without the express prior written consent of Lender; and (d) the death, bankruptcy, liquidation, disability, or lack of power of Guarantor.

9. REMEDIES. Upon occurrence of any Event of Default, Lender may take any or all of the following actions without any requirement of demand for payment or performance on the part of Borrower or any other persons whomsoever and without requirement of resort to any collateral for any of the Obligations or to any other means of obtaining payment or performance of any of the Obligations, as follows: (a) Lender may declare all of Borrower's Obligations under the Loan Documents, regardless of their terms and including Guarantor's Obligations hereunder, immediately due and payable and that performance thereof is immediately required; (b) Lender may accelerate all or any part of the Obligations and require full payment and performance thereof by Guarantor; (c) Lender shall have the right of setoff against a lien upon and a continuing security interest in all instruments, documents, securities, cash or other property, and all proceeds of the foregoing, which may now or hereafter be owned by Guarantor which may become in possession or control of Lender or any other party acting on Lender's behalf, directly or indirectly, regardless of the capacity in which Lender may receive, hold or control the same; and (d) Lender shall have all of the rights and remedies afforded to it under the Note and the Loan Documents or otherwise existing at law or in equity.

10. NATURE OF REMEDIES. The remedies provided herein, in the Note, and in all other Loan Documents shall be cumulative and none is exclusive and such remedies shall be exercised concurrently

or consecutively at the option of Lender. Any waiver, failure, or delay by Lender in exercising any remedy provided herein, in the Note or in any Loan Document upon occurrence of any Event of Default, shall not constitute a waiver of such right or remedy or preclude its future exercise or that of any other right of remedy in the event of any subsequent default, whether of the same or different nature. No notice to or demand on Guarantor by Lender shall be deemed to be a waiver of Lender's right to take other or further action and in no event shall any waiver or right, power or remedy of Lender hereunder be effective unless the same is in writing and signed by Lender.

11. SEVERABILITY. The invalidity, illegality or unenforceability of any provision of this Guaranty or in the Note or any of the Loan Documents shall not render invalid, illegal or unenforceable any other provision hereof.

12. SURVIVAL. All covenants, agreement, representations, and warranties of Guarantor contained herein and in any document or item delivered pursuant hereto shall survive the execution hereof and continue and remain in full force and effect until the Obligations have been paid, performed and satisfied in full.

13. ENTIRE AGREEMENT. This Guaranty contains the entire agreement and understanding between Guarantor and Lender with respect to the subject matter hereof, and supersedes all prior agreements and understandings, whether oral or written.

14. GOVERNING LAW. This Guaranty shall be governed and construed in accordance with the internal laws of the State of South Carolina, without regard to any choice of law or conflict of law provisions which might apply the law of another jurisdiction.

15. CONSENT TO JURISDICTION. Any action or proceeding which Lender may initiate with respect to this Guaranty shall, at Lender's sole option, be brought in and subject to the jurisdiction of the any state or federal court of competent jurisdiction of the State of South Carolina, to which jurisdiction Guarantor hereby irrevocably consents. Notwithstanding the foregoing, however, Guarantor additionally acknowledges and agrees that Lender may initiate any action upon or for the enforcement of this Guaranty in any state or federal court of competent jurisdiction in any other State in which Guarantor may at any time reside or possess material assets, to which jurisdictions Guarantor hereby further irrevocably consents. Guarantor irrevocably waives any objection, including without limitation any objection to the laying of venue based on the grounds of forum non conveniens, which she may now or hereafter have to the bringing of any such action or proceeding in any such jurisdiction. Nothing herein shall affect the right of Lender to serve process in any manner permitted by law nor shall limit the right of Lender to bring proceedings against another party to any of the Loan Documents in the courts of any other jurisdiction.

16. NOTICE. All notices made or required hereunder shall be in writing. The effective date of any notice shall be the date upon which such notice shall have been personally delivered (including personal delivery by Federal Express or other nationally recognized overnight private courier service) or the date of postmark when deposited in the United States Mail, registered or certified, postage prepaid, return receipt requested, addressed in any such event, to Lender or Guarantor at the address set forth after Guarantor's signature hereinafter, or at such other addresses as may hereafter be designated in writing.

17. WAIVER OF JURY TRIAL. GUARANTOR, TO THE MAXIMUM EXTENT PERMITTED BY LAW, WAIVES ANY RIGHT TO A TRIAL BY JURY IN ANY ACTION ARISING FROM OR RELATED TO THIS GUARANTY.

Executed this 30th day of July, 2010.

IN THE PRESENCE OF:

[Signature]
(Witness 1)

[Signature]
(Witness 2)

GUARANTOR:

[Signature]

Print Name: David A. Brosman

~~Social Security No.:~~ [Redacted]

NOTICE ADDRESS:

P D Box 22120
Hilton Head Is
SC 29925

Exhibit F

GUARANTY

(Continuing Debt - Unlimited)

DATE AND PARTIES. The date of this Guaranty is July 25, 2008. The parties and their addresses are:

LENDER:

CAROLINA FIRST BANK
104 South Main Street
Greenville, South Carolina 29601
Telephone: (800) 476-6400

BORROWER:

BLACK DIAMOND, LLC
6 South Carolina Limited Liability Company
5 GUNMORE COURT
HILTON HEAD ISLAND, South Carolina 29926

GUARANTOR:

J. CHRISTOPHER LINDGREN
32 WIDEWATER ROAD
HILTON HEAD ISLAND, South Carolina 29926

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

A. **Pronouns.** The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.

B. **Note.** "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.

C. **Property.** "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

2. SPECIFIC AND FUTURE DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce your forbearance with respect to any Debt, or to induce you to extend and/or maintain credit, or grant any other financial accommodation, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, No. 5120783855, dated July 25, 2008, from BLACK DIAMOND, LLC (Borrower) to you, in the amount of \$2,000,000.00.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of these debts) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

A. **Future Advances.** I waive notice of and consent to any and all future advances made to the Borrower by you.

4. UNCONDITIONAL LIABILITY. I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you.

J. CHRISTOPHER LINDGREN
South Carolina Guaranty
SC/4jor1379200922000005848013072409Y

©1996 Bankers Systems, Inc., St. Cloud, MN 

Page 1

pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

6. REVOCATION. I agree that this is an absolute and unconditional Guaranty. I agree that this Guaranty will remain binding on me, whether or not there are any Debts outstanding, until you have actually received written notice of my revocation or written notice of my death or incompetence. Notice of revocation or notice of my death or incompetence will not affect my obligations under this Guaranty with respect to any Debts incurred by or for which you have made a commitment to Borrower before you actually receive such notice, and all renewals, extensions, refinancings, and modifications of such Debts. I agree that if any other person signing this Guaranty provides a notice of revocation to you, I will still be obligated under this Guaranty until I provide such a notice of revocation to you. If any other person signing this Guaranty dies or is declared incompetent, such fact will not affect my obligations under this Guaranty.

7. PROPERTY. I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeasing, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me of my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

8. DEFAULT. I will be in default if any of the following occur:

A. **Payments.** I fail to make a payment in full when due.

B. **Insolvency or Bankruptcy.** The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-signer, endorser, surety or guarantor of this Guaranty or any Debt.

C. **Death or Incompetency.** I die or am declared legally incompetent.

D. **Failure to Perform.** I fail to perform any condition or to keep any promise or covenant of this Guaranty.

E. **Other Documents.** A default occurs under the terms of any other document relating to the Debt.

F. **Other Agreements.** I am in default on any other debt or agreement I have with you.

G. **Misrepresentation.** I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. **Judgment.** I fail to satisfy or appeal any judgment against me.

I. **Forfeiture.** The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. **Name Change.** I change my name or assume an additional name without notifying you before making such a change.

K. **Property Transfer.** I transfer all or a substantial part of my money or property.

L. **Property Value.** You determine in good faith that the value of the Property has declined or is impaired.

M. **Inaccuracy.** You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

9. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. **Additional Waivers.** In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or

either person in control or a close relative of any of these other persons.) Any Guarantor who is not an insider makes these waivers until all Debt is fully repaid.

B. **No Waiver By Lender.** Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. **Waiver of Claims.** I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. **REMEDIES.** After the Borrower or I default, you may at your option do any one or more of the following.

A. **Acceleration.** You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. **Sources.** You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. **Insurance Benefits.** You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. **Payments Made on the Borrower's Behalf.** Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. **Set-Off.** You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any individual Retirement Account or other tax-deferred retirement account.

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

F. **Waiver.** Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. **COLLECTION EXPENSES AND ATTORNEYS' FEES.** On or after Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you. If any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

12. **WARRANTIES AND REPRESENTATIONS.** I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

13. **RELiance.** I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and that I have signed this Guaranty to induce you to forbear from exercising your remedies against the Borrower, extend credit to the Borrower, maintain the Borrower's credit, or grant any other financial accommodation. I represent and warrant to you that I have a direct and substantial economic interest in the Borrower and expect to derive substantial benefits from the continued existence of the Debt guaranteed hereby, and from any loan and/or financial accommodations resulting in the creation of other Debt guaranteed hereby. I agree to rely exclusively on the right to revoke this Guaranty prospectively as to future transactions in the manner as previously described in this Guaranty if at any time, in my opinion, the benefits then being received by me in connection with this Guaranty are not sufficient to warrant the continuance of this Guaranty. You may rely conclusively on a continuing warranty that I continue to be benefited by this Guaranty and you will have no duty to inquire into or confirm the receipt of any such benefits, and this Guaranty will be effective and enforceable by you without regard to the receipt, nature or value of any such benefits.

14. **APPLICABLE LAW.** This Guaranty is governed by the laws of South Carolina, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

15. **AMENDMENT, INTEGRATION AND SEVERABILITY.** This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty is the complete and final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

16. **ASSIGNMENT.** If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unpaid right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

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

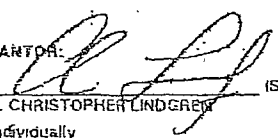
18. **NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

19. **CREDIT INFORMATION.** I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others.

20. **ADDITIONAL TERMS.** THIS GUARANTOR'S SOCIAL SECURITY NUMBER IS 523-80-2104. THIS GUARANTOR'S DATE OF BIRTH IS 09/13/1958

21. **SIGNATURES.** By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

GUARANTOR:


J. CHRISTOPHER LINDGREN
Individually

(Seal)

WOMBLE
CARLYLE
SANDRIDGE
& RICE

A LIMITED LIABILITY
PARTNERSHIP



550 South Main Street
Suite 400
Greenville, SC 29601

Mailing Address:
Post Office Box 10208
Greenville, SC 29603
Telephone: (864) 255-5400
Fax: (864) 255-5440
www.wcsr.com

Michael J. Bogle
Direct Dial: (864) 255-5426
Direct Fax: (864) 255-5865
E-mail: mbogle@wcsr.com

March 19, 2015

The Honorable Jerri Ann Roseneau
Clerk of Court, Beaufort County
PO Box 1128
Beaufort, SC 29901-1128

Re: *TD Bank, N. A. v. Black Diamond, LLC, J. Christopher Lindgren, David A.
Brosman, Julie H. King, and The Greenery, Inc.*
Case No. 2012-CP-07-00944

Dear Ms. Roseneau:

Enclosed please find an original and one copy of **TD Bank's Memorandum in Support of Its Motion to Strike Defendants' Jury Trial Demand** with regard to the above-captioned case. I would appreciate your filing the original and returning the copy to me as filed in the envelope provided. If you should have any questions or concerns, please do not hesitate to contact me.

Thank you for your assistance in this regard.

Very truly yours,

Michael J. Bogle

MJB/scc
Enclosures

cc: Keating L. Simmons, III (Via E-mail only)
Ehrick K. Haight, Jr. (Via E-mail only)

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

TD Bank, N.A., Successor by Merger to Carolina
First Bank,

Plaintiff,

v.

Black Diamond, LLC; J. Christopher Lindgren;
David A. Brosman; Julie H. King; and The
Greenery, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

C.A. No. 2012-CP-07-0944

**TD BANK'S MEMORANDUM IN
SUPPORT OF ITS MOTION TO
STRIKE DEFENDANTS' JURY TRIAL
DEMAND**

In this foreclosure action, TD Bank, N.A., Successor by Merger to Carolina First Bank, ("TD Bank" or "the Bank") has moved the Court to strike the jury trial demand of Defendants Black Diamond, LLC, J. Christopher Lindgren, and David A. Brosman¹ (collectively, "Defendants") because Defendants are not entitled to and waived any right to a jury trial in this case. Not only did Defendants contractually waive any right to a jury trial, see Motion to Strike, but they also are not entitled to a jury trial on the Bank's equitable claims against them or on their permissive counterclaims. In support of its Motion, TD Bank submits the following:

BRIEF BACKGROUND

The above-captioned lawsuit is a foreclosure action, which is equitable in nature and in which TD Bank seeks to (1) foreclose on mortgages that Defendant Black Diamond, LLC ("Black Diamond") executed in its favor and (2) recover any deficiency after the foreclosure sale from J. Christopher Lindgren and David A. Brosman (collectively, "the Guarantors"), who guaranteed Black Diamond's debts to the bank. See Compl.

¹ The remaining defendants in this case, Julie H. King and The Greenery, Inc., have not demanded a jury trial.

Black Diamond and the Guarantors have filed the following counterclaims against the Bank: breach of the covenant of good faith and fair dealing; breach of contract; breach of fiduciary duty; duress; interference with prospective economic relations; and unfair trade practices. Defendants' counterclaims do not dispute the execution or the enforceability of the loan documents which are subject to the Bank's foreclosure and deficiency claims, and, the counterclaims are based on alleged events that occurred after the execution of those contracts and/or on the Bank's refusal to agree to a short sale of commercial property that Black Diamond mortgaged to it.

ANALYSIS

I. Defendants Are Not Entitled to a Jury Trial on the Bank's Equitable Foreclosure and Deficiency Claims Against Them.

Foreclosure actions, like this one, are equitable, and, as a result, parties to such an action are "not entitled, as a matter of right, to a jury trial." Carolina First Bank v. BADD, LLC, No. 2013-000107, 2015 WL 340791, *1 (Jan. 28, 2015) (attached hereto as **Exhibit A**). See also S.C. R. Civ. P. Rule 71(a) ("Actions to foreclose liens or obtain partition of real property **shall be tried by the court**, and shall ordinarily be referred to a master pursuant to Rule 53") (emphasis added). In BADD, the South Carolina Supreme Court recently confirmed that guarantors, who are parties to a foreclosure action "for the purpose of collecting a deficiency," are not entitled to a jury trial on that claim because deficiency judgments are "incidental to the main relief sought" in a foreclosure action. BADD, at *2. In so holding, the BADD court relied on S.C. Code Ann. § 29-3-660, which specifically permits **a court** to award a deficiency judgment against a guarantor in a foreclosure action. Section 29-3-660 provides:

In actions to foreclose mortgages[,] . . . if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action

and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.

S.C. Code Ann. § 29-3-660 (emphasis added).

As noted above, the above-captioned lawsuit is a foreclosure action, which is equitable in nature and in which TD Bank seeks to: (1) foreclose on the mortgages that Black Diamond executed in its favor and (2) recover any deficiency after the foreclosure sale from the Guarantors. See Compl. As a result, Black Diamond is not entitled to a jury trial on the Bank's foreclosure action against it, BADD, at *1, and the Guarantors, whom "the Bank included . . . as [parties] to its foreclosure action only for the purpose of collecting a deficiency should one be adjudged," are not entitled to a jury trial on the Bank's claim against them because "a party does not have a right to a jury trial" on a deficiency claim, id., at *2.

II. In this Equitable Action, Defendants Are Not Entitled to a Jury Trial on Their Permissive Counterclaims against the Bank.

A defendant is "entitled to a jury trial on his counterclaims in an equitable action," like this one, "only if the counterclaims are legal and compulsory." Id., at *3. "A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim. In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, when there is a 'logical relationship' between the counterclaim and the enforceability of the guaranty agreement." Id. (emphasis added). As a result, in BADD, a foreclosure action in which the bank sought a deficiency against a guarantor, the South Carolina Supreme Court held that a guarantor who asserted counterclaims that lacked a logical relationship with the guaranty agreement's enforceability was not entitled to a jury trial on those claims.

The BADD guarantor asserted breach of contract and civil conspiracy legal counterclaims against the bank. In analyzing whether the counterclaims were compulsory or permissive, the BADD court found that “the execution of the guaranty agreements was the ‘transaction or occurrence’ that gave rise to [the guarantor’s] inclusion in the Bank’s foreclosure complaint.” Id. (emphasis added). Thus, in order to be compulsory, the guarantor’s counterclaims had to have a logical relationship with the guaranty agreement’s execution or enforceability. The BADD court found that the guarantor’s counterclaims were based on “an alleged conspiracy between the Bank” and a third party to “induce [the debtor’s] default” on the underlying notes and the Bank’s alleged breach of the covenant of good faith and fair dealing, which were “implied in the note, mortgage, and guaranty agreements,” by virtue of the “purported conspiracy.” Id., at *3. The Court held that the counterclaims did not have a “logical relationship to either the execution or enforceability of the guaranty agreements,” and it noted that the claims instead “presume[d] the enforceability of the guaranty agreements because the allegations, if true, would not render the guarantees unenforceable.” Id. As a result, the counterclaims were permissive and did not entitle the guarantor to a jury trial.

Like the BADD guarantor’s counterclaims, Defendants’ legal counterclaims are permissive in nature and do not entitle Defendants to a jury trial because they bear no “logical relationship” with the transaction that gave rise to the Bank’s foreclosure and deficiency action against them — the execution of the notes, mortgages, and guaranty agreements. Defendants have asserted the following counterclaims against the Bank: breach of the covenant of good faith and fair dealing; breach of contract; breach of fiduciary duty; duress; interference with prospective economic relations; and unfair trade practices. As with the BADD counterclaims, none of Defendants’ legal counterclaims “affect the execution or enforceability” of the loan

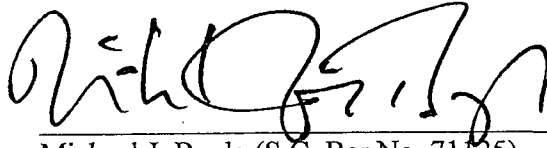
documents. Instead, they are premised on events that occurred after the execution of those documents, such as the Bank's refusal to accept a short sale of one of the mortgaged commercial properties. See, e.g., Brosman Answer and Counterclaim, at ¶ 27; Black Diamond and Lindgren Answer and Counterclaim, at ¶ 27. Importantly, Defendants, in their Memorandum in Opposition to the Bank's Summary Judgment Motion, confirmed that their counterclaims are based on alleged events that occurred "subsequent" to the execution of the parties' loan documents. See e.g., Defs' Memo in Opp., at 4-5 (Alleging that the purported breach of contract was "subsequent to" and "after" the execution of the forbearance agreements"). Consequently, Defendants' legal counterclaims against the Bank are permissive and do not entitle Defendants to a jury trial.

CONCLUSION:

For the reasons set forth above and in the Bank's Motion to Strike Defendants' Jury Trial Demand, the Bank respectfully requests that the Court strike Defendants' demand for a jury trial in this equitable foreclosure action in which Defendants waived their right to a jury trial and have not asserted any compulsory, legal counterclaims.

[Signature Page to Follow]

This 18 day of March 2015
Greenville, South Carolina



Michael J. Bogle (S.C. Bar No. 71125)

mbogle@wcsr.com

Clayton M. Custer (S.C. Bar No. 68495)

ccuster@wcsr.com

Catherine F. Wrenn (S.C. Bar No. 76042)

cwrenn@wcsr.com

Womble Carlyle Sandridge & Rice, LLP

550 South Main Street, Suite 400

Greenville, South Carolina 29601

Telephone: (864) 255-5400

*Attorneys for Plaintiff TD Bank, N.A., Successor by
Merger to Carolina First Bank*

Exhibit A

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Carolina First Bank, n/k/a TD Bank, NA, Petitioner,

v.

BADD, L.L.C., William McKown, and Charles A.
Christenson, Defendants,

of whom BADD, L.L.C. and William McKown are
Respondents.

BADD, L.L.C. and William McKown, Third-Party
Plaintiffs,

v.

William Rempher, Third-Party Defendant.

Appellate Case No. 2013-000107

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 27486
Heard December 10, 2014 – Filed January 28, 2015

REVERSED

Thomas Wm. McGee, III, C. Mitchell Brown, Allen
Mattison Bogan, all of Nelson Mullins Riley &
Scarborough, L.L.P., of Columbia, for Petitioner.

Richard R. Gleissner, of Gleissner Law Firm, L.L.C., of
Columbia, for Respondents.

JUSTICE PLEICONES: In this mortgage foreclosure action, the Court granted Carolina First Bank's ("the Bank") petition for a writ of certiorari to review the Court of Appeals' decision in *Carolina First Bank v. BADD, L.L.C.*, 400 S.C. 343, 733 S.E.2d 619 (Ct. App. 2012), which held William McKown¹ is entitled to a jury trial. We disagree and therefore reverse the decision of the Court of Appeals.

Procedural History

BADD, L.L.C. ("BADD"), purchased three warehouse units in Myrtle Beach. To finance the transaction, BADD executed two promissory notes. A personal guaranty was also executed by McKown, who was a member of BADD. After BADD defaulted, the Bank brought this foreclosure action and included McKown as a party pursuant to S.C. Code Ann. § 29-3-660 (2007) based on his status as a guarantor.

In McKown's amended answer and counterclaim, he demanded a jury trial because the Bank sought a money judgment for the breach of a guaranty arrangement. McKown further sought an accounting and a determination that the guaranty agreement was unconscionable. McKown then asserted two counterclaims—(1) civil conspiracy and (2) breach of contract—both based on an alleged conspiracy

¹ While BADD also joined McKown in his demand for a jury trial, the Court of Appeals' decision turns on McKown's right to a jury trial. Therefore, we address the merits of that decision with respect to McKown.

between the Bank and William Rempher. Finally, McKown asserted third-party claims against Rempher.²

The Bank moved for an order of reference. The circuit granted the motion, referring the matter in its entirety to the master-in-equity.

The Court of Appeals reversed, holding McKown was entitled to a jury trial because the Bank's claim on the guaranty agreement was a separate and distinct legal claim.³ *Carolina First Bank*, 400 S.C. at 347, 733 S.E.2d at 620.

We granted the Bank's petition for a writ of certiorari to review the Court of Appeals' decision.

Issue Presented

Did the Court of Appeals err in finding McKown was entitled to a jury trial?

Standard of Review

Whether a party is entitled to a jury trial is a question of law, which this Court reviews de novo, owing no deference to the Court of Appeals' decision. *See Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

² There is no question these third-party claims are permissive and do not entitle McKown to a jury trial. *See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989) (holding third-party claims are permissive and a party waives his right to a jury trial by asserting them in a foreclosure action).

³ The Court of Appeals also found McKown was entitled to a jury trial based on his counterclaims, but that finding relied on the threshold holding that the Bank's action on the guaranty agreement was separate and distinct from the foreclosure action. *See Carolina First Bank*, 400 S.C. at 347, 733 S.E.2d at 621.

Law/Analysis

The Court of Appeals held that when a lender exercises its statutory right to join a guarantor as a party to a foreclosure action in order to seek a deficiency judgment, the guarantor has a right to a jury trial. The Bank contends this was error. We agree.

I. **Guarantor's Right To A Jury Trial When A Bank Seeks A Deficiency Judgment Pursuant to § 29-3-660.**

The South Carolina Constitution provides that the right to a jury trial shall be preserved inviolate. S.C. Const. art. I, § 14. Whether a party is entitled to a trial by jury depends on whether the right to a jury was secured at the time of the adoption of our state constitution. *Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 150, 621 S.E.2d 344, 348 (2005) ("The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868."). "Generally, the relevant question in determining the right to a trial by jury is whether the action is legal or equitable." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial. *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

McKown was joined as a party to the foreclosure action pursuant to S.C. Code Ann. § 29-3-660 (2007). Section 29-3-660 provides:

In actions to foreclose mortgages . . . if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and *the court may adjudge* payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.

(Emphasis supplied). This statute is derived, in part, from the Act of 1791, which vests exclusive jurisdiction in courts of equity for foreclosure actions. *See, e.g., Williams v. Beard*, 1 S.C. 309, 324 (1870) (discussing the Act of 1791 and the role it played in vesting courts of equity with jurisdiction to decide mortgage-related disputes). The power to render a deficiency judgment is included within the

jurisdiction of courts of equity. *See Perpetual Bldg. & Loan Ass'n of Anderson v. Braun*, 270 S.C. 338, 342, 242 S.E.2d 407, 409 (1978) (recognizing that a deficiency judgment is incidental to the relief sought in a foreclosure action and that the Act of 1791 integrated the two for purposes of characterizing the action as equitable); *see also* 27 S.C. Jur. *Mortgages* § 103 (1996) ("Mortgage foreclosures are partly in rem . . . and partly in personam . . . ; however, the strict distinction between such designations was abandoned by the Act of 1791. . . . The court's in personam jurisdiction to enter a deficiency judgment does not alter the equitable character of the [foreclosure] action.").

Here, it is clear the Bank included McKown as a party to its foreclosure action only for the purpose of collecting a deficiency should one be adjudged. The Bank's action does not alter the equitable character of the action. *See Perpetual Bldg. & Loan Ass'n of Anderson*, 270 S.C. at 342, 242 S.E.2d at 409. Likewise, § 29-3-660 states, in part, that it is for the court to adjudge a deficiency. This statute, with its origins pre-dating the enactment of our Constitution, illustrates that a party does not have a right to a jury trial when he is included in the action solely for the purpose of obtaining a deficiency judgment. *See also* 27 S.C. Jur. *Mortgages* § 103 (stating mortgage foreclosure proceedings are regulated by statutes, and those statutes should be substantially followed). We therefore hold McKown is not entitled to a jury trial solely based on the Bank's inclusion of him as a party pursuant to § 29-3-660.

Accordingly, we reverse the Court of Appeals' holding that McKown was entitled to a jury trial solely based on the Bank's inclusion of McKown as a party to obtain a possible deficiency judgment. That holding conflicts with § 29-3-660, which confers upon *the court* the power to adjudge a deficiency.

Having determined McKown is not entitled to a jury trial for the reason relied on by the Court of Appeals, we address whether McKown is entitled to a jury trial based on his counterclaims. We do so in the interest of judicial economy as this issue was not addressed squarely by the Court of Appeals.

II. McKown's Right To A Jury Trial Based On His Civil Conspiracy And Breach of Contract Counterclaims.

The Bank argues the Court of Appeals erred because McKown's counterclaims, while legal, are permissive and thus, McKown waived his right to a jury trial by

asserting them in this equitable suit. We agree.

McKown is entitled to a jury trial on his counterclaims in an equitable action only if the counterclaims are legal and compulsory. *See* Rule 13(a), SCRPC. A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim. *Id.* In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, when there is a "logical relationship" between the counterclaim and the enforceability of the guaranty agreement. *Cf. N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. at 518–19, 381 S.E.2d at 905–06 (finding a foreclosure defendant was entitled a jury trial because his counterclaims that the bank breached subsequent oral contracts to arrange additional financing were compulsory because they bore a logical relationship to the enforceability of the note).

Given this framework, we determine whether McKown's legal counterclaims are compulsory.

a. Civil Conspiracy

McKown's civil conspiracy counterclaim is based on an alleged conspiracy between the Bank and Rempher. McKown contended that two years after the execution of the notes and guarantees, Rempher was substituted in Christensen's place as a member of BADD and began collecting rents from the income-producing warehouse units. Allegedly, Rempher had an ownership interest in other warehouse units not purchased by BADD and as a result, conspired with the Bank to induce BADD's default by directing potential tenants away from renting the properties. McKown further claimed Rempher intentionally failed to make payments on the note even though sufficient funds were available because Rempher wanted to purchase the three warehouse units at a below market value, foreclosure sale.

Here, the execution of the guaranty agreements was the "transaction or occurrence" that gave rise to McKown's inclusion in the Bank's foreclosure complaint. McKown's civil conspiracy counterclaim does not arise out of that transaction or occurrence because it bears no logical relationship to either the execution or enforceability of the guaranty agreements. *Cf. N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. at 518–19, 381 S.E.2d at 905–06; *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, 486 S.E.2d 367 (1996) (finding claims of fraud, negligence, and unfair trade practices in a foreclosure action were not compulsory because those claims did not affect the enforceability of the note). In other words, the civil conspiracy claim presumes the enforceability of the guaranty agreements because the allegations, if true, would not render the guarantees unenforceable. We therefore hold McKown waived his right to a jury trial by asserting the civil conspiracy counterclaim in a foreclosure action because the claim is permissive as it does not arise out of the same transaction or occurrence as the execution of the guaranty agreements. *See Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987) (stating a defendant waives his right to a jury trial by asserting a permissive counterclaim in an equitable action).

b. Breach of Contract

The breach of contract claim is based on an allegation that Rempher agreed to obtain financing for the three units BADD mortgaged. The only allegation specific to the Bank is that the Bank breached its covenant of good faith and fair dealing implied in the note, mortgage, and guaranty agreements based on the Bank's purported conspiracy with Rempher. Again, the "transaction or occurrence" for the purpose of determining the compulsory character of McKown's counterclaim is the execution of the guaranty agreements. McKown's "breach of covenant of good faith and fair dealing" claim depends on a purported conspiracy that took place, if at all, two years after the guarantees had been executed. This claim does not arise out of the underlying transaction or occurrence because it does not affect the execution or enforceability of the guaranty agreements. We therefore hold McKown waived his right to a jury trial by asserting a permissive counterclaim in the foreclosure action. *Cf. Advance Int'l, Inc.*, 316 S.C. at 270–71, 449 S.E.2d at 582–83.

Conclusion

We reverse the Court of Appeals as McKown is not entitled to a jury trial solely because the Bank exercised its statutory right to join him as a party in the event of a deficiency judgment. We further hold McKown is not entitled to a jury trial based on his counterclaims, which, while legal, are permissive. McKown waived his right to a jury trial by asserting permissive counterclaims in an equitable action. Accordingly, the effect of our decision affirms the circuit court's decision, which referred this matter in its entirety to the master-in-equity.

The Court of Appeals decision is therefore

REVERSED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

CERTIFICATE OF SERVICE

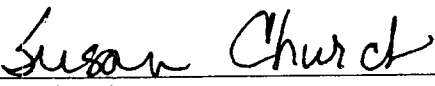
The undersigned hereby certifies that, on the 19th day of March, 2015, (s)he e-mailed a copy of the attached **TD BANK'S MEMORANDUM IN SUPPORT OF ITS MOTION TO STRIKE DEFENDANTS' JURY TRIAL DEMAND** by electronic mail.

Keating L. Simmons, III
SIMONS & DEAN
147 Wappoo Creek Drive
Suite 604
Charleston, SC 29412
klsimons@simonsanddean.com

Ehrick K. Haight, Jr.
P.O. Drawer 6067
Hilton Head Island, SC 29938
rick@mhalawfirm.com

Attorney for David A. Brosman

*Attorney for Defendants Black Diamond,
LLC and J. Christopher Lindgren*



Susan Church
Assistant to Michael J. Bogle

EXHIBIT 5

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

TD Bank, N.A., Successor by Merger to Carolina
First Bank,

Plaintiff,

v.

Black Diamond, LLC; J. Christopher Lindgren;
David A. Brosman; Julie H. King; and The
Greenery, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

C.A. No. 2012-CP-07-0944

PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

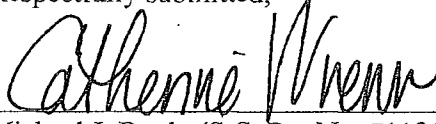
2014 FEB 25 PM 12:54
CLERK OF COURT
BEAUFORT COUNTY, S.C.

TD Bank, N.A., Successor by Merger to Carolina First Bank, ("**TD Bank**" or "**Plaintiff**"), moves the Court to enter summary judgment in TD Bank's favor pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, as there is no genuine issue of material fact as to Plaintiff's affirmative claims for relief asserted herein, nor as to the counterclaims asserted against TD Bank by Defendants Black Diamond, LLC; J. Christopher Lindgren; and David A. Brosman (collectively, "**Defendants**"), and therefore, Plaintiff is entitled to judgment as a matter of law both on its affirmative claims for relief as well as against Defendants' counterclaims.

TD Bank's Motion is supported by, without limitation, the pleadings, discovery, statutory and common law of the State of South Carolina, and any Memorandum of Law and/or affidavit(s) to be filed in support hereof, in addition to any other evidence that may be submitted to the Court at the hearing on this Motion or otherwise.

[Signature Line to Follow]

Respectfully submitted,



Michael J. Bogle (S.C. Bar No. 71125)

Email: mbogle@wcsr.com

J. Matthew Trent (S.C. Bar No. 74192)

Email: mtrent@wcsr.com

Catherine Wrenn (S.C. Bar No. 76042)

Email: cwrenn@wcsr.com

Womble Carlyle Sandridge & Rice, LLP

Post Office Box 10208

Greenville, SC 29603-0208

Telephone: (864) 255-5421

Fax: (864) 239-5852

*Attorneys for Plaintiff TD Bank, N.A., Successor by Merger
to Carolina First Bank*

This 21st day of February, 2014
Greenville, South Carolina.

CERTIFICATE OF SERVICE

This is to certify that on the 21st day of February, 2014, I did serve a copy of the foregoing **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** by forwarding the same first-class mail, proper postage affixed, addressed to the person hereinafter named, at the place and address stated below, which is the last known address:

Keating L. Simmons, III
SIMONS & DEAN
147 Wappoo Creek Drive
Suite 604
Charleston, SC 29412

*Attorney for Defendants Black Diamond,
LLC and J. Christopher Lindgren*

Ehrick K. Haight, Jr.
P.O. Drawer 6067
Hilton Head Island, SC 29938
Attorney for David A. Brosman

Susan Church

Susan Church, Assistant to Michael J. Bogle

2014 FEB 25 PM 12:54
CLERK OF COURT
JUDICIAL DISTRICT OF BEAUFORT
COUNTY, S.C.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

TD Bank, N.A., Successor by Merger to Carolina
First Bank,

Plaintiff,

v.

Black Diamond, LLC; J. Christopher Lindgren;
David A. Brosman; Julie H. King; and The
Greenery, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

C.A. No. 2012-CP-07-0944

**PLAINTIFF'S MEMORANDUM IN
SUPPORT OF SUMMARY
JUDGMENT**

2015 JAN 13 AM 10:00
CLERK OF COURT

TD Bank, N.A., Successor by Merger to Carolina First Bank ("Plaintiff"), moves the Court to enter summary judgment in its favor as to all counterclaims asserted by Defendants Black Diamond, LLC; J. Christopher Lindgren; and David A. Brosman, as there are no genuine issues of material fact as to any such claims. This Memorandum is meant to supplement the previously-filed Motion for Summary Judgment and any arguments that may be presented at the hearing on this matter.

INTRODUCTION AND BACKGROUND FACTS

This is a commercial foreclosure action involving two loans totaling \$5.5 million made by Plaintiff for the benefit of Defendant Black Diamond, LLC ("Black Diamond"), secured by two parcels of property located in Beaufort County, South Carolina. The first loan was in the original principal amount of \$3,500,000.00, as evidenced by a January 25, 2008 promissory note (the "\$3,500,000 Note", attached to the Complaint as Exhibit B) mortgage (the "\$3,500,000 Mortgage", attached to the Complaint as Exhibit J) and assignment of leases and rents (the "\$3,500,000 Assignment of Leases and Rents", attached to the Complaint as Exhibit L). The

second loan was in the original principal amount of \$2,000,000.00, as evidenced by a July 25, 2008 promissory note (the "\$2,000,000 Note", attached to the Complaint as Exhibit D), December 9, 2003 mortgage (the "\$2,000,000 Mortgage", attached to the Complaint as Exhibit K) and May 21, 2007 assignment of leases and rents (the "\$2,000,000 Assignment of Leases and Rents", attached to the Complaint as Exhibit M). Both the \$3,500,000 Note and the \$2,000,000 Note (collectively, the "Notes") were originally secured by personal guaranty agreements executed by Defendant J. Christopher Lindgren ("Lindgren") and Herb G. King ("King"). (Lindgren Guaranty Agreement corresponding to the \$2,000,000 Note, attached to the Complaint as Exhibit F; Lindgren Guaranty Agreement corresponding to the \$3,500,000 Note, attached to the Complaint as Exhibit G.) Following the death of King, Defendant David A. Brosman ("Brosman") was substituted as the second guarantor of the two loans. (Brosman Guaranty Agreement corresponding to the \$2,000,000 Note, attached to the Complaint as Exhibit I; Brosman Guaranty Agreement corresponding to the \$3,500,000 Note, attached to the Complaint as Exhibit H.)

As of July 2010, both Notes were in default due to payment defaults and the death of one of the guarantors (King). (See \$3,500,000 Forbearance Agreement, p. 1; \$2,000,000 Forbearance Agreement, p. 1; Lindgren Deposition, pp. 97-98 (acknowledging that, at the time of the Forbearance Agreements, the loans were in default due to missed payments).¹) As such, two forbearance agreements were entered into by the parties on July 28, 2010 (the "3,500,000 Forbearance Agreement", attached to the Complaint as Exhibit C, and the "2,000,000 Forbearance Agreement", attached to the Complaint as Exhibit E; collectively the "Forbearance Agreements"), whereby Plaintiff agreed to, among other things: (1) forbear from exercising its

¹ Cited portions of Lindgren's deposition will be collectively attached hereto as Exhibit I.

default rights and remedies under the loan documents; (2) release the Estate of King from the personal guaranty agreements executed by King; and (3) accept certain modifications of the Notes, including the transfer of King's membership interest in Black Diamond to Lindgren and the subsequent transfer of a fifty percent membership interest in Black Diamond from Lindgren to Brosman. (Forbearance Agreements, p. 1.²) In return, Black Diamond and both guarantors agreed to, among other things: (1) maintain a payment reserve account equal to two months of principal and interest payments; (2) enter into a management agreement whereby the management of Black Diamond shall be turned over to a manager to be designated by Plaintiff and shall have all rights and responsibilities of a court-appointed receiver, including without limitation the collection of rents, the payment to Plaintiff of all debt service requirements, and the day-to-day management of Black Diamond and the property encumbered by the \$3,500,000 Mortgage and \$2,000,000 Mortgage (collectively, the "Mortgages"); and (3) a representation that they have no claims, defenses, counterclaims or rights of setoff or recoupment against Plaintiff related to the loans. Black Diamond was represented by counsel, The McNair Law Firm, in the negotiation of the Forbearance Agreements. (See Exhibit 2, correspondence from Black Diamond's counsel related to preparation and execution of the Forbearance Agreements.)

The \$2,000,000 Note matured on July 25, 2011 and demand for payment was made by letter dated August 10, 2011 (attached to the Complaint as Exhibit R). The failure of Black Diamond to pay its obligations under the \$2,000,000 Note constitutes an event of default under the Notes. (See \$2,000,000 Note, ¶ 10.) Notice of default and demand for payment of the \$3,500,000 Note was made by letter dated September 13, 2011 (attached to the Complaint as

² As the terms of the \$3,500,000 Forbearance Agreement and \$2,000,000 Forbearance Agreement are almost identical, citations to the "Forbearance Agreements" will refer to that page or paragraph of both the Forbearance Agreements.

Exhibit S). Black Diamond has failed to make payment to Plaintiff in accordance with the terms of both Notes. (Lindgren Deposition, pp. 108-09.)

Plaintiff filed the present action on or about March 2, 2012. On April 23, 2012, Black Diamond and Lindgren filed an Answer and Counterclaim, asserting claims against Plaintiff for Breach of Covenant of Good Faith and Fair Dealing; Breach of Contract, Breach of Fiduciary Duty, Negligent Misrepresentation, Duress, Interference with Prospective Economic Relations, and Unfair Trade Practices. On May 18, 2012, Brosman filed an Answer and Counterclaim, identical in substance to that filed by Black Diamond and Lindgren.

ARGUMENT

The counterclaims of Black Diamond, Lindgren and Brosman (collectively, “Defendants”) are all based on the following allegations: (1) that Plaintiff coerced Defendants into cross-collateralizing the loans and agreeing to the retention of a property manager; (2) that Plaintiff interfered with the property manager’s contract; (3) that Plaintiff elected not to release its mortgage on one parcel of property in conjunction with a proposed sale for an amount less than what was owed on the corresponding note; and (4) that Plaintiff interfered with tenants. (Answer and Counterclaims, ¶ 27.) For the reasons set forth below, none of these claims are actionable under South Carolina law.

I. BREACH OF CONTRACT AND BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

Defendants have asserted a claim for breach of covenant of good faith and fair dealing, however South Carolina does not recognize an independent cause of action separate from breach of contract. RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) (“The implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract.”). Further, it is undisputed that

Defendants are in breach of the terms of the Notes and guaranty agreements, thereby breaching their contracts with Plaintiff. (Lindgren Deposition, p. 108 (acknowledging default under the Notes and guaranty agreements).) “One seeks to recover damages for breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was at the appropriate time, able, ready and willing to perform it.” Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C.469, 487, 514 S.E. 2d 126, 135 (quoting Parks v. Lyons, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951)). Since Defendants admit they breached the terms of the Notes and Guaranty Agreements, they cannot seek to recover damages under the same for breach of contract or any incident related to that type of claim. Accordingly, Defendants’ breach of contract claims fail as a matter of law and Plaintiff is entitled to summary judgment.

Alternatively, Defendants’ breach of contract claims fail because Defendants failed to prove the necessary elements to sustain such claims. To prove a claim for breach of contract, a party must establish at a minimum: (1) a binding agreement entered into by the parties; (2) a breach of that agreement; and, (3) damage suffered was a direct and proximate result of the breach. Fuller v. Eastern Fire Ins. Co., 240 S.C. 75, 124 S.E.2d 602, 609 (1962). The relative rights and obligations between the parties in the present action are defined by the terms of the loan documents, which together constitute the entirety of the parties’ contractual relationship.

A. Cross-Collateralization of the Loans and Appointment of a Property Manager

The first purported “breach” alleged by Defendants in support of their breach of contract claims is that Plaintiff coerced Defendants into cross-collateralizing the loans and agreeing to the retention of a property manager. (Answer and Counterclaim, ¶ 27; Lindgren Deposition, pp. 50-53; 104-05.) Neither claim has any merit whatsoever. The cross-collateralization of the loans is specifically set forth in the \$2,000,000 Note executed by Black Diamond on July 25, 2008:

THIS LOAN IS CROSS-COLLATERALIZED AND CROSS
DEFAULTED WITH LOAN #5121066531 IN THE NAME OF
BLACK DIAMOND LLC IN THE AMOUNT OF \$3,500,000.00
DATED JANUARY 25, 2008 SECURED BY REAL ESTATE
MORTGAGE.

(\$2,000,000 Note, ¶ 10.) Because the cross-collateralization of the two loans took place more than three years prior to the date of Defendants' counterclaims, any claim based on the same is barred by the applicable statute of limitation set forth in S.C. Code Ann. § 15-3-530. (See Lindgren Deposition, pp. 50, 111 (acknowledging the loans were cross-collateralized in July 2008).)

Next, the retention of a property manager is specifically identified in the Forbearance Agreements as a condition precedent to Plaintiff's agreement to forbear from exercising its default rights and remedies under the loan documents:

Lender, Borrower, Mr. Lindgren and the Substitute Guarantor shall enter into a management agreement whereby the management of Borrower shall be turned over to a manager to be designated by Lender, and which manager shall have all rights and responsibilities of a court-appointed receiver, including without limitation the collection of rents, the payment to Lender of all debt service requirements, and the day-to-day management of Borrower and the property encumbered by the Mortgage (the "Management Agreement"). The Management Agreement shall be subject to the approval of Lender as to both form and substance, and any default by Borrower, Mr. Lindgren the Substitute Guarantor or any other party with respect to such Management Agreement shall be a default under the Loan Documents and shall entitle Lender to pursue all rights and remedies of Lender set forth therein. All fees and expenses of such manager shall be paid by Borrower.

(Forbearance Agreements, ¶ 6(F).) Contemporaneous with the execution of the Forbearance Agreements, Defendants were in default due to payment defaults and the death of one of the guarantors (King). (Forbearance Agreements, p. 1; Lindgren Deposition, pp. 97-98.) Defendants admit to executing the Forbearance Agreements. (Lindgren Deposition, p. 96.) Defendants were represented by counsel in the negotiation and execution of the Forbearance

Agreements. (Exhibit 2.) The Forbearance Agreements contained an integration clause, specifically providing that:

This Agreement constitutes the entire agreement of the parties concerning the matters set forth herein and supersedes all prior and contemporaneous agreements, written or oral, concerning such matters. This Agreement may not be modified orally, and any modification must be in writing, signed by the party to be bound.

(Forbearance Agreements, ¶ 12.) Finally, in the Forbearance Agreements, Defendants confirmed, reaffirmed and ratified their respective obligations set forth in the loan documents and, as a condition precedent to Plaintiff's agreement to forbear, represented that they "have no claims, defenses, counterclaims or rights of setoff or recoupment against Lender under the Loan Documents or otherwise and hereby waive any such claims, defenses, counterclaims or rights of setoff or recoupment." (Forbearance Agreements, ¶ 7.) Accordingly, any purported "breach" alleged by Defendants taking place contemporaneous with or prior to the execution of the Forbearance Agreements was waived by the execution of such documents and cannot give rise to a claim against Plaintiff in the present action.

B. Interference with Property Manager's Contract

Defendants' next purported "breach" is that Plaintiff interfered with the contract with the property manager appointed pursuant to the Forbearance Agreements to manage Black Diamond and the subject properties. (Answer and Counterclaim, ¶ 27.) First, the Forbearance Agreements specifically state that the property manager is to be "designated by [the] Lender," that the management agreement "shall be subject to the approval of Lender as to both form and substance," and that the manager "shall have all rights and responsibilities of a court-appointed receiver, including without limitation the collection of rents, the payment to Lender of all debt service requirements, and the day-to-day management of Borrower and the property encumbered

by the Mortgage.” (Forbearance Agreements, ¶ 12.) Thus, it is anticipated in the Forbearance Agreements – executed by Defendants – that Plaintiff had the exclusive right to select the property manager and would be involved in the management of Black Diamond and the property going forward.

Regardless, when asked in depositions about Plaintiff’s alleged interference with the property manager, Defendants were able to identify only two instances: (1) where Plaintiff directed the property manager to pay an invoice related to the foreclosure proceeding from rents (see Lindgren Deposition, pp. 37-41) and (2) where the property manager notified Plaintiff that a tenant was late on the payment of rent and had been paying rent directly to Defendants, rather than to the property manager, in violation of the Forbearance Agreements (see Lindgren Deposition, pp. 42-49). Neither instance amounts to any improper action by Plaintiff, rather both are consistent with the property manager’s authority pursuant to the Forbearance Agreements, having “all rights and responsibilities of a court-appointed receiver, including without limitation the collection of rents, the payment to Lender of all debt service requirements, and the day-to-day management of Borrower and the property encumbered by the Mortgage.” (Forbearance Agreements, ¶ 12.) Further, neither instance resulted in any damages to Defendants, thus cannot give rise to claims against Plaintiff in the present action.

Furthermore, it is very clear from Lindgren’s testimony that the complaint about the property manager has nothing to do with Plaintiff’s contact with the manager, rather the management company that was appointed to manage Black Diamond and the property. (See Lindgren Deposition, pp. 27-36.) Lindgren had wanted to hire Charter One Commercial to manage the property, but Plaintiff opted for another local management company. (Id.) The Forbearance Agreements clearly state, however, that “management of Borrower shall be turned

over to a manager to be *designated by Lender.*” (Forbearance Agreements, ¶ 12 (emphasis added).) Regardless, as discussed above, Defendants are barred from raising issues that were agreed to in the Forbearance Agreements as a basis for claims in the present lawsuit. Defendants admit to executing the Forbearance Agreements. (Lindgren Deposition, p. 96.) Defendants were represented by counsel in the negotiation and execution of the Forbearance Agreements. (Exhibit 2.) The Forbearance Agreements contained an integration clause. (Forbearance Agreements, ¶ 12.) Finally, Defendants confirmed, reaffirmed and ratified their respective obligations set forth in the loan documents and, as a condition precedent to Plaintiff’s agreement to forbear, represented that they “have no claims, defenses, counterclaims or rights of setoff or recoupment against Lender under the Loan Documents or otherwise and hereby waive any such claims, defenses, counterclaims or rights of setoff or recoupment.” (Forbearance Agreements, ¶ 7.) Accordingly, breach of contract cannot be based on these allegations and summary judgment should be granted.

C. Bank’s Election Not to Give Partial Release of Mortgage for Short Sale

Defendants’ next example of a “breach” by Plaintiff is the bank’s election not to release its mortgage on one parcel of property in conjunction with a proposed sale for an amount less than what was owed on the corresponding note. (Answer and Counterclaim, ¶ 27; Lindgren Deposition, pp. 54-64.) This claim relates to a September 2010 letter of intent between Caegull Investments, LLC and Black Diamond to sell one of the two parcels of property for the gross amount of \$1,325,000, subject to a number of conditions. (See Exhibit 3, Letter of Intent.) The letter of intent was never reduced to contract. At the time, roughly \$1,800,000 was owed on the corresponding note (though the Notes were cross-collateralized, thus the total outstanding debt, not just that owed on the corresponding note, was secured by this parcel of property). (See

Lindgren Deposition, p. 54.) Defendants' claim is dependent upon a false premise that Plaintiff had some underlying duty to not only consider a loss mitigation/short sale proposal (if a letter of intent can even be construed as such), but to approve the sale of its collateral for less than the amount owed. There is simply no legal authority or contractual agreement between the parties to support this premise, and Defendants' claims based on this purported "breach" therefore fail as a matter of law.

Regardless of the particular circumstances at issue in this case, Defendants' claim fails because lenders have no cognizable legal duty to consider or approve loss mitigation or loan modification requests. As the United States District Court for the Western District of North Carolina explained:

Plaintiffs' second argument, that Defendant had a legally recognized duty to modify the terms of the loan, amounts to a request that the Court re-write the terms of the loan. See Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc., 872 P.2d 1359, 1363 (Colo. Ct. App. 1994) (holding that the duty to act in good faith "does not obligate a party to accept a material change in the terms of the contract or to assume obligations that vary or contradict the contract's express provisions," nor does the duty of good faith "inject substantive terms into the parties' contract"); see also General Aviation, Inc. v. Cessna Aircraft Co., 915 F.2d 1038, 1041-42 (6th Cir. 1990); Serfecz v. Jewel Food Stores, 1994 U.S. Dist. LEXIS 12239 (N.D. Ill. Aug. 30, 1994) ("Where the disputed issue in a contract is governed by express terms, however, there is no gap to be filled, and the parties' behavior is assessed according to the express provisions, without resort to an implied covenant of good faith and fair dealing"); Barnes v. St. Joseph's Hosp., 601 N.W.2d 587, 591 (N.D. 1999); Amoco Oil Co. v. Ervin, 908 P.2d 493, 498 (Colo. 1995); Idaho First National Bank v. Bliss Valley Foods, Inc., 121 Idaho 266, 824 P.2d 841, 863 (Idaho 1991); East Penn Sanitation, Inc. v. Grinnell Haulers, Inc., 294 N.J. Super. 158, 682 A.2d 1207, 1213 (N.J. Super. Ct. App. Div. 1996); Badgett v. Security State Bank, 116 Wash.2d 563, 807 P.2d 356, 360 (Wash. 1991); 17A Am.Jur.2d Contracts § 370. Applying these legal principles, the undersigned concludes that Defendant had no duty to forgo its rights under the terms of the loan to foreclose on the property.

James v. Vanderbilt Mortgage, 2012 WL 441170 at *4 (W.D.N.C. Jan. 23, 2012) (magistrate judge's memorandum and recommendation), affirmed and adopted, 2012 WL 440355 (W.D.N.C. Feb. 10, 2012); see also Mudge v. Bank of America, N.A. and TD Bank, N.A., 2013 WL 6095561 at *3 (D.N.H. Nov. 20, 2013) (holding that where a mortgage agreement did not contain a provision conferring discretion on the lender to allow the borrower to conduct a short sale, a breach of covenant of good faith and fair dealing claim fails as a matter of law) (both the James and Mudge decisions are collectively attached hereto as Exhibit 4). The court in Mudge went on to state:

Even if the complaint had alleged that the second mortgage agreement gave TD Bank the discretion to permit a short sale and that TD Bank had exercised that discretion unreasonably, the claim for breach of the implied covenant of good faith and fair dealing would still be dismissed. As TD Bank points out in its motion to dismiss, a short sale in real estate, where a lender accepts less than it is owed to secure its note, necessarily rewrites the terms of the parties' mortgage agreement. 'The covenant of good faith and fair dealing in a loan agreement cannot be used to require the lender to modify or restructure the loan.'

Id. (citing Moore v. Mortg. Elec. Registration Sys., Inc., 848 F. Supp.2d 107, 129 (D.N.H. 2012)).

South Carolina courts have similarly held that, absent a fiduciary duty, a bank has no duty of care to its customer. As the South Carolina Court of Appeals held in Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (2003), "South Carolina holds the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature." 354 S.C. at 671, 582 S.E.2d at 444. Here, Defendants do not contend that Plaintiff was their fiduciary, nor is there evidence to support the existence of a fiduciary relationship. The relationship between Plaintiff and Defendants was that of creditor and debtor, and there can thus be no argument that

Plaintiff had any unwritten duty to consider Defendants' loss mitigation/short sale proposals, much less within some arbitrary timeframe unilaterally set by Defendants.

As creditor and debtor, the parties' relative rights and obligations are defined by the provisions of the loan documents, under which Plaintiff was not contractually obligated to consider Defendants' loss mitigation/short sale proposals.³ Accordingly, Plaintiff's decision not to release its mortgage cannot give rise to a claim against Plaintiff in the present action.

D. Interference with Tenants

Defendants' final example of a "breach" by Plaintiff is its purported interference with tenants. (Answer and Counterclaim, ¶ 27; Lindgren Deposition, pp. 42-49.) The only instance identified by Defendants was Plaintiff's communications with the property manager about a tenant who was behind on rent and had been paying rent directly to Defendants, rather than to the property manager, in violation of the Forbearance Agreements. (Lindgren Deposition, pp. 42-49)

First, as discussed above, the Forbearance Agreements specifically state that the property manager is to be "designated by [the] Lender," that the management agreement "shall be subject to the approval of Lender as to both form and substance," and that the manager "shall have all rights and responsibilities of a court-appointed receiver, including without limitation the collection of rents, the payment to Lender of all debt service requirements, and the day-to-day management of Borrower and the property encumbered by the Mortgage." (Forbearance Agreements, ¶ 12.) Thus, it is anticipated in the Forbearance Agreements that Plaintiff had the exclusive right to select the property manager and would be stay informed of the management of Black Diamond and the property going forward. Second, the \$3,500,000 Assignment of Leases

³ Additionally, the September 2010 letter of intent (to which Plaintiff was not a party) acknowledged that Plaintiff's agreement to release its mortgage was a necessary prerequisite to the deal coming to fruition. (Exhibit 3, p. 1.)

and Rents and \$2,000,000 Assignment of Leases and Rents (collectively, the “Assignments of Leases and Rents”), expressly authorize Plaintiff, at its option, to communicate with tenants directly or through a third party about a number of issues, namely the payment of rent, upon the default of the borrower. (\$2,000,000 Assignment of Leases and Rents, ¶ 15(F-G); \$3,500,000 Assignment of Leases and Rents; ¶ 4(F).) Thus, Defendants’ allegations do not support a claim against Plaintiff in the present action.

II. BREACH OF FIDUCIARY DUTY

Plaintiff is entitled to summary judgment on Defendants’ breach of fiduciary duty counterclaim because it did not owe Defendants a fiduciary duty and because Defendants have not shown a breach of any such duty. To establish a claim for breach of fiduciary duty, Defendants must prove: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damages proximately resulting from the wrongful conduct. See generally, Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) (discussing the elements of a breach of fiduciary duty claim). “A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence.” Davis v. Greenwood Sch. Dist., 50, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005). Furthermore, “as a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. The other party must have actually accepted or induced the confidence placed on him.” Regions Bank v. Schmauch, 354 S.C. 648, 670-71, 582 S.E.2d 432, 444 (Ct. App. 2003). Moreover, “South Carolina holds the normal relationship between a bank and its customer is one of creditor-debtor and is not fiduciary in nature.” Id. at 671, 582 S.E.2d at 444. Defendants bear the burden of establishing a

prima facie case as to each element of the breach of fiduciary duty cause of action. See generally, Baughman, 306 S.C. at 116, 410 S.E.2d at 545-46.

Here, Defendants and Plaintiff were not in a fiduciary relationship. Rather, the relationship is a typical arms length business relationship between a debtor and a mortgage holder. Because the normal relationship between a bank and a debtor is not fiduciary in nature, Defendants bear the burden of marshalling evidence showing the relationship between Plaintiff and Defendants was something other than a standard arms length relationship. Schmauch at 670-71, 582 S.E.2d at 444. To this end, Defendants can present no evidence that the relationship was anything other than a “normal relationship between a bank and its customer.” Id. Therefore, the general South Carolina rule that no fiduciary duty exists between a bank and its customer applies. Because Defendants offer no evidence tending to show a fiduciary duty owed by Plaintiff, summary judgment should be granted and this Court should dismiss Defendants’ breach of fiduciary duty claim.

Furthermore, even if this Court were to find Plaintiff owed Defendants a fiduciary duty, the claim fails because Defendants have not established any actionable breach on the part of Plaintiff, as set forth in section I above. Accordingly, summary judgment should be granted in favor of Plaintiff on this claim.

III. NEGLIGENT MISREPRESENTATION

“To state a claim for negligent misrepresentation, the plaintiff must allege: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a

pecuniary loss as the proximate result of his reliance upon the representation.” Kelly v. S. Carolina Farm Bureau Mut. Ins. Co., 316 S.C. 319, 323-24, 450 S.E.2d 59, 62 (Ct. App. 1994). The only representation of Plaintiff identified by Defendants was that of a bank loan officer that Black Diamond “could select a [property] manager we were most comfortable with.” (Lindgren Deposition, p. 27.) As discussed in section I above, however, the Forbearance Agreements specifically state that the property manager is to be “designated by [the] Lender” and that the management agreement “shall be subject to the approval of Lender as to both form and substance.” (Forbearance Agreements, ¶ 12.) Further, the Forbearance Agreements contained an integration clause, specifically providing that:

This Agreement constitutes the entire agreement of the parties concerning the matters set forth herein and supersedes all prior and contemporaneous agreements, written or oral, concerning such matters. This Agreement may not be modified orally, and any modification must be in writing, signed by the party to be bound.

(Forbearance Agreements, ¶ 12.) Finally, in the Forbearance Agreements, Defendants “confirmed, reaffirmed and ratified their respective obligations set forth in the loan documents and, as a condition precedent to Plaintiff’s agreement to forbear, represented that they “have no claims, defenses, counterclaims or rights of setoff or recoupment against Lender under the Loan Documents or otherwise and hereby waive any such claims, defenses, counterclaims or rights of setoff or recoupment.” (Forbearance Agreements, ¶ 7.) Accordingly, any alleged oral statements contrary to the express terms of the Forbearance Agreements cannot give rise to a claim against Plaintiff.

IV. DURESS

Defendants’ next claim for duress is not recognized as a cause of action in South Carolina. See Troutman v. Facetglas, Inc., 281 S.C. 598, 603, 316 S.E.2d 424, 427 (Ct. App. 1984) (“We see no compelling reason under the facts and circumstances of this case to extend

the law of intentional torts in South Carolina to embrace economic duress.”). Regardless, even if such a claim did exist, Defendants have failed to establish any actionable basis for the same. Looking to the Wisconsin decision that our Court of Appeals in Troutman discussed but chose not to adopt, in order to establish a claim for economic duress, a party “must show that (1) a person used his superior bargaining position unreasonably or unjustifiably, (2) by wrongful conduct, generally threats, (3) the conduct or threats caused the injury, (4) the victim would not have acquiesced in the absence of wrongful threats, (5) resultant damages, and (6) the victim had no adequate legal remedy available to protect his interests at the time it was threatened.” Id. (citing Wurtz v. Fleischman, 278 N.W.2d 266 (Wis. App. 1979), rev’d on other grounds, 293 N.W.2d 155 (1980)). The only instances of “duress” or “coercion” identified by Defendants were the cross-collateralization of the loans in the \$2,000,000 Note and the requirement of the retention of a property manager as set forth in the Forbearance Agreements. (Lindgren Deposition, pp. 50-53, 104-07, 111.) At the outset, there is absolutely no authority standing for the proposition that either the cross-collateralization of loans or the execution of a forbearance agreement is wrongful or amounts to coercive conduct. Both practices are standard throughout the loan industry.

Furthermore, as set forth in section I above, the cross-collateralization of the loans took place in July 2008, more than three years prior to Defendants’ counterclaims in this litigation, thus a claim based on the same is barred by the applicable statute of limitation set forth in S.C. Code Ann. § 15-3-530. (See Lindgren Deposition, pp. 50, 111 (acknowledging the loans were cross-collateralized in July 2008).) Finally, the Forbearance Agreements were executed by the parties while the loan was in default. (Forbearance Agreements, p. 1; Lindgren Deposition, pp. 97-98 (acknowledging that, at the time of the Forbearance Agreements, the loans were in default

due to missed payments).) Defendants admit to executing the Forbearance Agreements. (Lindgren Deposition, p. 96.) Defendants were represented by counsel in the negotiation of the Forbearance Agreements. (Exhibit 2.) The Forbearance Agreements contained an integration clause. (Forbearance Agreements, ¶ 12.) Finally, in the Forbearance Agreements, Defendants confirmed, reaffirmed and ratified their respective obligations set forth in the loan documents and, as a condition precedent to Plaintiff's agreement to forbear, represented that they "have no claims, defenses, counterclaims or rights of setoff or recoupment against Lender under the Loan Documents or otherwise and hereby waive any such claims, defenses, counterclaims or rights of setoff or recoupment." (Forbearance Agreements, ¶ 7.) Accordingly, Defendants' claim for duress fails and summary judgment should be granted.

V. INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS

The elements of the tort of intentional interference with prospective contractual relations are (1) the intentional interference with the plaintiff's potential contractual relations, (2) for an improper purpose or by improper methods, and (3) causing injury to the plaintiff. Brown v. Stewart, 348 S.C. 33, 55, 557 S.E.2d 676, 688 (Ct. App. 2001); Love v. Gamble, 316 S.C. 203, 214, 448 S.E.2d 876, 882 (Ct. App. 1994). Importantly, "there can be no finding of intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the *proper pursuit of its own contractual rights* with a third party." United Educational Distributors, LLC v. Educational Testing Service, 350 S.C. 7, 14, 564 S.E.2d 324, 328 (Ct. App. 2002) (emphasis added).

In support of their claim for interference with prospective economic relations, Defendants raise Plaintiff's election not to release its mortgage on one parcel of property in conjunction with a proposed sale for an amount less than what was owed on the corresponding note. (Answer and

Counterclaim, ¶ 27; Lindgren Deposition, pp. 54-64.) As outlined in section I above, this claim relates to a September 2010 letter of intent between Caegull Investments, LLC and Black Diamond to sell one of the two parcels of property for the gross amount of \$1,325,000, subject to a number of conditions. (See Exhibit 3.) The letter of intent was never reduced to contract. At the time, roughly \$1,800,000 was owed on the corresponding note (though the Notes were cross-collateralized, thus the total outstanding debt – not just that owed on the corresponding note – was secured by this parcel of property). (See Lindgren Deposition, p. 54.)

As addressed in section I above, Defendants' claim is dependent upon a false premise that Plaintiff had some underlying duty to not only consider a loss mitigation/short sale proposal (if a letter of intent can even be construed as such), but to approve the sale of its collateral for less than the amount owed. There is simply no legal authority or contractual agreement between the parties to support this premise, and Defendants' claims arising out of this purported "breach" therefore fail as a matter of law. Lenders have no cognizable legal duty to consider or approve loss mitigation, loan modification or short sale requests. See James v. Vanderbilt Mortgage, 2012 WL 441170 at *4 (W.D.N.C. Jan. 23, 2012) (magistrate judge's memorandum and recommendation), affirmed and adopted, 2012 WL 440355 (W.D.N.C. Feb. 10, 2012); see also Mudge v. Bank of America, N.A. and TD Bank, N.A., 2013 WL 6095561 at *3 (D.N.H. Nov. 20, 2013) (holding that where a mortgage agreement did not contain a provision conferring discretion on the lender to allow the borrower to conduct a short sale, a breach of covenant of good faith and fair dealing claim fails as a matter of law); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003) (absent a fiduciary duty, which does not exist in a creditor-debtor relationship, a bank has no duty of care to its customer).

As creditor and debtor, the parties' relative rights and obligations are defined by the provisions of the loan documents, under which Plaintiff was not contractually obligated to consider Defendants' loss mitigation/short sale proposal. Accordingly, as Plaintiff's actions were consistent with the loan documents, there was no improper purpose or improper methods involved in Plaintiff's decision with regard to the Caegull Investments letter of intent and summary judgment should be granted as to this cause of action.

VI. UNFAIR TRADE PRACTICES

Defendants' claim for violation of the South Carolina Unfair Trade Practices Act ("SCUTPA") is futile because federally regulated banks, like Plaintiff, are exempt from the provisions of the SCUTPA. The application of the SCUTPA is drawn from the interpretation of 15 U.S.C. 45(a)(1), the corollary federal statute granting authority to the Federal Trade Commission ("FTC") to regulate and prohibit unfair methods of competition and unfair and deceptive acts affecting commerce. See S.C. Code § 39-5-20 (providing that "[i]t is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to § 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended"). Banks are specifically exempt from the Federal Trade Commission's (the "FTC") power to regulate and prohibit unfair competition and unfair or deceptive acts that affect commerce. See 15 U.S.C. 45(a)(2) ("The Commission is hereby empowered and directed to prevent persons, partnerships or corporations, *except banks* . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.") (emphasis added). Thus, because the SCUTPA looks to the FTC for guidance regarding the applicability

and enforcement of the provisions of the SCUTPA, federally regulated banks are likewise exempt from the provisions of the SCUTPA.

Moreover, in Anderson v. Citizens Bank, 294 S.C. 387, 399, 365 S.E.2d 26, 33 (Ct. App. 1987), the Court of Appeals held that the SCUTPA did not apply to banks because, under the “general activity” test set forth in McLeod v. Rhoades, 275 S.C. 104, 267 S.E. 2d 539 (1980), banks were already regulated by state and federal agencies:

The State Board of Financial Institutions regulates the banking practices of Citizens Bank pursuant to Section 34-1-10 to -130, Code of Laws of South Carolina, 1976. The Board has extensive regulatory authority over banking practices, including the power to initiate criminal prosecutions against banks that violate a statute or regulation. Sections 34-1-60, 34-1-90, 34-1-100, Code of Laws of South Carolina, 1976. Therefore, under the "general activity" test of State ex rel. McLeod v. Rhoades, 275 S.C. 104, 267 S.E. (2d) 539 (1980), the actions of Citizens Bank in connection with the Graham loan are exempt from the provisions of the Unfair Trade Practices Act pursuant to Section 39-5-40(a), Code of Laws of South Carolina, 1976. See NCNB Nat'l. Bank of North Carolina v. Tiller, 814 F. (2d) 931 (4th Cir. 1987).

Anderson v. Citizens Bank, 294 S.C. at 399, 365 S.E.2d at 33. In 1990, the Supreme Court rejected the “general activity” test from Rhoades and overruled Anderson “to the extent that the result was based upon the ‘general activity’ test.” Ward v. Dick Dyer & Assoc., 304 S.C. 152, 157, 403 S.E.2d 310, 313 (1991). However, the Anderson court included an additional sustaining ground for holding that the SCUTPA did not apply to lenders that was upheld by the Court:

Cf. 15 U.S.C. 57a(f)(1) (1985), which provides that unfair and deceptive practices by banks are regulated under rules of the Federal Reserve System, not under the Federal Trade Commission Act. See also Fed. Trade Comm’n. v. Winters Nat’l. Bank & Trust, Co., 601 F. (2d) 395 (6th Cir. 1979). The South Carolina Unfair Trade Practices Act states that the legislature intends the courts to be guided by federal interpretations of the Federal Trade

Commission Act in construing Section 39-5-20(a). See Section 39-5-20(b), Code of Laws of South Carolina, 1976.

Anderson, 294 S.C. at 399, 365 S.E.2d at 33. Various trial courts in South Carolina have since held the SCUTPA is inapplicable to banks regulated by the Federal Reserve, reasoning that the partial overruling of Anderson left the alternate rationale intact. See Lands Inn, Inc. v BB&T of South Carolina, 2:98-158-23 (D.S.C. Apr. 12, 1999); JJH Transport, LLC and Joel Herring v. BB&T of South Carolina, 2006-CP-21-1814 (S.C. Court Common Pleas, Florence County); BB&T of South Carolina v. Eartha Marshall, 2003-CP-40-3272 (S.C. Court Common Pleas, Richland County) (the Lands Inn, JJH Transport and BB&T decisions are collectively attached hereto as Exhibit 5). These opinions ground their SCUTPA exemption for federally regulated banks on Anderson and the text of the SCUTPA itself, and the Federal Trade Commission's exemption of banks in 15 U.S.C. 45(a)(2). Accordingly, the Court should grant Plaintiff summary judgment as to Defendants' SCUTPA claim.

In the alternative, Defendants' SCUTPA claim fails because the SCUTPA does not apply to private transactions where there is no evidence of adverse effect on the public interest. The South Carolina Supreme Court has refused to provide a test to determine what constitutes an "impact upon the public interest," but that requirement is most commonly met by demonstrating that acts or practices have the potential for repetition. See Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986); Global Protection Corp. v. Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (Ct. App. 1998). "The potential for repetition may be shown in two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998). A mere breach of contract

cannot constitute a violation of the SCUPTA. See Key Co., Inc. v. Fameco Distr., Inc., 292 SC 524, 357 S.E.2d 476 (Ct. App. 1987). Moreover, “conduct which only affects the parties to the transaction provides no basis for a UTPA claim” Jefferies v. Phillips, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994).

Here, we have nothing more than a dispute between the two parties to a private loan transaction as documented in the loan documents. The sole act or practice of Plaintiff identified by Defendants as purportedly affecting the public interest was Plaintiff’s decision not to release its mortgage to accommodate the Caegull Investments letter of intent short sale proposal. Such a decision is dependent on a number of unique factors, including the property in question, the terms of the subject loan documents and the amounts owed on the notes secured by the property, and is a matter solely and uniquely between Plaintiff and Defendants, not affecting the public interest.⁴ See, e.g., Drs. Steuer & Latham, P.A. v. Nat’l Med. Enterprises, Inc., 672 F. Supp. 1489, 1522 (D.S.C. 1987) aff’d, 846 F.2d 70 (4th Cir. 1988) (granting summary judgment based on absence of a showing of harm to the public interest); Jefferies v. Phillips, 316 S.C. 523, 527-28, 451 S.E.2d 21, 23 (Ct. App. 1994) (“To be actionable under the UTPA, an unfair or deceptive practice or act must adversely affect the public interest. Therefore, conduct which only affects the parties to the transaction provides no basis for a UTPA claim. This adverse effect on the public must be proved by specific facts. . . . Jefferies introduced no evidence of specific facts which show any member of the public was adversely affected by this transaction.

⁴ When questioned at deposition, Defendants claimed the conduct of Plaintiff (not releasing its mortgage) was at issue in another matter, identified only as “APEG.” (Lindgren Deposition, pp. 126-27.) Presumably, Defendants were referring to another action wherein the borrowers were represented by the same counsel, TD Bank, N.A. v. Atlantic Private Equity Group, LLC, Civil Action No. 2011-CP-07-00588. Notably, however, such an issue was never raised in that litigation, noticeably absent from the borrower and guarantors’ counterclaims against the bank. (See Exhibit 6, Answer and Counterclaim of APEG defendants.)

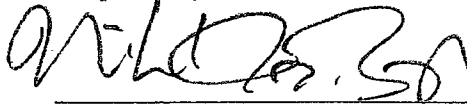
Without this showing, Phillips' conduct cannot be said to affect anyone other than the parties to this controversy, in which case the conduct falls outside the scope of the UTPA.").

Accordingly, summary judgment should be granted and Defendants' UTPA claim should be dismissed.

CONCLUSION

For the reasons set forth above, Plaintiff requests this Court grant its Motion for Summary Judgment as to Defendants' counterclaims, and for such other relief as may be requested in the previously-filed Motion for Summary Judgment as well as at oral argument.

Respectfully submitted,



Clayton M. Custer (S.C. Bar No. 68495)

Email: csuster@wcsr.com

Michael J. Bogle (S.C. Bar No. 71125)

Email: mbogle@wcsr.com

Catherine Wrenn (S.C. Bar No. 76042)

Email: cwrenn@wcsr.com

Womble Carlyle Sandridge & Rice, LLP

Post Office Box 10208

Greenville, SC 29603-0208

Telephone: (864) 255-5421

Fax: (864) 239-5852

*Attorneys for Plaintiff TD Bank, N.A., Successor by
Merger to Carolina First Bank*

January 9, 2015
Greenville, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 9th day of January, 2015, he mailed a copy of the attached **PLAINTIFF'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT** by electronic mail *and* by depositing same in the United States Mail, first-class, proper postage, affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

Keating L. Simmons, III
SIMONS & DEAN
147 Wappoo Creek Drive
Suite 604

Charleston, SC 29412

Email: klsimons@simonsanddean.com

Ehrick K. Haight, Jr.

P.O. Drawer 6067

Hilton Head Island, SC 29938

Email: rick@mhalawfirm.com

Attorney for David A. Brosman

*Attorney for Defendants Black Diamond,
LLC and J. Christopher Lindgren*



Michael J. Bogle (S.C. Bar No. 71125)

2015 JAN 13 AM 10:09
CLERK OF COURT
JANUARY 13 2015
CLERK OF COURT

EXHIBIT 6

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

TD Bank, N.A., Successor by Merger to Carolina
First Bank,

Plaintiff,

v.

Black Diamond, LLC; J. Christopher Lindgren;
David A. Brosman; Julie H. King; and The
Greenery, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

2015 JUN 11 PM 1:34
CASE No. 2012-CP-07-0944

BEAUFORT COUNTY S.C.
CLERK OF COURT

**ORDER GRANTING TD BANK'S
MOTION TO STRIKE DEFENDANTS'
JURY TRIAL DEMAND**

In this foreclosure action, TD Bank, N.A., Successor by Merger to Carolina First Bank, ("TD Bank" or "the Bank") has moved the Court to strike the jury trial demand of Defendants Black Diamond, LLC, J. Christopher Lindgren, and David A. Brosman¹ (collectively, "Defendants"), asserting that Defendants are not entitled to and/or waived any right to a jury trial in this case. On March 24, 2015, the Court held a hearing on the Bank's Motion. After review of the Bank's Motion and its supporting Memorandum, Defendant David A. Brosman's Memorandum in Opposition to that Motion, and hearing arguments from counsel, the Court **GRANTS** TD Bank's Motion for the reasons set forth below:

BACKGROUND:

This is a commercial foreclosure action involving:

- Two promissory notes that Defendant Black Diamond, LLC ("Black Diamond") executed in favor of the Bank: (1) a Promissory Note for \$3.5 Million ("the \$3.5 Million Note"), and (2) a Promissory Note for \$2 Million ("the \$2 Million Note") (collectively, "the Notes");

¹ The remaining defendants in this case, Julie H. King and The Greenery, Inc., have not demanded a jury trial.

- Mortgages on two parcels of Beaufort County, South Carolina real property that Black Diamond provided to the Bank to secure the Notes (“the Mortgages”); and
- Guaranty Agreements that Defendants J. Christopher Lindgren and David A. Brosman (collectively, “the Guarantors”) executed in favor of the Bank and which guaranteed Black Diamond’s payment of the Notes.

TD Bank alleges that Black Diamond is in default under the Notes, and it seeks to foreclose on the Mortgages that Black Diamond executed in its favor and recover any deficiency after the foreclosure sale from the Guarantors, who guaranteed Black Diamond’s debts to the Bank. Compl.

In response to the Complaint, Black Diamond and the Guarantors filed the following counterclaims against the Bank: breach of the covenant of good faith and fair dealing; breach of contract; breach of fiduciary duty; duress; interference with prospective economic relations; and unfair trade practices. Black Diamond and the Guarantors have requested a jury trial of all the claims and counterclaims in this matter.

FINDINGS:

I. Defendants Are Not Entitled to a Jury Trial on the Bank’s Equitable Foreclosure and Deficiency Claims Against Them.

Foreclosure actions, like this one, are equitable, and, as a result, parties to such an action are “not entitled, as a matter of right, to a jury trial.” Carolina First Bank v. BADD, LLC, No. 2013-000107, 2015 WL 340791, *1 (Jan. 28, 2015). See also S.C. R. Civ. P. Rule 71(a) (“Actions to foreclose liens or obtain partition of real property shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53”). In BADD, the South Carolina Supreme Court recently confirmed that guarantors, who are parties to a foreclosure action “for the purpose of collecting a deficiency,” are not entitled to a jury trial on that claim because deficiency judgments are “incidental to the main relief sought” in a foreclosure action. BADD,

at *2. In so holding, the BADD court relied on S.C. Code Ann. § 29-3-660,² which specifically grants a court the ability to award a deficiency judgment against a guarantor in a foreclosure action.

As noted above, this is a foreclosure action, which is equitable in nature and in which TD Bank seeks to: (1) foreclose on the mortgages that Black Diamond executed in its favor and (2) recover any deficiency after the foreclosure sale from the Guarantors. See Compl. As a result, Black Diamond is not entitled to a jury trial on the Bank's foreclosure action against it, BADD, at *1, and the Guarantors, whom "the Bank included . . . as [parties] to its foreclosure action only for the purpose of collecting a deficiency should one be adjudged," are not entitled to a jury trial on the Bank's claim against them because "a party does not have a right to a jury trial" on a deficiency claim, id., at *2.

II. Furthermore, Defendants Are Not Entitled to a Jury Trial on Their Permissive Counterclaims against the Bank.

The Court finds that, because Defendants asserted *permissive* counterclaims against the Bank in this equitable action, they are not entitled to a jury trial on those claims. A defendant is "entitled to a jury trial on his counterclaims in an equitable action," like this one, "only if the counterclaims are legal and compulsory." Id., at *3. "A counterclaim is compulsory if it arises out of the same transaction or occurrence as the party's claim. In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, when there is a 'logical relationship' between the counterclaim and the enforceability of the guaranty agreement." Id. As a result, in BADD, a foreclosure action in which the bank sought a

² S.C. Code Ann. § 29-3-660 provides: "In actions to foreclose mortgages[,] . . . if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases."

deficiency against a guarantor, the South Carolina Supreme Court held that a guarantor who asserted counterclaims that lacked a logical relationship with the guaranty agreement's enforceability was not entitled to a jury trial on those claims.

The BADD guarantor asserted breach of contract and civil conspiracy legal counterclaims against the bank. In analyzing whether the counterclaims were compulsory or permissive, the BADD court found that "the execution of the guaranty agreements was the 'transaction or occurrence' that gave rise to [the guarantor's] inclusion in the Bank's foreclosure complaint." Id. (emphasis added). Thus, in order to be compulsory, the guarantor's counterclaims had to have a logical relationship with the guaranty agreement's execution or enforceability. The BADD court found that the guarantor's counterclaims were based on "an alleged conspiracy between the Bank" and a third party to "induce [the debtor's] default" on the underlying notes and the Bank's alleged breach of the covenant of good faith and fair dealing, which were "implied in the note, mortgage, and guaranty agreements," by virtue of the "purported conspiracy." Id., at *3. The Court held that the counterclaims did not have a "logical relationship to either the execution or enforceability of the guaranty agreements," and it noted that the claims instead "presume[d] the enforceability of the guaranty agreements because the allegations, if true, would not render the guarantees unenforceable." Id. As a result, the counterclaims were permissive and did not entitle the BADD guarantor to a jury trial.

Like the BADD guarantor's counterclaims, Defendants' legal counterclaims against TD Bank are permissive in nature and do not entitle Defendants to a jury trial because they bear no "logical relationship" with the transaction that gave rise to the Bank's foreclosure and deficiency action against them — the execution of the notes, mortgages, and guaranty agreements. Defendants have asserted the following counterclaims against the Bank: breach of the covenant

of good faith and fair dealing; breach of contract; breach of fiduciary duty; duress; interference with prospective economic relations; and unfair trade practices. As with the BADD counterclaims, none of Defendants' legal counterclaims "affect the execution or enforceability" of the loan documents. Instead, they are premised on events that occurred after the execution of those documents, such as the Bank's refusal to accept a short sale of one of the mortgaged commercial properties. See, e.g., Brosman Answer and Counterclaim, at ¶ 27; Black Diamond and Lindgren Answer and Counterclaim, at ¶ 27. Importantly, Defendants, in Brosman's Memorandum in Opposition to the Bank's Summary Judgment Motion, confirmed that their counterclaims are based on alleged events that occurred "subsequent" to the execution of the parties' loan documents." See e.g., Def's Memo in Opp., at 4-5 (Alleging that the purported breach of contract was "subsequent to" and "after" the execution of the forbearance agreements.") Consequently, the Court finds that Defendants' legal counterclaims against the Bank are permissive and do not entitle Defendants to a jury trial.

Because Defendants are not entitled to a jury trial on the Bank's foreclosure claims against them or on their counterclaims against the Bank, the Court grants the Bank's motion to strike Defendants' demand for a jury trial.

III. Alternatively, the Court Also Finds that Black Diamond Contractually Waived Its Right to a Jury Trial.

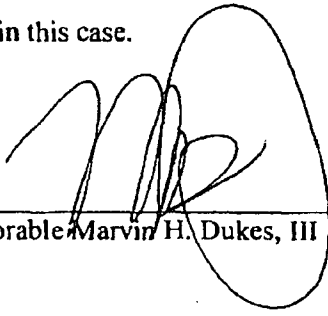
As an alternative ground for granting the Bank's motion to strike Defendants' jury trial demand, the Court also finds that Black Diamond contractually waived any right to a jury trial when it executed the \$3.5 Million Note. Under South Carolina law, "[a] party may waive the right to a jury trial by contract." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct. App. 2002). In this case, the \$3.5 Million Note, in capital letters conspicuously located directly above the signature line, unambiguously states that Black Diamond:

WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, THE RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM, WHETHER IN CONTRACT, TORT OR OTHERWISE, RELATING DIRECTLY OR INDIRECTLY TO THE LOAN EVIDENCED BY THIS NOTE, . . . THE SECURITY INSTRUMENT, THE LOAN AGREEMENT OR THE OTHER SECURITY DOCUMENTS OR ANY ACTS OR OMISSIONS OF LENDER OR BORROWER.

\$3.5 Million Note (emphasis added). As noted above, the claims and counterclaims at issue in this action relate directly to the \$3.5 Million Note, which the Bank asserts that Black Diamond is in default under, and the alleged "acts or omissions" of the Bank and Black Diamond. Therefore, per the plain, ordinary meaning of the \$3.5 Million Note's language, Black Diamond waived any right to a jury trial in this lawsuit.³

WHEREFORE, the Court GRANTS TD Bank's Motion to Strike Defendants' request for a jury trial on all claims and counterclaims in this case.

This 10 day of June 2015
Beaufort, South Carolina



The Honorable Marvin H. Dukes, III

³ The Court also finds that the Guarantors waived any right to a jury trial because the Guaranty Agreements clearly, and in conspicuous, capitalized language directly above or near the signature lines, provide that the Guarantors unequivocally waived such a right in "any action," like this one, regarding the Notes and/or the "relationship between" the Bank and Black Diamond. See, e.g., Lindgren Guaranty of \$3.5 Million Note, at ¶ 21; Brosman Guaranty of \$3.5 Million Note, at ¶ 17; Brosman Guaranty of \$2 Million Note, at ¶ 17. See also Lindgren Guaranty of \$2 Million Note, at ¶ 9 (providing that Lindgren consents to "any waiver" of Black Diamond, which as noted above, includes a waiver of a jury trial in this matter).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 22nd day of June, 2015, she served a copy of the **Order Granting TD Bank's Motion to Strike Defendants' Jury Trial Demand** by depositing same in the United States Mail, proper first class postage affixed, and via email addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es).

Keating L. Simmons, III
SIMONS & DEAN
147 Wappoo Creek Drive
Suite 604
Charleston, SC 29412
klsimons@simonsanddean.com

Ehrick K. Haight, Jr.
P.O. Drawer 6067
Hilton Head Island, SC 29938
rick@mhalawfirm.com

Attorney for David A. Brosman

*Attorney for Defendants Black Diamond,
LLC and J. Christopher Lindgren*

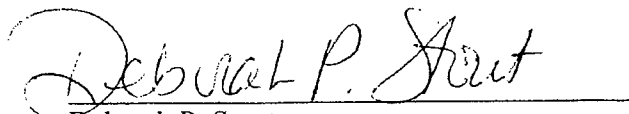

Deborah P. Stout
Assistant to Michael J. Bogle

EXHIBIT 7

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

TD Bank, N.A., Successor by Merger to Carolina First Bank,
First Bank,

Plaintiff.

v.

Black Diamond, LLC; J. Christopher Lindgren;
David A. Brosman; Julie H. King; and The
Greenery, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

2015 SEP 11 PM 3:58

C.A. No. 2012-CP-07-0944

ES. CLERK OF COURT
BEAUFORT COUNTY, S.C.

ORDER GRANTING TD BANK'S
MOTION FOR SUMMARY
JUDGMENT ON DEFENDANT'S
CLAIMS FOR BREACH OF
CONTRACT; BREACH OF
FIDUCIARY DUTY; DURESS; AND
UNFAIR TRADE PRACTICES

In this foreclosure action, TD Bank, N.A., Successor by Merger to Carolina First Bank, ("TD Bank" or "the Bank") has moved the Court to grant it summary judgment on Defendants Black Diamond, LLC, J. Christopher Lindgren, and David A. Brosman's¹ (collectively, "Defendants") counterclaims, contending that there are no genuine issues of material fact as to any such claims. On March 24, 2015, the Court held a hearing on the Bank's Summary Judgment Motion.

After review of the Bank's Motion and its supporting Memorandum, Defendants' Memorandum in Opposition, and hearing arguments from counsel, the Court, for the reasons set forth below, **GRANTS** TD Bank summary judgment on Defendants' breach of contract and of the covenant of good faith and fair dealing claim as it relates to the cross-collateralization of the loans and the Bank's decision not to agree to a proposed short sale; breach of fiduciary duty; duress; and unfair trade practices, but it **DENIES** the Bank's Motion for Summary Judgment on Defendants' remaining counterclaims.

¹ The remaining defendants in this case, Julie H. King and The Greenery, Inc., have not made claims against the Bank.

BACKGROUND:

This is a commercial foreclosure action involving:

- Two promissory notes that Defendant Black Diamond, LLC ("**Black Diamond**") executed in favor of the Bank: (1) a January 2008 Promissory Note for \$3.5 Million ("**the \$3.5 Million Note**"), and (2) a July 2008 Promissory Note for \$2 Million ("**the \$2 Million Note**") (collectively, "**the Notes**");
- Mortgages on two parcels of Beaufort County, South Carolina real property that Black Diamond provided to the Bank to secure the Notes ("**the Mortgages**"); and
- Guaranty Agreements that Defendants J. Christopher Lindgren and David A. Brosman (collectively, "**the Guarantors**") executed in favor of the Bank and which guaranteed Black Diamond's payment of the Notes.

Pursuant to the terms of the \$2 Million Note, the Notes are cross-collateralized. \$2 Million Note, at ¶ 10. In particular, the \$2 Million Note provides: "This Loan is cross-collateralized and cross defaulted with [the \$3.5 Million Note] in the name of Black Diamond, LLC in the amount of \$3,500,000.00 dated January 25, 2008 secured by real estate mortgage." Id.

TD Bank alleges that Black Diamond is in default under the Notes, and it seeks to foreclose on the Mortgages that Black Diamond executed in its favor and recover any deficiency after the foreclosure sale from the Guarantors, who guaranteed Black Diamond's debts to the Bank. Compl.

In response to the Complaint, Black Diamond and the Guarantors filed the following counterclaims against the Bank: breach of the covenant of good faith and fair dealing; breach of contract; breach of fiduciary duty; negligent misrepresentation; duress; interference with prospective economic relations; and unfair trade practices. Those counterclaims are all based on the following allegations: (1) that the Bank coerced Defendants into cross-collateralizing the loans and agreeing to the retention of a property manager; (2) that TD Bank interfered with the property manager's contract; (3) that TD Bank elected not to agree to a September 2010

proposed short sale (which entailed a release of its mortgage on one parcel of property in conjunction with a proposed sale for an amount less than what was owed on the corresponding note); and (4) that TD Bank interfered with tenants. Answer and Counterclaims.

FINDINGS:

I. TD Bank Is Entitled to Summary Judgment on Defendants' Claim for Breach of Contract and of the Covenant of Good Faith and Fair Dealing to the Extent that Cause of Action Is Based on the Bank's Cross-Collateralization of the Notes and the Bank's Refusal to Consent to a Short Sale.

To the extent that Defendants' counterclaim for breach of contract and covenant of good faith and fair dealing² is based on the Bank's cross-collateralizing of the Loans and its refusal to consent to a September 2010 proposed short sale, the Court grants TD Bank summary judgment because there are no material questions of fact and the Bank is entitled to judgment as a matter of law as the statute of limitations bars any breach based on the July 2008 cross-collateralization and South Carolina law imposes no duty on a Bank to modify loan documents.

A. Cross-Collateralization of Loans:

Defendants contend that the Bank breached the Notes by cross-collateralizing them in July 2008. However, the statute of limitations for such a claim lapsed before Defendants filed their breach of contract counterclaim. S.C. Code Ann. § 15-3-530 provides a three year statute of limitation for breach of contract claims. The discovery rule determines the date of accrual for such a legal claim, and, under that rule, Defendant's breach of contract claim based on the cross-collateralization of the Notes accrued on the date Defendants "either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence." Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998). In this case,

² South Carolina does not recognize a cause of action for the breach of the covenant of good faith and fair dealing that is independent and separate from a breach of contract cause of action. See, e.g., RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004).

Defendants admit that the Notes were cross-collateralized and allegedly breached in July 2008. See Lindgren Depo., at 50:111 (acknowledging the loans were cross-collateralized in July 2008). Furthermore, the very text of the \$2 Million Note, which was executed in July 2008, expressly states that the Note is “cross-collateralized and cross defaulted with” the \$3.5 Million Note, and Defendants are charged with knowledge of that Note’s provisions. See e.g., generally, York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 81, 749 S.E.2d 139, 146 (Ct. App. 2013 (A “party who signed a contract is deemed to have read and understood ‘the effect’ of the contract”). However, Defendants did not file their counterclaim based on that cross-collateralization until April 2012 (for Black Diamond and Lindgren) and May 2012 (for Brosman) — over three years after they knew of the cross-collateralization and the alleged breach. As a result, to the extent Defendants’ breach of contract cause of action is based on the cross-collateralization of the Notes, the statute of limitation bars the claim and TD Bank is entitled to summary judgment on it as a matter of law.

B. Proposed Short-Sale:

Additionally, the Bank is entitled to summary judgment on Defendants’ breach of contract claim to the extent that cause of action is based on the Bank’s refusal to release its mortgage in conjunction with a September 2010 proposed sale of the property for an amount less than that owed by Defendants on the Notes. Defendants contend that the Bank had a duty to not only consider a loss mitigation / short sale proposal, but to also approve the sale of its collateral for less than the amount owed. There is simply no legal authority or contractual agreement between the parties to support or establish such an alleged duty, which essentially would rewrite the terms of the parties loan documents. In fact, other courts have held that banks had no legal duty to consider or approve loss mitigation or loan modification requests. See, e.g., James v.

Vanderbilt Mortgage, 2012 WL 441170, *4 (W.D.N.C. Jan. 23, 2012), affirmed and adopted, 2012 WL 440355 (W.D.N.C. Feb. 10, 2012) (holding that the lender had “no duty to forgo its rights under the terms of the loan to foreclose on the property”); Mudge v. Bank of Am., N.A. and TD Bank, N.A., 2013 WL 6095561, *3 (D.N.H. Nov. 20, 2013) (noting that a short sale “necessarily rewrites the terms of the parties’ mortgage agreement,” and the covenant of good faith and fair dealing in a loan document “cannot be used to require the lender to modify or restructure the loan”).

As a result, to the extent Defendants’ breach of contract claim is based on the breach of that non-existent duty, it fails as a matter of law.

II. The Bank Also Is Entitled to Summary Judgment on Defendants’ Breach of Fiduciary Duty Claim Because There Is No Evidence that the Bank Either Owed Bank Owed No Fiduciary Duty to Defendants.

The Court also grants TD Bank summary judgment on Defendants’ breach of fiduciary claim, which fails as a matter of law because there is no evidence that the Bank owed a fiduciary duty to Defendants or that the Bank breached such a purported duty.

To establish a claim for breach of fiduciary duty, Defendants must establish: (1) that the Bank owed them a fiduciary duty; (2) that the Bank breached that duty; and (3) that Defendants have suffered damages as a proximate result of that breach. See generally Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004). “A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence.” Regions Bank v. Schmauch, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003). However, “South Carolina holds [that] the normal relationship between a bank and its customer is one of creditor-debtor and is not fiduciary in nature,” id., at 671, 582 S.E.2d at 444, and Defendants have presented

no evidence to establish that the parties departed from the normal debtor-mortgage holder relationship or that the Bank assumed any kind of a fiduciary duty to Defendants whereby Defendants believed that the Bank was acting, not "in [its] own behalf, but in the interests of [Defendants]," Burwell v. S. Carolina Nat. Bank, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986). Additionally, even if such a fiduciary relationship existed, Defendants have not established that the Bank breached any purported fiduciary duty to them.

Consequently, the Court grants the Bank summary judgment on Defendants' breach of fiduciary duty counterclaim.

III. Defendants' Counterclaim for Duress Fails as a Matter of Law.

The Court also grants the Bank's Motion for Summary Judgment on Defendants' duress claim because South Carolina does not recognize such a cause of action. See, e.g., 8 S.C. Jur. Extortion, Blackmail and Threats § 25 ("South Carolina law does not recognize a cause of action for economic duress"). In Troutman v. Facetglas, Inc., 281 S.C. 598, 603, 316 S.E.2d 424, 427 (Cl. App. 1984), the South Carolina Court of Appeals found "no compelling reason . . . to extend the law of intentional torts in South Carolina to embrace economic duress."

Alternatively, even if South Carolina recognized such a claim, summary judgment nonetheless would be appropriate as there is no legal authority that the Bank's conduct constitutes duress. Defendants contend that the Bank's cross-collateralization of the loans in the \$2 Million Note and the requirement for a property manager in the parties' Forbearance Agreements, Lindgren Depo., at 50-53; 104-07; 111, constitute duress. However, both of those practices are standard throughout the loan industry and there is no authority that such actions are wrongful or amount to coercive conduct. Additionally, to the extent that Defendants' duress

claim is based on the cross-collateralization of the loans, the applicable statute of limitations, S.C. Code Ann. § 15-3-530, bars such a cause of action.

For the reasons explained above, the Court grants the Bank summary judgment on Defendants' counterclaim for duress.

IV. The Court Also Grants the Bank Summary Judgment on Defendants' UTPA Claim.

The Court grants the Bank summary judgment on Defendants' UTPA counterclaim because the UTPA does not apply to private transactions like the ones involved in this case, where there is no evidence of adverse effect on the public interest. The South Carolina Supreme Court has refused to provide a test to determine what constitutes an "impact upon the public interest," but that requirement is most commonly met by demonstrating that acts or practices have the potential for repetition. See Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986); Global Protection Corp. v. Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (Ct. App. 1998). "The potential for repetition may be shown in two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998). A mere breach of contract cannot constitute a violation of the SCUPTA. See Key Co., Inc. v. Fameco Distr., Inc., 292 SC 524, 357 S.E.2d 476 (Ct. App. 1987). Moreover, "conduct which only affects the parties to the transaction provides no basis for a UTPA claim" Jefferies v. Phillips, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994).

Here, we have nothing more than a dispute between parties to a private loan transaction as documented in the loan documents. The sole act or practice of the Bank identified by

Defendants as purportedly affecting the public interest was its decision not to release its mortgage to accommodate the September 2010 proposed short sale. Such a decision is dependent on a number of unique factors, including the property in question, the terms of the subject loan documents and the amounts owed on the notes secured by the property, and is a matter solely and uniquely between Plaintiff and Defendants, not affecting the public interest. See, e.g., Drs. Steuer & Latham, P.A. v. Nat'l Med. Enterprises, Inc., 672 F. Supp. 1489, 1522 (D.S.C. 1987) aff'd, 846 F.2d 70 (4th Cir. 1988) (granting summary judgment based on absence of a showing of harm to the public interest); Jefferies v. Phillips, 316 S.C. 523, 527-28, 451 S.E.2d 21, 23 (Ct. App. 1994) ("To be actionable under the UTPA, an unfair or deceptive practice or act must adversely affect the public interest. Therefore, conduct which only affects the parties to the transaction provides no basis for a UTPA claim. This adverse effect on the public must be proved by specific facts. . . . Jefferies introduced no evidence of specific facts which show any member of the public was adversely affected by this transaction. Without this showing, Phillips' conduct cannot be said to affect anyone other than the parties to this controversy, in which case the conduct falls outside the scope of the UTPA.").

Alternatively, the Bank, which is federally regulated, is exempt from the provisions of the UTPA; as a result, Defendants' UTPA counterclaim fails a matter of law. The application of the UTPA is drawn from the interpretation of 15 U.S.C. 45(a)(1), the corollary federal statute granting authority to the Federal Trade Commission ("FTC") to regulate and prohibit unfair methods of competition and unfair and deceptive acts affecting commerce. See S.C. Code § 39-5-20 (providing that "[i]t is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to § 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)),

as from time to time amended"). Banks are specifically exempt from the Federal Trade Commission's (the "FTC") power to regulate and prohibit unfair competition and unfair or deceptive acts that affect commerce. See 15 U.S.C. 45(a)(2) ("The Commission is hereby empowered and directed to prevent persons, partnerships or corporations, *except banks* . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.") (emphasis added). Thus, because the UTPA looks to the FTC for guidance regarding the applicability and enforcement of the provisions of the UTPA, federally regulated banks are likewise exempt from the provisions of the UTPA. See, e.g., Lands Inn, Inc. v BB&T of South Carolina, 2:98-158-23 (D.S.C. Apr. 12, 1999); JJH Transport, LLC and Joel Herring v. BB&T of South Carolina, 2006-CP-21-1814 (S.C. Court Common Pleas, Florence County); BB&T of South Carolina v. Eartha Marshall, 2003-CP-40-3272 (S.C. Court Common Pleas, Richland County).

Accordingly, summary judgment should be granted and Defendants' UTPA claim should be dismissed.

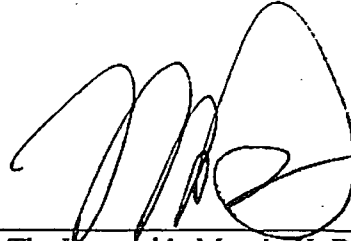
CONCLUSION:

WHEREFORE, the Court **GRANTS** TD Bank summary judgment on Defendants' counterclaims for: (1) breach of contract and of the covenant of good faith and fair dealing, to the extent that claim is based on the cross-collateralization of the loans and the Bank's decision not to agree to a proposed short sale; (2) breach of fiduciary duty; (3) duress; and (4) unfair trade practices. However, the Court **DENIES** the Bank's Motion to Summary Judgment on Defendants' remaining counterclaims for: (1) negligent misrepresentation; (2) interference with prospective economic relations; and (3) breach of contract and of the covenant of good faith and

fair dealing to the extent such a claim is *not* based on the cross-collateralization of the loans or the Bank's decision not to consent to the proposed short sale.

IT IS SO ORDERED.

This 11 day of July 2015

A handwritten signature in black ink, consisting of stylized, overlapping loops and curves, positioned above a horizontal line.

The Honorable Marvin H. Dukes, III

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-07-0941

2015 SEP 11 PM 3:58

ID Bank, N.A. Successor by Merger to Carolina
First Bank.

Black Diamond, LLC, J. Christopher Lindgren;
A. Brosnan; Julie H. King; and the

JEFFREY A. ROSENBERG
CLERK OF COURT

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Michael J. Bogle

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

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(e), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

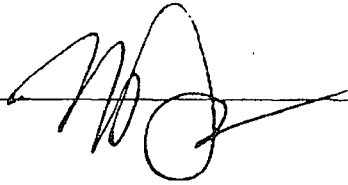
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

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

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

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

Circuit Court Judge



Judge Code

3069

Date

9/11/15

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

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

EXHIBIT 8

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-07-00941

TD BANK, NA, ET AL.

BLACK DIAMOND LLC, ET AL.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

THIS CAME BEFORE ME ON DEFENDANTS DAVID A. BROSSMAN, BLACK DIAMOND LLC AND J. CHRISTOPHER LINDGREN'S TWO MOTION FOR RECONSIDERATION, FILED 7/7/2015 AND 9/22/2015. AFTER HEARING FROM ALL PARTIES, I HEREBY DENY BOTH MOTIONS FOR RECONSIDERATION.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

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

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

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

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

Circuit Court Judge

3069

Judge Code

Date

7/11/16

For Clerk of Court Office Use Only

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

JAMES M. TRENT

CLAYTON M. CUSTER

MICHAEL J. BOGLE

ATTORNEY(S) FOR THE PLAINTIFF(S)

KEATING L. SIMONS III

EHRIK K. HAIGHT JR.

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: N/A

✓

EXHIBIT 9

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CIVIL ACTION NO.: 2012-CP-07-0944
COUNTY OF BEAUFORT	)	
	)	
TD BANK, N.A., Successor by	)	
Merger to Carolina First Bank,	)	
	)	MEMORANDUM IN OPPOSITION TO
Plaintiff,	)	PLAINTIFF'S MOTION FOR
	)	SUMMARY JUDGMENT
v.	)	
	)	
BLACK DIAMOND, LLC, J.	)	
CHRISTOPHER LINDGREN,	)	
DAVID A. BROSMAN, JULIE H.	)	
KING and THE GREENERY, INC.,	)	
	)	
Defendants.	)	
	)	
	)	

The Defendants, Black Diamond, LLC, J. Christopher Lindgren and David A. Brosman, by and through their undersigned counsel, oppose the Plaintiff's Motion for Summary Judgment. For the reasons discussed below, this motion should be denied.

STANDARD

"Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Bovain v. Canal Ins., 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). "Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 329, 673 S.E.2d 801, 802 (2009). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the

evidence must be viewed in the light most favorable to the nonmoving party.” Hancock, 381 S.C. at 329-30, 673 S.E.2d at 802. In considering a motion for summary judgment, the Court neither makes factual determinations nor considers the merits of competing testimony. David v. McLeod Reg’l Med. Ctr., 367 S.C. 242, 250, 626 S.E. 2d 1, 5 (2006); see also S.C. Prop. & Cas. Guar. Ass’n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001) (“At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact.”) In Hancock, the South Carolina Supreme Court clarified conflicting case law regarding the level of evidence required to withstand a motion for summary judgment, 381 S.C. at 330-31, 673 S.E.2d at 803. Specific to the causes of action at issue here, as the non-moving parties, the Defendants are required only to show “a mere scintilla of evidence in order to withstand a motion for summary judgment.” Id. Plaintiff has failed to meet its burden because the Defendants have provided the Court with far more than a “mere scintilla of evidence.”

The Defendants have submitted to the court and attach hereto as Exhibits “A”, “B” and “C” deposition excerpts from the depositions of J. Christopher Lindgren (which is also the 30(b)(6) deposition of Black Diamond, L.L.C.), Joseph B. Fraser, III and Baker Wilkins. The Plaintiff has also submitted with its memorandum many of the same pages of Lindgren’s deposition but did not include the following pages submitted by the Defendants: 22 through 25 and 115 through 120. The Plaintiff has not submitted any pages from Fraser or Wilkins’ depositions. Defendants have also submitted and attach hereto as Exhibit “D” a compilation of documents produced by Plaintiff in this case.

In pages 22 through 25 of Lindgren's deposition, he testified to the Plaintiff's failure to approve a transaction to sell a portion of the collateral to Ceagull Investments, LLC, a pattern of unfair dealings and the appropriating of funds from the operating accounts of Black Diamond, LLC. In pages 114 through 120, Lindgren testified to misrepresentations made by an officer of the Plaintiff concerning requests for documentation, Black Diamond, LLC's account and contact with the property manager.

Fraser, through Ceagull Investments, LLC, entered into a memorandum of understanding or letter of intent with Black Diamond, LLC to purchase a portion of the collateral for \$1,325,000.00. A copy of this document is attached to Fraser's deposition and to this memorandum in Exhibit "B". According to Fraser, a condition was "yes-or-no approval from the bank... and never got a response, so we never went forward with it." (Fraser depo. p.10).

Similarly, Wilkins, the real estate agent involved, testified to the letter of intent between Ceagull Investments, LLC and Black Diamond, LLC and the fact that the Plaintiff never responded: "And once the price was done, his brother, Simon Fraser,...was waiting on the response from TD Bank to accept the offer or give the mortgage lien release...and that's as far as we got." (Wilkins depo. pp. 13-14).

ARGUMENT

The Plaintiff claims that the counterclaims of the Defendants fail as a matter of law. The Defendants dispute this assertion.

I. Breach of Contract and Breach of Covenant of Good Faith and Fair Dealing

The Plaintiff claims that because the notes and guaranties had been breached, the Defendants cannot seek to recover under the same. The Plaintiff forgets, however, that there had been no breach of the forbearance agreements by the Defendants at the time of Ceagull Investments' offer and the letter of intent. The implied covenant of good faith and fair dealing exists even in connection with forbearance agreements. Time Warner Cable v. Condo Services, Inc., 381 S.C. 275, 672 S.E. 2d 816 (Ct. App. 2009) (there exists in every contract an implied covenant of good faith and fair dealing).

A. Cross-Collateralization of the Loans and Appointment of a Property Manager.

The Plaintiff alleges that because the cross-collateralization of the two loans took place more than three years prior to the date of the Defendants' counterclaims, any such claim is barred by the three year statute of limitations. The applicable statute of limitations; however, is just as likely to be the twenty year statute of limitations for sealed instruments such as the mortgages and modifications in this case. See S.C. Code Ann. §15-3-520.

The Plaintiff also claims that any breach alleged by the Defendants was waived by execution of the forbearance agreements. Again, however, the breach arising from the Plaintiff's failure to respond to the Ceagull Investments' offer and letter of intent was subsequent to the execution of the forbearance agreements and caused real and measurable damages.

B. Interference with Property Manager's Contract.

The Plaintiff is again confused about timing. The interference with the property

manager occurred after execution of the forbearance agreements. Bank documents obtained in discovery buttress Lindgren's testimony that Plaintiff represented that the property manager would be just that, a property manager, not a receiver, and that the relationship would be between the property manager and Black Diamond, LLC, not the Plaintiff. See Ex. D at 3351. Nevertheless, Plaintiff internally regarded the property manager as a receiver and treated him as such. See Ex. D at 6699. By way of example, Plaintiff directed the property manager in regard to payment of bills, Ex. D at 7032, 8504, collecting rents, Ex. D at 9446, and evicting tenants, Ex. D at 9448. In recognition of Plaintiff's de facto assumption of control, the property manager rendered "confidential" reports to the Plaintiff casting the property owner (to whom the property manager owed fiduciary duties) in a negative light and urged the bank to formally take over control of the property, Ex. D at 9600, all the while having lunch discussions with bank representatives about doing more business with Plaintiff and putting its own client, Black Diamond, LLC, in receivership. Ex. D at 9668.

C. Plaintiff's Failure to Even Respond to Request for Partial Release of Mortgage.

The Defendants have submitted testimony from three witnesses establishing that the Plaintiff never even responded to the request for a partial release pursuant to the letter of intent. The Plaintiff has mis-characterized its actions as a deliberate election not to release its mortgage - an election it apparently shared with nobody. The Defendants do indeed argue that the Plaintiff has a duty to consider and respond to the request. Certainly, the implied covenant of good faith and fair dealing requires no less.

Interestingly, the Plaintiff cites no South Carolina authority for its claim that lenders have no cognizable legal duty to consider or approve loss mitigation or loan modification requests. The Plaintiff cites authority from North Carolina and New

Hampshire. In residential foreclosure situations, the South Carolina Supreme Court has imposed a duty and process for the consideration of loss mitigation. See Administrative Order No. 2011-05-02-01.

Lindgren emailed the Offer/LOI to Plaintiff's representative, Mike Rose, on October 14, 2010. Ex. D at 6711 - 16. Lindgren followed up with Rose several times. Ex. D at 6597, 5846 and 5877. Finally, on December 2, 2010, Rose responded with an email beginning: "I have responded to you on a number of occasions, both via the phone and emails..." Lindgren has testified about this email, noting that nearly every sentence is a lie. (Lindgren depo. pp. 62-64) Plaintiff has produced thousands of pages of documents. There is not one email from Rose, or anyone at the bank for that matter, to Lindgren addressing the Ceagull offer. Moreover, there is no evidence in the bank files that any bank employee besides Rose even knew of the offer, much less that the bank actively considered the merits of the proposed sale. To the contrary, instead of dealing with his customer in good faith, on the same day he finally responded to Lindgren, Rose was secretly soliciting offers on the property from others. Ex. D at 5899. And in connection with that effort, again without disclosure to Black Diamond, LLC, Plaintiff sought and received the property manager's assistance in valuing the property.

D. Interference with Tenants

The Plaintiff's interference with tenants is simply further evidence of its disregard for the implied covenant of good faith and fair dealing.

II. Breach of Fiduciary Duty

The Plaintiff argues that there is no fiduciary relationship, claiming the relationship is merely a typical arms length business relationship between a debtor and a mortgage holder. In this case, however, the Plaintiff has directed the property manager. The property manager owes a fiduciary duty to its principal. See Fender

v. Fender, 285 S.C. 260, 329 S.E.2d 430 (1985); Tate v. Marco, 27 S.C. 493, 4 S.C. 71 (1887). By directing the property manager, the Plaintiff has stepped into the property manager's shoes and, correspondingly, into its fiduciary duties. See 10 S.C. Jur. Banks and Banking §170 (Banks must recognize that once they establish a control relationship in a debtor's business, by rights in the loan agreement, or otherwise, they may be found to have a fiduciary obligation to the debtor).

III. Negligent Misrepresentation

The Plaintiff asserts that the only misrepresentation identified by the Defendants was that of a loan officer, Mike Rose, that Black Diamond "could select a [property] manager we were most comfortable with." (Lindgren depo. p.27). This is not the only misrepresentation. For example, Lindgren testified as to another misrepresentation by the loan officer: "My understanding was they were going to respond to the terms of the deal and advise us whether or not we could go to contract." (Lindgren depo. p. 61): "[H]e told me that he would respond. He never responded either affirmatively or negatively." (Lindgren depo. p. 63). This misrepresentation, moreover, was made after execution of the forbearance agreements, rendering the Plaintiff's argument inapplicable.

Another misrepresentation, also subsequent to the forbearance agreement, was that related to the property manager's status as property manager not receiver. Plaintiff secretly directed and controlled the property manager, all the while asserting that the property manager was Black Diamond's agent, not that of the bank. This misrepresentation was persistent and ongoing.

IV. Duress

The Plaintiff asserts that duress is not recognized as a cause of action in South

Carolina, citing Troutman v. Facetglas, Inc., 281 S.C. 598, 316 S.E. 2d 424 (Ct. App. 1984). The Defendants maintain that the circumstances of this case justify the embrace of economic duress.

The Plaintiff alleges that the only instances of "duress" or "coercion" were the cross-collateralization of the loans and the requirement of the retention of a property manager. The Plaintiff should also include the "passive aggressive" failure of the Plaintiff to even consider the Ceagull Investments deal and respond. Again, this failure to even consider and respond occurred after the execution of the forbearance agreements, rendering the Plaintiff's argument inapplicable.

V. Interference with Prospective Economic Relations

The Plaintiff claims that its purported "election not to release its mortgage" was the "proper pursuit of its own contractual rights" and, therefore, there can be no finding of intentional interference with prospective contractual relations. If there was an "election" it was by secret ballot as three witnesses have testified that the Plaintiff failed and refused to even respond. As discussed above, there is no evidence that the Plaintiff actively considered the Ceagull proposal or that a conscious decision on the merits was made or conveyed to the bank's customer. The Defendants had a buyer in 2010 that was willing to pay \$125,000.00 more for less property than the current contract with Cross Outreach. Also, had the Ceagull Investments deal closed, all of the interest on \$1,325,000.00 less the commission and closing costs would have been saved over a period of years.

Again, the Plaintiff has cited no South Carolina authority for the proposition that it has no cognizable duty to consider or approve loss mitigation. Again, in the present case, this duty arguably requires no more than complying with the implied covenant of good faith and fair dealing. The Plaintiff owed the Defendants nothing

less. Moreover, had the Plaintiff approved the Ceagull Investments deal back in 2010, it would have been to its own benefit, not just to the benefit of the Defendants!

VI. Unfair Trade Practices

The Plaintiff cites to trial court opinions that purportedly hold the South Carolina Unfair Trade Practices Act ("SCUTPA") is inapplicable to banks regulated by the Federal Reserve. Other trial courts, however, have rejected an argument based upon a generalized banking industry exemption to the SCUTPA. See, e.g., Maybank v. BB&T Corporation, et al., C.A. No. 2001-CP-23-8578 (Order and Final Judgment dated November 10, 2014, a copy of which is attached hereto as Exhibit "E"). The SCUTPA exemption only excludes from the SCUTPA "those actions or transactions which are allowed or authorized by a regulatory agency or other statutes." Id.

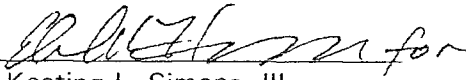
We are again confronted with the Plaintiff's failure to even respond to a request for loss mitigation. The Plaintiff again misconstrues its action as a deliberate and considered decision not to release its mortgage. It was instead a secret decision it shared with nobody. The potential for repetition is obvious. This procedure of secret and unannounced alleged rejections of requests creates a potential for repetition, adversely affecting the public interest.

CONCLUSION

For the reasons set forth above, the Defendants request that this Court deny the Plaintiff's Motion for Summary Judgment, allow this matter to proceed to trial on all claims and issues, and for such other and further relief as may be just and proper.

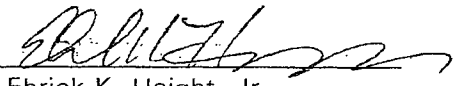
[Signature Page to Follow]

SIMONS & DEAN

By: 
Keating L. Simons, III
147 Wappoo Creek Drive
Suite 604
Charleston, SC 29412
(843) 762-9132
Attorneys for Black Diamond,
LLC and J. Christopher Lindgren

and

MINOR, HAIGHT & ARUNDELL, P.C.

By: 
Ehrick K. Haight, Jr.
P.O. Drawer 6067
Hilton Head Island, SC 29938
(843) 785-8040
Attorneys for Defendant
David A. Brosman

Hilton Head Island, South Carolina
This 25th day of February, 2015.

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

T.D. BANK, N.A., successor by
merger with CAROLINA FIRST
BANK,

Plaintiff,

v.

BLACK DIAMOND, LLC, J.
CHRISTOPHER LINDGREN, DAVID
A. BROSMAN, JULIE H. KING,
AND THE GREENERY, INC.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2012-CP-07- 00944

RECEIVED

APR 12 2016

SC Court of Appeals

CERTIFICATE OF MAILING

The undersigned, Elaine H. Montgomery, hereby certifies that on the 25th day of February, 2015, she deposited a copy of the *Memorandum in Opposition to Plaintiff's Motion for Summary Judgment with Exhibits* to counsel for the Plaintiff in the United States mail with sufficient postage prepaid to:

Michael J. Bogle, Esquire
Womble Carlyle Sandridge & Rice, LLC
Post Office Box 10208
Greenville, SC 29603

Elaine H. Montgomery
Elaine H. Montgomery

Sworn to and Subscribed Before Me
this 25th day of February, 2015.

[Signature]
Notary Public for South Carolina
My Commission expires: 7/20/2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APR 12 2016

SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Fourteenth Judicial Circuit

Marvin H. Dukes, III, Master in Equity/Special Circuit Court Judge

Appellate Case No. 2016-000537

TD Bank N.A., Successor by Merger
to Carolina First Bank.....Plaintiff/Respondent,

v.

Black Diamond, LLC; J. Christopher
Lindgren; David A. Brosman;
Julie H. King; and The Greenery, Inc.....Defendants,

Of Whom

Black Diamond, LLC; J. Christopher
Lindgren; David A. Brosman are.....Appellants.

PROOF OF SERVICE

I certify that on April 8, 2016, I have served TD Bank, N.A.'s Motion to Dismiss Appeal on Black Diamond, LLC, and J. Christopher Lindgren, by depositing a copy of it in the United States Mail, postage prepaid, addressed to their attorney of record, Keating L. Simmons, III, Esq., at Simons & Dean, 147 Wappoo Creek Drive, Suite 604, Charleston, SC 29412; and on David A. Brosman, addressed to his attorney, Ehrick K. Haight, Jr., Esq., at P.O. Box 6067, Hilton Head Island, SC 29938.

April 8, 2016



Michael J. Bogle (S.C. Bar No. 71125)

Email: mbogle@wcsr.com

Clayton M. Custer (S.C. Bar No. 68495)

Email: ccuster@wcsr.com

Catherine Wrenn (S.C. Bar No. 76042)

Email: cwrenn@wcsr.com

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

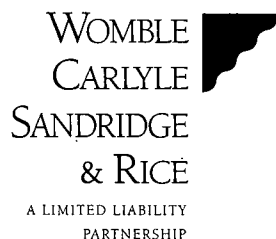
550 South Main Street

Suite 400.

Greenville, SC 29601

Telephone: (864) 255-5400

*Attorneys for Respondent TD Bank N.A.,
Successor by Merger to Carolina First Bank*



550 South Main Street
Suite 400
Greenville, SC 29601

Mailing Address:
Post Office Box 10208
Greenville, SC 29603
Telephone: (864) 255-5400
Fax: (864) 255-5440
www.wcsr.com

Michael J. Bogle
Direct Dial: 864-255-5426
Direct Fax: 864-239-5865
E-mail: mbogle@wcsr.com

April 8, 2016

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED

APR 12 2016

Re: *TD Bank, N.A., Successor by Merger to Carolina First Bank v. Black Diamond, LLC, J. Christopher Lindgren, David A. Brosman* SC Court of Appeals
Appellate Case No. 2016-000537

Dear Ms. Kitchings:

In connection with the above-referenced matter, enclosed for filing are the original and one copy of TD Bank, N.A.'s Motion to Dismiss Appeal, Proof of Service, and \$25 filing fee. Please file the original and return the extra filed copy to me in the postage-paid envelope provided.

Thank you for your assistance.

Sincerely,

WOMBLE CARLYLE SANDRIDGE & RICE
A Limited Liability Partnership

Michael J. Bogle

MJB:yf
Enclosures
c/enc: Keating L. Simmons, III, Esq.
Ehrick K. Haight, Jr., Esq.

WOMBLE CARLYLE SANDRIDGE & RICE
A Professional Limited Liability Company
P.O. BOX 10208
GREENVILLE, SC 29603-0208

NEOPOST
04/08/2016
US POSTAGE \$006.80⁰
ZIP 29601
041L11255004

First Class Mail

RECEIVED

APR 12 2016
SC Court of Appeals

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

 **UNITED STATES
POSTAL SERVICE®**

USPS TRACKING #



9114 9014 9645 0294 8410 90

Label 400 Jan. 2013
7690-16-000-7948